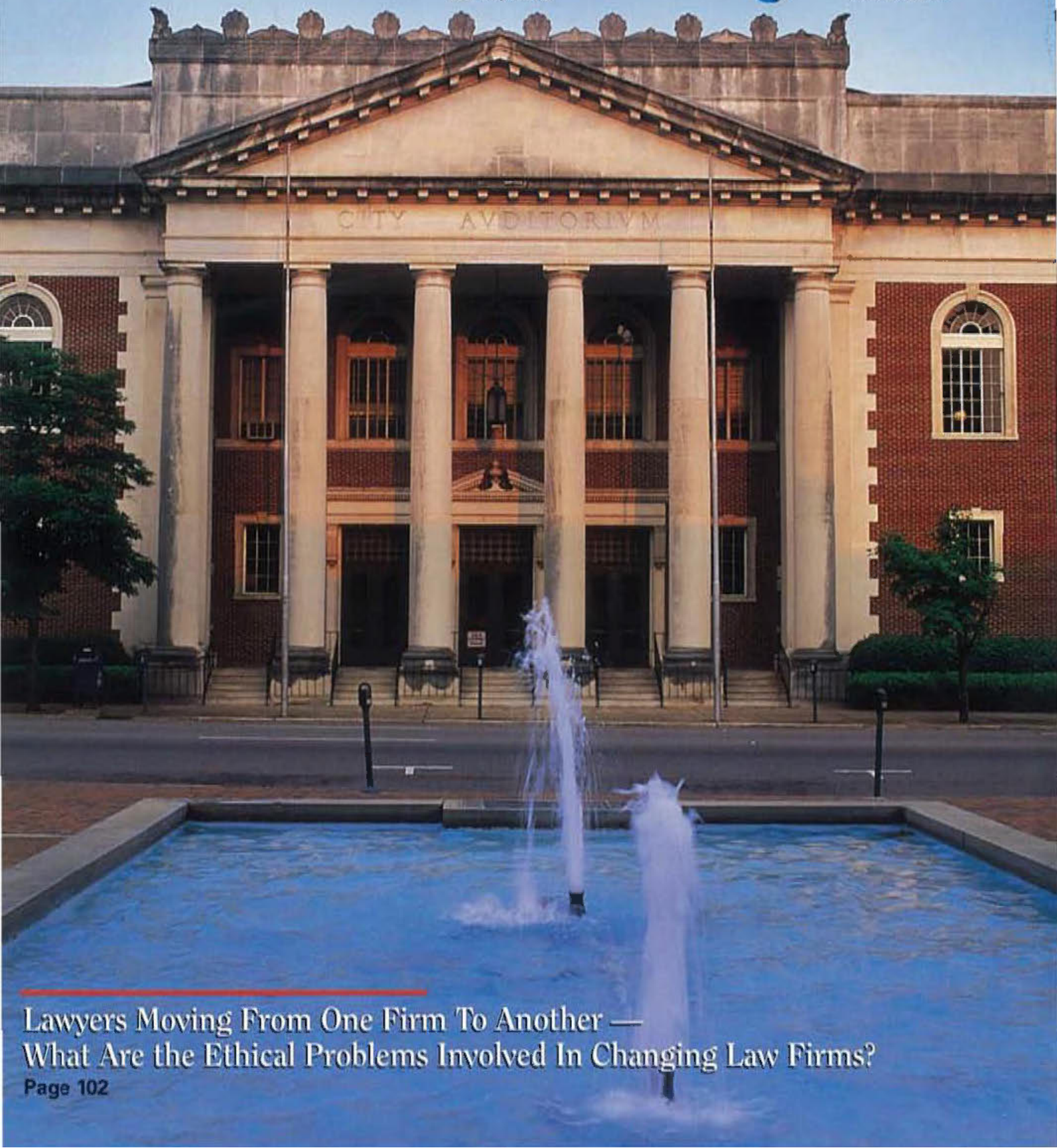


The Alabama Lawyer

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March 1999



Lawyers Moving From One Firm To Another —
What Are the Ethical Problems Involved In Changing Law Firms?

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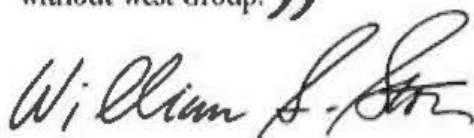
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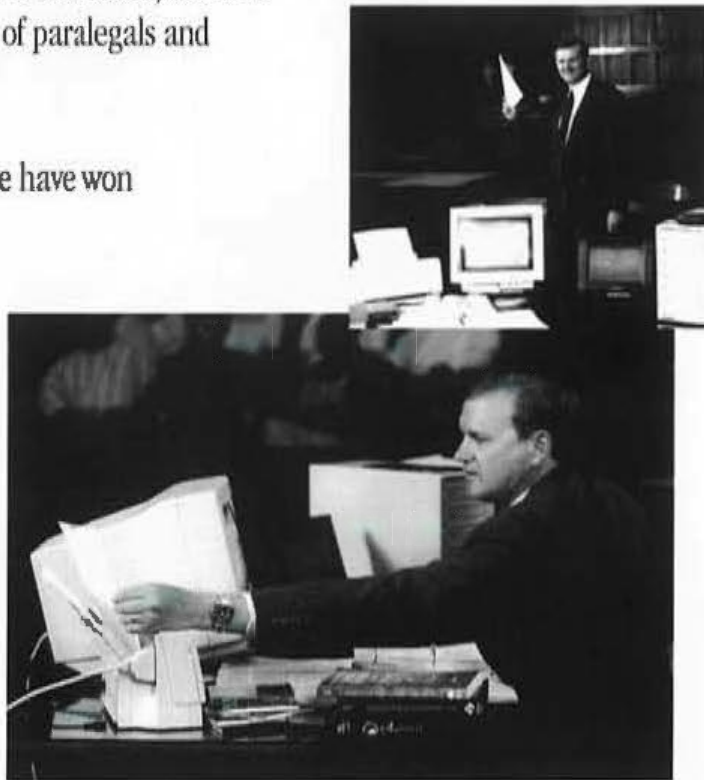
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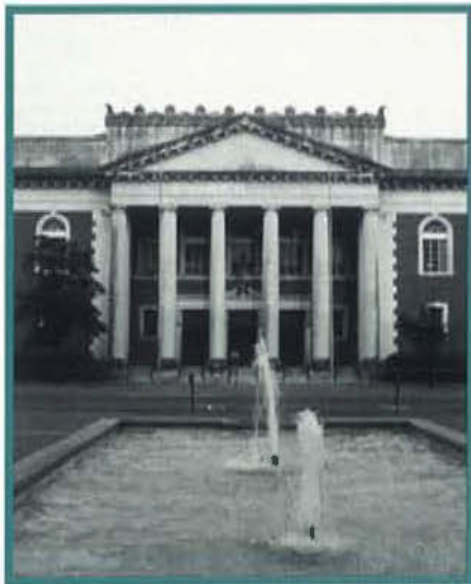
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—Photo by Paul Crawford, JD, CLU

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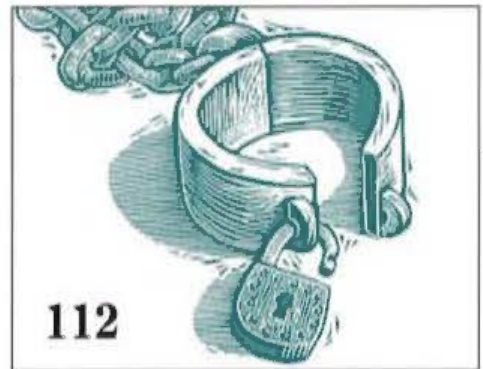
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PRESIDENT'S PAGE

By Vic Lott

Consolidating and Communicating



Vic Lott

Robert A. Huffaker, editor of *The Alabama Lawyer*, met recently with Alabama State Bar President Vic Lott to discuss the first half of his term—the changes he's brought about, the goals yet to reach and the overall general health of the ASB.

Robert A. Huffaker: Vic, you're halfway through your tenure as the bar president. What has been the theme, or the focal point, of your administration?

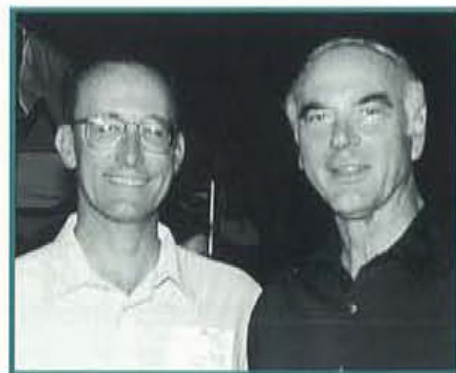
Vic Lott: Having been on the Board of Bar Commissioners for nine years, and then having served a year as president-elect, I've had the opportunity to see how the Board of Bar Commissioners and the committees of the state bar actually function. One of the things that I wanted to address was the administrative structure of the state bar.

RAH: How did you do that?

VL: I went back to our statutory mission and I tried to take a look at the programs, the committees and task forces that were in place. What I found was that there was really no rhyme or reason for the existence of a lot of the committees and the task forces which were supposed to be short-term efforts, and had, in many cases, dragged on for years. Some of the committees and task forces really weren't functioning and yet our staff has to appoint and re-appoint members each year with the help of the new bar president, try to encourage those committees to function, and arrange for meetings and so forth. That was taking a lot of time and effort by our staff that really wasn't producing anything.

RAH: Did you eliminate some of those committees?

VL: Yes. I don't remember the exact numbers, but we had about 45 committees and task forces and I reduced it to about 25. Some of them we eliminated



Vic Lott with past ASB President and fellow Mobilian Broox Holmes at the 1998 Annual Meeting in Orange Beach

altogether and some of them we combined. I'll give you an example. There was a permanent code commission on the Rules of Professional Responsibility, there was a committee on advertising and solicitation, and there was a task force on lawyer discipline. I combined all three of those into one committee. We took the people who had been most active from those three committees and rolled them all into one committee, giving them the task of reviewing the Rules of Disciplinary Enforcement and the Rules of Professional Responsibility on an on-going basis. They're coming back to the board at least annually with a report on modifications that may or may not be necessary. I think that's a good example of what needed to be done to bring some better focus to our committee structure.

I think the bar has two primary functions: One is regulatory, and that includes disciplinary functions, bar admissions and MCLE, and the other mission is programs. I tried to align our committees and our task forces along those two principal axis so that each program has a staff liaison person at the bar and a committee that functions like a board for that staff person. That's made our programs more efficient. It's enabled us to get our arms around exactly what it

is we are trying to accomplish in the state bar through our committees and our programs and to bring that back into alignment with our mission, which again is regulatory and program-oriented.

RAH: Have you appointed any task forces?

VL: A couple. One is a task force on long-range financial planning for the bar. We've had such good fortune in the past decade with our finances that I think we've been lulled into a malaise just assuming that we're always going to have plenty of money, but that was not the case as recently as the mid-'80s. There were times, I think, when Jim North was president, that the bar couldn't afford to pay for Jim to go to the National Conference of Bar Presidents. He had to pay his own way. That was not that long ago. Of course, we have increased dues, and Reggie Hamner and Keith Norman have done a superb job in managing our finances, so now we're in very good shape. In fact, the last six to eight years we've actually had a small surplus. We also created the Alabama State Bar Foundation which owns our state bar building and leases that facility to the bar for a fair market rent. We've been able to pay off the debt on that facility and the result is that the bar has a healthy financial situation right now, and the bar foundation does as well. But we're starting to see pressure on the bar's finances. I don't think it's going to be too much longer before we're going to have to make some decisions again about dues increases or perhaps decreasing the rent paid by the bar to the foundation. I appointed a task force that Rick Manley is heading and they are focusing on long-range finances, which I think is an enormously important effort. I think Rick is the perfect person for the job, too.

RAH: What was the other task force that you appointed?

VL: One of the things that Dag Rowe focused on during his term, and that I was very much in agreement with, was the need to do a better job in communicating with the specialty bars and sections in Alabama.



Judge Frank A. Long, of the Alabama Court of Criminal Appeals, and Vic Lott at a recent meeting of the Task Force on Intra-Bench and Bar Communications

RAH: What do you mean by specialty bars and sections?

VL: The Defense Lawyers Association, the Alabama Trial Lawyers Association, the District Attorneys Association, the Alabama Lawyers Association, the Criminal Defense Lawyers Association. We now have a Women Lawyers Section. All of those sections and specialty bars are very active on a substantive level but as a mandatory bar, I feel like we can do a lot to encourage communication among those various specialty bars and to make sure that they all understand what role the state bar is supposed to play and what role we cannot play. Being a unified bar, under the *Keller* decision, we can't take positions that are pro or con to various elements of our membership. We would be endangering our position under the *Keller* decision. That is for the specialty bars to do. If the Trial Lawyers Association wants to advocate a particular piece of legislation that they think benefits their constituency, they can do it. We can't. But we can be a forum for discussion purposes to try to facilitate the resolution of differences among our lawyers and among the various specialty bar and sections. I appointed a task force chaired by Greg Breedlove, who is the current president of the Alabama Trial Lawyers Association. We included representatives from every other specialty bar and some of the larger and older sections and they've met several times. They are trying to focus on things like inviting several of the representatives of the specialty bars to all of our Board of Bar Commissioners meetings just so they can see what we do. We are also coordinating our annual meetings so that we

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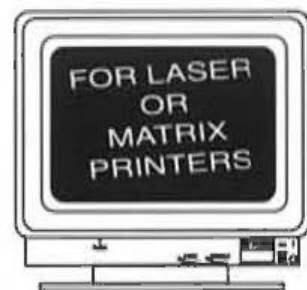
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President's Page

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include more activities by those specialty bars. Last year the Trial Lawyers Association had their own seminars at our annual meeting in Gulf Shores, which was very successful. It helped increase the participation level at our annual meeting. I think there are hot issues like arbitration and tort reform where the lawyers in the state have different opinions and different objectives, many of which are advocated by the specialty bars. I think that's where the state bar can play a role of encouraging discussion and facilitating some harmony and some direction for the benefit of the profession without advocating one position over the other. That's what I'm hoping is going to come out of that task force.

RAH: When will that task force render its final report?

VL: This spring.

RAH: Share with our readers the state of the communication between the bar and our appellate courts.

VL: We had reasonably good communication with the Alabama Supreme Court at least back to the point in 1986 or '87 when I became a bar commissioner. Most of that communication was through our Supreme Court Liaison Committee, which was a small group that met with the court a couple of times a year for a brief meeting about particular issues. However, there were a variety of issues that raised the ire of the court and the bar alike. Communications between the two broke down in about 1994 and we really have not met with the court since then, until this summer. I think Chief Justice Hooper was very instrumental in encouraging that communication and its re-institution. We had a good meeting with the court in July, very much assisted by Dave Boyd and Mark White, who I appointed as my supreme court liaison. The chief justice appointed Justice Champ Lyons as the liaison to the bar, which we were delighted with, not only because he is a personal friend of mine but also because we felt like that was an indication that the court was serious about their commitment to re-institute meaningful communication with the bar.

RAH: What other contact has the bar had with the supreme court?

VL: We've had two or three meetings with the court since then. These were very frank discussions about the pendency of rule changes, and about disciplinary issues that the court had already looked at and decided. We are requesting some rule changes on various fronts. The chief justice is very concerned about professionalism and we are talking about some joint efforts to improve professionalism in Alabama. We are also talking about some rather major issues that bear on our profession. It's particularly heartening to me, not only because the court seems to be very interested in communicating with the bar, but also because in the states that have the most effective judicial systems, many of the major efforts directed at benefiting our profession and the public are partnerships between the supreme court and the bar. That's a direction in which I would like to see us move. I think it's a direction in which the court is willing to move. We are sending them a lot of information as a matter of routine about what the Board of Bar Commissioners is doing, and about national issues that have been brought into focus at meetings of the National Conference of Bar Presidents and the Southern Conference of Bar Presidents. We are trying to heighten their recognition of issues facing the profession, many of which the court wants to be involved in. I think that's been a very successful effort and to cap it off I've been invited to speak to the court in June with a State of the Bar address.

RAH: How would you characterize the state of the bar?

VL: Alabama, I think, is the second oldest unified bar in the country. We've propounded the original Code of Professional Responsibility and Alabama continues to be thought of as one of the best functioning unified bars in the nation. And I say that not only because I'm proud of what we're doing and know that we have a good staff and good leadership, but because I have heard that comment many times from national and regional bar leaders at the National Conference of Bar Presidents and Southern Conference of Bar Presidents and at various ABA meetings of bar lead-

ers from all over the country. We are continually on the front line of issues. We just received a major national award for some of the video presentations that we have made and used in marketing and in efforts to try to improve the image of the lawyers in our state. Several other state bars are copying that effort now. That's just an example of how our state bar is coming up with innovative ways to address issues that are not just our issues but issues facing every organized bar. We're not having the problems that a lot of other bars have had. California doesn't even have a bar now. We have studied what they did over the past decade to make sure we don't do it. We really have a great and experienced staff. It's one that does a superior job on a very efficient basis. We have not let our staff at the state bar get bloated. Keith Norman does a great job in controlling finances and keeping his staff small and efficient. I think we've got a lot of support and really more interest in the state bar by the rank and file members than I've seen in 15 or 20 years. That's a result of efforts by Keith and the leadership of the bar over the past decade instituting programs that are meaningful to our members, like the Law Office Management Assistance Program that's reaching out to small firms and sole practitioners to help them with technology and other issues. I think we're doing a really good job. I think we have a lot of positive information to tell the supreme court when we make our State of the Bar address in June.

RAH: You mentioned earlier that one of the functions of the bar is discipline. I think we all know that there are laypersons who are participating now on the disciplinary panels. How is that working?

VL: I think it's working very well. As anticipated, those laypeople are really more conservative than the lawyers. They're more protective of the lawyers than the lawyers sitting on the panels. That was certainly the experience in other states. That's surprising to outsiders when you tell them that. I think it goes to show that we have an open system. We have a system that is not a good old boy system. It still needs some fine tuning and we are looking at it all the time. In fact the Committee on Lawyer Discipline has



Past President John Owens is a winner at the 1998 Annual Meeting.

made a partial report this year that recommends eight or ten fairly significant rule changes—but it is also looking at what would be some pretty major changes in the disciplinary panels. They haven't reported yet so I don't want to say what I think they might do but among the alternatives they are considering is adding an administrative law judge who would sit as the chairman of all the panels to lend some consistency and take some of the administrative burden off of the panels. They're looking at reducing the number of panels from five to three. We don't think that would significantly increase the workload of the three remaining panels but, again, it would be an effort to lend some consistency to the work and the outcome of some of the disciplinary hearings. We're looking at creating an intermediate appellate body that would be available to review any decision of a disciplinary panel before it went to the supreme court for the limited purpose of ensuring that the outcome was consistent with discipline meted out in similar cases to other lawyers in the state. None of those may end up happening. It may be felt that they are not necessary or we may have some combination. I think the message is that we are always looking at ways to fine tune our system and ensure consistency. We feel like we have it at a lower level of the disciplinary system through the Disciplinary Commission because it reviews every complaint and it's a single

body that looks at every single grievance filed in the state. But above it, the more serious disciplinary matters are handled by five different disciplinary panels and we want to make sure that we are achieving the highest level of consistency possible at that level, too.

RAH: What tasks still lie ahead for the next few months?

VL: We're continuing some of our administrative efforts—there's an evaluation of all of our programs that's underway to make sure that they are functioning as originally intended by the board. We'll be continuing our meetings with the supreme court. We're anticipating receiving some recommendations for some pretty significant changes in the bar admission and the bar examination processes in Alabama. I'll be continuing my efforts to bring some focus to what I think is a major issue facing our profession and our state which is "access to justice." We have a couple of committees that have been in place and working on that issue for over a decade that resulted from a survey that we initiated back in 1989 to pinpoint the number of indigents in the State of Alabama who were not able to access our legal system. That survey indicated that there were over 720,000 people in the State of Alabama who were not involved in our system. As a result of that, we created our Volunteer Lawyers Program at the state bar level.

We also encouraged the creation of various pro bono efforts by the local bars. Alabama lawyers have contributed millions of dollars worth of their time to this effort. After a decade of fighting this, I think we've accomplished a lot. We have one of the highest levels of pro bono participation among our lawyers of any state in the nation. But, we also have one of the highest levels of indigents of any state in the nation. We've just commissioned an update of that survey to see what impact we've had on this problem but we're faced with a tremendous challenge.

RAH: What is this challenge?

VL: Our two primary sources of funding for pro bono efforts in Alabama are IOLTA funds which go to the Alabama Law Foundation, but which are threatened by the Texas litigation that I know everyone is aware of, and Legal Services Corporation funding, which was maintained after a serious fight again this year in Congress but is severely threatened in the near future. Every indication is that the mechanism for distributing Legal Services funding is going to be changed to a matching system based on state and local funding. We get no state and local funding in Alabama. The State of Alabama contributes nothing and none of our local governments contribute anything. So, we could lose both of our major sources of funding for pro bono efforts within the next couple of years and that is going to create a tremendous crisis in this state if that happens. We've had a lot of meetings and discussions with the supreme court about this too. They are very concerned about it. At their suggestion, we're looking into some grants through the Department of Justice that might help us coordinate some resolution of these issues. I visited with the editorial boards of the major newspapers in Birmingham, Montgomery and Mobile and they feel like it is a very noteworthy issue. We've received some good press in the form of editorials in those newspapers. It's an educational process and it's one that I know my successor Wade Baxley is also very concerned about. I think it's one that the bar and the court are going to have to really put some effort into trying to resolve, to make sure that everybody in the State of Alabama has access to our legal system. ■



EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Good Bench And Bar Relations Strengthen Our Judicial System



Keith B. Norman

The principal components of our system of justice are the bench (federal and state) and the bar. Although we are all members of the legal profession, the bench and the bar serve two distinct purposes which are vital to the justice system's mission. We are the stewards of the justice system, ensuring that the system works fairly and impartially.

The old saying that a chain is no stronger than its weakest link is apt when referring to the role of lawyers and judges in the judicial system. The legal profession has received more than its share of opprobrium leading to a not-so-favorable public perception of lawyers. Although this is not entirely new for the legal profession, the recent degree and sharpness of attacks on our state and federal courts appear to me to be unprecedented. Our judicial system requires a strong legal profession and judiciary to function properly. Without these two strong links—judges and lawyers—our democratic form of government loses the important balance of a strong legal system.

One way of strengthening the judicial system is not necessarily to forge new links, but rather to fortify the existing bonds between the bench and the bar. One group working hard to do this is the Alabama State Bar Committee on Bench and Bar Relations. This committee has done much to improve channels of communication between judges and lawyers at all levels. The committee is ably chaired by **Ann McMahan**, Birmingham, and **Justice Hugh Maddox**, Montgomery, who serves as vice-chair. Other judges serving on this committee are: retired **Circuit Judge Joe Colquitt**, Tuscaloosa; **District Judge Aubrey Ford**, Tuskegee; **District Judge Peggy Givhan**, Montgomery; retired **Circuit Judge William Gordon**, Montgomery; **Circuit Judge Steve Haddock**, Decatur; retired **Court of Civil Appeals Judge Richard**

Holmes, Montgomery; former **Chief Justice Sonny Hornsby**, Tallahassee; **Circuit Judge William Jackson**, Birmingham; **Circuit Judge Robert Kendall**, Mobile; retired **Circuit Judge Gay Lake**, Tuscaloosa; **Circuit Judge Loyd Little**, Huntsville; **Circuit Judge Edward McDermott**, Mobile; **Circuit Judge Ben McLaughlin**, Ozark; **U. S. Bankruptcy Judge Tamara Mitchell**, Birmingham; **Circuit Judge Samuel Monk**, Anniston; **Municipal Judge Carnella Greene Norman**, Birmingham; **U. S. District Court Judge Lynwood Smith**, Huntsville; and **U. S. Magistrate Judge William Steele**, Mobile. The lawyer members include: **Michael Atchison**, Birmingham; **Mason Davis**, Birmingham; **Annesley DeGaris**, Birmingham; **Henry Frohsin**, Birmingham; **Lynn Hare**, Birmingham; **Trip Haston**, Birmingham; **Victor Hayslip**, Birmingham; **Chris Hume**, Mobile; **Frank James**, Birmingham; **Jesse Keller**, Florence; **Phillip Laird**, Jasper; **William Lawrence**, Talladega; Supreme Court Librarian **Tim Lewis**, Montgomery; **Jim Lloyd**, Birmingham; **U. S. Attorney Redding Pitt**, Montgomery; **Larkin Radney**, Alex City; **William Roedder**, Mobile; **Ken Schuppert**, Decatur; **Larry Sims**, Mobile; **Kathryn Sumrall**, Birmingham; **Rebecca Thal**, Huntsville; **Cleo Thomas**, Anniston; and **Joe Whatley**, Birmingham.

A most recent example of the excellent work of this committee was its participation in planning the bench and bar component of the Circuit and District Judges' Midwinter Conference this past January. The committee has planned this segment of the judges' midwinter conference for several years working with the staff of the Alabama Judicial College headed by **Callie Dietz**. For the first time this year, however, federal judges attended this segment of the meeting with their state judicial

colleagues and bar members. **Judge Tamara Mitchell** deserves much credit in encouraging the inclusion and participation of federal judges in this important gathering. Both **Chief Justice Perry Hooper** and **Chief Judge Joseph W. Hatchett** of the Eleventh Circuit Court of Appeals were enthusiastic supporters from the start and attended the meeting. Only by meeting and discussing issues that are common to us all, can we hope to have any chance of resolving them. This conference provided a perfect opportunity for the bench and bar to develop a dialogue that can lead to a mutual strengthening of our profession and our judicial system.

With public trust and confidence in our judicial system at a low ebb, judges and lawyers must act. Much of the public's disaffection stems from a lack of understanding about the operation of the judicial system. Lawyers and judges must share the responsibility of helping to educate the public. At the same time, the bench and the bar must cooperate in getting our own house in order. In this regard, I am happy to report that

Judge Harold Albritton, chief judge of the U.S. District Court for the Middle District of Alabama and former state bar president, and **Judge Myron Thompson** and **Judge Ira DeMent** have adopted standards of civility that were developed through the hard work and vision of **Carol Ann Smith**, Birmingham, and **Greg Breedlove**, Mobile. The compilation of these standards of civility was initiated by the Alabama Defense Lawyers Association and the Alabama Trial Lawyers

Association to emphasize to their members and lawyers in general the need for civility in dealing with other counsel and the court. These standards and their adoption by the Middle District represent a milestone effort to restore some of the luster that our profession has lost over the last few decades. It also reflects, I think, a new cooperative spirit between the bench and the bar that will help the bench and bar tackle other issues that are vital to the justice system. ■

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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 March 15, 1999. Nominations should be prepared and mailed to:

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

The Judicial Award of Merit was established in 1987. The 1998 recipient was United States District Court Judge Ira DeMent. 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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MAY	7-8	City & County Governments: Hilton Beachfront Garden Inn, Gulf Shores, Alabama (334-974-1600)
	14-15	Environmental Law: Windemere Condominiums and Conference Center, Gulf Shores, Alabama (800-974-1120)
JUNE	3-5	Tax Law Institute: Sandestin Resort, Destin, Florida (800-277-0800)

For questions regarding registration call 800-627-6514 or 205-348-6230



BAR BRIEFS

• The Lee County Bar Association recently recognized retiring **District Attorney Ronald L. Myers**. Myers has served as district attorney for Lee County since 1973. He retired in January. At the December meeting of the Lee County Bar Association, Myers was recognized for his outstanding work as district attorney and his contributions to Lee County.



Ronald Myers, right, receives a certificate of recognition from LCBA President Roger W. Pierce.

• The Alabama State Bar Road Show spoke to the **Lawrence County Bar Association** in December. The free CLE program featured a presentation by Judy Keegan, director of the Alabama Center for Dispute Resolution, entitled "Mediation and Arbitration in Alabama: An Update." Susan Andres, ASB director of communications, was available to answer questions about other state bar programs. To schedule a similar CLE presentation, call the communications department at the ASB, at (334) 269-1515, ext. 132.



Jerome Thompson, Lawrence County attorney, and Judy Keegan

• At a public ceremony held December 11 at the Tallapoosa County Courthouse, the late **Judge C.J. Coley**, former Tallapoosa County probate judge, was honored as the recipient of the 1998 Eugene W. Carter Medallion Award. The award is given to former officials who have distinguished themselves in public service. The award was presented to Judge Coley's widow, Evelyn McCord Coley, in a ceremony that was attended by friends and colleagues of Judge Coley's. **Mark Wilkerson**, chairman of the state bar's Administrative Law Section, and Keith Norman, ASB executive director, spoke on behalf of the state bar and the section.

The Carter award honors former government officials and serves as a beacon of light for current officials, according to Wilkerson.

Judge Coley was born June 17, 1902 and served as Tallapoosa County probate judge from 1946 to 1960. He died on December 16, 1997 and is survived by his wife and two children, Jack Coley and Evelyn Coley Puckett. ■



Judge Coley's widow, Evelyn M. Coley, accepts the award from Mark Wilkerson, honoring her late husband.

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MEMORIALS



Emily Badt Gassenheimer

Whereas, Emily Badt Gassenheimer, a highly beloved and respected member of the Montgomery County Bar Association, departed this life on April 28, 1998 at the age of 73 years; and Whereas, The Montgomery County Bar Association desires to honor her name and recognize her many contributions to the legal profession, her many civic and religious accomplishments, and enrichment of the arts in the City of Montgomery and State of Alabama;

Now, therefore, be it remembered that Emily Badt Gassenheimer was born on April 26, 1925 in Mount Pleasant, Texas, lived her early years in Shreveport, Louisiana, and then called Montgomery her home for more than 50 years. She had just celebrated her 50th wedding anniversary to Irvin Gassenheimer, Jr., a prominent Montgomery businessman. Emily honed her skills early as governor of Louisiana Girl's State and as valedictorian of Newcomb College, Tulane University where she graduated with a B.A. degree in 1946. Her educational experience also included a fellowship at the University of Chicago, study of clinical psychology at UCLA and courses at the Tulane School of Social Work.

Emily enrolled at Jones School of Law in 1958 and for the next 15 years she studied at a leisurely pace while raising her three daughters, attending classes one night a week in the converted downtown residence then occupied by Jones. She spent so long there she announced to Reginald T. Hamner, former executive director of the Alabama State Bar and dear friend and colleague, that she was "retiring from Jones" when she received her Juris Doctor degree. In fact, her attendance at Jones was the subject of a *New York Times* article

written by Ray Jenkins, local stringer for the paper.

Emily's extensive civic involvement in the area of mental health and juvenile justice, including 24 years of service on the board of directors of the Montgomery Mental Health Association, inspired her service in a legal context upon graduation from Jones. She was admitted to the Alabama State Bar in 1974. Consistent with the cause of mental health she had championed for decades, she was appointed by now United States Court of Appeals Judge Frank M. Johnson, Jr. lead attorney and guardian ad litem for Bryce Hospital and Veterans Administration patients in the landmark lawsuit of *Lynch v. Baxley* to improve the standards for the mentally ill and mentally retarded residing at these institutions.

Then Emily became employed by the newly-founded Legal Services Corporation in Alabama in 1977. She became its first managing attorney of the Montgomery Regional office. There were some resistant to this idea in the legal community here but, when they learned Emily Gassenheimer's name was attached to this endeavor, doors opened. She was also project director of the Juvenile Justice Judicial Project, a federal probation officer and she published a legal practice manual



governing laws and procedures in juvenile court systems in Alabama.

Emily Gassenheimer was born and married into families committed to Judaism and made those values her own. She had a long-standing involvement with Temple Beth Or in Montgomery and served the last two years of her life as its first woman president.

Emily eased back from her legal involvement after a few years and resumed her lifetime interest in art, taking welding at John Patterson Trade School and studying sculpture at Auburn University at Montgomery. One of her sculptures, "Salt & Light," is on display at the entrance of AUM's School of Nursing.

Emily was a very influential artist and leader in the Montgomery arts community, serving as a board member of the Montgomery Museum of Fine Arts, and as president of the Montgomery Art Guild. She was a life-long patron of the arts as well as an artist herself, devoting unflagging energies to painting, ceramic and metal sculpture. Posthumously, she was the subject of two art shows which had been planned before her demise, at a gallery in Montgomery and at the Center for Cultural Arts in Gadsden, Alabama. Her award-winning art is in more than a dozen public and private collections.

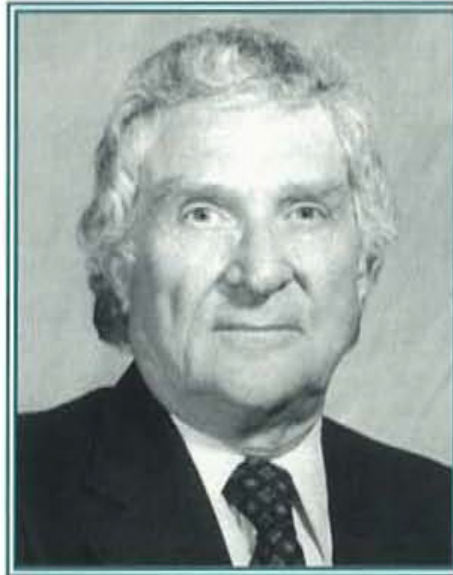
In addition to her numerous involvement in the civic and art communities, she was also co-founder, secretary and treasurer of Electronic Engineers, Inc. of Alabama with her husband, Irvin.

Whereas, Mrs. Gassenheimer is survived by her husband, Irvin Gassenheimer, Jr., of Montgomery; her three daughters, Mary T. Beller of Napa, California, Ann Gassenheimer of Montgomery and Emily Friedlander of Costa Rica; her brother, Joe M. Badt of Shreveport, Louisiana; and her four grandchildren, Erin Emily Beller, Megan Emily Gallagher, Isadora Amelia Friedlander and Harrison Ti Friedlander.

Now, Therefore, be it resolved by the Montgomery County Bar Association that we pay special tribute to the life of

Emily B. Gassenheimer, a woman of valor, and mourn her passing. Her commitment to service, her love of family and friends, her belief in causes good and just, her colorful character, and her complete and total selflessness are greatly admired by many, many people.

**-Terry Brown, Secretary/Treasurer
Montgomery County Bar Association
Prepared by Micki Beth Stiller,
Montgomery**



Frank J. Tipler, Jr.

"Stop all the clocks, cut off the telephone, Prevent the dog from barking with a juicy bone, Silence the pianos and with muffled drum Bring out the coffin, let the mourners come. Let aeroplanes circle moaning overhead Scribbling on the sky the message He Is Dead. Put crepe bows round the white necks of public doves, Let the traffic policeman wear black cotton gloves.

He was my North, my South, my East and West. My working week and my Sunday rest, My noon, my midnight, my talk, my song; I thought that he would last forever; I was wrong. The stars are not wanted now: put out every

one; Pack up the moon and dismantle the sun; Pour away the ocean and sweep up the wood; For nothing now can ever come to any good."

-W.H. Auden

When my father died this past weekend, even though we had expected his death for some time, it was unexpected. It was unexpected because of his strength. Many of you know that he has fought cancer for the last ten years, defying all odds and defeating all predictions. So when he was taken to the hospital this past week, I did not believe he would die. His wife, Katherine, told me that she thought it was his time; his doctor, Reid Kerr, told me that he did not believe my father would make it, but I believed that he would. During this past week at the hospital, he rallied, he seemed to be getting better. He watched "Judge Judy" on television with my wife, Lisa, who visited with him in the afternoons so that Katherine could have some relief from her constant vigil at his side. Dr. Kerr called me Thursday morning to tell me of his dramatic and unexpected improvement. Then, Friday night, his blood pressure dropped. When I went over Saturday morning, I held his hand as he slept, but he did not wake up. Katherine spent the early afternoon combing his hair and holding his hand. Then, at 2:30 that afternoon, he stopped breathing, quietly and painlessly in his sleep, and he was gone.

The poem that I just read by W. H. Auden is how I felt, how I know his wife, Katherine, felt, and how it seems to me the whole world must have surely felt about my father's passing.

How do you sum up his extraordinary life? My father was born almost 82 years ago and grew up in the small town of Sheffield in North Alabama. His parents were Grace and Frank Tipler. He had two brothers, Jack and George, and a younger sister, Doris. His father was a railroad conductor, and his mother ran the school cafeteria. He loved his time as a child, and he loved his parents and



family. His roots in North Alabama were very important to him. One of his oldest and best friends from up there, Howell Heflin, serves as an honorary pallbearer today. He was, not surprisingly, one of the smartest kids in his class, and he went to the University of Alabama at the age of 15. He received his law degree there at the age of 20 and became a member of the Alabama State Bar at that time. His best friend, when he was growing up, was a man named James Harvey Johnson. My father graduated from law school in 1939, and he and his best friend, Harvey, went off to war. Harvey did not return from the war. A pilot in the Air Force, he was missing in action. My father served in the Pacific Theatre and was on the staff of Admiral Bull Halsey. He was a lieutenant commander. When I was in college and the Vietnam War was being debated, he told me how it was different it was in World War II, that military service was not only an obligation but an honor because of the different kind of war that was being fought. His time in the service was one of the best times of his life. Years ago, I took my father on a trip back to the Pacific, and he showed me the places where he had served in the Navy—New Zealand, New Caledonia, Fiji, the New Hebrides. It was a special two weeks for him and for me, and I learned firsthand how important his time in the service was to my father and how proud he was of it.

Before he went off to war, my father married my mother. After his return, he and my mother had two sons, Frank Jennings Tipler, III, and me. My father was a terrific dad, and he was devoted to his family. When I was growing up, although I knew that he was a lawyer and that he had an office, I never had the sense that he ever worked. Any time I would call him and ask him to play catch with me or do anything I wanted, he would come immediately. Once, I understand, he was in a trial, and he told the judge that he had to leave early

because my Little League game was starting. He was married to my mother for 40 years. They raised two sons and sent us to college and graduate school.

During that time, his law practice blossomed. The month I was born in 1951, he received a judgment for the then unheard-of amount of \$60,000. This was, in those days, an enormous sum of money, and it put him and his law practice on a different level. The trial lawyers among us, especially those from my father's generation, will agree with me that the image of trial lawyers has been worse in the past than it is now, and it has been better in the past than it is now. It will continue to change. But my father, along with his long-time friend and law partner, Syd Fuller, and legendary lawyers like Howell Heflin, Truman Hobbs, Gareth Lindsey, and many others, helped to carve out in the State of Alabama a place of respect for trial lawyers that exists to this day. His fellow lawyers chose him as the only plaintiff's lawyer in Alabama to be included in the first edition of *The Best Lawyers in America*. He was very proud of that. He was also proud to have been selected to *The American College of Trial Lawyers* and to *The International Academy of Trial Lawyers*. He was very proud to have been selected in 1964 as the president of the Alabama State Bar. He really did receive every honor he could have received as a lawyer. I know that his abilities were revered and respected by his clients and by the public, but it was the respect with which he was held by other members of the bar, by members of the defense bar as well as the plaintiff's bar, and by members of the judiciary statewide, that he valued the most. He was the kind of lawyer who was able to command the respect not only of those lawyers customarily on his side of the bar, but also from those on the other side. He did this by integrity, and by always keeping his word.

In 1983, my father asked me to come back home from my law practice in California and take over the firm. It took

him about a year of talking, but I came back. He told me that the real reason I should come back was not for the money or for the success, but because he had things to teach me, and remember at that time, he was 66 years old, and he said, "I don't have that much time left to teach you, and you need to come back while I'm still able." Not many people know this, but I told him that I would come back to learn from him, but that I wouldn't stay more than two years. Fifteen years later, I'm still here, and he did have much to teach me.

Last week, the day he was taken to the hospital, I was sitting with him in the living room of his house where he was sleeping. When he awoke to find me there, he said, "Hey, boy. I was just catching a wish." I asked him what he was wishing for, and he said, "I was just thinking how we could push those two cases." Always the plaintiff's lawyer. I assured him that I would push the cases for him, and he went back to sleep.

This last Father's Day, I was watching "The Today Show" and they had interviews with several young children about their fathers. When a five-year-old boy was asked why he loved his father, he said, "My father is the kind of man who can fix whatever problem you have." I called my father that morning and told him the story because, as I told him, that was the kind of father he was to me. He told me he appreciated me saying that, and that he loved me. When I visited with Katherine within an hour after his death, she said almost the same words to me, that my father always seemed to be able to solve whatever kind of problem you had, that he always knew the right thing to do to fix it.

He loved his dogs. He loved all animals and particularly those dogs that were his constant companions during the later years of his life. He also loved pondering the possible outcomes of football games with some well-chosen friends, although I'm not sure what he meant by "point spreads." He loved his



grandchildren, Allison, Caroline, and Jemison. He loved the law, and he loved his law firm.

My father was loyal to his friends. I think it is testimony to my father's character that he really only had two secretaries in his entire 50-year career. Understand that he had other secretaries after the cancer had overtaken him during the last decade of his career, and they were very good to him, but the two women who really worked with him during his strong years as a lawyer were Evelyn Miller and, of course, Katherine, who became his wife. My father told me that Evelyn Miller, when she started to work for him, did not know how to type. It was just he and her in the office, she taught herself to type, and he paid her to basically stay in the office when he talked to people around town, so there would be someone there if a client came in. She, of course, became a very accomplished legal secretary, and her son, Tony, will be one of my father's pallbearers today.

I tried to think of what things I will miss most about my father, and it is impossible to summarize in a few minutes a life of 82 years, much less the 40-some-odd years that I have known and been close to him. Alabama football games when I was a kid, with his good friend, Red Clark. When I was older, he and my mother coming up to Yale to watch me play. A story he used to read every Christmas since my brother and I were little, and in later years to the staff of his law firm, called How Come Christmas. He could tell a story—to a jury, to his family, or to friends—and find humor in a situation, like no one else. Once, when I was a teenager, we were watching the movie "Camelot" on television, and the song "How to Handle a Woman" came on. If you don't know it, the song goes into the complexities of women, and concludes that the only way to handle a woman is to love her, simply and purely. After this beautiful, romantic song, he turned to me and said, "I don't

think it's quite that simple." He never did tell me the rest of his secret.

I would like to talk about my father's religion. There has been some talk, and I hope that Reverend Faircloth mentions this during his remarks, that my father was converted to Christianity recently. My father was a Christian his entire life. Many of you may not know that at the age of ten, he was a preacher in the Church of Christ. When my brother, Frank, and I were growing up, he was a Sunday School teacher. When my brother spent the summer after his junior year in high school at Harvard and came back with questions about God, my father debated with him through the night. Recently his strong religious faith was renewed, and he spoke to me about the importance of his granddaughter, Jemison, being part of a churchgoing family, and we agreed as a family that that would be true.

My brother's most recent book, *The Physics of Immortality*, is full of mathematics and physics that neither I nor most of us can understand, but it is, at its essence, about God. My brother was comforted by this after my father's death when he told me, "Harvey, I believe in the theory of my book." I went to hear my brother speak about his book soon after it was published, and I would like to quote from what he said to that audience in Atlanta. My brother said, "I am here to tell you that God exists, that He loves each and every one of us, and that at the end of time we will all be together again."

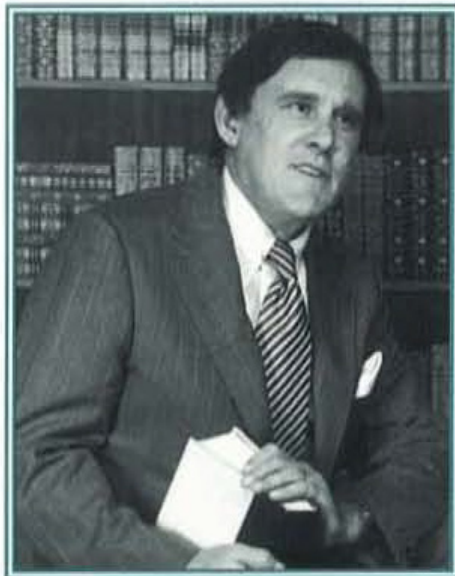
My father believed that, too, and so although the depth of loss expressed in the poem by W. H. Auden is very real, I would like to think that my father is looking down on us today, listening, and that he would want each of us not to be sad about his passing. I think he would have liked these words written by another poet:

*"Do not stand at my grave and weep.
I am not there; I do not sleep. I am a*

thousand winds that blow. I am the diamond glints on snow. I am the sunlight on ripened grain. I am the gentle autumn rain. When you awake in the morning's hush I am the swift upflying rush of quiet birds in circling flight. I am the soft star-shine at night. Do not stand at my grave and cry. I am not there; I did not die."

—Anonymous

—James Harvey Tipler, Andalusia



James Gilbert Speake

James Gilbert Speake of Moulton died December 24, 1998 after a difficult illness. He had served as attorney for the Lawrence County Board of Education for more than 25 years and was instrumental in initiating the equity funding lawsuit which challenged the method of funding Alabama schools. This case, which eventually saw all school systems in Alabama named as parties, resulted in the holding that the poorer school systems in Alabama were not fairly and adequately funded by the state formula in place at the time. The state was ordered to devise a more equitable method for funding public schools so that the quality of edu-



cation which an Alabama child received no longer depended chiefly upon where that child was born. Jimmy worked long and hard with a group of attorneys to further his passionate belief that the children of Alabama should be treated equally. A threshold barrier to the successful pursuit of the equity funding issue required an attack on Amendment 111 to the Constitution of Alabama, which said that the children of Alabama did not have a right to a free public education. This was commonly known as the "Segregation" Amendment since it was enacted shortly after the United States Supreme Court outlawed segregation in the public schools. Amendment 111 was declared unconstitutional and Jimmy and the Alabama Coalition for Equity went on to prevail in the equity funding case.

Jimmy was lifelong resident of Lawrence County with roots going deep into its history. He was born in the small community of Speake on March 17, 1933.

His ancestors included the first teacher in Speake, the first superintendent of education and a Reconstruction legislator. He graduated from Speake High School and Florence State Teachers College (now the University of North Alabama). He did graduate work at the University of Tennessee and received his law degree from Cumberland School of Law at Samford University.

After graduating from law school, he returned to Lawrence County in 1966 to practice law with his brother, Harold Speake. He was a member of the Lawrence County Bar Association and the Alabama State Bar and served as a commissioner for the state bar. He will long be remembered for his strong sense of justice, his indefatigable representation of his clients, his unquestioned ethical compass and his pride and professionalism in the practice of law. Jimmy viewed the legal profession as just that, a profession, and a high calling. The fact that it was

also a way in which to earn a living was always secondary to him. His devotion to the "jealous mistress of the law" was unparalleled and his passing leaves a void in the bar not soon to be filled.

Being a voracious reader, he was extremely well-read and widely knowledgeable. One of his chief diversions was discussing the books he had read. He was a great supporter of the public library, the Veterans, community beautification and innumerable other charitable causes.

Jimmy was a Veteran and a member of the First United Methodist Church of Moulton. Jimmy was preceded in death by his son, John Charles Speake. He is survived by his wife, Bonnie G. Speake; a daughter, Lauren Roberts of Decatur; a brother, Harold Speake of Moulton; and two grandchildren.

Memorials may be made to the Lawrence County Public Library.

—Tim Littrell, Moulton

John England Bertolotti, Jr.
Mobile
Admitted: 1978
Died: January 10, 1999

Robert Sommerville Hill, Jr.
Montgomery
Admitted: 1929
Died: November 18, 1998

Thomas Franklin Seale
Livingston
Admitted: 1937
Died: November 15, 1998

Karl T. Tyree, Jr.
Florence
Admitted: 1949
Died: October 29, 1998

Keener Tippins Blackmarr
Mobile
Admitted: 1941
Died: September 2, 1998

Rutherford Alonzo Norred
Birmingham
Admitted: 1951
Died: November 21, 1998

Clay Russell Sherrill
Anniston
Admitted: 1954
Died: December 21, 1997

Mary Alice Wells
Winter Park, Florida
Admitted: 1988
Died: August 28, 1998

George Imri Case, Jr.
Birmingham
Admitted: 1935
Died: December 2, 1998

J. Richard Piel
Montgomery
Admitted: 1974
Died: January 13, 1999

James Gilbert Speake
Moulton
Admitted: 1966
Died: December 24, 1998

Carl A. Elliott
Jasper
Admitted: 1936
Died: January 9, 1999

Bonnerrae Hastings Roberts
Mobile
Admitted: 1946
Died: October 11, 1998

William C. Thomas
Montgomery
Admitted: 1936
Died: December 2, 1998

Warren L. Finch
Mobile
Admitted: 1955
Died: September 20, 1998

Charles Barnwell Robinson
Tampa, Florida
Admitted: 1953
Died: March, 1997

Frank J. Tipler, Jr.
Andalusia
Admitted: 1939
Died: December 5, 1998



ROAD MAPS

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The ASB Task Force On Minority Participation showcases the challenges of our legal profession today and how specialty and local bars can work with the ASB on issues important to all Alabama attorneys. Program highlights include: *"Miles To Go: Progress of Minorities in the Legal Profession"*; *How to Get and Retain Corporate Clients*"; and a luncheon with guest speaker James O. Cole, Esq., past president of the National Bar Association.

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ABOUT MEMBERS, AMONG FIRMS

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish address changes for firms or individual practices. *It will continue* to publish announcements of the formation of new firms or the opening of solo practices, as well as the addition of new associates or partners. Please continue to send in address changes to the membership department of the Alabama State Bar.

About Members

Caryl P. Privett, formerly United States Attorney for the Northern District of Alabama, announces the opening of her office located at 115 Office Park Drive, Suite 320, Birmingham, 35223. Phone (205) 868-1240.

Stanley A. Martin announces the opening of his office at 400 Second Avenue, Opelika, 36801. The mailing address is P. O. Box 2526, 36803-2526. Phone (334) 749-4142.

Michael J. Upton announces the establishment of **Michael J. Upton, P.C.**, upon returning from a two-year sabbatical in Puerto Rico. Offices are located at 2121 14th Street, Tuscaloosa, 35401.

Dwayne L. Brown announces he is no longer with the firm of Chestnut, Sanders, Sanders & Pettaway, P.C. He has opened his solo practice, with offices located at 4252 Carmichael Road, Suite 219, P. O. Box 230205, Montgomery, 36123-0205. Phone (334) 277-3757.

William M. Moore, formerly a partner in McRight, Jackson, Myrick & Moore, L.L.C., announces the opening of his office at 107 St. Francis Street, 1204 First National Bank Building, Mobile 36602. Phone (334) 431-6817.

G. Patterson Keahey announces the opening of his office at 2323 2nd Avenue, North, Suite 200, Birmingham, 35203-3758. Phone (205) 250-0050.

Among Firms

G. Stephen Wiggins, Thomas R. Jones, Jr. and Charles M. Coleman announce the formation of **Davidson, Wiggins, Jones & Coleman, P.C.** The firm also announces that **McCoy Davidson** is of counsel and **Randal Kevin Davis** and **J. Paul Zimmerman** have joined as associates. Offices are located at 2625 8th Street, Tuscaloosa 35401. The mailing address is P.O. Box 1939, 35403-1939. Phone (205) 759-5771.

Helmsing, Sims & Leach announces that **James B. Pittman, Jr.** has become an associate. The mailing address is P. O. Box 2767, Mobile, 36652. Phone (334) 432-5521.

James E. Harris & Associates announces that **Kellie Avery-Tubb** has become an associate. Offices are located at the Civic Center Executive Suites, 1117 21st Street, North, Birmingham, 35234-2722. Phone (205) 322-5800.

Schofield & Wade, P.A. announces that **Paul A. Wilson** has become an associate. Offices are located at Harbourview on the Bay, 25 W. Cedar Street, Suite 620, P. O. Box 13510, Pensacola, Florida 32591-3510. Phone (850) 429-0755.

Russell Jackson Drake, Joe R. Whatley, Jr., Glen M. Connor, Andrew C. Allen, Maureen Kane Berg, Peter H. Burke, Charlene P. Cullen, W. Todd Harvey, and Richard P. Rouco announce the formation of **Whatley Drake, L.L.C.** Offices are located at 1100 Financial Center, 505 20th Street, North, Birmingham, 35203-4601. Phone (205) 328-9576.

Vickers, Riis, Murray & Curran, L.L.C. announces that **F. Grey Redditt, Jr., L. Thomas Styron** and **Terry A. Moore** have become members and that **Timothy A. Clarke** has become an associate. Offices are located at the Regions Bank Building, 8th Floor, 106 St. Francis Street, Mobile, 36602. Phone (334) 432-9772.

Hoiles & Dasinger, P.C. announces that **Frank Turner Hollon** has become a partner. The firm name has changed to **Hoiles, Dasinger & Hollon, P.C.** The mailing address is P. O. Box 1058, Robertsdale, 36567. Phone (334) 947-4757.

Spain & Gillon, L.L.C. announces that **David S. Maxey** and **James P. Rea** have become members and that **David P. Donahue** has become an associate.

Morrow, Romine & Pearson, P.C. announces that **Chandra C. Wright** has become an associate. Offices are located at 122 S. Hull Street, Montgomery, 36104. Phone (334) 262-7707.

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Sadler, Sullivan, Sharp & Van Tassel, P.C. announces that **Kevin T. Shires** and **Michael H. Gregory** have become associates. Offices are located at 2500 SouthTrust Tower, 420 N. 20th Street, Birmingham, 35203. Phone (205) 326-4166.

Charles M. Thompson & Associates, P.C. announces that **Kerri Page Parker** and **John P. Willis, IV** have become associates. Offices are located at One Independence Plaza, Suite 720, Birmingham, 35209. Phone (205) 879-9393.

Donaldson, Guin & Slate, L.L.C. announces that **Cinda R. York** and **Tammy McClendon Stokes** have become associates. Offices are located at The Morgan Keegan Building, 2900 Highway 280, Suite 230, Birmingham, 35223. Phone (205) 879-9994.

Berkowitz, Lefkovits, Isom & Kushner announces that **Kirsten H. Kowalski, Stanley W. Logan, Robert B. Phillips, II** and **Adam J. Sigman** have become associates and that **Linda S. Lehe** has become *of counsel*. Offices are located at the SouthTrust Tower, 420 N. 20th Street, Suite 1600, Birmingham, 35203-5202. Phone (205) 328-0480.

Richard E. Davis and **Leslie T. Fields** announce the formation of **Davis & Fields, P.C.** Offices are located at 25369 Highway 98, Suite C-2, P. O. Box 2925, Daphne, 36526. Phone (334) 621-1555.

Litman, Siegal & Payne, P.C. announces that **John Joseph Kubiszyn** has become a member. Offices are located at 600 N. 20th Street, Suite 400, Birmingham, 35203. Phone (205) 251-5900.

Bradley Arant Rose & White, L.L.P. announces that **Luther J. Strange, Hall B. Bryant, III, Paige M. Davis, Richard H. Monk, III, Jack W. Selden,** and **Meade Whitaker, Jr.** have become partners and that **Rebecca G. DePalma** and **Frederic Lee Smith, Jr.** have become associates.

Johnston Barton Proctor & Powell, L.L.P. announces that **John W. Sheffield, Haskins W. Jones** and **Russell L. Irby, III** have become partners. Offices are located at 2900 AmSouth/Harbert Plaza, 1901 Sixth

Avenue, North, Birmingham, 35203-2618. Phone (205) 458-9400.

Nakamura & Quinn, L.L.P. announces that **Graham L. Sisson**, formerly *of counsel*, has become deputy Attorney General for the State of Alabama.

Janecky, Newell, Potts, Wilson, Smith & Masterson, P.C. announces that **Harry V. Satterwhite** has become an associate. Offices are located in Mobile and Pensacola. Phone (334) 432-8786.

Holliday & Associates announces that **Roger W. Varner** has joined the firm with offices at Two Chase Corporate Center, Suite 120, Birmingham, 35244. Phone (205) 733-8598.

Brian M. White, Amelia Haines Griffith and **Brian Austin Oakes** announce the formation of **White, Griffith & Oakes, P.C.** Offices are located at 601 Johnston Street, SE, Decatur, 35601. Phone (256) 355-1100.

Gordon, Silberman, Wiggins & Childs announces that **Karen Kolaczek** has joined the firm. Offices are located at 1400 SouthTrust Tower, Birmingham, 35203. Phone (205) 328-0640.

Dempsey, Steed, Stewart & Keever, P.C. announces that **Jonathan David Green** has joined the firm. Offices are located at 100 RiverPoint Corporate

Center, Suite 205, Birmingham, 35243. Phone (205) 970-0034.

Wallace, Jordan, Ratliff & Brandt, L.L.C. announces that **J. Birch Bowdre, Kimberly R. West** and **Peter E. Barber** have become members and that **Matthew S. Atkins, Scott W. Gosnell, Kyle C. Barrentine, Shara L. Gray, Michael J. Murphy,** and **Joel D. Connally** have become associates. Offices are located in Birmingham and Montgomery.

Nix, Holtsford & Vercelli, P.C. announces that **Stacy A. Linn** and **Jay S. Tuley** have become associates. Offices are located at Union Station, 300-A Water Street, Suite 300, Montgomery, 36104-2558.

Frank Turner Hollon, Sharon Hoiles and **Michael Dasinger** announce the formation of **Hoiles, Dasinger & Hollon**. Offices are located at 18410 Pennsylvania Street, P. O. Box 1058, Robertsdale 36567. Phone (334) 947-4757.

Davidson, Wiggins, Jones & Coleman, P.C. announces that **Thomas R. Jones, Jr.** has joined the firm. Offices are located at 2625 8th Street, Tuscaloosa, 35403. The mailing address is P. O. Box 1939, 35401. Phone (205) 759-5771.

Lamar, Nelson & Miller, P.C. announces the change of its name to **Lamar, Miller & Norris, P.C.** The office will remain at 1600

Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the court has adopted the proposed amendments, with minor modifications, effective April 1, 1999. In particular, counsel are advised that the court adopted amendments to the Rules which provide that the time for filing appellant's brief begins to run on the date the court reporter files the transcript or, if no transcript is to be prepared, on the date the appeal is docketed by the court of appeals.

The court also determined to make additional minor revisions to the following Rules and Internal Operating Procedures (IOP) of the court: IOP (p. 22); 11th Cir. R. 11-2 and 11-3; IOP 1 and 2 (p. 43); 11th Cir. R. 28-1; IOP 2 (p. 73); IOP 15 (p. 99); IOP 4 (p. 128). Pursuant to 28 U.S.C. Section 2071(e), these additional amendments also take effect on April 1, 1999, at the same time as the other amendments to the Rules.

The circuit rules, along with the amendments thereto, may be found at the Eleventh Circuit's Website at www.ca11.uscourts.gov.

Financial Center, 505 20th Street, North, Suite 1600, Birmingham, 35203. Phone (205) 326-0000.

Bainbridge, Mims, Rogers & Smith, L.L.P. announces that **Charles Keith Hamilton**, formerly with Bradley Arant Rose & White, has become an associate. Offices are located at The Luckie Building, Suite 415, 600 Luckie Drive, Birmingham, 35223. The mailing address is P. O. Box 530886, 35253. Phone (205) 879-1100.

Halcomb & Wertheim, P.C. announces that **Thomas W. St. John** has become an associate. Offices are located at 2231 1st Avenue, North, Birmingham 35202. Phone (205) 251-0007.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **John M. Graham** became a partner. Offices are located in Birmingham and Mobile.

Sabel & Sabel, P.C. announces that **Maricia D. Bennekin**, former law clerk

to the Honorable Charles Price of the 15th Judicial Circuit, Montgomery County, and to the Honorable Sharon G. Yates, Alabama Court of Civil Appeals, has become an associate. Offices are located at 2800 Zelda Road, Suite 100-5, Montgomery, 36106. Phone (334) 271-2770.

Patton, Latham, Legge & Cole announces that **Claire Tinney Jones** has joined the firm. Offices are located at 315 W. Market Street, P. O. Box 470, Athens, 35611. Phone (256) 232-2010.

Massey & Stotser announces that **Anne D. Lamkin** and **Jeffrey W. Brumlow** have become associates. Offices are located at 1100 E. Park Drive, Suite 301, Birmingham, 35235. Phone (205) 836-4586.

William V. Powell, Jr. and **Gregory T. Denny** announce the formation of **Powell & Denny, P.C.** The mailing address is P. O. Box 362145, Birmingham, 35236. Phone (205) 982-6909.

Luker, Cole & Associates, L.L.C. announces that **Michael C. Gosney, M.D.** has become an associate. Offices are located at 2205 Morris Avenue, Birmingham, 35203. Phone (205) 251-6666.

Lucas, Alvis & Wash, P.C. announces that **Mark A. Stephens** has joined the firm. Offices are located at Two Chase Corporate Drive, Suite 460, Birmingham, 35244. Phone (205) 733-1595.

Pompey & Pompey, P.C. announces that **Deborah B. Montgomery**, formerly an attorney for the City of Birmingham, has become an associate. Offices are located at 117 Broad Street, Camden, 36726. The mailing address is P. O. Box 189. Phone (334) 682-9032.

McElvy & Ford, P.C. announces that **Richard M. Kemmer, Frank M. Cauthen, Jr.** and **David P. Martin** have become shareholders. Offices are located in Tuscaloosa and Centreville. ■

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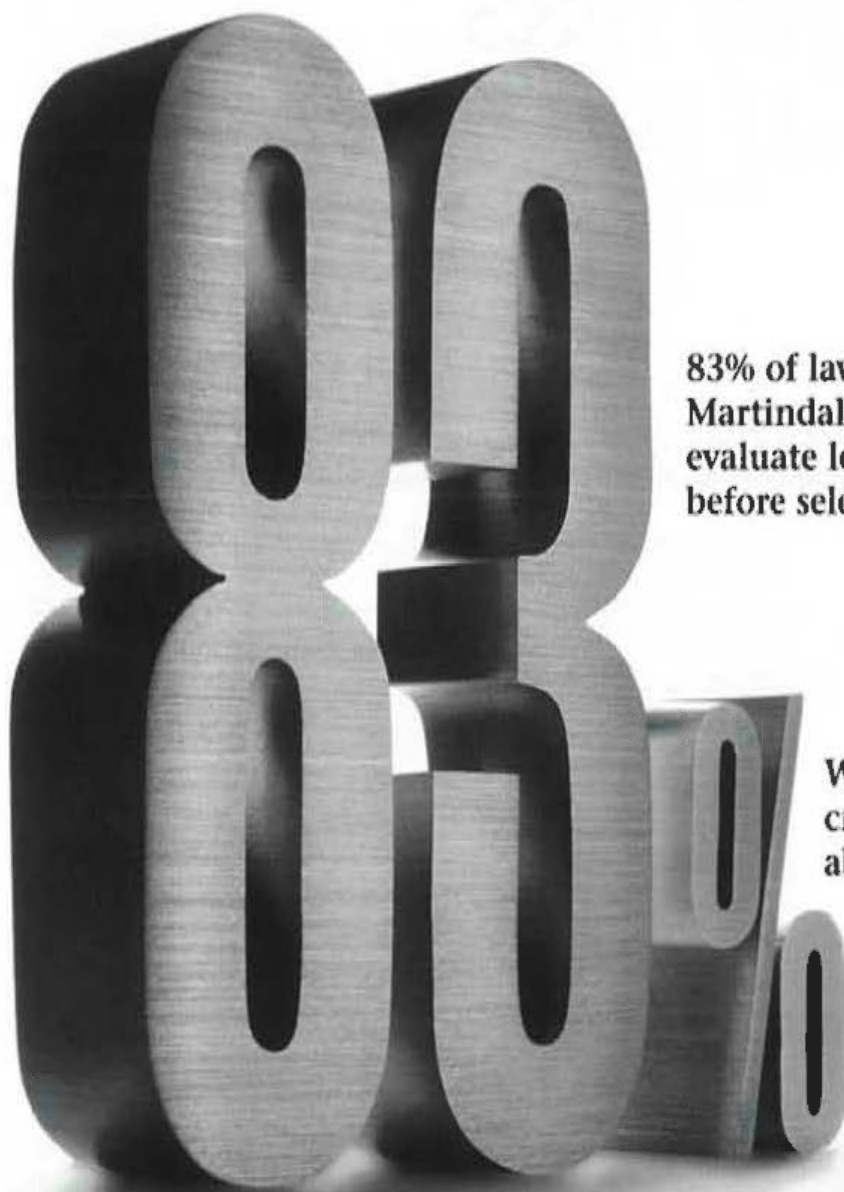
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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Barbour County

Barbour County was established on the busiest single day in Alabama county-creation history, which was December 18, 1832. Due to land cessions from the Choctaw, Cherokee and Creek Indians, the Alabama Legislature established ten new counties on that one day. Sumter came from the Choctaw land. Coosa, Macon, Randolph, Russell, Talladega, and Tallapoosa were carved from the Cherokee cessions. Chambers, Benton (later called Calhoun) and Barbour came from land previously occupied by the Creek Indians.

The earliest American settlers in the area that would become Barbour County probably arrived there in 1817. They came to trade with the Indians. The oldest town was Williamston, located approximately 12 miles southwest of present-day Eufaula and six and a half miles southeast of present-day Clayton. This town was settled by members of the Williams family from South Carolina. Farming and Indian trade were the principal occupations of the town. There is also evidence that other pioneers ventured down the Chattahoochee River in 1823 on their way to Marianna, Florida. They approached St. Francis Bend and were surprised to find the Indian town of "Yufala" located at St. Francis Point. They decided to remain in the area.

The Indian town of "Yufala" was located north of present-day Eufaula. A number of settlements throughout the Creek territory had this same name or one of its variants, including Ufala, Ufuala, Uphaulie and Yofala among oth-

ers. There is no generally agreed upon spelling or translation for the name. The spelling of present-day Eufaula is probably phonetic. There is also a Eufaula, Oklahoma, named by the Indians who were removed from Alabama in the 1830s.

When Barbour County was created on December 18, 1832, its territory came from Pike County and the Creek Indian lands. On January 11, 1833, the Legislature provided for the organization of the county. Any office-holders living in the portion of Pike County transferred to the new Barbour County could stay in office for the remainder of their terms. The legislation directed the sheriff to hold an election in February 1833 for additional officers as needed.

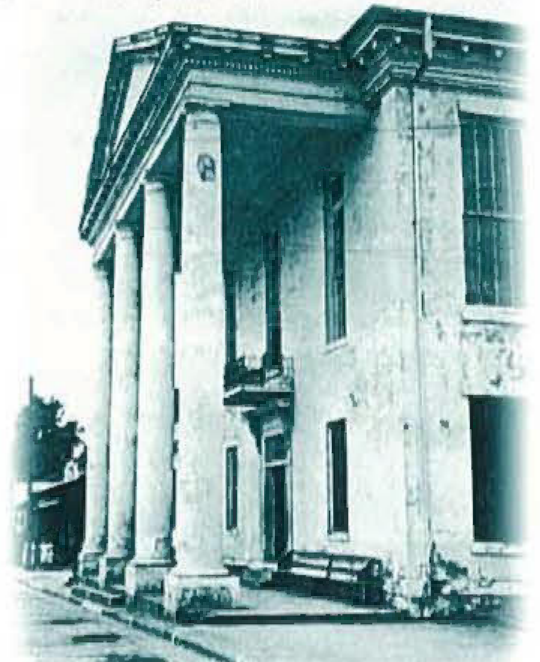
The Legislature appointed an 11-person commission to select the site for the county seat. The members of the com-



Barbour County

Established: 1832

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.



Courthouse at Clayton replaced in the 1960s

mission were: Jacob Utery, Daniel McKenzie, William Cadenhead, James A. Head, William Norton, William Bush, Green Beauchamp, Samuel G. B. Adams, Noah Cole, Robert Richards, and T. W. Pugh. The yet-to-be selected town site was named Clayton by the Legislature in honor of Judge Augustine Smith Clayton, a distinguished jurist, author and statesman from Athens, Georgia, who served in the United States House of Representatives from 1831 to 1835. The Legislature further mandated that until a centralized seat of justice was selected, courts would be held at Louisville, the former county seat of Pike County, which was now located in the newly-created Barbour County.

James Barbour, for whom the county was named, was a Virginian born in Orange County on June 10, 1775. He became a lawyer at age 19 and was elected to the Virginia House of Delegates at age 21. He served in that legislative body for 16 years and was elected Speaker of the House. He authored the Virginia anti-dueling laws. In 1812 he was elected Governor of Virginia. In 1815 he became a United States Senator. From 1825 to 1828 he was John Quincy Adams' Secretary of War. Barbour then served as Minister to England from 1828 to 1830. He died in Orange County, Virginia on June 8, 1842.

The first circuit court in Barbour County convened at Louisville on March 25, 1833, with Judge Anderson Crenshaw presiding. The next court was set for September 23, 1833, also at Louisville, but it adjourned to meet the next day at Clayton. The judge did not appear for this first scheduled court session at Clayton and so the first circuit court held in Clayton took place in March 1834 with Judge Anderson Crenshaw of the Sixth Circuit again presiding.

A "suitable house" had been provided by the citizens for holding court in Clayton. The courthouse was 20 feet square and constructed of round pine logs. It had one small window and one door at the southeast end of the building. According to an early account it was located on the northwestern corner of the present court square approximately where the store of C.C. Greene stood at the time the account was written in 1873. The contractor for this first courthouse was Thomas Warren.

While Clayton was the legislatively-mandated and centrally located county seat of Barbour County, another town was settled around 1832. On March 1, 1833, a post office was established at this small village overlooking the Chattahoochee.

The village was called Irwinton in honor of General William Irwin, an early pioneer and legislator from Henry County. He had done much for the development of the town, including securing a landing for riverboats as well as being instrumental in obtaining the post office. During 1834 and 1835 the town grew rapidly. The first churches, stores and hotels were established. Because a sawmill was built in 1835, better homes could be constructed. By 1836 the town had a population of approximately 1,500.

In 1843 the name of Irwinton was changed to Eufaula, the name of the former Indian village that had been located a few miles to the north. This action did not reflect disaffection of the community with General Irwin. It was simply done to avoid confusion with a Georgia town of the same name. Irwin continued to reside on his plantation located in the area. In March 1850, Irwin had sold some cotton and was returning with the gold payment which he kept in a money belt. The steamboat on which he traveled, the *H.S. Smith*, caught fire, and Irwin, weighted down with gold, drowned in the waters of the Chattahoochee River as he attempted to escape the flames. The river, which provided the foundation for prosperity in Irwinton, later called Eufaula, had claimed the town's first namesake and patron.

Eufaula became a rich community because of cotton, and many wealthy plantation owners built fine homes in the town. One reason they built these residences in Eufaula was to allow their children to take advantage of the educational opportunities there, including the Irwinton Literary Institute. Many of the beautiful ante-bellum mansions remain in Eufaula today, and a Heritage



Courthouse at Eufaula in the 1920s

Association sponsors annual tours of these homes.

Eufaula was threatened during the Civil War when federal troops under General Benjamin H. Grierson approached from Mobile on April 29, 1865. The general had not received word of Lee's surrender on April 9. Leaders of the town went out to meet the general and his 4,000 cavalymen. They escorted the soldiers through the town and across the Chattahoochee River bridge to camp near Georgetown, Georgia. Eufaula remained under federal military restriction for several months, but it did not formally surrender. No private property was destroyed, which makes Eufaula a showcase in Alabama of ante-bellum residential construction.

The 1833 log courthouse at Clayton was replaced in 1854. The new courthouse was built at a cost of \$9,695. It was constructed in the classical style. In 1924 this building was remodeled and expanded, and wings were added to the structure. In the 1960s a modern courthouse replaced the 19th century building at Clayton.

The new Clayton courthouse was a primary project of the Barbour County Board of Revenue, chaired at the time



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

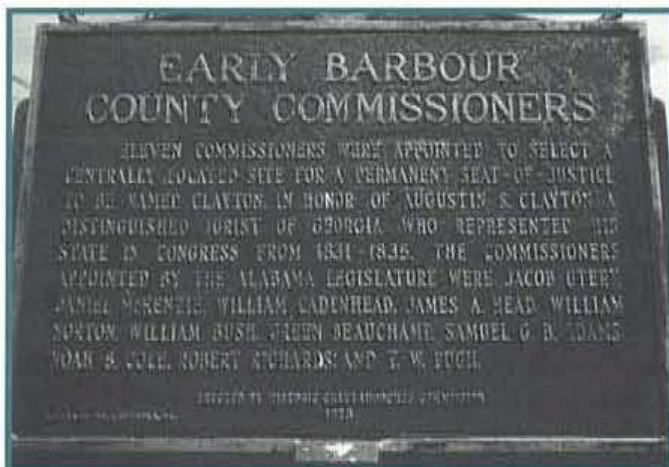
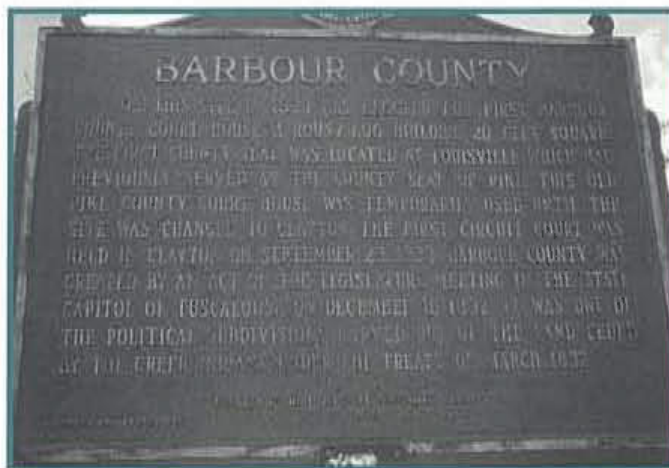
Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four, and is a member of *The Alabama Lawyer* Editorial Board.

by A. B. Robertson, Jr. It required years of planning and research. Construction was made possible by a vote of the county on June 28, 1960, authorizing \$350,000 in bonds for the project and a 2-mill ad valorem tax for a period of 20 years to amortize the bonds. The bond issue passed by a county-wide vote of 1,592 to 377. The ad valorem tax increase was approved by a vote of 1,532 to 385.

The courthouse contract was awarded on November 1, 1960 to Mid-South Constructors Corporation of Montgomery for \$414,030. The architect who designed the building was Carl Herbert Lancaster, Jr., also of Montgomery. In a news article published at the time that the contract was awarded, Lancaster stated that the design of the building was based on enhancing the entire court square and the Confederate monument which is typical of small southern towns.

The building was constructed of limestone, granite and brick. It consists of two stories and a full basement. On the front of the building is a massive portico of black granite columns enclosed with glass forming a lobby. The first floor was designed with an unusual octagonal-shaped auditorium that opens into the lobby. The large court room is located on the second floor. This courthouse in Clayton was completed in December 1961.

Meanwhile, by the 1870s, Eufaula had far outpaced Clayton as the most populous and important city in Barbour county and there was interest in having it be the county seat. Instead of removing the county seat from the geographical center to the commercial center of the county, Barbour County leaders reached a compromise. A courthouse would be built in Eufaula for the convenience of its citizens. The City of Eufaula would furnish the land and Barbour County would construct the



Markers at Clayton

building. By agreement, the city would have control of municipal offices in the building.

Act No. 106 of the legislature of 1878-79 was approved on February 12, 1879. Under this law, the first week of any term of circuit court in Barbour County would be held at Clayton. The second week of the term would then take place at Eufaula. The circuit clerk was directed to maintain an office in each loca-

tion. Also, a dividing line was made in the county between survey ranges 27 and 28. Criminal and civil matters arising west of the line would be heard in Clayton; those arising east of the line would be heard in Eufaula. This arrangement still exists today with courts being held in both Clayton and Eufaula.

The original courthouse in Eufaula was built in 1877. It was a two-story brick building with outside double curved stairs leading up to the entrance to the courtroom on the second floor. These stairs had cast iron posts and rails. This building was used jointly as a county courthouse by Barbour County and as a city hall by Eufaula. The City of Eufaula owned the building.

By November 1922, the city hall-courthouse in Eufaula needed to be replaced. The state fire marshal declared the structure unsafe. In 1923 the City of Eufaula appropriated \$15,000 toward construction costs of a new building on the same site. The County Board of Revenue awarded a building contract of \$34,958.52 to Shields-Guice Lumber Company of Dawson, Georgia for construction of a new facility. They also approved a heating-system contract with Walter Denison of Columbus, Georgia.

This new courthouse in Eufaula was completed in October 1924 at the same time that the Clayton Courthouse was remodeled and expanded. The building continued to be jointly owned and used by Barbour County and the City of Eufaula. The Eufaula Kiwanis Club passed a resolution praising the new courthouse and the cooperation of the City Council and the County Board of Revenue in completing the project.

By 1975 the shared facilities were no longer adequate for use by the city and the county. The Eufaula City Council and the Barbour County Commission



Barbour County Courthouse at Clayton

came up with a plan whereby the county would purchase the half interest of the city in the building for \$100,000. This amount would be paid in three yearly installments of \$33,333. As part of the agreement, the City could retain its courthouse offices rent-free for up to 30 months while a new city hall was built. The new Eufaula City Hall was completed in 1976 and the Eufaula Courthouse was then occupied solely by the county and the courts.

In 1984 a non-binding referendum took place to measure public opinion on an increase in property taxes that would be used to renovate and expand the courthouse at Eufaula. This straw vote passed 1,301 to 935. Substantial renovations were completed in 1986 which modernized the look and the operation of the building. Anderson Construction Company of Fort Gaines, Georgia served as general contractor. Blondheim and Mixon, Inc. were the architects.

As a final note about Barbour County, it has exerted an influence in Alabama politics far beyond what should be expected from a small, primarily rural county. Six Barbour countians have served as governor of the state of Alabama. These include John Gill Shorter, 1861 to 1863; William Dorsey Jelks, 1901-1907; Braxton Bragg Comer, 1907-1911; Chauncey Sparks, 1943-1947; George Corley Wallace, 1963-1967, 1971-1979, 1983-1987; and Lurleen Burns Wallace, 1967-1968.

It is also remarkable that the small county seat town of Clayton was the

home of both the Governor, George Wallace, and the Lieutenant Governor, Jere Beasley, from 1971 to 1979.

Barbour County has a truly remarkable heritage of providing high-ranking political leaders to the state of Alabama.

The author acknowledges the assistance of Justice J. Gorman Houston, Jr. of the Alabama Supreme Court; Eufaula attorney Preston C. Clayton;

Clayton attorney Lynn Robertson Jackson; and the Probate Office of Barbour County for assistance in obtaining information used in this article.

Sources: *History of Eufaula, Alabama*, Eugenia Persons Smartt, 1930; *History of Barbour County, Alabama*, Mattie Thomas Thompson, 1939; *Backtracking In Barbour County*, Anne Kendrick Walker, 1941; *Along Broad Street, A History of Eufaula, Alabama, 1823-1984*, Robert H. Flewellen, 1991; *The Clayton Record*, July 1, 1960, July 8, 1960, August 11, 1960, September 8, 1960, October 6, 1960, November 3, 1960, November 30, 1961, December 14, 1961; *The Clayton Record*, "Historical Facts of Barbour County Revealed," article by Ruth McDonald, Thursday, June 17, 1971.

Construction sign at Eufaula Courthouse, 1986



Eufaula Courthouse during renovations



Eufaula Courthouse following renovations

Lawyers Moving From One Firm To Another— What Are the Ethical Problems Involved In Changing Law Firms?

By J. Anthony McLain, general counsel

The history of the legal profession acknowledges continued loyalty and commitment to one's clients, with Alabama having adopted the first "official" code of ethics for lawyers, thereby formalizing these principles. With the growth of the profession, proliferation of special interest factions of the bar, and specialization, the days of firms having little, if any, turnover of lawyer members may soon be over.

Granted, there are those megafirms where lawyers who previously worked for the law firm as law clerks are hired upon graduation, tutored for the bar exam, and added to the roster of attorneys once they receive their successful bar exam grades. But there is also a significant increase in the transition of lawyers among firms, as well as substantial defections by lawyers from their parent firm to create a new and independent firm. In these situations of withdrawal of firm members, resort should be made to the rules of ethics to ensure that the principles of loyalty and confidentiality are upheld.

The most obvious problem would appear to be conflict of interest issues which are created by the transition of both lawyers and non-lawyer employees among law firms. However, a more troubling issue to the public appears to be what the "moving" lawyer can and cannot do with regard to contacting clients of the firm, as well as what happens to client files.

The Disciplinary Commission has considered what, if any, contact the departing

lawyer may have with clients of the firm. In RO-82-689, the Commission held that a former partner of a law firm could mail a proposed letter to members of the former firm, offering the lawyer's future services. The caveat as enunciated by the Commission was that such a letter was permissible if (1) the letter is limited to clients that the lawyer personally served and is not mailed to present or former clients of the firm with which the lawyer had not personal contact, and (2) the language of the letter, "If I may ever be of service to you in the future, please feel free to call on me," was deleted since such constituted direct



J. Anthony McLain

solicitation. Note that this opinion was rendered pursuant to the former Code of Professional Responsibility. Under the present rules governing lawyer advertising, the referenced language could be utilized so long as the disclaimer and filing requirements, as well as other applicable advertising rules requirements, were met.

With regard to client files, the Commission has repeatedly held that absent a fee dispute or valid attorney's lien, the file of the client belongs to the client. In RO-92-05, the departing lawyer sought advice as to what his former firm should do with the multiple files of an existing client, when the client had requested that the files be transferred to the departing lawyer at his new firm. The Commission determined that in all matters wherein the firm's fees had been paid, the firm would be required to release the files consistent with the directions of the client. The Commission

reaffirmed its earlier position as to the right to client files as previously concluded in RO's 86-02, 87-148, 90-92, and 91-06. The Commission noted that if the multiple files and documents contained therein were so interwoven that the files could not be, with reasonable effort, segregated, then the firm might be allowed under the attorney's lien statute (Code of Alabama 1975, § 34-3-61) to retain the entire work product. However, if, with the exercise of reasonable effort, segregation of the files could be accomplished, the lien would attach only to those files wherein the firm was still owed a fee.

The primary focus should remain on the client in these types of situations. Disputes between the firm and the departing lawyer should in no way jeopardize the rights of the client, and the orderly progression of the client's legal matter(s). Since most of the disagreement over client files appears to be matters of contract law disputes between the firm and the departing lawyer, and not the concern or responsibility of the client, these personal issues should in no way impair the continued zealous representation of the client.

In further explanation and amplification of these principles, the Commission, in RO-91-06, addressed the situation wherein a firm represented several clients on a contingency fee contract basis. Upon the departure of one of the members of the firm, the query was posed as to what contact the departing lawyer could have with these clients. The Commission concluded that the departing lawyer could contact the clients with whom he had had contact, some of whom he had even "brought" to the firm when he had joined it. The departing lawyer could, in communicating with these clients, notify them of their right

to designate where these files should go, including

- (1) staying with the firm,
- (2) going with the departing lawyer to his new firm, or
- (3) taking the file to a new lawyer or law firm. The departing lawyer could, upon request of the client, draft a letter to the former firm, for the client's signature, notifying the former firm of the client's decision and requesting that the client's file be transferred to the departing lawyer at his new firm. This all assumes the complete absence of any intentional interference with the previous contractual relationship, or fraud, deceit or misrepresentation in inducing termination of a previous lawyer-client relationship.

The conflict of interest problems are specifically addressed in various ethical rules. Rule 1.10, *Alabama Rules of Professional Conduct*, deals with the issue of imputed disqualification:

"Rule 1.10 Imputed Disqualification: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:
 - (1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."

The Comment to Rule 1.10 recognizes the present problem of being able to exactly define "firm," in the context that word is used concerning conflicts of interest. The Comment even devotes significant discussion to the concept of "Lawyers Moving Between Firms" and "Confidentiality."

Recognizing the need for interpretation of the "new" Rules of Professional Conduct as adopted by the Alabama Supreme Court in 1991, the Disciplinary Commission of the Alabama State Bar issued a formal opinion, RO-93-03, construing Rule 1.10 in light of a co-counsel arrangement. The Commission pointed out the general rule of 1.10 that when a lawyer switches firms, he or she must have actual knowledge about a former

client before there is any disqualification or imputed disqualification in representing a party adverse to the former client. In other words, a "moving" lawyer is only deemed to carry actual knowledge when associating with the "new" firm.

Under the previous Code of Professional Responsibility, the "taint" of imputed disqualification was much greater, causing almost absolute disqualification regardless of whether there was "actual knowledge," as is required under the present Rule 1.10. Thus, the "Typhoid Mary" standard has been significantly relaxed to now require knowledge, and not merely presume that such knowledge automatically exists.

The Disciplinary Commission has long recognized in its formal opinions the duties of loyalty and maintaining confidentiality of client information. The extension of these duties to non-lawyer employees was addressed in RO-89-41. Therein, the Commission concluded that the plaintiff's firm's hiring of a legal investigator previously employed by an insurance defense firm, and who had

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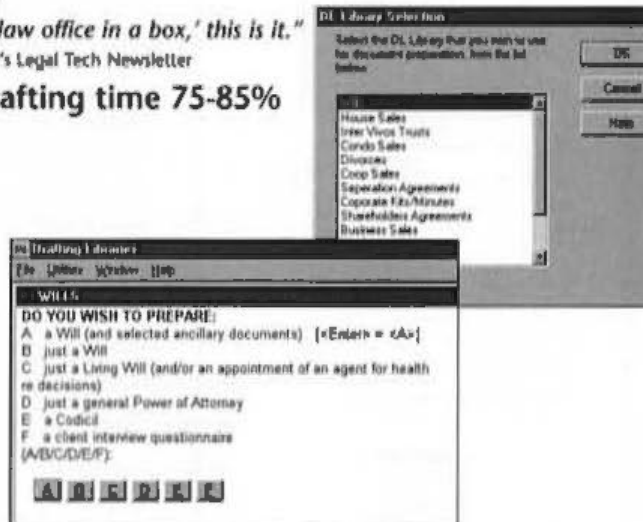
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actually performed investigative services for the defense firm wherein the plaintiff's firm was opposing counsel, was impermissible. The Commission did recognize that the parties could waive the conflict after full disclosure and consultation, but absent such the hiring of the investigator would require the plaintiff's firm to withdraw from all matters in the investigator had worked while employed by the defense firm.

In RO-89-71, a lawyer left one firm to begin a solo practice. The solo practitioner wanted to sublease office space from another attorney. However, the landlord-lawyer was opposing counsel in a case against the solo practitioner's former firm and in which the solo practitioner had been involved while a member of the firm. The solo practitioner's new arrangement with the landlord-lawyer would require him to assist in certain cases of the landlord-lawyer, but not the case in question. Even so, the Commission determined that the proposed sublease arrangement between the solo practitioner and the landlord-lawyer must be carefully guarded so as to not allow the shar-

ing of any information by the solo practitioner and the landlord-lawyer about the case in question. The Commission further cautioned the solo practitioner, in dealing with his "new" employees and associates, to exercise reasonable care to prevent his employees, associates and others whose services were utilized by the lawyer from disclosing or using the confidences or secrets of any of his former clients.

In RO-89-81, the Commission held that the hiring by plaintiff's law firm of a secretary who had previously been employed by opposing counsel, and who had been directly and substantially involved during said employment, disqualified the plaintiff's law firm from representation in the litigation. In reaching this conclusion, the Commission referred to and relied upon its determination in RO-89-41, *supra*. The Commission has further determined that the gaining of confidential information by a departing attorney may continue to disqualify said attorney from representing new clients against clients of the former firm, even in "new" matters. This disqualification occurs when the departing lawyer's knowledge includes settlement and trial strategies or philosophies, theories of defense, or overall litigation philosophy of the clients of the former firm.

The Commission has also considered the utilization of temporary non-lawyer employees, and the possible conflicts involved when these employees do work for more than one firm. The Commission determined that sharing of these temporary employees did not automatically require disqualification of the employer firms. In order for the firms to avoid disqualification, they must take reasonable measures to protect confidential information and to preserve the confidences of their clients. In its discussion of this issue, the Commission pointed out its findings in RO-89-91 that the firm should withdraw because it had made no effort to screen the secretary from further involvement in a particular case. Mention was also made of RO-89-41, pointing out that the opportunities for disclosure of confidential information were so great if the investigator were hired, that due diligence and "Chinese walls" erected around the investigator were insufficient to prevent disqualification.

In addition to RO-93-10, discussed above, two other opinions have been ren-

dered by the Commission since adoption of the 1991 rules which merit discussion. In RO-91-15, a firm was considering hiring a lawyer who was previously employed as assistant general counsel and assistant secretary for a corporation that had instituted a lawsuit against a client of the inquiring firm. Recognizing the "new," relaxed standard of the 1991 rules, the Commission concluded that it would not require disqualification of the firm if the hire was consummated, as the corporation had, in writing, waived any possible conflict. The Commission pointed out that the conflict could be waived, provided said consent was given after "consultation," and the lawyer satisfied himself that the representation would not be adversely affected. *See*, Rules 1.7 and 1.9, *Alabama Rules of Professional Conduct*.

Lastly, any lawyer confronted with the possible conflict of interest issue regarding vicarious disqualification should consider this matter in the context of the law, in addition to ethics. In the case of *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), the Supreme Court of Alabama held:

"We have fully considered the plaintiff's argument concerning the applicability of the so called 'Chinese wall' defense, which is recognized in some jurisdictions and which was recognized by the trialcourt as a basis upon which to avoid the vicarious disqualification of Pittman, Hooks. The term 'Chinese wall' refers to any set of physical and procedural barriers intended to prevent one member of an organization, such as a law firm, from being exposed to information relating to a matter currently or formerly handled by one of his colleagues.*****

However, this defense is not available under the Code [of Professional Responsibility], and it will be available 'under the new Alabama Rules of Professional Conduct only in certain cases involving the movement of lawyers between the government and private law firms.' At footnote 3.

In the final analysis, lawyers confronted with this type of ethical dilemma should consult the applicable rules of ethics, the case law, and the advice offered by the Office of General Counsel of the Alabama State Bar. ■



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LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

Lawyers Take Leadership Positions

Although there are only 21 lawyers in the Alabama Legislature, which is composed of 140 members, these few lawyers are in the most powerful positions.

The 11 lawyers in the Senate chair eight key committees and are vice-chairs of five more. Birmingham lawyer **Rodger Smitherman** chairs the Senate Judiciary. Russellville attorney **Roger Bedford** chairs the Finance and Taxation General Fund Committee that appropriates funds to all of state government except schools, while **Hank Sanders** of Selma chairs the committee that funds all schools. The Financial Responsibility Committee is chaired by Auburn's **Ted Little**. **Pat Lindsey** of Butler chairs the Senate Economic Expansion and Trade Committee and is vice-chair of two others. **Wendell Mitchell** of Lurverne, dean of Jones Law School, chairs the Business and Labor Committee. **Charles Langford** of Montgomery chairs the Tourism and Marketing Committee, while freshman Senator **Zeb Little** of Cullman chairs the Agriculture and Forestry Committee. Tuscaloosa attorney **Phil Poole** is vice-chair of two committees.

The House of Representatives has only ten lawyers out of its 105 members, however, six of them occupy some of the top positions. Birmingham city attorney and State Representative **Demetrius Newton** is Speaker Pro Tem, the number two position in the House. **Ken Guin** of Carbon Hill is Democratic Majority Leader while Anniston's **Mike Hill** is Republican Minority Leader. **Bill Fuller** of LaFayette chairs the powerful Judiciary Committee. **Marcel Black** of Tuscumbia chairs the Election Committee that will oversee reapportionment after the next census. **Howard Hawk**, Arab attorney and city judge, chairs the Ways and Means Committee that appropriates over two billion dollars a year to education.

Although lawyers are only 15 percent of the entire Legislature, they will be predominant as leaders the next four years.

Lt. Governor **Steve Windom**, a Mobile lawyer in the firm of Sirote & Permutt, continues the tradition that a lawyer is

president of the Senate, a tradition that has had few exceptions.

New Rules

New rules will govern the procedure of both the House and the Senate.

The House of Representatives, under the leadership of Speaker Seth Hammett, has revised its committee structure giving more power to the committees. These committees are organized around party lines with Democrats chairing all major committees. Also new this year is a consent calendar for speedy action on non-controversial bills.

The Senate rules placed the power of organizing the body in the hands of President Pro Tem Lowell Barron. All committee appointments are now made by the three senators who comprise the Committee on Assignments.

Regular Session

The 1999 Regular Session convened March 2nd. The Legislature only remains in session until June 14th.

The Alabama Law Institute has presented two major revisions: The Uniform Child Custody and Jurisdiction Enforcement Act to govern interstate child custody cases (see September 1998 *Alabama Lawyer*), and the Merger of Business Entities Act which will allow a business entity of one kind to merge into a separate form of business entity (see September 1998 *Alabama Lawyer*).

For more information about the Institute or any of its projects, contact Bob McCurley, director, at the Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or through the Institute's home page, www.law.ua.edu/ali. ■



Robert L. McCurley, Jr.

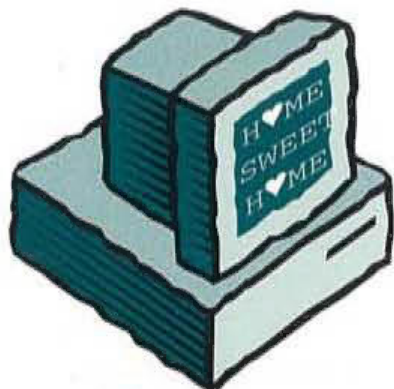
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

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Alternatives To Litigating Y2K Disputes

By Kurt Miller



A mediation group for Year 2000 (Y2K) business disputes has been formed under the auspices of the Alabama Supreme Court Commission on Dispute Resolution and their Center for Dispute Resolution. The purposes of the group include informing clients of alternative dispute resolution (ADR) initiatives at the state and national levels for resolving Y2K disputes and providing trained mediators to assist in mediating such disputes.

The Y2K problem arose out of programming conventions using six digits for dates (dd/mm/yy) rather than eight digits (dd/mm/yyyy). These conventions arose for a variety of reasons, including to econ-

omize computer memory and to aid in filling out preprinted forms. As a result, many computer programs may not recognize January 1, 2000 as a valid date or may interpret the date as January 1, 1900.

In Alabama, the Alabama Center for Dispute Resolution has assisted in establishing a group of mediators knowledgeable in the areas of business and computer law and information technology specifically for the purpose of mediating Y2K disputes. Additional information regarding the Y2K Mediation Team can be obtained from Kurt Miller, Balch & Bingham, (205) 226-3429, or Judy Keegan at the Alabama Center for Dispute Resolution, (334) 269-1515, ext. 111. ■

Should This Case Be Appealed?

By Forrest S. Latta

It was an important trial. The jury's verdict was like a kick in the head. Your client went home devastated. You kept your composure until you returned to the office. You are wrung out and depressed. A few days later you pick up the file again, but it represents a bad memory and you would rather not think about the case at all. Anger is mixed with wounded ego. Now comes the hard question, "*Should this case be appealed and, if so, what are the best issues?*"

Obviously your client feels the justice system failed, and you personally want vindication for your vanquished pride. You immediately think of five "errors" that you believe are obvious and which caused the unhappy outcome. All signals point to appeal, right? Not necessarily.

The matter now calls for clear-eyed objective analysis, free of anger and predilection. You must somehow disconnect from your emotions and/or seek counsel from a colleague who is more detached from the case. Even counsel for the *appellee* must overcome the euphoria of victory and consider whether circumstances dictate heading off an appeal by settlement. These tasks require a level of objectivity that is extremely difficult in the wake of a hard-fought trial. This is no time for snap decisions. Trusting one's own cloudy judgment (or shooting from the hip) can be costly.

One must first recognize that there is absolutely no vested right or due process right to an appeal, and none existed at common law. Does that surprise you? The remedy of appeal is given solely by statute. It may further surprise you that there is no such thing as a perfect trial, and the law does not guarantee one. It guarantees only that the proceedings shall be reasonably fair and free of any substantial prejudice. This came as a surprise to me, because somewhere along the way I had developed the notion that a perfect trial, and a fair appeal, were every

litigant's constitutional right. Not so. In fact, the American Bar Association has distilled the role of the appellate court into the following statement:

Scope of Appellate Review. In reviewing a determination by a trial court, an appellate court should determine whether the court below relied on properly applicable and correctly interpreted rules of law, conducted the proceeding fairly and deliberately so that there was *no substantial prejudice to the parties*, and rested its determination on factual conclusions reasonably supported by the evidence. It should consider an issue that was not raised in the court below only where necessary to prevent manifest injustice or where it concerns the court's jurisdiction or that of the court below. *It should reverse only when there has been a denial of substantial justice or a serious departure from established procedure.* Recognition should be given to the trial court's opportunity to assess conflicting testimony, to resolve conflicting inferences that might be drawn from the evidence, and to apply general legal standards to the particular circumstances at issue. Appropriate respect should be given the trial court's exercise of discretionary authority.

ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, § 3.11 at 19 (1977). (emphasis added) A party must have been deprived of a substantial right or prejudiced by the decision of the lower court for the matter to be reversed on appeal. Perfect trials cannot be had, and due recognition is accorded to the difficulty of conducting an error-free trial. Thus, some error is permitted in order to favor final and effective deci-



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and the law
does not
guarantee
one.

sions at the trial court level. Determining "appeal-worthiness" is a process of finding an issue that involves reversible error.

Finding An Appeal-Worthy Issue

The process of deciding whether to appeal requires honest, objective and informed analysis. *It is principally a process of issue selection*, which is not simply identifying all the possible errors you believe were committed. Issue *identification* is only the starting point for deciding whether a case is appeal-worthy. Once an appeal-worthy issue is found, it is unnecessary, even counterproductive, to assert all of the other issues. It is far more effective to distill the issues to two or three—a maximum of five—and perhaps use the others as "color." Remember the advice to use the "rifle shot" rather than "shotgun" approach.

Issue selection is one of the essential skills of the appellate lawyer's craft.

It is the laying of the cornerstone.

In my view, *issue selection is one of the essential skills of the appellate lawyer's craft. It is the laying of the cornerstone.*

Without skill and care in the selection of issues, your chance of success diminishes greatly. Issue selection therefore should be an integral part of your decision whether to appeal. Omit this step and you are vulnerable to the aphorism, "Ready, fire, aim!"

The process of issue selection involves an analysis of each issue with a view of where the court has been, and where it is going. It involves critically examining the record for preservation of the issue, knowing the standards of review on that issue, knowing the reversal rate on that issue, and other practical considerations that are discussed below.

Your goal ideally is to find an issue that involves all of the following factors:

- (1) a well-preserved objection,
- (2) a strict standard of review,
- (3) equitable appeal,
- (4) a proposition that is consistent with recent prior decisions or trends,
- (5) a higher than average reversal rate, and
- (6) a worthwhile outcome. The fewer of these factors, the more problematic your appeal. Keep in mind that the best appealable issue may not be the most glamorous, or the one that bothers you most. Remember you are looking for a winner—not a salve for wounded pride.

Determining appeal-worthiness is a process of evaluating your likelihood of success on your best issues. Once you select the best issues, you then must weigh the likelihood of success against other practical considerations that may or may not dictate an appeal. At this point your client does not need your advocacy or writing skills, or your research talent, but your common sense judgment.

Ten Factors for Assessing Appeal-Worthiness

1. Consider the possible issues

Begin by listing every possible issue, no matter how minor they are. This gets you in the mode of brainstorming to create a 'shopping list' of potential errors. At this point, you should leave nothing out. Think of both the novel and mundane. Be willing to challenge established precedent. If an issue was not adequately raised, and the record isn't closed, think of ways to raise it while the record is still open.

At this point your list of possible appealable issues may be quite lengthy. Sometimes it helps to group them by categories, such as pretrial, evidence, directed verdict, and so on. As you list the issues, it is not too early to start trying to state them in terms of how they might appear in a brief or argument. Your goal is to develop a tightly worded statement of the issue, a "grabber." Keep coming back to the list, allowing other people to review it, especially persons familiar with the proceedings.

2. Consider preservation of the issue(s)

Now begin honestly analyzing whether each issue was adequately preserved. It is best to confront this now, rather than risk being embarrassed later by an opinion that disposes of your argument for not being adequately raised. Ask how the record on this particular issue will look to the appellate court. It is important to view issue preservation from the court's perspective, not yours. Generally speaking, issues that are not adequately preserved in the trial court have little chance of being reviewed on appeal.

This process of analyzing issue preservation can sometimes be uncomfortable, but it requires total objectivity and candor. This is no time for trial counsel to be unduly sensitive. The willingness to be candid about whether an issue was adequately preserved is a mark of professionalism. Glossing over a record problem may only prove expensive and embarrassing, and damage the credibility of your appeal. Why should the court trust you on anything else, if you are not candid about the record? If you should choose to assert an issue on a weak record, then openly telling the court what happened, warts and all, may actually win you some credibility points. There is something powerful and persuasive about being candid about your weaknesses, but many lawyers find this difficult. It is best to acknowledge problems at the outset and show the court why you still are entitled to relief.

Even if the issue wasn't perfectly preserved, don't eliminate it from the list yet. The "not raised below" rule serves many valid purposes (promoting finality of judgments; avoiding second-guessing trial judges on issues that were never presented; using

View issue preservation
from the court's perspective,
not yours.

the trial court to sharpen the issue). However, there are certain exceptions that sometimes allow the appellate court to review issues first raised on appeal. There also are examples of cases that were decided on issues not fully raised in the trial court. Bear in mind such cases as *Armstrong v. Roger's Outdoor Sports*, wherein the Alabama Supreme Court ordered a "remand for cure" to allow the appellant to raise an important constitutional issue that was not adequately preserved in the trial court.

If the record is not closed, think of ways to adequately raise the issue before filing the appeal. Otherwise, keep the issue on your list for now (noting the record problem) and analyze it with all the others. In the end, however, a problem with the record generally suggests the issue has a low probability of success on appeal and is not appeal-worthy.

3. Consider the Standard of Review

In the author's opinion, this is the single most important and most overlooked aspect of deciding whether to appeal. *Determining whether a case is appeal-worthy is fundamentally a process of issue selection*, and you cannot fully evaluate the merits of an issue without considering the standard of review. The standard of review is the formula that determines what power the appellate court has to rule in your favor. Thus, the review standard will have as great a bearing on the disposition of the appeal as the merits themselves, if not more so.

The standard of review is the formula that defines the power of the appellate court to rule in your favor.

By determining what review standard will apply, you will be able to better evaluate the likelihood of that issue's success. The process of issue selection will be more informed, and your briefs and arguments will be more tightly focused and more persuasive.

Equally as important, your credibility will be enhanced by a demonstrated awareness of the court's constraints, which can be influential in shaping the final decision. For example, if the standard requires viewing the evidence from the opponent's perspective, and you keep insisting upon reciting facts favorable to your client, then your client may be impressed with your advocacy but the court will not.

The standard of review is what shapes your argument. It defines the playing field. What a pity to be playing by football rules, only to discover you were on a basketball court.

Bear in mind you sometimes can shape the standard of review, and hence the court's final decision, by how you define the issue. Every good lawyer for the appellant will try to present the issue in such a way as to climb the ladder of review to obtain the strictest standard possible—preferably the *de novo* standard. By "climbing the ladder" on standard of review, you increase your chance of success dramatically because the court has more power to grant relief.

An example is the "abuse of discretion" standard involving an evidence ruling. Recognize that some trial court decisions are entitled to broader discretionary review than others. The decision whether to permit an expert to testify is almost never

By climbing the ladder on standard of review, your chance of success on appeal increases dramatically

reversed, whereas the admissibility of certain opinion testimony by that expert may be contrary to certain legal guidelines in recent court decisions. The court has wider latitude in the first instance than the second. By demonstrating that the trial court's ruling involved pure legal error, you can essentially convert the "abuse of discretion" standard to a *de novo* standard. The chance of reversal goes up.

Another example: Appeal from the trial court's refusal to grant a remittitur. Does that trigger the traditional "abuse of discretion" standard? Not if you can show that the trial court misapplied the *Green Oil* or *BMW* factors. Ironically, the *Green Oil* system has essentially converted remittitur issues from "abuse of discretion" to pure legal error (*de novo* review) despite the striking down in *Armstrong* of the statutory *de novo* appeal standard, because the trial court's discretion now is constrained by various legal standards—at least 12 "factors" that must be considered. The scope of discretion is therefore somewhat more limited.

Many courts require that the parties set forth the applicable standards of review at the beginning of one's brief. The federal rules require this. If you are in such a court, do not simply recite a rote standard from a recent case without first carefully analyzing whether there is some nuance of the issue that entitles you to "climb the ladder" to a stricter standard. The Alabama Rules of Appellate Procedure presently do not require a statement of the review standard. Most good briefs nonetheless include a discussion of the review standard in their argument.

4. Consider the affirmance rate

Another aspect of determining whether a case is appeal-worthy involves trying to determine the reversal rate of cases which include the issues you propose, based upon the applicable standard of review. In some instances statistics are available from the Administrative Office of Courts. In others, you must draw upon your own base of experience in reviewing the court's decisions. Many experienced appellate lawyers already have an instinctive knowledge of the likelihood of success under various standards from a general familiarity with the court's decisions. For example, obtaining a reversal of an *ore tenus* finding that is supported by at least some evidence is virtually impossible. Obtaining a reversal of a discretionary action, standing alone, is almost as unlikely.

The data collection system of the Administrative Office of Courts now makes it possible to know the statistical chance of success in many situations that previously involved guesswork. This is a helpful service to litigants which, in theory, should reduce the number of appeals that are filed. The parties are more likely to resolve the case themselves where the outcome is more predictable. An experienced appellate lawyer can take the statistical figures and factor them upward or downward, based upon the assessment of other circumstances in the case. Sometimes it is possible to do your own statistical research by computer, such

as tailoring a query that includes, for example, the words "ore tenus" and "reversed" and "date (1996)." This kind of information will help you in advising your client whether to appeal.

5. Consider the court

Look at the trends of recent decisions from the appellate court and ask not only where the law is, but where it is going. Even if recent precedent is against you, consider the court composition, and how changes may have affected your issue. The process of "counting heads" may sound overly simplistic but it is realistic. Consider the following example. The United States Supreme Court issued an opinion in *Aetna Life Ins. Co. v. Lavoie* in 1985 that was the "clarion call" to file constitutional challenges against large punitive damage awards. The court gave every indication it was prepared to announce some standards for punitive damages in civil cases. Since then five justices have left the bench—Berger, Powell, Brennan, Marshall, and White—all of whom had written in favor of standards. It therefore is not the same court that first addressed that issue in 1985. It was more than a decade before the court finally addressed that issue. The point is, one must examine the changes in the court, and not merely rely upon yesterday's opinions, in determining the likelihood of success on a given issue.

For these reasons it is important—even vital—to know the direction the court is leaning on the issue you would raise on appeal. There is nothing wrong with seeking to overrule a long line of precedent, but your chances of success are obviously minimal unless you have detected a trend in your direction or a receptivity on the court to your argument. If the precedent is supportive, but the court is trending *away* from your position, that should figure strongly against appealing a particular issue.

6. Consider the equities, parties, lawyers

Always consider the nature of the parties, the lawyers, and the "equitable appeal" of the facts. One example involves a mother who lost her daughter to cancer, and who sued an insurance company that denied a claim of \$1,000 in cancer benefits. The jury awarded \$750,000 in punitive damages, which the trial court set aside. The appeal was argued in front of a live audience at the University of North Alabama. Because of the equities, the insurer's action appeared callous and indifferent. The court, in a poetic opinion using the illustration of the "widow's mite," reinstated the full amount of the judgment. Although the insurer's legal arguments were extremely compelling, the equities too strongly favored the plaintiff.

Another case involved the oystermen of the Alabama gulf coast who sought protection of their right to tong for oysters in Heron Bay. The riparian land owners had powerful legal arguments for exclusive ownership title to the bottom lands in the bay. That particular bay, however, was the only foul weather refuge for the oystermen—their only means of livelihood during the winter months. The briefs and oral argument by the riparian landowners were outstanding, but the equities—and the *ore tenus* rule—were on the oystermen's side.

The process of evaluating attorneys may sound crass, but it is important to consider the quality of counsel on each side. This

factor may not govern whether to appeal or not, but it is a factor to help evaluate the likelihood of success, just as in evaluating trials. Nobody would evaluate a trial without considering the attorneys, and the same is true in appeals. Are you in a dog-fight with Snoopy, or the Red Baron? It should make no difference theoretically, but practically it does.

Most appellate judges readily admit the quality of representation does make a difference. Suppose your opponent is highly knowledgeable of the court's decisions, schooled in the legal issue, skilled in the art of appellate advocacy, and has a reputation for candor with the court. That opponent knows how to win appeals, and will make your task very difficult.

If, on the other hand, the opponent has demonstrated total confusion on the legal issues and has no substantial experience in handling appeals, that may make a difference.

You, likewise, must honestly evaluate yourself by the same standards. Are you sufficiently detached from the case to be candid with the court? Are you sufficiently conversant about the *legal* issues that the court can look to you for guidance in resolving the case? Can you avoid lapsing into jury arguments? Are you disciplined enough to present your appeal within the proper standard of review? Do you have enough time in your busy schedule to prepare and present a quality appellate brief and argument?

7. Consider the expense

An obvious factor is the cost of an appeal. Your client needs and deserves to know this in deciding whether to file an appeal. There are several things to consider. First is the cost of the preliminaries—filing the notice, designating the record and so on—things that take a surprisingly large amount of time but often are forgotten in estimating the cost. While those functions often can be handled by a skilled legal assistant, it is rare that such details do not require some degree of the appellate lawyer's attention.

Second is the availability and cost of an appeal bond if you are appealing from a money judgment. Such bonds are becoming harder to obtain, as fewer insurance companies now offer them, and the premiums are higher. The bond surety commonly requires a financial statement, and sometimes requires collateral. It almost goes without saying that if the appeal is lost, your client will be obligated to pay the full judgment plus any interest and penalty from the date of judgment. And if there is any default, the bond surety will look to your client for indemnification and will remember you (the attorney) the next time you seek an appeal bond for a client. In some instances it is simpler and cheaper to simply post a cash bond with the clerk in an interest-bearing account, thereby forestalling execution and saving the cost of the appeal bond. Finally, there are times when your client cannot post an appeal bond of any kind, and you must face the reality of fighting execution of the judgment while prosecuting the appeal. Figure that cost as well.

Another important cost factor is the expense of preparing the record itself, including a transcript in some instances. Also consider the time and expense of reviewing and studying the

Are you in a dog fight with Snoopy? Or the Red Baron?

record, which is always time consuming if done properly. Of course, the largest expense typically will be the time devoted to research and preparation of the briefs and preparation for oral argument in some cases.

8. Consider the potential result

Never file an appeal without knowing what kind of relief the court is most likely to grant. Although this sounds obvious, it is surprising how many appellate parties apparently don't realize what relief they are likely to receive if they win, and the possibility of a "pyrrhic victory." It makes no sense to fight a battle that is meaningless.

9. Consider the client

This is sometimes the most difficult factor, especially where the client is unsophisticated in litigation. Sometimes the client truly cannot tolerate the result, because he cannot afford the judgment, or cannot survive without the relief sought. In those instances, there is no alternative to an appeal if the case cannot be settled.

The more difficult decisions come in two varieties. One is where the case is not appeal-worthy, but the client is insistent. He either is putting off the inevitable or trying to save face ("go down fighting") and the opposing party refuses to compromise. Those cases always challenge your professionalism. It seems many appeals could be avoided if the opposing parties would recognize the chance of reversal, and be a little less stingy, thereby allowing the loser to settle with dignity.

Another difficult decision involves the case that contains appeal-worthy issues but possesses other reasons that weigh against the risk of an unfavorable published opinion. There is a saying that "discretion is the better part of valor," and sometimes the risk of making bad law on a particular issue is worth buying your peace.

10. Consider the importance to society

We are, in many ways, public servants. As "officers of the court" we have a duty to consider the public nature of our job. It sometimes befalls us to make decisions on whether to raise an issue that will shape the law in some important way. There may be an issue that is repetitive in nature but does not often reach the appeal stage, or an issue that will establish an important legal precedent, thereby giving guidance to the bench and bar, and the public at large. Those things weigh in favor of appeal because you are helping develop the law for the benefit of all society, even if you don't ultimately prevail. Some clients are very receptive to this—they see the big picture—while others are not.

Conclusion

The decision whether to appeal a case should not be approached haphazardly, but as a craftsman would approach constructing a fine building, the cornerstone being the process of issue selection. Only in this way will you assure yourself of the best standard of review, and a more receptive audience. ■

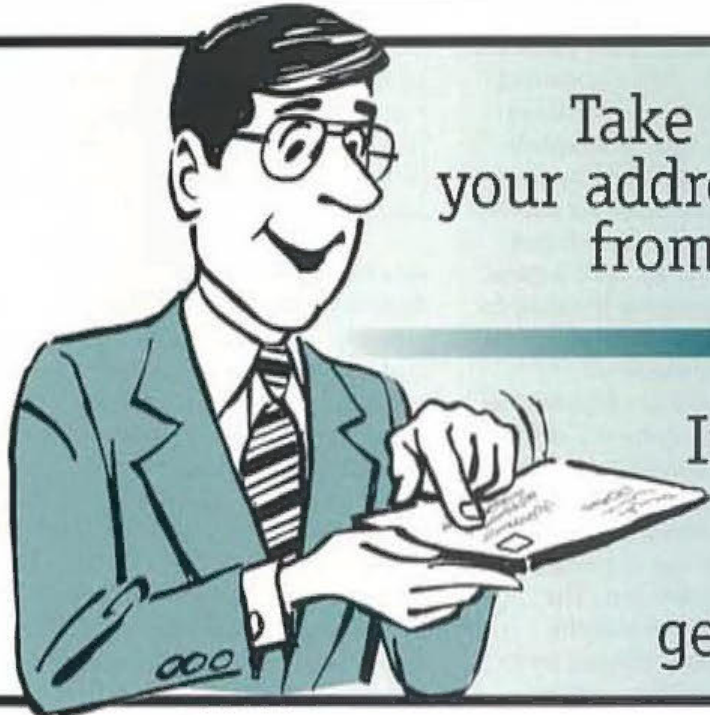
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SEX OFFENDER REGISTRATION & NOTIFICATION:



The Constitution vs. Public Safety

By Hon. Debra H. Goldstein and Stephanie Goldstein

Jesse Timmendequas lived across the street from seven-year old Megan Kanka in Hamilton Township, New Jersey. On July 29, 1997, Timmendequas, a convicted sex offender, raped and murdered Megan in his home. The New Jersey Assembly declared a legislative emergency and enacted Megan's Law, N.J. STAT. ANN § 2C:7-8 (West 1995), within three months of Megan's rape and murder. Megan's Law requires convicted sex offenders to register with law enforcement agencies and requires agencies to notify various segments of the public of the physical location of the offenders.

As a result of a national legislative frenzy to protect other children from similar brutal and senseless deaths, two types of sex offender laws generally were passed. All 50 states, and the federal government, adopted statutes requiring sex offender registration, and many states also passed legislation requiring public notification of the registration information.

Alabama passed a Community Notification Law in 1996, which required law enforcement officials to notify communities when a convicted sex offender was released from prison and planned to move into the neighborhood. Between 1996 and 1998, over 600 notices were mailed to Alabama communities. On May 1, 1998, the Alabama Legislature passed a modified Alabama Community Notification Act.¹

This new version incorporates sugges-

tions that arose after enactment of the original legislation. Changes from the 1996 law include: verification that the sex offender is going to live at the address that he/she gives law enforcement; imposition of a penalty on the sex offender if he/she falsifies the address at which he/she plans to live; requiring the Department of Pardons and Parole to send out notices when a sex offender is paroled or when a sex offender or parolee from another state moves to Alabama; sending notification immediately to the victim or family of the victim and to the community of the last known address of a convicted sex offender when he/she escapes from prison; notification of schools, daycare or child care centers when a convicted sex offender plans to live within three miles of the facility; and the establishment of an Internet web site (www.gsi-web.net) where all convicted sex offenders in Alabama are listed. By comparison to its predecessor, the 1998 version of the Alabama Community Notification Law strengthens Alabama's registration and notification provisions.

The Alabama Legislature explained its changes to the law in Section 1 of the Act. Section 1 cites the danger of recidivism posed by criminal sex offenders and the paramount concern or interest that the government has in protecting the public from sex offenders. The Legislature further noted that the efforts of law enforcement agencies to protect their communities, conduct

investigations, and quickly apprehend criminal sex offenders are impaired by a lack of information about the sex offenders within their jurisdiction. Thus, the purpose of the amended legislation is to better protect local communities, to assist in the investigation and apprehension of sex offenders, and to lessen the likelihood of child-related sex crimes by providing private citizens with relevant information.

This article will first present a specific overview of the statutory requirements of Alabama's new Community Notification Law. The second part of the article will analyze Alabama's law in the context of constitutional challenges to other existing state sexual offender laws, with particular emphasis on the Ex Post Facto Clause and the impact of registration/notification statutes in terms of the balance of public security versus punitiveness.

Alabama Community Notification Law²

In Alabama, § 15-20-21(a)(4) provides that a criminal sex offender is a person convicted of a criminal sex offense. A conviction is a determination of guilt as a result of a plea, trial or adjudication as either a youthful offender or a delinquent, regardless of whether adjudication is withheld. Section 15-20-21(5) lists as criminal sex offenses: First- or second-degree rape; first- or second-degree sodomy; sexual torture; first- or second-degree sexual abuse; first- or

second-degree promotion of prostitution; violation of the Alabama Child Pornography Act; enticement of a child to enter a vehicle, room, house, office, or other place for immoral purposes; first- or second-degree kidnapping of a minor, except by a parent; incest when the offender is an adult and the victim is a minor; and solicitation of a child by computer for the purpose of committing a sexual act and transmitting obscene material to a child by computer, or any solicitation, attempt or conspiracy to commit any of the offenses previously listed. In addition, any crime committed in another state, or a federal, military, Indian, or a foreign country jurisdiction which, if it had been committed in this state, would constitute one of the above listed offenses, will subject an individual to the registration and notification requirements.

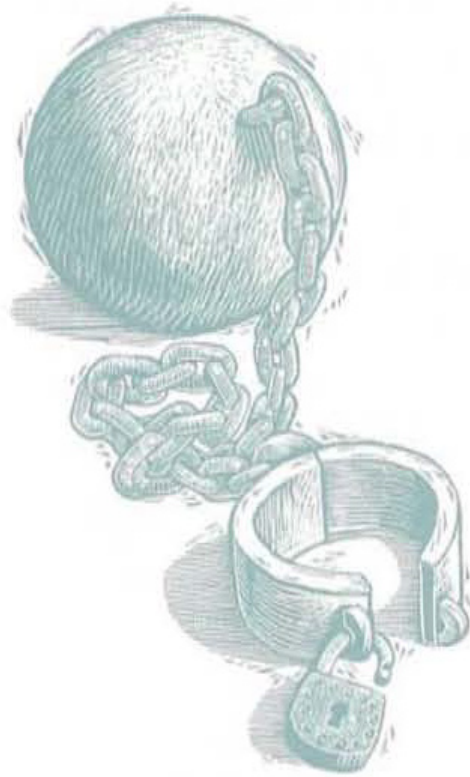
Registration of Criminal Sexual Offenders Released from Prison

The person or government entity charged with obtaining information from a criminal sexual offender before release and then providing that information to the appropriate police or sheriff's department is denoted as the responsible agency. Section 15-20-21(8) provides that the responsible agency for a person being released from state prison is the Department of Corrections. The county sheriff is responsible for information pertaining to individuals being released from county jail, while the municipal police department is responsible for municipal jail releases.

The sentencing court is the responsible agency for a criminal sex offender placed on probation, including conditional discharge or unconditional discharge, without any sentence of incarceration. By definition, a sentencing court is a court whose determination is competent under state law, but it need not be the same court in which the criminal sexual offender originally was convicted of the underlying criminal sex offense. If an individual is being released from a jurisdiction outside of Alabama, but is to reside in Alabama, the responsible agency is the Department of Public Safety.

Procedurally, 30 days before the release of a criminal sex offender for

any criminal sex offense conviction, the responsible agency is charged with requiring the criminal offender to declare in writing the actual living address at which he or she will reside upon release. An intentional failure to register through a timely written declaration shall constitute a Class A misdemeanor.



Responsible Agency Disclosure Responsibilities

If the sexual offender declares an intent to live within the boundaries of Alabama, the responsible agency has five days from the date of the written declaration to notify the Attorney General, the director of the Department of Public Safety, the county district attorney and sheriff where the individual plans to reside, the chief of police of the municipality where the individual plans to reside, and the Alabama Criminal Justice Information Center. In turn, the Alabama Criminal Justice Information Center is charged with notifying the Federal Bureau of Investigation of the data it receives. In order for this to be an effective tool, the legislation requires that the responsible agency include all information it possesses that would identify and trace the criminal sex offender. This includes, but

is not limited to, data pertaining to each sex offense history or pre-sentence investigation of the offense, fingerprints, and a current photograph of the criminal sex offender.

The responsible agency requirements are similar if the criminal sex offender declares an intent to live outside of Alabama. Under those circumstances, the responsible agency has five days from the written declaration to notify the Alabama Criminal Justice Information Center and the director of the Department of Public Safety, Attorney General, or designated state law enforcement agency of the state to which the offender has declared an intent to move. Again, the provided notification must include as much documentation as possible to permit the identification and tracing of the criminal sex offender.

Once the criminal sex offender is released into general society, he or she must reside for a minimum of 30 days at the address stated in the declaration of intent unless written approval is obtained from the sheriff in the county of residency. If a change of residency is desired in a municipality with a population in excess of 5,000, written approval must be obtained from the municipality's chief of police. The reporting provisions stated above are the same if the criminal sexual offender changes residential location after the minimum 30 days or with prior written approval.

Finally, the responsible agency is charged with cooperating with the director of the Department of Public Safety to enable the department to prepare a criminal sex offender release notification form. Any information collected or maintained by the Department of Public Safety, a sheriff or a police department, as prescribed by the Act, shall be for the purpose of tracking the whereabouts and movements of criminal sex offenders in Alabama. The information can be disclosed to federal, state and local criminal justice agencies for law enforcement purposes and for community notification as provided by Alabama's Section 15-20-22 or by a similar codification from another state. It also can be disclosed to federal, state, and local governmental agencies that are responsible for conducting employment related confidential background

checks. Since the effective date of the law, this information has been available for criminal justice purposes through the Alabama Criminal Justice Information Center network. It became accessible through the ACJIC/NCIC network on January 1, 1999.

Verification Provisions

The statute contains verification provisions pertaining to offenders who have been released from prison. This provision may have been added because of an incident in Birmingham. In October of 1997, a convicted rapist, serving time in a Florida prison, registered his second cousin's Birmingham address as his place of residence upon release. He did so without her knowledge. Police began to distribute flyers warning that a sex offender lived at this address. The rapist's second cousin had to post a sign on her mailbox stating that no sex offender lived at that address. As a result of this situation, the *Birmingham News* published an editorial calling for a change in the law to require police to verify addresses provided by offenders. *The Quill*, September 1, 1998.

Sixty days after an individual's most recent release, and on the anniversary date of a criminal sex offender's birthday occurring more than 90 days after release, except during ensuing periods of incarceration, the Department of Public Safety shall mail a non-forwardable verification form to the address of the criminal sex offender. The designated offender has ten days from receipt of the verification form to present in person a completed form to the sheriff, or where applicable, chief of police. The signed form shall attest that the criminal sex offender still resides at the designated address and that the individual is in compliance with the residence restrictions. At the time that the form is presented, the applicable law enforcement official will obtain fingerprints and a current photograph. Within 30 days of the annual date of address verification, the sheriff or police chief will submit verification of the criminal sex offender's address, pictures and fingerprints to the Department of Public Safety.

Failure of an individual to appear in person with a completed verification form within the specified ten days or to

refuse to permit fingerprinting and a photograph is a violation of the statutory provisions. As such, it constitutes commission of a Class C felony.

Agency Notification Situations Other Than Prison Release

Section 15-20-21 of the Alabama Community Notification Law also provides for three instances for notification, other than release from a penal institution. The three instances are escape, parole or probation, or when the sentencing court does not impose a sentence of incarceration. In the instance of an escape from a state or local prison facility, the responsible agency is charged, within 24 hours, to notify the Department of Public Safety, the sheriff and the chief of police who had jurisdiction at the time of the criminal sex offense conviction. Such notification must include the names and aliases of the criminal sex offender, the time remaining to be served, if any, on the full term for which the individual was incarcerated, and the nature of the punished crime. Fingerprints, a current photograph, and a summary of the offender's criminal record is to be transmitted at the same time the other information is provided.

As of June 30, 1998, the Board of Pardons and Paroles has been charged with notifying the Department of Public Safety of the name and aliases of any criminal sex offender who is on parole or probation. The notification also must include the address at which the offender resides, the amount of time to be served on parole or probation, the nature of the act that conviction was based upon, and a summary of the individual's criminal record. In addition to those on parole or probation for criminal acts in Alabama, the applicable definition of a criminal sex offender is broadened to include a person who resides in or enters Alabama who has been convicted in another state, or a

federal, military, Indian, or foreign country jurisdiction of a crime which would have been punishable as a criminal sex offense in Alabama. Once identified, the Board of Pardons and Paroles is required to direct each criminal sex offender on probation or parole to report to the appropriate law enforcement agency for fingerprinting and photographs that will be sent to the Department of Public Safety.

The final area of registration involves individuals who a sentencing court does not sentence to incarceration for their criminal sex offense conviction. In this instance, notification shall be provided by the responsible agency within 24 hours of release. The regulation does provide that after conviction, the sentencing courts shall order the criminal sex offender to submit to the sheriff or probation officer a DNA sample that will be forwarded to the Department of Forensics.

Public Notification

The notification provisions, rather than the registration provisions, of Megan's Law have been much more vulnerable to constitutional challenges. The Alabama Community Notification Law procedurally distinguishes between the cities of Birmingham, Mobile, Huntsville and Montgomery, and cities in Alabama with resident populations of 5,000 or more or 5,000 or less. In all three instances, the public notification procedures must occur within five days after the notification by a responsible agency of the release of any criminal sex offender.

In Birmingham, Mobile, Huntsville and Montgomery, the chief of police is charged with notifying, through a community notification flyer, or any other method reasonably expected to provide notification, all persons who have a legal residence within 1,000 feet of the stated residence of the released offender, and all public and private schools, licensed daycare centers, and other child care facilities within three miles of the released offender's declared address. Notice can be provided by mail, hand delivery, Internet posting, local newspaper publication, posting, or any other available means.

Cities with a resident population of 5,000 or more require the chief of police or, if none, then the county sher-

iff, to notify all persons having a legal residence within 1,500 feet of the declared residence of the released offender. Notification shall also be provided to all public and private schools, licensed daycare centers, and any other child care facilities within three miles of the convicted sex offender's stated residence. Again, notification shall be made through community notification flyer and any other means reasonably expected to provide notification to the public.

In unincorporated areas and in municipalities with resident populations of less than 5,000, the sheriff of the county in which the released criminal sex offender intends to reside is responsible for notifying all persons who have a legal residence within 2,000 feet of the declared residential address. Unlike the more densely populated areas, public and private schools, licensed daycare centers, and other child care facilities within six miles of the declared residence will receive notification of the offender's release through a community notification flyer sent by regular mail or hand delivered, as well as any other means reasonably expected to provide notification.

Convicted Sexual Offender Restrictions and Responsibilities

Pursuant to the Alabama Community Notification Act, any criminal sexual offender, whether having served time in prison or not for conviction for a sexual offense, always remains subject to the requirement that other residents living in the specified proximity be notified of the offender's presence. It is important to note that individuals who were convicted prior to the 1998 implementation of the notification law also are required to register. Once registered, the notification procedures required of police and sheriffs will be applied in the same manner as if the offender was being released from incarceration.

Individuals who have been released for more than 30 days are required to give 30 days written notice of an intent to change legal residency. It is noted that notwithstanding the provisions of this act, a criminal sex offender is deemed to have established a new residence during any period in which the individual is domiciled in a location for five consecutive days or more.

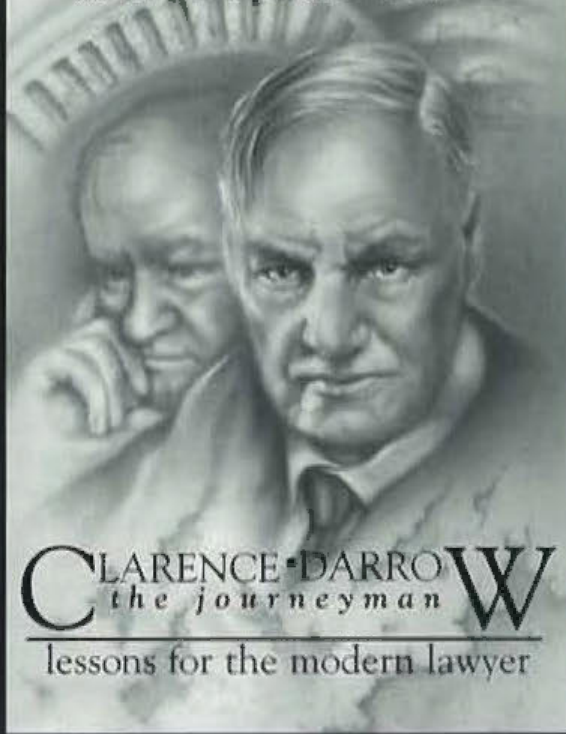
The Act also places boundary restrictions upon an individual's choice of residence and employment. Specifically, no criminal sex offender is allowed to establish a residence or accept employment within 1,000 feet of the property on which any public school, private or parochial school, licensed daycare center or other child care facility is located.

The offender also is restricted from establishing a residence or other living accommodation within 1,000 feet of the property on which any former victim or the victim's immediate family resides. Changes in property within 1,000 feet of the sex offender's registered address, which occur after a criminal sex offender establishes a residence or accepts employment, shall not form the basis for finding that a criminal sex offender is in violation of the residence restrictions set forth in the Act.

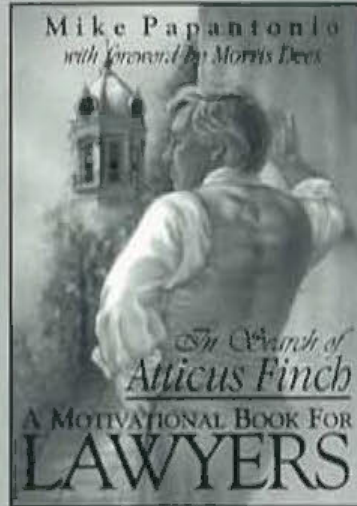
In terms of interacting with former victims, the Act prohibits a convicted sex offender from willfully or knowingly being within 100 feet of any former victim, except as where provided by law. Furthermore, visual or audible sexually suggestive or obscene gestures, sounds

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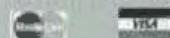
Mike Papantonio



Papantonio explains how neither Clarence Darrow nor Atticus Finch resembled the single-dimensional, linear-thinking attorney that seems to be almost cliché and epidemic in the '90s. They were not abridged versions of lawyers. Their endless effort to understand and appreciate the world outside the four walls of their offices provided balance to their lives. They both worked hard to acquire a type of enlightened wisdom that improved their lives and the lives of people they served.



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or communication directed at or to a former victim also are prohibited.

Convicted sexual offenders also are not allowed to establish residency where a minor resides. Notwithstanding the stated position, a criminal sex offender may reside with a minor if the individual is the parent of the minor, unless one of the following conditions applies: (1) the criminal sex offender's parental rights have been or are in the process of being terminated as provided by law and (2) any minor or adult child of the criminal sex offender was a victim of a criminal sex offense committed by the criminal sex offender. The Act also provides that a criminal sex offender shall not be allowed to change his or her name and that any notice provided to the community shall not contain the name or any other information identifying the victim. A knowing failure to comply with any provision of § 15-20-21 through § 15-20-24, except §15-20-21(b)(1), will constitute a Class C felony.

The final provisions of § 15-20-24 repeal all laws or parts of laws that conflict with the newly amended act. Section 4 of § 15-20-24 makes the provisions of the Community Notification Law severable. Thus, if any part of the act is declared invalid or unconstitutional, the remaining parts will remain valid and enforceable.

Constitutional Challenges

The importance of the severability provision of § 15-20-24 rests on the number of constitutional challenges that have been made against Megan's Laws. Alleged areas of violation of constitutional protections have included the Ex Post Facto clause, double jeopardy, equal protection, due process, and bill of attainder. A widely litigated challenge involves the Ex Post Facto clause.

Ex Post Facto laws have been defined as laws passed after the commission of an act which retrospectively change the consequences of the act. The Constitution, in two different clauses, U.S. CONST. Article I, section 9, clause 3 and U.S. CONST. Article I, section 10, prohibits passage of Ex Post Facto laws by Congress and the states, respectively.² The Constitutional Ex Post Facto clause guarantees an individual the right to rely upon the laws in place at the time an act is committed, and serves as a

means of restricting federal and state governments from passing legislation which is retroactive in nature.

The United States Supreme Court first addressed Ex Post Facto laws in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In *Calder*, the Supreme Court specifically denoted four types of laws that the Ex Post Facto clause prohibits:

- (1) punishment for an action that was innocent when the act was performed;
- (2) laws that make a crime greater than when it was committed;
- (3) laws which inflict a greater punishment than was prescribed by law at the time the crime was committed; and
- (4) laws that after the fact alter that rules of evidence necessary to convict an offender.⁴

The key issue in Ex Post Facto challenges is whether a given law can be defined as punishment. Therefore, the registration and notification provisions of Megan's Laws must be considered punitive in order to violate the Ex Post Facto clause. Historically, the constitutional definition of punishment for Ex Post Facto purposes has been unclear, but *Kansas v. Hendricks*, 117 S. Ct. 2072, 2083 (1997), a double jeopardy and Ex Post Facto case, significantly clarified that definition.

Hendricks based its test on *Ursery v. United States*, 116 S. Ct. 2135, 2139-40 (1996). *Ursery*, which held that civil forfeitures do not constitute punishment under the Double Jeopardy Clause, applied a two-part test. It examined first whether the legislature intended the measure to be criminal or civil and second whether the measures are so punitive in either purpose or effect as to persuade the court that it may not legitimately be viewed as civil in nature despite the legislature's intent.

Much Megan's Law litigation predates *Hendricks* and *Ursery*. Thus, courts have used different standards to evaluate Megan's Law cases. These cases relied on some combination of four Supreme Court cases to determine if registration and notification constitute punishment: *United States v. Halper*, 490 U.S. 435 (1989), which held that if a civil sanction does not solely serve a remedial purpose but rather can be explained as serving a deterrent or ret-

ributive purpose, it is punishment; *United States v. Austin*, 509 U.S. 602 (1993), which stressed the significance of a sanction's historically punitive purpose; *United States v. Kurth Ranch*, 511 U.S. 767 (1994), which stressed the punitive nature of a provision if it was conditioned on the commission of a crime; and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which provided seven considerations⁵ to aid analysis where intent is not clearly determinable.

Because of the very nature of the registration and notification provisions of Megan's Laws, these laws have been subject to ex post facto challenges since their inception.⁶ The ex post facto argument made against requiring registration of previously convicted sexual offenders is that such legislation imposes an additional and more burdensome punishment than was prescribed by law at the time the crime was committed. Similarly, challenges have been made that notification provisions, made applicable by statutes enacted after individuals have been previously convicted, violate the second and third prohibitions outlined in *Calder v. Bull*.

Generally, the counter argument is that Megan's Laws do not constitute punishment because the statutory design or legislative intent is to protect society from the danger of re-offense by sex offenders and to aid law enforcement in investigating and solving crimes. The extended argument is that failure to include previously convicted sexual offenders requires communities, despite knowledge of the high probability of recidivism, to wait until further harm occurs.

In balancing the different arguments, courts have had a difficult task because of the extreme difficulty in capturing the intent of the legislature. If the intent is purely punitive, the statute is punishment, however, if the intent is non-punitive, the courts have had to weigh whether the punitive effect of the statute negates the public safety intent of the legislature. Although legislative

intent is the threshold question, the courts also are grappling with giving the effects and purposes of the sanction equal weight in terms of balancing public safety versus punitiveness. Essentially, the thought is that despite the public safety arguments, Megan's Laws actually have much broader consequences on an offender's life, with notification potentially affecting his family, job and ability to live in a given community. Arguments that have been raised include potential vigilantism, financial hardship on both the offender and the community itself, and the personal stigma to the convicted offender



that widespread dissemination can have. These concerns may be especially salient in Alabama because Alabama's revised law regulates where an offender can live and work.

The argument pertaining to vigilantism is that with the information provided through notification laws, the possibility exists that irate citizens will use the information to seek out and terrorize sex offenders rather than allow them to live in a given community. In situations where the public takes matters into its own hands, the possibility of an innocent bystander, or an individual whose looks are similar to the offender, being injured becomes a real and frightening possibility.⁷

There also is a potential impact on the earning abilities of a convicted sex offender. Any individual convicted of a felony will have a more difficult time being hired, but it is argued that one who is subject to sex offender registration and notification law may find it dif-

ficult to obtain and maintain employment. Either pressure can be made to bear resulting in termination, resignation, or a business that declines when people minimize trading so as to avoid the offender.

Alabama Case Law

Alabama has not had a case that challenged Alabama's Community Notification Act on ex post facto grounds. An Alabama court, however, has given some indication of its views on the punitive nature of registration and notification. In *Robinson v. State*, Court of Criminal Appeals of Alabama, CR-97-0607, 1998 WL 599472 (not yet released for publication), September 11, 1998, the court held that registration and notification are not punishment.

Willie Robinson was indicted on two counts of first-degree sexual abuse. He pled guilty to one count. Robinson subsequently filed a motion to withdraw his guilty plea. He argued that his guilty plea was involuntary because the court did not fully inform him of the punishment. He argued that the failure of the district court to inform him of the application and effects of the Community Notification Act rendered his plea involuntary.

The court first noted the standard for a voluntariness challenge to a guilty plea. The court stated: "An accused is entitled to information concerning the direct consequences of his plea. He is not entitled to information concerning all collateral effects, or future contingencies that might arise." The court, citing case law from Washington state, Pennsylvania and New Jersey held that notification and registration do not constitute punishment. Thus, the provisions were collateral, rather than direct, consequences of Robinson's guilty plea.

The Real Megan's Law

Megan's Law, as passed by the New Jersey legislature at N.J. STAT. ANN. § 2C:7-8(c)(3)(West 1994), required anyone "convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense" to register upon release from incarceration,

relocation from another state, or after a conviction where an active sentence was not imposed. The statute further required previously convicted individuals, who were not presently incarcerated or subject to supervision, to register. In addition to registration, the New Jersey Megan's Law required notification to the public of certain offenders based upon three categories that were contingent upon the potential for recidivism, as determined by the prosecutor in the county where the offender resides. The breadth of notification was based upon the risk of potential recidivism. Thus, notification pertaining to low-risk individuals would only be made to law enforcement agencies likely to encounter the individual. Moderate-risk individuals also would be subject to having information released to schools, and religious and youth organizations. In the instance of a high-risk rated offender, the general public that was likely to come in contact with the offender would be notified.

Even with what seemed to be a clear tier variation in terms of disclosure and notification, New Jersey's Megan's Law was quickly the subject of litigation in both state and federal court. This has been the case in other states as well. Generally, the final determinations have held that the laws are proper because the statutory design or legislative intent of protecting the public, especially children, has outweighed any punitive impact.

Examples of decisions which have held registration provisions to be non-punitive include *Artway v. Attorney General*, 81 F.3d 1235, 1253-67 (3rd Cir. 1996), *rehearing denied*, 83 F.3d 594 (3d Cir. 1996) (finding challenges to public notification provisions unripe); *Doe v. Gregoire*, 960 F. Supp. 1478, 1482-82 (W.D. Wash. 1997); *Doe v. Pataki*, 940 F. Supp. 603, 629-30 (S.D.N.Y. 1996), *reversed in part*, 120 F.3d 1263 (2nd Cir.

1997); *Artway v. Attorney General*, 876 F. Supp. 666, 671-77, 688 (D.N.J. 1995), *vacated in part*, 81 F.3d 1235 (3rd Cir. 1996); *Rowe v. Burton*, 884 F. Supp. 1372, 1375-81 (D. Alaska 1994); *People v. Taylor*, 561 N.E. 2d 393, 393 (Ill. App. Ct. 1990); *State v. Myers*, 923 P.2d 1024, 1041-43 (Kan 1996), *cert. denied*, 117 S. Ct. 2508 (1997). Ex post facto cases which have held registration and notification provisions to be non-punitive include: *Russell v. Gregoire*, 124 F.3d 1070, 1087-94 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263, 1276-86 (2nd Cir. 1997); *W.P. v. Poritz*, 931 F. Supp. 1199, 1213-19 (D.N.J. 1996); *State v. Noble*, 829 P.2d 1217, 1221-24 (Ariz. 1992); *State v. McCuin*, 808 P.2d 332, 335-42 (Ariz. Ct. App. 1991), *vacated in part*, 829 P.2d 1217 (Ariz. 1992); *People v. Starnes*, 653 N.E. 2d 4, 6-7 (Ill. App. Ct. 1995); *State v. Pickens*, 558 N.W.2d 396, 397-400 (Iowa 1997); *State v. Manning*, 532 N.W.2d 244, 247-49 (Minn. Ct. App. 1995); *State v. Costello*, 643 A.2d 531, 532-35 (N.H. 1994); *Doe v. Poritz*, 662 A.2d 367, 3878-405 (N.J. 1995); *People v. Afrika*, 648 N.Y.S.2d 235, 238-41 (N.Y. Sup. Ct. 1996); *Kitze v. Commonwealth*, 475 S.E.2d 830, 832-34 (Va. Ct. App. 1996); *State v. Ward*, 869 P.2d 1062, 1067-74 (Wash. 1994); *State v. Taylor*, 835 P.2d 245, 247-49 (Wash. Ct. App. 1992); *Snyder v. State*, 912 P.2d 1127, 1130-31 (Wyo. 1996).

Based upon present case law and writings, it would appear that the greater need to protect the public's good has outweighed any stigma or difficulty that the individual offender will encounter. Perhaps, this is best summarized by the New Jersey Supreme Court in the decision *Doe v. Poritz*, 142 N.J. 1, 147 (1995), when the court quoted Blackstone's Commentaries (St. George Tucker ed. 1803), vol. v, ch. 18, at 251: "Preventive justice is upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice."

Act 98-489, the modified Alabama Community Notification Law, was signed on May 1, 1998 and did not become effective until August 1998. Although one Alabama court has held that registration and notification are not punitive, the court relied solely on other jurisdictions' cases. It provided no analysis. Like the many other states' versions of Megan's Law, Alabama's law too may be subject to Ex Post Facto challenges, and other constitutional challenges, in the future. ■

Endnotes

1. Act 98-489 to amend Section 15-20-21 to 15-20-24, Inclusive, *Code of Alabama* 1975
2. For reference to specific provisions mentioned see Act 98-489 to amend Sections 15-20-21 to 15-20-24, Inclusive, *Code of Alabama* 1975.
3. U.S. CONST. art I, Section 9, clause 3 (Congress); U.S. CONST. art I, §10 (states).
4. *Id.* at 390.
5. *The Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) factors are:
 - [1] whether the sanction involves an affirmative disability or restraint,
 - [2] whether it has historically been regarded as a punishment,
 - [3] whether it comes into play only on a finding of scienter,
 - [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence,
 - [5] whether the behavior to which it applies is already a crime,
 - [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and
 - [7] whether it appears excessive in relation to the alternative purpose assigned.
6. See generally, James O. Hacking, III, Comment, *Won't You Be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders' Rights Under The Constitution's Ban on the Passage of Ex Post Facto Laws?*, 41 *St. Louis U. L.J.* 761 (1997); Joanna Wells, *Community Notification Provisions for Sex Offenders: Not Punishment for Ex Post Facto and Double Jeopardy Purposes*, 22 *Southern Ill. Univ. L. J.* 243 (1997).
7. *The Amy Jackson Law - A Look at the Constitutionality of North Carolina's Answer to Megan's Law*, 20 *Campbell Law Review* 347, 367-8 (1988).



Judge Debra H. Goldstein

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Witness Statements

By Marcel L. Debruge and Tom S. Roper

Preparing a case for trial is a time-consuming and exhaustive process. Within the bounds of ethics, it is the lawyer's job to track down everyone who is, or could be, a witness and find out what that witness knows about the case. Certainly depositions are one of the most important tools in this process, but another option is taking a witness's statement. Indeed, determining when it is better to depose a witness, and when it is better simply to take his statement, is something the lawyer must decide, and if a witness statement is selected as the best way to proceed, care must be taken to see that it is done right.

Witness statements are valuable because they enable the lawyer to "lock in" the testimony of persons with knowledge of relevant facts. Often, an attorney is wise to obtain witness statements to safeguard against the unavailability of an important witness at trial and to preserve the testimony of a witness who, for any number of reasons, might later change his or her story. Witness statements can serve as an attractive and cost-effective alternative to depositions, especially when an attorney does not know beforehand what the witness's testimony will be. Thus, witness statements are an important part of trial preparation. A lawyer can ascertain critical facts, view the witness's demeanor, establish a relationship with the witness, and possibly uncover additional facts important to the case.

This article discusses:

- (1) taking a witness's statement,
- (2) the discoverability and admissibility of witness statements, and
- (3) limitations on the efforts of opposing counsel to obtain statements of a client's employees.

Preparing to Take a Witness's Statement

Most lawyers either obtain witness statements on their own, or use an investigator, associate or paralegal to obtain the statement. Investigators are an essential part of the litiga-

tion team for many attorneys, and statements taken by them are considered an attorney's work product. *U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975). When using investigators, however, the attorney should be careful to instruct the investigator that he must disclose to persons interviewed that he is employed by an attorney, and also inform the witness of the name of the attorney's client. (Alabama Rules of Professional Conduct Rule 4.3.)

Determining the best way to take a witness statement depends, of course, on who is being interviewed. If an attorney representing a corporation is taking the statement of the

client's current employee, the attorney ordinarily can expect a reasonable measure of cooperation. The primary considerations here are fact-finding, preservation of testimony, and creation of the attorney-client privilege, if applicable. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981), discussed *infra*. If an attorney interviews a person with no relation to any party in the case, it is important to proceed with caution and make



every effort to gain the witness' confidence. In such instances, lawyers should find out as much as possible about the witness before interviewing him and make every effort to obtain a complete account of the relevant facts. As discussed below, if a current or former employee of an adverse party is being interviewed, special considerations come into play.

Taking the Statement

At the outset, the attorney should inform the witness that the purpose of the meeting is to obtain truthful information about what he saw or what he knows about the relevant issue. Usually witness statements are handwritten statements taken outside the office. It is generally preferable to have the witness write the statement herself and sign it at that time. This is to avoid the embarrassment recently visited upon a fellow lawyer at the Jefferson County Courthouse when the lawyer was attempting to impeach a witness with his prior statement. The lawyer read

the statement aloud and asked the witness whether his signature appeared at the bottom of the page. The witness looked over the paper and responded, "Yeah, that's my signature, but you wrote the statement." However, on occasion, having the witness write the statement may not be feasible—things may be rushed, the witness may have very poor handwriting, or he may be just plain uncomfortable with the whole process. In such cases, the lawyer should avoid writing the statement. A paralegal may be used for such purposes, or, if the witness is an important one, use of a court reporter may be appropriate.

Electronically recording the statement also may be a good idea. Formerly, attorneys were prohibited by the Alabama State Bar from recording a person without his or her knowledge, but that rule has been changed. Based on discussions with counsel for the Alabama State Bar, it is the Alabama State Bar's position that an attorney (just like anyone else in Alabama) can tape record a conversation without the knowledge of the person being recorded. There is room for disagreement as to whether this new freedom for attorneys to surreptitiously tape record people is a good idea, but it is important that practitioners know what the rules are right now. Also, consider videotaping the statement, especially where the witness is presenting important visual information or explaining what happened at the scene of an accident.

All witness statements should include the following information:

- (1) The witness's name, address, occupation, date of birth, and telephone number;
- (2) The witness's confirmation that she was at the scene (or a party to the transaction, etc.), and had the ability and opportunity to personally observe the events recounted by her; and
- (3) Any special credentials the witness has relating to the weight of her observations (e.g., co-worker, supervisor, security guard, police officer, firefighter, nurse, etc.).

The witness should give her own account, in her own words, in plain English. Usually, it is best to proceed chronologically, noting the relevant dates and times. Be careful, however, when having the witness put down dates and times, because she could inadvertently make a mistake, thereby opening herself up to impeachment at trial. If the witness is not absolutely certain about dates and times, one way to reduce this risk is to have the witness recite that the dates and times given are approximations only. While it is true that the statement should be detailed, be careful not to go overboard and record *unnecessary* detail. Remember that the more you put in the statement, the more you give your opponent to scrutinize and attack.

If a notary is available, it is always a good idea to have the statement notarized. The attorney should not notarize the statement himself, as this creates a risk that he later could be called as a witness to testify about the circumstances surrounding the execution of the statement by the witness. Consider using a paralegal for this purpose. If a notary is not available, a third-party should sign the statement as a witness to its execution. The witness should initial each page of the statement, and the pages should be numbered "1 of 3," "2 of 3," etc. This prevents the witness from later claiming that a new page has been inserted or omitted. For those of you who favor "legalese," a provision can be inserted to acknowledge that the statement may be used

in a court of law or other legal proceeding. Finally, if there is not a notary available, and there are no witnesses available, have the witness declare "under penalty of perjury" that the information contained in his statement is true and correct.

Special Considerations

Memories fade, so the statement should be taken as soon as possible. The lawyer should do his best to investigate the facts and gather relevant documents *before* interviewing a witness because sometimes it will be helpful to refresh a witness' memory with facts and documents you have obtained elsewhere. It is advisable to move quickly so you can interview third-party witnesses first, before your opponent or his investigator. Also, leave it up to the witness to suggest the best place for the interview. This usually will result in a more comfortable and cooperative witness.

Whenever possible, the lawyer should be the one to take the statement. Investigators are an essential tool in the preparation of a case for trial, and cost-conscious clients may insist that non-attorney staff pound the pavement to obtain witness statements. However, if you contact witnesses and meet them in person to take their statement, you can use the opportunity to judge the witness's demeanor and even establish some measure of trust.

Drafting the Statement

A typed draft of the statement can be prepared from the notes or handwritten statement taken at the interview. Having the statement typed provides an excellent opportunity to correct glaring grammatical errors and make the statement more coherent, if necessary. The statement should be drafted in the first person, rather than using language such as, "The witness observed Mr. Smith run through the red light and strike Ms. Jones's automobile." Of course, if you plan to have a typed statement prepared, the witness should be told about it beforehand. For obvious reasons, the witness must be allowed to read through the typed draft and make any changes she wants. Additionally, make sure you give the witness an opportunity to read through the entire final draft before she signs it.

Discoverability and Admissibility of Witness Statements: The Work Product Doctrine

"The work product doctrine exists to protect the integrity of the adversary system by safeguarding the fruits of an attorney's trial preparation materials from discovery by the opposing party." *Federal Deposit Ins. Corp. v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 605 (M.D.Fla. 1990), (quoting *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371 (D.C.Cir. 1984)). The doctrine recognizes that a lawyer should not be relieved of his obligation to prepare a case by relying on the diligence of opposing counsel, and preserves the adversarial process in an arena of liberal, open discovery rules.

Unless a witness statement has been obtained from a client, the attorney-client privilege ordinarily does not prevent discovery of the statement by an adverse party. Consequently, attorneys generally argue that witness statements are shielded from discovery by the work product doctrine. See *Hickman v. Taylor*, 329 U.S. 495 (1947) (extending qualified immunity from disclosure to written statements of witnesses, as well as notes of

attorneys made during interviews, where such information is developed in preparation for possible litigation). In *Hickman*, the Supreme Court concluded that Fed. R. Civ. P. 33 does not require the production of witness statements prepared by an attorney after a claim arises. With this holding, *Hickman* created the work product doctrine ultimately codified in both the Federal and Alabama Rules of Civil Procedure. Among other things, the doctrine places considerable restrictions on the ability of one party to obtain an adverse party's witness-statement "work product." *Hickman* did not, however, impose any absolute restriction on the discovery of witness statements; a witness statement or other work product is discoverable if the moving party is able to show "substantial need" and "undue hardship." Fed. R. Civ. P. 26(b)(3); Ala. R. Civ. P. 26(b)(3).

In *Upjohn*, 449 U.S. 383, "the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements is considered to be opinion work product." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) (citing *Upjohn*, 449 U.S. at 399-400) (emphasis added), modified on other grounds, 30 F.3d 1347, cert. denied 513 U.S. 1110 (1995). Opinion work product cannot be discovered, even upon a showing of "substantial need" and "undue hardship." *Cox, id.* "Instead, 'opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.'" *Cox, id.* (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)). Thus, at least in the 11th Circuit, attorney notes made in connection with witness interviews are almost never discoverable.

Following the weight of federal authority, the Alabama Supreme Court has explained the work product doctrine as follows:

The work product doctrine is distinguished from the attorney-client privilege in that the latter applies only to communications between client and counsel. The work product doctrine is broader in that it affords protection to all documents and tangible items prepared by or for the attorney of the party from whom discovery is sought "as long as they were prepared in anticipation of litigation or preparation for trial."

Ex parte Great Am. Surplus Lines Ins. Co., 540 So. 2d 1357, 1360 (Ala. 1989) (quoting C. Lyons, Alabama Rules of Civil Procedure Annotated, § 26.6 (2d ed. 1986)) (emphasis added). The court in *Great Am. Surplus Lines* also adopted *Hickman's* articulation of the work product doctrine with regard to witness statements:

We are dealing with an attempt to secure the production of witness statements and mental impressions contained in the file and the mind of the attorney without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice.

Great Am. Surplus Lines, at 1360 (quoting *Hickman*, 329 U.S. at 495).

While at one time there may have been reason to question the authority of *Great American Surplus Lines*, the supreme court has recently reaffirmed, in undeniable terms, that witness statements taken in anticipation of litigation are work product pro-

TECTED FROM DISCOVERY BY ALA. R. CIV. P., RULE 26(b)(3). See *Ex parte Stephens*, 676 So. 2d 1307 (Ala. 1996). In *Stephens* the court faced the question of whether it is a violation of Rule 26(b)(3) to require that defense counsel be present when plaintiff's counsel interviewed policyholders who purchased policies from the same agent as plaintiff. The court found that it did.

In reaching this conclusion, the court noted that Rule 26(b)(3):

is a codification of the holding in *Hickman v. Taylor* [where] the Supreme Court refused to allow discovery of both written and oral statements made by witnesses to defense counsel during informal interviews. The Court reasoned that to allow such discovery would allow opposing counsel to peer into the all-important

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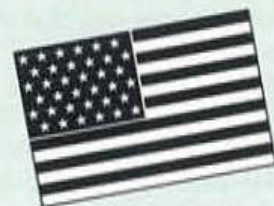
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mental impressions and strategies of defense counsel, and that an attorney's mental impressions of a case lie at the very heart of our justice system.

Stephens, 676 So. 2d at 1311 (citing *Hickman*, 329 U.S. at 510-11). After quoting from *Hickman* at length, the court rejected the defendant's argument that Rule 26(b)(3) only protected tangible items or writings, and therefore could not be extended to cover the actual interview process. In the court's view, "[q]uestions asked by an attorney during a pre-trial interview would seem to exhibit some of the purest forms of mental impressions, conclusions, and formulations of strategy." *Id.* at 1312. Accordingly, such work product was "due to be afforded the same type of protection that is given to 'opinion work product.'" *Id.* at 1313 (adopting, for witness statements, the standard of "near absolute immunity" set forth in the 11th Circuit's opinion in *Cox*). See *Ex parte Howell*, 704 So. 2d 479 (Ala. 1997) (following *Stephens* and reaching same conclusions on nearly identical facts). See also *Fomby v. Popwell*, 695 So. 2d 628 (Ala. Civ. App. 1996) (affirming trial court's refusal to allow discovery of witness statement taken by insurer, despite plaintiff's assertion that no litigation could have been "anticipated" at time of statement, where interactions between plaintiff and insurer were such that insurer could have "reasonably anticipated that a lawsuit was forthcoming").

Accordingly, after *Stephens*, it is clear that witness statements enjoy the same immunity from discovery in Alabama that they are afforded in the Eleventh Circuit.

Discovery of Statements in the Hands of Non-Attorneys

While it appears settled that the work product doctrine covers witness statements obtained by an attorney and in the attorney's possession, it is not as clear whether the work product doctrine affords protection to witness statements in the possession of the witness or a third party. If a witness requests a copy of his or her statement, the attorney must provide the statement to the witness. Ala.R.Civ.P. Rule 26(b)(3); Fed. R. Civ. P. 26(b)(3). A similar situation arises when an attorney's client provides a copy of a witness's statement to a non-party. What happens if opposing counsel subpoenas the statements in the possession of witnesses or non-parties? Thus far, no Alabama case has dealt with this situation.

It could be argued that a witness statement is "work product" only in the hands of the party or attorney who obtained it, or persons aligned with the party such as co-defendants or co-plaintiffs. Accordingly, when the statement is in the possession of a non-party, the work product privilege may not apply. Several cases support or accept such an argument. See John T. Kolinski, *Obtaining Nonparty Witness Statements Directly From the Witness: Legitimate Discovery or Impermissible End Run Around Attorney Work Product?*, 67 Fla. B.J. 16 (1993) (discussing both sides of the argument). However, note that the more recent cases appear to limit the availability of this "end-run" around the privilege to those situations where the party possessing the statements either obtained them, or failed to disclose their existence, in violation of the rules of discovery, the ethical rules or both. See, e.g., *Sea-Roy Corp. v. Sumbell Equip. & Rentals, Inc.*, 172 F.R.D. 179 (M.D.N.C. 1997) (unethically taped conversations); *Gotch v. Enesco Offshore Co.*, 168 F.R.D.

567 (E.D.La. 1996) (statement concealed through incomplete answers to interrogatories); *Ward v. Maritz, Inc.*, 156 F.R.D. 592 (D.N.J. 1994) (unethically taped conversations).

The idea that litigants should not be allowed (under normal circumstances) to use Rule 26(b)(3) to circumvent the work product protections was first set forth, in detail, in *In re Convergent Tech. Second Half 1984 Sec. Litig.*, 122 F.R.D. 555 (N.D.Cal. 1988), where the court, construing federal Rule 26, concluded that the drafters of the Rule never intended to allow discovery of witness statements from witnesses absent Rule 26's required showings of "substantial need" and "undue hardship." *Id.* at 560-64. See also *High Tech Communications, Inc. v. Panasonic Co.*, CIV. A. No. 94-1477, 1995 WL 83614 (E.D.La. Feb. 24, 1995) (finding that interview questionnaires used by the plaintiff to interview a number of witnesses were privileged under the work product doctrine and plaintiff did not waive privilege through limited disclosure to third-parties); *accord Halco Corp. v. W.R. Grace & Co.*, CIV. A. No. 89-1031, 1991 WL 83126 (D.N.J. May 10, 1991).

Because of the lack of guidance both in Alabama and the Eleventh Circuit, at present it appears that attorneys may consider requesting witness statements directly from the witness or from any non-party believed to possess a copy. Nothing in Rule 26 expressly prohibits this discovery, though the work product doctrine arguably protects attorney-produced witness statements regardless of the identity of the party possessing them. Each dispute likely will have to be resolved by the trial judge and there is a reasonable likelihood that most judges will require the moving party to show "substantial need" and "undue hardship."

Regardless of the above, if a witness statement is used to refresh a witness's recollection at trial, the statement can be requested by an opposing party pursuant to Fed. R. Evid. 612 or the corresponding Alabama Rule. Also, a statement may be obtained when it is used by the witness to prepare for a deposition. Alternatively, where the witness is a current or former employee of a client, attorney-client privilege may apply such that the witness may be compelled to keep his or her copy of the statement confidential even though the work product doctrine is found inapplicable.

Admissibility of Witness Statements at Trial

Extrinsic statements, whether oral or written, are considered hearsay if offered to prove the truth of the matter asserted. However, if the declarant is *unavailable* to testify at trial, an exception to the hearsay rule can be found in Rule 804(b) of the Federal Rules of Evidence. Assuming the witness statement was not taken in some prior "proceeding," and therefore admissible under Rule 804(b)(1), the party offering the statement should argue that the statement falls under Rule 804(b)(5)'s "catch all" provision.

Rule 804(b)(5) will allow the statement into evidence if (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the court finds that the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence. If the statement is signed under oath, the court would have reason to believe that it has equivalent circumstantial guarantees of trustworthiness as

other evidence which would pass muster under the hearsay rules. This tactic would not apply in Alabama as the new Alabama evidence rules differ with the federal rules by *eliminating* the "catch all" found in Rule 804(b)(5) of the federal rules.

If the declarant is *available* to testify at trial, Rule 803 of the Federal Rules of Evidence comes into play. This rule provides various exceptions to the hearsay rule such as present sense impression, excited utterance, etc., which may apply in limited circumstances.

The most promising vehicle for admitting a witness statement where the witness is available to testify is Rule 802(5)'s exception for recorded recollections. This rule comes into play where the witness's memory has deteriorated to the point that she cannot testify adequately as to the facts about which she is questioned. If this foundation is laid, the statement may be read to the jury, though it cannot be admitted as an exhibit unless offered by an adverse party. The new Alabama Rules of Evidence are consistent with the Federal rules on this point. C. Gamble, *McElroy's Alabama Evidence* § 116.03 (5th ed. 1996).

Limitations on the Efforts of Opposing Counsel to Take Witness Statements of a Client's Employees: The Alabama Rules of Professional Conduct

The analysis begins with Alabama Rule of Professional Conduct 4.2, entitled "Communication with Person Represented by Counsel":

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

The Comment to Rule 4.2 provides additional guidance:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Another Alabama Rule is relevant to this discussion:

3.4(d) Fairness to Opposing Party and Counsel

A lawyer shall not ... request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment to Rule 3.4(d)

Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client.

Current Employees

Ex parte contacts with corporate employees pose a serious threat to the attorney-client privilege because the employee generally is not knowledgeable about the privilege and may not share the employer's interest in preserving it. To protect the employer against possible overreaching or unfair interrogation by opposing counsel, especially where employee statements may be imputed to the employer, counsel for the employer must be present.

Under the Alabama Rules and recent cases, opposing counsel cannot interview, or even contact, current employees in the "management" category, without permission to do so. This category includes employees who have managerial responsibilities, or whose acts or omissions in connection with the matter in litigation may be imputed to the corporation for purposes of civil or criminal liability, or whose statements may be an admission on the part of the corporation. See *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306 (N.D.Iowa 1996)(applying managerial group test); *Browning v. AT&T Paradyne*, 838 F.Supp. 1564 (M.D. Fla. 1993)(same); *State v. O'Malley*, 888 S.W.2d 760 (Mo.Ct.App. 1994)(same).

The group of employees that may not be contacted without permission is essentially identical to that group of employees covered by the attorney-client privilege under the Supreme Court's decision in *Upjohn*, 449 U.S. 383. There the Court held that communications between corporate counsel and employees of the corporation, for the purpose of determining potential civil or criminal liability of the corporation, arose within the context of the attorney-client relationship and were therefore protected by that privilege.

ABA Formal Opinion 91-359 identifies the current employees covered by the privilege:

The inquiry as to present employees thus becomes whether the employee (a) has "a managerial responsibility" on behalf of the employer-corporation or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be *imputed* to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation.

Attorneys may contact current employees of an adverse party which do not fall within this definition without implicating either the ethical rules discussed above or the attorney-client privilege.

Contacts with Former Employees

Although courts around the country have split on the question of whether former employees may be contacted by opposing counsel, there is some authority in the Eleventh Circuit to support the argument that such communications are prohibited. *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F.Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995) ("ex parte contact should be barred to prevent disclosure of any inadvertent confidential communica-

tions"). *Rentclub* is significant because the Eleventh Circuit affirmed a restriction on contacts with *all* former employees. The court made no distinction between managerial and rank-and-file employees, which, as noted above, is an integral part of the law regarding contacts with current employees.

However, the viability of the rule barring *all* contact with former employees in *all* situations was essentially rendered nil in *Browning*, 838 F. Supp. 1564, where the very judge that wrote the district court's opinion in *Rentclub* "explained" that case as standing for the proposition that "this Court has and continues to hold that a "party" for purposes of [Rule 4.2] includes former managerial employees, if their statements . . . could be admissions against the corporation or . . . their actions could be imputed to the corporation." *Id.* at 1567. This also has been the position taken in a number of recent decisions addressing the issue of ex parte contact with former employees. See, e.g., *United States v. Beiersdorf-Jobst, Inc.*, 980 F. Supp. 257 (N.D. Ohio 1997); *United States v. Housing Auth. of the Town of Milford*, 179 F.R.D. 69 (D.Conn. 1997); *Barron Bldrs & Mgmt Co. v. J&A Air Conditioning & Refrigeration, Inc.*, CIV. A. No. 96-2921, 1997 WL 685352 (E.D.La. Oct. 31, 1997); *Terra Int'l, Inc.*, 913 F. Supp. at 1314-16.

On the other hand, there is also substantial authority for the position that the ethical rules regarding ex parte contact do not apply to former employees, thus, the ability of attorneys to interview such former employees is either unlimited or limited only by applicable privileges. See *Concerned Parents v. Housing Auth. of St. Petersburg*, 934 F. Supp. 406 (M.D.Fla. 1996) (declining to follow *Rentclub* and holding that contact with a former employee was only prohibited where the employee was represented by the same attorney representing the employer); *Aiken v. Business Indus. Health Group, Inc.*, 885 F. Supp. 1474 (D.Kan. 1995) (finding that Rule 4.2 has no application to former employees); *Reynoso v. Greynolds Park Manor, Inc.*, 659 So. 2d 1156 (Fla. Dist. Ct. App. 1995) (finding that Rule 4.2 has no application to former employees); *Continental Ins. Co. v. Superior Ct.*, 37 Cal. Rptr. 2d 843 (Cal. Ct. App. 1995) (finding former employees not within rule prohibiting ex parte contact); *In re: Domestic Air Trans. Anti-Trust Litig.*, 141 F.R.D. 556 (N.D. Ga. 1992) (holding that counsel has substantial liberty to contact and interview former employees of opposing parties); ABA Formal Opinion 91-359: *Contact with Former Employee of Adverse Corporate Party* (finding that Rule 4.2 does not apply to former employees). But see *United States v. Florida Cities Water Co.*, CIV. A. No. 93-281-CIV-FTM-21, 1995 WL 340980 (M.D. Fla. Apr. 26, 1995) (following *Rentclub*, however, party was only prohibited from contacting former employees outside the presence of opposing counsel).

With no real consensus on what is, and is not, permissible when it comes to contacting an opposing party's former employees, attorneys take a certain risk in doing so without disclosure to, and guidance from, the court involved. See *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) (disqualifying plaintiff's counsel for contacting defendant's former general counsel ex parte) *aff'd* 141 F.3d 1162 (4th Cir. 1998). This risk is especially high in states such as Alabama where the courts have yet to offer any real guidance on the matter. However, bear in mind that, at least for those courts that find such ex parte contact objectionable, the primary concern is that such contact does or will result in the disclo-

sure of privileged or confidential information, or both. The court in *Browning v. AT&T Paradyne* offered a common-sense solution to this particular problem.

The *Browning* court wrote that the proper way to protect privileged and confidential information in the hands of former employees was for the court to fashion an appropriate order governing such contact rather than barring it outright. *Browning*, at 1567. In *Lange v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995) the court attempted to fashion an "appropriate order" governing contacts with former employees of opposing parties by establishing some guidelines for such contacts. The court stated the following:

Therefore, the Court determines that [counsel] may initiate *ex parte* communications with former employees of [an opposing party] under any applicable ethical and procedural rules and the following guidelines:

- (1) Upon contacting any former employee, [counsel] shall immediately identify herself as the attorney representing [an opposing party] and specify the purpose of the contact.
- (2) [Counsel] shall ascertain whether the former employee is associated with an adverse party or is represented by counsel. If so, the contact must terminate immediately.
- (3) [Counsel] shall advise the former employee that:
 - (a) participation in the interview is not mandatory and that;
 - (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for the former employer. Counsel must immediately terminate the interview of the former employee if she or he does not wish to participate.
- (4) [Counsel] shall advise the former employee to avoid disclosure of privileged materials. In the course of the interview the [counsel] shall not attempt to solicit privileged information and shall terminate the conversation should it appear that the interviewee may reveal privileged matters.
- (5) The [interviewing party] shall create and preserve a list of all former employees contacted and the dates of contact and shall maintain and preserve any and all statements or notes resulting from such contact whether by phone or in person. [Adverse parties] are entitled to review the list and notes within seven days of demand subject to the protections of work product.

Id. at 1148-49.

With the possible exception of the fifth one, voluntary adoption and adherence to these guidelines, whether or not litigation is already pending, would undoubtedly go a very long way toward preventing ethical problems with regard to any contacts with former employees. Of course, any self-imposed restrictions should be objectively verifiable.

At present, Alabama places few, if any, restrictions on contacts with the former employees of an opposing party. Indeed, the Alabama Supreme Court's recent decision in *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363 (Ala. 1996), indicates the court may not apply Rule 4.2, or any other ethical rule, to block contact with *former* employees. While the *Gaylard* decision dealt with whether an attorney had acted improperly by contacting a *current* employee of an adverse party, the court's reasoning sheds some light on how

the court might view contact with former employees.

The attorney in question in *Gaylard* had been hired by an individual injured by the employee of a home health care agency. Prior to filing suit, the attorney contacted the employee and conducted an interview regarding the injury. The interview was taped without the employee's knowledge. The court found the attorney's actions to be unobjectionable based on the facts that: (1) neither the employee interviewed nor her employer were "parties" within the meaning of Rule 4.2 at the time the interview took place because no suit had been filed; and (2), as the employer had yet to retain counsel in this particular matter, it could not be shown that the employee was a person the attorney "knew" to be represented by counsel. *Id.* at 367. What is significant about this decision is the court's emphasis on the requirement that the person contacted be a "party." The court's opinion endorses a very narrow definition of who is a "party" and indicates that the term does not include even all current employees, much less former ones.

As an additional note of interest, the Court also held that evidence obtained in violation of an ethical rule was still admissible, stating that "the sole remedy for the violation of an ethical rule is the imposition of disciplinary measures. The rules of professional conduct... do not play a role in determining the admissibility of evidence." *Id.* Therefore, even a flagrant violation of these rules would not affect the admissibility of evidence at the trial. However, such a violation may well result in the violating attorney being disqualified from continuing in that particular representation. *See Ex parte Lammon*, 688 So. 2d 836 (Ala. Civ. App. 1996) (refusing to overturn trial court's order imposing sanction of disqualification against attorney who violated Rule 4.2 by making ex parte contact with opposing party specifically to discuss the case). Accordingly, it would be risky, at best, to interpret the *Gaylard* liberally, or even literally. Until Alabama courts offer more guidance on these issues, attorneys would be wise to consider *Gaylard* as being limited to the facts of that case.

Guidelines for Communications with Current and Former Employees

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Alabama Rules of Professional Conduct Rule 4.3.

Even where contacting a current or former employee is otherwise permitted, Rule 4.3 requires the lawyer contacting that

person to make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's current or former employer is an adverse party. *ABA Formal Opinion 91-359* (March 1991). Here again, voluntarily following the guidelines set out in *Lange* should prevent any problems.

Sanctions for Failure to Conduct Ex Parte Interviews Properly

Failure to conduct ex parte interviews in accordance with the rules in a particular jurisdiction (other than Alabama) may result in having the information obtained in the interview excluded from evidence, *Garrett v. National R.R. Passenger Corp.*, 1990 WL 122911 (E.D.Pa. Aug. 14, 1990); *Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc.*, 440 F.2d 1216 (7th Cir. 1971), the disqualification of the attorney in the litigation, *Zachair, Ltd.*, 965 F. Supp. 741; *American Protection Ins. Co. v. MGM Grand Hotel*, 2 Law. Man. Prof. Conduct 89 (D. Nev. 1986); *Mills Land and Water v. Golden West Ref. Co.*, 230 Cal. Rptr. 461 (Cal. App. 1986), or other appropriate sanctions, *see* Fed. R. Civ. P. Rule 11. As noted above, Alabama does not allow the exclusion of evidence solely because it was obtained in violation of an ethical rule, though disqualification of counsel remains a possibility as does a disciplinary proceeding before the state bar.

Conclusion

Witness statements are an inexpensive and highly versatile way to lock in and preserve witness testimony at the earliest stages of the litigation process. Additionally, as long as the statements are taken "in anticipation of litigation" there is little chance that an adverse party will be able to obtain them through discovery. However, where the witness is a current or former employee of an adverse party, the ability to take a witness statement without the consent of opposing counsel is limited and care should be exercised to ensure that the applicable ethical standards are not violated. ■

Endnotes

1. *See Assured Investors Life Ins. Co. v. National Union Assoc.*, 362 So. 2d 228, 231 (1978)(finding witness statement was not work product, regardless of the manner in which it was prepared). *But see, Sims v. Knollwood Park Hosp.*, 511 So. 2d 154 (Ala. 1987)(reconciling *Assured Investors* with great weight of Alabama authority on the basis that *Assured Investors* was decided on a finding that the statement at issue was not taken in anticipation of litigation, not on a finding that the statement was not work product). *See also Osborne v. Cobb*, 410 So. 2d 396, 399 (Ala. 1982)(indicating that witness statement was not discoverable); *Ex parte State Farm Mut. Auto. Ins. Co.*, 386 So. 2d 1133 (Ala. 1980)(witness statements obtained by insurance company's investigator held to constitute work product).



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Notice

The **Alabama Supreme Court Commission on Dispute Resolution**, established in 1994 by the Supreme Court of Alabama to promote mediation and other alternative ways to settle disputes in the state court system, communities, administrative agencies and schools, will be awarding mini-grants for ADR programs.

Grants applications must be received by the Commission by October 1 of each year. Currently, the Commission is accepting applications until October 1, 1999 for the grant cycle 2000.

For grant eligibility criteria and grant applications, please call the Alabama Center for Dispute Resolution at (334) 269-0409.

CLE Opportunities

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

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YOUNG LAWYERS' SECTION

By Gordon G. Armstrong, III, YLS President

Sandestin!

The Young Lawyers' Section of the Alabama State Bar is, once again, pleased to sponsor its annual seminar to be held at the Sandestin beach resort in Sandestin, Florida. **If you have not already made arrangements, the seminar has been scheduled for the week-end of May 21-23, 1999.**

This year's seminar is sure to be as informative and entertaining as in the past. If you have never attended, just ask someone who has and I bet they will tell you that the speakers are top-notch and provide valuable and useful insight into current topics. This year will be no different.

Although the final slate of speakers has not been confirmed as of the time this article was due for publication, our topics for discussion will include Alabama evidence, mediation and arbitration, implied warranty of habitability and associated issues, recent developments in medical malpractice cases, estate planning tips for the young lawyer, Y2K issues for the young lawyer, and a discussion by **Sid Jackson** on his recent appearance before the United States Supreme Court and their decision as to whether the Daubert factors apply to experienced based experts. It is our goal to select useful and current topics to be presented by speakers representing all facets of the bar.

We have also planned enjoyable social events to allow the attendees to learn and relax in the same weekend. As usual, a golf tournament has been scheduled for Friday afternoon immediately following the morning program. Although participation in the golf tournament is still limited, the popularity of this event has allowed us to convince Sandestin to increase the number of golfers to 80, broken down into 20 four-golfer teams. Participation will be on a first-come, first-serve basis.

If you don't feel like golfing, just take solace that you will be at the Sandestin beach resort. There will be afternoon beach parties on Friday and Saturday. As usual, our seminar sponsors are kind enough to provide beach towels, huggers, cups, and appropriate beverages for an afternoon in the sun (I hope). Although the weather is as unpredictable as my two-year-old son's behavior, we have been blessed with beautiful sunshine and warm temperatures over the last several years. I have also been assured of another beautiful weekend this year by a local meteorologist whose forecast accuracy is rumored to be better than Willard Scott's. As well, Sandestin will provide live entertainment by the pool if you decide to tap your toes.

There will also be evening social activities by the pool with live entertainment, food and beverages. All of the extracurricular social activities are good places to catch up with old classmates from law school, make new friends, and exchange experiences common to the new practitioner. I certainly believe that the interaction at the social activities is as important to the growth of the young lawyer as the actual CLE.

The registration cost of the seminar is competitive with other CLE opportunities but with one significant difference. If you have been practicing less than two years, then the registration cost is only \$125. Obviously, it is our goal for this seminar to be attractive and affordable for the new lawyer. As well, Sandestin will be providing reduced room rates. Please look for a special mail-out from the young lawyers with more details.

Thanks go to several lawyers on the YLS Executive Committee for the time and effort they have put into putting together this year's program: **Todd Strohmeyer, Stoney Chavers and Sarah Stewart** of Mobile; **Michael Mulvaney** of

Birmingham; and **Lisa Van Wagner** of Montgomery. Each of these lawyers has willingly devoted a significant amount of time, and sometimes their own resources, to making our seminar a success. The Alabama State Bar can be proud of these young lawyers whose thankless efforts are motivated solely by a desire to contribute to the fellow members of our organization.

For more information about the seminar, call Todd Strohmeyer at (334) 432-5521, Stoney Chavers at (334) 433-8100, or me at (334) 434-6428.

I look forward to seeing you in Sandestin. ■

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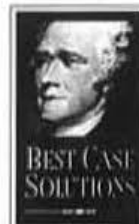
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DISCIPLINARY NOTICE

Notice

Notice is hereby given to **Whitmer A. Thomas** of Birmingham, Alabama that he must respond to the charges in disciplinary files ASB No. 98-131(A), et al. within 30 days from the date of this publication, March 1999. Failure to respond shall result in further action by the Office of General Counsel and/or a default to be entered against him. [ASB No. 98-131(A)]

Reinstatements

- On November 5, 1998, Gulf Shores lawyer **Jim Clay Fincher** was reinstated on the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [Pet. No. 98-010]
- Birmingham lawyer **Robert McKim Norris** was reinstated to the practice of law in the State of Alabama by order of Panel I of the Disciplinary Board, effective November 16, 1998. [Pet. No. 98-11]
- By order of the Disciplinary Commission dated August 31, 1998, **David Garrett Hooper**, a Montgomery attorney, was suspended from the practice of law in the State of Alabama for noncompliance with the Client Security Fund Assessment Rules of the Alabama State Bar. Said suspension was effective September 9, 1998, and, by order of the Disciplinary Commission dated September 18, 1998, David Garrett Hooper came into compliance with these said Rules and was reinstated to the practice of law effective September 17, 1998.

Disability

- Mobile attorney **Peter Austin Bush** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Professional Procedure, effective December 4, 1998. [Rule 27(c); Pet. No. 98-02]
- Birmingham attorney **Calvin Seely Rockefeller, III** was transferred to disability inactive status by order of the Disciplinary Board of the Alabama State Bar effective January 8, 1999. [Rule 27(c); Pet. No. 99-01]

Suspensions

- On January 20, 1999, Birmingham lawyer **David Elliott Hodges** was suspended by the Alabama Supreme Court for a period of 45 days. Hodges agreed to a 45-day suspension and two years' probation following his suspension. The suspen-

sion was ordered in conjunction with an agreement between Hodges and the Alabama State Bar in resolution of five pending disciplinary cases. The five cases all involved willful neglect and lack of communication. Four cases were instances in which Hodges failed to complete work on uncontested divorces and bankruptcies. After the clients confronted Hodges about the problems, he would give the client assurances which would not be met. In one case, Hodges missed a statute of limitations in an automobile accident case. Hodges notified his client that he had missed the statute of limitations, and later signed a promissory note for \$25,000 in an effort to make his client whole. After a couple of payments, Hodges defaulted. As part of his plea agreement with the Alabama State Bar, Hodges agreed to confess judgment, and make arrangements for satisfactory payment. [ASB No. 95-133(A), et. al.]

- By order of the Disciplinary Commission dated November 25, 1998, **Kenneth H. Millican**, a Hamilton, Alabama attorney, was 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. Said suspension was effective December 7, 1998. By order of the Disciplinary Commission dated January 11, 1999, Millican came into compliance with these said rules and was reinstated to the practice of law effective January 11, 1999. [CLE No. 98-27]
- Effective September 28, 1998, attorney **Richard Edward Jesmonth** of Pensacola, Florida has been suspended from the practice of law in the State of Alabama for noncompliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 98-11]
- Effective September 25, 1998, Birmingham attorney **Tilton Myers Gideon** has been suspended from the practice of law in the State of Alabama for noncompliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 98-32]
- Effective November 4, 1998, Mobile attorney **Charles Edward Pearce, Jr.** has been suspended from the practice of law in the State of Alabama for noncompliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 98-36]
- Opp attorney **Larry Randall Grissett** was suspended from the practice of law in the State of Alabama for a period of 91 days. Said suspension to be held in abeyance pending successful completion of a two-year probationary period conditioned on him serving a 30-day suspension from the practice of law effective at 12:01 a.m., December 1, 1998, based upon his plea of guilty to violating Rule 1.8(b), Alabama Rules of Professional Conduct. The respondent attorney admitted to engaging in sexual relations with a present client. Other con-

ditions of probation were ordered. [ASB No. 95-189(A)]

- Effective November 27, 1998, attorney **Omar Mark Zamora** of Atlanta, Georgia has been suspended from the practice of law in the State of Alabama for noncompliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE No. 98-25]

Public Reprimands

- Bessemer lawyer **Richard Larry McClendon** received a public reprimand with general publication for having violated Rules 1.3, 1.4 and 8.4(g), Alabama Rules of Professional Conduct. In January 1993, McClendon was retained by a client to represent her in a worker's compensation action. Although McClendon filed suit on behalf of his client, he took no action on her behalf and failed to communicate with her regarding the status of the case. Based upon McClendon's inaction, his client's case was eventually dismissed for failure to respond to court-ordered discovery. During this same time, McClendon agreed to defend his client in a matter involving a motor vehicle accident. Notwithstanding his agreement to represent her, McClendon failed to take any action on her behalf which resulted in a default judgment being taken against her. [ASB No. 97-308(A)]
- Birmingham attorney **Emily Cuby Eberhardt** received a public reprimand

without general publication for willfully neglecting a legal matter entrusted to her in violation of Rule 1.3, Alabama Rules of Professional Conduct, and for failing to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b), Alabama Rules of Professional Conduct. Eberhardt was retained by a client in May 1996 to represent her in a dispute with a local contractor. After the initial conference, the client had a difficult time contacting Eberhardt and obtaining information regarding the status of the matter. Based upon these difficulties, and the fact that Eberhardt did little or no work in the matter, the client terminated Eberhardt's services. Thereafter, Eberhardt failed to account for work performed or to refund any unearned portion of the retainer that had been paid by the client. The client then filed a complaint with the Alabama State Bar regarding the matter. During the investigation of the complaint, Eberhardt failed or refused to numerous requests for information from the Office of General Counsel as well as the local grievance committee of the Birmingham Bar

Association. Eventually, Eberhardt did communicate with the Office of General Counsel regarding the matter and, in February 1998, refunded the unearned portion of the retainer to the client. [ASB No. 96-307-A]

Emily Cuby Eberhardt also received a public reprimand without general publication for failing to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b), Alabama Rules of Professional Conduct. In May 1996, Eberhardt was retained to represent a client in matters involving a dispute with two local contractors regarding work performed on her home. Eberhardt did little or no work in that matter and failed or refused to communicate with the client regarding this matter. Therefore, the client filed a grievance with the Alabama State Bar in December 1996. Eberhardt failed or refused to respond to lawful demands for information from the Office of General Counsel, as well as to the Birmingham Bar Association Local Grievance Committee. [ASB No. 97-65(A)] ■

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State Bar Names New MCLE and VLP Directors

The Alabama State Bar recently named Kim Oliver Ward director of the Mandatory Continuing Legal Education Program and Linda L. Lund director of the Volunteer Lawyers Program. Ms. Ward had served as the VLP director since 1995.

Ms. Ward received her undergraduate degree from the University of Miami and her law degree from the University of Alabama School of Law. She previously worked as a national bank and national trust examiner, as well as deputy attorney general, State of Alabama Office of Attorney General, criminal appeals division.

Ms. Lund was previously employed as senior staff attorney for the Dothan Regional Office of Legal Services of Alabama. She is a graduate of Auburn University and received her law degree from the University of Alabama School of Law in 1989.



Linda L. Lund



Kim Oliver Ward

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 1999 to assume the presidency of the bar in July 2000. Any candidate must be a member in good standing on March 1, 1999. 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, 1999. 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 1999 *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 13, 1999.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4; 10th, place no. 7; 10th, Bessemer Cut-off; 11th; 13th, place no. 1; 15th, place no. 5; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; and 40th. 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, 1999 and vacancies certified by the secretary on March 15, 1999.

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 30, 1999).

Ballots will be prepared and mailed to members between May 15 and June 1, 1999. Ballots must be voted and returned by 5 p.m. on the second Tuesday in June (June 8, 1999) to state bar headquarters.

IMPORTANT!

Licenses/Special Membership Dues for 1998-99

All licenses to practice law, as well as special memberships, are sold through the Alabama State Bar headquarters.

In mid-September, a dual invoice to be used by both annual license holders and special members, was mailed to every lawyer currently in good standing with the bar.

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1998 and September 30, 1999, please be sure that you purchase an occupational license. Licenses are \$250 for the 1998-99 bar year and payment should have been RECEIVED between October 1 and October 31 in order to avoid an automatic 15 percent penalty (\$37.50). Second notices will NOT be sent!

An attorney not engaged in the private practice of law in Alabama may pay the special membership fee of \$125 to be considered a member in good standing.

Upon receipt of payment, those who purchase a license will be mailed a license and a wallet-size license for identification purposes. Those electing special membership will be sent a wallet-size ID card for both identification and receipt purposes. If you did not receive an invoice, please notify Diane Weldon, membership services director, at 800-354-6154 (in-state WATS) or (334) 269-1515, ext. 136, IMMEDIATELY!

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RECENT DECISIONS

By William M. Bowen, Jr., David B. Byrne, Jr., Rachel Sanders-Cochran and Wilbur G. Silberman

Recent Decisions of the United States Supreme Court—Criminal

Traffic stops and *Terry V. Ohio*

Knowles v. Iowa, No. 97-7597, ___ U.S. ___ (December 8, 1998). The Supreme Court, in *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), held that an investigative detention must be temporary and last no longer than necessary to affect the purpose of the stop. In *Knowles*, Chief Justice Rehnquist, writing for the majority, found that a "routine traffic stop, on the other hand, is a relatively brief encounter and 'is more analogous to a so-called *Terry* stop than to a formal arrest.'"

Patrick Knowles was stopped in Newton, Iowa after being clocked driving 43 mph where the speed limit was 25 mph. The police officer issued a citation to Knowles, although under Iowa law, he might have arrested him. The officer then conducted a full search of the car, and under the driver's seat, he found a bag of marijuana and a "pot pipe." Knowles was then arrested and charged with a violation of state law dealing with controlled substances.

Before trial, Knowles moved to suppress the evidence arguing that the search could not be sustained under the "search incident to arrest" exception recognized in *United States v. Robinson*, 414 U.S. 218 (1973) because he had not been placed under arrest. The trial court denied the motion to suppress and found Knowles guilty. The Supreme Court of Iowa, sitting *en banc*, affirmed by a divided court. The Iowa Supreme Court upheld the constitutionality of the search under a bright-line "search incident to citation" exception to the Fourth

Amendment's warrant requirement, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest. The Supreme Court granted *certiorari* and reversed.

Chief Justice Rehnquist found that the state's justification for authority to search incident to arrest, *i.e.*, the need to discover and preserve evidence, missed the mark. The Chief Justice wrote, "... Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."

In the case *sub judice*, the Supreme Court refused to extend the bright-line rule of search incident to arrest to a situation where concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all.

The Fourth Amendment and the casual visitor

Minnesota v. Carter, No. 97-1147, ___ U.S. ___ (December 1, 1998).

Does a defendant, who was visiting in another person's apartment for a short time, have a legitimate expectation of privacy in order to claim the protection of the Fourth Amendment? A sharply divided Supreme Court answered no.

A Minnesota police officer looked in an apartment window through a gap in the closed blinds and observed Carter and Johns and the apartment's lessee bagging cocaine. After the defendants were arrested, they moved to suppress the cocaine and other evidence obtained from the apartment and their car, arguing that the officer's initial observation was an unreasonable search in violation of the Fourth Amendment. The defendants were convicted of state drug offenses. The Minnesota trial court held that they were not overnight social guests and were not entitled to the Fourth Amendment's pro-

tection. The Minnesota Court of Appeals held that Carter did not have "standing" to object to the officer's actions because the evidence indicated that he used the apartment for a business purpose—to package drugs—and separately affirmed Johns' conviction without addressing the "standing" issue. The Minnesota Supreme Court reversed the intermediate appellate court and held that the defendants had standing to claim the Fourth Amendment's protection because they had a legitimate expectation of privacy in the invaded place, and further, that the officer's observation constituted an unreasonable search.

The Supreme Court reversed the judgment of the Minnesota Supreme Court and remanded.

Chief Justice Rehnquist, writing for a sharply divided Court, held that any search that may have occurred did not violate Carter's Fourth Amendment rights. The Chief Justice reasoned that, "... to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable ..." The Fourth Amendment protects persons against unreasonable searches of their "persons and houses" and thus indicates that it is a personal right that must be



William M. Bowen, Jr.

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January 1977 (at age 29, was the youngest appellate judge in the nation). After serving three full terms, Bowen retired in January 1995. He practices with the Birmingham firm of White, Dunn & Booker. Bowen has received numerous awards and has served as a frequent lecturer and instructor. He covers the criminal decisions.

invoked by an individual. The extent to which the Amendment protects people may depend upon where those people are. While an overnight guest may have a legitimate expectation of privacy in someone else's home, see, *Minnesota v. Olson*, 495 U.S. 91, 98, 99, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), one who is merely present with the consent of the householder may not. See, *Jones v. United States*, 362 U.S. 257, 259, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

The Chief Justice went on to reason that an expectation of privacy in commercial property is different from and less than a similar expectation in a home. See, *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). In this case, the purely commercial nature of the transactions, the relatively short period of time the defendants were on the premises, and the lack of any previous connection between them and the householder, lead to the conclusion that their situation is closer to that of one simply permitted on the premises. Thus, any search which may have occurred did not violate their Fourth Amendment rights. Because Carter had no legitimate expectation of privacy, the Court need not decide whether the officer's observations constituted a "search" within the meaning of the Fourth Amendment.

Recent Decisions of the Supreme Court of Alabama—Criminal

This installment includes a number of significant opinions by the Alabama Supreme Court. Without commenting on the substantive merits of the various decisions, the court is showing a healthy trend to review "settled" principles in the area of criminal law.

Instruction insufficient to cure prejudicial question

Ex parte Sparks [v. City of Weaver], Ala. S. Ct., 1970812, 11/20/98 (Almon). This case is so significant it was report-

ed in BNA's *Criminal Law Reporter*. (See vol. 64 no. 10, p. 178, 12/9/98). Sparks was charged with DUI and running a stop sign. On cross-examination, the city's prosecutor asked Sparks if he recalled having been convicted of DUI on a previous occasion. The trial judge denied defense counsel's motion for a mistrial after giving the jury a corrective instruction and after no jurors indicated that they could not disregard the prosecutor's improper question. The court of criminal appeals affirmed without published opinion.

Finding in a footnote that the prosecutor's question was indeed improper, the supreme court stated that "the only question to be resolved is whether the prosecutor's improper question was so prejudicial to Spark's case that it rendered the circuit court's corrective jury instruction insufficient to ensure a fair trial." The city relied on the oft-cited general rule that a corrective instruction by the trial court is ordinarily sufficient to eradicate any prejudice caused by an improper question. The supreme court responded with an unusual disregard of precedent:

"However, notwithstanding the cases cited by the City, this Court cannot condone a prosecutor's attempt to elicit testimony about a defendant's prior convictions in violation of the general exclusionary rule against such evidence. ... Moreover, reported cases involving such improper questioning—and a subsequent denial of the defendant's motion for a mistrial—are all too common, as demonstrated by the number of such cases cited in the city's brief and in the court of criminal appeals' memorandum affirming Spark's conviction. Consequently, it appears to this Court that the current approach to these situations is inadequate insofar as it allows prosecutors a 'free shot' at asking an improper question about a defendant's prior criminal record while providing little means to protect the defendant's right to a fair trial other than a mere corrective instruction to jurors, which is administered only after the defendant has been exposed to the prejudice caused by the prosecutor's questioning.

"Given the highly prejudicial nature of evidence of a defendant's prior arrests and convictions, especially when the defendant is questioned about having

previously been convicted of the same offense for which he is then being tried, it is difficult to expect that a jury could, even in all earnestness, completely disregard the prosecutor's improper questioning in reaching its verdict. **There are some errors that simply cannot be corrected with a mere corrective instruction to the jury...**" (bold added)

Chief Justice Hooper and Justices Shores, Kennedy and Lyons concurred in this opinion by Justice Almon. Justice Cook concurred specially. He noted that the question in this case was particularly prejudicial. However, he also noted that trial judges commonly cure improper prejudicial questions by a query to the jurors and his concurrence there was no indication that this procedure for curing error was no longer a proper means for addressing this problem. Justice See concurred in the result. He noted that "[a]lthough generally a trial court's immediate instruction to the jury to disregard an improper prosecutorial question will cure any potential prejudice, ... the question objected to in this case was so prejudicial that the prejudice could not be erased by an instruction." Justice Maddox dissented without opinion.

Insufficient circumstantial evidence

Ex parte Mitchell, 1961973, 10/23/98. This case involved a youthful offender "conviction" for theft of property in the second degree. The defendant was accused of stealing nitrous oxide tanks from a hospital. However, the tanks were never found. The defendant was admitted to the emergency room on the early morning of August 1, 1995 with a severe injury to his hand. He had been seen in the area of the tanks on the night of June 28th. Although the opinion does not state the exact date, a blood trail was discovered (apparently on August 1) leading



David B. Byrne, Jr.
David B. Byrne, Jr., is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Beiser and covers the criminal decisions.

from the area of the tanks to the emergency room. However, there was no testimony that it was the defendant's blood or that the defendant was near the tanks on the morning of August 1. The court held that "[c]ircumstantial evidence is sufficient when it is so strong and cogent as to indicate the guilt of the defendant to a moral certainty. That evidence should also exclude any inference consistent with the defendant's innocence."

Jeopardy

Ex parte Gentry, Ala. S. Ct. 1970961, 1/8/99. The court held that a reversal based on insufficient evidence bars a retrial for the same offense. Gentry's conviction for capital murder was reversed after the Alabama Supreme Court found the evidence insufficient to prove the burglary portion of the charge. The court held that he cannot be retried for capital murder even though the court admitted that their decision reversing Gentry's conviction was "erroneous" and "incorrectly states the law [of an unlawful remaining in the residence with the intent to commit a crime] of this State relating to the sufficiency of the evidence to prove burglary." See *Ex parte Davis*, below.

In *Lindley v. State*, Ala. S. Ct. 1961992, 9/1/98, the only evidence connecting Lindley to the crimes charged was a statement made to an investigating officer by Lindley's friend. At trial the friend testified that he was intoxicated when he made the statement and did not remember making it. The court found that the trial court erroneously admitted hearsay evidence of the friend's prior inconsistent statement as substantive evidence of Lindley's guilty. "The total evidence offered by the state and admitted by the trial court, however, whether erroneously admitted as substantive evidence or not, was sufficient to sustain a guilty verdict. Thus, the Double Jeopardy Clause does not preclude the state from retrying Lindley. *** The state should have the opportunity to submit *other evidence* of Lindley's guilty." (emphasis added).

Justice Almon dissented on the ground that in remanding for a new trial so that the State will have an opportunity to find new evidence, the majority allows the State "two bites at the 'same apple'"—just what the Double Jeopardy Clause was designed to prevent.

Burglary

Ex parte Davis, Ala. S. Ct. 1961993, 1/8/99. The court, in a per curiam opinion, reversed its prior holding in *Ex parte Gentry*, 689 So.2d 916 (Ala. 1996). Under § 13A-7-1(4), the state is "no longer required to prove that the defendant broke and entered the premises. Instead, the strictures of that element have been replaced with the general requirement of a trespass on premises through an unlawful entry or an unlawful remaining." "[T]he evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining. *** The evidence of a struggle giving rise to the inference of an unlawful remaining is supplied by Davis's choice to kill by a less-than-instantaneous technique of strangulation and by his use of three nonfatal stab wounds to the victim's lower back." Justices Almon, Shores, Kennedy and Cook dissented. Rejecting the construction of "remaining unlawfully" adopted by the majority, the dissenters argued that such a construction "has the potential to make almost ever murder committed indoors a capital murder." The majority's inference of the victim's implied revocation of privilege to remain on the premises results in the defendant being "'guessed' into a capital conviction."

Recent Decisions of the Alabama Supreme Court—Civil

Appellate procedure; third-party plaintiff is required to file an appeal in order to protect its claim of derivative liability

Ex parte P & H Construction Co., Inc. (In re *Barber v. State of Alabama*), 1998 WL 771733 (Ala., November 6, 1998). Plaintiffs sued a contractor alleging negligence or wantonness in connection with the contractor's work on bridge pilings. The contractor then filed a third-party complaint seeking contractual indemnity against the sub-con-

tractor that had performed the pile-driving operation. The trial court granted the contractor summary judgment on all claims asserted in the complaint and granted the sub-contractor summary judgment on the third-party complaint. The plaintiffs appealed the summary judgment entered against them.

On appeal, the Alabama Supreme Court reversed in part the trial court's summary judgment, finding sufficient evidence to state a jury question as to plaintiff's claims of negligence and wantonness against the contractor. However, the opinion on appeal did not address the summary judgment entered against the contractor on its third-party complaint as the contractor did not file an appeal from that judgment. After remand, the sub-contractor filed a motion to declare it a non-party, based on the contractor's failure to appeal. The trial court denied this motion, setting aside its earlier summary judgment in favor of the sub-contractor. The sub-contractor sought a writ of mandamus.

The Alabama Supreme Court phrased the issue before it as whether a third-party plaintiff was required to file an appeal in order to protect its claim of derivative liability. The Court concluded that because, under Rules 3 and 4 of the Alabama Rules of Appellate Procedure, the timely filing of a notice of appeal is a mandatory jurisdictional act. Thus, the failure to file such a notice within the time allowed is fatal to a claim of derivative liability. Because the contractor failed to timely appeal from the summary judgment entered against it, the Court held that the judgment was enforceable. A writ of mandamus was issued, ordering the trial court to dismiss the sub-contractor as a third-party defendant.

Court finds single transaction between out-of-state defendant and Alabama plaintiff sufficient to invoke general jurisdiction

Ex parte Phase III Construction, Inc. (In re *Collins Signs, Inc. v. Phase III Construction, Inc.*), 1998 WL 787347 (Ala., November 13, 1998). An out-of-state company initiated contact with an Alabama-based sign manufacturer and requested that the Alabama manufacturer produce signs to be installed in Virginia. When the out-of-state defendant did not pay the full contract price,

the sign manufacturer brought a breach of contract action against the company. Defendant moved to dismiss for lack of personal jurisdiction claiming that it lacked sufficient minimum contacts with the State of Alabama to confer personal jurisdiction upon the trial court. The trial court denied the motion to dismiss and the defendant petitioned for a writ of mandamus and, alternatively, for a writ of prohibition.

In arguing that the trial court lacked personal jurisdiction, the defendant relied upon previous decisions of the Alabama Supreme Court, in which the Court stated that "[t]he purchase of goods fabricated in a forum state, and of services provided by a resident corporation of a forum state, does not alone provide the requisite 'minimum contacts' for exercise of personal jurisdiction within the bounds of due process." In rebuttal, the plaintiff established that the defendant placed an unsolicited telephone call to the Alabama manufacturer requesting information about its products and services; that various oral and written correspondence followed that unsolicited telephone call; and that, upon receiving the signs in Virginia, the defendant forwarded a partial payment to the Alabama company.

The Alabama Supreme Court noted that "[w]hen nonresident defendants have initiated contacts with this state solely for their own profit, availing themselves of the privileges of conducting business here, this Court has determined that such activities were sufficiently systematic and continuous to support a finding of general jurisdiction and has determined that it was fair and reasonable and thus consistent with the principles of due process to invoke such jurisdiction." The Court concluded that, in this case, the defendant's actions were far more than the simple purchase of goods fabricated in the forum state as the defendant ordered the manufacture and installation of the signs and initiated the contact with the State of Alabama for its own profit. Thus, the Court held, the defendant availed itself of the privilege of doing business in Alabama. Because the litigation at issue arose out of the defendant's contacts with Alabama, the Alabama Supreme Court held that the trial court had general jurisdiction over the out-of-state defendant.

Justice Lyons concurred in the result



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only, finding that because the defendant's contacts with Alabama related to only one transaction, any jurisdiction exercised by Alabama courts must be specific rather than general.

Magnuson-Moss act prohibits inclusion of binding arbitration agreement in written warranty

Southern Energy Homes, Inc. v. Lee, ___ So. 2d ___, Ms. 1970105, 1970106, 1970107, 1970298. (Ala., January 8, 1999). In this five-to-four decision, a majority of the Alabama Supreme Court held that the Magnuson-Moss Act mandates that consumers have access to a judicial remedy and, thus, prohibits the inclusion of a binding arbitration provision in a written warranty governed by this Act. Justice Almon, with Justices Shores, Cook, and Kennedy concurring, concluded that "although several sections of the Magnuson-Moss Act make reference to informal dispute resolution procedures or mechanisms, those and other provisions also make it clear that a consumer is to have access to a judicial remedy. . . a warranty may expressly set forth an informal dispute-resolution mechanism and may make the use of that mechanism a prerequisite for filing a court action, but it may not provide that the use of such a

mechanism is binding or that it is a bar to a court action." In the four-member majority opinion, the Court relied heavily upon decisions issued by a federal district court in Alabama and the Federal Trade Commission, the agency charged with implementing and administering the Magnuson-Moss Act.

Justice Houston's special concurrence created the five-member majority. In his concurrence, Justice Houston noted Alabama's longstanding public policy against enforcement of pre-dispute arbitration agreements and deferred to the interpretation given to the Magnuson-Moss Act by the federal district court. His concurrence also recognized that under well-recognized principles of statutory construction, the subsequent-



Rachel Sanders-Cochran

Rachel Sanders-Cochran attended Cumberland Law School, where she graduated *cum laude* and was a member of the *Cumberland Law Review* and *Curia Honoris*. She practices with the Montgomery firm of Rushion, Stakely,

Johnston & Garrett, P.A. She covers the civil decisions.

ly enacted and more specific provisions found in the Magnuson-Moss Act superseded the general provisions of the Federal Arbitration Act.

Chief Justice Hooper and Justices See, Lyons and Maddox voted to enforce the arbitration provision found in the warranty agreement, based upon "an unbroken line of decisions starting in 1985" from the United States Supreme Court. The four-member minority noted that the Supreme Court had recognized arbitration as an appropriate forum in which to resolve various federal claims such as the Sherman Act, RICO, the Age Discrimination in Employment Act, the Securities Exchange Acts of 1933 and 1934, and concluded that the rationale of these cases was also applicable to the Magnuson-Moss Act.

Recent Bankruptcy Decisions

IRS priority claim properly perfected as a tax lien, retains priority status even after its lien perfection

In re Thomas Milton Haas; Bernice Elizabeth Haas, ___ F.3d ___, (11th Cir. Dec. 14, 1998), 1998 W.L. 864566. Debtors owed \$685,000 for federal income and employment taxes, secured by a federal tax lien prior to filing a chapter 11 petition in 1991. Of that amount, \$68,000 represented employment trust fund taxes. At the time of filing, debtors owned assets worth \$259,000. Additionally, a total of approximately \$71,600 in cash was accumulated post-petition. These sums were avail-

able for creditors. The court distinguished the types of claims recognized by the Code, to-wit: secured, priority and general unsecured. It then stated that a secured claim could not exceed the value of its collateral. Here, the value of the collateral securing the tax lien was \$259,000. Thus, the secured tax lien exhausted the \$259,000, with the excess of the tax claim being unsecured. The court noted, however, that the \$68,000 trust fund employment tax had priority, was not dischargeable under §523(a), and that a plan could be confirmed only if it provided for payment of such taxes in full within six years. The court further noted that the plan must be feasible and proposed in good faith.

In this case in prior appeals, it had been held that the tax lien was senior to a real estate mortgage and that the income taxes were dischargeable. The present debtor's plan provided that the \$68,000 trust fund tax be paid in full from the \$71,600 which would mean that this tax liability be treated as a secured claim. In turn, this would reduce the income tax portion of the secured claim from \$259,000 to \$191,000. The balance then would be unsecured. The plan proposed to pay the secured claims in monthly installments of \$1,345.72 over a 30-year period from the income of Thomas Haas (who is a 68-year-old attorney). The unsecured balance of tax claims was proposed to be paid \$500 per quarter over five years resulting in a payment without interest of approximately 2 percent. The Eleventh Circuit reversed the district court's order affirming the bankruptcy court's confirmation order. The Court of Appeals held that the plan provided for only a nominal recovery of the unsecured tax claims, that it was improper to treat the trust fund tax as a secured claim, rather than as a priority claim since this would reduce the IRS recovery by \$68,000, and that this would change the meaning of the law for it would result in forfeiting the protection of a priority claim. The court also ruled that the plan, which contemplated Mr. Haas continuing to practice law another 30 years on a full-time basis, was not feasible as it did not offer "a reasonable assurance of success." The court did not comment on whether the plan was proposed in good faith, nor did it address the absolute priority rule.

Comment: The history of the prior two appeals and the confirmation of the bankruptcy court, plus affirmance by the district court, are shown in the syllabus and partially in the opinion. To the debtors' attorneys, it was a good try, which worked through the bankruptcy and district courts, but failed at the circuit court level. The IRS is a tough adversary.

All you ever wanted to know as to the §1111(b)(2) election, and more to-wit: (1) when a chapter 11 appeal is not moot, (2) chapter 11 reorganization of consumer debt, (3) strip down of mortgages in chapter 11, (4) application of post-petition pre-confirmation payments.

In re Charles Weinstein and Joyce Weinstein, 227 B.R. 284; 33 B.C.D. 632 (BAP 9th Cir. Nov. 10, 1998). First Federal Bank of California (Bank) in 1991 lent \$1 million to debtors secured by a 10.463 percent mortgage on their residence. In 1994, after defaulting on the loan, they filed a chapter 11. Debtors made adequate protection payments of \$7,000 from April 1995 until plan confirmation in October 1996. Bank's total claim was \$1,012,700.71. In an evidentiary hearing, the property was valued at \$850,000, and Bank then made the election under §1111(b)(2). At the confirmation hearing, the court determined that the value remained at \$850,000; \$98,000 had been paid during the chapter 11 to Bank, which sum the court held to be a credit against the \$850,000 secured debt. The confirmation order provided for a secured claim of \$752,000 to be paid monthly, with interest at 9.490 percent, for 120 months, amortized over a 30-year period but with a balloon payment at the end of the tenth year. Also, if the fair market value (FMV) of the property at the maturity date or when sold exceeded \$850,000, Bank would receive an increase up to \$162,700.71.

Bank objected and, on losing, appealed on several grounds.

First, debtors claimed the appeal was moot because the plan was substantially consummated to an extent that setting it aside would ruin the entire reorganization, and that as the confirmation order had not been stayed, effective relief was



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no longer possible. The court disagreed, stating that if the court can fashion relief by simply ordering a party to pay more, the appeal is not moot, even though a stay was not requested; in this case, if the \$90,000 had been misapplied, such could be corrected by having the debtor pay more subsequent to the end of the term. Thus, the appeal was not moot.

Next, the court rejected Bank's argument that chapter 11 was being subverted by allowing debtors to reorganize their consumer debt, and in a plan providing for a strip down of the mortgage on their personal residence. (Note: for the practitioner who recognizes that §1123(b)(5) was changed in 1994, not to allow strip down on strictly residential property, the case was filed before the change). The court said that the Code does not prohibit chapter 11 for consumers, that the strip down of the residential mortgage was only incidental to the rest of the plan, and that nothing in chapter 11 law requires the property to be necessary to the reorganization. The B.A.P. in footnote 8 of its opinion argued that Dewsnap, the Supreme Court decision disallowing lien stripping in chapter 7, does not apply to chapter 11 reorganization cases.

Next, the 9th B.A.P. furnished a scholarly dissertation of §1111(b)(2), by discussing interrelations of §§506 and 1129. It stated that although §506(d) strips the under-secured creditor's lien from the unsecured portion, and the under-secured creditor with a non-recourse unsecured claim would not be entitled to a distribution in bankruptcy because such creditor would not have an unsecured claim, § 1111(b)(1)(A) allows the non-recourse deficiency to become an unsecured claim to be voted at the discretion of the creditor. However, if the §1111(b)(2) election is made, the election allows the non-recourse portion to become secured, albeit subject to certain differences which first eliminate the unsecured deficiency claim together with the right to vote as an unsecured creditor, and the deficiency portion can be paid over the life of the plan without interest, even though the secured portion is entitled to the present value of the collateral. This means that the original secured portion should be paid the value of the collateral in cash, or alternatively over a period of time with interest.

Thus, Bank's contention that it was entitled to the present value of the deficiency was denied.

Finally, the Court held that the \$98,000 paid post-petition and pre-confirmation as adequate protection was properly allocated to the \$850,000 secured portion because the U.S. Supreme Court had decided in *Timbers* that adequate protection payments cannot be used to compensate the creditor for lost interest or lost opportunity costs. Further, as in

the instant case where there has been no depreciation in the collateral, the majority view is that the payments should reduce the secured claim.

Comment: This is a lengthy, well-reasoned opinion. The reader who has similar problems should obtain the entire opinion. I do not know if the case is being appealed to the Ninth Circuit. A Bankruptcy Appellate Court is on the same level as a district court. ■

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