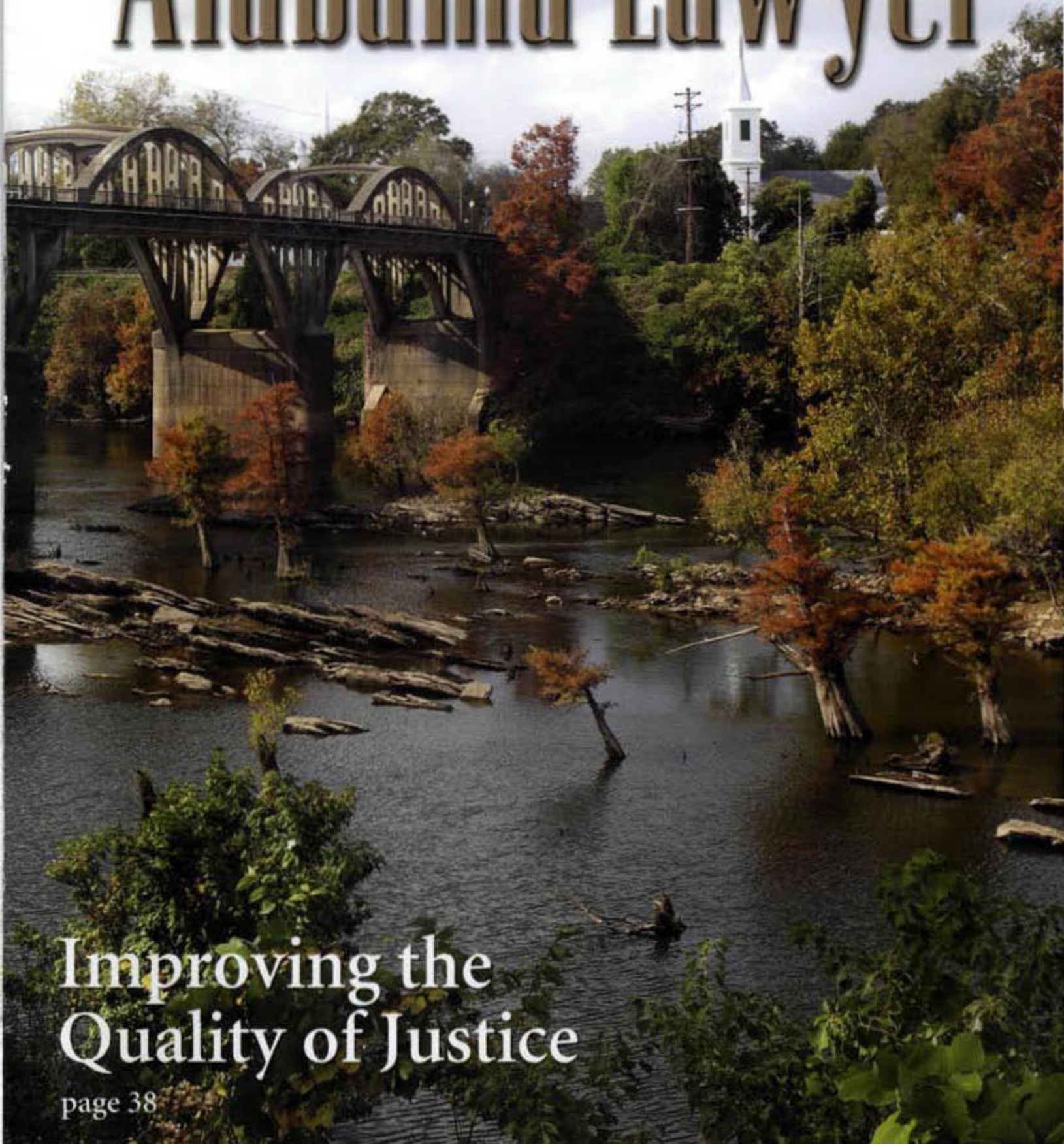


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The Alabama Lawyer



Improving the
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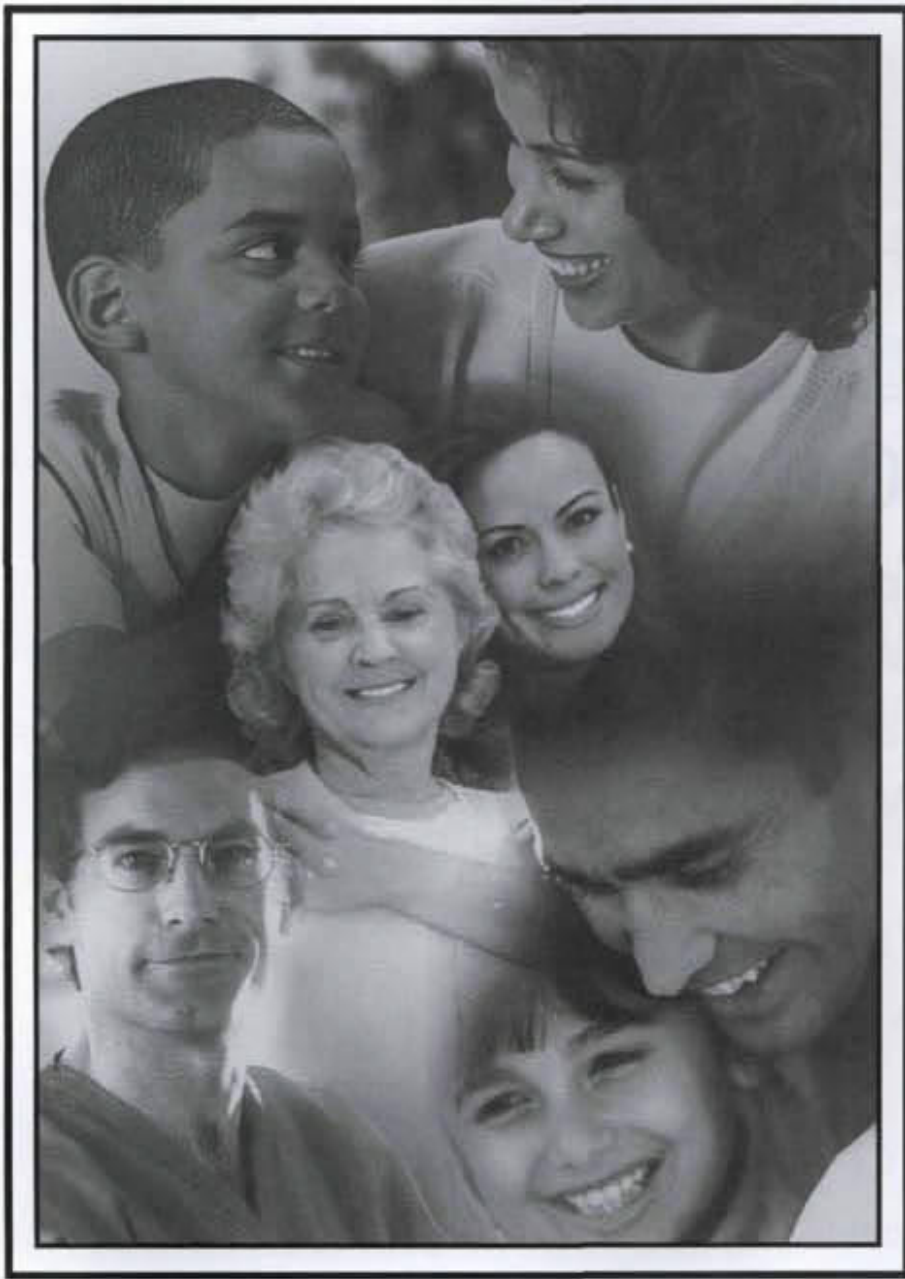


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The Alabama Lawyer

January 2006

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ON THE COVER

Coosa River and the Bibb Graves Bridge, Downtown Wetumpka

Spanning the Coosa River at Wetumpka, the Bibb Graves Bridge, named for the former Alabama governor, is the most recognizable feature of this Elmore County city. Downstream, the Coosa River joins the Tallapoosa River to form the Alabama River. For more information on Wetumpka, visit www.wetumpka.al.us.

Correction: The bridge on the cover of the November 2005 issue is the Swann Covered Bridge.

Photo by Paul Crawford, JD
pcrawford@aimsitc.com

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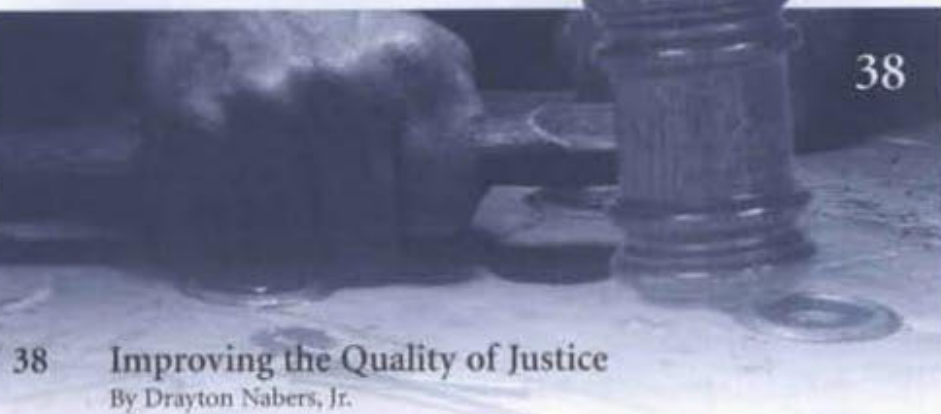
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Bobby Segall

What a Difference 25 Years Make

I know. My last column wasn't funny. Some things just aren't funny—hurricanes, floods, death and destruction among them. This column's not really funny either, but it's pretty interesting, at least to me. Tell me if you agree with the point it tries to make. If you disagree, tell Keith Norman.

In October, I attended a celebration honoring the 25 years **Myron Thompson** has spent as a federal district judge in Alabama's Middle District. In June, I attended the same kind of 25-year celebration for **U.W. Clemon**, district judge in the Northern District. Both parties were fun. Not Friday-nights-in-college fun, but fun. And, excruciatingly moving. So moving that I promised myself I would never again miss a party like that—even if not invited. And, since I likely won't be bar president next time there's a 25th anniversary party for a black federal judge in Alabama, I'm pretty sure I won't be invited.

I'm an American, though. We're always crashing other people's parties—just ask **Dubya**. Even crashing a party like this could be difficult, though, considering that—at best—I'll be approaching 85 at the time. The only 85- or 95-year-old Alabama lawyer spry enough to crash a

party is Decatur's **John Caddell**. I know **John Caddell**, and I'm no **John Caddell**.¹

You get the point, though. Since Judge **Clemon** and Judge **Thompson** were appointed in 1980, not one other black man or woman has been nominated to serve as a federal district court judge in Alabama. That's just not right. Alabama's population is more than one-fourth black, and Alabama has exceedingly talented black lawyers all over the state, from **Huntsville** to **Birmingham** to **Montgomery** to **Mobile**.

Yeah, I know. I've been whining about the horrendous way we select judges in state court, and now I'm whimpering about who doesn't get selected in federal court. And, you're asking yourselves, "What does the SOB want, to appoint all the judges himself?" Well, yes, but since that's not an option, I think **Congressman Artur Davis** is right. In January 2003, he asked our two U.S. senators to urge President **Bush** to consider black men and women for the federal bench in Alabama. I hope President **Bush** will do just that.

Every one of our state's district court judges is at least pretty good. We're fortunate that way, but a little diversity on the bench is a good thing. It makes everyone

feel—rightly or wrongly—like justice really is for all. I think the U.S. Supreme Court will lose something if it ends up, once again, 8-1 male-female, and I think the bar and our entire state will suffer if we lose racial diversity within our federal and state court systems.

One of Alabama's greatest heroes passed away recently after a long and inspiring life. Mrs. Rosa Parks did in death what she did throughout her life. She inspired Alabamians, and all Americans, to remember that our nation is the land of freedom and equality. When she refused to give up her seat on that bus, she woke up an entire nation and ushered in an era of change and growth the likes of which this country hasn't seen since. I hope we aren't falling asleep again. I hope we continue to remember how important it is that we remain committed to the dreams of racial equality and a color-blind society.

This shouldn't be a partisan issue. Although both Judge Clemon and Judge Thompson were appointed by Democrat Jimmy Carter, both Republicans and Democrats have since failed to follow his lead. Through two terms of Reagan, one term of Bush I, two terms of Clinton and now a term-and-a-half of Bush II, there's not been one appointment of a black person to the federal bench in Alabama. And I know Republicans have it in them just as much as any Democrat. The only black justice on the U.S. Supreme Court, Justice Clarence Thomas, was nominated by Bush I.²

What a difference 25 years make.

It's hard to believe now, but back in 1980 when Judge Thompson and Judge Clemon were first appointed, their appointment was a contentious issue within the state and in some places outside the state. The American Bar Association even claimed that Judge Clemon—a civil rights pioneer, a Columbia Law School grad and a state senator—was “unqualified.”

What a difference 25 years make.

I don't know if you've appeared before Judge Clemon, but “unqualified” is about

the last word that comes to mind. “Apprehension,” yes. “Terror,” maybe, but “unqualified,” never. Let's face it. Some folks aren't huge fans of the way Judge Clemon runs his courtroom—Castro has less control over Cuba—but he is about the smartest guy I know. Many of those who criticized him in 1980 now sing his praises. A former law clerk called him “brilliant” and “a legal genius.” One of the state's most successful trial attorneys said he was “highly intelligent” and “completely fair.”

Here's a little background. Judge Clemon was born and reared in Fairfield, Alabama. He was taught in high school by state school board member Ethel Hall. In college at Miles, he was at the heart of the civil rights movement. He didn't always, though, exercise the most mature judgment. When asked by his fellow

classmates to present a petition to Bull Connor calling for an end to segregation, he accepted. The reception he received from the Bull helped him mature. Connor ordered him to leave town, and as Judge Clemon describes it, somewhat concerned about “imminent harm,” he did just that.

Following Columbia Law School in New York, he came home more determined than ever to oppose discrimination. As a lawyer, he devoted his attention primarily to successful fights against segregation in schools and against employment discrimination, most notably at U.S. Steel. In 1974, he and (now retired) Circuit Judge Richmond Pearson became the first two blacks elected to the state senate since Reconstruction. Then, when Judge Clemon was only 37 years of age, President Carter, with a little nudge from



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Sen. Howell Heflin, named him Alabama's first black federal judge.

During his tenure on the bench, he's presided over untold numbers of high-profile and low-profile cases, treating all of them with the same degree of care and skill. He's received every kind and degree of notoriety and about every honor a judge can receive, including several recognitions of his exceptional legal scholarship. He has served as an adjunct professor of constitutional law at Birmingham-Southern College and has received an honorary doctorate for his contributions to that college and to his profession. He has spoken and written widely on legal and historic issues and has contributed significantly to many civic and community organizations. And, he is unquestionably as devoted a husband and father as anyone you know. In 1999, Judge Clemon became the chief judge of the Northern District.

What a difference 25 years make.

And what a difference a few months make. Just after Judge Clemon took his seat in Birmingham, Judge Myron Thompson became the first black federal judge in Alabama's Middle District. Judge Thompson was a Tuskegee kid. He grew up there, and then went to college and law school at Yale. He was accepted to Harvard, but says he wanted to go to a good school. Or, maybe, he wanted to be school mates with Bill and Hillary, or Dubya or the "I'm (not) Reporting for Duty" man.

After finishing law school in 1972, Judge Thompson became the first African-American assistant attorney general in the history of Alabama. That's right. Jackie Robinson played baseball in Brooklyn two and a half decades before Alabama had even one black assistant AG. **Bill Baxley** was our Branch Rickey.

What a difference 25 years make.

When someone finally showed the courage to bring an African-American to the Middle District bench, Judge Thompson became the guy. Not the first

guy. The first choice was Fred Gray, but after confirmation became problematical, and Mr. Gray withdrew, Sen. Heflin and the President turned to the 33-year-old Myron Thompson, then practicing in Dothan.³ That's right, 33, but already incredibly well respected and liked—both by folks who had practiced with and against him.⁴

And, his service on the bench has honored us all. He has handled many big cases, including, for example, the long-running mental health case, the State Department of Transportation employment case, a prison case involving a hitching post, another involving Julia Tutwiler Prison, and, of course, the Ten Commandments case. In each of these cases, he has ruled dispassionately, courageously and almost always correctly. And, Judge Thompson has remained steadfast and undaunted in his commitment to the Rule of Law despite outrageous personal attacks and threats of physical harm fomented (inadvertently, I'm sure) by you-know-who and his henchmen.

Although big cases have made Judge Thompson famous around the country, it's the way he handles his job in ordinary cases that lawyers most appreciate. Like with Judge Clemon, no matter who you are, if you're wrong, he'll find you wrong. If you're right, though, no matter how loathsome you might otherwise be, he'll find you're right.

Perhaps the best thing about Judge Thompson is his demeanor and judicial temperament. He is unfailingly polite to everyone, and generally doesn't interfere in jury trials. I like that about him. He lets you earn your defeats—all by yourself. Like Judge Clemon does now, Judge Thompson served as chief judge of his district for several years. Also like Judge Clemon, he is a wonderful husband and father.

What a difference 25 years make.

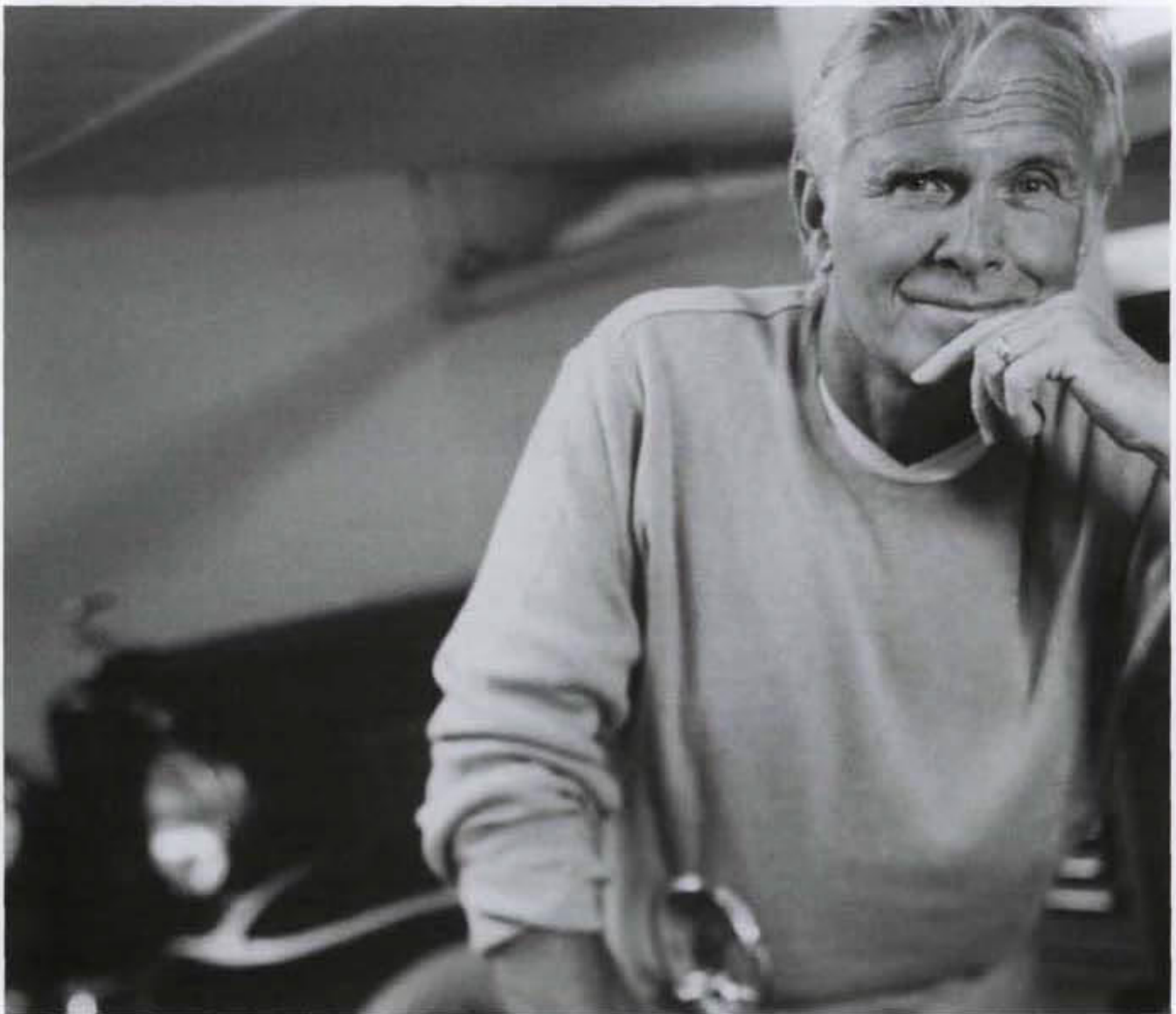
These two men—Judge Clemon and Judge Thompson—were appointed 25 years ago to serve as federal judges for as long as they chose to serve. For 25 years,

they have set two inspiring examples of what a judge should be, no matter his or her race: smart, engaged, firm but open-minded. From the earliest years of their lives, they helped pave the way for black men and women to achieve the pinnacles of success dreamed about by Rosa Parks and Dr. Martin Luther King, Jr. For 25 years, both on the bench and off, they have continued to blaze that path. But for 25 years, not one other black man or woman has been appointed to the federal bench; not one black man or woman has been given the opportunity to fill the void that will be left when these two men leave the bench.

What kind of difference, then, has 25 years really made? ■

Endnotes

1. John Caddell, president of the Alabama State Bar in 1951-52, is 95 years old and is still actively and effectively practicing law.
2. Thanks to **U.S. District Court Judge Harold Albritton** and the Albritton family, Justice Thomas spoke recently at the University of Alabama School of Law.
3. For the few of you who don't know, Fred Gray, who represented both Rosa Parks and Martin Luther King, Jr., has been a pioneering civil rights lawyer and was one of the first two African-Americans elected to the Alabama House of Representatives since Reconstruction. After withdrawing his name from consideration for a federal judgeship over 25 years ago, he has gone on to become our bar's first black president and to earn boatloads of money as an exceptional trial lawyer. His talents as a trial lawyer led to his induction into the American College of Trial Lawyers. He's also received every honor available to a lawyer, including the American Bar Association's prestigious *Spirit of Excellence Award*, recognizing his contributions to the legal profession, and the *Thurgood Marshall Award*, recognizing his contributions to civil rights. Today, Fred continues to practice law and to be a highly sought-after speaker around the country.
4. Judge Thompson's appointment followed closely after the 1979 elevation to the former **Fifth Circuit of District Judge Frank M. Johnson, Jr.**, one of the great judges in the history of our country. Judge Thompson, however, did not replace Judge Johnson. That honor fell to **Judge Truman Hobbs, Sr.**, one of the best human beings on this (or any other) planet. Judge Thompson was appointed very shortly after Judge Hobbs, and they remain close friends. Judge Hobbs was a speaker at Judge Thompson's 25th anniversary celebration.



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By Keith B. Norman

Fewer Lawyers Serving in Our State Legislature

The final regular session of the 2002-2006 legislative quadrennium begins January 10. The conclusion of this year's regular session, assuming there are no special sessions, will make way for a newly-elected house and senate when the legislature convenes for the first time in 2007. Re-elected incumbents will join those legislators who have been elected for the first time. If the results of the past 30 years are any indication, however, few lawyers will be included among the ranks of our state legislature for the new legislative term.

For the past three decades, the number of lawyers serving in the legislature has declined dramatically. In 1973, there were 20 lawyers serving in the senate, or 57 percent.¹ In the house, there were 33 lawyers serving, or 31 percent. By the start of the new quadrennium in 1982, the percentage of lawyers serving in the senate was 49 percent and 12 percent in the house. The percentages continued to drop in the '90s. When the legislature convened in 1994, the percentage of lawyers in the senate and house was 37 percent and nine percent, respectively.

When the senate convenes January 10, 11 lawyers, or 31 percent, will be counted among its ranks. The lawyers who will be serving are Roger Bedford, Russellville; Bradley Byrne, Fairhope; Curt Lee, Jasper; Pat Lindsey, Butler; Ted Little, Auburn; Zeb Little, Cullman; Wendell Mitchell, Luverne; Myron Penn, Union Springs; Phil Poole, Moundville; Hank Sanders, Selma; and Rodger Smitherman, Birmingham. The state house will convene with nine, or eight percent, of their total being lawyers.

They are Greg Albritton, Excel; Marcel Black, Tuscumbia; Paul DeMarco, Homewood; Ken Guin, Carbon Hill; Jeff McLaughlin, Guntersville; Yusuf Salaam, Selma; John Robinson, Scottsboro; and Cam Ward, Alabaster.

Despite their low numbers, the lawyers who are members of the legislature are active in committee leadership and chair important committees in each chamber. In the house², Marcel Black chairs the Judiciary Committee and Ken Guin chairs the Rules Committee. In the senate³, the following lawyers chair committees: Roger Bedford, Finance and Taxation-General Fund; Pat Lindsey, Economic Expansion and Trade; Zeb Little, Agriculture, Conservation and Forestry; Wendell Mitchell, Constitution, Campaign Finance, Ethics and Elections; Myron Penn, Tourism and Marketing; Phil Poole, Government Affairs; Hank Sanders, Finance and Taxation-Education; and Rodger Smitherman, Judiciary.

I am sure that there are those who, in derision, will say that fewer lawyers serving in the legislature is a good thing. Yet, of all professionals, lawyers are possibly the best equipped for service in the legislature. For example, a lawyer's specialized legal training provides him or her with a foundation of legal concepts that enhances their discernment for analyzing and drafting legislation. Moreover, lawyers are usually skilled negotiators and the art of negotiation and compromise is crucial to the legislative process.

What can explain the precipitous decline of lawyers in the Alabama legislature? I think the overriding factor is one of

"time." Beginning in 1975, annual sessions replaced biennial sessions. This change has probably had the most significant impact on the decline of lawyers seeking legislative office. Instead of 60 session days⁴ during a four-year term of office, annual sessions increased the total to 120 session days. This essentially doubled the time lawyer legislators had to be out of the office.

About the same time the Alabama legislature changed to annual sessions, many lawyers were moving from fee schedules to hourly billing. This switch was prompted by the United States Supreme Court decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) which ended the practice of fee schedules set by bar associations. With the demise of fee schedules, the notion of a "billable hour" made legislative service less appealing.

I am not optimistic that we will ever again see the percentage of Alabama lawyers approach the levels of the early 1970s. There is, however, a recent sign of encouragement. Last spring, Paul DeMarco was chosen in a special election to fill a vacancy in House District 46. Paul made the run-off against a candidate who, years before, served in the legislature representing District 46. He had to battle a candidate who was not only a former legislator, but a candidate who chose to campaign negatively on the fact that Paul is a lawyer. Paul won convincingly.

As Paul's election proves, lawyers can be elected to the legislature despite efforts to negatively portray them. It is hoped that Paul's example and that of lawyers who are now serving will encourage more lawyers to pursue this avenue of public service.

Education Debt for July Bar Examinees

Approximately 52 percent of those taking the July 2005 bar exam had education debt. The average amount owed for each with debt was \$70,310. ■

Endnotes

1. The Alabama senate has 35 elected members and the house has 105.
2. The house has 16 standing committees.
3. The senate has 21 standing committees.
4. Session days do not include travel as well as committee meeting days. During a typical legislative week, a legislator from outside Montgomery might arrive on Monday afternoon to attend legislative sessions generally held on Tuesdays and Thursdays, attend committee hearings on Wednesday and then return home Thursday night.

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Judicial Award of Merit

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, 2006. Nominations should be prepared and mailed to:

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

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

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

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

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 2006 to assume the presidency of the bar in July 2007. Any candidate must be a member in good standing on March 1, 2006. 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, 2006. 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 2006 *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 9, 2006).

Elected Commissioners

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

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1, 2006 and vacancies certified by the secretary no later than March 15, 2006.

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 28, 2006).

Ballots will be prepared and mailed to members between May 1 and May 15, 2006. Ballots must be voted and returned to the Alabama State Bar by 5 p.m. on the last Friday in May (May 26, 2006).

At-Large Commissioners

At-large bar commissioners will be elected for the following place numbers: 1st; 4th; and 7th.

United States District Court, Northern District of Alabama, Birmingham

VACANCY ANNOUNCEMENT

Position Title: Clerk of Court

Salary Range: \$134,867-\$146,800 (JSP 17)

Application Closing Date: March 31, 2006

NATURE OF THE POSITION

The Clerk of Court is appointed by the judges of the Court. This is a high-level management position that functions under the direction of the chief judge of the United States District Court. The Clerk of Court is responsible for managing the administrative activities of the Clerk's office and overseeing the performance of the statutory duties of the office. Included among the responsibilities are policy implementation and monitoring, long-range planning, budgeting, financial management, automation, human resource management, property procurement and management, and public relations.

QUALIFICATIONS

A minimum of ten years of progressively responsible administrative experience in public service or business which provides a thorough understanding of organizational, procedural and human aspects in managing an organization. At least three of the ten years' experience must have been in a position of substantial

management responsibility. Applicants also must have an understanding of automated systems, have administrative abilities and possess strong leadership and interpersonal skills.

EDUCATIONAL SUBSTITUTIONS

A bachelor's degree from an accredited college or university may be substituted for three years of general experience. Completion of a two-year master's degree program (60 semester hours or 90 quarter hours) in an accredited university (or completion of a Juris Doctor Degree) may be substituted for two years of general experience.

INFORMATION FOR APPLICANTS

The United States District Court is part of the judicial branch of the United States Government. Court employees are not included in the Government's civil service classification. They are, however, entitled to similar benefits as other federal employees, including paid vacation, sick leave, choice of health benefit plans and participating in the Federal Employees' Retirement System. This position is subject to mandatory electronic fund transfer participation for payment of net pay. The best qualified applicants will be invited for interviews. Applicants selected for interviews will be responsible for paying for expenses, including travel, associated with the interview. Relocation expenses are currently not available for the selected candidate. As a condition of employment, the selected candidate must successfully complete a ten-year background investigation and every five years thereafter will be subject to an updated investigation similar to the initial one.

APPLICATION PROCEDURE

Qualified persons are invited to submit a detailed resume including educational, work and salary history as well as a narrative statement, not to exceed two pages in length, addressing the applicant's ability to plan and implement the most effective use of resources, both human and financial: to achieve objectives; to interpret, understand and implement the policies of the Court; to interact with various types of people including superiors, peers, subordinates and the public; and the applicant's basic management philosophy. Letters of recommendation are desirable. All applications must be received by 5 p.m. on March 31, 2006.

Please submit application materials in an envelope marked confidential. No phone calls.

Clerk, U.S. District Court
1729 5th Avenue North
Birmingham, AL 35203
Attention: Personnel Specialist

The United States District Court is an Equal Opportunity Employer. ■

GENE ELBERT BELL

Gene Elbert Bell died March 19, 2004 in Birmingham.

After graduating from high school, Gene became employed in the Office of the Clerk of the United States District Court for the Northern District of Alabama. For a number of years, he also served as the courtroom clerk for the Honorable Seybourn H. Lynne.

Gene graduated from the University of Alabama at Birmingham and the Birmingham School of Law, both of which he attended during the evenings while working during the day for the U.S. District Court. For a number of years, while working during the day in the federal court system in Birmingham, he served as the judge in the Fairfield Recorder's Court.

Gene was a World War II veteran, having served in the 666th Field Artillery Battalion Battery C/3rd Army. He fought in the Battle of the Bulge.

After serving in the Army, Gene returned to the U.S. District Court where he served for 45 years and retired as Chief Deputy Clerk. He was always willing to provide young lawyers with assistance in their filings in the federal court. He had a wonderful sense of humor and was loved and respected by the lawyers in the Northern District of Alabama.

Gene was a member of Veterans Foreign War Post 3492 and was also a member of its honor guard. He was a charter member of the 87th Maneuver Area Command in Birmingham, and was active in the Boy Scouts of America, Troop 78 of Fairfield, the Fairfield United Methodist Church, its Men's Club, and the Civitan Club.

He is survived by his wife, Vera, his children and his grandchildren.

—Douglas Corretti, Birmingham

DAVID H. CULVER

David H. Culver, a member of the Huntsville-Madison County Bar Association, passed away on September 24, 2005 at the age of 82. Mr. Culver was born June 3, 1923.

He graduated from the University of Alabama, where he was a member of the Sigma Alpha Epsilon fraternity, with a Juris Doctor Degree. He practiced law in Huntsville for over 50 years, serving as the first deputy circuit solicitor of Madison County and as president of the Huntsville-Madison County Bar Association.

Mr. Culver served as a captain in the U.S. Air Force, was a B-29 pilot in World War II, a Military Army Transport Service pilot and airplane commander in the

Korean Conflict, and was awarded the Distinguished Flying Cross, the Korean Service Medal and the U.N. Service Medal.

He served as president of the ACME Club, president and lieutenant governor of Kiwanis Northern District of Alabama and a member of the vestry and junior warden of The Church of the Nativity, Episcopal.

Mr. Culver leaves behind his wife, Sally Ann Culver, and three daughters, Sally Culver Jones, Florence Culver Tyson and Leila Culver Hergert, and eight grandchildren.

—Huntsville-Madison County
Bar Association

H. TUCKER COTTEN, III

H. Tucker Cotten, III, a member of the Montgomery County Bar Association, died October 11, 2005 at the age of 63.

He received his bachelor's degree from the University of West Florida in 1968 and his law degree from Cumberland School of Law in 1972. That same year, Tucker was admitted to the Alabama State Bar and The Florida Bar.

In 1976, after working in Florida for several years, Tucker began his long career with the U.S. Veterans' Administration, working as a consultant to the Board of Veterans' Appeals in Washington, D.C.

The following year brought him to Montgomery, where he served the Veterans' Administration for the next 18 years, first as chief of the guardianship section, and later as district counsel and general attorney for the Administration.

After his retirement in 1995, he worked in a mentoring program with kindergarten pupils at Bear Elementary School in Montgomery, where he took particular delight in helping students to learn phonics and how to read.

Tucker is survived by his wife, Katherine K. Cotton, and his mother, Marion B.



Cotten. He also leaves behind his two daughters, Kelley Elizabeth Cotten, a student at Samford University in Birmingham, and

Katherine Marion Cotten, a senior in the Loveless Academic Magnet Program High School in Montgomery. Two sisters, Martha McCain and Kathryn Bryant, survive him as well.

—Montgomery County Bar Association

HUGH DOUGLAS FARRIS

On June 13, 2005, Hugh Douglas Farris, a longtime member of the Walker County Bar Association and the Alabama State Bar, passed away. He left behind his legacy in Jasper, where he practiced for over 50 years and was a partner with his son, Hugh Douglas Farris, Jr., for more than seven years.

On January 26, 1926, Hugh was born to Andrew Frank and Mae Harrison Farris in the small, rural town northeast of Jasper called Townley. He was the younger of two children.

Hugh graduated from Walker County High School in 1943 and attended

Marion Military Institute and the U.S. Naval Academy. He served in the U.S. Army with the Occupation Forces Japan from 1945 to 1947. Hugh continued his education at the University of Alabama where he received his undergraduate degree in 1950 and then attended the University of Alabama School of Law, where he graduated in the class of 1954.

Hugh was a member of Trinity Fellowship Church in Jasper and was also an organ donor.

Hugh Farris, our friend, colleague and, yes, sometimes our strong adversary in court, brought with him the spirit of

story-telling, humor, exceptional trial skills and respect to the courtroom. Those colleagues fortunate enough to have worked with Hugh only sing high praises for his dedication and perseverance to the avid defense he always showed to his clients.

He was preceded in death by his son, Van O'Rear Farris; his parents; and his brother, Guy Frank Farris. He is survived by his wife of 54 years, Mary Joy O'Rear Farris; two daughters, Melissa Brisendine (Dwight); Kathy Derzis (Pete); two sons, Doug Farris (Jane) and Joe Farris; and seven grandchildren.

—Walker County Bar Association

WILLIAM B. MOORE, JR.

Bill Moore, truly a man for all seasons and a great trial lawyer, passed away September 6, 2005 at the age of 85. He is survived by his beloved wife, Mary Frances; his children, Suzanne Selby, Molly Shafferman, Lee Cleveland and Michael J. Moore, their spouses and five grandchildren.

Bill was a product of the "Greatest Generation" as Tom Brokaw so accurately and poignantly described. He graduated from Auburn University in 1942 where he was president of the Student Government Association. He served as an officer in the Army Air Corps during World War II and then returned to the University of Alabama to obtain his law degree in 1948. His contemporaries in law school included Senator Howell Heflin and numerous

other judges and notable attorneys who have cast large footprints upon our state.

In January 1949, Bill began work with the Montgomery firm of Rushton, Stakely, Johnston & Garrett where he practiced until his retirement several decades ago. Bill was a superb trial lawyer receiving numerous accolades including selection as a member of the American College of Trial Lawyers. He was a past president of the Montgomery County Bar Association.

His legal accomplishments were legion but it was his service to the community, his family and friends which will mark his legacy. Bill would be embarrassed to be called a "philanthropist" but there are untold charities, public institutions and individual citizens who benefited from his willingness to provide financial sup-

port for those in need. Most of Bill's financial aid was given anonymously and without any expectation of accolades. He took particular interest in helping children with learning disabilities, as evidenced by his enthusiastic support of the Fast ForWord Program at AUM.

Bill's outside interests focused upon his family. He was never a spectator but always a participant. How else can you explain a man in his 70s fox hunting on horseback, river rafting or scaling mountain peaks?

Bill loved his family, his friends and his community. Equally important, he loved life and enjoyed it to the hilt. Those of us who practiced with Bill for many years and who witnessed his extraordinary generosity will miss him.

—Robert A. Huffaker, Montgomery

Baldone, James Charles
Birmingham
Admitted: 1940
Died: July 22, 2005

Burns, Charles Robert Douglas, Jr.
Gadsden
Admitted: 1970
Died: June 14, 2005

Cotten, Harvey Tucker, III
Montgomery
Admitted: 1972
Died: October 11, 2005

Ennis, John Thomas, Sr.
Birmingham
Admitted: 1976
Died: February 21, 2005

Farrington, Fletcher Napoleon, Jr.
Dadeville
Admitted: 1967
Died: August 26, 2005

Fleming, Dixon
Mount Pleasant, SC
Admitted: 1989
Died: October 18, 2005

Kendall, Robert Gordon, III
Mobile
Admitted: 1963
Died: October 20, 2005

McGowen, William Henry, Jr.
Birmingham
Admitted: 1941
Died: June 25, 2005

Mitch, William Evans
Birmingham
Admitted: 1941
Died: March 5, 2005

Moore, William Benjamin, Jr.
Montgomery
Admitted: 1948
Died: September 6, 2005

Musick, Quinton Edgar
Sheffield
Admitted: 1949
Died: September 17, 2005

Nesbit, Phyllis S.
Fairhope
Admitted: 1958
Died: October 3, 2005

Norman, Robert Daniel
Birmingham
Admitted: 1950
Died: August 9, 2005

Owens, James Bentley, Jr.
Birmingham
Admitted: 1952
Died: February 12, 2005

Rabren, Wilton W.
Columbiana
Admitted: 1954
Died: April 23, 2005

Robinson, Carl Ray
Bessemer
Admitted: 1965
Died: May 26, 2005

Schoel, Jerry Wayne
Birmingham
Admitted: 1968
Died: February 24, 2005

Shotts, Jesse Woodrow
Birmingham
Admitted: 1968
Died: April 23, 2005

Thompson, James Edmund
Cullman
Admitted: 1953
Died: January 21, 2005

Whitaker, Meade
Washington, DC
Admitted: 1948
Died: October 5, 2005

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- **Chilton County District/Juvenile Court Judge Rhonda Hardesty** received the 2005 Howell Heflin Award in October. The award is presented annually to an individual who significantly contributes to the Court Referral Officers' Program, even though they are not directly involved or compensated for it.

Judge Hardesty has been on the bench since 1998. She serves as special circuit and district judge in Elmore and Autauga counties. Prior to being elected district judge, she served as president of the Chilton County Bar Association. She is a member of the Chilton County Chamber of Commerce, the Alabama State Bar, the American Bar Association and the District Judges' Association. In 2003, she was named Chilton County Citizen of the Year for her work with the youth in her county.

The Howell Heflin Award is designed to highlight individual contributions to the Court Referral Programs Network.

- The Montgomery firm of **Rushton, Stakely, Johnston & Garrett** donated \$10,000 to the American Red Cross of Central Alabama to help with recent disaster-relief efforts.
- The American College of Trial Lawyers recently inducted 98 new Fellows, including Alabama attorneys **Allan R. Chason** of Bay Minette and **Ralph D. Cook** of Birmingham.
- **Sirote & Permutt PC** recently received the 2005 USFN Diamond Award of Excellence and **Jerry E. Held**, managing partner of the firm, was elected to the USFN Board of Directors. The USFN is the largest not-for-profit association of law firms in the U.S. in the mortgage banking business. All attorneys in the USFN represent national

mortgage lenders and servicers, as well as government agencies, within the home state of the attorney firm, providing all creditor-related legal services to their clients on a statewide basis.

- Governor Bob Riley appointed Mobile attorney and **Troy University** alumnus **Forrest S. Latta** to the university's board of trustees. Latta is a member of Bowron, Latta & Wasden PC. He graduated from Samford University's Cumberland School of Law in 1983. The broadcast journalist and Associated Press award winner is also a member of the Alabama Supreme Court Standing Committee on Rules of Appellate Procedure. He was a member of the Alabama Defense Lawyers Association board of directors from 1996 to 1998.
- The **Cabaniss, Johnston Scholarship** is usually awarded to one student. However, this year, two students were equally qualified so the Alabama Law Foundation awarded \$4,500 each to **Brandon Robinson** from Huntsville and **Natalie Waites** from Homewood. The scholarship's aim is to recognize and assist academically outstanding second-year law students who are also Alabama residents, and, further, to help promising law students become lawyers who will make a positive impact on society. Now in its 18th year, the scholarship fund is endowed by the firm of **Cabaniss, Johnston, Gardner, Dumas & O'Neal** of Birmingham and



Robinson



Waites

Mobile and is administered by the Alabama Law Foundation, the charitable arm of the Alabama State Bar. Natalie attends Harvard Law School, and Brandon attends Duke University Law School.

Although still attending Harvard Law School, Natalie has already gained work experience on international human rights issues. She graduated from the University of North Carolina at Chapel Hill, where she was awarded highest honors for her senior thesis. As a result of her academic performance and interest in human rights, Natalie was chosen as a Rotary International Ambassadorial Scholar. Through this program, she spent a summer in England at the University of Reading studying international law and politics. Specifically, she worked on cases dealing with prison legal systems, refugee issues and asylum applications.

Brandon is also interested in international human rights. While he continues his studies at Duke Law School, he also continues his work as director of the Refugee Asylum Support Project (RASP). Brandon received a Bachelor's of Arts Degree from Duke University and was honored by designation on the National Dean's List. As director of RASP, Brandon oversees student research that supports asylum applications to the United States from people who are fleeing torture and imprisonment from countries controlled by tyrannical political systems. Brandon is an advocate of pro bono work and after graduation wants to incorporate time for pro bono cases.

- The Alabama Law Foundation announces that John Owens is the new president for 2005-2006.

The Foundation recently helped Katrina victims by raising over



Left to right are Dot Owens, Tracy Daniel and John Owens

\$130,000, which was presented to the Red Cross and the Salvation Army during an ASB Commissioners' meeting.

Owens is the founder of Owens & Millsaps in Tuscaloosa.

- Bradley Arant Rose & White LLP announces that Meade Whitaker, Jr. is serving as the chairman of the board of trustees of the Alabama Real Estate and Research and Education Center, housed in the Culverhouse College of Commerce and Business Administration at the University of Alabama. Established in 1996, the Center is a state-of-the-art comprehensive research and education facility designed to support Alabama's professional real estate community and the state's overall economic development efforts.



Whitaker

- The American Association of Petroleum Geologists has appointed Bennett L. Bearden vice-chairman of its Public Outreach Committee. He will serve a three-year term through 2008. The AAPG Public Outreach Committee leads the Association's science-based



Bearden

efforts to educate the public and advise government affairs officials about oil and gas exploration and production, including the need to sustain a reliable energy supply, reduce environmental impacts, and encourage conservation. AAPG, an international geological organization, is the world's largest professional geological society. Bearden is director of the Petroleum Technology Transfer Council Eastern Gulf Region office in Tuscaloosa and an adjunct professor at Birmingham School of Law.

- Hand Arendall LLC announces Jack Edwards was inducted into the University of Alabama Communication Hall of Fame. He



Edwards

was honored along with five other inductees at a ceremony in October. The Communication Hall of Fame was created to honor, preserve and perpetuate the names and accomplishments of distinguished individuals who have brought lasting fame to the state of Alabama through one of the disciplines of communication.

Edwards was a member of the U.S. House of Representatives for 20 years. He served under five presidents, from Lyndon Johnson through Ronald Reagan's first term. After voluntarily retiring from the U.S. House of Representatives in 1985, he joined Hand Arendall. Since returning to Mobile, Edwards has served as chairman of the board of the Mobile Area Chamber of Commerce, and on the boards of the Mobile Opera, Mobile Economic Development Council and many other civic boards and committees. He has served on the Mayor's Waterfront

Advisory Committee and was named Alabama's Volunteer Industrial Developer of the Year in 1987. In 1985, he was inducted into the Alabama Academy of Honor and was honored as Mobilian of the Year for 1987.

- The Unified Judicial System and the Alabama State Bar co-hosted the ceremony honoring the late Senator Howell Thomas Heflin and Chief Justice C. C. Torbert, Jr. upon naming the Alabama Judicial Building "The Heflin-Torbert Judicial Building."

The newly named Heflin-Torbert Judicial Building will house bronze busts of both men, which were sculpted



Heflin



Torbert

by former Alabama State Bar President Warren B. Lightfoot, a Birmingham attorney. Although the building was technically named in March 2004 when the legislature passed a resolution, the ceremony took place in October in the rotunda in the Judicial Building in Montgomery. That date coincided with the opening of the new judicial year.

- Four new members were inducted into the Alabama Academy of Honor in August. "Membership in the Academy of Honor is limited by law to 100 living Alabamians whose accomplishments and service have greatly benefited the state," said Thomas N. Carruthers, Birmingham attorney and the Academy's chairman.

The induction ceremony was held in the old House Chambers at the State Capitol. Slated to address this year's assembly were Academy member John Caddell, Governor Bob Riley and Senator Richard Shelby.

The members of the Academy's Class of 2005 were Fred David Gray, Ted C. Kennedy, Richard C. Shelby and Gail Andrews Trechsel.



Gray

ASB member Fred Gray is a nationally recognized civil rights attorney, celebrated lecturer and successful author. With a legal career that has spanned more than half a century, Gray's landmark civil rights cases are now found in constitutional law textbooks. Elected to the Alabama House of Representatives in 1970, he was one of the first African-Americans to serve in the Alabama legislature since Reconstruction. He was also the first person of color to be elected president of the Alabama State Bar, serving as its 126th president in 2002-03. Gray, a Tuskegee resident, is the senior partner in Gray, Langford, Sapp, McGowan, Gray & Nathanson. ■

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- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
- Custody Affidavit
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- Arraignment Report

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- CS-41 - Child Support Obligations
- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
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Reinstatement

The Supreme Court of Alabama entered an order, based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar, reinstating former Baldwin County attorney **Claude Bennett McRae, Jr.** to the practice of law in the State of Alabama, effective August 24, 2005. [Pet. No. 05-03]

Suspensions

- Russellville attorney **Benjamin Horace Richey** was interimsly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective October 7, 2005. The order of the Disciplinary Commission was based on a consent to interim suspension filed by Richey on October 6, 2005. Richey consented to interim suspension pending appeal of his conviction in the United States District Court for the Northern District of Alabama for making false statements to the FBI in violation of 18 U.S.C. §1001(a)(2). [Rule 20 (a); Pet. No. 05-11]
- Huntsville attorney **Reid George Webster** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective September 19, 2005. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Webster had failed to respond to requests for information from a disciplinary authority during the

course of a disciplinary investigation. [Rule 20 (a); Pet. No. 05-10]

Public Reprimands

- Bay Minette attorney **Frank Wilson Myers, Sr.** received a public reprimand without general publication on October 21, 2005 for violating rules 3.2, 8.2(a) and 8.4(a), (c), (d) and (g), *Alabama Rules of Disciplinary Procedure*. Myers was appointed co-counsel in a capital murder trial along with another attorney who had less than five years' experience as required by statute. Two weeks prior to the trial, Myers advised the judge that he had a federal case set before Judge Smith and might not be available for trial. With Myers' permission, Judge Bahakel contacted Judge Smith who agreed to continue the federal case. On the morning of the fourth day of trial, Myers left the courtroom without Judge Bahakel's permission and went to federal court to attend a hearing before Judge Propst. Based upon co-counsel's representation that he had five years' experience, Judge Bahakel allowed the trial to proceed in Myers' absence. Co-counsel did not have five years' experience. When Myers returned to the courtroom, he explained that he had filed a motion to continue the federal matter two days before the hearing and understood that it had been continued until he was ordered to appear in court that morning. However, Myers had only filed his motion the day before. Judge Propst had not seen the motion until the morning of the hearing and the federal hearing could have been rescheduled. Because of Myers' unexcused absence and co-counsel's lack of experience, Judge Bahakel declared a mistrial

and ordered Myers not to submit an attorney fee voucher. Myers submitted one anyway. Upon conviction in a subsequent trial, Myers appeared as "retained" counsel on appeal on behalf of the defendant. Myers argued that the trial court abused its discretion and skewed facts to create a manifest necessity where one did not exist and made representations to the appellate court that were misleading. Myers made a false statement of material fact or law to a tribunal and made a statement that he knew to be false or with reckless disregard to its truth or falsity regarding the qualifications or integrity of a judge and engaged in misconduct that involved dishonesty, fraud, deceit or misrepresentation that is prejudicial to the administration of justice and adversely reflects on his fitness to practice law. [ASB No. 01-217(B)]

- On September 16, 2005, Talladega attorney Mark Smith Nelson received a public reprimand without general publication for violations of rules 1.3, 1.4(b) and 8.1(b), *Alabama Rules of Professional Conduct*. On April 15, 2005, the Disciplinary Commission of the Alabama State Bar accepted Nelson's conditional guilty plea. In January 2004, Amanda L. Rooks retained Nelson to proceed with a divorce action and paid a fee of \$750. Nelson filed the divorce and subsequently did little or no work on the matter. Rooks attempted to contact Nelson for two months without a response. Nelson did not return Rooks' phone calls until August 2004, at which time Rooks asked Nelson to proceed with the uncontested divorce as soon as

possible. Over the next several months, Nelson did little or no work on the matter and Rooks again left him numerous messages. When Nelson finally made contact with Rooks, he was asked to refund his fee so she could seek other counsel. Nelson advised her that he would take care of the divorce the next day, and once again, Rooks agreed. After several weeks, Rooks called Nelson and, once again, he failed or refused to return her calls. Nelson's inaction with respect to this matter caused Rooks severe financial distress due to the fact that child support was not established. Furthermore, when Nelson was contacted by the Alabama State Bar Disciplinary Commission on January 6, 2005, he refused to respond to multiple requests for information related to this matter. [ASB No. 05-57]

- Evergreen attorney Sara Oswald Stoddard received a public reprimand with general publication on September 16, 2005 for violations of rules 1.15(a), 1.15(b) and 1.16(d), *Alabama Rules of Professional Conduct*. Stoddard was retained to represent a client in a criminal matter and paid a \$2,500 retainer. About a week later, Stoddard was temporarily suspended from the practice of law in the State of Alabama. Upon receiving notice that Stoddard had been suspended, the client asked for a refund of the unearned portion of the fee. Stoddard told him that she did not have the money to reimburse him. Stoddard did not deposit and hold the unearned retainer in trust, nor did she promptly render a full accounting and refund the money upon request. Stoddard subsequently made restitution. [ASB No. 04-22]

ALABAMA LAWYER Assistance Program

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

*Are they telling you they
have it under control?*

They don't.

*Are they telling you
they can handle it?*

They can't.

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

It is.

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

You can.

**Don't be part of their
delusion.**

**BE PART OF
THE SOLUTION.**

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



By Christy Crow
Jinks, Daniel & Crow PC
Union Springs

For All This and More, Check Out www.alabamayls.org

Wow! We had almost 400 new admittees to the bar this fall. Welcome to all of you and good luck as you start your new careers. We're glad to have you in the Young Lawyers' Section of the Alabama State Bar.

As many of you know, the YLS is in charge of the admission ceremony. Because of the large number of new admittees each fall, the fall ceremony has been plagued with problems over the last few years. Processing that many new admittees in one morning is an arduous task, to say the least, and the Admissions Committee has been trying to solve a number of problems experienced in past admission ceremonies.

Under the leadership of George Parker, and with the help of Valerie Russell, Leslie Ellis, Chris Waller and Roman Shaul, the fall ceremony went off much more smoothly. The ceremony started on time and all of the guests had a seat. While this doesn't sound like a major accomplishment, it is an improvement over some of the past ceremonies. The admission ceremony is an important part of any new admittee's life and a lot of hard work and effort are put into the ceremony every year so if you get an opportunity to thank these volunteers, please do.

One thing new admittees need to remember is that there is a **package of information** waiting for you at the state bar but *you have to request it to receive it*. You should have been provided a form to request the package and on which you can give updated directory information to the ASB, but if you've lost the form, e-mail ms@alabar.org to request the package. Please include your updated directory information (name, firm name, address, phone number, e-mail address, etc.).

Our Iron Bowl CLE was also a great success. Many thanks to Jimbo Terrell and

Michael Clemmer for organizing this event. It was a great way to kick off the Iron Bowl weekend. We also thank our speakers Alabama Supreme Court Associate Justice Thomas A. Woodall, Jefferson County Circuit Judge Joseph L. Boohaker and Birmingham attorney Wilson E. Green. The YLS also extends its appreciation to the firm of Bradley Arant Rose & White LLP, who allowed us to use their conference room to host the CLE, and to the firm of McCallum, Methvin & Terrell PC for providing the refreshments.

On another note, we have received such a great response to our **committee mail-out**. Thank you to everyone who has responded. We are processing the responses and should be in contact with everyone in the near future. If you have not responded to the mail-out but want to be involved, e-mail me and let me know what committees you are interested in, and I will forward your information to the appropriate chair.

Finally, we are in the process of getting our **Web site** back up and running. It is hoped that by the time this is published, you'll be able to find out what your YLS is doing by visiting www.alabamayls.org. There will be information about the various subcommittees, as well as upcoming CLE information. The site is being built so if you have suggestions, let me know or contact Matt Stephens or Page Banks with your ideas. We want this site to be useful to all young lawyers and law students.

Every lawyer who is under age 36 or has been practicing for five years or less is automatically a **member of the YLS**. More importantly, membership in this section is **free**. If you haven't already done so, sign up for the opportunity to be on one of the committees so you can help make a difference in your community and in your profession. Together, we are making the YLS a better section every day. ■



ALABAMA LAWYERS' HALL OF FAME

INTRODUCTION

The idea for an Alabama Lawyers' Hall of Fame in various forms had been explored for several years. In 2000, Terry Brown of Montgomery wrote Sam Rumore, then Alabama State Bar president, with a suggestion to convert the old supreme court building into a museum honoring the great lawyers of Alabama. Although the concept of a lawyers' hall of fame was studied, the next bar president, Fred Gray, appointed a task force to implement a hall of fame. The Alabama Lawyers' Hall of Fame is the culmination of that idea and many meetings.

Dean Albert John Farrah

Dean Albert John Farrah was a native of the state of Michigan. He was born in Michigan, attended the University of Michigan and graduated from the University of Michigan Law School. Prior to becoming a lawyer, Dean Farrah had been in education—a school superintendent. After practicing law for two years in Battle Creek, he was invited to return to his alma mater as a law professor. He taught there for three years. Farrah had found his true calling in the area of legal education.

Perhaps the bitter winters in the Midwest made the South look quite attractive to Farrah. He became dean of three southern schools—first Stetson, from 1900 to 1909; then Florida, from 1909 to 1912; and finally the University of Alabama, from 1912 until his death in 1944. He was the longest-serving dean in that school's history.

When Farrah came to Alabama, the law library had only a few hundred books. Classes were held in Morgan Hall, a general classroom building where it was always hot in the summer and cold in the winter. Dean Farrah got to work. The

library increased to over 20,000 volumes. The law school became accredited by the American Bar Association and the Association of American Law Schools. And, he oversaw the construction of a new law building, where two generations of lawyers attended law classes. It became known as Farrah Hall.

Dean Farrah raised the level of legal education in the state of Alabama. His belief was that Alabama's state law school should be a special place and that no son or daughter of Alabama should ever have to leave the state to obtain a great legal education. Succeeding generations of deans, professors, law students and alumni have built on Farrah's firm foundation that he established at the University of Alabama School of Law.

Frank M. Johnson, Jr.

Frank M. Johnson, Jr. was born and educated in Alabama and graduated from the University of Alabama School of Law. He served as a combat infantryman in World War II, was twice wounded and ended his military career as a legal officer in Germany.

He began his law practice in Jasper in 1946 and was named United States Attorney for the Northern District of

Alabama in 1953. In 1955, he was named U.S. District Court Judge for the Middle District of Alabama. At the time of his investiture, he was the youngest federal judge in the nation.

Judge Johnson had a very short period of "calm" before the "Civil Rights Storm" that came to Montgomery and the United States. In a 1980 television interview, Bill Moyers noted that "fate placed Frank M. Johnson, Jr. in the nerve center of confrontation and change." One of his earliest decisions declared that segregated public transportation—the bus system of Montgomery—was unconstitutional.

Other landmark cases and decisions came rapidly in his judicial career. He ordered that blacks be registered to vote. His opinion in *United States v. Alabama* (1961) created a standard that was written into the 1965 Voting Rights Act. He was the first judge to apply the one-man, one-vote principle to state legislative apportionment. He ordered the first comprehensive statewide school desegregation. He was the first judge to apply the equal protection clause of the Constitution to state laws discriminating against women. He established the precedent that people in mental institutions have a constitutional right to treatment. He ordered the end of the jungle-like conditions in Alabama prisons. And, he stated that the law was clear that citizens have the right to petition their government to address grievances and that those rights be exercised by marching along a public highway from Selma to Montgomery.

Judge Johnson was one of the most honored judges of the 20th Century. He received honorary doctorates from colleges all over the country, including Notre Dame, Princeton, St. Michael's College, the University of Alabama, Boston University, Yale, Tuskegee Institute, and Mercer. At least four biographies have been written about him.

Frank Johnson was a great lawyer and earned a national reputation as a great judge.

Annie Lola Price

Annie Lola Price was the first woman to serve on an appellate court in Alabama. Her years of service were 1951 to 1972. She served on the Alabama Court of Appeals and became its presiding judge. And when the Alabama Court of Criminal Appeals was established in 1969, she became its first residing judge.

Judge Price was born in Cullman and attended Athens College. She worked in a law office in Cullman as a secretary and after "reading the law," she passed the Alabama Bar Exam in 1928, becoming one of the state's first women lawyers.

Governor "Big Jim" Folsom appointed Annie Lola Price to serve as his legal advisor in 1950. She was the first female legal advisor to serve a governor in Alabama. In 1951, Governor Folsom appointed his legal advisor to the court of appeals. The appointment was controversial at the time, and she declined to have a public investiture ceremony. Instead, she had a private ceremony where she was sworn in by her friend, Secretary of State Mable Amos, in her office. However, the voters of Alabama recognized the ability of Annie Lola Price and elected her to judicial office in 1952, 1958, 1964 and 1970.

The interesting anomaly about Judge Price was that at one time she was the highest ranking female appellate court judge—a presiding appellate court judge—in this country. However, her service predated the period of time when women were allowed to sit on juries in Alabama. For the first 15 years of her service, she reviewed lower court decisions but was not eligible to serve on the juries making those decisions.

Annie Lola Price served with great distinction as an appellate judge for 21 years until her death in 1972. At her memorial service, Nina Miglionico stated, "Women will remember most her quietness, her dignity; I never once heard her say an unkind thing." Judge Price was a pioneer and a role model for women lawyers in Alabama and she expanded options for women in the

legal profession. She has also been inducted into the Alabama Women's Hall of Fame.

Arthur Shores

Arthur Shores can be described in many ways. He was a courageous battler for civil rights. He was considered Alabama's "drum major for justice." However, the most affectionate title which I heard referring to him was "Daddy Shores." This title was not limited to his own children—Helen and Barbara—but to generations of young lawyers who sought his advice and received his mentorship.

Arthur was initially an educator serving as a teacher and high school principal. He had graduated from Talledega College but only completed one year of law school at the University of Kansas. He continued his legal studies through correspondence courses and then sat for and passed the Alabama Bar Exam in 1937. He was one of only a handful of black attorneys in the state, but his impact began immediately.

In 1938, he successfully sued the Alabama Board of Registrars for its refusal to register to vote seven black school teachers. In 1941, he argued all the way to the U.S. Supreme Court that a whites-only railroad union could not exclude blacks and then deny them better jobs because they were not union members. In 1942, he successfully represented a black principal to force the Jefferson County School Board to pay black teachers the same salaries as whites. In 1956, he represented Autherine Lucy in her effort to become the first black student at the University of Alabama. And, in 1963, he successfully argued to the Supreme Court that the arrests of peaceful demonstrators in Birmingham should be ruled unconstitutional.

In the late 1960s, Arthur Shores became the first black member of the Birmingham City Council. He is remembered as a strong advocate for his client and a gentleman in the law.

Arthur Shores was a strong and brave advocate, a gentleman at the law, but a lawyer who got results for his clients. ■

2006

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.)

NOMINATION

2006
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:



UNPACKING

Alabama's Plain-Meaning Rule of Statutory Construction

BY MARC JAMES AYERS

...the job as a judge is not to
“do justice” ...but to
“apply the law and hope
that justice is done.”

— Justice Oliver Wendell Holmes

In a now-famous law review article describing the canons of statutory interpretation, Professor Karl Llewellyn opined that “there are two opposing canons on almost every point...” Karl N. Llewellyn, “Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,” 3 *Vand. L. Rev.* 395, 401 (1950). His conclusion is somewhat unsettling, for it suggests that the science of statutory construction is an illusion—a mere game involving competing but equally authoritative canons, by which any interpretation is justifiable. Such a scenario would be frustrating for practicing lawyers who must evaluate their cases and advise their clients. And it would invite endless manipulation on the part of the courts, which could always cite a certain canon to support a desired outcome, all the while proclaiming fidelity to “the canons.”

In Alabama, while all of the various canons are certainly recognized, one has achieved "primary" status: the Plain Meaning Rule. As shown below, the Plain Meaning Rule is anchored in Alabama's strong adherence to the doctrine of separation of powers. The Rule provides a framework from which statutory construction is to begin and by which it is to be completed.

The purpose of this article is to flesh out this framework, both from a theoretical and a practical standpoint. Is there a "plain meaning?" How does one know what it is? What sources can one use to find the "plain meaning" without undermining the purpose of the Rule, which is to locate meaning only in the text of the statute? Does the Rule apply to constitutional interpretation? If nothing else, the practitioner must always be mindful of the Rule's framework, because it directly affects the courts' willingness to accept his proposed interpretation. Often arguments are made regarding the "legislative intent" behind a statute, when they could and should at least initially be cast in terms of the statute's "plain meaning."

Separation of Powers, Legislative Intent and the Plain Meaning Rule

The overarching principle that guides Alabama courts—and therefore must guide the advocate—in analyzing Alabama statutes is the principle of separation of powers. This principle is not merely one of good judicial philosophy, see *The Federalist* No. 47 (Madison), which happens to have been adopted by Alabama judges. Instead, it is a constitutional mandate. While the United States Constitution only implicitly assumes the separation of powers, Alabama's constitution contains an explicit, strongly-worded separation of powers provision. See *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, [Ms. 1031522, May 3, 2005] __ So. 2d __ (Ala. 2005) ("The Constitution of Alabama expressly adopts the doctrine of separation of powers that is only implicit in the Constitution of the United States."); *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) ("In Alabama, separation of powers is not merely an implicit 'doctrine' but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns."). Article III, Section 43 of the Alabama Constitution of 1901 provides, in pertinent part, that "[i]n the government of this state, except in the instances in this

Constitution hereinafter expressly directed or permitted, ... the judicial [department] shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." See also Ala. Const. 1901, Art. III, § 42 ("The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."). This provision, with very minor modifications, has been included in every version of the Alabama constitution since 1819. See *Rice v. English*, 835 So. 2d 157, 163 (Ala. 2002).

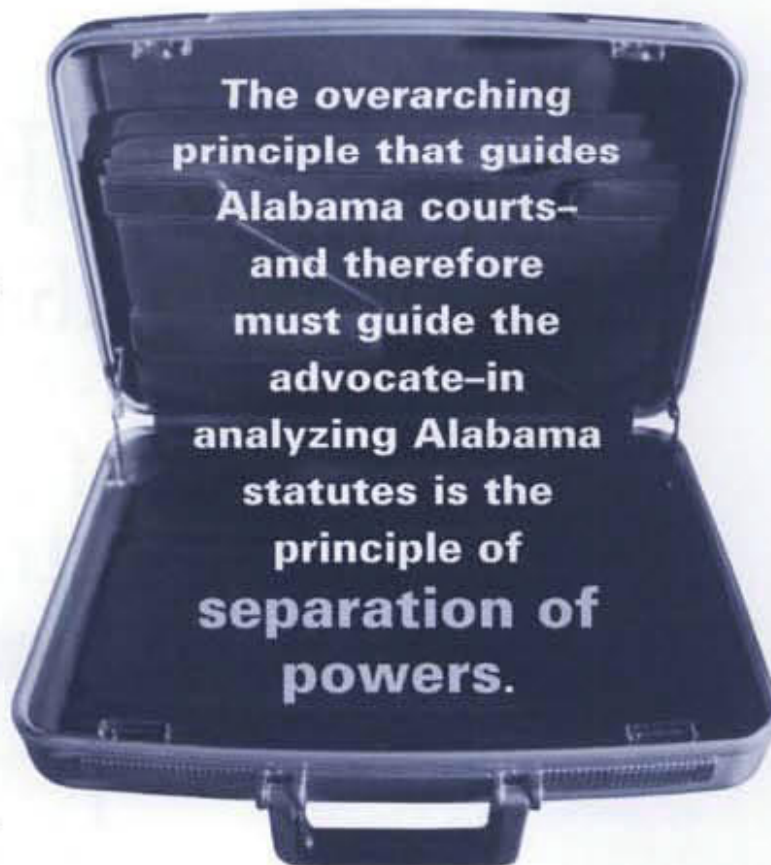
The justices and judges on Alabama's courts must and do take this principle seriously. See, e.g., *Ex parte Jenkins*, 723 So. 2d 649, 653-56 (Ala. 1998) (discussing in detail the historical and philosophical background of Alabama's separation of powers provision). Indeed, the Alabama Supreme Court not long ago ended, on separation-of-powers grounds, the long-running, much-publicized "Equity Funding Case" involving, essentially, court-mandated funding of Alabama's public school system. *Ex parte James*, 836 So. 2d at 815-19. The court stated that it could not impose any specific remedy sought by the plaintiffs without usurping the role of the legislature and thereby violating Section 43. *Id.* at 819.

Alabama's devotion to a proper separation of powers is reflected not only in its constitution but also in its political environment.

Alabama voters have become quite interested in rooting out what they perceive as judicial activism or "legislating from the bench." Therefore, virtually every candidate for judicial office—especially for a seat on one of Alabama's appellate courts—regardless of party, puts forth great effort to claim to only follow the law as written or to be a "strict constructionist."

It is the strong devotion to separation of powers that informs the judicial process of statutory interpretation in Alabama, and has made the Plain Meaning Rule preeminent. The importance of the Rule is reflected in the Alabama Supreme Court's opinion in *DeKalb County LP Gas Co. v. Suburban Gas*, 729 So. 2d 270 (Ala. 1998), one of the more systematic discussions of Alabama's approach to statutory construction. In that decision, the court set forth the Rule as follows:

In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:



“Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.”

It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.

DeKalb County, 729 So. 2d at 275-76 (citations omitted; emphasis added); see *id.* at 277 (“We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a straightforward application of the terms of the statute.”); see, e.g., *Pitts v. Gangi*, 896 So. 2d 433, 436 (Ala. 2004) (citing *DeKalb County*, and stating “[t]here is clearly a ‘rational’ way to view the words of the Legislature. It may not reflect a policy that the members of this Court would adopt, but that is an entirely different matter.”).

In *DeKalb County*, the court found the statute at issue unambiguous, and therefore rejected the use of other, “secondary” canons of statutory construction such as the *in pari materia* rule or the use legislative history. 729 So. 2d at 276. The court recognized certain possibly legitimate legislative motives supporting contrary interpretations of the statute, and even recognized that other canons of statutory construction could support that interpretation. However, the court made clear that it would not “engage in a guessing game” as to why the legislature chose to write the statute as it did, and that policy arguments “should be directed to the legislature, not to this Court.” *Id.* at 277. Indeed, the court has adhered to that sentiment. See, e.g., *Simcala v. American Coal Trade, Inc.*, 821 So. 2d 197, 203 (Ala. 2001) (citing *DeKalb County*, and stating “[i]f adverse effects on market conditions warrant a different result [than that demanded by the ‘plain meaning,’] it is for the Legislature, not this Court, to amend the statute”); *Folmar & Assocs. L.L.P. v. Holberg*, 776 So. 2d 112, 118 (Ala. 2000) (citing *DeKalb County*, and stating “[w]hile there may be valid policy arguments for extending the Act . . . it is not for the Judiciary to impose its view on the Legislature.”) (internal quotations omitted).

Getting to the “Secondary” Canons Through Ambiguity

DeKalb County thus makes clear that the Plain Meaning Rule is Alabama’s primary canon of statutory construction. An advocate construing a statute should not fail to mention the Plain Meaning Rule in at least some fashion, given the strongly-worded priority it is given in that decision. Indeed, the phrase “only if there is no rational way to interpret the words as stated will

we look beyond those words...” might appear to seal off too many avenues of reasonable argument. Of course, consistent with Article III, Section 43 of the Alabama Constitution, one would expect it to be quite difficult to avoid the plain language of a statute just because one thinks the legislative wisdom behind a statute to be lacking. Discerning “legislative intent” may be the primary goal of statutory construction, but Section 43 demands that that intent be determined only from the actual language of the statute if possible. See *Ex parte Lamar Adver. Co.*, 849 So. 2d 928, 930 (Ala. 2002). However, notwithstanding the strong language in *DeKalb County*, there is still ample room for argument and for the use of the “secondary” canons of statutory construction.

Sometimes, the nature of the legislation at issue triggers a different interpretive standard, as in cases involving tax exemptions. In *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834 (Ala. 2003), for example, the Alabama Supreme Court explicitly declined to interpret a broadly-worded statute as providing the plaintiffs a right to a tax exemption. Although the breadth of the statute appeared to support the right to the exemption, the court noted that statutes creating tax exemptions are to be strictly construed against the taxpayer and the right to an exemption must be stated in clear and unambiguous terms. The majority specifically rejected the reasoning in Justice Houston’s dissent, which relied on the *DeKalb County* Plain Meaning Rule, stating that *DeKalb County* did not involve a claimed tax exemption. *Ex parte Emerald Mountain*, 856 So. 2d at 840 n.1. The court affirmed the court of civil appeals’ narrow reading of the statute, relying upon many other rules of statutory construction. *Id.* at 840-44.¹ But see *Underwood v. Medical Clinic Bd.*, [Ms. 1031160, Dec. 30, 2004] __ So. 2d __ (Ala. 2004) (recognizing the general presumption in favor of the right to tax, but holding that “plain meaning” of statute clearly and unambiguously provided for a tax exemption; citing *DeKalb County*).

Usually, however, the way around the Plain Meaning Rule is through demonstrating that the statute is ambiguous. See, e.g., *Bassie v. Obstetrics & Gynecology Assocs. of Northwest Ala., P.C.*, 828 So. 2d 280, 284 n.3 (Ala. 2002) (“Were the statutory language ambiguous, we might consider conditions which might arise under the provisions of the statute and examine results that flow from giving the language in question one particular meaning.”) (internal quotations omitted). One way to argue ambiguity is to demonstrate that there is no rational way to comprehend the words as written. This is the “poorly-drafted-statute” argument. Like most human endeavors, the legislative process is not perfect, and sometimes statutes—after much compromise and revision in the back-and-forth process of the legislature—come out in a form that is less than clear or coherent. See, e.g., *Ex parte Jackson*, 881 So. 2d 450, 452 (Ala. 2003) (“The statute we are now charged with construing is quite confusing and internally inconsistent; we encourage the Legislature to reexamine and to clarify it.”). An Alabama court would not seek to impose the Plain Meaning Rule on a wholly incomprehensible statute. But see *Ex parte Waddail*, 827 So. 2d 789, 794 & n.3 (Ala. 2001) (acknowledging that the statute at issue was “perhaps not well written” and suggesting that the legislature clarify the statute, but nonetheless concluding that the statute was not ambiguous and therefore did not “require judicial construction”).

Another way to argue ambiguity is to demonstrate that the statute is comprehensible, but that "plain" application of the statute leads to more than one rational solution. See *Zitterow v. Nationwide Mut. Ins. Co.*, 669 So. 2d 109, 112 (Ala. 1995) (stating that "language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time"). This situation arises from words that have more than one legitimate, commonly-understood meaning, or from awkward grammatical structures—for example, peculiar punctuation or misplaced modifiers—that give one sentence multiple meanings. An example of this problem was recently presented in *Ex parte National Western Life Insurance Co.*, 899 So. 2d 218 (Ala. 2004).

Ex parte National Western involved the interpretation of a federal statute, the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6801 *et seq.* The "privacy provision" of the GLBA, 15 U.S.C. § 6802, prohibits financial institutions from disclosing certain information to third parties. One exception to this provision allows disclosure in order "to respond to judicial process." 15 U.S.C. § 6802(c)(8). The issue before the court was whether the phrase "judicial process" should be understood broadly (referring to any kind request for a response made during a judicial proceeding), or whether it should have some more limited meaning (such as a request to respond to an initial service of process). See *Ex parte National Western*, 899 So. 2d at 224, 225 n.2 (discussing the *Black's Law Dictionary* definition of "judicial process").

The court expressly acknowledged that the starting point of its analysis was the Plain Meaning Rule as set forth in *DeKalb County*.² However, the court found the Rule to be unavailing, stating:

... [H]ere the problem is not that there is no rational way to understand the words as they are written, but that there is more than one rational way to understand those words, i.e., there is no single "plain meaning." The phrase "judicial process" could have a very broad or a very specific meaning.... This ambiguity in the statutory language justifies the use of other canons of statutory construction (beyond the "plain-meaning" rule) in determining which definition Congress intended.

Id. at 223-24. The court then proceeded to examine evidence from outside the statute, such as that found in legislative history and in other similarly worded statutes, before settling on the broad interpretation of the phrase "judicial process." Id. at 224-27 & n.2. See also *Rice v. English*, 835 So. 2d 157, 167 (Ala. 2002) (quoting *Monroe v. Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000) (stating that when faced with two possible interpretations, Alabama courts will adopt the interpretation that avoids any constitutional difficulties)). In doing so, the court refused to second-guess Congressional wisdom when presented with the argument that the broad interpretation of "judicial process" would represent a lack of proportionality in the statute. The court stated that "[a] perceived lack of proportionality in a statute, like a perceived lack of wisdom in a statute, does not empower this Court to rewrite the statute, even if we wanted to do so." Id. at 226-27.³

In sum, the wise advocate always leads with an argument based on plain meaning. Under a strict reading of *DeKalb County*, only

if he demonstrates that the statute at issue is somehow ambiguous should he feel comfortable invoking one of the secondary canons of interpretation to help determine legislative intent.

The Limits of "Plain Meaning"

A. Realities regarding "plain meaning"

The foregoing discussion begs an important and difficult question: when is the meaning of a statute "plain?" Here it is helpful to make a small concession: There never really is a "plain meaning." That is, there never really is a "plain meaning" in the extreme sense of that phrase, if what is meant is that the "plain meaning" of a statute requires absolutely no interpretation. And lest any think this article advocates a view of language that throws the doors open to an "activist" approach to statutory construction, a bit of clarification is required.

The point raised here is that all terms require interpretation on some level, in the sense that all persons bring their own understanding of language to bear on anything that they read. Cf. *SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38, 45 (Ala. 2003) (See, J., dissenting) (rejecting the claim that a contractual provision was ambiguous, but stating that, "I understand that language itself has sufficient intrinsic ambiguity that an argument, compellingly and persistently made, when dwelt upon can cause one to doubt the clarity of anything...."). Imagine a statute that mandated that, "All barns shall be painted red." Such a statute seems very "plain" and easy to apply. However, what types of things qualify as "barns," what shades of color qualify as "red," and even the meaning of the word "shall" depends upon something outside the phrase itself—the personal experiences of the reader, a definition provided in some other authority (like a dictionary), the commonly understood rules of grammar, etc. This means that judges, at some level, no matter how conservative, are always interpreting when they read a statute. This fact is not a knock on judges; it is just the nature of communication.

This characteristic inherent in language is one reason why judges seeking to closely follow the text of a statute can still reach different interpretations. For example, in his book *A Matter of Interpretation*, United States Supreme Court Associate Justice Antonin Scalia describes two kinds of judges, both of whom would claim to reject judicial activism in statutory construction: textualists and strict constructionists. To describe the difference between the two philosophies, Justice Scalia tells a story regarding the Court's interpretation of a federal statute that prohibited the "use" of a firearm during a drug transaction:

A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. The difference between textualism and strict constructionism can be seen in [*Smith v. United States*, 508 U.S. 223 (1993)]. The statute at issue provided for an increased jail term if, "during and in relation to ... [a] drug trafficking crime," the defendant "uses ... a firearm." The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had "used a

firearm during and in relation to a drug trafficking crime." The vote was not even close (6-3). I dissented. Now I cannot say whether my colleagues in the majority voted the way they did because they are strict-construction textualists, or because they are not textualists at all. But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase "uses a gun" fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, "Do you use a cane?", you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.

Antonin Scalia, *A Matter of Interpretation*, 23-24 (1997). This kind of dispute is not unknown to the Alabama Supreme Court. See *Simcala*, 821 So. 2d at 204 (Woodall, J., dissenting) ("The majority has employed the plain-meaning rule ... to defeat the obvious purpose of [the statute]. In doing so, it has ignored another fundamental rule of statutory construction: 'A literal interpretation of a statute will not be blindly adopted when it would defeat the purpose of the statute, if any other reasonable construction can be given to the language in dispute.'" (quoting *McClain v. Birmingham Coca-Cola Bottling Co.*, 578 So. 2d 1299, 1301 (Ala. 1991))).

B. Utilization of the realities

Why all of this philosophical discussion? The primary reason is that it is always better to know more rather than less about the inner workings of the interpretive process—even if that means wading through a philosophical discussion—before presenting any argument concerning the interpretation of a statute.

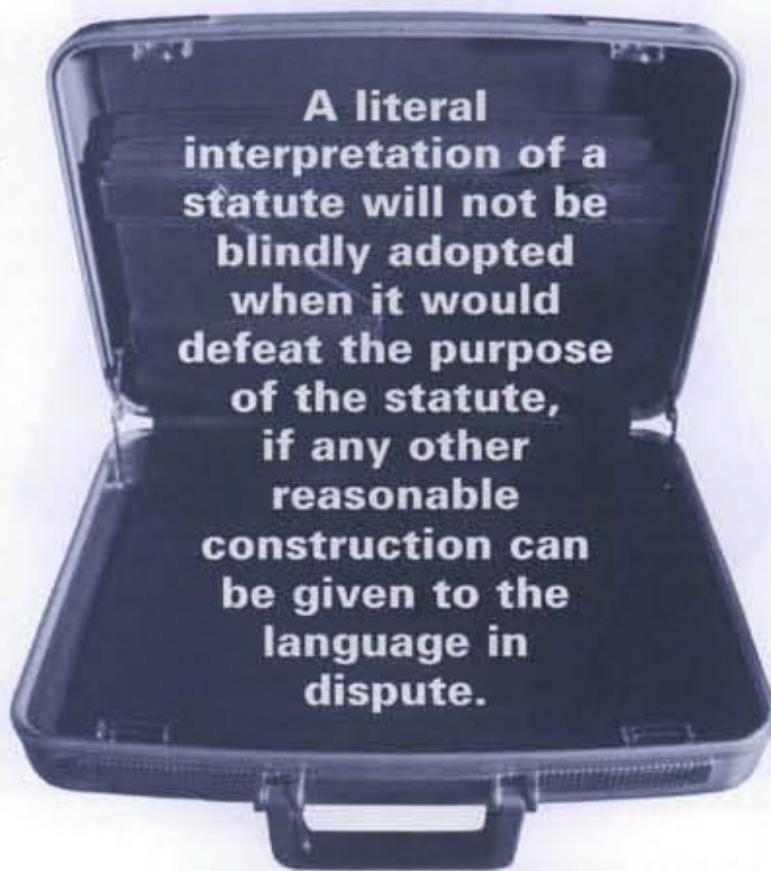
Another, more specific, reason for this discussion is that the smart advocate will use the inherent limitations in the notion of "plain meaning" to his benefit, by becoming familiar with where "plainness" ends and "ambiguity" begins. A "plain meaning" advocate who wishes to lead a court to reject an opponent's claim of ambiguity will learn to recognize and set out for the court those "outside" or "extra-textual" sources that can permissibly be used to determine the "plain meaning" of a term, and the use of which do not automatically trigger any conclusion of ambiguity. For example, the advocate might appeal to dictionaries such as *Black's* or *Webster's*, sources that are undoubtedly not part of the *Alabama Code*—and are thus technically "outside" sources—but are nonetheless frequently cited by Alabama's appellate courts in search of the "plain

meaning."⁴ See, e.g., *Blackmon v. Brazil*, 895 So. 2d 900, 907 (Ala. 2004) (citing *Black's Law Dictionary*); *Ex parte Lamar Adver. Co.*, 849 So. 2d at 930 (citing *Merriam-Webster's Collegiate Dictionary*); cf. *Ex parte Director, State Dep't of Indus. Relations*, [Ms. 1031724, June 17, 2005] _ So. 2d _ (Ala. 2005) (citing cases that rely upon Words and Phrases to interpret the phrase "with respect to"). Another example might be an appeal to authoritative works on, or general knowledge of, the commonly-understood rules of grammar. Cf. *Padgett v. Conecuh County Comm'n*, 901 So. 2d 678, 685-88 (Ala. 2004) (adopting the trial court's detailed discussion of the grammatical structure of a statute and a constitutional amendment).

By recognizing what are the permissible "outside" sources, the advocate can deflect an argument by his opponent that a statute is ambiguous and has no "plain meaning" simply because an appeal is made to some outside source in interpreting the statute. The advocate can acknowledge the use of legitimate "outside sources" like general experience, dictionary usage, etc. as being logically necessary for communication without admitting that the use of such sources renders the statute ambiguous such that any outside source or "secondary" canon (such as legislative history, other statutes, etc.) must necessarily be in play.

On the other hand, the advocate seeking to utilize certain secondary canons of construction may, in some situations, be able to do so without first demonstrating ambiguity and, at the same time, without violating *DeKalb County*. He may be able to

argue that those canons are actually tools to determine plain meaning, that they are—like appeals to *Black's* or to the rules of grammar—simply another source within that permissible class of "outside sources" discussed above. For example, it could be argued that, in some situations, certain "statutory-text-based" canons such as the *noscitur a sociis* rule (interpret words "by their companions," that is, by the surrounding words and context)—as opposed to "non-statutory-text-based" canons like those that look to purely extrinsic sources such as legislative history, committee reports, etc.—are "internal sources" more akin to rules of grammar and as such are legitimate sources to determine plain meaning. Cf. *Padgett*, 901 So. 2d at 688 (following *DeKalb County*, but indicating that where isolated terms of a statute are at issue, appeal may be made to the context of the statute to provide meaning: "The County Commission argues that terms like 'renovation' and 'repair' are broad enough to encompass the construction of a new courthouse. If those



words are viewed in a vacuum, such an interpretation may have merit. However, those words cannot be so viewed in the contexts in which they appear....";⁵ see also *DeKalb County*, 729 So. 2d at 277 ("We should turn to extrinsic aids to determine the meaning of a piece of legislation only if we can draw no rational conclusion from a straightforward application of the terms of the statute.") (emphasis added).

Future applications of the *DeKalb County* framework may produce new arguments and further refinements. The primary point is that, in one way or the other, practitioners advancing an interpretation of an Alabama statute will need to address *DeKalb County's* Plain Meaning Rule.

Interpreting the Alabama Constitution

Although somewhat outside the scope of this article, the question sometimes arises whether the Plain Meaning Rule applies with equal force to the interpretation of the Alabama constitution. At first glance, the answer would have to be no, at least with regard to the *DeKalb County* formulation of the Rule. This is because the concern for separation of powers as stated in § 43—the heart of *DeKalb County*—does not exactly fit when the focus is the Alabama constitution. Section 43 forbids the Alabama courts to exercise the powers of the legislature, but, unlike a statute, the constitution is not a creature of the legislature, but of the people.

Some early decisions appeared to favor an interpretive model that provided more room for judges to "go behind" the text of the constitution. See, e.g., *Realty Inv. Co. v. City of Mobile*, 181 Ala. 184, 187, 61 So. 248, 249 (1913) ("Constitutions usually deal with larger topics and are couched in broader phrase than legislative acts; hence their just interpretation is not always reached by the application of similar methods. 'A Constitution is not to receive a technical construction, like a common-law instrument, or statute.'") (quoting *Dorman v. State*, 34 Ala. 216, 235 (1859)). But see *State ex rel. Robertson v. McGough*, 118 Ala. 159, 166-67, 24 So. 395, 397 (1898) ("Whenever a constitutional provision is plain and unambiguous, when no two meanings can be placed on the words employed, it is mandatory, and the courts are bound to obey it. . . . In such a case, as has been said, there is no room for construction, and certainly none for disobedience by the courts. If so, there would remain no certainty or stableness in the written Constitutions of the states, or federal government."). However, the Alabama Supreme Court has since made it clear that the court is "not at liberty to disregard

or restrict the plain meaning of the provisions of the [Alabama] Constitution." *Brown v. Board of Educ.*, 863 So. 2d 73, 90 (Ala. 2003) (quoting *McGee v. Brown*, 341 So. 2d 141, 143 (Ala. 1976)). In fact, the court has specifically applied the *DeKalb County* Plain Meaning Rule in interpreting an amendment to Alabama's constitution.⁶ See *Padgett*, 901 So. 2d at 688.



Conclusion

As reflected in the strict *DeKalb County* formulation of the Plain Meaning Rule, Alabama courts strive to follow the principle summed up by Justice Oliver Wendell Holmes when he said that his job as a judge was not to "do justice"—a concept that allows judges to fill in the blanks with what they think justice requires in a particular case—but to "apply the law and hope that justice is done." *The Spirit of Liberty: Papers and Addresses of Learned Hand* 306-307 (Dilliard ed. 1960). This process allows the people, not judges, to govern themselves through their constitution and through the laws passed by and through their elected representatives. It is this concern for separation of powers that demands that Alabama courts show restraint and fol-

low the laws as written as closely as possible. Wise practitioners will keep these concerns, and thereby some discussion of the Plain Meaning Rule, in the forefront of any proposed statutory or constitutional interpretation. ■

Endnotes

1. The *Emerald Mountain Court* did, however, reaffirm the general statutory construction pattern discussed in *DeKalb County*, 856 So. 2d at 843 ("We recognize that the rules of statutory construction are only aids in ascertaining legislative intent where a statute is ambiguous").
2. Technically, the interpretation of federal statutes does not implicate the separation of powers provision of Section 43 of the Alabama Constitution, because that provision only bars Alabama courts from exercising the powers of the Alabama legislative or executive branches. Therefore, the argument could be made that Alabama courts are more free to look behind the "plain meaning" of a federal statute to determine Congress' intent—whatever that means—than they would otherwise be with an Alabama statute. However, in *Ex parte National Western*, the Alabama Supreme Court applied the *DeKalb County* plain meaning framework even though a federal statute was at issue, and the court thus imposed upon itself the same strictures to which it is bound when interpreting Alabama statutes.
3. The question remains to be seen, however, whether a lack of proportionality might be used to "break the tie" between two legitimate interpretations if none of the other secondary canons of construction are helpful.

4. Of course, the use of dictionaries in construing statutes raises other questions. One is which dictionary should be used: the dictionary in existence at the time the statute was enacted (i.e., the one that the legislators might have used) or the most current dictionary?
5. Although in *DeKalb County*, the Court stated that secondary canons like the *in pari materia* rule (providing that statutes concerning the same subject matter should be construed so as to be in harmony) are not to be utilized unless a statute is first found to be ambiguous, 729 So. 2d at 276-77, there is some authority for the proposition that the *in pari materia* rule might sometimes be utilized to determine "plain meaning" without a finding of ambiguity. See *Ex parte Exxon Mobil Corp.*, [Ms. 1040538, September 2, 2005] __ So. 2d __ (Ala. 2005) (quoting *DeKalb County* but adding that "[i]n determining the intent of the legislature, we must examine the statute as a whole and, if possible, give effect to each section."); *Richardson v. Terry*, 893 So. 2d 277, 283-86 (Ala. 2004) (applying *DeKalb County* in conjunction with the *in pari materia* rule); *Skelton v. J & G, L.L.C.*, [Ms. 2030823, Jan 14, 2005] __ So. 2d __ (Ala. Civ. App. 2005) (same); see also *Siegelman v. Alabama Ass'n of Sch. Bds.*, 819 So. 2d 568, 582 (Ala. 2001) ("In construing statutes, this Court does not interpret provisions in isolation, but considers them in the context of the entire statutory scheme.") (emphasis in original); cf. *State v. American Tobacco Co.*, 772 So. 2d 417, 421 (Ala. 2000) (plurality opinion) (rejecting a claim that the phrasing of the title to an Act created an ambiguity, stating "[b]ecause the title of the Act and the body of the Act, when read together, are unambiguous, there is no need to look to the title when interpreting § 29-2-41.2(b).").
6. "Plain meaning" analysis as applied to the Alabama Constitution may not be technically required by the separation of powers mandate of Section 43. Instead, the need to hold fast to the plain meaning of the constitutional text stems from a related concern

that it is for the people, not the courts, to modify their foundational governing document. See *Ex parte Melof*, 735 So. 2d 1172, 1189 (Ala. 1999) (Houston, J., concurring specially) (stating that it is "the expectation of the people that we, as judges, will interpret our Constitutions and their amendments as they are written, in order to effectuate the will of the people. To go any further would be to usurp the powers of the people....") (emphasis in original). A further debate, however, is whether "plain meaning" analysis in constitutional interpretation demands the use of the current plain meaning of the words or the "original" meaning—what the words plainly meant at the time they were written. Cf. Scalia at 37-47 (discussing the particular problems involved in interpreting constitutional, as opposed to statutory, texts).



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Improving the Quality of Justice

BY CHIEF JUSTICE DRAYTON NABERS, JR.

In the 18 months I have had the privilege of being this state's chief justice, I have been able to witness the strong dedication of employees throughout our judicial system to improving the system and making it more efficient. Judges, clerks, court specialists, judicial assistants, bailiffs, and administrative personnel have all joined in.

When Governor Riley appointed me chief justice in June 2004, our courts were faced with a significant financial and administrative challenge. Over 200 employees had been dismissed from both the Administrative Office of Courts (AOC) and the trial courts, resulting in a 25 percent reduction from scheduled levels of the manpower capacity in our clerks' offices. It was obvious to all that we had to capitalize on every opportunity to increase efficiency.

In November 2004, we appointed a "Process Review Committee" chaired by Judge Rusty Johnson and Circuit Clerk Corrine Hurst and comprised of clerks and judges. The charge was to identify all opportunities to become more efficient through technology and best practices. The Committee worked diligently and expeditiously and submitted a comprehensive list of recommendations. Many recommendations have been implemented, while others are under development. Here is an outline of some of the various projects. Your offices may already be benefiting from some of them.

E-Filing

Thanks to the interest shown by attorneys and judges, the electronic filing movement recently gained a tremendous amount of momentum in Alabama. The paper filing system produces literally volumes of files and documents for both attorneys' offices and clerks' offices to maintain. E-filing will help to decrease the workload, since a majority of the work would be completed, filed and stored on computers. In January 2005, a survey conducted by the AOC indicated that 93 percent of attorneys would utilize an electronic filing service and 74 percent of judges believe that it would be beneficial to the courts. Based on this data, the vast majority of you will be pleased to learn that E-filing will be available in the courts in the very near future.

The Alabama Judicial System is currently conducting an electronic filing project on a limited basis in the Baldwin County Clerk's Office with a select group of attorneys and judges. In early 2006, the limited test will expand to Lee, Madison, Montgomery and Russell counties. While the Alabama E-filing application is modeled on the federal E-filing system, the Alabama product has been tailored to accommodate the unique nature of Alabama filings.

The procedural aspects of E-filing are an issue that has been at the forefront of the project. The court has remained in close contact with the Supreme Court Rules Committee in order to assure that the AlaFile system compliments the present procedural rules and that those rules needing modifications are identified early on.

E-Appellate

E-Appellate is an Internet-based application which allows the clerk of the trial court to electronically file the record on appeal with the appellate court clerk's office. Attorneys in an appealed case will be able to log into the application and download a copy of the record on the appeal. The E-Appellate developers are also in the process of enhancing the current model so that attorneys can file briefs and Rule 21 filings.

The electronic appeals system will save the courts a tremendous amount of time. Under the current procedure, the clerks' office must spend protracted time preparing the record on appeal. Additionally, the clerk's office must pay significant postal and shipping costs to send the records to the appellate court. With E-Appellate, the clerk's office will only be required to scan in the pertinent documents and organize the record on appeal and then submit it to the appellate court electronically.

E-Appellate is currently in a pilot program in the trial courts of Lee, Madison, Montgomery and Russell counties. The pilot project will be expanded to other counties as this year progresses, and the site developers will soon complete construction on the brief filing mechanism. Soon enough, the product will be available statewide.

AlaVault

When e-filing is established in the Alabama courts, the clerks will need a centralized location to store filed documents. AlaVault is another Internet-based application, which permits the clerk to store electronic documents on a server and then retrieve them at a later date. The AOC maintains the application, but a clerk's office is responsible for placing its own files into AlaVault. Not only will electronically filed documents be placed into AlaVault for storage, the clerks' offices will also be able to scan paper documents into image format and place the document into AlaVault.

E-Citation

Under the direction of Dr. Allen Parrish, the CARE Research & Development Laboratory at the University of Alabama produced an application that has revolutionized the manner in which law enforcement officers issue a Uniform Traffic Citation (UTC). E-Citation allows law enforcement officers to issue UTCs with the assistance of a laptop computer. Rather than filling out the UTC by hand, the officer uses a driver's license scanner. When the license is scanned, the individual's data is transmitted to the laptop computer in the officer's patrol car. The data from the license scan immediately fills in most of the e-citation, and the remaining fields on the UTC can be completed using drop-down boxes. The officer then prints a hard copy of the ticket to give to the driver and transmits the ticket electronically to the AOC. The AOC can transmit the data back out to the district courts so there is never a need for hand data entry of the ticket.

The technology not only gets troopers out of bureaucratic hassles on the road, it also relieves the court clerk's offices from having to handle piles of UTC paperwork. E-Citation has been expanded to every clerk's office, and the technology will soon be available in all state trooper vehicles.

Traffic Call Center

Until this year, clerks' offices bore the burden of answering routine questions from drivers who received traffic citations. In March 2005, the AOC formed a centralized bureau for traffic defendants to call concerning routine questions, postponements, and payment options. Presently, over 1,500 phone calls per week are received at the call center. Coupled with the use of an Internet site to allow payment of Rule 20 eligible tickets by credit card, the call center has made noticeable differences for clerks' offices. Relieving the clerks of this enormous task has helped to free up a considerable amount of man hours, which the clerks' offices can dedicate to other matters.

AlaPay

AlaPay is the Internet site that is used by defendants to pay fines and costs by using a credit card. With the addition of this convenient method of payment, considerable time is being saved for the offender as well as our clerks' staffs. From January 1, 2005 through November 1, 2005, 17,607 payments have been processed electronically through AlaPay. Much like

the Traffic Call Center, AlaPay has helped to save hundreds of hours of work in clerks' offices.

E-Forms

E-Forms is an Internet site that functions as a repository for various UJS forms. Created and maintained by the AOC Helpdesk, E-Forms may be accessed by attorneys or by any member of the public by logging onto <http://eforms.alacourt.gov>. Most forms are available in portable document format (PDF) and can be filled out on the computer. This site is one way of providing attorneys and the public with 24-hour access to the court forms.

MIDAS

The Model Integrated Defendant Access System (MIDAS) is a case management application, which provides court referral officers with a method to organize information on offenders who are referred to them. CROs can log into MIDAS to locate a criminal offender's demographics and criminal history. CROs will have the capability of logging information regarding a defendant, such as when the defendant submits to a drug test. MIDAS is simply a better way to organize criminal information for CROs and will certainly improve their capability of managing criminal offenders.

Income Tax Setoff

In the 2004 Regular Legislative Session, House Bill 303 was passed which allows the courts to intercept state income tax refunds to satisfy delinquent fine accounts in criminal or traffic cases. The AOC has worked closely with the Department of Revenue since the passage of the legislation to help recover a portion of the millions of dollars owed in court cases with outstanding accounts. The program recovered nearly \$1.7 million in outstanding court fines in 2005. The Alabama General Fund will continue to benefit from the income tax setoff program in the coming years, as it has developed into an excellent method of enforcing court orders involving fines.

I am excited at the prospect of these projects enhancing the service that the judiciary provides to attorneys, their clients and the public as a whole. The court system is always searching for ways to make our courts more efficient. With this continued dedication, the quality of justice in Alabama will continue to improve. ■



Chief Justice Drayton Nabers, Jr.

Chief Justice Nabers was appointed chief justice of the Supreme Court of Alabama in June 2004 by Governor Bob Riley. He is a 1962 graduate of Princeton University and received his law degree from Yale School of Law in 1965. Following a clerkship for U. S. Supreme Court Justice Hugo Black, Chief Justice Nabers joined the firm of Cabaniss, Johnston, Gardner, Duran, & O'Neal in 1967. He joined Protective Life Corporation in 1979, rising to the position of chairman of the board and chief executive officer. He retired from that position in 2002 and was appointed finance director for the State of Alabama by Governor Riley. He served as finance director until his appointment to the supreme court.



Assertion of The Fifth Amendment Privilege Against

BY G. RAY KOLB, JR. AND WILLIAM L. PFEIFER, JR.

Introduction

The Fifth Amendment to the United States Constitution states, in relevant part, that a person shall “[not] be compelled in any criminal case to be a witness against himself.”¹ Article I, § 6 of the Alabama Constitution provides “[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.”² Although the phrase “to give evidence against himself” was once viewed as being broader than the protection given by the Fifth Amendment, the Alabama Supreme Court has stated that the two offer essentially the same privilege against self-incrimination.³

While it is relatively simple to understand this rule’s applicability in the course of actual criminal proceedings, the prohibition against compelling self-incrimination becomes more complex when the issue arises during civil litigation. Although a person’s privilege against self-incrimination must be protected, the courts must also attempt to protect the right of others to seek redress and receive compensation for civil wrongs.



Self-Incrimination in Civil Proceedings

History

The first serious treatment of this issue in Alabama was in the case of *Ex parte Baugh*, 530 So. 2d 238 (Ala. 1988).⁴ In *Baugh*, the defendant refused to answer any questions at her deposition, asserting her Fifth Amendment privilege because she was also subject to a grand jury investigation at that time. The trial court held Baugh in contempt of court for her failure to cooperate with the discovery process. The Alabama Supreme Court noted that this was a case of first impression in Alabama. After reviewing analogous federal court cases on the issue, the Alabama Supreme Court held that based on a "balancing interest" of the parties, Baugh had shown sufficient justification for a protective order and that it was an abuse of discretion when the trial court found her in contempt for her refusal to comply with discovery requests.⁵

As a result of *Baugh*, the law in Alabama became that a party could not be compelled to testify or be compelled to provide discovery in a civil proceeding if there was a parallel criminal action

pending against the party. This new rule also applied even if there was only a potential parallel criminal action on the horizon.⁶ In *Sanders v. Williams*,⁷ Williams was under criminal investigation for the same actions which gave rise to the civil suit against him. Williams moved for a stay of the proceedings, but the trial court denied the request because no actual criminal charges were pending against him. The Alabama Supreme Court held that, as it had in *Ex parte Coastal Training Institute*,⁸ the pendency of criminal proceedings was not necessary to the assertion of the privilege. A party could claim the Fifth Amendment privilege even if the risk of prosecution was remote. The court specifically rejected the argument that Williams could simply assert his Fifth Amendment right to remain silent

to individual incriminating deposition questions because that would be too narrow an application of the privilege. Quoting itself in *Coastal*, the court stated "[t]his point-by-point review of the civil case may lead to a 'link in the chain of evidence' that unconstitutionally contributes to the defendant's conviction." Thus, the court held that the trial court abused its discretion in denying the requested stay.

However, a potential conflict between a party's criminal and civil matters did not automatically require a stay of the civil proceedings pending the outcome of the parallel criminal proceeding.⁹ "The Fifth Amendment privilege against self-incrimination must be liberally construed in favor of the accused, *Hoffman v. United States*, 341 U.S. 479 (1951), and the privilege is applicable in state as well as in federal proceedings, *Malloy v. Hogan*, 378 U.S. 1 (1964), and in civil as well as in criminal proceedings, *Welsh v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979) . . . The Fifth Amendment does not mandate a stay of civil proceedings pending the outcome of criminal proceedings. Whether to grant a stay, based on a balancing of the interests of the parties—i.e., contrasting the interest of a party in postponing the civil proceedings with the possible prejudice to the party who wishes the litigation to go forward—is within the trial court's discretion."¹⁰ A trial court has the discretion to stay the entire civil proceeding, to merely postpone all or some of the civil discovery, or to impose protective orders and conditions against one or more of the parties in the civil action—all remedies available to the trial court under Rule 26(c), *Ala. R. Civ. P.*¹¹ In some circumstances, the civil matter could proceed in at least a limited fashion where a party was neither required to testify nor required to produce any documentation.¹² Thus, the standard of review on this issue is whether the trial court's ruling was an abuse of its discretion.¹³

Current State of Law

The *Baugh* court did not give much guidance on what the actual "balancing of interests" test would entail, stating merely that the trial court must "weigh

compelling interests and maintain an even balance."¹⁴ However, in *Ex parte Ebbers*,¹⁵ the Alabama Supreme Court recognized that "none of our cases have undertaken to catalogue the various factors that might properly enter into a weighing and balancing analysis" and addressed the issue at length. The court listed eight factors (based on elements identified in federal cases addressing this issue) that courts should consider when balancing between a person's Fifth Amendment privilege and another party's right to pursue discovery in a civil proceeding:¹⁶

1. The interest of the plaintiff in proceeding expeditiously with the civil litigation, or any particular aspect of it, and the potential prejudice to the plaintiff of a delay in the progress of that litigation;
2. The private interest of the defendant and the burden that any particular aspect of the proceedings may impose on the defendant;
3. The extent to which the defendant's Fifth Amendment rights are implicated/the extent to which the issues in the criminal case overlap those in the civil case;
4. The convenience of the court in the management of its cases, and the efficient use of judicial resources;
5. The interest of persons not parties to the civil litigation;
6. The interest of the public in the pending civil and criminal litigation;
7. The status of the criminal case, including whether the party moving for the stay has been indicted; and
8. The timing of the motion to stay."

As the Alabama Supreme Court recognized, "A trial court 'must make a highly fact-bound inquiry into the particular circumstances and competing interest involved in the case' when parallel civil litigation and actual, or reasonably expected, criminal charges coexist."¹⁷ It does not appear that the factors are in order of importance. Based on the court's rulings over the last 17 years, factors three and seven clearly seem to be the

most significant elements for a trial court to consider.

The *Ebbers* opinion also provided a valuable summary of the law in Alabama regarding the Fifth Amendment privilege, organizing the case law into 13 rules to be applied to Fifth Amendment questions. The rules were summarized as follows:

1. A party is entitled to assert the Fifth Amendment privilege against self-incrimination although no criminal charges have been instituted, and even where the risk of prosecution is remote, so long as the party reasonably apprehends a risk of self-incrimination. A party need not be indicted to properly claim the Fifth Amendment privilege.¹⁸
2. When the Fifth Amendment privilege is asserted, it is for the trial court, not the party asserting the privilege, to determine whether the party's apprehension of a risk of self-incrimination is reasonable and well-founded.¹⁹
3. The Fifth Amendment privilege applies in state-court civil proceedings, including depositions.²⁰ A party cannot be compelled to testify or compelled to provide discovery in a civil proceeding while there is a parallel criminal action pending against the party.²¹
4. The United States Constitution does not automatically require a stay of civil proceedings pending the outcome of parallel criminal proceedings or potential parallel criminal proceedings.²²
5. Whether to grant a stay to a party in a civil case who is the target of actual or threatened parallel criminal proceedings must be determined by weighing and balancing the interest of the party moving for the stay in postponing the civil action against the prejudice to the other party that might result from delay.²³
6. Under Rule 26(b), *Ala. R. Civ. P.*, parties are entitled to "obtain

discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" but under Rule 26(c) a party or other person from whom discovery is sought may obtain a protective order from the trial judge "for good cause shown." . . . These provisions vest broad power in the trial court to control the discovery process.²⁴

7. A court has the discretion to stay civil proceedings, to postpone civil discovery, or to impose protective orders and conditions in the face of parallel criminal proceedings against one of the parties when the interests of justice seem to require. Such interests include the need "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" pursuant to Rule 26(c), *Ala. R. Civ. P.*²⁵
8. State court procedural considerations must at all times yield to relevant federal constitutional principles.²⁶ When state concerns for judicial economy conflict with federal constitutional rights, those state concerns must give way.²⁷ In balancing the interests of the parties, we must favor the constitutional privilege against self-incrimination over the interest in avoiding a delay of a civil proceeding.²⁸ To the extent necessary to ensure protection of the privilege against self-incrimination, concerns about delays must yield.²⁹
9. While sometimes it is appropriate to stay an entire civil proceeding, rather than just as to the party moving for the stay, there are also situations where the right against self-incrimination can be adequately protected while the civil case proceeds in some limited way.³⁰
10. Sometimes the outcome of the balancing-of-interest test is such that

postponing the civil action is the "only method" or "only solution" sufficient to guarantee a party to a civil action the Fifth Amendment right against self-incrimination.³¹

11. A civil party's Fifth Amendment right against self-incrimination cannot be adequately protected by requiring him simply to assert his right to remain silent when asked specific questions during a civil



deposition; such an approach construes the Fifth Amendment too narrowly. The dangers in such an approach have been identified as including the possibility of a criminal investigator's being "planted" at the deposition, the revealing by the deponent of his weak points by his selection of which questions he refuses to answer, and the opportunity presented to a prosecutor of

deriving, by a point-by-point review of the civil case, a "link in the chain of evidence" that would unconstitutionally contribute to the defendant's conviction in the criminal case.³²

12. A motion to stay civil discovery during the pendency of a parallel criminal proceeding is not properly granted upon speculative or conclusory grounds.³³
13. In the event that a stay is appropriate at a particular point in time, the trial court is not precluded from subsequently entertaining a motion to dissolve the stay, if circumstances have changed in the interim in such a way as to render the stay no longer appropriate.³⁴

Since the *Ebbers* opinion, the court has only addressed this particular issue on a few occasions. A couple of these cases applied the factors enumerated by the court as the basis for addressing the implications of the Fifth Amendment on a civil proceeding.

In *Ex parte Oliver*, Oliver moved for a stay of the civil proceedings filed against him by the Woods based on pending criminal charges arising from the same set of facts. The plaintiffs argued that the issue was moot because three grand juries had been convened without Oliver's being indicted, the deposition notice to Oliver had been withdrawn and the Woods were only seeking to compel Oliver to answer those discovery requests which were non-incriminating in nature. In denying Oliver's petition for writ of mandamus, the court ruled that Oliver failed to show he had a clear legal right to the stay, or that the trial court had an "imperative duty" to grant his request. However, the court noted that subsequent to the filing of the petition for writ of mandamus, Oliver was indicted by the grand jury. The court then stated that:

[i]n light of the return of the indictment against Oliver and the need to guarantee Oliver's Fifth Amendment privilege, our caselaw, see *Ex parte White*, 551 So. 2d 923 (Ala. 1989), and its progeny, requires that a stay

of the civil proceedings be issued to guarantee Oliver's Fifth Amendment privilege. Oliver, however, has not presented this change in circumstance—the return of the indictment, which creates an imperative duty for the trial court to stay the civil proceedings—to the trial court. This court will not direct a court to take some action it has not previously refused to take. . . . Therefore, while a stay of the proceedings in the civil action is proper in light of the new fact presented by the issuance of an indictment, we cannot issue a writ staying those proceedings on this ground until the trial court refuses to do so.³⁵

Limitations of the Privilege

Even though *Baugh* and its progeny held that a party is entitled to assert a Fifth Amendment privilege against self-incrimination in a civil matter even where the risk of prosecution is remote, there is a limit on how far the appellate courts will extend that privilege. The key, as noted in *Ebbers*, is that the party "reasonably apprehends a risk of self-incrimination." In *Ex parte Braden*, Braden attempted to assert his Fifth Amendment privilege to a notice of deposition by the plaintiff in a civil action. Braden argued that he had been informed that the plaintiff planned to file criminal charges against him based on the same conduct involved in the civil action. Applying the factors as set out in *Ebbers*, the Alabama Supreme Court affirmed the trial court's denial of Braden's motion to stay, noting that "[a]s time passed without such an investigation materializing, and [the plaintiff] seemingly having elected to concentrate on its civil remedies, the likelihood of Braden's being exposed to criminal prosecution grew increasingly remote. [The plaintiff's] alleged 'threat' of requesting a criminal investigation was necessarily diffused by the passage of nine months without any 'follow-through.'"³⁶

Although based on a conviction for criminal charges, a claim filed to set aside a conviction pursuant to Rule 32 of the

Alabama Rules of Criminal Procedure is considered a civil action by the courts. Last year, the Alabama Court of Criminal Appeals again reviewed the issue of the Fifth Amendment privilege in the context of Rule 32 proceedings in *Taylor v. State*.³⁷ Taylor argued in his Rule 32 petition that he had received ineffective assistance of counsel during his trial. His petition was denied in circuit court, and on appeal he argued that his constitutional rights had been violated when the trial court allowed the introduction of exhibits from his trial attorney's work files, including statements he had made to his attorneys. The court of criminal appeals noted that it had rejected this same argument in *State v. Click*,³⁸ stating that "[t]he great weight of the United States Supreme Court's opinions supports the proposition that once a defendant has been convicted for a crime and his direct appeal from that conviction is final, a defendant no longer has a privilege against self-incrimination."³⁹ The court of criminal appeals went on to note that a post-conviction proceeding is a voluntary civil action filed by a defendant rather than a criminal action filed against him by the state. This makes it a voluntary proceeding rather than a compelled proceeding within the context of the Fifth Amendment.⁴⁰ Further, in rejecting the argument that a Rule 32 proceeding was a criminal action rather than civil, the court of criminal appeals has stated that the issue is not whether the underlying action is civil or criminal, but whether the risk of the facing criminal liability as a result of testifying at a post-conviction hearing is 'real and appreciable.'⁴¹

The most recent opinion (as of the date of the writing of this article) released on this subject was *Ex parte Antonucci*.⁴² In *Antonucci*, the court reviewed a trial court's denial of a motion to stay where Antonucci was being sued over alleged misconduct and was also the subject of a parallel criminal investigation for the same allegations. The court noted that since the trial court only considered the arguments of counsel and written evidentiary submissions (rather than live testimony), the review of the case was *de novo* for purposes of determining whether the trial court

exceeded its discretion. The court found that Antonucci "demonstrated that he reasonably apprehended a risk of self-incrimination if the civil action was allowed to proceed" due to the "significant overlap between the civil proceeding against Antonucci and the criminal investigation—both essentially focus on the same conduct." The court also found that Antonucci had not waived his Fifth Amendment privilege by his prior participation in discovery, since his participation consisted mainly of objections that did not disclose potentially incriminating testimony. Thus, Antonucci's petition was granted and the trial court's order denying the motion to stay was vacated.

Conclusion

In certain circumstances, a party to a civil action may assert the Fifth Amendment privilege against self-incrimination to obtain a stay of civil proceedings. A trial court has the discretion to stay the entire civil proceeding, to merely postpone all or some of the civil discovery, or to impose protective orders and conditions against one or more of the parties in the civil action. If the party does not have a reasonable apprehension of criminal prosecution, or if he files a post-conviction petition regarding the criminal charges, then that person cannot assert the privilege. ■

Endnotes

1. *U.S. Const.*, amend. V.
2. *Ala. Const.* 1901, art. I, § 6.
3. *Hill v. State*, 366 So. 2d 318, 322 (Ala. 1979).
4. In 1987, in *Ex parte McMahan*, 507 So. 2d 492 (Ala. 1987), the plaintiff in a civil matter had also been criminally indicted. The plaintiff sued the person who brought the criminal charges against him. After giving his own deposition, the plaintiff sought an order compelling the defendant to also submit to a deposition. On its own motion, the trial judge entered an order staying all forms of discovery until the criminal case was over. However, the plaintiff, the only party with a potential Fifth Amendment privilege claim, did not raise the issue.
5. *Baugh*, *supra*.
6. *Id.*
7. 775 So. 2d 146 (Ala. 2000).

8. 583 So. 2d 979 (Ala. 1991).
9. *Williams and Coastal, supra*. See also, *Ex parte Pegram*, 646 So. 2d 644 (Ala. 1994); and *Ex parte Hill*, 664 So. 2d 530 (Ala. 1996).
10. *Pegram, supra*.
11. *Baugh and Coastal Training, supra*.
12. *Ex parte Price*, 698 So. 2d 111, 112 (Ala. 1997) (referred to as *Price II* to distinguish it from another case with the same name, dealing with the same issue, and ruled on during the same year: *Ex parte Price*, 707 So. 2d 1105 (Ala. 1997) (*Price I*)).
13. *Ex parte Oliver*, 864 So. 2d 1064 (Ala. 2003).
14. *Baugh, supra*.
15. 871 So. 2d 776 (Ala. 2003).
16. The *Ebbers* court references federal cases after each of these points. These references have been omitted for the purposes of this article.
17. *Ebbers, supra* (quoting *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001)).
18. *Baugh, supra*; *Ex parte Great Escapes Travel, Inc.*, 573 So. 2d 278 (Ala. 1990); *Coastal Training, Price II and Williams, supra*.
19. *Coastal Training, supra*.
20. *Baugh, Coastal Training, Pegram and Price II, supra*.
21. *Baugh, supra*, and *Ex parte White*, 551 So. 2d 923 (Ala. 1989).
22. *Baugh, Coastal Training, Pegram and Hill, supra*.
23. *Baugh, White, Coastal Training, Hill, Price I, Price II, Williams, and Oliver, supra*.
24. *Baugh, White and Coastal Training, supra*.
25. *Baugh and Coastal Training, supra*.
26. *Id.*
27. *White, supra*.
28. *Coastal Training, Price II and Williams, supra*.
29. *Price I, supra*.
30. *Id.*
31. *White, Coastal Training and Williams, supra*.
32. *Coastal Training, Price II and Williams, supra*.
33. *Hill*, 674 So. 2d at 533.
34. *Baugh and Williams, supra*.
35. *Oliver, supra*.
36. *Ex parte Barden*, ___ So. 2d ___ (Ala. 2004).
37. ___ So. 2d ___ (Ala. Crim. App. 2004)
38. 768 So. 2d 417 (Ala. Crim. App. 1999).
39. *State v. Click*, 768 So. 2d 417, 420-22 (Ala. Crim. App. 1999)
40. *Id.*
41. *Ex parte State*, 768 So.2d 417 (Ala.Crim.App. 1999)
42. *Ex parte Antonucci*, ___ So. ___ (Ala. 2005).



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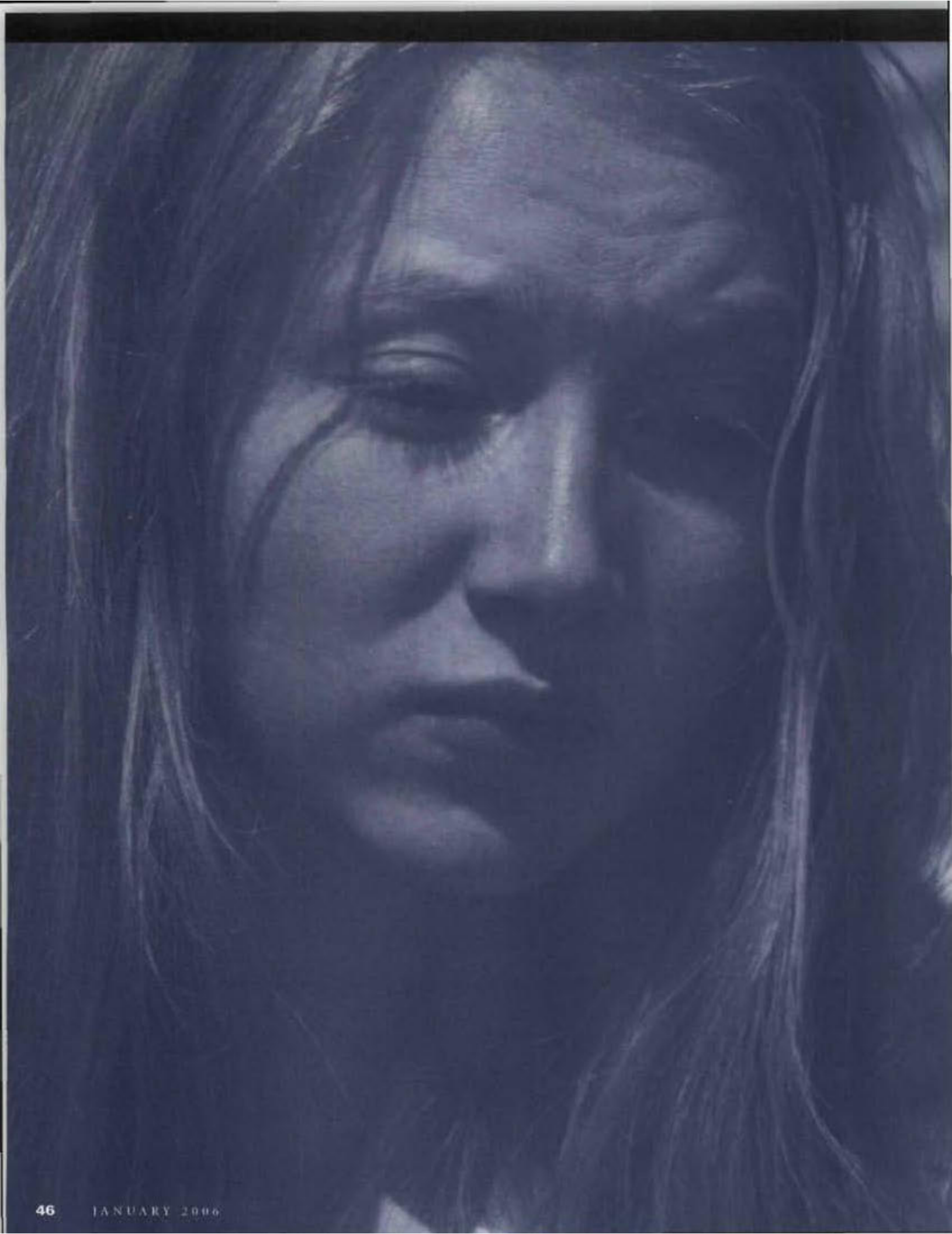
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PAINFUL FINDINGS: Determining the Availability of Mental Anguish Damages in Alabama

BY SUSAN E. MCPHERSON

At some point in their careers, whether representing the plaintiff or defendant, most lawyers will work a case where the plaintiff claims damages for mental anguish but has no physical injury.¹ In fact, for many litigation attorneys, such cases are actually quite common. Whether you need to creatively increase your client's recovery or just as creatively obtain a partial dismissal, Alabama law in this area can prove somewhat ambiguous, particularly in cases involving multiple claims and multiple parties. This article will provide an overview of the basic rules addressing the availability of mental anguish damages in Alabama and list the rules for several common causes of action where the plaintiff has suffered no physical injury.

Tort Claims

Somewhat counter-intuitively, the basic rule for tort claims is that damages for mental anguish may not be recovered where the plaintiff has suffered only damage to his or her property. As with most legal rules, however, an exception exists. The Alabama Supreme Court has held that damages for mental anguish may be had for injury solely to property where the tort has been "committed under circumstances of insult or contumely."² *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201, 1204 (Ala. 1999).³ Thus, where the defendant has sufficiently, and one would presume egregiously,⁴ insulted the plaintiff while damaging his property, the plaintiff may recover mental anguish damages. Note, however, that whether "the tort is committed under circumstances of insult or contumely is a question properly left to the determination of the jury." *Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509, 511 (Ala. 1986).

Negligence Claims

Although "Alabama law does not permit recovery of mental-anguish damages based on a claim of simple negligence where the negligent act or omission results in mere injury to property[.]" mental anguish damages may be recovered in specific circumstances. *Ex parte Grand Manor, Inc.*, 778 So.2d 173, 179-180 (Ala. 2000). For negligence actions, unlike other torts, Alabama courts apply the so-called "zone-of-danger" test to determine if plaintiffs may recover mental anguish damages where they have suffered no physical injury.⁵ Under this test, the plaintiff must have been placed "in immediate risk of physical harm" by the defendant's conduct.⁶ Note that it must have been reasonably foreseeable to the defendant that the plaintiff would be placed at risk by his conduct.⁷

In cases where there is a factual dispute about whether the plaintiff was actually in a zone of danger, the question is appropriate for jury determination, rather than for the trial judge. *City of Mobile v. Taylor*, 2005 WL 1414281 at *4 (Ala. Civ. App. June 17, 2005). The Alabama Court of Civil Appeals held in the *Taylor* case that in such circumstances, a jury instruction on the "zone of danger" test must be given in order "to provide the jury with the complete 'framework' of legal principles necessary for a determination of whether compensatory damages for mental anguish [can] appropriately be awarded."⁸

Fraud Claims

Damages for mental anguish have been held compensable in fraud cases, however, it is uncertain whether Alabama courts will

apply a specific test to make the determination.⁹ At least one case has seemingly applied the insult and contumely test for general tort claims.¹⁰ Note, however, that Justice Houston, in his concurring opinion in *Southern Bakeries, Inc. v. Knipp*, 852 So.2d 712 (Ala. 2002), discussed the most recent of these holdings, the *Spivey* case cited above, as it related to whether emotional distress/mental anguish damages are available for fraud. Justice Houston concluded that mental anguish damages were compensable where “sufficiently linked to other, legally cognizable injury.” *Id.* at 725. So far as this author can tell, the Alabama Supreme Court has not elaborated on Justice Houston’s statement.

Contract Claims

“An award of damages for mental anguish generally is not allowed in breach-of-contract actions in Alabama.” *Bowers v. Wal-Mart Stores, Inc.*, 827 So. 2d 63, 68-69 (Ala. 2001) (recognizing that in contract actions such damages are usually too remote, not contemplated by the parties, or not a natural result of a breach of the contract) (internal markings and citations omitted).¹¹ Exceptions are taken, however, where the breach of contract is tortious or “attended with personal injury,” and where the contractual duty is so related to “matters of mental concern or solicitude” or feelings, that a breach will necessarily cause mental anguish or suffering. *Id.* at 69.¹² For

example, as the supreme court noted in *Bowers* and also in *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991), mental anguish damages have been awarded for breach of contracts relating to: the habitability of a home;¹³ carriage; the delivery of baby where the child is still-born; the sale of a “lemon” vehicle; and deceased loved ones.¹⁴

Availability in Common Causes of Action

This section sets out a short list of common causes of action and the current availability of mental anguish damages pursuant to the rules discussed above where there has been no physical injury.

CAUSE OF ACTION	AVAILABILITY	RULE/AUTHORITY
Account Stated	Likely no.	No case or statutory law addresses. Courts would likely revert to the contract rules.
Open Account	Likely no.	No case or statutory law addresses. Courts would likely revert to the contract rules.
AEMLD	No.	See <i>White Consol. Indus., Inc. v. Wilkerson</i> , 737 So.2d 447 (Ala. 1999).
Bad Faith Failure to Honor Insurance Contract	Likely yes.	See <i>White Consol. Indus., Inc. v. Wilkerson</i> , 737 So.2d 447 (Ala. 1999). But see <i>Vincent v. Blue Cross-Blue Shield of Alabama, Inc.</i> , 373 So.2d (Ala. 1979).
Breach of Contract	No, with exceptions.	The general rule is no, however exceptions apply in the following situations: 1) a tortious breach or breach attended with physical injury, or 2) the duty is so coupled with matters of mental concern, solicitude or feelings that the will necessarily cause mental anguish or suffering. See <i>Sexton v. St. Clair Fed. Sav. Bank</i> , 653 So. 2d 959 (Ala. 1995).
Breach of Express Covenant	Likely no.	No case or statutory law addresses. Courts would likely revert to the contract rules. But note <i>Wyatt v. Adair</i> , 215 Ala. 363, 110 So. 801 (Ala. 1926) (allowing mental anguish damages for breach of “implied covenant not to rent to negroes”). Although the <i>Wyatt</i> case has not been overruled, the opinion is premised on racial biases which have been wholly, and this author believes rightfully, abandoned by the courts.
Breach of Express Warranty	No, with exceptions.	Generally no, however, the breach of contract exceptions apply. See <i>Bowers v. Wal-Mart Stores, Inc.</i> , 827 So. 2d 63, 68 (Ala. 2001).
Breach of Lease	Likely no.	No case or statutory law addresses. Courts would likely revert to the contract rules. Note, however, the closely related cases dealing with conversion of personal property related to wrongful termination of lease.
Civil Conspiracy	Uncertain.	No case or statutory law addresses. Courts would likely revert to the rule applicable to underlying cause of action.
Conversion & Theft	No, with exception.	Generally no, however the insult and contumely exception likely applies. See <i>Williford v. Emerton</i> , 2004 WL 596165 (Ala. 2004) (finding sufficient evidence to support compensatory damage award for conversion where evidence of mental anguish); <i>New Plan Realty Trust v. Morgan</i> , 792 So.2d 351 (Ala. 2000) (same, where lessor disposed of lessee’s personal property before lease ran, seemingly applying insult or contumely exception).
Breach of Fiduciary Duty	Uncertain.	No case or statutory law addresses.
Fraud	Likely yes.	Has been held compensable, but there is no clearly articulated test. See, e.g., <i>First Commercial Bank v. Spivey</i> , 694 So.2d 1316 (Ala. 1997); <i>Reinhardt Motors, Inc. v. Boston</i> , 516 So. 2d 509, 511 (Ala. 1986).
Legal Malpractice	Likely no.	See <i>Boros v. Baxley</i> , 621 So.2d 240 (Ala. 1993) (but note language indicating that mental anguish may be had in instances of “affirmative”).
Malicious Prosecution	Yes.	See <i>White Consol. Indus., Inc. v. Wilkerson</i> , 737 So.2d 447 (Ala. 1999).
Negligence	Yes, when criteria met.	Zone-of-danger test applies. See <i>Wal-Mart Stores, Inc. v. Bowers</i> , 752 So. 2d 1201, 1203 (Ala. 1999).
Negligence <i>Per Se</i>	Likely yes.	No case or statutory law addresses. Courts would revert to the negligence rules.
Negligence (<i>Res Ipsa Loquitur</i>)	Likely yes.	No case or statutory law addresses. Courts would likely revert to the negligence rules.
Negligent Hiring, Supervision, Retention	Likely yes.	No case or statutory law addresses. Courts would likely revert to the negligence rules.
Nuisance	No, with exception.	Insult and contumely exception applies. See <i>Wal-Mart Stores, Inc. v. Bowers</i> , 752 So. 2d 1201, 1204 (Ala. 1999); <i>Harris v. Birmingham Hide & Tallow Co., Inc.</i> , 589 So. 2d 150, 151 (Ala. 1991).
<i>Quantum Meruit</i>	Likely no.	No case law directly addresses, but courts would likely revert to the contract rules. Cause of action seems only to contemplate pecuniary damages.
Outrage	Yes.	By nature, the elements of outrage include emotional distress.
Slander of Title	Likely no.	The cases seem to contemplate only special damages as part of the elements of the cause of action.
Trespass	No, with exception.	Insult and contumely exception applies. See <i>Harris v. Birmingham Hide & Tallow Co., Inc.</i> , 589 So. 2d 150, 151 (Ala. 1991); <i>Jeffries v. Bush</i> , 608 So. 2d, 363 (Ala. 1992).
Unjust Enrichment	Likely no.	The cause of action is equitable, no case or statutory law addresses.
Wantonness	Uncertain.	Courts generally address punitive damages instead.
Wanton Hiring, Supervision, Training	Uncertain.	Courts generally address punitive damages instead.
Waste	Likely no.	The cases contemplate only pecuniary damages for diminution in value.

Other Rules

Whatever cause of action you are working with, remember that before mental anguish damages may be awarded, the court must determine and the plaintiff must prove that the plaintiff has actually suffered mental anguish.¹⁵ If there are multiple plaintiffs in the case, there must be evidence of mental anguish as to each plaintiff. Mental anguish suffered by one plaintiff is not sufficient to support a damage award for a different plaintiff, even in situations where the plaintiffs are closely related.¹⁶ Note that when the plaintiff presents proof of mental anguish, whether he or she suffered, and the amount of any award are fact questions for a jury to determine.¹⁷ Finally, note that where a defendant acts willfully and maliciously, the plaintiff may be entitled to recover damages for mental anguish alone.¹⁸ ■

Endnotes

1. This article does not address the availability of damages for mental anguish in cases where the plaintiff seeking such damages has suffered physical injury.

2. *Black's Law Dictionary* defines "contumely" as follows: "Insulting language or treatment; scornful rudeness." BLACK'S LAW DICTIONARY (8th ed. 2004).
3. See also *New Plan Realty Trust v. Morgan*, 792 So. 2d 351, 364 (Ala. 2000); *Harris v. Birmingham Hide & Tallow Co., Inc.*, 589 So. 2d 150, 151 (Ala. 1991).
4. See *Harris*, 589 So. 2d at 151.
5. See *City of Mobile v. Taylor*, 2005 WL 1414281 at *2 (Ala. Civ. App. June 17, 2005).
6. See, e.g., *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201, 1203 (Ala. 1999) (internal citations and markings omitted) (noting that the insult and contumely exception does not apply to cases of negligence).
7. See *Ex parte Grand Manor, Inc.*, 778 So.2d at 179; accord *Taylor*, 2005 WL 1414281 at *3.
8. *Taylor*, 2005 WL 1414281 at *4.
9. See *First Commercial Bank v. Spivey*, 694 So.2d 1316 (Ala.1997). Note also *Clare v. State*, 456 So.2d 355, 356 (Ala.Crim.App., Jul 19, 1983) ("In a civil action for fraud . . . recovery may be had for the ordinary, natural and proximate consequences of the fraud including mental suffering").
10. See *Reinhardt Motors*, 516 So. 2d at 511.
11. See also *Sexton v. St. Clair Federal Savings Bank*, 653 So. 2d 959 (Ala. 1995).

12. See also *Wellcraft Marine v. Zarzour*, 577 So. 2d 414, 418-419 (Ala. 1990).
13. See also *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959 (Ala. 1995).
14. *Bowers*, 827 So. 2d at 69-70; *Dillard*, 579 So. 2d at 1304.
15. See *Ex parte Grand Manor, Inc.*, 778 So.2d 173, 179 (Ala. 2000); *George H. Lanier Memorial Hospital v. Andrews*, 2004 WL 2634289 at *10 (Ala. Nov. 19, 2004).
16. See *Grand Manor*, 778 So.2d at 179-180; *City of Mobile v. Lester*, 804 So. 2d 220, 229-230 (Ala. Civ. App. 2001); *Lanier*, 2004 WL 2634289 at *10; *Taylor*, 2005 WL 1414281 at *3.
17. See *Bowers*, 827 So. 2d at 69; *Dillard*, 579 So. 2d at 1304; *Lanier*, 2004 WL 2634289 at *10.
18. See *Holcombe v. Whitaker*, 318 So.2d 289 (Ala. 1975); *Lanier*, 2004 WL 2634289 at *10.

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By Robert L. McCurley, Jr.

2006 Regular Session

The 2006 Regular Session of the Alabama Legislature begins Tuesday, January 10 and must adjourn no later than Monday, April 24.

The following are major revisions prepared by the Law Institute which are pending before the Alabama legislature.

The Trust Code

The trust law in Alabama, as well as the rest of the country, has predominately been established by common law, best representative in the Restatement in the Law of Trusts. Alabama currently has, as do other states, various statutes governing some aspects of trust law, but this is the first comprehensive codification of the trust law in Alabama.

The Trust Code does not try to incorporate a set of detailed rules for every conceivable kind of trust, nor does it incorporate all the kinds of trusts there are. It does contain a set of basic default rules that fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part because the terms of a trust instrument will govern, even if inconsistent with the statutory rules.

The Trust Code is divided into 12 articles, which are as follows:

Article 1 - General Provisions and Definitions

Article 2 - Judicial Proceedings

Article 3 - Representation

Article 4 - Creation, Validity, Modification and Termination of a Trust

Article 5 - Creditor's Claim, Spendthrift and Discretionary Trusts

Article 6 - Revocable Trusts

Article 7 - Office of Trustee

Article 8 - Duties and Powers of the Trustee

Article 9 - Prudent Investor Rule

Article 10 - Liability of Trustees and Rights of Persons Dealing with the Trustee

Article 11 - Miscellaneous Provisions

Article 12 - Pre-existing Alabama Trust Statutes

The Uniform Trust Code has already been adopted in 15 states.

Alabama Securities Act

There are two concurrent security regulation regimes. One is in the federal level and one in the state level. Recent investment fraud cases, as *Health South*, *Enron* and *WorldCom*, brought both federal and state securities law into review. The federal government reacted with the passage of the National Security Markets Improvement Act and the *Sarbanes-Oxley* federal law.

Alabama's current securities law is 50 years old with only a few modifications made 15 years ago. The new Act is designated to coordinate federal and state securities regulation. It will give Alabama a regulatory and enforcement authority and voids duplication of effort by blending the federal regulation in enforcement to provide a stronger securities regulatory framework and protection for investors.

The Act provides a basic law for registration of security issues, brokers-dealers and investment advisors, along with the enforcement powers for the Alabama Securities Exchange Commission.

Alabama Election Code

Alabama's Election Law evolved since the 1852 *Alabama Code* from paper ballots, to machine voting, to electronic voting, with all three processes having separate voting procedures that remain today. The law was more complicated by the passage of the federal "Help America Vote Act," the Secretary of State's Administrative Rules and the Attorney General's Opinions, which interpret the various statutes and rules. This complete reorganization of Title 17 has simplified the current law by conforming all the laws, rules and opinions to electronic voting machines to make sure the law coincides with voting procedures today. An Institute committee of legislators, lawyers, probate judges, sheriffs, clerks, and representatives from the Secretary of State's Office, County Commission, League of Municipalities, Attorney General's Office, and political parties have produced a revision that doesn't include substantive changes.

The house Constitution and Elections Committee has further reviewed substantive matters and is also proposing changes that will:

1. Permit poll workers to work split shifts;
2. Authorize the appointing boards to appoint alternate poll workers only to work where the regular poll workers are unable to serve on Election Day;
3. Require the computer systems monitoring election results to remain online until all polling places have closed;
4. Permit automatic election recounts if a ballot measure passes by less than one-half of one percent. Currently, recounts are only for candidates;
5. Require the County Board of Registrars and the elections division of the Secretary of State's Office to remain open during polling hours of any statewide election to provide assistance to election officials in regard to the voters' registration list;
6. Strike from the voter identification list the use of Social Security cards as an acceptable form of identification, this being for voter identification theft; and
7. Provide a ballot security procedure for recounts.

These bills will be presented separately from the election's code but were all uncontroversial during the 2005 Session.

Residential Landlord Tenant Act

This bill will again be presented to the legislature to provide for a delineation of landlord obligations and tenant obligations as well as to provide remedies for a violation of the lease.

Alabama is one of only two states in the nation that does not currently have a Landlord/Tenant Act. The law being presented to the legislature is similar to that in effect in 20 states, including Tennessee, Florida, Mississippi, South Carolina, Kentucky, and Virginia.

Mortgage Satisfaction Act

The Mortgage Satisfaction Act, the Business Entities Code and the Apportionment of Estate Taxes are all new acts currently being completed by the drafting committees of the Law Institute and will be discussed in a future *Alabama Lawyer* article.

Robert E. Perry

Mechanical Engineer

Expert Witness

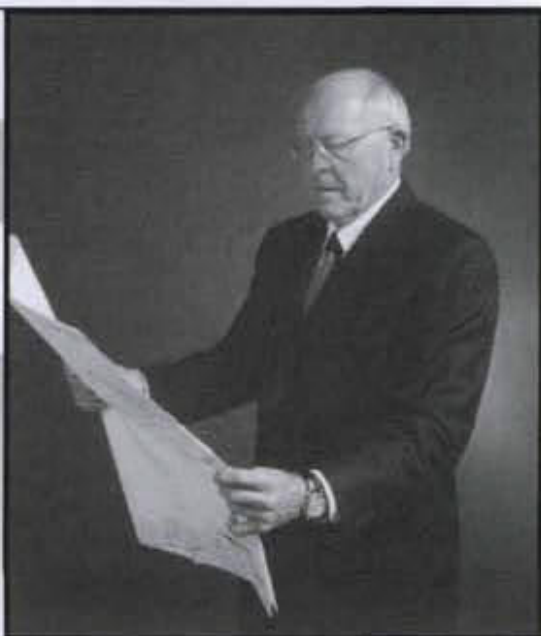
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Election 2006

Once every 12 years there are great numbers of elected officials running at the same time. There will not be this many running at the same time again until 2018.

Election

- April 7, 2006 - Last Day for Filing Declaration of Candidacy
- June 6, 2006 - Primary Election
- June 27, 2006 - Primary Run-Off
- November 7, 2006 - General Election

Offices Up for Election

- Governor
- Lt. Governor
- Secretary of State
- Attorney General
- All state senators
- All state house of representatives
- All U. S. representatives
- Five supreme court justices
- Three civil appeals judges
- Three criminal appeals judges
- All probate judges
- All circuit clerks
- All sheriffs
- Various circuit and district judges

LaVeeda Morgan Battle

We are pleased to announce that LaVeeda Morgan Battle, an attorney practicing in Birmingham, is now working two days per week with the Law Institute. Battle has been counsel to the senate Judiciary for the last five years. She is a member of the American Bar Association and served on the committee to review nominees for the federal bench and the U. S. Supreme Court for the ABA. Further, she is a former Clinton appointee to the Legal Services Corporation Board and a graduate of the University of California, Davis Law School.

For more information on 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, phone (205) 348-7411, or visit our Web site at www.ali.state.al.us. ■

Robert L. McCurley, Jr.

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

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

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Fall 2005 Admittees



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STATISTICS OF INTEREST JULY 2005 EXAM

Number sitting for exam.....	524
Number certified to Supreme Court of Alabama.....	375
Certification rate*.....	71.6 percent

Certification Percentages

University of Alabama School of Law.....	97.1 percent
Birmingham School of Law.....	26.7 percent
Cumberland School of Law.....	88.1 percent
Jones School of Law.....	67.3 percent
Miles College of Law.....	10.3 percent

*Includes only those successfully passing bar exam and MPRE

Alabama State Bar Fall 2005 Admittees

Adams, Peter Cabell
Alexander, Amy Lynne
Alfreds, Matthew Bruce
Allen, Christopher Edward
Allen, Jennifer Leigh
Annable, Zachery Zigmond
Averitt, Hannah Vaughan
Averitt, James Ikerman
Bacak, Brooke Jones
Baggett, Evan Patrick
Baity, Shenavia LaSha
Baker, Kristy Nicole
Baker, LaKeshia Apriel
Barber, Robert Norman
Barge, Rodrick Jermaine
Barger, Jr. James Fredrick
Barkley, Justin Anthony
Barnett, Shauna Renee
Bauer, Mary Catherine
Bauer, Matthew John
Benschoter, Amy Elizabeth
Blackburn, Kevin Wayne
Blackburn, Stephanie Charlene
Bledsoe, Jason Matthew
Blossom, Rashad Labrucliff
Blount, Ryan Gregory
Bolger, Bethany Lynn
Bondurant, Stacy Cameron
Bonner, William Earl
Borden, Alexia Bowers
Borden, Gray Michael
Borel, Cassius Ricardo Paul
Borelli, Anne Elisabeth
Botop, Jason Christopher
Boudreaux, Crystal Skantz
Boutwell, Christopher Don
Boyd, Allison Scarbrough
Boyd, Joy Anne
Bradford, Melanie Bean
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Brewington, Andrea Jeanne
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Coleman, LaShetta Shonta
Collins, Deaver Hiatt
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Coxwell, William John Nelson
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Daetwyler, David Alan
Dalton, Rodney Joe
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Davis, Thomas Logan
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Dowdy, Mark Alan
Dube, Leah Fuller
DuBois, Lori Erin
Dugas, Tanya Elizabeth
Dukes, Matthew Thornton
Elebash, William Lee

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Eubanks, Melinda Mims
Eubanks, Rebecca Crawford
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Fonteneau, Kira Yalon
Fowler, Dustin Judd
Fowlkes, Robert Harris
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Friday, Eric Jeston
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Geller, Joshua Mark
Gilchrist, Wesley Bowen
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Long, Deborah Lynn
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Marlow, Anna Lane
Martin, Stephanie Allison
Mataya, Mitchell Mark
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Mayer, Mara Lynne
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McCarthy, Thomas Michael
McClain, Shawnte' Denise
McFarlin, Dexter Lane
McGinley, Rachel Lee
McGuirk, James Edward Douglas
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Sanders, Orby Dan
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Self, Johnny Ross
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Smith, III Julian Houston
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Torbert, Allison Grimm
Town, John Edward
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Upchurch, Robert Garner
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Wallis, Jenifer Champ
Ward, Jennifer Leigh
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Weldon, Adam Shane
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Williams, Reginald Lewis
Williams, Tyler DeWitt
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Wilson, Jonathan Bradley
Worrell, Leslie Dawn
Wren, Onwotta Tameka
Yates, III Thomas Theodore
Young, Warren William
Yunker, Tosha Huffman
Zanaty, Timothy Harper
Zimmerman, Suzanne Marie

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*Andrew Maddox Thornley (2005), Brent Thornley (1974), Scott Thornley (2003)
Admittee, father, brother*



*Leah Moren Green (2005),
Arthur Green, Jr. (1965)
Admittee, father*



*Jason Ellis Gammons (2005), Robert C.
Gammons (1977) Admittee, father*



*Tabor R. Novak, III (2005), Tabor R.
Novak, Jr. (1970) Admittee, father*



*Shannon Nolan Connor (2005), James N.
Nolan (1978) Admittee, father*



*John Day Peake, III (2005), John Day
Peake, Jr. (1983) Admittee, father*



*Katherine Anne Rogers (2005), Robert
Rogers (1976) Admittee, father*



*Matthew Bruce Alfreds (2005), John
Thomas Kirk (1972) Admittee, stepfather*

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*William Henry Robertson, V (2005), Alyce S. Robertson (1995),
Ret. Judge William H. Robertson, IV (1969), Lynda Knight Woodall (1976),
Hon. William Thomas Gaither, Sr. (1978),
Admittee, sister, father, cousin, father-in-law*



*David Johnson (2005), Judge Albert
Johnson (1980) Admittee, father*



*Jenifer Champ Wallis (2005), J. Rick Wallis (1999), Kenneth D. Wallis, II (1968)
Admittee, husband, father-in-law*



*Charles Howard Grisham, Jr. (2005),
Charles Howard Grisham (1978)
Admittee, father*



*Huey Thomas Wells, III (2005), Lynlee Wells Palmer (2001),
H. Thomas Wells, Jr. (1975), Lynn McKenzie (1985)
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Brinkley, Sr. (1974) Admittee, father*

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Herman Warren Cobb (1968)
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*Brooke Whisonant Patterson (2005),
Michael Wayne Whisonant (1980)
Admittee, father*



*Jenna Smith Stephens (2005),
Craig Stephens (1997)
Admittee, husband*



*Robert Francis Lamkin (2005), Anne Lamkin Durward (1995),
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*Reginald Lewis Williams (2005),
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Sarah Carlisle Pflaum (2004)
Admittee, sister*



*Onwotta Tameka Wren (2005),
Samuel E. Wiggins, III (1992)
Admittee, brother*



*James Allen Sullivan, Jr. (2005)
James Allen Sullivan, Sr. (1977)
Admittee, father*



*Seth Howell Donaldson (2005),
Ray E. Donaldson (1999)
Admittee, father*



*Nathan Andrew Dickson, II (2005),
Lynn Jinks (1974)
Admittee, father-in-law*



*Ashley Grier White (2005),
Joshua Byron White (2003)
Admittee, husband*



*Christopher Michael McIntyre (2005),
Marilyn May Hudson (2003)
Admittee, mother*

Lawyers in the Family



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Robert E. Upchurch (1977)
Admittee, father*



*Darren William Kies (2005),
Kathleen Kies DeMaria (2000)
Admittee, cousin*



*Evan Patrick Baggett (2005),
Mark Baggett (1979)
Admittee, father*



*Kevin Lynn Weaver (2005), Amy Lynne Alexander (2005), James P. Alexander (1969)
Admittee-fiancé, admittee-fiancée, father-in-law/father*



*Laura Elizabeth Hancock (2005),
Julia A. Hatley (2005)
cousin co-admittees*



*Everette Tedford Taylor, Jr. (2005), Everette Tedford Taylor, Sr. (1966), Leah O. Taylor (1983),
Tracy T. Sproule (1996), R. Gordon Sproule, Jr. (1996), George P. Walthall, Jr. (1974)
Admittee, father, stepmother, sister, brother-in-law, uncle*



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John E. Medaris (1977)
Admittee, father*

Lawyers in the Family



*Amelia Gail Tait (2005),
James Edwin Tait (1979)
Admittee, father*



*James Wallace Porter, III (2005),
James Wallace Porter, II (1974)
Admittee, father*



*Charles Zackery Moore (2005),
Judge Craig Miller (1966)
Admittee, stepfather*



*Arden Reel Pathak (2005),
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cousin co-admittees*



*James Edward Hill, III (2005),
Judge James E. Hill, Jr. (1975)
Admittee, father*



*Stephen Wright Still, Jr. (2005),
Stephen Still (1978)
Admittee, father*



*David Forrest Lasseter (2005),
Earle Forrest Lasseter (1966)
Admittee, father*



*William John Nelson Coxwell (2005), J. Milton Coxwell, Jr. (1974),
Katharine W. Coxwell (1996)
Admittee, father, mother*

Lawyers in the Family



*Lori Schultz Grayson (2005),
William Claude Grayson (2005)
wife and husband admittees*



*Eric Neal Snyder (2005),
Aundrea Mann Snyder (2005)
husband and wife admittees*



*Ashley Elizabeth Calhoun (2005),
Judge John C. Calhoun (1972)
Admittee, father*



*Sean Frederick Hampton (2005),
Mary Ann Hampton (1998)
Admittee, mother*



*Robert Ryan Daugherty (2005),
Ann Marie Daugherty (2002)
Admittee, wife*



*Charles Ervin Mauney, Jr. (2005),
Charles E. Mauney, Sr. (1976)
Admittee, father*



*Frances Ross Nolan (2005),
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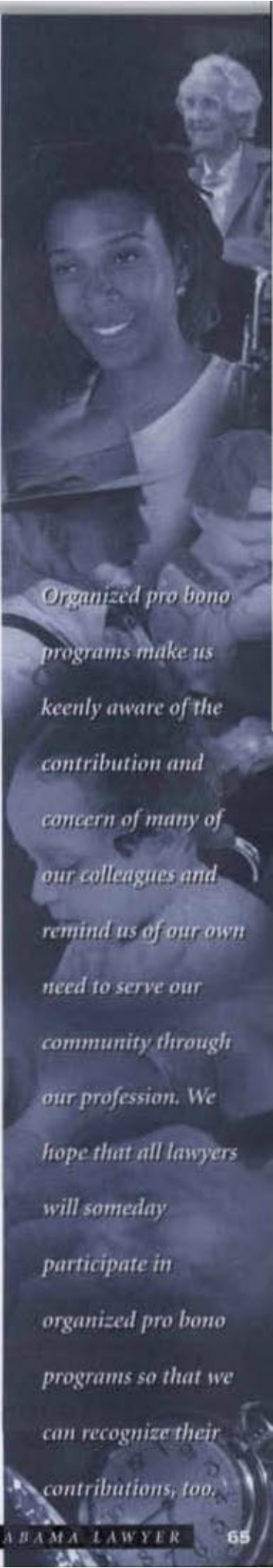
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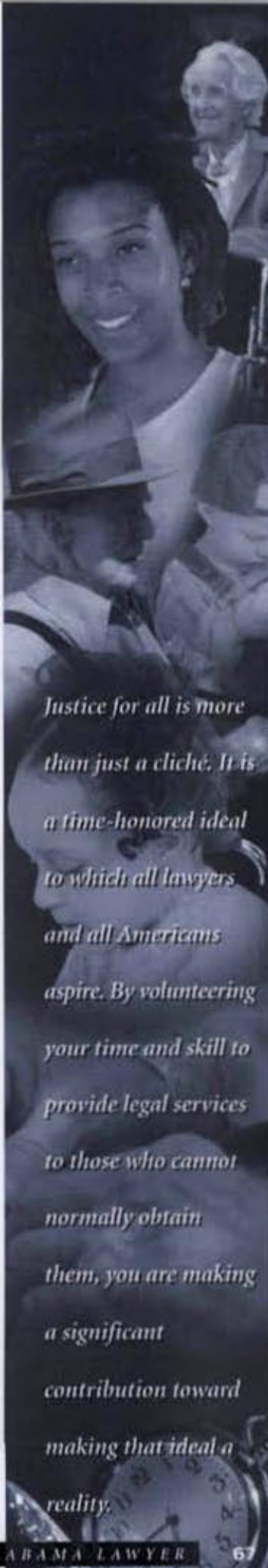
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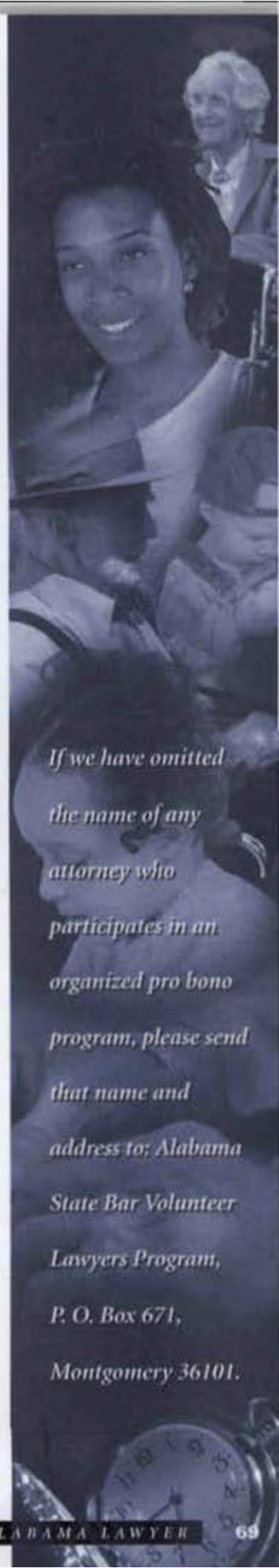
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By J. Anthony McLain

Lawyer as a Witness

Question:

"In June 1988, Ms. S came to me for advice in regard to her work-related injury while in the employ of Company One on or about February 4, 1988. During the course of my representation of Ms. S, facts came to my attention which would indicate that she was harassed by the employer and, more particularly, its plant nurse. I had a number of conversations with the attorney for Company One, the personnel manager for Company One, a rehabilitation nurse hired by the workers' compensation carrier, and two employees of the workers' compensation carrier concerning my client's medical condition and the fact that I thought she was being harassed by the plant nurse. On two or three occasions, I was contacted by the personnel manager of the company who desired to know when my client would be returning to work. He was quite insistent upon obtaining this knowledge because he said he needed to make provisions for replacing her if she would not be back and needed to take care of other administrative matters. Based on information that I obtained, I wrote the personnel manager a letter stating that my client would not be returning to work because of the recommendations of her doctors concerning her medical and mental condition resulting from her injury.

"Upon receiving my letter, the personnel manager mailed to me a letter stating that he considered that my client had

quit. To my knowledge, I had no further contact with the personnel manager after this point. On August 28, 1989, I, along with co-counsel, brought a suit against Company One on behalf of Ms. S in the Circuit Court of ABC County. The suit alleged injuries compensable under the workers' compensation law of the state of Alabama and also stated a claim for wrongful discharge or termination under the same workers' compensation act. These two causes of action were later severed for separate trial. A jury trial was requested by the plaintiff for the cause of action based upon wrongful termination.

"During the course of discovery, the deposition of the personnel manager, Mr. G, was taken by the plaintiffs. At the deposition, Mr. G made the following statement when asked about a conversation that he had with me:

"Page 132, Lines 13 & 14: Q. 'Okay. Do you recall anything else that was said in those discussions?'

"Page 132, Lines 15 & 16: A. 'The only thing that I remember specially that Lawyer X told me was when she quit.'

"Page 132, Lines 17, 18 & 19: Q. 'And what was that?' A. 'That, in essence, Ms. S has quit and she will not be returning to work.'

"Subsequently, the defendant, Company One, noticed my deposition and it was taken in part but not concluded on the 6th of March 1991.

"At my deposition, counsel for the defendant raised questions about the propriety of my continuing to represent my

client and testifying at the trial of the case and cited Disciplinary Rule 5-101(B) of the *Code of Professional Responsibility* of the Alabama State Bar. I have consistently maintained to the attorneys for the defendants and the court that based upon the discovery that we have had to date it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workers' compensation nurse or the employees of the insurance carrier testified as to matters that were discussed between us prior to the instigation of the lawsuit and that such testimony was contrary to my understanding of our conversation. I have not heard anything to date that would lead me to believe that I would be called

as a witness for the plaintiff in the case in chief or for impeachment purposes against defendants' witnesses. My feeling is that the only testimony I might give would be for impeachment of one of the defense witnesses previously mentioned if they were to change their testimony or testify to facts that were contrary to my memory of said communications.

"Because the defendants have made various remarks concerning the propriety of my representing my client and testifying as a witness at the trial I would appreciate it very much if you could answer the following questions:

"1. First, may I continue to represent Ms. S throughout the remaining discovery procedures in this case?

"2. May I represent Ms. S at the trial of the wrongful discharge action and/or workers' compensation action?

"3. If I am called upon to give testimony to impeach defendants' witnesses concerning my communications with them, would I be required to withdraw?

"4. If it becomes apparent that I may be called upon for the sole purpose of impeaching testimony given by the defendants' witnesses concerning whether or not the plaintiff voluntarily terminated her employment, may I continue as her attorney and give such testimony or am I required to withdraw at that point?

"5. If the defendants call me as a witness, would I be required to withdraw?"

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Answer, Question One:

Yes, the lawyer witness rule is not applicable to the pre-trial phase of litigation.

Answer, Question Two:

You may represent Ms. S at the trial of the workers' compensation action since it is "unlikely" that you would be a "necessary witness." The answer to your question concerning the representation of Ms. S at the trial of the wrongful discharge action is contained in three, four and five below.

Answer, Questions Three, Four and Five:

You must withdraw from the representation of Ms. S in the wrongful discharge action, if, at trial, you are called upon to

testify concerning whether or not the plaintiff voluntarily terminated her employment, unless withdrawal at that point would work a substantial hardship on your client. Your withdrawal in this instance would be mandated without regard to which party called you as a witness. Your disqualification in this matter, however, would not extend to co-counsel or other members of your firm.

Discussion:

Rule 3.7 of the *Rules of Professional Conduct* of the Alabama State Bar, effective January 1, 1991, continues the traditional and well-established proposition that a lawyer who represents a client in a litigated matter may not also appear in that matter as a witness. Rule 3.7 provides as follows:

"3.7 Lawyer As Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9."

The prior lawyer witness rules, DR 5-101(B) and DR 5-102, contained the somewhat vague language regarding the conditions that would lead to disqualification,

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i.e., when a lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness." The effect of this language in some instances caused counsel to be disqualified on mere speculation. The language in new Rule 3.7 is more carefully drawn requiring withdrawal only when the lawyer is "likely" to be a "necessary" witness. Consequently, the decision to withdraw can, in good faith, be delayed to a time closer to the date of the trial. At that point, the lawyer would then determine whether his continued representation at trial would be permitted under any of the three exceptions in 3.7(a).

The third exception [3.7(a)(3)] to the lawyer witness rule is the most important because it permits an equitable balancing of the interests of the parties. Consequently, a lawyer may continue as an advocate at trial even though he is a witness if the harm to his client caused by his withdrawal is not outweighed by the harm to the opposing party. This exception is similar to the exception found in DR 5-101(B)(4) but less restrictive. The language in DR 5-101(B)(4) permitted a lawyer to continue as an advocate at trial if his disqualification would "work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in a particular case." The new language permits a balancing of the equities without tying substantial hardship to the distinctive value of the lawyer.

Finally, Rule 3.7(b) makes it clear that the disqualification is personal and is not imputed to other members of the lawyer's firm. Thus, a solution, and a factor, in balancing the equities involved in disqualification is to permit another lawyer in the firm to continue the trial should that become necessary.

In the fact situation that you pose you state, "I have consistently maintained to the attorneys for the defendants and the court that based upon the discovery that we have had to date, that it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workers' compensation nurse or the employees of the insurance carrier testified as to matters that were dis-

cussed between us prior to the instigation of the lawsuit and that such testimony was contrary to my understanding of our conversation." In view of your uncertainty concerning whether it will be necessary that you be a witness, you may delay a withdrawal decision to such time that any uncertainty is resolved. It should be noted that it does not become "necessary" that a lawyer be a witness simply because the opposing party asserts that the lawyer has knowledge that might be relevant. If, in fact, it does become "necessary" that you be called as a witness, whether before trial or during trial, then you must withdraw as counsel at the trial unless your testimony relates to an uncontested issue or withdrawal would cause a substantial hardship on your client. In this regard, if possible, you should prepare co-counsel to proceed with the trial should it become necessary for you to be a witness. [RO-1991-19] ■



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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.

About Members

John R. Campbell, formerly of Kettell & Campbell LLC, announces the establishment of John R. Campbell LLC Attorney at Law at 229 East Side Square, Huntsville 35801. Phone (256) 534-0407.

G. Whit Drake announces that Elizabeth Shaw has left the firm and the firm name has changed to Drake Law Firm.

Stanley Foy, formerly an administrative law judge with the Alabama Public Service Commission, announces the opening of his office at P. O. Box 240385, Eclectic 36024. Phone (334) 857-2118.

Jennifer Gray announces the opening of her office at 109-A N. Jefferson Street, Suite 8, Huntsville 35801. Phone (256) 533-1874.

William B. Lloyd announces the opening of his office at 3800 Colonnade Parkway, Suite 340, Birmingham 35243. Phone (205) 969-6235.

Among Firms

The Alabama Board of Pardons and Paroles announces the appointment of Dana Lea Pittman as an assistant attorney general.

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Armstrong & Gray PC announces that April Lancaster Logan has joined the firm as an associate.

Atchison Firm PC announces that Donald G. Beebe has become *of counsel*.

Bainbridge, Mims, Rogers & Smith LLP announces that Rebecca Crawford Eubanks and Celeste Crowe Grenier have become associated with the firm.

Balch & Bingham LLP announces that Rich Sanders and Joseph C. Mandarino have been named partners, and Walter H.C. McKay, Kelly F. Pate and Joseph Seawell Moore have been named associates.

Bonner Landreau Kingrea LLC announces that David R. Anderson has joined the firm *of counsel*.

Michael D. Boyle, formerly of the Law Offices of Michael D. Boyle, announces that he has closed his office and joined the legal staff of the City of Montgomery as an associate attorney.

Brad Almond and Randy Cheshire announce the opening of Almond & Cheshire LLC, with offices at 2829 7th Street, Tuscaloosa 35401. Phone (205) 349-5004.

Bradford Law Firm PC announces that Shane T. Sears has become a shareholder and that Evan P. Baggett and Jereme C. Logan have joined the firm as associates. The firm name has changed to Bradford & Sears PC.

Bradley Arant Rose & White LLP announces that Laura Bauer, Marshall Crutcher, Amelia Driscoll, Brooke Everley, Matt Goforth, Michael Huff, Elizabeth Mitchell, Sarah Katherine Nichols, Jeremy Pope, Aimee Pruitt, Britt Seal, Katie Suttle, Darrell Tucker, Michael Walker, and Ashley White have joined the firm as associates. N. Christian Glenos has joined the firm as a partner.

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About Members, Among Firms

Continued from page 77

The Law Firm of Richardson Callahan LLP of Huntsville announces its merger with Paul W. Frederick and the formation of Richardson Callahan & Frederick LLP. The firm also announces that W. Brad English is now a partner, and that Christopher C. Schwan has joined the firm as an associate.

Capell & Howard PC announces that Arden Reed Pathak has become an associate.

The Cochran Firm announces that Byron Perkins has become a partner.

Ray E. Donaldson and Seth H. Donaldson announce the opening of Donaldson & Donaldson Attorneys At Law LLC, 132 N. Gay Street, Suite 201, Auburn 36831. Phone (334)501-7804.

Virginia Wiggs Haas PC announces that Alison Baxter Herlihy has become associated with the firm.

Feld, Hyde, Wertheimer, Bryant & Stone PC announces that James C. Reilly has joined the firm of counsel, and Harvey A. Hutchinson, III has joined as an associate.

James E. Fleenor, Jr., Harlan F. Winn, III, Wilson F. Green, Robert E. Battle, and Michael J. Clemmer announce the formation of Battle, Fleenor, Green, Winn & Clemmer LLP, with offices at

1150 Financial Center, 505 N. 20th Street, Birmingham 35203. Phone (205) 397-8160.

Hand Arendall announces that Stephen Fitts and Jeff Graveline have joined the firm as associates. Both attorneys will practice in the Birmingham office.

Harris, Caddell & Shanks PC announces that Matthew T. Dukes has joined the firm as an associate.

Ford & Harrison LLP announces that Marion F. Walker has joined the firm as senior counsel.

Gaines, Wolter & Kinney PC announces that Aubrey J. Holloway, Ronald J. Gault, Wendy F. Pope, Peter M. Wolter, and Davis A. Barlow have become partners, and Ashley T. Robinson, David E. Miller, Jr., Ashley E. Manning, Shelley D. Lewis, M. Elizabeth McIntyre, and Travis G. McKay, Jr. have joined as associates.

Huie, Fernambucq & Stewart LLP announces that Gordon J. Brady, III, Jeremy S. Hazelton and J. Brannon Maner have joined as associates.

Ivey & Ragsdale announces that Donna Wesson Smalley has joined the firm's Jasper office as an associate.

Leitman, Segal & Payne PC announces that R. Mike Conley has joined the firm as a shareholder.

Kendall W. Maddox and Jennifer Q. Griffin, formerly of Dempsey, Steed, Stewart, Maddox & Gaché, LLP, announce the opening of Kendall Maddox & Associates LLC, 2550 Acton Road, Suite 210, Birmingham 35243. Phone (205) 977-9045.

Miller, Hamilton, Snider & Odom LLC announces that Beverly P. Baker, Roger A. Brown, Wendi M. Brown, Karen B. Johns, W. Kyle Morris, Hugh C. Nickson, James A. Patton, Glennon E. Threatt, Jr., David E. Walker, and David R. Wells have become members of the firm. They also announce that Ryan M. Aday, Pascal B. Caputo, Holly M. Hicks, Shamanda R. Joseph, Adam M. Milam, James E. Murrill, Ryan T. Northrup, and John E. Searcy, Jr. have become associated with the firm.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that Veronica L. Merritt has joined the firm as an associate in the Birmingham office.

Parkman, Adams & Associates announces that William C. White, II has joined the firm as a partner and the firm's name has changed to Parkman, Adams & White.

Martin M. Poynter and Ginger G. Parker announce the opening of Parker & Poynter Law Firm LLC, 305 N. Joachim Street, Suite A, Mobile 36601. Phone (251) 441-0653.

Rushton, Stakely, Johnston & Garrett PA announces that Bethany L. Bolger has joined the firm as an associate.

Spotswood LLC announces that Emily J. Tidmore has become an associate.

Sutley & Davis LLC announces that Matthew E. Rone has become an associate.

Walston, Wells & Birchall LLP announces that Dena H. Sokolow and Christian S. Spencer have become associated with the firm. ■

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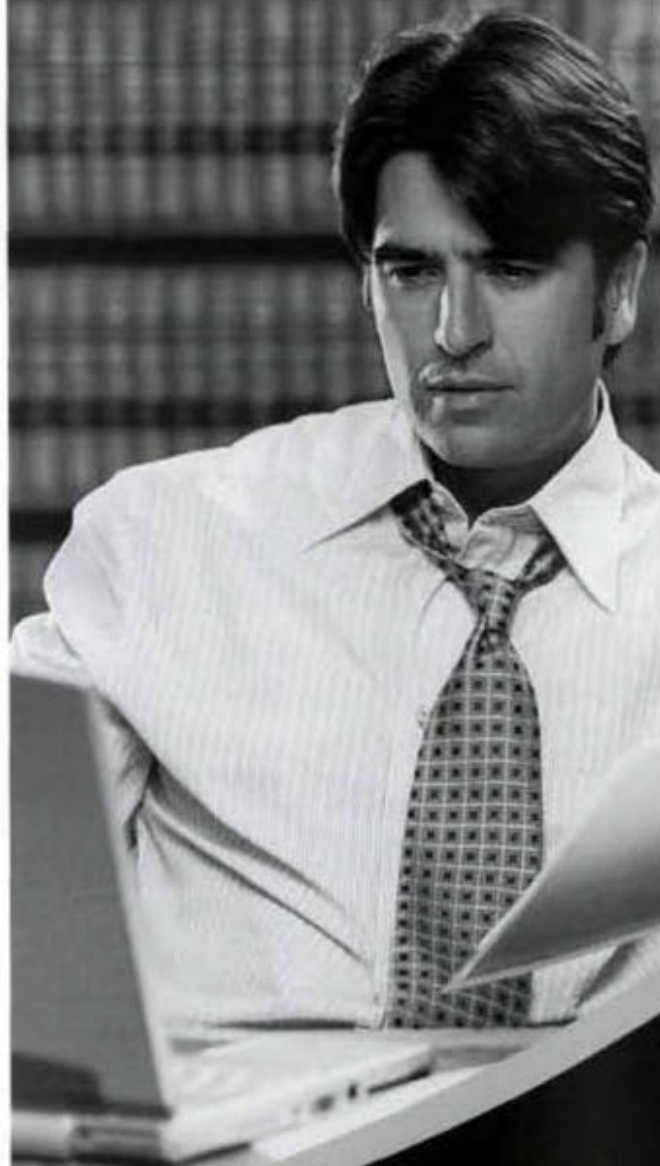


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