CABA
Capital Area Bar Association

DEC. 2021

President's Column:

Voluntary Bar Associations are the Heartbeat of the Legal Profession

By Clarence Webster

Westerosi philosopher (scholar, warrior, military commander, and Hand of the King and, later, Queen) Tyrion Lannister opined, "The true history of the world is the history of great conversations in elegant rooms." Events happen, but what's said about those events matters. History is, Napoleon said, "a set of lies that people have agreed upon." (Napoleon was not the first person to convey that thought, if he said it at all. But does that matter?).

History is storytelling. As lawyers, it is our job to tell a compelling story that informs and persuades. Telling our own stories should be easy. Our stories are important, especially to younger lawyers. An important part of my development as a young lawyer was listening to the legal battles of more seasoned lawyers and jurists. I learned how to handle a recalcitrant witness, difficult counsel, and a "hot" bench long before I dealt with any of those issues firsthand.

CABA has made a call for your stories. The stories we share will go down in the annals of Mississippi history as a roadmap to success or as a cautionary tale. We welcome your short summary of what happened or a full-length article that tells the whole story in all its glorious (or infamous) detail. Names may be changed or you may remain anonymous to protect the innocent. Please submit your stories to CABA at info@caba.ms.

A great place to tell your story is CABA events! The membership numbers of voluntary bar associations worldwide have been in decline for years. The pandemic accelerated that downward trend. CABA is not an exception. In recent (and not-so-recent) newsletters, my predecessors have sounded the alarm about CABA's declining membership. While I am not pressing the panic button, my finger is hovering over it. Hat in hand, I implore you to encourage our colleagues to renew their CABA memberships.

Voluntary bar associations are the heartbeat of the legal profession. They are important to our development as lawyers, providing opportunities for mentorship and sponsorship. Bar-association involvement builds one's reputation in the legal community. It helps foster relationships that can be not only fulfilling but professionally useful. (This remains true, despite what the cookie-cutter legal consultants

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Inside

Upcoming Events

February 15
CABA Membership Meeting
Noon • The Capital Club

March 21
CABA Golf Tournament
Jackson Country Club

CABA Membership Luncheon *Meeting*

Tuesday, February 15, 2022
Lunch at 11:30, Meeting at 12:00 • The Capital Club

Free Lunch

tell us about bar associations—and hanging out with other lawyers—being a waste of time.)

The CABA committees have been hard at work to develop a diverse array of events and CLE opportunities. The Diversity Committee will present a one (1) hour CLE program at the February 15, 2022 membership meeting; the Bench and Bar Committee will present a one (1) hour CLE lunch program at the April 19, 2022 membership meeting. These membership luncheons are free with your CABA membership. CABA's Annual Golf Tournament, benefitting MVLP, will be held at the Jackson Country Club on March 21, 2022. The Spring Social will be April 28, 2022, and the Evening Honoring the Judiciary will be May 12, 2022.

There will also be opportunities to give back to the Capital-Area community where we live and work through pro bono opportunities. CABA will also offer additional networking opportunities through Bar Review, an informal happy hour that will take place in early 2022.

Thank you for continuing to support CABA. Together, we can ensure that CABA continues its service to members and our capital area communities well into the future. Happy New Year!

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LAW LIBRARY HOURS

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Justice Denied
Restricting the Right to Trial by Jury and the Erosion of Our Legal System

By John Hawkins

I was fortunate enough to see one of my favorite lawyers, the venerable John Corlew, argue an important case before the Mississippi Supreme Court many years ago. Beginning his argument, he respectfully reminded the Court that we inherited the right to trial by jury from England. He explained that this essential right was originally contained in the Magna Carta issued in June 1215, brought over on the Mayflower and ultimately guaranteed to us by the United States and Mississippi Constitutions. He followed these solemn words saying something along the lines of, "and by God we need to take this seriously!"

We do need to take this seriously. The jury trial is the great equalizer—it allows each of us to be judged by our peers and treated equally irrespective of background, politics, socio-economic status, sex, race or religion. The jury trial is where justice is meted out and I love everything about it.

Yet, I would submit we have taken it for granted in some respects. By taking measures such as enacting caps on damages and enforcing pre-dispute mandatory arbitration in healthcare and consumer cases, lawyers, jurists, state

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legislators and members of Congress have allowed the erosion of the jury's role in our system of justice over the past couple decades. It's wrong and dangerous to continue this course.

John Adams wrote in 1766 that the "liberty and security of the people would be protected by trial by jury. The jury trial is the most extensive and robust expression of direct democracy that the world has ever seen. Quite simply, jurors are the life's blood of our third branch of government."

We have the greatest system of justice on earth. I was involved in a Medicare Fraud False Claims Act jury trial before United States District Judge Henry Wingate on the Gulf Coast for 9 weeks just before COVID shut things completely down. He told the jury *venire* at the outset of the case that visitors come from all over the world to tour the court and ask questions. He told them these visitors marvel at our great system of justice and, in particular, our jury system. Circuit Court Judge Dewey Arthur made similar comments about the importance of our jury system to the jury pool in a medical malpractice case I tried in November of 2020. I have no doubt these expressions from the bench helped to set the tone for justice to be done in these trials.

We have a constitutional right to trial by jury in criminal and civil cases. The Seventh Amendment to The United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Further, Article 3, Section 31 of the Mississippi Constitution provides that "[t]he right of trial by jury shall remain inviolate…"

Our Founding Fathers demanded the sanctity of the jury trial be protected and not interfered with. Some examples:

"Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds." *John Adams,* 1766

"The wisdom of our sages and the blood of our heroes has been devoted to the attainment of trial by jury. It should be the creed of our political faith." *Thomas Jefferson*, 1801.

"Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *James Madison*, 1789.

Erosion of the Right to Trial by Jury

Arbitrary Caps on Damages

It has long been the jury's role to determine appropriate damages in civil cases. It is within the purview of the judicial branch to review those awards. However, the Mississippi legislature has interfered with these roles by placing one-size-fits-all caps on damages.

Miss. Code Ann. 11–1-60 arbitrarily limits the jury's ability to award damages. In 2002 the Mississippi Legislature enacted a $500,000 pain and suffering cap in all medical and nursing negligence cases. This coming July, this law will be 20 years old. Leaving the question of the validity of the caps aside for a moment, the legislation *fails to even adjust for inflation*. Simply adjusting for inflation, the cap would be up about 50% or adjusted to $762,400. In 2004 the Mississippi legislature enacted a $1,000,000 cap on pain and suffering damages in all other tort cases. Adjusted for inflation that $1,000,000 would now be $1,452,143.

I submit these legislative caps are unconstitutional. Many state legislatures enacted caps during the great wave of "tort reform." The highest Courts in several of those states have since declared the caps to be unconstitutional. A couple of examples:

Georgia–*Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, NO. SO9A1432 (Ga. March 22, 2010). The Court determined that damages caps in medical malpractice cases violated the right to trial by jury under Georgia's constitution finding that, because the determination of damages has historically rested within the province of the jury, this includes the "attendant right to the award of the full measure of damages, including noneconomic damages as determined by the jury."

The Georgia Supreme Court rejected the medical provider's arguments that, because punitive damages limits have been upheld, so too should noneconomic damages caps. The Court distinguished punitive damages as not being "facts" determined by the jury. Therefore, limitations on punitive awards did not implicate the right to a jury trial.

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Illinois—damages caps have been declared unconstitutional on three different occasions, most notably on grounds of separation of powers. Most recently, the Illinois Supreme Court determined that caps on damages unduly encroach upon the judiciary's power to determine whether a jury's award for damages is excessive through remittitur.

The Mississippi Supreme Court will ultimately declare arbitrary caps on damages to be unconstitutional—let's hope sooner rather than later. As lawyers, we should be doing our part to challenge the caps in appropriate cases.

How do we do that? We should raise the issue early in cases at the trial court level and give notice to the Attorney General's office. MRCP 24(d) provides that a party asserting the unconstitutionality of a statute "shall notify the Attorney General of the State of Mississippi within such time as to afford [her] an opportunity to intervene and argue the question of constitutionality." A word to the wise—this is not something that can be raised for the first time on appeal. I invite anyone reading this who is interested in this topic to contact me (john@hgattorneys.com) and I will provide complaints and other pleadings I have used to address this.

Pre-dispute Arbitration Agreements

Pre-dispute mandatory arbitration in tort cases also endangers the right to a jury trial. Arbitration is not a proper substitute for jury trials in civil cases. I'm not saying arbitration is inappropriate under all circumstances. AIA construction contracts have contained arbitration clauses for a very long time and no construction project ever gets completed on time or on budget. The owners, architects, contractors, subcontractors, *et al.* know going in they don't want to get caught up in potentially never-ending litigation when disputes inevitably arise. In this context, sophisticated parties agree on the front end that arbitration is more expeditious and cost-effective than litigation. So be it.

There are other commercial contracts and business deals where the contracting parties decide at the outset that arbitration is the best course to resolve disputes that may arise. These parties are likewise typically sophisticated and have made, usually with the help of their lawyers, the decision to agree as part of their contract to arbitrate disputes that may arise out of their business dealings. These individuals and businesses make knowing and intelligent determinations that arbitration is the acceptable form of dispute resolution when entering into their contracts.

However, under current Mississippi law, a person can be held to have knowingly and intelligently waived his or her constitutional right to trial by jury without ever knowing they've done so, such as when they sign documents seeking medical or nursing care that contain mandatory arbitration agreements. Such persons waive their constitutional right to a trial by jury without having any understanding of what arbitration even means, without even being able to read the arbitration terms in admission documents, and under circumstances where nobody even attempts to explain to them what they are signing.

Even if a healthcare administrator, nurse or doctor were to attempt to explain arbitration to a patient, they would not be able to adequately explain what it is. They are healthcare professionals, not lawyers. If they were qualified to give these explanations (they are not), they should not be giving legal advice to patients and their families seeking medical care. And, while I think people are by and large well-intentioned, explanations about arbitration given from healthcare providers to the patient are often something like, "oh don't worry about that, it's just something thrown in the paperwork for your benefit," or "that just means that you can go to court if you want to or you can try to settle out of court if a problem comes up."

I would also argue that, once compelled to arbitration, the parties are effectively denied an opportunity to have valid constitutional

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2022 HOLIDAYS

January 1	New Year's Day
January 17	Robert E. Lee and Dr. Martin Luther King, Jr.'s Birthday
February 21	George Washington's Birthday
April 25	Confederate Memorial Day
May 30	National Memorial Day and Jefferson Davis's Birthday
July 4	Independence Day
September 5	Labor Day
November 11	Veteran's Day
November 24	Thanksgiving Day
December 25	Christmas Day

issues heard and decided in the case. How so? In my experience, arbitrators follow the law as it stands and do not consider issues challenging the constitutionality of statutes such as caps on damages. If the arbitrator refuses to take up the issue, is that ruling appealable? No. If an arbitrator rules on the issue what appeal rights does the losing party have? Virtually none.

> MS Code § 11–15-133 (2016) provides as follows:
> (1) Upon application of a party, the court shall vacate an [arbitration] award where:
> (a) The award was procured by corruption, fraud or other undue means;
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

Also, for those of us representing individuals, arbitration is unaffordable for the average consumer. When I oppose motions to compel arbitration, I often attach my own affidavit testifying that, based on arbitrations and costs I've encountered over the years, and based on my client's monthly income, the client cannot afford the costs associated with arbitration. Courts and juries don't charge our citizens for their services, and making access to justice unaffordable denies access to courts and juries as guaranteed by our state and U.S. constitutions.

Placing Form Over Substance: Notice Letters and dismissal for failure to strictly comply

Under Miss. Code Ann. §15–1-36, "[n]o action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. Failure to strictly comply results in dismissal without prejudice." *Thomas v. Warden*, 999 So.2d 842, 847 (Miss. 2008).

I've encountered arguments recently in cases where pre-suit notice was given, but suit was filed before the 60 days expired under § 15–1-36. The Defendant filed a motion to dismiss and, by the time the motion was filed, the statute of limitations that would have applied in the absence of the tolling under the notice statute had run. Defense counsel argued dismissal must be with prejudice. I successfully negotiated with counsel in one of these cases to allow us a "re-do," which required a new notice letter, waiting for the time to run, and then proceeding in Court. That was a completely unnecessary delay but the courts have said dismissal is the remedy for failing to strictly comply.

In another recent case, § 15–1-36 notice was given but the suit was filed on Friday, the 59th day following notice rather than on Monday, the next business day. The defendants insisted on pushing the issue to a hearing, claiming that the suit must be dismissed with prejudice – the ultimate sanction and the ultimate example of placing form over substance. The case was settled before this issue was heard by the trial court.

Mississippi law is arguably unclear on this. This needs to be determined and while I believe it will be decided in a way that protects access to the courts and our jury system under our state and federal constitutions, it's a dangerous issue for plaintiffs and their lawyers, and must be properly argued in compliance with available procedures.

Inadequate insurance policies and eroding coverage

Nursing homes are not required to carry liability or E&O coverage. Think of that. Any driver must carry $25,000 liability coverage in case of possible injury to others. While that's clearly not enough, we all need it to drive. Nursing homes, meanwhile, which care for our most vulnerable citizens, are not required to have a penny in coverage. That's not acceptable in a civilized society.

Nursing homes also get the benefit of $500,000 caps on pain and suffering damages — no matter how horrendous the pain and suffering. One size fits all. And nursing home plaintiffs are without economic damages to add to the $500,000 — no lost earnings and no significant medical bills (at least that aren't subject to Medicare and Medicaid liens).

To make matters worse, some nursing homes have insufficient limits of liability — $250,000 — which erodes with costs of defense, experts, etc. This effectively creates a cap of $250,000 unless a plaintiff (or their family) has counsel with the wherewithal and fire power to take the matter to verdict in hopes of getting an excess verdict. That can be years in the making, however, and the risks are great. A typical nursing home case requires expenditures of $50,000 or more to get through a trial. Meanwhile, the $250,000 has eroded by defense costs so the money that should be readily available to pay the plaintiff is greatly reduced, requiring collection from a nursing home.

What does this have to do with jury trials? It squeezes the plaintiffs and families, forcing settlements in even the strongest cases for amounts well under even the arbitrary caps on damages enacted by the legislature. Plaintiffs' lawyers and mediators find themselves explaining to families in horrible cases with huge damages that they really should consider taking an unacceptably low offer early in the case because: a) there's only $250,000 in available coverage, b) the family will ultimately bear the costs of litigation of a settlement (let's say conservatively $50,000 for experts, depositions and trial costs), and c) there's no guarantee of winning but, even if the family hits a homerun under current law obtaining a pain and suffering award in the amount of $500,000, the $250K policy limits will have eroded significantly over the course of litigation and trial. The nursing homes have sewn this up tight, the result being that trial by jury is all but eviscerated in these cases.

Conclusion

I think we all believe in the right to trial by jury. We know it is essential to our system of justice. However, we can ill-afford to pay lip service to this right. Indeed, the United States Constitution says the right to trial by jury shall be preserved and the Mississippi Constitution mandates that the right to a jury trial shall remain inviolate. These are not suggestions. I'm with John Corlew on this – we need to take this seriously and do our part as lawyers and jurists to protect this sacred right. Our system of justice and judicial branch of government depend on it. We cannot remain silent. The profession and people we represent deserve better.

2021 Christmas Party

CABA held its annual holiday party on December 2, 2021 at Char Restaurant.

Christmas Party

Event photos continued…

Understanding How to Use Shortcuts

By Joel Howell

Do you find yourself spending a lot of time on your iPhone or iPad running one task after another across a variety of apps? Think how much time you would save if you could automate those tasks, or even combine them into a single action. You can do all that and more with Apple's Shortcuts app.

Offering a host of predefined actions, the Shortcuts app lets you create customized sequences or access a large gallery of existing shortcuts. After you set up a shortcut, tap it, and it will perform all the assigned tasks.

A shortcut can run on your iPhone, iPad, or iPod touch running iOS 12 or higher, but you will need to be running iOS 13 and up on iPhone or iPadOS 13.1 and up on iPad to tap into all the app's functionality. This includes integration with the Notes app in iOS 12.2 and, most recently, a new automation feature that lets you select actions to add to your shortcuts in a more user-friendly, step-by-step manner.

You can run a shortcut a number of ways. Opening the Shortcuts app and tapping a shortcut from the main screen is the most basic option. You can also add a Shortcuts widget to your home screen to trigger the sequence more quickly or integrate the app into Siri's repertoire. Open the Shortcuts app and tap the Get Started button to kick things off.

Evernote is a note-taking app with a variety of uses. You can keep important ideas in it, anything from a list of recommended books to your personal catalog of recipes. With Evernote, you can capture notes by writing, recording audio, taking photos, uploading PDFs, sketching digitally, and more. One of Evernote's selling features is that when you search for a word or phrase, the app looks not only in your text but also for pictures of the words in images. That means, if you snap a picture of a For Sale sign and later search for "sale," Evernote will find it. Paying account holders can search PDFs and other uploaded documents from instances of words as well. Although we have listed Evernote as a "personal productivity" app rather than one for collaboration, you certainly can use it with a group to share notes and collectively create and edit them.

Microsoft OneNote is a note-taking app that can synchronize with other Microsoft products. While it is like Evernote in its core concept, OneNote has a different layout. Each page for notes is more like a pasteboard than a word processing document. You can insert text, images, and other assets onto the page and move them around at will. If you use Microsoft OneDrive for storage or Outlook for email and calendaring, then OneNote is a natural choice because it has tight ties to both those programs. OneNote has a number of math features. It also has some interesting features if you use it to record audio while also taking notes. When you play back the lecture, your notes reappear as if coordinated with the audio.

RescueTime does for your productivity what calorie-counting does for weight loss: It brings attention and insight to your actual habits. You cannot change your habits unless you know what they are. RescueTime is a time-tracking tool that records the apps you use, websites you visit, and the breaks you take while working. That way, you can see exactly how you spent your time. RescueTime also classifies each app and website you use into five productivity ratings, which you can change: 1) very productive, 2) productive, 3) neutral, 4) distracting, and 5) very distracting. It also categorizes them by type, such as communication and scheduling, social networking, entertainment, design, and composition, and so forth. RescueTime can also block distracting sites when you need to focus, and help you set goals for what you want to accomplish.

SaneBox can be a good service for improving your email filings. For a few dollars a month (the site says "only 23¢ a day"!), SaneBox goes into your email on the backend and puts messages that are not important into different folders that are not your inbox. How does it perform this magic? It figures out the difference between a "cold call" email and one from an acquaintance or business associate by looking at whether they are in your address book and other details. You also teach SaneBox by giving it feedback. Over time, it can be smart when it comes to deciding who and what is important to you. That way, you do less inbox triaging, which means you can focus on more important work.

Todoist is one of the most advanced to-do apps you will find. The free version of the app will get you hooked on its native language input, priority ratings, ability to assign tasks to other people ("It's your turn to take out the trash, oh housemate of mine"), and other core features. With a free account, you can collaborate with up to five people per project, and you can manage up to eighty projects. Upgrade to a paid plan, starting from $36 per year, to get reminders, labels, filters, and the ability to add comments to tasks. Todoist has a Business-grade tier of service, too, in case you love it so much you want to share it at work, too.

Questions or comments?
Drop me an email: jwh3@mindspring.com

BLUE PLATE Highways

Adventures in Gastronomy in Rural Mississippi

By Chad Hammons[1]

Como es COMO?

It is not a large town, and it is not a county seat, although it is close to several. It has an exit on I-55, but like a lot of small towns between Southaven and Magnolia, you have to go a ways and pass through farmland and over railroad tracks to get "into town."

I'm referring to the tiny hamlet of Como, Mississippi, situated in the northern part of Panola County, between Sardis and Senatobia. According to Google, it had a population of 1,390 in 2019, per the Census Bureau. Curiously though, despite being so small, Como literally has multiple destination restaurants, all situated on "the main drag" running north/south between I-55 on the east and Hwy 51 to the west.

The most well-known is Como Steakhouse. I began going there way back in law school, in the mid '90s. It is a great example of an out-of-the-way Mississippi steakhouse nestled in a small town that attracts people from a wide surrounding area. In my experience, there are two types of these places: ones that have a bar and serve alcohol, and ones that allow you to brown bag wine, bourbon, or whatever.[2]

Como Steakhouse hews to the former. It has a full bar, situated in the back of the restaurant, where you can sit at a table or at the bar, and eat just as you would in the main dining room. It also has an oyster bar upstairs. (As with any place that serves oysters, I recommend only eating them during cold weather months, and making sure they are freshly shucked.) The steaks are excellent, as are the sides and potatoes, which you can get smothered in all sorts of toppings. One item that does not receive enough attention at Como or any steakhouse of its kind, is the pork chop. If you have never tried a pork chop at a steakhouse, you should do so. It is usually about half the price, and tends to be a hidden gem.

One drawback to Como Steakhouse is the fact that the late 20th century war on smoking in restaurants has not seemed to have caught up with them. Or maybe it did, but they just didn't surrender. I don't know about the main dining room, but if you sit in the bar, you had better be prepared to get in your time machine and travel back to the days of unapologetic smoking.

The steakhouse is not the only place on the Como strip though. The owners of Como Steakhouse also own a bar and grill called Windy City Grille that is good for a change of pace, with more of a bar and grill menu. (There is also a Windy City Grille in Hernando, on the square by the courthouse.)

Across the street from the steakhouse and the grill is another destination restaurant for Panola and Tate Counties, the Thai Hut Restaurant and Bar, owned by a nice couple named Larry and Peach. I recently ate there as part of a group of six. The bar choices and wine list were good, the food was authentic, and the price wasn't bad. A keeper.

There are two other restaurants on the strip as well, Como Catfish, and El Rio. I haven't eaten at either of them, but intend to do so. I mention them mainly to point out just how many options are available and how this little town has created an economic niche and identity.

Lodging

Aside from the restaurants, another hidden gem in downtown Como is Como Inn. Yes, Como has a legitimate hotel. I was unaware of this until about six month ago, when my friend and client Brad Ogletree suggested we stay there on a visit to his bank's Senatobia branch. Located in the same structure as the Steakhouse and the Grill (as well as an antique shop), Como Inn is a throwback in time, and an absolute delight.

To gain access, you have to call and talk to the owner, Frances May. When you make your reservation, she will assign your room, and—no joke—will leave a key in an envelope behind the fern in front of the door. When I checked in, and began walking up the old wooden stairs, I thought I might see Sheriff Dillon or Miss Kitty[3] pass me on the way down.

All kidding aside, the place still has hardwood floors and a refurbished rustic vibe, combined with spacious, high-ceilinged guest rooms, a small reading room, and a breakfast area, complete with homemade muffins and such. It also has a balcony in the rear that is perfect for that nightcap after walking back from the Steakhouse, the Grill, or Thai Hut. I strongly recommend it for anyone who might have court in Batesville, Sardis, Senatobia, or anywhere else in that general vicinity. Once you park, you will not have to start your car again until you leave the next day.

1. Chad Hammons is a partner at Jones Walker LLP.
2. I've heard there are small town steakhouses that do not serve alcohol and that do not allow brown bagging. I am not personally familiar with this subset, and have no actual experience with them.
3. Tell your audience you're old, without telling them you're old.

CABA Membership Meeting *October 16*

To view more photos of this CABA Membership Meeting please visit caba.ms

CABA
Capital Area Bar Association

Correspondence regarding the newsletter should be directed to: CABA Newsletter Editor, 151 E. Griffith Street, Jackson, MS 39201. Letters to the editor must be signed, but the writer's name will be withheld upon request. Telephone inquiries should be made to the Executive Director at 601.969.6097.

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