



# *The* Alabama Lawyer

Vol. 63, No. 2

March 2002

Alabama's Own John Grisham

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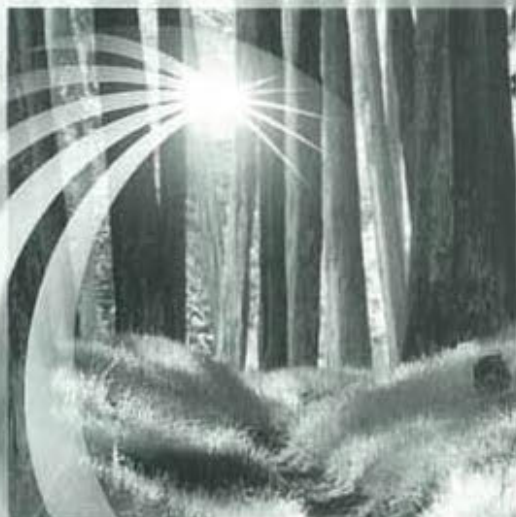
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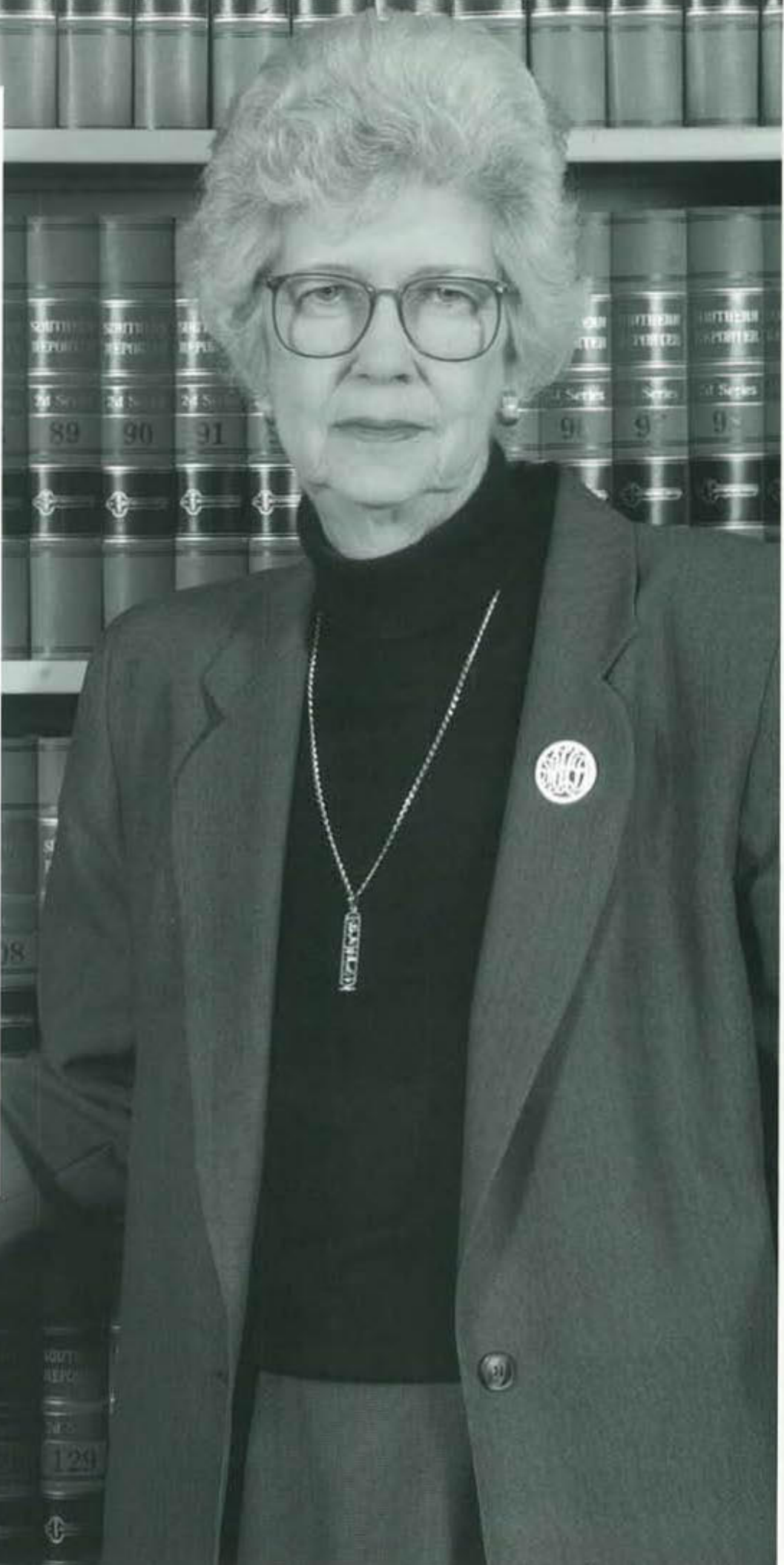
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Springtime at Bellingrath Gardens, Theodore, AL

—Photography by Paul Crawford, JD

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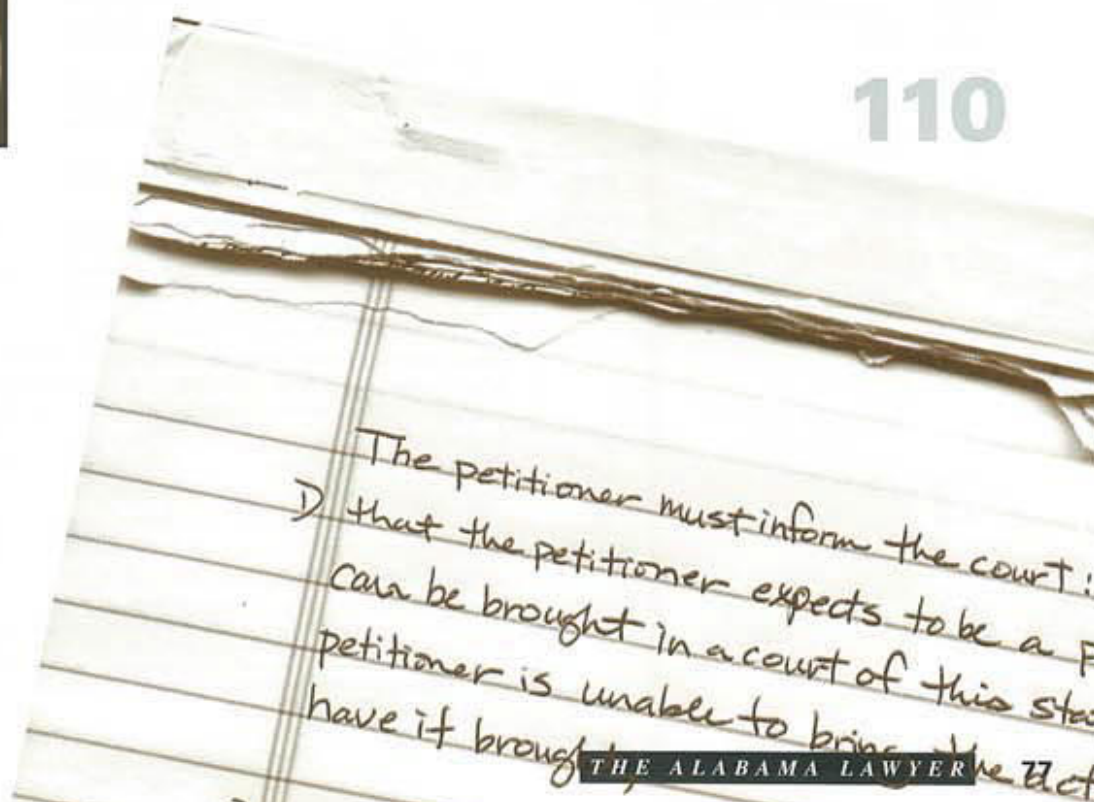
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Larry W. Morris

# The Joy of Being a Lawyer

*A little over six months into his term, Alabama State Bar President Larry Morris sat down (via telephones) with Robert Huffaker, editor of The Alabama Lawyer. This is what transpired.*

*The Alabama Lawyer:* Larry, you did not come up through the ranks as a bar commissioner, which is the traditional training ground for bar presidents. What made you decide to run for Alabama State Bar president?

**Morris:** I think I was a compromise candidate in that it had been many years since an active member of the Alabama Trial Lawyers Association had been president. I was approached by the defense bar and some other members of the state bar and was asked if I was interested. Of course, I was a bit surprised. I think the biggest surprise, though, is that after eight months, I haven't been impeached. I understand it was even money that I wouldn't make it six months. I hope that the time has run on the impeachment process or that at least we can stall it!

*AL:* Seriously, what has been the biggest surprise during your presidency?

**Morris:** By and large, I think the lawyers in this state have been the biggest surprise to me.

*AL:* Do you say that positively or negatively?

**Morris:** Very positively! For many years I have been in a specialized area of the law, litigation, but there is a wealth of talent in a lot of other areas of the law, along with an ability to get things done. I also found it comforting that there are over 10,000 lawyers in this state practicing law for a living, and they get immense help from the state bar and its staff. I had no idea that there are so many good programs designed to assist lawyers. It's obvious that people realize that the practice of law is difficult. It's a demanding profession. I never wanted to get any mail from the state bar, particularly marked "personal and confidential." I guess I looked on the bar as my enemy, but what I find most comforting is that the bar is designed to help, more than to serve as a watchdog over a person's activities. That's a minor part of what the bar does. The entire staff does a wonderful job helping lawyers.

*AL:* Do you think that the assistance and the programs the bar offers to members is being communicated well enough, particularly to the young lawyer who has been in practice only five years or so?

**Morris:** Yes. I think that the services have expanded so much. I was aware 20 years ago of the number of activities and services available to the practicing lawyer, but the older you get, the less I would hope that we would need the services of the bar. So, when I say I was surprised what the bar offers, I think what the bar is offering to the practitioner has changed and it has expanded, such as, programs in specialty areas. Psychological problems that lawyers have, substance abuse that lawyers experience, the debt that lawyers have. They teach courses to lawyers about managing debt as a result of their education. Those type of programs I just never knew existed, and I think they are very helpful, very beneficial, and I do believe they are being communicated.

*AL:* Most bar presidents adopt some central theme as the focal point of their administration. What is the central theme of yours?

**Morris:** I have studied the presidents of the United States, such as Chester A. Arthur and Millard Fillmore, and their behavior pretty closely. I could find absolutely nothing that they did other than occupy their position for four years. It looks like I have pretty well succeeded in picking either of those two as my hero. I think I would be stretching the truth if I said I had an overall theme other than to promote the joy of being a lawyer.

*AL:* How have you done that?

**Morris:** Well, I've had the privilege during the last eight months of speaking to 17 bars, and various spin-offs of lawyer groups. I have also spoken to a number of organizations with prospective lawyers, such as law schools, including all three accredited in-state schools, Jones, Cumberland and Alabama. I've had an opportuni-



ty to do a good bit of speaking and my theme really is very simple: If we pause and reflect on where we are, there is wonderful joy, wonderful experience in being a lawyer. The only thing I can claim that is a little unique is I don't know of too many people who enjoy being a lawyer more than I. Maybe it's because I've always looked up to lawyers. I never knew any lawyers when I was growing up, and I take being one as a special privilege and as an opportunity. There are many leaders in our state who are members of our bar. The Governor, both U.S. Senators, all nine of our Supreme Court members, a large number of members of the Legislature, several of our Congressmen—all are members of the Alabama State Bar. So, leadership is a dominant theme in the bar. The joy of being around people who can step forward, who understand how to right a wrong, and who can lead—I'm impressed with that and I enjoy that.

**AL:** How do you assess the success of the bar's grievance process?

**Morris:** I think our disciplinary process has worked well. Without downplaying the service of any of the bar's previous general counsel, I think Tony McLain is the best general counsel that I've been around. I think he has shown wisdom and an ability to help lawyers, with a sensitive ear to the public and to what the public expects of lawyers. I think that the disciplinary process is the best in the 30-something years I've been involved with the bar.

**AL:** Have you appointed any task forces during your administration?

**Morris:** I've appointed one, the Long-Range Planning Committee.

**AL:** What is their responsibility?

**Morris:** Considering where the state bar should be, ten years from now.

**AL:** Why did you do that?

**Morris:** Because it was time. It was last reported in 1994, I think, so it was time to reassess our goals. It's made up of very strong individuals.

**AL:** How is the bar's financial condition?

**Morris:** I've said repeatedly, it's the only organization that I've ever been a part of that's solvent. I've been involved in the church and I've been involved in civic clubs and I've been involved in specialty bars, and every one of them needs money or is in desperate need of money. Because Keith Norman watches every dollar and does a great job, the bar is in good financial condition. This has been a trying year for him because I was introduced with the explanation that I am the only person who can ever exceed an unlimited budget, and I have done a pretty good job of that.

**AL:** We're conducting this interview in late February and it will appear in the March issue of the magazine. What's on tap for the remainder of your term?

**Morris:** We're having a day in May that I think will be special, honoring all of the past presidents as our special guests at Lake Martin. We have everyone from federal judges to U.S. Senators who have been president of the Alabama State Bar. They have had long and illustrious careers, not only in law, but in other areas, too. I am also confident the Long-Range Planning Committee is headed in a good direction with worthy goals.

**AL:** Is there anything else to share with our readers?

**Morris:** As my year closes out, I feel the bar is in as good a shape as it has ever been. In comparing it with other bars throughout the country, we have as strong a bar as I've encountered. We're in the minority now of mandatory membership in bar associations. I believe that non-mandatory bar memberships has dramatically hurt other bar associations. Because of so many pressing issues, I do wish that the bar could take a more active role in some of the real inequities in this state. I think the way we elect judges is terrible. I think the way that we operate under an antiquated constitution is ludicrous. And, if we, as lawyers, don't lead, then traditionally there is a void in the leadership. Twenty of the first 23 presidents of the United States were lawyers. The other three were war heroes. Lawyers have traditionally stepped up to a leadership role and I think there is some unfinished business in Alabama that we need to address. Often, lawyers are positioned to see where wrongs or inequities exist, and it's our duty to help right the situation.

**AL:** Have you enjoyed serving as bar president?

**Morris:** I certainly have. It's been a great honor. One of the prior presidents of the state bar told me something that contains a lot of wisdom. He said to take the position of president very seriously; just don't take myself too seriously. I have tried to keep that in mind. I think I have understood and appreciated the honor and dignity of being president of the bar. So far, it has been a wonderful journey, and I have enjoyed the ride. ■

## Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers," he says. "They have simply learned how to market their services."

A successful sole practitioner who once struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals

are unpredictable. You may get new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of new clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a FREE copy of this report by calling 1-800-562-4627, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>





Keith B. Norman

# Is There a New Constitution in Our Future?

This is a question that has bedeviled our state for many years. I am neither a soothsayer nor do I have the clairvoyant powers of a "Miss Cleo," but it is clear that momentum is building for a replacement of the 1901 constitution. Recent media reports indicate that both the governor and lieutenant governor favor a convention to draft a replacement. A number of legislators have expressed their desire for a modern organic law for our state as well. In the first few weeks of the 2002 legislative session at least a half dozen bills dealing with constitutional revision have been introduced.

One person, in particular, who has played a major role in refocusing the public's attention on the need for a new constitution, has been **Dr. Thomas E. Corts**, president of Samford University. A native of Indiana and untainted by any special interest other than the welfare of Alabama, Dr. Corts has traveled the state speaking at numerous civic clubs explaining the need for a constitution that will allow Alabama to achieve its fullest potential instead of the present document that shackles the state to the 19th century. As Dr. Corts and other state leaders over the years have wisely recognized, Alabama's economic health is tied directly to our constitution. The selfless work of Dr. Corts has attracted a great deal of interest from many sectors of our state and has once more moved constitutional reform to the forefront of political debate and made it a key issue for the this year's political races. Dr. Corts has served his adopted state well.

The Alabama State Bar has had a long association with the issue of a new constitution to replace the 1901 version. Former Alabama State Bar President, Governor and Lauderdale County native **Emmett**

**O'Neal** made the following statement at an annual meeting of the state bar:

"We can only judge other States by our own and we know that in Alabama reforms have been accomplished only after continued but painfully slow efforts, checkmated too often by selfish special interests—that there is a profound distrust of our Legislature, a distrust justified by the record they have made in recent years, that our taxing system is chaotic, both unjust and unproductive, frequently based on false and vicious principles, lacking both in equality and uniformity, that notwithstanding the marvelous resources of the state, and our increasing wealth, industrial and agricultural development, our state treasury constantly faces a deficit and that contributing more from the general treasury for the support of our common and high schools than any State in the Union, we still rank near the bottom of the list in the scale of illiteracy."

These remarks were made by Governor O'Neal at the bar's 40th Annual Meeting in 1917! In the course of his remarks that run for more than 70 pages, Governor O'Neal highlighted the chief defects of the 1901 constitution and recommended specific reforms in the three respective branches of government and especially in the areas of education and taxation. His words still haunt us 85 years later: squandering of resources; short sightedness and unwise organization.

Four years later, **Thomas E. Orr** of Albertville presented his paper at the 44th Annual Meeting entitled, "Does Alabama Need a New Constitution?" Mr. Orr



mentioned recent efforts that had taken place to address the inadequacies of the 1901 constitution namely: six amendments to patch up the old constitution that "...met the usual fate of defeat and were compelled to drag along through the old constitutional ruts...", and a legislative resolution introduced in the 1919 legislative session calling for a constitutional convention that was ultimately defeated on the House floor. Concluding that Alabama needed a new constitution, Mr. Orr pointed out that:

"Everyone who has given the subject real thought admits that our Constitution is full of technicalities and so complex that it is a hindrance rather than a help. It has grown to be a patchwork of Amendments, some of which are hard to reconcile with the original instrument. It has served its usefulness and the day has come when the bench and bar and press of the State, who the laity must look for information on the subject, must take a strong position and make known to the people, in no uncertain terms, the real cause for the many failures of the State Government to properly function."

More recent efforts have included the work of the Alabama Constitutional Commission. In its final report of 1973, the Commission concluded "... that the 1901 constitution...is obsolete and should be replaced with a constitution that is more adequate for the citizens of the state and for their government both state and local." The Commission, headed by lawyer **Conrad Fowler**, drafted a proposed new constitution complete with commentary for each section explaining the differences between it and the 1901 document and the Commission's rationale for each change. The work of the Commission was significant and laudable. It served as the foundation for the new Judicial Article (Art. VI), the ultimate adoption and ratification of which **Chief Justice Howell Heflin** spearheaded. The Commission's 1973 report also served as the basis of the short-lived constitutional reform effort supported by **Governor Fob James** during his first administration.

Interestingly, in 1983, a proposal for a new constitution that was making its way through the legislature was not supported by the bar. Alabama State Bar **President Bill Hairston** of Birmingham appointed **Harold Herring** of Huntsville to chair a task force to evaluate the proposed constitution. The task force analyzed each article of the proposed constitution and found the document to have "numerous inadequacies." The Board of Bar Commissioners voted unanimously to adopt the report of the task force and its recommendation that the voters of the state reject the proposed document.

Last year, with interest in a new constitution once again heating up, state bar **President Sam Rumore** appointed retired **Federal District Judge Sam Pointer** to chair a task force to consider a new constitution. Serving with Judge Pointer are: **Beverly Baker** of Birmingham; **Bill Broome** of Anniston; **Jim Campbell** of Anniston; **Camille Cook** of Tuscaloosa; **Greg Cusimano** of Gadsden; **Mason Davis** of Birmingham; **Judge Bill Gordon** of Montgomery; **Jack Janecky** of Mobile; **Rick Johanson** of Birmingham; **Sandra Lewis** of Montgomery; **Vic Lott** of Mobile; **Rick Manley** of Demopolis; **Malcolm Newman** of Dothan; **Donna Pate** of Huntsville; **Dag Rowe** of Huntsville; **Justice Janie Shores**; **Bill Wasden** of Mobile; and **Cathy Wright** of Birmingham.

The specific charges given this task force are:

## How Can You Be in Two Places at One Time?

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For more information about rates and scheduling, contact **Laura Calloway** or **Sandra Clements** at the Alabama State Bar, (334) 269-1515.

1. To study any proposed Constitution, and as a part of its deliberations the Task Force shall compare the provisions of such proposed constitution with the provisions of the 1901 Constitution as amended and determine where and what changes have been made.
2. While the Task Force need not necessarily come to a conclusion as whether or not to recommend ratification or rejection in whole or in part of any proposed Constitution, it may do so. Its report of findings should be of such depth so as to allow a voter to make an intelligent and informed choice.
3. The primary purpose of the Task Force is to serve as a resource tool for all entities who shall be involved in the process of formulating a new constitution, including serving as a resource tool for those voters who desire to know more about any document they are ultimately called upon to consider.
4. The Task Force shall, in addition to its studies, make a recommendation concerning establishment of a speaker's bureau for the purpose of disseminating the results of its studies to interested citizens within the state.

I am not an astrologer so I am not sure if the planets and the stars are properly aligned for a new constitution to become a reality. The signs are encouraging, however, that the state's citizens may be closer than ever before to having a new constitution. Although public sentiment may be in favor of a new constitution, experience with the adoption and the ratification of the Judicial Article shows that many hurdles must be overcome. This campaign season could very well determine if constitutional reform will continue to be rhetoric or become reality. ■





- The **Alabama Association of Legal Assistants** recently elected new officers. They are: **Michael Ivey**, Burr & Forman, president; **Gena Wood**, Bradley Arant Rose & White, parliamentary; **Jane McKinnon**, Balch & Bingham, first vice-president; **Sherri L. Watson**, Morris, Cary & Andrews, second vice-president, membership; **Becky Shipps**, Burr & Forman, second vice-president, seminars; **Roxann Mathers**, Mobile County Probate Court, secretary; and **Deborah J. Geiger**, Loveless & Lyons, treasurer.
- December 11, 2001 was declared "**Billy C. Bedsole Day**" in Mobile by a proclamation of the City of Mobile. Bedsole, a graduate of the University of Alabama and the University's School of Law, has served numerous terms as the state bar commissioner for the Thirteenth Judicial Circuit, as well as on the

ASB Disciplinary Commission. Other volunteer work includes serving as a deacon since 1976 and as a Sunday School teacher for 25 years at Spring Hill Baptist Church, and as past president of the Municipal Park Youth Football Association and Municipal Park Baseball Association, having coached in various age divisions for the past 30 years (13 Mobile Youth Football Conference Championships and four second-place teams, as well as many basketball championships). Bedsole also has been selected Coach of the Year by the City of Mobile six times.

- **John M. Floyd**, with Vulcan Materials Company, was recently named to the Samford University Board of Trustees. Floyd is a graduate of Samford and the Cumberland School of Law, Samford University. ■

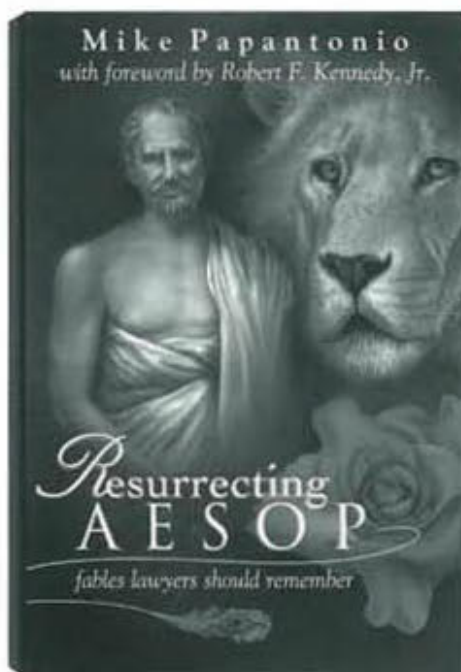
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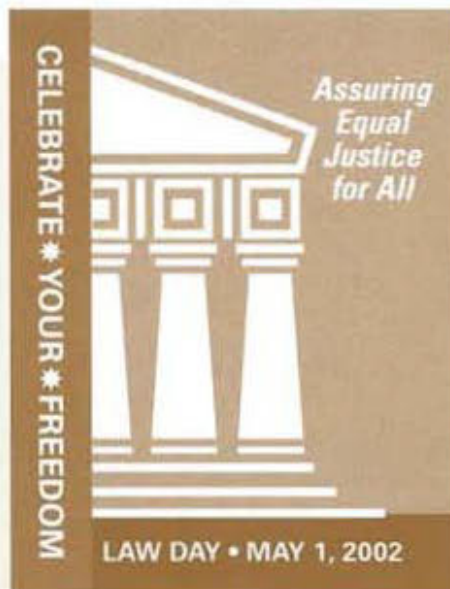
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## what are you doing for Law Day 2002?

For many Americans, this year the celebration of Law Day will take on extra meaning. After the events of September 11, Law Day 2002 will provide an especially pertinent way to recognize and deal with the very real struggles facing our democracy today. Terrorism presents challenges to America's core civic values, to our commitment to a pluralistic democracy and to our commitment to the rule of law. Law Day 2002 offers us a chance to focus on the common ground we share as Americans in a diverse society and as members of the global community. The law – and our commitment to justice and democratic values – is what binds us together as a people.

This Law Day, perhaps more than any in recent memory, provides an important opportunity for bar associations and their individual members to reach out to Alabama communities, schools and citizens. At the Alabama State Bar, we can help. Encourage participation in the Alabama State Bar Annual Law Day Poster, Essay and Photography Contest. Start a Law Day program in your community – we can provide you with a detailed Law Day Planning Guide. Call us or visit our Web site at [www.alabar.org](http://www.alabar.org) and see what resources we offer. If you already do a Law Day program in your community, please share that as well.

Together, we can work to make this the best – and most meaningful – Law Day ever.  
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*The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.*

### About Members

**Walter A. Williams, Jr.** announces the opening of his office at 153 S. 9th Street, Gadsden 35901. Phone (256) 543-0188.

**Roianne Houlton Frith** announces a name change to **Roianne Houlton Conner** and that she will continue to practice in Montgomery.

**Jeffrey W. Wagnon**, formerly of Brunson & Associates, PA, announces the opening of his office, at 310-D Meighan Boulevard, Gadsden 35901. Phone (256) 543-2926.

**Charles L. Miller, Jr.** announces the relocation of his practice to 1650 Government Street, Mobile 36604. Phone (251) 471-3772.

**David A. Bagwell** announces that he has moved his practice across Mobile Bay, with the mailing address now P.O. Box 2126, Fairhope 36533. Phone (251) 928-2970.

### Among Firms

**Beasley, Allen, Crow, Methvin, Portis & Miles, PC** announces that **C. Gibson Vance, J.P. Sawyer, C. Lance Gould, Joseph H. Aughtman, Dana G. Taunton, J. Mark Englehart**, and **Clinton C. Carter** have become shareholders; **Robert Haggard** and **J. Paul Sizemore** have become *of counsel*; and **Ronald Austin Canty, Melissa A. Prickett** and **W. Roger Smith, III** have become associated with the firm.

**Donald N. Guthrie** and **Kelly R. Knight** announce the formation of **Guthrie & Knight, LLC**, with offices at 3118 Bellwood Drive, Birmingham. Phone (205) 967-0399.

**Henslee, Robertson & Strawn, LLC** announces that **Christie D. Knowles** has become a member and the firm name has changed to **Henslee, Robertson, Strawn & Knowles, LLC**.

**Self & Smith** announce that **Bob Burdine** and **Greg Burdine** have joined the firm and the firm name has changed to **Self, Smith, Burdine & Burdine**. **Hank Self** and **Bob Burdine** will remain *of counsel*.

**Richardson, Spear & Spear, PC** announces that **David A. Hamby, Jr.** and **Jene W. Owens, Jr.** have joined the firm. The firm name has changed to **Richardson, Spear, Spear & Hamby, PC**.

**Jere C. Trent, David A. Thomas** and **Charlotte C. Christian** announce the formation of **Trent, Thomas & Christian**, with offices at 109 W. Washington Street, Athens. Phone (256) 232-2611.

**Morris, Cary & Andrews LLC** announces that **Cory H. Driggers** has joined the firm as an associate.

**Phillip E. Adams, Jr., Arnold W. Umbach, Jr., Patrick C. Davidson, Matthew W. White**, and **Jacob Walker** announce the formation of **Adams, Umbach, Davidson & White LLP**, with offices at 205 S. 9th Street, Opelika 36801. Phone (334) 745-6466.

**Ford & Harrison LLP** announces the opening of its Birmingham office and that **Steven M. Stastny, Patrick F. Clark** and **Andrew Scharfenberg** will be located there.

**Maynard, Cooper & Gale, PC** announces that **Jim G. McLaughlin** and **Carole Golinski Miller** have been elected shareholders in the firm, **Thomas G. Mancuso** has joined the firm as a shareholder and **Eric L. Pruitt** has joined as an associate.

**R. Michael Caddell, Jr.** and **Stephen W. Thompson** announce the formation of **Caddell & Thompson**. The mailing address is P.O. Box 59802, Homewood 35259.

**Baker, Johnston & Wilson, LLP** announces the relocation of its offices to the Colonial Bank Building, 2501 20th Place South, Suite 250, Birmingham 35223. Phone (205) 397-5200.



**Fawwal & Fawwal, PC** announces that **Jerry W. Burchfield** has become associated with the firm and that **William E. Ramsey** is no longer associated with the firm.

**Michael Gillion, PC** announces that **Scott W. Hunter** has become associated with the firm.

**Massey & Stotser, PC** announces that the firm name is now **Massey, Stotser & Nichols, PC**, and that **Lorrie A. Maples** is now a partner and **Christopher W. Johnson** has joined as an associate.

**Redden, Mills & Clark** announces that **Keith E. Brashier** has joined the firm as an associate.

**Sears, Terry & Algood, LLC** announces that **Steven L. Terry** has withdrawn from the firm and has opened an office in Daphne. The firm name now is **Sears & Algood, LLC**.

**Feld, Hyde, Lyle, Wertheimer & Bryant, PC** announces that **Mark M.**

**Gibson** has joined the firm as an associate.

**Young, Young & Parks** announces that **Christopher L. Albright** has become associated with the firm.

**Judge William C. Thompson** of the **Alabama Court of Civil Appeals** announces that **C. Richard Hill, Jr.** and **Aimee S. Pruitt** have joined his office as staff attorneys.

**Leitman, Siegal & Payne, PC** announces that **Christopher R. Hood** and **R. Link Loegler** have become shareholders in the firm.

**Rosen, Cook, Sledge, Davis, Cade & Shattuck, PA** announces that **Jeffrey C. Smith** has become a shareholder, and **Mary Beth Wear Cavert, William A. Jones, Matthew Q. Thompkins** and **Laura J. Crissey** have become associated with the firm.

**Morris & McDermott, LLC** announces that **Aimee C. Smith** has

joined the firm as a partner, and the firm name has been changed to **McDermott, Smith & Associates, LLC**.

**Johnstone, Adams, Bailey, Gordon & Harris, LLC** announces that **Robert E. Clute, Jr.** and **Richard W. Vollmer, III** have become members of the firm.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces that **G. Thomas Sullivan** has become a partner of the firm and **Amy Bell Nelson** has become associated with the firm.

**Alford, Clausen & McDonald, LLC** announces that **L. Hunter Compton, Jr., Cali A. Henderson, Christina L. May** and **Margaret E. McDowell** have become associated with the firm.

**Friedman, Leak & Bloom, PC** announces that **Christopher J. Zulanis** has joined the firm as a shareholder, and that **Jess S. Boone, Christopher M. Mims, Michael J. Douglas** and **J. Scott Evans** have become associated with the firm. ■

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*Left to Right: Tom Marvin, Gina Matthews, Leon Sanders, Buddy Rawson*

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### *William Doyle Scruggs, Jr.*

---

Whereas, the pursuit of a just cause is virtuous only when such pursuit is governed by honorable intentions and adherence to the highest ethical standards, and

Whereas, the true nobility of the law is manifested in the character of those whose lives honor the principles of honesty and integrity, and

Whereas, the life of William Doyle Scruggs, Jr. of Fort Payne, Alabama was a tribute to those principles, and

Whereas, William Doyle Scruggs, Jr. departed this life on November 6, 2001, the DeKalb County Bar Association, therefore, desires to honor his name, pay tribute to the example which he has set for all members of the bar, and express condolences to his wife, Kay; their daughter, Shannon; son-in-law Christopher Campagna; granddaughter Liza Banks; his sister, Jane; and all his friends and associates.

Be it known that because of his qualities of intellect and character, Bill Scruggs was elected and served as bar commissioner for the Ninth Judicial Circuit (DeKalb and Cherokee counties) from 1974 until 1986, when he became president of the Alabama State Bar. In 1987, he resumed his position as commissioner for the Ninth Circuit and continued to serve in that position until 1993. Throughout all his years of service to the Ninth Judicial Circuit and the State of Alabama, Bill Scruggs approached every task with a keen intellect, quick wit and uncompromising integrity.

His high ethical standards earned him the respect of

lawyers throughout the state and resulted in his service as chairman of the Task Force on Lawyer Discipline, chairman of the Task Force on Professionalism, vice-chairman of the Committee on Legal Ethics and Lawyer Discipline, and chairman of the Mandatory Continuing Legal Education Commission. He was a member of the Alabama Supreme Court Judicial Ethics Committee, and served as a judge on the Court of the Judiciary from 1985 until his death. Bill Scruggs earned the Alabama State Bar Award of Merit because of his unselfish contributions to the legal profession.

This loss to the DeKalb County Bar Association and the citizens of this circuit is irreplaceable, but the memory of Bill Scruggs will endure, and the example he set for us all will live for generations to come.

Be it therefore now resolved, by the DeKalb County Bar Association, that as we mourn the passing of William D. Scruggs, Jr., we commit ourselves to honor his life by following his example. We acknowledge that by adherence to the highest ethical standards, the cause of the legal profession is advanced, and we pledge ourselves to the daily increase of pride and professionalism in the practice of law.

Be it further resolved that the family and friends of Bill Scruggs know of our deepest sympathy in his passing, and be assured of the commitment we here make.

—DeKalb County Bar Association

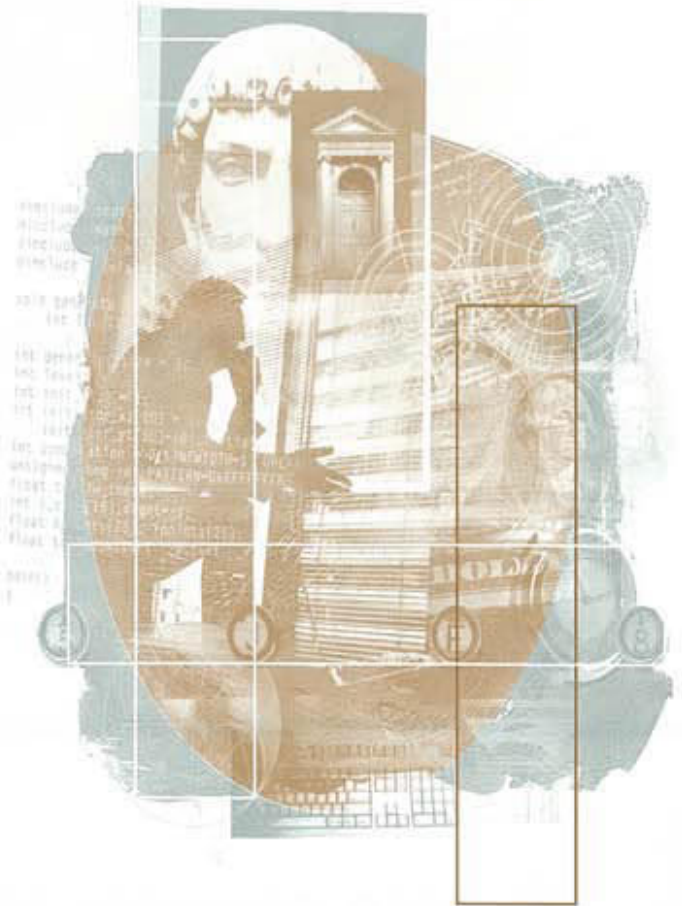


# Introducing... the Alabama Lawyer Assistance Foundation

Over 300 lawyers have accessed the Alabama Lawyer Assistance Program since the program was first implemented. For some, it was a crisis that precipitated the call. A spouse threatened to leave; a job was lost; or there was an alcohol/drug-related arrest. Others have called because they could no longer watch their friend or colleague participate in self-destructive behavior, placing their lives and the well being of their clients at risk. Whatever the reason for the call, when a lawyer finally admits that he/she needs help, it is a time to act. Their lives, as well as their recoveries, may depend on it.

The members of the Lawyers Helping Lawyers Committee are a crucial part of ALAP. They are committed to helping lawyers in need. Most of their work is done confidentially so you may not be aware of the extent of their service. These committee members are often the ones accompanying the depressed, addicted or delusional lawyer to treatment. They are the ones sitting in admissions offices when a lawyer in need is denied access to help because their insurance has lapsed or their plan didn't include mental health, or they simply have run out of funds. It is these committee members who also give hours of their time meeting with judges, grievance committees, and disciplinary panels to assist ALAP in helping lawyers. They are valuable members of your bar and they need your help.

The number one obstacle in getting a lawyer appropriate treatment is financial. Often by the time a lawyer is ready for help, he/she has exhausted all financial means to pay for it. Seventy percent of lawyers in Alabama were denied treatment last year, only to be placed on waiting lists. The Alabama Lawyer Assistance Foundation has been established to open the doors and help lawyers get a chance at recovery. It is not a giveaway but a loan, enabling funds to always be available to the next lawyer in need. When lawyers are given a chance at recovery and held accountable, they can and do return as valuable members of their profession, their families and their communities. That's good for everyone involved.



In the following weeks, you will be hearing more about the Alabama Lawyer Assistance Foundation. For more information now on how you can help, contact the ALAF at 334.834.7576 or visit the Alabama State Bar's Web site at [www.alabar.org](http://www.alabar.org). The Alabama Lawyer Assistance Foundation . . . another way for lawyers to help lawyers help themselves. ■

## Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented at the Alabama State Bar's Annual Meeting in July at Orange Beach.

Local bar associations compete for these awards based on their size. The three categories are large, medium and small bar associations. The following criteria will be used to judge the contestants for each category: **The degree of participation by the individual bar in advancing programs to bene-**

**fit the community; The quality and extent of the impact of the bar's participation on the citizens in that community; and The degree of enhancement to the bar's image in the community.**

To be considered for this award, local bar associations must complete and submit an award application by May 1, 2002.

Contact Ed Patterson, director of programs for the ASB, at (800) 354-6154, (334) 269-1515, ext. 161, or P.O. Box 671, Montgomery 36101 for an award application. ■





## CEELI Attorneys Wanted

The Central and East European Law Initiative (CEELI), a public service project of the American Bar Association, seeks attorneys, with five+ years' experience, to develop, coordinate and implement legal reform projects in Central and Eastern Europe and the NIS. Positions of various lengths are available throughout the region to work with local judiciaries, bar associations, attorneys and legislative drafting committees on criminal, environmental, commercial, or gender issues or civil law reform. Participants receive a generous support package. E-mail Alison at [ceeli@abanet.org](mailto:ceeli@abanet.org) or visit [www.abanet.org/ceeli](http://www.abanet.org/ceeli) for an application and information.



The recent events in New York, Washington, D.C. and Pennsylvania underscore the need for updated and thorough disaster preparedness and response plans. These plans can save lives, and help protect and give direction to staff and leadership in the midst of an emergency. With this in mind, the Alabama State Bar has produced a concise, easy-to-implement guide that features a crisis management checklist, steps for putting together a bar association or legal practice emergency preparedness plan, and resources for providing volunteer legal services. The guide is available, at no cost, on-line at [www.alabar.org](http://www.alabar.org) or upon request by calling 800-354-6154, extension 132.



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# ALABAMA STATE BAR

## 2002-2003 Committee and Task Force Preference Form

### A Message from Fred D. Gray, president-elect

*I extend an invitation to all Alabama State Bar members to volunteer for service on a state bar committee or task force. During this bar year, we will focus on **LAWYERS RENDERING SERVICES**. Help us by volunteering to serve on one of the bar committees or task forces. Please be active in your local bar association first. They need your time and talents, too. I hope you see a state bar committee or task force that really interests you; if so, please let me know by completing this form. State bar projects involve travel or other out-of-the-office time commitments. Volunteer if you are willing to be a participating committee or task force member. I encourage your service and your input for future bar projects.*

### **APPOINTMENT REQUEST** - Terms begin August 1, 2002 and expire July 2003.

Indicate your top two preferences from the list by marking 1 or 2 beside the preferred committee (c) or task force (tf).

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#### **How much time are you willing to spend on a committee or task force?**

- |   |  |
|---|--|
| <input type="checkbox"/> 16+ hours per month  | <input type="checkbox"/> 5 hours per month       |
| <input type="checkbox"/> 6-15 hours per month | <input type="checkbox"/> occasional contribution |

### **INSTRUCTIONS FOR SUBMISSION**

Copy this form from this edition of *The Alabama Lawyer*, and mail it to **Alabama State Bar, Attention: Programs, P.O. Box 671, Montgomery, Alabama 36101-0671**, send by **facsimile, (334) 261-6310**, or go to [www.alabar.org](http://www.alabar.org) and complete the form on-line and send it. We must receive your form **on or before May 15, 2002** to consider you for a committee or task force appointment. Please remember that the vacancies available for each committee and task force are extremely limited as most committee appointments are filled on a three-year rotation basis.





By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

# Constitutional Revision

At the end of the 2001 Regular Session of the legislature, by House Resolution 538, the Alabama House of Representatives requested that "the Alabama Law Institute conduct an analysis of the amendments to the Constitution of Alabama of 1901, for the purpose of recommending to the House of Representatives of the Legislature a procedure for revising and consolidating the Constitution." The goals of such an analysis by the Institute should include the following:

- (1) Create public awareness of and educate the public on the problems currently existing in the Alabama Constitution;
- (2) Provide the House of Representatives with specific guidance for constitutional revision; and
- (3) Identify the goals of a new constitution and identify methods and approaches for revising or rewriting the current constitution.

In response to this resolution, the Law Institute filed the following report with the House of Representatives:

The goal of a state constitution should be to provide a framework for government and protection of its people while investing legislators with the authority to manage and lead state government.

Public awareness can best be accomplished by promotion from the Governor, individual legislators and additional assistance of non-legislative groups. Currently, the following organizations have a constitution education program: State Constitutional Law Project at Cumberland School of Law, Samford University; Alabama Citizens for Constitutional Reform; Alabama 2000; Alabama State Bar; Public Affairs Research Council of Alabama; Alabama League of Women Voters; Appleseed Foundation;

Cities and Universities Leadership Organizations; chambers of Commerce; and various organizations of public officials.

A re-codification of the constitution is currently being prepared.

The following describes **four different approaches** to address constitutional reform. Each approach will require extensive review. This is followed by **Appendix A** consisting of a chart that provides various comparisons of the 1901 Constitution.

- I. The **first approach** is for the legislature to revise the 1901 Constitution, *Article by Article*. Below is a suggested time table and method to accomplish this approach:
  - I. Declaration of Rights - *House Passed in 2000 & 2001*
  - II. State Boundaries - *House Passed in 2000 & 2001*
  - III. Distribution of Powers - *No Need to Revise*
  - IV. Legislative Department - *Revise 2004 (except Home Rule dealt with by Special Commission)*
  - V. Executive Department - *Revise 2004*
  - VI. Judicial Department - *Revised 1973*
  - VII. Impeachments - *Revise 2002*
  - VIII. Suffrage and Elections - *Revised 1972*
  - IX. Representation - *Revise 2003*
  - X. Exemptions - *Revise 2003*
  - XI. Taxation - *Special Commission - Report 2004*
  - XII. Corporations - *House Passed 2001*



- XIII. Banking - *House Passed 2001*
- XIV. Education - *Special Commission - Report 2004*
- XV. Militia - *Revise 2002*
- XVI. Oath of Office - *No Need to Revise*
- XVII. Miscellaneous - *Home Rule - Special Commission - Report 2004*
- XVIII. Mode of Amending Constitution - *Revise 2004*

Under this first approach, approximately two or three articles are considered and revised by the legislature each year. A revision of the entire constitution could be accomplished in the next three years. The principal substantive provisions to be revised are articles dealing with taxation, education and the home rule provisions. Therefore, a special committee of the legislature, or special constitutional commission, could be created to study and hold hearings and forums on these items. The committee, or commission, would submit to the legislature recommendations for revisions in these three areas. At the same time, the legislators, the public and those affected would be educated as to the barriers and safeguards regarding these three areas.

The revised articles could be presented in the following ways:

- A. Each article presented as a separate constitutional amendment to be voted on individually.
- B. All revised articles to be presented as one amendment since articles III, VI, VIII and XVI will not be revised. This would not be an entirely new constitution and would be permitted according to a California holding in *McFadden v. Jordan*, 32 Cal.2nd 330 (1948). Where the effect of adoption of the measure proposed would be to "add or change within the lines of the original instrument [to] effect an improvement or better carry out the purpose for which it was framed." *Livermore v. Waite*, 102 Cal. 113, 118 (1894). However, the legislature should request an opinion of the Alabama Supreme Court as to the constitutionality of this approach.

- 2. A **second approach** would be for the legislature to adopt a **codification** of the current constitution, folding into it

the 700-plus amendments. Delaware Supreme Court *Opinion of the Justices*, 264 A.2nd 342 (Del. 1970) so permitted.

An opinion of the Alabama Supreme Court would need to be requested as to whether the entire re-codified constitution could be voted on as one constitutional amendment since there would be no substantive change. This would allow for a better understanding of many amendments and would omit the sections that have been held unconstitutional and those whose applicability have lapsed by the passage of time, such as tax and bond authorizations.

This intermediate step would not provide any constitutional revision, however, it would bring the current amendments into an organized form. The re-codified constitution would be subject to additional amendments in the same manner as the current 1901 Constitution has been amended.

- 3. A **third approach** is a **comprehensive revision** of the constitution by the legislature. All articles and sections would be considered. This approach would require a constitutional amendment to permit one vote of the people on an entire constitution, *see State v. Manley*, 441 So.2d 864 (Ala. 1983). The voters must first determine whether they should vote on an entirely new constitution. If the voters approve this approach, they would then vote on any proposed constitution approved by the legislature.
- 4. A **fourth approach** would be for the legislature to pass an act or resolution calling for a **convention**. The selection of delegates, financing the convention and a reporting date would need to be determined. The previous six constitutions (1819, 1861, 1865, 1868, 1875, and 1901) were drafted by conventions of approximately 100 members.

Accompanying this report is **Appendix A** which are charts prepared for the Law Institute by Professor Howard Walthall, director of the State Constitutional Law Project at Cumberland School of Law, analyzing the 1901 Constitution in the following charts:

#### Appendix A

- CHART I** Constitutional Sections with Amendments to Each Section

- CHART II** Amendments Referencing Constitution Section Amended

- CHART III** Sections Held Unconstitutional

- CHART IV** Articles Revised and Ratified by the Voters

- CHART V** Articles Revised by House of Representatives

- CHART VI** Superseded Provisions

**Appendix B**, which followed the initial report, was a re-codification of the entire constitution which incorporated into the 1901 Constitution the 705 amendments to date, thereby giving the legislators a cohesive constitution.

The Alabama House of Representatives passed six bills, revising six articles of the current constitution, and sent them to the Senate for consideration. These bills are as follows: HB-45 (Article I), HB-46 (Article II), HB-48 (Article XII), HB-49 (Article XIII), HB-50 (Article XV), HB-51 (Article VII).

#### Institute-prepared legislation:

1. Alabama Uniform Anatomical Gift Act, HB-71, SB-51 sponsored by Representative Demetrius Newton and Senator Ted Little.
2. Alabama Uniform Interstate Enforcement of Domestic Orders, HB-98, SB-33, sponsored by Representative Joe Carothers and Senator Rodger Smitherman.
3. Alabama Uniform Institutional Funds Act, HB-96, SB-91, sponsored by Representative Marcel Black and Senator Tom Butler.

The legislature is expected to stay in session until the middle of April.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or through the Institute's Web site, [www.ali.state.al.us](http://www.ali.state.al.us). ■

#### Robert L. McCurley, Jr.

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





J. Anthony McLain

# Imputed Disqualification of Law Firms When Nonlawyer Employees Change Firms

## Question:

In formal opinions RO-91-01 and RO-91-28, the Disciplinary Commission of the Alabama State Bar held, in substance, that conflicts of interest resulting from nonlawyer employees changing law firms can be overcome by building a "Chinese wall" to screen the newly hired employee from involvement with any matter on which the employee worked while employed at his or her old firm. In recent years, however, an increasing number of jurisdictions have concluded that such screening procedures are ineffective when a nonlawyer employee has obtained confidential information concerning the matter in litigation. Consideration of the positions taken by these jurisdictions calls into question the factual and ethical validity of the rationale upon which these two opinions were predicated and the Disciplinary Commission has, therefore, determined that the conclusions reached therein should be reconsidered.

## Answer:

A nonlawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a nonlawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case.

## Discussion:

In some jurisdictions the "Chinese wall" cure for conflicts resulting from changing firms has been applied to lawyers as well as nonlawyers. The Alabama

Supreme Court, however, has taken the position that the "Chinese wall" concept should not apply to practicing lawyers. In *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), the Court held, by way of dicta, that the "Chinese wall" could not provide an effective screen to attorneys in private practice but should apply only to government or other publicly employed attorneys. 572 So. 2d 1231, 1234 at n. 3.

More significantly, in 1990 the Alabama State Bar proposed, and the Alabama Supreme Court adopted, the Alabama Rules of Professional Conduct, which became effective January 1, 1991. Rule 1.10(b) of the Rules of Professional Conduct governs conflicts of interest on the part of a firm which employs an attorney previously employed by opposing counsel in ongoing litigation and provides, in substance, that an attorney with confidential information about a former client has a conflict of interest which precludes representation by the firm. The rule makes no mention of, or provision for, any type of "Chinese wall" screening process.

Based upon the above, the Office of General Counsel and the Disciplinary Commission have consistently held that such conflicts on the part of an attorney cannot be cured or overcome by erection of a "Chinese wall" or any other type of screening procedure. The Disciplinary Commission refused, however, to disallow the "Chinese wall" concept in addressing conflicts of interest which can result when a nonlawyer changes law firms.

In recent years, however, various jurisdictions have begun to question the effectiveness of screening procedures when a nonlawyer employee who changes firms is in possession of confidential information concerning the matter in litigation. One of the first jurisdictions to



reject screening and to hold nonlawyer employees to the same standard as lawyers was the U.S. District Court for the Western District of Missouri. In *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W. D. Mo. 1984), the court made the following statement:

"Nonlawyer personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have a devastating effect on both the free flow of information between the client and the attorney and on the cost and quality of legal services rendered by an attorney. Every departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." 588 F. Supp. at 1044.

Subsequently, as more states began to adopt the Model Rules of Professional Conduct, or some variation thereof, more and more jurisdictions concluded that Rule 5.3(a)&(b)<sup>1</sup> when read in conjunction with Rule 1.10(b)<sup>2</sup> requires that non-lawyer employees be held to the same standards as attorneys with regard to client confidentiality and conflicts of interest resulting from changing firms. Typical of the jurisdictions which employed this analysis is the opinion of the Supreme Court of Nevada in *Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997). The Nevada Supreme Court concluded as follows:

"When SCR 187 [ARPC Rule 5.3] is read in conjunction with SRC 160 (2) [ARPC 1.10 (b)], non-

lawyer employees become subject to the same rules governing imputed disqualification. To hold otherwise would grant less protection to the confidential and privileged information obtained by a non-lawyer than that obtained by a lawyer. No rationale is offered by *Ciaffone* which justifies a lesser degree of protection for confidential information simply because it was obtained by a nonlawyer as opposed to a lawyer. Therefore, we conclude that the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a nonlawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests." 945 P.2d at 953.

The Nevada Supreme Court characterized the "Chinese wall" approach as having been "roundly criticized for ignoring the realities of effective screening and litigating that issue should it ever arise." The court cited as an example of such criticism an article in the *Georgetown Journal of Legal Ethics*, viz.:

"For example, one commentator explained that a majority of courts have rejected screening because of the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures. M. Peter Moser, *Chinese Walls: a Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 *Geo. J. Legal Ethics* 399, 403, 407 (1990)." 945 P.2d at 953.

There are numerous other decisions which reach the same or similar conclusions, e.g., *Cordy v. Sherwin Williams*, 156 F. R. D. 575 (D.C. N.J. 1994); *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712 (D. Conn. 1991); *Makita Corp. v. U.S.*, 17 C. I. T. 240, 819 F. Supp. 1099 (CIT 1993); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 129 A.D.2d 678, 514 N.Y.S. 2d 440 (1987); *Smart Industries v. Superior Court*, 179

Ariz. 141, 876 P.2d 1176 (1994); *Koulisis v. Rivers*, 730 So.2d 289 (Fla. Dist. App. 1999); *Daines v. Alcatel*, 194 F. R. D. 678 (E. D. Wash. 2000) and *Zimmerman v. Mahaska Bottling Co.*, 270 Kan. 810, 19 P.3d 784 (2001).

In *Zimmerman, supra*, the Supreme Court of Kansas pointed out that disqualification is not inevitable in every instance.

"Our holding today does not mean that disqualification is mandatory whenever a nonlawyer moves from one private firm to another where the two firms are involved in pending litigation and represent adverse parties. A firm may avoid disqualification if (1) the nonlawyer employee has not acquired material and confidential information regarding the litigation or (2) if the client of the former firm waives disqualification and approves the use of a screening device or Chinese wall." 19 P.3d at 793.

For the reasons stated above the Disciplinary Commission of the Alabama State Bar is of the opinion that a non-lawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm who hires a non-lawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case. [RO-02-01] ■

## Endnotes

1. Rule 5.3(a) & (b) provides as follows: "With respect to a nonlawyer employed or retained by or associated with a lawyer:
  - (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
  - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the the person's conduct is compatible with the professional obligations of the lawyer."
2. Rule 1.10(b) provides as follows:

"When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."





Todd S. Strohmeyer

**M**ark your calendars--the Alabama Young Lawyers' Section Sandestin Seminar is May 17th and 18th! This seminar is the section's most important event of the year. Please make plans now so that you will be there. We always have the best CLE speakers and this one is head and shoulders above the other CLE seminars. We already have confirmations from **Professor Brad Bishop** and **Professor Gene Marsh**, as well as **ASB President Larry Morris**. Plan ahead and don't miss this opportunity for personal and professional growth.

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*Todd Strohmeyer is a partner at Sims, Graddick & Dodson in Mobile.*

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# Alabama's Own John Grisham *Saigon Landing*

A novel by Jim Accardi, published by Xlibris Corporation, Philadelphia, PA, March 2001, 307 pages, \$32 (hardback) and \$22 (paperback), available through *Barnesandnoble.com*, *Amazon.com* and various locations of Books-A-Million.

In *Saigon Landing*, Jim Accardi has created a wonderful legal thriller that is a must-read for all Alabama attorneys. Set in the fictional town of Richfield, Alabama, this is the story of former prosecutor Katie O'Brien and her representation of an accused capital murderer. When Katie, now a successful personal injury litigation specialist, is asked by a local judge to represent an indigent defendant, she gladly accepts. However, Katie quickly learns that she has gotten involved in something much larger than she anticipated.

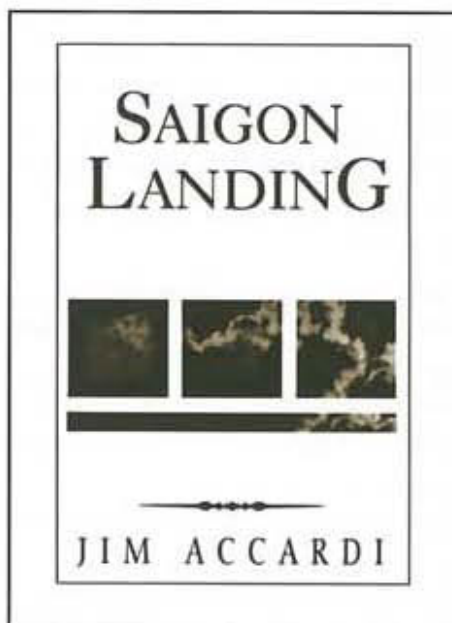
The problems begin for Katie very shortly after her appointment. Chief among them is a formerly disbarred defense attorney who, much to Katie's dismay, has managed to insert himself on the defense team. The two lawyers soon grow to despise one another, making Katie's life miserable. All the while, a ruthless organized crime ring is running rampant across the state.

Katie quickly discovers that this gang is somehow connected to the case. She's sure that many of Richfield's most powerful people are involved, but she doesn't know how or who. When Katie gets too close, the gang retaliates, and hits very close to home. From there, the story takes a number of surprising twists, and the ending is truly amazing.

Most striking about *Saigon Landing* is Accardi's attention to detail. Each character is so fully developed that the reader will have no problem relating to each one, even the villains! Moreover, Accardi accomplishes this in a way that doesn't slow the story's exciting pace. He consulted with numerous investigators and forensic scientists in writing the novel, which undoubtedly helped in his precise description of crime scenes and investigative procedures. Accardi's vast knowledge and clear understanding of the Alabama criminal jus-

tice system gives this story a real-world feel uncommon to most works of this genre.

Readers will truly enjoy Accardi's poetic descriptions of the setting. The book begins with this detailing of a beautiful fall morning: "[t]he rising sun chased the full moon from the western sky—the dramatic coda in a celestial dance of two." Accardi's renderings of the Richfield landscape are magnificent, and will make all Alabamians yearn for those cool autumn days in the country.



Although this is Accardi's first novel, he is no stranger to the literary world. Jim has authored dozens of essays, articles and profiles, which have been published in regional and national magazines and journals. He has also published two books of satirical short stories. His second novel, *The Rosette Habit*, is due out in October 2001. He is currently working on a sequel to *Saigon Landing*.

Jim Accardi serves as a deputy district attorney for Madison County, and has been a prosecutor in that office for 25 years. A graduate of the University of North Alabama and the University of Alabama School of Law, Jim has remained active in the academic arena. He has taught classes in business law, criminal law and history at the University of Alabama-Huntsville and Calhoun Community College. Jim and his wife, Marian, a journalist, have two children and live in Huntsville. ■

*Walter Brad English practices with the Huntsville firm of Richardson Callahan LLP. He is a graduate, magna cum laude, of Auburn University, and received his J.D. from the University of Alabama School of Law. He is a member of the Alabama State Bar, the American Bar Association and the Madison County Bar Association.*





# BALANCING The SCALES

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Membership Reception – Poolside

## Friday:

Plenary - John V. McShane, esq., Dallas, Texas Family & Criminal Law specialist and nationally acclaimed author specializing in achieving peak performance, career resilience and quality-of-life issues

Topic: *"Winning Your Life While Winning Cases: Maintaining Joy and Health in the Practice of Law."* Two-hour workshop to follow

Featured Workshop: *The Times In Which We Live—Justice v. Security*  
Presenter: Barry Schneider, USAF Proliferation Center of the Air War College, Maxwell Air Force Base, Montgomery, Alabama

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Alabama, like every other state in the country, has a "door closing" statute that

bars foreign  
the state from



# Reforming Qualification to Transact Business Requirements in the Alabama Constitution

BY FREDERIC L. SMITH, JR.

Efforts to rewrite Alabama's 101-year old constitution are quickly gathering momentum. With one exception, all of the major candidates for governor have endorsed a new state constitution.<sup>1</sup> Alabama Citizens for Constitutional Reform, a group organized to begin a grass-roots campaign to rewrite the state constitution, has over 1,000 members, including business, education and political leaders.<sup>2</sup> A poll conducted by the Mobile Register and the University of South Alabama last year found that 60% of Alabama residents favor a new state constitution.<sup>3</sup> Editorial boards of the state's major newspapers have called for a revision of the state constitution.<sup>4</sup> At a forum sponsored by the Alabama Citizens for Constitutional Reform held on October 23, 2001 in Birmingham, Governor Siegelman called for a citizens' constitutional convention to reform the state constitution and observed that "[o]ur constitution hinders progress, prevents change and punishes children."<sup>5</sup>

Much of the debate about constitutional reform has understandably focused on provisions of Alabama's constitution that limit ad valorem taxes, restrict the autonomy of local governments and require an excessive number of earmarked appropria-

tions. However, little attention has been paid to article XII, section 232 of the Alabama Constitution, which precludes foreign corporations not qualified to transact business in Alabama from enforcing contracts made in the state. Section 232 serves no legitimate purpose in today's business world, makes conducting business in Alabama unnecessarily difficult and ultimately increases the cost of doing business in Alabama. While section 232 is unlikely to grab headlines in the debate over constitutional reform, state legislators—or delegates at a future constitutional convention—should give serious consideration to repealing or amending this state constitutional provision so that foreign corporations can conduct business more efficiently in Alabama.


Alabama, like every other state in the country, has a "door closing" statute that bars foreign corporations transacting business in the state from maintaining an action in state court if the corporation has not properly qualified to transact business in the state.<sup>6</sup> Alabama's door closing statute is codified at Alabama Code section 10-2B-15.02(a):

A foreign corporation transacting business in this state without a certificate of authority or without complying with Chapter 14A of Title 40, may not maintain a proceeding in this state without a

corporations transacting business in maintaining an action in state court

if the corporation has not properly qualified to transact business in the state.





taxes and complied with other requirements necessary for the privilege of conducting business in the state.

In all jurisdictions except Alabama, however, the bar to maintaining an action in state court can now be retroactively cured by a foreign corporation's subsequent qualification.<sup>7</sup> Alabama appears to be the only state in the country where a foreign corporation's failure to be properly qualified before entering into a contract in the state is incurable. All contracts entered into in Alabama by a foreign corporation prior to the date it obtains a certificate of authority from the Alabama Secretary of State are voidable by the other party to the contract. Under current law in Alabama, a party can, subject to certain exceptions, avoid otherwise binding contractual obligations simply because a foreign corporation that is the other party to the contract failed to obtain a certificate of authority from the Alabama Secretary of State before entering into a contract in Alabama.<sup>8</sup> There are numerous reported cases in which foreign corporations have been barred from enforcing contracts for no reason other than the failure to properly qualify to transact business in Alabama.<sup>9</sup> The Alabama Supreme Court has on several occasions recognized the harsh and unjust effects of the rule.<sup>10</sup>

Unfortunately, the current law in Alabama cannot be changed merely by amending Alabama Code section 10-2B-15.02. The law barring unqualified foreign corporations from enforcing contracts in Alabama is derived from article XII, section 232 of the state constitution:

Unfortunately, the current law in Alabama cannot be changed merely by amending Alabama Code section 10-2B-15.02.

certificate of authority. All contracts or agreements entered into in this state by foreign corporations prior to obtaining a certificate of authority to transact business in this state shall be held void at the action of the foreign corporation or any person claiming through or under the foreign corporation by virtue of the contract or the agreement; but nothing in this section shall abrogate the equitable rule that he who seeks equity must do equity.

While it is not always clear whether the activities of a foreign corporation in a particular state require qualification, the act of qualifying to transact business itself is a relatively simple administrative process in which a foreign corporation files an application with the appropriate state agency (usually the secretary of state), pays required fees and taxes and is issued a certificate evidencing the foreign corporation's authority to transact business. Forum closing statutes are based upon the reasonable premise that a foreign corporation that is doing business in a state should not be allowed to use that state's courts to enforce its contracts if the corporation has not paid required fees and

No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon any agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax.<sup>11</sup>

Section 10-2B-15.02 and its statutory predecessors are codifications of state constitutional provisions that have since 1875 prohibited foreign corporations from enforcing contracts entered into in Alabama before properly qualifying to transact business here.<sup>12</sup>

A constitutional provision restricting the intrastate business activities of foreign corporations first appeared in Alabama's fifth state constitution, the Constitution of 1875. Article XIV, section 4 of the Constitution of 1875 constitution provided that "[n]o foreign corporations shall do any business in this state without having at least one known place of business and an



authorized agent or agents therein." The Constitution of 1875, known as the "constitution of prohibition," was adopted at the end of Reconstruction.<sup>13</sup>

The first forum closing statute was not enacted by the Alabama legislature until 1887.<sup>14</sup> Although article XIV, section 4 of the Constitution of 1875 did not expressly render void contracts made by foreign corporations in this state, courts interpreting the constitutional provision in cases decided prior to the enactment of the 1887 statute held that the constitutional provision was self-executing and allowed Alabama residents to void such contracts even in the absence of a statute giving effect to the constitutional provision. In 1880, the Alabama Supreme Court held that the constitutional provision alone was sufficient to render unenforceable a contract entered into in Alabama by a foreign corporation that had failed to properly qualify to conduct business in the state:

This clause of the Constitution [article XIV, section 4] is prohibitory and needs no legislation to carry the mere prohibition into effect, or to give it force. The bill filed by the appellant corporation fails to aver that it has a place of business or an authorized agent in the State of Alabama. It has, therefore, presumptively no lawful right to do any business in the State by reason of this Constitutional prohibition, provided the clause in question is not violative of the Constitution of the United States, or any law enacted by Congress pursuant thereto.<sup>15</sup>

Other courts considering contracts entered into by foreign corporations in Alabama prior to the enactment of the 1887 statute reached the same conclusion.<sup>16</sup>

The Constitution of 1901 is substantially similar to the Constitution of 1875, and many defects in the state's current constitution were inherited from the Constitution of 1875.<sup>17</sup> Article XII, section 232 of the state's current constitution is nearly identical to article XIV, section 4 of the Constitution of 1875, except that the current constitutional provision also prohibits foreign corporations from transacting business in Alabama "without filing with the secretary of state a certified

copy of its articles of incorporation or association."<sup>18</sup> Like article XIV, section 4 of the Constitution of 1875, article XII, section 232 of the Constitution of 1901 does not expressly declare that contracts entered into in Alabama by unqualified foreign corporations are void. Nonetheless, the Alabama Supreme Court has held that article XII, section 232, like its constitutional predecessor, is self-executing:

The Constitution having thus in terms required foreign corporations to do certain things, in order to acquire the right to do business in the state . . . it is not competent for the legislature to relieve the corporations of this burden, or to deprive the citizens of the right so conferred. The Legislature may provide statutes to give force, effect and application to the provisions of the Constitution, but it cannot, as this court has repeatedly reaffirmed, bend or alter such provisions as are self-executing.<sup>19</sup>

Since the adoption of the Constitution of 1901, Alabama courts have continued to hold that the rule barring unqualified foreign corporations from enforcing contracts in Alabama courts is embodied in Alabama's statutes and constitution.<sup>20</sup>

The harsh effects of section 10-2B-15.02 were purportedly relaxed by the Alabama legislature in 1994.<sup>21</sup> The legislature added several provisions to section 10-2B-15.02, to be effective January 1, 1995, making Alabama's door closing statute more consistent with the forum closing statutes of other states.<sup>22</sup> In particular, the 1994 amendments added a provision to section 10-2B-15.02 expressly stating that a foreign corporation's failure to qualify would not impair the validity of its corporate acts.<sup>23</sup> The 1994 amendments also included a provision permitting a court to stay a judicial proceeding instituted by a unqualified foreign corporation pending its proper qualification.<sup>24</sup> The official commentary to section 10-2B-15.02 states that the 1994 amendments "make a substantial change from present Alabama law by eliminating the rule that a failure to qualify renders all prior contracts void, with no procedure by which the foreign corporation can cure its delinquencies and then be able to enforce any rights it may have under its contracts."<sup>25</sup> However, given that the law voiding contracts entered into in Alabama by



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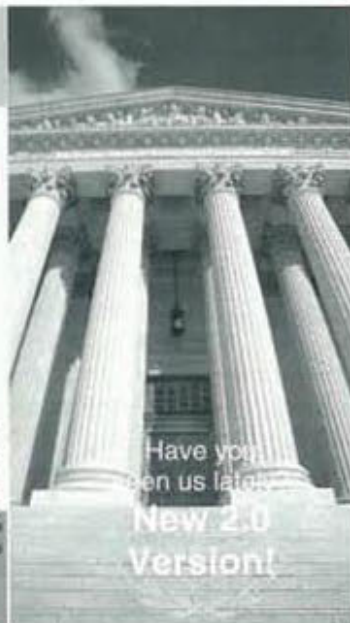
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unqualified foreign corporations is embodied in article XII, section 232 of the state constitution, and in view of the substantial Alabama case law finding the constitutional provision to be "self-executing," the 1994 amendments to section 10-2B-15.02 could not, in fact, have effected any change in Alabama law. Any such changes would have required a revision of the state constitution or a constitutional amendment.

Accordingly, effective August 1, 1995, the Alabama legislature repealed and reenacted section 10-2B-15.02.<sup>28</sup> The reenacted version of section 10-2B-15.02 was once again consistent with article XII, section 232 of the constitution, as interpreted by Alabama courts, by providing that any contracts entered into in Alabama by unqualified corporations are void. The legislature stated several policy reasons in 1995 for the repeal and reenactment of section 10-2B-15.02:

The State of Alabama, for the protection of its citizens from fraudulent and overreaching practices by foreign corporations, including refusals by foreign corporations to establish sufficient bases for responding to proceedings by citizens of this state to redress wrongs committed by such corporations through agents transacting business in Alabama, has a long established public policy that such recalcitrant foreign corporations are estopped from enforcing contracts made in violation of the laws which require registration with the Secretary of State as a condition precedent to the transaction of business, by contract, within Alabama.<sup>29</sup>

The 1995 legislative act became law under article V, section 125 of the Alabama Constitution without approval of the governor.<sup>28</sup> There is now no question but that Alabama law provides that contracts entered into in this state by unqualified foreign corporations are unenforceable by the unqualified foreign corporations.

Whatever the justification that may have existed for Alabama's public policy on this issue at the end of Reconstruction when the Constitution of 1875 was adopted and again in 1901 when the state's current constitution was adopted, it is difficult to conceive of a reason for maintaining the status quo. The stated reasons for maintaining the current Alabama constitutional and statutory provisions are no longer accurate or applicable.

One stated justification for the current law is that requiring foreign corporations to qualify and appoint an agent for service of process in Alabama ensures that foreign corporations will be subject to service of process here.<sup>29</sup> Admittedly, an Alabama court's ability to exercise personal jurisdiction over a foreign corporation would not be in question if the corporation were qualified to do business in the state.<sup>30</sup> Nevertheless, the "service of process" justification for maintaining current Alabama law has been outdated for many years because under Alabama's long arm rule, Alabama Rule of Civil Procedure 4.2, the jurisdiction of Alabama courts extends to the permissible limits of due process under the United States Constitution and reaches foreign corporate defendants regardless of whether they are qualified to transact business in Alabama.<sup>31</sup> "It is far easier to find that a foreign corporation is 'doing business' for service of process than it is to find that the corporation is conducting intrastate business subject to state regulation in view of the Commerce Clause."<sup>32</sup> Because the jurisdiction of Alabama courts extends to foreign corporate plaintiffs not qualified to transact business here, maintaining the constitutional and statutory forum closing provisions for personal jurisdiction purposes is outdated and unnecessary.

Another stated justification for the Alabama constitutional and statutory provisions rendering void contracts entered into in

Alabama by unqualified foreign corporations is to ensure that such corporations pay all required fees and franchise taxes for the privilege of conducting business here.<sup>33</sup> This objective can easily be accomplished without voiding the contracts of unqualified foreign corporations by requiring such corporations, upon qualification, to pay all relevant state taxes and penalties owed for the periods in which the corporation should have been qualified but was not.<sup>34</sup> Forty-nine other states apparently deem the collection of back taxes and, in some cases, the imposition of penalties sufficient punishment for a foreign corporation's failure to properly qualify — Alabama should be no different.

Perhaps the most compelling reason for amending article XII, section 232 of the constitution and Alabama Code section 10-2B-15.02 is the difficulty involved in determining exactly what constitutes "doing business" in Alabama. Determining whether a foreign corporation is "doing business" in Alabama is a factual determination made on a case-by-case basis.<sup>35</sup> Generally, the single act of a foreign corporation, if done in furtherance of the business for which it was organized, constitutes "doing business."<sup>36</sup> However, corporate acts which are considered "incidental" or "preparatory" to acts for which the corporation was organized do not constitute "doing business."<sup>37</sup>

Once the court determines whether a foreign corporation is "doing business" in Alabama, it must then determine whether the business conducted by the corporation is primarily intrastate or interstate in nature. The Commerce Clause of the United States Constitution precludes enforcement of article XII, section 232 and section 10-2B-15.02 when the contract at issue is primarily interstate in nature.<sup>38</sup> Determining whether a foreign corporation is engaging in intrastate or interstate activity is, again, a factual determination to be made on a case-by-case basis.<sup>39</sup> When the contract at issue involves the exercise of both interstate and intrastate activities, the court must separate the interstate and intrastate activities and determine whether the main or primary purpose of the contract is interstate or intrastate.<sup>40</sup> A nonqualified foreign corporation has conducted intrastate business, and is therefore subject to the harsh effects of article XII, section 232 and section 10-2B-15.02, "when it has engaged in some activity toward establishing a continuing presence in the state, over and above merely shipping commodities between the states."<sup>41</sup> Thus, mere delivery of goods to Alabama or solicitation of business in the state is generally considered interstate in nature.<sup>42</sup> When the contract at issue requires agents of an unqualified foreign corporation to provide labor or services in Alabama, the contract is likely to be considered intrastate in nature.<sup>43</sup> However, not every contract that requires an unqualified foreign corporation to provide labor or services in Alabama will be considered intrastate in nature. In several cases, the Alabama Supreme Court has held that contracts for the provision of labor or services that are merely incidental to the interstate sale and delivery of goods are considered primarily interstate in nature.<sup>44</sup>

It is unreasonably harsh to void an otherwise valid contract entered into in Alabama by an unqualified foreign corporation when determining whether qualification is even required in the first instance requires a subjective and fact intensive inquiry. It will often be difficult for a foreign corporation to predict whether its business activities in Alabama rise to the level of "doing business" such that qualification is required. The drafters of the Revised Model Business Corporation Act reject the



notion that an unqualified foreign corporation's contract should be unenforceable for the very reason that determining what constitutes "doing business" is necessarily imprecise and because a foreign corporation's failure to qualify is often the result of a bona fide dispute over what constitutes "doing business."<sup>4</sup>

The risk of failing to properly qualify in Alabama is so great, and the law governing whether qualification is required is so unclear, that unqualified foreign corporations that contemplate entering into contracts here routinely incur unnecessary costs and delay or restructure transactions in an effort to avoid running afoul of Alabama's constitutional and statutory door closing provisions. In some cases, unqualified foreign corporations simply conclude that the risk of entering into contracts here is greater than the potential benefit of doing business with Alabama corporations. In any event, the increased transaction costs and the opportunity costs resulting from foreign corporations that choose not to do business here are borne by Alabama corporations and their shareholders. Alabama's constitutional and statutory door closing provisions thus harm the very people they were intended to protect – Alabamians.

Changing Alabama's current constitutional and statutory law on this point to bring Alabama in line with the laws of the other forty-nine states would enable a foreign corporation that has concluded, based upon a reasonable interpretation of Alabama case law, that its business activities in Alabama do not rise to the level of requiring qualification to conduct business here without fear that all of its contracts entered into in Alabama could be declared unenforceable. If an Alabama court were to ultimately determine that the foreign corporation should have qualified to transact business in Alabama before entering into a contract here, the corporation can be required to qualify and pay all back fees and taxes before being allowed to prosecute a contract action in state court. There simply appears to be no justifiable reason for Alabama to void otherwise enforceable contracts as a result of a foreign corporation's failure to qualify to transact business here. Given the apparent groundswell of support for constitutional reform, the time is ripe for repealing or amending article XII, section 232 of the Alabama Constitution.

## Endnotes

1. Thomas Spencer, *New Constitution Advocates told to Beware Bandwagon*, *Birmingham News*, Oct. 24, 2001, at 3C.
2. *Id.*
3. *New Poll Shows New Support for Constitution Reform*, *Birmingham News*, April 10, 2001, at 10A.
4. Siegelman's Call, *Birmingham News*, Oct. 26, 2001, *New State Constitution Needs Firm, Deep Roots*, *The Decatur Daily*, Aug. 24, 2001, *Ask the People—Let the Voters Decide*, *The Anniston Star*, Aug. 24, 2001, *Siegelman's Right: People Need to Write Constitution*, *Mobile Register*, Oct. 26, 2001; *Time for Action, Not Talk*, *The Tuscaloosa News*, Oct. 25, 2001; *Going Public on Reform*, *The Huntsville Times*, Aug. 19, 2001; *Citizen Convention Better Approach*, *Montgomery Advertiser*, Aug. 19, 2001.
5. Spencer, *supra* note 1.
6. Ala. Code § 10-2B-15.02(a); Alaska Stat. § 10.06.713; Ariz. Rev. Stat. Ann. § 10-1502(A); Ark. Code Ann. § 4-27-1502(A); Cal. Corp. Code § 2203(c); Colo. Rev. Stat. § 7-115-102(1); Conn. Gen. Stat. § 33-921(a); Del. Code Ann. tit. 8, § 383(a); D.C. Code Ann. § 29-101.119(a); Fla. Stat. Ann. § 607.1502(1); Ga. Code Ann. § 14-2-1502(a); Haw. Rev. Stat. § 414-431; Idaho Code § 30-1-1502(1); Ill. Ann. Stat. ch. 805,

§ 5/13.70; Ind. Code Ann. § 23-1-49-2(a); Iowa Code Ann. § 490.1502(1); Kan. Stat. Ann. § 17-7307(a); Ky. Rev. Stat. Ann. § 271B.15-020(1); La. Rev. Stat. Ann. § 314(A); Me. Rev. Stat. Ann. tit. 13A, § 1214(2); Md. Ann. Code, Corps. & Ass'ns § 7-305; Mass. Gen. Laws Ann. ch. 181, § 9; Mich. Comp. Laws Ann. § 450.2051(1); Minn. Stat. Ann. § 303.20; Miss. Code Ann. § 79-4-15.02(a); Mo. Ann. Stat. § 351.574(1); Mont. Code Ann. § 35-1-1027(1); Neb. Rev. Stat. § 21-20, 169(1); Nev. Rev. Stat. § 80.210(b); N.H. Rev. Stat. Ann. § 293-A:15.02(a); N.J. Stat. Ann. § 14A:13-11(1); N.M. Stat. Ann. § 53-17-20(A); N.Y. Bus. Corp. Law § 1312(a); N.C. Gen. Stat. § 55-15-02(a); N.D. Cent. Code § 10-19.1-142(1); Ohio Rev. Code Ann. § 1703.29(A); Okla. Stat. Ann. tit. 18, § 1137(A); Or. Rev. Stat. § 60.704(1); 15 Pa. Cons. Stat. Ann. § 4141(a); R.I. Gen. Laws § 7-1.1-117(a); S.C. Code Ann. § 33-15-102(a); S.D. Codified Laws Ann. § 47-8-30; Tenn. Code Ann. § 48-25-102(a); Tex. Bus. Corp. Act Ann. art. 8.18(A); Utah Code Ann. § 16-10a-1502(1); Vt. Stat. Ann. tit. 11A, § 15.02(a); Va. Code Ann. § 13.1-758(A); Wash. Rev. Code Ann. § 23B-15.020(1); W. Va. Code § 31-1-66; Wis. Stat. Ann. § 180.1502(1); Wyo. Stat. § 17-16-1502(a).

7. Statutes in 46 states and the District of Columbia explicitly provide that a foreign corporation's failure to obtain a certificate of authority does not impair the validity of its corporate acts: Alaska Stat. § 10.06.715; Ariz. Rev. Stat. Ann. § 10-1502(E); Ark. Code Ann. § 4-27-1502(E); Colo. Rev. Stat. § 7-115-102(5); Conn. Gen. Stat. § 33-921(e); Del. Code Ann. tit. 8, § 383(b); D.C. Code Ann. § 29-101.119(b); Fla. Stat. Ann. § 607.1502(5); Ga. Code Ann. § 14-2-1502(d); Haw. Rev. Stat. § 414-431; Idaho Code § 30-1-1502(5); Ill. Ann. Stat. ch. 805, § 5/13.70; Ind. Code Ann. § 23-1-49-2(e); Iowa Code Ann. § 490.1502(5); Kan. Stat. Ann. § 17-7307(b); Ky. Rev. Stat. Ann. § 271B.15-020(5); La. Rev. Stat. Ann. § 314(B); Me. Rev. Stat. Ann. tit. 13A, § 1214(3); Md. Ann. Code § 7-305; Mass. Gen. Laws Ann. ch. 181, § 9; Mich. Comp. Laws Ann. § 450.2051(2); Minn. Stat. Ann. § 303.20; Miss. Code Ann. § 79-4-15.02(e); Mo. Ann. Stat. § 351.574(5); Mont. Code Ann. § 35-1-1027(5); Neb. Rev. Stat. § 21-20, 169(5); N.H. Rev. Stat. Ann. § 293-A:15.02(e); N.J. Stat. Ann. § 14A:13-11(2); N.M. Stat. Ann. § 53-17-20(B); N.Y. Bus. Corp. Law § 1312(b); N.C. Gen. Stat. § 55-15-02(e); N.D. Cent. Code § 10-19.1-142(2); Ohio Rev. Code Ann. § 1703.29(A); Okla. Stat. Ann. tit. 18, § 1137(B); Or. Rev. Stat. § 60.704(5); 15 Pa. Cons. Stat. Ann. § 4141(b); R.I. Gen. Laws § 7-1.1-117(b); S.C. Code Ann. § 33-15-102(e); Tenn. Code Ann. § 48-25-102(f);

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



Tex. Bus. Corp. Act Ann. art. 8.18(B); Utah Code Ann. § 16-10a-1502(6); Vt. Stat. Ann. tit. 11A, § 15.02(f); Va. Code § 13.1-758(E); Wash. Rev. Code Ann. § 23B.15.020(5); W. Va. Code § 31-1-66; Wis. Stat. Ann. § 180.1502(4); Wyo. Stat. § 17-16-15.02(e). Although the Montana statute provides that a foreign corporation's failure to obtain a certificate of authority does not impair the validity of its corporate acts generally, the statute does allow the state, a state agency or a political subdivision of the state to void a contract entered into with an unqualified foreign corporation. Mont. Code Ann. § 35-1-1027(6). Statutes in California, Nevada and South Dakota prohibit a foreign corporation that transacts business in the state from maintaining an action in state court "until" the corporation has complied with statutory qualification requirements, clearly indicating that failure to qualify can be retroactively cured. Cal. Corp. Code § 2203(c); Nev. Rev. Stat. § 80.210(1)(b); S.D. Codified Laws Ann. § 47-8-30.

8. There are several instances when the forum-closing statute does not apply. First, the statute is enforceable only when the contract at issue is primarily intrastate in nature. The Commerce Clause of the United States Constitution precludes enforcement of § 10-2B-15.02 when the contract at issue is primarily interstate in nature. *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1510 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); *Hays v. Bunge Corp.*, 777 So. 2d 62, 64 (Ala. 2000); *Sharer v. Bend Millworks System, Inc.*, 600 So. 2d 223 (Ala. 1992). Determining whether a particular contract is primarily interstate or intrastate in nature is often a difficult and fact-intensive exercise. Second, due to the penal nature of the statute, enforcement is limited to contract actions. *Legion Ins. Co. v. Garner Ins. Agency, Inc.*, 991 F. Supp. 1326, 1329 (M.D. Ala. 1997); Actions *ex delicto* by non-qualified foreign corporations are not prohibited in Alabama courts. *Freeman Webb Investments, Inc. v. Hale*, 536 So. 2d 30, 31 (Ala. 1988), citing *Shiloh Construction Co. v. Mercury Construction Co.*, 392 So. 2d 809, 813 (Ala. 1980). The so-called "equitable exception" in § 10-2B-15.02 that "he who seeks equity must do equity" does not alter the law that an unqualified foreign corporation cannot recover on contract, but it does allow unqualified foreign corporations to prosecute actions other than those based on contract. *Burnett v. National Stonehenge Corp.*, 694 So. 2d 1276, 1279 (Ala. 1997); *Sanjay v. Duncan Construction Co.*, 445 So. 2d 876, 879 (Ala. 1984). Thus, nonqualified foreign corporations have been allowed to maintain claims for fraud or trespass. *Freeman Webb*, 536 So. 2d at 31-32 (fraud); *Jones v. Kendrick Realty Co.*,

252 So. 2d 61, 64-65 (Ala. 1971) (trespass). Finally, amendment 154 to the Alabama Constitution permits foreign corporations to lend money to Alabama residents and to take mortgages on Alabama property as security therefor without qualifying to transact business in Alabama. Ala. Const. amend. 154; *Weningar v. S.S. Steele & Co., Inc.*, 477 So. 2d 949 (Ala. 1985).

9. *Stewart Machine & Engineering Co., Inc. v. Checkers Drive-In Restaurants of North America, Inc.*, 575 So. 2d 1072, 1074-75 (Ala. 1991) (barring contractor, a Mississippi corporation, from enforcing lien and maintaining breach of contract action against owner after construction project was complete); *Calvert Iron Works, Inc. v. Algernon Blair, Inc.*, 227 So. 2d 424 (Ala. 1969) (barring foreign corporation from recovering under construction contract after contract was fully performed); *Freeman Webb*, 536 So. 2d at 31 (barring plaintiff, a Tennessee corporation not qualified to conduct business in Alabama on date it entered into contract to purchase apartment complex, from recovering \$160,000 earnest money payment under breach of contract theory); *Hays Corp.*, 777 So. 2d at 65 (barring plaintiff, a Georgia corporation not qualified to conduct business in Alabama, from recovering under contract to provide construction services); *Sanjay*, 445 So. 2d at 879-81 (barring subcontractor, a foreign corporation, from recovering under contract when subcontractor failed to qualify until after performance under contract had begun).
10. *Geo. W. Muller Mfg. Co. v. First Nat'l Bank of Dothan*, 57 So. 762, 763 (Ala. 1912) (results of enforcing the forum-closing statute "in some instances, may appear abhorrent to the judicial conscience"); *Sanjay*, 445 So. 2d at 881 ("This Court, like its predecessors, recognized the harshness of this rule; however, it is our duty to uphold the principles established by our Constitution and statutes."); *Computallor Co. v. N.L. Blaum Construction Co.*, 265 So. 2d 850, 853 (Ala. 1972) (recognizing that, even though the rule appears to be harsh, it cannot be ignored by judicial decision); *Stewart Machine*, 575 So. 2d at 1075 ("Although we are mindful of the harshness of the rule, we conclude . . . that [plaintiff], as an unqualified corporation, should not be allowed to proceed in the Alabama court system to recover under any theory sounding in contract."); *Calvert Iron Works*, 227 So. 2d at 426 ("[T]he severe rule which enables one to accept and appropriate the valuable material of another without payment therefor works grave injustice, yet the public policy clearly written into our law . . . cannot be

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Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4; 10th, place no. 7; 10th, Bessemer cutoff; 11th; 13th, place no. 1; 15th, place no. 5; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; 40th; and 41st. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions were determined by a census on March 1, 2002 and vacancies certified by the secretary no later than March 15, 2001.

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 26, 2002).

Ballots will be prepared and mailed to members between May 1 and May 15, 2002. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 31, 2002) to the Alabama State Bar.



stricken down by judicial decision.”), quoting *Gray-Knox Marble Co. v. Times Building Co.*, 144 So. 29, 31 (Ala. 1932); *Hays Corp.*, 777 So. 2d at 64 n.1 (“While it may be conceded that the law of Alabama declaring void all contracts of nonqualified foreign corporations entered into in Alabama is penal in nature, this policy is not an accidental part of the law of Alabama; it has been deliberately fashioned.”) (citations omitted).

11. Ala. Const., art. XII, § 232.
12. Since 1887, Alabama has had a door-closing statute that prohibited foreign corporations from conducting business here without being properly qualified. The 1907 statute appears to be the first statute that expressly declared the contracts of unqualified foreign corporations entered into in Alabama to be void. 1886-87 Ala. Acts, pp. 102-104; Ala. Code, 1896, Art. 16, §§ 1316-1317; Ala. Code, 1907, §§ 3642-3645; Ala. Code, 1923, § 7220; Ala. Code, 1940, tit. 10, § 192; Ala. Code, 1975 § 10-2-254; Ala. Code, 1975 § 10-2A-247, Ala. Code, 1975, § 10-2B-15.02.
13. Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 Ala. L. Rev. 583 (Winter 1997).
14. 1886-87, Ala. Acts, pp. 102-104.
15. *American Union Telegraph Co. v. Western Union Telegraph Co.*, 67 Ala. 26, 30-31 (Ala. 1880).
16. *Farrior v. New England Mortgage Security Co.*, 7 So. 200, 201 (Ala. 1890) (“The legislative act cannot change the constitution or meaning of the constitutional clause under consideration. It may throw light on its construction, and render its enforcement more effective; but it can neither add to nor take away from the legal significance of its meaning.”); *New England Mortgage Security Co., v. Ingram*, 9 So. 140 (Ala. 1891) (“We have uniformly held that art. XIV, § 4) is self-executing, without any statute to give it practical effect.”). See generally Charles J. Fleming, *Defense of a Contract Action Based on the Failure of the Plaintiff Foreign Corporation to Have Qualified to Do Business in Alabama*, 39 Ala. Law. 223 (1977).
17. Brewer, *supra* note 14 at 583-84.
18. Ala. Const., art. XII, § 232.
19. *Ex Parte Western Union Telegraph Co.*, 76 So. 438, 439 (Ala. 1917).
20. *Hays Corp.*, 777 So. 2d at 64 n.1 (“Since 1901, the Constitution of Alabama has required foreign corporations to properly qualify before doing any business in this state. By force of this constitutional provision, contracts of nonqualified foreign corporations entered into in Alabama are void.”)(citations omitted); *Sanjay*, 445 So. 2d at 881 (“Our Constitution and statutes have created a bar precluding enforcement of contracts made by foreign corporations that failed to qualify before and at the date of the contract, where the contract is to be performed in Alabama.”) (emphasis in original); *North Alabama Marine, Inc. v. Sea Ray Boats, Inc.*, 533 So. 2d 598, 600-01 (Ala. 1988) (recognizing that constitution and statutes bar unqualified foreign corporations from enforcing contracts); *Boddy v. Continental Inv. Co.*, 88 So. 294, 295 (Ala. App. 1921) (“It is admittedly the law that foreign corporations must qualify to do business in this state in accordance with the requirements of our Constitution and statute, and contracts made by them in this state before qualifying are void.”); *Computafloor*, 265 So. 2d at 853 (“While the rule may appear to be harsh, it is a part of this state’s Constitution and statutes and cannot be ignored by judicial decision.”).
21. Act of March 21, 1994, No. 245, § 1, 1994 Ala. Acts 343, 439 (codified as amended at Ala. Code § 10-2B-15.02).
22. *Id.*
23. *Id.*
24. *Id.*
25. Ala. Code § 10-2B-15.02, commentary.

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26. Act of Aug. 2, 1995, No. 663, §§ 2-3, 1995 Ala. Acts 1374 (codified as repealed and reenacted at Ala. Code § 10-2B-15.02).
27. *Id.* at § 1.
28. *Id.* at § 4.
29. *Ex Parte Nissei Sangyo America, Ltd.*, 577 So. 2d 912, 914 (Ala. 1991) ("One of the purposes of the qualification statute is to compel foreign corporations to submit themselves to the jurisdiction of the courts of this state"); *Ex Parte Hawkins*, 497 So. 2d 825, 828 (Ala. 1986) (observing that purpose of art. XII, § 232 was to provide Alabama citizens with the opportunity to sue foreign corporations without the burden of going out of state to institute legal proceedings); *Sea Scaping Const. Co., Inc. v. McAtee*, 402 So. 2d 919, 921 (Ala. 1981) (statutory and constitutional provisions ensure that foreign corporations will be subject to process in state courts); *Ala. Western R.R. Co. v. Talley-Bates Const. Co.*, 50 So.341, 342 (Ala. 1909).
30. *Nissei Sangyo*, 577 So. 2d at 914 (by qualifying to conduct business and appointing an agent in Alabama, a foreign corporation is deemed to have submitted to the jurisdiction of state courts).
31. *Steel Processors v. Sue's Pumps, Inc.*, 622 So. 2d 910, 911 (Ala. 1993) (recognizing that Alabama long-arm rule extends to the permissible limits of due process under the United States Constitution). Several courts have held that foreign corporate defendants were subject to jurisdiction in Alabama despite not being qualified to transact business here. *Atlanta Auto Auction, Inc. v. G&G Auto Sales, Inc.*, 512 So. 2d 1334 (Ala. 1987); *Huey v. American Truetschler Corp.*, 47 F. Supp. 2d 1342 (M.D. Ala. 1999); *MacKinnon v. St. Louis Southwestern Ry.*, 518 So. 2d 89, 90-91 (Ala. 1987); *Ex Parte Phase III Construction Co.*, 723 So. 2d 1263, 1264-65 (Ala. 1998).
32. *Johnson v. MPL Leasing Corp.*, 441 So. 2d 904, 906 (Ala. 1983); see also *Schoel v. Sikes Corp.*, 522 F.2d 930, 933 (5th Cir. 1976).
33. *Haskew v. Green*, 571 So. 2d 1029, 1032 (Ala. 1990).
34. *Sanjay*, 445 So. 2d at 881-82 (Torbert, C.J., dissenting).
35. *Green Tree Acceptance*, 525 So. 2d at 1370.
36. *Id.*; *Vines v. Romar Beach*, 670 So. 2d 901, 903 (Ala. 1995).
37. *Vines*, 670 So. 2d at 903.
38. *Hays Corp.*, 777 So. 2d at 64.
39. *Camaro Trading v. Nissei Sangyo America*, 628 So. 2d 463, 466; *Stewart Machine & Engineering Co., Inc. v. Checkers Drive In Restaurants of North America, Inc.*, 575 So. 2d 1072, 1074 (Ala. 1991).
40. *Competitive Edge, Inc. v. Tommy Moore Buick-GMC, Inc.*, 490 So. 2d 1242, 1244-45 (Ala. Civ. App. 1986); see generally *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1511-13 (11th Cir. 1990), cert. denied 498 U.S. 1026 (1991).
41. *Ex Parte Dial Kennels of Alabama, Inc.*, 771 So. 2d 419, 426 (Ala. 1999), citing *Wise v. Grumman Credit Corp.*, 603 So. 2d 952 (Ala. 1992).
42. *Johnson v. MPL Leasing Corp.*, 441 So. 2d 904, 906 (Ala. 1983) (soliciting copier sales and delivering copiers considered interstate activity); *Kentucky Galvanizing Co. v. Continental Cas. Co., Inc.*, 335 So. 2d 649 (Ala. 1976) (soliciting orders and delivering products incident thereto considered interstate activity); *Competitive Edge*, 490 So. 2d at 1244 ("[T]ransactions involving no more than the sale, transportation, and delivery of materials into this state are acts of interstate commerce to which the laws of Alabama are not applicable.").
43. *Wise*, 603 So. 2d at 953; *Hays Corp.*, 777 So. 2d at 64; *Building Maintenance Personnel, Inc. v. International Shipbuilding, Inc.*, 621 So. 2d 1303, 1305 (Ala. 1993).
44. *Wallace Construction Co. v. Industrial Boiler*, 470 So. 2d 1151, 1155 (Ala. 1985); *North Alabama Marine*, 533 So. 2d at 601-02 (Ala. 1988); *Sharer*, 600 So. 2d at 229-30.
45. Revised Model Business Corporation Act § 15.02, commentary.

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# Petitions for Pre-Action Discovery Under Rule 27,

## Alabama Rules of Civil Procedure:

# A P R I M E R

BY KEVIN WALDING

In today's sometimes hostile and often uncivil litigation climate litigators in Alabama should acquaint themselves, or reacquaint themselves, as the case may be, with the petition for pre-action discovery. This tool appears to be little used<sup>1</sup>, but it can serve at least two important functions: preserving testimony or information you fear might be lost and helping you analyze a potential case before filing.<sup>2</sup>

This article will examine the requirements for a petition for pre-action discovery under Rule 27, Ala. R. Civ. P.,<sup>3</sup> will make various general observations about the procedure for filing, limitations on the petition, and will discuss, in the context of the general observations, the cases construing the Rule. It is hoped that this article will serve as a primer on the subject for busy practitioners.

### The Requirements for a Pre-Action Discovery Petition

Rule 27(a)(1), Ala. R. Civ. P., sets forth the information a petition for pre-action discovery must contain. Essentially, a petition for pre-action discovery under Rule 27, Ala. R. Civ. P., must contain eight pieces of information and a request for an order from the court.

The petition must inform the court:

- (1) that the petitioner expects to be a party to an action that can be brought in a court of this state, but that the petitioner is unable to bring the action presently, or have it brought;
- (2) the subject matter of the expected action;
- (3) the petitioner's interest in the expected action;
- (4) the information the petitioner desires to establish or perpetuate;
- (5) the petitioner's reason or reasons for desiring to establish or perpetuate the information;
- (6) the names and addresses of the persons the petitioner expects to be adverse parties (or a description of the expected adverse parties if no names and addresses are known);
- (7) the names and addresses of the persons to be deposed (or the persons who have the information the petitioner seeks) (or the persons to be examined) (or the land or thing to be inspected); and
- (8) the substance of testimony or information sought.<sup>4</sup>



The petitioner must inform the court:

- 1) that the petitioner expects to be a party to an action that can be brought in a court of this state, but that the petitioner is unable to bring the action presently, or have it brought;
- 2) the subject matter of the expected action;
- 3) the petitioner's interest in the expected action;
- 4) the information the petitioner desires to establish or perpetuate;
- 5) the petitioner's reason or reasons for desiring to establish or perpetuate the information;
- 6) the names and addresses of the persons the petitioner expects to be adverse parties (or a description of the expected adverse parties if no names and addresses are known);
- 7) the names and addresses of the persons to be deposed (or the persons who have the information the petitioner seeks) (or the persons to be examined) (or the land or thing to be inspected); and

the substance of testimony or information -



Also, quite logically, the petition must contain a request for an order allowing or granting the testimony or discovery sought.<sup>5</sup> Depending on the particular circumstances, such as the accepted custom or procedure where the petition is filed, the lawyer should draft a proposed order that tracks the requests made in the petition. Quite often a busy trial judge will appreciate a proposed order; revisions to a proposed order are generally easier to make than drafting an order for the court after the hearing.

## Some General Observations

First, and very importantly, a petition for pre-action discovery must be verified.<sup>6</sup> Verification requires "confirmation of correctness, truth, or authenticity, by affidavit, oath, or deposition."<sup>7</sup> This requirement means that the petitioner's attorney must work closely with the petitioner and ensure that the information contained in the petition is accurate.

Second, under the Rule, you file a pre-action discovery petition in the circuit court of the county where any expected adverse party resides.<sup>8</sup> This rule leaves the petitioner some leeway on venue. It also leads to questions about whether you can file a pre-action discovery petition that seeks discovery from an out-of-state expected adverse party.<sup>9</sup> Arguably, the fact that one expected adverse party is an out-of-state citizen or entity should not thwart the beneficial purposes of the Rule. In a world of fairly common requests for

Litigation Accountability Act<sup>10</sup> relief, the courts should encourage, not discourage, pre-action discovery petitions.

Third, the expected future action must be one "cognizable in any court of this state," but not necessarily the circuit court in which the petition is filed.<sup>11</sup> In *Stoor v. Turner* the court states, "Rule 27 does not require that the prospective or potential action be within the circuit court's jurisdiction; it need only be 'cognizable in any court of this state.' Rule 27 requires that the petition to perpetuate testimony be filed in the circuit court, but the prospective action does not have to be within the jurisdiction of the circuit court."<sup>12</sup> The court in *Stoor* reversed the trial court's dismissal of a pre-action discovery petition seeking to perpetuate testimony for a possible will contest in probate court.<sup>13</sup>

Fourth, according to *Opinion of the Clerk No. 19, 374 So.2d 273 (1979)*, the petition must be accompanied by a filing fee. Section 12-19-71(a)(3) and (b), Ala. Code 1975 sets forth the applicable filing fee. In a similar vein, a pre-action petition for discovery, at least one filed before any lawsuit is instituted (as opposed to one pending appeal), must be filed as an independent action.<sup>14</sup> As the court in *Ex parte Norfolk Southern Railway Company* states, "Rule 27, authorizing discovery before the filing of a complaint, requires that the petitioner file an independent action for relief. Absent a filing of the independent action, the trial court acquires no jurisdiction to grant the relief sought."<sup>15</sup>

Fifth, the discovery you can obtain is

somewhat limited, but nonetheless helpful in either perpetuating testimony or assessing a potential case. In relevant part the Rule reads, "A person who desires to perpetuate that person's own testimony or that of another person or to obtain discovery under Rule 34 or Rule 35 regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court ...."<sup>16</sup>

The Rule, then, allows you to perpetuate either the petitioner's testimony or the testimony of any other person by deposition.<sup>17</sup> The testimony or information must be in danger of being lost, destroyed or forgotten, or some other valid reason to perpetuate the testimony must exist.<sup>18</sup>

Short of a deposition to perpetuate testimony in danger of being lost, destroyed or forgotten, the Rule allows discovery only under Rules 34 and 35.<sup>19</sup> Rule 34, Ala. R. Civ. P., of course, deals with production of documents or tangibles and entry upon land for inspections; Rule 35, Ala. R. Civ. P., deals with mental and physical exams.<sup>20</sup>

Thus, the discovery methods available under a pre-action discovery petition are limited to depositions to perpetuate testimony, production of documents and tangibles, entry upon land to inspect, measure, etc., and mental and physical examinations. These methods, though somewhat limited, are valuable nonetheless. As the Alabama Supreme Court states in *Ex parte Anderson*, 644 So.2d 961, 964 (Ala. 1994), "Rule 27 does not give a potential plaintiff 'carte blanche' to 'fish' for a ground for filing an action..." It does, however, provide valuable tools for

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evaluating possible claims and avoiding Litigation Accountability Act problems.

Sixth, whether to grant or deny the petition is a discretionary decision with the trial court, subject to an abuse of discretion appellate review standard. In *Ex parte Anderson*, 644 So.2d 961, 964 (Ala. 1994), the court states, "As previously noted, relief under Rule 27 is discretionary with the trial court, and a trial court's ruling on a Rule 27 petition will not be reversed in the absence of an abuse of discretion."<sup>21</sup>

Seventh, the standard before the trial court is whether the trial court "is 'satisfied' that such discovery 'may prevent a failure or delay of justice'." This standard is derived directly from Rule 27(a)(3), which reads in relevant part, "If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order ...."<sup>22</sup>

Eighth, the Rule calls for appropriate notice on expected adverse parties; a reasonable time for the expected adverse parties to prepare, and a hearing on the petition. In relevant part, Rule 27(a)(2) reads, "The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least thirty (30) days before the date of the hearing the notice shall be served ...."<sup>23</sup>

Ninth, a deposition perpetuating testimony properly taken pursuant to the Rule can be used in a subsequently filed action involving the same subject matter.<sup>24</sup> The Rule references Rule 32(a), which allows use of a deposition "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, ..."<sup>25</sup>

Tenth, a pre-action discovery petition is not subject to a motion to dismiss under Rule 12(b)(6).<sup>27</sup> The court in *Driskill v. Culliver*, 797 So. 2d 495 (Ala. Civ. App.) states, in relevant part, "Rule 12(b)(6) has no application to a petition for pre-action discovery. A Rule 12(b)(6) motion serves to 'test' [ ] the sufficiency of the pleading to determine if the plaintiff has stated a claim upon which relief can be granted.' ... We cannot possibly apply this standard of review to a Rule

27 petition for pre-action discovery because that pleading is not one stating a claim, but is instead one seeking pre-action discovery to determine whether the plaintiff has a reasonable basis for filing an action."<sup>28</sup>

Eleventh, the most logical available defenses to a pre-action petition for discovery are privilege, or other defenses effecting the discoverability of the information sought.<sup>29</sup> Quite logically, a petitioner should not be able to discover privileged information through a pre-action petition when he or she would not be able to discover this same information in a lawsuit.<sup>30</sup>

A respondent, also, could arguably raise any of the Rule 12(b)(1) through (5) defenses in opposition to a pre-action petition.<sup>31</sup> These possible defenses are "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service of process...."<sup>32</sup> Moreover, a respondent could attack the petitioner's allegations directly and question whether the petition has followed the procedure outlined in the Rule.

Twelfth, a pre-action petition for dis-

covery is, apparently, not subject to removal. In one of the few reported cases construing Rule 27, Ala. R. Civ. P., the United States District Court for the Southern District of Alabama holds that a petition for pre-action discovery is not subject to removal.<sup>33</sup> The Court in *Hinote* finds that a pre-action petition for discovery is "a discovery tool available prior to the commencement of a civil action. The petition itself is not a civil action and, therefore, is not subject to removal under 28 U.S.C. Section 1441."<sup>34</sup>

Thirteenth, and finally, a practitioner should remember that Rule 27(b) allows discovery pending appeal by motion.<sup>35</sup> The motion must contain only the names and addresses of the persons to be deposed (or from whom discovery is sought), the substance of the expected testimony, and the reasons supporting the request.<sup>36</sup>

## Conclusion

The pre-action petition for discovery is apparently a seldom used tool that, especially in today's tense litigation climate, litigators should reevaluate and begin

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using more often. The petition offers the litigator the advantage of learning, in advance, whether sufficient facts or evidence exist to support a potential claim. Also, a litigator can use the petition to preserve testimony or information that might become lost, destroyed or simply forgotten for use in a potential future case.

As the Alabama Supreme Court states in *Ex parte Anderson*, "limited use of Rule 27 for purpose of evaluating a potential claim is entirely consistent with the underlying purpose of both Rule 11, Ala. R. Civ. P., and the Alabama Litigation Accountability Act..."<sup>737</sup> The trial courts of this state should embrace and aid attempts to ensure that sufficient facts and evidence exist to support a claim before a lawsuit is actually filed, not the opposite. ■

## Endnotes

1. This writer's research reveals only seven reported appellate cases that actually discuss the petition and only a handful more that mention a pre-action petition being filed. These latter cases involve issues unrelated to the actual petition.
  2. The Court in *Ex parte Anderson*, 644 So.2d 961 (Ala. 1994) holds that Rule 27, Ala. R. Civ. P., is not limited in use to merely preserving testimony that might be lost and states that "limited use of Rule 27 for the purpose of evaluating a potential claim is entirely consistent with the underlying purpose of both Rule 11, Ala. R. Civ. P., and the Alabama Litigation Accountability Act, Ala. Code 1975, Section 12-19-270, et seq...."
  3. This article does not address Federal Rule 27, which differs fairly substantially from Alabama Rule 27. Federal Rule 27 only allows for pre-action depositions to perpetuate testimony and does not allow pre-action discovery to evaluate potential cases. For
4. Rule 27(a)(1), subsections (1) through (5), Ala. R. Civ. P.
  5. See, e.g., Rule 7(b)(1), Ala. R. Civ. P., which provides in part that "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis supplied).
  6. In relevant part, Rule 27(a)(1), Ala. R. Civ. P., reads: "A person who desires to perpetuate that person's own testimony or that of another person ... may file a verified petition ...." (Emphasis supplied).
  7. *Black's Law Dictionary* 1400 (5th edition 1979).
  8. In relevant part, Rule 27(a)(1), Ala. R. Civ. P., reads: "A person who desires to perpetuate that person's own testimony or that of another person ... may file a verified petition in the circuit court in the county of the residence of any expected adverse party." (Emphasis supplied).
  9. This writer's research has not revealed any Alabama opinion addressing this question. Logically, however, a petitioner should be able to obtain discovery from an out-of-state entity or person, at least as long as there are more than one expected adverse party, one of whom resides in Alabama, and the other requirements are met. As a matter of policy, a petitioner should be able to obtain pre-action discovery from an out-of-state expected adverse party, assuming that the expected adverse party has taken some action or made some omission that fits it or them within the long-arm statute, and thus subjects it or them to *in personam* jurisdiction.

a more detailed comparison of the two rules see Champ Lyons Jr., *Alabama Rules of Civil Procedure Annotated Section 27.4* (3rd edition 1996 & Supp. 2000).

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10. Section 12-19-270, *et seq.*, Ala. Code 1975; and see, *Pacific Enterprises Oil Co. v. Howell Petroleum Corp.*, 614 So. 2d 409 (Ala. 1993) (discussion of the elements of a Litigation Accountability Act claim).
11. *Stoor v. Turner*, 727 So. 38, 40 (Ala. 1998).
12. *Id.*
13. *Id.* See, also, Justice Lyons dissent in *Stoor* in which he states, "I do not wish to be understood to embrace the holding of *Ex parte Anderson*, 644 So.2d 961, 965 (Ala. 1994). Rule 27 does not provide a vehicle for pre-action discovery to determine whether a cause of action exists. Instead, as the Committee Comments to Rule 27 state, that rule allows only pre-action discovery 'under Rules 34 and 35 for the purpose of perpetuating evidence pursuant to those rules.'" (Emphasis in original omitted). See, also, Champ Lyons Jr., *Alabama Rules of Civil Procedure Annotated* Section 27.1 (3rd edition 1996 & Supp. 2000) (in which Mr. Lyons expresses the same opinion expressed in his dissent in *Stoor*).
14. *Ex parte Norfolk Southern Railway Company*, \_\_\_ So. 2d \_\_\_ (Ala. 2001), 2001 WL 1175352 (Ms. 1990361, October 5, 2001, Johnstone, J.).
15. *Id.* at \*3.
16. Rule 27(a)(1), Ala. R. Civ. P.
17. In relevant part, Rule 27(a)(1), Ala. R. Civ. P., reads "and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony ...."
18. See, e.g., *Ex parte Anderson*, 644 So. 2d 961, 962 (Ala. 1994) (which reads, in relevant part, "Rule 27, on its face and stripped of its historical background, does not restrict discovery under rule 34 to cases where evidence is in danger of being lost or destroyed.").
19. Rule 27(a)(1), Ala. R. Civ. P., states in relevant part, "or to obtain discovery under Rule 34 or Rule 35 ...."
20. Rules 34 and 35, Ala. R. Civ. P. See, also, *Ex parte Smith*, 686 So. 2d 245, 246 (Ala. 1996) (wherein the Court notes that two parties filed pre-action petitions seeking to compel an individual to give a blood sample so that this person's DNA could be compared with DNA found on a cigarette thought to be involved in starting a fire).
21. See, also, *Stoor v. Turner*, 727 So. 2d 38, 49 (Ala. 1998) (which quotes from *Anderson* and finds that the trial court abused its discretion in failing to grant the petition) (*Stoor* involves the issue of whether tes-
- timony in an anticipated action in probate court can be subject to a pre-action petition for discovery).
22. *Ex parte Anderson*, 644 So.2d 961, 963 (Ala. 1994).
23. Rule 27(a)(3), Ala. R. Civ. P.
24. Rule 27(a)(2), Ala. R. Civ. P.
25. Rule 27(a)(4), Ala. R. Civ. P., reads "If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in this state in accordance with the provisions of Rule 32(a) and (b)."
26. Rule 32(a), Ala. R. Civ. P.
27. *Driskill v. Culliver*, 797 So. 2d 495, 497 (Ala. Civ. App. 2001).
28. *Id.* at 497-98.
29. See, e.g., *Ex parte Alabama Department of Transportation*, 757 So. 2d 371 (Ala. 1999) (holding that various documents concerning other accidents that occurred at the same road site as Plaintiff's were not discoverable because of a federal statute protecting such information).
30. See, Rule 26(b)(1), Ala. R. Civ. P., concerning the scope of discovery. That provision allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action, ...." *Id.*
31. *Driskill v. Culliver*, 797 So. 2d 495 (Ala. Civ. App. 2001) holds that a Rule 12(b)(6) motion will not lie against a pre-action petition for discovery. That case does not address the other possible defenses available under Rule 12(b).
32. Rule 12(b)(1) through (5), Ala. R. Civ. P.
33. *In re the Matter of Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998) (Chief Judge Butler).
34. *Id.*
35. Rule 27(b), Ala. R. Civ. P.; see also, *Sharrief v. Gerlach*, 798 So.2d 646, 651-53 (Ala. 2001) (discussing a post-trial motion for discovery concerning jury deliberations).

36. *Id.*

37. *Ex parte Anderson*, 644 So. 2d 961, 965 (Ala. 1994).

#### Kevin Walding

**Kevin Walding** is a partner in the Dothan firm of Hardwick, Hause & Segrest. He is a 1988 *magna cum laude* graduate of Huntingdon College and a 1991 graduate of the University of Alabama School of Law. He served as law clerk and staff attorney to Justice Hugh Maddox of the Supreme Court of Alabama. He is a member of the Houston County Bar Association, the Alabama State Bar and the American Bar Association, as well as the Alabama Defense Lawyers Association and the Defense Research Institute. He serves on the editorial boards of *The Alabama Lawyer* and the **ADDENDUM**.

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## Disciplinary Proceedings

- **Ruthann Mott McCrory**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of April 15, 2002 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 00-132(A) and 01-67(A) before the Disciplinary Board of the Alabama State Bar.

## Reinstatements

- The Supreme Court of Alabama entered an order based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar reinstating Birmingham attorney **Michael Alan Newsom**, to the practice of law in the State of Alabama, effective November 20, 2001 subject to the terms and conditions as set out in Panel V's order of November 20, 2001. [ASB Pet. No. 98-07]
- The Supreme Court of Alabama entered an order reinstating Birmingham attorney **William Eugene Rutledge** to the practice of law in the State of Alabama effective December 18, 2001. This order was based upon the decision of Panel VI of the Disciplinary Board. [ASB Pet. No. 01-05]

## Disability Inactive

- Troy attorney **John Michael Woodham** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective February 20, 2001. [Rule 27(c); ASB Pet. No. 01-01]
- Mobile attorney **John Mark Greer** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective November 20, 2001. [Rule 27(c); ASB Pet. No. 01-03]

## Disbarment

- **Charles Timothy Koch** was disbarred from the practice of law in the State of Alabama effective

October 30, 2001, by order of the Alabama Supreme Court. The court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

In ASB No. 97-90(A), formal charges were filed against Koch on January 28, 1998, alleging that Koch was employed to represent a client in a divorce proceeding. The charges further alleged that Koch collected \$261 as attorney's fees at the outset of the representation. Thereafter, Koch did no work on behalf of the client and did not communicate with him regarding the matter. During the course of the representation, Koch was suspended from the practice of law in the State of Alabama for failure to pay his occupational license fee. Koch did not communicate to the client the fact that he had been suspended. Koch did not file an answer to the formal charges. Therefore, on December 9, 1998, a default judgment was entered against him, finding him guilty of violating rules 1.1, 1.3, 1.4(a), 5.5(a), and 8.4(g), Alabama Rules of Professional Conduct.

In ASB No. 97-110(A), formal charges were filed against Koch on January 28, 1998, alleging that Koch was retained to represent a client in a divorce proceeding. The client paid Koch a \$500 retainer fee in advance. Thereafter, Koch failed to respond to discovery requests in the divorce action and failed to appear at scheduled hearings. As a result, a default judgment was entered against the client. Koch also failed to communicate with the client regarding the matter. During the course of the representation, Koch was suspended from the practice of law in the State of Alabama for failure to pay his occupational license fee and did not inform the client about this suspension. Further, after the grievance was filed



with the state bar, Koch failed to respond to numerous requests for information regarding the matter during the course of the bar's investigation. Koch failed to answer the formal charges and, therefore, on December 9, 1998, a default judgment was entered against him, finding him guilty of violating rules 1.1, 1.3, 1.4(a), 5.5(a), 8.1(b), and 8.4(g), A.R.P.C.

In ASB No. 98-141(A), formal charges were filed against Koch on August 5, 1998, alleging that he was employed to file a breach of contract suit on behalf of a client. Koch told the client that the suit had been filed when, in fact, it had not. Thereafter, the client was sued by the potential defendant for breach of contract. Koch advised the client that he would file a counterclaim. However, Koch took no action on behalf of the client and failed to communicate with him regarding the matter. As a result, a default judgment was entered into against the client in the amount of \$23,000. Koch failed to answer the formal charges and, therefore, on December 9, 1998, a default judgment was entered against him finding him guilty of violating rules 1.1, 1.3, 1.4(a), 8.4(c) and 8.4(g).

A hearing to determine discipline was conducted by Panel III of the Disciplinary Board on October 16, 2001. Koch failed to appear at this hearing. During this hearing, the Alabama State Bar offered evidence to establish that Koch had been suspended for failure to comply with the Mandatory Continuing Legal Education requirements on July 26, 1996 and again on February 6, 1998. Because of Koch's failure to cooperate during the investigation of these complaints, he was interimly suspended from the practice of law in the State of Alabama effective May 13, 1998. [ASB nos. 97-90(A), 97-110(A) and 98-141(A)]

## Suspensions

- Fairhope attorney **Gregory Brown Dawkins** was suspended from the practice of law in the State of Alabama

for a period of one year, effective September 25, 2001, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar. On September 25, 2001, Dawkins pled guilty to unlawful possession of a controlled substance and unlawful possession of drug paraphernalia in the Circuit Court of Baldwin County and was allowed to participate in the pre-trial intervention program.

On October 15, 2001, Dawkins entered a conditional guilty plea before the Disciplinary Commission admitting that he violated Rule 8.4(b), Alabama Rules of Professional Conduct, based upon his guilty plea to unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. In exchange for the plea, Dawkins was suspended from the practice of law in the State of Alabama for a period of one year, effective September 25, 2001. [ASB No. 01-244(A)]

- Athens attorney **Cynthia Jane Bridgeman** was suspended from the practice of law in the State of Alabama for a period of 91 days, effective December 5, 2001, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

In ASB No. 00-282(A), formal charges were filed against Bridgeman on March 30, 2001, alleging that Bridgeman had been retained to represent a client in bankruptcy proceedings. The client paid Bridgeman a \$600 retainer. Thereafter, Bridgeman advised the client that she was leaving the practice of law, but would file the bankruptcy petition upon payment of \$125 for court costs. Bridgeman made arrangements to meet with the client but never followed up. Thereafter, Bridgeman did no work on behalf of the client and failed to communicate with her regarding the matter. During the course of the bar's disciplinary investigation, Bridgeman failed to respond to requests for information

regarding the complaint. Bridgeman did not answer the formal charges and, therefore, on May 9, 2001, a default judgment was entered against her, finding her guilty of violating Rules 1.3, 1.4(a) and 1.16(d).

In ASB No. 01-19(A), formal charges were filed against Bridgeman on March 20, 2001, alleging that she had been retained by a client to represent him in an uncontested divorce. The client paid Bridgeman \$300 for the representation. Thereafter, Bridgeman performed no services, failed to communicate with the client regarding the matter, and failed to refund the unearned portion of the retainer. Bridgeman failed to file an answer to the formal charges and, therefore, on May 9, 2001, a default judgment was entered against her, finding her guilty of violating Rules 1.3, 1.4(a) and 1.16(d).



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Because of her failure to respond or otherwise cooperate during the course of the bar's investigation, Bridgeman was interimly suspended from the practice of law in the State of Alabama, effective March 5, 2001. [ASB nos. 00-282(A) and 01-19(A)]

- Effective October 28, 2001 attorney **Kenneth Holloway Millican** of Hamilton has been suspended from the practice of law in the State of Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [ASB CLE No. 01-33]
- Jacksonville attorney **David Joel Forrester** was suspended from the practice of law in the State of Alabama for a period of 91 days. The imposition of the 91-day suspension was suspended pending successful completion of a two-year probationary period, conditioned on Forrester serving 30 days of the 91-day suspension, effective December 1, 2001. The supreme court ordered the suspension based upon a decision of the Disciplinary Commission of the Alabama State Bar in ASB No. 99-115(A), where Forrester pled guilty to violating Rules 5.3(a) and 8.4(g), Alabama Rules of Professional Conduct. Forrester admitted that he employed a client in exchange for legal services and, thereafter, provided minimal or improper training and supervision during employment and engaged in inappropriate conduct of a personal and sexual nature toward his employee. [ASB No. 99-115(A)]

### Public Reprimands

- **Pete James Vallas** received a public reprimand without general publication for a violation of Rules 1.1 and 1.3, A.R.P.C. Vallas was retained to represent the complainant in post-conviction proceedings. The complainant had been charged in federal court with trafficking in cocaine. Because of his cooperation with federal authorities, the complainant's charges were transferred to state court. In state court, a plea agreement was reached wherein the complainant would plead guilty

and receive a sentence of 15 years split with time served, and the remainder of his sentence on probation. The state court judge rejected this plea and the complainant eventually entered a blind plea to possession of cocaine. On May 19, 2000 the complainant received a 25-year sentence in the state penitentiary.

Vallas was hired about a week later to seek reconsideration and modification of the complainant's sentence and to secure the presence of the Assistant U.S. Attorney to testify before the state court to explain the extent of the complainant's cooperation with federal authorities. The Assistant U.S. Attorney did not personally appear at the first hearing, but did submit a letter on the complainant's behalf. Because the Assistant U.S. Attorney did not personally appear, Vallas requested and received a continuance to arrange for her personal appearance. Prior to the second hearing, Vallas communicated with the Assistant U.S. Attorney and understood that she was reluctant to personally appear. Vallas did not subpoena the Assistant U.S. Attorney, nor did he make any other arrangements with the federal authorities for her appearance. The complainant's motion was heard without the benefit of a personal appearance of the Assistant U.S. Attorney and was denied.

In addition, at the first hearing on the motion to reconsider, Vallas gave oral notice of appeal of the conviction. Vallas was subsequently notified that the oral notice of appeal was not sufficient and that a written notice of appeal was required. On July 27, 2000, the Alabama Court of Criminal Appeals dismissed the appeal as being untimely filed because Vallas did not file a written notice of appeal. [ASB No. 00-226]

- Montgomery attorney **Valerie Murry Smedley** entered a conditional guilty plea, which was accepted on October 22, 2001, by the Disciplinary Board of the Alabama State Bar, to charges of incompetence, willful neglect and the failure to properly communicate with a client. The Disciplinary Board ordered that Smedley receive a public reprimand without general publication.



Smedley's former client, Carolyn D. Eaves was purchasing some rental property in Montgomery and hired Smedley to handle the transaction for \$300. The closing was held and all documents were signed and notarized. Smedley failed to send the mortgage assumption package to the mortgage company and also failed to record the deed. Because of this neglect, the mortgage company refused to recognize Mrs. Eaves as the property owner. It force-placed insurance on the property, thereby raising the mortgage payments by 26 percent. Mrs. Eaves got in arrears on the mortgage payments and foreclosure proceedings were begun. Throughout this entire situation, Mrs. Eaves contacted Smedley on several occasions to assist her in correcting the problem, but Smedley took no action. After Mrs. Eaves filed a complaint with the state bar, Smedley recorded the deed. In Smedley's response to the bar complaint, she blamed another lawyer for the failure to forward the closing documents. That lawyer denied any such responsibility, stating that he only notarized the documents at her request. Smedley violated Rules 1.1 [competence], 1.3 [diligence], 1.4(a), and 1.4(b) [communication] of the Alabama Rules of Professional Conduct. [ASB No. 00-223(A)]

- Birmingham attorney **Roscoe Benjamin Hogan, III** received a public reprimand without general publication for violating Rule 8.4(g), A.R.P.C. On or about June 7, 1999, Hogan and his firm, Hogan, Smith & Alspaugh, P.C., represented the plaintiff in a civil action before the Honorable W. B. Hand, senior judge of the United States District Court for the Southern District of Alabama. During settlement negotiations, in which Judge Hand directly and actively participated, Hogan was placed on notice of the defendant's concerns that there not be any admission of liability or any publication of the settlement, particularly in the firm's newsletter, *The Leading Edge*. As part of the settlement, Hogan agreed to a confidentiality and non-disclosure clause. Based upon the agreement, Judge Hand entered an order dismissing the case with prejudice.

On or about June 17, 1999, the parties and their counsel executed a Settlement and Confidentiality Agreement, which contained specific language intended to maintain confidentiality by prohibiting publication of the settlement.

Notwithstanding this language, on or about January 24, 2000, counsel for the defendant received a newsletter published by Hogan's firm entitled *The Leading Edge*. The newsletter contained details of the settlement of the case in direct violation of the Settlement and Confidentiality Agreement.

Upon receipt of this publication, counsel for the defendant attempted to resolve the breach of confidentiality and violation of the Settlement and Confidentiality Agreement without court intervention. Those efforts were unsuccessful. Therefore, on March 1, 2000, the defendant filed a Motion for Relief, requesting assistance from the United States District Court in enforcing the Settlement and Confidentiality Agreement.

During proceedings conducted by Judge Hand on the defendant's Motion for Relief, Hogan acknowledged that publication of the settlement in the firm brochure technically violated the Settlement and Confidentiality Agreement. However, Hogan asserted that the Court was without jurisdiction to provide a remedy. The Court determined otherwise. On July 18, 2000, after a hearing, Judge Hand found that Hogan had engaged in professional misconduct by his failure to abide by the terms of the Settlement and Confidentiality Agreement. The Court imposed numerous sanctions on Hogan and the firm, including a requirement that Hogan publish a retraction in *The Leading Edge*, copies of which were required to be sent to each recipient by certified mail, that Hogan pay reasonable attorney's fees incurred by the defendant, and that Hogan and the firm be suspended from practicing law in the United States District Court for the Southern District of Alabama. The Disciplinary Commission considered, as mitigation, the Court's severe sanctions, as well as the fact that Hogan and the firm have since purged themselves of those sanctions. [ASB No. 00-183(A)]

- On January 18, 2002, Theodore attorney **George Lucas Simons** received a public reprimand without general publication in connection with the complaint of Naomi Lee Collins of Mobile. Ms. Collins was injured on the job in August 1998 and came to see Simons about a worker's compensation case in the fall of 1998. Simons did not have her sign a contract but when she would call to check on the status of her case he led her to believe that he was working on the matter. After she began experiencing difficulty communicating with Simons, she contacted another lawyer in March 2001. She told this lawyer that Simons was representing her, but that he would not return her calls. That lawyer called Simons to see if he was representing her. Simons did not deny that Ms. Collins was his client. When asked whether Simons had filed a case for her, he stated that he had not, and had no explanation or reason for not doing so. That lawyer declined to represent Ms. Collins because he believed the statute of limitations had run on her claim. Accordingly, Simons was publicly reprimanded for having violated Rules 1.3 [diligence] and 1.4(a) [communication] of the Alabama Rules of Professional Conduct. ■

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





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March 2002 issue—deadline January 5, 2002; May 2002 issue—deadline March 5, 2002. No deadline extensions will be made.

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

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## Notices

### • NOTICE FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS AND ADOPTION

**NOTICE:** In the Court of Common Pleas of Berks County, Pennsylvania, Orphans' Court Division, Case No: 76972

Notice is hereby given that the Petition for the Involuntary Termination of Parental Rights of Gayle L. Hirneisen, whose last known address is 132 County Road 881, Jones, Dallas County, Alabama, 36749, and the Petition for the Adoption of Christopher DeTemple have been filed in the above named Court, praying for a decree of Involuntary Termination of Parental Rights of Gayle L. Hirneisen and praying for a decree of Adoption of Christopher DeTemple.

The Court has fixed the 8th day of May, 2002, at 9:30 a.m. in the courtroom of Peter W. Schmehl, at the Berks County Courthouse, 633 Court Street, Reading, Berks County, Pennsylvania, as the time and place for the hearings of the said Petitions, when and where

all or any other persons interested including Gayle L. Hirneisen, may appear and show. Petitions should not be granted.

Rebecca Batdorf Stone, esquire, 317 East Lancaster Avenue, Shillington, Pennsylvania, 19607; phone (610) 775-0477.

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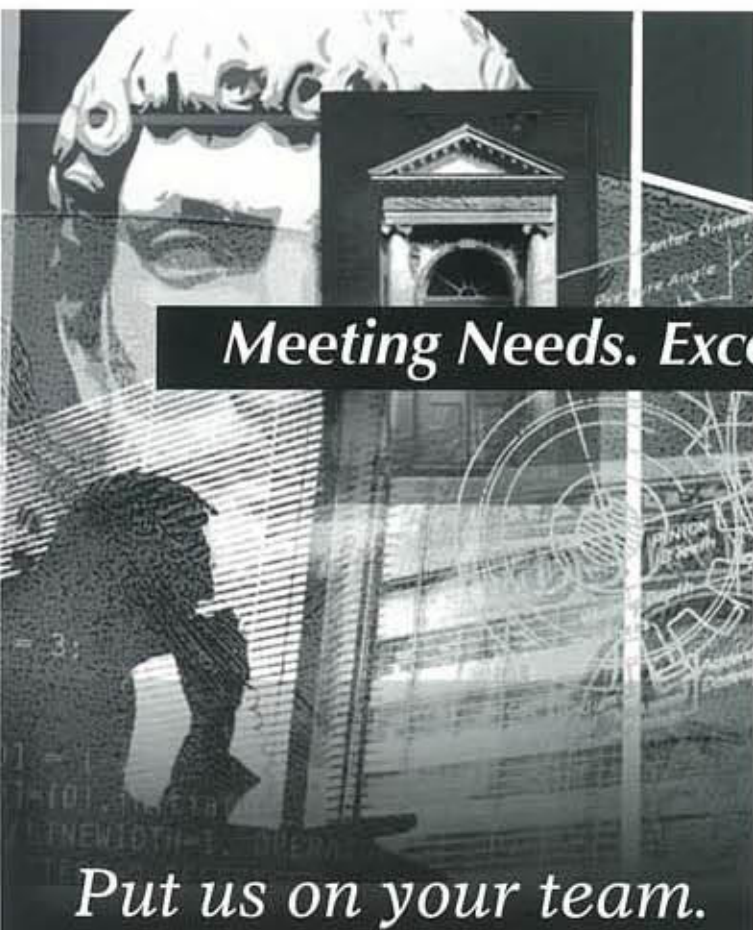
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