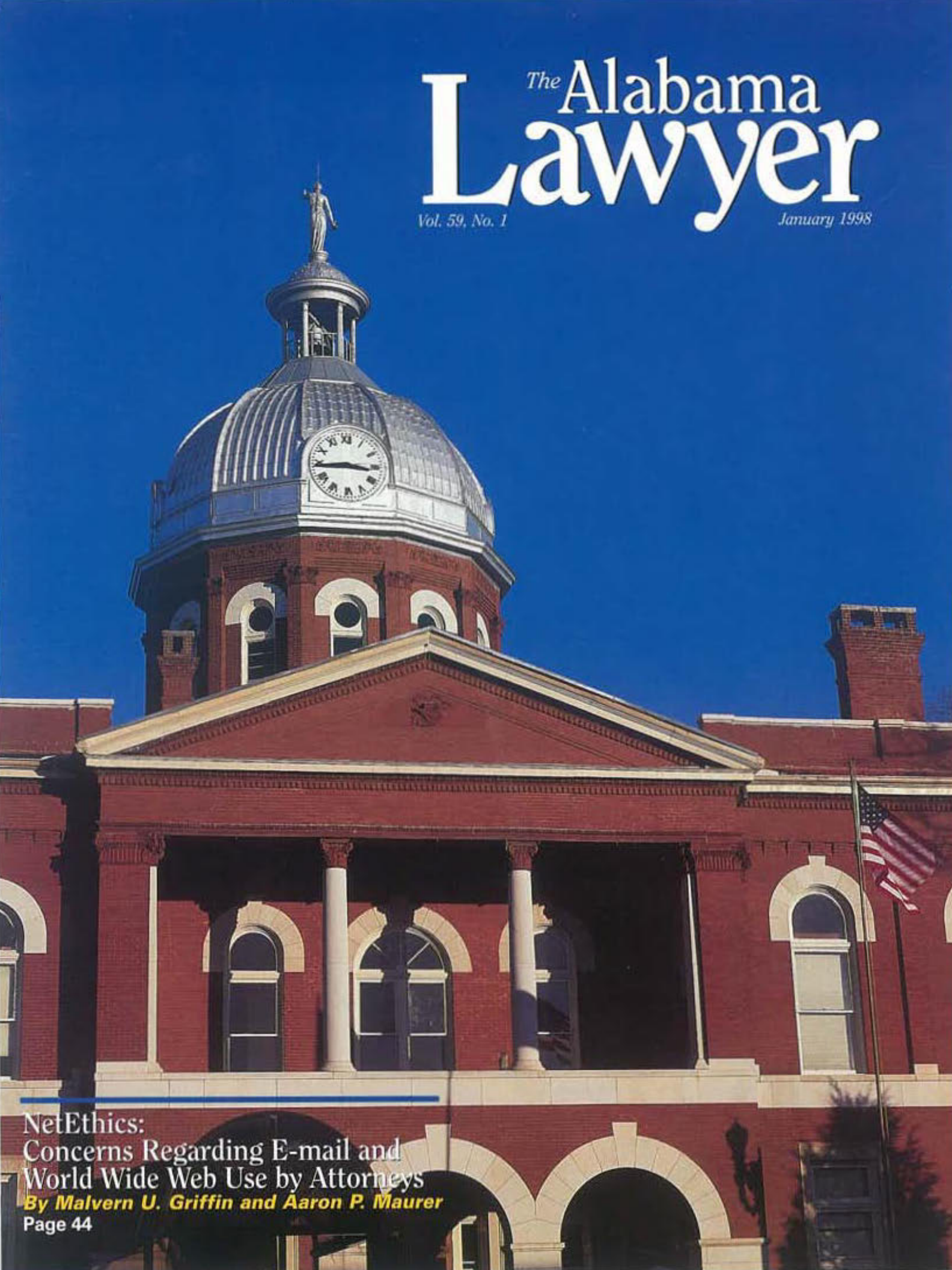
The Alabama Lawyer
Vol. 59, No. 1 January 1998

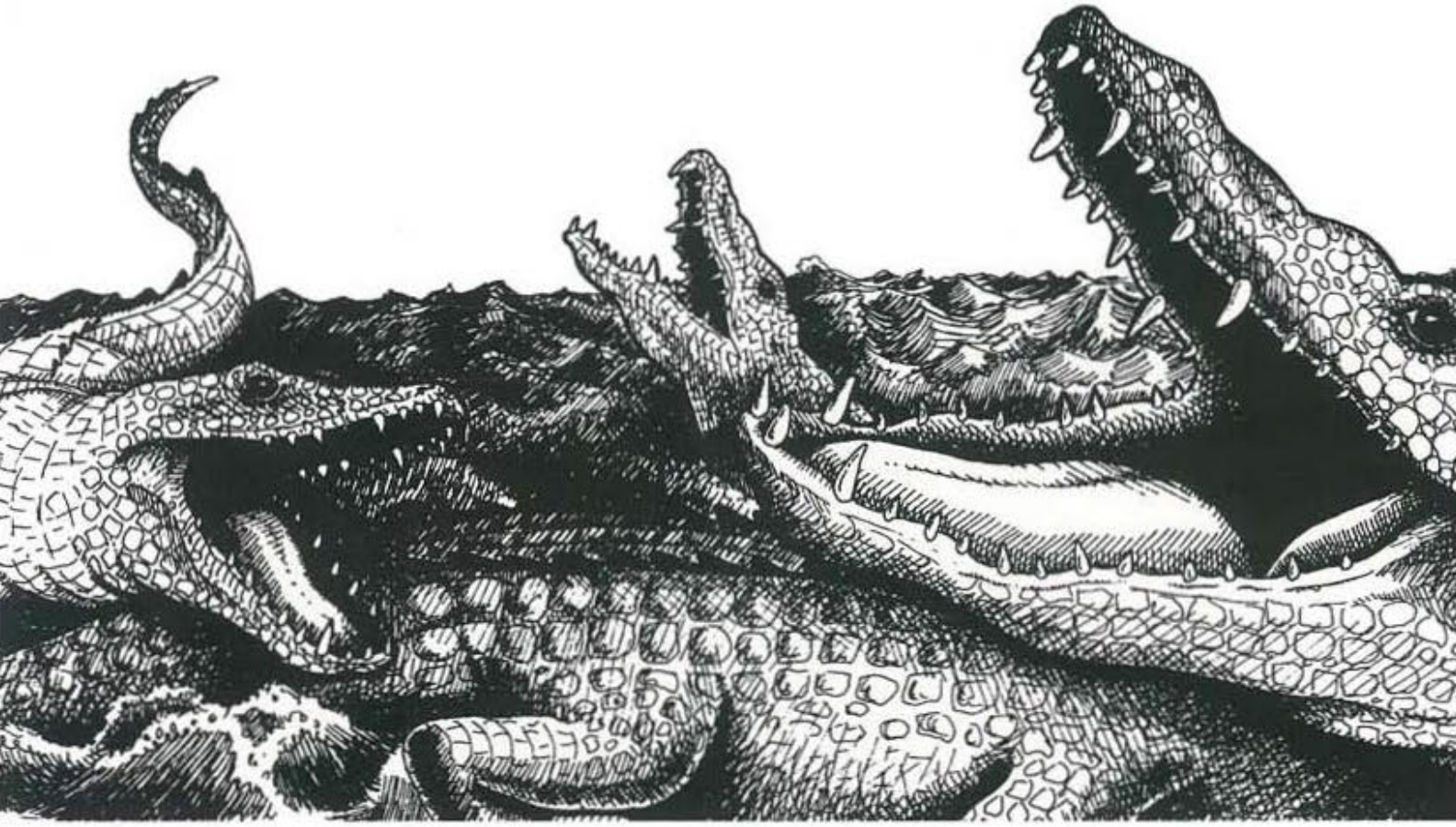


NetEthics: Concerns Regarding E-mail and World Wide Web Use by Attorneys

By Malvern U. Griffin and Aaron P. Maurer

Page 44

Finding Malpractice Insurance Does Not Have To Be A Trip Through Troubled Waters



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1998 Spring CLE Calendar

JANUARY	23	The False Claims Act and *Qui Tam* Symposium
FEBRUARY	13	Alabama Appellate Practice: Will include the newly revised *Alabama Appellate Practice* Handbook
	14	Keys to Successful Solo and Small Firm Practice
	20	The Litigator's Tool Box: Computers and Your Law Practice
	27	Family Law Practice
MARCH	6	The Successful Advocate: The Art of Winning Before Trial
	13	Banking Law
	27	Worker's Compensation
APRIL	10	Expanding Horizons in Employment Law
	17	Creditors' Rights and Remedies
	23-25	* 35th Annual Corporate Law Institute
MAY	1-2	* City and County Governments
	8-9	* Environmental Law Update
	15-16	* Business Torts and Antitrust
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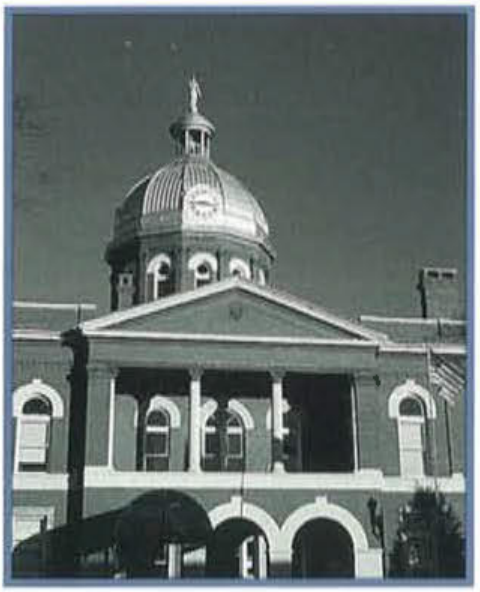

The Alabama Lawyer

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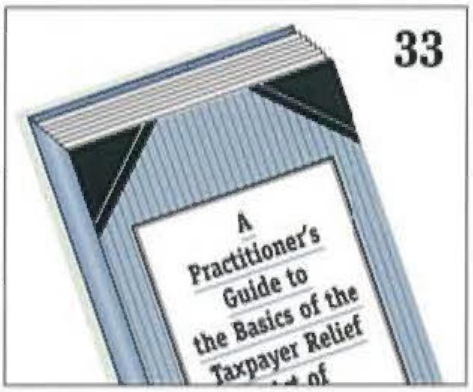
On the Cover

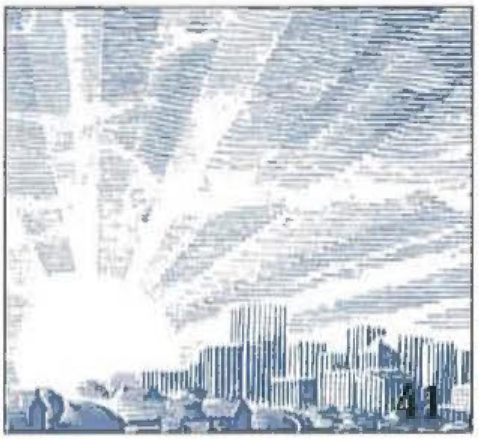
Chambers County Courthouse, LaFayette, Alabama. Chambers County was created December 18, 1832, from Creek Indian cession. It was named for Dr. Henry C. Chambers of Madison County, who was a member of the Constitutional Convention of 1819 and legislature of 1820. He was elected U.S. Senator in 1825 but died enroute to Washington. A log courthouse was built here in 1833, followed by a brick structure in 1837, and the present courthouse in 1899.

—Photo by Paul Crawford, JD, CLU

In This Issue

(Continued on page 4)





(Continued from page 319)

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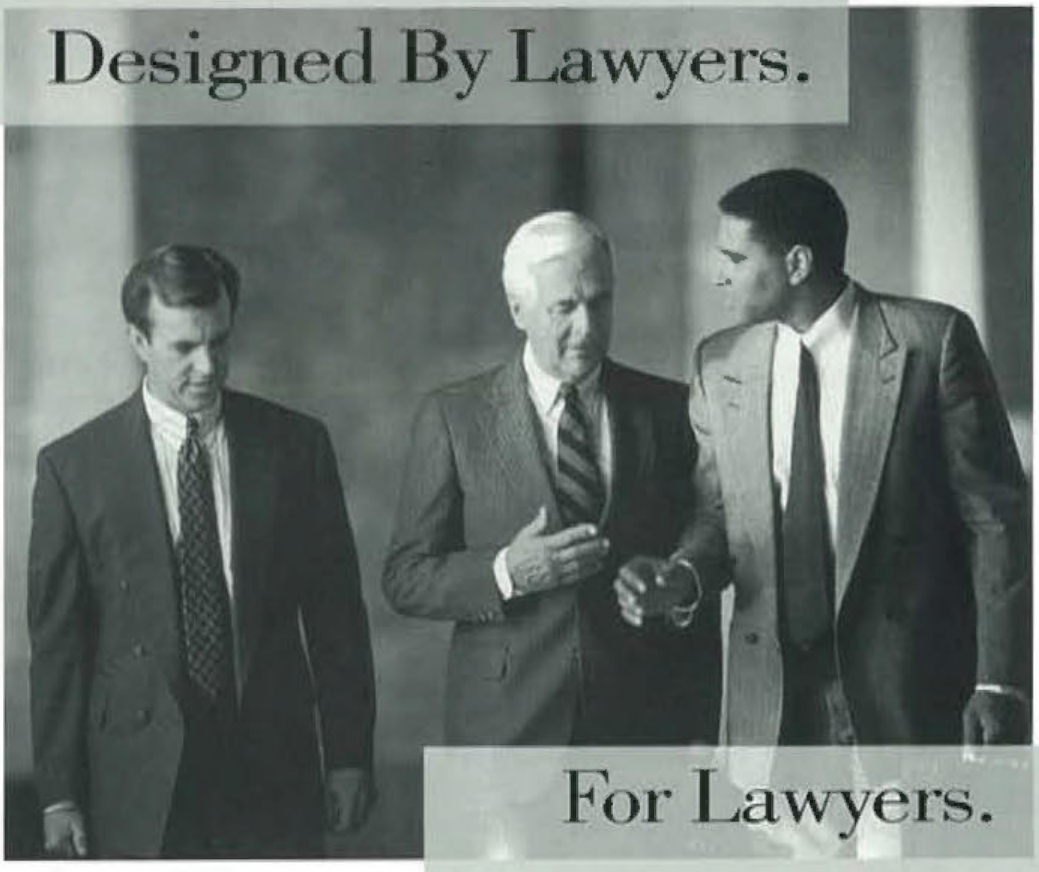

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PRESIDENT'S PAGE

By Dag Rowe

The following remarks were delivered by President Dag Rowe to the Mobile Bar Association on December 19, 1997, at the recognition ceremony for the MBA's award-winning Volunteer Lawyers Program, in which more than 40 percent of its members participate (the national average is 17 percent).

Is It Professionalism or "Show Me The Money?"

Dag Rowe

We live and practice law at a time where the emphasis is, "Show me the money." It is believed by many of our colleagues and the lay public that professionalism has become a thing of the past, replaced by a fixation on billable hours and the bottom line. Some say that our profession and indeed our society are more concerned about what's in it for them and less concerned about what we can do for each other. Sol Linowitz, former ambassador to the Organization of American States, recently observed, "In too many firms, the computer has become the managing partner as law firms are ruled by hourly rates and time sheets."

Please don't misunderstand me, there's nothing wrong with achieving personal success, as long as we remember the words of Dr. Harold Blake Walker, "We make a living by what we get, but we make a life by what we give." As Benjamin Ola Akande said, "It's only when prosperity and personal success blind us and prevent us from seeing the misery and hardship that surround us, then we have missed the opportunity to make a difference."

The success of your Volunteer Lawyers Program reminds us that government does not have a monopoly on compassion and that the best charity is local. As Texas Governor George Bush, Jr. recently said, "The most compassionate and effective social service is one that restores the human link between recipient and giver and that replaces a faceless bureaucracy with the helping hand of a neighbor."

William H. Miller wryly observed that if you ask military veterans the single most important thing they learned in the service of their country, they'll respond, only half jokingly, "Never volunteer." Notwithstanding that military lesson, last year 90 million Americans spent an average of 4.7 hours a week to benefit others and gave a total of $100 million dollars.

One hundred and sixty years ago, Alexis de Toqueville said that while other nations have two sectors (public and private), America has a third: volunteerism. Since the Great Depression, that "volunteer sector" has never been needed more. Today we are witnessing a fundamental change in the way our government deals with social services. Whether you agree with President Clinton's commitment "to change welfare as we know it" or whether you subscribe to Newton Gingrich's approach outlined in his book, *To Renew America*, it is obvious that bedrock changes are afoot in how we help those who are less fortunate. It has become abundantly clear that there will be more responsibility at local levels and more dependence on private generosity. This new reality has not been missed by President Clinton, who recently said, "The era of big government is over; the era of the big citizen is just getting underway." These changes will require a renewed and enhanced commitment by us all to volunteerism and philanthropy. We must realize that volunteerism is good for the soul of the volunteer, good for the life of the person served, and good for the collective social fabric.

Increased volunteerism can benefit each of us not only by making our communities a better place to live, but by

helping to repair our profession's tarnished image. Attorney Bill Bepko, chancellor of Indiana University, recently observed that:

"Today many lay persons view lawyers with unfocused resentment. This seems to be on the assumption that lawyers take disproportionate value out of the economic system, not only in litigation costs but in disruption of legitimate business transactions and the employment of costly and needless [litigation] practices."

Rightly or wrongly, lawyers are blamed for Rambo-tactics characterized by costly and needless confrontation, which ignore opportunity for resolution and consensus, and which enhance our reputation as hired guns profiting by the misfortune of our clients.

This perception brings to mind John Howard's story about a British knight back in the Middle Ages. A knight was returning to the castle one evening after a long, hard day. His armor was dented, his helmet was askew, and his plume was smashed. His horse was limping and the knight was listing to one side, barely staying in the saddle. The King saw him coming and went out to greet him. "You look awful! What hath befallen you, Sir Albert?" he asked. The knight straightened himself up and said, "Oh Sire, I have been striving in your behalf all day, burning and pillaging your enemies to the West." "You've been doing what?" asked the astonished King. "I don't have any enemies to the West." "Oh!" said the knight. "Well, you do now."

A significant and sustained commitment to volunteer work by lawyers can surely help improve that tarnished image. I am convinced, however, that in order for our profession to correct its image we must fundamentally and permanently return to the bedrock values that originally made ours an honorable profession, second to none. We must give an honest hour's work for an honest fee. We must not lie, cheat, chisel, or steal. We must respect our colleagues, judges and legal system. We must also respect our clients and others' clients, their property and their opinions. When we individually and as a profession remember these things, we will no longer have to worry about our image.

In an age when lawyers are supposed to be tough and pragmatic, we often forget that much of our legal heritage is based on a commitment to how things can be and should be—not merely how they are now. We forget that our colleagues who framed the Declaration of Independence and the Constitution were idealists committed to values that transcended the present and the practical. James O. Freedman, president of Dartmouth College, recently said that:

"Idealists are people inspired by an idea greater than themselves, who are driven by a moral imperative to imagine a world better than the one they found...Idealists are informed [about] and involved in the civic life of their communities...Idealists care about those who need help and commit themselves to service and to a life-time of civic [and professional] engagement. They care about the health and well-being of neighbors and strangers alike. They care about the legal rights of all, especially those without advocates. They care about the working poor who struggle to make their way and to preserve their families in a global economy of bewildering technological change. They care about children, who need the full support of society in order to achieve their potential. Idealists remind us, by the way in which they advance the lives of others, that, as Matthew Arnold said, 'Life is not a having and getting, but a being and becoming.' And they invite us through their generosity to be open to the possibility that what they have been for us, we might be for others. Idealists are not mere dreamers. They are known by their deeds and by the pride and purpose that animate their [charity and generosity]...Idealists are not rare, but there are not enough of them [in this profession or] in society."

There is an old African proverb that says, "God gives nothing to those who keep their arms crossed." It's obvious to me that a lot of people in the Volunteer Lawyers Program have their arms wide open to others with a helping hand.

EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Front row, from left: Professor Cole, Juiz Paulo Eduardo Razuk, Juiz Luiz Antonio de Godoy and Keith Norman. Back row: Juiza Fernanda Gomes Camacho, Juiza Carmen Lucia da Silva, Juiza Ely Amioka and Juiz Paulo Jorge Scartezzini Guimaraes.

Judicial Selection, Brazilian Style

Keith B. Norman

The Alabama State Bar recently had the privilege of hosting seven judges from the state of Sao Paulo in Brazil. These judges were visiting the United States on an educational program. Professor **Charles D. "Bo" Cole** of Cumberland Law School served as their official host for the Alabama visit. Included on their busy itenerary was a trip to Montgomery. While here, our judicial visitors had the opportunity to visit our state appellate courts and the state bar. Their state bar visit included a tour of our facilities, a general overview of the operation of bar associations in this country and an explanation of the licensing and regulatory function of the Alabama State Bar in particular. The Brazilan jurists were especially interested in the work of the Alabama Center for Dispute Resolution in advancing this concept in our state.

The Brazilan judicial system is similar to our federal and state court system. Two of the visiting Brazilan jurists sit on the Civil Court of Appeals of the State of Sao Paulo. This court is similar to our own intermediate appellate courts of appeal. The five remaining jurists sit on trial courts that are similar to our circuit courts. Their trial courts are divided so that they hear criminal and civil cases separately.

My conversations with these judges comparing and contrasting our respective judicial systems was fascinating and enlightening. I was particularly interested to learn how judges are selected in Sao Paulo. Eighty percent of the judges, both in federal and state service, are selected by examination. The remaining 20 percent are appointed by the governor of each state or the president of the union after undergoing a

qualification process. The appointing authority then selects one name from among the five names offered. The 20 percent selected in this fashion are referred to as the "constitutional fifth." The wisdom of the "constitutional fifth" is that it provides the judiciary with balance and diversity. Judges appointed in this fashion must nevertheless have experience as practitioners, prosecutors, state's attorneys or in other law-related functions.

The remaining 80 percent of Brazilian judges are selected by examination. A law graduate, however, cannot sit for the judicial examination without first obtaining two years of legal experience. This experience may be gained by practicing law, clerking with a court, serving as a state's attorney, or the like. Generally, examinations are held when there are a sufficient number of vacancies to justify doing so. Following appointment of those candidates who have scored the highest on the judicial exams, the new judge is usually assigned to sit in the most rural area of the state until the Tribunal Justicia (equivalent to our state supreme court) promotes the judge to more highly sought judicial positions closer to the capital.

The Tribunal Justicia acts upon requests for promotions when vacancies occur in the more desirable courts on the recommendation of a committee of 25 senior judges on that court (there are 133 judges on the Tribunal Justicia). The newly appointed judge serves a two-year conditional term. Upon satisfactorily completing the two-year conditional term, the judge is then eligible for permanent appointment by the Tribunal Justicia. Unless they retire or are removed from office for misconduct, federal and state judges in Brazil may serve until age 70.

Dorothy Johnson (left), admissions director for the state bar, explains the requirements to be eligible to sit for the bar exam.

Our Brazilian friends came to the United States and Alabama to increase their understanding about our national and state judiciary. I hope we were able to impart information that will later prove useful to the State of Sao Paulo's judicial system. In turn, maybe we can use what we have learned from them to rethink the way we currently select judges in Alabama. ■

About Members, Among Firms

About Members

Lisa Milner Hancock announces the relocation of her office to 2205 Taylor Street, Guntersville, 35976. Phone (205) 582-6940.

John W. Green, III announces the relocation of his office to Plaza I, Suite 24, 300 Clinton Avenue, West, Huntsville, 35801. Phone (205) 534-5671.

Aaron E. Bradshaw announces the relocation of his office to 313 South Street, Gastonia, North Carolina 28052. Phone (704) 865-4613.

Amardo Wesley Pitters announces a change of address to 207 Montgomery Street, Suite 210, Montgomery, 36104. Phone (334) 265-3333.

John R. Christian announces the relocation of his office to 1233 Graylynn Drive, Birmingham, 35216-2621. Phone (205) 822-6297.

Charles A. Ray, IV announces a change of address to 130 Summit Oaks Drive, Apt. 1508, Huntsville, 35801. Phone (205) 534-8996.

Lanier B. Cooper announces a change of address to 2114 Westchester Drive, Daphne, 36526. Phone (334) 621-6932.

Oscar W. Adams, III announces the relocation of his office to Arthur D. Shores Law Center, 1603 5th Avenue, North, Birmingham, 35203. Phone (205) 917-3700.

N.P. Callahan, Jr. announces the relocation of his office to 813 Shades Creek Parkway, Suite 208, Birmingham, 35209. Phone (205) 871-1500.

Kathryn A. Lepper announces a change of address to 317 20th Street, North, Birmingham, 35203. Phone (205) 324-1334.

Carey Bennett McRae announces the opening of his private practice. His office is located at 1425 South 21st Street, Suite 204, Birmingham, 35205. Phone (205) 930-9006.

Perry G. Shuttlesworth, Jr. announces the formation of **Perry G. Shuttlesworth, Jr., P.C.** Offices are located at 300 N. 21st Street, Suite 200, Birmingham, 35203. Phone (205) 252-1146.

Among Firms

Balch & Bingham announces that **Michael D. Waters** has joined as a partner. Offices are located at 2 Dexter Avenue, Montgomery, 36104. Phone (334) 269-3138.

Wallace, Jordan, Ratliff & Brandt announces that **Kimberly R. West** is now *of counsel*. Offices are located at 800 Shades Creek Parkway, Suite 400, Birmingham, 35209. The mailing address is P.O. Box 530910, 35253. Phone (205) 870-0555.

Thomas O. Kotouc, P.C. announces that **Nick Y. Shimoda** has joined the firm as *of counsel*. The new location is 4142 Carmichael Road, Montgomery, 36106-2802. Phone (334) 409-0088.

Miller, Hamilton, Snider & Odom announces that **Christopher Kern** and **Gregory C. Buffalow** have become members, and **Rosemary Ponder Cole, Walter Mark Anderson, IV** and **Robert B.W. McLaughlin** have become associates. Offices are located in Mobile and Montgomery, Alabama and Washington, DC.

Langston, Frazer, Sweet & Freese announces that **James G. Stevens**, former assistant attorney general for the Alabama Department of Environmental Management, has joined the firm. Offices have relocated to Morgan Keegan Center, 2900 Highway 280, Suite 240, Birmingham, 35223. Phone (205) 871-4144.

Balch & Bingham announces the relocation of its Huntsville office to 655 Gallatin Street, S.W., Suite 200, Huntsville, 35801. Phone (205) 551-0171. The Washington office has relocated to 1275 Pennsylvania Avenue, N.W., 10th Floor, Washington, DC 20004. Phone (202) 347-6000.

Phelps, Jenkins, Gibson & Fowler announces that **A. Courtney Crowder** has become a member and **W. David Ryan** has become an associate. Offices are located at 1201 Greensboro Avenue, P.O. Box 020848, Tuscaloosa, 35402-0848. Phone (205) 345-5100.

The State of Alabama Board of Pardons and Paroles announces that **Steve Sirmon** has been promoted to deputy attorney general, assigned to the board's legal division. Offices are located at the Lurleen B. Wallace Building, 500 Monroe Street, P.O. Box 302405, Montgomery, 36130-2405. Phone (334) 242-8700.

Thomas, Means & Gillis announces that **Deborah Sanders Manasco** and **Darnell D. Coley** have become associates. Offices are located at 3121 Zelda

Court, P.O. Drawer 5058, Montgomery, 36103-5058. Phone (334) 270-1033.

John Martin Galese, P.A. announces the relocation of offices to 300 1st Commercial Bank Building, 800 Shades Creek Parkway, Birmingham 35209. Phone (205) 870-0663.

Hycall Brooks, III and **Charles I. Brooks** announce the formation of **The Brooks Firm, P.C.** Offices are located at 2001 Park Place, North, Park Place Tower, Suite 920, Birmingham, 35203. Phone (205) 320-0005.

Sherling, Browning & York announces the relocation of offices to 1 Houston Street, Mobile, 36606. Phone (334) 476-8900.

Brooks & Hamby announces that **Stewart L. Howard** has become a partner. Other members include **Benjamin H. Brooks, III, David A. Hamby, Jr., Jene W. Owens, Jr., Harry V. Satterwhite,** and **Daryl A. Atchison**. Offices are located at 618 Azalea Road, Mobile, 36609. Phone (334) 661-4118.

Lehr, Middlebrooks, Price & Proctor announces that **Cinda R. York** has become an associate. Offices are located at 2021 Third Avenue, North, Suite 300, Birmingham, 35203. Phone (205) 326-3002.

Thomas H. Brown and **Clyde O. Westbrook, III**, formerly of Harris & Brown, have changed the firm name to **Brown Westbrook**, and **Clyde Westbrook** has become a shareholder. In addition, **John S. Johnson** has become an associate. Offices remain at 2000-A SouthBridge Parkway, Suite 520, P.O. Box 59329, Birmingham, 35209. Phone (205) 879-1200.

Redden, Mills & Clark announces that **Ronald J. Gault** has joined the firm. Offices are located at 940 1st Alabama Bank Building, Birmingham, 35203. Phone (205) 322-0457.

L. Scott Johnson, Jr. announces that the firm of BirdSong & Johnson will cease, and the firm name of **L. Scott Johnson, Jr.** will resume in its place. Offices remain located at 207 Montgomery Street, 36104. The mailing address is P.O. Box 1547, Montgomery, 36102. Phone (334) 834-3221.

Evans, Jones & Reynolds announces that **Samuel D. Payne**, formerly with Cabaniss, Johnston, Gardner, Dumas & O'Neal, has joined the firm as an associate. The shareholders are **J. Clarence Evans, Richard A. Jones, Winston S. Evans** and **J. Allen Reynolds, III.** Offices are located at 1810 First Union Tower, 150 4th Avenue, North, Nashville, Tennessee 37219-2424. Phone (615) 259-4685.

Berkowitz, Lefkovits, Isom & Kushner announces that **Edward P. Meyerson** and **Michael R. Silberman** have become members of the firm. Offices are located at 1600 SouthTrust Tower, 420 N. 20th Street, Birmingham, 35203. Phone (205) 328-0480.

John M. Wood and **Paul B. Shaw** announce the formation of **Wood & Shaw, L.L.C.** Offices are located at 2001 Park Place, North, 810 Park Place Tower, Birmingham, 35203. Phone (205) 322-2777.

Herring, Dick, Wisner, Adams & Walker announces that **Eric F. Adams** has become a member. Offices are located at 100 Washington Street, Suite 200, Huntsville, 35801. Phone (205) 533-1445.

Lange, Simpson, Robinson & Somerville announces that **William S. Fishburne, III** and **Mac B. Greaves** have become partners and **Michael J. Velezis, Jack G. Kowalski, C. Barton North, K. Bryance Metheny, Joyce Baker-Selesky,** and **Vanessa A. Simmons** have become associates and that **Mark L. Thompson** has joined the firm. Offices are located at 417 20th Street, North, Suite 1700, Birmingham, 35203-3272. Phone (205) 250-5000.

Behrouz K. Rahmati and **Kevin C. Gray** announce the formation of **Rahmati & Gray.** Offices are located at 200 Clinton Avenue, West, Suite 806, Huntsville, 35801. The mailing address is P.O. Box 19006, 35804. Phone (205) 533-2002.

Brown, Hudgens P.C. announces that **Stewart J. Brooker** has become an associate. Offices are located at 1495 University Boulevard, P.O. Box 16818, Mobile, 36616-0818. Phone (334) 344-7744.

Zarzaur & Schwartz announces that **Wendy A. Zarzaur** has become an associate. Offices are located 2209 Morris Avenue, Birmingham, 35203. The mailing address is P.O. Box 11366, 35202-1366. Phone (205) 250-8437.

Leitman, Siegal & Payne announces that **David B. Champlin, Marcie A. Lanier** and **Tona M. Hitson** have become associates. Offices are located at 600 N. 20th Street, Suite 400, Birmingham, 35203. Phone (205) 251-5900.

Malone, Brinyark & Nelson announces that **Bryan S. Brinyark** and **Mark C. Nelson** have become shareholders and that **James E. Gentry** has become an associate. Offices are located at 2216 14th Street, Tuscaloosa, 35401. Phone (205) 349-3449.

Lyons, Pipes & Cook announces that **Roger E. Cole, S. Andrew Scharfenberg, Ginger L. Pierce** and **Philip A. Stroud** have become associates. Offices are located at 2 N. Royal Street, Mobile, 36652. Phone (334) 432-4481.

Joseph G. Stewart, Jr. and **Thomas E. James** announce the formation of **Stewart & James, P.C.** Offices are located at 200 S. Lawrence Street, Montgomery, 36104. Phone (334) 263-3552.

Harris, Cleckler, Berg, Rogers, Hollis & Bumgarner announces that **Stephen J. Bumgarner** has become a member and that **Jeffrey G. Tickal** and **Paul A. Wilson** have joined the firm as associates. Offices are located at Historic 2007 Building, 2007 3rd Avenue, North, Birmingham, 35203. Phone (205) 328-2366.

Regina B. Edwards and **Thomas R. Edwards** of **Edwards & Edwards** have relocated to 109 E. Bridge Street, Wetumpka, 36092. Phone (334) 514-1011.

Durward & Cromer announces that **G. John Durward, Jr.** has become an associate. Offices are located at 2015 2nd Avenue, North, Suite 100, Birmingham, 35203. Phone (205) 324-6654.

CLE Reminder

All CLE credits must have been *earned* by December 31, 1997. All CLE transcripts must be *received* by January 31, 1998.

James T. Sasser and **Rebecca A. Walker**, formerly of Simmons, Brunson, Sasser & Walker, have relocated their practice. The firm name is **Sasser & Walker, P.C.** Offices are located at 406 S. 5th Street, P.O. Box 186, Gadsden, 35902. Phone (205) 547-1133.

Donald, Randall, Donald & Tipton announces that **Elizabeth U. Sadler** and **Timothy L. Shelton** have become associates. Offices are located at AmSouth Building, Ninth Floor, 2330 University Boulevard, Tuscaloosa, 35401. The mailing address is P.O. Box 2155, 35403. Phone (205) 758-2585.

Tanner & Guin announces that **Steven M. Wyatt** has become an associate. Offices are located at 2711 University Boulevard, Tuscaloosa, 35401. Phone (205) 349-4300.

Freman & Kanui announces the relocation of offices to 211 S. Cedar Street, Mobile, 36640. Phone (334) 432-2111.

Cabaniss, Johnstoo, Gardner, Dumas & O'Neal announces that **Stacey L. McDuffa, M. Annette Lanning, Kyle C. Barrentine** and **Jarrod J. White** have become associates. Offices are located at Park Place Tower, 2001 Park Place, North, Suite 700, Birmingham, 35203. Phone (205) 252-8800.

William J. Gibbons, Jr. and **Darla T. Furman** announce the formation of **Gibbons & Furman.** Offices are located at 117 Jefferson Street, North, Huntsville, 35801. Phone (205) 539-0021.

William J. McDaniel, Jack M. Bains, Jr. and **Patrick R. Norris** announce the formation of **The McDaniel Firm, P.C.** and that **William S. Crowson** and **Michelle K. Pieroni** have become associates. Offices are located at Two Metroplex Drive, Suite 504, Birmingham, 35209. Phone (205) 871-1811.

Charles C. Hart and **William R. Willard** announce the relocation of offices to 420 S. 4th Street, Gadsden, 35901. The mailing address remains P.O. Box 26, 35902. Phone (205) 543-1701.

Albert J. Trousdale, II and **Larry B. Moore** announce the formation of **Moore & Trousdale.** Both were previously members of Ashe, Tanner, Moore & Wright, and the offices will remain at the former Florence office, located at 201 S. Court Street, Suite 510, 35630. The mailing address and phone will remain the same, P.O. Box 1072, 35631. Phone (205) 718-0120.

Hubbard, Smith, McIlwain, Brakefield & Shattuck announces that **Elizabeth F. Colwick,** former law clerk to Chief Justice Perry O. Hooper, Jr., has become an associate. Offices are located at 808 Lurleen Wallace Boulevard, North, Tuscaloosa, 35401. Phone (205) 345-6789.

Rogers, Young, Wollstein & Hughes announces the relocation of offices to 1304 Quintard Avenue, Anniston, 36201. The mailing address will remain P.O. Box 2728, 36202. Phone (205) 235-2240.

David S. Luker, J. William Cole and **William K. Bradford** announce the formation of **Luker, Cole & Associates, L.L.C.** Offices are located at 2205 Morris Avenue, Birmingham, 35203. Phone (205) 251-6666.

Yearout, Myers & Traylor announces the relocation of offices to 800 Shades Creek Parkway, Suite 500, Birmingham, 35209. Phone (205) 414-8160.

Starnes & Atchison announces that **Bryan O. Balogh,** previously with Lusk, Fraley, McAlister & Simms, has joined the firm. Offices are located at 100 Brookwood Place, 7th Floor, Birmingham, 35209. The mailing address is P.O. Box 598512, 35259-8512. Phone (205) 868-6000.

Sirote & Permutt and **Sasser & Littleton** announce their merger, under the name of **Sirote & Permutt.** Offices are located in Birmingham, Huntsville, Mobile and Montgomery.

Loftin, Herndon & Loftin announces that the firm name has changed to **Loftin, Herndon, Loftin & Miller.** Offices are located at 1705 7th Avenue, Phenix City, 36868-2566. The mailing address is P.O. Box 2566. Phone (334) 297-1870.

Lanier, Ford, Shaver & Payne announces that **Gregory S. Martin** and **J. Clark Pendergrass** have become associates. Offices are located at 200 West Side Square, Suite 5000, Huntsville, 35801. Phone (205) 535-1100.

Roy S. Goldfinger, P.C. announces the relocation of offices to 4137 Carmichael Road, Suite 210, P.O. Box 231555, Montgomery, 36123-1555. Phone (334) 395-8500. ■

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Bar Briefs

• A luncheon to celebrate the dedication of *From Maverick to Mainstream*, a sesquicentennial history of Cumberland School of Law, brought together members of the Cumberland community at The Club in Birmingham on August 27. Guest of honor was longtime Samford University benefactor Lucille Stewart Beeson, whose most recent gift is the law school's new library, and to whom *From Maverick to Mainstream* is dedicated.

Cumberland Dean Barry Currier introduced co-authors **Howard P. Walthall** and David J. Langum, both professors of law at Cumberland, who spoke on significant events of and interesting tales from the school's past.

From left are co-authors David J. Langum and Howard Walthall; Lucille Stewart Beeson; Samford President Thomas E. Corts; and Cumberland Dean Barry A. Currier.

• This year's recipient of the Alabama Circuit Judges Memorial Scholarship, presented annually by the Circuit Judges Association to an outstanding law student, is Birmingham School of Law student **Patsy McCoy Dunivant**. The scholarship fund was established July 1, 1991 to promote the education of deserving students of the law and honor the memory of deceased Alabama circuit judges for their dedicated service.

Judge Gary Pate congratulates his judicial assistant, Patsy McCoy Dunivant, on receiving the Circuit Judges' Scholarship.

Dunivant, a 21-year veteran of the Alabama Judicial System, worked as a judicial assistant to six of the ten judges in whose honor the scholarship is awarded. She currently serves as judicial assistant to Circuit Judge J. Gary Pate, domestic relations division, Birmingham, Alabama.

• **Wilbur G. Silberman** was recently presented with a lifetime achievement award by the Bankruptcy and Commercial Law Section of the Birmingham Bar Association. He is the first recipient of such an award. Silberman is a founding shareholder of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, P.C.

• **Charles J. Kelley** has been named chairperson of the Young Lawyers Committee of the 21,000-member Defense Research Institute, the nation's largest association of civil litigation defense lawyers. Specializing in product and premises liability as well as fraud and automobile litigation, he is a partner with Howard & Kelley, L.L.C. of Florence.

• **Launice Sills** has been named president-elect of the Alabama Lawyers Association, the Alabama affiliate of the National Bar Association and comprised of approximately 200 attorneys from across the state. Sills previously served as assistant secretary for the ALA and was also the association's annual retreat coordinator.

Sills practices in the Montgomery office of Thomas, Means & Gillis.

• **Joseph H. Johnson, Jr.**, of the firm of Lange, Simpson, Robinson & Somerville, has been awarded the Bernard P. Friel Medal by the National Association of Bond Lawyers for distinguished service in public finance. The award was made on September 25, 1997 at the Association's annual meeting in Chicago. The Friel Medal is awarded no more frequently than annually, but has not been awarded since 1994. ■

ALABAMA STATE BAR

1997 Fall Admittees

STATISTICS OF INTEREST

Number sitting for exam	600
Number certified to Supreme Court of Alabama	407
Certification rate*	67.8 percent

Certification Percentages:

University of Alabama School of Law	93 percent
Cumberland School of Law	89.3 percent
Birmingham School of Law	43.1 percent
Jones School of Law	39.2 percent
Miles College of Law	12.5 percent

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

1998 ALABAMA STATE BAR

ANNUAL MEETING

SIMPLIFY YOUR LIFE...

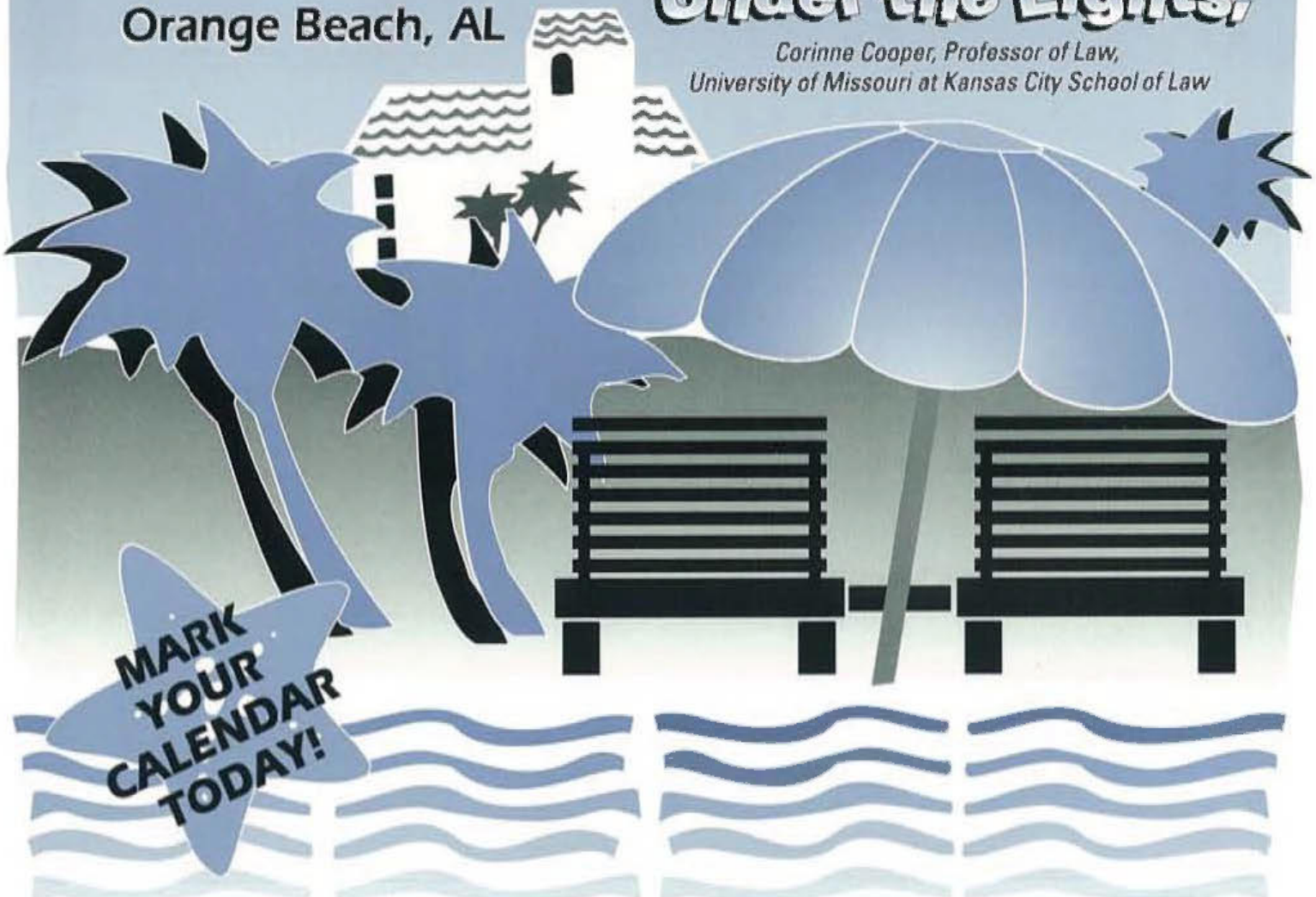
And Be a Better Lawyer

July 8-11, 1998
Perdido Beach Resort
Orange Beach, AL

"Professional Presence & Projection:

Keeping Your Cool When You're Under the Lights."

Corinne Cooper, Professor of Law,
University of Missouri at Kansas City School of Law



MARK YOUR CALENDAR TODAY!

Alabama State Bar 1997 Fall Admittees

Aaron, John Michael
Akers, Janet Marie
Alexander, Roger Lewis
Alford, Reece Brandon
Allen, Richard Harrison
Allen, Wynn Dee Turberville
Anderson, Allen Lewis
Andrews, Steven Douglas
Aquila, Julia Theresa Spazzarini
Ardoin, David Winston
Atkins, Matthew Scott
Atkinson, Amanda Shea
Backus, Gary Arthur Charles
Bagley, Mark Lee
Balogh, Charla Joann Durham
Banks, Stephanie Diese
Bardell, Craig Allan
Barnes, Stephanie Renee Bain
Barnett, Allison Vernon IV
Barnett, Jeffery Scott
Barnhill, Shannon Leanne
Barrentine, Kyle Craig
Baty, John Alan
Beaulieu, Donna Janice
Bedwell, Robert Roy III
Benson, William Howard III
Berryhill, Jonathan Lewis
Beshany, Yvonne Marie Norris
Betbeze, Jaime William
Black, Broderick Sterling
Black, Dylan Cook
Black, Edward Shane
Black, Stephen Foster
Blackburn, Calvin Weis III
Blackwell, Jonathan Andrew
Blankenship, Allison Suzanne Gunnin
Blankenship, Elizabeth Jackson
Blankenship, Lucien Bernard
Blessman, Vickie Lee
Blount, Edward Carter Jr.
Bodie, John Louis
Booth, Rainey Cawthon
Boyanton, Benjamin Lee
Bozeman, Martha Renee'
Brady, Anupama Ashok Mahatekar
Brantley, Larry Wayne
Brightwell, Ruth Massey
Brooker, Stewart Jefferson
Brooks, Donna Eich
Brooks, Erin Elisabeth O'Neill
Brown, Karen Kathy
Brown, Todd Allen
Brown, Wendi Mack
Bruijn, Pascal
Buchanan, John Rodney
Buchanan, Virginia Marie
Buck, Brannon Jeffrey
Bulls, Fannie Lucretia Sampson
Bunin, Nancy Byrd
Burroughs, Rickey Clyde
Caddell, Roy Michael Jr.
Caldwell, Leslie Ann
Callaway, Harold Deason III
Calton, Jimmy Spurlock Jr.
Campbell, John Stuart
Canada, Cynthia Marie May
Canada, Larry Gene
Caraway, John Melville Jr.
Carr, Bobbi Jane
Carroll, Hunter Copeland
Carter, Jerome Christopher
Chambless, Andrew Rabun
Chambliss, Micah Farrell
Chandler, Billy Howard
Chappell, Guy DeWitt III
Charles, John Wesley III
Childs, James Wesley Jr.
Cleveland, Clifford Wayne II
Clifton, Jeffrey James
Cochran, Robert Hollis
Collins, Melissa Ann Babcock
Cooper, Gary Shane
Copenhaver, Bradley Sean
Cottemond, Mtesa Patrice
Cotter, Maria Athanasia
Coughlin, Tammy Denise Smith
Courtney, Jeffrey Joel
Cox, Elizabeth Anne
Coyle, Charles Raphael Gerard
Crow, Christina Diane
Crowe, Donna Marcelle
Curtis, Steven Craig
D'Angelo, Joseph Bryan
Daubenberger, Kathryn Darragh
Davenport, Tara DeLana
Davis, Jennifer Leigh
Dearman-Davidson, Kimberly Jane
Deering, Christopher Wayne
DeMarco, John Anthony
Dettling, Aaron Linden
Dickey, Kathryn Mae
Dodgen, Walter Arthur Jr.
Ducker, Charles Raymond Jr.
Dudley, Che'Ree' Minor
Duncan, Priscilla Lee Black
Dunham, Darryl Andrew
Dunn, William Norris
Duplechin, Durward James
Durrance, Jenelle Rae
Durward, Gerard John Jr.
Edge, Harry Arthur III
Edge, Larson Dewitt Jr.
Eisenberg, Teryl Ann Smith
Elam, Freeman Milton
Elwood, Mark Stephen
England, April Anita
Ensken, Alan Frederick
Evans, Carl Lenford Jr.
Evans, Melissa Denise
Falls, Brandon Kent
Fellows, Michael Clay
Fisher, John Tracy Jr.
Flowers, Mona Lee
Folmar, Jason Matthew
Freeman, Glenda Delorse
French, Laura Jones
Fritz, Michael Aaron Sr.
Gaal, Richard Mark
Gaillard, Thomas Octavius III
Gaines, Rebecca Ann
Garner, Alan Wayne
Garrett, Joe Wheeler Jr.
Gault, Ronald James
Gibbons, Kristel Neshelle Mayton
Gilliam, John Stuart
Gilliland, Scott Alan
Golden, Ronald Scott
Goldstein, Lawrence Jonathan
Gomes, Patrick Fitzgerald
Gonzalez, Carlos Antonio
Goodrich, Thomas Michael II
Gordon, Nicole Lynn
Graham, Carole Lynn
Gratz, Michael Blakely Jr.
Gray, Patrick O'Neal
Gray, Robert Brian
Gray, Shara Lynne
Green, Jonathan David
Griffin, Jennifier Quintina Crews
Griffin, Rebecca Colley
Grimsley, Darrell Wayne Jr.
Grissom, Christopher Ray
Gunther, James Lee
Guthrie, Larry Lee Jr.
Hager, Kimberly Liane
Hagmaier, Jason Kirk
Hamilton, Orville Lee III
Hammitte, Mark Eferm
Hanthorn, Gregory Russell
Harden, Joseph Nathanial
Harris, Pierce Jackson Jr.
Harrison, Michael Alan
Harry, Robert Edwin Jr.
Harwell, Helen Ruth
Hattaway, Ashley Suzanne Heron
Haynie, Leigh Ann
Henry, James Fred
Herring, Myles Stanley Jr.
Hester, DeLacie Caroline
Hickman, Michael DeWitt
Hicks, James David
Hill, Eugene Patrick
Hill, Lisa Jo
Hill, Marvin Clifford Jr.
Hilyer, Jeffery Alan
Hines, William Christian III
Holder, Gary Bryce
Holladay, John Ross
Honeycutt, J.D. III
Hope, Alvin Kirkley II
Horace, Toni Jacqueline
Howard, Ricky Allen
Huddleston, David Wyatt
Hudson, Timothy Cecil
Hughes, David Bowen
Hughes, Glenda Wingard
Hull, Sunny Summer
Hunt, Robert Scott
Huntley, Elizabeth Humphrey
Hussey, Curtis Ray
Hutchinson, Harvey Atwood III
Jackson, Joseph Walton
Jackson, Marshell Rena
Jacobs, Johnny Eugene
Jain, Kristin Brooke Handley
James, Thomas Earl
Jastrebski, Alycia Katrin
Johnson, Candace Leigh Dolbare
Johnson, James Ronald
Johnson, John Stephen
Johnson, Nathan Paul
Johnston, David Lee Jr.
Johnston, James David Eardley
Jones, Allan Sidney
Jones, Thomas Alfred III
Jurnovoy, Holly Vigodsky
Jurnovoy, Steven David
Kanuru, Rajendra Kumar

Alabama State Bar 1997 Fall Admittees

Kaufman, Timothy William
Keenan, Patrick James
Kennedy, Deborah Lou
Kerr, Lacy Elizabeth
Kittrell, William Bradford
Klimjack, Stephen Louis
Knight, Samuel David
Knowles, Christina Lee Dasinger
Knowles, Jason Eugene
Knowles, Jeremy Lynn
Lagarde, Paul Villere
Langley, Jason Matthew
Larry, William Todd
Ledbetter, Fred Franklin Jr.
Leggett, Joel Thomas
LeJeune, Peter Dietrich
Lemons, James Andrew
Levert, Gina Raye
Levy, Nathan Cook
Levy, Shelby Leigh Hockman
Lichenstein, Robert Maurice Jr.
Linton, Kara Kimberly
Linton, Rand Anderson
Lisenby, Kimberly Katherine Till
Little, Carol Carr
Little, John Anthony
Little, John Meighan
Livaudais, Alfred Friedrichs Jr.
Lloyd, Laura Alice Towe
Loggins, Katie Evans
Longshore, Carol Lynn
Lowder, Sherilyn Jean
Lusk, Payton Caldwell
Lyons, Champ III
MacFarlane, James Wry
Maddalena, Gracemarie
Main, Benjamin Saxon
Manson, Patricia Louise
Marks, Richard Hughes
Marshall, Alexander Joseph III
Marshall, Dennis Edward
Martin, Cynthia Ann Pound
Martin, James David
Martin, Kathleen Christine Scott
Mastin, Karen Lyn
McCammon, Jennifer Ann
McCarty, Holly Garrett
McCormick, William Fray
McCoy, Albert Lee
McCulloch, Michael Jason
McDowell, Marcus Edward
McGill, Cheryl Ardell
McGowan, Stephen Glenn
McKinney, Esther Parson
McLendon, Robert Robinson IV
McMahan, Van Douglas
McPheeters, Steven Lee
McPherson, Scott Landers
McWhorter, William Allen
McWilliams, Mary Martha
Medley, Arthur Ross
Miano, Bert Joseph
Miller, Deborah Kay
Miller, Leigh Ellen Lassiter
Mitchum, JoClaudia
Mokray, Lynn Anne
Moore, John David
Morgan, David Troy
Morman, Stephanie Jean Norris
Morris, Brenton Kirk
Morris, Richard Lee
Morrison, David Brent
Morrison, John Gorman II
Morrow, Jefferson Daniel
Moscarelli, Joyce Beth
Mullins, Misha Ylette
Mulondo-Bowden, Tessie
Murray, Steven Andre
Nabors, Scott Jason
Nance, Mark Edward
Neill, Robert Hamilton Jr.
Newman, Kimberly Jo
Nichols, William Wayne
Noles, James Lewis Jr.
Obikoya, Olufemi Adesoji
Padgett, Jimmy Glen
Padgett, Tina Carol
Paduda, Marcie Elizabeth
Parker, Brent Lorne
Parker, David Michael
Parker, Edwin Lewis
Parker, Kerri LaShon Page
Patterson, Lori Carol Hackleman
Paulus, Leslie Caren
Payne, Charles Lee Jr.
Pearce, Julie Elizabeth Davis
Pendergrass, Joel Clark
Perkins, Jerry Foster Jr.
Perrett, Michael Kevin
Perry, Susan Michelle
Pieroni, Michelle Kirby
Poerschke, Page Anderson
Ponder, David Randall
Portera, Anthony Catledge
Powe, Valerie Hicks
Powell, Shannon Leigh
Pressley, Dianah Lynne
Price, Joel Anthony Jr.
Pritchard, Joan Allison
Quillen, Amy Bailey
Quinlan, Shaun Leigh
Quinn, Patricia Alice
Rainer, Nancy Jo Pugh
Rasmussen, Karyl Lynne
Ray, Charles Adrian IV
Reed, Joe Morgan
Reese, Joseph Lawrence Jr.
Reynolds, Lynn
Rice, Dana Lorne
Riley, Minda Lynn
Ritchey, Brian Joseph
Ritter, Tommy Carrell Jr.
Roberts, Elisabeth Ann
Roberts, Joe Lester
Robinson, Lonzo Christopher
Roscoe, Jennifer Anne
Rosser, Charles Daniel Jr.
Rosser, Daniel Pinson
Rouse, Scott Lee
Rowan, Edward Powell
Rowe, Stephen Jackson
Russell, Jacqueline Virginia
Sanderson, Stephanie Denise
Satterwhite, Jill Kathleen Yingling
Saul, Rhonda Rana
Schuerman, Mary Beth
Segal, Mark Alan
Sellers, Myra Mills
Shabani, Michael Moosavi
Shamblin, Jason Alan
Sheffield, Haidee Leah Oppie
Shelton, Timothy Luke
Sholtis, Jonathan Edward
Shoots, Vanessa Odette Arnold
Simmons, Delores Jacqueline
Simmons, Vanessa Ann
Simon, Kell Ascher
Simon, Ramsey
Sims, Jodi Michelle
Smith, Alan Lee
Smith, Damon Quinn
Smith, Gary Stephen
Smoke, Jacqueline Cooper
Soutullo, Scott Wayne
Stanford, Jud Clifford
Steele, Rhonda Victoria
Steen, Perry Russell
Steffan, Leslie Elizabeth
Stephens, Charles Raymond Jr.
Stephens, Craig Martin
Stephens, Michelle Elizabeth Riley
Stephens, Nicole Leigh
Stevens, Joseph Dwayne
Storie, Leon Roger
Story, Tamara Ann
Strawbridge, Caroline Jackson
Strong, Henry Whitfield Jr.
Stroud, Philip Andrew
Stuedeman, Amy Lynn
Summers, William Alan Jr.
Talbott, Jeremiah Joseph
Taylor, James Edmond Jr.
Thompson, Dennis Lane
Thompson, Martha Susan Leach
Thompson, Tracy Michelle Lynn
Tindal, Mark Eugene
Tindol, Melton Chad
Tomlinson, Bartley Eugene III
Tompkins, Kristina Pride
Trussell, Sara Martha
Tucker, Karen Lanette
Tucker, Laura Hays
Underwood, Vicky Renee
Walker, John Reagan
Walker, Shonn Wayne
Walthall, Carrie Parks
Walthall, Hardwick Cox
Warmbrod, Monica Lynn
Warren, Gordon Howard
Webb, Robert Hays
Wheeler, Sean Thomas
White, James Herbert IV
White, Jarrod Joel
White, Katherine Claire
Whitney, Jeffery Alan
Wiggins, Daphne Nell
Williams, Angela Renee
Williams, Joy Evette
Williams, Karen Matthews
Williams, Kirby Hann
Williams, Matthew Christian
Williams, Michael Courtney
Wilson, Paul Alan
Wilson, Rhonda Fredericka
Winston, Kelley Renee Mitchell
Winston, Norman Green Jr.
Winter, Bryan Patrick
Wise, Brandon Chadwick
Wolf, Darby Reynolds
Wood, Elizabeth Louise
Woolley, James William
Woolley, Tammy Cecile Murphy
Worley, Jenifer Nicole Strickland
Worley, Steven Lytle
Wright, Daniel William
Yaghmai, Gregory Farzan
Zarzaur, Wendy Ann

Lawyers in the Family

Stephanie D. Sanderson (1997) and Delores R. Boyd (1975)
admittee and cousin

John DeMarco (1997) and Paul DeMarco (1993)
admittee and brother

Norman G. Winston, Jr. (1997), Kelley Mitchell Winston (1997), Norman G. Winston (1967) and Raymond C. Winston (1968)
husband and wife co-admittees, father/father-in-law and uncle

Benjamin L. Boyanton (1997) and George A. Moore (1973)
admittee and cousin

G. John Durward, Jr. (1997) and Gerard J. Durward (1966)
admittee and father

Whit Strong (fall 1997) and Rene' Strong (spring 1997)
admittee and mother

William A. McWhorter (1997) and Robert D. McWhorter, Jr. (1979)
admittee and brother

W. Alan Summers, Jr. (1997) and W. Alan Summers, Sr. (1968)
admittee and father

Daniel Rosser (1997) and Charles D. Rosser (1963)
admittee and father

Nicole L. Gordon (1997), Bruce L. Gordon (1965) and Bari Gordon Levin (1987)
admittee, father and aunt

Marcus E. McDowell (1997) and Jerry A. McDowell (1963)
admittee and father

Lawyers in the Family

Elizabeth L. Wood (1997) and James C. Wood (1962)
admittee and uncle

Aaron L. Dettling (1997) and Sandra Marie D. Dettling (1995)
admittee and sister-in-law

Charles R. Stephens, Jr. (1997) and Charles R. Stephens (1974)
admittee and father

Tina C. Padgett (1997) and J. Glen Padgett (1997)
sister and brother co-admittees

Stewart Brooker (1997) and Norton Brooker, Jr. (1968)
admittee and father

Brian Ritchey (1997), Albert Ritchey (1959) and Ferris Ritchey, III (1984)
admittee, father and cousin

Front row: Richard H. Allen (1997) and Wynn Dee Allen (1997) Back row: Richard F. Allen (1973), Robert Faulk (1980) and Dan Turberville (1978)
husband and wife co-admittees, father/father-in-law, brother-in-law/brother and father-in-law/father

Joe Morgan Reed (1997) and Terry G. Davis (1981)
admittee and cousin

Jimmy S. Calton, Jr. (1997), Jimmy S. Calton, Sr. (1968) and Walter B. Calton (1991)
admittee, father and uncle

Kristina Tompkins (1997) and Judge N. Pride Tompkins (1967)
admittee and father

Front row: Fred F. Ledbetter, Jr. (1997), Betty Love (1965) and Huel Love (1949) Back row: D. Leigh Love (1988) and Huel M. Love, Jr. (1982)
admittee, mother, father, sister and brother

Lawyers in the Family

Clifford W. Cleveland, II (1997) and Clifford W. Cleveland (1974)
admittee and father

Benjamin Saxon Main (1997) and James Allen Main (1972)
admittee and father

Katie Loggins (1997), Eugenia Loggins (1978) and Tim Loggins (1975)
admittee, mother and father

Jason Matthew Folmar (1997), Joel M. Folmar, Sr. (1967) and Jon M. Folmar (1992)
admittee, father and brother

Troy Morgan (1997) and John Holloway (1978)
admittee and stepfather

Caroline Jackson Strawbridge (1997), Ronald H. Strawbridge, Sr. (1967), Alto Loftin Jackson, Sr. (1937) and Robert O. Jackson (1981)
admittee, father, grandfather and uncle

Caroline Jackson Strawbridge (1997) and Judge Cecil H. Strawbridge (1931)
admittee and grandfather

Sam David Knight (1997) and John David Knight (1966)
admittee and father

Kirby H. Williams (1997) and Jesse M. Williams, III (1964)
admittee and father

Lucien B. Blankenship (1997) and Donald E. Blankenship (1989)
admittee and cousin

Alan Frederick Enslen (1997), Frederick T. Enslen (1966), Judge Richard C. Bentley (1972) and Alan G. Koch (1968)
admittee, father, uncle and stepfather

Lawyers in the Family

Stephen J. Rowe (1997), Benjamin T. Rowe (1972) and S. Dagnal Rowe (1972)
admittee, father and uncle

Champ Lyons, III (1997) and Champ Lyons, Jr. (1965)
admittee and father

Laura T. Lloyd (1997) and Scott C. Lloyd (1996)
admittee and husband

Wendy Zarzaur (1997) and Ben Zarzaur (1972)
admittee and father

April A. England (1997), Judge John H. England, Jr. (1974) and John H. England, III (1996)
admittee, father and brother

John R. Walker (1997) and William A. Walker (1994)
admittee and brother

Martha Leach Thompson (1997), John N. Leach, Jr. (1966) and Susan Stivers Leach (1968)
admittee, father and mother

Carl L. Evans, Jr. (1997) and Administrative Law Judge Carl L. Evans, Sr. (1967)
admittee and father

Brad Kittrell (1997) and Judge Braxton Kittrell, Sr. (1967)
admittee and father

K. Claire White (1997) and Judge James M. White (1962)
admittee and father

Kathleen C. Martin (1997) and Robert L. Martin (1995)
admittee and husband

Lawyers in the Family

Rand Anderson Linton (1997), Kara Kimberly Linton Roberts (1997) and Jack Lee Roberts, Jr. (1990)
brother/sister co-admittees and brother-in-law/husband

Kimberly Katherine Till Lisenby (1997) and Grey Till (1973)
admittee and father

Scott L. McPherson (1997) and B. J. McPherson (1969)
admittee and father

Bert J. Miano (1997) and S. Eason Balch, Sr. (1948)
admittee and father-in-law

Candace Dolbare Johnson (1997) and Stephen Patrick Johnson (1996)
admittee and husband

Hardwick Cox Walthall (1997), Carrie Parks Walthall (1997) and Robert C. Walthall (1967)
husband and wife co-admittees, father/father-in-law

William Bew White, Jr. (1946), T. Michael Goodrich (1971) and T. Michael Goodrich, Jr. (1997)
grandfather, father and admittee

MEMORIALS

Thomas Nicholson

Thomas Nicholson

We honor the memory of Thomas Nicholson who passed away at Carraway Hospital in Birmingham, Alabama on July 17, 1996. Tom attended public schools in Jasper, Alabama, and graduated from Walker College in 1970 and the University of Alabama in 1972. He obtained his Doctor of Jurisprudence degree from the University of Alabama Law School in 1975. He was admitted to the Alabama State Bar in 1975. He began practicing then with the law firm of Maddox & MacLaurin. At his death, he was a partner in the firm of Maddox, MacLaurin, Nicholson & Thornley.

Tom was a distinguished member of the legal community in Jasper and Walker County. Tom was a very capable advocate for his clients. He had served in the Alabama Legislature representing Walker County from 1982 to 1986. For many years, he served as the attorney for Walker County and was very influential in this position. He was also instrumental in the 911 board being started in Walker County. Tom was a strong supporter of education, and served on the Board of Trustees at Walker College. He was a force in the negotiations necessary for the merger of Walker College and the University of Alabama in Birmingham. He was a loyal supporter of the Democratic party.

Tom was a very devoted family man. He was married for 24 years to Rita Nicholson. His children are John Tyler Nicholson, age 21 and Grace Lee Nicholson, age 15. Tom was also an avid hunter.

Tom had many friends in Walker County and throughout the state of Alabama. He always had a funny story to tell, and many of his stories will be repeated for years. His friends and associates continue to mourn his passing.

— Nelson Allen
President, Walker County Bar Association

Dean Martin Leigh Harrison

Dean Leigh Harrison

Whereas, the members of the Tuscaloosa Bar Association were saddened to learn of the death on July 1, 1997, of Dean Martin Leigh Harrison in Boone, North Carolina. He was living there in a nursing home near his daughter and son after sustaining a broken hip from a fall at his Tuscaloosa home in August 1996; and

Whereas, Dean Harrison resided in Tuscaloosa for 58 years from 1938 when he began serving on the faculty of the University of Alabama School of Law. He was dean of the law school for 16 of those years. The many members of this bar who were his students attest to his astute ability as a teacher, legal scholar and as a dean who commanded respect by demanding high standards and yet giving careful attention and utmost fairness to the smallest of their problems; and

Whereas, during his tenure as Dean, the law school and its facilities were always available to members of this association, who were encouraged to participate in its activities including opportunities for continuing legal education. He also encouraged faculty members to aid in improving legal services, such as Professor Payne's proposal for requiring source of title and estate pages in conveyancing which was first adopted in Tuscaloosa County. He also allowed and encouraged students to accept paralegal clerkships in Tuscaloosa law firms providing both a rich source of clinical training, and in many cases, an opportunity for placement for the students and of substantial assistance to the attorneys in legal research and service; and

Whereas, Dean Harrison loved the legal profession and in a quiet, serious manner and with much diligence and attention to detail inspired those around him to the same standards of careful analysis and preparation, and integrity in all dealings as being the essential ingredients of a successful practice; and

Whereas, Dean Harrison's career was carefully outlined in a tribute to him appearing in the March 1997 issue of *The Alabama Lawyer*, published just prior to his 90th birthday, which is incorporated herein by attachment in the permanent minutes;

Now, therefore, be it resolved by the Tuscaloosa County Bar Association in the meeting assembled on this 18th day of September 1997 that it mourns the death of Martin Leigh Harrison and honors the memory of this distinguished colleague whose life has exemplified the highest and best principles to which members of the legal profession aspire.

Be it further resolved that this resolution be spread upon the minutes of the association and that copies be forwarded to his daughter, Barbara Ann (Mrs. Harwood) Smith, of Boone, North Carolina, and his son, W. Robert Harrison, of Danville, Virginia with the condolences of the members of this association.

— G. Stephens Wiggins
President, Tuscaloosa Bar Association

Hugh D. Merrill, Jr.

Hugh D. Merrill, Jr. passed away on Friday, October 31, 1997. Hugh graduated from the University of Alabama School of Law in 1937 and practiced law for more than 50 years in Anniston, Alabama with the firm of Merrill, Merrill, Mathews & Allen.

Mr. Merrill served in the Alabama House of Representatives from 1955 to 1978. A very effective Legislator, Hugh chaired the Judiciary Committee and the House Ways and Means Committee.

Instrumental in passing many pieces of legislation, he served as floor leader for Governor George C. Wallace and was sponsor of the Bill to create the Alabama Law Institute, as well as help create the board of trustees for Jacksonville State University.

Jim Campbell, an Anniston attorney and currently president of the Alabama Law Institute, said, "Without Hugh's work, the Alabama Law Institute would never have been a reality. He was one of the legislators who was responsible for formulating the idea for the Institute, and he shepherded the legislation creating it through the Legislature."

Oakley Melton, former president of the Alabama State Bar and the Alabama Law Institute, said, "Hugh Merrill was a great American, and an outstanding Legislator. He was the moving force which created the Alabama Law Institute. His leadership made the Alabama Law Institute one of the most outstanding Institutes in the United States. He will be missed." Hugh Merrill, a quiet unassuming legislator, is survived by his wife, Martha, one daughter, Nancy Merrill Magnuson, and three sons, David Merrill, Paul Merrill and Hugh Merrill, III.

— Robert L. McCurley, Jr., director
Alabama Law Institute, Tuscaloosa

Richard Dale Durden

Whereas, the Birmingham Bar Association lost one of its youthful members through the death of Richard Dale Durden on December 17, 1995 at the very young age of 37 years. A product of Montgomery and a 1976 graduate of the Jeff Davis High School there, Richard Dale Durden graduated from Auburn University at Montgomery in 1980 and received his law degree from Cumberland Law School in 1983; and,

Whereas, he served as a senior staff attorney with the Southern Company Services, holding membership in the Alabama State Bar, the Birmingham Bar Association, the Masonic Lodge and the Baptist Church; and,

Whereas, Richard Dale Durden left surviving him his widow, Mrs. Ginger Patterson Durden; his sons, Zachery Dale Durden and Mason Warren Durden; along with his parents, Colonel M. Durden and Shirley Glenn Durden; and,

Whereas, this Resolution is offered as a record of our admiration and affection for Richard Dale Durden and of our condolences to his wife, sons and parents, and the other members of his family.

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

The Birmingham Bar Association greatly mourns the passing of Richard Dale Durden and is profoundly grateful for the example that his useful life has brought to the membership, both individually and collectively;

That the surviving members of the family of Richard Dale Durden are hereby assured of our deep and abiding sympathy;

That a copy of this Resolution be spread upon the records of the Birmingham Bar Association as a permanent memorial to this departed brother; and

That copies of this Resolution be furnished to his wife, his sons and his parents as our expression to them of our deepest sympathy.

— M. Clay Alspaugh
Birmingham Bar Association

Charles Owings Caddis
Birmingham
Admitted: 1967
Died: August 5, 1997

Martin Leigh Harrison
Tuscaloosa
Admitted: 1904
Died: July 1, 1997

Wiley P. Henderson
Flomaton
Admitted: 1955
Died: October 16, 1997

Marx Leva
Washington, DC
Admitted: 1940
Died: February 2, 1997

Joseph Jacob Levin
Montgomery
Admitted: 1934
Died: July 12, 1997

Hugh D. Merrill, Jr.
Anniston
Admitted: 1937
Died: November 1, 1997

Irene Feagin Scott
Washington, DC
Admitted: 1936
Died: April 10, 1997

Tom Cast Shirley
Beaumont, TX
Admitted: 1982
Died: September 27, 1997

Peter Vaughan Sintz
Mobile
Admitted: 1967
Died: October 6, 1997

Claude Richard Smith
Metairie, LA
Admitted: 1967
Died: January 21, 1997

Clyde Allen Smith, Sr.
Montgomery
Admitted: 1965
Died: August 26, 1997

Samuel A. Sommers, Jr.
Selma
Admitted: 1951
Died: August 26, 1997

Lisa Slay Street
Atlanta, GA
Admitted: 1986
Died: July 8, 1997

Robert F. Ware, Jr.
Millry
Admitted: 1953
Died: August 14, 1997

BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Conecuh County

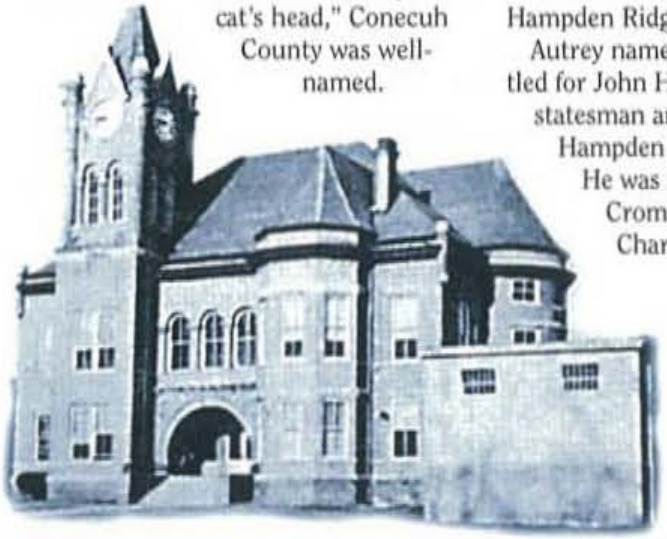
Established: 1818

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. 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.

Conecuh County

Conecuh County, in south Alabama, has a rich Indian heritage and a mysterious name. "Conecuh" was derived from one of several Choctaw or Creek words. Some sources say that the name comes from the Indian word "conata" meaning "crooked." However, most scholars discount this derivation. A popular belief is that the county name is a corruption of "econneka" which means "land of cane." Other sources say the name comes from the Creek "kono ika" which means "polecat's head." Another possible derivation is a combination of the Choctaw words "kuni akka" which translates into "young canes below."

Any of these possible meanings would have been appropriate for the frontier from which Conecuh County was carved. When it was first settled by Americans, the territory was quite wild and overgrown. Canebreaks grew everywhere, and the area was filled with wild animals such as deer, wolf, bear and skunks. So with either popular version, "land of cane" or "polecat's head," Conecuh County was well-named.



Front view of 1899 Conecuh County Courthouse before 1958 addition

The first significant military activity in the future county, a skirmish in the Creek Indian War, took place on July 27, 1813 at Burnt Corn Creek. A group of Indian warriors were returning with weapons and supplies from their British allies in Pensacola. The American forces surprised and attacked the Indians. The Indians fled and the Americans began to plunder their camp. Meanwhile, the Indians regrouped and counter-attacked. It was now the Americans' turn to flee and they were almost routed. Fortunately, Captain Sam Dale covered the retreat with a rear guard and the Americans escaped back to their Tombigbee settlements. The next month these same Creek Indians attacked Fort Mims and massacred the inhabitants there.

After the Creek Indian War ended, pioneers began settling in the future Conecuh County in late 1815. Samuel Buchanan was the first settler. The second man to settle within the borders of the county was Alexander Autrey. In 1816 Autrey, a native of South Carolina, moved from a place he called Autrey's Creek to a line of hills above Murder Creek. He called his new home Hampden Ridge.

Autrey named the place where he settled for John Hampden, an English statesman and leader of Parliament. Hampden lived from 1594 to 1643. He was a first cousin of Oliver Cromwell and an opponent of Charles I. Autrey honored Hampden for being an independent defender of liberty and property.

On February 13, 1818, the Alabama Territorial Legislature created Conecuh County from Monroe County. The new county extended from the Federal Road, which bordered Monroe County, to the Chattahoochee River. It covered parts of 14 present-day Alabama counties and extended approximately 170 miles east to west at its longest point and approximately 60 miles north to south. This first configuration included roughly 8,100 square miles.

When the county was established, the legislature mandated that courts be held for the time being at the house of Mayberry Thomas, or if there was a lack of necessary buildings, court could be convened at a more convenient place contiguous. Thomas was a major in the militia who lived near Alexander Autrey at Hampden Ridge. So, Hampden Ridge, while not being specifically named county seat by the legislature, did effectively become the county seat and all county business was transacted there.

The first courthouse was a one-room log building, with a dirt floor and wooden shutters for windows. Juries would retire to the surrounding forest for privacy when deliberating. This building also doubled as a church when the infrequent religious services were held there.

At this time, Murder Creek served as a dividing line between Hampden Ridge and an Indian village on the east bank of the creek. This village was called Old Town. For several years the Indians and the American settlers lived in peace. However, a roving band of Indians made a raid against the settlers and stole some cattle. The local Indians were blamed and so the settlers attacked Old Town, drove the Indians away, and burned the village.

Several residents from Hampden Ridge moved to the eastern side of Murder Creek and settled there on the site of the destroyed Indian town. The first such settlers were Major Richard Warren and his sons. Other families soon joined the Warrens. Thomas Watts, an attorney, moved to the area from Sparta, Georgia. He suggested that the village be called "Sparta."

As the number of residents in Sparta increased, they sought to have the courthouse moved to their village. A bitter struggle ensued between the Autrey faction on Hampden Ridge and the Warren faction in Sparta. Finally, on December 13, 1819, the Alabama Legislature appointed five commissioners to fix a permanent seat of justice for Conecuh County. These commissioners sided with the Warrens and made Sparta the county seat in 1820.

On December 13, 1819, the Legislature also created seven new Alabama counties. Among these were Butler and Henry. Most of the territory of Conecuh County was lost to these two new counties. Conecuh was left with approximately 1,480 square miles.

Side view of 1899 Conecuh County Courthouse

Rear view of 1899 Conecuh County Courthouse

The first courthouse built at Sparta was only a slight improvement over the one at Hampden Ridge. It was constructed of pine logs, consisted of two rooms, and had dimensions of 20 by 30 feet. It had two doors. The building also served as the local house of worship when a minister was available.

In December 1820, the legislature passed a tax for the construction of another courthouse and jail, which were completed around 1823. The contractor for the building was a Mr. Simmons from Tallahassee, Florida. In addition to his compensation from the county, he was paid $500 by the local Masonic Order to build their lodge on the second floor of the courthouse.

The town of Sparta was arranged around a square. The courthouse and jail were located within the public square. Businesses surrounded the square. The town limits extended 200 yards in each direction from the courthouse.

Besides being the county seat of Conecuh County, Sparta became an important town in the region because of the Federal Land Office. On May 11, 1820, Congress established a regional office there for the sale of government lands in this area of southern Alabama. Purchasers of land came to Sparta, and lawyers, merchants and hotel-keepers all prospered.

On December 8, 1821, the Alabama Legislature incorporated the Sparta Academy, the first such school in this part of the

state. It drew students from a wide area. Its most famous graduate was William Barrett Travis who later became a lawyer and achieved immortal fame as the commander of Texas troops at the Alamo.

On December 17, 1821, the Alabama Legislature authorized the opening of a road from Cahaba, the state capital, to Pensacola. This road played an important role in the development of Sparta. It connected Sparta with the Alabama River in one direction and with the Gulf of Mexico in the other. Sparta was later linked to Mobile by telegraph line in 1858. By 1861, a railroad was completed in the county.

The Civil War began in 1861 and the residents of Conecuh County proved their patriotism along with other Southerners. Eight companies of infantry were made up in whole or in part from the citizens of Conecuh County. The first of these was Company E of the Fourth Alabama Regiment. The command was popularly called the "Conecuh Guards." This unit was first organized on April 1, 1861. It mustered into service on May 7, 1861 at Lynchburg, Virginia. Its service continued throughout the war until its surrender at Appomattox Court House, Virginia on April 9, 1865.

Conecuh County Courthouse 1958 addition

Front and side view of 1958 addition to Conecuh County Courthouse

Union forces did not enter Conecuh County until 1865 following the fall of the Gulf Coast. According to official reports, Colonel A. B. Spurling, in command of three brigades of calvary, came up from Milton, Florida, by way of Andalusia on March 21, 1865. Near Owassa he struck the railroad line. After displacing the tracks he captured the train coming northward from Pollard on the morning of March 24. Later that morning he captured the train coming southward from Montgomery.

Next, the raiders arrived in Evergreen and destroyed all Confederate government property they could find there. From Evergreen they arrived at Sparta late in the afternoon of March 24. Here they spared the courthouse but burned the county jail. After spending the night in Sparta, Colonel Spurling and his men proceeded southwesterly out of the county the next day.

In 1860, Sparta had a population of approximately 500. It was the largest town between Montgomery and Pensacola. Yet after the Civil War it rapidly declined. How did this happen?

First of all, the Federal Land Office was moved from Sparta to Elba in 1855. With the loss of the Land Office, many lawyers moved away. Hotel and mercantile trade also declined.

Next, the location of the railroad significantly affected Sparta. Early surveys had indicated that the railroad would come through the center of Sparta. Instead the railroad was constructed on the west side of Murder Creek and the depot was built about a mile and half from the town's center. Some merchants moved to the depot area and the town proper diminished more.

Another factor was the war itself. The raid on Sparta resulted in the destruction of several buildings that would have to be replaced. Also, many soldiers did not return from the war and so the population declined.

Finally, the town of Evergreen, where the railroad did pass through, was steadily growing. It became the rival of Sparta and soon won the county seat. The town of Sparta died and its location has subsequently faded away. One local historian has stated that it is virtually impossible to determine the exact location of Sparta since no physical traces of any sort remain today. It is one of the dead towns of Alabama that eventually disappeared completely.

The town that would become Evergreen was first settled by James Cosey in 1818. Cosey had been a Revolutionary War veteran. The location of his cabin, and the place where other pioneers settled, was called Cosey's Old Field. In 1838, a one-room country school was built here through the efforts of Reverend Alexander Travis, uncle of William B. Travis. He named the little school the Evergreen Academy, because it was located among the pines. A small community developed around the school and by 1860 it had a population of around 150 residents. Cosey's Old Field became known as Evergreen.

On February 23, 1866, the Alabama Legislature passed an Act calling for an election on the first Monday in May 1866, to determine the location of the county seat for Conecuh County. The Act also provided that if any place other than Sparta received a majority of the votes, then the residents of that place had to build a courthouse of equal value, capacity and

Samuel A. Rumore, Jr.

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

convenience for the transaction of county business. It also stated that if a new courthouse was not constructed by January 1, 1867, then the courthouse would remain permanently located in Sparta.

The citizens of Evergreen, desiring to capture the courthouse, agreed to erect a new building free of charge to the county. Because of its rising fortunes, its accessibility due to the railroad, and its promise to build a courthouse, Evergreen became the new county seat. The exact date for the construction of the courthouse is uncertain, but the Act did specify that a new courthouse had to be ready by January 1, 1867. What is known is that county records were still housed at Sparta when unfortunately the courthouse there burned on November 10, 1866. All of the early county records were lost.

On December 10, 1868, the Alabama Legislature created Escambia County from Conecuh County and a portion of Baldwin County. This left Conecuh County with approximately 820 square miles of area. Minor modifications in the boundaries took place in the 1870s and 1880s, but Conecuh County has remained virtually the same size and shape since 1868.

Reports conflict describing the courthouse built at Evergreen. One account states that the courthouse was destroyed by a fire in 1875. Another claims that the county records were again destroyed by fire in 1882. In any event, the citizens of Conecuh County erected a fine new courthouse in Evergreen in 1899. This building, though modified, is still standing today.

The 1899 courthouse is two stories in height, has a T-shaped floor plan, and also contains an attic and a basement. The architectural design is Romanesque. The building was originally 84 feet long, 80 feet wide, and 30 feet high. An early photo shows that the courthouse at one time contained an impressive three-story clock tower. The 1899 courthouse was the model for the Baldwin County Courthouse constructed at Bay Minette in 1901. In 1935, the courthouse was repainted and general repairs were made to the building.

By the 1950s, the county needed more space. Instead of razing the courthouse, Conecuh County decided to add a new office building and jail, and connect it to the older structure. The result was a functional though not aesthetically pleasing addition. The clock tower was removed, and a new building was attached to the front of the older courthouse. Martin J. Lide served as architect for the 1958 project, and Cooper Brothers Construction Company was the contractor. ■

SOURCES:

History of Conecuh County Alabama, Benjamin Franklin Riley, 1881; *Sparta Alabama, 1821-1866*, Pat Poole, no date; *From Cabins to Mansions*, Mary E. Brantley, no date; *Inventory of the County Archives of Alabama, No. 18-Conecuh County*, WPA, May 1938.

ALABAMA STATE BAR

Partnership Program

PHOTO HIGHLIGHTS

MONTGOMERY COUNTY BAR ASSOCIATION

BIRMINGHAM BAR ASSOCIATION

COFFEE COUNTY BAR ASSOCIATION

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 15, 1998. Nominations should be prepared and mailed to:

Keith B. Norman, Secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

The Judicial Award of Merit was established in 1987. The 1997 recipient was the Honorable Hugh Maddox, associate justice, Alabama Supreme Court.

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

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

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

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 1998 to assume the presidency of the bar in July 1999. Any candidate must be a member in good standing on March 1, 1998. 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, 1998. Any candidate for this office must also submit with the nominating petition a black and white photograph and biographical data to be published in the May 1998 *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 7, 1998.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, places no. 3 and 6; 13th, places no. 3 and 4; 14th; 15th, places no. 1, 3 and 4; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 1998 and vacancies certified by the secretary on March 15, 1998.

The terms of any incumbent commissioners are retained.

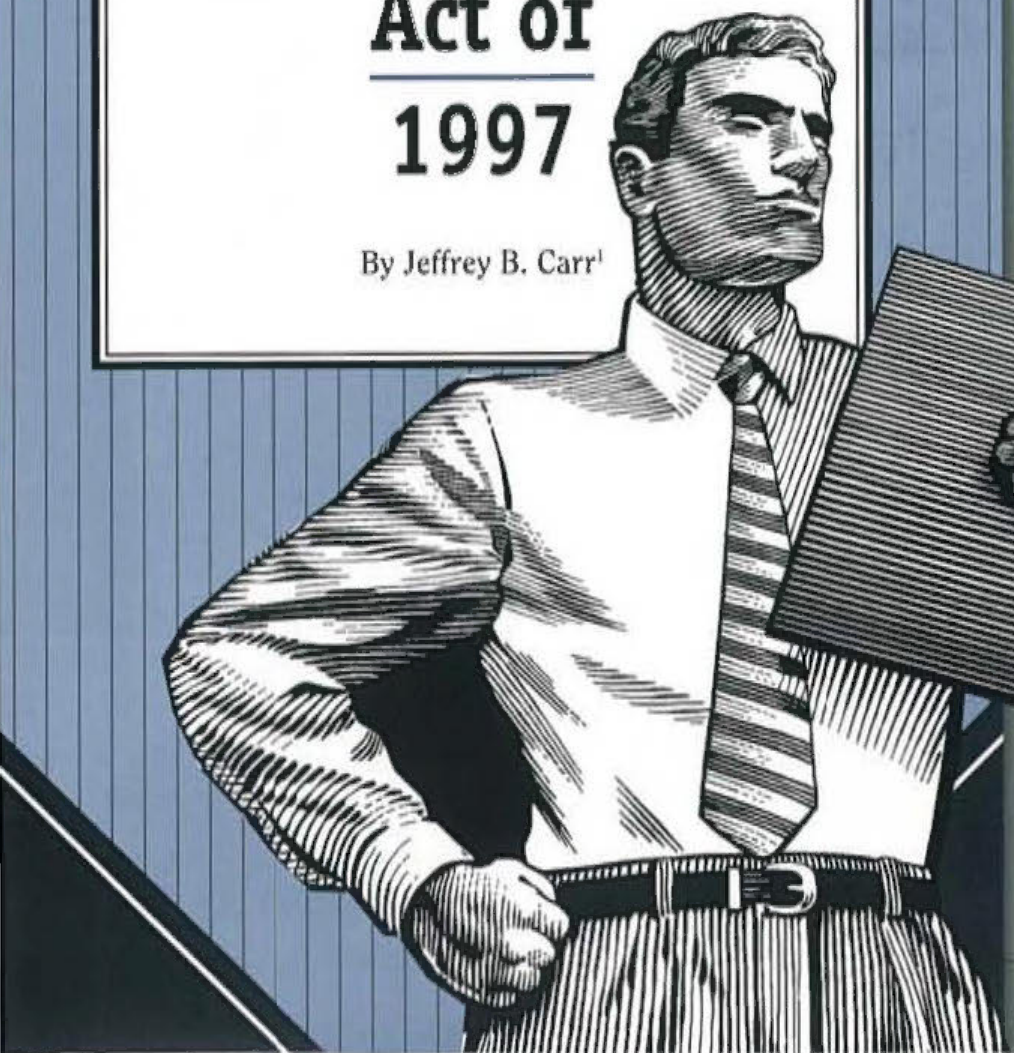
All subsequent terms will be for three years.

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 24, 1998).

Ballots will be prepared and mailed to members between May 15 and June 1, 1998. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1998) to state bar headquarters.

A Practitioner's Guide to the Basics of the Taxpayer Relief Act of 1997

By Jeffrey B. Carr[1]



Following a myriad of backroom deals and arm twisting maneuvers that would make even the staunchest bureaucrat blush, Congress, on July 31, 1997, passed the Taxpayer Relief Act of 1997 (the "Act"). President Clinton signed the legislation into law on August 5, 1997. The Act represents a compromise between top congressional and presidential representatives, and is the first significant federal tax reduction since Ronald Reagan signed the Economic Recovery Tax Act, some 16 years ago. Although the Act does not change the basic structure of our tax system, it does make hundreds of revisions to the tax laws, many of which are implemented in increments over a number of years. In fact, numerous rules, exclusions and deduction amounts will change, and continue to change, well into the next century. To say the least, the vast changes to our tax system are technical in nature and very far reaching, making the implementation and understanding of the Act complex indeed.

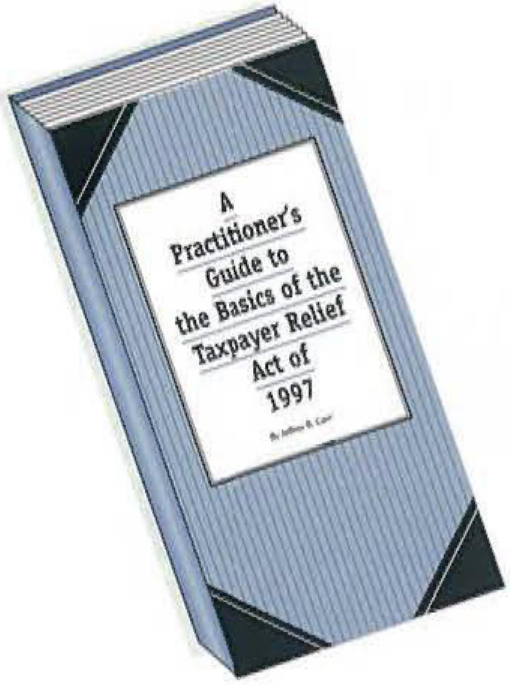
With that in mind, the following is an attempt to highlight and explain some of the key changes affecting lawyers and their clients. Certainly, all of the nuances of the Act will not be covered. As is the case with any article of this type, all statements made herein should be independently verified before being applied to a particular fact situation or communicated to a client.

A. Reductions And Capital Gains Rates

Generally considered to be the crown jewel of the new legislation, the Act makes significant changes to the rules governing the taxability of long-term gains on non-corporate capital assets. Although the top tax rate has been reduced in most cases from 28 percent to 20 percent, the holding period required for long-term treatment has been increased. To further complicate matters, the date when the property is sold (and in some cases acquired) can play a vital role in determining whether the new preferential treatment is allowed.

Needless to say, the different rules on holding periods make it difficult to determine which rates apply. For example, for sales of capital assets sold after May 6, 1997, but prior to July 29, 1997, the maximum capital gains rate has been reduced from 28 percent for individuals, estates and trusts to a maximum rate of 20 percent if the asset was held for more than 12 months. However, for taxpayers in the 15 percent income tax bracket, the maximum rate on long-term capital gains under this scenario would be 10 percent instead of 20 percent. In the event a capital asset is sold on July 29, 1997, or later, the new 20 percent maximum rate will apply if the asset was held for more than 18 months. The old 28 percent maximum rate continues for capital assets sold after July 28, 1997 and held for more than 12 months, but less than 18. Additionally, capital gain on a sale of depreciable real property that is owned for more than 18 months is taxed at a top rate of 25 percent to the extent of previously deducted depreciation.

Beginning in 2001, an 18 percent maximum rate will apply to property acquired in that year or later if held for more than five years. In some special instances, even if the transaction would not otherwise qualify, taxpayers may be able to take advantage of the 18 percent rate on property acquired before 2001 by "marking to market" on January 1, 2001 and paying the resulting capital gains tax on the appreciation as of that date. Under that scenario, if the property is held for more than five years, the 18 percent rate would apply to any future appreciation. Additionally, taxpayers in the 15 percent income tax bracket will be able to take advantage of an 8 percent maximum rate on capital assets sold after 2000 if the property was held for more than five years.



B. Home Sale Gain Exclusion

Effective after May 6, 1997, if a taxpayer sells a home that was used as a principal residence for at least two of the previous five years, a single filer (or married couple filing separate) can exclude from his income up to $250,000 of gain from the sale. Likewise, joint filers can exclude up to $500,000. As previously noted, to take advantage of this new exclusion, the home must have been used as a principal residence a total of two years in the past five-year period. However, the home need not have been used for two consecutive years to be eligible for the exclusion.

The home sale exclusion is available regardless of age, and should be available on the sale of more than one principal residence so long as the taxpayer does not use it more than once every two years. Furthermore, any sale consummated prior to May 7, 1997 does not count in determining whether a taxpayer has made more than one sale in the preceding two-year period.

With that said, in certain circumstances, a taxpayer who does not otherwise qualify for the exclusion either because the home has not been used as a principal residence for at least two of the last five years, or because the taxpayer sold another principal residence less than two years before the date of the sale, may still be entitled to at least a partial exclusion if the home was sold due to a change of place of employment, for health reasons, or for some other reason allowed by the IRS.

Finally, taxpayers can elect not to apply the new rules in certain circumstances if the sale occurred prior to August 5, 1997, or if a sales contract was in effect on or before that date.

C. Education Tax Breaks

Another major area of change is in the education arena. To say the least, many educational incentives were included in the Act. One of the major changes is the Act's creation of two new post-secondary education tax credits—the HOPE Scholarship tax credit and the Lifetime Learning tax credit.

The HOPE credit is based on a per-student concept, and is allowed for the first two years of post-secondary education. The credit is limited to 100 percent of the first $1,000 of qualifying

annual tuition expenses and fees, and 50 percent of the next $1,000. Hence, the total annual maximum exclusion is $1,500 per student. It is available for tuition and expenses paid after 1997.

The Lifetime Learning credit, on the other hand, is based on a per-taxpayer concept. It is available for tuition and fees paid after June 30, 1998. Its main purpose is to help cover college degree program expenses after the first two years, plus educational expenses necessary to acquire or improve job skills. At the present time, the credit amount is 20 percent of annual tuition expenses and fees up to $5,000. The maximum credit of $1,000 (20 percent of $5,000) is available regardless of the number of students in the family. The limit increases to 20 percent of annual tuition expenses and fees up to $10,000 in the year 2003.

Allowable tuition expenses and fees for both credits are reduced by grants, scholarships and employer-provided assistance. Additionally, both credits are phased out between adjusted gross income of $80,000 and $100,000 for joint filers, and between $40,000 and $50,000 for other taxpayers. Under the Act, neither credit is available to married taxpayers filing separate returns.

In addition to the newly created tax credits, beginning next year, a new deduction will be allowed for interest paid on qualified educational loans. This is true regardless of whether the taxpayer is able to itemize deductions. A qualified loan is one incurred to pay qualified higher educational expenses of the taxpayer, his spouse or any dependent. The deduction is phased out between adjusted gross income of $60,000 and $75,000 for joint filers, and between $40,000 and $55,000 for other taxpayers. Like the tax credits, the Act does not allow a deduction for married taxpayers who file separate returns. The deduction is limited to $1,000 for 1998, $1,500 for 1999, $2,000 for 2000 and $2,500 for subsequent years. Only interest paid during the first 60 months that interest payments are required under the terms of the loan qualify for the deduction.

An additional educational incentive under the Act is that tax breaks related to the earnings on contributions made to qualified prepaid state tuition programs created under last year's legislation have been expanded to retroactively cover contributions to pay for room and board, as well as tuition and fees.

In addition to these benefits, beginning in 1998, the Act allows parents to establish educational IRAs for each child and make annual non-deductible contributions of up to $500 to each. However, contributions cannot be made after the child reaches the age of 18 years. Earnings on educational IRAs will accumulate tax-free, and tax-free withdrawals may be made to pay for undergraduate or graduate educational expenses, including tuition, books and room and board. The phase-out for this benefit is adjusted gross income of $150,000 and $160,000 for joint filers, and between $95,000 and $110,000 for single taxpayers. Subject to these limitations, grandparents and other individuals may be able to establish educational IRAs to benefit grandchildren and designated individuals.

D. Increased IRA Opportunities

Effective January 1, 1998, numerous changes to the IRA rules may be taken advantage of by taxpayers. Under the new law, traditional tax-deductible IRAs will be available to more taxpayers. Specifically, the adjusted gross income limits of those eligible to make deductible IRA contributions will gradually increase to $80,000 for married taxpayers filing jointly by the year 2007, and $50,000 for single taxpayers by the year 2005.

Additionally, the Act allows an individual who is not an active participant in a qualified retirement plan to contribute and deduct up to $2,000 to an IRA even if his spouse is an active participant in a qualified retirement plan. As everyone recalls, the old law prohibited deductible contributions if the taxpayer's spouse participated in employer sponsored retirement plans. The new deduction is phased out between adjusted gross income of $150,000 and $160,000.

Another change is the creation of the new ROTH IRA. Contributions to ROTH IRAs are non-deductible. However, their earnings accumulate tax-free. The lesser of earned income or $2,000 can be contributed annually, reduced by any contributions made to traditional IRAs. The phase-out for contributions to ROTH IRAs is adjusted gross income between $150,000 and $160,000 for joint filers, and between $95,000 and $110,000 for singles.

Beginning in 1998, withdrawals from traditional IRAs may be taken to pay for qualified higher educational expenses of the taxpayer, his spouse, dependent child or grandchild, without incurring the 10 percent penalty tax that generally arises for withdrawals made prior to the age of 59 ½. Nevertheless, these withdrawals may be subject to federal income tax and the alternative minimum tax, if applicable. Allowable expenses under this scenario include tuition, fees, books, room and board, and equipment required for enrollment and attendance to an eligible educational institution.

In addition to the allowable early withdrawals for educational expenses, penalty-free withdrawals from traditional IRAs can be taken to purchase a first principal residence of the taxpayer or an immediate family member. A $10,000 lifetime limit applies to withdrawals under this situation.

E. Rules for Home Office Deductions

Beginning in 1999, more taxpayers may be able to take deductions for at least some of the costs of working out of their homes. This is true due to the Act's change in the definition of "principal place of business."

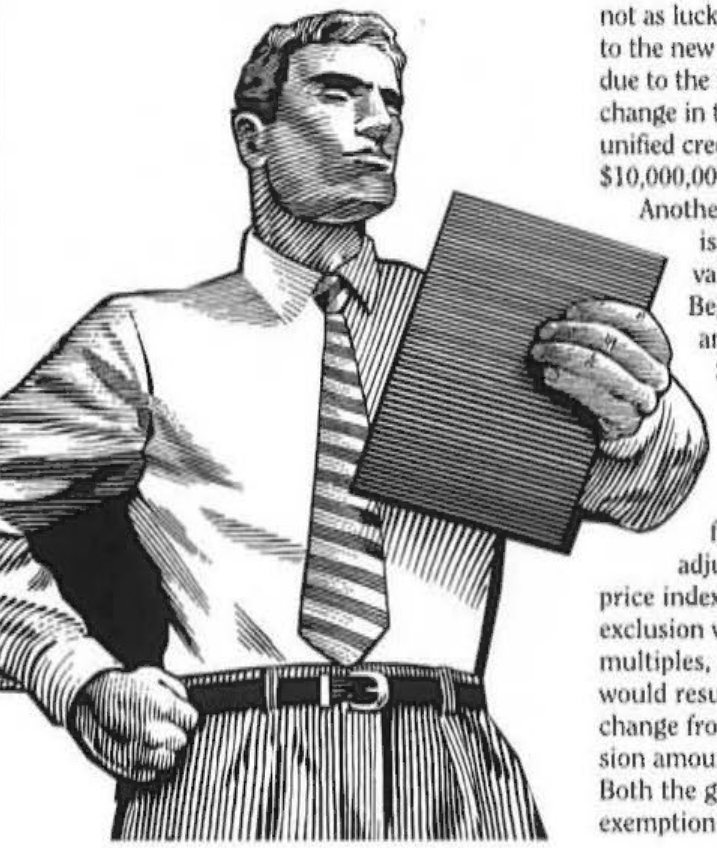
Under the new law, a home office can qualify as a principal place of business if two tests are met. First, the taxpayer must use the office to conduct administrative and management activities of his trade or business. Second, there cannot be another fixed location where the taxpayer conducts those activities. Should the new definition be applicable, taxpayers may also be entitled to deduct the cost of traveling to and from their homes to other locations where their trade or business is conducted.

F. Estate and Gift Tax Changes

One of the major changes, if not the major change, in our tax system is the Act's increase of the unified credit exemption. For approximately 21 years, gift and estate taxes on transfers made by taxpayers have been calculated by applying a unified rate schedule. Until recently, the unified credit has allowed cumulative transfers of up to $600,000 to be sheltered from estate and gift taxes. Beginning in 1998, however, the unified credit will be gradually increased. The increase will be phased in as follows:

Tax Year	Exemption Amount
1998	$625,000
1999	$650,000
2000 and 2001	$675,000
2002 and 2003	$700,000
2004	$850,000
2005	$950,000
2006	$1,000,000

The increasing unified credit will reduce the number of estates subject to estate tax. It will also permit a married couple to pass up to $2,000,000 tax free by the year 2006. However, as in the past, coordination of both spouses' respective estate plans will be required to fully maximize the use of the credits available. Unfortunately, the extremely wealthy are not as lucky as the rest of us with respect to the new unified credit amounts. This is due to the fact that the Act makes no change in the provision phasing out the unified credit for estates in excess of $10,000,000.



Another major change under the Act is the new inflation indexing of various estate and gift amounts. Beginning in 1999, the $10,000 annual gift exclusion, the $1,000,000 generation-skipping trust exemption and the $750,000 maximum reduction for special use valuation will all be adjusted for inflation. The base for adjustment will be the consumer price index for 1997. The annual gift exclusion will be adjusted in $1,000 multiples, and any adjustment that would result in less than a $1,000 change from the previous annual exclusion amount will simply be ignored. Both the generation-skipping trust exemption and the special use valuation amount will be adjusted in $10,000 multiples.

The Act also codifies a new estate tax exclusion for family-owned businesses. This exemption allows the exclusion from estate tax a portion of the value of family-owned businesses. The amount of the extra exclusion is the difference between $1,300,000 and the unified credit amount. For example, the amount of the exclusion available in 1998 would be $675,000 ($1,300,000 less the $625,000 unified credit). By 2006, however, the exclusion drops to only $300,000 ($1,300,000 less the $1,000,000 unified credit). In either event, the exclusion is in addition to, and not in lieu of, the applicable unified credit.

For the family-owned business exclusion to apply, the business must be a "qualified family-owned business." To gain recognition, many stringent, complex and confusing requirements must be met. Generally, a business is a qualified family-owned business only if (1) 50 percent or more of it is owned by the decedent and his or her family, (2) 30 percent or more of it is owned by the decedent and his or her family if 70 percent or more of the business is owned by two families or (3) 30 percent or more of it is owned by the decedent and his or her family if 90 percent or more of the business is owned by three families. The exclusion is available only if the estate tax value of the decedent's interest in the business exceeds 50 percent of his gross estate, and the decedent or his family owned and/or materially participated in the business for five out of the eight years preceding death. Finally, the business must continue in the family for ten years after the date of death. There are tax recapture rules for failure to comply with these requirements.

Another important aspect of the Act is the valuation methods of real estate allowed for family-owned farms or businesses under Section 2032A. Now, if the real property is continued to be used by the family as a farm or business, such real estate can be valued at its current use value, rather than at its fair market

value considering its highest and best use. To qualify, a proper election must be made by the personal representative. Unlike the old law, the Act provides the personal representative with a reasonable time to correct a defective election.

The new law also changes the installment payments of estate taxes attributable to certain closely held businesses. More precisely, effective in 1998, the Act alters the rate at which interest is charged on the deferred tax. Interest calculated on the first $1,000,000 of value in excess of the unified credit has been decreased from 4 percent to 2 percent. Interest remaining on the remaining estate tax will be 45 percent of the IRS underpayment rule. An estate that elects to pay the tax in installments, however, will not be allowed to deduct the discounted interest as an estate tax administration expense.

G. Reporting Requirements of Attorneys' Fees

For the first time in the history of the tax code, the IRS has specifically targeted a particular industry for special informational reporting. Attorneys comprise the targeted group. The Act specifically requires that any person engaged in a trade or business who makes a payment, regardless of the amount, to an attorney must report the payment on an 1099B information return filed with the IRS. The old law exempted informational returns for payments made directly to corporations for legal services rendered. However, the new Act abrogates that exemption.

An interesting aspect of this new reporting requirement arises when a monetary settlement is not allocated between damages and attorneys' fees. In such a case, the Act seems to suggest that the entire settlement must be reported on the informational return. For example, suppose you represent a business client in a civil suit pertaining to your client's business, and your fee arrangement is one-third of any recovery. Prior to trial, you settle the suit for payment of $100,000 to your client, and the settlement agreement does not allocate the proceeds between damages and attorneys' fees. The Act dictates that the entire $100,000 be reported on the 1099B as a payment to the attorney. This certainly can lead to a lot of problems for lawyers with the IRS.

As if that were not enough, the Act goes even further. Now, upon request,

attorneys must promptly supply their taxpayer identification number to clients. Failure to do so subjects the attorney to a $50 penalty for each instance, and subjects any payments to backup withholdings.

H. Other Changes

The Act contains a multitude of other changes. Some of those changes concern reporting requirements for certain real estate transactions and charitable gifts; deductions for securities donated to charitable organizations; self-employed contributions to 401(k) plans; the alternative minimum tax for certain corporations; and the deductibility of health insurance premiums for self-employed individuals.

As stated at the beginning, this article is simply a thumbnail sketch of some of the major tax provisions in the Act. It is not all inclusive as there are hundreds of other changes out there. With tax time just around the corner, it is a certainty that lawyers advising clients on tax and related issues will be flooded with questions about the Act. Only by studying the new law, and working hand in hand with your Certified Public Accountant, will the solutions to your clients' problems become apparent. ■

1. The author expresses his gratitude to Gerald R. Rowe, Jr., CPA, and the accounting firm of McGriff, Dowdy & Associates, P.C., without whose help, guidance and expertise this article would not have been possible.

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New Life For Ala. R. Civ. P. 56(F) Affidavits

By Teresa G. Minor

A recent decision of the Alabama Supreme Court has[1] revived an often-forgotten and seldom-used rule of civil procedure, Ala. R. Civ. P. 56(f). In *Ex parte Wal-Mart Stores, Inc.*, 698 So. 2d 60 (Ala. 1997), the court *granted* a writ of mandamus directing the Circuit Court of Autauga County, Alabama to *set aside* its order allowing the plaintiffs to conduct additional discovery before answering the defendants' pending summary judgment motion due to the plaintiffs' counsel failure to comply with Ala. R. Civ. P. 56(f). The case was a potential class action challenging the collection of sales tax on the sales of computer software. The defendants moved for summary judgment. Even though the plaintiffs' counsel had not filed a Rule 56(f) affidavit explaining that the lack of discovery had caused the plaintiffs to be unable to respond to the motions, the trial court denied the motion, on the basis that the plaintiffs had not had sufficient discovery to adequately respond.

In granting the petition for writ of mandamus, the Alabama Supreme Court cited Rule 56(f) which provides:

> (f) *When evidentiary matter is unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Ala. R. Civ. P. 56(f).[1] This rule, according to the Alabama Supreme Court, *requires* counsel opposing summary judgment to file an affidavit explaining why he or she cannot present essential facts to oppose the motion. Because the plaintiffs' counsel had not filed such a motion, the trial court erred in denying the defendants' motion on the grounds that the plaintiffs should be entitled to conduct further discovery. Accordingly, the court granted the writ directing the trial court to vacate it order.[2]

Reasons Articulated in the Affidavit

The holding of *Ex parte Wal-Mart Stores* forces practitioners to re-examine Rule 56(f) and consider, if opposing a summary judgment motion, what reasons must be expressed in the affidavit in order to ensure that the summary judgment motion will be continued. The following is a list of reasons that have been expressed in such affidavits:

A. Pendency of Discovery or Insufficient Time for Discovery

The fact that the non-movant has discovery pending against the moving party is the most frequently used reason asserted in a Rule 56(f) affidavit. Nonetheless, the mere fact that discovery is pending will not operate to forestall the court's ruling on a pending summary judgment motion even if a Rule 56(f) affidavit is filed.[3] Instead, the affidavit must express that the discovery that is pending is "crucial," and the burden of showing the "crucial" nature of the discovery is on the affiant.[4]

For example, in *Parr v. Goodyear Tire & Rubber Co.*, 641 So. 2d 769 (Ala. 1994), the defendant, Goodyear, moved for sum-

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mary judgment on the plaintiffs' claims that it had improperly disposed of hazardous waste at a landfill, thereby causing a devaluation of the plaintiffs' property. At the time the trial court granted Goodyear's motion, the plaintiff had outstanding discovery requests to Goodyear concerning the nature of the materials disposed at the landfill.[5] On appeal of the grant of summary judgment, the Alabama Supreme Court reversed the summary judgment, finding that the outstanding discovery was "crucial" to the issues raised by the motion. Specifically, the discovery sought information regarding the nature of the materials disposed by Goodyear at the landfill in order to counter the basis of the motion that the materials were not hazardous.

Conversely, if the discovery sought is not "crucial," it is error for the trial court to continue the pending summary judgment motion in order for the discovery to be completed. *Diamond v. Aronov*, 621 So. 2d 263 (Ala. 1993) illustrates this point. In this action seeking the defendant's proportionate share of a partnership debt, the plaintiffs' motion for summary judgment was granted despite the defendant's assertions that the plaintiffs had failed to respond to outstanding requests for admissions. The trial court did not deem the requests to be crucial to the issues raised by the summary judgment. On appeal, the Alabama Supreme Court affirmed, finding that the defendant had failed to meet his burden showing that the discovery was "crucial."

The holding of *Ex parte Wal-Mart Stores* forces practitioners to re-examine Rule 56(f) and consider, if opposing a summary judgment motion, what reasons must be expressed in the affidavit in order to ensure that the summary judgment motion will be continued.

B. Facts to Oppose Motion are within Exclusive Control of the Moving Party

Another reason presented through a Rule 56(f) affidavit that is closely akin to the above-discussed reason is that the facts necessary to oppose the motion are in the exclusive control of the moving party. The Alabama Supreme Court described this situation in *Griffin v. American Bank*, 628 So. 2d 540 (Ala. 1993):

> [a] typical situation for the application of Rule 56(f) is where the opposing party cannot present by affidavits facts essential to justify his opposition because knowledge of those facts is exclusively with, or largely under the control of, the moving party. In such a situation the opposing party should present an affidavit showing that the knowledge or control of the facts is exclusively or largely with the moving party and describing any attempts to obtain those facts.

Griffin, 628 So. 2d at 542.

One caution should be noted. Although the court in *Griffin* did acknowledge this as a valid reason to support a Rule 56(f) affidavit, the court went on to hold that the trial court did not err in refusing to continue the summary judgment motion. The reason for this ruling was because there was evidence that the non-movant had been given approximately two months to discover the evidence within the control of the moving party, but had failed to do so. *Id.* at 543; *see also Central Acceptance corp. v. Colonial Bank of Alabama, N.A.*, 439 So. 2d 144, 147-148 (Ala. 1983) ("[t]he defendants cannot forestall a summary judgment by asserting that the opposing party has possession of pertinent documents where the defendant failed to utilize discovery to acquire evidence to rebut the plaintiff's contentions").

C. Unavailability of a Witness

Although no Alabama case has considered this reason, federal decisions have recognized that a sufficient reason to include within a Rule 56(f) affidavit is that a crucial witness is unavailable. *United States v. Gotham Pharmacal Corp.*, 1 F.R.D. 744 (D.C.N.Y. 1941) (request for continuance properly granted where witness likely could be located with government's assistance). *But see United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 999 (5th Cir. 1990) (affidavit did not demonstrate how the witness would be found and, therefore, request for continuance was properly denied).

D. "Hope" that Evidence Will Emerge at Trial

Federal cases also recognize that a mere "hope" that evidence will emerge at trial is not sufficient to support a Rule 56(f) affidavit. *See Cramer v. Devon Group, Inc.* 774 F. Supp. 176, 180 (S.D.N.Y. 1991) ("a party cannot successfully oppose a summary judgment motion by simply claiming that further discovery may yield unspecified facts that could plausibly defeat summary judgment"); *see also Searer v. West Michigan Telecasters, Inc.*, 381 F. Supp. 634, 643 (W.D. Mich. 1974), *aff'd*, 524 F.2d 1406 (6th Cir. 1975).

The Affidavit Itself

A. When It Should be Filed

No Alabama decision has addressed the issue of when such a Rule 56(f) affidavit must be filed. Federal authorities, however, have found that the timing requirements contained in Rule 56(c)[6] are equally applicable to Rule 56(f) affidavits.

Thus, under this authority, such an affidavit must be filed prior to the day of the hearing. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 519-520 (9th Cir. 1990) (court found that Rule 56(c) timing requirements also apply to Rule 56(f) affidavits and, thus, Rule 56(f) affidavits must be filed prior to the summary judgment hearing); *accord* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2740 at 531 (1983).

B. Specific Contents[7]

Although there is no concrete list of what must be contained in a Rule 56(f) affidavit, a review of the reported decisions[8] discussing such affidavits would reveal that the following should be contained in such an affidavit:

1. A showing of diligence on the part of the non-movant to obtain the information;
2. A detailed expression of "crucial" facts to be obtained;
3. An explanation of why a Rule 56(e) response is not presently possible; and
4. An explanation of how continuation will augment the nonmovant's ability to establish the presence of a genuine factual issue.

C. Technicalities

A few oddities also appear in some decisions regarding Rule 56(f) affidavits. For example, in *Oliver v. Townsend*, 534 So. 2d 1038, 1042 (Ala. 1988), the Alabama Supreme Court found that an affidavit was not required to be filed. Instead, in that case, the non-movant's brief was sufficient to serve as a Rule 56(f) affidavit because the brief is signed by the attorney as an officer of the court.[9] Another point that should be mentioned is that, in the affidavit, the attorney actually must request a continuance or other appropriate relief. *Johnson v. Cramer*, 598 So. 2d 980, 982 (Ala. Civ. App. 1992). There is no duty on the trial court to apprise counsel of availability of Rule 56(f). *See Malloy v. Sullivan*, 455 So. 2d 12, 13 (Ala. 1984). Finally, the Rule 56(f) affidavit should be precise. Making statements based upon information and belief is not sufficient. *Government Street Lumber Co. v. AmSouth Bank*, 553 So. 2d 68, 78 (Ala. 1989); *Osborn v. Johns*, 468 So. 2d 103, 108 (Ala. 1985).

Conclusion

With *Ex parte Wal-Mart*, the Alabama Supreme Court has signaled that those who wish to oppose summary judgment based on a lack of discovery will be held to the requirements of Rule 56(f). Practitioners must be careful to make their record as to "crucial" discovery that they seek to acquire, but have not obtained, if they are to successfully ward off a hearing on a pending summary judgment motion. Conversely, practitioners seeking to advance a summary judgment motion now have *Ex parte Wal-Mart* to offer in response to the often-heard refrain: "But Judge, I need more time!" ■

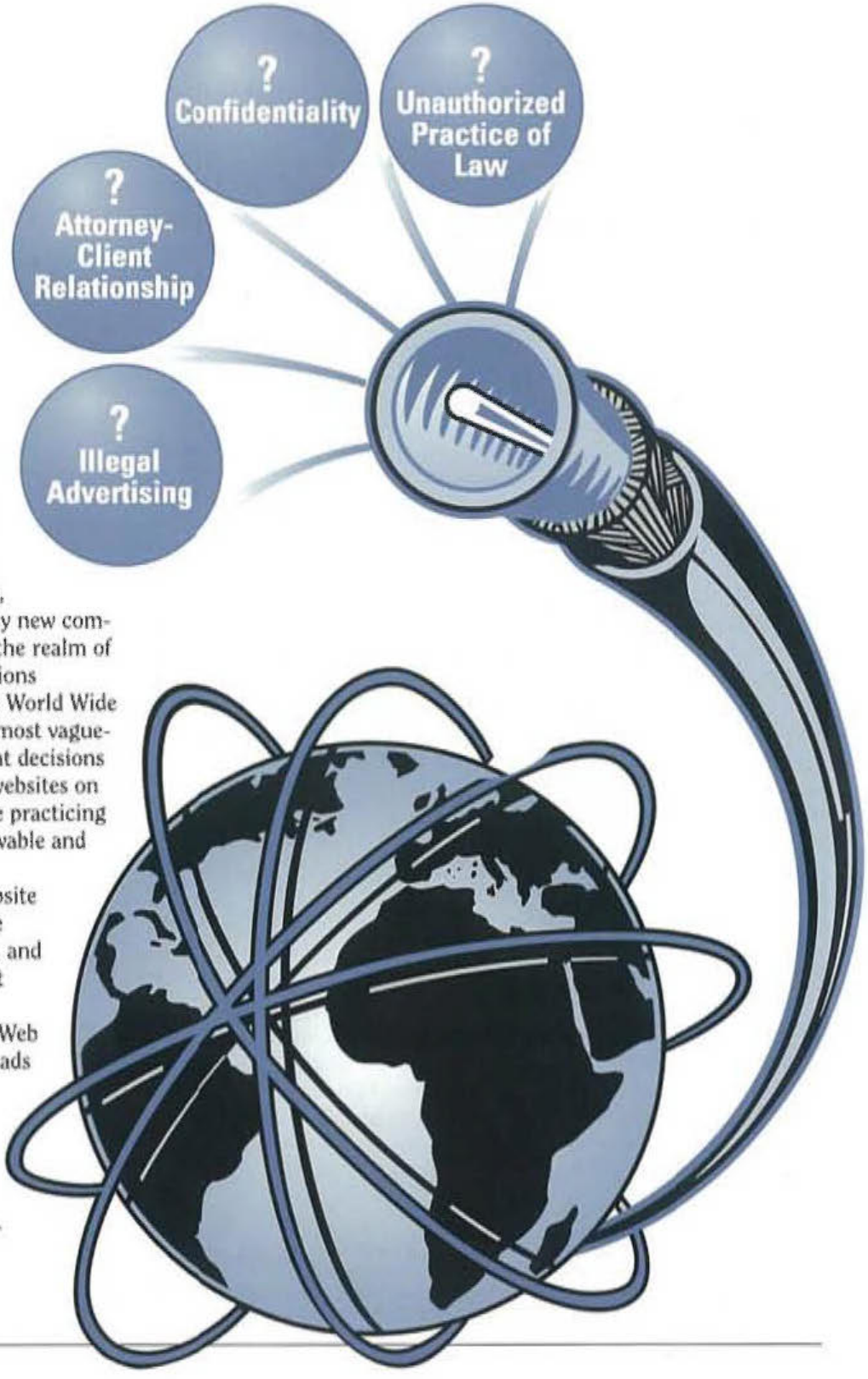
Endnotes

1. The text of Ala. R. Civ. P. 56(f) is identical to the text of Fed. R. Civ. P. 56(f). *Noble v. McManus*, 504 So. 2d 248, 250 (Ala. 1987). Consequently, federal cases interpreting Fed. R. Civ. P. 56(f) are considered persuasive authority to an Alabama court. *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 103 (Ala. 1981).
2. The court refused to direct the trial court to grant the defendants' summary judgment motions. Rather, the court noted that the effect of the writ would be that the summary judgment motions would be renewed before the trial court. See *Id.* n.2.
3. See generally *Ex parte Sverdrup Corp.*, 692 So. 2d 833 (Ala. 1996); *Naramore v. Duckworth-Morris Realty Co.*, 669 So. 2d 946, 950 (Ala. Civ. App. 1995); *Terry v. Lee Apparel Co.*, 656 So. 2d 811, 812-813 (Ala. Civ. App. 1994).
4. *Hope v. Brannan*, 557 So. 2d 1208, 1212-1213 (Ala. 1989).
5. From the opinion, it does not appear that the plaintiffs' attorney filed a formal Rule 56(f) affidavit, but he did file a motion to compel that he asserted was "in the form of a Rule 56(f)" affidavit. *Parr*, 641 So. 2d at 771. Goodyear did not dispute this issue, and thus, the court did not specifically address whether the motion was technically sufficient. *Id.*; but see *Noble*, 504 So. 2d at 250 ("a trial court is not required to treat a motion to compel as satisfying the requirements of [Rule 56(f)]").
6. See Ala. R. Civ. P. 56(c) ("any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing").
7. See generally John J. Coleman, III, "Summary Judgment in Alabama," 20 *Cumb. L. Rev.* 1, 15-17 (1989).
8. See also 1992 Committee Comments to Ala. R. Civ. P. 56(f) ("[s]uch an affidavit should state with specificity why the opposing evidence is not presently available and should state, as specifically as possible, what future actions are contemplated to discover and present the opposing evidence").
9. But see *Herring v. Parkman*, 631 So. 2d 996, 1002-1003 (Ala. 1994) (attorney's "objections[s] to submission of summary judgment" was not sufficient); *Griffin*, 628 So. 2d at 540 (motion for a continuance not sufficient).

NetEthics:

Concerns Regarding E-mail and World Wide Web Use by Attorneys

By Malvern U. Griffin and Aaron P. Maurer



Introduction

In the practice of law today, attorneys are using, and are increasingly expected to use, modern communication methods. Notwithstanding their advantages, devices such as cellular phones, facsimile machines, pagers and computers have introduced many new complexities into the practice of law, including the realm of ethics. Two of the most recent communications advances, electronic mail ("e-mail") and the World Wide Web[1] (hereafter the "Web"), are among the most vaguely defined from an ethical standpoint. Recent decisions concerning the use of e-mail and attorney websites on the Web have provided little guidance to the practicing attorney regarding which activities are allowable and which are forbidden.

For instance, a law firm might have a website that details the areas of its practice, lists the biographies of the members of the law firm, and provides copies of some general articles that members of the law firm have published. A potential client browsing (or "surfing") the Web happens upon the law firm's website, and reads one of the posted articles. After deciding that she would like to explore what the firm could offer in terms of legal advice and representation, the potential client clicks on one of the ubiquitous "e-mail the firm" buttons and submits a query sharing specific details about a matter she is involved with and asks for advice.

Several issues arise in this hypothetical. First, has the law firm engaged in illegal advertising over the Web by posting a website? If an attorney with the law firm responds to the e-mail, has the attorney established an attorney-client relationship? If so, then has the attorney committed the unauthorized practice of law if the potential client is located in a state where the attorney is not licensed to practice? Further, in responding to the potential client via e-mail, can the attorney be certain that he has not divulged client confidences, thereby violating provisions of the ethics code and possibly exposing himself to liability for malpractice? While the Alabama courts and the Alabama State Bar Center for Professional Responsibility have not yet explicitly addressed these issues, indications regarding potential answers can be gleaned from other sources. The following provides a brief introduction into these and other issues regarding attorneys' use of e-mail and websites, and provides guidance regarding how one might avoid ethical violations or malpractice claims originating from such use.

E-mail

Why use E-mail?

E-mail is rapidly growing in popularity as a means of communication. E-mail combines the speed of a telephone transmission with the accuracy of text, as well as incorporating the advantages of being easy to modify, relatively inexpensive and reliable. Compared to facsimile machines, e-mail is superior since it is usually delivered directly to the desktop computer of the addressee and, unlike facsimile machine phone numbers, it is unlikely that different e-mail addresses will be confused with one another since e-mail addresses are usually descriptive of the addressee. That is, the addressee's name usually comprises a portion of the e-mail address (for example, johndoe@firmname.com). Moreover, e-mail can be used to send documents prepared with a word processor or spreadsheet program over the Internet as an attachment, thereby maintaining the electronic format and integrity of the document. This is particularly useful when drafting or revising a document with a remotely located party. Further, e-mail advantageously can (1) be easily stored or archived in a relatively small amount of computer memory; (2) can be easily edited; (3) can be easily replied to or forwarded; and (4) can be reproduced or copied without any degradation.

Technological Background

In order to more fully understand the implications of using e-mail, some background information about the technology involved is useful. For the most part, an e-mail traveling via the Internet is sent as a plurality of packets of information. For example, when the potential client from the above hypothetical sent e-mail to the law firm, the e-mail was not sent in one piece like a letter sent through the postal service. Instead, the e-mail was broken up into small chunks of data at the client's computer. Each data "packet" contained a portion of the message as well as a label with the destination and return addresses. The data packets were then directed over the Internet through a multitude of specialized computers which automatically routed the data packets to successive computers until each packet reached the destination address. At the destination, the data packets were put back in order, reassembling the e-mail into a single document. The e-mail was then passed to the e-mail software on the computer and then to the receiving attorney. Though it is possible that all of the data packets took the same path through the multitude of connections comprising the Internet, it is highly unlikely.

Ethical Concerns

Foremost among most attorneys' concerns in communicating with clients via e-mail is the attorney's duty to protect confidential information. This duty arises, at least in part, from Rule 1.6(a) of the Alabama Rules of Professional Conduct, which imposes the obligation that an attorney "not reveal information relating to the representation of the client unless the client consents after consultation."[2] Attorneys are also fearful that e-mail may not fall under the scope of rules protecting the attorney-client privilege, which rules state that communications are privileged only if they are made in, and maintained in, confidence.[3] The concern arising in using e-mail systems is that e-mail will not be considered to fall in the category of communications made in confidence, and thus, will not be privileged.

The Old Standard

The American Bar Association (ABA), addressing the issue of on-line communication in a relatively outdated 1986

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report, suggested that lawyers should not communicate over any sort of on-line network without being certain that the system was capable of confidential, reliable communication.[4] Essentially following the lead of the ABA report, the Iowa Supreme Court Board of Professional Ethics and Conduct stated in a 1996 ethics opinion that attorneys sending privileged material over the Internet must either obtain the client's consent or encrypt the sensitive material.[5] In a 1995 ethics opinion, the South Carolina Ethics Advisory Committee followed this restrictive position toward online communication in stating that attorneys should receive their client's permission before communicating online.[6]

The recommendation set out by the ABA report and the above ethics opinions are considered archaic by many given the technology now used for e-mail.[7] Particularly, considering the complexities involved in intercepting all of the data packets forming a single e-mail message, and given the volume of e-mail routinely passing through each computer on the Web, it appears that e-mail users should have the same expectation of privacy for e-mail as for other, accepted means of communicating confidential information, including postal mail, facsimile transmissions and land-based telephones. In fact, e-mail is more difficult to intercept than a phone conversation on an office phone, the use of which is not generally considered to be a violation of the duty of confidentiality.[8] Further, the Electronic Communications Privacy Act (ECPA) of 1986 makes it a criminal offense to intercept e-mail messages (the illegality of tapping phone lines was already provided by the act), and expressly provides that any intercepted e-mail message retains its character as a privileged communication.[9]

The Rising Standard

Recognizing these complexities and changes in technology, several recent decisions have concluded that the ABA report and the South Carolina and Iowa concurring ethics decisions no longer accurately embrace the technological and legal environment with respect to the use of e-mail. Citing several articles critical of the South Carolina and Iowa ethics committee decisions, the Illinois State Bar Association (ISBA) issued an Advisory Opinion on Professional Conduct in May 1997, suggesting that e-mail should be subject to the same reasonable expectation of privacy as ordinary land-based telephones.[10] The reasoning of the ISBA opinion stating that the use of e-mail did not violate Rule 1.6(a) of the Illinois Rules of Professional Conduct[11] was based on two critical points: 1) the interception of e-mail messages, though possible, is at least as difficult as intercepting an ordinary telephone call; and 2) the ECPA makes the interception of e-mail messages illegal.[12] The Illinois opinion and its reasoning were cited in turn by the Vermont Bar Association in a concurring advisory ethics opinion in which the Vermont Bar Association stated that Vermont attorneys generally may communicate with clients by unencrypted e-mail.[13] Further, the South Carolina Ethics Advisory Committee overturned its 1995 decision in June of 1997 in an advisory opinion that states South Carolina attorneys may use e-mail to communicate confidential client information, but should discuss with the client options such as encryption for especially sensitive information.[14]

In addition to the states noted above which have recognized that e-mail interception is not a significant security risk, the Attorney's Liability Assurance Society (ALAS), a captive insurance company that insures large law firms for malpractice, has taken the position that an attorney can use e-mail without encryption when communicating with or about clients, yet the attorney should take extra precaution when dealing with matters so important that any threat of interception must be avoided.[15]

The same ethics opinions discussed above also support the assertion that e-mail should be protected by the attorney-client privilege. Although it has long been illegal to intercept cellular phone conversations,[16] these conversations have not been considered confidential due to the ease of interception, and thus, were not protected by the attorney-client privilege.[17] The South Carolina Ethics Advisory Committee, recognizing that many commentators have tried to draw a parallel between e-mail and cellular phone transmissions with respect to attorney-client privilege, found, on the contrary, that e-mail provided a much more confidential means of communication and that privilege thus attached.[18] Further, the Vermont Bar Association's Advisory Ethics Opinion states explicitly that "e-mail privacy is no less to be expected than in ordinary phone calls."[19] Thus, it can be implied that the expectation of confidentiality is at last the same for e-mail as for ordinary phone calls, and that attorney-client privilege should attach to both.

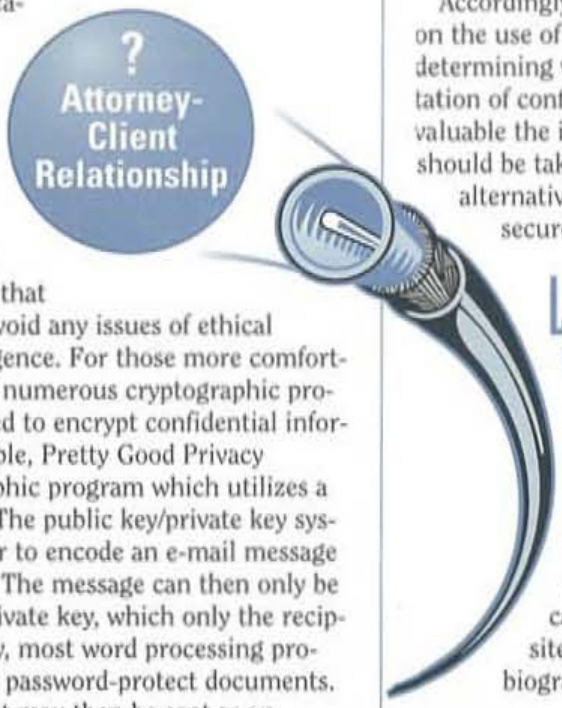
There are several reasons why the old standards regarding e-mail confidentiality and attorney-client privilege have given way to the new. The South Carolina Ethics Advisory Committee, in overturning its earlier decision requiring that attorneys obtain client consent before using e-mail, reasoned that its changing view was influenced by the fact that "the use of e-mail has become commonplace and there now exists . . . improvements in technology" as compared to when the first decision was reached.[20] Another contributing factor may be that, as people have learned more about e-mail, they have become more aware of how technically difficult it is to inter-

cept a message, especially in light of the increasing volume of e-mail flooding the Internet. Regardless of the reasons, however, as the new ethics opinions make clear, the view of e-mail as non-trustworthy and non-confidential is quickly vanishing.

Suggested Practices

The Alabama State Bar Center for Professional Responsibility ("Center") has not yet made any ruling on the level of protection that attorneys should apply when utilizing e-mail to correspond with or about clients. A fair assumption is that the Center will likely follow the lead of Illinois and Vermont in recognizing that unencrypted e-mail is at least as secure as using a land-based telephone, and thus, the same standard of confidentiality should apply to both.

However, until an actual opinion is proffered, attorneys should not include confidential information in an e-mail communication without the client's informed written consent. Informed consent, in this context, means that the attorney fully discloses to the client the possibilities of e-mail interception, and the possibilities of losing attorney-client privilege with respect to that communication. This should avoid any issues of ethical violation, malpractice or negligence. For those more comfortable with computers, there are numerous cryptographic programs available that can be used to encrypt confidential information in an e-mail. For example, Pretty Good Privacy (PGP®) is a popular cryptographic program which utilizes a public key/private key system. The public key/private key system in general enables any user to encode an e-mail message with the recipient's public key. The message can then only be decoded with the recipient's private key, which only the recipient should have.[21] Alternatively, most word processing programs include the capability to password-protect documents. A password-protected document may then be sent as an attachment to an e-mail, ensuring that only those computer users with the password will be able to view the document. It should be noted, however, that while encryption clearly offers a reasonable expectation of confidentiality, it is not clear whether merely password-protecting a document using a word processor would be considered to offer the same expectation of confidentiality.[22]



Another precaution that one may take when using e-mail is to include a disclaimer in the subject line and/or at the beginning of an e-mail before the message. The use of such a disclaimer is analogous to the recommended practice for facsimiles. The disclaimer puts the actual recipient on notice that the e-mail contains confidential information and may deter further dissemination of a misdirected e-mail. Further, if the e-mail is received by another attorney, that attorney may have an ethical duty to avoid reading the e-mail and to notify the sender.[23] Such a disclaimer may read as follows:

NOTICE: This Electronic Mail (e-mail) contains confidential and privileged information that is intended only for the individual or party identified directly below, and not necessarily the addressee. Do *not* read, copy or forward this e-mail unless you are the intended recipient. If you are not the intended recipient, please call **[firm name]** at **[phone number]** and ask for **[sender]**. In addition please return this e-mail using a reply command and then delete all copies. Thank you.

While somewhat lengthy, this disclaimer can be easily inserted by using a macro command or cutting/pasting in a Windows® environment.

Accordingly, given the relatively small amount of authority on the use of e-mail, one should use prudent judgment in determining what steps to take to ensure a reasonable expectation of confidentiality. Obviously, the more sensitive and valuable the information, the greater the measures that should be taken, including encrypting the e-mail or using an alternative medium of communication that offers more secure communication.

Law Firm Websites

Why Have a Law Firm Website on the World Wide Web?

A website on the Web allows attorneys and law firms to publish information in a manner that is superior to traditional means of advertising, including Yellow Pages® and print advertisements. Websites are interactive, searchable, relatively inexpensive, instantly accessible, and can be updated easily. Law firms might use websites to list a description of the firm's history or biographical sketches of its members, or to discuss

the law firm's practice areas. Also, a website may include the information found in most Yellow Pages® advertisements, such as phone numbers and addresses, as well as possibly including e-mail links to each of the firm's attorneys. Because of the international reach of the Web, websites have proven valuable to attorneys servicing international clients. To this extent, some websites offer a language option so that the viewer can select the language of their choice for browsing the website. However, while a website offers much, the myriad of ethical and legal concerns surrounding the Web have prevented many attorneys and law firms from creating websites. The following discussion addresses many of these concerns, including advertising, attorney-client relationships, the unauthorized practice of law, and disclaimers. First, however, a brief technological overview will be helpful.

Technological Background

The Internet consists of more than 15,000 individual computer networks which connect over 2.2 million computers and more than 23.5 million users around the world.[24] Current trends indicate that the number of users on the Internet doubles every 12 to 15 months.[25] The Web, a subset of the Internet, comprises a series of documents stored on different computers throughout the Internet. These documents, called "web pages", are all formatted according to a standard language referred to as Hypertext Markup Language ("HTML"). HTML essentially lays out the format for the text, images, sound or video comprising an HTML document in a manner that a user's browser program can interpret for presentation to the user. A collection of Web pages that are related is often referred to as a website.

Every Web page has a unique address referred to as a Uniform Resource Locator (URL). By typing the URL of a Web page into a browser program, the browser program automatically retrieves that Web page from the location where it is stored on the Web. In addition, a Web page can also contain one or more references, in terms of other URLs, to other Web pages. These references are known as hyperlinks (or "links") and are typically flagged by the browser in a particular manner (for example, any text associated with a hyperlink may be in a different color or underlined). If the user selects the hyperlink, then the referenced Web page is retrieved and replaces the currently displayed Web page. Hence, each Web page can be cross-linked to many other pages, which, if pictured graphically, shows the structure giving the Web its name.

Ethical Concerns

Advertising

The Alabama State Bar Center for Professional Responsibility has stated that websites are governed by the same set of rules and standards as all other advertisements, as Web pages are a means of commercial speech.[26] Thus, Web pages must not be false or misleading as defined by Rule 7.1 of the Alabama Rules of Professional Conduct,[27] and more generally, as defined by the United States Supreme Court in *Bates v. State Bar*.[28] Further, the application of Rule 7.2 implicates many administrative details. For example, each Web page must have the language: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."[29] Rule 7.2 also requires that a copy of the Web page be forwarded to the Office of the General Counsel of the Alabama State Bar within three days of its posting, and that a copy of the Web pages be kept for at least six years after they were last on the Web.[30] Ethics Rules 7.4 regarding specialization, 7.5 regarding firm names, and 7.6 regarding certifications will also apply to website content, and therefore should be taken into account.

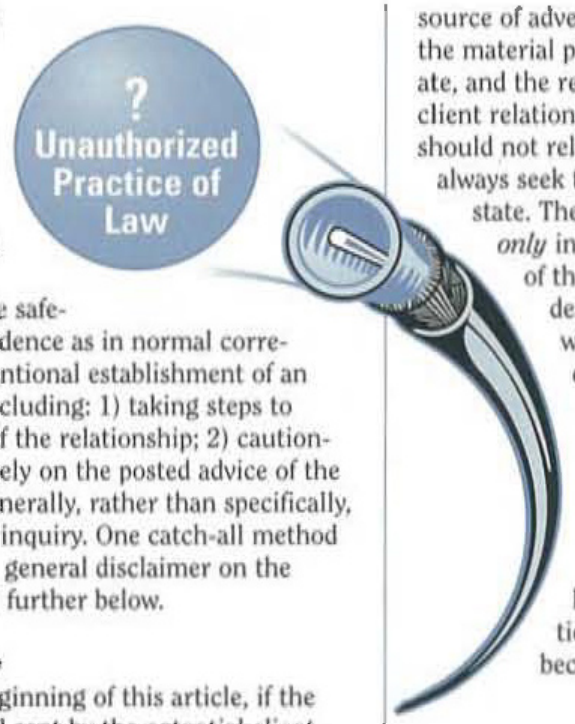
It is unlikely that Rule 7.3, regarding direct solicitation of prospective clients, will be applied to attorney websites. The viewing of websites is a voluntary action taken by prospective clients; unlike direct mail or telephone calls, there is no directed communication by attorneys posting websites. Indeed, both the Vermont Bar Association[31] and the South Carolina Bar Ethics Advisory Committee[32] recently likened websites to the static advertisements found in the Yellow Pages® and concluded both are subject to the existing ethical standards with respect to advertising. However, as the South Carolina opinion aptly notes, future changes in technology may allow law firms to target special viewer profiles.[33] This new technology, for example, "Push" technology or directed banner advertising,[34] may be closer to solicitation than advertising, and thus subject to regulation as such.

Therefore, websites that are "published" on the Web by Alabama firms and attorneys are generally subject to the same restrictions and regulations as other forms of attorney advertising in Alabama. One important caveat follows, however, in that it is unclear if and how the material available on the Web, which by the nature of the Web is accessible in jurisdictions outside of Alabama, will be subject to the regulations of these other jurisdictions.[35]

Establishing an Attorney-Client Relationship

Even though an attorney is connected to the Web, the attorney may never personally interact with the visitor browsing the attorney's website, or exchange e-mail with the visitor. Nonetheless, it is important that the attorney be wary of

establishing an attorney-client relationship, and thus, invoking the liability of potential malpractice suits as well as the duties of confidentiality, loyalty, zealous representation and competence required by the Alabama Rules of Professional Conduct.[36] Attorneys should take the same safeguards in electronic correspondence as in normal correspondence to avoid this unintentional establishment of an attorney-client relationship, including: 1) taking steps to specifically clarify the nature of the relationship; 2) cautioning the computer user not to rely on the posted advice of the attorney; and 3) responding generally, rather than specifically, to the fact pattern posed in an inquiry. One catch-all method of effecting these safeguards, a general disclaimer on the attorney's website, is discussed further below.



Unauthorized Practice of Law

In the hypothetical at the beginning of this article, if the attorney responds to the e-mail sent by the potential client, the attorney may have inadvertently violated the prohibitions against unauthorized practice of law if the potential client was located in a state where the attorney was not licensed to practice law. Alabama Rule 5.5 provides that a lawyer shall not either practice law in a jurisdiction where that lawyer is not authorized to practice or assist any person who is not authorized to practice law in any activity that constitutes the unauthorized practice of law.[37] Thus, in on-line communications, attorneys should take special care to not give legal advice to persons in jurisdictions foreign to the attorney's authorized jurisdiction of practice. Practically, this means that attorneys should ensure that their website is tailored so as not to offer legal opinions or advice. Further, before answering any e-mails with personalized legal advice, the attorney should make sufficient efforts to confirm that the attorney is qualified to give legal advice, both with respect to the subject matter and the jurisdiction as required by the client.

Suggested Practices

One way to help ensure that attorneys do not become entangled in the newly-spun web of ethics hazards presented in modern communications methods, is the judicious use of disclaimers. While each attorney is individually responsible for addressing these ethical concerns, the following is one example of a disclaimer aimed at addressing the issues:

This website is purely a public resource of general information which is intended, but not promised or guaranteed, to be correct, complete, and up-to-date. This website is not a source of advertising, solicitation, or legal advice, and thus the material provided on this website is not intended to create, and the receipt of it does not constitute, an attorney-client relationship. Internet subscriber and on-line reader should not rely on information provided herein, and should always seek the advice of competent counsel in the reader's state. The owner of this website is an attorney licensed *only* in the State of Alabama. Furthermore, the owner of this website does not wish to represent anyone desiring representation based upon viewing this website in a state where this website fails to comply with all laws and ethical rules of that state. Do not send the owner of this website or anyone listed herein information until you speak with one of our lawyers.

The specification of "general information" will hopefully help to avoid ethical difficulties regarding both the unauthorized practice of law and the creation of an attorney-client relationship. Since legal articles and newsletters can become outdated fairly quickly, the disclaimer that

the information is "not promised or guaranteed to be correct, complete, and up-to-date" helps in preventing detrimental reliance and also will help in avoiding allegations that the information provided was "false or misleading."[38] By disclosing the names of the states in which the attorney is registered to practice, the attorney strengthens the argument that the attorney is not attempting to practice law in other jurisdictions. This argument is further bolstered by the statement that the attorney does not wish to represent anyone desiring representation based upon viewing the website in a state where the website fails to comply with all laws and ethical rules of that state. Finally, the request that no information be sent until the visitor talks with a lawyer may prevent a disqualifying disclosure from a potentially adverse party. In other words, a party with an adverse position to one of your current clients which is seeking representation may send you an e-mail with material admissions. Those admissions may then be used in a disqualification motion to prevent you from representing your current client in an action adverse to the inquiring party. This will also allow a conflict check to be performed before confidential information is disclosed and the attorney-client relationship is created.

Conclusion

The new means of communication arising via the Internet provide a new realm for attorneys to help disseminate information about themselves, and law in general. Thankfully, courts and ethics boards have seen fit to embrace this new technology for the future promise it holds for the practice of law. Hopefully they will continue to do so as new hurdles arise in concert with future technological advances. Until then, this generation of attorneys should firmly grasp the advances that technology has allowed and continue in the ethical path of the legal profession. ■

Endnotes

1. The World Wide Web is actually a subset of the Internet, though the two are often referred to synonymously.
2. Alabama Rules of Professional Conduct, Rule 1.6(a) (1996).
3. See *Law. Man. Prof. Conduct* 55:303-304 (1984).
4. See ABA Standing Comm. on Lawyers' Responsibility for Client Protection, Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication, (1986) at 67.
5. Iowa Supreme Court Board of Professional Ethics and Conduct, Opinion No. 96-1 (August 29, 1996).
6. South Carolina Bar Ethics Advisory Comm., Advisory Opinion No. 94-27 (January 1995).
7. See, e.g., William Freivogel, "Internet Communications - Part II, A Larger Perspective," *ALAS Loss Prevention Journal* (1997) at 2.
8. See generally *ALAS Loss Prevention Journal*, January 1993, at 6; *ALAS Loss Prevention Journal*, September 1995, at 24.
9. See 18 U.S.C.A. § 2517 *et seq.* (1997).
10. See Illinois State Bar Assn., Advisory Opinion on Professional Conduct No. 96-10 (May 16, 1997).
11. Rule 1.6(a) of the Illinois Rules of Professional Conduct provides, similar to the corresponding Alabama rule, that "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." Illinois Rules of Professional Conduct, Rule 1.6(a) (1997).
12. Illinois State Bar Assn., *supra* note 10.
13. Vermont Bar Assn., Advisory Ethics Opinion No. 97-5 (1997).
14. South Carolina Bar Ethics Advisory Comm., Advisory Opinion No. 97-08 (June, 1997); accord, New York State Bar Assn., CPLR 4547 (January 24, 1997).
15. William Freivogel, "Communicating With or About Clients on the Internet - Legal, Ethical, a Liability Concern," *12 ALAS News*, No. 3 (Autumn 1995).
16. See 18 U.S.C. §§ 2510(1), 2512(A) (1996).
17. See, e.g., Massachusetts Ethics Op. No. 94-5 (1994); Iowa Ethics Op. No. 90-44 (1991); New Hampshire Ethics Op. No. 1991-92/6 (1992).
18. South Carolina Bar Ethics Advisory Comm., *supra* note 14.
19. Vermont Bar Assn., *supra* note 13.
20. South Carolina Bar Ethics Advisory Comm., *supra* note 14.
21. For more information on public key/private key cryptography, see Pretty Good Privacy's website at *http://www.pgp.com*.
22. The Iowa Supreme Court Board of Professional Ethics and Conduct recently indicated that the password protection provided by word processing programs such as Microsoft® Word or WordPerfect® is sufficient to conform with Opinion No. 96-1 (*supra* note 5).
23. See, e.g., ABA Formal Ethics Op. 92-368 (1992).
24. Andrew Kautor, "Off the Charts - The Internet 1996," *Internet World*, Dec. 1996, at 46.
25. *Id.*
26. Alabama State Bar Center for Professional Responsibility, Ethics Opinion No. RO-96-07 (1996).
27. Alabama Rules of Professional Conduct, Rule 7.1 (1996).
28. 433 U.S. 350 (1977) (setting out the bounds of control over lawyer acts including advertising).
29. Alabama Rules of Professional Conduct, Rule 7.2(e) (1996).
30. Alabama Rules of Professional Conduct, Rule 7.2(b) (1996).
31. See Vermont Bar Assn., *supra* note 13.
32. See South Carolina Bar Ethics Advisory Comm., *supra* note 14.
33. *Id.*
34. See Mark Hankins, "Ambulance Chasers on the Internet: Regulation of Attorney Web Pages," 1 *J. Tech. L. & Pol'y* 3, 22 (1996).
35. See *National Law Journal*, Nov. 6, 1995 at A16.
36. See, e.g., Alabama Rules of Professional Conduct, Rules 1.1, 1.3, 1.4 (1996).
37. Alabama Rules of Professional Conduct, Rule 5.5 (1996).
38. Alabama Rules of Professional Conduct, Rule 7.1 (1996).

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The 1998 Regular Session of the Legislature began January 13, 1998. It must adjourn after meeting 30 legislative days but no more than a 105-calendar day period.

The Institute has two bills that will be introduced:

Legal Separation

This bill is designed to allow couples who are facing marital discord to have a viable alternative to immediately obtaining a divorce. It has been drafted to provide flexibility so that it can be utilized by couples who hope for a brief period of legal separation while they attempt to reconcile or it can be used by couples who anticipate a long, perhaps even permanent separation but do not want to obtain a divorce for religious or other reasons.

Under Section (1)(a) the court shall enter a legal separation if requested by one or both of the parties provided that the jurisdictional requirements for a dissolution of a marriage have been met. In so doing, the court must comply with Rule 32 relating to the mandatory child support guidelines, if the couple has children.

Section (1)(b) reiterates that a decree of legal separation does not terminate the marital status of the parties. Section (1)(c) specifies that the terms of a legal separation can be modified or dissolved only by written consent by both parties and ratification by the court or by court order upon proof of a material change of circumstances. Moreover, the existence of a legal separation does not bar a party from later instituting an action for dissolution of a marriage.

Section (1)(d) contemplates that the terms relating to alimony or a property settlement in the legal separation will not generally be incorporated into a final divorce decree absent agreement by the parties. This section recognizes that in many instances the parties hope to reconcile and therefore have not attempted to equitably divide their property during what is hoped will be only a brief period of separation. However, this section does provide the flexibility of allowing the couple to agree that if a reconciliation does not occur that the division of property and the alimony provision will be continued in a final decree.

Section (1)(e) provides that "the best interest of the child" standard shall apply if the parties to the legal separation later file for dissolution of their marriage. Section (1)(f) provides that if both parties consent, property acquired by each party subsequent to the legal separation will be deemed the sole party of the person acquiring the property. Likewise, if both parties consent, each spouse may waive all rights of inheritance subsequent to the legal separation. This section has been included to provide flexibility to those parties who desire more economic certainty when a legal separation is anticipated to extend for a long period of time or when the parties prefer to have those matters settled by consent prior to the entry of the legal separation. Section (1)(g) provides that the cost for legal separation is the same as if a dissolution of the marriage was requested.

Sections 30-2-30 and -31 relating to divorce from bed and board have been repealed.

The act has a delayed effective date to January 1, 1999 to enable the bench and bar to be informed of the new law.

Constitutional Amendment—Corporations

The newly formed Business Entities Committee has recommended that Ala. Const. sections 232, 233, 234 and 237 relating to corporations be amended to authorize the Legislature to define activities that do or do not constitute the doing of business in Alabama by foreign corporations, to permit domestic corporations to engage in certain business not expressly authorized by its charter, to remove certain restrictions on the issuance of stock and bonds by domestic corporations, and to permit domestic corporations to issue preferred stock as authorized by statute.

Institute Committees at Work:

Rules of Criminal Procedure Committee, chaired by Billy Burney of Moulton. This committee reviews suggestions presented to it to amend the rules and commentary.

Business Entities Committee, chaired by Jim Pruett of Gadsden. This committee is reviewing all of the business entity statutes, ie., corporations, P.C.s and LLCs, etc., to see that comparable provisions in the statutes are consistent. Such matters as mergers, filings and qualification to do business are under review.

Uniform Child Custody Jurisdiction and Enforcement Act Committee, chaired by Gordon Bailey of Anniston. This committee is reviewing the Uniform Act proposed by the National Conference of Commissioners on Uniform State Laws. This Act revises the Uniform Child Custody Jurisdiction Act

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to make it consistent with case law. It also enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. It further provides a remedial process to enforce interstate child custody and visitation determinations.

Uniform Principal and Income Act Committee, chaired by Leonard Wertheimer of Birmingham. This committee is reviewing the Uniform Act which covers four areas of trust administration:

1. How income earned during probate of an estate is to be distributed;
2. When income interest in a trust begins, what property is principal that eventually goes to the remainder beneficiary;
3. When income interest ends, who gets the income that has been received but not distributed; and
4. After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income.

New Acts

The Limited Partnership Act (10-9B-101) becomes effective October 1, 1998. Limited Liability Company Amendments became effective January 1, 1998.

For more information concerning the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411 or phone (205) 348-7411. Institute Home Page—www.law.ua.edu/ali ■

RECENT DECISIONS

By David B. Byrne, Jr. and Wilbur G. Silberman

Bankruptcy Decisions

Must debtor reaffirm to maintain car payments—Second Circuit says "No!" (contradicting the Eleventh)

In re Brian K. Boodrow, No. 96-5078, 1997 U.S. App. LEXIS 23906 (2nd Cir. September 12, 1997). Boodrow filed chapter 7. He reamined current on payments, as well as maintaining the required insurance. There was no compliance with §521(2) which provides that within 30 days of filing the petition, there must be an election to surrender, redeem or reaffirm. This debtor, although filing a statement of intention, did not do any of the three, whereupon the secured creditor, Capital Communications Federal Credit Union ("Capital") moved to lift the stay for non-compliance with the §521(2)(A) requirements. If granted, this would require one of the following: immediate payment of the balance, the return of the vehicle, or re-establishment of personal liability of the debtor. Capital argued the Eleventh Circuit case of *In re Taylor*, 3 F.3d at 1516, that §521(2)(A) mandates the debtor to select one of the three mentioned alternatives. The Second Circuit, in interpreting the statute, held that confining a debtor to the three choices could interfere with providing a fresh start—that to require reaffirmation would give the creditor a veto on a "fresh start." Capital countered by quoting the Eleventh Circuit case of *In re Taylor* which held that the additional option would give the debtor not a fresh start, but a "head start." Nevertheless, the Second Circuit, after disposing of the various arguments of Capital (as enunciated in the *Taylor* case) and discussing when there could be grounds for lifting the stay, held that §521(2) "does not prevent a bankruptcy court from allowing a debtor who is current on loan obligations to retain the collateral and keep making payments under the original loan agreement."

COMMENT: Even though this case conflicts with the Eleventh Circuit, I have detailed it to show the reasoning, and further that there is a definite conflict in the circuits leading to a possible United States Supreme Court decision. The case contains a strong dissenting opinion both on the merits and mootness. Both opinions could be helpful as to legislative interpretations, mootness and consideration of "plain language" of a statute.

Seventh Circuit allows new value "exception" to Absolute Privacy Rule

In re 203 N. LaSalle Partnership, Nos. 96-2137, 96-2138, 1997 U.S. App. LEXIS 27008 (7th Cir. September 29, 1997). In an extremely lengthy opinion of a panel 2-1 decision, the Seventh Circuit held that contribution of new capital, with the partners retaining their interest, would not defeat the absolute priority rule, thus allowing for a confirmed plan. The plan, in addition to requiring fresh capital, provided for waiver of unsecured claims by insiders, payment of other unsecured claims in full without interest, payment of priority claims, and the $55.8 million secured claim of the bank to be paid partly in cash with the balance in seven to ten years with interest. The bank had elected to bifurcate its claim into a secured claim for the value of the property, and unsecured for the deficiency. The total amount owed to Bank America was more than $93 million. Should the property be sold or refinanced, after the secured claim was paid, the balance would be paid on the unsecured claim of $38.5 million. The unhappy bank appealed confirmation of the plan, contending that the absolute priority rule was violated because under §1129(b)(2)(B)(ii), every impaired senior credit must be paid in full before a junior can receive, *on account of its previous interest*, any property. The bank contended that this provision of the Code eliminated any new value exception, but even if it did not, the amount of capital to be injected was unsubstantial. The court rejected this argument, and further, although it stated that it was not conclusive that the

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plan would succeed, ruled that the plan was feasible, and therefore could affirm the confirmation.

COMMENT: This matter is still alive and kicking. The lender, Bank of America Illinois, has requested a rehearing, *en banc*, before the entire circuit, and the case may be headed to the U.S. Supreme Court. The present opinion, although lengthy, containing 30 pages of the majority and 15 of the minority, bears reading because of the different issues discussed, to wit: good faith; cramdown; chapter 11 confirmation requisites; mootness after plan confirmation and implementation; feasibility; new value corollary with relation to the absolute priority rule; legislative interpretation and history with regard to amendment of prior bankruptcy provisions; impaired classes; and discrimination in two classes of unsecured claims. In addition, there is a strong dissent which also discusses these issues. The majority and minority opinions can be a primer for chapter 11 cases.

Eleventh Circuit rules that post-petition taxes assessed on pre-petition income do not constitute an administrative expense

In re Hillsborough Holdings Corp., 116 f.3d 1391 (11th Cir. 1997). Hillsborough and its 32 subsidiaries (debtors) were on a May 31st fiscal year. Debtors filed chapter 11 on December 27, 1989. Debtors filed post-petition income tax returns only for income from December 27, 1989, leaving unpaid the income earned between June 1 and December 27, 1989. The IRS claimed that the tax on income for that time was an administrative expense—due to the tax being assessed post-petition. The bankruptcy court and the district court upheld the debtors' objection and determined that the tax was not incurred by the estate. The court of appeals first ruled that the judgment of the bankruptcy court was a final appealable order under 28 U.S.C. §158(d), thus supporting prior Eleventh Circuit case law. (See *In re Charter Co.*, 778 F.2d 617, 621). The court then referred to Title 11, §507(a)(1) and (7), holding that the basic question was whether the unpaid taxes "were not assessed before, but assessable after the beginning of the case." It took issue with the government's argument, and agreed with the Eighth and Ninth circuits that the position of the United States would contradict the plain meaning of the statute. The government had argued that Section 507(a)(7) does not allow for bifurcating a single tax and giving different treatment to the bifurcated portions. It contended that to do so would allow a debtor to subvert the tax code. The Eleventh Circuit disagreed, saying that to divide the tax into two portions would have no effect on the tax liability, the rate, or the length of the tax year, but that the payment would be governed by bankruptcy law's principles and priorities. Thus, it affirmed the decision of the lower courts in denying administrative priority to the tax attributable to pre-petition income.

COMMENT: In a footnote, the court stated that it was a mystery as to how the debtors computed the tax liability. This may be the largest problem in carrying out the mandate of this case.

Absolute latest (October 24, 1997) from Eleventh Circuit on attorney fees

Gray v. Lockheed Aeronautical Sys. Co., No. 95-8459, 1997 U.S.App.LEXIS 29124, (11th Cir. October 24, 1997). Lockheed was found guilty of destroying documents. The district court imposed sanctions including the assessment of attorney fees. Lockheed claimed excessiveness for the following reasons: (1) excess of market rate, (2) legal services unrelated to document destruction, and (3) excessive, duplicative and unnecessary billings. On appeal, the Eleventh Circuit first referred to *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir., 1988) for the standards relative to hourly rates and time, defining a reasonable hourly rate as "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation." *Norman* also held that the trial court could use its discretion to exclude "excessive or unnecessary work on given tasks." The appellate court then held that the district court properly relied on affidavits and news reports drawn from the bankruptcy court for the Northern District of Georgia, as they represented "a broad cross section of different size firms and different levels of attorney experience" as well as practice other than in bankruptcy. Further, the court noted that the district court found the appellees' records reliable with no objections by the appellant other than conclusory statements. The court concluded with these salient words: "as the district court must be reasonably precise in excluding hours thought to be unreasonable or unnecessary, so should the objections and proof from fee opponents." It then affirmed the district court.

COMMENT: This was not a bankruptcy case, but as the district court used bankruptcy fee allowances as a guide, I thought it proper to review. It is noteworthy that records of bankruptcy cases are approved as a guide for other types of litigation. ■

Opinions of the General Counsel

By J. Anthony McLain, general counsel

Payment of Expert and Lay Witnesses

J. Anthony McLain

QUESTION:

Under what circumstances can an attorney pay a witness who offers testimony at trial or by deposition for an attorney's client?

ANSWER:

Witnesses who offer testimony at trial fall generally into two categories, expert witnesses and lay or fact witnesses. An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding. An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income.

DISCUSSION:

The prohibitions against paying fact witnesses and against paying experts a contingency fee are found in Rule 3.4(b) of the Rules of Professional Conduct of the Alabama State Bar, which provides that a lawyer shall not "offer an inducement to a witness that is prohibited by law." However, the Comment to this rule recognizes that the prohibition does not preclude payment of a fact witness's legitimate expenses as long as such payment does not constitute an inducement to testify in a certain way.

This Comment is consistent with DR 7-109 of the old Model Code of Professional Responsibility which specifically authorized a lawyer to pay "expenses reasonably incurred by a witness in attending or testifying" and "reasonable compensation to a witness for his loss of time in attending or testifying."

Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute "expenses of litigation" within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee. However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.

In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way. An expert witness may be paid his reasonable, usual and customary fee for preparing and providing expert testimony, provided such fee is not contingent. This opinion is consistent with previous opinions of the Disciplinary Commission on similar or related issues in ROs 81-549, 82-699 and 88-42. ■

[RO-97-02]

DISCIPLINARY NOTICE

Disability

- Jasper attorney **Larry Edward Smith** was transferred to disability inactive status, effective October 1, 1997. Smith's transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 27; Pet. No. 97-04]

Disbarred

- By order of the Supreme Court of Alabama, Orange Beach attorney **Ozmus Sigler "Tony" Burke, Jr.,** was disbarred from the practice of law in the State of Alabama, effective October 29, 1997. Burke had executed a consent to disbarment based upon his felony convictions on two counts of first-degree theft and one count of second-degree theft in Baldwin County Circuit Court. [Rule 23(a) Pet. No. 97-03]

Surrender of License

- Fairfield attorney **Yolanda Nevett-Johnson** surrendered her license to practice law in the State of Alabama by Order of the Supreme Court of Alabama effective October 11, 1997. [ASB No. 97-346(A)]

Suspensions

- Effective September 29, 1997, Dothan attorney **Charles Bruce Adams** has been suspended from the practice of law in the State of Alabama for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 97-01]
- Effective September 29, 1997, Dothan attorney **Edward Michael Young** has been suspended from the practice of law in the State of Alabama for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 97-15]
- Effective September 29, 1997, Birmingham attorney **James Newt Brown, III** has been suspended from the practice of law in the State of Alabama for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 97-16]
- Effective October 17, 1997, Alabaster attorney **Richard Wayne Mizell, Jr.** has been suspended from the practice of law in the State of Alabama for noncompliance with the Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 97-11]
- Sylacauga attorney **James Walthall Mims, Jr.** was interimly suspended from the practice of law by order of the Disciplinary Commission of the Alabama State Bar effective September 26, 1997. Mims was suspended as a result of his having practiced law for approximately five years without having obtained an annual license or having met the continuing legal education requirements of the Alabama State Bar. Mims also held himself out to be a Certified Public Accountant when he was not licensed as such by the Alabama Board of Public Accountancy. [Rule 20(a), Pet. No. 97-12]
- Montgomery attorney **Keith Ausborn** has been suspended from the practice of law for a period of 91 days by order of the Alabama Supreme Court to become effective November 1, 1997. Ausborn had previously entered a plea of guilty to having violated the Rules of Professional Conduct of the Alabama State Bar. At the time Ausborn entered his guilty plea he had 14 active disciplinary complaints pending against him, most of which involved his failure to provide adequate legal services after having been employed and paid by the client. After serving the 91-day suspension Ausborn will have to apply for reinstatement of his license. Ausborn's application for reinstatement will be considered by the Disciplinary Board of the Alabama State Bar in a formal hearing. [ASB Nos. 95-150(A), 95-159(A), 95-193(A), 96-293(A), 96-316(A), and 97-076(A)]

Public Reprimands

- Mobile attorney **Sandra Kay Meadows** received a public reprimand without general publication on September 19, 1997 for failing to hold property of a client separate from her own property in violation of Rule 1.15 of the Rules of Professional Conduct. Meadows was hired to represent an individual in a divorce proceeding. Pursuant to the terms of the divorce decree Meadows' client was to pay his former wife monthly alimony. To facilitate this the client paid Meadows a monthly installment which Meadows was to deposit into her trust account and in turn issue a check on said trust account to the former wife's attorney to satisfy the alimony obligation. However, upon receipt of one such monthly installment from the client Meadows deposited the check to her regular business account and treated it as partial payment of the client's bill for legal services. When Meadows discovered her mistake she tendered to the client a refund check drawn on her business account. However, in the meantime, the IRS had executed on her business account thereby causing the check she had issued to her client to be dishonored because of insufficient funds. Meadows was only able to replace $1,500 of the $2,500 paid to her by the client, with the client having to make up the difference to satisfy his alimony obligation. [ASB No. 95-325(A)]

- Cullman attorney **Michael Allen Stewart, Sr.** received a public reprimand without general publication on September 19, 1997 for having violated the Rules of Professional Conduct of the Alabama State Bar. Records of the Cullman County Sheriff's Department disclosed that Stewart had been arrested on 20 separate occasions since February 1993. The charges included criminal trespass, criminal mischief, assault, harassment, theft of property, interference with custody, burglary, menacing, and harassing communications.

  All of the criminal charges were brought against Stewart by his ex-wife or other members of her family and resulted from altercations involving domestic relations and child custody disputes between Stewart and his former wife. In March 1996, Stewart was given a public reprimand for having violated the Rules of Professional Conduct. When the reprimand appeared in the local newspaper, Stewart responded by issuing a statement to the media in which he claimed the arrest record relied upon by the Disciplinary Commission in reprimanding him was false and was not his arrest record but rather was that of "an African American man in Ohio with the same name." [ASB No. 96-238(A)]

- Foley attorney **Preston Lee Hicks** received a public reprimand without general publication on September 19, 1997 for having violated Rule 1.2(d) of the Rules of Professional Conduct of the Alabama State Bar which prohibits an attorney from assisting a client in conduct that the attorney should have known was criminal or fraudulent. Hicks was retained by an individual in connection with a possible bankruptcy proceeding. At the time of the employment the client had in his possession a check made payable to his employer in the amount of $4,486. Hicks suggested to the client that he endorse the check which the client did with Hicks taking possession of the check and endorsing it for deposit only to his trust account. Hicks deposited said check to his trust account and thereafter deducted from this amount his attorney fee in the bankruptcy case and an additional $600 for "negotiation with the Internal Revenue Service." Hicks then wrote his client a check for the balance of the money remaining in the trust account. [ASB No. 96-258(A)]

- Foley attorney **Preston Lee Hicks** received a public reprimand without general publication on September 19, 1997 for having violated Rule 3.10 of the Rules of Professional Conduct of the Alabama State Bar which prohibits an attorney from threatening criminal prosecution solely to obtain an advantage in a civil matter. Hicks was retained by an individual to represent her in a claim for damages done to a mobile home by the tenants to whom the client had rented the mobile home. Thereafter Hicks wrote a letter to the tenants wherein he threatened them with criminal prosecution unless they paid civil damages to Hicks' client. [ASB No. 96-257(A)]

- Pelham attorney **William Edward Swatek** received a public reprimand without general publication based upon his plea of guilty to violating Rules 1.3 and 1.4, Alabama Rules of Professional Conduct. Swatek filed suit on behalf of a client naming the wrong party defendant. Thereafter, Swatek failed to timely amend the complaint to correctly name the property party defendant resulting in summary judgment granted in favor of the named defendants against his client and his client's claims against the proper party defendant barred by the applicable statute of limitations. The respondent attorney agreed to make restitution to his client. [ASB No. 95-158]

- On September 19, 1997, Montgomery lawyer **John Thomas Horn** received a public reprimand without general publication for violating Rule 7.3 of the Rules of Professional Conduct. Horn sent a direct mail advertisement to prospective clients in Dothan, Alabama. These letters were sent in envelopes which contained the term "Advertisement" as required by the rule. There was also extraneous language on the envelope which the Disciplinary Commission concluded was calculated to undermine the objective purpose of this rule's requirements. Horn accepted the Disciplinary Commission's determination and did not demand formal charges. [ASB No. 97-85(A)]

- Jackson attorney **Larry Wayne Keel** received a public reprimand without general publication on October 24, 1997. Keel had been appointed to represent two criminal defendants in separate appeals before the Alabama Court of Criminal Appeals. Keel failed to timely file briefs in both cases. The cases were remanded to the trial court for appointment of new counsel and the matter was referred to the Disciplinary Commission of the Alabama State Bar. The matter was investigated by the Office of General Counsel of the Alabama State Bar. During the investigation, Keel failed to respond to numerous requests for information from the Office of General Counsel. Keel was eventually reinstated as appellate counsel by the Alabama Court of Criminal Appeals and allowed to file out-of-time briefs in both cases. Keel also eventually filed a response pursuant to the Office of General Counsel's repeated requests for information. However, the Disciplinary Commission determined that Keel's conduct before the Alabama Court of Criminal Appeals and during the investigation conducted by the Office of General Counsel of the Alabama State Bar evidenced a disregard of court rules and the disciplinary process and violated Rules 8.1(b) and 8.4(a), (d) and (g), Alabama Rules of Professional Conduct. [ASB Nos. 97-176(A) and 97-192(A)] ■

Delinquent Notice

Licensing/Special Membership Dues 1997-98

All Alabama Attorneys:

The dual invoice for licenses or special memberships was mailed in mid-September and was to be paid between October 1 and October 31. **IF YOU HAVE NOT PURCHASED AN OCCUPATIONAL LICENSE OR PAID SPECIAL MEMBERSHIP DUES, YOU ARE NOW DELINQUENT!**

In Active Private Practice:

Any attorney who engages in the active private practice of law in Alabama is required to purchased an occupational license. The practice of law is defined in Section 34-3-6, *Code of Alabama*, 1975, as amended. (Act #92-600 was passed by the Alabama Legislature and amended Section 40-12-49, *Code of Alabama*, 1975, effective October 1, 1992.)

Occupational License: $287.50 (includes automatic 15 percent late penalty)

Not in Active Private Practice:

An attorney not engaged in the active private practice of law in Alabama may pay the special membership fee to be a member in good standing. Judges, attorneys general, United States attorneys, district attorneys, etc., who are exempt from licensing by virtue of a position held, qualify for special membership. (Sections 34-3-17 & 18, *Code of Alabama*, 1975, as amended)

Special Membership Dues: $125 (penalty not applicable)

Direct any questions to:

Diane Weldon, membership services director, at 1-800-354-6154 (in-state WATS), (334) 269-1515, or e-mail ms@alabar.org IMMEDIATELY!

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JANUARY

8

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21-23

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22

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(Continued on page 64)

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(Continued from page 63)

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