The background of the cover is a photograph of a sunset over the ocean. The sky is filled with soft, golden light and scattered clouds. In the distance, a fishing boat with a large net is visible on the horizon. The water in the foreground shows gentle waves.

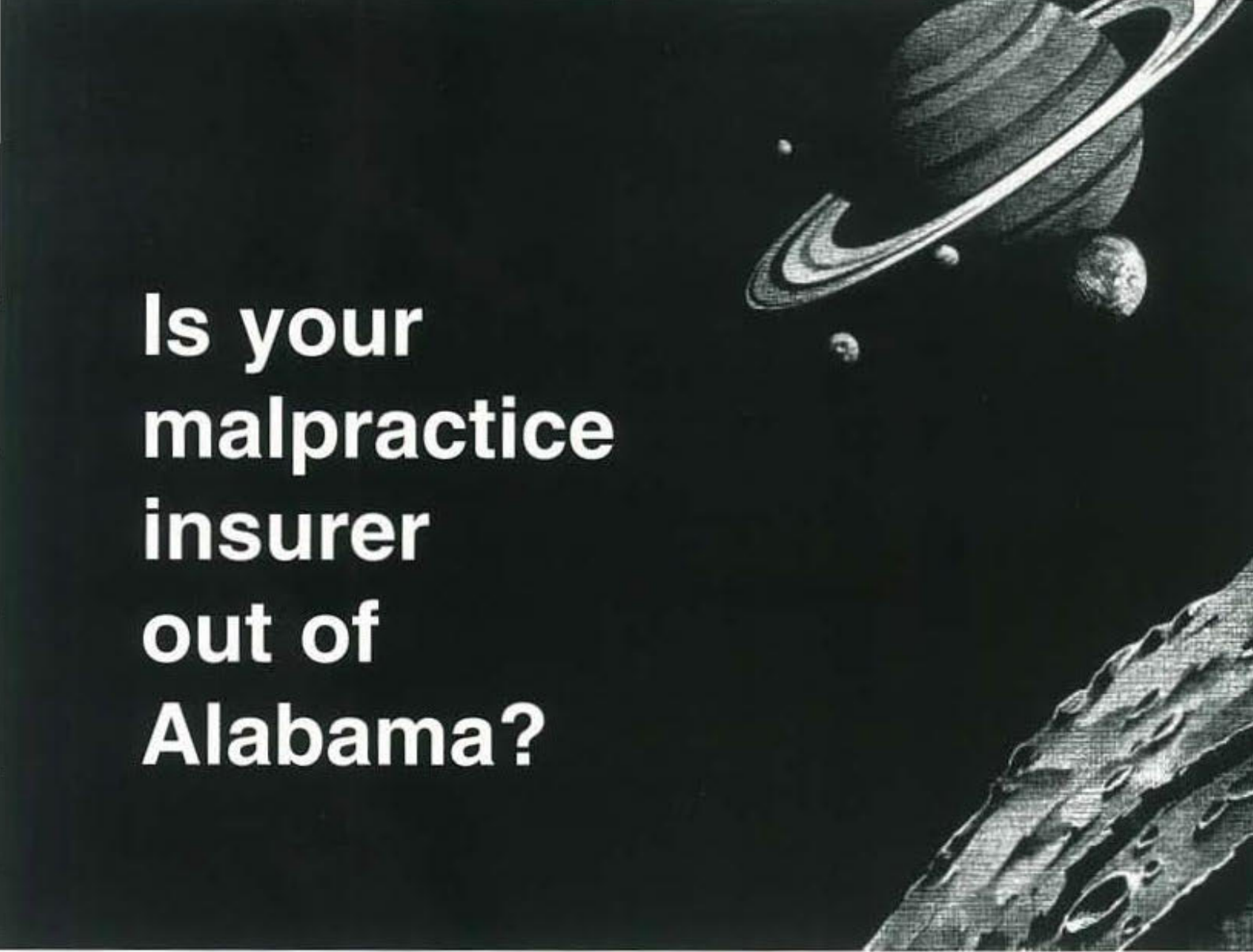
The Alabama Lawyer

Vol. 64, No. 1

January 2003

**Janie L. Shores Receives
The Maud McClure Kelly Award**

page 61



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On the Cover:

Shrimp boat at sunset, offshore Baldwin County, Alabama—Although Alabama’s coastline is relatively short in terms of miles, it has a strategic location in the north central Gulf of Mexico, and has two major seafood ports: Bayou La Batre and Bon Secour/Gulf Shores. Shrimp is the mainstay of the Alabama commercial fishery, followed by oysters, crabs and finfish. Most vessels operating from Alabama’s ports are trawlers that use nets and trawl boards. While company-owned fishing fleets are common in some parts of the United States, many of Alabama’s commercial fishing vessels are family owned. Fishing vessels regularly range along the entire Gulf coast, from the Florida Keys to Mexican territorial waters. (Source: Auburn University Marine Extension & Research Center related publication)

—Photo by Paul Crawford, JD



38



52

Features

23 Alabama State Bar Takes Top PR Award

25 Mobile Bar Association Sponsors Presentation of “To Kill a Mockingbird”

By Lawrence B. Voit

30 Fall 2002 Admittees

38 Alabama Code § 25-5-11: A Narrow Cause of Action Against Co-Employees

By Kevin W. Patton and William L. Campbell, Jr.

49 War Stories

50 Spotlight on a Section: Family Law Section Celebrates 16 Years of Service

By Robin L. Burrell and Gordon Bailey

52 Alabama’s New Mortgage Brokers Licensing Act

By V. Lynne Windham

58 Howell Heflin Presents the Maud McClure Kelly Award

61 Janie L. Shores Receives the Maud McClure Kelly Award

62 Book Review: *Hugo L. Black: Justice for All*

Reviewed by James L. Noles, Jr.

65 2002 Pro Bono Honor Roll

THE ALABAMA LAWYER

Vol. 64, No. 1
January 2003



President's Page
8



Executive Director's Report
10



Bar Briefs
16



**About Members,
Among Firms**
18



Memorials
20



Legislative Wrap-Up
24



**Opinions of the General
Counsel**
26



Disciplinary Notices
72



Classified Notices
78

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The Alabama Lawyer (ISSN 0002-4287) is published seven times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36103-4156.

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Calendar for SPRING 2003

FEBRUARY	6	Appellate Practice - Birmingham
	7	Employment Law - Birmingham
	21	Banking Law - Birmingham
	28	Nursing Home Litigation - Birmingham
<hr/>		
MARCH	7	Elder Law - Birmingham
	13	Commercial Real Estate - Birmingham
	14	Workers' Compensation - Tuscaloosa
	21	Advanced Family Law - Birmingham
<hr/>		
APRIL	24-26	Southeastern Corporate Law Institute - Pt. Clear
<hr/>		
MAY	2	Products Liability - Birmingham
	9-10	City and County Governments - Orange Beach
	23	Legal Research/Internet - Tuscaloosa
<hr/>		
JUNE	6-7	Bridge the Gap - Tuscaloosa
	26-28	Litigation Tips for Trying an Environmental Tort Case - Walt Disney World in Florida



Fred D. Gray

By Fred D. Gray

Civil Rights—Past, Present and Future, *Part II*

(This is the second installment of a three-part series adapted from a speech given to the International Society of Barristers in 2001; the first part appeared in the November 2002 Alabama Lawyer.)

Personal History and the Birth of the Civil Rights Movement

Let me tell you a little bit about how I became involved in this whole business. I did not start out wanting to be a lawyer. I did not know any lawyers. I was preparing for a nice, safe position that African-Americans could have in the late 1940s: I was going to be a preacher and a teacher. My mother packed me up and sent me up to Nashville to one of our church schools so I could learn how to preach. While there in school, I traveled all over the country with one of our old pioneer preachers, raising funds for the school and recruiting students. When I finished training in 1948, I returned home to go to college at Alabama State, the historically African-American college in Montgomery. I lived on the west side of town, and Alabama State was on the east side of town, so I used bus transportation at least twice a day, and sometimes as often as six times a day. I saw so many of our people being mistreated on the buses.

Those experiences on the buses awakened me. It suddenly struck home that everything in Montgomery at that time was segregated based on race, and if a person of color had a claim against a white person, there was nobody who would even handle the case. So I decided that, in addition to saving folks' souls, I needed to give them some earthly help. I made a secret pledge that I would become a lawyer, return to Alabama, pass the bar exam, and destroy everything segregated I could find.

I couldn't attend the law school at the University of Alabama then because of my race. Alabama, like most of the southern states, had a plan that would allow it to meet the requirement of providing equal educational

facilities for African-Americans while still keeping the races separate: Alabama would help pay tuition, room and board for African-Americans who went to school somewhere else. That's how I happened to get my law degree at Case Western Reserve University in Cleveland, with the help of the State of Alabama.

As I look back on it now, I wonder how in the world a boy, who at that time was about 19 years of age, could have thought of such a plan. I hadn't even told my mother that I had applied to law school. When I received the acceptance letter, I gave it to her during dinner one evening. She read it and said, "Well, Mr. Smarty, now that you've been accepted, where are you going to get the money?" Then she went out and helped get the money.

So I was privileged enough to go to Case Western Reserve University, but I always had the intention of returning to Alabama. I had enough sense to stop by Columbus and take the Ohio bar exam just in case. But six weeks later I took the Alabama bar exam. The Alabama examiners in 1954 assumed that one little African-American boy from the ghettos of Montgomery wouldn't rock the boat and couldn't hurt anything. I passed both bar exams the first time around.

Less than six months later, in March 1955, I represented a 15-year-old girl named Claudette Colvin. Most of you don't know of Claudette Colvin, but nine months before Rosa Parks was arrested, Claudette Colvin was arrested under very similar circumstances. Coming from school, she boarded a bus in downtown Montgomery. On the way home and after one block, she was asked to give up her seat to a white man. She refused, and they dragged Claudette off the bus. I represented her in the Juvenile Court of Montgomery

County. Everyone knows about Rosa Parks and about Martin Luther King, but no one knows about Claudette Colvin. She still lives in the Bronx.

Throughout the civil rights movement there were hundreds of individuals such as Claudette, people who took stands and made sacrifices, but whose names never appear in print and whose pictures never appear on television. They are the ones who laid the foundation and who gave us the moral courage. If there had been no Claudette Colvin, for example, we might not have been prepared to mount the bus boycott after Mrs. Parks was arrested. We have to remember the thousands of people who have suffered and even died.

A lot of events happened in Montgomery in a short period of time. Let me give you a quick chronology: On September 7, 1954, Fred Gray, then 23 years of age, was admitted to the practice of law in Alabama; on October 30, 1954, Martin Luther King, Jr., was installed as pastor of Dexter Avenue Baptist Church; on March 2, 1955, Claudette Colvin was arrested for refusing to give up her seat. Another lady, Mary Louise Smith, was arrested in October 1955; on November 5, 1955, just 26 days before Rosa Parks was arrested, Frank M. Johnson, Jr. became a judge of the United States District Court for the Middle District of Alabama. I want to pause here for a moment because I think the appointment of Judge Johnson was very important. Judge Johnson was one of those rare judges who was ready and willing to put his life on the line to do what he knew to be right under the Constitution, not just in the bus case but in many cases that arose in Alabama. On December 1, Rosa Parks was arrested; on December 5, she was tried and convicted; the bus boycott started and Dr. King was introduced to Montgomery and the world. On February 2, 1956, we filed the case of *Browder v. Gayle*, in which the district court ruled the bus segregation unconstitutional; and some five or six months later the supreme court affirmed that decision. And the civil rights movement was born. Frankly, I think the Lord had something to do with bringing the individuals and events together in Montgomery at that time; the coalescence went beyond chance or coincidence. A pebble cast in the segregated waters of Montgomery, Alabama created a human rights tidal wave that changed America and eventu-

ally washed up onto the shores of such faraway places as the Bahamas, China, South Africa, the Soviet Union, and even Great Britain.

In this brief overview of history, I need to mention one more chapter—the infamous Tuskegee Syphilis Study. By the early 1970s I had tried hundreds of cases against discrimination by cities and counties in Alabama and by the state itself, and in many of those cases the federal government was right on our side. Then I woke up one day in 1972 and learned that in my own county of Macon, the federal government had financed a 40-year program in which it had used 623 African-American men, some of whom had syphilis and some of whom did not, to study the course and effects of untreated syphilis—without the knowledge or consent of the men involved. So I had to file suit against the United States Government. In addition to getting a fair settlement (for those days), the survivors eventually received an apology from the President of the United States. In 1997, President Clinton admitted that our country did a grievous injustice to the men in the study and apologized, in person, to the survivors. Those survivors had decided that what they wanted was a permanent memorial in Tuskegee acknowledging not only their contributions, but the contributions others have made in the field of civil rights. So when the spokesman for the survivors introduced the President on May 16, 1997, he announced the formation of the Tuskegee

Human and Civil Rights Multicultural Center. When fully developed, the Center will educate the public on the contribution of all the ethnic groups in our area who have assisted in bringing about human and civil rights. In the next year or so, visitors to Tuskegee will be able to see all of that at one place. ■

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117, 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, www.alabar.org.



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Keith B. Norman

By Keith B. Norman

Alabama's Implementation of the *National Action Plan On Lawyer Conduct And Professionalism*

In 1996, the Conference of Chief Justices passed a resolution calling for a national study and action plan to improve lawyer conduct and professionalism. This resolution was in response to the recommendations contained in the 1992 American Bar Association (ABA) McKay Commission Report entitled, "Lawyer Regulation for a New Century." Over the last few years, the ABA's Center for Professional Responsibility through its Professionalism Committee and Joint Committee on Lawyer Regulation have cooperated with the Conference of Chief Justices to develop a plan that would address concerns over the decline in professionalism in the bar and the concomitant drop in the public's confidence in the profession and justice system. After many meetings and a great deal of hard work, in January 1999, the Conference of Chief Justices adopted the *National Action Plan on Lawyer Conduct and Professionalism*. An implementation strategy was adopted in August 2001.

The national action plan contains black letter recommendations covering seven broad areas. Each of the

seven areas has subcategories of specific recommendations. The national action plan's recommendations have been included here for you to review. Because of the conscious efforts of state bar leaders and our supreme court, only a few of the action plan's recommendations remain for us to implement or address. Because work remains in several areas, including mentoring, public accountability and public outreach, efforts to fill the remaining gaps will continue.

Alabama lawyers should be pleased the supreme court and the state bar have made much progress in implementing so many elements of the national action plan. There are no overnight cures that will change the present condition of the profession or improve the public's attitude about the judicial system. Over time, the measures called for in the national action plan and already implemented in Alabama will foster improvements in lawyer conduct and help restore public confidence in our profession and justice system. ■

A. Professionalism, Leadership and Coordination

The appellate court of highest jurisdiction in each state should take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs. Specific efforts should include:

- Establishing a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction;
- Ensuring that judicial and legal education makes reference to broader social issues and their impact on professionalism and legal ethics;
- Increasing the dialogue among the law schools, the courts and the practicing bar through periodic meetings; and
- Correlating the needs of the legal profession - bench, bar, and law schools - to identify issues, assess trends and set a coherent and coordinated direction for the profession.

B. Improving Lawyer Competence

1. Continuing Legal Education (CLE)

Each state's appellate court of highest jurisdiction should encourage and support the development and implementation of a high-quality, comprehensive CLE program including substantive programs on professionalism and competence. An effective CLE program is one that:

- Requires lawyer participation in continuing legal education programs;
- Requires that a certain portion of the CLE focus on ethics and professionalism;
- Requires that all lawyers take the mandated professionalism course for new admittees;
- Monitors and enforces compliance with meaningful CLE requirements;

- Encourages innovative CLE in a variety of practice areas;
- Encourages cost-effective CLE formats;
- Encourages the integration of ethics and professionalism components in all CLE curricula;
- Encourages CLE components on legal practice and office management skills, including office management technology; and
- Teaches methods to prevent and avoid malpractice and unethical or unprofessional conduct and the consequences of failing to prevent and avoid such conduct.

2. Law Office Management

State bar programs should support efforts to improve law office efficiency. Effective support includes:

- Establishing a law office management assistance program;
- Providing assistance with daily law office routines; and
- Providing monitoring services for lawyers referred from the disciplinary system.

3. Assistance with Ethics Questions

Lawyers should be provided with programs to assist in the compliance of ethical rules of conduct. State bar programs should:

- Establish an Ethics Hotline;
- Provide access to advisory opinions on the Web or a compact disc (CD); and
- Publish annotated volumes of professional conduct.

4. Assistance to Lawyers with Mental Health or Substance Abuse Problems

Lawyers need a forum to confront their mental health and substance abuse problems. State bar programs should:

- Create a Lawyer Assistance Program (LAP) if one does not exist;
- Fund the LAP through mandatory registration fees;
- Provide confidentiality for LAP programs;

- Establish intervention systems for disabilities and impairments other than substance abuse or expand existing LAPs to cover non-chemical dependency impairments;
- Provide monitoring services for lawyers referred from the disciplinary system; and
- Provide career counseling for lawyers in transition.

5. Lawyers Entering Practice for the First Time — Transitional Education

Judicial leadership should support the development and implementation of programs that address the practical needs of lawyers immediately after admission to the bar. Effective programs for newly admitted lawyers:

- Mandate a course for new admittees that covers the fundamentals of law practice;
- Emphasize professionalism;
- Increase emphasis on developing post-graduation skills; and
- Ensure the availability of CLE in office skills for different office settings.

6. Mentoring

Judicial leadership should promote mentoring programs for both new and established lawyers. Effective programs:

- Establish mentoring opportunities for new admittees;
- Establish mentoring opportunities for solo and small firm practitioners;
- Provide directories of lawyers who can respond to questions in different practice areas;
- Provide networking opportunities for solo and small firm lawyers; and
- Provide technology for exchange of information.

C. Law School Education and Bar Admission

1. Law School Curriculum

In preparing law students for legal practice, law schools should provide students with the fundamental principles of professionalism and basic skills for legal practice.

2. Bar Examination

The subject areas tested on the examination for admittance to the state bar should reflect a focus on fundamental competence by new lawyers.

3. Character and Fitness Evaluation

Law schools should assist bar admissions agencies by providing complete and accurate information about the character and fitness of law students who apply for bar admission.

4. Bar Admission Procedures

Bar admissions procedures should be designed to reveal instances of poor character and fitness. If appropriate, bar applicants may be admitted on a conditional basis.

D. Effective Lawyer Regulation

1. Complaint Handling

Information about the state's system of regulation should be easily accessible and presented to lawyers and the public in an understandable format. The disciplinary agency, or central intake office if separate, should review complaints expeditiously. Matters that do not fall under the jurisdiction of the disciplinary agency or do not state facts that, if true, would constitute a violation of the rules of professional conduct should be promptly referred to a more appropriate mechanism for resolution. Complainants should be kept informed about the status of complaints at all stages of proceedings, including explanations about substantive decisions made concerning the complaint.

2. Assistance to Lawyers with Ethics Problems or "Minor" Misconduct (e.g., acts of lesser misconduct that do not warrant the imposition of a disciplinary sanction)

The state's system of lawyer regulation should include procedures for referring matters involving lesser misconduct to an appropriate remedial program. Such procedures may include:

- Required participation in a law office management program;
- Required participation in a lawyer assistance program;
- Enrollment in an "ethics school" or other mandatory CLE; and
- Participation in a fee arbitration or mediation program.

3. Disciplinary Sanctions

The range of disciplinary sanctions should be sufficiently broad to address the relative severity of lawyer misconduct, including conduct unrelated to the lawyer's legal practice. Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions. All public sanction should be reported to the National Lawyer Regulatory Data Bank of the American Bar Association.

4. Lawyers' Funds for Client Protection

The state's system of lawyer regulation should include a Lawyers' Fund for Client Protection to shield legal consumers from economic losses resulting from an attorney's misappropriation of law client and escrow money in the practice of law.

Rules or policies of the appellate court of highest jurisdiction should:

- Provide for a statewide client protection fund;
- Require that the fund substantially reimburse losses resulting from dishonest conduct in the practice of law;
- Finance the fund through a mandatory assessment on lawyers;
- Designate the fund's assets to constitute a trust;

- Appoint a board of trustees, composed of lawyers and lay persons, to administer the fund; and
- Require the board of trustees to publicize the fund's existence and activities.

5. Other Public Protection Measures

The state's system of lawyer regulation should include other appropriate measures of public protection. Such measures that the Court should enact include:

- Mandating financial recordkeeping, trust account maintenance and overdraft notification;
- Establish a system of random audits of trust accounts;
- Requiring lawyers who seek court appointments to carry malpractice insurance;
- Collect annual information on lawyers' trust accounts;
- Studying the possibility of recertification;
- Providing for interim suspension for threat of harm; and
- Establishing a 30-day no-contact rule.

6. Efficiency of the Disciplinary System

The state system of lawyer regulation should operate effectively and efficiently. The Court should enact procedures for improving the system's efficiency, including:

- Providing for discretionary rather than automatic review of hearing committee or board decisions by the Court;
- Providing for discipline on consent;
- Requiring respondents to disciplinary investigations to be reasonably cooperative with investigatory procedures;
- Establishing time standards for case processing;
- Periodically reviewing the system to increase efficiency where necessary;

- Eliminating duplicative review in the procedures for determining whether to file formal charges;
- Authorizing disciplinary counsel to dismiss complaints summarily or after investigation with limited right of complainants to seek review;
- Using professional disciplinary counsel and staff for investigation and prosecution and volunteers on boards and hearing committees;
- Providing appropriate training for all involved; and
- Incorporating disciplinary experiences in CLE curricula.

7. Public Accountability

The public should have access to information about the system of lawyer regulation including procedures, aggregate data concerning its operations, and lawyers' disciplinary records. Laypersons should be included on disciplinary hearing panels and boards. Other measures to ensure public accountability of the disciplinary agency include:

- Making written opinions available in all cases;
- Making formal disciplinary hearings open to the public;
- Collecting and making available information on lawyers' malpractice insurance; and
- Speaking about the disciplinary system at public gatherings.

E. Public Outreach Efforts

1. Public Education

Judges, lawyers and bar programs should provide more public understanding of lawyer professionalism and ethics by developing and implementing public education programs. Effective public education programs should:

- Emphasize lawyer professionalism in court communications with the public;

- Provide a "Public Liaison" office or officer to serve in a clearinghouse function;
- Distribute public education materials in places commonly accessible to the public;
- Include public speaking on the topic of professionalism on the agenda for bar association speaking bureaus;
- Encourage a more active role between educational institutions and organizations and the justice system; and
- Educate the legislative and executive branches of government about issues related to the legal profession and the justice system.

2. Public Participation

The participation of the public should be supported in all levels of court and bar institutional policy-making by judges, lawyers, and bar programs. Judges, lawyers, and bar programs should:

- Publicize the nomination and appointment process for public representatives on court and bar committees;
- Once appointed, provide lay members access to the tools necessary for effective participation; and
- Provide adequate funding on an ongoing basis.

3. Public Access to the Justice System

Judges, lawyers, and bar programs should encourage public access to the justice system through the coordination of pro bono programs. Effective coordination of pro bono programs should:

- Encourage judicial support and participation in lawyer recruitment efforts for pro bono programs;
- Provide institutional support within the court system for lawyer pro bono service;

- Establish an "Emeritus Lawyer" pro bono program;
- Provide institutional and in-kind support for the coordination of pro bono programs; and
- Explore funding alternatives to support pro bono programs

4. Public Opinion

To gauge public opinion about the legal profession and the level of professionalism demonstrated by lawyers, the court and the bar should create regular opportunities for the public to voice complaints and make suggestions about judicial/legal institutions.

5. Practice Development, Marketing and Advertising

The judiciary, the organized bar and the law schools should work together to develop standards of professionalism in attorney marketing, practice development, solicitation and advertising. Such standards should:

- Recognize the need for lawyers to acquire clients and the benefit to the public of having truthful information about the availability of lawyers;
- Emphasize the ethical requirements for lawyer advertising and client solicitations;
- Emphasize the need to be truthful and not misleading; and
- Encourage lawyers to employ advertising and other marketing methods that enhance respect for the profession, the justice system and the participants in that system.

F. Lawyer Professionalism in Court

1. Alternative Dispute Resolution Programs

If appropriate for the resolution of a pending case, judges and lawyers should encourage clients to participate in Alternative Dispute Resolution (ADR) programs. An effective ADR program should:

- Ensure that court-annexed

ADR programs provide appropriate education for lawyers about different types of ADR (e.g., mediation, arbitration);

- Establish standards of ethics and professional conduct for ADR professionals;
- Require lawyers and parties to engage the services of ADR professionals who adhere to established standards of ethics and professional conduct;
- Encourage trial judges to implement and enforce compliance with ADR orders; and
- Educate clients and the public about the availability and desirability of ADR mechanisms.

2. Abusive or Unprofessional Litigation Tactics

To prevent unprofessional or abusive litigation tactics in the courtroom, the court and judges should:

- Encourage consistent enforcement of procedural and evidentiary rules;
- Encourage procedural consistency between local jurisdictions within states;
- Adopt court rules that promote

lawyer cooperation in resolving disputes over frivolous filings, discovery, and other pretrial matters;

- Encourage judicial referrals to the disciplinary system;
- Educate trial judges about the necessary relationship between judicial involvement in pretrial management and effective enforcement of pretrial orders;
- Encourage increased judicial supervision of pretrial case management activities; and
- Establish clear expectations about lawyer conduct at the very first opportunity.

3. High Profile Cases

In high profile cases, lawyers should refrain from public comment that might compromise the rights of litigants or distort public perception about the justice system.

G. Interstate Cooperation

The appellate courts of highest jurisdiction should cooperate to ensure consistency among jurisdictions concerning lawyer regulation and professionalism and to pool resources as appropriate to fulfill

their responsibilities. Specific efforts of interstate cooperation include:

- Continued reporting of public sanctions to ABA National Regulatory Data Bank;
- Using the Westlaw Private File of the ABA National Regulatory Data Bank;
- Inquiring on the state's annual registration statement about licensure and public discipline in other jurisdictions;
- Providing reciprocal recognition of CLE;
- Establishing regional professionalism programs and efforts;
- Recognizing and implementing the International Standard Lawyer Numbering System created by Martindale-Hubbell and the American Bar Association to improve reciprocal disciplinary enforcement; and
- Providing information about bar admission and admission on motion (including reciprocity) on the bar's Web site. ■

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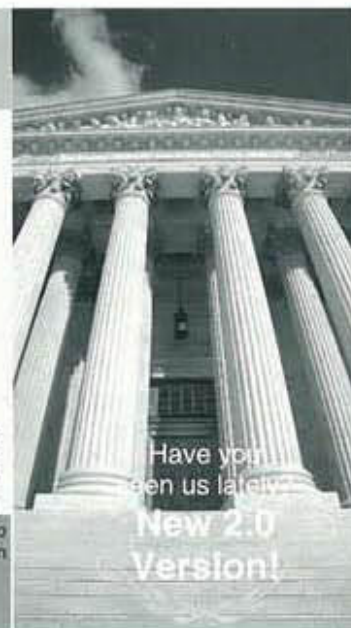
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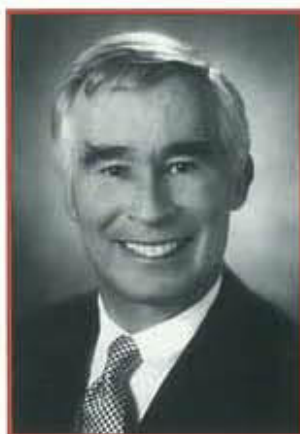
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- **Warren B. Lightfoot** has been elected president of the American College of Trial Lawyers. Founded in 1950, the College comprises the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' trial experience before they can be considered for Fellowship.



Warren B. Lightfoot

Lightfoot is a partner in the Birmingham firm of Lightfoot, Franklin & White. He was inducted as a fellow of the College in 1984 and has previously served as a member of the Board of Regents, the governing body of the College, for five years. Lightfoot was president of the Birmingham Bar Association in 1990 and the Alabama State Bar in 1996.

- **Linda S. Reid, CLA**, senior corporate legal assistant at Sirote & Permutt PC, was recently selected by her peers as Legal Assistant of Year 2002 by the Alabama Association of Legal Assistants. The award is given to a paralegal in Alabama who has made a lasting impact on the paralegal profession in this state. The Alabama Association of Legal Assistants was formed in 1982 to encourage a high order of ethical and professional attainment, further the legal education of the members, cooperate with state and local bar associations, and assist in forwarding the aims and programs of their national organization. ■

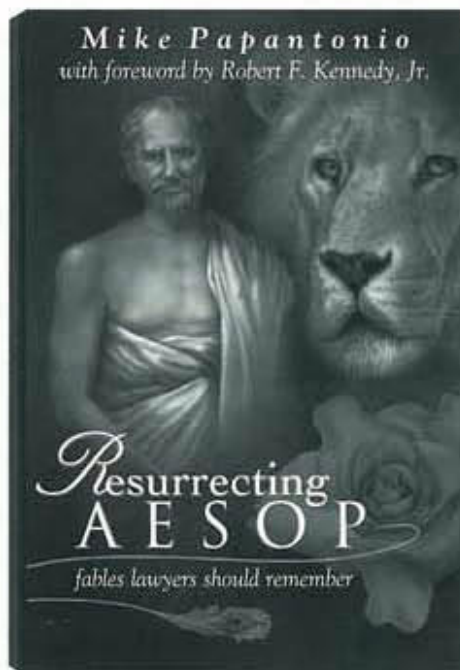
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The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.

About Members

William Marsh Acker, III announces the opening of his office at 2015 1st Avenue, North, Birmingham 35203. Phone (205) 458-1154.

Wanda J. Batson announces the opening of her office at 103 E. 2nd Street, Sylacauga. Phone (256) 249-0903.

A. Eric Johnston announces the opening of his office at Highway 280 East, Meadow Brook Corporate Park, 1200 Corporate Drive, Ste. 107, Birmingham 35242. Phone (205) 408-8893.

Elizabeth Anne Jones announces the opening of the **Law Firm of Elizabeth Anne Jones LLC**, with offices located at 515 S. Court Street, Ste. 110, Montgomery 36104. Phone (334) 356-5291.

Bobby Lott, Jr. announces the relocation of his office to the Frank Nelson Building, 205 20th Street, North, Ste. 710, Birmingham 35203. Phone (205) 322-3747.

William D. Owings announces the relocation of his office to 40 Court Square East, Centreville 35042. Phone (205) 926-4416.

Stuart E. Smith announces the relocation of his offices to the AmSouth Center, 200 Clinton Avenue, West, Ste. 301, Huntsville 35801. Phone (256) 533-3090.

Stewart Springer announces the opening of his offices to 950 22nd Street, North, Ste. 638, Birmingham 35203. Phone (205) 458-8568.

Shelly D. Thornton announces the formation of **Thornton Law Office, Inc.**, with offices located at 7651 Highway 72 West, Ste. 3, Madison 35758. Phone (256) 716-1990.

Among Firms

Alford, Clausen & McDonald LLC announces that **Elizabeth A. Citrin, Mary Abigail Sessions** and **H. James Koch** have joined the firm as associates.

Richard G. Brock announces that **American Legal Search LLC** has opened its third branch office, in Los Angeles.

J.B. Atwood, Jr., Mickey Gentle, Robert Gish and **C. Michael Seibert** announce the formation of **Appellate Attorney Group PC**, and the mailing address is P.O. Box 18035, 1216 Memorial Parkway, North, Huntsville 35804. Phone (256) 536-3636.

Jacqueline E. Austin announces that her daughter, **J. Pratt Austin-Trucks**, has joined her practice as an associate.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **David F. Miceli** and **Frank Woodson** have become shareholders, and **John E. Tomlinson, Kimberly R. Ward** and **Navan Ward, Jr.** have become associated with the firm.

Berkowitz, Lefkovits, Isom & Kushner PC announces that **Linda J. Peacock** and **Leah F. Scalise** have become members, **Dana R. Gache'** has become of counsel and **Stacey A. Davis** and **Chad J. Post** have become associates of the firm.

Brett M. Bloomston and **Julie Katz Callaway** announce the formation of **Bloomston & Callaway**, with offices located at 1330 21st Way, South, Ste. G-10, Birmingham 35205. Phone (205) 212-9700.

Burr & Forman announces that **Joseph W. Buffington** has become *of counsel*.

N.P. Callahan, Jr. and **Nicholas P. Callahan, III** announce the opening of **The Callahan Law Firm**, with offices at 4914 Cahaba River Road, Birmingham 35243. Phone (205) 967-6670.

Capell & Howard PC announces that **T. Randal Lyons** has joined the firm as a member.

Dominick, Fletcher, Yeilding, Wood & Lloyd PA announces that **Arthur J. Hanes, Jr.** and **Ezra B. Perry, Jr.** have joined the firm.

Rogert K. Fuston, Michael D. Petway and **G. Courtney French** announce the formation of **Fuston, Petway & French LLP**, with offices located at The Luckie Building, 800 Luckie Drive, Birmingham 35223. Phone (205) 871-7878.

Gordon, Silberman, Wiggins & Childs PC announces that **Paul C. Williams** has joined the firm.

Hand Arendall LLC announces that **Amy St. Pe'** and **Adrian C. Payne** have joined the firm as associates.

E. Clayton Lowe, Jr., Peter A. Grammas, Brent D. Hitson and **John G. Dana** announce the formation of **Lowe, Grammas, Hitson & Dana LLP**, with offices located at 3500 Blue Lake Drive, Ste. 209, Birmingham 35243. Phone (205) 380-2400.

Norman, Wood, Kendrick & Turner announces that **James L. Pattillo** has joined the firm as an associate.

Richardson Callahan LLP announces that **K. Elizabeth Hill** has joined the firm as an associate.

Schwartz Zweben & Associates LLP announces that **Edward I. Zwilling** has joined the firm.

Siniard, Timberlake & League announces that **Brent Jordan** has joined the firm as an associate.

Sirote & Permutt PC announces that **C. Brandon Browning** has joined the firm.

Stephens, Millirons, Harrison & Gammons PC announces that **Deborah S. Hensley** has joined the firm as an associate.

Stockman & Bedsole announces that **Elizabeth A. Stockman** has become associated with the firm.

L.P. Sutley, Spencer E. Davis, Jr. and **Linda L. Howard** announce the formation of **Sutley & Associates PC**, with offices located at 1111A N. McKenzie Street, Foley. Phone (251) 955-1579.

Tanner & Guin LLC announces that **Brandi L. Branton** has become associated with the firm.

The **United States Attorney's Office**, Northern District of Alabama, announces that **Miles M. Hart, Lane Woodke** and **George Martin** have joined the office as assistant U.S. Attorneys in the Birmingham office.

Watson, deGraffenried, Hardin & Tyra LLP announces that **Donna W. Prashad** has joined the firm as an associate.

Webb & Eley PC announces that **Lisa D. Van Wagner** has become a shareholder with the firm and that **Gary L. Williford, Jr., Charles Richard Hill, Jr.** and **Ashley Hawkins Freeman** have joined the firm as associates. ■

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John Robert Hutson

John Robert Hutson, a stalwart member and a former president of the Morgan County Bar, died May 18, 2001, four days prior to the last annual meeting of the Morgan County Bar. Both in his professional life and in his personal life, Robert exhibited a rare blend of commendable traits rarely united in one person: he was frugal yet fair; he was candid yet charitable; he was unassuming yet forceful; he was industrious yet invariably calm; he was highly intelligent yet infinitely patient with those of less intelligence; he made the most of his opportunities yet he was always considerate of those who either had not had his opportunities or

did not have his ability to make the most of them.

In Robert's passing, his children, his partner, his church, the several civic and charitable organizations in which he was active, and the Morgan County Bar all lost a true friend and a willing helper.

The Morgan County Bar expresses its deep regret and its profound loss in the passing of John Robert Hutson; it acknowledges with appreciation the work that he did; and, albeit belatedly, it extends its sympathy to his children and grandchildren.

—Harvey Elrod, Decatur

Ralph D. Porch

On August 12, 2002, Ralph D. Porch of Anniston died. A native of Sylacauga, Mr. Porch lived in Anniston most of his life. After December 7, 1941, Pearl Harbor Day, Ralph, then a student at the University of Alabama School of Law, almost immediately joined the U.S. Marine Corps, attaining the rank of captain. That earned him the right to participate in the Okinawa Invasion, one of the bloodiest and longest battles of World War II, whence he emerged with a bullet wound in the leg and a Purple Heart.

After his Marine Corps discharge, Mr. Porch completed his law degree in 1947. He was selected to the Farrah Order of Jurisprudence. Ralph returned to Anniston to serve over 50 years as a practicing attorney with Knox, Jones, Woolf & Merrill and its successors. He distinguished himself as a trial attorney who also did real estate, commercial and estate planning work, retiring a few years before his death.

After World War II, Porch joined the Alabama National Guard. The 31st Division was activated during the Korean Campaign and Ralph was sent to Germany, serving as a JAG Officer with the 8th Infantry Division. The 31st was again called up during the Civil Rights struggles in Montgomery. Porch, as the 31st Division JAG spokesman, became its vocal supporter of deference to the Rule of Law.

Few of us have contributed so much to society as did Ralph Porch. Space does not permit us to catalogue his leadership positions, his legions of honors nor the success

of his multitudinous civic accomplishments. We can only mention a few of those organizations he worked for, each with great leadership, vigor and passion.

Porch was a long-time vestryman and senior warden at Grace Episcopal Church. He later joined the United Methodist Church and served there as a Sunday School teacher, as a member of the Board of Stewards and chairman of the Board of Trustees. At different times, he sang in the choirs of each church.

As a Rotarian, he earned a 55-year perfect attendance pin, served as president of the Anniston Rotary Club and as district governor for the entire state. For decades, he was a board member in the Anniston Salvation Army and the International House of Jacksonville State University.

With former Governor Albert Brewer, Mr. Porch was influential in organizing the Brewer-Porch Children's Center at the University of Alabama, which has had a tremendous and positive influence on its constituents, the emotionally disturbed children of Alabama. It operates a hospital model and two residential units for disturbed children at Tuscaloosa. Ralph's interest in disturbed children led him to serve also on the Calhoun County Mental Health Board.

Ralph would not want it to pass unnoticed that he was an avid, albeit mediocre, golfer and an enthusiastic Tide football supporter.

—Charles S. Doster, Anniston

Frank Howard Hawthorne

The Alabama State Bar lost one of its most distinguished and honorable members on April 8, 2002, upon the death of Frank Howard Hawthorne of Montgomery.

Mr. Hawthorne was born in Hope Hull, Alabama on September 16, 1923. He attended Auburn University (formerly Alabama Polytechnic Institute) from 1941-1943. Thereafter, he joined the United States Air Force and served our country as a navigator in World War II. In 1945 he returned to his beloved Auburn University and graduated in 1946 with a B.S. degree in both economics and mathematics. While attending Auburn University, Mr. Hawthorne taught college algebra for three quarters and was a member of many scholastic organizations, including the Omicron Delta Kappa and Pi Tau Chi national honor societies. He was also very active socially and excelled in leadership, serving as president of Pi Kappa Phi Fraternity, Auburn Interfraternity Council, and the Auburn Pre-Law Society. Following college, Mr. Hawthorne received a fellowship to the University of Alabama where he taught economics, algebra and math of finance as a student instructor in the College of Commerce and Business. During this same period of time, he entered the University of Alabama School of Law where by he graduated in 1949 with a LL.B. degree. While attending law school, he was elected president of Omicron Delta Kappa and co-chairman of the student committee to renew athletic relationships between Auburn and the University of Alabama. He also served as Homecoming chairman in 1947 and as a member in Phi Alpha Delta Law Fraternity. He served his country again from 1951-52 in Strategic Air Command during the Korean War.

Mr. Hawthorne was a person of honor, integrity and dignity. He exalted himself in all aspects of community and professional life. His commitment to the community of Montgomery and the impact he made on it are almost legendary. To name a few of his achievements, he served as president of the Montgomery Chamber of Commerce in 1975 and was a past president of the Society of

Pioneers. He was chairman of the March of Dimes in Montgomery in 1961. Additionally, he was an active member of the Capital City Kiwanis Club, St. John's Episcopal Church, the Thirteen Club (a prestigious literary organization), and the Harlequins. He was also a former board member of Goodwill and the Montgomery Public Library. Mr. Hawthorne's professional achievements are equally impressive. He was a former partner of Balch & Bingham, L.L.P. and Hawthorne & Hawthorne, L.L.C. He became licensed to practice as an attorney-at-law and solicitor in chancery in all the courts in this state on June 27, 1949. He became a member of the American Bar Association on January 1, 1956 and later became a member of the American Bar of Taxation Committee. Furthermore, on October 1, 1981, he was admitted as an attorney and counselor of the U.S. Court of Appeals for the 11th Circuit. Over the years, he not only earned the respect and love of his fellow lawyers but also of all who knew him.

Mr. Hawthorne is survived by his loving wife, Esther "Rae" Hawthorne; his three children and their spouses, Frank H. Hawthorne, Jr. (Vera), Raymond (Corky) J. Hawthorne (Cathy) and Mary Jule Hawthorne Burleson (Mike); and six grandchildren, Raymond James Hawthorne, Jr., Frank Howard Hawthorne, III, Martha Carroll Hawthorne, Charles Earl Hawthorne, Ruth Thornton Hawthorne, William Davis Burleson; sister, Julia Dubberley; and two sister-in-laws, Dorothy Hawthorne and Mary Hawthorne.

Mr. Hawthorne loved the law and its challenges. He understood the intricacies of the law and admired its complexities. He welcomed the many opportunities it provides for us to do good by our fellow man.

The Alabama legal community suffered a great loss with the passing of Frank Howard Hawthorne. He was an inspiration for all who seek to honor our profession. To me, he was a mentor and a dear friend.

—Jeffrey G. Hester, Birmingham

H. Gerald Reynolds

The state bars of Alabama and Florida lost one of their most dedicated members when H. Gerald Reynolds passed away in Tampa, August 20, 2002, at the young age of 62.

Gerre was a native of Alexander City and graduated from Auburn University in 1962, where he was a member of Blue Key and ODK. He had a distinguished record at Cumberland Law School, graduating in 1965.

After a few years of private practice in Alexander City, Gerre and his family moved to Birmingham, where he worked as counsel for U.S. Pipe & Foundry Company. Active in community and legislative affairs, he was a member of the Alabama Constitutional Revision Commission from 1970-75. Gerre was very involved in the drafting of much of the work of that distinguished commission.

The parent company of U.S. Pipe, the Jim Walter Corporation, moved Gerre to its headquarters in Tampa in 1973, where he continued his career, becoming environmental counsel and responsible for the environmental issues of the various Jim Walter companies throughout the United States. He was highly regarded as an environmental lawyer and dealt with cutting-

edge issues as that body of law developed over the next 30 years.

Gerre loved the law, the legal profession and lawyers. He devoted substantial energy to the betterment of our profession working particularly in the area of continuing legal education. He was a regular participant in seminars around the country, especially his native state of Alabama and adopted state of Florida. He was chairman of the Florida Bar's CLE Committee in 1981-82.

Gerre died after a lengthy illness and is proof of the old adage that only the good die young. He is survived by his wife, Mary, of 42 years; daughters Cathy Thornhill and Amy Newberry and sons Gerre, Jr. and Rich Reynolds, all of Florida. He was very proud of his six grandchildren and is also survived by his mother, Melba Victoria Reynolds, and a brother, Dr. Gene Reynolds.

Gerre was always cheerful and always had a good story to tell, usually involving his three loves: Auburn, Cumberland and the law. He will be sorely missed by all who knew him.

—Fournier J. Gale, III, Birmingham

Robert E. Paden

The Bessemer Bar Association, and the people of the Bessemer Division of Jefferson County, Alabama, lost a crusader for individual rights, when Robert E. Paden, age 71, passed away on June 16, 2002.

Not only was Mr. Paden a charter member of the Woodland Hills Baptist Church, he was a long-standing member of the Bessemer Bar Association, Alabama State Bar and Bessemer YMCA Board of Directors.

During the course of his career, Mr. Paden was also a member of the board of directors of First Financial Bank, and served as attorney for the City of Bessemer for 19 years, attorney for Governmental Utilities Service Corporation, City of Bessemer Industrial Development Board, and as the senior partner of Paden & Paden, and served his clients well.

Mr. Paden was a champion of the progress of the City of

Bessemer, and served its interests well from the 1970s until his death.

The City of Bessemer, its citizens and attorneys will not forget the contributions he made to the bench and bar of the Bessemer Division of Jefferson County.

Mr. Paden also proudly served as president of the Bessemer Bar Association, and provided guidance and advice to the younger members of the Bessemer Bar, myself included, throughout his career and lifetime.

Mr. Paden is survived by his wife, Betty; sons Robert Shan Paden and Emmett Todd Paden, and their spouses and children; together with his sister, Elizabeth Paden Brooks. He will be truly missed.

—H. Jadd Fawwal, *president,*
Bessemer Bar Association

Glenn F. Manning

Glenn F. Manning was born July 10, 1922 in Huntsville and his family was among the earliest settlers in Madison County, Alabama.

Glenn served his country well in World War II during which time he was stationed in the Philippines and Japan. Upon completion of military service, Glenn graduated from the University of Alabama School of Law in 1948 and received an LL.M degree from George Washington University in 1949. After completion of his legal education, Glenn worked as an attorney for the Federal Trade Commission and served the state of Alabama as district attorney from 1951-59.

Glenn and his lovely bride, Betsy, were married in 1954 and God blessed them with four children, Frank, Mary, Alice and Sam.

Glenn entered private practice in Huntsville and became a partner in the firm of Watts, Salmon, Roberts, Manning & Noojin and its successor firms. Glenn contributed greatly to the legal community, including serving on the board of directors of the University of Alabama School of Law Foundation, and was a member of the Alabama State Bar Board of Bar Commissioners and the Advisory Committee to the Alabama Supreme Court on Rules of Criminal Procedures.

Glenn contributed greatly to those most in need in Huntsville and Madison County by strongly supporting the establishment of Legal Services of North Central Alabama, and by serving on the Board of Directors for Legal Services for more than two decades. His compassion and dedication have assured that quality legal representation was available to all of our neighbors.

Glenn was a very able and dedicated lawyer in the Huntsville-Madison County Bar Association for many years and earned the respect of all who came to know him. He firmly and steadfastly held to the conviction that the practice of law demands a high calling of honor, integrity and professionalism. For almost 50 years, he was a lawyer's lawyer who capably and zealously represented his clients, regardless of their position or status in life. He further served his community as a senior warden of St. Stephen's Episcopal Church and, at the time of his death, was a member of the Church of the Nativity.

Glenn died August 7, 2002, survived by his dear wife, his beloved children, and his precious grandchildren, Allison, Betsy, Bo, Ben, Davis, Jennifer, Margaret, Teresa, and William.

—John P. Burbach, *president,*
Huntsville-Madison County Bar Association

Alexander, Julian Lester, Jr.
Hoover
Admitted: 1980
Died: September 3, 2002

Alexander, Melton Lee
Birmingham
Admitted: 1954
Died: March 18, 2002

Bass, Rodger D., Jr.
Pelham
Admitted: 1993
Died: November 3, 2002

Garvin, Sylvia Eleanor
Huntsville
Admitted: 1989
Died: March 10, 2002

Jones, Kenneth Roger
Georgiana
Admitted: 1968
Died: November 5, 2002

Lanier, Milton H.
Huntsville
Admitted: 1938
Died: October 17, 2002

Lawson, Thomas Seay, Hon.
Montgomery
Admitted: 1929
Died: September 2, 2002

Musgrove, William Thomas, Jr.
Florence
Admitted: 1964
Died: February 23, 2002

Randall, H. Pettus, III
Tuscaloosa
Admitted: 1972
Died: September 14, 2002

Reynolds, Horace Gerald
Brandon, Florida
Admitted: 1965
Died: August 20, 2002

Roddam, Clyde Howard
Albertville
Admitted: 1957
Died: August 4, 2002

Sauls, Edward Tisdale
Gulf Breeze, Florida
Admitted: 1951
Died: July 16, 2002

Williams, George Killough, Jr.
Mobile
Admitted: 1950
Died: August 9, 2002

Wynn, Carlton Terrell, Sr.
Birmingham
Admitted: 1944
Died: October 26, 2002



ALABAMA STATE BAR Takes Top PR Award

Each year, the state organization of public relations professionals honors outstanding efforts in the field of public relations. A panel of public relations practitioners from outside the state judges entries based on planning, originality, creativity and effectiveness. Entries may receive a Medallion Award, an Award of Excellence or a Certificate of Merit.

The Alabama State Bar's director of communications, **Susan H. Andres** (right), received a Medallion Award for "LIFEPLAN 2001." This entry was also chosen as the *PRCA Best of Show*. The judges considered it to be the most outstanding of all the 166 entries received.

LIFEPLAN 2001 was a statewide public education campaign developed by the Alabama State Bar, in partnership with the Medical Association of the State of



Alabama and the Alabama Hospital Association and with assistance from the Alabama Department of Public Health and the Alabama Organ Center, to promote future health care planning, encouraging families to discuss health care wishes and to prepare advance directives now, rather than in a time of crisis. Held in October 2001, over 200 attorneys, doctors and other health professionals received training and presented workshops across the state. Nearly 17,000 free consumer guides have been distributed since the campaign began and an informative Advance Health Directives video is now available upon request.

The awards were presented at the 2002 PRCA Conference held at The Legends of Capitol Hill with more than 150 of the state's top public relations professionals in attendance. ■

Important Reminder About Your Continuing Legal Education Requirement

If you had a membership status change at any time during 2002, you may have been required to earn and report 12 hours of CLE credit by December 31, 2002. Mandatory Continuing Legal Education Rules require attorneys who hold an occupational license (regular membership) any time during the calendar year 2002 to earn 12 hours of CLE credit. If you are not currently a regular member but were a regular member for part of the year you are still required to comply with MCLE Rules. (MCLE Rule 2.5)

For example, if you were inactive or held a special membership and converted to a regular membership during 2002, you are required to obtain 12 hours of CLE credit. If you were a regular member during 2002 but converted to special member or to inactive status you are also required to comply with the 12-hour CLE requirement.

You are not required to obtain 12 hours of CLE credit if you are eligible to claim an exemption from the MCLE Rules. Your exemption, however, must have been claimed on the 2002 CLE reporting form which was mailed to you in early December. If you need to locate approved CLE programs you may request a calendar of approved CLE programs from the ASB CLE department or from the state bar's Web site at www.alabar.org.

Call the Alabama State Bar's CLE department at (334) 269-1515, extension 158, 156 or 117, for more information.



Robert L. McCurley, Jr.

The New Legislature

When the Legislature convenes for its organizational session January 7, 2003, there will be 19 lawyers in the two houses. The Senate will be presided over by a non-lawyer for only the second time in over 50 years. All of the lieutenant governors, since 1950, have been lawyers except for Jim Folsom (1987-1995). These were:

Clarence Inzer (1947-51)
 James D. Allen (1951-55)
 W.G. Hardwick (1955-59)
 Albert Boutwell (1959-63)
 James D. Allen (1963-67)
 Albert Brewer (1967-71)
 Jere Beasley (1971-79)
 George McMillan (1979-83)
 Bill Baxley (1983-87)
 Don Siegelman (1995-99)
 Steve Windom (1999-2003)

Lieutenant Governor Lucy Baxley is no newcomer to the senate since she was First Lady of the Senate 20 years ago. She will be joined by only six senators who were there in 1983.

The senate will have two new lawyers: Bradley Byrne, Mobile, and Myron Penn, Union Springs. They will join nine returning lawyers in the Senate: Zeb Little, Cullman; Curt Lee, Jasper; Roger Bedford, Russellville; Rodger Smitherman, Birmingham; Phil Poole, Moundville; Pat Lindsey, Butler; Hank Sanders, Selma; Ted Little, Auburn; and Wendell Mitchell, Luverne.

The house of representatives will have eight lawyers. There are three new lawyers elected: Yusuf Salaam, Selma; Cam Ward, Alabaster; and Greg Albritton, Evergreen. The returning lawyers are: Marcel Black, Florence; Mark Gaines, Birmingham; Ken Guin, Carbon Hill; Jeff McLaughlin, Guntersville; and Demetrius Newton, Birmingham.

Compare this with the legislature of 25 years ago. The senate now has 11 lawyers compared to 12 lawyers 25 years ago. The house has eight lawyers, down from 11 lawyers 25 years ago. While lieutenant governors have generally been lawyers, Tom Drake is the only lawyer speaker of the house of representatives in the past 25 years.

It has been reported that Alabama has had the fewest

women legislators in the nation. This year the number of women in the senate did not change. We still have only three. The women in the house of representatives increased from eight to 12.

There are now 64 Democrats and 41 Republicans in the house of representatives. The Senate has 25 Democrats and 10 Republicans.

In December, the Law Institute held a three-day orientation for the newly-elected legislators. The first day, the 29 new legislators were informed about how to get bills drafted, ethical standards, staff resources and legislative rules. The following two days, all legislators received briefings on the economic condition of the state, how other states are meeting the financial crunch, homeland security, and other critical issues facing Alabama. Chief Justice Roy Moore addressed the legislators concerning the critical issues facing the judiciary. The legislature met in organizational session January 7, 2003. The Regular Session will begin March 4, 2003.

One can find out more about the legislature and the members by looking at their Web site, www.alisdb.legislature.state.al.us/acas/ACASLogin.asp. You can also find out more about the Alabama Senate with their Web site, www.legislature.state.al.us/senate.html. The House of Representatives' Web site is www.legislature.state.al.us/house/house.html.

The Alabama Law Institute can be found at the Institute's Web site, www.ali.state.al.us. The Institute will present to the legislature a new "Residential Landlord-Tenant" law, a revised "Anatomical Gift Act," and a law affecting "Interstate Enforcement of Domestic Violence Protection Orders Act." Copies of these bills can be obtained from the Law Institute Web site.

For more information, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; Web site www.ali.state.al.us. ■

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.

MOBILE BAR ASSOCIATION Sponsors Presentation of "To Kill a Mockingbird"

BY LAWRENCE B. VOIT


For many years, I tried to get tickets to the "To Kill a Mockingbird" production in Monroeville. They always sold out every performance the day the tickets went on sale, so I was never able to attend. I had heard about how fascinating it was to see Christopher Sergel's adaptation of the famous Harper Lee novel portrayed on the lawn of the historic Monroe County Courthouse, and the riveting fictional trial of the falsely accused Tom Robinson defended by lawyer/role model Atticus Finch portrayed in the actual courtroom which served as the model for the courtroom in the 1962 movie starring Gregory Peck.

It occurred to me that the Mobile Bar Association could perform a unique public service by bringing this production to Mobile. I took my idea to the Executive Committee of the Mobile Bar Association. I proposed that the bar association sponsor the event, and that all net proceeds be contributed to the Mobile Bar Foundation. Although they enthusiastically bought into it, I knew my real work had just begun.

Mobile's tricentennial year was 2002, and the broad-based Tricentennial Commission was endorsing various events taking place all year. By making a phone call to the Tricentennial Commission, we got on their calendar and they, too, fell in love with the idea.

To Kill a Mockingbird

April 19 & 20, 2002
Saenger Theatre • Mobile, Alabama



Mockingbird Players

Monroeville's Mockingbird Players have a special connection with "To Kill a Mockingbird." After all, they share the same hometown as Harper Lee, author of the Pulitzer Prize-winning novel. Their annual production of the timeless dramatization of the 1960 classic has become a tradition, helping to raise funds for the local courthouse and other community projects. This year, the Mockingbird Players will once again be proud to present the timeless classic, "To Kill a Mockingbird," at the Saenger Theatre in Mobile. Don't miss it! The Mockingbird Players' production comes straight from the heart.



Friday, April 19 at 7:30 p.m.
Saturday, April 20 at 7:30 p.m.

Tickets are \$20 and \$30
Call the Saenger box office at
(251) 208-5600 (www.mobilesaenger.com)
Also available at local Ticketmaster outlets

Sponsored by the Mobile Bar Association

So, we then became an official Tricentennial event.

Scheduling was worked out with the Saenger Theater, so we went forward with plans for a single performance on Saturday, April 20, 2002. About two weeks before the show, I started calling the Saenger Theater every day to see how our ticket sales were doing. I was nervous that we would not sell enough tickets to cover our costs, and then we would all be in big trouble. Every time I called the

ticket office, they would put me on hold and tell me that they too busy selling tickets to talk to me. I did not mind that a bit.

The cast and crew from Monroeville arrived in Mobile on Friday morning. What an amazing group of special people they are! They moved into the Saenger quickly and held a dress rehearsal at 2 p.m. About 70 school children paid \$5 each to see the dress rehearsal, and we were glad to accommodate them. The performance on Friday night was to an audience of about 1,200. The Saturday evening performance was even better. The actors were more comfortable in the theater, and the audience was over 1,400 strong.

When all was said and done, the townspeople from Monroeville had put on two reenactments of "Mockingbird" to large appreciative audiences; the Mobile Bar Association achieved a major public relations boost; the audience

was reminded of a country lawyer's courage in accepting an unpopular case and exposing racial injustice; we added a major event to the Mobile Tricentennial celebration; and, after payment of all expenses, we were delighted to write a check to the Mobile Bar Foundation to increase its grant-making ability by over \$51,000. We achieved all of our goals and more, and come to think of it, I finally got to see "Mockingbird." What could we possibly do for an encore? ■



J. Anthony McLain

Contact With Employees of Opposing Party—Refined Opinion

Question:

"I have a slip and fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

"I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

Answer:

Pursuant to Rule 4.2 of the Rules of Professional Conduct of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person... whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

Discussion:

Communication with persons represented by counsel is governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

"Rule 4.2 Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.¹

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation.

Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the Rules of Evidence. Still others have interpreted the Rule narrowly to prohibit contact with only a "control group," which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The Supreme Judicial Court reversed, concluding, in pertinent part, as follows:

"The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

However, other jurisdictions that have adopted the same or similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted) Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to Fed. R. Evid. 801(d)(2)(D) and any corresponding State rule of evidence. *Id.* This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'

At the other end of the spectrum, a small number of jurisdictions has interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the



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uppermost echelon of the organization's management. Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization's employees, still maintains some protection of the organization.

Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to Fed. R. Evid. 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority suffi-

cient to give them the right to speak for, and bind, the corporation.'

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are

"As lawyers we spend a lot of time learning how to 'put together' a case for trial. We want the right interrogatories, the right exhibits, the right expert. The Trial Lawyers College ['TLC'] program focuses on intangibles rarely if ever addressed in a law school or a continuing education program.... How do we connect with a jury as human beings? How do we convey to a group of strangers our client's pain, or innocence? How do we pull from our hearts what we want our jury to do in our client's case and empower them to a just result? Gerry Spence and the TLC have created a program which explores these worthy goals and expands the horizon from which any attorney can view his or her case."

Larry Mertes — Mertes & Strauss, LLP - Boulder, CO

Now, you too can learn to win with the Gerry Spence Method!

You can learn to:

- Know the jury;
- Understand the judge;
- Crawl into the hide of the witness and win;
- Empower the jury to do justice for your clients;
- And, will experience first hand the Gerry Spence Method taught at the Trial Lawyers College.

March 6-9, 2003, in Toccoa, Georgia, the Trial Lawyers College will present one of its Regional Seminars to train and educate lawyers for the people in the unique, effective and powerful methods designed, developed and taught at the Trial Lawyers College at Thunderhead Ranch in Dubois, Wyoming.

This seminar is an intensive hands-on, three-and-a-half day workshop during which you will be exposed to and experience the Gerry Spence Method taught at the Trial Lawyers College. You will learn by doing, guided by experienced trial lawyers skilled in this method and trained by Spence.

If you attend this seminar, you will obtain powerful new tools which will change your life, the way you practice law and try cases!



TOCCOA, GEORGIA

Georgia Baptist Conference Center - March 6-9, 2003

This seminar will focus on voir dire and opening statement. You will learn to connect with the jury from the moment trial begins and how to use the Gerry Spence Method to tell the story of your case in a powerful and effective manner. Approved by the Georgia Commission on Continuing Lawyer Competency for 21 CLE hours including 2.0 Ethics hours and 6.0 Trial Hours. Tuition: \$1,250

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adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over nonorganizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence."

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not "have authority on behalf of the corporation to make decisions about the course of the litigation," you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the Rules of Professional Conduct. Those Rules provide, respectively, as follows:

"Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal

or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

"Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication. [RO-02-03] ■

Endnote

1. Obviously, communication is also prohibited with any employee who is individually represented.

Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers", he says. "They have simply learned how to market their services."

A successful sole practitioner who struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals are unpredictable. You may get

new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a **FREE** copy of this report by calling 1-800-562-4627, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>

Fall 2002 Admittees



Statistics of Interest

Number sitting for exam.....	608
Number certified to Supreme Court of Alabama.....	368
Certification rate*.....	60.5 percent

Certification Percentages:

University of Alabama School of Law.....	83.3 percent
Birmingham School of Law.....	27.9 percent
Cumberland School of Law.....	87.5 percent
Jones School of Law.....	48.2 percent
Miles College of Law.....	15.2 percent

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

Alabama State Bar Fall 2002 Admittees

Adams, Keri Brooke	Brown, Jeffery Adrian Jr.	Edmiston, Parker Ebra	Halfman, Ashley Ann
Adams, Robin Ann	Brown, Lori Jill	England, Christopher John	Hamner, Steven Rodgers
Akins, George Meador	Brown, Robert Leslie Jr.	Essig, Brandon Keith	Hampton, Leif Rush
Alley, Edward Lynn	Bryant, Douglas Hugh	Ezell, Bradley Harden	Hancock, William Matthew
Allred, Henry Prentiss	Burnham, Bradley Daryl	Fallow, Mary Frances	Hankins, William Roland Jr.
Altom, Kent Edward	Butler, Cynthia Vines	Faulkner, Brent Kenneth	Hargrove, Holli Michelle
Ashworth, Kristin Taylor	Cade, Gregory Andrews	Fernandez-Casablanca, Manuel	Harrell, Charles Miner Jr.
Aungst, Kristopher Edward	Camp, Robert Joseph	Fickett, Lawrence Allen Jr.	Harrison, Mary Ellen Wyatt
Austin-Hatcher, Monica Denise	Carney, Lois Ann	Fields, Randall Earl	Harville-Stein, Susan Francene
Austin-Trucks, Jacqueline Pratt	Carter, Matthew Keith	Fleming, Charles Jackson Jr.	Hatfield, Alysonne Odessa
Babineaux, Donald Ray	Cash, Regina Ford	Flowers, Ronald Wayne Jr.	Hazelton, Jeremy Scott
Baggot, Brian James	Casto, Patricia Leigh	Floyd, Elizabeth Redding	Henderson, Amy Ray
Bailer, Donna M.	Caver, James Patrick	Fontaine, Wesley Thomas	Henderson, Charles Todd
Baker, Matthew Michael	Caviedes, Rhonda Richardson	Foster, Alan LaMonte	Henderson, David Wayne
Baker, Schuyler Allen Bradley III	Chistolini, Paul Ugo	Fowler, Joshua Keith	Henry, Rebecca Denean
Ball, Helen Denice	Citrin, Elizabeth Anne	Fowler, Paul Weston	Herrin, Brent William
Ball, William Steven	Clark, Jackie Delaine	Freeman, Ashley Hawkins	Hightower, Bradley Richard
Ballentine, Michael Robert	Cleckler, Douglas Craig	Freeman, Benjamin Joseph	Hill, Angela J.
Banik, Jennifer Leigh	Cleveland, Coker Bart	Freeman, Richard McConnell Jr.	Hill, Katherine Elizabeth
Barbour, Amanda Bolz	Clifton, Myra Jayne Horn	Fuller, Michael Wayne	Holmes, John Barksdale III
Barnes, Cynthia Lee	Cobb, Brentley Tyler	Gaines, Carmen M. McCorvey	Holt, Angela
Barnes, James Albert IV	Cobb, Henry Herbert IV	Galligan, Keith Michael	Hooper, Stacy Bryant
Barnhart, Shelly Lynn	Coe, David Eugene	Gamble, John Barry	Horne, Jonathon Matthew
Bates, Ernest	Cole, Leslie Michelle	Garris, Robert Bradford	Houser, Matthew Scott
Beardsley, Robin Leigh	Colvin, Latisha Vanese	Garrison, Elene	Howe, Timothy John
Beason, Warren Dyer	Cook, Wesley Chadwick	Geldmeier, Lisa Maria	Howell, Christopher Michael
Bellamy, Robert Wayne	Couch, Christopher Patrick	Getty, John Eric	Hughes, Brandon Michael
Bellenger, Alan Keith	Craig, Seneca Shanta	Gilbert, Joel Iverson	Hughes, Michael Pennington
Bellenger, Raegan Whitten	Cross, Laura Rebekah	Gilder, Harry Lipscomb Jr.	Hunter, Virgil Eric II
Bellew, Heather May	Crull, Luther Putnam III	Glover, Raymond Matthew	Hurst, Daniel Mathis
Benefield, Ellenann Cook	Cummins, Timothy Peter	Glover, Thomas Carpenter	Hyndman, Claire Janet
Benson, Blaine Sanders	Cunningham, Felecia Denese	Godwin, Chadwick Stuart	Jackman, Laura Mann
Berry, Kevin Lawrence	Daigle, Danielle Andree	Golden, Maggie Elizabeth	Jackson, Douglas Blaine
Booker, Kelly Rogene	Danley, Christopher Dwight	Gordon, David Taylor	Jackson, Karen Haiden
Boyle, Michael David	Darneille, Jason Digges	Gordon, Michael Patrick	James, Christopher Shane
Brackin, Ashley Ann	Darty, Lauren Lynn Shutt	Graham, William Abbay Jr.	Johnson, Richard Brantley
Bradley, Jeffrey Robert	Daugherty, Ann Marie Finley	Green, Christmas Yvette	Johnston, Hamilton Robert
Bragdon, David Alan	Davis, Stacey Ann	Green, William Chadwick	Jones, Albert
Branton, Brandi Lynne	Dean, Enid Elizabeth	Grimes, Christine Anne	Jones, Morgan Webb
Brisendine, James Eric	deGraffenried, William Ryan III	Grossman, Deborah Hardwick	Jones, Robin Houston
Briskman, Samuel Joshua	Dill, Andrew Douglas	Guidry, Heather Renee	Joseph, Shamanda Ronette
Britt, Brian Patrick	Dixon, Christina Lee	Guster, Eric Lance	Juneau, Leanne Elizabeth
Britt, Britten Leslie	Dixon, Donna Leisa	Guster, Ta'Kisha La'Nete	Kegley, Thomas Edward
Brockwell, Gregory Austin	Dodd, Howard Hube Jr.	Hagen, Rebecca Brannan	Ketcham, Carleton Putnam III
Broderick, Randall James	Douglas, Gayle LaRece	Hagood, Sandra Payne	King, Bufkin Alyse
Brogdon, Jonathan Lyn	Doyle, Ursula Tracy	Hale, Carter Roberts	Kirkland, William Anderson II
Brooks, Gerald Clark	Drummond, Roshunda LaVisha	Hale, Elizabeth Blake	Kirschberg, Jason Matthew
Brooks, Michael Dryden	Dupont, Audrey Yearout	Hale, Jason Glenn	Knee, Tara Smelley

Alabama State Bar Fall 2002 Admittees (Continued)

Knight, Christopher Alan	Mixon, David Earl	Robison, John Andrew	Thompson, Jennifer Marie
Koch, Henry James	Moak, Andrew Joseph	Rogers, Ruth Marie	Thompson, John Gordon Jr.
La Trace, Rick Andrew	Money, Steven Wesley	Rose, Derek Christopher S.	Thompson, Nathan Michael
Lambert, James Keith	Monroe, Brian Edward	Ross, Fred III	Thompson, Rachel Ross
Lassiter, Joe Frank III	Moody, Mark Bradley	Rumsey, Patrick Shawn	Tolar, Meredith Lee
Lassitter, Amy Gail	Moore, LeTonya Faye	Russell, Samantha Noel	Tubbs, Jacob Michael
Lawrence, John David	Mooring, Mary Ellen	Russom, Tracy Leigh	Upchurch, Shannon Viar
Leavell, Hallie Laura	Morris, Harold Wayne	Ryan, Clayton Michael	Veazey, David Lloyd
Lee, Frank Edward	Morris, Kathryn Luise	Sander, Andrea Gail	Vickers, John Ellison
Lee, Gary Wilson	Morris, Kevin Mika	Sansbury, Michael Todd	Vickers, Jonathan Kenton
Lee, Heather Ann	Murrill, James Edward Jr.	Sasser, Larry Ray	Vickrey, Alan Lane
Lewis, Laura Ellen	Nelson, Meegan Benson	Sawyer, John Scott	Voght, Laura Lynne
Lipow, Danielle Jeannine	Nichols, Amanda Lynn Burkhalter	Schefano, Angela Michelle Moore	Wade, Eric Michael
Littell, Carolyn Elizabeth	Nomberg, David Philip	Schilleci, Joseph Paul Jr.	Wainwright, Reed Ryan
Liveoak, Thomas Blake	Nunnelley, Jennifer Andra	Scott, Curtis Leverne	Waites, Rodney B
Lloyd, Gregory Sean	Ogle, Tina Rochelle	Scott, Marsha Baxley	Walker, Michael Brandon
Loftis, Scott Lee	Overstreet, Michael Lee Jr.	Seale, Turner Chapman Jr.	Walker, Michael Hosie
Logan, Jamie Parris	Owens, Terrie Seal	Self, Cindy Lorraine	Walker, Valeria Frye
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Mathews, Darold Alan	Patton, Leslie Elizabeth	Simon, Candice Cheree	Westbrook, Jessica Michelle
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Mitchell, Ralph Christopher	Robbins, Ray Frank III	Teague, Matthew Patrick	

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admittee and father*



*Cynthia Vines Butler (2002) and James D. Butler (1995)
admittee and husband*



*Stephen Shows (2002) and Jack Park (1986)
admittee and stepfather*



*Charles Jackson Fleming, Jr. (2002) and Charlie Fleming (1971)
admittee and father*



*Leslie Cole (2002) and Carrie Ellis McCollum (1996)
admittee and sister-in-law*



*James Alton Stewart (2002) and Charles D. Stewart (1968)
admittee and father*



*Audrey Yearout DuPont (2002), J. Gusty Yearout (1971) and Jason L. Yearout (2000)
admittee, father and brother*



*Christopher England (2002), Judge John H. England, Jr. (1974), John H. England, III (1996) and April England Albright (1997)
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*S.A. Bradley Baker, III (2002) and S. Allen Baker, Jr. (1973)
admittee and son*



*Carleton P. Ketcham, III (2002) and Carleton P. Ketcham, Jr. (1974)
admittee and father*

Lawyers in the Family



Blake Hale (2002), Oscar Hale (1978), Ashley Hale Rives (1994), Patrick B. Hale (1997), and Robert D. Rives (1996) admittee, father, sister, brother, and brother-in-law



Blaine Sanders Benson (2002), Jimmie Clay Benson, Jr. (1998) and Linda D. Benson (1980) admittee and cousins



Denise Wiginton (2002) and Don Wiginton (1975) admittee and father



William Ryan deGraffenried, III (2002) and William Ryan deGraffenried, Jr. (1975) admittee and father



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Claire Hyndman (2002) and Edward A. Hyndman, Jr. (1967) admittee and father



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Ashley Hawkins Freeman (2002) and Richard McConnell Freeman, Jr. (2002) wife and husband co-admittees



Joe Frank Lassiter, III (2002) and Emily S. Lassiter (2000) admittee and wife



James Letcher Mitchell (2002) and Elizabeth Bloodworth Mitchell (2002) husband and wife co-admittees

Lawyers in the Family



*Brian Britt (2002), Britten Britt (2002) and Ron E. Kopesky (1973)
husband and wife co-admittees, father-in-law/father*



*Susan Harville-Stein (2002) and
Dean D. Stein (2001)
admittee and husband*



*Tamala Brogden Prickett (2002)
and Robert H. Brogden (1972)
admittee and father*



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(1968)
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*Hallie L. Leavell (2002) and Barry
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admittee and father*

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*Cynthia Propst Raulston (2002)
and Jonathan Raulston (2001)
admittee and husband*



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Alabama Code § 25-5-11: A Narrow Cause of Action Against Co-Employees





BY KEVIN W. PATTON AND WILLIAM L. CAMPBELL, JR.

John Owerly gets up every morning and goes to work at Acme Industrial in Smalltown, Alabama. One day, while operating a piece of industrial equipment, John suffers an on-the-job injury that results in the loss of his left hand. While John clearly has a claim for workers' compensation benefits against Acme, recovery under that claim is generally limited to the statutory provisions of the Workers' Compensation Act. Can he also maintain a claim against a supervisor or co-worker?

If you represent either Mr. Owerly or Acme, there are several questions that must be answered before the ultimate question of the potential liability of a co-employee can be addressed. Is there evidence that a co-employee intended to injure John? Was there a safety device on the machine John was operating when he was injured? Is there any evidence that a co-employee's intoxication was a causal factor in the accident? Had Mr. Owerly submitted a written complaint about the violation of a safety rule to the alleged violator? The answers to these questions will provide counsel with important information necessary in evaluating the potential liability of a co-employee.

In the 17 years since the Alabama legislature adopted the current co-employee liability statute, Alabama courts have interpreted, molded and, at times, expanded that statute. In an effort to understand the exact boundaries of a statute that has been the focus of over 80 appellate court decisions, the following is a general overview of judicial treatment of the co-employee statute.

The Players

While the Alabama legislature limited recovery for work-related injuries against an employer by passing the Workers' Compensation Act (hereinafter "the Act"), the lawmakers also allowed for a cause of action against co-employees (and other individuals and entities) under Section 25-5-11 of the Alabama Code (hereinafter "25-5-11" or "the statute"). The current version of 25-5-11 was passed in 1984 and went into effect on February 1, 1985. While some minor revisions were made in 1992, no substantive alterations have been made since the original passage in 1984.

Proper parties for claims under the statute are listed in 25-5-11(a). Defendants include individual co-employees, third-party workers' compensation insurers and their agents/officers/directors, labor unions, a governmental agency or its employees, and officers/directors/agents of the employer. For simplicity purposes, the term "co-employee" will cover all the potential defendants, although virtually every case addressing the statute dealt with co-employee defendants who actually worked for the same employer as the plaintiff. A claim may be brought by either the injured co-employee or, in the event of a fatality, by the employee's dependents (as defined in §§ 25-5-61 to 64). Yet, if an employee recovers any damages under the statute, the employer can seek subrogation to cover any compensation paid as a result of the injury.¹

The Statute

Even though the statute provides for a broad range of potential defendants, it imposes liability only for "willful conduct." § 25-5-11(b) ("If personal injury or death to any employee results from willful conduct, . . ."). The statute goes on to define "willful conduct" in 25-5-11(c) by giving an exhaustive list of four definitions listing the type of activity which constitutes such conduct. Since each definition will be discussed in detail, the specific language of each provision will be provided in turn below. The legislative intent behind the statute can be found in § 25-5-14. The legislature reiterated in that section that by giving employees a cause of action against co-employees, merely proving negligent or wanton conduct is not enough; allowing for that lower standard would have a negative impact on businesses, burden the judicial system, and harm the employer-employee relationship. The statute of limitations for a claim under 25-5-11 is two years. See § 6-2-38(g).

In recognition of the plain language of 25-5-14 regarding negligence and wantonness, Alabama courts have maintained a hard line by limiting claims under the statute to those involving the four definitions of "willful conduct" provided in 25-5-11(c). See, e.g., *Powell v. United States Fidelity & Guar. Co.*, 646 So. 2d 637, 639 (Ala. 1994); see also *Burkett v. Loma Mach. Mfg., Inc.*, 552 So. 2d 134 (Ala. 1989); see also *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988) (holding that 25-5-11 passes muster under the Alabama constitution); *Kruszewski v. Liberty Mut. Ins. Co.*, 653 So. 2d 935, 938 (Ala. 1995) (same). Section 25-5-11 is not to be used as the basis for a cause of action for every on-the-job injury. *Layne v. Carr*, 631 So. 2d 978, 982 (Ala. 1994).

A review of cases directly addressing the provisions of 25-5-11 reveals just how narrow that cause of action really is. Of the approximately 50 appellate cases reviewed for this article, 75 percent of those cases resulted in pro-defendant rulings, most of which affirmed a trial court's granting of summary judgment in favor of the co-employee defendant(s). The first cases under the revised co-employee statute reached the appellate level in 1988. In the four years that followed, the courts molded, expanded and interpreted 25-5-11. However, since the mid-1990s, the trend has been toward a narrowing of the interpretation of the statute.

25-5-11(c)(1) or "Intent to Injure"

The first definition of "willful conduct" provided in 25-5-11(c)(1) (hereinafter "(c)(1)") reads as follows:

(c) As used herein, "willful conduct" means . . .

(1) A purpose or intent or design to injure another; and if a person, with knowledge of the danger or peril to another, consciously pursues a course of conduct with a design, intent, and purpose of inflicting injury, then he or she is guilty of "willful conduct."

Next to 25-5-11(c)(2), this definition has been the most litigated of the four. A simple reading of (c)(1) would indicate that a plaintiff must show an intent to injure another person, and as a general rule, that is how this definition has been interpreted. See *Hobden v. Snow*, 551 So. 2d 317 (Ala. 1989) (noting that (c)(1) "require[s] an intentional act for recovery"). Yet, the courts have broadened this definition in one significant way and have arguably lowered the standard to one of "recklessness" for some situations. See *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988).

In *Reed*, the plaintiff injured his hand in a concrete mixer; he sued all the management personnel in his direct chain of command. *Reed*, 527 So. 2d at 104. The drum on the mixer was rotated by a rubber, motorized drive wheel that pressed against the drum; there were safety guards on some parts of the machine, but not for the place where the wheel met the drum. *Id.* Plaintiff was working in the area of the drive wheel when he lost his balance and fell toward the mixer, catching his hand at the "nip point" where the wheel met the drum. *Id.* Plaintiff's claim was based on both (c)(1) and (c)(2) theories. *Id.* at 119. The court laid out the following two-prong test that has been used consistently in (c)(1) cases ever since:

[W]e believe the Legislature sought to insure that these kinds of cases [(c)(1)] would not be submitted to a jury without at least some evidence tending to show either 1) the reason why the co-employee defendant would want to intentionally injure the plaintiff, or someone else, or 2) that a reasonable man in the position of the defendant would have known that a particular result (i.e. injury or death) was substantially certain to follow from his actions.

Id. at 120 (emphasis in original). This two-prong test (hereinafter "the *Reed* test") provided guidance for trial courts on how to weigh the sufficiency of evidence presented against a co-employee defendant in (c)(1) cases. The *Reed* court went on to apply this new test and affirm summary judgment in favor of the co-employee defendants. *Id.* at 121.

Since evidence showing that a co-employee defendant "would want to intentionally injure" the plaintiff is rare, it is understandable that the second prong in the *Reed* test is the one that has received the most judicial attention. However, the court has addressed the first prong on at least one occasion. See *Means v. International Sys., Inc.*, 555 So. 2d 142 (Ala. 1989); see also *Lee v. Ledsinger*, 577 So. 2d 900 (Ala. 1991) (reaffirming that to satisfy the first prong of the *Reed* test, the plaintiff need only show that the co-employee defendant(s) intended to injure someone, not necessarily the plaintiff).

Soon after the Alabama Supreme Court handed down the *Reed* decision, the court began to clarify the boundaries of the second prong. In *Turnbow v. Kustom Kreation Vans*, 535 So. 2d 132 (Ala. 1988), the plaintiff was injured when he fell out of a company van after the driver's side door opened while the van was moving at 40 m.p.h.; the van had been damaged years earlier and the evidence showed that the supervisors knew of the damage. *Turnbow*, 535 So. 2d 133. The problem with the van's door latch mechanism had not manifested itself until approximately two days before the accident. *Id.* Moreover, the co-employee defendant had driven the van himself even after he knew of the problem with the door; also, no injuries had resulted from the damage to the van before Turnbow was injured. *Id.* at 134. As it applied the second prong of the *Reed* test, the court affirmed summary judgment in favor of the co-employee defendant and noted that the supervisor "may have perceived a risk of injury, but that is not enough for a jury to infer that he acted with purpose to injure another by failing to have the van's door repaired." This "perception of a risk" language clarified the scope of the second prong and has been used in several subsequent cases. See, e.g., *Warren v. Webster*, No. 2001010, 2002 WL 168648 (Ala. Civ. App. Feb. 1, 2002); *Burkett v. Loma Mach. Mfg., Inc.*, 552 So. 2d 134 (Ala. 1989); *Layne v. Carr*, 631 So. 2d 978 (Ala. 1994).



An important (c)(1) case in the context of government safety regulation violations is *Pitts v. Beasley*, 706 So. 2d 711 (Ala. 1997). In *Pitts*, the plaintiff was injured as the result of a methane explosion in the No. 5 Mine at Jim Walter Resources (“JWR”). *Pitts*, 706 So. 2d at 713. JWR received several ventilation-related citations from the Mine Safety and Health Administration (“MSHA”) in the months before the explosion. *Id.* The MSHA investigation concluded that the failure to extend a line curtain, which aids in keeping the mine properly ventilated, could have been a contributing factor. *Id.* (this issue was a key factor in the (c)(2) claim, discussed *infra*). None of the co-employee defendants were present at the time of the explosion nor were they responsible for positioning the line curtain. *Id.* The court, while affirming summary judgment for the defendants, held that there was no evidence presented that indicated that the co-employee defendants would have been substantially certain that an injury would follow from their actions. *Id.* at 715. Specifically, the only evidence presented that showed that the defendants had any knowledge of ventilation problems were the MSHA citations. *Id.* The court concluded:

Although [the MSHA citations] may show that the defendants knew of an inherent risk of injury or death associated with underground coal mining and that they appreciated that risk, it falls short of demonstrating that any of the defendants knew with substantial certainty that the extendable curtain near where Pitts was working would cause a methane gas explosion.

Id. This holding is important for two reasons: (1) MSHA and other government safety citations will not establish the presumption that co-employee defendants were substantially certain an injury or death would follow their actions, and (2) mere appreciation of the dangerous nature of the workplace will not be enough to sustain a (c)(1) claim under the second prong of the *Reed* test.

Another important (c)(1) case was *Merritt v. Cosby*, 578 So. 2d 1242 (Ala. 1991). The plaintiff’s decedent was killed when the brakes on a large tractor/mower failed and the mower ran over the decedent. *Merritt*, 578 So. 2d at 1243. There was evidence that Cosby, the manager responsible for maintenance of all equipment and a co-employee defendant, knew of the brake problems on the

mower at issue and had ordered that the brakes be “straightened” even though other employees recommended a complete brake replacement. *Id.* at 1245. There was also evidence that Cosby knew that the condition of the brakes may allow for debris to get into the brakes and decrease the system’s effectiveness. *Id.* at 1246. Cosby did not have the brakes replaced because he knew the mower was about to be transferred to another facility and he did not want to spend money on maintenance. *Id.* The court focused on Cosby’s mindset with regard to the brakes and concluded that “[i]t was not Cosby’s design, intent, and purpose to inflict injury upon [the deceased] by not replacing the brakes; it was his design, intent, and purpose to avoid spending money on a tractor that was not going to be used in his district.” *Id.* Based on this motive, the court held that “[t]here was no evidence that [the deceased’s] death was substantially certain to follow from Cosby’s actions.” *Id.* at 1246. This case is important because the court focused on the intent of the co-employee, despite facts that would not garner much support for that defendant. Essentially, the court held that there must be a direct causal link between the intentions behind a co-employee’s actions and the injury or death. This was a clear narrowing of the “substantial certainty” standard set out in the second prong of the *Reed* test.

Another (c)(1) case worthy of examination is *Lane v. Georgia Cas. & Sur. Co.*, 670 So. 2d 889 (Ala. 1995). In *Lane*, the plaintiff was injured as he held a metal chisel for another worker to strike with a hammer; upon the hammer’s impact, a metal chip from the chisel hit the plaintiff in the eye. *Lane*, 670 So. 2d 890. Earlier on the day of the accident, Lane was working outside and asked a co-employee for a pair of safety glasses due to blowing sawdust; the supervisor refused to provide plaintiff with the glasses. *Id.* at 891. Plaintiff argued that this refusal created a substantial certainty that an injury would result from the danger to his eyes from the sawdust, and therefore, the co-employee defendant was substantially certain that plaintiff’s eyes would be injured. *Id.* The court affirmed summary judgment as to Lane’s (c)(1) claim (as well as his (c)(2) claim, discussed *infra*) by pointing to a causation problem with Lane’s argument. *Id.* The danger to Lane’s eyes that his supervisors appreciated was related to sawdust, not metal chips. *Id.* This case further reinforces the direct causal connection required for a (c)(1) claim. Therefore, the “substantial certainty”



causal link in the second prong of the *Reed* test requires the following: the co-employee must have been “substantially certain” of the specific danger that actually caused injury or death, not of some other risk that could have caused the same injury.

A final (c)(1) case worthy of specific discussion (because it tied together many of the key (c)(1) nuances) is *Ex parte Martin*, 733 So. 2d 392 (Ala. 1999). In *Martin*, three employees were killed when a chemical tank exploded as they performed maintenance on that tank. *Martin*, 733 So. 2d at 393. Eight months before the accident, the co-employee defendant supervisor ordered a new relief system for the tank; the order form indicated that the current relief system was “inadequate.” *Id.* The new relief system, however, was not installed prior to the explosion. *Id.* After the accident, the Occupational Safety and Health Administration (“OSHA”) cited the company for regulatory violations. *Id.* at 394. As it reversed the Alabama Court of Civil Appeals’ reversal of summary judgment in favor of defendant, the court focused on three key facts: (1) the tank had been operating with the original relief system for over 27 years without incident; (2) the knowledge that the relief system needed to be upgraded; and (3) OSHA’s citations. *Id.* at 395-96. As for the ordering of a replacement system, the court relied on *Turnbow* (discussed *supra*) and concluded that mere knowledge of a problem does not equate to a substantial certainty that injury or death would follow the co-employee defendant’s actions. *Id.* at 396. In addressing the OSHA citations, the court relied on *Harris* (*infra*) and concluded that if pre-accident OSHA citations were not enough to provide substantial certainty under the *Reed* test (as the court held in *Harris*), then post-accident citations are not enough to maintain a (c)(1) claim. *Id.*^{2,3}

25-5-11(c)(2) or “Safety Device Removal”

The second definition of “willful conduct” provided in 25-5-11(c)(2) (hereinafter “(c)(2)”) reads as follows:

- (c) As used herein, “willful conduct” means . . .
- (2) The willful and intentional removal from a machine of a safety guard or safety device provided

by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal; provided, however, that removal of a guard or device shall not be willful conduct unless the removal did, in fact, increase the danger in the use of the machine and was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective.

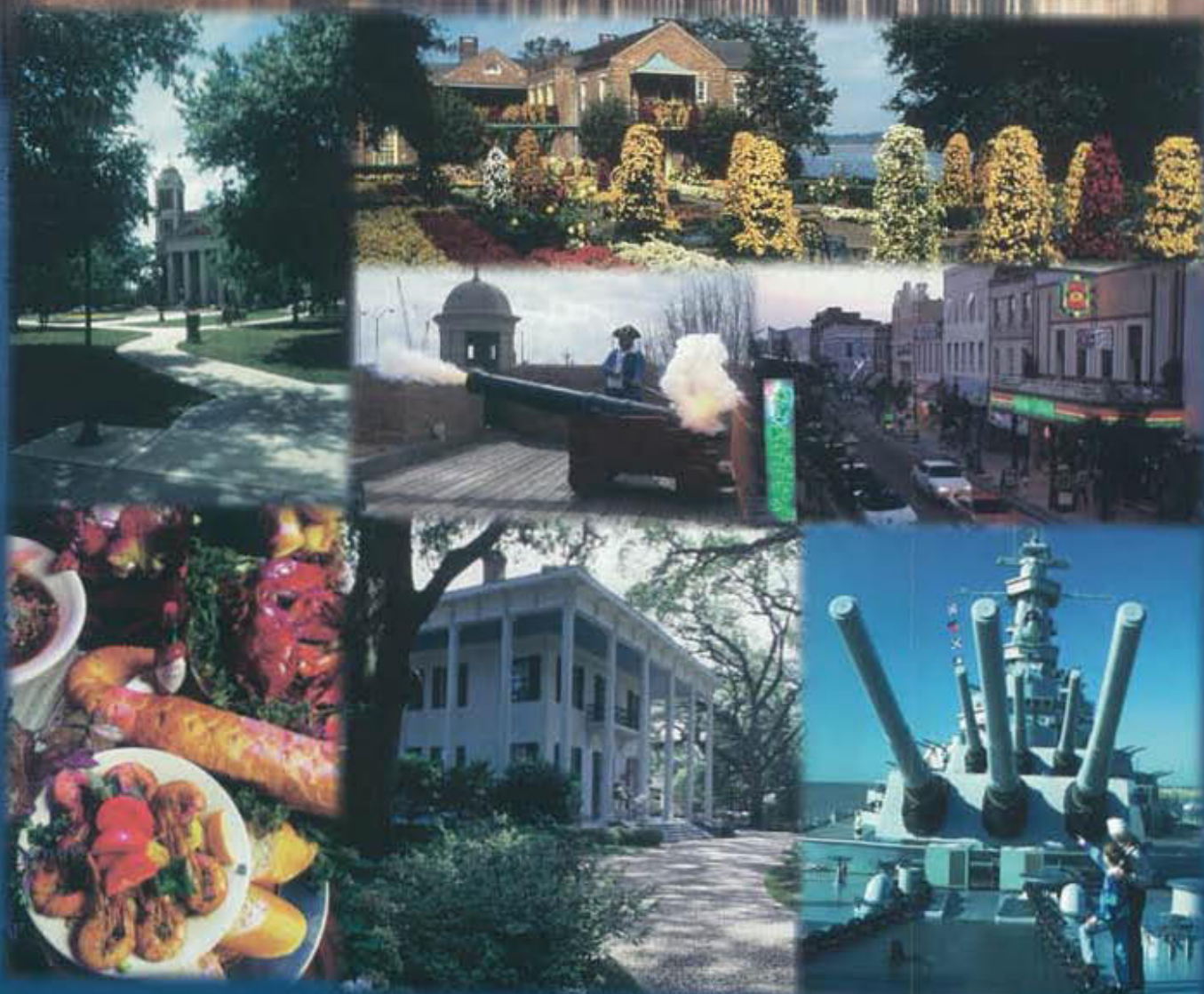
This definition is the most heavily litigated of the four provided in 25-5-11(c).⁴ Before looking to the judicial interpretation of this definition, several threshold issues must be addressed. The statute uses three key terms: safety guard/device, manufacturer and machine. If a defendant can show that one of these requirements is not met, the plaintiff cannot maintain a (c)(2) claim. First, the courts have not defined what constitutes a “machine” as that word is used in 25-5-11. The Alabama Supreme Court, however, has declined to use the following definition since the particular apparatus at issue—a coal mine—had already been found not to be a machine: “an assemblage of bodies that transmits forces in a predetermined manner and to a desired end.” *Pitts v. Beasley*, 706 So. 2d 711, 715-16 (Ala. 1997). Absent further guidance, parties are left only with what the court has found not to be machines: a coal mine (*Pitts supra*; *Layne v. Carr*, 631 So. 2d 978 (Ala. 1994); *Mallisham v. Kiker*, 630 So. 2d 420 (Ala. 1993) (holding that improper placement of a ventilation curtain is not actionable under (c)(2) because the curtain is attached to the mine roof, and the mine is not a “machine”); the human body (*Lane v. Georgia Cas. & Sur. Co.*, 670 So. 2d 889 (Ala. 1995); a respirator (*Namislo v. Akzo Chem. Co., Inc.*, 671 So. 2d 1380 (Ala. 1995)). One possible definition can be found in *Webster’s Dictionary*, which defines a “machine” as “a structure consisting of a framework and various fixed and moving parts, for doing some kind of work.” *Webster’s New Universal Unabridged Dictionary* 1080 (2d ed. 1983).

The court has defined “safety device or guard” as “an invention or contrivance intended to protect against injury, damage or loss that insures and gives security that an accident will be prevented.”⁵ *Moore v. Reeves*, 589 So. 2d 173, 177 (Ala. 1991). The *Moore* court went on to add that a safety guard or device is:

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that which is provided, principally, but not exclusively, as protection to an employee, which provides some shield between the employee and danger so as to prevent the employee from incurring injury while he is engaged in the performance of the service required of him by the employer: *it is not* something that is a component part of the machine whose principal purpose is to facilitate or expedite the work.

Moore, 589 So. 2d at 177 (emphasis added).

Finally, the court defined "manufacturer" as "[not only] the original manufacturer (one who produces articles for use or trade), but also a subsequent entity that substantially modifies or materially alters the product through the use of different components and/or methods of assembly." *Harris v. Gill*, 585 So. 2d 831, 836 (Ala. 1991) (discussed *infra*).

In order to maintain a (c)(2) cause of action, the plaintiff is not required to provide evidence demonstrating that the co-employee defendant(s) intended to harm the plaintiff. Rather, it is the willful or intentional removal of a safety guard or device, regardless of the intended result, that will incur liability under (c)(2). *Bailey v. Hogg*, 547 So. 498 (Ala. 1989) (discussed *infra*). However, foreseeing the danger resulting from the removal of the safety guard/device is required for a (c)(2) claim. To establish a *prima facie* claim under (c)(2), the plaintiff must show:

1. The safety guard or device must have been provided by the manufacturer of the machine;
2. The safety guard or device must have been removed from the machine;

3. The removal of the safety guard or device must have occurred with knowledge that injury would probably or likely result from that removal; and
4. The removal of the safety guard or device must not have been part of a modification or an improvement that rendered the safety guard or device unnecessary or ineffective.

Harris, 585 So. 2d at 835.

On its face, (c)(2) appears to limit the willful conduct under that definition to situations where there was an affirmative removal of a safety guard/device. However, the Alabama Supreme Court has broadened that definition in several ways. These expansions will be examined before various (c)(2) cases are reviewed.

In an early 25-5-11 case, the Alabama Supreme Court articulated the first expansion of the statute. See *Bailey v. Hogg*, 547 So. 2d 498 (Ala. 1989). The plaintiff in *Bailey* had a thumb amputated by a pulley inside a concrete plant; his employer had recently purchased the plant from another company. *Bailey*, 547 So. 2d at 498-99. The machine arrived with a guard designed to cover the injury-causing pulley, but the employer had failed to install the guard. *Id.* at 499. The co-employee defendant testified that he knew the guard was delivered and not installed, but did not know why it was not installed. *Id.* The court reviewed the legislative intent behind 25-5-11 and noted "the important public policy of promoting safety in the workplace and the importance of such guards in providing such safety. The same dangers are present when an available safety guard is not installed as are present when the same guard has been removed." *Id.* at 499-500.⁶ The court held that a willful and intentional failure to install a guard provided by the

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manufacturer is the equivalent of removing a guard or device, and is therefore actionable conduct under (c)(2). While this opinion seems to make sense on several levels, the court, at best, noted evidence that Hogg merely negligently or recklessly failed to install the guard, which is arguably a departure from the "willful" standard found in the plain language of 25-5-11. This expansion, however, continues to be good law to this day.

Another expansion of the plain language of (c)(2) came two years later in *Harris v. Gill*, 585 So. 2d 831 (Ala. 1991). In that case, the plaintiff was injured in a punch press accident. *Harris*, 585 So. 2d at 833. The injury-causing press was delivered to the plaintiff's employer years earlier with no safety devices whatsoever. *Id.* The company, however, added two mechanisms to the machine—palm buttons and a foot control pedal—to enable the operator to activate the press. *Id.* However, if the operator was using the foot pedal, the palm buttons were inoperative. *Id.* at 836. After laying out the *prima facie* case under (c)(2) (listed *supra*) for the first time and defining "manufacturer" (discussed *supra*), the court held that bypassing a safety device—the palm buttons—is the equivalent of "removing" a safety device or guard under (c)(2). *Id.* at 837.

A final early expansion of (c)(2) occurred in *Moore v. Reeves*, 589 So. 2d 173 (Ala. 1991). In *Moore*, the plaintiff, a security guard for a school, was injured when the driver's side door on a patrol car came open during operation causing him to fall out of the vehicle. *Moore*, 589 So. 2d at 175. Moore presented evidence that his supervisors knew of the disrepair of the vehicle and still required him to drive it on the day of the accident. *Id.* After providing a (new) definition of a "safety guard or device," the court looked to the policy articulated in *Bailey* and held that "the failure to maintain and/or repair a safety guard or device provided by the manufacturer of a particular machine would be tantamount to the 'removal of' or the 'failure to install' a safety guard or device." *Id.* at 178.

In sum, the three main expansions of (c)(2) outside of that definition's express language are: (1) failure to install (*Bailey*); (2) by-passing the safety guard/device (*Harris*); and (3) failure to repair (*Moore*).

This expansion of 25-5-11(c)(2) did not continue beyond the early 1990s, however, and this definition remains a fairly narrow cause of action. In *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988) (also a very important (c)(1) case, as noted *supra*), the court limited the safety device at issue to one that covered the injury-causing part of the machine. Mr. Reed's hand was injured when it was caught in a "nip point" on a rotating concrete drum. *Reed*, 527 So. 2d at 104. A safety guard for another part of the concrete mixer had been removed, but Reed was not injured by that part of the machine. *Id.* at 121. The court held that mere removal of a safety guard is not enough to maintain a (c)(2) claim; the removal of the guard must have *proximately caused* the plaintiff's injury. *Id.* Moreover, even if the safety guard was removed from the injury-causing area of the machine, it is still a jury question as to whether the removal caused the injury. See *Pressley v. Wiltz*, 565 So. 2d 26 (Ala. 1990) (holding that removal of safety rails installed only for a management visit may not have been the cause of plaintiff's injury and left it for the jury to determine that question of fact); see also *Landers v. O'Neal Steel, Inc.*, 564 So. 2d 925 (Ala. 1990) (holding that if injury would have occurred regardless of a previous by-passing of a safety switch, the causal connection for a (c)(2) claim could

not be made). Finally, the court has held that merely asserting that a safety guard/device should have been placed on a machine is not sufficient for maintaining a (c)(2) claim if the plaintiff cannot show that the guard was part of the originally manufactured machine or that such a guard is available, even if the employer was the manufacturer. *Kruszewski v. Liberty Mut. Ins. Co.*, 653 So. 2d 935 (Ala. 1995).

The court also refused to allow for (c)(2) claims alleging the "constructive removal" of a safety device. See *Cumbie v. L&A Contracting Co, Inc.*, 739 So. 2d 1099 (Ala. 1999). In *Cumbie*, the employer welded an otherwise removable crank handle to a machine; the handle spun freely and hit the plaintiff in the eye, causing an injury. *Cumbie*, 739 So. 2d at 1100. The court analyzed the three previous expansions of (c)(2) (*Bailey*, *Harris*, and *Moore*) and declined to further expand that definition to include the "constructive removal" of a safety device, i.e. since the handle was designed to be removable, welding it changed the nature of the handle and increased the risk of injury. *Id.* at 1103. The *Cumbie* court concluded by noting that (c)(2) "cannot be construed to allow a co-employee action in every situation where an employee is injured on the job and that any change in the limited right of action provided for in [(c)(2)] must be left to the legislature." *Id.* at 1103-04 (citation omitted) (emphasis added). The court also refused to expand (c)(2) to include providing a safer workplace by installing better lighting. See *Blackwood v. Davis*, 613 So. 2d 886 (Ala. 1993) (plaintiff was injured when he fell in a dark stairwell). Finally, the court refused to classify a failure to follow a safety rule as the equivalent of removal of a safety guard/device; such an action, however, may be actionable under (c)(1). See *Williams v. Price*, 564 So. 2d 408 (Ala. 1990).

As the language of (c)(2) indicates, an important factor is whether the manufacturer originally made the machine with the safety device or whether one was added later. In *Burkett v. Loma Mach. Mfg., Inc.*, 552 So. 2d 134 (Ala. 1989), the plaintiff injured his arm while operating a billet saw. Burkett provided substantial evidence that his employer had doubled the exposed area of the saw blade and that the co-employee defendants failed to add a splash guard, even though such a guard was not included as a component when the machine was purchased. *Burkett*, 552 So. 2d at 137. As for the alteration of the exposure area for the saw blade, the court held that since the co-employee defendants were not employed by the company when that alteration was made, they could not be liable for that alteration. *Id.* The court also ruled in favor of the co-employees on the failure to add a splash guard. *Id.* As to that claim, the court held that "[t]here is no duty under § 25-5-11(c)(2) on co-employees to add safety guards that the manufacturer fails to provide." *Id.* at 138 (emphasis added). In addressing Burkett's argument that the co-employee defendants should have added a splash guard after previous employees had expanded the area of the exposed saw blade, the court went on to add, "Section 25-5-11(c)(2) does not require co-employees to add a safety device to compensate for the willful removal of one by previous employees." *Id.* This case shows an unwillingness by the court to impose liability on supervisors for the willful acts of their predecessors. Essentially, it limits the focus to the actions of the co-employee defendants, which appears to be consistent with the intent of the legislature. See *id.*; see also Ala. Code § 25-5-14 (providing the legislative intent behind 25-5-11). In a similar

case, the court has held that there is no duty to upgrade safety devices after delivery of the machine from the manufacturer. See *Thermal Components Inc. v. Golden*, 716 So. 2d 1166 (Ala. 1998); see also *Crawford v. Martin*, 733 So. 2d 387 (Ala. Civ. App. 1997) (affirming summary judgment in favor of the co-employee defendants when neither the "safety device" at issue nor its recommended replacement system were provided by the manufacturer). Finally, the court has held that even if OSHA cites an employer for failing to have certain safety guards, if the machine was delivered by the manufacturer without those guards, co-employees cannot be liable under (c)(2). See *Harris v. Simmons*, 585 So. 2d 906 (Ala. 1991).

Several cases provide some insight into the liability of supervisory co-employees following a plaintiff's on-the-job injury. In *Cunningham v. Stern*, 628 So. 2d 576 (Ala. 1993), the plaintiff was injured by a punch press that was originally manufactured with a selector switch allowing the operator to select either the palm buttons or the foot pedal as the activation device. The employer had previously modified the safety devices by adding wrist bracelets designed to pull the operators' arms clear of the press area when the machine was activated, but those bracelets failed at the time of the accident. *Cunningham*, 628 So. 2d at 577. Plaintiff offered evidence that the palm press buttons had been deactivated. *Id.* at 578. The court reversed summary judgment and held that whether or not the addition of the bracelet system made the palm buttons unnecessary was a jury question. *Id.*

In *Kirk v. Klements*, 628 So. 2d 580 (Ala. 1993), the plaintiff had three fingers amputated while operating a grinding machine; a piece of wire mesh that was designed to cover the grinding wheel was not in its proper place and plaintiff's hand slipped through a small gap and came into contact with the wheel. *Kirk*, 628 So. 2d at 581. The plaintiff testified that he did not know who was responsible for causing the gap in the wire and the co-employee defendants testified that they were not responsible for the defect in the mesh. *Id.* The court pointed to an important step taken by the co-employees in their motion for summary judgment: making a *prima facie* case of nonliability. *Id.* at 582. This showing shifted the burden to the plaintiff to present evidence that the co-employee defendants were responsible for causing the wire mesh to be altered. *Id.* While this burden shifting is normal at the summary judgment stage, it shows how a defendant can place the burden on the plaintiff to bring forward specific evidence of liability beyond merely alleging a responsibility for removal of a safety guard/device.

An important case in the context of claims against supervisory personnel is *Raines v. Browning-Ferris Indust. of Ala., Inc.*, 638 So. 2d 1334 (Ala. Civ. App. 1993). In *Raines*, the plaintiff was injured when the door of a vehicle opened unexpectedly. *Raines*, 638 So. 2d at 1338. The co-employee defendants testified that they had no knowledge of previous problems with that door even though several former employees presented evidence that the door had malfunctioned in the past. *Id.* Additionally, there were no maintenance records evidencing any problems with the door. *Id.* The court, while finding that there was insufficient evidence for any kind of 25-5-11 claim, noted that (c)(2) "states that the willful or intentional removal of a safety guard or safety device from a machine with knowledge that injury or death would likely result from such removal is 'willful conduct.'" *Id.* Here the court relied on the express language of (c)(2). Moreover, the court, in a general discussion of 25-5-11,

has also observed that "[t]he position he occupies, without more, cannot serve as a basis for a co-employee's liability" under (c)(2). See *Thompson v. Liberty Mut. Ins. Co.*, 552 So. 2d 129 (Ala. 1989).

25-5-11(c)(3) or "Intoxication"

The third definition of "willful conduct" provided in 25-5-11(c)(3) (hereinafter "(c)(3)") reads as follows:

(c) As used herein, "willful conduct" means . . .

(3) The intoxication of another employee of the employer if the conduct of that employee has wrongfully and proximately caused injury or death to the plaintiff or plaintiff's decedent, but no employee shall be guilty of willful conduct on account of the intoxication of another employee or another person.

Unlike 25-5-11(c)(1), where there must be a finding of intent to injure, no such requirement is present in (c)(3). See *Hobden v. Snow*, 551 So. 2d 317, 319 (Ala. 1989) (noting that unlike other provisions in 25-5-11, (c)(3) "does not require an intent to intoxicate the employee").

Only two appellate cases have directly addressed this definition since its passage in 1985, both decided in the late 1980s. The first case was *Rudolph v. Gwin*, 526 So. 2d 581 (Ala. 1988). In that case, the plaintiff, a garbage collector, was injured when the garbage truck backed over him; he sued the co-employee driver of the truck. *Rudolph*, 526 So. 2d at 582. The plaintiff alleged that Gwin had been drinking a beer immediately prior to the accident. *Id.* He could not, however, provide any other evidence of intoxication. *Id.* at 583. In affirming summary judgment in favor of the co-employee defendant, the court first looked to various definitions of "intoxication" since the legislature did not provide a definition in the statute. *Id.* at 583-84. The court went on to note that "one who is 'intoxicated' is distinguishable from one who has been 'drinking,' because not every one who 'drinks' an alcoholic beverage will be 'intoxicated.'" *Id.* The court concluded that mere evidence of drinking, without evidence of intoxication, will not support a (c)(3) claim. *Id.*

The other (c)(3) case was decided a year after *Rudolph*. See *Hobden v. Snow*, 551 So. 2d 317 (Ala. 1989). In *Hobden*, an injured plaintiff (and his wife) sued the owners of the company for which he worked for the actions of a co-employee (Holt).⁷ *Hobden*, 551 So. 2d at 317-18. Plaintiff offered testimony that Holt was intoxicated on the day of the injury and that the Snows had purchased wine for him on several previous occasions. *Id.* at 318. The Snows admitted to having knowledge of Holt's intoxication while at work, but denied ever buying alcohol for him. *Id.*

The court began its analysis in *Hobden* by defining who could be liable under (c)(3). First, it noted that a co-employee who knew of intoxication could not be liable for the behavior of other employees. *Id.* at 319 (citing the last phrase in (c)(3)). Officers and directors, however, can be liable under (c)(3). *Id.* The court held that the "legislature did not intend for the officer or director who has been put on notice of an employee's intoxication at work should be protected from liability when he acquiesces in the intoxication." *Id.* Since there was evidence that the owners of the company knew of Holt's intoxication, the court reversed summa-

ry judgment in favor of the defendants. While this conclusion may pass the "common sense" test, it certainly is an expansive reading of (c)(3) and 25-5-11 in general. Even though 25-5-11 is a provision of the Workers' Compensation Act, the court appears to be incorporating the general employer liability principles of tort law into what is, at least on its face, a narrow cause of action. A second expansion that occurred in this case is the allowance of plaintiff's wife as a co-plaintiff. Under 25-5-11(a), the statute lists possible plaintiffs as "the employee, or his or her dependents in the case of death." (emphasis added). A suit by the dependent of a surviving employee appears to expand the scope of 25-5-11. Moreover, in light of the fact that the statute is part of the Act which gives employees rights against their employers for work-related injuries, it is difficult to see how the dependent of a living plaintiff-employee is a proper plaintiff in a 25-5-11 suit.

To summarize, to make a claim under (c)(3), the plaintiff must prove that another employee was intoxicated and that as a result of that intoxication, the plaintiff was injured. Moreover, it is not just the intoxicated co-employee who may be liable; supervisory personnel may also be liable if they knew of the intoxication and took no steps to prevent the intoxicated employee from working.

25-5-11(c)(4) or "Safety Violation"

The fourth definition of "willful conduct" provided in 25-5-11(c)(4) (hereinafter "(c)(4)") reads as follows:

(c) As used herein, "willful conduct" means . . .

(4) Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of the written notice, suffers injury resulting in death or permanent total disability as a proximate result of the willful and intentional violation. The written notice to the violating employee shall state with specificity all of the following:

- a. The identity of the violating employee.
- b. The specific written safety rule being violated and the manner of the violation.
- c. That the violating employee has repeatedly and continually violated the specific written safety rule referred to in b. above with specific reference to previous times, dates, and circumstances.
- d. That the violation places the notifying employee at risk of great injury or death.

A notice that does not contain all of the above elements shall not be valid notice for purposes of this section. An employee shall not be liable for the willful conduct if the injured employee himself or herself violated a safety rule, or otherwise contributed to his or her own injury. No employee shall be held liable under this section for the violation of any safety rule by any other employee or for failing to prevent any violation by any other employee.

Like (c)(3), this definition has not been subjected to much judicial scrutiny. There are a couple of key phrases in (c)(4) worth point-

ing out before delving into the case law. First, this is the only "willful conduct" definition that limits causes of action based on the severity of the injury involved. A (c)(4) action can only be maintained if the plaintiff died or was permanently disabled. Consequently, an employee who was injured but later fully recovered cannot maintain a (c)(4) claim. Another foundational issue for (c)(4) is the *mens rea* involved. A (c)(4) plaintiff is not required to show that the co-employee defendant intended that an injury occur. Rather, the plaintiff must prove that the defendant willfully violated a safety rule. See, e.g., *Haisten v. Audubon Indem. Co.*, 642 So. 2d 404, 406 (Ala. 1994) (citations omitted).

As the text of (c)(4) indicates, liability will be imposed on a co-employee if he or she, after receiving a written warning containing specific information from the injured employee regarding violation of a safety rule, willfully violated that rule and that violation resulted in death or permanent disability for the reporting co-employee. It is the format of the written notice that has been the subject of many of the (c)(4) cases. One of the most important (c)(4) cases was *Layne v. Carr*, 631 So. 2d 978 (Ala. 1994). In *Layne*, a foreman in a coal mine was injured while wading through some water on the mine floor. *Layne*, 631 So. 2d at 980. Prior to the shift during which Layne was injured, there were several safety "write-up's" addressing the accumulation of water. *Id.* It was these write-up's that Layne contended satisfied the written notice requirement of (c)(4). *Id.* at 983. In addressing his (c)(4) claim, the court made several important observations about the written notice required in (c)(4) cases. First, the notice must come from the injured employee. *Id.* Additionally, the notice must be given to the offending employee(s). *Id.* Finally, the written notice must "substantially conform to the requirements" listed in (c)(4). *Id.* While the "substantially conform" language leaves a little room for interpretation, the tone of *Layne* is strict as to the requirements for maintaining a (c)(4) action. The court has never allowed the warning to be oral instead of written. See *Scott v. Goins*, 677 So. 2d 1154 (Ala. 1996) (holding that oral complaints about violations of safety rules are not sufficient for the purposes of maintaining a (c)(4) cause of action).

Another important factor in a (c)(4) case is the source of the written warning. While *Layne* makes it clear that the warning must come from the injured employee, not every injured employee who submits a warning can maintain a (c)(4) action. In *Maro v. Sizemore Sec. Intern., Inc.*, 678 So. 2d 1127 (Ala. Civ. App. 1996), a former safety inspector was terminated and alleged that she was terminated for writing safety reports that were too strict. The appellate court held, however, that (c)(4) was not enacted to protect a person whose job duties require him or her to submit written safety complaints. *Maro*, 678 So. 2d at 128. Alabama courts have held that the following safety documents will not satisfy the requirements of (c)(4): a safety complaint that does not substantially conform to the requirements listed in (c)(4) (see *Layne supra*); a citation from the Mine Safety & Health Administration⁸ (see *Pitts v. Beasley*, 706 So. 2d 711 (Ala. 1997)); *Coates v. Guthrie*, 707 So. 2d 204 (Ala. 1997).⁹

Conclusion

Section 25-5-11 remains a narrow cause of action. As the above discussion indicates, these co-employee cases tend to be fact-specific. When these cases are evaluated, along with the narrow provisions of the statute, it is clear that co-employee

claims are generally difficult for plaintiffs to win. The development of 25-5-11 claims is consistent, on the whole, with the legislature's intent, almost 20 years ago, when it passed a narrow co-employee exception to the exclusivity provisions of the Alabama Workers' Compensation Act. ■

Endnotes

1. One uncertain issue regarding proper plaintiffs can be found in 25-5-11(d). That provision includes the following sentence: "If the injured employee has no dependent, the personal representative, in the event of death, may bring a civil action against the other party to recover damages without regard to this chapter." This phrase may be interpreted to grant the personal representatives of a deceased employee the right to maintain a cause of action against co-employees for willful conduct. However, the case law is anything but clear as to whether this phrase creates another group of proper plaintiffs—the personal representative of a dependentless deceased employee. For a discussion of this issue, see *Tucker v. Malden*, 761 So. 2d 966 (Ala. 2000).
2. Cases addressing the "weight of evidence" for (c)(1) claims include: *Beville v. Spencer*, 568 So. 2d 1224 (Ala. 1990) (affirming summary judgment for co-employee defendant following a manibus (driven by the defendant) accident where two other passengers testified that Spencer was not driving too fast and that it was common for manbuses to derail); *Grimes v. Stewart*, 628 So. 2d 467 (Ala. 1993) (reversing a jury verdict for plaintiff in a workplace exposure case where plaintiff alleged that he contracted leukemia; court held that if there is conflicting testimony as to the cause of the illness, the co-employee defendants could not have known "with any degree of certainty, much less substantial certainty" that the exposure would cause Stewart to contract leukemia); *Lee v. Longhorn Steaks of Ala., Inc.*, (662 So. 2d 672 (Ala. 1995) (affirming summary judgment for defendant in a case involving an injury following "horseplay" at work; the court held that since Lee testified that she didn't think the co-employee defendant intended to harm her, she could not show anything more than negligence and a perception of a risk of injury, neither of which will sustain a (c)(1) claim); *Smith v. Lewis*, 684 So. 2d 1317 (Ala. Civ. App. 1996) (affirming summary judgment for defendant in case involving a fatal electrocution of an employee of a tree company where supervisor co-employee defendant had previously warned the decedent of the danger of the power lines before the accident); *Williams v. Price*, 564 So. 2d 408 (Ala. 1990) (affirming summary judgment for defendant and noting that "a purpose, intent, or design to injure another was not intended to be reasonably inferable from evidence showing only knowledge and appreciation of a risk of injury or death"); *Pressley v. Wiltz*, 565 So. 2d 26 (Ala. 1990) (affirming summary judgment for defendant on (c)(1) claim; the court noted that if the co-employee defendant actually used the same machine that plaintiff alleges caused his injury, there cannot be substantial certainty that the co-employee would have known that injury would follow from his actions).
3. Cases that focused on the "degree of knowledge" required by the co-employee defendant in a (c)(1) case include: *Townsend v. General Motors Corp.*, 642 So. 2d 411 (Ala. 1994) (affirming summary judgment for defendant in a case involving the injury of garbage collectors when the brakes of their garbage truck failed resulting in a crash; while plaintiffs presented evidence that some of the co-employee defendants knew of the brake problems, the court focused on the fact that none of the co-employee defendant knew the plaintiffs would be using that truck the day of the accident); *Cooper v. Nicoletta*, 797 So. 2d 1079 (Ala. 2001) (affirming summary judgment for defendant in case involving an injury which occurred when plaintiff was emptying a large vat; court held that since there were no prior accidents when using the procedure for emptying the vat during the ten years that the procedure was used, there cannot be "substantial certainty" that injury would follow from having the plaintiff empty the vat using that procedure); *Harris v. Simmons*, 585 So. 2d 906 (Ala. 1991) (affirming summary judgment for defendant in a case involving a punch press injury where OSHA had previously cited the company for regulation violations related to punch presses; court found that "substantial certainty" prong of the *Reed* test was not satisfied despite the prior citations for the punch press since the press had been operated for an extended period without an injury); *Warren v. Wester*, No. 2001010, 2002 WL 168648 (Ala. Civ. App. Feb. 1, 2002) (affirming summary judgment for defendant where only one OSHA citation had been issued and since it was not a "repeat" offense, there could not be "reasonable certainty" that an injury would follow the co-employee defendants' actions); *Hallmark v. Duke*, 624 So. 2d 1058 (Ala. 1993) (holding that the failure to inspect a pipe system that was ordered to be drained may be negligence, but is not the type of conduct that is actionable under (c)(1); the plaintiff was injured when a pipe holding caustic liquid burst while he was attempting to repair a leak in that pipe after his supervisor failed to inspect the tank to verify that the system was drained properly).
4. Over 60 percent of the reported 25-5-11(c) cases addressed a claim under (c)(2). In addition to injuries arising from a specific accident, (c)(2) claims can also be maintained for occupational diseases. See *Namisto v. Azko Chem. Co., Inc.*, 671 So. 2d 1380 (Ala. 1995) (the safety device at issue was a respirator, but the court held that since the human body is not a "machine," the plaintiff could not maintain a (c)(2) claim).
5. When a device serves multiple purposes, if one of the purposes is to promote safety, the court has held that a (c)(2) claim can be maintained if that device is removed or not repaired. See *Smith v. Wallace*, 661 So. 2d 207 (Ala. 1995) (holding that a tool rest served two purposes: to hold tools and to protect the machine operator's hands from being pulled into the machine).
6. The *Bailey* court also noted: "[t]o hold that the willful and intentional failure to install an available safety guard is not actionable would allow supervisory employees to oversee assembly of new machinery, instruct their employees not to install the safety guards, and then, when an employee is injured due to the lack of a safety guard, claim immunity from suit." *Bailey*, 547 So. 2d at 500. Of course, the court failed to articulate why an employer would want to do such a thing when it could just as easily install the device. This appears to foreshadow the pro-plaintiff expansionist treatment of 25-5-11 that would follow *Bailey*.
7. While 25-5-11(b) states "If personal injury or death to any employee results from willful conduct, as defined [in (c)], of any officer director, agent, or employee . . .," the court clearly expanded the scope of 25-5-11 in the *Hobden* case by such a loose interpretation of (c)(3).
8. While the question of whether an OSHA citation satisfies the requirements of (c)(4) has not been addressed directly, a strong argument could be made that the strong similarity between MSHA and OSHA citations indicates that OSHA citations not originated by the injured employee would not be enough to maintain a (c)(4) claim. But see *Morgan, infra*.
9. It is also important to note that another provision in the Act implicates (c)(4) as well. Under Section 25-5-11.1 (the retaliatory discharge statute), "No employee shall be terminated by an employer . . . solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of Section 25-5-11." Essentially, 25-5-11.1 prohibits retaliation against an employee who made a (c)(4) report, even if the safety violation never resulted in an injury or death. For an analysis of this provision, see *Morgan v. Northeast Ala. Reg'l Med. Ctr.*, 624 So. 2d 560, 562 (Ala. 1993) (holding that the legislature did not intend to impose the strict requirements for (c)(4) reporting on 25-5-11.1 claims and noting that "[t]here are legitimate reasons for imposing a strict notice-filing requirements before a co-employee can be said to be engaging in 'willful conduct' that injures the complaining employee, but those reasons do not apply to the policy of prohibiting employers from firing employees for complaining about safety violations" (emphasis added)); see also *Rowe v. Woods Assoc., Inc.*, 695 So. 2d 1210, 1212 (Ala. Civ. App. 1997) (holding that "Section (c)(4) provides a mechanism for employees to report a violation of a specific written safety rule of the employer by a co-employee in order to preserve a possible future cause of action against that co-employee for injury resulting from a violation of safety rules by that co-employee").



Kevin W. Patton

Kevin Patton practices in the Birmingham office of Maynard, Cooper & Gale, PC. Patton received his undergraduate degree from the United States Naval Academy and his law degree from Duke University School of Law.



William L. Campbell, Jr.

William Campbell practices in the Birmingham office of Maynard, Cooper & Gale, PC. Campbell received his undergraduate degree from the United States Naval Academy and his law degree from the University of Alabama School of Law.

War Stories

There was a gentleman, whom we shall refer to as Junior, who committed a burglary, was caught, tried, convicted and sentenced to the penitentiary. After having served about eight years, he was released on parole. One week into his parole, he was caught committing a burglary, was tried, convicted and sentenced. After having served an additional ten years, he was paroled. About two weeks into this parole period, he was caught committing a burglary—and I got appointed to represent him.

Junior has spent all but three weeks of the past 18 years in the penitentiary. He does not know that you cannot enter someone else's residence. Junior is not among the intellectually blessed.

During the course of trial preparation, I inquired of Junior as to why he entered his neighbor's residence. He told me that he went in to use the telephone. He told me that his mother, with whom he was residing, also borrowed that neighbor's telephone. Additionally, his sister frequently used the neighbor's telephone. Also, Junior insisted that he knocked on the front door before he climbed in through the bathroom window to borrow the telephone.

The neighbor, who was asleep and thus failed to answer the knock on her door, was awakened by the sounds of Junior coming in through her bathroom window. When she woke up, she looked and saw Junior, recognized him, screamed out his name and called the police. The police, fortunately, were on the scene in time to catch Junior climbing out of the bathroom window.

Having no other credible defense, I decided to use permission to use the telephone as our defense.

I put Junior on the stand to testify.

Question: Did you knock on the front door before you entered this house?

Answer: Yes, I did.

Question: Have you entered this house before with permission?

Answer: Yes sir, I have.

Question: Have you used the telephone in this residence before?

Answer: Yes sir, I have.

Question: Have you had the owner's permission to use her telephone?

Answer: Yes sir, I have.

Question: Does your mother borrow your neighbor's telephone?

Answer: Yes sir, she does.

Question: Does your sister borrow your neighbor's telephone?

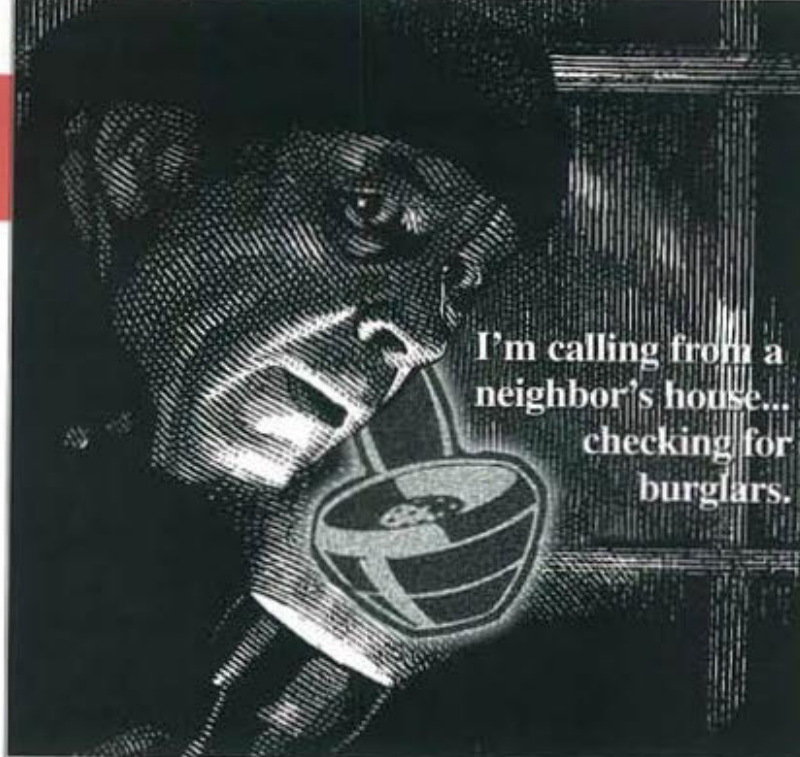
Answer: Yes sir, she does.

Question: Does your family frequently go in and out of your neighbor's house using her telephone?

Answer: Yes sir, we do.

Question: In fact, you all treat this telephone as if it were yours and you've had your neighbor's permission to do that, haven't you?

Answer: Yes sir, we do.



I'm calling from a neighbor's house... checking for burglars.

Question: So, you are telling the court that you entered this residence not to commit a crime but to use the telephone?

Feeling as accomplished as I might, I sat down and turned the questioning over to the district attorney.

Question: Tell me again why you entered this lady's residence.

Answer: I was checking for burglars.

(This was the first time I had heard this rendition of the facts.)

Question: You were checking for burglars?

Answer: Yes sir, we had had some burglaries in the neighborhood and I was checking for burglars.

Question: Oh, there had been some burglaries? Did you commit those, too?

Answer: No sir, I was in the penitentiary when those happened.

To this day, that case still holds the record for the quickest verdict in the history of Pike County, Alabama. The jury actually deliberated in the box. At the close of the judge's instructions, the jurors sat still, gazed at one another, then collectively shook their heads at the judge, announcing the guilty verdict.

The judge admonished the jury that they would have to go out, pick a foreman, deliberate, and then return their verdict, upon which the jurors took a water break and, within five minutes, returned with a guilty verdict.

The last time I heard from Junior, he was safe and sound at home—in the penitentiary.

—Joel Lee Williams, Troy

The Alabama Lawyer is looking for "war stories" to publish in upcoming issues, humorous tales and anecdotes about Alabama lawyers and judges.

Obviously, for such stories to be published, they must be (a) true, (b) amusing and (c) tasteful. Send your reminiscences to: *The Alabama Lawyer*, P.O. Box 4156, Montgomery 36101. Be sure to include your name, address and a daytime telephone number, in case we need to contact you.

Family Law Section Celebrates 16 Years of Service

BY ROBIN L. BURRELL AND GORDON BAILEY

The Family Law Section of the Alabama State Bar was created in 1984, and the first chairperson to serve was **Sam Rumore**. The section is generally recognized as being one of the most active sections in the bar, from its inception until the present time. Currently, the section has over 200 members, and the current chairperson for 2002-2003 is **Leslie Barineau** of Birmingham.

At this year's Divorce on the Beach XVI seminar held May 30th through June 1st, the Family Law Section celebrated 16 years of service to its members by inviting and hosting all of the past chairpersons to return as program speakers.

"Welcome Back" was the theme song of the event as all of the past chairpersons (introduced by an appropriate "Golden Oldie" musical selection) returned to present various timely programs, including a case law update, the art of mediation and a panel discussion addressing typical family law issues confronting the members in their daily law practice. Each of the



Current chairperson Leslie Barineau (2003) with her son, Alexander



Past chairpersons pictured with their Family Law Section medallions are left to right: Front row — Tim Smith (1977), Amy Slayden (1994), Hon. Vanzetta McPherson (1986), Robin Burrell (2001), Jerilee Sutherlin Lewallen (1990), Steve Arnold (1989), Sam Rumore (1985), Gordon Bailey (1998); Back row — Randy Nichols (1992), Herndon Inge (1995), Bill Blanchard (1993), Mike Manasco (1991), Joe Sullivan (1987), Ron Boyd (1999), and Drew Whitmire (1996). Not Pictured — Rick Fernambucq (1988) and John Wood (2000)



Past chairpersons field questions from the audience on various family law issues during Divorce on the Beach — pictured left to right: Sam Rumore (1985), Tim Smith (1997), Jerilee Sutherlin Lewallen (1990), Steve Arnold (1989), Hon. Vanzetta McPherson (1986), and Joe Sullivan (1987).

past chairpersons received a commemorative Family Law Section Medallion commissioned especially for this reunion.

Hosting this year's celebration of 120 attendees were **Gordon Bailey** (past chair 1998) and **Julie Palmer** (seminar director), along with the section chair for 2002, **Noah Funderburg**, and chairperson-elect for 2003, Leslie Barineau. During the three-day seminar, the section sponsored the Second Annual Silent Auction which raised over \$4,000, providing a donation of \$2,500 to the Big Oak Ranch. The amount of knowledge disseminated at this seminar every year is only exceeded by the amount of fun to be had by all. Participants enjoy a fun and relaxed atmosphere with well-attended and enjoyable social events, highlighted this year by the section's own rock and roll band, "The Marital Assets." Mark your calendar for next year's Divorce on the Beach XVIII, which is set for June 5th through 7th, 2003, again at Sandestin, Florida.

"Family Law Retreat to Beach" is a section joint venture with ABICLE and is held every year in October in Gulf Shores. This seminar is somewhat less rambunctious and more low key than Divorce on the Beach, attracting between 110 to 125 attendees, featuring both judges and attorneys as speakers.

For the past number of years, the section has published its own newsletter, *The Alabama Family Lawyer*, with articles of interest to its members, section information and interviews with family law practitioners and family law judges. Several years ago, the

section decided to create and distribute to all members a directory with a listing of all section members, both alphabetically and by counties, to facilitate communication between section members and to allow for referral of business. At this past Alabama State Bar Annual Meeting in July, the section hosted approximately 80 members for our annual discussion of current case law and developments in the practice of family law. Additionally, in 2000, Noah Funderburg created a list serve for the section allowing members to "chat" about areas of interest, seek advice and apprise members about topics of significance. To participate, send your e-mail address to Noah Funderburg at pronoah@comcast.net. The service is free and limited to Alabama lawyers. The section also maintains a Web site with basic information about the section and, during the legislative session, tracks the progress of bills that pertain to domestic relations and related areas of practice at www.alafamlaw.org. Although the section does not and is prohibited from espousing an official position on any legislation, it does provide information to its members regarding legislation that may affect their practice so that individual members may do so on their own.

For the past two years, the section offered a "Road Show" consisting of meetings, cocktail parties or a CLE program to local bar associations throughout the state. If your local bar association would like a section speaker to visit your area, please contact Membership Committee Chair **Melody Brooks** of Anniston. These opportunities for statewide discussion of family law topics coupled with the section's mentor program (which pairs new attorneys with "seasoned" attorneys) illustrate the section's endeavors to augment each member's family law practice. In 2000, under **Robin Burrell's** leadership (past chair 2000), section scholarships were established at the University of Alabama School of Law, Cumberland Law School, Miles Law School, Jones Law School, and the Birmingham School of Law. These are \$500 scholarships which are awarded yearly to the student with the best academic grades in the Family Law Section at each school.

Domestic relations law is a very stressful practice area by any measure, requiring attorneys to have knowledge in the areas of real estate, tax, probate, business, and other related practice areas, as well as an ability to guide clients through an emotional time in their lives. The Family Law Section strives to enhance



The Divorce on the Beach cocktail party crowd at the presentation of the medallions to the past chairpersons, followed by entertainment from the section band, "The Marital Assets"



The section's Silent Auction raised over \$4,000 for this year's law school scholarships and a \$2,500 donation to the Big Oak Ranch.

the quality of life for the domestic relations attorney in hosting annual events which encourage comradery, and by disseminating up-to-date information on new statutes and case law, as well as promoting professionalism and civility in the bar. To join the section, contact **Brian Huff**, 2801 University Blvd., Ste. 302, Birmingham 35233, (205) 930-9000. ■

Divorce on the Beach



The Family Law Section of
the Alabama State Bar presents
"Divorce on the Beach XVII," June 5-7, 2003
Sandestin Golf and Beach Resort,
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Alabama's New Mortgage Brokers Licensing Act

BY V. LYNNE WINDHAM

On May 30, 2001, Governor Don Siegelman signed into law Act No. 2001-692, known as the Mortgage Brokers Licensing Act (Act), now codified at Section 5-25-1 *et seq.*, Code of Alabama (Supp. 2001). For the first time, mortgage brokers operating in Alabama must be licensed and regulated by the State Banking Department (Department). Generally, a mortgage broker functions as an intermediary who matches prospective home borrowers with potential lenders.

The new Act attempts to close a gap in the regulation of providers of consumer real estate services. For years before the Act's passage, real estate agents, real estate appraisers and mortgage lenders were members of established industries routinely regulated by various state agencies. During the 1980s and 1990s, as the financial services industry became more diversified, an independent mortgage broker industry developed, offering to assist consumers through the complicated maze of financing and refinancing a home. The National Association of Mortgage Brokers estimates that in the year 2000, 55 percent of all home loans were originated by mortgage brokers.¹ Yet, the growth of this industry has brought with it increasing complaints of mortgage fraud and predatory lending. Regulating mortgage brokers is an attempt to curb these abuses. This article will review the basic requirements of the new law and the policies developed thus far by the State Banking Department in implementing the Act.

Highlights of the Mortgage Brokers Licensing Act

The Mortgage Brokers Licensing Act provides a statutory framework for regulating mortgage brokers in Alabama. The first threshold question to consider is, "What activities are subject to the Act?" The answer lies in the definitions found in Section 2 of the Act.

The Act defines "mortgage broker" as "Any person who directly or indirectly solicits, processes, places, or negotiates mortgage loans for a borrower, or offers to solicit, process, place, or negotiate mortgage loans for a borrower." § 5-25-2(9) (emphasis added). A "mortgage loan" is defined as, "A loan or agreement to loan money made to a *natural person*, which loan is secured by a deed to secure debt, security deed, mortgage, security instrument, or other document representing a security interest or lien upon any interest in a single-family to four-family *residential property* located in Alabama, regardless of where made, including the renewal or refinancing of any loan." § 5-25-2(10) (emphasis added). "Residential property" is defined as, "Improved real property used or occupied, or intended to be used or occupied, as the *principal residence* of a natural person. The term does not include rental property or second homes." § 5-25-2(13) (emphasis added).

Thus, the Act applies when a business offers to find a mortgage loan for natural



persons looking to buy or refinance a home on land located in Alabama. This definition implicitly includes out-of-state mortgage brokers brokering homes located in Alabama. Lenders who actually fund the mortgage are still subject to licensing under the pre-existing Alabama Consumer Credit Act "Mini-Code." § 5-19-1 *et seq.* Some self-identified mortgage brokers may actually be creditors under the Mini-Code, as opposed to mortgage brokers as defined in the new Act. For example, the department distinguishes between mortgage brokers that "table-fund" loans from self-identified mortgage brokers with *bona fide* warehouse lines of credit.² Mortgage brokers that merely "table-fund" loans must obtain a mortgage brokers license, while "mortgage brokers" with warehouse lines are treated as lenders that must obtain a Mini-Code license.

If a business falls within the definition of a mortgage broker, then, generally, the Act:

- Excludes specified persons from its applicability.
- Requires mortgage brokers to obtain a license from the State Banking Department.
- Establishes specific duties and restrictions for licensees.
- Provides enforcement mechanisms and penalties for violations.

Exemptions from the Act

Even if a business falls within the statutory definition of a mortgage broker,

the Mortgage Brokers

Licensing Act explicitly provides 13 exemptions from its applicability. § 5-25-3.

If qualified for an exemption, then the mortgage broker is not required to obtain a license or to comply with any other provision of the Act.

Thus, the second threshold question to consider is "does the mortgage broker qualify for one of the exemptions under the Act?" The Department construes the Act's exemptions narrowly. *See United Companies Lending v. McGehee*, 686 So. 2d 1171, 1178 (Ala. 1996).

Most of the exemptions in the Act are for persons already subject to regulation by other government agencies. For example, state and federal banks, credit unions, trust companies and insurance companies are exempt. § 5-25-3(1). Lenders licensed under the Alabama Consumer Credit Act "Mini-Code" are exempt. § 5-25-3(2). National Housing Act lenders are exempt if they are approved by the U.S. Department of Housing and Urban Development (HUD) to conduct business in Alabama. § 5-25-3(7); *see United Companies Lending v. McGehee*, 686 So. 2d 1171, 1179 (Ala. 1996). Securities brokers are exempt. § 5-25-3(10). Even state bar members are exempt when their mortgage brokering services are incidental to their legal practice. § 5-25-3(3).

The Act also provides exemptions for rare instances of mortgage brokering. For example, a person may broker one mortgage loan a year without complying with the Act. § 5-25-3(8). Persons performing an act relating to mortgage loans pursuant to a court order are exempt. § 5-25-3(4). And employers who offer mortgage brokering services for their employees are exempt. § 5-25-3(9).

Requirements to Obtain A Mortgage Brokers License

The Mortgage Brokers Licensing Act requires all nonexempt mortgage brokers to be licensed by the State Banking Department as of January 1, 2002. § 5-25-4(a). Mortgage brokers must obtain a

license for *each* office location. § 5-25-4(b). The cost of the license is \$500 per year, plus a \$100 fee to investigate the application. § 5-25-5(c)(1). Applicants must have a minimum net worth capital of \$25,000 and six letters of reference concerning the applicant's experience and reputation. § 5-25-5(c). The Act also requires applicants to obtain 12 hours of continuing education approved by one of the following entities: the Alabama Mortgage Bankers Association, the National Association of Mortgage Brokers, the Alabama Mortgage Brokers Association, the Alabama Bankers Association, or the National Minority Mortgage Bankers Association. § 5-25-5(b)(6) (as amended).

Applicants for a mortgage brokers license must complete a two-page application under oath on the department's goldenrod-colored forms. The application requests information on the applicant's principals and officers. The department cannot issue a license to any applicant with a principal or officer who has been convicted of a felony of any kind, or any crime, including misdemeanors, involving breach of trust, fraud or dishonesty. § 5-25-6(c). The following attachments must accompany the application: (1) resumes of all owners or principals; (2) a business plan; (3) proof of continuing education; (4) a financial statement prepared by a Certified Public Accountant; (5) three letters of reference regarding the applicant's reputation in the community; (6) three letters of reference from lenders; (7) a certified copy of its Articles of Incorporation and By-laws, or equivalent documents; (8) a copy of its customer-broker agreement; (9) a \$100 certified check and a separate \$500 certified check; and (10) copies of the driver's license of each owner and principal.

Upon receiving a completed application package, the Department conducts an investigation to verify the information submitted and to determine that the applicant is "of good character and ethical reputation and will operate honestly and fairly within the purposes of this chapter; that the applicant demonstrates reasonable financial responsibility; and that the applicant has and maintains a place of business in this state." § 5-25-6(a). Moreover, the "Department may not license any applicant unless it is satisfied that the applicant may be expected to operate its mortgage brokerage activities in compliance with

the laws of this state." § 5-25-6(b). The Department may deny a license to any applicant that has previously had a license denied, suspended or revoked by any government agency. § 5-25-6(d). The Act allows the Department 90 days to grant or deny an application, although the usual investigation of a completed application takes approximately 30 days. § 5-25-6(e).

If the Department finds sufficient evidence to deny an applicant's license, then the Act requires the Department to provide the applicant notice and an opportunity for a hearing. § 5-25-14(b). The Notice of Intent to Deny will be in writing, sent certified mail. Applicants have 20 days to request in writing a hearing before the supervisor of the Bureau of Loans to contest the denial. § 5-25-14(b). The supervisor of the Bureau of Loans is the official responsible for enforcing the Act. § 5-25-16. Although the State Banking Department is exempt from the Alabama Administrative Procedures Act, the Department generally follows the minimum due process standards it establishes for contested hearings. § 41-22-1 *et seq.* An applicant is entitled to judicial review of a final order denying an applicant's license. § 5-25-14(c). Such judicial review is *de novo* and must be requested within 30 days of the date of the final order. § 5-25-15(a). Either party may appeal the circuit court's decision to the Alabama Supreme Court. § 5-25-15(b).

Duties and Restrictions Of Mortgage Brokers

Mortgage brokers must comply with several specific directives under the Mortgage Brokers Licensing Act. In addition, their consumer loans must comply with the substantive requirements of the Alabama Consumer Credit Act "Mini-Code." Pertinent requirements of each law will be addressed separately.

1. Mortgage Brokers Licensing Act

The Mortgage Brokers Licensing Act directs licensees to a few simple ministerial acts. The Act requires all licensees to conspicuously post their license in their place of business. § 5-25-8(b). Licensees may not transact business under any other name except the name designated on the license. § 5-25-8(d). Licensees

must maintain a physical location in this state. § 5-25-11. And they must notify the Department of any change in their address 15 days prior to such change. § 5-25-8(e). To make an address change, licensees should send their original license to the Department with a \$25 certified check. All licensees must retain all their business records for at least three years. § 5-25-9(d). Such records must be kept separately from any other business done at the licensed location. § 5-25-9(a). The Department sends each licensee a suggested "stacking order" on how to keep their loan files. All licensees must file an annual report on May 1st of each year. § 5-25-10(a).

The substantive requirements of the Act are found in Section 12. Subsection 12(a) mandates two affirmative duties for all licensees: (1) licensees shall disclose to the borrower up front the nature of their relationship and the method by which the mortgage broker will be paid; and (2) licensees shall comply with all applicable federal and state disclosure laws. The two main federal laws which the Department

reviews during its examinations of mortgage brokers is the Real Estate Settlement Procedures Act (RESPA), and its implementing Regulation X, and the Truth in Lending Act (TILA), and its implementing Regulation Z. RESPA, 12 U.S.C. § 2601 *et seq.*; Reg. X, 24 C.F.R. § 3500.1; TILA, 15 U.S.C. § 1601 *et seq.*; 12 C.F.R. § 226.

Subsection 12(b) prohibits licensees from the following five acts: (1) intentionally misrepresenting or concealing a material fact of the transaction; (2) failing to use due diligence to procure a loan; (3) failing to disburse funds in accordance with the settlement statement; (4) delaying closing of a mortgage loan for the purpose of increasing its interest rate or other costs; and (5) collecting any mortgage broker fee up front. These prohibitions address the concerns of mortgage fraud and predatory lending. Any findings of fraud are most certainly grounds for license revocation.

2. Alabama Consumer Credit Act "Mini-Code"

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15 Year	\$220	\$220	\$285	\$530	\$835	\$1,250	\$2,020
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The Alabama Consumer Credit Act "Mini-Code" proscribes certain substantive and other regulatory requirements for consumer credit transactions conducted in Alabama. § 5-19-1 *et seq.* Except as provided in section 5-19-31, the Mini-Code's restrictions apply to consumer loans whether the creditor is licensed under the Mini-Code or not. *McCartha v. Iron and Steel Credit Union*, 373 So. 2d 328, 331 (Ala. Civ. App. 1979). Therefore, the Mini-Code's restrictions on consumer home loans also apply to the loans closed with the assistance of mortgage brokers.

The Mini-Code limits the types and amounts of fees that may be charged to consumers in home loans. The Mini-Code does not specifically authorize fees paid by consumers to mortgage brokers. However, prior to passage of the Mortgage Brokers Licensing Act, the Department allowed mortgage brokers to be paid under the Mini-Code's five-points limitation. § 5-19-4(g). Section 5-19-4(g) allows creditors to charge and collect from borrowers a maximum of five percent of the original principal balance of a home mortgage as fully earned, prepaid points. Any fees charged and retained by lenders not otherwise enumerated in the Mini-Code, including fees paid to mortgage brokers, are subject to this five-point cap. Because the Mortgage Brokers Licensing Act is silent in regards to the amount of fees that mortgage brokers may charge, the Department continues to apply the Mini-Code's five-points limitation to mortgage brokers. Therefore, mortgage brokers may not charge and collect from consumers more than five percentage points, inclusive of any "points" retained by the lender.³

Another pertinent issue to mortgage brokers arising under the Mini-Code for consumer home loans is the Mini-Code's prohibition against prepayment penalties. § 5-19-4(c). Prepayment penalties are additional fees borrowers must pay if they pay-off a loan early. Generally, Alabama is a "no prepayment penalty" state. However, there are some limited exceptions found in state law when a prepayment penalty may be assessed on home mortgages. The exceptions under state law are clarified in Mini-Code regulation § 155-2-2-11(4), which states as follows:

Prepayment penalties may be provided for in a consumer credit transaction contract and assessed in a simple interest transaction only where the original amount financed is equal to or greater than \$2,000 and (a) the transaction involves an interest in real property and the creditor is either an approved mortgagee under the provisions of the National Housing Act or exempt from licensing under the Alabama Consumer Credit Act; or (b) the creditor is a trust institution or an exempt trust as described in Section 5-19-31(a). In all other situations, whether the consumer credit transaction is simple interest or pre-computed, the inclusion of a prepayment penalty is not permissible under the Alabama Consumer Credit Act.

In other words, under Alabama law a mortgage broker may close a home loan with a prepayment penalty when the loan amount is greater than \$2,000, if the lender is out-of-state and not required to



obtain a Mini-Code license or if the lender is a HUD-approved mortgagee. Mini-Code section 5-19-4(f) provides a list of other fees that may be charged in home loans, e.g. fees for title examination, title insurance, deed preparation, appraisals, etc.

Enforcement and Penalties

The Mortgage Brokers Licensing Act delegates enforcement of its provisions to the Supervisor of the Bureau of Loans at the State Banking Department. § 5-25-16. Penalties for violations include license suspension or revocation; civil penalties of up to \$15,000 for "knowing" violations; and even criminal misdemeanor penalties of not more than one year imprisonment and/or a \$1,000 fine. § 5-25-14 (license revocation); § 5-25-16 (civil penalties); § 5-25-17 (criminal penalties).

The primary way in which the Department investigates violations of the Act is by examining a licensee's business records. § 5-25-9(b). The bulk of the Department's staff are loan examiners who go out in the field and personally visit each licensee. They all carry state identification, which they show upon entering a licensee's place of business for the first time. Each loan examiner works from an examination worksheet to organize the review. Examiners will sample a selection of the licensee's loan files to see if all the required documentation is present in each file and to check that the consumer has not been overcharged any fees. Licensees are expected to fully

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cooperate with the examination process. Licensees are charged \$100 per examiner per day for the examination. § 5-25-9(d). Once completed, an examination report is then forwarded to and reviewed by the supervisor. All licensees will then be sent a final report of examination written by the supervisor, which may include a demand for refunding any overcharges to borrowers.

Of the approximately 50 examinations of mortgage brokers that the Department has conducted thus far, only five have resulted in refunds to borrowers. All of these refunds were based on the licensee collecting brokers' fees in excess of the Mini-Code's five-points limitation. Other violations found thus far include: failure to keep copies of a borrower's complete loan file after closing; failure to provide new disclosures when there is a substantial difference in the original good faith estimate and the final loan offered; failure to date the original loan application; and submitting forged documents in connection with a loan. Licensees are counseled during the exam on the examiner's findings and the expectations of the Department.

The Department also investigates possible violations of the Act raised from consumer complaints. These complaints are handled by staff from the Department's central offices. As part of the investigation, Department staff will contact the licensee to obtain the relevant documents from the consumer's loan file. Again, all licensees are expected to fully and promptly cooperate with such requests. Before any penalties are assessed, licensees will be sent a formal notice and an opportunity for a hearing will be provided.

Finally, the Department has authority to promulgate regulations necessary for the enforcement of the Act. § 5-25-13. Generally, in order to promulgate a regulation, the Department must first publish proposed regulations in the *Alabama Administrative Monthly* for a 35-day comment period. Licensees will also be sent a courtesy copy of any proposed regulation for their review and

comment. The supervisor will consider all written comments before issuing the final rule. No regulations have yet been promulgated under the Act.

Conclusion

Passage of Alabama's new Mortgage Brokers Licensing Act puts the mortgage broker industry under regulation for the first time in Alabama. By requiring mortgage brokers to be licensed, to take continuing education classes, to maintain records, and to comply with specific duties and restrictions, it is hoped that the industry can become more educated and thus more professional. By authorizing the State Banking Department to conduct field examinations of licensees, it is hoped that the "bad apples" can be weeded out to minimize mortgage fraud and predatory lending. Ultimately, Alabama's

consumers and lenders are expected to benefit from the new Act. ■

Endnotes

1. National Association of Mortgage Brokers, "Wholesale Access: Mortgage Brokers 2000" (July 2001 study, available at www.namb.org).
2. In "table-funded" loans, mortgage brokers close the loan with their own name listed as the creditor, but the loan is immediately assigned to a wholesale lender that actually provides the funds for the borrower's mortgage loan. Unlike "mortgage brokers" with *bona fide* warehouse lines of credit, mortgage brokers that "table fund" loans never use their own money to fund the borrower's mortgage loan. See HUD's *RESPA Statement of Policy 99-1*, "Regarding Lender Payments to Mortgage Brokers."
3. Mortgage brokers are also sometimes paid by lenders. The Mortgage Brokers Licensing Act is silent in regards to these "yield spread premiums," except that a mortgage broker must disclose in writing to the borrower any such arrangements. Otherwise, payments of yield spread premiums are governed by HUD and federal law. See RESPA, 12 U.S.C. § 2607; Reg. X, 24 C.F.R. § 3500.14.



V. Lynne Windham

V. Lynne Windham is associate counsel with the State Banking Department. She received her B.A. and M.P.A. from the University of Alabama at Birmingham and her J.D. from the University of Alabama School of Law.

Howell Heflin Presents The Maud McClure Kelly Award

Orange Beach, Alabama • July 19, 2002

The individual we honor is a superb jurist whose accomplishments and contributions have benefitted hundreds of thousands of Alabamians through her leadership role in the progressive development of the common law of the state and courageous application of constitutional provisions to prevent discrimination or undue harm to the rights of women, blacks, the needy, disadvantaged, businesses, workers and the injured during the turbulent years of the 1970s, 1980s and 1990s.

Her achievements as an extraordinary legal secretary, a superb law student, a skilled lawyer, competent corporate counsel, a scholarly law professor, and remarkable jurist signify successive rungs of the achievement ladder as she climbed toward legal and judicial preeminence.

As a firm believer in feminine causes, whose quiet demeanor and intelligent expressive ways seem never to threaten her male counterparts, she became a trail blazer, a role model, a legend and, yes, a heroine to thousands of women who have profited by the doors she has opened, and helped to keep open, in a male-dominated profession.

She is a woman who has lived a full life as a homemaker, who was a loyal, caring and encouraging wife to her recently departed, successful lawyer-husband, and devoted mother who has lived to see her daughter follow in her footsteps as a great lawyer.

Janie Ledlow Shores entered this world in Butler County about three miles from Georgiana on a farm in 1932. Janie was working in the strawberry fields at age five. She moved to Loxley in Baldwin County when her father found employment in Mobile after the beginning of World War II. She worked in the potato fields and sheds to earn money to buy school clothes.

At Robertsdale High School she developed excellent skills as a typist and as a shorthand sentence-taker. After graduation she went to an employment agency and it arranged an interview with a truly outstanding lawyer in Mobile, Vince Kilborn, Sr. She phoned for an appointment. It was a Saturday and he answered the telephone himself. He said, "Come on now." After testing her skills for several hours, he gave her a job at the prevailing rate of \$100 a week.

Janie has said many times that Vince changed her life. Mr. Kilborn had a fine law practice with many varied clients, including the Catholic Diocese of Mobile and Bishop Toolen, personally. Vince observed that Janie had unique and achieving abilities. He told her that she should further her education, and he then began to urge her to study to become a lawyer. Her standard for work then, and throughout her life, was:

"My experience has convinced me that if you get there first, leave last, and don't make any mistakes, you will ultimately be rewarded."

After four years with Vince Kilborn, Janie decided that she could become a lawyer. After completing the three-year pre-law



Dawn Hare, left, and Caryl Privett, right, congratulate Janie Shores on receiving the Maud McClure Kelly Award.

admission requirement at Judson and the University of Alabama, Janie entered law school at the University of Alabama. In law school she made a superb academic record, became the editor of the *Law Review*, and the winner of the Phi Alpha Delta Moot Court Competition Award. Using her shorthand skills, Janie took down the law professor's lectures and made summaries of assigned cases and her notes. A bookstore engaged her to put her summaries in a merchantable form. There, these were the best sellers of law publications for a number of years.

When Janie worked with Vince Kilborn, the only woman lawyer she knew in Mobile was a court reporter. When she entered law school, there were only five female students. When she graduated in 1959, it was tough for women to succeed in the practice of law. In fact, no women were permitted on juries until seven years later in 1966.

Upon graduation from law school, Justice Robert T. Simpson asked Janie to be his law clerk. He had a fine female law clerk, Margie Sparks, previous to Janie's clerkship and was well pleased with her work. When Janie practiced in Selma, it was the custom that the newest member of the bar was to be the secretary of the local bar association. But the Selma bar had to change its bylaws to strike the word "male" from the requirements that officers had to be "white male members of the State Bar in good standing."

When Janie became a member of the faculty of Cumberland she was the first female law school teacher in the state and one

of the first in the South. Vince Kilborn, upon learning of her faculty selection, remarked "she has made both of us proud."

While at Cumberland, Janie co-authored two books, *Cases and Materials on Law Pleadings in Alabama* with C. Bankester and J. Harrell (Banner Press, 1966) and *Alabama Pattern Jury Instructions—Civil*, working with judges Ingram Beasley, Bill Sullivan and the other members of the committee (Lawyers Cooperative Publishing Company, 1974). I believe she was probably the first woman lawyer in the South to author or co-author a legal book. I am reasonably sure that would be true in regard to the state of Alabama. Janie wrote numerous *Law Review* articles. She was an excellent law professor and was honored when the moot court competition began to bear her name. She campaigned throughout the state, particularly with women's groups, to support the new Judicial Article. Shortly after being selected to the faculty, Professor Shores went back to school earning her AB degree from Samford.

At the urgings of a large number of lawyers, including myself and many of her former law students, she offered herself as candidate for the Supreme Court of Alabama, 1974, and was overwhelmingly elected. She became the first female justice on the Alabama Supreme Court and the third in the nation on a state highest court. She took the oath of office in January 1975 and she served on the supreme court for 24 years.

There are 1,362 opinions that bear her name. She also authored many *per curiam* opinions that do not bear her name. She was a workhorse and helped some slower or lazy members of the court catch up with their assigned cases toward the end of a term in order that the court could declare that it was current. In fact, she wrote opinions that bear their names.

Janie was unafraid to tackle the heated and controversial questions facing the court. At all times, she was a staunch defender of the constitutions of Alabama and the United States. Often, Justice Shores demonstrated her concern for the preservation and protection of a defendant's constitutional right to due process of law. She has an innate ability to tell right from wrong. As a member of the court, she continued what she had done during her law professor days by publishing writings in numerous law reviews, bar journals and other legal periodicals. Her article entitled "The Alabama Experience Over the Past Five Years" was published in 1977 in the *New York State Bar Journal*. Her speech at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice, (also known as the Roscoe Pound Revisited Conference) in St. Paul, Minnesota in 1976 was published in *U. S. Law Week*.

She was one of a few state jurists who was selected for a summer and correspondent learning course. Upon completion she was awarded an LLM degree by the University of Virginia.

While I served on the court with Janie, it came through loud and clear that she had the brightest mind of anyone on that court, and I might say there were some truly highly intelligent members of the court.

During the time she served on the court, Janie never lost sight of the fact that she should eliminate barriers to equal opportunity for women. One of her opinions struck down an Alabama statute that denied a wife the full use of her lands without the assent and concurrence of her husband.

During the Clinton Administration, I had the honor of submitting her name to the President for a vacancy on the United States Supreme Court and the pleasure of talking to him per-



Carol Ann Smith, Janie Shores and ASB President-Elect Bill Clark at awards luncheon honoring Shores

sonally about her fine qualifications. He was greatly impressed and listed her name in a short list of possible nominees. However, he nominated Ruth Bader Ginsburg. Later President Clinton nominated Janie and she was confirmed by the U. S. Senate to be a member of the Board of Directors of the State Justice Institute, a federal agency that makes grants for innovative ideas, programs and projects designed to improve the administration of justice in the states.

As a homemaker, Janie loved to cook and sew and enjoyed gardening. She was a caring and encouraging wife to her late, successful-lawyer husband who was seriously ill the last years of his life. Janie was a devoted mother who has lived to see her daughter, Laura Scott Shores, graduate with honors from Smith College and the University of Chicago Law School and who is continuing her mother's footsteps in pursuit of law as a partner in the large law firm of Howrey & Simon in Washington, DC after clerking for Judge Robert Vance. Recently, Laura was a part of the legal defense team that appeared before the U. S. Supreme Court in the Webster Hubbell case. However, it is hard for me to imagine Janie ever pushing a baby carriage.

We are not here to canonize Janie Shores, for she was no saint. She had her faults as we all do, for she was human. Sometimes her language was quite salty—so salty that it could make a seaman first class blush.

When she first went to Birmingham, she sought jobs with all the major law firms and legal departments, but was turned down until she finally got a position within the legal department of Liberty National. While she was hunting a job, she heard there was a vacancy in the legal staff of a major corporation in Fairfield. She went out and talked to the head lawyer who told her that he "didn't think it would be appropriate for a woman lawyer to work there because the language that she would hear would not be very lady-like." On her way back to Birmingham, Janie remarked to a companion who had gone with her with words like this, "If the chauvinist S of B had worked in the potato fields of Baldwin County, then he would really have a vocabulary of profane language."

While she exhibited collegiality with the members of the court, sometimes, in private, she would castigate one of her brother jurists after a heated conference better than an alligator chewing on a frog, but it was only a temporary verbal explosion. Shortly thereafter, she forgave him for whatever caused her displeasure.

I think it would be appropriate to let you know what some women lawyers in the state have expressed about Justice Shores. Helen Kathryn Downs wrote:

"The primary reason that Justice Shores has always been a role model for me is her remarkable strength. I have heard it said that she has never been intimidated by anything, and I find that to be an apt description. She has not only hurdled straight over any obstacles in her path, she has done it in such a way as to carve out avenues for women to follow behind her. . . She has single-handedly created opportunities for more women to engage in the private practice of law, advance in the academic hierarchy at area law schools, and serve at the highest levels of the judiciary."

Celia Collins stated ". . . Justice Shores blazed a trail where no woman in the state had traveled before her."

Caryl Privett expressed these words: "As the first woman to be elected to the Alabama Supreme Court, Justice Shores served as a role model for women lawyers. To have a woman serving on our highest court assisted young women lawyers in gaining acceptance in the courtrooms of our state."

She has been recognized with "The American Heroine

Award" by *Ladies Home Journal* in 1984, as one of the top ten women of 1990 by the *Birmingham Business Journal*, and as one of the top graduates at the University of Alabama in 1993, and has received honorary doctoral degrees from the University of Alabama, Judson College and Jones School of Law.

In 1998, Janie was honored by the Board of Commissioners of the Alabama State Bar when she announced her retirement.

If historians give the impact of the judiciary its proper due, then Justice Janie Shores will undoubtedly be counted among the greats of American women. It is generally thought that historians rank Helen Adams Keller and Julia Strudwick Tutwiler as being the most outstanding women of Alabama for their personal accomplishments. While Helen Keller was best known primarily for her triumphs over adversity, she was also an activist for improving government for the benefit of individuals. She was labeled by conservative reactionaries of her day as "a socialist." Tutwiler's reform contributions to education and prison conditions caused advocates of the then-status quo to refer to her as "a flaming liberal from Vassar." Justice Shores has her detractors, but all shakers and movers for the good of society do.

In my judgment, the name of Janie Ledlow Shores should be inscribed along with Helen Adams Keller and Julia Strudwick Tutwiler at the top of the list of Alabama's great women. ■

Notice of Election

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

President-Elect

The Alabama State Bar will elect a president-elect in 2003 to assume the presidency of the bar in July 2004. Any candidate must be a member in good standing on March 1, 2003. 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, 2003. 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 2003 *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 13, 2003).

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th, place no. 1; 9th; 10th, place no. 1, place no. 2, place no. 5, place no. 8, place no. 9; 12th; 13th, place no. 2; 15th, place no. 2; 16th; 20th; 23rd, place no. 2; 24th; 27th; 29th; 38th; and 39th.

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 2003 and vacancies certified by the secretary no later than March 15, 2003.

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 25, 2003).

Ballots will be prepared and mailed to members between May 1 and May 15, 2003. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 30, 2003) to the Alabama State Bar.

JANIE L. SHORES

Receives the Maud McClure Kelly Award

I am profoundly honored today, not only to be the first recipient of the to-be annual award which honors Maud McClure Kelly, the first woman graduate of the University of Alabama School of Law, but also to have it awarded by the Women Lawyers Section of the bar. I am proud of the fact that there are now women lawyers in Alabama sufficient to make up a section of the bar. Back when I was first attending the annual Alabama Bar Convention, Miss Nina Miglionico, Phyliss Nesbitt, Florence Burke, Annie Lola Price, Miss Rosa Gearhart, and only a few others made up the women's section. We did not constitute a significant voting block back then to warrant the kind of attention you should be getting now.

I am also honored to have Bill Baxley, who should have been Alabama's first "New South" governor, and who did bring national praise to Alabama for his courageous pursuit of justice for all Alabama citizens, not just its white citizens, as its youngest attorney general. Later, as lieutenant governor, he accomplished what no other had been able to accomplish. He was able to pass through the legislature a new, modern, equitable constitution for the state to replace the much maligned, but not overly-maligned, 1901 constitution. That constitution was submitted to the people for approval, but in a decision by the supreme court, over the well-reasoned, correct dissent of three of the justices, the court stopped the counting of the votes and ruled that the people in an open, free election did not have the right to adopt an entire constitution. I still dissent. Some thought the decision was influenced by gubernatorial considerations. I do not know whether that is true or not, but it explains the result better than the authority cited in the majority opinion.

As lieutenant governor, Bill Baxley had the courage and the will, not to mention faith in the citizens of Alabama, to try to right the wrongs deliberately written into the 1901 document. We are still living with that document, which in many respects is as disgraceful today as it was a century ago.

The only major constitutional achievement in this century resulted because of the will and commitment of Howell Heflin. A

new Judicial Article replaced the old Judicial Article to the 1901 Constitution in 1973. It happened because then-Chief Justice Howell Heflin refused to believe that it could not be done. He was willing to assume the leadership required to get it done, and to cajole, persuade, pester, compromise where necessary, anybody or anything that stood in the way. Almost 30 years later, the remainder of the constitution remains the same. Just last spring, the lead-



Janie L. Shores, recipient of 2002 Maud McClure Kelly Award

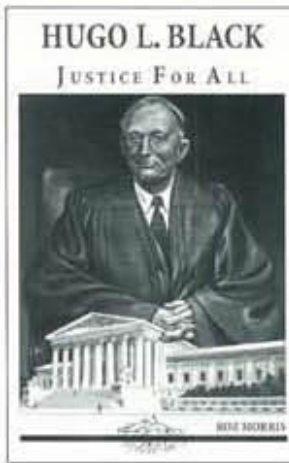
ers of state government—the Governor, Lt. Governor and Speaker of the House—all stated that their experience polling, or whatever they consider in taking a position, indicated that there was no wide public demand for a new constitution. I always thought political leaders were expected to lead, not follow. Had Howell Heflin waited until the public demanded a unified court system, we would still be operating under a hodgepodge of courts of different jurisdictions, with different rules of procedure, no administrative arm, no assurance of adequate funding, served by underpaid judges, with no retirement benefits. And, on top of that, there was not a single soul in Alabama who could tell you what it cost to run the court system. Because he had the courage to lead, all of that changed in 1973, and Alabama established a unified court system, which has served as a model for other states for more than a quarter of a century.

So, I am honored to be presented this award by Bill Baxley, delivering so masterfully Howell Heflin's remarks. I am

honored to count both of them as my friends. I know beyond a doubt that I would never have gotten to law school without the help and encouragement of my late friend, Vince Kilborn. I might point out that I have always gotten along with smart men, which accounts, no doubt, for the fact that I got along so well with all the judges on the Heflin court and all but one on the Torbert court.

Through his service in the Senate, Howell brought back to Alabama the respect we enjoyed when senators Lister Hill and John Sparkman represented us. He gained the respect and trust of senators from all over the United States, some of whom never understood a word he said. I think his mind works faster than he talks. It is true that some of my liberal friends were disappointed in some of his votes, and some of them might have felt that I had misled them in assuring them that he would always vote correctly. Of course, I knew how close he was when it comes to money, down right cheap. But, on the things that really matter to the country, he always did the right thing. I disagreed with him on some things, like his failure to fully appreciate the value of saving the snail darter, or some little fish that lives here, as well as a little rat that lives at Gulf Shores, but he voted correctly on federal judges, keeping some *off* and helping to get some *on* the bench. I see some of the latter here.

I am honored to be awarded the Maud McClure Kelly Award by my peers. That so many women are now successful lawyers, finally accepted as deserving members of the bar, brings me great joy. I am sure each of you continues to suffer slights from time to time, but I am equally sure that they are subtler than they once were, and I know that they will continue to diminish as you continue to grow in stature and in number. My life has spanned some exciting times. I was born during the Great Depression in one of the nation's poorest states, but I have been enriched by good and courageous friends, mostly lawyers and judges with whom I have shared some great experiences. When the history of our time and place is written, I know we will be treated well because I intend to write it. ■



Hugo L. Black: Justice for All

A Biography for Young Readers, by Roz Morris, paperback, Seacoast Publishing, 2001
128 Pages, Illustrated, \$7.95

Hugo L. Black: *Justice for All* is one of the initial offerings in an ambitious project: the development of a wide-ranging series of biographies of famous Alabamians for young readers. Published as a joint venture between Will Publishing, Inc. and Birmingham's Seacoast Publishing, the *Alabama Roots* biography series provides elementary school teachers with a powerful tool to aid in their efforts to breathe life into Alabama history. To date, other Alabamians featured in the series are Julia Tutwiler, Daniel Pratt, Emma Sampson, Bear Bryant, Hank Aaron, and Sam Dale, with books telling the stories of Booker T. Washington, George W. Carver and A.G. Gaston, among others, on the way.

Given the avowed mission of the *Alabama Roots* series, *Hugo L. Black* is, appropriately, written by Roz Morris, a third-grade teacher at Hoover's Shades Mountain Elementary. In *Hugo L. Black*, she has done a remarkable job in addressing the controversies, challenges and triumphs of Black's life and legal career in a manner fully accessible to young readers. Morris couples an engaging story-telling style that flows easily across her pages with an impressive attention to historical detail. No doubt it would have been easier for Morris to simply base her research on Black on the numerous works covering the senator and Supreme Court Justice already in print for adult readers. Morris, however, was not content with such an approach. Instead, she went farther, interviewing Black's descendants and accumulating a number of family photographs to grace her book's pages.

Morris picks up Black's story with his birth into the bleak, hardscrabble life of his mother, Della, in rural Clay County in 1886. From there, she traces Black's life through his precocious childhood in Ashland, detailing his early musical talents, a near-fatal bout with influenza, his delight in attending school, expo-



Hugo L. Black

sure to the ugly realities of small-town racism in the turn-of-the-century South, and a growing desire to become an attorney. Black's young life, however, contained its share of disappointment and tragedy—an alcoholic father, Black's brother's accidental death, and his failure to earn a teacher's certificate. Morris touches upon them all.

On a lighter note, Morris also tells of Black's half-hearted foray into a medical education in

Birmingham. Although a promising medical student, Black's unhappy experiences with the school's cadavers exemplified the old adage that a law student is "a bright young person who can't stand the sight of blood."

The latter two-thirds of *Hugo L. Black* recount Black's legal and political career. It follows him from his legal studies at the University of Alabama (where the University's yearbook predicted that he would one day be a justice on the United States Supreme Court) to a struggling law practice back home in Ashland and then on to his professional success in the industrial boomtown of Birmingham. From there, Morris writes of his election to the U.S. Senate and his eventual elevation to the Supreme Court. Although she ignores—understandably, given the political and social complexities of the case—Black's involvement in the infamous murder trial of Father Coyle, Morris confronts Black's controversial membership in the Ku Klux Klan head-on. In fact, Morris makes Black's famous radio speech addressing his Klan membership the climatic moment of her book.

Perhaps most impressively, at several points in Black's career, Morris manages to convey the challenges, drama and occasional humor of a trial to her readers. That is no small feat in a book written for fourth-graders. Her handling of Black's first wife, Josephine's, struggle with depression and her untimely death is equally adept.

If there is an obvious omission in *Hugo L. Black*, it is Morris' brief treatment of Black's nearly 34-year career on the Supreme Court in the book's epilogue. Nowhere in it is men-

tion of Black's role in such seminal cases as *Brown v. Board of Education*, *Gideon v. Wainwright* or *Katzenbach v. McClung*. Likely, this was a conscious decision on Morris' part. Those cases are difficult enough for first-year law students to digest (or at least they were for this reviewer), much less a fourth-grader. In a book aimed at young readers, perhaps the focus should indeed be on the path to greatness. If that was Morris' intended focus here, then she has succeeded admirably.

Morris is also the author of two other books in the Alabama Roots series, *Hank Aaron: Dream Chaser* and *Julia Tutwiler: Alabama Crusader*. *Hugo L. Black* and those books, as well as others in the series, can be obtained at local bookstores or ordered directly from Seacoast Publishing at (205) 979-2909. ■

William (Bill) H. Odum, Jr.
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Disability Inactive

- Huntsville attorney **Mark Bruce Flake** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective September 16, 2002. [Rule 27(c); Pet. 02-01].

Reinstatements

- Effective July 22, 2002, attorney **Tamara Ann Story (Knowles)** of Alexander City, Alabama was suspended from the practice of law in the State of Alabama for noncompliance with the 2001 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On August 20, 2002, Story (Knowles) came into compliance with the MCLE Rules and was reinstated to the practice of law in the State of Alabama. [CLE No. 02-144]
- The Supreme Court of Alabama entered an order based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar reinstating Birmingham attorney **Donald Towns Trawick** to the practice of law in the State of Alabama, effective June 13, 2002. [Pet. No. 02-03]
- On October 22, 2002, an order was entered by the Disciplinary Commission granting the petition of the Office of General Counsel for summary suspension of Birmingham attorney **Joe Wilson Morgan, III** based on his non-cooperation with the investigation of a bar complaint by the Alabama State Bar Office of General Counsel. After numerous correspondence to Morgan, he failed or refused to respond to the bar's request for information. Morgan offered a letter dated September 12, which he contended he wrote in response to the letter from the Birmingham Bar Grievance Committee, but which he says was inadvertently never mailed. The letter did not actually respond to the charges in a meaningful way. Further, even six weeks later, when appearing in support of his petition to dissolve the suspension, Morgan had not filed and did not bring with him any written answers to the charges. This matter was heard on October 29, 2002 before

Panel V of the Disciplinary Board. They ordered that Morgan's petition be conditionally granted under the following conditions: As soon as feasible, Morgan was to file with the General Counsel a full and complete response to the charges, addressing each and every allegation. If the General Counsel decided that the response was adequate, the petition would be deemed granted, and Morgan would be deemed reinstated. Following the oral announcement of the foregoing decision at the conclusion of the hearing on October 29, Morgan later filed his response, which the General Counsel did not object to. On November 4, 2002, an order was entered and, accordingly, Morgan's petition was granted, thereby reinstating him to the practice of law.

Disbarments

- The Supreme Court of Alabama adopted the order of the Disciplinary Board, Panel IV, disbarring Mobile attorney **Paul Martin Foerster, Jr.** from the practice of law in the State of Alabama, effective September 25, 2002. Foerster was found guilty of all charges, including rules 1.1 [competence], 1.3 [diligence], 1.4(a) and (b) [communication], 1.5(a) [fees], 5.5 [unauthorized practice of law], 8.1(b) [bar admission and disciplinary matters], and 8.4(c), (d) and (g) [misconduct], of the Alabama Rules of Professional Conduct. These offenses included willfully neglecting cases, in which Foerster had been paid a retainer, failing to communicate with his clients, misrepresentation or dishonesty, practicing law while his license was suspended, charging excessive fees, and failing to cooperate or respond to the bar investigation. Upon Foerster's failure to file any answer or other defensive pleading, default judgment was entered on February 26, 2002, so these allegations were deemed admitted. Foerster's seven prior instances of bar discipline were also considered in rendering the decision. [ASB nos. 99-79 (A), 99-184(A), 99-219(A), 99-237(A), 99-258(A), 99-299(A), 00-12(A), 00-47(A), and 00-96(A)]

- New Jersey attorney **Donald C. Vaillancourt** was disbarred from the practice of law in the State of Alabama effective September 20, 2002. The supreme court entered its order based upon the decision of the Disciplinary Board disbarring Vaillancourt as reciprocal discipline pursuant to Rule 25(a), A.R.D.P. This discipline was based upon the July 15, 2002 order of the Supreme Court of New Jersey disbarring Vaillancourt from the practice of law in the State of New Jersey based upon his plea of guilty to mail fraud in violation of 18 U.S.C.A. Sections 1341 and 2. [Rule 25(a); Pet. No. 02-02]

- On October 8, 2002, the Alabama Supreme Court entered an order disbarring Birmingham attorney **Allen Eugene Perdue, Jr.** from the practice of law in the State of Alabama effective September 5, 2002, pursuant to Rule 23, A.R.D.P. Perdue entered a consent to disbarment dated September 5, 2002.

Perdue was convicted of bank fraud on September 19, 2001 in the United States District Court for the Northern District of Alabama. He was sentenced to serve 41 months in the custody of the Bureau of Prisons and to make restitution in the amount of \$176,165.86.

Perdue was again convicted of bank fraud on July 8, 2002, in the U.S. District Court for the Northern District of Alabama. He was sentenced to serve 24 months to run concurrently with the September 19th conviction, and to make restitution in the amount of \$61,291.68.

Perdue notified the bar of his convictions and, thereafter, entered a consent to disbarment.

Suspensions

- Montgomery attorney **Keith Ausborn** entered a conditional guilty plea to violations of rules 1.3 and 1.4(a), A.R.P.C., and was suspended from the practice of law in the State of Alabama for a period of one year. The board stayed the imposition of the suspension in order to allow Ausborn to make restitution in the amount of \$6,500 to the complainant on or before April 18, 2002. The board further ordered that the suspension would be suspended and abated upon payment of restitution

and that Ausborn would receive a public reprimand without general publication and be placed on probation for a period of two years. Ausborn made restitution to the complainant in a timely manner.

Ausborn was retained to recover damages for injuries that the complainant received in a motor vehicle accident that occurred on April 30, 1996. Ausborn filed suit, but was not able to obtain service on the defendant. On November 1, 1997, Ausborn was suspended from the practice of law in the State of Alabama for a period of 91 days. Ausborn informed the complainant about the suspension, but encouraged her not to terminate him and to allow him to remain as her attorney, promising to complete her case when his suspension was over. Ausborn represented to the complainant that he expected to be reinstated in February 1998 and that no action would be necessary on her case prior to that time. Ausborn was not reinstated in February 1998. During his suspension, the court indicated that the case would be dismissed for failure to prosecute due to lack of service. During this time, Ausborn did not communicate with this client concerning the matter.

On June 3, 1998, when the court ordered that service be obtained within 14 days or the case would be dismissed, Ausborn caused a summons to be issued to a different address, even though he had not been reinstated to the practice of law at that time. The summons was returned for failure of service and the case was dismissed on July 9, 1998. [ASB No. 99-18(A)]

- On August 14, 2002 the Disciplinary Commission of the Alabama State Bar entered an order dissolving **William E. Friel, II's** summary suspension from the practice of law. The summary suspension was imposed by the Disciplinary Commission of the Alabama State Bar on April 19, 2002 because of Friel's failure to respond to requests for information from the Alabama State Bar during the course of a disciplinary investigation. The dissolution of the summary suspension was part of a conditional guilty plea submitted by Friel in four pending disciplinary cases. In ASB No. 02-38(A),

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Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

Maybe they're telling you it's none of your business.

It is.

People entrenched in alcohol or drug dependencies can't see what it is doing to their lives.

You can.

Don't be part of their delusion.

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For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.

Friel pled guilty to violating rules 1.3, 1.4(a) and 8.1(b), A.R.P.C. Friel admitted that he failed to file a brief in the Alabama Court of Criminal Appeals on behalf of a client and that he did not respond to requests for information during the investigation of the complaint. In ASB No. 01-311(A), Friel pled guilty to violating rules 1.3, 1.4(a) and 8.1(b), A.R.P.C. and agreed to make restitution to the complainant in the amount of \$600. Friel admitted that he was hired to file a Chapter 7 bankruptcy and was paid a \$600 fee, but did not file the bankruptcy. In addition, Friel did not respond to requests for information from the investigator for the local grievance committee of the Birmingham Bar Association. In ASB No. 01-158(A), Friel pled guilty to violating rules 1.3 and 8.1(b), A.R.P.C. Friel admitted that he failed to file a brief in the Alabama Court of Criminal Appeals on behalf of a client and did not respond to requests for information during the investigation of the complaint. In CSP No. 01-773(A), Friel pled guilty to violating rules 1.3 and 1.4(a), A.R.P.C. Friel admitted that he was retained in July 2000 to represent a client in a divorce action and was paid \$500. Friel moved without notifying the client and did little or no work on behalf of the client. In addition to dissolving the summary suspension, the Disciplinary Commission ordered that Friel be suspended from the practice of law for a period of 91 days. However, the Disciplinary Commission suspended the 91-day suspension and placed Friel on probation for a period of two years. [Rule 20(a); Pet. No. 02-05 and ASB nos. 02-38(A), 01-158(A), 01-311(A) and CSP No. 01-773(A)]

- Point Clear attorney **Robert Bernard Wilkins, Jr.** was intermily suspended by order of the Disciplinary Commission of the Alabama State Bar effective October 9, 2002. Wilkins was suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel filed a petition pursuant to Rule 20(a), based upon Wilkins' being indicted in the United States District Court for the Southern District of Alabama for violating 18 U.S.C. Section 1708 [mail fraud].

The Disciplinary Commission further ordered that Wilkins be restricted from maintaining a trust account. [Rule 20(a); Pet. No. 02-11]

- Hoover attorney **Gary Wayne Abbott** was suspended from the practice of law in the State of Alabama for a period of 22 months by order of the Alabama Supreme Court. The supreme court entered its order based upon the findings and order of the Disciplinary Commission of the Alabama State Bar. The Commission further ordered that the suspension should be retroactive to September 2, 2000, the effective date of a 91-day suspension in ASB No. 00-115(A). Abbott made restitution in each case.

In ASB No. 01-55(A), the complainant hired Abbott to defend her brother in a sexual abuse case and paid \$10,000 of a \$15,000 fee. When Abbott was suspended, Abbott wrote the complainant and told her he was suspended, but stated that he would be reinstated in 91 days. Abbott referred the case to another attorney who told the complainant he would not make a court appearance without being paid the remaining \$5,000 she owed Abbott. Abbott did not respond during the bar's investigation of the complaint. Abbott pled guilty to violating rules 1.16(d), 8.1(b), 8.4(a) and (g), A.R.P.C.

In ASB No. 01-82(A), the complainant hired Abbott to represent her in a divorce. She paid him \$500, plus the filing fee. Abbott did no work in the matter and the complainant could not locate him. Abbott did not respond during the bar's investigation of the complaint. Abbott pled guilty to violating rules 1.3, 1.4(a), 1.16(d), 8.1(b), 8.4(a), and (g), A.R.P.C.

In ASB No. 01-174(A), the complainant and her husband hired Abbott and paid him a \$1,000 retainer to represent them concerning problems they were having with their new van and their inability to reach a settlement with the dealer. Abbott did not pursue their claims against the dealer or the manufacturer and, at the time they filed the bar complaint, had physical possession of their van at his home. After his suspension, the complainants learned that Abbott's files had been turned over to another attorney, but

were unable to obtain a copy of their file. They hired another attorney to handle the matter for them. Abbott did not respond during the bar's investigation of the complaint. Abbott pled guilty to violating rules 1.3, 1.4(a), 1.16 (d), 8.1(b), 8.4(a), and (g), A.R.P.C.

In ASB No. 01-175(A), the complainant retained Abbott to defend her on criminal charges and paid him \$1,250 of a \$1,500 retainer. Abbott did some work in the case and made appearances. However, he was suspended prior to conclusion of the representation. The complainant requested an account and a refund, but Abbott never responded. Abbott did not respond during the bar's investigation of the complaint. Abbott pled guilty to violating rules 1.3, 1.16(d), 8.1(b), 8.4(a) and (g), A.R.P.C.

On September 27, 2002, the Supreme Court of Alabama ordered Abbott reinstated to the practice of law in the State of Alabama, effective August 21, 2002. The supreme court's order was based upon a September 6, 2002 order of the Disciplinary Board of the Alabama State Bar reinstating Abbott pursuant to the provisions of Rule 28, A.R.D.P. [ASB nos. 01-55(A), 01-82(A), 01-174(A), 01-175(A) and Pet. No. 01-01]

- On August 26, 2002, the Supreme Court of Alabama adopted the July 9, 2002 order entered by the Disciplinary Board, Panel IV, suspending Anniston attorney **James Almwick Mitchell, Jr.** from the practice of law for 90 days, with 30 days to be served immediately, and 60 days to be held in abeyance, pending completion of a two-year probation. Said suspension became effective June 17, 2002. Mitchell was retained by Brenda Gholston to represent her in a divorce proceeding in September 1998. Gholston paid \$325 in cash to Mitchell's secretary, Mrs. Rudolph. Rudolph gave Gholston a receipt for payment of the attorney's fee. Thereafter, Gholston heard nothing from Mitchell, so she contacted him during the first part of 1999. Mitchell assured Gholston that everything was fine and he had her paperwork. Thereafter, Gholston received a telephone call from Mitchell's new secretary, asking her to come in because her

file had been deleted. A few months later, Gholston checked at the courthouse and was informed that no divorce papers had been filed. Toward the end of 1999, Gholston met with Mitchell and he informed her that Rudolph had taken some money from his office and he would follow up to get her divorce. Ultimately, Mitchell filed a complaint for divorce on September 7, 2000. Mitchell testified that Rudolph was terminated in December 1998, and because of her criminal activity, he lost approximately \$5,000, therefore, he had her prosecuted for theft. The board found Mitchell guilty of violating rules 1.3 and 1.4(a) of the Alabama Rules of Professional Conduct. Prior discipline was considered.

- Birmingham attorney **Edward E. Angwin** received a public reprimand without general publication for violating rules 1.3, 1.4(a) and 1.4(b), A.R.P.C. Angwin was retained in September 1995 to file suit against Memorex Telex for breach of a contract of employment. After an initial

investigation of the matter, Angwin obtained a \$20,000 settlement offer. His client declined the offer and advised that he would not take less than \$100,000. Thereafter, Angwin filed suit on behalf of his client and associated another lawyer to assist in the litigation. During discovery, counsel for Memorex Telex intimated that their client was experiencing financial difficulties which might result in bankruptcy. Angwin advised his client of this fact and told him that his potential claim might lose all of its value if that occurred. As suggested, Memorex Telex filed bankruptcy on October 15, 1996. Angwin received Notice of Suggestion of Bankruptcy from opposing counsel. Thereafter, Angwin did not file a claim on behalf of his client in the bankruptcy proceeding. Angwin also failed to communicate with the client regarding the status of the matter or to provide the client with sufficient, accurate information to allow him to make informed decisions regarding the representation. As a result, his client's

claims, whatever their merit, were forfeited without the client's informed consent. [ASB No. 01-248(A)]

- On September 6, 2002, Gadsden attorney **John Edward Cunningham** received a public reprimand with general publication. On June 24, 2002, Cunningham waived the filing of formal charges and pleaded guilty to the allegations of a complaint brought against him by his former client, Jamie Daniel. Discipline agreed to was a public reprimand with general publication. Cunningham represented Daniel in a divorce case. As part of the divorce settlement, her ex-husband was to continue making payments on her automobile. By agreement with the ex-husband, these payments were sent to Cunningham for transmittal to Daniel. In December 2001 and January 2002, Cunningham inadvertently gave Daniel insufficient funds checks for her auto payments. Later, a complaint was filed with the Alabama State Bar regarding this situation. Cunningham was provided with a copy of the complaint and was

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requested to respond to it in writing. In spite of numerous contacts by the bar, Cunningham failed to respond.

Because Cunningham was already on probation for failing to respond in another unrelated complaint, an interim suspension was ordered by the Disciplinary Commission. After Cunningham complied with certain requirements, the interim suspension was dissolved. Cunningham was continued on his probation of two years. Upon his plea, Cunningham was found guilty of violating Rule 8.1(b) [bar admission and disciplinary matters] of the Rules of Professional Conduct. [ASB No. 02-83(A)]

- On September 6, 2002 Sylacauga attorney **Michael Anthony Givens** received a public reprimand without general publication. Mr. McGhee hired Givens during December 2000 to file a divorce for him. He paid Givens \$615 for an uncontested divorce, to include fees for a process server in New York City, where the estranged wife lived. Givens did not file the divorce until March 13, 2001. During March and April 2001, Givens failed to adequately communicate with McGhee about his efforts to have the wife served. On April 2, 2001, McGhee paid Givens another \$160 for a process server in New York. Two weeks later, he called the process server's office and was told that they had not received any divorce papers from Givens, nor had they had any communication with him. On June 1, 2001, McGhee filed a complaint with the Alabama State Bar. Givens was sent a copy of the complaint on August 2, 2001 and asked to respond to it within 14 days. After several additional letters and calls from the bar, Givens finally submitted a response on October 10, 2001. The Disciplinary Commission found Givens's conduct in violation of rules 1.3 [diligence], 1.4(a) [communication], and 8.1 (b) [bar admission and disciplinary matters] of the Alabama Rules of Professional Conduct. [ASB No. 00-233(A)]
- **Frank M. Cauthen, Jr.** received a public reprimand without general publication for violations of rules 8.4(a), (c) and (g), Alabama Rules of Professional Conduct. The Disciplinary Commission also ordered

that Cauthen make restitution to his former law firm in the amount of \$7,512.17.

Cauthen was employed with a law firm. As an employee of that firm, he received case referrals from other attorneys within the firm, as well as attorneys from outside the firm. The firm's policy and practice was that any and all fees resulting from work performed by an attorney employed by the firm was the property of the firm. After Cauthen began working for the firm, the firm employed another attorney. That attorney brought with him active files from his former firm. The attorney made several attempts to settle one of the cases that he brought with him. He was not successful in negotiating a settlement with the adjuster assigned to the case. Thereafter, the attorney referred the case to Cauthen because Cauthen had been successful in negotiating with the adjuster on a previous case. During Cauthen's representation he used personnel, equipment, supplies and other resources of the firm. Cauthen was able to successfully negotiate a settlement. Prior to disbursement of the settlement, the attorney who brought the case into the firm told Cauthen that he did not intend to report the attorney's fee earned in the case to the firm. He also told Cauthen that if he did not want to report the fee, he would not say anything about it. Cauthen expressed concern that the settlement would appear in the firm's trust account and records. But the attorney assured Cauthen that he would use his trust account from his former firm to disburse the settlement. After receiving assurance that the attorney's fee would be concealed from the firm, Cauthen accepted his share of the attorney's fee and deposited it into his personal account without reporting it to the firm. [ASB No. 01-223(A)]

- Anniston attorney **Hugh Merrill Vardaman** received a public reprimand without general publication for violating rules 1.8(a) and 1.15(c), A.R.P.C.

A client, who was the brother of Vardaman's secretary, borrowed \$15,000 against his house. He was unable to make the payments and contacted Vardaman for help. In exchange for Vardaman's help, the client transferred the deed to the house to

Vardaman. Vardaman borrowed sufficient money to satisfy the first mortgage and prevent foreclosure. Vardaman and the client agreed that because he owed fees for prior legal services and for other loans, which he did not repay, Vardaman would receive additional proceeds from the new loan. Vardaman agreed to make payments on the loan and to pay the insurance and taxes until the client decided what he wanted to do with the house. The agreement was not reduced to writing and the transaction was not in compliance with other provisions of Rule 1.8(a), A.R.P.C.

Documents received from the closing attorney establish that the "sales contract" provided a purchase price of \$65,000, with receipt of \$20,000 earnest money acknowledged and \$45,000 due at closing. The HUD-1 statement established that the first mortgage of \$12,169.38 was satisfied and that the client should have received \$32,588.82. The closing attorney paid this amount to the client with two checks. A check for \$21,685.82 was made payable solely to the client and a check for \$10,903 was made payable to the closing attorney and the client. The \$10,903 check was the amount due from Vardaman to close the transaction. Obviously, the client paid this amount. In addition, Vardaman never actually paid the \$20,000 earnest money acknowledged in the "sales contract."

After the closing, Vardaman prepared a deed from himself to the client to be used in case of Vardaman's death. At some point, the client decided to sell the house. A friend of the client's was interested in the house and signed a lease with an option to buy. During the time that the friend was making arrangements to purchase the house, the client died. The client's sole heir was a minor child, the client's wife having died a few years earlier. The executor of the client's estate, who was also the guardian for the minor child, was forced to hire a lawyer to help him recover the assets of the estate from Vardaman. In conversations with that lawyer, Vardaman explained that if he was not able to sell the house, then he would deed the house to the client's estate and if he sold the house, then he would remit the proceeds to the attorney to hold in trust until such time as

the executor and guardian released Vardaman and his secretary from any liability arising out of the earlier transactions between Vardaman and his client. Vardaman eventually sold the house. However, he did not deposit the proceeds from the sale of the house in trust. He commingled the funds and treated them as his own.

Vardaman eventually paid \$40,000, less funeral expenses, to the attorney for the estate to hold in trust until a conservatorship could be established for the minor child. That amount represented all of the funds due the estate. [ASB No. 01-190]

- On October 24, 2001, the Disciplinary Commission of the Alabama State Bar determined that Bessemer attorney **Lonnie Anthony Washington** should

receive a public reprimand without general publication. Charlene Floyd of Bessemer was involved in an automobile accident on March 8, 2000. On March 12, 2000, she was contacted over the phone by Stephen Tutt, who stated that he was a "claim specialist" with the Washington Law Center. Tutt stated that he had obtained Floyd's name and number from a police accident report. He told Floyd that he wanted to help her get her car repaired and ". . . whatever else you are entitled to." Tutt met with Floyd the following day and gave her a business card, which clearly identified him as a "claim specialist" at the Washington Law Center. Over the ensuing weeks, Tutt proceeded to negotiate a settlement of Floyd's property damage claim for \$4,300. He arranged for the

repair of Floyd's vehicle under questionable circumstances. Later, Floyd learned that the insurance company had declared her car a total loss. When contacted by the Birmingham Bar Grievance Committee, Washington stated that he had no knowledge of Floyd or her insurance claim, and that he had no file on the case. Washington further stated that Stephen Tutt no longer worked for him. Stephen Tutt claimed that he received no money from this claim, but was merely helping Floyd because she was known to a friend of his. The Disciplinary Commission found Washington's specific actions to be violative of rules 5.5(b) [unauthorized practice of law] and 7.6 [professional cards of non-lawyers] of the Alabama Rules of Professional Conduct. ■

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