The cover of 'The Alabama Lawyer' magazine features a photograph of a red tugboat named 'FT. MORGAN' from New Orleans, LA, navigating through a narrow channel between wooden pilings. The sky is overcast and grey, with a few birds flying. The water is a murky greenish-grey with white foam from the boat's wake. In the foreground, there are large, rusted metal structures, possibly part of a pier or breakwater.

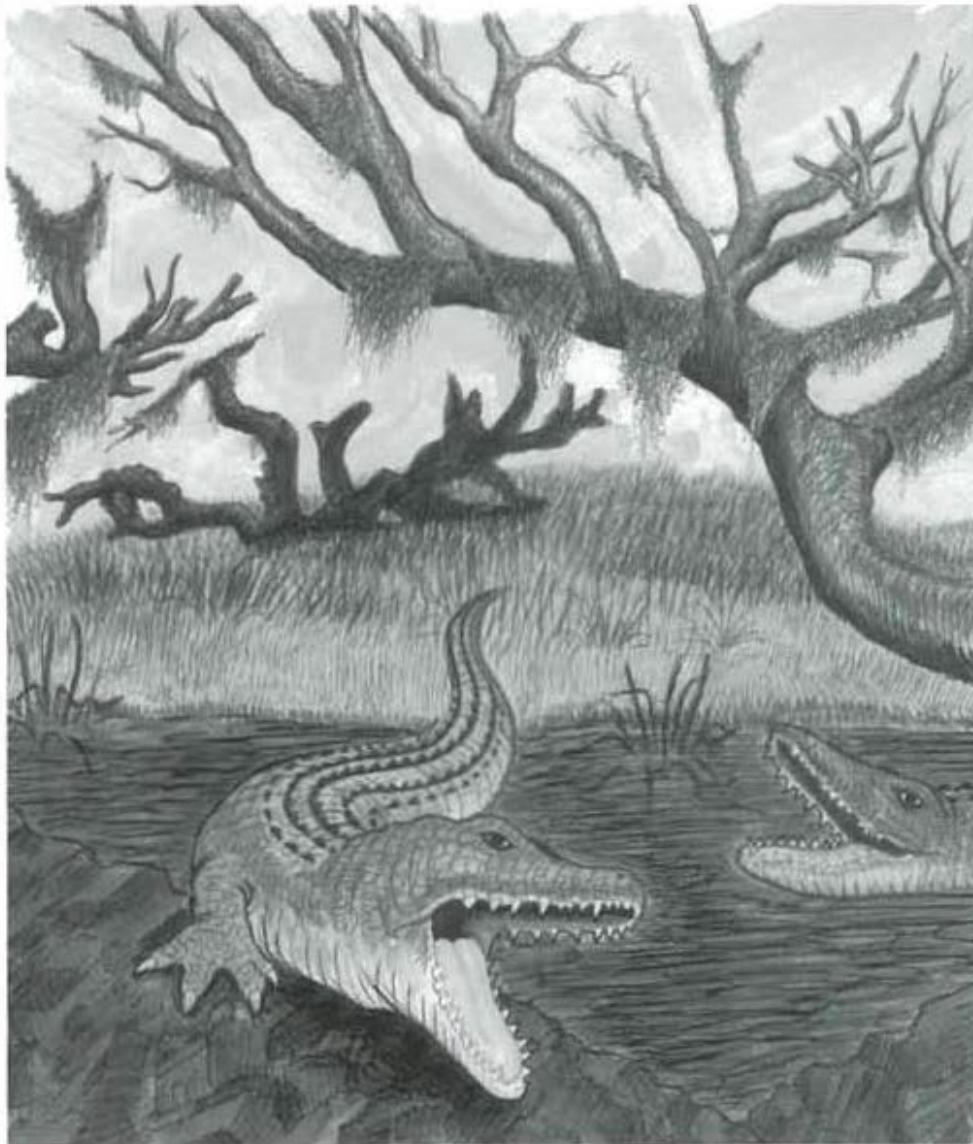
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January 2004

"Lawyers' Cases for Kids"
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old (ôld) ► *adj.* Made or acquired long ago; having lived or existed for a long time*

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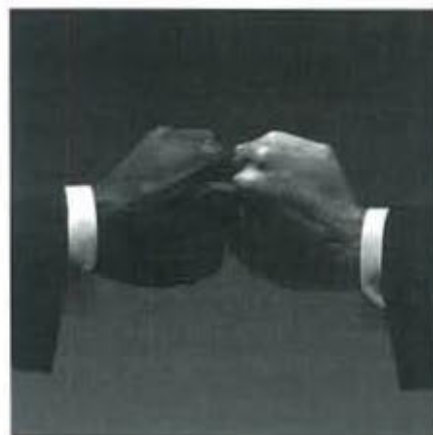


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On the Cover:

Mobile Bay Ferry Departing from Fort Morgan

The Mobile Bay Ferry carries vehicles and passengers between Fort Morgan and Dauphin Island, at the entrance of Mobile Bay in the Gulf of Mexico. Also visible are two offshore drilling platforms.

Photo by Paul Crawford, JD

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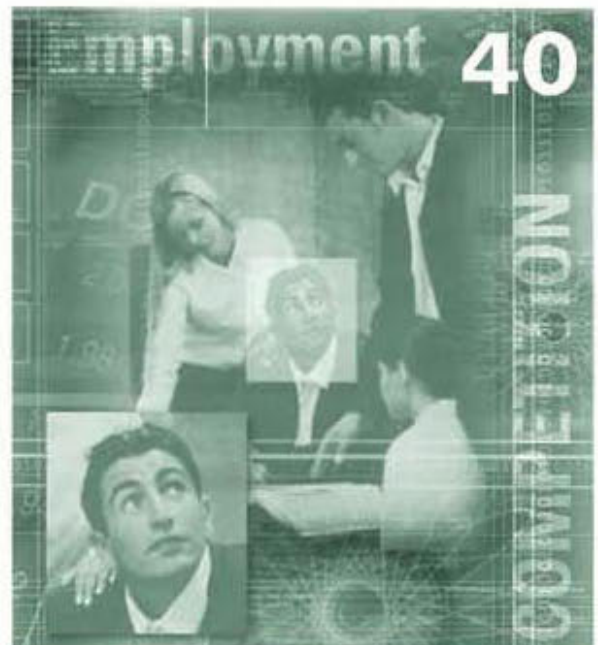
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Are footprints as foolproof as fingerprints?

The prosecutor in a capital offense case wanted to submit footprints taken inside a shoe as evidence. Two nights before the trial, the defense attorney received a Mealey's E-Mail News Report about a case that questioned the admissibility of this evidence.



The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender[®], including *Moore's Federal Practice*[®] on the LexisNexis[™] services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis[™] Total Research System—It's how you know.



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AL6619



By William N. Clark



William N. Clark

I was honored recently to have the opportunity to speak to the **Morgan County Bar Association** at their annual meeting. There are many distinguished lawyers in that association, but **John Caddell** clearly stands out. Mr. Caddell began the practice of law in 1933, and is 93 years old. Mr. Caddell told me, somewhat apologetically, that he spends eight hours a day in his office. He also mentioned that he is preparing for a jury trial! John Caddell is an outstanding lawyer and servant of the community and our profession. He is a member of the American College of Trial Lawyers, served as president pro tempore of the University of Alabama Board of Trustees, and, in 1951, was elected president of the Alabama State Bar. He epitomizes what we mean when we talk about "professionalism." We can be proud of the leadership that he and others have provided as a part of what Tom Brokaw called, "The Greatest Generation." We can be proud to be successors to the professionalism of "The Greatest Generation," but have we lived up to the high standards set by our predecessors?

Thirty-five years ago this past August I returned from a year as an advisor in Viet Nam to begin law school at the University of Alabama. At that time in polls of the public's perception of various jobs and professions, lawyers were rated near the top while the military was near the bottom. Thirty-five years later, the positions have reversed. Why? Why the dramatic change in the perception of the public regarding lawyers and the military? Perhaps the most fundamental change for the military was that after Viet Nam the senior leadership in the Army did the equivalent of a self-assessment. There was a return to recognition of the military as a profession—in the same sense as medicine, the practice of law and the clergy. To be a true professional is to have an allegiance to a higher calling: in the ministry, to God; in law, to the rule of

law; in medicine, to the protection of life; and in the military, dedication to the service and defense of our nation. Each of these professions requires learning the basic skills and the fundamental principles that are necessary to carry out that profession's mission. The professional knows not only how to do what his profession calls for, but why he or she does it, and the history of the profession, i.e., where it has been, and where it is going. Above all, though, the professional is committed to serve.

The Army did not set about to change its image for appearances sake. The Army set about to make fundamental changes to better enable it to carry out its mission. Improvements were made in training; core values were established for officers, NCO's and enlisted soldiers; and equipment was upgraded. As these goals were met, not only did the Army actually better perform its mission, it also became more professional. The Army focused on its mission and being prepared to perform that mission, rather than focusing on what others thought about it. In short, the Army focused on ensuring that its soldiers and units were ready to serve their nation, wherever called upon to go.

So, what happened to lawyers, to our profession? Certainly, legal training has improved, lawyers are generally competent in the use of technology, and all states have established rules of professional conduct. What's missing? One significant change has been the focus on the practice of law as a business rather than as a service profession. During that 35 years, when the Army tried to focus on management techniques learned in business, it soon discovered that there is a difference in management and leadership. A platoon leader can't manage a platoon up a hill.

The focus on business techniques and economic incentives may have improved the "bottom line" for lawyers, but has been detrimental to the law as a pro-

profession. At a recent meeting of the American Bar Association in San Francisco, one of the speakers commenting on the negative perception by the public of lawyers noted that there are over 800,000 Web sites which are devoted to lawyer jokes. Many state bars around the country have attempted to change that perception by having advertising campaigns to improve the image of lawyers. While such an approach has merit, perhaps rather than focusing on improving our image, we should recognize that the application of business techniques and technology to the practice of law is not necessarily equivalent to the service expected of us by our clients, and as professionals. Following appropriate business principles is not in and of itself a mistake. It is only when the focus on business overrides our passion to serve our clients, the public and the profession that problems arise. If your passion is for something else, if you have not already, you may eventually become dissatisfied with the law. Those who chose the law for economic reasons often become frustrated. In contrast, many lawyers who pursue it as an opportunity for service find the law to be exciting and challenging. Whether one is representing a corporation or an individual, real people and their lives are affected. They expect us to take them and their problems seriously. Serving our clients is the essence of what we do, but we must not forget our obligations to our communities, our profession and our families.

Several years ago, the Alabama State Bar initiated a program to enhance professionalism among lawyers in Alabama.

Currently, Cumberland and the University of Alabama law schools rotate the presentation of a program on professionalism to all new admittees. Lawyers from a variety of areas of practice present a day-long seminar. Among the comments received in the evaluations by the participants in the most recent program were concerns that in their brief time of practice they had seen lawyers who they thought needed a refresher course on professionalism. That comment reminds me of the admonition my mother often gave me as I went out the door, "Behave yourself, you never know who is watching." It is to be expected that young lawyers look to those already in practice for an example. It is important that we set that example in a positive and professional way. We should, however, try to do the right thing not just because someone is watching, but because it is the right thing to do.

A short course in professionalism is encompassed in what Georgia's commission on professionalism described as the "stop and think" school of professionalism. Too often today letters are written, e-mails sent and pleadings filed without reflecting on whether the decision we are about to make or the communication we are about to send is ethically appropriate, in the best interest of our client, and consistent with our goal of professional conduct. Civility between opposing lawyers should not be a goal, it should be a given.

Not only should our efforts at professionalism focus on opposing counsel, but also on our relationship with our clients.

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 2004 to assume the presidency of the bar in July 2005. Any candidate must be a member in good standing on March 1st, 2004. 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 1st, 2004. 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 2004 *Alabama Lawyer*.

Ballots will be mailed between May 15th and June 1st and must be received at the state bar by 5 p.m. on the second Friday in June (June 11th, 2004).

COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, place no. 3, place no. 6; 13th, place no. 3, place no. 4; 14th; 15th, place no. 1, place no. 3, place no. 4; 23rd, place no. 3; 25th; 26th; 28th; 32nd; and 37th.

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1st, 2004 and vacancies certified by the secretary no later than March 15th, 2004.

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 30th, 2004).

Ballots will be prepared and mailed to members between May 1st and May 15th, 2004. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 28th, 2004) to the Alabama State Bar.

Informal surveys done in Georgia reflected that too often certain client expectations of the lawyer/client relationship are not met in the eyes of the client. Things the survey reported clients expect included:

- At the beginning of the representation, an explanation of the process, the charges or fee arrangement, time expectation for resolution of the problem, alternatives to the court system;
- A full assessment of the case without "sugar coating";
- Listening to the client and treating the client with respect, compassion and sensitivity;
- Prompt return of phone calls; and
- Effective, competent and efficient representation completed in a timely manner.

In Georgia, the study concluded that there were "unfortunate trends of commercialization and loss of professional community in the practice of law which are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and of our system of justice, and a lack of regard for others and for the common good." The Georgia study went on to state:

As a community of professionals, we should strive to make the internal rewards of service, craft, and

character, and not the external reward of financial gain, our primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

Fred Gray, my predecessor as president of the Alabama State Bar, introduced "Lawyers Render Service," which has now been adopted as the motto of the Alabama State Bar. That truly is our challenge as lawyers, to remain true to that goal—service to our clients, to our profession, to our communities, and to our families. When we seize these opportunities for service we add fulfillment and meaning to our lives, and, incidentally, improve the public's confidence in and respect for our profession. I am excited about the opportunities for service we have as lawyers in Alabama in the 21st century, and satisfied that the Alabama State Bar is made up of lawyers committed to service. I suggest that we all try the "stop and think" approach to professionalism, and dedicate ourselves to putting into practice our new state bar motto, "Lawyers Render Service." ■

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15th, 2004. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

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

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



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By Keith B. Norman



Keith B. Norman

One Hundred Twenty-Five and Counting

The Alabama State Bar celebrates its 125th anniversary, or Quasquicentennial, this month. The records reflect that a preparatory meeting to form the association was first held in Montgomery on December 13, 1878. Following this meeting, a call was issued for each county bar to send a delegate to meet on January 15, 1879 for the purpose of organizing a state association. The organizational session was held in the chambers of the Alabama House of Representatives. The session concluded on January 20, 1879, with the adoption of a constitution and bylaws

for the Alabama State Bar Association. **Walter W. Bragg** of Montgomery was elected to serve as the association's first president until the first annual meeting set for the first Tuesday of December 1879. On February 12, 1879, the governor approved an act incorporating the Alabama State Bar Association. The 30 lawyers who had organized the state bar became its first members. At the association's first meeting on December 4, 1879, **E.W. Pettus** of Dallas County was elected as the state bar's second president.

The minutes of the association's early meetings reflect that the state bar was principally a social organization drawing together lawyers from across the state. The annual meetings also provided the opportunity for lawyers to present papers on subjects of intellectual and professional interest. Our present-day annual meetings likewise provide a convivial atmosphere for renewing old acquaintances and professional education. Although social functions and professional education still continue to predominate annual state bar meetings, today's state bar has evolved from its simple beginnings of social interaction to a complex service agency administering every aspect of the legal profession's licensure and regulation in Alabama.

The 1923 act of the legislature transformed the voluntary bar into the second integrated bar in the country. By this act, every lawyer licensed to practice law in the State of Alabama became members of the Alabama State Bar. The state bar was given the authority to carry out the rules promulgated by the supreme court. Thus, the state bar enforces the admission rules, rules of professional conduct, mandatory legal education rules, client security fund rules, and rules of specialization. As a self-regulated profession, the supreme court's rules are carried out by groups of

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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.

volunteer bar members, including the Character and Fitness Committee, the Board of Bar Examiners, the Disciplinary Commission, the Disciplinary Hearing Panels, the Disciplinary Appeals Panel, the MCLE Commission, the Client Security Fund Committee, and the Board of Legal Specialization.

I regularly compare the state bar to a "sandwich." Admissions and discipline, the two most well-known functions of the state bar, are like the two slices of bread while the other less well-known programs are like the meat between the two slices of bread. The Law Office Management Assistance Program, the Volunteer Lawyers Program, the Lawyer Referral Service, and the Lawyer Assistance Program are examples of programs that serve the members of the bar and represent the real "meat" of the bar. I realize that this analogy is simplistic, but these are the programs and activities that have helped the state bar become a more complete service agency by fulfilling its licensing and regulatory obligations to the public and its associational responsibilities to bar members.

The state bar has changed a great deal over the course of the last 125 years. The legal profession has likewise experienced great change during this time. The thing that has remained constant from 1879 until now, however, is the notion that our profession is one based on service. At its meeting last September, the Board of Bar Commissioners approved as a permanent motto for the state bar the theme of Fred Gray's year as president, "Lawyers Render Service." As we celebrate the state bar's Quasiquicentennial, let us continue our tradition of service for the next 125 years. ■

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>



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— Johnnie Cochran

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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

Janie Baker Clarke announces the opening of her office at 112 1st Street, West, Fort Payne. Phone (256) 845-5055.

Charles W. Edmondson, formerly of Azar & Azar, LLC, announces the opening of his office at 621 S. Perry Street, Montgomery. Phone (334) 265-9034.

Steve R. Graham, former prosecutor and district attorney for Lauderdale County, has announced his retirement and his election to become a supernumerary district attorney. He has opened an office for the general practice of law at 210 W. Tuscaloosa Street, Florence. Phone (256) 767-3050.

Bradley M. Hale announces the opening of his office at 14315 Court Street, Moulton. Phone (256) 905-4991.

Marilyn May Hudson, LLC announces the opening of her office at The Anniston Office Center, 1316 Noble Street, Suite 1-I, Anniston. Phone (256) 235-9105.

Kelly R. Knight announces the opening of offices at Two Perimeter Park South, Suite 315, East, Birmingham. Phone (205) 967-6304.

Joseph C. Kreps announces the opening of his office at 1313 Alford Avenue, Birmingham. Phone (205) 823-0894.

Jeffrey C. Robinson announces the opening of his office at 719 Broad Street, Selma. Phone (334) 877-1011.

James Tassin announces the opening of his office at 1015 Highway 72, East, Tuscumbia. Phone (256) 383-0802.

Among Firms

The **Alabama Secretary of State's Office** announces that **Trey Granger** has been selected to serve as general counsel for the agency.

Alford, Clausen & McDonald, LLC announces that **Mignon M. DeLashmet, E. Larkin Hatchett, Charles C. Wimberly, III** and **D. Brian Murphy** have joined the firm as associates.

Benton & Centeno, LLP announces that **Travis B. Holly** has become an associate.

Daniel E. Boone announces that **Jasper Dane Perry** has joined his firm as an associate.

Bradley Arant Rose & White, LLP announces that **John D. Bond, III** has joined the firm as a partner.

Bush Intellectual Property Law Group, LLC announces that **Mark D. Erdberg** has joined the firm as an associate and that **Gerald M. Walsh** has become *of counsel*.

Campbell & Baker LLP announces that **D. Keiron McGowin** has joined the firm as an associate.

Campbell, LaBudde & Weston LLC announces a name change to **T. David Weston, LLC**. **Harvey Campbell** and **Frank LaBudde** will serve as *of counsel* to the firm.

Capell & Howard, PC announces that **John H. Roth** has become an associate of the firm.

Leon M. Capouano, Paul L. Beckman, Jr. and **Ronald W. Russell** announce the formation of **Capouano, Beckman & Russell, LLC**. Offices are located at 560 S. McDonough Street, Suite C, Montgomery. Phone (334) 834-4808.

Carr, Allison announces that **Alan K. Bellenger, Daniel A. Feig, Stephen N. Fitts, III, Elizabeth Jackson, Cody D. Robinson, and Matthew P. Stephens** have joined the firm as associates and are located in the Birmingham office. **James C. Morris** has become associated with the firm in the Mobile office.

John W. Clark, Jr., Judith E. Dolan, Wayne Morse, Jr., Shane M. Oncale, and Barry W. Hair announce the formation of **Clark, Dolan, Morse, Oncale & Hair, PC** and that **Bradley J. Smith, Lucy W. Jordan** and **Charles D. Stewart, Jr.** have joined the firm as associates. Offices are located at 800 Shades Creek Parkway, Suite 850, Birmingham. Phone (205) 397-2900.

Clark, Scott & Sullivan, PC announces that **French McMillan** has joined its Mobile office as an associate.

Estes, Sanders & Williams, LLC announces that **Thomas Claiborne Williams** has joined the firm as an associate.

Fidelity National Title Insurance Company of New York announces that **Jerome Stephen Grand** has become assistant vice-president and Alabama state counsel.

Friedman & Downey, PC announces that **Keith M. Galligan** and **Daphne S. Jackson** have joined the firm as associates.

Gidiere, Hinton & Herndon announces that **H. Robert Johnston** has joined the firm as an associate.

James Truett Gullage, Jeffrey Gerald Tickal, Lauryn Akens Lauderdale and Kent Michael Lauderdale announce the formation of **Gullage, Tickal, Lauderdale & Lauderdale, LLP**. Offices are located at 700 Avenue D, Opelika. Phone (334) 749-5115.

Hand Arendall announces that **Michael C. Niemeyer** has joined the firm as a member, and **S. Leanna Bankester, Robert D. Hancock** and **W. Bradley Smith** have become associates.

R. Lyle Harmon and Kyle C. Barrentine announce the formation of **Harmon & Barrentine, LLC** with offices located at 1901 Cogswell Avenue, Suite 2, Pell City. Phone (205) 338-5350.

Hill, Hill, Carter, Franco, Cole & Black, PC announces that **Scott M. Speagle** has joined the firm as an associate.

Hornsby, Watson, Hornsby & Blackwell announces that **Jennifer L. McKown** has been named a junior partner of the firm.

Jackson Walker, LLP announces that **James L. Pledger** has become senior counsel in the Austin, Texas office.

Johnston, Barton, Proctor & Powell, LLP announces that **Kenny M. Williamson, Alan D. Mathis** and **Nicole S. Fox** have become associates of the firm.

The Law Office of Sandra H. Lewis, PC announces that **Karen L. Mastin** has become associated with the firm.

Lyons, Pipes & Cook, PC announces that **Bradley R. Sanders, Jr.** has joined the firm as an associate.

Massey, Stotser & Nichols, PC announces that **Richard A. Bearden** is now a partner in the firm.

Newman, Miller, Leo & O'Neal announces a name change to **Leo & O'Neal**.

The Robinson Law Firm, PC announces that **Laurie Suzanne Mize Henderson** has become a member of the firm.

Rushton, Stakely, Johnston & Garrett, PA announces that **James R. Dickens** has joined the firm as an associate.

Sirote & Permutt, PC announces that **Amanda Craft Hines** has become associated with the firm.

Smith, Spires & Peddy, PC announces that **Robert B. Stewart** and **Steven M. Brom** have joined the firm as associates.

Starnes & Atchison LLP announces that **Nicole M. Liechty, Sonya U. Sheth, William Tipton Johnson, L. Ben Morris,** and **Robin W. Beasley** have joined the firm as associates.

Gregory B. Stein and **Henry Brewster** announce that **Mary E. Pilcher** has joined the firm as a member, and the firm name is now **Stein, Brewster & Pilcher, LLC**.

Stephens, Millirons, Harrison & Gammons announces that **Robert J. Wermuth** joined the firm as an associate.

Stites & Harbison of Atlanta announces that **Marianne Cosse Boston** has joined the firm. She is a 1991 graduate of the University of Alabama School of Law and a member of the Alabama State Bar.

Toffel & Altmann, PC announces that **E. B. Harrison Willis** has joined the firm as an associate.

Young, Young & Parks announces that **Valerie N. Hutchinson** has joined the firm as partner, and the firm will now operate under the name of **Young, Parks & Hutchinson**. ■

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G15	\$135	\$135	\$168	\$290	\$443	\$650	\$1,035
G20	\$168	\$170	\$225	\$373	\$575	\$863	\$1,418

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G10	\$185	\$185	\$230	\$375	\$535	\$930	\$1,495
G15	\$220	\$220	\$285	\$530	\$835	\$1,250	\$2,020
G20	\$285	\$290	\$400	\$695	\$1,100	\$1,675	\$2,785

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A1001(3-01)



Judge William Loy Campbell

Judge W. Loy Campbell of Scottsboro, a member of the Jackson County and Alabama State Bar, passed away on November 6, 2003 at the age of 75.

He was born November 26, 1927, the oldest of three sons of John Horace Campbell and Dot Blackwell Campbell. His parents were both school teachers in his younger years on a farm on Sand Mountain, and his father served three terms as tax assessor for DeKalb County. He attended school initially in Fyffe, Alabama and later at DeKalb County High School in Ft. Payne, where he graduated in 1946. Judge Campbell obtained his bachelor's and law degrees from the University of Alabama and opted upon graduation to begin the practice of law in Scottsboro in 1952.

His brother, H.R. Campbell, graduated from the University of Alabama School of Law and served two years in the Army before joining his brother in the practice of law in Scottsboro in 1955. His younger brother, John Paul Campbell, followed the path of his parents into the teaching profession.

The partnership of the Campbell brothers in the practice of law existed for some 20 years, during which time Judge Campbell served as an assistant solicitor for Jackson County from 1954 until 1962. He was elected to and served as a representative in the state legislature from 1962 until 1967. He also served as attorney for the Jackson County Commission from 1967 until 1975. In 1975, he was appointed by Governor George Wallace to a newly created second circuit court judgeship in Jackson County. He began his career on the bench serving with



John B. Tally and became the presiding judge of the circuit after the retirement of Judge Tally in 1982. He remained the presiding judge in the circuit until his retirement in 1997, his career on the bench spanning more than 21 years. During his tenure on the bench, he served as president of the Circuit Judges' Association in 1995 and 1996.

Judge Campbell was practicing law with his brother, Bunk Campbell, when he lost both of his legs as a result of a car explosion on December 4, 1972.

Confined to a wheelchair for the last 30 years of his life, he stood very tall in the judicial profession among his colleagues and the attorneys and litigants who appeared before him. Some his colleagues on the bench described him as having an acute grasp of the law, and knack for applying the law to common sense and a mental toughness and sense of humor that belied his physical handicap. In a 1995 interview, Judge Campbell said he never felt like giving up after he lost his legs. He attributed his perseverance to his upbringing. Judge Campbell stated, "Being in a wheelchair is not the worst thing that could happen to a person. My disability has given me a much better perception of life as well as an appreciation for it."

Judge Campbell is survived by his wife, Elizabeth Hall Campbell; his daughter, Ramona Collins; two stepsons, Donald Kennamer and Barry Kennamer; two brothers, H.R. Campbell and John Paul Campbell; and grandchildren Carson Collins, Ethan Collins and Tyler Kennamer.

—Don Word, president,
Jackson County Bar Association

Richard Lee Reed

Richard Lee Reed, a member of the Mobile Bar Association, died January 22, 2003 at the age of 52.

Mr. Reed, a native of Louisville, Kentucky and a longtime resident of Mobile, graduated from high school in Huntsville.

He received a bachelor's degree from the University of Alabama and later received a juris doctor degree from the University's School of Law. He also attended the University of Florida where he received certification as a tax attorney.

He practiced law the Pillans law firm from 1981 through 1997 and thereafter became general counsel for Southern Medical and Springhill Medical Center.

Aside from his law practice and representing Springhill Medical, Mr. Reed was an accomplished carpenter as testified to by numerous remodeling jobs

that he did on his home. He was also an avid golfer, loved football and was a very faithful Crimson Tide fan. He also served on the board of directors for Mainstreet Mobile and attended St. Ignatius Catholic Church.

Cecilia Wallace, head of Mobile's Springhill Medical Center, said, "He was a wonderful counselor, and he is going to be sorely missed."

Mr. Reed is survived by his wife, Cynthia White Reed; three children, Ann Taylor, Samuel Todd Reed and Richard Oliver Reed; his parents, Dr. Samuel F. Reed, Jr. and Ann Reed of Houston, Texas; and two sisters, Brenda Reed Beyer of Columbus, Ohio, and Linda Reed Carroll, of Houston.

—Michael D. Knight, president,
Mobile Bar Association

Alan B. Weissinger

Alan B. Weissinger, a Mobile lawyer, died Sunday, July 6, 2003 at the age of 87. He was born in Birmingham on August 19, 1915 and was educated in the public schools in Opelika. He attended Auburn University, obtaining both his undergraduate and master's degrees in business. He entered the United States Army on July 2, 1941 and was discharged on May 15, 1946 with the rank of lieutenant colonel. During his military career, he served in the China Offensive and was commander of a small base in China, which refueled planes for strikes in the war against Japan. He was awarded the Asiatic Pacific Campaign Medal. Following his honorable discharge, he attended the University of Alabama School of Law and graduated in January 1953.

Following graduation, Alan moved to Mobile and entered the private practice of law with Mylan R. Engel. He remained in private practice for approximately two years. In 1955, Alan joined Judge Walter B. Gilliard in forming Title Guaranty and Abstract Company. After the death of Judge Gilliard, Alan and George Williams incorporated Realty Title in July 1964. He remained with that company until his retirement in July 1989. Alan was president of the company and had several loyal employees, three of whom started with him in 1955 and remained with him until he retired. These employees were Sally Thornton, Sarah Roberts and Jean Adcock. Sally said, "Alan was the best boss anyone could have ever had. He was always one to try to help his employees get good health benefits and be able to participate in a



retirement or IRA plan. You could not have a better friend or confidante than Mr. Weissinger." Sarah Roberts said of her old boss, "I started working for him right out of high school. When I left Realty Title for a few years and came back, he made me feel as if I had never left. He was a most gentle and kind man." Jean Adcock said, "He was a wonderful person. He never talked about himself." Another longtime employee, Julie Brandt, said, "He always spoke to everyone in the office when he came into work in the morning. He was a true southern gentleman and the greatest title man. He loved the title work."

Following his retirement, he spent a part of every day at the local library. He read hundreds of books and would go from one library to the other. He read everything he could get his hands on. Alan also played the organ and piano at home and he learned to play both of these instruments by ear. He enjoyed teaching his grandchildren how to play. Alan was recognized as one of the most outstanding title lawyers in the entire state.

Alan was married to Mary F. Weissinger on November 20, 1948 in the Opelika Presbyterian Church. He is survived by Mary; three daughters, Mary Ann Johnson of Mobile, Susan Lee Weissinger of Boston and Lois Camille Revere of Semmes; two sons, Alan B. Weissinger, Jr. and Leonard A. Weissinger, both of Grafton, MA; one brother, Leonard A. Weissinger of New Orleans; and nine grandchildren.

—Michael D. Knight, president,
Mobile Bar Association

Frederick G. Collins

Frederick G. Collins, a Mobile lawyer, died July 2, 2003 at the age of 79.

Fred, a native of Alexandria Bay, New York, attended LaSalle College in Philadelphia. He then went to the Navy Officer Training School at Mt. St. Mary's College in Maryland, midshipman school at Columbia University at New York, and communication school at Harvard University. During World War II, he served in the U.S. Navy on Eniwetok Atoll in the South Pacific.

Fred graduated from the University of Alabama School of Law in 1949 and began practicing in Mobile in 1950. He was a founding partner in the firm of Collins, Galloway & Murphy. In 1953, Fred was employed as Mobile City Attorney and remained in that capacity for some 30 years, retiring in 1989. Peggy Beadnell, office manager for the city's legal department, remembered him as a dedicated person whose long years of service as head of the department made him invaluable. She said, "He really was an



expert in municipal law and he was a really good lawyer."

Fred's partner of approximately 40 years, Tom Galloway, praised his abilities as an attorney and said, "He represented the city when the city was undergoing changes due to desegregation issues." He worked closely with former mayors Langan, Outlaw and Dole. (Fred and Tom met at law school and later became partners.)

Fred was a founding member of St. Dominic Catholic Church and the Friendly Sons of St. Patrick. He was also a member of the Mobile, Alabama and American bar associations.

He left surviving him his wife of 52 years, Thelma Namias Collins, and eight children: Cathy Collins, Susan Collins, Carolyn Davidson, Rick Collins, Linda Jensen, Patrick Collins, Laurie Kilpatrick, and Joseph Collins. In addition, he had 13 grandchildren.

—Michael D. Knight, president,
Mobile Bar Association

Judge E. B. Haltom, Jr.

The Honorable Elbert Bertram Haltom, Jr., retired senior United States District Judge, died October 12, 2003. He was one of the Shoals area's most distinguished legal scholars and citizens.

Judge Haltom was a native of Florence. He graduated from Coffee High School and attended Florence State Teachers College (now the University of North Alabama). During WWII, he flew 35 combat missions as a ball turret gunner in a B-24 bomber with the 15th Army Air Corps, Italian Theater of Operations.

Judge Haltom graduated in 1948 from the University of Alabama School of Law. He was a member of Phi Delta Phi legal fraternity and Phi Gamma Delta social fraternity.

His law practice began in Florence with the firm of Bradshaw & Barnett. After ten years, he and Donald Patterson, the late Lauderdale County circuit judge, founded the firm of Haltom & Patterson. After a very distinguished law practice of 32 years, he was appointed United States district judge for the Northern District of Alabama by President Jimmy Carter in 1980. He retired in 1995 as a senior judge.

Judge Haltom was a member of the Alabama State Bar, the American Bar Association, a Fellow of the American College of

Trial Lawyers, and a Fellow of the International Society of Barristers.

Judge Haltom was one of the foremost civic leaders in Lauderdale County. He was former president of the Florence Chamber of Commerce, the Florence Junior Chamber of Commerce and the Florence Exchange Club. He was also a member of the Florence Rotary Club. He was former chairman of the Riverbend Center for Mental Health Board of Directors, and a state director of Blue Cross and Blue Shield of Alabama. He also served the Shoals area and the state very distinctively in both the House of Representatives (1954-58) and the Senate (1958-62). He lost in a runoff to Jim Allen for Lt. Governor in 1962.

A lifelong active member of the First United Methodist Church of Florence, he served as chairman of both the administrative board and the Pastor-Parish Relations Committee. He was a longtime Sunday School teacher of the Men's Bible Class and the founder and teacher of the Ferguson Class.

Judge Haltom is survived by his wife, Nonnie, his daughter, Emily Olsen, and her husband, Norman, and two grandchildren, Emily and Bertram Olsen.

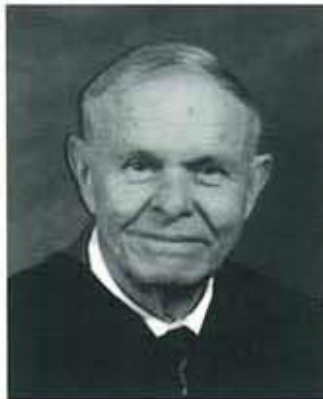
—Ralph E. Holt,
Lauderdale County Bar Association

Hon. Richard W. Vollmer, Jr.

The Honorable Richard W. Vollmer, Jr., a senior United States District Judge, died at his home on March 20, 2003 at the age of 77.

Richard W. Vollmer, Jr. was born in St. Louis on March 7, 1926, the son of Richard W. and Beatrice Burke Vollmer. His family moved to Mobile when he was a young boy. He attended McGill Institute, graduating in 1944, and then entered Springhill College for his pre-law studies, which were interrupted by a two-year tour in the U.S. Navy. He graduated in 1949 and entered the University of Alabama School of Law, only to have his studies interrupted again by service in the Navy for two years, ultimately receiving his degree in 1953. While in law school, he was a member of the board of editors of the *Alabama Law Review*. He worked in the claims department of State Farm Insurance Company from 1953 to 1955, and then joined the law firm of Pillans, Reams, Tappan, Wood & Roberts in 1956. From 1956 through 1990, he engaged in an active trial practice, in both federal and state courts. He defended civil cases almost daily for over 30 years and never had a substantial judgment rendered against any of his clients.

Judge Vollmer was a member of the Mobile, Alabama and American bar associations, and while serving as president of the MBA in 1990, was appointed to the bench by President George W. Bush on the recommendation of then U.S. Representative Sonny Callahan. At the time of his appointment, his firm was known as Reams, Vollmer, Philips, Killion, Brooks & Schell.



In his everyday practice, he was known to be a man of his word, showing respect to the court as well as to his fellow lawyers.

He took senior status as a U.S. District Judge in December 2000, after having served on the bench for over ten years. In preparation for the unveiling of his portrait to hang in the U. S. District Courthouse, his longtime law partner and friend, Fred W. Killion, Jr., unbeknownst to Judge Vollmer, solicited comments from members of the bar who had appeared before the judge. Those lawyers respectfully described him as:

"A judge of the old school—courteous to everyone."
"Handles the business of the court in an even-handed manner."
"Attorneys receive very fair treatment from him."
"Treats everyone with dignity."
"I've never seen any sign that he's partial toward one side or the other. . . I don't think he favors either side."

Judge Vollmer was a religious man, completely devoted to his family and his wife, Marilyn Jean Stikes Vollmer, whom he married in 1949. He was often heard to say, "I've got it made—I've got Marilyn and the kids." Judge Vollmer is survived by his wife and their five children, Marilyn Ann Burke; Richard W. Vollmer, III; Steven H. Vollmer; Mary Elizabeth Delchamps; and James Burke Vollmer; and nine grandchildren. Judge Vollmer's love of the law and exemplary life obviously led two of his children to become lawyers, Richard and James.

—Michael D. Knight, president,
Mobile Bar Association

Erling Riis, Jr.

Erling Riis, Jr., a Mobile lawyer, died in Point Clear on March 24, 2003 at the age of 75.

He was born in Camden, Arkansas on July 25, 1927. His family moved with International Paper Company to Mobile in the early 1940s. He was a longtime resident of Mobile before moving to Point Clear on the Eastern Shore. Erling was a University Military School graduate. After graduation from UMS High School, he served in the U.S. Navy during World War II. He received his bachelor's degree from Howard College in 1951 and his law degree from the University of Alabama School of Law in 1953.

Erling was admitted to the Alabama State Bar in 1953 and was a member of the Mobile, Alabama and American bar associations from that time on, serving as president of the MBA in 1975. Erling began his law practice with Marion Vickers and Ed Thornton, and, in 1956, became a founding member of the firm



of Vickers, Riis, Murray & Curran. He also served as an assistant attorney for Mobile County during the 1960s.

Erling was a former president of the Rotary Club of Mobile and the Athelstan Club. He was affiliated with the Senior Bowl Committee and was a longtime member of All Saints Episcopal Church in Mobile. More recently, he was a member of St. Paul's Episcopal Church in Magnolia Springs, where he served as a vestry member.

Erling married Mary Semple on December 1, 1954, and they had five children: two daughters, Fran Dick of Louisville, Kentucky and Betsy Leslie of Memphis; and three sons, Erling Riis, III, Buzzy Riis and Jim Riis, all of Mobile. He also left surviving a sister, Dolly Bates, of Mobile, and 14 grandchildren.

—Michael D. Knight, president,
Mobile Bar Association

Inez Duke Searcy

Inez Duke Searcy, a member of the Alabama State Bar, died June 12, 2003 at the age of 102.

Mrs. Searcy was born on August 30, 1900, the daughter of Alice H. Duke and Lum Duke, who served as circuit judge from 1910 through 1923 and Lee County probate judge from late 1932 until January 1935.

Mrs. Searcy was educated in the public schools of Opelika and received her undergraduate degree in 1920 from The Hollins, now known as Hollins University. She was the first female law school graduate of the University of Alabama and the second woman admitted to the Alabama State Bar.

In 1929, she returned to her hometown of Opelika and commenced the practice of law with her brother, William S. Duke, whose distinguished law career spanned 69 years in Opelika and Montgomery. In 1931, Mrs. Searcy married W. Tunstall Searcy and moved to Tuscaloosa where she assisted her husband in his law practice. She served as assistant register in equity for

Tuscaloosa County from 1940 until 1956. She returned to Opelika in 1956 and resided in this community until her death.

Mrs. Searcy was actively involved in the civic and cultural affairs of this community as witnessed by her service on numerous civic and community committees and as demonstrated by her leadership in founding the Twentieth Century Study Club. She was devoted to her Creator and was active in the affairs of the First Baptist Church of Opelika and did extensive work with the Women's Missionary Union and served as president of that organization.

Mrs. Searcy was known in the community for her gracious dignity, fine mind, sound judgment and common sense. She was an inspiration to women in the profession of law in Alabama.

Mrs. Searcy was a devoted mother and is survived by two sons, Lum Duke Searcy, who is also an attorney, and Tunstall Searcy, Jr.

—Corinne Tatum Hurst, president,
Lee County Bar Association

Alonzo, Frank Oliver, Sr.
Mobile
Admitted: 1961
Died: October 18, 2003

Garren, John Davis, Hon.
Altoona
Admitted: 1967
Died: June 9, 2003

McDaniel, William Joseph
Birmingham
Admitted: 1953
Died: September 13, 2003

Schenck, Matthew Alan
Birmingham
Admitted: 1993
Died: October 27, 2003

Cooper, Jerome Alfred
Birmingham
Admitted: 1936
Died: October 14, 2003

Howard, John Justin
Columbus, Georgia
Admitted: 1996
Died: 2003

Mims, Roy Leon
Birmingham
Admitted: 1963
Died: July 28, 2003

Stokes, Jackson William
Elba
Admitted: 1953
Died: September 6, 2003

Cornett, Homer Wilson, Jr.
Phenix City
Admitted: 1950
Died: September 19, 2003

Jeakle, Edwin Beyer
Dearborn, Michigan
Admitted: 1984
Died: June 25, 2003

**Powell, Sherman
Blackstone, Sr.**
Falkville
Admitted: 1940
Died: October 10, 2003

Tweedy, Charles Enzer, Jr.
Jasper
Admitted: 1928
Died: September 24, 2003

Fleener, John Robert
Birmingham
Admitted: 1954
Died: August 23, 2003

Johnston, John Reese, Jr.
Birmingham
Admitted: 1947
Died: October 12, 2003

Roe, William Harvey
Oneonta
Admitted: 1979
Died: September 21, 2003

Watson, Daniel Eugene
Birmingham
Admitted: 1979
Died: September 29, 2003



By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

2003 Special Session

With less than two weeks before the end of the fiscal year, the legislature was called into Special Session to pass a General Fund and an Education Budget. In the two-week period, the legislature passed an Education Budget of approximately \$4.5 billion and a General Fund Budget of approximately \$1.2 billion and 80 other bills. Of these 80 bills, 30 were local Acts and 42 bills appropriated funds to non-state agencies that had previously been in the budget, which were funded until the end of the 2003 year. Only three bills of statewide concern affected the general public at large.

Act 2003-415 (HB-3)—The restoration of voting rights of a convicted felon had previously been passed in the 2003 Regular Session and been vetoed by the Governor. This new bill was substantially different from the one the Governor vetoed. Nominations to the Pardon and Parole Board, once made only by the Governor from a list provided by the Chief Justice of the Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the Lt. Governor, now adds to the nomination committee

the Speaker of the House of Representatives and the President Pro-Tem of the Senate. The bill allows the Governor to appoint four persons to serve as special members of the board through September 30, 2006, thereby expanding the board from three members to seven and authorizing them to sit in two panels of three each for the purpose of conducting hearings, with the chairman of the board serving as an alternate for either panel.

The bill further provides a procedure for restoration of eligibility to register to vote by deleting the requirement that a person must be paroled for at least three years without any parole violation before one is eligible to have their voting rights restored. It shortens the time for the initial application for reinstatement to board members from 60 days to 45 days and deletes the automatic revocation of the certificate of eligibility to register when a person's parole is revoked. However, one convicted of any of 15 crimes listed in the Act are not eligible for restoration of voting rights.

Act 2003-430 (SB-39)—Notification of Suspended Drivers License. *Ala. Code* Section 32-6-17 has been amended to delete the requirement for the Department of Public Safety to notify by "certified" mail any person

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whose license has been suspended, cancelled or revoked and now permits notification to be made by "mail."

Act 2003-516 (SB-41)—Trailer Parks. Provides a way for the owner of a trailer park to dispose of manufactured housing left on their property when: (1) Sixty days have elapsed since the termination or expiration of the lease agreement and, (2) the tenant has been absent continuously for 30 days after termination of tenancy by court order that has not been executed. The landlord must give notice personally or by certified mail to the tenant as well as to any lien holder. If the property is not removed, the landlord can remove the manufactured home and all personal property, charge for storage, or declare the property abandoned and dispose of it after publishing a notice in the paper. If the tenant does not respond within the time period or does not remove the manufactured home within 45 days, the manufactured home and any personal property will be conclusively presumed to be abandoned. The lien holder may make the monthly payments and leave the trailer at the park for up to 12 months. This Act became effective December 1, 2003.

2004 Regular Session

The 2004 Regular Session begins February 3, 2004.

It is expected that the state again will be in a funding crisis. The 2003-2004 budgets are 75 million dollars less than the prior year's appropriation, but 430 million dollars below the essential needs of the state. The current year's budget was assisted by a one-time grant of \$260 million to Alabama by the federal government which was a part of the \$20 billion in federal relief

effort toward states. There is no expectation that this funding from the federal government will continue.

The Law Institute is expected to introduce the following bills during the 2004 Regular Session, and copies will be available on the Institute's Web site.

1. The Uniform Residential Landlord Tenant Act, (See *Ala. Lawyer*, March 2003)
2. The Uniform Trust Code, (See *Ala. Lawyer*, May 2003)
3. Uniform Securities Act, (See *Ala. Lawyer*, July 2003)
4. A revision of Article 7 of the UCC, "Documents of Title." A discussion of this article and the revision of UCC Article 1 will be at a later time.

The Institute is currently studying the Alabama Election Law and Business Entities Laws, however, it is not expected that any recommendation will be available until the 2005 Regular Session for these two projects.

For more information about the Institute, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or visit our Web site at 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.

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- **Starnes & Atchison** lawyer **Ashley Watkins Umbach** was named the Birmingham Legal Secretaries Association's 2003 Lawyer of the Year. Last year's winner, **Richard Duke**, of Homewood presented the plaque. Nancy Harris, Umbach's legal secretary and the BLSA 2002 Member of the Year, nominated her.
- **U.S. District Court Judge Karon O. Bowdre** of Birmingham has been named an Alumna of the Year by Samford University. She is a 1977 Samford graduate and a 1981 Cumberland School of Law graduate.

Bowdre was named federal district court judge, Northern District of Alabama, in 2001. She taught at Cumberland from 1990 until 2001, and was director of the school's Legal Research and Writing program. Prior to that, she was a partner with the Birmingham firm of Rives & Peterson.

- Gadsden attorney **Gregory S. Cusimano** is co-editor of a newly published national six-volume work entitled, *Litigation Tort Cases*, designed to assist trial lawyers to evaluate and prepare tort cases. The Association of Trial Lawyers of America and Thomson/West published the work, which has been described as "the most comprehensive current coverage of tort cases and procedural issues that arise in them."



Cusimano

Cusimano is a 1968 graduate of the University of Alabama School of Law and past president of the Alabama Trial Lawyers Association. He is a member of the ATLA Board of Governors, past chair of the National College of Advocacy and one of only six recipients of the Lifetime Achievement Award presented by the Association of Trial Lawyers of America.

- **Matt Lembke**, a partner with the Birmingham firm of **Bradley Arant Rose & White LLP**, is the new president of the Birmingham Kiwanis Club, the largest Kiwanis Club in the world, with over 530 members. At age 37, he is the youngest president in the 85-year history of the Birmingham club. Lembke is a *summa cum laude* graduate of Rhodes College and a graduate of the University of Virginia School of Law. He was recently appointed by the Alabama Supreme Court to serve on the Standing Committee on Rules of Conduct and Canons of Judicial Ethics.



Lembke

- **A. H. Gaede**, also a partner with **Bradley Arant**, is vice-president of The American College of

Construction Lawyers, an organization of 120 lawyers from across the country dedicated to excellence in the specialized practice of construction law. He has been a Fellow of the ACCL since 1991 and is currently the treasurer. Gaede is a graduate of Yale University and Duke University School of Law, and is a member of the American Law Institute and the Chartered Institute of Arbitration. He was recently appointed by the American Bar Association to serve on its Law School Accreditation Committee, which accredits all U.S. law schools.



Gaede

- Alabama Governor Bob Riley appointed **Rebecca W. Pritchett** to the state's three-member Oil and Gas Board. The board is charged with preventing the waste of Alabama's oil and gas resources, and protecting the rights associated with ownership interests in property, mineral or royalty rights relative to the exploration and development of oil and gas resources. Pritchett serves as general counsel to the **Alabama Forestry Association**, and as a member of the Board of Trustees of the Alabama Forever Wild Land Trust, the Birmingham Regional Chamber of Commerce Environmental and Water Board Committee, the Business Council of Alabama Environmental Committee and its Brownfields Workgroup. She is co-chair of the Executive Women's Roundtable in Birmingham, chair of the Alabama State Bar Environmental and Natural Resources Law Section and a member of the Birmingham Bar Association Environmental Committee.
- **E. Barry Johnson**, a member of **Johnston, Barton, Proctor & Powell**, was installed as a member-at-large on the Executive Board of the National Association of Women Lawyers. She joined NAWL in 2000, and is co-chair of the Rainmaking Committee, which publishes The National Directory of Women-Owned Law Firms and Women Lawyers. The NAWL is a voluntary legal professional organization devoted to the interests of women lawyers and the promotion of women's rights.



Pritchett

In 2001, Ms. Johnson received the American Bar Association's Pro Bono Publico Award for the nine-year pro bono representation of Michael Pardue, resulting in his release from prison in 2001, after having served 28 years. Also in 2001, the University of

Alabama School of Law named her an Honorary Member of the Order of the Samaritans. She is currently the Alabama co-chair of the Women's Advocate Committee of the ABA Section of Litigation. She also serves on the ABA's Standing Committee on Pro Bono and Public Service. Ms. Johnson is a graduate of the University of South Alabama, where she was on the Dean's List, and the University of Alabama School of Law, where she was the senior editor of the Alabama Law Review. She is a member of the Order of the Coif, was a Dean M. Leigh Harrison Scholar and Hugo Black Scholar, participated on the National Moot Court Team, and served on the John A. Campbell Moot Court Board.

- **Jonathan Geisen**, in the Birmingham office of **Baker, Donelson, Bearman, Caldwell & Berkowitz**, was named vice-chair of the Corporate Counsel Committee and Planning Board and the Business Law Committee.
- **Laura E. Proctor**, a shareholder in the Birmingham office of **Baker, Donelson**, was appointed to chair the Young Lawyers' Committee of the Defense Research Institute. As chair, Proctor will preside over the organization's second largest committee with over 2,500 members and oversee 19 sub-committees.

DRI is the largest national organization of defense trial lawyers and corporate counsel in the country with over 21,000 members.

- The Homewood-Mountain Brook Kiwanis Club selected **J. Scott Sims** as the 2003 Kiwanian of the Year. Sims was recognized for his leadership efforts with his club, where he has been nominated to serve his second term on the board of directors and also serves as the Kiwanis Advisor to the Homewood High School Key Club. He is also a member of the Board of Directors of the Homewood City Schools Foundation. Sims was recently named to the *Birmingham Business Journal's Top 40 Under 40*, and is a graduate of the Birmingham Chamber's Leadership Development Class of 1995 and Project Corporate Leadership.

He is a shareholder with **Sirote & Permutt, P.C.** Sims graduated from the University of Alabama and received his law degree from Cumberland School of Law.

- The **Talladega County Bar Association** elected the following officers: **James Van Wilkins**, Sylacauga, president; **Jeb Fannin**, Talladega, vice-president; and **Jennifer B. Caraway**, Talladega, secretary/treasurer.
- **W. Douglas Arant** and **Bernard A. Monaghan, Jr.** were among the recent inductees into the Downtown Kiwanis Club's 2003 Class of the Birmingham Business Hall of Fame. Created by the Downtown Kiwanis Club in 1997, the Hall of Fame recognizes Birmingham business leaders who have exemplified strong leadership or made extraordinary contributions to the greater Birmingham area.

W. Douglas Arant was a 1923 *magna cum laude* graduate of Yale University, where he was editor-in-chief of the *Yale Law Journal*. In 1927, he joined the firm of Tilman, Bradley & Baldwin, which later became **Bradley Arant Rose & White LLP**, and which will celebrate its centennial next year.

- Bernard A. Monaghan, Jr. earned his bachelor's degree and a Phi Beta Kappa key at Birmingham-Southern College and a law degree from Harvard University. He was a Rhodes Scholar to New College, Oxford University in 1939. He then joined Bradley

Arant Rose & White. In 1958, he became executive vice-president of **Vulcan Materials Company** and was named president and chairman of the executive committee in 1977. Monaghan received a doctorate of humanities degree from Birmingham-Southern College in 1967 and the Gold Knight of Management Award from the National Management Association. He was inducted into the Alabama Academy of Honor in 1978.

- **Finis St. John** of Cullman became a Fellow of the American College of Trial Lawyers. The College is made up of the best of the trial bar from the United States and Canada. Fellowship in the College is by invitation only. St. John is a partner in the firm of **St. John & St. John** and has been in practice for 20 years. He is an alumna of the University of Alabama and the University of Virginia School of Law, and is a member of the Board of Trustees of the University of Alabama System.
- **Ashley Elizabeth Grier** of Vinemont and **John Rea** of Pell City have been awarded Cabaniss, Johnston scholarships by the **Alabama Law Foundation**. The scholarships are given each year to second-year law students who are Alabama residents attending an ABA-accredited law school. The scholarship was endowed by the firm of **Cabaniss, Johnston, Gardner, Dumas & O'Neal**.
Grier, a graduate of Birmingham-Southern College, will continue her studies at Duke University, and Rea, a UAB graduate, is attending Yale Law School.
- **Jonathan C. Augustine**, with **Adams & Reese LLP**, was elected executive vice-president of the Young Democrats of America.
- **Wade H. Baxley**, a senior partner with the Dothan firm of **Ramsey, Baxley & McDougale** and a past president of the Alabama State Bar, was elected to the American Bar Association Board of Governors.
- **Brian P. McCarthy**, a member of the firm of **McDowell, Knight, Roedder & Sledge, LLC**, has been named the southeastern region vice-president of the National Association of Railroad Trial Counsel. The Association, formed in 1955, is designed to facilitate exchange of information and ideas among lawyers who defended the railroads. McCarthy is a 1981 graduate of Illinois State University and a 1986 graduate of the University of Alabama School of Law.
- **Tracy Cary**, **Houston County Bar Association** president, said the HCBA recently donated a television to the jury assembly room at the county courthouse. Comcast Cable is providing free cable service for the television, which cost approximately \$400.
- **Katherine N. Barr**, a shareholder at **Sirote & Permutt**, has been selected as chairman of the American Bar Association's Real Property, Probate and Trust Law Section Committee on Long-term Care, Medicaid and Special Needs Trusts.
- The **St. Clair County Bar Association** recently made a \$750 donation to the Hannah Home-St. Clair County. Hannah Home has been open since August 2002 and is a place where women and children can go who are fleeing from domestic violence.
- **Robert Minor**, president of the St. Clair County Bar Association, said the idea to help Hannah Home was unanimously approved by the association. ■

Fall 2003 Admittees



Statistics of Interest

Number sitting for exam	555
Number certified to Supreme Court of Alabama.....	386
Certification rate*	69.5 percent

Certification Percentages:

University of Alabama School of Law	94.2 percent
Birmingham School of Law.....	33.3 percent
Cumberland School of Law.....	86.8 percent
Jones School of Law	60.6 percent
Miles College of Law	9.7 percent

*Includes only those successfully passing bar exam and MPRE

Alabama State Bar Fall 2003 Admittees

Abercrombie, LaKisha Allen	Bynum, Terry Randall	Everett, Daniel James	Hayes, Christen LaMonica
Abston, James David	Cabaniss, Catherine McConnell	Farley, Shannon Michelle	Heath, Robert Wayne
Albea, Stuart Dennis	Cain, David Steven	Farmer, Melissa Beth	Heaven, Jennifer Belle
Alexandre, Michele	Calabrese, Jeffrey August	Feig, Daniel Alexander	Heinss, Christopher Fred
Anderson, Andrew Patrick	Caldwell, Jessica Lynn Ventiere	Felsen, Michael Joseph	Henderson, Laurie Suzanne Mize
Anderson, Thomas Treutlen	Calligas, Louis Michael	Ferguson, Charles McDonald	Henry, Russell Rawls
Armstrong, Benjamin Scott	Camp, Caron Lee	Finnegan, Patrick Conor	Hill, NaShanta Latise Maze
Arnold, Hobart Hundon	Camp, John Goodwyne	Fitts, Stephen Noble	Hines, Amanda Craft
Arnold, Timothy Lee	Campbell, Joseph Randall	Fleming, David Michael	Hinson, Madeline Petrina
Austin, Stephen Jared	Cantrell, Christopher William	Fleming, Erin Brook	Hinson, Robert Ivan
Avon, Matthew Jay	Carpenter, David O'neil	Flowers, Virginia Anne	Hodgins, Allison Louise
Ayers, Donna Tucker	Carroll, Charles Clay	Foote, Timothy Jay	Hoff, Shannon Elizabeth
Baggett, Emily Leigh	Carter, Meredith Jean	Ford, Benjamin Young	Hogan, Stephen Richard
Bahakel, Alfred Mark	Casey, Thomas Lee	Ford, Camille Root	Hogg, David Earl
Bankester, Susan Leanna	Chandiramani, Komal Lalchand	Fox, Nicole Smith	Holly, Travis Blake
Banks, Page Ann	Chandler, Albert Dalton	Frasure, Lori Ann	Holtham, Scott Jeffrey
Barber, Beverly Owen	Chesser, Mary Elizabeth	Frederick, Christopher Lee	Homer, Kimberly Anne
Barger, Cyrus Clifford	Cloud, Brian Michael	Freeman, Robin Cobb	Hood, Patrick Joseph
Batiste, Dorothea	Coaker, Tameka Ann	Fults, Deanna Leigh	Hooks, Jonathan Michael
Beasley, Robin Wade	Cochran, Misty Blue	Funk, Hilary Leigh	Howell, Sally Ann Brewer
Belcher, Sidney Bruce	Collins, Terry Eugene	Gallot, Freddie	Howell-Best, Katherine Erika
Bell, Robert Lance	Conte, Christopher Thomas	Garrett, John Kirkman	Hurst, Brian Joseph
Bell, Shaunathan Clint	Conte, Emily Rice	Gill, Stephanie Celeste	Hutchinson, Valerie Nunnelly
Bence, Turk Lamar	Cooper, Amy Michele	Glasscock, Steven Ryan	Illman, Robert Morgan
Bensinger, Bill DeLoney	Cooper, Dafina Masani	Gleason, Rachel Elisabeth	Ingram, Safiya Lynn
Berhow, Karen Renae	Cornelius, William Dalton	Goldstein, Steven Jay	Ivey, Lisa Marie
Bethea, Britt Ventson	Cotter, Edward Devereaux	Goleman, Ronald Ray	Jackson, Elizabeth
Bilbrey, Shelley Lynn	Cranford, Elizabeth Ashley	Goodman, James Jefferson	Jackson, Heather Kelly
Birks, Walter Thomas	Crosby, Angela Jolyn	Graffeo, Vincent John	Jackson, Jason Matthew
Bishop, Brandon Todd	Crunk, Michelle Leigh	Graveline, Jeffrey Donald	Jackson, Joseph Dudley
Bishop, Harrison Kimbrough	Cummings, Angela Rechelle	Graves, Michael Lee	Jacobs, James Allen
Blackwell, Virginia Lee	Cummings, Marlana	Gray, Alfreda Rockell	Jenkins, Charles Richard
Blumberg, Jarrod Abrams	D'Olive, Harry McLeod	Gray, Bridgett Vasser	Joe, Jennifer Denise
Bodie, Melissa J. Bottoms	Daniels, Suzette Elizabeth	Greco, Monica Denise Hall	Johnson, Brenda Ann
Bonds, Thomas Dewayne	Danzey, Spencer Wayne	Greene, Andrea Morgan	Johnson, John W.
Booderas, Lyle-Andrew	De Gweck, Benjamin John	Greene, Rosalind	Johnson, William Tipton
Bostwick, Henry Green	DeLucia, John Michael	Griffin, Carrie Roberts	Johnston, Kesa Marie
Bowden, Carrie Michelle	Dickens, James Raymond	Griffin, Kelli Blake	Jones, Alexander White
Boyd, Leon Augustus	Donahue, Susan Gale	Griffin, Michael Ray	Jones, LaShante Juanika Brown
Branum, Emily Rhea Gary	Dotson, Michael Jeremy	Grubb, Archibald Irwin	Jordan, Julie Elizabeth
Brasher, Charles Harry	Dotson, Tracey Crisan	Hall, Charles Philip	Jordan, Tina Coker
Bridwell, Philip McCall	Dowling, Christie Eilleen Lyman	Hamburg, Leigh Anne	Kamphuis, Julie Taylor
Bronner, George David	Dubin, Jacob Ari	Hamilton, William Eric	Kerry, Clifford Eazeb
Brown, Tiffany Anne	Duck, Christopher Ramsey	Hammond, Susan Nielsen	Killebrew, Amelia Robinson
Browning, John Philip	Duncan, Joseph Robert	Hand, Robert Tyler	Kim, Do Te
Bryan, Chad Wesley	Dunlap, Steven Reid	Hansen, Suzanne Bailey	King, Angela Renae
Bryant, Amy Elaine	Easley, Patricia Louise	Hardage, Jonathan Alex	Kitchen, Charles Andrew
Bullard, Leigh Hazlett	Edwards, Camille Leigh	Harper, Carol Gann	Klos, Katherine Marie
Burkholder, David Randall	Eldridge, Kathryn Nichols Roe	Harris, Ashley Steven	Knowles, Lee Franklin
Burnett, Dayna Renae	Ellerbrock, Robert Steven	Harris-Hill, Donna Patrise	Koch, Jennifer Tyler
Burton, Shavon Latress	Ellis, Elizabeth Anne	Hatchcock, Leslie Carol	Kreps, Joseph Claude
Bussey, Heather Marie	Erdberg, Mark David	Hatchett, Elizabeth Larkin	Kruger, Kirk Anthony

Alabama State Bar Fall 2003 Admittees (Continued)

Kusta, Kevin Raymond	Morris, Shane Padgett	Robinson, Richard Alexander	Thornton, James Leon
Ladner, Amber Lynn	Mountain, Clinton Delaine	Robinson, Ruth Lang	Thornton, Mary Kathleen
Lamb, Justin Barrett	Mouser, Anne Marie	Rodgers, William Lee	Tidmore, Ethan Tyler
Landers, Daryl Keith	Munnerlyn, Samarria Yvette	Russell, Paul Vaughan	Tidwell, Daniel Brian
Lee, Patricia Irene	Murphy, Daniel Brian	Salaam, Ramadanah Maryum	Tingle, Jason Bryon
Lilienthal, Morris Herbert	Nation, Horace Hendrix	Sanders, Bradley Robert	Tompkins, Blake Jewett
Lindsey, Kechia Juan	Naugle, Margaret Vance	Sass, Holly Dawn	Toole, Ashley Warren
Logan, Meredith Rhea	Neeley, Andrea Denice	Schuck, Lynn Hogewood	Touchstone, William Franklin
Long, Felicia Abernathy	Neese, Laura Lee	Scott, Amy James	Trippe, Jason Andrew
Long, Oliver Wesley	Nesmith, Kip Allen	Scott, David Lamar	Tucker, Jeremy Dean
Long, William Jacob	Nichols, April Ellis	Scozzaro, Harry Emmanuel	Turnipseed, Kenneth McShan
Lowe, Brandi Lynn	Nichols, Edwin Bryan	Searcy, John Edwin	VanNortwick, Rachel Ellen
Lowther, Matthew Todd	Nichols, LaShanna Paige	Sedor, Kimberly Gail Shelley	Vogt, Elliot Joseph
Lucas, Jeffery Neal	Nix, Andrew Sykes	Self, Edwin Barnett	Wade, Michael Lawrence
Maluff, Victoria Shunnarah	Norton, James Patrick	Seuell, Ashley Elizabeth	Wadsworth, Brett Lee
Marsili, Larry Robert	Oliver, Blake Lee	Shaddrix, Matthew David	Walding, Brian Ray
Marston, Linda Jo Clingan	Oliver, Sarah Moore	Shapiro, Marc Robert	Walker, Henry James
Martin, Kevin Lee	Osborn, Gary Matthew	Shelley-Tremblay, Shannon Marie	Walker, Samuel Kirkland
Martin, Stanley Allen	Parker, Darryl Avon	Simmons, Elizabeth Armistead	Warwick, Brian Allen
Mathis, Alan Daniel	Parker, Walter Wayne	Simmons, Jason Terry	Waters, Lydia Ann
May, Amy Nicole	Parrish, Russell Neal	Simmons, Timothy Brandon	Watkins, Joshua Martin
May, Erin Elizabeth	Partin, John William	Sledge, Edward Simmons	Watkins, Melanie Chism
Maze, Corey Landon	Pate, David Hunter	Smith, Amy Dalton	Weeks, Bobbi Julaine
McClammy, Patrice Erita	Patterson, Jon Howard	Smith, Cynthia Parris	Wermuth, Robert Joseph
McCluer, Stuart Halkett	Patton, Mary Ellen Garrick	Smith, Elizabeth Anne	Whaley, Brandi Jo
McGowan, Stephen Glenn	Pearson, Lemesia Nichelle	Smith, Jason Ray	Whatley, Mary Brunson
McGuire, Richard Alan	Penn, David Bryan	Smith, Justin Lee	Wheat, Thomas Allen
McMillan, French Andrew	Phillips, Jennifer Dawn Hudson	Smith, Lyndsay Marie	White, Joshua Bryon
McMillan, Tiffany Entreklin	Plant, Adam Patterson	Smith, Marjorie Morton	White, Karen Denise
McNiel, Jacob Bartlett	Plante, Valerie Hose	Snow, James Winfred	Wideman, Jamila Ann
McPherson, Susan Elaine	Potts, James Alan	Sosebee, Misty Dawn	Williams, Anna Jean
Meadows, Holly Wales	Poynter, Martin Miller	Southworth, Kristen Paige	Williams, April Denise
Meadows, Michael Brandon	Price, Gregory Keith	Spann, Jonathan Ashley	Williams, Leslie Eason
Melton, Azzie Lee	Price, Phillip Allen	Speagle, Scott Michael	Williams, Lonnie Jason
Merchant, George Wayne	Pulvere, Graham Ross	Spencer, Glenn Alan	Williams, Micah Chad
Miller, Alan Benton	Ranieri, David Benjamin	Stamps, John Thomas	Williams, Phillip Wayne
Miller, Micah Marvin	Raper, James Luther	Steensland, Maurice John	Williams, Thomas Claiborne
Miller, Tracy Michelle	Raphan, Lori Michele	Stephens, Matthew Phillip	Williamson, Kenny Mallow
Mills, Derrick A.	Ratliff, Robert Allen	Stinson, Charles Bradford	Willis, Stephanie Amanda
Miner, Joseph Todd	Rayborn, William Morgan	Stokes, Ronald Keith	Wilson, Joshua David
Mitchell, James Ellington	Reagan, Henry Theodore	Stowe, James Virgil	Wilson, Natasha Lynke
Moncrief, Benjamin Michael	Retherford, Jeremy Lowery	Stutz, Joseph David	Wilson, Nathan Philip
Moncus, James Roy	Rhyne, Laura Patricia	Sullins, Calvert Catherine	Wimberly, Charles Corbett
Montgomery, Michelle Larra Barker	Richard, Clarence	Taaffe, Laura Domm	Windham, Jeffrey Neil
Montgomery, Patrick Glenn	Richardson, Angelina Marie	Tapley, Frank Jerome	Wireman, John Wheatley
Moore,Carolynn Hinkle	Rickman, Amanda Paige	Taylor, Allison Suzanne	Wolfe, Thomas Samuel
Moore, Glen Chattin	Riley, Albert Bernard	Taylor, Coretta Elaine	Wood, Jeffrey Heath
Moore, Monroe Gerald	Roark, Christopher Lee	Teague, Robert Troy	Worsham, Randall Keith
Morgan, Chad Allen	Roberson, Mary Bishop	Temonia, Lydia	Wright, David Alan
Morris, Farrell Norwood	Roberts, John Allen	Tharp, Jamie Alisa Nix	Wright, Shannon Kay
Morris, James Carroll	Roberts, John William	Thompson, Amy Leigh	
Morris, Larry Benjamin	Robinson, Cody Dewayne	Thornley, John Scott	

Lawyers in the Family



*Virginia Lee Blackwell (2003) and
Cartledge W. Blackwell, Jr. (1972)*
(admittee and father)



*Paul Vaughn Russell, Jr. (2003) and
Paul Vaughn Russell, Sr. (1978)*
(admittee and father)



*Travis Holly (2003) and Alex
Jackson (1974)*
(admittee and father-in-law)



*J. Todd Miner (2003) and Charlie
Waldrep (1976)*
(admittee and father-in-law)



*Elizabeth Jackson (2003), Judge Edward Jackson (1973),
Angelina Jackson (1986) and James Theodore Jackson, Jr. (1969)*
(admittee, father, aunt and uncle)



*Bridgett Vusser Gray (2003), Fred D. Gray, Jr. (1988),
Fred D. Gray, Sr. (1964) and Stanley F. Gray (1990)*
(admittee, husband, father-in-law and brother-in-law)



*Scott Thornley (2003) and Brent
Thornley (1974)*
(admittee and father)



*Larry Benjamin Morris (2003), Larry W. Morris (1968) and
A. Clark Morris (1996)*
(admittee, father and sister)



*John Kirkman Garrett (2003) and
Broox G. Garrett, Jr. (1973)*
(admittee and father)

Lawyers in the Family



*Clinton Delaine Mountain, Jr. (2003), C. Delaine Mountain, Sr. (1968) and Barbara W. Mountain (1984)
(admittee, father and stepmother)*



*Page Ann Banks (2003) and Daniel B. Banks, Jr. (1967)
(admittee and father)*



*Kirk Walker (2003) and Dagny Walker (May 2003)
(admittee and wife)*



*Emily Rice Conte (2003), Christopher Thomas Conte (2003) and Bert W. Rice (1974)
(wife and husband co-admittees, father/father-in-law)*



*Scott M. Speagle (2003), Regina Maise Speagle (2001) and Willie A. Maise (1981)
(admittee, wife and father-in-law)*



*Thomas Claiborne Williams (2003), Paul Christopher Williams (1996) and Matthew Christian Williams (1997)
(admittee and brothers)*



*William T. Johnson, III (2003), John W. Johnson, II (2003), William T. Johnson, Jr. (1970), United States District Judge Inge P. Johnston (1978), Judge John C. Tyson (1950), and John L. Tate (1994)
(brother co-admittees, father, mother, cousins)*

Lawyers in the Family



*John William Roberts (2003) and
Andy L. Roberts (1977)
(admittee and father)*



*Stanley Allen Martin, Jr. (2003)
and Stanley Allen Martin (1976)
(admittee and father)*



*Alfred Mark Babakel (2003), Circuit Judge Alfred Babakel (1979), Izas
Babakel (1957) and Circuit Judge Gloria Babakel (1988)
(admittee, father, grandfather and aunt)*



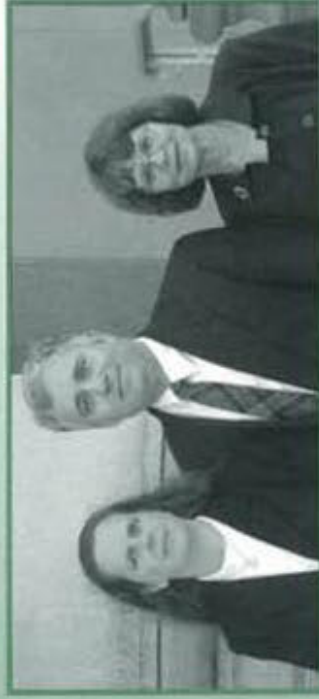
*Edward S. Sledge, IV (2003) and
Edward S. Sledge, III (1972)
(admittee and father)*



*Julie Taylor Kamphuis (2003), Scott Parker Taylor (2000) and Lloyd Earl
Taylor (1968)
(admittee, brother and father)*



*Vincent John Graffeo (2003) and
Marye Ann D'Alessandro (1988)
(admittee and aunt)*



*Melissa Rotions Bodie (2003), John L. Bodie (1997) and Coritelia A. Bodie
(1993)
(admittee, husband and mother-in-law)*



*M. John Steensland, III (2003) and
Judge M. John Steensland, Jr. (1986)
(admittee and father)*



*Horace H. Nation, IV (2003) and
Horace H. Nation, III (1974)
(admittee and father)*

Lawyers in the Family



*Dafina M. Cooper (2003) and
Lawrence Cooper (1988)*
(*admittee and father*)



*Mary Ellen Patton (2003) and
Walter Patton (1965)*
(*admittee and father*)



*Robin Cobb Freeman (2003), Benjamin J. Freeman (2002), Angie Ingram
(1994) and E.J. McArthur (1987)*
(*admittee, husband, aunt and uncle*)



*Alfreda R. Gray (2003) and Marva
Owens-James (1992)*
(*admittee and cousin*)



*Jeff Graveline (2003) and Monica
Graveline (2000)*
(*admittee and wife*)



Lee F. Knowles (2003), John Knowles (1963) and Norma Stanley Healy (1986)
(*admittee, uncle and cousin*)



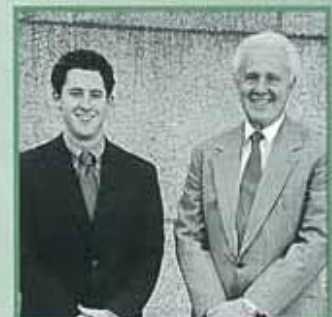
*Archie I. Grubb, II (2003) and
William I. Grubb, II (1971)*
(*admittee and father*)



*Mark Erdberg (2003), Isaac Cohen
(1939) and Joe Erdberg (1974)*
(*admittee, grandfather and father*)

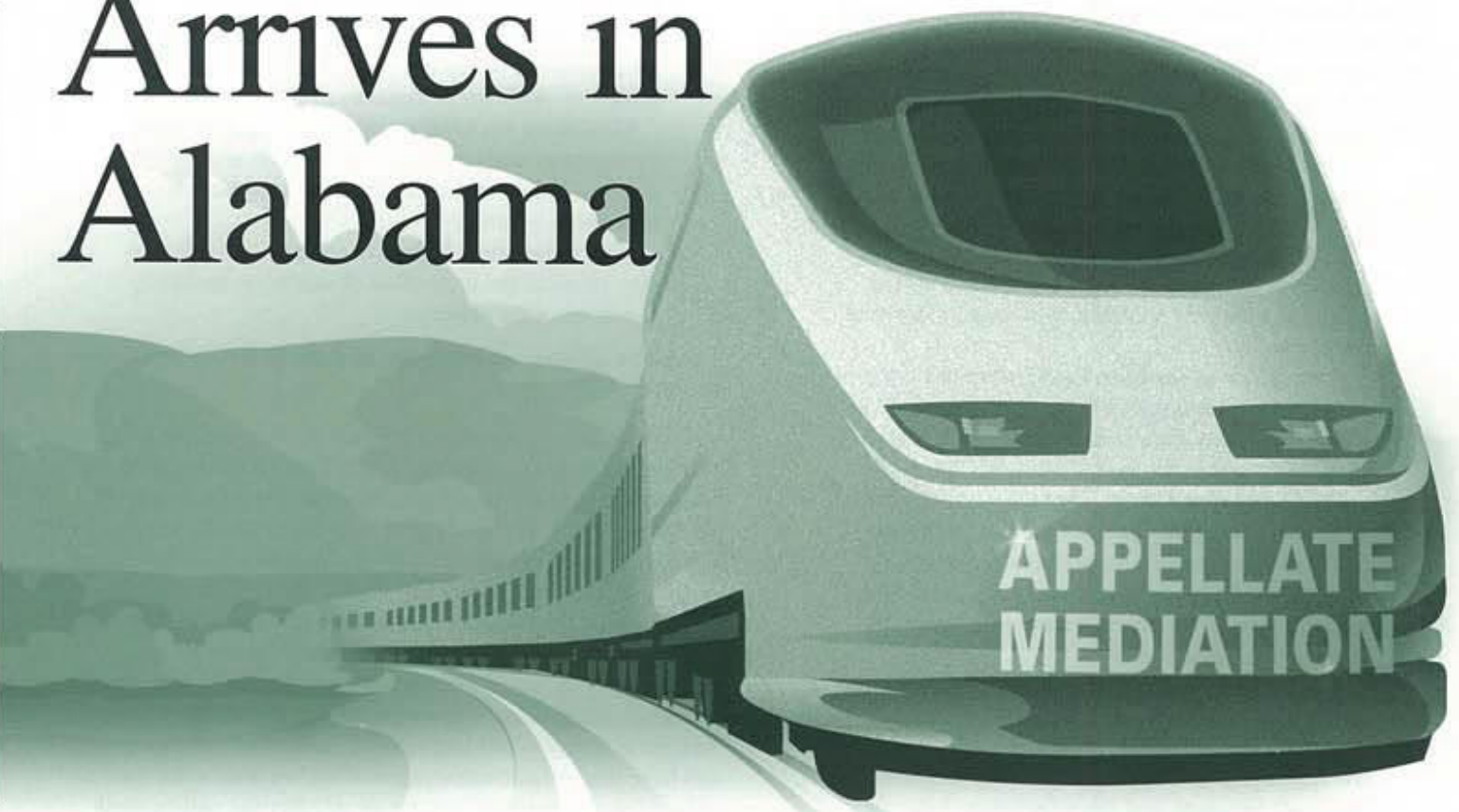


*Ben Ford (2003) and Camille Ford
(2003)*
(*husband and wife co-admittees*)



*Todd Lowther (2003) and Judge
Jack Lowther (1974)*
(*admittee and father*)

Appellate Mediation Arrives in Alabama



BY JUDITH M. KEEGAN, director, Alabama Center for Dispute Resolution

Beginning this month, Alabama will have a mediation program at the Supreme Court of Alabama and the Alabama Court of Civil Appeals. There are many advantages to a mediated settlement at the appellate level. First, parties may save the cost of transcript, record and attorney fees if mediation results in a settlement. Second, the closure in mediation means that there will be no applications for rehearing or petitions for cert, and parties will not be distracted from more productive activities. Third, parties may avoid future legal proceedings since mediated settlements are more often complied with, and reduce the chance of later actions for modification or collateral relief. Fourth, the potential resolution can be flexible. Parties are not confined to "legal" remedies and may adopt non-economic remedies such as

apology, scholarship or insurance. Payment plans and partial resolution are also possibilities. Fifth, mediation may help to maintain or enhance relationships in family and employment cases, and for those in a continued business relationship. Finally, mediation at the appellate level helps to avoid unfavorable precedent that may be used in a later proceeding of the same or similar cases.

The Supreme Court Standing Committee on Appellate Mediation, chaired by Justice Champ Lyons, Jr., began meeting in May 2003, and has worked to develop a mediation program for both courts. Members of the Committee included Justice R. Bernard Harwood, Justice Thomas A. Woodall, Hon. Sharon G. Yates, Judith M. Keegan, and Rhonda P. Chambers.

On July 17, 2003, the Supreme Court of Alabama adopted Rule 55, Alabama Rules

of Appellate Procedure. This rule establishes a confidential mediation program at the appellate level. Rules for the program were complete in early December and the program begins this month.

Alabama mediators who have elected to participate as appellate mediators were trained in a one-day seminar in December. The morning focused on program rules and forms. The afternoon was a skills-based appellate mediation training by Gary F. Canner, Circuit Mediator, United States Court of Appeals, Eleventh Judicial Circuit. The training was hosted by the Alabama Center for Dispute Resolution at the Alabama State Bar.

Look for a more detailed article on Alabama appellate mediation in an upcoming bar publication.

RULE 55 Appellate Mediation

Introduction. An appellate court may direct the attorneys for the parties and the parties to appear before an approved mediator, who may be designated by the Court.

Attendance at sessions. Parties with full settlement authority and parties' counsel are required to attend mediation, unless excused from attendance by the mediator.

Privileged discussions. The content of mediation discussions and proceedings, including any statements made or documents prepared by any party, attorney, mediator, or other participant, is privileged and shall not be construed for any purpose as an admission against interest.

Confidentiality. Statements and comments made during mediation conferences and in related discussions are confidential and shall not be disclosed to the appellate court. Appellate mediators shall not be called as witnesses, and the information from the mediation, except for failure of a party or counsel to comply with this rule, shall not be disclosed to judges, staff, or employees of any court; provided, however, that it shall not be a violation of this sub-

section (d) to disclose to the appropriate person or entity such information as may be necessary to track the mediation and appeal process. The purposes of disclosing such information are to maintain status records and statistics, to ensure orderly compliance with this rule, and to provide a mechanism for returning the case to the ordinary appeal process where mediation has not resolved the case.

Notwithstanding the foregoing, the bare fact that a settlement has or has not been reached as a result of mediation shall not be considered confidential.

Mediation not binding. No party shall be bound by anything said or done at a mediation session unless a settlement is reached and the agreement is reduced to writing.

Noncompliance. Failure to comply with this rule may result in the imposition of sanctions, including dismissal of the appeal.

Court Comment to Adoption of Rule 55 Effective October 6, 2003

At the time of the adoption of this rule, the supreme court was considering the adoption of Appellate Mediation Rules to facilitate the mediation process; however, those rules had not yet been drafted. The intent of this rule is to permit and encourage mediation at the appellate level. The rule contemplates that statements and comments made during the mediation process shall be privileged and confidential, but it recognizes that it may be necessary to divulge certain information to the person appointed by the court to track the mediation, who may be an employee of the court. The judges or justices of the court in which the appeal is pending may be advised of whether the parties have reached a tentative agreement, but need more time to reduce the agreement to writing, or whether the parties need more time to continue mediation, or whether the mediator has determined that additional time for mediation would not be productive. No other information about the mediation shall be conveyed to the judges or justices. ■



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Adoption of Appellate Mediation Rules

Pursuant to Rule 55, Alabama Rules of Appellate Procedure, the Alabama Supreme Court adopted the Alabama Appellate Mediation Rules, effective January 1, 2004. The order adopting the Appellate Mediation Rules appears in an advance sheet of *Southern Reporter* dated on or about December 11th, 2003.

— Bilee K. Cauley,
reporter of decisions,
Alabama Appellate Courts

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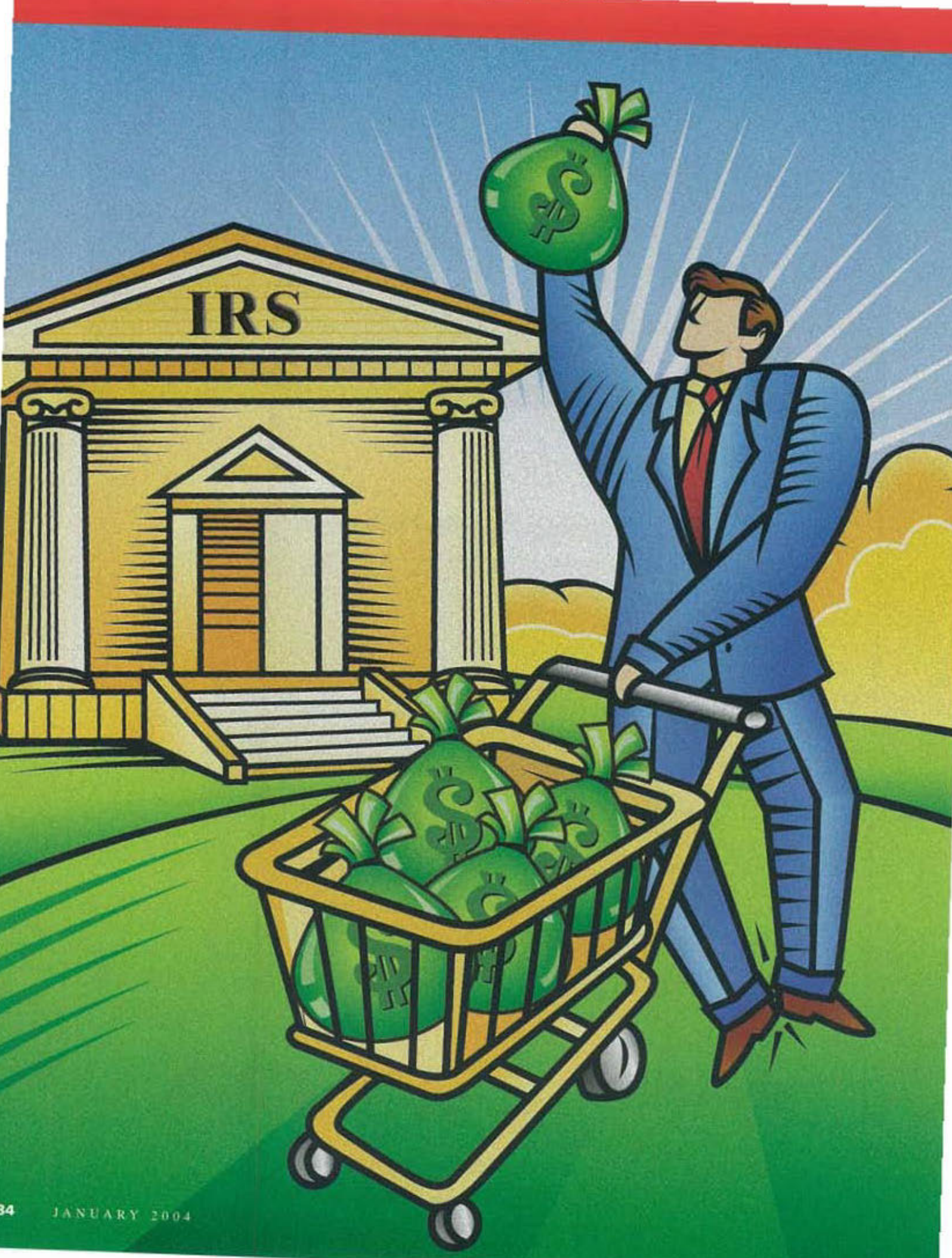
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IRS

BANKRUPTCY LAWYERS:

If You Want Attorney's Fees from the IRS, Exhaust Your Administrative Remedies.

It Might Not Be a Bad Idea Anyway

BY CHARLES BAER

Dealing with creditor violations of the automatic stay of 11 U.S.C. § 362(a) is part of the job for counsel for a debtor. One saving grace of those situations for debtor's counsel is that the offending creditor is often ordered to pay the attorney's fees of the debtor in the stay litigation. The Statute expressly contemplates awards of fees. 11 U.S.C. § 362(h). This article will discuss how the interplay between Section 362(h), the recently enacted 26 U.S.C. § 6330 (Internal Revenue Code) and 26 U.S.C. § 7430 may effect the award of attorney's fees against the United States in bankruptcy cases.

A. AWARD OF ATTORNEY'S FEES UNDER PRIOR LAW

As the Internal Revenue Service is a major creditor in bankruptcy cases,¹ it is hardly unknown for the Service to violate the automatic stay. It is not uncommon for IRS stay violations to cause

courts to award damages payable by other taxpayers as well as awards of fees to be awarded to debtor's counsel from the United States for litigating the stay violation case.²

The Eleventh Circuit has held that the attorney's fee award procedures of the Internal Revenue Code, 26 U.S.C. § 7430, as well as the general provisions for fee awards against the United States, 28 U.S.C. § 2412, apply to requests for award of attorney's fees against the United States in bankruptcy cases. *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996). Attorney's fees may also be awarded as part of an 11 U.S.C. § 105 contempt order for a stay violation. *Hardy*, 97 F.3d at 1387. Among the requirements for an award of attorney's fees is that the debtor has exhausted his administrative remedies. 26 U.S.C. § 7430(b)(1). Courts have repeated this requirement, then went on.³ For years it was black letter law that there was no right to a hearing or other due process review *before* the Internal Revenue Service could exercise forced collection of delinquent taxes by levy.⁴

B. ENACTMENT OF ADMINISTRATIVE APPEAL RIGHTS FOR IRS COLLECTIONS

In 1998, Congress, after a parade of horrors at hearings held by Senator Roth,⁵ passed the Internal Revenue Service Restructuring and Reform Act. Among the provisions of the Restructuring Act was the creation of a right to an administrative appeal before the IRS could take a delinquent taxpayer's property by administrative levy to deal with these claims of IRS overzealousness. 26 U.S.C. § 6330. At least thirty (30) days before the IRS may levy (administratively garnish) a tax delinquent's property, it must give the person written notice of his right to administrative appeal. 26 U.S.C. § 6330(a). If the appeal is made during that thirty day period, the levy actions are suspended during the pendency of the appeal unless the IRS shows that there is good cause not to suspend the levy. 26 U.S.C. § 6330(c).⁶ The appeal is heard by the Internal Revenue Service Office of Appeals. The Appeals Office is required to act "with strict impartiality between the taxpayer and the Government. . . ." 26 C.F.R. § 601.106(f)(1). Congress required that appeals of proposed levies be

handled by an impartial officer who had no prior involvement in the matter. 26 U.S.C. § 6330(b)(3). By regulation, proceedings before Appeals are informal. 26 C.F.R. § 601.106(c). Testimony under oath is not presented, although affidavits or declarations may be required. 26 C.F.R. § 601.106(c). The request for a collection due process hearing must be in writing. 26 C.F.R. § 301.6330-1(c)(1). Attorneys or other taxpayer representatives⁷ must present a power of attorney form before the Appeals Officer will discuss the matter with the representative. 26 C.F.R. § 301.6103(c)-1. The demand for this form by the Appeals Officer is not mere bureaucratic rigidity. Internal Revenue Service employees who discuss a taxpayer's tax situation with an unauthorized third parties may face criminal prosecution. 26 U.S.C. § 7213. An appeal may be done on a written record or a conference with the Appeals Officer may be requested. Among the issues to be considered by the Appeals Officer are "innocent spouse" defenses⁸ offered by a tax delinquent; challenges to the appropriateness of collection actions; and offers of collection alternatives, such as an installment agreement, or an offer of compromise. 26 U.S.C. § 6330(c)(2).

If the tax delinquent is dissatisfied with the determination of the Appeals Officer,

he may then seek judicial review. The forum for judicial review depends on the type of tax involved. If the tax at issue is the type of which the United States Tax Court has jurisdiction (such as an income tax or an estate or gift tax)⁹ appeal lies to the Tax Court. 26 U.S.C. § 6330(d)(1)(A). The Tax Court is located in Washington,¹⁰ and pleadings, including the appeal, must be filed there. The Court hears cases when it "rides circuit" through the nation to hear cases. In Alabama, the Court holds sessions in Birmingham and Mobile. Otherwise (as for "Form 941" employment taxes or the "100% Penalty" for failure to turnover Trust Fund taxes of 26 U.S.C. § 6672) appeal lies in the United States District Court. 26 U.S.C. § 6330(d)(1)(B). This right to an administrative appeal before IRS collection became effective on January 19, 1999. Note to 26 U.S.C. § 6330.

C. EFFECT OF 1998 CHANGES ON AWARDS OF ATTORNEY'S FEES

The Bankruptcy Court for the Southern District of Alabama may have been the first court to have applied the administra-

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tive exhaustion requirement of 26 U.S.C. § 7430 to a failure to utilize the administrative remedy of 26 U.S.C. § 6330. *In re Parker*, 279 B.R. 596 (Bankr. S.D. Ala. 2002).¹¹ There the Court found that the IRS had sent debtors notices of intent to levy, and actually attempted to levy on debtors' bank account, even though debtors had been in a bankruptcy case for several years. *Parker*, 279 B.R. at 599-602. In fact, the IRS had previously been sanctioned for violations of the automatic stay earlier in the same case. *Parker*, 279 B.R. at 599. After hard fought litigation, the court awarded debtors damages for proven medical costs and their time and expenses in attending the hearing. *Parker*, 279 B.R. at 604-605. The Court denied damages for general and emotional stress, following *Aiello v. Providian Financial Corp.*, 239 F.3d 876, 880 (7th Cir. 2001), and *In re Taylor*, 263 B.R. 139 (N.D. Ala. 2001).

The United States argued that debtors could not be awarded attorney's fees as they had not exhausted their administrative remedies under 26 U.S.C. § 6330. In regard to the notices of intent to levy and the attempted levy, the Court agreed, hold-

ing that "as to the Notice of Levy of November 28, 2000, and the levy itself in May 2001, no fees can be paid. All administrative procedures were not exhausted." *Parker*, 279 B.R. at 606. The Court noted that this administrative remedy did not exist at the time of its *In re Matthews*, 184 B.R. 594 (Bankr. S.D. Ala. 1995) decision. *Parker*, 279 B.R. at 606, n.8.

It may be expected that other Government counsel will cite the exhaustion requirement ruled on in *Parker* and *Torres*. Both the Bankruptcy Code and the Internal Revenue Code show that Congress, while providing some remedy for taxpayers aggrieved by Government action, intended to limit the liability of other taxpayers for any damage awards.¹² Congress has imposed even more stringent exhaustion requirements in regard to other sorts of claims against the Federal Treasury. For example, both Tort Claims and tax refund actions against the United States are barred unless the plaintiff had first filed an administrative claim.¹³ Counsel hoping for an award of attorney's fees should therefore consider bringing an appeal of administrative col-

lection to the Internal Revenue Service Appeals Office before filing a motion for damages for violation of the automatic stay in Bankruptcy Court to avoid losing their claim to attorney's fees. Such an administrative appeal may also lead to a quick end to the stay violation, and minimize the damages to your client.¹⁴

The administrative appeal rights of 26 U.S.C. § 6330 may also be an alternative to a Title 11 bankruptcy filing for a client whose woes are more limited to tax collection problems than financial problems generally. The informal procedures before IRS Appeals are not public, unlike bankruptcy court filings. There is no need to make public financial disclosures, or to imperil other credit. Nor is there a need for the client to take time off from work to attend court hearings. Both the collection appeal form, Form 9423, and the power of attorney form, Form 2848, are available at the IRS Web site. Counsel may wish to give serious consideration to using the administrative appeal rights of Section 6330 to deal with a client's problems before the IRS, rather than filing a bankruptcy petition for the client. ■



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Endnotes

1. The April 1997 Visa Consumer Bankruptcy Survey reported that six percent of bankruptcy filers reported that taxes were the immediate cause for their bankruptcy.
2. *In re Hardy*, 97 F.3d 1384, 1391 (11th Cir. 1996); *In re Jove Engineering*, 92 F.3d 1539, 1560 (11th Cir. 1996); *In re Flynn*, 185 B.R. 89 (S.D. Ga. 1995); *In re Thibodaux*, 201 B.R. 827 (Bankr. N.D. Ala. 1996); *In re Davis*, 201 B.R. 835 (Bankr. S.D. Ala. 1996); *In re Matthews*, 184 B.R. 594 (Bankr. S.D. Ala. 1995); *In re Tyson*, 145 B.R. 91 (Bankr. M.D. Fla. 1992).
3. *In re Matthews*, 184 B.R. 594, 601 (Bankr. S.D. Ala. 1995). See also *In re Brickell Inv. Corp.*, 922 F.2d 696, 703-04 (11th Cir. 1991) (Award of attorney's fees proper as there was no administrative remedy for an erroneous proof of claim).
4. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977). *Myers v. United States*, 647 F.2d 591, 602 (5th Cir. 1981).
5. The IRS, in view of the taxpayer privacy requirements of 26 U.S.C. § 6103, did not publicly answer any of these taxpayer complaints, leaving the discussion one-sided.
6. The legislative history states that an appeal can still be filed even after the 30-day period expires. H.R. Rep. 105-599 at p. 131.
7. Taxpayers are often represented by accountants before appeals.
8. See 26 U.S.C. § 6015.
9. 26 U.S.C. §§ 6212(a); 6213(a).
10. 400 Second Street, N.W., Washington, D.C. 20217.
11. The Bankruptcy Court for the District of Puerto Rico, in an unreported decision, denied an award of attorney's fees based upon the failure of debtors to submit an administrative claim for damages to an IRS District Director. The regulations under 26 U.S.C. §

7430 includes such a written claim under the definition of "administrative remedies" for the purpose of Section 7430. 26 C.F.R. § 301.7430-1(d)(i)(ii). *In re Torres*, 2001 WL 1807624 (Bankr. D. P.R. Oct. 17, 2001). The Section 7430 regulations pre-date the enactment of Section 6330.

12. See 11 U.S.C. § 106(a)(3)(bar against punitive damages); 106(c)(offset of damage claim against Governmental claim); 26 U.S.C. § 7430.
13. 28 U.S.C. § 2675(a); 26 U.S.C. § 7422(a).
14. Another way to obtain quick relief from stay violations by agencies of the United States Government is to contact the appropriate United States Attorney's Office or Internal Revenue Service Area Counsel office. Please feel free to call the author at (251) 415-7161 or fax at (251) 441-5051. In the Middle District, you may wish to contact Assistant U.S. Attorney Patricia Conover at (334) 223-7280. In North Alabama, you may wish to contact IRS Counsel Senior Attorney Jack Driscoll at (205) 912-5458. Please include whatever document your client received from the IRS or other agency, the Bankruptcy Court case number and the Social Security or Tax Identification number of the debtor.

This article originally appeared in the November 2003 issue of *The Florida Bar Journal* and is reprinted with permission.

Charles Baer

Charles Baer is a graduate of Holy Cross College and Duke University School of Law. He is admitted in Georgia, Florida and Alabama. Before becoming an Assistant U.S. Attorney, he was in private practice, and also worked at the Securities and Exchange Commission, with the Department of Justice and was a SAUSA and IRS attorney in Florida.

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For example, if you were inactive or held a special membership and converted to a regular membership during 2003, you are required to obtain 12 hours of CLE credit. If you were a regular member during 2003 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 2003 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.

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Employment



NOVEMBER

The Enforceability of Covenants Not To Compete In Alabama¹

BY MICHAEL EDWARDS, MICHAEL FREEMAN AND MATTHEW CARROLL

Covenants not to compete, which, at one time, were primarily used with high-level executives and managers, have become commonplace in today's workplace.² This trend, combined with the current downturns in both the job market and the economy in general, has led to a recent increase in the number of cases, both in Alabama and elsewhere, where an employer is seeking to enforce a non-compete agreement or a former employee and his new employer are seeking to avoid one.³

This article discusses the enforceability of covenants not to compete under Alabama law. In Alabama, the enforceability of such agreements is restricted by statute⁴ and by a judicially imposed test of reasonableness.

The Alabama statute applicable to covenants not to compete is Section 8-1-1, entitled "Contracts restraining business void." It provides:

- (a) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by this section is to that extent void.
- (b) One who sells the goodwill of a business may agree with the buyer and one who is employed as an agent, servant or employee may agree with his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city or part thereof so long as the buyer, or any person deriving title to the goodwill from him, or employer carries on a like business therein.
- (c) Upon or in anticipation of a dissolution of the partnership, partners may agree that none of them will carry on a similar business within the same county, city or town, or within a specified part thereof, where the partnership business has been transacted.⁵

The statute begins in subsection (a) by declaring void *all* contracts by which anyone is restrained from exercising a lawful profession, trade or business except as specifically provided by the statute. Thus, in determining the enforceability of a covenant not to compete governed by Alabama law, one generally should begin with the proposition that all such covenants are void unless they fit within one of the exceptions provided by subsections (b) or (c).

Of course, actions on contracts containing covenants not to compete, in addition to meeting the requirements of Section 8-1-1(b), are also subject to the same defenses as any other contract action. For example, a party seeking to enforce a contract containing a covenant not to compete must have been qualified to do business in Alabama at the time the covenant was executed, unless the activities contemplated by the agreement are interstate in nature.⁶

While this article focuses primarily on the enforceability of covenants not to compete, practitioners should be aware that litigation in this area often includes other claims arising out of the employment relationship and its termination. For example, in *James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc.*,⁷ the former employer sued its former employee and his new employer, asking for injunctive relief to enforce the covenant, damages against the former employer for breach of contract and damages against the new employer for knowing and intentional interference with the covenant. The Supreme Court of Alabama ruled that (1) the covenant was enforceable by injunction, (2) the former employee was liable for damages for breach of contract, and (3) the new employer was liable for damages for intentional and knowing interference with the contractual relationship between the former employer and its former employee.

For purposes of discussion, the agreements in restraint of trade *not* disallowed by the Alabama statute may be divided into two categories: (1) covenants not to compete between employers and employees, and (2) covenants not to compete arising from the sale of a business and dissolution of a partnership.

Employer-Employee Covenants

Increasingly, as a condition of employment or otherwise, employees will agree not to compete with their employers after termination of their employment.⁸ Alabama courts have cautioned that they review such restraints with disfavor "because they tend not only to deprive the public of efficient service, but tend to impoverish the individual."⁹ As the Alabama Supreme Court declared in *Calhoun v. Brendle, Inc.*,¹⁰ "One does not have an unfettered right to be free of competition in this country, and contracts which seek to restrain one in the exercise of his right to practice a lawful trade or profession are disfavored."

A. Alabama Code Section 8-1-1

Consistent with the court's general attitude toward post-employment restraints, Alabama courts have narrowly construed the employer-employee exception contained in *Alabama Code* § 8-1-1(b). For example, the supreme court has construed the wording "with his employer" in § 8-1-1(b) to preclude the enforcement of covenants entered into between the employee and anyone other than his then-current employer. In *Pitney Bowes, Inc. v. Berney Office Solutions*, the court held that a restriction signed by individuals shortly before they began working at a company was unenforceable because the individuals had not been Pitney Bowes employees at the time the agreements were executed:

The employer-employee exception to the voidness of non-compete agreements does not save a non-compete agreement unless the employee-employer relationship exists *at the time the agreement is executed*. . . . Absent the employee-employer relationship when the agreement is executed, the agreement is void. . . . The voidness of the agreement in this case did not disappear when Pitney employed Morris almost a month after the signing. Morris did not re-execute the agreement after Pitney employed him.¹¹

Similarly, the court has construed the phrase "an agent, servant or employee" in the statute to preclude the enforceability of a covenant not to compete entered into by independent contractors and sales agents.¹² For instance, in *Premier Industrial Corp. v. Marlow*,¹³ the court refused to enforce covenants between a corporation and its "independent sales agents." In determining whether the independent sales agents were independent contractors (covenant not enforceable) as opposed to employees (covenant enforceable), the court applied the following test:

For one to be an employee, the other party must retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.¹⁴

Alabama courts have also narrowed the employer-employee exception by holding that it does not apply to professionals. The basis for the court's holding on this point is its interpretation of subsection (a) to the Alabama statute, which provides:

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Every contract by which anyone is restrained from exercising a lawful profession . . . otherwise than is provided by this section is to that extent void.

Neither subsection (b) nor subsection (c) of the statute exempt contracts restricting the practice of a "profession." Applying this interpretation, the Supreme Court consistently has refused to enforce post-employment restrictions signed by professionals.

In defining what is a "profession" and who are "professionals," Alabama courts have referred to the late Dean Roscoe Pound's definition found in the *Lawyer from Antiquity to Modern Times*:

The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is the purpose. Gaining a livelihood is incidental, whereas, in a business of trade it is the entire purpose.¹⁵

The callings the court has defined as "professions" include physicians,¹⁶ veterinarians¹⁷ and accountants, both public¹⁸ and certified.¹⁹ However, in *Dobbins v. Getz Exterminators of Alabama, Inc.*,²⁰ the court, noting "there are multitudes of businesses but few professions," rejected the argument that pest control technicians were "professionals" by virtue of a statute referring to them as "persons engaged in professional services."

Finally, the court's construction of § 8-1-1 limits not only whether a covenant falls within the employer-employee exception, but also who has standing to enforce such covenants when they do. For instance, in *Construction Materials, Ltd. v. Kirkpatrick Concrete, Inc.*, the court held that a third party beneficiary had no standing to enforce a covenant not to compete because nothing in § 8-1-1 recognized the right of a third party to enforce a covenant not to compete. The court ruled:

However, in light of our public policy against restraints of lawful trade and our correspondingly strict construction of § 8-1-1, this court . . . will not recognize a third-party beneficiary's right to enforce a non-competition agreement unless § 8-1-1 mandates that we do so. The fact that the agreement here expressly provides for the enforcement by the third party does not in itself authorize us to recognize such a right.²¹

Similarly, in *Clark Substations, L.L.C. v. Ware*, the court held that a corporation that purchased the assets of another corporation was not entitled to enforce non-competition agreements entered into between the corporation whose assets were acquired and its employees.²² The court explained that, under the provisions of the Alabama Business Corporation Act, the "mere purchase of a corporation's assets, without a valid assignment of specific contract rights," does not give the purchaser all the rights of the seller of the assets. Accordingly, there was nothing about a mere purchase of assets that would override the language of Section 8-1-1 limiting the right of enforcement only to employers.²³

B. Common Law Restrictions on Enforcement of Covenants Not to Compete

Even where an employer/employee relationship exists and a covenant falls within the exception provided by 8-1-1, Alabama courts still may refuse to enforce covenants unless the former employer demonstrates the following:

1. it has a protectable interest;
2. the restriction is reasonably related to that interest;
3. the restriction is reasonable in time and place; and
4. the restriction imposes no undue hardship on the employee.²⁴

The Alabama Supreme Court emphasized the importance of the "protectable interest" requirement in the 1982 decision of *DeVoe v. Cheatham*.²⁵ In *DeVoe*, the employer hired and trained an inexperienced employee to install vinyl tops on automobiles and had him sign a five-year restrictive covenant. After the employee was discharged, the employer sought to enforce the covenant against him. The court held that the restriction was not enforceable, explaining that the employer did not have a "sufficiently unique" right to warrant protection:

If an employee is in a position to gain confidential information, access to secret lists, or to develop a close relationship with clients, the employer may have a protectable interest in preventing that employee from competing. But in the present case, DeVoe learned no more than the normal skills of the vinyl top installation trade, and he did not engage in soliciting customers. There is no evidence that he either developed any special relationship with the customers or had access to any confidential information or trade secrets. A simple labor skill, without more, is simply not enough to give an employer a substantial protectable right unique in his business.²⁶

Since *DeVoe*, the protectable interest requirement has been the focus of much litigation. In a variety of contexts, the court has refused to enforce post-employment covenants where the employment relationship was of short duration or where the court felt the employee was like the simple laborer in *DeVoe* and did not possess either close relationships with his employer's clients or knowledge of any confidential information. For example, the court has found that the employer had no protectable interest in cases involving an insurance agent who was employed for only a year and denied having any customer information,²⁷ copier technicians,²⁸ a television station advertising salesman employed for only two months, and a fire extinguisher technician.²⁹

The court, however, will find a protectable interest and enforce a covenant not to compete where the evidence indicates that the employee had substantial customer contact during his employment. For example, in *Clark v. Liberty Nat'l Life Insurance Co.*,³⁰ the Alabama Supreme Court affirmed a judgment declaring valid a non-competition agreement signed by an insurance agent, noting that he was Liberty National's "sole contact" with its policyholders, and recognizing that these relationships were a "valuable asset."

Similarly, the courts will enforce a covenant where the evidence indicates that the employer has imparted confidential competitive information to his employee. For example, in *Central Bancshares of the South, Inc. v. Puckett*,³¹ the court enforced statewide a covenant between Central Bank and two of its former top executives, finding that:

Brannon and Puckett, as key employees of Central Bank, had peculiar access to all of the techniques and strategies of the bank responsible for that position. If an employee is in a position to gain confidential information, access to secret lists, or to

develop a close relationship with clients, the employer may have a protectable interest.³²

Finally, though no state court has confirmed this interpretation, the Eleventh Circuit has concluded that under Alabama law a protectable interest also can arise from an employer's investment and training of its employees.³³

Even where an employer establishes the existence of a protectable interest, either in its customers or confidential information, the court will only prohibit competition that threatens that protectable interest. This point was illustrated in the *Central Bancshares* decision where the court stated:

We find that the restriction regarding competition in the banking business is reasonably related to Central Bank's protectable interest, because the restriction is designed to protect Central Bank only in the area in which it has a legitimate interest: the banking industry. The agreement specifically prohibits Brannon and Puckett from competing in the banking business; it does not preclude Brannon and Puckett from pursuing work outside of banking.³⁴

The court will also look at whether the restriction is reasonable as to time and place. The language of Section 8-1-1 specifically states that an employee may agree not to compete with his employer "within a specified county, city or part thereof so long, as the... employer carries on a like business therein." Though this language would appear to limit the geographic scope of a covenant not to compete to a city or county, the supreme court interprets this statutory language as requiring that any restriction be "reasonable in time and place." Where a restriction is overly broad, however, Alabama courts have the equitable power to strike any unreasonable portion and to "blue pencil" or rewrite contracts to make it reasonable.³⁵

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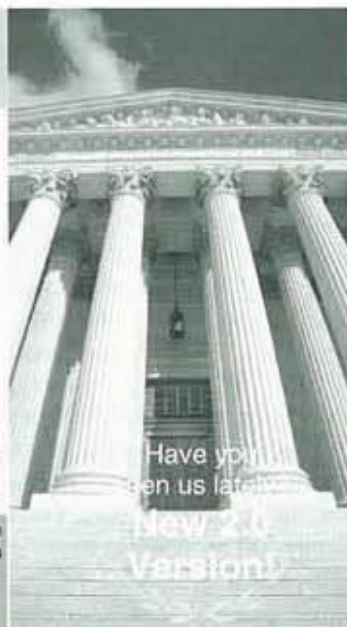
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What constitutes a reasonable geographic area depends upon the proof of what protection the business needs. As the Eleventh Circuit advised in *Cornutt*,³⁶ "To secure enforcement of a non-compete clause within a particular territory, the employer must demonstrate that it continues to engage, in that locale, in the activity it seeks to enjoin."³⁷ Applying similar logic, the Alabama Supreme Court endorsed a trial judge's order limiting to one county the territorial restriction to be enforced by injunction where 90 percent of the employer's customers were located in that county.³⁸

While few Alabama cases expressly discuss what period of time is reasonable for a valid employment restriction, it is clear that durations of two years and less pass judicial scrutiny.³⁹ On more than one occasion the court has stated, "[T]here can be no doubt that a two-year period for the restriction is reasonable."⁴⁰ While the supreme court has never defined the outer boundary of what time period is reasonable, it has affirmed a trial court that reduced an employer-employee covenant from five years to three years,⁴¹ and refused to enforce a five-year covenant against a former employee who had refrained from competing for two years and four months following his termination.⁴²

Oftentimes, when the court refuses to enforce a covenant on the basis that the employer lacks a protectable interest, it also will find as additional support for its decision that the covenant would place an undue hardship on the employee.⁴³ For example, in *Chavers v. Copy Products Co.*,⁴⁴ the court, after finding the employer lacked a protectable interest, added:

[T]he restriction in question places an "undue hardship" on Chavers. Though he is a highly skilled working man, he is nevertheless still only a working man, and it is undisputed that the only trade he knows and by which he can support himself and his family is copier maintenance and repair.⁴⁵

Similarly, in *Sheffield v. Stoudenmire*,⁴⁶ the court stated, "This restriction imposes an undue hardship on Stoudenmire, who is fifty years old, married, and possesses significant financial obligations."⁴⁷

However, the supreme court has recognized that payment of significant consideration to the employee for his agreement not to compete is an important factor in the undue hardship analysis. The court has stated:

Considering all the circumstances, we cannot hold that Beasley will suffer undue hardship if the covenant is enforced according to its terms. As a former director and officer of First National, he bargained for and received over a quarter of a million dollars for his stock. He is free to accept employment in a bank outside of Baldwin County, or he can accept a non-banking position within Baldwin County. On March 16, 1985, he will be totally free of the non-competition covenant. We do not see how any lesser burden could be placed on Beasley without completely derogating both the covenant's purpose and its consideration.⁴⁸

It is clear from the decisions discussed *supra* that Alabama courts disfavor post-employment non-competition agreements

and that convincing a court to enforce one can be challenging. Still, where the facts warrant, Alabama courts have been more than willing to enforce covenants and have done so in all sorts of contexts. For instance, Alabama courts have enforced covenants not to compete against banking executives,⁴⁹ insurance agents,⁵⁰ television broadcasters,⁵¹ radio announcers,⁵² newspaper publishers,⁵³ advertising managers,⁵⁴ gas company⁵⁵ and dry cleaning route men,⁵⁶ pest control managers and technicians,⁵⁷ travel agents,⁵⁸ and even a coffee salesman.⁵⁹



Sale of Business and Partnership Dissolution Covenants

Subsection (b) of the Alabama statute permits the seller of the goodwill of a business to agree with the buyer to refrain from carrying on or engaging in a similar business. Likewise, subsection (c) permits partners upon or in anticipation of dissolution of a partnership to agree that some of them will not carry on a similar business.⁶⁰

Alabama courts considering covenants not to compete executed in such situations have not been nearly so restrictive in con-

struing the agreements as they have been in construing covenants executed by employees. Although not articulated by an Alabama court, this probably is due to the fact that covenants executed in connection with the sale of a business are far more likely to have been negotiated between sophisticated individuals capable of arms-length bargaining who usually receive greater up-front consideration for their non-competition promises than do employees.

In order for a covenant not to compete to be valid when executed in connection with the sale of a business, it is not necessary that the contract of sale specifically state that the transaction includes the sale of goodwill. It is sufficient if the contract indicates that the buyer is taking over a going concern.⁶¹ However, the contract of sale must contain a provision prohibiting competition, because covenants not to compete will never be implied.⁶²

Just as contracts restricting the practice of a profession are void in the employment context, so too are contracts executed by "professionals" in connection with the sale of a business or the dissolution of a partnership. For example, in *Friddle v. Raymond*,⁶³ the Alabama Supreme Court affirmed a trial judge's refusal to enforce a covenant not to compete contained in an agreement memorializing the dissolution of a partnership between two veterinarians. Similarly, in *Thompson v. Wiik, Reimer & Sweet*, the court refused to enforce a covenant not to compete made in connection with the sale of an accounting practice.⁶⁴ The court did hold, however, that while the accountant who sold the practice was permitted to compete, the purchaser was relieved of the obligation to make future purchase payments to the seller.

In subsequent decisions, the court has distinguished *Thompson* and required purchasers to continue to make payments to sellers even though the sellers' covenants not to compete were found void.⁶⁵ The court has justified its rulings in these subsequent cases on the basis that there was sufficient consideration, in addition to the covenant, provided by the seller to support the purchase price.⁶⁶

Under the category of something to consider, the supreme court has refused to enjoin the wife of the seller of a business

from competing with the business her husband sold where the wife was not a party to the agreement. In *Russell v. Mullis*,⁶⁷ an action was brought against a wife to enjoin her from operating a convenience store in competition with two convenience stores her husband previously sold to the plaintiff. Noting that the wife "was not a party to either contract," and the evidence showed that the convenience store was "owned and operated solely" by the wife, the court denied the plaintiff's request for injunctive relief against the wife. The court did recognize, however, that had the facts shown that the husband assisted his wife in operating the store or the wife assisted the husband in violating the covenant, the wife properly could be enjoined.⁶⁸

The court has made clear, however, that it will not tolerate circumvention of valid covenants not to compete through the use of front people. In *Files v. Schaible*,⁶⁹ a restaurant owner sold his restaurant, named the "Ellis Red Barn Restaurant" and agreed not to compete. Shortly thereafter, a restaurant named the "Ellis V" opened across the street from the "Ellis Red Barn Restaurant." Though the lease purchase agreement for the new restaurant was signed by a former Red Barn waitress rather than by its former owner, the court had no difficulty in affirming a jury verdict against the former owner for breach of the agreement where the evidence at trial was that the former owner told a number of people that he had managed to find a way to "get around" the non-competition agreement.⁷⁰

Like post-employment restraints, the court will enjoin competition only for a reasonable time and within a reasonable geographic location. The courts, however, seem to recognize that a wider scope may be appropriate in the sale of business context than it would be in the employment context. For example, agreements not to compete with sold businesses have been enforced in areas as expansive as the entire United States and Canada for a period of five years.⁷¹ Again, like post-employment restraints, the guiding light has been what protection is necessary under the particular facts of the case. Put more simply, "Where did the sold business operate prior to the sale?"⁷²

Partial Restraints

Alabama courts long held that the prohibition of § 8-1-1 against restraints of trade applied only to agreements that were general or total restraints and not to agreements that only partially restrained trade, such as non-solicitation agreements. As a result, whether a restraint was general or only partial was a hotly litigated issue.⁷³ In 1998, in the case of *Sevier v. Willis Corroon*, the supreme court abrogated this rule and held that § 8-1-1 applies to all restraints of trade, regardless of whether they are characterized as total or partial restraints. The court reached this decision after examining the legislative history of § 8-1-1 and finding nothing that justified its prior interpretation that the statute applied only to general restraints.⁷⁴ Accordingly, the defense that a covenant not to compete is only a partial restraint of trade outside of the terms of 8-1-1 is no longer valid.

Remedies for Violation

Alabama courts have recognized both monetary damages⁷⁵ and injunctions⁷⁶ as appropriate remedies for the breach of an

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enforceable covenant not to compete.⁷⁷ In contrast to the numerous Alabama cases discussing when such covenants are enforceable, however, there have been relatively few cases analyzing when or under what circumstances either of these two remedies (or both) would be appropriate.

The proper measure of monetary damages for breach of a covenant not to compete is the standard breach of contract damages measure of "an amount sufficient to return the plaintiff to the position he would have occupied had the breach not occurred."⁷⁸ This can include lost profits, assuming the employer's formula for calculating lost profits meets the general standards of reliability imposed by Alabama law.

In *Clark*, the Alabama Supreme Court affirmed a lost profit award for an insurance agent's violation of a covenant not to compete after reviewing his former employer's lost profits calculation and finding that it was reasonable and fair under the circumstances. In reaching this conclusion, the court rejected the agent's argument that the formula was flawed because it did not take account of certain factors such as the defendant's good relationship with his customers, and the fact that defendant's replacement did not have as good a relationship with the customers as he had. The court held that Clark had no right to object to the formula on these grounds because "these are the very things that the non-competition agreement protects Liberty National from and are not factors by which Clark is entitled to have the trier of fact decrease the amount of damages."⁷⁹

Other remedies employers frequently seek are temporary restraining orders (which are limited and valid for only short

periods of time)⁸⁰, preliminary injunctions and permanent injunctions. All of these seek a court order enjoining the employee from competing.

The Alabama Supreme Court recently addressed what an employer must show to be entitled to a preliminary injunction against its former employee. In *Ormco Corporation v. Johns*, the court made clear that an employer seeking an injunction must satisfy the traditional requirements for a preliminary injunction, i.e., that: (1) without an injunction they would suffer immediate and irreparable injury, (2) that they have no adequate remedy at law, (3) that they have a reasonable chance of success on the ultimate merits of the case, and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to them.⁸¹ Adopting Minnesota law, the court then created what it referred to as a new "framework" for determining whether an employer has demonstrated the "immediate and irreparable injury" element in covenant not to compete cases involving salespeople.⁸² Under this new framework, an employer can create a "rebuttable inference" of immediate and irreparable injury by making a *prima facie* showing that (1) a valid non-competition agreement exists, (2) it has a protectable interest, and (3) the former employee is actively competing with it in the same geographic area.

The employee then has the opportunity to rebut this inference. According to the court, the employee could do this with "evidence indicating that the customers' purchase decisions were based primarily on an independent preference for the particular goods of the employer rather than on the relationship between

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the customer and the salesperson" or "evidence indicating either that the salesperson did not have confidential information or that the information was not really confidential." If the salesperson produces such evidence, the inference is destroyed and the burden then shifts back to the employer to produce additional evidence that it will be irreparably harmed by the salesperson's activities.⁸³

Laws to be Applied

Quite often, contracts containing covenants not to compete, like other contracts, provide that they shall be governed by the laws of another state. The Alabama Supreme Court has held that "the right of parties to a contract to choose the law governing their obligations is recognized by Alabama law only if the consequences of that election are not contrary to Alabama public policy."⁸⁴ Accordingly, the court has refused to enforce a covenant not to compete that ran afoul of Alabama's limits on such restraints even though the covenant was fully enforceable under the laws of the state (North Carolina) selected by the choice of law provision.⁸⁵

Conclusion

As may be evident from this article, it is often difficult to predict where a trial or appellate court may draw the fine line between reasonable protection of an employer's or purchaser's business interests and an unreasonable restraint on trade. As the court cautioned in *Sheffield v. Stoudenmire*,⁸⁶ "[E]ach particular contract must be tested by determining on the facts of the particular case whether the restriction upon one party is greater than is reasonably necessary for the protection of the other party." While this article is in no way exhaustive, it is hoped that it provides some guidance in the drafting of restraints on competition and some assistance to counsel who may be drawn into disputes involving such agreements.

Endnotes

1. The precursor to this article first appeared in *The Alabama Lawyer* in September 1983 and that original article was updated and re-published in 1992. The authors count no less than 15 Alabama Supreme Court and Court of Appeals cases on covenant not to compete issues during the decade since this topic was last addressed, illustrating the significant amount of activity in this area. While this article generally employs the same

format as its predecessors, it places more emphasis on cases decided in the past decade and highlights those areas where the law has changed.

2. Vivian Marino, "Five Questions for Arnold H. Pedowitz: So Long, Now Don't Compete," *N.Y. Times*, February 16, 2003, Sec. 3, p. 10.
3. See Adam Geller, "Non-Compete Contracts Spread Confusion in a Tight Job Market," *St. Louis Times Dispatch*, March 9, 2003, E2.
4. See generally *Ala. Code* § 8-1-1 (1975).
5. *Ala. Code* § 8-1-1 (1975).
6. *Compare Advance Indus. Sec., Inc. v. William J. Burns Int'l Detective Agency*, 377 F.2d 236 (5th Cir. 1967); *C & C Products, Inc. v. Premier Indus. Corp.*, 290 Ala. 179, 275 So.2d 124 (1972); with *Ormeo Corporation v. Johns*, 2003 WL 2007816 n. 1 (Ala. May 2, 2003).
7. 434 So.2d 1380 (Ala. 1983).
8. Vivian Marino, "Five Questions for Arnold H. Pedowitz: So Long, Now Don't Compete," *N.Y. Times*, February 16, 2003, Sec. 3, p. 10.
9. *Sheffield v. Stoudenmire*, 553 So.2d 125, 126 (Ala. 1989) (quoting *Robinson v. Computer Servicers, Inc.*, 346 So.2d at 943).
10. 502 So.2d 689, 693 (Ala. 1986).
11. 823 So.2d 659, 662 (Ala. 2001) (internal citations omitted)(emphasis in the original).
12. *Premier Indus. Corp. v. Marlow*, 292 Ala. 407, 295 So.2d 396, *Cert. Denied*, 419 U.S. 1033 (1974); *C&C Products, Inc. v. Fidelity & Deposit Co.*, 512 F.2d 1375 (5th Cir. 1975); *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979).
13. *Premier Indus.*, 292 Ala. 407, 295 So.2d 396. This rule recently was recognized and referenced by Justice Harwood in his concurring opinion in *Pitney Bowes*, 823 So.2d at 665.
14. *Premier Indus.*, 292 Ala. at 411-412, 295 So.2d at 399 (quoting *Odess v. Taylor*, 282 Ala. 389, 396, 211 So.2d 805, 811 (1968)).
15. *Fridtle v. Raymond*, 575 So.2d 1038, 1040 (Ala. 1991) (quoting *Odess v. Taylor*, 282 Ala. 389, 396, 211 So.2d 805, 812 (1968)).
16. *Salisbury v. Semple*, 565 So.2d 234 (Ala. 1990); *Odess v. Taylor*, 282 Ala. 389, 211 So.2d 905 (1968).
17. *Fridtle*, 575 So.2d at 1040.
18. *Burkett v. Adams*, 361 So.2d 1 (Ala. 1978).
19. *Cherry, Bekaert & Holland v. Brown*, 582 So.2d 502 (Ala. 1991); *Mann v. Cherry, Bekaert & Holland*, 414 So.2d 921 (Ala. 1982); *Thompson v. Wik, Reimer & Sweet*, 391 So.2d 1015 (Ala. 1980).
20. 382 So.2d 1135 (Ala. Civ. App., 1980).
21. 631 So.2d 1006, 1009 (Ala. 1994); *but see Ormeo Corporation v. Johns*, 2003 WL 2007816 n. 1 (Ala. May 2, 2003)(holding that subsidiary corporation could enforce where agreement was between employee and parent corporation "and each of its divisions and subsidiary corporations").
22. 838 So.2d 360, 365 (Ala. 2002).
23. 838 So.2d at 365. The supreme court has, however, recognized that after a merger of two corporations, the successor corporation had standing to enforce covenants entered into between one of the two predecessor corporations and its employees where the Alabama corporate statute governing the merger gave the corporation that survived all the rights of its predecessor. *Sevier Insurance v. Willis Corroon*, 711 So.2d at 1000-1001.
24. *Central Bancshares of South, Inc. v. Puckett*, 584 So.2d 829 (Ala. 1991) (quoting *James S. Kemper & Co. Southeast, Inc. v. Cox & Assoc., Inc.*, 434 So.2d 1380, 1384 (Ala. 1983)).
25. 413 So.2d 1141 (Ala. 1982).
26. 413 So.2d at 1142 (citing the Restatement (second) of Contracts § 188, Comment B (1979)).
27. *Sheffield v. Stoudenmire*, 553 So.2d 125 (Ala. 1989).
28. *Chavers v. Copy Products Co.*, 519 So.2d 942 (Ala. 1988); *Greenlee v. Tuscaloosa Office Prods. & Supply Co., Inc.*, 474 So.2d 669 (Ala. 1985).
29. *Birmingham Television Corp. v. DeRamus*, 502 So.2d 761 (Ala. Civ. App. 1986).
30. 592 So.2d 564, (Ala. 1992).
31. 584 So.2d 829 (Ala. 1991).
32. 584 So.2d at 831 (quotation marks and citation omitted).
33. *Nationwide Mutual Insurance Co. v. Cornutt*, 907 F.2d 1065, 1068 (11th Cir. 1990).
34. *Central Bancshares*, 584 So.2d at 831.

2003 Alabama Bar Directory Errata Sheet

Members' copies of the 2003 *Alabama Bar Directory* have been mailed. However, several additions/corrections need to be made to this year's edition. We have compiled this information into an errata sheet which can be downloaded from the ASB Web site, at www.alabar.org. Please visit the "Members" page for more information. **Membership information is not affected.**

35. *Cullman Broadcasting*, 373 So.2d at 835; *Mason Corp. v. Kennedy*, 286 Ala. 639, 645, 244 So.2d 585, 590 (1971).
36. 907 F.2d 1085 (11th Cir. 1990).
37. *Id.* at 1088; see also *James S. Kemper & Co. Southeast Inc. v. Cox & Assocs. Inc.*, 434 So.2d 1380, 1385 (Ala. 1983) (noting that "the area in which the [insurance] agent was active for the insurance company" is the appropriate territory to enjoin competition).
38. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 93, 229 So.2d 480, 484 (1969).
39. *Clark*, 592 So.2d at 566; *Central Bancshares*, 584 So.2d at 831; *James S. Kemper*, 434 So.2d at 1384.
40. *Clark*, 592 So.2d at 566 (quoting *James S. Kemper*, 434 So.2d at 1385).
41. *Ex Parte Caribe U.S.A., Inc.*, 702 So.2d 1234 (Ala. 1997).
42. *Mason Corp. v. Kennedy*, 286 Ala. 639, 244 So.2d 585 (1971).
43. See *Sheffield v. Stoudenmire*, 553 So.2d 125, 126-27 (Ala. 1989); *Chavers v. Copy Products Co.*, 519 So.2d 942, 945 (Ala. 1998); *Caihour v. Brendle, Inc.*, 502 So.2d 689, 694 (Ala. 1986).
44. 519 So.2d 942 (Ala. 1988).
45. 519 So.2d at 945.
46. *Sheffield*, 553 So.2d 125.
47. 563 So.2d at 126-127.
48. *Central Bank of the South v. Beasley*, 439 So.2d 70, 74 (Ala. 1983).
49. *Central Bancshares of the South, Inc. v. Puckett*, 584 So.2d 829 (Ala. 1991).
50. *Clark*, 592 So.2d at 567; *James S. Kemper & Co. Southeast, Inc.*, 434 So.2d at 1385-86.
51. *Booth v. WPMI Television Co.*, 533 So.2d 209 (Ala. 1988).
52. *Cullman Broadcasting Co. v. Bosley*, 373 So.2d 830 (Ala. 1979).
53. *Tyler v. Eufaula Tribune Publishing Co.*, 500 So.2d 1005 (Ala. 1986).
54. *Parker v. EBSCO Indus.*, 282 Ala. 98, 209 So.2d 383 (1968).
55. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So.2d 480 (1969).
56. *Shelton v. Shelton*, 238 Ala. 489, 192 So.55 (1939).
57. *Rush v. Newsom Exterminators*, 261 Ala. 610, 75 So.2d 112 (1954); *Slay v. Hess*, 252 Ala. 455, 41 So.2d 582 (1949); *Dobbins v. Getz Entertainment of Alabama, Inc.*, 382 So.2d 1135 (Ala. Civ. App. 1980).
58. *Daniel v. Trade Winds Travel, Inc.*, 532 So.2d 653 (Ala. Civ. App. 1988).
59. *Dixon v. Royal Cup, Inc.*, 386 So. 2d 481 (Ala. Civ. App. 1980).
60. Because there are far fewer cases construing this provision, this article focuses more on the "sale of a business" exception to the general prohibition against agreements that restrain trade.
61. *Russell v. Mullis*, 479 So.2d 727, 729 (Ala. 1985); *Files v. Schiabile*, 445 So.2d 257, 260 (Ala. 1984); *Maddox v. Fuller*, 233 Ala. 662, 173 So. 12 (1937).
62. *Joseph v. Hopkins*, 276 Ala. 18, 23-24, 158 So.2d 660, 665 (1963) (citing *Collas v. Brown*, 211 Ala. 443, 100 So.2d 769 (1924)).
63. 575 So.2d 1038 (Ala. 1991).
64. 391 So.2d 1016 (Ala. 1980).
65. *Salisbury v. Semple*, 565 So.2d 234, 236 (Ala. 1990); *Mann v. Cherry, Bekaert & Holland*, 414 So.2d 921, 924 (Ala. 1982).
66. *Salisbury*, 565 So.2d at 236 (purchaser required to continue payments where 70 percent of the purchase price was allocated to the covenant not to compete and 30 percent for goodwill); *Mann* 414 So.2d at 924 (contract not void even though covenant unenforceable where purchaser also obtained client list and goodwill).
67. 479 So.2d 727 (Ala. 1985).
68. 479 So.2d at 729 (citing *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So.2d 480 (1969)).
69. 445 So.2d 257 (Ala. 1984).
70. 445 So.2d at 261.
71. 523 So.2d at 359.
72. See *Kershaw*, 523 So.2d at 359 (holding covenant enforceable only to extent that it prohibited where business was conducted prior to the sale); *Central Bank*, 439 So.2d at 73.
73. See *Corson v. Universal Door Systems, Inc.*, 596 So.2d 565 (Ala. 1991); *Hoppe v. Preferred Risk Mut. Ins. Co.*, 470 So.2d 1161 (Ala. 1985); *FAMEX, Inc. v. Century Ins. Servs., Inc.*, 425 So.2d 1053 (Ala. 1982); *Hibbett Sporting Goods, Inc. v. Biernbaum*, 391 So.2d 1027, 1029 (Ala. 1980); *Terre Haute Brewing Co. v. McGeever*, 73 So.2d 889 (1916).
74. *Sevier Insur. Agency, Inc. v. Willis Corroon Corporation of Birmingham*, 711 So.2d 995 (Ala. 1998).
75. *Clark*, 592 So.2d 564 (employer awarded \$14,819.61 for employee's violation of covenant); *Files v. Schiabile*, 445 So.2d 257 (Ala. 1984) (restaurant purchaser awarded \$50,000 where seller breached covenant by opening competing business across the street).
76. See, e.g., *Booth v. WPMI Television Co.*, 533 So.2d 209 (Ala. 1988) (enjoining television advertising salesmen from working for another television station within a 60-mile radius for one year).
77. *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 229 So.2d 480 (1969) (in addition, the courts have recognized that a new employer may be enjoined from employing the party agreeing not to compete, or may be assessed damages for interfering with the covenant).
78. *Clark*, 592 So.2d at 567.
79. See 592 So.2d at 568.
80. Alabama Rules of Civil Procedure Rule 65(b).
81. *Ormco*, 2003 WL 2007816* 2 (citing *Perley v. Tapscan, Inc.*, 646 So.2d 585, 587 (Ala. 1994)).
82. *Ormco*, 2003 WL 2007816* 6-7.
83. *Ormco*, 2003 WL 2007816* 7.
84. *Buckley v. Seymour*, 679 So.2d 220 (Ala. 1996).
85. *Cherry, Bakaert & Holland v. Brown*, 582 So.2d 502 (Ala. 1991).
86. 553 So.2d at 126 (citing *Robinson v. Computer Servicers, Inc.*, 346 So.2d 940, 943 (Ala. 1977)).



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Michael Edwards is a partner with Balch & Bingham in the Birmingham office. He is a graduate of the University of Alabama (1964) and the University's School of Law (1966), where he was a member of the *Alabama Law Review* editorial board. He has been listed in *The Best Lawyers in America* and *America's Leading Business Lawyers*, and he is a Fellow of the American College of Trial Lawyers. Edwards is a Master of the Birmingham Inns of Court and served as president from 2001-2003; he also has served on the Executive Committee of the Birmingham Bar Association and the Board of Directors of the Birmingham Bar Foundation. Edwards is a former member of the ASB Board of Bar Commissioners, and a former chair of the Business Torts and Antitrust Section and the Committee on Alternative Dispute Resolution. He is a Fellow of the Alabama Law Foundation. He is a member of the American Arbitration Association, and served in the United States Army, Judge Advocate General's Corps, 1966-1971.



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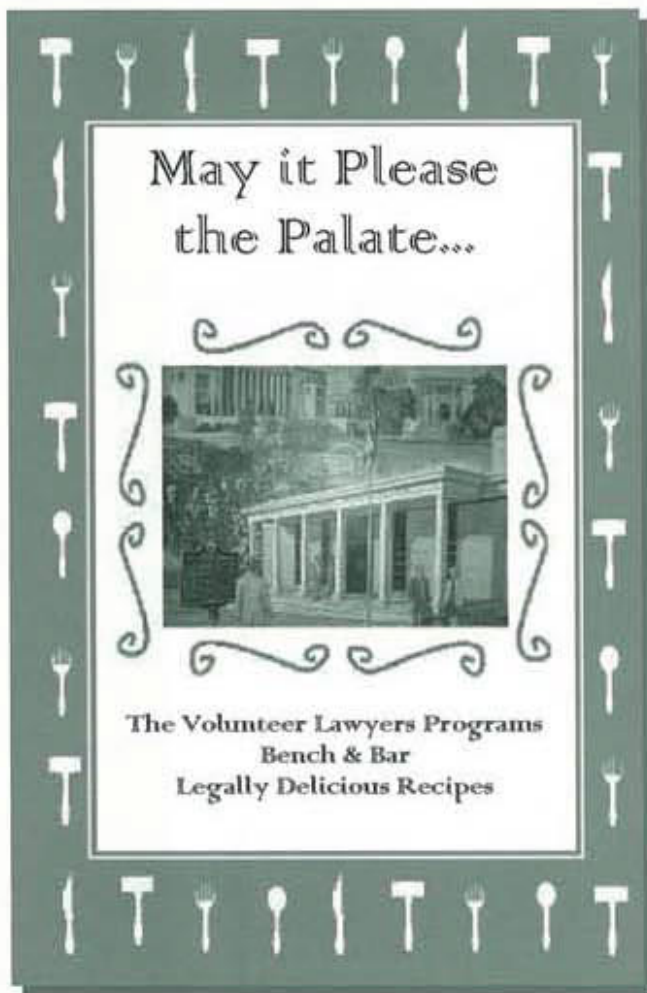
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This Honor Roll reflects our efforts to gather the names of those who participate in organized pro bono programs. If we have omitted the name of any attorney who participates in an organized pro bono program, please send that name and address to:

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"LAWYERS' CASES FOR KIDS"



Sorting luggage are members of the Women Lawyers Section (L-R) Mary Lynn Bates, Julie D. Pearce, Lara D. Thomas, legal assistant to Julie D. Pearce, and Linda Cole



(L-R) Linda Cole, Women Lawyers Section chair (2002-2003); Abby Van Alstyne, Projects Committee co-chair (2002-2003); Clarence Rowe, Community Partnership/Kinship Care coordinator; Julie D. Pearce, Projects Committee chair (2002-2003); Robin King, Resource Development social worker

The Women Lawyers Section of the Birmingham Bar Association recently sponsored a luggage drive for children in Jefferson County's foster care program. "Lawyers' Cases for Kids" began as a simple way to help children in protective custody or foster care, many of whom are forced to leave their homes with a few belongings in paper sacks or plastic bags. As these children are relocated from home to home, they often acquire more belongings, but they have nothing in which to carry them. Through "Lawyers' Cases for Kids," the Women Lawyers Section collected close to 1,000 suitcases, tote bags, backpacks and duffle bags for foster children in Jefferson County.

"Lawyers' Cases for Kids" was featured in the *Birmingham News*, and Birmingham's local Fox affiliate, Channel 6, presented a feature story on the evening news. The willingness of the local media to publicize "Lawyers' Cases for Kids" increased interest and support for the project throughout the Birmingham area. Many local schools, churches and organizations began collecting luggage for the project, and employees of the Greater Birmingham Humane Society even volun-



Our social workers helping to sort luggage

teered their shelter to serve as a drop-off location for donors. The Women Lawyers Section has received numerous offers to provide items other than luggage for DHR's foster care program, which is especially appreciated given the state's current budgetary problems.

Linda Cole, chair of the Women Lawyers Section, said the response from the entire community was amazing, not only from the section's members, but also from the many area lawyers, judges, staff members and families who participated so generously in the project. The president of the Greater Birmingham Foster/Adoptive Parent Association, Freda Williams, expressed her heartfelt appreciation to the section and pointed out that many foster

children critically need diaper bags, diapers, children's clothing in all sizes, and cribs. All too often, when children come into their care at all hours of the day and night, all they may have are the clothes they are wearing.

Julie Pearce and Abby van Alstyne, chair and co-chair of the Projects Committee, spearheaded the luggage drive and coordinated the drop-off locations and delivery times to DHR's office in Birmingham. They had great support and help from their committee members and many other volunteers.

For more information about "Lawyers' Cases for Kids," or for assistance in implementing a similar program in your area, contact Julie Davis Pearce at (205)



J. Anthony McLain

The New Landscape of Lawyering

The practice of law in today's world is ever changing, ever evolving and driven by like significant changes in our society. Generally, jurisprudence, while tied to precedent, also attempts to conform itself to the demands and mores of the public.

New theories of recovery appear as frequently as pop-up ads on the Internet. Novel positions of defense counsel, which appear less than credible at first blush, are readily accepted by a jury in finding for the defendant.

Legislation, rules changes and financial issues create a fluid world of lawyering whereby the practitioner is required to consider things which heretofore were not a necessary process for the lawyer. Instead, the practice of law becomes more complicated with each new statute or regulation, and the lawyer's responsibility to be informed and current increases exponentially.

Federal Legislation

In the last few months, Congress has passed two acts which have caused quite a stir in the legal community. The Gramm-Leach-Bliley Act is the piece of legislation which has contributed significantly to that stack of trash you discard when opening your daily personal mail. Businesses covered by the statute are required to provide you with a privacy notice concerning your account with them. Most consumers have learned that the "Privacy Notice" contained in their monthly credit card bill merits no consideration, much less a detailed reading.

Initially it was thought that the bill applied to lawyers just as it did to credit card companies and banks. The Federal Trade Commission was asked by the American Bar Association if lawyers were exempted from the requirements of the legislation. In 2002, the FTC issued a letter stating that it lacked the authority to grant an exemption from the statute to lawyers

even though requested by the ABA to do so. The ABA had hoped for some relief for lawyers from the reporting requirements of the statute, but alternatively had posted sample privacy notices at its Web site.

Subsequently, the ABA and the New York State Bar Association filed litigation in the federal courts asking that the FTC be enjoined from enforcing the statute against lawyers. Then ABA President A.P. Carlton, Jr., in a January 10, 2003 memo, stated the ABA's position as follows, "The FTC's overly broad interpretation risks confusing clients about the more stringent privacy protections they already enjoy. All lawyers are subject to the laws of the 50 states and the District of Columbia that strictly regulate the privacy, confidentiality and security of all client information. They offer broader and more stringent protections than are spelled out in the Act."

In the federal court litigation, U.S. District Court Judge Reggie Walton of the District Court of Columbia denied the FTC's motion to dismiss the ABA and New York State Bar lawsuits, finding that, "[I]t does not appear that Congress intended for [the Act's] privacy provisions to apply to attorneys," and that the FTC's insistence in enforcing the statute against attorneys "appears to constitute 'arbitrary and capricious' agency action."

So, for now, even if you were not aware of this federal legislation, it is hoped that you are aware of the possible ramifications which it could have on you as a practicing attorney.

A second piece of federal legislation is the Sarbanes-Oxley Act. This Act, referred to as the corporate accountability act, required the Securities Exchange Commission to adopt rules governing lawyers who appear and practice before the SEC. The SEC, in response to the directives of the Act, adopted rules which, in essence, require lawyers for public companies to report "up the ladder" within the client-company structure fraudulent securities activities. If the offi-

cials so notified fail to act on the reported activities, the lawyer could have to report the matter to the SEC if such would prevent the SEC from being defrauded by the client.

The Rules of Professional Conduct

In response to this wave of corporate representation consciousness, the ABA considered substantive revisions to the Model Rules of Professional Conduct. In August 2003, the ABA House of Delegates adopted revisions to Model Rules 1.6 and 1.13.

The amendment to Rule 1.6 would allow a lawyer to reveal confidential information where a client is using the lawyer's services to commit a crime or fraud that would cause financial harm to others.

Rule 1.13, as amended, would allow a lawyer representing an organization to report "up-the-ladder" violations by corporate officers of laws or legal duties harmful to the organization.

Regulation of Our Profession

While your area of practice may not be heavily affected by the above-mentioned federal legislation, one thing should make you remember that our profession is constantly being scrutinized, and that there are major forces at work attempting to regulate us in new areas and different ways than any we've seen before.

Stay informed on the health of our profession and those who seek to regulate what we have previously enjoyed to be a self-policing profession. It is incumbent upon us as lawyers to be aware of how federal legislation and proposed changes to our rules of conduct can significantly alter the landscape of our pro-

fession. We must provide our input and efforts in this process to guarantee our continued right to exercise our independent professional judgment on behalf of our clients, and further protect the principles of privilege, confidentiality and loyalty, which are so crucial to our legal system. ■

CORRECTION

Please note the following correction to the "Opinions of the General Counsel" which appeared in the November 2003 *Alabama Lawyer*. Under "Endnotes," the second sentence reads:

"Such authorization should include language to the effect that the creditor acknowledges that the authorization is irrevocable and the client understands that, when the attorney has made a commitment to pay the creditor pursuant to that authorization, the attorney is ethically obligated to do so, regardless of whether the client's preference in the matter may change."

The sentence should read:

"Such authorization should include language to the effect that the client acknowledges that the authorization is irrevocable and the client understands that, when the attorney has made a commitment to pay the creditor pursuant to that authorization, the attorney is ethically obligated to do so, regardless of whether the client's preference in the matter may change."

JOIN US!

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$25 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.



Stuart Y. Luckie



By the time this article is published, the Alabama Young Lawyers' Section will have conducted our second annual **Iron Bowl CLE**. Co-Chairs **Jimbo Terrell** and **Anna Katherine Bowman** worked hard in putting on "A View from the Bench." The speakers for this year's seminar were **District Court Judge Terry Bozeman**, **Circuit Court Judge William Shashy**, **Alabama Court of Civil Appeals Judge Sharon Yates** and **U.S. Magistrate Judge Delores Boyd**. Thanks to all of these judges for taking time out of their busy schedules to assist us with this novel CLE. Also, thanks to **Beasley, Allen, Crow, Methvin, Portis & Miles** for sponsoring the door prizes for the seminar—tickets to the big game. We hope the winner of the tickets enjoyed the outcome of the game! We are also deeply grateful to **Jones School of Law** for their generous donation of the use of their fine facilities.

At this time, we are in full swing preparing for our **Sandestin Seminar**. This year, the seminar will be held on **May 21st and 22nd**. Confirmed speakers to date are **Jere Beasley**, **Warren Lightfoot**, **Tony McLain** and **Judge Judson Wells**. We are very excited to have this great lineup of speakers already!

Chairperson **Kim Walker** is hard at work setting up the seminar so all participants can gain valuable CLE credit and have a good time. I hope we can continue to count on the generous support of our sponsors for this really unique seminar.

As you will note from the pictures above, the Alabama Young Lawyers' Section is involved in administering the **admissions ceremony for the state bar**. This ceremony is conducted twice yearly and takes a tremendous amount of time for our committee members. Co-Chairs **Christy Crow** and **Roman Shaul** are to be commended for their efforts. I can state without hesitation that Christy and Roman are ecstatic to have the assistance of two of our newest committee members, **Chris Sanspree** and **George Parker**.

The Young Lawyers' Section has other ongoing projects that you will be hearing about, including the **Minority Pre-Law Conference** and the **FEMA Response Project**. As always, we look forward to the challenges that these projects provide. ■

Stuart Luckie is a partner in the firm of Diamond, Hasser, Frost & Luckie.

ATHLETES, ACADEMICS AND THE LAW

Play It Smart!



"Athletes, Academics and the Law: Play It Smart!" is a project sponsored by the Alabama State Bar. The project will identify varsity college athletes from major colleges who are now successful lawyers and involve them in speaking to students about a career in law, focusing on the 9th grade and above.

The goal will be two-fold:

- 1) to highlight successful athlete/lawyers at halftime presentations during fall and winter sports schedules; and
- 2) to have participating lawyer/athletes make appearances at area schools to talk to high school students about the importance of focusing on academics with an eye toward a future in law or similar professions. Athletics is a great training ground for personal development and can be a stepping stone to many future opportunities and fields of endeavor.

The project runs through April 2004.

We are currently compiling a list of lawyer/athletes. If you lettered in collegiate sports or know of colleagues who did, and are interested in participating in this program, please contact Susan Andres, director of communications, at 800-354-6154, ext. 132, or send an e-mail to sandres@alabar.org.



ALABAMA STATE BAR



- Notice is hereby given to **Anders Jacob Kaye**, who practiced law in Montgomery, Alabama, and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated October 30, 2003, he has 60 days from the date of this publication (January 15, 2004) to come into compliance with the Mandatory Continuing Legal Education Rule 9 Professionalism requirements. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 03-123]
- Notice is hereby given to **Laurence Byron Reid**, who practiced law in Panama City, Florida, and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated September 12, 2003, he has 60 days from the date of this publication (January 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2002. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 03-122]

Reinstatement

- On September 25, 2003, the Supreme Court of Alabama entered an order based upon the decision of Panel VI of the Disciplinary Board of the Alabama State Bar reinstating former Birmingham attorney **John Freeman Tanner** to the practice of law in the State of Alabama, effective June 16, 2003. [Pet. No. 01-09]

Suspensions

- Birmingham attorney **Frank Clark Gilmore, III** pled guilty to violating rules 1.1, 1.3, 1.4(a), 1.4(b), 1.16(d), and 8.1(b), *A.R.P.C.* Gilmore was suspended from the practice of law in the State of Alabama for a period of 91 days. The 91-day suspension was suspended and held in abeyance pending a two-year period of probation.

Gilmore admitted that after being retained to represent his clients in a civil action filed against them, he filed an answer on behalf of all defendants, but did no further work in the matter. As a result of his inaction, sanctions and a default judgment were entered against his clients. Gilmore did not notify his clients of entry of the judgment or otherwise communicate with them about the matter or his abandonment of the representation. Further, Gilmore was

non-responsive during the investigation by the local grievance committee of the Birmingham Bar Association. Gilmore has agreed to make restitution to his clients in the amount of \$15,000. Other conditions of probation were ordered. [ASB No. 02-295(A)]

- Montgomery attorney **Branch D. Kloess** was suspended from the practice of law in the State of Alabama for a period of one year, effective August 8, 2003 by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of the Disciplinary Commission accepting Kloess's plea to violating Rule 8.4(b), *Alabama Rules of Professional Conduct*.

On March 6, 2002, Kloess pled guilty in the United States District Court for the Middle District of Alabama to one misdemeanor count of contempt, a violation of 18 U.S.C. §401(1) [misbehavior, i.e., obstructing the administration of justice] and to one misdemeanor count of contempt, a violation of 18 U.S.C. §401(2) [misbehavior of any officers of the court in their official transactions]. Kloess was sentenced to the custody of the United States Bureau of Prisons for a total term of three months, together with supervised release for a period of one year in each case to run concurrently. [ASB No. 00-68(A)]

- Effective September 29, 2003, attorney **June Oswald** of Denver, Colorado has been suspended from the practice of law in the State of Alabama for noncompliance with the 2002 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 03-114]
- Birmingham attorney **Stephen Daniel Phillips** was intermily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated May 12, 2003. The Disciplinary Commission found that Phillips's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 03-06]
- Heflin attorney **Wayne Harris Smith** was intermily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated September 12, 2003. The Disciplinary Commission found that Smith's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 03-11] [ASB No. 03-101(A) & CSP 03-563(A)]
- Evergreen attorney **Sara Oswald Stoddard** was intermily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective October 24, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel based upon Stoddard's arrest on October 20, 2003 in Conecuh County, Alabama on two charges of unlawful possession of controlled substances. [Rule 20(a); Pet. No. 03-13]
- Mobile attorney **Lewis Daniel Turberville** pled guilty and was suspended from the practice of law in the State of Alabama for a period of one year, suspended and held in abeyance pending a two-year period of probation, conditioned on Turberville serving 45 days of the one-year suspension. The suspension was made effective retroactive to April 30, 2003, the date of his interim suspension from the practice of law.

In ASB No. 03-89(A), Turberville pled guilty to violating Rule 8.4(a), *A.R.P.C.* Turberville admitted that he did not promptly remit an attorney's fee to his co-counsel, which had been pre-paid by their client and which he should have been holding in trust for the benefit of co-counsel. Turberville agreed to make restitution to co-counsel in the amount of \$2,500.

In ASB No. 03-56(A), Turberville pled guilty to violating rules 1.15(a) and (b), *A.R.P.C.* Turberville admitted that he received funds from a client that were to be held in trust for payment to a third party. Turberville cashed the check and commingled the funds with attorney and personal funds. Turberville failed to promptly deliver the funds to the client and provide a full accounting. Turberville admitted that he failed to keep complete and accurate records of his trust account. No restitution was due.

In ASB No. 02-325(A), Turberville pled guilty to violating Rule 1.4(a), *A.R.P.C.* Turberville admitted that he failed to timely

ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?

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.

BE PART OF THE SOLUTION.

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.

respond to reasonable requests for information from his client regarding the status of his client's criminal case on appeal.

In ASB No. 03-135(A), because of his interim suspension, Turberville could not complete work on a bankruptcy matter for which he had been paid. Turberville made a full refund of the retainer in exchange for dismissal of this matter.

In ASB No. 03-151(A) Turberville pled guilty to violating rules 1.15(a) and (b), *A.R.P.C.* Turberville admitted that on or about June 4, 2001, he received funds from his clients that were to be paid to the Chapter 7 Trustee for the United States Bankruptcy Court for the Southern District of Alabama. Rather than making a lump sum payment, Turberville entered into an agreement with the Chapter 7 Trustee to pay 14 equal monthly installments for the benefit of the bankruptcy estate. Turberville did not timely make the payments. From August 27, 2002 until within 60 days of June 5, 2003, Turberville did not submit a final payment, except for a check drawn on his "escrow" account that was returned on "multiple occasions by the payor bank due to non-sufficient funds." Turberville agreed to make restitution to the Chapter 7 Trustee plus interest and costs (including attorney's fees) as previously ordered by the Bankruptcy Court.

Turberville also was suspended from the practice of law in the State of Alabama for a period of 45 days, effective November 3, 2003 by order of the Supreme Court of Alabama. The supreme court's order was based upon the Disciplinary Board's order revoking Turberville's probation.

On February 10, 2003, Turberville entered a plea to violating rules 1.1, 1.3, 1.4(a), 1.4(b), 1.16(d), and 8.4(a) (d) and (g), *Alabama Rules of Professional Conduct*. Turberville

received a 45-day suspension, which was suspended pending two years' probation. Turberville was to make restitution in the amount of \$25,000 as a condition of probation on or before August 22, 2003. The Office of General Counsel requested that Turberville confirm that he had made restitution as required. Turberville did not respond. The Office of General Counsel filed a motion to revoke probation based upon Turberville's failure to make restitution. Turberville admitted that he had not complied with the Disciplinary Board's order. Based upon that admission, an order revoking his probation was entered on October 6, 2003. [ASB No. 01-315(A)]

- Mobile attorney **Robert Cooper Wilson** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective November 5, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Wilson had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20; Pet. No. 03-14]

Public Reprimands

- On October 24, 2003, Decatur attorney **Randal Dean Beck** received a public reprimand without general publication for a violation of Rule 8.1(b) [bar admissions and disciplinary matters], *Alabama Rules of Professional Conduct*, based upon the acceptance of his guilty plea by the Disciplinary Board of the

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Alabama State Bar. In or about September 2000, Mary Melcher hired Beck to file an opposition to extended visitation sought by her daughter's natural father. She paid Beck \$800 for fees and costs. Beck failed to file anything with the court in spite of his representations to the contrary. In January 2001, the father filed a petition to modify visitation. A settlement was reached on August 13, 2001, but Melcher did not agree with the terms, and she hired new counsel. On October 15, 2001, Melcher filed a complaint with the bar basically alleging Beck's neglect and lack of communication with her. Beck filed a brief response with the bar on November 15, 2001, admitting that he had, "...failed to communicate effectively with this client." The bar sent Beck two additional letters requesting that he supplement his initial response and provide an accounting for his time and expenses. Beck never responded to those requests with any information. [ASB No. 01-295(A)]

- On September 12, 2003 Montgomery attorney **Rioanne Houlton Conner** received a public reprimand without general publication, for violations of rules 1.3 and 8.1(b) of the *Alabama Rules of Professional Conduct*. These rules prescribe willful neglect of a legal matter and the failure to respond to a request for information in a disciplinary matter.

On January 17, 2001, Bobby Card, Jr. hired Conner to modify his child support and enhance his visitation rights with his child. He paid a retainer fee of \$1,000. Conner experienced problems with service on the mother. The Circuit Court Domestic Relations Clerk suggested that the case be transferred to the Juvenile Court. The matter was never transferred, and Conner took no further action even though Card was on active military duty, and had told Conner at the outset that time was of the essence. On October 23, 2001, and December 19, 2001, Card wrote to Conner requesting the refund of his \$1,000 due to Conner's inaction. Conner did not respond to those letters until 45 days later when Conner refunded the \$1,000 retainer. At that point, Card had already filed a bar complaint.

Also, in a letter to the bar and in an interview with the Montgomery County Bar investigator, Conner stated that the case had been refiled in Juvenile Court but, again, service on the mother was not possible. The investigator determined through the Juvenile Court that Conner had not filed anything. Conner did not respond to the investigator's letter about this particular issue. Conner later explained this failing by saying she was "too embarrassed" to return his calls, once she learned of her mistake. [ASB No. 02-63(A)]

- On September 12, 2003, Selma attorney **William Thomas Faile** received a public reprimand with general publication for violations of rules 1.3 [diligence] and 1.4(a) [communication], *Alabama Rules of Professional Conduct*. In the spring of 1999, the complainant approached Faile about representing him in a personal injury case against Wal-Mart, Inc. Between 1999 and 2002, the complainant had difficulty communicating with Faile by telephone about the status of his case. The complainant wrote Faile a letter on June 4, 2002 demanding a status report. Knowing that the statute of limitations had run in 2001, Faile sent the complainant a letter on June 28, 2002 detailing the legal theories applicable to his case and inviting him to meet with him in July, "...to discuss all facets of the case especially what we

can show as causing you to fall." In Faile's response to the bar complaint, Faile admitted that the complainant employed him to represent him in his slip and fall case. Faile stated that Wal-Mart had denied the claim, and that the complainant did not know what had actually caused him to fall. Faile further explained that, "Some time passed and I inadvertently allowed the statute of limitations to expire." [ASB No. 02-298(A)]

- On September 12, Centreville attorney **Michael Lynn Murphy** received a public reprimand without general publication, in connection with the complaint filed against him by Johnny Ray Howard of Helena, Alabama. Murphy was hired as the attorney for the estate of Jack Howard. The decedent's widow, Violet Howard, was the administratrix of the estate. The two other heirs were Violet Howard's stepchildren. Ms. Howard received \$88,000 in asbestosis payments through Murphy's office between 1998 and 2001. She never opened an account for the estate, and she never provided any estate accounting to the probate court, although she was ordered to do so on more than one occasion. When she was removed as administratrix of the estate she had spent all but \$5,000 of the \$88,000 collected. Murphy responded to the complaint that it was not his practice to set up estate accounts, and that it was Ms. Howard's responsibility to manage the affairs of the estate. However, as the attorney for the estate, Murphy did not represent the administratrix *per se*, but the estate for the benefit of all the heirs. It was Murphy's ethical duty to properly advise Ms. Howard about her legal responsibilities, and to seek her removal when, and if, it became apparent that she was not fulfilling those responsibilities. Murphy's conduct violated rules 1.3 [diligence] and 1.4(b) [communication], of the *Alabama Rules of Professional Conduct*. [ASB No. 02-115(A)]
- On September 12, 2003, Foley attorney **James Russell Pigott** received a public reprimand without general publication for violations of rules 1.4(a) and 1.4(b) [communication] of the *Alabama Rules of Professional Conduct*. Pigott requested reconsideration of that decision, but his request was denied. In September 1998, Pigott was appointed to represent a client in a probation revocation matter. The client's probation was going to be revoked for his failure to report to his probation officer and for leaving the state without permission. A hearing was held November 18, 1998 during which the client's probation was revoked. On November 23, 1998, Pigott filed a motion for rehearing in order to present additional evidence. When Pigott did not get an immediate ruling on this motion, he filed a notice of appeal to the Alabama Court of Criminal Appeals. Pigott assumed that the client was given a rehearing, which was handled by other counsel, which was not the case. Pigott did not verify this by checking the court file. However, based on this false "assumption," Pigott did not file a brief in the appeal. In April 1999, Pigott received a deficiency notice from the Court of Criminal Appeals. Without consulting with his client, he voluntarily dismissed the appeal on April 20, 1999. Pigott did not notify his client about this fact until November 26, 1999, when he wrote to him at the correctional facility. Pigott invited him to file a Rule 32 petition, which he did, and the court later found, after an evidentiary hearing, that Pigott had dismissed the appeal by "mistake and inadvertence." [ASB No. 02-65(A)] ■



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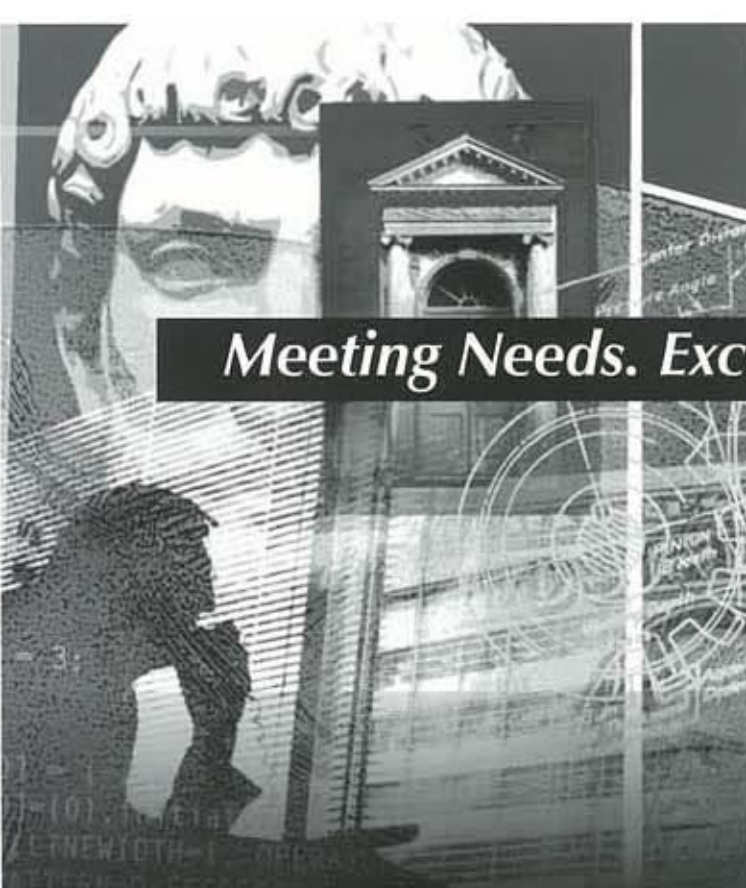
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