

# The Alabama Lawyer

Vol. 62, No. 1

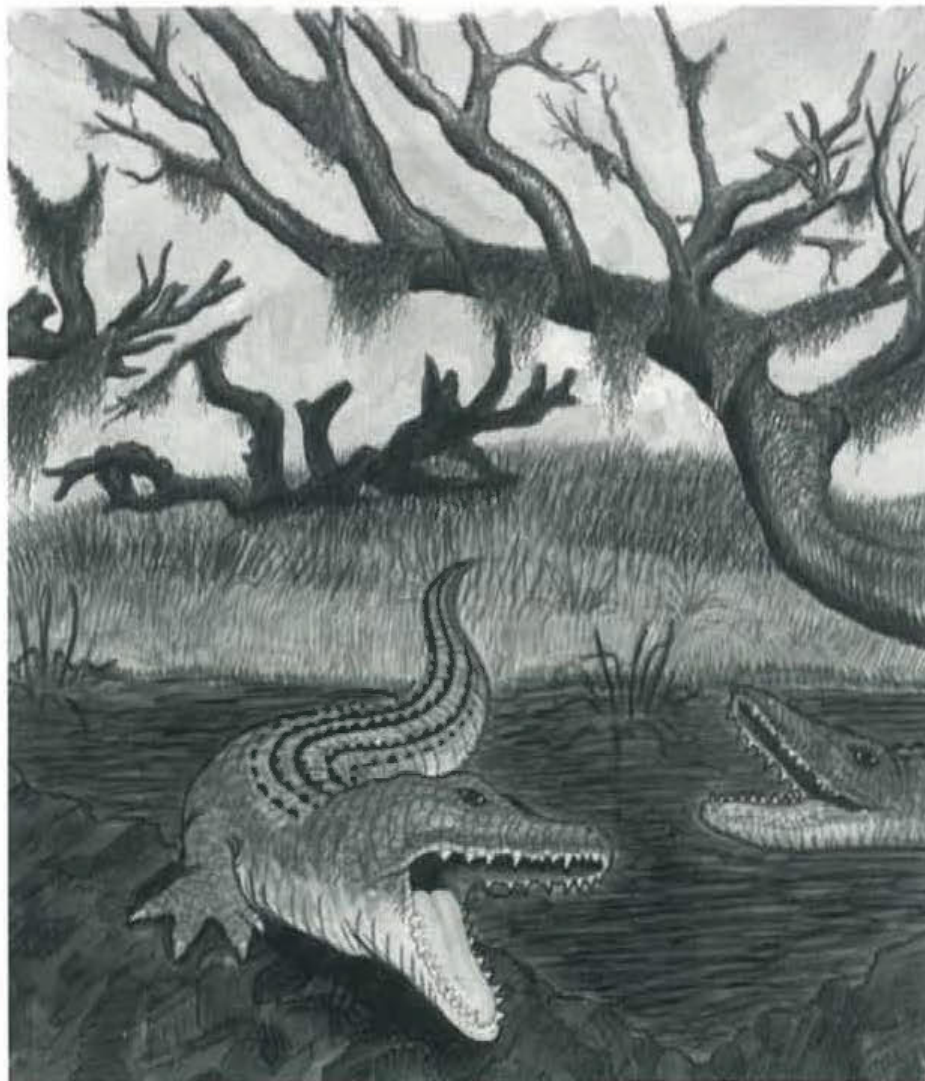
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## 2001 Spring Calendar

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JANUARY	19	Video Replay Seminars	Birmingham
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FEBRUARY	2	Probate Court for the Family Law Practitioner	Birmingham
	9	Commercial Real Estate Transactions	Birmingham
	15	Appellate Practice in Alabama	Birmingham
	16	Nursing Home Litigation	Birmingham

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MARCH	2	Banking Law	Birmingham
	16	Arbitration	Birmingham

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APRIL	20	Employment Law	Birmingham
	26-28	38th Annual Southeastern Corporate Law Institute	Point Clear
	27	Workers' Compensation	Birmingham

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MAY	4	Intellectual Property Law	Birmingham
	4-5	City & County Governments	Gulf Shores
	11	Elder Law	Birmingham
	24	Uniform Commercial Code Update	Birmingham
	31-June 2	Tax Law Institute	Sandestin, FL

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JUNE	8-9	Bridge the Gap	Tuscaloosa
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## On the Cover

*The Old Senate Chamber, Alabama State Capitol—The Senate Chamber is the most historic room in the Alabama Capitol. It was here in February of 1861 that delegates from the seceding Southern states organized the Confederate States of America. Based on extensive documentary and physical research, the Senate Chamber is restored as closely as possible to its appearance at that time. The chandelier is a reproduction of a large oil-burning fixture which hung in 1861. Desks and chairs replicate several surviving originals. The Legislature convenes the 2001 Session on February 6.*

—Photograph by Paul Crawford, JD

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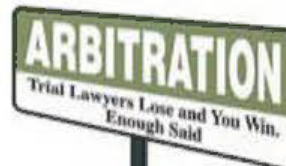
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By Samuel A. Rumore, Jr.



Samuel A. Rumore, Jr.

## Some Thoughts for the Beginning of 2001

**T**he Roman deity Janus is the namesake for the month of January. Old Janus is represented as having two faces, one looking back and the other looking ahead. He was the patron of beginnings and endings. That is appropriate because in January we take stock of the shortcomings in our past and make resolutions for improvements in the future. I share some thoughts with you now as we begin the year 2001.

Over a year has passed since the world was struck with "millennium madness." The fears of Y2K computer problems have come and gone. We have now become accustomed to writing the year beginning with a 2 rather than a 1. There will be many more changes as we move through the 21st century. One of those changes that I hope will take place soon is a new constitution for the state of Alabama.

This year we celebrate the 100th birthday of our constitution. Perhaps "celebrate" is not the proper word to use. Alabama must "endure" the 100th anniversary of this document that was adopted in 1901 but was based on a previous constitution passed in 1875. It has been amended more than 650 times with 15 amendments being considered in the last election alone. After looking back at this fragmented document that is 100 years old, we need to look forward to the next 100 years.

Creating a new constitution for Alabama will require the hard work and good will of many people. Many matters will be debated. A constitution is the basic document that governs any democratic society. That is why I would like the Alabama State Bar to be involved in the discussions.

I have asked recently retired federal **Judge Sam Pointer** to chair a state bar task force on a new Alabama Constitution. Judge Pointer is a well-respected jurist who is nationally known for his handling of com-



The Rumore family: Samuel, Claire, Sam, Pat, and Theresa

plex litigation. There probably is not a more complex issue in our state than the writing of a new constitution.

The state bar has the expertise within its membership to conduct a studied, objective and impartial examination of any proposed constitution. I want this task force to inform the members of the legal profession and the public at large of the content and impact of proposals already made and those to be made in the future.

Therefore, this task force will:

1. Study all constitutional proposals, determine what changes to the 1901 Constitution have been included, and evaluate their merit using the expertise in constitutional law found in our state bar.
2. Serve as a resource for all the groups involved in the effort to draft a new constitution.
3. Report its findings to assist voters in making an intelligent and informed decision and to possibly establish a speakers bureau for informing interested groups of its findings.



I hope that this effort will not take a century to complete. There is no doubt that it will be a long process, however the future citizens of our state will applaud our involvement.

The next area to discuss is a Lawyers' Campaign for Legal Services that will begin this year. As we all know, lawyers have an ethical duty to promote the administration of justice. Many citizens in Alabama are poor and cannot afford to have lawyers assist them in basic areas such as housing, domestic violence, consumer problems, health care needs, and the problems of the elderly. I know that a number of lawyers assist our citizens for low or no fees concerning these problems. But that is not the same as having an organized group to assist those clients where they will know where to go rather than using the piecemeal efforts of public-spirited professionals who may or may not be accessed by the poor.

Therefore, I will be calling on lawyers and local bar associations to assist with a fund-raising drive for Legal Services. Congress has cut back funding for the

Legal Services Corporation from past years. The state of Alabama has never appropriated funds for Legal Services. The good work done by Legal Services attorneys and their attorney volunteers is tremendous, but all lawyers in the state have a responsibility to help.

You will hear more about this campaign during the year. If every Alabama lawyer donated the equivalent in money of only one billable hour per year, Legal Services would not be in constant fear of closing its operations for lack of funds. The effort for a lawyer campaign begins this year. Perhaps it will continue for ten years or indefinitely into the future until the needs are met. The Alabama State Bar will assist in this effort which flows from the Pledge of Allegiance to our national flag which closes with the words: "With liberty and justice for all."

Finally, as I have mentioned a 100-year-old document and a possible ten-year project, it is now time to focus on one year, this year of 2001. I encourage all members of the bar to become involved with their bar association this year. The

qualifying deadline for running for bar commissioner is the last Friday in April. All one needs to qualify is a nominating petition signed by five lawyers in your circuit. Your board of bar commissioners is a hard-working and dedicated group. I have been associated with the bar commission since 1990. I can assure you that the time invested in working with the bar will be rewarded many times over. Of course, that is not the reason to get involved, but it is a natural benefit from getting to know your fellow lawyers.

And, if the state bar seems beyond your reach right now, please make 2001 the year you get involved with your local bar association. I have traveled around the state and have spoken to a number of bar associations and other legal groups. Those local bars need you. Your time, talent and, yes, treasure (dues) keep these organizations energized. This is all very important and a part of our duty as professionals. I encourage all of you to become involved lawyers and I wish you all the best in your efforts to promote the legal profession in Alabama in the year 2001 and beyond. ■

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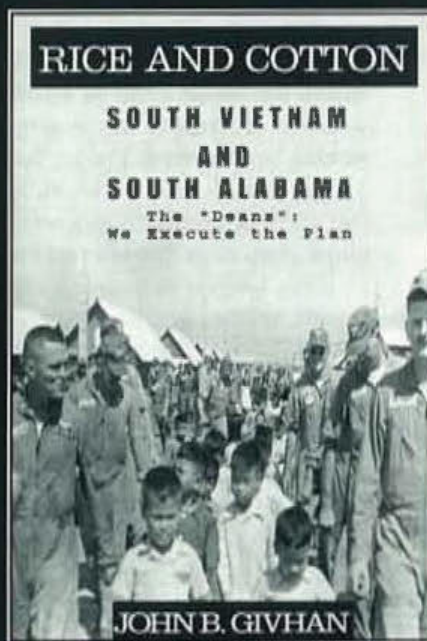
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Keith B. Norman

# 2001: Our Profession's Odyssey

By Keith B. Norman

**A**s we enter the 21st century, our profession is certain to witness change. We see the portent of change in many areas. From venues in which lawyers practice and with whom they share their fees, to the manner in which lawyers practice, the legal profession is attempting to deal with changes that are both fundamental and accelerated.

Last summer, the American Bar Association's House of Delegates resoundingly defeated a proposal to amend the Model Rules of Professional Conduct which would have removed the long-standing prohibition preventing lawyers from sharing fees with non-lawyers. The proposal, known as Multidisciplinary Practice (MDP), was advocated as a way of increasing the range of services that lawyers could furnish clients by allowing lawyers to partner with non-lawyer professionals, such as accountants.

MDP was studied not only by a specially appointed commission by the ABA, but also by practically every state bar in the country, including ours. Our MDP task force, headed by Immediate Past President Vic Lott of Mobile and co-chairs John Molen of Birmingham and Bob Meadows of Opelika, studied this issue last spring and released "pro MDP" and "con MDP" analyses. ASB President Wade Baxley appointed lawyers as well as accountants to serve on the task force.<sup>1</sup> I believe that the MDP measure failed in the ABA House of Delegates and before the board of bar commissions principally because the change of allowing non-lawyers to partner with lawyers could not be reconciled with our profession's core values, among them client confidentiality, independence of judgment and avoidance of conflicts of interest. It is unlikely, however, that MDP will go away entirely, especially since sever-

al jurisdictions have modified their rules to permit lawyers to share fees with non-lawyers.

In November 1999, a conference sponsored by the Law Practice Management Section of the ABA was held. The conference title was "Seize the Future," and its purpose was to provide an interactive forum for leaders of the legal profession to understand the future of the profession, sort through the impact of current developments relevant to trends affecting the profession and develop the tools that will help them move their constituencies into a change process that will meet the demands of the 21st century.

Not surprisingly, a number of the speakers and topics discussed at the conference addressed the need for a paradigm shift in how lawyers practice law in order to meet the changing needs and requirements of clients. In this regard, a business model was suggested to replace the traditional notions of practicing law.<sup>2</sup>

The legal profession is now beset with the issue of multi-jurisdictional practice (MJP). ABA President Martha Barnett has appointed a commission to develop recommendations for ABA policy on how to govern multi-jurisdictional practices so that the regulatory system designed to protect the public can accommodate the changing nature of the way lawyers practice. Recent symposia, as well as articles in a number of professional publications, have discussed this issue, including: "One License for Life: A Paradigm for Multi-Jurisdictional Practice," in the spring issue of the *Professional Lawyer*; "Multi-Jurisdictional Practice: A Challenge for Bar Examiners," in the November 2000 issue of *The Bar Examiner*; and "State-Hopping—UPL, Case Trying to Catch Up With Lawyers on the Go," in the December 2000 issue of the *ABA Journal*. These



and other articles reflect the level of attention that MJP is generating within the profession.

Proponents of MJP maintain that UPL rules across the country are vague and this creates uncertainty for the counseling and transactional practices of lawyers whose clients' matters may take them into other jurisdictions to advise or negotiate. Even if those lawyers do not travel to other jurisdictions, they may advise clients or negotiate for them in those jurisdictions via fax, e-mail and other technological means to the extent that a court could later characterize their activity as the virtual practice of law in those jurisdictions and unauthorized. In this regard, the Supreme Court of California's ruling in the well-known case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), is instructive.

Because of the nature of their practice, transactional lawyers cannot avail themselves of pro hac vice admission as do litigators. Accordingly, to most

observers, transactional lawyers are increasingly practicing where they are not admitted. Indeed, transactional lawyers argue that the same notions of public protection do not apply to their practice as they do to lawyers whose practice is localized within a single jurisdiction. This is because, as they contend, their clients are sophisticated and involved with interstate or international transactions. Consequently, these clients do not need the protection of a state regulatory authority that, in essence, is requiring them to retain local counsel when doing so adds very little to the transaction.

Plainly, the winds of change for the legal profession are blowing. What will be the ultimate outcome of the current MJP debate or the lingering MDP issue is hard to tell. Both call for change that is dramatic. The next few years of the new century will be an odyssey for the legal profession. The legal profession is resilient and I am confident that our profession will adapt as it has done now for more than 200 years. ■

## Endnotes

1. The "pro" and "con" reports were originally posted on the bar's Web site ([www.alabar.org](http://www.alabar.org)) last summer. They have been posted again and can be downloaded. (Lawyer members of the MDP Task Force included: Mason Davis, Birmingham; Beverly Baker, Birmingham; Ebi Ball, Bay Minette; Charlie Crook, Montgomery; Milton Davis, Tuskegee; Bill Hairston, Jr., Birmingham; Sonny Hornsby, Tallahassee; Hon. Robert Kendall, Mobile; Hon. Braxton Kittrell, Mobile; Thomas Lee, Birmingham; Debbie Long, Birmingham; Hon. Rosalyn Mattingly, Bay Minette; ASB President-elect Larry Morris, Alex City; and Dennis Price, Birmingham. The non-lawyer members included: Charles Maddox, Dothan; Wray Pearce, Birmingham; and Yvette Smith, Montgomery.)
2. For example, in an article entitled, "The Territory Ahead: 25 Trends to Watch in the Business of Practicing Law," by seminar participant Merrillyn Astin Tarlton and co-authored by Simon Chester, I found a number of the trends identified by the writers instructive: The global practice; client-controlled marketplace; corrosive influence of greed; lawyers as businesspeople rather than members of the bar; paperless, borderless communications; flex time, flex place, road warrior, virtual law firm; nimble law firms can take on large competitors; and dissolution of practice monopoly.

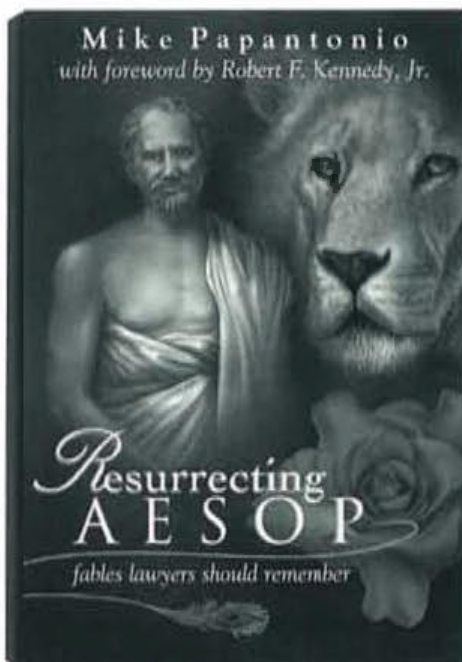
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- The Montgomery chapter of the Federal Bar Association has elected officers for 2000-2001. They are: **Jeff Duffey**, president; **Lynn Mokray**, first vice-president; **Mike Kanarick**, second vice-president; and **Dorman Walker**, secretary/treasurer.
- **Jack Janecky** was recently inducted as president of the Alabama Defense Lawyers Association. He is a graduate of the United States Air Force Academy and the University of Alabama School of Law and practices with the firm of Janecky Newell, P.C.
- **Gregory S. Cusimano** was recently awarded the Lifetime Achievement Award by the Association of Trial Lawyers of America. He was only the fifth recipient of this award and the first from Alabama. The award was presented at the annual convention of ATLA in Chicago, and is given to a member for their lifelong dedication to the civil justice system. Cusimano is a member of the Gadsden firm of Cusimano, Keener, Roberts, Kimberley & Miles, P.C.
- **Alabama Assistant Attorney General Milt Belcher** has been chosen to serve a three-year term as a member of the Board of Directors for the University of Alabama Law School Foundation. The foundation meets annually to discuss and vote on business matters of importance to the law school. The board's members act as advisors to the law school's dean.
- **Jo Allison Taylor**, director of Legal Counsel for the Elderly in Tuscaloosa, recently was awarded certification as an elder law attorney by the National Elder Law Foundation. NELF is the only organization approved by the American Bar Association to offer the CELA designation. (LCE is a University of Alabama Law School Clinical Program, funded in part by West Alabama Planning and Development Council through an Older Americans Act grant.)
- **Herbert Harold West, Jr.**, of the Birmingham firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, recently was named as a member of the State of

Alabama Board of Bar Examiners in the area of business organizations.

- The **Alabama Judicial Inquiry Commission** was represented at the 17th National College on Judicial Conduct and Ethics in Chicago in October by Commission Chairman Randall L. Cole; Second Vice-Chairman James M. White; Commission members P. Ben McLaughlin, Jr., David Scott, J. Mark White and Lee E. Portis; and Executive Director Margaret S. Childers. The College is conducted every two years by the American Judicature Society's Center for Judicial Conduct Organizations. It provides a forum for members and staff of judicial conduct commissions, judges, judicial educators and others interested in judicial ethics to learn about new developments, exchange experiences and discuss solutions to problems
- **Alabama Supreme Court Justice J. Gorman Houston, Jr.** became the eighth Tukabatchee Area Council Eagle Scout to receive the National Distinguished Eagle Scout Award. The award, granted by the National Eagle Scout Association and the National headquarters of the Boy Scouts of America, honors Eagle Scouts who not only have achieved success in their career but who also have an exemplary record of volunteer service to the community over the years.



*Justice J. Gorman Houston, Jr.*

The award has been granted since 1969 to such former Eagle Scouts as President Gerald Ford and chief executive officers of Fortune 500 companies.

The award was presented at a special banquet in November at the Embassy Suites Hotel in Montgomery. ■



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*Due to the huge increase in notices for "About Members, Among Firms," The Alabama Lawyer will no longer publish addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.*

## About Members

**Micki Beth Stiller** announces the opening of her new office at 124 W. Reynolds, Ozark 36360. Phone (334) 774-1118. Offices are also located in Montgomery and Selma.

## Among Firms

**Leitman, Siegal & Payne, P.C.** announces that **Robert R. Maddox** has become associated with the firm.

**Rogers, Young, Wollstein, Jackson & Whittington, L.L.C.** announces that **Rochelle D. Hunt** has become an associate with the firm.

**Killion & Rowan, P.C.** announces that **Roger C. Guillian** has become associated with the firm.

**Sims, Graddick & Dodson, P.C.** announces that **Robin P. F. Rolison** has become associated with the firm.

**Helmsing, Leach, Herlong, Newman & Rouse** announces that **William R. Lancaster** has become a member of the firm and that **Leslie G. Weeks** and **Louisa F. Long** have become associated with the firm.

**Morris & Cary, L.L.C.** announces that **Wayne Cary** has joined the firm as an associate.

**Raymond L. Jackson, Jr.** and **Jeremy W. Armstrong** announce the formation of **Jackson & Armstrong, P.C.** Offices are located at 145 E. Magnolia Avenue, Suite 201, Auburn 36830. Phone (334) 321-2006.

**Gathings Kennedy & Associates** announces that **Patrick Patronas** and **Mickey B. Wright** have joined the firm as associates.

**Washington Group International** announces that **John L. Tate** has been named corporate counsel in the Birmingham office.

**Zieman, Speegle, Jackson & Hoffman, L.L.C.** announces that **Robin Banck Taylor** has become associated with the firm.

**Klemm & Gourley, P.C.** announces the change of the firm name to **Klemm, Gourley & Scott, P.C.** and that **Pamela Ann Ragan Scott** has become a shareholder of the firm.

**Sadler Sullivan** announces that **Marcus A. Jaskolka** has become associated with the firm.

**Callis & Stover** announces that **Scott F. Stewart** has become a partner in the firm.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces that **Diane Babb Maughan** and **Nikaa Baugh Jordan** have become associates with the firm.

**Wilmer, Cates Fohrell & Kelley, P.A.** announces that **L. Tennent Lee, III** and **S. Dagnal Rowe** have become shareholders in the firm. The firm name has been changed to **Wilmer, Lee, Rowe, Cates, Fohrell & Kelley, P.A.** **Richard J. R. Raleigh, Jr.** and **Allen M. Hammer** have become associated with the firm.

**Coca-Cola Bottling Company United, Inc.** announces that **M. Williams Goodwyn, Jr.** has joined Coca-Cola United as vice-president and general counsel.

**Humphreys Dunlap Wellford Acuff & Stanton** announces that **James E. Bailey, III** has become a member of the firm.

**Dominick, Fletcher, Yelding, Wood & Lloyd, P.A.** announces that **Ann McMahan** and **James P. Rea** have joined the firm.

**James A. Kee, Jr.** and **David L. Selby, II** announce the formation of **Kee & Selby L.L.P.** **Kyle C. Barrentine** and **Jon M. Hughes** have joined the firm as associates. Offices are located at 1900 International Park Drive, Suite 220, Birmingham 35243. Phone (205) 968-9900.

**Olen, Nicholas & Copeland P.C.** announces that **Reggie Copeland, Jr.** has become *of counsel* with the firm.



Jean M. Bruner and Thomas E. Rimmer announce the formation of **Bruner & Rimmer, L.L.C.** Office are located in the Lawrence Building, 472 S. Lawrence St., Montgomery. Phone (334) 834-1375.

Luker, Cole & Associates, L.L.C. announces that **Katherine P. Luker** has become an associate with the firm.

Hall, Conerly, Mudd & Bolvig, P.C. announces that **Terry Alan Sides** has joined the firm as a shareholder.

Hill, Hill, Carter, Franco, Cole & Black, P.C. announces that **James R. Seale** and **Martha Ann Miller** have become members of the firm and that **Jeffery N. Mykkeltvedt** has joined the firm as an associate.

Haskell Slaughter & Young, L.L.C. announces that **F. Lane Finch, Jr.** has become *of counsel* to the firm, and that **N. Andrew Rotenstreich, Vanessa A. Scott, Ryan M. Aday** and **T. Scott Kelly** have become associated with the firm.

M. Clay Ragsdale, IV and Allan R. Wheeler announce the formation of **Ragsdale & Wheeler, L.L.C.** M. Stan Herring is an associate with the firm. Offices are located at 1929 Third Avenue, North, The Farley Building, Suite 550, Birmingham 35203. Phone (205) 251-4775.

Friedman & Pennington, P.C. announces that **C. Melanie Purvis** has joined the firm.

Huckaby Scott & Dukes, P.C. announces that **M. Brent Yarborough** has become associated with the firm.

Hand Arendall, L.L.C. announces that **Lisa Darnley Cooper, Andrew J. Crane, Christopher M. Gill, Louis C. Norvell,** and **Tracy Reynolds Davis** have joined the firm as associates.

Cochran, Cherry, Givens & Smith, P.C. announces that **Terry G. Key** has joined the firm. ■

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## *Ormond Somerville, Jr.*

After 93 years on this earth Ormond Somerville, Jr. was called to his eternal reward on March 21, 1998.

Ormond Somerville's deep devotion and commitment to the practice of law and betterment of his chosen profession were rare and exemplary. He served with distinction as counsel for Samford University, the Industrial Water Board of Birmingham, the Birmingham Public Library Board and the Birmingham Board of Education for many years, and was recognized for his distinguished service to the legal profession by being named the Birmingham Bar Association "Outstanding Lawyer of the Year" in 1987. Like both his father and grandfather, Mr. Somerville served as a justice on the Alabama Supreme Court in 1972.

Ormond Somerville was also prominent in many civic, religious and professional matters, including serving as trustee, elder and deacon for Independent Presbyterian Church, director of the church Foundation, and trustee for the Birmingham Bar Association Bar Aid Trust.

He lived a full life with many interests, including being an avid genealogist, fly fisherman and lover of nature.

This resolution is offered as a record of our admiration and affection for Ormond Somerville, Jr. and our condolences to his family.

— *S. Shay Samples, president,  
Birmingham Bar Association*



*Aldridge, Gareth Van Antwerp*  
Mobile  
Admitted: 1935  
Died: September 25, 2000

*Callaway, Clyde W., Jr.*  
Birmingham  
Admitted: 1951  
Died: November 7, 2000

*Embry, James Bass, Jr.*  
Pell City  
Admitted: 1978  
Died: June 26, 2000

*Eyster, Charles H., Jr.*  
Decatur  
Admitted: 1948  
Died: March 3, 2000

*Haney, William P., Jr.*  
Camarillo, CA  
Admitted: 1967  
Died: August 30, 2000

*Henderson, Howard Ray*  
Pell City  
Admitted: 1952  
Died: January 3, 2000

*Hollis, Murray Cobb, Jr.*  
Winfield  
Admitted: 1959  
Died: March 23, 2000

*Jinright, Olen*  
Birmingham  
Admitted: 1955  
Died: September 13, 2000

*Kettler, Charles Joseph, III*  
Montgomery  
Admitted: 1991  
Died: April 3, 2000

*Leathers, Jackie Pearl*  
Montgomery  
Admitted: 1998  
Died: March 5, 2000

*Montgomery, Robert Munger*  
Birmingham  
Admitted: 1939  
Died: July 26, 2000

*Starke, Walter Marcellus*  
Birmingham  
Admitted: 1961  
Died: August 2, 2000

*Wallace, Joe Robert*  
Birmingham  
Admitted: 1947  
Died: May 23, 2000

*Welch, Henry Burt*  
Birmingham  
Admitted: 1937  
Died: March 9, 2000



## Order Supreme Court of Alabama • October 30, 2000

It is ordered that Rule 4.2(b) (5), Alabama Rules of Disciplinary Procedure, be amended to read as follows:

"(5) As to a proceeding before the Disciplinary Board, to conduct all preliminary matters, to rule on all matters of evidence, to vote as a member of the panel on all matters before the panel, and generally to guide and superintend the conduct of the proceeding. For purposes of all hearings and proceedings, the Disciplinary Hearing Officer shall have the power and immunity of a circuit judge and the Alabama Rules of Civil Procedure and Alabama Rules of Evidence, as applicable to nonjury trials in the circuit court, shall apply, except to the extent that these Rules may provide otherwise."

It is further ordered that the amendment of this rule be effective immediately.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 4.2:

"Note from the reporter of decisions: The order amending Rule 4.2(b) (5), effective October 30, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 2d."

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

## Order Supreme Court of Alabama • October 30, 2000

It is ordered that Rule 4(a)(1), Alabama Rules of Disciplinary Procedure, be amended to read as follows:

"(1) The Board of Commissioners of the Alabama State Bar shall appoint six panels of six members each, each panel to be known as 'The Disciplinary Board of the Alabama State Bar' (hereinafter referred to as a 'Disciplinary Board'). Each panel shall be composed of four persons who are Bar commissioners, one layperson, and the Disciplinary Hearing Officer appointed pursuant to Rule 4.2 of these Rules. As used in these Rules, the term 'Disciplinary Board' shall refer to that panel involved in a particular disciplinary proceeding, and the term 'layperson' shall mean an adult resident citizen of the State of Alabama who is not now, and who never has been, a lawyer. Those Bar commissioners appointed to the Disciplinary Board shall be appointed for terms of three years, except when appointed to fill an unexpired term, and they cannot serve more than two consecutive full terms. Layperson members shall be appointed for terms of one year and may serve unlimited successive terms. Any member appointed to a Disciplinary Board shall be required to attend a three-hour training session conducted by the Office of General Counsel of the Alabama State Bar at Alabama State Bar Headquarters. Members who are lawyers will receive CLE credit for attending the training session."

It is further ordered that Rule 4(a)(2), Alabama Rules of Disciplinary Procedure, be amended to read as follows:

"(2) The Disciplinary Hearing Officer appointed pursuant to Rule 4.2 of these Rules and assigned to hear a particular matter may appoint members of the board of Bar Commissioners who are not members of the Disciplinary Commission to sit temporarily on a Disciplinary Board. The Disciplinary Hearing Officer may make such a temporary appointment to ensure that a quorum of the Disciplinary Board is available to hear or to consider a particular matter, but the Disciplinary Hearing Officer's authority to appoint temporary members of the Disciplinary Board is not restricted to appointment of that number of members as may be necessary to secure a quorum, and the Disciplinary Hearing Officer may appoint as many temporary members as the Disciplinary Hearing Officer deems appropriate, up to the number required to provide a full panel of six members. A roster shall be made of the names of the Bar commissioners who are not members of the Disciplinary Board or Disciplinary Commission, and these temporary appointments shall be made from that roster."

It is further ordered that Rule 4(d), Alabama Rules of Disciplinary Procedure, be amended to read as follows:

"(d) Establishment of Quorum; Majority Required for Disciplinary Board to Act. Four members constitute a quorum, provided, however, that the quorum must include a lay member. A panel shall act only with the concurrence of a majority of its six members, notwithstanding that fewer than all members are present to conduct the proceeding."

It is further ordered that these amendments be effective immediately.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 4:

"Note from the reporter of decisions: The order amending Rule 4(a) (1), 4(a) (2), and 4(d), effective October 30, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 2d."

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.





By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

The next Regular Session of the Alabama Legislature convenes Tuesday, February 6, 2001. The Institute will present the following revisions: Interstate Enforcement of Domestic Violence Orders, Uniform Athlete Agents Act, Revised UCC Article 9 and the Uniform Electronic Transactions Act. In the November 2000 *Alabama Lawyer* we reviewed the first two revisions. In this article we will review the remaining.

## Revised UCC Article 9, Secured Transactions

A major revision of Article 9 was drafted and approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1999. It has already been adopted in 27 states in the past two years.

The Uniform Commercial Code in Alabama was adopted in 1965 and was last revised in 1981. However, this revision is more wide sweeping than the earlier revision. Currently, financing statements are filed in either the probate office or in the Secretary of State's Office. Under this revision, the place of filing follows the domicile of the debtor rather than the location of the security. Also, there will only be one central data base.

For natural persons living in Alabama the filing will still remain in Alabama. However, for business entities, although located in Alabama and with property in Alabama, if they are foreign business entities the filing will be in the state of organization.

It is also envisioned that filing could either be paper documents or electronic records.

Article 9 is not simple; the following summary of Article 9 is adopted from the NCCUSL comments and is not a treatise on Revised Article 9, but is a schematic summary of its relevant changes provided by the drafters.

**1. The Scope Issue**—This revision expands the "scope" of Article 9. What this means literally is that the kinds of property in which a security interest can be taken by a creditor under Article 9 increase over those available in Article 9 before revision. Also, certain kinds of transactions that did not come under Article 9 before now come under Article 9. These are some of the kinds of collateral that are included in Revised Article 9 that are not in original Article 9: sales of payment intangibles and promissory notes; security interests created by governmental debtors; health insurance receivables; consignments; and com-

mercial tort claims. Non-possessory, statutory agricultural liens come under Article 9 for determination of perfection and priority, generally the same as security interests come under it for those purposes.

**2. Perfection**—Filing a financing statement remains the dominant way to perfect a security interest in most kinds of property. It is clearer in Revised Article 9 that filing a financing statement will perfect a security interest, even if there is another method of perfection. "Control" is the method of perfection for letter of credit rights and deposit accounts, as well as for investment property. Control was available only to perfect security interests in investment property under old Article 9. A creditor has control when the debtor cannot transfer the property without the creditor's consent. Possession, as an alternative method to filing a financing statement to perfect a security interest, is the only method for perfecting a security interest in money that is not proceeds of sale from property subject to a security interest. Automatic perfection for a purchase money security interest is increased nationally from ten days in old Article 9 to Alabama's current 20 days in Revised Article 9. Attachment of a purchase money security interest is perfection, at least for the 20-day period. Then another method of perfection is necessary to continue the perfected security interest. However, a purchase money security interest in consumer goods remains perfected automatically for the duration of the security interest.

**3. Choice of Law**—In interstate secured transactions, it is necessary to determine which state's laws apply to perfection, the effect of perfection and the priority of security interests. It is particularly important to know where to file a financing statement. The Revised Article 9 makes two fundamental changes from old Article 9. In old Article 9, the basic rule chooses the law of the state in which the collateral is found as the law that governs perfection, effect of perfection and a creditor's priority. In Revised Article 9, the new rule chooses the state that is the location of the debtor. Further, if the debtor is an entity created by registration in a state, the location of the debtor is the location in which the entity is created by registration. If an entity is a corporation, for example, the location of the debtor is the state in which the corporate charter is filed or registered. In old Article 9, the entity that is a debtor is located in the state in which it has its chief executive office. These changes in basic choice of law rules will change the place in which a financing statement is filed



in a great many instances from the place it would have been filed under old Article 9.

**4. The Filing System**—The filing system in the Revised Article 9 includes a full commitment to centralized filing—one place in every state in which financing statements are filed, and a filing system that escorts filing from a system of filed documents to a system of electronic communications and records. Under Revised Article 9, the only local filing of financing statements occurs in the real estate records for fixtures. Fixtures are items of personal property that become physically part of the real estate, and are treated as part of the real estate until severed from it. It is anticipated that electronic filing of financing statements will replace the filing of paper. Revised Article 9 definitions and provisions allow this transition from paper to electronic filing without further revision of the law. Revised Article 9 makes filing office operations more ministerial than old Article 9 did. The office that files financing statements has no responsibility for the accuracy of information on the statements and is fully absolved from any liability for the contents of any statements received and filed. Financing statements, therefore, may be considerably simplified.

There is no signature requirement, for example, for a financing statement.

**5. Consumer Transactions**—Revised Article 9 makes a clearer distinction between transactions in which the debtor is a consumer than prior Article 9 did. Enforcement of a security interest that is included in a consumer transaction is handled differently in certain respects in the Revised Article 9. Examples of consumer provisions are: a consumer cannot waive redemption rights in a financing agreement; a consumer buyer of goods who pre-pays in whole or in part has an enforceable interest in the purchased goods and may obtain the goods as a remedy; a consumer is entitled to disclosure of the amount of any deficiency assessed against him or her and the method for calculating the deficiency; and a secured creditor may not accept collateral as partial satisfaction of a consumer obligation, so that choosing strict foreclosure as a remedy means that no deficiency may be assessed against the debtor. Although it governs more than consumer transactions, the good faith standard becomes the objective standard of commercial reasonableness in the Revised Article 9.

**6. Default and Enforcement**—Article 9 provisions on default and enforcement deal generally with the procedures for

obtaining property in which a creditor has a security interest and selling it to satisfy the debt, when the debtor is in default. Normally, the creditor has the right to repossess the property. Revised Article 9 includes new rules dealing with "secondary" obligors (guarantors), new special rules for some of the new kinds of property subject to security interests, new rules for the interests of subordinate creditors with security interests in the same property, and new rules for aspects of enforcement when the debtor is a consumer debtor. These are some of the specific new rules: a secured party (creditor with security interest) is obliged to notify a secondary obligor when there is a default, and a secondary obligor generally cannot waive rights by becoming a secondary obligor; a secured party who repossesses goods and sells them is subject to the usual warranties that are part of any sale; junior secured creditors (subsequent in priority) and lienholders who have filed financing statements must be notified when a secured party repossesses collateral; and, if a secured party sells collateral at a low price to an insider buyer, the price that the goods should have obtained in a commercially reasonable sale, rather than the actual price, is the price that will be used in calculating the deficiency.

## 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 2001 to assume the presidency of the bar in July 2002. Any candidate must be a member in good standing on March 1, 2001. 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, 2001. 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 2001 *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at the state bar by 5 p.m. on the second Friday in June (June 8, 2001).

### Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, places no. 3 and 6; 13th, places no. 3 and 4; 14th; 15th, places no. 1, 3 and 4; 25th; 26th; 28th; 32nd; and 37th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 2001 and vacancies certified by the secretary no later than March 15, 2001.

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 27, 2001).

Ballots will be prepared and mailed to members between May 1 and May 15, 2001. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 25, 2001) to the Alabama State Bar.



**7. Effective Date**—Most of the 27 states which have already passed Revised Article 9 made the Act effective July 1, 2001. We do not expect Alabama to make the Act effective until sometime in 2002.

This committee is chaired by **Larry Vinson**, who is with the firm of Bradley Arant Rose & White LLP of Birmingham.

## Electronic Transactions Act

The Electronic Signatures in Global and National Commerce Act or "E-SIGN" was

passed by Congress and signed by the President on June 30, 2000. This new federal law establishes for the first time base line rules to facilitate the nationwide use of electronic signatures, contracts and records in commercial transactions. The Act's focus is more on enabling electronic transactions and removing current barriers to such transactions than on the technical requirements of electronic signatures. The "E-SIGN" functions to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures.

The federal law does provide states with limited authority to modify, limit or supersede the E-Sign Act basic provisions to comply with state law by the adoption of the Uniform Electronic Transactions Act. UETA was drafted by the National Conference of Commissioners of Uniform State Laws in 1999 and in the last two years has been adopted by the 22 states. The following summary of UETA is adapted from the NCCUSL comments to the Uniform Act.

Although related to the Uniform Commercial Code, the rules of UETA are primarily for "electronic records and electronic signatures relating to a transaction" that are not subject to any article of the Uniform Commercial Code, except for articles 2 and 2A. A "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.

UETA applies only to transactions in which each party has agreed by some means to conduct them electronically. Agreement is essential. Nobody is forced to conduct electronic transactions. Parties to electronic transactions come under UETA, but they may also opt out. They may vary, waive or disclaim most of the provisions of UETA by agreement, even if it is agreed that business will be transacted by electronic means. The rules in UETA are almost all default rules that apply only in the event the terms of an agreement do not govern.

Electronic commerce means, of course, persons doing business with other persons with computers and telephone or television cable lines. The Internet is the great marketplace for these kinds of transactions.

A few things are known about the existing electronic marketplace and there are some assumptions about the law that governs transactions within it that can be made with reasonable certainty into the future. Electronic transactions are conducted by communicating digitized information from one person to another. That digitized information can be communicated and stored without the use of paper, and the basic language of electronic transactions is fully and inherently paperless. The need to expand requirements in the law for writings and manual signatures so that electronic records and electronic signatures will satisfy those requirements is the one thing that is reasonably certain with respect to electronic transactions.



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UETA does not attempt to create a whole new system of legal rules for the electronic marketplace. The objective of UETA is to make sure that transactions in the electronic marketplace are as enforceable as transactions memorialized on paper and with manual signatures, but without changing any of the substantive rules of law that apply. This is a very limited objective—that an electronic record of a transaction is the equivalent of a paper record, and that an electronic signature will be given the same legal effect, whatever that might be, as a manual signature. The basic rules in UETA serve this single purpose.

The basic rules are in Section 7 of UETA. The most fundamental rule in Section 7 provides that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form." The second most fundamental rule says that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." The third most fundamental rule states that any law that requires a writing will be satisfied by an electronic record. And the fourth basic rule provides that any signature requirement in the law will be met if there is an electronic signature.

Almost all of the other rules in UETA serve the fundamental principles set out in Section 7, and tend to answer basic legal questions about the use of electronic records and signatures. Thus, Section 15 determines when information is legally sent or delivered in electronic form. It establishes when electronic delivery occurs—when an electronic record capable of retention by the recipient is legally sent and received. The traditional and statutory rules that govern mail delivery of the paper memorializing a transaction can't be applied to electronic transactions, however, UETA provides the rule.

Another rule that supports the general validity of electronic records and signatures in transactions is the rule on attribution in Section 9. Electronic transactions are mostly faceless transactions between strangers. UETA states that a signature is attributable to a person if it is an act of that person, and that act may be shown in any manner. If a security procedure is used, its efficacy in establishing the attribution may be shown. In the faceless environment of electronic transactions, the obvious difficulties of identification and attribution must be overcome. UETA, Section 9 gives guidance in that endeavor.

A digital signature is really a method of encryption that utilizes specific technology; however, UETA may not be characterized as a digital signature statute. It does facilitate the use of digital signatures and other security procedures in rules such as the one in Section 9 on attribution. Section 10 provides some rules on errors and changes in messages. It favors the party who conforms to the security procedure used in the specific transaction against the party who does not, in the event there is a dispute over the content of the message.

Nothing in UETA requires the use of a digital signature or any security procedure. It is technologically neutral. Persons can use the most up-to-date digital signature technology, or less sophisticated security procedures such as passwords or pins. Whatever parties to transactions use for attribution or assuring message integrity may be offered in evidence if there is a dispute.

UETA is procedural, not substantive. It does not require anybody to use electronic transactions or to rely upon electronic records and signatures. It does not prohibit paper records and manual signatures. Basic rules of law, like the general and statutory law of contracts, continue to apply as they have always applied.

There are three provisions in UETA that need special attention. First, UETA excludes transactions subject to the Uniform Commercial Code, except for those under articles 2 and 2A, laws governing estates and trusts, and any other specific laws that a state wants to exempt from the rules applied in UETA. Some writing and signature requirements in state law do not have an impact on the enforceability of transactions, and have objectives that should not be affected by adoption of a statute like UETA. The limitation of UETA to agreed electronic transactions will eliminate any conflict with other writing requirements for the most part.

Second, UETA provides for "transferable records" in Section 16. Notes under Article 3 and documents under Article 7 of the Uniform Commercial Code are "transferable records" when in electronic form. Notes and documents are negotiable instruments. The quality of negotiation relies upon the note or document as the single, unique item of the obligations and rights embodied in the note or document. Maintaining that quality as a unique item for electronic records is the subject of Section 16. A transferable

record exists when there is a single authoritative copy of that record existing and unalterable in the "control" of a person. A person in "control" is a "holder" for the purposes of transferring or negotiating that record under the Uniform Commercial Code. Section 16 is essentially a supplement to the Uniform Commercial Code, until its relevant articles can be fully amended or revised to accommodate electronic instruments.

Third, UETA clearly validates contracts formed by electronic agents. Electronic agents are computer programs that are implemented by their principals to do business in electronic form. They operate automatically, without immediate human supervision, though they certainly are not autonomous agents. They are a kind of tool that parties use to communicate. Section 14 provides that a person may form a contract by using an electronic agent. That means that the principal, which is the person or entity which provides the program to do business, is bound by the contract that its agent makes.

When somebody buys something on the Internet, therefore, that person will be assured that the agreement is valid, even though the transaction is conducted automatically by a computer that solicits orders and payment information.

Three sections, 17, 18, and 19 of UETA, deal with electronic records that state governmental agencies create and retain. The Institute is working with state agencies to determine what part of this Act should apply to them. All three sections are currently optional.

One thing is certain: electronic commerce law is a reality. We will either be governed by the federal law after March 1, 2001 or by this Act.

**Dean Mike Floyd** of Cumberland School of Law Serves as chair and reporter for this committee.

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





J. Anthony McLain

## Lawyer May Seek Appointment of Guardian for Client Under a Disability, or Take Other Protective Action Necessary to Advance Best Interest of Client

### Question:

"Through Legal Services Corporation I have agreed to represent an indigent individual in a Petition to Modify his Divorce Decree to terminate or reduce his child support since he is now unemployed. He quit his job due to a nervous breakdown and has been hospitalized twice for suicide attempts. He has stopped seeking psychological counseling because he is scared of indigent health care systems and has feelings of paranoia about being watched and/or investigated.

"It has now come to my attention that there, in fact, is an ongoing investigation about his alleged sexual abuse of one of his children two years ago. He has not been allowed visitation with his children in over a year pursuant to terms in the divorce decree for this very reason.

"Every time I talk to him about any facet of his case he has a complete emotional breakdown. He cannot handle any stress right now. I cannot convince him to seek psychological counseling because of his fear of what might be revealed.

"He is so unstable, I do not believe I can proceed with the Petition to Modify, because I will not be able to get him through a court proceeding or even the discovery necessary to prove his case. He has no immediate family that I can call upon for help.

"I have been approached by opposing counsel (who must represent his client, the ex-wife, who will not consent to a temporary termination of the court-ordered child support) stating that he would be willing to allow an in-chambers presentation to the judge about our dilemma. If I do so, I will be divulging to the judge that the man has a serious emotional problem that the judge might want me to establish or he might even order psychological

testing to see if my client can adequately assist me with the case. In either event, if the man goes to any counselor further evidence would be revealed about his serious feelings of guilt and remorse which could be used against him in a criminal investigation.

I cannot counsel with my client as to which course to take because he cannot deal with conflict without an emotional breakdown and I feel this could jeopardize his life, (i.e. another suicide attempt and/or because he is incapable of making rational decisions). On the other hand, I cannot leave him without relief from the Decree of Divorce because the arrearages would just keep adding up at \$950 per month. (He was formerly employed at a very good wage working in an intensive care unit at a local hospital which caused such a high child support award).

"I am convinced my client's emotional instability is real and I have experience and training to make that judgment.

"How must I proceed in properly representing my client?"

"This is, of course, urgent because a trial date is coming up in a few weeks and I am further concerned for my client's well being."

### Answer:

The Alabama Rules of Professional Conduct allow you to seek appointment of a guardian for your client, or to take any other protective action if you reasonably believe that your client cannot adequately act in his own interest. Further, the rules allow you to disclose such confidential information as may be required to adequately represent your client and advance your client's interest.



Rule 1.14, Alabama Rules of Professional Conduct, states as follows:

**"Rule 1.14 Client Under A Disability**

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

The Comment portion of Rule 1.14 takes note of the fact that disclosure of the client's disability could adversely affect his interests. The Comment directs that the lawyer may seek guidance from an appropriate diagnostician in furtherance of the client's best interest.

The issue which you face requires consideration of the obligation of confidentiality, but also requires that you assess the situation and make a determination as to what you feel would be best, under the totality of the circumstances, for your client's interest. In RO-90-67, the Disciplinary Commission stated that Rule 1.14 "... [R]ecognizes that a lawyer may, on occasion, best serve a client by taking action that, on first blush, might appear to be adverse to the client."

In RO-95-03, the Disciplinary Commission reasoned that a lawyer confronted with such a dilemma must determine what is in the best interest of the client based on the lawyer's analysis of all aspects of the situation, including opinions of medical experts. The Commission further stated:

"Much of the burden of this decision is placed on the lawyer who must keep foremost in his mind the increased standard of responsibility when dealing with a disabled client. He must assess all aspects of the situation, including expert medical opinions, balancing the client's ability to communicate and to appreciate the serious decisions to be made. If the lawyer has doubts, he should resolve those doubts in a manner that best serves his client. The lawyer should also appreciate the Court's increased concern in matters involving lawyers and their representation of incompetent clients. 'The normal limitations on a lawyer's self-enrichment at the expense of a client are applied with enhanced strictness when the client is a child or otherwise not capable of making fully informed and voluntary decisions.' Wolfram, *supra*, p.159."

Hazard and Hodes, in their treatise *The Law of Lawyering*, deal with Rule 1.14 and give an illustrative case wherein a lawyer is representing a criminal defendant with diminished capacity. Hazard and Hodes determined that the lawyer acts properly in urging his client, who has diminished capacity, to accept a plea bargain offered by the prosecution and to waive a possible insanity defense, even though it would mean a conviction on the client's record and a short jail term.

Hazard and Hodes conclude that the lawyer may judge that his client's long-term best interest would be best served by accepting a short jail term rather than an indeterminate stay in a mental institution. Hazard and Hodes feel that in close cases, the lawyer "cannot

be disciplined for any action that has a reasonable basis and arguably is in his client's best interests." Section 1.14: 201

Finally, Rule 1.6, Alabama Rules of Professional Conduct, deals with "confidentiality of information." Subsection (b) of Rule 1.6 allows disclosure of information by a lawyer which is otherwise confidential if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which the lawyer believes is likely to result in imminent death or substantial bodily harm. The Comment provision to Rule 1.6 allows that the lawyer has professional discretion to reveal information in order to prevent such consequences. Therefore, if you determine that the best interest of your client would be served by making disclosure to the court of your client's condition, and the possibility that he might harm himself, and that protective measures should be taken to prevent such harm, the Rule would allow such. In conjunction with Rule 1.14, if you make this determination, then you could seek appointment of a legal representative for your client to further protect your client's interest.

There is no definitive standard which can be applied in such a situation to guarantee the best result. The rules are fashioned to allow the lawyer to analyze the client's emotional state, in the interest to be advanced by the lawyer on behalf of the client, and then pursue whatever action the lawyer deems best under obviously difficult circumstances. Once the lawyer has determined what he feels to be the proper course of action to best serve his client, the rules allow the lawyer to do what is necessary to advance the interest of the client, while, at the same time, insuring protection of the client and his well being. [RO-95-06]

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Etowah County Established: 1868



Samuel A. Rumore, Jr.

## Etowah County Revisited

The Etowah County Courthouse was featured in the September 1990 issue of *The Alabama Lawyer*. Since that time, a new jail and judicial center have been constructed in Gadsden. This article tells the story of these new structures.

The genesis of the new Etowah County Courthouse can be traced to a federal civil rights lawsuit citing overcrowding and poor living conditions in the Etowah County jail. In August 1991, a one percent sales tax went into effect so that the county could build a court-ordered jail and also renovate the old courthouse. The new sales tax generated \$300,000 per month, which county officials believed was sufficient to also build a new courthouse.

In a *Gadsden Times* article dated December 6, 1991, the jail building effort was described as a \$9.1 million project. The architectural firms chosen were Watson, Watson & Rutland (now known as 2WR/Architects, Inc.) of Montgomery and McElrath & Oliver of Gadsden. The contractor chosen was Ray Sumlin Construction Company of Mobile. The initial site preparation cost approximately \$575,000 and was completed by Chorba Construction of Guntersville. The article went on to say that the county did not anticipate any problems in meeting a court-imposed deadline of September 1, 1993 for a new jail.



Main entrance to Judicial Building



Etowah County Judicial Center

Unfortunately, the county did fail to meet the deadline. Changes were made in the plans and design of the jail. There was a controversy over whether the jail should have a courtroom.

It was finally decided that the facility would be better served by a multi-purpose room that could be used for arraignments and other non-jury court business while also serving other functions. An article in February 1994 listed the project as costing \$14 million. The county also paid more than \$160,000 in fines because it did not meet the September 1, 1993 deadline set by United States District Judge U. W. Clemon.

The new detention center finally opened in March 1994 with a capacity of 250 prisoners. Construction costs of the building were \$9.5 million. The balance of the \$14 million total cost included purchasing the land and site preparation. This facility can be expanded in the future by adding one floor and a mezzanine so that the total prisoner population can reach a maximum of 332 inmates. The new detention center is a modern facility and received an award from the American Institute of Architects for its design excellence.

The judicial center and courthouse renovation projects were placed on hold because the original 1991 cost estimate of \$12 million was updated to \$15 million when it was time for the work to be undertaken. The county had initially designated \$6 million each to the new building construction and the old building renovation. Since this amount proved to be inadequate, the

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





Front view of new Etowah County Judicial Complex



Modern sign at new facility



Child Support Division drive-up window

The plans included a basement in the new building for maintenance and storage. The County Commission also approved approximately \$7 million for renovation of the 1950 courthouse.

The architect for the new judicial center was Mike Rutland of 2WR/Architects, Inc. of Montgomery. The architects for the courthouse renovation were McElrath & Oliver of Gadsden. These were the same firms who collaborated on the jail project. The construction manager was Doster Construction of Birmingham.

The cornerstone for the newly completed judicial center was laid with appropriate Masonic ceremonies on Saturday, May 8, 1999. Probate Judge Bobby Junkins spoke at the ceremony and related that this building was the third courthouse constructed in Gadsden. The first courthouse was completed in 1870 and cost approximately \$13,000. The second courthouse was completed in

1950 and cost approximately \$1 million. The total cost of this new courthouse facility would exceed \$10 million.

The new building is of modern design and matches the style of the adjoining detention center. The facility has incorporated state-of-the-art courthouse planning. One interesting feature is that the new Etowah County Courthouse may be the only facility in the state with a drive-in window for the payment of court-ordered child support. The citizens of Etowah County will be served long into the 21st century by their new courthouse and their renovated 1950 structure. ■

projects were not commenced until the additional funds could be approved.

Finally, in August 1997, the County Commission approved a \$15 million budget for the new judicial building and the renovation of the existing courthouse. The commission earmarked approximately \$8 million for a new building across the street from the existing courthouse and adjoining the detention center.

Sources: Articles in the *Gadsden Times*—March 21, 1990; June 28, 1991; December 6, 1991; April 21, 1993; November 8, 1993; January 18, 1994; February 26, 1994; February 21, 1995; February 9, 1997; August 27, 1997; February 1, 1999; and May 9, 1999.

The author thanks Gadsden native and Birmingham attorney John Miglionico for assistance in obtaining material used in this article and for the photographs of the new Etowah County facilities.



Etowah County Detention Center

**Samuel A. Rumore, Jr.**

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore served as the bar commissioner for the 10th Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He served as the 1999-2000 state bar president-elect and took over the presidency at the state bar's annual meeting in July. He is a retired colonel in the United States Army Reserve JAG Corps.





Cole Portis

**M**y tenure as president of the Young Lawyers' Section seems to be passing by quickly. We have accomplished much. For example, **Todd Strohmeyer** has done a great job organizing the YLS Sandestin Seminar. His committee has confirmed the following speakers: **Judge U.W. Clemon, Lee Cooper, Warren Lightfoot, Jere Beasley, Carol Ann Smith, and Bryan Stevenson.** Please make plans to attend this seminar from May 18-19, 2001. (Reserve your place today. The registration form is located on the facing page).

In addition, as YLS president, I was invited to speak to the new admittees during their admissions ceremony. Although my speech paled in comparison to the comments of **Judge Ed Carnes** and **ASB President Sam Rumore**, I was able to share the following inspiring story:

Henry Peterson was a fourth-string halfback on the University of Alabama football team. He rarely saw playing time.

Sadly, prior to the Auburn-Alabama football game, he received a phone call from home. He learned that his father had died unexpectedly. Henry spoke with Coach Bryant and told him, "Coach, I can't be there for the game Saturday. You see, my father just died and I need to go home." With compassion, Coach Bryant told Henry to forget about the team and go spend time with his family.

After a few days at home, Henry called Coach Bryant to tell him that he did not want to let the team down and that he would be at the game on Saturday. Coach Bryant again told him not to think about the team, but to spend time with his family.

Nonetheless, two hours before the game against Alabama's biggest rival, Auburn, Henry walked

in to see Coach Bryant and said with great passion, "Coach, I want you to start me today." Coach Bryant was taken aback and reminded Henry that he was the fourth-string halfback and that he would be foolish to start him at tailback. Henry was persistent. Finally, Coach Bryant relented, but warned Henry, "Okay, I am going to put you in on the first series of downs. The first time you hurt our team, I *will* pull you out. Do you understand?"

Henry must have understood. Henry ran circles around Auburn's defense, scoring four touchdowns in the first half. At halftime, Coach Bryant did not know whether to hug Henry or hit him. Flabbergasted, Coach Bryant asked Henry, "Why didn't you show me or tell me you could play football like that?" Humbly, Henry responded, "Coach, you knew my Dad. You knew he was blind. Today was the first day he was able to see me play football!"<sup>1</sup>

In my opinion, every one of us is playing the game of life, including practicing law, before the eyes of God, our family, our friends and our contemporaries. These are powerful motivations to live life, and to practice law, to the very best of our abilities.

We are a great profession! I hope that each of us will practice law professionally and in a civil fashion. I hope that each of us will pay back our communities with all of the blessings we have received as a result of our careers.

If you have any comments about or criticisms of the YLS, please let me know. I can be reached at [jcp@bwamc.com](mailto:jcp@bwamc.com) or P.O. Box 4160, Montgomery 36103-4160.

## Endnotes

1. The information for this story taken from Farrar, Steve, *Quiet Whispers* (Nashville: J. Countryman, 1989).



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## 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, 2001. Nominations should be prepared and mailed to:

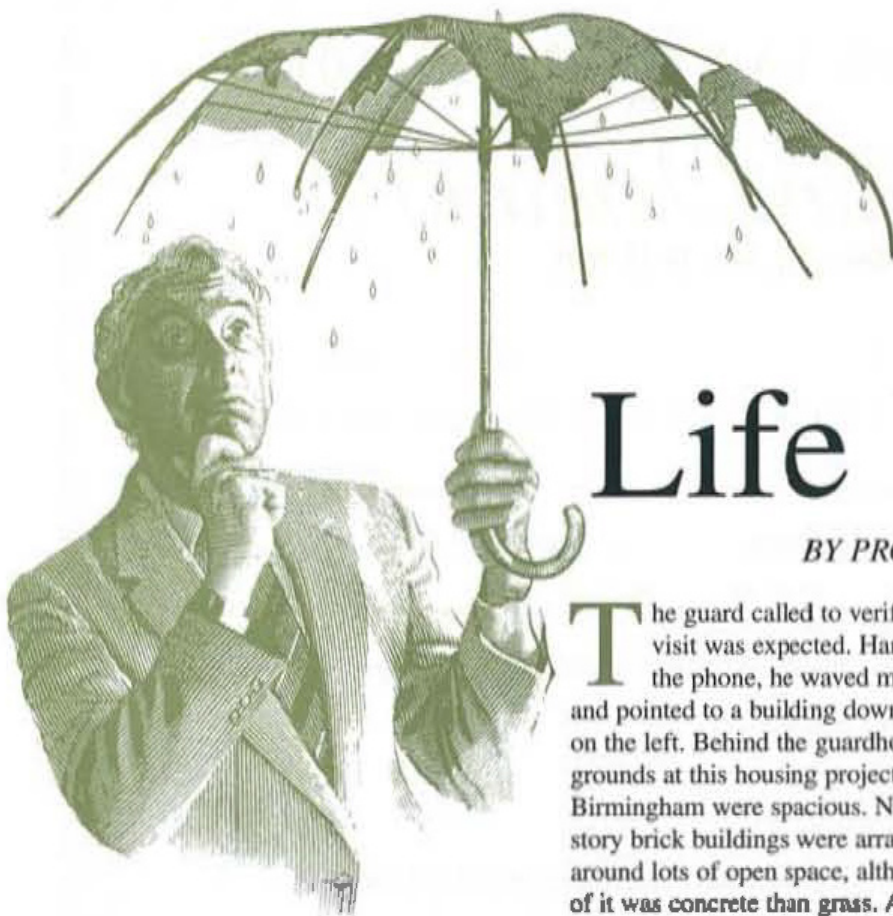
**Keith B. Norman, secretary**  
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**P.O. Box 671**  
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The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, 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.





# The VLP and Life Insurance

BY PROFESSOR PAMELA H. BUCY

**T**he guard called to verify that my visit was expected. Hanging up the phone, he waved me through and pointed to a building down the road, on the left. Behind the guardhouse, the grounds at this housing project in North Birmingham were spacious. Neat, two-story brick buildings were arranged around lots of open space, although more of it was concrete than grass. At mid-

morning on this spring weekday, folks were out working on cars, standing in their yards, visiting, hanging clothes on clotheslines. Ms. Stafford<sup>1</sup> was waiting for me by the road and led me to her apartment, on the corner. Inside her small sitting room, there were family pictures and religious pictures everywhere.

We sat on plastic covered couches and Ms. Stafford told me about living in the

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projects, where she has lived for the past five years. She likes it "because I don't have anywhere else to go." Is she ever scared? "I feel pretty safe here. They do a lot of shooting and stuff. But I got three things. I got a phone to the outside world, I got my 9 millimeter and I got Jesus." Ms. Stafford hasn't ever had to use her gun, but she likes to be prepared because "you don't look for trouble, trouble finds you."

Ms. Stafford told me about her VLP<sup>2</sup> case. For 37 years before seeking legal advice, Ms. Stafford had been paying premiums on life insurance for herself and a number of relatives. "I already buried one with that insurance," she said. She pays on it every month. Over the years, she had borrowed against her policies and wanted to do so again. The company would not let her and she did not understand why. Every time Ms. Stafford talked with the insurance agent—which was pretty often since he came by monthly to collect premiums due—he changed the subject, away from borrowing on her policies. According to Ms. Stafford, "He got that sweet talk."

Ms. Stafford went to Legal Services for advice, and soon received word that Leila Watson, a lawyer enrolled in the VLP, would help her with her insurance questions. Ms. Watson called Ms. Stafford with directions to her office, via a bus since Ms. Stafford doesn't have a car. Ms. Stafford described her visit: "Oh, Ms. Watson was so nice. She asked me if I wanted something to drink. She told me to relax, sit back, just like I was at home. She introduced me to her secretary. I felt like I was talking to a family member. I felt so comfortable. She said, 'I'm here for you. I'm going to fight for you. I'm going to fight hard.'" Ms. Stafford smiled and said, "I like that. I like that when someone takes my side."

Ms. Stafford took her insurance papers with her, in Piggly Wiggly grocery bags, mixed in with several years of junk mail. Ms. Watson found that Ms. Stafford was paying a huge chunk of her income—which for years has consisted entirely of SSI disability—for life insurance policies, including one on her husband, who had abandoned her long ago. She also was unnecessarily paying double premiums for some of the policies, was paying full premium for her own policy although she was eligible for a disability waiver of the premium, and had some overdue premiums. Ms. Watson obtained copies of

replacement policies, talked Ms. Stafford into dropping the policy on her husband, got rid of the double coverage, obtained the waiver for Ms. Stafford's own policy and got Ms. Stafford's premiums up to date. She was unable to obtain refunds of the over-payments.

Leila Watson also advised Ms. Stafford not to buy any more insurance without checking with her first. As Ms. Stafford explained: "Ms. Watson told me to call her anytime, about anything. So, sometimes I call her up and just say, 'Hey darling, how are you doing?'" At one point Ms. Stafford wanted to buy some fire insurance, but called Ms. Watson first to talk to her about it and, after being advised to "stay within your limit," decided not to buy the insurance.

What does Ms. Stafford think about Ms. Watson? "She's wonderful. Just wonderful. She helped me learn about what insurance to get and what not to get. It's nice how she reached down and helped little people. Little people in the projects need help too. Put yourself in my position. You didn't have anyone to back you up. Didn't have nothing. She was there for me."

Leila Watson signed up with the Volunteer Lawyers Program almost as soon as the Birmingham Bar Association started its VLP. Why? "Because I can do it. Because I like doing it. People need help. When you're a professional, you should give back."

*(Thanks to Linda Lund, Wythe Holt and, especially, to Leila Watson)*

### Endnotes

1. A pseudonym
2. The Volunteer Lawyers Program (VLP) began statewide in Alabama in 1991. Modeled after the highly successful Mobile Bar Association VLP, it provides a way for lawyers in Alabama to help their communities. Attorneys enroll in the program by agreeing to provide up to 20 hours per year of free legal service to poor citizens of Alabama. Cases are referred to the VLP from Legal Services offices around the state. Before referral, the cases are screened for merit and complexity (each case should be resolvable in 20 hours or less) and the potential client is screened for income eligibility (must live at 125 percent of poverty level, currently \$1,776 monthly for a household of four).

#### Pamela H. Bucy

Pamela H. Bucy is the Bainbridge Professor of Law at the University of Alabama School of Law and was admitted to the Alabama State Bar in 1991.



# PROBONO

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more than just a  
cliché. It is a time-  
honored ideal to  
which all lawyers  
and all Americans  
aspire. By volun-  
teering your time  
and skill to provide  
legal services to  
those who cannot  
normally obtain  
them, you are  
making a significant  
contribution toward  
making that ideal a  
reality.*



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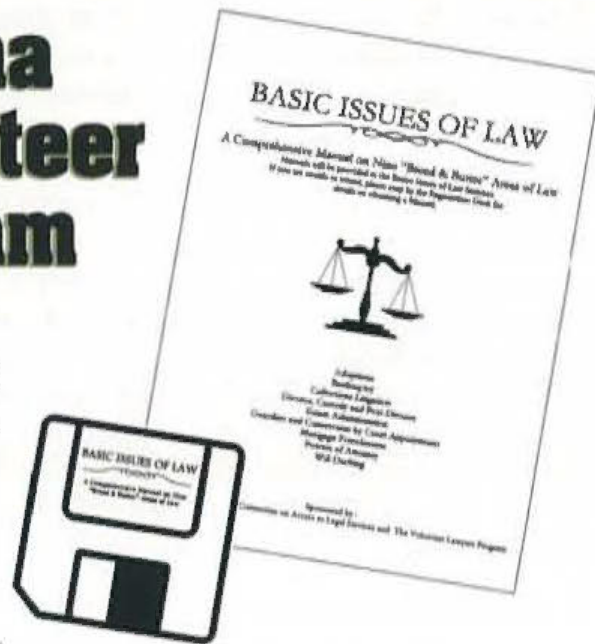
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 Gary C. Huckaby  
 Patrick Lamar  
 Stuart Maples  
 A. Mac Martinson  
 Douglas C. Martinson  
 G.R. Mahmood  
 Robert H. McCaleb  
 David McDowell  
 Jeffery W. McKinney  
 Barbara Miller  
 Elizabeth Beason Moore  
 Burt W. Newsome  
 Brent Parker  
 Thomas E. Parker, Jr.  
 Jonathan Pippin  
 Earnest Potter  
 Katrina Ross  
 Dag Rowe  
 L. Thomas Ryan, Jr.  
 Bradley P. Ryder  
 Teresa N. Ryder  
 Robert S. Smith  
 Don T. Terrell  
 Shelly D. Thornton  
 Richard W. Tingle  
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The American Bar Association Standing Committee on Pro Bono and Public Service invites nominations for the 2001 Pro Bono Publico Awards. Five awards will be presented to individual lawyers and institutions in the legal profession who have demonstrated outstanding commitment to volunteer legal services for the poor and disadvantaged. The Pro Bono Publico Awards were established by the ABA in 1984 to recognize lawyers and law firms for extraordinary noteworthy contributions to extending legal services to the poor and disadvantaged. The awards will be made at the Pro Bono Publico Awards Assembly Luncheon in August 2001 at the ABA Annual Meeting in Chicago.

For more information about nomination guidelines and the selection process, contact Dorothy Jackson, The Pro Bono Publico Awards, American Bar Association, 541 N. Fairbanks Court, 15th Floor, Chicago 60611 or phone (312) 988-5766.

The nomination deadline is March 1, 2001.

## Position Available

### Assistant Federal Defender

The Middle District of Alabama Federal Defender Program, Inc., in Montgomery, Alabama, is accepting applications for the full-time position of assistant federal defender. The office is a non-profit corporation providing legal representation to indigent persons in federal criminal cases and related matters in federal court. This position exists due to the promotion of a staff member.

Duties of this position include trial and appellate representation of office clients in the United States District Court for the Middle District of Alabama and in the United States Court of Appeals for the Eleventh Circuit. In addition, office attorneys contribute to a newsletter and training programs for private attorneys involved in representation of indigent federal defendants.

Criteria for this position include excellent research, writing and advocacy skills, trial and appellate experience, computer skills, ability to communicate and work well with others, demonstrated interest in criminal defense issues, and commitment to obtaining justice for indigent persons. An applicant must be a member in good standing of a state bar and have a driver's license. Assistant federal defenders may not engage in the private practice of law.

Salary for this position depends on experience and is comparable to salaries provided to assistant U.S. attorneys with similar experience. This office provides excellent benefits.

To apply for the position, send a letter describing your interest in the position to:

Christine A. Freeman  
Executive Director  
Office of the Federal Defender for the  
Middle District of Alabama  
201 Monroe Street, Suite 1960  
Montgomery, Alabama 36104

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# Fall 2000 Admittees



## Statistics of Interest

Number sitting for exam. . . . .	553
Number certified to Supreme Court of Alabama . . . . .	357
Certification rate* . . . . .	64.6 percent

**Certification Percentages:**

University of Alabama School of Law . . . . .	87.3 percent
Birmingham School of Law . . . . .	28.4 percent
Cumberland School of Law . . . . .	87.1 percent
Jones School of Law . . . . .	30 percent
Miles College of Law . . . . .	18.2 percent

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



## Alabama State Bar Fall 2000 Admittees

<b>Abbott, Phillip Matthew</b>	<b>Buggé, Brian Christopher</b>	<b>Drane, Jodi E. Reese</b>	<b>Harris, Bradley Martin</b>
<b>Adams, Scott Edward</b>	<b>Burkhalter, Elizabeth Angela</b>	<b>Drinkard, Laura Andrea</b>	<b>Haug, Christopher Christian</b>
<b>Aday, Ryan Michael</b>	<b>Butler, Jonathan Lloyd</b>	<b>Drinkard, Tara Mendalyn</b>	<b>Hawkins, Lana Kay</b>
<b>Agee-Kimbrough, Monica Yvette</b>	<b>Byrd, Beverly Ann</b>	<b>Edwards, Jason Clark</b>	<b>Hayes, Tina Michelle Jacks</b>
<b>Alford, Joshua Maddux</b>	<b>Cain, Tanita Michelle</b>	<b>Ellis, Page Alexis Stanley</b>	<b>Haynes, Wallis Spencer</b>
<b>Allen, Joseph Michael III</b>	<b>Calamusa, Jane Margaret Laird</b>	<b>Ennis, John Thomas Jr</b>	<b>Hendrix, Michelle Lynn</b>
<b>Allenstein, Rose Marie</b>	<b>Caputo, Pascal Benoit</b>	<b>Erickson, Janelle Marie</b>	<b>Hightower, David Edward</b>
<b>Amason, Thomas Gilbert III</b>	<b>Carlton, Patricia Kathryn</b>	<b>Estes, Allen McLean</b>	<b>Hodge, David Jason</b>
<b>Amthor, Rebecca Ann</b>	<b>Carothers, Robert Leroy Jr.</b>	<b>Eubanks, Jason Robert</b>	<b>Hollifield, Francis David III</b>
<b>Anderson, Jeffrey Michael</b>	<b>Carroll, Lonnie Jayson</b>	<b>Ezell, Pamela Rena</b>	<b>Holly, Jason Lee</b>
<b>Andrews, Bryan Hugh</b>	<b>Cash, Brian Verbon</b>	<b>Ferguson, Ralph Alton III</b>	<b>Holmes, Edward Earl II</b>
<b>Ashmon, Melvin Eugene</b>	<b>Chappell, Jeanna Marie Davis</b>	<b>Fisher, Angelita Elizabeth</b>	<b>Holmes, Samuel Ray</b>
<b>Atwood, James Bant Jr.</b>	<b>Chatawanich, Cateleya Cathy</b>	<b>Fletcher, Evelyn McRee</b>	<b>Hopper, Chad Allen</b>
<b>Baldwin, Erica Lynn</b>	<b>Chisholm, Afrika Shakir</b>	<b>Flood, Kenneth Patrick</b>	<b>Howard, John Allen Jr.</b>
<b>Barabash, Claire</b>	<b>Clements, Ralph Mayo III</b>	<b>Flood, Khristi Doss</b>	<b>Howton, Shelley Diane</b>
<b>Barnett, Staci Lea</b>	<b>Clements, Tessie Patrice</b>	<b>Florence, Willie Sr.</b>	<b>Hudson, Candace LeAnn</b>
<b>Barnett, Thomas Paul</b>	<b>Clemmons, Tracey Leanne</b>	<b>Ford, Jeffrey Clark</b>	<b>Hudson, Kimberly Bruner</b>
<b>Baschab, Denise Adeliene</b>	<b>Clift, Raymond Spencer III</b>	<b>Fortune, William Thomas Jr.</b>	<b>Hunt, Rochelle Diane</b>
<b>Beatty, Kevin Walker</b>	<b>Cochran, Angela Ann</b>	<b>Foster, Tommy Kenneth</b>	<b>Hunt, Susan E. Fonseca</b>
<b>Berdan, David Lee</b>	<b>Cochran, Ryan Kent</b>	<b>Fowler, Michael Eric Jr.</b>	<b>Hunter, Ronald Coleman</b>
<b>Berry, Ian Michael</b>	<b>Coffee, Sheri Louise Hull</b>	<b>Francez, Barbara Ellen Jenkins</b>	<b>Huntley, Robert Todd</b>
<b>Betts, Laura Motlow</b>	<b>Colclough, Steven Randolph</b>	<b>Gabrielson, Yvonne Vernice</b>	<b>Hutchinson, Sandra Ellen</b>
<b>Black, Kevin Roger</b>	<b>Cole, Carl Allen III</b>	<b>Garner, Christopher Richard</b>	<b>Isbell, John Franklin</b>
<b>Bolden, Dana Jeanae</b>	<b>Collins, John David</b>	<b>Gates, George Frazier</b>	<b>Jansen, Christy Lynn</b>
<b>Boles, Audrey Melissa</b>	<b>Connell, Jason Wheeler</b>	<b>Gause, Randall Kent</b>	<b>Jaskolka, Marcus Alexander</b>
<b>Boles, Loretta Denise</b>	<b>Conrad, Hugh Victor</b>	<b>Gelsen, Jonathan Robert</b>	<b>Jernigan, Adero Soyini</b>
<b>Bomar, William Calvin</b>	<b>Conradi, Mark Thompson</b>	<b>Geisler, Kimberly Wood</b>	<b>Johnson, Andrew Burns</b>
<b>Bonner, Eric David</b>	<b>Copland, Theodore Alexander II</b>	<b>Geisler, Stephen Robert</b>	<b>Johnson, Mark Edgar</b>
<b>Bonner, Julie Lynn</b>	<b>Costello, Matthew David</b>	<b>Gill, Christopher Morris</b>	<b>Jones, Eleanor Janice</b>
<b>Booth, Mary Leesa</b>	<b>Cowan, Chad Wesley</b>	<b>Glover, Glenn Edward</b>	<b>Jones, Michael Lee</b>
<b>Bosio, Nathaniel Austin</b>	<b>Cunningham, Jennifer Leath</b>	<b>Gordon, Alfred Benjamin III</b>	<b>Jones, Robert Goodwin</b>
<b>Bosquet, Elizabeth Erin</b>	<b>Dabbs, Stephanie R. Lindsay</b>	<b>Graham, Christina Diane Ashley</b>	<b>Jones, William Andrew</b>
<b>Bottoms, Michel Claire</b>	<b>Davis, Amy Elizabeth</b>	<b>Graham, Gabriel Grace</b>	<b>Jordan, Brent Howard</b>
<b>Boyd, Shayana</b>	<b>Davis, Christopher Michael</b>	<b>Graveline, Monica Grace</b>	<b>Jordan, Nikaa Baugh</b>
<b>Bozeman, Russell Foster</b>	<b>Davis, Preston Bryan</b>	<b>Green, Gloria Cornelia Wood</b>	<b>Junkin, Samuel Woodrow</b>
<b>Bradley, Brent Fritzalton</b>	<b>Davis, Thad Austin</b>	<b>Griffin, Jennifer Leigh</b>	<b>Kelly, Thomas Scott</b>
<b>Brannen, Candace Ellen</b>	<b>Davis, Tracy Reynolds</b>	<b>Griffis, Melissa Lois Darden</b>	<b>Kelly, William</b>
<b>Braswell, Alexander Fournier</b>	<b>Deas, William Lawrence</b>	<b>Grimes, David Carlton</b>	<b>Kendrick, Kermit LaGuin</b>
<b>Breazeale, Amy Nicole</b>	<b>Deason, Kristi Leigh</b>	<b>Gruesbeck, Kelly Catherine</b>	<b>Killian, Ashley Elizabeth Adam</b>
<b>Brewer, Johnny Scott</b>	<b>Delchamps, Noel Gregory</b>	<b>Guthrie, Rebecca Anne Wilson</b>	<b>Killian, Charles David</b>
<b>Brittain, William Evans</b>	<b>Dell-Curtis, Janie Kathryn</b>	<b>Hale, Phillip Brian</b>	<b>Killings, Aaron Jr.</b>
<b>Brock, Quinn Eric</b>	<b>DeMaria, Kathleen Jean</b>	<b>Halla, Michael Boice</b>	<b>King, Joe Alton Jr.</b>
<b>Brown, Hunteria Benetta Nelson</b>	<b>Dixon, Joseph Moore III</b>	<b>Hamilton, Lynnwood Hale Jr.</b>	<b>Kingrea, Richard Owen</b>
<b>Brown, Stephen Fate</b>	<b>Donaldson, Hugh Locke</b>	<b>Hammer, Allen Morris</b>	<b>Klotz, Amy Manderson</b>
<b>Bryan, Stacy Leigh</b>	<b>Dorger, Sarah Beth Bond</b>	<b>Hansford, Nathaniel Fincher</b>	<b>Krettlein, Robert Lee</b>
<b>Buck, Andrew Benjamin</b>	<b>Doyle, James Victor Jr</b>	<b>Hanson, Chad Arthur</b>	<b>Laird, Phillip Andrew Jr.</b>



## Alabama State Bar 2000 Fall Admittees

Lambert, Michael Clem	Moore, David Boyd	Roby, Riley Whitt	Taylor, James Michael
Lanier, John Thomas	Moore, Thomas Johnson III	Rocco, Nicole Marie	Taylor, Robin Banck
Lassiter, Emily Stoddard	Mordecal, Deanna Herring	Rodriguez, John David	Teague, Alto Lee IV
Lathram, Othni James	Morris, Leslie Harold	Roy, Douglas McLean Jr.	Thomas, Aaron Brooks
Law, David Frank	Morris, Steven Robert	Ruel, Charissa Ann	Thomas, Jimmy Lee
Lawrence, Marcus Sexton Jr.	Moss, Lisa Annette Blaylock	Ruff, Annette Theresa	Thomas, Julia Ellen Sheppard
Lawrence, Mary Patricia	Mudano, Mitchell Sebastian	Rutledge, Jon Jackson	Thomas, Melissa Ann
Lee, Arthur Davis Shores	Mykkeltvedt, Jeffrey Norman	Salas-Gonzalez, Edelmiro Antonio	Thompson, Kathrya Abbie
Lee, Robert David	Necklaus, Heather Lauren	Sallé, Randy Carl	Thompson, Leslie Arnold
Lehman, Anthony Darrell	Neiman, John Cowles Jr.	Saunders, Bartow Shannon	Treadwell, Thomas Allen
Lehman, John Richard II	Newman, Crystal Anne	Schiffman, Karen Leslie	Trehella, Richard Edward Jr.
Lindquist, Melissa Marie	Nichols, Jarrod David	Schroeder, Todd Allen	Trueblood, Temple DeAnna
Lockhart, Monica Linn	Nicholson, Tina Lorraine	Schuler, Daniel Roy	Tunstall, Wendy Tyler
Loftin, Mark Oliver	Oliver, Dawn LaTasha	Scott, Alvin Donald Jr.	Turner, Damon Bart
Lomers, Ashley Dawn	Ormstedt, Russell Scott	Seibenhener, Lance Brown	Turner, John Barnett Jr.
Lucas, Virginia Emfinger	Ormstedt, Wendy Dawn Braitsch	Shaw, Sammie Dewayne	Turner, Judson Herben
Luker, Katherine Patterson	Oswald, June	Shelton, Jason Lee	Turner, Paul Franklin Jr.
Lunsford, William Richard	Owen, David Wayne	Sherman, Cynthia Jeanne	Tyson, Milton Bruce
Maclin, Thomas Mark	Owen, John David	Shirley, Sean William	Van Rassen, Cynthia Marie
Macon, Joseph Allston III	Parker, Katherine Tiffany	Simpson, Sandra Cooper	Vance, Aldos Lamont
Maddox, Robert Richmond	Parrish, Jimmy Dale	Sims, Elizabeth Bull	Wadsworth, Brian Davis
Malone, Shami Summers	Pate, Randolph Wayne	Skilling, Karen Elizabeth	Wagnon, Jeffrey Wayne
Marchand, Chad Christopher	Patterson, Richard Eric	Smith, Bradley Johns	Wahl, Brian Alexander
Marsteller, Ryan Scott	Perkins, Vernetta Rochelle	Smith, Davis Houghton	Walsh, Gerald Michael
Mathews, Donna Jo	Pernell, Jillian Natalie	Smith, Gayla Fay Morris	Walsh, Thomas Brian
Matuszak, Olivia Suzanne	Phillips, John Michael	Smith, India Althea Powell	Warren, Ronald Bryan
May, Alisha Ruffin	Phillips, Stephen Daniel	Smith, Janine Louise	Washington, Frederic Lamar I
McBeal, Mitch	Philpott, James Michael Jr.	Smith, William Earl	Watkins, Laura Stephanie
McCauley, Lara Lynn	Pierce, Jeffrey Grant	Sodergren, Kristofor David	Wess, Everett Warkeen
McConatha, Andrew Dean	Pitts, Christopher Bernard	Soper, Jennifer Leigh	Whittington, Julie Gay
McCord-Jackson, Monica Dionne	Plott, Robert Snow	South, Ricky Van	Williams, Leslie Ann
McDavid, Andrew Scott	Plummer, John Scott	Spencer, Donald Eugene Jr.	Williams, Mary Margaret
McEniry, John Howard IV	Poss, Jamy Braydon	Spray, Jason Carlton	Williams, Michael Anthony
McGee, Jonathan Kyzer	Pratt, Erick Kerr	Squire, Brendan Edward	Wilson, Jean Marie
McKown, Jennifer Levina	Prescott, George Robert Jr.	Starling, Laura Ruth	Wilson, Steven Travis
McLeod, Alma Kelley	Priebe, James Andrew	Starnes, Joseph Wayne	Winters, Stephen Kellis
McNally, Timothy Scott	Prim, Harry Samuel III	Steiner, John Stewart	Wisdom, Travis Russell
McPherson, Karla Denise	Pruet, David Reynolds III	Stephens, James Matthew	Wise, Kyler Lee
McReynolds, John Andrew IV	Pugh, Brian Thomas	Stephens, Patricia Ann Roberts	Wise, Reagan David
Mehlman, Hope Dana	Raines, Angela Cheyenne	Stewart, James David III	Witt, Kevin Allen
Mendheim, Ronald Clifford	Ramey, Shaun Kevin	Stewart, Ryan Christopher	Woodard, Jason Dwight
Merrell, Walter Marvin III	Randall, Angela Lise	Stockton, Colin Rutherford	Woodard, Stephanie Lynne Smith
Meyer, Michael Emery	Reddy, Aparna Madadi	Stone, Emmy Harper	Woodruff, Chad Edward
Mitchell, Josh Jason	Reynolds, Matthew Alexander	Strawbridge, Audrey L. Oswald	Wright, Mickey Bryan
Mitchell, Michael David	Richardson, Mathew Bernard	Strawbridge, Ronald Howard Jr.	Yancey, Perry Michael
Mixon, Gregory Knowles	Richter, Dana Rachelle	Strickland, Robert William Jr.	Yarborough, Martin Brent
Moncus, Meagan Leigh	Robertson, Lacy Shrac	Sullivan, Burton Macon Jr.	Yearout, Jason Lamar
		Sylvester, Roy Roderick II	Zarzaur, Gregory Martin
		Tallie, Jody Lynn Brasher	Zeigler, Jennifer Frances



# Lawyers in the Family



*Amy Elizabeth Davis (2000) and Norman Davis, Jr. (1975) admittee and father*



*Monica Linn Lockhart (2000), Virginia B. Lockhart (1991) and Danny C. Lockhart (1976) admittee, mother and father*



*Julie Whittington (2000) and John Whittington (1972) admittee and father*



*Mitch McBeal (2000) and Kim Clenney (1999) admittee and sister*



*Katherine Patterson Luker (2000) and David S. Luker (1983) admittee and husband*



*Mary Margaret Williams (2000) and Bryant F. Williams, Jr. (1974) admittee and father*



*Anne Wilson Guthrie (2000) and Cal Wilson (1973) admittee and father*



*Samuel W. Junkin (2000) and Clatus Junkin (1967) admittee and father*



*Johnathan L. Butler (2000) and Judge John F. Butler (1973) admittee and father*



*David F. Law (2000) and John K. Johnson (1980) admittee and brother-in-law*



*Melissa Boles (2000) and Hamp Boles (1967) admittee and father*



# Lawyers in the Family



*Nathaniel F. Hansford (2000) and Nathaniel Hansford (1979) admittee and father*



*Rose Marie Allenstein (2000) and Myron Allenstein (1973) admittee and father*



*Matt Abbott (2000) and Dennis Abbott (1976) admittee and father*



*Tara Mendalyn Drinkard (2000) and Vaughan Drinkard, Jr. (1977) admittee and father*



*Randy Carl Salle' (October 2000) and Carl Robert Salle' (May 2000) admittee and father*



*W. Evans Brittain (2000) and William H. Brittain, II (1980) admittee and father*



*Brian Alexander Wahl (2000), William L. Lee (1995) and William L. Lee, III (1968) admittee, brother-in-law and father-in-law*



*Laura Motlow Betts (2000) and William Dudley Motlow, Jr. (1980) admittee and uncle*



*Jeffrey G. Pierce (2000), John C.S. Pierce (1991) and Donald F. Pierce (1958) admittee, brother and father*



*J. Michael Allen, III (2000) and Joseph M. Allen, Jr. (1966) admittee and father*



# Lawyers in the Family



*Russell Foster Bozeman (2000), Judge Terri Bozeman (1996), Randall K. Bozeman (1988) and (retired) Judge A. Ted Bozeman (1967) admittee, sister, brother and father*



*Meagan Moncus (2000) and David Moncus (1992) admittee and father*



*Mary Pat Lawrence (2000) and Will Lawrence (1973) admittee and father*



*Phillip Andrew Laird, Jr. (2000) and Phillip Andrew Laird, Sr. (1969) admittee and father*



*J. Kathryn Dell-Curtis (2000) and Jack Curtis (1975) admittee and husband*



*Arthur Shores Lee (2000) and Helen Shores Lee (1988) admittee and mother*



*Brian Thomas Pugh (2000) and Bennett Lee Pugh (1985) admittee and cousin*



*Ronald H. Strawbridge, Jr. (2000), Audrey Oswalt Strawbridge (2000), Ronald H. Strawbridge, Sr. (1967), Alto L. Jackson, Sr. (1937), Robert O. Jackson (1981), Caroline Strawbridge Rains (1997) and David E. Rains (1996) husband and wife co-admittees; father/father-in-law; grandfather/grandfather-in-law; uncle/uncle-in-law; sister/sister-in-law; and brother-in-law/brother-in-law*



*Alexander Braswell (2000) and Nick Braswell (1965) admittee and father*



*William R. Lunsford (2000) and Ingrid B. Lunsford (1999) admittee and wife*



# Lawyers in the Family



*Joe A. Macon, III (2000), Judge Joe A. Macon, Sr. (1940) and Judge John M. Puryear (1948) admittee, grandfather and grandfather*



*David J. Hodge (2000), Laura Drinkard Hodge (2000) and Judge Wade Drinkard (1969) husband and wife co-admittees and father-in-law/father*



*Matthew Alexander Reynolds (2000) and Daniel J. Reynolds, Jr. (1968) admittee and father*



*Kelli R. Davis (1998) and Thad A. Davis (2000) wife and admittee*



*Russell S. Ormstedt (2000) and Wendy B. Ormstedt (2000) husband and wife co-admittees*



*John T. Ennis, Jr. (2000) and John T. Ennis, Sr. (1975) admittee and father*



*Laura Stephanie Watkins (2000) and John William White (1975) admittee and uncle*



*Kimberly Geisler (2000) and Stephen Geisler (2000) wife and husband co-admittees*



*Vernetta R. Perkins (2000), Collins Pettaway, Jr. (1985) and Byron R. Perkins (1989) admittee, uncle and cousin*



*Judge James S. Garrett (1972) and Marcus S. Lawrence, Jr. (2000) father-in-law and admittee*



*R.A. Ferguson, III (2000) and R.A. Ferguson, Jr. (1974) admittee and father*





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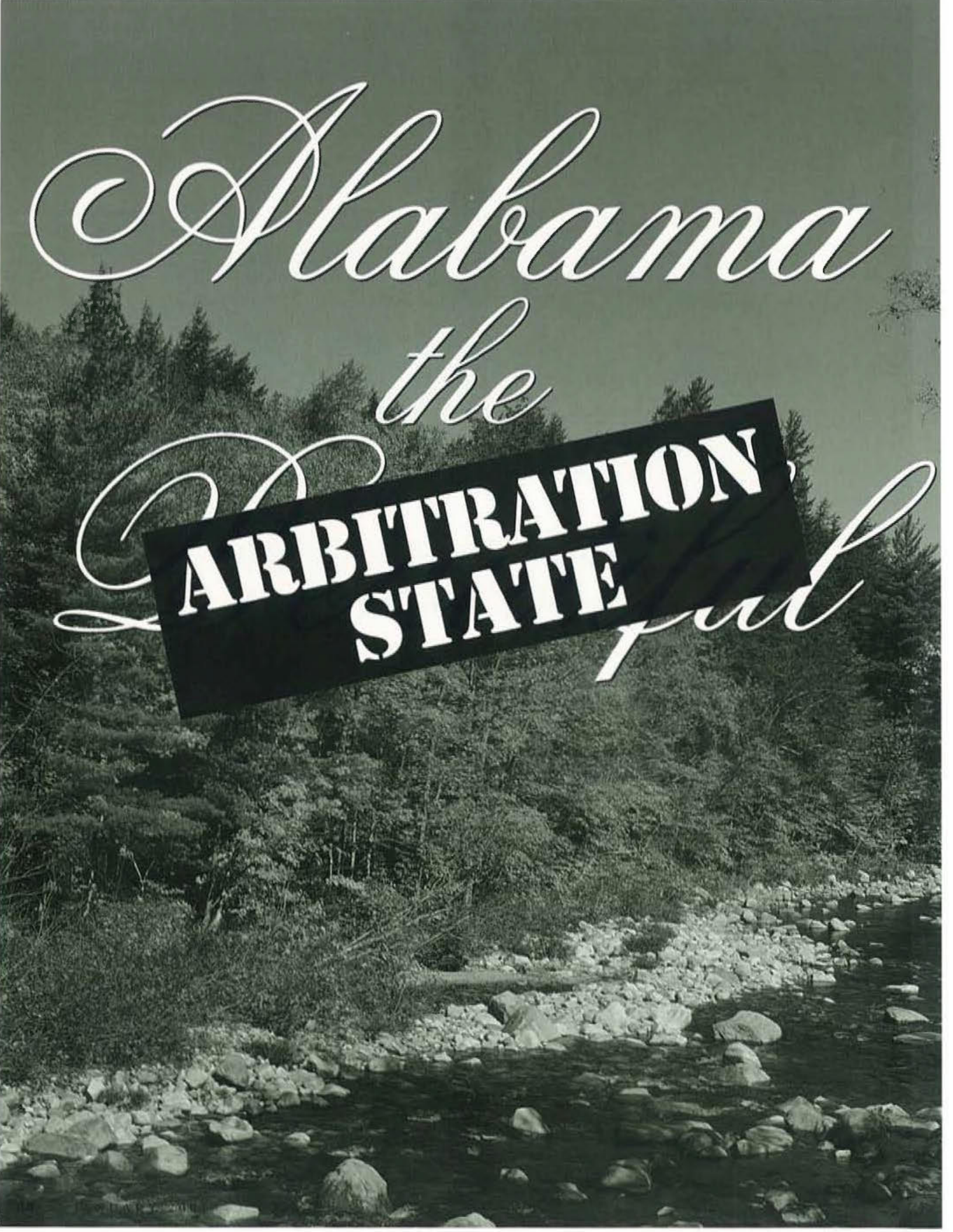




Alabama  
the

**ARBITRATION  
STATE**

ful





Since childhood, I have often heard that Alabama lags behind other states in protecting its citizens. Low literacy rates, inadequate health care, insufficient funding for education, low household income, and high teenage pregnancy rates are just a few of the categories that come to mind. Much of this at least has been understandable, considering the economic disparity between Alabama and some other states. While our state has recently made great strides in recruiting industry and in other areas, I am afraid that we have fallen to the bottom of the list in protecting the rights of our consumers. Many consumers in Alabama are poor or illiterate. In fact, one in three did not even make it through high school. These citizens need protection. One reason for our weak consumer protection is not the result of economic disparity. Instead, it is the result of the widespread use of mandatory arbitration provisions against consumers. According to the Trial Lawyers for Public Justice Foundation, who reviewed case law from Alabama and other states, Alabama is the single most pro-arbitration state in the United States.

Most agree that arbitration is unfair to consumers and small businesses. Even the industries that force arbitration on consumers agree it's unfair to them when they have a claim against a giant corporation. Automobile dealers in Alabama use arbitration agreements against consumers more than any other group. They repeatedly state that arbitration is a fair way to resolve disputes that consumers have against them. However, they are totally against arbitration when it applies to their disputes with automobile manufacturers. They are currently lobbying Congress to pass a bill to disallow all arbitration agreements in contracts between automobile dealers and manufacturers.

The automobile dealers say the following regarding arbitration:

"Dealers should never be forced to sign away their rights under state laws or be denied access to courts or state alternative dispute resolution forums to obtain or keep franchisees." *Jim Willingham, NADA Chairman*

"Legislation to eradicate mandatory binding arbitration is absolutely our top priority. This unfair practice cannot continue." *Tom Greene, Chief Operating Officer, NADA Government Relations*

Everyone seems to agree that arbitration is unfair to the party with the lesser bargaining power.

Likewise, one of the largest credit card banks in the country has been to arbitration with its consumers 19,705 times. Not surprisingly, the bank won 19,618 times. The consumers only won 87 times. How can anyone argue with a straight face that arbitration is fair to consumers or those with weak bargaining power?

The founders of our country thought the right to trial by jury (the opposite of arbitration) was one of our most important rights. In 1774, John Adams stated:

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

In 1776, representatives of the 13 original colonies stated in the Declaration of Independence that one of the reasons we were leaving the English government was:

"For depriving us, in many cases, of the benefits of Trial by Jury."

Thomas Jefferson, author of the Declaration of Independence, later stated:

"The right to trial by jury is more important than the right to vote."

In 1789, James Madison stated:

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

The inherent unfairness of arbitration and the importance of the right to trial by jury must be considered when interpreting Congress's intent in passing the Federal Arbitration Act.

Historically, our courts were rightly opposed to arbitration. The Federal Arbitration Act (FAA) was intended to overcome "long-standing judicial hostility to arbitration provisions that had existed at English common law and had been adopted by American courts and to place arbitration agreements upon the same footing with other contracts." *Rhode v. E & T Investments, Inc.*, 6 F. Supp. 2d 1332, 1325 (M.D. Ala. 1998), quoting *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 at 24, 103 S. Ct. 927 (1983). A contract that contains an agreement to arbitrate disputes falls within the Federal Arbitration Act "if it involves interstate commerce." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995). The Federal Arbitration Act, codified at 9 U.S.C. § 1, *et seq.*, provides the following:

"[§ 2] A written provision in any maritime transaction or a contract evidencing a *transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,



irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (emphasis added.)

A review of the legislative history of the Act demonstrates that Congress enacted the Federal Arbitration Act in 1925 to allow businesses to resolve their contractual disputes with experienced decision makers in expedited cost-effective proceedings. It was a result of the American Bar Association's efforts to obtain Congressional authorization for federal courts to enforce arbitration agreements in maritime contracts and interstate commercial contracts. *Joint Hearings on S. 1005 and R. 646* before the sub-committees of the Judiciary Committee, 68 Cong. 1st Sess. 34 (1924). The legislative record makes it clear that the supporters of the FAA, including the Chamber of Commerce, the American Bar Association and the American Bankers Association, expected the FAA to have narrow application to commercial business relationships. It was Congress's intent at the time of enacting the FAA that it would apply to agreements between businesses to resolve contractual disputes. Particularly, when pressed by Senators, the American Bar Association representative who proposed the legislation plainly stated that the primary end of the Act was to deal with disputes "between merchants one with another, buying and selling goods." No one envisioned that the Act would be applied to consumer contracts.

For example, a colloquy between Senator Walsh of Montana and Mr. W. H. H. Piatt, the chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association, who proposed the legislation, indicated that the proponents of the FAA did not intend for it to apply to "take it or leave it" type contracts that were not really entered voluntarily. Walsh and Piatt stated the following:

"Senator WALSH of Montana. This has occurred to me. I see no reason at all—I see none now; there may be some reason but I see no reason now—why, when two men voluntarily agree to submit their controversy to arbitration, they should not be compelled to have it decided that way.

"Mr. PIATT. Yes, sir.

"Senator WALSH of Montana. The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [*sic*] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says[:] 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

\* \* \*

"Mr. Piatt. That would be the case in that kind of a case, I think; but it is not the intention of this bill to cover insurance cases.

\* \* \*

"Senator WALSH of Montana. And then they have the regular bill of lading contract, but they have a further provision that any controversy arising under the contract

shall be submitted to arbitration; and the fellow says [:] 'Well, I haven't any confidence in it. If I have a controversy[,] I would like to have it tried before a court, where I feel I can get justice.'

"Mr. PIATT. Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing [of] a man to sign that kind of a contract. I can see where that could be, right now.

"Senator WALSH of Montana. You can see where they are not really voluntary contracts, in a strict sense.

"Mr. PIATT. I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods. The shipper is nearly under a necessity.

"Senator WALSH of Montana. Yes."

*Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing S. 4213 and 4214 before a Subcommittee of the Committee on the Judiciary, 67th Cong., 4th Sess., 9-10 (1923) (emphasis added).*

*Allstar Homes, Inc., d/b/a Best Value Mobile Homes, et al. v. Rex Waters*, 711 So.2d 924 (Ala. 1997). (Cook concurring specially).

Now, courts have unleashed the FAA from its originally intended purposes and routinely apply it to consumer transactions, where consumers typically, rather than negotiating contractual terms, accept contracts including arbitration provisions on a take it or leave it basis. Consumers generally are far less knowledgeable than bankers or businessmen about the consequences of the agreements.

When determining whether an arbitration agreement or provision is enforceable, the guiding principle declared by the United States Supreme Court is that arbitration is solely a matter of contract, and a party cannot be compelled to arbitrate any claims that he or she has not agreed to submit to arbitration. *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415 (1986). As with any other contract, the parties' intentions control. The U.S. Supreme Court and the Federal Arbitration Act itself have made it clear that state law governing the enforceability of contracts generally plays a role in the arbitration context. For example, each state's law regarding enforceability, e.g., assent, contract formation and unconscionability, controls when determining the validity of an arbitration agreement.

Whether you agree with the extension of the Federal Arbitration Act to the consumer area or not, everyone must agree that this is a federal act that should be applied evenly throughout the country. Certainly, Congress never intended that consumers in Alabama would be forced to give up their right to trial by jury and be compelled to arbitrate disputes that citizens of other states such as California, Florida, Texas or West Virginia would not be compelled to arbitrate under the same circumstances. Research shows that the general law regarding the enforceability of contracts to be applied under the Act doesn't differ markedly from state to state. However, the current Alabama Supreme Court has been very willing to read state contract law narrowly and strip away its protections, in order to compel arbitration and deprive consumers of their right to jury trial. Other state courts and federal courts have been much less willing to do this.



Even the Alabama Supreme Court has admitted several times in several opinions that, because an arbitration agreement is a waiver of a party's right under the Seventh Amendment to the United States Constitution to a trial by jury, such a waiver must be made knowingly, willingly and voluntarily. *E.g., Allstar Homes, Inc., d/b/a Best Value Mobile Homes, et al. v. Rex Waters*, 711 So.2d 924 (Ala. 1997). Even though it has often stated this principle, its recent decisions do not seem to follow it.

The following compares how the Alabama Supreme Court and other courts throughout the country have ruled in arbitration cases involving similar facts. First, it should be noted that from January 1999 to September 2000 alone, the Alabama Supreme Court has reviewed 67 cases involving parties being required to submit to arbitration against their will. They compelled arbitration in 47 of these cases (70 percent) and denied arbitration in 20 of these cases (30 percent). By contrast, during the same time period, the Florida Supreme Court reviewed two such cases and refused to compel arbitration in both. The Tennessee Supreme Court reviewed one such case and refused to compel arbitration in that case. The Mississippi Supreme Court reviewed no such cases, and the Georgia Supreme Court reviewed no such cases. (Georgia and Mississippi each reviewed one arbitration case but it did not deal with whether a party was required to go to arbitration.)

As can be seen from above, arbitration is being reviewed and required in Alabama much more than in neighboring states.

## A. Is an Arbitration Provision Material So That It Must Be Specifically Agreed Upon?

Many arbitration cases deal essentially with the issue of whether or not an arbitration clause is a material provision of an agreement. This is an important question because material terms have to be agreed upon specifically in a contract and generally cannot be altered unilaterally. Before 1999, virtually every court in the country that had considered the question had determined that arbitration clauses are material terms to a contract. *See, e.g., Diskin v. J.P. Stevens & Co.*, 836 F.2d 47 (1st Cir. 1987); *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (4th Cir. 1979); *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375 (5th Cir. 1981); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 727 (8th Cir. 1977); *Universal Plumbing and Piping Supply, Inc. v. John C. Grimberg Co.*, 596 F. Supp. 1383, 1385 (W.D. Pa. 1984); *Fairfield-Noble Corp. v. Pressman-Gutman Co.*, 475 F. Supp. 899, 903 (S.D.N.Y. 1979); *Duplan Corp. v. W.B. Davis Hosiery Mills, Inc.*, 442 F. Supp. 86 (S.D.N.Y. 1977); *Valmont Indus. v. Mitsui & Co.*, 419 F. Supp.

1238, 1240 (D. Neb. 1976); *John Thallon & Co. v. M&N Meat Co.*, 396 F. Supp. 1239 (E.D.N.Y. 1975); *J&C Dyeing, Inc. v. Drakon, Inc.*, 93 Civ. 4283, 1994 U.S. Dist. LEXIS 15194 at \*6, \*8 (S.D.N.Y. 1994); *DeMarco California Fabrics, Inc. v. Nygard International*, No. 90 Civ. 0461, 1990 U.S. Dist. LEXIS 3842 at \*7 (S.D.N.Y. 1990); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 995, Cal. Rptr. 347, 352 (1972); *Matter of Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 408 N.Y.S. 2d 410, 45 N.Y. 2d 325, 380 N.E. 2d 239 (1978); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E. 2d 834, 842 (N.C. 1974); *Just Born, Inc. v. Stein Hall & Co.*, 59 D. & C. 2d 407 (Pa. D. & C. 1971); *Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co.*, 697 A.2d 323, 329 (R.I. 1997); *Bollingbrook Park District v. National-Ben Franklin Ins. Co. of Illinois*, 420 N.E.2d 741, 744 (Ill. Ct. App. 1981); *Boston Teachers Union Local 66 v. School Committee of Boston*, 363 N.E.2d 492, 493 (Mass. Sup. Jud. Ct. 1977).

Yet, in 1999, the Alabama Supreme Court held that an arbitration clause was essentially immaterial in that it could be added to an agreement after it was signed, even after a party was irrevocably bound to the contract and unable to get out of the deal.

In *McDougle v. Silvernell*, 738 So.2d 806 (Ala. 1999), the Silvernells' claims rose out of the purchase of land. At closing, they were issued a

"Commitment For Title Insurance" which indicated that a policy would be issued to them later. There was no mention of an agreement to arbitrate. The policy, which was delivered weeks later, after all the

money had been paid, after the deed was signed and delivered and after the Silvernells could not back out of the policy, contained an arbitration agreement. The Alabama Supreme Court compelled arbitration and, in essence, held that an arbitration provision was not a material provision that needed to be in contemplation of the parties at the time the deal was completed. The *McDougle* court merely stated that the terms of the policy had been incorporated by reference in the "Commitment For Title Insurance" even though the Silvernells were unaware of the content of the actual policy. The court relied on *Ben Cheeseman Realty Co. v. Thompson*, 216 Ala. 9 (1927), for the proposition that documents could be incorporated by reference. However, as Justice Johnstone pointed out in his dissent, the fact that the terms of the policy itself were incorporated by reference in the initial "Commitment For Title Insurance" should have been of no consequence, because incorporation by reference is limited to terms that are "reasonable and in contemplation of the parties to the contract." Even the *Cheeseman Realty* case had limited the doctrine of incorporation by reference to those agreements that were contemplated by the parties at the time the contract was entered. The record was clear that the Silvernells had no idea that the policy would eventually contain an arbitration provision.

The Silvernells, as consumers, were worse off than a commer-

*"The right to trial by jury is more important than the right to vote."*

—Thomas Jefferson



cial businessman under similar circumstances because the law protects businessmen from such additional terms. For example, in a contract between merchants, a later document received and not objected to may modify a contract *unless* it adds a "material term." If the additional term is a "material" one, it merely becomes a proposal. If Alabama law actually considers an arbitration provision to be material, then an arbitration clause added after the deal is completed is unenforceable between merchants. Yet, without saying so, the *McDougle* court essentially held such an additional provision is immaterial when it is added to a consumer agreement. While courts of other states unanimously hold that an arbitration clause is a material term, Alabama courts have ruled as if it is not.

## B. Are Mail-Outs or Bill Stuffers an Acceptable Means of Notification of Addition of an Arbitration Provision?

Likewise, the Alabama Supreme Court has been more willing than other courts to allow banks and other companies to add arbitration clauses by allowing companies to insert them in a change-of-term notice in a billing statement. Other courts have flatly rejected the validity of the practice. The California Court of Appeals refused to enforce the arbitration provision and denied arbitration in *Badie v. Bank of America*, 79 Cal. Rptr. 2d. 273 (Cal. 1998). The defendant bank attempted to add an arbitration agreement to its relationship with its customers by inserting it in a billing statement pursuant to a "change-of-terms" provision in its credit card contracts. The change-of-terms provision provided that the bank could change any "term, condition, service or feature" of the account. In reliance on that clause, the bank attempted to add a new term requiring mandatory arbitration of disputes between cardholders and the bank. The California Court of Appeals refused to enforce the arbitration clause. It found that the original contract, while broadly worded, pertained only to matters integral to the bank-customer relationship and did not address collateral issues such as a method or forum for dispute resolution. The bank could not add a term by simply mailing an insert. The California Supreme Court declined to review and change the *Badie* decision. The same conclusion was recently reached by a federal District Court in California. The court held that a change-of-terms provision in an agreement in a credit card application that did not address dispute

resolution could not be reasonably construed as explicitly allowing insertion of an arbitration clause. *Long v. Fidelity Water Systems, Inc.*, 2000 WL 989914 (N.D. Cal. May 26, 2000).

Similarly, the District Court of Appeals for the First District of Florida voided an arbitration provision that had been inserted by Powertel in bills that were mailed to its customers. *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. App. 1 Dist. 1999). Powertel had included a pamphlet restating many of the terms and conditions of the original service contract, but had also included a new provision relating to the resolution of disputes. The pamphlet further stated that by continued use of Powertel service following

receipt of notice of such changes or modifications, the customer was deemed to have accepted and agreed to the changes. The Florida Court held that the provision was unconscionable because it was an adhesion contract that not only provided for a method of dispute resolution but also dictated a one-sided waiver of an important substantive right. Most important, the method Powertel employed left many customers unaware of the new arbitration clause. The Florida court recognized problems with such changes by bill stuffers. It quoted the following from the trial court with approval:

The mere filing of this—sending the pamphlet in the mail routinely with the bill in a very—pamphlet similar to that which you received in the first place, I don't think this is the type of notice of a change, particularly a change of this nature, that the company could expect the consumer to know about.

These things are so routine of throwing pamphlets in the mail with billings and things of that nature that, Lord, I'll bet 90 percent just throw them out and

don't even read them. Because it becomes so routine in today's mailing habits.

Both California and Florida protected their citizens from "change-in-terms" arbitration by mail. Yet, Alabama courts condone adding an arbitration agreement by "mailout" or through a "change-in-term" provision and apparently hold that such a practice is effective to meet the test of a knowing and willing waiver of a fundamental right. In the Alabama case of *SouthTrust Bank v. Williams*, 2000 WL 1007064 (Ala. July 21, 2000), Daniels and Williams began their relationship with SouthTrust in 1981 and 1995 respectively by executing checking account "signature cards." The cards contained change in terms clauses, which stated that each customer "agreed to be subject to the rules and regulations as may now hereafter be adopted by the bank." The card

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nature."*

—James Madison



did not address dispute resolution. In 1997, SouthTrust added a paragraph to its regulation, which provided that any controversy between SouthTrust and its customers would be settled by binding arbitration under the FAA. In July 1998, Daniels and Williams filed suit challenging SouthTrust procedures for paying overdrafts, and SouthTrust moved to compel arbitration. The *SouthTrust* court upheld the added arbitration provision, not because the consumers had agreed to the provision but because they "took no action that could be considered inconsistent with an assent to the arbitration provision."

Was this an unequivocal agreement to arbitrate? No. Even the court acknowledges that it was, at best, implicit assent. The Alabama Supreme Court, in a footnote, acknowledged the California court's decision in *Badie* and just stated that it was not controlling. Further, it acknowledged the Florida decision in *Powertel* and asserted that it was distinguishable, but did not address the issues raised by *Powertel*, i.e., SouthTrust's method of notice or unconscionability of the provision.

Importantly, the Alabama Supreme Court strained to avoid the most logical analogy to such an addition of terms, an amendment in an agreement between merchants. The *SouthTrust* court stated that Daniels's and Williams's relationships with the bank did not involve the sale of goods governed by § 7-2-207. The court ignored the fact that much of Article 2 is merely the compilation of common law and common sense. Again, as in *McDougle v. Silvernell*, the court essentially confirmed that while the addition of the arbitration clause is a material alteration to a contract between merchants and would have been invalid, such a provision is nevertheless valid when made pursuant to a change of terms provision in a contract between a sophisticated bank and an entire class of less sophisticated parties. Simply put, Florida and California courts recognize the inadequacies of adding mandatory arbitration clauses in such a manner, but Alabama does not.

## C. Are Arbitration Provisions Required in Consumer Loan Transactions Invalid?

Courts in other states have held that inconspicuous arbitration agreements in consumer loan documents are unenforceable given the nature of the transactions and the knowledge and relative bargaining power of the parties. In *Pitchford v. Oakwood Mobile Homes*, 1999 U.S. Dist. Lexis 20596 (W.D. Va. 1999), the U.S. District Court for the Western District of Virginia found that there was no valid contract for arbitration where a customer testified that there was no discussion about the arbitration agreement or the arbitration process. In fact, Pitchford did not know what arbitration was and had no recollection of the word being mentioned during the transaction. The purchase of the mobile home by Pitchford, who had an 11th-grade education, was her first major purchase. She had been recently divorced and needed housing for herself and her four daughters. She met with a sales agent and spent between 20 and 30 minutes executing the contract and a number of other documents that were placed before her, which she "just signed."

Similarly, in *Williams v. Aetna Finance Company, d/b/a ITT Financial Services*, 700 N.E. 2d 859 (Ohio 1998), the Ohio Supreme Court struck down an arbitration provision found in a

home improvement financing agreement. A contractor who wanted to make repairs to her home had approached Williams, a 66-year-old widow. He took her to ITT Financial Services, where she signed printed loan documents that included provisions for insurance charges, high origination fees and interest charges and an arbitration provision. When the contractor failed to complete the work, Williams sued and ITT attempted to enforce the arbitration agreement. The Supreme Court of Ohio, in refusing to enforce the provision, stated:

The trial court was entitled initially to view the arbitration clause at issue with some skepticism. In the situation presented here, the arbitration clause, contained in a consumer credit agreement with some aspects of an adhesion contract, necessarily engenders more reservation than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement. See, generally, 1 Domke on Commercial Arbitration (Rev.Ed.1997) 17-18, Section 5.09

\* \* \*

The parallels between the *Patterson* case and the case before us are striking. *Patterson* involved small consumer loans made by ITT on preprinted forms similar to the form signed by Williams, with a virtually identically worded arbitration clause. Consequently, based on the specific circumstances present here, we determine that the trial court's decision denying ITT's motion to \*\*867 compel arbitration was tantamount to a finding that the agreement to arbitrate was invalid, and further that the arbitration provision was unconscionable. We determine that any presumption in favor of arbitration was overcome based on the entire record of this case. Furthermore, we believe that the presumption in favor of arbitration should be substantially weaker in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

83 Ohio St.3d 464, \*472, 700 N.E.2d 859, \*866. The *Williams* court affirmed an award of \$15,000 in compensatory damages and \$1.5 million in punitive damages.

Though other courts have clearly recognized the potential for abuse when unsophisticated people deal with sophisticated institutions, Alabama courts have zealously enforced arbitration pro-

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visions and compelled arbitration against people who have difficulty reading. The Alabama Supreme Court recently implied that two elderly people who never finished high school, and who had difficulty reading and poor eyesight, should have asked for assistance during their contract negotiation. *Ex Parte Napier*, 723 So.2d 49 (Ala. 1998). The court stated that they had not carried their burden to prove unconscionability. A simple extension of *Napier* would require people to have documents relating to their transactions reviewed by a lawyer before signing them.

Likewise, our court held in *Anniston Lincoln Mercury Dodge v. Conner*, 727 So.2d 898 (Ala. 1998) that a Korean-born plaintiff who did not fully understand the English language was required to go to arbitration. The court overturned the trial court, which had concluded that her inability to understand the English language had caused the parties not to reach a meeting of the minds as to the agreement to arbitrate. It seems our most vulnerable citizens are being forced to give up their constitutional right to a trial by jury.

## D. Are One-Way Arbitration Provisions that Lack Mutuality of Remedy Valid?

Many arbitration agreements allow the company to take the consumer to court to collect a debt but do not allow the consumer to take the company to court under any circumstances. Recently, in *Arnold v. United Companies Lending Corp.*, 511 S.E. 2d 854 (W. Va. 1998), the West Virginia court characterized a situation as grossly unequal in which a national corporate lender was on one side and elderly unsophisticated customers were on the other. It called the situation a contract between a "rabbit and a fox" where consumers are unaware of the implications of what they are signing and do not understand that they are bargaining away many of the protections secured for them with difficulty at common law. The *Arnold* court held that where there is a lack of mutuality because the lender maintains the right of judicial or non-judicial relief to enforce the agreement, arbitration could not be enforced against the borrower.

Likewise, in *ShowMeTheMoney Check Casher, inc. v. Williams*, 27 S.W.3d 361 (Ark. 2000) the Supreme Court of Arkansas held that an arbitration clause was unenforceable for lack of mutuality because an arbitration agreement "should not be used as a shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action."

This is not the case in Alabama. In *Ex Parte Parker*, 730 So.2d 168 (Ala. 1999), the Alabama Supreme Court enforced an arbitration agreement that lacked mutuality stating that lack of mutuality is merely one factor to consider. See also *Ex Parte McNaughton*, 728 So.2d 592 (Ala. 1998).

## E. Are Arbitration Provisions in Warranties Provided Pursuant to the Magnuson-Moss Act Enforceable?

For several years, courts unanimously held that claims under the Magnuson-Moss Act for breach of an express warranty for such products as mobile homes and automobiles could not be

forced into arbitration. *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1537-38 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997); *Rhode v. E & T Investments, Inc.*, 6 F.Supp. 2d 1322, 1332 (M.D. Ala. 1998); *Boyd v. Homes of Legend*, 981 F. Supp. 1423, 1440-41 (M.D. Ala. 1997); *In re Van Blaricum*, 19 S.W. 3d 484 (Tex. App. - Corpus Christie 2000). In *Southern Energy Homes v. Lee*, 732 So.2d 994 (1999), even the Alabama Supreme Court, in a 5-4 decision, recognized that Magnuson-Moss claims could not be forced into binding arbitration. Nevertheless, in June of this year the court overturned its own decision from the previous year in *Southern Energy Homes v. Ard*, 2000 WL 709500 (Ala. June 2, 2000). By the swing of just one vote, the court disregarded its own precedent and the precedent of the entire country and held that consumers must arbitrate their Magnuson Moss warranty claims. This clearly was never Congress's intent.

## F. Is Fraud in the Inducement a Defense to an Arbitration Provision?

Our supreme court has held numerous times that fraud in the inducement of the contract is not a defense to arbitration. *AmSouth Inv. Services, Inc. v. Bhuta*, 749 So.2d 409 (Ala. 1999); *Green Tree Financial Corp. of Alabama v. Wampler*, 749 So.2d 409 (Ala. 1999). The Supreme Court of Tennessee held the exact opposite in the case of *Frizzell Construction Company, Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999). In that case one party complained it was fraudulently induced into a contract. The other party stated these claims were required to be arbitrated regardless of the alleged fraudulent inducement. The Tennessee Supreme Court stated that the fraudulent inducement claims were not subject to arbitration and the party could have its day in court.

## Conclusion

Other courts around the country seem to recognize the potential for abuse in mandatory arbitration clauses forced on consumers and small businesses. Where there is evidence that the parties did not meaningfully agree to them, as required by the United States Supreme Court, or where the arbitration scheme is unfair, other courts are not enforcing them. Other courts are becoming protective of individual rights to ensure that arbitration is not abused. In Alabama, there is widespread use of arbitration agreements. As stated earlier, Alabama is "The Arbitration State."



**Thomas J. Methvin**

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# WAR STORIES

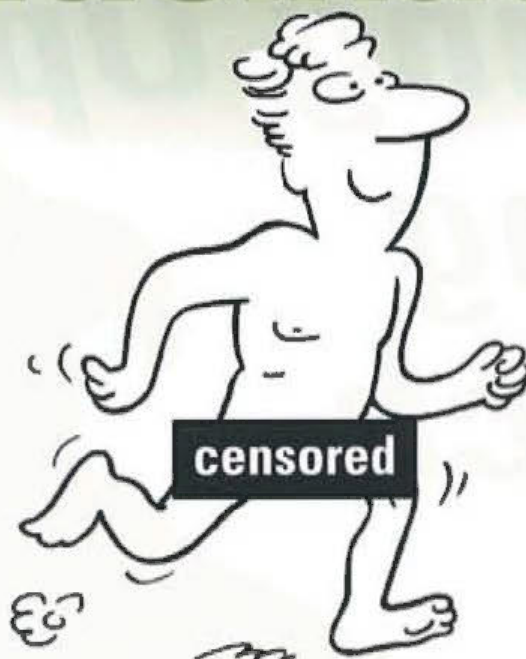
*The Alabama Lawyer* asked our readers to contribute "war stories," humorous tales and anecdotes about Alabama lawyers and judges, to be published in upcoming issues of the magazine. The first installment appeared in the September issue. Here is another!

## Hallucinating



A few years ago I represented an elderly man who was hard of hearing and who asked me to file a petition to involuntarily commit his grandson to the insane asylum. During the course of the hearing, I called a psychologist to the stand who testified that after testing and interviewing the grandson and evaluating his mental condition, he found the grandson to be mentally ill and that confinement was the least restrictive alternative to treating his mental condition. In a routine manner he also testified that the boy was hearing voices, was hallucinating and was a danger to himself and others.

I then called the grandfather to the stand and he testified about the bizarre things that he had seen his grandson do over the six-



month period immediately preceding the hearing and he also expressed an opinion that he was dangerous to be around.

On cross examination, opposing counsel asked the old man if he had ever seen any evidence of the grandson hallucinating. Since the old man was hard of hearing, he asked the attorney to repeat the question. After hearing

the question the second time, he responded as follows:

"Yes sir, I have seen him out behind the house running *a' loose naked* many times."

—Michael Onderdonk, Chatom

### Law School Educational Debt

	Feb 00	July 00	Feb 99	July 99	Feb 98	July 98	Feb 97	July 97
<b>Examinees With Educational Debt</b>	122 (36%)	317 (57%)	144 (41%)	297 (54%)	125 (44%)	310 (60%)	105 (53%)	317 (68%)
<b>Average Debt</b>	\$44,885	\$50,441	\$46,500	\$50,070	\$41,885	\$50,418	\$35,308	\$44,528
<b>Debt Service 7.5% For 10 Years</b>	\$533 Per Month	\$599 Per Month	\$552 Per Month	\$594 Per Month	\$497 Per Month	\$589 Per Month	\$420 Per Month	\$528 Per Month

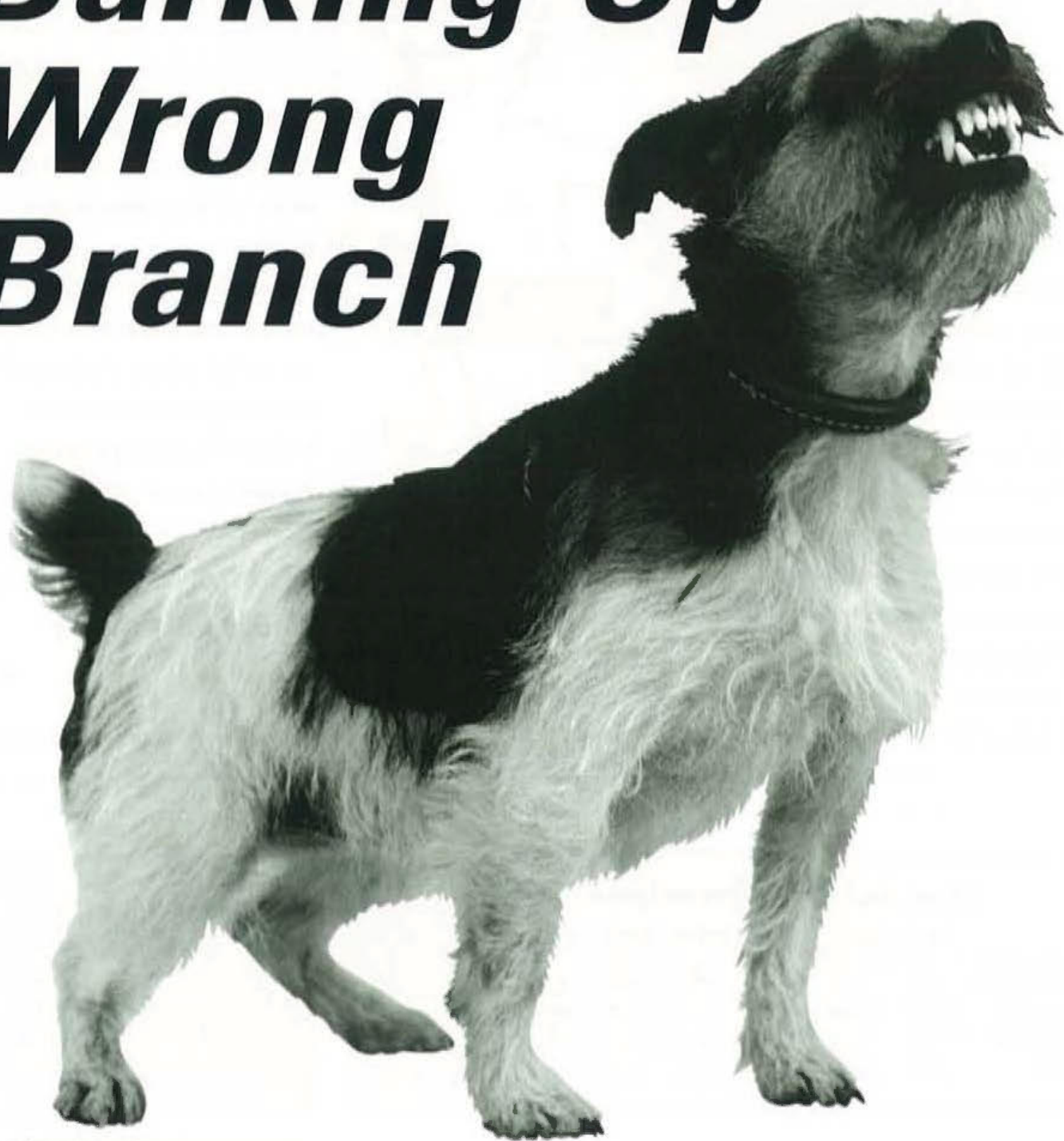
### CLE Reminder

**ALL** Continuing Legal Education credits must have been **earned** by December 31, 2000. All CLE transcripts must be **received** by January 31, 2001.



# ARBITRATION OPPONENTS

## *Barking Up Wrong Branch*





## Introduction

Lost in the hue and cry of the "battle over arbitration"—replete with charges of businesses "stealing" the right to trial by jury and "Republicans on the Alabama Supreme Court" denying Firestone victims their day in court—is the fact that arbitration is predominantly a creature of federal, not state, law. The twin pillars upon which any legal analysis concerning the enforceability of an arbitration agreement must begin are the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et. seq.*, and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Any reasonable reviewer of these laws must conclude that opponents of consumer arbitration should approach Congress, the original author of the FAA, with their complaints. For if, as [Montgomery attorney] Tom Methvin suggests, Congress never intended the FAA to extend into the area of consumer contracts as was mandated by the United States Supreme Court in *Terminix*, and valid policy concerns should be considered in determining when and how arbitration clauses legitimately can be inserted into consumer agreements, if at all, should not these concerns be addressed to Congress?

Instead, we have witnessed what appears to be an expensive and certainly inflammatory campaign designed to pressure state court judges—and particularly members of the Alabama Supreme Court—to disregard clear and unequivocal federal law and U.S. Supreme Court precedent and in an activist manner maneuver around the federal mandate of the FAA through utilization of state contract law. This effort was most clearly apparent in the recent elections for the Alabama Supreme Court, manifested in those infamous placards proclaiming arbitration a license to steal. Several weeks before the November election the words "Vote Democratic" were added to these placards, suggesting implicitly, if not explicitly, that all that was or should be involved in this complex legal determination involving federal statutory law,

U.S. Supreme Court precedent and Alabama law concerning contract formation, was a party label.

Further lost in the politicization of these complex legal issues are important constitutional principles involving the separation of powers and freedom of contract. The gist of the anti-arbitration group's argument against arbitration is at bottom a policy argument centered on the fairness of inserting arbitration clauses in standard form consumer agreements, presented on a "take it or leave it" basis. Certainly, these are legitimate policy questions upon which reasonable people can disagree. That being said, it should be troublesome to those adherents to the Constitutional notion of separation of powers that some appear to force a litigation solution to a legislative mandate. Moreover, one must consider, absent congressional action, the damage that would be wrought to Alabama's general law of contracts if, as Mr. Methvin suggests, the Supreme Court of Alabama uses every means available to circumvent otherwise lawful contracts only to strike down the arbitration clause contained in those contracts. For, as will be shown, arbitration agreements, though disfavored and abhorred by some, are favored by Congress and no court may invalidate arbitration on any "special" or "disfavored" basis. Rather, general contract law principles must be applied equally to arbitration agreements as any other contract provisions. Thus, in terms of Alabama's general law of contracts, the court must "throw the baby out with the bath water," so to speak, in order to invalidate arbitration agreements.

## Arbitration Is Purely a Matter of Contract

Absent an agreement, arbitration is not mandated by law. Thus, no party can force another party to agree to arbitrate. Parties *choose* by contract to give up their right to a jury trial and to settle their disputes by arbitration. This freedom to con-

tract is enshrined in both the United States Constitution and the Alabama Constitution of 1901. *U.S. Const.* art. I, § 10; *Const. of Ala.*, 1901, art. I, § 22.

Indeed, the U.S. Supreme Court has consistently endorsed a contractual approach to arbitration. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *see also* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001 (1996) ("The contractual approach rests on the principle that arbitration law is a part of contract law and courts should treat arbitration agreements, with few exceptions, like they treat other contracts"). Thus, when the Alabama Supreme Court specifically enforces an agreement to arbitrate, it is not, as Mr. Methvin suggests, taking away the right to trial by jury; rather, it is appropriately following well-settled Supreme Court precedent and honoring the constitutional guarantee of freedom of contract. *See Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989) (holding that "arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit").

When Congress enacted the FAA it adopted a national policy to promote the arbitration of disputes by encouraging and enforcing arbitration agreements. The U.S. Supreme Court has repeatedly resisted efforts to dilute this policy through judicial doctrines that show hostility toward arbitration. Indeed, the Supreme Court has issued a series of rulings that have reinforced the primacy of the FAA and the application of uniform federal substantive law in resolving issues concerning the enforceability of arbitration agreements. *See, e.g.,*



*Doctor's Assocs., Inc. v. Casarotto*, supra at 686-88 (1996) (state statute conditioning the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally was preempted because it impermissibly singled out arbitration agreements for special treatment); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (confirming that "the basic purpose of [the FAA] is to overcome courts' refusals to enforce agreements to arbitrate" and that the Act "preempts state law"); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989) (primary purpose of the FAA is to eradicate the historical reluctance of courts to enforce arbitration agreements); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) "[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect . . . is to create a body of federal substantive law of arbitrability . . .").

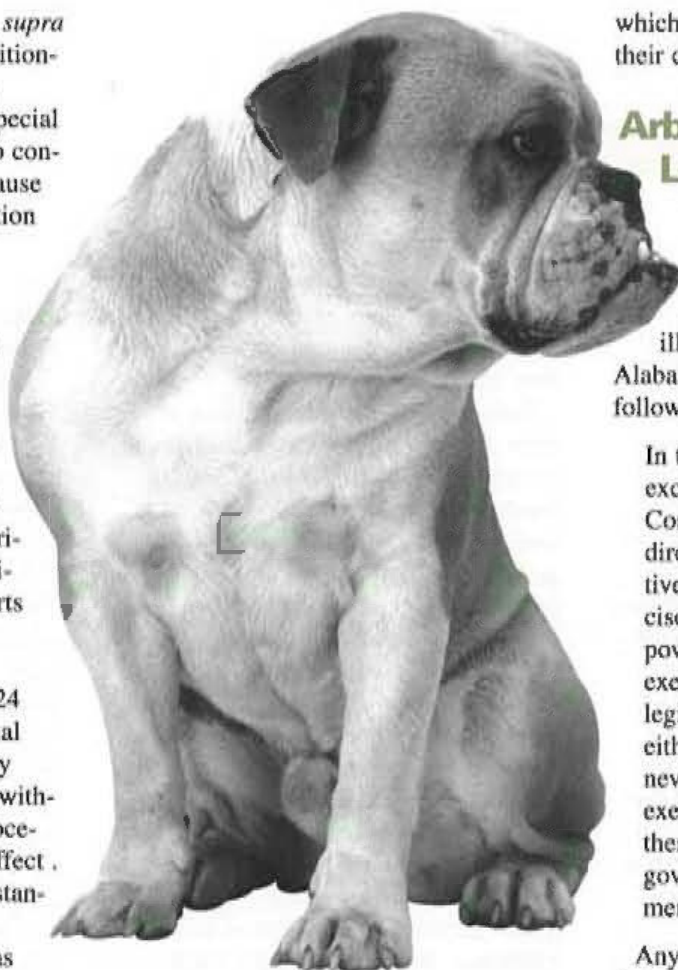
In addition, the Supreme Court has held that all disputes over contract interpretation should be resolved consistent with the liberal federal policy favoring arbitration agreements:

[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense of arbitrability.

*Moses H. Cone*, supra at 24-25.

Any state law, such as Ala. Code § 8-1-41(3), Alabama's anti-arbitration statute, or any contract interpretation that frustrates this federal policy favoring arbitration is displaced. Congress's ability to preempt state law is, of course, found in the Supremacy Clause of the United States Constitution, which states as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme



law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

*U.S. Const.*, art. VI, cl. 2. Consistent with the Supremacy Clause any conflict between state law and federal law arising out of a valid exercise of federal authority is resolved in favor of the federal law. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1 (1912); *Clafin v. Houseman*, 93 U.S. 130 (1876). The United States Constitution struck the balance in favor of the federal government more than two centuries ago. See, e.g., *Bonito Boats, Inc. v. ThunderCraft Boats, Inc.*, 489 U.S. 141 (1989) (state statute held preempted under Supremacy Clause).

Given these axiomatic principles, it is somewhat remarkable that the opponents of arbitration would go to such great lengths to try to subvert core constitutional principles involving the separation of powers. All rhetoric aside, it is the legislative, not the judicial, branch to

which arbitration opponents should voice their concerns.

## Arbitration Is a Legislative Enactment

In our constitutional system of government, the powers of government are separated. In Alabama, this idea is most vividly illustrated by Section 43 of the Alabama Constitution, which provides as follows:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Any activist attempt by the judiciary to thwart the legislative will upsets this constitutional balance of powers. See *Parker v. Hilliard*, 567 So.2d 1343 (Ala. 1990).

Yet this is precisely what Mr. Methvin and others apparently are calling for—they are asking the courts of this state to ignore the plain language of a federal statute and the healthy federal policy favoring arbitration, and decide, by judicial fiat, to frustrate and subvert both the statute and the policy behind it. Not only does such an effort run afoul of our constitutional balance of power, it flies in the face of settled rules of statutory construction mandating that the judiciary give effect to legislative enactments, absent some constitutional infirmity. See, e.g., *National Coal Ass'n v. Chater*, 81 F.3d 1077 (11th Cir. 1996) (holding that where Congress plainly expresses its intent in a statute, courts must give effect to that intent). And, in addition to the plain language of the FAA requiring arbitration agreements to be specifically enforced, U.S. Supreme Court precedent requires that *any doubts concerning any arbitrable issues* be resolved in favor of arbitration. See *Moses H. Cone*, supra.

After *Sisters of the Visitation v.*



*Cochran Plastering Co.*, 2000 WL 264243 (Ala.) there may now be some room to argue whether the FAA actually applies to a given transaction; however, once it is determined that the FAA applies, and it virtually always will, particularly in the type of standard consumer contracts about which Mr. Methvin complains, then there is little left for a court to do but to carry out its constitutional role in our system of government and enforce the agreement to arbitrate.

With this in mind, a more productive and appropriate use of arbitration opponents' time would be to petition Congress with their concerns. In fact, Senator Jeff Sessions recently has introduced an amendment to the FAA entitled the "Consumer and Employee Arbitration Bill of Rights" that, at a minimum, appears to be a starting point for addressing many of the concerns voiced by Mr. Methvin and other opponents of arbitration.

This amendment to the FAA would, among other things:

- Require arbitration contract clauses to have a heading in large, bold print that would say whether arbitration is binding or optional;
- Give all parties to arbitration an equal voice in selecting a neutral arbitrator;
- Give consumers and employees the right to a fair hearing in a nearby or reasonably convenient forum;
- Grant consumers and employees the right to conduct discovery and present evidence, cross-examine witnesses represented by the other party and hire a stenographer to produce a record of the hearing;
- Provide for reimbursement of costs to consumers under certain circumstances, and waive fees in case of hardship; and
- Grant consumers the right to opt out of arbitration into small claims court if that court has jurisdiction over the claim and the claim doesn't exceed \$50,000.

Also, at the state level, 49 states have adopted some form of the Uniform Arbitration Act, originally promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws. In February 2000, a Revised Uniform Arbitration Act, (RUAA) was proposed.

The RUAA, in part, provides regulation for those procedural areas of arbitration not pre-empted by the FAA, such as discovery, consolidation of claims, arbitration immunity and arbitrator disclosure of potential conflicts of interest. The RUAA, as contemplated by *Mastrobuono, supra*, also gives effect to more substantive choice of law provisions routinely included in commercial and consumer contracts.

Clearly, legislative bodies, at both the federal and state levels, are aware of arbitration's importance as a method of resolving disputes and are capable of addressing any legitimate concerns brought to them. If, however, opponents of arbitration fail to pursue these legislative options and continue to approach the judiciary with their perceived abuses, not only does the principle of separation of powers suffer, the stability of the whole of contract law—on which our entire commercial system depends—is threatened.

### **Arbitration Should Not Destroy Contract Law**

It is beyond question that arbitration is a matter of contract. Arbitration opponents and advocates can at least agree on

this. Mr. Methvin's criticisms of arbitration, however, rest on an implicit assumption that arbitration clauses are different, more suspect, than other contract provisions. Such an assumption runs squarely afoul of *Casarotto*. At its simplest, *Casarotto* teaches courts that they must place arbitration agreements upon the same footing as other contracts. See also *Volt Information Sciences, supra* at 478 ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs"). Mr. Methvin would ignore these holdings and would seek to persuade the courts of Alabama to adopt special, more lenient rules applicable to arbitration agreements, but not applicable to contracts generally.

Nowhere is this more clear than in Mr. Methvin's discussion of *Ex parte Napier*, 723 So.2d 49 (Ala. 1998) and *Anniston Lincoln Mercury Dodge v. Conner*, 720 So.2d 898 (Ala. 1998), cases wherein the Alabama Supreme Court upheld the validity of arbitration agreements in contracts entered into by persons claiming difficulties with reading and understanding English. Mr. Methvin takes the court to task for its decisions, even though the court's decisions are grounded on hornbook principles of contract law.

It has long been the rule in Alabama that one is not relieved of one's contractual obligations if one neglects to read a contract, or, if one cannot read, "neglects to have it read." See *Mitchell Nissan, Inc. v. Foster*, 2000 WL 804452 (Ala.) (quoting *Beck & Pauli Lithographing Co. v. Houppert & Worcester*, 104 Ala. 503, 16 So. 522 (1894)). Apparently, though, this century-old rule should not apply in the arbitration context and, in its stead, there should be a much looser doctrine of unconscionability than any we have ever seen.





The Alabama Supreme Court, in both *Ex parte Napier* and *Anniston Lincoln Mercury Dodge v. Conner*, appropriately relied on *Casarotto* in refusing to single out the arbitration agreement for special, suspect treatment. In short, the court simply followed clear Supreme Court precedent, and refused to recognize any argument regarding unconscionability that would not be applicable to contracts generally.

Further, Mr. Methvin approvingly cites the California Court of Appeals decision in *Badie v. Bank Of America*, 67 Cal. App. 4th 779 (1998), which, against the overwhelming weight of authority, rejected the right of banks and credit card issuers to modify account terms pursuant to change in terms clauses in their customers' accounts and refused to uphold an arbitration agreement added in this manner.

Banks and credit card issuers routinely amend deposit and revolving credit account terms through change in terms clauses to insert new price terms, changing interest rates, cash advance charges, new services, and numerous other terms. The legal effect of these changes is, of course, never questioned. This is significant because procedures that are used to amend contracts generally may be used to amend contracts to include arbitration provisions. Indeed, courts have routinely approved the addition of arbitration provisions to contracts pursuant to change-in-terms procedures. See, e.g., *Clayton v. Woodmen of the World Life Ins. Society*, 981 F. Supp. 1447 (M.D. Ala. 1997); *Stiles v. Home Cable Concepts, Inc.*, 994 F.Supp 1410 (M.D. Ala. 1998) *Ex parte Rager* 712 So.2d 333 (Ala. 1998); *Fineman v. CitiCorp USA, Inc.*, 485 N.E. 2d 591 (1st Dist. 1985); *Garber v. Harris Trust & Savings Bank*, 432 N.E. 2d 1309 (1st Dist. 1982); *Beck v. First National Bank of Minneapolis*, 270 N.W. 2d 281 (Minn. 1978).

To the extent *Badie* rejected the addition of the arbitration provision merely because it was an arbitration provision, it obviously runs afoul of *Casarotto*. In short, *Badie* is bad from a policy standpoint in that it hampers financial institutions' ability to effectively and practically change their account agreements, and *Badie* is bad from a legal standpoint in that it flatly contradicts *Casarotto*. When faced with an arbitration challenge arising out of a change-in-terms procedure, the Alabama Supreme Court, in *SouthTrust Bank v. Williams*, 2000 WL 1007064 (Ala.), was

right to reject *Badie*, and was right to hold that *Casarotto* precluded it "from subjecting arbitration provisions to special scrutiny." *Williams*, 2000 WL at \*6.

The sanctity of a contract should not be sacrificed in the name of consumers' rights. In any event, far from being hostile to consumers, arbitration is a time-honored, reliable and impartial mechanism to resolve disputes outside of protracted and expensive civil litigation. The United States Supreme Court has observed that arbitration often works to the benefit of consumers, who are less likely to be able to finance the expenses of formal litigation:

We agree that Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Con., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big businesses and little businesses alike . . . corporate interests [and] . . . individuals"). Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. See, e.g., H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbi-

tration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealing among the parties; it is often more flexible in regards to scheduling of times and places of hearings and discovery devices. . . .)

*Allied-Bruce Terminix Cos.*, *supra* (citations omitted).

Mr. Methvin, however, asserts that no one can argue with a straight face that arbitration is fair to consumers, despite Supreme Court pronouncements to the contrary, and he illustrates this purported unfairness by pointing out that a credit card bank has invoked arbitration 19,705 times and prevailed 19,618 times. What Mr. Methvin does not say is that virtually all of these cases were collection cases filed by the bank against customers more than six months behind on their credit cards bills. Unquestionably, the result in collections court would have been the same.

The mantra that arbitration is "anti-consumer" has been rejected by both Congress and the U.S. Supreme Court. In the final analysis, though, whether arbitration becomes more or less frequently used, and the form it will take, ultimately will be decided either by Congress or by private enterprise responding to the pressures of the marketplace. As to the latter, despite an expensive and highly visible campaign to demonize arbitration, the public remains non-plussed. Merchants have not reported unusual numbers of complaints from consumers concerning executing arbitration agreements and certainly, the much ballyhooed "referendum on arbitration," the elections for Alabama's Supreme Court, was not a stirring victory for the anti-arbitration forces.

## Arbitration and the Marketplace

In their zeal to stamp out arbitration, opponents of arbitration have perhaps lost sight of consumers' freedom to choose and contract as they see fit. If a consumer wishes not to arbitrate, he is free to do business with a company that does not require it. Consumers do have choices when it comes to arbitration. For instance, there are hundreds of insurance companies licensed to write policies in





Alabama, but only a handful require arbitration. On the other hand, many consumers might prefer arbitration over an expensive and lengthy lawsuit. In fact, the December 1, 1999 issue of *The Jere Beasley Consumer Report* recognizes that free market principles are at play in the arbitration context, by including the following example:

A well-known Montgomery car dealer is sending out large post-cards to all of its former customers. In bold print on the addressee side of the card, the following statement in large print is found: "NO ARBITRATION AGREEMENT REQUIRED ON NEW INFINITY MODELS." On the back side of the card, the very same message is again stated in bold print. I suspect the reason for this strange turn of events is the fact that many Montgomery citizens are driving to Columbus, Georgia, and buying their motor vehicles there without having to sign arbitration agreements.

If left unfettered by arbitration opponents' dictates, the free market will always change and adapt to meet genuine consumer desires. If enough people demand something, some entrepreneur will always provide it—this elementary principle of the marketplace has as much application to arbitration as it does to electronics. In short, the competition of the marketplace—not road signs along the highway—will decide when and how arbitration will be used.

By way of example, the American Arbitration Association promulgated its "Consumer Due Process Protocol," wherein it defines what a fair arbitration process involving a consumer must include. The AAA adopted this protocol specifically to protect the rights of consumers who enter into the types of form contracts that Mr. Methvin criticizes. Also, The National Arbitration Forum has enacted detailed policies and procedures to ensure that the arbitration process is fair. The influence of these private groups in addressing any perceived abuses of arbitration is likely to have more effect on arbitration, working through the marketplace, than any legal changes called for by self-interested arbitration opponents. And, these protocols underscore the fact that, in the marketplace, the consumer will never be ignored.

## Arbitration's Prevalence In Alabama

Mr. Methvin criticizes the Alabama Supreme Court for handing down a large number of arbitration-related decisions. Mr. Methvin, however, fails to ask why this is so. Why is arbitration so prevalent in Alabama and not Georgia, Tennessee or Florida? Part of the answer at least results from a perception that businesses simply were not getting a fair shake in Alabama courts. So long as parties believe their disputes will be resolved fairly and efficiently in court, there will be no real clamor for or against arbitration. When, however, "court" comes to connote an uneven playing field that gives rise to completely unpredictable and oftentimes irrational results, parties will necessarily pursue alternatives to court. Arbitration is one such alternative. See Stephen J. Ware, *Default Rules From Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999).

If businesses in other states are not using arbitration as frequently as those in Alabama, and if a person can buy a new vehicle in Florida, Georgia or Mississippi without signing an arbitration agreement, it may well be that parties in other states do not fear going to court and resolving their disputes there. In Alabama, unfortunately, a different perception still exists. It was not so long ago that punitive damage verdicts became so outrageous that the U.S. Supreme Court had to step in, class certifications, even *ex parte* class certifications, were almost routine, and, with the abolition of the "reasonable reliance" standard, every consumer contract case became a multimillion dollar fraud claim. This scenario earned Alabama an infamous national reputation. It is hoped that this is not the scenario to which opponents of arbitration wish to return.

Arbitration, in all likelihood, will remain prevalent in Alabama until *all parties* have confidence that the bench and bar are committed to fundamental notions of fairness. And so, in the end, it is ironic that those groups most responsible for the expensive and explosive campaign to demonize arbitration in reality are acting in a manner most likely to cause its perpetuation.

## Conclusion

Arbitration is hardly the "anti-consumer" evil that Mr. Methvin makes it out to be, nor does arbitration *steal* anyone's right to trial by jury, as suggested by the opponents of arbitration in the recent judicial elections. Arbitration is simply a contractual method of resolving disputes outside of protracted and expensive civil litigation—mandated by Congress and favored by the Supreme Court. Any perceived evils in this system should be legislatively addressed, and state court judges—particularly members of the Alabama Supreme Court—should no longer be assailed for following the law and holding parties to the terms of their contracts. ■



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ARBITRATION IN ALABAMA—

# Of Road Signs and Reality

**ARBITRATION**  
A License to Steal

**ARBITRATION**  
Trial Lawyers Lose and You Win.  
Enough Said



Unless you have had the good fortune of enjoying a three-year sabbatical out of state, as an Alabama lawyer and motorist you have undoubtedly observed the primacy arbitration has attained as the hot legal issue both in the courts and on the roadways of Alabama. In the past three years alone, the Supreme Court of Alabama (the court) released nearly 80 opinions on the subject of challenges to the formation and enforceability of arbitration agreements. During that same time frame, the entire federal judiciary released roughly 115 such opinions and no other state supreme court has come close to the court's record.<sup>1</sup> Meanwhile, on the highways and byways of our fair state, road signs of every size, color and description battle in the court of public opinion for the affections of our citizenry. "Arbitration—A License to Steal" or "Arbitration—Trial Lawyers Lose and You Win. Enough Said" compete for our attention and support.

In the recent statewide judicial elections, certain elements of the political populace raised the specter of constitutional deprivation at the hands of arbitration unless citizens supported the "right" party. Such advertisements brought a quick and pointed response from certain members of the court who insisted that the subject advertisements were inaccurate and demanded that they be withdrawn. The advertisements continued to run, yet the results of the statewide judicial elections arguably demonstrate that arbitration is not the hot button issue many believed it to be.

As it has before on other important legal issues such as punitive damages, Alabama has become a legal battleground on the issue of arbitration. Why Alabama? That is a good question worthy of analysis, but outside the scope of this article. Instead, this article undertakes to provide an overview of the recent and burgeoning body of authority from the court on the many challenges to the formation and enforceability of arbitration agreements contained in written contracts. Addressed below are the most common type challenges the court has resolved in the past three years.

## Burden of Party Seeking to Enforce Arbitration

A party who seeks to enforce an arbitration agreement to resolve a dispute must show that the parties are bound to a valid and written arbitration agreement and the contract in which the arbitration agreement appears relates to a transaction involving interstate commerce.<sup>2</sup> Thus, challenges to enforceability of an arbitration agreement usually involve claims on the absence of one or both of these elements. Challenges under the first element will be referred to as "Contractual Challenges" while a challenge to the second prong will be referred to as the "Interstate Commerce Challenge."

## Contractual Challenges

### A. Absence of Assent Challenges

One of the more frequent challenges to the enforceability of an arbitration agreement is a claim by the plaintiff that he or she never assented to the arbitration agreement. The bases for the claimed absence of assent have come in the form of the absence of both parties' signatures to a contract,<sup>3</sup> claims of fraudulent inducement into the contract or arbitration agreement,<sup>4</sup> and, more fundamentally, that the document containing the arbitration agreement was not part of the parties' contract.<sup>5</sup>

#### 1. Absence of Signatures of Both Parties

In reviewing challenges based upon the absence of one of the parties' signatures to a contract, the court has recognized, as an initial matter, that "the object of a signature on a contract is to show mutuality and assent, and that mutuality and assent can be manifested in ways other than a signature."<sup>6</sup> A party can manifest its consent to a contract via ratification through its actions in fulfilling the burdens and accepting the benefits of a contract.<sup>7</sup> The court has recognized, as a result, that unless required by statute, a contract need not be signed to be enforceable so long as it is accepted and acted upon.<sup>8</sup> However, if the terms of a contract expressly require both parties' signatures in order to be valid and enforceable, and one of the parties has failed to sign the contract, then a party will not be entitled to enforce an arbitration agreement contained within the contract.<sup>9</sup>

If a contract allows for future amendments, one party to the contract may issue amendments to the contract in the form of a change-in-terms notice<sup>10</sup> or otherwise amend the contract to include an arbitration agreement.<sup>11</sup> When the court has faced challenges to an arbitration agreement contained in an amendment to an underlying contract, it has applied the same analysis as with challenges based on the absence of a signature; namely, whether the party challenging the arbitration agreement has manifested his or her assent to the new term in the contract by his or her actions.<sup>12</sup> If the party's actions demonstrate assent, then the court has held that the arbitration agreement is enforceable.<sup>13</sup>

#### 2. Fraudulent Inducement

Another challenge to the enforceability of an arbitration agreement is a claim of fraudulent inducement. The court has recently made clear, in accord with the United States Supreme Court's decision in *Prima Paint Corporation v. Flood & Conklin Manufacturing*<sup>14</sup> and *First Options of Chicago, Inc. v. Kaplan*<sup>15</sup> that in order to be a viable basis for challenge, a party must establish that he or she was fraudulently induced *into the arbitration agreement specifically*, and not the contract in general.<sup>16</sup> Therefore, claims that one has been fraudulently induced into an entire contract that contains an arbitration agreement are



to be resolved through arbitration while claims that one was specifically fraudulently induced into an arbitration agreement contained within a contract are resolved by a trial court.<sup>17</sup>

Analogously, the court has recognized that "challenge[s] to avoid or to rescind a contract [are] subject to arbitration but a challenge to the very existence of a contract is not subject to arbitration."<sup>18</sup> The latter type of challenge has been articulated by the court as that of "fraud in the factum" which occurs "when a party 'procures a[nother] party's signature to an instrument without knowledge of its true nature or contents.'"<sup>19</sup> The court has also further articulated what constitutes "fraud in the factum" as follows:

Alabama caselaw, like the *Restatement [(Second) of Contracts]*, recognizes that to constitute fraud in the factum, and thereby to prevent the formation of a contract, the misrepresentation must go to the essential nature or existence of the contract itself, for example, a misrepresentation that an instrument is a promissory note when in fact it is a mortgage. [citations omitted] A misrepresentation that concerns a misapprehension of the legal meaning of a term or provision in a contract does not constitute fraud in the factum.<sup>20</sup>

Such challenges require a court's, as opposed to an arbitrator's, resolution.<sup>21</sup>

In order to establish a viable basis for fraudulent inducement, a party must present "substantial evidence of fraud in the inducement, particularly related to the arbitration clause" and not merely "ad hoc argument[s]" such as being rushed through a contract, being vaguely confused about the arbitration provision, or asserting that the other party to the contract failed to specifically point out the arbitration provision.<sup>22</sup>

#### 3. Arbitration Agreement Not Part of Contract

The court has also addressed challenges where a party maintains that the document containing the arbitration agreement was not part of the parties' contract and, therefore, the party never assented to arbitration.<sup>23</sup> For example, parties have sought to compel arbitration based upon the inclusion of arbitration agreements made part of a warranty contained in an "Owner's Manual" that a plaintiff claimed never to have received<sup>24</sup> and contained on the back page of a contract which a plaintiff claimed never to have seen.<sup>25</sup>

When analyzing such challenges, the court determines whether the record evidence establishes that a party has assented to the arbitration agreement by its signature or via ratification by its actions.<sup>26</sup> If the record before the court is insufficient to make such a determination, the court has, on occasion, allowed limited discovery on remand on the narrow issue on whether or not a party assented to the arbitration agreement.<sup>27</sup> In a very recent decision, the court held unenforceable an arbitration agreement contained on the back page of a contract which plaintiff claimed she never saw.<sup>28</sup> Plaintiff claimed she was not shown the back of the contract and nothing on the front of the contract she was shown revealed that the back of the contract contained additional terms. On this basis, the court determined that the arbitration agreement was not part of the parties' contract.<sup>29</sup>

#### 4. Voided or Rescinded Contracts

It goes without saying that if a contract containing the subject

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arbitration agreement is void, then it is by definition, unenforceable.<sup>30</sup> The court has refused to enforce arbitration agreements contained, for example, in automobile leases which also contained unsatisfied financing approval contingencies.<sup>31</sup> Similarly, if a court determines that a contract is illegal, then the contract is void and any arbitration clause contained within the contract is unenforceable.<sup>32</sup>

On occasion, parties have sought to avoid arbitration agreements by claiming that the subject contract has been rescinded.<sup>33</sup> If the rescission of the contract is mutual, then it is doubtful that any arbitration agreement contained within the contract could be enforceable.<sup>34</sup> However, if a party asserts a breach of contract claim on the very contract they claim has been rescinded, then the court has held that a party may not claim rescission of only certain portions of the contract (such as the arbitration agreement) while at the same time seeking damages for breach of other portions of the contract.<sup>35</sup>

#### B. Who Arbitrates Arbitrability?

When the parties do not dispute the existence of an arbitration agreement in the contract at issue but one party opposes arbitration on contractual grounds other than assent, as an initial matter, a court first is to assess whether there is "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability.<sup>36</sup> In other words, if a party opposes submitting a dispute to arbitration, a court must be satisfied by "clear and unmistakable evidence" that the parties' arbitration agreement contemplated resolving challenges to the right to arbitrate disputes via arbitration as opposed to the court system.<sup>37</sup>

The language of the parties' contract typically controls such determinations. For example, the court has found such "clear and unmistakable evidence" in the form of a broadly-worded arbitration agreement that provides for the resolution of "any challenges to the validity and enforceability" of the parties' contract<sup>38</sup> or "all disputes and controversies of every kind and nature [between the parties] arising out of or in connection" with the parties' purchase<sup>39</sup> or "all disputes, claims, or contro-



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versies arising from or relating to [the parties' contract] or the parties thereto."<sup>40</sup> If a court satisfies itself that the parties' contract provides for arbitration of arbitrability, then procedural challenges to the arbitration process itself are submitted to the arbitrator to decide.<sup>41</sup> If the evidence establishes that the parties have agreed to arbitrate arbitrability, the court has indicated that a trial court's role in ruling on formation and enforceability challenges is to decide matters of "substantive arbitrability" which matters inquire as to "whether there is a valid arbitration agreement between the parties and whether the specific dispute presented by the case falls within the scope of that agreement."<sup>42</sup> On the other hand, matters of "procedural arbitrability," such as claims of waiver by failing to comply with the arbitration agreement's procedural requirements or claims of unenforceability based upon the vagueness of the arbitration procedures contained within an arbitration agreement, are for an arbitrator to decide and not for a court.<sup>43</sup>

### C. Non-Signatory Challenges

Often, a non-party, or "non-signatory," to a contract containing an arbitration agreement, who has been sued by one of the parties to the contract, will seek to enforce the arbitration agreement to resolve the dispute at issue.<sup>44</sup> The party opposing arbitration typically challenges the non-signatory's right to arbitrate, arguing that he or she never assented to arbitrate disputes with the non-signatory.

Non-signatories are allowed to enforce an arbitration agreement under two recognized exceptions to the general rule that one must be a party in order to enforce such an agreement. The first exception allows non-signatories to compel arbitration under the theory of "equitable estoppel." Under this exception, a non-signatory must establish two elements. First, the non-signatory must demonstrate that the scope of the arbitration agreement signed by the party resisting arbitration is broad enough to encompass the claims made by that party against the non-signatory.<sup>45</sup> This element can be established by demonstrating that the claims at issue are either (a) "based upon duties or obligations

founded in and intertwined with the contract, or (b) sufficiently intertwined with those against a party" to the contract.<sup>46</sup> Second, the non-signatory must show that the arbitration agreement's description of the parties subject to the agreement is not so restrictive as to preclude arbitration with the non-signatory.<sup>47</sup>

If the language of the arbitration agreement is specifically limited to the signatories, then it is unlikely that a non-signatory will meet the "equitable estoppel" exception.<sup>48</sup> Similarly, a non-signatory may not compel arbitration when the claims at issue arise independent of the contract containing the arbitration agreement.<sup>49</sup> However, if the agreement's language is sufficiently broad and a plaintiff asserts common claims against a purported non-signatory agent along with a signatory principal, the court has held that the "equitable estoppel" exception will allow the agent to compel arbitration.<sup>50</sup> Also, if a party alleges specific conspiracy claims against a signatory and a non-signatory, the court has held the non-signatory could compel arbitration under the "equitable estoppel" exception.<sup>51</sup> Finally, if the signatory/defendant to the contract has not moved to compel arbitration of the dispute, the court has held that the non-signatory/defendant cannot compel arbitration under the "equitable estoppel" exception.<sup>52</sup>

The second exception allows a non-signatory to enforce arbitration when a non-signatory is a third-party beneficiary to the contract containing the arbitration agreement. The court has recognized this exception under two factual settings.

The first circumstance involving this exception occurs when a third-party beneficiary to a contract sues on the contract and attempts to resist the contract's arbitration provision.<sup>53</sup> In such circumstances, the court has held that a non-signatory may not claim the benefit of the contract and avoid the contract's arbitration provision.<sup>54</sup>

The second circumstance occurs when a non-signatory claims it is a third-party beneficiary to a contract and seeks to enforce the contract's arbitration agreement. The court has held that if the non-signatory establishes its status as a third-party beneficiary, it is entitled to compel arbitration.<sup>55</sup> In order to be a third-party beneficiary in this instance, a non-signatory must establish that the parties to the contract containing the arbitration agreement intended to bestow a direct benefit upon the non-signatory.<sup>56</sup>

### E. Waiver Challenges

If a party does not assert its right to compel arbitration of a dispute at the inception of a lawsuit, it runs the risk of a challenge that it has waived its right to seek arbitration. The court has distinguished between two types of "waiver" in its decisions.

If a party opposing arbitration contends that the party seeking arbitration has waived its right to arbitrate by a failure to comply with the procedural requirements of the terms of the arbitration agreement, this is a matter of "procedural arbitrability" reserved for an arbitrator's resolution, and not the trial court's.<sup>57</sup> On the other hand, if a party claims waiver due to the other's "substantial invocation of the litigation process" that has resulted in prejudice to the party opposing arbitration, this is a matter for the trial court's resolution.<sup>58</sup> The court has referred to this type of "waiver" as a "default" under Section Three of the Federal Arbitration



Act.<sup>59</sup> The court has held that a finding of waiver will not be inferred lightly given the strong federal policy in favor of arbitration.<sup>60</sup> In determining whether such a waiver has occurred, a trial court should examine whether that party's "participation [in the judicial process] bespeaks an intention to abandon the right [to seek arbitration] in favor of the judicial process, and, if so, whether the opposing party would be prejudiced by a subsequent order requiring it to submit to arbitration."<sup>61</sup> Waiver inquiries are not given to strict bright-line rules, but require a case-by-case analysis.<sup>62</sup> However, the longer a party waits after the filing of a lawsuit to seek arbitration and the more a party participates in the litigation of the lawsuit, the more likely a claim of waiver will be successful.<sup>63</sup> Similarly, so long as a party seeks to compel arbitration within the first few months after a lawsuit has been filed, the court has regularly found that no waiver occurred.<sup>64</sup>

#### F. Scope Challenges

Often, in opposing arbitration, a party will acknowledge a binding arbitration agreement in its contract, but contend that the scope of the agreement does not include the dispute that is the subject of its lawsuit. As an initial matter, the court has long recognized that parties cannot be compelled to arbitrate any dispute that they have not agreed to submit to arbitration.<sup>65</sup>

In analyzing such "scope" challenges, Alabama courts are to apply standard contract interpretation principles<sup>66</sup> with a healthy regard for the federal policy favoring arbitration.<sup>67</sup> Indeed, the court most recently stated that "cases interpreting the Federal Arbitration Act mandate that a court give the broadest possible interpretation to an arbitration agreement and resolve all doubts in favor of arbitration."<sup>68</sup> The court has also described the analysis as follows:

The FAA requires this Court, in applying Alabama contract law to questions of arbitrability, to resolve "any doubts concerning the scope of arbitrable issues ... in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."<sup>69</sup>

Thus, trial courts are to give the terms of an arbitration agreement their clear and plain meaning and should presume that the parties intended to do what the terms of the agreement clearly states.<sup>70</sup>

If the terms are unambiguous, "then there is no room for construction and it is the duty of the court to enforce [the arbitration agreement] as written."<sup>71</sup> On the other hand, if a court determines that the terms are ambiguous, a court is to apply established rules of contract construction to resolve the ambiguity.<sup>72</sup> In so doing, when given a choice between an interpretation that upholds the contract or one that would destroy the contract, the court has a duty to choose the construction that upholds the contract and that will give effect to all of its terms.<sup>73</sup> Finally, while ambiguities in a contract are construed against the drafter,<sup>74</sup> "ambiguities as to the scope of the arbitration clause itself [are to be] resolved in favor of arbitration."<sup>75</sup>

#### G. Unconscionability Challenges

Perhaps the most common challenge to enforceability of an arbitration agreement in recent years has been a claim that the

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agreement is unconscionable and, therefore, unenforceable. By statute, unconscionable contracts in Alabama are unenforceable.<sup>76</sup> A party opposing arbitration on this basis has the burden to establish the unconscionable nature of the contract.

The Alabama Supreme Court has described an "unconscionable contract" as one "such as no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."<sup>77</sup> While acknowledging the absence of an explicit standard for unconscionability, the court has established the following four factors to evaluate in making such determinations: (1) whether there was an absence of meaningful choice on one party's part; (2) whether the contractual terms are unreasonably favorable to one party; (3) whether there was unequal bargaining power among the parties, and; (4) whether there were oppressive, one-sided, or patently unfair terms in the contract.<sup>78</sup>

In reviewing such challenges, the court has recognized a distinction between "procedural" unconscionability and "substantive" unconscionability.<sup>79</sup> Procedural unconscionability relates to alleged deficiencies in the contract formation process such as deception or a refusal to bargain over terms which leaves one party without meaningful choice over whether and how to enter the subject transaction.<sup>80</sup> Procedural unconscionability often involves allegations of the absence of assent to the arbitration agreement for various reasons, including fraudulent inducement, as discussed above.

Substantive unconscionability usually involves claims that certain contractual terms are unreasonably favorably to one party to the contract.<sup>81</sup> As an initial matter, the court has made clear that arbitration agreements are not in themselves unconscionable.<sup>82</sup> With regard to specific attacks on an arbitration agreement as unconscionable, the court has rejected the following arguments: (1) financial hardship of the party opposing arbitration;<sup>83</sup> (2) ignorance of the party opposing arbitration as to what arbitration entails or claims of general lack of sophistication;<sup>84</sup> (3) general allegations that the contract is more favorable



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to the party seeking to compel arbitration;<sup>85</sup> (4) limited reading ability of the party opposing arbitration;<sup>86</sup> and (5) general allegations of unequal bargaining power between the parties.<sup>87</sup>

Another commonly-made substantive unconscionability challenge involves an alleged lack of mutuality of remedy. Such challenges have been made over arbitration agreements that reserve to one party (but not the other) the right to litigate certain types of claims while requiring the other party to arbitrate all claims.<sup>88</sup> The court has uniformly rejected such claims and has explained the inopposite nature of "lack of mutuality of remedy" claims in this context as follows:

The doctrine of mutuality of remedy is limited to the availability of the ultimate redress for a wrong suffered by a plaintiff, not the means by which that ultimate redress is sought. A plaintiff does not seek as his ultimate redress an arbitration proceeding or a court proceeding. Instead, he seeks legal relief (e.g., damages) or equitable relief (e.g. specific performance) for his injury, and he uses the proceeding as a means to obtain that result.<sup>89</sup>

Thus, a contract will not be deemed unconscionable solely because it specifies the forum (court or arbitration) in which a party is to pursue its claims so long as the contract does not abridge the parties' rights to equally pursue remedies for their claims against each other. In the words of the court, rather than being unconscionable, "a party, 'by agreeing to arbitrate, ... trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"<sup>90</sup>

### Interstate Commerce Challenge

As referenced earlier, in addition to establishing the existence of a valid and written arbitration agreement, the Federal Arbitration Act requires proof that the contract containing the arbitration agreement "involves" interstate commerce in order for such agreements to be enforceable.<sup>91</sup> Long an afterthought because of the historical breadth of "interstate commerce" since

the days of *Katzenbach v. McClung*<sup>92</sup> and *Heart of Atlanta Motel*,<sup>93</sup> this element has recently been given new vitality by the court.

In *Sisters of the Visitation v. Cochran Plastering Company*,<sup>94</sup> the court recognized that the "involving interstate commerce" requirement merited a new level of scrutiny due to the United States Supreme Court's recent decision in *United States v. Lopez*.<sup>95</sup> In *Lopez*, the United States Supreme Court struck down an act of Congress for the first time in 60 years due to their conclusion that Congress had exceeded their authority under the Commerce Clause in passing the subject act.<sup>96</sup> The *Lopez* Court ruled that in order for an economic activity to come within Congress' Commerce Clause authority, the activity must "substantially affect" interstate commerce.<sup>97</sup> Based upon this interpretation from *Lopez*, the *Sisters of the Visitation* court inferred that the Federal Arbitration Act's requirement that a contract including an arbitration agreement "involve" interstate commerce must now "substantially affect" interstate commerce.<sup>98</sup>

The *Sisters of the Visitation* court next proceeded to establish a five-factor test to determine whether the party seeking to enforce the arbitration agreement had satisfied the "substantially affecting" interstate commerce requirement. The following factors are now to be considered when analyzing the interstate commerce requirement: (1) citizenship of the parties; (2) movement of tools and equipment across state lines; (3) allocation of cost of services and materials between intrastate and interstate sources; (4) subsequent movement across state lines of subject matter of contract; and (5) degree of separability from other contracts that have substantial effect on interstate commerce.<sup>99</sup>

In light of this new test, one might conclude that intrastate transactions between Alabama residents, such as the one involved in *Sisters of the Visitation*, are less likely to satisfy the "interstate commerce" requirement. A mere recitation in a contract that the parties acknowledge the contract involves interstate commerce standing alone is insufficient.<sup>100</sup> However, the court has observed that "even an intrastate transaction 'involves' interstate commerce if it has a substantial effect on the generation of goods or services for interstate markets and their distribution to the consumer."<sup>101</sup>

In *Ex parte Stewart*<sup>102</sup> the court arguably limited the *Sisters of the Visitation* holding to allow the "interstate commerce" requirement to be met when intrastate activities are "integral and inseparable parts of the flow of interstate commerce."<sup>103</sup> At issue was whether a distribution agreement between *The Birmingham News* and a local distributor satisfied the "interstate commerce" requirement. The court concluded that, while the immediate actions only of newspaper distribution only involved intrastate commerce, such actions were a part of a much larger "flow" of interstate commercial activity.<sup>104</sup> Justice Houston, who joined the majority in *Sisters of the Visitation* and who also concurred specially in *Stewart* harmonized the court's two opinions by explaining that "neither the words nor the reasoning of the majority opinion in *Sisters of the Visitation* has any precedential value in a case involving an activity in which the flow of commerce must continue in order to fulfill the purpose of the activity."<sup>105</sup>

To date, the court has determined that the following type contracts failed to satisfy the Federal Arbitration Act's "interstate





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commerce" requirement: (1) a contract for the provision of plastering services between Alabama residents;<sup>106</sup> (2) a contract for the repair of a chimney between Alabama residents;<sup>107</sup> or (3) an insurance contract involving an Alabama insurer and an Alabama insured.<sup>108</sup> Thus, parties seeking to enforce arbitration agreements in contracts between Alabama residents are likely to have greater difficulty establishing the "interstate commerce" requirement than those contracts involving parties of diverse residence.

## Conclusion

While the debate over the merits of arbitration as a means of dispute resolution continues to be waged on the interstates and county roads of Alabama, the future use of arbitration as a means of alternative dispute resolution remains uncertain.<sup>109</sup> Regardless, as a result of the vigor with which arbitration has been opposed in the trial courts of our state in the past three years, the Supreme

Court of Alabama has been compelled to address and resolve scores of complex and difficult issues regarding the viability of arbitration agreements in numerous contexts. The result of the court's efforts is a substantial body of authority that rivals any state appellate court's in breadth and depth on the subject of formation and enforceability of arbitration agreements. ■



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## Endnotes

- Specifically, based upon the author's research, California appellate courts published 15 such opinions; Texas appellate courts 22 such opinions; Florida appellate courts 38 such opinions; and New York appellate courts 56 such opinions. When Alabama's population is considered with respect to these states' respective populations, the Alabama Supreme Court's production of opinions on this topic is truly astonishing.
- Southern Energy Homes, Inc. v. Marcus*, 1999 WL 1207035 at \*3 (Ala. Dec. 17, 1999).
- Crown Pontiac, Inc. v. Davis*, 2000 WL 572752 (Ala. May 21, 2000); *SouthTrust Bank, N.A. v. Williams*, 2000 WL 1007064 at \*2 (Ala. July 21, 2000) (application for rehearing pending); *Southern Energy Homes, Inc. v. Ard*, 2000 WL 709500 (Ala. June 2, 2000); *Ex parte Shelton*, 738 So.2d 804 (Ala. 1999); *Southern Energy Homes, Inc. v. Marcus*, 754 So.2d 622 (Ala. 1999); *Premier Chevrolet, Inc. v. Headrick*, 748 So.2d 891 (Ala. 1999); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Kilgore*, 751 So.2d 8 (Ala. 1999); *Ex parte Rush*, 730 So.2d 1175 (Ala. 1999); *Woodman of the World Ins. Soc'y v. Harris*, 740 So.2d 362 (Ala. 1999); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998); *Anderson Bros. Chrysler Plymouth Dodge, Inc. v. Hadley*, 720 So. 2d 895 (Ala. 1998).
- Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409 (Ala. 1999); *Ex parte Perry*, 744 So.2d 858 (Ala. 1999).
- Ryan's Family Steakhouse, Inc. v. Brooks-Shade*, 2000 WL 1451563 (Ala. Sept. 29, 2000); *Southern Energy Homes, Inc. v. Kennedy*, 2000 WL 681085 (Ala. May 26, 2000).
- Kilgore*, *supra*, at 10 (citing *Lawler Mobile Homes, Inc. v. Torver*, 482 So.2d 297 (Ala. 1986)).
- See, e.g., Southern Energy Homes, Inc. v. Gregor*, 2000 WL 869592 (Ala. Jun. 30, 2000); *Ard*, *supra*, at \*3; *Shelton*, *supra*, at 870.
- Id.*; *See Crown Pontiac, Inc.*, *supra* at \*2 (same). *See also Ex parte Rush*, 730 So.2d 1175, 1178 (Ala. 1999) (recognizing that "[t]he [Federal Arbitration Act] requires only that there be a 'written provision' in a 'contract,' it does not specify that a party's assent to the terms of a contract containing an arbitration provision can be evidenced only by that party's signature").
- See Ex parte Pointer*, 714 So.2d 871, 872 (Ala. 1997); *Headrick*, *supra*, at 893-894; *Med Center Cars, Inc.*, *supra* at 14.
- See, e.g., Ex parte Shelton*, *supra*, at 867; *Southtrust Bank, N.A. v. Williams*, *supra*, at \*1.
- See, e.g., Woodman of the World Life Ins. Soc'y*, *supra*.
- Id.*
- See id.* *See also Southern United Fire Ins. Co. v. Howard*, 2000 WL 1006955 at \*5 (Ala. July 21, 2000) (finding that plaintiff's payment of premiums, renewal of the subject insurance policy, and submission of a claim under the policy manifested assent to the arbitration agreement).
- 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967).
- 514 U.S. 938, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995).
- Harold Allen's Mobile Home Factory Outlet, Inc. v. Early*, 2000 WL 869579 (Ala. Jun. 30, 2000); *Ex parte Perry*, *supra*, at 863.
- Id.* *See also Wampler*, *supra*, at 413-14; *Investment Management & Research, Inc. v. Hamilton*, 727 So.2d 71, 78 (Ala. 1999) (same).
- Oakwood Mobile Homes, Inc. v. Barger*, 2000 WL 739598 (Ala. Jun. 9, 2000) at \*8.
- Id.* at \*5 (quoting *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 88, 93, 105 S. Ct. 398, 98 L.Ed.2d 340 (1987)).
- Early*, *supra* at n. 6.
- Id.*
- Ex parte Perry*, *supra*, at 863 & 868; *NationsBank Investments, Inc. v. Paramore*, 736 So.2d 589, 591 (Ala. 1999); *Anniston Lincoln Mercury Dodge v. Conner*, 720 So.2d 898, 901-02 (Ala. 1998). *See Early*, *supra*.
- See, e.g., Ryan's Family Steakhouse*, *supra*; *Southern Energy Homes, Inc. v. Marcus*, 759 So.2d 622 (Ala. Dec. 17, 1999); *Kennedy*, *supra*.
- Id.*
- Thermo-Sav, Inc. v. Bazeman*, 2000 WL 1803654 (Ala. Oct. 27, 2000).
- See Marcus*, *supra*, at 626.
- See id.*; *Ex parte Jim Burke Automotiva, Inc.*, 2000 WL 1073713 (Aug. 4, 2000).
- Thermo-Sav, Inc.*, *supra* at \*1.
- Id.* at \*2.
- See Ex parte Cobb*, 2000 WL 145254 (Ala. Sept. 29, 2000); *Ex parte Payne*, 741 So.2d 398 (Ala. 1999).
- See id.*
- See, e.g., Alabama Catalog Sales v. Harris*, 2000 WL 1310579 (Ala. Sept. 15, 2000) The *Alabama Catalog Sales* opinion also contains two significant dissents by Justice Lyons and Justice See who point out that an allegation of illegality, even if supported by substantial evidence, should not be sufficient to render a contract void, but rather, such challenges to the enforceability of the contract should properly be resolved via arbitration as provided in the parties' contract.
- See, e.g., Celtic Life Ins. Co. v. Lindsay*, 765 So.2d 640 (Ala. 2000).
- See id.* at 642.
- Id.*
- Oakwood Mobile Homes, Inc. v. Barger*, 2000 WL 739598 at \*5 (Ala. Jun. 9, 2000); *Ex parte Perry*, 744 So.2d 859 (Ala. 1999).
- Barger*, *supra*, at \*5 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). *See also Alabama Catalog Sales*, *supra*, at \*8 (Lyons, J., dissent) ("[The plaintiff's] contention that the contract is invalid is not grounded on a claim of want of assent, but rather on a claim of unenforceability notwithstanding assent. Such a claim of invalidity must be determined by the arbitrator, not the court").
- Id.*
- Ex parte Perry*, *supra*, at 862.
- Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 413-14 (Ala. 1999).
- See Ex parte Perry*, *supra*, at 864; *Southern United*



- Fire Ins. Co. v. Howard*, 2000 WL 1006955 at \*4 (Ala. July 21, 2000).
42. *Dean Witter Reynolds, Inc. v. McDonald*, 758 So.2d 539, 542 (Ala. 1999) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47, 558, 84 S. Ct. 909, 11 L.Ed.2d 898 (1964); *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 455 (4th Cir. 1997)).
43. *Id.*; *Southern United Fire Ins. Co. v. Howard*, 2000 WL 1006955 at \*7 (Ala. July 21, 2000).
44. *See, e.g., Howard, supra* at \*7; *Ex parte Lovejoy*, 2000 WL 898954 (Ala. July 7, 2000); *Norman v. Occupational Safety Assoc.*, 2000 WL 869562 (Ala. June 30, 2000); *Ex parte Stamey*, 2000 WL 869577 (Ala. June 30, 2000); *Southern Energy Homes v. Kennedy*, 2000 WL 681065 (Ala. May 26, 2000); *Southern Energy Homes, Inc. v. Gray*, 2000 WL 681067 (Ala. May 26, 2000); *First American Title Ins. Corp. v. Silvermail*, 744 So.2d 883 (Ala. 1999).
45. *See Howard, supra* at \*2; *Ex parte Stamey*, 2000 WL 869577 at \*2-3 (Ala. June 30, 2000); *Ex parte Lovejoy*, 2000 WL 898954 at \*3-4 (Ala. July 7, 2000); *Ex parte Napier*, 723 So.2d 49, 52-53 (Ala. 1998).
46. *See id.*
47. *Id.* *See also Carriage Homes v. Channell*, 2000 WL 869615 at 11 (Ala. June 30, 2000) (denying a non-signatory alleged principal's enforcement of a signatory alleged agent's arbitration agreement).
48. *See e.g. Parkway Dodge, Inc. v. Yarbrough*, 2000 WL 1234387 at \*5 (Ala. Sept. 1, 2000); *Ex parte Lovejoy, supra* at \*4; *Norman, supra* at \*2; *First Family Fin. Servs., Inc. v. Rogers*, 736 So.2d 553 (Ala. 1999); *Med Center Cars, Inc. v. Smith*, 727 So.2d 9 (Ala. 1998); *Ex parte Isbell*, 708 So.2d 571 (Ala. 1997).
49. *Kennedy, supra* at \*4.
50. *See Howard, supra* at \*3.
51. *Southern Energy Homes, Inc. v. Gary*, 2000 WL 881067 at \*13 (Ala. May 26, 2000).
52. *See Southern Energy Homes, Inc. v. Hennis*, 2000 WL 1982118 at \*2 n.1 (Ala. Aug. 4, 2000) ("In other words, 'intertwining' requires at least two threads to weave together — one cannot intertwine a single thread.") (quoting *Kennedy, supra* at \*3); *Carriage Homes, supra*.
53. *Ex parte Stamey, supra* at \*6.
54. *Id.* (citing *Ex parte Dyess*, 709 So.2d 447, 451 (Ala. 1997); *Ex parte Warren*, 718 So.2d 45, 47 n.4 (Ala. 1998)).
55. *Ex parte Stacey, supra* at \*6.
56. *Id.* (quoting *Weathers Auto Glass, Inc. v. Alfa Mut. Ins. Co.*, 619 So.2d 1328, 1329 (Ala. 1993)); *Ex parte Dyess, supra* at 447.
57. *Dean Witter Reynolds, Inc. v. McDonald*, 758 So.2d 539, 542-43 (Ala. 1999).
58. *Id.* at n.4; *Ex parte Handley*, 2000 WL 804446 at \*2 (Ala. June 23, 2000); *U.S. Pipe & Foundry Co., Inc. v. Curren*, 2000 WL 804444 at \*2-3 (Ala. June 23, 2000) (quoting *Companion Life Ins. Co. v. Whitesell Mfg., Inc.*, 670 So.2d 897, 899 (Ala. 1995)).
59. *See McDonald, supra* at n.4.
60. *Big Valley Home Center, Inc. v. Mullican*, 2000 WL 772941 at \*2 (Ala. June 16, 2000). *See Curren, supra* at \*2-3; *Jim Walter Resources, Inc. v. Argo*, 2000 WL 804445 at \*2 (Ala. June 23, 2000).
61. *Argo, supra* at \*2 (quoting *Companion Life Ins. Co. v. Whitesell Mfg., Inc.*, 670 So.2d 897, 899 (Ala. 1995)).
62. *Id.*
63. *See, e.g., Mullican, supra* at \*3 (party waited until eve of trial to seek arbitration).
64. *Ex parte Smith*, 736 So.2d 604 (Ala. 1999) (various parties waited two, four and five months before seeking arbitration); *Curren, supra* at \*3 (party asserted right to compel arbitration in its answer, notice of removal to federal court, and as a part of its discovery plan in federal court).
65. *Harcus, supra* at 626 (quoting *Ex parte Stallings & Sons, Inc.*, 670 So.2d 861, 862 (Ala. 1995)); *Homes of Legend, Inc. v. McCollough*, 2000 WL 92255 at \*4 (Ala. Jan. 28, 2000) (same).
66. *Thompson Tractor Co., Inc. v. Fair Contracting Co., Inc.*, 757 So.2d 396, 398 (Ala. 2000).
67. *Homes of Legend, Inc., supra* at \*3 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Construct. Co.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983)).
68. *Ex parte Morris*, 2000 WL 1603857 (Ala. Oct. 27, 2000).
69. *Harcus, supra* at 626 (quoting *Moses H. Cone Mem'l Hosp., supra*, 460 U.S. at 24-25). *See also American Bankers Life Assurance Co. v. Rice Acceptance Co., Inc.*, 709 So.2d 1188, 1190 (Ala. 1998) (quoting same language from *Moses H. Cone Mem'l Hosp.*); *Green Tree Fin. Corp. v. Vinton*, 753 So.2d 497, 501-502 (Ala. 1999) (recognizing the "strong federal policy favoring arbitration" and citing *Moses H. Cone Mem'l Hosp.*).
70. *See Southland Quality Homes, Inc. v. Williams*, 2000 WL 1520277 at \*3 (Ala. Oct. 13, 2000); *Brewbaker Motors, Inc. v. Beiser*, 2000 WL 1073712 at \*2 (Ala. Aug. 4, 2000).
71. *Thompson Tractor Co., Inc., supra* at 398 (quoting *Ex parte Conference America, Inc.*, 713 So.2d 953, 956 (Ala. 1998)). *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Kirton*, 719 So.2d 201, 203 (Ala. 1998) (same).
72. *Homes of Legend, supra* at \*4.
73. *Id.*
74. *Beiser, supra* at \*2.
75. *Homes of Legend, Inc., supra* at \*3 (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76, 109 S. Ct. 1248, 103 L. Ed.2d 480 (1989)). *See also Southland Quality Homes, supra* at \*3; *Harcus, supra* at 626 (same); *Kanworth of Dothan, Inc. v. Bruner-Wells Trucking Co.*, 745 So.2d 271, 274 (Ala. 1999).
76. *Ala. Code* §7-2-302 (1999); *Ala. Code* § 5-19-16 (1999).
77. *Howard, supra* at \*4 (quoting *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1992)).
78. *Id.*
79. *Ex parte Foster*, 758 So.2d 516, 520 n. 4 (Ala. 1999).
80. *Id.*
81. *Id.*
82. *Mitchell Nissan, Inc. v. Foster*, 2000 WL 804452 at \*3 (Ala. June 23, 2000) (quoting *Ex parte McNaughton*, 728 So.2d 592, 598 (Ala. 1998)); *Vinton, supra* at 504.
83. *Parkway Dodge, Inc. v. Yarbrough*, 2000 WL 1234387 at \*4 (Ala. Sept. 1, 2000) (citing *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409 (Ala. 1999); *First Family Fin. Servs., Inc. v. Rogers*, 736 So.2d 553 (Ala. 1999); and *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So.2d 33 (Ala. 1998)).
84. *Howard, supra* at \*4 & n.6; *Vinton, supra* at 503-04; *Jim Burke Automotive, Inc. v. Murphy*, 739 So.2d 1084, 1087 (Ala. 1999).
85. *Id.*; *Mitchell Nissan, supra* at \*3.
86. *Mitchell Nissan, supra* at \*3 (sixth-grade reading level); *Southern Energy Homes, Inc. v. Gray*, 2000 WL 681067 at \*7 (tenth-grade reading level); *Ex parte Napier*, 723 So.2d 49, 52 (Ala. 1998).
87. *Ex parte Foster, supra* at 519.
88. *See e.g. Leggett, supra* at 896-97; *Ex parte Smith*, 736 So.2d 604, 612 (Ala. 1999); *Vinton, supra* at 504; *Med Center Cars, Inc. v. Smith*, 727 So.2d 9, 15-16 (Ala. 1998); *McNaughton, supra* at 596-97.
89. *McNaughton, supra* at 598.
90. *Id.* at 597-98 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).
91. *Southern United Fire Ins. Co. v. Knight*, 736 So.2d 582, 598 (Ala. 1999).
92. 379 U.S. 294, 85 S. Ct. 377, 13 L.Ed.2d 290 (1984).
93. 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1984).
94. 2000 WL 1981513 (Ala. Mar. 10, 2000), rehearing denied, 2000 WL 681066 (Ala. May 26, 2000).
95. 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).
96. *Id.* at 559.
97. *Id.*
98. *Sisters of the Visitation, supra* at \*2-5.
99. *Id.* at \*7-8.
100. *Rogers Foundation Repair, Inc. v. Powell*, 748 So.2d 869, 872 (Ala. 1999).
101. *Southern United Fire Ins. Co. v. Knight*, 736 So.2d 582, 598 (Ala. 1999).
102. 2000 WL 1367608 (Ala. Sept. 22, 2000).
103. *See id.* at \* 2-4.
104. *Id.*
105. *Id.* at \* 5.
106. *Sisters of the Visitation, supra* at \*2-5.
107. *Rogers Foundation Repair, Inc., supra* at 872.
108. *Knight, supra* at 586-87.
109. Legislative initiatives in Congress may affect the future reach of Federal Arbitration Act. For example, on September 14, 2000, the House Judiciary Committee approved a bill (H.R. 534) which would prohibit the use of pre-dispute arbitration agreements in motor vehicle franchise agreements. Moreover, the United States Supreme Court has accepted certiorari in an important case from the Eleventh Circuit that may affect what terms an arbitration agreement must contain in order to compel arbitration of certain federal claims. *Green Tree Fin. Corp. v. Randolph*, \_\_\_ U.S. \_\_\_, 120 S.Ct. 1552, 146 L.Ed.2d (2000).



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# Howell Heflin:

## First in a New Generation of State Bar Leaders

BY PAT BOYD RUMORE

**H**owell T. Heflin of Tusculum served as president of the Alabama State Bar from July 1965 to July 1966. At age 44, he was the first lawyer to be elected president who had graduated from law school and entered the bar after serving in World War II, the first of a new generation of state bar leaders whose attitudes would be unlike those who came before. These lawyers were ready for change, for progress and for reform, and the Heflin administration laid the groundwork for what many have called unbelievable changes in the years that followed.

What was the climate of the legal system in Alabama when Howell Heflin took over the reigns of leadership? With few exceptions, the state bar had been led for many years by men who propounded the themes of states' rights, interposition and segregation in defiant opposition to United States Supreme Court rulings which demanded change. And their views dominated the pages of *The Alabama Lawyer*, the voice of the Alabama State Bar. Alabama had been the scandal of the nation with a quickie divorce mill which the legislature refused to shut down because many of those who were getting rich from law practices specializing in the out-of-state "quickie" divorce had undue influence there.

Justices of the peace were perpetrating a scandal as well, because they made their livings by always finding *against* the defendant in traffic cases and always finding *for* the plaintiff in collection cases, since their



*Heflin in the early '60s*

income came from fees and court costs assessed against the defendants in these cases. Again the legislature refused to act to reform the situation. It also refused to adopt new rules of civil procedure



*Heflin in the Marines*

because, it seemed, many older, influential lawyers liked to use their esoteric knowledge of Alabama's ancient pleading system to trip up the younger generation. The model legislation proposed to update Alabama's court procedures was based on rules used in the federal court system, on whose benches were the "demon" judges pointed to

by Alabama's segregationist politicians as the cause of all of Alabama's troubles. There were backlogs of cases in both the state circuit courts and the state appellate courts with no systematic administration of courts through which these problems could be addressed. Judges were too few, underpaid and without benefits. The system of removing both bad lawyers and bad judges was antiquated and convoluted. And Alabama's *Code* had not been revised and updated in 20 years, leaving lawyers with many books that had bigger pocket parts than main texts. Yet little, if anything, had been done by the state bar to try to improve the situation. It was perceived by many of the younger members as a dormant organization whose leadership accepted the status quo and represented an era still looking back to the wounds of Reconstruction and the Civil War.

Heflin's election might be described as a coup, but he will not admit to any planned revolution. In describing how his election came about, he merely acknowledges that prior to the convention at which he was elected, he had not been a member of the bar commission or those committees that generally produced the leadership ranks. At the convention in Mobile where the election took place, there was a nominee generally viewed as the "anointee" of the power structure of the bar who was expected to win. He was a man who had entered the bar during the mid-1930s, as had most of the leaders of the decade prior to Heflin's election, and who, it was believed by most, represented the status quo. There were those who were looking for new leadership and they used a rumor floating around the convention that the nominee was being looked at by the Internal



Revenue Service because of possible unreported canasta winnings at his country club as an excuse to recruit a second nominee.

The nominee they recruited was Howell Heflin. Although not a member of the power structure of the past, Heflin was a regular attendee of bar conventions and had helped a fellow North Alabama attorney, Clopper Almon of Sheffield, get elected bar president a few years earlier, giving his nominating speech and politicking at the convention two years in a row since Almon was beat the first time out by Kirkman Jackson of Birmingham. Heflin was well known in the bar for other reasons as well. The University of Alabama's law school class of '48, of which he was a prominent member, is highly regarded in the history of Alabama's legal profession for the number of prominent attorneys who were among its roster. The members of the Colbert County Bar Association had previously elected Heflin president of their association and at the time of the 1964 state bar convention, Heflin was serving as president of the Alabama Trial Lawyers Association. He had previously helped found the University of Alabama School of Law Alumni Association and was president of the law school's Foundation from 1962 to 1964.

While influential corporate attorneys from Alabama's major cities had dominated the bar during the decade that preceded his election, Heflin was known as a "country lawyer" who specialized in a general trial practice of both criminal and civil cases. He was even referred to by some as the "Perry Mason" of North Alabama. He was also known as a decorated war hero, having earned both a Silver Star and the Purple Heart during his World War II service as a Marine in the South Pacific, and as a member of an Alabama family famous for its members who had rendered public service throughout Alabama's history. Among several well-known family members, his uncle, Tom Heflin, had reached the pinnacle of service by his election as a United States Senator from Alabama during the 1920s.

For any group of attorneys looking for new leadership, Howell Heflin was the perfect choice. And there was an immediate ground swell of enthusiasm at the convention once Heflin's name was presented as a possible alternative to the one

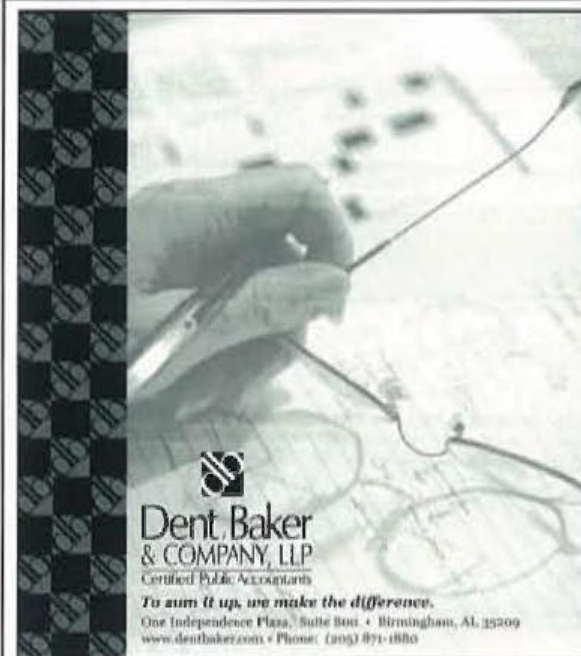


*Mrs. Heflin and Justice Heflin on the campaign trail for Senator*

known nominee. On Friday afternoon of the convention Heflin agreed to accept a nomination. Thereupon a phone campaign to north Alabama began and, by Saturday morning's election, busloads and planeloads of new convention attendees who represented the younger generation of the bar were present in the audience to carry the day for Howell T. Heflin.

Heflin used his year as president-elect to make his plans. Becoming active in both American Bar Association and

American Judicature Society programs, he used the opportunities afforded him by these activities to learn what other states were doing in the areas of legal education, bar association organization and judicial and legal reform. And within two months of taking over the reigns of leadership he established over 25 new committees to undertake the process of examining the many issues facing the bar and the legal system in Alabama as the first step in a long process of reform. More than 250 lawyers were appointed



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Heflin voting for the Judicial Article



Heflin swears in Justice Janie Shores

to the various committees, representing every geographical area of the state and bringing into leadership many new faces from the post-war classes of bar admittees. From the ranks of these committees would come 11 future bar presidents, including seven of the ten in the decade following Heflin's presidency, as well as future federal and state court judges and dozens of influential practitioners, making them the cream of the crop of their generation of Alabama lawyers.

Howell Heflin is noted in the annals of Alabama's legal history for his leadership in the historic revision of the judicial article of Alabama's 1901 constitution which reorganized the judicial system. This revision would come about during his subsequent tenure as chief justice of the Alabama Supreme Court during the years 1971-1976. It may not be so well known that the committees he appointed during his state bar presidency

began the process which brought about creation of Alabama's judicial commission, elimination of the corrupt justice of the peace system, promulgation by the Alabama Supreme Court of the rules of procedure used in all Alabama state courts, adoption of a new code of ethics, revision of the procedures followed in the grievance process, recodification of the *Code of Alabama*, new disciplinary procedures for judges including removal (replacing the never-used impeachment process), a retirement system for judges, and authorization of citizens' conferences on the courts. These committees also started the work which resulted in the creation of the various clinical education programs at Alabama's schools of law, creation of legal aid programs in Alabama, improvement of the law on bail and recognizance bonds in the state, creation of the Client Security Fund, adoption of continuing legal education

requirements, a reorientation of the editorial policies of *The Alabama Lawyer*, and the creation of the Alabama Law Institute.

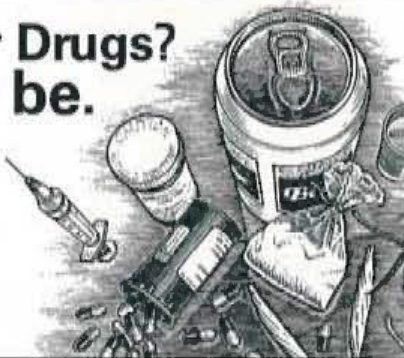
What is it about Howell T. Heflin that allowed him to be the catalyst for so much change?

First, he is a man of character, whose integrity, honesty and basic unselfishness have been recognized by others throughout his long career of public and professional service. And he is a man of energy and persistence who has derived tremendous satisfaction from using his talents to bring about positive forward progress in a state where, and during a time when, many in positions of leadership were recalcitrant in fighting the forces of change. He is a man of faith, the son of a Methodist minister, and his faith has given him optimism and hope. He is a man of tolerance, who has always judged others not based on race, creed, sex or religion but on the content of their character and on their ability. And he is a man of humor and good will, recognized for his ability to lighten the atmosphere even in the tensest situations with a well-placed anecdote or turn of phrase.

He is also a man with many friends. His bar service laid the foundation of friendship, but another fortuitous public service expanded his contacts among lawyers throughout the state. He was one of the organizers and first president of the University of Alabama Law School Alumni Association. Subsequently, he

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helped organize and served as president of the Law School Foundation in the early 1960s and then, in 1969, he helped found the Farrah Law Society at the University of Alabama School of Law and served as its first chairman. In these endeavors, he was in touch with lawyers throughout the state recruiting members and raising funds for improvement of legal education. These friendships, not based on politics, but on a mutual love for their alma mater and a desire to improve legal education, provided a loyal base from which Heflin was able to draw leadership and support for all the reform efforts he espoused.

Howell Heflin has always displayed a kind of natural affability and sense of humility which has allowed him to communicate with Alabamians from all walks of life at a level of friendship and good will. Early in his public speaking career he created story characters like No-Tie Hawkins, Sockless Sam and Beltless Bill from Vina, Alabama, in the Freedom Hills. His tall tales about these characters became so popular and well-known that years later when he was at the opening of the 11th Circuit Court of Appeals, created by legislation he sponsored as a U.S. Senator, he was given a certificate of admission for No-Tie Hawkins to practice before that court. He was recognized in the January 1982 edition of the *Washingtonian* magazine among Washington's ten best political jokers, along with Ronald Reagan, Bob Dole, Pat Moynihan and Mo Udall, while serving as United States Senator from Alabama.

A sign of the uniqueness of the man who has been described as "probably the most effective president the Alabama Bar Association ever had" is the many affectionate nicknames and titles he has had throughout his life. When asked, he recalls that as a child he was dubbed, first, "Hef" and then "Heffer", both a reference to his last name and a suggestion about his size, even as a young man. He also recalls the blind date he had while serving as a Marine in New Zealand who, upon seeing him for the first time, said, "Why, he's as big as a moose." Thus "Moose" became his nickname during his time in the Marines. Another nickname referring to his bulky shoulders and chest was given him by Associate Supreme Court Justice and good friend Janie Shores, who called him

"Buffalo." He was called "Chief" by his staff at the supreme court, "Judge" by fellow lawyers and justices and even Senators during his early years in Washington, and now "Senator." When asked which title he likes the best, he says they all refer to different stages of his life, and his preference now is just plain "Howell."

Justice Shores has written:

Do some few people of each generation stand out from the others because of differences in kind or simply because of differences in degree? Do we admire those few because they possess in greater quantity than others the characteristics we most admire, such characteristics as basic honesty, integrity, loyalty, complete devotion to family and dedication to excellence in every undertaking? Or are they different from the others in kind? Do they possess qualities which most others do not have? I am not sure. But I do know that such people are special, and I know that Howell Thomas Heflin is such a person.

Howell T. Heflin has had a long and distinguished career as an attorney, a jurist, statesman, educator, soldier, and dedicated public servant. His is a career any aspiring attorney could use as a model of the best a lawyer can aspire to be. And, fortunately for the lawyers and citizens of Alabama, he was the right man selected at the right time to bring positive reform to the legal system of Alabama. And he laid the foundation for



*Heflin with law clerk Pat Boyd (Rumore) in 1975*

the many excellent state bar leaders who would follow him. ■

*Photos courtesy of the Bounds Law Library of the University of Alabama School of Law.*



**Pat Boyd Rumore**

Pat Boyd Rumore received her B.A. with a major in American Studies from the University of Alabama in 1971 and her JD from the University in 1975, where she was an associate editor of the *Alabama Law Review*. She served as law clerk to Chief Justice Howell T. Heflin from 1975 to 1976. Rumore is a former corporate counsel at Liberty National Life Insurance Company and now is associated with the firm of Miglionico & Rumore. She is the author of the book *Lawyers in a New South City: A History of the Legal Profession in Birmingham*.



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## Notices

- **David Malcolm Tanner**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2001 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 99-251(A) and 00-030(A) before the Disciplinary Board of the Alabama State Bar.
- **Gregory Miles Hess**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2001 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 00-04(A) before the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **Melvin Lamar Bailey**, who practiced law in Harpersville, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated August 7, 2000, he has 60 days from the date of this publication (January 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 1999. Noncompliance with the MCLE requirements shall result in suspension of his license. [CLE No. 00-1]
- Notice is hereby given to **Sloan Young**, who practiced law in Birmingham and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated August 7, 2000, he has 60 days from the date of this publication (January 15, 2001) to come into compliance with the Mandatory Continuing Legal Education requirements for 1999. Noncompliance with the MCLE requirements shall result in suspension of his license. [CLE No. 00-41]

## Disability Inactive

- Robertsdale attorney **Daniel T. Bankester** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective October 17, 2000. [Rule 27(c); ASB Pet. No. 00-03]

## Disbarments

- The Alabama Supreme Court affirmed an order of the Disciplinary Board, Panel III, disbarring Mobile attorney **John Thomas Kroutter** from the practice of law in the State of Alabama effective October 11, 2000. Kroutter was found guilty of violating rules 1.3 [diligence], 1.4(a) [communication], 1.5(a) [fees], 1.15(b) [safekeeping of property], 8.1(b) [bar admission and disciplinary matters] and 8.4 (b) (c) and (g) [misconduct] in three separate cases. In ASB No. 97-371(A), Kroutter was employed by the client to probate her deceased husband's will. Without the client's knowledge, Kroutter settled a claim in the amount of \$23,000. Kroutter misappropriated these funds to his own use. Thereafter, the probate court ordered Kroutter to file a partial settlement of the deceased's estate. Kroutter failed or refused to file the partial settlement resulting in the court revoking the client's letters testamentary.

Despite repeated requests for information, Kroutter failed or refused to communicate with the client or provide her with information on the status of the probate proceeding. The client filed a complaint with the Alabama State Bar. Kroutter failed or refused to respond or cooperate with the Mobile Grievance Committee. Kroutter was interimly suspended from the practice of law, and restricted from maintaining an attorney trust account. Formal charges were later filed and Kroutter allowed a default to be taken.

In ASB No. 98-274(A), Kroutter was retained by the client to represent her in a Chapter 13 bankruptcy proceeding. The client paid Kroutter a filing fee of \$160 and attorney's fees in the amount of \$1,500. Although Kroutter represented to the client that this was his only fee, he applied for and received an additional \$1,500 from the funds the client paid through her Chapter 13 bankruptcy plan. The client also paid Kroutter \$3,176.28 to be used to make her mortgage payments. Kroutter did not apply this sum on the client's mortgage, but misappropriated and converted said sum to his own use, resulting in a foreclosure on the client's home. The client was forced to refinance her mortgage at considerable additional expense. Kroutter also failed or refused to return the client's telephone calls or respond to written correspondence.



Kroutter was served with charges, which he failed to answer. A default was taken against him.

In ASB No. 99-129(A), Kroutter was employed by clients to represent them in connection with appeal of a mortgage foreclosure on their residence. Kroutter negotiated a settlement under the terms of which the clients' mortgage obligation would be satisfied by payment of \$12,200. They paid Kroutter a total of \$13,200 to be used to pay the mortgage obligation and Kroutter's fee. Kroutter misappropriated and converted funds. Foreclosure proceedings were brought against the clients. Kroutter also failed or refused to return telephone calls or respond to written correspondence from the clients. After Kroutter did not respond to the written request of the Mobile Bar Association investigator, the investigator attempted to contact Kroutter and discovered that his office had been closed, his telephone disconnected and his law practice abandoned.

On May 26, 2000, an order setting date and place for hearing to determine discipline was filed and service attempted upon Kroutter by certified mail. Kroutter failed or refused to appear for the hearing to determine discipline. On June 29, 2000, the Disciplinary Board issued an order disbaring Kroutter from the practice of law.

## Suspensions

- Birmingham attorney **William David Nichols** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated September 29, 2000. The Disciplinary Commission found that the respondent attorney had failed or refused to respond to numerous requests for information from a disciplinary authority during the course of disciplinary proceedings by the Alabama State Bar and the local grievance committee of the Birmingham Bar Association. [Rule 20(a); ASB Pet. No. 00-07]
- Dothan attorney **Stephen Glenn McGowan** was suspended from the practice of law in the State of

Alabama for a period of two years effective September 29, 2000, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of Disciplinary Board of the Alabama State Bar. Based on the evidence presented, the board found that McGowan knowingly provided false, deceptive and misleading information on his application to take the Alabama State Bar examination and further knowingly failed or refused to fully and completely provide or disclose the information requested in the application. McGowan was also required to submit a new application to take the Alabama State Bar examination, to be approved by the Character and Fitness Committee of the bar and to retake and pass the Alabama State Bar examination. In addition, McGowan was also required to complete 12 hours of continuing legal education on the subject of professional ethics. McGowan was found to have violated Rule 8.1(a) which prohibits a bar applicant from making a false statement of material fact, Rule 8.4(c) which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit and misrepresentation, and 8.4(g) which prohibits an attorney from engaging in conduct that adversely reflects on his fitness to practice law. [ASB No. 98-05(A)]

- Bessemer attorney **Garry Wayne Abbott** was suspended from the practice of law in the State of Alabama for a period of 91 days effective September 2, 2000, by order of the Alabama Supreme Court. The supreme court entered its order based upon the findings and order of Disciplinary Commission of the Alabama State Bar. Abbott pled guilty to violating rules 1.15(a), 1.15(b), 8.4(c) and 8.4(g), Alabama Rules of Professional Conduct. Abbott admitted that while serving as trustee for a client he commingled and misappropriated trust funds, took improper and/or unauthorized advances from the trust estate, and failed to render a timely accounting of his management of the trust. [ASB No. 00-115(A)]
- Birmingham attorney **Michael Jackson Hollingsworth** was interimly

suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective, November 13, 2000. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Hollingsworth had, on more than one occasion, failed to promptly notify clients and third parties upon receipt of funds belonging to them and had failed to promptly remit those funds to the rightful owner. [Rule 20(a), ASB Pet. No. 00-08]

## Public Reprimands

- On September 29, 2000 Anniston attorney **Daniel Eugene Morris** received a public reprimand without general publication involving four separate cases. In January 1995, Morris was employed to represent Clarence Griffith before the Board of Pardons and Paroles. Griffith's family paid Morris a total of \$6,000. Thereafter, Morris failed or refused to obtain a hearing before the Board of Pardons and Paroles for Griffith or to take any other action on his behalf. Morris failed or refused to return telephone calls, respond to written correspondence, or otherwise communicate with Griffith or his family concerning the status of the representation. Morris's conduct violated Rule 1.3 of the Rules of Professional Conduct which provides that a lawyer shall not willfully neglect a legal matter entrusted to him and Rule 1.4(a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [ASB No. 98-145(A)]
- In 1995, Morris was employed by Kenneth Barrett to represent him at a hearing before the Board of Pardons and Paroles. Barrett paid Morris \$12,000. Thereafter, Morris failed or refused to file a petition with the Board of Pardons and Paroles on behalf of Barrett or to provide him with any other meaningful representation. Morris also failed or refused to return telephone calls, respond to



written correspondence, or otherwise communicate with Barrett concerning the status of the representation. Morris's conduct constituted a violation of Rule 1.3 of the Rules of Professional Conduct which provides that a lawyer shall not willfully neglect a legal matter entrusted to him and Rule 1.4(a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [ASB No. 99-158(A)]

Morris was employed by Donald Lee Allison to represent Allison's stepson, Dennis Calvin Williams, before the Board of Pardons and Paroles. Allison paid Morris \$4,000 in attorney's fees. Morris failed to investigate the facts or research the legal issues involved in Williams's case or otherwise adequately prepare for the hearing with the result that Williams was denied parole. Subsequently, when the Board of Pardons and Paroles reset Williams's hearing in April 1999, Morris failed to appear at the hearing. Morris also failed or refused to return telephone calls, respond to written correspondence, or otherwise communicate with his client or his client's family concerning the status of the representation. Morris's conduct violated Rule 1.3 of the Rules of Professional Conduct which provides

that a lawyer shall not willfully neglect a legal matter entrusted to him and Rule 1.4(a) which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [ASB No. 99-207(A)]

In 1994, Morris was employed by Michael T. McArthur before the Board of Pardons and Paroles. McArthur paid Morris \$8,000 in attorney's fees. Morris failed to appear at McArthur's hearing before the Board of Pardons and Paroles on November 3, 1994. Thereafter, Morris promised McArthur's family that he would get the hearing rescheduled but failed to do so. Morris also represented to McArthur and his family that he would obtain a reduction in the period of time before McArthur was eligible for another hearing but failed or refused to make any attempt to obtain such a reduction in time. Morris also failed or refused to return telephone calls, respond to written correspondence, or otherwise communicate with his client or his client's family concerning the status of the representation. Morris's conduct violated Rule 1.3 of the Rules of Professional Conduct which provides that a lawyer shall not willfully neglect a legal matter entrusted to him and Rule 1.4(a) which provides that a lawyer shall

keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [ASB No. 99-214(A)]

- On September 29, 2000, Mobile attorney **Robert Cooper Wilson** received a public reprimand without general publication in three separate cases. The reprimand was a result of Wilson having entered a conditional guilty plea to a violating rules 1.3, 1.4(a), 1.16(d) and 8.1(b), Alabama Rules of Professional Conduct, in each of the following matters. The Disciplinary Board ordered that Wilson be suspended from the practice of law in the State of Alabama for a period of 91 days, with the imposition of said suspension being suspended and held in abeyance pending the successful completion of a two-year probationary period.

In ASB No. 98-309(A), the respondent attorney was retained to represent a client in a divorce that needed to be handled in an expeditious manner. After paying the filing fee, the client was unable to contact the respondent attorney. He failed or refused to return her telephone calls or otherwise communicate with her, failed to appear for a scheduled appointment and failed or refused to respond to repeated requests for information from the Alabama State

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In ASB No. 99-01(A), the respondent attorney was retained to represent a client in a Chapter 13 bankruptcy matter. After being retained, the respondent attorney failed or refused to communicate with the client regarding the matter, failed to perform any substantial work or services on behalf of the client, failed to appear at a bankruptcy hearing and failed or refused to respond to repeated requests for information from the Alabama State Bar and the local grievance committee of the Mobile Bar Association.

In ASB No. 99-36(A), the respondent attorney was retained to represent a client in a forfeiture action. Respondent attorney represented to the client that he would represent her, but never filed a response. As a result of his inaction, a default judgment was taken against his client. Respondent attorney failed to communicate with the client regarding the matter, failed to do any substantial work on her behalf hearing and failed or refused to respond to repeated requests for information from the Alabama State Bar and the local grievance committee of the Mobile Bar Association.

On October 27, 2000, Mobile attorney **Robert Cooper Wilson** received a public reprimand without general publication for a violation of rules 1.1, 1.3, 1.4(a) and 8.4(a) and (g). The respondent attorney was retained to represent a client in a Chapter 13 bankruptcy proceeding. The client paid Wilson \$26,000 which represented payment in full of all outstanding bankruptcy debts. Respondent attorney was to retain the funds in his trust account and make monthly payments to the bankruptcy court. Respondent attorney failed to make monthly payments as agreed, and the bankruptcy was dismissed for nonpayment. Respondent attorney subsequently filed and obtained reinstatement of the proceedings, accounted for all the funds held in trust and remained as counsel for the debtor. [ASB No. 00-218(A)]

- Anniston attorney **Hilliard Wayne Love** received a public reprimand with gen-

eral publication. Love was appointed administrator of an estate by virtue of his position as county administrator for Calhoun County. A Birmingham law firm investigated the possibility of bringing an action for wrongful death, however the family of the deceased decided not to pursue the claim. Thereafter, the family made numerous requests of Love to sell the limited assets of the deceased and close the estate. Love failed to take any action after publishing a notice to creditors. This resulted in constant inconvenience to family members. Love rarely returned telephone calls to the family members. After the Office of General Counsel contacted Love on several occasions regarding this matter, Love finally filed a petition for final settlement of the estate on March 14, 2000. The Disciplinary Commission found Love's actions constituted a violation of rules 1.3 and 1.4(a). No prior discipline was involved or considered. [ASB No 99-268(A)].

- Mobile attorney **John D. Rivers** was publicly reprimanded by order of the Disciplinary Commission of the Alabama State Bar on October 27, 2000. Rivers was found guilty of willfully neglecting a legal matter entrusted to him by a client, of failing to keep a client reasonably informed about the status of a matter, and of charging a clearly excessive attorney's fee, violations of rules 1.3, 1.4, and 1.5, Alabama Rules of Professional Conduct. A client retained Rivers to represent her in an action to obtain and enforce grandparent visitation rights. The client paid a retainer of \$5,000. During the five months that Rivers represented the client he did little or no work in the matter. He did not initiate court proceedings until after the client had informed him that she was terminating the representation. He also failed to reasonably communicate with the client regarding the matter. The Disciplinary Commission ordered that Rivers make restitution to the client in the amount of \$5,000 in addition to receiving the public reprimand. The Disciplinary Commission considered Rivers's prior disciplinary history as an aggravating factor in imposing discipline in this matter. [ASB No. 99-63(A)]. ■

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