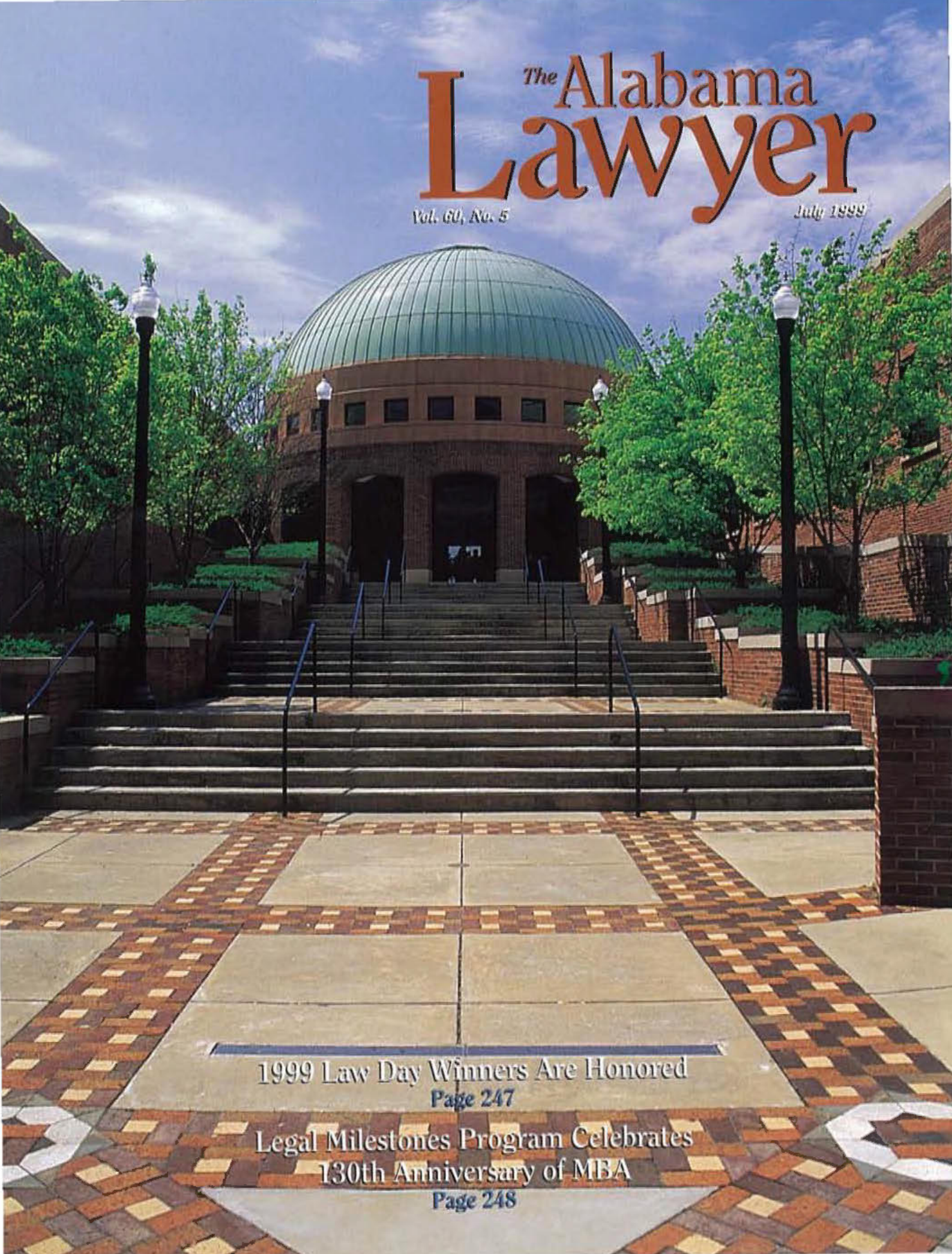

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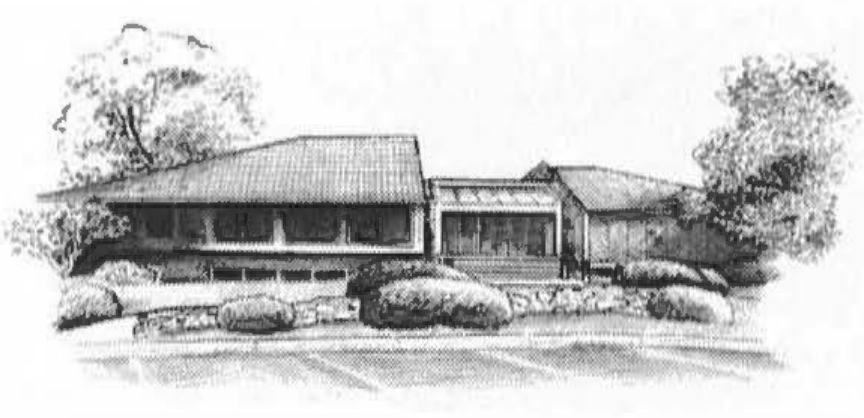

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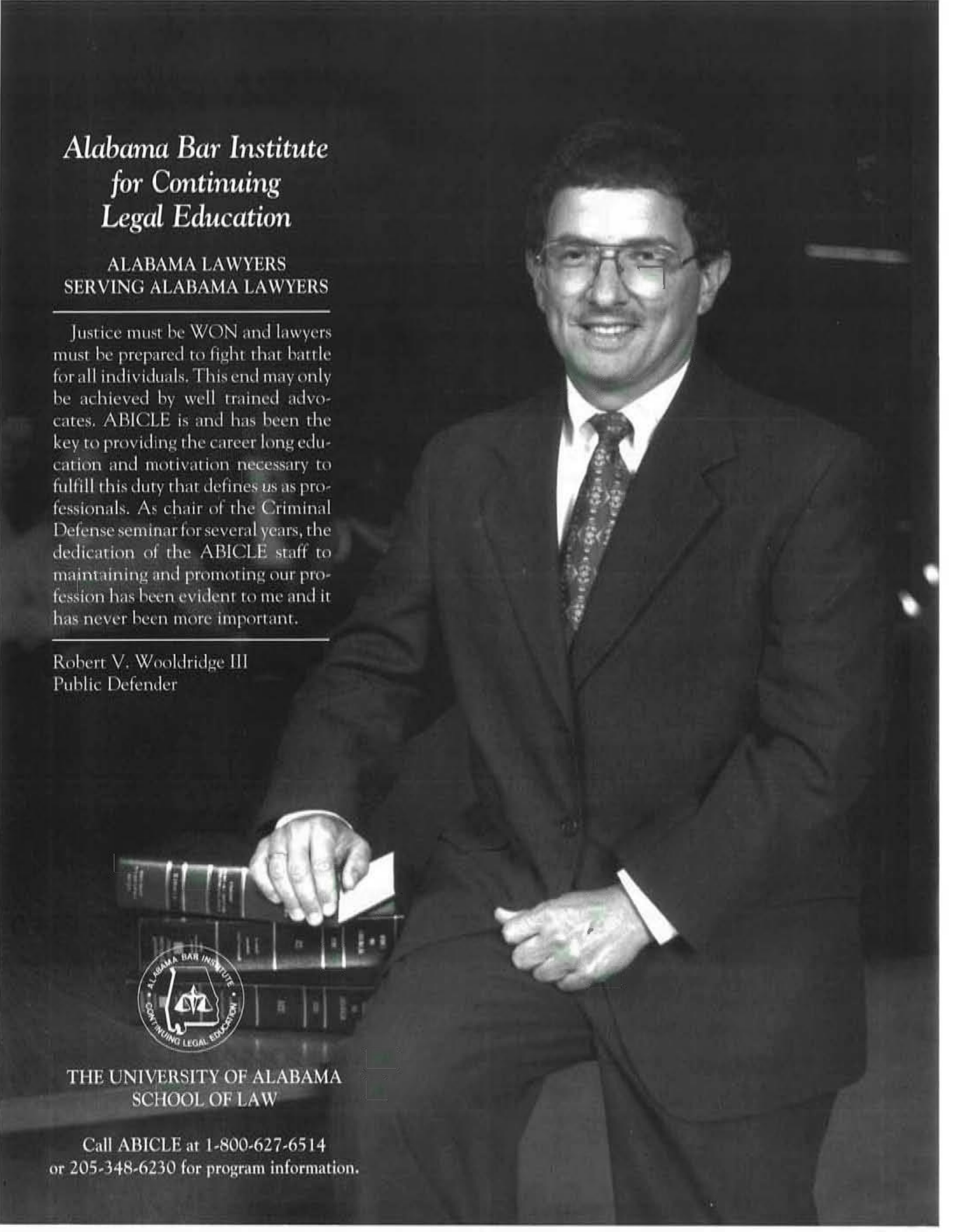

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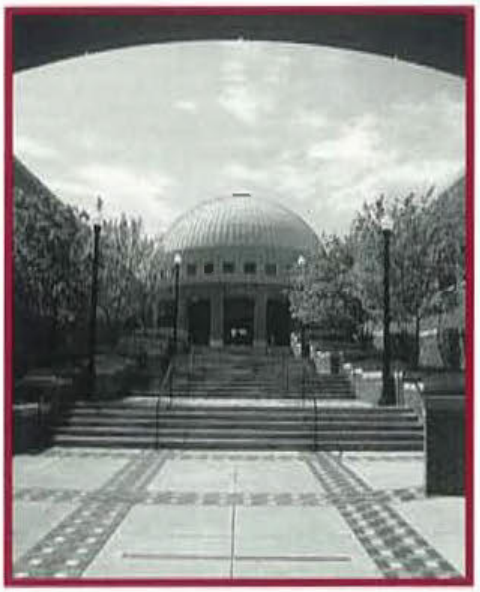

The Alabama Lawyer

Vol. 60, No. 5 July 1999

On the Cover

Birmingham Civil Rights Institute. Dedicated on November 15, 1992, the Birmingham Civil Rights Institute is a community's commitment to those courageous individuals who walked to freedom. It is a center for education and discussion about civil and human rights issues. The Institute's projects and services promote research, provide information and encourage discussion on human rights in America and around the world.

—Photo by Paul Crawford, JD, CLU

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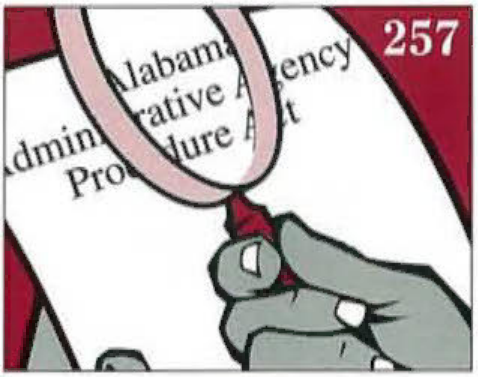

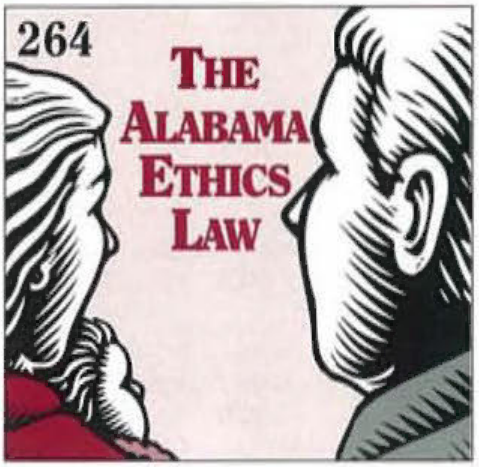

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President's Page

By Vic Lott

Final Thoughts

Vic Lott

When I look back on my year as president I am struck by the fact that our state bar is more relevant and more vibrant than at any time in its history. I have written at length during my year about the many challenges facing lawyers and our profession, and the quickening pace of change. These challenges are both institutional and individual, in that the ever-increasing demands of our profession are taking a greater toll on lawyers and their personal lives than ever before. This is not to say that most lawyers in Alabama are unhappy or dissatisfied with their practices and their profession, because our recent survey data indicates to the contrary. In fact, most of the practicing lawyers in Alabama enjoy their work and most clients have a great deal of respect for their own personal attorney, even though many of those same individuals would severely criticize the profession as a whole. I believe this dichotomy in and of itself has heightened the pressure on lawyers not only to perform in their jobs on a daily basis, but also to try to please the public and improve the perception of our profession.

I know that I am "preaching to the choir" when I tell you that through all of the criticism the fact is that lawyers in Alabama have been and will continue to be a positive and progressive force, and a source of dynamic leadership in every area of our state. There is no doubt that our lawyers are among the most generous and community-minded citizens in all of the towns and cities that they serve throughout Alabama. In addition to donating over $30 million a year in the value of pro bono services to the poor and indigent in this state, lawyers contribute countless thousands of additional hours of service to various not-for-profit boards and organizations ranging from YMCAs and Boys and Girls clubs to arts and educational organizations. One wonders how these generous, dedicated community leaders and volunteers can don the role, en masse, as a Prince of Darkness by day. Of course, we know that this is not the case. Lawyers by training and experience are dedicated, selfless, focused and successful in serving the needs of their families, their clients, their communities and the public at large. In this heyday of leadership by public opinion poll, true service still means doing the right thing, the necessary thing, and not necessarily the popular thing. From defending accused murderers and rapists, to advocating the rights of consumers and the less fortunate, lawyers are often called upon to swim upstream. When necessary we do it well and we should be proud that we are willing, and that our state and federal constitutions give us the right and the ability. As an organization whose mission and purpose is to serve the profession and to ensure that our profession serves the public, your state bar is focused on the challenges, and prepared to lead the bar of the State of Alabama into the 21st century. I am proud to have played a small part. ■

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The Cumberland School of Law at Samford University is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our educational seminars during the 1998-1999 academic year. We gratefully acknowledge the contributions of the following individuals to the success of our CLE programs.

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Samford University

Executive Director's Report

By Keith B. Norman

KUDOS! H.B. 53 Becomes Law

Keith B. Norman

After many tries, hourly compensation for attorneys appointed to represent indigent defendants will increase. Governor **Don Siegelman** allowed this bill to become law at the conclusion of the regular session of the legislature.

While H.B. 53 received the attention of the media writers because of the included compensation increase for judges and district attorneys, little attention was given to other aspects of this comprehensive legislation including indigent defense. I have highlighted what this law will accomplish.

Effective immediately are:

- Increases from $40 to $50 per hour for time in court and
- Increases from $20 to $30 per hour for time out-of-court.

Effective October 1, 2000 the:

- In-court rate is increased from $50 to $60 and
- Out-of-court rate is increased from $30 to $40.

The law sets new caps on total fees except in capital cases or life without parole, for which there will be no limit on in-court time. Fees are limited as follows:

- Class A felony–$3,500;
- Class B felony–$2,500;
- Class C felony–$1,500;
- Juvenile cases–$2,000;
- All other cases–$1,000; and
- Capital offense cases or a charge that carries a possible sentence of life without parole–no limit.
- A court may, upon a finding of good cause, approve fees in excess of these limits.
- The per-hour payment on appellate cases increases from $40 to $50 upon enactment and from $50 to $60 effective October 1, 2000. The total payment for an appeal is increased from $1,000 to $2,000.
- Hourly payments are increased in post-conviction remedy phase for in-court and out-of-court time same as above.
- The hourly overhead expense remains in effect.

An important feature of this legislation that received no attention in the media is the creation of the "Advanced Technology and Data Exchange Fund." Moneys from this legislation placed in this fund can be used for activities related to the administration of justice, including the use of credit and debit cards and electronic fund transfers for collection and distribution of court-ordered moneys authorized under this legislation. These funds will also be used to improve the collection of court costs, fines, child support and other court-ordered moneys.

Another important aspect of this legislation is the funding for the supreme court to establish a statewide coordinator of *pro bono* services and a commission on professionalism. Many states have similar programs and this legislation will allow our state to join the mainstream in these two important areas.

Many of you wrote letters and called legislators to urge the passage of H.B. 53. This grassroots effort was very crucial to the passage of this bill. The hard work of **Joel Williams** of Troy, chair of the Indigent Defense Committee this year, and the entire committee for the last several years to increase indigent defense compensation finally paid off this year. We owe a debt of gratitude to the bill's sponsors in the House, Speaker Pro Tem **Demetrius Newton** of Birmingham, Judiciary Chairman **Bill Fuller** of LaFayette and Representative **Pat Jones** of Huntsville, who steered this bill through safe passage in the House. The bill passed convincingly in the House and I encourage you to thank the bill's three sponsors, as well as Speaker **Seth Hammett** and the other

members of the House who supported this bill. The following lawyers, who are members of the House, also deserve a special word of appreciation: **Marcel Black**, **Mark Gaines**, **Ken Guin**, **Howard Hawk**, and **Mike Rogers**.

You should also thank Senator **Pat Lindsey** of Butler, chair of the Economic Expansion and Trade Committee, for seeing this bill out of committee in the Senate. Lt. Governor **Steve Windom** and President Pro Tem **Lowell Barron** were instrumental in H.B. 53's overwhelming passage in the Senate as were many other Senators. Senators who are also lawyers and deserve a thank-you include: **Roger Bedford**, **Ted Little**, **Charles Langford**, **Curt Lee**, **Wendell Mitchell**, **Hank Sanders**, **Phil Poole**, and **Rodger Smitherman**.

Finally, Governor **Don Siegelman** deserves our sincerest thanks for allowing H.B. 53 to become law despite intense pressure to kill the bill. Governor Siegelman's good vision allowed him to see the bill for more than just a "judicial pay bill" as the editorial writers tagged it. All of the elements of this bill are important and Governor Siegelman exhibited great leadership by allowing H.B. 53 to become law. Thank you Governor! ■

ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?

Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

Maybe they're telling you it's none of your business.

It is.

People entrenched in alcohol or drug dependencies can't see what it is doing to their lives.

You can.

Don't be part of their delusion.

Be part of the solution.

For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 395-0807. All calls are confidential.

Cumberland School of Law

Continuing Legal Education
Fall 1999 Schedule

September	10	Developments and Trends in Health Care Law 1999
	17	Prosecuting and Defending DUI Cases in Alabama Courts
	24	Probate Practice Seminar
October	1	10th Annual Bankruptcy Law Seminar
	8	Managing Today's Law Practice: Law Firm Breakup, Technology, Avoiding Malpractice
	15	Selecting and Influencing Your Jury with *Susan E. Jones*
	22-23	Fundamental Lawyering Skills
	29	Y2K Litigation
November	5	13th Annual Workers' Compensation Seminar
	11	Choice of Business Entity – Of Partnerships, LLCs and Corporations
	19	The Truth, The Whole Truth, and Nothing But The Truth with *Stephen D. Easton*
December	3	Persuasive Legal Writing featuring *Steve Stark*
	9	Employment Law Update
	10	"Hot Topics" in Civil Litigation - Mobile
	17	"Hot Topics" in Civil Litigation - Birmingham
	29-30	CLE By The Hour

A brochure describing the course content in detail will be mailed approximately six weeks prior to the seminar. If you do not receive a brochure for a particular seminar let us know by calling CLE at 726-2391 or 1-800-888-7454, e-mailing us at lawcle@samford.edu, or visiting our website at http://cumberland.samford.edu. Additional programs may be added to this schedule.

Samford University

LEGAL ASPECTS of DIVORCE

...offers options and choices involved in divorce

ALABAMA STATE BAR
Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and local bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available from the Alabama State Bar for distribution by local bar associations, under established guidelines.

Brochures

Law As A Career **$10.00 per 100** **Qty. _____ $ _____**
...opportunities and challenges of a law career today

Lawyers and Legal Fees **$10.00 per 100** **Qty. _____ $ _____**
...a summary of basic information on common legal questions and procedures for the general public

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...covers aspects of estate planning and the importance of having a will

Legal Aspects of Divorce **$10.00 per 100** **Qty. _____ $ _____**
...offers options and choices involved in divorce

Consumer Finance or "Buying on Time" **$10.00 per 100** **Qty. _____ $ _____**
...outlines important considerations and provides advice on financial matters affecting the individual or family

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...provides an overview of the mediation process in question-and-answer form

Acrylic Brochure Stand **$5.00 each** **Qty. _____ $ _____**
...individual stand imprinted with individual, firm or bar association name for use at distribution points
One stand per brochure is recommended.

Name to imprint on stand: _____

Mailing Address

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Subtotal $ _____

Shipping & Handling $ 5.00

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Please remit *CHECK OR MONEY ORDER MADE PAYABLE TO THE ALABAMA STATE BAR*
for the amount listed on the TOTAL line and forward it with this order form to:
Susan H. Andres, Director of Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101, (334) 269-1515

BAR BRIEFS

• **Joseph B. Mays, Jr.** of Birmingham has been re-elected as vice-chair of the Alabama Educational Television Foundation (AETF), the governing body of Alabama Public Television. The AETF was founded in 1982 by the Alabama Legislature to help raise private funds for Alabama Public Television. Mays is a partner in the firm of Bradley, Arant, Rose & White in Birmingham.

• A legal education program designed by **Gregory S. Cusimano** of Gadsden, Alabama and David Wenner of Phoenix, Arizona won an "Award of Excellence in Education Certificate for 1998." The honor was given by the American Society of Association Executives in Washington, D.C. The Program, "Overcoming Juror Bias," won in the single seminar program category. Cusimano, a Diplomat in Trial Advocacy, is a member of the firm of Cusimano, Keener, Roberts & Kimberley. ■

How do we improve the image of the legal profession today?

Our answer is "One lawyer at a time."

Winner of a 1997 Public Relations Council of Alabama Merit Award and a prestigious 1998 TELLY award for video production, "To Serve The Public" is designed for use in speaking to civic and community groups, including schools. Every local bar association in the state has received a free copy of the video presentation and 300 brochures. Contact your local bar association president or call the ASB at (334) 269-1515 for additional copies or information. This complete public service video presentation includes: the eight-minute video; a handbook of speech points; and informational brochures for the audience. (NOTE: TV and radio announcements have been excerpted from the video and are now being shown across the state—look and listen for them in your community and encourage your local stations to air them!)

TO SERVE

THE PUBLIC

YES, I volunteer to present or to help schedule a presentation of "TO SERVE THE PUBLIC" to groups in my area. Contact me to make arrangements!

NAME _____

BAR ASSOCIATION _____

PHONE OR E-MAIL _____

MEMORIALS

Karl T. Tyree, Jr.

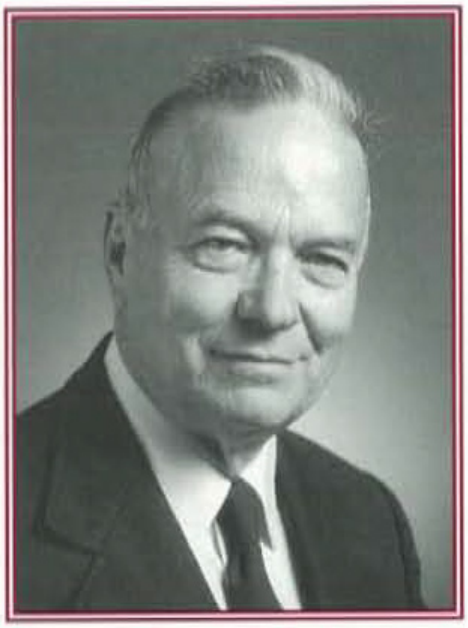
Karl T. Tyree, Jr., 73, of Florence, died October 29, 1998. Mr. Tyree was born in Florence and attended the Kilby Training School, Coffee High School and Florence State Teachers College. He was an Eagle Scout and as an adult would help the Scouting movement. He attended Auburn University where he was a member of Phi Delta Theta Fraternity. He served in the U.S. Army infantry during World War II and then graduated from the University of Alabama School of Law.

Mr. Tyree was a lifelong member, elder and trustee of the First Presbyterian Church, Florence. He has been a member of the Jr. Chamber of Commerce and the Exchange Club of Florence. He had been a law partner with Mims Rogers in the firm of Rogers & Tyree and was a member of the Alabama State Bar.

He served as executive director of the Florence Housing Authority from 1955 to 1990. He served in many offices and was a life member of S.E.R.C. and N.A.H.R.O.

Mr. Tyree is survived by his wife, Freddie Richardson Tyree; sons Will Tyree and Robert Tyree and wife Rhonda; daughters Clyde Tyree Cook and husband Bill and Jane Tyree Guin and husband Dan; and numerous grandchildren, nieces and nephews.

–Florence TimesDaily



Keener Tippins Blackmarr

Whereas, Keener Tippins Blackmarr, a long-time, respected, and well-liked member of the Mobile Bar Association, departed this life on September 2, 1998, at the age of 81 years; and

Whereas, the Mobile Bar Association desires to honor his name and perpetuate his memory;

Now, therefore, be it remembered that Keener Tippins Blackmarr was born on June 2, 1917, in Brewton, Alabama, and grew up in Gulfport, Mississippi, where he graduated from Gulfport High School. Kenner attended the University of Alabama, where he received his A.B. in 1939 and his law degree in 1941.

Following his graduation from law school, he served four and a half years in the United States Army during World War II, receiving five Battle Stars. Three of those years were served in England, Africa and Italy, handling claims in the Judge Advocate General's Corps.

After the war, in 1945, he began his law practice with the firm of Hand, Arendall, Bedsole, Greaves & Johnston. He left that firm in 1947 to open his own office. In 1954, he was appointed an Assistant U.S. Attorney and served as such until 1959, when he resigned that position and went back to private practice. Among the lawyers he practiced with at various times were Sam Stockman, Bill Saliba and Alice Meadows. Keener is remembered for having high standards for his legal practice, for having empathy and concern for people, for being generous with his time, for being willing to represent anyone with a just cause, for being an innovator (he was one of the first lawyers to move his office to the western part of town, opening his office at Bel Air Mall in 1966), and for having a wide variety of interests, including opening and running a successful restaurant. He made it some of his personal rules to always talk to other lawyers on the telephone when they called him, as he recognized that they were as busy as he was, and to return telephone calls before the end of the day they were received.

During one period of his law practice, he also served as a judge in the City of Mobile's Traffic Court. In 1970, he accepted a job as general counsel with Jack R. Taylor, handling the legal needs of a number of Mr. Taylor's companies, including Fact-O-Bake International and Bumper Service Corporation.

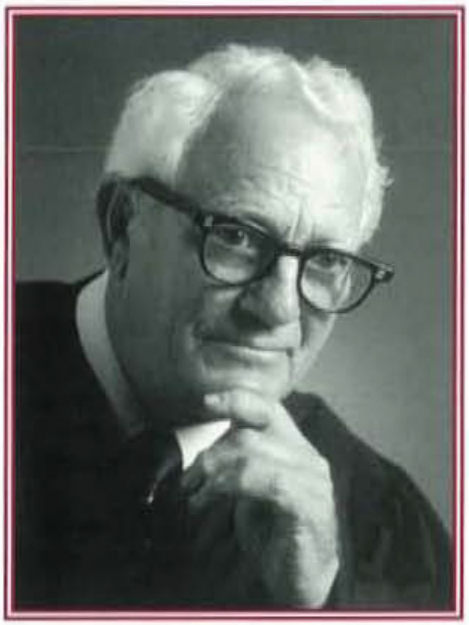
Keener was a very active member of Dauphin Way Methodist Church, where he taught Sunday School and served on the Official Board.

He was also very active in civic affairs. He was a former president of the Mobile Child Day Care Association and was a member of the Civitan Club, where he supported all of its projects and helped run the Mobilian of the Year Program. He was a Mason and a member of the Loop Lions Club.

Keener was very dedicated to his family. He is survived by his wife of 56 years, Mary Lillie Echols Blackmarr; two daughters, Virginia Blackmarr

Voght of Alexandria, Virginia, and Anna Blackmarr James of Birmingham, Alabama; and seven grandchildren.

–Stova F. McFadden, president, Mobile Bar Association



Judge Thomas F. Sweeney

Whereas, the Mobile County Bar Association wishes, on this date, to honor the memory of Judge Thomas F. Sweeney, a distinguished retired jurist and member of this association, who died on June 8, 1998, and

Whereas, the Mobile Bar Association further desires to memorialize his career and to recognize his many contributions to our profession and to this community;

Now, therefore, be it remembered:

Judge Thomas F. Sweeney was a native and lifelong resident of Mobile. He graduated from the old Spring Hill High School in 1935, and then graduated *summa cum laude* from Spring Hill College in the class of 1939. Following that accomplishment, he entered Georgetown University Law School and was graduated *cum laude* in 1943. Each institution selected him for membership in its highest academic honor society. The year he graduated from law school, he married Margaret Cecelia Odewalt of York, Pennsylvania. She preceded him in death in 1993.

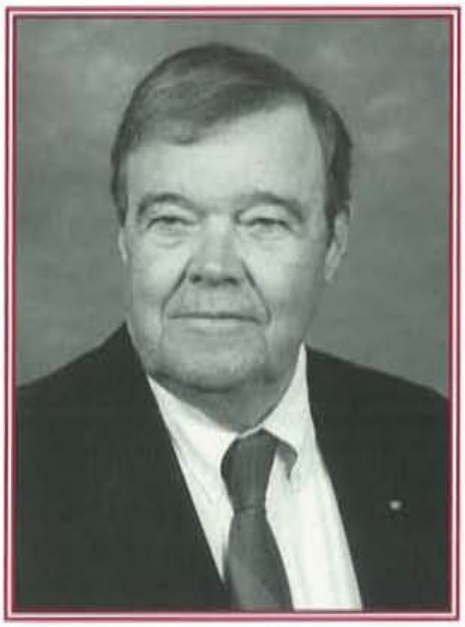
He practiced law in Mobile from 1945 until 1970, at which time he was appointed judge of the Court of General Sessions of Mobile County by Governor Albert P. Brewer. He served on that court and later on the district court until his retirement as a district court judge in 1987.

During his legal career, he taught as an associate professor at Spring Hill College, co-hosted Mobile's "Great Books" television series, and served as chairman of the board of the Catholic Maritime Club and as chairman of the parish council of St. Mary's Catholic Church. He was appointed by Governor Patterson as a Special Assistant Attorney General to help modernize the probate court deed records, and by both Governors Wallace and Patterson as an Honorable Lieutenant Colonel.

In his "spare time," he successfully raised 11 children, Jody Sweeney Coombs of Birmingham; Antonia Maureen Sweeney of Mobile; Jean Marie Sweeney, Metairie, Louisiana; Timothy Sweeney of Atlanta; Daniel Sweeney of Baltimore; Donald Sweeney of Loxley; Gregory Sweeney; Robert Sweeney and Thomas I. Sweeney of Mobile; Joseph Sweeney of Grand Junction, Colorado; and Mark Sweeney of Huntsville, Alabama; 29 grandchildren; and two great-grandchildren.

Judge Sweeney was widely regarded as an outstanding district court judge, noted for his fairness and judicial temperament.

–Stova F. McFadden, president, Mobile Bar Association



Cecil A. Chason

Cecil A. Chason, dean of Alabama Municipal Law, was born in Chatom, Alabama in Washington County on July 11, 1914, and passed away on April 17 in Baldwin County.

Chason graduated from Spring Hill College, where he played football, and attended the University of Alabama School of Law where he received his law degree in 1940. He served as a Naval officer during World War II and after the war opened his law office in Foley, Alabama. His law practice was to continue for 55 years and include service as city attorney for Gulf Shores, Summerdale and Elberta and counsel for area banks and South Baldwin Hospital. He served his community in many ways, including as director and president of the South Baldwin Chamber of Commerce and was the recipient of the Paul Harris Fellow Award and Free Enterprise Person of the Year Award. This long service and his dedication to Foley, as well as his knowledge and skill, earned Cecil Chason the unofficial title of dean of Alabama Municipal Law.

Cecil Chason will be *greatly* missed by his friends and fellow attorneys and he will be remembered by so many Baldwin countians he helped. My family was among those he assisted many years ago after we lost my little sister in tragic accident. He provided advice and counsel and never sent a bill for his services. He gave me an opportunity to begin my legal career by hiring me as an associate attorney 15 years ago and being my mentor during all of my endeavors. There are many others who have been helped and supported by his generosity and concern.

Chason is survived by his wife of 62 years, Dorothy, three daughters, a sister, seven grandchildren and eight great-grandchildren.

–Judge Pamela Baschab, Alabama Court of Criminal Appeals

Roderick Beddow, Jr.

Whereas, after 72 years on this earth, Roderick Beddow, Jr. was called by his maker to his eternal reward on May 13, 1998. The son of a great lawyer, Roderick Beddow, Sr., Roderick Beddow, Jr. achieved a rare station in life in that he, as his father, was recognized as a great lawyer; and,

Whereas, his commitment to the cause of righting a wrong or rectifying injustice was second to none and he devoted his life to ensuring that justice would prevail; and,

Whereas, Roderick Beddow, Jr. served as president of the Birmingham Bar Association in 1986 and was honored as the Birmingham Bar Association's Outstanding Lawyer of the Year in 1991. On that occasion it was said that no cause could have a better advocate, no client could have a better attorney and no person could have a better friend than Roderick Beddow, Jr.; and,

Whereas, despite the infirmities caused by his illness, he never permitted himself to be anything other than tenacious in his profession and in his commitment to life. On the occasion of his memorial service, the nurses who accompanied him on the journey created by his last illness spoke of him with humor and reflected on the inspiration he was to each of them. He would have considered himself honored by their words and by the words spoken by others on that occasion; and,

Whereas, in addition to his service to the legal profession, Roderick Beddow, Jr. served as a member of the Jefferson County Personnel Board for ten years and was active and prominent in other civic and professional matters. In addition to the innumerable host of friends who mourned his passing he left behind a loyal and devoted wife, Joann; two children, Mrs. Daniel Heidrich and Roderick Beddow, III; a stepson, Scotty Greene; stepdaughters, Darah Dufresne and Leslie Yarbrough; and two sisters, Mrs. Ernesto Cook and Mrs. Royal Hatch; and,

Whereas, while we recognize that he was one of the few of whom it can be said that the void created by his passing will never be filled, we are left with the inspiration that was created by his life here on earth; and,

Whereas, it is well that we pause and reflect on this life which was so important to our own, mindful that such reflection can do no less than contribute to a better tomorrow for each of us; and,

Whereas, this Resolution is offered as a record of our admiration and affection for Roderick Beddow, Jr. and of our condolences to his family.

–Brittin T. Coleman, president, Birmingham Bar Association

Alfred G. Swedlaw

Whereas, the Birmingham Bar Association lost one of its distinguished members through the death of Alfred G. Swedlaw on January 6, 1998; and,

Whereas, a Birmingham native, Alfred G. Swedlaw took his undergraduate degree at Vanderbilt University and received his law degree from Harvard University in 1939. He practiced in Birmingham with the firm of Leader, Tenenbaum, Perrine & Swedlaw. More recently, he practiced with the firm of Johnston, Barton, Proctor, Swedlaw & Naff. He was an excellent lawyer, legal scholar and draftsman, teacher of young lawyers, and valued friend. He was not a bad fisherman and tennis player and was quite a baseball fan; and,

Whereas, Alfred G. Swedlaw is survived by his wife, Ruth, daughters Shelly and Patricia, and son Henry; and,

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

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association, at its regular meeting assembled:

1. This Executive Committee greatly mourns the passing of Alfred G. Swedlaw and is profoundly grateful for the example that his long and useful life has brought to the membership, both individually and collectively.
2. That the surviving members of the family of Alfred G. Swedlaw are hereby assured of our deep and abiding sympathy.
3. That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed member.
4. That copies of this Resolution be furnished to his wife, daughters and son as our expression of deep sympathy.

–Brittin T. Coleman, president, Birmingham Bar Association

Jack Gideon Paden

Be it resolved by the Executive Committee of the Birmingham Bar Association that:

Whereas, Jack Gideon Paden was born in Bessemer, Alabama in 1922 and graduated from Birmingham Southern College in 1947. He received his bachelor's of law and doctor of jurisprudence degrees from the University of Virginia, where he served as editor of the *Virginia Law Review*. He also attended Columbia University and the Northwestern University Trust Banking School, and served as a captain in the United States Naval Reserve; and,

Whereas, Jack Gideon Paden practiced law in Bessemer, Alabama up to the time of his death on October 27, 1998. He was a member of the Bessemer, Birmingham, Alabama and American bar associations. He was a Fellow of the International Academy of Trial Lawyers and a member of the American College of Trial Lawyers. He

also served as executive vice-president and chief executive officer of the Trust Department of AmSouth Bank; and,

Whereas, Jack Gideon Paden was active in numerous associations throughout his life, including serving as chairman of the Board of Hill Crest Foundation, president of the Birmingham Southern College National Alumni Association, president of the Alabama Ballet Company, board member of the Alyce B. Stephens Performing Arts Center, and a member of the board of the American Counsel for the Arts; and,

Whereas, Jack Gideon Paden also gave freely of his time and served as a member of the Board of Directors for the National Alliance for Research on Schizophrenia and Depression and Director of F&M Bank Corporation, former president of Town & Gown Theater and a supporter of the Theater in Birmingham. He was also cited by the Alabama Association of Independent Colleges and Universities and the Counsel of the Advancement of Private Colleges in Alabama for his dedication to the cause of improving education. He was further highly honored by Birmingham Southern College inferring upon him the degree of doctor of laws *honoris causa*. He was also an active member of Mountain Brook Baptist Church; and,

Whereas, Jack Gideon Paden is survived by his wife, Marjorie; daughter Lisa and son-in-law Rad Gaines; two grandsons, Dewar and Paden Gaines; and a host of other relatives and close friends.

–Brittin T. Coleman, president, Birmingham Bar Association

R. B. Jones

hero: 1. "an illustrious warrior" 2. "a man admired and emulated for his achievements and qualities" 3. "the central figure in an event or period" (See R. B. Jones)

Whether serving with the United States Marine Corps in World War II as part of the Invasion Force of Iwo Jima, on the battlefield in Korea or in the Circuit Court for the Tenth Judicial Circuit, R. B. Jones was a hero. He was consulted by lawyers with no experience and by lawyers who had infinite experience. His opinion, both as to the law and as to life, was solicited by everyone, received with respect, and given with love. His advice and comments have been and will continue to be quoted by lawyers seeking to illustrate a point, advance a cause or provide wisdom.

Notwithstanding the high esteem in which he was held by others, he was modest in his description of his own achievements and humble in his assessment of his own success. Clients respected and benefited from his counsel. Judges and lawyers enjoyed his commitment to the law and his tenacious representation of his clients, and women loved him.

Whereas, it is well that we pause and reflect on this life which was so important to our own, mindful that such reflection can do no less than contribute to a better tomorrow for each of us; and,

Whereas, this resolution is offered as a record of our admiration and affection for R. B. Jones and of our condolences to his family.

Now, therefore, be it resolved by the Executive Committee of the Birmingham Bar Association at its regular meeting assembled:

1. This Executive Committee greatly mourns the passing of R. B. Jones, and is profoundly grateful for the example that his long and useful life brought to the members of the Birmingham Bar Association, both individually and collectively.
2. That the surviving members of the family of R. B. Jones are hereby assured of our deep and abiding sympathy.
3. That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother.
4. That copies of this Resolution be furnished to his family as our expression to them of our deepest sympathy.

–Brittin T. Coleman, president, Birmingham Bar Association

Honorable Jerrilyn Blankenship
Huntsville
Admitted: 1976
Died: April 26, 1999

Joe Creel
Coral Gables, Florida
Admitted: 1934
Died: December 26, 1998

Frank Michael Ford
Tuscaloosa
Admitted: 1975
Died: April 25, 1999

Samuel Spartan Hays, Jr.
Birmingham
Admitted: 1952
Died: February 28, 1999

Byron Roswell Hess, III
Mobile
Admitted: 1962
Died: April 21, 1999

Alan David Levine
Birmingham
Admitted: 1967
Died: March 2, 1999

Roy Harding Phillips
Phenix City
Admitted: 1949
Died: April 4, 1999

Ronald Philip Slepian
Mobile
Admitted: 1957
Died: February 16, 1999

Edgar A. Stewart, Jr.
Selma
Admitted: 1932
Died: December 29, 1998

ROAD MAPS

DIRECTIONS FOR THE LEGAL PROFESSION

"The Image Problem Is Ours. TV Didn't Make It. The Movies Didn't Make It. We Did."

Douglas O'Brien, former chair, New York State Bar Association Public Relations Committee, addresses the tough topic of image and lawyer-bashing in a direct, practical and upbeat manner. You will definitely leave this session as a better lawyer. And that's no joke!

"There Is A Place At The Table For Us All."

The ASB Task Force On Minority Participation showcases the challenges of our legal profession today and how specialty and local bars can work with the ASB on issues important to all Alabama attorneys. Program highlights include: *"Miles To Go: Progress of Minorities in the Legal Profession"*; *How to Get and Retain Corporate Clients"*; and a luncheon with guest speaker James O. Cole, esq., past president of the National Bar Association.

"One Of The Very Few, Really Funny, Inspiring Men In America Today!"

Mark Mayfield continues to earn accolades for his high-content seminars and stand-up comedy. He received rave reviews at his previous appearance before the Alabama State Bar and returns by popular demand to help Alabama lawyers *"Keep Balanced!"*

ALABAMA STATE BAR

1999 ANNUAL MEETING

July 14-17, 1999 • Birmingham, Alabama

Sheraton Birmingham Hotel (Downtown)

About Members, Among Firms

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish address changes for firms or individual practices. *It will continue* to publish announcements of the formation of new firms or the opening of solo practices, as well as the addition of new associates or partners. Please continue to send in address changes to the membership department of the Alabama State Bar.

About Members

R. Scott Golden announces the opening of his office at 109 Company Street, Suite 210, Wetumpka, 36092. Phone (334) 567-9191.

Klari B. Tedrow announces the opening of her practice at The Benson Building, 1824 29th Avenue, South, Birmingham, 35209. Phone (205) 871-8084.

Archie C. Lamb, Jr. announces the formation of **Law Offices of Archie Lamb, LLC**. Offices are located at 2017 2nd Avenue, North, Suite 200, Birmingham, 35203. Phone (205) 324-4644.

Heather Crumpton announces the formation of **The Law Firm of Heather Crumpton** with offices at Financial Center, 505 20th Street, North, Suite 1005, Birmingham, 35255. The mailing address is P.O. Box 55881, Birmingham 35255. Phone (205) 930-9840.

Roy Lynn Vanderford announces the opening of his office at 1302 Noble Street, Suite 2-D, Anniston, 36201. Phone (256) 236-0557.

Shawn Hill-Gunter announces the opening of her office at Liberty Square, Suite 323, 7 E. 13th Street, Anniston, 36202-8022. Phone (256) 238-6200.

Christopher H. Jones announces the opening of his office at 2223 8th Street, Tuscaloosa, 35401. The mailing address in P.O. Box 1477, Tuscaloosa, 35403. Phone (205) 344-4555.

Among Firms

Williams & Cheshire announces that **Christopher A. Thigpen** has joined the firm. Offices are located at 2617 8th Street, Tuscaloosa, 35401. Phone (205) 345-7600.

Stevan K. Goozee, Lawrence T. King and **Richard F. Horsley** announce the formation of **Goozee, King & Horsley** with offices relocated at One Perimeter Park South, Suite 486, North, Birmingham, 35243. Phone (205)969-0500.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **C. Fred Daniels** and **John M. Graham** have become partners of the firm. Offices are located in Birmingham and Mobile.

Burr & Forman, LLP announces that **Richard A. Fishman, C. Read Morton, Jr., William T. McKenzie, James D. Spratt, Jr., R. Hunt Dunlap, Jr., D. Tully Hazell, Peter A. Grammas, Patricia Powell Burke, Gregory F. Harley,** and **F.A. Flowers, III** have become partners in the firm, and that **Cameron P. Turner, Stephen J. Bumgarner, James C. Stanley, III, Rebecca W. Block, Lori L. Howard, Jamie L. Moore, D. Brian O'Dell,** and **Cathleen C. Moore** have joined the firm as associates.

Pierce, Ledyard, Latta & Wasden, P.C. announces that **Abe L. Philips, Jr.** and **A. Lewis Philips, III** have joined the firm, **David P. York, Michael D. Strasavich** and **Jeffrey U. Beaverstock** have become associated with the firm, and **Thomas E. Twitty, Jr.** has joined the firm *of counsel*.

Rives & Peterson announces that **Daniel D. Sparks, David P. Condon** and **James R. Bussian** have become shareholders of the firm. **M. Alex Goldsmith** and **David L. Faulkner, Jr.** have joined the firm as associates. **Champ Lyons III, Reginald L. Snyder, Patrick S. Flynn** and **Summer H. Zulanas** also joined the firm as associates. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, 35203-2607. Phone (205) 328-8141.

Lanier, Ford, Shaver & Payne, P.C. announces that **Frank McRight, Edward E. Wilson, Jr., Jamie M. Brabston** and **P. Scott Arnston** have become members of the firm, and that **Daniel F. Beasley** and **Paul B. Seeley** have become associated with the firm. Offices are located at 200 West Court Square, Suite 5000, Huntsville, 35801.

Cherry, Givens, Peters & Lockett, P.C. announces that **Alex W. Zoghby**

has joined the firm. Offices are located at 401 Church Street, P.O. Drawer 1129, Mobile, 36633. Phone (334) 432-3700.

Michael L. Fees and **C. Gregory Burgess** announce the formation of **Fees & Burgess, P.C.** Offices are located at 200 Clinton Avenue, West, Suite 507, Huntsville, 35801. Phone (256) 536-0095.

Maddox, Austill, Parmer & Lewis, P.C. announces that **Joseph E.B. Stewart** has joined the firm as an associate. Offices are located Lakeshore Park Plaza, Suite 215, 2204 Lakeshore Drive, Birmingham, 35209-6702. Phone (205) 870-3767.

Sidney C. Summey announces the addition of **Karen M. Williams** as an associate with the **Law Offices of Sidney C. Summey**. Offices are located at 2112 11th Avenue, South, Suite 219, Birmingham, 35203. Phone (205) 326-4149.

Walston, Wells, Anderson & Bains, LLP announces that **Jerry Dean Hillman** has become a partner in the firm and that **Benjamin E. Waller, Alan M. Warfield** and **Tracy H. Beauchamp** have joined the firm as associates. Offices are located at 500 Financial Center, 505 20th Street, North, Birmingham, 35203. Phone (205)251-9600.

Riezman & Blitz, P.C. announces that **Richard N. Tishler** has joined as a principal with the firm. Offices are located at 7700 Bonhomme, 7th Floor, St. Louis, Missouri, 63105. Phone (314) 727-0101.

Nathan & Associates, P.C. announces that **Jason A. Stoves** has joined the firm as an associate. Offices are located at Suite 300 Massey Building and the mailing address is P.O. Box 1715, Birmingham, 35201-1715. Phone (205) 323-5400.

Brown, Hudgens, P.C. announces that **Brian W. Miller** became associated with the firm. Offices are located at 1495 University Boulevard, P.O. Box 16818, Mobile, 36616-0818. Phone (334) 344-7744.

Lusk, Fraley, McAlister & Simms, P.C. announces that **Lea Bone** has joined the firm as an associate. Offices are located at Suite 1700, AmSouth/Harbert Plaza, 1901 Sixth Avenue, North, Birmingham, 35203. Phone (205) 323-7100.

American Employee Leasing, Inc. announces that **Amie Remington** has joined the company as general counsel. Offices are located at 9160 Roe Street, Pensacola, Florida 32514.

Rick D. Francis & Associates, P.C. announces that **Charles C. Dawson** has become an associate with the firm. Offices are located at 2015 First Avenue, North, Birmingham, 35203. Phone (205) 254-3800.

Kenneth Ingram, Jr. & Associates, P.C. announces that **Catherine Moncus** and **Jeremy Knowles** have become associates. Offices are located at 1055 Cherokee Road, Alexander City, 35010. Phone (256) 212-9700.

Constangy, Brooks & Smith, LLC announces that **Dana L. Thrasher** has joined the firm. Offices are located in Birmingham, Atlanta, Columbia, Nashville, Arlington and Winston-Salem.

Frank S. Buck, P.C. announces that **Lisa Frost Brown** has joined the firm. Offices are located at 2160 14th Avenue, South, Birmingham, 35255. Phone (205) 933-7533.

James T. Sasser, Lynn McCain, William B. Ogletree and **Lee T. Ozmint** announce the formation of **McCain, Ogletree, Sasser & Ozmint, P.C.** Offices are located at The Printup Building, 350 Locust Street, Second Floor, Gadsden, 35901. The mailing address is P.O. Box 1099, 39502. Phone (256) 547-0023.

Offshore Tool & Energy Corporation announces that **Kathy P. Sherman** has become general counsel. Offices are located at 300 St. Francis Street, P.O. Box 1352, Mobile, 36633-1352. Phone (334) 432-4472.

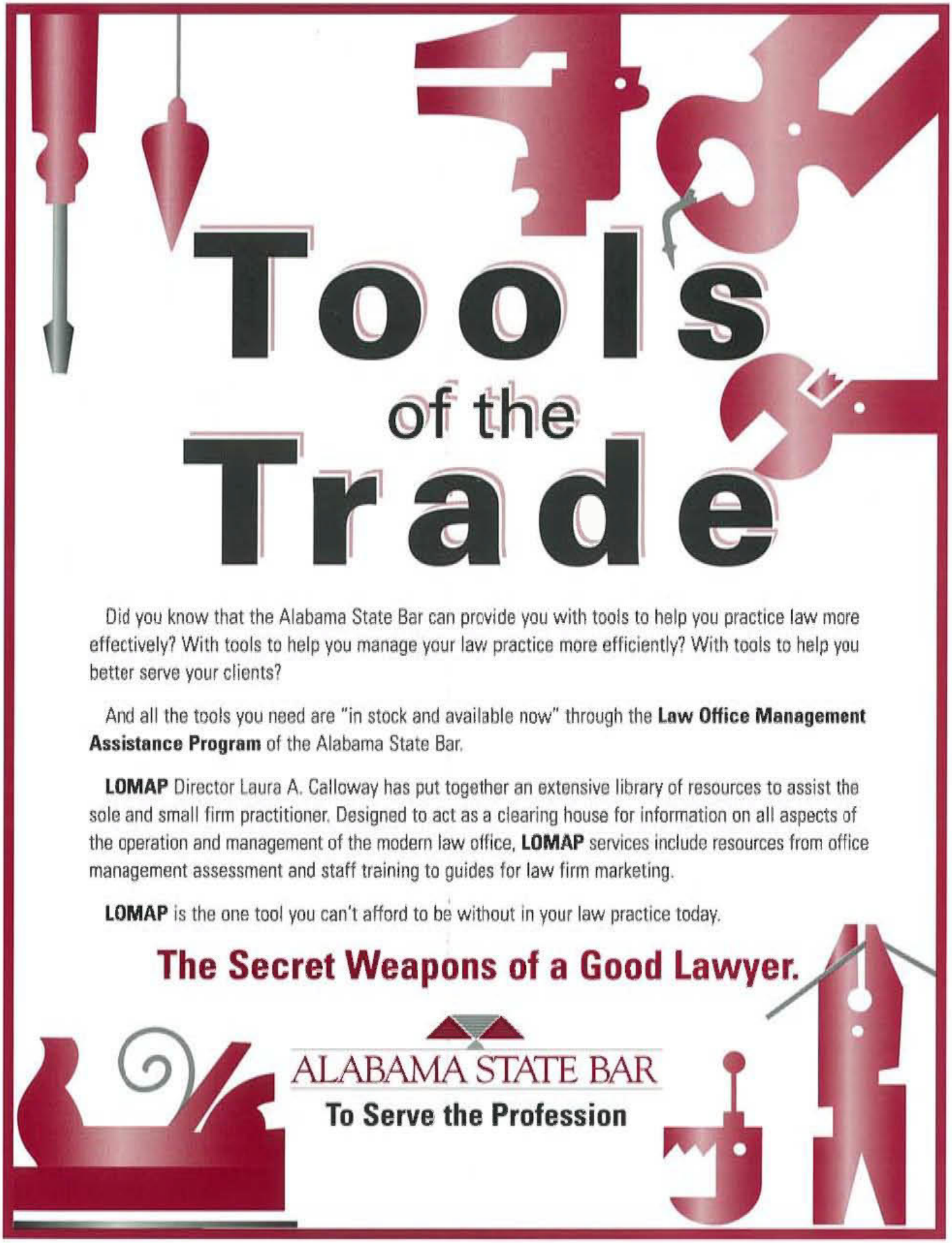
Paula McCreless Bassham and **Timothy L. Shelton** announce the formation of **Bassham & Shelton**. Offices are located at 302 2nd Avenue, S.E., Suite B, Decatur, 35601. Phone (256) 351-8827.

Haygood, Cleveland & Pierce LLP announces that **Gerald A. Mattson, Jr.** has joined the firm as an associate. Offices are located at 611 E. Glenn Avenue, Auburn, 36830. Phone (334) 821-3892.

Kenneth W. Underwood, Jr. and **Lucie Underwood McLemore** announce the formation of **Underwood & McLemore LLP**. Offices are located at 200 S. Hull Street, Montgomery, 36101. Phone (334) 263-3034.

McDonald, Fleming, Moorhead & Ferguson announce that **William J. Green** and **J.D. Smith** have become partners in the firm and the firm name has changed to **McDonald, Fleming, Moorhead, Ferguson, Green & Smith**. The firm also announces that **Paul A. Wilson** has become associated with the firm.

The firm of **Mann & Cowan P.C.** announces that **Robert Potter** has joined the firm as an associate. ■



Did you know that the Alabama State Bar can provide you with tools to help you practice law more effectively? With tools to help you manage your law practice more efficiently? With tools to help you better serve your clients?

And all the tools you need are "in stock and available now" through the **Law Office Management Assistance Program** of the Alabama State Bar.

LOMAP Director Laura A. Calloway has put together an extensive library of resources to assist the sole and small firm practitioner. Designed to act as a clearing house for information on all aspects of the operation and management of the modern law office, **LOMAP** services include resources from office management assessment and staff training to guides for law firm marketing.

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ALABAMA STATE BAR

To Serve the Profession

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Justice Must Be Won VII: What's HOT and What's NOT!

August 12-14, 1999
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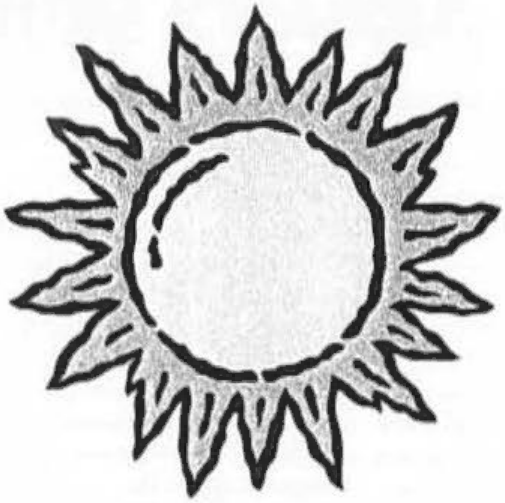
Gulf Shores, Alabama



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- Legal Research & The Internet
- Story Telling
- Cross Exam of Police officers in DUI Cases
- Cross Exam of Homicide Detectives

Faculty!

- Lee Harmon
- Robert Acton
- Kris Sperry
- Paul Whaley
- Sam Dennis
- Mark White
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- Vic Kelley
- Drew Findling
- Luncheon Keynote Speaker: Bobby Lee Cook

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The Alabama Judicial Inquiry Commission's advisory opinions are now available on the Internet. The site is posted and managed by ALALINC, the State Law Library's legal information service Web site.

If you have your own Internet account, you may connect directly to the search page for commission advisory opinions at www.alalinc.net/jic. If you connect to the Internet through ALALINC, first connect to ALALINC and then launch your Web browser. This will bring you to a welcome page that has an index with links to various Web pages along its left margin. Click on "Judicial Inquiry Commission Opinions" on this index to go to the search page for commission opinions. You may need to scroll down the index to get to the link to commission opinions.

Once you are at the search page, click on "Search Tips" if you need instructions for constructing a query to find opinions on a particular topic. Search Tips include information on subjects such as searching for multiple words in an opinion, excluding opinions containing certain words, and searching for either exact terms or stemmed variants of words.

If you already know the number of the opinion you are seeking, simply move the cursor to the beginning of the box following "Search For," type the number in the box, and hit enter or click on the Search button. (If your monitor is small, you may need to scroll down to get to the Search box.) If you are looking for an opinion by its date, type the date or partial date in the search box.

After you hit enter or click on the Search button after entering a query, a frame will appear that states the number of files (opinions) found, followed by a list of those files. Each entry on the list begins with an underlined file name that identifies the advisory opinion number, e.g., ao97-662, followed by the first five lines of the text of the opinion. To view the entire opinion, click on the underlined file name.

To return to the search result list after viewing an opinion, click on the "Back" arrow at the left end of the toolbar near the top of the screen. To return to the search page, you may either use the Back arrow again, or click on the "Judicial Inquiry Commission" title at the top of the search result frame or the "Go Back" button at the bottom of this frame.

To print an opinion, first open the full text of the opinion and then click inside the frame containing the opinion. After this, click on either the print icon on your toolbar or the print command in the File menu. The search result list may be printed in the same fashion, i.e., click in the frame containing the list and then click the print icon or the print command under File.

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Building Alabama's Courthouses

By Samuel A. Rumore, Jr.

Palacio de Justicia - Toledo, Spain

Inscription above courthouse doorway at Toledo

Spain

The early history of Alabama is the story of Spanish explorers. The earliest documented European visitors were the Spanish sailors under Alonso Alvarez Pineda who visited Mobile Bay in 1519, which was 300 years before Alabama became a state. Other Spanish explorers included Panfilo de Narvaez, Hernando DeSoto, Guido de Las Bazares and Tristan de Luna.

Because of this early Spanish influence in Alabama, which did not end until a Spanish garrison at Mobile surrendered to American forces in 1813, it is relevant to consider our heritage from this European country.

Recently courthouse author Sam Rumore and his family took a spring break trip that included several days in Spain. This trip was particularly special because the family stayed with friends in Madrid.

Each day in Spain they ventured out to a different location. At Toledo, they saw the Palacio de Justicia which was on the ancient square and across from the 13th Century Cathedral. They were not able to enter the courthouse because, true to local custom, it was closed in the early afternoon for the traditional siesta.

On another day they visited the walled city of Avila. Here they viewed the judicial building near the birthplace of St. Theresa. It is located in a 16th Century palace that was once the home of a Latin American viceroy. Among the interesting features found in this courthouse were the religious symbols that are specifically prohibited from being displayed in an American courtroom. This courthouse contained artwork and beautiful wall accessories. Also, the *court*house at Avila was originally a home with its own *court*yard.

Samuel A. Rumore, Jr.

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore served as the bar commissioner for the 10th Circuit, place number four, and is a member of *The Alabama Lawyer* Editorial Board. He is a retired colonel in the United States Army Reserve JAG Corps.

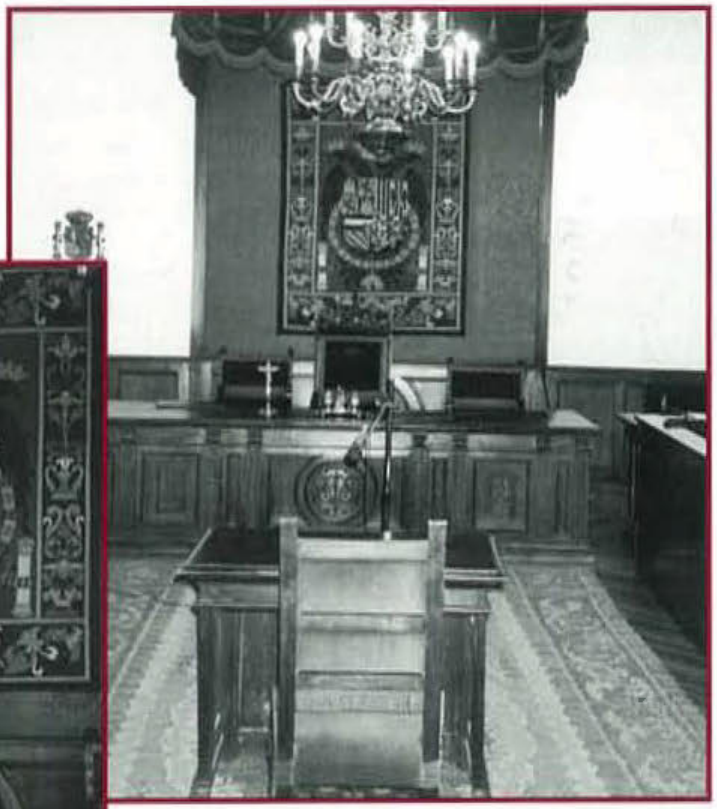
It was a tremendous experience for the family to visit Spain and to see buildings of the Spanish legal system. The regular feature *"Building Alabama's Courthouses"* will continue in the next issue of *The Alabama Lawyer.* ■

Courthouse at Avila, Spain

Artwork in Avila Courthouse

Crucifix in Spanish courtroom

(Left) Courtroom in Avila - Note religious symbol on Judge's bench



(Above) Witness Chair - Note tapestry behind Judge's bench

Courtyard within the Avila Courthouse

Criminal Court

Witness Room

LETTERS

Dear Mr. Rumore:

Being interested in history, I read your stories on Alabama courthouses, and recently read the one on Barbour County, Alabama.

So that the record is straight, I point out that the commissioner you list as Jacob Utery should be Jacob Utsey. This man was my great, great-grandfather who was born in South Carolina and moved to Barbour County. He later moved to Choctaw County and died here and is buried here. His full name was John Jacob Utsey, and he is listed in the book, *Early Settlers of Barbour County*, first edition, by Marie Godfrey. He is also listed as one of the commissioners to locate the county seat in the history of Barbour County. I enclose pages of each publication in order to verify the correct spelling of his name.

Keep up the work. Your articles are excellent.

Very truly yours,
William L. Utsey
Butler, Alabama
April 5, 1999

Dear Mr. Utsey:

Thank you for your recent letter setting the record straight that the person listed in my article on Barbour County as Jacob Utery should have been listed as Jacob Utsey. I went back to my notes to see how the mistake could have been made. My source for that particular section was Thomas McAdory Owens' *History of Alabama*. On page 118 of the book he listed the commissioners and the first one mentioned was Jacob *Utery*.

I am very happy to set the record straight and I assure you that the correct name of your ancestor, Jacob Utsey, will be included in any future publication of the Barbour County article.

Thank you for your kind words.

Sincerely yours,
Samuel A. Rumore, Jr.
April 20, 1999

Dear Sam:

Over the past several years I have enjoyed your articles about the various courthouses throughout Alabama and their historical developments. I do not recall how long you have been writing your article, however I assume that you must be getting close to the end of the 67 counties in Alabama. I thought I would pass some information along to you about another courthouse, and even though it is located outside the State of Alabama, it probably has a historical connection to the northeast part of our state.

I recently visited the New Echota State Historic Site near Calhoun, Georgia and visited the reconstructed courthouse of the Supreme Court of the Cherokee Nation.

As you probably recall, much of northeast Alabama (to include DeKalb and Cherokee counties) was part of the Cherokee Nation.

The Cherokee Nation had a system of government paralleling the United States Government and had a Supreme Court, four Circuit Courts and eight District Courts in its judicial system, as well as sheriffs to attend these courts.

I first became acquainted with this state historic site in an article that I read in the *American Bar Association Journal* in the late 1960s.

Sincerely,
Patrick H. Tate
March 30, 1999

Dear Pat:

Thank you for your letter of March 30. The information you related about the courthouse buildings of the Cherokee Nation located at the New Echota State Historic Site near Calhoun, Georgia was quite interesting. I am passing your letter on to the editor of *The Alabama Lawyer* magazine. I hope that the information will be useful to other lawyers around the state who might enjoy a visit to that particular locale.

Thank you for your interest and sharing this information with me.

Sincerely yours,
Samuel A. Rumore, Jr.
April 20, 1999

ALABAMA STATE BAR

1999 Spring Admittees

STATISTICS OF INTEREST
FEBRUARY 1999 BAR EXAM

Number sitting for exam	348	
Number certified to Supreme Court of Alabama	174	
Certification rate*	50	percent

Certification Percentages:

University of Alabama School of Law	84	percent
Cumberland School of Law	84.2	percent
Birmingham School of Law	27.4	percent
Jones School of Law	44.6	percent
Miles College of Law	7.1	percent

**Includes only those successfully passing bar exam and MPRE*

Alabama State Bar 1999 Spring Admittees

Michael Wayne Armistead
Katherine Brown Arnold
Marc James Ayers
Edward Andrew Bailey
Sheri Renee Barker
Barbara Denise Dorriety Bates
Daniel Farris Beasley
George Steven Bell, III
Raymond Lloyd Bell, Jr.
Melissa Hope Bender
Cathey Elaine Berardi
Martin Kassab Berks
Polly Rene Blalock
Irene Elizabeth Blomenkamp
Rebecca Elaine Boswell
William Louis McKinney Bross, IV
Jay W. Brown
Michele Marie Brubaker
Kerry Harmon Bryan
Janine Marie Burrell
John Edward Byrd, Jr.
Elbridge Gerry Cabaniss, III
Douglas Walter Carr
Lloyd William Carr
Wayne Carter
Thomas Wayne Cary
David Clay Cicero
Alan Bruce Clements
Kimberly Marie Clenney
Jennifer Erin Cobb
Derrick Kendall Collins
Gloria Lowell Brown Collins
John Collins
Jennifer Blaire Kunk Compton
John McKeighan Compton
Catherine Heuer Coppedge
Mark Aubrey Covin
Roy Lajuan Dancybey
Terry Lynn Danford
Larry Eugene Darby
Charles Brian Davidson
William Richard Davis
Allison Joan Hornsby Deison
Ann Ingram Dennen
Tammy Anita Denson
Ray Ellis Donaldson
Jamie DeAna Ayers Durham
John Martin Eades, Jr.
Cheryl Marie Earle
Nadine Farid
Daniel Moses Filler
Stephen Dale Fischer
Charles Glover Fisher, VI
Joseph Lee Fitzpatrick, Jr.
Eden Joanna Brown Gaines
Glenda Denise Bumpus Gamble
Tracey Dawn Gibson
Frederick Parsons Gilmore
Duane Franklin Gordon, Jr.
Brendette Laurione Brown Green
Michael Scott Green
Sonya Darlene Greene
Jose Enrique Guzman
James Edward Hall
Randy Allan Hames
Dusty Lynn Harrell
Eileen Lucille Harris
James Longmire Harrison
Walter Lee Heglar, Jr.
Andrew Arden Hothem
Katharine Aiken Huffman
Susan Amanda Cook Huffstutler
Brian Keith Jackson
Monica Elisabeth Pauli Jayroe
Marci Michelle Suggs Johns
Lucinda Byrd Johnson
Michael Patrick Johnson
Valerie Delone Dawson Judah
David Patrick Judd
Mary DuBois Krohn Kamplain
Cheryl Anderson Kidd
Keith Daniel Kirkley
Stephanie Mock Knight
Laura Elizabeth Kruck
Amanda Rose Lewis
Terrell Barr Linton
Brandon Clayton Little
John Thomas Longino, IV
Terrinell Lyons
Danny Ray Manley
Richard John Marsden
Holly Stubblefield Mathews
Gordon Anthony Mayfield
Wesley Todd Mays
Eric Christopher McAdory
Kim Elizabeth McClain
Joseph Charles McCorquodale, IV
Steven Curtis McGinity
Reta Ann Allen McKannan
Mitchell Matthew McKinney
Bradley Grant McNutt
Frank Edwin McRae, III
Tiffin Amanda Miller
Jacqueline Renee Mills
Cathleen Curran Moore
Harold Van Morgan, Jr.
James Earl Morgan, Jr.
Rachel Diane Murphy Morgan
Robert Jennings Morris
Nina Moulas
Mary Evelyn Moulton
Mary Lee Ellington Mrochek
Patrick Joseph Murphy
John Michael Murray
William Clyde Nabors
James Park Neill
John Leland Nelms, Jr.
Gary Reagan New
David Robert Nimocks
Norman Alexander Nolte
Norman McLeod Orr
Carter Randolph Page
Debora Ellen Palmer
Gary Dean Parker
Tommy Eugene Patterson, Jr.
John Calvin Peacock
Scott Walker Pedigo
Russell Ellis Penfield
Myron Cordell Penn
Samuel Richard Perloff
Michael John Petersen
Henry Winston Pirtle, Sr.
William Calvin Porter
Celeste Karen Poteat
John Michael Poti
Vincent Gerard Rapp
Eric Tyson Ray
Stacy Jane Lott Reed
Edward Earl Reynolds, Jr.
Robert Forest Ripley
Reginold Robinson
Francis Jackson Rogers
Melvin Douglas Russell
Roman Ashley Shaul
Billy Joe Sheffield, II
Elizabeth Ann Sheppard
Derek Brandon Simms
Mara Regina Sirles
Kathleen Anne Skemp
Bradford James Smith
Francoise Adele Turgeon Smith
Robert Brian Smith
Steven Vincent Smith
Mary Elizabeth Snow
Warren Kevin Snyder
Bartley Stiers Spung
Susan Belle Steelman
Hubert Ray Steinmann
Larry Ray Stewart
Tony Bruce Stroud
Michelle Brumbaugh Tangeman
Amy L. Kondrath Tanner
Brian Steed Tatum
Erika Perrone Tatum
Stacie Foster Taylor
Neil Gaston Tew
Richard Lawrence Thigpen, II
James Joseph Thompson, III
Michael Leslie Thompson
Paul Joseph Thompson
Glennon Fletcher Threatt, Jr.
Cameron Parnell Turner
Deena Voncia Tyler
Powell Dean Waite, Jr.
Barry Wayne Walker
David Riggs Walker
Jacqueline Denise Brock Washington
Franklin Harold Watson
Nedra Joan Watson
Gregory Lee Watt
Martha Ellen Weatherford
Rachel Callie Lavender Webber
William Howard Weems, Jr.
Deborah Korzeniowski Wheeler
Lou Starla White
Kenneth Ray Widner
James Curtiss Wiggins
Gary Lee Willford Jr.
Calvin Lakeith Williams
Tamula Renee Yelling

Lawyers in the Family

Marty Weatherford Williams (1999) and Jim Weatherford (1972)
admittee and father

Billy J. Sheffield, II (1999) and Billy J. Sheffield (1973)
admittee and father

Denise Bates (1999, and Douglas Bates (1971)
admittee and husband

Stephen D. Fischer (1999) and Erby J. Fischer (1996)
admittee and brother

Michael W. Armistead (1999) and Tara Barr Armistead (1998)
admittee and wife

Glenda Gamble (1999) and Charles Gamble (1968)
admittee and father-in-law

Frederick Parsons Gilmore (1999), V. Wylynn Gilmore-Phillippi (1979) and Wyman O. Gilmore, Jr. (1983)
admittee, sister and brother

J. Charles McCorquodale, IV (1999) and Mac McCorquodale (1971)
admittee and father

Larry R. Stewart (1999) and Patricia Warner (1993)
admittee and sister-in-law

Jay Thompson (1999), Jim Thompson (1969) and John Thompson (1969)
admittee, father and uncle

Samuel R. Perloff (1999) and Mayer W. Perloff (1953)
admittee and father

Emily Hornsby Nelson (1994), Allison Hornsby Daison (1999), Clay Hornsby (1988) and Sonny Hornsby (1960)
Sister, admittee, brother and father

John E. Byrd (1975) and John E. Byrd, Jr. (1999)
father and admittee

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The court system and the Alabama State Bar supported House Bill 53, which was sponsored by Representatives Demetrius Newton and Bill Fuller, to equalize pay for appellate, circuit and district judges. This bill eliminates local supplements and settles the pending law suit over inequities of judges' pay due to county supplements. It also increases attorney fees for indigent defense and provides funds for computerization of the court system.

Pay Raises

On October 1, 2000 the minimum salary of circuit court judges will be the same as a State Attorney IV, step 14 ($100,526) with supreme court judges receiving $141,580, appellate judges $140,580, and district judges, along with district attorneys, receiving $124,658. All salaries are adjusted, relative to the circuit judge's pay, as provided by Act III of the 1990 Regular Session.

On October 1, 2001 the salary of circuit judges will be that of a State Attorney IV, step 17 ($108,248).

On October 1, 2002 circuit judges' salaries will be increased to $111,973, with others adjusted accordingly. This will be in lieu of cost of living raises.

Any circuit or district judge taking office after October 1, 2001 will receive no local county supplements. Incumbent judges and justices will receive additional compensation of 1.25 percent for every year of service, to a maximum of 25 percent of their case pay, all from state funds. This will allow circuit judges with experience to receive up to $125,658. This additional compensation will offset local supplements which will eventually be phased out completely.

Furthermore, all judges' retirement benefits will be paid by the state. The law providing for the Judicial Compensation Commission is also repealed.

Indigent Defense Attorneys' Fees

Attorneys' fees for appointed counsel in indigent cases will be raised immediately from $40 to $50 per hour, in court, and $20 to $30, out of court. On October 1, 2000 the hourly rate will increase to $60, in court, and $40, out of court. The maximum in each case will be:

Capitol Cases	No limit
Class A Felony	$ 3,500
Class B Felony	$ 2,500
Class C Felony	$ 1,500
Juvenile Cases	$ 2,000
All Other Cases	$ 1,000

The maximum may only be exceeded in exceptional cases with court approval.

Effective October 1, 2000 attorneys will be paid $60 per hour for appeals, with the maximum amount increasing to $2,000, up from $1,000 for each appeal, plus expenses.

Court Costs

All docket fees will be increased to finance judges' pay raises, appointed council fees and computerization of the court system. Examples of the increases are set forth. For filing fees in civil cases:

Small Claims	$25 increased to $30
District Court	$74 increased to $104
Circuit Court	$110 increased to $140

For criminal cases, the docket fees also increase as follows:

Traffic Violations	$62 increases to $92
Misdemeanors	$87 increases to $117
Felonies	$155 increases to $185
Juvenile	$55 increases to $85

All docket fees will increase an additional $5, effective October 1, 2000. In addition to criminal case docket fees, there are additional court cost fees for drug cases. These additional fees range from $40 for unlawful possession of marijuana, to $600 for trafficking in a controlled substance.

Advanced Technology and Data Exchange Fund

Out of these new fees a fund is created for the following purposes: Expand methods and means for collection and disbursement of court-ordered monies through the use of credit cards and electronic funds and transfers; enhance sharing of data with the bar and courts; provide for electronically filing of cases; and training of court personnel.

Tort Reform

Three bills received great debate, Senate bills 72, 305 and 137.

Senate Bill 72 supplements Ala R.Civ P.23 and provides new guidelines for certification of class actions.

Senate Bill 305 amends Ala. Code Sections 6-3-7 and 6-3-21.1 and delineates the proper venue for filing of civil cases as (1) the county where the occurrence took place, (2) county where the corporation's principal office is located, or (3) county where the plaintiff resided at time of the occurrence.

A third Senate Bill, SB 137, provides caps on punitive damages except for wrongful death and actions involving intentional physical injuries. The limits are as follows:

> Three times economic damages or $500,000, whichever is greater.
>
> For other actions against small businesses, the punitive award may not exceed 10 percent of the defendant's net worth, or $50,000. A "small business" is a business with a net worth of $2,000,000 or less at the time of the occurrence.
>
> Punitive awards for personal injury may not exceed three times compensatory damages, or $1,500,000, whichever is greater.

Child Custody Jurisdiction and Enforcement Act

Sponsored by Representatives Demetrius Newton, Marcel Black and Bill Fuller, and in the Senate, Senators Rodger Smitherman and Roger Bedford, House Bill 224 provides a procedure for the filing and enforcement of interstate child custody cases. This bill provides guidelines for the proper forum and resolution of disputes where divorced parents live in separate states. It also will assist in the speedy enforcement of visitation requests by the non-custodial parent (effective January 1, 2000).

The act repeals the current Uniform Child Custody Jurisdiction Act.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205)348-8411; phone (205) 348-7411; or visit the Institute's home page, *www.law.ua.edu/ali*. ■

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

Alabama Students Named Medal Winners on Law Day

And the winners are . . .

Medal winners with Law Day co-chairs Tim Lewis and Tommy Klinner

Winners and families attend MCBA Law Day Luncheon

Essay contest judges make their choices.

Colorful posters and thoughtful essays made it tough for the judges of the 1999 Law Day Poster and Essay Contest sponsored by the Alabama State Bar. A record number of Alabama elementary, middle and high school students competed for honors in the statewide contest.

For the first time, winners in first, second and third place received gold, silver or bronze medals, as well as United States Savings Bonds and a commemorative certificate. Honorable mention winners and all participating schools received certificates of recognition. Winners were recognized at the Montgomery County Bar Association's Law Day Luncheon and then toured the Judicial Building.

This year's winners were:

POSTER CONTEST

Grades K-3

First Place: Joshua White, Phillips School, Bear Creek

Second Place: Matthew Bond, Red Level School, Red Level

Third Place: Lindsay Durham, Phillips School, Bear Creek

Honorable Mention: Roderick Taylor, Fitzpatrick Elementary School, Montgomery

POSTER CONTEST

Grades 4-6

First Place: Amber Lynn Zaber, Floyd Middle Magnet School, Montgomery

Second Place: Brittany Jackson, Floyd Middle Magnet School, Montgomery

Third Place: Peyton Roberts, Indian Valley School, Sylacauga

Honorable Mention: Ben Andrews, Indian Valley School, Sylacauga

ESSAY CONTEST

Grades 7-9

First Place: Brock Bergstue, Hartselle Junior High School, Hartselle

Second Place: Leslie Morris, Hartselle Junior School, Hartselle

Third Place: Brad Wallace, Hartselle Junior School, Hartselle

Honorable Mention: Ben Atchison, Hartselle Junior High School, Hartselle

ESSAY CONTEST

Grades 10-12

First Place: Jamie Jackson, Cuffee High School, Florence

Second Place: Aaron Ross Burks, Ashville High School, Ashville

Third Place: Jamilla Howard, Bradshaw High School, Florence

Honorable Mention: Thomas Drake, Bradshaw High School, Florence

The judges for this year's contest were Shirley Z. Brown, Deb Keysor, Lynne Thrower, Dean Hartzog, Linda B. Allen, Mac McArthur, and Tommy Klinner and Tim Lewis, who serve as Law Day Committee co-chairs. ■

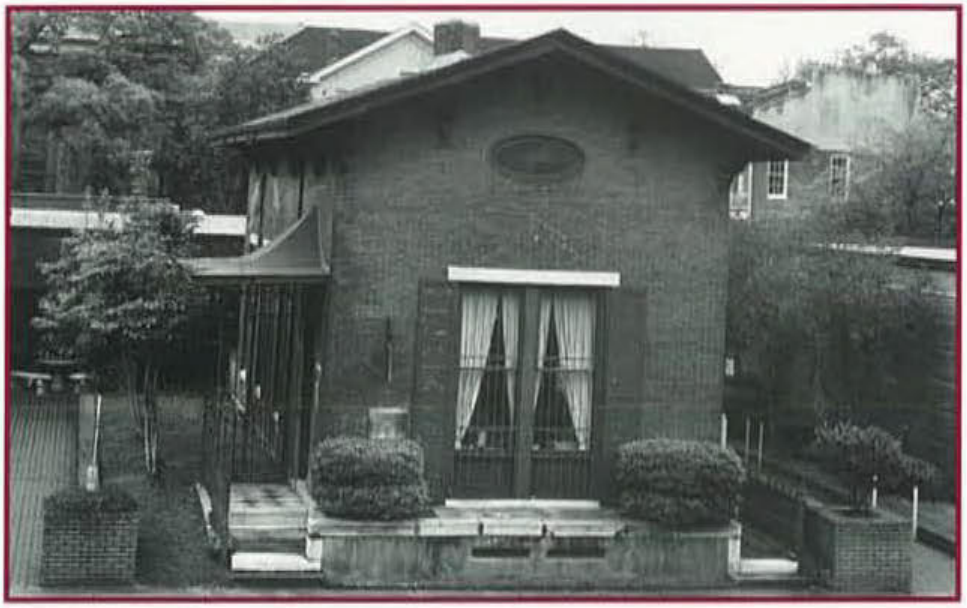
MOBILE BAR ASSOCIATION
Celebrates 130th Anniversary

On April 15, the Mobile Bar Association celebrated its 130th anniversary as the first bar association in the state and the 14th oldest bar association nationwide. The celebration at the MBA's Levert office headquarters included the unveiling of a special commemorative plaque authorized by the Alabama State Bar Legal Milestone program, which recognizes important cases, events or personalities in Alabama's legal history.

On April 12, 1869, 32 local attorneys filed a Declaration of Incorporation, having contributed $5,000 in capital. The original members included: P. Hamilton, Thos. A. Hamilton, Henry St. Paul, Thos. N. Macartney, H. Austill, Robert H. Smith, Wm. G. Jones, Thos. H. Price, Thomas E. Herndon, D.C. Anderson, M.E. Macartney, Hugh L. Cole, E.S. Dargan, D.P. Bestor, L. Gibbons, A.R. Manning, George A. Stewart, W.C. Easton, G.Y. Overall, R. Inge Smith, Percy Walker, J. Little Smith, M.B. Jonas, A.M. Granger, Jno. A. Tompkins, W. Boyles, G. Horton, A.E. Buck, James Bond, Harry T. Toulmin, James Gillette, and C.F. Moulton.

The corporation existed for the next 20 years and continued to flourish, incorporating in June 1903 as the Mobile Bar Association. The new corporation, boasting of 65 members, was a no-stock nonprofit corporation with the stated objective of "cultivating the science of Jurisprudence, to promote and encourage reform in the law, to increase its usefulness in promoting the due complete administration of Justice, to elevate the legal profession to the highest possible standing of learning, integrity, morality, dignity and courtesy, to regulate its practice, and to cherish the spirit of brotherhood and social intercourse among its members, and to establish and maintain for the free use and convenience of its members, a law library."

Until 1981, the MBA had no permanent office. ■



The Mobile Bar Association's headquarters at the Levert Building where the plaque commemorating the 130th anniversary of the bar as the first bar association in the state is displayed

Commemorative plaque depicting the original members who established the Mobile Bar Association in 1869

Newest Additions to the Alabama State Bar

The month of May saw several new names added to the list of staff members of the Alabama State Bar.

Sandra Clements joined the Alabama State Bar as an administrative assistant to the Law Office Management Assistance Program and the Lawyer Assistance Program. Previously, Sandra worked for the Montgomery law firm of Gidiere, Hinton & Herndon. She attended Lipscomb College in Nashville. Sandra has three children, Julie (married to Jimmie Durr), Tripp (married to Elizabeth Starke), and Tyler. She enjoys her three grandchildren, Ches, Will and Liz. Sandra enjoys reading, snorkeling, entertaining family and friends, long walks and, of course, baby-sitting her grandchildren.

Valerie Ross was hired as a secretary in the Continuing Legal Education department. Valerie is a native of Wetumpka. She attended Alabama State University and majored in computer information systems. She has a seven-year-old daughter, Shakira. In her spare time, Valerie enjoys relaxing with family and friends.

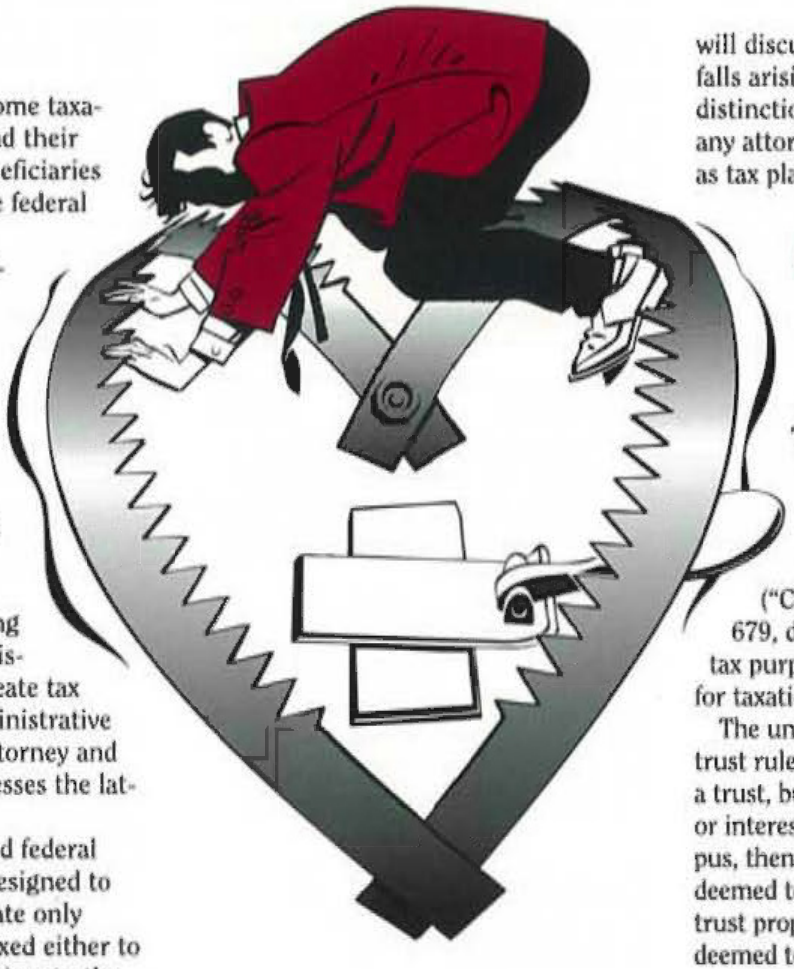
Shannon Elliott also joined the Alabama State Bar, as the communications/publications administrative assistant. She previously worked as office manager for Robert Little Millwork Co. for six years. Shannon is a native of Wetumpka and graduated from Wetumpka High School. She is married and has two children, Taylor and Hunter. In her spare time, Shannon enjoys watersports and visiting area lakes.

Carol Thornton became the fourth staff addition in May, taking over as the Lawyer Referral Service secretary. Carol previously worked for Jess Smith & Sons Cotton. Carol lives in Wetumpka with her husband Ray and daughter Tara. She enjoys fishing and spending time with family. ■

Unique Alabama Trust and Estate Income Tax Rules Create Traps for Alabama Lawyers

By Joseph W. Blackburn

Introduction



Alabama's system for income taxation of estates and trusts and their respective grantors and beneficiaries is broadly modeled after the federal pattern. Alabama does *not*, however, follow current federal law in several important, specific respects. Some of these disparities can be used to great advantage by Alabama taxpayers in lawfully avoiding Alabama tax on capital gain and investment income. Such disparities can also and have led to misunderstandings regarding Alabama tax rules. These misunderstandings, in turn, create tax planning and fiduciary administrative traps for the uninformed attorney and his client. This article addresses the latter of these ramifications.

Broadly, both Alabama and federal income taxation rules are designed to tax income of a trust or estate only once. The income will be taxed either to the fiduciary (trust or estate) or to the beneficiary, but not both. Taxability depends on whether the trust or estate accumulates current income or distributes such income to the beneficiary before year-end. If trust or estate income is not distributed before year-end, the respective trust or estate is taxed on such income. If income is distributed before year-end, the beneficiary is taxed on such distributed income and the trust deducts the amount so distributed from the trust's income. The two concepts of a deduction of distributed income by the trust or estate and inclusion of such income by the beneficiary are thus interdependent. "[A] decision on either question becomes authority on the other." 1 A.L.R.2d 1283 (1948).

Despite the broad similarity in taxing systems, there are some very important statutory distinctions. Two important specifics on which current Alabama and current federal law differ are: (1) tax treatment of so-called Grantor trusts and their grantors, and (2) rules governing distributable net income ("DNI") which determine whether a trust's income is deemed to have been distributed and thereby deductible by the trust and taxable to the beneficiary. These differences can result in creation of unanticipated Alabama taxable income and in unexpected shifting of the Alabama tax burden among grantors, trusts, estates and beneficiaries.

This article will first discuss these important, though infrequently recognized, distinctions between Alabama and federal rules governing taxation of trusts and estates and their grantors and beneficiaries. Thereafter, the article will discuss some specific planning pitfalls arising as a consequence of these distinctions. Such pitfalls can entrap any attorney advising fiduciaries as well as tax planning specialists.

Grantor Trusts

A. In General

The concept of "grantor" trusts arose and evolved under federal case law. Thereafter, in 1954 these common law principles were embodied in a series of statutes. Today, the United States Internal Revenue Code ("Code") of 1986, sections 671-679, define grantor trusts for federal tax purposes and prescribe special rules for taxation of grantor trust income.

The underlying concepts of the grantor trust rules are simple. If a grantor forms a trust, but retains sufficient power over or interests in the trust's income or corpus, then the grantor, not the trust, is deemed to still be the true owner of the trust property. As a result of being deemed to be the true owner of the trust property, the grantor is directly taxed on trust income from such property. Neither the trust nor the beneficiary is taxed on such trust income. The grantor is taxed irrespective of whether the income is accumulated by the trust or distributed to the beneficiary.

The grantor is treated as the alter ego of the trust. That is, the trust's separate existence is ignored and a grantor and his or her grantor trust are treated as the same taxpayer. Normal rules governing taxation of trusts and their beneficiaries are not applicable to grantor trusts.

B. Federal Rules

Among the earliest cases establishing grantor trust principles were *Corliss v. Bowers*, 281 U.S. 376 (1930), *Helvering v. Horst*, 311 U.S. 112 (1940), and *Helvering v. Clifford*, 309 U.S. 331

(1940). These cases, later cases, and, finally, statutory provisions refined the circumstances under which a trust would receive federal grantor trust status. Such circumstances include the grantor's retention of a reversionary interest in the trust (§ 673); retained powers to control beneficial enjoyment (§ 674); overly broad administrative powers (§ 675); retained power to revoke (§ 676); retained beneficial interests in income (§ 677); and creation of a foreign trust with a U.S. beneficiary (§ 679).

When a grantor retains one of the foregoing powers or interests "all transactions by [and income of] the trust are treated as transactions [and income] of the owner." I.R.S. Notice 97-24, 1997-16 I.R.B.6. The common identity of a grantor trust and a grantor is evidenced in numerous cases and rulings: *Swanson v. Commissioner*, 518 F.2d 59 (transfer of grantor's life insurance); GCM 37575, 1978 WL 43533 (transfer of installment note not a disposition); and Rev.Rul. 85-13, 1985-1 C.B. 184 (no gain on sale by Grantor to grantor trust).

C. Alabama Rules

Alabama clearly has *not* adopted federal grantor trust rules. For Alabama tax purposes, a grantor is not taxed on the income of a trust unless the trust is revocable. "The income from a revocable trust is taxable income to the grantor *unless* the trust is irrevocable as to the income; then the income is taxable to the trust or the beneficiary...." Al. Dept. of Rev. Regs. § 810-3-25-.05(7) (emphasis added).

In *State of Alabama v. Montgomery, Alabama Taxpayer*, Docket No. INC. 86-113 (1986) Dept. of Rev., Admin. Law Div.; W.L. 28948, the Alabama Department of Revenue argued that § 644 and § 674 (grantor trust rules) of the Code should be the controlling authority for interpretation of the Alabama statutes governing income taxation of trusts. The administrative law judge held that federal law did not control interpretation because Alabama had no statutes corresponding to the federal grantor trust rules. Indeed, the Alabama Code has no statutory provisions which even remotely correspond to Code §§ 671-679. Alabama rules governing taxation of trusts were adopted in 1935 and have never been amended. See *Walton, infra*. This predates federal statutory grantor trust provisions by almost 20 years.

One early case did suggest that Alabama might adopt the common law principles that were precursors to the federal grantor trust statutes. In *Snow v. State*, 60 So.2d 346 (Ala. Sup. Ct. 1952), the Alabama Supreme Court specifically cited the federal common law of grantor trusts (*Horst* and *Clifford*) for the proposition that "[t]he command of income and its benefits marks the real owner of property for income tax purposes." *Snow*, at 348. *Snow*, however, has never been cited for that proposition in a grantor trust context. Indeed, the facts of *Snow* did not involve a trust and it would seem to stretch this single holding too far to say it established grantor trust principles in Alabama.

Thus, in Alabama, income of a trust is taxable to the trust or to the beneficiary, not the grantor, so long as the trust is irrevocable. Tax results turn solely on whether the trust is revocable or irrevocable and not on the grantor's retained interests or powers.

Planning concerns which arise as a result of the differences between federal and state grantor trust rules occur frequently as a result of lack of information as to Alabama's unique statutory and regulatory rules. These planning concerns are discussed subsequently.

Distributable Net Income Rules

D. General Concept

As stated at the outset of this article, a trust's income is taxable either to the trust or to the beneficiary. If a trust's income is not distributed to the beneficiary before the end of the trust's taxable year, the income is taxed to the trust. If trust income is distributed, the trust is allowed to deduct the distributed income from the trust's gross income in calculating its net taxable income. Such distributed and deducted income is then taxed to the beneficiary.

Since its inception in 1913, the Code has excluded from gross income the "value of property acquired by gift, bequest, devise or descent." Revenue Act of 1913 § 11B, 38 Stat. 114. Today, this exclusion continues in section 102(a) of the Code.

Though bequests of property are not included in an heir's taxable income, it has long been clear that bequests of *income* from property are taxable, *i.e.*, not excluded. *Irwin v. Gavit*, 268 U.S. 161 (1925); Code § 102(b). Thus, in the system for taxation of trusts, estates and beneficiaries, it has always been and is essential to determine whether amounts received by a beneficiary are tax-free receipts of bequeathed property or rather receipts of taxable income from property.

Once a determination has been made that a payment is for a specific bequest of property, then clearly such amount is not taxable to the beneficiary and the trust or estate receives no corresponding income tax deduction for such a payment. Any such amount or distribution is deemed a payment of principal receivable tax-free as a gift or bequest. The governing instrument, *e.g.*, a will or trust document, and applicable state law control the determination of the beneficiaries' rights in property as contrasted with rights to receive income. *Weigel v. Commissioner*, 34 B.T.A. 237; 96 F.2d 387 (7th Cir.); 141 ALR 1055, 1059-1064 (1941).

The key is to determine which distributions are of principal and which are of income. State Principal and Income Acts have evolved to distinguish between principal and income for non-tax purposes. Operating in conjunction with wills and trust documents, Principal and Income Acts determine whether, for example, gain on sale of assets goes to a remainderman or to an income beneficiary. The most an income beneficiary could receive from a trust or estate would be the fiduciary accounting income determined under such state law rules as applied to the dispositive instrument.

Early federal tax rules based the existence of fiduciary taxable income and its distribution on these same state law principles. Thus, even though a fiduciary's taxable income may exceed its fiduciary accounting income, the most that could be distributed and thereby taxed to an income beneficiary would be the maximum fiduciary accounting income distributable to such a beneficiary. Likewise, if a distribution was deemed a distribution of principal under a state's Principal and Income Rules, or other applicable state law principles, then no distribution of income was deemed to be properly paid

for federal income tax purposes. These rules are explained below more fully.

However, today's rules governing determination of a trust's income available for distribution to a beneficiary are quite complex under federal law. Current federal law creates the concept of "distributable net income" or "DNI" to govern deductibility and taxability of trust distributions. Current federal DNI rules have a built-in preference for taxing a beneficiary rather than the trust or estate. This preference was intended to help limit the usefulness of trusts and estates for income-splitting purposes.

The discussion below analyzes the federal DNI rules and the Alabama Trust Distribution Rules, and then contrasts the two sets of rules.

E. Current (Post-1941) Federal DNI Rules

Under current federal DNI rules, distinctions in wills, trust instruments and state law between distributions of principal and of fiduciary accounting income no longer control the actual taxable character of distributions for federal tax purposes. For example, assume a trust or estate has undistributed, current year income and makes a final distribution of all residuary assets prior to its year-end. This distribution will be deemed by current DNI rules to include income for the year of distribution, even though the trust instrument may characterize the distribution as being from principal, *e.g.*, a distribution of an estate's residue to its residual heir. I.R.C. §§ 661 and 662.

Current federal rules utilize a complex tiering system to determine which beneficiaries are taxed. However, an underlying theme is that distributions to any beneficiary are deemed to come first from trust income to the extent the trust has undistributed current income. This effectuates the policy favoring taxation of beneficiaries rather than trusts.

F. Alabama Trust Income Distribution Rules

1. Current Alabama Statutes

Key provisions of the Alabama Code dealing with Alabama income taxation of trusts, estates and their beneficiaries are as follows:

§§ 40-18-25. Trusts and estates

(a) The tax imposed by this chapter shall apply to the income of estates or of any kind of property held in trust, including:

(1) Income received by estates of deceased persons during the period of administration or settlement or settlements of the estate.

(2) Income accumulated in trust for the benefit of unborn or unascertained persons with contingent interests.

(3) Income held for future distribution under the terms of a will or trust.

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(c) In cases under *subdivisions (1), (2), and (3)* of subsection (a) of this section, the tax shall be imposed upon the net income of the estate or trust using the rate schedule in subdivision (1) of Section 40-18-5 and *shall be paid by the fiduciary; except*, that in determining the net income of the estate of any deceased person during the period of administration or settlement, there may be deducted the amount of any income *properly paid or credited* to any legatee, heir, or other beneficiary. . . .

(d) In cases under *subdivision (4)* of subsection (a) of this section, and in the case of any income of an estate during the period of administration or settlement permitted by subsection (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall *not* be paid by the fiduciary, but there *shall be included in computing the net income of each beneficiary* his or her distributive share whether distributed or not, of the net income of the estate or trust for the taxable year. . . .

(emphasis added)

Note that the statute contemplates that the beneficiary will be taxed on all income described in subdivision 40-18-25(a)(4) above. See subsection 40-18-25(d), *supra*. Conversely, the statute contemplates that the fiduciary will be taxed on all income described in subdivisions 40-18-25(a)(1), (2), and (3) *unless*, as described in subsection 40-18-25(c), amounts collected during administration or settlement under subdivision (a)(1) are thereafter "properly paid or credited" to the beneficiary.

In order to determine when income collected during the administration or settlement of a trust or estate has been "properly paid or credited" to the beneficiary requires a review of applicable statutory and common law precedent.

2. Current Alabama Statutes Based on 1935 Federal Statutes

Alabama's rules governing distribution of income from trusts and estates were adopted in 1935. General Laws of the Legislature of Alabama, 1935, Revenue Act, § 345.18. Other than renumbering of sections, today's statute has not been altered since its initial adoption in 1935.

Alabama's 1935 laws governing taxation of trusts and their beneficiaries were derived from and based upon comparable 1935 federal law. 1935 Code,

§§ 161 and 162. When Alabama revenue statutes are based upon comparable federal law, federal regulations and federal case law normally establish precedent for the Alabama statute. See the discussion of *Walton, infra*.

Federal statutes, as discussed above, have changed markedly since 1935. However, since no comparable amendments were made to Alabama statutes, current federal law and related precedent are inapplicable in the State of Alabama. Today in Alabama, income taxation of trusts, estates, and their beneficiaries, including characterization of trust or estate distributions, is based on 1935 federal statutes and related precedent, according to *Walton, infra*, and the Alabama Department of Revenue's interpretation and application of Alabama's statutes.

The Court of Civil Appeals of Alabama in *Estate of Walton v. State Department of Revenue*, 579 So.2d 643 (Ala. Civ. App.1991) addressed this exact issue. The *Walton* case involved an estate's attempted deduction of part of a $78,000 payment to the decedent's widow. The payment was required to be paid to the widow in the nature of an inheritance and was in no way linked to or payable solely from the estate's fiduciary accounting income.

At the time of the payment, under current federal rules, the trust had $59,528 of undistributed trust income, *i.e.*, DNI. The estate deducted $59,528 of the total $78,000 payment. The $59,528 deduction was based on a deductible distribution of estate income which would thereafter be included in taxable income of the widow as the distributee. The widow was to receive no other benefits or distributions from the estate. Thus, imposition of income tax on her rather than on the estate truly shifted the economic burden of the tax to her and away from the estate's residual heirs.

Upon audit, the Alabama Department of Revenue denied the estate's deduction. This denial would place the burden of Alabama taxes back on the estate and its residual beneficiaries and remove this tax burden from the widow. The case was first before the Administrative Law Division. *See Alabama, Department of Revenue v. *** Taxpayer*, Docket No. Inc. 88-127 (1989); 1989 WL 104200. The Administrative Law Division's opinion states:

> However, while the Alabama and federal statutes relate to the same subject matter, the language of *the Alabama statute does not provide for the same deduction as currently allowed by the federal statute.*
>
> * * * * *
>
> The predecessor to § 40-18-25(c) was enacted in 1935 by Acts of Alabama 1935, No. 194, § 345.18, and provided a deduction for 'the amount of any income properly paid or credited to any legatee, heir or beneficiary'. That section was modeled after the federal statute on point, Revenue Act of 1932, § 162(b), which also provided in substance for a deduction for income distributed to a beneficiary or heir. For a history of the federal section, *see Anderson's Estate v. C.I.R.*, 126 F.2d 46.
>
> The old federal statute was interpreted *so that only distributions of income were deductible, and not distributions from corpus*. That is, *if a distribution was not conditioned upon the receipt of sufficient [fiduciary accounting] income by the estate, then it was not deductible. Richards v. C.I.R.*, 111 F.2d 374, *Anderson's Estate v. C.I.R., supra, Craig v. United States*, 69 F.Supp. 229 (1946), *Bishop Trust Company v. Commissioner of Internal Revenue*, 92 F.2d 877 (1937). (Emphasis added.)
>
> On appeal, the Court of Civil Appeals of Alabama, in upholding denial of the deduction for Alabama tax purposes, stated:
>
> "The predecessor to § 40-18-25(c) was enacted in 1935 by Acts of Alabama 1935, No. 194, § 345.18. It was modeled after the then-analogous federal statute—Revenue Act of 1932, § 162(b). The Alabama legislature has not yet amended § 40-18-25(c) to conform with the language of [U.S. I.R.C.] § 661. There is no Alabama case law construing § 40-18-25(c). It is generally the practice for Alabama tax statutes to, more or less, track similar federal tax statutes, but it is not a required practice. An amendment of a federal statute does not amend a similar state statute without action of the state legislature. Therefore, we find the pre-1954 [should be pre-1942] federal statute and the case law interpreting it to be applicable here."

3. Pre-1942 Federal Trust Distribution Rules

Current Alabama rules governing taxation of trusts were enacted in 1935, were based on federal law, and have never been amended. See discussion of *Walton, supra*. Federal policy has not always favored taxation of beneficiaries over taxation of trusts, and in 1935 was tied to state law concepts of fiduciary accounting income.

In 1935, a trust's deduction for distributions of its income, and the corresponding taxation of the beneficiary, were controlled by Code sections 161 and 162. Generally, only fiduciary accounting income actually distributed as income to an income beneficiary or credited income amounts also traceable to and payable directly from fiduciary accounting income pursuant to trust documents or applicable state laws were deductible by the trust and taxable to the beneficiary. Gen. Couns. Mem. 22034, 1940-1 C.B. 90 (Taxation turned on order of probate court; distribution of residue, including commingled current income, held not deductible by trust).

The 1935 Code and related common law divided fiduciary income into several types and determined which types constituted or became commingled with principal (the distribution of which was not deductible to the fiduciary nor taxable to the beneficiary) and which types were traceable to fiduciary accounting income (the distribution of which was deductible by the fiduciary and taxable to the beneficiary). In 1935, the Code required trust income to be divided into two "mutually exclusive categories: (1) Income accumulated for future distribution [as principal] under the terms of the will or trust and (2) income which is to be distributed currently [as income] by the fiduciary to the beneficiaries. The first [category] is taxable to the trust, the second to the beneficiaries." *Spreckels v. Commissioner*, 101 F.2d. 721, 722 (9th Cir., 1939).

a. Distributions of Current Fiduciary Accounting Income,

Code of Alabama, 1975 § 40-18-25(a)(4)

In 1935, Code section 161(a)(2) described this type of income as "[I]*ncome which is to be distributed* currently by the fiduciary to the beneficiaries." (emphasis added). The comparable provision of the Code of Alabama 1975 (enacted in 1935 as Section 345.18(1)(d)) is A(a)(4) *Income which is to be distributed* to the beneficiaries. . ." (emphasis added)

Federal courts interpreting Code section 161(a)(2) determined that it encompassed only distributions of fiduciary accounting income to income beneficiaries. Thus, where the will or trust instrument or applicable state law required fiduciary accounting income, or some portion thereof, to be distributed as income to an income beneficiary, then such distributable amount would be deducted from trust income and taxed to the beneficiary. *Helvering v. Butterworth*, 290 U.S. 365 (1933). The amount of any such distribution deduction would necessarily be dependent upon, traced to, and limited by the adequacy of fiduciary accounting income. The Supreme Court in *Butterworth* held that distributions "payable at all events . . . did not depend upon income...[and] were not distribution of income; but in discharge of a gift or legacy." Id. at 370-371.

b. Income Accumulated and Merged with Principal, Code of Alabama 1975, § 40-18-25(a)(2) and (3)

In 1935, Code section 161(a)(1) described "income accumulated in trust for the benefit of unborn or unascertained person or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust." The Code of Alabama 1975 divided this category into two separate subdivisions (enacted as 345.18(1)(b) and (c)) as follows: "(a)(2) Income accumulated in trust for the benefit of unborn or unascertained persons with contingent interests; [and] (3) Income held for future distribution under the terms of a will or trust."

This type of trust income was clearly taxable to the trust or estate. Code of Alabama 1975, § 40-18-25(c). Even though this category of income would ultimately be distributed, it would be deemed blended with and made a part of trust or estate principal. *Butterworth*, at 370. Distributions of trust or estate principal were to be received in their entirety by the beneficiary or heir tax free as excluded gifts or inheritances.

c. Income Received During Administration, Code of Alabama 1975, § 40-18-25(a)(1)

Another type of trust or estate income described by 1935 Code Section 161(a) was "(3) Income received by estates of deceased persons during the period of administration or settlement of the estate." The comparable provision of the Code of Alabama 1975 (enacted as § 345.18(1)) reads "(a)(1) Income received by estates of deceased persons during the period of administration or settlement or settlements of the estate."

As noted above, Code of Alabama 1975, subsection 40-18-25(c) taxes this type of income to the fiduciary *unless* it has been "properly paid or credited" to the beneficiary. The "properly paid or credited" terminology also comes directly from the federal statute. 1935 Code § 162(c). Federal case law discussed below establishes the clear precedent that in order to be "properly paid," income must be traced to and properly paid directly from fiduciary accounting income.

Prior to amendment of Code § 162(b)(2) (governing a trust's deduction for income distribution) in 1942 and further refinements and amendments in 1954, most litigation over this type of income during administration or settlement of an estate or trust arose in the context of either a partial or final liquidating distribution from an estate or trust. As with Alabama law, the federal courts had to determine when such income was deemed to have been "properly paid or credited" to the beneficiary.

In the estate context, the issue most frequently arose for the year in which the estate made its final distribution to its beneficiaries. The question was whether income realized by the estate during its final year was distributed as income to the beneficiaries or whether the income effectively merged with principal so that the final distribution consisted solely of principal. If the income was distributed *as such*, i.e., as fiduciary accounting income,

the estate would receive a distribution deduction and the beneficiary would be taxed. If the income was distributed as an integral part of principal, *e.g.*, as the residue of the estate to a residual beneficiary, then no deduction could be taken by the estate, and the estate, not the beneficiary, would be taxed.

The same issue also arose for trusts for terminating or partially terminating distributions. If, for example, a trust beneficiary was to receive the property held in trust for her benefit upon reaching age 21, would a distribution of such amounts during the year of her 21st birthday carry with it a distribution of the trust's taxable income for such year or would it be viewed in its entirety as a tax-free receipt of principal?

Prior to amendment of relevant sections of the Code in 1942, the federal district courts, the Board of Tax Appeals (Tax Court) and federal circuit courts, all consistently held that such distributions consisted solely of principal. The Supreme Court denied certiorari in these cases because all circuits deciding the issue were in agreement and there was no conflict.

Thus, all otherwise undistributed fiduciary accounting income in the year of such distributions was taxable to the fiduciary, *i.e.*, the estate or the trust. No amount of such income was taxable to the beneficiary and was not deemed to have been "properly paid or credited" to the beneficiary as fiduciary accounting income. The cases held that such final distributions were necessarily made *after*, not during, estate administration and that such amounts were payable in all events and not limited by the sufficiency of income.

In *Spreckels, supra*, the Ninth Circuit held that trust distributions to a beneficiary in the year he attained the age of majority did not include income *as such*, and no amount was taxable to the beneficiary. The Ninth Circuit made a similar holding as to the final distribution from an estate to its residual beneficiary in *Anderson v. Commissioner*, 126 F.2d 46 (9th Cir. 1942). In *Anderson*, the Ninth Circuit specifically noted that income for the year was factually mingled with corpus, but that the income was not distributed *as income* to an income beneficiary but was distributed as part of the residue or principal and excluded as an inheritance. The Ninth Circuit held, therefore, that such income had not been "properly paid or credited." *Anderson*, at 48.

The Second Circuit made similar determinations in the context of the residual beneficiary of a trust in *Commissioner v. Clark*, 134 F.2d 159 (2nd Cir. 1943) and for the residuary heir of an estate in *Commissioner v. Stearns*, 65 F.2d 371 (3d Cir. 1933). The Third Circuit likewise made a similar finding involving liquidating trust distributions in *Roebling v. Commissioner*, 78 F.2d 444 (3d Cir. 1935).

The Board of Tax Appeals and numerous federal district courts consistently held that such distributions were distributions of principal, not of income *as such*. See, *e.g., Durkheimer v. Commissioner*, 41 B.T.A. 585 (1940); *Wilcox v. Commissioner*, 43 B.T.A. 931 (1941), following *Durkheimer; Whitaker v. United States*, 44 F. Supp. 484 (1941); *Frazer v. Driscoll*, 46 F. Supp. 838 (1942); and *Norris v. United States*, 48 F. Supp. 673 (1943).

Amendment of relevant Code sections in 1942 was necessary to thereafter cause the beneficiary, not the fiduciary, to be taxed for federal purposes on such income realized by the trust or estate during the year of a final or liquidating distribution. For a discussion of the issue and the purpose of the 1942 amendment, see *Carlisle v. Commissioner*, 8 T.C. 563 (1947), 165 F.2d 645 (6th Cir. 1948). Of course, as noted in *Walton, supra*, no comparable amendment has ever been made to Alabama law. Therefore, pre-1942 federal precedent should remain the law in Alabama.

d. Deductions for Distributions–The "Properly Paid or Credited" Issue, Code of Alabama 1975, § 40-18-25(c) and (d)

Since the issues of taxation of income to the trust and the trust's deductions for distributed income are interdependent, ultimate taxation can also be approached from an analysis of deduction provisions. The 1935 Code embodied trust and estate income categories discussed above in section 161, but deductions for distributions (the mirror-image of the same issue) were embodied in section 162. Comparable Alabama distribution provisions are contained in Code of Alabama 1975, subsections 40-18-25(c) and (d). Analysis of these provisions reflect that they do in fact mirror the taxation of income categories described above. Alabama's statutes are not drafted as "deduction" provisions as such but reach the same result.

First, Code of Alabama 1975, subsection 40-18-25(d) allows a fiduciary to exclude from income any amount which *is to be* distributed currently to beneficiaries from fiduciary accounting income described in subdivision (a)(4). Since the beneficiaries have enforceable legal rights to receive such income, the deduction is allowed and the amounts taxed to the beneficiary "whether distributed to them or not." Thus, as to such distributions traced directly to fiduciary accounting income, Alabama rules properly grant the fiduciary a deduction and tax the beneficiary.

Code of Alabama 1975, subsections 40-18-25(c) and (d) also allow the fiduciary to exclude amounts "properly paid or credited" to the beneficiary. As noted, 1935 federal law also granted a deduction under section 162(c) for "income received by estates of deceased persons during the period of administration or settlement of the estate . . . which is *properly paid or credited* during such year to any legatee, heir or beneficiary . . ." (emphasis added). Again, to be deductible, i.e., to be "properly paid," the distribution must be traced to fiduciary accounting income payable as such under state law. *Anderson, supra*; Gen. Couns. Mem. 22034, supra; Ferguson, *Income Taxation of Estates, Trusts and Beneficiaries*, 3rd Edition, p. 7-57; to the contrary, see *Malmgren v. McColgan*, 126 P.2d 616 (1942), but *Malmgren* applied to California state income tax and appears limited by unique aspects of California law.

Under the clear pronouncement of *Walton* and under the interpretation and application of the Alabama Department of Revenue, pre-1942 federal law today governs Alabama taxation of trust and estate income. Even though comparable federal laws were amended in 1942 and thereafter to bring about a different result, no such amendments were ever made to Alabama statutes.

Early federal law only allowed a deduction to the fiduciary and corresponding inclusion in the beneficiaries' income if the distribution were payable directly from and traceable to fiduciary account-

ing income. If the distribution was due to be paid in any event, *i.e.*, it would be paid irrespective of the adequacy of income, then the distribution was deemed to be from principal and did not give rise to a deduction for the trust or estate.

Consequences

G. Grantor Trust Consequences

Differences in federal and Alabama grantor trust rules create planning and administrative problems in numerous ways. Tax practitioners routinely advise clients to take affirmative actions as part of planning to minimize federal income and estate taxation. Too often, planners, especially out-of-state practitioners advising Alabama clients, fail to consider Alabama income tax ramifications.

Affirmative planning techniques currently utilized by tax planners nationwide are centered on federal grantor trust rules. One such planning technique is a transaction frequently referred to as an "intentionally defective grantor trust."

As part of "intentionally defective grantor trust" planning, very valuable assets such as stock in a family business are deliberately "sold" by a taxpayer to a grantor trust. Under federal grantor trust rules, such a "sale" does not result in any federal gain because the grantor (as seller) and the grantor trust (as buyer) are, as discussed above, the same taxpayer.

However, for Alabama income tax purposes, the grantor and the trust are not the same taxpayer. Thus, such a sale of the stock by an Alabama resident to the trust is likely to be fully taxable for Alabama income tax purposes. This, of course, would be quite an unpleasant surprise to the tax advisor, to his client, to the trust fiduciary, and to beneficiaries of the trust. Indeed, post-sale taxation of the grantor, the trust, and its beneficiaries on fiduciary income will also be different under Alabama rules.

In addition to triggering unanticipated gain, misapplication of federal grantor trust rules to Alabama trusts would cause improper shifting of the Alabama tax burden. In Alabama, income of an irrevocable trust is taxable to the trust or to the beneficiary, depending on whether the income is distributed or commingled with principal. In no event is such income taxable to the grantor as under federal rules. Query whether payment of the trust's or beneficiary's Alabama tax liability by the grantor would create a gift for federal gift tax purposes.

H. DNI Consequences

Differences in federal and Alabama distributable net income rules for trusts and estates create different and perhaps more widespread problems. Again, most problems would arise as a result of a misunderstanding as to the existence of these differences. Most, but not all, distributable income problems arise in the same context as the early federal litigation described above. "Such cases are usually cases where accumulated income of an estate if [sic] paid to a residuary legatee upon termination of the estate or where income of a trust is accumulated for distribution upon the beneficiary's reaching a specified age." *Carlisle, supra*, at 647.

One clear example arises when an estate funds marital and non-marital testamentary trusts. Under today's estate and gift tax laws, estate tax planning for a married couple normally centers on maximizing funding of a non-marital trust in an amount equal to the nontaxable unified credit amount. This planning is accomplished with formulas which calculate a pecuniary *amount* which shall go to the surviving spouse with the residue to the non-marital, unified credit trust, or *vice versa*. Regardless of which trust receives this calculated *amount*, the formula is not sufficiently specific to allow such an amount to constitute a tax free inheritance of property for federal tax purposes under Code § 102(a) by reason of Code § 663(a)(1).

Thus, under current federal rules, funding of both such trusts carries out DNI for the year of such funding. Under Alabama's rules, funding of both trusts would not be traceable to nor constitute distributions of fiduciary accounting income "as such." See *Anderson* and *Walton, supra*. Therefore, for Alabama tax purposes, such funding would not be viewed to carry out the estate's taxable income for such year to its beneficiaries. The result is that federal law imposes income tax on the beneficiary whereas Alabama law imposes its tax on the same income upon the fiduciary to be borne by the residuary heirs.

Since the State of Alabama does not apply a significantly progressive income tax rate schedule, there is little difference in total taxes owed whether an Alabama trust or an Alabama beneficiary pays the tax. Thus, in drafting trust instruments or wills, there is no substantial overall Alabama tax advantage in carefully planning whether income

will be taxed to such a trust or beneficiary. The total tax liability will likely be almost the same in either case.

The important difference, as in the *Walton* case, is who will bear the burden of Alabama income tax on trust or estate income. An Alabama trust instrument or will may be drafted so that a distribution to a beneficiary is payable in all events, including fractional or percentage shares or residuary interests, *i.e.*, payable from principal, not income. This means that such a distribution, including a final distribution from a trust or from an estate, funding marital or unified credit testamentary trusts will *not* constitute a distribution of taxable income for Alabama tax purposes, even though it carries out taxable DNI for federal tax purposes. The Alabama income tax would be payable by the trust or the estate and the true cost borne by the residual beneficiary.

Indeed, many tax planners plan final estate distributions to a surviving spouse, or to a trust for the spouse's benefit, in order to carry out as much DNI as possible. By doing this, the distributee spouse is obligated to pay the federal income tax. This obligation reduces the surviving spouse's net inheritance and, hopefully, reduces such spouse's future estate taxes. This planning is ineffective, based on *Walton*, for Alabama income tax purposes irrespective of such a distribution since Alabama imposes state income tax on the estate or trust and its residual heirs in conformity with pre-1942 federal rules.

If trustees and executors fail to reflect these important differences in their Alabama fiduciary tax returns, they may favor the remainder or residual beneficiaries over the current distributees. Where such persons are one and the same, there would be little difference. Where, however, such persons are not the same, e.g., the current distributee is a spouse under a pecuniary marital deduction formula and a trust for the children receives the residue, the spouse should be receiving such amounts from principal and thereby free of any Alabama income tax obligation. If federal rules are unwittingly and improperly applied, the fiduciary and his, her or its advisors may be unfairly burdening some heirs in favor of others. Again, there may also be a federal gift tax issue as a result.

Conclusion

Differences between important Alabama and federal income tax rules have been minimized in many areas of taxation by recent Alabama conformity legislation. See Alabama Act 98-502. However, the newly conforming legislation did not address these issues involving income taxation of grantors, trusts, estates, and their beneficiaries.

These differences are not well understood or perhaps just not accepted by many practitioners. Even tax specialists are understandably either confused or unaware of these subtle but substantial differences. Fiduciaries and practitioners may merely be refusing to accept this analysis until the Alabama Supreme Court has ruled on these issues. Such misunderstandings and inconsistencies can clearly lead to planning and fiduciary administration problems.

However, like most tax principles, the differences discussed above can be a double-edged sword cutting both ways. Not only do such differences result in planning and administrative problems, but they also result in major tax planning opportunities. Such planning opportunities may be even more substantial than the problems described above for tax planners and their clients. Such benefits are limited only by the imagination of tax practitioners.

For example, careful planning can lead to the complete exclusion of certain types of income and gain from Alabama taxation altogether. Likewise, intentionally defective grantor trust planning can also be effected for Alabama residents, but only when problems described above are recognized and solutions developed. ■

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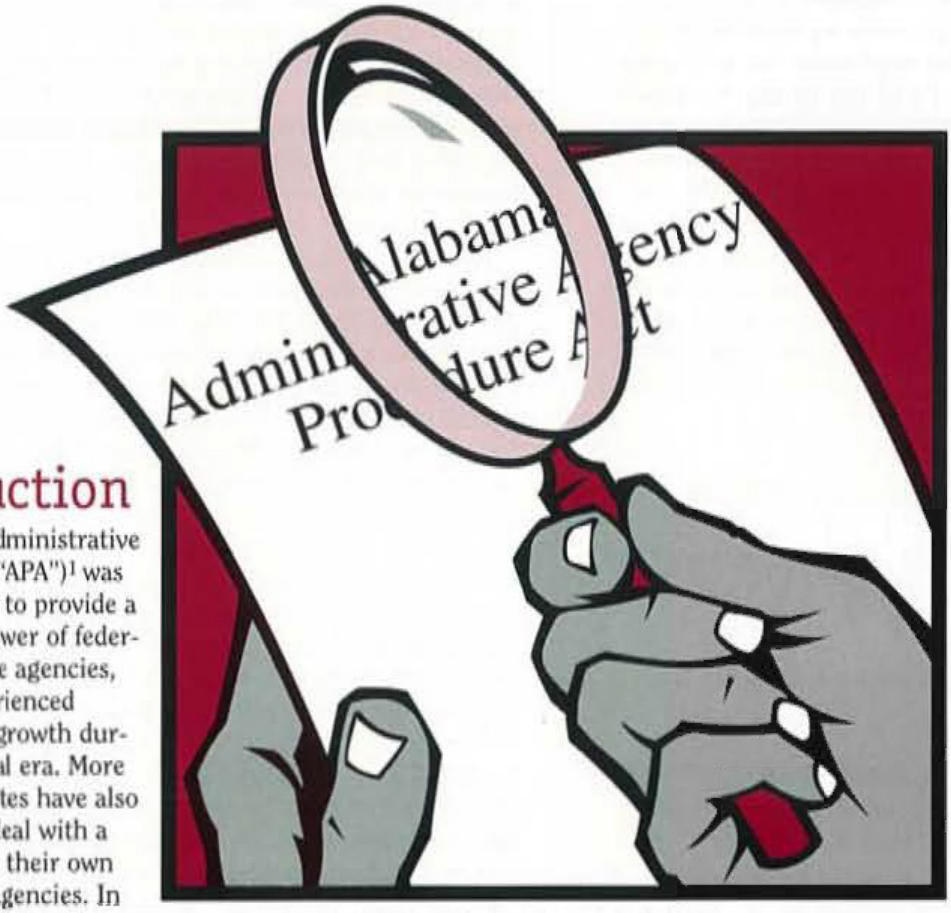
Judicial Review of Administrative Agency Actions Under the Alabama Administrative Agency Procedure Act



By Michael C. Skotnicki

Introduction

The federal Administrative Procedure Act ("APA")[1] was enacted in 1946 to provide a check on the power of federal administrative agencies, which had experienced unprecedented growth during the New Deal era. More recently, the states have also been forced to deal with a rise in power by their own administrative agencies. In 1981, the legislature of Alabama enacted its own Administrative Procedure Act ("AAPA").[2] The AAPA was "intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public." [3] Among the specific purposes of the AAPA are to "increase public participation in the formulation of administrative rules" [4]and to "simplify the process of judicial review of agency action as well as increase its ease and availability." [5]

Now that the AAPA has been in place for nearly two decades, this article is intended to (1) explain the statutes that control the procedure for obtaining judicial review of agency actions, (2) provide an analysis of when an Alabama administrative agency is required to enact policy by formal rule-making procedure rather than *ad hoc* adjudication, and (3) to review significant opinions of the Alabama appellate courts that explain the standards that have been adopted for judicial review of administrative agency decision-making. It is worth noting at this point that the Alabama Public Service Commission ("APSC") is exempted from the AAPA by Ala. Code 1975, § 41-22-2(e), and this article is not intended to provide any information regarding judicial review of APSC rulings.

Obtaining Judicial Review

In Alabama, the general procedure for obtaining appellate review of a state administrative agency decision under the AAPA is governed by Ala. Code 1975, § 41-22-20. This section of the AAPA provides a detailed list of requirements for perfecting an appeal of an agency decision to an appropriate circuit court.[6] However, appellate review of a final decision of the Alabama Environmental management Commission ("AEMC") (which oversees the actions of the Alabama Department of Environmental Management) is sought, a provision of the Environmental Management Act is also applicable. Contrary to the detailed procedure of § 41-22-20, Ala.

Code 1975, § 22-22A-7(c)(6) provides much simpler requirements for appealing an AEMC decision.

In *Ex parte Plumbers and Steamfitters, Local 52*, 622 So.2d 247 (Ala. 1993), the Alabama Supreme Court explained how the two appellate procedure statutes, § 41-22-20 and § 22-22A-7(c)(6), were to work with one another in the appeal of an AEMC ruling. The court determined that the statutes were "squarely at odds" with each other, so that the requirements for perfecting an appeal set out in § 41-22-20 did not apply to appeals from the AEMC. 622 So. 2d at 349. Instead, the procedure for perfecting an appeal from the AEMC is prescribed *solely* by § 22-22A-7(c)(6), and § 41-22-20 is only applicable to issues unrelated to the perfecting the appeal. *Id.* The court noted that by creating the simpler appeals procedure of § 22-22A-7(c)(6), "the legislature evidenced an understandable sensitivity to the gravity of the types of appeals covered by the AEMA. .... These appeals often involve some risk of serious adverse effects to the health and welfare of the public and sometimes the risk of widespread and irreparable harm." *Id.* The court reasoned that although having technical requirements for perfecting an appeal has certain benefits, the more detailed requirements also create added risk that an appeal will never be heard.[7] Accordingly, the court reversed the ruling of the court of civil appeals, and held that the union's appeal had was procedurally proper.[8]

What is an Agency "Rule" and When Must an Agency Proceed by Rule-making Procedure Rather Than Adjudication?

The AAPA definition of a "rule" under § 41-22-3(9) includes any "agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy or that describes the organization, procedure or practice requirements of any agency ...."[9] This statutory definition has been closely examined by the Alabama Supreme Court several times, first in *Ex parte Traylor Nursing Home*, 543 So. 2d 1179 (Ala. 1988), where a nursing home sought to have an amendment to the State Health Plan ("SHP") declared a rule and, thus, invalid because it had not been adopted according to the formal rule-making procedure of the AAPA.[10]

In *Ex parte Traylor*, the court reversed the ruling of the court of civil appeals and held that the SHP amendment was an agency rule. The court noted that the SHP amendment prescribed procedures and practice requirements for health care providers that had the general applicability of a rule, rather than the limited applicability of a decision or policy made in a contested case against an individual entity. 543 So. 2d at 1184. In fact, the court stated that "we can find no better example of a rule, regulation, or standard." *Id.* The *Ex parte Traylor* opinion is important because in perhaps its first opportunity to write to the issue the court clearly endorsed the broad AAPA definition of what type of agency rulings constitute a rule and, thus, trigger AAPA rule-making requirements before they may be enforced. Moreover, the court defined a "rule" as including "agency interpretations of statutes, rules, or other species of law or policy." *Id.* at 1183. Under this broad definition, it would appear that formal AAPA rule-making procedure is required for a wide variety of agency action describing, interpreting, or implementing law or policy that has general applicability over a class of persons or other members of a defined class, such as a regulated business.[11] Accordingly, class members may have grounds to challenge the validity of agency actions of general applicability when the agency has not implemented that policy through formal rule-making procedure.[12] Formal rule-making procedure obviously provides a valuable opportunity for the regulated class to have advance notice of proposed rules and to provide the agency with the benefit of the class's comments and input into the policy-making process.[13]

The Alabama Supreme Court continued its broad view of an agency rule in *Brunson Constr. & Env. Serv., Inc. v. City of Prichard*, 664 So.2d 885 (Ala. 1995), where the court held that ADEM's procedure for determining the daily permitted volume of waste to be deposited in solid waste landfills was an agency rule due to its statewide application. Consistent with the approach taken in *Ex parte Traylor*, the court's focus was on the fact that the standard that had been used by ADEM had "general applicability" and, thus, met the definition of an agency rule. 664 So.2d at 893.

While the above-noted opinions indicated that in during the 1980s through mid-1990s the Alabama Supreme Court viewed the AAPA's definition of a rule as having been broadly worded and, so that administrative agencies were required to receive input from regulated businesses or other regulated entities before making generally applicable changes to policy, it appears that a majority of justices on the present court view the definition of an agency rule more narrowly. This approach makes it highly likely that administrative agencies will now make statewide policy changes without following the AAPA's formal rule-making procedure.

In *Alabama Dept. of Transportation v. Blue Ridge Sand and Gravel*, 718 So. 2d 27 (Ala. 1998), the court held that a generally applicable amendment to the Department of Transportation's standard road and bridge construction specifications, which mandated new standards for acceptable gravel aggregate, was *not* an administrative rule that required to have been implemented through rule-making procedure.[14] Although the standard specifications at issue were clearly intended by the department to be applicable to every road construction project statewide, the court's reason for holding that the standard specification was not a rule was that the standard specification was only "a term that *may* be incorporated into a contract between the Department and some other party." 718 So. 2d at 29. The court seized on the distinction that the gravel criteria amendment might not *always* be included in the state's construction projects, even though the department had previously

indicated a broadly applicable purpose for making the gravel aggregate criteria more stringent–to improve longevity of road and bridges statewide. Because the Alabama Supreme Court rarely has the opportunity to speak to the issue of what is an administrative agency rule, the *Blue Ridge Sand and Gravel* opinion must be taken as an indication that the court now views the § 41-22-3(9)'s definition of a rule more narrowly than it has in the past. This ruling appears to invite a growth in state administrative agency power and flexibility in action, at a cost to regulated businesses and other entities who desire agency action to be predictable and are able to provide important input to the agency's process of changing its policy on a subject only when formal AAPA rule-making procedures are be followed .

While the AAPA's definition of a rule indicates a legislative preference for agency policy-making by formal rule-making procedure rather than *ad hoc* adjudication, the AAPA does recognize that state agencies must be allotted a certain amount of flexibility in their decision-making process. Thus, the AAPA specifically exempts from the definition of a rule the "[d]eterminations, decisions, orders, statements of policy and interpretations that are made in contested cases."[15] For example, in *Potts v. Bennett*, 487 So. 2d 919 (Ala.Civ.App. 1985), the court of civil appeals held that the Alcohol Beverage Control ("ABC") Board's decision to deny a liquor license to a store located less than 200 feet from a school was not subject to AAPA rule-making requirements. The court held that the ABC Board had properly exercised its discretionary power in using adjudication to deny the applicant's liquor license based on the specific facts of the case, such as the store's location and surroundings, rather than through formulating a rigid regulation. 487 So. 2d at 921.

The *Potts* court noted that under federal law, administrative agencies are "not precluded from announcing new principles in an adjudicatory proceeding" and that when a controversy arises the choice of acting by adjudication rather than by rule-making is largely left to the discretion of the agency. *Id.* Further, the court reasoned that the legislature had granted the ABC Board certain discretionary power the court would not "accept the argument that all licensing criteria and policy must be made through formal rule-making procedure." *Id.* The reasoning used by the court in *Potts* is similar to the federal standard which allows agencies to create certain policy through adjudication rather than always requiring rule-making.[16]

In sum, under a strict reading of the AAPA the scope of the applicability of an agency policy decision controls whether or not the agency must effectuate that policy via formal rule-making procedure. If the policy decision is one of general applicability to an entire class or community of parties, then AAPA rule-making procedure must be followed. But if the agency policy decision is fact-specific and limited to a single party or parties in a contested action or otherwise has no general applicability, then adjudication alone is an appropriate vehicle for agency policy-making. However, this standard is now somewhat in doubt, as the *Blue Ridge Sand and Gravel* opinion suggests that the Alabama Supreme Court may now be willing to interpret the AAPA in such a way as to allow administrative agencies additional power to formulate generally applicable policy without following rule-making procedure.

Standards of Judicial Review

In general, the standards for judicial review of a final ruling of an administrative agency in a contested case are controlled by § 41-22-20(k). That provision of the AAPA states, in relevant part, that a reviewing court may reverse or modify an agency decision or provide other relief from the agency action "if substantial rights of the petitioner have been prejudiced because the agency action is ... (6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (7) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion ...." The Alabama Supreme Court has noted that an agency action will not be found arbitrary or capricious simply because the agency acted inconsistent with a prior ruling. The court has stated that "[b]ecause there is a need for flexibility in administrative decision-making, the doctrine of stare decisis generally does not bind administrative agencies to their prior decisions." *Ex parte Shelby County Medical Center, Inc.*, 564 So. 2d 63, 68 (Ala. 1990). These AAPA standards for judicial review are similar to those in the APA controlling judicial review of federal administrative agency decisions.[17]

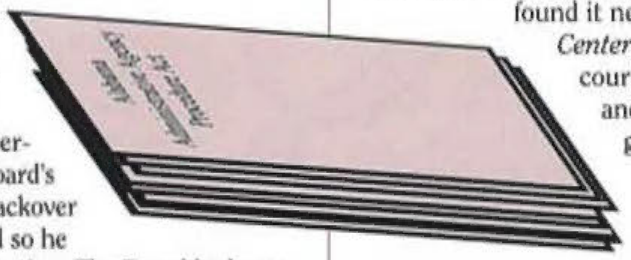
However, decisions of the AEMC are expressly exempt from AAPA standards of review.[18] Instead, judicial review of decisions of the AEMC utilizes the same standard as under certiorari review.[19] In *Bates Motel v. Environmental Management Comm'n*, 596 So. 2d 924, 925 (Ala.Civ.App. 1991), the court of civil appeals noted that under certiorari review, "if there is *any evidence* in the record to sustain the Commission's decision, the court must affirm." (Emphasis added.) Further, the court stated that a decision of the AEMC should not be reversed unless it is unsupported by the uncontradicted evidence or it is found that the AEMC has misapplied the evidence to the law. 596 So. 2d at 925. Thus, the legislature has granted the AEMC greater discretion than other state administrative agencies bound by the AAPA standard for judicial review which, as noted, uses a "substantial evidence" standard.[20]

A. Judicial Review of Questions of Fact

The same public policy underlying the creation of administrative agencies, the need for expertise in a specialized field or discipline, also argues for a deferential standard of judicial review to be applied to agency findings of fact in a contested case. The court of civil appeals has reasoned that "[t]he special competence of the agency lends great weight to its decision." *State*

Health Planning & Dev. Agency v. AMI Brookwood Medical Center, 564 So.2d 54, 56 (Ala.Civ.App. 1989). Accordingly, under the AAPA, "the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."[21] The court of civil appeals has also stated that "[w]hen the legislature delegates a discretionary function to an agency with special competence, the court frustrates that discretionary role by stepping in when the agency's choice is not clearly unreasonable or arbitrary." *State Health Planning & Resources Dev. Admin. v. Rivendell of Alabama, Inc.*, 469 So.2d 613, 614 (Ala.Civ.App. 1985).

Thus, a court is to apply an "arbitrary and capricious" standard of judicial review to administrative agency fact-finding, indicating the legislature's intent that a court should not merely substitute its judgment for that of the agency, and may only invalidate an agency action if the court determines that the agency's action is irrational. For example, in *Roberts v. State Oil and Gas Board of State of Alabama*, 441 So.2d 909 (Ala.Civ.App. 1983), a property owner appealed the Oil and Gas Board's denial of his petition to have the Smackover Gas Pool enlarged to include his land so he would receive a share of its gas production. The Board had concluded that the evidence presented to it was insufficient to indicate that the natural gas pool extended beneath the petitioner's property. In reviewing the board's decision, the court of civil appeals noted that the case involved complex technical issues calling for "expert testimony from people that specialize in the areas of geology, mining and drilling." 441 So.2d at 912. Accordingly, the court held that it was not its function to substitute its own judgment for that of the board, which had expertise in evaluating the expert testimony. *Id.*



A similar case is *Alabama Department of Public Health v. Perkins*, 469 So.2d 651 (Ala.Civ.App. 1985), where a landowner appealed the Public Health Department"s denial of his permit to install a septic tank. The department's decision has been based on a factual finding that the groundwater table at the chosen site was shallower than the depth required for septic tank placement. In reviewing the department's ruling, the court of civil appeals noted that judicial deference to administrative agencies with regard to fact-finding is necessary "to insure uniformity and consistency of decisions in light of the agency's specialized competence." 469 So.2d at 653. Further, the court stated that it would frustrate legislative intent and usurp agency discretion if the court "stepp[ed] in when the agency's choice is not clearly unreasonable or arbitrary." *Id.* Explaining its understanding of the "arbitrary and capricious" standard of review, the court noted that an agency factual finding cannot be overturned as arbitrary when there is "a reasonable justification for the decision" and that a reviewing court cannot simply "substitute its judgment for that of the administrative agency." *Id.*

Even with the deferential "arbitrary and capricious" standard of review, the Alabama Supreme Court has shown a willingness to disturb agency decision-making when the court found it necessary. In *Ex parte Shelby Medical Center*, 564 So.2d 63, 69 (Ala. 1990), the court ruled that the State Health Planning and Development Agency's decision to grant a certificate of need for a new hospital in Shelby County was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In a notable dissent, however, Justice Maddox warned that the court's majority had too greatly expanded the scope of judicial review by conducting an independent review of the record rather than simply determining whether the agency had clearly abused its discretion. He warned of the danger of the courts substituting their judgment for that of an expert agency, stating "[t]he awarding of certificates of need, the setting of utility rates, the granting of moor carrier certificates, the granting of ABC licenses, the regulation of banks, zoning, and a myriad of other regulatory functions are vested in administrative boards and agencies that supposedly are in the best position to determine what is and what is not in the public good." 564 So.2d at 73.

B. Judicial Review of Questions of Law

Pure questions of law, such as an administrative agency's interpretation of a statute in a contested case, are generally to be reviewed by a court without any presumption of correctness. The United States Supreme Court established the federal policy for judicial review of an agency's statutory or regulatory interpretation in *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Under the *Chevron* analysis, if the language of the statute at issue is unambiguous, then the reviewing court must give effect to the clear intent of the legislature regardless of the agency's interpretation. 104 S.Ct. at 2781. However, if the court determines that the statute is ambiguous in meaning, then the court's role is to determine whether or not the agency's interpretation of the statute is reasonable. *Id.* at 2781-82. The court will adopt

the agency's interpretation of the statute if it determines that the interpretation is reasonable. Thus, *Chevron* allows federal courts court to follow the guidance of administrative agencies in instances where the court is in need of assistance.

It appears that to some extent the Alabama Supreme Court has adopted the federal *Chevron* standard for review of administrative agency's interpretations of statutes. In *Farmer v. Hypo Holdings, Inc.*, 675 So.2d 387, 390 (Ala. 1996), the court noted that while generally an administrative agency's interpretation of a statute it administers will be given consideration, where the statute is plain in meaning the court "will not blindly follow an administrative interpretation, but will interpret the statute to mean exactly what it says." In addition, the court noted that even when a statute is reenacted without modification after the legislature can be presumed to know of an agency interpretation of the statute, the interpretation is *not* binding on the judiciary, although it will be considered persuasive. These statements suggest that the Alabama Supreme Court will follow an agency's interpretation of a statute when the statute's meaning is determined to be uncertain, and the court requires guidance.

Pre-AAPA precedent also suggests that Alabama courts will acknowledge some deference to administrative agencies on interpretations of statutes and their own regulations. For instance, in *Broadwater v. Blue & Gray Patio Club*, 403 So.2d 209, 213 (Ala. 1981), the Alabama Supreme Court noted that while it was not bound by an agency's interpretation of a statute the agency had the responsibility to enforce, it would give that interpretation consideration. Likewise, in *Glen McClendon Trucking Co. v. Hall Motor Express, Inc.*, 285 Ala. 98, 229 So.2d 488 (1969), the court noted that the interpretation by a "quasi-judicial body," such as the Public Service Commission, of one of its own agency rules should be given weight and followed unless found to be arbitrary and capricious.

C. Judicial Review of Mixed Questions of Law and Fact

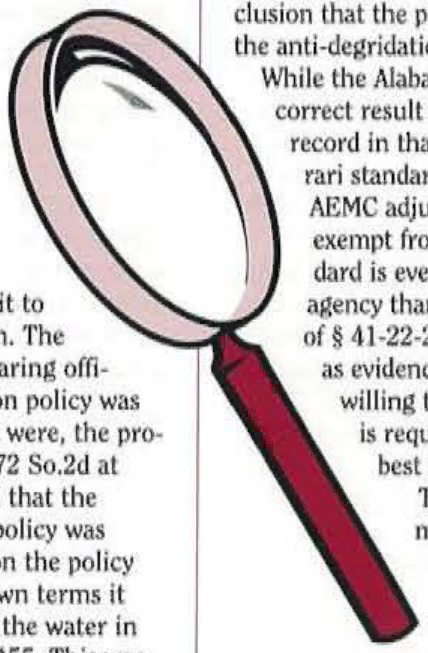
Most challenges to administrative agency decisions in contested cases are based on the argument that the agency misapplied the relevant law to the its fact-finding. This creates an appeal to the judiciary based on a mixed question of law and fact. Generally, in such a review the federal courts apply an "arbitrary, capricious, or abuse of discretion" standard of review[22] and the similar AAPA standard has been applied by the Alabama courts. Thus, although a court should not simply defer to an agency's interpretation of law, it is required to show some deference to the agency's application of the law to a set of facts.

For example, in *State Health Planning and Devel. Agency v. Mobile Infirmary Ass'n*, 608 So.2d 1372 (Ala.Civ.App. 1992), the court of civil appeals reversed the circuit court and affirmed the agency's decision to deny a certificate of need to Mobile Infirmary. The court noted that its review was limited to "whether the [agency's] decision was made in compliance with applicable law, whether the [agency's] decision was arbitrary and unreasonable, and whether the [agency's] decision was supported by substantial evidence." 608 So.2d at 1374. The court noted that although it might have weighed some factors under the State Health Plan guidelines differently than the agency, the agency had complied with the applicable law and it stated that it was not the court's place to "substitute its judgment for that of the administrative agency." *Id.* at 1375.

However, the Alabama Supreme Court has not always been willing to show deference to agency decision-making, and it has on occasion reaffirmed its power over state agencies. In *Ex parte Shelby Medical Center, Inc.*, 564 So.2d 63, 69 (Ala. 1990), the court ruled that the State Health Planning and Development Agency's decision to grant a certificate of need allowing the construction of a new hospital in Shelby County was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." However, the decision is most notable for the dissenting opinion by Justice Maddox which called for a very limited role for the judiciary. He wrote that the court had too greatly expanded the scope of judicial review of agency adjudications by conducting an independent review of the record rather that simply determining whether the agency had clearly abused its discretion. 564 So.2d at 73. He stated that the court had substituted its judgment for that of the agency and noted that "[t]he awarding of certificates of need, the setting of utility rates, the granting of motor carrier certificates, the granting of ABC license, the regulation of banks, zoning, and a myriad of other

regulatory functions are vested in administrative boards and agencies that supposedly are in the best position to determine what is and what is not in the public good." *Id.*

Despite Justice Maddox's view of a limited judicial review of administrative agency action, the Alabama Supreme Court has often applied what could be considered a *de novo* standard of review. For example, in *Ex parte Fowl River Protective Ass'n*, 572 So.2d 446 (Ala. 1990), the court held that the AEMC had erred in its interpretation of the state's water quality anti-degradation policy and had improperly granted a pollution discharge permit to Mobile's Board of Water and Sewer Commission. The AEMC has adopted the findings of an ADEM hearing officer who had concluded that the anti-degradation policy was not applicable to Mobile Bay, and that even if it were, the proposed discharge would not violate the policy. 572 So.2d at 451-52. However, the supreme court concluded that the AEMC's interpretation of the anti-degradation policy was erroneous, because under such an interpretation the policy would not apply to certain waters that "by its own terms it does apply to" and would allow "degradation of the water in violation of the anti-degradation policy." *Id.* at 455. This was an appropriate ruling by the court on a question of law where the court's expertise is unquestioned in comparison to an administrative agency.



However, in *Fowl River* the court was required to also address the AEMC's findings in an area of the agency's expertise, computer modeling of pollutant discharge into Mobile Bay and how stratification of the saltwater in the bay would effect the discharge. Although the AAPA expressly requires the courts to show deference to administrative agencies on questions involving the agency's area of expertise, in *Fowl River* the court showed a willingness to ignore that mandate. Rather than simply defer to the AEMC's issuance of the discharge permit based on the agency's determination that the dynamic estuary computer model sufficiently represented the conditions of Mobile Bay, the court performed its own review of the conflicting expert testimony regarding the computer model. *Id.* at 457. After reviewing the complex record in detail, the court made a finding that the computer model could not sufficiently simulate the complex environment of Mobile Bay and, thus, should not have been so relied upon by the AEMC in reaching its conclusion that the pollution discharge at issue would not violate the anti-degradation policy. *Id.* at 462.

While the Alabama Supreme Court may have reached the correct result in *Fowl River*, its in-depth review of the record in that case is in direct contradiction to the certiorari standard of review that is particularly applicable to AEMC adjudications which, as previously noted, are exempt from the AAPA standards of review. The standard is even more deferential to the administrative agency than the AAPA's "substantial evidence" standard of § 41-22-20(k)(6). Thus, the *Fowl River* opinion stands as evidence that the Alabama Supreme Court has been willing to ignore the AAPA's standard of review if that is required to reach the result the Court believes is best in that case.

The AAPA's standard of judicial review of mixed questions of law and fact is obviously easier to explain than for any court to consistently apply. The proper approach is most likely the middle-ground between the Alabama Supreme Court's sometimes aggressive depth of review and Justice Maddox's call for great deference. Under such a standard the reviewing court would give more deference to the agency decision the more complex the facts, or when the decision involves questions of scientific or other special areas of expertise which a judicial body does not normally possess, and less deference where the decision did not involve those considerations.

Conclusion

It appears that for the most part, judicial review of agency actions by the Alabama appellate courts under the AAPA parallels that of the federal courts under the APA. However, there are notable differences.

First, until the *Blue Ridge Sand and Gravel* case, the Alabama Supreme Court had articulated a very broad standard for what constitutes an agency "rule" require adoption by AAPA procedures. The AAPA's "general applicability" test for required rule-making had been enforced by the Alabama appellate courts and when combined with the inclusion of agency interpretations of statutes as "rules," it allowed a great many agency actions to be challenged with the argument that the action was based on a "rule" that had not been properly adopted. This standard may have constrained administrative agency discretion, but the loss in discretion appeared to be offset by increased fairness to businesses and other members of the regulated community that formal notice and comment rule-making provides. After *Blue Ridge Sand and Gravel*, however, the balance may have shifted back toward greater agency discretion on whether it make implement generally applicable policy without formal rule-making.

Second, the Alabama Supreme Court has in the past proven willing to undertake an in-depth review and overturn administrative agency decisions. While this expanded depth of judicial review seems to conflict with the level of deference given to agency adjudications by the terms of the AAPA, it is appropriate as to pure questions of law where no ambiguities exist and possibly also mixed questions of law and fact where the question does not involve an area of agency expertise. However, the manner in which the court currently views its sometimes contentious relationship with state administrative agencies will likely differ as we move into the 21st Century. ■

Endnotes

1. 5 U.S.C.A. §§ 551 to 706.

2. Ala. Code 1975, § 411-22-1 et seq. The AAPA is adapted from the Revised Model State Administrative procedure Act (1961) and various state administrative procedure acts. The commentary to each section of the AAPA notes what sections of the Revised Model Act and state acts the Alabama legislature relied upon when drafting that section. Thus, the Revised Model Act and cases interpreting referenced sections from other state acts may be useful to provide assistance in interpreting sections of the AAPA.

3. Ala. Code 1975, § 41-22-2(a).

4. Ala. Code 1975, § 41-22-2(b)(5).

5. Ala. Code 1975, § 41-22-2(b)(7).

6. Appeals from the final judgment of the circuit court are perfected according to the Alabama Rules of Appellate Procedure.

7. The Court concluded that "[s]uch increased risk is logically undesirable where, as here, potentially grave and far-reaching matters involving the public health and welfare are involved." 622 So. 2d at 349.

8. The Supreme Court of Alabama has also recognized that a wide variety of parties may have standing to challenge an AEMC action, holding that an adversely affected legal right or equitable interest in land is not required by § 22-20-7(c). *Ex parte Fowl River Protective Ass'n*, 572 So. 2d 446, 456, n.2 (1990).

9. The AAPA definition of a rule is very similar to that provided for in the APA in 5 U.S.C. § 551(4), but is not quite as broad. The APA definition also includes "statements of particular applicability," whereas the AAPA is limited to statements of general applicability. However, such statements of particular applicability under the APA appear to be limited to utility and common carrier rate making. Because the AAPA is not applicable to the Alabama Public Service Commission, which regulates such rate making, there is no need for the AAPA's definition of a rule to be identical to the APA's.

10. The AAPA's procedural requirements by which a state administrative agency may adopt a "rule" are set forth in §§ 41-22-4 to -7. Most importantly, § 41-22-5 requires 35-day notice to the public by publication in the Alabama Administrative Monthly and an opportunity for the public to comment on the proposed rule, either orally or in writing.

11. In *Brunson Constr. & Env. Serv., Inc. v. City of Prichard*, 664 So.2d 885, 894 (Ala. 1995), the Court held that ADEM was required to "formally promulgate a rule or regulation articulating the factors or criteria that are to be considered in establishing permitted volumes for Alabama [solid] waste facilities in connection with volume modifications or initial permits," because the informal standards ADEM had been using had general applicability.

12. The validity of an Alabama Department of Management "interpretation" of one of its regulations was successfully challenged by a manufacturer on the basis that the interpretation was intended to have general applicability and that ADEM had not adopted the interpretation through formal rulemaking procedure. ADEM had not provided sufficient notice to the regulated industry of its "interpretation," nor had it initiated rulemaking procedure to modify the regulation to more clearly reflect ADEM's interpretation of that regulation. *Techtrix, Inc. v. Alabama of Env. Mgmt*, Docket No. 92-15 (Ala. Env. Mgmt Comm'n, Sept. 23, 1992).

13. While AAPA rulemaking procedures provide minimal due process protections related to a proposed agency rule such as publication of a notice in the Alabama Administrative monthly and a public hearing, *see* Ala. Code 1975 § 41-22-5, actual notice to regulated entities is not required even where new agency regulations would potentially impose civil liability. *Krupp Oil Co. v. Yeargan*, 665 So.2d 920 (Ala. 1995).

14. This holding is surprising because in his treatise on state administrative law, Professor Kenneth Davis, the foremost authority on that subject, cited standard highway construction specifications as a prime example of an administrative agency rule. Since the *Blue Ridge Sand and Gravel* opinion the Alabama Legislature has amended the AAPA's definition of an administrative "rule" to specifically exclude Department of Transportation highway and bridge specifications.

15. Ala. Code 1975, § 41-22-3(9)(d). The federal APA contains similar exemptions from the definition of a rule. 5 U.S.C. § 553(b)(A).

16. See *Securities and Exchange Comm'n v. Chenery*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed.2d 1995 (1947). The *Chenery* opinion established the general rule that a federal administrative agency is free to use its sound discretion to formulate policy either by rulemaking with corresponding general applicability or by adjudication with applicability to the contested case. The Supreme Court stated that "an administrative agency must be equipped to act either by general rule or individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." 332 U.S. at 203.

17. The APA, in 5 U.S.C. § 706, states that "[t]he reviewing court shall ... (2) hold unlawful and set aside agency action ... found to be (A) arbitrary or capricious, and abuse of discretion, or otherwise not in accordance with law; ... (E) unsupported by substantial evidence ...."

18. Ala. Code 1975, §§ 41-22-27(l) and 22-22A-7(c)(6).

19. See *Alabama Dept. of Env. Mgmt. v. Wright Bros. Constr. Co.*, 604 So. 2d 429 (Ala.Civ.App. 1992); *Alabama Env. Mgmt Comm'n v. Fisher Indus. Serv., Inc.*, 586 So.2d 908 (Ala.Civ.App. 1991); *Dawson v. Alabama Dept. of Env. Mgmt.*, 529 So. 2d 1012 (Ala.Civ.App. 1988).

20. See *State Health Planning Agency v. Mobile Infirmary Ass'n*, 608 So. 2d 1372 (Ala.Civ.App. 1992); *Henley v. Alabama Bd. of Nursing*, 607 So. 2d 256 (Ala.Civ.App. 1992); *Health Care Authority of the City of Huntsville v. State Health Planning Agency*, 549 So. 2d.973 (Ala.Civ.App. 1988).

21. Ala. Code 1975, § 41-22-20(k).

22. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Michael C. Skotnicki

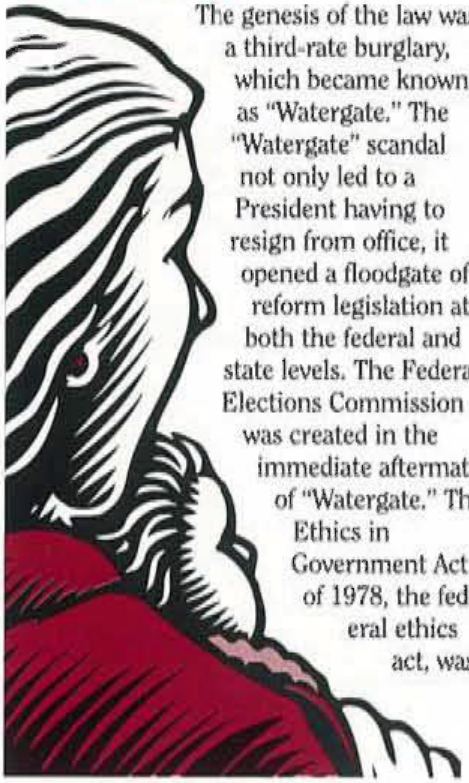
Michael C. Skotnicki received his undergraduate and graduate degrees from Auburn University and his Juris Doctor, *magna cum laude*, from the Cumberland School of Law. He served as a judicial law clerk for Chief Justice Sonny Hornsby, and as a staff attorney for Justices Henry Steagall, Terry Butts and Champ Lyons of the Alabama Supreme Court. He currently is associated with the Birmingham firm of Ritchie & Rediker, LLC.

THE ALABAMA ETHICS LAW: A Retrospective

By James L. Sumner, Jr.

The Alabama Ethics Law, *Code of Ethics for Public Officials, Employees, etc., Section 36-25-1 through 36-25-30, Code of Alabama, 1975*, which was conceived in a cavalier game of "chicken" between the state Senate and House of Representatives and then, once it became law, barraged with every possible legal challenge imaginable, just celebrated the 25th anniversary of its enactment. September 14, 1998 marked that milestone anniversary for the law few thought would live to see its first, much less its 25th, birthday. Although the Ethics Law has been revised several times–most significantly in 1995–it still stands as a strong deterrent to using one's public office or employment for your personal gain.

Enactment of the Law



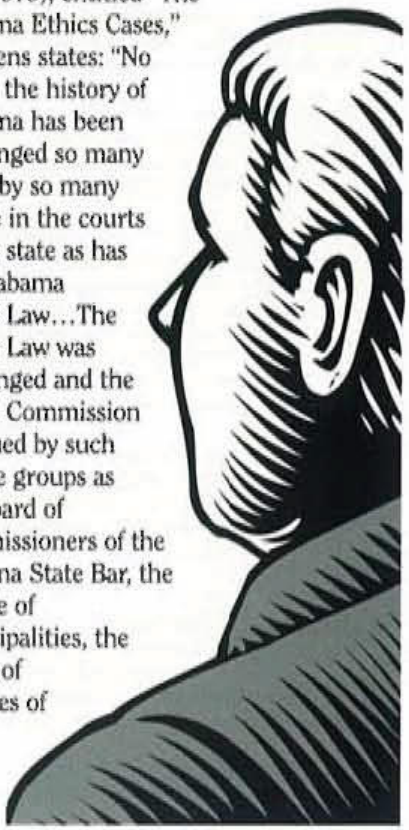
The genesis of the law was a third-rate burglary, which became known as "Watergate." The "Watergate" scandal not only led to a President having to resign from office, it opened a floodgate of reform legislation at both the federal and state levels. The Federal Elections Commission was created in the immediate aftermath of "Watergate." The Ethics in Government Act of 1978, the federal ethics act, was enacted into law. Ethics laws, campaign finance and election reforms were adopted and revised across the country. On the heels of this movement, Alabama adopted its first Ethics Law, Act No. 1056, 1973 Alabama Acts, to the surprise and dismay of many in the Legislature.

The process began uneventfully enough with the introduction of Senate Bill 1 by Senator George Lewis Bailes, Jr. of Jefferson County as its lone sponsor. What happened next could only be described as reckless at best and Machiavellian at worst. Senator Bailes' bill passed the Senate on May 1, 1973, with only two dissenting votes. The bill closely resembled model ethics legislation that had been drafted by Common Cause in Washington. The House of Representatives then took up the bill and added some 16 amendments. Thus began the game of "chicken" with the House raising the ante on the Senate with the hope–and full expectation–that the Senate would kill the bill. Unbelievably, the Senate adopted the amendments in their entirety and sent the legislation to the Governor for final action. Governor George C. Wallace signed the bill into law the next day, September 15, 1973.

In his wonderful law review article about the legislative history of the adoption of the Ethics Law, "The Alabama Ethics Act–Milestone or Millstone," 5 *Cumb.-Sam. L. Rev.* 183 (1974), Melvin G. Cooper, the Commission's first executive director, shared a marvelous quote from a veteran senator who had told him: "Mr. Cooper, your Ethics Commission is a red-headed step-child with ugly freckles, bow legs, big nose, and many warts which is hated by its father and despised by its mother, both of whom kept hoping for an abortion which never took place." In spite of this, the newly-enacted law was viewed as the best such law in the country at that time and was used as a model for other states as they developed their own ethics laws.

Immediate Legal Challenges

The ink from Governor Wallace's signature was barely dry before the first lawsuit was filed on September 18, 1973, challenging the constitutionality of one provision of the new Ethics Law. This was only the first of almost 20 such lawsuits challenging the law in every imaginable way. The definitive–and excellent–statement on these legal challenges was authored by William T. Stephens, who served as chief of the civil division in the Office of the Attorney General and who defended the Ethics Commission and the Ethics Act in each of these matters. In his article, found at volume 10, number 2, *Cumb. L. Rev.* 317 (1979), entitled "The Alabama Ethics Cases," Stephens states: "No law in the history of Alabama has been challenged so many times by so many people in the courts of this state as has the Alabama Ethics Law...The Ethics Law was challenged and the Ethics Commission was sued by such diverse groups as the Board of Commissioners of the Alabama State Bar, the League of Municipalities, the Board of Trustees of the



University of Alabama, and the Alabama State Employees Association."

The litigation of all of these cases essentially amounted to a "holy war" against the Act and the Commission. Emotions ran as high as the stakes. It was extremely contentious and intense. But, in the end, the act was upheld and the Commission began to carry out its charge.

The first challenge was neither unexpected nor difficult to dispose of. It was filed in Federal District Court in Montgomery by the editor of *The Birmingham Times* and challenged the constitutionality of Section 14 of the Ethics Law. This section prohibited any member of the news media from attending legislative sessions if they failed to register with the Ethics Commission and receive a pass for such attendance. The obvious basis of the lawsuit was that Section 14 violated the first amendment guarantee of freedom of the press. The case was heard by a three-judge panel and the opinion, written by Judge Frank M. Johnson, Jr., held that Section 14 was unconstitutional and enjoined its enforcement.

A more serious challenge followed with the filing of seven lawsuits over a six-week period challenging the constitutionality of the Ethics Law. Specifically, these lawsuits questioned whether the requirement that statements of economic interests be filed annually was an infringement on the fourth amendment right of privacy. Among the plaintiffs in these lawsuits were: the Board of Commissioners of the Alabama State Bar, the members of the Court of the Judiciary and the members of the Judicial Compensation Commission; the League of Municipalities and the Association of County Commissioners; the Board of Trustees of the University of Alabama; and the Alabama State Employees Association. Temporary restraining orders and preliminary injunctions were issued in all of the cases, oftentimes *ex parte*, restraining the Commission from enforcing the Ethics Law.

Quoting from the Stephens article, *supra*, "The preliminary injunction hearings were fairly uniform. In each case, members of the plaintiff class testified that they would resign their positions rather than comply with the provisions of the Ethics Law. Each testified that he thought that the financial disclosure requirements of the Ethics Law invaded his right of privacy. Each forecast doom for the particular governmental entity with which he was associated. According to testimony, state, county, and local government would come to a screeching halt unless the court enjoined application of the Ethics Law."

The Commission's counsel argued that "the alleged injuries ... simply did not constitute cognizable legal injury to the individual plaintiffs, that the forecast of mass resignations was merely speculation, and that, even if such resignations did occur, sufficient numbers of competent people resided in the affected cities, counties, and the state to replace the persons who resigned." (Stephens, *supra*) The Commission also argued that the benefits derived from the Ethics Law such as "honest government and public confidence in the integrity of governmental officials, far exceeded whatever forecast 'injuries' the plaintiffs had alleged." (Stephens, *supra*)

It was the intent of the plaintiffs that the League of Municipalities/Association of County Commissioners' case be the test case. The attorneys for both groups had been preparing for months their challenge to the constitutionality of the law. However, the Commission felt that its strongest case was against the Alabama State Employees Association, so they filed a motion for summary judgment in the State Employees Association case soon after it was filed, but before attorneys for the League/County Commissioners could proceed in their case. The Commission's counsel also filed a motion to stay any further proceedings in all other causes pending the outcome of the State Employees Association case.

After oral argument, briefs and consideration of the record from the preliminary injunction proceedings, Judge Eugene Carter deliberated for several weeks and then entered an order upholding the constitutionality of the Ethics Law and its application to state employees, ruling against the State Employees Association on all issues. "The first and most significant case, the test case, had been won. The Ethics Law was constitutional." (Stephens, *supra*)

The plaintiffs in the other cases and those cases which followed had been dealt a serious blow. As the cases proceeded to trial there were some minor, and oftentimes short-lived, victories on behalf of the plaintiff groups, but for the most part, the Ethics Law was upheld, the Commission began its work and the Ethics Law was enforced. As a result of the League/County Commissioners case, the Legislature amended the Ethics Law, in 1975, to clearly include county and municipal officials and employees within the coverage of the law.

Space constraints prevent me from doing an exhaustive summary of the legal challenges to the Ethics Law. For those of you interested in the blow-by-blow description of these legal skirmishes, I highly recommend that you read William T. Stephens' outstanding law review article, *supra*.

I might also add that not every legal challenge to the Ethics Law was fought out in the courtroom. Each time the Legislature met over those years immediately following the passage of the law, there were bills introduced to repeal the law and abolish the Commission. There were efforts to "sunset" the Commission and efforts to limit the Commission through the appropriations process. The Commission was always fortunate to have a core group of legislative supporters who prevented these efforts from being successful. To those supporters, the Commission and the citizens of this state are forever indebted.

Commissioners and Staff

The Ethics Law provided for the creation of a five-member Commission, "each of whom shall be a fair, equitable citizen of this state and of high moral character and ability." Throughout its history, the Ethics Commission has truly been blessed to have serve as Commissioners 29 private citizens (***See Chart on page 266***), who came from all walks of life: business, labor, religion, law, medicine and other professional endeavors, education and civic leaders. These Commissioners reflected the great diversity of Alabama and, no matter what their political affiliations or personal allegiances might be, they rose to the very highest levels of the responsibility that had been thrust upon them to fairly, equitably, impartially and in an absolutely nonpartisan manner determine the outcome of the issue at hand. They have

Ethics Commission Commisioners

Name	Occupation	Years Served
James H. Anderson	Attorney	1986-1992
Whit Armstrong	Banker	1991-1994
Dr. George E. Bagley*	Exec. Sec. Alabama Baptist Conv.	1973-1977 & 1978-1982
Bester Bonner	College Professor	1977-1981
Jack W. Boykin	Businessman	1983-1988
Camille S. Butrus	Civic Volunteer	1994-1999
H. Dean Buttram, Jr.	Attorney, Federal Judge	1992-1998
Donald Comer, III	Businessman	1973-1976
Neil O. Davis	Newspaper Publisher/College Professor	1979-1984
Russell Jackson Drake	Attorney	1998-2003
Connie Entrekin	AFL-CIO Official	1973-1975
Henry B. Gray, III	Cattle Rancher/Alabama Dept. Head	1993-1998
Dr. James J. Hicks	Doctor	1983-1989
Maynard Layman	Newspaper Publisher Asst.	1977-1980
Alto Lee, III*	Attorney	1973-1978
Helen Shores Lee	Attorney	1995-2000
William H. Lovin	Maintenance Supervisor, Amoco Chem.	1981-1985
Frank L. Mason	Businessman	1992-1995
Lee McGriff	Insurance Executive	1989-1993
Dr. Sandra K. M. McLeod	Junior College President	1985-1992
Lewis G. Odom, Jr.	Attorney	1998-2002
James T. Pursell	Businessman	1992-1998
Edward C. Sherling, Jr.	Businessman	1981-1986
Reverend John Vickers	Minister	1979-1982
J. Ray Warren	State Employee	1987-1992
John H. Watson	Businessman	1998-2001
Adolph Weil, Jr.*	Businessman	1979-1983
Dr. Leslie S. Wright*	University President	1973-1979
Dr. Cordell Wynn	College President	1984-1991

*Deceased

oftentimes undertaken their task in the face of great adversity and have provided great service to the Ethics Commission and to the citizens of Alabama that far exceeds their minuscule compensation of $50 per monthly meeting.

The Commission was aided in its task by strong and dedicated staff members who also faced all manner of resistance and adversity as they set out to enforce the law.

The first Executive Director of the Commission, Melvin G. Cooper, was hired in January 1974. His task was to literally start the Commission operation from scratch. There was no office space, no telephone, no stationery and no staff. Faced with the legal and legislative hurdles I mentioned earlier, these obstacles were the least of his worries. But, obstacles they were. There were times when the small staff felt there was no way to get the job done. Funding was extremely tight and not only did the Commission operate for several years with no investigator, it often found itself unable to purchase routine, but necessary, office supplies. Nonetheless, with a steady hand on the rudder and a large measure of perseverance, Melvin Cooper led the Commission staff for more than 20 years until his retirement in 1994.

Melvin Cooper was succeeded by his long-time Assistant Director Howard McKenzie, who served as acting executive director in 1994 until the new executive director was named. McKenzie provided continuity and kept the ship on course during his tenure. Upon the selection of the new Executive Director, E. J. "Mac" McArthur, in the fall of 1994, McKenzie retired from the Ethics Commission after 17 years of distinguished service.

The three hallmarks of the McArthur era at the Ethics Commission are 1) the passage of a major revision of the Ethics Law in 1995, 2) the tripling of the legislative appropriation for the operation of the Commission, and 3) the hiring of an outstanding group of staff members who are well-equipped to handle their assigned tasks. When Mac McArthur resigned to pursue another endeavor in February 1997, he was succeeded very ably by Commission General Counsel Hugh R. Evans, III. Under Hugh Evans' leadership, the staff and Commission never missed a beat as the Commission conducted their search for a new director of the Commission. My first official act as director was to appoint Hugh to the additional position of assistant director, as well as his role as general counsel.

On April 26, 1997, I began my duties as director of the Ethics Commission–only the third permanent director over the 25-year history of the Commission. At the time of my selection, and in the period since then, I have diligently strived to carry out my pledge to the Commission that I would maintain the very highest standards of fairness, impartiality and nonpartisanship in the matters that come before the Commission. At the end of my service here, it is my sincere hope that everyone would agree I had achieved that goal.

Major Cases Under the Ethics Law

Over the 25-year history of the Ethics Commission countless public officials and employees, ranging from governors, legislators, cabinet officials to sheriffs, circuit clerks, county commissioners, mayors to rank-and-file employees of various cities, counties or the state have run afoul of the Ethics Law. The following are a few of the major cases involving public officials:

- Former Governor Guy Hunt: Hunt was convicted and removed from office in 1993 for using $200,000 from his 1987 inaugural fund for his personal use. Although the verdict was upheld in state and federal appeals, the Alabama Board of Pardons and Paroles pardoned Hunt based on their belief that he was innocent.
- Former State Treasurer Melba Till Allen: Allen was convicted in 1978 for using her public office to obtain bank loans for a personal business venture. She also failed to report the loans on her Ethics financial disclosure forms. She was sentenced to three years in prison.
- Former Public Service Commission President Juanita McDaniel: She was convicted in 1980 for filing false expense requests and sentenced to seven months in prison.
- Former Insurance Commissioner Jimmy Dill: Dill was convicted in 1997 for accepting $175,000 from his daughter who was in the insurance business and subject to her father's regulation. Dill, who had been appointed by former Governor Jim Folsom, was no longer serving in his state position when the Ethics case began. The verdict in the case was overturned by the Alabama Court of Criminal Appeals.
- Industrial Relations Director Dottie Cieszynski: Cieszynski was fined $3,000 in 1996 for using state employees for her personal errands and a state car for personal use. She was appointed to her cabinet post by former Governor Fob James.
- Selma Mayor Joe Smitherman: Mayor Smitherman was fined $4,000 in 1998 for using his city automobile to make personal trips to the beach and to other destinations.
- Former Birmingham Water Board Chairman Horace Parker: Parker was convicted in 1998 for arranging to get a water main upgrade done on the street on which he lives in Gardendale to improve the water pressure for his lawn sprinkler system. Parker also voted as a member of the Water Board to approve the work being done.

A Current Perspective

In 1999, we daily see examples of ethically questionable conduct in Washington, in state government and in our city and county governments. These examples involve public officials and employees from the President of the United States on down to the local water board. In Alabama, the revised 1995 Ethics Law provides us with major new tools to deal with the matters which come before the Ethics Commission: a revolving-door provision, the authority to initiate our own investigations, whistle-blower protection and it establishes a system for fines and restitution for minor violations, among many other new provisions. The revised law is much more workable and understandable than it previously was which makes our job much easier.

In the period I have served as director, our operational philosophy has been one of establishing clear and reliable precedent and of education and prevention. In every possible way, we are taking the Commission and the law to the people. By that I mean, we are conducting educational programs (some 77 last year or 1.5 per week) at every opportunity. We recently conducted a seminar on the Ethics Law for several cities and towns in the Quad-cities area which was attended by nearly 100 mayors, council members, police chiefs, fire chiefs, etc., as well as rank-and-file employees. We now distribute a digest of the Commission's opinions and a quarterly newsletter to the governor and other constitutional officers, cabinet officials, department, agency, board and commission directors, members of the legislature, the Association of County Commissioners and the League of Municipalities.

I am also extremely proud of the fact that we have eliminated our backlog of advisory opinion requests and we are working to significantly reduce the length of time required to conduct an investigation into a complaint filed with the Commission. The Commission rendered 69 opinions last year and had 328 complaints filed. We also are striving to ensure that those 26,000 public officials and employees required to file Statements of Economic Interest do so properly and in a timely manner. The same is true for the 561 lobbyists and 681 principals who are registered with the Commission.

After 25 years, have we eliminated unethical behavior? Clearly not, but I would strongly argue that the Ethics Law has made a difference–a real difference–in how our governmental business, the people's business, is conducted. I believe we as a people have a much better understanding of our ethical responsibilities and, for the most part, we adhere to them. Most public officials and employees realize today that they cannot use their public office or position for their personal gain or the gain of their family.

Do the citizens of Alabama get their money's worth as a result of our efforts? Absolutely. The Commission's budget is less than one-tenth of one percent of the state's General Fund Budget. The annual cost of operating the Commission for each of the 200,000 covered public officials and employees is $4.69. The cost per citizen of the state is only 22 cents. What a tremendous bargain to ensure the integrity of our governments at every level throughout the state. ■

James L. Sumner, Jr.

James L. Sumner, Jr. is the director of the Alabama Ethics Commission. He was appointed in April 1997. He holds an additional appointment as a deputy Attorney General.

He graduated from the University of Alabama in 1970 and Cumberland School of Law, Samford University, in 1974.

He has served as assistant to the vice-chancellor for external affairs of the University of Alabama System, as vice-president/legislative affairs for the Alabama Hospital Association, and as executive assistant to the lieutenant governor and chief of staff, lieutenant governor's office, in addition to other corporate and governmental positions. He is a member of the American Bar Association and the Alabama State Bar.

Alabama Mediation and Arbitration Training

(Approved for CLE credit and Alabama Center for Dispute Resolution roster registration)

In-State *(Additional courses will be scheduled.)*

July 22-24
Montgomery
Arbitration
Jones School of Law
(Steve Ware, Cumberland School of Law)
(800) 879-9816, ext. 186
CLE hours will be finalized shortly.

Mobile
Mediation Process & the Skills of Conflict Resolution
Litigation Alternatives, Inc.
(Troy Smith)
(800) ADR-FIRM or (888) ADR-CLE3
CLE: 20 hours

July 29-31
Birmingham
Mediation Process & the Skills of Conflict Resolution
Litigation Alternatives, Inc.
(Troy Smith)
(800) ADR-FIRM or (888) ADR-CLE3
CLE: 20 hours

August 25-27
Huntsville
Mediation/Conflict Management
Better Business Bureau
(Anne Isbell)
(256) 539-2118
CLE: 20 hours

Note: To date, all courses except those noted have been approved by the Center. Please check the Interim Mediator Standards and Registration Procedures to make sure course hours listed will satisfy the registration requirements. For additional out-of-state training, including courses in Atlanta, Georgia, call the Alabama Center for Dispute Resolution at (334) 269-0409.

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

Opinions of the General Counsel

By J. Anthony McLain, general counsel

An Attorney May Not Pay the Advertising Expenses of Another Attorney in Exchange for Referrals from the Attorney Whose Services are Advertised

J. Anthony McLain

Question:

The Disciplinary Commission has determined that it would be appropriate to give further consideration to the conclusions reached in RO's 92-23 and 93-23 which address the issue of whether an attorney may pay the advertising expenses of another attorney in exchange for referrals from the attorney whose services are advertised.

Answer:

An arrangement whereby advertising expenses are paid by someone or some entity other than the lawyer whose services are being advertised would, in the opinion of the Disciplinary Commission, violate Rule 7.1 of the Rules of Professional Conduct, in that advertising under such circumstances would constitute "a false or misleading communication about the lawyer or the lawyer's services." Additionally, payment of advertising expenses in exchange for referrals violates the prohibition in Rule 7.2(c) against a lawyer giving "anything of value to a person for recommending the lawyer's services."

Discussion:

Rule 7.1 of the Rules of Professional Conduct provides as follows:

"Rule 7.1 Communications Concerning A Lawyer's Services

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

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) Compares the quality of the lawyer's services with the quality of other lawyer's services, except as provided in Rule 7.4; or

(d) Communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.7."

It would appear obvious that any potential client who calls the telephone number listed in the above described advertisement scheme would be mislead as to which attorney they would be dealing with and who would be representing them in their particular legal matter. While the referral concept is obviously an acceptable one in this state, advertisement by means of this type of conduit whereby one attorney or firm avoids direct participation in the advertising, other than funding the same, misleads the public as to what attorney or attorneys a potential client will be dealing with and which attorney will ultimately serve as the client's legal representative.

Further, the lawyers involved in open referrals must ensure the client is aware of the referral system, division of fees, degree of participation of the attorneys involved, etc., as mandated by Rule 1.5 of the Alabama Rules of Professional Conduct.

The purpose of the rules is to protect the public. Any advertising scheme which would circumvent full disclosure of relevant information to the consuming public violates, not only the rules themselves, but their spirit and purpose as well.

Strict adherence to applicable rules would not allow such an advertising and referral arrangement. The cir-

cuitous referral concept envisioned therein is not a plan structured as to prevent misleading the public while maintaining the integrity of the representation of the client.

Other rules of professional conduct would be affected, or potentially affected, by this type of advertising and referral arrangement. First, the fact that one attorney would be paying the advertising expenses of a second attorney in exchange for referrals means that the second attorney would be receiving something of value in return for a referral or recommendation of the first attorney's services. This is clearly violative of Rule 7.2(c), which provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services ...."

Furthermore, Rule 1.10 deals with vicarious disqualification of lawyers associated in a "firm." Whether a group of lawyers constitutes a "firm" for purposes of this rule is a factual question. The Comment to Rule 1.10 notes that a group of lawyers could be considered a "firm" in one context of the rule, but not in another. If lawyers are associated in the practice of law in some way, the exact relationship can be immaterial for the purposes of disqualification under Rule 1.10. In light of the provisions of Rule 1.10, and the construction which has been placed thereon, there would appear to be a distinct possibility that attorneys or firms who participate in such an advertising arrangement would inherit one another's conflicts of interest and would thereby be vicariously disqualified from any matter in which the other had a conflict.

Based upon the above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that it is ethically impermissible for one attorney to pay the expense of advertising the services of a second attorney in exchange for the referral of cases by the second attorney. To the extent that RO-92-23 or RO-93-23 may be inconsistent with the conclusions stated herein, they are to be considered as modified in conformity herewith. [RO-99-01] ■

DISCIPLINARY NOTICES

Jerome Tucker of Birmingham, who received a public reprimand on January 22, 1999, is not to be confused with **Jerome Tucker, III** of Tucker & Wagnon of Birmingham. ***Jerome Tucker, III has never received a public reprimand and continues to be a member in good standing of the Alabama State Bar.***

Notice is hereby given to **David Malcolm Tanner** of Birmingham, Alabama that he must respond to the charges in Disciplinary file, within 30 days from the date of this publication, July 15, 1999. Failure to respond shall result in further action by the Office of General Counsel and/or a default judgment to be entered against him.

Reinstatements

- The Alabama Supreme Court entered an order reinstating Montgomery attorney **Keith Ausborn** to the active practice of law effective December 1, 1998. [ASB Pet. No. 98-03]
- **John Samuel Gonas, Jr.** was reinstated to the practice of law by order of the Supreme Court of Alabama, effective April 21, 1999, conditioned upon Gonas' having by said date obtained 24 CLE hours in courses which have been approved by the Mandatory Continuing Legal Education Committee of the Alabama State Bar. [ASB Pet. No. 98-06]
- On March 5, 1999, Birmingham lawyer **Robert B. Roden** was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [ASB Pet. No. 98-012]
- On September 23, 1998, Alabaster lawyer **Nickey John Rudd, Jr.** was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [ASB Pet. No. 98-008]

- On March 5, 1999, Birmingham lawyer **Robert J. Hayes** was reinstated on the roll of the Alabama Supreme Court as authorized to practice law in the courts of Alabama. [ASB Pet. No. 98-013]

Public Reprimands

- Birmingham attorney **Edward Eugene Angwin** received a public reprimand without general publication on March 19, 1999, for violating rules 1.3, 1.4 and 8.1(b), *Alabama Rules of Professional Conduct*. The respondent attorney was retained to represent a client. He obtained a settlement on behalf of each client and, thereafter, did little or no work in the matter which included failing to communicate with the client regarding the status of the matter or to forward the proceeds of the settlement to the client or the client's file to the client upon request. Discipline was aggravated in this case because of the respondent attorney's failure to cooperate and refusal to respond to numerous requests for information by the local grievance committee investigator. [ASB No. 98-77(A)]

Angwin also received a public reprimand without general publication on March 19, 1999 for violating rules 1.3, 1.4 and 8.1(b), *Alabama Rules of Professional Conduct*. The respondent attorney was retained to represent a client. He obtained a settlement or partial settlement on behalf of each client and, thereafter, did little to no work in the matter which included failing to communicate with the client regarding the status of the matter or to forward the proceeds of the settlement to the client or the client's file to the client upon request. Discipline was aggravated in this case because of the respondent attorney's failure to cooperate and refusal to respond to numerous requests for information by the local grievance committee investigator. [ASB No. 98-78(A)]

- Prattville attorney **James Myron Smith** received a public reprimand with general publication on May 21, 1999. Smith pleaded guilty to formal charges which alleged that he had given false testimony under oath in a deposition given during the course of his personal divorce proceeding. Smith subsequently informed the court of his false deposition testimony and gave truthful testimony at trial. Smith pled guilty to a violation of Rule 8.4(c) which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty or misrepresentation. [ASB No. 98-026(A)]
- On May 21, 1999, Huntsville attorney **Carter Alan Robinson** received a public reprimand with general publication. This reprimand was based on a finding by the Disciplinary Commission of the Alabama State Bar that Robinson had violated rules 1.3, 1.4 and 8.4(g), *Alabama Rules of Professional Conduct*. Robinson was appointed to represent a criminal defendant. During the 13 months in which Robinson represented the defendant, he did little or no work in the matter and failed or refused to communicate with his client regarding the case. During an investigation conducted by the Huntsville-Madison County Bar Association local grievance committee, Robinson failed to timely respond to numerous requests for information regarding the matter. [ASB No. 98-255(A)] ■

Recent Decisions

By David B. Byrne, Jr., Wilbur G. Silberman and William M. Bowen, Jr.

Recent Decisions of the Supreme Court of Alabama–Criminal

Joinder/severance of offenses for trial

Ex parte Pincheon, No. 1971729 (Ala., May 14, 1999) *per curiam*. Under Rule 13.3(a), A.R.Cr.P., the charges of interference with the custody of one child (JK) were improperly tried with the offenses of rape of another child (MK), even though all offenses were charged in the same indictment. In a separate trial, the evidence against one child would not have been admissible against the other. The charges are not of the same or of a similar character, they are not based on the same conduct, and they are not alleged to have been part of a common scheme or plan. In addition, the charges relate to two separate victims. The only connection is that the alleged victims are sisters. There is an obvious prejudice to the defendant inherent in his being forced to defend against the charge of interference with the custody of J.K., when he was additionally charged with first- and second-degree rape of M.K. Here, the court found the prejudice to be "compelling prejudice" requiring the granting of a severance.

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

Guilty plea

Ex parte Blackmon, No. 1971145 (Ala., April 23, 1999) Justice Lyons. A defendant may prove an unknowing or involuntary guilty plea based on representations or promises made by defense counsel, the trial court, or the State. A misrepresentation by a defendant's counsel, if material, may render a guilty plea involuntary. Whether a defendant should be allowed to withdraw a guilty plea is a matter within the discretion of the trial court, whose decision will not be disturbed on appeal absent a showing of abuse of that discretion. In this case the supreme court could not find that the trial court abused its discretion because the evidence was conflicting. The court found it significant that the defendant neither called his trial counsel as a witness nor introduced an affidavit from his trial counsel verifying defendant's claim that counsel had made the alleged misrepresentations. Testimony verifying that counsel made the alleged misrepresentations may be sufficient to warrant withdrawing or setting aside a guilty plea.

Sentence

Ex parte Kent, No. 1971588 (Ala., March 19, 1999) Justice Maddox. When the same trial judge imposes a harsher sentence on a defendant following a second trial on the same charge, the judge is required to affirmatively state on the record his reasons for imposing the harsher sentence. After both trials, Kent was sentenced to ten years' imprisonment. However, after his first trial, that sentence was "split" into one year of imprisonment and three years of probation. In his second trial, the sentence was "split" into two years of imprisonment and two years of probation. The Alabama Supreme Court applied the holding of *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969): "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." The court distinguished *Ex parte Weeks*, 591 So. 2d 439 (Ala. 1991), and *Alabama v. Smith*, 490 U.S. 794, 799-800(1989). The court also found it irrelevant that the second sentence was only "slightly harsher" than the first. Finally, the court set forth guidelines for when, as here, the burden will not rest upon the defendant to prove actual vindictiveness.

Prosecutorial misconduct

Ex parte Kent, No. 1971588 (Ala., March 19, 1999). In this opinion authored by Justice Maddox, Justice Lyons concurred specially to address the defendant's argument concerning the prosecutors' misconduct during the cross examination of the defendant's wife and during closing argument. A prosecutor's putting prejudicial allegations before the jury without being prepared to prove them is generally reversible error. However, even if a prosecutor's conduct was improper, the extreme remedy of a mistrial is not always required and not every violation of the rules is so "grossly prejudicial" that it requires a mistrial. After concluding that the prosecutors' questions and comments objected to were not so "grossly prejudicial" that they amounted to reversible error, Justice Lyons wrote "to make it clear to the prosecutors in this case that I cannot condone their actions." ""The primary duties of the office of the District Attorney are to see that justice is done, and to see that the state's case [is] properly presented to the court and jury as made by the evidence. ... In the performance of his duties the District Attorney should treat the defendant fairly and the witnesses courteously, both in examination and in argument. The prosecuting attorney has a duty to be fair and impartial in presenting the evidence and in examining or cross examining witnesses. While he may not take unfair advantage of a

defendant, he is under a duty to prosecute with earnestness and vigor.'" "[I]t would serve the ends of justice for prosecutors, who are acting as representatives of the State, to temper their zeal in future cases by paying closer attention to a prosecutor's obligation of fairness."

DUI

Ex parte Parker, No.197001 (Ala., February 26, 1999) Justice Cook. This case involves a prosecution under § 32-5A-191(f), now codified as § 32-5A-191(h) providing that a person convicted of driving under the influence of alcohol or a controlled substance is guilty of a Class C felony if the DUI conviction is the fourth or subsequent such conviction within five years. (The "within five years" provision has now been removed from subsection (h). See ' 32-5A-191(h), Ala. Code 1975.) The defendant argued that the fact of the prior DUI convictions was not an element of the crime for which he was charged and that evidence of those prior convictions would constitute improper evidence of bad character. The supreme court held that § 32-5A-191(h) does not state a substantive offense, and the three prior convictions referred to in that subsection are not elements. The prior offenses referred to in that subsection are properly to be considered only for the purposes of determining whether upon conviction a defendant shall receive an enhanced sentence. Subsection (h) provides for sentence enhancement, rather than as stating the elements of an offense.

Rape Shield Law

Ex parte Dennis, No. 1971060 (Ala., February 19, 1999) *per curiam*. This case contains an excellent history of the "rape shield law," when it applies and when exceptions must be made. The Alabama rape shield statute, Ala. Code 1975, § 12-21-203, has been superseded by Rule 412, Ala. R. Evid. (effective date was January 1, 1996). Rule 412 merely "expand[ed] the [rape-shield statute's] definition of 'evidence relating to past sexual behavior' to include opinion evidence regarding the victim's character" and changed the notice provisions of the rape shield statute. To read Rule 412 as requiring an absolute exclusion of all evidence of past sexual activity between the victim and third persons could, in some cases, violate a criminal defendant's constitutional rights. Therefore, we hold that when Rule 412 is applied to preclude the admission of particular exculpatory evidence, the constitutionality of its application is to be determined on a case-by-case basis. Here, the rule applied was that testimony by a proposed defense witness that the victim told the witness that the victim had had sex with someone other than the defendant was inadmissible hearsay when offered to prove that victim in fact had had the sexual encounter. That witness's proposed testimony that she saw someone other than the defendant attempting to have sex with the victim-child was inadmissible because its prejudicial effect substantially outweighed its probative value. The medical expert testified unequivocally that he believed the child's condition was caused by recurrent penetration, rather than by a single incident. Thus, the proposed testimony regarding the assault had very limited probative value because her testimony would not have established that penetration occurred during the incident involving the other man, much less that the other man was responsible for recurrent penetration.

Capital murder/burglary

Ex parte State (Adrian Davis), No. 1961993 (Ala., January 8, 1999) *per curiam*. In *Ex parte Gentry*, 689 So. 2d 916 (Ala. 1996), the Alabama Supreme Court "overruled a line of precedents holding that evidence of a struggle and a murder inside the victim's dwelling was sufficient to establish that any initial license to enter had been withdrawn." *Gentry* condemned a finding of burglary merely from the commission of a crime that could not be deemed to be within the scope of the privilege to enter, and condemned the use of evidence of a struggle as indicium of revocation of the defendant's license or privilege to remain. At the urging of the court of criminal appeals, the supreme court revisited *Gentry* and recognized that "[i]n so doing, the Court swept with too broad a broom." The court announced the rule that "[e]vidence of a struggle that gives rise to circumstantial evidence of revocation of a license or privilege can be used to show an unlawful remaining, a separate prong of the offense of burglary upon which a conviction can be based," and held that *Gentry is overruled* to the extent that it is inconsistent with this rule. The court reiterated that the evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining. Justices Almon, Shores, Kennedy, and Cook dissented.

Recent Bankruptcy Decisions

United States Supreme Court takes on question of whether there is new value exception to absolute priority rule

Bank of America National Trust and Savings Association, Petitioner v. 203 North LaSalle Street Partnership, U.S. Supreme Court, May 3, 1999, __U.S.__, 119 S.Ct.1411. Justice Souter's opinion begins with the issue of whether prepetition equity holders could, over an objecting senior class, contribute new capital without offering the same purchase privilege or offer of property to such class. Section 1129(b)(2) reads in pertinent part:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

****

(b) With respect to a class of unsecured

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claims—

****

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

****

The facts and opinions of the lower courts have been reported in prior issues but, for those unfamiliar with the facts of the case, I summarize as follows:

Bank of America (bank) loaned $93 million, secured by a first mortgage on a 15-floor office building in downtown Chicago, to 203 North LaSalle Street Partnership (debtor). When debtor defaulted in January 1995, the bank began foreclosure. Debtor filed under chapter 11, the principal purpose being to stave off foreclosure which could cost the partners some $20 million in personal income taxes. Debtor's plan separately classified both bank's secured claim and its unsecured deficiency claim of $38.5 million, and the unsecured trade debt of $90,000. The plan also proposed:

(1) to pay bank's $54.5 million secured debt in full, albeit seven to ten years later than the original contract date;

(2) discharge bank's unsecured debt of $38.5 million for 16 percent of its present value;

(3) $90,000 to be paid in full to unsecured trade creditors, without interest on the effective date of the plan; and

(4) a contribution of $6.25 million by former partners of debtor (present value $4.1 million) over a five-year period for which sum these former partners would entirely own the reorganized debtor, and *no other party could contribute for an ownership interest!*

Bank objected to the plan, but debtor was successful in a cram down under §1129(b) of the Bankruptcy Code. The two-prong requirement of:

(1) acceptance by an impaired class was met by the acceptance of the $90,000 trade creditors, and

(2) best interest of creditors test was met by being uncontested. The bankruptcy court held that the plan did not unfairly discriminate, but was fair and equitable to impaired non-accepting classes. Justice Souter, in rejecting the holding of the bankruptcy court, emphasized that for a non-assenting impaired unsecured creditor class, a plan may be fair and equitable *only* if "the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest *any property*." (emphasis supplied) *This is the absolute priority rule!* Or in layman's terms, pay your creditors before you pay yourself.

In the bankruptcy court, the bank had unsuccessfully objected on the ground that the absolute priority rule was violated. The Seventh Circuit, with a divided panel, affirmed. The majority of the Circuit, in interpreting the Bankruptcy Code, held:

> *When an old equity holder retains an equity interest in the reorganized debtor by meeting the requirements of the new value corollary, he is not receiving or retaining that interest '**on account of his prior equitable ownership** of the debtor. Rather, he is allowed to participate in the reorganized entity **on account of a new, substantial, necessary and fair infusion of capital.**'* (emphasis supplied)

The minority in the Seventh Circuit stated the plain language of the absolute priority rule did not include a new value exception. Justice Souter then stated that the U.S. Supreme Court would not decide whether there was an exception, and that on the facts it would reverse because the proposed plan did not satisfy the statute. He first referred to the historical data, reflecting that many bills had been introduced in Congress since 1973 on the particular issue of new value exception, but were rejected either directly or by lack of action. Even so, he opined that there is nothing in the history to prohibit the interpretation now sought by debtor that "new value" in the phrase "on account of such junior claim" could imply that the absolute priority rule prohibition against receipt by junior creditors of any interest, when an unconsenting senior class is not paid in full, may be modified. He discussed the language of "on account of" concluding that it meant the same as "because of"; this recognizes that a causal connection between holding the prior claim or interest, and receiving or retaining property, is the catalyst which activates the absolute priority rule. However, he continued by first disagreeing with the *amicus curae* position of the U.S. The U.S. had contended that under a plan, old equity should not be allowed to take any property of the debtor if creditors are not paid in full. Justice Souter said that this was a "starchy" position, that the Government could not be correct because under this view of the absolute priority rule, Congress would have omitted entirely the phrase "on account of." His reasoning was that the "exclusivity" allowing old equity in setting a price amounted to a property right in itself. The following is quoted from his opinion:

> *Hence it is that the exclusiveness of the opportunity with its protection against the market's scrutiny of the purchase price by means of competing bids or even competing plan proposals, renders the partners' right a property interest extended "on account of" the old equity position and therefore subject to an unpaid senior creditor class's objection.*

The opinion concluded by stating that the question of whether a market test would require an opportunity to offer competing plans, or simply the right to bid along with old equity, was not being decided in this case. This case decided only that, if it be assumed there is a new value corollary, providing junior interest holders with exclusive opportunity, free from competition and without market valuation, violates Code §1129(b)(2)(B)(ii).

There is a scathing concurring opinion by Justice Thomas joined in by Justice Scalia. It takes the majority to task for commenting on a new value corollary when it says there is none. It seizes the opportunity to denounce the court for its opinion in *Dewsnup v. Timman*, 502 U.S. 410 (1992), which case had absolutely nothing in common

with the instant case other than statutory interpretation. It reiterates *Ron Pair Enterprises*, 489 U.S. 235 that the clear meaning of words should not be changed by courts, and it should be remembered that the enactment of the Bankruptcy Code was to modernize bankruptcy laws and, in so doing, made significant changes in the law. Justice Thomas further stated that it is erroneous to rely on pre-Code precedent, and that bankruptcy judges should not have the burden of making independent rulings where there is the clear meaning of words. He asserted that in this case, the wording is absolutely plain and clear, and that there should be no grafting of a "new value exception." Finally, he declared that there is no ambiguity just because there are separate and distinct views enunciated by adverse parties and, in such instances, "it usually means that one of the litigants is simply wrong." He also criticized the majority's use of dictum in prior cases to find differences in interpretation of the law. He wrote that prior to the enactment of the Code, no court ever relied on the dictum of *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939) to approve a plan, and that it should not be done so now. All I can say is "whew!"

There is also a strong dissent by Justice Stevens who dissects the majority opinion, but pays scant attention to Justice Thomas and the Government's more extreme views. It is noteworthy that Justice Stevens also refers to the clear meaning of the statute, but his view is exactly the contrary of the majority. His interpretation is certainly worth reading.

Comment: This time I will make no prediction into the future. Certainly, the bankruptcy court will be compelled to look long and hard at any plan based on "new value" to determine if it is fair and equitable.

For your information, I wrote the following comment after reviewing *In re Coltex Loop Central Three Partners, L.P.*, 138 F.3d 39 (2nd Cir. Feb. 19, 1998) for the September 1998 issue of this publication. Alas, it ended on the cutting floor.

***Comment:** Until the U.S. Supreme Court rules on the case of **203 N. LaSalle Street Partnership**, in which the Seventh Circuit held the new value exception to be valid, 126 F.3d 955 (1997), this case is presented generally for informational purposes. **It is predicted that the Supreme Court will most likely hedge by holding that it depends on the particular facts in determining whether the injection of capital is sufficient.** Perhaps the U.S. Supreme Court will also require that creditors should be allowed the option of participating in the same manner as the prior equity. There should be an answer on this in the near future.*

So, we now are sure that the right to purchase is a property right which cannot be denied, but we still do not know if there is a "new value" exception to the absolute priority rule.

Eleventh Circuit distinguishes between "core" and "related to" jurisdiction

In re Toledo 170 F.3d 1340 (11th Cir., 1999), 34 BCD 205. Plaintiff was a partner with debtor in a real estate partnership. Debtor, without plaintiff's knowledge, mortgaged partnership realty to a bank to secure personal debt. The bank foreclosed on the partnership property along with debtor's personal property. A sale of the property was approved by the bankruptcy court, which order contained a provision for a portion of the proceeds allowed to the bank to pay off its mortgage. The plaintiff partner was successful in an adversary proceeding contesting the validity of the bank's mortgage. The district court, considering this a core proceeding, did not consider it *de novo*, but affirmed under the deferential standard of review. On appeal, the Eleventh Circuit vacated the order and remanded. In the appeal, the bank contended that the bankruptcy court had no jurisdiction to accept the A.P. filed by the plaintiff but, if so, it was non-core with limitation on the right of the bankruptcy court to adjudicate the matter.

The Eleventh Circuit first held that the bankruptcy court had jurisdiction under title 28, §1334. There are three categories to determine bankruptcy court jurisdiction, to-wit proceedings that:

(1) arise under title 11,

(2) arise in cases under title 11, and

(3) are related to cases under title 11.

It said that the instant case did not arise:

(1) under title 11 or

(2) in a case under the Bankruptcy Code, but is

(3) a "related to" case, which is the minimum for bankruptcy court jurisdiction. It based this upon *In re Lemco Gypsum*, 910 F.2d 784 (11th Cir. 1990) as the seminal case in the Circuit, which in a very liberal definition, held that if a proceeding could affect the administration in bankruptcy of the estate, it was "related to" jurisdiction. In the present case, it decided that the validity of the mortgage could have a $200,000 effect for if it went to the partnership, the interest of the estate in the partnership would be increased. If the bank had to look to other assets, such as the debtor's residence, it could not be paid in full, but would be an unsecured creditor for the deficiency causing the unsecured creditors to be spread thinner. Thus, the outcome of the litigation would have an effect upon the estate. Having decided this issue, the court then held that the district court erroneously had determined it to be a core proceeding on reasoning that the outcome affected priority of liens. This was in error because the *res* was partnership property which was never part of the estate even though the debtor was a partner. It cited cases to show that the bankruptcy of a partner does not cause administration of the partnership assets. It said that this case could have been brought outside of bankruptcy as well as in it; thus, although there is jurisdiction in bankruptcy, it is non-core. Thus being such, the district court should have reviewed the bankruptcy court's decision as merely proposed findings and conclusions, and "should have conducted a *de novo*

review contemplated by §157(c)(1) and Bankruptcy Rule 9033."

Comment: This case sets up guidelines for determining jurisdiction, and core versus non-core. The distinctions become very blurred as it appears that valid arguments could be made either way but, nevertheless, the opinion should be helpful to the judiciary and practitioners in first deciding the jurisdiction of the bankruptcy court and second, whether an appeal is limited to questions of law, or whether it is *de novo* allowing the appellate court much more discretion.

Recent Decisions of the United States Supreme Court

Supreme Court raises the bar in carjacking prosecutions

Jones v. United States (Case No. 97-6203) ___ U.S. ___, 1999 WL 155688 (March 24, 1999).

A federal carjacking law that makes it a crime to use a gun while taking a motor vehicle from someone else by force and violence, 18 U.S.C. § 2119, requires federal prosecutors to prove beyond a reasonable doubt the "serious injury" provision of the statute.

This five-four decision will make it harder for prosecutors to seek enhanced punishment for alleged carjackers who hurt or kill someone during their crimes. The statute makes the maximum penalty for use of a gun 15 years in prison, but that penalty goes up to 25 years if "serious injury" results, and to life in prison if a death occurs.

Jones was charged with *inter alia* carjacking, in violation of 18 U.S.C. § 2119, which at the time provided "... that a person possessing a firearm who takes a motor vehicle ... from the person or presence of another by force and violence or by intimidation ... shall - (1) be imprisoned not more than 15 years ... (2) if serious bodily injury results, be imprisoned not more than 25 years ... and (3) if death results, be imprisoned by any number of years up to life - ...". The indictment in *Jones, supra*, made no reference to §2119-numbered subsections and charged none of the facts mentioned in the latter two subsections.

Jones was told at arraignment that he faced a maximum 15-year sentence for carjacking and the jury instructions at his trial defined that offense by reference solely to §2119(1). After Jones was found guilty, the district court imposed a 25-year sentence on the carjacking charge because one victim suffered serious bodily injury. The district court rejected Jones' objection that serious bodily injury was an element of the offense which had neither been pled in the indictment nor proven before the jury. In affirming, the Ninth Circuit agreed with the district court holding that §2119(2) was a sentencing factor and not an element of an independent offense.

Justice David A. Souter, writing for the Court, reversed the Ninth Circuit. The Court held that §2119 establishes three separate offenses by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Justice Souter critically noted, "... We think the fairest reading of Section 2119 treats the fact of serious bodily harm as an element, not a mere enhancement." The Court reasoned that the Government's construction of the statute would raise serious constitutional questions under the Fifth Amendment's due process clause and the Sixth Amendment's notice and jury trial guarantees. Ultimately, the Court resolved the issue with these words: "Any doubt on the issue of statutory construction should thus be resolved in favor of avoiding the question, under the rule that, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter.'"

Practice tip: Counsel should be mindful that with Alabama's extensive criminal enhancement scheme, this decision may give rise to a constitutional challenge brought under the Fifth, Sixth and Fourteenth amendments.

Car search of passenger's belongings

Wyoming v. Houghton, No. 98-184, ____ U.S. ____, 1999 WL 181177.

During a routine traffic stop, a Wyoming highway patrol officer noticed a hypodermic syringe in the driver's shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment for contraband, removing and searching what respondent, a passenger in the car, claimed was her purse. The officer found drug paraphernalia in the purse and arrested the passenger on drug charges.

The trial court denied her motion to suppress all evidence from her purse as the fruit of an unlawful search. The Wyoming Supreme Court reversed, holding that if an officer knows or should know that a container within a car belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection.

A divided Supreme Court reversed. Justice Scalia delivered the opinion of the Court. The Supreme Court held that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. In determining whether a particular governmental action violates the Fourth Amendment, the Supreme Court inquires first whether the action was regarded as an unlawful search or seizure under the common law when the amendment was framed. *See, e.g.*,

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Wilson v. Arkansas, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976. Where that inquiry yields no answer, the Court must evaluate the search or seizure under traditional reasonableness standards by balancing an individual's privacy interest against legitimate government interest.

Justice Scalia reasoned that "... This Court has concluded that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to believe contained contraband, *Carroll v. United States*, 267 U.S. 132, as well as the warrantless search of containers within the automobile, *United Sates v. Ross*, 456 U.S. 798."

The Court further reasoned that the analytical principle underlying *Ross'* rule is also fully consistent with the balance of this Court's Fourth Amendment jurisprudence. Thus, passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. The governmental interest in effective law enforcement would be appreciably impaired without the ability to search the passenger's belongings since an automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained.

Justice Stevens filed a dissenting opinion in which Justices Souter and Ginsburg joined.

Recent Decisions of the Eleventh Circuit Court of Appeals

Eleventh Circuit adopts *Knowles v. Iowa*, ___ U.S. ___, 119 S.Ct. 484 (1998)

United States v. Oscar Hernan Pena, et al., Case No. 97-6217, ___ F.3d ___ (May 10, 1999).

Shortly after midnight on July 29, 1995, Officer Joseph Moore of the Shelby County, Tennessee Sheriff's Department stopped a van on Interstate 40 in Memphis, Tennessee. Oscar Pena was the driver of the vehicle. Miguel A. Garrido, a woman and a young male were all passengers in the van. Officer Moore informed Pena that he had been stopped for speeding (65 mph in a 55 mph zone). Moore directed Pena to accompany him to his police car so that he could check on the status of Pena's driver's license and issue him a speeding ticket. Once in the police car, Moore began asking Pena questions unrelated to the stop, *e.g.*, where Pena's family resided in Memphis. Pena told the officer that he was visiting relatives in Memphis who lived near the intersection of Baltic and Summer streets. Moore then asked Pena if his registration and insurance papers were in the van. Pena responded affirmatively and Moore left to retrieve them. Standing outside the van, Moore asked Garrido, seated in the front passenger's seat, for the registration and insurance papers. He also asked the two other passengers who they were going to visit in Memphis and that person's street address. Moore then returned to his police car where, instead of completing Pena's ticket, he proceeded to ask Pena (a) to identify the three other van passengers; (b) how much he paid for the van; (c) what kind of work he did for a living; (d) whether Garrido was his brother; and (e) finally, why did they have different last names?

Again, postponing the writing of Pena's ticket, Moore asked Pena if he had anything illegal in the van; Pena said no. Moore followed up by asking if he had pistols or weapons or drugs. Again, Pena responded no a third time.

Moore, having no reasonable suspicion of criminal activity by Pena, nonetheless asked him if he could search the van. To that end, he handed Pena a written consent form in Spanish to be signed. Pena declined to sign the form. Instead of completing the traffic ticket, Moore picked up his police radio to declare that "... I have a refusal," a code phrase indicating to other officers that they should bring a drug dog to the scene.

Nearly one-half hour after Pena's initial stop, the dog arrived. The dog sniffed the outside of the van and indicated the presence of drugs. The van was then searched by Moore and other officers acting without a warrant. The search revealed significant amounts of marijuana (approximately 81 pounds). Pena and Garrido were arrested and read their *Miranda* rights in English and in Spanish.

At trial and on appeal, Pena challenged the constitutionality of Moore's search. The district court denied the motion finding that Moore's conduct leading up to the search was supported by the required reasonable suspicion of Pena's guilt.

The Eleventh Circuit reversed, following its earlier holding in *United States v. Tapia*, 912 F.2d 1367 (11th Cir. 1990), and the more recent decision of the Supreme Court in *Knowles v. Iowa*, ___ U.S. ___, 119 S.Ct. 484 (1998).

Since the issuance of *Tapia*, the Eleventh Circuit has consistently held that once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation, *i.e.*, a ticket, the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *See United States v. Holloman*, 113 F.3d 192, 196 (11th Cir. 1997), *per curiam*, noting that a police stop cannot otherwise last "any longer than necessary to process the traffic violation."

Thus, at the time Pena, Garrido and others were stopped, Officer Moore had before him evidence of speeding. His questioning following the stop, therefore, should have been directed to securing Pena's license, registration and insurance papers. Once such brief questioning was completed, Pena and the others should have been free to go, as Moore was provided at that time with no reasonable suspicion of their criminal activity. In such circumstances, "... additional fishing expedition questions, such as 'What do you do for a living?' and 'How much money did your van cost?' are simply irrelevant and constitute a violation of *Terry*."

Practice tip: In light of the Supreme Court's holding in *Wyoming v. Houghton*, counsel must focus on whether the arresting officer was acting on unsupported hunches instead of reasonable suspicion that the driver had violated anything other than the speeding laws or similar moving traffic violations. ■

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- **LEGAL RESEARCH AND WRITING:** Jennifer L. Jones, licensed Alabama attorney and member of the Alabama State Bar, 1724 3rd Avenue, North, Bessemer, Alabama. (205) 424-1188. Research and writing services on civil and criminal matters. *No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*

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- **HANDWRITING EXPERT:** Forensic document examiner. ABFDE certified, past president Southeastern Association of Forensic Document Examiners, American Academy of Forensic Sciences Fellow. Federal court qualified. Nineteen years' experience. Civil and criminal. Handwriting comparison, forgery detection, detection of altered medical records and other documents. Contact L. Keith Nelson, Stone Mountain, Georgia. Phone (770) 879-7224.

- **ELECTRICAL EXPERT WITNESS:** Twenty-four years' in the electrical industry. Member of BOCA, CABO, IAEI, ICBO, SBCCI. OSHA-authorized instructor. LPI certified lighting protection. NICET certified. Master electrician/contractor in 39 states. Fee basis only. Contact Steven J. Owen, electrical consultant. Phone (205) 987-2502. Fax (205) 982-9613.

- **FORENSIC DOCUMENT EXAMINATIONS:** Seventeen years' forensic document examinations; 27 years' total forensic experience. Retired senior documents examiner and discipline coordinator, Alabama Department of Forensic Sciences. Member, Questioned Document Section-American Academy of Forensic Sciences; Southeastern Association of Forensic Document Examiners; Southern Association of Forensic Scientists, Alabama State Association of Forensic Sciences (past president). Contact Richard A. Roper, Ph.D., 7956 Vaughn Road, #141, Montgomery 36116. Phone (334) 260-2552. Fax (334) 260-7929. E-mail: *richroper@aol.com.*

- **CONSTRUCTION MANAGER AND STRUCTURAL ENGINEER:** Registered professional engineer in Alabama, Mississippi and Louisiana. M.S.C.E. Twenty-seven years' experience with chemical plants, pulp and paper, refineries, fertilizer complexes, petrochemical plants, commercial and residential. Extensive experience with structural failures and insurance claims. Computer animation for failed structures. Negotiate construction claims and mediate construction disputes. Contractor's license in Alabama and Louisiana is current. Will testify. Contact Hal K. Cain, P.E., Mobile. Phone (334) 661-2605. Web site: *www.hkcain.com.*

- **LEGAL RESEARCH AND WRITING:** Research and writing services, including briefs, trial memoranda and other documents. Prompt deadline services. Experienced researcher and writer. Licensed Alabama attorney and member of the Alabama State Bar since 1979. Katherine S. Weed, P.O. Box 590104, Birmingham 35259. Phone (205) 941-1496. *No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*

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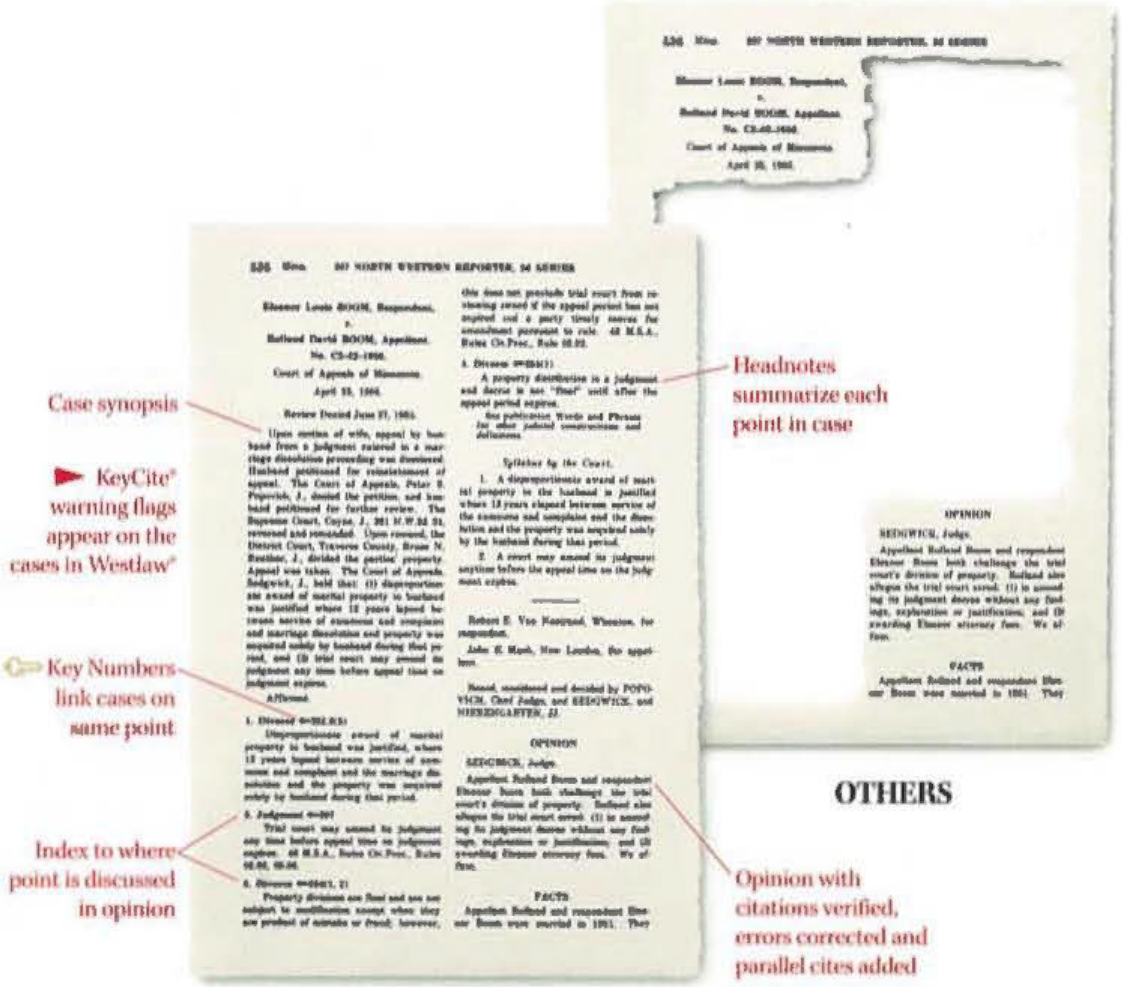

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