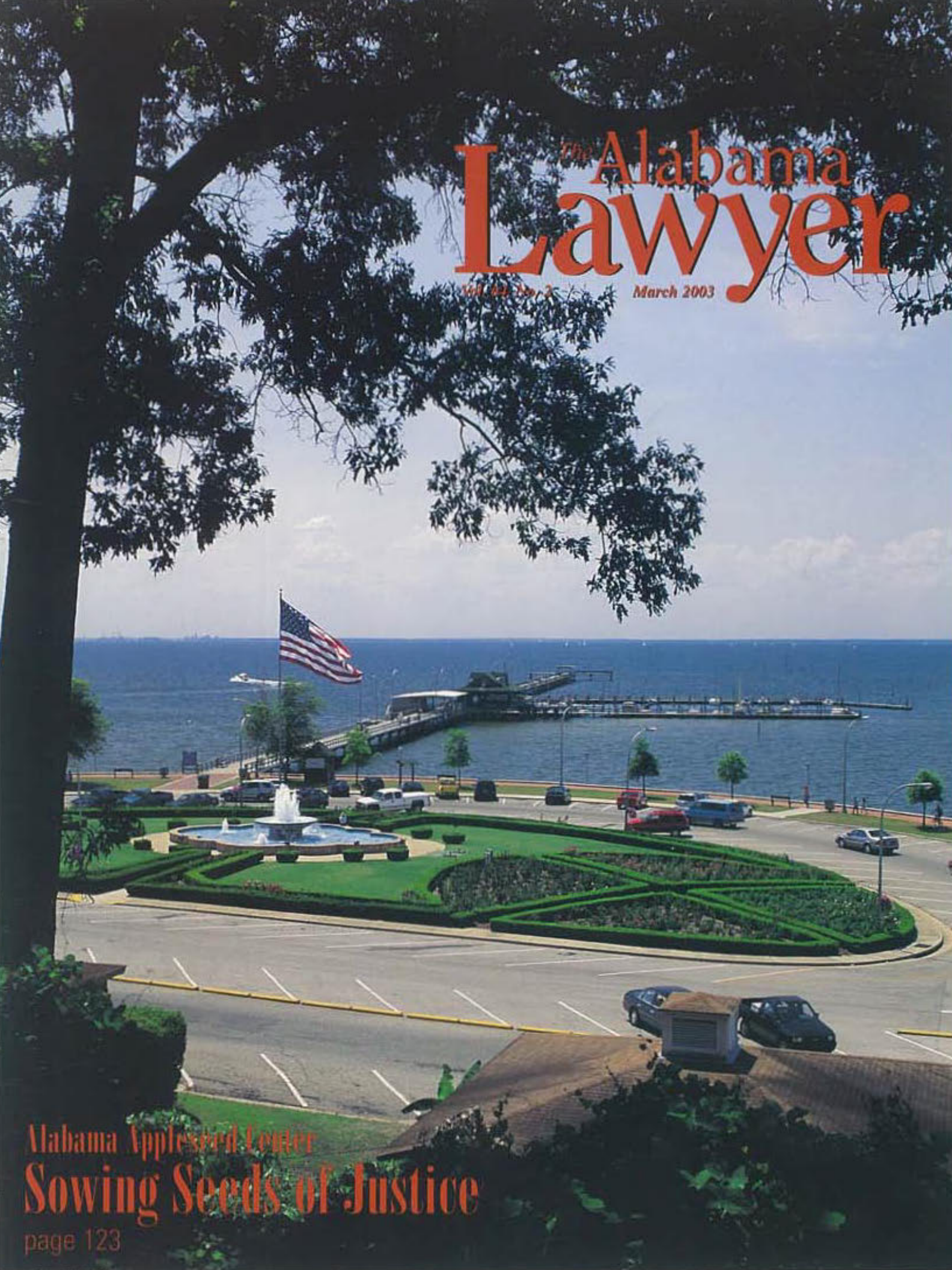


The Alabama Lawyer


Vol. 30, No. 2

March 2003



Alabama Appellate Center
Sowing Seeds of Justice

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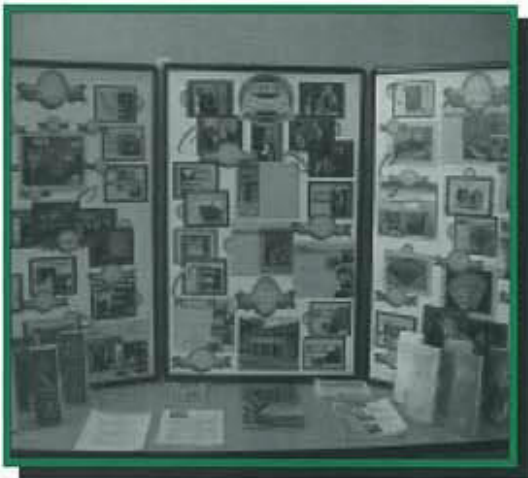


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ABICLE extends a special note of thanks to Patrick H. Graves, Jr. of Bradley Arant Rose & White LLP in Huntsville for serving as the 2002 editor and for the countless number of hours that he volunteered to update this book. We also appreciate the efforts of Dale B. Stone, the special editor for the chapter covering tax consequences of a divorce.



On the Cover:

Fairhope, Alabama

Twenty miles southeast of Mobile, on the bluffs of the Eastern Shore of Mobile Bay, lies the picturesque city of Fairhope, Alabama. With beautiful sunset views, waterfront parks and a vibrant downtown, Fairhope is an Alabama treasure.

Photo by Paul Crawford, JD

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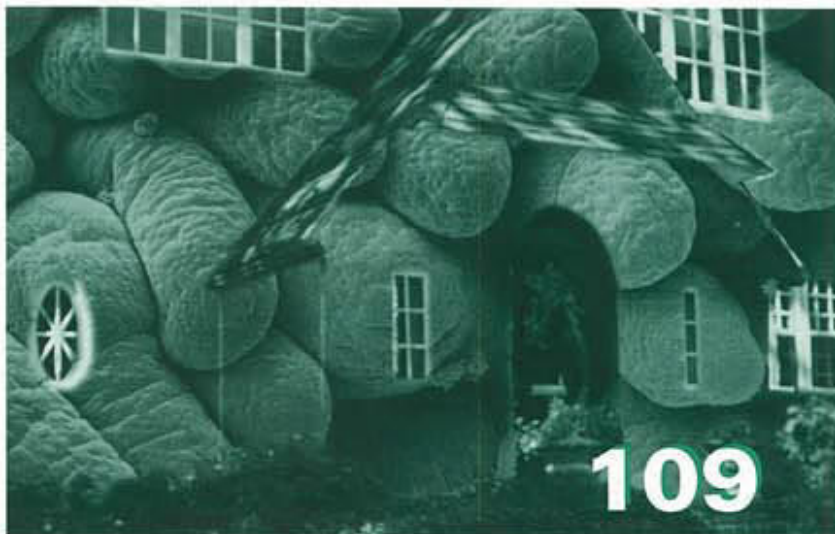
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Please join the Alabama State Bar in working to make this Law Day a time to make the rule of law even more significant and precious to all Alabamians. Law Day 2003 provides an important opportunity for bar associations and each individual member to reach out to Alabama communities, schools and citizens. And the Alabama State Bar can help! We can provide you with a detailed Law Day Planning Guide at no cost. Students and schools in your area can be encouraged to participate in our statewide Essay and Poster Contest. Call us or visit our Web site at www.alabar.org and see what resources we offer.

Together, we can make this the best – and most meaningful – Law Day ever.

Plan to join the celebration now.




ALABAMA STATE BAR
Lawyers Render Service



By Fred D. Gray



Fred D. Gray

Civil Rights—Past, Present and Future, *Part III*

*(This is the third installment of a three-part series adapted from a speech given to the International Society of Barristers in 2001; the first and second parts appeared in the November 2002 and January 2003 **Alabama Lawyer**, respectively.)*

The Present

You might be wondering what all of this means to us here today. We have made a tremendous amount of progress, and I would not try to tell you that we have not. But notwithstanding our progress, in recent years, we have seen an increase in racism, expressed in many ways, including the burning of churches. We have seen a change in the United States Supreme Court, which, for more than a quarter of a century, had been a pioneer in protecting the rights of minorities and women; the Court is now reversing itself on some important constitutional principles. We have seen similar changes in the federal district courts and courts of appeal across the nation. In recent months, we have seen assaults upon affirmative action and other programs that have effectuated or protected the constitutional rights of individuals and made our country a great country. We have witnessed the resurgence of hate groups. And, many old wrongs remain un-redressed. For example, in 1963, I filed cases that involved desegregating 104 of the 119 school systems in Alabama; about 40 or 50 of those cases are still active today. My sons, who were just little boys when I filed those suits, are now going into court trying to get people to do what they should have done long ago.

The struggle has not ended. Racial discrimination in the United States has not ended. We do not have a level playing field. There is no such thing as a race-neutral society in America. The consequences of 350 years of slavery, segregation and discrimination have not disappeared in the last 40 years. Unfortunately, we still live in a racist society, and if we're not careful, it's going to get worse before it gets better.

The Future

If the lives and work of Dr. King and Mrs. Parks are to mean anything, the struggle for equal justice under the law, particularly for women and minorities, must continue. We face a real challenge on whether the gains we have obtained will continue or will be lost, and more remains to be achieved. If we lose, it will mean that Dr. King and others who have given their lives in the cause of human and civil rights have died in vain. If we lose, the nation loses.

I hope this society is active in the field of diversity for we are living in a world where the majority of the people are colored peoples, not white. Even if we focus only on the United States, the census reports show that the Asian population and the Hispanic population and even the African American population are increasing. So, we need to be concerned about diversity.

We have seen some promising steps taken at various levels. A few years ago, President Clinton appointed a race relations commission. On October 30, 1999, the then-president of the American Bar Association indicated that one of his major priorities was to increase the involvement of minorities in the American Bar Association. I'm happy to say that in our state of Alabama, which we usually think of as falling at the bottom of the list, white folks, African-American folks, rich folks, poor folks, educated and uneducated people came together a few years ago and elected a governor, Don Siegelman, who has been working hard to change the image of our state, and, to a great degree, he has succeeded.

What can we do on a more personal level to change or increase diversity? I'm going to tell you two little things that you might be able to do. One is a suggestion that came from one of my children when I was getting ready to make a speech a few years ago. She said, "Daddy, people don't know each other, and when they don't know each other, they are unable really to understand each other. What if everybody would select one person who is not of their own race to be their friend? You would learn about that person's likes, that person's dislikes, even little things such as what they eat and what they don't eat. You'd get a chance to truly know that person." I challenge each of you to do that, to keep trying if it doesn't work out the first time. After all, you haven't given up on all your friends of your own race just because people of your own race are not your friends. The other thing I will ask of you is that you look around you in your neighborhood, at your workplace, at your place of worship, and in your social groups. If everybody in those places is of the same race, please at least pause to wonder why it's that way.

Stepping back to the community or national level, I want to submit for your consideration three basic things I think we can do that will help us to get to the point where everybody is truly free and truly equal. First, we all must recognize that we still have race problems in this country. President Bush realizes that we still have serious problems in this country with reference to race and racism. In his first address to Congress, he told the nation that racial profiling must end, and he has directed his Attorney General to take the proper steps to correct these injustices. We need to acknowledge that we have race problems, and we need to decide that it's wrong and that we're going to correct it. Secondly, we have to develop some plans for correcting the problem. Some of this will involve work at the local level. I can't tell you what needs to be done or what will work in every community, but I cannot believe that with all of our knowledge and all of our wisdom, we cannot come up with solutions to correct our race problems. Finally, the plans we devise must be executed.

One of the greatest areas of discrimination I have found in this country now is the economic area. You can find

African-American kids and white kids who have gone to the same schools and been taught by the same persons, and you will see that when they go out to get jobs, the white ones usually will get good jobs and the African-American ones either won't get jobs at all or will get menial ones. You can look at any of the economic census reports and find the tremendous disparity economically between people of color and the majority. As I tell lawyers and law students across the country, this is an area in which the law can and should play a role in righting the wrongs.

The desegregation and civil rights laws in this country have been developed primarily because lawyers like us have used our talents and argued cases from the justice of the peace court to the Supreme Court of the United States. Historians have basically written lawyers out of the civil rights movement. But, it was court decrees entered by courageous judges that changed the racial landscape of this nation. The lawsuits were drafted and filed by lawyers like us. As lawyers in

our respective fields, there is a duty and a responsibility upon us to be sure that justice is administered. We must continue the battle of destroying racism wherever it appears. Many of us do not realize it, but racism is a problem today and there are too many decisions that are still being rendered based on race. As leaders in your community and in the legal profession, you can make a difference.

Let me leave you with the words of Governor Wilder, the first African-American governor of the Commonwealth of Virginia, as he was being inaugurated a few years ago. He was speaking of young people, but his words apply more broadly. He said:

"I want them to know that oppression can be lifted, that discrimination can be eliminated, that poverty need not be binding, that disability can be overcome, and that the offer of opportunities in a free society carries with it the requirement of hard work, the rejection of drugs and other false highs, and a willingness to work with others, whatever their race or national origin may be." ■

Public Notice for Reappointment of Incumbent Magistrate Judge

The current term of the office of United States Magistrate Judge Charles S. Coody is due to expire April 30, 2003. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; (4) trial and disposition of civil cases upon consent of the litigants; and (5) examination and recommendation to the judges of the district court in regard to prisoner petitions and claims for Social Security benefits.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Chair, Merit Selection Panel
c/o Debra P. Hackett, Clerk
U.S. District Court
P.O. Box 711
Montgomery, AL 36101-0711

Comments must be received by March 31, 2003.



Keith B. Norman

Task Force Studies Bar Admission Procedures

One of the bar's principle functions as the legal profession's licensing and regulatory authority is admissions. As many of you probably remember from applying to take the bar exam, admissions is a two-step process. A bar applicant first must satisfy the requirement that he or she possesses the requisite character and fitness to practice law. Then the applicant must successfully complete the Multi-State Professional Responsibility Examination (MPRE) and the bar examination. With respect to the bar's admission procedures, state bar **President Fred Gray** has appointed the **Task Force to Study the Rules Governing Admission**. The future recommendations of this task force will complete a thorough review of *The Rules Governing Admission to the Alabama State Bar*. An earlier task force recommended rules changes approved by the Alabama Supreme Court that modify the format of the bar examination. These format changes, which I will detail in a future article, will occur with the administration of the July 2003 exam.

The admissions task force is chaired by **Mike Waters** of Montgomery, a former chairman of the Board of Bar Examiners. The vice-chair is **Judy Holt** of Birmingham, a longtime member of the Character and Fitness Committee. Also serving with Mike and Judy are **Mike Atchison**, Birmingham; **Mike Conaway**, Dothan; **Lee Copeland**, Montgomery; **Laura Crum**, Montgomery; **Milton Davis**, Tuskegee; **Wanda Devereaux**, Montgomery; **Gwen Garner**, Montgomery; **Ed Gentle**, Birmingham; **Richard Gill**, Montgomery; **Fred Gray, Jr.**, Tuskegee; **Victor Hayslip**, Birmingham; **Rick Meadows**, Montgomery; **Anne Mitchell**, Birmingham; **Jack Janecky**, Mobile; **Donna Pate**, Huntsville; **Roger Smith**, Montgomery; and **Jimmy Walter**, Montgomery.

This task force will study rules that the previous task force did not consider, specifically rules I-V. They will examine admission procedures and focus on concerns that were not envisioned when rules I-V were last amended, namely: (1) bar applicants who have foreign undergraduate degrees but have attended domestic law schools; (2) bar applicants who are foreign lawyers and have attended domestic Master's of

Laws programs; (3) foreign lawyers desiring admission to practice in Alabama; and (4) multi-jurisdictional practice (MJP). Every member of the task force is familiar with these and other issues to be studied.

Of the issues that the task force has been asked to consider, MJP is perhaps the one that has received the greatest amount of attention over the last few years. The term MJP describes the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law. This past August, the House of Delegates of the American Bar Association approved the Report and Recommendation of the ABA's Commission on Multi-Jurisdictional Practice. The Commission's report contained nine principle recommendations. I will not detail them here, but the full report may be downloaded by accessing the ABA's Web site, www.abanet.org, and clicking on "Entities" and then going to "Commissions."

Many jurisdictions are closely studying the MJP report and recommendations. The principle thrust of the MJP proposal is modification of a state's restrictions on the unauthorized practice of law (UPL). The modifications would permit a lawyer admitted in another jurisdiction to practice law, in very narrowly defined circumstances, on a temporary basis in other jurisdictions. Those circumstances would be different from the activities regulated under a jurisdiction's *pro hac vice* rules. Another noteworthy change which the Commission report recommends is the admission of a lawyer on motion, or without taking the bar exam again, if the lawyer has been engaged in the active practice of law for a significant period of time and is a member in good standing in all other jurisdictions where he or she is admitted.

The Task Force to Study Rules Governing Admission has much to consider. It possesses excellent leadership and knowledgeable members. Consequently, the task force is well situated to analyze the admission issues brought about in large measure because of the significant changes that the practice of law has experienced in the last decade. The work of the able members of this task force continues the state bar's effort that we fulfill our public responsibility as a self-regulated profession. ■

Notice of Election

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

Commissioners

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

Additional commissioners will be elected in circuits for each 300 members of the state bar offices whose principal offices are located in these circuits. The new commissioner positions will be determined by a census on March 1, 2003 and vacancies certified by the secretary no later than March 15, 2003.

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 25, 2003).

Ballots will be prepared and mailed to members between May 1 and May 15, 2003. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 30, 2003) to the Alabama State Bar.

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- **James W. Porter, II** was recently designated as a Local Government Fellow by the International Municipal Lawyers Association. The Fellows program was established in 1998 to recognize attorneys as legal specialists in the field of local government law, as well as to encourage attorney proficiency and competency in the field.

- **William S. Labahn**, a 1975 bar admittee who now practices in Oregon and Alaska, was profiled in the December 9, 2002 issue of *The National Law Journal*.



The Alabama Chapter of the American Academy of Matrimonial Lawyers recently served meals at a community soup kitchen. The academy is a national organization established to encourage the study, improve the practice and elevate the standards of matrimonial law.



One week after the general election, the Houston County Young Lawyers' Association conducted a service project, removing the remaining political campaign signs from the right-of-way on various county highways. Pictured above are Samuel Prim, Hamp Baxley, Cliff Mendheim and Shannon Rash.

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- **March 20—22**, Birmingham, Mediation Process and the Skills of Conflict Resolution, Litigation Alternatives, Inc., (Troy Smith, JD) 1-800-ADR-FIRM, adrinfo@aol.com; www.mediationseminars.com
- **May 5—7**, Montgomery, Mediation Process and the Skills of Conflict Resolution, Litigation Alternatives, Inc., (Troy Smith, JD) 1-800-ADR-FIRM, adrinfo@aol.com; www.mediationseminars.com
- **June 5—9**, Birmingham, Family and Divorce Mediation, Atlanta Divorce Mediators. Contact Betty Manley, M. Ed., JD (404) 378-3238, or (800) 862-1425.
- **September 18—20**, Birmingham, Mediation Process and the Skills of Conflict Resolution, Litigation Alternatives, Inc., (Troy Smith, JD) 1-800-ADR-FIRM, adrinfo@aol.com; www.mediationseminars.com
- **November 13—17**, Montgomery, Family and Divorce Mediation, Atlanta Divorce Mediators. Contact Betty Manley, M. Ed., JD (404) 378-3238, or (800) 862-1425.
- **December 4—6**, Birmingham, Mediation Process and the Skills of Conflict Resolution, Litigation Alternatives, Inc., (Troy Smith, JD) 1-800-ADR-FIRM, adrinfo@aol.com; www.mediationseminars.com

Arbitration training schedule will be added at a later date.

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.

Are You an Appellate Lawyer or Judge?

The Alabama State Bar has appointed a task force to determine the interest among civil, criminal, government and private attorneys and appellate judges in an Appellate Practice Section to:

- foster communication among lawyers and appellate judges;
- provide a resource group for appellate courts;
- provide networking opportunities for appellate practitioners; and
- otherwise improve the quality of appellate practice.

Before an Appellate Practice Section can be formed, the task force must identify lawyers and judges who would be interested in joining. If you or someone you know would like to join an Appellate Practice Section, we need to hear from you. Please contact:

Appellate Practice Task Force
c/o Susan S. Wagner, chairperson
Berkowitz, Lefkovits, Isom & Kushner, P.C.
1600 SouthTrust Tower
420 N. 20th Street
Birmingham, Alabama 35203-5202
swagner@blik.com



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

M. Bradley Almond announces the opening of his firm, **M. Bradley Almond LLC**, at 2223 8th Street, Tuscaloosa 35403. Phone (205) 349-5004.

Alan Hunt announces the opening of the **Law Firm of Alan Hunt LLC**, with offices at 126 S. Center Avenue, Piedmont 36272. Phone (256) 447-0055.

Heather Newsom Leonard announces the formation of **Heather Leonard PC** with offices at 2108 Rocky Ridge Road, Suite 1, Birmingham 35216. Phone (205) 978-7899.

Albert L. McCoy announces the opening of the **Law Office of Albert L. McCoy** at 414 Frank Nelson Building, 205 N. 20th Street, Birmingham 35203. Phone (205) 252-2022.

D. Brent Morrison announces the opening of the **Law Firm of D. Brent Morrison LLC**, with offices at 111 S. Main Street, Piedmont 36272. Phone (256) 447-0016.

Raymond A. Pierson announces the opening of his office at 501 Church Street, Mobile 36602. Phone (251) 433-3671.

Timothy L. Shelton announces the opening of his office at 303 Second Avenue, SE, Suite B, Decatur 35601. Phone (256) 355-2398.

Robert D. Weathers, Jr. announces the opening of his office at Bradford Square, 400 14th Street, SE, Suite A, Decatur 35601. Phone (256) 353-1118.

Thomas B. Woodall announces the opening of his office at 434 Gunter Avenue, Guntersville 35976. Phone (256) 582-0567.

Among Firms

American Legal Search LLC announces that **Brannon Ford** has joined the company's Birmingham office.

Ball, Ball, Matthews & Novak, PA announces that **Jordan Montiel McBride** has joined the firm.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Kendall Dunson** has become a shareholder.

Berkowitz, Lefkovits, Isom & Kushner PC announces that **William M. Lawrence, Laura E. Proctor** and **Jacquelyn D. Smith** have become members.

Bishop, Colvin, Johnson & Kent announces that **Claire J. Hyndman** has joined the firm as an associate.

Boardman, Carr, Weed & Hutcheson PC announces that **Alicia Fritz Bennett, Katherine C. Hortberg** and **Dana J. Bolden** have become shareholders.

Pierce, Ledyard, Latta, Wasden & Bowron PC announces a name change to **Bowron, Latta & Wasden PC**.

Bradford Law Firm PC announces that **J. Vincent Swiney, II** has joined the firm as an associate.

The Burns Law Firm announces that **Christopher R. Garner** has become a member.

Burr & Forman announces that **Cameron T. Earnhardt** and **John O'Shea Sullivan** have been named partners of the firm.

Capell & Howard PC announces that **Richard H. Allen** and **M. Courtney Williams** have become members of the firm and **Paige R. Jackson** has become an associate.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Joseph V. Musso** and **Ian D. Rosenthal** have become partners of the firm.

Christian Small LLP announces that **Jessica K. Stetler, Lynn Shutt Darty** and **S. Michael Pack, Jr.** have joined the firm as associates.

Cincinnati Children's Hospital Foundation announces that **Kenneth Massey** has been named president.

Corley, Moncus & Ward PC announces that **Mark E. Hoffman** has joined the firm as a shareholder.

Gregory D. Crosslin announces the formation of **Crosslin & Associates PC**, with offices at 4131 Carmichael Road, Suite 2, Montgomery 36106. Phone (334) 260-2847. **Carey Bos** will serve as *of counsel*.

Engel, Hairston & Johanson PC announces that **Sherrie L. Phillips** has become a shareholder.

Frederick T. Enslin PC announces that **Susan Berman Norris** has become associated with the firm.

Derrell O. Fancher and Fletcher D. Green announce the formation of **Fancher & Green LLP** with offices at 507 Lay Dam Road, Clanton 35045. Phone (205) 755-5880.

Hall & Hall LLC announces that **Thomas S. Hiley** has joined the firm as an associate.

Hand Arendall announces that **V. Leigh Mattox** has joined the firm as *of counsel*.

Leitman, Siegal & Payne PC announces that **W. Harold Parrish, Jr.** and **Jim H. Wilson** have become shareholders in the firm.

Lyons, Pipes & Cook PC announces that **Richard B. Johnson** and **Julie Hatcher Ralph** have become associated with the firm.

Christopher E. Malcom, Angela D. Terry and **Errek P. Jett** announce the formation of **Malcom, Terry & Jett PC**, with offices at 734 Main Street, Moulton 35650. Phone (256) 974-4262.

Mary E. Murchison, Chandra C. Wright and **Linda L. Howard** announce the formation of **Murchison, Howard & Wright LLC** with offices at 307 S. McKenzie Street, Suite 106, Foley 36535. Phone (251) 955-1572.

Nathan & Nathan PC announces that **J. Bart Lloyd, III** has joined the firm as an associate.

The Law Office of Peter M. Neil

announces that **Tina R. Ogle** has joined the firm as an associate.

Owens & Millsaps LLP, formerly **Owens & Almond LLP**, announces that **Susie Taylor Carver** has rejoined the firm, and **W. Ivey Gilmore, Jr.** has joined the firm as an associate.

Rosen, Cook, Sledge, Davis, Cade & Shattuck PA announces that **David Wayne Childress** has become *of counsel* for the firm.

Rumberger, Kirk & Caldwell PA announces that **Marc Dawsey** has joined the firm.

Smith, Spires & Peddy PC announces that **Melanie F. Lyerly** has joined the firm as an associate.

Scott Soutullo announces that he has joined the firm of **James A. Johnson PC**.

Stockham & Stockham announces a name change to **Stockham, Stockham & Carroll PC**.

Vicky U. Toles and **Trina S. Williams** announce the formation of **Tole & Williams LLP**, with offices at 400 S. Union Street, Suite 270, Montgomery 36104. Phone (334) 832-9915.

The United States Attorney's Office

for the Middle District of Alabama announces that **Martha Ann Miller, James B. Perrine, Verne H. Speirs, Matthew S. Miner, and Susan R. Redmond** have joined the office as Assistant U.S. Attorneys in the Montgomery office.

Melanie L. Looney announces that she has joined the Committee on Education and the Workforce with the **United States House of Representatives**.

Walston, Wells, Anderson & Bains LLP announces that **Shawn A. Tidwell** has joined the firm and **Jeffery S. DeArman, Judd A. Harwood, Walter H. McKay, Joe F. Lassiter, Elizabeth B. Mitchell, Warren D. Beason, and Karon A. Sasser** have become associated with the firm.

Watson, Jimmerson, Givhan, Martin & McKinney PC announces that **C. Anthony Graffeo** has become associated with the firm.

Wilmer & Lee PA announces that **Robert V. Wood, Jr.** and **Robert C. Lockwood** have become shareholders in the firm and **Brian E. Monroe** has become an associate. ■

ARE YOU PAYING TOO MUCH FOR LIFE INSURANCE?

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West Coast Life
\$250,000 Level Term Coverage
Male, Select Preferred NonSmoker

AGE:	30	35	40	45	50	55	60
10 Year	\$118	\$118	\$140	\$213	\$293	\$490	\$773
15 Year	\$135	\$135	\$168	\$290	\$443	\$650	\$1,035
20 Year	\$168	\$170	\$225	\$373	\$575	\$863	\$1,418

West Coast Life
\$500,000 Level Term Coverage
Male, Select Preferred NonSmoker
Annual Premium

AGE:	30	35	40	45	50	55	60
10 Year	\$185	\$185	\$230	\$375	\$535	\$930	\$1,495
15 Year	\$220	\$220	\$285	\$530	\$835	\$1,250	\$2,020
20 Year	\$285	\$290	\$400	\$695	\$1,100	\$1,675	\$2,785

* A+ Rating by A.M. Best
West Coast Life

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Robert Franklin Adams

Robert Franklin Adams, a highly respected and successful lawyer for more than a half century, died at his home February 23, 2002, at the age of 94.

Bob was born July 20, 1907 in Jackson, Alabama, where he attended public schools and was a graduate of the University of Alabama, where he was elected to Omicron Delta Kappa, a national leadership fraternity. After a seven-year banking career in Jackson, he attended and graduated from the University of Alabama School of Law.

Bob served with the U.S. Army in Europe during World War II with the 283rd Combat Engineer Battalion and, in 1937, moved to Mobile to practice law. He practiced in Mobile for over 50 years and was retired senior partner of the firm Johnstone, Adams, Bailey, Gordon & Harris. He served for periods of time as a member of the Administrative Conference of the United States, and as a board member of Title Insurance Company, the Lerio Corporation and Southern Electrical and Pipefitting Corporation, and was a lifetime trustee of Mobile Infirmary.

He was a past president of the Mobile Bar Association and a member of a delegation from the American Judicature Society, which met and studied with legal authorities in the former Soviet Union.

Bob gave unselfishly of his time to the Mobile community by serving as president of the Counsel of Social Agencies; director, trustee and president of the

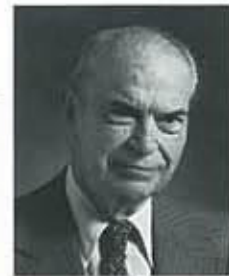
Mobile Opera Guild; director of the Mobile Kiwanis Club; president of the Mobile Junior Chamber of Commerce; director and treasurer of the Mobile Chamber of Commerce; and trustee, deacon and Sunday School superintendent of the First Baptist Church of Mobile.

According to Ben Harris, firm partner, "He was a great lawyer and father figure to many of us, and we will miss him . . . He'd always turn me in the right direction. . . When he started out in the '30s, you had to do everything—corporate, personal injury, civil, criminal. . . On top of that, he worked hard. He was in the office every Saturday into his 80s."

Wade Perry, Bob's grandson, said, "He was the most amazing man I have ever known."

Bob was preceded in death by his wife, Margaret Crossley Adams, and is survived by a son, Robert F. Adams, Jr. and his wife, Carolyn, of Helena, Montana; two daughters, Mary Elizabeth Perry and her husband, Bo Perry, of Mobile, and Laura Phillips and her husband, Charles Phillips, of Winston-Salem, North Carolina; ten grandchildren; two great-grandchildren; and nieces and nephews.

—Donald Briskman, president,
Mobile Bar Association



Rodger Dale Bass, Jr.

Rodger Dale Bass, Jr., a member of the Shelby County Bar Association, died November 3, 2002. He was a graduate of the University of Montevallo in 1987, and the Birmingham School of Law in 1993, having served in the United States Army from 1989 to 1993.

Rodger is survived by his wife, Debbie Jean Bass; his children, Hannah Nicole Bass and Brandon Chase Bass; his parents, Betty Shinn and Rodger D. Bass, Sr.; and many relatives and other friends whom he deeply loved.

Rodger grew up in Maylene, Alabama and gave back to his community by providing legal services for the residents of Maylene and supporting the volunteer fire department there.

As a tribute to a distinguished member of the Shelby County Bar Association, this resolution is offered as a record of our admiration and affection for Rodger Dale Bass, Jr. and of our condolences to his family, friends and colleagues.

—Larry W. Harper, president,
Shelby County Bar Association

Alfred P. Holmes, Jr.

Alfred P. Holmes, Jr., a native of Birmingham, died March 8, 2002. He received his law degree from the University of Alabama in 1953 and served with the Army Corps of Engineers for 29 years. He retired in 1990 as chief of the legal division in the Corps' Mobile District Office.

He was a member of the local, state and national bar associations and past president of the Mobile area Federal Bar Association.

Al also served as an officer in the Army Judge Advocate General Corps, as an assistant U.S. Attorney for the Southern District of Alabama, and as a lawyer in private practice in Mobile for many years.

Al moved here with his family as a child and attended Leinkauf Grammar School and Murphy High School and received his BA and Juris Doctorate degree at the University of Alabama, where he was president of Theta Chi social fraternity and Omicron Delta Kappa national fraternity and a student government leader.

In 1977, Al was inducted into the Southern Debate Hall of Fame at the University of Alabama.

While at the Corps, Al received numerous official commenda-

tions from the Department of the Army and was presented the U.S. Corps of Engineer's Exemplary Service Award in 1990, and, in 1994, he was inducted into the District Gallery of Distinguished Civilian Employees. At the induction ceremony, he was commended for guiding the district through some of the Corps' most protracted and complex litigation involving the Tennessee-Tombigbee Waterway.

Al was also an active member in Ashland Place United Methodist Church, and was serving as chairman of the board of trustees at the time of his death. He also served as an officer in several United Way agencies.

Al was highly regarded for his high ethical standards of conduct and sound legal judgment.

Al left surviving him his wife, Angie Holmes, of Mobile; two sons, Parker Holmes of New York City and Brock Holmes of Mobile; one grandson, Michael Andrew Holmes; several nieces; and other relatives.

—Donald Briskman, president,
Mobile Bar Association



Marshall Timberlake

We pause in our busy lives to remember our friend, and one of the great ADR proponents, Marshall Timberlake. Marshall left us on December 9, 2002, after a brief illness. His wife, Becky, two daughters and other relatives, friends and partners mourn him. Although Marshall's earthly life is over, his work in establishing the foundation for mediation in Alabama will continue.

Marshall was admitted to the bar in 1970, after attending the University of Alabama School of Law, and practiced with Balch & Bingham in Birmingham for over 32 years. As early as 1991, he was taking ADR courses for his CLE requirements, and served with energy and vision as chair of the bar's ADR Task Force from July 1992 to July 1994.

The task force drafted the Alabama Civil Court Mediation Rules that became effective August 1, 1992, (revised June 2002) after supreme court approval. Additionally, as part of its efforts to educate the bar, the judiciary and the public about ADR, the first *ADR Handbook* (now in its third revision) was prepared and published by the task force in 1994. Shortly thereafter, the Board of Bar Commissioners approved the transformation of the task force into a permanent committee.

On July 1, 1994, the Alabama Supreme Court, by court order, created the 19-member, broad-based Alabama Supreme Court Commission on Dispute Resolution. Marshall Timberlake became the first chair of the Commission. He was also selected to be on the Board of Directors of the Alabama Center for Dispute Resolution, Inc., the organization that serves as the state office of dispute resolution and the administrative arm of the commission as ordered by the supreme court, and remained

on both the commission and the board until his death. Marshall Timberlake also was the founder of the ADR Foundation, Inc. in Birmingham.

Four years ago, Marshall was appointed to the Governor's Task Force on State Agency ADR, and served as its co-chair. State agency ADR became the new frontier, and Marshall was eager to go there. The Governor's Task Force developed the *Fellows Program* to educate government executives about ADR, requested an Attorney General opinion regarding the use of mediation by state agencies, requested an executive order encouraging state agencies to use ADR, developed the State Agency Employment Mediation pilot program, and was instrumental in advocating that the governor and attorney general draft a joint memo to assistant AG's requiring mediation clauses in all state contracts. The final task force report was sent to Governor Siegelman a few days after Marshall's death, and was dedicated by the task force to Marshall.

Until the very last, I was sending Marshall the latest ADR information from the organizations of which he was an integral player. We all benefited from his wisdom as a litigator and peacemaker. Marshall said yes to hiring me as the director of the center in 1994. It is impossible to thank him enough, and we will miss him.

For those of you who wish to send cards, the family address is 3349 Brookwood Road, Birmingham 35223.

—Judith Keegan, Montgomery



George Killough Williams, Jr.

On August 9, 2002, George Killough Williams, Jr., a member of the Mobile Bar Association, Alabama State Bar and American Bar Association, departed this life in a local hospital. He was born on July 21, 1928 in Tanner-Williams, Alabama and was a lifelong resident of Mobile County, living in Tanner-Williams the entire time. He was predeceased by his parents, George Killough Williams and Alleen Whitehead Williams.

George graduated from the University of Alabama School of Law in 1950. He devoted his entire practice of law to real estate and title insurance. In 2000, he was recognized for 50 years' service as a member of the Mobile Bar Association and the Alabama State Bar. George was a charter member of Dixie Land Title Association, served as its president and was recognized as title person of the year in 1994. He was also a member of the Mobile Kiwanis Club and served on the board of the Boys Club. George was a member, trustee, officer and legal advisor for Tanner-

Williams United Methodist Church, where he was a lifelong member.

George and his wife, June Watson Williams, were married more than 49 years.

George was known by his many close friends to have one of the best legal minds regarding real estate at the Mobile bar, and that his word was his bond. He had a host of friends among the bar who sought his help and advice over his many years of practice, and he became an expert in real estate law.

George is survived by his wife, June, and two sons, Watson Knox Williams and Kenneth Lee Williams; five grandsons; two sisters; and aunts, nieces and nephews.

—Donald Briskman, president,
Mobile Bar Association



Horace G. Williams, III

The Third Judicial Circuit Bar Association lost one of its most popular lawyers, Horace G. Williams, III on August 26, 2002 at the age of 40. Chip was a native of Montgomery but he spent most of his life in Eufaula, where his father, Horace, practiced law for many years. He earned his college degree from Troy State University. He attended Jones School of Law and became a member of the Alabama State Bar in 1996.

Prior to practicing law, Chip was an investigator for the Third Judicial Circuit's District Attorney's Office for a number of years. He joined his father's law practice in 1996, which became the firm of Williams, Potthoff, Williams & Smith in Eufaula.

Chip was a friend to all, as was evidenced by the more than 900 people who attended his funeral visitation at his beloved First Baptist Church of Eufaula.

Chip was very active in his community, working and devoting his time as a host for the Little League World Series held in Eufaula, and as a former president of the Eufaula Rotary Club and the United Way of Greater Barbour County. He served the local United Way in every capacity at one time or another.

Chip was a loving and devoted husband to his wife, Sheila, and father to his two girls, Shelby and Jaelyn. Despite his professional, civic and church responsibilities, Chip always found time for his wife and daughters, rarely, if ever, missing a dance recital, school program or cheerleading routine. Chip's devotion to his family extended beyond his immediate family, however. He was devoted to his elderly grandmother, who resides in a domiciliary in Eufaula, where he visited almost daily and took care of her personal business and needs.

Chip was a tenacious lawyer who fought hard for his clients, helping people with legal needs regardless of whether they

showed up at his office in tailored suits or overalls. He treated all of his clients the same, regardless of the size of their pocket books. And, oftentimes, he would go to the office before 5 a.m. to make the time for his various activities during his long, busy days.

In his spare time, Chip was an avid golfer with an extraordinary gift for crushing the ball. Of the last nine tournaments Chip played in, he won the long drive competition in every one. He also organized a charitable golf tournament for his friend Robert Johnson, a church custodian and avid golfer who also died of a massive heart attack a few years back. He and one of his friends organized this tournament to help raise money for the Eufaula Boys and Girls Club. Chip's ability to hit a golf ball was such that even his preacher couldn't resist talking about it when eulogizing him, calling it "unbelievable."

Chip was also an active member of First Baptist Church, where he led a Bible study class for young boys, and served as a deacon. He was active in many aspects of church life, including Sunday School and men's prayer breakfast group. During football season, he cooked breakfast for local high school football players at the church on Friday mornings. Dr. Ken Bush, pastor of First Baptist Church, which Chip attended since an early age, not only was Chip's pastor also one of his best friends and his favorite golf partner. As Dr. Bush said, "This man had a heart as big as both oceans in giving himself."

Most importantly, however, as Dr. Bush told the congregation of an estimated 800 people who filled the church for his funeral, "Chip grew and matured and became a strong disciple of Jesus Christ."

—Joel P. Smith, Jr., Eufaula

George F. Wood

George F. Wood, a distinguished lawyer and a founding member of the University of Mobile, died at his home at the age of 85 on March 14, 2002.

George was born in Washington County, Alabama on December 11, 1916. He practiced maritime law with the firm of Pillans, Reams, Tappen, Wood & Roberts, as well as the successor firms, from 1945 until his retirement in 1981. He served as president of the Mobile Bar Association in 1961 and as associate editor of *Maritime Cases*.

He was both a founding and a lifetime trustee for the University of Mobile, and he also wrote the charter for the university. He was the faculty and curriculum chairman for the board of trustees at the University of Mobile. In 1981, he received an honorary doctor of law degree from the university.

University Chancellor William K. Weaver, Jr. remembered Wood as a man of exemplary character. Dr. Weaver remarked: "George was an outstanding member of our Board of Trustees and a member of our first board. He was just one of the most supportive individuals you could imagine. He was very supportive of me. I spent a lot of time in his office over those years getting guidance and advice. He was an unusual person. He was a wonderful example for everyone who knew him."

George was also a charter member and life deacon of Springhill Baptist Church, where he was selected by the congregation as a deacon for every eligible term in the church's 52-year history, and was elected chairman of the deacons six times. He taught the first men's Sunday School class and continued teaching until one month prior to his death. During his years

there, he served as superintendent of the teacher training department and personally trained more than 200 Sunday School teachers. The Reverend Drew Gunnels, retired pastor of Springhill Baptist Church, noted that George taught the same Sunday School class for as long as the church has existed. He was a good man in every sense of the word.

He also wrote *Teaching and Learning With Adults in Sunday School*, which was adopted by the Sunday School Board of the Southern Baptist Convention, and he was invited to teach the book throughout the Southern Baptist Convention at numerous teaching sessions in Alabama, Florida and North Carolina. He was honored by the Mobile Junior Chamber of Commerce as the Christian Lay Leader of the year in 1977. He was honored by the Mobile Junior Chamber of Commerce as the Christian Lay Leader of the Year in 1977.

He was a graduate of Springhill College in 1937, and later received his law degree from the University of Alabama in 1940. He served in the U.S. Navy in World War II from 1941 to 1945, attaining the rank of Lieutenant Commander. He received a Bronze Star as captain of supply ship LSM-228 during the landings in Okinawa.

George is survived by his wife, Helen Wood; one son, Marcus Wood; one daughter, Judith Morgan; and four grandchildren.

—Donald Briskman, president,
Mobile Bar Association



Boling, Jefferson Davis

Birmingham

Admitted: 1950

Died: November 18, 2002

Duck, John Victor

Fairhope

Admitted: 1957

Died: December 16, 2001



Fincher, Jim Clay

Gulf Shores

Admitted: 1967

Died: November 10, 2002

Greene, Edward Chesley

Mobile

Admitted: 1976

Died: November 24, 2002

Johnson, David Cromwell

Birmingham

Admitted: 1972

Died: January 2, 2003



By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

Organizational Session

The legislature met in organizational session on January 14, 2003. The senate organized itself giving power to the president pro tem of the senate who is again Senator Lowell Barron of Fyffe, Alabama. Lawyers obtaining leadership positions are: **Senator Roger Bedford**, Russellville, chair, Finance and Taxation—General Fund; **Senator Hank Sanders**, Selma, chair, Finance and Taxation—Education Fund; **Senator Rodger Smitherman**, Birmingham, chair, Judiciary; **Senator Zeb Little**, Cullman, chair, Agriculture, Conservation and Forestry; **Senator Pat Lindsey**, Butler, chair, Economic Expansion and Trade; **Senator Phil Poole**, Moundville, chair, Governmental Affairs; and **Senator Myron Penn**, Union Springs, chair, Tourism and Marketing.

The house re-elected Representative Seth Hammett as speaker. Lawyers who obtained leadership positions in the House of Representatives are: **Representative Demetrius Newton**, Birmingham, speaker pro tem; **Representative Marcel Black**, Tusculumbia, chair, judiciary; and **Representative Ken Guin**, Carbon Hill, chair, Constitution and Elections.

With only 11 lawyers in the senate and eight in the house of representatives, the Law Institute has again been asked to provide legal counsel to the senate Judiciary and to 15 committees of the house of representatives.

Major Law Revisions Before the 2003 Regular Session

The following major revisions of law are being considered by the legislature. All are the results of years of study by committees of the Alabama Law Institute.

Residential Landlord and Tenant Act

Alabama is one of only two states that does not currently have a Residential Landlord-Tenant Act. This draft uses as its guide the Uniform Residential

Landlord and Tenant Act, adopted in 20 states.

The Act applies only to residential tenant relationships that begin after January 1, 2004.

The Act provides that the landlord can obtain a security deposit which must be refunded unless used to make repairs due to damage caused by the tenant. The landlord must comply with housing and building codes which materially affect health and safety and make all repairs necessary to keep the premises in a habitable condition.

The tenant must also comply with all applicable building and housing codes affecting health and safety. They must also keep the premises clean and safe, and take care to not negligently damage the property, or conduct themselves so as to disturb their neighbor's enjoyment of the premises.

Either party can terminate a lease for a material breach of the agreement by giving a 14-day notice. If the defect is so minor that the cost of the repair is less than half a month's rent, the tenant may have the repair work done and deduct the cost of the repairs from the next month's rent. Any failure of the landlord to maintain the premises or provide heat and water is a breach of the lease. The tenant must give notice of this breach of the lease to the landlord. The bill also provides for an eviction proceeding that is an exclusive remedy under this Act. Under the eviction proceeding the landlord may obtain an eviction, rent, monetary damages or other relief governed by the Rules of Civil Procedure. The process is similar to the current unlawful detainer provisions which provide three methods for protecting notice. Notice may be given to the tenant personally or delivered to the person residing on the premises, or after reasonable effort is made to give personal notice, and if no person is found residing on the premises, notice may be given by posting a copy on the door and on the same day mailing notice of the eviction to the tenant.

The Act, although effective January 1, 2004, does not affect leases entered into before the effective day of the Act which are not extended or renewed after that date.

For a more exhaustive review of the Act, read the summary in the November 2, 2002 *Alabama Lawyer* or review the Act in its entirety on the Law Institute's Web site at www.ali.state.ua.us.

Alabama Uniform Interstate Enforcement of Domestic Orders Act

This Act provides a uniform system for enforcement of domestic violence protection orders across state lines. The full faith and credit provisions direct states to honor valid protection orders issued in other jurisdictions and to treat those orders as if they were their own. The Act has two purposes: one, to define the meaning of full faith in credit as it relates to Interstate Enforcement of Domestic Violence Protection Orders, and two, to establish uniform procedures for effective interstate enforcement.

Individuals who are covered by a protection order may, but are not required to, register a foreign protection order with an enforcing state. This Act completes a series of interstate family laws that have been passed by the legislature over the past several years, in particular the Uniform Interstate Family Support Act and the Uniform Interstate Child Custody Jurisdiction and Enforcement Act.

Uniform Anatomical Gift Act

Alabama currently has the 1968 Uniform Anatomical Gift Act which has been adopted in all 50 states. It is codified at § 22-19-41 through §22-19-47. The 1968 Uniform Act has been updated and has already been passed by half the states.

It is estimated that at any one time 34,000 people are waiting for a transplant organ. A recent poll showed that 75 percent of the people are willing to donate an organ but organs come from only 15 percent of the people.

The Act simplifies the manner for making an anatomical gift. It also specifies the circumstances in which coroners, medical examiners or other local public officials may be permitted to

remove a part of the body for the purpose of transplantation.

The bill clarifies the rights of parties involved in the donation and the authority of individuals involved in the procedures for removing and transplanting a part. It is not a major change from our current law but is more simple since the "document of gift" is not required to be witnessed in the same manner as wills. The bill provides that the subsequent revocation, suspension, expiration or cancellation of a license that provides the authorization for an organ donation does not invalidate the anatomical gift.

The Alabama legislature will annually honor the memory of individuals who have made a "gift of life" to another individual during the previous year by their generous donation pursuant to the Alabama Uniform Anatomical Gift Act.

Major Revisions Under Study

The Alabama Law Institute currently has committees drafting the following laws:

- * Business Entities Code
- * Parentage Act
- * Trust Code
- * Securities Act

The next *Alabama Lawyer* article will review the work of the Trust Code and the Securities Act revision.

The regular session of the Alabama legislature began on March 4, 2003 and may hold 30 legislative days within the 105 days allowed under the Constitution. The session must end by June 16, 2003.

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 visit our Web site at www.ali.state.al.us.

Robert L. McCurley, Jr.

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

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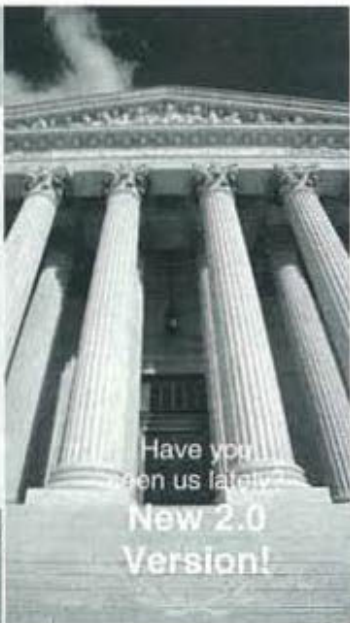
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J. Anthony McLain

Lawyer May Seek Appointment of Guardian for Client Under a Disability, Or Take Other Protective Action Necessary to Advance Best Interest of Client

By J. Anthony McLain, general counsel

Question:

"Through Legal Services Corporation, I have agreed to represent an indigent individual in a petition to modify his divorce decree to terminate or reduce his child support since he is now unemployed. He quit his job due to a nervous breakdown and has been hospitalized twice for suicide attempts. He has stopped seeking psychological counseling because he is scared of indigent health care systems and has feelings of paranoia about being watched and/or investigated.

"It has now come to my attention that there in fact is an ongoing investigation about his alleged sexual abuse of one of his children two years ago. He has not been allowed visitation with his children in over a year pursuant to terms in the divorce decree for this very reason.

"Every time I talk to him about any facet of his case he has a complete emotional breakdown. He cannot handle any stress right now. I cannot convince him to seek psychological counseling because of his fear of what might be revealed.

"He is so unstable, I do not believe I can proceed with the petition to modify, because I will not be able to get him through a court proceeding or even the discovery necessary to prove his case. He has no immediate family that I can call upon for help.

"I have been approached by opposing counsel (who must represent his client, the ex-wife, who will not consent to a temporary termination of the court-

ordered child support), saying that he would be willing to allow an in-chambers presentation to the judge about our dilemma. If I do so, I will be divulging to the judge that the man has a serious emotional problem that the judge might want me to establish, or he might even order psychological testing to see if my client can adequately assist me with the case. In either event, if the man goes to any counselor, further evidence would be revealed about his serious feelings of guilt and remorse which could be used against him in a criminal investigation.

"I cannot counsel with my client as to which course to take because he cannot deal with conflict without an emotional breakdown and I feel this could jeopardize his life (i.e., another suicide attempt and/or because he is incapable of making rational decisions). On the other hand I cannot leave him without relief from the decree of divorce because the arrearages would just keep adding up at \$911.56 per month. (He was formerly employed at a very good wage working in an intensive care unit at a local hospital which caused such a high child support award). I am convinced my client's emotional instability is real and I have experience and training to make that judgment.

"How must I proceed in properly representing my client?

"This is, of course, urgent because a trial date is coming up in a few weeks and I am further concerned for my client's well being."

Answer:

The Alabama Rules of Professional Conduct allow you to seek appointment of a guardian for your client, or to take any other protective action if you reasonably believe that your client cannot adequately act in his own interest. Further, the rules allow you to disclose such confidential information as may be required to adequately represent your client and advance your client's interest.

Rule 1.14, Alabama Rules of Professional Conduct, states as follows:

"Rule 1.14 Client Under A Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

The comment portion of Rule 1.14 takes note of the fact that disclosure of the client's disability could adversely affect his interests. The comment directs that the lawyer may seek guidance from an appropriate diagnostician in furtherance of the client's best interest.

The issue which you face requires consideration of the obligation of confidentiality, but also requires that you assess the situation and make a determination as to what you feel would be best, under the totality of the circumstances, for your client's interest. In RO-90-67, the Disciplinary Commission stated that Rule 1.14 "... [R]ecognizes that a lawyer, on occasion, may best serve a client by taking action that, on first blush, might appear to be adverse to the client."

In RO-95-03, the Disciplinary Commission reasoned that a lawyer confronted with such a dilemma must determine what is in the best interest of the client based on the lawyer's analysis of all aspects of the situation, including opinions of medical experts. The Commission further stated:

"Much of the burden of this decision is placed on the lawyer who must keep foremost in his mind the increased standard of responsibility when dealing with a disabled client. He must assess all aspects of the situation, including expert medical opinions, balancing the client's ability to communicate and to

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appreciate the serious decisions to be made. If the lawyer has doubts, he should resolve those doubts in a manner that best serves his client. The lawyer should also appreciate the Court's increased concern in matters involving lawyers and their representation of incompetent clients. 'The normal limitations on a lawyer's self-enrichment at the expense of a client are applied with enhanced strictness when the client is a child or otherwise not capable of making fully informed and voluntary decisions.' Wolfram, *supra*, p.159."

Hazard and Hodes, in their treatise *The Law of Lawyering*, deal with Rule 1.14 and give an illustrative case wherein a lawyer is representing a criminal defendant with diminished capacity. Hazard and Hodes determined that the lawyer acts properly in urging his client, who has diminished capacity, to accept a plea bargain offered by the prosecution and to waive a possible insanity defense, even though it would mean a conviction on the client's record and a short jail term. Hazard and Hodes conclude that the lawyer may judge that his client's long term best interest would be best served by accepting a short jail term rather than an indeterminate stay in a mental institution. Hazard and Hodes feel that in close cases, the lawyer "cannot be disciplined for any action that has a reasonable basis and arguably is in his client's best interests." Section 1.14: 201 Finally, Rule 1.6, Alabama Rules of Professional Conduct,

deals with "confidentiality of information." Subsection (b) of Rule 1.6 allows disclosure of information by a lawyer which is otherwise confidential if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which the lawyer believes is likely to result in imminent death or substantial bodily harm. The comment provision to Rule 1.6 allows that the lawyer has professional discretion to reveal information in order to prevent such consequences. Therefore, if you determine that the best interest of your client would be served by making disclosure to the court of your client's condition, and the possibility that he might harm himself, and that protective measures should be taken to prevent such harm, the Rule would allow such. In conjunction with Rule 1.14, if you make this determination, then you could seek appointment of a legal representative for your client to further protect your client's interest.

There is no definitive standard which can be applied in such a situation to guarantee the best result. The rules are fashioned to allow the lawyer to analyze the client's emotional state, and the interest to be advanced by the lawyer on behalf of the client, and then pursue whatever action the lawyer deems best under obviously difficult circumstances. Once the lawyer has determined what he feels to be the proper course of action to best serve his client, the rules allow the lawyer to do what is necessary to advance the interest of the client, while, at the same time, ensuring protection of the client and his well being. [RO-95-06] ■

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2003. Nominations should be prepared and mailed to:

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

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

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

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

Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available for distribution by bar members and local bar associations.

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Alabama State Bar Resolutions *Lawyers Render Service*

In keeping with President Fred Gray's theme of "Lawyers Render Service," the Board of Bar Commissioners recently recognized two Alabama lawyers, T. Massey Bedsole of Mobile and Richard P. Carmody, Jr. of Birmingham, as examples of lawyers who render service to their clients, communities and profession. If there are lawyers you know who should be considered for the service they have rendered, please contact Keith Norman at the state bar, (334) 269-1515 or exec@alabar.org.

T. Massey Bedsole

WHEREAS, T. Massey Bedsole has practiced law for 56 years, rendering years of outstanding service to his many clients; and

WHEREAS, T. Massey Bedsole has rendered a lifetime of service to the public in time of war with the United States Naval Air Corps, and in time of peace by service to the First Baptist Church of Mobile, Community Chest, Mobile Rescue Mission, Home Vision Board of the Southern Baptist Convention, Mobile Area Chamber of Commerce, Southern Seminary Foundation, Junior Achievement of Mobile, Inc., Downtown Mobile Unlimited, the University of Alabama as Trustee and Trustee Emeritus, Alabama Public Affairs Research Council, Mobile College (now the University of Mobile), the Alabama Women's Hall of Fame, the Governor's Task Force on Economic Recovery, and Westminster Village, and

WHEREAS, T. Massey Bedsole has rendered a lifetime of service to the profession of law especially through his work with the Alabama State Bar, the University of Alabama School of Law and the Mobile Bar Association; and

WHEREAS, T. Massey Bedsole has unselfishly given his time and assistance to several generations of his fellow lawyers; and

WHEREAS, in such service, T. Massey Bedsole epitomizes **Lawyers Rendering Service** to clients, to the public and to the profession;

NOW, THEREFORE, BE IT RESOLVED that the Board of Bar Commissioners of the State Bar this day assembled pays its highest respect and expresses its deepest gratitude to T. Massey Bedsole of the Mobile Bar for service to the public and to the profession.

DONE this 6th day of September, 2002.

—Keith B. Norman, secretary

Richard P. Carmody

WHEREAS, Richard P. Carmody, a partner in the law firm of Lange, Simpson, Robinson & Somerville, LLP, has practiced law for 27 years, rendering outstanding service to his many clients; and

WHEREAS, Richard P. Carmody has rendered many years of distinguished public service that includes his serving as state chair of the National Conference for Community and Justice 2000-2002; as trustee of St. Vincent's Hospital Foundation; as a member of the Clergy Retirement Board of the Catholic Diocese of Birmingham; as chair of the Lawyers Division, United Way Campaign 1993 and 1995; as a member of the National Conference for Community & Justice (2000, 2001) Walk-As-One where he took first place in individual fundraising (2000, 2001); as a member of the firm's Adopt-A-School team, as president and subsequent board member of Birmingham Council of Campfire, Inc.; and as a volunteer in the BEAT Project in Ensley, which builds houses for the underprivileged; and

WHEREAS, Richard P. Carmody has rendered notable service to the legal profession by virtue of his work with the Alabama Law Institute where he served on committees on revising articles 3, 4, 4A, 5, and 9 of the Uniform Commercial Code, and with the Volunteer Lawyers Program representing indigents in bankruptcy court; and

WHEREAS, Richard P. Carmody has unselfishly given his time and assistance to several generations of his fellow lawyers; and

WHEREAS, in such service Richard P. Carmody epitomizes the state bar's theme, **Lawyers Rendering Service** to clients, to the public and to the profession;

NOW, THEREFORE, BE IT RESOLVED that the Alabama State Bar Board of Commissioners this day assembled pays its highest respect and expresses its deepest gratitude to Richard P. Carmody of the Birmingham Bar for his service to the public and to the profession.

DONE this the 25th day of October, 2002.

—Keith B. Norman, secretary

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THURSDAY, JULY 17 Bench & Bar Luncheon

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FRIDAY, JULY 18 Opening Plenary

James W. McElhaney — Used judiciously, humor can be a great tool in the courtroom. You don't want to miss this session with this distinguished scholar in trial practice and lecturer in trial advocacy. McElhaney also serves as senior editor and columnist for *Litigation*, the journal of the ABA Section of Litigation. See why "Make 'Em Laugh" can make sometimes make good sense.

SATURDAY, JULY 19 Morning Convocation

Millard Fuller, founder of Habitat for Humanity and president of Habitat for Humanity International (HFHI). Since Habitat's founding, his leadership has helped forge Habitat into a worldwide Christian housing organization with more than 625,000 people now having safe, decent, affordable shelter due to Habitat's work around the world. Fuller received the Medal of Freedom, the Harry S. Truman Public Service Award, and the Martin Luther King, Jr. Humanitarian Award. Hear firsthand about his outstanding leadership and contributions toward meeting the goal of eliminating poverty housing worldwide. Fuller is a member of the Alabama State Bar.

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A Fungus Among Us: The New Epidemic of Mold Claims

BY JULIE S. ELMER

Ed McMahon says it killed his dog Muffin. Erin Brokovich has it. A family in California torched their house to get rid of it. A family in Texas won a \$32 million verdict because of it. What is it? It is mold, and it is making front page news across the country.

Molds are a type of fungi, and fungi comprise a quarter of the Earth's biomass. Because mold is everywhere, human exposure to it is impossible to avoid. Nevertheless, during the past couple of years mold has become the new hot topic for many lawyers, who allege that mold has toxic effects on humans when they are exposed to it indoors. In fact, the Insurance Information Institute reports that approximately 10,000 mold-related lawsuits are pending across the country. The theory of many of these lawsuits is that mold, while not harmful when dispersed throughout the natural environment, has adverse effects on humans when it grows in enclosed spaces, such as homes and office buildings.

The current explosion in mold litigation is to some degree a natural outgrowth of other toxic tort litigation and heightened public awareness of indoor air quality. In addition, the energy crisis of the 1970's led to the construction of more energy-efficient buildings, in which fresh air does not circulate as freely as it does in older structures. If mold begins growing in part of a building, powerful modern heating and air-conditioning systems can accelerate the spread of mold spores throughout the building. Some people believe that the population boom in the Sunbelt, where the majority of mold claims are being filed, also has contributed to the rise in mold claims. Their theory is that contractors cut corners and used unskilled workers and lower-quality building materials to keep up with the demand for new housing. Low-quality construction potentially can lead to water damage, and water damage potentially can lead to mold growth. Of course, the publicity surrounding sensational jury verdicts in a few mold cases also has contributed to the surge in mold claims.

Whatever the reason for the sudden obsession with mold, it is now being blamed for a variety of health complaints from dizziness, chronic fatigue, nosebleeds, headaches, and respiratory illnesses to impaired immune function, mental confusion, asthma, and even some cancers. In addition to filing personal injury claims, many are blaming mold for damage to property and reductions in property values.

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The nationwide rise in mold claims comes with a staggering price tag. For example, during the year 2001, mold-related expenses cost the homeowners insurance industry well over \$1 billion. As a result, many insurers have begun issuing special endorsements to exclude coverage for mold-related claims. Other insurers have stopped writing policies altogether in states, such as Texas and Florida, with large numbers of mold claims.

This costly trend has found its way to Alabama. Most Alabama lawyers who practice construction defect or landlord-tenant litigation already have had their first confrontation with mold. Real estate lawyers now regularly consider mold issues in real estate transactions, and there has been a sharp increase in lawsuits alleging nondisclosure of prior water damage and mold in real estate transactions.

When thinking about mold, the three key things to keep in mind are causation, causation and causation. Understanding the various potential causes of indoor mold growth can help prevent it from developing in the first place. If mold

does develop in a home or office building, successful remediation requires that the underlying cause of the mold be addressed. In addition, pinpointing the underlying cause of mold is frequently critical to determining whether insurance coverage for remediation costs, property damage, and personal injury claims exists. Finally, in the event of an alleged personal injury claim based on an occurrence of mold in a home or office building, attacking the alleged causative link between the mold and the purported injuries is one of the most effective ways to successfully respond to such a claim.

With these points in mind, this article is intended to provide a general overview of mold litigation. The first section outlines some of the potential defendants and theories of recovery. The second section is an introduction to mold prevention. The third section discusses general guidelines for the remediation of mold-infested property. The fourth and fifth sections focus on the defense of and the use of experts in mold lawsuits. The sixth section is a general discussion of some of the key insurance coverage issues relating to mold.

Potential Mold Defendants

The list of potential mold defendants includes parties whose actions are alleged to have contributed in some way to conditions conducive to mold growth; parties who fail to properly remediate mold growth; parties who fail to disclose prior mold infestations or conditions which could lead to mold infestations; and parties who fail to detect mold infestations or conditions which could lead to mold infestations. The list of potential mold defendants is practically endless, but may include sellers of real estate, real estate agents, general contractors, roofing, plumbing and HVAC contractors, engineers, architects, building owners and managers, building materials and appliance manufacturers, building and home inspectors, employers, insurance carriers, and environmental testing and remediation firms.

Possible causes of action against these potential defendants include negligence against building inspectors, contractors, architects, and remediation firms; breach of implied warranty of habitability



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against landlords; bad faith against insurers that do not respond promptly or adequately to mold or water damage claims; fraud and suppression against property sellers and real estate agents who do not disclose prior mold or moisture problems; product liability or negligence against building materials and appliance manufacturers; and workers' compensation claims against employers whose employees are exposed to mold in the workplace.

Causation is decisive in determining if, and to what degree, any of these potential defendants may be liable in a mold case. In Alabama, a joint and several liability jurisdiction, a defendant can try to use expert testimony to show that its actions did not contribute in any way to the mold growth. In a comparative fault jurisdiction, a defendant can use expert testimony to show that the actions of the plaintiff or of other defendants were more significantly causally related to the mold growth than its own actions.

Mold Claim Prevention

The best way to prevent mold claims is to prevent mold. Mold needs both a food source and a water source in order to thrive. Food sources for mold are plentiful indoors and include wallpaper, drywall, ceiling tiles, and carpet. It is almost impossible to eliminate mold food sources from most structures, because these food sources are also useful building materials. Therefore, the key to preventing mold is eliminating water sources. In houses and office buildings, water sources which typically can lead to mold include sudden events such as floods, windstorms, and acute plumbing leaks; structural problems such as leaky roofs and damp basements; and chronic problems resulting from poor maintenance, such as slow plumbing or HVAC system leaks.

During the construction or remodeling of a structure, contractors, architects, engineers and designers must consider all avenues of potential water intrusion, and then design and construct the building to prevent such intrusion. Key water control strategies include grading the land to slope away from the building to prevent water from collecting at the foundation; waterproofing the foundation; installing adequate flashing, gutters and downspouts to carry water away from the building; ensuring adequate ventilation of crawl spaces, basements and attics; venting showers and moisture-

generating appliances to the outdoors; and refraining from installing carpet in moisture-prone areas such as basements, bathrooms and kitchens.

Employers, building owners, and property managers need to regularly inspect buildings under their control for evidence of water damage. If damage is found, prompt action should be taken to locate and correct the source of the water incursion. Any wet or damp spots should be cleaned and dried within 48 hours to prevent mold growth. These same parties also should perform regular maintenance on plumbing, HVAC systems, appliances, roofs and gutters, and maintain indoor humidity levels to prevent moisture condensation.

Building owners and managers, employers, and property and casualty insurers should respond promptly to reports of water damage. Timely clean up and repair of water damage can prevent or minimize mold growth. Moreover, parties that respond to reports of water damage with care can avoid the ill will that may lead to acrimonious litigation down the road. Defendants in several of the large-verdict mold cases which have been reported, either ignored complaints of water damage and mold, or delayed their responses to those complaints.

In real estate transactions, property sellers and their agents should disclose prior water damage and mold. Property with a significant mold history should be inspected by a professional, who then can provide documentation of remediation. In fact, a growing number of potential home buyers are demanding pre-purchase mold testing. In states such as Texas, where mold claims generated \$853 million in insurance losses in 2001, many prospective homeowners cannot get insurance without a pre-purchase mold report. California has enacted the Toxic Mold Disclosure Act, which requires anyone selling, leasing or transferring property to disclose any known potential dangerous mold problems. In conjunction with the Act, the California Department of Health Services is expected to develop permissible exposure limits for molds by July 1, 2003. Other states are considering similar mold disclosure legislation.

Mold Remediation

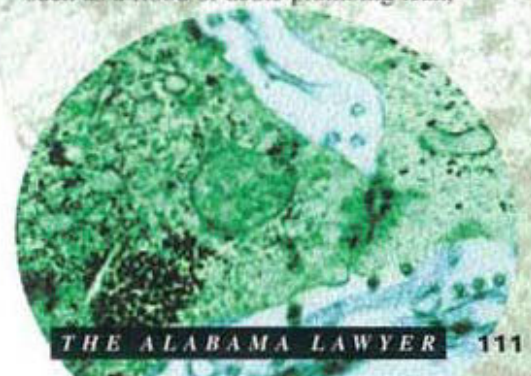
Smell and sight are the best ways to detect mold. According to the Environ-

mental Protection Agency (EPA), if mold is readily apparent, tests to identify the types of mold present or measure the levels of mold present are not needed.

Rather, the EPA recommends that any mold be cleaned up and all sources of water intrusion repaired. Mold tests are often expensive, and can produce inconclusive or misleading results.

If a party nevertheless believes it is necessary to test for mold, the testing firm should be selected with caution. The boom in mold claims has caused mold testing and remediation firms to spring up quickly, and the mold remediation industry is largely unregulated. Some companies and individuals have taken advantage of the media hype to charge inflated prices for their services. To avoid potential conflicts of interest, the firm retained to do the testing should not also be hired to do the remediation. In addition, it is important to ensure that a testing firm which takes indoor air samples also concurrently takes outdoor air samples, to establish baseline levels of naturally occurring mold. An extremely crude rule of thumb is that indoor mold levels should not be significantly higher than outdoor mold levels.

Regardless of whether testing is done, the key thing to remember about the remediation of mold is that it is not enough simply to clean up the mold. It is crucial that the ultimate cause of the mold be addressed, or the problem will simply recur. The EPA and the Centers for Disease Control (CDC) have provided general guidelines for mold remediation. If mold is found, the first step is to identify and repair the moisture source. In most cases, the mold then can be removed from hard surfaces such as tile, wood floors, plaster walls and kitchen cabinets with a ten percent bleach and water solution. According to the CDC, if soft and porous materials such as carpets and ceiling tiles are infested with mold, they will usually have to be discarded and replaced. After a sudden water event such as a flood or acute plumbing leak,





the affected area should be promptly wiped down with a ten percent bleach and water solution to prevent mold growth.

New York City is the first jurisdiction to issue guidelines for mold remediation, but other jurisdictions are expected to follow suit. The *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*, issued by the New York City Department of Health in 2000, are not legal mandates, because there are presently no federal, state or municipal regulations which establish "safe" or "unsafe" levels of mold exposure. However, the *Guidelines* do recommend different methods of mold cleanup depending on the amount of mold present.

California, Texas, New Jersey, Indiana and Maryland have organized task forces or proposed legislation with a view toward establishing mold exposure guidelines. In June 2002, Congressman John Conyers of Michigan introduced federal legislation to regulate mold inspection and remediation firms, and to coordinate mold research among various federal agencies. A similar bill is expected to be introduced in the United States Senate this year.

Defending Mold Claims

Causation is the Achilles heel of a mold claim. A plaintiff in a mold personal injury case must establish causation on a number of different levels. First, she must establish the presence of mold. Second, she must demonstrate the cause of the mold and relate that cause to a specific defendant. Third, she must

demonstrate actual exposure to the mold. Fourth, she must establish that the exposure was a dose sufficient to cause health effects. Fifth, she must establish a sufficient causative link between her alleged health problems and the specific type of mold found.

It is difficult for a plaintiff to successfully establish causation on all five levels. First, there are no accepted standards for mold sampling or for interpreting the data collected from such sampling. Second, even if mold is proven to be present in an indoor environment, proving actual human exposure can be quite difficult. Take, for example, the case of *Stachybotrys*, a black mold which can take hold in buildings which have sustained water damage. *Stachybotrys* spores are large and sticky and tend to settle quickly. Therefore, they are not easily airborne. Even if a building has an extensive and active *Stachybotrys* infestation, *Stachybotrys* spores rarely will show up at any significant level in air sampling tests. As a result, it is difficult for a plaintiff to prove inhalation exposure to *Stachybotrys* and even more difficult to prove that the exposure has been at a level sufficient to cause health effects. If the mold is growing in a hidden area, the chance of exposure through contact with the skin is also extremely low. Moreover, because there are no distinct biological markers of *Stachybotrys* exposure, there are no simple blood or urine tests to demonstrate individual exposure.

Third, most plaintiffs' experts in mold cases rely on air or bulk sampling, which provide less reliable data than the human dose-response data typically preferred in alleged toxic exposure cases. Air sampling is unreliable, in part, because air particle levels vary widely and continuously according to changes in temperature, humidity, mechanical disturbance, HVAC operation, fan and vacuum cleaner use, and human and animal traffic through the area. Bulk sampling, which in its simplest form consists of pressing clear cellophane tape against a mold-contaminated surface to later be analyzed by a lab, has its own disadvantages. The identification of mold in a surface sample does not necessarily demonstrate that human exposure has taken place, because mold can be present on a surface without dispersing particles into the air. Without

proof of a mode of human transmission, either by ingestion, inhalation, or direct contact with the skin, it is scientifically impossible to link human health complaints to the presence of mold.

Fourth, it is difficult for a plaintiff to establish a sufficient causative link between health problems, other than allergies, and mold. It is well accepted among the medical establishment that molds can cause common allergic reactions in sensitive individuals, which make up about ten percent of the population. The claim that has been making headlines, however, is that certain molds produce byproducts, known as mycotoxins, which allegedly can cause "toxic" health effects, such as memory loss, pulmonary bleeding, chronic fatigue, and neurological damage, even in non-sensitive individuals. At this time, no reliable medical evidence exists to support this claim. Many of the symptoms which allegedly result from mold exposure, such as chronic fatigue, are subjective. A wide variety of alternative causes, ranging from smoking to other illnesses, actually may account for alleged mold-related symptoms. Further, no adequate epidemiological research about mold and its effects on human health exists because mold is so widely found in the natural environment. Therefore, it is hard to find unexposed individuals who can serve as a control group for epidemiological study.

Certain molds do produce byproducts called mycotoxins. There are a few documented cases of human illness related to exposure to unusually high levels of mycotoxins, but none of these cases are linked to living or working in water-damaged buildings. For example, some Russians who ate substantial quantities of mold-contaminated grain during the World War II siege of Stalingrad developed gastrointestinal disorders related to mold. There also have been some reports of cases of hypersensitivity pneumonitis ("farmer's lung") among agricultural workers exposed to extremely high levels of mold spores while working in silos with large amounts of mold-contaminated grain. These cases, however, are not relevant to the types of mold claims in the news and in the courts today.

Mycotoxin-producing molds which may be found in water-damaged buildings include *Penicillium*, *Aspergillus*,

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and *Stachybotrys*. The news media have portrayed *Stachybotrys* as a "toxic mold," even though no toxic effects have been scientifically proven. As a September 2002 report of the Texas Medical Association's Council on Scientific Affairs concluded, public concern about adverse health effects due to the inhalation of *Stachybotrys* spores in water-damaged buildings is not supported by the existing scientific and medical literature.

The only report in the peer-reviewed medical literature which has suggested a potential link between inhalation exposure to *Stachybotrys* in the non-industrial context and human illness is a 1994 CDC investigation of pulmonary hemorrhage in inner-city infants in Cleveland. A number of the affected infants lived in water-damaged public housing where *Stachybotrys* was later found. The CDC ultimately determined that the methodology used in its investigation was flawed, partly because it did not account for alternative causes of illness, such as poor nutrition and the smoking habits of cohabitants, and partly because the air

sampling methods used by the researchers were overly aggressive, thereby skewing the results. In January 2002, the CDC commissioned the Institute of Medicine to begin a new study on the relationship of moldy indoor environments to human health. The study is expected to be completed in the late summer or fall of 2003.

Use of Experts

Because causation is such a key issue, mold cases usually boil down to a battle of the experts. The types of experts which may be used in mold cases include structural engineers, architects, contractors, industrial hygienists, microbiologists, mycologists, allergists, immunologists, toxicologists, neurologists, and neuropsychologists, among others. Structural engineers, architects and contractors may be used to identify the sources and causes of mold. Industrial hygienists may be used to measure the levels of mold in the building and identify the types of mold present. Mycologists are mold experts who may testify about the types of byproducts pro-

duced by certain molds. Medical experts are needed to assess the alleged link between mold exposure and claimed health effects. The need for so many experts obviously makes mold cases expensive to prosecute and defend.

Motions to exclude expert testimony are pivotal in a mold case. The standards used to evaluate such motions differ depending on the jurisdiction. Federal courts and some state courts apply the flexible standard articulated by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-94 (1993). *Daubert* requires an expert's opinions to be relevant and reliable in order to be admissible. There is no particular test for reliability under *Daubert*, but factors a court may consider in determining whether an expert's opinion is reliable include: 1) whether the expert's theory can be empirically tested; 2) whether the expert's theory or study has been published or subject to peer review; 3) whether the known or potential rate of error is acceptable; and 4) whether the expert's method is generally accepted in

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the scientific community. *Allstate Ins. Co. v. Hugh Cole Builder, Inc.*, 137 F.Supp.2d 1283, 1286 (M.D. Ala. 2001).

Alabama state courts still apply the "general acceptance" test set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) to assess the admissibility of expert testimony in civil cases. *Slay v. Keller Industries, Inc.*, 823 So. 2d 623, 625-26 (Ala. 2001). Under *Frye*, a witness who offers opinion testimony as a scientific expert must show that he or she relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the witness is testifying. *Slay*, 823 So. 2d at 626.

Effective use of the available scientific research, which finds no causal relationship between mold and alleged "toxic" health effects, should afford a defendant a good chance of excluding a plaintiff's expert testimony under Alabama's *Frye* standard. In addition, Alabama's standard for medical causation is high, requiring a showing of probable, rather than possible, cause. See *Tidwell v. Upjohn*, 626 So.2d 1297, 1301 (Ala. 1993) (medical causation requires a showing of probable, rather than possible, cause). Given the many levels of causation that a mold personal injury plaintiff must establish, he or she likely will have significant difficulty meeting this standard.

Insurance Coverage for Mold Claims

Causation is also crucial to insurance coverage. Most mold claims are either first party claims against property insurers or third party claims against contractors or other parties under CGL, worker's compensation, or other liability policies. Regardless of the type of policy involved, determining the cause of the mold is frequently the key to determining whether coverage exists. This determination typically requires expert testimony, which affords the parties yet another opportunity to use the *Frye* or *Daubert* tests to exclude their opponents' experts. Many of the potential insurance coverage questions raised by mold claims are beyond the scope of this article. However, two particularly important issues include the enforceability of mold and rot exclusions, and the applicability of pollution exclusions to mold claims.

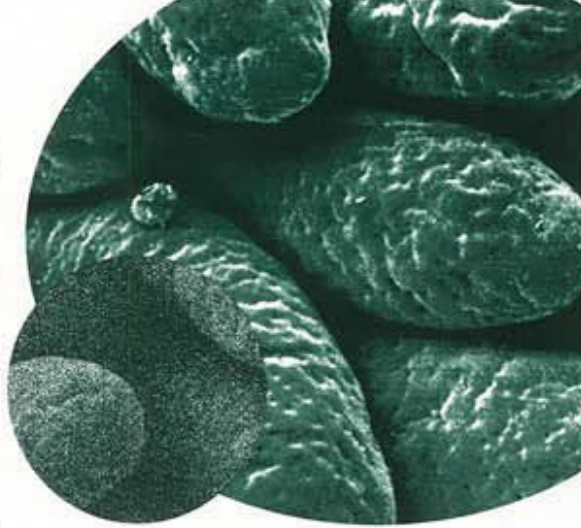
Many insurance policies include gen-

eral exclusions relating to mold and rot. For example, a typical homeowners policy excludes from coverage losses caused by "smog, rust or other corrosion, mold, wet or dry rot." The Alabama Supreme Court has enforced this type of exclusion with regard to losses caused by rot, but has not yet addressed the exclusion in the mold context. See *Koch v. State Farm Fire and Cas. Co.*, 565 So. 2d 226, 230 (Ala. 1990).

Some policyholders successfully have circumvented mold exclusions by arguing that a covered event, such as a windstorm or burst water pipe, is the ultimate cause of mold, making mold simply a result of the covered loss. Policyholders have used various policy terms or legal theories to support this argument. Among them are "ensuing loss" provisions and the "efficient proximate cause" doctrine.

An "ensuing loss" provision is a written provision in an insurance policy which often follows a mold and rot exclusion and provides that the policy nevertheless insures "ensuing covered losses unless another exclusion applies." Determining whether a loss falls within a mold and rot exclusion or is covered by an ensuing loss provision typically requires a significant amount of causation testimony. Various courts have come down on both sides of this issue, depending on the testimony. See *Schloss v. Cincinnati Ins. Co.*, 54 F.Supp.2d 1090, 1094-96 (M.D. Ala. 1999), *aff'd*, 211 F.3d 131 (11th Cir. 2000) (unpublished) (rot-related damage not saved from exclusion by ensuing loss" provision); *Home Ins. Co. v. Dennis D.*, 2000 WL 144115 (Rex. Ct. App.-Houston, Feb 10, 2000) (unpublished opinion) (mold-related damage saved from exclusion by "ensuing loss" provision).

Another causation-intensive argument which can be used to circumvent mold exclusions is the "efficient proximate cause" doctrine. This doctrine provides that when an insured can identify an insured peril as the proximate cause of the loss, coverage exists even if subsequent events in the causal chain are expressly excluded from coverage. *Bowers v. Farmers Ins. Exchange*, 991 P.2d 734, 738 (Wash. App. 2000). In *Bowers*, a Washington appeals court held that several tenants' marijuana cultivation, which created a hot and humid atmosphere in the basement of a rental



house, was the efficient proximate cause of mold damage to the remainder of the house. Because the efficient proximate cause of the loss was the covered vandalism of the marijuana-growing tenants, the landlord's insurance policy covered the mold damage, despite the fact that the policy contained a mold exclusion. 991 P.2d at 738.

In another case, the Eighth Circuit Court of Appeals reversed a summary judgment for a homeowners insurer for further findings as to whether a burst water pipe (a covered peril) or mold (an excluded peril) was the efficient proximate cause of the policyholder's loss. *Shelter Mutual Ins. Co. v. Maples*, 309 F.3d 1068, 1070-71 (8th Cir. 2002). In contrast, a federal court applying Arizona law held that a standard mold exclusion precluded coverage for mold, despite the fact that a covered water event was the ultimate cause of the mold, because Arizona had not adopted the efficient proximate cause doctrine and because the policy expressly excluded coverage for losses caused by mold "regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Cooper v. American Family Mutual Ins. Co.*, 184 F.Supp.2d 960, 962 (D. Ariz. 2002).

It is unclear where Alabama courts will come down on the "efficient proximate cause" doctrine. Alabama adopted an "efficient proximate causation" standard in *Western Assurance Co. v. Hann*, 78 So. 232 (Ala. 1917). However, the Alabama Supreme Court has held that the purpose of the standard is to construe spare policy language and that the standard should not be elevated to a public policy principle used to invalidate unambiguous policy language. *State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293, 314

(Ala. 1999). No Alabama appellate court has yet ruled on the application of the "efficient proximate causation" standard to mold-related claims.

Some insurers have tried to invoke the pollution exclusions which appear in many homeowners' and commercial policies to deny coverage for mold claims. A typical pollution exclusion precludes coverage for losses caused by actual, alleged or threatened release, discharge, escape or dispersal of "contaminants or pollutants." A "contaminant or pollutant" is typically defined as any irritant or contaminant which can, after its release, cause or threaten damage to human health or property.

As of this writing, there are few reported decisions regarding the application of pollution exclusions to mold claims. In *Leverance v. United States Fidelity & Guaranty*, 462 N.W. 2d 218, 232 (Wis. 1990), a Wisconsin appeals court held that the pollution exclusion did not apply to a mold claim because no contaminants were released into the environment. The mold in the building at issue was allegedly the result of moisture trapped within the walls of the structure. *Id.* The court reasoned that the fact that the mold grew over time as a result of the conditions in the building meant that it was not discharged, dispersed, or released into the environment under the terms of the pollution exclusion. *Id.*

On the other hand, a federal court in Texas recently held that a pollution exclusion precluded coverage for a mold claim. *Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 WL 356756, *3 (N.D. Tex. 2002) (slip opinion). In *Lexington Ins. Co.*, the insurance company presented experts who testified that when mold proliferates, it produces both reproductive spores and secondary byproducts (mycotoxins) which are released into the environment. *Id.* The court was persuaded by the expert testimony, and concluded that the release of reproductive spores and mycotoxins brought the mold claim within the pollution exclusion. *Id.* In so doing, the court noted that the Texas Supreme Court had broadly interpreted the

term "pollution" in previous insurance coverage disputes. *Id.* (citing *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W. 2d 517, 519 (Tex. 1995)).

The Alabama appellate courts have not yet addressed the application of pollution exclusions to mold claims, but are more likely to follow the *Leverance* approach than the *Lexington Ins. Co.* approach, if the Alabama Supreme Court's prior decisions are any indication. Unlike the Texas Supreme Court, the Alabama Supreme Court has tended to construe pollution exclusions narrowly and in favor of coverage, particularly when indoor air quality issues are involved. *See, e.g., Porterfield v. Audobon Indemnity Co.*, —So. 2d—, 2002 WL 31630705, *11-17 (Ala. 2002) (pollution exclusion in landlord's CGL policy did not preclude liability coverage for tenant's lead paint personal injury claim); *Alabama Plating Co. v. United States Fidelity & Guaranty Co.*, 690 So. 2d 331, 334-35 (Ala. 1996) (manufacturer's CGL policy was construed liberally to cover unexpected and unintended migration of contaminants into groundwater); *Essex Ins. Co. v. Avondale Mills, Inc.*, 639 So. 2d 1339, 1341-42 (Ala. 1994) (pollution exclusion in liability policy applied to natural environment, not to indoor air quality). Given that mold claims are similar in many ways to other indoor air quality claims, Alabama courts likely will be reluctant to construe pollution exclusions to deny coverage for mold claims.

Although many insurers are excluding mold coverage from their standard policies, some are beginning to offer coverage under separate environmental policies, particularly in the commercial context. This trend will likely create new coverage questions.

Conclusion

Mold litigation is on the rise across the nation and in the state of Alabama. Firms and individuals which have a good understanding of the potential causes of indoor mold will be better prepared to protect themselves from mold lawsuits and effectively handle mold infestations should they occur. In the event a firm or individual is named as a defendant in a mold lawsuit, it is important for the lawyers representing that party to focus on causation, which is critical to determining whether coverage for the mold claim exists, defeating key elements of the claim, and excluding plaintiff's expert testimony at trial. ■

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An Examination of the *Faragher/Ellerth* Defense To **HARASSMENT**

In the Workplace

BY TONI J. BRAXTON



Litigation surrounding hostile work environment or harassment, be it sexual, racial or otherwise, is alive and well in the state of Alabama, as any employment law attorney can attest to. The Supreme Court established with clarity an affirmative defense that may be available to employer's who are charged with creating or maintaining a hostile work environment. However, as with all rules there are exceptions and caveats that must be examined closely when litigating these cases, from both the plaintiff's and defendant's perspective. Following is an analysis of the *Faragher/Ellerth* affirmative defense and some of the pertinent cases that have shaped this area of employment law. The purpose of this article is only to provide a basic overview of the elements of proof that the Eleventh Circuit requires in its determination of an employer's liability for workplace harassment.

Employer's liability for harassment

The Eleventh Circuit has long held, that:

[w]hen an employee's ability to perform his or her job is compromised by discriminatory acts . . . and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate.

Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (citing *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989)). However, the scope of that liability and what defenses may be available depend on the relationship between the harasser and the victim. See *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501, 510 (11th Cir. 2000).

As determined by the Supreme Court, an employer is subject to vicarious liability to an employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 118 S.Ct. 2257, 2270 141 L.Ed.2d 633 (1998). No affirmative defense is available, however, when "the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S.Ct. 2257. An adverse employment action can also include "other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Gupta v. Florida Bd. Of Regents*, 121 F.3d 571, 587 (11th Cir. 2000).

Hence, a Title VII plaintiff can establish her entire *prima facie* case simply by showing that she was harassed by a fellow employee, and that the alleged harasser took a tangible employment action against her. *Llampallas v. Mini-Circuits, Lab., Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998). When no tangible employment action is taken, the employer may then raise an affirmative defense. *Faragher*, 118 S.Ct. at 2293; *Ellerth*, 118 S.Ct. at 2270.

Elements of the Affirmative Defense

The *Faragher/Ellerth* defense has two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher*, 118 S.Ct. at 2293; *Ellerth*, 118 S.Ct. at 2270. Both elements of the defense must be satisfied for the employer to avoid liability, and the defendant bears the burden of proof on both elements. *Frederick v. Sprint/United Management Company*, 246 F.3d 1305, 1313 (11th Cir. 2001).

Anti-harassment Policy

While proof that an employer has an anti-harassment policy with a reasonable complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. *Faragher*, 118 S.Ct. at 2293; *Ellerth*, 118 S.Ct. at 2270.

At the same time, an employer's showing that it has a harassment policy does not automatically satisfy its burden, as in the case where an employer entirely fails to disseminate the policy. *Frederick*, 246 F.3d at 1314. In *Faragher*, the Supreme Court held that this affirmative defense was not available where the employer (1) failed to disseminate its policy against sexual harassment, (2) officials made no attempt to keep track of the conduct of supervisors, and (3) the policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. *Faragher*, 118 S.Ct. at 2293.

The Eleventh Circuit has held that "dissemination of an employer's anti-harassment policy is fundamental to meeting the requirement for exercising reasonable care in preventing sexual harassment. *Madray v. Publix Supermarkets*, 208 F.3d 1290, 1298 (11th Cir. 2000).

In determining if a policy has been effectively published the court may consider whether the victim ever received the policy, whether it was posted, and whether it was clear as to how a complaint should be filed. See *Frederick*, 246 F.3d at 1315. The Eleventh Circuit also considers how familiar management is with the policy and whether it is present in the plaintiff's personnel file. *Miller*, 2002 WL 5354, *6.

Title VII's deterrent purpose was clarified by a 1990 policy statement from the EEOC "enjoining employer to establish a complaint procedure designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." *Madray* 208 F.3d at 1298. Therefore a sexual harassment policy meets the standards set by the EEOC in 1990 by providing to employees alternative avenues for lodging a complaint other than a harassing supervisor. *Madray*, 208 F.3d at 1298. For example, the employer in *Madray* designated appropriate company representatives that were accessible to store employees and then provided phone numbers, including a toll-free number, for employees to make complaints. *Madray*, 208 F.3d

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If you had a membership status change at any time during 2002, you may have been required to earn and report 12 hours of CLE credit by December 31, 2002. Mandatory Continuing Legal Education Rules require attorneys who hold an occupational license (regular membership) any time during the calendar year 2002 to earn 12 hours of CLE credit. If you are not currently a regular member but were a regular member for part of the year you are still required to comply with MCLE Rules. (MCLE Rule 2.5)

For example, if you were inactive or held a special membership and converted to a regular membership during 2002, you are required to obtain 12 hours of CLE credit. If you were a regular member during 2002 but converted to special member or to inactive status you are also required to comply with the 12-hour CLE requirement.

You are not required to obtain 12 hours of CLE credit if you are eligible to claim an exemption from the MCLE Rules. Your exemption, however, must have been claimed on the 2002 CLE reporting form which was mailed to you in early December. If you need to locate approved CLE programs you may request a calendar of approved CLE programs from the ASB CLE department or from the state bar's Web site at www.alabar.org.

Call the Alabama State Bar's CLE department at (334) 269-1515, extension 158, 156 or 117, for more information.

at 1298. The Eleventh Circuit held that policy provided employees with multiple avenues for lodging a sexual harassment complaint outside the supervisory chain of command and was therefore sufficient. *Madray*, 208 F.3d at 1298.

An employer does not always have to show that it has a formal sexual harassment policy to meet its burden of proof; for example, a small employer may show they exercised reasonable care to prevent and correct harassment through informal complaint mechanisms. *Frederick*, 246 F.3d at 1314.

However, unlike the employer of a small work force who might expect that sufficient care to prevent tortious behavior could be exercised informally, larger employers must provide more to escape liability for hostile environments. *Faragher*, 118 S.Ct. at 2293.

Notice of Harassment

When an employer has taken steps, such as publishing a reasonable harassment policy to prevent harassment in the workplace, "an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem." *Coates*, 164 F.3d at 1366. Notice can be provided in numerous ways, however, not all complaints by plaintiffs are considered sufficient to create a duty for the employer to take action.

For example, in *Coates*, the plaintiff, Coates, confided in a co-worker that she was being sexually harassed and the co-worker reported it to the human resources manager on Coates' behalf. *Coates*, 164 F.3d at 1364. The co-worker did not reveal Coates' identity when initially making the complaint, however, Coates later met with the HR manager and expressed her desire that the harassment stop. *Id.* The Eleventh Circuit held in that situation that "[t]his set of encounters leaves no doubt that employer was on notice of the harassment. *Id.*

On another occasion, Coates asked to speak with her direct supervisor, however when asked if the matter was personal or professional, she indicated it was personal and her direct supervisor responded she didn't have time to discuss personal matters. *Id.* At no time did Coates indicate that she wished to lodge a sexual harassment complaint. *Id.* at 1365. Therefore, the Court held that plaintiff's statement did not create a reasonable belief

that the problem bore on her work life and needed to be addressed by her supervisor. *Id.*

On yet another occasion, Coates showed the plant manager a note from the alleged harasser which was of a sexual nature. *Id.* However, she never indicated that her receipt of the note presented a problem about which she was concerned or that she required the plant manager's immediate attention. *Id.* The Court held that the conversation did not "adequately apprise [the plant manager] of the dimensions of the problem or even that there was a problem that required his attention, and he could not therefore reasonably have been expected to act to address it." *Coates*, 164 F.3d at 1365.

The Eleventh Circuit has also held that, where the complaining employee did not indicate that the incident she was reporting was part of an on-going pattern of sexually harassing behavior or that she wanted some action to be taken to stop the harassment, the employer could not have been expected to take action. *Madray*, 208 F.3d at 1300. The rule seems to be that when a harassment policy is in place, which clearly specifies the steps an employee should take to report harassment, then the employer has established when it is deemed to have notice of the harassment. *Coates*, 164 F.3d at 1364. In other words, when one of the individuals designated in an employer's policy to receive harassment complaints is informed of harassment, then the employer is deemed to have been given notice sufficient to obligate it to make a prompt corrective response. *Madray*, 208 F.3d at 1300.

Employee's Failure to Report

The second element of the defense, which must also be proven, is that the victimized employee failed to put the employer on notice of the harassment. This element does not become an issue unless there was some form of reporting procedure in place. While proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of the employee's failure will normally suffice to satisfy the employer's burden. *Faragher*, 118 S.Ct. at 2293; *Ellerth*, 118 S.Ct. at 2270. As the Court has reasoned, once an employer has promulgated an effective anti-harassment policy, "it is incumbent on the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances." *Madray*, 208 F.3d at 1300 (quoting *Farley v. American Cast Iron Pipe*, 115 F.3d 1548, 1554 (11th Cir. 1997)). Consequently, the employer cannot be considered to have been placed on notice of harassment by informal complaints to individuals not designated by the employer to receive such complaints. *Madray*, 208 F.3d at 1300. This rule is very important when the notice alleged is constructive as opposed to actual.

Constructive notice of harassment depends on the following factors: (1) the remoteness of the location of the harassment as compared to the location of management; (2) whether the harassment occurs intermittently over a long period of time; (3) whether the victims were employed on a part-time or full-time basis; and (4) whether there were only a few, discrete instances of harassment. *Miller v. Kenworth of Dothan, Inc.*, —F.3d—, 2002 WL 5354 (11th Cir. 2002)(citing *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997)). Constructive notice has been found when the harassment occurred daily, in the pres-



ence of others and in the presence of management. See *Miller*, 2002 WL 5354, *5.

Moreover, the Eleventh Circuit has recognized that "when an employer has promulgated an effective and comprehensive anti-harassment policy that is aggressively and thoroughly disseminated to its employees, an employee's failure to utilize the policy's grievance process will prevent constructive knowledge of such harassment from adhering to the employer. *Miller*, 2002 WL 5354, *5 (citing *Farley*, 115 F.3d at 1554).

There are also circumstances where an employee's non-compliance with the complaint policy may be reasonable under the circumstances. *Frederick*, 246 F.3d at 1314. For example, there may be extenuating circumstances that might explain why the plaintiff failed to timely use the complaint procedures, such as the fact that she never received a copy of the policy and was unclear as to how to report her complaint. *Frederick*, 246 F.3d at 1316. There may also be evidence that she was persuaded by another employee not to pursue her complaint. *Frederick*, 246 F.3d at 1316. The question of whether an employee followed the procedures established in the company's policy in a reasonable manner is an issue of fact to be determined by a jury. *Breda v. Wolf Camera & Video*, 222 F.3d 886, 890 (11th Cir. 2000).

Employer's Response

An employer need not act instantaneously, but must act in a reasonably prompt manner to respond to the employee's complaint. *Frederick*, 246 F.3d at 1314 (citing *Madray*, 208 F.3d at 1302). In order to determine if an employer's response was appropriate, the Court must determine when the employer had notice of the harassing behavior. *Madray*, 208 F.3d at 1299. That

does not necessarily mean when the plaintiff complained, as notice of harassment can come from other sources, as well.

There may be cases where the evidence indicates the employer had notice of the harassment prior to the party's complaint from other sources. For example, in *Dees v. Johnson Controls World Services*, 168 F.3d 417, 422 (11th Cir. 1999), an HR employee had heard about the plaintiff's complaint and commented that people in the fire department were "up to their old tricks again," stating that she had investigated the same complaints in 1991 but that no action was taken. *Dees*, 168 F.3d at 423. The Eleventh Circuit held that a jury could reasonably infer that the employer knew that harassment existed in the department before the plaintiff made her complaint. *Dees*, 168 F.3d at 423.

Plaintiff could also take advantage of an "open door policy" as well. See *Madray*, 208 F.3d at 1301. The Eleventh Circuit has held that "[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law." *Madray*, 208 F.3d at 1302. ■



Toni J. Braxton

Toni J. Braxton practices with the Brooks Firm PC in Birmingham. She received her Juris Doctor from the University of Alabama School of Law in 1997, where she was a member of the Black Students' Association and Farrah Law Society, after graduating from Yale University in 1994. She is a member of the Federal Bar Association, the American Bar Association, the Birmingham Bar Association, the Magic City Bar Association, the Alabama Lawyers Association, and the Alabama State Bar.

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Alabama State Bar President-elect Fred D. Gray of Tuskegee has chosen as his theme "Lawyers Render Service" and is issuing a special invitation to all local and specialty bar associations to join him in this statewide positive public image campaign.

The Alabama State Bar has developed an eight-minute video presentation program entitled "TO SERVE THE PUBLIC." Available at no cost, materials include a handbook with talking points, the video and brochures for distribution. The presentation can be used as a "stand-alone" program or as a part of any meeting program. Perfect for community, civic, church or school groups, this presentation shows the many ways that today's lawyers render service to their clients, their communities and their profession.

Your bar association is invited and encouraged to participate in showing this video at every opportunity during the coming year.

Please complete and return the form below to receive your own association's copy to use for this purpose:

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Alabama Appleseed Center— Sowing Seeds of Justice

BY JOHN A. PICKENS

As the executive director of the Alabama Appleseed Center for Law & Justice, Inc. ("Alabama Appleseed"), I take this opportunity to introduce Alabama Appleseed to the membership of the Alabama State Bar. We are a non-profit, legal and justice advocacy organization. Our mission is to identify in Alabama those practices, policies or other situations that have a detrimental and unfair impact upon a segment of the population creating injustice or inequality. Then, through education, advocacy, coalition with other groups and, when needed, litigation, we seek to achieve lasting positive and practical change that alleviates the injustice or inequality. I was hired September 30, 2002 as Alabama Appleseed's first executive director.

As I have traveled around the state to introduce people to our work, I have noticed that by the time the words "Alabama Appleseed" leave my mouth, a strange and perplexed expression appears on the face of the listener. I immediately surmise they are thinking: "Appleseed, what a strange name for a legal and justice advocacy group and where the heck did that name come from?" Well, the name obviously comes from the legendary Johnny Appleseed figure, who two centuries ago, walked around the

eastern United States planting apple orchards. Not unlike this legendary figure, Alabama Appleseed also has everything to do with sowing seeds, bearing good fruit and assuring adequate provision for all.

Alabama Appleseed is the newest in a nationwide network of state legal and justice advocacy centers established and fostered by The Appleseed Foundation in Washington, D.C. ("Appleseed Foundation"). In 1993, two alumni classes of the Harvard Law School celebrated, respectively, their 35th and 30th reunions. At these reunions the idea was originated and presented to both alumni classes to take some action to establish a legacy of their classes that would leave a more lasting legacy than any of their individual legal careers. This kernel of an idea germinated into the idea to form a national non-profit organization with the express purpose and mission to organize and thereafter help sustain independent state centers that would engage in legal and justice advocacy work focusing on the issues particular to each state. In 1993, the national organization was formed and shortly thereafter three Appleseed centers were established in Washington, D.C., New Jersey, and Massachusetts. Today, there are 15 Appleseed Centers—the three original

centers, plus ones in Connecticut, Indiana, Chicago, Nebraska, Kansas, Oklahoma, Texas, Louisiana, Florida, South Carolina, Hawaii, and Alabama. Our center here in Alabama is the newest Appleseed center. Each state center operates independently with its own board of directors and sets its own agenda.

The organizing Board of Directors for Alabama Appleseed was brought together in 1999 and has been functioning since that date. The organizing board consisted of a number of prominent and well-known Alabamians, including former Governor **Albert P. Brewer**, former Chief Justice **C.C. Torbert, Jr.**, former Justice **Janie L. Shores**, **J. Mason Davis, Jr.**, and Dean **Kenneth C. Randall** of the University of Alabama School of Law. In addition to these individuals (with the exception of Mason Davis), the following persons currently serve on our board: **Nick Gaede**, chair, Birmingham; **Dean John L. Carroll** of the Cumberland School of Law, Birmingham; **Herman Cobb**, Dothan; **Greg Cusimano**, Gadsden; **Judge John H. England**, Tuscaloosa; **Martha Jinright**, Montgomery; **Merceria Ludgood**, Mobile; **David Marsh**, Birmingham; and **Dudley Reynolds**, Birmingham. I feel honored and privileged to have the opportunity to work with such

a distinguished group. In 2001, Alabama Appleseed was organized as an Alabama non-profit corporation and is a 501(c)(3) charitable organization.

We undertake new advocacy projects once a majority of our board agrees to the project. Currently, we have three advocacy projects. First, we are working on drafting and promoting recommendations on the way our judicial elections are held and how those campaigns are financed. As we all know, judicial elections in Alabama have become extremely partisan and negative, threatening the independence of our judiciary at all levels. Campaign costs for judicial elections have escalated significantly in recent years, threatening the ability and interest of qualified candidates to seek election. Reforms need to be implemented in both areas to restore confidence in our judiciary. We already have commissioned and received a comprehensive report on the judicial selection practices in all 50 states, and we have made preliminary recommendations on judicial selection reform to the Citizens Commission on Constitutional Reform.

Our second project relates to what is commonly called a "living wage." We have undertaken a project to calculate what a self-sufficient, "living wage" is for Alabama. We have commissioned such a study by the Department of Demographics at Auburn University Montgomery.

We will use the results of this study in our educational and advocacy efforts to promote the establishment of such a living, sustainable wage scale for governmental and other employers. We also hope to use this information to help those who plan and support economic development in local communities. Our work is modeled after a living wage project conducted a few years ago by the Nebraska Appleseed Center.

As our third project, we have joined a broad effort to reduce and regulate payday lending practices, whereby lending companies offer short-term loans to consumers at exorbitant interest rates in exchange for post-dated personal checks. The main arena now for this issue is before the Alabama Supreme Court, where we have filed an *amicus curiae* brief in support of bringing these practices under the Alabama Small Loan Act. We expect additional advocacy to be necessary irrespective of how this legal issue is resolved by the supreme court.

As the new executive director of Alabama Appleseed, I know I have my work cut out for me. We will face many challenges in the next few years as we begin in earnest our work of identifying issues and developing solutions. I come to this work after a 30-year legal career in Georgia, the last 20 years of which I was principally engaged in the non-profit sec-

tor practicing indigent criminal defense. Although my legal career was centered in Georgia, my roots are in Alabama. I was born and raised in Tuscaloosa. My ancestors going back several generations were from central Alabama around Montgomery. In a real sense I have returned home and that feels right and timely.

At Alabama Appleseed we hope that many of you will join us as we grow and develop and take on new issues. It is an exciting time in Alabama. In a public interest group's office here in Alabama that I visited recently, I noticed a poster that read, "Never doubt that a small group of thoughtful and committed citizens can change the world." In reading these words it struck me as an apt description of Alabama Appleseed and what we aspire to do here in Alabama. We are, at present, a small group. We are committed. We believe we can make a difference. We do not know at this time what additional issues we will tackle and to whom we must speak to effectuate positive and lasting change. But, we do know we are committed to this worthy undertaking and invite you to participate with us. Perhaps involvement with Alabama Appleseed will be our part of that greater legacy left for future generations of Alabamians that goes beyond the legacy any of us leave from our own individual law practices. ■



John A. Pickens

John A. Pickens is a native of Tuscaloosa. He received a B.A. in economics in 1968 from Rice University in Houston and a J.D. in 1971 from Vanderbilt School of Law in Nashville. He practiced for 31 years in Atlanta before becoming the executive director of the Alabama Appleseed Center for Law & Justice, Inc.



Alabama State Bar President Fred D. Gray of Tuskegee has chosen as his theme "Lawyers Render Service" and is issuing a special invitation to all local and specialty bar associations to join him in this statewide positive public image campaign.

The Alabama State Bar has developed a series of logos that will be used on all bar correspondence, in all publications and at any bar event during this year. Your bar association is invited and encouraged to participate in a similar manner.

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The HIPAA Privacy Rules from a Litigation Perspective

BY J.S. CHRISTIE, JR.

The new HIPAA Privacy Rules change the law concerning the use and disclosure of Health Information. All litigators, especially employment lawyers, need some familiarity with this new area of law.

What Are the HIPAA Privacy Rules?

HIPAA is the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA includes new portability requirements for group health plans, creates standards for health data, and changes the health care fraud and abuse laws. *Cf.* J. Christie, "Federal Mandates for HMOs and Health Plans: What is HIPAA?," 4(1) *HMOs & Health Plans* 1 (Spring 2001) (giving an overview of HIPAA's portability requirements).

As part of the standards for health data, Congress told the U.S. Department of Health and Human Services ("HHS") to promulgate privacy rules. 42 U.S.C. §§ 1320d-2(d) & 1320d-3(a). HHS has now promulgated the HIPAA Privacy Rules, which are generally effective April 14, 2003 (April 14, 2004, for Small Health Plans). 45 C.F.R. § 164.534. *Cf. Ass'n of Am. Physicians & Surgeons, Inc. v. HHS*, 224 F. Supp. 2d 1115 (S.D. Tex. 2002) (dismissing constitutional and statutory challenges); *South Carolina Med Ass'n v. HHS*, Civil Action No. 3:01-2965 (August 14, 2002) (same).

These new HIPAA Privacy Rules (1) establish Individual rights with respect to covered Health Information, (2) define and limit the circumstances in which a Covered Entity may use and disclose Protected Health Information, and (3) require Covered Entities to adopt safeguards to protect the confidentiality of Protected Health Information.

Why are the HIPAA Privacy Rules in part Employment Law?

Employers are not Covered Entities. Even Health Care Providers, such as hospitals and physicians, are not Covered Entities in their roles as employers. Then, why are the HIPAA Privacy Rules often considered to be a new area of employment law?

First, most people in the United States have health coverage with a Health Plan through their employer. The HIPAA Privacy Rules essentially apply to all Health Plans. Accordingly, people are likely to look to employment lawyers for advice about the HIPAA Privacy Rules.

Second, non-governmental employers are often plan sponsors and plan administrators for Health Plans. *See* Employee Retirement Income Security Act of 1974 ("ERISA") § 3(16), 29 U.S.C. § 1002(16) (defining plan sponsor and administrator). For example, an employer that contracts with Blue Cross and Blue Shield or an HMO is the plan sponsor and, unless the plan documents name another entity, is the administrator. Therefore, employers are required, as plan sponsor and/or administrator, to have their Health Plans comply with the HIPAA Privacy Rules.

Third, in relation to employment law issues such as workers' compensation, attendance, or job performance, employers often are given or seek Health Information. Such Health Information is the same information protected by the HIPAA Privacy Rules. Therefore, litigation involving the HIPAA Privacy Rules, and compliance with the HIPAA Privacy Rules to avoid litigation, might often concern employment law issues.

Who Are the HIPAA Players?

The HIPAA Privacy Rules define many terms – some common words and others specialized terms. 45 C.F.R. §§ 160.103, 160.202, 160.302, 164.501, 164.504 & 164.508. (Terms defined by the HIPAA Privacy Rules are capitalized throughout this article to warn the reader to check the definitions.) To be familiar with the HIPAA Privacy Rules, a litigator one should understand the definitions for the following entities or persons:

A. *Covered Entities* - Health Plans, Health Care Clearinghouses, and Health Care Providers who transmit any Health Information in electronic form in connection with any transaction covered by the HIPAA Privacy Rules. 45 C.F.R. § 160.103.

1. *Health Plans* - any individual or group plan that provides, or pays the cost of, medical care, including Group Health Plans, Health Insurance Issuers, HMOs, and numerous government programs providing health coverage or benefits. 45 C.F.R. § 160.103. "Health Plans" excludes life, disability and workers' compensation plans. *Id.*

a. *Group Health Plans* - insured and self-insured ERISA plans providing medical care or benefits, except for those that are self-administered by the employer and plan sponsor and that cover fewer than 50 participants (a rare plan). 45 C.F.R. § 160.103.

b. *Health Insurance Issuers* - insurance companies, insurance services, or insurance organizations (including Blue Cross and Blue Shield of Alabama) (also including HMOs). 45 C.F.R. § 160.103. The term does not include Group Health Plans. *Id.*

2. *Health Care Clearinghouses* - entities that process Health Information received from another entity. 45 C.F.R. § 160.103.

3. *Health Care Providers* - providers of medical or health services or any other persons or organizations that furnish, bill or are paid for health care in the normal course of business. 45 C.F.R. § 160.103.

B. *Business Associates* - persons who assist a Covered Entity perform any function or activity regulated by the HIPAA Privacy Rules. 45 C.F.R. § 160.013.

What Other HIPAA Definitions Should a Litigator Understand?

From a litigation perspective, one probably should understand the following additional definitions:

A. *Individually Identifiable Health Information* - Health Information that is created or received by a Health Care Provider, Health Plan, employer, or Health Care Clearinghouse and that identifies the Individual or can be used to identify the Individual. 45 C.F.R. § 160.103.

B. *Protected Health Information ("PHI")* - Individually Identifiable Health Information that is transmitted in any form or medium. 45 C.F.R. § 164.501. Employment records held by a Covered Entity in its role as employer are specifically excluded. 45 C.F.R. § 160.501.

C. *Authorization* - a document that is signed by an Individual or personal representative of an Individual and that includes (1) a specific description requesting that Health Information be used or disclosed, (2) the name or specific identity of who is authorized to use or disclose the information, (3) a description of each purpose for the Use or Disclosure (unless the Individual initiates the authorization, thus making "at the request of the individual" sufficient), (4) an expiration date or event, (5) statements as to the Individual's right to revoke the authorization, (6) statements concerning whether Treatment, Payment, enrollment, or eligibility for benefits can or cannot be conditioned on the Individual signing the authorization, and (7) other requirements, depending on the circumstances. 45 C.F.R. § 164.508(c).

D. *Consent* - a document that is signed by an Individual or personal representative of an Individual and that gives permission for Protected Health Information to be used or disclosed, but is not required and may not substitute for a required authorization. 45 C.F.R. § 164.506.

E. *Notice* - a document that an Individual or an Individual's representative has a right to receive, that a Covered Entity is required to provide, and that describes how the Individual's Protected Health Information may be used or disclosed by a Covered Entity. 45 C.F.R. § 164.520(a)(1). Health Care Providers are required to make a good faith effort to obtain a written acknowledgment of receipt from Individuals of this Notice. 45 C.F.R. § 164.520(c). Health Plans "are not required to obtain this acknowledgment from individuals, but may do so if they choose." 67 Fed. Reg. 53239 (August 14, 2002).

F. *Summary Health Information* - a summary of a Group Health Plan's claims history, claims expenses, or types of

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

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new clients this month, you may not," he says.

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

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claims, with all the information that might identify an Individual deleted, except aggregate information to the level of a five digit zip code. 45 C.F.R. § 164.504.

G. *Small Health Plans* - Health Plans with annual receipts of \$5 million or less (and have until April 14, 2004, to comply with HIPAA). 45 C.F.R. §§ 160.103 164.534(b)(2).

What Does HIPAA Prohibit?

A Covered Entity is prohibited from using or disclosing an Individual's Protected Health Information, except as authorized by the Individual or as required or permitted by the HIPAA Privacy Rules. 45 C.F.R. § 164.502(a). When using or disclosing Protected Health Information or when requesting Protected Health Information from another Covered Entity, a Covered Entity must usually make reasonable efforts to limit the Protected Health Information used, disclosed or requested to the Minimum Necessary. See 45 C.F.R. § 164.502(b) (defining "Minimum Necessary"); 45 C.F.R. § 164.514(d) (more Minimum Necessary requirements).

What HIPAA Rights Do Individuals Have?

The HIPAA Privacy Rules create numerous new rights for Individuals regarding access to their own Protected Health Information. 45 C.F.R. §§ 164.520, 164.522, 164.524, 164.526, 164.528 & 164.530(d).

A. *Request Restricted Access to PHI* - an Individual has a right to request a Covered Entity to restrict the Uses and Disclosures of his or her Protected Health Information. 45 C.F.R. § 164.522. A Covered Entity is not required to agree to a

restriction. *Id.* If a Covered Entity agrees, however, any Use or Disclosure of the Protected Health Information is then further regulated by the HIPAA Privacy Rules. *Id.*

B. *Access to PHI* - an Individual has a right of access to inspect and to obtain a copy of his or her Protected Health Information, except for three exceptions. 45 C.F.R. § 164.524. These exceptions are Psychotherapy Notes, litigation work product, and information subject to or exempted by the Clinical Laboratory Improvements Amendments of 1988. *Id.* In addition, in some very limited circumstances, a Covered Entity can deny access without providing an administrative review and in other limited circumstances a Covered Entity can deny access and the Individual has the right to request an administrative review. *Id.*

C. *Amendment of PHI* - an Individual has a right to have a Covered Entity amend Protected Health Information. 45 C.F.R. § 164.526. In some circumstances, a Covered Entity can deny a request to amend, which then gives the Individual a right to submit a written statement disagreeing. *Id.* This process has time deadlines and procedures and can result in additional materials that a Covered Entity might be required to disclose when disclosing the original Protected Health Information. *Id.*

D. *Accounting of Disclosures of PHI* - an Individual has a right to a written accounting of disclosures of Protected Health Information by a Covered Entity, with exceptions. 45 C.F.R. § 164.528. The accounting is to be for six years, but starting April 14, 2003. The exceptions include most of the required and permitted Uses and Disclosures of Protected Health Information. *Id.*

E. *Notice Concerning PHI* - an Individual has a right to a detailed Notice concerning Protected Health Information, as described above. 45 C.F.R. § 163.520.

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

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F. *Challenge Disclosures of PHI* – an Individual has a right to make a complaint to a Covered Entity about the Covered Entity's policies and procedures for using and disclosing Protected Health Information or about compliance with those policies and procedures. 45 C.F.R. § 164.530(d). An Individual also has a right to file a complaint with the Secretary of HHS. 45 C.F.R. § 160.306.

What Disclosures Does HIPAA Require?

A Covered Entity is required to disclose Protected Health Information only in two circumstances. First, when an Individual requests his or her own Protected Health Information, a Covered Entity is usually required to disclose the Protected Health Information. 45 C.F.R. § 164.502(a)(2)(i). Second, when HHS's Secretary is investigating a complaint or determining a Covered Entity's compliance with the HIPAA Privacy Rules, a Covered Entity is required to disclose Protected Health Information. 45 C.F.R. § 164.502(a)(2)(ii). Note, a federal governmental agency, HHS, has promulgated a regulation giving both the Individual and the federal governmental agency legally enforceable rights to the Individual's Protected Health Information.

What Uses and Disclosures Does HIPAA Allow?

A Covered Entity is permitted to use or disclose Protected Health Information only when authorized by the Individual or when required or permitted by the HIPAA Privacy Rules. 45 C.F.R. § 164.502. Under the HIPAA Privacy Rules, there are five types of Use and Disclosure of Health Information: (1) an Authorization is always required; (2) Treatment, Payment and Health Care Operations, (3) an opportunity to agree or to object is required (*i.e.*, hospital directories), (4) an Authorization or an opportunity to agree or to object is not required (*e.g.*, public health activities), and (5) de-identified Health Information. 45 C.F.R. §§ 164.506, 164.508, 164.510, 164.512 & 164.514.

A. *Authorizations* - in addition to needing a valid Authorization to use or disclose Protected Health Information for any purpose not allowed by the HIPAA Privacy Rules, a Covered Entity must have a valid Authorization for any Use or Disclosure of Protected Health Information in two circumstances:

1. *Psychotherapy Notes* - an Authorization is required, except for Treatment, a Covered Entity's own training, or when a Covered Entity is defending itself in a legal action brought by the Individual. 45 C.F.R. § 164.508(a)(2); *see* 45 C.F.R. § 164.501 (definition of Psychotherapy Notes).

2. *Marketing* - an Authorization is required, except for face-to-face communications by a Covered Entity to an Individual or for promotional gifts of nominal value provided by the Covered Entity. 45 C.F.R. § 164.508(a)(3); *see* 45 C.F.R. § 164.501 (definition of Marketing). If a Covered Entity directly or indirectly received remuneration from a third party to be involved in Marketing, the Authorization must state that such remuneration is involved. 45 C.F.R. § 164.508(a)(3)(ii).

B. *Treatment, Payment and Health Care Operations* - Except for the two circumstances described above when an Authorization is always required, a Covered Entity may use or

disclose Protected Health Information for Treatment, Payment and Health Care Operations, provided that such Use or Disclosure is consistent with the HIPAA Privacy Rules. 45 C.F.R. § 164.506; *see* 45 C.F.R. § 164.501 (defining Treatment, Payment and Health Care Operations). Generally, a Health Plan is permitted to use or disclose Protected Health Information for what one expects Health Plans to do.

C. *Facility Directories* - a Covered Entity that is a Health Care Provider may have a facility directory with the Individual's name, location in the facility, general condition, and (to be disclosed to clergy only) religious affiliation, but must normally give the Individual an opportunity to agree or object before including the Individual in the facility directory. 45 C.F.R. § 164.510.

D. *No Authorization or Agreement* - A Covered Entity may disclose Private Health Information for a laundry list of purposes, primarily a number of public health activities, without the Individual's Authorization, agreement, or opportunity to object. 45 C.F.R. § 164.512. Many of these Disclosures are Required By Law. Examples include Health Information gathered to prevent or control diseases, to compile public health statistics, or to report victims of abuse, neglect or domestic violence. *Id.* As particularly relevant to litigation are the following:

1. *Judicial and Administrative Proceedings* - a Covered Entity may disclose Protected Health Information in response (a) to an order of a court or administrative tribunal that expressly authorizes that Disclosure or (b) to a subpoena or discovery request, if a qualified protective order has been requested or a good faith effort has been made to give notice to the Individual and any objections have been resolved. 45 C.F.R. § 164.512(e); *see* 45 C.F.R. 164.514(h) (verification requirements); *cf. United States v. The Louisiana Clinic*, 2002 WL 31819130 (E.D. La. Dec 12, 2002) (discussing and implementing the qualified protective order requirement).

2. *Worker's Compensation* - a Covered Entity may disclose Protected Health Information "as authorized by and to the extent necessary to comply with laws relating to workers' compensation . . ." 45 C.F.R. § 164.512(l); Preamble, 65 Fed. Reg. 82630; Preamble, 67 Fed. Reg. 53198-99. *See* Ala. Code § 25-5-77(b) (requiring Health Care Providers to give employers a copy of the medical records of an injured employee). As a Disclosure that is Required By Law, the Minimum Necessary standard does not apply to requests under Alabama's Workers' Compensation law. 45 C.F.R. §§ 164.502(b)(2)(v) & 164.512(a); 67 Fed. Reg. 53199.

E. *De-identified Health Information* - a Covered Entity may use or disclose de-identified Protected Health Information, partially de-identified Protected Health Information that is part of a limited data set and is disclosed under a data use agreement, and demographic information for the Covered Entity's own fundraising. 45 C.F.R. § 164.514.

What Safeguards Does HIPAA Provide?

The HIPAA Privacy Rules do not define safeguards as a term, but requires safeguards and the Preambles use "safeguards" to describe HHS's approach to the HIPAA Privacy Rules. *See* 45 C.F.R. § 164.530(c) (requiring Covered Entities to have appropriate safeguards in place for Protected Health Information). In



All other Group Health Plans are required to distribute a Notice to covered Individuals before April 14, 2003, to new enrollees at the time of enrollment, and within 60 days of a material revision to the Notice. At least once every three years, such a Group Health Plan must notify covered Individuals of how to obtain a Notice. A Notice provided to the plan participant (the employee usually) satisfies this requirement as to dependents. Examples of Group Health Plans that must provide this Notice include self-funded plans, on-site health clinics, and health Flexible Spending Arrangements (usually part of a cafeteria plan). 45 C.F.R. § 164.520(c).

What Should a Litigator Know about Amending a Group Health Plan?

Unless a Group Health Plan's documents have been appropriately amended, the HIPAA Privacy Rules prohibit Covered Entities from sharing most Protected Health Information with a plan sponsor. 45 C.F.R. § 164.504(f).

A. Indirect Regulation – HHS indirectly regulates Plan Sponsors (*i.e.*, employers) by requiring Group Health Plans to be amended to safeguard Protected Health Information. 45 C.F.R. § 164.504(f). All Plan Sponsors have enrollment data, which is Protected Health Information. Some Plan Sponsors have whatever Protected Health Information that a Group Health Plan has, because the Plan Sponsor acts for the Group Health Plan. Yet, Plan Sponsors are not Covered Entities. So, they are not directly regulated by HIPAA. Restricting a Plan Sponsor's Use and Disclosure of Protected Health Information through Business Associate contracts would be awkward at best. Most Plan Sponsors enter into contracts for their Group Health Plan. So, requiring a Business Associate contract would be requiring the Plan Sponsor to agree with itself. For these reasons, HHS apparently believed that regulating Plan Sponsors was necessary, but could only be done through requiring Plan Sponsors to amend the Group Health Plan's documents.

B. Required Amendments – The required amendments to Group Health Plans include (1) identify the employees or classes of employees to be given access to Protected Health Information for Plan Administration Functions; (2) restrict these employees' access and Use to Plan Administration Functions; (3) provide an effective mechanism for resolving any issues of noncompliance, and (4) require the Plan Sponsors to certify that the Group Health Plan's documents have been amended and that the Plan Sponsors will, in essence, comply with the HIPAA Privacy Rules. 45 C.F.R. § 165.504(f). The Certification includes not using Protected Health Information for employment-related actions and decisions or in connection with any other benefits or employee benefit plan of the Plan Sponsor. *Id.*

C. Which Group Health Plans – If a Plan Sponsor only has Summary Health Information and information on whether an Individual is enrolled in or disenrolled from the Group Health Plan, then the Group Health Plan is not required to be amended as described above. 45 C.F.R. § 165.504(f)(1). For many fully-insured plans, the Plan Sponsors will not need additional information. So, these plan amendments would not be required. (A unique need for Protected Health Information could be met with an Authorization.) The administration of other Group Health Plans will probably involve so much Protected Health Information that amending the Group Health Plan would be necessary.

addition to the rules limiting Use and Disclosure, the HIPAA Privacy Rules safeguard individual privacy by requiring Notices to Individuals of an Individual's rights and the Covered Entity's duties, requiring Group Health Plans to amend plan documents to incorporate parts of the HIPAA Privacy Rules, requiring Covered Entities to have Business Associates agree to comply with the HIPAA Privacy Rules, and requiring Covered Entities to adopt numerous administrative requirements. Not all Group Health Plans, however, have to comply with all these additional safeguards, as explained below.

What Should a Litigator Know about HIPAA Notices?

As explained above, Individuals have a right to receive detailed Notices of privacy rights from Covered Entities.

A. Purpose for a Notice – HHS requires Notices because it “continues to believe strongly that promoting Individuals' understanding of privacy practices is an essential component of” the HIPAA Privacy Rules. 67 Fed. Reg. 53240. A Covered Entity is required to give Individuals a detailed Notice describing when the Covered Entity may use or disclose Protected Health Information, describing the Individual's rights with respect to his or her Protected Health Information, and describing how the Individual may exercise his or her rights. 45 C.F.R. § 164.520. A sample notice from Blue Cross and Blue Shield of Alabama is available at www.bcbsal.org.

B. Which Group Health Plans – For providing notices, Group Health Plans fall into three groups: No Notices, maintain Notices, and distribute Notices. 45 C.F.R. § 164.520(a)(2).

If a fully-insured Group Health Plan does not create or receive Protected Health Information other than Summary Health Information or information on whether an Individual is enrolled in or disenrolled from the Group Health Plan, it is not required to maintain or provide a Notice. 45 C.F.R. § 164.520(a)(2)(iii).

If a fully-insured Group Health Plan creates or receives Protected Health Information in addition to Summary Health Information and information on whether an Individual is enrolled or disenrolled from the Group Health Plan, it is required to maintain a Notice and provide the Notice to any person upon request. 45 C.F.R. § 164.520(a)(2)(ii).

What Should a Litigator Know about Business Associate Contracts?

To disclose Protected Health Information with any person who assists the Covered Entity to perform functions regulated by the HIPAA Privacy Rules, a Covered Entity is required to have a Business Associate contract with the person. 45 C.F.R. § 165.504(e).

A. Requirements for Business Associate Contracts – A Business Associate contract is a written contract between the Covered Entity and its Business Associate, with the contract requiring the Business Associate to safeguard Protected Health Information. 45 C.F.R. § 165.502(2) (if such a contract is entered into, permitting a Covered Entity to disclose Protected Health Information to a Business Associate). The HIPAA Privacy Rules list the requirements for this contract. 45 C.F.R. § 165.504(e). Sample provisions are listed as an Appendix to the Preamble to the changes to the final rules. 67 Fed. Reg. 53264-66. From April 14, 2003, to April 14, 2004, a transition rule deems existing contracts, which are not renewed or modified, between a Covered Entity and a Business Associate, to comply with the HIPAA Privacy Rules, without having to be amended. 45 C.F.R. § 164.532(e).

B. Which Group Health Plans – If a fully-insured Group Health Plan contracts with a Health Insurance Issuer (*i.e.*, Blue Cross) or an HMO and the Group Health Plan is not required to be amended or is amended as described above, then the Group Health Plan will not need a Business Associate contract with the Health Insurance Issuer or HMO. 45 C.F.R. § 164.502(e)(ii)(B); 67 Fed. Reg. 53248. If a self-funded Group Health Plan (or any Group Health Plan other than a fully-insured Group Health Plan) contracts with a Health Insurance Issuer or an HMO as a third-party administrator, whether the Group Health Plan and Health Insurance Issuer or HMO need a Business Associate contract is unclear, but the safe course would be to have one. If a Group Health Plan contracts with any person other than a Health Insurance Issuer or HMO for any function or activity

regulated by the HIAA Privacy Rules, then the Group Health Plan needs a Business Associate contract with that person or entity. *See* 45 C.F.R. § 160.103 (defining Business Associate).

What Should a Litigator Know about Administrative Requirements?

The HIPAA Privacy Rules create numerous additional new administrative requirements for Covered Entities.

A. Privacy Official and Contact Person – A Covered Entity must designate a Privacy Official and designate a contact person or office. 45 C.F.R. § 164.530(a). The Privacy Official is responsible for developing and implementing the Covered Entity's policies and procedures for complying with the HIPAA Privacy Rules. *Id.* The contact person or office is responsible for receiving complaints and providing further information. *Id.*

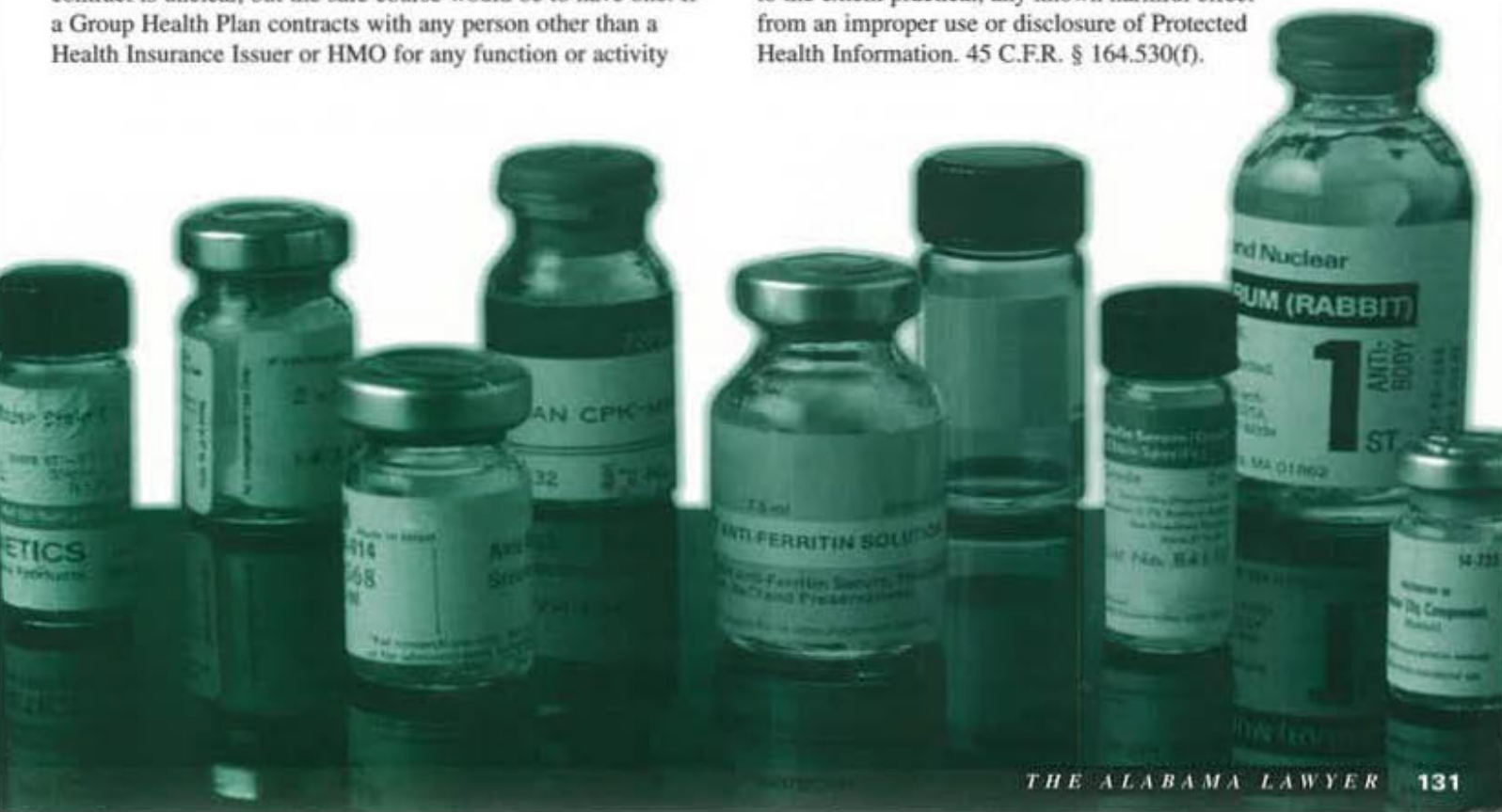
B. Training – A Covered Entity must train all its employees on the Covered Entity's policies and procedures with respect to Protected Health Information. 45 C.F.R. § 164.530(b). A Covered Entity also must document that this training has been provided. *Id.*

C. Safeguards – A Covered Entity must have in place appropriate administrative, technical and physical safeguards to protect the privacy of Protected Health Information. 45 C.F.R. § 164.530(c).

D. Complaints – A Covered Entity must provide a process for Individuals to make complaints concerning the Covered Entity's policies and procedures or the Covered Entity's compliance with those policies and procedures. 45 C.F.R. § 164.530(d).

E. Sanctions – A Covered Entity must have and apply appropriate sanctions against the Covered Entity's employees who violate its policies and procedures or the HIPAA Privacy Rules. 45 C.F.R. § 164.530(e). Additionally, a Covered Entity must document sanctions that are applied. *Id.*

F. Mitigation – A Covered Entity must mitigate, to the extent practical, any known harmful effect from an improper use or disclosure of Protected Health Information. 45 C.F.R. § 164.530(f).





ate or receive Protected Health Information other than Summary Health Information and whether an Individual is enrolled in or disenrolled from a health insurance issuer or HMO, then that Group Health are not subject to the administrative requirements of designating a Privacy Official and Contract person or office, training, safeguards, complaints, sanctions, mitigation, and policies and procedures. *Id.*

What State Laws Does HIPAA Preempt?

The HIPAA Privacy Rules preempt some State Laws, but the analysis for determining what laws are preempted is convoluted.

A. *HIPAA Preemption* - Generally, HIPAA preempts State Laws that are Contrary to the HIPAA Privacy Rules. 42 U.S.C. § 1320d-7(a)(1); 45 C.F.R. § 160.203; *cf. United States v. The Louisiana Clinic*, 2002 WL 31819130 (E.D. La. Dec. 12, 2002) (holding Louisiana law concerning disclosure of nonparty patient records not to be Contrary to federal law). A process is established for requesting HHS's Secretary to make an exception to HIPAA preemption for a particular State Law. 42 U.S.C. 1320d-7(a)(2); 45 C.F.R. § 160.204. In addition, a State Law that is More Stringent in protecting the privacy of Individually Identifiable Health Information is not preempted by HIPAA. 45 C.F.R. § 160.203(b). More Stringent generally means being more restrictive in using or disclosing Individually Identifiable Health Information, unless an Individual seeks his or her own Individually Identifiable Health Information, and then means giving more access or rights to the Individual. 45 C.F.R. § 160.202. Yet, a State Law that would otherwise be preempted by ERISA is not saved by HIPAA from ERISA preemption. Preamble, 65 Fed. Reg. 82483.

B. *Alabama Laws* - Alabama does not have a general statute addressing privacy of Health Information. Alabama does require an HMO to keep confidential all data or information about an enrollee's or applicant's diagnosis, treatment or health. Ala. Code § 27-21A-25. Alabama provides a consumer of mental health services a right of access to all information in his mental health and medical records. Ala. Code § 22-56-4(b)(7). Both of these Alabama laws, and others, may be More Stringent.

How are the HIPAA Privacy Rules Enforced?

The HIPAA Privacy Rules can be enforced by civil and criminal penalties and by private actions under ERISA and, possibly, under state tort law.

A. *Civil and Criminal Penalties* - HHS's Secretary may begin an investigation based on an Individual's complaint or on a compliance review. 45 C.F.R. § 160.306 ("Complaints to the Secretary"), § 160.308 ("Compliance reviews"), § 160.312 ("Secretary actions regarding complaints and compliance reviews"). As a civil matter, the Secretary "shall impose on any person who violates a provision of [HIPAA] a [civil] penalty of not more than \$100 for each such violation . . ." 42 U.S.C. § 1320d-5(a). The maximum civil penalty "imposed on a person for all violations of an identical requirement or prohibition during a calendar year may not exceed \$25,000," *Id.* As a criminal matter, a person who knowingly obtains or discloses Individually Identifiable Health Information "shall be fined not more than \$50,000, imprisoned not more than 1 year, or both." 42 U.S.C. § 1320d-6. If the offense is committed under false

G. *No Intimidation or Retaliation* - A Covered Entity may not intimidate, threaten, coerce, discriminate against, or take other retaliatory action against an Individual for exercising his or her rights under the HIPAA Privacy Rules or for participating in any HIPAA enforcement proceedings. 45 C.F.R. § 164.530(g).

H. *No Waiver of Rights* - A Covered Entity may not require Individuals to waive their rights to file a complaint with the Secretary of HHS as a condition of participating in a Health Plan. 45 C.F.R. § 164.530(h).

I. *Policies and Procedures* - A Covered Entity must implement policies and procedures with respect to Protected Health Information that are designed to comply with the HIPAA Privacy Rules and make appropriate changes to comply with changes in the law. 45 C.F.R. § 164.530(i).

J. *Documentation* - For six years, a Covered Entity must maintain written (or electronic form) policies and procedures and maintain written or electronic copies of communications or actions required by the HIPAA Privacy Rules to be in writing. 45 C.F.R. § 164.530(j).

K. *Which Group Health Plans* - All Group Health Plans are subject to the administrative requirements of no intimidation or retaliation, no waiver of rights, and documentation. 45 C.F.R. § 164.530(k). If a fully-insured Group Health Plan does not cre-

pretenses, the person may "be fined not more than \$100,000, imprisoned not more than 5 years, or both." *Id.* If the offense is committed for financial gain, personal gain, or malicious harm, the person may "be fined not more than \$250,000, imprisoned not more than 10 years, or both." *Id.*

B. Private Actions - HIPAA does not authorize private actions for violations of the HIPAA Privacy Rules. Nonetheless, the HIPAA Privacy Rules create duties of care with respect to Health Information. Therefore, one might expect to see the HIPAA Privacy Rules used as part of state law tort actions. For claims related to Group Health Plans, however, ERISA would preempt state law tort claims. 29 U.S.C. § 1144. An Individual, however, could claim that a violation of a Group Health Plan amendment was also a violation of ERISA. *See* 29 U.S.C. § 1132(a)(3) (providing for a cause of action "to enforce the terms of the plan"). In addition, a plan administrator that failed to provide requested information about required plan amendments might be liable for a penalty of up to \$110/day. 29 U.S.C. § 1132(c)(3). In any action under ERISA, a party might also recover an attorney's fee and costs. 29 U.S.C. § 1132(g)(1).

Conclusion

From a litigation perspective, the HIPAA Privacy Rules are a new area of federal law with which most litigators should become familiar. The HIPAA Privacy Rules will govern aspects of most future litigation involving Health Information (*i.e.*, medical records), because such litigation is the Use and Disclosure of Health Information. Most future litigation directly asserting viola-

tions of the HIPAA Privacy Rules will be brought by the federal government against Covered Entities, such as hospitals and physicians, or their agents, because HIPAA generally does not create private causes of action. Finally, some future litigation involving the HIPAA Privacy Rules should be expected under ERISA and, eventually, indirectly under tort law. ■

J.S. Christie, Jr.

J.S. Christie, Jr. is a partner with the Birmingham office of Bradley Arant Rose & White LLP. He graduated from Duke University in 1985 with his J.D. and an M.A. in public policy. In 1986 and 1987, he taught at the Yaounde University School of Law and Economics in Yaounde, Cameroon, West Africa. Christie then clerked for the Honorable Seybourn H. Lynne, senior judge, U.S. District Court, Northern District of Alabama. In 1988, he joined Bradley Arant.

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Robert G. Methvin, Jr.

By Robert G. Methvin, Jr.

YLS Hard at Work

The Young Lawyers' Section was hard at work in 2002 and expects a productive 2003. The highlight of 2003 for the YLS will be the annual seminar at Sandestin Resort in Florida on Friday, May 16 and Saturday, May 17. As always, this seminar not only will be informative, but extremely entertaining. Seminar Chairman **Stuart Luckie** is making sure that the seminar offers something for all young lawyers, and the event promises to be a great opportunity to congregate in both a professional and social setting. Past seminar speakers have been consistently rated "excellent" by the attendees, and we have a great lineup again this year as well.

You will be hearing more about the Sandestin Seminar in the weeks ahead, but I encourage you to plan now to attend. You should be receiving a registration form in the mail within the next few weeks. If you have any questions regarding the Sandestin Seminar, please call Stuart at (251) 432-3362, or me at (205) 939-3006.

In November, the YLS held its first annual fall seminar in Birmingham, entitled "Judicial Perspectives: A View from the Bench." We were fortunate to have four well-respected judges from throughout the state speak to us on various topics. **Alabama Supreme Court Justice Tom Woodall** began the seminar with a very informative discussion of the nuts and bolts of appellate practice. Justice Woodall was followed by **United States District Judge U. W. Clemon**, who provided an interesting insight into the current state of capital pun-

ishment. Retired **Jefferson County Circuit Court Civil Judge Arthur Hanes** followed Judge Clemon with an in-depth discussion on the practical aspects of civil courtroom procedure in the State of Alabama. Lastly, retired **Jefferson County Circuit Court Criminal Judge Jim Garrett** gave us his thoughts on the "do's and don'ts" of criminal courtroom practice and how trial work has changed throughout his years on the bench. Approximately 45 attorneys were on hand for this seminar, which was held in one of the state-of-the-art conference rooms in the new law offices of **Bradley Arant Rose & White**. Special thanks to Bradley, Arant for allowing us to use their facilities.

The YLS is also busy preparing for the Minority Pre-Law Conference and we are expecting record attendance of approximately 400 high school students. The conference is an annual event held in Montgomery and is open to high school students across the state. Please talk to the appropriate person at your local high school and see if the school would like to participate. If so, contact **LaBarron Boone** at (334) 269-2343 or **Christy Crow** at (334) 738-4225 with the contact information.

Representatives from the Alabama YLS will be attending various American Bar Association functions throughout the United States to bring innovative ideas to our section, as well as the entire state bar.

I look forward to seeing you at Sandestin in May.

William D. "Bill" Scruggs, Jr. Service to the Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award through March 15, 2003. Nominations should be prepared on the appropriate nomination form available on the bar's Web site, www.alabar.org, and mailed to:

Keith B. Norman, executive director
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of the accomplishments on behalf of the bar of former state bar president Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

William D. "Bill" Scruggs, Jr. SERVICE TO THE BAR AWARD



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Transfer to Disability Inactive

- Bessemer attorney **Rita Davonne Hood** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective November 15, 2002. [Rule 27(c); Pet. No. 02-02]

Suspensions

- On December 3, 2002, the Supreme Court of Alabama entered an order adopting the order of the Disciplinary Board, Panel VI, suspending former Roanoke attorney **John Ralph Gunn** for a period of three years, retroactive to his interim suspension entered on October 27, 2000. Gunn entered a plea of guilty to violations of rules 1.3 [diligence]; 1.4(a) [communication]; 1.15(a) [safekeeping property]; and 8.4 (b), 8.4(c) and 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. As a condition of Gunn's plea, he has agreed to reconcile the trust accounts he maintained during his practice and reimburse any clients found to have been deprived of any funds on deposit in these accounts. The interim suspension of October 27, 2000 was merged into and dissolved upon the Disciplinary Board's acceptance of Gunn's plea. [ASB No. 00-36(A)]
- Effective December 13, 2002, Birmingham attorney **Laurie Ann Richardson Burch** has been suspended from the practice of law in the State of Alabama for noncompliance with the 2001 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 02-137]
- Former Birmingham attorney **Carol Ann Rasmussen** was suspended from the practice of law in the State of Alabama for a period of 91 days, to run concurrently in each case, effective October 8, 2002, 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. 99-169(A), formal charges were filed, alleging that Rasmussen violated rules 1.1, 1.3, 1.4(a), and 1.16(d), ARPC. Rasmussen was retained in 1997 to represent the complainant in an Equal Employment Opportunity Commission matter and was paid a \$2,500 retainer fee. During the course of the representation, the complainant encountered difficulties in communicating with Rasmussen concerning her case. Rasmussen failed to return the complainant's telephone calls and failed to attend scheduled appointments with the complainant and/or her witnesses. Rasmussen failed to notify the EEOC that she represented the complainant, and the complainant subsequently received an adverse decision from the EEOC.

In ASB No. 00-107(A), formal charges were filed, alleging that Rasmussen violated rules 111, 1.3, 1.4(a), 114(b), 3.2, and 8.4(a), ARPC. Rasmussen was retained in 1992 to represent the complainant in a federal worker's compensation matter. Between 1992 and April 1998, Rasmussen advised the complainant that all of the necessary pleadings and documents had been filed and she was waiting for a decision. Rasmussen was subsequently intermly suspended on September 15, 1998 and failed to notify the complainant of her suspension and her inability to continue to represent her. Rasmussen knowingly made misrepresentations of material fact to the complainant when she told her that everything had been filed and they were simply waiting for a decision. At the time these representations were made, the federal worker's compensation claim had already been denied and removed to Federal Records Storage.

Rasmussen did not answer the formal charges in either of the foregoing cases. Default judgments were entered against her on June 13, 2002. [ASB nos. 99-169 and 00-107(A)]

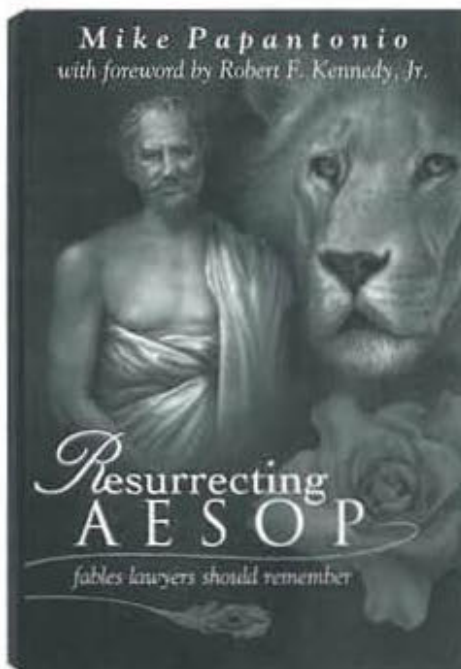
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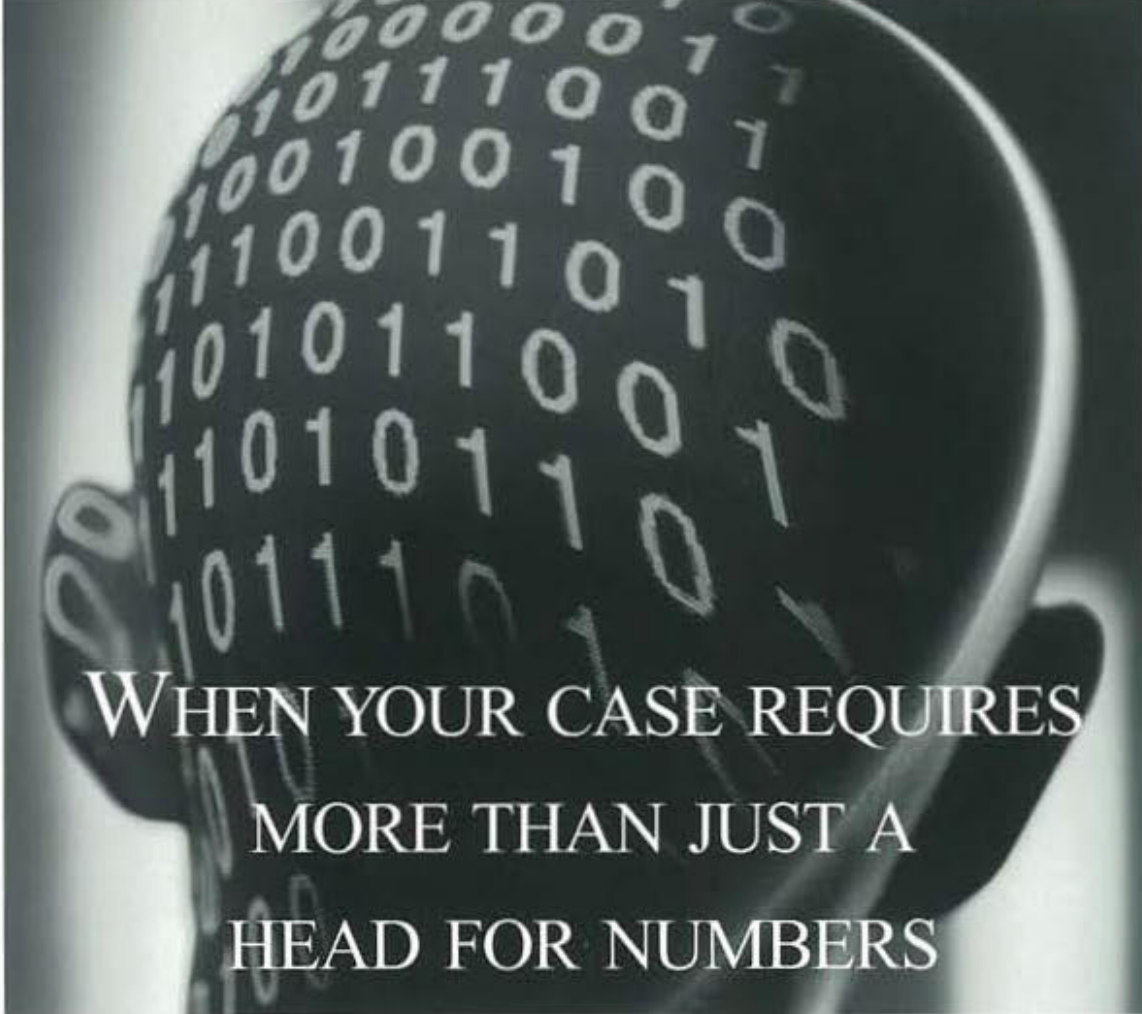
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