The background of the cover is a photograph of a public fountain. The fountain consists of several white, curved arches of varying heights. Water is spraying upwards from the base of the arches. Behind the fountain, there are several tall flagpoles, each flying a Spanish flag. The scene is set outdoors with green trees and a blue sky with light clouds. The magazine title 'The Alabama Lawyer' is printed in a large, white, serif font across the top. Below the title, the volume and issue information 'Vol. 59, No. 2' and the date 'March 1998' are printed in a smaller font.

# The Alabama Lawyer

Vol. 59, No. 2

March 1998

**PR Spotlight:**  
**Interview with Kay Wilburn**  
Page 118

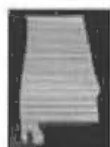




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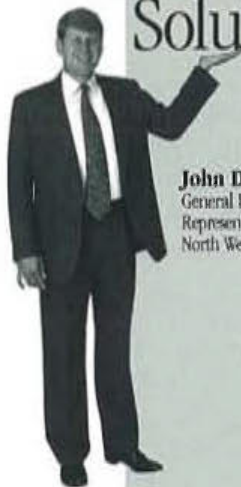


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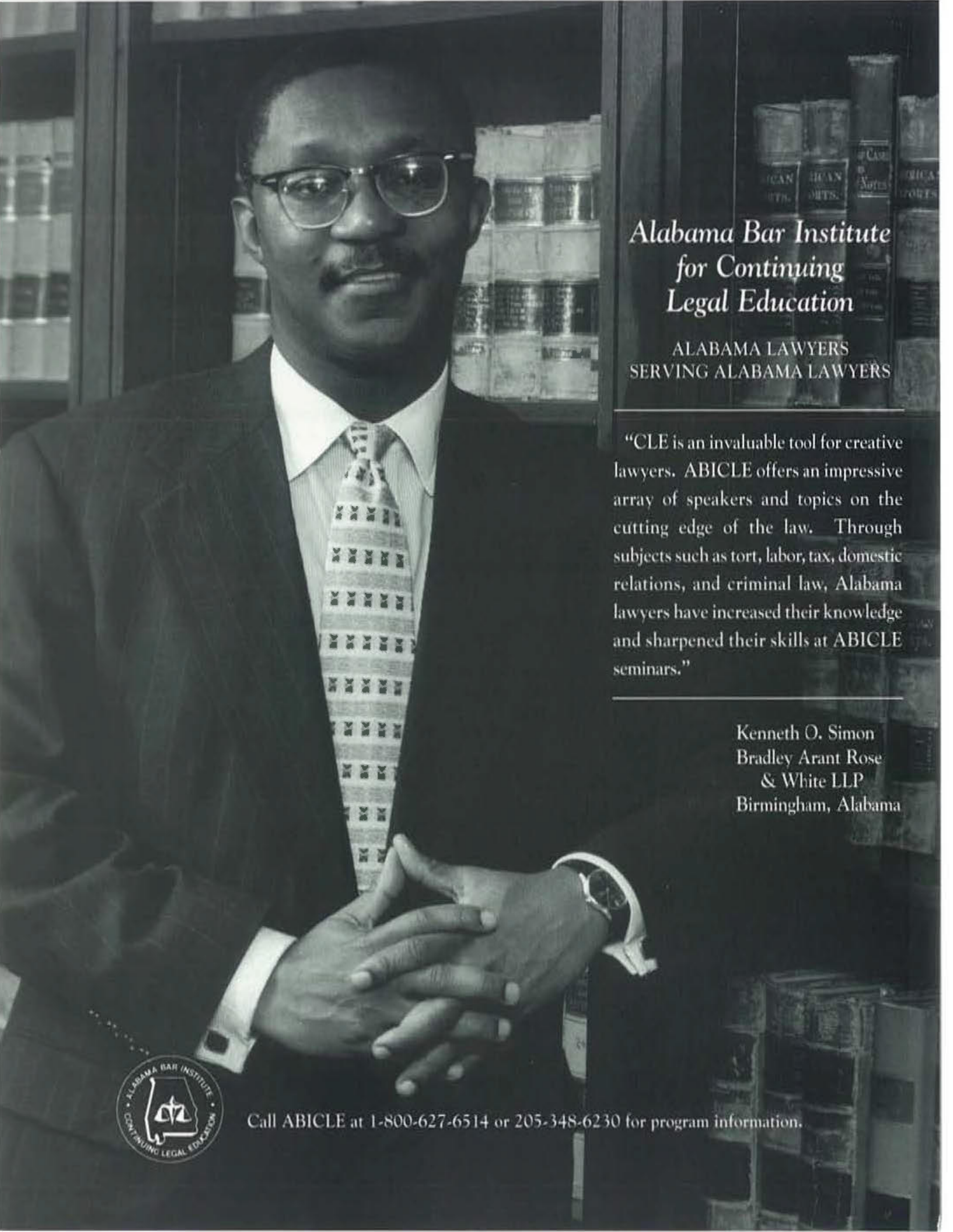


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# The Alabama Lawyer

Vol. 59, No. 2

March 1998



**On the Cover**

**Mobile's Spanish Fountain (Fuente de Espana).** Mobile's Spanish Fountain was a gift from Spain, and is located at the corner of Government and Hamilton streets. It was designed by one of the great fountain designers of the world, Buigas of Barcelona. The fountain is surrounded by "Friendship Arches" and ten colorful flags, donated by ten different provinces in Spain. They are designed to honor those areas in Spain that exerted the greatest influence on Spanish discovery, exploration, and culture in the Gulf Coast area.

—Photo by Paul Crawford, JD, CLU

## IN THIS ISSUE

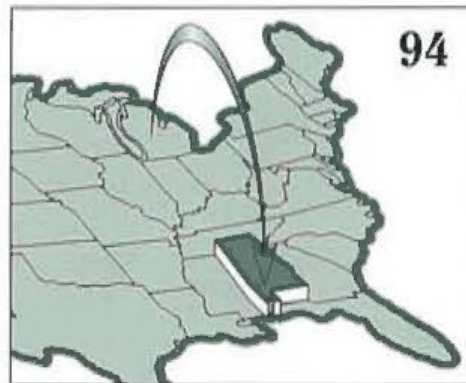
THE RIGHT TO COURT-APPOINTED COUNSEL IN EXTRADITION PROCEEDINGS .....94

THE ALABAMA ETHICS LAW FOR LAWYERS .....101

A PRACTITIONER'S GUIDE TO THE ALABAMA AGE DISCRIMINATION ACT OF 1997 .....108

PR SPOTLIGHT: INTERVIEW WITH KAY WILBURN .....118

(Continued on page 68)



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What's New . . .

- Publications
- On-Line Community
- OGC Opinions
- CLE Calendar
- On-Line Change of Address

**TO SERVE THE PUBLIC**

118



# DEPARTMENTS

President's Page  
70

Executive Director's Report  
72

About Members, Among Firms  
74

Bar Briefs  
78

Memorials  
80

Building Alabama's Courthouses  
86

Legislative Wrap-Up  
88

Opinions of the General Counsel  
91

CLE Opportunities  
117

Recent Decisions  
120

Disciplinary Notice  
123

Classified Notices  
126

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A MEMBER SERVICE OF  
  
ALABAMA STATE BAR





## PRESIDENT'S PAGE

By Dag Rowe

# “Does the Bar Do All That?”



Dag Rowe

*Past President Phil Adams once said that the state bar is sort of like an ant bed. You can see it from a distance and not much seems to be happening. But the closer you get, the more apparent it becomes that there is a lot happening involving a lot of lawyers. Because our members sometimes don't realize what all the state bar does, I am devoting this "President's Page" to a review of what it is and what it does.*

### What is the Alabama State Bar?

The Alabama State Bar is a state agency, created by statute, charged with the responsibility of licensing and regulating lawyers. The bar is funded by our license fees and some user fees generated by such things as the bar exam. Although the bar's \$3.2 million annual budget is included in the state's general fund, no state revenues are included in our budget.

We are a mandatory bar, which means that attorneys who want to practice in Alabama must be members. With this "monopoly" and state agency status come certain restrictions on what the bar can do. I am occasionally asked by both lawyers and laypersons why the state bar doesn't "take a stand" on tort reform or on some other political issue. We can't because our bar is mandatory and necessarily diverse—we are an umbrella representing the plaintiff's bar, the defense bar and every shade and stripe in between.

As Past President Alva Caine once said, "The state bar is every lawyer's common ground." One of our goals this year has been to reverse the increasing polarization and factionalism of our profession. While we may have different specialties and varied philosophies and priorities, we are ultimately and essentially just lawyers—and we can, in fact, all find "common ground" at the state bar. I invite each of you to join in our efforts and activities to ensure that our state bar involves and serves all its members: plaintiffs' lawyers and defense lawyers, male lawyers and female lawyers, big

FIGURE 1

### The ALABAMA STATE BAR 1997-98 Membership Facts

TOTAL MEMBERSHIP.....	11,894
In-state members.....	10,225
Out-of-state members.....	1,669
Male.....	78%
Female.....	22%
African-American.....	4%

A TOTAL OF 71% OF ALL IN-STATE LAWYERS PRACTICE IN JEFFERSON, MOBILE, MONTGOMERY, MADISON AND TUSCALOOSA COUNTIES.

firm lawyers and solo lawyers.

There is indeed a place at the table for us all, but, as you can see from **Figure 1** on this page, it needs to be a big table. Currently, there are almost 12,000 members of the Alabama State Bar, and we are growing at a rapid rate.

Presently, 78 percent of the bar members are male and 22 percent are female. In 1990, 83.3 percent of Alabama lawyers were male and 16.7 percent were female. In the same seven years, the number of African-American members has grown from 3.1 percent to 4 percent of the total membership.

As you can see from **Figure 2**, our bar is increasingly urban. Of the 10,225 of our members who are in-state, 37 percent are in Jefferson County. Seventy-one percent of all in-state lawyers practice in the five most populous counties. You might also be interested to see that our five less developed counties each have only a handful of lawyers. In this context,

FIGURE 2

### Counties with largest number of members

Jefferson.....	3,764
Montgomery.....	1,353
Mobile.....	1,127
Madison.....	550
Tuscaloosa.....	424

### Counties with fewest number of members

Greene.....	6
Lowndes.....	7
Coosa.....	7
Lamar.....	7
Cleburne.....	8

Membership has increased almost 3% each year for the past seven years.



it is not surprising when we read that we are handling less than 20 percent of the legal needs of America's poor.

### How is the Alabama State Bar governed, staffed and organized?

The bar is governed by a board of commissioners, composed of 58 members who are elected by lawyers from each judicial circuit. On the theory of "one person, one vote," Birmingham has ten commissioners, Montgomery has five, Mobile has four, Huntsville has two, and every other circuit has one. By legislative authority, and with approval from the supreme court, the commissioners prescribe and administer rules governing admission to the bar and rules of conduct and discipline for its members.

We have 32 employees housed in our 22,000-square-foot headquarters on Dexter Avenue, a few doors down the hill from the state capitol. The employees are allocated to six divisions:

1. Admissions (staff: 3)
2. Center for Professional Responsibility (staff: 11)
3. Membership (staff: 2.5)
4. Programs and Activities (staff: 6.5)
5. Communications and Publications (staff: 3)
6. Administration and Finance (staff: 6)

### What does the Alabama State Bar do?

As you know, one of the primary functions of your state bar is the promotion of professionalism among our members. Because of the troubling decline in professionalism, we have asked the supreme court to permit us next year to require that all new admittees to the bar undergo six hours of training in professionalism within one year of admission. We are confident that the supreme court will approve that mandate and we look forward to providing that needed service to our new lawyers. Our **Young Lawyers' Section** and our **Solo and Small Firms Committee** are also studying the implementation of a new statewide mentoring program, which is sorely needed. With the rapid growth of the bar and with more than 65 percent of practicing lawyers being either solos or with small firms, the need for mentoring can't be overestimated.

The Alabama State Bar has a history of being in the forefront of professional ethics. Ours was the first state bar in the nation to adopt a Code of Ethics, one that became the model for the American Bar Association in 1908. Notwithstanding that tradition, an important aspect of the bar's regulatory responsibility remains lawyer discipline. Last year, our staff attorneys handled almost 1,700 formal and informal ethics opinions, which are a great way to head off a disciplinary problem before it occurs. Regretfully, however, our Center for Professional Responsibility also received 1,641 ethics complaints last year. A majority was summarily "screened out" because they lacked merit on their face, but as you can see from **Figure 3**, there were 144 that resulted in the imposition of discipline. In fact, 20 ended with either suspension or loss of license. Many of those complaints started as fee disputes and that is one of the reasons we have started

FIGURE 3

#### Office of the General Counsel 1996 Yearly Report

#### COMPLAINTS

Received .....	1,641
Screened out/pending .....	1,277
Files opened .....	351
Closed w/o discipline .....	162
Closed w/discipline .....	144
Active pending files .....	156
Formal charges pending .....	142
Private reprimands .....	63
Public reprimands w/o general publication .....	29
Public reprimands w/general publication .....	15
Suspensions .....	14
Disbarments .....	3
Surrender of license .....	3

our **Fee Arbitration Program**, which is now up and functioning as a statewide, voluntary mediation service.

As you know, the practice of law has become increasingly specialized in recent years. Even among those of us who regard ourselves as general practitioners, most tend to establish areas of expertise which may dominate our interests, our time and our revenue. The state bar has adapted its programming and structure to reflect that evolution in our profession. There

are now almost 8,462 lawyers participating in the bar's 19 practice sections:

- Administrative Law—147
- Bankruptcy & Commercial Law—266
- Business Torts & Antitrust Law—216
- Communications Law—4
- Corporate, Banking & Business Law—142
- Corporate Counsel—154
- Criminal Law—72
- Disabilities Law—17
- Elder Law—14
- Environmental Law—129
- Family Law—293
- Health Law—133
- International Law—55
- Labor Law—161
- Litigation—167
- Oil, Gas & Mineral Law—127

(Continued on page 125)

FIGURE 4

#### KEY AREAS OF BAR ACTIVITY PUBLIC SERVICE

- Committee on Client Security Fund
- Committee on Access to Legal Services
- Committee on Alternative Dispute Resolution
- Indigent Defense Committee
- Prepaid Legal Services Committee
- Law Day Committee
- Citizenship Education Committee
- Committee on Correctional Institutions and Procedures
- Adult Literacy Committee

#### FOCUS ON THE PROFESSION

- Editorial Board of *The Alabama Lawyer*
- Permanent Code Commission
- Committee on Lawyer Public Relations
- Solo and Small Firm Practitioners Committee
- Insurance Programs Committee
- Law Day Committee
- Ethics Education Committee
- Committee on Women in the Profession
- Local Bar Activities and Services Committee
- Task Force on Minority Participation & Opportunity
- History and Archives Committee

#### BENCH & BAR

- Bench and Bar Committee
- Supreme Court Liaison Committee
- Judicial Conference for the State of Alabama

#### BAR MANAGEMENT & GOVERNANCE

- Long-Range Planning Task Force





## EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

# A Milestone Celebration for *The Alabama Lawyer*



Keith B. Norman



Past President Norborne Stone, Mark White, Jen Nowell Kelly and Robert Huffaker reminisced about the "early days" of *The Alabama Lawyer*.

This January marked a milestone for *The Alabama Lawyer*. It was 15 years ago that *The Alabama Lawyer* underwent a radical transformation. Not only were the size and the format of the magazine changed, the content was altered and the frequency of the publication was increased, as well. While this might not seem the stuff of celebration, one need only recall that the *Lawyer* had remained basically unchanged since its initial publication in 1940, or for more than 40 years!

**E.T. Brown** of Birmingham was the state bar president who appointed the Alabama Lawyer Survey Committee, chaired by **Mark White**, also of Birmingham, that recommended the changes in its 1981 final report to the Board of Bar Commissioners. Although the changes to the format and style of the *Lawyer* were dramatic, the final

report made clear that the substance should not be changed and that *The Alabama Lawyer* should "...continue to carry scholarly works of interest and use to the practitioner of law...disseminating current information to all members..." With one notable exception, the Board of Commissioners adopted the recommendations of the committee to change *The Alabama Lawyer*. The final report also stated: "It is recommended that a general newsletter be published during the months in which *The Alabama Lawyer* is not published and it should compliment *The Alabama Lawyer*." Twelve years later, the *ADDENDUM* newsletter was published, finally fulfilling the recommendations of the 1981 committee report.

As a state bar publication, *The Alabama Lawyer* is one of the oldest in the country. Its content, layout and



design make it one of the best, too. The quality of *The Alabama Lawyer* is no accident. It is the result of the energies of the bar staff, a graphic designer and a printer, plus the dedication of lawyers who serve as editors and contributors. Each is responsible for the final product that you receive every other month. We have also had the good fortune of having serious-minded and committed persons who have served as editors. **Judge Walter B. Jones** served as the first editor from 1940 to 1964.

Following Judge Jones were **Richard W. Neal** (1964-1968), **J.O. Sentell** (1968-1983) and current editor **Robert A. Huffaker**. The devotion of these individuals has made *The Alabama Lawyer* a first-rate publication.

In January, a luncheon was held at state bar headquarters to recognize those who played a part in the magazine's transformation, as well as the members of the board of editors who have guided



*Kitty and Robert Huffaker at the Lawyer luncheon*

the *Lawyer* the past decade and a half. We owe these people and our colleagues who draft the articles that comprise the magazine a great debt of gratitude for their contributions to this outstanding publication. Without their commitment of time and energy, we would lack an important resource that helps keep us all better informed lawyers. ■

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**Phillip J. Sarris** announces a change of his mailing address to 3106 Independence Drive, Birmingham, 35209. Phone (205) 870-9940.

**Wilson Myers** announces the relocation of his office to 600 Robert Jemison Road, Suite B, Birmingham, 35209. Phone (205) 945-8550.

**Michael D. Morgan** announces the opening of his private practice. His office is located at 4252 Carmichael

Road, Montgomery, 36106. Phone (334) 274-1117.

**Beverly J. Howard** announces a change of address to 640 S. McDonough Street, Montgomery, 36104. Phone (334) 269-6964.

**Michael S. McGlothren** announces the opening of his office. His mailing address is P.O. Box 2263, Daphne, 36526.

**Kathryn A. Lepper** announces the relocation of her office to 2100 Park Place, North, Suite 1045, Birmingham, 35203. Phone (205) 324-1334.

**K. David Sawyer** announces the opening of **K. David Sawyer, L.L.C.** His office is located at 300 N. 21<sup>st</sup> Street, Suite 301, Birmingham, Alabama 35203. Phone (205) 322-2331.

**Russell K. Bush** announces the opening of his office located at 812 Avenue A, Opelika, 36801. The mailing address is P.O. Box 135, 36803-0135. Phone (334) 741-4171.

**David A. Garfinkel**, formerly a partner of Datz, Jacobson, Lembcke & Garfinkel, announces the opening of his office located at 2064 Park Street, Jacksonville, Florida 32204. Phone (904) 384-4989.

### Among Firms

**David A. Tomlinson**, formerly with Gonce, Young & Sibley, has taken a new position as general counsel with the **Foundry of the Shoals, Inc.** The mailing address is P.O. Box 916, Florence, 35631. Phone (205) 760-2050.

**Kathryn R. Shelton** announces a change of address to the **City of Huntsville, Office of the City Attorney.** Offices are located at 308 Fountain Circle, P.O. Box 308, Huntsville, 35804. Phone (205) 532-7301.

**Engel, Hairston & Johanson** announces that **Sherrie L. Phillips** and **Brenton K. Morris** have joined the firm as associates. Offices are located at 109 N. 20<sup>th</sup> Street, 4<sup>th</sup> Floor, Birmingham, 35203. Phone (205) 328-4600.

**Pierce, Ledyard, Latta & Wasden** announces the relocation of offices to the Colonial Bank Centre, Suite 400, 41 N. Bellline, Mobile, 36608. The mailing address is P.O. Box 16046, 36616. Phone (334) 344-5151. The firm also announces that **C. William Daniels, Jr.** has become a shareholder and **Stephanie K. Alexander, James Robert Turnipseed, Michael A. Montgomery** and **Mark E. Tindal** have become associates.

**Haskell Slaughter Young & Gallion** announces that **Carter H. Dukes, F. Hampton McFadden, Jr.** and **John W. Scott** have become members, **Donald T. Locke** has joined as *of counsel*, and **Gordon O. Jespersen, Lynn Reynolds, Joseph N. Harden, Clinton C. Carter** and **Kimberly L. Hager** have become associates. Offices are located at 305 S. Lawrence Street, P.O. Box 4660, Montgomery, 36103-4660. Phone (334) 265-8573.

**McDermott, Will & Emery** announces the relocation of offices to 600 Thirteenth Street, N.W., Washington, D.C. 20005-3096. Phone (202) 756-8000.

**Janecky, Newell, Potts, Wells & Wilson** announces that **Judson William Wells** has been appointed judge, **District Court of Mobile County**, and the name of the firm has been changed to **Janecky, Newell, Potts, Wilson, Smith & Masterson.**

**William Robert Lewis**, formerly of Pate, Lewis, Lloyd & Fuston, announces the formation of **William R. Lewis & Associates.** Offices are located at 120 Euclid Avenue, Birmingham, 35213. Phone (205) 871-3900.

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**Gaines, Wolter & Kinney** announces that **Christopher B. Greene** and **Julie Davis Pearce** have joined the firm as associates. Offices are located at 22 Inverness Center Parkway, Suite 300, Birmingham, 35242. Phone (205) 980-5888.

**Burgess & Hale** announces that **Ethan R. Dettling**, **Samuel M. Ingram** and **Van D. McMahan** have joined the firm as associates. Offices are located at 450 Park Place Tower, 2001 Park Place, North, Birmingham, 35203. Phone (205) 715-4466.

**Silver & Voit** announces that the firm name has been changed to **Silver, Voit & Thompson**. **Irving Silver**, **Lawrence B. Voit**, **Barry L. Thompson** and **Thomas G.F. Landry** are members. Offices are located at 4317-A Midmost Drive, Mobile, 36609-5589. Phone (334) 343-0800.

**Huie, Fernambucq & Stewart** announces that **Martha Leach Thompson** and **Patrick O. Gray** have become associates. Offices are located at 800 Regions Bank Building, Birmingham, 35203. Phone (205) 251-1193.

**Hall, Conerly, Mudd & Bolvig** announces that **P. Ted Colquett** and **Linda H. Ambrose** have joined the firm as associates. The mailing address is 1400 Financial Center, 505 N. 20<sup>th</sup> Street, Birmingham, 35203-2626. Phone (205) 251-8143.

**Oros & Stirling** announces that **Darby R. Wolf** has become an associate. Offices have relocated to 517 Beacon Park, West, Birmingham, 35209. The new mailing address is P.O. Box 190047, 35219. Phone (205) 945-0664.

**Huntley, Jordan & Associates** announces that **Kelli D. Taylor-Etheredge** and **Alvin K. Hope, II** have become associates. Offices are located at 503 Government Street, Suite 201, P.O. Box 370, Mobile, 36601-0370. Phone (334) 434-0007.

**Michael S. Burroughs** and **Sandra C. Guin**, formerly of Phelps, Jenkins, Gibson & Fowler, announce the formation of **Burroughs & Guin, L.L.P.** Offices are located at 2216 14<sup>th</sup> Street, Tuscaloosa, 35401. Phone (205) 349-5470.

**Nowlin & McAnnally** announces that **James Patrick Lamb** has become an associate. Offices are located at 118 E. Moulton Street, Decatur, Alabama 35601. Phone (205) 353-8601.

**Webb & Eley** announces that **Lorelei A. Lein** has joined the firm. Offices are located at 166 Commerce Street, Suite 300, P.O. Box 238, Montgomery, 36101-0238. Phone (334) 262-1850.

**Scott Donaldson** and **Paula W. Higginbotham** announce the formation of **Donaldson & Higginbotham, L.L.P.** Offices have relocated to 1007 21<sup>st</sup> Avenue, P.O. Box 2344, Tuscaloosa, 35403. Phone (205) 750-0098.

**Yearout, Myers & Traylor** announces that **John G. Watts** and **D. Dirk Thomas** have become associates. Offices are relocated to 800 Shades Creek Parkway, Suite 500, Birmingham, 35209. Phone (205) 414-8160.

**Thomas, Means & Gillis** announces that **Wendell Chambliss** and **Milton J. Westry** have become associates. Offices are located at 505 20<sup>th</sup> Street, North, Suite 1035, Birmingham, 35203-4607. Phone (205) 328-7915.

**White, Dunn & Booker** announces that **William M. Bowen, Jr.** has joined the firm. Offices are located at 290 N. 21<sup>st</sup> Street, Massey Building, Suite 600, Birmingham, 35203. Phone (334) 323-1888.

**Steve Olen** and **Steven L. Nicholas** announce the formation of **Olen & Nicholas**, formerly Olen, McGlothern & Nicholas. Offices remain located at Riverview Plaza Office Tower, 63 S. Royal Street, Suite 710, P.O. Box 1826, Mobile, 36633. Phone (334) 438-6957.

**Cusimano, Keener, Roberts & Kimberley** announces that **Philip E. Miles** has become a shareholder. Offices are located at 153 S. Ninth Street, Gadsden, 35901. Phone (205) 543-0400.

**Cloud & Cloud** announces the relocation of offices to 521 Madison Street, 1<sup>st</sup> Floor, Huntsville, 35801. Phone (205) 533-9480.

**Sigler, Moore, Clements, Wolfe & Zoghby** announces the withdrawal of **Patrick M. Sigler** from the partnership



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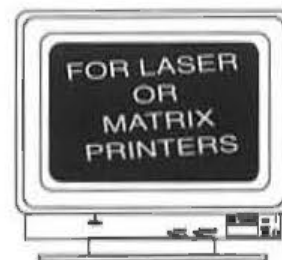
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and the changing of the firm name to **Moore, Clements, Wolfe & Zoghby**. Offices are located at 107 Saint Francis Street, Suite 2525, Mobile, 36602. Phone (334) 433-7766.

**Raymond C. Winston** announces that **Norman G. Winston, Jr.** has become an associate. Offices are located at 1800 12<sup>th</sup> Avenue, South, Birmingham, 35205. Phone (205) 933-2300.

**Patton, Latham, Legge & Cole** announces that **Charla D. Balogh** has become an associate. Offices are located at 315 W. Market Street, P.O. Box 470, Athens, 35612. Phone (205) 232-2010.

**Lloyd, Schreiber & Gray** announces that **Tessa M. Thrasher, Howard Y. Downey, James A. Patton, Jr., Jennifer A. McCammon** and **John T. Ritondo, Jr.** have become associates. Offices are located at 2 Perimeter Park, South, Suite 100, Birmingham, Alabama 35243. Phone (205) 967-8822.

**Jock M. Smith** announces that **Fannie Sampson-Bulls** has become an associate. Offices have relocated to 306 N. Main Street, Tuskegee. The mailing address is P.O. Box 830419, 36083. Phone (334) 727-0060.

**Bond, Botes, Sykstus & Larsen** announces that **Janna L. Ifshin** has joined the firm. Offices are located at 102 S. Court Street, Suite 314, Florence, 35630. Phone (205) 760-1010.

**Harris, Caddell & Shanks** announces that **Jeffrey S. Brown** has become a partner, and **Huel Harris** has become an associate. Offices are located at 214 Johnson Street, Southeast. The mailing address is P.O. Box 2688, Decatur, 35602. Phone (205) 340-8000.

**Gilmore Law Office** announces that **D. Gregory Dunagan** has become an associate. Offices are located at 116 Court Street, P.O. Box 729, Grove Hill, 36451. Phone (334) 275-3115.

**John A. Owens** and **M. Bradley Almond** of **Owens, Carver & Almond** announce that **Susie T. Carver** has joined the professional staff of the **University of Alabama School of Law**.

The firm name has changed to **Owens & Almond, L.L.P.**, and that **Apsilah G. Owens** has become a partner and **Anna C. Northington** has become an associate. Offices are located at 2720 6<sup>th</sup> Street, Suite 3, Tuscaloosa, 35401. Phone (205) 750-0750.

**Williams, Potthoff & Williams** announces that **Joel P. Smith, Jr.** has become an associate. The mailing address is P.O. Box 880, Eufaula, 36072-0880. Phone (334) 687-5834.

**Bainbridge & Straus** announces the relocation of its offices to 2210 2<sup>nd</sup> Avenue, North, Birmingham, 35203. Phone (205) 324-3800.

**Pittman, Pittman & Carwie** announces that **Richard W. Fuquay** has been named partner. The new firm name will be **Pittman, Pittman, Carwie & Fuquay**. **Janine M. McGinnis** and **Kelli Wise** have become associates. Offices are located at 1111 Dauphin Street, Mobile, 36640. Phone (334) 433-8383.

**Hand Arendall** announces that **Henry T. Morrisette, Patricia J. Ponder, Edwin O. Rogers** and **J. Stephen Harvey** have become members. The firm also announces that **J. Ken Thompson, Jaime W. Betbeze, Richard M. Gaal, E. Shane Black, and Jeffrey D. Dyess** have joined the firm as associates. The firm has offices in Birmingham (205) 324-4400, Montgomery (334) 264-5532, and Mobile (334) 432-5511.

**Fred Lawton, III** announces that **William Randall Payne** has become an associate. Offices are located in the AmSouth Bank Building, Anniston, 36201. Phone (205) 238-1984.

**Paul A. Avron** and **David Murphree** announce the formation of **Murphree & Avron, L.L.P.** Offices are located at 200 Frank Nelson Building, 205 N. 20<sup>th</sup> Street, Birmingham, 35203. Phone (205) 327-5555.

**Lange, Simpson, Robinson & Somerville** announces a name change to **Lange, Simpson, Robinson & Somerville L.L.P.**, and that **David B. Hall, Frances E. King, Harald E.**

**Bailey** and **Jeffrey E. Holmes** have become partners. **Michael A. Poil** has become an associate, and **Cleophus Thomas, Jr.** and **Will M. Booker** have become *of counsel*. A new office has opened in Anniston, located at the SouthTrust Bank Building, Suite 501, 36202. Other locations are Birmingham, Huntsville and Montgomery.

**Zieman, Speegle, Oldweiler & Jackson** announces that **Ben H. Harris, III** has become an associate. Offices are located at 3200 1<sup>st</sup> National Bank Building, 107 Saint Francis Street, 36602. The mailing address is P.O. Box 11, Mobile, 36601. Phone (334) 694-1700.

**Arthur Andersen** announces that **J. Bartley Cavender** has joined as a manager. Offices are located at 633 West Fifth Street, Los Angeles, California 90071. Phone (213) 614-7580.

**Brown & Battles L.L.C.** announces that **Daniel J. Reynolds, Jr.**, formerly a circuit judge of the tenth judicial circuit, has become *of counsel*. Offices are located at 510 N. 18<sup>th</sup> Street, Bessemer, 35020. Phone (205) 425-7001.

**Akridge & Balch** announces that **Robert H. Cochran** has become an associate. Offices are located at 1702 Catherine Court, Suite 2-D, Auburn, 36830. Phone (334) 887-0884.

**Johnstone, Adams, Bailey, Gordon** and **Harris**, a Mobile law firm which this year celebrated its 100<sup>th</sup> anniversary, has opened a Baldwin County office. The firm also announced that **Charles C. Simpson, III**, formerly a partner in Owens, Benton & Simpson, has joined the firm and will be resident in the Baldwin County office. **J. Conner Owens, Jr.**, also a former partner in the firm of Owens, Benton & Simpson, will be *of counsel* to the firm in Bay Minette.

**Boyd F. Campbell, P.C.**, of Montgomery and the **Immigration Law Center, P.C.** of Birmingham announce the formation of the **Immigration Law Center, L.L.P.**, and the opening of an office at 1621 S. University Boulevard, Suite B-3, Mobile 36609. Phone (334) 662-0314. ■



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## BAR BRIEFS

• The Lee County Bar Association recently awarded the "Spud Wright Jurisprudential Award" to **Thomas Samford**. The award is in memory of the late Judge Spud Wright and honors members of the legal profession by recognition of a career of extraordinary contributions and service to the legal profession and to the community.

Judge Samford graduated from Princeton University, *magna cum laude*, and was a member of Phi Beta Kappa and on an NROTC scholarship. He was commissioned into the United States Marine Corps and served three years on active duty. He then returned to the University of Alabama School of Law and graduated first in his class. He later served as president of the University of Alabama National Alumni Association.



Mike Williams congratulates Judge Samford.

He entered private practice in Opelika and also continued a family tradition of being general counsel of Auburn University, until 1995. He served as Opelika Municipal Court Judge for 17 years. Civic activities have included serving as president of the Opelika Kiwanis Club, president of the Opelika Chamber of Commerce and chair of the United Way. He is active in the Trinity United Methodist Church.



Immediate Past Section Chairman Mark P. Williams (center) presents checks to Dean Ken Randall (left), University of Alabama School of Law, and Dean Barry Currier (right), Cumberland School of Law.

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• The **Bankruptcy and Commercial Law Section** of the Alabama State Bar contributed \$3,000 per school to the University of Alabama School of Law and the Cumberland School of Law to sponsor teams from each law school for the Sixth Annual Judge Conrad B. Duberstein Moot Court Competition to be held in New York City this month. The competition is sponsored by St. John's University School of Law and the American Bankruptcy Institute and is the nation's only moot court competition devoted entirely to bankruptcy. The competition is designed to promote and recognize the finest student oral and written advocacy on a significant problem in bankruptcy practice. ■

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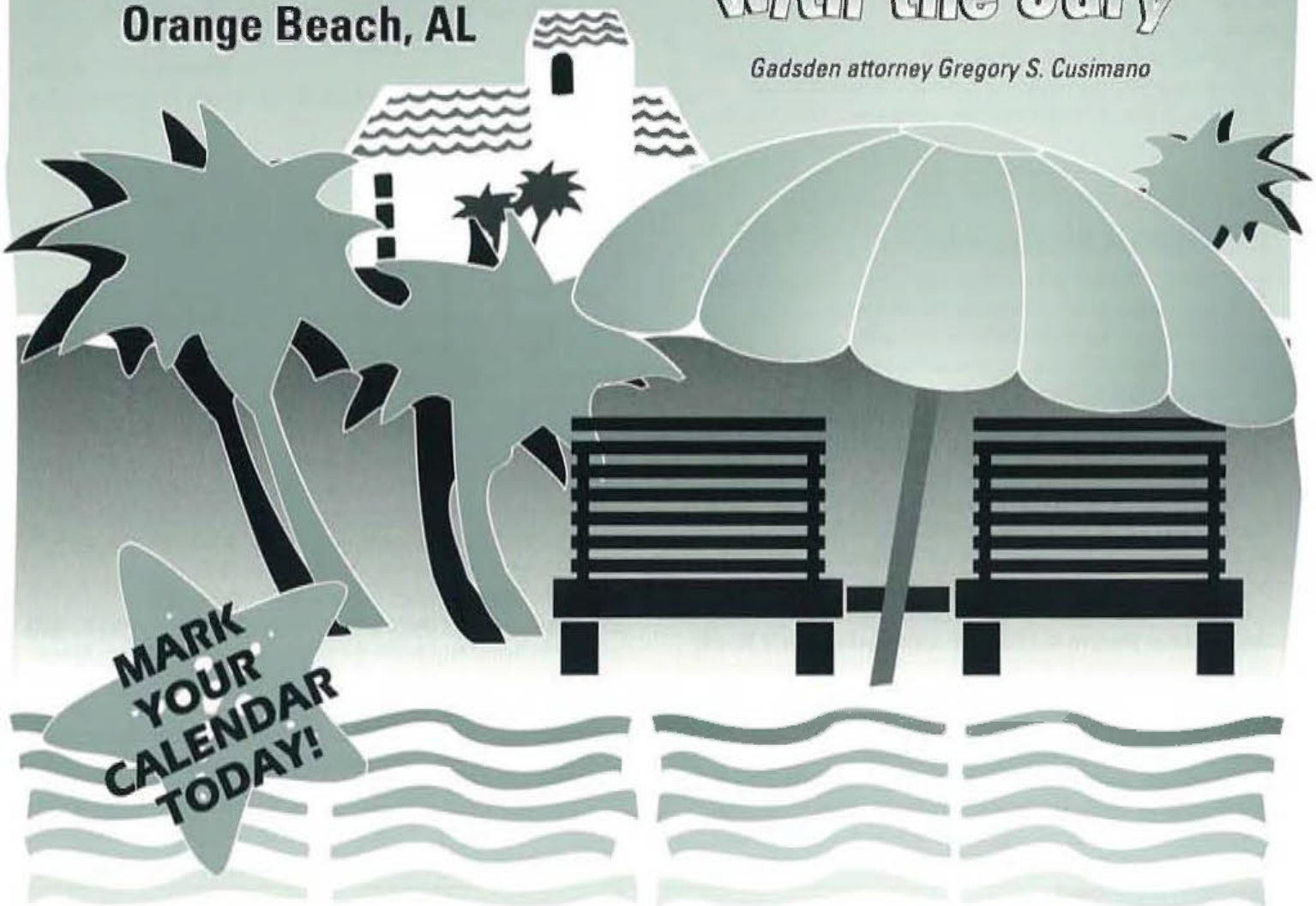
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## MEMORIALS

### John Peters Ansley

Whereas, John Ansley was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Wednesday, October 15, 1997; and,

Whereas, John Ansley was born in Philadelphia on January 14, 1914; and,

Whereas, John Ansley's family moved to Birmingham where his father was for many years the principal of Barrett School (Woodlawn); and,

Whereas, John Ansley attended the Birmingham Public Schools and while a student at Phillips High School won the annual statewide oratorical contest sponsored by the *Birmingham News*; and,

Whereas, John Ansley's interest in public speaking and in Alabama history and political science continued. Discussion of politics often led to his recalling and recounting the moving acceptance speech of Adlai Stevenson; the fireside chats of FDR; Winston Churchill's courageous and eloquent war-time speeches; and the political and judicial career of Justice Hugo Black — all these and more furnished interesting and provocative conversations; and,

Whereas, John Ansley attended the University of Alabama and was awarded his undergraduate and law degrees by Alabama. At the university he was a member of the Sigma

Alpha Epsilon social fraternity; and,

Whereas, "the law" for John was a "zealous mistress;" with golf and Shoal Creek as close seconds; and,

Whereas, John Ansley was a member of the Alabama State Bar and the Birmingham Bar Association since 1938, a long-time partner in the law firm of Spain, Gillon, Riley, Tate & Ansley, and practiced law for over 40 years in Birmingham; and,

Whereas, John Ansley was an agent in the Federal Bureau of Investigation during the war years; and,

Whereas, John Ansley was a faithful member of the First Methodist Church of Birmingham and in later years of Canterbury Methodist Church; and,

Whereas, John, in his personal life and profession, sought to follow the exhortation of the prophet Micah to "do justly, love mercy, and walk humbly with thy God"; and,

Whereas, we desire to express our deep regard for John Ansley and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

Now, therefore, be it resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to Ruby Syx Ansley, John's beloved wife.

— Stephen D. Heninger  
President, Birmingham Bar Association

### John McNeel Breckenridge

Whereas, Mack Breckenridge, who died on June 1, 1997, was a long-time member of the Birmingham Bar Association and the Alabama State Bar; and,

Whereas, Mack Breckenridge was born in Samson, Alabama on August 4, 1907 where, upon his father's death, he assumed, at the age of 16 years, a father-like responsibility of helping his mother raise his seven younger brothers and sisters; and,

Whereas, Mack Breckenridge, under those difficult circumstances, graduated from high school, attended and graduated from Birmingham-Southern College and received his law degree from Birmingham School of Law; and,

Whereas, Mack Breckenridge served his country well in the United States Navy in the South Pacific during World War II; and,

Whereas, Mack Breckenridge joined the City of Birmingham Legal Department in 1968 as an attorney, representing the City of Birmingham under five mayors (W. Cooper Green, James W. Morgan, Art Hanes, Albert Boutwell, and George Seibels), and served as city attorney from 1960-1974, difficult, turbulent years during which Birmingham

benefited greatly from his wisdom, fairness, self-restraint, and unflinching courtesy; and,

Whereas, Mack Breckenridge entered the private practice of law with the law firm of Cabaniss, Johnston, Dumas, & O'Neal for approximately ten years after retiring as city attorney; and,

Whereas, Mack Breckenridge was an active member of Aldersgate United Methodist Church (formerly known as Eleventh Avenue Methodist Church); and,

Whereas, we desire to express our high regard for Mack Breckenridge and our deep sense of loss in the passing of our distinguished colleague who served our profession well, and particularly to express this to his wife of 59 years, Ann Threadgill Breckenridge; to his sons, John McNeel Breckenridge, Jr. of Tampa, Florida and Joe Boyer Breckenridge of Birmingham; and to his daughter, Judy Breckenridge Mann of Birmingham; and to the rest of his family.

It is therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to his wife, Ann Threadgill Breckenridge.

— Stephen D. Heninger  
President, Birmingham Bar Association





## John Patrick Carlton

Whereas, John Patrick Carlton was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Sunday, May 18, 1997; and,

Whereas, John Patrick Carlton attended the University of Alabama, graduating in 1958 with a bachelor of arts degree after performing as First Trumpet in the Million Dollar Band; and,

Whereas, John Patrick Carlton graduated from the University of Alabama School of Law in 1960 with a bachelor of laws degree; distinguished himself as editor-in-chief of the *Alabama Law Review*; as an honored member of Omicron Delta Kappa Society, Sigma Delta Kappa Law Fraternity and Theta Chi Fraternity; and,

Whereas, upon his graduation from the University of Alabama School of Law, John Patrick Carlton practiced law for three years in the United States Army Judge Advocate General's Corps, and beginning in 1974, founded and practiced in the law firm under the name of Carlton, Vann & Stichweh until his death; and,

Whereas, John Patrick Carlton was recognized and highly regarded by the bench and bar as a keen and diligent lawyer who promoted justice while fairly and vigorously representing his clients, and setting an example of selflessness and profes-

sionalism by providing many hours of pro bono work; and,

Whereas, John Patrick Carlton was an active lifelong member of Central Park Baptist Church, joining the sanctuary choir at the age of 15, and faithfully serving as chairman of the deacons, chairman of the board of trustees, and interim minister of music; and,

Whereas, John Patrick Carlton loved life and lived life to its fullest, performing with the Birmingham Town and Gown Theatre under the direction of James Hatcher, and portraying the role of his personal idol, Franklin Delano Roosevelt, in productions of "Annie" and in a one-man show throughout the state and Southeast, to great acclaim; and,

Whereas, we desire to express our deep regard for John Patrick Carlton and our profound sense of loss in the passing of our distinguished colleague who served our profession and delighted the hearts of untold Alabamians.

It is therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to his wife, Carolyn, and to his children and their spouses, Laura C. and J. Scott Vickery, Clarence A. and Mary K. Carlton, and Paul J. Carlton, III.

— Stephen D. Heninger  
President, Birmingham Bar Association

## Richard Hughes Clem

Whereas, Richard H. Clem was a member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on April 23, 1997; and,

Whereas, Richard H. Clem was born in Jefferson County on January 3, 1930 and was a lifelong resident of Birmingham, graduating from Woodlawn High School in 1948; and,

Whereas, Richard H. Clem attended Howard College and joined the United States Army, serving in the 82<sup>nd</sup> Airborne Division during the Korean conflict; and,

Whereas, Richard H. Clem returned to Birmingham, completed his undergraduate studies at the University of Alabama at Birmingham in 1973; and worked in the contract division at Hayes Aircraft; and,

Whereas, Richard H. Clem received his juris doctor degree from Birmingham School of Law and was admitted to practice law in the State of Alabama in 1977, practicing law until 1984 when his health forced him to retire; and,

Whereas, Richard H. Clem was a lifetime member of Ruhama Baptist Church, having served as the chairman of deacons on numerous occasions and the teacher of the

Outreach Sunday School class for some 20 years; and,

Whereas, Richard H. Clem was active in the East Lake Masonic Lodge and the Kenny Morgan Group from Woodlawn High School which raised money for Samford University Football Scholarships; and,

Whereas, Richard H. Clem, following his retirement, spent countless hours providing legal services and assistance to friends and members of his church at no expense; and,

Whereas, Richard H. Clem was recognized as one who gave freely of his time, lived a full, but modest life and provided an example of all that is good and right in our profession; and,

Whereas, we desire to express our deep regard for Richard Hughes Clem and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

It is therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to his wife of 47 years, Mary Louise Clem, his daughter, Patricia Clem Slocum, and his son, Richard Hughes Clem, II.

— Stephen D. Heninger  
President, Birmingham Bar Association





## James H. Dodd

Whereas, James Dodd was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Saturday, January 18, 1997; and,

Whereas, James Dodd was born in Carbon Hill, Alabama on September 8, 1924 and graduated from Walker County High School in 1942; and,

Whereas, James Dodd next entered the United States Air Corps and was trained as a cadet officer at the University of Tennessee, and then, as a Lieutenant and navigator, flew 60 missions in the South Pacific during World War II and earned a number of combat medals; and James Dodd was discharged from the Air National Guard in 1962 with the rank of captain; and,

Whereas, James Dodd graduated from the University of Alabama Law School in 1951 and practiced law in Birmingham until his death; and,

Whereas, James Dodd was recognized and highly regarded by the bench and bar as a keen and diligent lawyer who fairly and fearlessly pursued the causes of his clients and the causes of justice while providing an example of all that is good and right in our profession; and,

Whereas, James Dodd received many honors and awards during his career, including being inducted into Alabama's Who's Who; and,

Whereas, James Dodd was an active member of Ridgecrest Baptist Church from 1957 and taught Sunday School there for many years; and,

Whereas, James Dodd gave freely of his time and to serving his church and his community; and,

Whereas, James Dodd loved life and brought good spirit to all who had the occasion to know him; and,

Whereas, we desire to express our deep regard for James H. Dodd and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

Now, therefore, be it hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to Connie Brazil Dodd, his wife; William Brent Dodd, his son and law partner; his daughters, Karen Zito and Crisse Franco; and his brother, Lewis G. Dodd; and his stepmother, Bida Dodd.

— Stephen D. Heninger  
President, Birmingham Bar Association

## Merron Alton Hodges

Whereas, Merron Alton Hodges was a member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Saturday, May 31, 1997; and,

Whereas, Merron Alton Hodges received a B.S. degree from the University of Texas (Austin), and M.Ed. degree from Eastern Washington State College, a Ph.D. from the University of Texas Health Science Center of Houston and a J.D. degree from Birmingham School of Law; and,

Whereas, Dr. Hodges was a professor at the University of Alabama at Birmingham and secretary of the Birmingham Bar Association's Medical Liaison Committee; and,

Whereas, Dr. Hodges' involvement in research and public policy included being special assistant for the president of Health Policy Development at the University of Texas Health Science Center of Houston from 1982 to 1984 as well as legislative assistant to United States Congressman Phil Gramm from 1980 to 1981; and,

Whereas, Dr. Hodges was the recipient of numerous

awards, including outstanding author, *Journal of Allied Health*, 1987; award of merit, Texas Society of Allied Health Professions, 1982; presidential citation, American Corrective Therapy Association, 1977; as well as other awards; and,

Whereas, Dr. Hodges was a member of the Association of Schools of Allied Health Professions, the American Congress of Rehabilitation Medicine, National Rehabilitation Association, and the Smithsonian Association; and,

Whereas, Merron Alton Hodges was well-respected in the community for his work in the medical, legal and educational fields; and,

Whereas, we desire to express our deep regard for Dr. Merron Alton Hodges and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

It is, therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and that copies thereof be sent to Dr. Hodges' wife, Mary Jo Hodges.

— Stephen D. Heninger  
President, Birmingham Bar Association





## Judge Joshua Sanford Mullins

Whereas, Judge Joshua Mullins was born September 9, 1923 in Alexander City, Russell County, Alabama, and died March 3, 1997, in Birmingham, Alabama, age 73 years; and,

Whereas, Judge Mullins graduated from Marion Military Institute, after which he entered the University of Alabama Law School where his studies were interrupted by service in the United States Army Corps during World War II; and,

Whereas, Judge Mullins ended his missions as a bombardier navigator in B-25s of the Twelfth Air Force on VE Day, from which he returned to graduate from the University of Alabama Law School in 1946; and,

Whereas, Judge Mullins entered the practice of law in Birmingham, Alabama, in the firm headed by Harvey Deramus which became Deramus & Mullins in 1950; and,

Whereas, Judge Mullins was elected to the circuit court bench in 1976 and served in the civil division of that court until his retirement in 1995; he then returned to the succes-

sor firm of Deramus & Mullins, Johnston, Barton, Proctor & Powell, L.L.P. until his death; and,

Whereas, Judge Mullins will always be remembered by all who practiced before him for his legal scholarship, integrity and dedicated service all leavened with a kindness, a sense of humor, and a care that lawyers' and litigants' expectations of the judicial system be met; and,

Whereas, Judge Mullins thereby was deeply respected, admired, and loved by members of the bench and bar, as well as the community at large; and,

Whereas, we desire to express our deep regard and sense of loss in the passing of our brother in this honorable profession.

It is, therefore, resolved, that this resolution be spread upon the minutes of this executive committee and that copies thereof be sent to Judge Mullins' wife, Jane, and to his son, J. Sanford Mullins, III, and to his daughter, Maryon A. Allen.

— Stephen D. Heninger  
President, Birmingham Bar Association

## Barry Reed Tuggle

Whereas, Barry Tuggle was an active member of the Birmingham Bar Association and the Alabama State Bar at the time of his death on Monday, June 30, 1997; and,

Whereas, Barry Tuggle was born on June 21, 1967, in Birmingham; was raised in Huffman, Alabama; and graduated from the University of Alabama with a bachelor of arts degree, majoring in history; and,

Whereas, Barry Tuggle received his juris doctor from the Birmingham School of Law on May 22, 1994; and,

Whereas, Barry Tuggle distinguished himself while in law school as a member of Sigma Delta Kappa, a legal honor society; and,

Whereas, upon his graduation from the Birmingham School of Law, Barry Tuggle practiced law in Birmingham, Alabama, with the firm of Johnson, Liddon & Tuggle, until the time of his death; and,

Whereas, Barry Tuggle was recognized and regarded as a keen and diligent lawyer who fairly but fearlessly pursued the causes of his clients and the causes of justice while providing an example of all that is good and right in our profession; and,

Whereas, Barry Tuggle was an active member of Huffman Baptist Church; and,

Whereas, Barry Tuggle gave freely of his time, actively serving as a member of the Birmingham Bar Association, the American Trial Lawyers Association, the National Association of Criminal Defense Lawyers, the Alabama Young Republicans, and the chairman of the Policy Exchange Foundation; and,

Whereas, Barry Tuggle loved life and lived life to the fullest, bringing laughter and good spirit to all who had the occasion to know him, and who possessed a sharp, quick wit and a contagious sense of enthusiasm; and,

Whereas, Barry Tuggle was a devoted husband to his wife, Sallie, and a loving father to his daughter, Lila, who looked forward with anticipation and delight for the birth of his second child, Barrie Reed, born on December 16, 1997; and,

Whereas, we desire to express our deep regard for Barry Tuggle and our profound sense of loss in the passing of our distinguished colleague who served our profession well.

It is therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to Sallie M. Tuggle, Barry Tuggle's wife; Mr. and Mrs. Charles Tuggle of Trussville, his parents; Mrs. Effie Howell of Trussville, his grandmother; and Timothy Tuggle, his brother.

— Stephen D. Heninger  
President, Birmingham Bar Association





## Malcolm Lynch Wheeler

Whereas, Malcolm Lynch Wheeler was and had been an active member of the Birmingham Bar Association and the Alabama State Bar for 57 years at the time of his death on February 23, 1997, in Birmingham, Alabama; and,

Whereas, Malcolm Wheeler was a lifelong resident of Birmingham, Alabama, being the son of the late Circuit Court Judge Robert J. Wheeler and Mary Beggs Wheeler; and,

Whereas, Malcolm Wheeler graduated from Birmingham Southern College in 1936 with a B.A. degree and subsequently received his law degree from Birmingham School of Law; and,

Whereas, Malcolm Wheeler honorably served his country in the United States Navy during World War II; and,

Whereas, Malcolm Wheeler was a volunteer and board member of The Shepherd Center in East Lake, and was a charter member of two Methodist churches, Wilson Chapel United Methodist Church and Lake Highland United Methodist Church; and,

Whereas, Malcolm Wheeler served as a member of the Board of Directors of Birmingham Federal Savings & Loan

Association and was the county administrator for Jefferson County for 12 years; and,

Whereas, during his long and successful practice, Malcolm Wheeler established a reputation as a tireless worker, worthy opponent and legal scholar. He was a general practitioner in the fullest sense, but during his latter years he devoted much of his practice to real estate and estate administration; and,

Whereas, Malcolm Wheeler's life and career sets a worthy example for his entire profession and was one that will be long remembered by the Birmingham Bar; and,

Whereas, we now desire to express our deepest regard for Malcolm Wheeler and our sense of gratitude for his distinguished career.

It is therefore, hereby resolved, that this resolution be spread upon the minutes of this executive committee and copies thereof be sent to his widow, Virginia W. Wheeler, his two sons, Warren O. Wheeler and M. Wayne Wheeler, and his daughter, Elaine W. Beiersdoerfer.

— **Stephen D. Heninger**  
**President, Birmingham Bar Association**

### Walter Lamar Allen

*Montgomery*  
Admitted: 1961  
Died: December 29, 1997

### Joan Van Almen

*Lake Oswego, OR*  
Admitted: 1982  
Died: January 14, 1998

### John Peters Ansley

*Birmingham*  
Admitted: 1938  
Died: October 15, 1997

### Ernest Hampton Brown

*Birmingham*  
Admitted: 1963  
Died: November 29, 1997

### John Young Christopher

*Tuscaloosa*  
Admitted: 1949  
Died: October 7, 1997

### William B. Fernambucq, Sr.

*Birmingham*  
Admitted: 1951  
Died: December 23, 1997

### James David Ford

*Caruthersville, MO*  
Admitted: 1978  
Died: April 26, 1997

### Lawrence F. Gerald, Jr.

*Montgomery*  
Admitted: 1940  
Died: October 13, 1997

### Merron Alton Hodges

*Birmingham*  
Admitted: 1996  
Died: May 31, 1997

### Drayton Nobles James

*Birmingham*  
Admitted: 1969  
Died: December 23, 1997

### James Paul Lowery

*Montgomery*  
Admitted: 1956  
Died: January 15, 1998

### Margaret Kennedy Persons

*Birmingham*  
Admitted: 1937  
Died: August 25, 1997

### Jesse H. Slaughter, Jr.

*Stockton*  
Admitted: 1969  
Died: September 21, 1997

### Rick A. Williams

*Montgomery*  
Admitted: 1976  
Died: December 7, 1997

### Bloys Gregory Wood

*Talladega*  
Admitted: 1977  
Died: January 1, 1998







## Carl W. Albright, Jr.

Whereas, Carl W. Albright, Jr. was born in Tuscaloosa, Alabama on April 27, 1944, attended Stafford Elementary, Tuscaloosa Junior High, and Tuscaloosa High School; and,

Whereas, he entered the University of Alabama in 1963, where he was an active member of the Alpha Tau Omega Fraternity and where he earned a degree in aeronautical engineering in 1967 and a Juris Doctor in 1970; and,

Whereas, following his admission to the Alabama State Bar, he entered the private practice of law with the firm of Rosen, Wright, Harwood & Albright, during which time he was actively involved in the work of the Tuscaloosa County Bar Association, serving as president of the association in 1981; and,

Whereas, Carl left the private practice of law in 1981 to begin a distinguished career in banking, joining the First National Bank of Tuscaloosa as its general counsel. In 1983 he was elected executive vice-president and a member of the board of directors. Following the merger of First National Bank of Tuscaloosa with AmSouth Bank in 1988, he was elected an executive vice-president of AmSouth Bancorporation, chairman of the Tuscaloosa Board of Directors, and an area executive for West Alabama operations. In 1993 he was honored by being elected the president of the Alabama Bankers Association; and,

Whereas, Carl was a tireless civic leader, serving as a director of the Black Warrior Council of the Boy Scouts of America for 17 years, as a director and president of DCH Foundation, as a director and chairman of Commerce of West Alabama and as a director and chairman of the Tuscaloosa County Industrial Development Authority, where he actively pursued the recruitment of new industries to Tuscaloosa County and was instrumental in attracting major industries such as JVC, Tuscaloosa Steel, and Mercedes Benz to locate in Tuscaloosa County; and,

Whereas, Carl was a staunch supporter of Tuscaloosa's institutions of higher learning, serving as a member of the president's cabinet at the University of Alabama and serving for 14 years on the Board of Trustees of Stillman College, where he also served as president of the Stillman College Foundation and chaired a campaign to raise funds to renovate Winsborough Hall on the campus of Stillman College; and,

Whereas, Carl was a loyal member of the First Presbyterian Church of Tuscaloosa and served as chairman of the board of deacons and as an elder of the church. Carl's leadership as chairman of a multi-million dollar building campaign for the church was undoubtedly the most enduring legacy he left his beloved church and its members; and,

Whereas, Carl Albright was a devoted husband and father, an avid hunter and golfer, and trusted friend to many, opening his home and his heart to newcomers and making them feel welcomed and part of the community; and,

Whereas, the members of the Tuscaloosa County Bar Association were saddened by his untimely death on December 11, 1997.

Whereas, therefore, be it resolved, that the Tuscaloosa County Bar Association in meeting assembled on this 23rd day of January 1998, mourns the death of Carl W. Albright, Jr. and desires to honor the memory of this distinguished colleague, businessman and community leader, whose life expanded the highest principals and ideals of our legal profession.

Be it further resolved that this resolution be spread upon the minutes of the association and that copies be forwarded to his wife, Rainer Lamar Albright, and to his two children, Sally Lamar Albright and Carl W. Albright, III, with the sincere condolences of the members of this association.

— G. Stephen Wiggins  
President, Tuscaloosa County Bar Association

## E. Hampton Brown

The staff and board of directors of the Legal Aid Society of Birmingham, Inc. sadly note the passing of E. Hampton Brown on November 29, 1997. Hampton was a proud graduate of the University of Alabama, receiving his B.S. degree in commerce and business administration in 1961 and his J.D. degree in 1963. He was admitted to the Alabama State Bar in 1963.

Hampton began his practice as an assistant district attorney in Huntsville, Alabama. Hampton also served as an assistant city attorney in Huntsville and with the Legal Aid Society of Madison County. From 1976 until his death, Hampton was

employed with the Legal Aid Society of Birmingham. He served as executive director of the Legal Aid Society of Birmingham, Inc. for many years.

Hampton was recognized by the Alabama Judicial Faculty Association. He was a member of the Alabama Criminal Defense Lawyers Association, and was a strong advocate for indigent defense, serving as chair of the Alabama State Bar Indigent Defense Committee from 1991 until 1993.

Hampton is survived by his children, Beverly Brown, Barry Brown and Bliss Brown Wilson; one granddaughter, Olivia Grace Wilson; his mother, Gaynelle Brown; two sisters, Gay Pinson and Lavinia Mitchell; and several nieces and nephews.

—Legal Aid Society of Birmingham, Inc.





## BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

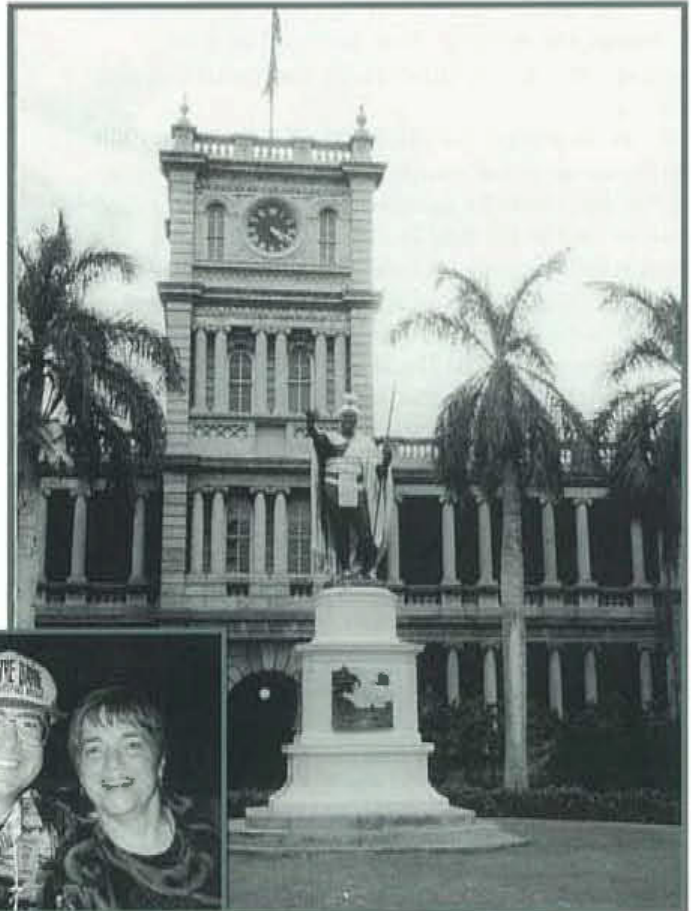


### Hawaiian Islands

Attorneys Sam and Pat Rumore recently enjoyed a vacation in our 50<sup>th</sup> state. While in Hawaii they took in the sights, sounds, and food of the islands, plus attended a football game. They viewed volcanos, saw surfers, and passed pineapple plantations.

These distractions coupled with the Christmas holidays put Sam behind schedule on his next "Alabama Courthouse" article. In its place are photographs taken in Hawaii. Included are the supreme court building with the statue of King Kamehameha, the Federal Courthouse in Honolulu which is across the street from the supreme court, and Sam and Pat having a good time at a Hawaiian luau.

The regular feature "Building Alabama's Courthouses" will continue in the next issue of *The Alabama Lawyer*. ■



*Sam and Pat enjoying themselves at a Hawaiian luau*

*Hawaii Supreme Court, with statue of King Kamehameha (The courthouse was used to depict a police station in the television series "Hawaii Five-O.")*



*Federal Courthouse in Honolulu (across the street from the supreme court)*



#### **Samuel A. Rumore, Jr.**

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and

is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four, and is a member of *The Alabama Lawyer* Editorial Board.



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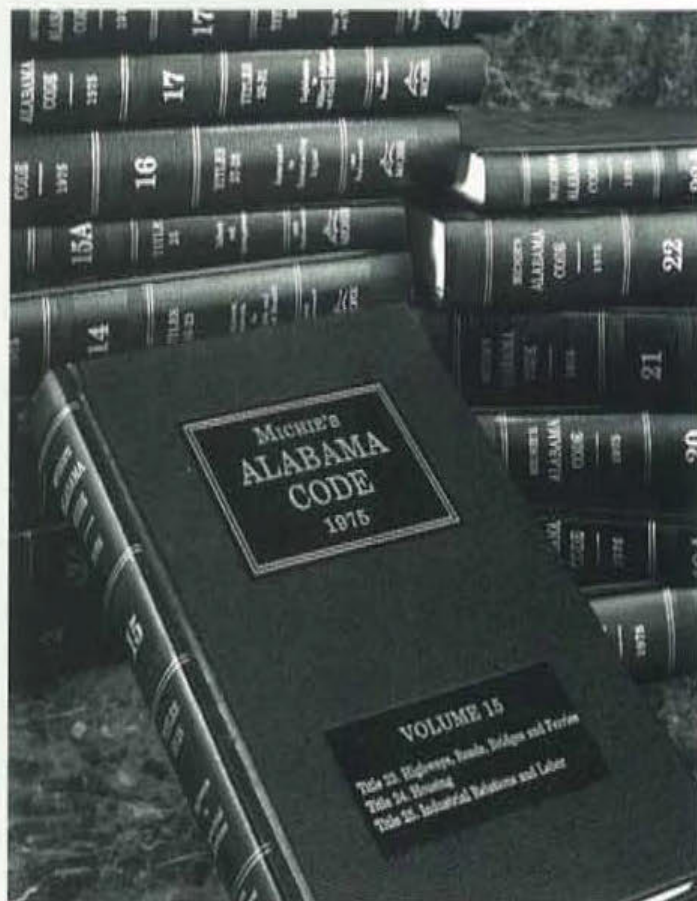
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## LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

### Legislature online: [www.legislature.state.al.us/](http://www.legislature.state.al.us/)

The Legislature and *Code of Alabama* is now online through the Alabama Legislature Information System (ALIS). The Internet homepage lists the following options:

- Code of Alabama
- Text Search
- Key Word Search

By clicking on "Text Search" one can search the *Code of Alabama* or Alabama Constitution by "key words." One option is an abstract of the number of documents the search has

found and the *Code* citations that are applicable. From there you can go to the full text of the *Code* citation with the key word highlighted.

A second feature is the ability to search the bills filed in the 1998 Regular Session of the Legislature by key word or bill number. By clicking on "Session 1998RS" you can then enter either the subject matter you are searching for or if you know the bill number, enter the bill number in lieu of the word search. This will reveal the subject matter of the bill, its sponsors and a brief synopsis of the bill. From there you can review the text of the bill on computer screen or obtain a printout.

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There are also "tips for searching" the *Code* or bills for those unfamiliar with the key word search process. This is a new system for Alabama and may still contain "bugs." To assure that the information is error-free you may want to confirm the information by looking in the *Code* or obtaining a copy of the bills from the House or Senate.

**Alabama State Government online:**  
[www.state.al.us/govern.html](http://www.state.al.us/govern.html)

From this web page you can obtain html links to the governor's office, lt. governor's office, state agencies, Legislature, and judicial system. These links provide names, addresses, and phone numbers for the governor and his staff, legislators and agencies. The judicial system has the "ALALINC" network which will enable you to view and download Alabama appellate court decisions as well as 11<sup>th</sup> Circuit Court of Appeals opinions and United States Supreme Court opinions.

**Other Internet Addresses**

Alabama State Bar: [www.alabar.org](http://www.alabar.org)  
American Bar Association: [www.abanet.org/](http://www.abanet.org/)  
American Law Institute: [www.ali.org/](http://www.ali.org/)  
National Conference of Commissioners on Uniform State Laws: [www.nccusl.org/](http://www.nccusl.org/)  
National Conference of State Legislatures: [www.ncsl.org](http://www.ncsl.org)  
Alabama Law Institute: [www.law.ua.edu/ali](http://www.law.ua.edu/ali) (The status of Institute prepared bills are available at this site plus links to

the University of Alabama Law School, Cumberland Law School, Alabama State Bar, and State of Alabama.)

We are again providing legal counsel to both branches of the Legislature—in the Senate, Chris Pankey and in the House, Pam Higgins.

We also have three college students working as capital interns during the Regular Session:

Governor's Office: Kristopher Robinson

Lt. Governor's Office: Melinda Stallworth

Speaker's Office: Rebecca Tyree

Anyone wishing more information concerning the Institute or any of its projects may contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348- 8411; phone (205) 348-7411; Institute home page: [www.law.ua.edu/ali](http://www.law.ua.edu/ali). ■



**Robert L. McCurley, Jr.**

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



*Leon Sanders (seated), Gina Matthews and Tom Marvin of Mississippi Valley Title in Birmingham.*

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## Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through May 15, 1998. Nominations should be prepared and mailed to:

**Keith B. Norman, Secretary**  
**Board of Bar Commissioners**  
**Alabama State Bar**  
**P.O. Box 671**  
**Montgomery, Alabama 36101**

The Judicial Award of Merit was established in 1987. The 1997 recipient was the Honorable Hugh Maddox, associate justice, Alabama Supreme Court.

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

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

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



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Be sure to make your hotel reservation while rooms last.

**35th Annual Corporate Law Institute**, (Call Marriott's Grand Hotel at 800-544-9933 for a room reservation.) April 23-25, 1998, Point Clear, Alabama, The Grand Hotel, 12 MCLE Credit Hours, \$395 Preregistration Fee, \$150 Registration Per Day.

**WHILE OUR ROOM BLOCK LASTS--call the Hilton Beachfront Garden Inn at 334-974-1600 or 1-888-6-HILTON for a room reservation for the programs below:**

**City and County Governments Seminar**, May 1-2, 1998, Orange Beach, Alabama, Hilton Beachfront Garden Inn, 6.0 MCLE Credit Hours, \$245 Preregistration Fee, \$265 Door Registration.

**Environmental Law Update**, May 8-9, 1998, Orange Beach, Alabama, Hilton Beachfront Garden Inn, 6.0 MCLE Credit Hours, \$245 Preregistration Fee, \$265 Door Registration.

**Business Torts and Antitrust**, May 15-16, 1998, Orange Beach, Alabama, Hilton Beachfront Garden Inn, 10.0 MCLE Credit Hours, \$245 Preregistration Fee, \$265 Door Registration

**36th Tax Law Institute**, June 4-6, 1998, Orange Beach, Alabama, Hilton Beachfront Garden Inn, 12 MCLE Credit Hours, \$395 Preregistration Fee





## OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

# Lawyers' Ethical Obligations When Representing Public Bodies



J. Anthony McLain

**T**he settlement of a recent lawsuit filed against the Alabama State Bar involved the interpretation of the Alabama Rules of Professional Conduct as applied to lawyers representing public boards or agencies. Media reports concerning this lawsuit and the settlement have been less than accurate. This article is intended to clarify the subsequent confusion created by the media's dissemination of this information.

The Disciplinary Commission of the Alabama State Bar had previously rendered a formal opinion concerning a lawyer's obligations to a client whose meetings were subject to the Alabama Sunshine Law, and that same lawyer's ethical obligations as to confidentiality pursuant to the Alabama Rules of Professional Conduct. The opinion request sought reconciliation of these issues of law and ethics in light of the opinion rendered by the Alabama Supreme Court in the case of *Dunn v. Alabama State University Board of Trustees*, 628 So.2d 519 (Ala. 1993). The court adopted the standard approved by the Supreme Court of Tennessee in addressing that state's "Open Meetings Act."

That standard is that discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act. The Tennessee Supreme Court also opined that this was a "narrow exception," and applied only to those situations in which the public body is a named party in the lawsuit. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 334-35 (Tenn. 1984).

In RO-95-09, the Disciplinary Commission reaffirmed the obligation of the lawyer representing a public body to adhere to the provisions of Rule 1.6, Alabama Rules of Professional Conduct, concerning confidentiality. The commission pointed out its lack of jurisdic-

tion to interpret the Sunshine Law, and recognized that in some instances a lawyer's ethical duty to his or her client could appear to conflict with statutory or case law.

Subsequent to the issuance of this opinion by the Disciplinary Commission, the Alabama Press Association ("APA") requested reconsideration of the opinion, contending that the opinion encouraged lawyers who represented public bodies to blatantly disregard the Sunshine Law and the holding in *Dunn*.

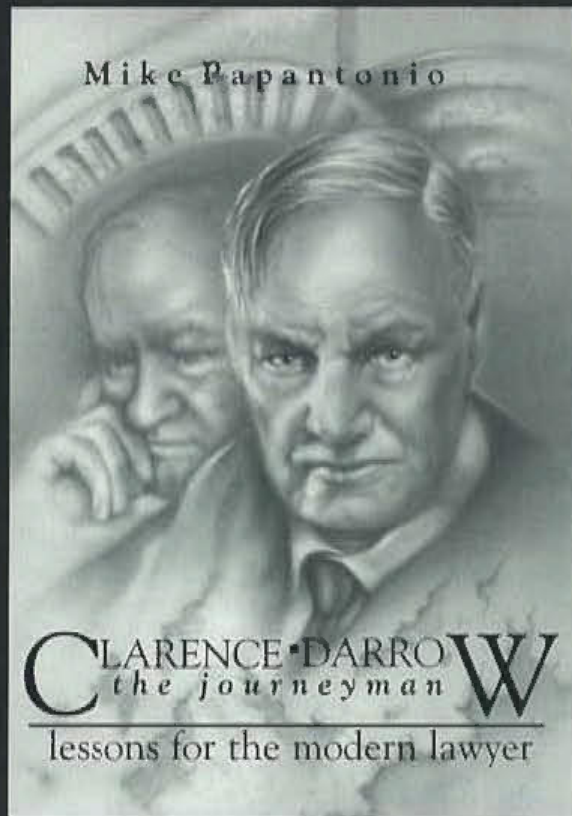
The Disciplinary Commission reconsidered its opinion, and supplemented the opinion with the following language:

"The Disciplinary Commission urges lawyers confronted with this dilemma to ensure that the client is aware of the requirements of the statute as well as the lawyer's ethical responsibilities under the Rules of Professional Conduct. The client must be adequately informed in order to make a decision on what action it will pursue. Disclosure by the lawyer of his or her ethical obligation under the Rules to the client allows the client to better understand the ramifications of the lawyer's advice and counsel, and should involve a discussion of the requirements of the statute as enunciated in *Dunn*."

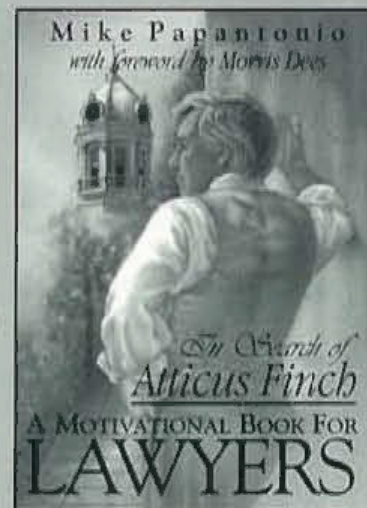
Thereafter, the Alabama State Bar and the APA filed a joint petition with the Supreme Court of Alabama, seeking guidance from the court as to clarification of the legal and ethical issues presented. The court declined the petition and request. The APA then filed suit against the bar in the Montgomery County Circuit Court. Settlement negotiations resulted in the APA dismissing the lawsuit after receiving a letter of explanation from the Office of General



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## Notice of Election

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

### President-Elect

The Alabama State Bar will elect a president-elect in 1998 to assume the presidency of the bar in July 1999. Any candidate must be a member in good standing on March 1, 1998. 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, 1998. 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 1998 *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at state bar headquarters by 5 p.m. on July 7, 1998.

### Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1<sup>st</sup>; 3<sup>rd</sup>; 5<sup>th</sup>; 6<sup>th</sup>, place no. 1; 7<sup>th</sup>; 10<sup>th</sup>, places no. 3 and 6; 13<sup>th</sup>, places no. 3 and 4; 14<sup>th</sup>; 15<sup>th</sup>, places no. 1, 3 and 4; 25<sup>th</sup>; 26<sup>th</sup>; 28<sup>th</sup>; 32<sup>nd</sup>; and 37<sup>th</sup>. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 1998 and vacancies certified by the secretary on March 15, 1998.

The terms of any incumbent commissioners are retained.

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 24, 1998).

Ballots will be prepared and mailed to members between May 15 and June 1, 1998. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 9, 1998) to state bar headquarters.



Counsel as to the application of the Rules of Professional Conduct to lawyers representing public bodies.

In reporting this settlement, one APA member newspaper editorialized:

"Usually, it seems, lawyers sue the media. This time, the media sued the lawyers, and won. "Last year the Alabama Bar Association advised governmental agencies they could meet behind closed doors to discuss any kind of legal matter. The practical effect of that rule was an open invitation to exclude the public from the public's business whenever agencies wanted.

\*\*\*\*\*

"Thanks to an agreement worked out between the bar and nine news organizations which sued, that will no longer be the case. In fact, the bar will send a letter to members making it clear that lawyers for public bodies should advise their clients of the need to obey the open meetings law. "Also, as part of the agreement, public agencies may meet privately to discuss legal advice only when suits already have been filed, not to discuss potential cases."

*The Birmingham News*, November 19, 1997.

Based on a press release from the APA, a state association newsletter reported the settlement as follows:

"This consent decree holds that the attorney-client privilege applies only where a lawsuit has been filed

against the municipality and the attorney needs to provide legal advice to the council. Any discussions relating to the action to take on the advice of the attorney must take place in the public meeting." *Alabama Municipal News*, January 1998.

These two articles are replete with incorrect information. First, the bar has never encouraged lawyers to violate the law. Second, the opinions of the Disciplinary Commission and the Office of General Counsel deal only with ethical issues, as neither have the authority to render opinions or advice on matters of law. Third, there is no real "agreement." The APA dismissed the lawsuit based upon a letter from the Office of General Counsel to counsel for the APA explaining how lawyers seeking an ethics opinion in this area are advised by the bar. This letter was in response to a hypothetical inquiry of said counsel in an effort to settle the lawsuit. Last, the letter and the opinion in no way interpret the Sunshine Law, Dunn, and the legal issue of attorney-client privilege, as these all involve issues of law, and not of ethics.

The opinion of the Disciplinary Commission clearly, emphatically and repeatedly states that the only matters which can be addressed in such an opinion are matters which deal with the Alabama Rules of Professional Conduct. To borrow from the "settlement" letter directed to counsel for the APA:

"In those few instances where attorneys have sought ethical guidance in this regard, the attorneys have been informed by the Office of General Counsel that the Rules of Professional Conduct, as well as the opinions of this office [Office of General Counsel] and the Disciplinary Commission, are restricted only to the ethical parameters of the attorney's conduct, and that they in no way address questions or issues of law relevant to the attorney's representation of his client.

"To the contrary, all issues of law are left solely for determination by the attorney, based upon the attorney's professional opinion and what is in the best interest of the client consistent with statutory and case law."

In order to help lawyers throughout the state who may have read or heard inaccurate reports similar to those set out previously in this article, the Office of General Counsel and the Disciplinary Commission seek to clarify these matters, and offer continued advice on these and other issues of ethics. ■

[RO-95-09]

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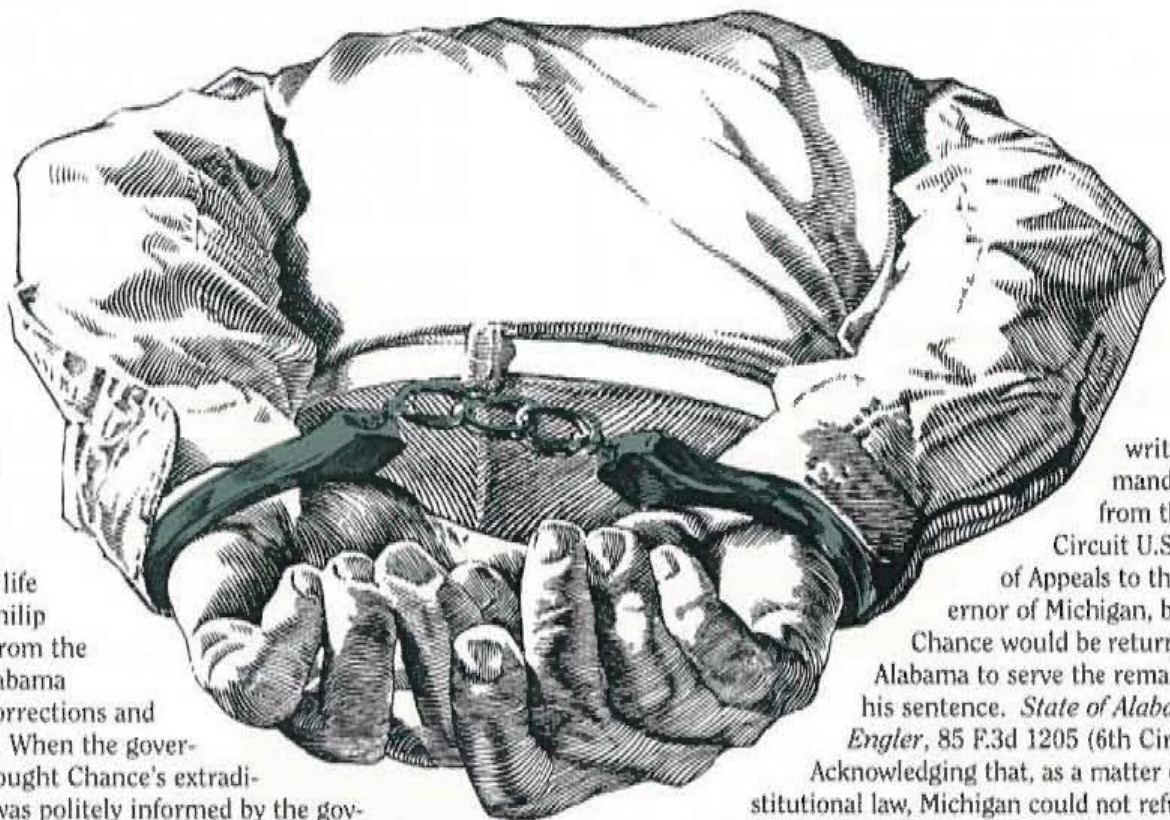
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# The Right to Court-Appointed Counsel in Extradition Proceedings

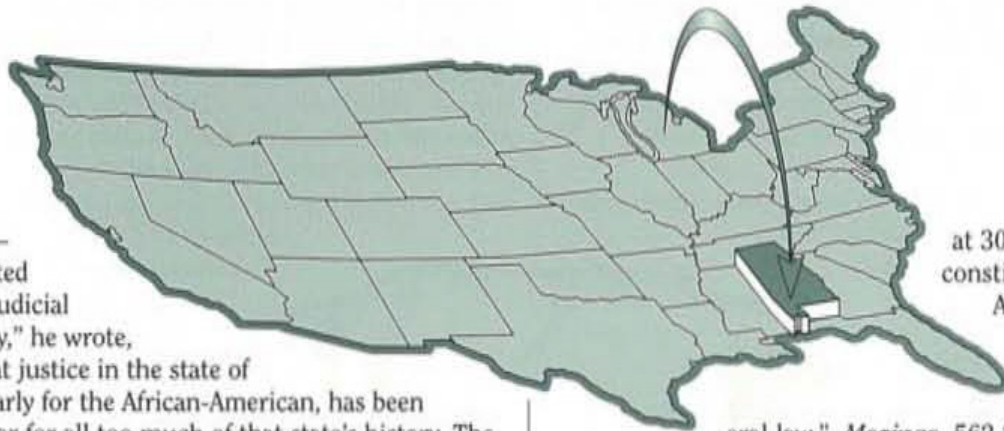
By Robert M. Weinberg



**E**ight years after he was convicted of murder and sentenced to life imprisonment, Philip Chance escaped from the custody of the Alabama Department of Corrections and fled to Michigan. When the governor of Alabama sought Chance's extradition in 1982, he was politely informed by the governor of Michigan that Chance had been granted "asylum" from Alabama because of his "very fine character" and "the support of his friends." What Michigan really meant was that it believed Chance had been "railroaded," and it intended to protect him from a Southern justice reminiscent of the days of the Scottsboro boys described in *Powell v. Alabama*, 287 U.S. 45 (1932). It would be another 14 years and require a

writ of mandamus from the Sixth Circuit U.S. Court of Appeals to the governor of Michigan, before Chance would be returned to Alabama to serve the remainder of his sentence. *State of Alabama v. Engler*, 85 F.3d 1205 (6th Cir. 1996). Acknowledging that, as a matter of constitutional law, Michigan could not refuse extradition, Judge Nathaniel R. Jones of the Sixth Circuit nonetheless felt compelled to "write separately to express my distaste at being unable to affect the return of a citizen of this County, or any human being, to a jurisdiction and prison system with a wretched history [as Alabama's.]" *Id.* 85 F.3d at 1210. Decrying the return of the "chain gang" to Alabama prisons—a practice not in existence at the time





Chance escaped — Judge Jones indicted Alabama's entire judicial system. "Certainly," he wrote, "it is no secret that justice in the state of Alabama, particularly for the African-American, has been invisible or peculiar for all too much of that state's history. The instant case has reminded me of the Scottsboro saga . . . " *Id.*

Rarely are judges so inclined as Judge Jones to concur separately in order to use that privilege as a platform from which to gratuitously censure the very party to whom they grant relief. But Judge Jones' injudicious dicta may not be the most troublesome aspect of Michigan's refusal to honor its constitutional commitments. What is most disturbing is the presumption from our neighbors to the north, state and federal, that Alabama has not learned a thing or two since the days of the "Scottsboro saga." The *Powell* case recalled by Judge Jones involved the question whether there even existed a right under the Constitution to court appointed counsel in state court; at the time, it did not. The question in *Engler* involved a state's obligations under the extradition clause of Article IV. Having paired the two, it might interest Judge Jones to learn that the evolution of the law applicable to both in Alabama reveals a judicial system more forward thinking than he and the authorities in Michigan have been led to believe.

The origin of every state's extradition authority, responsibility and duty to deliver fugitives from justice to a demanding state, is found in the United States Constitution. "A person charged in any State With Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U.S. Const. art. IV, § 2, cl. 2. In 1931, the Alabama Legislature, patterned with slight variations after the 1926 text of the Uniform Criminal Extradition Act, passed Ala. Acts 1931, No. 482, p. 559. *Mozingo v. State*, 562 So.2d 300, 302 (Ala.Cr.App. 1990); *Krenwinkel v. State*, 45 Ala.App. 474, 232 So.2d 346 (1970). There have been no substantive changes in the statute in over 60 years. "Subject to the qualifications of this division, the controlling provisions of the Constitution of the United States and acts of congress in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime who has fled from justice and is found in this state." Ala. Code § 15-9-30 (1995). "This section is, in large part, a restatement of Article IV, § 2, cl. 2, of the United States Constitution." *Mozingo*, 562 So.2d

at 302. Considering their constitutional origin, Alabama courts have held that "extradition issues are largely controlled by federal law." *Mozingo*, 562 So.2d at 303.

At first blush, the role of the courts appears narrowly defined. "This examination by a circuit court is not a roving commission. Rather, its function is to make sure of a proper formal charge and that the accused is a fugitive." *Krenwinkel*, 45 Ala.App. at 476, 232 So.2d at 348; see also *Mozingo*, 562 So.2d at 303; *Morrison v. State*, 258 Ala. 410, 63 So.2d 346 (1953); *Rayburn v. State*, 366 So.2d 698, 702 (Ala.Cr.App. 1978), *aff'd*, 366 So.2d 708 (1979). Courts faced with requests for extradition may not entertain, for example, affirmative defenses to the crimes charged, or allegations that the person sought to be extradited will not be tried fairly in the demanding state. Ala. Code § 15-9-47 (1995); *Coulter v. State*, 611 So.2d 1129, 1132 (Ala.Cr.App.1992); *California v. Superior Court of California*, 482 U.S. 400, 407 (1987); *Michigan v. Doran*, 439 U.S. 282, 288-90 (1979); *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952); *Marbles v. Creecy*, 215 U.S. 63, 69 (1909). But that is not to say the role of the courts is considered to be without consequence. "Because a person to be extradited is not already in prison, supporting documents are required by the requesting state for the person, and the asylum state is permitted to investigate the demand in order to determine whether the individual should be surrendered. See §§ 15-9-33 through 15-9-33, Code of Alabama 1975. Certain rights of arrestees sought to be extradited are outlined in § 15-9-38, Code of Alabama 1975." *Coulter*, 611 So.2d at 1131.

Included among the rights guaranteed by statute are the right to notice of the demand, notice of the crime charged, and notice of the right to demand counsel. "No person arrested upon a warrant of arrest issued under this division shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender, the crime with which he is charged and that he has the right to demand legal counsel." Ala. Code § 15-9-38(a) (1995). "That Section merely requires that *before* an arrestee is delivered over to agents of the state requesting his extradition, the arrestee must be 'informed of the demand made for his surrender, the crime with which he is charged, and that he has the right to demand legal counsel.' Alabama Code Section 15-9-38(a) (1975) (emphasis added)." *Hester v. State*, 444 So.2d 1, 2 (Ala.Cr.App. 1983). The right to demand legal counsel is



not a privilege, gratuitously conferred, but serves an important purpose. Indeed, federal courts that have had occasion to construe Alabama's extradition statutes have held that a person "sought to be extradited has a federal constitutional right to test the validity of his extradition by filing a writ of habeas corpus. *Crumley v. Snead*, 620 F.2d 481 (5th Cir. 1980)." *Payne v. Burns*, 707 F.2d 1302, 1303 (11th Cir. 1983).

Alabama law provides the mechanism whereby an accused may test the legality of his extradition. "If the

prisoner, his friends or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a district or circuit court in this state, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus." *Ala. Code* § 15-9-38(b) (1995).

"This statute is not directed to whether a prisoner will elect to file or not file a petition but rather *guarantees* him time in which to apply for the writ and holds his extradition in limbo during such time." *Payne*, 707 F.2d at 1303 (emphasis added).

Another right expressly conferred by statute is the right to bail. "Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, *the district or circuit judge must admit the person arrested to bail* by bond or undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state." *Ala. Code* § 15-9-43 (1995) (emphasis added). The statutes governing extradition thus anticipate that legal counsel, whether appointed or retained, may play a significant role in exercising the rights of a person charged with a crime and who has been arrested and detained within the State of Alabama at the request of a foreign state. Those rights include the right to notice, the right to challenge the validity of the charging and requesting documents, and the right to bail pending extradition.

Since 1931, there has been but one reported decision on point on the question whether an indigent accused of a crime in a foreign jurisdiction is entitled to court appointed in an extradition proceeding held in this state. In 1965, the court of appeals held that a two-year-old statute pertaining to the provision of court appointed counsel for indigents accused of serious crimes, Act. No. 526, Acts of Alabama, 1963, "does not apply to extradition." *Sullivan v. State*, 43 Ala.App. 133, 181 So.2d 518, 520 (1965). But the decision is limited on its facts, and by the statute the court was asked to construe. For the right to appointed counsel has evolved considerably since 1965; the Alabama Legislature has amended the statute

referred to by the court of appeals in *Sullivan* many times in response to evolving standards of when and in what circumstances an accused is entitled to court appointed counsel. And the right to have the *assistance* of counsel under the state and federal constitutions, as is true of the right to demand counsel under the extradition statute, has not always been synonymous with the right to be *appointed* counsel if one is indigent and accused of a crime. It was not until the year after the

Alabama Legislature codified the right to demand counsel in extradition proceedings that the United States

Supreme Court, in a capital case from Alabama, held for the first time that a person accused "requires the guiding hand of counsel at every step in the proceedings against him."

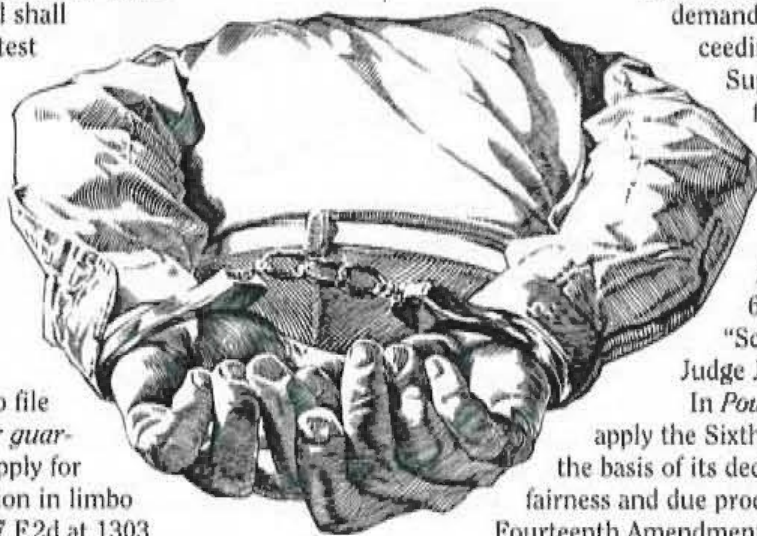
*Powell v. Alabama*, 287 U.S. 45, 69 (1932). *Powell* was that

"Scottsboro saga" referred to by Judge Jones.

In *Powell*, the Supreme Court did not apply the Sixth Amendment to the states as the basis of its decision, but upon fundamental fairness and due process concerns expressed by the Fourteenth Amendment. "Even the intelligent and

educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence." *Powell*, 287 U.S. at 69. While the Court held that the Fourteenth Amendment clearly required the appointment of counsel to indigents accused of *serious* crimes and capital offenses, 287 U.S. at 73, it did not elaborate beyond the facts of the case. And the Sixth Amendment was not to be applied to the states for a number of years.

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), Justice Hugo Black writing for the Supreme Court applied the Sixth Amendment, for the first time, to criminal prosecutions brought in federal court. "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential prerequisite to a *Federal court's* authority to deprive an accused of life or liberty." 304 U.S. at 467 (capitalization in the original; emphasis added). Four years later, Justices Black, Douglas and Murphy dissenting, the Supreme Court declined the invitation to apply the Sixth Amendment to the states, and further declined to lay down a hard and fast rule as to when appointed counsel is constitutionally required under the Fourteenth. "The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argument, but, as petitioner





admits, none of our decisions squarely adjudicates the questions now presented." *Betts v. Brady*, 316 U.S. 455, 462-63 (1942) (footnote omitted).

Thirty years after *Powell v. Alabama*, in another capital case from Alabama, the United States Supreme Court held as a matter of federal law that, because arraignment is the time at which an accused enters a guilty or not guilty plea, and must enter or waive special defenses, such as an insanity plea, and must raise or waive challenges to the indictment or the make-up of the grand jury, the arraignment is a "critical stage" in Alabama criminal proceedings, and the due process clause of the Fourteenth Amendment requires that accused are entitled to counsel at that time. *Hamilton v. Alabama*, 368 U.S. 52 (1961). "Whatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in the proceeding. What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Hamilton*, 368 U.S. at 54 (footnote omitted). The Supreme Court did not address the applicability of the Sixth Amendment to the rights of state criminal defendants, nor did it specifically address the question of whether *indigents* are due to be *appointed* counsel at state expense, and would not do so for another two years.

On March 18, 1963, the Supreme Court held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment entitles indigent criminal defendants to appointed counsel at trial in all felonies. The Supreme Court's decision in *Gideon* was a turning point, not only in the evolution of federal law and Sixth Amendment jurisprudence, but in the evolution of Alabama law on the question whether and under what circumstances an accused is entitled to appointed counsel at the expense of the state. Six months after the Supreme Court's decision in *Gideon*, on September 16, 1963, the Alabama Legislature set forth specific guidelines for the courts to follow pertaining to the provision of appointed counsel for indigents in non-death penalty cases, "wherein a defendant is charged with a *serious offense* in the circuit court, or court of like jurisdiction." Ala. Acts 1963, No. 526, p. 1136, § 1 (emphasis added). Two years later, the Alabama Supreme Court held that an accused has the right to counsel beginning with arraignment and at every stage of the proceeding, including guilty plea, unless a competent, intelligent, and voluntary waiver is made. *Stickland v. State*, 280 Ala. 31, 189 So.2d 771 (1965). Earlier that year, however, the court of appeals held that it did "not think that petitioner had any constitutional right to counsel taken from him in this case [because] Act. No. 526, Acts of Alabama, 1963, does not apply to extradition."

*Sullivan v. State*, 43 Ala.App. 133, 181 So.2d 518, 520 (1965). Interestingly, Sullivan himself, although "not represented by counsel at the proceedings in the circuit court, [was] represented by *court-appointed* counsel on . . . appeal." *Id.*, 43 Ala.App. 133, 181 So.2d at 518 (emphasis added).

In the years following *Sullivan*, the United States Supreme Court continued to redefine the constitutional rights of indigents accused of crime. See *e.g.*, *United States v. Wade*, 388 U.S. 218 (1967) (indigent accused is entitled to appointed counsel at a pre-trial post-indictment lineup); and *Memph v. Rhay*, 389 U.S. 128 (1967) (indigent has right to appointed counsel at sentencing). In another case from Alabama, the court held in *Coleman v. Alabama*, 399 U.S. 1 (1970), that because a preliminary hearing is a "critical stage" under Alabama law, an indigent accused is entitled to court appointed counsel. *Coleman* was decided June 22, 1970. The following year, evidently anticipating the courts' need for flexibility, the Alabama Legislature amended the phrase in Act No. 526 which previously read "wherein a defendant is charged with a serious offense," to read: "when a defendant is entitled to counsel as provided by law." Ala. Acts 1971, No. 2420, p. 3851, § 1. In 1973, the Alabama Constitution was amended to formally recognize the authority of the



Alabama Supreme Court to make and promulgate rules. Ala. Const. amend. 328, § 6.11. But nearly 20 years would pass before the Alabama Supreme Court's exercise of that authority would lend any assistance to today's inquiry. And still the phrase "as provided by law" remained undefined other than as interpreted by the

United States Supreme Court.

Nine years after *Gideon* marked another turning point when in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) the United States Supreme Court held that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.*,

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407 U.S. at 37. Eight years after *Argersinger*, in *Scott v. Illinois*, 440 U.S. 367 (1979), the Supreme Court declined to require the appointment of counsel in all cases where imprisonment may result, adopting instead "actual imprisonment as the line defining the constitutional right to appointment of counsel." 440 U.S. at 373. Still, the phrase "as provided by law" began to focus less on the nature or severity of the offense charged, and more on the likelihood of an accused's involuntary deprivation of liberty. Five years after *Scott*, the Alabama Legislature again amended the statute to incorporate this new approach, and to provide for court appointed counsel in all criminal cases "which may result in the jailing of the defendant." Ala. Acts 1984, 1st Ex. Sess. No. 84-793, p. 198, § 1; Ala. Code § 15-12-20 (1995).

The very nature of the law of extradition contemplates that a person whose extradition is sought will not be routinely placed at liberty. "The officer or person executing a governor's warrant of arrest under this division or the agent of the demanding state to whom the prisoner may have been delivered may confine the prisoner in the jail of any county or city through which he may pass when necessary. The keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with the expense of the keeping." Ala. Code 1975 § 15-9-39 (emphasis added). In the case of an arrest prior to a formal requisition from a foreign state, the law requires the individual be committed to jail, although it does not state for how long. "If, from the examination before the district or circuit court judge, it appears that the person held is the person charged with having committed the crime alleged, that he probably committed the crime and, except in cases arising under section 15-9-34, that he has fled from justice, the judge must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the execu-

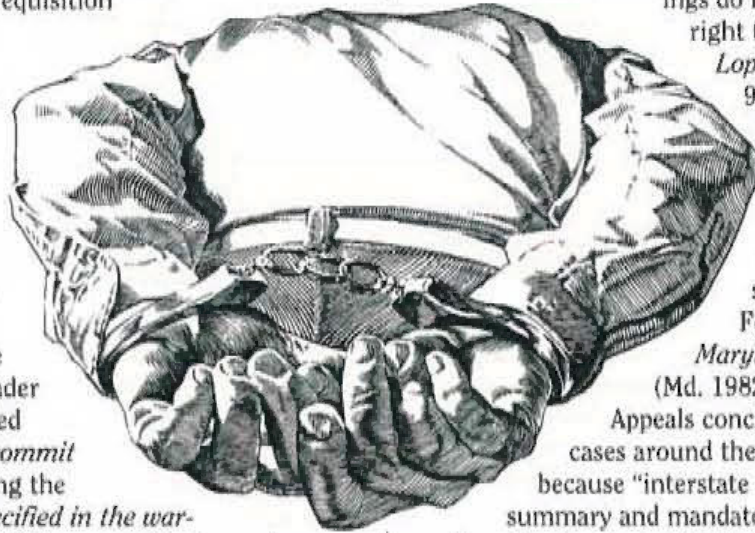
tive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in section 15-9-43, or until he shall be legally discharged." Ala. Code § 15-9-42 (1995) (emphasis added). Alabama courts have construed the language "for such a time specified" to allow for the passage of "a reasonable time" between arrest and formal demand, see *State v. Sparks*, 44 Ala.App. 531, 215 So.2d 469 (1968), but the statutes also provide for the extension of the initial period of detention pending formal extradition. Ala. Code § 15-9-44 (1995). And while the statutes do not otherwise identify how long an individual may be detained in jail pending formal extradition, as a practical matter, it may be upward of 90 days or more. Cf. *Alabama Rules of Criminal Procedure*, Rule 7.4(c) and (d), which requires that the circuit and municipal courts "shall review the conditions of release for every defendant who has been in jail for more than ninety (90) days."

Interestingly, no federal court has ever expressly held there exists a federal constitutional right to court appointed counsel in extradition proceedings. Those federal courts that have considered the argument, reject it. "It is well settled that extradition proceedings are not considered criminal proceedings that carry the sixth amendment guarantee of assistance of counsel." *Chewning v. Rogerson*, 29 F.3d 418, 421 (8th Cir. 1994). "Thus, because the sixth amendment by its terms applies only to 'criminal prosecutions,' extradition proceedings do not carry the sixth amendment right to the assistance of counsel."

*Lopez-Smith v. Hood*, 951 F.Supp. 908, 912 (D. Az. 1996). If such a right is to be found it will be in state court. But until recently, most state courts routinely held there was no right to court appointed counsel in extradition proceedings.

For example, in *Utt v. State of Maryland*, 293 Md. 271, 443 A.2d 582 (Md. 1982), the Maryland Court of Appeals concluded the "the vast majority of cases around the country" found no such right because "interstate extradition is intended to be a summary and mandatory executive proceeding derived from the language of U.S. Const. art. IV, § 2, cl. 2. It was never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." *Id.* 293 Md. at 285, 443 A.2d at 589. And in *People v. Morton*, 479 N.Y.S.2d 275, 278, 104 A.D.2d 569, 571 (N.Y. App. Div. 1984) the court held that "extradition process is not a critical stage of a criminal proceeding and the constitutional right to counsel does not attach thereto." *Accord*, *People v. Benedict*, 508 N.Y.S.2d 656, 124 A.D.2d 890 (N.Y. App. Div. 1986).

In 1991, the First District Court of Appeal of Florida, construing a statute practically identical to Alabama's that provides a person arrested upon an extradition warrant "has the right to demand and procure legal counsel," arrived at a differ-



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ent conclusion. "[I]t is our view that the language of section 941.10(1) which originated in the Uniform Extradition Act, gives a prisoner the right to legal counsel and that the Fourteenth Amendment prohibits the denial of this right to indigents, when it has been made available to those able to afford counsel. *Bentzel v. State of Florida*, 585 So.2d 1118, 1120 (Fla. Dist. Ct. App. 1991) (citations omitted). Today, the Alabama Supreme Court would likely agree with the Florida District Court of Appeal's 1991 decision, for that same year the Alabama Rules of Criminal Procedure became effective. "A defendant shall be entitled to be represented by counsel in any criminal proceedings held pursuant to these rules and, if indigent, shall be entitled to have an attorney appointed to represent the defendant in all criminal proceedings in which representation by counsel is constitutionally required." *Alabama Rules of Criminal Procedure*, Rule 6.1(a). And while it can be argued that the phrase "constitutionally required" limits the right to appointed counsel to those types of proceedings the United States Supreme Court has specifically held require them as a matter of law, such a limiting construction ignores the Supreme Court's shift in focus in *Scott v. Illinois*, and *Argersinger v. Hamlin*, from the nature or severity of the offense charged to the likelihood of an involuntary deprivation of liberty as the determining factor by which to judge whether appointed counsel is constitutionally required. *Cf. In re Himant*, 424 Mass. 900, 906-08, 678 N.E.2d 1314, 1318-19 (1997) (acknowledging the sui generis civil nature of extradition proceedings but finding nonetheless there does exist a right to court appointed counsel because "where a potential deprivation of liberty is involved, it is appropriate that we consider due process rights as we would were this a criminal proceeding").

Finally, committee comments to the rules may not be controlling, *cf. IMED Corp. v. Systems Engineering Assocs. Corp.*, 602 So.2d 344, 348 (Ala. 1992), but in this instance, do prove particu-

larly instructive. "For the purpose of Rule 6, the term 'criminal proceeding' includes any stage of the criminal process, from accusation through appeal, and in collateral proceedings arising from the initiation of a criminal action against the defendant, such as post-conviction proceedings and appeals therefrom, *extradition proceedings*, and other like proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal and without regard to whether a 'criminal proceeding' has or has not been commenced under Rule 2.1." Committee Comments, *Alabama Rules of Criminal Procedure*, Rule 6.1 (emphasis added).

In view of the Committee Comments and the Alabama Legislature's provision for counsel to be appointed in all cases "which may result in the jailing of the defendant," it would appear that where-

as the federal courts may still be somewhat behind the times, in Alabama today, the rights of an indigent who faces extradition to a foreign state include the right to court appointed counsel. Judge Jones' uninformed dicta that Alabama's judicial system applied to Philip Chance is presumptively nothing more than a modern day "Scottsboro saga," serves only to perpetuate stereotypes of Southern justice that no longer exist. This much, however, is clear: if Michigan were to seek the extradition of a convicted murderer who escaped from one of its prisons, not only would that individual, if indigent, likely be entitled to court appointed counsel as a matter of state law, but it would not take 14 years and a federal writ of mandamus for Alabama to honor its constitutional commitments. ■

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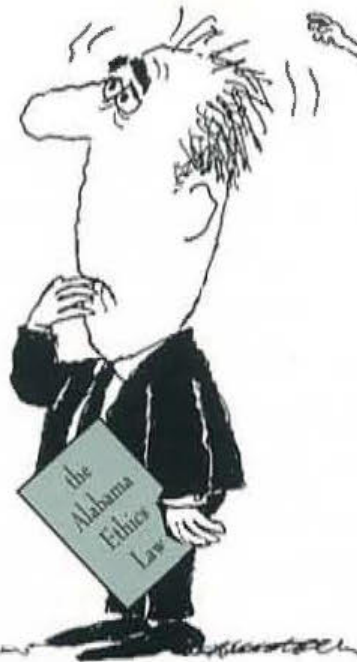
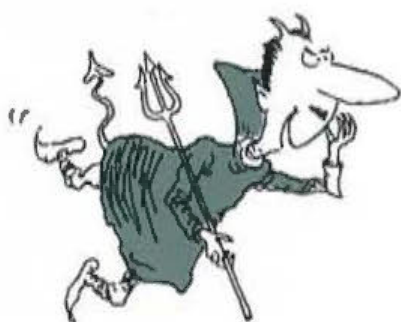
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# The Alabama Ethics Law for Lawyers

by James L. Sumner, Jr. and Hugh R. Evans, III



## Introduction

In 1995, sweeping revisions were made to the Alabama Ethics Law, *Code of Ethics for Public Officials, Employees, etc.*, §36-25-1 through 36-25-30, *Code of Alabama, 1975*. Those changes have had a tremendous impact on the way the public's business is conducted in the State of Alabama.

While the Alabama Ethics Law and Ethics Commission only have jurisdiction over public officials and public employees, there are certain areas of the Ethics Law of which the practicing attorney in the State of Alabama should be aware.

## Section I

### Reporting Violations of the Alabama Ethics Law

Section 36-25-17 of the 1995 amended Ethics Law provides that:

*"(a) Every governmental agency head shall within 10 days file reports with the commission on any matters that*

*come to his or her attention in his or her official capacity which constitute a violation of this chapter.*

*(b) Governmental agency heads shall cooperate in every possible manner in connection with any investigation or hearing, public or private, which may be conducted by the commission."*

While the law requires that every governmental agency or department head report suspected violations of the Ethics Law to the Commission, it is important to recognize that it is not the department head's responsibility to determine

whether or not a violation has in fact occurred, but it is merely their obligation to report suspected violations of the law. While the legal obligation to report these matters to the Commission rests solely on the department head, for the Ethics Law to be successfully enforced, it is incumbent upon those individuals who provide legal counsel to the various public entities to not only make those governmental officials whom they represent aware of the reporting requirements, but to advise those officials as to the merits of a suspected Ethics violation. A recommended guideline if there is any question is, "when in doubt, report to the Commission."

Due to the litigious nature of today's society, many individuals are somewhat reluctant to report suspected violations for fear of incurring liability for their actions. Governmental agency heads should be counseled that if their report is made in good faith to the Commission, no liability will attach to them. Their failure to file the required information, however, could subject



that governmental agency or department head to criminal liability.

Section 36-25-27(a)(7) makes the failure to disclose required information to the Ethics Commission a Class A misdemeanor. Under the Ethics Law, a Class A misdemeanor is punishable by up to a year in prison and up to a \$2,000 fine. Under the new law, there is a two-year statute of limitations for misdemeanor prosecutions.

Section 36-25-17 further requires that the reporting of suspected violations to the Ethics Law be made within ten days. From a realistic viewpoint, the Ethics Commission is not so concerned as to when the suspected violation is reported, but that the suspected violation is, in fact, reported. For example, should the department head not make the report until the 13<sup>th</sup> or 15<sup>th</sup> day is of little or no consequence as long as the report is indeed filed with the Commission.

Section 36-25-2(c) indicates that the Ethics Law shall be liberally construed to promote complete disclosure of all relative information and to ensure that the public interest is fully protected.

There are many situations under which a department will conduct an internal investigation into alleged violations of the Alabama Ethics Law. Should disclosure of the investigation hinder or jeopardize an internal investigation, the Ethics Commission would surely not hold the department head to a strict ten-day reporting requirement. However, as a practical matter, the Commission should be notified of the internal investigation with the additional caveat that the results of the internal investigation will be forwarded to the Commission upon completion. Generally speaking, the Commission will then take no action until the internal investigation is completed.

Section 36-25-17 further requires department heads to cooperate in every possible manner in connection with any investigation or hearing being conducted by the Alabama Ethics Commission. Therefore, a department head should be prepared to provide the Ethics Commission with any and all documentation that supports the allegation, as

well as making individuals available to assist in gathering needed documents. In other words, a department head should not file a complaint with the Ethics Commission and then fail or refuse to provide the documentation to back up the charges.

A further question that arises is whether or not a department head or counsel for that department head may require an employee to testify in matters relating to that investigation.



The Ethics Law clearly states that respondents may not be required to testify or be a witness against themselves during any phase of an Ethics Commission investigation. In addition, as the Ethics Commission has no subpoena power, no witness may be compelled to testify. The case of *Garrity v. New Jersey*, 87 S. Ct. 616, 385 U.S. 493, 17 L. Ed. 2d 562 (1967), held that a police officer may be required to give a statement during an internal investigation and refusal to do so could result in termination or other disciplinary action. However, should the police officer give a statement, while it may be used against that officer in disciplinary matters, it may not be used against him in a criminal proceeding.

Based on *Garrity* and the Ethics Commission's lack of subpoena power, the Ethics Commission has taken the position that a department head may not force an employee to testify before the Commission and then use that testimony against the employee in a criminal proceeding. This would especially hold true with individuals who are answering to ethics complaints. However, a department head should, under no circumstances, discourage or prohibit an employee, who is asked to testify, from testifying.

One area of concern that has arisen on numerous occasions under the reporting requirements of Section 36-25-17 is the question of whether or not the department head, in fulfilling their legal obligation to report a suspected violation, is merely fulfilling their reporting requirements, or is in fact filing an official complaint. The Ethics Commission has addressed this situation from two perspectives.

In one situation, a department head is fulfilling his reporting requirements under the law and has taken appropriate action against the employee in relation to the suspected violation, and does not intend the report to be a formal complaint. Under this scenario, it is within the Ethics Commission's discretion to either treat the notification as a complaint and investigate further, or if appropriate action has indeed been taken by the department head, to consider the matter appropriately handled and the reporting requirements satisfied.

Under the second scenario, the department head not only fulfills his reporting requirements but fully intends for his notification to the Commission to serve as a formal complaint. Under the second scenario, an investigation will be instituted into the allegations as would be done in the case of any other complaint filed with the Commission.

## Section II

### Resolving Conflicts of Interests Under the Alabama Ethics Law

One key area that attorneys who represent public entities often have to deal with involves situations whereby a conflict of interests is presented. The Alabama Ethics Law defines a conflict of interest as:

*"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of*



his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

For example, a member of a county board of education has a spouse who is employed as a tenured teacher within that county school system. The question that presents itself is, "Am I strictly prohibited from participating in any matters that come before the board for official action due to the fact that my spouse will be impacted by my action?"

In *OPINION OF THE JUSTICES NO. 317, 474 So. 2d 700*, the Supreme Court of the State of Alabama addressed a similar situation regarding legislators who were also educators, or who had spouses who were educators, and what, if any, involvement they could have in school

funding matters. In that opinion, the supreme court stated that legislators/educators could vote and participate in matters that they or a family member might be affected by,



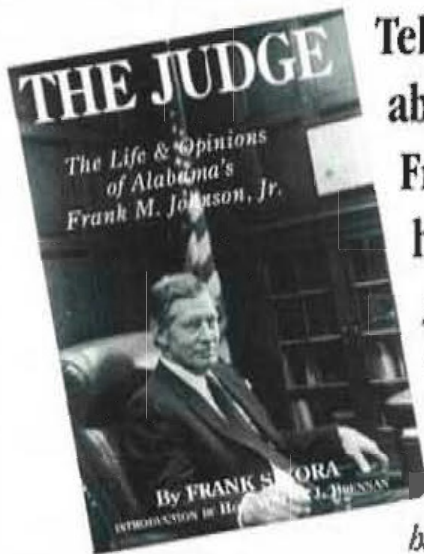
provided, that they or the family member were not affected in a manner different from other members of the class to which they belong.

In the hypothetical situation we have presented, a county board of education

member may vote on an across-the-board pay raise for all employees of the school system, but not vote, attempt to influence or in any way participate in a vote for a pay raise that is only going to be given to science teachers, when that board member's spouse happens to be a science teacher. The effect of that vote would be that the spouse is affected differently from other members of the class to which he or she belongs, that class being all employees of that county school system.

In the past several months, the Ethics Commission has rendered numerous advisory opinions relating to this matter, a sampling of which is below.

**Advisory Opinion No. 95-73** states that a mayor or council member may not vote or participate in any matters which would result in financial gain to the member, or family member, or a business in which the mayor or council member has an interest.



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**Advisory Opinion No. 96-20** states that a city council member, whose spouse is employed as a tenured teacher by the City of Athens School System, may vote on an appointment to the city school board.

**Advisory Opinion No. 96-69** states that an employee with a municipal water and sewer board may run for the position of city councilman or mayor and hold the same, if elected; provided, that the public office is not used for personal gain, that he not vote on or otherwise participate in the appointment of his superiors to the water and sewer board, and that the duties of city councilman or mayor are performed on his own time, and further that no public equipment, facilities, time, materials, or labor are used to assist the public official.

Further, a mayor or council member, whose spouse is employed with that city's library, may not vote or otherwise participate on a matter that will affect his spouse in a manner differently than the rest of the class to which she belongs.

Further, a mayor or council member, whose spouse is employed with that city's library, may not vote or otherwise participate in any budgetary matters relating to the library employing the spouse.

**Advisory Opinion No. 96-78** states that a superintendent of a county school system, may recommend an across-the-board pay raise for all school board employees, including his wife, as long as his wife does not benefit in a manner different from other members of the class to which she belongs.



## Section III

### Attorneys as Lobbyists

Section 36-25-1(17) defines lobbying as:  
“(17) **LOBBYING.** The practice of promoting, opposing, or in any manner influencing or attempting to influence the introduction, defeat, or enactment of legislation before any legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body; provided, however, that providing public testimony before a legislative body or regulatory body or any committee thereof shall not be deemed lobbying.”

Further, Section 36-25-1(18)(a) defines a lobbyist as:

“1. A person who receives compensation or reimbursement from another person, group, or entity to lobby.

2. A person who lobbies as a regular and usual part of employment, whether or not any compensation in addition to regular salary and benefits is received.

3. A person who expends in excess of one hundred dollars (\$100) for a thing of value, not including funds expended for travel, subsistence expenses, and literature, buttons, stickers, publications, or other acts of free speech, during a calendar year to lobby.

4. A consultant to the state, county, or municipal levels of government or their instrumentalities, in any manner employed to influence legislation or regulation, regardless whether the consultant is paid in whole or part from state, county, municipal, or private funds.

5. An employee, a paid consultant, or a member of the staff of a lobbyist, whether or not he or she is paid, who regularly communicates with members of a legislative body regarding pending legislation and other matters while the legislative body is in session.”

Section 36-25-1(18)(b) excludes from the definition of a lobbyist the following:

“1. A member of a legislative body on a matter which involves that person's official duties.

2. A person or attorney rendering professional services in drafting bills or in advising clients and in rendering opinions as to the construction and effect of proposed or pending legislation, executive action, or rules or regulations, where those professional services are not otherwise connected with legislative, executive, or regulatory action.

3. Reporters and editors while pursuing normal reportorial and editorial duties.

4. Any citizen not expending funds as set out above in paragraph a.3. or not lobbying for compensation who contacts a member of a legislative body, or gives public testimony on a particular issue or on particular legislation, or for the purpose of influencing legislation and who is merely exercising his or her constitutional right to communicate with members of a legislative body.

5. A person who appears before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services.

6. A person whose primary duties or responsibilities do not include lobbying, but who may, from time to time, organize social events for members of a legislative body to meet and confer with members of professional organizations and who may have only irregular contacts with members of a legislative body when the body is not in session or when the body is in recess.”

A common question that arises when an attorney is representing clients before public boards and bodies is whether or not that attorney is in fact serving as a lobbyist. Several questions for thought are:

(1) Under what circumstances is an attorney required to register as a lobbyist?

(2) Would an attorney be required to register as a lobbyist every time he or she files an appearance of counsel with an agency on behalf of a client?

(3) Who will be affected by the attorney's actions?

The important distinction to make is, when does the attorney cease to be an



attorney representing a client and become a lobbyist, triggering the reporting requirements of the Alabama Ethics Law?

The obvious distinction is the situation where an association consisting of numerous businesses with similar interests hires an attorney to represent them regarding legislation that impacts on the various association members. This obviously would consist of lobbying, thereby triggering the reporting requirements and requiring the attorney to register with the Commission as a lobbyist.

If the attorney is merely representing a client before an agency, he may not necessarily be considered a lobbyist. For example, an attorney represents an individual attempting to have a plat restriction lifted by the municipal zoning board. The fact that the official action requested will impact only on the client would not trigger the lobbying registration requirements as this is a situation where the attorney is clearly representing the interests of a client, and not attempting to influence legislation per se.

On the other hand, should that same attorney be appearing before the same municipal zoning board in an effort to have the entire municipal zoning ordinance revised, he would indeed be considered a lobbyist and would therefore have to register with the Ethics Commission.

A key consideration in making the distinction is who will be affected by the attorney's actions. Will the actions have an impact on only the individual he is immediately representing, or will his actions have an impact on a broader group? If his actions have an impact on a larger group, more than likely, he will be considered a lobbyist and not strictly an attorney representing a client.

There are many agencies within the State of Alabama whereby an attorney represents a client just as he would represent a client in a court of law. For example, before the Public Service Commission, an attorney is required to file formal pleadings, notices of appearance, briefs, etc. In this setting, which is more likely than not a quasi-adversarial setting, the attorney would again

merely be representing a client and advocating the interests of that client. On the other hand, should the attorney be representing a special interest group in an effort to have regulations, guidelines, etc., revised, changed, or amended, he would be lobbying and would be required to register with the Alabama Ethics Commission.



## Section IV

### Representing Clients Before the Alabama Ethics Commission

The Alabama Ethics Commission sits as a quasi-criminal body whose function is to determine whether or not probable cause exists to believe that an individual who has been charged with violating the Alabama Ethics Law has violated the Ethics Law. Section 36-25-1(23) defines probable cause as, "A finding that the allegations are more likely than not to have occurred."

The Ethics Commission, therefore, serves in the nature of a grand jury, and hearings before the Ethics Commission

are conducted in much the same manner as proceedings before a grand jury. In fact, Section 36-25-4(b) states that a complaint filed with the Ethics Commission is "subject to the same restrictions relating to secrecy and non-disclosure of information, conversation, knowledge, or evidence of Sections 12-16-214 to 12-16-216 . . ." (commonly referred to as the Grand Jury Secrecy Act).

Section 36-25-4(d) requires that a respondent be given no less than 45 days' notice of a complaint having been filed against him or her prior to that matter being set for a hearing with the Ethics Commission.



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Just as with a grand jury proceeding, there is no right to cross-examination, nor are the Rules of Evidence strictly applied.

We all know that when a client has been sued civilly, the first step in defending the client is to obtain a copy of the complaint. Likewise, if you are representing a criminal defendant, you first obtain a copy of the indictment. However, under the Alabama Ethics Law, a complaint filed with the commission is considered confidential information and is not discoverable as provided in Section 36-25-1(7), which states:

*"(7) CONFIDENTIAL INFORMATION. A complaint filed pursuant to this chapter, together with any statement, conversations, knowledge of evidence, or information received from the complainant, witness, or other person related to such complaint."*

To protect the respondent's due process rights, the law requires that the respondent be provided with a summary of the charges that have been levied against him or her. The policy of the Ethics Commission is to make that summary as detailed as possible in order to make certain that the respondent's due process rights are protected.

One of the basic concepts in legal proceedings is the right of cross-examination. However, under the Grand Jury Secrecy Laws, there is no right of cross-examination. When a complainant testifies before the Commission, neither the respondent nor his or her attorney is present in the hearing room, and likewise, when a respondent and his attorney testify before the Commission, the complainant is not present in the hearing room. In addition, the respondent may produce any witnesses he or she deems necessary to defend the allegations levied against him or her; however, when those witnesses testify, neither the respondent nor the respondent's attorney are allowed to be present in the room, nor may they examine those witnesses.

Should you as an attorney represent an individual before the Ethics Commission, the filing of a formal notice of appearance is not a technical requirement; however, in order that all communications be addressed through you and not your client, it would be the wiser course of action to file a notice of appearance as soon as you are retained by your client.

As the Alabama Ethics Commission does not have subpoena power, the commission may not compel the attendance of either respondents or witnesses at a commission hearing. As an attorney representing a client before the commission, it is your judgment which should determine whether or not your client is going to appear and testify before the commission.

The Alabama Ethics Law provides that discovery will be made pursuant to Rule 16.1 of the *Alabama Rules of Criminal*

*Procedure*. Under the *Rules of Criminal Procedure*, the Ethics Commission will provide to you and your client, prior to the hearing, copies of any statements that your client may have made to a special agent of the Alabama Ethics Commission.

In addition, should there be co-respondents to the complaint, you will likewise be provided with their statements.

As a general rule, it is the policy of the Ethics Commission to supply to the respondent any information and documentation that may arguably be exculpatory in nature. In addition, any documentation that your client is questioned on during any interview conducted with a staff member of the commission will be provided to you as part of the discovery process.

Just as in a normal criminal proceeding, the Ethics Commission will not disclose internal memoranda, specifics of an investigation which may include opinion, or witnesses who may testify before the commission.

After the Ethics Commission hears the testimony and evidence relating to the complaint, one of three possibilities exists. First of all, the Ethics Commission can determine that probable cause does not exist and close the case, ending the matter at that point. Likewise, the Ethics Commission can determine that probable cause does exist and can refer the case for further review and presentation to a grand jury to either the attorney general or the district attorney for the appropriate jurisdiction.

For purposes of the Ethics Law, venue is located in the county where the



**James L. Sumner, Jr.**

James L. Sumner, Jr. is the director of the Alabama Ethics Commission, having been appointed to the position by the Commission in April 1997. Prior to his appointment, Sumner served as assistant to the vice-chancellor for external affairs of the University of Alabama System, as vice-president/legislative affairs for the Alabama Hospital Association and as executive assistant and chief of staff in the lieutenant governor's office. He also served as administrative assistant to the late U.S. Circuit

Judge Robert S. Vance and as an assistant attorney general. He is a graduate of the University of Alabama and Cumberland School of Law, Samford University.



**Hugh R. Evans, III**

Hugh R. Evans, III received his undergraduate degree from Auburn University at Montgomery and his J.D. degree from Jones School of Law. He presently serves as assistant director and general counsel for the Alabama Ethics Commission.



alleged violation occurred. Should the violation have occurred outside the State of Alabama, venue lies in Montgomery. Should the attorney general or district attorney have a conflict or otherwise be unable to prosecute the case, the case may be referred back to the Ethics Commission for prosecution by the commission staff under the auspices of either the attorney general or the district attorney.

When the Alabama Ethics Law was amended in 1995 to give the Ethics Commission prosecutorial powers, there was a benefit that was created that was undoubtedly not intended. Because the Ethics Commission has prosecutorial powers and the case may be referred back to the commission staff for handling, the Ethics Commission's policy is that the staff will not make a recommendation of probable cause unless the staff is ready, willing and able to prosecute the case to its conclusion. This benefit accrues to the respondent in that the staff has placed a higher burden on itself than the general probable cause standard.

Prior to the 1995 amendments to the Ethics Law, the Ethics Commission had only two choices of action: (1) refer the case for prosecution, and (2) close the case for lack of probable cause. The Alabama Ethics Law, as amended, includes a procedure known as an "administrative resolution." An administrative resolution is appropriate when the financial benefit to the individual charged or the financial detriment to the public entity is less than \$250, making it a minor violation as defined by law.

Should the Ethics Commission determine that an administrative resolution is appropriate, several steps must be taken. First of all, the respondent must request that his or her case be handled administratively and must acknowledge an unintentional violation of the law. In other words, an individual may not appear before the Ethics Commission and simply state, "I did not do this; however, I would like to have my case handled administratively."

Should the respondent request an administrative resolution, the Ethics Commission must unanimously agree to have the matter handled administra-

tively. Should the commission do so, either the attorney general or the district attorney for the appropriate jurisdiction must also give their approval. Once the paperwork is completed, the Ethics Commission can order restitution to be paid and may order a fine of three times the restitution up to \$1,000.

The mission of the Ethics Commission is not only the responsibility of seeing that individuals who have violated the Ethics Law are adequately punished, but it is also to see that those individuals who have had a complaint wrongly filed against them have their good name and character cleared. The commission staff works equally hard to accomplish both goals.

## Section V

### Advisory Opinions

Just as the attorney general's office is charged with the responsibility of interpreting various sections of Alabama law, so is the Ethics Commission charged with rendering advisory opinions relating to interpretations of the Alabama Ethics Law.

Any individual within the State of Alabama, whether it be a public official, public employee, attorney representing one of the above classes of individuals, or an individual who purely has an interest in state law, may request a formal advisory opinion based on either a hypothetical set of facts or an actual fact situation, provided that the scenario is prospective in nature.

A formal advisory opinion is drafted by the staff of the Ethics Commission and is presented to the commission for official action. The commission may either adopt the opinion as drafted, adopt the opinion with modifications, or may render an entirely different opinion from that which was presented to the commission.

A formal advisory opinion carries the weight of law to the extent that it is (1) requested in good faith; (2) all pertinent facts are made available to the commission; and (3) it is relied on as rendered.

An advisory opinion is only as good as the facts that are presented. Should an

individual provide a specific set of facts to the Ethics Commission which leave out material details, then the advisory opinion will not offer that individual the protection of law. Likewise, an advisory opinion that is relied upon in good faith by other individuals similarly situated to that of the individual requesting the opinion will also protect that person from potential liability. ■



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**Age Discrimination**

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**Act of 1997**

By John W. Sheffield and  
Brian R. Bostick



The Alabama legislature recently enacted Alabama Act No. 97-723, which prohibits age discrimination in employment. The Act went into effect on August 1, 1997, and now Alabama, like every other state, the District of Columbia, Puerto Rico, and the Virgin Islands, has an age discrimination statute.<sup>1</sup> Yet, important distinctions between Alabama and all other states will give rise to several questions about the application and interpretation of Alabama's statute.

Alabama is one of only three states that does not have a state or local fair employment practice ("FEP") agency that handles discrimination complaints under the relevant state or local law.<sup>2</sup> The other two states that have no such agencies are Mississippi and Arkansas. However, Alabama is unlike Mississippi and Arkansas, because those two states' statutes are limited to public officers and employees, and the sparse case law interpreting those two statutes sheds little light on any comparable interpretation of Alabama's Act.

Three states (Georgia, Louisiana and North Dakota) have local fair employment agencies that have not been given "FEP designation" by the Equal Employment Opportunity Commission.<sup>3</sup> Again, however, the statutes of North Dakota and Georgia are distinct from Alabama's because they provide that a statutory violation constitutes a misdemeanor punishable by fine. Thus, liability is imposed criminally, not civilly. Louisiana has adopted an age discrimination statute



that is somewhat similar to Alabama's statute.<sup>4</sup> Both statutes expressly provide for a private right of action. Because that statute, like Alabama's, only became effective on August 1, 1997, there is not much case law to help practitioners and courts interpret Alabama's statute.

Alabama's Act is modeled somewhat after the federal Age Discrimination In Employment Act ("ADEA") of 1967, 29 U.S.C. §§ 621 *et seq.* Generally, both prohibit discrimination in employment against individuals who are at least 40 years old. The Alabama statute expressly adopts all remedies, defenses and statutes of limitation enumerated in the federal ADEA. State courts commonly look to federal ADEA precedent for guidance in construing provisions of state statutes that are similar to, or the same as, the terms of the federal statute. However, state law will not necessarily be read and applied the same way as its federal counterpart simply because a given state law provision parallels an ADEA provision.

The enactment of Alabama's Age Discrimination in Employment Act poses several questions that Alabama's courts and practitioners will be forced to answer in the near future. Some important issues to be resolved include: (1) how the act interacts with other statutes; (2) the applicable statute of limitations period; (3) proper plaintiffs and defendants; (4) prohibited employment practices and available affirmative defenses; (5) available remedies; and (6) the constitutionality of the act.

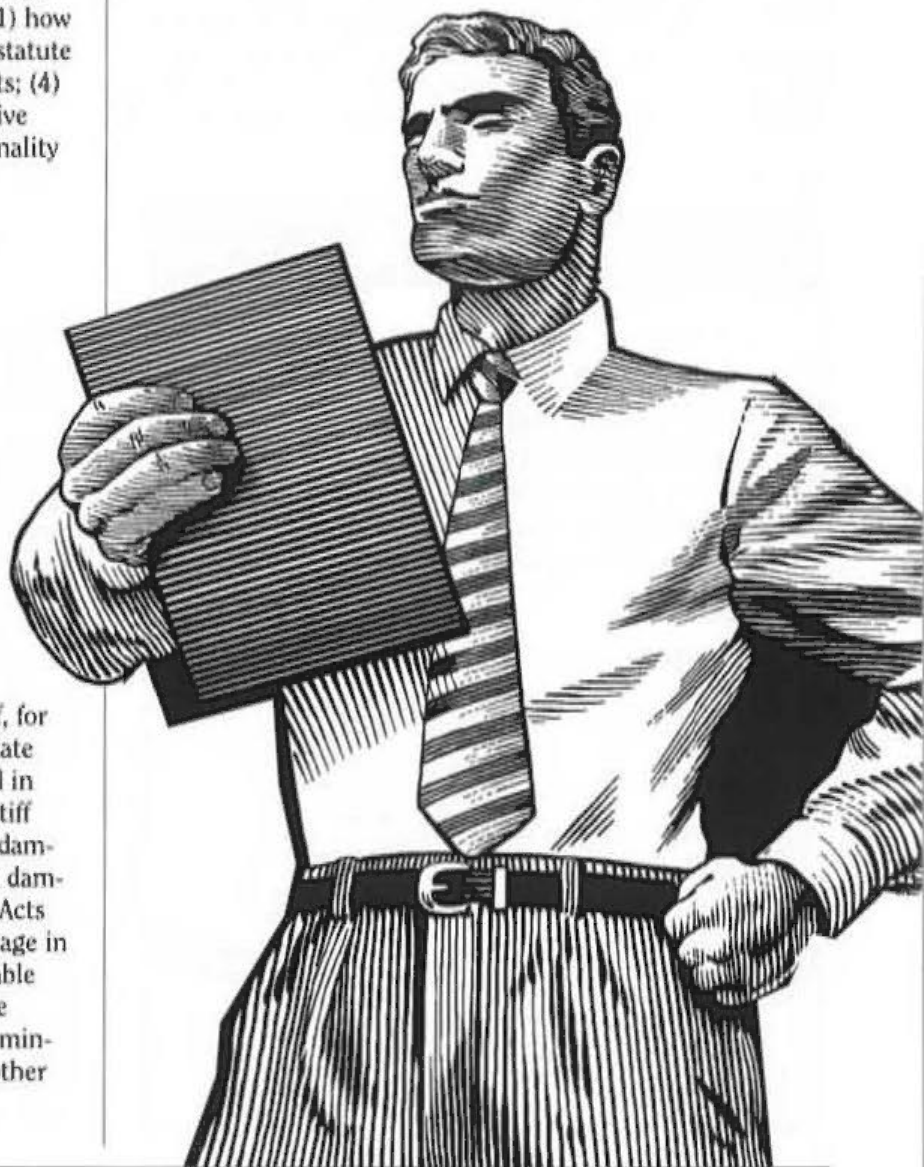
## Interaction with Other Statutes

### A. The Federal Age Discrimination in Employment Act

The Alabama Age Discrimination Act was intended to be an alternative form of relief to the federal ADEA. Therefore, the statute provides that "if an action is brought in the federal court, any action pending in the state court shall be simultaneously dismissed with prejudice." 1997 Alabama Acts 97-723 § 10. The federal ADEA also notes the superiority of a federal action by stating that a federal ADEA action "shall supersede any State action." 29 U.S.C. § 633(a). If, for some reason, a defendant fails to move to dismiss the state court action, there are still further safeguards expressed in the statute. The Alabama statute provides that the plaintiff "shall only be entitled to one recovery of damages. Any damages assessed in one court will offset any entitlement to damages in any other state or federal court." 1997 Alabama Acts 97-723 § 10. If the Alabama courts stray from the language in the Alabama statute and allow for damages not recoverable under the federal ADEA (*i.e.*, compensatory and punitive damages), then there could be much confusion in determining what damages are offset by damages awarded in another court.

### B. ERISA

Section 514(a), 29 U.S.C. § 1144(a), of ERISA provides that if a state law "relate[s] to ... employee benefit plans," then it is preempted. "A law 'relates to' an employee benefit plan if it has a connection with or reference to such a plan." *Champion Intern. Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984). "[T]he express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Thus, to the extent the Alabama ADEA applies to employee benefit plans covered by ERISA, the Alabama statute may be preempted in some cases. *See, e.g., Van Camp v. AT & T Info. Sys.*, 963 F.2d 119 (6th Cir. 1992) (ERISA preempted state age and sex discrimination claims of participant who was allegedly forced to accept early retirement under enhanced pension plan in lieu of reassignment), *cert. denied*,





506 U.S. 934 (1992), *overruled on other grounds*, 46 F.3d 531 (6th Cir. 1995).

### C. Alabama Venue Statutes

The Alabama ADEA provides that an employee "may bring a civil action in the circuit court of the county in which the person was or is employed...." 1997 Alabama Acts 97-723 § 10. Under Alabama Code § 6-3-7:

A foreign corporation may be sued in any county in which it does business by agent, and a domestic corporation may be sued in any county in which it does business by agent or was doing business by agent at the time the cause of action arose; provided, that all actions against a domestic corporation for personal injuries must be commenced in the county where the injury occurred or in the county where the plaintiff resides if such corporation does business by agent in the county of the plaintiff's residence.

The venue provision in the Alabama Age Act does not allow for suit in the plaintiff's county of residence, unless that happens to be the county in which the plaintiff is employed. Further, no distinction is made between domestic and foreign corporations. Thus, if the Alabama courts strictly follow the language of the Act, then a plaintiff's choice of venue will be limited to the county of his or her employment. Where a spe-

cific venue provision is provided in a legislative enactment, Alabama precedent indicates that the specific venue provision will control over the general venue provisions of the Alabama Code. *Ex parte Ala. Dept. of Env. Mgt.*, 623 So. 2d 1061, 1063-64 (Ala. 1993).

## Proper Plaintiffs

Under the Alabama Act, any "worker 40 years of age and over" may sue for age discrimination. Courts have determined that the federal ADEA does not cover uniformed military personnel,<sup>5</sup> and independent contractors are also excluded from the definition of "employee" under the federal ADEA, and are therefore, not allowed to file suit. The federal ADEA allows private employers to impose mandatory retirement at age 65 on certain "bona fide executives" or "high policy making" employees. 29 U.S.C. § 631(c). Alabama's Act does not define "employee" and does not provide for any of the above exceptions, but Alabama courts may carve out exceptions as to who may sue under the Act.

## Proper Defendants

### A. Employers

Both statutes define an "employer" as a person employing 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Some federal courts have held that the number of individuals employed in the year the alleged discrimination occurred, not the year when a charge of discrimination is filed or an action commenced, determines whether an entity meets the statutory definition of "employer."<sup>6</sup> The Supreme Court has recently held that "the payroll method represents the fair reading of the statutory language" in terms of counting employees. *Walters v. Metropolitan Educational Enterprises, Inc.*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 660 (1997). The EEOC has issued policy guidelines applying the "payroll method" as well. The EEOC states that it is appropriate to count employees maintained on the payroll during any given week for employer coverage purposes, and not just those employees who report to work every day of the work week. EEOC Policy Statement No. N-915.052 (April 20, 1990). Further, the EEOC states that temporary employees should be counted if they are actually on the payroll.

Both acts include any agent of that "person" within the definition as well. Alabama courts will have to determine if an individual can be a defendant to a suit under the Alabama statute because that individual was acting as an agent of an employer. The majority of federal courts that have addressed this issue have held that individuals may not be made defendants under the ADEA. *See, e.g., Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (ADEA case holding that Congress did not intend to allow civil liability to run against individual employees), *cert. denied sub*

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nom., *Miller v. La Rosa*, 510 U.S. 1109 (1994); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir.) (individuals cannot be held liable under Title VII or the ADEA), *reh'g denied*, 59 F.3d 1248 (1995).

The federal act also expressly includes "a state or political sub-division of a state" in the definition of an employer and certain federal employees are protected under the federal act. 29 U.S.C. § 630. State and federal agencies are neither specifically excluded or included from coverage under the Alabama Act. However, federal employees should not be covered under the Alabama Act because the United States government is immune from suits to which it has not consented through the doctrine of sovereign immunity. See *Loeffler v. Frank*, 486 U.S. 549 (1988). Sovereign immunity is a jurisdictional bar that operates when a suit threatens to impose liability upon the United States for money or property damages of some form or coercive injunctive relief. See *FDIC v. Meyer*, 510 U.S. 471 (1994).

State employees will also likely be excluded from coverage under the Act because Article I, § 14 of the Alabama Constitution of 1901 states that "the State of Alabama shall never be made a defendant in any court of law or equity." Section 14 "wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state." *Dunn Construction Co. v. State Board of Adjustment*, 234 Ala. 372, 376, 175 So. 383, 386 (1937). Thus, the legislature's failure to expressly exclude state employees from coverage under the Act will not provide a reason to penetrate the "almost invincible 'wall' of the state's immunity, as established by the people through their Constitution." *Hutchinson v. Board of Trustees of University of Alabama*, 288 Ala. 20, 24, 255 So.2d 281, 284 (1971). However, the Alabama Supreme Court has held that municipalities and other local governmental entities are not entitled to immunity under § 14. See *City of Foley v. Terry*, 278 Ala. 30, 175 So.2d 461 (1965). Therefore, municipalities will likely be capable of being sued under the Act.

## **B. Employment Agencies and Labor Organizations**

The Alabama statute also allows suits against an "employment agency" or a "labor organization." An "employment agency" is defined as "[a]ny . . . person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunities to work for an employer, including any agent of that person." 1997 Alabama Acts 97-723 § 1(2). That definition is virtually identical to the definition of "employment agency" under the federal ADEA.

A "labor organization" is defined under the Alabama statute as "[a]ny organization which exists for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment." 1997 Alabama Acts 97-723 § 1(3). Unlike the federal statute, the labor organization does not have to be

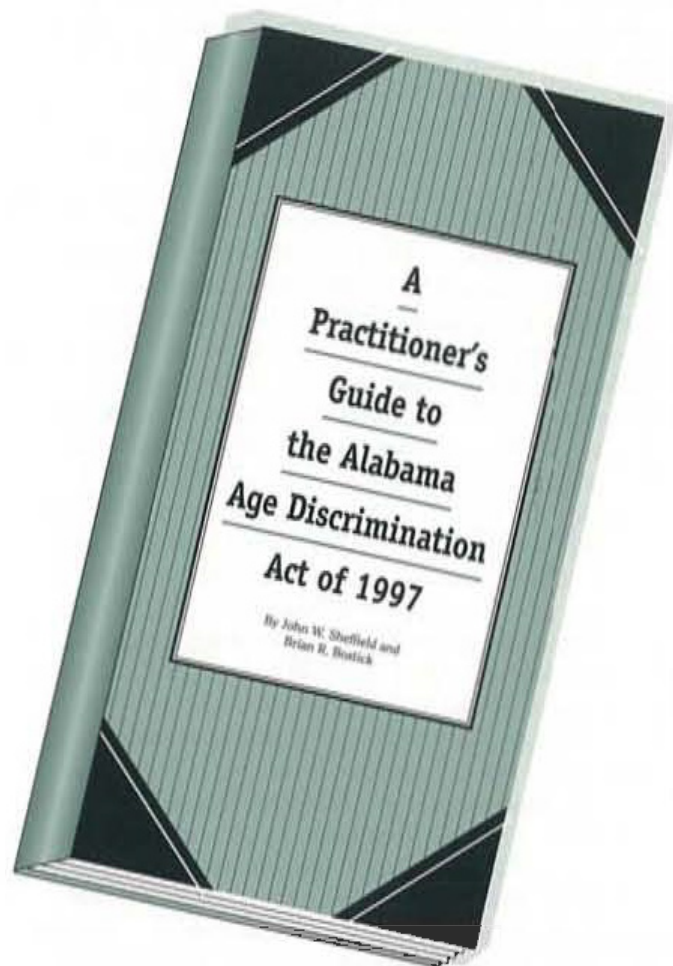
"engaged in an industry affecting commerce" to be covered by the Act. See 29 U.S.C. § 630(d).

## **Prohibited Employment Practices**

The Alabama Age Discrimination in Employment Act follows the federal ADEA by providing that it is an unlawful employment practice for an employer to:

- (1) Fail or refuse to hire or discharge an individual, or otherwise discriminate against an individual with respect to compensation, terms, or privileges of employment, because of the age of the individual.
- (2) Limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or to adversely affect the status of an individual as an employee, because of the age of the individual.

1997 Alabama Acts 97-723 § 3. Under both acts, it is an unlawful employment practice for an "employment agency" to fail or refuse to refer for employment an individual because of his or her age. Both acts prohibit "labor organizations" from refusing to refer a member for employment on the basis of age,





or from limiting, segregating, or classifying its membership on the basis of age. Both acts also contain retaliation provisions.

Employers, labor organizations and employment agencies are also expressly forbidden from printing or causing to be printed or published any notice or advertisement relating to employment that expresses a preference on the basis of age. The EEOC regulations will be helpful for Alabama employers in determining what constitutes words of preference in their advertisements. Those regulations prohibit advertisements containing age-based "trigger words," such as "age 25-35," "young," "recent college graduate," "boy," or "girl." 29 C.F.R. § 1625.4(a). The EEOC regulations also prohibit advertisements that express preferences such as "age over 50" or "age over 65" because such advertisements might exclude individuals at the younger end of the protected age group.

The Alabama Act also specifically prohibits covered entities from considering age in the selection or placement of employees into apprenticeship or training programs. Also, under the Alabama Act, covered entities cannot discriminate against individuals who are seeking licensing or certification.

## Method of Proof

Both the federal and state acts provide for jury trials. The Alabama Act, however, does not define what method of proof is required to establish liability. It merely provides that employers cannot "discriminate" against an individual because of his age. Clearly, a plaintiff can establish a violation of the Alabama Act through evidence of disparate treatment. A plaintiff establishes disparate treatment when he proves that his employer treated him differently than similarly situated employees because of his age. Disparate treatment can be proven through either direct or circumstantial evidence. When the evidence is circumstantial, the Alabama courts will likely follow the universally accepted burden-shifting framework for Title VII and ADEA cases expressed by the Supreme Court in the following trilogy of cases: *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In fact, Alabama courts have already adopted that methodology for retaliatory discharge cases under § 25-5-11.1. Under that framework, a plaintiff must first establish a *prima facie* case of discrimination. After the plaintiff establishes a *prima facie* case, the employer must produce a legitimate, non-discriminatory reason for its action. The plaintiff must then disprove the employer's stated reason and prove that his age was the true reason for the adverse action to establish liability.

It is not clear whether adverse impact claims will be allowed under the Alabama Act. Under the adverse impact theory, an employer's facially neutral policy or practice may be unlawful—despite no showing of discriminatory intent—merely because it has a significant adverse impact on a protected group. Federal courts are split as to whether the adverse impact theory applies under the federal ADEA. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 607-12 (1993)

(reserving the issue); *MacPherson v. University of Montevallo*, 922 F.2d 766, 772 (11th Cir. 1991) (allowing adverse impact claim under ADEA, but affirming district court's directed verdict in favor of employer); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994) (holding the ADEA does not recognize the adverse impact theory of liability), *cert. denied*, 515 U.S. 1142 (1995).

## Affirmative Defenses

The Alabama ADEA provides that "[a]ny employment practice authorized by the federal Age Discrimination in Employment Act shall also be authorized by this Act and the...defenses...under this Act shall be the same as those authorized by the federal Age Discrimination in Employment Act." 1997 Alabama Acts 97-723 § 10. Thus, the federal ADEA provides the defenses that are available under the Alabama Act.

### A. Statutory Provisions

The Federal ADEA authorizes the following conduct by employers:

- (1) "to take any action otherwise prohibited...where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business";
- (2) "to take any action otherwise prohibited...where the differential is based on reasonable factors other than age";
- (3) "to take any action otherwise prohibited...where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located";
- (4) "to take any action otherwise prohibited...to observe the terms of a bona fide seniority system";
- (5) "to take any action otherwise prohibited...to observe the terms of a bona fide employee benefit plan";
- (6) "to discharge or otherwise discipline an individual for good cause."

29 U.S.C. § 623(f). Therefore, the federal defenses should be utilized in state court cases.

### B. "Mixed Motives" Defense

The Alabama Act does not expressly state that federal common law defenses to the federal ADEA, such as the "mixed motives" defense, also apply to the state ADEA. The "mixed motives" defense arises when both legitimate and illegitimate considerations play a role in an adverse employment decision. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that once an employee presents direct evidence of discrimination, an employer may escape liability by showing, as an affirmative defense, that it would have made the same decision without regard to the employee's improper



motive. The Civil Rights Act of 1991 incorporated the "mixed-motives" standard into Title VII, but provided that it was not a complete defense. Even if the employer establishes the defense, the court may award attorney's fees and costs and declaratory and injunctive relief. See 42 U.S.C. §2000e-5(g)(2)(B). However, the ADEA was not affected by that amendment. Thus, a mixed-motives defense under the ADEA is still a common law defense. Therefore, it is unclear whether such a defense will be allowed under the Alabama Act because such a defense is "authorized" by the courts, not by the Act itself. Even if the defense is allowed, it is unclear whether Alabama courts will allow it as a complete defense, or as a limited defense pursuant to the Civil Rights Act of 1991.

## Settlements and Releases

Another issue that is likely to arise under the Alabama ADEA is whether a settlement or release of a claim under that Act constitutes a defense, and therefore requires the parties to comply with the stringent standards established for releases and settlements under the federal ADEA. Clearly, if a plaintiff attempted to file suit after he or she signed a release, the employer would assert as a defense that the action is barred because the plaintiff had already released the employer from any potential liability. Under the federal ADEA, the waiver of "any right or claim" must be "knowing and voluntary," and will not be considered as such unless the following requirements of the Older Workers Benefit Protection Act ("OWBPA"), are met:

- (1) the waiver must be part of an agreement that is "written in a manner calculated to be understood" by the individual;
  - (2) the waiver must specifically refer to the ADEA claims or rights;
  - (3) the waiver must not cover prospective claims or rights;
  - (4) the individual must receive consideration in addition to anything of value to which the individual was already entitled;
  - (5) the employee must be advised in writing to consult an attorney prior to executing the agreement;
  - (6) the employee must be given at least 21 days within which to consider the agreement, unless the waiver is offered to a group or class of employees, then the individual must be given a period of at least 45 days within which to consider the agreement;
  - (7) the agreement must provide for at least a seven-day revocation period following the execution of the agreement and the agreement does not become effective or enforceable until the revocation period has expired.
- 29 U.S.C. § 626(f)(1).

The Alabama courts may determine that a release or settlement need only be "knowing and voluntary," without requiring that the federal statutory requirements be met. However, employers would be well advised to comply with the OWBPA requirements for executing a release, which is necessary to bar a federal ADEA claim.

## Remedies

### A. Compensatory and Punitive Damages

The Alabama ADEA has conflicting provisions as to what relief is available to plaintiffs under the Act. The Act first provides that a plaintiff may bring an action "for such legal or equitable relief as will effectuate the purposes of this Act." 1997 Alabama Acts 97-723 § 10. This language arguably encompasses compensatory and punitive damages. However, the Alabama statute merely tracks the language of 29 U.S.C. § 626(c)(1), which provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." Federal courts have unanimously held that compensatory and punitive damages are not recoverable under the federal ADEA. See Lindemann & Grossman, *Employment Discrimination Law*, at 644 n.563, & 645 n.566 (3d ed. 1996) (listing cases that have held compensatory and punitive damages are not recoverable under the federal ADEA).

In *Dean v. American Securities Insurance Company*, 559 F.2d 1036, 1038-39 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978), the former Fifth Circuit examined the "legal ... relief as may be appropriate to effectuate the purposes of this Act" language and concluded that neither compensatory or punitive damages were recoverable:

The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving Secretary, employee and employer which might well be calculated to frustrate rather than to "effectuate the purposes" of the Act.

...  
The provisions for liquidated damages for willful violation of the Act and its silence as to punitive damages convinces us

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that the omission of any reference thereto was intentional. *Dean*, 559 F.2d at 1039.

The Alabama Act also provides that "the remedies...under this Act shall be the same as those authorized by the federal Age Discrimination in Employment Act..." 1997 Alabama Acts 97-723 § 10. Thus, under the Alabama Age Discrimination Act, a plaintiff may receive the following relief:

#### **B. Back Pay**

Back pay encompasses the wages and benefits the plaintiff would have received in compensation but for the employer's violation of the Act. It may include lost wages, pension, insurance, vacation, profit-sharing, accrued sick leave and other economic benefits of employment. Back pay accrues from the date of the wrongful act and terminates on the date that damages are "settled," which in most cases will be the date of judgment.

#### **C. Liquidated Damages**

Under the federal ADEA, liquidated damages are awarded for "willful violations of the Act." 29 U.S.C. § 626(b). To establish a willful violation, the plaintiff must show the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985) (citations and internal quotations omitted). After a determination of willfulness is made, an award of liquidated damages is mandatory and must equal double the amount of the actual damages to date. Front pay is not included in the amount of damages doubled for purposes of liquidated damages. See *Graefenain v. Papst Blue Ribbon Co.*, 870 F.2d 1198, 1210 (7th Cir. 1989).

The federal ADEA does not incorporate § 11 of the Portal-to-Portal Pay Act, 29 U.S.C. § 260, which provides a good faith defense to an award of liquidated damages. See *Trans World Airlines*, 469 U.S. at 128 n.22. However, the Eleventh Circuit has held that a consideration of the employer's good faith will play a part in the threshold determination of willfulness. See *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988). Therefore, a good faith defense may be applicable to state Age Act claims because that defense is authorized under the federal ADEA by virtue of case law.

#### **D. Equitable Relief**

The federal ADEA allows courts to "grant such...equitable relief as may be appropriate to effectuate the purposes of this Act." 29 U.S.C. § 626(b). Therefore, Alabama courts are empowered to issue injunctions against employers and to grant orders compelling employment, reinstatement, or promotion. In accordance with federal precedent, Alabama courts may award front pay instead of reinstatement when reinstatement is not feasible. See *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1449 (11th Cir.) (front pay is appropriate when "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy"), *cert. denied*, 474

U.S. 1005 (1985). Finally, prevailing plaintiffs are entitled of an award of attorney's fees and costs. See 29 U.S.C. § 626(b) (which incorporates by reference § 16(b) of the FLSA, 29 U.S.C. § 216(b), which provides that a court shall allow reasonable attorney's fees and costs to the prevailing plaintiff).

## Statute of Limitations

#### **A. Confusing Statutory Language**

The most immediate issue for the Alabama courts to resolve is the applicable statute of limitations. The Alabama Act provides that the "statutes of limitations, under this Act shall be the same as those authorized by the federal ADEA except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this Act." 1997 Alabama Acts 97-723 § 10. This language is confusing because the statute of limitations in the federal ADEA is based directly on compliance with administrative filing deadlines. The federal ADEA states that a charge must be filed with the EEOC within 180 days of the unlawful practice. 29 U.S.C. § 626(d)(1). Then, after the employee receives his right-to-sue letter from the EEOC, he must file a federal ADEA suit within 90 days. 29 U.S.C. § 626(e). Thus, the statute of limitations under the Alabama Act must be 90 or 180 days after the unlawful practice.

In deferral states, the filing period is extended to 300 days after the occurrence of the unlawful practice or 30 days after the individual receives notice of termination of a state agency proceeding, whichever occurs first. 29 U.S.C. § 626(d)(2). For a state to qualify as a deferral state it must have: (1) a law prohibiting age discrimination in employment; and (2) an agency established or authorized to grant or seek relief from age discriminatory practices. 29 U.S.C. § 633(b). Alabama is not considered a deferral state because it does not meet the second requirement. Thus, the 300-day time limit has no application in Alabama.

In addition to deciding the applicable limitations period under the Alabama statute, Alabama courts will have to determine whether the limitations period is subject to equitable tolling. "Equitable tolling is a type of equitable modification, which often focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987) (quoting *Nation v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981)).

#### **B. The Statute Will Only Be Applied Prospectively**

The Alabama Age Discrimination in Employment Act does not state that it will be applied retroactively. In the absence of such an explicit statement, Alabama courts will presume that the Act is to be applied only prospectively:

The judiciary generally disdains retroactive application of laws because such application usually injects undue disharmony and chaos in the application of law to a given fact situation:



therefore, the courts will generally indulge every presumption in favor of prospective application unless the legislature's intent to the contrary is clearly and explicitly expressed.

*Lee v. Lee*, 382 So. 2d 508, 509 (Ala. 1980). Thus, any alleged acts of discrimination that occurred prior to August 1, 1997 will not present a cognizable claim.

## Constitutional Issues

In *Opinion of the Justices*, No. 102, 252 Ala. 527, 41 So. 2d 775 (1980), the Alabama Supreme Court was asked to issue an advisory opinion as to whether a classification scheme under an unemployment compensation statute satisfied due process and equal protection requirements. The court focused on the classification under the statute:

While the due process and equal protection guaranties are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring other in like circumstances.... It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class.

*Id.*, 252 Ala. at 530, 41 So. 2d at . The court then determined that it did not have sufficient information to make a determination:

While good faith and knowledge of existing conditions on the part of the legislature are to be presumed, yet we do not think it well to advise as to the validity of the proposed bill upon a presumption when the bill upon its face appears to be discriminatory. With no recital in the proposed bill to show that the classification is reasonable and not arbitrary and no facts called to our attention or which we judicially know to show that the classification is reasonable and based on a rational basis, we feel that your inquiry should not be categorically answered in response to this request for an advisory opinion.

*Id.*, 252 Ala. at 532, 41 So. 2d at . The classification under the Alabama ADEA "upon its face appears to be discriminatory," *id.*, because it allows only certain individuals to bring claims under the act (*i.e.*, those over age 40).

While Congress has made findings that age discrimination

is an invidious form of discrimination that requires protection of a group, no reasonable argument can be made as to how the protected class is defined. In passing the 1974 amendments to the ADEA, both the House and Senate committees expressly found that "[d]iscrimination based on age ... can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group." *Equal Employment Opportunity Commission v. Elroy*, 674 F.2d 601, 605 (7th Cir. 1982) (citing STREP. No 93-690, 93d Cong., 2d Sess. 55 (1974); H.R.Rep. No. 93-913, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 2811, 2849). Ironically, in seeking to redress injuries caused by age discrimination, Congress and the Alabama legislature have created "some arbitrarily defined group." Both have arbitrarily chosen 40 years of age as the entry point for coverage under the Act without stating any rational basis for that decision. The Alabama legislature's failure to give some rational basis for allowing someone 40 years old to bring a claim under the statute, but denying someone 39 years old that same opportunity should render the statute unconstitutional.

### Conclusion

As the foregoing discussion reveals, practitioners would be well advised to keep abreast of all cases involving application and interpretation of the Alabama ADEA. Although Alabama courts will likely look to federal ADEA precedent for guidance, there is no guarantee that Alabama courts will read and apply Alabama's statute in the same manner. ■

### Endnotes

1. See 8A BNA Labor Relations Reporter, FEPM, 451:58.
2. See 8 BNA Labor Relations Reporter, FEPM, 403:22. The Equal Employment Opportunity Commission will defer charges of discrimination to an agency with "FEP designation."
3. See 8A BNA Labor Relations Reporter, FEPM, 403:22.
4. See Louisiana Rev. Stat. Ann. Title 23, Ch. 9 §§ 311-314 (1950), as amended by 1997 La. Acts No. 1409.
5. See *Spain v. Ball*, 928 F.2d 61, 83 (2d Cir. 1991); *Kawitt v. United States*, 842 F.2d 951, 953-54 (7th Cir. 1988).
6. See *McGraw v. Warren County Oil Co.*, 32 FEP 1798, 1799 (S.D. Iowa 1982), *aff'd per curiam*, 707 F.2d 900 (8th Cir. 1983); *Smith v. Wythe-Grayson Regional Library Bd.*, 657 F. Supp. 1216, 1219 (W.D. Va. 1987).



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# Your Help Needed to Pass Bills to Increase Indigent Defense Fees

Two bills have been filed to increase the compensation for attorneys: H.B. 458, sponsored by lawyer-legislators **Demetrius Newton** of Birmingham, **Ken Guin** of Carbon Hill, **Marcel Black** of Tusculumbia, and **Mike Rogers** of Anniston, and its Senate companion, S.B. 437, sponsored by lawyer-legislator **Roger Smitherman** of Birmingham. This legislation will accomplish the following:

1. Raise the hourly rate paid to attorneys appointed to represent indigents in criminal case to \$55 per hour in court and out of court;
2. Raise the maximum allowable fees to the following levels:
  - a. No limit in capital cases;

- b. \$3,500 where original charge is a Class A Felony;
  - c. \$2,500 where the original charge is a Class B Felony;
  - d. \$1,500 where the original charge is a Class C Felony;
  - e. \$2,000 in juvenile cases;
  - f. \$2,000 for each level of appellate work; and
  - g. \$1,000 for post conviction work.
3. Additional expenses incurred by this legislation will be funded by a \$28 increase in the filing fees for criminal and civil cases.

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### Description of Position:

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### Responsibilities:

The initial responsibilities will be to establish the Lawyers' Assistance Program in coordination with the Lawyers Helping Lawyers Committee of the Alabama State Bar. Specifically, the responsibilities will include:

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4. To establish and oversee monitoring services with respect to recovery of lawyers when monitoring is legally prescribed by the disciplinary, admissions or other authority;
5. To plan and deliver educational programs to the legal community and to law students;
6. To inform the bar, courts and families about alcohol and drug dependency and the availability of resources for recovery and the available services of the Lawyers' Assistance Program;
7. To recruit, train and effectively utilize the services of a statewide network of lawyer volunteer for intervention, monitoring, and/or peer support groups;
8. To identify and seek out funding for the administrative expenses of this program for treatment of impaired attorneys;
9. To establish, maintain and provide the initial response to a statewide "hotline" to assist attorneys with alcohol and drug abuse problems and to assist colleagues and family members; and
10. To maintain statistics and report to the Board of Bar Commissioners concerning program status, financial status, utilization, etc., of the Lawyers' Assistance Program,

### Qualifications:

At a minimum, the director should be either a person with several years' experience in recovery, or a qualified mental health professional with addiction treatment experience. The director must have sufficient experience in training to enable him/her to identify and assist impaired lawyers. The director will not provide counseling services. Salary is commensurate with experience.

### Location:

The office of the Lawyers' Assistance Program will be located in the state bar headquarters in Montgomery. The director will be required to operate the program from this office.

### Application:

Please submit a resume with cover letter to:

Lawyers Assistance Program  
Attention: Keith Norman  
P. O. Box 671  
Montgomery, AL 36101

**The deadline  
for applications is  
April 10, 1998.**





## CLE OPPORTUNITIES

The following in-state programs have been appointed for credit by the Alabama Mandatory CLE Commission. However, information is available free of charge on over 4,500 approved programs nationwide identified by location date or specialty area. Contact the MCLE Commission office at (334) 269-1515, or 1-800-354-6154, and a complete CLE calendar will be mailed to you.

### MARCH

17

#### Effective Estate Planning for the Small Estate in Alabama

Birmingham  
Holiday Inn Redmont  
National Business Institute  
CLE credits: 3.0 Cost: \$99  
(715) 835-8525

18-20

#### 14<sup>th</sup> National Symposium on Child Sexual Abuse

Huntsville  
National Children's Advocacy Center  
CLE credits: 15.0 Cost: \$350  
(205) 534-6868

26-27

#### Regional Seminar for Court and Police Officials

Gulf Shores  
Gulf Shores Quality Inn Hotel  
Alabama Judicial College  
CLE credits: 8.0  
(334) 242-0300

31-April 1

#### Preventing Employee Lawsuits

Tuscaloosa  
Alabama Bar Institute for CLE  
CLE credits: 13.0  
(205) 348-6230

### APRIL

30-May 1

#### Regional Seminar for Court and Police Officials

Birmingham  
Birmingham Radisson Hotel  
Alabama Judicial College  
CLE credits: 8.0  
(334) 242-0300

## In-State Mediation Training

(Approved for CLE credit and Alabama Center for Dispute Resolution roster registration)

### Attention Arbitrators

If you would like to be listed on the temporary arbitrator roster being developed by the Alabama Center for Dispute Resolution, please call the Center for an application: (334) 269-0409.

April 16-18  
Birmingham

#### Mediation Process & the Skills of Conflict Resolution

Litigation Alternatives, Inc. (Troy Smith)  
(800) ADR-FIRM or (888) ADRCLE3  
22 Hours

April 20-22  
Montgomery

#### Mediation Process & the Skills of Conflict Resolution

Litigation Alternatives, Inc. (Troy Smith)  
(800) ADR-FIRM or (888) ADRCLE3  
22 Hours

April 23-25  
Mobile

#### Mediation Process & the Skills of Conflict Resolution

Litigation Alternatives, Inc. (Troy Smith)  
(800) ADR-FIRM or (888) ADRCLE3  
22 Hours

April 24  
Montgomery

#### Arbitration Training

Resolution Resources Corp.  
(800) 745-2402  
7 Hours

May 23-27  
Montgomery

#### Divorce Mediation

School for Dispute Resolution  
(Lemoine Pierce)  
(404) 373-4457  
40 Hours



# PR Spotlight:

## Interview with Kay Wilburn

**R**ecently, *The Alabama Lawyer* Editor Robert Huffaker sat down (via telephone) with Birmingham attorney Kay Wilburn, chair of the state bar's Media Project sub-committee. Robert and Kay discussed "To Serve the Public," the Alabama State Bar's complete public service video presentation, as well as the TV/radio image campaign which began in January.

**The Alabama Lawyer:** How did you become involved in this video project and what is the purpose of this campaign?

**Kay Wilburn:** I became part of the state bar's Committee on Lawyer Public Relations because I felt that we needed to address the public image of the legal profession, and that, as a whole, we typically do not do that.

Originally, I was on the Committee on Alternative Methods of Dispute Resolution, where I felt the committee did an excellent job of teaching judges and attorneys more about ADR, including mediation. The ADR Committee had worked with the Public Relations Committee on some mediation spots for radio. I felt the PR Committee could enhance the legal profession by teaching the public about ADR and other positive aspects of lawyer public service. The year I went on the committee, they decided to try something that had never been done, which was to create a video.

The eight-minute video covers state bar services such as the Lawyer Referral Service and the bar's free legal brochures as well as attorney volunteerism. The video comes with a packet of materials that makes it very easy for an attorney to take it to civic organizations or schools

or churches and present the legal profession in a very positive way.

**AL:** How could I get a copy of the video?

**KW:** All of the local bar associations have copies and the state bar has extras that can be checked out. Contact Susan Andres or Rita Gray at the state bar for information. Attorneys need to utilize the video when making presentations to the public.



*Kay Wilburn, chair, Media Project sub-committee*

**AL:** What's in the video?

**KW:** In addition to highlighting the Lawyer Referral Service and other bar programs, the free brochures and alternative dispute resolution, the video also covers the many ways Alabama attorneys give something back to their communities. One example of that is the state bar-affiliated Partnership Program, where attorneys and judges go into the

classroom and help students learn about citizenship, conflict resolution skills and other law-related topics. The video includes attorneys volunteering in non-law-related areas, too.

**AL:** How do you plan to get the word out about these good things that Alabama attorneys are doing?

**KW:** That's why we came up with the third phase of the public relations campaign. The first phase was the video presentation package, a complete tool to assist attorneys speaking to various groups and an easy way of informing the public about positive aspects of the legal profession in Alabama. The second phase was getting the materials produced to accompany the video—a handbook of speech points and brochures for the public. But we knew those wouldn't be enough because you can't reach everyone through public speaking engagements. In December, the Media Project sub-committee went before the Board of Bar Commissioners and received approval for funding a partnership with the Alabama Broadcasters Association. This began the third phase.

**AL:** What will this partnership lead to?

**KW:** This is very exciting! The Alabama Broadcasters Association has an arrangement called a Non-Commercial Sustaining Announcement program. If you "partner" with the ABA, you contribute an initial amount and then they guarantee you media coverage throughout the state in a specified, agreed-upon amount. We qualify for a four-to-one return on our investment amount during 1998.





*Producer Margaret Richardson, Leo Tichell Productions; Kay Wilburn; and Dr. Lowell Broom, chair, department of accounting, UAB School of Business, discuss the scenes shot at the school.*

The sub-committee had looked at different awards and grants from various associations, including the American Bar Association, to further promote the positive message of the video, but was disappointed in the amounts offered. We quickly found out that we needed a significant amount of money in order to have an effective campaign.

Once we received approval from our Board of Bar Commissioners and the Broadcasters Association to "partner," we began work on the three 30-second public service announcements currently airing on television and radio stations around the state. The three spots concentrate on bar services for the public; attorneys volunteering in the public; and alternative dispute resolution. I was very impressed by the fact that the legal profession gives more volunteer hours than any other profession. The public probably doesn't know that.

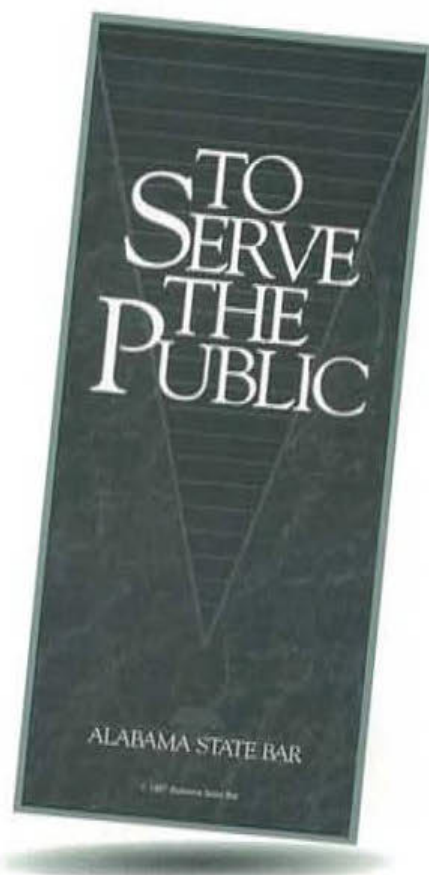
With 30 seconds, you cannot fully educate the public on each topic, but a telephone number of the state bar is provided in case someone has a ques-

tion. In fact, calls are already coming in requesting brochures and information on mediation.

*AL: Anything else?*

**KW:** The video received a 1997 Medallion Award of Merit from the Public Relations Council of Alabama. We've also been getting calls from bars across the country who are interested in doing something similar. I'm proud to be part of such a proactive program where other states are looking to us. You're not going to be able to change everyone's opinion but I think focusing on the positive side of the legal profession is very important.

One thing I do want to note. We made sure the spots are not easily dated so they won't be shelved quickly. We might even do this another year because we can use the same spots. When you look at the total number of ASB members and the cost of the partnership, it is only a few dollars per member. This is a good return on your bar dues! ■







## RECENT DECISIONS

By Wilbur G. Silberman

### Bankruptcy Decisions and Amendments to Bankruptcy Rules

#### Law firm entitled to reimbursement for "user fee" expenses not included in "overhead"

*In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 31 B.C.D. 917 (11th Cir. 1997). In this chapter 11 case, the bankruptcy court denied reimbursement of several categories of expenses claimed by the attorneys for the chapter 11 debtors and the official bondholders committee as "overhead". These expenses included postage, secretarial charges, word processing, clerical tasks, local travel expenses, meals, express mail, messenger delivery expenses, copy charges, laundry, office supplies, typesetting, and computer research charges. The court determined that these expenses were non-compensable because they were already built into the firms' hourly billing rates. The bankruptcy court rejected the firms' argument to the contrary that the charges were "user fees" which were assessed directly to the particular client for

whom they were identifiably incurred and were excluded when the firms set up their hourly rates.

The firms appealed the denial of reimbursement of these expenses in the final order on their fee applications. After the district court affirmed the bankruptcy court, the firms appealed to the Eleventh Circuit.

The Eleventh Circuit vacated and remanded pursuant to the pre-amendment section 330(a)(2). The Court initially noted that the bankruptcy judge abused his discretion by refusing to consider the reimbursement of the expenses without receiving evidence apparently because of the bankruptcy judge's belief that these categories of expenses could not by their nature be true "expenses" under pre-amendment section 330(a)(2). The Eleventh Circuit then noted that the legislative history of section 330 is inconsistent with a narrow reading of that section and emphasized the Congressional intent to promote the same billing practices in bankruptcy cases as in other areas of the legal practice. The Court then noted the widespread use of "user billing" and held that the record did not support the bankruptcy court's ruling which was apparently based solely upon the bankruptcy judge's personal belief that the requested "expenses" were "overhead".

The Court first quoted *In re Red Carpet, etc.*, 902 F.2d 890 (11th Cir. 1990) that, "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." It then found that the bankruptcy judge in an early stage of the case said he would not allow the aforementioned expenses. As there was no evidence taken on the question,

the court viewed the review standard to be on the legal questions only. It then reviewed various cases which had considered the questions of overhead expense, and opined that "if certain categories of expenses are commonly billed by practitioners in non-bankruptcy cases, they should not be arbitrarily excluded under §330(a)(2)." The Eleventh Circuit panel agreed with the Third Circuit holding in *In re Busy Beaver*, 19 F.3d at 848 that the best method is to rely on the market, subject to court review. Circuit Court Judge Carnes (an Alabama judge) strongly dissented, stating that the appellate court should not have second guessed the bankruptcy judge—that the review should have concerned only whether the overall amount was *fair*. (emphasis supplied). He further commented that because the majority required the trial court to consider both compensation and expenses, the award may change little when being reconsidered. Judge Carnes said that the majority opinion gives the law firms, rather than the courts, discretion as to billing.

**COMMENT:** In its consideration of fees and expenses, the bankruptcy court will have much support from the dissent. In my opinion, this case will not change the law greatly except that the bankruptcy court will be more apt to insist upon testimony as to fees and expenses, and then make a reasoned finding.

#### Amendments to Bankruptcy Rules effective December 1, 1997

Various amendments to the Bankruptcy Rules were submitted to Congress in April 1997 to become effective on December 1, 1997, if not modified or deleted. Changed were Rules



**Wilbur G. Silberman**

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Sanford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.



1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9015. In addition there are now new rules to-wit: 1020, 3017.1, 8020, and 9015. A short synopsis follows:

**Rule 1010. Service of Involuntary Petition and Summons; Petition Commencing Ancillary Case**

This amendment seems purely technical in nature, made only to conform to changes made in subdivisions of Bankruptcy Rule 7004 and FRCP 4.

**Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case**

When a reorganization case is converted to chapter 7, all claims filed before conversion are deemed filed in the chapter 7 case. Additionally, there are other amendments clarifying or improving on the requirements in the event of conversions.

**Rule 1020. Election to be Considered a Small Business in a Chapter 11 Reorganization Case**

Any election to be considered a small business must be made in writing no later than 60 days from the order for relief.

**Rule 2002. Notices to Creditors, Equity Security Holders, United States and United States Trustee**

Provision is made for notices to be given if the chapter 11 trustee is to be elected; also requires that notices to creditors must contain information in the caption as mandated by section 342(c) requiring the name, address and tax identification of the debtor.

**Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case**

This is a completely new provision added concerning (a) the motion for appointment of a trustee in a chapter 11 case; (b) the procedures for the request of election of a trustee, manner of election and notice, report of election and resolution of disputes; and (c) the approval of appointment.

**Rule 3014. Election Under Section 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case**

This amendment concerns time limits and procedures for election of the 1111(b) option in chapters 9 and 11.

**Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases**

Procedure for hearings and objections thereto on disclosure statements filed pursuant to Rule 3016(b). This amendment was for the purpose of giving discretion to the court as to determining those holders of securities entitled to receive notice of disclosure statement, ballot, and other matters related to vote solicitation.

**Rule 3017.1. Court Consideration of Disclosure Statement in a Small Business Case**

The thrust of this new provision is in allowing the disclosure statement to be conditionally approved; thus getting the case on a fast track to confirmation. Where small business has been elected, this rule should be carefully followed.

**Rule 3018. Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case**

This amendment allows the court discretion in setting a bar date for identifying record holders of securities entitled to vote.

**Rule 3021. Distribution Under Plan**

This is another amendment after confirmation allowing (1) the court discretion in determining the record date of the holding of a claim by an equity security holder in order that distribution be handled properly; (2) equal treatment to holders of debt security as that of other creditors by requiring allowance of their claims; and (3) mandating distribution to interest holders whose interests have not been disallowed.

**Rule 8001. Manner of Taking Appeal; Voluntary Dismissal**

This amendment allows appeal from an order either increasing or decreasing the exclusivity period for filing a chap-

ter 11 plan. Subdivision (e) of the amendment refers to 28 U.S.C. §158(c) dealing with appeals from interlocutory orders and decrees and also the method of electing to have the appeal heard by the U.S. District judge rather than the Bankruptcy Appeal Panel ("BAP").

**NOTE:** As there is no such panel in the Eleventh Circuit, this presently would be inapplicable.

**Rule 8002(c). Time for Filing Notice of Appeal**

The amendment to subsection (c) sets out the exceptions to the discretion of the bankruptcy judge in extending the time for appeal in a manner different from the original wording of this rule. It states that the request must be by written motion, and sets out the time limits of the extension, to-wit 20 days from the expiration of the original time prescribed by the Rule, or in the event of excusable neglect, ten days from the date of the order granting the motion.



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**Rule 8020. Damages and Costs for Frivolous Appeal**

This is a new rule providing that if the district court or the BAP in considering an appeal from an order, judgment, or decree of a bankruptcy judge, believes the appeal to be frivolous, "it" may, after a separately filed motion or notice from the district court or BAP, and after reasonable opportunity to be heard, award damage costs to the appellee.

**COMMENT:** This rule leaves something to be desired. Is the "it" the bankruptcy judge or is "it" the district judge, or BAP. Also who files the motion, the opposing attorney or the court?

**Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verifications and Copies of Papers**

This rule was amended in order to conform it to changes made in 1993 to Rule 11 of FRCP, with the exception that the portion of Rule 11 disallowing sanctions if the particular paper in question is withdrawn or corrected,

does not apply to a petition. (Apparently, this means "petition in bankruptcy".) This rule was rewritten to confirm generally to Rule 11, and thus is not in the form of the prior Bankruptcy Rule 9011. Generally speaking, the most notable change from that of the present FRCP 11 is that the withdrawing of a petition in bankruptcy will not relieve the attorney of exposure to sanctions.

**Rule 9015. Jury Trials**

This is a new rule (the prior 9015 was abrogated in 1987). It applies FRCP 38, 39, 47-51, and 81(c), except that a jury demand under FRCP 38(b) is filed pursuant to Bankruptcy Rule 5005. If a bankruptcy judge is designated to conduct the jury trial, the parties may consent to the bankruptcy judge by filing consent, jointly or separately, under the time limits imposed by the local rules.

**Rule 9035. Applicability of Rules in Judicial Districts in Alabama and North Carolina**

This rule states that the bankruptcy rules apply to these two states only as not inconsistent with any federal statute relating to bankruptcy administration.

**U.S. Supreme Court overrules Eleventh Circuit and possibly Senator Heflin on interpretation of enabling loan exception, Section 547(c)(3)(B)**

*Fidelity Financial Services, Inc. v. Fink*, U.S. Sup. Ct. No. 96, 1370, Souter, J., Jan. 13, 1998. The debtor gave a purchase money security interest to Fidelity on a new car. Under Missouri law, the lender was allowed 30 days to perfect. Fidelity mailed the application 21 days after delivery. The trustee claimed a preference. Fidelity contended that compliance with state law resulted in the perfection on the day of creation. All the lower courts ruled in favor of the trustee. The U.S. Supreme Court affirmed. Bankruptcy Code Section 547(c)(3)(B) provides that a trustee may not avoid a transfer "(3) that creates a security interest in property acquired by the debtor—\*\*(B) that is perfected on or before 20 days after the debtor receives possession of such property."

The Supreme Court held that state law must be complied with, and that the bankruptcy section not only applies but controls. A colloquy in 1994 between Senator Heflin and Senator Sasser was referenced in which Fidelity had contended that both senators thought that in increasing the time period from ten to 20 days, the state "relation-back" statutes were being made consistent with federal law. Not so, said Justice Souter. He said that the statements of the senators were at odds with the governing text, and with statutory history of the preference provisions. The opinion in footnote two referred to the opinion in the Eleventh Circuit case of *In re Busenlehner*, 918 F.2d 928, 930-931, as a contrary holding. Thus, there is little doubt that such case was being overruled.

**COMMENT:** The end result is that if there are different "relation-back" periods in the state and federal law, the secured party must perfect within the shorter period. ■

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## DISCIPLINARY NOTICE

### Notice

- **Jesse Eldridge Holt**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 1998 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 92-505, 92-530, 93-22, 93-422 and 94-20 before the Disciplinary Board of the Alabama State Bar.

### Reinstatements

- By order of the Alabama Supreme Court **James Curtiss Bernard** was reinstated to the active practice of law on October 14, 1997. Bernard was disbarred on March 9, 1992 for a period of five years. [Pet. No. 97-03]
- Effective December 11, 1997, Dothan attorney **Charles Bruce Adams** has been reinstated to the Alabama State Bar. On September 29, 1997, he had been suspended from the practice of law in the State of Alabama for noncompliance with the Mandatory Continuing Legal Education Rules. [CLE 97-01]

### Suspensions

- Birmingham attorney **Stephen Willis Guthrie** was suspended from the practice of law for a period of 45 days by order of the Alabama Supreme Court effective August 26, 1997. Guthrie's suspension was the result of his having entered a plea of guilty in the Circuit Court of Jefferson County to the possession of a controlled substance. [Rule 22(a), Pet. No. 97-05]
- Effective December 4, 1997, Pelham attorney **William Felix Mathews** has been suspended from the practice of law in the State of Alabama for noncompliance with the

Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 97-10]

### Public Reprimands

- On December 5, 1997, Birmingham lawyer **Robert McKim Norris** received a public reprimand without general publication for violating Rules 8.1(a) and 8.4(a) and (g), Alabama Rules of Professional Conduct. This discipline was imposed by Panel I of the Disciplinary Board of the Alabama State Bar after finding Norris guilty of making false statements and misrepresenting his participation in a matter under investigation to an investigator of the Birmingham Bar Association Grievance Committee.  
It should be noted that the disciplinary proceedings conducted before the Disciplinary Board were in conjunction with Norris' petition for reinstatement to the practice of law in Alabama. The petition for reinstatement was denied. [ASB No. 92-19]
- On December 5, 1997, Bessemer lawyer **Tommy Eugene Tucker** received public reprimands without general publication in ASB Nos. 96-235, 96-244, 96-247, 96-267 and 97-134. This discipline is based upon Tucker's guilty pleas in the foregoing cases for willfully neglecting legal matters entrusted to him [Rule 1.3, Alabama Rules of Professional Conduct] and/or failing to respond to reasonable requests for information from a client [Rule 1.4, A.R.P.C.] and/or failing to take reasonable steps to protect a client's interest upon termination of representation, including failing to return client's files and/or failing to refund to clients any unearned portions of retainer fees

*(Continued on page 124)*



• **Check us out at . . .**



## Disciplinary Notice

(Continued from page 123)

[Rule 1.16(a), A.R.P.C.]; engaging in conduct involving misrepresentation [Rule 8.4(c), A.R.P.C.] and for engaging in conduct prejudicial to the administration of justice.

It should be noted that in addition to the imposition of these public reprimands, Tucker received a 91-day suspension from the practice of law, the imposition of which was suspended pending Tucker's successful completion of a two year-period of probation. [ASB Nos. 96-235, 96-244, 96-247, 96-267 and 97-134]

- Selma attorney **Bruce Carver Boynton** received a public reprimand without general publication on December 5, 1997. Boynton represented two different individuals on criminal charges after his representation was concluded both of these client's requested copies of their file including their transcripts. However, Boynton failed or refused to respond to these requests. Thereafter, both individuals filed complaints against Boynton with the Alabama State Bar. Boynton failed or refused to respond to requests for information from the office of general counsel or to otherwise cooperate in the investigation of these two complaints. [ASB No. 96-358 (A) and 97-008(A)]
- Birmingham attorney **Edward Eugene May** received a public reprimand without general publication on December 5, 1997. May represented Mr. and Mrs. Herbert Williams in connection with two real estate closings. When questions arose with regard to title insurance and termite bond on the property the Williams' attempted repeatedly to contact May to resolve these problems but he consistently failed or refused to return the Williams' telephone calls or otherwise communicate with

## Letter to the Editor

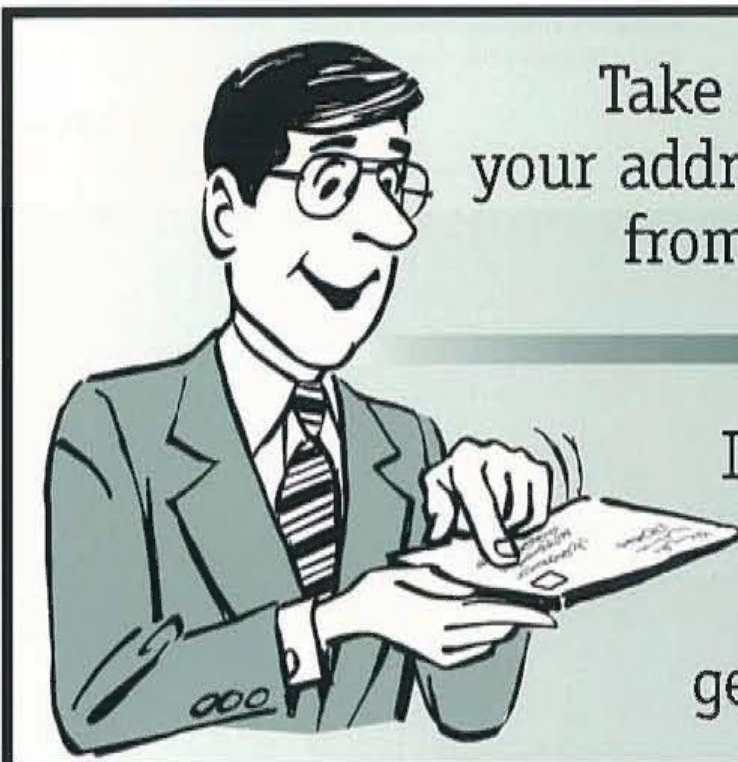
This is a letter of apology under the directive of the Alabama State Bar Association for my conduct in failing to timely file state income tax returns.

I have recently pled guilty to four counts of failing to timely file state income tax returns and have been sentenced to probation, community service and fines. I have also agreed to have this letter published in *The Alabama Lawyer* and to comply with other directives of the Disciplinary Commission.

I regret the publicity and embarrassment this has caused the Alabama State Bar Association and to members of our profession. I urge all other members to the Alabama State Bar Association to comply with all tax laws and regulations and to cooperate with the Disciplinary Commission of the Alabama State Bar Association.

— **John L. Sims**  
Hartselle, Alabama

them regarding their concerns. Thereafter, the Williams' filed a complaint against May with the Alabama State Bar and May failed or refused to respond to the complaint or otherwise cooperate with the bar in its investigation of the Williams' complaint. [ASB No. 96-056(A)] ■



Take a moment now to check  
your address on any mailing label  
from the Alabama State Bar.

*Is it correct?*

If it isn't, you have until  
**April 1st, 1998**  
to change it and still  
get it in the '98 directory.



## President's Page

(Continued from page 71)

Professional Economics & Technology—153

Real Property, Probate & Trust Law—314

Taxation—241

Workers' Compensation—268

Young Lawyers'—3,715

These sections provide a valuable service to their members in terms of seminars, newsletters, brainstorming and fellowship.

In addition to the bar's practice sections, there are 38 bar committees and task forces. This year we had over 700 lawyers who volunteered for appointment to little more than 200 vacant slots. These committees and task forces might be categorized in four areas (figure 4, page 71): (1) public service; (2) focus on the profession; and (3) bench and bar/bar management and governance.

I will highlight a few specific bar programs which might be of particular interest:

(1) **Alabama Law Foundation**—Receives interest income from the trust accounts of participating lawyers. In the past ten years, it has made grants of

over \$7,000,000 to law-related projects.

(2) **Volunteer Lawyers' Program**—Provides pro bono legal services to the poor in civil, non-fee-generating matters, and is now particularly important in light of the decreased funding of Legal Services.

(3) **Alternative Dispute Resolution Center**—Meets the growing need to promote ADR and mediation training.

(4) **Lawyer Referral Service**—Founded in 1978 to assist the public in finding legal representation.

(5) **Law Office Management Assistance Program**—Provides practice management assistance (such as computer software, accounting and file management) to solos and small firms. We have hired an attorney, **Laura A. Calloway** (who has several years' experience practicing in a small firm), to coordinate this cutting-edge program.

(6) **Law-Related Education Program**—Provides an opportunity for local bars and school systems to jointly sponsor and implement programs to put lawyers and law-related materials in the classroom.

(7) **Public Relations**—The board of bar commissioners has appropriated \$50,000 for television and radio spots that began January 30 on the 30 major

television stations and 100 radio stations across the state, as a part of an agreement with the Alabama Broadcasters Association, under which the broadcasters will match each "paid" spot with at least four free spots.

(8) **Website** ([www.alabar.org](http://www.alabar.org))—Puts the Alabama State Bar online.

(9) **Publications**—Include the bi-monthly magazine, *The Alabama Lawyer*, and in alternate months, the *ADDENDUM*, an eight-page newsletter.

(10) **Member Services**—Include AT&T savings services, group insurance, malpractice insurance, Airborne Express discounts, and many others.

(11) **"To Serve the Public"**—(A bar-sponsored video available to local bars, civic clubs and schools) Highlights the ways attorneys serve the public and focuses attention on the principles underlying the Lawyers' Creed.

If the Alabama State Bar is indeed an "ant hill," then it's an exceedingly busy one. We realize, however, that we cannot adequately represent or serve our diverse membership if we're not aware of our members' professional needs and concerns. Consequently, we continue to request and welcome the suggestions and recommendations of our members. ■

# [www.alabar.org](http://www.alabar.org)

*The Alabama State Bar on the World Wide Web*





## CLASSIFIED NOTICES

**Rates: Members:** Two free listings of 50 words or less per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—\$35 per insertion of 50 words or less, \$.50 per additional word;

**Nonmembers:** \$35 per insertion of 50 words or less, \$.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

**March '98 issue**—deadline January 15, 1998; **May '98 issue**—deadline March 15, 1998. No deadline extensions will be made.

Send classified copy and payment, payable to *The Alabama Lawyer*, to: **Alabama Lawyer Classifieds, c/o Rita Gray, P.O. Box 4156, Montgomery, Alabama 36101.**

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- **DOCUMENT EXAMINER:** Certified Forensic Document Examiner. Chief document examiner. Alabama Department of Forensic Sciences, retired. American Board of Forensic Document Examiners, American Academy of Forensic Sciences, American Society of Questioned Document Examiners. Over 20 years' experience in state and federal courts in Alabama. Lamar Miller, 11420 N. Kendall Drive, Suite 206-A, Miami, Florida 33176. In Birmingham, phone (205) 988-4158. In Miami, phone (305) 274-4469. Fax: (305) 596-2618.
- **HANDWRITING EXPERT/FORENSIC DOCUMENT EXAMINER:** ABFDE certified; past president, Southeastern Association of Forensic Document Examiners; American Academy of Forensic Sciences fellow. Federal court qualified. Nineteen years' experience. Civil and criminal. Handwriting



comparison, forgery detection, detection of altered medical records and other documents. L. Keith Nelson, Stone Mountain, Georgia. Phone (770) 879-7224.

- **EXPERT WITNESS:** Professional engineer and attorney with a practice of expert testimony in construction, safety, highway and structural design. Thirty-five years' experience in highway, railroad, commercial buildings and power plant construction. Call or write for resume, fees: Lamar T. Hawkins, Medical Forum Building, 950 22<sup>nd</sup> Street, North, Suite 632, Birmingham, Alabama 35203. Phone (205) 458-8485. *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*
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- **COUNSELING:** Carey Bennett McRae, J.D., M.S., CCA, lawyer, mental health counselor, and domestic relations mediator, offers counseling services for adults experiencing depression, anxiety, stress, vocational issues, grief and relationship concerns. Certified counselor associate of Judith Harrington, Ph.D., LPC, in Birmingham. Weekend, evening appointments available. Phone (205) 930-9006. *No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.*
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## MISCELLANEOUS

- **ANIMAL RIGHTS:** The Southern Animal Law Center seeks to hear from attorneys who are interested in animal-related matters from a legal perspective. Contact the center, James R. Foley, director, at P.O. Box 2692, Huntsville, Alabama 35804.
- **LAST WILL & TESTAMENT:** Attorney who prepared a will after 1992 for LeRoy (Lee) Bush, who died June 16, 1997. Mr. Bush lived in Leeds (St. Clair County), operating his own construction business specializing in decks and patios. He told his family that he designed an unusual patio for the attorney who prepared his will, and showed them a videotape of the project. The house sat at the top of a steep inclining lot, with steps down the back of the lot to a gazebo, small creek, and wooded area. This attorney may have lived near the Galleria in Jefferson or Shelby counties.

IF THIS SOUNDS LIKE YOUR HOUSE, OR THE HOUSE OF ANY ATTORNEY YOU KNOW, please contact J. Sanford Mullins, III, Spain & Gillon, L.L.C. in Birmingham. Phone (205) 581-6222.

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