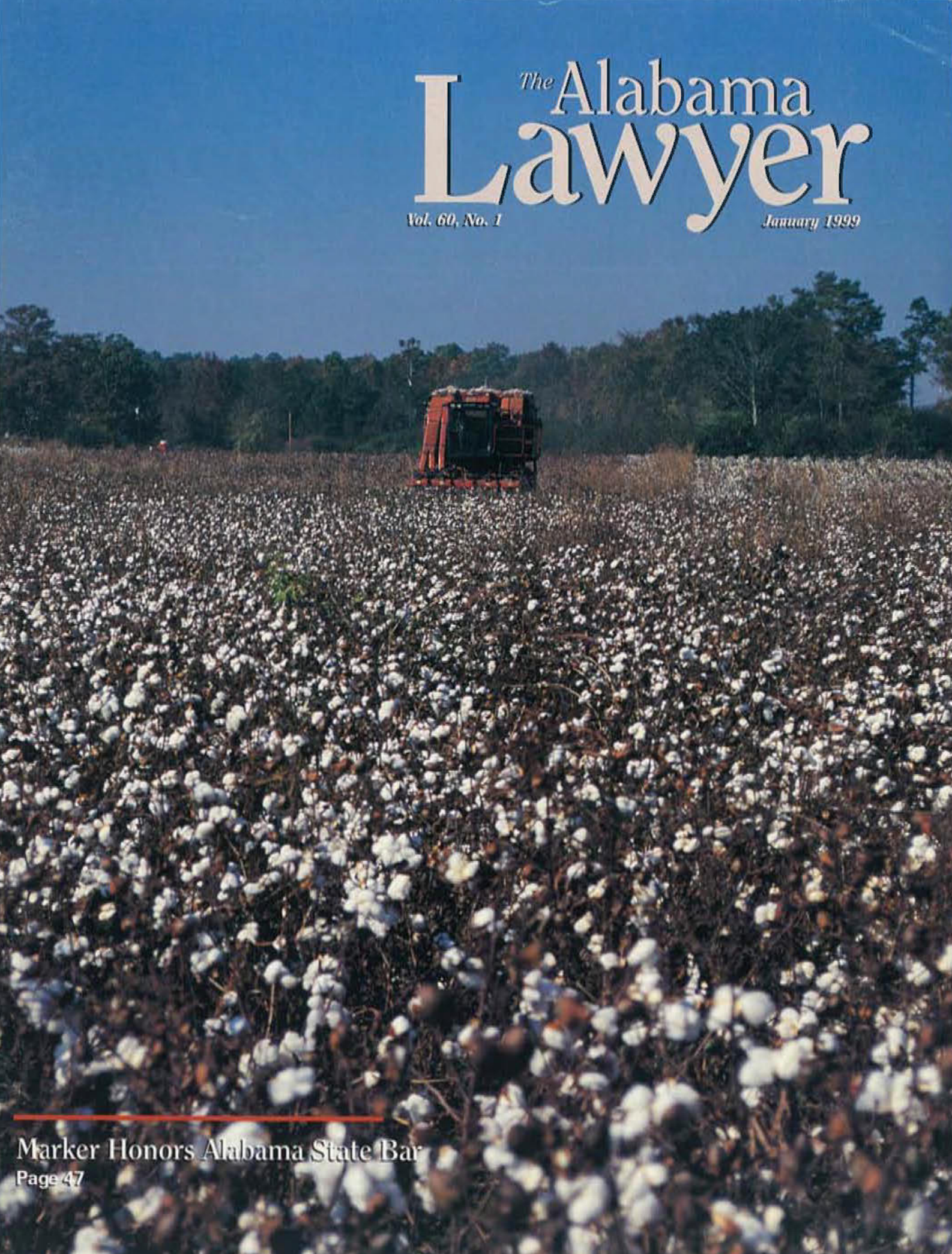

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Marker Honors Alabama State Bar

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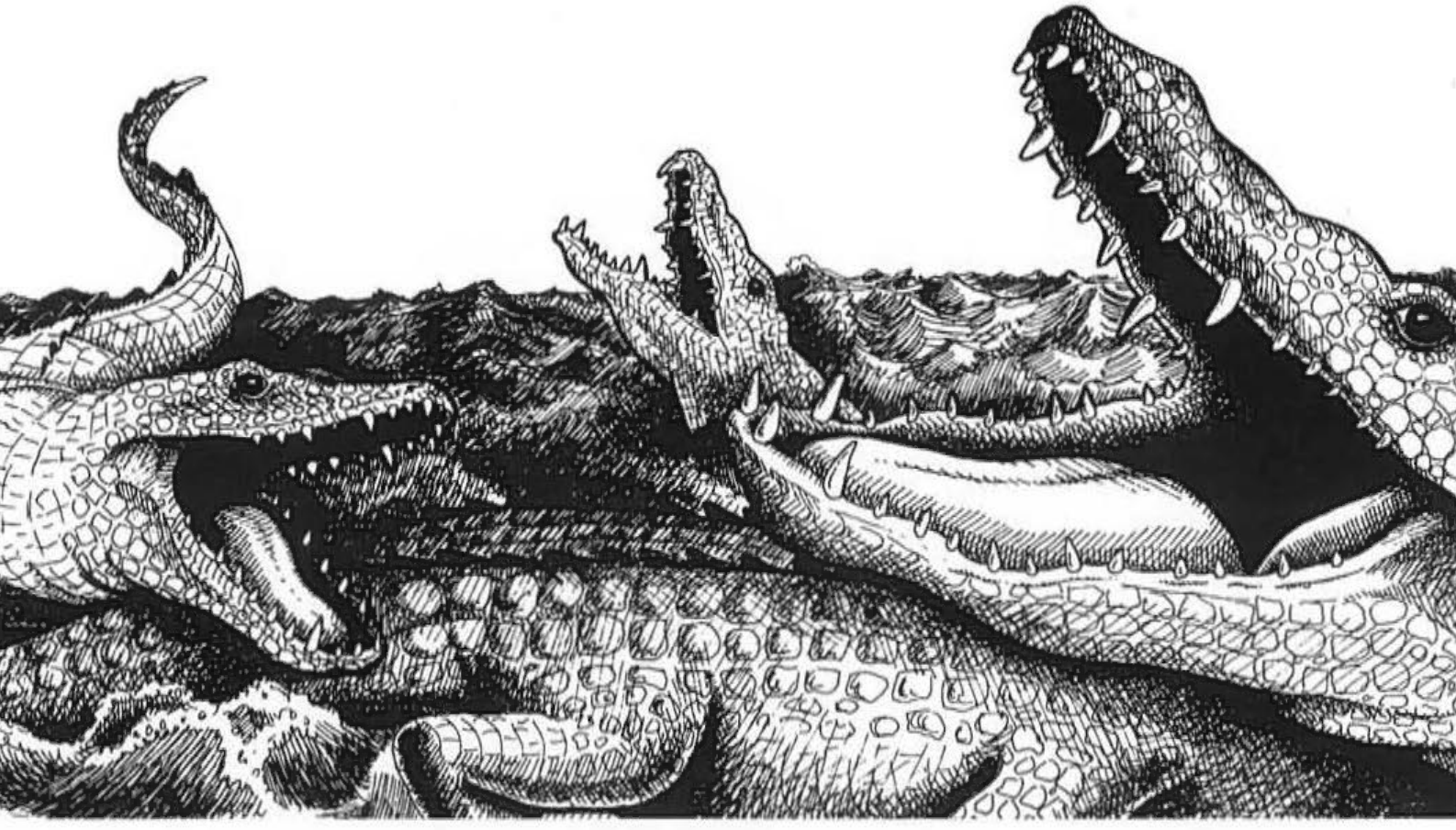

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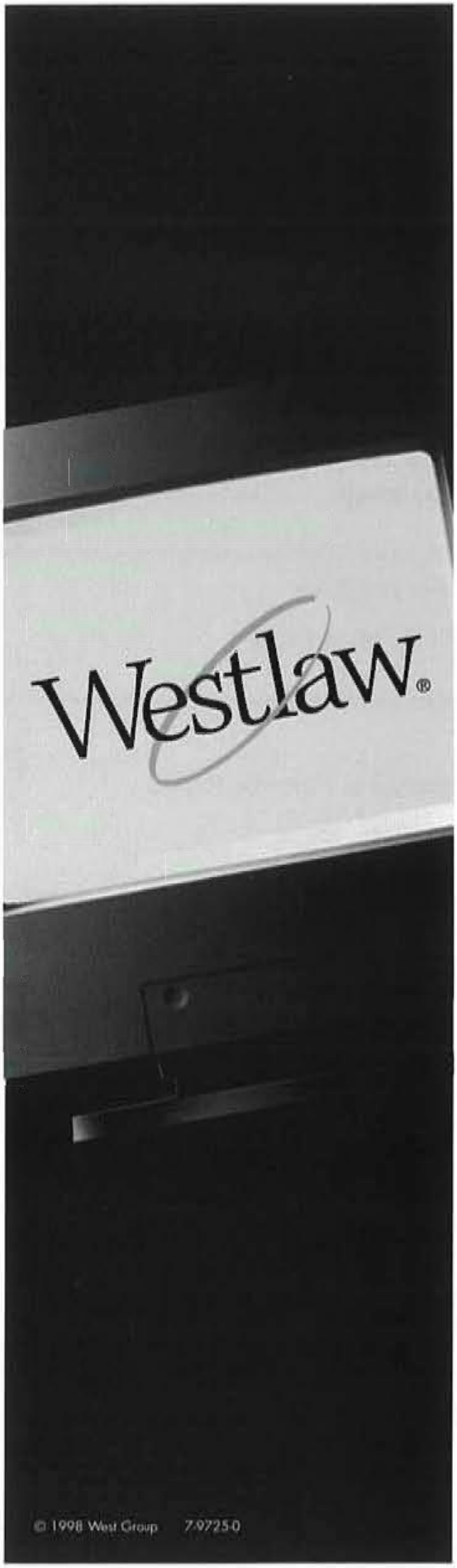

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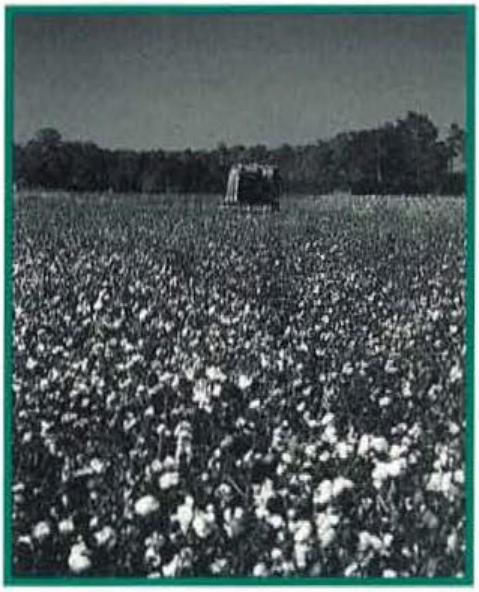

The Alabama Lawyer

Vol. 60, No. 1 January 1999

On the Cover

Cotton field in northeast Alabama. Although cotton is grown in most counties in the state, it is more concentrated in the Tennessee Valley and the Wiregrass areas. This year, Alabama cotton farmers harvested about 570,000 bales of cotton. Limestone County leads the state in cotton production, and Alabama ranks 11th nationally. Cotton is planted in the spring and mechanically harvested in the fall.

—Photo by Paul Crawford, JD, CLU

In This Issue

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(Continued from page 3)

DEPARTMENTS

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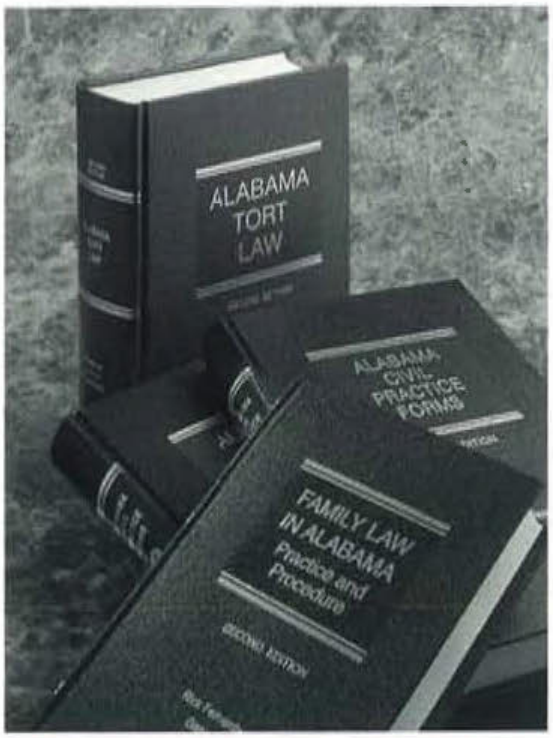

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President's Page

By Vic Lott

Are We Willing to Be Professionals?

Vic Lott

In nearly every survey of lawyers conducted over the past several years, poor perception of lawyers by the public and the lack of professionalism and civility have ranked, respectively, as the number one and number two concerns of lawyers. This is certainly the case in Alabama as reflected in the results of our 1998 survey on the profession which we reported to you in an earlier edition of *The Alabama Lawyer*. In response to your concerns, and as a part of our strategic plan, the state bar has undertaken several initiatives to address these issues. Though these two concerns are certainly interrelated, "professionalism" is of particular concern. We are actively trying to improve the public's perception of lawyers, though given the adversarial nature of our legal system, I do not think it is realistic to think that we will ever be looked upon kindly by all of our citizenry. Professionalism, on the other hand, is almost entirely up to us.

As you all know, when we speak of "professionalism," we are not just talking about ethics, or complying with the Rules of Professional Conduct, or competence, or even civility in the context of litigation and other dealings by and between lawyers. We are, in fact, talking about all of the above and more.

I have been practicing law since 1975 and I certainly remember a kinder and gentler approach to the practice of law. We worked hard, but few lawyers kept time sheets. We took several breaks during each workday to visit in the office or over a cup of coffee, and your word to another lawyer was your bond. While litigators were aggressive adversaries for their clients, I don't recall the meanspiritedness and verbal haranguing that pervades litigation today, particularly during the discovery process. On the other hand, our own surveys indicate that lawyers in Alabama and elsewhere generally make more money than in the past, even when corrected for inflation.

If we are to change our ways and try to re-instill "professionalism" into the day-to-day practice of law in Alabama, we each must be willing to make some very difficult decisions, which, in many instances, may affect our pocketbooks. Are we willing to do so?

We are driven by the clock in our practices today, particularly in the larger firms in metropolitan areas, but not only there. Are we willing to reduce hourly goals for the lawyers in our firms in order to improve their quality of life, and, perhaps, allow them to spend some of their extra time providing pro bono services to the many poor and indigent in this state who cannot access our system despite our best efforts to date?

If, after analyzing a potential cause of action on behalf of a client, we conclude that the client's case is weak or nonexistent, are we willing to advise the client of such, or do we take the case hoping to extort a small amount of damages in "settlement value"? Worse, are we willing to file complaints based on unsubstantiated allegations of a client without completing our own due diligence, to ensure that no one else beats us to the case? In general, are we willing to make decisions about the clients and the cases which we accept based on purely professional motives, or are those decisions based in significant part on economics? Far too often these days, I think our answers to all of these questions revolve around potential profitability to the lawyer or the law firm, instead of our responsibilities to each other and to our profession. How often have you heard a lawyer defend the filing of what should be categorized as a frivolous lawsuit by stating that if he had not filed it someone else would? If our justification for the pursuit of questionable claims is to fall back on the various remedies intended to protect one from the filing of "frivolous lawsuits," then I am afraid we are living by the letter of the law instead of its spirit. This is not profes-

sional conduct and it is not what we should aspire to if we are serious about "professionalism." Nevertheless, if you are a young lawyer with $50,000 or $100,000 in student debt staring you in the face, these decisions are very difficult, and they don't get any easier as the ranks of lawyers within our profession continue to swell and the competition for legal business becomes more and more intense each year.

Another area where I have grave concerns about the lack of professionalism often arises when lawyers decide to move from one practice to another. The movement of lawyers from one firm to another has become much more accepted than in the past, but the manner in which one departs a practice is governed by a number of ethical rules which, apparently, are unknown to many practicing lawyers, or simply ignored. On many occasions in the past several years, I have heard lawyers complain of partners or associates who announced that they were leaving to join another practice and that, "Oh, by the way, I went ahead and contacted all of the firm's clients and many of them are leaving with me." When this conduct is challenged, the response is often something along the lines of, "Well, they were my clients anyway," or "I had to know who would go with me before I made the decision to leave so I could evaluate my ability to make ends meet." I understand the reasoning, but this type of conduct is unethical, disloyal and unprofessional. Once again, many lawyers are making decisions like this based on financial concerns instead of thinking first of their professional responsibility to their colleagues and partners, and to their profession. Tony McLain, general counsel of the Alabama State Bar, has written an article in this edition of the *Lawyer* explaining the various ethical concepts which bear upon the departure of a lawyer from a law firm, and I recommend that each of you read this.

I am sure that all of you can think of many other examples where our professional duties seem to be at cross purposes with other personal or institutional goals. We can talk about "professionalism" all we want, but until and unless we each are willing to "talk the talk and walk the walk," as they say, professionalism will remain a lofty aspiration which we have no willingness to achieve. Yes, these are difficult decisions. Yes, some of them may even have an impact on our levels of income. But, if we are not willing to make these sacrifices, and many others that embody the "professionalism" which we seek, then we need to quit worrying about public perception, quit calling ourselves professionals, just admit that we have become a trade association focused solely on profitability, and go about our business. I don't know of many lawyers who are ready to admit to this, but we can't be hypocritical and expect the public not to call our hands. The same people whose perception about us is of great concern are the ones who see us make these unprofessional decisions every day. We can't allow ourselves to be manipulated by our colleagues or our clients to conduct that is unbecoming and unprofessional. We must be willing to draw the line in the sand and stand up for our profession if we are ever to regain the mutual respect for our profession and its professionals which we desire. ■

Executive Director's Report

By Keith B. Norman

Bar Facilities Expand for New Programs

Keith B. Norman

As the number of members of the bar has increased since the start of this decade, the bar has added programs to meet the varying needs of an expanding membership. In 1990, there were 9,300 members. As we begin this new year, our membership stands at 13,600! In less than a decade, we have added a dozen new membership benefits, e.g. Airborne Express discounts, AT&T long distance service, Pennywise Office discounts, and nine brand new practice sections. Additionally, during this period of growth, the Board of Bar Commissioners approved the creation of four major programs that were recommended by committees appointed by previous bar presidents to study existing needs within the bar. These programs are: the **Volunteer Lawyers Program** (VLP), **Law Office Management Assistance Program** (LOMAP), **Fee Dispute Mediation** and **Lawyer Assistance Program** (ALAP). The **Alabama Center for Dispute Resolution** (ADR Center) has also been operating at the state bar for the last several years.

With these newest programs, the bar offers a broad range of services designed to help increase lawyer productivity and efficiency, as well as make it easier for lawyers to fulfill our profession's commitment to public service. In essence, these programs are offered to help you be a better lawyer.

This expanded array of programs and services has made it necessary for us to reorganize existing staff and add additional staff to provide the best service possible. As a consequence, we are completing work on a portion of the third floor of the state bar headquarters building to accommodate this program growth. The third floor was constructed during the 1990 building campaign for future expansion but left unfinished. The build-out of a portion of the third floor will provide us with needed office space for VLP, LOMAP, ALAP and the ADR Center to operate efficiently. Joining these programs and the ADR Center on the third floor will be the **Alabama Law**

(Continued on page 10)

ALABAMA EVIDENCE 1998 COURTROOM MANUAL

By Glen Weissenberger


CHAPTER 102

Rule 102. Purpose and Construction

Rule 102 reads as follows:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Comment

Rule 102 is identical to Fed. R. Evid. 102. The Alabama Rules of Evidence were modeled after the Federal Rules, except where different treatment was necessary for Alabama practice. Accordingly, cases interpreting the Federal Rules of Evidence provide persuasive authority in the Alabama courts for interpreting Rules of Evidence.

Rule 102 directs courts to apply a construction to the Rules of Evidence which will attain the stated goals of fairness to the parties throughout the administration of proceedings and the elimination of unjustifiable expense and delay. The Rule also provides courts with power to expand the Rules of Evidence through case law to receive growth and refinement of the Rules of Evidence in order that truth may be ascertained and fair results obtained. By granting discretion to the trial court in admitting evidence, the drafters tacitly recognized that the inflexible application of any system of rules may result in unfairness.

A system of rules that does not allow for some discretion on the part of a trial judge in making evidentiary rulings lays the groundwork for its own obsolescence. As methods of communication and interaction between individuals change, the Rules of Evidence must accommodate this progress. Rule 102 is designed to insure the continued validity of the Alabama Rules of Evidence by providing that the evidence as to the trier of fact.

between the parties is available to the trier of fact.

Rule 102 relies on the discretion of the trial court to fulfill its stated objectives. The court's discretion is, of course, subject to review under Rule 103.

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Executive Director's Report

(Continued from page 8)

Foundation (ALF). Also included with the expanded facilities on the third floor will be a state-of-the-art video-conference facility. This facility will be available for bar committees, task forces and sections to use for conducting meetings. When not in use by bar groups, the video-conference facility will be available for use by bar members on a fee basis.

We anticipate that the third floor work will be completed this month and that furnishings will be delivered and installed by early February. We are excited about the completion of this new space and the opportunity for these programs to operate in offices that are more than makeshift. Our past and present officers and commission members should be praised for their foresight in constructing a bar facility to accommodate our profession's future needs for growth. These individuals also deserve our thanks for their stewardship.

Because of their wise management of the bar's resource, the build-out of the third floor will be accomplished without the need for a dues increase. The Alabama State Bar is poised to enter the next century with programs and services that can help make the legal profession even stronger in the future. ■

BAR BRIEFS

• Hope Place, Huntsville's shelter for victims of domestic violence, has named attorney **Stacey Haire** "Volunteer of the Year." The annual honor goes to a person whose gift of time and energy provided exceptional help for HOPE Place's clients.

In presenting the award, HOPE Place Executive Director Kathy Wells noted that Ms. Haire routinely goes far beyond what her job requires. "Once a month she comes to the shelter so that clients can ask her legal questions on legal matters," Ms. Wells said. "She's also the advisor to HOPE Place's Legal Assistance Program, and she trains our other volunteers in child custody, protection order and other domestic violence laws."

Stacey Haire

Haire received her J.D. from the University of Alabama School of Law in 1995 and joined HOPE Place as a staff attorney. She joined Legal Services of North Central Alabama in 1996. In April 1998, the women's shelter in Dothan nominated her for recognition by the Department of Justice during National Crime Victims' Week in recognition of the successful appellate brief she wrote for the Dothan shelter.

• Assistant United States Attorney **Michel Nicrosi** was selected as one of the five recipients of the 1998 Younger Federal Lawyers Award sponsored by the Federal Bar Association. Now in its 31st year, this award program is designed to recognize outstanding young federal attorneys selected from among those nominated by agency heads, general counsels and fellow attorneys throughout the country and overseas. Civilian and military lawyers who have at least three years of continuous federal service and are under the age of 36 are eligible for the award. A panel of distinguished federal judges selected the recipients. Nicrosi, who is the chief of the criminal division of the U.S. Attorney's Office in Mobile, was honored at the Federal Bar Association's Annual Convention in San Antonio in October.

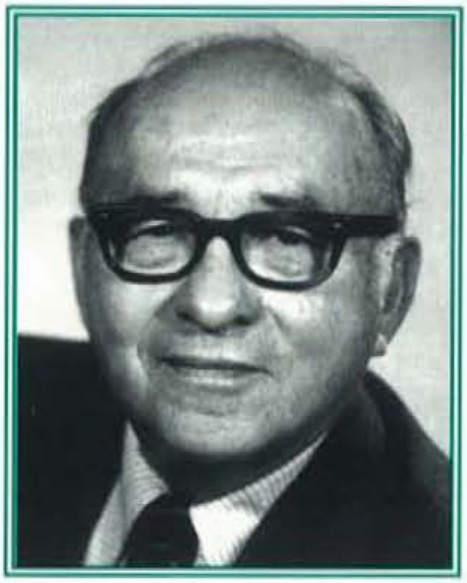
• **Charles A. Stewart, III** has been elected president of the Alabama Defense Lawyers Association (ADLA). Practicing in the Montgomery office of Sirote & Permutt, Stewart was voted into office at the group's annual meeting recently held in Birmingham.

J. Marland Hayes, newsletter editor, makes presentation to R. Austin Huffaker, Jason Smith and Thomas W. Scroggins

• The **Environmental Law Section** of the Alabama State Bar recently announced the winners of its 1998 Environmental Law Essay Contest. The first prize of $300, second prize of $150 and third prize of $100 were awarded to **Thomas W. Scroggins** of Montgomery, **Jason Smith** of Reform and **R. Austin Huffaker** of Montgomery, respectively. All three are seniors at the University of Alabama School of Law and students of William Andreen, professor of environmental law.

The annual contest is in its fourth year and is open to all students enrolled in an Alabama law school. Essays may have been submitted for course credit or for law reviews, but not as part of paid employment. The first place essay, by Scroggins, entitled "CERCLA Liability and Insurance Indemnity," appeared in the fall issue of *The Enlaw*, the quarterly newsletter of the Environmental Law Section. ■

MEMORIALS



Judge Robert W. Gwin, Sr.

Whereas, Robert W. Gwin, retired Jefferson County District Judge, passed away on June 8, 1998, after a distinguished legal and judicial career in Birmingham, Jefferson County, Alabama; and,

Whereas, the Birmingham Bar Association desires to honor his name and recognize his contributions to the legal profession; and,

Whereas, Robert W. Gwin was born on August 19, 1912, in Bessemer, Alabama, and graduated from Bessemer High School in 1929. Judge Gwin graduated from Howard College, now Samford University, in 1934, and received his L.L.B. degree from George Washington University in 1939. Upon his return to Birmingham, Judge Gwin began his legal career as a partner with Howard Sullinger in Bessemer, Alabama. He was appointed Assistant U.S. Attorney in 1943 and in 1946 became associated with the law firm of Beddow & Jones. Judge Gwin became a partner in the firm of Beddow, Gwin & Embry in 1951 and after serving as Assistant District Attorney for both the Bessemer and Birmingham divisions of Jefferson County, was appointed as the presiding judge of Criminal Court of Jefferson County in 1965. He later became president of the Alabama District Judge's Association. After retirement as the presiding judge, Judge Gwin received appointments by the Chief Justice of the Alabama Supreme Court to return to advice judicial duty for 15 continuous years; and,

Whereas, while a partner in the law firm of Beddow, Gwin & Embry, Judge Gwin participated in numerous noteworthy criminal trials with Roderick Beddow, Sr., including the defense of Albert Fuller, one of several defendants accused of the murder of Albert Patterson, the then-Democratic nominee for Attorney General; and,

Whereas, while serving as district judge for 18 years, Judge Gwin was a member of the Executive Committee for Judicial Reform in the State of Alabama and participated in the establishment of the current Unified Judicial System; and,

Whereas, Judge Gwin was a member of the Democratic Executive Committee, delegate to the Democratic National Convention at four conventions and was a member of the Jefferson County Board of Education; and,

Whereas, Judge Gwin served as chairman of a citizen's committee working toward the incorporation of the City of Vestavia Hills, also serving as its city attorney and city judge, was a member of the Vestavia Hills Historical Society, the Vestavia Hills Exchange Club, the Episcopal Church of the Ascension and The Club. He was also a Mason, a Shriner and a member of the Elks Club; and,

Whereas, Judge Gwin was predeceased by his wife of 57 years, Harriet Wise Gwin, and is survived by their four children, Ann Gwin Keith, Robert W. Gwin, Jr., Gay Gwin Fowler and David White Gwin. He is also survived by his beloved wife, Virginia Hanners Gwin, whom he married on January 4, 1997.

Be it, therefore, resolved, by the Executive Committee of the Birmingham Bar Association that the legal community was well served by Judge Robert W. Gwin, both as an active practitioner and advocate for his clients in the practice of law and as a fair and impartial judge.

— Stephen D. Heninger
President, Birmingham Bar Association

Jack G. Paden

Jack G. Paden was a member of the Bessemer Bar Association at the time of his death on October 27, 1998. I first knew Jack when he was a member of the trust department of AmSouth, formerly First National Bank of Birmingham. This was in the early seventies and then, as always, Jack displayed his unique ability to be a Southern gentleman. Jack was always a favorite lawyer of the Bessemer Bar Association, always affable, always pleasant and a pleasure to be around. He loved his family, spoke of them often, particularly his grandchildren, and of his place in North Carolina.

Jack attended Birmingham Southern College, graduating in 1947. He received the Bachelor of Law and Doctor of Juris Prudence degrees from the University of Virginia in 1949 where he was editor of the *Virginia Law Review*. He continued his education at Columbia University and the Northwestern Trust Banking School.

Jack was an active member of the following professional associations; The Bessemer Bar Association, the Alabama State Bar and American Bar Association. His excellence in law was recognized by citing him as a member of the Fellow of International Academy of Trial Lawyers

and the American College of Trial Lawyers. While at AmSouth, he was appointed vice-president and chief executive officer of the trust department.

As a prominent citizen of the community, Jack was associated with the following: chairman of the board of Hillcrest Foundation, president of Birmingham Southern College National Alumni Association, president of the Alabama Ballet Company, board member of the Alice B. Stephen's Performing Arts Center, and a member of the board of the American Counsel for the Arts. Jack served on the board of directors for the National Alliance for Research of Schizophrenia and Depression and director of P&M Bank Corporation. In addition, he served on the board of the Birmingham Civic Ballet, the Birmingham Museum of Art, the Birmingham Metropolitan Arts Association, as former president of Town and Gown Theater, and on the UAB Arts Board. Jack was a supporter of Birmingham Summerfest, Birmingham Festival Theater, Terrific New Theater, and the Birmingham Opera.

Recent honors were cited by the Alabama Association of Independent Colleges and Universities and the Counsel for the Advancement of Private Colleges in Alabama which recognized his influence in education. In June of 1998, Birmingham Southern College honored him with the Doctor of Laws Honoris Causa.

Jack is survived by his wife, Marjorie C. Paden; daughter Lisa P. Gaines and son-in-law, Rad; grandsons Dewer and Paden Gaines; brother Robert E. Paden and sister Elizabeth P. Holt.

Jack will be missed by all of his friends and family and particularly, I will miss seeing his smile at a local favorite restaurant.

— Clifford W. Hardy, Jr.
President, Bessemer Bar Association

George Rushton Baggett
Dayton, Ohio
Admitted: 1953
Died: May 11, 1998

Thomas Merle DeRose
Tallahassee, Florida
Admitted: 1979
Died: September 4, 1998

Joseph Michael Hayes
Hartford, Connecticut
Admitted: 1968
Died: March 16, 1998

Robert Sommerville, Jr.
Montgomery
Admitted: 1929
Died: November 18, 1998

William Dunn Mallard
Atlanta, Georgia
Admitted: 1971
Died: August 25, 1998

Charles Albert Nix
Westpoint, Georgia
Admitted: 1951
Died: October 10, 1997

Jack Merrell Nolen, Sr.
Fayette
Admitted: 1952
Died: September 24, 1998

Jack Gideon Paden
Bessemer
Admitted: 1949
Died: October 27, 1998

James Reese Phifer
Tuscaloosa
Admitted: 1940
Died: October 25, 1998

Wesley Reid Smith
Albuquerque, New Mexico
Admitted: 1940
Died: September 27, 1998

ALABAMA STATE BAR

1998 Fall Admittees

STATISTICS OF INTEREST

Number sitting for exam	571
Number certified to Supreme Court of Alabama	399
Certification rate*	69.9 percent

Certification Percentages:

University of Alabama School of Law	95.4 percent
Birmingham School of Law	38.5 percent
Cumberland School of Law	84.3 percent
Jones School of Law	48.6 percent
Miles College of Law	10.3 percent

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

Fall 1998 Admissions Ceremony

Remarks Given By Perry O. Hooper, Sr., chief justice of the Alabama Supreme Court

Congratulations on becoming a member of one of the finest professions known to man. Congratulations, also, to those who helped you to get where you are–your parents, grandparents, a wife, a husband–perhaps, a good friend. We certainly want to remember your excellent professors who worked with dedication in teaching you the fundamentals necessary to becoming a lawyer.

All of this makes you unique, because relatively very few people have attained what you have attained. In 1997 the population of Alabama was 4,141,410. There were only 8,231 licensed attorneys in Alabama, a very small part of the population. There are those who mistakenly say there are too many lawyers in the United States of America. As long as we are a free people, there will always be a great need for a very substantial number of lawyers. Just how good a lawyer you will be, will be entirely up to you–limited only by your desire. The greater the desire–the greater the lawyer.

You are unique, because you belong to the same profession that a large percentage of our founding fathers belonged. There is a kinship and a relationship in the legal profession. It is the nature of lawyers to believe in the freedoms of the individual. Our very reason for existence is to protect those rights and freedoms.

There was a great spirit that inspired our founding fathers. There is hardly a grade school student who will not quote along with you these words: "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." The more you think on these beautiful words, the more meaningful they become.

What students don't seem to remember are the last words of that great Declaration of Independence: "And for the support of this Declaration and a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor."

I've often thought of those words, Divine Providence, and the full meaning. The best way I know is to describe the part that two of those signers played–Thomas Jefferson and John Adams. One the principle author, Jefferson, the other, John Adams. The Declaration was executed on July 4, 1776. Both of these men later became presidents of the United States of America. The two men died exactly 50 years later on the exact same day of July 4, 1826.

Have you ever thought of the odds at that time of such an occurrence? We hear a lot about lotteries these days. I made an inquiry about the odds of winning a lottery. I am told that the odds of winning the power ball lottery are over 90 million to one and that the Florida lottery odds are over 30 million to one. Pretty big odds, but the odds of Thomas Jefferson and John Adams, both writers of the Declaration, which was executed on July 4, 1776, both later becoming presidents, and both dying on the same date of the Declaration, July 4, 50 years later are, I am told are 20 trillion to one. What unbelievable odds. There are those who take this as chance or just an unusual occurrence. Based on the evidence, Perry Hooper, Sr., who also happens to be chief justice of Alabama, can only conclude this to be Divine Providence to a watching world.

I sometimes find myself concerned that we do not fully comprehend what those men launched in 1776, even though we are recipients of that which was passed on to us. I read an article in the *Albany Law Review* that I believe makes us all understand ourselves a little better. The article was written by a lady who is a justice of the Ohio Supreme Court.

Justice Evelyn Lunberg Stratton *was born in Bangkok, Thailand, to American missionaries. She writes: "I grew up without television or movies; I never saw Perry Mason win a case.*

"As a child, I went to mission-run boarding schools in South Viet Nam and Malaysia; the flower children and Viet Nam protesters were merely pictures in a magazine.

"At age eighteen, I came to America alone, with $500, expecting a land of rebellion, protest, and negativity, my images from the news magazines I had read. Instead, I found a country filled with pride, hope, and opportunity.

"I watched America send its youth to South Viet Nam to fight for someone else's freedom, to die on foreign soil. I wept when our missionaries, giving lives of sacrifice to others, were killed by Viet Cong just to make a statement.

"We, as missionary children, railed against the American press for their harsh treatment of My Lai, while never reporting the daily atrocities of the Viet Cong, of our village pastors hung upside down from trees and their guts cut out while their children watched.

"I worked my way through college and law school. In the countries of my youth, working in the rice paddies would have been my main opportunity.

"America is generous to its poor with grants and scholarships; my childhood friends only went to college if their parents were wealthy.

"I blazed trails as the first woman in law firms and on the trial bench; I still walk five paces behind my husband, my Asian culture inbred.

"My mother, when pregnant, had to take a ten-hour train ride to get to a decent hospital in Bangkok; I owe my life to that trip, because I was born of an emergency Cesarean section birth. During my pregnancy, I could call my doctor, my core of friends, at every twitch or imagined pain.

"When my mother was in a local Thai hospital for a broken back, there were no MRI machines, no myleograms. Families of other patients slept on the floors in the halls or under the beds of their sick relatives.

"We debate issues of insurance and underinsurance, of greedy plaintiff trial lawyers versus 'fat cat' insurance companies; in my youth, no one even had insurance.

"We demand the highest standards of our physicians, suing at the slightest appearance of malpractice. There, no one sued doctors; no one malingered to

recover undeserved benefits. No one received workman's compensation for legitimate injuries.

"Here, product liability suits shape product safety, raise standards, sharpen consumer attention to quality, sometimes resulting in outrageous punitive damages. Companies in many countries have no goal but profit, no guide except greed, no recourse for those injured by their product.

"As judges, we struggle with piles of zoning ordinances, EPA restrictions, OSHA regulations, building codes. In other countries, factories and apartments collapse from poor construction.

"Our poor live in government housing, having only a black and white television, a ten-year-old car, food stamps; their poor have only the clothes on their backs.

"I watch the press in this country uncover scandals, expose graft, highlight government weakness; in my youth, the paper sang only praises for every government action.

"Here, we ponder where police power ends and constitutional rights begin; in other lands, governments scoffs at such a dilemma while the prisoner languishes for years, still not charged with a crime.

"We hotly debate issues of judicial restraint versus judicial activism; judges elsewhere may only be puppets who rubber-stamp government actions.

"Here an unpopular decision draws a harsh editorial; an unpopular decision against certain parties in Columbia can result in death.

"As a Justice of the Ohio Supreme Court, I cast votes in cases of free speech; I hate what they say, but their right to say it freely in this country reminds me of the forced silence of others in my youth. My memory is vivid of the Buddhist monk, crimson robes aflame, sitting in lotus position, making his protest by his death.

"I cast votes at work on esoteric issues of tax and public utilities, zoning regulations and lesser included offenses of murder; I go home and thank God for the privilege of living in this great country."

When I read things like this, I am reminded of the words of Jeremiah Denton when he got off the plane in the good ole U.S.A., after having been kept in a box like prison for several years by the enemy in North Vietnam. His words: **"God Bless America."**

Thomas Payne

At the time of the signing of the Declaration, Thomas Payne wrote these words:

"These are the times that try men's souls. The summer soldiers and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that stands it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph. What we obtain too cheap, we esteem too lightly: 'tis dearness only that gives every thing its value. Heaven knows how to put a proper price upon its goods; and it would be strange indeed, if so celestial an article as ***freedom*** *should not be highly rated."*

Ben Franklin

Dr. Benjamin Franklin, while departing the Constitutional Convention of 1787, was asked, "Well doctor, what have we got? A republic or a democracy?" "A republic," the good doctor replied, "if you can keep it."

Both of these seminal documents are necessary for a free people–the Declaration of Independence and the Constitution.

As we think on what Justice Stratton had to say, we fully realize the importance of freedom, the importance of necessity for a written constitution, the necessity of the legal profession to maintain those liberties and the necessity of having to fight, as did Jeremiah Denton, from time to time to protect those liberties.

My friend Bob Ingram, a former U. S. Marine, who is a well known and outstanding columnist, wrote this about two months ago in the *Montgomery Advertiser* on the occasion of the death of C. C. "Jack" Owen, who served for years on the Public Service Commission and who was my dear friend.

"Time nibbles away at ranks of World War II veterans in politics.

"There were countless others after World War II, many of them with distinguished combat records, who came home from what has been accurately called 'the last good war' and were successful in politics.

"Now there are so few of them left, in and out of office, and with the death of Jack Owen there is one less.

"Once there were scores of World War II veterans holding state office in Alabama. Today there are only three–House Speaker Jimmy Clark of Eufaula, state Rep. Pete Turnham of Auburn and Supreme Court Chief Justice Perry Hooper, Sr.

"Clark and Turnham are retiring at the end of their present terms and then there will be just one."

Conclusion

His article reminds me that it was on August 13, 1943, the day I left Birmingham for the United States Marine Corps, that President Franklin Roosevelt dedicated the Jefferson Memorial and identified him as the "apostle of freedom." Written on this memorial are these words:

"For I have sworn on the alter of God eternal hostility against every form of tyranny over the mind of man."

All lawyers have a right to be proud to be lawyers and, also, be proud to have such an excellent heritage.

Since our Declaration and our written Constitution, we have held this country together under unbelievable circumstances. Freedom is not perfect–law is not perfect, but freedom is something we must constantly fight for and justice is something we must constantly strive for under the law. There will always be weeds in the yard. We just have to dig them.

I lost a lot of dear friends in World War II, just as I lost dear friends in the Korean and Vietnam wars. It reminds me and you of the price that many have paid for the freedoms that you and I enjoy.

Freedom has never been free nor will it ever be free. You in this room have a great heritage from people like Thomas Jefferson and John Adams–outstanding lawyers. You and I are about to take a step into the 21st century, a new millennium. I am convinced that the land of liberty–America–must maintain its principles and be an example to the watching world. You can be an outstanding example in preserving and protecting our liberties by how you conduct yourselves as lawyers. Never, never forget that *character does count.* The challenge is up to you. You can be only limited by your desire to do good and to be a good lawyer.

May God bless you and your journey in the legal profession. ■

Alabama State Bar 1998 Fall Admittees

Adkins, Brandy Ann
Alcorn, Lana Kay
Allen, Frederick Wendell
Andreae, Eric Christopher
Aparicio, Ricardo
Armistead, Tara Jean Barr
Arrington, Andrew Darrell
Artrip, Eric James
Atchison, James Derek
Atkins, Sarita Tyienne
Atwood, Melissa Kay
Austin, Jeffrey Brian
Axtman, Sarah Lynne Adam
Ayers, Hope Michelle
Azar, Thomas Joseph Jr
Bailie, Matthew John
Baker, Susannah Leigh
Barker, William Cory
Barnett-Jefferson, Renita Faye
Bartee, Sidney Travis
Bates, Mary Ellen
Bazemore, Jarrod Braxton
Bearden, Nolanda Hatcher
Beaverstock, Jeffrey Uhlman
Belt, Keven Curtis
Bennekin, Maricia Danielle
Benton, Richard Barry
Bergman, Andrew Dean
Berry, Edward Joseph
Billingsley, Dana A Helton Moore
Bitzer, Windy H Cockrell
Blair, William Stuart
Blaudeau, Francois Michel
Block, Andrew David
Block, Rebecca Williams
Bonar, Jason James
Bone, Roxana Lea
Boone, Jess Street
Bottegal, Jennifer Jo
Boykin, Scott Ashley
Brake, Ryan Geoffrey
Brooks, Leonard D III
Brooks, Taylor Patrick
Brown, Carol Necole
Brown, Keith Adrian
Brumlow, Jeffrey Wayne
Bruner, Rhonda Denise
Burkhart, Joseph Elkins
Burroughs, Dolores Campbell
Butrus, Gregory Paul
Cain, Christopher Lee
Cain, Ellen Mary Maus
Caliento, Robert Stephen
Calvert, Jimmy Ray
Carey, Terry Michael
Carmack, Bettie Jean
Carmichael, Thomas Lavon
Carter, Maxwell Douglas
Casey, William Julius II
Cataldo, Rebecca Inez Byrd
Cigelske, Bryan Neil
Cigelske, Kathryn McCain
Clark, Brian David
Clark, Kevin Eugene
Clemmer, Michael Jay
Coale, James Eric
Cochran, James Christopher
Cole, Kenneth Bridges Jr
Comer, James Michael
Condra, James Jeffrey
Connally, Joel Davidson
Coody, Emily Michele
Coomes, James Joseph
Couch, Steven William
Cox, Gregory Richard
Crawford, Barton Thomas
Crawford, Silas Jr
Croft, Christopher Kyle
Crutchfield, William Todd
Cunningham, Russell McWhorter IV
Cusick, Richard Anthony
Dagley, David Lynn
Daniel, Jeffrey Stuart
Davenport, Caroline Armstrong
Davis, Kathy Rawding
Davis, Kelli Robinson
Davis, Kelvin Leonard
Davis, Randal Kevin
Dawsey, Marc Cyrus
Dawson, Charles Cook Jr
Deakle, John Mark
Deakle, Margaret Molette
Dean, Brenton Lawrence
DeGeurin, George Michael Jr
DeGeurin, Virginia Gladys Patrick
Derry, Kasandra Lee
Dixon, Hallie Scott
Donahue, David Patrick
Dorough, Lisa Hudson
Dorsett, Suzanne Carol
Dowdey, Carl King III
Draper, Jonathan Lee
Dukes, Richard Sears Jr
Duncan, William Casey
Dunn, Charles Hardy
Dye, Clinton Elworth III
Dykes, Jonathan Tobias
Erwin, Charldon Mark
Estelle, Kimberly Sue
Estes, Brent Michael
Estes, Christopher Belk
Estes, Raymond Timothy
Evans, Matthew Lawrence
Everage, Charles Ali
Falkner, Leigh Grace
Farris, Hugh Douglas Jr
Ferguson, Honey Renee
Ferguson, James Holt
Fields, Jennifer Lynn
Flynn, Patrick Smith
Ford, John Douglas
Franklin, Matthew Thomas
Franks, John Richard Jr
French, George Courtney
Fulmer, Christopher Tracy
Furnish, Tara Lynn
George, Melisa Christine H
Golson, Ginger Lorraine
Golston, Larry Apall Jr
Gonzales, Jacquelyn Ann
Goodwin, James Alan
Gorham, Julie Ann
Gosney, Michael Conrad
Graves, Anna-Katherine
Graves, Irene Michelle N
Graves, John Patrick
Gray, John Philip
Gray, Kenneth Frank Jr
Green, Brendette Laurione Brown
Green-Barnett, Cheryl Delois
Greer, Joseph Scott
Gregory, Michael Hagel
Gregory, Sandra Eubank
Grill, Matthew Warren
Grimes, Charles Todd
Grimmett, Cindy Sue
Guilian, Roger Crane
Hackney, James Patrick
Hahn, Nancy Clara
Hale, Bradley Mitchel
Hall, Stephen Hamilton
Ham, John Charles
Hammick, Michael Alan
Hanson, Alan Ross
Harbison, Katherine Anderson
Hardin, Peter James
Harman, Kathryn Lea
Hart, John Webb
Hartkoff, Jeffrey Jay
Hartley, Elizabeth Ingalls
Hartley, Gerald Wade Jr
Hatfield, David Andrew
Havercroft, Jeffrey Venton
Hayes, Donald Eugene Jr
Head, Jonathan Byron
Head, Thomas Richard III
Heartsill, James Abner III
Helms, Tara Laine
Hendrick, Jeulia Lorraine Eatman
Hendrick, Robert Wayne
Hendrickson, Holly Jean
Hensley, Michael Alan
Henson, Willard Hutchens
Herring, Joe Evans Jr
Hester, Anna Kathryn Hood
Hester, Jeffrey Grant
Hieftje, Tosca Maria
Higey, Todd Michael
Hill, Mary Ammons
Hinton, Brian Robert
Hodges, Brooke Parker
Hollaway, Eric Shane
Holston, Amy Stolarczyk
House, Mark Edward
Howard, Nicholas Leon III
Howland, Lori Lee
Hudson, Margaret Kelley
Hughes, Donnie Clay Jr
Hughey, James Fletcher III
Humphrey, Mark Alan
Hunter, Gina Pearson
Hunter, Mary Scott
Hyde, Clinton Hassell
Ingram, Jerry Dana
Irby, Robert Brent
Irons, Tammy Leigh
Jackson, Christy Leigh Walker
James, Claudine Rae
James, Walter Kendrick
Jander, Markus Alexander
Jenke-Huber, Erika Lynne
Jenkins, Theresa Renee
Jester, William David
Johnson, Anne Rawlings Moody

Alabama State Bar 1998 Fall Admittees

Johnson, Gary Charles
Johnson, Gregory Allen
Johnson, Kimberly Jean
Johnson, Lisa Michele
Johnson, Nathan Warren
Johnson, Tonya Gail
Johnston, John Christopher
Johnston, Sharon Andrew
Johnstone, Francis Inge
Jones, Claire Cook Tinney
Jones, Matthew Boyd
Keel, James Michael
Key, Brian Christopher
Kilborn, Benjamin Heustis Jr
Kilgore, Christina Diane
Kilgore, Richard Allen Jr
King, James William
Kirk, Brandy Michele Clark
Kisor, Hazel Theresa Rankin
Knowlton, Donald Duane II
Kobler, George Ponds
Kuehnert, Joel Michael
Lackey, Patricia Sue
Lamberth, Kelley Pirnie
Lamberth, Richard Edwin
Langland, John Brian
Langley, Eric Brandon
Lanier, Stephanie Leigh
Larkin, Benjamin Thomas
Lawley, Hugh Cannon
Leathers, Jackie Pearl
Lee, Gregory Wayne
Lee, Robert Joseph
Lee, Tracie Breshun
Liggan, Kristy Lynn
Linn, Stacy Anne
Lloyd, James Barto III
Luckado, Michael Shannon
Lynn, Larry Allen Jr
Macey, Marilyn Hilda Hopewell
Manasco, Jason Lee
Mann, Brian Daniel
Mapp, Gayle Nicole
Margeson, Leigh Ann
Martin, James Douglas Jr
Massey, Ralph Edward III
Mattson, Gerald Arthur Jr
Mays, Mary Elizabeth
McCain, Jennifer Ruby
McDaniel, Emily Scott
McDonald, Jennifer Elaine
McGhee, Venus Sharee
McGowin, Donald Keiron
McInerney, Kerry Patrick
McWaters, Megan Lee
McWhorter, David Keith
Meadows, LaTasha Antoinette
Merritt, Stanley Leland Jr
Miles, Jonathan Eric
Miller, Christopher Ray
Miller, David Earl Jr
Millican, Shannon LeAnne
Minor, Anna Rebecca
Moncla, Dan Paul
Montgomery, Connie Sue
Moore, Jamie Lee
Moore, Shannon Matthew
Moore, Thomas Shealer
Moore, Thomas Wilson Jr
Moss, James Woodson
Moss, Patricia June
Mullins, Robert Albert Jr
Murphy, Michael Joseph
Naftel, James Philip II
Newsom, Heather Elizabeth
Newsome, Burton Wheeler
Nguyen, Manh Hung
Nix, ShaDel
Noe, Glenn Carlyle
Northrup, Ryan Thomas
O'Dell, David Brian
Ortega, Juan Carlos
Owens, Katherine Leigh
Paris, Beverly Diane
Parker, George Robert
Patterson, Paul Winton II
Payne, Blake Alan
Payton, Dana Leigh
Pearce, Allyson Carole
Peeples, Lloyd Chandler III
Penfield, Jennifer Lee Renfro
Perkins, Alfred Huey Jr
Pettis, Kimberly Dawn Lindsey
Phillips, Michael Scott
Phillips, Robert Buchanan II
Phillips, Spencer Antonio
Phillips, Will Grimes Sr
Pittman, James Bradford Jr
Plouff, Thomas O'Connor
Pomeroy, Jeffrey Matthew
Poole, William Luther Chandler
Pope, Cecilia Ann
Porco, Geraldine Janet
Powell, Daniel Chappell
Pritchett, Stephen Nix Jr
Proctor, Richard Derek
Pruitt, Eric Lloyd
Quarles, Tyrone
Radney, William Larkin IV
Ransburg-Brown, Cynthia
Reaves, Samuel Timothy
Redmond, Jerry Dancy Jr
Reed, Charles Wallace Jr
Reed, Michele Elaine
Reid, Kirkland Edward
Resavage, Todd Preston
Reynolds, Misty Claire DeMott
Rice, Jann Alicia Jackson
Ricks, Jennifer Wise
Riley, Richard Jon
Robbins, Elizabeth Elsing
Roberts, Thomas Atkinson Jr
Robinett, Matthew Whittle
Robinson, Donald Taylor
Robinson, Kenneth Jerome
Ross, Alyssa Lynn Wardrup
Rounsaville, Bradley Boone
Rowell, June Kristen
Royal, Tamara
Royster, Brian Speegle
Russell, Brion Dejon
Santangini, Laura Alison
Schlenker, Jonathan Scott
Schurger, Eric David
Seibel, Anne Marie
Sheedy, Brett Scott
Shires, Kevin Tannehill
Shook, Chadwick Lester
Shores, Jackson Graham Jr
Sigler, David Andrew
Sigman, Adam Joshua
Sims, James Marvin
Slate, Amy LeAnn
Slaughter, Marjorie Padgett
Smartt, Philander Knox III
Smith, Christopher Nathan
Smith, James Michael
Smith, Paul Douglas Jr
Smith, Taffiny Louise
Smith, Teri Kaye Hayes
Smith T, Mandi Norton
Snyder, Reginald Lavon
Sowell, Stephen Liles
Speirs, Verne Hanning
Spencer, Fred Jr
Staggs, Kimberly Glee Minor
Stewart, Joseph Edward Bishop
Stewart, Scott Forester
Stewart-Magee, Candace Burnes
Stith, Jennifer Dawn
Stokes, Tammy McClendon
Stover, Fallany Olay
Strength, Brian Paul
Styres, Jeffery Allan
Sykes, Paul Matthew
Talmadge, Joseph Daniel Jr
Terrell, James Michael
Terry, Angela Paige Dawson
Till, Misty Carol
Tinker, Nikki Michelle
Trousdale, Jeremy Nelson
Tucker, Joseph Luther
Tufts, Cynthia Ann Delaney
Tuley, Jay Stewart
Tuley, Scarlette Moore
Turner, Brian Donald
Varner, Kathryn Hardwich
Ventimiglia, Tiziana Maddalena
Waller, Benjamin Earl F Bishop
Waller, Tara Sherrell
Walsh, Stephen Andrew
Walthall, Howard Philip Jr
Ward, Brandon Scott
Warfield, Alan Michael
Washburn, Laura C Parchman
Wayne, Desiree Welborn
Webb, Linda Suzanne
Wedgworth, Phillip Garrison
Weil, Sheila Ann
Weldon, Michael David
Weldon, Stephen Scott
Wells, David Robert
Wells, Heidi Anne Stark
Wells, Jimmy Donald
White, Susan Brennan
White, William Calvin II
Wilkes, James Steven
Williams, Anthony Brett
Williamson, Theresa Norris
Willis, John Perry IV
Wilson, Debra Black
Winters, Raymond Howard
Wise, Martha E Waters
Woodke, Lane Hines
Woodruff, Johnny Leon
Wright, Joshua Jon
Yarbrough, Milton Edward III
Young, John David
Young, Leilus Jackson Jr
Zalontz, Henry Phillip
Zehrt, Ruth Lynn Ridgeway
Zimmerman, Joseph Paul

Lawyers in the Family

Brian D. Turner (1998), James D. Turner (1974), Louise I. Turner (1953) and James A. Turner (1952)
admittee, father, grandmother and grandfather

David Earl Miller, Jr. (1998), Cindy Bagby (1974), Henry Arthur Leslie (1948), Leslie Miller Klasing (1992), Daniel R. Klasing (1991), and Henry Arthur Leslie (1981)
admittee, mother, grandfather, sister, brother-in-law, and uncle

Taylor Brooks (1998) and J.R. Brooks (1971)
admittee and father

Claire Tinney Jones (1998), John A. Tinney (1974) and John Gunn (1992)
admittee, father and uncle

Michael A. Hensley (1998) and Quinton R. Bowers (1956)
admittee and father-in-law

Jason Lee Manasco (1998) and Deborah Sanders Manasco (1984)
admittee and wife

William C. White, II (1998) and Jerry M. White (1965)
admittee and father

Holly Hendrickson (1998) and R. David Hendrickson (1976)
admittee and father

Stacy Anne Linn (1998) and Nancy Linn Eady (1998)
admittee and sister

Jarrod B. Bazemore (1998) and Michael L. Roberts (1977)
admittee and cousin

Lawyers in the Family

Brent Irby (1998), Rusty Irby (1992) and Russell Irby (1968)
admittee, brother and father

Suzanne Webb (1998), James Webb (1956) and Kendrick E. Webb (1987)
admittee, father and brother

Valerie Kisor (1992) and Theresa Kisor (1998)
daughter and admittee

Anna-Katherine Graves (1998), Patrick Howard Graves, Jr. (1972) and Donald Massey James (1977)
admittee, father and uncle

Henry P. Zaiontz (1998) and Richard L. Jones (1990)
admittee and cousin

Julie Gorham (1998) and Charles W. Gorham (1968)
admittee and father

R. Edward Massey, III (1998) and R. Edward Massey, Jr. (1972)
admittee and father

Charles C. Dawson, Jr. (1998), Charles C. Dawson, Sr. (1969) and Judge Francis A. Long, Sr. (1985)
admittee, father and cousin

Lawyers in the Family

William Poole (1998) and Robert Poole (1993)
admittee and brother

Jeffrey Brian Austin (1998) and Melinda Morgan Austin (1996)
admittee and wife

Leonard D. Brooks, III (1998), Leonard D. Brooks, Jr. (1981), Judge Robert A. Sapp (1949), June Sapp Brooks (1986), Robert A. Sapp, Jr. (1982), and John Mark Sapp (1981)
admittee, father, grandfather, mother, and uncles

Amy L. Slate (1998), Ralph E. Slate (1949), Beth Slate Poe (1983), Cynthia Slate Cook (1987), and Shelly Slate Waters (1989)
admittee, father and sisters

Hugh D. Farris, Jr. (1998) and Hugh D. Farris (1955)
admittee and father

James Michael Keel (1998) and Virginia K. Hopper (1989)
admittee and sister

Mary-Ellen Bates (1998) and John Burdette Bates (1963)
admittee and father

Irene M. Graves (1998) and John P. Graves (1998)
wife and husband co-admittees

Cynthia D. Tufts (1998) and Robert A. Tufts (1997)
admittee and husband

Emily M. Coody (1998), Judge Charles S. Coody (1975) and Richard H. Marks (1997)
admittee, father and fiance'

Lawyers in the Family

Milton Edward Yarbrough, III (1998) and Milton Edward Yarbrough, Jr. (1981)
admittee and father

Scott Forester Stewart (1998) and Judge Donald W. Stewart (1971)
admittee and father

Mary Elizabeth Mays (1998) and Joseph B. Mays (1978)
admittee and father

Leigh Owens (1998) and Paul D. Owens (1969)
admittee and father

James F. Hughey, III (1998) and James F. Hughey, Jr. (1970)
admittee and father

Daniel Chappell Powell (1998) and C. Glenn Powell (1966)
admittee and father

Matthew W. Grill (1998) and Larry R. Grill (1979)
admittee and father

John Webb Hart (1998) and James E. Hart, III (1996)
admittee and brother

Clinton Hassell Hyde (1998) and David T. Hyde, Jr. (1967)
admittee and father

Gina Pearson Hunter (1998) and Ginger Tomlin (1991)
admittee and mother

Jess Street Boone (1998) and Robert E. Boone, Jr. (1965)
admittee and father

Francis Inge Johnstone (1998) and Douglas Inge Johnstone (1966)
admittee and father

Lawyers in the Family

Brenton Lawrence Dean (1998), Howard F. Bryan, III (1974) and Judge Howard F. Bryan (1972)
admittee, grandfather-in-law and father-in-law

Edwin Lamberth (1998), Kelley Lamberth (1998) and Judge Bill Thompson
husband and wife co-admittees and father-in-law/stepfather

Jonathan T. Dykes (1938) and Judge James O. Haley (1936)
admittee and grandfather

Frederick Wendell Allen (1998) and Fred W. Allen (1968)
admittee and father

Howard P. Walthall, Jr. (1998) and Howard P. Walthall, Sr. (1987)
admittee and father

Patricia S. Lackey (1998) and Gary W. Lackey (1981)
admittee and brother

Initial Domestic Corporation Franchise Tax Returns and Permit Application

Newly organized domestic corporations are required to file their initial domestic corporation franchise tax return and permit application with the Alabama Department of Revenue and remit the taxes and fees due within ten days of incorporation. The effective date of incorporation is the date that the articles of incorporation are filed with the judge of probate.

Corporations that do not file their return and make payment within ten days of incorporation are subject to penalties and interest. Additionally, a corporation that does not comply after 180 days of incorporation may be certified for involuntary dissolution.

The initial return and permit applications are available at the office of each judge of probate, the Revenue Department's Taxpayer Service centers and on the department's Web site, *www.ador.state.al.us*. For additional information or assistance, contact the Alabama Department of Revenue, Individual and Corporate Tax Division, Domestic Franchise Tax Section, (334) 353-7923.

About Members, Among Firms

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

About Members

James Barry Abston announces the opening of his office at Eastside Square, Suite 2B, Huntsville, 35801. Phone (256) 534-3336.

Tameria S. Driskill announces the opening of her office at 246 South 8th Street, Gadsden, 35901. The mailing address is P.O. Box 8505, 35902. Phone (256) 546-6557.

James N. Thomas announces the opening of his office at 405 Elm Street, P.O. Box 974, Troy, 36081. Phone (334) 566-2181.

G. Patterson Keahey announces the opening of his office at 2323 2nd Avenue, North, Suite 200, Birmingham, 35203-3758.

Patrick M. Lamar announces the formation of **Patrick M. Lamar, L.L.C.** His office is located at the Civic Plaza, Suite 311, 307 Clinton Avenue, West, Huntsville, 35801. Phone (256) 534-4355.

John B. Harper, deputy regional counsel, Southeast Region, Internal Revenue Service, announces his retirement after 29 years of government practice.

Among Firms

Russell Drake, Joe R. Whatley, Jr., Glen M. Connor, Andrew C. Allen, Maureen K. Berg, Peter H. Burke, Charlene P. Cullen, W. Todd Harvey, and **Richard P. Rouco** announce the formation of **Whatley Drake, L.L.C.** Offices are located at 1100 Financial Center, 505 20th Street, North, Birmingham, 35203-4601. Phone (205) 328-9576.

Lloyd, Schreiber & Gray, P.C. announces that **E. Britton Monroe, Kathy R. Davis, Heidi Stark Wells** and **Michael J. Clemmer** have become associates. Offices are located at Two Perimeter Park, South, Suite 100, Birmingham, 35243. Phone (205) 967-8822.

Dillard, Goozee & King announces that **Allwin E. Horn, IV** has joined the firm as an associate. Offices are located at 2015 2nd Avenue, North, The Berry Building, 4th Floor, Birmingham, 35203. Phone (205) 251-2823.

Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A. announces that **Lisa Hudson Dorough** has become an associate. Offices are located at 2121 Highland Avenue, South, Birmingham, 35205. Phone (205) 939-0033.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Stephen A. Walsh** and **Mark E. House** have become associates. Offices are located at Park Place Tower, 2001 Park Place, North, Suite 700, Birmingham, 35203. Phone (205) 716-5200.

Kaufman & Rothfeder, P.C. announces that **Eric Lloyd Prultt** has become an associate. Offices are located in the Aliant Bank Center, 2740 Zelda Road, 3rd floor, Montgomery, 36106. Phone (334) 244-1111.

Schoel, Ogle, Liles & Upshaw, L.L.P. announces that **Jann J. Rice** has become an associate. Offices are located at 600 Financial Center, 505 North 20th Street, Birmingham, 35203. Phone (205) 251-7000.

Sintz, Campbell, Duke & Taylor announces that **Kathryn W. Petersen** and **Michael D. Anderson** have become associates. Offices are located at 3763 Professional Parkway, Mobile, 36609. Phone (334) 344-7241.

Roy F. King, Jr., Nancy C. Drummond and **Marjorie O. Dabbs** announce the formation of **King, Drummond & Dabbs, P.C.** Offices are located at 100 Centerview Drive, Suite, 180, Birmingham, 35216. Phone (205) 824-7882.

Hubbard, Smith, McIlwain, Brakefield & Shattuck, P.C. announces that **Herbert E. Browder** has joined as a partner. Offices are located at 808 Lurleen Wallace Boulevard, North, P.O.

Box 2427, Tuscaloosa, 35403-2427. Phone (205) 345-6789.

Harris, Cleckler, Rogers, Hollis & Bumgarner, P.C. announces a name change to **Harris, Cleckler, Hollis & Bumgarner, P.C.** Offices are located at 2007 3rd Avenue, North, Birmingham, 35203-3347. Phone (205) 328-2366.

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

Rosen, Cook, Sledge, Davis, Carroll & Jones, P.A. announces a name change to **Rosen, Cook, Sledge, Davis, Carroll & Cade, P.A.** Offices are located at 2117 River Road, Tuscaloossa, 35401. Phone (205) 344-5000.

Ball, Ball, Matthews & Novak, P.A. announces that **Emily M. Coody, Brandy A. Adkins** and **George R. Parker** have become associates. Offices are located at 2000 Interstate Park Drive, Suite 204, Montgomery, 36109. The mailing address is P.O. Box 2148, 36102. Phone (334) 387-7680.

Bennet & Bennet, P.L.L.C. announces that **Donald L. Herman, Jr.** has joined the firm. Offices are located at 1019 Nineteenth Street, N.W. Suite 500, Washington, D.C., 20036. Phone (202) 530-9800.

Leitman, Siegal & Payne, P.C. announces that **James S. Robinson** has become an associate. Offices are located at 600 North 20th Street, Suite 400, Birmingham, 35203. Phone (205) 251-5900.

Campbell, Waller & McCallum, L.L.C. announces that **David M. Loper** has become a partner, **Janet R. Varnell**, formerly associated with Aldridge & Associates has become *of counsel*, and **R. Brent Irby** has become an associate. Other members are **Andrew P. Campbell, Jonathan H. Waller, Charles A. McCallum, III, Martha Reeves Cook,** and **Elizabeth Barger Anthony.** Offices are located at 2000A SouthBridge Parkway, Suite 330, Birmingham, 35209. Phone (205) 803-0051.

Donald, Randall, Donald & Tipton announces that **John R. Franks, Jr.** has become an associate. Offices are located at the AmSouth Building, Ninth floor, 2330 University Boulevard, Tuscaloosa, 35401. The mailing address is P.O. Box 2155, Tuscaloosa, 35403. Phone (205) 758-2585.

Pittman, Hooks, Dutton & Hollis, P.C. announces that **Steve Couch** has joined the firm. Offices are located at 1100 Park Place Tower, Birmingham, 35203. Phone (205) 322-8880.

Morris, Haynes, Ingram & Hornsby announces that **Nancy L. Eady** has become an associate. Offices are located at 131 Main Street, Alexander City, 35010. The mailing address is P.O. Box 1660, 35011-1660. Phone (256) 329-2000.

Cusimano, Keener, Roberts & Kimberley, P.C. announces that **Jarrod Braxton Bazemore** has become an associate. Offices are located at 153 S. Ninth Street, Gadsden, 35901. Phone (256) 543-0400.

Bradley Arant Rose & White, L.L.P. announces that **Paul M. Sikes** joined the

firm as an associate. Offices are located at 2001 Park Place, Suite 1400, Birmingham, 35203-2736. Phone (205) 521-8000.

Espy, Nettles, Scogin & Brantley, P.C. announces that **Bradley M. Hale** has become an associate. Offices are located at 2728 8th Street, Tuscaloosa, 35401. Phone (205) 758-5591.

Potts & Young, L.L.P. announces that **Debra Hendry Coble** has become a partner. Offices are located at 107 E. College Street, Florence, 35630. Phone (256) 764-7142.

David R. Baker and **J. Brooke Johnston, Jr.** announce the opening of their offices at One Independence Plaza, Suite 322, Birmingham, 35209. Phone (205) 263-9050.

Pruett & Waldrup, L.L.C. announces that **Teri Hayes Smith** has become an associate with the firm. A new office is located at 121 Piedmont Highway, Suite E. Centre, Gadsden, 35960. The mailing address is P.O. Box 892. Phone (256) 927-3904. Other offices are located at 111 S. Fourth Street, 35901. Phone (256) 546-9666.

Janecky, Newell, Potts, Wilson, Smith & Masterson announces that **Harry V. Satterwhite** has joined the firm. Offices are located at the AmSouth Bank Building, 107 Saint Francis Street, Suite 3300, Mobile, 36602. Phone (334) 432-8786.

Balch & Bingham announces the addition of 11 new associates, **William S. Blair, Gregory P. Butrus, J. Chris Cochran, Bingham D. Edwards, Theresa R. Jenkins, Eric B. Langley, J. Thomas Longino, IV, Jennifer R. McCain, J. Beth Moscarelli, Shannon L. Powell,** and **Wendy A. Zarzaur. Fred Eames, B. Judson Hennington, III** and **Robert L. Loftin, III** have been added as *of counsel*. Offices are located in Birmingham, Hunstville, Montgomery and Washington, D.C.

Capell, Howard, Knabe & Cobbs, P.A. announces the change of its name to **Capell & Howard, P.C.**

Franklin W. Cordery announces that he has closed his private practice and is now serving as an assistant district attorney for the **12th Judicial Circuit** (Elmore, Autauga and Chilton counties).

Henderson & Butler announces that **Larry O. Daniel, Jr.** has joined the firm. The address is 200 W. Court Square, Suite 972, Huntsville 35801. Phone (256) 536-4457.

Otts, Moore & Jordan announces that **James Eric Coale** has become an associate. Offices are located at 401 Evergreen Avenue, P.O. Box 467, Brewton, 36427. Phone (334) 867-7724. ■

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

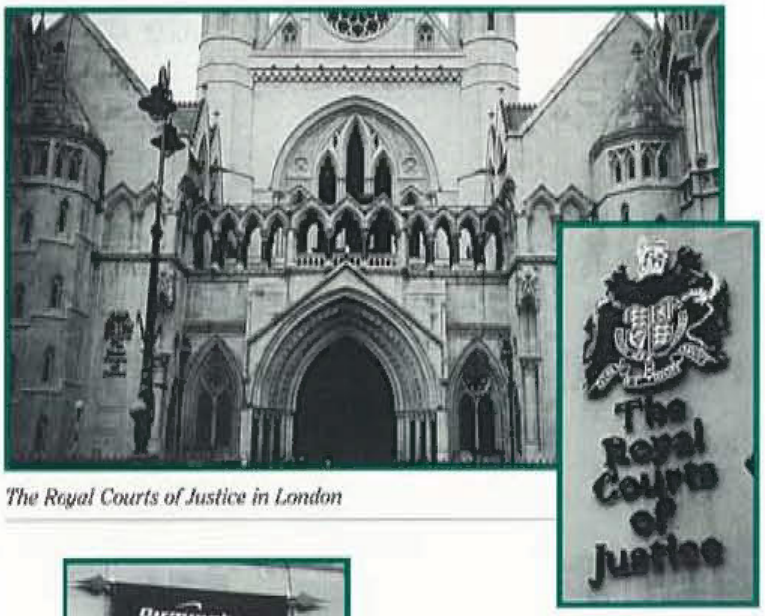
The British Isles

Once again, a vacation trip caused a minor delay for courthouse article author Sam Rumore's next installment on Alabama courthouses. This time, the destination was to the ancestral home of American jurisprudence and the Common Law–the British Isles.

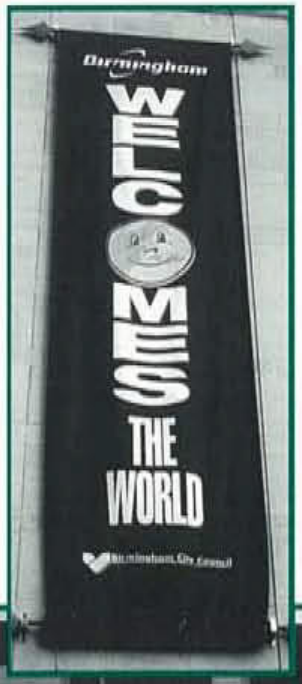
Sam and Pat spent two weeks in England and Ireland. One highlight was staying with the family of an old high school classmate who is the military attaché to the American ambassador. Another highlight was seeing an old college classmate who is the Deputy Chief of Mission at the American embassy in London.

The vacation included visits to castles, palaces, cathedrals, abbeys, museums, theatres, and the Tower of London. Particularly interesting was the morning spent in Birmingham, England, the namesake city of Birmingham, Alabama. Of course, Sam and Pat saw the Royal Courts of Justice and photographed numerous courthouses.

The regular feature "Building Alabama's Courthouses" will continue in the next issue of *The Alabama Lawyer.* ■



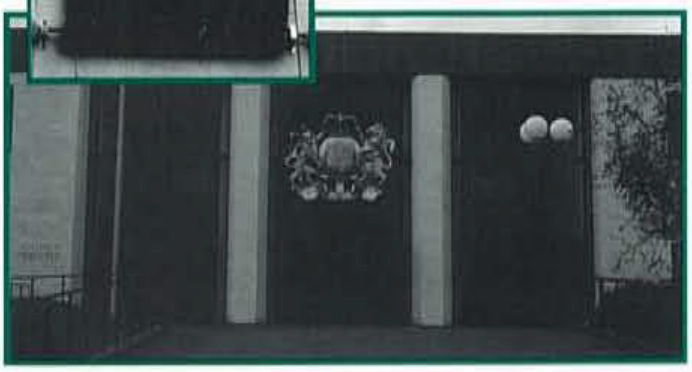
The Royal Courts of Justice in London



Banner from Birmingham, England

The Inns of Court School of Law

Touring London on a double-decker sightseeing bus



The Crown Court building at Coventry, home of Lady Godiva

The interior of the court at Leicester, England with visitors from Alabama

The symbol of modern England's law and order

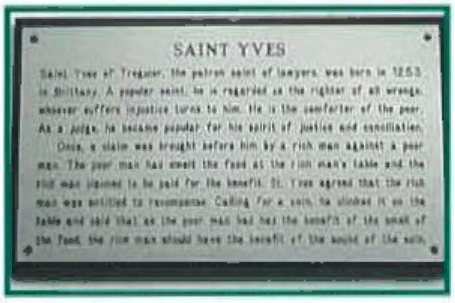
The symbol of medieval England's law and order

The courthouse at Huntingdon, built in 1745

Marker at the Huntingdon Courthouse noting the birthplace town of Oliver Cromwell

The courthouse at Warwick–note the flower boxes in the windows.

Courthouse at Tralee, Ireland



Sign outside lawyer's office in Tralee, Ireland

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.

Opinions of the General Counsel

By J. Anthony McLain, general counsel

In recent weeks, the Office of General Counsel has received numerous opinion inquiries concerning two growing areas of ethical concern for the practitioner: collection of child support arrearage and third-party audits of lawyer billings.

The Disciplinary Commission has recently rendered formal opinions dealing with these two areas of practice. In an effort to keep the members of the Alabama State Bar informed as to the position of the Commission on these issues, both formal opinions are reproduced in this issue of *The Alabama Lawyer*.

J. Anthony McLain

Contingency Fee Contract in Collection of Child Support Arrearage Cases Impermissible Absent Extraordinary Circumstances

Question:

In 1991, the Disciplinary Commission of the Alabama State Bar issued formal opinion RO-91-05 which held that an attorney may enter into a contingency fee agreement to collect child support arrearage where the client is unable to pay a reasonable attorney's fee on a non-contingent basis. Since the issuance of this formal opinion, there have been two significant developments which are material to the conclusions reached therein. First, Alabama appellate courts have held in a number of recent child support cases that the money due for support belongs to the child, not the custodial parent. Second, there have been federally mandated changes in child support proceedings which require the Department of Human Resources to provide collection services to any individual regardless of his or her economic status or ability to pay. The question presented is whether, in light of these developments, RO-91-05 continues to accurately reflect the position of the Disciplinary Commission of the Alabama State Bar with regard to the collection of child support arrearage on a contingency fee basis.

Answer:

In view of changes in the responsibilities of the Department of Human Resources for the collection of back child support, the Disciplinary Commission has difficulty envisioning any circumstance under which a contingency fee contract would be in the best interest of the child. However, the Commission does not, at this time, conclusively prohibit such contracts out of concern that unforeseen circumstances could result in a situation where a contingency fee contract is the only means available to the child to collect past due child support and would, therefore, be in the child's best interest.

Discussion:

Rule 1.5(d) of the Rules of Professional Conduct of the Alabama State Bar prohibits contingency fees in any "domestic relations matter." The rationale behind this prohibition is a public policy concern that a lawyer-client fee arrangement should not discourage reconciliation between the parties. Obviously, this rationale has limited applicability in child support arrearage cases, and most states allow attorneys to collect child support arrearage on a contingency fee basis where the right for child support has already been judicially established and the sole purpose of the representation is to collect past due payments. However, these states all impose conditions upon the use of contingency fees in arrearage cases similar to the conditions imposed by the Disciplinary Commission in RO-91-05.

The concluding paragraph of RO-91-05 provides as follows:

> "For these reasons, it is our view that it would not be a violation of Rule 1.5(d) to charge a contingent fee in a case involving collection of arrearages in unpaid child support, subject to the following conditions:
>
> (1) that the fee is fair and reasonable;
>
> (2) that the client is indigent and no alternative fee arrangement is practical, and

(3) there are no means available to the client (similar to those mentioned in your question) to collect the arrearage."

While RO-91-05 continues to accurately reflect, in substance, the position of the Disciplinary Commission, the Commission is of the opinion that, in light of the changes in DHR's mandate and responsibilities, further restrictions on the use of such contracts would appear to be appropriate. It is, therefore, the opinion of the Disciplinary Commission that an attorney may enter into a contingency fee agreement to collect child support arrearage only when to do so is in the best interest of the child and, even then, subject to the specific conditions discussed below.

One of the conditions imposed in RO-91-05 on contingency fees in arrearage cases is that there be "no means available to the client (similar to those mentioned in your question) to collect the arrearage." The opinion request makes specific reference to an income withholding order which may be obtained from the court for payment of a modest fee. More significantly, at the time RO-91-05 was issued, the Department of Human Resources provided child support arrearage collection services only to custodial parents who met the department's indigency requirements. It would appear, therefore, that at the time the Disciplinary Commission issued RO-91-05, the Commission intended that an attorney not accept a contingency fee if the custodial parent qualified for the same services to be provided free of charge by DHR. However, since that opinion was issued, there has been a federally mandated change in child support procedures which now requires the Department of Human Resources to provide arrearage collection services to any custodial parent regardless of his or her economic status. It is, therefore, no longer feasible to tie the propriety of contingency contracts to whether the custodial parent would qualify for free DHR services, since all custodial parents may now avail themselves of these services.

In view of the fact that collection of back child support is provided free by the state, the Disciplinary Commission is of the opinion that only in the rarest of instances should an attorney accept such collection cases on a contingent basis. The determinative consideration should always be the best interest of the child, which may not necessarily coincide with the desires or expectations of the custodial parent. An attorney should not enter into a contingency fee agreement without giving serious consideration to whether an hourly or contingent fee is in the best interest of the child.

The Commission frankly has difficulty envisioning any circumstance under which a contingency fee contract would be in the best interest of the child. However, the Commission does not, at this time, conclusively prohibit such contracts out of concern that certain circumstances, of which the Commission is not cognizant and cannot at this time foresee, could result in a situation where a contingency fee contract is the only means available to the child to collect past due child support and would, therefore, be in the best interest of the child. The Commission emphasizes again, however, that an attorney should not enter into a contingency fee agreement unless the attorney can conclusively make a good faith determination that the interests of the child are best served by such an agreement.

The Disciplinary Commission is further of the opinion that, in those rare instances under which an attorney can make a good faith determination that a contingency contract is in the best interest of the child, the attorney must advise the parent, in writing, that the collection of child support is available at no expense to the parent or child through either the Department of Human Resources or the Child Support Collection Division of the District Attorney's Office. In fact, the Disciplinary Commission is of the opinion that the parent should be advised of the free service offered by the state, regardless of whether the representation is on a contingency or set fee basis. The Disciplinary Commission is also of the opinion that failure of the attorney to adequately inform the parent of the availability of DHR or the DA's services, or any attempt by the attorney to discourage or dissuade the parent of using such free services, would constitute a violation of the Rules

of Professional Conduct of the Alabama State Bar, including, but not necessarily limited to, Rule 1.4(b). Attached to this opinion as an addendum is an acknowledgment form which gives notice to the parent of the availability of free services and also contains an affirmation by the parent that the attorney has discussed and explained the option of using the Department of Human Resources or the District Attorney's Office to collect the arrearage. The Disciplinary Commission of the Alabama State Bar is of the opinion that Rule 1.4(b) requires every attorney who proposes to enter into a contingency contract or a set fee contract to collect past due child support to obtain the signature of the custodial parent on this acknowledgment.

Another requirement of RO 91-05 is that the fee must be fair and reasonable. The Disciplinary Commission has serious concerns that, in the absence of significant militating factors to the contrary, any contingency fee which exceeds the actual value of the services rendered by the attorney, when calculated on the basis of a reasonable hourly rate for time actually expended, would be excessive. In fact, the Disciplinary Commission is of the opinion that there should be a rebuttable presumption that any contingency fee which exceeds the actual value of the services calculated on an hourly basis must be deemed excessive. In other words, in those rare instances where a contingency fee is determined to be in the best interest of the child, the fee may not exceed the amount the attorney would receive were he em ployed on an hourly basis. Any attorney who accepts a child support arrearage case on a contingency fee basis should carefully consider the amount of his fee and should make a good faith determination that the fee is reasonable when measured by the above standard and the factors set forth in Rule 1.5. All attorneys who accept contingency fee arrearage cases should be aware that their fees are subject to scrutiny by the Office of General Counsel and the Disciplinary Commission to determine compliance with the Rules of Professional Conduct and this opinion. Any attorney whose fee is challenged as being unreasonable will bear the burden of showing that the above standard, as well as the criteria in Rule 1.5, have been applied in determining the fee.

The final condition imposed by RO 91-05 is that the client must be truly indigent and, therefore, unable to pay for the legal services on any basis other than a contingency fee. If the client is able to pay the prevailing hourly rate for an attorney's services, the attorney has an ethical obligation to work for an hourly rate fee rather than taking a substantial portion of the back child support which, in virtually every instance, would result in a much higher attorney's fee than would an hourly rate. Again, the determinative criteria is the best interest of the child. When an attorney takes a percentage of back child support as his fee, he deprives the child for whom the child support was intended of obviously needed resources. As referenced in the question, Alabama Courts have held, and repeatedly confirmed in recent decisions, that child support belongs to the minor child, not the custodial parent, and the parent may not, by agreement with the non-custodial parent or others, deprive the child of the monetary support to which the child is entitled. Representative of such cases is *Floyd v. Edmonson*, 681 So.2d 583 (Ala.Civ.App. 1996), which holds, in pertinent part, as follows:

> "'Although child support is paid to the custodial parent, it is for the sole benefit of the minor children.' *State ex rel. Shellhouse v. Bentley*, 666 So.2d 517, 518 (Ala. Civ.App. 1995).
>
> 'Parental support is a fundamental right of all minor children .... The right of support is inherent and cannot be waived, even by agreement.' *Ex parte University of South Alabama*, 541 So.2d 535, 537 (Ala. 1989). 'A child has an inherent right to receive support from his parents, and that right cannot be waived by the parents by agreement even if a waiver of support provision is included in the final decree.' Davis & McCurley, *Alabama Divorce, Alimony & Child Custody Hornbook* § 22-8 at 247 (3d ed. 1993). See also *Ex parte State ex rel. Summerlin*, 634 So.2d 539 (Ala. 1993). It is 'the public policy of this state that parents cannot abrogate their responsibilities to their minor children by mutual agreement between themselves so as to deprive their minor children of the support to which they are legally entitled.' *Bank Independent v. Coats*, 591 So.2d 56, 60 (Ala. 1991)."

681 So.2d at 585. See also, *State Dept. of Human Res. v. Sullivan*, 701 So.2d 16 (Ala.Civ.App. 1997); *State Dept. of Human Res., ex rel. Nathan v. Nathan*, 655 So.2d 1004 (Ala.Civ.App. 1995). The Disciplinary Commission has serious concerns that the practice of allowing contingency fees in child support arrearage cases can result in a substantial portion, sometimes as much as half, of the funds that should be used to clothe, feed and educate dependent children, going to attorneys in the form of contingency fees. If the custodial parent may not deprive the child of support by forgiving the support obligations of the non-custodial parent, it would appear equally questionable for the parent to deprive the child of support by giving a substantial percentage thereof to an attorney as legal fees. This concern becomes even more compelling if the parent has the ability to pay the attorney from funds other than those designated for support of the child. It is the opinion of the Disciplinary Commission that any attorney who desires to take a child support arrearage case on a contingency fee basis must take all reasonable steps to investigate the financial condition of the custodial parent and make a good faith determination that the parent is, in fact, unable to pay a reasonable hourly rate or to obtain legal representation on any other than a contingency fee basis. It is further the opinion of Disciplinary Commission that an attorney who accepts a child support arrearage on a contingency basis when he knows that the parent is financially able to pay an hourly fee, or an attorney who fails to adequately investigate the financial resources of the parent in order to make such a determination, is in violation of Rule 1.5(d) and is subject to discipline therefor. In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that rarely, if ever, are contingency fee contracts in the best interest of the child and that before any attorney enters into a contingency fee contract for the collection of child support arrearage, the following conditions must be satisfied:

1. The attorney has made a good faith determination that a contingent fee or hourly fee is in the best interest of the child.

2. The attorney has required the custodial parent to sign a written acknowledgment affirming that the parent understands that the same collection services are available from the state at no cost.
3. The contingent fee is reasonable and not excessive. There shall be a rebuttable presumption that any contingency fee which exceeds the actual value of the services calculated on an hourly basis must be deemed excessive.
4. The attorney has conducted sufficient inquiry to make a good faith determination that the parent cannot pay an hourly rate from funds other than those designated for support of the child. [RO-98-01] ■

Addendum To RO 98-01

I, _____ (name of parent), acknowledge that I have been informed and understand that the Department of Human Resources, and/or the District Attorney for the Judicial District in which I reside, will collect the past due child support to which my child is entitled at no cost to me or to my child. I further acknowledge that my attorney has explained to me the procedures which I may follow to avail my child of this free service and that my attorney has done or said nothing to discourage or dissuade me from using this service . With full knowledge of the availability of this free service, I hereby make the conscious and informed decision not to take advantage of such free service to collect the support due my child, but instead I have decided to pay my attorney either an hourly rate of $ _____ per hour or a percentage of the money due my child in accordance with the terms of the attorney's proposed contingency fee contract. My signature on this acknowledgment affirms that I fully understand my rights and obligations with regard to the back child support due my child.
Signed this the ____ day of _____, 19____.

_____
signature of parent

Third Party Auditing of Lawyer's Billings—Confidentiality Problems and Interference With Representation

Question:

The Office of General Counsel has received numerous opinion requests from attorneys who represent insureds pursuant to an employment agreement whereby the attorney is paid by the insured's insurance carrier. Some insurance companies have begun to submit to the attorney billing guidelines and litigation management guidebooks which place certain restrictions on discovery, the use of experts and other third party vendors. The billing guidelines also restrict the lawyers who will be allowed to work on the files and require pre-approval of time spent on research, travel and the taking and summarization of depositions. Some insurance companies also require the attorneys they employ to submit their bills to a third party billing review company for their review and approval. The bills obviously contain de- scriptions of work done on behalf of the insureds. In most instances, the insureds have not been consulted and have not approved the use of the billing guidelines and litigation management guidebook or the billing review process. The inquiry presented is whether there is any ethical impropriety in following these procedures which some insurance companies are attempting to impose.

Answer:

It is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer's independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect. It is further the opinion of the Commission that a lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work product privilege would occur.

The Disciplinary Commission expresses no opinion as to whether an attorney may ethically seek the consent of the insured to disclosure since this turns on the legal question of whether such disclosure results in waiver of client confidentiality. However, the Commission cautions attorneys to err on the side of non-disclosure if, in the exercise of the attorney's best professional judgment, there is a reasonable possibility that waiver would result. In other words, if an attorney has any reasonable basis to believe that disclosure could result in waiver of client confidentiality, then the attorney should decline to make such disclosure.

Discussion:

The Disciplinary Commission of the Alabama State Bar has addressed the conflict of interest issues raised by dual representation of the insurer and the insured in several earlier opinions. In one of those, RO-87-146, the Commission concluded as follows:

> "Although you were retained to represent the insured by the insurance company and are paid by the company, your fiduciary duty of loyalty to the insured is the same as if he had

directly engaged your services himself. See, RO-84-122; *Nationwide Mutual Insurance Company v. Smith*, 280 Ala. 343, 194 So.2d 505 (1966) and *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 536 F. 2d 730, 7th Cir. (1976). Since the interests of the two clients, the insurance company and the insured, do not fully coincide, the attorney's duty is first and primarily to the insured."

Similar conclusions were reached in RO-90-99 and RO-81-533. Additionally, the Alabama Supreme Court discussed the insurer-insured relationship in *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988) and confirmed the Disciplinary Commission's analysis of that relationship, *viz:*

"It must be emphasized that the relationship between the insured and attorney is that of attorney and client. That relationship is the same as if the attorney were hired and paid directly by the insured and therefore it imposes upon the attorney the same professional responsibilities that would exist had the attorney been personally retained by the insured. These responsibil- ities include ethical and fiduciary obligations as well as maintaining the appropriate standard of care in defending the action against the insured." 533 So.2d at 199.

See also, Hazard and Hodes, *The Law of Lawyering*, 2nd Ed. §§ 1.7: 303-304. These authorities conclusively establish the proposition that the insured is the attorney's primary client and it is to the insured that the attorney owes his first duty of loyalty and confidentiality.

Effective January 1, 1991, the Alabama Supreme Court promulgated the Rules of Professional Conduct of the Alabama State Bar. Rule 1.8(f) of the Rules of Professional Conduct provides as follows:

"Rule 1.8 Conflict of Interest: Prohibited Transactions

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6."

A similar and related prohibition is found in Rule 5.4(c) of the Rules of Professional Conduct which provides as follows:

"Rule 5.4 Professional Independence of a Lawyer

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's pro-fessional judgment in rendering such legal services."

The Disciplinary Commission has examined a "Litigation Management Guidebook" which the Commission understands to be one example among many of the procedures which some insurance companies have requested attorneys to follow in representing insureds. This guidebook contains various provisions and requirements which are of concern to the Commission. The guidebook requires a "claims professional", who in most instances is a non-lawyer insurance adjuster, to "manage" all litigation. An excerpt from the guidebook provides as follows:

"Accountability for the lawsuit rest with the defense team. This team is composed of the claims professional and the defense attorney. The claims professional is charged with fulfilling all the responsibilities enumerated below and is the manager of the litigation."

Other responsibilities of the claims professional include "evaluation of liability, evaluation of damages, recommendation of discovery and settlement/disposition." The guidebook requires the claims professional and the defense attorney to jointly develop an "Initial Case Analysis" and "Integrated Defense Plan" which are "designed for the claims professional and defense attorney to reach agreement on the case strategy, investigation and disposition plan." Furthermore, the attorney "must secure the consent of the claims professional before more than one attorney may be used at depositions, trials, conferences, or motions." The claims professional must approve "[e]ngaging experts (medical and otherwise), preparation of charts and diagrams, use of detectives, motion pictures and other extraordinary preparation ...." The Litigation Management Guidebook also requires that all research, including computer time, over three hours be pre-approved by the insurance company and restricts deposition preparation by providing that the "person attending the deposition should not spend more time preparing for the deposition than the deposition lasts."

It is the opinion of the Disciplinary Commission of the Alabama State Bar that many of the requirements of the Litigation Management Guidebook such as described above could cause an "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship" in violation of Rule 1.8(f)(2) and also possibly constitute an attempt "to direct or regulate the lawyer's professional judgment" in violation of Rule 5.4(c). The Commission is of the opinion that foremost among an attorney's ethical obligations is the duty to exercise his or her independent professional judgment on behalf of a client and nothing should be permitted to interfere with or restrict the attorney in fulfilling this obligation. An attorney should not allow litigation guidelines, or any other requirement or restriction imposed by the insurer, to in any way impair or influence the independent and unfettered exercise of the attorney's best professional judgment in his or her representation of the insured.

The Commission has also examined the insurance company's "Billing Program" pursuant to which attorneys are required by the insurance company to submit their bills for representation of the insureds to a third party auditor for review and approval. Not only are the bills themselves to be submitted to the auditor, but all invoices must be accompanied by the most recent Initial Case Analysis and Integrated Defense Plan which contains the defense attor-

ney's strategy, investigation and disposition plans. Each activity for which the attorney bills "must be described adequately so that a person unfamiliar with the case may determine what activity is being performed."

It is the opinion of the Disciplinary Commission that disclosure of billing information to a third party billing review company as required by the billing program of the insurance company may constitute a breach of client confidentiality in violation of Rules 1.6 and 1.8(f)(3) and, if such circumstances exist, such information should not be disclosed without the express consent of the insured.

However, the Commission also has concerns that submission of an attorney's bill for representation of the insured to a third party for review and approval may not only constitute a breach of client confidentiality, but may also result in a waiver of the insured's right to confidentiality, as well as a waiver of the attorney-client or work product privileges. While it is not within the purview of an ethics opinion to address the legal issues of whether and under what circumstances waiver may result, the fact that waiver is a possibility is a matter of significant ethical concern. A recent opinion of the United States First Circuit Court of Appeals, *U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), held that the IRS could obtain billing information from MIT's attorneys, which would otherwise be protected under the attorney-client privilege and as work product, because MIT had previously provided this same information to Defense Department auditors monitoring MIT's defense contracts. The Court held that the disclosure of these documents to the audit agency forfeited any work product protection and waived the attorney-client privilege. MIT argued that disclosure to the audit agency should be regarded as akin to disclosure to those with a common interest or those who, though separate parties, are similarly aligned in a case or consultation, e.g., investigators, experts, codefendants, insurer and insured, patentee and licensee. The Court reject-

ed this argument holding that an outside auditor was not within the "magic circle" of "others" with whom information may be shared without loss of the privilege.

> "Decisions do tend to mark out, although not with perfect consistency, a small circle of 'others' with whom information may be shared without loss of the privilege (e.g., secretaries, interpreters, counsel for a cooperating codefendant, a parent present when a child consults a lawyer). Although the decisions often describe such situations as one in which the client 'intended' the disclosure to remain confidential, the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely related persons who are appropriate, even if not vital, to a consultation. An intent to maintain confidentiality is ordinarily necessary to continue protection, but it is not sufficient.

On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege." 129 F.3d at 684.

As indicated above, the question of whether disclosure of billing information to a third party auditor constitutes a waiver of confidentiality or work product is essentially a legal, as opposed to ethical, issue which the Commission has no jurisdiction to decide. The Commission is also aware that this may be a developing area of the law which could be affected, or even materially altered, by future decisions. However, while the Commission recognizes that the MIT opinion may not be the definitive judicial determination on this issue, the possibility that other courts could follow the 1st Circuit makes it incumbent on every conscientious attorney to err on the side of caution with regard to such disclosures. If disclosure to a third party auditor waives confidentiality, the attorney-client privilege or work product pro-tection, then such disclosure is clearly to the detriment of the insured to whom the defense attorney owes his first and foremost duty of loyalty. Attorneys who represent the insured pursuant to an employment contract with the insurer should err on the side of non-disclosure when there is any question as to whether disclosure of confidential information to a third party could result in waiver of the client's right to confidentiality or privilege.

Furthermore, while a client may ordinarily consent to the disclosure of confidential information, the Commission questions whether an attorney may ethically seek the client's consent if disclosure may result in a waiver of the client's right to confidentiality, the attorney-client privilege or the work product privilege. This concern was specifically addressed by the State Bar of North Carolina in Proposed Ethics Opinion 10. The opinion points out that "the insured will not generally benefit from the release of any confidential information." To the contrary, release of such information could work to the detriment of the insured.

> "The release of such information to a third party may constitute a waiver of the insured's attorney-client or work product privileges. Therefore, in general, by consenting, the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any returned benefit."

The North Carolina opinion discusses the comment to Rule 1.7(b) which states that the test of whether an attorney should ask the client to consent is "whether a disinterested lawyer would conclude that the client should not agree." The opinion concludes as follows:

> "When the insured could be prejudiced by agreeing and gains nothing, a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance. Therefore, the lawyer must reasonably conclude that there is some benefit to the insured to outweigh any reasonable expectation of prejudice, or that the insured cannot be prejudiced by a release of the confidential information, before the lawyer may seek the informed consent of the insured after adequate consultation."

In reaching the above stated conclusions, the Disciplinary Commission has examined and considered, in addition to opinion of the North Carolina Bar referenced above, opinions issued by, or on behalf of, the Bar Associations of Florida, Indiana, Kentucky, Louisiana, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, Utah, Washington and the District of Columbia. All of these opinions appear to be consistent with the conclusions and concerns expressed herein. Only Massachusetts and Nebraska have released opinions which may, in part, be inconsistent with this opinion, and it appears that the opinions from these two states are not official or formal opinions of those states' Bar Associations.

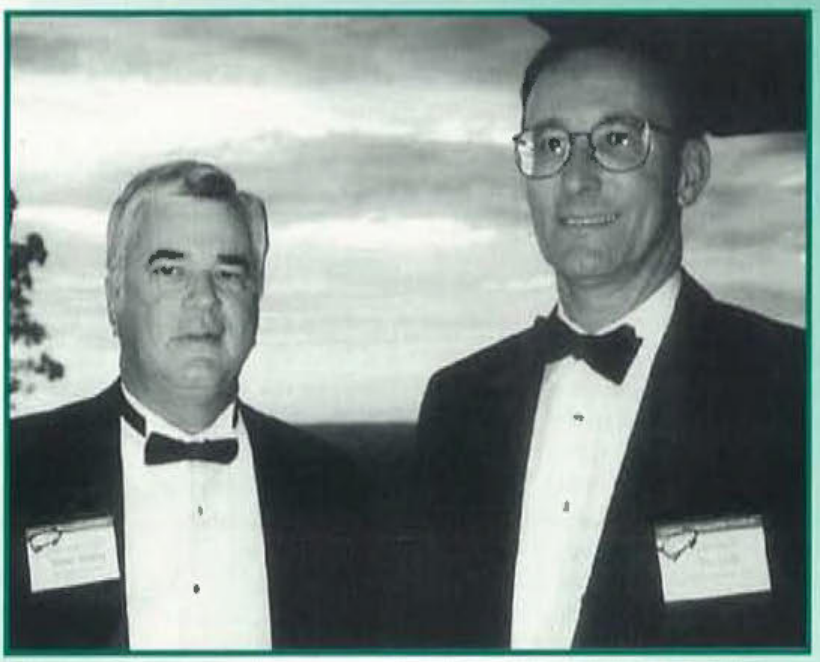
In summary, and based upon the foregoing, it is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer's independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect. It is further the opinion of the Commission that a lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work product privilege would occur.

The Disciplinary Commission expresses no opinion as to whether an attorney may ethically seek the consent of the insured to disclosure since this turns on the legal question of whether such disclosure results in waiver of client confidentiality.

However, the Commission cautions attorneys to err on the side of non-disclosure if, in the exercise of the attorney's best professional judgment, there is a reasonable possibility that waiver would result. In other words, if an attorney has any reasonable basis to believe that disclosure could result in waiver of client confidentiality, then the attorney should decline to make such disclosure. [RO-98-02] ■

Southern Conference of Bar Presidents

The 1998 Southern Conference of Bar Presidents was held in October in Branson, Missouri. Representing the Alabama State Bar were President Vic Lott, President-elect Wade Baxley, Past President Spud Seale and Executive Director Keith Norman.



Pictured above are ASB President-elect Wade Baxley and President Vic Lott at a dinner hosted by The Missouri Bar.

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The new legislators have been sworn in and the Legislature finds itself with 22 new House members and ten new Senators. Eight of the Senators are first-timers in the legislative process, while all of the House members are first-timers.

The new legislators met at the Law Center in Tuscaloosa for an orientation on December 14, 1998, where they were briefed on the legislative process, what to expect as a new legislator, staffing, offices, and computer capabilities, as well as an awareness of the ethics law and dealing with lobbyists.

The new legislators were joined by the returning legislators on Tuesday and Wednesday, December 15–16, 1998. This three-day session was presided over by Senator Roger Bedford, chair of the Legislative Council and Representative Seth Hammett, vice-chair of the Legislative Council. The kick-off remarks were delivered by Lt. Governor-Elect Steve Windom. He was followed by Brian Weberg, of the National Conference of State Legislatures in Denver, who spoke on the trends of state legislatures as we approach the 21st century. Other issues addressed were children, education K through 12, and higher education.

Former Mississippi Governor William Winter reviewed a plan for economic development. Dr. Earl Fox, administrator of the Health Resources and Services Administration in Washington, DC, briefed them on health care problems. They were also given a welfare reform update and briefed on the reapportionment process that this legislature will have to undergo after the 2000 census. Alabama's financial condition was reviewed by Joyce Bigbee, director, Legislative Fiscal Office, and Bill Newton, assistant finance director for the State of Alabama. This was followed by Chief Justice Perry Hooper briefing them on critical issues facing the judiciary.

The three-day Legislative orientation session, held at the University of Alabama School of Law, concluded with an address by Governor-Elect Don Siegelman in his first major address to the entire Legislature.

This orientation was the seventh conducted by the Alabama Law Institute and Legislative Council and held at the University of Alabama School of Law since 1974.

Lawyers comprise 11 of the 30 Senatorial positions, but only ten of the 105 seats in the House of Representatives. This was a decrease of lawyers from 25 to only 21 in this new Legislature. These law graduates come from eight law schools. Six lawyers attended Cumberland, five attended the University of Alabama, and another five attended the Birmingham School of Law. There is also one from each of the following schools: Harvard, Miles, Catholic University, Boston University, and Jones School of Law.

The Legislature will convene for an organizational session on January 12, 1999, with the inauguration held Monday, January 18, 1999. Some of the first items of business will be to organize the respective houses. The House of Representatives will elect a Speaker and Speaker Pro Tem. The Senate will elect a President Pro Tem. Both Houses will develop legislative rules and legislators will receive committee appointments. This organizational session is limited to ten consecutive calendar days and no business can be transacted at these sessions, except organization of the Legislature, election of officers, adoption of rules, appointment of committees, and declaration of results of the elections for constitutional state executive officers.

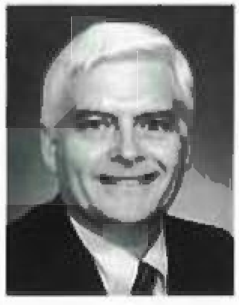
The regular session of the Legislature will begin Tuesday, March 2, 1999. The Legislature has 105 calendar days in which to meet for 30 legislative days.

Special sessions can only be called by the Governor. Should Governor Siegelman decide on a Special Session, the Legislature would have 12 legislative days within a period of 30 calendar days to consider any legislation in the Governor's call. Any bills, other than those in the Governor's stated purpose of the legislative session, must pass with a two-thirds majority of each house.

Institute-Drafted Legislation

The Alabama Law Institute is expected to present to the Legislature the Uniform Child Custody Jurisdiction and Enforcement Act (see November 1998 *Alabama Lawyer*), and a merger provision for all business entities (see September 1998 *Alabama Lawyer*).

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



Robert L. McCurley, Jr.

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

Committee on Access to Legal Services Honors Volunteers

Alabama Supreme Court Justice Hugh Maddox and Alabama State Bar President Vic Lott, Jr. were the featured speakers recently at special luncheons in Birmingham and Montgomery honoring Leadership Council members. The Leadership Council consists of attorneys throughout Alabama who have volunteered to take an active role in recruiting more bar members to join and participate in the Volunteer Lawyers Program. The VLP provides legal assistance to qualified persons who cannot afford to pay for legal services.

Alabama currently has 21 percent of eligible attorneys enrolled in the program (the national average is 17 percent), and the goal for 1999 is to have 40 percent participating.

For more information about the VLP contact Kim Oliver, director, at (334) 269-1515, ext. 117.

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Employer Liability In Sexual Harassment Cases:

Two New U.S. Supreme Court Decisions

By Matt Vega

Introduction

In its most recent term, the United States Supreme Court issued three decisions that significantly expand the law against sexual harassment in the workplace (and one additional decision concerning liability of educational institutions for sexual harassment of students by employees).[1] Two of these landmark cases, *Burlington Industries, Inc., Petitioner v. Kimberly B. Ellerth*, 118 S. Ct. 2257 (1998), and *Beth Ann Faragher, Petitioner v. City of Boca Raton*, 118 S. Ct. 2275 (1998), were decided on the final day of the term. This latest pair of decisions constitutes the Supreme Court's first attempt to decide when and under what circumstances an employer could be held liable for the conduct of its employees.

For over a dozen years there has been continued uncertainty over whether an employee who brings a sexual harassment claim can recover against an employer that did not know about (or authorize) the alleged harassing behavior. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court first recognized sexual harassment as a cause of action under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq*. In that seminal case, however, the Court specifically declined to issue a definitive rule on employer liability. Instead, it instructed the lower courts to look at common law agency principles while keeping in mind that Congress clearly intended that there be "some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* at 72. As a result, for over a decade courts have been conducting complex scope of employment analyses to determine employer liability, with widely varying results.

Seven years after *Meritor* the Court made some effort in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), to define hostile work environment sexual harassment, but it still did not assist the lower courts in deciding when the employer could be held liable for harassment perpetrated by its employees.

Although the new opinions certainly raise further questions, they do provide some much-needed assistance to employers who attempt to "follow the rules." This article will attempt to explain the newly announced rules as well as report what

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some of Alabama's largest employers have done or are doing to comply with the rulings and to avoid legal liability.

The New Standard for Employer Liability

In *Ellerth* and in *Faragher*, the Supreme Court expanded an employer's liability for sexually harassing acts by supervisors. Before June 26, 1998, most courts had ruled that the standard for liability turned primarily on whether a case was *quid pro quo* sexual harassment or hostile work environment sexual harassment. The employer was held vicariously or automatically liable for *quid pro quo* sexual harassment, but was generally not held liable for a hostile environment unless it "knew or should have known of the harassment and failed to take prompt remedial action." See *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982).

The basic distinction between *quid pro quo* and hostile environment harassment is that in a *quid pro quo* case, the employer has explicitly demanded sexual favors in return for a job benefit, or conversely explicitly denied job benefits because of the employee's rejection of the demand for sexual favors (e.g., "Go to bed with me and I'll hire you" or "If you don't go to bed with me, I'll demote you"). In the hostile environment case, however, the employer does not overtly demand sexual favors, yet the verbal, physical or visual misconduct is so "severe or pervasive" on both a subjective basis (i.e, unwelcomed by the victim) and objective basis (i.e., as perceived by a reasonable person) that the court infers that the employer has altered the terms and conditions of employment.

In *Ellerth* and *Faragher*, the Supreme Court all but abandoned this traditional dichotomy of *quid pro quo* or hostile environment. First, employers can no longer defend themselves in certain hostile environment cases merely by proving that they were unaware of the harassment or that the victim failed to report the harassment. There is no more "ostrich-head-in-the-sand" defense. Instead, the Supreme Court shifted the focus to whether the alleged harasser is a supervisory or non-supervisory employee. The Court held that an employer can be held vicariously (or automatically) liable for a hostile environment created by a manager or supervisor (subject to a new affirmative defense discussed below if no tangible employment action follows). Of course, when the hostile environment is created by co-workers rather than supervisors, it seems likely that courts will continue to use the same standard applied prior to *Ellerth* and *Faragher*; namely, whether the employer reasonably knew or should have known of the conduct and failed to address it.

The *Ellerth* and *Faragher* decisions also clarified the law on *quid pro quo* harassment. The Court made clear in these opinions that the *quid pro quo* framework will not apply to a non-supervisory employee unless he or she has been given some form of authority, such as making out assignments or scheduling, and could abuse that authority to coerce sexual favors through the promise of preferential treatment or threats of reprisal.

In addition, the strict liability formerly associated with the term *quid pro quo* now is limited to circumstances where a "tangible employment action" has occurred. Formerly, if a supervisor stated, "If you want to keep your job you'll have to go to bed with me," this was labeled *quid pro quo* sexual harassment even if nothing detrimental (or positive) actually occurred. Under the new standard such a statement would constitute a hostile environment claim, provided that no "tangible employment action" actually occurred. The Court narrowly defined tangible employment actions as those resulting in a significant change in employment status such as a "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Strict liability means no defense would be available for an employer found vicariously liable for harassment that resulted in a "tangible employment action."

Finally, the Court also gave employers guidance regarding how to limit their liability. The employer not only must have an effective anti-harassment policy in place, with an effective complaint procedure, but it also must attempt to prevent the harassment from occurring and take appropriate corrective action when it does occur. This is important because it is the first time the Supreme Court has used the word "prevent" to describe what the employer must do to make out an affirmative defense.

The Court's rulings constitute a two-edged sword for employers. On the one hand, it is now possible for employers to avoid liability for certain types of *quid pro quo* harassment (non-tangible harassment) by reclassifying the conduct as hostile environment harassment and proving their affirmative defense. On the other hand, employers will be found strictly liable for hostile environment harassment if a supervisor was involved and the conduct resulted in tangible employment action against the employee.

Burlington Industries, Inc. v. Ellerth

In *Ellerth*, the plaintiff, Kimberly Ellerth, was employed by Burlington, a large corporation, as a salesperson in a small outlying office located in Chicago, with a staff consisting of herself and her direct supervisor Mary Fitzgerald. Ellerth claimed her boss' boss, Theodore Slowik, had sexually harassed her. Slowik was a mid-level manager who worked out of the New York City office and visited the Chicago office once or twice a month, and regularly called the office four or five times a month. The Supreme Court found that the combination of Slowik touching Ellerth on the knee, making veiled but unfulfilled threats (telling her she should "loosen up" and that he could make her job "very hard or very easy"), referring to Ellerth's breasts, legs and buttocks, and making comments about her clothing was "severe and pervasive" enough to constitute hostile work environment harassment.

Although the plaintiff rebuffed her supervisor's advances, she suffered no tangible job detriment and was, in fact, promoted. If she had suffered some tangible employment action, the Court observed that it would have held the employer strictly liable for the hostile environment. Nevertheless, the employer was still held vicariously or automatically liable for the supervisor's misconduct even though she suffered no tangible job detriment. The Court allowed the plaintiff to pursue the lawsuit against the employer. However, in order to square its ruling with its decision in

Meritor, which made clear that vicarious liability for employers should not be absolute, the Court provided the employer Burlington with a new affirmative defense.

The affirmative defense available to all employers comprises two necessary elements, both of which must be proved by a preponderance of the evidence: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

Keep in mind, this affirmative defense applies only in a hostile environment case, and only where there is no tangible job detriment. There are no available defenses to *quid pro quo* harassment or to hostile environment harassment that affects the victim's employment status. In such cases it is irrelevant whether the employer maintained an anti-harassment policy or whether the victim complained to management.

Although it remanded the case back to the district court without ruling on the facts of the case, the Supreme Court noted that Burlington could attempt to defend itself by proving that Ellerth never sought assistance under the company's sexual harassment program. The case record showed that Burlington had an appropriate written sexual harassment policy, and that Ellerth admitted she was aware of it but claims she was unsure whether it was enforced and feared retaliation. Therefore, Burlington will have to demonstrate that it would have quickly investigated and taken corrective action if Ellerth had complained. If Burlington can establish this part of the defense, then the fact that Ellerth failed to take advantage of the protections in the workplace should bar all liability and damages.

Faragher v. City of Boca Raton

In the *Faragher* opinion, handed down the same day as *Ellerth*, the Supreme Court provided further guidance concerning what conduct constitutes an actionable hostile environment. The plaintiff, Beth Faragher, was employed during the summer as a part-time lifeguard for the City of Boca Raton, Florida, from 1985 to 1990. During her employment Faragher was supervised by Bill Terry, chief of marine safety, and two marine safety lieutenants, David Silverman and Robert Gordon. Fewer than ten percent of the lifeguards on the City's payroll were women at the time. The Court noted the district court's conclusion that the two supervisors repeatedly touched the bodies of female employees without invitation (including on the buttocks), made gestures imitating various sex acts, told female employees they would like to have sex, and made "crudely demeaning" comments to women. The Court concluded that this conduct was "severe and persuasive" enough to establish a hostile work environment claim.

The Court further ruled that the fact that Faragher resigned in 1990 without complaining to city management, and therefore the city had no way of knowing she had been harassed, did not negate the city's liability. The Court also rejected the court of appeals' finding that the City could not be held liable under basic agency principles because the two supervisors were not acting within the scope of their employment when the harassment occurred and their positions did not "facilitate" their harassment. The City of Boca Raton was held vicariously or automatically liable for the supervisor's actions, with its only recourse to assert the new affirmative defense.

The case gives us some indication of what it takes to assert the new affirmative defense. Instead of remanding the case, the Court held that the City, as a matter of law, could not satisfy either element of the affirmative defense. An employer can normally successfully raise the affirmative defense by establishing the existence of a harassment policy and the employee's unreasonable failure to use it. In this case, however, the Court said the affirmative defense was not available to the City because it had failed to disseminate the policy to all of its employees (or in the alternative "keep track of" its supervisors), and it had failed to include a reporting procedure in the policy allowing the complaining person to bypass the harassing supervisor.

Practical Steps to Comply with These New Rulings

Under the new standard, an employer with 15 or more employees must be prepared to show that it "exercised reasonable care to prevent and correct promptly" any harassing conduct. At a minimum, Alabama employers report that they have taken or are about to take the following steps:

1. Adopt a standard higher than the legal one. Because the Court held that an employer is vicariously liable for actionable

harassment caused by a supervisor, Jerry Kirby, human resources legal counsel for Proffitt's, Inc., advises employers to take "a zero tolerance position on harassment." In other words, management must avoid *any* action which could arguably be construed as harassment. Kirby says his company deals with problems at a very early stage, "before the conduct even comes close to the harassment standard." The *Ellerth* and *Faragher* decisions are evidence that the legal standards are constantly evolving. The only way an employer, especially a large employer, can quickly respond to new rulings without unduly disrupting its business is to stay ahead of them. A good anti-harassment policy will include both the legal definition of harassment as well as concrete examples of prohibited verbal, physical and visual misconduct and unprofessional behavior. At the same time, an employer should not attempt to define in its policy what does *not* constitute sexual harassment; otherwise the employer runs the risk of creating a loophole in the policy.

2. Establish a written policy. The EEOC as well as the courts have long counseled employers to promulgate a written policy prohibiting harassment. The Supreme Court's recent decisions elevate these basic precautions to a mandate. Although it made clear that a formal written policy is not absolutely required, the Supreme Court in *Faragher* stated that such a document would constitute "a significant factor" in meeting the first element of the employer's defense. The Court left open the possibility that an employer with a small work force could theoretically communicate its policy and implement a sensible complaint procedure without having a written document; however, the Court also seemed to suggest that such an employer would have the more onerous burden of constantly "monitoring" its supervisor's behavior. Since the majority of covered employers have a written policy, it seems clear that anyone who chooses not to adopt one will be hard pressed to show it exercised "reasonable care" to prevent and correct harassing behavior.

3. Replace your existing sexual harassment policy with an anti-harassment policy. Those employers that have not already done so should update their sexual harassment policy to prohibit all forms of unlawful harassment, not just sexual. The EEOC and courts recently have applied the same legal principles developed in sexual harassment cases to harassment claims based on race, color, creed, national origin, disability, or age. In his dissent in both *Ellerth* and *Faragher*, Justice Thomas points out that this new framework for hostile work environment claims will be easily extended to claims of harassment based on race or national origin. Several lower courts have already done so.[2] The new standard for liability will also very likely be extended to statutes beyond Title VII, such as the Age Discrimination in Employment Act, since the Supreme Court's reasoning was based on the authority of a supervisor in the workplace more than on any specific legislative mandate in Title VII.

4. Review your complaint and grievance procedures. Anti-harassment policies should contain an effective mechanism to give employees alternative avenues for reporting harassment. Because a person's direct supervisor is often the alleged harasser, every employee should be given the name and contact information of at least one additional member of management, preferably a senior-level manager. Whenever possible, the multiple channels of communication should include at least one female manager to whom employees can feel free to bring a complaint. This will help reduce the anxiety commonly associated with reporting problems of a private or embarrassing nature to persons of the opposite sex. Employers may also wish to consider setting up a toll-free telephone number which employees can call 24 hours a day, seven days a week, to file a complaint. Brad Hale, group vice-president, human resources, at HealthSouth, cautions employers, however, that a complaint hotline will never replace the traditional complaint and grievance procedure. "HealthSouth uses the hotline as a fallback," says Hale. This is due to the fact that HealthSouth's hotline is not set up to handle sexual harassment issues exclusively. In addition, one of the main difficulties with a complaint made over the telephone is that the caller will often wish to remain anonymous which makes it much more difficult, if not impossible, to properly investigate.

5. Enforce your policy. Employers should make clear to their employees that anyone who engages in prohibited conduct will be subject to disciplinary action, up to and including immediate dismissal. In addition, there should be equally severe consequences for anyone found to have retaliated against someone for reporting possible harassment. On the other hand, anyone who uses the anti-harassment policy to bring frivolous complaints against a supervisor also should be reprimanded.

6. Disseminate the policy to every employee. The importance of communicating and enforcing the anti-harassment policy cannot be overemphasized. Too many employers still maintain their policies only in management binders or on corporate office shelves. The anti-harassment policy should be issued to each employee. In addition, each employee should be required to sign a paper copy of the policy or a receipt acknowledging that he or she was given a copy of the policy. Employers should reissue the policy to all employees on a periodic basis.

7. Establish investigation guidelines. Typical investigation protocol requires that all complaints be channeled to a centralized place such as the employer's human resources department. It also provides a timetable for reporting harassment, beginning and completing an investigation, and responding to the complainant. Laura Hayden, senior vice-president, human resources, at Bruno's, Inc., stresses the importance of conducting the investigation immediately. "Normally HR gets involved the same day the complaint is received," says Hayden. Investigators at Bruno's generally interview the complainant within 24 hours, and then interview the alleged harasser and any witnesses. In addition, Hale recommends the practice at HealthSouth of "suspending the alleged harasser pending the outcome of the investigation." Finally, an employer should seldom promise absolute confidentiality. At most, an employer

MARKER HONORS ALABAMA STATE BAR

The Alabama State Bar now has its own historical marker highlighting events in the establishment of the bar in Alabama. An unveiling and presentation were held December 4, 1998, just prior to the regularly scheduled meeting of the Board of Bar Commissioners. Birmingham attorney and chair of the bar's History and Archives Committee Sam Rumore made the presentation.

The Legal Milestones Program recognizes important cases, events or personalities in Alabama's legal history by placing bronze plaques at designated sites. Current sites include Monroeville, commemorating Harper Lee's *To Kill A Mockingbird* and the importance of its main character, Atticus Finch, to the legal profession, and Huntsville, honoring the state's first constitution and statehood.

The Montgomery marker highlights three significant dates: the establishment of the state bar in 1879; the adoption of the code of legal ethics in 1887, making Alabama the first state in the country to do so and providing the foundation for the canons of ethics later adopted by the American Bar Association and other states; and 1924, the year that the bar became a mandatory bar with rules to regulate and govern the conduct of attorneys in Alabama. ■

can assure the complainant that every reasonable effort will be made to respect his or her privacy.

8. Conduct regular EEO and sexual harassment training. When a supervisor's conduct is at issue, courts will no longer focus on whether the employer knew or should have known of the conduct. Rather, in a case involving a hostile environment created by a supervisor that does not culminate in a tangible employment action, the focus will be on the employer's procedure for, and response to, complaints. All employers should therefore update their training regimens for supervisors and, if feasible, non-supervisors as well. A good training program typically takes at least one to two hours and would discuss what constitutes harassment, and how to prevent it, and review the contents of the anti-harassment policy and the proper procedures for filing a harassment complaint. The company should provide additional training to designated managers and supervisors (e.g., human resources directors) on how to investigate harassment complaints and take corrective action. The programs should emphasize the need to show employees respect and to remind supervisors that they can be found personally liable under state tort laws and the new Violence Against Women Act (VAWA). See *Braden v. Piggly Wiggly* (M.D. Ala. 1998). For larger employers with multiple locations like Proffitt's, Kirby suggests conducting "train the trainer" courses and developing a "canned" seminar complete with video and handouts that can be sent to a particular location and used by the general manager as a refresher course on an as-needed basis.

9. Take prompt and effective remedial action. Bruno's tries to take appropriate corrective action within as short a time frame as possible, usually no more than seven to ten days after the complaint was first reported. "Many complaints are resolved even more quickly," stated Hayden. While the victim is not entitled to decide what action will be taken, his or her wishes should be taken into consideration. To avoid claims of retaliation, the victim should not be required to transfer or to change jobs to resolve the situation. At this stage, it is also a good idea to reaffirm the employer's anti-harassment policy with all employees involved in the investigation, including the accused, the accuser and any witnesses. Copies of the policy should be distributed to such persons as a matter of course. Under appropriate circumstances, immediate training is recommended. The investigation and corrective action taken should be well-documented and the documentation kept in a safe area. Employers must be prepared for the fact that raising the new affirmative defense will likely open the door for the plaintiff to seek broad discovery of any and all documentation related to the investigation and decision-making process. To what extent the courts will allow require employers to produce records relating to prior internal investigations remains to be seen.

10. Follow up. The employer should always follow-up with the harassed employee after remedial action has been taken to make sure that it was effective in resolving the harassment. The follow-up questions (including any feedback) as well as any periodic monitoring should be well documented. ■

Endnotes

1. The other two U.S. Supreme Court decisions not discussed in this article are *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998 (1998) (holding that Title VII covers same-sex sexual harassment) and *Gebser et al v. Lago Vista Independent School District*, No. 96-1866 (1998) (holding a school district is not liable for a teacher's sexual harassment of a student unless a school district official who has authority to institute corrective measures knows about and is deliberately indifferent to the teacher's actions).

2. See, e.g., *Booker v. Budget Rent-A-Car Systems*, (N.D. Tenn., July 10, 1998). Applying the Supreme Court's analysis to racial harassment, the trial judge in *Booker* ruled that Budget was prevented from asserting an affirmative defense against vicarious liability for the racial harassment of one of its market managers by a general manager because Budget failed to prove it distributed its anti-harassment policy to employees and failed to prove "that management ever received the kind of training with respect to issues of racial harassment."

THE NEW LITIGATIVE ENVIRONMENT:

Defending a Client in Parallel Civil and Criminal Proceedings

By Anthony A. Joseph and R. Marcus Givhan

Introduction

You have just returned from a much-needed vacation and there is an urgent message on your answering machine from Ivil Handelit, in-house counsel for XYZ Health Care Providers. You immediately call Ivil, who proceeds to tell you how much fun he's had over the past two weeks. Things started to happen when the manager of one of XYZ's facilities called Ivil and informed him that investigators from the United States Department of Health and Human Services had just arrived, unannounced, at the facility. The manager stated that the investigators had an "IG subpoena" (whatever that was) and were demanding that XYZ produce all of Dr. Crook's patient files and all supporting documentation for Dr. Crook's "consultation fees." Ivil informs you that he instructed the manager to tell all employees to cooperate fully with the investigators and to answer any questions they might have.

You interrupt Ivil and ask him whether he has a copy of the subpoena. Ivil tells you that he received a copy of the subpoena when the investigators came to corporate headquarters to speak with XYZ's CEO. You ask Ivil, "What questions did the investigators ask the CEO?" Ivil tells you that he was not present during the interview.

Ivil then tells you that the fireworks really started when 30 FBI agents executed a search warrant at one of XYZ's other corporate facilities. None of the employees at the facility had any prior experience with an FBI agent. Many of the employees talked freely with the agents, in an effort to avoid even the slightest suggestion that they had anything to hide.

You ask Ivil whether he obtained a copy of the search warrant. Ivil informs you that he did get a copy, but has not had an opportunity to read it.

While Ivil is describing this nightmare, you recall that several months ago Ivil asked you to give him a legal opinion on a sensitive antitrust issue. You recall sending Ivil a confidential attorney-client memo reflecting your legal analysis of the issue. Hoping for the best, and expecting the worst, you ask Ivil whether he took any steps to protect privileged attorney-client documents when the FBI agents were searching the XYZ facility. Ivil tells you that in the midst of all the excitement, it never crossed his mind.

You then slowly break the news: it appears that XYZ is embroiled in parallel civil and criminal proceedings. In other words, the corporation, its directors, its officers, and possibly a few key employees could be facing civil penalties, fines and exclusion from the Medicare program, along with criminal sanctions that could include restitution, forfeiture, felony convictions, and jail time.

Once Ivil's breathing pattern settles back into a normal mode, he concludes that he is going to have to speak with the board of directors about these parallel proceedings. Before doing so, he wants you to provide him with some guidance on the following issues: (1) Are parallel civil and criminal proceedings common? (2) Is it constitutionally permissible for the government to pursue parallel proceedings? (3) What triggers parallel civil and criminal investigations? (4) What should a company do when confronted with grand jury subpoenas, search warrants and other contacts by government investigators? (5) What are the rights and obligations of a company's directors, officers, and employees during parallel investigations? (6) Are there any fundamental issues that are of particular concern during parallel proceedings? (7) How

can a company reduce its chances of civil and criminal exposure?

Due to time constraints, you tell Ivil that you have only an hour to speak to him about parallel proceedings, but think you can give him a sufficient overview to facilitate his general understanding of the process and prepare him for his discussions with the board of directors.

Background: The New Litigative Environment

In what was characterized as the "new litigative environment" in the prosecution of white collar crime, United States Attorney General Janet Reno, in a memorandum circulated to all U.S. Attorney's offices and Department Litigation divisions, launched a new initiative for coordinated use of parallel criminal and civil proceedings. (*Memorandum from the Attorney General to Federal Attorneys*, July 28, 1997). Emphasizing the need to use resources efficiently, the Attorney General stated:

> The challenge requires greater cooperation, communication and teamwork between the criminal and civil prosecutors who are often conducting parallel investigations of the same offenders and matters. . . . In order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions, and to agency administrative actions . . . Accordingly, every United States Attorney's office and each Department Litigating Division should have a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within the office.

Id. Although it is not yet clear how many federal prosecutions will ultimately be conducted as parallel proceedings, this "new litigative environment" foreshadows the government's use of a broader, more aggressive range of statutory and investigative tools than was used in the past to prosecute white collar crime.

While the federal government has expressed an increased focus on all white collar criminal matters, considerable funding has been earmarked toward eradicating, or at least reducing to an appreciable degree, health care fraud. (FBI Report to House Ways and Means Committee, October 9, 1997). In 1996, Congress enacted the Health Insurance Portability and Accountability Act ("HIPPA"), which contains many new anti-fraud-and-abuse provisions and enforcement tools. Congress established a Health Care Fraud and Abuse Control account (Section 201(b)) to fund these investigative efforts. (Pub. L. No. 104-91, 110 Stat. 1936 (1996)). In this regard, $548 million has been appropriated to the FBI over the next seven years (and $114 million each year thereafter) for health care fraud enforcement. (FBI Report, supra).

On the local front, Alabama Attorney General Bill Pryor recently announced that his office also intends to prioritize white collar criminal prosecutions by forming a new white collar crime enforcement division within the Attorney General's office. The new division was created primarily to attack fraud committed against the State of Alabama. Under this new state initiative, Attorney General Pryor is seeking passage of a "criminal fraud bill" to give his new division the weapons it needs to combat white collar criminal matters, especially in the area of government fraud. (Attorney General 1997 Press Release).

Alabama has also benefited from the HIPPA funding account. The Attorney General's Medicaid Fraud Unit recently received a $232,700 grant from DOJ and HHS for the exclusive purpose of investigating and prosecuting Medicaid fraud. Notably, while the federal government's use of parallel proceedings is on the rise, the investigative trends appear to be headed "toward a coordinated investigation by task forces composed of federal and state investigators." (Bucy, *Health Care Fraud: Criminal, Civil and Administrative Law*).

Constitutionality

A. Parallel Proceedings are Constitutionally Permissible

In *United States v. Kordel*, 397 U.S. 1, 10 (1970), the United States Supreme Court confirmed that, in general, parallel civil and criminal proceedings are constitutionally permissible, noting that "[i]t would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." As long as the government has not initiated the civil action in "bad faith"–that is, for the purpose of obtaining evidence for its criminal prosecution–parallel proceedings are permitted by the Constitution. *See United States v. Tison*, 780 F.2d 1569 (11th Cir. 1986) (finding that it is improper for a government to institute a civil action to generate discovery for a criminal case).

B. *Hudson v. United States*: No Double Jeopardy

The Double Jeopardy Clause of the United States Constitution provides that no person "[shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. The clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989).

By their very nature, parallel criminal and civil proceedings would seem to be vulnerable to Double Jeopardy challenges, particularly to challenges that the government is seeking to impose multiple punishments–criminal and civil–for the same offense. A recent United States Supreme Court decision, however, effectively closes the door to such challenges.

In *Hudson v. United States*, 522 U.S., 139 L.Ed.2d 450, 458-59 (1997), the Court re-affirmed that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense and then only when such occurs in successive proceedings." (emphasis added) (citations omitted). The Court then set forth a two-step analysis for determining whether a particular punishment is criminal or civil for purposes of the Double Jeopardy Clause.

Under *Hudson*, a trial court "must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a

preference for one label or another.'" *Hudson*, 139 L.Ed.2d at 459, *quoting United States v. Ward*, 448 U.S. 242, 248 (1980). In other words, did the legislature intend to establish a criminal or a civil penalty? If the legislature intended to establish a criminal penalty, then the penalty is subject to the Double Jeopardy Clause without further analysis. If the legislature intended the penalty to be civil, however, the court must inquire further. The court must determine whether the penalty is "so punitive in either purpose or effect" as to render the penalty criminal despite the legislature's intent to the contrary. 139 L.Ed.2d at 459. The Supreme Court identified the following factors listed in *Kennedy v. Medoza-Martinez*, 372 U.S. 144 (1963), as providing "useful guideposts" for making this determination: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether the sanction comes into play only on a finding of scienter; (4) whether the operation of the sanction will promote the traditional aims of punishment–retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable for it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. *Hudson*, 139 L.Ed.2d at 459. The Court cautioned that "only the clearest proof" would be sufficient to override legislative intent and transform an intended civil remedy into a criminal penalty. *Id.*

For all practical purposes, the *Hudson* decision means that parallel civil and criminal proceedings will rarely, if ever, violate the Double Jeopardy Clause. Except in the rare case where "the clearest proof" establishes that a civil statute, on its face, imposes a penalty "so punitive" that the penalty is rendered criminal, the Double Jeopardy Clause will not be offended.

Parallel Investigations

A. Sources of the Investigation

Parallel civil and criminal proceedings can be generated from a number of sources: (1) False Claim lawsuits; (2) media reports; (3) audits; (4) complaints obtained from governmental hotlines; (5) Congressional inquiries; (6) tips or complaints from competitors; and (7) interviews with current and former employees. (Effective Corporate Compliance Programs for Health Organizations; *see* Bucy, supra.). Any of these sources may spur an industrious agent or prosecutor to pursue parallel proceedings against a defendant.

False Claim lawsuits, in particular, often lead to parallel proceedings. Strengthened during the Reagan administration, the False Claims Act, 31 U.S.C. § 3729 *et seq.*, has emerged from over a century of neglect to become one of the government's most potent anti-fraud weapons. In a False Claims Act suit (also known as a "Qui Tam" suit), a private plaintiff brings an action on behalf of the government against an individual or entity that is alleged to have knowingly defrauded or conspired to defraud the government. The plaintiff who successfully prosecutes a False Claims Act suit on behalf of the government is entitled to at least 15 percent–and may be awarded as much as 30 percent–of the total government recovery. 31 U.S.C. § 3730(d). In addition, the plaintiff may be entitled to recover attorney's fees, expenses and costs. *Id.*

The potential recovery alone is more than sufficient to produce legions of "private attorneys general." Such plaintiffs often come from the ranks of current or former employees, who may be motivated by conscience, by antipathy toward the employer, or by a simple desire to share in the proceeds of any recovery.

B. Investigative Tools

Defense counsel should fully expect the government to take advantage of all available investigative tools in this "new litigative environment." The ultimate goal of DOJ's white-collar crime enforcement initiative is "to use the government's resources as efficiently and effectively as possible in order to punish offenders, recover damages, and prevent future misconduct." (Attorney General's Memorandum, July 28, 1997). To this end, the government's inventory of investigative tools includes: (1) grand jury subpoenas (for testimony or for documents); (2) search warrants; (3) IG subpoenas; (4) civil investigative demands ("CID"); and (5) interviews with current and former employees. Defense counsel and their clients should also expect greater use of more sophisticated investigative techniques such as undercover operations, electronic surveillances, and computer programs designed to screen Medicare claims. (*Bucy*, supra).

The government not only has the weapons, it also has the element of surprise–the luxury of knowing when, where, how, and what level of force to use in investigating the matters under consideration. Accordingly, it is extremely important that employees are fully apprised of their rights and obligations with respect to responding to subpoenas, search warrants, and contacts by government agents.

1. Grand Jury Subpoena

The grand jury is empowered to issue subpoenas requesting testimony or production of documents. The fundamental purpose of the grand jury is for the enforcement of criminal laws. *United States v. Sells Eng., Inc.*, 463 U.S. 418, 435-42 (1983). Therefore, as a general rule, the information obtained pursuant to a grand jury subpoena will be available only to the criminal investigation, and not to the civil investigation, absent a showing of a "particularized need." *See* Rule 6(e)(2) of the Fed. R. Crim. P.; *United States v. Sells*, supra. On the other hand, it is permissible to use the information subpoenaed by, but not presented to, the grand jury in a civil False Claims Act case. *United States v. Educational Development Network Corp.*, 884 F.2d 737 (3d Cir. 1989), *cert. denied*, 484 U.S. 1078 (1990).

Once a subpoena has been presented, counsel should be contacted as soon as possible. Counsel should immediately determine whether there are potential conflicts and whether additional counsel is needed. This is especially true where several members of a corporation have been subpoenaed to testify. An initial conversation with the Assistant United States Attorney assigned to the case could help clarify whether separate counsel is needed for individual officers or employees. With respect to requests for documents, counsel should follow a pre-designed procedure that the appropriate personnel are prepared and able to implement.

2. Search Warrant

In most cases, the target has no advance warning that agents are in the process of executing a search warrant. Most people have had little or no experience with federal agents. Intentionally or circumstantially, this unfamiliarity creates trepidation on the part of unsuspecting employees; as a natural consequence of these unfamiliar circumstances, employees often feel pressure to conform, which is not always in their best interests. Educating employees about their rights and obligations during execution of search warrants and other contacts with agents will make the experience less intimidating and will further enhance the prospect of preserving all rights and privileges.

As a general instruction, anyone confronted with a search warrant is obligated to allow the agents to search for the specific items in the locations identified in the search warrant, but is not obligated to do anything more. While an employee may not delay or interfere with the search, the employee is not obligated to submit to an interview. Without the proper guidance, employees often feel that they have no choice other than to answer questions posed by the agents.

A word of caution: in instructing clients on how to deal with search warrants, it is improper to advise that they cannot talk to the agents during a search. This could be construed as obstruction of justice. [*See* 18 U.S.C. § 1518–Obstruction of Criminal Investigation of Health Care Offenses, which applies to anyone who willfully prevents, obstructs, misleads, or delays communication of information or records relating to a violation of health care offense to a criminal investigator.] Corporate counsel may, however, advise employees that, due to the seriousness of the allegations of the investigation, the company would prefer that any employee who decides to speak with the investigators has counsel present.

Some basic instructions regarding search warrants are as follows:

- **Contact counsel immediately;**
- **Obtain a copy of the search warrant;**
- **Identify the agents (particularly the lead agent) and the agency involved;**
- **Respond only to the specific items identified in the search warrant;**
- **One or more employees should be assigned to take detailed notes of the agents' activities during and after the search; e.g., rooms searched, items taken, questions asked, and length of search;**
- **Obtain receipt or copy of inventory for all property taken;**
- **You do not have to talk to the agents unless you want to–the search warrant only requires the agents to search certain areas and to take property, it does not authorize the agents to conduct investigative interviews;**
- **If you decide to speak with the agents, you have the right to have counsel present;**
- **Do not interfere with the agents' search efforts; that is, do not mislead, hide or discard documents or delay in producing the items identified in the search warrant; and**
- **If you decide to speak with the agents, your responses must be truthful.**

See, e.g., Brogan v. United States, 1998 Lexis 648 No. 96-1579, 118 S.Ct. 805 (1998). In *Brogan*, agents from the IRS and the Department of Labor contacted Brogan at his home and sought his cooperation in an ongoing investigation. Brogan agreed to speak with the agents. The agents then specifically asked him whether certain real estate companies had ever paid him or given him gifts. Brogan told them "no." Unbeknownst to Brogan, the agents had already determined that he had in fact received gifts. Brogan declined to change his answer. A grand jury subsequently indicted Brogan for making a false statement under 18 U.S.C. § 1001. Brogan argued that his general denial flowed out of his right against self-incrimination, which should not provide a basis for a false statement charge. This argument traditionally is referred to as the "exculpatory no" doctrine. In rejecting the doctrine, the Court held that while the Fifth Amendment privilege is available to any person at any time, it is not a "privilege to lie." The privilege only allows the individual to avoid incriminating himself by staying silent. *Id.*

3. IG Subpoena

The IG subpoena requires the target to produce "information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence." 5 U.S.C. App. § 6(a)(4). The information obtained pursuant to this subpoena may be used in civil, criminal, and administrative proceedings. *See U.S. v. Educational Dev. Network Corp*, 884 F.2d 737, 740-44 (3d Cir. 1989); *United States v. Aero Mayflower Transit Company*, 831 F.2d 1142, 1145 (D.C. Cir. 1987).

4. Civil Investigative Demand (CID)

Pursuant to a CID, the DOJ has the right to demand documents, answers to interrogatories, and oral testimony. 31 U.S.C. § 3733(a)(2)(B)-(D) (False Claims Act); *see also* 18 U.S.C. § 1312 (antitrust) and 18 U.S.C. § 3486 (HIPPA). The requested information must be "relevant" to that particular agency's investigation. *United States v. Markwood*, 48 F.3d 969, 977 (6th Cir. 1995).

5. Responding to Requests for Documents

With respect to responding to requests for documents pursuant to grand jury subpoenas, IG subpoenas or CIDs, the following points should be considered:

- **Review the request in detail;**
- **Locate the documents;**
- **Identify responsible, competent custodian;**
- **Organize, assemble, Bates stamp and index all relevant documents;**
- **Make copies of all documents produced; and**
- **Ensure that attorney-client and work product privileged documents are properly protected.** *See Upjohn v. United States*, 449 U.S. 383, 394-395 (1981).

As a practical matter, in most instances it will be difficult to convince the agents that certain documents should not be taken because of the attorney-client or work product privileges. If the agents insist that the documents are due to be taken, there are a couple of approaches to try: (1) ask the lead agent not to review those particular documents and to place those documents under seal for a court determination, or (2) speak with the AUSA in

charge of the investigation and make the same request. If those approaches fail, counsel should take immediate steps to request a court review, identifying, if at all possible, each document and citing the reason why the document should be protected.

6. Interviews With Employees

Interviewing former or current employees is one of the most basic–yet most explosive–means of obtaining a bird's-eye view of the practices of any company. A company embroiled in a parallel proceeding should fully expect that if its employees have not already voluntarily submitted to an interview, at some point the investigators will attempt to either interview the employees during the course of executing a search warrant or contact them away from the workplace.

If an employer decides to educate its employees about the possibility of being contacted by investigators, the instructions should be directed to explaining the employees' rights and obligations with respect to such contact. It cannot be overemphasized that any instruction directing employees not to speak with agents could be construed as an attempt to thwart or delay the efforts of the agents and could subject an employee or the company to obstruction of justice charges.

An issue that frequently arises during the investigation of a corporation is whether prosecutors or agents may interview employees without corporate counsel being present. ABA Model Rule 4.2, which has been adopted by the Alabama Rules of Professional Conduct, expressly forbids communication with parties a lawyer knows to be represented by another lawyer, absent that lawyer's consent or by some other legal authorization.

The commentary to Model Rule 4.2 states that the prohibition on ex parte communications applies to any person exercising managerial responsibility on behalf of a corporation, or to anyone whose acts or omissions may be imputed to the corporation or whose statements may constitute a binding admission against the corporation. Rule 801(d)(2)(D) of the Federal Rules of Evidence allows an employee's statements to be construed as admissions against the corporation if the comments concern any matter within the scope of his or her employment and made during the course of the employee's relationship with the corporation.

Interestingly, DOJ's own internal rules are considerably more tolerant of ex parte contact with corporate employees. 28 C.F.R. § 77.10(a), a rule promulgated by the Attorney General, authorizes ex parte government contacts with employees who are not "controlling individuals." The Regulation defines a controlling individual as any high level employee who acts as a decision-maker in defining the corporation's legal position.

It is unsettled whether DOJ's more permissive standards of ex parte contacts supersede a state's local rules of conduct for attorneys. The Eighth Circuit of Appeals addressed this issue in *United States v. McDonnell Douglas Corporation*, 132 F.3d 1258 (8th Cir. 1998). In *McDonnell Douglas*, the Eighth Circuit found that the federal regulations on ex parte employee contacts do not trump local disciplinary rules.

It is worth noting that a modification to ABA Model Rule 4.2 has been proposed. Under proposed Rule 10, prosecutors would be free to speak directly with persons represented by a lawyer if the contact occurs "before the person is arrested or charged, or before he or she is named as a defendant in a civil law enforcement proceeding." ABA Journal *Lawyer Ethics: One Size Fits All?*, July 1998. Government lawyers are seeking this modification to Model Rule 4.2 because the existing prohibitions "obstruct criminal and civil investigations, particularly in cases involving companies and organizations where several people are represented by the same lawyer." *Id.* While it is almost certain that this proposed rule will not be adopted in its present form (if it is adopted at all), the proposed rule still points to the government's efforts to obtain additional tools for the "new litigative environment."

Concerns of the Civil/Criminal Defendant In Parallel Proceedings

Unless a defendant involved in parallel civil and criminal proceedings is able to obtain a stay of the civil action while the criminal action is pending, parallel proceedings will inevitably present several interrelated concerns for the civil/criminal defendant. Those concerns include: (1) preserving the Fifth Amendment privilege against self-incrimination, (2) ensuring that the broad, liberal discovery permitted in civil actions is not used to further the criminal prosecution, and (3) protecting against disclosure of the theory of the criminal defense in advance of trial. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

A. Fifth Amendment

As a general rule, the privilege against self-incrimination can be maintained "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444 (1972). It is particularly important to note that in the context of a civil interrogation, a defendant cannot rely upon a general assertion of pleading "the Fifth," but must instead answer each question that does not involve Fifth Amendment implications, and invoke the privilege as to each question that does. *U.S. v. Babb*, 807 F. 2d 272, 276 (1st Cir. 1986). If the Fifth Amendment privilege is not properly invoked in the civil action, the privilege will be waived and the information obtained through the waiver may be used against the defendant in the criminal proceeding. *United States v. Kordel*, 397 U.S. 1, 11-13 (1970). A witness should invoke his or her privilege against self-incrimination where there is even the slightest possibility of criminal prosecution. *U.S. v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

With respect to the civil trial, the jury is permitted to draw an adverse inference from a defendant's invocation of the Fifth Amendment privilege against self-incrimination. *Baxter v. Palmigicao*, 425 U.S. 308 (1976).

The United States Supreme Court has long recognized that corporations do not enjoy Fifth Amendment protection. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968); *see also Bellis v. United States*, 417 U.S. 85 (1974) (finding that records generated by corporate entities are not shielded by

the privilege against self-incrimination). Conversely, corporate directors and officers are afforded Fifth Amendment privilege. A director's or officer's assertion of the Fifth Amendment privilege at trial can be problematic for the corporation, especially if the jury is instructed that the admission may be used to establish liability on the part of the corporation. There is a split among the circuits as to whether this is a universally accepted rule. *United States v. Single Family Residence*, 803 F.2d 625, 629 (11th Cir. 1986); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271 (3d Cir. 1986); *Brink's, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983); *United States v. District Counsel of New York and Vicinity of the United Bd. of Carpenters and Joiners of Am.*, 832 F. Supp. 644, 651 (S.D. N.Y. 1993). Keep in mind that a corporate employee's active participation in an illegal activity can expose the corporation to liability as long as the employee acted within the line of scope of his or her authority and the company reaped some benefit. *U.S. v. Cincotta*, 689 F.2d 238, 241-242 (1st Cir.), *cert. denied sub nom Zero v. United States*, 459 U.S. 991, 103 S.Ct. 347 (1982); *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979); *Standard Oil v. United States*, 307 F.2d 120 (5th Cir. 1962).

B. Fifth Amendment's Application to Production of Documents

Under the holding in *Bellis, supra*, corporations do not enjoy Fifth Amendment protection. As a result, records generated by corporations are not shielded by the privilege against self-incrimination. *Bellis*, 417 U.S. at 90–91. Accordingly, neither a corporation nor its employees may avoid a grand jury subpoena request for documents by asserting that the records may expose the corporation to criminal liability.

In *Braswell v. United States*, 487 U.S. 99 (1988), the United States Supreme Court explicitly held that corporate custodians may not avoid a subpoena to produce records on the ground that the act of production could be incriminating. The Court reasoned that a corporate custodian, rather than functioning as an individual, is merely a ghost of the underlying corporate entity. The Court concluded that recognizing Fifth Amendment protection for record custodians would, as a practical matter, substantially undercut the corporate exemption from the Fifth Amendment. *Id.* On the other hand, a sole proprietor may invoke his or her Fifth Amendment right with respect to producing documents requested by a grand jury. *United States v. Doe*, 465 U.S. 605 (1984). Note, however, that the contents of the documents are not privileged, just the act of producing them.

The *Braswell* decision leaves unanswered one thorny question: whether a custodian may be compelled to answer questions about the location of records that were subpoenaed but not produced? In *In re Grand Jury Subpoena Dated April 9, 1996*, 87 F.3d 1198 (11th Cir. 1996), the Eleventh Circuit held that a custodian may assert a Fifth Amendment privilege against questions related to the location of unproduced documents. The court reasoned that to compel such testimony would be a direct intrusion into the thought processes of the custodian, and would squarely invade the protective zone of the Fifth Amendment.

C. Broad Civil Discovery

For the criminal defendant, civil discovery during the course of parallel proceedings can generate significant concerns. Under Rule 26(b) of the Federal Rules of Civil Procedure, anything that is relevant to the subject matter and does not fall squarely within a privilege is discoverable. The defendant will not be able to plead the blanket protection of "the Fifth" as a means of avoiding questions posed during civil discovery. The liberal civil discovery rules will therefore allow the government access to information which would not normally be available under the criminal rules. A criminal defendant caught in this web has the option of seeking a stay, a protective order, or an order that places certain conditions on discovery. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980); *Federal Savings and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *United States v. District Council of New York City*, 782 F. Supp. 920, 925 (S.D.N.Y. 1992). The decision to grant a stay is discretionary with the trial court. *U.S. v. Kordel*, 397 U.S. 1, 12 (1970). In making this decision, the court weighs the costs and the competing interests in determining the appropriateness of the stay, including such factors as: (1) the plaintiff's interest in expediting the process and the prejudice to the defendant in defending the stay, (2) injury to public interest, (3) the potential for lost evidence (and witnesses), and (4) whether there is an infringement on a defendant's Fifth Amendment privilege. *In Re Grand Jury Proceedings*, 995 F.2d 1013, 1018 (11th Cir. 1993); *Wilson v. Olathe Bank*, 1998 WL 184470 (D. Kan.).

As long as the government does not abuse the civil discovery process, it is allowed to pursue civil discovery to the full extent of the rules. *SEC v. Dresser Indus., Inc.*, supra. The government cannot, however, use a civil action merely to gain access to broad base civil discovery for use in the criminal action. *Id.*

Corporate Compliance

State and federal enforcement agencies' current focus on parallel criminal and civil prosecutions of health care fraud and other white collar crimes sends a blaring signal to businesses–noncompliance will be costly. For corporations or responsible individuals such as officers and directors, the cost of noncompliance may take the form of criminal penalties, substantial monetary fines, or administrative penalties such as exclusion from participation in government health programs, often a death knell for those in the health care industry. A company that finds itself a target of a government investigation often must devote money and managerial personnel responding to the investigation while, at the same time, waging a publicity battle in the media. These efforts take their toll on the bottom line, even if the company ultimately prevails in the criminal or civil proceeding. By proactively developing an effective internal compliance program that enables the company to detect and root out problems or illegal practices *before* becoming embroiled in a government investigation, the company can reduce its exposure, both civilly and criminally.

Compliance programs, when properly designed and implemented, offer several important benefits. Such programs reduce or prevent criminal and civil

exposure by reaffirming organizational themes such as quality and superior service, keeping management and employees informed of legal requirements, establishing internal monitoring systems that deter organizational misconduct and detect problems when they do occur, and providing an opportunity for damage control before a company finds itself under a prosecutorial microscope. In addition to these benefits, the Organizational Sentencing Guidelines ("Guidelines") promulgated in 1991 establish a uniform sentencing structure for business organizations' criminal conduct. *See* United States Sentencing Guidelines ("USSG") Ch. 8. Corporations have powerful incentives under the Guidelines to have compliance programs in place to detect violations of the law, report violations when discovered to law enforcement authorities, and take voluntary remedial action. In the event of a conviction, the existence of an effective compliance program may lead to a significant reduction in sentencing.

Furthermore, the costs that a government investigation and prosecution poses to a public corporation may result in more shareholder suits asserting that corporate officers and directors should be personally liable for any injury to the corporation. The existence of an effective corporate compliance program provides directors with a defense to personal liability in such circumstances. *In re Caremark Int'l. Inc. Derivative Litigation*, 698 A.2d 959, 969-70 (Del. Chan. 1996). The *Caremark* decision suggests that officers and directors may have a fiduciary responsibility to ensure that their companies have compliance programs in place that provide adequate information and reporting on the corporation's activities. *Id.* at 969-70.

Although a detailed framework for the development and implementation of a compliance program is beyond the scope of this discussion, the Sentencing Guidelines set forth "seven minimum steps" a company must take for its program to be considered as a mitigating factor in any criminal or civil investigation:

(1) Establish compliance standards and procedures for employees to follow that deter prospective criminal conduct.

(2) Identify high-level personnel to oversee compliance by employees and managers with such standards and procedures.

(3) Avoid delegating substantial discretionary authority to an employee or a group of employees who have incentives for or a history of violating applicable laws and regulations.

(4) Communicate the company's standards and procedures to all employees effectively and repeatedly through training programs or publications that explain clearly what conduct is prohibited.

(5) Take reasonable steps to ensure compliance with company standards of conduct through monitoring and auditing systems and through a confidential reporting system where employees can report criminal activity without fear of reprisals.

(6) Enforce compliance standards consistently through appropriate disciplinary measures for employees who violate the standards or fail to detect violations by others.

(7) After a violation has been detected, respond appropriately to the offense by reevaluating and modifying the compliance program, if necessary, to prevent similar offenses.

USSG § 8A1.2, comment. n. 3(k).

Recent legislation, judicial decisions and the extraordinary commitment of government resources have dramatically increased the likelihood of greater scrutiny, especially in the health care industry. As a result, the adoption and maintenance of corporate compliance programs has never been so important to companies' continued viability.

Conclusion

As Ivil is now aware (thanks to your quick but informative overview), parallel civil and criminal proceedings are the government's most potent anti-fraud weapon and its most effective means of obtaining high returns on its investment of money and manpower. The trend is toward increased emphasis on such proceedings in the future. Along with this emphasis has come a more aggressive effort to root out fraud wherever agents can find it, especially in the health care industry.

For defense counsel, operating in this "new litigative environment" of parallel proceedings requires a "proactive defense" rather than a "reactive defense." Counsel must take the lead in convincing their business clients of the need to be prepared to respond to search warrants, grand jury or IG subpoenas, and CIDs. Corporate officers, directors and employees must be aware of their rights and obligations with respect to contacts by investigators and must be forewarned of the significance of preserving work product materials and the attorney-client privilege. Equally as important, corporate clients must take steps to develop, monitor and maintain effective compliance programs that will reduce their exposure to both civil and criminal liability. The government's use of parallel proceedings can be a formidable weapon against any target. Vigilance and preparation are the keys in the defense of this two-pronged attack. ■

Anthony A. Joseph

Anthony A. Joseph is a partner in the Birmingham firm of Johnston Barton Proctor & Powell LLP. He is a graduate of Vanderbilt University, Howard University and the Cumberland School of Law. He was formerly employed as an assistant district attorney, as a Special Agent with the Federal Bureau of Investigation and as an Assistant United States Attorney. He is the 1998 chair of the White Collar Crime Subcommittee of the Commercial and Banking Litigation Section of the American Bar Association.

R. Marcus Givhan

R. Marcus Givhan is a partner in the firm of Johnston Barton Proctor & Powell LLP. After graduating from Cumberland School of Law, he served as a deputy district attorney for Montgomery County and as a deputy attorney general for the State of Alabama in charge of special litigation.

REGISTRATION FORM

Joint Meeting of the Bench and Bar & The State and Federal Council

Embassy Suites Hotel • Montgomery, Alabama
January 21-22, 1999

A joint meeting of the Bench and Bar and the State and Federal Council will be held January 21-22, 1999 at the Embassy Suites Hotel in Montgomery. The meeting is sponsored by the Alabama Judicial College, the Administrative Office of Courts, the Circuit and District Judges Association, and the Alabama State Bar.

A total of 8.3 CLE hours has been approved. The $60 registration fee includes lunch on January 21. Tickets to the joint reception at 6 p.m. on January 21 may be purchased for $15 each. Seminar topics include: "Courts Under Attack: Problematic Communication"; "Scheduling Conflicts: Attorney Client Calendar Conflict Resolution Order"; "Discovery in Federal and State Courts"; "Federal and State Courts–Comparing Issues in Criminal Matters"; "Standards of Civility in the Alabama Legal Community"; and "Civil Law and Domestic Relations Law Updates."

Name: _____

Address: _____

_____

Telephone: _____

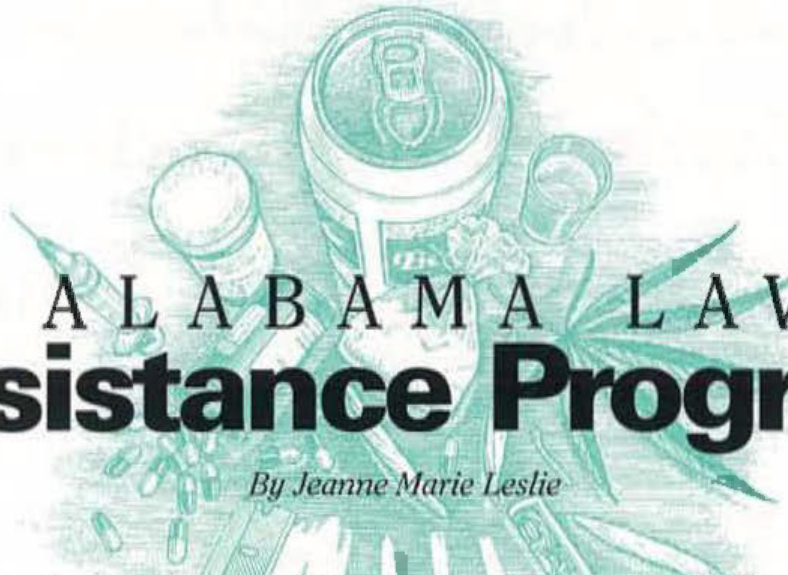
☐ Enclosed is my registration fee of $60.00 for this training session.
☐ I will attend the reception at 6:00 p.m. on January 21, 1999.
☐ I will have a guest (s) at $15.00 each at the reception.
☐ I will not attend the reception.

Total amount of check enclosed $_____

Make check payable to: AJCFA

Mail the form and check by January 7, 1999 to:
The Alabama Judicial College
300 Dexter Avenue
Montgomery, Alabama 36104

Sponsored by the Alabama Judicial College, the Administrative Office of Courts, the Circuit and District Judges Associations and the Alabama State Bar Association



THE ALABAMA LAWYER
Assistance Program

By Jeanne Marie Leslie

"We are all subject to stresses that could at the wrong time in our lives push us over the edge. There is a great need for colleagues who can help us deal with such stresses and perhaps take us aside and keep us from going over the edge. At that point, if we, who know that lawyer, could step in and perhaps even halt the process of deepening substance abuse, perhaps we could salvage a valuable member of the bar and do a little something to preserve our reputation as attorneys. The Alabama State Bar has a program intended to do just that. I heartily endorse this program."

–Alabama Supreme Court Chief Justice Perry O. Hooper, Sr.

The Alabama State Bar has recently joined 38 other states in developing and implementing a Lawyer Assistance Program. The Alabama Lawyer Assistance Program offers prompt, effective and confidential assistance to lawyers, judges and law students with alcohol/drug problems.

Services Offered

Assessment and Referral: The ALAP Director and/or members of the committee will meet with the affected person, to assess the problem and recommend professional evaluation, treatment and rehabilitation options.

Interventions: When appropriate the program director will plan, rehearse and facilitate a formal intervention to assist the affected person in recognizing their illness, allowing for the recovery process to begin.

Peer Support Network: The professional in need of helping will be paired with a recovering lawyer or judge in their geographic area, who will help provide support and guidance into the recovery process.

Education and Prevention: ALAP will work with law firms, the courts, and the ASB committees and sections, as well as local bar associations to provide education concerning lawyers troubled by alcohol and drug dependencies. ALAP is also available to present educational programs on prevention and how individuals can help.

Confidentiality: All calls to the ALAP are confidential and are treated with the concept of helping and assisting the individual involved.

The stories you are about to read are not about bad people, immoral people or weak people. They are about fellow colleagues who needed help.

"Will's" Story

My name is Will, and I am a lawyer in recovery. This is hard for me to write in short space. It would be best if I just told the whose story without descriptions, but this is my best shot at it.

I had developed a successful law practice when I became addicted. I remember driving along the highway on a spring afternoon and thinking that I might have a problem. Weekends had suddenly become longer and my resolve to quit after "this one" no longer worked. I knew that the only way was to quit entirely and for a moment I thought about asking for help. Instead, I decided to stop for a month, maybe I could control it again. That brief moment was the last sane thought to cross my mind for a long time. I am fortunate that addiction finished me off quickly. Only a person who has been there can comprehend how my life spiraled downward until everything and everyone I cared about was gone, my profession, my friends, and my family. I know now that they weren't really gone, they just did not know what to do with me. People tried to talk to me, but I was living with insanity. There is no explanation for why I could not just stop, except that I was an addict and a very sick person. I don't know how to relate what it was like to be in hell and to be controlled by something that powerful. In less than a year after I first thought about asking for help, I was arrested. I went to treatment for damage control, promised myself to stop and came back to start back where I left off. I was unwilling to take the time and make necessary changes in my life. I kept trying to

do it my way, but ultimately my way failed, and I was ready to take the easy way out. Accounts were exaggerated, but I can't complain, because the truth was worse. It was just a sad story.

I know a few people who have whatever it takes to give up early, but I didn't and was totally helpless before I surrendered. Alabama lawyers began a process which eventually saved my life. For the first time, I was ready to do anything and to trust others to help me. I know that the question must have been asked before, but my answer was always qualified. Nothing changed for me until my answer to question "what are you willing to do in order to turn your life around," was- "anything." There were so many people who made a difference that I am not sure that I would have made it without everyone of you. Other attorneys who were in recovery became actively involved in putting me back together. The lawyers who reached out to me gave me hope. Then, I had to accept responsibility for my actions and make an attempt at honesty. For the first time, I let someone else tell me how to live. I went to a long term treatment center that lawyers recommended. Members of Lawyers Helping Lawyers Committee stayed in touch with me and let me know that I did not have to do this alone. Next, came a transition facility where I could work during the day. Being a clerk in small law firm was fun. A committee member and Bar Commissioner gave me a chance to start a new life. I worked all day with them and also spent all of my free time out of treatment with them. They introduced me to other people who, like me, were sober (maybe I should have said other friends who understood me). My life started to change and good things started to happen. I started to love the law again. Lawyers and judges helped me to work through a period of shame and guilt, feelings which would have eventually driven me back down. I didn't have a chance by myself, but lawyers helped me into a network where I could be myself and struggle along with others.

After a year of clerking, I applied for reinstatement from disabled status. When I went to the hearing with some of the lawyers and professionals who had helped me, I was still sick enough to prepare myself for another look at shame, although I had done everything asked of me. I was wrong again. The Alabama Bar Association recognized that I had a treatable disease. The Bar wanted to verify my recovery and help me, provided that I stay in the program. They welcomed me back. It was emotional.

My relationship with friends and family is better than before the bad times. I have a good law practice and enjoy going to work again. I have been sober over four years now and I am getting a chance to change. That deep feeling of fear and insecurity that I have lived with all my life has started to subside some. I had been hurting a long time and didn't even know it. Now, sometimes, just for a little while, I feel at peace. It would be a mistake to hold me out as an example of recovery; I still struggle, but I am staying sober partly because of the Alabama Bar Lawyers Helping Lawyers Program. After I had a sufficient amount of recovery time, they told me: "good news and bad news; the good news is welcome to the lifeboat, the bad news is that you have to help row." Working in the program is good for me, because it helps me to remain sober. Hopefully, someone else will learn from my past experiences without making all of the mistakes that I made.

There are many others who Alabama lawyers have quietly reached out to touch. Some have made it, some have not, but the program works. I am sorry for the hurt and the embarrassment that I caused my friends. I am grateful that you thought that I was worth saving and reached out a hand when I was desperate and needed you.

Another Alabama Attorney

What happened? I was the lawyer who had the world by the tail. Hadn't I had great success in my first seven years of law practice? I had handled a case that settled for two million dollars. I had been able to convince jurors and judges that my side deserved to be awarded the verdict. I had a wife and four wonderful children, a house, new cars and all the trappings of success. Why were these lawyers telling me I might have an addiction problem? Who were they but a couple of drunks?

In hindsight they saw something I didn't. They saw the client complaints and grievances that on their face appeared trivial but were in reality a sign of my inattentiveness and distraction. They had heard from my wife and my father (also an attorney) about the man that they could always depend on who wasn't dependable any more.

I was deep in denial about the fact that I drank to excess and was addicted to cocaine. Hadn't I come up with some of my best jury arguments at the bar after a day in court or at one o'clock in the morning while doing a "line"! I wanted them to leave me alone! Thank God they didn't.

I was told that I could either get into a treatment program or else. I was backed into a corner by three drunk lawyers who had conspired with my wife and parents to make me do something that a bright successful guy like me didn't need to do.

I entered treatment because some lawyers and my family wanted me to. Boy, did I learn a lot. I was an addict and an alcoholic who had no control over my disease. Plus, I found out that I wasn't the only successful lawyer who suffered. The fact that other lawyers were willing to share their similar experiences, trials and tribulations helped me to have the hope and determination to become a grateful recovering addict/alcoholic.

Thanks to Lawyers Helping Lawyers, I have a promising recovery that allows me to continue to practice law soberly and to be the dependable man I want to be.

If not doing drugs or drinking were as easy as many want to believe, wouldn't these people have just quit? They would not have destroyed their families and their careers, bankrupted their friendships, gone to jail, been institutionalized, or possibly died–they simply would have stopped. But that's not how it is–alcohol and drug dependencies are progressive illnesses, ones that without help only get worse.

Lawyers are not immune to these problems; in fact, by the nature of their profession they are at greater risks. The Alabama State Bar recognizes that acknowledging and educating its membership about alcohol and drug dependencies is not only responsible but can also promote healthier stress-reduction choices. Understanding the disease of addiction often leads to action, and acting early in these illnesses often leads to recovery.

The Alabama Lawyer Assistance Program is about halting the disease process before issues of misconduct are raised, enabling a valuable member of the bar to get the help they need and return to practice. For strictly ***confidential*** assistance or for more information call Jeanne Marie Leslie, program director, at **(334) 834-7576.** ■

"Clearly, the mission of the Alabama State Bar is to improve the administration of justice by assisting the lawyers and citizens of our state with their legal needs. It is imperative that this assistance include efforts to encourage impaired lawyers to seek the help necessary for their recovery so that they can continue to provide effective legal services to the public."

–Victor H. Lott, Jr.

Jeanne Marie Leslie

The Alabama State Bar recently named Jeanne Marie Leslie director of its Lawyer Assistance Program, joining 38 other states in implementing such a program. The Lawyers Helping Lawyers Committee was instrumental in bringing this need to the forefront and, following the committee's recommendations, the formation process began.

Ms. Leslie received her BSN from the University of South Alabama and a Masters degree in counseling from Auburn University in 1990. She was previously employed with the Alabama Department of Public Health's Worksite Wellness program, where she presented programs on various health- and stress-related issues. For the past two years, Ms. Leslie has also worked with other licensed professionals recovering from addictions, by monitoring, assisting and supporting their journey back into their practiced professions.

She is married to Arthur Leslie, who is a member of the Alabama State Bar, and they have two children, Arthur, 11, and Culle, eight.

The Alabama Lawyer Assistance Program is designed to promote confidential, early intervention to lawyers, judges and law students with alcohol/drug dependencies.

YOUNG LAWYERS' SECTION

By Gordon G. Armstrong, III

YLS Assists Disaster Victims

Many years ago, the Young Lawyers' Section organized a disaster relief committee to provide natural disaster victims with pro bono legal advice as may be needed following natural catastrophes. YLS volunteers, working through the cooperative efforts of FEMA, discuss problems, answer questions, and generally try to steer disaster victims in the right direction when their lives are otherwise turned upside down by a hurricane, tornado, flood, fire, or other disaster.

Although I would sincerely prefer that our program never be utilized, I am proud to say that YLS volunteers from across the state have provided much needed help over the last year or so. Last year's tornadoes in Birmingham, as well as late September's Hurricane Georges in the Mobile area, have put our program to a test. Through the leadership of last year's Alabama YLS FEMA program chairman, **Michael D. Freeman**, and this year's chairman, **Janelle Evans**, both of Birmingham, the disaster victims were offered free legal aid to assist them with legal issues related to the particular disaster. The aid program offered help with the following legal concerns: insurance claims for medical bills and loss of property; drawing up wills and other legal papers lost in a disaster; home repair contracts and contractors; and landlord/tenant problems.

Our bar and our state can be proud of the tireless efforts of Mike, Janelle and all of the members of the YLS who volunteered their time and service for such a needy cause. They have not only honored their profession, but more importantly, they have honored themselves. Congratulations and thank you.

Young Lawyers' Section Officers for 1998-99

Officers for this year's Young Lawyers' Section were elected at the Alabama State Bar annual meeting held in July in Orange Beach, Alabama. This year's officers are:

Gordon G. Armstrong, III–President

Thomas B. Albritton–President-elect

J. Cole Portis–Secretary

J. Bryan Slaughter–Treasurer

Robert J. Hedge–Immediate Past President

Each of the officers is dedicated to serving the YLS membership and looks forward to a very successful year. If anyone has questions or is interested in YLS activities, please call me at (334) 434-6428 or any of the officers. We are here to serve you. ■

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 March 15, 1999. Nominations should be prepared and mailed to:

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

The Judicial Award of Merit was established in 1987. The 1998 recipient was United States District Court Judge Ira DeMent.

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.

CLE Reminder

All CLE credits must have been **earned** by December 31, 1998. All CLE transcripts must be **received** by January 31, 1999.

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

Alabama Mediation and Arbitration Training

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

January 21-23
Birmingham
Mediation Process & the Skills of Conflict Resolution
Litigation Alternatives, Inc.
(Troy Smith)
(800) ADR-FIRM
(888) ADRCLE3
CLE 22 Hours

January 21-24
Montgomery
Divorce Mediation
Atlanta Divorce Mediators
(Elizabeth Manley)
(800) 862-1425
CLE 40 Hours

February 25-27
Mobile
Mediation Process & the Skills of Conflict Resolution
Litigation Alternatives, Inc.
(Troy Smith)
(800) ADR-FIRM
(888) ADRCLE3
CLE 22 Hours

March 15-17
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DISCIPLINARY NOTICE

Notice

Walter Jasper Price, Jr., whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 1999, or, therafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 97-232(A) before the Disciplinary Board of the Alabama State Bar. [ASB No. 97-232(A)]

Reinstatement

- By order of the Disciplinary Commission dated August 31, 1998, **David Garrett Hooper**, a Montgomery attorney, was suspended from the practice of law in the State of Alabama for noncompliance with the Client Security Fund Assessment Rules of the Alabama State Bar. Said suspension was effective September 9, 1998, and, by order of the Disciplinary Commission dated September 18, 1998, David Garrett Hooper came into compliance with these said Rules and was reinstated to the practice of law effective September 17, 1998.

Suspensions

- Birmingham attorney **Charles Robert Poore, III,** was interimly suspended from the practice of law by order of the Disciplinary Commission of the Alabama State Bar effective October 21, 1998. [Rule 20(a); Pet. No. 98-10]
- Monroeville attorney **Mickey Womble** has been suspended from the practice of law for a period of 90 days, effective August 14, 1998. This action was taken as a result of Womble having pleaded guilty in federal district court to filing a false federal income tax return for the year 1992. [Rule 22(a)(2); Pet. No. 98-02]

Public Reprimands

- On September 18, 1998, Birmingham lawyer **David B. Norris, Sr.** received a public reprimand with general publication in connection with his conditional guilty plea. Norris was handling a personal injury case for a client. When he was unable to settle the case at his initial demand, he turned the case over to a subordinate lawyer in the firm. That lawyer failed to file suit within the two-year statute of limitations. Norris maintained some control over the file after assigning it to the subordinate lawyer, and even wrote letters to healthcare providers after the statute had already run. Norris pleaded guilty to willfully neglecting a legal matter, and failing to supervise a subordinate lawyer in his ethical obligations. [ASB No. 95-132(A)]
- On September 17, 1998, Birmingham lawyer **Dennis Michael Barrett** received a public reprimand without general publication in conjunction with his conditional guilty plea. While serving as a "staff litigation attorney" with the law firm of Norris & Associates, Barrett neglected to file a personal injury lawsuit within the statute of limitations period. Barrett entered a plea to willfully neglecting a legal matter entrusted to him. [ASB No. 95-132(B)]
- On September 18, 1998, Birmingham lawyer **Henry Lee Penick** received a public reprimand with general publication by the Alabama State Bar. Penick failed to obtain service on a defendant he had sued for one of his clients. The U.S. District Court subsequently dismissed the case, but Penick did not notify his client of that fact. The Disciplinary Board of the Alabama State Bar found that this conduct violated the Rules of Professional Conduct, in that Penick neglected a legal matter entrusted to him, and failed to communicate with his client. Prior discipline was considered. [ASB No. 95-237(A)]
- On October 16, 1998, Mobile lawyer **Deborah Diane McGowin** received a public reprimand without general publication by the Alabama State Bar for her conduct in three different cases in which she was involved. In one case, McGowin failed to re-file a case in a timely manner, and let the statute of limitations run. In another case, McGowin failed to communicate with her clients after summary judgement had been granted against them. In the third case, McGowin failed to cooperate in the investigation of a grievance filed by one of her incarcerated criminal clients. McGowin plead guilty to violations of Rule 1.3, Rule 1.4(a) and Rule 8.1(b) of the Rules of Professional Conduct. Prior discipline was considered. [ASB Nos. 95-336(A), 96-282(A) & 97-380(A)] ■

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 1999 to assume the presidency of the bar in July 2000. Any candidate must be a member in good standing on March 1, 1999. 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, 1999. 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 1999 *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 13, 1999.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4; 10th, place no. 7; 10th, Bessemer Cut-off; 11th; 13th, place no. 1; 15th, place no. 5; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; and 40th. 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, 1999 and vacancies certified by the secretary on March 15, 1999.

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 30, 1999).

Ballots will be prepared and mailed to members between May 15 and June 1, 1999. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 8,1999) to state bar headquarters.

IMPORTANT!

Licenses/Special Membership Dues for 1998-99

All licenses to practice law, as well as special memberships, are sold through the Alabama State Bar headquarters.

In mid-September, a dual invoice to be used by both annual license holders and special members, was mailed to every lawyer currently in good standing with the bar.

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1998 and September 30, 1999, please be sure that you purchase an occupational license. Licenses are $250 for the 1998-99 bar year and payment should have been RECEIVED between October 1 and October 31 in order to avoid an automatic 15 percent penalty ($37.50). Second notices will NOT be sent!

An attorney not engaged in the private practice of law in Alabama may pay the special membership fee of $125 to be considered a member in good standing.

Upon receipt of payment, those who purchase a license will be mailed a license and a wallet-size license for identification purposes. Those electing special membership will be sent a wallet-size ID card for both identification and receipt purposes.

If you did not receive an invoice, please notify Diane Weldon, membership services director, at 800-354-6154 (in-state WATS) or (334) 269-1515, ext. 136, IMMEDIATELY!

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RECENT DECISIONS

By Wilbur G. Silberman and Rachel Sanders-Cochran

Recent Bankruptcy Decisions

Any United States agency owing bankruptcy debtor has right of setoff of claim due from debtor to another agency of U.S.

United States v. Maxwell, 157 F.3d 1099, 33 B.C.D. 332 (7th Cir. 1998). The lower courts held there to be an exception to the bankruptcy right of setoff in deciding that the "pervasive nature" of the U.S. prevented the right of one federal agency to set off its debts to the debtor against those of the debtor owed another federal agency. In this case, the Navy reached agreement with the trustee for an obligation due the debtor of $51,050. However, the SBA had a secured claim of $490,575 due on various loans. Also, there were substantial unsecured claims. The U.S. filed a complaint, which included a setoff claim, to determine rights of the various creditors in the $51,050. The trade creditors denied the claim of setoff while the trustee took no position other than to defend his own administrative claim. The bankruptcy court held that the setoff claim was superior to equitable liens, but that lienholders had priority over secured creditors. It rejected the contention of the U.S. that the setoff of the amount due from the Navy could be setoff to the SBA. The court based its holding on two grounds–one, that Section 553 of the Bankruptcy Code did not allow setoff between distinct federal agencies, as they are separate entities under both 101 and 553, and the other that public policy favors denial of setoff between different U.S. agencies and the debtor, in that setoff undermines treating similar creditors equally and that the "pervasive" nature of the federal government "amplifies the effect of setoff".

The district court affirmed only on the public policy argument, saying that to allow setoff in such instances would give the government an unfair advantage.

The Seventh Circuit disagreed, stating that the Bankruptcy Code preserves whatever rights exist outside bankruptcy–that outside of bankruptcy, the United States is a single entity. It noted that nothing in the Bankruptcy Code creates an exception to setoff when there are pervasive creditors, and to hold to the view of the lower courts would be a repeal of the statute. It cites as authority the Eleventh Circuit case of *SEC v. Elliott*, 953 F.2d 1560, 1573 (11th Cir.1992). The court concluded with a statement that bankruptcy courts cannot in the name of equitable subordination, categorically subordinate certain claims, because it would intrude on the legislative function.

Comment: This decision, in its application, could be far-reaching. For example, in chapter 11 cases, how does the court allow certain critical creditors to be paid pre-petition claims, in order that the chapter 11 debtor obtains their product or services during the chapter 11 proceeding? Are these variances not clear violations of the preference provisions?

Wilbur G. Silberman

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

Eleventh Circuit rules that State of Georgia lost its Eleventh Amendment immunity by reason of filing proof of claim for unpaid state income taxes

In re Burke, 146 F.3d 1313 (11th Cir. 1988). In the *Burke* case, the Georgia Department of Revenue (GDR) filed a proof of claim for unpaid income taxes of $12,437.40 from years 1980-84. Prior to discharge, neither the debtor nor GDR requested a determination of whether these taxes were discharged, and the chapter 7 (converted from chapter 11) was closed. Three months subsequent to the discharge, GDR demanded payment from the debtor who then re-opened the case, and filed an adversary proceeding against the State of Georgia contending violation of the discharge injunction set out in 524(a). The State moved to dismiss under the Eleventh Amendment immunity clause per *Seminole Tribe v. Florida,* 116 S.Ct. 1114 (1996). The bankruptcy court held for the debtor under the authority of the Eleventh Amendment, and also Bankruptcy Code Section 106(a), stating that 106(a) was enacted under authority of the Fourteenth Amendment.

The Eleventh Circuit, on appeal from the district court, first commented that the Supreme Court has previously held that the Eleventh Amendment not only bars suits against a state by citizens of other states, but also by its own citizens. It determined that it was not necessary to decide whether 106(a) was enacted under the 14th Amendment, because the State waived its immunity privilege by

filing a proof of claim. The State contended that GDR could not waive immunity, that according to its constitution only the Legislature could do so, and that waiver is limited to the extent provided in the Georgia constitution. The Eleventh Circuit dealt with this by citing *Gardner v. New Jersey*, 67 S.Ct. 467 (1947) which held that when the State becomes the actor by filing a proof of claim, it waives its immunity. The Eleventh Circuit followed by stating that the waiver includes the bankruptcy court's enforcement of the discharge injunction and the automatic stay. *But*, it then narrowed its ruling, stating that it ruled in this manner because the debtors were seeking only costs and attorneys' fees incurred in enforcing the automatic stay and discharge injunction.

Comment: I do not know what to gather from the "narrowing" portion of the opinion. Does it mean that if additional damages flowing from the violation were incurred, the immunity would not have been waived? This is intimated. Should the practitioner have this problem in the future, a decision will have to be made on the particular facts of the matter.

Case Update

Important to chapter 11 practitioners: Supreme Court hears argument on new value exception to absolute priority rule

As I have commented previously, the U.S. Supreme Court is considering whether there is an exception to the absolute priority rule contained in Code Section 1129(b)(2)(B)(ii). The Justices heard oral argument on November 2, 1998, and at this submission (November 16, 1998) is considering its answer. The above-cited Code section provides that a plan may be confirmed over dissenting creditors only if unsecured creditors receive full payment or equity holders will not receive or retain property on *account* of their equity interests. (emphasis supplied because the interpretation of this appeared to be the main issue)

Possibly by the time this issue of *The Alabama Lawyer* is published, you will have an answer. I go out on the limb predicting, as previously, that unless creditors are granted the same privilege as equity holders for purchase of the new equity, the new value exception will be rejected.

Recent Civil Decisions

Arbitration; mutuality of remedy doctrine inapplicable to invalidate agreement to arbitrate; insufficient evidence of unconscionability; non-signatory may enforce arbitration provision when complaint alleges joint conspiracy

Ex parte Napier (*Napier v. Manning, et al.*), Ms. 1961828 (Ala., Nov. 6, 1998). Plaintiffs sued a mobile home dealer, the dealer's representative, the assignee of the installment contract, and an insurer, alleging fraud in connection with the sale of the mobile home and in the procurement of force-placed insurance on the mobile home. The defendants sought to compel arbitration. Plaintiffs objected, alleging that the arbitration provision was void for lack of mutuality of remedy, that enforcement of the provision would be unconscionable because of plaintiffs' advanced age, lack of education and poor vision, and that the non-signatories were not entitled to enforce the arbitration agreement. The trial court granted defendants' motion to compel and plaintiffs petitioned for mandamus relief.

The Alabama Supreme Court denied the plaintiffs' petition, rejecting all three of plaintiffs' arguments. The court reaffirmed the holding of *Ex parte McNaughton*, in which the doctrine of mutuality of remedy was unequivocally rejected as a defense to the enforcement of an agreement to arbitrate. As to the plaintiffs' claims of unconscionability, the court noted that, although an unconscionable arbitration provision would be unenforceable, the party asserting unconscionability bore the burden of proof on the issue. Because plaintiffs failed to present sufficient evidence to meet their burden of proof, the court rejected the claim of unconscionability. Finally, the court found that because the plaintiffs' complaint alleged a conspiracy among the signatories and non-signatories to defraud plaintiffs, the claims asserted against the non-signatories were intimately intertwined with the claims asserted against the signatory parties. For this reason, the court compelled the claims asserted against the non-signatories to arbitration.

Motion to Reopen a Bankruptcy Code Case

The Judicial Conference has mandated a change in the fee schedule for filing a motion to reopen a bankruptcy code case.

Effective immediately, a fee shall be collected in the same amount as the filing fee prescribed by 28 U.S.C. Section 1930(a) for commencing a new case on the date of reopening, unless the reopening is to correct an administrative error or for actions related to the debtor's discharge.

The court may waive this fee under appropriate circumstances or may defer payment of the fee from trustees pending discovery of additicnal assets.

This new language mandates that the reopening fee will be collected by the bankruptcy clerk's office at the time of filing. The fee is non-refundable even if the motion is denied.

–U.S. Bankruptcy Clerk's Office, Northern District of Alabama, 1800 5th Avenue, North, Birmingham, Alabama 35203; phone (205) 714-4000.

Medical malpractice; trial court's discretion under rule 403 as to admissibility of evidence relating to physician's lack of board certification

Gipson v. Younes, Ms. 2970415 (Ala. Civ. App., October 2, 1998). Plaintiffs filed a medical malpractice action alleging negligence in physician's treatment of plaintiff's chronic pain. At trial, plaintiffs sought to introduce evidence that physician twice had failed the medical board certification exams for anesthesiology and pain management. Although the physician was allowed to testify as an expert on his own behalf, the trial court refused to allow plaintiffs to question or elicit information regarding the physician's "failure" of the board exams for fear that the jury would connote the word "failure" with "negligence." However, the plaintiffs were allowed to question the physician as to whether he was board-certified. The jury returned a verdict in favor of the physician and plaintiffs appealed. Presenting an issue of first impression in Alabama, plaintiffs challenged the trial court's refusal to allow evidence that the physician failed the board exams, claiming that the evidence was highly probative and that its exclusion was prejudicial to them.

The court of civil appeals concluded that a physician's inability to pass a medical board certification exam is irrelevant to the issue of the physician's negligence in a malpractice case. However, the court also held that when a physician sued for malpractice testifies as an expert, the fact that he has failed a board certification exam is relevant to his credibility as an expert. In the case before it, the physician had testified as an expert and, therefore, his two failed attempts at board certification were relevant to his credibility. However, the court affirmed the trial court's decision to exclude the evidence as unfairly prejudicial, noting the great discretion afforded a trial court under Rule of Evidence 403.

Class actions; diversity of citizenship jurisdiction and fraudulent joinder

Triggs v. John Crump Toyota, Inc. et al., ___ F. 3d ___, 1998 WL 633673 (11th Cir., Sept. 16, 1998). In this case, plaintiff Triggs leased a car from Omni, a Florida corporation, through an Alabama car dealership, Crump Toyota. Plaintiff filed a fraud action in Alabama state court against Omni and Crump Toyota, alleging that Crump and other dealerships sold cars in Alabama to Omni at inflated prices and that Omni would then lease the cars to the plaintiff class, passing the excess cost onto them. Plaintiff sought class certification. The defendants removed the suit to federal court on the basis of diversity jurisdiction, alleging that Crump had been fraudulently joined. On a motion to remand, the District Court found that the putative class included over 17,000 people, all of whom had dealt with Omni, but only 2 percent of whom had dealt with Crump. On this basis,

the District Court concluded that Crump had been fraudulently joined. Because there was complete diversity of citizenship among the named parties once Crump was disregarded, the district denied plaintiff's motion to remand.

On appeal, the Eleventh Circuit reversed, finding that Crump Toyota had been properly joined, thereby defeating diversity jurisdiction. The Eleventh Circuit reviewed the three situations in which the courts have deemed joinder of a party to be fraudulent: (1) when there is no possibility that the plaintiff can prove a cause of action against the non-diverse defendant; (2) when there is outright fraud in the plaintiff's pleading of jurisdictional facts; and (3) where a diverse defendant is joined with a non-diverse defendant as to whom there is no joint, several or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant.

The Eleventh Circuit found that the plaintiff's complaint clearly stated a potential cause of action against Crump and, thus, as to the named plaintiff, Crump was not fraudulently joined. The Eleventh Circuit rejected the defendants' claim that because 98 percent of the putative class members would have no claim against Crump, Crump must have been fraudulently joined. "This focus is inconsistent with the well-settled rule for class actions–that a court should consider only the citizenship of the named parties to determine whether there is diversity jurisdiction." For these reasons, the Eleventh Circuit found Crump's joinder as a party to be proper under Rule 23.

Rachel Sanders-Cochran

Rachel Sanders-Cochran attended Cumberland Law School, where she graduated *cum laude* and was a member of the *Cumberland Law Review* and Curia Honoris. She practices with the Montgomery firm of Rushton, Stakely, Johnston & Garrett, P.A. She covers the civil decisions.

The Eleventh Circuit noted that Crump's joinder was also proper under Rule 20 of the Federal Rules of Civil Procedure. Under the express language of Rule 20, "a plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." Thus, the fact that a great many of the members of the putative class could seek no relief against Crump was no obstacle to Crump's joinder as a defendant.

Additionally, the defendants argued that bifurcation was appropriate because many of the putative class members did not have a potential claim against all of the defendants. In rejecting this argument, the Court distinguished *Tapscott v. M. S. Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996). The Court found that, unlike *Tapscott*, this case "does not involve two distinct classes that have no real connection to each other. . . . Triggs and all the members of the putative class have claims for relief which would impose joint liability upon Omni and the particular dealership involved. Those claims arise out of a series of transactions precisely like the Triggs-Omni transaction and give rise to common questions of law and fact. Thus, unlike *Tapscott*, there is a real connection between the claims of the named plaintiff and the claims which defendants seek to bifurcate and sever (i.e., the claims of the 98 percent of the putative class)." For these reasons, the Eleventh Circuit found that Crump's joinder was also proper under Federal Rule of Civil Procedure 20.

Finally, the Eleventh Circuit rejected defendants' claims that because plaintiff joined only one of the numerous dealerships through whom members of the putative class dealt with Omni, plaintiff must have joined Crump solely to defeat diversity jurisdiction. Citing United States Supreme Court precedent, the Eleventh Circuit stated that "a plaintiff's motivation for joining a defendant is not important as long as the plaintiff has the intent to pursue a judgment against the defendant." Because the Court found nothing in this case to suggest an absence of an intent to pursue a joint judgment against Crump, the Eleventh Circuit rejected defendants' "bad faith" argument. ■

Additional Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the court has determined to make the following additional revisions to the Rules as set forth below. Pursuant to 28 U.S.C. Section 2071(e), these additional amendments take effect on December 1, 1998 at the same time as the other amendments to the Rules.

1. New 11th Cir. R. 27-1(b)(4) is amended to begin with the following clause: "Except in capital cases in which execution has been scheduled, . . ."

2. 11th Cir. R. 28-2(a) is amended to conform to the list of items contained in FRAP 32(a)(2).

3. 11th Cir. R. 32-3 is amended to add the following sentence: "The clerk may exercise very limited discretion to permit the filing of briefs in which the violation of FRAP and circuit rules governing the format of briefs is exceedingly minor if in the judgment of the clerk recomposition of the brief would be unwarranted."

4. 11th Cir. R. 27-1(c)(5) is amended to end with the following clause: " . . ., but only when the court's opinion is unpublished."

5. 11th Cir. R 27-1(e) is amended to read: "Two-Judge Motions Panels. Specified motions as determined by the court may be acted upon by a panel of two judges."

6. 11th Cir. R. 47-5(a) is amended to delete the last sentence.

7. IOP 8, Negative Poll (p. 85) is amended to read: "If the vote on the poll is unfavorable to en banc consideration, the chief judge enters the appropriate order."

On and after December 1, 1998, the revised rules may be found at the Eleventh Circuit's Web site, *www.ca11.uscourts.gov.* ■

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Specific responsibilities include case management, personnel, statistical reporting, automation, court sessions, fiscal, and procurement. The chief deputy clerk directly supervises mid-managers and oversees and coordinates all case processing activities; establishes, adjusts and ensures compliance with quality control standards; assists in establishing and enforcing operating procedures and standards and ensures compliance; assists in developing organizational goals and objectives; establishes plans, priorities and deadlines for completion of work assignments; and acts for the clerk in his absence.

Qualifications

An undergraduate degree from an accredited university is required, while a post-graduate degree in judicial or public administration, business, political science, or a related field is desirable. A law degree is highly desirable.

A minimum of six years of progressively responsible managerial or administrative experience is required, three of which must have involved management responsibility, preferably in an appellate or federal court environment.

Analytical and communication skills (oral and written), interpersonal skills and an ability to assume and delegate responsibility must be demonstrated.

A knowledge of office automation is required.

Salary

The salary range of $90,316–$117,407 (JSP 16) is dependent upon the applicant's qualifications.

How to Apply

Submit a letter of interest and current resume to:

Thomas K. Kahn, clerk
U.S. Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303
Attn: Personnel Specialist

Deadline

The application deadline is February 1, 1999.

A copy of the position description is available upon request from the personnel specialist at (404) 335-6202.

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- **ATTORNEYS WANTED:** Firms throughout Alabama and across the nation are seeking outstanding attorneys in the following areas: banking, corporate, employment, ERISA, IP, litigation, and tax. Partner and associate level positions available. Strictly confidential. Contact Richard G. Brock, esq. at Special Counsel. Phone (205) 870-3330, extension 102. Fax (205) 870-3337 or e-mail to *richard@amicus-staffing.com.*

- **ASSOCIATE POSITION:** Mid-size firm is seeking an associate with two to five years' experience in Estate Planning. Must possess good interpersonal skills and be able to work directly with clients with minimal supervision. All inquiries will remain confidential. Mail resume to Managing Partner, P. O. Box 2729, Anniston, Alabama 36202.

- **LITIGATION:** Birmingham plaintiff's law firm is seeking an attorney with one to three years' litigation experience. Strong appellate writing skills also essential. Insurance and 401K plan included. Salary commensurate with experience. Send resume to: Garrison and Sumrall, PC 2117 Magnolia Avenue, South, Birmingham, Alabama 35205.

- **ENVIRONMENTAL ATTORNEY:** The Southern Environmental Law Center, one of the nation's leading environmental organizations, is interviewing for a staff attorney position in its Deep South office in Atlanta, Georgia. Position requires a lawyer with strong academics, four years' litigation experience, environmental litigation or advocacy experience strongly preferred. Competitive salary, excellent benefits. Send resume and three references to Hayley Parrish, Southern Environmental Law Center, 201 W. Main Street, Suite 14, Charlottesville, Virginia 22902-5056.

- **ASSOCIATE:** Atlanta office of international law firm seeks labor and employment associate. Successful candidate should have excellent academic credentials and a minimum of two years' experience in employment litigation. Send resume and law school transcript in confidence to Hunton and Williams, Recruiting Administrator, NationsBank Plaza, Suite 4100, 600 Peachtree Street, N. E., Atlanta, Georgia 30308-2216. No phone calls or placement firms, please. EOE/AA

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- **OFFICE SPACE:** For lawyer for lease, located at the Walker Building, 2230 Third Avenue, North, Birmingham, Alabama 35203-3877. Parking for attorney, secretary and clients. Office has library, utilities, receptionist area, copy machine and fax. Available immediately. Call Wayne Wheeler, phone (205) 322-0627. ■

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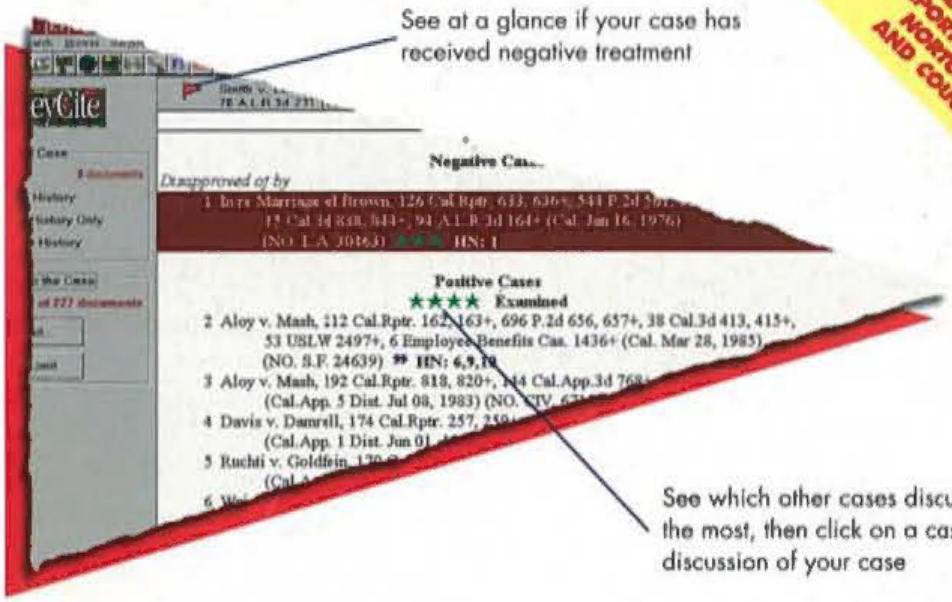

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