The cover of 'The Alabama Lawyer' journal features a photograph of a large, modern bridge with a white truss structure and a curved roadway, spanning a wide river. The bridge is set against a clear blue sky with some light clouds. In the foreground, there is a grassy embankment and a few trees. The title 'The Alabama Lawyer' is prominently displayed in a large, white, serif font at the top right. Below the title, the volume and issue information 'Vol. 61, No. 2' and the date 'March 2000' are printed in a smaller, white, sans-serif font.

The Alabama Lawyer

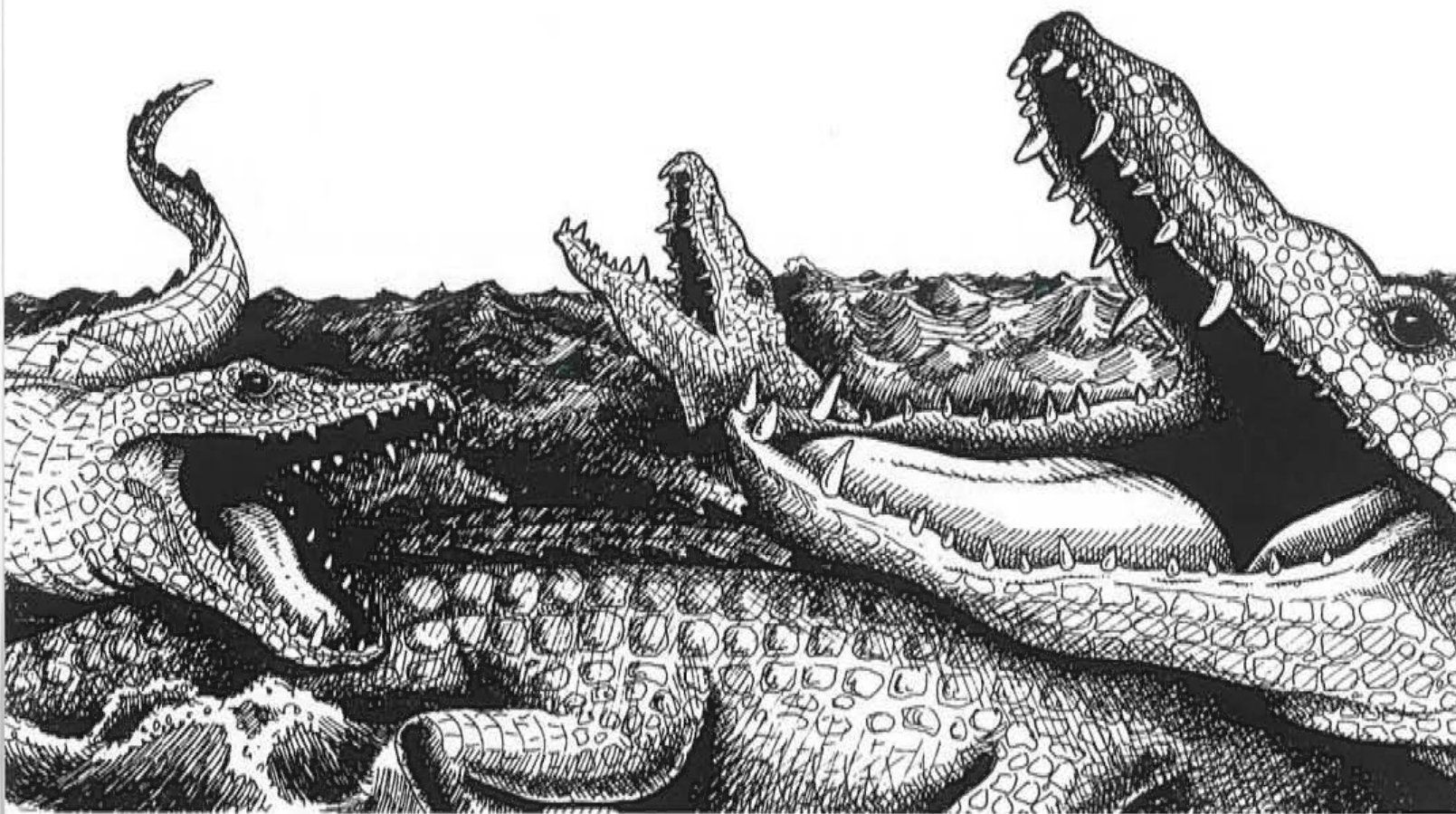
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The Alabama Lawyer

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March 2000



On the Cover

Wheeler Dam – Located in northwest Alabama on the Tennessee River in Lauderdale County, Wheeler Dam is 6,342 feet long and 72 feet high. It was built in 1933-1936 by the Tennessee Valley Authority as a unit of its multi-purpose systems of dams. Its reservoir is 74 miles long, and in addition to producing electricity, it helps regulate floods.

—Photograph by Paul Crawford, JD

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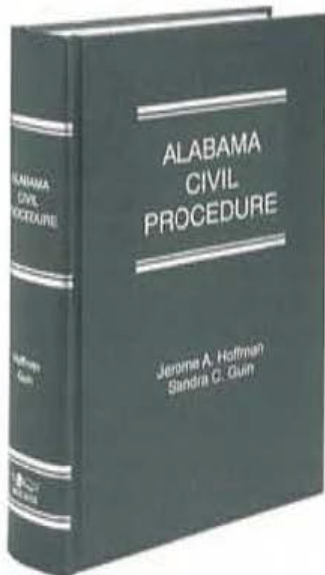
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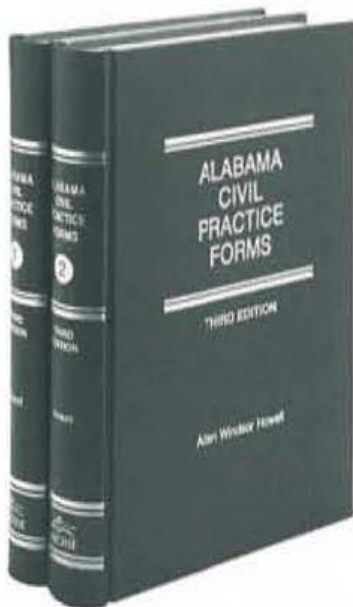
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Talking with Wade Baxley

By Robert A. Huffaker, editor, *The Alabama Lawyer*

Every year, The Alabama Lawyer editor "sits down" with the Alabama State Bar president, to highlight some of the president's accomplishments and goals. This particular session with the Lawyer editor and the ASB president takes on special meaning, since Robert Huffaker and Wade Baxley can lay claim to a friendship that began over 30 years ago, in high school.



Wade and Joan Baxley — at home in Dothan

RH: Wade, how would you assess your first six months in office?

WB: Robert, I knew from the start what I was getting into since I had served on the ASB Board of Bar Commissioners for 13 years and I had served a year as president-elect. I'd say the first six months have been very good, very meaningful. I am grateful that we haven't had a major controversial issue, such as tort reform, to cause a rift between segments of the bar during this time.

RH: How have you focused on integrating the various specialty bars into the programs of the state bar?

WB: When **Dag Rowe** was president several years ago, he called for a summit on the legal profession and invited leaders of the various specialty bars, judges' associations and large city bars to attend. The outgrowth of that summit was the creation of a task force consisting of presidents and presidents-elect of those groups. Past President **Vic Lott** and I have continued this task force to show that the state bar needs to be the spokesperson for *all* lawyers in our state and the umbrella organization for these specialty bar groups and local bar associations. We also want to support the judiciary and keep an open line of communication between the state bar and all branches of the judiciary.

RH: Why is it so important to try to involve the specialty groups in the ASB?

WB: The main reason is to stop the divisiveness that has sometimes developed between certain segments of the bar. Also, programs of the state bar are beneficial to all members. In the past, specialty bar groups—ATLA, ADLA, women, minorities, criminal lawyers, and others—have tended to "do their own thing" and haven't attended annual meetings of the state bar. Also, members of these specialty groups haven't participated in state bar governance and

committee work. In fact, ATLA created its own IOLTA (Interest On Lawyer Trust Accounts) program, separate and apart from the state bar. This "splintering off" causes fragmentation of the organized bar and is not healthy for the legal profession as a whole.

RH: Have you seen any tangible evidence that the efforts to have more involvement by the specialty bars is actually coming to pass?

WB: Yes, I have. **Greg Breedlove** of Mobile was the initial chairman of the task force appointed by **Dag**, and he has continued to be the chairman because he has been such an effective leader. I think that our efforts have caused ATLA and other specialty bars to realize that we are not just some elite association in Montgomery running the state bar. The Board of Bar Commissioners is made up of general practitioners, plaintiff lawyers, defense lawyers, big city lawyers and small town lawyers. I have seen a different attitude from members of ATLA who serve on the Board of Bar Commissioners. They now realize that the board is really a voice for *all* lawyers in Alabama and that bar commissioners do not merely cater to the wishes of the big city bars or sponsor pro-business types of programs. I don't think they realized this until this task force was created.

RH: What other areas have been your focal points?

WB: I've tried to emphasize judicial reform. We absolutely have to go to a merit selection of judges, not only at the appellate court level, but also at the state court level. I wrote an article in the November issue of *The Alabama Lawyer* pointing out stances taken by the Board of Bar Commissioners over the past decade concerning judicial reform. Following the publication of that article, I received calls and letters that were very supportive of a merit selection process. I have also talked with a number of attor-

neys, appellate court judges and trial court judges who strongly support merit selection. All we've got to do now is convince the general public and the legislature of this need, which I don't believe is an insurmountable problem. I think that both sides of the spectrum here should not be at odds about who has control of the courts. I am a hopeless idealist and I strongly believe justice demands that courts be level playing fields. In recent years, you've seen a lot of money being pumped into judicial campaigns, and these campaigns have become very expensive and very demeaning. The concept the public has is that whoever wins will decide issues in favor of the side that financed them. That's not good for our judicial system. Our judicial system needs to be independent, fair, reasonable and balanced.

RH: Will the Alabama State Bar or any of its committees or task forces have any role in the upcoming judicial elections?

WB: No, the organized bar cannot take part in that. Of course, many states have nonpartisan elections for judicial offices. That's certainly a step in the right direction, but it's not the ultimate goal. We need to encourage good, qualified people to serve as judges. I think everyone understands that the selection of judges can't be taken totally out of politics. However, we need to isolate and insulate the process and remove it from the political process to a substantial degree in order to have an independent judiciary. Until we take judicial selection out of the purely political process, it will continue to be expensive and very divisive, and a demeaning experience for candidates.

RH: Another area drawing a good bit of discussion recently is multi-disciplinary practice. What is the state bar doing to address that issue?

WB: You're trying to stump me, aren't you? Multi-disciplinary practice, or MDP, would allow attorneys to partner and



Wade on the Swilcan Bridge at the "Old Course" in St. Andrews, Scotland

share fees with non-attorneys in other professions. From what I understand and what I've read, this is an accepted practice in Europe. It's becoming more and more acceptable in other Western nations. What has happened is that some of the major accounting firms are trying to create business relationships with attorneys to provide services not only for general accounting work and estate planning, but also for general legal services. I understand that MDP already exists in

Washington, D.C. That's not true in the 50 states, due to the model rules of professional conduct prohibiting this relationship. A resolution allowing MDP was proposed by an ABA commission on multi-disciplinary practice at the last annual meeting of the ABA in August 1999. Most states had not had time to study how this would affect the practice of law as we know it. A substitute resolution was eventually adopted to allow adequate time for state and local bars to further study the issue of MDP. I have appointed a task force, chaired by past president Vic Lott and composed of lawyers and lay members, who will be thoroughly reviewing this issue and reporting back to the Board of Bar Commissioners with a recommendation at some time in the near future.

RH: Has the Board of Bar Commissioners taken a position on this issue?

WB: The board adopted a resolution last year asking our delegates to the ABA House of Delegates not to vote on MDP until we had time to thoroughly study it.

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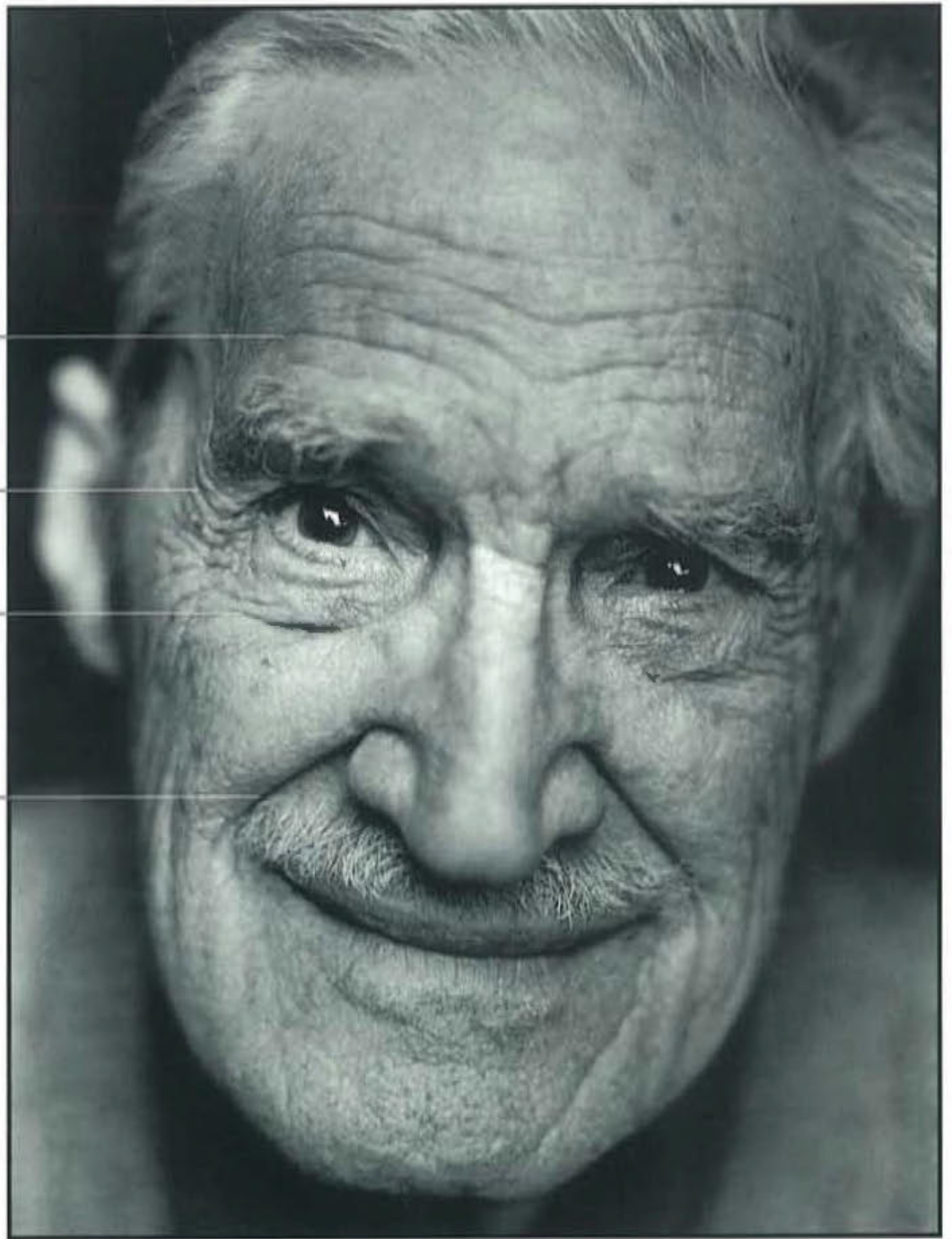


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I think every state has essentially taken this same position. It's probably going to be brought up again at the annual meeting of the ABA in July in New York, but keep in mind that whatever position the ABA eventually takes will have no effect on what our state may or may not do with MDP. It will be up to the Alabama State Bar and the Supreme Court of Alabama to change our rules of professional conduct to allow this partnering and a sharing of fees with non-attorneys.

RH: I've asked this question of your predecessors and I'll ask you the same. Do you think that our disciplinary process is functioning sufficiently and, if so, do you see that the involvement of laypersons on the disciplinary panel has been helpful?

WB: I think it's still being fine tuned. We just recently submitted a new set of model rules to our supreme court for consideration and adoption. Alabama is one of the few state bars in the nation that handles discipline in-house. Discipline in most other states is totally controlled by their highest courts. Of course, our supreme court is the body



At Bryant-Denny Stadium with wife Joan and sons Hamp and Keener

that eventually rules on all disciplinary matters. The Supreme Court of Alabama has authorized the Alabama State Bar to handle discipline, but the justices can take that away. Yes, I think it works. I think it has improved over the past 15 years that I've been a part of that process. I've served on disciplinary panels as a bar commissioner and I've served as a member of the Disciplinary Commission. One problem has been that sometimes different panels have meted out different punishments for the same type of offense.

RH: Has that been corrected?

WB: It has, to a great extent. We now have a better reporting process

being utilized. The addition of laypersons, which occurred five or six years ago, has been a very, very good thing. In fact, we had heard from a number of states, who utilized laypersons before us, that these people tend to be more conservative than the lawyer members of the discipline panels. Additionally, they go out and tell the public that we do a darn good job in seeing to it that lawyers are properly disciplined. I think that has proved to be the case in our state as well. The laypersons who are involved in our process are very supportive of what we do in our handling of discipline. In my opinion, the legal profession does a substantially better job than any other profession as far as discipline.

RH: I assume from your comments that you are satisfied with how the disciplinary process is functioning?

WB: Concerning our discipline process, do I think it's perfect? No. Do I think it's in the process of getting fairer and better? Yes. The disciplinary panels do a good job. The General Counsel's office does an excellent job in making sure that non-meritorious complaints

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are screened out from the very beginning. The Disciplinary Commission makes sure that meritorious complaints will be handled in a proper and professional manner and that the charged lawyer will be given due process. Recent emphasis has been upon more uniform punishment for similar offenses. I think that our discipline process is in good shape and should continue to improve in the years to come.

RH: What's ahead for Wade Baxley in the next six months?

WB: Chief Justice Perry Hooper and I are appointing a joint task force on *pro se* litigation. This stems from the fact that we're seeing more and more litigants coming into court at the various levels and representing themselves *pro se*. In some states, such as Florida and Arizona, *pro se* litigation has reached somewhat an epidemic situation. Arizona has even created self-help centers for litigants in domestic cases that provide forms. I don't know if everyone is aware of this, but litigants have a constitutional right in Alabama to appear in court *pro se*. If a judge requires a litigant to come back into court with an attorney, that requirement probably violates our state constitution. Right now we are in the process of gathering statistics through the Administrative Office of Courts showing where *pro se* litigants are appearing. I certainly don't think the Alabama State Bar and state judges should encourage litigants to appear in court *pro se*. It's usually not in an individual's best interest to appear *pro se*. By the same token, if these litigants do choose to appear *pro se*, then they should be given enough access to the court and enough help that the judges

can render a proper decision. We've seen more of these litigants from what I would call the "working poor." They earn too much to qualify for legal aid, but they are not wealthy enough to hire an attorney to appear for them.

RH: What else do you want to share with our readers?

WB: I believe that every lawyer owes it to the profession to give a portion of his or her time in some type of service, whether it be the Volunteer Lawyers Program, a committee of the state bar or service in specialty bar associations. I feel very strongly about that. My friend, **Phil Adams** of Opelika, who also served as state bar president, once told me he thought the attitude of most local bars was that if the Alabama State Bar would leave them alone, they would leave the Alabama State Bar alone. That's not a healthy attitude. We need to encourage lawyers to get more involved. We can usually find time for hunting, fishing or, in my case, golf, and I know that we can certainly find time to serve our profession.

RH: In closing, how does it feel to be a member of that famous law school class of 1968?

WB: I assume you're being facetious since you and I are both members of that great class. Seriously, though, I feel very honored to have been part of that class. We've had three Alabama State Bar presidents from that class, **Bill Scruggs**, **Phil Adams** and me. We've had a Alabama Supreme Court Justice, **Terry Butts**. We've had a dean of the University of Alabama School of Law, **Charles Gamble**. We've had a president of the University of Alabama, **Richard Thigpen**. We've had the editor of *The Alabama Lawyer*, whose name escapes me right now. We've had several circuit court judges. We've had four presidents of the ATLA, **Larry Morris**, **Andy Hollis**, **Greg Cusimano** and **Delaine Mountain**. I'm very proud of our class. The class of '68 has attorneys practicing in every area of the State of Alabama—big cities, rural areas, from the tri-cities and Ft. Payne in the northern corners to Dothan and Mobile in the southern corners and all areas in between. I am also equally proud



Vic Lott, Sam Franklin and Wade — August 1999 Executive Council meeting in Sandestin

of the attorneys here in the Wiregrass area of Alabama. The Wiregrass is a great venue in which to practice law. This is because lawyers and judges here generally act professionally and civilly toward each other, in and out of court.

RH: How would you assess the quality of service provided by the staff at the Alabama State Bar?

WB: I'm glad you asked that because I wanted to mention how well-run our state bar is by its full-time staff. **Keith Norman** does an outstanding job. He has followed up well to what **Reggie Hamner** did during his 25 years of service. **Tony McLain** also does a great job as general counsel. Our state bar's full-time staff is excellent. Every program is run by competent and professional staff personnel. On many occasions, I've said that our state bar is a model that organized bars in other states try to emulate.

RH: You come from a family of lawyers—your father was a lawyer and a judge, and your brother Bill is a lawyer and former attorney general. Are there going to be other lawyers in your family?

WB: As a matter of fact, my oldest son, **Hamp**, is at the University of Alabama in law school right now. He'll be out in a couple of years and in practice with me, I hope. My youngest son, **Keener**, who is named after my father, has just completed his MBA and is working in Birmingham. He has also expressed an interest in attending law school. At last count, brother Bill had four sons and a daughter, and I'm sure some of them will become lawyers. I'm proud to be a lawyer, and I hope that members of my family will continue to be active in the practice of law in the State of Alabama. ■



Wade receives the president's gavel from Vic Lott.

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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Looking Back at 60 Years of Alabama's Legal Profession, Part III: The 1970s¹



Keith B. Norman

The decade of the '70s began with a nine-member Alabama Supreme Court sitting for the first time. Hugh Maddox of Montgomery and former Circuit Judge Dan T. McCall of Mobile were sworn in as the eighth and ninth justices of the newly enlarged court. Likewise, the newly constituted court of civil appeals witnessed the investiture of its three new members: Robert P. Bradley, L. Charles Wright and T. Werth Thagard. J.O. Sentell, editor of *The Alabama Lawyer* and supreme court clerk, wrote "The Supreme Court of Alabama—1820-1970—A Glimpse," which appeared in the *Lawyer*. It provided one of the first concise histories of Alabama's highest court. "Physician-Patient Confidence: Legal Effects of Computerization of Records" was an early indication of concern with the potential impact of computerization. Similarly, the 1970 article, "The Need for Constitutional Revision in Alabama," would be the first of many articles and committee reports recommending the replacement of Alabama's antiquated constitution.

The Alabama State Bar had become a mandatory bar by virtue of a 1923 legislative act. In the "President's Message," state bar President Patrick W. Richardson of Huntsville wrote:

Considering that there was only one such act in existence to serve as a model when ours was drawn in 1923, we must credit its draftsmen with incredible foresight and skill. By the broad simplicity of its provisions, investing authority over regulation of the practice of law in the Board of Bar Commissioners (subject to

Supreme Court review) the Act has created a uniquely flexible and responsive vehicle.

For the 1970-71 bar year, there were 40 different committees, including the Committee on Automotive Reparation Plans, Committee on Data Retrieval and Computers, Screening Committee on State Court Judges, and Committee on Lawyers and Title Insurance Companies.

Former state bar President Howell Heflin was sworn in as Alabama's 24th chief justice in 1971. The Client Security Fund began operation that year with an initial funding of \$15,000. The supreme court declined to approve canons of ethics for lawyers in government which had been proposed by the state bar. Miss Mollie Jordan became the first female clerk of an appellate court in Alabama when she was sworn in as clerk of the Alabama Court of Criminal Appeals. Charles Y. Cameron became the first director of courts. State bar President Robert Albritton of Andalusia reported in the "President's Page" on the bar-supported "court reforms," including rule-making authority for the supreme court, a system of court management and legislative appropriations for the defense of indigents charged with crimes. President Albritton also highlighted several other matters being considered by the bar, including an internship for third-year law students, long-range planning for the bar, economics of law practice, closer liaison with local bars, and revision of the canons of ethics. Two major figures of the legal profession died in 1971. They were United States Supreme Court Justice Hugh Black and former Alabama Supreme Court Chief Justice Ed Livingston.

Comprehensive judicial reform legislation was passed during the regular and special sessions of the legislature in 1972. The 17 legislative items in the judicial reform package included rule-making authority for the supreme court, mandatory retirement at age 70 for judges, two additional judges for the court of criminal appeals, a constitutional amendment to create a judicial commission to investigate complaints against judges, and the abolition of the office of justice of the peace. With the prospect of rule-making authority, the supreme court appointed a committee to study proposed rules of civil and appellate procedure. A host of articles appeared in the *Lawyer* dealing with the proposed new rules. Champ Lyons, an attorney in Montgomery and future associate justice of the Alabama Supreme Court, wrote his first article for the *Lawyer* entitled, "Proposed Rules of Practice in Alabama."

An article by David A. Bagwell of Mobile, "Bench and Ballot in Alabama," called attention to the disadvantages of partisan election of judges and recommended a serious dialogue to examine other means of selecting judges.

Another 1972 article, "Law Clerkships—Three Inside Views," by Arthur Fite, Robert C. Potts and Donald B. Sweeney, Jr., covered clerkships with the Alabama Supreme Court, Federal District Court and U. S. Court of Appeals and was the first article appearing in the *Lawyer* dealing extensively with judicial clerkships. In 1972, the state bar received an Award of Merit Honorable Mention from the American Bar Association. Camille W. Cook became the director of continuing legal education for the University of Alabama replacing Doug Lanford. Judge Annie Lola Price died that year. In 1951, Judge Price had become the first female to serve on an appellate court in Alabama. She became presiding judge of the court of appeals in 1962 and presiding judge of the court of criminal appeals with that court's creation in 1969.

In 1973, the state bar installed a WATS line to better serve members and, as state bar President Drew Redden described, to be the "source" for service for the legal profession. The Board of Bar Commissioners approved an Anti-trust Law Section and the multi-state bar

exam for use beginning with the July 1973 bar exam. A second Citizen's Conference on Alabama's judicial system in April of that year resulted in a "consensus statement" that called for the following: 1) unification of state trial courts under the supervision of the supreme court; 2) non-political merit selection of judges with retention elections; and 3) releases on recognizance instead of bail, court control of criminal dockets, full-time prosecutors, adequate compensation for appointed defense counsel, and speedy trials. An article by Alabama native Robert C. Ford, project director of the American Bar Association Activation Program for Correctional Reform entitled, "The Bar's Responsibility for Prison Reform," urged the bar to pursue needed prison reforms. The bar responded with state bar President Rod Nachman's appointment of the Correctional Institutions and Procedures Committee. This committee consisted of both lawyers and lay persons to study the Alabama prison problem.

On July 3 1973, the Alabama Rules of Civil Procedure became effective. Chief

Justice Howell Heflin received the Herbert-Lincoln Harley Award from the American Judicature Society for his tireless efforts in promoting judicial reform in Alabama. The Environmental Law Section was chartered by the Board of Bar Commissioners as the eighth practice section of the bar. The first state bar meeting held outside Alabama was in Biloxi that year. The Alabama Bar Foundation, the Alabama Law School Foundation and the state bar's Committee on Professional Economics published the first set of "How to Do It" books and forms. The supreme court approved the Alabama Pattern Jury Instructions. Cumberland law Professor Janie L. Shores, who would later be elected to the supreme court, had served as the reporter for the Alabama Jury Charge Committee that had drafted the pattern jury instructions. The new Judicial Article was ratified by voters in December 1973, by a 2-1 margin. The Alabama Constitution Commission, consisting of lawyers, judges and citizens and chaired by lawyer Conrad M. Fowler, probate judge of Shelby County, played a signifi-

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cant role in the public's overwhelming acceptance of the new Judicial Article.

A long-range planning study commission in 1974, chaired by Oliver Brantley of Troy, studied the issue of lawyer specialization and certification and the relationship of CLE to specialization. The *Alabama Code of Professional Responsibility* was approved by the supreme court after its recommendation by the bar, and became effective October 1. Alabama law Professor M. Clinton McGee served as chief reporter for the Alabama Criminal Code Project of the Alabama Law Institute. His article, "Towards a New Criminal Code for Alabama," appeared in *The Alabama Lawyer* and pointed out the many deficiencies in Alabama's existing criminal law. The supreme court approved a third-year law student practice rule in 1974. The Proposed New Rules of Appellate Procedure Advisory Committee and the Code Revision Committee were chaired by Opelika lawyers Jacob A. Walker, Jr. and C. C. "Bo" Torbert, respectively. As women lawyers were starting to join the legal profession in ever-larger numbers, the article "Why Can't a Woman Be More Like a Man, or Visa Versa?" by Camille Cook noted:

The issue is not whether men or women have 'superior rights,' it is that different treatment based solely on sexual characteristics is seldom justifiable and that its obliteration will require a substantial revision of the law.

In an address before the Southern Conference of Bar Presidents in October 1974, Judge Frank M. Johnson highlighted the role and the need for the organized bar in providing legal services to those who were unable to afford them.

The year 1975 witnessed both high inflation and long gasoline lines with the energy crisis. An article in the *Lawyer* entitled, "Inflation is Illegal," challenged inflation as being an unconstitutional taking. State bar President Alto V. Lee, III of Dothan reported in his presidential address at the annual meeting that summer that there were 36 sections, committees and task forces of the bar at work. Nineteen seventy-five also marked Miles Law School's first entering class. Bar member George D. Schrader, lt. colonel, USAF, reflected on a goal for

more lawyers to consider—retirement. In his article, "The Attorney Retired," Colonel Schrader wrote:

Perhaps like old soldiers, old lawyers never retire. They just practice away. Realistically, however, lawyers should review retirement as a desirable goal and as a reward for a life of service to their profession and society.

Gadsden attorney Robert L. McCurley was named the new director of the Alabama Law Institute. He followed L. Vastine Stabler, Jr., the institute's first full-time director. Three new associate justices joined the Alabama Supreme Court: former court of appeals Judge Reneau P. Almon, T. Eric Embry of Birmingham and Janie L. Shores, also of Birmingham. Justice Shores became Alabama's first female associate justice. John H. Wilkerson, Jr. was named clerk of the court of civil appeals that same year. Rules of disciplinary enforcement were recommended by the state bar's Task Force on Professional Discipline for the supreme court's consideration. The Young Lawyers' Section received two top awards at the American Bar Association's Annual Meeting in 1975. The section, chaired by future ABA President Lee Cooper of Birmingham, was recognized for its legislative program dealing with the Judicial Article and improvements in Alabama's bail bond law, as well as its Volunteers in Parole Project. The Judicial Article Implementation Act, companion to the Judicial Article, was enacted. The "new" tort of outrage was featured for the first time in an article in *The Alabama Lawyer*. The supreme court adopted Alabama's first Canons of Judicial Ethics in December 1975.

The nation's bicentennial in 1976 was celebrated by the *Lawyer* with a special edition. In his "State of the Judiciary," Chief Justice Heflin responded to critics who were claiming that the unified judicial system would put the state into receivership. He reported that the judicial system would actually create a surplus. Justice Pelham Merrill retired after 23 years on the state's highest court. Sam A. Beatty followed Justice Merrill as associate justice. The supreme court's advisory committee on rules for defending indigents was

chaired by William M. Clark of Birmingham. Future bar President Wade H. Baxley of Dothan served as vice-chair of that committee.

The state bar's active membership in 1977 totaled nearly 5,000. The state bar's budget for the 1977-78 fiscal year was \$330,397. Howell Heflin stepped down as chief justice and C. C. "Bo" Torbert was elected in 1977 as Alabama's 25th chief justice. *Alabama Reports* and *Alabama Appellate Courts Reports* were discontinued that year and the decisions of Alabama's three appellate courts are reprinted in a single volume, *Alabama Reporter Southern Second* beginning with volume 331-333 of the Alabama edition of the *Southern Reporter*. One hundred and sixty applicants sat for the February bar exam. The *Code of Alabama 1940* and the *1958 Recompilation* were replaced by the *Code of Alabama 1975*. The state bar's code revision committee played a significant role in the development of the new code. The Fifth Circuit Judicial Conference was held in Birmingham, the first time in the 34-year history of the meeting that the conference was held in Alabama. The Alabama State Bar Rules of Disciplinary Enforcement became effective in 1977.

The state bar Lawyer Referral Service commenced operation in 1978. The subcommittee studying voluntary specialization released its report analyzing the concept of lawyer specialization and suggested that a plan be adopted in Alabama. The recommendation was voted down by the Board of Bar Commissioners. Judge John Scott, former secretary and executive director of the state bar, died in February 1978. During the 1978 legislative session, lawyer Joe Carpenter of Montgomery served as the state bar's first legislative counsel. The state bar's first public service commercials ran on television. The two commercials discussed the importance of having a will and tips for the home buyer. Proposed rules of criminal procedure were first published in 1978. Tallassee lawyer Sonny Hornsby, who would later be elected chief justice, served as state bar president. The state bar's first operational survey by a visiting team from the American Bar Association was conducted during President Hornsby's term. The lawyers

admitted to the Alabama Academy of Honor in 1978 were: William Douglas Arant, George Alexander LeMaistre, Pelham Jones Merrill, Seybourn Harris Lynne, Bernard Andrew Monaghan, Jr., and Armistead Inge Selden, Jr.

An article appearing in the *Lawyer* entitled, "Beginner's Guide to Word Processing Terminology," was a first-time introduction for many lawyers to computer terms such as diskette, electronic mail, hardware, modem, OCR (optical character reader), and software. The new law center at the University of Alabama was completed in 1978. A juror qualification act was enacted by the legislature to provide a jury box where identifiable classes of citizens were no longer systematically excluded from grand and petit juries.

The decade of the seventies concluded with the bar celebrating its centennial, 1879-1979. State bar President Hugh W. Roberts, Jr. of Tuscaloosa announced in his president's message that the Federal Trade Commission had contacted the Alabama State Bar as a part of its

nationwide investigation of the legal profession. Judge Frank M. Johnson, Jr. delivered the keynote address at a joint meeting of the National Conference of Bar Presidents and the National Association of Bar Executives in Atlanta in February 1979. His address was entitled "Judicial Independence." A survey of lawyer population ratios of Alabama counties appearing in the *Lawyer* found that Montgomery County had more lawyers based on population than any other of Alabama's 67 counties. The survey indicated that approximately three of every 1,000 people in Montgomery County were lawyers. The county with the lowest ratio was Bibb County with approximately two of every 10,000 residents being a lawyer. The *Lawyer* continued to include many practice-related articles. "The Federal and Alabama Rules of Evidence," "To Appeal or Not to Appeal," "The New Bankruptcy Code," and "The New Rules of Discipline and Their Practical Application" were examples of some of the articles appearing on the pages of the journal in 1979 dealing

with recently enacted rules. Robert L. Potts of Florence served as president of the Young Lawyers' Section. The section's 17 committees included the Public Information Committee, Disaster Emergency Legal Assistance Committee, Notary Public Manual Distribution Committee and Bar Admissions Committee. A helpful article entitled, "Preparation for a Legal Career," by Justice Sam Beatty helped aspiring lawyers prepare for their careers as lawyers. The article "Legal Malpractice" by Ralph Gaines of Talladega explained the legal standard for malpractice, the burden of proof, areas of liability, damages, and limitations of actions. Concerning this new trend of cases, Mr. Gaines aptly noted, "Our profession has reached a milestone." ■

Endnote

1. Due to space limitations, only the period of the 1970s could be covered in Part III. We will endeavor to close this series with Part IV in the next issue, covering the 1980s and 1990s.

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MEMORIALS

Augusta Elliott Wilson

Augusta Elliott Wilson was born in Rosedale, Mississippi on March 12, 1939 and passed away in Jackson, Mississippi on December 22, 1999 of heart failure. Wilson attended Stratford Hall Preparatory School and Vanderbilt University where she was a member of the Kappa Alpha Theta sorority. She received her master's degree in English literature from Ole Miss and her Juris Doctorate from Catholic University Law School in Washington, D.C., where she was on the editorial staff of the *Law Journal*. Wilson was the recipient of many academic and scholarship honors and taught English literature at Delta State University. She was admitted to the Alabama State Bar in 1973.

Augusta Wilson was former publications director of the Democratic National Committee in Washington, D.C., and a congressional staff member. As a staff member, Wilson was instrumental in drafting the Fair Credit Reporting Act of 1971. She was executive assistant to the late Winthrop Rockefeller, governor of Arkansas. Augusta Elliott Wilson was the author of a book entitled, *Leader In the House*, published by Parthenon Press.

Augusta Wilson had been a land developer and an insurance agent in Pascagoula, Mississippi and practiced law in Mobile from 1973 until 1995, when she retired. Wilson was the Democratic party nominee for Congress for the First District of Alabama in 1974.

She is survived by her sister, Mary Elizabeth Wilson Pierce of Mobile; her brother, William Roberts Wilson, Jr. of Jackson; her nieces, Mary Elizabeth Milek, Elizabeth Ann Wilson, Augusta Elliott Wilson and Dana Oldani; and nephews William Roberts Wilson, III and Mark Blanton. Wilson was the daughter of the late Mr. and Mrs. William Roberts Wilson, Sr. of Rosedale.

— William Robert Wilson, Jr.

Judge Jeri Blankenship

With the untimely passing of Judge Jeri Blankenship, the legal community of Huntsville and Madison County has lost an admired and beloved member of the profession and the State of Alabama has lost a valued and respected public servant.

Judge Blankenship received a Bachelor of Arts degree from the University of Alabama in 1966, where she was a member of Phi Beta Kappa and, thereafter, taught in public and private schools from 1967 to 1972. In 1976, Judge Blankenship received her law degree from the University of Alabama School of Law and then served in clerkship positions with Justice Eric Embry of the Supreme Court of Alabama and with Judge Joseph Colquitt of the Circuit Court of Tuscaloosa County.

After moving to Huntsville, Jeri Blankenship demonstrated her high level of legal skill, dedication and professionalism and, by doing so, clearly justified her appointment as a district court judge of Madison County in 1981. Having confirmed her skill and strength as a jurist by her sound judgment, hard work and fairness, Judge Blankenship became the first woman circuit judge in Madison County upon her appointment to the court in 1987, a position to which she was twice selected subsequent to her appointment, ultimately serving as the presiding judge of the circuit court.

Judge Blankenship earned the respect of those who came before her by the fairness of her judgment and the evenness of her demeanor. She was able to maintain her wit and common touch without sacrificing the respect of the office that she held, frequently using her sense of humor and her candor as effective tools in eliminating conflicts and resolving disputes.

Also, Judge Blankenship demonstrated a strength of character and uncommon valor as she waged a courageous fight against the illness that ultimately claimed her, while being ever mindful of

the obligations of her position and, in so doing, established a standard of personal and professional behavior of the highest degree.

While the passing of this truly fine individual and public servant is a loss to our profession, our community and our state, all who were privileged to know Judge Jeri Blankenship have been blessed by the example of a life well lived, a community well served and a profession practiced at the highest level of skill and honor.

The Huntsville-Madison County Bar Association and the community have suffered a great loss in the passing of Judge Jeri Blankenship and we sympathetically join with her husband, Clyde Alan Blankenship, her mother, Norma B. Burnette, and the other members of her family in celebrating the life, recognizing the accomplishments and honoring the name and legacy of Judge Jeri Blankenship.

— Charles G. Robinson, president,
Huntsville-Madison County Bar
Association

F. Michael Ford

F. Michael Ford, a distinguished and respected member of the Tuscaloosa County Bar Association, passed away on April 25, 1999 in Tuscaloosa County at the age of 51. He was born in Tuscaloosa, and attended undergraduate school at the University of Alabama, where he lettered in football in 1966, 1967 and 1968. He was selected to the first team All SEC in 1967 and 1968 and was selected to the All SEC Academic Team in 1968.

While at the University, he was instrumental in securing the chapter for Campus Crusade for Christ and was also active in the Fellowship of Christian Athletes.

Upon graduation from the University of Alabama, he attended the University's



School of Law, graduating with a Juris Doctor degree; he was admitted to the Alabama State Bar in 1975, and began practicing law that year. In 1978, he was a founding member of the firm of Ford, McElvy & Ford in Tuscaloosa, where he practiced until 1984, at which time he left the practice of law to engage in full-time church work and Christian ministry, a call which he long sensed on his life. After service in Christian ministry for a number of years, he returned to the active practice of law in 1991 in Tuscaloosa, where he practiced until his untimely and unfortunate death.

During the course of his life, many people of all walks of life were served by his caring friendship, counsel and selfless service. He will be remembered for his intellect, keen sense of humor and contagious laughter and personality.

F. Michael Ford was a man with a deep devotion to his five children: Frank Michael Ford, Jr., Favor Ford, Forrest Ford, Joanna Ford, and Camille Claire Ford. In addition to his children, he is survived by his wife, mother, two brothers, and many nieces and nephews.

The Tuscaloosa County Bar Association mourns the passing of F. Michael Ford and honors the memory of our friend and fellow member.

— **Charles R. Malone, president,**
Tuscaloosa County Bar Association

James T. Tatum, Jr.

The Huntsville-Madison County Bar Association suffered the loss of one of its most highly respected and beloved members by the death of James T. Tatum, Jr. on September 8, 1999. Jim was born on May 28, 1931 in Birmingham to James T. and Katherine McKenzie Tatum. He received his Bachelor's of Mechanical Engineering degree from Auburn University in 1953 and his law degree from the University

of Alabama School of Law in 1962, where he received numerous honors and served as president of the law school student body. Jim also served his country as a first lieutenant in the United States Army Corps of Engineers.

He was a respected and admired member of the Huntsville-Madison County Bar Association for over 35 years, being elected president in 1985, and where he practiced law as a partner in the firm of Berry, Ables, Tatum, Baxter, Parker & Hall.

Jim was a member of the Episcopal Church of the Nativity, giving unselfishly of his time and efforts to numerous civic and charitable organizations and was honored to serve on the board of trustees of his beloved Auburn University for over 13 years.

Through his skillful and diligent practice of his profession, his pride in and devotion to his community, and his high level of character and courteous demeanor, he personified the very best traits of a citizen and lawyer and set an example to which all lawyers should aspire.

The Huntsville-Madison County Bar Association was honored to count Jim Tatum as one of its own and joins in sympathy with his wife, Dana Lee Tatum; his children, William B. Tatum, Terri Tatum Estess, Jamie Tatum Brown, Terese Estess, Jamie Tatum, Philip Lee Lehman, and Julie Lehman Burk; his six grandchildren; and the other members of his family and loved ones.

— **Charles G. Robinson, president,**
Huntsville-Madison County Bar Association

W. B. Fernambucq, Sr.

The Birmingham Bar Association lost a true gentleman with the death of W. B. Fernambucq, Sr. on

December 23, 1997 at the age of 75. Bill was a lifelong resident of Birmingham, and was married to his childhood sweetheart, Georgia, for 52 years. They had three sons and five grandsons, along with many nieces and nephews. Bill graduated from the University of Alabama, both undergraduate and law school, and was an enthusiastic supporter of the Crimson Tide. He was also very active at Lakeside Baptist Church.

Bill was one of the founding members of the firm of Huie, Fernambucq & Stewart, and he had practiced law since 1951. One of the traditions he started at Huie, Fernambucq & Stewart was cooking breakfast on Friday mornings for everyone at the office. He loved to cook, not only for his law firm but for his family, and wore colorful outfits on special occasions and holidays. He also loved playing with his grandsons in his later years. Bill was known at his firm and throughout the legal community of Birmingham for his humor, kindness, integrity and professionalism. He was a true gentleman in every sense of the word.

This resolution is offered as a record of our admiration and affection for Bill Fernambucq and of our condolences to his wife, sons and their families.

— **S. Shay Samples, president,**
Birmingham Bar Association

Judge Drayton N. James

The Birmingham Bar Association lost one of its most distinguished members and judges through the death of Judge Drayton N. James on December 23, 1997 at the age of 59.

Judge James grew up in Auburn and went to Auburn University for his undergraduate degree. Even at that stage in his life, he loved fast cars. He then attended the University of Alabama School of Law and was admitted to the Alabama State Bar in 1969.



Judge James had a distinguished law practice with Charles Tyler Clark for many years before he went on the bench. As a lawyer, he was known as a very fair, calm, kind and professional advocate. Those same qualities served him well for the years he served as a circuit judge for the Tenth Judicial Circuit. Litigants before Judge James were always treated with respect, kindness and professionalism. He was greatly respected as a trial judge by members of the Birmingham Bar Association.

He was a loving husband to his wife, Billie, and loving father to his daughter, Tracy. He was a very active member at St. Luke's Episcopal Church and was greatly respected by all in that congregation. As mentioned above, Judge James loved fast cars, especially Porsches, and tinkering with them.

This resolution is offered as a record of our admiration and affection for Judge Drayton N. James and of our condolences to his wife, daughter and other members of his family.

— **S. Shay Samples, president,**
Birmingham Bar Association

R. A. Norred

The Birmingham Bar Association lost one of its most distinguished members through the death of R. A. Norred on November 21, 1998 at the age of 71. Bob Norred was a veteran of the United States Army, having served in the 82nd Airborne Division. He graduated from the University of Alabama School of Law in 1951 and had a distinguished legal career thereafter, which included being a

prosecutor in Calhoun County, in private practice in many courts of the state, and, especially, in representing Jim Walter Homes for the past 35 years.

Bob was a loving husband to his wife, Helon, and a wonderful father to his son, Michael, and daughters Stephanie and Shelby. He also had three granddaughters whom he loved very much. In addition, Bob was very active and involved with Kairos Prison Ministry for many years and was a very active member of St. Stephen's Episcopal Church, serving as senior warden on the vestry.

This resolution is offered as a record of our admiration and affection for R. A. Norred and of our condolences to his wife, son, daughters and the other members of his family.

— **S. Shay Samples, president,**
Birmingham Bar Association

Alonzo, Reynolds Thomas, Jr.
Mobile
Admitted: 1963
Died: July 8, 1999

Harrell, Sidney Moxey
Mobile
Admitted: 1954
Died: November 20, 1999

Holt, John Benjamin
Florence
Admitted: 1971
Died: December 6, 1999

Knight, Andrew Hendrix
Birmingham
Admitted: 1930
Died: December 6, 1999



Mays, Wesley Todd
Phil Campbell
Admitted: April 30, 1999
Died: July 10, 1999

McInish, Huey Dwight, Jr.
Dothan
Admitted: 1949
Died: November 20, 1999

Niezer, Charles Mahlon
Cullman
Admitted: 1975
Died: December 16, 1999

Steagall, Henry Bascom, II
Ozark
Admitted: 1951
Died: November 20, 1999

Wilson, Augusta Elliott
Jackson, MS
Admitted: 1973
Died: December 22, 1999

Mandt, John Frederick
Birmingham
Admitted: 1982
Died: January 13, 2000



ABOUT MEMBERS, AMONG FIRMS

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish addresses and telephone numbers **unless** the announcement relates to the opening or address change of a firm or solo practice. Please continue to send in name and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.

About Members

Todd B. Watson announces the opening of his office at 102 Court Street, Evergreen, 36401. Phone (334) 578-1330.

Mark D. Ryan announces the opening of his office, **Mark D. Ryan, P.C.** Offices are located at 100 E. First Street, Bay Minette, 36507. Phone (334) 580-0500.

Angela L. Kimbrough announces the opening of her office at 104 Main Street, Eutaw, 35462. Phone (205) 372-9635.

Among Firms

Leon Y. Sadler, IV announces the formation of **Leon Y. Sadler, IV L.L.C.** Offices are located at 2702 8th Street, Tuscaloosa, 35401. Phone (205) 344-5848.

The Martin Mediation Group announces that it has changed its name to **The Mediation Group, Inc.**, and its new address is 717 Focis Street, Metairie, Louisiana, 70005. Phone (504) 836-8400.

Heninger, Burge, Vargo & Davis, L.L.P. announces that **R. Edwin Lamberth** has become associated with the firm.

Benton & Centeno, L.L.P. announces that **C. Steven Ball** has joined the firm as an associate.

Burdette & Burdette, P.C. announces that **James W. Wolley** has become a partner in the firm and the firm name has changed to **Burdette, Wooley & Burdette, P.C.**

Carr, Alford, Clausen & McDonald, L.L.C. announces that **Marcus E. McDowell, David A. Strassburg** and **Holly T. Alves** have joined the firm as associates.

Harris & Harris, L.L.P. announces that **Pamela Ryan Hiebert** and **Stephanie Zohar Lynton** have become associated with the firm.

Larry U. Sims, Charles A. Graddick, Charles H. Dodson, Jr., Joseph D. Steadman, and Todd S. Strohmeyer announce the formation of **Sims, Graddick & Dodson, P.C.** and that **James B. Pittman, Jr.** has become associated with the firm. Offices are located at 205 St. Emanuel Street, Fort Conde Village, Mobile, 36602. Phone (334) 690-9300.

Piper & Marbury L.L.P. announce a merger with **Rudnick & Wolfe** creating the new firm, **Piper, Marbury, Rudnick & Wolfe.** Offices are located in Chicago, Baltimore, New York, Philadelphia, Tampa, Dallas, Reston and Washington, D.C.

Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C. announces that **P. Vincent Gaddy** has become a member of the firm and that **Mary Carol White, Gregory P. Bru** and **Craig D. Martin** have become associated with the firm.

Adams & Reese, L.L.P. announces that **T.K. Jackson, III, Paul D. Myrick, Bradley R. Byrne, William T. McGowin, IV, John W. McDonald, Randall Scott Hetrick, and Kelly Collins Woodford** have become associated with the firm.

Robert J. Morris and **Garry S. McAnnally** announce the formation of

Morris & McAnnally, L.L.C. Offices are located at 10365 Holtville Road, Deatsville, 36022. Phone (334) 569-1820.

Berkowitz, Lefkovits, Isom & Kushner, P.C. announces that **G. Steven Henry** has joined the firm as a member. **Andrew R. Chambless, Lee T. Clanton, William M. Lawrence, D. Keith Andress, Michele L. Scarbrough, Amy D. Sylvester, and Kenneth P. Weinberg** have also joined the firm as associates.

Bradford & Donahue, P.C. announces that **Shane T. Sears** and **Daniel P. Avery** have joined the firm as associates.

Gilbert & Sackman announces that **Laurie A. Traktman, Jay Smith** and **Christopher E. Krafchak** have become principals of the firm.

McPhillips, Shinbaum & Gill, L.L.P. announces that **Joseph C. Guillot** has become associated with the firm.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Anna Funderburk Buckner** and **William B. Walker** have become associated with the firm.

Lanier, Ford, Shaver & Payne announces that **David L. Berdan, Taylor P. Brooks** and **Robert N. Bailey, II** have become associated with the firm and that **Gerald M. Walsh, Ph.D.** has become *of counsel* to the firm.

Robert G. Methvin Jr. and **Phillip W. McCallum** announce the formation of **McCallum & Methvin, P.C.** Offices are located at 2201 Arlington Avenue, South, Birmingham, 35205. Phone (205) 939-3006.

Farmer, Price, Hornsby & Weatherford, L.L.P. announces that **Joel W. Weatherford, D. Lewis Terry, Elizabeth B. Glasgow** and **J. Vincent Edge** have become partners in the firm and that **Cathey E. Berardi** has joined the firm as an associate.

Hall & Smith announces that **Nancy Smith Pitman** and **M. Adam Jones** have joined the firm as associates.

Cory, Watson, Crowder & DeGaris announces that **C. Anthony Graffeo**, **David Madison Tidmore** and **Dennis Russell Weaver** have become partners in the firm.

Callis & Stover announces that **Frank I. Brown** has become *of counsel* for the firm.

The Southern Law Group, P.C. announces that **Gregory L. Case** has become associated with the firm.

Hand Arendall, L.L.C. announces that **Brannon D. Anthony** has become a member of the firm and **Ginger P. Gaddy**, **W. Craig Hamilton**, **Aaron L. Dettling**, **Geoffrey K. Gavin**, and **Norman M. Stockman** have joined the firm as associates.

John L. Bodie, **David M. Parker** and **Gordon H. Warren** announce the formation of **Bodie, Parker & Warren, P.C.**

Offices are located at Suite 200, Frank Nelson Building, 205 N. 20th Street, Birmingham, 35203. Phone (205) 251-6510.

Cusimano, Keener, Roberts & Kimberley, P.C. announces that **Philip Earl Miles** has joined the firm as a partner and the firm name has been changed to **Cusimano, Keener, Roberts, Kimberley & Miles P.C.**

Pierce, Ledyard, Latta & Wasden, P.C. announces that **Douglas L. Anderson**, **John P. Kavanagh, Jr.**, **W. Perry Hall** and **Gabrielle Elaine Reeves** have joined the firm.

Schmitt, Harper & Smith announces that **Steven F. Schmitt** has become *of counsel* to the firm. **Michael S. Harper** and **John G. Smith** will continue their practice under the name of **Harper & Smith, P.C.**

Gorham & Waldrep, P.C. announces that **Isaac Roitman** has joined the firm as an associate.

Otts, Moore & Jordan announces that **James Eric Coale** has become a partner of the firm and that the firm's name has been changed to **Otts, Moore, Jordan & Coale**.

Ball & Koons announces that **Russell J. Watson** has joined the firm as a partner. The firm's name has been changed to **Ball, Koons & Watson**. Offices have been relocated to 502 E. 2nd Street, Bay Minette, 36507. Phone (334) 937-2303.

Wolfe, Jones & Boswell announces that **Gary P. Wolfe** has become a partner of the firm.

Kilpatrick Stockton L.L.P. announces that **Michael E. Hollingsworth, II** has joined the firm as an associate.

Patton, Latham, Legge & Cole announces that **B. Chadwick Wise** has become associated with the firm.

Berkowitz, Lefkovits, Isom & Kushner, P.C. announces that **Jack B. Levy** has joined the firm as a member. **V. Leigh Mattox** and **Laura Schiele Robinson** have also joined as associates. ■

Notice of Election

Notice is given herewith pursuant to the Alabama State Bar Rules Governing Election of Commissioners.

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 2nd; 4th; 6th, place no. 2; 9th; 10th, places no. 1, 2, 5, 8, and 9; 12th; 13th, place no. 2; 15th, place no. 2; 16th; 20th; 23rd, place no. 2; 24th; 27th; 29th; 38th; and 39th. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 2000 and vacancies certified by the secretary no later than March 15, 2000.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 28, 2000).

Ballots will be prepared and mailed to members between May 1 and May 15, 2000. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 26, 2000) to the Alabama State Bar.

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LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

Second Special Session 1999

The Second Special Session convened November 15, 1999 and adjourned November 29. There were 140 bills introduced in this two-week session, with 59 of them being enacted into law. Most of these new acts were local, with only eight bills being of statewide concern to lawyers.

Four bills replaced the revenue shortage caused by Alabama's franchise tax being declared unconstitutional. These are:

Act 99-600 (HB-3)

A proposed constitutional amendment to provide a rate of 6.5 percent on taxable income of corporations for the calendar year 2001 and for any fiscal year beginning in the calendar year 2001 and each year thereafter. The special election to vote on the amendment is to be held on March 21, 2000.

Act 99-650 (HB-2)

A redistribution of certain taxes from the Special Education Trust Fund to the State General Fund by amending *Ala. Code* §§ 40-12-227, 40-23-2, 40-23-61, 40-23-108, and 40-25-23. This act will become effective January 1, 2000, provided the constitutional amendment is approved.

Act 99-664 (HB-4)

A bill to revise the corporate income tax law to conform to the federal corporate tax system and to increase the financial

institution excise tax to 6.5 percent. This will amend *Ala. Code* §§ 40-16-4, 40-16-6, 40-18-16, and 40-18-31 through 40-18-35 and repeals §§ 40-18-31.1, 40-18-36 and 40-18-38. These taxes will be distributed to the State General Fund.

Act 99-665 (HB-1)

The Alabama Business Privilege and Corporate Income Shares Tax of 1999 provides for a tax on the net worth of corporations, limited liability entities and disregarded entities, which will replace the domestic and foreign franchise tax declared unconstitutional by the United States Supreme Court and provides a new statewide shares tax, also levied on net worth, and repeals the former Domestic Shares Tax. It provides for an increase in the corporate income tax from 5 percent to 6.5 percent, provided the constitutional amendment is approved. It further provides for an increase in the financial institution's excise tax from 6 percent to 6.5 percent and repeals various sections of Title 40.

Act 99-663 (HB-73)

Technical amendments to the electronic voting counting systems law and provides definitions, the system's approval process, and a process for implementation of procedures for electronic voting by amending *Ala. Code* §§ 17-24-2, 17-24-4, 17-24-5 and 17-24-9.

(Continued on page 100)

Pro Bono Award Nominations

The Alabama State Bar Committee on Volunteer Lawyer Programs (formerly the Committee on Access to Legal Services), is seeking nominations for the Alabama State Bar Pro Bono Award. Nominations forms can be obtained by contacting:

Linda L. Lund, director
Volunteer Lawyers Program
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101
(334) 269-1515

The Alabama State Bar Pro Bono Award recognizes the outstanding pro bono efforts of attorneys, law firms and law students in the state. The award criteria includes but is not limited to the following: the total number of pro bono hours or complexity of cases handled, impact of the pro bono work and benefit for the poor, particular expense provided or the particular need satisfied, successful recruitment of other attorneys for pro bono representation, and proven commitment to delivery of quality legal services to the poor and to providing equal access to legal services.

Nominations must be postmarked by May 15, 2000 and include a completed Alabama State Bar Pro Bono Awards Program nomination form to be considered by the committee.



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Act 99-695 (HB-35)

Amends Alabama election law § 17-22A-7 to provide that during the period of 12 months before an election in which the person intends to be a candidate, the prohibition concerning contributions shall not apply to a loan from a candidate to his or her own political campaign committee.

Act 99-696 (HB-18)

This bill delays the effective date of requiring a person to present to the licensing authority proof of automobile insurance as provided in Ala. Code § 32-7-6.1(a)-(e). This delay is until January 1, 2001. The other sections of the act will become effective June 1, 2000.

Act 99-705 (SB-16)

Amends Ala. Code § 16-28-16 to specify that each child who enrolls in a public school is subject to the school attendance and truancy law irrespective of the required age of compulsory attendance, i.e., 16.

2000 Regular Session

The 2000 Regular Session of the Legislature began February 1, 2000 and can continue until May 15, 2000.

For information about bills and the current legislative term, you may access this information at www.legislature.state.al.us. For information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or through the Institute's home page at 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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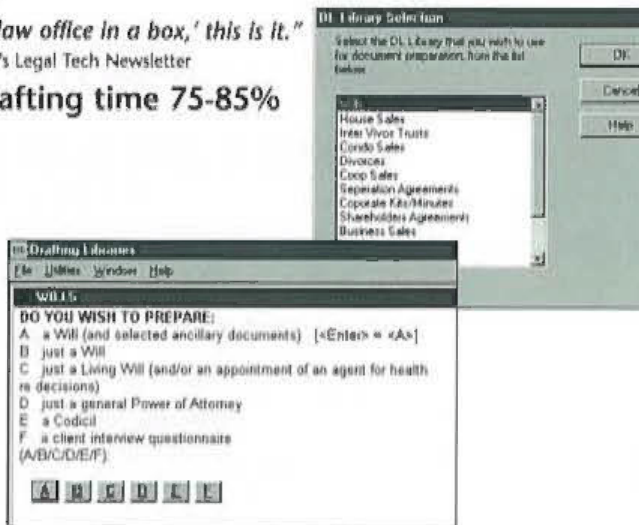
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BAR BRIEFS

- The National Board of Trial Advocacy announces that **John A. Lentine** of the Birmingham firm of Gorham & Waldrep has achieved Board Certification as a criminal trial advocate through NBTA. NBTA is dedicated to the identification of attorneys with a history of enhanced skill in trial practice and ensures that each NBTA board-certified attorney can substantiate his or her specialty designation with true quality.

- The Lawrence County Bar Association recently elected new officers. Chosen were **John Eric Burnum**, Moulton, president; **Sean Dale Masterson**, Moulton, vice-president; and **Richard Derek Proctor**, Moulton, secretary-treasurer.

- **Anthony A. Joseph**, a partner with the Birmingham firm of Johnston Barton Proctor & Powell LLP, was recently elected to serve on the Council of the American Bar Association's Criminal Justice Section. Joseph also serves on the Executive Committee of the Birmingham Bar Association and is chair of the White Collar Crime Subcommittee of the Commercial & Banking Litigation Committee of the Litigation Section of the American Bar Association.

- **Thomas Jay Skinner, IV** of the Birmingham firm of Lloyd, Schreiber & Gray, P.C. is currently serving as president of the Alabama Real Estate Lawyers Association, Inc.

- **Judith S. Crittenden** of Crittenden-Martin Attorneys at Law was recently named Lawyer of the Year and her secretary, **Debbie Lawrence**, was named Member of the Year by BLSA, a professional organization whose members work in law-related offices and agencies. Crittenden is a founding partner of Crittenden-Martin of Birmingham. Lawrence has worked for Crittenden-Martin since 1994. She earned her Professional Legal Secretary certification in 1995 and now teaches sections of certification workshops.

- The **Civil Practice Federal Court Committee of the Mobile Bar Association** recently published a practitioner's guide entitled *Introduction to Civil Discovery Practice in the Southern District of Alabama*. The committee worked closely with the judges of the Southern District in drafting this guide to local discovery practice and thank the court for its participation, especially **Magistrate Judge William E. Cassidy**, who served as chairman of the committee. Copies of the guide are being attached to the court's local rules and may be obtained, free of charge, from the clerk's office of the Southern District.

- The **Eleventh Circuit Historical Society**, a private, non-profit organization incorporated in Georgia in 1983, invites judicial conference members to join the Society. The Eleventh Circuit was the first federal appeals court in the country to create an historical society dedicated to preserving chambers papers, portraits and personal memorabilia of its judges; over 650 federal and state court judges, attorneys, law firms and legal history scholars are members.

To increase the public's awareness of the Eleventh Circuit federal courts' role in American history, three books were commissioned by the Society: *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821-1990*; *United States Court of Appeals for the Eleventh Circuit: The First Decade, 1981-1991*; and *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820-1994*.

The Society has a permanent office in the Elbart Parr Tuttle United States Court of Appeals Building in Atlanta. Officers include Alabama attorneys **Thomas S. Lawson, Jr.**, president, and **Ben H. Harris, Jr.**, vice-president. Trustees include **Julian D. Butler**, **Walter R. Byars**, **A.J. Coleman**, **Camille Wright Cook**, **N. Lee Cooper**, **Richard H. Gill**, **Ralph N. Hobbs**, **Alex W. Newton**, and **James L. North**, all members of the Alabama State Bar.

For more information, contact the Society at (404) 335-6395 or at P.O. Box 1556, Atlanta 30301.

- **Forrest S. Latta**, of the Mobile firm of Pierce, Ledyard, Latta & Wasden, P.C., is the latest recipient of the Defense Research Institute's G. Duffield Smith award. The DRI, the nation's largest association of civil litigation defense lawyers, presents the award annually to the author of the most outstanding article published by the Institute.

- The **Mobile Bar Foundation**, the charitable arm of the Mobile Bar Association, provided over \$30,000 to Mobile area charitable organizations. Beneficiaries of the 1999 grants, which included The Shoulder, Ronald McDonald House, Penelope House and the Mobile Bar Association Pro Bono Program, were recognized at the association's luncheon January 20. Since its establishment in 1995, the Foundation has made gifts to community organizations in excess of \$150,000. ■

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 117, 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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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.



Fayette County

Established: 1824

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.



Fayette County Courthouse after renovation

Fayette County Revisited

The Fayette County Courthouse was first featured in the January 1992 issue of *The Alabama Lawyer*. This courthouse has undergone a recent renovation and deserves an update.

The building was originally constructed in 1911 at a cost of \$59,000. The renovation, completed in 1999, covered two phases and cost approximately two million dollars. Phase one was the new roof that cost over \$350,000. Phase two was the interior renovation that had a price tag of approximately \$1.7 million. A large portion of the funds for the project came from a one million dollar gift from local philanthropist Earl McDonald.

The modernization work included new lighting, new ceilings, new wiring, and the renovation of walls, floors and cabinetry. The courthouse now has central heat and air for the first time. Formerly, it had more than 30 window air conditioning units. A new sprinkler

and alarm system was installed for fire protection. A wheelchair ramp and elevator were added for compliance with the Americans With Disabilities Act. The third-floor attic was totally renovated to now include a new courtroom and 2,000 square feet of additional office space. The two-story main courtroom was completely renovated. The ceiling was raised and the balcony area opened up. Much of the original wood, marble and pressed copper ceiling were retained. Exterior landscaping will complete the Fayette County Courthouse project.

The contractor for the Fayette County Courthouse renovation was H & N Construction, Inc. The architectural firm was TurnerBatson, with Jamie Collins as project coordinator. A rededication and public barbecue are planned for the spring of this year, according to Probate Judge William Oswald. ■



Close-up view of courthouse facade

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Fayette County construction sign



New secretarial area

*Photos furnished by
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Clerk's office



Renovated main courtroom



View of courtroom public area



Renovated judge's office



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 served as the bar commissioner for the 10th Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He is the current president-elect of the state bar and will become president in July 2000. He is a retired colonel in the United States Army Reserve JAG Corps.

BOOK REVIEWS

The Soulbane Stratagem

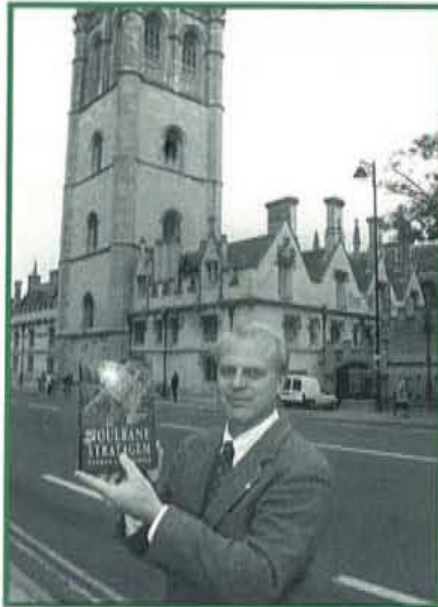
A novel by Norman Jetmundsen, Jr. • Hardcover • John Hunt Publishing • October 1999

Reviewed by Charles A. Stewart, III

The *Soulbane Stratagem*:

You won't find it in the convenience store down the street, nor in crowded airport bookstores alongside Grisham's novels yet, but when you do find it, Norman Jetmundsen's first novel is an exciting discovery. The book is a sequel to C. S. Lewis's book, *The Screwtape Letters*. I happened upon his novel at the University Supply Store while visiting my alma mater, The University of the South in Sewanee, Tennessee, where Norman was an undergraduate student, too.

Do not be fooled. This is not the typical lawyer's mystery novel. The site of the novel is Oxford, England. The main character is an American student, Cade Bryson, who is studying at Magdalen College. While studying in the library late one snowy winter's solstice night, Cade discovers some strange letters hidden in the bookshelves. These letters were exchanged between a junior devil, Soulbane, and his fiendish superior, Foulheart. They contain a riddle about the location of some reports to be prepared by Soulbane. Cade Bryson goes in search of the reports. He receives help from a fellow student, Rachael, and Mr. Brooke, the vicar of a small country church. The story is exciting, with some unexpected twists and turns. The message is strong and very timely.



Norman Jetmundsen in Oxford with Magdalen Tower in the background



British Sales Manager Colin Nutt toasts Kelli and Norman Jetmundsen with champagne and flowers sent by Norman's firm, Bradley Arant Rose & White, for the book's launching in Oxford.

Like C. S. Lewis's characters, *Screwtape* and *Wormwood*, these evil characters are pleased with the current state of the world and the church. In discussing the state of the modern world, *Soulbane* addresses the numerous victories that the devil has managed to have on Earth. Of course, from the devil's perspective, everything is reversed (i.e., evil is good, down is up, he has no compassion). Among those victories are the inability of man to tell right from wrong, the nuclear destruction of the family, the effect of technology on our lives, and the overall decay of the moral and religious fiber of our society. *Soulbane* even says the following about lawyers:

"As a part of our research, we attempted to interview that special species of vermin they call lawyers. Badness knows, there are enough of them down here! (Even our Royal Hindness can't stand to be around them for very long.) It is clear that the goal of lawyers in their trials is not justice, but winning. We tried to get a group of them to explain to us why there is so much litigation in western society, and why society is so distrustful of the legal system, so that we could clarify the matter for this Report, but all they did was argue, and we never got a straight answer. Later, several even tried to send us a bill for their time!"

Norman graduated from Sewanee with a degree in English literature. He attended the University of Alabama School of Law. Thereafter, he clerked for Judge Sam Pointer in the Northern District of Alabama. He then studied at Magdalen College, Oxford, where he received an M.Litt. in Law. A Rotary International Scholarship is what landed Norman in Oxford. It was while at Oxford that he kindled his interest in C. S. Lewis. Lewis taught at Magdalen College, where he wrote *The Screwtape Letters*.

Norman conceived the idea for the book while crossing High Street in Oxford one day. Having tossed around the idea of the book for nearly ten years, Norman started putting

Charles A. Stewart, III

Charles A. Stewart, III practices with the firm of Sirote & Permutt. He attended college at The University of the South, during which time he spent a summer studying at Oxford. He received his law degree from Cumberland School of Law, Samford University, where he was an associate editor of the *Cumberland Law Review*. He was admitted to the Alabama State Bar in 1985 and is a member of the Alabama Defense Lawyers Association, the Defense Research Institute and the American Bar Association, as well as numerous other organizations. Stewart also was an adjunct professor of law at Jones School of Law in Montgomery.

down his thoughts in March 1994, two months after his wife, Kelli, gave birth to triplet boys, Jonathan, Taylor and Nelson. The birth of the triplets is partly responsible for the book's having taken so long to write, as is the fact that he maintained his full-time law practice at Bradley Arant Rose & White LLP. After a couple of years, he began to think that perhaps this could turn into a book, and Norman then engaged in a self-study program to learn how to write fiction.

Norman is a member of the litigation practice group with Bradley Arant, and also works in the area of alternative dispute resolution, serving as a mediator and arbitrator in various cases. The firm has been very supportive of the publication of his novel. Also, the Rev. Dr. Paul Zahl, an Episcopal priest, and the Rev. Fred Barbee, editor of *The Anglican Digest*, provided him with guidance, advice and support. In addition, Norman received assistance from Robert Fraley, a former University of Alabama

quarterback and sports attorney, who was Norman's friend in law school. Fraley's firm, Leader Enterprises, helped Norman find a British publisher in John Hunt Publishing Ltd. The tragic death of Robert Fraley with golfer Payne Stewart occurred immediately before Norman left for Oxford to launch the new book. Norman, Kelli, his brother and several friends, including his partner, Joe Mays, and Joe's wife, June, were present for the official launch of Norman's book at Magdalen College on October 29, 1999.

Norman's first novel is a real success, and I highly recommend it to you. Your local bookstore can order *The Soulbane Stratagem* from the United States distributor, Morehouse Publishing, in Harrisburg, Pennsylvania. (It can also be ordered over the Internet from Barnes & Noble, at www.barnesandnoble.com, and from www.amazon.co.uk.)

Based upon my reading of this book, I certainly hope Norman will write another one! ■

Business and Commercial Litigation in Federal Courts (ABA and West Group 1998, \$480)

Reviewed by Edgar C. Gentle, III

This six-volume work was prepared jointly by the American Bar Association and West Group. The volumes were authored by distinguished federal judges and litigators practicing in federal courts, including Birmingham's own Lee Cooper, who co-authored the chapter on the Selection of Expert Witnesses.

The work is 6,700 pages long, containing 349 forms and 319 jury charges in print and on disk. It boasts over 17,000 cited cases and thousands of cited statutes. The first half of the set is devoted to the simple and sophisticated building blocks of general commercial litigation. There are scholarly chapters dealing in an academic manner with hotly contested threshold issues in federal cases, such as subject matter and personal jurisdiction and venue. These portions of the work provide a welcomed update to *Wright & Miller's Classic Treatise*. Even these portions of the series are practical, however, in providing handy checklists to comply with or challenge the legal strictures involved, as well as forms, for example, to accept service or transfer venue.

Other chapters on the fundamentals of litigation treat law as art and not science, in, for example, addressing how to engage and use investigators to work up a case, debating whether to have a factually developed or a brief and general complaint or answer, how to select a jury, present or cross

witnesses, and open and close the case. The voice of experience is loud and clear in many of the practical forms provided, such as written investigator guidelines designed to reduce exposure resulting from aggressive discovery by non-lawyers.

Unlike many trial advocacy works, this series tries to take an even-handed approach to the topics, not favoring either side of the bar. Thus, the treatment of the expert testimony turmoil resulting from *Daubert* is addressed objectively, from the perspectives of both admitting and excluding expert evidence.

In addition to the more rudimentary chapters applying elements encountered in every litigated commercial case, the series also provides chapters with lesser known factors affecting litigation, such as the Bankruptcy Code and multi-district litigation options.

The building block half of the set proceeds chronologically through a lawsuit, discussing procedure, legal principles, practical advice and strategy specifically applying to commercial litigation for each building block. Helpful narrative discussion, practice pointers and checklists are provided on liability, defenses and damages, as well as case summaries, forms and jury charges.

The second half of the work outlines the practice procedure and strategy in the commercial litigation of specific subject matters, including traditional areas such as contracts, warranties, the sale of goods, employment discrimination, and competitive torts, as well as more specialized or undeveloped fields, such as antitrust, franchising, energy and environmental claims.

The work is a valuable guide for tyro and expert litigator alike. It provides necessary ammunition used in every case as well as insights into more specialized, but increasingly popular, avenues of commercial litigation.

To order, call 1-800-328-9352. ■

Edgar C. Gentle, III

Edgar C. Gentle, III practices with the Birmingham firm of Gentle, Pickens & Eliason. He has a master's of science degree in natural resource management from the University of Miami and studied law at the University of Oxford in England as a Rhodes Scholar, obtaining a B.A. in jurisprudence. He has served as senior staff attorney with AT&T, and as general counsel to various interexchange and competing local exchange carriers in Alabama, as well as to the Alabama State Senate.

Stress Management for Lawyers

By Jeanne Marie Leslie, director, Alabama Lawyer Assistance Program

“**S**tress Management for Lawyers,” a four-hour continuing legal education program, was offered in December at the Alabama State Bar in Montgomery. Amiram Elwork, Ph.D., director of the Law-Psychology Graduate Training Program at Pennsylvania’s Widener University, captivated lawyers from around the state with his fast-paced presentation. Along with his work at Widener University, Dr. Elwork has a private psychology practice, where he counsels firms and individual lawyers in managing stress. He has literally written the book on the topic, entitled *Stress Management for Lawyers*.

Dr. Elwork discussed many ways to increase both personal and professional satisfaction in the practice of law. In particular, he described how poor stress management skills can keep lawyers from experiencing their full potential. Developing these skills can help lawyers experience job satisfaction, achieve balance between career and personal life, improve relationships with family, associates and clients, and even increase productivity.

According to many studies, the practice of law is one of the most stressful professions. There are higher incidences of depression, substance abuse and suicide among lawyers than any other professional group. As a result of the stress lawyers experience, there is a rising rate of job dissatisfaction, and increasing numbers of lawyers are dropping out and switching to new careers.

Dr. Elwork defines a successful lawyer as one who finds happiness and does not experience chronic distress in the practice. All lawyers will experience stress from time to time, but chronic distress can be avoided with appropriate stress management techniques. Dr. Elwork outlined many methods to help stay calm and confident during stressful times and to eliminate negative thinking habits. He described ways to under-



Dr. Amiram Elwork (right) discusses several stress-reducing techniques with ALAP Director Jeanne Marie Leslie and Montgomery attorney Corky Hawthorne.



Alabama lawyers take notes while Dr. Elwork discusses stress management.

stand stress responses and replace maladaptive reactions with beneficial ones.

All participants received a copy of Dr. Elwork’s book, and the response to the presentation and written materials was overwhelmingly positive. Unfortunately, many who wanted to attend were turned down because of limited space, however, another workshop is under consideration. **If you are interested in being placed on the mailing list for a**

repeat presentation, please call Sandra Clements at the Alabama State Bar, (334) 269-1515, extension 302.

This program was sponsored by the Alabama State Bar’s Law Office Management Assistance Program, the Alabama Lawyer Assistance Program, the Volunteer Lawyers Program and the Lawyer Referral Service, and was made possible through a generous grant from Lexis Publishing. ■



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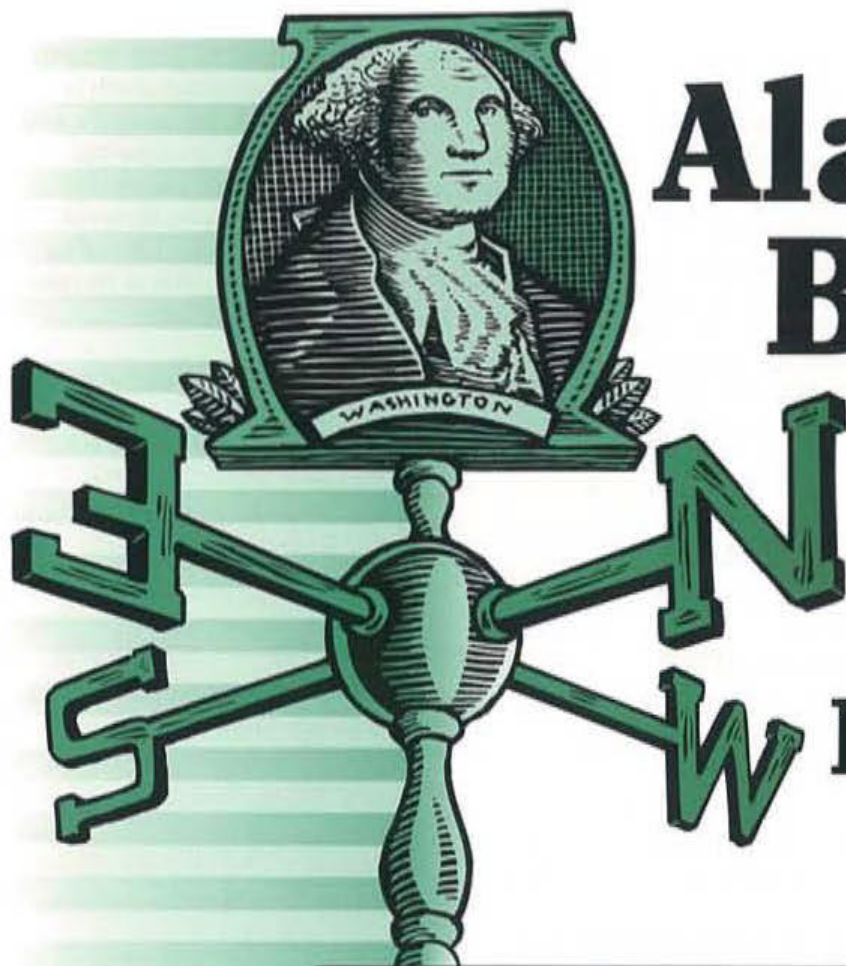
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Alabama's Business Taxes: A Change In Direction

By William D. Lineberry and Bingham D. Edwards, Jr.

On March 23, 1999, the United States Supreme Court declared that Alabama's franchise tax system violated the dormant commerce clause of the United States Constitution. See *South Central Bell Telephone Co. v. Alabama*, 119 S. Ct. 1180, 1185-86 (1999). As a result, Alabama was confronted with the potential annual revenue loss of \$150 million.

Following a historic six-day special session of the Alabama Legislature, on November 29, 1999, Governor Don Siegelman signed into law the Alabama Business Privilege and Corporate Shares Tax Act of 1999 (the Act). The Act provides for the implementation of a business privilege, or franchise, tax as well as a shares tax. The shares tax would be repealed if a constitutional amendment is approved to increase the corporate income tax rate. The referendum on the constitutional amendment will be held on March 21, 2000.

The following is a summary of the Act and the related tax legislation that was enacted.¹

Business Privilege (Franchise) Tax

Applicability

The business privilege tax applies to all corporations and limited liability entities (LLEs) which do business in Alabama or are organized under the laws of Alabama. It applies beginning January 1, 2000.

Tax Base

The tax base is the net worth of the taxpayer.

- For a corporation, net worth equals the sum of:
 1. Outstanding capital stock
 2. Paid-in capital, without reduction for treasury stock
 3. Retained earnings, but not less than zero
- For an LLE, net worth equals the sum, but not less than zero, of the owners' capital accounts. Limited liability companies taxed as partnerships, registered

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For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 395-0807. All calls are confidential.

limited liability partnerships and limited partnerships are examples of LLEs subject to the privilege tax.

- For a disregarded entity such as a single-member LLC or qualified subchapter S subsidiary, the net worth of the disregarded entity is included in the net worth of its owner. However, if the owner of the disregarded entity is an individual, general partnership or other entity not subject to the privilege tax, then the disregarded entity is subject to tax, and net worth is equal to its assets minus liabilities.

Additions to Net Worth

- Related-party debt in excess of net worth
- Excess compensation:
 1. Compensation in excess of \$500,000 paid to a 5 percent or more owner of a C corporation
 2. Compensation or distributions in excess of \$500,000 paid to a 5 percent or more owner of an S corporation
 3. Compensation or distributions in excess of \$500,000 paid to an owner of an LLE or disregarded entity
 4. Aggregation rules are provided for payments of compensation and/or distributions to related parties, unless the individual recipient is over 21 years of age and materially participates

Deductions from Adjusted Net Worth

- Equity investments in other taxpayers doing business in Alabama
- Purchased goodwill and core deposit intangibles
- The unamortized balance of any amount a taxpayer elected, pursuant to FASB pronouncements, to amortize rather than expense
- Additional deductions available only to financial institutions:
 1. Investments in any other corporation or LLE not doing business in Alabama if the taxpayer owns more than 50 percent, unless the other corporation or LLE is dormant
 2. The amount of net worth exceeding 6 percent of assets

Apportionment of Net Worth

An entity's adjusted net worth is apportioned to Alabama using the entity's Alabama income or excise tax apportionment factors, except that an insurance company apportions net worth on the basis of the ratio of its Alabama premium income to its nationwide total direct premiums.

Deductions from Apportioned Net Worth

- Net investments in Alabama securities issued before January 1, 2000
- Net investments in Alabama pollution control devices and facilities
- Net investments by a certified or licensed air carrier with a hub operation
- Certain investments in manufacturing facilities meeting minimum investment and employment criteria
- Certain reserves, funds or accounts required for plant or site reclamation, storage, decontamination or retirement
- The book value of any low-income housing projects
- For an S corporation, 30 percent of its taxable income
- For an LLE, 30 percent of its taxable income (only if the shares tax is not in effect)

Tax Rates

Tax rates are graduated and based on federal taxable income apportioned to Alabama.

Prior Year's Taxable Income	Tax Rate
Less than \$1	\$0.25 per \$1,000
\$1 to \$200,000	\$1.00 per \$1,000
\$200,000 to \$500,000	\$1.25 per \$1,000
\$500,000 to \$2,500,000	\$1.50 per \$1,000
\$2,500,000 and over	\$1.75 per \$1,000

Tax Caps

The minimum amount of tax is \$100. The maximum amount for most taxpayers is \$15,250 for the year 2000 and \$15,000 for all years thereafter.

- For utilities with an obligation to serve the public, insurance companies subject to premium taxes, and financial institutions subject to the financial institution excise tax, the maximum amount of tax is \$3 million.

- For real estate investment trusts (REITs), the maximum amount of tax is \$500,000.
- If a constitutional amendment is passed to raise the corporate income tax to 6.5 percent, the tax cap for utilities with an obligation to serve the general public and REITs will be decreased to \$15,000. Financial institutions and insurance companies will remain subject to a maximum tax of \$3 million.

Family Limited Liability Entities

The tax on a qualified family limited liability entity is \$500 if it makes an annual election. A limited liability entity can elect to fall within this provision if:

- It is at least 80 percent owned by an individual and his family, and
- At least 90 percent of the assets of the entity are used in a passive activity, which includes certain rental activities.

Tax-Exempt Entities

Organizations described in 26 U.S.C. § 501(a) are exempt from the privilege tax.

Time of Payment

The tax is calculated January 1 of each year and is due March 15. Extensions will be allowed for a period not to exceed six months. A new entity must calculate the tax on the day it is organized or first does business in the state, must pay the tax two and a half months later, and is allowed to prorate the tax based on the number of days it does business during the short taxable year.

Consolidated Reporting

Not allowed

Shares Tax

Applicability

The shares tax applies to all corporations which do business in Alabama or are organized under the laws of Alabama other than utilities with an obligation to serve the public, insurance companies, financial institutions, and REITs. It applies beginning January 1,

2000. The shares tax will be repealed for all taxable years beginning after December 31, 2001 if a constitutional amendment is passed on March 21, 2000 to raise the corporate income tax to 6.5 percent.

Tax Base

The tax base is the net worth of the taxpayer. The net worth of a taxpayer is computed in the same manner as the privilege tax (without additions). The tax base is apportioned to Alabama in the same manner as the privilege tax.

Deductions from Net Worth

- Book value of goods, wares and merchandise held for sale
- Book value of the equity investment in other corporations doing business in Alabama
- Book value of federal obligations, weighted in certain circumstances
- The unamortized balance of any amount a taxpayer elected, pursuant to FASB pronouncements, to amortize rather than expense
- For an S corporation, the greater of 30 percent of its taxable income or its tax liability if it were treated as a C corporation
- Net value of IDB-financed assets obtained prior to May 21, 1992, limited to \$200,000 annually

Apportionment of Net Worth

A corporation's adjusted net worth is apportioned to Alabama using the corporation's Alabama income tax apportionment factors.

Deductions from Apportioned Net Worth

- Net investments in Alabama securities issued before January 1, 2000
- Book value of Alabama pollution control devices and facilities
- Certain investments in manufacturing facilities meeting minimum investment and employment criteria
- Certain reserves, funds or accounts required for plant or site reclamation, storage, decontamination or retirement

- Fair market, or current use value (if applicable), of the real and personal property as last determined by the county assessing official on which the taxpayer is subject to property tax

Tax Rates

The tax rate is \$5.30 per \$1,000. If a constitutional amendment raising the corporate income tax rate to 6.5 percent is passed on March 21, 2000, the shares tax rate will decrease to \$1.33 per \$1,000 with a maximum tax of \$125,000 for taxable years beginning after December 31, 2000, and the shares tax will be repealed for all taxable years beginning after December 31, 2001.

Tax Caps

There is no minimum amount of tax. The maximum amount of tax is \$500,000.

Time of Payment

The tax is calculated January 1 of each year and is due March 15. Extensions will be allowed for a period not to exceed six months. A new entity must calculate the tax on the day it is organized or first does business in the state, must pay the tax two and a half months later, and is allowed to prorate the tax based on the number of days it does business during the short taxable year.

Consolidated Reporting

Not allowed





Financial Institution Excise Tax (FIET)

Applicability

The Act specifically extends the FIET to out-of-state credit card companies. Consequently, Alabama is one of a minority of states attempting to tax this activity. However, it is unknown whether these attempts will be successful or whether the FIET's reach may now be broader than its stated extent.

Apportionment

Financial institutions allocate and apportion net income to Alabama as provided in future department regulations which shall be substantially the same as the allocation and apportionment formula for financial institutions recommended by the Multistate Tax Commission. Until regulations are adopted, the apportionment formula for financial institutions recommended by the Multistate Tax Commission should be used.

Tax Rates

The tax rate remains 6 percent. However, if a constitutional amendment is passed on March 21, 2000 to raise the corporate income tax rate to 6.5 percent, the FIET tax rate will also be raised to 6.5 percent for all taxable years beginning after December 31, 2000.

Credits

The privilege tax is not creditable against the FIET.

Insurance Premium Tax (IPT)

The Act reduces the amount of privilege tax which is allowed as a credit



against the insurance premium tax to 60 percent from 100 percent. With the repeal of the securities registration tax, the deduction for security registration taxes paid has been removed.

Corporate Income Tax

On March 21, 2000, a constitutional referendum will be held to consider whether the constitution should be changed to allow the corporate income tax rate to be increased to 6.5 percent. The following describes the corporate income tax for all taxable years beginning on or after January 1, 2001 if such amendment passes.

Applicability

The corporate income tax will apply to all corporations and to tax-exempt organizations (described in 26 U.S.C. § 501(c)) with unrelated business taxable income. The tax will not apply to:

- Farmers and certain mutual companies
- Associations for the marketing of products grown by farmers
- Federal land banks and national farm loan associations
- Building and loan associations
- Counties, municipalities and instrumentalities of the state or its subdivisions
- National banks and corporations engaged in banking, if subject to the FIET

- Insurance companies, if subject to the IPT

Tax Base

The tax base will be federal taxable income without federal net operating losses.

Additions to Tax Base

- State and local income taxes
- Interest earned on state and local bonds
- Refunds of federal income taxes
- Dividends received from a corporation less than 20 percent owned by the taxpayer

Deductions from Adjusted Tax Base

- State and local income tax refunds
- Federal income taxes paid or accrued
- Interest earned on federal bonds
- Interest earned on Alabama state and local bonds if included in federal gross income
- Amounts paid to the State Industrial Development Authority to induce an approved company to undertake a major project
- Expenses otherwise deductible that were not deducted for federal purposes as a result of an election to claim a credit for such expenses
- Dividend income received from certain foreign corporations

Apportionment of Adjusted Tax Base

The tax base, plus additions and less deductions, will be apportioned to Alabama using traditional apportionment methods.

Tax Rates

The tax rate will be 6.5 percent of the apportioned tax base.

Tax Credits

The tax incentives provided for in §§ 41-10-44.8(a)(1) and 41-10-44.9, *Code of Alabama of 1975*, will be allowed as credits.

Time of Payment

There is no change from current law. Taxes are due on the 15th day of the third month following the close of the taxable year, although estimated tax payments may, as before, be required.

Consolidated Reporting

There is no change from current law. An affiliated group of corporations (defined in 26 U.S.C. § 1504 and not including any corporations subject to the IPT or FIET) which files a federal consolidated return may elect to file an Alabama consolidated return for the same period.

Old Provisions Repealed

The Act repeals the following provisions:

- Foreign admissions tax
- Requirement of corporate permits
- Domestic shares tax
- Securities registration tax
- Foreign and domestic franchise tax (repealed prospectively only)

Constitutional Referendum

On March 21, 2000, a constitutional referendum will be held to consider whether the constitution should be changed to allow the corporate income tax rate to be increased to 6.5 percent.

If such an amendment passes, the following will occur:

- For utilities with an obligation to serve the general public and for REITS, the privilege tax caps of \$3 million and \$500,000, respectively, will be decreased to \$15,000. Financial institutions and insurance companies will remain subject to a maximum tax of \$3 million.
- The shares tax rate will be changed to \$1.33 per \$1,000 with a maximum tax of \$125,000 for taxable years beginning after December 31, 2000.
- The shares tax will be repealed for all taxable years beginning after December 31, 2001.
- The FIET tax rate will be increased from 6 percent to 6.5 percent for all taxable years beginning after December 31, 2000.
- The Alabama corporate income tax will generally "piggyback" the federal tax rules and federal taxable income will be apportioned to Alabama and will be subject to Alabama-related adjustments.
- A corporate income tax rate of 6.5 percent will be effective for taxable years beginning after December 31, 2000.

Still outstanding is the remedy phase of the *South Central Bell* litigation. The past discrimination against foreign corporations identified in *South Central Bell* could be remedied by refunding to foreign corporations the taxes they overpaid or, as the State has suggested, by requiring domestic corporations to pay some of the taxes they underpaid in the past. ■

Endnote

1. Authors' Note: This article was submitted prior to the likely introduction of a technical corrections bill in the 2000 regular session of the legislature. Accordingly, technical corrections made by the legislature, if any, are not addressed.



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DIVORCE & TAXES:

What Every Divorce Attorney Should Know About Taxes

By Michael A. Kirtland

Despite the hesitancy of organized bars throughout the United States to recognize it, law has become a complex subject in which most lawyers end up "specializing" in some particular area to the exclusion of most, or even all, other areas of practice. This concentration of an attorney's practice does not, however, eliminate the need for the attorney to remain aware of other practice areas that have a direct impact on an attorney's primary area of concentration.

One such area in which attorneys often concentrate their practice is divorce law. Another is tax law. While many view these two areas as far divergent, federal and state tax laws inherently affect virtually every divorce decree, settlement agreement or legal separation. Far too often, though, the domestic relations attorney simply tells his or her client, "I don't do taxes. You'll have to consult a tax attorney or accountant." Perhaps even more commonly, the domestic relations attorney simply says nothing to the client about the tax implications of the divorce. While the providing of specific tax advice by an attorney who doesn't practice in this area is not advisable, having some basic tax knowledge concerning the tax implications of divorce will permit domestic relations attorneys to gain more advantageous settlements for their clients, and perhaps keep both the client and the attorney from receiving unhappy surprises when tax time arrives.

The Basics

Property

Virtually every divorce decree involves a property settlement. While, in general, property transferred between spouses made

within one year after the end of a marriage is not subject to income tax (IRC § 1041), certain exceptions apply which can cause inclusion of property settlements in taxable income. The party receiving the property in the divorce proceeding takes the property with the same basis for tax purposes as the property had in the marriage. However, if the transfer is made to a spouse who is not a U.S. resident, or if the transfer is made to a trust rather than directly to the spouse, any gain on the property must be reported and is subject to tax.

The benefit of this non-taxable status is expanded under Internal Revenue Code (IRC) § 2516, which provides that if the property transfer is pursuant to a written agreement between the parties, in settlement of marital and property rights, or if it is done to provide child support to a minor child of the parties, and the divorce occurs within a three-year time period beginning one year before the agreement is entered into and ending two years after the agreement is entered, the Internal Revenue Service (IRS) presumes that the transfer is not intended as a gift, and therefore is not subject to gift tax.

Child Support

Child support is perhaps the second most common provision of a divorce decree. The IRS recognizes child support as a responsibility of the paying party, regardless of whether or not the parents remain married. As such, child support is not taxable to the non-custodial parent (IRC § 71(c)), nor is it deductible to the paying spouse, regardless of the physical or legal custody status awarded in the divorce decree. However, the decree needs to be careful to make a distinction between child support and alimony in any decree containing both payments, lest the entire amount be considered alimony, resulting in inclusion as taxable income to the receiving party.

Where the settlement agreement or divorce decree have been less carefully drafted and the distinction between the amount of support payment attributable to alimony and that to child support is unclear, the IRS will consider the amount of the undistinguished payment ending upon a child attaining certain specified conditions, including death, marriage, age of majority or leaving school, as child support, resulting in its exclusion from income of the recipient, and also eliminating it as a deductible amount from the income of the payor. Given the formula approach to child support found in Rule 32 of the *Alabama Rules of Judicial Administration*, and the requirement for written justification of any deviation from this amount, the Service would likely impute the Rule 32 amount as child support in any unspecified support payment.

A major issue which causes the divorced parties to be audited by the IRS is the question of who may deduct the children of the marriage as dependents on their federal income tax return. The IRS routinely catches divorced parents who are both claiming the children as a dependent exemption, by computer matching Social Security numbers submitted on the tax return form, and resulting in penalties and interest becoming due, in addition to the increased, re-computed tax. Reporting the Social Security number of dependent children is a requirement in order to claim the exemption, and the IRS will not permit a claim for a dependent exemption for a child without a Social Security number. The basic rule of the Internal Revenue Code is that the parent with primary physical custody is entitled to claim the exemption for dependent children (IRC § 152). However, where the spouses are in different tax brackets, or where one spouse has no taxable income, this can lead to the exemption being wasted or underused. As a result, there is provision in § 152 for the primary physical custody parent to voluntarily give up the child's exemption in favor of the non-custodial parent. This is accomplished by having the parent with primary physical custody complete an IRS Form 8332, and attaching that form to the federal tax return of the non-custodial parent who will be claiming the exemption. This same Form 8332 is used where parents are entitled to claim the dependent exemption in alternating years according to the divorce decree or incorporated settlement agreement.

Alimony

The third common tax issue in many divorces is the question of alimony. Alimony may be had as periodic, or recurring, alimony or as "alimony in gross." Under numerous provisions of the Internal Revenue Code, alimony (and separate maintenance payments under a legal separation) are considered income to the recipient and as a deduction to the paying spouse. This fact can have significant advantages in negotiating a settlement agreement between spouses whose post-divorce income will be significantly different. Where one spouse will have income placing them in a high income tax bracket, the advantage of being able to claim the deduction for alimony is greater than the impact of the income tax on

the recipient spouse in a low income tax bracket. Being aware of the tax impact on each spouse can enhance the divorce attorney's ability to negotiate alimony payments favorable to his or her client.

Unlike periodic alimony, alimony in gross is considered to be a property settlement between the divorcing parties, and therefore is not taxable. In order to prevent the abuse of the distinction between deductible alimony payments and non-deductible alimony in gross, IRC § 71(f) makes provision for recapture of alimony payments deducted by the paying spouse when there is significant "front loading" of these alimony payments. While computation of what constitutes "front loading" is complex, essentially, the IRS looks to the first three years of alimony payments to determine whether an "excess" amount of alimony is being paid during this time period. If the total of the first year's alimony minus the average alimony paid in the second two years is greater than \$15,000, or the second year's alimony minus the third year's alimony is greater than \$15,000, the payments will be considered as part of a property settlement, rather than periodic alimony, resulting in their non-deductibility. Any "excess" amount deducted by the paying spouse will be re-computed as income to the paying spouse, with an equivalent deduction from income for the receiving spouse. Divorce practitioners attempting complex alimony schedules must be aware of this rule to prevent serious tax consequences to the client and possible claims of malpractice against the lawyer.

In determining what is alimony, the attorney needs to realize that many items of support to the ex-spouse may be considered alimony, not just cash payments. An item which can be included is payment of court-ordered life insurance, used to replace alimony support in the event of the death of the paying spouse. Again, however, a distinction needs to be made between life insurance intended as a replacement of alimony in the event of death and that intended to replace child support, with the amount paid for child support being non-deductible. Also included among the non-cash payments which may be deductible as alimony are tuition paid on behalf of the spouse, medical insurance paid on behalf of the spouse, or similar payments. Note, however, that where such payments are made for the benefit of the children, they will always be considered additional child support and therefore non-deductible.

Attorney's Fee

Often the domestic relations attorney will be asked whether the cost of an attorney's fee is a deductible expense. Ordinarily, this amount, regardless of how large, is not deductible. However, where a portion of the attorney's fee is itemized as tax advice pursuant to a divorce proceeding, that portion is deductible, just as any other tax advice would be. The key is that the tax-related advice must be clearly delineated. The IRS will not presume a portion of a general divorce fee has been paid for tax advice.

Retirement Benefits

Where the parties to the marriage have done careful planning in the form of a prenuptial agreement, such agreement may be enforceable in the divorce proceeding, but it is not binding on the IRS for any agreements concerning who may be taxed on issues in the prenuptial agreement. Among those rights which should be considered in prenuptial planning for possible divorce are a spouse's right to retirement benefits.

While not necessarily present in all divorce cases, the area that has the greatest tax impact is often the issue of division of retirement funds, including pensions, profit-sharing plans, such as 401(k) and 403(b) plans, annuities and survivor benefit plans. Quite often, these retirement funds can be a significant portion of the assets of the divorcing couple. Eligibility of a spouse to receive, as a portion of the property settlement, a portion of the retirement benefits from a spouse is governed by the *Code of Alabama*, § 30-2-51. In order to receive any portion of a spouse's retirement benefits there must have been a marriage of at least ten years in length. Regardless of the length of the marriage, the total award of retirement benefits cannot exceed 50 percent, and no benefits may be included in the division if those benefits were acquired prior to the existence of the marriage.

If one or both of the parties to the divorce is a military member, the requirements become even more stringent, and are governed by federal law, in the form of the Uniformed Services Former Spouses' Protection Act (USFSPA 10 U.S.C. § 1401 *et. seq.* More specifically, 10 U.S.C. § 1048 for division of retired pay and §§ 1447-1460 for Survivor Benefit Plan issues, discussed later in this paper), and Department of Defense regulations. The issue of military retirement benefits in a divorce is one filled with misinformation, both among divorcing parties and among lawyers practicing divorce law. Perhaps the most common misperception is that a person divorcing a military member is automatically entitled to a portion of the military member's retirement benefits as a matter of federal law. Quite to the contrary, military retirement benefits are never an automatic entitlement. There are provisions in the law which permit the Department of Defense to make direct pay-

ment of retirement benefits to the former spouse at the time the retired military member begins to collect military retirement, depending on a combination of the length of the marriage and the length of military service.

In 1993, Alabama became the last state in the Union to recognize military retirement benefits as divisible marital property. (*Ex Parte Vaughn*, 634 So. 2d 533, Ala. 1993). Prior to that case, the law in Alabama was that military retirement was not divisi-

ble as property in any event, although the value of military pension payments could be used in calculation of an appropriate child support or alimony amount. The USFSPA was a reaction to a decision of the U.S. Supreme Court concerning a California divorce case which said military retirement benefits were not divisible as property. USFSPA reversed this by declaring that retirement benefits were, in fact, divisible by divorce. However, this Act left it up to the governing law of each state to determine if such benefits were property divisible under state law.

The *Ex Parte Vaughn* decision, which covered only military retirement, was expanded upon in *Byrd v. Byrd* (644 So. 2d 21, Ala. Civ. App. 1994), extending coverage to all retirement plans as assets which a trial court was free to consider in fashioning property and alimony awards. As property, the division of retirement benefits are not modifiable more than 30 days after the entry of judgment in the divorce case.

(*Locklier v. Locklier*, 625 So. 2d 442, Ala. Civ. App. 1993). The late recognition of this concept has led to many unhappy clients in divorce proceedings.

Qualified Domestic Relations Order

The procedure for effecting the division of retirement benefits is the filing of a Qualified Domestic Relations Order (QDRO) with the retirement fund administrator. As each retirement fund administrator has its own requirements for what must be included in the QDRO, it is advisable for the domestic relations attorney to contact the plan administrator and request an example of an acceptable QDRO prior to submitting the QDRO to the court for signature of the presiding judge.



A properly prepared QDRO, approved and ordered by the domestic relations court, will not be subject to income tax if the transfer is made within one year of the divorce (IRC § 1041). The Internal Revenue Code further permits that the transfer of Individual Retirement Account interests pursuant to a divorce is not taxable to either party. (IRC § 408) After the division by the QDRO, the receiving spouse is considered to be the owner of the IRA or other retirement account, takes the original owner's basis in that portion of the account and permits "rollover" of the account into other retirement vehicles in accordance with standard Internal Revenue Code procedures. (IRC § 402).

Survivor Benefit Plans

A separate issue from retirement benefits paid to military members and federal civil service retirees is the issue of military or civil service Survivor Benefit Plan (SBP) benefits. These federal programs are essentially survivor annuity payments for the surviving spouse or former spouse of a retired military member or civil service retiree. The rules are fairly complex and strict. Any attorney considering SBP payments in the settlement agreement or divorce decree should consult with the personnel office at the nearest military installation or federal employment office in advance of the final divorce hearing to ensure all SBP benefits are protected.

Death of a Former Spouse

Even well-designed settlement agreements can be defeated by the death of the former spouse. From the beginning of the divorce, tax issues invade the divorce proceeding and have consequences where one of the spouses dies prematurely. Should one of the spouses die during the pendency of the divorce, the divorce proceeding will become moot. (*Jones v. Jones*, 517 So. 2d 606, Ala. 1987). Parties to a divorce often ask about existing wills in the event of the death of a divorcing party. If the divorce is not final, the existing will governs the distribution of property of the deceased. In the event the deceased has no will, Alabama intestate rules under the Probate Code govern, and the spouse will receive his or her appropriate share of the deceased's property. Once the divorce is final, all portions of the will of the deceased concerning bequests to the former spouse are automatically revoked by the divorce or annulment, as well as any designation of the former spouse as executor, trustee or guardian under the will. However, if the parties are legally separated rather than divorced, the will provisions still govern, as the parties are legally still husband and wife. (§ 43-8-137, *Code of Alabama*). It is important to remember that a beneficiary designation under a life insurance policy is not revoked by a divorce decree or settlement agreement, nor can the will change the

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Ward, who has taught his referral system to almost two thousand lawyers throughout the US, says that most lawyers' marketing is, "somewhere between atrocious and non-existent." As a result, he says, the lawyer who learns even a few simple marketing techniques can stand out from the competition. "When that happens, getting clients is easy."

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life insurance beneficiary designation. Unless the attorney is thorough in the administration of the divorce, this area can be easily overlooked, resulting in a windfall to a former spouse.

Perhaps the most negative tax consequence concerning life insurance paid to a former spouse is the fact that, if the deceased remained the owner of the life insurance policy, the former spouse receives the benefits of the policy while the estate of the deceased former spouse is required to count the face value of the life insurance policy in the taxable estate of the deceased. (IRC § 2042) As federal estate taxes begin at 37 percent and rise rapidly to as high as 55 percent, the negative impact can be quite large.

One very useful solution for the former spouse required to maintain a life insurance policy with the former spouse or children as the irrevocable beneficiary, is the creation of an irrevocable life insurance trust (ILIT). Under this trust arrangement, the trust may purchase a new life insurance policy, or the insured may transfer an existing life insurance policy to the trust, which becomes the owner of the life insurance. If an existing policy is transferred to the ILIT, the non-inclusion of the policy benefits in the estate of the insured will only occur after three years from the date of transfer to the ILIT. (IRC § 2035) The former spouse or children can be named as the beneficiary in accordance with the divorce decree or settlement agreement. Because the insured former spouse has no incidents

of ownership in the policy, the value of the policy is not included in the estate of the deceased. Since life insurance payments are not subject to income tax, the beneficiary spouse or children have no tax consequences either. Case law in Alabama permits the payment of life insurance premiums to a trust to qualify as an acceptable alternative to direct ownership of a life insurance policy. It should be noted that careful drafting of the ILIT is required to ensure that the payment of premiums to the ILIT do not accidentally result in the paying spouse owing gift tax on the premium payments. The use of an ILIT is especially helpful where the estate of the former spouse is quite large or if the amount of the life insurance ordered for the benefit of the former spouse or children is substantial.

Income Taxes

Payment of income tax in the final year of marriage is an issue facing most, if not all, divorcing parties. The IRS basic rule is that a person attains the tax filing status that he or she holds on the last day of the tax year. That is, if the parties are married on December 31, they are required to file either a joint return or separate returns filing as married persons. This is so regardless of whether a legal separation or divorce is in progress at the close of the tax year. Settlement agreements during the first portion of the year should address the issue of who is entitled to the tax refund, if any, and who is liable for any taxes due if the parties attempt to file a joint tax return.

Of special concern to former spouses is what happens to them if it is discovered that their former spouse has not correctly reported income for tax purposes during the marriage. The Internal Revenue Code permits the IRS to collect any outstanding taxes from either party in a joint tax return, without regard to who actually earned the income resulting in additional tax due. It is quite common for recently divorced parties to receive a notice from the IRS that the income tax return they thought they were going to receive is being held by the IRS in partial payment of the tax burden of the former spouse. Given the common mistrust among recently divorced spouses, and the fearsome reputation of the IRS in collecting taxes due, this causes great concern for many former spouses.

The Innocent Spouse Rules

Fortunately, recent changes to the Internal Revenue Code have significantly improved the options for former spouses. Known as the "Innocent Spouse Rule," IRC § 6015 provides three separate methods of relief for former spouses and those legally separated over one year.

The first of these methods is separate liability. The spouse who filed a joint return during the marriage, only to find the IRS coming back after the marriage to collect back taxes, can request that the IRS consider the liability of each spouse for taxes due based upon their pro rata portion of the income earned. As a result, if the untaxed or under-taxed income is attributable to only one spouse, the other spouse can request that the IRS collect the taxes due only from the spouse earning the income, or if the income is from both spouses, pro rate the tax according to

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the relative income of each party which resulted in additional taxes. To qualify for this relief, the two spouses (if still married but separated) must have lived separately for 12 months prior to the filing of the request for innocent spouse protection (not a requirement if already divorced); the spouse requesting the relief must not have actual knowledge of the income causing additional taxes to be due; and the request for relief must be made within two years after the IRS begins collection activity.

If the additional tax burden is a result of underestimation or under-reporting of income which is unknown to the other spouse, that spouse may request innocent spouse relief removing any liability for the taxes due from the innocent spouse altogether. In order to qualify for this relief, the parties must have previously filed a joint return; the IRS must determine that the misstatement of tax is due to an erroneous item of the other spouse; the innocent spouse must not know or have reason to know there was an understatement of tax due; it must be inequitable to hold the innocent spouse liable for the tax; and the relief must be requested within the two-year time period after the IRS begins collection activity.

Finally, even if the former spouse is technically liable jointly with the other spouse for the taxes due, he or she can request that the IRS provide purely equitable relief from tax liability where it is shown that it would be inequitable to demand payment from the former spouse. If the additional tax due is the result of underpayment of taxes (as opposed to underestimation or under-reporting), then only equitable relief is available to the former spouse.

The spouse requesting relief must file IRS Form 8857, Request for Innocent Spouse Relief, within this two-year time frame. The applicant should request all possible forms of relief at the same time, giving the IRS the opportunity to apply any relief which may be available.

These are only the basic tax ramifications in a divorce proceeding. For the divorce attorney who remains unaware of the tax consequences of divorce decrees and settlement agreements, the pitfalls can be enormous. Conversely, for the divorce attorney who is aware of the various tax issues which surround divorce, the advantages in settlement negotiations can be very advantageous to the client, providing significant leverage in the divorce process. In any event, providing the best possible advice concerning tax issues results in a more satisfied client. ■



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Michael A. Kirtland is a solo practitioner in Montgomery. He holds a B.A. in history from Coe College and an M.P.A. from the University of Colorado. He received his J.D. degree from Jones School of Law and his LL.M. in taxation from the University of Alabama School of Law. He is a member of the editorial board of *The Alabama Lawyer* and an acquisitions editor for the American Bar Association's Section on Real Property, Probate and Trust Law.



ASB Executive Director Keith Norman (left) and Cumberland Professor Charles Cole (right) with Brazilian visitors Juiz Jorge Alberto De Carvalho Silva; Juiza Simone Gomes Rodrigues Casoretti; Juiza Fatima Cristina Mazzo de Faria; Juiz Roberto de Barros Fulcao; Juiz Roberto Calderia Barioni; Desembarjador Massami Ugeda; and Juiz Roberto Grassi Neto

Brazilian Judges Enjoy Visit to ASB

Each year, Cumberland School of Law, Samford University, hosts visiting judges from *Brasil* (the traditional spelling). The judges attend law school classes, observe trial and appellate court sessions, and talk with the staff of both the Administrative Office of Courts and the Alabama State Bar. The *Brazilian* visitors represent both trial and appellate courts in *Brasil*, and are primarily from the city of Sao Paulo.

Professor Charles D. Cole, a member of the Cumberland faculty, serves as the director of International Programs for the law school and coordinates the planning and implementation of the visits. Professor Cole reported that the visitors were very impressed with the state bar's facility, however, the visitors were even more impressed that the state bar staff offered such a comprehensive overview of the numerous bar functions. According to Professor Cole, bar associations in *Brasil* are not as effective as those in the United States, but visits such as those to the ASB are having a positive impact on the functions of the *Brazilian* bars. ■



ASB Admissions Director Dorothy Johnson (left) greets Juiz Roberto Calderia Barioni, Juiza Fatima Cristina Faria (partially hidden), Juiz Roberto Grassi Neto and Juiz Jorge Alberto De Carvalho Silva.



The Doctrine of *Caveat Emptor* and the Duty to
Disclose Material Defects and Other Conditions in the Sale of
Single Family Residential Real Estate:
Defining the Home Buyer's Legal Rights

By Bowdy J. Brown

Introduction

In the sale of single family residential real estate, the relationship between buyer and seller is generally no different from any other vendor-purchaser relationship. Absent an express warranty, special relationship, or some actionable fraud on the part of the seller in inducing the sale, the transaction between buyer and seller is governed by the doctrine of *caveat emptor*, or "let the buyer beware." 77 Am. Jur. 2d *Vendor and Purchaser* § 326 (1997). Under this doctrine, a seller is not liable for injury to a buyer caused by a defective condition of the real estate existing at the time the buyer takes possession. *Id.*

Historically, Alabama courts have applied the *caveat emptor* doctrine to the sale of single family residential real estate without exception. In recent years, however, Alabama courts have chipped away at the scope and applicability of the doctrine, weakening it considerably. Today, the doctrine of *caveat emptor* no longer applies to the sale of new single family residential real estate and is subject to a number of exceptions with respect to the sale of used single family residential real estate. The effect of these changes has been to shift from buyer to seller part of the legal responsibility for ensuring the home is habitable and free of defects.

In light of these changes, this article will analyze the rights and responsibilities of the buyer and the seller in the sale of single family residential real estate. Specifically, it will focus on the current scope of the *caveat emptor* doctrine with respect to the seller's and/or real estate broker's duty to disclose to a buyer the presence of material defects or conditions in the sale of single family residential real estate.

Discussion

A. Sales of New Single Family Residential Real Estate: The Application of the Doctrine of *Caveat Venditor*

Following the lead of a number of states, Alabama has abrogated the doctrine of *caveat emptor* with respect to the sale of new single family residential real estate. In the 1971 case of *Cochran v. Keaton*, the Alabama Supreme Court overruled its 1961 decision in *Druid Homes, Inc. v. Cooper*, in which the Alabama Supreme Court applied the doctrine of *caveat emptor* to the sale of a new residence by a builder-vendor. *Cochran v. Keaton*, 287 Ala. 439, 252 So. 2d 313 (1971); *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961). In abandoning the doctrine, the *Cochran* court implicitly acknowledged that a warranty of fitness and habitability, known as the doctrine of *caveat venditor*, or "seller beware," applied instead in the sale of new single family residential real estate. 287 Ala. at 440, 252 So. 2d at 314. However, the *Cochran* court did not discuss the scope or the application of the *caveat venditor* doctrine.

In the case of *Sims v. Lewis*, the Alabama Supreme Court in 1979 formally recognized the *caveat venditor* doctrine. 374 So. 2d 298 (Ala. 1979). In its opinion, the *Sims* court acknowledged that "implicit in *Cochran* is the principle that Alabama would generally follow the *caveat venditor* doctrine as developed in other jurisdictions." *Id.* at 303. Drawing from the opinion in a similar case decided by the Indiana Supreme Court, *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972), the *Sims* court outlined the elements of a claim under the implied warranty of fitness and habitability:

- (1) The plaintiffs purchased a new residence from the defendants;
- (2) The defendants had constructed the residence;
- (3) The residence had not been inhabited by any other person or persons prior to the purchase of the residence;
- (4) The residence was constructed by the defendants for purposes of sale and was sold in a defective condition, which defective condition impaired the intended use of the residence, namely, inhabitation;
- (5) Plaintiffs were not aware of the defective condition and were not possessed of any knowledge or notice by which they could have reasonably discovered it;
- (6) By reason of the defective condition, the plaintiffs suffered damages in the form of a decrease in the fair market value of the residence.

Sims v. Lewis, 374 So. 2d at 303 (Ala. 1979).

Since *Sims*, there has been very little litigation involving the implied warranty of fitness and habitability. The few suits involving the implied warranty of fitness and habitability have dealt with the scope of the *Sims* criteria. One issue receiving attention from the Alabama Supreme Court has been the term "other person" as it is used in the third element of the *Sims* criteria. For example, in the case of *Waites v. Toran*, plaintiffs brought suit against the builder of their new home for breach of the implied warranty of fitness and habitability. 411 So. 2d 127, 128 (Ala. 1982). In defense, the defendant builder claimed the home was not new, and therefore not subject to the implied warranty, because the plaintiffs had resided in the home for several months before purchasing it. *Id.* Reasoning potential owners will sometimes live in homes before purchasing, the court rejected defendant's argument, finding owners of a new home are not "other persons" for the purposes of the third element of the *Sims* criteria. *Id.* at 129-130.

In 1985, the Alabama Supreme Court faced a similar issue in the case of *O'Connor v. Scott*. 533 So. 2d 241 (Ala. 1988). In *O'Connor*, plaintiffs purchased a home in which the sellers resided for almost two years prior to the purchase. *Id.* at 242. After noticing structural defects, plaintiffs brought suit against defendant sellers. *Id.* One of the issues in the case was whether the defendants were "other persons" for the purposes of the third element in the *Sims* criteria. In holding the home in question was not "new" for purposes of applying the doctrine of *caveat venditor*, the court concluded the sellers of a new home, by living in the home before selling it, qualified as "other persons" under the third element of the *Sims* criteria. *Id.* at 243. See also *Haygood v. Burl Pounders Realty, Inc.*, 571 So. 2d 1086 (Ala. 1990) (finding that the sale of a home was one of a used residence because the builder had lived in the home for three years prior to selling it).

Outside of these types of cases, the abrogation of the doctrine of *caveat emptor* and the recognition of the implied warranty of fitness and habitability have largely eliminated suits concerning the disclosure of defects and conditions in

the sale of new single family residential real estate. As a result, there is little incentive on the part of the builder-vendor to challenge the claim of the buyer.

B. Sale of Used Single Family Residential Real Estate: The Application of the Doctrine of *Caveat Emptor*

Despite its willingness to abrogate the doctrine of *caveat emptor* with respect to the sale of new single family residential real estate, the Alabama Supreme Court has nevertheless refused to abrogate the doctrine as it applies to the sale of used single family residential real estate. See, e.g., *Ray v. Montgomery*, 399 So. 2d 230 (Ala. 1980) ("although we have abrogated the *caveat emptor* rule in sales of new residential real estate by a builder-vendor, . . . we are not inclined in this case to depart from a long-standing rule which provides certainty in this area of the law"); *Lee v. Clark & Associates Real Estate, Inc.*, 512 So. 2d 42 (Ala. 1987) ("Alabama still retains the *caveat emptor* rule as regards the sale of residential real estate"). However, the court has been willing to carve out certain exceptions to the *caveat emptor* doctrine in several specific situations. These excepted situations can be divided into five general categories: (1) specific inquiry by the buyer; (2) latent defect that affects health and safety; (3) existence of a special relationship; (4) express agreement; and (5) misrepresentation of a material fact. Each of these situations will be discussed in turn.

1. Specific Inquiry by the Buyer

The first exception to the rule of *caveat emptor* as it applies in the sale of used single family residential real estate is the situation in which the buyer directly inquires as to a material defect or condition known to the seller and/or broker. In these cases, the seller and/or broker have a duty to disclose the defect or condition upon such inquiry. See, e.g., *Fennel Realty Co., Inc. v. Martin*, 529 So. 2d 1003 (Ala. 1988) (affirming judgment against defendants for their failure to disclose, upon direct inquiry by the plaintiffs, a malfunctioning air conditioning unit that was producing carbon monoxide). To trigger this exception, the buyer must (i) make an inquiry (ii) which is direct and (iii) which pertains to a defect or condition of which the seller and/or broker have knowledge.

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a. Inquiry must be made

For the specific inquiry exception to apply, the buyer must make an inquiry into the defect or condition. If the buyer does not inquire, the exception does not apply. The case of *Hays v. Olzinger* is illustrative of this point. 669 So. 2d 107 (Ala. 1995). During a pre-purchase inspection of their home, plaintiffs noticed a distinct odor in the kitchen area, but did not question the sellers about the smell. *Id.* at 108. After purchasing the home, plaintiffs determined the odor was caused by a pesticide sprayed in the home by sellers. *Id.* Thereafter, plaintiffs sued sellers for failure to disclose the spraying. *Id.* Affirming the trial court's judgment in favor of the defendants, the *Hays* court stated, "Absent a question by the [plaintiffs] concerning the odor, the [defendants] were under no obligation to relate any information about the odor." *Id.* The court concluded its opinion by stating the case "illustrate[d] the importance of a prospective home buyer's questioning the seller regarding the history and condition of the home." *Id.*

b. Inquiry must be direct

The second requirement of the specific inquiry exception is the inquiry must be direct. In order to meet this requirement, the inquiry must be specific and to the point. Questions such as, "Is this floor warping?" or "Does the roof leak?", satisfy this requirement; however, vague inquiries, such as, "Are there any problems with this house?", are insufficient to meet this requirement. *See, e.g., Ivey v. Frankle*, 619 So. 2d 1277 (Ala. 1993) (finding that a "casual inquiry about loose dirt does not constitute a specific inquiry about a material condition"); *Bennett v. Cell-Pest Control, Inc.*, 701 So. 2d 1122 (Ala. Civ. App. 1997) (determining that inquiry by plaintiffs regarding whether there was anything else about

the house that they should know was too vague to bring case within the specific inquiry exception).

c. Seller/broker must have knowledge of the defect or condition

The third requirement of the specific inquiry exception is the seller and/or broker must have knowledge of the defect or condition in the used single family residential real estate. Proof of knowledge requires a significant evidentiary showing. Evidence that only tends to show knowledge is not sufficient; rather, the evidence must be direct and incontrovertible. For example, in *Commercial Credit Corp. v. Lisenby*, plaintiffs sued seller, broker and broker's agents for failing to disclose a defect in the home defendants sold plaintiffs. 579 So. 2d 1291, 1292 (Ala. 1991). Plaintiffs claimed to have inquired about the condition of the roof. *Id.* at 1293. However, plaintiffs produced no evidence that defendants had any knowledge of water damage or roof leakage. *Id.* at 1294. Noting defendants had no duty to disclose a latent defect of which they were unaware, the court reasoned that "[k]nowledge of previous problems and repair of earlier difficulties does not impute or constitute knowledge of present problems." *Id.* at 1294.

2. Latent Defect that Affects Health and Safety Known by the Seller/Broker

A second exception to the rule of *caveat emptor* as it applies to the sale of used single family residential real estate is the situation in which there exists a defect or condition affecting health and safety not readily observable to buyer but known by seller and/or broker. *See, e.g., Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623 (Ala. 1993) (reversing summary judgment for the seller because seller failed to disclose hidden termite

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infestation which could eventually affect health and safety of the plaintiffs). In the latent defect exception, unlike in the case of the specific inquiry exception, the seller and/or broker have a duty to disclose the defect or condition regardless of whether the buyer directly inquires as to the problem. See *Fennell*, 529 So. 2d at 1005 (Ala. 1988). To trigger this exception, the buyer must show there was (i) a defect or condition affecting health and safety (ii) not readily observable to the buyer, but (iii) known to the seller and/or broker.

a. Defect or condition must affect health and safety

The first requirement of the latent defect exception is there must be a defect or condition affecting health and safety. It is not enough that a defect or condition exists; rather, the defect or condition must also affect health and safety. The case of *Cashion v. Ahmadi* is illustrative. 345 So. 2d 268 (Ala. 1977). In *Cashion*, plaintiffs sued sellers and brokers for failing to disclose the home sold to plaintiffs had a standing water problem in the basement. *Id.* Plaintiffs alleged, among other things, that defendants had a duty to disclose the water leakage because it affected the health and safety of the plaintiffs. *Id.* at 269. Affirming the judgment in favor of two of the three defendants, the court found that the water problem did not affect the health or safety of plaintiffs. *Id.* at 271. In so doing, the court confirmed that "the doctrine of *caveat emptor* ... should remain alive and well in the situation ... where the alleged defect does not affect health and safety." *Id.*

b. Defect or condition must not be readily observable to the buyer

In addition, the latent defect exception requires the defect or condition must be unobservable to the buyer. If the defect or condition is patent, the doctrine of *caveat emptor* applies, and seller and/or broker have no duty to disclose the defect or condition. Instead, all seller and/or broker must do is provide buyer with an opportunity to determine the defect or condition through inspection of the residential real estate. An example of this requirement is given in *Compass Point Condominium Owners Ass'n. v. First Federal Sav. & Loan Ass'n of Florence*. 641 So. 2d 253 (Ala. 1994). The plaintiffs in *Compass Point* purchased from a bank a condominium that had obvious water problems. *Id.* at 254. Plaintiffs brought suit against the bank when they learned the bank failed to disclose a third-party report that detailed the water intrusion. *Id.* Rejecting plaintiffs' arguments regarding failure of defendant bank to disclose the report, the Alabama Supreme Court affirmed the trial court's summary judgment in favor of defendant based on the fact that "plaintiffs had ample opportunity to inspect the condominiums" in order to detect the water damage. *Id.* at 255-256. See also *Blaylock v. Cary*, 709 So. 2d 1128 (Ala. 1997) (fact that buyers knew of water damage before they purchased home precluded buyers from asserting latent defect exception to the rule of *caveat emptor*).

c. Defect or condition must be known to the seller/broker

The third, and final, requirement of the latent defect exception is seller and/or broker must have knowledge of the defect

or condition. To meet this requirement, the buyer must show the seller and/or broker had *actual* knowledge of the defect or condition. Simple allegations that seller and/or broker knew of the defect or condition are insufficient to show knowledge. For example, in *Williamson v. Realty Champion*, plaintiffs purchased a home that ultimately turned out to have a number of structural defects. 551 So. 2d 1000, 1001-1002 (Ala. 1989). Plaintiffs sued the real estate brokerage firm that sold the home, alleging the firm had failed to disclose these defects. *Id.* at 1002. However, plaintiffs failed to produce evidence showing defendant had any knowledge of the defects. *Id.* Finding no such evidence of knowledge, therefore, the Alabama Supreme Court affirmed the judgment in favor of defendant. *Id.*

3. Existence of a Special Relationship Between Buyer and Seller/Broker

A third exception to the rule of *caveat emptor* as it applies to the sale of used residential real estate occurs when there exists a special relationship between the parties which creates a duty on the part of the seller and/or broker to disclose defects or conditions in the real estate. See, e.g., *Cole v. Farmers Exchange Bank*, 1999 WL 820799 (Ala. Civ. App. 1999); see also Ala. Code § 6-5-102 (1975). A special relationship between buyer and seller and/or broker can arise in two general circumstances.

The first circumstance in which a special relationship can arise is the situation in which seller and/or broker and buyer



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enter into a fiduciary relationship. See *Cato v. Lowder Realty Co.*, 630 So. 2d 378 (Ala. 1993). When the parties are deemed to be in a fiduciary relationship, the seller and/or broker must act in the buyer's best interests, which includes disclosing any material defects or conditions in the real estate that buyer is purchasing. Generally, any arrangement between seller and/or broker and buyer in which seller and/or broker agree to perform for or act on behalf of buyer would give rise to a fiduciary relationship. The most common such arrangement is an oral or written agreement in which the broker agrees to represent the buyer in a transaction involving the purchase of single family residential real estate.

The second circumstance in which a special relationship can arise involves unequal bargaining power between the two parties. In this case, if buyer lacks the same bargaining power as seller, then seller may be required to disclose any material defect or condition in the residential real estate over which the parties are bargaining. See, e.g., *Jim Walter Homes, Inc. v. Waldrop*, 448 So. 2d 301 (Ala. 1983) (stating that "where one party has some particular knowledge or expertise not shared by plaintiff a duty to disclose has been recognized"). However, facts indicating seller and/or broker and buyer dealt with each other in an arm's length transaction tends to show that seller and/or broker had no duty of disclosure. See, e.g., *Richard Brown Auction & Real Estate, Inc. v. Brown*, 583 So. 2d 1313 (Ala. 1991) (recognizing that "an obligation to disclose does not arise where the parties to a transaction are knowledgeable and capable of handling their affairs").

4. Express Agreement

A fourth exception to the rule of *caveat emptor* in the sale of used single family residential real estate is the situation in which buyer and seller agree by contract to the terms and scope of the duties and responsibilities owed each other. In the usual sale, the seller includes in the sales contract "no warranties" and "as is" clauses which require the buyer to accept the residential real estate as sold and in its "as is" condition. However, buyer need not accept these provisions and may protect himself by altering the agreement to include terms more favorable to his position. See *Montgomery*, 399 So. 2d at 233 ("a purchaser may protect himself by express agreement in the deed or contract for sale"); *Leatherwood, Inc. v. Baker*, 619 So. 2d 1273 (Ala. 1992). In many sales of used residential real estate, the seller may warrant certain aspects of the home for a certain period of time. Such warranties eliminate the doctrine of *caveat emptor* to the extent

of the subject matter of the warranties, thus shifting to the seller part of the responsibility for repair of defects or other conditions.

5. Misrepresentation of a Material Fact

The final exception to the rule of *caveat emptor* as it applies in the sale of used residential real estate is the situation in which the seller and/or broker misrepresents a material fact relating to the home sold to the buyer. See, e.g., *Stoner v. Anderson*, 701 So. 2d 1140 (Ala. Civ. App. 1997); see also Ala. Code § 6-5-101 (1975). In the misrepresentation situation, the seller and/or broker are under a duty not to misrepresent to buyer any material fact that buyer might rely on in purchasing the real estate. If seller and/or broker misrepresent a material fact upon which buyer relies, causing buyer damage, the doctrine of *caveat emptor* will not apply to protect seller and/or buyer from the resulting liability. To trigger this exception, plaintiff must show seller and/or broker (i) misrepresented (ii) a material fact (iii) that the buyer relied on and (iv) that caused the buyer injury.

a. Seller/broker must make a misrepresentation

The first requirement of the misrepresentation exception is that seller and/or broker must make a false representation. To meet this requirement, buyer must offer *direct* evidence that seller and/or broker knowingly misrepresented a defect or condition. Evidence showing only indirect proof that a false representation was made is insufficient for the purposes of meeting this requirement. For example, in *Sanders v. White*, the plaintiffs brought suit against the sellers of a home that had a leaking roof and a defective supporting structure. 476 So. 2d 84, 85 (Ala. 1985). At trial plaintiffs attempted to prove, among other things, defendants re-shingled the roof in order to conceal the fact that the roof leaked. *Id.* Concluding plaintiffs failed to produce sufficient evidence to show defendants knew of the defects in the home, the trial court entered summary judgment in favor of the defendants. *Id.* On appeal, the Alabama Supreme Court affirmed, stating that "[t]he fact that the [defendants] put new shingles on the house does not, without more evidence, give rise to the inference they intentionally misrepresented material facts about the roof." *Id.* at 86.

b. The misrepresentation must concern a material fact

The second requirement of the misrepresentation exception is the misrepresentation must concern (i) a fact that is (ii) material. To prove this requirement, buyer must first show the misrepresentation concerned a fact. Mere opinion, or "puffery" as it is

called, is insufficient for the purposes of proving the fact requirement. See, e.g., *Cornelius v. Austin*, 542 So. 2d 1220 (Ala. 1989) (sellers' negative response to plaintiffs' question whether there were any problems with the house "constituted an expression of opinion, not a misrepresentation of fact"); *Cooper & Co., Inc. v. Bryant*, 440 So. 2d 1016 (Ala. 1983) (Realtor's description of the house's condition as "excellent" was an opinion and mere puffery). However, any representation that is a definite and unequivocal statement of fact will satisfy the requirement. For example, in *Cruse v. Coldwell Banker/Graben Real Estate, Inc.*, plaintiffs purchased a home advertised by defendant real estate brokerage firm as "new." 667 So. 2d 714, 715 (Ala. 1995). After taking possession, plaintiffs noticed several defects in the home and thereafter brought suit against defendant. *Id.* Rejecting defendant's characterization of the use of the term "new" as puffery, the Alabama Supreme Court reversed the trial court's judgment in favor of the defendant, ruling that "the unequivocal term 'new,' when applied to real estate, is not merely descriptive [, but] is a definite legal term that carries with it the implied warranty of habitability and prevents the broker/Realtor from invoking the protection of the doctrine of *caveat emptor*." *Id.* at 716.

In addition, buyer must also show the fact misrepresented was material to buyer's decision to purchase the residential real estate. If the fact misrepresented would not have affected buyer's decision to purchase the home, then seller and/or broker cannot be liable under this exception, for buyer would have entered into the purchase regardless of the misrepresentation. The Alabama Supreme Court case of *Reeves v. Porter* illustrates this requirement. 521 So. 2d 963 (Ala. 1988). In *Reeves*, plaintiffs sued a broker and its agent for failing to disclose termite and water damage in a home sold by the broker to the plaintiffs. *Id.* at 966. At trial, defendants produced evidence plaintiffs had contractually agreed to purchase the house even if there was structural damage to the property. *Id.* at 967. The trial court granted summary judgment in favor of defendants, and plaintiffs appealed. *Id.* at 964. Affirming the trial court, the Alabama Supreme Court found the "alleged misrepresentations in the present case were not material, because the [plaintiffs] were not, and could not, have been injured by reliance thereon." *Id.* at 969.

c. The buyer must rely on the misrepresentation

The third requirement of the misrepresentation exception is that the buyer must rely on the misrepresentation. Reliance is closely related to the materiality requirement discussed above. To meet this requirement, buyer must show reliance on the misrepresentation in making the decision to purchase the used single family residential real estate. In *Alfa Realty, Inc. v. Ball*, for example, plaintiffs brought suit against a broker and its agents for misrepresenting the condition of a home sold to plaintiffs. 733 So. 2d 423, 424 (Ala. Civ. App. 1998). Specifically, plaintiffs claimed defendants failed to disclose the roof leaked. *Id.* At trial, defendants argued plaintiffs could not have relied on defendants' representations because plaintiffs did not believe the roof was leak-free. *Id.* at 425. As proof of the plaintiffs' skepticism, defendants showed that after the representations were made, plaintiffs hired an engineer to inspect the home in order

to confirm the roof did not leak. *Id.* Finding that plaintiffs did not rely on the representations of defendants, the court stated, "The undisputed fact that [plaintiff] was unwilling to accept the statement of the [defendant] without verification is evidence that he did not rely on it." *Id.* The *Ball* court then reversed the judgment in favor of plaintiffs and remanded the case for a new trial based on other grounds. *Id.* at 426.

d. The misrepresentation must cause the buyer damage

The final requirement of the misrepresentation exception is the misrepresentation must cause the buyer injury. The evidentiary showing required to prove injury in this case is relatively low. All the buyer must show is the misrepresentation caused some injury that would not have resulted but for the misrepresentation. Injury is not limited to physical injury, but includes financial damage as well.

Conclusion

While the Alabama Supreme Court has replaced the doctrine of *caveat emptor* in the sale of new single family residential real estate with the doctrine of *caveat venditor*, it nevertheless continues to apply the doctrine of *caveat emptor* to the sale of used single family residential real estate. However, the supreme court has determined there are certain circumstances in which the doctrine of *caveat emptor* should not apply. These circumstances can be grouped into the following five categories:

- (1) specific inquiry by the buyer;
- (2) latent defect that affects health and safety;
- (3) existence of a special relationship;
- (4) express agreement; and
- (5) misrepresentation of a material fact.

The foregoing exceptions to the *caveat emptor* doctrine have helped to mitigate the significant burdens the doctrine places on the buyer of used residential real estate; however, the exceptions are far too narrow to provide complete relief. The continued application of the *caveat emptor* doctrine to the sale of used single family residential real estate can still trap the unwary home buyer. As a result, buyers of used single family residential real estate must continue to be aware of their unprotected position and take every precaution to protect themselves from the harsh consequences the doctrine can cause. ■



Bowdy J. Brown

Bowdy J. Brown is a shareholder with the Montgomery firm of Rushton, Stakely, Johnston & Garrett, P.A. He received his bachelor's degree from Huntingdon College and his law degree from Jones School of Law. Substantial contributions were made to the article by a former law clerk, Rick McBride, who recently completed his law degree and MBA at the University of Alabama and is currently enrolled at New York University Law School in its master's of taxation program.

Alabama's Code of Legal Ethics

By Mary Edge Horton

On December 14, 1887, the 68th anniversary of Alabama's statehood, the Alabama State Bar adopted a Code of Ethics, the first such American code and a subsequent model for that of many other states. The author was primarily Thomas Goode Jones.

Col. Thomas Goode Jones was a distinguished ex-Confederate officer, serving the State of Alabama in the dark Reconstruction days. He served as Governor of Alabama twice, and was a member of the Constitutional Convention of 1901. He also served 13 years as a Judge of the United States District Court for the Northern and Middle Districts of Alabama.

The Alabama Code was, in large part, subsequently made on the basis of the canons adopted by the American Bar Association, which were presented by a committee that included Col. Jones. It was also adopted by the bars of 11 states.

Thomas Goode Jones, a young man who had studied law in a night class held in Montgomery by Chief Justice Abram J. Walker, was interested in the welfare of the younger lawyers of the Montgomery bar, and frequently assisted them with their questions and problems. They consulted him often about many matters, including the subject of professional ethics. On his desk, he kept a copy of "An Essay on Professional Ethics" by former Chief Justice George Sharswood of the Supreme Court of Pennsylvania, a distinguished lawyer, law professor and jurist. Judge Sharswood's "Essay" was first published in 1854 as a "Compend of Lectures on the Aims and Duties of the Profession of the Law," delivered before the law class of the University of Pennsylvania¹, but it was not widely circulated in Alabama. Col. Jones consulted it regularly. Many of its principles and

standards are visible in the code which Col. Jones drafted.

In 1881, Thomas Goode Jones, 37 years old and chairman of the Alabama State Bar's "Committee on Judicial Administration and Remedial Procedure," first recommended "that the Association appoint a committee, with instructions to report a Code of Legal Ethics for consideration at the next annual meeting." His suggestion was worded as follows:

"While there are standard works of great eminence and authority upon legal ethics, these are not always accessible. In many instances, practices of questionable propriety are thoughtless rather than willful and would have been avoided if any short, concise Code of Legal Ethics stamped with the approval of the Bar had been in easy reach. Nearly every profession has such a work which is treasured by its members. With such a guide pointing out in advance the sentiment of the Bar against practices which it condemns, we would find them disappearing, and should any one be bold enough to engage in evil practices the Code would be a ready witness for his condemnation and carry with it the whole moral power of the profession... What just complaint exists of lawyers stirring up strife, or being swift to originate or initiate litigation, would vanish when the profession throughout the State raises its warning voice in advance against these pernicious practices. The lawyer who shall frame such a Code need ask no greater nor more enduring fame. Nothing would more effectively promote the ends

of justice or tend more to advance judicial administration."

It was ironic that this duty was later assigned to Col. Jones.

For whatever reason, this suggestion was not acted upon by the bar until a year later, when Major Henry C. Semple, a Montgomery lawyer, moved that a committee of three be appointed to compose a Code of Ethics to be presented at the next bar meeting, and that Col. Jones be the chairman of that committee. This motion was carried, but due to some misunderstanding, the members of the committee were not named. Col. Jones felt it would be improper of him to proceed alone, regarding the duty as very delicate and important, and desiring the counsel and experience of a full committee.

In 1883, at the fifth annual meeting of the bar in Blount Springs, Col. Jones, serving as chairman of the Executive Committee, again brought the need for this Code to the attention of his colleagues in his report, stating:

"Your committee believes that a Code of Legal Ethics would go very far, using the language of our Constitution, 'to advance the science of jurisprudence, to promote the administration of justice throughout the state, uphold the honor of the profession of the law and establish cordial intercourse among the members of the Bar of Alabama.'"

The committee recommended the appointment of a special committee of three to prepare a Code of Legal Ethics for the Bar of Alabama, and report it to the next annual meeting. The special committee consisted of: Col. Jones,

chairman; Col. Richard Orrick Pickett, a distinguished soldier of the Southern Confederacy and an outstanding northern Alabama lawyer; and Col. Daniel Shipman Troy, a veteran of the Confederacy, and an able lawyer. Although neither Col. Pickett nor Col. Troy took an active part in the drafting of the Code, a draft of it was apparently submitted to them for their approval prior to its presentation to the bar.

The next meeting of the Alabama State Bar was held in Birmingham in 1884. When the report of the special committee was called for, Col. Jones requested additional time, stating that "drafting a Code of Ethics is a matter of such importance to the profession that it cannot be done hurriedly. A great deal of preparatory work has been accomplished. Letters have been written to many eminent lawyers and judges asking suggestions, and with the aid thus obtained the Chairman had expected to be able to draft the Code and submit it to the members of the Committee in time to be acted on at this meeting. The week set apart for this work was unavoidably taken up by other duties and the committee is reluctantly compelled to ask the indulgence of the Association until its next meeting." This request was granted.

The seventh annual meeting of the bar was held at the Capitol in 1884. When the report of the committee was called for, Col. Jones was on the floor of the State Legislature in a debate, so the consideration of the report was postponed, but it was ordered to be printed in pamphlet form and sent to each member of the bar with instructions that they read it and be ready to discuss it and make suggestions at the next meeting.

In 1885, at the eighth annual meeting of the bar in Montgomery, when the report was called for, Col. Jones was involved with the U.S. Court. It was postponed for another year.

The ninth annual meeting was held in Montgomery in 1886. The report was set to be presented on Wednesday, December 2, 1886. Col. Troy, a member of the committee, stated that Col. Jones, as Speaker of the House, felt that he needed to be at the Legislature in the morning, but moved that the report of the committee be set to be presented at 4 p.m. This motion was adopted.

At 4 p.m., Col. Jones arose and stated that an accident prevented him from presenting the report—apparently part of the proposed Code of Ethics had blown out through a window and was lost! Consideration of the Code was again postponed, but it was again ordered to be printed in a pamphlet and sent to all the members.

In 1887, Montgomery was again the site of the annual bar meeting. At the morning session on December 14, in the hall of the House of Representatives in the Capitol, Col. Jones at long last read the report of the committee appointed to draft a Code of Legal Ethics, in its entirety. He further asked that the committee be discharged, and that further consideration of the report be made a special order of 4 p.m. that day. The bar reassembled that afternoon to discuss the Code. The preamble was immediately adopted, and the remainder of the report was discussed extensively, section by section.

Of interest, the shortest of the 56 sections of the proposed Code was Section 20, which read: "An attorney should not

conduct his own cause." Mr. Alex T. London of Montgomery, later of Birmingham, stated that he did not see any objection to it, "[b]ut it is one of the American privileges to make a fool of yourself and it is guaranteed by the Constitution, and I do not see anything wrong in it—anything immoral in it, and I move to strike the rule out." That rule was stricken.

Following the discussions, the Code was adopted as a whole. At that time, there were apparently 795 lawyers in Alabama, and only half of them were members of the bar. One thousand copies were ordered to be printed, with one mailed to every lawyer in the state, and to each of the judges of the courts of record. The Code was printed for the first time as an appendix to the report of the 10th Annual Meeting of the Alabama State Bar.

This Code was written by Col. Jones without any model or guide, except for guidance from Judge Sharswood's "Essay." It was adopted with very few changes from the original draft, and the

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Alabama State Bar has the distinction of having adopted, on December 14, 1887, the first Code of Legal Ethics in the country.

In 1907, approximately 20 years after the adoption of the Code, the Alabama State Bar printed and framed copies of the Code to present to all the courts in Alabama. The *Alabama Law Journal* (issue October 1925, vol. 1, no. 1, page 24) related the story of Thomas Goode Jones, while presiding on the bench of the United States District Courts for the Northern and Middle districts of Alabama, having his court interrupted by Mr. Alexander Troy, secretary of the Alabama State Bar, who presented a framed copy of the Code to the court. Mr. Troy stated, "Your honor, if one's literary productions are the children of his brain, then, in presenting this Code to your honor, and asking its acceptance, I feel that I am but presenting you with one of your own children."

The committee of the American Bar Association on a Code of Professional Ethics, in 1907, as reported by Col.

Thomas Hamlin Hubbard of New York City, stated in part:

"The report which I now present gives the Alabama Code and the variations made by the ten associations other than the association of the State of Alabama that have followed it. So that you have before you in this report, as we think, the substance of all that is needed to prepare canons of ethics and you have in the main a form which may safely be adopted; for manifestly, it is safer to follow a good precedent if one has been made than to establish a new one."

In its final report, the committee of the American Bar Association, on Thursday, August 27, 1908, paid a tribute to the Alabama Code and its author as follows:

"The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887, and which, with but slight modifications, has been adopted in eleven other states. The committee in this connection desire to record their appreciation of the help they have received in this work from their fellow member, Honorable Thomas G. Jones, of Alabama, who was the draftsman of the Alabama code of ethics, and who attended the three days' session of your committee in Washington, March 30 to April 1, 1908, and moved the adoption of a number of your committee's modifications of the Alabama code drafted by him more than a score of years ago."

This history of the Code of Ethics was written by Col. Jones' son, Judge Walter Burgwn Jones. The Code of Ethics itself is stated in *Alabama Reports*, volume 118, and reprinted in the same book as the above-mentioned history, beginning on page 259.

In 1998, a historical marker was placed outside the Alabama State Bar building in Montgomery, giving a history of the Alabama State Bar. A portion of that marker reads:

"Thomas Goode Jones of Montgomery drafted a code of professional ethics, and

on December 14, 1887, the Alabama Bar became the first in the country to adopt a code of legal ethics. The Alabama code was the foundation of the canons of ethics later adopted by the American Bar Association and by other states."

Additionally, a museum display has been set up in the Alabama Judicial Department building in Montgomery which contains some of the documents used in compiling the information for this article. This display also includes one of the framed original copies of the Code (on loan from the Jackson County Law Library) which was distributed to all the courthouses in the state in 1907.

The information contained in this article was taken from the following sources:

1. *The Alabama Law Journal*, October 1925, vol. 1, no. 1, p. 24.
2. Hon. George Sharswood, LL.D., *An Essay on Professional Ethics*, 5th edition, in the Memorial.
3. "Canons of Professional Ethics, Their Genesis and History," *Notre Dame Lawyer*, vol. 7, 1931-32.
4. "Final Report of the Committee on Code of Professional Ethics," *Reports of the American Bar Association*, vol. XXXIII, 1908.
5. "Code of Ethics Adopted by Alabama State Bar Association," *Alabama Reports*, vol. 118, 1897, p. 259.
6. "The Alabama Code of Legal Ethics," *The Alabama Lawyer*, vol. 2, p. 245, July 1941. ■

Endnotes

1. Information taken from *An Essay on Professional Ethics* by Hon. George Sharswood, LL.D., 5th Edition, in the Memorial.

Mary Edge Horton

Mary Edge Horton has served in a variety of judicial roles over the past 15 years, working for the Alabama Supreme Court, the court of civil appeals, and the Administrative Office of Courts, prior to her present position as assistant curator of the Alabama Supreme Court and State Law Library. In this capacity, she coordinates all judicial building tours, as well as obtaining historical data, maintaining and updating all the public displays and museum areas, and providing informational brochures and newsletters.

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OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Lawyer-Witness Rule Not Applicable to Pre-Trial Phase of Litigation



J. Anthony McLain

Question:

"In June 1988 Ms. Doe came to me for advice in regard to her work-related injury while in the employ of ABC on or about February 1988. During the course of my representation of Ms. Doe, facts came to my attention which would indicate that she was harassed by the employer and, more particularly, its plant nurse. I had a number of conversations with the attorney for ABC, the personnel manager for ABC, a rehabilitation nurse hired by the workmen's compensation carrier, and two employees of the workmen's compensation carrier concerning my client's medical condition and the fact that I thought she was being harassed by the plant nurse. On two or three occasions I was contacted by the personnel manager of the company who desired to know when my client would be returning to work. He was quite insistent upon obtaining this knowledge because he said he needed to make provisions for replacing her if she would not be back and needed to take care of other administrative matters. Based on information that I obtained, I wrote the personnel manager a letter stating that my client would not be returning to work because of the recommendations of her doctors concerning her medical and mental condition resulting from her injury. Upon receiving my letter the personnel manager mailed to me a letter stating that he considered that my client had quit. To my knowledge I had no further contact with the personnel manager after this point. On 8-28-89 I, along with co-counsel, brought a suit against ABC on behalf of Ms. Doe in the Circuit Court of Anywhere County. The suit alleged injuries compensable under the workmen's compensation law of the state of Alabama and also stated a claim for wrongful discharge or termination under the same workmen's act. These two causes of action were later severed for separate trial. A jury trial was requested by the plaintiff for cause of action based upon wrongful termination.

"During the course of discovery the deposition of the personnel manager,

Mr. Smith, was taken by the plaintiffs. At the deposition Mr. Smith made the following statement when asked about a conversation that he had with me:

Pages 132, Lines 13 & 14:

Q. 'Okay. Do you recall anything else that was said in those discussions?'

Pages 132, Lines 15 & 16:

A. 'The only thing that I remember specially that Mr. G told me was when she quit.'

Pages 132, Lines 17, 18 & 19:

Q. And what was that?'

A. That, in essence, Ms. Doe has quit and she will not be returning to work.'

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

"At my deposition, counsel for the defendant raised questions about the propriety of me continuing to represent my client and testifying at the trial of the case and cited disciplinary rule 5-101(B) of the *Code of Professional Responsibility of the Alabama State Bar*. I have consistently maintained to the attorneys for the defendants and the court that based upon the discovery that we have had to date, that it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workmen's compensation nurse or the employees of the insurance carrier testified as to matters that were discussed between us prior to the instigation of the lawsuit, and that such testimony was contrary to my understanding of our conversation. I have not heard anything to date that would lead me to believe that I would be called as a witness for the plaintiff in the case in chief or for impeachment purposes against defendants' witnesses. My feeling is that the only testimony I might give would be for impeachment of one of the defense witnesses previously mentioned if they were to change their testimony or testify to facts that were contrary to my

memory of said communications.

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

1. First, can I continue to represent Ms. Doe throughout the remaining discovery procedures in this case?
2. Can I represent Ms. Doe at the trial of the wrongful discharge action and/or workmen's compensation action?
3. If I am called upon to give testimony to impeach defendants' witnesses concerning my communications with them would I be required to withdraw?
4. If it becomes apparent that I may be called upon for the sole purpose of impeaching testimony given by the defendant's witnesses concerning whether or not the plaintiff voluntarily terminated her employment, may I continue as her attorney and give such testimony or am I required to withdraw at that point?
5. If the defendants call me as a witness, would I be required to withdraw?"

Answer, Question One:

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

Answer, Question Two:

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

Answer, Questions Three, Four & Five:

You must withdraw from the representation of Ms. Doe in the wrongful discharge action, if, at trial, you are called upon to testify concerning whether or not the plaintiff voluntarily terminated her employment, *unless* withdrawal at that point would work a substantial hardship on your

client. Your withdrawal in this instance would be mandated without regard to which party called you as a witness. Your disqualification in this matter, however, would not extend to co-counsel or other members of your firm.

Discussion:

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

"Rule 3.7 Lawyer as Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:
 - (1) The testimony relates to an uncontested issue;
 - (2) The testimony relates to the nature and value of legal services rendered in the case; or
 - (3) Disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9."

The prior lawyer-witness rules, DR 5-101(B) and DR 5-102, contained the somewhat vague language regarding the conditions that would lead to disqualification, i.e., when a lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness." The effect of this language in some instances caused counsel to be disqualified on mere speculation. The language in new Rule 3.7 is more carefully drawn requiring withdrawal only when the lawyer is "likely" to be a "necessary" witness. Consequently, the decision to withdraw can, in good faith, be delayed to a time closer to the date of the trial. At that point, the lawyer would then determine whether his continued representation at trial would be permitted under any of the three exceptions in 3.7(a).

The third exception [Rule 3.7(a)(3)] to the lawyer-witness rule is the most important because it permits an equitable balancing of the interest of the parties.

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

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

In the fact situation that you pose you state, "I have consistently maintained to the attorneys for the defendant and the court that based upon the discovery that we have had to date that it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workmen's compensation nurse or the employees of the insurance carrier testified as to matters that were discussed between us prior to the instigation of the lawsuit and that such testimony was contrary to my understanding of our conversation." In view of your uncertainty concerning whether it will be necessary that you be a witness, you may delay a withdrawal decision to such time that any uncertainty is resolved. It should be noted that it does not become "necessary" that a lawyer be a witness simply because the opposing party asserts that the lawyer has knowledge that might be relevant.

If, in fact, it does become "necessary" that you be called as a witness, whether before trial or during trial, then you must withdraw as counsel at the trial unless your testimony relates to an uncontested issue or withdrawal would cause a substantial hardship on your client. In this regard, if possible, you should prepare co-counsel to proceed with the trial should it become necessary for you to be a witness. ■

[RO-91-19]



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DISCIPLINARY NOTICES

Notices

- **John Thomas Kroutter**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2000, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 97-371(A), 98-274(A) and 99-129(A) before the Disciplinary Board of the Alabama State Bar.
- **Harold G. Quattlebaum**, whose whereabouts are unknown, must answer the Alabama State Bar's for-

mal disciplinary charges within 28 days of March 15, 2000, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 94-014(A), 94-138(A), 94-222(A) and 95-279(A) before the Disciplinary Board of the Alabama State Bar.

- **Richard Jude Spurlin**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2000, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos.

99-041(A), 99-48(A), 99-49(A), 99-72(A), 99-80(A), 99-125(B), 99-134(B), and 98-337(A) before the Disciplinary Board of the Alabama State Bar.

- **William Bartlett Taylor**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2000, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 96-331(A), 96-332(A), 96-374(A), 97-093(A) and 97-116(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- On October 28, 1999, Gulf Breeze, Florida lawyer **Richard E. Jesmonth** was reinstated to the roll of the Alabama Supreme Court as an attorney authorized to practice law in the courts of Alabama. [ASB Pet. No. 99-006]
- Huntsville attorney **Carter Alan Robinson** was reinstated to the practice of law in the State of Alabama by order of Panel IV of the Disciplinary Board, effective January 5, 2000. [Rule 20(a); ASB Pet. No. 99-07]
- Jasper attorney **Larry Edward Smith** was reinstated to the practice of law in the State of Alabama by order of the Disciplinary Board of the Alabama State Bar effective October 22, 1999. [ASB Pet. No. 99-02]
- The Supreme Court of Alabama entered an order reinstating Huntsville attorney **David Eugene Worley** to the practice of law in the State of Alabama, effective November 17, 1999. This order was based upon the decision of Panel II of the Disciplinary Board. [ASB Pet. No. 98-09]

Suspensions

- Effective January 3, 2000, attorney **Gregory Miles Hess** of Mobile has been suspended from the practice of law in the State of Alabama for non-compliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-13]
- On December 27, 1999, the Alabama Supreme Court affirmed a 120-day suspension for Birmingham attorney **David Malcolm Tanner**. Tanner was given the suspension following a hearing before the Disciplinary Board, Panel V, on October 19, 1999. The hearing was held to determine appropriate discipline in five cases pending against Tanner. The cases primarily involved willful neglect of client matters and the failure to cooperate in the investigation of the underlying complaints themselves. Tanner allowed defaults to be entered on the merits of each case. The complaints were filed between 1997 and 1998. Tanner offered mitigating factors due to several personal problems within that time period. Prior discipline was considered and restitution

is a condition of reinstatement. [ASB No. 98-081(A), *et. al.*]

- On December 27, 1999, the Alabama Supreme Court affirmed a 91-day suspension for Birmingham attorney **Sean Edward McLaughlin**. McLaughlin tendered a conditional guilty plea which called for the imposition of the suspension in return for McLaughlin's guilty plea to all charges in the three underlying cases. In one case, McLaughlin was hired to represent a client on DUI charges. The client had several prior DUI convictions. McLaughlin attempted to get the client's ex-wife to pay the legal fees associated with his representation of this client. The client's ex-wife refused to pay the charges. Thereafter, McLaughlin wrote the client's elderly mother an inflammatory letter in hopes that she would pay his fees. McLaughlin filed a notice of *lis pendens* on property owned by the client's mother, without legal basis of any kind. This notice interfered with an attempt to sell the property. In a separate case, McLaughlin was hired to represent a foreign natural in an immigration matter and was paid a

retainer of \$1,000. The client was already in the United States but was eligible for "permanent resident status." McLaughlin failed to meet deadlines imposed by the Immigration and Naturalization Service and failed to communicate with the client. At one point, McLaughlin continued a critical hearing to a date beyond a statutorily imposed deadline. As a result, the client's permanent resident status was procedurally denied. The client then hired another attorney to fight deportation by the Immigration and Naturalization Service. In a third matter, McLaughlin was representing a woman in a domestic matter. At one point during the representation, McLaughlin exposed himself to her. At other times, McLaughlin had tried to get her to engage in sexual activities. [ASB No. 97-363(A), *et. al.*]

- Effective December 8, 1999, attorney **Paul R. Knighten** of Marietta, Georgia has been suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 99-46]
- By order of the Disciplinary Board, Panel I, Mobile attorney **Vader Al Pennington** has received a three-year suspension, effective January 1, 1992. Pennington was previously interimly suspended by the Disciplinary Commission of the Alabama State Bar while several disciplinary files were pending against him. Pennington entered a guilty plea to charges pending against him in certain of these cases in exchange for a fixed suspension of three years, effective January 1, 1992. The cases were resolved in an effort to allow Pennington's petition for reinstatement to the practice of law to proceed consistent with the *Alabama Rules of Disciplinary Procedure*. The records of the Disciplinary Commission reflected that some 25 disciplinary files were pending against Pennington at the time he petitioned for reinstatement. While the plea fixes Pennington's suspension at three years, Pennington will still be required to undergo the reinstatement process. [ASB No. 89-418 *et. al.*]

- By order of the Disciplinary Board of the Alabama State Bar, Bessemer lawyer **Richard Larry McClendon** was suspended from the practice of law in the State of Alabama for a period of 91 days with the imposition of the 91-day suspension to be suspended and held in abeyance pending McClendon's successful completion of a two-year probationary period. This discipline was imposed pursuant to McClendon's pleas of guilty in two separate matters. In one case McClendon pled guilty to violating Rules 1.3, 1.4(a) and 1.16(d), *Alabama Rules of Professional Conduct*. In the second case, McClendon willfully neglected legal matters entrusted to him by doing little work on the client's behalf. He also failed or refused to promptly respond to reasonable requests for information from each client regarding their case. In one matter, McClendon failed to promptly deliver the client's file upon termination of the representation and the request of the client. [ASB Nos. 98-09(A) and 99-193(A)]
- Birmingham attorney **Phillips Russell Tarver** was suspended from the practice of law in the State of Alabama for a period of 45 days by order of the Disciplinary Board, effective November 16, 1999. Tarver pled guilty to soliciting professional employment from a prospective client with whom he had no familial or current or prior professional relationship, a violation of Rules 7.3 (b) and 8.4 (a), *Alabama Rules of Professional Conduct*. Tarver was automatically reinstated to the practice of law effective December 31, 1999. [ASB No. 97-218(A)]
- Effective November 22, 1999, attorney **David Garrett Hooper** of Montgomery was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-14]
- Effective December 6, 1999, attorney **William Clayton Wallace** of Gulf Shores was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-31]
- Effective December 6, 1999, attorney **Joan Charlene McLendon** of Conway, Arkansas was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-22]
- Effective October 20, 1999, attorney **Michael Norman McIntyre** of Birmingham was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-21]
- Effective October 26, 1999, **Michael Norman McIntyre** was reinstated to the practice of law by fulfilling his 1998 requirements. [CLE 99-21]
- Effective October 18, 1999, attorney **Michael Bray Houston** of Mobile was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-15]

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- Effective October 26, 1999, attorney **John A. Blanton, III** of Columbiana was suspended from the practice of law in the State of Alabama for non-compliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-3]
- Effective October 26, 1999, attorney **Rose Marie Jones** of Birmingham was suspended from the practice of law in the State of Alabama for non-compliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-18]
- Effective October 26, 1999, attorney **John Gregory Wolinski**, practicing in Columbus, Georgia, was suspended from the practice of law in the State of Alabama for noncompliance with the 1998 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 99-33]
- On November 17, 1999, the Disciplinary Commission of the Alabama State Bar interimsly suspended Birmingham attorney **Dennis Michael Barrett** on the grounds that his conduct was causing or was likely to cause immediate and serious injury to a client or to the public. The Disciplinary Commission found that Barrett had misappropriated a substantial sum of client money from the trust account of the law firm of Barrett & Poore, P.C. Formal charges were filed by the Alabama State Bar's Office of the General Counsel on December 22, 1999. [Rule 20(a), ASB Pet. No. 99-008]
- Baldwin County attorney **William Clayton Wallace** was suspended from the practice of law in the State of Alabama for a period of two years, effective November 18, 1999, by order of the Alabama Supreme Court. The Alabama Supreme Court entered its order based upon the decision of the Disciplinary Board, Panel IV, of the Alabama State Bar. A default judgment was entered against Wallace finding him guilty of violating Rules 1.1, 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. Wallace was retained to represent a client in an uncontested divorce and paid \$525 for his services. Thereafter, Wallace did lit-

tle work in the matter, failed or refused to communicate with the client regarding the matter and eventually abandoned his client and the practice of law. During the course of the disciplinary proceedings, Wallace failed or refused to respond to requests for information from the Office of the General Counsel and the Baldwin County Bar Association local grievance committee. [ASB No. 99-21(A)]

- On October 21, 1999, Panel I of the Disciplinary Board imposed a 45-day suspension on Birmingham attorney **Chuck Hunter**. The suspension is to be held in abeyance while Hunter serves a one-year probationary term with special conditions. Hunter was found guilty of a violation of Rule 8.1(a), Rule 8.4(c) and Rule 8.4(g) of the *Rules of Professional Conduct*. The Disciplinary Board found that Hunter had submitted a false affidavit from one of his clients. The affidavit was sent to the bar, unsigned, in connection with a grievance Hunter had filed against another attorney. The affidavit was never submitted with a signature because the client refused to sign it due to the purported untrue statement contained therein. [ASB No. 98-250(A)]

Public Reprimands

- On December 3, 1999, Texas attorney **Rolando Garcia**, who was admitted *pro hac vice* in the Circuit Court of Mobile County, was publicly reprimanded for engaging in improper trial publicity, engaging in conduct that adversely affects the administration of justice and engaging in conduct that adversely reflects on his fitness to practice law, violations of Rules 3.6(a), 8.4(a)(d) and (g), *Alabama Rules of Professional Conduct*. Garcia was reprimanded for comments made during a press conference, in which he was a participant, which improperly criticized the rulings and questioned the integrity of the circuit judge presiding in the case in which he appeared as counsel. [*Pro hac vice* admission]
- On December 3, 1999, Birmingham attorney **Chuck Hunter** received a public reprimand without general publication. The reprimand was the result of a conditional guilty plea tendered by

Hunter for having violated Rule 1.5(c) of the *Rules of Professional Conduct*. Hunter represented a client in a dog bite case. The client terminated Hunter one week before trial and sought other counsel. The client's case settled for \$7,500 and Hunter asserted a lien for \$2,250. The trial court reduced Hunter's lien to \$750 and based its decision on the fact that Hunter did not have a written contract agreement in a contingent fee case as required by Rule 1.5(c), A.R.P.C. The court also noted, in reducing the claimed fees that Hunter's services "...were of no substantial value to the plaintiff." [ASB No. 98-249(A)]

- On December 3, 1999, Montgomery attorney **Charles Nicholas Parnell, III** received a public reprimand without general publication for engaging in a business transaction or acquiring an ownership, possessory, security or other pecuniary interest adverse to a client in violation of Rule 1.8(a), *Alabama Rules of Professional Conduct*. Parnell represented a lawyer client in bankruptcy and other related proceedings. During the course of these proceedings, Parnell negotiated with several of his client's creditors and obtained their agreement to accept deeds in lieu of foreclosure in full satisfaction of certain debts owing on numerous parcels of real estate in Lee County. These transactions were structured, in part, on the advice of the client's accountant and were intended to avoid adverse tax consequences which would have resulted from the sale of these properties and would have had an adverse impact on the client's bankruptcy proceedings. The bankruptcy court approved these transactions on motion of Parnell's client. Records indicate that shortly after the bankruptcy court approved these transactions, Parnell and his client's accountant incorporated an entity which was solely owned by their children and for which Parnell and his client's accountant were the sole directors and officers. During the next year this corporation acquired several parcels of real estate that Parnell's client had contemporaneously surrendered to creditors in lieu of foreclosure. This corporation also

purchased another parcel of property at a foreclosure sale, having previously accepted a third mortgage on this property from Parnell's client. In addition, Parnell's client directly conveyed separate parcels of real estate to Parnell, to the accountant and to the corporation. It appeared that the lawyer client was aware of these transactions and, by his participation, approved of them. However, Parnell's relationship with the corporation that ultimately purchased the properties was not disclosed to the bankruptcy court in the motion for approval of these transactions and there was no evidence of strict compliance with the provisions of Rule 1.8(a), *A.R.P.C.* It was noted that the fact that Parnell's client was a lawyer did not insulate him from a finding of guilty in Rule 1.8(a), but was considered as substantial mitigating evidence when imposing discipline in this case. [ASB No. 96-309(A)]

- Bay Minette attorney **Habib Yazdi** received a public reprimand with general publication from the Disciplinary Board of the Alabama State Bar on December 3, 1999. Yazdi was appointed by the Circuit Court of Baldwin County to represent an indigent criminal defendant. After conclusion of the trial, but while he was still attorney of record, the client's mother asked Yazdi to provide her son with his case file and court documents. Yazdi told the client's mother, whose only income is a disability check, that she would have to pay him \$200 in order for him to take the files from his office in Daphne to her son in the Baldwin County Jail and consult with him. He eventually collected \$50 from her. The Disciplinary Board determined this conduct constituted a violation of Rule 1.5(f) which prohibits an attorney appointed to represent an indigent criminal defendant from accepting any fee from the defendant or anyone on the defendant's behalf without prior approval of the appointing court and Rule 8.4(d) which prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. [ASB No. 98-273(A)]

Disability

- The Supreme Court of Alabama has adopted the decision of the Disciplinary Board of the Alabama State Bar transferring Montgomery attorney **Calvin Mercer Whitesell, Jr.** to disability inactive status effective November 5, 1999. [Rule 27(c); ASB Pet. No. 99-07]
- Hoover attorney **William Kevin DelGrosso** was transferred to disability inactive status pursuant to Rule 27(c),

- Alabama Rules of Disciplinary Procedure*, effective November 9, 1999. [Rule 27(c); ASB Pet. No. 99-06]
- The Supreme Court of Alabama has adopted the decision of the Disciplinary Board of the Alabama State Bar transferring Anniston attorney **Daniel Eugene Morris** to disability inactive status effective December 3, 1999. [Rule 27(c); ASB Pet. No. 99-02] ■



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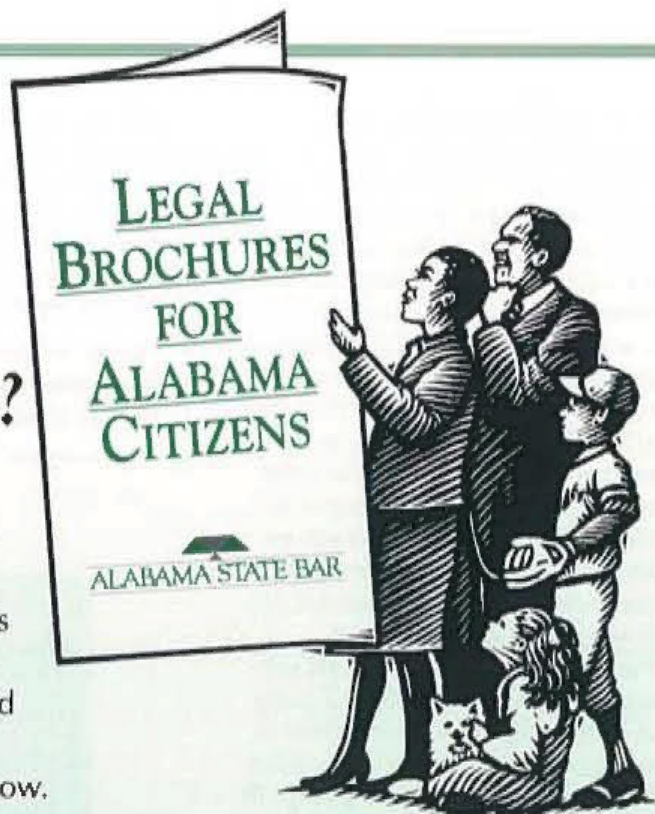
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RECENT DECISIONS

By David B. Byrne, Jr. and Wilbur G. Silberman

United States Court of Appeals for the Eleventh Circuit

Money laundering—Eleventh Circuit's primer

United States v. Majors, Case No. 97-2803 ___ F.3d ___ (November 19, 1999). Federal criminal practitioners are encountering, on a far more frequent basis, indictments that allege *inter alia* money laundering. The Eleventh Circuit, in *United States v. Majors*, clarified the substantive difference between the promotion prong of money laundering, section 1956(a)(1)(A)(i), and the concealment prong, section 1956(a)(1)(B)(i). The *Majors*' opinion is "must reading" for every lawyer engaged in federal criminal practice.

Before the primary offense of money laundering can occur, the underlying criminal activity must be complete, generating proceeds to be laundered. See *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997). Section 1956(a)(1)(A)(i) has been referred to as the promotion prong of the money-laundering statute. See, *United States v. Calderon*, 169 F.3d 718, 720 (11th Cir. 1999). For sentencing purposes, a defendant convicted under the *promotion* prong receives a base offense level of 23, USSG section 2S1.1, while one convicted under the *concealment* prong, section 1956(a)(1)(B)(i), receives a base offense level of 20. *Id.* A greater punishment is applied to those defendants who encourage or facilitate the commission for other crimes. USSG section 2S1.1 Commentary.

The Eleventh Circuit, in *Majors*, critically notes that money laundering is not a continuing offense. *United States v. Kramer*, 73 F.3d 1067, 1072 (11th Cir. 1996). The statutory language and legislative history indicate that each transaction or transfer of money constitutes a separate offense. Thus, a violation of the concealment provision must "follow in time" the completion of the underlying transaction as an activity designed to conceal or disguise the origin of the proceeds. The concealment prong was designed to punish defendants who take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.

The panel opinion in *Majors* also adopts the Tenth Circuit's rationale in *Garcia-Emanuel*, 14 F.3d 1469, 1476

(10th Cir. 1994). In *Garcia-Emanuel*, the Tenth Circuit attempted to formulate certain principles governing section 1956(a)(1)(B)(i) appeals, a "difficult task of separating money laundering, which is punishable by up to twenty years in prison, from mere money spending, which is legal." *Id.* at 1473. "Because the statute is aimed at transactions that are engaged in for the purpose of concealing assets, merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime . . . if transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute." *Id.* at 1469. Ultimately, the Tenth Circuit concluded that section 1956(a)(1)(B)(i) is a concealment statute, not a spending statute. A related principle is that the evidence of concealment must be substantial.

The Eleventh Circuit, in *Majors*, also adopted the rationale of the Fifth Circuit in *United States v. Dobbs*, 63 F.3d at 391. In *Dobbs*, the Fifth Circuit reversed a money-laundering conviction because the transactions were as open and notorious as typical bank transactions can be. The cattle rancher in *Dobbs* had been charged with money laundering when he deposited illegal cattle sale proceeds in his wife's bank account and used those funds to pay ordinary household and ranch expenses.

Ultimately, the activity that section 1956(a)(1)(B)(i), the concealment provision, seeks to prevent is the injection of illegal proceeds into the stream of commerce while obfuscating their source.



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 & Belser and covers the criminal decisions.

Recent Bankruptcy Decisions and Rule Changes

Eleventh Circuit holds that debtor's unsecured trust fund recovery penalty tax not dischargeable

In re Costas J. Gust, 197 F.3d 1112 (11th Cir. Dec. 9, 1999); 84 A.F.T.R. 2d 99-7208, 1999 WL 1127405. Under the IRC, debtor was a responsible party of his corporation, Con-Fleet Enterprises, Inc., which owed the Internal Revenue Service trust fund taxes. The IRS assessed a penalty of \$18,413.85 and interest, which it followed with a tax lien notice on August 16, 1989. Five years later in the Southern District of Georgia, debtor filed a chapter 7, listing \$19,821 in personal property which he claimed exempt. On April 13, 1995, the IRS filed a corrected tax lien notice which extended the lien through June 24, 1999. Two years later, debtor filed a chapter 13, listing personal property of \$51,420, of which he claimed \$47,320 exempt. The IRS filed a claim for \$52,612.26 which consisted of \$50,255.83 secured, and priority unsecured of \$2,356.43. The secured claim included the trust fund penalty claim of \$18,413.85 plus accrued interest of \$31,841.98. The debtor objected to the IRS claim on the ground that section 507(a)(8) only excepts from discharge unsecured claims. Debtor appealed from the bankruptcy court's adverse ruling.

District Court Chief Judge Bowen, a former bankruptcy judge, affirmed with

an opinion adopted by the Eleventh Circuit. The debtor had contended that because section 507(a)(8) gives priority to "allowed unsecured claims of governmental units," and section 523 provides that no discharge is granted for a section 507(a)(8) tax claim, it follows that the exception to discharge applies only to unsecured tax debts. The argument was bottomed upon the Tenth Circuit case of *United States v. Victor* (10th Cir. 1997) but Judge Bowen rejected it, stating that the *Victor* case was erroneously decided. He noted that the Tenth Circuit in the *Victor* case disagreed with *In re Gurwich*, 794 F.2d 584 (11th Cir. 1986). Judge Bowen, in turn, approved the opinion of the bankruptcy judge, who said that the plain meaning of the legislation was clear, and he quoted the lower court: "There is no ambiguity in § 523(a)(1)(A). Section 523(a)(1)(A) addresses 'debt' arising from a 'tax', 'of the kind' specified in § 507(a)(8)."

Judge Bowen, in concluding, cited other cases and, in particular, *In re Latulippe*, 13 B.R. 526 (Bankr. D.Vt. 1981) which noted, "It is illogical that Congress intended to make unsecured claims non-dischargeable while rendering a claim dischargeable if the government has sought to enforce payment by creating a lien."

Comment: It is certain that the Eleventh Circuit is not going to change its view that it makes no difference if the tax claim is secured or unsecured. If it is a trust fund liability, it is not dischargeable.

Eleventh Circuit says no payment can be made from chapter 7 estate to pay debtor's attorney

In re American Steel Products, Inc., ___ F.3d ___; 35 BCD § 86, p 394, 1999 WL 1186416 (11th Cir. Dec. 15, 1999). In a very terse opinion of Judge Charles R. Wilson, the Eleventh Circuit held that the 1994 Congress amended Section 330 to delete the provisions allowing for payment from the bankruptcy estate to the attorney for debtor. In this chapter 7 case, which was converted from a chapter 11, debtor's attorneys requested \$30,141.87, of which \$19,600 had been paid as a pre-petition retainer. The bankruptcy court allowed \$10,541.87 (the difference which was unpaid), but

reserved ruling as to whether it should come from the estate or the initial retainer. Later, in reconsidering, the bankruptcy court vacated the original order, and held that nothing could be paid from the estate. An appeal culminated in the Eleventh Circuit, which held that the plain reading of the legislation did not permit payment from the estate to debtor's attorney. The Court rejected the attorney's contention that as Congress allowed such payment in a chapter 12 or 13, it must have intended the same in a chapter 7 or 11. In adopting this view, the Eleventh Circuit followed the Fifth Circuit ruling in *In re Pro Snax Distributors*, 157 F.3d 414, 425, and differed with the Ninth Circuit in *In re Century Cleaning Service*, 195 F.3d 1053 (9th Cir. Nov. 18, 1999), which had written that the failure of Congress to include chapters 7 and 11 attorneys for the debtor in the list of compensable persons, was "an unintended slip of the pen...."

Comment: I assume the attorneys were allowed to keep their pre-petition fees, although the Court could have said these fees were in trust, and thus part of the estate. As the matter now stands in the Eleventh Circuit, do not look for additional fees from the estate once a chapter 7 or 11 case is filed. To change this will require action from Congress or the U.S. Supreme Court.

Rule Changes

On April 26, 1999, the U.S. Supreme Court promulgated amendments to the Bankruptcy Rules. In the absence of any changes by Congress, these amendments became effective December 1, 1999.

It had been my intent to review these changes in depth; however, it became apparent there would be too much detail for this column. Thus, I will attempt a very broad brush with the admonition that one should refer to a book or service showing the before-and-after changes.

The substance of the changes on some routine motions are to reduce the number of parties upon whom notice is obligatory and to allow losing parties additional time to obtain a stay pending an appeal. For example, the changes to Rule 1017 require only that the debtor and the case trustee be given notice of a motion to dismiss as filed by the U.S.



Wilbur G. Silberman

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Trustee or Bankruptcy Administrator for failure of the debtor to furnish information such as schedules, lists of creditors, etc.

Rule 1017 applies generally to dismissal, conversions and suspensions. The change reduces the number of persons to be notified in such instances unless the court otherwise directs. Additionally, in subdivision (f) is a provision that a motion to dismiss or abstain, except in certain enumerated cases, will be a contested proceeding under Rule 9014.

Rule 1019 clarifies or describes procedures to be followed when a case is converted to chapter 7 from any of the other chapters. Subdivision 6 of Rule 1019 requires that all administration expenses incurred before the conversion of a chapter 11, 12 or 13 case to chapter 7 be made by filing a request under § 503(a), rather than filing a proof of claim under § 503(a).

Rule 2003(d) concerns the mechanics of reporting when there is a disputed election.

Rule 3020(e) was added to provide for a ten-day stay after an order of confirmation of a plan, unless otherwise directed by the court.

Rule 3021, concerning distributions, adopts the same ten-day stay mentioned in Rule 3020(e). These amendments were made in order to allow adverse parties the opportunity to request a stay pending an appeal.

Rule 4004(a) makes certain that a complaint objecting to discharge must be filed 60 days after the first date set for the creditors' meeting, regardless of whether the meeting takes place. Rule 4007(c) was amended exactly the same in filing a complaint to determine the dischargeability of any debt.

Rule 6004(g), in order to allow time for a party to request a stay pending appeal, provides for any automatic stay

for ten days of an order authorizing the use, sale or lease of property. Likewise, 6006(d) allows the ten-day window on orders authorizing the assignment of an executory contract or lease of property, except for cash collateral.

Rule 7001 now provides that when injunctive or other equitable relief is part of a confirmed plan, it is unnecessary to file an adversary proceeding for the same relief.

The last sentence of amended Rule 7004(e) excepts service of process in a foreign country so that the ten-day time limit after issuance does not apply.

The amendment to Rule 7062 deletes contested proceedings from the stay of proceedings to enforce the order. The Advisory Committee comment states that this change is because Rule 9014 was amended to make the rule inapplicable in contested proceedings unless authorized by the court. ■



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