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MARCH 1991

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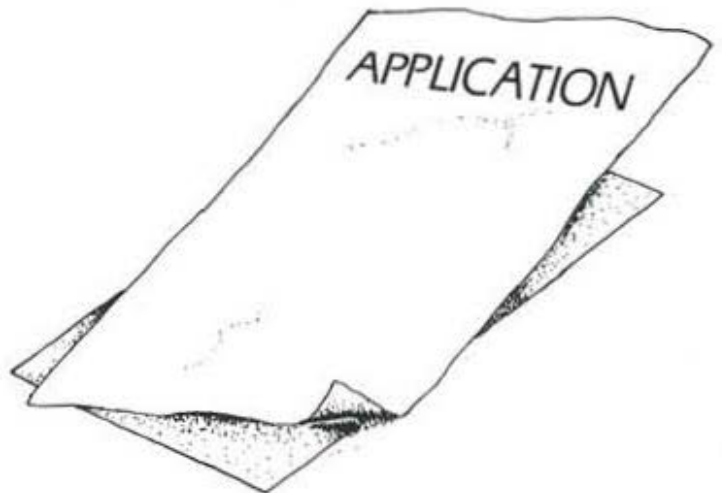
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VIDEO COURT REPORTING

See cover story on page 88.

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ON THE COVER: Videotaping court proceedings has come to Alabama's courtrooms. The impact of this new technology is already affecting cases now under consideration. For the pros and cons on the use of video in the courtroom see our discussion on page 88.
(Photo by Mark Wright)

INSIDE THIS ISSUE:

Possible Appellate Court Restructuring in Alabama

By Bert S. Nettles.....77

Video Court Reporting:

Videotaping of Court Proceedings

By Associate Justice Hugh Maddox.....91

Videorecording Court Proceedings Comes to Alabama

By Thelma Braswell.....92

Videotape as the Official Record of the Trial

By Judge Stuart Leach.....94

Video Court Reporting: What Judges and Lawyers Think

By Judge Randall Cole.....95

Court Reporting in the 1990s

By Jenny Dunn.....97

The Soviet Experiment: The Perspective of an Alabama Lawyer

By James G. Speake.....106

President's Page.....68	Building Alabama's Courthouses.....84
Executive Director's Report.....70	CLE Opportunities.....88
Legislative Wrap-Up.....71	Riding the Circuits.....99
Bar Briefs.....72	Consultant's Corner.....100
About Members, Among Firms.....74	Building Fund Honor Roll.....101
Disciplinary Report.....76	MCLE News.....105
Memorials.....78	Recent Decisions.....109
Opinions of the General Counsel.....80	Classified Notices.....112

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LET'S MEET AT THE BEACH

As winter recedes, it is not too early to begin thinking about a new experience for the Alabama State Bar. This summer we will take our annual meeting to the Alabama Gulf Coast.

July 18-21, 1991, is the time and the Perdido Beach Hilton at Orange Beach, Alabama, is the place. The emphasis will be on fun, family and informality, and we are expecting this to be the biggest and best convention we have ever held.

The Perdido Beach Hilton is a great facility. The entire hotel has been reserved for us, reduced rates have been arranged, and the key to the success of this convention will be to bring all of us under the same roof. I hope that everyone will plan to stay at the convention hotel.

As planning goes forward, every effort is being made to make this a fun experience for the family and not just a business meeting. This includes the availability of a top-notch children's program for those families staying at the Hilton. The program, designed for children ages five to 11, will be conducted by a well-trained professional staff and will be available both day and night. There is a local nanny service which may be used for help with younger children.

Casual dress will be encouraged. A golf tournament is being organized, and there will be plenty of free time in the schedule.

While the full program has not yet been completed, I can share with you some of the things which have now been set.

Alabama's judges will be holding their annual meeting at Gulf Shores the first three days of this same week. Judges and lawyers will come together at the Hilton on Thursday for the Bench and Bar Luncheon. In keeping with the emphasis on fun, our speaker will be United States District Judge Jerry Buckmeyer, of Dallas, Texas. In addition to being a popular after-dinner speaker, Judge Buckmeyer is widely known for his humorous series of public service radio spots sponsored by the Texas State Bar.

Thursday afternoon will feature an all-star Bench v. Bar

Beach Olympics, designed for the fun of the spectators, as well as of the participants.

Thursday night's cocktail buffet promises to be outstanding. It will be held around the pool with its beautifully landscaped patio, large deck and the adjoining beach. This area is one of the finest features of the hotel. A reggae band will be a special feature of the party.

Technology for the law office will be in the spotlight on Friday. We have arranged a presentation by two nationally recognized experts in the field. There will be a panel discussion with Alabama lawyers from different types of practice, solo practitioners to large firms. A large array of equipment will be demonstrated and on display, and small group consultations will be available.

This year, we will extend the convention through the weekend with parties on Friday and Saturday nights and conclude with the Hilton's famous jazz brunch on Sunday. And there will be ample opportunities throughout the week for obtaining CLE credits.

For all of you who have been to Alabama State Bar annual meetings before, I urge you to come again—

this will be the best yet! For those of you who have never attended an annual meeting, I urge you to make this your first.

Lawyers are a unique breed. Despite our many differences, differences in background, age, race, sex, types of practice, political beliefs, and types of clients, we are joined by a common bond—we are all lawyers. Our differences, the stress of law practice and the very nature of our adversary system often make our relationships with each other difficult. Our common bond allows us to put those differences aside and enjoy each other on a personal level. And, nowhere is it more possible to transcend those differences and experience the pleasures of our common bond than at our annual meeting.

So, mark your calendars now and begin making your plans for July 18-21, 1991. Kick off your shoes, pack up the kids and come on down to Beach Convention '91.

It's going to be a blast! ■



W. Harold Albritton, III

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EXECUTIVE DIRECTOR'S REPORT

WORKMEN'S COMP REFORM

The word "reform" usually evokes an emotional surge in today's society because it is generally associated with change, and change that is usually overdue in the eyes of the reformer.

The Department of Industrial Relations is asking representatives from various groups to serve in an advisory capacity to help the department address specific topics for proposed workmen's compensation reform. J.G. Allen, director of the department, recently requested that the Alabama State Bar identify three attorneys from our membership to help in this task.

Fortunately, the bar already had in place a task force created to determine the feasibility of creating a Workmen's Compensation Section of the state bar. The response to an interest survey was the most overwhelming ever to such a survey—over 400 lawyers indicated a desire to join the section. Obviously, these proposed changes will invite significant interest among our members.

Craig A. Donley, assistant general counsel to the Department of Industrial Relations, advised me that Alabama's Workmen's Compensation law has remained basically unchanged since its enactment in 1920. Along with education, workmen's compensation has developed into one of the two most serious problems facing our state's economic development. The high cost of workmen's compensation insurance and/or self-insurance is viewed by the department as a major threat to the stability of Alabama's economy.

The Department of Industrial Relations is responsible for the administration of the workmen's compensation law in Alabama. The law's four basic objectives are:

- (1) Provide sure, prompt and reasonable income and medical benefits to work-accident victims, regardless of fault;
- (2) Provide a single remedy and reduce court delays, costs and workloads arising out of litigation;
- (3) Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism; and
- (4) Promote frank study of causes of accidents to reduce preventable accidents and human suffering.

Four areas have been identified by the department as contributing to the perceived problems in Alabama. It is these areas that will be the subject of the reform.

The area of administration of the law, namely a court-administered system in which the circuit court is the first point of resolve, is to be examined. Alabama and Tennessee are the only two remaining jurisdictions using the courts as the administrative point of first resolve. One option that could be considered would be use of administrative law judges and inter-agency appeals that ultimately could reach the state supreme court. Attorneys would be allowed to participate at all levels of resolution with the present fee schedule remaining intact.

Medical costs are a second area of concern. The national average for medical costs on workmen's compensation claims is near 40 percent while costs in Alabama are near 60 percent. The reforms effort will study medical costs in other states to find methods of containment.

Surely to be controversial will be efforts to address the concerns with the type of claim being paid under our law. Donley and other department officials indicated the scope of "accidents" arising out of and in the course of one's employment appears to have been broadened outside the original intent of the law. New definitions and redefinitions of key words within the law are viewed as possible ways to reduce the costs in Alabama.

The last of four areas, viewed as the minimum necessary by the department, deals with the Second Injury Trust Fund. The investment account from which payments are made has decreased 70 percent over the last four years, dropping from \$1,200,000 to less than \$400,000. It would appear that the lump sum award of attorneys' fees in SITF cases will be viewed as an area in need of reform.

A recent request for a 44.6 percent rate increase in Alabama for workmen's compensation insurance is driving this reform effort. The average cost of workmen's compensation insurance in Alabama is currently \$3.06 per \$100 of wages. The southeast average is \$2.86 per \$100 in wages. The pending rate increase, if approved, would significantly increase the Alabama rate.

The department is seeking to bring together the constituencies of the bar, hospital association, medical association and insurance industry to work with the national expert it will hire to advise in this effort. The ultimate goal of the

(Continued on page 73)



Reginald T. Hamner

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

In December, the Legislature met for two days at the University of Alabama School of Law for an orientation. Sponsored by the Alabama Law Institute and Legislative Council, the Legislature reviewed a range of subjects from bill drafting to long-range planning.

Institute President Oakley Melton spoke to the legislators concerning major litigation in which the State of Alabama is a party. A short statement of each case is offered from Melton's remarks:

1. *Alabama Coalition for Equity, Inc.*, (14 county boards of education and numerous individual students and their parents) *v. the Governor, Superintendent of Education, members of the State Board of Education, Finance Director, Lieutenant Governor, and Speaker*. The plaintiffs claim Alabama's tax support of education is unconstitutional due to students receiving different per capita amounts according to the degree of local tax support.

2. The John Knight seven-year-old college desegregation lawsuit now being tried in the federal court in Birmingham.

3. *South Central Bell Telephone Co. v. State of Alabama, Department of Revenue*. This suit was filed on September 26, 1990, and challenges the Alabama corporation franchise tax.

4. *Rinehart v. Sizemore, as Commissioner of the Alabama Department of Revenue*. Involves the unconstitutionality of the Alabama income tax law which exempts the retirement income of state employees from income tax, but does

not exempt the retirement income of military retirees and non-civil service federal government retirees.

5. *Tel-Net v. State of Alabama*. Involves the telephone gross receipts tax and the contention by long distance carriers that they are not a telephone company since they do not provide "local exchange service."



6. *State of Alabama v. Franco Novelty Co.* Involves the contention of the taxpayer that the sales tax machine rate of 1.5 percent should be applied to the sale of pinball machines, juke boxes and vending machines since these machines "process electricity" and electricity has been held to be tangible personal property.

7. *State of Alabama v. King World Productions*. Involves Alabama's lease or rental tax on movies and television shows which are transmitted into Alabama by satellite and shown by Alabama television stations to television viewers in Alabama. The Montgomery Circuit Court held last week that there was no lease or rental tax due on such transmittals since the microwave signals are not tangible, personal property.

8. *Chemical Waste Management v. State of Alabama*. This is the hazardous waste fee case which was tried in the Montgomery Circuit Court in late 1990 and under submission at the time of publication.

9. *Phillips Petroleum Co. v. State of Alabama*. This case involves the question of the proper method to determine the value of oil when it is taken out of the ground at the oil well. The state contends that it should be determined on the basis of the "work back method," and Phillips Petroleum contends otherwise.

10. The insurance premium tax case which is the case involving the challenge by foreign insurance companies to Alabama's insurance premium tax (which is less for domestic insurance companies).

11. *State of Alabama v. U.S. Army Corps of Engineers*. This water diversion case involving the proposed withdrawal of large amounts of water from Lake Lanier, Carters Lake and Lake Allatoona in Georgia.

12. There is a case to require judicial reapportionment in all multi-judge circuits and the appellate courts, which is in the U. S. District Court for the Middle District of Alabama.

13. There is a case filed by Montgomery District Attorney Jimmy Evans against the state auditor and secretary of state over "expense allowances" which they are now receiving.

14. Pending before the Alabama Supreme Court is a case testing a 1930 Alabama statute that taxes credit card business from banks outside of Alabama.

The Legislature delivered to the Governor within the last five days of the Regular Session of the 1982 Legislature 140 bills. These bills were signed but not delivered to the secretary of state's office within ten days after legislative adjournment. The Alabama Supreme Court, on December 7, 1990, in *Ex parte Robert Coker* (case no. 89-1034), declared one of these acts, the "Pharmacy Robbery Act," to be pocket vetoed.

The Alabama Legislature will meet for their Regular Session April 16, 1991. These cases, plus reapportionment, should provide the Legislature with plenty of problems to keep them busy for their 105-calendar-day session. ■



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.

Hare selected to teach



Hare

Birmingham attorney Francis H. Hare, Jr., who practices with the firm of Hare, Wynn, Newell & Newton, was selected as the George E. Allen Chair in law to teach at the Uni-

versity of Richmond Law School during the month of February 1991. The Allen Chair was established in 1988 to allow the law school to invite distinguished legal scholars to spend time in residence and interact with the students and faculty of the University of Richmond Law School. Hare gave a series of lectures on "Current Issues in Complex Litigation."

He was admitted to the Alabama State Bar in 1959 and is a member of the board of bar commissioners, tenth circuit, place number one.

ABA book named one of four best by Money magazine

You and the Law, the American Bar Association's new 608-page legal guide for consumers, has been chosen by *Money* magazine as one of the four best books on personal finance published in 1990. It introduces the legal systems and lawyers in various chapters, such as "When and How to Use a Lawyer" and "How the Legal System Works," and explores specific legal problems consumers may face: family law, including marriage, divorce and children's rights; buying and selling a home; renting residential property; consumer credit; bankruptcy; contracts; buying, owning and selling a car; law and the workplace, including sexual harassment and racial discrimination; personal injury; criminal justice; the rights of older Americans; and wills, trusts and estate planning. There are also charts, graphs and maps that provide information about

the laws in each state or federal laws that apply across the United States. *You and the Law*, from the ABA Division for Public Education, does not offer legal advice. It can be purchased from ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, Illinois 60611, for \$19.95, plus \$3.95 postage and handling. Specify product code 235-0019.

Ingram and Thigpen invested in January



Ingram

New supreme court Justice Kenneth F. Ingram of Ashland and new appeals court Judge Charles A. Thigpen of Greensboro were invested in ceremonies January 23, 1991, at the Montgomery Civic Center. Justice Ingram moves to the supreme court from his position as presiding judge of the court of civil appeals. Ingram was elected to the appeals court in 1986, after serving as a circuit judge in the 18th Judicial Circuit for 18 years.



Thigpen

Judge Thigpen comes to the court of civil appeals from his position as presiding judge of the fourth Judicial Circuit, consisting of Dallas, Hale, Perry, Wilcox and Bibb counties. Justice Ingram is a graduate of Auburn University and Jones School of Law. Judge Thigpen is a graduate of the University of Alabama and the University's School of Law.

Max chosen member of Newcomen Society

Rodney A. Max, a member of the Birmingham firm of Najjar Denaburg, P.C., has been invited to join the Alabama

Chapter of the Newcomen Society of the United States.

The Society's purpose, a non-profit membership corporation, is to promote private enterprise and study and recognize achievement in American business and the society it serves. Max was admitted to the state bar in 1975.

Zarzaur re-elected president, AACA

Ben L. Zarzaur, a member of the Birmingham firm of Najjar Denaburg, P.C., was recently re-elected to a second term as president of the American Association of Creditor Attorneys. Zarzaur is a 1972 admittee to the Alabama State Bar.

Founded in 1989, the AACA is a national organization of creditor attorneys linked by a common computer network. The organization represents creditors in the commercial and collections business throughout the United States.

Johnson co-authors toxic tort book

Birmingham attorney John M. Johnson, of the firm of Lightfoot, Franklin, White & Lucas, recently co-authored and published *Pesticide Litigation Manual*, a legal "service manual" for handling pesticide litigation cases. Dr. George W. Ware, an associate director of the Agricultural Experiment Station of the University of Arizona, is the co-author.

The manual includes a detailed survey of FIFRA, theories of liability and defense, a lawyer's guide to pesticides, issues frequently briefed in pesticide cases, and a list of experts in pesticide cases. To order a copy contact Clark Boardman Company, Ltd., 375 Hudson Street, New York, New York 10014, or call 1-800-221-9428.



Johnson

Tapley resigns to direct The Sentencing Institute



Tapley

Administrative Director of Courts Allen L. Tapley recently announced his resignation from that post to found and direct The Sentencing Institute, a private, non-profit

organization designed to deal with Alabama's prison overcrowding problem. The Sentencing Institute will be located in Montgomery, and initial funding will be provided by a grant from the Edna McConnell Clark Foundation. Tapley has served as administrative head of Alabama's court system for 14 years under two chief justices, C.C. Torbert, who appointed him to the post in 1977, and Sonny Hornsby. A native of Camp Hill in Tallapoosa County, Alabama, Tapley earned his undergraduate degree in education from Auburn University and his graduate degree in education from the University of Alabama. In 1985, he received the American Judicature Society's Herbert Harley Award, which recognized "his accomplishments and extraordinary commitment to the improvement of the ad-

ministration of justice in Alabama." He was nominated for the Harley Award by United States Senator Howell Heflin. Tapley currently is a member of the board of directors of the Conference of State Court Administrators and served on the Jury Standards Task Force of the National Center for State Courts. He also is a member of the American Judicature Society. Tapley is a member of Frazer Memorial United Methodist Church and is married to the former Eugenia Nix of Foley. They have four children.

Mitchell elected Fellow of College

Anne W. Mitchell, of the Birmingham firm of Berkowitz, Lefkowitz, Isom & Kushner, was recently elected a Fellow of the American College of Trust and Estate Counsel. Mitchell is a graduate of Cumberland School of Law. The College is an international association of lawyers who have been recognized as outstanding practitioners in the laws of wills, trusts, estate planning and estate administration. Membership in the College is by invitation of the board of regents. ■

EXECUTIVE DIRECTOR'S REPORT

Continued from page 70

department is a comprehensive package to present to the legislature in April 1991.

Comments, suggestions and inquiries are invited by the Department of Industrial Relations Workmen's Compensation Task Force at 649 Monroe Street, Room 204, Montgomery, Alabama 36131. President Albritton will name three Alabama State Bar members with the advice and consent of the board of commissioners to the advisory committee. You should be sure your bar commissioner has the benefit of your views in this significant undertaking.

Do not forget that pending is a Tax Reform Commission report which includes a proposal to tax professional services.

At times, I get the feeling that the apocryphal clergyman purportedly ridden out of a certain Picken's County town might well be traversing Dexter Avenue with his admonition here: Reform! Reform! Reform! ■

CORRECTION!

Please make this correction in your copy of the 1990-91 Alabama Bar Directory.

The telephone number of the firm of Pittman, Hooks, Marsh, Dutton & Hollis was listed as (205) 388-8880.

The correct number is, and always has been, (205) 322-8880.

The firm's address, 800 Park Place Tower, Birmingham, Alabama 35203, as listed in the directory, is correct.

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ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

Robert B. Huie announces the relocation of his office to 2104 Rocky Ridge Road, Birmingham, Alabama 35216. Phone (205) 979-3371.

Mark A. Cavanaugh announces the relocation of his offices to 4191 Carmichael Road, Montgomery, Alabama 36101. Phone (205) 272-8444.

Charles E. Robinson announces the opening of **Charles E. Robinson, P.C.**, at Sixth Avenue-Court Street West, Ashville, Alabama 35953. Phone (205) 594-5133.

Mary Little Mattair announces the opening of her office at 314 South Baylen, Suite 206, Pensacola, Florida, 32501. Phone (904) 469-8180.

Jeb S. Fannin announces the opening of his office at 303 South Court Street, Talladega, Alabama 35160. Phone (205) 362-4420.

J. Thomas King, Jr., announces that, effective January 1, 1991, he became a vice-president with **Collateral Mortgage, Ltd.** His new address is 1900 Crestwood Boulevard, P.O. Box 830180, Birmingham, Alabama 35283-0180. Phone (205) 951-4000.

James D. Moffatt announces a change of address. His new office is located at 213 South Jefferson Street, Athens, Alabama 35611. Phone (205) 233-5091.

J. Paul Lowery announces the relocation of his office to 4183 Carmichael Road, Montgomery, Alabama 36106-2889. Phone (205) 271-0852.

Richard K. Mauk, former law clerk to U.S. Bankruptcy Judge Stephen B. Coleman, announces the relocation of his office to Park Place Tower, Suite 550, 2001 Park Place, North, Birmingham, Alabama 35203. Phone (205) 251-3311.

AMONG FIRMS

Sheffield, Sheffield & Sheffield, P.C. announces the change of the firm name to **Sheffield, Sheffield, Sheffield & Lentine, P.C.**, and that **John A. Lentine** has become a partner of the firm. Offices are located at Frank Nelson Building, 205 20th Street, North, Suite 730, Birmingham, Alabama. Phone (205) 328-1365.

W. Clint Brown, Jr., and **Sherrie G. Willman** of **Brown-Willman** announce the relocation of offices to 118 E. Moulton Street, Suite 6, Decatur, Alabama 35601. Phone (205) 355-4956.

Roden & Hayes, P.C., **Huel M. Carter, P.C.**, **Salem N. Resha, Jr.**, **Robert W. Shores**, and **Michael S. Herring** announce the merger of their firms. **Richard L. Jones** has become associated with the firm. They will practice under the name of **Roden & Hayes, P.C.**, at 2015 First Avenue, North, Suite 400, Birmingham, Alabama 35203. Phone (205) 328-6869.

The firm of **John T. Mooresmith, P.C.** announces that **J. Timothy Coyle** became a member of the firm effective January 1, 1991. Offices are located at 100 Brookwood Place, Suite 202, Birmingham, Alabama 35209. Phone (205) 871-3437.

Maynard, Cooper, Frierson & Gale, P.C. announces that **Gregory H. Hawley**, formerly an associate of the firm, has become a member of the firm, and that **Mitchell G. Allen**, **Thomas H. Brinkley**, **Katharine A. Weber**, **Steven T. Marshall**, **Michael D. Mulvaney**, and **J. Alan Truitt** have joined the firm as associates. Offices are located at 1901 Sixth Avenue, North, Suite 2400, AmSouth-Harbert Plaza, Birmingham, Alabama 35203-2602. Phone (205) 254-1000.

Gardner, Middlebrooks & Fleming, P.C., 16th floor, P.O. Drawer 3103, SouthTrust Bank Building, Mobile, Ala-

bama 36652, announces that **John D. Gibbons**, former law clerk to Circuit Judge Edward B. McDermott, and **Dixon Torbert Martino**, former assistant district attorney of Mobile County, have become associated with the firm. Phone (205) 433-8100.

Richard Jordan & Randy Myers, P.C. announces that **Benjamin L. Locklar**, former law clerk to Judge John C. Tyson, III, Alabama Court of Criminal Appeals, has become associated with the firm. Offices are located at 302 Alabama Street, Montgomery, Alabama 36104. Phone (205) 265-4561.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Helen Currie Foster** and **Steve Alan Tucker** became members of the firm July 1, 1990, and that **Herbert Harold West, Jr.**, **O. Kevin Vincent**, **Russell W. Adams**, **Emily Sides Bonds**, and **Melanie F. Merkle** have become associates of the firm. Birmingham offices are located at 1700 AmSouth-Sonat Tower, Birmingham, Alabama 35203. Phone (205) 252-8800.

Hamilton, Butler, Riddick, Tarlton & Sullivan, P.C. announces that **Steven C. Pearson** has become associated with the firm. Offices are located at Tenth floor, First National Building, P.O. Box 1743, Mobile, Alabama 36633. Phone (205) 432-7517.

The firm of **Heninger, Burge & Vargo** announces the relocation of their offices to 1500 Financial Center, Birmingham, Alabama 35203, effective December 17, 1990. Phone (205) 322-5153. The firm also announces that **Joseph W. Buffington** has become a member of the firm, and **David M. Cowan** has become associated with the firm.

John D. Richardson, **Mark E. Spear**, **David F. Daniell** and **Mark J. Upton**, formerly members of Brown, Hudgens, Richardson, P.C., announce

the formation of **Richardson, Daniell, Spear & Upton, P.C.** Offices are located at 1110 Montlimar Drive, P.O. Box 16428, Mobile, Alabama 36616. Phone (205) 344-8181.

The firm of **Lyons, Pipes & Cook** announces that **Allen E. Graham, Robert S. McAnnally** and **Michael C. Niemeyer** have become associated with the firm. Offices are located at 2 North Royal Street, P.O. Box 2727, Mobile, Alabama 36652. Phone (205) 432-4481.

Burr & Forman announces that **Robert H. Rutherford** and **Gene T. Price** have become partners in the firm, and **Robert S.W. Given, Victor L. Hayslip, Nancy L. Childress, Laura W. Brewer, Jennifer Manasco Busby,** and **James A. Taylor, Jr.**, have become associated with the firm. Birmingham offices are located at 3000 SouthTrust Tower, 420 North 20th Street, Birmingham, Alabama 35203. Phone (205) 251-3000.

The firm of **Johnstone, Adams, Bailey, Gordon & Harris** announces that **Michael C. White** has become a member of the firm, and **Robert S. Frost** has become associated with the firm. Offices are located at Royal St. Francis Building, 104 St. Francis Street, Mobile, Alabama 36602.

The office of **Prince, Baird, Turner & Poole, P.C.**, announces the addition of former **Circuit Judge Jerry B. Baird** as a partner in the firm, effective January 4, 1991. Offices are located at 2501 Sixth Street, Tuscaloosa, Alabama 35401. Phone (205) 345-1105.

The firm of **Norman, Fitzpatrick, Wood, Williams & Parker** announces that **Robert D. Norman, Jr.**, and **Thomas A. Kendrick** have become partners of the firm. Offices are located at 1800 City Federal Building, Birmingham, Alabama 35203. Phone (205) 328-6643.

Gordon, Silberman, Wiggins & Childs, P.C. announces that **Naomi Hilton Archer, Joseph H. Calvin,**

III, Timothy D. Davis, and **Linda J. Peacock** have become associated with the firm. Offices are located at 1400 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 328-0640.

Donald F. Pierce, Davis Carr and **Helen Johnson Alford** announce the opening of their firm, **Pierce, Carr & Alford.** **Forrest S. Latta** joined the firm effective January 1, 1991. Offices are located at Suite 900, Montlimar Park Office Building, 1110 Montlimar Drive, Mobile, Alabama 36609. The mailing address is P.O. Box 16046, Mobile 36616. Phone (205) 344-5151.

The firm of **Lanier, Ford, Shaver & Payne, P.C.** announces that **M. Ann Wagner, Lewis E. Bell** and **George E. Knox** have become associated with the firm. Offices are located at 200 West Court Square, Suite 5000, Huntsville, Alabama 35801.

The firm of **Steven F. Schmitt, P.C.** announces that **Michael S. Harper** became a member effective February 1, 1991. The new firm will be known as **Schmitt & Harper, P.C.** Offices will be located at 213 Barnett Boulevard, P.O. Box 606, Tallahassee, Alabama 36078. Phone (205) 283-6855.

Wilson & Pumroy announces that **T. Boice Turner, Jr.**, has become a partner in the firm, and the name of the firm has been changed to **Wilson, Pumroy & Turner.** Offices are located at 1431 Leighton Avenue, P.O. Box 2333, Anniston, Alabama 36202. Phone (205) 236-4222.

Cherry, Givens, Tarver, Aldridge, Peters, Lockett & Diaz, P.C. announces the relocation of their Mobile office to 401 Church Street, Mobile, Alabama 36602. Phone (205) 432-3700.

The Law Offices of **Jeffery A. Foshee** announces that **Daniel R. Farnell**, formerly practicing in Mobile, has become associated with the firm. Offices are located at 900 S. Perry Street, Montgomery, Alabama 36104. Phone (205) 265-1960.

The firm of **Spain, Gillon, Grooms, Blan & Nettles** announces that **Deborah A. Pickens, James A. Kee, Jr.**, and **Betsy Palmer Collins** have been named partners in the firm, located at 2117 Second Avenue, North, Birmingham, Alabama 35203. Phone (205) 328-4100.

The Law Office of John E. Enslen announces that **Parker C. Johnston** has been made a partner, effective January 1, 1991. The name of the firm has been changed to **Enslen & Johnston**, with offices located at 499 S. Main Street, Wetumpka, Alabama 36092. Phone (205) 567-2545.

Correction: The address in the January issue of *The Alabama Lawyer* for **Davis & Neal** should have read P.O. *Drawer* 711, Opelika, Alabama 36801. ■

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DISCIPLINARY REPORT

Disbarment

Montgomery lawyer **Elno A. Smith, Jr.**, was disbarred, effective at midnight on December 31, 1990, based upon various violations of the *Code of Professional Responsibility*, involving neglect of client affairs. [ASB Nos. 87-642, 87-672, 88-784, 89-413, and 89-452]

Public Censure

On November 2, 1990, **Charles Clifford Carter**, an Alabama lawyer practicing in Columbus, Georgia, was publicly censured for violating Disciplinary Rules 6-101(A), 7-101(A)(1)(2) & (3), and 1-102(A)(5) of the *Code of Professional Responsibility of the Alabama State Bar*. Carter filed a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Alabama for a client and, thereafter, failed to attend the first meeting of creditors, failed to timely submit a confirmable proposed plan, failed to attend two show cause hearings ordered by the bankruptcy judge and failed to make a timely refund of his fee to his client when ordered to do so by the Court.

Carter was suspended from practice before the Bankruptcy Court for one year and was found by the Disciplinary

Board of the Alabama State Bar to have willfully neglected a legal matter entrusted to him, to have failed to seek the lawful objectives of his client, intentionally failed to carry out a contract of employment entered into with his client, prejudiced or damaged his client during the course of a professional relationship, and engaged in conduct that is prejudicial to the administration of justice. [ASB No. 89-501]

Private Reprimands

• On December 14, 1990, a lawyer was privately reprimanded for having intentionally failed to seek the lawful objectives of his client through reasonably available means, in violation of DR 7-101(A)(1). The lawyer was hired to defend a civil suit and filed an appearance on behalf of his client. He, thereafter, without objection or motion to dismiss, allowed the case to be continued nine times over a period of 16 months, and billed his client for his appearances at these nine separate docket calls. [ASB No. 90-428]

• On December 14, 1990, a lawyer was privately reprimanded for conduct prejudicial to the administration of justice and conduct adversely reflecting on

fitness to practice law. The lawyer had filed a suit and then entered into an agreement with opposing counsel to grant the defendant additional time, to a specified date, within which to file an answer, in order to allow for possible settlement. The lawyer, nonetheless, filed an application for default judgment with supporting affidavit prior to the agreed-upon date, and without any notice to opposing counsel. [ASB No. 90-356]

• On December 14, 1990, a lawyer was privately reprimanded for having willfully neglected a legal matter entrusted to him. He accepted original documents from clients, after discussing his fee, and agreed to file suit on behalf of the clients or promptly return the documents to them. He did neither, however, and thereafter failed to return numerous telephone calls from the clients. He told the clients in the fall of 1989 that he would file suit shortly, but did not do so. He ignored the clients' January 1990 certified mail request that he return their documents, and did not return the documents to the clients until they filed a complaint against him with the bar in February 1990. [ASB No. 90-162]

• On December 14, 1990, a lawyer was privately reprimanded for conduct adversely reflecting on fitness to practice law, in violation of DR 1-102(A)(6). The lawyer struck a court clerk in a courthouse hallway, in front of other lawyers and other court personnel, and, using mild profanity, expressed displeasure over the recordkeeping done in the clerk's office. [ASB No. 89-835]

• On December 14, 1990, an Alabama lawyer received a private reprimand for violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6). The Disciplinary Commission found that the lawyer had engaged in a personal business relationship with a client and had mislead the client, had misinformed the client as to the import of certain documents executed by the client and performed other acts that adversely reflected on his fitness to practice law. [ASB No. 90-160] ■

FALL 1990 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	370
Number certified to Alabama Supreme Court	260
Certification rate	70 %
Certification percentages:	
University of Alabama	80 %
Cumberland	80 %
Birmingham School of Law	47 %
Jones Law Institute	46 %
Miles College of Law	25 %

POSSIBLE APPELLATE COURT RESTRUCTURING IN ALABAMA

By BERT S. NETTLES

During the past two decades there have been numerous studies and recommendations with respect to Alabama's appellate courts. The most recent study was made in 1988 and 1989 by a special Alabama State Bar task force. With one modification as later noted, the task force report was adopted on September 15, 1989, by the board of bar commissioners, "Upon an understanding that the board was merely approving the task force's work and it was not approving in detail some of the specifics noted therein."

Although the workload of the Alabama Supreme Court has since further increased approximately 20 percent¹, no changes in structure have been made. In 1989, the Alabama Supreme Court published more opinions than any other court of last resort in the United States.²

That increased workload undoubtedly contributed to the continued decline in the use of oral argument.

During the 1989-90 term, the supreme court heard only 41 oral arguments in approximately 5 percent of the cases in which written opinions were released.³ Likewise, for the 1988-89 term, only 6 percent of the 365 cases decided by opinion in the court of civil appeals were orally argued. During the past two

court terms, oral argument was heard in only 1 percent of the cases docketed in the court of criminal appeals. By contrast, the United States Circuit Court of Appeals for the Eleventh Circuit, during the year July 1, 1989, through June 30, 1990, heard oral argument in 826 cases (46.5 percent) out of 1,778 reviewed.

All projections point to still further substantial increases in Alabama's appellate workload. No matter how industrious and dedicated our appellate judges are, there is a limit to everyone's capacity. A new and greatly enlarged Judicial Building is under construction. That building can easily accommodate the additional judges necessary for appellate restructuring. As a consequence, the task force report (now almost two years old) seems more pressing than ever:

JUNE 20, 1989

Final Report of the Alabama State Bar's Task Force on the Possible Restructuring of the Appellate Courts

This task force was formed by appointment of President Gary Huckaby upon his assuming office in July 1988. Subcommittees of the task force met with all of the Appellate Judges of the State of Alabama soliciting suggestions and general input. In addition, the task force has reviewed previous reports and recommendations, including those of the Harris Commission, the Thomas B. Marvell Report of December 1985, prepared jointly by the Appellate Justice Center and the Institute of Judicial Administration, and the 1973 report on the Appellate Process in Alabama prepared by

David Halperin of the National Center for State Courts. The task force is particularly appreciative of the assistance received from Chief Justice E.C. "Sonny" Hornsby, former Chief Justice C.C. "Bo" Torbert, Associate Justice Hugh Maddox (who attended our January meeting), Associate Justice Sam Beatty (who is a member of the task force), Judge William Bowen of the Court of Criminal Appeals (who is a member of the task force), Judge Sam Taylor of the Court of Criminal Appeals (who attended one of the meetings of the task force), Associate Justice Willis B. Hunt of the Georgia Supreme Court (who attended the January task force meeting), and all of the other Appellate Judges of the state who contributed to the information-gathering process.

The task force is convinced that a critical need exists for immediate restructuring of Alabama's appellate courts. The problem is particularly acute with the workload presently thrust upon the members of the Alabama Supreme Court, who are now called upon to handle caseloads more than 125 percent above that recommended by appellate court experts. As Justice Hunt stated in reviewing recent changes in the Georgia Appellate Court system, appellate judges should be more than just a paper-grader for law clerks.

In addition to the presently increasing caseload of the Supreme Court, any necessary changes should be made now in order to allow for proper utilization of the new Alabama Judicial Building for which plans are currently being drawn.

The task force has divided its recommendations into two areas, those pertaining to the Supreme Court and those presently pertaining to the intermediate appellate courts.

(Continued on page 79)



Bert S. Nettles

Bert S. Nettles is with the Birmingham firm of Spain, Gillon, Grooms, Bran & Nettles. He is a graduate of the University of Alabama and the University's School of Law. Since 1988, he has been chairperson of the Alabama State Bar Task Force on Possible Restructuring of the Appellate Courts.



RONALD A. DRUMMOND

Resolution of Jackson County Bar Association

Whereas, the Honorable Ronald A. Drummond departed this life on the 22nd day of July 1990, and the members of this association wish to acknowledge the many and meaningful contributions he has made to the legal profession and to convey to his family our deep sympathy; and

Whereas, it is fitting on the occasion of this special meeting of this association to note the following in his life:

That he was born in Walker County, Alabama, on September 28, 1945, and later moved to Scottsboro, where he graduated from high school in 1963;

That he earned his bachelor of arts degree from the University of Alabama in 1967;

That he was married to the former Rebecca Barclay, and two children were born of that marriage, Will and Claire, all of whom survive him;

That he attended and graduated from the Cumberland School of Law of Samford University, receiving his law degree in 1972, cum laude, having served as a law student on the board of editors of the *Cumberland-Samford Law Review*, and having published in that law review;

That he thereafter served as law clerk to the late Justice James Bloodworth of the Supreme Court of Alabama;

That he returned first to Jasper, Alabama, and then to this community to begin the private practice of law, where he was actively engaged in the

general practice of law, including the trial bar, until his death, a period of over 18 years of service to the legal profession;

That, during his tenure in our ranks, he served as president of this association, while maintaining an active role as a member of the State of Alabama and American Bar Associations; and

That he served from 1987 until his death as judge of the City of Scottsboro Municipal Court;

That his active participation was not confined to the legal profession, but extended to his church, where he served as a member of the board of trustees of the First United Methodist Church of Scottsboro, to the Kiwanis Club, where he served as its president, to the chamber of commerce, where he served as vice-president, and to the Jackson County Heart Association, which he served as president; and

That his life was marked by his devotion to his church, his family and to this profession.

*John F. Porter, III
Livingston, Porter & Paulk, P.C.
Scottsboro, Alabama
President, Jackson County Bar Association*



WALTER FREDERICK EIGENBROD

Resolution of Huntsville-Madison County Bar Association

Whereas, Walter Frederick Eigenbrod departed this life in Huntsville, Alabama, on the 8th day of November 1990; and

Whereas, for 43 years he was a practicing attorney and member of this association and served as its president in 1963; and

Whereas, he was awarded a bachelor of arts degree from Louisiana State University in 1935 and a Juris Doctor from Tulane University in 1941 and served in the United States Army Air Corps from 1941 through 1945 and was discharged with the rank of major; and

Whereas, in 1962 he was appointed by President John F. Kennedy as a member of the Presidential Emergency Board No. 148 to investigate a dispute between New York Central Railway Company System and the Pittsburgh and Lake Erie Railroad Company; and

Whereas, in 1967 he was appointed by President Lyndon B. Johnson as an advisor to the Fifth Session of the Trade and Development Board of the United Nations Conference of Trade and Development at Geneva, Switzerland; and

Whereas, he was a member of the American Arbitration Association Voluntary Labor Arbitration Panel, the Arbitration Panel of Federal Mediation and Conciliation Service, the National Academy of Arbitrators and the American and Alabama State Bar Associations; and

Whereas, he has served his community as chairperson of the Madison County March of Dimes, president of the Tennessee Valley Chapter of Association of U.S. Army, vice-commander of the Huntsville Post American Legion, president of the Kiwanis Club of Huntsville, a member of the Board of Advisors of the Little Theater, president of the Madison County Tuberculosis Association, a member of the Huntsville-Madison County Railroad Authority; and a member of the Alabama State Democratic Executive Committee.

*John W. Evans, III
President, Huntsville-Madison County Bar Association*

Recommendations with Respect to the Alabama Supreme Court

1. Jurisdiction of the Supreme Court should be limited to certiorari jurisdiction. However, direct appeals should be allowed as presently provided by statute in utility rate cases and lawyer disciplinary matters. Further, appeals should be allowed as a matter of right from the Court of Criminal Appeals with respect to cases for which the death penalty has been imposed. Further, the task force would consider provisions for other direct appeals or appeals as a matter of right where such action is now specially authorized by statute.

2. The Supreme Court should have "reach down" authority. Such reach down authority should be limited to matters raised on the Supreme Court's own motion.

3. Certification of particular appeals or questions, such as constitutional issues of first impression, should be available to the intermediate appellate courts.

4. The membership of the Supreme Court should be reduced from nine to seven justices, by attrition.

5. The Supreme Court should sit as an en banc court, with no panels or divisions.

Intermediate Courts of Appeals

1. The present distinction between the Alabama Court of Criminal Appeals and the Alabama Court of Civil Appeals should be maintained.

2. In view of the greatly expanded workload that will result from the above recommended changes of the Supreme Court, the task force recommends that the members of the Court of Civil Appeals be increased from three to twelve judges, with three to be appointed for two-year terms, three elected for four-year terms and three elected for six-year terms.

3. Due to the probable need for still additional judges in the future on the Court of Civil Appeals and also the Court of Criminal Appeals, the task force recommends that a special commission or possibly an existing group, such as the Judicial Study Commission Session, be

directed to provide periodic recommendations as may be appropriate with respect to the number of judges on both courts.

4. Judicial panels should be authorized in order that either of the intermediate court of appeals could sit in panels of three or more judges as may be necessary. However, all courts and panels of courts should avoid geographic divisions, and they should be available for en banc hearings as may be appropriate.

5. The intermediate Courts of Appeals should have the authority to decline issuing written opinions, as they may deem appropriate.

6. Other than the above, no changes are recommended with respect to the Court of Criminal Appeals.⁴

Implementation

1. All recommended changes should become effective in January 1991.

2. Upon approval of the Alabama Board of Bar Commissioners, the Chief Justice of the Alabama Supreme Court and the Administrative Office of Courts should be asked to supervise the drafting of legislation necessary to implement the recommended recommendations.

3. The proposed statutory and/or con

stitutional changes should be pre-cleared with the U.S. Department of Justice.

4. The task force volunteers and recommends that it remain available to assist in the implementation of these recommendations. Specifically, the task force recommends that any changes in these recommendations deemed necessary or appropriate be made as soon as possible by the Board of Bar Commissioners rather than referring these recommendations to any other or further committee, commission or task force.

In conclusion, the task force recommends the consideration and implementation of these recommendations as a highest priority of the Alabama State Bar. ■

Footnotes

1. The number of filings with the supreme court increased from 1,597 in 1987-88 to 1,865 in 1989-90. The number of written opinions released during those court terms increased from 672 to 797.
2. West Publishing Company letter of November 27, 1990.
3. The supreme court now sits en banc for oral argument.
4. The board of bar commissioners substituted, "It is further recommended that the members of the Court of Criminal Appeals be increased from five to seven judges immediately and to nine judges two years hereafter."

· M · E · M · O · R · I · A · L · S ·

WILLIAM HENRY ARMBRECHT, JR.
Mobile
Admitted: 1932
Died: February 2, 1991

ALBERT HARVEY CASEY, JR.
Birmingham
Admitted: 1987
Died: November 20, 1990

JOHN MANNING HIGGINS
Clanton
Admitted: 1967
Died: August 4, 1990

MITCHELL JENKINS JACKSON
Montgomery
Admitted: 1928
Died: February 1, 1991

FLETCHER LORD
New Brockton
Admitted: 1923
Died: July 16, 1990

BALPHA LONNIE NOOJIN, JR.
Gadsden
Admitted: 1942
Died: June 26, 1990

MELEA CLARE RODGERS
Decatur
Admitted: 1980
Died: December 30, 1990

CHARLES AUGUSTUS SULLINS
Huntsville
Admitted: 1963
Died: January 7, 1991

OPINIONS OF THE GENERAL COUNSEL

By ALEX W. JACKSON*

MARKETING LEGAL SERVICES IN THE '90S: Good Taste and Professional Ethics Take on the First Amendment

During a recent television special Roseanne Barr joked about lawyer advertising, depicting client "testimonials" as meaningless and ripe for misrepresentation. Using visual images inappropriate to this article, Ms. Barr pointed out that, without all the facts, it is impossible to determine whether a given settlement figure is adequate, or appropriate, despite the apparent satisfaction of the client giving the testimonial, or the truth of the client's statement. While the source of these observations may be surprising, they nonetheless demonstrate the delicate balance that exists between constitutionally guaranteed freedom of speech and bar authority to regulate the form and content of public communications regarding an attorney's services.

Some guidance in this area has come from the United States Supreme Court, but many marketing concepts have yet to be considered by that Court. As a result state regulatory agencies, like the Alabama State Bar, have had to engage in the uncomfortable business of predicting how the Court might view certain marketing (i.e., advertising) schemes. The bar has done this in three ways, the first by formal rule, the next by formal opinion, interpreting the actual Rules of Professional Conduct, and finally by informal opinion, interpreting, for guidance purposes, all sources of authority, and seasoning that interpretation with (it is hoped) practical common sense. The "Black Letter" rules on advertising are found in Rules 7.1 through 7.7 of the Alabama Rules of Professional Conduct. These Rules were adopted in 1990, with an effective date of January 1, 1991, but they continue in most respects the regulatory scheme

that existed under the former *Alabama Code of Professional Responsibility*. The Rules speak, in most instances interchangeably, of "advertising" and "communication about the lawyer or the lawyer's services", maintaining, for ex-

A lawyer awakening from a 15-year coma would, after a day or two of exposure to current electronic and print media, opine that "anything goes" in regard to attorney advertising.

ample, that the prohibition on "false and misleading statements" applies to both (Rules 7.1 and 7.2, see also the Comment to Rule 7.1).

A lawyer awakening from a 15-year coma would, after a day or two of exposure to current electronic and print media, opine that "anything goes" in regard to attorney advertising. True, much has changed and probably change will continue, but certain thresholds will probably not be abrogated in the foreseeable future. It is unlikely that the ban on direct personal solicitation of clients will be repealed, or even materially altered (Rule 7.3). It is also probable that live telephone solicitation will continue to be prohibited conduct and, even though a small number of jurisdictions now allow the operation of computer-

ized, recorded-message telemarketing schemes, such schemes are, and probably will continue to be, not allowed in Alabama.

Hundreds of calls a year are made by Alabama lawyers to bar counsel to inquire about permissible forms of advertising/communication. Some forms are specifically approved in Rule 7.2 (a), including telephone directories, legal directories, newspapers or other periodicals, outdoor displays, radio, television, or written communication "not involving solicitation." The latter includes direct mail targeted advertisements or letters, which, although permitted, must comply in all particulars with requirements attendant to other, more conventional, forms of communication.

The Disciplinary Commission, through formal ethics opinions, has advised that Alabama lawyers may sponsor little league baseball teams, may sponsor high school year books, PTA handbooks and the like, and may be named or recognized for this sponsorship. The line is crossed, however, when the lawyer or law firm attempts to use this recognition for a commercial purpose and includes in the publication information about the lawyer beyond typical "business card" information (i.e., name, address, phone number), such as area of practice. When this more descriptive information is included the "communication" becomes an advertisement, and all of the relevant rules apply. Similar distinctions would apply on announcements regarding the formation or relocation of a law practice such that, depending on the content, the announcement might, or might not, be an "advertisement." The content test is not, however, solely determinative on this question as the method, or context, of the presentation may also be sufficient

to define a communication as an "advertisement."

For example, a firm name and telephone number, without any other information but presented in 20-foot tall electric lights on the side of a blimp over the Super Bowl would, no doubt, be considered as an "advertisement." In similar fashion, some definitional inferences are to be drawn by the context of the presentation such that a lawyer listing himself under specified areas of practice in telephone directory listings that are formatted in that fashion has, thereby, "advertised" and must comply with the advertising rules.

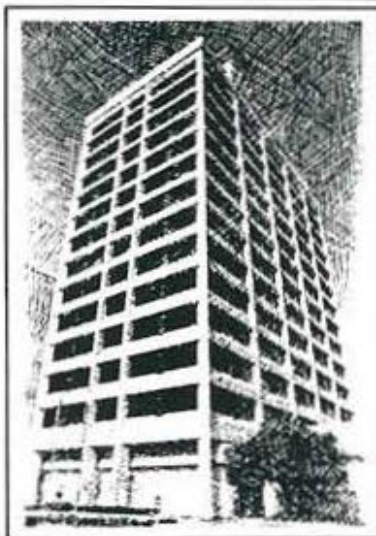
Lawyers use other forms of printed communication to "bring the message" to the public. Among them, and gaining in popularity and respectability, is the "firm brochure", which may be anything from an in-house typewritten curriculum vitae to a professionally produced, multi-color slick paper "history and biography" of a law firm and its members. These brochures are permitted but have been defined, on the basis of content, and perhaps intent, as advertisements. Another common vehicle is the "public service" legal advice column in a newspaper or other periodical. In most instances these are not considered to be "advertisements," but the method of presentation and the degree and nature of information about the responsible lawyer can lead to a different determination.

Once a communication has, by content, context or otherwise, become an advertisement certain requirements apply. The first, already mentioned, is that the advertisement not be false or misleading. Rule 7.1 further cites specific matters that are, per se, false or misleading, including communications that contain a misrepresentation of fact or law, that create an unjustified expectation about the results the lawyer can achieve, that compare the quality of the lawyer's services with the quality of other lawyer's services or that communicate (directly or by implication) certification of the lawyer by a non-bar approved certifying organization. [Rule 7.1, (a)-(d)].

Fine rules all, but what do they mean in application? To go back to Roseanne Barr's joke, client testimonials are not allowed in Alabama on the premise that they, generally, omit facts and are mis-

leading by omission and that, in any event, they create unjustified expectations about the results a particular lawyer can obtain. The United States Supreme Court has denied certiorari on a California case wherein a lawyer was disciplined for using client endorsements/testimonials, but to date there have been no opinions on point to guide regulatory agencies which must, in the absence of authority, apply the generic principles of fraud and misrepresentation in their most logical and reasonable fashion. Further examples of communication deemed impermissible under these standards are statements that a lawyer is "the best" or "the smartest" or "the toughest," whereas the statement that a lawyer is "experienced" is, if true, permitted. A lawyer may not claim that he is certified as an "NFL Agent/Attorney," because that certification is not recognized by the Alabama State Bar, but a lawyer may state, if true, that he is a "Certified Civil Trial Advocate" by the National Board of Trial Advocacy, currently the only certification group approved in this state.

When read together these rules formed a substantial part of the basis of the bar's formal opinion holding that Alabama lawyers may not ethically participate in marketing ventures such as the Personal Injury Trial Lawyers Association, Bankruptcy Attorneys Trust, DUI/DWI Defense League and the like [see Opinion RO-90-49(A) & (B)]. Other marketing schemes, quasi-legal service plans, such as those offered by American Express and Montgomery Ward, have not, to date, been specifically approved or disapproved by the bar, but are currently being studied to determine what they are, how they operate and what degree of regulation of lawyer participation in them is necessary, if any at all. The bar does not seek to regulate any of the companies offering marketing plans, whatever they may be called, but rather seeks to advise Alabama lawyers about the ethical implications of their participation in such plans. Rule 7.2(c) prohibits lawyer participation in "for-profit" lawyer referral services; other rules prohibit sharing legal fees with non-lawyers (Comment, Rule 7.2; Rule 5.4), but



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lawyers are permitted to pay the "reasonable costs" of their own otherwise permissible advertisements or written communications.

Once a lawyer has elected to "advertise" other regulations also come into play. For example, each advertisement must contain the disclaimer and the disclaimer must be "clearly legible or audible." The disclaimer set out in Rule 7.2(e) is slightly changed from the former *Code of Professional Responsibility* disclaimer, although a transition rule does provide some change over time for advertisements that commenced under the former language and continue under the new.

Each advertisement must contain the name of at least one lawyer responsible for its content [Rule 7.2(d), or the "designated target" rule], even if a trade name is used. Trade names are permitted by Rule 7.5(a); more on them later.

A copy or recording of each advertisement must be delivered to the office of the bar's general counsel within three days after its first dissemination. In addition, the lawyer responsible for the content must keep a copy for six (6) years. The lawyer is required to tell the bar who is publishing or broadcasting the advertisement and the contemplated duration of the advertisement. This is a filing and recordkeeping rule, not a pre-screening rule. Receipt of the advertisement by the bar is not tantamount to approval of the same, unless a specific request has been made and acknowledged. Rule 7.2(f) provides that if fees are stated in the advertisement then the stated services must be available at the stated rate for no less than sixty (60) days after the last date of broadcast or publication. Failure to comply constitutes "prima facie evidence of misleading advertising and deceptive practices."

Lawyers may state that they do, or do not, practice in an area of the law, but they may not state or imply, in so doing, that they specialize or are expert in any areas of practice. Lawyers admitted to practice before the U.S. Patent and Trademark Office may so specify and lawyers engaged in Admiralty Practice may so designate. The Rules, as mentioned, also specify that certain certifications granted by outside (i.e., non-bar) organizations may be included in other-

wise permissible advertisements. A review and approval process is set forth in Rule 7.7 whereby such outside organizations may grant certification to Alabama lawyers and those lawyers may advertise that certification. Very few lawyers have taken advantage of this opportunity, and only one certifying organization has been approved.

For some time trade names have been permitted in Alabama, provided that they are not misleading and do not imply a connection with a government agency or with a public or charitable organization. In a recent formal opinion on trade name usage (RO-90-100), the Disciplinary Commission considered the developing trend of lawyers and law firms that select and use alphabetically advantageous trade names to obtain lead-off directory listings (where such listings are alphabetical), and fail to use that trade name in any other context.

The Commission held such practices to be in violation of the Rules and determined that a trade name, once adopted and used in any permissive public communication, should be used consistently in all public communications (including advertisements). Thus, John Doe may not use the trade name "AAA Legal Clinic" to gain an advantageous telephone directory listing and then abandon that name in all of his other public communications. In addition, of course, the use of a trade name does not abrogate the requirement that the name of a lawyer be used, meaning that any advertisement for "AAA Legal Clinic" must also contain language similar to "The Law Office of John Doe" or "John Doe, Attorney." Once this joinder has been effected it must be continual and consistent.

With the phenomenal growth in lawyer advertising in the last few years many new marketing/advertising concepts have been developed. Closely related to the "legal service" plans previously mentioned are programs whereby institutional clients, such as banks and credit unions, advertise as additional services available for their customers/members certain standard legal services such as "will review." Some of these programs, rendering services with non-lawyer personnel, are prohibited as the unauthorized practice of law; others, which rely on corporate in-house coun-

sel, may also be prohibited by rules which prevent the practice of law by non-legal corporations [Rule 5.4, Rules 5.5(b)] on a similar basis. Still others, which rely on services provided by outside (but closely affiliated) counsel may be permissible, but subject to bar regulation in a number of areas, including advertising. It is axiomatic that a lawyer may not do through a third party or entity that which he himself is prohibited from doing [Rule 8.4(a)].

Insofar as advertising done by non-lawyers, or entities, which benefits a particular lawyer or lawyers, application of this principal would impose upon that benefited lawyer or lawyers the obligation to require that the advertisement or communication in question be in full conformity with bar advertising rules. For example, a lawyer may not benefit from, or be party to, third-party advertisements that tout expertise (i.e., "As a free service to our customers we will provide a will review by John Doe, Attorney, a well-known estate planning expert"). Indeed, lawyer participation in such programs, even when properly advertised, is problematical, at best, and subject to many other ethical and practical considerations.

It is certain that before this article is published new innovative marketing programs will be developed and offered to Alabama lawyers. Practitioners interested in participating in such programs should carefully consider the permissive ethical boundaries that exist, being aware that the right to commercial free speech is not absolute. The Alabama State Bar has made a good faith effort over the past several years to keep up with developments in this area by coordinating the work of the bar legal staff with three active bar committees, the Lawyer Advertising and Solicitation Committee, the Prepaid Legal Services Committee and the Permanent Code Commission. When in doubt about a proposed course of conduct, early contact with the bar can be helpful and informative. Advertising is here to stay, but even a ribald comedienne knows that "not everything goes." ■

* Jackson now is in private practice in Montgomery, but served as assistant general counsel for the Alabama State Bar for ten and a half years.

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BUILDING ALABAMA'S COURTHOUSES

BESSEMER COURTHOUSE

By SAMUEL A. RUMORE, JR.

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



Henry DeBardeleben is remembered as one of the premier industrialists and entrepreneurs in Alabama.

He grew up as a ward in the home of Daniel Pratt, who had made Prattville in Autauga County the manufacturing center of Alabama prior to the Civil War. After the war, Pratt expanded his interests to railroads, mining and real estate in Jefferson County. DeBardeleben married Pratt's daughter and was his heir when Pratt died in 1873.

DeBardeleben had a dream of building a new industrial city from the bottom up using the mineral resources of north Alabama. He hoped that the new town would become a steel center and wanted it to have a name related to steelmaking. DeBardeleben proposed the name "Bessemer" in honor of Sir Henry Bessemer, an Englishman who had invented the "Bessemer Process" of steelmaking. On July 28, 1886, he helped organize the Bessemer Land Company. On April 12, 1887, the Land Company sold the first lots in the town of Bessemer.

Bessemer was located approximately 13 miles southwest of Birmingham, its older rival in Jefferson County. The new industrial city prospered as investors,



Birmingham Courthouse (1889-1931)

capitalists and speculators flocked there. By 1890 Bessemer was the eighth largest city in Alabama. Even today it is often called the "Marvel City," similar to Birmingham's nickname of the "Magic City."

The first court held in Bessemer took place in June 1887 before justice of the peace R.M. McAdory. As early as 1888, the optimism over the future of Bessemer prompted many leaders to seek the creation of a new county where Bessemer would be the county seat and have its own circuit court. An editorial in the *Bessemer Journal* of December 20, 1888, called for the creation of a Bessemer County. The editorial also warned against the selfish opposition to this proposal from that other industrial town to the east, Birmingham.

By 1891, the *Bessemer Journal* reversed its editorial policy for a more immediate and attainable approach. In an editorial dated December 31, 1891, and

entitled "Drop the New County Subject", the paper pointed out that what Bessemer really needed was a local court beyond the justice of the peace court.

On January 21, 1893, the Alabama Legislature created the Bessemer Division of the Jefferson County Circuit Court. The citizens of Bessemer had felt "cut off" from the rest of the county. In response, the new law required that a circuit judge from Birmingham, the county seat, would actually hold court on a regular basis in Bessemer. This law created what is known today as the Bessemer Cut-off, because it described a specific territory and excluded the authority of the circuit court in Birmingham from this "cut-off" area. The circuit court was held in Bessemer June 5, 1893, on what was called the "Charleston Block." Court was later held at Rebie Hall on the site of the present-day Realty Building.

The desire for a separate county never totally disappeared. By November 1900, a city alderman called for a resolution by the city council endorsing a bill in the Legislature that would create a Bessemer County. Another name that was suggested for the new entity was Pettus County in honor of Edmund W. Pettus of Selma, who was a lawyer, Civil War general and United States Senator.

The next milestone in the Bessemer story took place February 28, 1901. The Legislature passed a bill abolishing the Bessemer Division of the Jefferson County Circuit Court. In place of the old system, the new law created a Bessemer City Court. This court had similar territorial jurisdiction over the Cut-off area.

On May 18, 1901, the *Bessemer Weekly* stated that a new county was still needed. If created, it would be 13th in population in Alabama, and seventh in taxable land values. The paper further editorialized on the subject as follows: "With Bessemer the shire town of its own county, its translation into a thoroughly independent, self-reliant, self-governed municipality, with its courts of records, its public buildings and institutions, the residence of county officials, the seat of a county's official business, would be immediate and notable. Values would in consequence appreciate and become more stable; confidence would infect and inspire every citizen and arouse the strongest local pride and Bessemer abroad would command the attention and interest that she never can while subject to the civil and political domination of her sister city, Birmingham."

The *Bessemer Workman*, in an editorial dated May 23, 1901, eloquently pleaded the position for a new Bessemer



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

Migliorico & Rumore. Rumore was recently elected to serve as the bar commissioner for the 10th Circuit, place number four.



Bessemer Courthouse (1920)



Birmingham Courthouse (1875-1887)

County to the 1901 Constitutional Convention delegates. The rivalry between Birmingham and Bessemer was clearly illustrated in the following:

"Jefferson County has long ago ceased to have a government representative of her people. Birmingham is powerful enough to dictate its politics and its policies. The county is great only to the extent that it may add to Birmingham's greatness. The tax gatherer brings the funds to Birmingham from all parts of the county and then it is disbursed as best suits the interests of the capital city. In the matter of distributing the money for public roads and bridges during the past ten years, the discrimination against the Bessemer District would

amount to thousands of dollars. The law all along has been that the road money should be spent in the district from which it was collected, but this district until quite recently has been impotent to enforce the observance of the law and secure their rights.

"The people of the proposed Bessemer County want nothing but that which they are entitled to. They are asking for home rule and are able and willing to pay for it to the extent of taking upon themselves a just proportion of the indebtedness of the counties from which it is formed.

"Bessemer County is a necessity, its establishment a right, and the delegates to the Constitutional Convention will, we are most positive, favor the just demands of a people appealing only for the right of local self-government."

Despite the efforts of Bessemer, the greater influence of Birmingham can be seen in the restrictions placed on the formation of new counties by the Alabama Constitution of 1901. The Constitution effectively blocked the creation of a new county centered at Bessemer. Article II, Section 39 provided that no new county could be formed of less than 600 square miles, and no existing county could be reduced to less than 600 square miles. Since Jefferson County has 1,115



Bessemer Courthouse Annex (1980)

square miles, the creation of a new county would require a shifting of territory from one or more other counties in order to reach the necessary minimum area and still leave 600 square miles intact. No neighboring county would vol-

untarily give up its territory so this requirement effectively made the creation of a new county impossible.

Further, Article II, Section 40 provided that no county line should be altered or changed, or in the event of the cre-

ation of new counties, should be established so as to run within seven miles of the county courthouse of any existing county. This would mean that the eastern boundary of Bessemer County could not be closer than seven miles from the Birmingham Courthouse. The Cut-off line would have to be moved farther west, thus making it more difficult to reach the minimum threshold or area.

Various amendments were proposed over the years to assist in creating a new county. One proposal was to reduce to 400 square miles the minimum area necessary for a county. Proponents argued that a small portion of Walker and Tuscaloosa counties could be joined with western Jefferson County to form the new county. This would still have left Jefferson County as the state's most populous. On November 3, 1908, an amendment to the Alabama Constitution dealing with this issue was considered by the voters of Alabama. It was defeated.

In 1915, Bessemer's Representative in the state Legislature, William S. Welch, authored the legislation that created the



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present Bessemer Cut-off, and finally put the issue of a new county to rest. The Bessemer Division of the Tenth Judicial Circuit would have its own judge "in residence." The Legislature also authorized the construction of a courthouse wherever circuit court was held, meaning that Bessemer would get its own courthouse as well.

Birmingham architect Harry B. Wheelock designed the first official Bessemer Courthouse. Due to World War I, bids were not taken on the project until June 1919. Smallman-Brice Construction Company served as general contractor for the project. The total cost for the three-story structure was approximately \$175,000. The building was ready for occupancy in October 1920.

The Act of 1915, which set up the Bessemer Division, has been amended by local acts over the years. Modifications of the Cut-off territory were passed in 1919, 1935 and 1943. A line of cases has evolved over the years concerning the relationship of the Birmingham and Bessemer divisions. Basically, the Bessemer Division has exclusive "territorial jurisdiction" over any actions arising in its described area.

As early as 1938 plans were made to enlarge the Bessemer Courthouse. However, funding was unavailable since the Federal Works Progress Administration had ended. Then World War II intervened, and the courthouse addition was again delayed until 1948. Architect Charles McCauley of Birmingham designed the three-story annex and Brice Building Company was awarded the contract that was completed in the spring of 1949.

In 1958 a plan was proposed for the City of Bessemer to buy the Bessemer Courthouse building and Bessemer City Hall would then be razed for the construction of a new courthouse. This plan was scrapped after it was learned that a new courthouse would cost \$2-3 million dollars while renovation of the old courthouse would only cost about \$600,000.

In 1967, another renovation was needed due to lack of space as evidenced by the location of a deputy sheriff's office in the Bessemer Courthouse men's room. This renovation was completed in 1970.

By 1976, a new court building annex

was planned and it would be built with the help of federal revenue sharing dollars. The seven-story structure, the tallest in Bessemer, consists of four parking levels and three floors of courtrooms and offices. The approximate cost of the new tower was \$6.5 million. The building was designed by Buddy Golson of Blondheim, Williams & Golson, Inc., and the construction was performed by Robins Corporation. This Bessemer Courthouse Annex was dedicated Sunday, November 9, 1980. ■

The author acknowledges his use of the following in preparation of this article:

Tramel W. Durham in *The History of the City of Bessemer, 1887-1917*, unpublished M.A. thesis, Birmingham-Southern College, 1962;

Chris H. Doss in the dedication ceremony program of the Jefferson County Courthouse, Bessemer, Alabama, November 9, 1980; and

Lynn Riddle Stewart in "The Bessemer Courthouse," an article in the *Journal of History of the West Jefferson County Historical Society*, Vol. VIII, No. 3, spring 1981.

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- Development of a network of experienced attorneys to share information and ideas regarding substantive health law issues;
- Presentation of a periodic newsletter dealing with health care issues;
- Presentation of an annual seminar;
- Review of legislative changes and oversight regarding legislative issues; and
- Informational meetings to address state or federal law changes affecting health care practitioners. Attorneys who might be interested in joining the Alabama State Bar Health Law Section would be those who have an interest in health care issues and who represent health care facilities, health care providers, industries involved in providing services to health care providers or practitioners, and attorneys who represent the general public with respect to health care issues. The annual dues for membership will be \$15.

If you are interested in becoming a charter member of this section, please mail the attached form to Keith B. Norman at P.O. Box 671, Montgomery, Alabama 36101 by April 30, 1991.

(Check one)

- I am interested in joining the Health Law Section. Enclosed is my check for \$15, made payable to the Alabama State Bar Health Law Section.
- I am interested in additional information regarding the Health Law Section.

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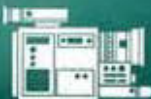
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VIDEOTAPING OF COURT PROCEEDINGS

By ASSOCIATE JUSTICE HUGH MADDOX

Last year, the Supreme Court of Alabama adopted an American Bar Association Time Standard for Disposition of Appeals, which states that an appeal should be disposed of by an appellate court within 280 days after the notice of appeal is filed. One of the causes for delay on appeal was determined to be that many transcripts of the evidence, for one reason or another, were not being filed within 56 days as provided by the Rules of Appellate Procedure.

In the early part of 1990, the Administrative Office of Courts determined to find out how much delay there was in transcript filings and the cause of the delay. Setting as its objective a determination of the best court reporting system for providing an accurate, verbatim record of court proceedings in a timely manner as economically as possible, staff at AOC, under the supervision of **Thelma Braswell**, director of court operations, did a detailed study of transcripts filed in the appellate courts of Alabama between 1987 and the date of the study. After looking at all factors involved, the Administrative Office of Courts presented to the supreme court in August 1990

a three-volume report containing its findings. Based on its study, AOC concluded that "videotaping court proceedings and allowing the videotape to serve as the official record on appeal was the most efficient and cost effective method."

In the following articles, contrasting views are expressed concerning the best method for getting a verbatim record of a trial, as quickly as possible, and as economically as possible. After examining the pros and cons of video recording, **Braswell** concludes that "videorecording court proceedings provides many advantages for improving the timely delivery of justice services for litigants," but recognizes that it is "not without some deficiencies."

Judge Stuart Leach of Birmingham, where videorecording is now being used, concludes that although there are unknowns "it appears the benefits outweigh the disadvantages with the margin to be determined after having actually operated the system for a reasonable period of time."

Judge Randall Cole, who attended a conference in Louisville, Kentucky, on videorecording, notes that "[t]rial judges, appellate judges, and attorneys at the conference gave video reporting mixed reviews, with attorneys giving it the lowest marks." Judge Cole concludes that the placement of video equipment in three Birmingham court-

rooms will provide a valuable opportunity for judges and attorneys to evaluate for themselves the pros and cons of video.

Jenny Dunn, past president of the Alabama Court Reporters Association, thinks that videorecording should be only an adjunct to having a written transcript, and the "computer-integrated courtroom" is the answer, and that adoption of a rule requiring videotaping would be a "shortcut." ■



Hugh Maddox
Associate Justice Hugh Maddox has been on the Supreme Court of Alabama since 1969. He is a graduate of the University of Alabama and the University's School of Law. He is the author of *Alabama Rules of Criminal Procedure* and is a member of the board of editors of *The Alabama Lawyer*.





VIDEORECORDING COURT PROCEEDINGS COMES TO ALABAMA

By *THELMA BRASWELL*

Alabama will soon launch a videorecording demonstration project in three courtrooms in Birmingham. Modern state-of-the-art cameras and videorecorders will be installed in courtrooms of circuit judges Stuart Leach, Marvin Cherner and Joe Barnard to record all court proceedings and hearings. The design will follow the prototype developed for Kentucky courts where 42 of 91 circuit judges use video equipment to record court proceedings.

While Kentucky has more courtrooms equipped for videorecording than any other state, several other states and a few federal courts have embarked on videotaping projects in selected courts. The states include Oregon, Washington, Michigan, Florida, North Carolina, Virginia, District of Columbia, Hawaii, and Maryland, and federal district courts in San Francisco, Philadelphia and New Orleans.

The Birmingham courtrooms will be equipped with five fully automatic, permanently mounted cameras which are quiet and give no indication when they are being used. Six or seven microphones will be strategically placed throughout the courtroom. Four VCRs will simultaneously record the court proceedings to guard against an equip-

ment failure of a single VCR and to make multiple original videorecords. Tapes are programmed to record six hours of proceedings to minimize interruptions during a trial to replace tapes. The date and time are imprinted on the videotapes as they record for reference. A VCR will be available in the courtroom with a large-screen television for use if a video deposition is to be presented. The video deposition will be recorded onto the trial tape. The effectiveness of this equipment is made possible by a computer-controlled mixer developed to have voice-activated microphones switch on the cameras.

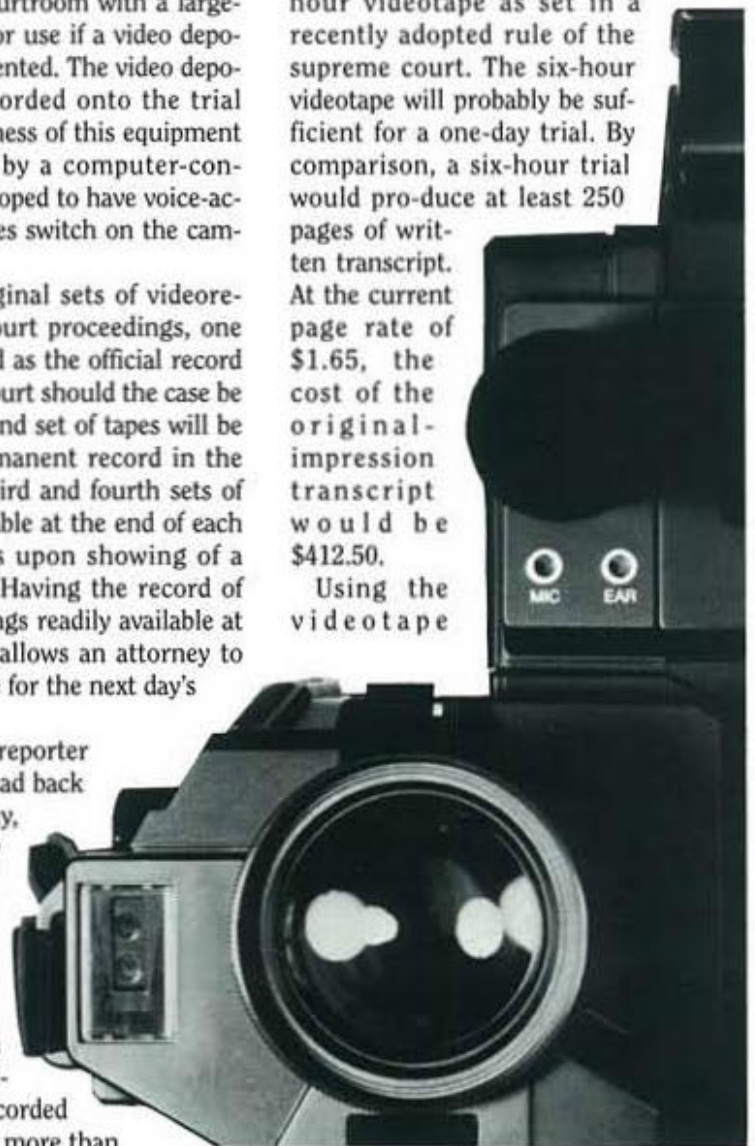
Of the four original sets of videorecordings of the court proceedings, one set will be reserved as the official record for the appellate court should the case be appealed. The second set of tapes will be retained as a permanent record in the trial court. The third and fourth sets of tapes will be available at the end of each day's proceedings upon showing of a purchase receipt. Having the record of the day's proceedings readily available at a reasonable cost allows an attorney to review and prepare for the next day's presentation.

Just as a court reporter may be asked to read back previous testimony, the videotape may be rewound to a particular witness' testimony and that portion may be replayed. A question often raised is how testimony could be recorded on the videotape if more than

one person speaks at a time. Only one camera switches on, but the audio from several microphones is recorded so that all parties speaking would be heard on the videotape.

In Alabama, the cost for videorecords for cases on appeal will be \$100 per six-hour videotape as set in a recently adopted rule of the supreme court. The six-hour videotape will probably be sufficient for a one-day trial. By comparison, a six-hour trial would produce at least 250 pages of written transcript. At the current page rate of \$1.65, the cost of the original-impression transcript would be \$412.50.

Using the videotape



Thelma Braswell

Thelma Braswell is director of court relations at the Alabama Administrative Office of Courts. She was first employed at AOC as associate dean of the Alabama Judicial College in 1978, became its director in January 1980, and was named court relations director in March 1986. Braswell earned her undergraduate degree from Huntingdon College and graduate degree in education from Auburn University.



record will significantly improve the timeliness of the record being available to file in cases appealed. The record will be accurate and complete. Attorneys will be required to cite the videotape number, date and time in their briefs to the appellate courts. The judges of the appellate courts will view the tapes as necessary in preparation of their opinions.

Based on surveys and interviews with attorneys who have worked with videotape records the following are some pros and cons expressed:

PROS

- An inexpensive, accurate daily record is available;
- The judge is always in control of the court's schedule without having to coordinate with a court reporter;
- No clients are unable to appeal because of the cost of a transcript of their trial;
- A videotape record captures the nuances of a trial showing demeanor, gestures and expressions;
- The record is accurate and complete, removing the necessity of supplementing the record;
- A record of all hearings is available;
- Lawyers may use videotape records to critique presentations, to assess witnesses from other cases, and to teach new lawyers effective trial techniques.

CONS

- Without a written transcript, a lawyer has more trouble quoting verbatim and must paraphrase testimony for briefs;
- More time is required to prepare briefs. If the lawyer on appeal was not the trial lawyer, this problem is exacerbated;
- Some lawyers feel their movement about the courtroom is restricted by the range of the cameras;
- While a transcript can be reviewed anywhere, reviewing videotape records requires viewing equipment;
- Some fear that appellate judges will substitute their judgment for that of the trial judge.

In closing, a summary of benefits of videorecording court proceedings includes:

(1) Savings to litigants and courts — Realized in the difference is the cost of a transcript calculated on a per page rate and a videotape record of six hours of trial. This cost savings accrue to the state for indigent transcripts. Realized in the difference in salary and benefits for personnel required to operate the video equipment as compared to court reporters. Realized because all proceedings can be recorded and preserved.

(2) Time delay in having the record available for appeals is reduced because videotapes provide an instant record for use on appeal while transcripts must be produced. Every trial must be transcribed, even though a relatively small percent of the total cases are appealed.

(3) The videorecord is absolutely accurate and reliable because of no human intervention whereas court reporters can only record trials as they perceive what they hear.

(4) The video system is unobtrusive because the cameras are small, silent, wall-mounted units with the computer system located outside the courtroom. This is less obtrusive than a reporter located in front of the bench "stroking in" testimony.

(5) Videotapes can provide public information and education. Reporters can access the system to record proceedings without ever entering the courtrooms.

Just as with all innovations, videorecording court proceedings provides many advantages for improving the timely delivery of justice services for litigants, but is not without some deficiencies. A change is always difficult. ■

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VIDEOTAPE AS THE OFFICIAL RECORD OF THE TRIAL

By JUDGE STUART LEACH

Video cameras and recording equipment, along with sound enhancements, were recently installed in three circuit court rooms in the Birmingham Division of the Tenth Judicial Circuit. In two of the courts, the trials involved are almost exclusively non-jury. In one court, the subject matter is domestic relations and the other is traditional equity cases. The third installation is in my court, and my assignment is to try traditional law cases, 80 percent of the time with a jury.

At the time the video equipment was installed, none of the three judges involved had any "hands on" experience in connection with using video as the official record, although I had had the benefit of seeing the system in operation in Kentucky, and the opportunity to talk with both trial and appellate judges and some lawyers in Kentucky, as to their opinions about the system.

It would appear that the advantages fall primarily into two categories, one relating to costs, and the second to the time within which the record is available for appeal or other purposes. Our recently adopted rule sets the cost of the videotape for appellate purposes at \$100 per

tape and the cost of the copy of the tape which would be used by counsel in the preparation of appellate briefs at \$50 per tape. As each tape holds six hours of viewing, this means that for each day's trial, the cost for the appellate record would be \$100. As a practical matter, \$50 would have to be added to that cost because a copy of the tape would be necessary in order to prepare an appellate brief.

In essence, there is no elapsed time between the conclusion of a day's trial, and the availability of the record of that day's trial. On appeal, the record will consist of the judge's log, the tape and the exhibits or photographs of the exhibits that were offered at the trial of the case, and possibly the transcription of depositions.

It is hoped that there are other advantages to the use of video as the official record. As I indicated, the installation of the system includes enhanced sound. This means that there will be several microphones located at different places in the courtroom, and there will be several speakers; consequently, not only does the videorecording system pick up the sound from the microphones, but the sound is amplified and more effectively distributed throughout the courtroom. It is my expectation that everyone—jurors, judge and counsel—will be better able to hear everything that is said.

One other possible advantage would be the opportunity for other counsel to buy a copy of the tape, perhaps

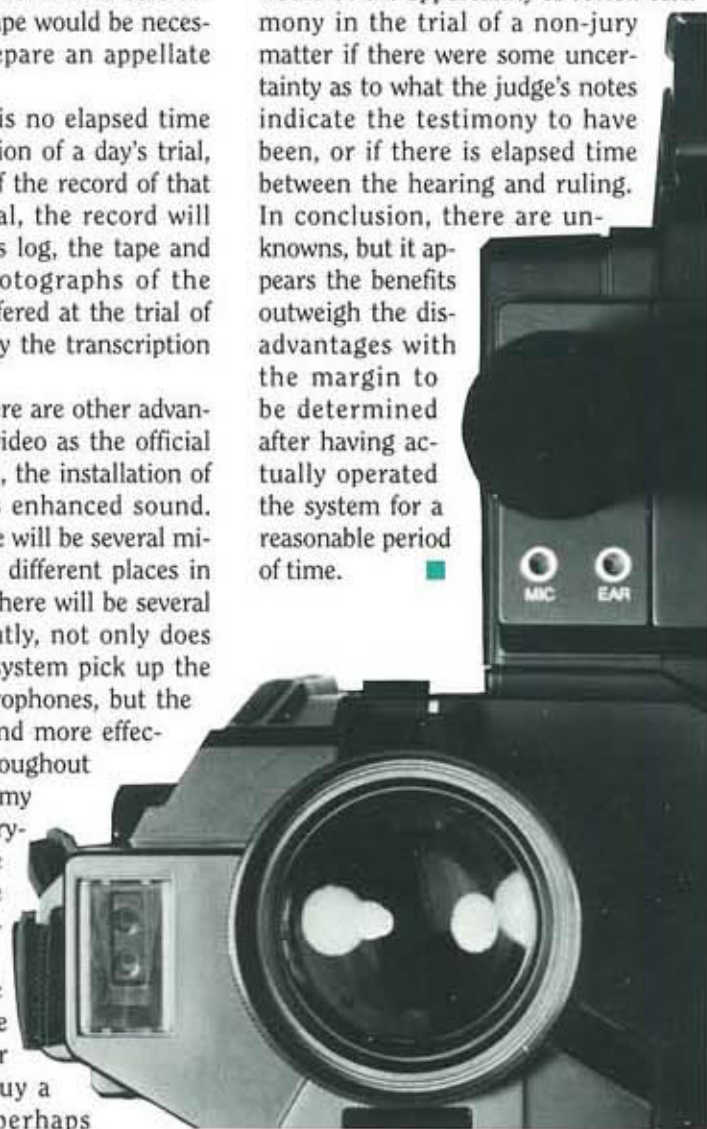
showing the opening statement, examination of a particular expert, argument or some other pertinent portion of the trial to gain some insight into the tactic and technique of the presentation of similar issues or facts in a similar case.

From the judge's perspective, there would be the opportunity to review testimony in the trial of a non-jury matter if there were some uncertainty as to what the judge's notes indicate the testimony to have been, or if there is elapsed time between the hearing and ruling. In conclusion, there are unknowns, but it appears the benefits outweigh the disadvantages with the margin to be determined after having actually operated the system for a reasonable period of time. ■



Stuart Leach

Judge Stuart Leach, of the tenth judicial circuit of Alabama, has been a circuit judge for eight years. He is a graduate of Auburn University and the University of Alabama School of Law. Previously, he was legislative assistant to U.S. Senator John Sparkman and in private practice for over 20 years.





VIDEO COURT REPORTING: WHAT JUDGES AND LAWYERS THINK

By JUDGE RANDALL COLE

A judge from Michigan, where video court reporting has been used on an experimental basis for several years, acknowledged that his thinking might be old-fashioned, but it seemed to him that "a court reporter simply belongs in the courtroom." Countering this view, another Michigan judge compared the continued use of court reporters to requiring "firemen" to ride on diesel locomotives.

The polarized views of these two colleagues on the Michigan bench are representative of the opinions which surface when judges, lawyers, court reporters and other court personnel talk about video court reporting.

As president of the Alabama Association of Circuit Judges, I attended, along with two other participants from Alabama, a three-day conference in Louisville, Kentucky, on "Videorecording in the Courts" sponsored by the Institute for Court Management. The conference brought together trial judges, appellate judges, attorneys, court reporters, and court administrators from 22 states to discuss the pros and cons of this technological innovation.



Randall L. Cole
Judge Randall Cole of Ft. Payne, Alabama, is the presiding judge for the ninth judicial circuit. He is a graduate of Jacksonville State University and the University of Alabama School of Law. He is the first vice-president of the executive committee of the Alabama

Association of Circuit Judges and is past president of the DeKalb County Bar Association.

The most extensive use of video reporting has been in Kentucky, but courts in at least ten other states have also made experimental use of video reporting in recent years. Alabama is now added to the list as video equipment is installed in three Jefferson County courtrooms.

After experiments in Ohio and Tennessee, the use of videorecording was discontinued in those states. The video equipment consists of several unobtrusive cameras, supersensitive microphones at fixed stations, a bank of VCRs, a computerized operating system, and associated equipment. The cameras are voice-activated and automatically videotape the person who is speaking. No operator is required other than someone to turn the system on and off, a function generally performed by the judge.

The purpose of this article is to report the perspectives of trial judges, appellate judges and attorneys to the use of video reporting as related at the Louisville conference.

Trial judges' perspective

Trial judges from Washington, Michigan and Kentucky who have used videorecording reported two primary advantages: (1) it allows judges greater flexibility in scheduling and (2) it insures greater accuracy in the record.

They point out that as dedicated as a court reporter may be, his or her schedule is not always compatible with the needs of the

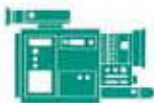
judge to conduct proceedings at unscheduled times and "after hours." Likewise, the reporter's need for vacation time and sick days can restrict the judge's capacity to function.

They suggest that the videorecording makes a more accurate record of trial proceedings than the written record because it records not only the spoken word, but also the demeanor, body language and voice inflection of trial participants. It also eliminates the possibility that a misplaced comma in the transcription will change the meaning of a witness' answer.

One judge also noted the relative ease with which testimony can be replayed for the jury.

The advantages of video





VIDEO COURT REPORTING

court reporting identified by trial judges must be weighed, however, against the disadvantages also identified. The primary disadvantage noted was the requirement that a log be maintained of trial events. The log must be made in sufficient detail that it will enable the user of the videotape to find the testimony of a particular witness or other happening in the trial without viewing the entire tape. Most judges reported that they make these logs themselves while others say they are provided a courtroom clerk or bailiff to discharge this responsibility.

The judges reported that adjustments also had to be made to accommodate the marking and maintaining of exhibits, functions which have traditionally been performed by the court reporter, and that it is necessary to designate a staff person to identify, store and distribute the videotapes.

In spite of the inconveniences articulated, most of the trial judges at the Louisville conference expressed a generally satisfactory experience with video-recording. A notable exception was the judge from Washington who said that with his new equipment and the new responsibilities incident to its operation, he now feels like a movie director.

Appellate judges' perspective

The perspectives of the appellate judges in attendance at the conference were mixed. In Michigan and Washington, the appellate courts require that they be furnished a written transcript even though the trial court proceedings were recorded by video. The transcripts are prepared by official court reporters from the videotapes. The appellate judges can request the videotape for review if they wish to do so but they

seldom make such a request. The appellate judges in these jurisdictions, therefore, are affected very little by the video-recording system.

In those jurisdictions in which the record on review is the videotape itself, appellate judges complained that the trial logs prepared by the trial judges frequently were insufficient for them to work with, that the quality of the tapes sometimes was poor, and that it takes much too long to review the record from videotape. One appellate judge commented that reviewing a trial from a videotape record was like "watching paint dry."

The appellate judges recognized, however, that it is seldom necessary for them to review an entire record, and that it is generally sufficient for them to look only at those portions to which the attorneys direct them in their briefs.

Another complaint registered by ap-



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pellate judges was that it is difficult or impossible to hear answers given during voir dire examination of jurors.

Responding to concerns expressed by trial judges that videorecords might prompt appellate courts to abandon presumptions of correctness afforded trial court findings, the appellate judges acknowledged the validity of the concern but pointed out that the affirmance rate from videorecords is higher than from written transcripts because appellate judges who view videotapes can get a better "feel" for the trial.

Attorneys' perspective

Four attorneys appeared on the program at the Louisville conference—two civil defense attorneys and two attorneys from a public defender's office. All the attorneys complained that the use of videotapes doubles or triples the time involved in preparing appellate briefs. The civil defense attorneys reported that they now routinely hire typists or court reporters to prepare a written transcript from the videotape for their use in preparing briefs. The attorneys from the public defender's office reported that an additional attorney was hired in their office specifically because of the extra time it takes to prepare briefs from videos. Attorneys in Kentucky were routinely seeking extensions for filing briefs in video appeals, causing the supreme court to double the time for filing such briefs.

The attorneys complained also that in brief preparation it is difficult to use videotapes in small increments of time, that one needs a block of at least two hours to do anything productive using a videotape.

One advantage that the attorneys identified was the ability to get an inexpensive daily record of the trial by the use of videorecording. Another advantage pointed out by one attorney was that he had once used a videorecord effectively to get a trial judge removed from a case because the video revealed the judge's voice inflection in dealing with the attorneys. The attorneys agreed that

the videorecordings also serve a useful purpose as an aid in training new trial attorneys.

Conclusion

Trial judges, appellate judges and attorneys at the conference gave video reporting mixed reviews, with attorneys giving it the lowest marks.

The attitude of most judges and attorneys in Alabama at the present time is probably similar to that of the Michigan

judge who observed that a court reporter simply belongs in the courtroom. The placement of video equipment in three Alabama courtrooms provides a valuable opportunity for judges and attorneys here to evaluate for ourselves the pros and cons of video, but it is hoped that we will await the results of that evaluation before we consider abandoning our present court reporting system, which over the years generally has served courts, attorneys and litigants well. ■

NOTICE OF ELECTION

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

President-elect

The Alabama State Bar will elect a president-elect in 1991 to assume the presidency of the bar in July 1992. Any candidate must be a member in good standing on March 1, 1991. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 1991. Any candidate for this office also must submit with the nominating petition a black and white photograph and biographical data to be published in the May *Alabama Lawyer*. Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 16, 1991.

Commissioners

Bar commissioners will be elected by those lawyers with their principal office in the following circuits: 2nd; 4th; 6th, place #2; 9th; 10th, places #1, 2, 5, 8, and 9; 12th; 13th, place #2; 15th, place #2; 16th; 20th; 23rd, place #2; 24th; 27th; 29th; 38th; and 39th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices therein. The new commissioner positions will be determined by a census on March 1, 1991, and vacancies certified by the secretary on March 15, 1991.

The terms of any incumbent commissioners are retained.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 26, 1991).

Ballots will be prepared and mailed to members between May 15 and June 1, 1991.

Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 11, 1991) to state bar headquarters.

COURT REPORTING

I N T H E 1 9 9 0 s

By JENNY DUNN

Imagine if in the early 1980s the American business community decided not to computerize. Where would we be today? Would our deficit be even bigger? Would our industries be even remotely competitive compared to the economic powers of Japan and Germany? Would we even be a world power in 1991?

I think we all know the answers to these questions. Amazingly, the court systems in Alabama and the rest of the nation are now facing the same dilemma as American business did in the '80s: Is it necessary to computerize? The answer is obviously "yes," and one of the professions leading the way toward courtroom computerization is court reporting.

Many in the legal community have seen official court reporters work with computer-aided transcription systems, and have even received a day's testimony on a floppy disk for insertion in their office computer. Still more attorneys have worked with the sophisticated litigation support software provided by independent free-lance reporting agencies across the state. To paraphrase an old show tune, when it comes to computers and court reporters, "You ain't seen nothin' yet."

The Alabama Court Reporters Association is in the process of installing a computer-integrated courtroom in Judge Sam Monk's courtroom in Annis-

ton. In the next couple of years, you will see a number of these advanced features in such courtrooms:

- The capability of all parties in a case to instantly view trial proceedings on a computer terminal, enabling the judge to review testimony on which an objection is based and also providing attorneys the opportunity to search for key

*Proper use of
alternative systems
can enable court
managers to put
computerized reporters
where they are
needed most.*

words and phrases and extract portions of proceedings for brief preparation, motion purposes and impeachment of witnesses.

- Methods where attorneys will find contradictions in in-court testimony with what was said in depositions, even while court is in session.

- A technology in which the computerized transcript appears as on-screen subtitles to a video of court proceedings and testimony, whereby the operator can input key words and bring up the video in the right place.

- More accessible storage procedures where three-and-half-inch disks hold hundreds of pages of testimony, easily accessed and retrieved when needed.

- Systems for court administrator management where reporter-inputted information will give automatic status

to reports on all cases in a court system.

Many legal professionals see video as an adjunct to the written transcript, not a replacement. Because if reporterless video systems become the system of choice in Alabama courts, the computer age is dead before it even officially begins.

The complaints about both video and audio recording systems have been well documented across the country by the primary users of the product. For example, an assistant attorney general in Kentucky said, "I can emphatically state that they are a disaster." A senior litigator at New Jersey's largest law firm, McCarter & English, recently testified at a state hearing that, "From my personal experience, (audiotape) transcription has not been shown to be sufficiently accurate that we should trust our court system to it."

In addition, an Oregon federal district court judge said after a case in which video was used, "The video and audio quality were never good, and at times, when a litigant lowered his voice or spoke while returning to his seat, nearly inaudible. Even if the tape quality were perfect, viewing a videotape requires much more time than reading a transcript."

This does not mean that video does not have a place in the courts. In fact, it is a possible alternative for those courts where there is little or no need for a transcript and few appeals. Proper use of alternative systems can enable court managers to put computerized reporters where they are needed most. Alabama courts need to be cost-efficient, but not at the expense of its future.

ACRA encourages a rational and analytical approach to improving the reporting function in our state. We offer four common-sense steps our judiciary should take before committing to any new reporting venture:



Jenny Dunn

Jenny Dunn has been a court reporter for 13 years and is a partner in the firm of Dunn, King & Kirkpatrick in Montgomery. She is the immediate past president of the Alabama Court Reporters Association.

(1) Decide which courts need professionally-produced transcripts—where are our high and medium volume courts? The Alabama court system needs to conduct an analysis of where there is a likelihood of appeals and use of the transcript, and where there is not.

(2) Look now at emerging technologies; computerization is evolving at a rapid pace. Our judiciary needs to contact computer companies to see what they are developing for the courts. We also need to look at prototypes of systems which combine computers and video to determine their feasibility.

(3) Do not accept the "minimally acceptable record". Because of the recession, there is a tendency by some to panic. In the courts, that panic may translate into a major push into short-term thinking—a major move toward tapes, even if attorney productivity suffers and costs increase to litigants.

(4) Look at all costs involved, front-end and back-end costs, i.e., the reporter is an extra staff person for the judge's office whose duties include, but are not limited to, taking verbatim testimony, interrupting where that testimony is not clear and discernible, as well as marking and organizing exhibits. While video may eliminate a reporter's salary, it may ultimately still require another staff person to keep an extensive video log, operate the machinery, label and file videos with the clerk and keep up with exhibits, effectively replacing one staff member with another who has a less effective method of keeping the record. There is also a matter of extra staff required at the appeals court level whose task is now to view videos rather than written transcripts.

Some may say, "We cannot afford computers, we cannot afford professionals; just give the attorneys tapes, it is good enough." Well, it is not good enough, and Alabama courts will suffer if shortcuts rule the day. Remember the adage, "If you cannot afford to do it right the first time, how will you afford to do it all over again?"

A lot is happening out there. It is up to our judicial leaders to make sure they fully understand the technological options they have and not let us fall behind the rest of the nation. ■

RIDING THE CIRCUITS

MOBILE BAR ASSOCIATION

The following attorneys were elected to serve for 1991:

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CONSULTANT'S CORNER



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

This is the 19th article in our "Consultant's Corner" series. We would like to hear from you, both in critique of the article written and suggestions of topics for future articles.

Telephone charges

Here comes the bill! More than 30 days after you have made a client-chargeable long distance telephone call, your bookkeeper dumps a sheaf of call detail slips on your desk with the reminder that, "We cannot close out billing for the month until the phone charges are allocated." You turn your attention to the pile of detail slips, beginning a laborious task of matching your time slip notations of long distance calls to an infuriating list of dates, area codes and exchanges.

But there is more—what about the call you made from the airport, using your personal credit card? the collect call you accepted at home on a Saturday afternoon? the calls made on MCI? Don't change careers; there are alternatives.

Ignore it

This can be tempting. After all, why waste an hour or more of a lawyer's time chasing small change? For the same reason you ought to chase copier charges, namely, they add up to a significant bottom line profit contribution. Our studies reveal that law firms incur more than \$150 per lawyer per month in phone costs that should be recoverable from clients. Ignoring does save the lawyer's time, but it allows more than twice the cost to slip away as missed profit opportunity.

Fold it into the rates

This is done with some overhead factors, such as the cost of word processing. On that basis, you should raise your rates about \$1 per hour, clearly an impractical notion. Five dollars an hour would be outrageous and cause you more grief than profit. That aside,

clients are not as accepting of rate increases as they once were. In fact, one is hard-pressed to find any client who is not downright resistant to rate increases. On the other hand, telephone charges billed as an adjunct cost of business are traditional and generally acceptable to clients. After all, they make phone calls (and copies and mail packages, etc.)

High tech it

The key to capturing phone charges with a minimum of effort is to record the entire transaction at the time it occurs. As you place a call to a client you obviously know whom you are calling and on what matter. What you do not know is the charge your friendly long distance carrier is running up for you. Conversely, the telephone company knows the charges but not the client's name or matter number. Enter "high tech."

Some telephone switches have a feature called "station message distribution reporting." The feature accumulates a record of who (which station) placed a long distance call, and how many minutes the call lasted. This listing begins to get together the two pieces of the equation. With a bit of creativity, one can enter client/matter number through a phone instrument prior to dialing the number. The SMDR record produces a list for manual entry into the billing system.

Taking the process a step further, some vendors of legal-specific billing programs offer some interface software that dynamically captures SMDR information and automatically updates a client's billing record. This is a technique only for medium and large firms. It requires a digital telephone switch, SMDR, a mini-computer-based billing

system and a great deal of discipline. The discipline involves having to dial in client and matter number as a condition of accessing the long distance line. Needless to say, some lawyers find that a bit much.

Low tech it

If you are not a large firm, nor interested in acquiring a digital telephone switch, nor a mini-computer, there is a perfectly sound procedure you can adopt, and it doesn't cost anything. Assign a standard cost to long distance telephone calls, and automatically trigger the toll charge as you fill out the slip for your professional time. A standard cost is simply an average that is easily computed by dividing total long distance charges by the number of calls made. If you are a typical firm your average cost will be in the \$1.50 to \$2.50 range and will not be an unfair burden for a client involved with a brief conversation.

If you do not habitually charge for time spent on phone calls, there is a quick calculation that should instantly disabuse you of that practice. How much fee income is lost from ignoring 15 minutes per day (at \$80 per hour)? Would you believe \$5,000 per year?

The single professional time charge you (now) habitually generate pursuant to a client phone conversation becomes two transactions, one for your time and one for a standard long distance charge. It does become necessary to distinguish these dual transactions from those where the client calls you, or from local calls. Consider a trigger such as "STD LDTC" on your time slip. You have locked in billable long distance charges to your professional timekeeping. Now you can smirk at the bookkeeper. ■



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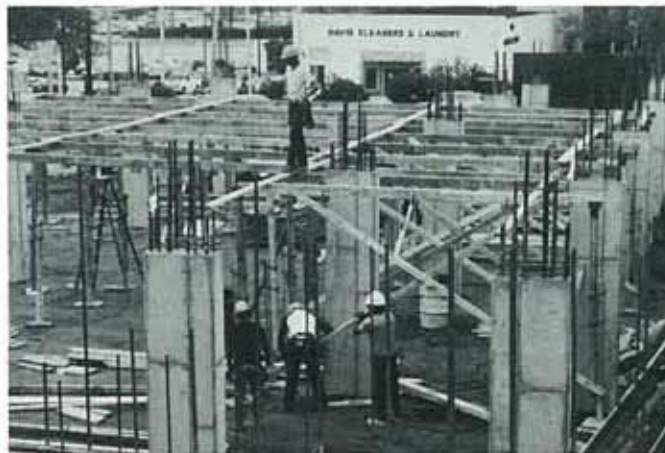
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December 1990: The first floor supports being laid

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*We urge every lawyer
who has not already done
so to join this list.*

As of February 28, the following firms had made pledges to the building fund. Their names will also be included on a wall in the new building listing all contributors. Their pledges are acknowledged with grateful appreciation.

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As of February 28, the following special pledges or substantial contributions had been received to dedicate rooms or areas in the state bar's new building:

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M · C · L · E

NEWS

MCLE Commission approves regulation to encourage Rules of Professional Conduct education

The MCLE Commission has approved a regulation change to encourage lawyers' attendance of approved seminars addressing the Alabama Rules of Professional Conduct which became effective in January. The MCLE Commission approved the regulation change based on the recommendation of the Alabama State Bar's Ethics Education Committee. The change will allow attorneys attending approved CLE programs dealing with the Rules of Professional Conduct to claim two CLE credits for each hour of instruction attended. The Ethics Education Committee, chaired by Richard Thigpen of Tuscaloosa, proposed this recommended change as a part of its plan to implement lawyer education for the new rules. The change is effective for the 1991 and 1992 CLE reporting periods.

The change is implemented by the addition of Regulation 3.10 to the Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations. Regulation 3.10 reads as follows:

For 1991 and 1992, attorneys attending approved CLE activities devoted to the Alabama Rules of Professional Conduct may claim two (2) CLE credits for each hour of instruction attended.

Reporting of attendance of approved CLE programs dealing with the new rules of conduct will remain the same as for any programs. Any questions concerning this regulation change may be addressed to either Keith Norman, director of programs, or Diane Weldon, administrative assistant of programs, at the Alabama State Bar headquarters.



THE SOVIET EXPERIMENT

The Perspective of an Alabama Lawyer

By JAMES G. SPEAKE

Marxism is in relative eclipse. An era in its history has ended.
— Edmund Wilson, *To The Finland Station*, 1940¹

What is now emerging on the territory traditionally known as Russia will not be — cannot be—the Russia of the Czars. Nor can it be the Russia of the Communists. It can only be something essentially new, the contours of which are still for us and for the Russians themselves, obscure....The Russian people are today poorly prepared.

The events of this century have, as we have seen, taken a terrible toll on their social and spiritual resources. Their own history has pathetically little to tell them. A great deal will have to be started from scratch, the road will be long, rough and perilous. The greatest help we can give will be of two kinds: (1) understanding and (2) example.

—George F. Kennan, 1990²

Journey to Moscow



In the late afternoon of Sunday, September 16, 1990, Professor Charles D. Cole of the Cumberland School of Law and I arrived in Moscow from Frankfurt. As the two delegates from Alabama, we were to join 700 Americans as participants with 2,000 Soviets in the Moscow Conference on Law and Economic Bilateral Relations.

The sky was overcast with a cold and steady rain. We did not anticipate that this dark and dreary day would set the tone for our experience in the capital of the Russian Republic and the Soviet Union.

As we proceeded through the line for visa inspection, we were greeted by the stare of a young Soviet soldier, whose demeanor was as chilling as the wintry rain. As we waited in the dark and dingy Sheremyetovo Airport for our baggage, we were told by representatives of our organizing committee that our hotel accommodations had been changed from the Hotel Moscow across the street from the Kremlin to the Hotel Ukraine, which we later determined was built by Joseph Stalin at the end of World War II, to commemorate the victories of the Red Army. We were informed that the change was required because of an emergency meeting of the Supreme Soviet in the Kremlin Palace.

In the mid-afternoon before our arrival, 50,000 protesters, led by Boris Yeltsin, president of the Russian Republic, were demonstrating in Red Square, demanding conversion to a market economy within 500 days. Troops and security police were massed in the subways.

Following our negotiation of the \$20 fare with the Russian cab driver (he had commenced negotiations at \$50), we proceeded to Moscow in his small, vintage 1950s, poorly-main-

tained vehicle.³ In the distance, I saw an antiquated, barn-like structure with a rusty tin roof. This was the only such building I would see in Moscow. There are no private homes in Moscow except for the official dachas concealed behind high fences and wooded areas of beautiful fir and white birch trees. One observes mile after mile of massive yellowstone, poorly maintained apartments with fading white trim. Most of the apartments occupied by Soviet citizens are owned by the State. Recently, limited opportunities have become available to some Soviets to purchase their own apartments in Moscow. It is difficult for outsiders to comprehend that in the communist state there is virtually no ownership of private property.

Soviet citizens are friendly, effusive and courteous in their greeting toward Americans. Soviet lawyers tend to grasp you with a strong and vigorous handshake. I spoke with no Soviet lawyer or citizen who appeared optimistic for the future of their country. Young, articulate and bright Soviets spoke to me with pessimism and hopelessness that their system would emerge from the chaos and despair which is evident to the observer in Moscow.

Moscow is a city of penetrating odors of infinite variety—all unpleasant. The Moscow River, passing through the city, is polluted. Natasha, one of our official guides from the ministry of justice, told us that, "Not one fish can live in the Moscow River." Moscovites by the thousands, when not standing in long lines, are constantly strolling night or day. It is a city of massive structures and poor housekeeping. Smog and pollution are pervasive. Some Soviet young people and children are moderately well-dressed, but the majority of Soviets, including officials and lawyers I observed inside the Kremlin, were wearing clothing of poor fit, material and workmanship. Soviet soldiers, numerous everywhere in Moscow, were immaculate in tan uniforms with red stripes. Older Russian veterans wear their civilian suits covered above the pocket with ribbons representing participation in World War II campaigns.

The Moscow Conference



At the opening session in the Kremlin we were warned by the Honorable William P. Rogers, former secretary of state and chairman of our delegation, that a deep "chasm" of understanding would become apparent as we engaged Soviet lawyers in discussions of our respective constitutional and judicial concepts. He was precisely correct. Our panel sessions with Soviet lawyers and scholars, which included topics such as "The Rule of Law", "The Role of Lawyers in



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the United States and the Soviet Union", "Constitutional Law and Its Implementation" and "The Role of the Judiciary (including Administrative Law Judges)" would appear to have afforded practical opportunities for exchange of views and concepts between lawyers. We had no opportunity to talk with lawyers in the Union of Advokats, which is the organization of independent Soviet lawyers. Most Soviet lawyers are affiliated with the Soviet State. Their speeches and remarks in various sessions were abstract, theoretical and unclear as to how the sweeping changes proposed in the Soviet legal system would be implemented on a case-by-case and day-to-day basis. A Soviet scholar at our conference spoke eloquently on what appeared to be a clear understanding of defects in the Soviet judicial system:

"Justice is a very accurate indicator of the degree of the social maturity of a society. The higher the role of authority in court and justice as a state power, the higher the degree of legality and democracy, the more effectively are the rights and freedoms of the citizens protected. Unfortunately, because of the previous negligence of the law and substitution of law rules by administrative acts, the prestige of court is still very low. Court does not occupy the unique place it has in a real law-governed state. Present judicial power does not, neither in theory nor in practice, equal legislative and executive powers. It is characterized by restricted jurisdiction, insufficient democratic procedure of functioning and restricted independence.... It is necessary to ensure independence to court—the main condition of its successful functioning."⁴ (sic)

The remarks of the Soviet professor suggested further profound changes necessary for revision of the Soviet legal system, but these changes may be more of the same high-sounding proposals for which the Soviets are experts.

Hedrick Smith, the author of the recently published and important work, *The New Russians*, has observed this tendency in the Soviet character: "Of course the system looks better on paper than in reality; Soviet leaders are experts at nice-sounding proposals, but bad at putting them into practice, especially when they cut across the interest of the rulers."⁵

Although the infamous Article VII of the Soviet Constitution, granting to the Communist Party the dominant role in the Soviet judicial system, had been repealed by the time of our conference, no Soviet lawyer spoke in a practical sense as to how the theory of judicial independence, so essential to our own system, was to be implemented in the Soviet Union. Little mention was made of the removal and extraction of the Communist Party from its traditional governing influence upon the Soviet judiciary. A member of our delegation has commented with particular regard to the Soviet tendency for abstraction and generalization. Because the Soviets have a "fundamentally different, inquisitorial, continental legal system, sometimes it's like talking to a wall."⁶

Although the Soviets appear to be groping for an understanding of the necessity for judicial reform assuring independence of the judiciary, they do not appear to be approaching its realization.

One of our delegates, Judge Abner J. Mikva, spoke bluntly to

the Soviets of the necessity for judicial independence: "The judicial system must have substantial independence from the political system. The role of the judge must be distinct from that of the prosecutor and other representatives of the legislative or executive branches of government."⁷

He also made this observation for the benefit of our Soviet hosts: "There is obviously a very thin line between judges providing an appropriate forum for individuals unhappy with their government and judges inserting themselves inappropriately into the political process."⁸

Our own U.S. Attorney General, Richard Thornburgh, and a leader of our delegation, also has made this observation with respect to the Soviet understanding of judicial independence: "I discerned from my meetings in Moscow that the Soviets simply do not comprehend how a political structure can exist with deliberate tensions built in among government branches and political factions, since in their tradition decisions are reached either through the unanimity of dictatorial fiat or by consensus motivated by utopian vision."⁹

Although our scheduled visit to the Soviet academy of independent lawyers, the Advokats, was cancelled without explanation, we did visit the law department of Moscow State University. This was the first opportunity for our group in the delegation to direct questions to our Soviet counterparts. We addressed a question to our hosts as to how the Soviets propose, within the framework of a market economy, to implement a system for buying and selling real estate upon the privatization of the collective farms. The interpreter did not appear to understand our question and we were required to ask it again. A bright, young Soviet professor gave us a lengthy and impassioned response in Russian. At the conclusion of his remarks the interpreter simply advised: "He is against it, the collective farms are the lands of the people."¹⁰

There are deep divisions in the Soviet Union from the followers of Solzhenitsyn who seek to restore some form of the Russian monarchy to the so-called "liberal left" once lead by the now-silent voice of Andrei Sakharov. As evidenced by developments at the time of this writing, it is clear that the right wing of the Soviet Communist Party now dominates official Soviet policy. These developments appear to respond to the Soviet dependence upon central control to insure stability and order.

If one is of the view that the ownership of private property with the freedom to buy and sell that property is indispensable to a market economy, the Soviets have not arrived. In my opinion, they will not arrive in 500 days nor in 5,000 days.

Perspective of one



Our limited experience in Moscow does not diminish the inescapable conclusion that the Soviet Union is a country approaching economic and political collapse. Rhetoric may speak profoundly of "a new world order", but it is the consequences of the "new world order" which we, as lawyers, must address.

Increasingly, I believe Alabama lawyers will interact with Soviet citizens and Soviet lawyers. I would respectfully en-

courage my colleagues of the bar to exercise such opportunity should it be presented. Developments in the Soviet Union in the immediate future will be increasingly volatile and dangerous, yet in the long term, mutually desirable economic opportunities may emerge.

I believe that we, as lawyers, must play the leading role in the preservation of the independence of our own judicial system and thereby set an example for the Soviets who will be observers of our conduct.

We, as Alabama lawyers, can contribute in at least two ways:

(1) Continue to insist upon the integrity of an independent judiciary while maintaining our awareness of the danger of usurpation by the judiciary of the legislative and executive process; and

(2) Maintain an awareness of a judicial bureaucracy, which, although formulated with good intentions, may envelope the legal profession. Our failure to impose restrictions upon an expanding judicial bureaucracy will stifle legal and judicial creativity and render its performance rigid and sterile.

Despite my assertions to the contrary, at the closing state banquet in the Kremlin Palace of the Congresses, my Soviet counterpart, Professor Karimova of the Red Institute in Tashkent, insisted that I was a rich man. As we viewed the city of Birmingham, Alabama, from the airplane upon our return, and as I drove to my office in the little town of Moulton, Alabama, on a bright, clear morning, I knew she was right. I knew that I was lucky to be an American and lucky to be an Alabama lawyer. ■

Footnotes

1. Wilson Edmund, *To The Finland Station*, Doubleday, 1940.
2. Kennan, George F., *Communism in Russian History*, Foreign Affairs/ winter 1990.
3. Soviet cab drivers are fond of country music. When one enters his cab, he turns up the volume of his shortwave radio. They would also perform well at Indianapolis and the Talladega 500.
4. Savitsky, Professor, *Judicial Power in the Socialist Law Governed State*. Paper delivered at Moscow Conference, September 20, 1990.
5. Smith, Hedrick, *The New Russians*, Random House, 1990.
6. Legal Summit in Moscow, Hon. Weyman Lundquist, quote by author Stephanie Goldberg, *ABA Journal*/December 1990.
7. Mikva, Abner J., United States Circuit Judge, paper delivered at the Moscow Conference on the role of the judiciary, September 21, 1990.
8. *Id.*
9. Thornburgh, Richard, *The Soviet Union and The Rule of Law*, Foreign Affairs/spring 1990.
10. Response of Soviet law professor to question addressed to him at Moscow State University, September 21, 1990.

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RECENT DECISIONS

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

UNITED STATES SUPREME COURT

Doctrine of *Edwards v. Arizona* extended

Minnick v. Mississippi, 89-6332, 59 USLW 4037 (December 3, 1990). May the police, after a criminal suspect has requested a lawyer, reinstate interrogation without the lawyer's being present? The Supreme Court said no, by a six-to-two vote.

Minnick was arrested on a Mississippi warrant for capital murder. Interrogation by federal law enforcement officials ended when he requested a lawyer, and he subsequently communicated with appointed counsel two or three times. Interrogation was reinstated by a Mississippi deputy sheriff after Minnick was told that he could not refuse to talk to him and Minnick confessed. The motion to suppress the confession was denied, and the defendant was convicted.

The Mississippi Supreme Court rejected Minnick's argument that his confession was taken in violation of his Fifth Amendment right of counsel under the rule of *Edwards v. Arizona*, 451 U.S. 477. Justice Kennedy focused the issue as follows:

The issue in the case before us is whether *Edwards*' protection ceases once the suspect has consulted with an attorney.

The Supreme Court held that when counsel is requested, interrogation must cease in accord with *Edwards v. Arizona* and *Miranda*, and officials may not reinstate interrogation without counsel present, whether the accused has consulted with his attorney. In context, the requirement that counsel be "made available" to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation.

Justice Kennedy reasoned that, "This rule is appropriate and necessary, since

a single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights and from the coercive pressures that accompany custody and may increase as it is prolonged." Finally, the Supreme Court provided a "brightline test" with the following holding:

In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether the accused has consulted with his attorney.

SUPREME COURT OF ALABAMA

Challenge for cause

Ellington v. State, 24 ABR 4884 (September 28, 1990). In *Ellington*, the Alabama Supreme Court granted certiorari to address the defendant's argument that the trial court erred in refusing to strike a juror for cause. The Alabama Supreme Court reversed and remanded the case.

On appeal, Ellington argued that one of the members of the jury venire admitted that the fact that her husband

worked for the police department, coupled with the fact that two of the detectives from the police department would be testifying in the trial, would affect her ability to fairly judge the issues at trial. Following the exchange between Ellington's attorney and the potential juror, counsel challenged the juror for cause. The trial court denied.

Justice Adams reversed Ellington's conviction because the evidence before the court indicated probable prejudice, and, thus, an abuse of discretion on the part of the trial court in refusing to strike for cause the potential juror. In reaching its conclusion, the supreme court reaffirmed its opinion in *Knop v. McCain*, 561 So.2d 229 (Ala. 1989). In *Knop, supra*, the supreme court observed:

In challenging a juror for cause, the test to be applied is that of probable prejudice. *Alabama Power Co. v. Henderson*, 342 So.2d 323, 327 (Ala. 1976). While probable prejudice for any reason will serve to disqualify a prospective juror, qualification of a juror is a matter within the discretion of the trial court....

This court must look to the questions propounded to, and the answers given by, the prospective juror to see if this discretion was properly exercised....

Ultimately, the test to be applied is whether the juror can set aside her opinions and try the case fairly and impartially, according to the law and to the evidence....

Thus, a prospective juror should not be disqualified for prejudices or



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

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biases if it appears from his or her answers and demeanor that the influence of those prejudices and biases can be eliminated and a verdict rendered according to the evidence.

See also *Wood v. Woodham*, 561 So.2d 224 (Ala. 1989).

Psychologist expert cannot base opinion upon unsworn statement of others

Nash v. Cosby clarified *Wesley v. State*, 24 ABR 4952 (September 23, 1990). In *Wesley*, the Supreme Court of Alabama reversed Wesley's capital murder conviction because the trial judge allowed the State of Alabama's psychologist-expert to testify from reports and records which were not in evidence.

In *Brackin v. State*, 417 So.2d 602, 606 (Ala.Crim.App. 1982), the court of criminal appeals set forth the traditional rule regarding expert testimony as follows:

The traditional rule in this country has been that an expert, in giving his opinion, cannot rely upon the opinion of others. The basis for this rule of exclusion has been that such testimony is based upon what others have said, and, consequently, constitutes hearsay. In light of this rule a physician-witness' testimony to his opinion with respect to the condition of his patient may not be supported by testimony by such witness that certain opinions or reports...concerning the patient had been made to him by other physicians.

In *Nash v. Cosby*, [Ms. 88-1068, July 20, 1990] ___ So.2d ___ (Ala. 1990), the Alabama Supreme Court modified that traditional rule. In *Nash*, the supreme court adopted a standard which allows a medical expert to give opinion testimony based in part on the opinions of others when those other opinions are found in medical records admitted into evidence. In reaching this result, Justice Houston observed:

Thus, in *Nash*, we modified the Court of Criminal Appeals' holding in *Brackin* as it relates to the testimony of medical experts based on the opinions of others, but *Nash* has

not changed the traditional rule followed in Alabama that the information upon which the expert relies must be in evidence.

It is interesting to note from Justice Houston's footnote that the Alabama Supreme Court has not adopted the trend which would allow expert testimony based upon medical or hospital records even in some cases where those records are not in evidence. In so doing, the supreme court clearly stopped short of allowing an Alabama expert to base his expert opinion upon medical, hospital or psychological records that are not in evidence.

BANKRUPTCY

Post-petition enhancement of pre-petition security interest

In *re Jessie C. Jones*, 908 F.2d 859 (11th Cir. 1990). An issue of first impression in the Eleventh Circuit concerned interpretation of §552(b) of the *Bankruptcy Code* relative to a pre-petition security interest extending to enhancement of an asset, to wit: cash value of an insurance policy, after bankruptcy. The bankruptcy court and the district court had ruled that a security interest of the First National Bank of Atlanta did not extend to an increase, post-petition, in the cash surrender value of a life insurance policy.

The Eleventh Circuit determined that the post-petition increase in the cash surrender value of the policy which had been assigned by the debtor to the bank, was not subject to the creditor's lien, but was property of the estate. The court stated that the situation was similar to that of post-petition deposits into a bank account which do not increase the lender's lien. In the instant case the increased cash surrender value came about by reason of subsequent premium payments made by debtor's wife and son from their own separate assets.

Determination of reasonable fees under Bankruptcy Code

Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. Au-

gust 10, 1990). The Eleventh Circuit further refined several prior cases regarding attorney's fees including the non-bankruptcy case of *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988), which had held that success in litigation was a prerequisite for compensation for services rendered with regard to the litigation. This had been followed in the bankruptcy case of *In re Port Royal Land & Timber Co.*, 105 B.R. 77-78.

In *Grant*, the Eleventh Circuit held that in considering an attorney's claim for fees, the issue is not whether the services rendered were reasonable and necessary to the administration of the estate. The *Port Royal* case is on appeal at this time before the Eleventh Circuit. Regardless, it is recommended that lawyers who are involved in bankruptcy cases where the fee is paid from the estate carefully read the *Grant* case as undoubtedly bankruptcy judges in the Eleventh Circuit will use it as a guideline.

Excusable neglect and due process

In re Dennis D. White, debtor. Foremost Financial Services Corp. v. White & Gardner, 908 F.2d 691 (11th Cir. July 19, 1990). This is a case which was appealed from the Northern District of Alabama. The bankruptcy court omitted a creditor from a list of secured or priority claims in the Chapter 13 Confirmation Order.

When the bankruptcy court denied a reconsideration of formal status as a secured creditor, there having been no objection to the claim by any party, Foremost appealed to the United States District Court which found the appeal to be untimely because the Motion for Reconsideration was filed more than ten days after confirmation.

Foremost then appealed to the Eleventh Circuit contending that the procedural errors in the bankruptcy case caused it to be denied adequate notice of the court's adverse ruling, which was the reason for a two-month delay in requesting reconsideration. The Eleventh Circuit agreed with Foremost, holding that under the circumstances where there was no objection to the claim and no notice to Foremost other

than general notice of confirmation hearing caused Foremost to suffer prejudice.

The court also held that there was a more fundamental reason for it to exercise its supervisory powers to insure due process:

... that there is a justifiable reliance that the bankruptcy court would follow required notice procedures and rule only on matters properly before it. This is comparable to the situation where a party's

appeal is deemed timely due to the appellants being misled by acts of judicial officers under the doctrine of "unique circumstances."

Attorney/client privilege

In re Cumberland Investment Corp., 20 B.C.D. 1967 (Bankr. D.R.I., October 23, 1990). This case involves the right of the trustee to conduct a Rule 2004 ex-

(Continued on page 113)

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RECENT DECISIONS

Continued from page 111

amination of the debtor's attorney. The president of debtor corporation objected, contending that the attorney represented him personally and that the conversations between the president and the attorney were privileged. The court held as a factual determination that if an attorney/client relationship ever arose between the president and the at-

torney, such consent can be implied from conduct, but that there was no such evidence in this case.

More importantly, the court stated that there was establishment of a prima facie finding of fraud and mismanagement on the part of the president, and that under such situations there is no attorney/client privilege. The court cited many cases to substantiate its position, stating that to hold otherwise would be an invitation to widespread abuse. ■

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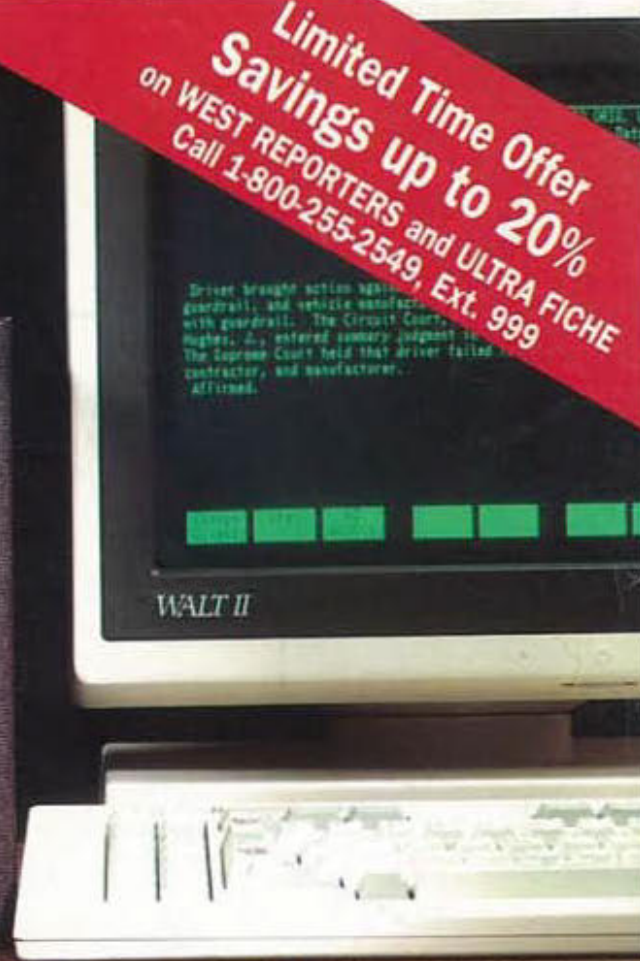
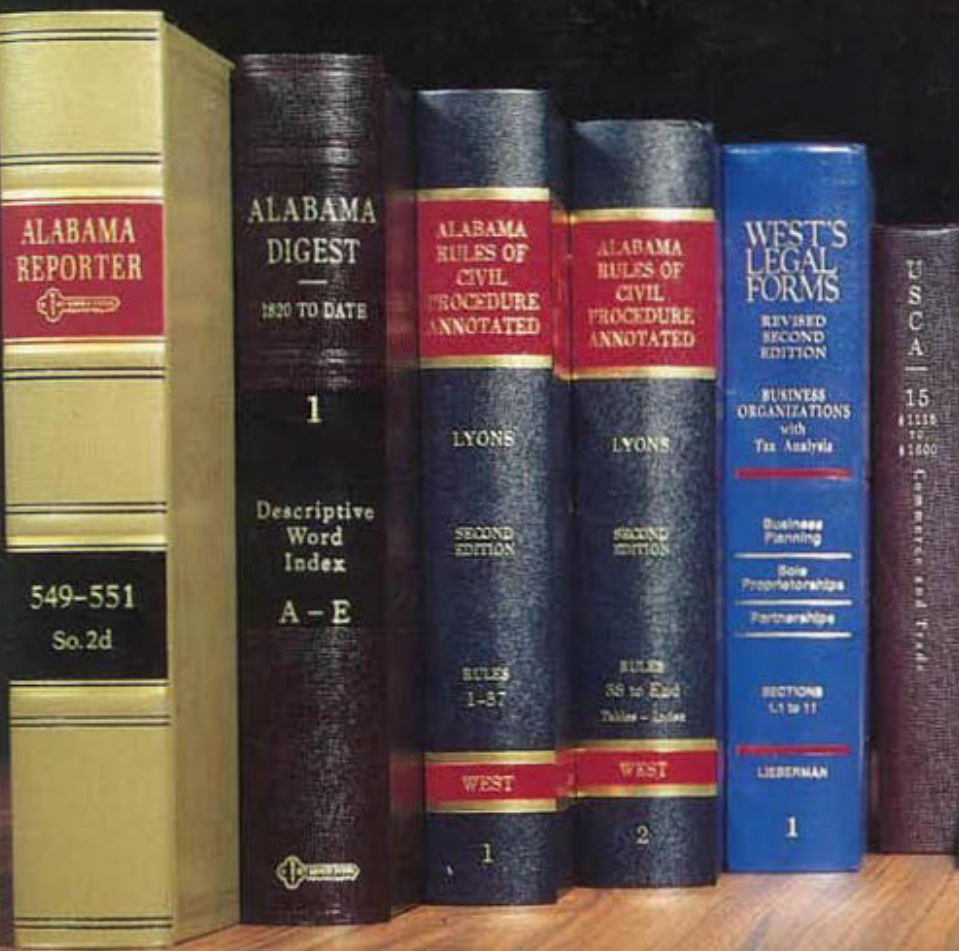
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