

The Alabama Lawyer

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September 1990



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In Brief

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(photo by Warren Sams, Opp, Alabama)

ON THE COVER — W. Harold Albritton, III, the newly-installed president of the Alabama State Bar, is shown with his family at his home in Andalusia. Seated with him in the center is First Lady Jane. On the left are their eldest son, W. Harold, IV, his wife, Lucy, and their daughter, Rollins. In the center are middle son Benjamin, his wife, Sharon, and their son, Benjamin, Jr. On the right are youngest son Thomas B., and his wife, Amanda. Hal is a partner in his father's law firm. Both Ben and Tom are second-year students at the University of Alabama School of Law.



Edgar T. Albritton
1857-1925



W. Harold Albritton
1881-1929



Robert B. Albritton
1905-1983

The Albritton family has practiced law in Andalusia continuously since January 1887, and has included five generations. The firm, now Albrittons, Givhan and Clifton, was founded by Edgar Thomas Albritton, who came to Andalusia from Snow Hill, North Carolina. His son, W. Harold Albritton, was graduated from the University of Alabama School of Law, as have been the three later generations of Albritton lawyers, and entered the firm in 1903. Harold's son, and the current president's father, Robert B. Albritton, practiced with the firm until shortly before his death in 1983 and served as president of the Alabama State Bar in 1971-72. Among his partners were his brothers, William H., Jr., and J. Marvin.

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ALABAMA BAR INSTITUTE FOR CONTINUING LEGAL EDUCATION



Seminar Calender

September

- 7 - Will Drafting—Birmingham
- 13 - Divorce Law—Huntsville
- 14 - Divorce Law—Birmingham
- 14 - Divorce Law—Mobile
- 21 - Divorce Law—Montgomery
- 21-22 - Law Office Management—
Point Clear
- 27 - *New Alabama Rules of
Criminal Procedure—
Montgomery
- 28 - *New Alabama Rules of
Criminal Procedure—
Birmingham

October

- 4 - **New Alabama Rules of
Criminal Procedure—
Dothan
- 4 - #Divorce Law—Sheffield
- 5 - Alabama Securities Law—
Birmingham
- 11 - **New Alabama Rules of
Criminal Procedure—
Huntsville
- 12 - Collections Law—
Birmingham
- 18 - Trying and Settling the
Personal Injury Case—
Montgomery
- 19 - Trying and Settling the
Personal Injury Case—
Birmingham
- 26 - Juvenile Law and Practice—
Montgomery
- 26 - Administering Estates in
Alabama—Birmingham

November

- 1 - #Trying and Settling the
Personal Injury Case—
Sheffield
- 1 - Real Estate—Montgomery
- 2 - Real Estate—Birmingham
- 8 - **New Alabama Rules of
Criminal Procedure—
Mobile
- 9 - Motion Practice—
Birmingham
- 9 - #Trying and Settling the
Personal Injury Case—
Dothan
- 15 - Civil Procedure—
Montgomery
- 16 - Civil Procedure—
Birmingham
- 29 - Trial Issues—Huntsville
- 29 - Trial Issues—Mobile
- 30 - Bankruptcy Law—
Birmingham

December

- 6 - Trial Issues—Montgomery
- 7 - Trial Issues—Birmingham
- 7 - Estate Planning—Birmingham
- 11 - Alabama Practice
Update—Mobile
- 12 - Alabama Practice
Update—Montgomery
- 13 - Alabama Practice
Update—Huntsville
- 14 - Alabama Practice
Update—Birmingham
- 18 - #Divorce Law—Tuscaloosa
- 19 - **New Alabama Rules of
Criminal Procedure—
Birmingham
- 19 - #Trying and Settling the
Personal Injury Case—
Tuscaloosa
- 20 - **New Alabama Rules of
Criminal Procedure—
Tuscaloosa

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President's Page

Acceptance Speech Delivered
to Alabama State Bar
Annual Meeting
Mobile, Alabama
July 21, 1990

We have an exciting year ahead of us in the Alabama State Bar. We just finished a breakfast meeting where members of over 40 committees and task forces began organizing for the coming year. They are all important and worthy of mention, but time will only permit mention of a few.

I hope that by this time next year we will be in an expanded building on Dexter Avenue, with everything under one roof. We currently have our General Counsel's office and disciplinary staff popping at the seams in a separate building on Perry Street, our IOLTA funds director working from a little table in the corner of the library, and when your president uses a telephone it is often the one sitting on top of the mimeograph machine. Our needs are critical. We now have the necessary extra land, a fine set of plans, and we are ready to move. With your support we will have the necessary funds to make this project a reality.

In addition to the expansion of the bar headquarters, these are just a few of the important issues with which our committees and task forces will be dealing this year:

Specialization—Has its time come? A task force, appointed last year and continued this year, is studying this question in depth and will report its recommendations to the board of commissioners during this year.

Professionalism—What is it, are we losing it, and what can be done? This task force will study what is being done in other states, particularly in Virginia, which is in its second year of a required two-day post graduate course as a prerequisite to taking the bar exam, and will bring recommendations as to things we might do in Alabama.

Pro bono—Availability of legal services to the poor. While I strongly oppose the idea of mandatory pro bono



ALBRITTON

that is being touted in some states, I also strongly support the expansion of voluntary pro bono work by lawyers in Alabama. Our bar's study this past year has shown that there is a great unmet need for legal services to the poor in this state. There are people out there who are homeless, afflicted and in desperate need of legal services through no fault of their own.

If we oppose, as I do, simply turning over this problem to the federal government to be dealt with by tax dollars, and if we oppose *requiring* lawyers to work without pay as a condition to their license, then we *must* work harder to meet this need on a voluntary basis. Local bars in Mobile, Montgomery, Tuscaloosa, Birmingham, Huntsville and elsewhere are already doing good work.

Our task force has recommended, and on Wednesday the board of commissioners supported, the hiring of a full-time coordinator to develop a statewide program for voluntary delivery of legal services to the poor. An application for IOLTA funds will be made and you will hear more about this exciting program during the year.

Appellate courts—Our task force will continue with its efforts to bring about implementation of its recommendations for restructuring the appellate courts of this state.

Judicial selection—When I spoke to the annual convention of state circuit and district judges earlier this week at Gulf Shores I shared with them my serious concerns in this area. I have always favored selection of judges by popular election, but we have serious problems which may mandate change. For example, our system of election is presently under attack in federal court as being racially biased.

Another problem which greatly concerns me is the ever-increasing cost of running for judicial office. More and more candidates are facing expensive primary races and then having to run again in the general election. With this has come the demeaning necessity of judicial candidates

(continued on page 250)

Executive Director's Report

Fun and facts

Planning for the 1991 annual meeting of the Alabama State Bar was underway before the recently concluded 1990 meeting in Mobile began. In fact, the 1992 meeting is already booked in Birmingham with a return to the Wynfrey.

As has been customary for years, the hospitality extended by the Mobile Bar Association and its bar auxiliary contributed to another successful convention in the port city. The compliments still being paid those who planned the programs, social fun and alumni events have been gracious and numerous.

The attendance at all events was outstanding. Special thanks are due Judge Griffin Bell and Dean John Reed for the two of the best presentations this writer has heard at bar conventions not only in Alabama, but in other jurisdictions.

The 1991 meeting format will be different in several ways. These changes are dictated by a new and previously unvisited convention site for the Alabama State Bar—the Perdido Beach Hilton on Alabama's Gulf Coast at Orange Beach, Alabama, will be the headquarters.

President Albritton wants this to be a family-and fun-oriented meeting. Shirts with ties will be discouraged. Our events will be casual. Because of limited meeting space and the need for food functions, all educational programs will be in a General Assembly format. Meetings will begin early—but no sessions will be held to compete with recreational activities each afternoon after 1 p.m. Planning activities are such as to maximize the opportunities to rest and relax on our beautiful Gulf coast.

The bar has reserved the entire hotel

room block—all 300+ rooms. Reservations will be available only on the convention registration forms through the bar headquarters. Individual callers to the hotel will be directed to contact the bar. It is reasonable to assume that the hotel will not be able to accommodate all those desiring rooms in the hotel. To plan for this eventuality we hope to have a shuttle bus to operate between Gulf State Park and the Hilton for all registrants at lodging sites between these points.

Convention activities will begin Thursday, July 18, and proceed through Saturday night, July 20. We hope to have the program finalized for pre-registration in late spring 1991.

Lawyer utilization up-date

The American Bar Foundation recently released an update of its Legal Needs Study, 1974. Some interesting facts are noted in the 1989 update entitled *Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and the Public Generally*.

This second phase of the original study was conducted at the request of the ABA's Consortium on Legal Services and the Public.

This new project documented changes in three areas:

- use of lawyers for personal legal problems
- methods of lawyer selection
- methods of payment for lawyers' services

Some major findings reflected the following:

- 72 percent of 1989 respondents had consulted lawyers for personal



HAMNER

- matters—up 8 percent from 1974.
- 39 percent of 1989 respondents consulted lawyers at least once within three years of the survey—up 12 percent from 1974.

According to the 1989 survey, 54 percent of respondents seeking lawyers consulted nonlawyer friends and relatives. Another 21 percent turned to relatives and friends who were lawyers. The Yellow Pages were used by 4 percent, while 4 percent relied on other forms of advertisements.

Only 1 percent of 1989 respondents seeking legal help mentioned lawyer referral services as a means of locating a lawyer.

The entire survey findings are available from the ABA Order Fulfillment Department for \$8.95, plus postage and handling. ■

President's Page

(continued from page 248)

and sitting judges accepting—and even seeking—campaign contributions from lawyers, potential litigants and special interests. This is just *wrong*. No one should have to wonder whether a judicial decision will be affected by which lawyer makes the largest campaign contribution. Money should not be a factor—either real or perceived—in the dispensation of justice and we cannot tolerate the appearance of justice for sale. Our task force on judicial selection will be taking a fresh look at these problems and whether the time has come to seriously consider such changes as nominating commissions, appointment with retention ballot, nonpartisan election and finance restrictions.

In addition to the fine work being done by the task forces I have just mentioned, I have appointed three new task forces this year to work in areas that I believe deserve special attention.

The first is a **Task Force on Minority Participation and Opportunity**. This is a biracial group which will work to increase participation in bar activities by minority lawyers, stop the "brain drain" of many highly qualified minority students to law schools in other states and minority lawyers to jobs in other states, and encourage the expansion of career opportunities for minority lawyers in Alabama. We want everyone to know that not only is every lawyer required to belong to the Alabama State Bar and pay dues, but also that they are an integral part of it—their participation is welcomed and needed.

The second is a **Task Force on Disaster Response**. This group will put in place plans for rapid response to sudden disasters, whether man-made or natural. This will involve lawyers working with governmental agencies and others in three areas—to assist local lawyers and courts with personal problems, to provide legal

advice to victims, and to deter unscrupulous persons, such as bogus claims assistants and "parachute" lawyers out to take advantage of victims.

Finally, we will have a new **Task Force on Quality of Life**. Why are we beginning to hear lawyers say, "Practicing law just isn't fun anymore," and "Practicing law is not what I expected it to be"? Is this just the nature of the beast or can we identify specific problems and do something about them? That is what we are going to try to find out.

The practice of law is certainly not for everyone. It can be a hard, contentious, low paying way of making a living. But, for those of us who choose this way of life it can be all that we ever wanted it to be. Sure there are the lows—ranging from the devastation a young lawyer feels when his court appointed client, in whose cause he has come to strongly believe, is convicted and sent to jail, to the personal anguish felt by a business lawyer whose long and best efforts to save the business of a client and friend go down the drain in bankruptcy. There are the long hours, sleepless nights, the strains put on family, and the aggravation of being told the latest lawyer jokes at parties.

But there are also the highs—the thrill of winning the big case in court, the satisfaction of creating just the right estate plan or the new mechanism that makes a business deal work, finding a "spotted hog" case during research in your law library late at night, or the smile on a young family's face when you have concluded an adoption.

And, you know, as much as we all like to make a good living, the real thrills in being a lawyer are rarely caused by the money we make.

Over a year ago two of my sons were working on applications for law school and we were talking about the questions. One was the simple question, "Why do you want to be a lawyer?" A simple question, but not so easy to answer. It caused me to think back to my own reasons for wanting to take this road. It would be

easy to say that I was attracted to the glamour and integrity of a lawyer courageously defending an innocent man and proving his innocence. But I remembered a night at home when I was young.

Our dining room had been off limits for several days, with the table piled high with books, papers and charts. I had been watching my father come in from the office with brief cases, eat supper with us in the kitchen, and then head for the dining room. That night I had seen him getting up and down from the table and pacing the floor. When I saw him standing and staring out the window I got up my courage and went in and asked what he was doing. He said, "Well, son, the judge has appointed me to defend a man charged with murdering his wife." I asked how it had happened and he said, "The witnesses say he chased her around the house, out into the yard, shot her three times with a shotgun and then broke the stock of the gun over her head. I think he was insane." I told him I didn't think he handled criminal cases and he said, "I don't and I'm having to do a lot of extra studying to know what I'm doing." I said, "Did he kill her?" and he said, "Yes." I said, "Are you making a lot of money for this?" and he said, "I'm not being paid anything." I said, "Why are you doing this?" and he said, "Because I am a lawyer."

I really didn't know what a lawyer was, but right then I knew I wanted to be one. Why? That would sound very strange to some. I didn't know then and it is hard to articulate now, but you all know what I mean. I will say this—I have been married to the law for 30 years now and it is still a honeymoon. And the proudest moment of those 30 years is right now as I accept the presidency of this association.

During the coming year I will do all that I possibly can to make you a good president. You have honored me beyond what words can express—and I simply say—

Thank you, my brothers and sisters at the bar. ■

Bar Briefs

Jackson installed as president-elect, ATP

William P. Jackson, Jr., a senior partner in the Arlington, Virginia, firm of Jackson & Jessup, was installed recently as president-elect of the Association of Transportation Practitioners. The association held its 61st annual meeting in June in Toronto, Ontario. He is a 1963 graduate of the University of Alabama School of Law and served as law clerk to Judge Aubrey M. Cates of the Alabama Court of Appeals in 1965. He has been in private practice continuously in Birmingham, Alabama, Washington, D.C., and Arlington, Virginia, since then.

American College of Trial Lawyers' award for courageous advocacy

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

"The award of the College of 'Courageous Advocacy' shall be given for outstanding efforts by a lawyer, whether or not a member of the College, on behalf of a controversial cause or client where the representation occurs in the face of actual or possible disfavor or public unpopularity or adverse treatment by the media of the lawyer, client or cause."

Only a handful of awards have been made over the years. All have been exemplary of the type of courageous advocacy which the College believes should be rewarded. The matters handled which resulted in the awards have ranged from civil and administrative matters to criminal cases.

The most recent recipient of the award was Stanton Bloom of Tucson, Arizona, for his pro bono defense of a criminal

case in which there was great public outrage about the alleged crime.

Nominations for recipients of this award should include a resume of the nominee, copies of any newspaper accounts of the matter handled by the nominee, and letters of support from members of the bench and bar who are knowledgeable about the matter. These should be sent to Sylvia H. Walbolt, P.O. Box 3239, Tampa, Florida 33601.

Max elected to Leadership Birmingham Alumni Council

The Leadership Birmingham Class of 1990 has elected five of its members to the Alumni Council. Members elected are Rodney Max, Chris Womack, Elise Penfield, Yvonne Baskin and Jenny Gauld.

Max is a member of the firm of Najjar, Denaburg, Meyerson, Zarzaur, Max, Wright & Schwartz, a professional corporation. He is a graduate of Cumberland School of Law.

UA System names Powell new general counsel

C. Glenn Powell of Tuscaloosa has been named general counsel of The University of Alabama System. The appointment is effective immediately, according to an announcement by UA System Chancellor Philip E. Austin.

Powell has been associated professionally with the University since 1972, and became deputy general counsel for the UA System in 1974. The office delivers legal services to all components of the UA System, which includes 42,000 students and 17,000 faculty and staff, on three campuses in Tuscaloosa, Birmingham and Huntsville.

The Office of Counsel in its present form was created by the board of trustees in 1986, when offices on each campus and in the system office were consolidated administratively but not geograph-

ically. The office now operates as an integrated unit in the four locations. As general counsel, Powell is charged with administration, staffing and organization of the system-wide department.

The legal office holds distinction as the first in-house legal department in a university or college in the United States. Its origin dates to 1899 when Tuscaloosa attorney Robison Brown was appointed as secretary of the board of trustees. Brown became loan attorney for the University in 1925.

Clifton Hewitt Penick assumed the position in 1939 and served until his death in 1952. J. Rufus Bealle was appointed in 1953 and held the position until his retirement in 1983. Robert Potts became general counsel in 1984, serving until January 1990 when he was named interim president of the University of North Alabama in Florence. Powell becomes the fifth attorney to hold the position.

A graduate of the University of Alabama, Powell received an LL.B. degree from the UA Law School. His profession-



Powell

al affiliations include the Alabama State Bar, the American Bar Association and the National Association of Colleges and University Attorneys.

Reeves admitted to American College of Trial Lawyers

W. Boyd Reeves has become a Fellow of the American College of Trial Lawyers. Membership is by invitation of the Board of Regents. The College is a national association of 4,500 Fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the profession. The induction ceremony took place during the recent spring banquet of the American College of Trial Lawyers.

Reeves is a partner in the Mobile firm of Ambrecht, Jackson, DeMouy, Crowe, Holmes & Reeves and has been practicing for 30 years. He is an alumnus of Tulane School of Law.

Rubin inducted member of American College of Bankruptcy Professionals

Robert B. Rubin, a senior partner of the Birmingham firm of Sirote & Permutt, P.C., was recently inducted as a charter member of the American College of Bankruptcy Professionals. The induction ceremonies took place May 7, 1990, at the Supreme Court of the United States in Washington, D.C. The College is a newly formed organization sponsored by the American Bankruptcy Institute, with the purpose of recognizing those practitioners, professors and judges who have made a significant contribution to the field of bankruptcy law. Rubin will serve as the Alabama delegate to the 11th Circuit Counsel of the College.

Court of criminal appeals selects Mann new clerk

The Alabama Court of Criminal Appeals has selected Lane W. Mann of Montgomery to replace the long-time clerk, Mollie Jordan, who retired April

30, 1990, after 54 years of service. Pursuant to the court's order, Mann will assume the office of clerk beginning October 1, 1990.

Mann has served as director of the legal division of the Administrative Office of Courts since 1979, and also as



Mann



Jordan

director of Alabama's Judicial Study Commission since his appointment in February 1987 by former Chief Justice C.C. Torbert, Jr. He is the son of career

public servant Floyd Mann who served in cabinet positions under three governors prior to his retirement in 1983 as vice-president of external affairs for the University of Alabama. Mann is married to the former Lana Bush of Montgomery and they have three daughters, Julie, Katie and Lucy.

In addition to his service as director of the legal division for the Administrative Office of Courts, Mann's prior employment experience includes service as a state trooper; a United States Postal Inspector in Philadelphia, Pennsylvania; and an investigator for the Law Enforcement Division of the Alabama Attorney General's Office under former Attorney General Bill Baxley; and as a special assistant attorney general under former Attorney General Charles Graddick.

Davis presented Dean Thomas W. Christopher Award

J. Mason Davis, of the Birmingham firm of Sirote & Permutt, was recently presented the Dean Thomas W. Christopher Award by the Student Bar Association of the University of Alabama School of Law. This award was created in 1981 and is presented annually to a student, alumnus, faculty member or friend of the School of Law who has made a lasting contribution to legal education and the University of Alabama School of Law. The general purpose of the award is to recognize lasting contributions for the betterment of the School of Law.

In presenting the award to Davis, SBA President Chris Hughes noted that Davis recently participated in a successful fund drive which established the Arthur Davis Shores Scholarship Fund at the School of Law and has served the School of Law as an adjunct professor of law since 1972.

New ABA Life Fellows honored

S. Eason Balch of Birmingham and M. Roland Nachman, Jr., of Montgomery were honored as new Life Fellows of the American Bar Foundation in Los Angeles at the 34th Annual Meeting of The Fel-

lows of the American Bar Foundation. Plaques were presented by Robert M. Ervin, chairperson of the Fellows, and William G. Paul, the newly-elected chairperson of the Fellows.

The Fellows is an honorary organization of practicing attorneys, judges and



Balch

law teachers who encourage and support the research program of the American Bar Foundation.

The objective of the Foundation is the improvement of the legal system through research concerning the law, the administration of justice and the legal profession.

Warren appointed to Harold Edward Harter chair

Manning G. Warren, III, recently was appointed to the Harold Edward Harter Chair of Commercial Law at the University of Louisville School of Law. Warren is a graduate of the University of Alabama and the George Washington University Law School.

He served as law clerk to United States District Judge Seybourn Lynne; an associate with the firm of Bradley, Arant, Rose & White (1974-76); a partner in the firm

of Ritchie, Rediker & Warren (1976-83); a professor of law at Cumberland School of Law (1980-83); and a professor of law at the University of Alabama School of Law (1983-90).

Attorney selected for district judgeship

Mobile attorney and Mobile Bar Association President Richard W. Vollmer, Jr., was recently selected as United States District Judge for the Southern District of Alabama. Upon his resignation as president of the association, George Finkbohner assumed the office.

Vollmer is a graduate of Springhill College in Mobile and the University of Alabama School of Law (1953).

Vollmer had been with the firm of Reams, Vollmer, Philips, Killion, Brooks & Schell since 1956.

Spina elected Fellow

The American Board of Criminal Lawyers announces that Thomas J. Spina of Birmingham has been elected as a Fellow in the American Board of Criminal Lawyers, a group of criminal attorneys throughout the United States, Canada and the Philippines.

Spina is a 1978 graduate of Cumberland School of Law.



Spina

ABA offers free law practice management catalog

The American Bar Association is giving away copies of the 1990 summer edition of its *Law Practice Management Publications Catalog* to help attorneys keep up with the newest trends in lawyer management.

The 20-page multi-colored catalog is a complete listing of the ABA Law Practice Management Section's books, videos and cassettes. It offers numerous products covering a variety of areas, such as automation, financial management and analysis, malpractice prevention, marketing, staffing and office procedures, Spanish translations and a special center gatefold of the "New Books" section. Each item includes a short detailed summary and a price.

The 1990 *Law Practice Management Catalog* is available—free—upon request to the American Bar Association's Order Fulfillment department at (312) 988-5555. ■

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About Members, Among Firms

ABOUT MEMBERS

Augustine Meaher, III, announces the opening of the office of **Augustine Meaher, III, P.C.** at Suite 2118, First National Bank Building, Mobile, Alabama. Phone (205) 432-9971.

Lisa Huggins joined the City of Birmingham's law department as an assistant city attorney, beginning June 4, 1990. The law department is located at 600 City Hall, Birmingham, Alabama 35203. Phone (205) 254-2369.

Lauren L. Becker announces the relocation of her office, practicing under the name of **Law Offices of Lauren L. Becker**, to 8 Lenox Pointe, N.E., Atlanta, Georgia 30324-3167. Phone (404) 233-9023.

Carlton M. Johnson, Jr., has been made a shareholder in the Pensacola, Florida, firm of **Smith, Sauer, DeMaria, Pugh & Johnson**. Offices are located at 316 South Baylen Street, Suite 600, Pensacola, Florida 32501. Phone (904) 434-2761. Johnson is a 1986 admittee to the Alabama State Bar.

Lionel C. Williams announces the relocation of his offices to Suite 903, Commerce Building, 118 North Royal Street, Mobile, Alabama 36602-3600. Phone (205) 433-5703.

AMONG FIRMS

Coale, Helmsing, Lyons, Sims & Leach announces that **Harwell E. Coale, Jr.**, became general counsel to

Energy Service Company, Inc. of Houston, Texas, on May 1, 1990, and has become of counsel to the firm. The firm's mailing address is Box 2767, Mobile, Alabama 36652. Phone (205) 432-5521.

The firm of **Powell, Powell & McKathan** announces that **C. Grant-ham Baldwin** has become a member of the firm, effective May 14, 1990. Offices are at 102 North Cotton, P.O. Drawer 969, Andalusia, Alabama 36420. Phone (205) 222-4103.

The firm of **Cleary, Bailey & McDowell, P.C.** announces the relocation of its offices, as of July 30, 1990, to AmSouth Center, 200 Clinton Avenue, West, Suite 603, Huntsville, Alabama 35801. Phone (205) 534-2436.

Ritchie & Rediker announces that **Thomas L. Krebs** has joined the firm. Offices are at 312 North 23rd Street, Birmingham, Alabama 35203-3878. Phone (205) 251-1288.

Robert S. Ramsey and **Ellsworth P. Scales, III**, announce the formation of a professional corporation in the name of **Ramsey & Scales, P.C.**, and the association of **J. Michael Hendrich, Sr.**, and **Richard S. Sheldon**. Offices are at 605 Bel Air Boulevard, Suite 31, P.O. Box 160647, Mobile, Alabama 36616. Phone (205) 479-0040.

The firm of **Cherry, Givens, Tarver, Aldridge & Diaz** announces a merger with the firm of **Peters & Lockett, P.C.** The firm will operate under the name of **Cherry, Givens, Tarver, Aldridge,**

Peters, Lockett & Diaz, P.C. Offices are at 125 W. Main Street, P.O. Box 927, Dothan, Alabama 36302. Phone (205) 793-1555.

Dennis N. Balske and **Joan Van Almen** of **Balske & Van Almen** announce the relocation of their offices, effective July 1, 1990, to 644 South Perry Street, Montgomery, Alabama 36104. Phone (205) 263-4700.

Walter J. Price, Jr., announces that **Bonnie Rowe Bennett**, formerly with the firm of **Richards, Layton & Finger**, Wilmington, Delaware, has become associated with the firm of **Price & Bennett**. They also announce the relocation of their offices to 200 West Court Square, Suite 60, Terrace Level, Huntsville, Alabama. Phone (205) 539-7725.

The firm of **McFadden, Lyon, Willoughby & Rouse** announces that **Douglas L. Anderson** has become a member of the firm. Offices are located at 718 Downtowner Boulevard, Mobile, Alabama 36609.

The Law offices of **Demetrius C. Newton** announces that **Edward E. May**, formerly of **Barnes, Dunning, May & Miller**, has become a partner in the firm, and the firm name has been changed to **Newton & May**. Offices are located at Suite 207, 1820 Seventh Avenue, North, Birmingham, Alabama 35203. Phone (205) 252-9203.

The firm of **Pope, McGlamry, Kilpatrick & Morrison** announces that **Edward H. Kellogg, Jr., P.C.** has withdrawn from the firm, that **Earle F. Lasseter, Michael L. McGlamry, Steven W. Saccoccia, William J.**

Cornwell, and Jay F. Hirsch have become members of the firm, and that Joan Swift Conger and Daniel W. Sigelman have become associated with the firm. Phenix City offices are at P.O. Box 1430, Phenix City, Alabama 36868-1430. Phone (205) 298-7354.

The firm of Miller, Hamilton, Snider & Odom announces that Richard A. Wright and Richard Y. Roberts have become members of the firm, and Robert Bruce Rinehart and Robert G. Jackson, Jr., have become associated with the firm. Mobile offices are at 254 State Street, P.O. Box 46, Mobile, Alabama 36603. Phone (205) 432-1414.

The Birmingham firm of Miglionico & Rumore announces that Sherry Brock McGowin has become associated with the firm. Offices are located at 1230 Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 323-8957.

The firm of Thomas, Means & Gillis, P.C., formerly of 901 South Hull Street, Montgomery, Alabama, announces the relocation of their offices to 3121 Zelda Court, Montgomery, Alabama 36107. Phone (205) 270-1033.

Darrell L. Cartwright has recently joined the firm of Najjar, Denaburg, Meyerson, Zarzaur, Max, Wright & Schwartz, P.C. A graduate of Tulane University School of Law, Cartwright also holds an advanced degree from the University of Miami School of Law in taxation.

Jesse P. Evans, III, was recently named partner in the firm. Evans is a graduate of the Birmingham School of

Law. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

Rumrell & Johnson, P.A., announces that O. Mark Zamora has become an associate of the firm, located at 2601 Gulf Life Tower, Jacksonville, Florida 32201. Zamora is a member of the Alabama and Florida state bars.

Smith & Taylor announces that Todd N. Hamilton has become an associate of the firm. Offices are located at 2000 First Avenue, North, Suite 1212, Brown Marx Towers, Birmingham, Alabama 35203. Phone (205) 251-2555.

R.O. Hughes and David S. Maxey announce the formation of Hughes & Maxey, and that Adam M. Porter and Frederick M. Garfield have become associated with the firm. Offices are located at 400 Park Place Tower, Birmingham, Alabama 35203. Phone (205) 323-0010.

Hill, Hill, Carter, Franco, Cole & Black, P.C. announces that Terry A. Sides has become a partner in the firm and that the Honorable Richard L. Holmes (retired) has become of counsel to the firm. Offices are located at the Hill Building, 73 Washington Avenue, P.O. Box 116, Montgomery, Alabama 36101-0116. Phone (205) 834-7600.

The firm of Luker & Brewer announces that Jeffrey D. Bramer has become an associate of the firm,

located at 2205 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 251-6666.

Meadows, Meadows & Littleton announces that Patricia W. Hall has joined the firm, and the name of the firm has been changed to Meadows, Littleton & Hall. Offices are at 955 Downtowner Boulevard, Suite 107, Mobile, Alabama 36609. Phone (205) 343-7717.

William H. Pickering, formerly with Balch & Bingham in Birmingham, has been elected president of the Chattanooga Bar Association. Pickering is a partner in the Chattanooga firm of Chambliss & Bahner, and has practiced with that firm since returning to Chattanooga in 1979.

The firm of Bland, Bland & Harris and the firm of Battles & McClellan announce that the firms merged, effective July 1, 1990, and the new firm shall be known as Bland, Battles, Harris & McClellan. Offices will be located at 405 Second Avenue, S.W., Cullman, Alabama, with a mailing address of P.O. Drawer O, Cullman, Alabama 35056. Phone (205) 734-4040.

The Law Offices of W. Eugene Rutledge & Associates announces the relocation of its offices, effective July 2, 1990, to One Highland Place, 2151 Highland Avenue, Suite 300, Birmingham, Alabama 35205. Phone (205) 930-0311.

Albrittons, Givhan & Clifton, Andalusia, Alabama, announces that **William B. Alverson, Jr.**, has become an associate with the firm. Offices are at 109 Opp Avenue, P.O. Drawer 880, Andalusia, Alabama 36420-0880. Phone (205) 222-3177.

Lightfoot, Franklin, White & Lucas announces that **William S. Cox, III**, formerly with Latham & Watkins in San Diego, California, has joined the firm as an associate. Cox received his law degree from the University of Virginia School of Law in 1988. Offices are at 300 Financial Center, 505 20th Street, North, Birmingham, Alabama 35203-2706. Phone (205) 581-0700.

Gary P. Smith and **Christopher A. Smith** announce the formation of a partnership of **Smith & Smith** located at 211 South Cedar Street, Florence, Alabama 35630. Phone (205) 767-5021.

The firm of **McInnish & Bright, P.C.**, announces the relocation of its offices to 235 South McDonough Street, P.O. Box 52, Montgomery, Alabama 36104. Phone (205) 263-0003.

Beasley, Wilson, Allen, Mendelsohn & Jemison, P.C. announces that **Mark J. Williams**, former law clerk to Alabama Supreme Court Justice H. Mark Kennedy, became associated with the firm, effective July 1, 1990. Offices are at 207 Montgomery Street, 10th Floor, Bell Building, P.O. Box 4160, Montgomery, Alabama 36103-4160. Phone (205) 269-2343.

Louis C. Rutland and **Bradley S. Braswell** announce the formation of a partnership under the name of **Rutland & Braswell**, with offices located at 208 North Prairie Street, P.O. Box 108, Union Springs, Alabama 36089. Phone (205) 738-4770.

Arlie D. Price and **Rodger K. Brannum** announce the opening of their law office located on the second floor of the Rawls Building in Enterprise, Alabama. The mailing address will be P.O. Drawer 1580, Enterprise, Alabama 36331-1580. Phone (205) 393-2532.

John D. Gleissner and **Herbert B. Sparks, Jr.**, announce the association of **Allen R. Trippeer, Jr.**, with **The Law Offices of John D. Gleissner**, 1200 Corporate Drive, Suite 105, Meadow Brook Corporate Park, Birmingham, Alabama 35242. Phone (205) 995-1713.

The firm of **Smith & Taylor** announces that **Todd Hamilton** has become associated with the firm. Offices are located at Suite 1212, Brown Marx Tower, Birmingham, Alabama 35203. Phone (205) 251-2555.



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NOTICE

The Alabama Supreme Court, on May 31, 1990, issued an order adopting the Alabama Rules of Criminal Procedure, to be effective January 1, 1991. A complete publication of those new rules will appear in the So.2d advance sheet issued on or about June 28, 1990. That advance sheet will be a "Special Alabama Edition," and West Publishing Company will mail that edition to its advance sheet subscribers with Alabama mailing addresses.

Before the effective date of those rules, the full text should be available in a supplement to West's 1990 *Alabama Rules of Court* pamphlet, in a Michie replacement Volumes 23 of the *Alabama Code*, and in *Alabama Reporter*.

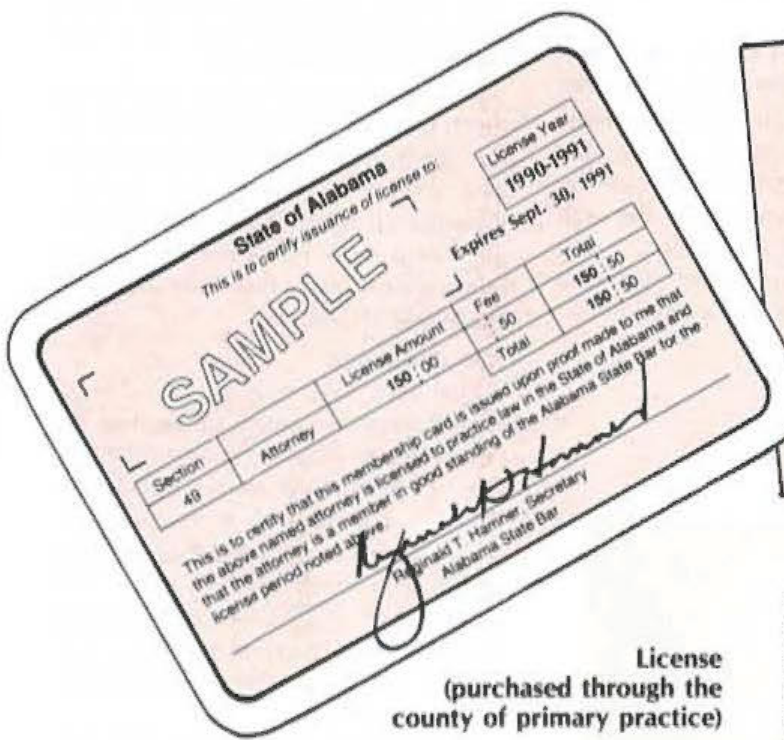
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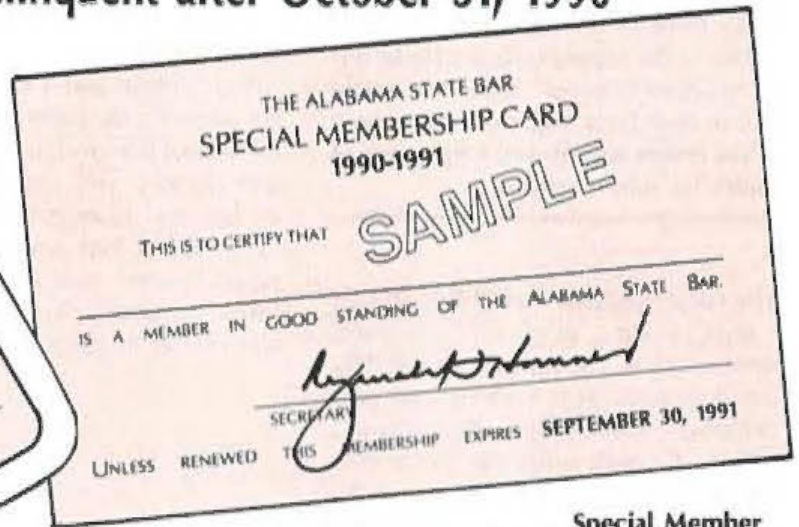
1990-91 DUES NOTICE

(All Alabama attorney occupational license and special memberships expire September 30, 1990)

Annual License—Special Membership Dues
Due October 1, 1990 ★ Delinquent after October 31, 1990



License
 (purchased through the
 county of primary practice)



Special Member
 (paid directly to the Alabama State Bar)

If you are admitted to the Alabama State Bar and engaged in the practice of law, you are required to purchase an annual occupational license. Section 40-12-49, *Code of Alabama* (1975), as amended. This license gives you the right to practice law in the state of Alabama through September 30, 1991. The cost of the license is \$150, plus the county's nominal issuance fee, and is purchased from the probate judge or license commissioner (where applicable) in the county in which you primarily practice. In addition to the state license, all practicing attorneys should check with their municipal revenue departments to be sure that the licensing requirements of the city or town are also being met. Please send the Alabama State Bar a copy of the license when it is purchased and you will receive a wallet-size duplicate of your license (pictured above) for identification purposes during the 1990-1991 license year.

Special membership status is acquired pursuant to Section 34-3-17 or Section 34-3-18, *Code of Alabama* (1975), as amended. Federal and state judges, district attorneys, United States attorneys and other government attorneys who are prohibited from practicing privately by virtue of their positions are eligible for this membership status. Likewise, persons admitted to the bar of Alabama who are not engaged in the practice of law or are employed in a position not otherwise requiring a license are eligible to be special members. Attorneys admitted to the bar of Alabama who reside outside the state of Alabama who do not practice in the state of Alabama also are eligible for this status. With the exception of state attorneys and district attorneys, and those who hold a license at any time during the bar year, special members are exempt from mandatory continuing legal education requirements; however, this annual exemption must be claimed on the reporting form. Special membership dues are paid directly to the Alabama State Bar. In the event you enter the practice of law during the bar year, which necessitates the purchase of an occupation license, these dues are not refundable after December 31, 1990, and no credit will be given for payment of special membership dues. Membership cards, as shown in the sample above, are issued upon receipt of the dues and are good for the license year. Special membership dues are \$75.

Dues include \$15 annual subscription to *The Alabama Lawyer*. (This subscription cannot be deducted from the dues payment.)

If you have any questions regarding your proper membership status or dues payment, please contact Alice Jo Hendrix, membership services director, at (205) 269-1515 or 1-800-392-5660 (in-state WATS).

Consultant's Corner

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

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

The rural law firm—what lies ahead?

Rural law firms, principally solo practitioners, are at a crossroads in the '90s, anxious about their viability and concerned about their clients. That dilemma will resolve itself if they can merge their concerns. Rural practice and concern for clients is a formula for success in the '90s. Unlike the urban scene with its dramatic demographic changes, the rural scene will remain essentially unchanged for the decade and offer its practitioners an uncommon opportunity to prosper and be pillars of their communities. There is a connection.

The practice

Legal practice in a rural area is much like rural medical practice—you have to be a jack of *most* trades, but not all. You will be expected to become expert in transaction oriented law, real estate closings (including occasional huge agricultural parcels), wills and probate, family law, some civil litigation and a bit of criminal defense work (often court-assigned). Matters under the jurisdiction of a federal court are usually referred to a lawyer in an urban area having a federal court, so you generally will not become involved in tax and bankruptcy cases.

The hours are civilized, on the order of 8:30 to 5:30. The small towns generally "close up" at supper time, so you might

as well too. Do not be misled. You have to get in your billable hours like any other successful practitioner, but you do *not* have to log 2,000 or more per year just to earn an appropriate income, like your urban counterparts.

The lifestyle

You (almost) automatically become a key person in the community. Along with the school principal, the bankers, clergy and doctors, you are the community leaders. You are expected to serve on the local United Way committee, the high school boosters, civic associations, church governing boards, chambers of commerce and county development authorities.



Bornstein

Political office is more readily attainable than in urban areas, be it county commissions, mayoralities or state representatives. The net earnings are on the order of two-thirds that of an urban lawyer, but the cost of living is much less in a rural area than an urban one.

The connection

Unlike your urban counterpart, who has two sets of associations, clients and a circle of friends, you have just one. Your clients are your circle of friends and acquaintances. You go to church with your clients, you serve on committees with your clients and your children go to school with children of your clients. Your clients are your neighbors.

Reciprocally, rural clients tend to be much more loyal to their lawyer than urban clients. They tend to be more settled and given to generational loyalties. Whereas an urban lawyer might fret a good deal about his or her Yellow Page listing, a rural lawyer frets more about real estate title chains.

The challenge

One does not simply move to a small town, hang out a shingle and wait for the clients to call. Most successful rural lawyers practice in the towns where they were raised. Some apply to associate with an established practitioner, often an older person who sees retirement in the next ten years or so. Younger rural lawyers often will resist taking on associates, fearing that today's associate will be tomorrow's competitor.

A rural lawyer's spouse (male or female) must be adaptable to rural life for the practitioner to be successful. In two-career families, finding a suitable situation for the spouse can be a real problem.

Sure, some rural counties are losing population to the urban areas where jobs are perceived to be more plentiful. Nonetheless, rural populations are more stable than urban ones, which translates to "rural clientele are most stable than urban ones." This is the genuine attraction of rural practice, to develop and nurture long-term client relationships in a setting of interdependence. You have to like doing business with friends and you have to be an exceptional lawyer to keep both your clients and your friends, since they are one and the same. ■

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. WP Needs DP Needs
 Audit Analysis 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.

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

Etowah County

Etowah County is the smallest county in the state of Alabama, with less than 540 square miles. It is also a relatively young county, having been established after the Civil War, but it has a rich history.

In November 1866, the first post-war Legislature in Alabama convened in Montgomery. A state senator from Cherokee County presented a petition from residents of Cherokee, Calhoun, St. Clair, Blount, Marshall and DeKalb counties asking for the formation of a new county in their area. On December 7, 1866, Baine County was created from land taken from the six listed counties.

David William Baine was a young Alabama leader whose life was cut short by the Civil War. A native of Ohio, Baine came to Alabama in 1848 and settled at Centre in Cherokee County as a teacher. He studied law at the office of Thomas E. Cooper in Centre and was admitted to the bar in 1855. In 1856 Baine and his family moved to Hayneville in Lowndes County. He became a successful lawyer and rose to political prominence.

Baine was a delegate to the Democratic National Convention which convened in Charleston, South Carolina, in

May 1860. He left this convention, where Stephen A. Douglas was nominated, and attended instead a new convention organized by Southern dissidents and held in Richmond, Virginia. That convention nominated John C. Breckenridge for president. When Abraham Lincoln ultimately was elected president, Baine supported Alabama's decision to secede from the Union.

In the fall of 1861, Baine returned to Richmond as a lieutenant colonel of the 14th Alabama Infantry Regiment. On June 30, 1862, he led his men in an attack at Frazier's Farm during the "Seven Days Battle" near Richmond. There he was struck by a minie ball and died on the battlefield. Baine was only 32 years old when he died. He was buried at Hollywood Cemetery in Richmond.

When the Alabama Legislature created the requested county in 1866, the Speaker of the House was Thomas B. Cooper, the same man who had trained David Baine to be a lawyer. He suggested that the new county be named for Baine, his young protege from years before.

The first court was held in Baine County October 7, 1867. The site was the First Baptist Church of Gadsden, located at Fifth and Broad streets.

Baine County existed less than one year. Radical politicians throughout the South systematically nullified laws passed by provisional governments in the seceding states, including the law which created Baine County. That law became a target because the name "Baine" was controversial since it memorialized a secessionist born in the North who fought and died for the South. The county was abolished December 3, 1867.

On December 1, 1868, the law abolishing Baine County was repealed. Once re-established, the county was given a new name of Etowah. This name was supposedly derived from the Cherokee word "ITAWA" which means "strong tree," or "well-bearing tree." Certainly this name sparked no controversy.

Gadsden, the county seat of Etowah County, also has an interesting story behind its name. Early settlers in the region first called the community "Double Springs" because of the two springs located at the site. In 1846, Gabriel and



Joseph Hughes of North Carolina, together with John S. Moragne of Charleston, South Carolina, purchased land in the area to lay out formal streets and blocks for a town.

A personal friend of Moragne was James D. Gadsden, a fellow South Carolinian. Gadsden had served in Alabama with Andrew Jackson during the Creek Indian War. He later became Jackson's



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 Miglioni & Rumore. Rumore was recently elected to serve as the bar commissioner for the 10th Circuit, place no. four.



Etowah County Courthouse

aide in the Seminole Indian War and played a leading role in removing the Seminoles to southern Florida.

Colonel Gadsden became president of the South Carolina Canal and Railroad Company. He visited his friend Moragne in Alabama. On this visit he was so impressed by the natural beauty of the area and the advantages of a location on the Coosa River that he predicted a great city would one day emerge there. The founders were so appreciative of this prediction, and the encouragement of Gadsden, that they decided to name their town in his honor.

James Gadsden was later appointed by President Franklin Pierce to serve as Minister to Mexico. He negotiated the purchase of land for the construction of a railroad line through the southern parts of present-day Arizona and New Mexico. This acquisition for ten million dollars took place in 1854 and is known in history as "The Gadsden Purchase."

The first courthouse in Etowah County was constructed by Colonel R.B. Kyle and Major W.P. Hollingsworth. The contract for the building was let on December 6, 1869. It was completed about a year later and cost \$12,990.

The building was a red brick structure, two stories in height, of Colonial design, and located between Broad and Locust streets in Gadsden. It had four white columns in front with a small iron-rail balcony under its portico. From here a bailiff could call witnesses on the courthouse grounds to testify when their time came in court. A grove of trees surrounded the building.

When the county outgrew this structure, a proposal was made to build a new courthouse in Attalla. With a tie vote on the county governing the body, Judge J.A. Tallman broke the tie and voted to keep the courthouse in Gadsden. It has remained there ever since.

In 1890 this courthouse was razed in order to make room for a larger building at the same site. This second courthouse was three stories in height and contained an impressive five-story clock tower. Its style was Romanesque. An addition was made to this courthouse during 1926-27.

As early as 1938 plans were made for a new courthouse in Gadsden. Public Works Administration money was approved, but local funding was not forthcoming.

Finally in 1949, construction began on the third Etowah County Courthouse. The architect was Paul W. Hofferbert, and the contractor was J.F. Holley. This building cost approximately one million dollars, and was dedicated in July 1950. It still serves as the courthouse of Etowah County.

The author thanks Gadsden attorney Howard B. Warren for obtaining research materials used in the preparation of this article. ■

1990 Annual Meeting Highlights

Mobile, Alabama



Alabama State Bar Commissioners A.J. Coleman (Decatur), William B. Matthews (Ozark) and Bob Faulk (Prattville)

Neil Johnston (Mobile) presents plaque to Craig Kneisel (Montgomery) for outstanding service as 1989-90 chair, Environmental Law Section.



Al Vreeland (Tuscaloosa), 1989-90 chair, Administrative Law Section



Bruce Ely (Tuscaloosa), Judith McMillin (Mobile), Roy Crawford (Birmingham), 1989-90 chair, Taxation Section, and Jim Sizemore (Montgomery), commissioner of revenue

Don Siegelman (Montgomery), Linda Friedman (Birmingham), 1989-90 chair, Business Torts & Antitrust Law Section, and Terry Calvani (Washington, D.C.), commissioner, Federal Trade Commission



George Finkbohner, president, Mobile Bar Association, Dean John Reed (Wayne State University Law School, Detroit), Bench & Bar luncheon speaker, and ASB President Alva C. Caine, Birmingham



Hon. Sonny Hornsby, Tallassee



Alva Caine and Hon. Joseph Phelps (Montgomery), 1989-90 Judicial Award of Merit recipient



Beth Marietta-Lyons (Mobile), member, Alabama House of Representatives, and Penny Davis (Tuscaloosa), assistant director, Alabama Law Institute



Steve Emens (Tuscaloosa), director, ABICLE, and Champ Lyons (Mobile), recipient of Walter P. Gewin award



Young Lawyers' Section Officers: (front) Amy Slayden (Huntsville), (back) Keith Norman (Montgomery), Percy Badham (Birmingham), James Anderson (Montgomery), Sid Jackson (Mobile), and Les Hayes (Montgomery)



Past Presidents, ASB (front) Bill Hairston (Birmingham), Walter Byars (Montgomery), Jim North (Birmingham), Bill Scruggs (Fort Payne), and Ben Harris (Mobile), (back) Ed Thornton (Mobile), Drew Redden (Birmingham), Sonny Hornsby (Tallassee), Oakley Melton (Montgomery), E.T. Brown (Birmingham), and Norborne Stone (Mobile)



Dr. Philip Austin (Tuscaloosa), chancellor, University of Alabama system



Hon. William Bowen (Montgomery) and Hon. Mark Kennedy (Montgomery)



Alva and Katherine Caine



President Caine "on the stump"



Bob Ingram (Montgomery), master of ceremonies at Friday night's political rally



Eleanor, Katherine, Elizabeth, and Alva Caine, Jr.



Hon. B.J. Russell (Montgomery), candidate, court of civil appeals



Hon. Charles Thigpen (Greensboro), candidate, court of civil appeals



Billy Joe Camp (Montgomery), candidate, secretary of state



Hon. Kenneth Ingram (Montgomery), candidate, associate justice, Alabama Supreme Court



Spencer Bachus (Birmingham), candidate, attorney general



Jimmy Evans (Montgomery), candidate, attorney general



Bill Cabaniss (Mountain Brook), candidate, U.S. Senate



Howell Heflin (Tuscumbia), candidate, U.S. Senate



Friday night's entertainment, "The Skunk Posey Band"



Paul Hubbert (Montgomery), candidate, governor of Alabama



Howell Heflin, Hon. Griffin Bell (Atlanta), former U.S. Attorney General, Harold Albritton (Andalusia), Ben Harris, and Reggie Hamner (Montgomery)



President Caine presents gavel to incoming ASB President W. Harold Albritton, III

For 50 years of membership in the state bar, certificates were presented to: (l-r) Cecil Chason (Foley), W. Dewitt Reams (Mobile), Kenneth Cooper (Bay Minette), Malcolm L. Wheeler (Birmingham), Robert Sim Wilbanks, Jr. (Alexander City), and Joe H. Bynum (Savannah, Georgia).



Harold Albritton, president, Phil Adams (Opelika), president-elect, and Alva Caine, immediate past president

Stand Up—A Lawyer's Passin'

by John W. Reed,
Bench and Bar Luncheon Speaker
July 19, 1990
Alabama State Bar Annual Meeting
Mobile, Alabama

Thank you for your generous hospitality. It has been said that a professor is a person who would look like a foreigner in any land, but you have made me feel very much at home here in Mobile.

To come to Alabama has special meaning for me because of your legal heritage. Even as a young law student I learned that your bar association was the nation's first to adopt canons of ethics, which influence us all even to this day. I have always believed Hugo Black's name is one to conjure with. Near and dear to my heart is Harper Lee's "To Kill a Mockingbird." And, on a higher intellectual level, I have a collection of Howell Heflin's "No-Tie Hawkins" stories. Alabama has enriched my life.

As I was preparing to come here, one of my colleagues at Wayne State University called my attention to a turn-of-the-century passage in the long-defunct *American Law Review*. It was the notice of the death of that great Michigan judge, Thomas M. Cooley. Speaking of the Michigan Supreme Court in the two decades after the Civil War, when Cooley sat, the writer said, "We doubt whether the [Michigan] court, as it then existed, had an equal among American state courts outside of Massachusetts, unless it could be found in the Supreme Court of Alabama, long the ranking court in the South." I trust you will allow me the pride of that association between my Michigan and your Alabama. Of course, judges then were surer about everything than judges now are about anything.

My first visit to your state, other than as a tourist, was about 20 years ago, to participate in a judicial training program at the University of Alabama Law School, arranged by a man whom some of you know: Douglas Lanford. In these later years I have gotten to know a number of your finest lawyers and judges through an organization known as the Interna-

tional Society of Barristers, which I have the honor to serve as editor and administrative secretary. Alex Newton was the president when I was appointed its editor, and I have attended three of his firm's annual retreats. Other Alabama barristers I have gotten to know include Walter Byars (like Alex, a former president), Dick Bounds, Alva Caine, the Robert Cunninghams, senior and junior, "Brother" Hare, the irrepressible Billy McDaniel, and some of your judges: Chief Justice Hornsby (right there is a cultural difference: in Michigan, we wouldn't dare call our chief justice "Sonny") Judge Howard. And I cannot fail to pay homage to the memory of Bob Vance. I mourn with you the loss of this great man. We have—all of us—been diminished by his death.

I am privileged to know these distinguished judges and lawyers; through knowing them I have come to have great regard for the bench and bar of Alabama. And so I am honored to be your guest and your speaker at this significant meeting.

It is particularly good to have so many judges here. With both trial and appellate judges present, I am reminded of Justice Scalia's analogy to ancient warfare: Trial judges, he says, preside over the battle on the plain. Appellate judges are a tribe who lives in the hills and rides down after the battle and shoots the survivors. Supreme Court justices are like court of appeals judges, except that they have less compunction and shoot the women and children as well.

I was about to say that it is an honor for us lawyers to meet with Your Honors. But then I remembered the late Skelly Wright's account of the time he was presiding over a trial in Mississippi federal court, and he noticed that the lawyers kept addressing the witness as "Colonel." When they were about to break for a recess, he asked the witness what his military service had been. The witness replied that he hadn't been in the army, that "colonel" was just a title that the governor bestowed on some of his political supporters. He said to Judge

Wright, "It don't really mean nothing; it's just like when the lawyers call you 'Your Honor.'"

A moment ago I characterized this as a significant meeting. I say that because you who are lawyers and you who are judges have decided to resume meeting together periodically to express your views and share your concerns and work together on your mutual problems. Our profession will serve the public interest well only if all elements of the profession join together to address its problems and to fashion a continuously evolving vision of its future. Any expert called in to advise you about improving Alabama's justice system will sound a little like a counsellor speaking to a husband and wife whose marriage is languishing—at the outset he will say, "To begin with, you've got to learn to communicate better." This year's state bar meeting, keynoted by this luncheon, suggests the beginning of a new era of communication, of cooperation between your bench and bar in finding wiser ways to secure to the people of Alabama the blessings of equal justice under law.

We've got to concede, of course, that not all communication is good, that success is not assured even though you communicate more, just as some marriages cannot be saved by better communication. Indeed, the quality, the clarity of communication, varies widely in different settings. A few years ago, a furniture salesman from Grand Rapids, on his first trip to Paris, sat in a sidewalk cafe, watching a pretty woman at another table. Since he spoke no French, he asked the waiter to give her a note. On it he had drawn a picture of a wine bottle. She nodded and smiled, and he sent a bottle of wine to her table. After drinking some of the wine, she asked the waiter for paper and pencil. On it, she drew a picture of a brass bed and sent it to the salesman. And, you know, to this day he can't figure out how she knew he was a furniture salesman.

I know not how effectively you lawyers and judges are communicating with each other. You may or may not be able

to fashion new efficiencies; you may or may not be able to devise procedures that produce fairer results—what someone called “a juster justice, a more lawful law.” But one thing seems certain: the chances for marked improvement are almost nil if you do not engage in candid, thoughtful, earnest communication about the mutual problems of bench and bar, of judge and lawyer. That you appear to have begun that process anew is surely cause for rejoicing—cause for optimism, for hope that Alabama’s legal profession is about to move to higher levels of service and distinction. You pioneered in fashioning the ethical codes of the nation’s lawyers. You now have a chance to fashion new modes of cooperation in addressing the myriad problems of the justice system.

I am sure that I tell you nothing you do not already know when I suggest that the tasks we face as the organized bar are formidable—so formidable that it would be easy to resign oneself to the status quo (which the country preacher said was Latin for “the mess we is in”). Many lawyers, though assuredly not all, are doing well financially. They are learning to adjust to the concept of law practice as a business rather than a profession. And since the problems are almost intractable, why bother?

It certainly is easy to understand why it is difficult to make the improvements in the justice system that we know ought to be made. Progress is hard. First, all reform is tough to achieve. It is not a sport for the shortwinded. As Machiavelli said, “It must be considered that there is nothing more difficult to carry out nor more doubtful of success nor more dangerous to handle than to initiate a new order of things, for the reformer has enemies in all of those who profit by the old order and only lukewarm defenders in all of those who would profit by the new.” But it is simply common sense that change will be more acceptable if it is a joint product of those who will be affected. We need to get away from simply instituting rules with little or no discussion. The Michigan court recently promulgated a rule that came as something of a surprise to the bar, and a friend of mine said the process reminded him of the title of a story by Ring Lardner. The name of the story was “Shut up,” she explained.”

Second, when we propose changes and reforms in the system, almost certainly we will get only minimal help and even some opposition from the public, because it doesn’t really understand the meaning of “profession” and doesn’t really understand such concepts as the adversary system—a public, moreover, which does not regard us highly and is ready to think the worst of us. We conduct expensive surveys of popular opinion in various states only to learn in minute detail what Dr. Samuel Johnson put so succinctly two centuries ago when he remarked to a friend, “Sir, I do not mean to speak ill of any man behind his back, but the fact is, he is an attorney.” We cannot expect much help from a public which neither trusts us nor respects us very much.

It is easy, of course, to make the case that lawyers are not held in high public esteem. I need not read you my list of sarcastic, and sometimes clever, put-downs of lawyers; you undoubtedly have your own collection. It is enough to quote Richard Moll’s sober statement in his new book, *The Lure of the Law*: “Lawyer’ in America has come to connote egoism and rabid competitiveness coupled with greed, a seeming detachment from issues of right and wrong; and yes—one who is very bright and hardworking but, so often, dull.” (Moll is an equal opportunity critic: He repeats a trial lawyer’s statement that “law school professors are the drones and morticians of the profession.”)

You may have seen the item in *Newsweek* reporting that the Dallas Zoo, which has an Adopt an Animal program, has added snakes to its list of adoptable animals and has suggested that they be named after members of the bar. I am glad to report that lawyers have reacted good-naturedly; the Dallas firm of Bickel & Brewer underwrote the adoption of all the snakes in the reptile collection. And in the Los Angeles Zoo, there is a king vulture that answers to “Senior Partner.”

But for all the bad jokes about lawyers, the most disturbing criticisms of the legal profession today come, not from laymen, but from lawyers themselves. The criticisms are not of the law but of lawyers, not of the legal system but of the legal profession. There is among lawyers an uneasiness, a malaise, a fear, a pessimism about lawyers that is nothing like anything I have seen in my nearly half-

century at the bar or, for that matter, in anything I have read about the history of our profession. And that is our third obstacle.

Our own self-image has declined dramatically in just a few years. I do not exaggerate when I say that hardly a week goes by without my encountering a lawyer who expresses dismay about the profession, unhappiness about life as a lawyer, and thoughts about possible change of career. I’ve been around a long time, and that’s new; that’s new—at least the magnitude of it is new—in the last ten years or so. When the Supreme Court, every time it is faced with issues of advertising, solicitation and regulation, equates the practice of law with commerce, it is no wonder that we lawyers begin to view ourselves as businesspersons whose concern is mostly profit and loss. That doesn’t mean that we try less hard to produce a superior product—that is, superior legal services. Quite the contrary; we redouble our efforts to achieve good results for our clients. But there is a shift—sometimes not so subtle—a shift in our motivation: a shift from service to profit. And also, it seems, a shift in what we will do, how far we will go, in order to achieve that good result for the client, with a consequent decline in civility.

Since most of us entered the practice of law with some measure of idealism—with motives of service and caring—the shift in the nature of the profession imposes enormous psychological costs on each of us and all of us. As a consequence, we are unhappy—ranging from outright despair which is leading increasing numbers to leave the profession in midcareer, to vague feelings of unease that take the fun out of practice. When we are so concerned about ourselves, our capacity to improve the system is diminished, in part because our morale is lower and our motivations less generous, but, more importantly, because our vision of what ought to be is clouded by self-interest. As the Danish theologian Kierkegaard once observed, the majority of men are objective toward all others and subjective toward themselves, terribly subjective sometimes—but the real task is to be objective toward oneself and subjective toward all others.

With these and other obstacles to improvement and reform how can we possibly get anything done? The answer, of

course, is that reform begins at home. I can point to the faults of others, but, as I learned as a child, when I point my index finger at anyone, there are yet three of my fingers pointing back at me. I must look first at myself: my motives, my tactics, my commitment—my continuing commitment—to professional responsibility. Professional responsibility is not merely the absence of unethical conduct, it is also the presence of a concern for justice, or, better yet, a highly developed sense of injustice. Most of us have little difficulty seeking what we regard as justice for our clients. What is more difficult is waging passionate battle against injustices that are systemic. If I act responsibly, in the highest traditions of the profession, then I am like the organisms that form the coral reefs: I may be only a tiny chamber beneath the sea, but as we all do this, one by one, the reef builds and builds, and one day breaks through the surface for all to see. I will work together with my fellow lawyers and judges in concerted efforts to improve the law and its courts and procedures, and that is important. But my inescapable, bed-rock responsibility is to do it right myself.

Are improvement and reform difficult? Always. Is the public rooting for us? Not noticeably. Is the profession in good emotional health? Generally not. Is the very concept of professionalism at risk? Absolutely. And so there is ample basis for pessimism. But you and I are not prepared to give up. ABA President Herman recently wrote that "lawyers are idealists by nature, optimists by inclination, realists by choice." Rather than to give in to pessimism and give up the concept of "profession," we must have the long wind to stay the course. An older friend said to me in my youth, "It is better to lose in a cause that must eventually succeed than to succeed in a cause that must eventually fail." Benjamin Mays, the late president of Morehouse College, put it more poetically. Mays said, "Tragedy doesn't lie in not reaching your goal. Tragedy lies in having no goal to reach. It isn't a calamity to die with dreams unfulfilled, but it is a calamity not to dream....Not failure but low aim is the sin."

We need again and again to articulate, for ourselves and for others, the ideals and high principles of our profession. In this skeptical if not cynical age we seem

reluctant to speak in grand terms because they seem a bit old-fashioned, even corny: terms like "equal justice under law." But we need to speak of those things—justice, ethics, morality—because by speaking of them, we are more likely to keep them in our individual and collective consciousness. Then, even if we meet high principle only to fail it, we may fail it at an altitude better than all lower successes.

And there are health benefits from having high aspirations! Striving to be a better professional, and working to bring about a better profession will keep you young. In a bit of free verse, Thomas John Carlisle wrote of the dangers of sitting on the sidelines:

"Discharge, O God,
discharge me
from all perils
and all responsibilities

and I shall not even know
that I am dead."

So, I urge you to look alive, to join the fray. Look to your own conscience and be sure that you are practicing or judging at the highest levels of competency and humanity of which you are capable. Then join with one another, working in concert to produce for the people of Alabama a system of justice that each year is fairer and nobler than the last.

When, as here, we gather together as members of the bar, a fellowship of lawyers and judges, inevitably we find ourselves thinking about what it means to be a lawyer—a good lawyer, a responsible, professional lawyer. That's not only a duty, it's also rewarding, because it sends us back to our daily responsibilities refreshed by a new sense, or at least a renewed sense, of what we are as lawyers.

In my first year at Wayne State Law School I invited your own John Godbold to be our commencement speaker. In his address he said that in the days before he went on the bench, he and Mrs. Godbold had a cleaning lady who always called him "Lawyer Godbold," even though she seemed to address no one else by title. When he asked her why she did that, she said, "Why, that's a term of honor!" That little story brought to mind

the unforgettable courtroom scene in *To Kill a Mockingbird*. The jury had just come in with a verdict of guilty against Tom Robinson for sexual assault against the white girl, despite the courageous defense by Atticus, who had undertaken the unpopular cause. (You undoubtedly visualize Atticus as Gregory Peck.) The black community was watching from the balconies, where they were required to sit. Sitting up there in the heat with Calpurnia, her nanny, was Atticus's daughter, Jean Louise, better known as Scout. Let me pick up Harper Lee's story at this point, being told in the first person by the young girl, Scout:

Judge Taylor was saying something. His gavel was in his fist, but he wasn't using it. Dimly, I saw Atticus pushing papers from the table into his briefcase. He snapped it shut, went to the court reporter and said something, nodded to Mr. Gilmer, and then went to Tom Robinson and whispered something to him. Atticus put his hand on Tom's shoulder as he whispered. Atticus took his coat off the back of his chair and pulled it over his shoulder. Then he left the courtroom, but not by his usual exit. He must have wanted to go home the short way, because he walked quickly down the middle aisle toward the south exit. I followed the top of his head as he made his way to the door. He did not look up.

Someone was punching me, but I was reluctant to take my eyes from the people below us, and from the image of Atticus's lonely walk down the aisle.

"Miss Jean Louise?"

I looked around. They were standing. All around us and in the balcony on the opposite wall, the Negroes were getting to their feet. Reverend Sykes's voice was as distant as Judge Taylor's:

"Miss Jean Louise, stand up. Your father's passin'!"

After Judge Godbold's commencement address, one of my faculty colleagues said to him, "I feel good again about being a lawyer." I hope you feel good about being a lawyer, and I pray that those men and women whom you serve will say:

"Stand up. A lawyer's passin'!"

Resolution of the Board of Bar Commissioners of the Alabama State Bar

Communications Law Section

WHEREAS, the decade of the 1990s has been called the "Information Decade" and it is anticipated that the dramatic growth in this area of the law will directly affect Alabama attorneys and businesses and there will be and is presently a need for an organized and distinct group of attorneys who are equipped and trained to meet the demands of this burgeoning field; and

WHEREAS, after due consideration, a Task Force on a Proposed Communications Law Section ("Task Force") was constituted by order of the then-President of the Alabama State Bar, Gary C. Huckaby, and continued by order of President Alva C. Caine, consisting of M. Roland Nachman, Jr., of Montgomery, Edward S. Sledge, III, of Mobile, E. Cutter Hughes, Jr., of Huntsville, Gilbert E. Johnston, Jr., of Birmingham and Bruce P. Ely of Tuscaloosa (chairman); and

WHEREAS, the Task Force has determined by various means, including polling the membership of the state bar, that there is a sufficient number of interested lawyers who desire to participate in, or at least to support, the activities of a Communications Law Section, and that the best interests of the Alabama State Bar and its members would be served by the formation of a Communications Law Section, and has so recommended to this board; and

WHEREAS, the stated purposes and goals of this section would be to: (1) develop a network of experienced attorneys for the sharing of information, the identification of knowledgeable attorneys throughout the state, and professional improvement and scholarship in the field

of communications law; (2) publish a periodic newsletter dealing with communications law topics of special interest to Alabama attorneys; (3) present an annual seminar, either in conjunction with the state bar convention or possibly with other communications or media groups; and (4) provide legislative oversight, advisory services and consultation as the need arises; and

WHEREAS, the board of bar commissioners has considered the report and recommendation of the task force and concurs in their recommendation;

NOW, THEREFORE, BE IT:

RESOLVED, that the Board of Bar Commissioners of the Alabama State Bar hereby finds and declares that there is an immediate need for the formation of a Communications Law Section with the stated purposes and goals as provided above;

FURTHER RESOLVED, that a section of the Alabama State Bar to be known as the Section of Communications Law be, and the same hereby is, authorized, created and established, the initial membership of the said section to immediately be composed of the members who composed the task force, who are hereby authorized to organize the said section's leadership, to recruit additional members from among the membership of the state bar, and to plan and implement activities and services appropriate to such a section;

FURTHER RESOLVED, that the Director of Programs of the Alabama State Bar ("Director of Programs") be and is hereby authorized and directed to coordinate with the members of the task force an or-

ganizational meeting of the proposed Communications Law Section on or about July 20, 1990, to be held in connection with the annual meeting of the Alabama State Bar in Mobile, Alabama, and to encourage members of the state bar to join and actively participate in the functions of this section;

FURTHER RESOLVED, that the chairman of the task force and/or the director of programs shall make a written report to the board of bar commissioners at its next regularly scheduled meeting following the annual meeting of the state bar, which shall list the new officers of the section and the names and addresses of those attorneys who have joined the section at any time prior to the delivery of said report;

FURTHER RESOLVED, that the form of by-laws submitted to the board for approval be and the same are hereby approved and adopted as the initial by-laws of the section; and

FURTHER RESOLVED, that a copy of this resolution shall be published in the next edition of *The Alabama Lawyer*, and that a copy hereof be presented at the organizational meeting of the section to be held on or about July 20, 1990.

Done this the 18th day of May 1990 at Montgomery, Alabama.

ATTEST:

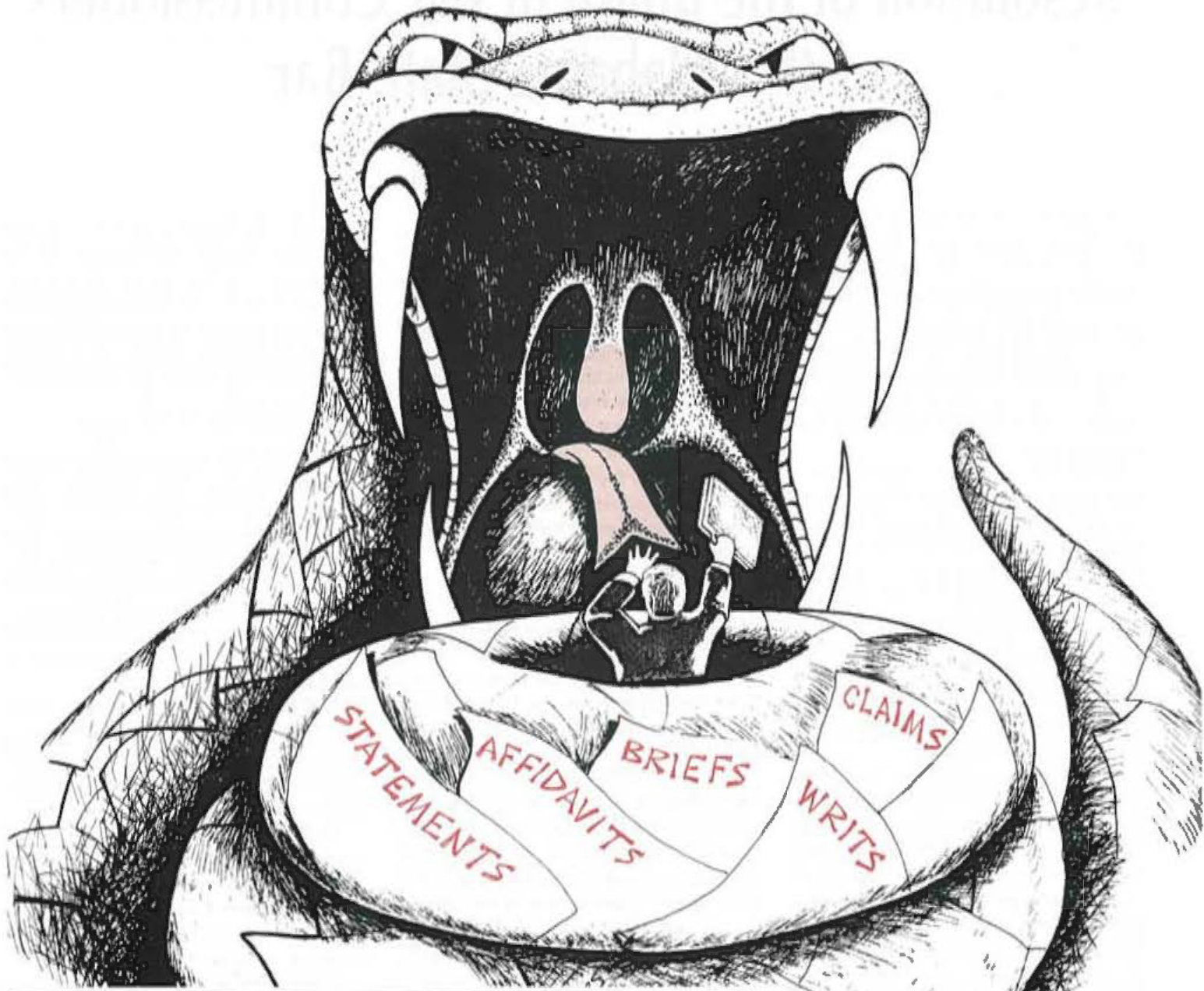
/s/ Reginald T. Hamner
Its Secretary

BOARD OF BAR COMMISSIONERS
By:/s/ Alva C. Caine
Its President

■

RICO in the 11th Circuit after *H.J., Inc.*

by Andrew P. Campbell



Andrew P. Campbell, a partner in the Birmingham firm of Leitman, Siegal, Payne & Campbell, P.C., is a graduate of Birmingham Southern College, cum laude, and the University of Alabama School of Law where he was a member of the Order of the Coif and Alabama Law Review. He is a past chairperson of the Business Torts Antitrust Section of the Alabama State Bar, a member of the Executive Committee of the Birmingham Bar Association and a member of the Board of Editors of *The Alabama Lawyer*.



"It is this factor of continuity plus relationship which combines to produce a pattern. RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity, a plaintiff or prosecutor must show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity."

Justice Brennan for the majority in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2900 (1989)

"[T]he Court counsels the lower courts: 'continuity plus relationship . . . This seems to me about as helpful to the conduct of their affairs as 'life is a fountain.'"

Justice Scalia in concurrence in *H.J., supra*, at 2907.

Like the proverbial serpent, the law of RICO fascinates and repels. It is attractive and intellectually stimulating to those masochists who delight in the supreme challenge of litigating a RICO claim to a successful conclusion with its treble damages and attorneys' fees, the spoils awaiting the victor. At the same time, the statute intimidates because of its sheer complexity borne of the scope of its broad terms. Add to this the ever present threat of Rule 11 for the litigator who misreads the statute and it is no wonder that the first visceral reaction of many attorneys to RICO is, in the words of Dr. Hunter Thompson, one of abject "fear and loathing."

For all of RICO's chameleon traits, it can be safely said that in light of the Supreme Court decisions in *Sedima SPRL v. Imrex Co.*, 473 U.S. 479 (1985) and more recently in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2983 (1989), the Act is the most potent weapon for litigating business-related misconduct in the history of the United States. Every attorney who thinks himself equipped to handle fraud cases under Alabama law owes it to his clients to understand the basic principles and scope of RICO. For any factual scenario having more than one fraudulent act which in turn is carried out in interstate commerce may yield a potential RICO claim.

Coming to grips with the statute and its reach is made necessary not only by Supreme Court decisions in *Sedima* and *H.J., Inc.*, which shielded the statute's

broad ambit from judicial constraints, but also by the 11th Circuit which in this author's opinion has consistently adopted the most liberal interpretation of RICO in the country. This jurisprudence has resulted in large measure from the Court's expansive reading of the statute's elements in order to affirm criminal convictions under RICO, primarily those involving multiple defendants engaged in drug and other conspiracies. *E.g.*, *U.S. v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), *U.S. v. Hartley*, 678 F.2d 961 (11th Cir. 1982), cert. den. 459 U.S. 1170 (1983); *U.S. v. Hobson*, 893 F.2d 1267 (11th Cir. 1990).

It can be argued with merit that principled decision-making based on fidelity of the statute and legislative history has taken a back seat to a policy of upholding lengthy, arduous and complex prosecutions of notoriously bad people and putting them behind bars. If the public can be considered the direct beneficiary of such judicial elasticity then the secondary beneficiaries of these criminal decisions and expansively applied principles surely have been civil plaintiffs whose burden to establish an actionable RICO claim has been reduced in commensurate fashion. This historical liberality of interpreting RICO claims by the 11th Circuit makes it important if not potentially profitable for one to develop a cogent understanding of the statute's terms.

This article will seek to shed light on the state of the 11th Circuit law on RICO in light of the recent Supreme Court decision in *H.J., Inc.* This decision is the benchmark of any review of the law for, as discussed below, the Supreme Court attempted to adopt a minimum standard for the requirement of a pattern of racketeering activity (continuity plus relationship) as required by 18 U.S.C. §§1961(5) and 1962. How well the Court succeeded is open to question, as is the impact, if any, of *H.J., Inc.* on the developing RICO law of this circuit.

These questions will be discussed—but not in a vacuum. If the author has learned anything from countless briefs, articles and seminars, holding an audience's attention to an exposition of RICO's elements requires breathing life into dry terms through their application to everyday life. I will "put meat on the bones" by the oversimplistic use of hypo-

thetical facts drawn from two leading civil cases in this circuit to illuminate the statutes' requirements. Each element of RICO will be applied to these hypotheticals. By doing so, it is hoped three objectives will be achieved: facilitating a better understanding of the statutes, predicting the direction of future decisions, and getting the reader through this article without falling asleep.

I. The hypotheticals

A. An outside accounting firm, which is a corporation, through its accountants prepared financial statements and reports on six occasions over three years on a company. The statements were mailed to the bank and the bank made \$60,000,000 in loans to the company on the strength of these financial statements. The bank sued accounting firm and accountants under RICO, alleging the statements were false and that they induced the loans. *Bank of America v. Touche Ross & Co.*, 782 F.2d 966.

B. Defendant-limited partnership is formed to acquire and market a series of business management video cassettes. Interests (units) in the limited partnership are sold to investors via private placement memorandum. Plaintiffs claimed prospectus and later communications contained false and fraudulent information. Plaintiffs brought suit under RICO. Plaintiffs alleged in their RICO complaint that one of the plaintiffs had invested in similar limited partnership of defendant where investors bought interests in business video cassette venture with similar purported tax benefits and marketed with similar techniques. *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988).

II. Statutory underpinnings and stating the basic RICO claim

This article will focus on 18 U.S.C. § 1962(c), the most litigated RICO section. In sum and substance, this provision makes it unlawful (and thus actionable) for any person to participate, directly or indirectly, in the conduct of affairs of an enterprise engaged in interstate com-

merce through a pattern of racketeering activity. The civil right of action (18 U.S.C. §1964) and criminal liability (18 U.S.C. § 1963) both arise from violations of 18 U.S.C. §1962. Accordingly, the statute is interpreted the same for both criminal and civil cases. See *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970, n.2 (11th Cir. 1986).

In *Sedima*, the Supreme Court held that a plaintiff must plead and prove (1) a person's conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 973 U.S. at 496. One must add the additional element of direct injury "by reason" of the predicate acts which, as discussed below, also creates standing to bring a claim. To fully comprehend RICO in the 11th Circuit, one must take and review each of these elements within its own separate sphere.

III. What do the elements encompass?

- A. Conduct of a person (directly or indirectly in the enterprise's affairs)

A "person" who may be subject to liability as a defendant under RICO is statutorily defined at 18 U.S.C. §1961(3) to include any individual or entity capable of holding an ownership interest in property. Hence, corporations or partnerships are persons whose conduct of the enterprise through a pattern of racketeering activity exposes them to liability. As discussed hereinafter, this becomes interesting since the 11th Circuit has held that the "person" and "enterprise" may be the same. As a result, a business can be liable for conducting itself in a corrupt fashion.

What does "conduct" by a person mean in the 11th Circuit? It extends well beyond active management of the enterprise to mere participation or association. The Court in *Bank of America*, *supra* at 970, defined "conduct" to include "its performance of activities necessary or helpful to the operation of the enterprise." Thus, exposed are not simply the central characters, but also the bit players. Any peripheral actor assisting in any phase of operations of the enterprise is potentially liable. Outside pro-

fessionals as well as inside management may be caught in this web. While attorneys, underwriters and accountants may not be "sellers" within the federal securities laws so as to incur liability, they may be ensnared for the same alleged fraud under RICO.

The reach of this element was shown by the 11th Circuit Court's reasoning in *U.S. v. Watchmaker*, 761 F.2d 1459, 1476:

The substantive proscriptions of the RICO statute apply to insiders and outsiders—those merely "associated with" an enterprise—who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity The RICO net is woven tightly to trap even the smallest fish, those peripherally involved.

In Hypothetical A, the outside accountants who prepare false financial statements for the corporation can be guilty of RICO violations if the statute's other requirements are shown. The same is true in Hypothetical B, where liability will extend to the limited partnership, the underwriters and brokers and agents

NOTICE

The United States Attorney's Office, Southern District of Alabama, address has changed as follows:

**U.S. Attorney's Office
169 Dauphin Street, Suite 200
Mobile, Alabama 36602**

NOTICE

The Supreme Court of Alabama is discontinuing use of its post office box. The mailing address now is 445 Dexter Avenue, Montgomery, Alabama 36130. Please direct any correspondence to this new address.

**Robert G. Esdale,
Clerk**

who were involved in selling the units and even the attorneys who prepared the prospectus.

And what of the accounting firm in Hypothetical A which as an entity did not engage in wrongful conduct, but whose employees did? Do the words "person who conducts" create vicarious liability under agency or respondeat superior principles for the corporation or partnership because its agents participated in racketeering activity? Many courts say "No," because RICO policies are to punish guilty persons with the scienter to corrupt, not innocent corporations. E.g. *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964 (7th Cir. 1988).

The 11th Circuit in *U.S. v. Hartley*, 678 F.2d 761 (11th Cir.) cert. denied (1982), seemed to take a different view that a corporation could be held vicariously liable for the acts of its agents. In rationalizing that the corporation could be both a "person" and, thus, a defendant as well as the "enterprise," the Court made the following statement:

Appellants complain that Treasure Isle's corporate status, allowing for the government's alleged emasculation of the enterprise element, is "particularly grievous" in view of the doctrine of corporate liability. *Since a corporation is liable for the acts of its agents and employees, it permits an employee's activities to serve as proof of the two predicate acts required by §1962(c). This is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the attendant responsibilities.*

678 F.2d at 988-89 (emphasis added).

That vicarious liability may apply to RICO is suggested by *American Society of Mech. Engineers v. Hydrolevel Corp.* 456 U.S. 556 (1981) wherein the Supreme Court applied the doctrine of respondeat superior to the federal antitrust laws. In so doing, the Court held that common law agency principles applicable to torts governed antitrust violators since Congress, by text or comments, had not indicated otherwise and the statute was broad and remedial in nature. *Id.* at 570. The same considerations clearly could be applied to RICO.

B. The enterprise (conducted by a person through a pattern of racketeering activity)

Nowhere is the 11th Circuit's expansive construction of RICO more clearly evidenced than in its approach to the enterprise requirement. The 11th Circuit stands alone as the only circuit in this country that has held that the "person" conducting the "enterprise" and the "enterprise" may be the same for purposes of 18 U.S.C. §1962(c). This rule was established in *U.S. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982).

In effect, the Court has held that a corporation which conducts itself with others through a pattern of racketeering activity is liable. *Accord Shared Network Technologies, Inc. v. Taylor*, 669 F.Supp. 422, 427 (N.D. Ga. 1987). A review of legislative history suggests the Court's train of reasoning has jumped the tracks of logic and reality. RICO was enacted primarily to deter organized criminal syndicates from seizing control and corrupting legitimate businesses (the enterprise). Somehow, it seems that subjecting the victim corporation to liability for the perpetrator's actions is not exactly what Congress had in mind. Nor does such a conclusion flow from the clear words of the statute, as other courts have held in requiring a person-enterprise dichotomy. See e.g. *Bishop v. Corbett Marine Ways*, 802 F.2d 122 (5th Cir. 1986); *Haroco v. American Nat. B&T Co. of Chicago*, 747 F.2d 384, 400-01 (7th Cir. 1984). These decisions require proof of an enterprise separate and apart from the persons acting in concert.

But, under *Hartley* in Hypothetical A and B, the plaintiff can sue the accounting firm and the limited partnership defendants and also allege them to be both defendants and the enterprise corrupted through a pattern of racketeering activity. Alternatively in both hypotheticals, the enterprises can be the co-conspirators acting in loose confederation or association in fact. Further, in Hypothetical A, a plaintiff may allege the enterprise to be the debtor corporation that borrowed the bank's money based on false financial statements.

That a plaintiff may choose is due in part to the enterprise definition at 18 U.S.C. §1961(4) which includes any "person, individual, partnership, association or other legal entity, and any group of individuals associated in fact though not a legal entity." In the leading decision of *U.S. v. Turkette*, 432 U.S. 576, (1981) the Supreme Court interpreted the statute to

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encompass both legal and illegal groups associated in fact. While there must be a nexus between the enterprise, RICO violations and interstate commerce, in line with modern federal jurisprudence, this can be minimal. *Shared Network Technologies, Inc. v. Taylor*, *supra* at 426. Moreover, in the 11th Circuit, the enterprise need not receive an economic benefit, *U.S. Hartley*, *supra*, at 990-91.

Simply put, in the 11th Circuit, any ongoing association or organization of persons with common aims will satisfy the enterprise requirement. As noted above, this can be the corporate defendant itself. Moreover, in other criminal decisions liberally construing the statute to affirm convictions, the Court has held that proof of the predicate acts *ipso facto* may also prove the enterprise. *U.S. v. Weinstein*, 762 F.2d 1522, 1527, 1537 (1985); *U.S. v. Cagina*, 697 F.2d 915, 921 (1983). Stated differently, the enterprise need not be identifiable separately from the co-conspirator's loose association to commit wrongful conduct but can be inferred from the conduct. *Cagina*, *supra* at 921. Nor must it exist prior to the undertaking of racketeering activity. *Weinstein*, *supra*, citing *U.S. v. Elliott*, 571 F.2d 880 (5th Cir.) cert. den. 439 U.S. 953 (1973).

Under prevailing criminal decisions in the 11th Circuit, the Court has virtually written the enterprise requirement out of the law. There is no practical difference between an "enterprise" and a common law "conspiracy" between actors to commit bad acts. Any defendants acting in concert to commit wrongs satisfy the enterprise requirement and implicate RICO, despite the words of the statute and its legislative history which seem to require something more. Where one of the actors is a corporation, it may serve double duty as the enterprise. The practical effect of all of this is that civil defendants will enjoy no success in defeating the enterprise requirement as long as the plaintiff alleges concerted involvement by more than one actor and more than one predicate act.

C. Pattern of racketeering activity (through which an enterprise is conducted)

Racketeering activity is statutorily defined at 18 U.S.C. §1961(1). While state felonies such as murder and bribery may serve as predicate acts, as well as numerous federal crimes, the most commonly

litigated racketeering predicates are securities fraud, wire fraud and mail fraud. However, RICO claims founded on fraud against broker-dealers, a fertile field in the past, were struck a mortal blow at the hands of the Supreme Court in *Shearson American Express v. McMahan*, 482 U.S. 222 (1987). The Court held that RICO claims based on securities fraud are subject to binding arbitration under boilerplate arbitration clauses found in customer agreements. Henceforth, such customers will find themselves litigating RICO claims for treble damages before unfriendly arbitration panels dominated in many cases by members of the securities industry. Certainly *McMahan* reinforces the now conventional wisdom of arbitration clauses in any contractual arrangement of a commercial institution or business.

In *Sedima*, *supra*, the Supreme Court held that RICO does not require a prior criminal conviction or indictment based on the predicate acts prior to bringing a civil action. 473 U.S. at 488. The court further rejected a burden of proof beyond a reasonable doubt in RICO civil cases. *Id.* at 491-92. In Hypothetical A, the racketeering activity would likely fall under mail and wire fraud. In Hypothetical B, the same indictable offenses could be used with the addition of a claim based on securities fraud.

D. The elusive pattern requirement

After *H.J., Inc.*, there is little doubt that most future battles over civil RICO in the 11th Circuit will occur on the ramparts of the "pattern" and its sufficiency under the law. It was different prior to *H.J., Inc.* The 11th Circuit's standard was easily met. The Court applied the pattern definition of 18 U.S.C. §1961(5) of "at least two acts of racketeering activity" committed within ten years of each other to mean more than one act, whether or not related. In *U.S. v. Phillips*, 664 F.2d 971 (11th Cir. 1981), the Court held that two predicate affairs unrelated to each other but related to the enterprise sufficed to establish RICO criminal liability. The same rule was applied in *U.S. v. Gatteman*, 1724 F.2d 1517, 1522 (11th Cir. 1984), wherein the Court held that two isolated sales of pirated videotapes occurring at different times sufficed to form a pattern. The Court also held that two separate indictable acts arising from the same transaction and occurring contem-

poraneously formed a pattern. E.g. *U.S. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985); *U.S. v. Phillips*, *supra*, 664 F.2d at 1038-39.

In *Sedima*, decided in 1985, Justice White for the Supreme Court suggested two acts may not form a pattern. 473 U.S. at 496 n. 14 ("[T]wo of anything do not generally form a 'pattern'"). The Court also indicated that "isolated" acts would not suffice; what was required was "continuity plus relationship" as stated in the RICO's legislative history, a chain of related acts occurring over a period of time with a threat of continuing activity. *Id.*

Despite indications in *Sedima* that the 11th Circuit's standard may be too permissive, the Court continued to read "pattern" broadly. In *U.S. v. Hobson*, 825 F.2d 364, 366 n.2 (11th Cir. 1987), principled construction again accommodated expediency in a drug case as the Court applied its prior rule and found that two separate crimes constituted two separate predicate acts for purposes of RICO, and thus met the continuity requirement.

In *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986), the basis of Hypothetical A, the Court interpreted *Sedima* to hold that a pattern requires "a showing of more than one [emphasis added] racketeering activity and the threat of continuing activity."

In *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), Hypothetical B's counterpart in reality, involving the sale of limited partnership interest in a video library, the Court cited *Sedima* as interpreted in *Bank of America Nat'l Trust* and held only two predicate acts were required to meet the pattern requirement. *Id.* at 1512. The Court found the second act in the sale of interest in a venture using similar methods. Appellants correctly asserted that these were isolated, independent events and involved, with one exception, wholly different investors. *Id.* Moreover, there apparently was no showing in the record that the prior venture was fraudulently represented. *Id.* Yet the Court determined mere similarity satisfied the "threat of continued activity" requirement.

Although the two schemes in this action involved different investors, the acts are sufficiently similar to withstand a motion for summary

judgment. The use of business instructional video cassette tapes, the alleged promises of tax benefits and alleged inflated appraisals which led to IRS denial of tax benefits create a degree of similarity between the two schemes. While we recognize the various facts asserted by appellants distinguishing the schemes, these contentions illustrate that there is an issue of material facts as to the similarity of the two predicate acts. The District Court therefore properly denied the motion for summary judgment.

Id.

Durham rightfully can take its place in history as the desperate plaintiff's "life-boat case." When all appears lost and a plaintiff appears to be sinking under the weight of a defense that no pattern exists, he may cling to *Durham* and escape the deep waters of summary judgment if he can locate a second "similar" act. The only problem is at first glance and at second, the decision appears utterly at odds with *Sedima* and its emphasis on continuity and multiple acts. Yet *Durham*

speaks volumes of the 11th Circuit's expansive approach to the pattern requirement and to RICO prior to *H.J., Inc.*

In *H.J., Inc.* the Supreme Court made clear what it had indicated in *Sedima*, that such a standard of only two acts which are barely related and lack continuity, was insufficient under the statute. The Court, through Justice Brennan, enshrined "continuity plus relationship" as the rule and attempted to give it teeth. 109 S.Ct. at 2900. To prove a pattern, the plaintiff or prosecutor, according to the majority, "must show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity." *Id.* In discussing these two elements, the Court rejected the construction of the 11th Circuit of requiring only two predicate acts. *Id.* at 2899. The Court also disagreed with other circuit rulings (rightly rejected by the 11th Circuit in *Bank of American Nat'l Bank*) that an overlay of multiple schemes was required.

Id. In so holding the Court stated as follows:

We find no support in those sources for the proposition es-

poused by the Court of Appeals for the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes. Nor can we agree with those courts that have suggested that a pattern is established merely by proving two predicate acts . . . In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

Id.

What the Court had in mind in defining relatedness were multiple acts related by "an external organizing principle." *Id.* at 2901. Drawing on other non-RICO provisions of the 1970 Organized Crime Control Act, the Court held this common denominator may be "same or similar

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 RE: Correction
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purposes, results, participants, victims or methods of commission or otherwise related by distinguishing characteristics and not isolated events." *Id.* Sporadic activity or unrelated acts, previously approved by the 11th Circuit, no longer will form the basis of a pattern of predicate acts.

Continuity or the threat of continuing activity is a more elusive concept. The Court held this may be proven in two separate but overlapping ways. First, continuity is shown by "a series of related acts extending over a substantial period of time." *Id.* at 2902. The majority held that this closed-ended approach did not contemplate criminal behavior occurring over a "few weeks or months," but "long-term criminal conduct" which by its very longevity suggests continuation in the future. *Id.*

The second means of proving continuity was open-ended where the misconduct is ongoing, e.g. where the acts have so infected the business as to become a normal part of its regular operations. *Id.* The Court suggested that such predicates ongoing as regular business may be fewer in number than the "closed period of repeated conduct" since they, by their vested place in the business, pose a threat of repetition in the future. *Id.*

While Justice Scalia in concurrence viewed the new test as little more than rhetorical flourish, *H.J., Inc.* may be fairly read to clarify and considerably tighten the pattern requirement. The Court indicated that a RICO pattern requires multiple related acts occurring over a lengthy period of time or which are open-ended, ongoing or threaten repetition in the future. The emphasis on longevity and recurrence seemingly would have a profound effect on the 11th Circuit law. Applying continuity plus relationship to Hypothetical B, our syndicators from *Durham, supra*, this RICO claim would go out on summary judgment. First, only two predicate acts are shown and two will not suffice under *H.J., Inc.* Second, there is a question of the acts' relatedness and third, they are past acts (closed-ended) with no threat of future repetition. Of course, an able litigator might circumvent this problem by conducting discovery showing defendants sold other syndications using the same methods and from this evidence

argue that the fraudulent sales are currently ongoing and thereby threaten future repetition. In any event, on its facts, Hypothetical B does not appear to satisfy *H.J., Inc.*'s pattern requirement.

The more difficult case is Hypothetical A, but the preparation of false statements on six prior occasions over three years may pass muster as a pattern. They are related, prepared for the same company for the same purpose, to induce financing, and with the same victims. And what of the continuity requirement? The number of statements prepared over a period of three years would suggest a threat of repetition. Here we see how the closed-ended and open-ended approaches projecting into the future coalesce. Repeated past fraudulent conduct clearly indicates that the accounting partners are conducting their business or that of the client (whichever is the enterprise) in a corrupt fashion which likely will be repeated in the future. Hypothetical A featuring repeated, ongoing conduct, and not sporadic episodes, contains a sufficient pattern.

Litigators must evaluate continuity from both perspectives to determine whether the predicates are simply in the past or extend into the future. What is clear from *H.J., Inc.* is that "continuity" will become the first line of defense for attorneys defending RICO claims. They may succeed (particularly with defense-minded courts), if the plaintiff establishes only a series of closed-ended predicate acts in the past that occurred and ended before the litigation. The plaintiff blessed with few predicates must argue that the misconduct evinces a regular course of conduct, part of the lifeblood of the business and thus threatens repetition.

E. After *H.J., Inc.*: Where do we go from here?

With the restrictive pattern requirement, *H.J., Inc.*, one would expect the 11th Circuit to follow suit, placing similar constraints on RICO. Perhaps it will and then again, perhaps not. In *U.S. v. Alexander*, 888 F.2d 777 (11th Cir. 1989), the Court interpreted *H.J., Inc.*, to require only two predicate acts. The Court thus affirmed a RICO criminal connection based on violation of the Hobbs Act and the conspiracy to violate the Act arising out of the same set of transactions. *Id.* at 778. The Court noted the conduct threatened future repetition because some of

it had occurred in each of the seven years the defendant had held office. *Id.*

The Court appeared to deviate drastically from *H.J., Inc.*'s teaching in *U.S. Hobson*, 893 F.2d 1267 (11th Cir. 1990), like *Alexander*, a decision on remand after being vacated by the U.S. Supreme Court in *H.J., Inc.* The sole question was whether one set of facts producing two criminal connections, aiding and abetting importation of drugs and aiding and abetting possession of the same drugs with intent to distribute, could form a pattern. Both acts arose from one episode of conspiracy by Hobson and others to smuggle drugs into Florida. *Id.* at 1268-69. Quite amazingly, the Court found a pattern. This dubious result was reached notwithstanding an absence of *H.J., Inc.*'s required multiple acts, as opposed to an isolated event, extending over a sustained period of time, thereby indicating long-term criminal behavior. To affirm under RICO the 11th Circuit elected to rely on the second avenue of continuity holding that the acts projected into the future. *Id.* at 269. To reach this far, the Court cited not the two predicate acts from the same episode, but related non-predicate, non-indictable facts such as the defendant's demand for his money back when the mission failed. *Id.*

Where does 11th Circuit law stand in light of *H.J., Inc.*? It is hard to say, but *Hobson* and *Alexander* fairly suggest that the Court may continue to require only two predicate acts that are related and give mere lip service to *H.J., Inc.*'s heightened continuity requirement. If "continuity plus relationship" is to be honored simply in the breach, the law will be basically the same as it was before *H.J., Inc.* Thus, Hypotheticals A and B, after *H.J., Inc.*, may state a RICO claim after all.

It is evident that as long as the tail of criminal decisions wags the dog of civil jurisprudence, the attempt to develop a firm "pattern" requirement will take many inconsistent twists and turns. Without a consistent standard based on *H.J., Inc.*, confusion will continue to reign supreme and any certainty in the law may prove to be a goal utterly unreachable.

F. Standing and injury

No struggle to define RICO's status in the 11th Circuit would be complete with just a brief mention of standing and damages. Again *Sedima* is the lodestar, the

Court holding that the two requirements are co-extensive. 473 U.S. at 496. Eighteen U.S.C. §1964(c) limits recoveries to a person "injured in his business or property by reason of a violation of §1962." The Court in *Sedima* held that this provision gave standing for suit only to persons suffering injury to property or business caused by commission of the predicate acts. *Id.* In other words, the compensatory damage "is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497.

The 11th Circuit has held this standard requires proof that predicate acts were the proximate cause of plaintiff's damages that directly result from their commission. *Morast v. Lance*, 807 F.2d 1211, 1214 (5th Cir. 1987). The 11th Circuit in *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989) went as far as to indicate that plaintiffs, to have standing, must be "targets" of the underlying predicate acts. *Id.* at 1563. Thus, an employee who is fired for refusing to participate in a RICO scheme or reporting the scheme has no direct injury flowing directly from RICO violations. *Id.* The decisions in *Morast* and *O'Malley* afford a defendant a window of opportunity if it can establish plaintiff was not an actual "target" of the fraudulent scheme.

VI. Conclusion

Until the Act is dismantled by Congress or struck down as unconstitutionally vague by the Supreme Court, the efforts of the 11th Circuit and its bar to give meaning to RICO will continue. Amidst competing societal interests and policies clamoring for accommodation in both the civil and criminal arena, these efforts, our efforts, to properly apply the statute should take into account the timeless admonition of Justice Oliver Wendell Holmes:

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which

even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try—I have tried—to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet, when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

...

"The statute of which we have to find the meaning is a criminal statute. The two sections on which the government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail."

These words were spoken in dissent from an ends-oriented construction of the federal antitrust laws, but they equally apply to RICO counseling judicial restraint and principled fidelity to legislative intent. They should be our guiding rules, setting the course for development of RICO law. ■



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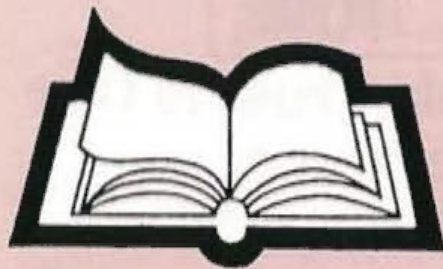
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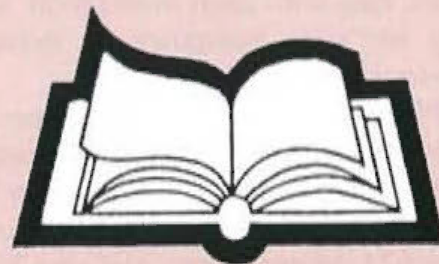
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Answers:

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Thomas Goode (1900-01) and Walter B. Jones (1954-55)
Frances J. (1934-35) and Frances H. Inge (1955-56)
Robert B. (1971-72) and W. Harold Albritton (1990-91)

An Overview of RICO

by Pamela H. Bucy and Steven T. Marshall

RICO, Racketeer-Influenced and Corrupt Organizations,¹ is a prosecutor's powerhouse and civil plaintiff's dream. It is also a statute of "daunting complexity."² Passed in 1970 as part of a major crime fighting bill,³ RICO's stated goal is to protect the public from "parties who conduct organizations affecting interstate commerce through a pattern of criminal activity."⁴ This article provides a general overview of RICO.

The statute has been extended to cover a wide range of conduct: organized crime,⁵ white collar crime,⁶ even Croation terrorists,⁷ and abortion clinic protestors.⁸ The United States Supreme Court has not been sympathetic when RICO defendants have argued that this broad application exceeds the intended scope of RICO, stating: "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . . but also of its express admonition that RICO is 'to be liberally construed to effectuate its remedial purposes.'"⁹ Since 1970, over 20 states have passed statutes similar to the federal RICO statute.¹⁰ In 1988 a "mini-RICO" statute was signed into law in Alabama.¹¹ This statute simply expands the type of property already forfeitable in connection with controlled substance offenses; it contains none of the other major features of the federal RICO statute.

One of RICO's unique features is that it provides both criminal and civil causes of action for a violation of its provisions. Thus, the United States Department of Justice¹² can seek a criminal indictment or file a civil complaint alleging RICO violations. At the same time, private parties can file a complaint alleging the same RICO violations.¹³ RICO has become renown, in part, because of the stiff sanctions it provides: mandatory forfeiture for a criminal violation, in addition to possible imprisonment and fines,¹⁴ treble damages and attorney fees for a civil violation.¹⁵

The RICO statute is organized very logically. Section 1961 sets forth definitions. Section 1962 lists the four types of



conduct that constitute a RICO violation. Section 1963 sets forth the criminal penalties; section 1964 sets forth the civil penalties. Sections 1965 through 1968 provide housekeeping details. Section 1965 deals with venue and process. Section 1966 provides for expedition of certain civil RICO actions brought by the government. Section 1967 gives a court the discretion to close civil proceedings to the public. Section 1968 gives the Attorney General the authority to issue civil investigative demands for documents in certain circumstances.

There are four types of conduct prohibited by RICO. The gist of all four is using a business to commit crime. Whether the case is civil or criminal, the plaintiff must prove that the defendant committed at least one of these types of conduct. Before discussing the prohibited conduct, it is necessary to review three of the major RICO definitions.

The first significant definition is "racketeering activity." Section 1961(1) defines "racketeering activity" as committing any one of specifically listed crimes, often referred to as "predicate acts." The crimes listed in 1961(1) include certain state felony offenses (murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity or narcotics) and approximately 55 federal felony offenses. The federal offenses include those typically thought of as "racketeering" offenses, i.e., the Hobbs Act (interfering with interstate commerce through violence or the threat of violence), distribution of illegal narcotics, bribery, extortion, gambling, prostitution. Also included as "racketeering activity" are many white collar crimes: mail fraud, wire fraud, labor union and

pension fraud, money laundering, and securities fraud.¹⁶

One does not commit a RICO offense simply by committing one "racketeering activity," rather, one must engage in a "pattern of racketeering activity." "Pattern of racketeering activity" is defined in Section 1961(5) as "at least two acts of racketeering activity within a ten-year time period."¹⁷ The federal courts have struggled with this minimal definition. In 1986 the United States Court of Appeals for the Eighth Circuit gave a narrow interpretation to "pattern," holding that two counts (i.e., two mailings) in a mail fraud scheme were so closely related to each other that they constituted only one "racketeering activity" and not a "pattern" of racketeering activity.¹⁸ Almost every other federal court of appeals had rejected this narrow interpretation¹⁹ when the Supreme Court also rejected it in a recent decision, *H.J. Inc. v. Northwestern Bell Telephone Co.*²⁰

The Supreme Court attempted to clarify the pattern requirement, but as Justice Scalia observed, the Court's effort provides meager guidance.²¹ After examining the legislative history,²² the Court stated that "the term 'pattern' itself requires the showing of a relationship between the predicates . . . and of 'the threat of continuing activity.'"²³ Addressing first the "relationship" prong of this definition, the Court stated that a relationship exists between acts of racketeering activity if the acts have "same or similar purposes, results, participants, victims, or methods of commission."²⁴ "Threat of continuity," according to the Court, is both a closed- and open-ended concept. "A party alleging a RICO viola-

tion may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time."²⁵ But, when a RICO action is "brought before continuity can be established in this way, . . . liability depends on whether the threat of continuity is demonstrated."²⁶ Such an open-ended threat can be explicit or implicit. An implicit threat could be shown with evidence "that the predicate acts or offenses are part of an ongoing entity's regular way of doing business."²⁷

The Court's application of the "pattern" requirement to the facts of *H.J. Inc.* is somewhat illustrative of this requirement. The plaintiffs in this case were customers of one of the RICO defendants, Northwestern Bell Telephone Company. Bringing a class action suit that included state claims based upon statutory and common law, the plaintiffs alleged that various officers and employees of Northwestern Bell, as well as members of the state utilities commission, engaged in a pattern of racketeering activity (bribery) causing telephone rates to rise.²⁸ Applying the newly clarified "pattern" definition, the Supreme Court reversed the district court's dismissal of the RICO complaint, noting that the plaintiffs may be able to prove that the alleged predicate acts constituted a "pattern of racketeering activity." Relationship between the predicate acts could possibly be shown if the alleged acts of bribery "are said to be related by a common purpose, [that is] to influence the Utilities Commissioners in . . . order to win approval of unfairly and unreasonably high rates for Northwestern Bell."²⁹ Threat of continuity, the Court noted, may be satisfied with proof that the bribery "occurred with some frequency over at least a 6-year period,"³⁰ or alternatively, by a showing that the bribes were "a regular way of conducting"³¹ either the business of Northwestern Bell or the utilities commission.

Although the Supreme Court's clarification of this element may be meager guidance, at the moment it is the best RICO plaintiffs have. Suffice it to say that hereafter RICO plaintiffs should be sure they can prove a "pattern of racketeering activity" by showing a sufficient "relationship" between the specific acts of "racketeering activity" they have alleged and a sufficient "threat of continuity" (be



Professor Bucy is an associate professor of law at the University of Alabama School of Law where she teaches white collar crime, criminal law and criminal procedure. From 1980-87 she served as an assistant U.S. Attorney in St. Louis, Missouri, where she specialized in prosecutions of white collar crime.



Steven T. Marshall is a 1987 graduate of the University of North Carolina and a May 1990 graduate of the University of Alabama School of Law.

it the "closed-ended" or "open-ended" version) between such acts.

The third significant definition in RICO is "enterprise." Simply engaging in a "pattern of racketeering activity" will not constitute a RICO offense. The statute forbids engaging in a pattern of racketeering only insofar as an enterprise is involved.³² Section 1961(4) defines enterprise broadly as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."³³ Sections 1962(a)-(d) add that the enterprise "must affect interstate or foreign commerce."³⁴ This commerce requirement is minimal and easily met.³⁵

To prove the existence of an enterprise, the RICO plaintiff must first prove that there exists some type of "ongoing organization, formal or informal."³⁶ Evidence of just enough organization among individuals to carry out the predicate acts could suffice to meet this burden.³⁷ The RICO plaintiff must also prove that the various associates in this on-going organization "function as a continuing unit."³⁸ This "continuity" can be shown by evidence of the commission of the same type of acts where the jobs to be performed remain the same (even if the people performing these jobs change).³⁹

Courts also have required clear proof of nexus between the pattern of racketeering activity and the enterprise. In the United States Court of Appeals for the Eleventh Circuit, this nexus is shown by "proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity."⁴⁰ It is not necessary to go further and prove that the racketeering activities had "an effect upon the common, everyday affairs of the enterprise."⁴¹

The United States Court of Appeals for the Eighth Circuit imposes another requirement in proving the existence of an enterprise. It holds that the proof of the enterprise must be distinct and separate from the proof of the pattern of racketeering activity.⁴² Other federal courts of appeals,⁴³ including the United States Court of Appeals for the Eleventh Circuit,⁴⁴ reject this position and hold that the same evidence can suffice to prove the existence of the enterprise and the pattern of racketeering activity "as long as the proof offered is sufficient to satisfy both

elements."⁴⁵ *U.S. v. Mazzei*,⁴⁶ a criminal RICO action brought against individuals, including members of the Boston College basketball team, for a "point shaving" scheme⁴⁷ helps demonstrate the practical significance of this distinction. In this case, the government used the same evidence (point shaving and gambling) to prove the existence of the enterprise (a group of individuals associated to engage in a point shaving/gambling scheme) and to prove that predicate acts were committed (gambling). The United States Court of Appeals for the Second Circuit ruled that using the same evidence to prove both components was not a problem but recognized that a contrary holding likely would result using the Eighth Circuit's position.⁴⁸

Although both the United States Courts of Appeals for the Fifth and Third circuits have applied the Eighth Circuit's requirement of distinct proof, it is not clear how stringently they do so. The United States Court of Appeals for the Fifth Circuit hinted that if continuity is

proven in the evidence of the pattern of racketeering activity, this same proof could suffice to demonstrate the existence of an enterprise.⁴⁹ Given the Supreme Court's subsequent holding in *H.J. Inc.*⁵⁰ that proof of a pattern of racketeering activity must include proof of continuity,⁵¹ the Fifth Circuit's view may now more closely align with that of the Eleventh Circuit. In the Third Circuit's seminal opinion, *United States v. Riccobene*,⁵² the finding of "distinct evidence" to prove the "enterprise" after the pattern had been proven was so broad that such evidence will be present in virtually every case. In *Riccobene* the Third Circuit found that the enterprise "served [as] a clearinghouse and [provided] a coordination function above and beyond that necessary to carry out any single one of the racketeering activities charged against individual defendants."⁵³ Evidence of this function was held to be distinct from the evidence of the predicate acts. Common sense tells us that when more than one actor is involved, such "coordination" will always be necessary

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to commit any acts, including RICO predicate acts.

To summarize these definitions: a RICO offense can occur only when there is a pattern of racketeering activity affecting an enterprise. "Racketeering activity" is easily determined by referring to the list of offenses in 1961(l). The Supreme Court's recent explanation in *H.J. Inc.* of "relationship" and "continuity" should be used to assess whether a "pattern of racketeering activity" exists. Depending on which federal court of appeals one is in, the following issues must be resolved to determine if a RICO "enterprise" has been shown to exist: presence of an "ongoing organization" which "function[s] as a continuing unit"; sufficient showing of the nexus between the enterprise and the pattern of racketeering activity; and, proof of the enterprise that is distinct from the proof of the pattern of racketeering activity. Once these definitional hurdles are met, one can move on to determine if conduct has occurred that is prohibited by RICO.

The four types of conduct prohibited by RICO are set forth in four subsections of 1962. Section 1962(a) makes it unlawful for any person to "use or invest" any income derived from a pattern of racketeering activity in an enterprise.⁵⁴ *United States v. Zang*⁵⁵ provides an example of a 1962(a) offense. Zang and Porter were partners who owned oil refining and related businesses. They falsified information about the oil they were processing, used the mails to do so and were found to have committed the racketeering activity of mail fraud.⁵⁶ A 1962(a) violation occurred because Zang and Porter ("persons") funneled the profits they made from their mail fraud scheme ("pattern of racketeering activity") into one of the businesses ("enterprise") they owned. The portion of this business attributable to the ill-gotten profits was forfeitable property under RICO.⁵⁷

Section 1962(b) makes it unlawful for any person to acquire or maintain control of any enterprise through a pattern of racketeering activity. *United States v. Local 560 Int'l Brotherhood of Teamsters*⁵⁸ provides an example of a 1962(b) action. The United States brought a civil RICO action against 12 individuals, Local 560 of the International Brotherhood of Teamsters, and Local 560's Welfare Fund and Severance Pay Plan. A

Section 1962(b) violation occurred because the individuals ("persons") acquired an interest in and control of Local 560 ("enterprise") through extortion and murder⁵⁹ ("pattern of racketeering activity").

Section 1962(c) makes it unlawful for any person "employed by or associated with any enterprise" to conduct the affairs of the enterprise through a pattern of racketeering activity.⁶⁰ Section 1962(c) offenses are the most common. One study of all reported RICO cases through 1985 showed that 92 percent of the cases charged a violation of 1962(c), or a conspiracy to violate 1962(c).⁶¹ *Bennett v. Berg*⁶² provides an example of a 1962(c) action. Residents of a retirement community filed a civil complaint against numerous individuals and corporations alleging that because of the defendants' fraud, the retirement community was on the verge of bankruptcy and the residents faced the loss of the services they had paid for and been promised.⁶³ The complaint alleged violations of 1962(c), asserting that some of the defendants ("persons") conducted the affairs of the retirement community ("enterprise") through mail and wire fraud ("pattern of racketeering activity").

Section 1962(d) makes it unlawful for any person to conspire to do any of the acts in 1962(a)-(c).⁶⁴ The usual elements of conspiracy must be proven to prevail on a 1962(d) action: the defendants agreed to commit at least one type of RICO conduct as specified in 1962(a)(b) or (c), and at least one conspirator committed at least one overt act in furtherance of the conspiracy.⁶⁵ A RICO conspiracy requires proof of an agreement to violate substantive RICO provisions.⁶⁶ The RICO plaintiff does not have to prove that each defendant also agreed to personally commit the predicate acts that make up the "pattern of racketeering activity," but the plaintiff must prove that each defendant personally agreed to the commission by someone of the predicate acts.⁶⁷ By the same token, proof only that a defendant agreed to the commission of the predicate acts without further proof of an agreement to violate a substantive RICO offense is inadequate to prove a RICO conspiracy.⁶⁸

The following example may help demonstrate what proof is necessary to establish a 1962(d) RICO conspiracy. If

a plaintiff proves that the defendants agreed to collect insurance proceeds from the arson of several businesses and that one defendant committed one overt act in furtherance of this insurance fraud, the plaintiff may have proven a conspiracy to commit mail fraud (assuming the insurance claim was mailed). However, unless the plaintiff also proves an agreement to use or invest the ill-gotten insurance proceeds in an enterprise, (a 1962(a) action), or to acquire or maintain control of one enterprise through the insurance fraud, (a 1962(b) action), or to conduct the affairs of an enterprise through the insurance fraud, (a 1962(c) action), no RICO conspiracy has been proven.

If, as one court stated, the RICO statute is "constructed on the model of a treasure hunt,"⁶⁹ Sections 1963 and 1964 are the treasure. Section 1963 sets forth the criminal penalties. A criminal conviction subjects the RICO defendant to a possible sentence of imprisonment of 20 years,⁷⁰ substantial fines,⁷¹ and forfeiture of "any interest . . . acquired or maintained" in violation of RICO.⁷² Most of section 1963 deals with the forfeiture penalty. The government is given broad power to seek restraining orders or performance bonds "to preserve the availability of the property subject to forfeiture."⁷³ In unusual cases, such orders or bonds may be obtained before indictment, ex parte and without notice.⁷⁴ Section 1963 also sets forth the procedure a bonafide purchaser of property subject to forfeiture should follow to secure her rights to her property.⁷⁵

Section 1964 addresses standing for civil plaintiffs and civil penalties. It confers standing to bring a civil RICO action on "any person injured in his business or property by reason of a violation of 1962"⁷⁶ and sets forth the damages recoverable: "threefold the damages [sustained] and the cost of the suit, including a reasonable attorney's fee."⁷⁷

Standing for the civil plaintiff

In order to maintain a civil action, it is not necessary for a plaintiff to demonstrate that the defendant has been criminally convicted under the RICO statute.⁷⁸ Rather, the appropriate standing inquiry focuses upon the injury that has been suffered and its relationship to the defendant's RICO violation.

The courts have encountered difficulty in establishing the parameters of the injury requirement necessary to gain standing. The United States Court of Appeals for the Eighth Circuit has construed injury broadly, granting standing to plaintiffs who were not the targets of the racketeering activity and only suffered "indirect" injury.⁷⁹ The courts of appeal for the Second, Fifth and Seventh circuits have granted standing only to those plaintiffs who suffer a "direct" injury arising from the RICO predicate acts.⁸⁰

The Court of Appeals for the Eleventh Circuit, while setting forth an analysis which shuns the indirect/direct injury label, seemingly adopts a view of section 1964(c) consistent with the latter approach. In *O'Malley v. O'Neill*,⁸¹ the court proffered a three-part test for standing whereby a plaintiff must show: "(1) a violation of 1967; (2) injury to business or property; and (3) that the violation caused the injury."⁸² If there is only a "tenuous" relationship between the harm and the RICO violation, the proximate causation requirement is not satisfied, under this Eleventh Circuit test, and standing will be denied.⁸³ The court stated that it was unwilling to grant standing absent a "strong link" between the defendant's commission of the predicate acts and the plaintiff's alleged injury.⁸⁴

Pleading the criminal or civil RICO cause of action⁸⁵

Generally, a RICO complaint must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."⁸⁶ These four requirements, while seemingly straightforward, have given rise to a vast amount of litigation concerning motions to dismiss for inadequate pleading. Each allegation is itself a term of art and embodies its own requirements of particularity.⁸⁷ For this reason, a comprehensive discussion of all RICO pleading issues is beyond the scope of this overview, but several recurring issues deserve brief discussion.

One issue which numerous courts have addressed is whether a complaint that alleges a fraud offense as a predicate act complies with the requirements of Rule 9(b) of the Federal Rules of Civil Procedure (FRCP). In *Durham v. Business Management Associates*,⁸⁸ the United States Court of Appeals for the

Eleventh Circuit, in examining the sufficiency of mail fraud allegation in a RICO complaint, held that "allegations of date, time, or place satisfy the Rule 9(b) requirement that the *circumstances* of the alleged fraud must be pleaded with particularity."⁸⁹ However, the court cautioned that the particularity requirement does not abrogate the concept of notice pleading embodied in FRCP 8.⁹⁰

A second pleading issue that arises in 1962(c) RICO actions is whether the enterprise can also be the "person" committing the crime. Every federal court of appeals, except the Eleventh Circuit, has said no.⁹¹ These courts hold that for purposes of 1962(c), the enterprise whose affairs are conducted through a pattern of racketeering activity cannot also be the "person" charged. Where the enterprise is the "deep pocket," this rule may reduce the chances for collecting on any judgment obtained. When this is not a problem, this rule is not a difficult one to comply with and would rarely impede charging a 1962(c) action. In almost every RICO action the "persons" charged will include principals of the

relevant enterprise. To comply with this rule of pleading, the RICO plaintiff should simply delete the enterprise from the list of persons otherwise charged.

A related pleading question is whether the "enterprise" can be named as a "person" committing 1962(a) offenses. The Supreme Court has not addressed this issue, but the federal courts of appeals which have held that this restriction does not apply in 1962(a) actions.⁹² In reaching this conclusion, these courts focus primarily on the difference in the language in 1962(a) and (c). Because the pertinent language in 1962(b) is identical to that in 1962(a), it is also doubtful that this pleading nuance would apply in 1962(b) actions.

Double jeopardy

Generally, the Double Jeopardy Clause of the fifth amendment protects a defendant from a second prosecution for the same offense (after an acquittal or conviction) and from multiple punishments for the same offense.⁹³ Several criminal RICO defendants have asserted that a criminal

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RICO prosecution after a former trial for a violation of the predicate acts abridges the protections of the Double Jeopardy Clause.

Courts have rejected this "successive prosecution" argument, holding that Congress intended separate convictions for both the RICO offense and the underlying predicate acts.⁹⁴ Similarly, courts have rejected RICO defendants' arguments that punishment for both the individual predicate acts and the RICO offense violates the cumulative punishment protection of the fifth amendment.⁹⁵ These decisions hold that Congress intended to permit cumulative punishment for substantive RICO violations and the predicate crimes, and thus, found no fifth amendment violation.⁹⁶

While the Double Jeopardy Clause provides little protection to a criminal RICO defendant, its prohibition against multiple punishments may provide some relief to some civil RICO defendants. A recent United States Supreme Court decision may allow the Double Jeopardy Clause to limit the recovery sought against a civil RICO defendant when the action is brought by the government. In *United States v. Halper*,⁹⁷ a former medical service manager, who was previously convicted for violating the criminal false claims act, was sued by the government under the civil false claims act. The defendant, conceding liability under the civil statute, contended that the severity of the additional penalties under the remedial provisions of the civil act violated the multiple punishment protection of the Double Jeopardy Clause. The Supreme Court agreed that, under certain circumstances, such a fifth amendment violation could occur. The Court stated, "[The] Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole."⁹⁸ Thus, after this decision, a civil RICO defendant may successfully argue that the remedy sought by the government in the civil action is excessive and has no relation to making the government whole. However, the Court in *Halper* made clear that its decision did not apply when the civil action was brought by a private plaintiff.⁹⁹

Forfeiture

In carrying out the order of forfeiture against the defendant, issues arise as to the effect of the forfeiture order upon private parties not convicted of a RICO violation.

The RICO statute provides following procedure for rights of bonafide purchasers of property subject to RICO forfeiture. Subsequent to the entry of the order of forfeiture, the United States must publish notice of the order in such a manner as directed by the Attorney General and, if practicable, provide notice to any person known to have an interest in the property subject to forfeiture.¹⁰⁰ Within 30 days of the final publication of this notice, any person asserting a legal interest in the property must petition the court for a hearing.¹⁰¹ The petition must state the (1) nature and extent of the party's right, title, or interest in the property, (2) the time and circumstances of the party's acquisition of the right, title, or interest in the property, (3) any additional facts supporting the petition, and (4) the relief desired.¹⁰² Thereafter, the court shall, if practicable, hear the petition within 30 days of filing.¹⁰³

At the forfeiture hearing, the court alone will make a determination of the issues presented.¹⁰⁴ In making the decision, the court will consider testimony presented by the petitioning party as well as any relevant portions of the record of the criminal case.¹⁰⁵ In order to prevail, the petitioning party must convince the court by a preponderance of the evidence that (1) he has a legal right, title, or interest in the property which vested in the petitioner or was superior to any right, title, or interest of the defendant at the time the criminal acts which gave rise to forfeiture took place, or (2) that he was a bonafide purchaser who at the time of purchase did not reasonably believe the property was subject to forfeiture.¹⁰⁶ If the private party can demonstrate either that legal title existed prior to the criminal acts or that he is a bonafide purchaser, the court thereafter may amend the order of forfeiture and require the government to relinquish its interest in the particular property at issue.¹⁰⁷

In determining the scope of the order of forfeiture, another issue that has arisen is whether funds intended for use as attorney's fees are subject to forfeiture. In *United States v. Mansanto*,¹⁰⁸ the Su-

preme Court addressed this issue and held that a district court can freeze assets in the defendant's possession even when the defendant seeks to use those assets to retain an attorney.¹⁰⁹

Burden of proof

Section 1964 is silent as to the burden of proof which a civil plaintiff bears in proving the elements of RICO. The Supreme Court has hinted, but not firmly established, what is the necessary evidentiary standard.¹¹⁰ However, following the Court's suggestion, the circuit courts are in accord that the predicate acts must be proven by a preponderance of the evidence.¹¹¹

Conclusion

RICO is a complex statute but it provides advantages for both criminal and civil plaintiffs. As the criminal plaintiff, the government can join together disparate crimes in one indictment, including crimes over which it otherwise has no jurisdiction. More significantly, however, the government obtains the defendant's property through the forfeiture penalty. With this penalty, the government can hit criminals where it hurts: in their pocketbooks. The civil plaintiff, meanwhile, gains immediate federal jurisdiction, and if successful, automatic treble damages for what is often "garden-variety" fraud otherwise litigated in the state courts with only the possibility of punitive damages.

There are hazards with RICO, however. Overuse of RICO by both criminal and civil plaintiffs has seriously jeopardized the statute's future. During the past five years increasingly aggressive efforts have been made in Congress to curtail RICO's provisions by restricting the predicate acts for which treble damages are available.¹¹² For the civil plaintiff, another hazard exists. The courts have been increasingly willing to impose sanctions on parties bringing inappropriate RICO actions.¹¹³

Applied correctly and in appropriate situations, RICO serves as a valuable weapon to both prosecutors and civil plaintiffs. RICO litigants should be advised, however, that the statute's future is uncertain and the consequences of its improper use are potentially severe.

1. Racketeer-Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§1961-1968 (1982 and Supp.).
2. Lynch, *RICO: The Crime of Being a Criminal, Parts I and II*, 87 *Colum. L. Rev.* 661-764 and *Parts III and IV*, 87 *Colum. L. Rev.* 920-984, at 680 (1987) [hereinafter Lynch].
3. Organized Crime Control Act of 1970, Title IX, Pub. L. No. 91-452, 84 Stat. 941 (1970).
4. 115 Cong. Rec. 9568 (1969), Remarks of Senator McClellan.
5. See, e.g., *United States v. Local 560 of Int'l Brotherhood of Teamsters*, 550 F.Supp. 511 (D.N.J. 1982) *aff'd*, 780 F.2d 267 (3d Cir. 1985) *cert. denied* 476 U.S. 1140 (1986); *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977) *cert. denied* 435 U.S. 952 (1978).
6. See, e.g., *United States v. Milken*, Cause No. S 89 CR 4 (S.D.N.Y. 1989) (securities fraud).
7. *United States v. Bagario*, 706 F.2d 42 (2d Cir.) *cert. denied* 464 U.S. 840 (1983).
8. *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736 (E.D. Pa. 1985).
9. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-498 (1985).
10. See, e.g., *Ariz. Rev. Stat. Ann.* § 13-2312 (1978); *Ca. Code Ann.* § 16-14-1 (1984); *Miss. Code Ann.* § 97-43-1 (1985).
11. *Ala. Code* § 20-2-93 (1988 as amended April 18, 1990).
12. RICO Guidelines, *United States Attorney's Manual* §9-110.000 *et. seq.*
13. *Cf. Civil RICO is a Misnomer: The Need For Criminal Procedural Protections in Actions Under 18 U.S.C. §1964*, 100 *Harv. L. Rev.* 1288, 1298 (1987).
14. 18 U.S.C. § 1963(a).
15. 18 U.S.C. § 1964(c).
16. 18 U.S.C. § 1961(i).
17. 18 U.S.C. § 1961(i).
18. *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257-58 (8th Cir. 1986).
19. See, e.g., *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989).
20. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989).
21. *Id.* at 2906-2909 (Scalia, J. concurring).
22. *Id.* at 2902-2905.
23. *Id.* at 2900.
24. *Id.* at 2901.
25. *Id.* at 2902.
26. *Id.* (emphasis in original).
27. *Id.*
28. *Id.* at 2897.
29. *Id.* at 2906.
30. *Id.*
31. *Id.*
32. *Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982), *cert. denied sub. nom.*, *Prudential Insurance Co. v. Bennett*, 464 U.S. 1008 (1983).
33. 18 U.S.C. § 1961(4).
34. 18 U.S.C. §§ 1962(a), (b), (c), (d).
35. *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1986); *United States v. Robinson*, 763 F.2d 778, 781 (6th Cir. 1985).
36. *United States v. Turkette*, 452 U.S. 576, 583 (1981).
37. See, e.g., *United States v. Cagnina*, 697 F.2d 915, 921-922 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983); *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).
38. *Turkette*, 452 U.S., 583 (1981).
39. *United States v. Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982) *cert. denied* 459 U.S. 1110 (1983).
40. *United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir.) *cert. denied sub. nom.*, *Morris v. United States*, 469 U.S. 819 (1984); See, e.g., *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 195 (9th Cir. 1987); *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980); *United States v. Carlock*, 806 F.2d 535, 546 (5th Cir. 1986) *cert. denied* 480 U.S. 949, (1987); *United States v. Blackwood*, 768 F.2d 131, 138 (7th Cir.), *cert. denied*, 474 U.S. 1020 (1985).
41. *Carter*, 721 F.2d at 1527.
42. See, *United States v. Bledsoe*, 674 F.2d 647, 663-665 (8th Cir.), *cert. denied sub. nom.*, *Phillips v. United States*, 459 U.S. 1040 (1982).
43. See, e.g., *Mazzei*, 700 F.2d at 89; *United States v. Bagnariol*, 665 F.2d 877, 890-891 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Griffin*, 660 F.2d 996, 1000-01 (4th Cir. 1981), *cert. denied*, 454 U.S. 1156, (1982).
44. *Cagnina*, 697 F.2d at 921.
45. *Mazzei*, 700 F.2d at 85.
46. *United States v. Burke*, 700 F.2d 70, 73 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983).
47. *Id.* at 83.
48. *Id.* at 88-89.
49. *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987).
50. *H.J. Inc.* 109 S.Ct. 2893.
51. See text accompanying notes 20-31 *supra*.
52. *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied sub. nom.*, *Ciancaglini v. U.S.* 464 U.S. 849 (1983).
53. *Id.* at 224.
54. 18 U.S.C. § 1962(a).
55. *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 838 (1983) and *sub. nom. United States v. Porter*, 464 U.S. 828 (1983).
56. *Id.* at 1193.
57. *Id.* at 1195.
58. *Local 560*, 780 F.2d 267.
59. *Id.* at 273-274.
60. 18 U.S.C. § 1962(c).
61. Lynch, *supra* n. 2 at 724, 726, 731.
62. *Bennett v. Berg*, 685 F.2d 1053.
63. *Id.* at 1057.
64. 18 U.S.C. § 1962(d).
65. *Carter*, 721 F.2d at 1528 n. 17.
66. *Id.* at 1528 citing *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), *cert. denied sub. nom.*, *Delph v. United States*, 439 U.S. 953 and *Hawkins v. United States*, 439 U.S. 953 (1978).
67. *Carter*, 721 F.2d at 1531.
68. *Elliott*, 571 F.2d at 902-903.
69. *Sutliff Inc. v. Donovan Companies, Inc.* 727 F.2d 648, 652 (7th Cir. 1984).
70. 18 U.S.C. § 1963(a).
71. RICO provides a maximum fine of \$25,000, 18 U.S.C. § 1962(a), but the Alternative Fine Provision, which applies to all Title 18 offenses, imposes a higher and more complex fine structure, 18 U.S.C. § 3571.
72. 18 U.S.C. § 1963(a).
73. 18 U.S.C. § 1963(b)-(h).
74. 18 U.S.C. § 1963(d)(1)(B) and (d)(2).
75. 18 U.S.C. § 1963(i)-(m).
76. 18 U.S.C. § 1964(c).
77. *Id.*
78. *Sedima*, 473 U.S. at 489.
79. See generally, *Terre du Lac Ass'n v. Terre du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).
80. See, *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988); *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988); *Haroco, Inc. v. American Nat'l Bank and Trust*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).
81. 887 F.2d 1557 (11th Cir. 1989), *cert. denied* _____ U.S. _____ 110 S.Ct. 2620 (1990).
82. *Id.* at 1561.
83. *Id.*
84. *Id.*
85. For a sample form complaint containing RICO allegations, See, 23 *Am. Jur. Pl & Pr Stock and Commodity Exchanges*, Form 4.2 (Supp. 1988). On reserve at the University of Alabama School of Law is a collection of RICO complaints and indictments filed in federal courts around the country. Ask for *Bucy, RICO*.
86. *Sedima*, 473 U.S. at 496.
87. *Elliott v. Foulas*, 867 F.2d 877 (5th Cir. 1989).
88. 847 F.2d 1505 (11th Cir. 1988).
89. *Id.* at 1512 (emphasis in original).
90. *Id.* at 1511.
91. *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982) *cert. denied* 459 U.S. 1170 (1983). *Contra*, e.g. *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985) *cert. denied* 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co., Inc.* 751 F.2d 628, 633 (3rd Cir. 1984); *Bishop v. Corbitt Marine Ways Inc.*, 802 F.2d 122, 122 (5th Cir. 1986); *Haroco Inc.*, 747 F.2d at 400.
92. See, *Official Publications, Inc. v. Kable News Co.* 884 F.2d 664, 668 (2d Cir. 1989); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249 (7th Cir. 1989).
93. *United States v. Halper*, _____ U.S. _____, 109 S.Ct. 1892, 1897 (1989).
94. See generally, *United States v. Grayson*, 795 F.2d 278, 283 (3d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); *United States v. Boldin*, 772 F.2d 719 (11th Cir.), *mod. on other grounds*, 779 F.2d 618 (1985).
95. See generally, *United States v. Callanan*, 810 F.2d 544 (6th Cir. 1987); *Boldin*, 772 F.2d at 728-30.
96. *Id.*
97. 109 S.Ct. 1892 (1989).
98. *Id.* at 1903.
99. *Id.*
100. 18 U.S.C. § 1963(l) (1982 & Supp. V)
101. 18 U.S.C. § 1963(l)(2).
102. *Id.*
103. 18 U.S.C. § 1963(l)(3).
104. 18 U.S.C. § 1963(l)(2).
105. 18 U.S.C. § 1963(l)(6).
106. *Id.*
107. *Id.*
108. 109 S.Ct. 2657 (1989).
109. *Id.*; See also, *United States v. Bissell*, 866 F.2d 1343 (11th Cir.) *cert. denied*, 110 S.Ct. 146 (1989).
110. *Sedima*, 473 U.S. at 491.
111. See, *Fleischhauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987); *Culler v. Margiot*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475 (5th Cir. 1986); *Local 560*, 780 F.2d at 267.
112. *Amending the Racketeer Influenced and Corrupt Organizations Act Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (April 24, 1990).
113. Spence, *The Improper Civil RICO Claim: If Such a Thing Exists, Can It Be Battled with Sanctions? The Ala. Lawyer* (1990).

The Improper Civil RICO Claim: If Such a Thing Exists, Can It Be Battled with Sanctions?

by Elwyn Berton Spence

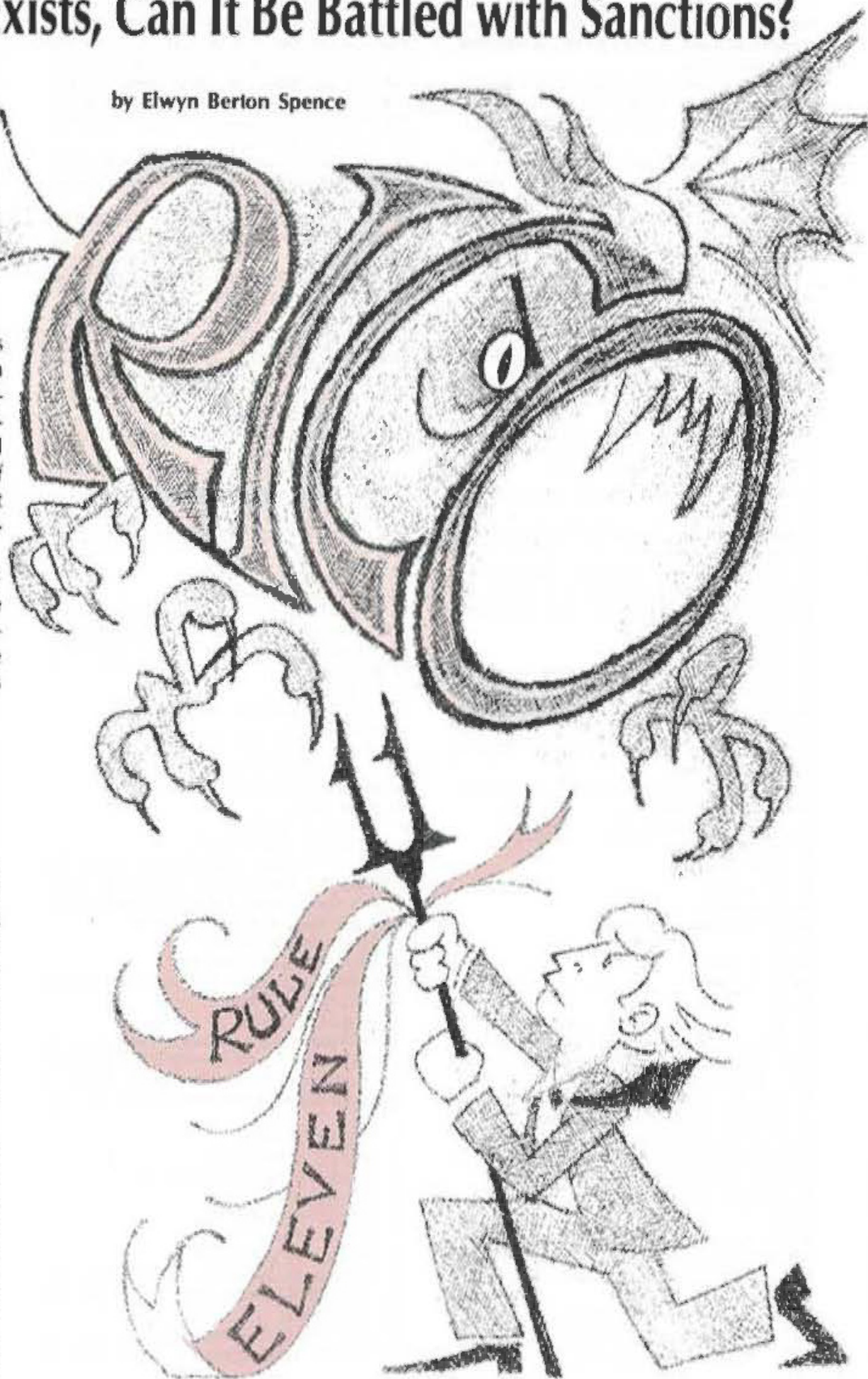
Twenty years ago the word "RICO" was nothing more than the shortened version of the latin name "Ricardo." Now, the utterance of those two syllables within ear-shot of anyone connected to the legal profession will bring to mind images of an explosion in federal civil litigation not seen since the passage of the first anti-trust laws.

Likewise, litigation over the appropriateness of imposing sanctions under Rule 11¹ against attorneys for asserting frivolous claims is rapidly on the rise. One commentator comparing the two areas of growth noted:

"Indeed, many have said that Rule 11 has replaced civil RICO actions as the cottage industry of the litigation bar."²

Rather than one replacing the other, however, it appears that the two are found in tandem: the civil plaintiff threatening RICO and the defendant countering with a request for Rule 11 sanctions for the improper use of the statute. (As of 1987, securities fraud/RICO cases made up around 15 percent of all Rule 11 cases, with plaintiffs the target of requests for sanctions in over 84 percent of these cases.)³

Ironically, RICO, which stands for "Racketeer Influenced Corrupt Organizations," is the title of Chapter 96⁴ of the United States Criminal Code. It is Title IX of the Organized Crime Control Act of 1970⁵ and thus appears on its face to have been intended as a new weapon for the Justice Department's continual battle against the mob. It is, however, RICO's civil remedies⁶ that have employed the



most lawyers. Civil RICO is now routinely pleaded, though not always successfully, in areas bearing no relationship whatsoever to traditional notions of organized crime. This phenomena has not been described so dispassionately by the courts:

"RICO is just, in my view, a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud."⁷

Because civil RICO exposes defendants to huge liabilities in the form of treble damages and attorney's fees recoverable by successful plaintiffs,⁸ the mere allegation of a civil RICO violation can have an *in terrorem* effect on defendants, theoretically forcing settlements far in excess of those generated by the traditional fraud claims that are now gathered under the RICO umbrella. (RICO is essentially a means of punishing repeated illegal acts. It targets as defendants those who have engaged in at least two of the predicate acts listed in 18 U.S.C. § 1961[1] within a period of ten years—the "pattern of racketeering activity" or PRA defined in 18 U.S.C. §1961[5]. Most civil RICO claims are grounded on the various types of fraud found within this list of predicate acts.)⁹ As such, RICO can become a powerful club for plaintiffs.

The attempt by defense lawyers to use Rule 11 as a shield from the blows, however, has posed one enormous difficulty: it is very awkward to describe a RICO claim as frivolous when no one, not even the courts, seems to know exactly what RICO is or how to use it. The federal circuits are split on their constructions of the most basic elements of the statute, making it almost impossible for even the most diligent of attorneys to accurately construct a RICO pleading. The courts do not seem pleased with a statute that gives rise to such disparate definitions. The Supreme Court of the United States has passed up two opportunities to clarify the most troublesome of the statute's definitional elements, that of the "pattern of racketeering activity," (PRA)¹⁰ and other definitions within the statute remain confusing as well,¹¹ leaving the above-quoted RICO critic and federal district court judge to expound thusly:

"RICO is a recurring nightmare for federal courts across the coun-

try. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jettisoned an effusion of opinions which bobble in its wake."¹²

One such opinion has created a new area of confusion. The use of RICO against anti-abortion activists has led to debate over whether the defendant enterprise under the statute must be one that seeks to make a monetary profit. The federal circuits are characteristically split on this issue as well, and the Supreme Court has thus far refused to settle the matter.¹³

Failure of the courts to cement these definitions has led many business leaders to call on Congress to limit the statute so as to exclude otherwise legitimate business enterprises from RICO's special liabilities. As of this writing, the most recent move has been the introduction of a bill in the Senate that would not limit the class of defendants, but would reduce civil RICO damages from treble to a mere double, and would raise the burden of proof necessary to establish the predicate acts from a preponderance to the clear and convincing level.¹⁴ At this time, however, no action has been taken.

With both the courts and Congress failing to rein in the statute, it continues to run free under the steady horsemanship of creative and imaginative plaintiffs who seek to transmogrify otherwise ordinary civil actions into hugely lucrative RICO judgments. The climate is one that encourages forum shopping, and in the hearts of the bold, promotes the use of RICO as a remedy for almost any wrong, on the theory that some court, somewhere, has probably sustained its use in just such a situation.

One dramatic example can be found in the case of an oil company executive who felt he had been wrongfully discharged for his refusal to participate in what he felt to be an illegal scheme.

*Williams v. Hall*¹⁵ outlines the allegations of William McKay and Harry Williams, both former executives of Ashland Oil Co. Both men charged that they were fired because they refused to go along with Ashland's bribing of several officials of Middle Eastern countries in violation of the Foreign Corrupt Practices Act.¹⁶ McKay and Williams further alleged numerous other predicate acts under RICO such as mail fraud, wire fraud and securities fraud.

According to an article by Thomas Harrison in the February 1989 issue of the *ABA Journal*,¹⁷ McKay and Williams were both successful at trial. When McKay's actual damages from lost wages were trebled, he received an award of \$43 million. Williams was awarded a paltry \$23 million, and in Harrison's words, "As though to add insult to injury, the jury threw in \$3 million in punitive damages—presumably in case Ashland failed to get the point."¹⁸

Numerous other defendants, few of whom, if any, would be characterized as having anything to do with organized crime, are getting the point.

How can this be? Was not RICO aimed specifically at the mob? The stated purpose of the Organized Crime Control Act¹⁹ would seem to indicate that it was:

It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by

Elwyn Berton Spence is a May 1990 graduate of the University of Alabama School of Law, and currently is with the Birmingham firm of Lange, Simpson, Robinson & Somerville.



establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime (emphasis added).²⁰

The statements referring specifically to RICO, however, were not so limited:

The provisions of this title [Title IX, Racketeer Influenced Corrupt Organizations] shall be *liberally construed to effectuate its remedial purpose* (emphasis added).²¹

As a result of its attractive civil remedies and a statement of purpose commanding courts to construe it liberally, RICO has been the basis of suits filed against almost anyone, with only the aforementioned creativity and imagination of plaintiff's lawyers serving as a limit. As will be shown, however, at some extremely indeterminate point, creativity and imagination become frivolity.

"Liberally construed" or just plain meritless?

The following are offered as a brief catalogue of the disparate uses, certainly not always successful but attempted nonetheless, of civil RICO. Afterward, cases involving requests for sanctions will be reviewed in order to see if the interminancy of that point of frivolity renders such requests practically useless as a means of stemming the civil RICO tide.

*Saporito v. Combustion Engineering, Inc.*²² and *Crawford v. La Boucherie Bernard Ltd.*²³ are but two of the large and still growing number of cases combining

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charges of ERISA²⁴ violations with RICO claims.²⁵

In *Saporito*, several employees charged that they were induced to retire early under one pension plan while management was concealing the existence of a second, more lucrative plan that would be offered to other employees. The plaintiffs were able to characterize this as a breach of fiduciary duty sufficient to invoke the federal mail and wire fraud statutes²⁶ as the necessary predicate acts (the court noted that plaintiffs had failed to plead the frauds with sufficient particularity but allowed amendment of the complaint²⁷).

In *Crawford*, the court found that the knowing illegal transfer of retirement plan assets satisfied the racketeering activity requirement of RICO, presumably dispensing with the requirement that two such activities within 10 years be found.²⁸

Indeed, the entire field of employment and labor law is now being permeated by RICO. Attorneys Ira Michael Shephard, Stephen Horn and Robert L. Duston of the Washington, D.C., firm of Schmeltzer, Aptaker & Shepard detail in their article "RICO and Employment Law"²⁹ the recent application of RICO in civil actions against employers and unions for wrongful discharge, contract and ERISA claims.

RICO is also being used by employers, say the three, noting that employers can use RICO against employees who have defrauded the company or who have set up competing business violative of various business tort laws.

Plaintiffs in *E.F. Hutton Mortgage Co. v. Equitable Bank*³⁰ attempted to

characterize fraud and negligence claims against a bank as RICO charges, but the court found RICO to be inapplicable,³¹ as did the court in a similar situation described in *Buchan v. Peterson Bank*.³²

Minority shareholders have sued majority shareholders under RICO after characterizing breaches of duty as mail and wire frauds,³³ while at least one company has tried to sue shareholders of another by characterizing an alleged conversion as a RICO predicate act.³⁴

The field of securities fraud has also become increasingly an area for the use of RICO. Two recent examples are found in *Hybert v. Shearson Lehman/American Express, Inc.*,³⁵ and *In re Gas Reclamation Inc. Securities Litigation*.³⁶ In *Hybert*, plaintiffs sued a brokerage house for falsifying financial statements as part of a scheme to facilitate churning, while in the *Gas Reclamation* case the charge was one of fraudulent misrepresentation in a private placement memorandum offering gas reclamation units (which the court held to be securities).

In *Shaw v. Rolex Watch, USA, Inc.*,³⁷ a plaintiff was able to characterize as RICO his claim that a company owned by foreign interests had falsely represented ownership by United States citizens in order to come under the protection of customs laws which would have allowed the defendant company to prohibit the importation of items bearing its mark by the plaintiff/importer.

The field of health care is beginning to see its share of RICO suits as well. In *Does 1-60 v. Republic Health Care Corp.*,³⁸ 60 plaintiffs alleged a scheme to defraud Medicare; a scheme to fraudulently sell Republic to American

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Medical Internation (AMI); mail³⁹, wire⁴⁰ and securities frauds⁴¹ in connection with the acquisition of a third corporation by Republic; fraud in the "taking private" of Republic; and fraud in denying to the plaintiffs the lifetime care for which they had contracted.

And, though apparently unsuccessful, plaintiffs in *Khaimi v. Schonberger*,⁴² elderly nursing home patients, attempted to use RICO to battle their upcoming eviction from the home.

Not even products liability has been immune from RICO. Dow Chemical Co. faced RICO charges recently in connection with allegations of fraud in its marketing of two different products, "Sara-bond" and "Roommate."⁴³

The foregoing by no means adequately describes the technical aspects of how the RICO statute works, but it should demonstrate that enough confusion surrounds the statute to make the labelling of its use in a particular set of circumstances as "improper" very difficult. It also should serve as a warning to general civil litigators: If you are not already, you will soon be seeing RICO in complaints against your clients. Whether a motion for sanctions is an available weapon with which to deter the plaintiff who cites RICO merely to up the ante in settlement talks is, unfortunately for defendants, not so certain.

How meritless is meritless enough?

Given the incredible increase in the use of RICO by plaintiffs and its inherent *in terrorem* effect (treble damages can scare even the most stalwart defendant), defendants have reached for any help they can find. They have seized primarily upon two methods of attack: Federal Rule of Civil Procedure 11⁴⁴ and 28 U.S.C. § 1927,⁴⁵ known as the "vexatious litigation statute."

Rule 11 has been characterized as a defendant's tool, and this seems in general to be true.⁴⁶ It applies to pleadings, motions or other papers at the time of signing (this is important because the volume of RICO litigation going on at any particular moment is such that the law in this area changes rather rapidly).⁴⁷ In addition, the rule proscribes basically two types of misconduct: 1) the failure of an attorney to conduct a reasonable inquiry of the sort necessary to support his knowledge, information and belief that

his argument is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and 2) the interposition of a pleading, motion or other paper for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.⁴⁸

It would seem to be extremely awkward to tell an attorney that his inquiry into RICO law is unreasonable simply because he failed to understand all of it. The most learned jurists in the nation do not agree on even the most basic of RICO's elements. Thus, only the most egregious failures to research RICO will qualify under the first prong of Rule 11, leaving the second prong, or the improper purpose test, where Rule 11 and the vexatious litigation statute overlap, as the most likely method of obtaining sanctions.

Take, for example, *Damiani v. Adams*,⁴⁹ where defendants asked for both Rule 11 and §1927 sanctions. The court noted

that §1927 sanctions could only be imposed against attorneys and decided the case under Rule 11 language instead because the case was brought on a *pro se* motion.⁵⁰

Sanctions were requested because the plaintiff had apparently attempted to characterize as a RICO claim his belief that he was being conspired against in an effort to deprive plaintiff of his property. According to the court, plaintiff had filed numerous suits charging a conspiracy, all of which were dismissed. It appears that plaintiff continued to refile, adding to his list of alleged conspirators all the court officials previously encountered in his attempts to prosecute the lawsuit.⁵¹

Finally, plaintiff described his alleged conspiracy in RICO terms. The *Damiani* court discussed its imposition of sanctions in terms of both prongs of the Rule 11 test as follows:

in *Zaldívar v. City of Los Angeles*,
supra, 780 F.2d at 831, the court
stated:

M.C.P. Industries, Inc.

Decatur, Alabama

has sold its

Creative Foam Division

to

United Foam Plastics Corporation

Georgetown, Massachusetts

*The undersigned acted as financial advisor to
M.C.P. Industries, Inc. and assisted in the
negotiations leading to this transaction.*



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"[W]e affirm that Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith [*Damiani* court's emphasis]."

The standard adopted by the Ninth Circuit thus does not require that the litigant have acted in "subjective bad faith." The papers are to be judged by an objective standard. *Id.* at 831-832.

Applying this standard to the instant lawsuit, this Court finds that the legal arguments proffered by plaintiffs are frivolous on their face. They have presented legal arguments already aired, and rejected, in numerous other lawsuits. If anything, the papers submitted by plaintiffs are indicative of subjective bad faith [court's emphasis].

The *Zaldivar* court stated that:

"[w]ithout question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11 For a claim of harassment to be sustained on the basis of successive filings, there must exist an identity of parties involved in the successive claim, and a clear indication that the proposition urged in the repeat claim was resolved in the earlier one [citation omitted]."

The Court concludes that the standard adopted by the Ninth Circuit fits the facts of the instant case [*Damiani*] like a glove.⁵²

Thus, it seems clear that a plaintiff who tries to resurrect an earlier, dismissed, predicate act as a RICO claim will probably be subject to sanctions. Unfortunately, this is not the usual occurrence.⁵³

Likewise, disregarding a clearly applicable statute of limitations is an almost sure way to draw Rule 11 sanctions. *Fred A. Smith Lumber Co. v. Edidin*⁵⁴ provides a clear example of this in the RICO arena:

"No competent attorney who made a reasonable inquiry into the state of the law . . . could have thought the [pleading] had any possible merit. He should have known it was time-barred."⁵⁵

The problem here, however, is the same one that haunts all of RICO. Until 1987 when the Supreme Court of the United States decided *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*,⁵⁶ the federal circuits were applying different statutes of limitations of RICO.⁵⁷ *Agency Holding Corp.* made clear that RICO's statute of limitations would be borrowed from that of its ancestral cousin, the Clayton Act,⁵⁸ resulting in a four-year limitation period.⁵⁹

At least now, however, it seems clear that disregard of the four-year statute of limitations is another sanctionable act. As in the case of repetitive claims, however, this problem also does not often arise.

The remaining problem is one that does arise with some frequency. It concerns the attempt to describe as a violation of RICO acts that simply do not fit. This broad categorization can be broken down into several more limited areas, most of which overlap to a significant degree.

For instance, if the characterization of the defendant's acts as predicate acts under RICO is not itself well grounded in fact, then of course the RICO allegation will fail as well. That is, if a plaintiff attempts to describe as mail fraud an activity which clearly is not mail fraud (nor even, in good faith, arguably so), in an attempt to show that particular mail fraud as a predicate act under RICO, the entire claim is prejudiced and sanctions may well be imposed.

*Brandt v. Schal Assoc., inc.*⁶⁰ provides a perfect example. Here, a contractor sued a construction manager for failure to pay on a contract. The court refused to allow the plaintiff to turn what amounted to a simple breach into a fraudulent scheme of the sort that would

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support mail fraud, wire fraud, robbery or extortion claims. "Fraud, however," said the court, "is a far cry from breach of contract."⁶¹

The court then went on to impose sanctions against the plaintiff under Rule 11 because the allegations of fraud were not well grounded in fact.⁶²

Likewise, in *E.F. Hutton Mortgage Corp. v. Equitable Bank*,⁶³ the court found that both sides had violated Rule 11 (because both parties were equally liable, the court imposed no actual sanctions) by claiming and counterclaiming RICO solely for "tactical reasons."⁶⁴ There, the court had already warned both parties to keep Rule 11 in mind when answering the summary judgment motions against them. Apparently both parties, each of whom were charging the other with fraud in connection with a nest of facts that had already resulted in a First American Mortgage Co. executive's pleading guilty to fraud charges, had lost money on FAMCO's problems and were trying to cut their losses, each by suing the other.

According to the court, when the summary judgment motions were cross-filed, discovery had been underway for some time. The court felt that both parties should have clearly seen that the predicate acts of fraud were not well grounded in fact and should have dismissed them.⁶⁵

Note, however, the denial of sanctions in *Morda v. Klein*.⁶⁶ There, plaintiffs attempted to characterize the self-dealing and siphoning of funds of the general partner and top executives of a clinical lab partnership as mail frauds. The Sixth Circuit agreed that the plaintiffs' allegations of mail fraud were not well grounded in provable fact,⁶⁷ but failed to impose sanctions against plaintiffs' attorneys because of problems they had encountered in discovering the information that would have revealed the frivolity of the charges.⁶⁸

This ground for sanctions, the failure to recognize that the facts of a given situation do not add up to the charge complained of (presumably under circumstances where reasonable diligence on the part of the attorney would afford

such recognition), should be distinguished from the situation where the allegation of predicate acts, even if well grounded in fact, still would not result in a RICO claim. In the latter situation, sanctions appear to be much less likely.

Note, for instance, *Creative Bath Products, Inc. v. Connecticut General Life Ins. Co.*,⁶⁹ where failure to properly allege a pattern of racketeering activity was held not to support the imposition of sanctions under Rule 22:

"There is no basis for requiring plaintiffs to have anticipated the direction that this Court's post-*Sedima* decisions would take; indeed, we concede that our route may not have been the clearest and most predictable."⁷⁰

Likewise, the court in *Rochester Midland Corp. v. Mesco*⁷¹ refused to impose sanctions for failure to adequately allege a pattern of racketeering activity:

"The federal courts have struggled for more than five years over what constitutes a civil RICO



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claim. As of this date, the issue remains unresolved. Rule 11 sanctions should not be imposed for the filing of an unsuccessful claim in an area of law as undecided as civil RICO unless the filing is *patently without merit* [emphasis added].⁷²

In rare instances, the technically improper pleading of a predicate act will result in sanctions. If *Brandt* means that trying to call an act a fraud when it clearly is not a fraud is sanctionable, and *Creative Bath* describes the situation where even if the act is a fraud, it still does not describe a pattern sufficient to support a RICO claim, then *Barlow v. McLeod*⁷³ is a case of failing to properly plead the underlying fraud in a Rule 9(b)⁷⁴ technical sense, regardless of whether the facts might describe a fraud if correctly pleaded.

The *Barlow* court, however, in imposing sanctions against the plaintiff for improperly pleading its predicate acts, seemed to refer to the *Brandt* type of failure to properly ground the allegation in fact:

"[P]laintiff's complaint and opposition to the motion for summary judgment are woefully lacking in details. The pleadings consist almost entirely of conclusory allegations . . . This lack of specificity strongly suggests that counsel had no factual basis for bringing the action . . . The magistrate in this case had flagged this as a potential problem in his . . . order imposing a default judgment against the other defendants for not cooperating in discovery . . . [T]he magistrate noted that with regards to plaintiff's RICO claim, it 'appears that the plaintiff is merely hoping that through the production he may hit pay dirt.'"

"It is clear that the only reason these statutory claims were alleged was because they contain treble damages provisions. Counsel has therefore not only failed to make sure the pleadings he signed were well grounded in fact and warranted by law, but he has also interposed the pleadings for improper purposes. Use of the statutory claims in a context such as the in-

stant case smacks of exactly the kind of bad faith Rule 11 sanctions were created to curb."⁷⁵

The more usual response to a case involving merely a technically imperfect pleading, however, appears to be embodied in the opinion in *Beeman v. Fiester*.⁷⁶ Though the Court of Appeals found the plaintiff's complaint to be, quoting the trial court, "nothing other than a nightmare,"⁷⁷ the court found no evidence that the plaintiff lacked a good faith belief in the extension of RICO and likewise found no improper purpose for the pleading:

"The basis of the district court's conclusion that the complaint was not well grounded in fact is simply a pleading failure. The facts reasonably discovered by plaintiff and his counsel, as alleged, failed to fit within the pattern of facts to which RICO provides a remedy. This alone, however, cannot be the basis for sanctions; otherwise every complaint dismissed under Rule 12(b) (6) would be sanctionable."⁷⁸

Likewise, in *Official Publications, Inc. v. Kable News Co.*,⁷⁹ the failure to plead predicate acts of fraud which formed the basis for a RICO claim with sufficient particularity did not support, in the Second Circuit's view, the district court's imposition of sanctions. Instead, said the Court of Appeals, plaintiffs should have been allowed to "replead" their RICO counts.⁸⁰

Note also that in *Delta Education, Inc. v. Langlois*,⁸¹ failure to plead predicate acts with sufficient particularity did not result in sanctions.⁸²

*Rhoades v. Powell*⁸³ provides a similar example concerning the improper pleading of a substantive provision of RICO itself as opposed to a badly pleaded predicate act. Here, plaintiff had pleaded the "person" and "enterprise" as the same entity in a circuit that had held against this construction.⁸⁴ The court refused to impose Rule 11 sanctions, noting:

"The defects in the RICO claim might be cured by amendment, and the enterprise theory proposed by plaintiffs has found approval in at least one reported decision."⁸⁵

The court went on to characterize the entire RICO v. Rule 11 controversy thusly:

"The court is cognizant of the *in terrorem* power of RICO and the flurry of meritless RICO claims, but at this stage of the proceedings does not find plaintiff's claim so patently meritless as to award sanctions. Further, the court is also aware of the use of Rule 11 for mere harassment, a practice which dulls the spirited advocacy that is the lifeblood of federal litigation. Although such free-wheeling Rule 11 practice may be standard in other federal districts of this state, it is not approved by this court."⁶⁶

If all it takes to avoid the label of "patently meritless" is for the plaintiff's RICO theory to have found approval in at least one reported decision, regardless of whether that decision was rendered by a trial court and subsequently vacated, or written by an appellate court and later overturned, it will be difficult indeed to construct a sanctionable RICO complaint, no matter how improperly conceived. Fortunately for harried defendants, failure of the plaintiff to correctly construct any part of the RICO pleading still appears to be worthy of sanctions.

Failure to adequately plead the predicate acts along with an incorrectly alleged pattern of racketeering activity, as well as a complete lack of RICO injury⁶⁷, was enough to earn sanctions against the plaintiff's attorney in *Henry v. Farmer City State Bank*,⁶⁸ and similar total failure in light of advice from the court itself concerning the deficiencies was apparently meritless enough in *Chris & Todd, Inc. v. Arkansas Dept. of Fin. & Admin.*⁶⁹

Thus, it appears that RICO is so unsettled an area of law that almost, but not quite, any assertion made in connection with it can appear to have been made in good faith following reasonable inquiry.⁷⁰

The RICO cases that have resulted in sanctions against plaintiffs have almost universally been the result of conduct concerning an egregious error in dealing with the law of the underlying predicate acts, not errors in dealing with RICO itself, unless the errors were of such magnitude as to make it obvious that RICO was only being used to hike up potential settlement figures.

The upshot is that until RICO is more succinctly defined by the Supreme Court

of the United States or limited by Congress, defendants looking for a way to beat back the onslaught of civil RICO claims will largely be bluffing when they fight back with requests for Rule 11 and §1927 sanctions. Given the near impossibility of determining what a proper RICO claim is, it seems likely that courts will continue to be very hesitant in characterizing one as improper.

Footnotes

1. Fed. R. Civ. P. 11.
2. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1987).
3. *Id.* at 201-202.
4. 18 U.S.C. § 1961-1968 (1982).
5. Pub. L. No. 91-452, 84 Stat. 922 (1970).
6. 18 U.S.C. § 1964 (1982).
7. In re the Dow Co. "Sarabond" Products Liability Litigation, 666 F. Supp. 1466, 1471 (D. Colo. 1987)

(J. Kane quoting his own prior remarks on the subject of RICO) (hereinafter "Sarabond Litigation"), 8. 18 U.S.C. § 1964(c).

9. See generally *Civil RICO Symposium*, 21 Cal. W.L. Rev. 243 (winter 1985) (complete discussion of the mechanics of civil RICO in several contexts).

10. See *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985) and *H.J. Inc. v. Northwestern Bell Telephone Co.*, _____ U.S. _____ (1989) (both cases construing the definition of "pattern of racketeering activity" found in 18 U.S.C. § 1961(5)). See also Bucy and Marshall, *An Overview of RICO*, _____ *Alabama Lawyer* _____ (1990) (discussion of the PRA element as well as the other elements of a RICO claim).

11. The definitions of "person" under 18 U.S.C. § 1961(3) and "enterprise" under § 1961(4) have given particular trouble. See Bucy and Marshall, *supra* note 10.

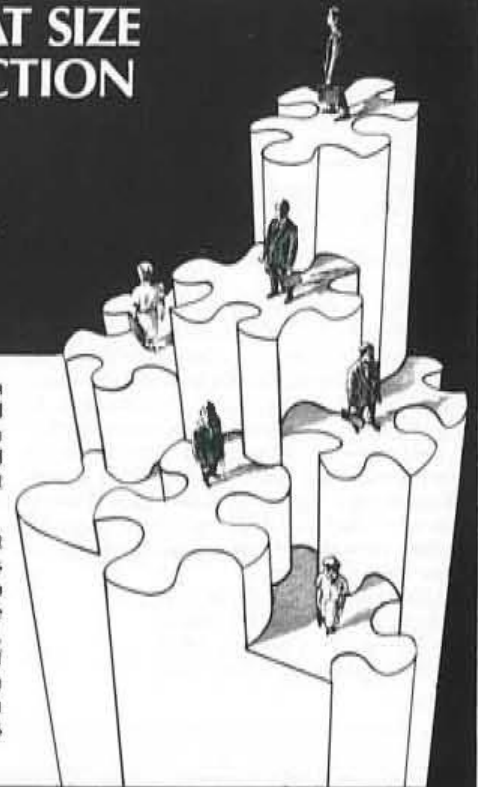
12. *Sarabond Litigation*, 666 F.Supp at 1470.

13. See *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.) cert. denied, _____ U.S. _____, 110 S.Ct. 261 (1989) (3d Cir. holding no profit motive necessary, while White, J., dissenting to the denial of certiorari called for

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a resolution of the split in the federal circuits on the question, _____ U.S. _____, at _____, 110 S.Ct. at 261.

14. S. 438, 101st Cong., 1st Sess. (1989); S.Rep. No. 269, 101st Cong., 2d Sess. (1990).
15. 683 F.Supp. 639 (E.D.Ky. 1988).
16. 15 U.S.C. §78dd-1 (1982).
17. Harrison, *Look Who's Using RICO*, Feb. 1989 A.B.A.J. at page 56.
18. *Id.*
19. Pub. L. No. 91-452, 84 Stat. 922 (1970).
20. *Id.*, Statement of Findings and Purpose, 84 Stat. 923.
21. *Id.*, §904(a), 84 Stat. 947.
22. 843 F.2d 666 (3d Cir. 1988), vacated, _____ U.S. _____, 109 S.Ct. 1306 (____).
23. 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 484 U.S. 943 (1987), reh'g denied 484 U.S. 1020 (1988).
24. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982).
25. See generally, *Western and Southern Life Ins. Co. v. Smith*, 847 F.2d 407 (6th Cir. 1988); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988); *In re Chateaugay Corp.*, 838 F.2d 59 (2d Cir. 1988); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, Fed. Sec. L. Rep. p. 93,243 (7th Cir. 1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986); *Dimenstien v. Whiteman*, 759 F.2d 1514 (11th Cir. 1985).
26. 18 U.S.C. §§ 1341 and 1343 (1982), respectively.
27. Saporito, 843 F.2d at 673-676.
28. Crawford, 815 F.2d at 122, n.8. See also, *Pension Fund-Mid-Jersey Trucking Industry v. Omni Funding Group*, 687 F.Supp. 962 (D.N.J. 1988) (plaintiff sued for fraudulent transfer of ERISA-covered pension funds).
29. Shepard, Horn and Duston, *RICO and Employment Law*, 3 *The Labor Lawyer* 267 (spring 1987).
30. 678 F.Supp. 567 (D.Md. 1988).
31. *Id.*
32. Accessible on Westlaw(c), #1988 WL 35504 (N.D. Ill. 1988).
33. *Klapper v. Commonwealth Realty Trust*, 657 F.Supp. 948 (D. Del. 1987) (minority shareholders brought a RICO claim charging as predicate acts mail and wire fraud in connection with the diversion of business opportunities, the usurpation of trust dividends and attempted securities fraud).
34. *Associated Petroleum Products, Inc. v. Tenco 3 Rivers Energy Corp.*, 692 F.Supp. 1070 (E.D. Mo. 1988) (plaintiffs alleged that shareholders of defendant corp. had converted gas from plaintiff's pipeline; court held this did not satisfy the PRA requirement).
35. 688 F.Supp. 320 (N.D. Ill. 1988).
36. 659 F.Supp. 493 (D.Ny. 1987).
37. 673 F.Supp. 674 (S.D.Ny. 1987).
38. 669 F.Supp. 1511 (D.Nev. 1987).

39. 18 U.S.C. § 1961(i)(B) (1982) makes mail fraud (18 U.S.C. §1341) a RICO predicate act.
40. 18 U.S.C. § 1961(i)(B) (1982) makes wire fraud (18 U.S.C. § 1343) a RICO predicate act.
41. 18 U.S.C. § 1961(i)(D) brings securities frauds into the RICO fold.
42. 664 F.Supp. 54 (E.D.Ny. 1987).
43. *In re The Dow Co. "Sarabond" Products Liability Litigation*, 666 F.Supp. 1466 (D.Colo. 1987) (fraud in connection with the marketing of two separate products was held to satisfy the PRA requirement).
44. Fed. R. Civ. P. 11.
45. 28 U.S.C. § 1927 (1982).
46. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 200 (1987) (Vairo's statistics indicate that plaintiffs are hit with Rule 11 sanctions almost five times as often as defendants).
47. *King v. Idaho Funeral Service Assoc.*, 862 F.2d 744, 747 (9th Cir. 1988), citing, *Cunningham v. County of Los Angeles*, 859 F.2d 705, 714 (9th Cir. 1988). See also note 71, *infra*.
48. Fed. R. Civ. P. 11. Note that "good faith" has been tied to the "reasonable inquiry" test: "A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry.'" *King*, 862 F.2d at 744, citing, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986).
49. 657 F.Supp. 1409 (S.D.Cal. 1987).
50. *Id.* at 1417.
51. *Id.* at 1411-1414.
52. *Id.* at 1417-1418.
53. But see *Gordon v. Heilmann*, 715 F.2d 531 (11th Cir. 1983) (refiling of previously dismissed RICO suit held frivolous).
54. 845 F.2d 750 (7th Cir. 1988).
55. *Id.* at 753.
56. _____ U.S. _____, 107 S.Ct. 2759 (1987).
57. See, *Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105 (5th Cir. 1987).
58. 15 U.S.C. § 15 (1982) (Clayton Act's statute of limitations).
59. Agency Holding Corp., _____ U.S. at _____, 107 S.Ct. at 2762-2767.
60. 121 F.R.D. 368 (N.D. Ill. 1988).
61. *Id.* at 379.
62. *Id.* at 389.
63. 678 F.Supp. 567 (D. Md. 1988).
64. *Id.* at 587.
65. *Id.* at 587-588. See also, *Chapman & Cole v. Tel Container International, BV.*, 116 F.R.D. 550 (S.D. Tex. 1987) (failure to dismiss after argument became "ridiculous" was ground for Rule 11 sanction), *aff'd*, 865 F.2d 676 (5th Cir. 1989) ("attorney's responsibility to conduct a reasonable prefiling investigation is particularly important in RICO claims...") 865 F.2d at 685); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (Vairo discusses how a claim may "become" frivolous); but see, *Smith International Inc. v. Tex-*


- as Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988) (reliance on unclear precedent to allege that a particular promissory note was a "security" such that defendant's actions were violative of securities laws and thus predicate acts for RICO were not grounds for Rule 11 sanction even though note was found not to be a security).
66. 865 F.2d 782 (6th Cir. 1989).
67. *Id.* at 785.
68. *Id.* at 785-786.
69. 837 F.2d 561 (2d Cir. 1988).
70. *Id.* at 564.
71. 696 F.Supp. 262 (E.D. Mich. 1988).
72. *Id.* at 268. See also, *Singh v. Curry*, 122 F.R.D. 27 (N.D. Ill. 1988) (failure of facts alleged to meet definition of PRA depended on two 7th Cir. opinions issued 25 and 10 days earlier. Inquiry could be "reasonable" and still not find these cases).
73. 666 F.Supp. 222 (D.D.C. 1986).
74. Fed. R. Civ. P. 9(b): "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."
75. Barlow, 666 F.Supp. at 229.
76. 852 F.2d 206 (7th Cir. 1988).
77. *Id.* at 208.
78. *Id.* at 211. See also *Airlines Reporting Corp. v. Aero Vbyagers, Inc.*, 721 F.Supp. 579 (S.D.N.Y. 1989) (grounds for dismissal, without more, are not grounds for sanctions) and *Martinez Inc. v. H. Landon & Co.*, 107 F.R.D. 775 (N.D. Ind. 1985) (pleadings must be looked at as a whole in Rule 11 analysis. Just because a pleading might be dismissable does not make it sanctionable).
79. 884 F.2d 664 (2d Cir. 1989).
80. *Id.* at 670.
81. 719 F.Supp. 42 (D.N.H. 1989).
82. *Id.* at 51.
83. 644 F.Supp. 645 (E.D. Cal. 1986).
84. See note 11, *supra*.
85. Rhoades, 644 F.Supp. at 673. See also *Carlton v. Jolly*, 125 F.R.D. 423 (E.D. Va. 1989) (plaintiff failed to plead enterprise adequately under 4th Cir. opinions but pleading was nonetheless good faith attempt to extend law of other circuits, therefore sanctions did not lie).
86. *Id.* at 673-674.
87. 18 U.S.C. § 1964(c) states that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this Chapter [emphasis added] may sue"
88. 127 F.R.D. 154 (C.D. Ill. 1989).
89. 125 F.R.D. 491 (E.D. Ark. 1989).
90. See, e.g., *Phelps v. Wichita Eagle Beacon*, 886 F.2d 1262 (10th Cir. 1989) (plaintiff's attempt to characterize a series of allegedly defamatory articles as a pattern of racketeering activity "border[ed] on being frivolous" but because plaintiff had "raised some complex issues" no sanctions were imposed. *Id.* at 1274).



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Legislative Wrap-up

by Robert L. McCurley, Jr.

The Alabama Law Institute held its annual meeting at the Alabama State Bar annual meeting in Mobile, Alabama. The following officers and executive committee members were elected:

President - Oakley Melton, Jr., Montgomery
Vice-president - Jim Campbell, Anniston
Secretary - Bob McCurley, Tuscaloosa
Executive Committee:

George Maynard, Birmingham
Rick Manley, Demopolis
Yetta Samford, Opelika
Ryan deGraffenried, Tuscaloosa
E.C. Hornsby, Tallassee
Frank Ellis, Columbiana

It was reported that since the last annual meeting of the Law Institute, the Legislature passed the following acts:

Condominium Law Revision, Act No. 90-551
Adoption Law Revision, Act No. 90-554
Alabama Securities Act, Act No. 90-527

It was also noted that the Alabama Rules of Criminal Procedure were adopted by the Alabama Supreme Court to be effective January 1, 1991.

The Alabama Supreme Court, after 15 years of study by the Law Institute, has adopted the Alabama Rules of Criminal Procedure to be effective January 1, 1991. A copy of these rules can be found in 260 So.2d #3, dated June 28, 1990. The Alabama Bar Institute for Continuing Legal Education and the Cumberland Institute for Continuing Legal Education are offering joint seminars this fall on these new rules.

Legislators recognized at the annual Bench and Bar Luncheon for their sponsorship of Institute bills were Senators Ryan deGraffenried, Charles Langford, Frank Ellis, Steve Windom, James Preuitt, and Jim Smith, and Representatives Jim Campbell, Beth Marietta-Lyons, Michael Box, G.J. Higginbotham, Bill Fuller and Bill Slaughter.

The Alabama Law Institute presently has the following revisions under study in the following areas: probate procedure, chaired by E.T. Brown of Birmingham, Professor Tom Jones as reporter; Business Corporation Act, chaired by George Maynard of Birmingham, Professor Howard Walthall and Professor Richard Thigpen as co-reporters;

Rules of Evidence, chaired by Pat Graves of Huntsville, Professor Charles Gamble as reporter; Article 2A of the UCC, chaired by Bob Fleenor of Birmingham, Professor Peter Alces as reporter.

Publications recently completed by the Institute are: *Model City Ordinances*—In conjunction with the League of Municipalities and the Alabama School of Law, the Institute has developed a set of model city ordinances and a program whereby small municipalities may request from the League of Municipalities a law student to review and compare their city's code for deficiencies.

Pattern Criminal Jury Instructions, 1990—Judge Joe Colquitt of Tuscaloosa as chief editor along with a committee of circuit judges revised the Alabama Criminal Jury Instructions. These jury instructions were distributed to each trial judge by the Administrative Office of Courts and are available to practicing lawyers through the Alabama Institute of Continuing Legal Education.

Alabama Election Handbook, 5th ed. 1990
Alabama Government Manual, 8th ed. (available November 1990)

Alabama Tax Assessors/Tax Collectors Handbook, 4th ed. (available September 1990)

Alabama Legislation—Cases and Statutes, 2nd ed. 1989
The Legislative Process, A Teacher's Guide to the Alabama Legislature, 2nd ed. 1989



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.

Standards for Delay Reduction to Become Effective October 1, 1990

On June 12, 1990, the Alabama Supreme Court adopted standards relating to delay reduction.

The delay reduction standards adopted by the supreme court were recommended by committees of circuit court judges and district court judges appointed by Chief Justice Sonny Hornsby in July 1989. The circuit court judges committee was chaired by Judge Joseph D. Phelps of Montgomery; the district court judges committee was chaired by Judge Gerald S. Topazi of Birmingham.

These standards, generally referred to as time standards, are goals for case processing and are designed to provide clear, understandable benchmarks to measure effective case management in the courts. They are not intended in any way to affect, enlarge or limit the substantive rights of any party. While the time standards provide uniform goals for the entire state, the committees and the supreme court recognize that because of the disparity from circuit to circuit in the average amount of time required to dispose of particular types of cases, the standards in some instances may provide greater lengths of time than the average amount of time generally required to dispose of a particular type of case in a particular circuit. The time standards are not intended to be construed to suggest that more time should be taken in reference to such cases.

In developing the recommended time standards, the circuit judges and district judges committees held public hearings in Birmingham in November 1989. Court officials, attorney organizations and other interested parties and agencies were invited to address the committees. In addition to receiving input from the public hearings, the committees were assisted by national experts in the area of case management.

The American Bar Association adopted standards relating to court reduction in August 1984. Alabama is the 24th state

to adopt time standards; several other states presently are considering adoption of time standards.

The State of Alabama— Judicial Department in the Supreme Court of Alabama June 12, 1990 Order

WHEREAS, the Chief Justice of this Court appointed committees of circuit court judges and district court judges to study and recommend time standards or goals for the processing of cases in Alabama's trial courts; and

WHEREAS, these committees completed their study and filed on April 26, 1990, with this Court a "Report of the Circuit Judges Time Standards Committee and District Judges Time Standards Committee,"

NOW, THEREFORE, IT IS ORDERED that the following standards relating to delay reduction be adopted as guidelines for timely case management in the courts of this State:

Standards Relating to Delay Reduction: I. Civil—

Circuit Civil—90% of all circuit civil cases should be settled, tried, or otherwise concluded within 18 months of the date of filing; 95% within 24 months of filing; and the remainder within 30 months of filing, except for individual cases in which the court determines, by written order, that exceptional circumstances exist and for which a continuing review should occur.

District Civil—90% of all district civil cases should be settled, tried, or otherwise concluded within 9 months of the date of filing; 98% within 12 months; and 100% within 15 months.

Small Claims—90% of all small claims actions should be concluded within 4 months of the date of filing;

98% within 6 months; and 100% within 9 months.

II. Domestic Relations—

90% of all domestic relations matters should be settled, tried, or otherwise concluded within 6 months of the date of filing; 98% within 12 months; and 100% within 18 months, except for individual cases in which the court determines, by written order, that exceptional circumstances exist and for which a continuing review should occur.

III. Criminal—

Criminal Felony—90% of all circuit felony cases should be adjudicated or otherwise concluded within 9 months from the date of arrest and 100% within 12 months, except for individual cases in which the court determines, by written order, that exceptional circumstances exist and for which a continuing review should occur.

Circuit Misdemeanors—90% of all misdemeanor cases in the circuit court should be adjudicated or otherwise concluded within 6 months from the date the circuit court obtains jurisdiction and 100% within 9 months, except for individual cases in which the court determines, by written order, that exceptional circumstances exist and for which a continuing review should occur.

District Misdemeanors, Traffic, and Conservation—90% of all misdemeanors, traffic, conservation, other infractions, and non-felony cases should be adjudicated or otherwise concluded within 3 months from the date of the arrest or citation; 98% within 4 months; and 100% within 6 months.

Persons in Pretrial Custody—Persons detained should have a determination of custodial status or bail set within 72 hours of arrest. Persons incarcerated before trial should be afforded priority for trial.

Preliminary Hearings—Where a preliminary hearing is demanded or otherwise set, 90% should be held within 2 months from the date of arrest; 98% within 4 months; and 100% within 6 months.

IV. Juvenile—

Detention and Shelter Care Hearings—Detention and shelter care hearings should be held not more than 72 hours, including weekends and holidays, following admission to any detention or shelter care facility.

Delinquency: Adjudicatory/Transfer Hearing—

Where a child is detained, 50% of all adjudicatory/transfer hearings should be held within 1 month from the date of admission to detention; 75% within 2 months; 90% within 3 months; and 100% within 4 months.

Where a child is not being detained, 50% of all adjudicatory/transfer hearings should be held within 2 months from the date of the filing of the petition; 75% within 4 months; 90% within 6 months; and 100% within 9 months.

Dependency/CHINS: Adjudicatory Hearing—

Where a child has been removed from the home, 50% of all adjudicatory hearings should be held within 1 month from the date of removal from the home; 75% within 2 months; 90% within 3 months; and 100% within 4 months.

Where a child has not been removed from the home, 50% of all adjudicatory hearings should be held within 2 months from the date of the filing of the petition; 75% within 4 months; 90% within 6 months; and 100% within 9 months.

Delinquency/Dependency/CHINS: Dispositional Hearing—

75% of all dispositional hearings should be held within 1 month of the date of the adjudicatory hearing; 90% within 2 months; and 100% within 3 months.

Dependency: Review/Determination of Reasonable Efforts—

100% reviewed by the court, administratively or formally, and/or determination of reasonable efforts made within 6 months after adjudication and at least every 12 months or more frequently as required by law until the case is closed.

Paternity—100% of all paternity cases should be adjudicated or otherwise disposed of within either 12 months of (a) successful service or (b) the child's reaching 6 months of age, whichever occurs last.

Child Support—90% of all child support actions should be adjudicated or otherwise concluded within 3 months of the date of service; 98% within 6 months; and 100% within 12 months.

Comment: Time standards are goals for case processing and are designed to provide clear, understandable benchmarks to measure effective case management in the courts. They are not intended in any way to affect, enlarge, or limit the substantive rights of any party litigant. Judges must continue to be sensitive not only to the quantity and timeliness of cases disposed of but also to the mandates of justice. No defendant should be released, nor should any case be dismissed or prejudiced, for the sole reason that trial settings or other dispositional actions exceed the time standards herein presented. Nothing herein contained shall be construed to affect the substantive rights of any party.

In developing these standards, a guiding principle has been that there should be uniform standards for the entire state. In some instances, there are reasons beyond the court's control which contribute to the wide disparity from circuit to circuit in the average amount of time required to dispose of particular types of cases. In recognition of this fact, some of the recommended standards, therefore, may provide greater lengths of time than the average amount of time generally required to dispose of a particular type of case in a partic-

ular circuit. However, it is certainly not intended that these standards be construed to suggest that more time should be taken in reference to such cases.

Circuit Court Civil: Within the meaning of these standards, the computation of time shall begin upon the court's obtaining jurisdiction by the filing of an original pleading or upon receipt of a case by transfer, appeal, or remand. A case shall be deemed disposed of when the court makes a final judgment as to the last remaining party and as to all of the claims.

The committees have identified certain cases which might constitute exceptional cases, including, but not limited, to:

- Probate cases where there is protracted, on-going administration; Cases in which progress has been slowed or halted by ancillary declaratory judgment actions or receiverships; Adult protective service cases; Cases that have late interventions, substitutions, or additional parties; Cases wherein a party has died and a revival or substitution of parties is in order; Cases wherein the benefits of the Soldiers' and Sailors' Civil Relief Act have been invoked; Cases wherein mistrials or hung juries are declared; Complex professional liability, products liability, or class action cases; and Cases in which the suggestion of bankruptcy has been made.

Circuit Court Criminal: Time goals in criminal cases must be triggered by the date of arrest. Public perception is focused on the total lapse of time between arrest and trial. Therefore, to be meaningful, standards or goals must address the entire process.

With respect to the time period between arrest and preliminary hearing, attention is invited to Rule 5.1 of the Alabama Rules of Criminal Procedure, adopted May 31, 1990, and effective January 1, 1991, which would allow a defendant 30 days from arrest to demand a preliminary hearing and require that

the hearing be held within 21 days from the demand. See Section 15-11-1, *Code of Alabama* 1975.

Rule 5.4(b) of the Alabama Rules of Criminal Procedure provides that if probable cause is established or if a hearing is waived or not demanded, "the district attorney shall present the complaint to the grand jury by the end of its present session, if the grand jury is in session or is subsequently recalled into session, but in no event later than the beginning of its next term." Section 12-16-190, *Code of Alabama* 1975, requires empaneling at least two grand juries each year and provides that the juries, "when they have completed their labors," may be placed in recess subject to recall. If a grand jury is kept either in session or on call at all times, there should be no problem in providing a timely grand jury to which the district attorney could present complaints. Although not within the scope of this report, the committees feel that a study should be conducted with a view toward eliminating the necessity of grand jury action in most criminal cases.

The term "adjudicated or otherwise concluded" shall be satisfied by adjudication of guilt. Sentencing should be accomplished expeditiously, particularly when the defendant is in confinement.

Cases in which the defendant is granted treatment as a youthful offender should be adjudicated or otherwise concluded within the time standards established for felony cases.

It is recognized that exceptional circumstances may exist in a limited number of cases which prohibit their conclusion within the 12-month goal. Examples of cases in which exceptional circumstances may exist include, but are not limited to, the following:

Cases in which the defendant has been committed to a psychiatric facility for evaluations or treatment;

Cases in which the defendant is incarcerated in another jurisdiction or has escaped after arrest; and

Cases in which pretrial appeals have been filed or which have been continued by the grand jury after initial presentation.

These standards shall in no way affect, enlarge, or limit the substantive or constitutional rights of criminal defendants. Specifically, they are not intended to, and shall not be construed as establishing standards for speedy trials as contemplated by the Constitution of the United States or the Constitution of the State of Alabama. Rather, these standards are a case management tool which addresses cases in the aggregate and not in the particular. It is recognized that each case stands on its own merits.

Circuit Court Misdemeanor: The circuit court obtains misdemeanor jurisdiction in various ways. For reasons of consistency, time standards for circuit misdemeanors should be triggered by the date jurisdiction is obtained. The same considerations for exceptional circumstances as set forth for circuit court felony cases should apply to misdemeanor cases.

District Court Felony: The committees recommend that a district court felony case be considered disposed of when the judge binds the case over to the grand jury or when the 30-day time limit for filing a request for preliminary hearing has expired without a request having been filed or where the defendant has been indicted.

Pretrial Custody: Persons detained should have a determination of custodial status or ball set within 72 hours of arrest. The committees recommend that in the event a district judge is not available, the presiding circuit judge should appoint a circuit judge to handle the pretrial hearing. One impediment to proper implementation of the 72-hour hearing provision is the fact that a person can be detained in a city jail without notice being sent to the district court. The committee recommends that each jurisdiction adopt procedures to prevent this situation from occurring.

Domestic Relations: The committees recommend that, for the purpose of time standards, no distinction be made between contested or uncontested actions, because the only uncontested cases which would not be disposed of within the proposed time limits would be those which presented procedural or discretionary problems of an individualized nature which would not be subject to generalized time standards. The committees also recommend that no distinction be made between initial filings or filings for modification of prior actions, because the issues and burdens in modification proceedings are often as difficult as or more difficult than those presented in initial proceedings. The committees do not recommend time standards for temporary/pendente lite hearings because the granting of such hearings is discretionary and is, to a great extent, dependent on court staffing in various jurisdictions.

Juvenile: The same basic time standards for dispositions should apply to all juvenile cases, whether matters of delinquency, dependency, or CHINS, but disposition should be given priority in cases where a child is being detained or has been removed from the family pending hearing.

Review/Determination of Reasonable Efforts: Dependency cases are usually before the court for years after adjudication to ensure that these cases are continually monitored and that appropriate reviews and determination of reasonable efforts are made with regard to reuniting families or providing permanent placements for children. Considering the extremely wide variety of cases and individualized problems which are involved, the committees do not feel that a percent factor time standard would be appropriate with regard to review and determination of reasonable efforts. Public Law 96-272 sets forth specific standards for reviews and reasonable efforts determinations. These federal standards should be met in all cases.

Paternity: With respect to paternity cases filed under the Uniform Parentage Act, the committees feel that standards required by federal law are reasonable, particularly considering the substantial delays in such cases required by necessity for blood and/or genetic testing. The general federal standard is that all paternity cases be disposed of within one year of the later of (a) successful service of process or (b) the child's reaching six months of age (genetic testing is not available until the child has reached six months of age).

Child Support Enforcement: The standards for expedited process required for Title IV-D child support cases by federal regulation and by Rule 35, Alabama Rules of Judicial Administration, should apply to all child support actions, and no distinction should be made between Title IV-D cases and other cases. It is important to note that the current time standards for the purposes of expedited process run from the date of service and not the date of filing. The committees, therefore, recommend that time standards for all child support actions also run from the date of service.

The Court recognizes that it may not be possible to achieve these standards in every instance; nevertheless, the Court envisions that judges shall make every conscientious effort to meet these standards.

IT IS FURTHER ORDERED that the following recommendations of the committee be implemented by the courts and the appropriate agencies of the Unified Judicial System:

I. Case Management Plans

Each circuit and district court should establish an effective case management plan which will promote compliance with the recommended time standards and eliminate unnecessary delay in the processing of cases. Such a case management plan should provide for:

- A. Judicial supervision and early and continuous control of all cases, including the setting of civil and criminal dockets under the supervision of the trial judge or court administrator, where available.

- B. Specialized procedures for the handling of cases involving complex substantive or procedural issues.
- C. Intermediate time frames for critical events in the processing of cases which can be monitored by the court to ensure compliance.
- D. Trial setting policies which will reasonably assure that cases scheduled for trial on any given date will be reached.
- E. Setting of trials for a date certain.
- F. Strict policies on continuances.
- G. Where feasible, individual dockets should be adopted in multi-judge circuits where more than one judge is assigned to a division of the court.

Comment: Judicial commitment is essential to a successful case management program. Once an action is filed, it is the responsibility of the court to ensure that the issue is expeditiously brought to conclusion. Research indicates that those courts which are most successful in reducing unnecessary delay are those which instigate control at an early point, e.g., time of filing, and maintain continuous supervision through each discrete processing phase. It is equally important that courts require all trials to be set for a date certain. Court dockets should be structured to reasonably ensure that all trials scheduled for a specific date will, in fact, be tried. Continuances should be granted only in exceptional circumstances when substantial good cause requires.

II. Exceptional Cases

Exceptional cases in which the court's jurisdiction is stayed or precluded may be transferred from the active docket to an administrative docket. For statistical purposes, a case will be considered "disposed of" when it is transferred to the administrative docket. When a case is ready for action, the court must enter an appropriate order for final disposition or for return to the active docket. Return to the active docket will not constitute a new case filing. Cases on the administrative docket should be reviewed at least once a year.

- A. Circuit and District Court Bankruptcy Cases: If the suggestion of bankruptcy has been made in a circuit or district court case, in lieu of the procedure stated in the previous paragraph, the court is authorized to remove the case without prejudice from the active docket to be reinstated without costs at such time the case is no longer stayed by bankruptcy.

- B. Estate Cases (Guardianship, Receivership, or Pro Ami): Currently, the law provides for the transfer of probate cases to circuit court but does not provide for their return to probate court. For the purposes of these time standards, such cases shall not be considered.

Comment: Section 12-11-41, Code of Alabama 1975, could be amended to provide for the transfer of cases back to probate court. This change would allow the court to receive a case from probate court, rule on issues at question, and then transfer the case back to probate court for administration.

- C. Civil Settled/Paying Docket: An administrative docket may be established specifically for the settled/paying docket. Upon receipt of the signed agreement between the parties, the court would enter an order removing the case from the active docket and placing it on the administrative docket. The clerk should maintain a separate docket book for the cases placed on the settled/paying administrative docket. Upon completion of the agreement, the parties would notify the court and these cases would be removed from the administrative docket.

III. Withdrawing and Filing of Circuit Criminal Cases

Uniform procedures should be established to provide for the timely withdrawing and filing of circuit court criminal cases. Rule 16(c) of the Alabama Rules of Judicial Administration provides that the court, on its own motion, may direct the district attorney to withdraw and file criminal cases in which an arrest warrant has been twice returned "not found."

IV. Alias or Capias Warrants in Criminal Cases

All criminal cases in which alias or capias warrants have been issued should be counted as disposed of cases for statistical purposes. If the defendant is arrested, the case should be adjudicated in the normal manner but should not be counted as a disposition. Currently, traffic cases in which an alias and/or UTTC 6B has been issued are counted as disposed of and future resolution of the case is treated in the same manner.

V. Judicial Education

The Alabama Judicial College, a division of the Administrative Office of Courts, should provide orientation and continuing education to judges, court clerks, and other court officials on time standards and case management procedures.

Comment: If courts are to establish and maintain successful case management programs, it is essential that judges, clerks of court, and

other court officials be provided comprehensive and continuing education on the fundamental concepts of court management as well as specific procedures, processes, and technologies which have been effective. Such programs should include education and training services offered by state and national organizations.

The support of the Bar, district attorneys, law enforcement, probation officers, and other officials with interest in the judicial process is important to the effective operation of courts. The Alabama Judicial College is urged to coordinate with representatives of such groups or organizations in developing educational or informational programs on case management procedures.

VI. Reporting and Monitoring

The Administrative Office of Courts should develop uniform procedures for the reporting of case actions and

the monitoring of the achievement of the time standards or goals in each circuit and district court. Reports should be prepared and provided all courts on no less than a semiannual basis.

VII. Technical Assistance

The Administrative Office of Courts, upon request, should provide technical assistance to any district or circuit court in developing case management plans. Where a court is identified as not substantially achieving the time standards goals, the Administrative Office of Courts should be available to review the court's case management plan and operating procedures. Recommendations for improved case management procedures shall be prepared and submitted to the court for review and consideration.

This order shall be effective October 1, 1990.

Hornsby, C.J., and Maddox, Jones, Almon, Shores, Adams, Houston, Steagall, and Kennedy, JJ., concur. ■

NOTICE

The Labor and Employment Law Section of the Alabama State Bar will hold its annual fall seminar in Gulf Shores October 5 and 6 at Summerchase Condominiums. The seminar includes a survey session for the beginning practitioner or one who wishes to become generally familiar with the field. Other sessions will cover issues such as Title VII, the Age Discrimination in Employment Act, ERISA, and other areas of importance for lawyers with a general practice in the labor and employment area. The cost is \$125 for members and \$155 for non-members. Register for the seminar by contacting Joseph Spransy, P.O. Box 10406, Birmingham, Alabama 35202. Phone (205) 254-7252.

Accommodations are available at the Summerchase Condominiums at P.O. Box 2344, Gulf Shores, Alabama 36542. Phone (205) 981-9731 or 1-800-722-GULF.

NOTICE

The Supreme Court of Alabama has adopted new Alabama Rules of Professional Conduct (superseding the *Code of Professional Responsibility*); new Alabama Rules of Disciplinary Procedure (Interim) (superseding the Alabama Rules of Disciplinary Enforcement); and new Alabama Standards for Imposing Lawyer Discipline.

These three new sets of rules and standards become effective January 1, 1991. These rules and standards will be published in a *Southern 2d Advance Sheet* dated on or about September 13, 1990, and then in *Alabama Reporter*. The *Southern 2d Advance Sheet* publication will be in a special "Alabama Edition" mailed only to subscribers with Alabama mailing addresses.

Opinions of the General Counsel

by Robert W. Norris, General Counsel

The following are cases of interest involving lawyer discipline in other states.

Bankruptcy

In re Anonymous: Bar applicant may not be denied admission to practice law solely because applicant filed petition for bankruptcy. However, an applicant may be denied admission based on a "lack of financial responsibility." (N.Y. C.App. No. 251, 11/30/89).

Hippard v. California State Bar: Lawyer may not be denied reinstatement solely because he filed for bankruptcy and thereby discharged debts to his clients and to the Client Security Fund, but state bar may properly consider as an indicator of requisite rehabilitation, absence of lawyer's efforts to make any restitution. Reinstatement denied. (Calif. S.C., No. 5008378, 12/11/89).

Fees

Estate of Callaghan v. Parkhurst: Lawyer retained on contingent fee basis and then discharged by client may sue to recover reasonable value of his/her services to date of discharge even if client's case has not been tried or settled. This court rejects rule (adopted in California) that the right to recover legal fees does not accrue until the occurrence of the contingency, i.e., money damages recovered by client. Instead, court adopts a "flexible" rule giving trial court the discretion to allow the lawyer to sue immediately if the client already has a "ready source of payment." (Illinois App. Ct., 3d Dist., No. 3-89-0002, 9/7/89).

District of Columbia Bar Legal Ethics Committee: Lawyer's one-third contingent fee in case resolved by structural settlement must come from one-third of initial lump sum payment plus one-third of each periodic payment received by the client, unless lawyer and client have agreed to different method of calculating the fee. (Opinion 208, 11/21/89).

Philadelphia Bar Association Professional Guidance Committee: Lawyers whose dissolution agreement will form two firms and calls for division of cases and contingent fees upon termination of present firm must inform clients of proposed fee-splitting and may not divide fees in any case in which a client objects.

West Virginia State Bar Committee on Legal Ethics v. Galager: Lawyer's 50 percent contingent fee for simple personal injury case, requiring less than 17 hours of work to achieve settlement, was clearly excessive and warrants both public reprimand and restitution. Client who was unable to read and write was injured while a passenger in her son's car. She did not wish to sue but merely wanted lawyer to negotiate with the

insurance company. The respondent lawyer obtained the client's medical records, made a settlement offer and accepted the insurance company's first counter-offer. The lawyer's fee was not discussed nor was a written fee contract executed. (W.Va. Sup. Ct. App., No. 18701, 1/24/89) (Note: The proposed Rules of Professional Conduct of the Alabama State Bar adopt a "clearly excessive" standard).

Loans to judges

In re Lidov: Lawyer loaned \$4,000 in cash to judge for "campaign purposes." Lawyer had no cases before the judge at the time, but two cases were later assigned while the loan was outstanding. While DR 7-110(A) permits lawyers to make campaign contributions to judges this was deemed a violation because it was made directly to the judge and not to the judge's campaign committee. The lawyer was suspended for six months. [544 N.E. 2d 294 (Ill. 1989)].

In re Chatz: Lawyer loaned judge \$5,000. Unlike *Lidov* there was no evidence that it was for campaign purposes. Although the record revealed no evidence that the lawyer sought favors from the judge, his firm did have cases before the judge and the court was "disturbed" that the lawyer did not disclose the loan to opposing counsel in this case. [546 N.E. 2d 613 (Ill. 1989)].

Loans from clients and other business transactions

In re Imming: Lawyer borrowed money from eight clients to support his failing plastics manufacturing business. At the time the loans were made the lawyer was performing some legal services for them or had performed legal services within a relatively short period of time. The lawyer did not advise the clients of the financial status of the company or himself nor did he advise them to seek the advice of other counsel. The lawyer contended that the *Code* did not apply because at the time of the loans the parties involved were not in an attorney-client relationship with him. The Court ruled that misconduct would have been established even if the creditors had not been clients since his failure to disclose the financial problems of the company to financial investors would have evidenced a lack of personal honesty. A two-year suspension was imposed as a "deterrence to impress upon the lawyer and others the absolute necessity of full disclosure in business transactions with clients." (Ill. S.C., No. 67738, 9/27/89).

In re Spear: A lawyer was suspended for five years for entering into a real estate deal with a client without informing the client of the questionable legality of tax advice he gave or without giving the client specific advice about seeking independent counsel. The Court said, "To minimize ethical problems, no

lawyer should allow a client to invest or otherwise participate in a lawyer's business venture unless the client obtains independent legal advice. Nothing else will protect the profession's integrity and the public interest." (Ariz. S.C., No. SB-88-00090D, 5/16/89).

Matter of Urbanich: Lawyer given a public reprimand when he, while engaged in a real estate venture which was in financial difficulty, sold a lot and used the down payment for other purposes. In addition, he continued to accept deposits for construction of homes he knew, or should have known, would never be built. The Court said:

"As this case illustrates, lawyers who embark on speculative business ventures expose themselves to risks not borne by members of the bar who confine themselves to the practice of law. We need not determine the low-water mark for non-lawyer businessmen to affirm that lawyers should be above-board in their business transactions. A lawyer who acts dishonestly discredits the reputation of all lawyers." [566 A. 2d 814 (N.J. 1989)].

Advertising and solicitation

Rose v. State Bar: Lawyer for accident victim may contact other victims to investigate and develop evidence in support of client. A lawyer who contacts victims for legitimate investigative purposes is not barred from then representing them if they request, although unethical to directly solicit such employment. [779 P. 2d 761 (Calif. 1989)].

Matter of Caola: A lawyer received a public reprimand for sending a letter to a prospective client containing misrepresentation of his background and experience as a criminal defense attorney. The lawyer acknowledged that he engaged in "puffery." The Committee on Advertising

said, "The retention of legal counsel is fundamentally different from the purchase and use of ordinary consumer products The choice of an attorney is far more important than that of a laundry detergent or household appliance." [564 A. 2d 842 (N.J. 1989)].

California State Bar Standing Committee on Professional Responsibility: A lawyer cannot shield improper solicitation from scrutiny by securing a waiver of such conduct from the client in the retainer agreement. Such a waiver would not relieve the lawyer of his professional obligations under the Rules of Professional Conduct, which are designed to protect the public.

Reciprocal discipline

In re Allred: Lawyer disbarred by federal appeals court for failure to comply with orders of that court. Upon review of facts, state court imposed public censure and one-year supervised probation, including condition that lawyer abstain from alcohol use and continue with alcohol counseling. [777 P. 2d 905 (N.M. 1989)].

Disability defense

In re Hoover: Lawyer who misappropriated substantial sums of money from his client suffered from bipolar manic depressive psychosis. Psychiatrists believed lawyer *M'Naghten* insane at the time of the misappropriation. Court held that mental illness may be used in mitigation but is not a *per se* bar to imposing sanctions on a lawyer for ethical violations. The court also held that the lawyer is not deprived of equal protection of the law simply because he, as with other lawyers, is subject to bar discipline for conduct that could not have formed the basis for criminal prosecution. [Ariz. S.C., No. SB-88-0029-D, 7/28/89)]. ■

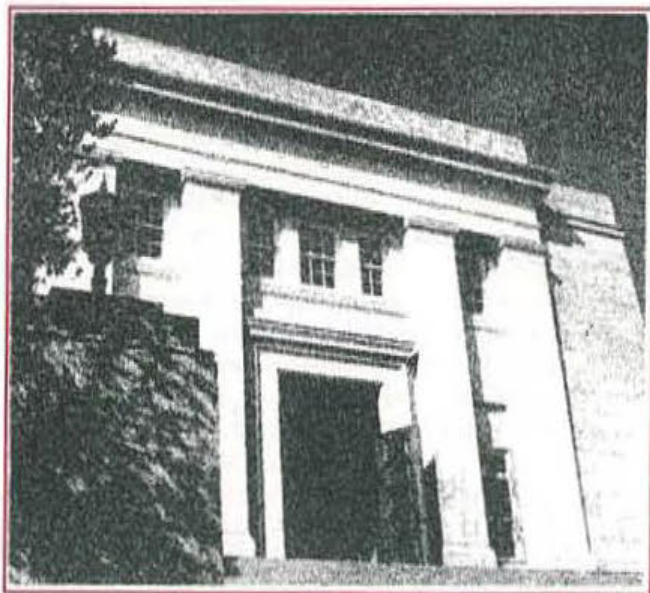
Letters to the Editor

I must have said thank you a million times in the last three months. You might think that after that many times it would become meaningless, or perfunctory at best. Let me tell you that is furthest from the truth. I have grown to appreciate people—some of whom I never knew existed before March 17, 1990 [when Elba flooded]. I am amazed that help has come so often from places least expected.

My partner, Mark Vaughan, and I have found new reasons to take pride in this fraternity of lawyers. Dozens of our colleagues have come to our aid, and have provided us with valuable tangible aid. I am dictating this letter on a machine that was collected from some good lawyer. It isn't new, and it isn't the most modern equipment available, but it works. It helped get us back in business, and it is something that we did not have to buy two months ago. This dictating machine is just one of several items that have been so generously given.

I extend our warmest appreciation and thanks to the Alabama State Bar and my fellow lawyers. In fact, I even extend my congratulations because I think that an organization that could perform so well under these circumstances deserves congratulating. I take pride in being a member.

**Robert E. Cannon,
Cannon & Vaughan,
Elba, Alabama**



Recent Decisions

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

Recent Decisions of the Supreme Court of Alabama

Civil procedure . . .

Rule 4.3(d) (1) requires facts showing an avoidance for service by publication

Fisher v. Amaraneni, 24 ABR 2040 (April 27, 1990). Amaraneni filed suit against the Fishers and engaged a process server to serve them. The process server made six unsuccessful attempts to serve the Fishers at their residence. Process was eventually returned to the clerk's office marked "Not Found." Amaraneni filed a motion to have service by publication under Rule 4.3, A.R.C.P., and executed an affidavit mentioning the six unsuccessful attempts at service and stated "defendants are avoiding service." The court granted the motion and entered a default judgment. Eventually, the Fishers became aware of the default judgment and filed a Rule 60(b)(4), A.R.C.P., motion for relief maintaining that the judgment was void because they were not properly served. The trial court denied the motion, and the Fishers appealed. The supreme court reversed.

The Fishers maintained that Amaraneni had failed to aver in the affidavits facts showing that they had avoided service of process. The

supreme court agreed. The official comments to Rule 4.3(c) state, "More than mere inability to find the defendant is required because the use of the term 'avoidance' of service." The rule requires an element of culpability. The conclusory statements made in the affidavit coupled with the process server's failed attempts to perfect service and his later endorsement on the process "Not Found" are insufficient to satisfy the requirement of rule 4.3(d)(1), so that service by publication was improper.

Civil procedure . . .

discovery precedes, not follows, determination of merits of litigation

Ex parte Kershaw, Inc. (Re: Kershaw, Inc. v. Kershaw), 24 ABR 1868 (April 20, 1990). The petitioner sought relief in circuit court asking that defendants be held in civil contempt for an alleged violation of a non-competition agreement and an injunctive order. At the same time, petitioner served interrogatories and a request for production of documents seeking to discover information pertaining to the transactions alleged in the contempt petition. Defendants objected to the discovery on the grounds of relevancy and confidentiality. Petitioner filed a motion to compel the discovery, and defendants produced certain documents for an in camera inspection by the trial judge. The court stated it would look



John M. Milling, Jr., is a member of the firm of Hill, Hill, Carter, Franco, Cole & Black in Montgomery. He is a graduate of Spring Hill College and the University of Alabama School of Law. Milling covers the civil portion of the decisions.



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

at the documents to determine if the documents evidenced a violation of its injunctive order. The court subsequently denied the petitioner's motion. The petitioner requested the supreme court to order the defendants to respond to the discovery and the supreme court granted the writ.

The supreme court noted that when assessing claims of confidentiality or privilege in discovery matters, it is appropriate for the trial judge to conduct an in camera inspection of the documents. Where portions of the documents are discoverable, the trial judge might "excise" those portions of the documents which it finds to be confidential or privileged. This procedure allows the party seeking discovery to obtain the information he legitimately needs, while, at the same time, preserving the adverse party's confidences. Materials not produced should be placed in a sealed envelope in the custody of the clerk for preservation. In this case, the court did not inspect the documents to determine if they were confidential or privileged, but rather to determine if they violated the injunction. In doing so, the court reversed the function and purpose of discovery in that discovery precedes, not follows, a determination of the merits of the litigation.

Municipal law . . .

\$100,000 cap subject to §8-8-10

Elmore County Commission v. Ragona, 24 ABR 1893 (April 20, 1990). Ragona obtained a \$136,750 judgment against Elmore County and some individuals in a personal injury action. The County paid \$100,000 in court to satisfy the judgment. Ragona filed a motion to have the \$100,000 released to her and to have post-judgment interest set under §8-8-10, *Ala. Code* (1975). The county asserted that \$100,000 was the maximum amount recoverable from it under §11-93-2, *Ala. Code* (1975). The trial court released the \$100,000 to Ragona and awarded her post-judgment interest in the amount of \$32,317.81. The county appealed and the supreme court affirmed.

In a case of initial impression in Alabama, the supreme court held that the \$100,000 cap established by §11-93-2 does not preclude the operation of §8-8-10, and that the county is liable for

interest on a \$100,000 judgment even though that would allow a total recovery to exceed the \$100,000 cap. The supreme court reasoned that had the Legislature wanted to limit the effect of §8-8-10 it could have easily done so in §11-93-2. The court noted that §8-8-10 is designed to encourage everyone, counties as well as private citizens, to avoid unnecessary litigation and to promptly pay judgments. The supreme court also noted that it has recently held that interest on worker's compensation judgments is allowed because it encourages prompt payment and discourages long delays and frivolous appeals.

Real property . . .

§6-5-235, et seq. is remedial and liberally construed

Spencer v. West Alabama Properties, Inc., 24 ABR 2163 (May 4, 1990). West Alabama purchased land from Campbell. It paid \$10,000 cash and executed a promissory note for the balance. It secured payment of the note by executing a mortgage covering the land. West Alabama defaulted and Campbell foreclosed and purchased the land at public auction. Campbell sold the land to Spencer. One day before expiration of the statutory redemption period, West Alabama filed a complaint initiating redemption and tendered its personal check to redeem the land. The check was deposited in an interest-bearing account by order of the court. Two days after the redemptive period ran, the check was honored by the bank. The trial court allowed redemption. Spencer appealed maintaining that §§6-5-235 and 238, *Ala. Code* (1975) require "payment" within the redemptive period. Spencer argued that tender of a check was not cash or its equivalent and was not "payment." The supreme court disagreed and affirmed.

The supreme court stated that because the word "payment" as used in the statute is not entirely clear, it should be construed so that neither party is unfairly advantaged. The purpose of the statute is to allow the defaulting purchaser the opportunity to redeem the property that has been lost by foreclosure. The statutory rights of redemption are intended to "rescue" from "sacrifice" the property of a debtor. West Alabama made a good faith effort to pay the amount due. Strict

interpretation of "payment" would serve only to defeat the legislative intent behind the statute.

Worker's compensation . . .

§25-7-77(a) applied

Radiology Associates, P.A. v. St. Clair Timber Co., 24 ABR 2141 (April 27, 1990). Campbell injured his back while working within the line and scope of his employment. He sued his employer for worker's compensation benefits and later amended his complaint to include St. Clair, alleging that he was also an employee of St. Clair. The trial court eventually entered a consent judgment whereby St. Clair agreed to pay all necessary medical costs directly related to the accident. Subsequently, Radiology Associates, one of Campbell's health care providers, filed suit against St. Clair and its worker's compensation carrier alleging that they were responsible for Campbell's medical bills. Defendants argued that there was no contractual relationship between them and the plaintiff, and the court granted defendants' motion to dismiss. The plaintiff appealed, and the supreme court affirmed.

The supreme court noted that §25-7-77(a), *Ala. Code* (1975) gives the employer the right to select the doctor for the employee. However, "if the employee obtains medical treatment from a doctor of his choice, the employer will not be held liable for the cost of treatment," if the employee obtains his own doctor without the approval of the employer. Plaintiff produced no evidence that defendants agreed that plaintiff could treat Campbell at their expense or that defendants consented to plaintiff's treatment of Campbell. Accordingly, defendants were not contractually liable to pay Campbell's medical bills.

Recent Decisions of the United States Supreme Court

Double jeopardy clause—new test

Grady v. Corbin, 89-474, 58 USLW _____ (May 28, 1990)—Does the Constitution's double jeopardy clause protect someone against being prosecuted for an alleged offense based on conduct for which he or she already has

been prosecuted? The Supreme Court, in a five-to-four decision, answered yes.

In an opinion authored by Justice William J. Brennan, the Court scrapped a double jeopardy test it had used since 1932. The Court's earlier construction of the double jeopardy clause held that successive prosecutions under separate statutes were barred if each required the same proof. The new test is whether the *alleged offense is based on the same conduct*. Justice Brennan reasoned that, "The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense alleged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

Justice Scalia joined by Chief Justice Rehnquist and Justice Kennedy dissented with the following words: "If the Double Jeopardy Clause guaranteed the right not to be twice put in jeopardy for the same conduct, it would bar this second prosecution. . . . But that clause guarantees only the right not to be twice put in jeopardy for the same offense."

Pretrial detention and procedural defects

United States v. Montalvo-Murillo, 89-163, 58 USLW _____ (May 28, 1990)—Must a defendant who otherwise could be held in pretrial detention be freed on bail if not given a pretrial detention hearing at his first judicial appearance before the magistrate as required by the Bail Reform Act of 1984? The Supreme Court, in a six-to-three decision, said no.

Justice Kennedy, writing for the majority, held, "The safety of society does not become forfeit to the accident of non-compliance with statutory time limits where the government is ready and able to show release on bail is not feasible." Justice Kennedy said, "Neither the time requirement nor any other part of the act can be read to require, or even suggest, that a timing error must result in the release of a person who should otherwise be detained."

Inventory search of automobile's closed containers

Florida v. Wells, 88-1835, 58 USLW 4454 (April 18, 1990)—Is physical evidence seized in an inventory search of a car impounded by police admissible if

there was no official policy governing which closed containers are to be opened during inventory searches? The Supreme Court, in a unanimous decision, answered no.

Following his arrest for DUI, Wells gave the Florida Highway Patrol permission to open the truck of his impounded car. An inventory search of the car turned up two marijuana cigarette butts in an ashtray and a locked suitcase in the trunk. The suitcase was forced open and revealed a garbage bag containing a considerable amount of marijuana.

The Florida Supreme Court affirmed the suppression of the evidence noting the absence of any highway patrol policy on the opening of closed containers found during an inventory search and held that *Colorado v. Bertine*, 479 U.S. 367 requires the policy to mandate either that all containers be opened during inventory searches or that no container be opened, leaving no room for discretion on the part of an individual officer.

Chief Justice Rehnquist said the Florida Supreme Court was correct in excluding evidence seized by the state troopers during the inventory search of the impounded car. The Chief Justice critically noted: "In the present case, the Supreme Court of Florida found that the Florida Highway Patrol had no policy whatsoever with respect to the opening of closed containers encountered during an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment, and that the marijuana which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida."

Fourth Amendment limitations to *Payton v. New York*

New York v. Harris, 88-1000, 58 USLW 4457 (April 18, 1990)—When the police have probable cause to arrest someone but do not first obtain the constitutionally mandated warrant before arresting him in his home, is a confession he gives after being taken from his home admissible? A sharply divided Supreme Court answered yes by a margin of five-to-four.

New York City police officers, having probable cause to believe that Harris had committed murder, entered his home without first obtaining a warrant. The officers read Harris his *Miranda* rights and

purportedly secured an admission of guilt. After he was arrested, taken to the police station and again given his *Miranda* rights, Harris signed a written inculpatory statement.

The New York trial court suppressed the first statement under *Payton v. New York*, 445 U.S. 573, which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

Justice White framed the issue as follows:

"The sole issue in this case is whether Harris's second statement—the written statement made at the station house—should have been suppressed because police, by entering Harris's home without a warrant and without his consent, violated *Payton v. New York*, 445 U.S. 573 (1980), which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."

Justice White reasoned that the rule in *Payton* was designed to protect the physical integrity of the home, not to grant criminal suspects protection for statements made outside their premises where the police had probable cause to make an arrest. In such circumstances, Justice White wrote for the Court, the exclusionary rule does not bar use of the confession:

"Because the officers had probable cause to arrest [the defendant] for a crime, Harris was not in lawful custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk."

Justice White continued by saying that, "For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested the defendant on his door step, illegally entered his home to search for evidence and later interrogated [him] at the station house."

Fourth amendment standing-overnight guest

Minnesota v. Olson, 88-1916, 58 USLW 4464 (April 18, 1990)—Does an overnight guest in a private home enjoy the

same Fourth Amendment rights as the host? The Supreme Court said yes in a seven-to-two decision.

Minneapolis police suspected Olson of being the driver of the getaway car used in a robbery-murder. After recovering the murder weapon and arresting the suspected murderer, they surrounded the home of two women with whom they believed Olson had been staying. Without seeking permission and with weapons drawn, the police entered the home and found Olson hiding in a closet. They arrested him. Shortly thereafter, he gave the police a confession which the trial court refused to suppress.

The Minnesota Supreme Court reversed and held that Olson had a sufficient interest in the women's home to challenge the legality of his warrantless arrest. Olson also contended that the arrest was illegal because there were no exigent circumstances to justify the warrantless entry into the home and that his statement was tainted and should have been suppressed.

In *Payton v. New York*, *supra*, the Supreme Court held that a suspect should not be arrested in his house without an arrest warrant, even though there is probable cause to arrest him. The purpose of the decision was not to protect the person of the suspect, but to protect his home from entry in the absence of the magistrate's finding of probable cause.

Justice White, writing for the majority, held that Olson's arrest violated the Fourth Amendment. In short, the Supreme Court held that Olson's status as an overnight guest alone was sufficient to show that he had an expectation of privacy (subjective expectation) in the home where he was a guest and that society is prepared to recognize that as reasonable. See also *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978).

Who can consent to search?

Illinois v. Rodriguez, 88-2018, 58 USLW 4892 (June 21, 1990)—In *United States v. Matlock*, 415 U.S. 164 (1974), the Supreme Court reaffirmed that a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of "unreasonable searches and seizures" if the officers have obtained the consent of a third party

who possesses common authority over the premises. The *Rodriguez* case presents the issue which the Court expressly reserved in *Matlock*, i.e., whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believed to possess common authority over the premises, but who, in fact, does not do so.

Rodriguez was arrested at his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry into the apartment with the consent and assistance of Fischer, who had lived there with the defendant several months. Fischer represented to the officers that the apartment was "ours" and that she had clothes and furniture there. She unlocked the door with her key and gave officers permission to enter.

At trial, the judge concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment, based upon his finding that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, and that she did not have access to the apartment when Rodriguez was away.

Justice Scalia reversed and remanded the case to the Illinois Supreme Court to determine whether the police reasonably believed that Fischer had authority to consent to the entry into the defendant's apartment.

Writing for the majority, Scalia noted that the record demonstrated that the State had not satisfied its burden of proving that Fischer had "joint access or control for most purposes" over the respondent's apartment as is required under *United States v. Matlock*, *supra*. However, the Supreme Court extended its decision in *Matlock* and held that a warrantless entry could be valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believed to possess common authority over the premises, but who, in fact, does not.

"As with the many other factual determinations that must regularly be made by government agents in the Fourth Amendment context, the 'reasonableness' of a police deter-

mination of consent to enter must be judged not by whether the police were correct in their assessment, but by the objective standard of whether the facts available at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid."

Police sobriety checkpoints do not violate Fourth Amendment

Michigan State Police v. Sitz, 88-1897, 58 USLW _____ (June 14, 1990)—Do police sobriety checkpoints, where motorists are detained briefly in the absence of any individualized suspicion of drunken driving, violate the Fourth Amendment's ban on unreasonable police seizures? The Supreme Court, in a six-to-three decision, answered no. This decision is extremely significant and marks the first time that the Supreme Court has allowed suspicionless stops by the police in the pursuit of routine law enforcement activities.

Chief Justice Rehnquist delivered the opinion of the Court, stating in pertinent part as follows:

"The balance of the state's interest in preventing drunken driving . . . and the degree of intrusion upon individual motorists who are briefly stopped weighs in favor of the state program."

The Court's ruling presents a balancing test between legitimate state interest against the minimal intrusion caused by a brief investigatory stop.

Anonymous telephone tip can furnish reasonable suspicion to make investigatory stop

Alabama v. White, 89-789, 58 USLW _____ (June 11, 1990)—Can an anonymous telephone tip which was loosely corroborated by independent police work constitute sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop? The Supreme Court, in a six-to-three decision, answered yes.

Under *Adams v. Williams*, 407 U.S. 143, 147, an informant's tip may carry sufficient "indicia of reliability" to justify a *Terry* stop even though it may be insufficient to support an arrest or search warrant. Moreover, in *Illinois v. Gates*, 462 U.S. 213, 230, the Supreme Court adopted the "totality of the circumstances" test to determine whether an informant's tip establishes probable cause. In *Gates*, the Supreme Court did not completely abandon the two-prong test of *Aguilar* and *Spinelli* whereby the informant's veracity, reliability and basis of knowledge are highly relevant considerations. The Supreme Court also noted that those same factors were relevant in the "reasonable suspicion" context although the Court felt that an allowance had to be made in applying them for the lesser showing required to meet the reasonable suspicion standard as opposed to probable cause.

Montgomery police detectives received an anonymous telephone tip that White would be leaving a particular

apartment at a particular time in a particular vehicle, that she would be going to the Doby Motel on the Mobile Highway and that she would be in possession of cocaine inside a brown attache' case. The detectives immediately proceeded to the apartment building and saw a vehicle matching the description given by the tipster. They observed an unidentified woman leave the building and enter the vehicle and followed her along the most direct route to the Doby Motel. However, the police stopped her vehicle approximately 200 yards south of the motel. A consensual search of White's vehicle revealed a small quantity of marijuana, and later, after she was arrested and booked at police headquarters, three milligrams of cocaine were found in her purse.

The Alabama Court of Criminal Appeals reversed her conviction holding that the trial court should have suppressed the marijuana and cocaine because the officers did not have the reasonable suspicion necessary under *Terry v. Ohio*, 392 U.S. 1, in order to

justify the investigatory stop of White's vehicle.

Justice White delivered the opinion of the Court and acknowledged that *Alabama v. White* was an extremely close case. Justice White observed that standing alone, the anonymous telephone tip was completely lacking in the necessary indicia of reliability since it provided virtually nothing from which one might conclude that the caller was honest or his information reliable; moreover, the tip gave no indication of the basis for the caller's predictions regarding White's criminal activities.

In concluding, Justice White observed, "Although it is a close case, we conclude that under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car. We, therefore, reverse the judgment of the Court of Criminal Appeals of Alabama and remand for further proceedings not inconsistent with this opinion." ■

NOTICE

Based on security measures, the Alabama Court of Criminal Appeals has decided to close the post office box used for many years and receive mail at the street address, Judicial Building, 445 Dexter Avenue, Montgomery 36130.

—Judge John Patterson

Riding the Circuits

Marshall County Bar Association

On March 21, 1990, the Marshall County Bar Association met and elected the following individuals as officers:

President—Claude E. Hundley, III,
Guntersville

Vice-president—Lisa Karch,
Guntersville

Secretary/treasurer—T.J. Carnes,
Albertville

Memorials



Philander Lionel Butler—Birmingham

Admitted: 1950
Died: July 26, 1990

Ronald Alan Drummond—Scottsboro

Admitted: 1972
Died: July 22, 1990

Jesse Willard Pienezza—Tallasse

Admitted: 1940
Died: July 29, 1990

Thomas Arnold Scott, Jr.—Scottsboro

Admitted: 1956
Died: May 9, 1990

John Knox Winn—Clayton

Admitted: 1940
Died: January 4, 1990

LELAND G. ENZOR

Judge Leland G. Enzor, former probate judge of Covington County, passed away March 9, 1990.

Judge Enzor was born in Covington County on July 16, 1923, and graduated from Andalusia High School in 1941. He attended Birmingham-Southern College on a scholarship.

In 1943, Judge Enzor entered the United States Army, where he served his

country for three years during World War II and the European Theater.

Upon completion of his military duties, Judge Enzor entered the University of Alabama School of Law and earned his law degree.

In 1948, he married the former Bonnie Stewart of the Rose Hill community.

After receiving his law degree, Judge Enzor came home to his beloved Covington County, where he went to work for Alatex-Andala as personnel director. He held this position for six and a half years.

He was elected mayor of Andalusia and served in this position from 1956 until 1959. In 1958, he ran for and was elected probate judge of Covington County. Judge Enzor served as probate judge for 26 years. He was re-elected for a fifth term by 83.5 percent of the vote. Due to ill health, Judge Enzor retired during his fifth term of office.

Upon retirement, Enzor opened a small law practice in Andalusia. Through his law practice, he helped his fellow Covington countians, often with little or no pay, with their legal problems.

Judge Enzor was the founder and first president of the Alabama Probate Judges Association. He was past president of the Alabama Mental Health Association and the South Central Alabama Regional Alcoholism Council. Also, he was chairperson of the South Central Alabama Mental Health Board. He received the Chamber of Commerce President's Award in 1989.

He was a member of the American Legion, Veterans of Foreign Wars, Masonic Lodge, Scottish Rites and the Alcazar Shrine. He was a past president of the Andalusia Kiwanis Club and the Alabama Juvenile Court Judges Association. He served 12 years in the Army Reserves.

Judge Enzor is best remembered for his ability to listen, understand and help all who had an occasion to come before him. It can truly be said that he devoted

his life to the service of the people of Covington County. He will be deeply missed and fondly remembered.

Judge Leland G. Enzor is survived by his wife, Bonnie S. Enzor of Andalusia; one daughter, Phala E. Boney of Baton Rouge, Louisiana; two sons, Leland G. Enzor, Jr., of Andalusia and Rhett S. Enzor of Montgomery; and six grandchildren.

—Sherrie R. Phillips,
Judge of Probate,
Covington County, Alabama



MONCURE CAMPER O'NEAL

Moncure Camper O'Neal, a highly respected attorney practicing primarily in the area of municipal finance, died Saturday, August 5, 1989, in Birmingham, Alabama, at the age of 82.

O'Neal was born in Florence, Alabama, on April 29, 1907. He was graduated from Coffee High School in Florence, where he was twice named an all-state football player. He received the

bachelor of arts degree from Davidson College in 1928. He received his law degree from Columbia University in 1933. O'Neal was awarded the James Kent Scholarship for distinction as a scholar during his last two years at Columbia.

He was admitted to the bar of the State of New York in 1933 and was admitted to practice law in Alabama in 1946. He was a member of the Birmingham Bar Association, Alabama State Bar, American Bar Association and The Association of the Bar of the City of New York.

O'Neal began his practice of law in 1933 by serving on the legal staff of the Agricultural Adjustment Administration. In 1935 he went to work with the Wall Street law firm of Root, Clark, Buckner & Ballantine (currently known as Dewey, Ballantine, Bushby, Palmer & Wood), where he served as an associate with John M. Harlan, who later became an associate justice of the United States Supreme Court. During 1941-42, he was assistant corporation counsel in the law department of the City of New York. Fiorello Henry La Guardia was mayor of the City of New York at the time.

O'Neal served in the United States Army from 1942 to 1946. For two and a half years, he trained troops in handling and flying barrage balloons at Camp Tyson, near Paris, Tennessee. He then served on the legal staff of the Chief of Ordnance in the Pentagon. In that position he was responsible for the legal work of the Tank-Automotive Procurement Division of the Ordnance Department.

He retired from the Army Reserve as a lieutenant colonel.

At the conclusion of World War II, he returned to Alabama. He first taught in the University of Alabama School of Law at Tuscaloosa for a year. He then joined with Lawrence Dumas, Jr., and Hubert Hayes to form the firm of Dumas, O'Neal & Hayes in January 1947. This firm merged with Cabaniss, Johnston, Gardner & Clark to become Cabaniss, Johnston, Gardner, Dumas & O'Neal in 1974. O'Neal specialized in rendering legal opinions on state, county and municipal financing. He retired from active practice in 1983.

O'Neal was married to Louise Clarke on January 27, 1945. He is survived by his wife; three sons, Moncure Camper O'Neal, Jr., of Great Falls, Virginia, Bertrand Clarke O'Neal of Birmingham, and John Coffee O'Neal of Clinton, New York; one daughter, Marie Louise Clarke O'Neal Tucker of Birmingham; and seven grandchildren, one of whom was born after his death.

O'Neal stood in a notable tradition. He was the son of Edward A. O'Neal, Jr., a national farm leader and president of the American Farm Bureau. He was the great-grandson of former Alabama Governor Edward A. O'Neal. The O'Neal Bridge over the Tennessee River in Florence was named for O'Neal's great-uncle, former Alabama Governor Emmett O'Neal.

His hobbies were golf and genealogy. In addition, in his retirement he made it a practice to spend time each week with

his grandchildren who lived in Birmingham, instilling in them both a love for books and his love for golf. He was a member of and has served as an officer of the Society of Colonial Wars, Sons of the Revolution and the Society of War of 1812 in Alabama. He was also a member of the St. Francis Xavier Catholic Church, the Mountain Brook Club and the Downtown Club. His fraternity was Phi Gamma Delta.

O'Neal: He was a gentleman. O'Neal distinguished himself as a scholar, a skilled attorney and a devoted family man. He left a legacy of honor, humility and integrity. It was a privilege to have known him. It is a challenge to follow in his tradition.

A scholarship in O'Neal's honor has been established by the family at the University of Alabama Law School. Donations may be sent to the Moncure Camper O'Neal Scholarship Fund, P.O. Box 870382, Tuscaloosa, Alabama 35487. ■

—Steve A. Tucker,
(Moncure Camper O'Neal's son-in-law)
Cabaniss, Johnston, Gardner,
Dumas & O'Neal
Birmingham, Alabama



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.

Disciplinary Report

Reinstatement

● **Kenneth Paul Carbo, Jr.**, was reinstated to the practice of law by order of the Supreme Court effective June 26, 1990. (Pet. No. 90-04)

Suspension

● **Hugh Don Waldrop**, a Tuscaloosa attorney, is temporarily suspended from the practice of law in the State of Alabama effective immediately by order of the supreme court dated May 29, 1990, under Rule 3(c) of the Rules of Disciplinary Enforcement. [Rule 3(c) No. 90-01]

Private Reprimands

● On May 18, 1990, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 6-101(A), 7-101(A)(1), 7-101(A)(2), and 7-101(A)(3). The lawyer was contacted by the client to file bankruptcy papers and also to represent the client against a finance company which was seeking to repossess the client's mobile home. The client paid what she thought to be one-half of the lawyer's fee. However, the lawyer failed to file any bankruptcy papers or any other pleadings on behalf of the client. Due to the lawyer's failure to protect the interests of the client, the client's mobile home was repossessed.

The lawyer was found guilty of willfully neglecting a legal matter entrusted to him, of failing to seek the lawful objectives of his client, of failing to carry out a contract entered into for professional services, and, of prejudicing or damaging his client during the course of the professional relationship. [ASB No. 88-297]

● On May 18, 1990, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 5-101(A) and 6-101(A). The Disciplinary Commission determined that the lawyer willfully neglected a real estate transaction that he handled and that he allowed his personal interests to interfere with his representation of a client. [ASB No. 89-71]

● On May 18, 1990, an Alabama lawyer was privately reprimanded for violation of Disciplinary Rules 1-102(A)(2) and 3-103(B). The lawyer in question entered into a relationship with a non-lawyer whereby the non-lawyer advertised to solicit business for the preparation of wills and then referred the legal business to the lawyer in question. The Disciplinary Commission determined that this circumvented the Disciplinary Rules by the actions of another and aided and abetted another in the unauthorized practice of law, all in violation of the Code. [ASB No. 89-459] ■

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.

Circled One	Mr.	Miss	Member Identification (Social Security) Number			
	Mrs.	Ms.				
	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	

Classified Notices

RATES: Members: 2 free listings per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—\$35 per insertion of 30 words or less, \$50 per additional word. Nonmembers: \$35 per insertion of 30 words or less, \$50 per additional word. Classified copy and payment must be received according to the following publishing schedule: September '90 issue—Deadline July 31; November '90 issue—Deadline September 20. No deadline extensions will be made. Send classified copy and payment, made out to *The Alabama Lawyer*, to: Alabama Lawyer Classifieds, c/o Margaret Murphy, P.O. Box 4156, Montgomery, AL 36101.

FOR SALE

FOR SALE by the Tuscaloosa County Law Library, one set of each of the following: Bender's Forensic Sciences "Civil/Criminal"; Morton's on Bankruptcy; the Restatement of the Law; Words and Phrases; Proof of Facts; Southeast Litigation Guide; ALR Federal; Wright and Miller Federal Practice and Procedure; Shepherd's Causes of Action; Bender's Art of Advocacy; Bender's Criminal Law Advocacy. All volumes are current and in excellent condition. **Please submit written bids to the Law Offices of Dan M. Gibson, 2918 7th Street, Tuscaloosa, Alabama 35401. Phone (205) 758-5521.**

FOR SALE: Alabama Law Bibliography—Author/title index, over 325 entries. Subject index, over 425 entries. \$23.95 (Alabama sales tax .96/Montgomery city and county .96) Make check payable to Barrister Press. Mail order to **JPS/BP, AUM, 7300 University Drive, Montgomery, Alabama 36117.**

FOR SALE: Retiring Birmingham lawyer will sell Sou. Rep. 2nd complete to date and Alabama Digest up-to-date, including 1990 pocket parts. Oak shelving included with books. **Phone (205) 322-6400.**

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ATTORNEY JOBS: National and Federal Legal Employment Report: highly regarded monthly detailed listing of hundreds of attorney and law-related jobs with U.S. government, other public/private employers in Washington, D.C., throughout U.S. and abroad. \$32—3 months; \$55—6 months. **Federal Reports, 1010 Vermont Avenue, NW, #408-AB, Washington, D.C. 20005. Phone (202) 393-3311. Visa/MC.**

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WRONGFUL DEATH/PERSONAL INJURY—Expert actuaries will testify to value of lost future earnings in wrongful

death and personal injury cases. Fellows of Society of Actuaries. Experience in court. Can assist in design of structured settlement. Call **David Godofsky—C&B Consulting Group, a Corroon & Black company, 1927 1st Avenue, North, Birmingham, Alabama 35203. Phone (205) 323-7000.**

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.**

EXAMINATION OF QUESTIONED Documents: Handwriting, typewriting and related examinations. Internationally court-qualified expert witness, Diplomate, American Board of Forensic Document Examiners. Member: American Society of Questioned Document Examiners, the International Association for Identification, the British Forensic Science Society and the National Association of Criminal Defense Lawyers. Retired Chief Document Examiner, USA CI Laboratories. **Hans Mayer Giddion, 218 Merrymont Drive, Augusta, Georgia 30907. Phone (404) 860-4267.**

TRAFFIC ENGINEER: Consultant/Expert Witness. Graduate, registered, professional engineer. Forty years' experience. Highway and city design, traffic control devices, city zoning. Write or call for resume, fees. **Jack W. Chambliss, 421 Bellehurst Drive, Montgomery, Alabama 36109. Phone (205) 272-2353.**

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Classified Notices

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Young Lawyers' Section



**Walker Percy Badham, III
YLS President**

I am truly excited about the upcoming year. It is an honor and a privilege to have the opportunity to carry the banner for Alabama's young lawyers. Along with our on-going projects (Youth Judicial Program, SanDestin Seminar and Bridge the Gap, etc.), I want to focus on the issues of lawyer satisfaction, both professionally and personally, and better communication about what young lawyers across the state are doing.

I have asked the following people to serve on the executive committee:

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Laura L. Crum
D. Taylor Flowers
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William O. Walton, III
Hal West
Duane A. Wilson
Ernest F. Woodson

In addition, we have some great officers: Keith B. Norman, president-elect; Sidney W. Jackson, III, secretary, and A. Lester Hayes, III, treasurer. Please feel free to call any of us if you have any questions, comments or ideas.

Finally, I thank James Anderson for his outstanding leadership this past year. James did a tremendous job and deserves our appreciation. ■

THANKS TO STRONG MANAGEMENT, WE'VE KEPT OUR BALANCE FOR NEARLY HALF A CENTURY.

MISSISSIPPI VALLEY TITLE INSURANCE COMPANY CONSOLIDATED BALANCE SHEET March 31, 1990

ASSETS

CASH AND INVESTED ASSETS

Cash	
Demand Deposits	\$ 29,249
Time Deposits	2,410,945
Bonds, at amortized cost (market, \$4,558,292)	4,507,637
Stocks	
Preferred, at cost (market, \$98,560)	104,457
Common, at market (cost, \$254,638)	773,041
Mortgage loans	234,273
Investment income due and accrued	167,295
Total cash and invested assets	<u>8,226,897</u>

OTHER ASSETS

Accounts and premiums receivable	806,480
Real estate, buildings, furniture and equipment, at cost, less accumulated depreciation of \$696,630	381,891
Title plants and records	1,065,926
Investment in affiliated companies	503,643
Sundry	240,228
Total other assets	<u>2,998,168</u>
Total assets	<u>\$11,225,065</u>

LIABILITIES AND SHAREHOLDERS' EQUITY

LIABILITIES

Claim reserves	\$ 3,739,133
Fees and taxes	51,228
Payable to affiliated company	111,652
Accounts payable	28,322
Notes payable	4,353
Deferred income taxes	(12,477)
Sundry	722,259
Total liabilities	<u>4,644,470</u>

SHAREHOLDERS' EQUITY

Common stock, at stated value of \$1,550 per share.	
Authorized 1,600 shares; issued 322.6 shares	500,098
Paid-in capital	4,308,812
Unrealized gain on investments	267,762
Retained earnings	1,597,877
Less treasury stock, at cost, 19.5 shares	(93,954)
Total shareholders' equity	<u>6,580,595</u>
Total liabilities and shareholders' equity	<u>\$11,225,065</u>

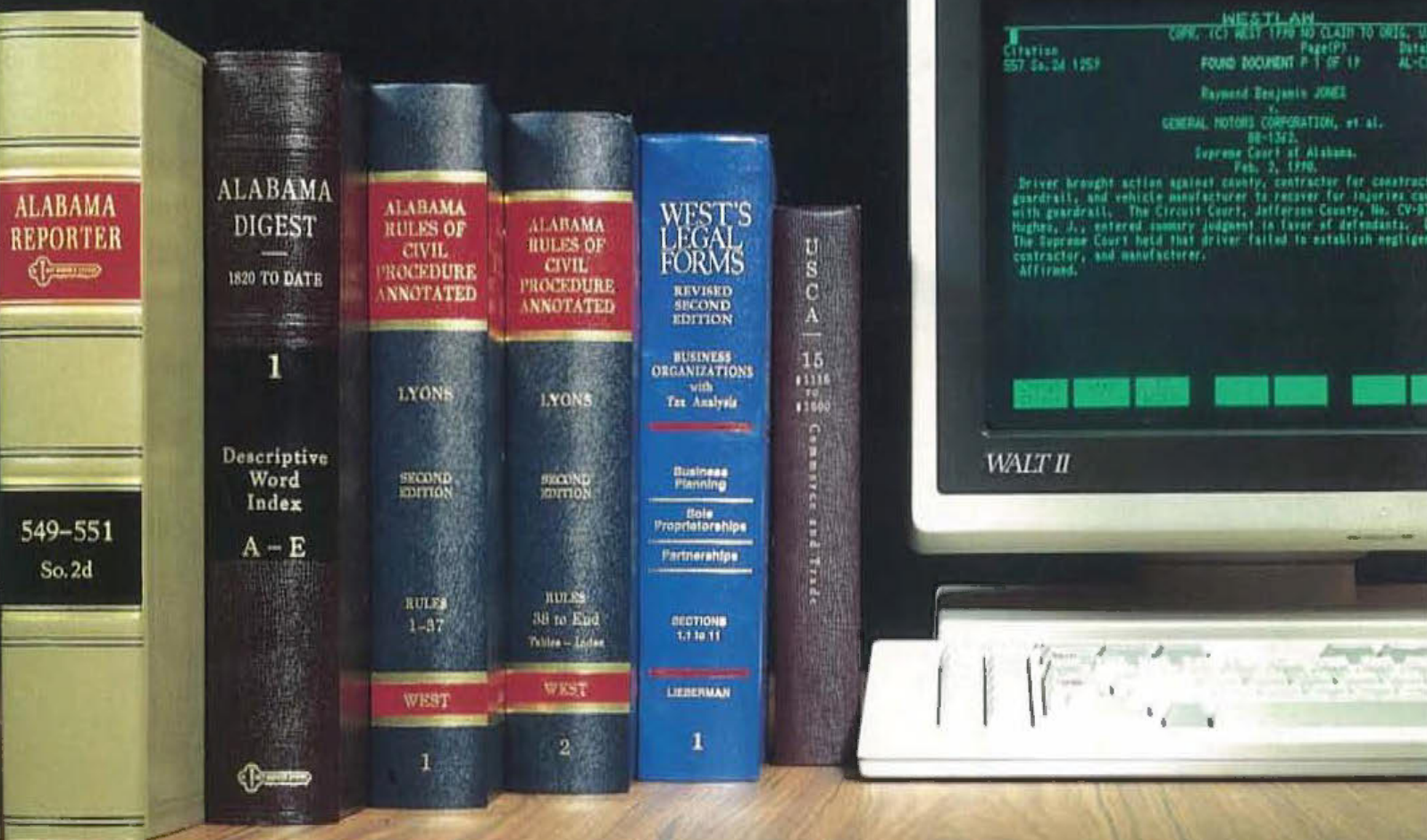
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