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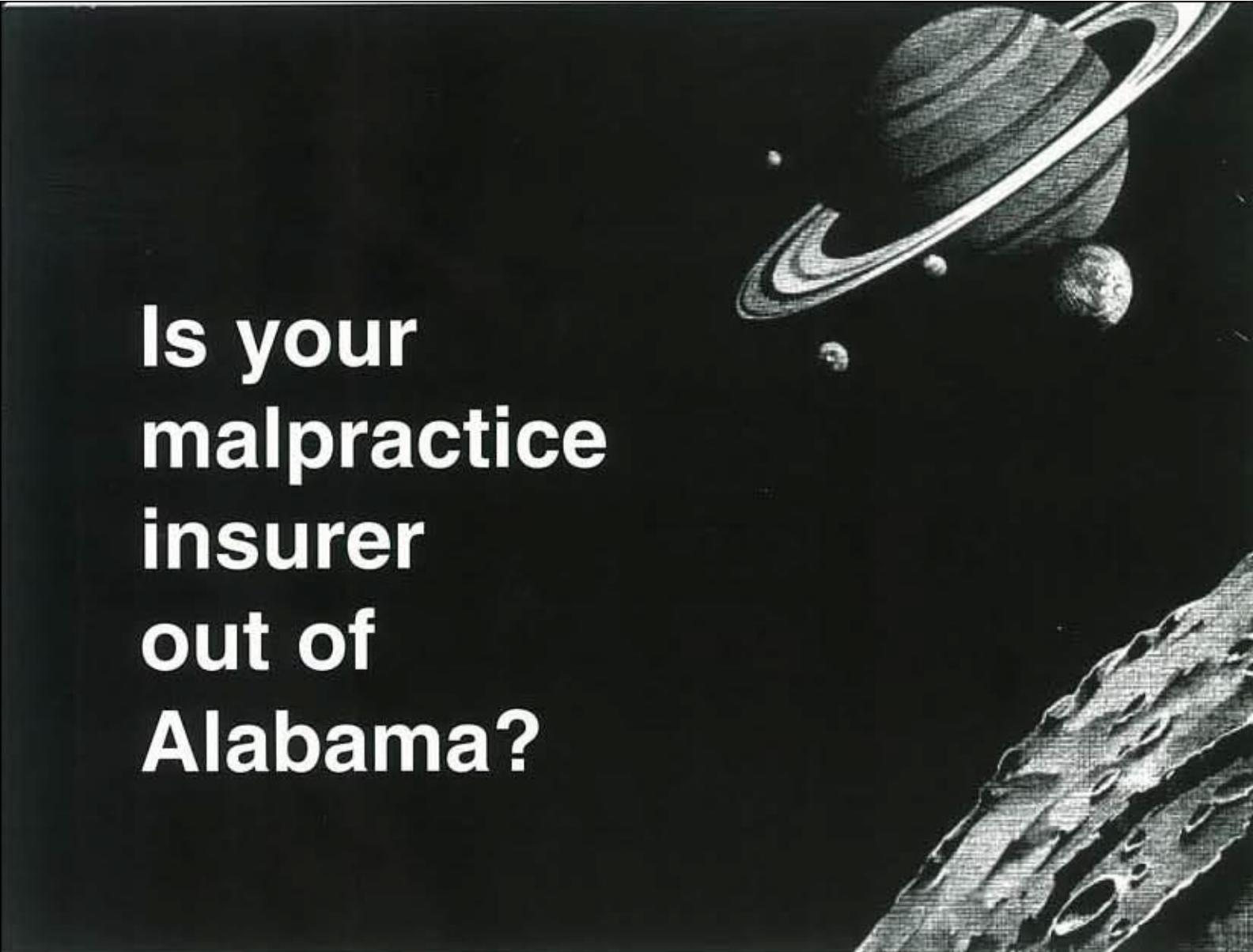
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The Alabama Lawyer

A photograph of a large concrete dam with a blue walkway. A white boat is on the water in the foreground. The background shows a river and trees under a clear sky.

Fighting Over
Government
Contracts

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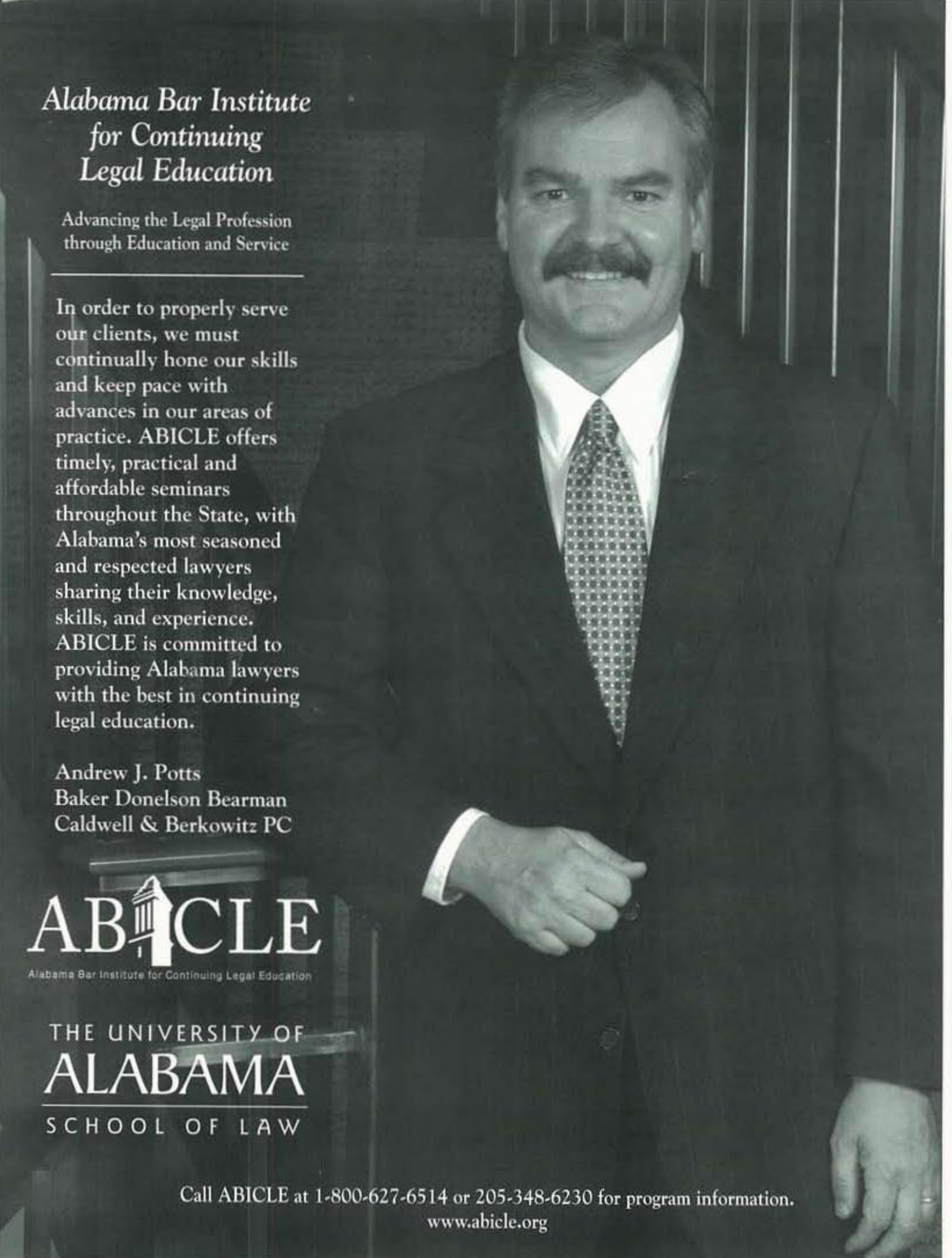
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The Alabama Lawyer

January 2005

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ON THE COVER

Coal Barge Entering Wheeler Locks on the Tennessee River Near Florence, Alabama
 Wheeler Locks and Dam is part of the Tennessee Valley Authority (TVA) system of dams on the Tennessee River. TVA is America's largest public power company, and its facilities include 29 hydroelectric dams, 11 fossil plants, three nuclear plants, six combustion turbine plants, and 17,000 miles of transmission lines. Alabama has large deposits of coal, and coal barges are one of the primary means of transporting this natural resource.

For perspective on size, see employee standing on front corner of barge.

Photo by the Paul Crawford, JD

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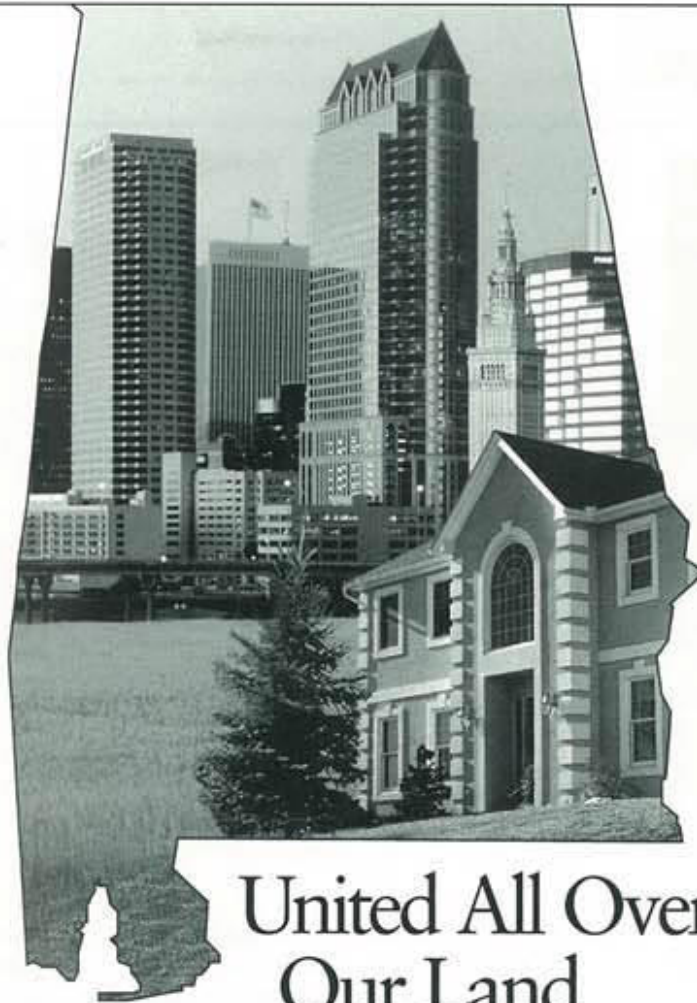
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By Douglas McElvy

6-yr

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Dear Keren
I am sorry for calling you a
spot head but truth is an apsolut defenc
of defemation. I will try not to do itagin.

J Love,
Douglas

No, this is not about defamation. It's about a little boy trying to wiggle out of a tight spot and the thought process it provoked. You see, when our youngest child was only ten years old, he had the poor judgment to call his next older sister, then about 11 1/2 years old, an unkind name. In order to receive a reduced sentence for his transgression, he was given the opportunity to write a letter of apology and retraction. On my office letterhead, he penned the following:

Dear Keren:
I am sorry for calling you a "*****"
but truth is an apsolut defenc of defe-
mation. I will try not to do it agin.
Love,
Douglas

While the name, unfortunately, was not the worst I had heard in our home, the apology seemed somewhat sincere, even if the retraction lacked a certain tone of conviction. Like any forward-thinking,

conniving lawyer-parent, I saved the letter for future use. These things tend to provide no small entertainment at graduation parties, family get-togethers, wedding rehearsal parties and the like. In reality, I was amazed at the correct application by a ten-year-old of such a legal principle. Not that there was any truth in what he called his sister, but he had somehow, I assume by osmosis from living with a father-lawyer, picked up this correct legal principle. My wife, Eleanor, has stated that her warning to the children, "Wait until your father comes home," helped all of our children learn defense strategies at an early age. This example got me thinking about what it is like to live in a home where the spouse/parent is a lawyer.

If you think about it, we lawyers have a uniquely tough job. I can think of no other profession where just about all of our daily activities, especially in litigation, include an equal but opposite professional to object to our statements and

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proclaim that everything we say is either illogical, misinterpreted, misguided or an obvious distortion of the truth, the facts or the law.¹ No other profession offers this unusual challenge. In medicine, when a doctor makes a diagnosis and prescribes treatment for his patient, no other doctor is present to object to the diagnosis and advise the patient that the other doctor is completely off-base. Likewise, when a minister stands at the pulpit to preach, no other minister is present to try and convince the congregation that he is wrong and to preach on behalf of the devil. Not only that, but practically everything we do is scrutinized by a judge, a jury and other

lawyers. Make a mistake and it's on the record forever.

Of course, we also have all of those deadlines. And woe unto us lawyers if we miss the statute of limitations or the time for filing an appeal or the response for request for admissions or any other number of deadlines imposed by court orders, discovery rules, scheduling orders, statutes and so forth.

I know lawyers who get so stressed out that they cannot sleep at night. Imagine that! A lawyer friend of mine told me that once he awakened at night, and before he could go back to sleep, his mind drifted over to a case he was handling. He knew the statute of limitations

was getting close and because he was so concerned about it, he got out of bed at 3 a.m. and went to his office to make sure he had not slept through the statute.

No wonder recent studies found that lawyers give "substantial indication of a profession operating at extremely high levels of psychological stress."² In fact, the same study measured symptoms of psychological distress such as anxiety, obsessive compulsiveness, depression and so forth. The percentage of lawyers suffering from these maladies was literally off the charts compared to the general population. Researchers affiliated with Johns Hopkins University found statistically significant elevations of Major Depressive

4 BOOKS FOR TODAY'S ATTORNEYS



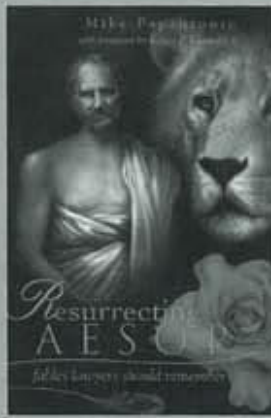
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Disorder in only three of 104 occupations.³ Lawyers topped the list, suffering from Major Depressive Disorder at a rate almost four times higher than non-lawyers who shared their key socio-demographic traits. The rate of alcoholism among lawyers is double the rate of alcoholism among adults generally, and one out of three lawyers suffers from clinical depression, alcoholism or drug abuse.⁴ These are frightening statistics. The Alabama State Bar has an excellent program under the direction of Jeanne Marie Leslie, who has received national recognition for the **Alabama Lawyer Assistance Program**. If you or another lawyer you know is suffering from any of these problems, please contact Jeanne Marie at (334) 834-7576. **Alabama Lawyers Helping Lawyers** is another outstanding program headed by David Wooldridge. Confidential help is available. Most of us know that it is not always easy to turn off all of these pressures when we hit the door to our homes. "Lawyers practice in the most scrutinized professional environment, with colleagues, opposing counsel, and clients all breathing down their necks. And, in that environment, success means that they have to set up defense mechanisms that are hard for some—impossible for others—to switch

off at the front door."⁵ It is clear that the calling of a lawyer pours over into home life, whether it's receiving calls at home late at night or taking your briefcase on vacation. I certainly need the support and encouragement and understanding that my family gives, but I am frequently concerned that they are exposed to the dangers of my stress, like secondhand smoke. Living with a lawyer may be tougher than actually being a lawyer.

Some of our unique personal characteristics just don't play very well at home. For example, we're trained to analyze everything forwards, backwards, sideways, up, and down; to question every issue and every facet of every decision, and that just doesn't play too well at home. We're also taught to argue and to fight with our opponents. Law is the only profession other than some sports (wrestling, boxing and football come to mind) where we are taught to fight with our opponents, and that just doesn't play too well at home. Add to that our Type-A, always right, workaholic, procrastinating, aggressive, competitive personalities, and that also just doesn't play too well at home. I guess you could say that we lawyers are not always the easiest people in the world with whom to live.

Last year a book came out entitled, *Should You Marry a Lawyer?* The review I read said that it should have been a very short book indeed, for only two letters were really needed to answer the question: "N" and "O."⁶ The book was written by Fiona Travis, a psychologist who's married to a lawyer. She talks of the challenges of being married to a lawyer: We "work long hours, endure enormous stress, and are immersed in a profession that values rationality over emotion."⁷ Travis quoted one spouse who said she was tired of being cross-examined and another who said, "He'd use trial techniques to make my point of view sound unreasonable."⁸ Sound familiar? The book was really more about the challenges of being married to a lawyer than answering the question, "Should you marry a lawyer?" Travis suggests that being married to a lawyer requires, "More patience, more understanding. Certainly more flexibility."⁹

I asked Eleanor and our children what it's been like living with a lawyer. Eleanor quickly stated, "I learned to know my facts before I discuss an issue." Our family quickly learned the maxim: "For by thy words thou shalt be justified, and by thy words thou shalt be condemned."¹⁰ One of our sons said, "Pretty girls assumed that I might be a lawyer too. This probably got me more dates than I should have been allowed." He also said that he learned it was important to anticipate the outcome of his decisions. Then, there was one of our other sons who was about to undergo a medical diagnostic procedure when the technician recognized his last name and asked if his father was a lawyer. He then turned to his colleagues and yelled out, "Better do this one right, guys. His father's a lawyer."

Using your lawyerly skills to conduct your home life sometimes backfires. At least once, and often more than once, a week Eleanor hands me a deposit slip for her account with the amount already filled in. She says, "Being married to a lawyer has developed my logic and critical thinking skills to better justify why I



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need a new deposit each week." If I ever intimate that her account may be overdrawn, she retorts that she is not overdrawn, but that I've just "under-deposited" her account.

One of my daughters stated, "I saw how you always encouraged people. That's why I want to be a lawyer. I want to do that." My other daughter, who as a teenager had an affection for wrecking the family vehicles, quipped how grateful she was at having a father for a lawyer to maneuver her through those difficulties. See, it's not all bad.

While the practice of law certainly presents our families with unique challenges—and the potential for great pitfalls—we don't have to fall into that trap. As important as our profession is (as I have written in a previous column), there are some things that are even more important: our faith and our families. Our families must know that they are more important to us than our work.

My secretaries have always been instructed that they can interrupt me if Eleanor or one of my children calls. I want my family to know that I'm always accessible to their needs. They didn't often exercise this prerogative, but the crucial thing was that they knew they were more important to me than my work. Last year, when my son Douglas was playing football, I got a copy of the schedule early on and made sure that game times were blocked off so that no meetings or depositions or mediations were scheduled, and I was able to attend all of his games. In fact, all of our children's activities, whether cheerleading, sports or otherwise, were put on my calendar just like other appointments and court settings. I knew it was important to my children that I was there, but the greatest reward was mine.

You might consider setting aside some portion of your time that is *not for sale*—maybe a weekly date night with your spouse or a weekly family night with your kids or a school play or ballgame—which your office staff knows is absolutely

off-limits and non-negotiable for other scheduling purposes.

I believe that by being mindful of where our true priorities lie and by proactively setting aside time for them we can protect our families from many of the hazards of living with a lawyer.

Our spouses are key players in our profession because, at least speaking for myself, I know I could not do what I do without my wife. Like your spouse, mine has served as an excellent sounding board, calming influence and balanced friend. I appreciate how my family has dealt with my last-minute schedule changes, understood that I sometimes have to work on vacations and given me enormous moral support. We owe our families a tremendous debt of gratitude. ■

Endnotes

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2. Connie J.A. Beck & Bruce D. Sales, *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers*, 10 *J.L. & Health* 1, 49 (1995-96).
3. Patrick Schiltz, *Those Unhappy, Unhealthy Lawyers*, *NOTRE DAME MAGAZINE* (Autumn 1999), at www.nd.edu/~ndmag/legl2f99.htm.
4. *Id.*
5. TRAVIS, *supra* note 1, at 16.
6. Bill Ibelle, *Balancing Life and Practice: Book Explores the Potential Perils of Lawyer Marriages*, *LAWYERS WEEKLY USA* (March 2004), at www.judicialaccountability.org/articles/lawyersdislikesystem.htm
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8. TRAVIS, *supra* note 1, at 40, 50.
9. TRAVIS, *supra* note 1, at 39.
10. *Matthew* 12:37.

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By Keith B. Norman

Will International Trade Laws Impact the Licensing and Regulation Of Lawyers in Alabama?

What do WTO, GATS, Doha, Track I, Track II, USTR, Request and Offer, MJP, and May 1, 2005 mean? If these acronyms, terms and date lack any special significance for you, then you are not alone. Surprisingly, they could mean a great deal to lawyers because they could soon shape the regulation and licensing of lawyers in Alabama and other states as well.

In 1994, more than 140 nations signed a treaty creating the World Trade Organization ("WTO").¹ The agreement establishing the WTO had several agreements that were annexed to it. One of those agreements was the *General Agreement on Trade in Services* ("GATS"). This is the very first multilateral trade agreement that applied specifically to services instead of goods. The provisions of GATS cover trade in services, accounting services, architecture services, tourism services, and all the other kinds of services imaginable. This means that the rules governing legal services as promulgated by the various states are subject to GATS.

GATS required WTO member states to begin negotiations to liberalize trade barriers. In the Doha Ministerial Declaration signed in November 2001 (it was signed in Doha, Qatar), WTO members set a timetable for these new negotiations. These negotiations are generally referred to as the "Doha Round." The Office of the U.S. Trade Representative ("USTR") has

coordinated the negotiations for the United States. The negotiations take place through the framework of a "Request and Offer." In its "Requests," the U.S. will identify rules that make the practice of law difficult for U.S. lawyers who are operating temporarily or in a branch office in another country. In its "Offer," the U.S. will state what practice rights it will offer to foreign lawyers coming into the U.S. The final round of these negotiations for specific commitments was to conclude by January 1, 2005, but has been shifted to May 1, 2005.

Simultaneous to these negotiations is a separate "track" of negotiations. Track I, or the Doha Round, addresses the concessions a country is willing to make in order to allow foreign lawyers to practice law. Track II deals with whether to extend to the legal profession the "Disciplines for the Accountancy Sector," which were adopted in 1998. Since 1999, a working group has been studying the use of the Accounting Disciplines as a model for drafting disciplines for other services, including legal services. The International Bar Association ("IBA") was asked by the WTO whether the existing Accounting Disciplines were suitable or needed to be supplemented. The IBA has responded with a number of specific changes that should be made if they are applied to legal services.

GATS likely will have very little impact on how most lawyers practice law in Alabama. The most significant impact

GATS could have would be in the manner of licensing foreign lawyers desiring to practice in Alabama. The U.S. has not offered to make any changes in state laws concerning foreign lawyers. USTR representatives have indicated they do not intend to displace state regulation. In fact, some observers think that rules adopted in response to GATS may eventually lead to fewer restrictions against multi-jurisdictional practice ("MJP") by lawyers throughout the U.S. This is because states typically will not desire to give foreign lawyers an advantage by offering them less restrictive practice rules. In addition, because the USTR is negotiating their position on regulating foreign lawyers based on state ethics codes that already govern U.S. lawyers, the states will have less flexibility to change them in the future. If a state agrees

to have a particular rule included in GATS, the state cannot later decide to be more restrictive without triggering some obligation on the part of the federal government. Needless to say, this portends greater federalization of state practice rules.

Although GATS may not be a "bread and butter" issue for most Alabama lawyers, the changes it will bring are likely to be fundamental and far-reaching. I encourage you to stay informed. The USTR is currently sharing information with various legal organizations including the American Bar Association, Conference of Chief Justices, National Conference of Bar Examiners, National Organization of Bar Counsel, National Association of Attorneys General, and Association of American Law Schools. Additional information is available

through the ABA's Web site at www.abanet.org/cpr/gats/gats_home.html.

Debt Load for July 2004 Bar Examinees

Three hundred and seven, or approximately 75 percent, of the first-time examinees taking the July bar exam had educational debt. The average debt for each was \$65,899. ■

Endnotes

1. The WTO Secretariat is based in Geneva, Switzerland. The 500-member staff is headed by a director general. The Secretariat does not have decision-making authority. It is responsible for collating information from WTO member states, preparing minutes of meetings, collecting statistics and preparing analyses.

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Position Available: Assistant General Counsel

The Alabama State Bar is now accepting applications by letter with resumes from qualified lawyers for the position of assistant general counsel. These applications should be addressed and mailed to:

J. Anthony McLain
General Counsel
P.O. Box 671
Montgomery, Alabama 36101

This position requires an experienced lawyer with a strong professional background. Salary will be commensurate with experience and maturity. The deadline for submission is February 15, 2005. The Alabama State Bar is an equal opportunity employer.

ASB Lawyers' Hall of Fame Nominations Due

Alabama has always been in the forefront of the legal profession, and through the Lawyers' Hall of Fame, the Alabama State Bar continues its tradition of honoring those outstanding lawyers who have demonstrated a lifetime of achievement.

Honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national or international level and meet the criteria of the award. Criteria include a breadth of achievement, a profound respect for professional ethics, community leadership and a recognized ability to mentor, lead or inspire others in the pursuit of justice. Two honorees who have been deceased at least two years will be selected. A third honoree, deceased at least 100 years, will also be selected. A 12-person panel serves as the Selection Committee, with Birmingham attorney and former ASB President **Sam Rumore** serving as committee chair. The class of inductees will be announced at the bar's 2005 annual meeting, and a formal ceremony will be held at a later date. The inaugural class of inductees included **Dean Albert Farrah, Judge Annie Lola Price, Arthur Shores and Judge Frank Johnson**.

Nominations are open to the bar and community at-large and the deadline for nomination submission is **March 1, 2005**. Nominations previously submitted will be considered with all new nominations. Nomination forms are also available from the ASB Web site, www.alabar.org. All nomination forms should be mailed to: Sam Rumore, Alabama Lawyers' Hall of Fame, P.O. Box 671, Montgomery 36101.

2005

NOMINATION

ALABAMA LAWYERS' HALL OF FAME

Nominee _____
(Last) (First) (Middle or Maiden)

Born _____ Died _____
(Date and Place) (Date and Place)

Please note: There are two categories of nominees: Those nominees who have been deceased at least two years and those nominees who have been deceased at least one hundred years.

General statement of nominee's qualifications and achievements:

(Continued on next page.)

Biographical Description of Individual being Nominated

Please provide the following information (no more than two pages):

- A. Significant achievements
- B. Professional (vocational) history – chronologically
- C. Other information which supports nomination
- D. Sources containing biographical data (author, title, publisher, and pagination)
- E. Picture – Black and white, if available

Nomination submitted

by: _____

(address)

Nomination endorsed by:

_____ (address) _____

DEADLINE FOR SUBMISSION: March 1, 2005

**Mail to: Sam Rumore
Alabama Lawyers' Hall of Fame
P. O. Box 671
Montgomery, Alabama 36101**

Notice of Election

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

President-Elect

The Alabama State Bar will elect a president-elect in 2005 to assume the presidency of the bar in July 2006. Any candidate must be a member in good standing on March 1, 2005. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 2005. 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 2005 *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at the state bar by 5 p.m. on the second Friday in June (June 10, 2005).

Elected Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4 and place no. 7; Bessemer Cut-Off; 11th; 13th, place no. 1; 15th, place no. 5; 17th, 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; 40th; and 41st.

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 1, 2005 and vacancies certified by the secretary no later than March 15, 2005.

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 29, 2005).

Ballots will be prepared and mailed to members between May 1 and May 15, 2005. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 31, 2005) to the Alabama State Bar.

At-Large Commissioners

The Board of Bar Commissioners will select nine at-large commissioners. The initial terms of the nine at-large commissioners will be staggered: three at-large commissioners will be selected for terms of one year each; three at-large commissioners will be selected for terms of two years each; and three at-large commissioners will be selected for terms of three years each. The commission will be responsible for selecting candidates who are members in good standing and reflect the racial, ethnic, gender, age, and geographic diversity of the members of the Alabama State Bar.

The at-large positions will be filled from applications which must be received by the Secretary no later than 5:00 p.m. on April 1, 2005. The application will be available on the state bar Web site, www.alabar.org, beginning March 1, 2005. Those selected to the at-large positions will be notified promptly of their selection. The terms of the at-large commissioners will commence on July 1, 2005.

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2005. Nominations should be prepared and mailed to:

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

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.

About Members, Among Firms

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, or you may change it online at www.alabar.org under "Members." Click on "Member Log-In," and follow the directions.

About Members

Paul R. Holland announces the opening of The Law Office of Paul R. Holland, at 2130 6th Avenue, SE, Decatur 35601. Phone (256) 306-0088.

Raymond L. Johnson, Jr. announces the formation of Law Offices of Raymond L. Johnson, Jr., located at 1117 22nd Street, South, Birmingham 35205-2813. Phone (205) 939-0000.

Former Assistant United States Attorney Ronald R. Brunson announces the opening of his office at 2126 Morris Avenue, Birmingham 35203. Phone (205) 252-2100.

Among Firms

Sims, Graddick & Dodson PC announces that Charles A. Graddick, Sr. has been appointed by Governor Riley to the position of circuit judge, Thirteenth Judicial Circuit, and the firm's name has been changed to Dodson & Steadman PC.

The University of Alabama System trustees appointed Michael Bownes as secretary.

Thomas Lee Rountree was recently elected district attorney for the 41st Judicial Circuit of Alabama (Blount County).

Balch & Bingham LLP announces that Gina Derosier, Talia Johnson Nurse, Tyrell Jordan and Ryan Stewart have become associates in the Birmingham office. The firm also announces that John G. Smith and G. Lane Knight as partner and associate, respectively, in the Montgomery office.

Thomas O. Bear and Christi A. Roberts announce the formation of Bear & Roberts LLC, with offices located at 12440 Magnolia Avenue, Suite 300, Magnolia Springs 36555. Phone (251) 943-3077.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that Wesley Chadwick Cook has become an associate with the firm.

Robert R. Bedwell, III and J. Glen Padgett announce the formation of Bedwell & Padgett PC with offices located at 16 W. Front Street, North, Thomasville 36784. Phone (334) 636-9704.

Brantley & McLendon LLC announces that Jon-Patrick Amason has joined the firm as an associate.

Brinyark & Lee PC announces that Christopher L. Frederick has become associated with the firm. Offices are located in Tuscaloosa and Eutaw.

Brown, Hudgens PC announces a name change to Wright, Green PC.

Burr & Forman LLP announces that Dow A. Davidson, Teri D. Fields, Graham W. Gerhardt, Amy K. Jordan, April M. Mason, Matthew T. Mitchell, Joanne Patterson, Alphonso Simon, Jr., and David G. Wanhatalo have joined the Birmingham office as associates.

Clark, Dolan, Morse, Oncale & Hair PC announces that Bradley J. Smith and Lucy W. Jordan have become members. Jordan previously assisted Senator Jeff Sessions with his work on the Senate Judiciary Committee.

Daniell, Upton, Perry & Morris PC announces that William D. Anderson and Jonathon R. Law have joined the firm as associates.

Doster & Woodrow announces that Melody Smith Brooks has joined as a partner and that the firm name has been changed to Doster, Woodrow & Brooks.

Estes, Sanders & Williams LLC announces that D. Barron Lakeman has joined the firm as an associate.

Fees & Burgess PC announces that Danny D. Henderson has become *of counsel* to the firm, and that Carolyn A. McAlister has become associated with the firm.

Flowers Foods announces that Stephen Avera has become senior vice-president.

Gardner, Middlebrooks, Gibbons, Kittrell & Olsen PC announces a name change to Gardner, Middlebrooks,

Continued on page 20

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Gibbons, Kittrell, Olsen, Walker & Hill PC, and that M. Vance McCrary has moved from the Birmingham office to the Mobile office.

Daniel B. Graves and Blake J. Tompkins announce the formation of Graves & Tompkins LLC, located at 3009 Firefighter Lane, Birmingham 35209. Phone (205) 802-6111.

Ham, Stankoski, Stankoski & Zundel LLP announces that Joshua P. Myrick has joined the firm as an associate.

Hand Arendall LLC announces that Ginger Gaddy has become a member of the firm, and Katie L. Hammett and Jay E. Tidwell have become associates.

Charles A. Hardin and David A. Hughes announce the formation of Hardin & Hughes LLP.

Hill, Hill, Carter, Franco, Cole & Black PC announces that Amanda Kay Morgan Allred has joined the firm as an associate.

Johnstone, Adams, Bailey, Gordon & Harris LLC announces that Sonya LaShea Crawford and Faith Ann Pate have joined the firm.

Clatus Junkin, Charles E. Harrison and Samuel W. Junkin announce the formation of Junkin, Harrison & Junkin PC, with offices located in Fayette and Tuscaloosa.

Kaufman & Rothfeder PC announces that D. Brent Wills, Sarah S. Johnston and John Rodgers Morgan, III have joined the firm as associates.

Lamar, Miller, Norris & Feldman PC announces that Stephen D. Christie and Michael L. Haggard have become shareholders, and the firm name has been

changed to Lamar, Miller, Norris, Haggard & Christie PC. The firm also announces that Lee Stewart and Justin South have become associates.

Maynard, Cooper & Gale PC announces that Carol Sue Nelson and Chris Mitchell have joined the firm as shareholders, and that Stuart M. Maxey, Harrison K. Bishop, Joel C. Porter, Jessica S. Grover, Joshua D. Jones, Theodore P. Bell, Andrea M. Greene, T. Melvin McElroy, II, Audrey Y. Dupont, Jonathan D. Kipp, Bonnie L. Branum, Will A. Smith, Grace C. Robinson, Christopher J. Williams, and Robert D. Hancock have become associates.

McDowell Knight Roedder & Sledge LLC announces that William G. Chason,

Continued on page 22

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	30	35	40	45	50	55	60
	G10	\$185	\$185	\$230	\$375	\$535	\$930
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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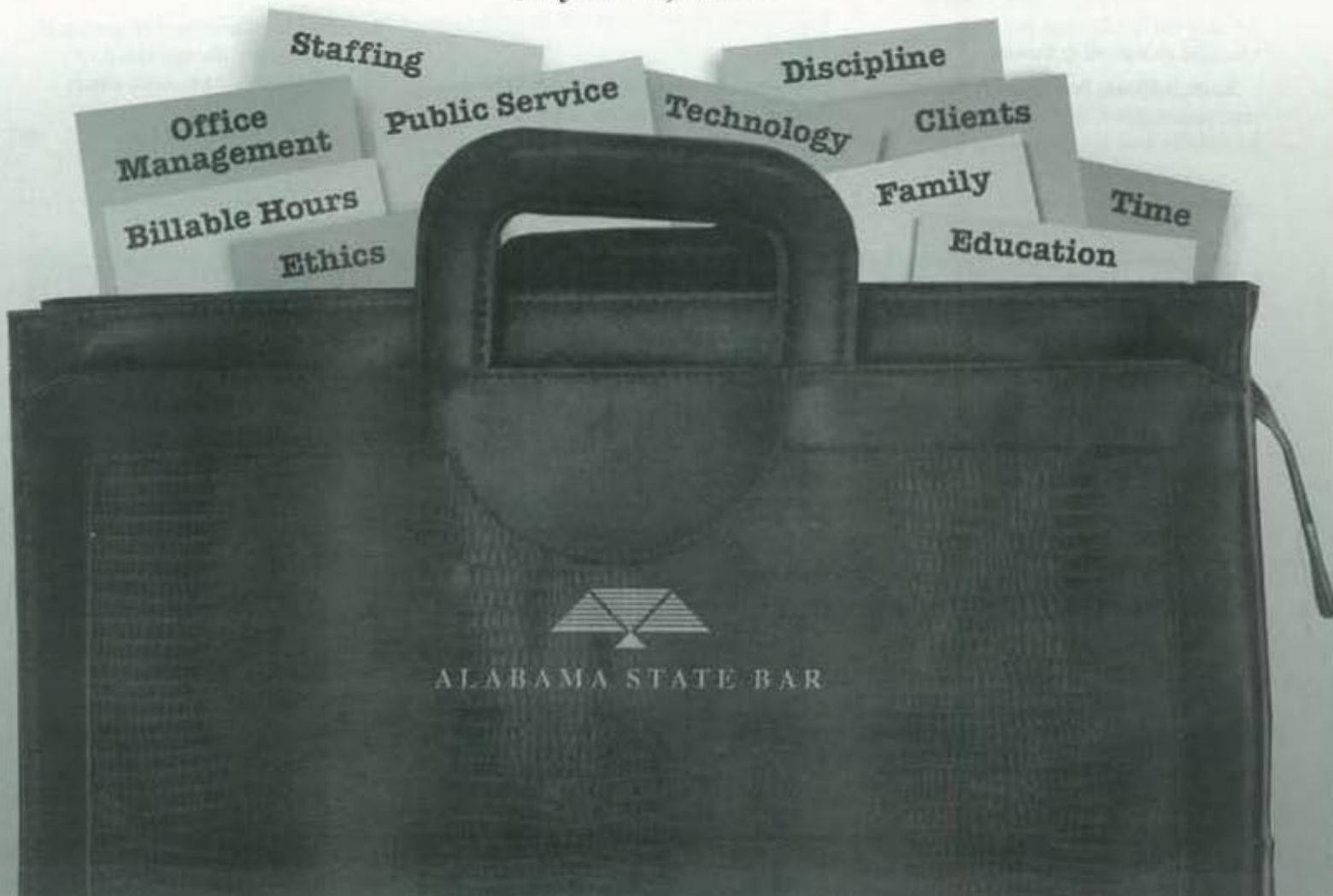


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About Members, Among Firms

Continued from page 20

Anne Laurie Smith and Jason O. Wells have become associated with the firm.

Merrill, Harrison & Adams announces that David K. Hogg has become associated with the firm.

Andrew L. Smith, Philip H. Partridge, Winston R. Grow and A. Neil Hudgens announce the formation of Partridge, Smith PC. The office mailing address is P.O. Box 81429, Mobile 36699. Phone (251) 338-0566.

Phelps, Jenkins, Gibson & Fowler LLP announces that Bruce H. Henderson has joined the firm as a partner.

Rosen, Cook, Sledge, Davis, Shattuck & Oldshue PA announces that Stuart D. Albea, William S. Poole, III and Chad L. Hobbs have joined the firm as associates.

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

John A. Russell, III announces the association of his son, John A. Russell, IV, and the firm's name has been changed to Russell & Russell.

Scott, Sullivan, Streetman & Fox PC announces that Chris L. Albright has joined the firm as an associate.

Michael A. Anderson and Paul B. Shaw, Jr. announce the opening of Shaw-Anderson LLC at 2924 Crescent Avenue, Homewood 35209. Phone (205) 871-9550.

Smith, Spires & Peddy PC announces that Griffin M. Shirley has joined the firm as an associate.

Sommer Barnard Attorneys PC announces that Joseph W. Cade has joined of counsel.

Elizabeth C. Stallworth and Angela M. Johnson announce the formation of Stallworth Johnson LLC, with offices located at 113 N. Three Notch Street, Troy 36081. Phone (334) 670-0450.

Stone, Granade & Crosby PC announces that Shawn T. Alves and R. Scott Lewis have become partners of the firm.

The Law Office of Collier H. Swecker LLC announces a name change to Swecker & Sparks LLC, and that Christopher Ryan Sparks has become a partner.

Thomas, Means, Gillis & Seay PC announces that J. Clayton Davie, Jr., Monet McCorvey Gaines, Patricia V.

Kemp, Tamica Clemons Richard, Clarence Richard, III, Carl W. Robinson, Ramadanah Salaam, Joi C. Scott, Jacqueline C. Smoke, Christopher K. Whitehead, April D. Williams, and Angela Williams-Barnes have joined the firm.

Turner & Miller LLC announces that D. Jamie Carruth has joined the firm as an associate.

John Unzicker announces the opening of Vernis & Bowling of Southern Alabama LLC, with offices located at 162 Saint Emanuel Street, First Floor, Mobile 32202-3007. Phone (251) 432-0337.

Walston, Wells, Anderson & Bains LLP announces that John P. Strohm, Deanna L. Weidner and Shala R. Fletcher have become associated with the firm.

Watson, deGraffenreid & Tyra LLP announces that Suzanne H. Mills has joined the firm as an associate.

Jonathan S. Wesson and Jacquelyn H. Wesson announce the formation of Wesson & Wesson, LLC, with offices located at 212 Main Street, Warrior 35180. Phone (205) 590-1128. ■

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- CS-41 - Child Support Obligations
- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
- Custody Affidavit
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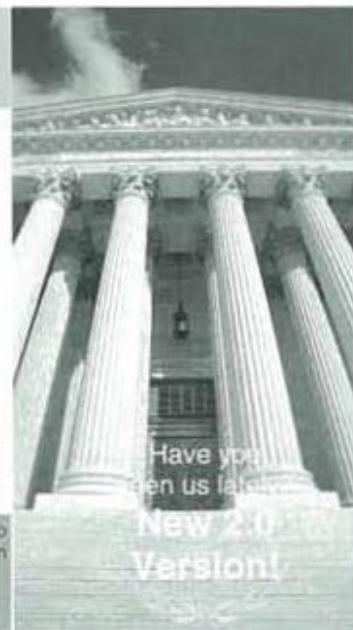
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** Additional Full Registration means two or more full registrations from the same organization when submitted together.

ALTON R. BROWN, JR.

Alton R. Brown, Jr., a member of the Mobile Bar Association, died February 21, 2004. He was born November 21, 1926 in Guntersville. He was a graduate of the University of Alabama School of Law and a member of the Farrah Order. Following his graduation in May 1954, he moved to Mobile and began practicing law in July. In 1969, after several years of practice, Al formed the firm of Brown Hudgens PC.

Al was admitted to the United States Supreme Court, the United States Court of Appeals, for the 5th and 11th circuits, and the Alabama Supreme Court. He was a member of the Mobile and American bar associations, as well as the Alabama State Bar, the Alabama Defense Lawyers Association, the Defense Research Institute, the Southeastern Admiralty Law Institute, and the Maritime Law Association of the United States. His main area of practice was insurance defense.

Al was a veteran of World War II and the Korean Conflict. He entered the U.S. Military Service in 1944, first with the U.S. Maritime Service, which was known as the Merchant Marine, and later with the U.S. Army European Command. He retired from the U.S. Army Transportation Corps in 1982, following 34 years of combined military service with the rank of colonel, having served as the commander of the 1184th Army Reserve Terminal Unit in Mobile and the 375th Motor Transport Group, also in Mobile. He was the recipient of the Army Commendation Medal with Oak Leaf Cluster, Meritorious Service Medal and Legion of Merit, among other awards. Al was also a member of the American Legion and the Veterans of Foreign Wars Post 49.

Al was the former chairman of the March of Dimes in Mobile and a past president of the University of Alabama Alumni Association. He was active with the Mobile Jaycees and the Mobile Area



Chamber of Commerce, as well as being active in other civic and political organizations. He also served as president of the Mobile Bar Association in 1995.

Al was a member of Phi Delta Theta fraternity, and Phi Alpha Delta law fraternity. He was an active member of the board of directors of the American Resources Insurance Company of Mobile and a member of St. Marks United Methodist Church.

He is survived by his wife of 26 years, Joyce Dearing Brown; his sister, Anna Laura Brown White of Oxford, Ohio; his three children, Alton Rives Brown, III and his wife, Toni, of Mobile; Kitty Brown Stockton and her husband, Bob, of Chapel Hill; and William Thompson Brown and his wife, Virginia, of Seattle. He is also survived by a stepson, Dwight O. Henderson, Jr. and his wife, Theresa, of Asheville, North Carolina; seven grandchildren; and numerous other cousins, nieces, nephews, relatives, and friends.

—James A. Yance, president, Mobile Bar Association

SAMUEL MARTIN McMILLAN

Samuel Martin McMillan, a member of the Mobile Bar Association, died April 3, 2004. He was a native and lifelong member of Mobile. He attended Leinkauff School and Murphy High School. After graduation, he joined the United States Marine Corps, serving as a radar engineer in the Pacific theater of operations during World War II. After the war, he studied history at the University of Alabama, where he was a member of Phi Beta Kappa fraternity. He attended Harvard Law School and graduated from there in 1954.

In 1956, Sam was appointed as special counsel to the Senate Small Business Committee by U.S. Senator John J. Sparkman of Alabama. In 1976, the Federal Republic of Germany appointed Sam as Honorary Consul in Alabama. He later received the Officer's Cross of the

Order of Merit by the Federal Republic of Germany for serving as Honorary Consul, a position he held until 1993.

Sam entered the private practice of law in Mobile, and at the time of his death, was a member of the firm of Inge, McMillan & Coley. In the early 1950s, he also served as an assistant solicitor under Circuit Solicitor Carl Booth. Herndon Inge, Jr., his law partner of many years, said, "Sam was a brilliant lawyer. He could always give you the correct answer to any legal question."

Sam was preceded in death by his wife, Jean McInnis McMillan. He is survived by his son, Martin McMillan of Upton, New York; his daughter, Ann McMillan of Sunnyvale, California; his sister, Delphine Johnson of Mobile; two grandchildren, Baird and Payne McMillan; and numerous nieces and nephews.



—James A. Yance, president, Mobile Bar Association

Chadbourne, James Donald

Huntsville

Admitted: 1974

Died: August 24, 2004

Evans, Carl Lenford

Montgomery

Admitted: 1967

Died: September 6, 2004

Fuller, Kenneth Tifton

Phenix City

Admitted: 1957

Died: November 1, 2004

Grow, John

Gulf Shores

Admitted: 1962

Died: September 6, 2004

Kelley, Jennie Lee

Alexander City

Admitted: 1970

Died: November 19, 2003

Loper, Cecil Lamar

Montgomery

Admitted: 1988

Died: September 15, 2004

Low, James Vincent

Gadsden

Admitted: 1973

Died: August 6, 2004

Reid, Laurence Byron

Fort Lauderdale

Admitted: 1991

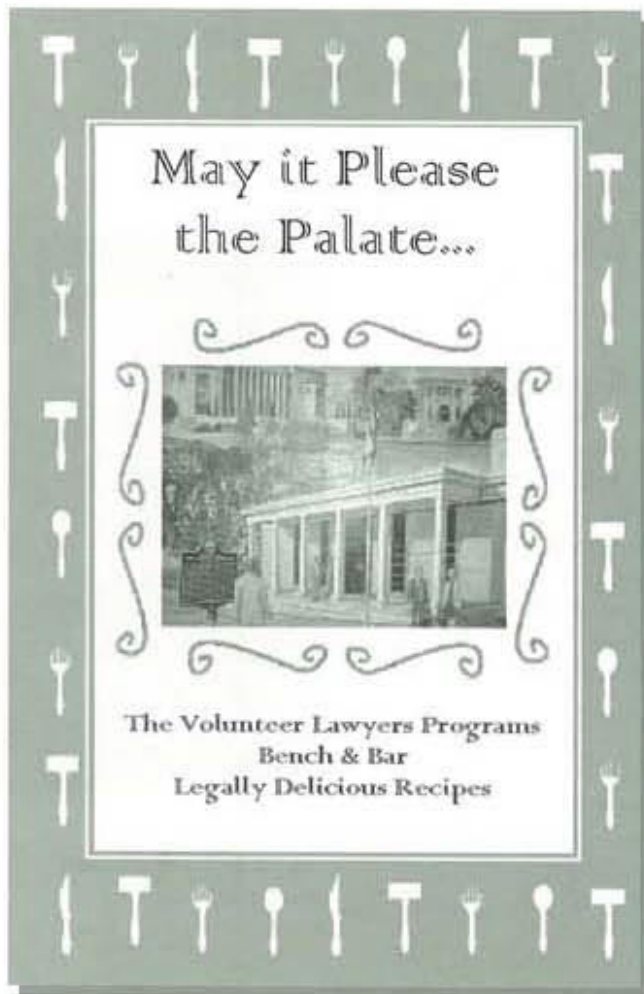
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Fall 2004 Admittees



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STATISTICS OF INTEREST JULY 2004 EXAM

Number sitting for exam.....	524
Number certified to Supreme Court of Alabama.....	368
Certification rate*.....	70.2 percent
Certification Percentages	
University of Alabama School of Law.....	94.2 percent
Birmingham School of Law.....	37.9 percent
Cumberland School of Law.....	83.9 percent
Jones School of Law.....	52.5 percent
Miles College of Law.....	6.3 percent

*Includes only those successfully passing bar exam and MPRE

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Arnold, Allen Durham
Asbell, Michael Jason
Askew, Marcie Lynn Foster
Atkins, Maria Lee
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Barclay, John Michael DeCarlo
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Bell, Joshua Adolph
Bell, Theodore Patrick
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Bishop, Lara Lea
Blake, Kelli Danielle
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Bouchet, Merrit Amanda
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Crayton, Laetitia Nicole
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Davidson, Dow Ambrose
Davidson, Kevin Paul
Davis, Timothy Michael
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Dean, Michael Gregory
DeCoudres, Shaun Addison
Dedmon, Ty Edward
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DeRosier, Gina Elizabeth
DeShazo, John Curtis
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Donaldson, Emily Carol

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el Kouni, Sarah Mahmoud
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Ezell, Elizabeth Pendergrass
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Hauser, Daniel Lloyd Lawrence

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Holmes, Scott Anthony
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Reiter, Richard Brinton
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Richardson, Randall Kermit
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Rogers, Gilbert Broughton
Rumsey, Samuel Reagan
Russell, Jack Pershing

Russell, IV John Archibald
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Sasser, Michaelyn Laresa
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Smith, Christopher Edmon
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Spain, Amanda Frances
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Stivender, David Andrew
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Walsh, Shannon Mika
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Warren, Angela Nichole
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Weller, Joseph Oliver
Wells, Jason Owen
Wesson, Jacquelyn Hudson
Whitehead, Stephanie Dianne
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Wilkerson, Lance Jeffrey
Williams, Allison Elizabeth
Williams, Carlen Bailey
Williams, Christopher James
Williams, Cynthia Norman
Williams, Vera Bates
Wilson, Jenny Rutledge
Wilson, Timothy Ronald
Wireman, Sabra Micah Barnett
Witherspoon, Chereka Lavo
Wohlfeld, Anne Lawrence
Wood, Jennifer Alley
Woods, Ricardo Andrew
Worman, Kelly Louis
Wright, Matthew David
Young, Kristin Nicole
Zana, Anthony Phillip
Ziegler, Karen Rene
Zuccala, Kimberly Chambers

Lawyers in the Family



*Kimberly Drake (2004), Tommy Drake (1989), Tom Drake (1963),
Christine Drake (1985), Whit Drake (1989)*
Admittee, husband, father-in-law, mother-in-law, brother-in-law



*Juliana T. Dean (2004) and
Michael Gregory Dean (2004)*
Wife and husband admittees



*Samantha Smith (2004), Hilda Trapp Smith (1993), Caroline Gidiere (1996),
Larry Mack Smith (1979)*
Admittee, mother, sister, father



*Whitney Polson (2004) and Mark Polson
(1975)*
Admittee and father



Clay J. Thomason (2004), Bill Thomason (1970), Becky Thomason (1999)
Admittee, father, sister



*Jasper B. Roberts, Jr. (2004) and Jasper B.
Roberts, Sr. (1969)*
Admittee and father

Lawyers in the Family



*Lance Wilkerson (2004) and
Crystal Wilkerson (2004)
Husband and wife admittees*



*Tim Davis (2004) and Leigh Davis
(1997)
Admittee and sister*



*Julie Sellers Swann (2004) and Brandon
Sellers (1993)
Admittee and brother*



*Griffin Merrill Shirley (2004) and Leon
Merrill Shirley (1976)
Admittee and father*



*Shana N. S. Gartlan (2004) and R. Aaron
Gartlan (2000)
Admittee and husband*



*Edward Bennet Sorrells (2004) and
Thomas W. Sorrells (1972)
Admittee and father*



*Emily Donaldson (2004) and Jeff
Donaldson (1968)
Admittee and father*



*Angela Cameron (2004) and Ashley E.
Cameron (1999)
Admittee and sister*



*R. Gates Hinds (2004) and William L.
Hinds, Jr. (1965)
Admittee and father*

Lawyers in the Family



*Grace C. Robinson (2004) and Charles G. Robinson (1971)
Admittee and father*



*Michael Walker (2004), Marion Walker (1976), George Walker (1977)
Admittee, aunt, father*



*William Graham Burgess (2004), Gregory Burgess (1995), William P. Burgess (1973)
Admittee, brother, father*



*Gil Rogers (2004) and Mabry Rogers (1974)
Admittee and father*



*Randall K. Richardson (2004) and Rhonda Richardson Caviedes (2002)
Admittee and sister*



*Jeffrey G. Rainer (2004) and Nancy J. Rainer (1997)
Admittee and wife*



*Joshua P. Myrick (2004) and Paul D. Myrick (1976)
Admittee and father*

Lawyers in the Family



*Jacquelyn Hudson Wesson (2004) and
Jonathan S. Wesson (1996)
Admittee and husband*



*William R. Gordon, Jr. (2004) and Judge
William R. Gordon (1969)
Admittee and father*



*Shaun DeCoudres (2004) and Don
DeCoudres (1974)
Admittee and father*



*Shelley Lewis (2004) and Philip Lewis
(1985)
Admittee and father*



*Amanda Kay Morgan Allred (2004), David Craig Allred (2004), David E. Allred (1977)
Wife and husband admittees, father-in-law/father*



*William Tucker Brown (2004) and
Stephen E. Brown (1974)
Admittee and father*



*Paul Juliano (2004) and Jay Juliano
(1977)
Admittee and father*



*Melissa Lynne Doggett (2004) and
Edward Whitfield Doggett (1973)
Admittee and father*

Lawyers in the Family



*James R. Markham (Spring 2004) and
Margaret Markham Casey (2004)
Brother and admittee*



*Wesley L. Phillips (2004), Denise Wiginton (2002), Don Wiginton (1975)
Admittee, cousin, uncle*



*Jaime Cowley Erdberg (2004), Mark David Erdberg (2003), Joe Erdberg (1974), Isaac
Cohen (1939)
Admittee, husband, father-in-law, grandfather-in-law*



*Roderick Mark Alexander, Jr. (2004) and
Roderick Mark Alexander, Sr. (1979)
Admittee and father*



*John Michael DeCarlo Barclay (2004), Elise DeCarlo Barclay (1979), John Paul DeCarlo
(1965)
Admittee, mother, grandfather*



*Allen D. Arnold (2004) and Stephen R.
Arnold (1974)
Admittee and father*

Lawyers in the Family



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*Suzannah Lane Childers (2004) and
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Admittee and father*



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Russell, III (1975)
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FIGHTING OVER GOVERNMENT CONTRACTS

BY JEROME S. GABIG, JR.

Introduction

Government contracts are a major contributor to Alabama's economy. Governor Riley has observed:

[Defense spending is] an engine of economic growth that brings and creates good, quality jobs for Alabama. Over 30,000 of our citizens are employed on our military bases, and thousands more throughout the state have jobs today because these bases are located here. Alabama's military installations exceed \$4 billion in operating budgets and payrolls, creating a multi-billion dollar impact to our state economy.¹

Of the 30,000 jobs, many of them are subject to being outsourced to industry through government contracts.² Much of the four billion dollars in operating budgets for Alabama's military installations is spent through government contracts.

Although unmentioned by Governor Riley, four federal contracting activities in Alabama annually award many more billions dollars to companies that primarily perform the work in other states. These four federal contracting activities are the U.S. Army Aviation and Missile Command; NASA's Marshall Space Flight Center; the Missile Defense Agency; and the Corps of Engineers Support Center. For example, in fiscal year 2003, "Team Redstone" (*i.e.*, the military contracting activities located on Redstone Arsenal) awarded about \$11.3 billion in federal contracts.

Invariably, when contracts are competitively awarded, there are "winners and losers." Unlike the private sector where the disappointed vendor has essentially no recourse, an unsuccessful offeror for a federal procurement has a statutory right to protest.³ As explained by the Court of Appeals for the Eleventh Circuit, Congress created this right because "the public and ... bidders have a strong interest in certainty in the bidding process.... To achieve this certainty, strict adherence to the procedures for bidding is necessary."⁴

Unlike the private sector where the disappointed vendor has essentially no recourse, an unsuccessful offeror for a federal procurement has a statutory right to protest.

The Majority of Protests Are Filed At the GAO

A disappointed vendor has a choice of three forums in which to file a protest: the procuring agency, the United States Court of Federal Claims, and the General Accounting Office ("GAO").⁵ For a variety of reasons, most protests are filed at the GAO.⁶ Over the years, the GAO has developed a substantial body of precedent for bid protests. In fiscal year 2004, 1,483 protests were filed at the GAO.

Of these 1,483 protests, the GAO sustained 21 percent. This low percentage presents a misleading picture of the effectiveness of the protest process. The primary reason for the low percentage of sustained protests is that a minority of protests involve ill-conceived grounds, amateurish preparation, or unwarranted whining.⁷ Nevertheless, the GAO contends that the "effectiveness rate" for protests is approximately 40 percent. The effectiveness rate recognizes that agencies often take some corrective action in instances where there appears to be merit to the protest. Examples of corrective action include revising the solicitation, re-opening discussions and re-evaluating offers.

One of the major advantages of a protest to the GAO is the automatic stay provisions. If properly invoked, these provisions prevent the procuring agency from awarding a contract.⁸ If the contract had been awarded before the protest is filed, the automatic stay provisions can nevertheless require the agency to issue a stop work order until the protest is decided.⁹ As a practical matter, obtaining a stay is very important from a protester's perspective. Consider a situation where there is no stay; instead, the awardee performs some of the work during the months that the protest is pending. If the GAO sustains the protest, the GAO may be reluctant, because of the economic waste, to recommend that the contract be terminated and re-competed.

The GAO's web site, www.gao.com, contains useful guides and recent decisions. Where the acquisition involves a large quantity of money, savvy protesters are likely to retain attorneys with experience in GAO protests. Likewise, an astute awardee is also likely to retain counsel to protect the awardee's interest by intervening. To be effective, intervenor's counsel should work closely with the attorney for the procuring agency.

Filing the Protest

The GAO protest process officially begins with the protester filing a written protest with the GAO.¹⁰ The GAO will not consider protests relating to (1) contract administration; (2) small business administration matters; (3) the awarding of subcontracts; and (4) challenges to suspensions and debarments.¹¹ Although there is no prescribed format for filing a protest, the GAO requires some minimum information.¹² The most important information that a protester must provide is "a detailed statement of the legal and factual grounds of protest including copies of relevant documents."¹³ These grounds for protest generally involve allegations that the procuring agency violated one or more procurement statutes or regulations. Simultaneous with filing a protest, the protester should file a request for specific documents. The document request must explain the relevancy of the requested documents to the protest grounds.¹⁴

Drafting a protest requires strategic thinking not unlike drafting a complaint. Thinking strategically, counsel must keep in mind that many GAO protests are won with documents that the agency produces either in its agency

report or in response to a document request. However, the agency need only provide documents to the protester that are relevant to the grounds for protest. Hence, a seasoned protest attorney fashions the grounds for protest as broadly as possible to force the agency to produce key documents. In this regard, it is not uncommon for the GAO to sustain a protest that is based on grounds raised in a supplemental protest based on what the protester learned from documents provided by the agency in an earlier protest.

If a protester can establish that the agency violated either a procurement law or regulation and that the violation resulted in prejudice to the protester, the GAO will probably sustain the protest. The following are among the more common reasons for sustained protests:

- A lack of "full and open" competition as required by the Competition In Contracting Act;
- Failure of the agency to make an award based on the evaluation criteria set forth in the solicitation;
- The evaluators incorrectly evaluated the proposals;
- The awardee's proposal does not comply with the solicitation;
- The offerors were not treated equally during the procurement process;
- The agency did not engage in adequate discussions regarding deficiencies and significant weaknesses in the protester's proposal; and
- The record does not support a rational basis for the award decision.

A large percentage of all protests are summarily dismissed by the GAO for failing to comply with strict time limits for filing a

One of the major advantages of a protest to the GAO is the automatic stay provisions.

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protest.¹⁵ These timeliness rules vary depending on when the protester first became aware of the grounds for protest as well as whether a debriefing was provided by the agency. An example of a specific timeliness rule is the requirement for a vendor to protest objectionable terms of a solicitation either prior to bid opening or at the time established for receipt of initial proposals. Where no specific timeliness rule is applicable, the GAO invokes a general timeliness rule—the protest must be filed no later than ten days after the basis of protest is known or should have been known.¹⁶

The Agency Report and Release of Documents

As previously indicated, winning a protest is often a matter of getting incriminating documents from the Government. The Government, however, is reluctant to release procurement documents for two reasons. First, the proposals of other offerors may contain trade secrets. Second, the agency's evaluation can provide insight into the agency's deliberative processes. This information could provide a competitive advantage to the protester if the Government were required to re-compete the acquisition.

To overcome the valid concerns of the Government, the GAO has authority to issue protective orders.¹⁷ Under a protective order, only attorneys and experts retained by attorneys are permitted access to the documents. In fact, in-house counsel will not be admitted under the protective order unless the in-house counsel convinces the GAO that he or she is not involved in competitive decision-making on behalf of the company.

If the protester submitted a document request with its protest, the agency must provide a list of any requested documents that the agency intends to withhold. The list must be provided to the protester no later than five days before the protester is provided with a copy of the agency report. The protester has two days to

object to the GAO regarding the documents on the list.¹⁸ The GAO encourages agencies to release documents to the protester as soon as possible rather than delaying to provide the documents with the agency report.¹⁹

Within 30 days of the protest being filed, the procuring activity must provide the GAO and the protester with a copy of the agency report. The agency report should consist of a statement of facts by the contracting officer, a memorandum of law and the relevant documents.²⁰ If there is no protective order, the protester is provided with a redacted version of the agency report. The redacted version excludes much of the proposals of the other vendors as well as matters that the agency deems competition sensitive.

Protester's Response

Upon receiving the agency report, the protester should quickly study the report to ascertain if it justifies seeking additional documents. Under the GAO Rules, the protester may request additional documents after receipt of the agency report when either the existence or the relevance of nondisclosed documents first becomes evident in the agency report. However, this opportunity to request additional documents ceases two days after receipt of the agency report.²¹

As previously mentioned, agency reports frequently provide information to support a supplemental protest. Two of the more common grounds raised in supplemental protests involve allegations of the agency (1) failing to treat all offerors equally, and (2) incorrectly evaluating the awardee's proposal. To be timely, the supplemental protest must be filed at the GAO within ten days of the protester receiving the agency report.²²

The protester has ten days to file comments to the agency report. Failure to provide comments can result in the GAO dismissing the protest as abandoned.²³ The comments to the agency report are the best opportunity for protester's counsel to



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persuade the GAO that the protest is meritorious. The most effective form of advocacy is to analogize the facts involving the contested acquisition to the facts in a GAO decision where the protest was sustained.

Possible Hearing

Hearings are the exception rather than the rule. In fiscal year 2003, the GAO granted hearings for 13 percent of the protests. Hearings are primarily used where there are factual disagreements. Usually, the hearing is held at the GAO offices in Washington, D.C. Occasionally, the GAO attorney will schedule the hearing at a location that is more convenient for the parties.

The GAO rules allow either the protester or the agency to request a hearing. The request must set forth the reasons why a hearing is necessary to resolve the protest.²⁴ Alternatively, the GAO may order a hearing on its own initiative. Since the protester bears the burden of proving its protest, astute protesters usually request a hearing.²⁵ Conversely, rarely will an agency request a hearing.

Experienced procurement attorneys generally regard the scheduling of a hearing as a preliminary indicator that the GAO is inclined to believe that there is merit to the protest. However, hearings are not always beneficial to protesters. The hearing presents an opportunity for the Government to provide testimony to overcome a lack of an administrative record.

Hearings are relatively informal compared to litigating in more traditional tribunals. The GAO attorney has broad discretion on how the hearing will be conducted. Nevertheless, protester's counsel is always given an opportunity to question any witness. If a witness designated by the GAO to give testimony does not attend or fails to answer a relevant question, the GAO may draw an inference unfavorable to the party for whom the witness would have testified.²⁶

The post-hearing comments are due five days after the hearing is complete. If the protester does not file comments within five days, the GAO may dismiss the protest.²⁷ In post-hearing comments, the protester should quote the testimony which supports the grounds for protest. When quoting from the transcript, the protester should cite the page and line numbers. Hence, prior to the hearing, the protester should retain a court reporter to record the hearing and provide copies of the transcript within 24 hours after the hearing is complete.

The Decision and Possible Reimbursement Of Costs

Once the administrative record is complete, the Comptroller General promptly issues a written decision. In the decision, the GAO will either dismiss, deny, or sustain the protest.

Because the GAO is part of the legislative branch, as a matter of constitutional law, a GAO decision cannot be binding on the

executive branch. Hence, the decisions are couched as a recommendation. Although any party may request reconsideration, it is uncommon for the GAO to change its recommendation.²⁸ More importantly, once the time to request reconsideration has expired, it is exceedingly rare for an agency to refuse to follow the GAO's recommendation.²⁹

Thirty one USC § 3554(b)(1) identifies the following remedies that the GAO can recommend:

- (A) Refrain from exercising any options under the contract;
- (B) Recompete the contract immediately;
- (C) Issue a new solicitation;
- (D) Terminate the contract; and
- (E) Award a contract consistent with the requirements of such statute and regulations

**Failure to file
the claim within
60 days
can result in
forfeiture of the
right to recover.**

Where the agency has not stayed the performance of work until the protest is decided, the likelihood of the GAO recommending the contract be terminated is significantly reduced.³⁰ In those instances where the GAO sustains the protest but does not recommend that the agency recompete immediately, the vendor's remedy may be limited to recovering the cost of preparing its bid or proposal.

The GAO has demonstrated that it will fashion remedies that it deems appropriate. For example, the GAO has recommended that a contract be awarded to the protester.³¹

In another instance, because the GAO had misgivings whether the government evaluators were impartial, the GAO recommended that the agency replace the evaluators.³²

The Competition in Contracting Act allows the recovery of protest costs by both large and small businesses.³³ The statute, however, grants GAO considerable discretion in allowing reimbursement of protest costs. In exercising its discretion, GAO balances "the competing policies of encouraging litigation of procurement conflicts" and controlling "litigation costs."³⁴ If an agency delays taking corrective action until after the protester provides comments to the agency report, the GAO is likely to permit attorney fees on "clearly meritorious protests."³⁵

If the GAO recommends that the contracting agency pay the protester the cost of filing and pursuing the protest, the protester has 60 days to submit a claim to the contracting officer. Failure to file the claim within 60 days can result in forfeiture of the right to recover.³⁶ If the protester and the contracting officer cannot settle the claim within a reasonable amount of time, the protester can petition the GAO to recommend the amount to be paid.³⁷

Final Comment

The GAO has an exemplary record of complying with its duty to decide protests within 100 days.³⁸ To appreciate the time constraints, imagine an Alabama circuit court disposing of a lawsuit on the merits 100 days after the filing of the complaint. During that this short period, the attorneys must complete discovery and file closing arguments. As shown by the time constraints

identified in this article, any attorney who represents a protester before the GAO should anticipate some short suspenses that are likely to have a disruptive impact on the rest of his or her practice. ■

Endnotes

1. Press Release entitled "Proactive Partnership Will Protect Alabama's Bases and the Jobs That Depend on Them," January 20, 2004.
2. See generally, Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) ("FAIR Act").
3. See generally, the Competition in Contracting Act of 1984, 31 U.S.C. § 3551-56 and 28 U.S.C. § 1491(b)(1).
4. *Choctaw Manufacturing Co., Inc. v. United States*, 761 F.2d 609, 619 n. 17 (11th Cir. 1985).
5. There was a time when U.S. District Courts had jurisdiction to decide bid protest cases under the Administrative Procedure Act. See generally, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). However, the Administrative Disputes Resolution Act of 1996 had a sunset provision for such jurisdiction. As of January 1, 2001, U.S. District Courts no longer have bid protest jurisdiction. See generally, *Novell v. United States*, 109 F. Supp. 2d 22 (D.D.C. 2000).
6. Agency-level protests can be troublesome in terms of getting the procuring activity to stay the procurement until the protest has been decided. Additionally, rarely is the agency willing to provide the Protester will documents that are either source selection sensitive or trade secrets of other vendors. Also, there is a perception (which is sometimes justified) that an agency is pre-disposed to "rubber stamp" the decision of its procurement officials. Protests to the Court of Federal Claims can be twice as expensive as a GAO protest because of the formalities of the litigation process.
7. It is not in the best interest of a vendor to file such protests. They annoy government personnel. Savvy vendors keep in perspective that past performance is usually one of the evaluation criteria for large procurements. Savvy vendors also know that government personnel have considerable discretion in making past performance assessments. Hence, needlessly annoying government officials might not be helpful in trying to obtain future business. It should also be noted that the GAO may summarily dismiss a frivolous protest without obtaining an agency report. 31 U.S.C. § 3554(a).
8. The rules for obtaining an automatic stay are similar to the GAO rules for timeliness. See generally, Federal Acquisition Regulation ("FAR") Subpart 31. However, if a protester files a protest on the tenth day and the GAO does not notify the agency of the protest until the eleventh day, the protest may be timely but the agency may not be bound by the statutory stay. Hence, it is prudent to file protests a day earlier than required by the timeliness rules. If the protest is filed on the tenth day, it is advisable to call the GAO to verify that notice has been sent to the agency before the end of the tenth day. Also, it should be noted that the timeliness rule for automatic stays where there has been a requested and required debriefing is different. The protest following a debriefing must be filed within five days.
9. Under limited circumstances, an agency may override the stay. Prior to award, an agency may override the stay for "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO." See FAR § 33.104(b)(1)(i). After award, the agency may override the stay for the additional reason that "contract performance will be in the best interest of the United States." See FAR § 33.104(c)(2)(ii).
10. Unofficially, the vendors should be sensitive to protestable issues from the inception of the procurement. At a minimum, a disappointed offeror should be considering a possible protest strategy when assessing its debriefing options.
11. 4 C.F.R. § 21.5.
12. 4 C.F.R. § 21.1(c).
13. 4 C.F.R. § 21.1(c)(4).
14. 4 C.F.R. § 21.1(d).
15. 4 C.F.R. § 21.2.
16. 4 C.F.R. § 21.2(a)(2).
17. 31 U.S.C. § 3553(f)(2)(A).
18. 4 C.F.R. § 21.3(c).
19. Protesters occasionally submit untimely supplemental protests because they overlook that the ten days to file a supplemental protest based on information revealed in the disclosed documents began on the date that the Protester received the documents.
20. 4 C.F.R. § 21.3(d).
21. 4 C.F.R. § 21.3(g). Many GAO attorneys will allow requests for additional documents even though filed more than two days after receipt of the report.
22. While the ten days to file comments can be extended by the GAO attorney, this does not extend the time to file supplemental protests—a trap for the unwary.
23. 4 C.F.R. § 21.3(i).
24. 4 C.F.R. § 21.7(a).
25. In general, the GAO follows the well-established principle of administrative law that "in the absence of clear evidence to the contrary, courts presume that [Government officials] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).
26. 4 C.F.R. § 21.7(f).
27. 4 C.F.R. § 21.7(g).
28. 4 C.F.R. § 21.14. Only a participating party can file a request for reconsideration; an awardee who declined to intervene cannot request reconsideration.
29. Agencies prefer to avoid the consequences of ignoring a GAO recommendation. Specifically, 31 U.S.C. § 3554(e)(1) requires the Comptroller General to report to Congress "any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General."
30. An exception exists if the agency declines to stay the performance of work based on a determination that "contract performance will be in the best interest of the United States." In those instances, if the GAO sustains the protest, the remedy recommended by the GAO will not consider "any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. § 3554(b)(2).
31. *BAE Systems*, B-293070, January 28, 2004.
32. *Beneco Enterprises*, B-283512.3, July 10, 2000.
33. 31 U.S.C. § 3554(c)(1).
34. *Innovative Refrigeration Concepts - Claim for Costs*, B-258655.2, July 16, 1997.
35. *Millar Elevator Services Co - Costs*, B-281334.3, Aug. 3, 2000.
36. 4 C.F.R. § 21.8(f)(1).
37. *Id.*
38. The duty to decide protests within 100 days is not absolute. Congress limited the duty "to the maximum extent practicable." 31 U.S.C. § 3554(a)(1).

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NAVIGATING THE APPELLATE PROCESS: A GUIDE FOR APPELLANTS IN CIVIL CASES

BY TONI J. BRAXTON

As many lawyers know, both those new to the game and those with many years of experience under their belt, perfecting and successfully preparing an appeal in federal court or in state court can be an overwhelming and somewhat daunting task the first few times. It is an experience that most lawyers do not jump at the chance to have. However, many find themselves facing this challenge without any idea where to begin. It is not the substance of the appeal that poses the most difficulty, especially since in many cases you have already been through summary judgment. However, the technical aspects of the rules, which may change from one appeal to the next, may be difficult to navigate. The growing trend toward electronic filing has only complicated the process, especially for those of us who are not too computer savvy.

This article will attempt to provide a starting point for your journey through the civil appellate process and some tips and guidelines this practitioner has used many times in filing appeals. Not every technicality can be discussed in this article; therefore, it is imperative that you read the Federal Rules of Appellate Procedure ("FRAP") and/or the Alabama Rules of Appellate Procedure ("ARAP") in order to properly handle every issue of your particular case.

through the civil appellate process...

Federal Appellate Practice

Preliminary Filings

A. Finding the Proper Resources

First, consult the Federal Rules of Appellate Procedure, even if you just filed an appeal a month ago. The rules change often, and, in fact, were just updated October 1, 2004. The easiest way to find the most current copy of the Rules is to go to the Eleventh Circuit's Web site and download them at www.ca11.uscourts.gov.

When consulting the Rules, do not neglect to read the Eleventh Circuit's local rules and internal operating procedures which follow each rule. At times, these rules are more detailed, or may relieve the parties of some duty that is stated in the federal rule.

B. Notice of Appeal

This is the first and easiest step that must be taken. FRAP 3 and 4 deal with how and when the notice of appeal must be filed. A Notice of Appeal must be filed with the United States District Court where the case originated within 30 days, unless the United States is a party, and then within 60 days from the

final order or judgment being appealed. You must also pay the District Court a docketing fee. The clerk can tell you what the current fee is.

The notice itself is not complicated and must include the names of the parties involved in the appeal, a statement of the judgment or order being appealed and the name of the court to which the appeal is being taken.

C. Initial Forms to be Completed

There are three forms that need to be completed and filed shortly after filing the notice of appeal. The Transcript Order Form must be filed with the District Court within ten days of filing the Notice of Appeal. This form must be filed regardless of whether a transcript is being ordered. A copy of this form may be obtained from the District Court Clerk when the Notice of Appeal is filed.

The last two forms must be filed with the Eleventh Circuit. A Civil Appeal Statement, along with two copies, must be filed within ten days of filing the Notice of Appeal. A copy of the order or judgment being appealed must be attached, along with any memorandum opinion that was entered. FRAP 33. A copy of this form can also be obtained from the District Court Clerk when the Notice of Appeal is filed.

The Eleventh Circuit will send Appearance of Counsel forms, with the appellate case number on them, to be completed within 14 days of receipt. FRAP 12.

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D. Record on Appeal

The only responsibility the appellant has regarding the record on appeal is to file the Transcript Order Form. FRAP 10. The District Court will notify all parties when the Record on Appeal has been completed. That certificate by the Clerk signifies when the appellant's time for filing the brief starts to run. A copy of the record should be requested from the District Court Clerk, with appropriate arrangements for payment of copies made.

The Appellant's Brief

After the preliminary filings have been done and the time for filing the brief has begun, attention must be devoted to the brief itself. The appellant has 40 days from the date the record was completed to file the brief. FRAP 31. Again, notice of completion of the record will be sent by the Eleventh Circuit Clerk.

A. Contents of the Brief

The Rules require ten or 11 sections to be included in every initial brief filed by an appellant. FRAP 28. The 11th Cir. R. 28-1(a) lists the information that should be contained in the cover page. FRAP 32(a)(2) specifies further how the cover should be formatted.

A *Certificate of Interested Persons or Corporate Disclosure Statement* is required by FRAP 26.1 and is usually the first statement in the brief following the cover. These pages are to be numbered C-1, etc. A *Statement Regarding Oral Argument* can be included next if the appellant is requesting oral argument or if the parties have agreed that the appeal should be submitted on the briefs. FRAP 34.

The *Table of Contents* and *Table of Authorities* follow with page references included. The authorities should be alphabetically arranged. A good practice is to also list the authorities in order of their persuasiveness, (i.e., United States Supreme Court, Eleventh Circuit, etc.).

The *Jurisdictional Statement* has four components: (1) the subject matter jurisdiction of the lower court, (2) the basis for the court of appeal's jurisdiction, (3) filing dates to establish timeliness and (4) a statement that the appeal is from a final order or judgment that disposes of all claims. Citations to applicable statutes and facts supporting jurisdiction must be included. All of the foregoing sections shall be numbered in the brief with Roman numerals as they are not included in calculating the number of pages of the brief.

The next four sections are basically summaries of the substance of the appeal. First is the *Statement of the Issues Presented*, which lays out for the Court concisely what issues are being appealed. They should not include every claim brought by the plaintiff in

the lower court if all of those claims are not at issue on appeal. The *Statement of the Case* describes what type of case it is, what the lower court proceedings were and what the disposition was. This section sets the stage for the appellate court procedurally.

Last is the *Summary of the Argument*, which should *not* be a listing of the argument headings. The Summary of the Argument should be written last and then inserted here. As we all know too well, arguments can change after a thorough review of the evidence in the record. That is more likely to happen when reviewing the appellate record where it may be discovered that evidence you thought made it into the record actually did not.

The *Argument* is, of course, the bulk and the substance of the brief. It must include citations to authorities and to the record.

The standard of review must also be stated for each issue being appealed. Following the argument must be a statement of the relief sought. The only other section that may be included in the brief would be a *Certificate of Compliance* if required by

FRAP 32(a)(7) if the brief exceeds the page limitation, but fits within the type-volume limitation, which will be discussed. As with all filings, a *Certificate of Service* should be included.

B. Format of the Brief

Equally important to the substance of the brief is its format. Rule 32 spells out the requirements for each party's briefs. The key requirements are that the brief must be no longer than 30 pages, double-spaced, or 14,000 words or 1,300 lines. The cover of the appellant's initial brief must be blue.

The original and six copies must be filed with the Eleventh Circuit Clerk, and two copies to the opposing counsel for each party.

C. Record Excerpts

Although FRAP 30 requires the appellant to file an Appendix to the Briefs, 11th Cir. R. 30-1 only requires filing certain record excerpts along with the initial brief. The excerpts must include a copy of the following: (1) docket sheet (obtained from the lower court); (2) complaint; (3) answer; and (4) judgment or order appealed from, along with memorandum opinion, if any. This filing should be bound across the top with a white cover. The original and five copies are to be sent to the Eleventh Circuit Clerk and one copy to opposing counsel for each party.

Electronic Filing

The Eleventh Circuit now requires that along with filing the required number of hard copies of briefs, the parties must also file their briefs electronically. This means converting your file to an Adobe Acrobat PDF file and uploading it to the Court's Web



site. When the file is saved in PDF format, it must be named in a specific manner required by the Court. The name of the file must be the appellate case number followed by the name identifier for the party (in this case "Apl" for appellant), and then the last name of the party.

Before you can electronically file a brief, each attorney must register on the Eleventh Circuit's Web site for an ID and password in order to log onto the system. Instructions regarding electronic filing can be found on the Web site as well.

Alabama Appellate Procedure

Preliminary Filings

A. Finding the Proper Resources

The appellate process in the State of Alabama is different in a few ways that will be addressed here. Again, the first step is always to review the rules. Current changes to the Alabama Rules of Civil Procedure can be found at www.alacourt.gov. One other preliminary matter, before embarking on a state court appeal, is determining which appellate court will have jurisdiction over your particular claims, the Alabama Court of Civil Appeals or the Alabama Supreme Court. One good resource that summarizes the state appellate process can be found online at www.alalinc.net/appellate_civil, which provides an Appellate

Process Chart that summarizes the jurisdiction of each state appellate court.

B. Notice of Appeal

In state court, filing the notice of appeal means simply completing the standard form and filing it with the circuit court where the case originated. ARAP-1. The Administrative Office of Courts provides samples of each of the forms needed for the appeals process online at www.alacourt.gov/Forms/Appellate.

However, the most important difference between federal and state appeals is that in state court the notice of appeal must be filed 42 days after the entry of a final judgment or order. *Ala. Code* (1975) ARAP 4. A docketing fee must also be paid.

C. Initial Forms to be Completed

As with federal court, a Transcript Purchase Order and Docketing Statement of Appeal must be completed and filed with the trial court. These forms can also be found at the above Web site. There are two different docketing statements depending on which court has jurisdiction.

D. Record on Appeal

This portion of the appellate process is somewhat different in state court because the appellant has more responsibility in seeing that the record is delivered to the appellate court. Rule 11(a)(4) requires that the appellant make arrangements with the trial court clerk to file a copy of the record on appeal with the appellate court that has jurisdiction. The copy of the record is due to the appellate court within 14 days from the date the clerk certifies the record has been completed. ARAP 10 specifies what the record on appeal must contain.

The Appellant's Brief

In state court, once again, the timelines for filing are much shorter than in federal court. ARAP 31 requires that the appellant's brief be filed within 28 days after the certification of completion of the record. However, Rule 31(d) allows one seven-day extension. This can be requested over the telephone prior to the date the brief is due, with a letter confirming the extension and the new due date sent to the clerk and opposing counsel.

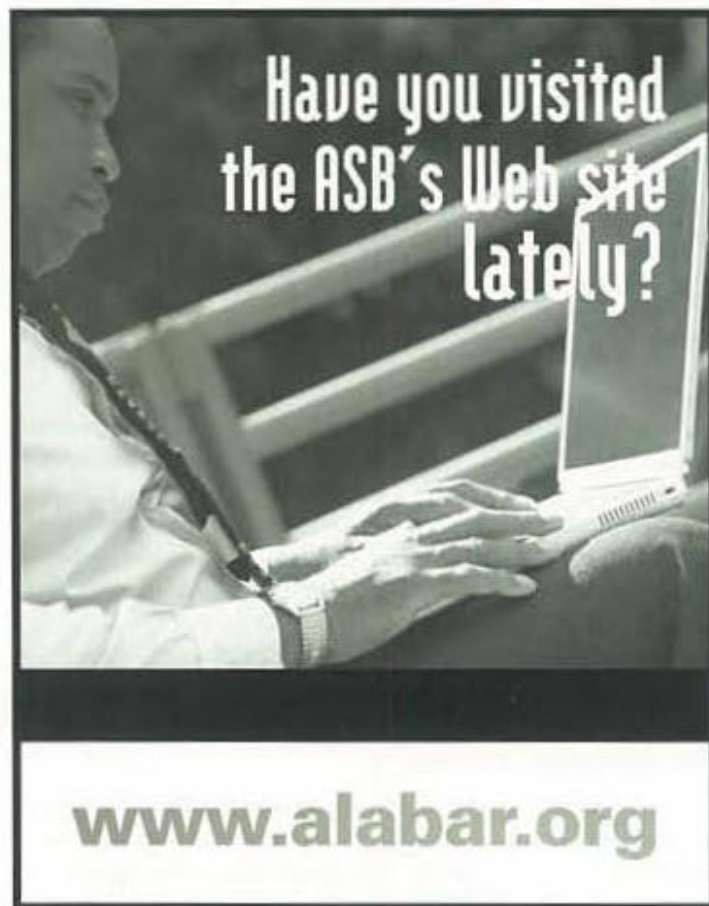
A. Contents of the Brief

The contents of the appellant's brief in state court are virtually the same as those required in federal. A statement regarding oral argument is required whether oral argument is being requested or not. ARAP 28(a)(1).

B. Format of the Brief

The formatting requirements of the brief in state court are more specific. An amendment to ARAP 32 requires that the font Courier New 13 be used. The brief can be no longer than 70 pages, which is much longer than what is allowed in federal appeals.

The cover of the brief is substantially the same as in federal court, however, the statement "Oral Argument Requested" must appear on the cover if applicable. The colors of the covers are



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Length of Initial Brief	30 pages	70 pages
Number of Copies	Original + 6 copies	Original + 9 copies

the same. The original and nine copies must be filed with the appellate court, with a copy to opposing counsel. There is a specific form used as the certificate of service when filing both the appellant's and the appellee's briefs. ARAP 7 and 8.

As with most things, practice makes perfect. The more you navigate through these complicated waters, the better you become at avoiding the problems that may be lurking. The Eleventh Circuit's Web site has a wealth of information to aid attorneys in the appeal process, as does the Clerk's office. The clerks are often very helpful and informative, although they cannot give any legal advice. Lastly, if you still find the process a little overwhelming the first time, the Clerk can usually grant a short extension of time if timely requested.

This information is provided only as a starting point in perfecting and preparing your appeal and could not possibly include

all the information you need. Consult the Federal or Alabama Rules of Appellate Procedure before starting the process as the rules change often and without notice. Stay organized and focused, and you will sail right through. Good luck. ■



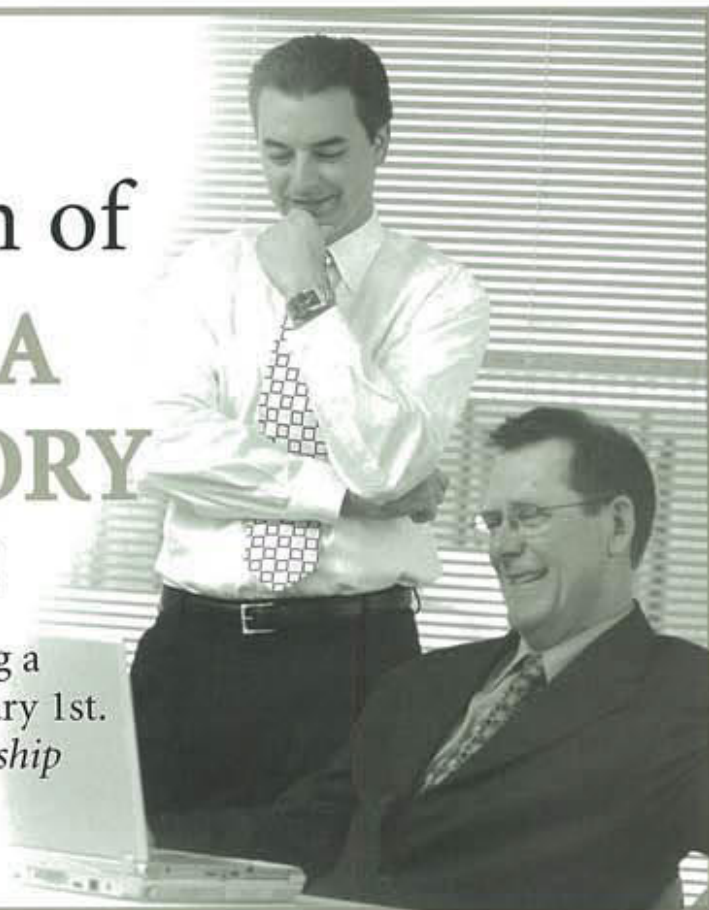
Toni J. Braxton

Toni J. Braxton is a graduate of Yale University and the University of Alabama School of Law. She has been practicing law in Alabama for almost seven years. She is currently working with The Brooks Firm, P.C. located in Birmingham.

The 2004-2005 combined edition of **THE ALABAMA BAR DIRECTORY**

will be online February 1, 2005!

If you returned your postcard requesting a printed copy, they will be mailed February 1st. If you did not, contact the *ASB Membership Department* by e-mail (ms@alabar.org) by January 14, 2005.





Regardese

Is it Time for the “Plain English” Jury Charge?

HON. SCOTT DONALDSON

A “Plain English” charge is a deliberate, conscious attempt to phrase the legal instruction in terms commonly understood by the average juror. Should we examine this approach in Alabama? Certainly, the existing pattern jury instructions are uniformly recognized as excellent statements of law, time-tested and proven, with established appellate court approval. In recent years, though, there has been a renewed movement to restate most legal documents into language used by the general public (particularly regarding consumer issues).¹ Attention is now turning toward reforming the language used in jury charges as well, with several states either examining the issue or developing revisions. These efforts usually combine the expertise of judges and lawyers with input from language experts and non-lawyers to evaluate the “understandability” of instructions.

Complaints about the way we in the legal profession write and speak are not new. Even Thomas Jefferson complained about “legalese” when he criticized statutes which:

...from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by *said*s and *afosaid*s, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.²

But there may be a compelling reason why we now should heighten our interest in simplifying the language used within the judicial system. Whether we like it or not, Alabama jurors today have seen

dozens of "trials" on television and in movies before they ever reach our courtrooms. Script and screen writers phrase the fictional jury charge not for legal accuracy but for entertainment purposes, for they know that they cannot gain the attention of the audience if the speech of the characters cannot be understood. Our jurors arrive in court expecting to hear the same short, clear, simple expla-

nation of the law to be applied. As such, restating the jury charge into language more commonly used deserves renewed analysis in part because of the characteristics and backgrounds of modern jurors.

To be sure, there is nothing particularly new about the concept of the "Plain English" movement. One of the stated goals of the original Alabama Jury Instructions Committee was to develop

instructions in "simple understandable language,"³ and the members of the Pattern committees have unquestionably met that goal in their exemplary work through the years. But if we are to fulfill our obligations to the public, we should constantly pro-actively examine how well we are communicating legal issues to juries. The failure to do so can erode confidence in the jury system:

Lack of jury understanding raises suspicion about the fairness of trials and calls into question the whole jury system and its basic premise - that laypersons, peers of those before them, will thoughtfully and dispassionately apply the law to resolve disputes in favor of the deserving party.⁴

So how are charges re-stated into "Plain English"? Here is an example of a translation adopted by one state regarding the burden of proof in civil cases:

Existing Charge: "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.⁵

As lawyers, we have no trouble understanding this concept as we have heard the terms repeated many times in law school and in previous trials. Think about how those words would sound, though, if you never went to law school, and consider the revised "Plain English" version of the same charge:

New Charge: When I tell you that a party must prove something, I mean that the party must persuade you, by the evidence presented in court, that what he or she is trying to prove is more likely to be true than not true. This is sometimes referred to as the "burden of proof."⁶

It is difficult to argue against the theory that the restated charge is more likely to be understood and applied by the average juror, because it uses more common terms to express the same concept. Some suggest that instructions should be specifically directed to the "average literacy



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level" of the state population as determined through empirical analysis, or more likely to reach readers of *Sports Illustrated* as opposed to the *Harvard Business Review*.⁷ Existing pattern instructions (civil and criminal) would continue be the benchmarks for concise, proven, accurate statements of legal principles (since there must be an acceptable base from which restatements are made), but additional input would be received from non-lawyers as well as experts in language and/or reading:

The role of the lawyers and judges would be to ensure that the instructions correctly express the law, the role of the lay persons would be to ensure that non-lawyers can understand them, and the role of the reading specialist would be to assist both groups so that the instructions are accurate and comprehensive, yet readable for as many jurors as possible.⁸

So why would there be resistance to "Plain English" revisions? Several valid reasons exist. Pattern charges are the product of years of scholarly efforts of outstanding lawyers and judges, and are endorsed by the appellate courts. There is certainly the chance that an attempted restatement of an otherwise approved or accepted charge will not receive the same endorsement. There is also the daunting, enormous task of undertaking such a translation with the attendant risks of error. Furthermore, we have to reject any unspoken fear that using "plain" or more common language will somehow make us appear less knowledgeable, and/or

diminish the integrity of the proceedings. In fact, the opposite is quite likely to be true—it will require outstanding legal skill and expertise to re-phrase charges into non-legal, common terms.

There are times when it seems the primary emphasis of the jury charge is to preserve or eliminate an issue for appeal rather than providing the jury with adequate instructions:

Often, comprehensibility is a subsidiary goal in drafting [jury] instructions, with rigid adherence to all the minute subtleties of the law being the primary goal.⁹

By focusing on the appellate review process, we necessarily limit meaningful discussion between the trial court and counsel on how well proposed charges actually inform the jury of the applicable principles, and "[e]xperimenting with a 'novel' jury instruction is viewed as dangerous by lawyers and trial court judges alike."¹⁰ But we must remind ourselves that the primary purpose of the charge is to provide jurors with the correct law to be applied in a manner they can understand.¹¹ Innovation should be cautiously evaluated but not feared, since:

[A] jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be



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appraised in terms of its net effect. Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence.¹²

...from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by saids and aforesaid, by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.

—Thomas Jefferson

Other reforms to the jury instruction process are being proposed as well. The American Judicature Society suggests consideration be given to providing written copies of certain instructions for use in deliberations, and to give at least some of the charges on legal issues at the beginning of the trial.¹³ Note that this type of "preliminary" instruction differs from giving the entire final charge before closing arguments, which is discouraged

in Alabama.¹⁴ A suggestion has also been made to permit illustrations to be used in addition to plain language.¹⁵

So should we examine the movement toward "Plain English" charges? If an instruction (particularly if written or adopted decades ago) still makes perfect sense to attorneys but sounds like a foreign language to the average Alabama juror today, we should take action. If jurors do not understand the charge, the

verdict cannot be trusted and public confidence in the system will erode. Re-evaluating the manner in which we speak to juries makes sense as:

[a]ll our work, our whole life, is a matter of semantics, because words are the tools with which we work, the material out of which laws are made, out of which the Constitution was written. Everything depends on our understanding of them.¹⁶ ■

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For further information, contact Kim Jierski, staff attorney, Alabama Crime Victims' Compensation Commission at (334) 242-4007.

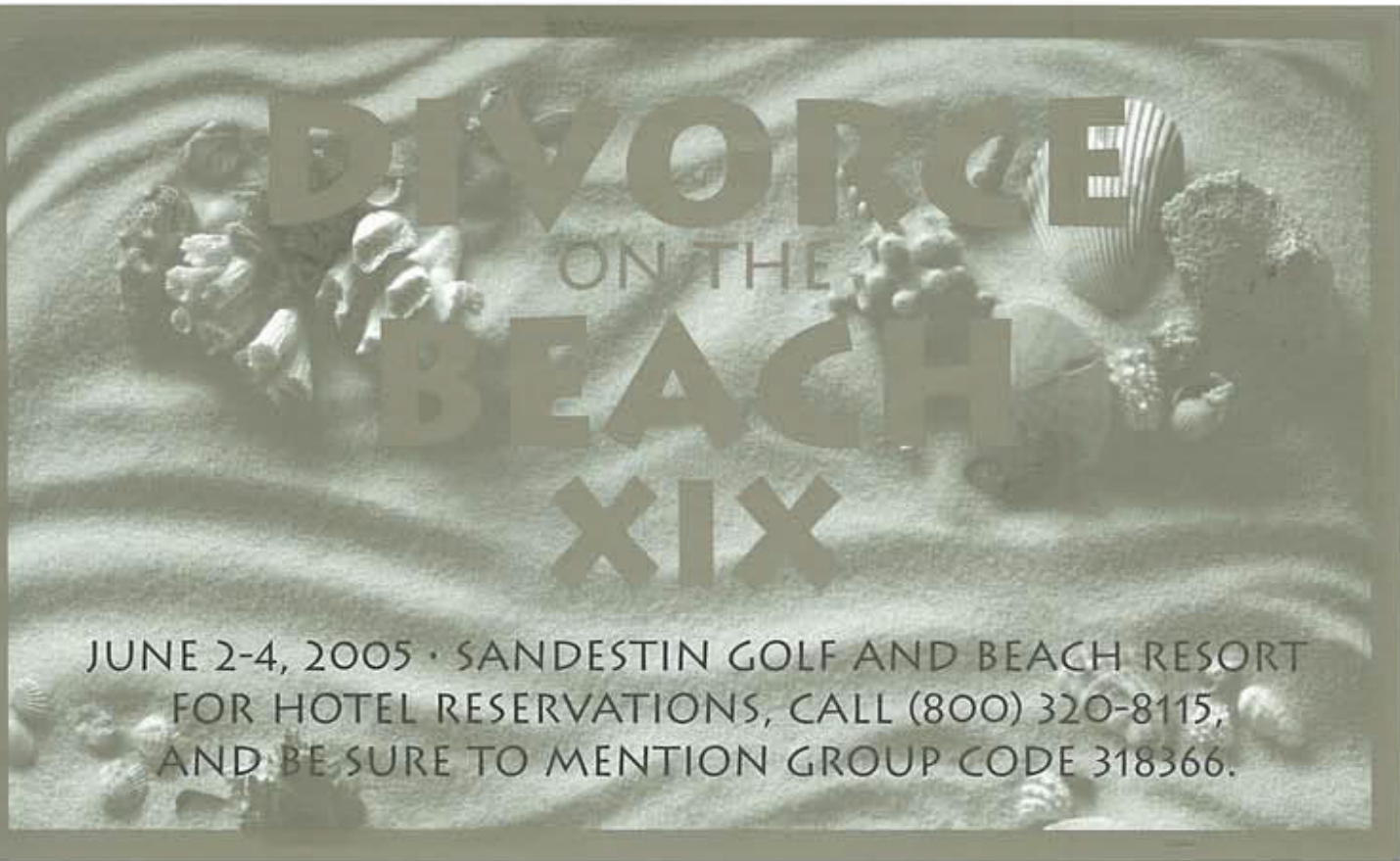


Endnotes

1. Arguments are also made in favor of reducing or eliminating footnotes in legal writings and judicial opinions, particularly for anything other than citations. See, e.g., Abner J. Mikva, *Goodbye to Footnotes*, 56 Univ. Colo. L. Rev. 647 (1985). This will be the only footnote with anything other than a citation in this brief article.
2. Thomas Jefferson, quoted in *The Founder's Constitution*, chapter 4, document 7, The University of Chicago Press (online edition 1987).
3. Alabama Pattern Jury Instruction Committee, *Report to the Supreme Court*, reprinted in *Alabama Pattern Jury Instructions*, vol. 1, p. xvii (1993).
4. Bettina E. Brownstein, *It's Time to Make Jury Instructions Understandable*, 37 Arkansas Lawyer 24 (2002).
5. California BAJI 2.60.
6. Judicial Council Instruction 200, California.
7. Bettina E. Brownstein, *supra* note 4.
8. Bettina E. Brownstein, *supra* note 4, page 26; American Judicature Society, *Jury Improvements: Plain English Jury Instructions* (available at www.ajs.org/jc/juries/jc_improvements).
9. Douglas Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 528-529 (1997).
10. American Judicature Society, *supra* note 8.
11. Order of the Supreme Court of Alabama Approving Use of Pattern Jury Instructions, reprinted in *Alabama Pattern Jury Instructions*, vol. 1, p. xix (1993).
12. *Time, Inc. v. Hill*, 385 U.S. 374, 418 (1967) (Fortas, J., dissenting).
13. American Judicature Society, *supra* note 8.
14. See, e.g., *James v. State*, 723 So.2d 786, 787 (Ala. 1998) (disapproving the delivery of the entire charge prior to arguments).
15. See, e.g., Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 Law & Psychology Review 67 (1998).
16. Charles R. Wilson, *How Opinions are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 Stetson L. Rev. 247 (2003), quoting Justice Felix Frankfurter.



Judge Scott Donaldson
Judge Scott Donaldson is a circuit judge in Tuscaloosa County and a former member of the Alabama State Bar Board of Bar Commissioners and the ASB Disciplinary Commission.



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25. Percent Paid and/or Requested Circulation (18 divided by 24, times 100)		<u>99%</u>	<u>99%</u>

- The University of Alabama Federal Tax Clinic Board of Directors voted to name a scholarship to the Alabama School of Law in honor of **Charles B. Bailey, Jr.** of



Bailey

Johnstone, Adams, Bailey, Gordon & Harris LLC. The Charles B. Bailey, Jr. Scholarship will retain this name for a period of five years. Bailey is one of Alabama's leading tax authorities and is former chairman of the Federal Tax Clinic. He also serves on the Advisory Committee on Graduate Tax Programs, University of Alabama School of Law; as a member of the Board of Trustees, University of the South (1972-79); as a member of the American College of Real Estate Lawyers; and as a member of the MidContinent Oil and Gas Association.

- **Bennett L. Bearden** announces that he has been appointed as investigator for the Alabama Board of Licensure for Professional Geologists. This position is primarily for investigation of complaints received by the board. Bearden is director of the Petroleum Technology Transfer Council, Eastern Gulf Region, Tuscaloosa.

- The Young Lawyers' Section of the Birmingham Bar Association raised more than \$21,000 to benefit Birmingham Athletic Partnership, SpeakFirst and Pathways: A Woman's Way Home.

Section officers and members who organized a golf tournament, silent auction and other fundraising activities included Anna Katherine Graves Bowman, T. Charles Fry, Jr., Jenna McCammon Bledsoe, F. Wendell Allen, Andrew B. Buck, and John Dana.

- **David R. Boyd**, a partner in the firm of Balch & Bingham LLP, was elected chair of the Board of Trustees of the National



Boyd

Conference of Bar Examiners. The NCBE is a not-for-profit corporation whose mission includes developing and providing tests, educational programs and other services to bar examining boards across the nation. Tests offered to the jurisdictions by NCBE are the Multistate Bar Examination, the Multistate Essay Examination, the Multistate Performance Test, and the Multistate Professional Responsibility Examination.

- The world's largest all-male singing society chose **J. Noah Funderburg** to fill an extended term on its board of directors. He will help guide the Barbershop



Funderburg

Harmony Society, a non-profit organization of more than 30,000 male close-harmony singers in the United States and Canada. Funderburg, senior assistant dean at the University of Alabama School of Law, is a member of the Central Alabama Chapter in the Society's Dixie District.

- The Board of Directors of the Alabama Humanities Foundation announced that **Senator Howell Heflin** is the recipient of the 2004 Alabama Humanities Award. The mission of the AHF is to create and foster opportunities to explore human values and meaning

through the humanities. Founded in 1974 as the state affiliate for the National Endowment for the Humanities, the AHF is a nonprofit organization. Senator



Heflin

Heflin is a graduate of the University of Alabama School of Law, and has served on the Alabama Teachers Tenure Commission and as president of the Alabama Committee for Better Schools. In 1993, he sponsored the nomination and confirmation of Sheldon Hackney, Birmingham native and then president of The University of Pennsylvania, to be tapped as chair of the National Endowment for the Humanities.

- William H. Horton, with the firm of Haskell Slaughter Young & Rediker, has begun a one-year term as chair of the American Bar Association Health Law Section's Transactional and Business Healthcare Interest Group.

- Jack Selden, a partner in the Birmingham firm of Bradley Arant Rose & White LLP, has been installed as president of The National Association of Former United States Attorneys. Selden has been a member of the NAFUSA board of directors for the last five years.



Selden

- Charles A. Stewart, III, a partner in the firm of Bradley Arant Rose & White LLP in Montgomery, was recently awarded the Rich Krochock Award at the 2004 Defense Research Institute Annual Meeting. He was honored for providing exemplary leadership and support to the DRI Young Lawyers' Committee through a variety of programs, including the Law School Initiative. This program has allowed DRI to expand its reach to law students and form DRI chapters within law schools.



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By Robert L. McCurley, Jr.

Special Session

Governor Riley called the Alabama legislature into Special Session on Monday, November 8, 2004. In a record time of five legislative days, the legislature passed five bills concerning state health insurance.

Act 2004-646 (HB 1)—Teachers' Health Insurance, and Act 2004-647 (HB 2)—State Employees' Health Insurance, provide for sharing of costs of health insurance

premiums by employees and retirees covered under state health plans.

These bills give the Insurance Board the authority to increase premiums, etc., among all classes of employees and retirees by two-thirds vote of the board members. It further provides that employees can opt out of participation in the plan and allows an employee to purchase supplemental coverage in lieu of primary coverage.

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The bills also allow the Insurance Board to add a surcharge to the employee's contribution for smokers and consider other "avoidable risk factors." Premiums may be adjusted and surcharged for (1) family size, (2) smokers, (3) preventative care and wellness participation, and (4) other categories of risk the board approves. An employee who submits materially false or misleading information will be required to repay the state all claims and expenses, plus interest. Any disputes will be reviewed by a claims administrator with appeals to the Montgomery County Circuit Court. And, the insurance boards may require co-payments by employees in addition to deductibles. The bills also provide assistance to low-income employees who qualify by the Federal Poverty Guidelines. Currently, a family of four with a household income below \$18,850 could receive a subsidy of \$82 toward their total premium cost of \$164.

Act 2004-648 (HB 3)—State Employees, and Act 2004-649 (HB 4)—Teachers, will require state retirees retiring after September 30, 2005 to make health insurance contributions based on their years of service and require retirees employed by another employer, with other insurance coverage, to take the other insurance. Currently, all state employees retiring after ten years of service receive the same health insurance benefit. For example, if a person retires after 20 years of service, the state would pay 90 percent of their non-Medicare family premium, i.e. two percent for each year under 25 years' employment. Currently, the state pays \$673.94 and the retiree pays \$302. With this bill, the state would pay \$606.57 and the retiree's share would be \$369.40.

The final bill, Act 2004-650 (HB 5), will allow teachers a flexible benefit health plan creating the Public Education Flexible Benefits Board for the administration of the program.

There were also 14 local bills passed by the Legislature and 60 resolutions. The 2005 Regular Session begins February 1.

Major revisions prepared by the Law Institute and expected to be considered by the 2005 Legislature are:

1. Alabama Trust Code—Ralph Yeilding, committee chair
2. Alabama Securities Act—Mike Waters, committee chair
3. Residential Landlord-Tenant—James Tingle, committee chair

Drafting committees are currently revising the following:

1. Business Entities Law—James Pruett, committee chair
2. Alabama Parentage Act—Noah Funderburg, committee chair
3. Estate Tax Apportionment—Leonard Wertheimer, committee chair

4. Limited Partnership Act—Bob Denniston, committee chair
5. Real Estate Laws—John Plunk, committee chair

To review the current Law Institute draft of these acts, go to www.ali.state.al.us.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013, fax (205) 348-8411, or phone (205) 348-7411. ■

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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By J. Anthony McLain

Retention and Destruction of Client Files

QUESTION:

"I am seeking an ethics opinion from the Alabama State Bar Association regarding the retention, storage, and the disposing of closed legal files.

"My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage, and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

"I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the files remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes, rules of conduct relating to this process, and any other ethics opinions.

"Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six years interval, what is the appropriate method of disposing of a client's file?"

DISCUSSION:

A lawyer does not have a general duty to preserve all his files permanently.

However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed. ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).

While there are no specific rules in the *Alabama Rules of Professional Conduct* regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary Commission established the following guidelines in Formal Opinion 84-91.

The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation. For that reason, the file should be examined and the contents segregated in the following categories:

- (1) Documents that are clearly the property of the client and may be

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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.

of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.;

- (2) Documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him;
- (3) Documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and,
- (4) Documents which fall in neither of the above categories.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court.

Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her. Documents which fall into category 4 could be appropriately destroyed.

With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances. Since the file is the property of the client, theoretically it may be immediately returned to the client when the legal matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging from a few years

to permanent retention. The length of time is more a matter of the lawyer's or the firm's policy rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider that the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition. First, the client should be informed of the disposal plans and given the opportunity of being provided with the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the Commission's view that six years is reasonable) and then destroyed with the exception of those documents classified as category 1 above. Prior to destroying any client file, the file should be screened to ensure that permanent type (category 1) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer's or law firm's office or at some secure off-site location. Any medium that preserves the integrity of the documents in the file, whether microfilm or by electronic scanning, is appropriate. [RO-1993-10] ■

Disciplinary Notices

- James Melvin Burns, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2005 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 03-249(A) before the Disciplinary Board of the Alabama State Bar. [ASB No. 03-249(A)]

Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of the Disciplinary Board, Panel V, reinstating Birmingham attorney **William K. DelGrasso** to the practice of law in the State of Alabama, effective August 18, 2004. [Pet. for Rein., ASB No. 03-08]

Suspensions

- Effective September 15, 2004, **Rayford Lee Etherton, Jr.** of Point Clear, Alabama has been suspended from the practice of law in the State of Alabama for noncompliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-01]

- Effective September 7, 2004, **Robert Jeffrey Kelsey** of Memphis, Tennessee has been suspended from the practice of law in the State of Alabama for non-compliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-62]
- Effective September 15, 2004, **Kristie Dixon Morris** of Ashland, Alabama has been suspended from the practice of law in the State of Alabama for non-compliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-82]
- On June 15, 2004, the Disciplinary Commission entered a restraining order summarily suspending Birmingham attorney **William Mack Pate** from the

Continued on page 74

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practice of law in Alabama. This suspension was based upon the petition for summary suspension filed by the Office of General Counsel of the Alabama State Bar. Subsequent to this suspension, Pate filed a petition to be transferred to disability inactive status on July 28, 2004. The Disciplinary Board of the Alabama State Bar entered an order granting Pate's petition to be transferred to disability inactive status pursuant to Rule 27(c) of the Alabama Rules of Disciplinary Procedure, effective August 6, 2004. [Rule No. 27(c), Pet. No. 04-05 and Rule No. 20(a), Pet. No. 04-07]

- Effective September 7, 2004, **Richard Forrest Sharrad** of Edwardsville, Illinois has been suspended from the practice of law in the State of Alabama for noncompliance with the 2003

Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-98]

- Effective September 16, 2004, **Ronald Frank Suber** of Huntsville, Alabama has been suspended from the practice of law in the State of Alabama for non-compliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-182]
- On August 20, 2004, the Supreme Court of Alabama adopted the July 13, 2004 order entered by the Disciplinary Commission, suspending Montgomery attorney **Kelly Dean Vickers** from the practice of law in Alabama for 30 months. On May 20, 2004, the Disciplinary Board of the Alabama State Bar, Panel I, entered an order determining that Vickers had commit-

ted a "serious crime" when he entered a guilty plea to theft III, on July 24, 2003, in the Circuit Court of Autauga County. Vickers was sentenced to one year suspended and two years' probation. The court fined Vickers \$1,000 and he is to perform 100 hours of community service. He was also ordered to make restitution in the amount of \$25,000 to the victims and pay \$1,000 to the Alabama Crime Victims' Compensation Fund. [Rule No. 22(a), Pet. No. 04-01]

- Effective September 16, 2004, **Slade Gordon Watson** of Mobile, Alabama has been suspended from the practice of law in the State of Alabama for non-compliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-117]

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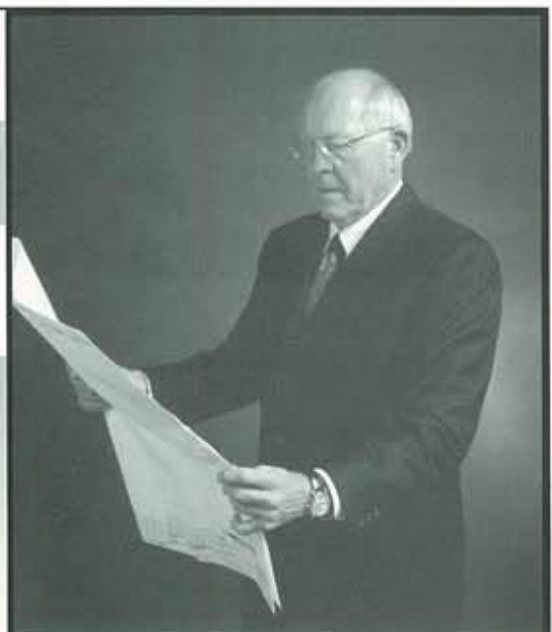
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