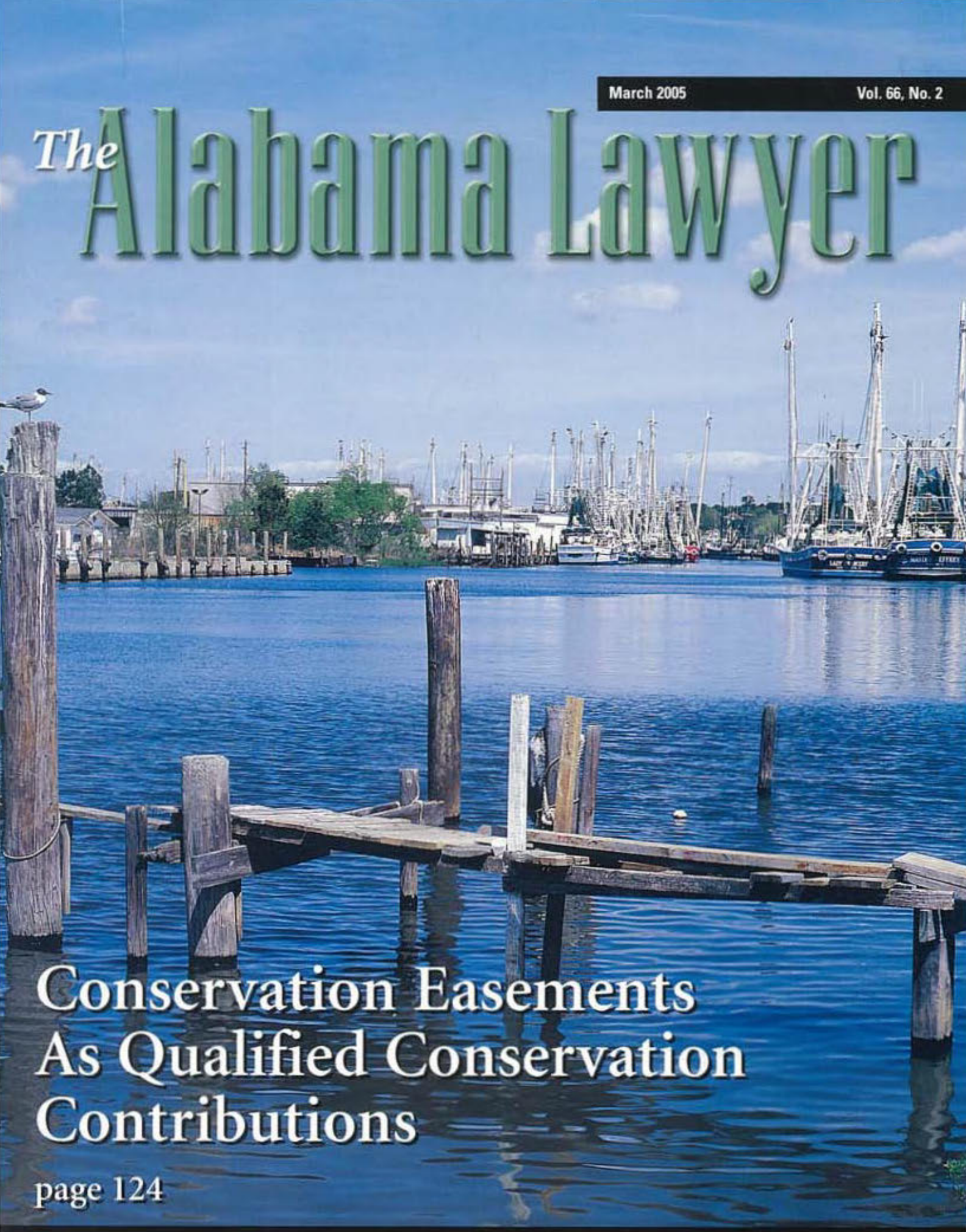
March 2005 Vol. 66, No. 2

The Alabama Lawyer



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The Alabama Lawyer

March 2005 Vol. 66, No. 2

ON THE COVER

Bayou La Batre, Alabama

Nestled along the peaceful shores of the Mississippi Sound, on the Gulf of Mexico, Bayou La Batre is known as the Seafood Capital of Alabama. Located 15 miles southwest of Mobile, Bayou La Batre also has a significant shipbuilding industry. Founded in the late 1700s, the name of the city originated from a battery maintained there by France. Each year, the city hosts the nationally known "Blessing of the Fleet" event. (For more information, visit *www.gulfinfo.com/bayoulabatre.*)

Photo by Paul Crawford, JD
pcrawford@aimsltc.com

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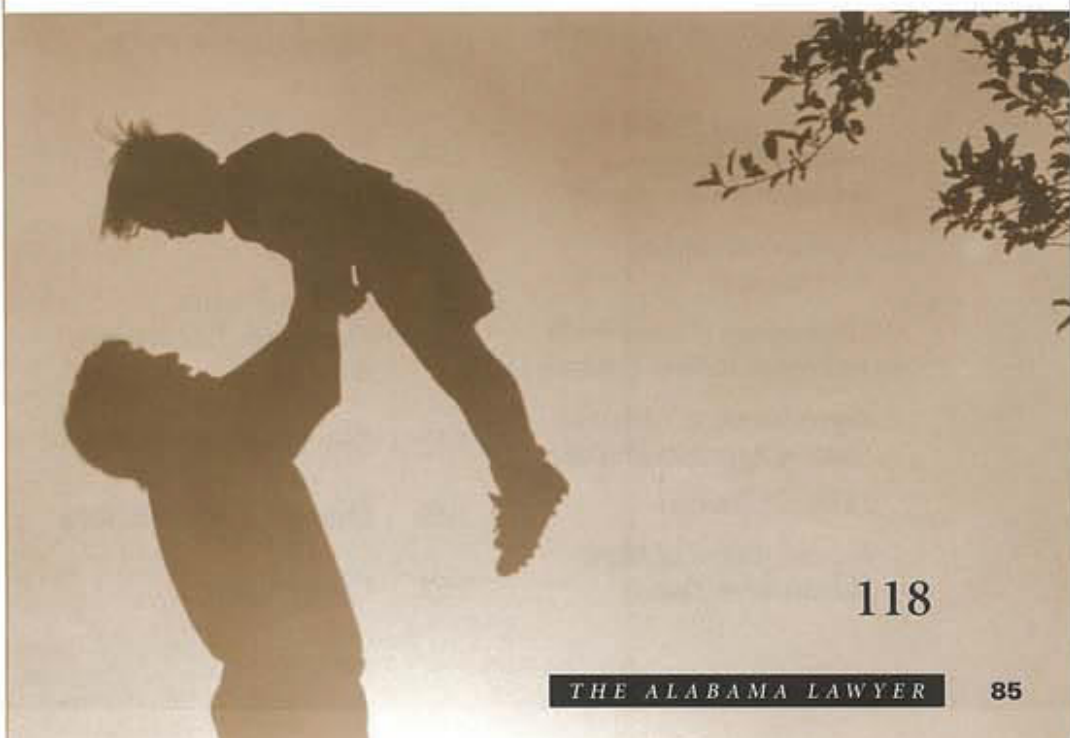

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By Douglas McElvy

The Good That Men Do Lives After Them

Johann Gottfried Cullman (1823-1895) was a lawyer who founded a German colony in the county that now bears his name. Having a deep interest in the welfare and problems of the immigrant settlers, he functioned as "judge, banker, doctor, minister, real estate agent, and ticket agent"[1] in the early days of the settlement. Using the wealth he had acquired from his lucrative law practice, he purchased several thousand acres of land for his settlement. He sold the land at a very low price to allow settlers to acquire a plot of ground they could call their own. He donated more land for churches, a park and a cemetery. In his later years, he devoted his time and energies to creating jobs for the citizens of Cullman. The town prospered and thrived under his fatherly attention and care.

Houston County was also named for a lawyer, **George Smith Houston** (1811-1879). He served nine terms in the United States Congress, two terms in the U.S. Senate and two terms as Alabama's governor. He is credited with ending the Reconstruction Era in Alabama. During his terms in office, the Alabama Constitutional Convention of 1875 was held, the public school system was reorganized, and the Alabama State Board of Health was established.[2]

In St. Clair County, we find **Judge John Washington Inzer** (1834-1928) as one of the incorporators for Pell City. After serving as a soldier and being held as a prisoner of war during the Civil War, he returned to St. Clair County. He was appointed probate judge soon after his return, and accepted the appointment

although he was still ill from his imprisonment. He lived a life full of service to the public.

At first it amazed me, the role that lawyers played not only in founding, but also building, practically every county and community in Alabama. Since taking office, I have visited and addressed many local bar associations, ranging from the smallest and most rural to the largest urban areas in our state. Prior to my visiting each bar, my paralegal conducted fairly extensive research on each county where I was headed. Like the stories above, everywhere we looked, lawyers played a pivotal role in sometimes the founding and always the development of the counties and communities. In fact, in almost every case, lawyers and judges had great influence, comprising the original aristocracy and leadership. If you look at the City of Birmingham, you find lawyers not only leading in the legal system but also serving as industrialists and developers. You find lawyers like **Rufus Rhodes** (1856-1910), who founded *The Birmingham News*, and lawyers like **Frank Spain** (1891-1986), a great lawyer and philanthropist, who was instrumental in the development of Spain Rehabilitation Center and the Spain Heart Tower. **Maud McLure Kelly** (1887-1973), the first Southern woman to plead a case before the U.S. Supreme Court, also devoted countless hours to civic clubs and service organizations.

These lawyers are not the exception. In virtually every county, you find that lawyers were at the heart of forming and supporting educational institutions, hospitals, banks and other institutions which are still serving our communities today. In many cases their names are forgotten but the good they did lives after them. Their legacy continues to have a profound impact on their communities long after they are gone.

It's been a great honor to crisscross the state representing the Alabama State Bar and meeting so many lawyers who are great leaders in their communities. As I've done so, I have often wondered what legacy our generation of lawyers is leaving for future generations.

When I became a member of the bar in 1971, it wasn't uncommon still to fuss with carbon paper on typewriters. We've come from carbon paper to computers, fax machines, cell phones, the Internet and electronic transfer of mail and documents, and what took two to three weeks to turn around back in the old days, now takes two to three hours. With technology comes efficiency, but the expectations and demands of immediacy have dashed any hope of having more time. With this kind of pressure, even our most noble intentions to do good are sometimes truncated before they ever get off the ground.

In previous columns I have talked about the importance of our profession and the stresses that go along with our work. I don't want to rehash that here, but when you add to that the torrid pace of our work, it seems there is a great gravitational pull to live in a just-get-by mode. Sometimes we have to climb out of the trench and take a look around to get a bigger perspective. It's this perspective that I think those great lawyers had in past generations and many have in this generation. Take, for example, the great Alabama lawyers who were involved in the Civil Rights movement. Essentially, they were willing to sacrifice all to use their legal abilities to stamp out the pernicious evil of racial discrimination and segregation. Had I been a lawyer during that time, I often wonder if I would have stood next to and supported those legal giants who suffered abuse, insult, intimidation and arrest for a greater good.

We still have the opportunity to solve the problems of racial disharmony and other issues of discrimination that lawyers are uniquely situated to influence. Our own bar association has taken the initiative to expand the Board of Bar Commissioners to take advantage of the talent and perspective of minorities. No community of people plagued with racial disharmony and discrimination can fulfill its highest mission. There is still much to be done.

Sometimes the overwhelming pressures of daily life or the desire to be amalgamated into the mainstream hinders us from seizing the great opportunities our profession offers each of us. Problems like those plaguing many of our school systems in Alabama are no less severe than when lawyer **Alexander Beaufort Meek** (1814-1865) helped develop the public school system in Alabama. Meek was a lawyer who served in the Alabama House of Representatives. As chairman of the House Committee on Education, he oversaw the passage of the bill which established the state's free public school system. Lawyers led the way to solve the problems with education then, and there are those in our profession today who have the ability to step up to the plate.

Perhaps another hindrance to lawyers being active in public service is that our new lawyers enter the profession with huge educational debt. Of last July's bar examinees, 75 percent of them had an average debt of almost $66,000. Some had debt as high as $185,000. The implications of those statistics are dismal. Young lawyers with that kind of debt are just not capable of stepping into the public service roles in which many of us started our careers. The Alabama Law Foundation and the Alabama State Bar are investigating debt forgiveness programs for lawyers who enter the public service arena, but that kind of debt load severely restricts an attorney's ability even to participate in the **Volunteer Lawyers Program**. The VLP is an excellent program, but we need the participation of more lawyers.

Recently, I was talking to one of the Legal Services attorneys in Montgomery, and I asked the question, "What can lawyers do to help the over-burdened Legal Services programs?" He responded that the Volunteer Lawyers Program is the greatest help but said, "We just need more lawyers." Currently, only about 20 percent of our lawyers participate in this service. If you haven't signed up, I encourage you to do so. Even if you take only one case a year, it would be a great service. Please contact **Linda Lund** at the Alabama State Bar (334-269-1515) for more information.

President's Page

Continued from page 89

Then there are the issues with the perception of our judicial system. The cost of justice is beyond the pale of many of our citizens, and the high cost and acrimony associated with some of our judicial races result in a diminished respect for our judicial system. Since 1996, candidates for Alabama Supreme Court races have been required to raise more than $1 million per election. In that same year, contributions exceeded $2.68 million to the winning candidate and $1.76 million to the losing candidate.[3] The total $4.4 million for that race held as a national record for state high court campaigns until surpassed by an Illinois Supreme Court campaign in 2004.[4] In the year 2000, when five seats were filled, the total Alabama Supreme Court campaign contributions exceeded $13 million. That election led the nation for campaign contributions to judicial candidates. I'm not questioning the excellent ability or the integrity of the members of our court, but unfortunately such high-stakes, politically-charged elections (in which special interests sometimes play a larger-than-desirable role) damage public perception of the judicial process.

In addition to the high cost of judicial campaigns, the Alabama court system has recently suffered from a lack of adequate funding by the legislature. This is a serious problem that now deprives our court system of sufficient personnel and adequate training of new judges and court staff. Jury trials have been curtailed, and in most of our counties, the court system is severely understaffed.

John Adams once said, "No civilized society can do without lawyers."[5] To that may I respectfully add that no civilized society can continue to function without a balanced, independent, effective judiciary and one respected by its citizens. This is essential to sustaining life and liberty in a "government of laws not of men."

The Board of Bar Commissioners recently approved a reiteration of its 1997 proposal calling for merit selection of appellate judges in Alabama. While it may not be the only answer or the final solution, it is worth noting that Alabama is one of only eight states that provide for partisan elections of appellate court judges. The goal of our judicial system is to administer justice fairly, impartially and in accordance with the rule of law. If lawyer-judges and members of the bar do not solve the problems, who will?

Clement Comer Clay (1789-1866), first chief justice of the Alabama Supreme Court, helped the state's nascent judicial system grow and develop into a respected institution. During the Reconstruction Era, when respect for the rule of law had nearly disappeared, another lawyer came along who worked to restore public confidence in the judiciary.[6] **Chief Justice George Washington Stone** (1811-1894) invested his time, efforts and personal reputation to see the legal system returned to its proper constitutional parameters. His own personal character helped restore the public's confidence in the rule of law and the judicial branch of government. As lawyers today, we can't sit by and watch our court system deteriorate. Our courts should be out of the reach of no one, and its doors should never be closed because of the lack of funding.

It has been argued that, "Alabama's lawyers owe high fiduciary duties to all Alabamians, especially the most powerless and vulnerable, such as children, the elderly and those trapped in poverty or struggling to make ends meet at low income levels," and that this fiduciary duty extends to an obligation, "to ensure that the state's laws themselves promote justice for all Alabamians, especially the poor and powerless."[7] This is a challenging statement and one supported by the *Rules of Professional Conduct* and the history and tradition of the Alabama legal profession. Many of the lawyers in Alabama are very involved in seeking solutions to these and other issues. These are not problems that the legal profession alone faces, but there is no other profession or group who is better equipped to lead the way.

Of course there are all kinds of opportunities for good in our profession beyond solving the major issues of our day. Just the sensitivity and attentive ear extended to those seeking our advice to be sure we're helping them with their real needs are of great value. Most of the lawyers I know do everything they can to help their clients and their communities. Alabama lawyers give thousands and thousands of hours yearly to charitable institutions and other projects for public good. If you multiply that time by their hourly rate, the contribution would reach into the millions of dollars. I personally know several judges and lawyers who have coached baseball, basketball and virtually every other youth sport. One of my sons, who is now an adult, still talks about the Tuscaloosa lawyer who coached him in his first years of basketball. He made an impact on my son's life which continues to encourage him to this day.[8] Just proof that even the simple things that we do to increase good can live after us.

My prayer is that all of us would be mindful of the potential we have to do good now and leave our fingerprints on future generations. ■

Endnotes

1. Margaret Jean Jones, *Combing Cullman County* 8 (1972).
2. Samuel Rumore, *Building Alabama's Courthouses*, 60 Ala. Lawyer 300 (1999).
3. For an interesting discussion of this issue, see Laura Stafford and Samantha Sanchez, *Campaign Contributions and the Alabama Supreme Court*, (May 5, 2003), at 5, available at *www.followthemoney.org/press/AL/20030505.pdf*.
4. *ICPR Finds Illinois Supreme Court Race Breaks National Record*, PR Newswire, (Oct. 19, 2004), available at *www.news.findlaw.com/prnewswire/20041019/19oct2004180428.html*.
5. David McCullough, John Adams 591 (2001).
6. Alabama Department of Archives & History, *Alabama Hall of Fame: George Washington Stone* (Jan.18, 1996), *available at www.archives.state.al.us/famous/g_stone.html*.
7. Susan Pace Hamill, *The Book That Could Change Alabama*, 56 Ala. L. Rev. 219, 240 (2004).
8. As a side note, while we are on the issue of family, I wanted to add how overwhelmed I have been by the number of encouraging comments I have received on my last article, which addressed the stresses of being a member of a lawyer's family. Many have affirmed the ideals it contained regarding keeping our faith and our families in proper priority with our professional work. As I mentioned in the article, I am indebted to Fiona Travis for her insightful book *Should You Marry a Lawyer?* from which several of the concepts and ideas used in my article were drawn.

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Executive Director's Report

By Keith B. Norman

A 12-Year Streak Comes to an End

It's often said that all good things must come to an end. For the past 12 years, the annual occupational license fee has been $250 and special membership dues have been $125. Regrettably, the streak must come to an end. The Board of Bar Commissioners has authorized a $50 increase in the occupational license fee and a $25 increase for special membership dues, effective October 1, pending legislative approval.

Before authorizing this fee increase, the Commission studied state bar finances and the state bar's future needs. The Commission considered all aspects of state bar operations as well as the membership's increasing desire for additional services from the state bar. As good stewards must, the Commission has made particularly sure that the state bar's finances have been well managed and its expenditures justified. As an example, last summer, the Commission cut their reimbursement for attending the annual meeting.

The fact of the matter is that for the last several years, the state bar's revenues have not kept up with its expenditures. **Figure A** shows state bar revenues and disbursements for the last five years. In '01-'02, disbursements *exceeded* revenues by nearly $13,000. The next year, '02-'03, the deficit increased to $116,000. Because the state bar budget is put together two years in advance, this delays the implementation of remedial measures. By '03-'04, several temporary cost-saving and cost-shifting measures had been imposed; otherwise the state bar would have experienced a shortfall of $83,000. Fortunately, the state bar's reserves have been sufficient to postpone a fee increase

Figure A

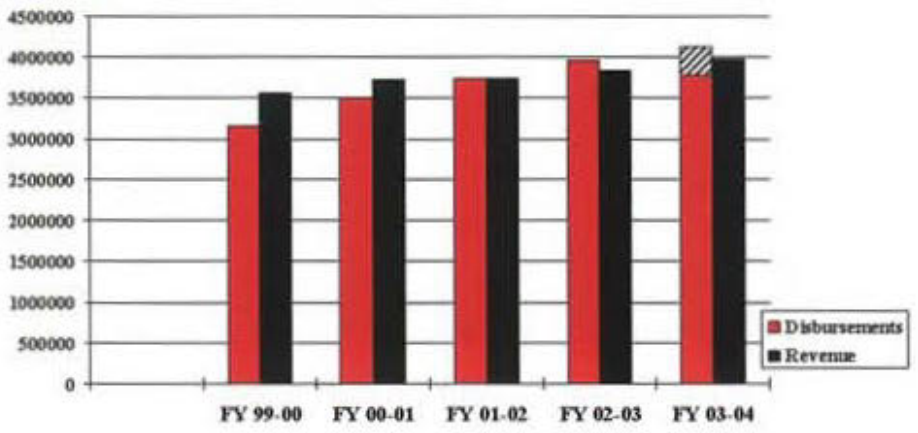
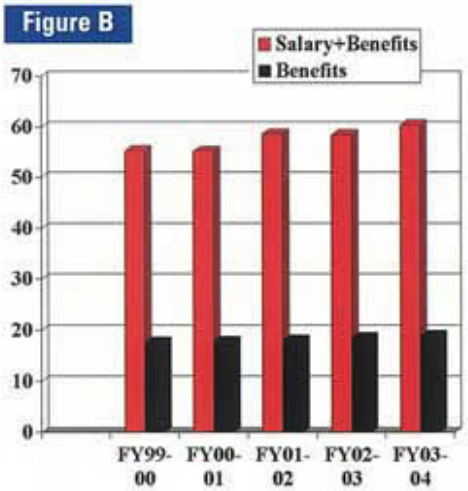


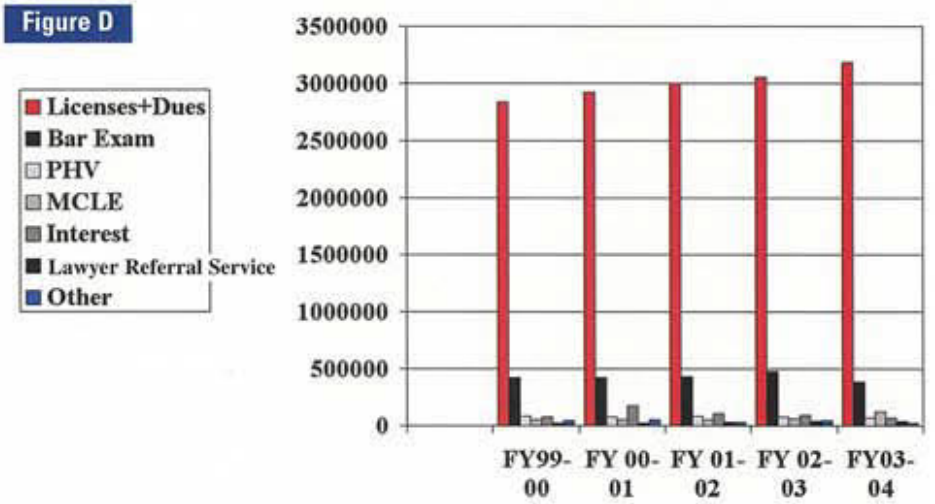
Figure B



until now.

The next several graphs give you an idea of how state bar funds are spent, as well as the sources of those funds. **Figure B** shows that "Personnel" constitutes the largest single cost. Although personnel costs have increased both in actual terms and as a percentage of overall operating costs these past five years, i.e., from 52 percent to 60 percent, the state bar's costs in this regard are below other state agencies and many of our peer bar groups. **Figure C** shows state bar expenditures by department and program for '03-'04.

Figure D



As **Figure D** suggests, license fees and special member dues are the primary sources of revenue for the state bar. Since 1959, the state bar has had four license fee increases, or an increase roughly every 8.25 years. The average percentage fee increase has been 77.8 percent. A $50 license fee increase will be the fifth increase in the last 46 years. By comparison, it comes 12 years after the last one and amounts to a 20 percent increase. Even with an increase of $50, lawyers will be paying less for their licenses and special memberships in real terms than they were paying in 1993! Finally, **Figure E** provides a five-year projection of revenues and expenses with a $50 license fee and $25 special membership dues increase.

A fee increase not only will allow the state bar to keep up with increased costs, but it will provide the state bar with the revenue to broaden administrative support for 23 practice sections and our most utilized programs. Furthermore, we will be able to transfer 16,000+ member files to an electronic document management system. Finally, we will use these increased revenues to make better use of the Internet by augmenting information and services available through the bar's Web site, *www.alabar.org*.

The occupational license fee Alabama lawyers now pay ties us with five other state bars at 14th place for the amount of license fees. A $50 increase will move us to tenth place. The better measure is not the amount of the license fee but the total of all mandatory fees that lawyers must pay. In this regard, we rank 22nd among all states. A $50 increase will move us to 17th place on that list.

Several years ago, I wrote in my "Executive Director's Report" that the savings a member could accrue from the state bar's many member benefits in many instances would more than offset the cost of the occupational license. Even with a $50 increase, this is still the case. In May, we will roll out unlimited, free Internet-based legal research with **Casemaker®**. This service will be available to all bar members. With these and other services available in the future, the privilege to practice law in Alabama has never been more valuable.

Figure C

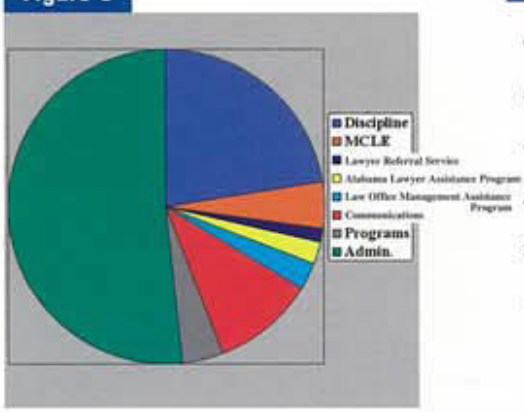
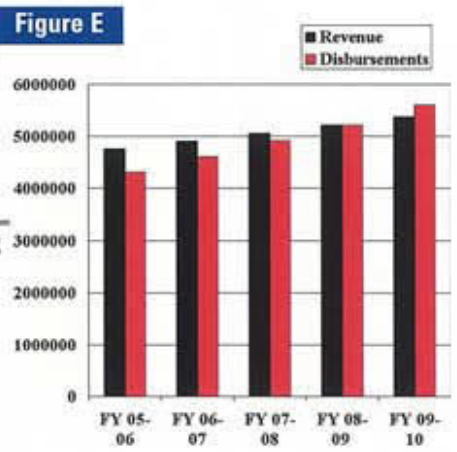


Figure E



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The Eleventh Circuit Historical Society is a private, nonprofit organization incorporated in Georgia on January 17, 1983. Although we have no legal connection with the United States Court of Appeals for the Eleventh Circuit or the federal government, the Society's **primary purpose** is to keep a record of the history of the courts of the Eleventh Circuit as institutions and of the judges who have constituted these courts. In this regard, the Society considers the judges in the old Fifth Circuit from the states of Alabama, Florida, and Georgia to be included in our area of interest.

In addition, the Society continually strives towards our **broader mission** of fostering public appreciation of the role and impact of the federal court system in the states encompassed by the Eleventh Circuit.

Since the formation of the Society came shortly after the creation of the Circuit, this timing is especially exciting because we can **write history as current history, not as research history**. We are devoted to preserving our courts' heritage through the collection of portraits, photographs, videotaped oral histories, documents, news articles, books, artifacts, and personal memorabilia.

The Society has a permanent office located in the **Elbert Parr Tuttle United States Court of Appeals Building** in Atlanta. Our **Board of Trustees** is composed of lawyers and legal scholars who represent the historical interests of Alabama, Florida, and Georgia.

The Society's archival activities are partially funded by grants and other special gifts, but we **depend primarily upon our members** for our financial support and general maintenance. Hence, the success of the Society's ongoing collection program rests upon the generosity of our members.

You can take pride in knowing that **through your membership** you are helping to recapture ever-fading memories of past events, and thus, supplementing historical knowledge that will enlighten and enrich present and future generations. In essence, the Society's achievements and accomplishments belong to you.

The Officers and Trustees of the Eleventh Circuit Historical Society cordially **invite you to join** in this rewarding challenge.

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FEES	Early Bird Fee (On or Before February 18, 2004)	Regular Registration Fee (After February 18, 2004)
Full Registration*	$695	$795
Additional Full Registration**	$595	$695
Full Registration with Program Promoters Discount	$595	$695
One Day Sessions Only	$295	$345
Exhibits Only	$free	$free

*Full Registration includes access to all educational programs and to the exhibit floor for the entire event.

** Additional Full Registration means two or more full registrations from the same organization when submitted together.

Important Notices

William D. Scruggs, Jr. Service To The Bar Award

1. There is hereby established a William D. "Bill" Scruggs, Jr. Service Award
2. The purpose of this award is to honor the memory and the accomplishments of William D. "Bill" Scruggs, Jr. and to encourage the emulation of his deep devotion and service to the Alabama State Bar by recognizing outstanding, longterm service by living members of the Bar of this state to the Alabama State Bar as an organization
3. This award shall be granted, from time to time, by the Board of Bar Commissioners of the Alabama State Bar upon the report of the award committee as described below. There is no requirement that this award be presented on an annual basis or that it be limited to one recipient a year
4. The William D. "Bill" Scruggs, Jr. award committee shall be a committee of the Alabama State Bar consisting of the following:
   (a) President-elect of the Alabama State Bar
   (b) Executive Director of the Alabama State Bar
   (c) General Counsel of the Alabama State Bar
   (d) Two members of the Alabama State Bar Board of Bar Commissioners appointed by the president who have a minimum of six years of total service as a member of the Board of Bar Commissioners, though not necessarily consecutively
5. The committee shall submit, at least 30 days prior to the annual meeting of the Alabama State Bar, to the Board of Bar Commissioners Executive Committee of the Alabama State Bar, a report setting out the name or names of such person or persons that the committee recommends as a recipient of the award for that year. If the committee does not choose to present the award in a given year, this fact shall also be reported
6. The presentation of the award shall be made during the annual convention of the Alabama State Bar in such manner as the president deems most appropriate
7. The award shall consist of an appropriate plaque to be presented to each recipient and enrollment of the name of each recipient on a permanent plaque displayed at the Alabama State Bar building

For an application, contact Keith Norman, ASB executive director, at (800) 354-6154 or (334) 269-1515, or download one from the ASB Web site, *www.alabar.org*.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2005 Annual Meeting, July 21-23 at Point Clear.

Local bar associations compete for these awards based on their size—large, medium or small.

The following criteria will be used to judge the contestants for each category:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2005. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, or download one from the ASB Web site, *www.alabar.org*.

Chief Justice's Commission on Professionalism Created

New commission to focus on highest levels of professionalism among Alabama lawyers

Drayton Nabers, Jr., chief justice of the Supreme Court of Alabama, announces the creation of the Chief Justice's Commission on Professionalism. The purpose of this Commission is to focus on the ethics of the legal profession to assure that they are continuously improved. "I worked with **Douglas McElvy**, president of the Alabama State Bar, and talked with leading lawyers in our state as well as deans of our law schools," Nabers said, "and I want to emphasize that though much is already being done in the area of ethics without having a commission, we need to continue to enhance those efforts."

Based on a successful model in Georgia, the purpose of the 21-member commission is to identify, support and encourage lawyers to aspire to and exercise the highest levels of professional integrity in their relationships with clients, other lawyers, the courts and the public; to sustain a high level of respect for professionalism among all members of the Alabama bench and bar and law students; and to ensure that the practice of law remains a high and worthy calling which serves clients and the public good.

The commission will provide and facilitate forums to meet and discuss ideas. Nabers emphasized that he and commission members would be directly involved in speaking and encouraging comments from lawyers and judges across the state. "We will also be studying other states with respect to their efforts in this area," he stated. In addition, the commission will serve as a source of recognition to show appropriate appreciation to those individuals and programs that are examples for others to follow.

Nabers also announced that the **Hon. Sharon Yates**, former presiding judge of the Alabama Court of Civil Appeals, will serve as the executive director of the commission. Judge Yates said, "One goal that I have always had is to raise the level of professionalism for both the bench and the bar. I am excited to be able to contribute to this goal in my capacity as executive director of the commission."

Those serving on the commission are:

Drayton Nabers, chief justice of the Alabama Supreme Court, chair;
Judge William C. Thompson, Alabama Court of Civil Appeals;
Judge Greg Shaw, Alabama Court of Criminal Appeals;
Judge Herman Y. Thomas, Mobile County Circuit Court;
Judge Judson Wells, Mobile County District Court;
Judge Sharon Lovelace Blackburn, United States District Court, Birmingham;
Governor Albert P. Brewer, Cumberland School of Law;
John Carroll, dean, Cumberland School of Law;
Kenneth Randall, dean, University of Alabama School of Law;
Charles I. Nelson, dean, Thomas Goode Jones School of Law;
J. Douglas McElvy, president, Alabama State Bar;
Bobby Segall, president-elect, Alabama State Bar;
Brannon J. Buck, president, Young Lawyers' Section, Alabama State Bar;
Leon Ashford, Birmingham;
Samuel N. Crosby, Daphne;
Samuel H. Franklin, Birmingham;
Ernestine Sapp, Tuskegee;
Leon Garrett, Piedmont;
Victor H. Lott, Jr., Mobile;
Bryan A. Stevenson, Equal Justice Initiative of Alabama;
Keith B. Norman, executive director, Alabama State Bar; and
J. Anthony McLain, general counsel, Alabama State Bar.

Amendments to *Alabama Rules of Appellate Procedure*

The Alabama Supreme Court has adopted amendments to Rule 21(a), Rule 28, Rule 31(b), Rule 32(a) and (b), Rule 34(a), Rule 39, and Rule 40(g), *Alabama Rules of Appellate Procedure*, and has adopted a new rule, Rule 25A, *Alabama Rules of Appellate Procedure*, "Signing Briefs, Motions, and Other Papers; Representations to Court." The amendments of the rules and the adoption of Rule 25A are effective June 1, 2005. The order amending the rules and adopting Rule 25A appears in an advance sheet of the *Southern Reporter* dated on or about February 24, 2005.

Rule 39 has been significantly revised, in part to eliminate the requirement that a brief be filed with a petition for a writ of certiorari and to clarify that a statement of the facts should be included with the petition for the writ of certiorari. The brief will be filed after the writ, if any, issues. Rule 28 has been revised in part to reflect the changes effected by the amendment to Rule 39.

Amendments to Alabama Rules of Criminal Procedure

The Alabama Supreme Court has adopted amendments to Rule 18.4(b), Rule 32.1(f) and Rule 32.2(c), Alabama Rules of Criminal Procedure. The amendments are effective June 1, 2005. The orders amending the rules appear in an advance sheet of the Southern Reporter dated on or about February 24, 2005. The amendment to Rule 18.4(b) requires the court to administer an oath to the jury upon calling the case. The amendment to Rule 32.2(c) requires that a Rule 32 petition for an out-of-town appeal from the denial or dismissal of a previously filed Rule 32 petition be filed no later than six months after the petitioner discovers that the petition was denied or dismissed.

—Bilee K. Cauley, reporter of decisions, Alabama appellate courts

Important Notices

Continued from page 97

Notice of Election

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

Elected Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4 and place no. 7; Bessemer Cut-Off; 11th; 13th, place no. 1; 15th, place no. 5; 17th, 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; 40th; and 41st.

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1, 2005 and vacancies certified by the secretary no later than March 15, 2005.

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 29, 2005).

Ballots will be prepared and mailed to members between May 1 and May 15, 2005. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 31, 2005) to the Alabama State Bar.

At-Large Commissioners

The Board of Bar Commissioners will select nine at-large commissioners. The initial terms of the nine at-large commissioners will be staggered: three at-large commissioners will be selected for terms of one year each; three at-large commissioners will be selected for terms of two years each; and three at-large commissioners will be selected for terms of three years each. The commission will be responsible for selecting candidates who are members in good standing and reflect the racial, ethnic, gender, age, and geographic diversity of the members of the Alabama State Bar.

The at-large positions will be filled from applications which must be received by the Secretary no later than 5:00 p.m. on April 1, 2005. The application will be available on the state bar Web site, *www.alabar.org*, beginning March 1, 2005. Those selected to the at-large positions will be notified promptly of their selection. The terms of the at-large commissioners will commence on July 1, 2005.

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, 2005. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36101-0671

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. ■

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Implementation of House Bill 308: Motion Cover Sheet

BY NATHAN WILSON

For the past several years, budgetary restraints on the Alabama Judicial System have threatened the efficacy of our courts. In the fall of 2003, the severity of the dilemma climaxed when hundreds of court employees throughout the state lost their jobs. As part of the relief effort, House Bill 308 was passed in the 2004 Regular Session which increased various court costs for civil filings and established filing fees for certain dispositive motions such as motions for summary judgment and judgment on the pleadings (see *Alabama Code* §12-19-71(a)(10)). The revenue produced through HB 308 was intended to bring the court system closer to full capacity. Upon a recent assessment of the revenue reports from the past fiscal year, the Administrative Office of Courts (AOC) has detected a shortfall on the collection of costs for dispositive motions. A closer review of court files indicates that confusion may exist between attorneys, clerks and judges regarding which motions require a fee. It is necessary for the resilience of the judicial system that any confusion over motion fees pursuant 12-19-71(a)(10) be eradicated. At the same time, fairness dictates that we take appropriate measures to ensure that a uniform system exists. At a recent meeting of circuit and district judges, the chief justice announced the implementation of a standardized Motion Cover Sheet. This sheet will be used in all civil cases and is necessary to secure our court system.

The Motion Cover Sheet will require an attorney filing a motion to choose from a list of specific motion types. AOC conducted a file audit of several counties, which revealed motions titled differently than the relief requested. For example, many motions for summary judgment went uncharged by the clerk because they were titled "Motion to Dismiss." According to §12-19-71(a)(10), Motions to Dismiss pursuant to Rule 12(b) are exempt from the dispositive motion fee. Filings titled Motions to Dismiss that are actually Motions for Summary Judgments divert the filing clerk's attention from the true nature of the motion and fees go uncharged. With the Motion Cover Sheet, attorneys will be required to select the correct nature of their motion from a predetermined list. Upon the filing of the cover sheet with the motion, the clerk can more readily identify the type of purported motion presented and ultimately determine with ease whether a fee should be charged.

An additional source of the problem includes dispositive motions filed in open court. The collection of filing fees is a duty of the clerk, not the judge. Our judges, who are currently overloaded with cumbersome dockets, should not bear the burden of collecting fees. If a motion requiring a fee is filed in open court, the judge will require the filing party or attorney to file the Motion Cover Sheet and, if necessary, remit payment retroactively to the Clerk's Office. If an attorney or party files a motion in open court which does not require a fee, it should still be accompanied with a cover sheet for accountability purposes. The layout of the Motion Cover Sheet is relatively simple as not to place an excessive burden on judges or their staffs when they are asked to file motions in open court.

Prior to the implementation of the cover sheet, members of the bar should become familiar not only with its purpose but also with its application (sample attached). House Bill 308 excludes workers' compensation and small claims cases from filing fees for dispositive motions, so the coversheet will not be required in these cases. A cover sheet must be filed per motion; however if the same motion is filed against numerous parties simultaneously, only one cover sheet is required. The cover sheet should accompany all motions whether filed with the clerk or filed in open court. Copies will be available at all circuit clerks' offices and will also be made available on the AOC Web site (*www.alacourt.gov*). Prior to implementing statewide use of the coversheet, an evaluation period will be conducted in Montgomery County and Lee County.

Since the ratification of House Bill 308, members of the bar have been overwhelmingly cooperative with the judicial system. Attorneys have recognized the judicial system's need for monetary support to function at adequate capacity. The bar has exhibited an exceptional level of unity and support which has enabled the courts to survive on a limited budget. AOC understands that the Motion Cover Sheet will be an additional burden on attorneys, but the burden is relatively disproportionate to the overall need for a suitably funded judicial system. ■

Nathan Wilson
Nathan Wilson is a graduate of Birmingham-Southern College and the University of Memphis School of Law. Following a clerkship with the Hon. Tennant M. Smallwood in Jefferson County, he joined the legal staff of the Administrative Office of Courts.

STATE OF ALABAMA
Unified Judicial System

Revised 2/14/05

_____County

Check one(*Not for Workers' Comp., PFA, or Small Claims cases*): ☐ District Court ☐ Circuit Court

_File No.

Style of case:

v.

MOTION COVER SHEET

Name of Filing Party:

Name, Address, and Telephone No. of Attorney or Party, If Not Represented:

Attorney Bar No.:

To be filled out by Clerk of Court:
- ☐ Filing Fee Charged and Collected (Amt $_____)
- ☐ Filing Fee Not Required (SM, Work Comp, PFA)
- ☐ Affidavit of Hardship on File

Type of Motion (Check One)

Motions Requiring Fee

- ☐ Default Judgment ($50.00)
- ☐ Intervene or Appear as Third Party Plaintiff – Only in CV cases, excluding DV cases filed on the CV docket ($297.00)
- ☐ Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Judgment on the Pleadings ($50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary Judgment($50.00)
- ☐ Other Dispositive Motion not pursuant to Rule 12(b) ($50.00)
- ☐ Renewed Dispositive Motion (Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Summary Judgment or other Dispositive Motion not pursuant to Rule 12(b) ($50.00)
- ☐ Other _____, pursuant to Rule_____($50.00)

* Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

☐ Local Court Cost $_____

Motions Not Requiring Fee

- ☐ Add Party
- ☐ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during trial)
- ☐ Disburse Funds
- ☐ Discovery
- ☐ Ex Parte Restraining
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Plaintiff's Motion to Dismiss or Stipulation of Dismissal
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Show Cause
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Temporary Restraining Order
- ☐ Vacate or Modify
- ☐ Withdraw
- ☐ Other_____, pursuant to Rule_____(Subject to filing fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship ☐	*Date:*	*Signature of Attorney or Party:*

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

** Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee

About Members, Among Firms

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, or you may change it online at www.alabar.org under "Members." Click on "Member Log-In," and follow the directions.***

About Members

Lisa Burnette announces the opening of her office at 6000-B 20th Avenue, Valley. Phone (334) 756-9595.

Kevin K. Hayes announces a name change of his company to Gulf South Title Services LLC.

Ereck Jett announces the opening of **Ereck Jett PC**, 724 Main Street, Moulton 35650. Phone (256) 974-7360.

Mike Winter announces the opening of **Winter Legal Strategies** at 300 Water Street, Suite 300-A, Montgomery 36104.

Among firms

Blount County District Attorney-Elect Tommy Rountree announces the appointment of **Ted Williams, Jr.** as assistant district attorney for the **41st Judicial Circuit of Alabama.**

Alford Clausen & McDonald LLC announces that **Christina M. Adcock** has been named a partner in the firm.

Austill, Lewis & Simms PC announces that **William K. Bradford** and **Marsá Janousek** have become shareholders in the firm's Birmingham office.

Baker, Donalson, Bearman, Caldwell & Berkowitz PC announces that **Jason Asbell** has become an associate with the Birmingham office.

Debra Taylor Lewis announces that she is now associated with the Birmingham office of **Balch & Bingham LLP.**

Ball, Ball, Mathews & Novak PA announces that **Eris Bryan Paul** has joined the firm as an associate.

Beckman & Associates LLC announces that **Joseph W. Warren** has become *of counsel* for the firm.

Benton & Centeno LLP announces that **Brenton K. Morris** has become a partner in the firm.

Bradley Arant Rose & White LLP announces that **Marc Ayers, Brian Blythe, Brad Burleson, Tye Dedmon, Hall Eady, Danielle Greco, Leigh Anne Hamburg, Ben Moncrief, Charles Moore, Leslie Morgan, Mitchell Mudano, Laura Palmer, Jeff Peters, Laura Taafee, Crystal Wilkerson,** and **Sabra Wireman** have become associates with the firm's Birmingham office, and **Chris Smith** is an associate in the firm's Huntsville office.

Burgess & Hale LLC announces that **Terry Allan Sides** has joined the firm.

Burr & Forman announces that **Jamie L. Moore, Dr. Brian O'Dell** and **L. Griffin Tyndall** have been named partners with the firm and **Debra Lee Mackey** has joined the firm as *of counsel.*

Cannon & Vaughn announces that **Gloria Maloy** has been named a partner with the firm and the firm's name has been changed to **Cannon, Vaughan & Maloy PC.**

Capell & Howard PC announces that **Paige R. Jackson** and **Wyndall A. Ivey** have become members of the firm, **James L. Webb** and **Caty Houston Richardson** have become associates of the firm, and **Terrie S. Biggs** has become a staff attorney with the firm.

Christian & Small LLP announces that **William R. Pringle, J. Kirkman Garrett** and **Brian H. Tobin** have become associates with the firm.

Citrin & McGlothren PC announces that **C. Randwell Caldwell, Jr.** has joined the firm as an associate, and **James B. Pittman, Jr.** has joined the firm *of counsel.*

Dillard & Associates LLC announces that **Stewart S. Wilbanks** has become an associate with the firm.

Donahue & Associates LLC announces that **Michael A. Casey, Jr.** has joined the firm.

Donald, Randall & Donald announces that **Walter S. Hayes** has become an associate with the firm.

Garrison Scott PC announces that **Brian D. Hancock, Warren M. Parrino, Richard A. Cusick** and **Mary Elizabeth Mayes** have become associates with the firm.

Hand Arendall, LLC announces that **Windy Cockrell Bitzer**, of the Mobile office, and **M. Allison Taylor** and **James S. Witcher, III** of the Birmingham office, have become members of the firm.

Harding & Claunch LLC announces that **Ward S. Sullivan** has joined the firm.

Haygood, Cleveland, Pierce, Mattson & Thompson LLP announces that retired **Circuit Judge Robert M. Harper** has become a member of the firm.

Helmsing, Leach, Herlong, Newman & Rouse PC announces that **Russell C. Buffkin** has become a member of the firm.

Huie, Fernambucq & Stewart announces that **Paul F. Malek, H. Cannon Lawley** and **Anna-Katherine G. Bowman** have become partners in the firm, and **C. Jeffrey Ash, J. Reed Lawrence, John Isaac Southerland, Doug R. Kendrick,** and **Jacob W. Crawford** have become associates with the firm.

Lanier Ford Shaver & Payne PC announces that **Mark Bledsoe** and **Graham Burgess** have been named associates with the firm.

Robert F. Lewis PC announces that **J. Stuart McAtee** has joined the firm.

Donald D. Lusk, Kenneth A. Dowdy, Payton C. Lusk and **Leslie A. Caldwell** announce the formation of **Lusk, Lusk, Dowdy & Caldwell PC**, with offices located at 2101 Highland Avenue, Ste. 410, Birmingham 35205. Phone (205) 933-7090.

Maynard, Cooper & Gale PC announces that **Terri A. Sewell** has become a shareholder.

(Continued on page 104)

About Members, Among Firms

Continued from page 103

McCallum Law Firm LLC announces that **Eric D. Hoaglund, Martha Reeves Cook** and **R. Brent Irby** have become partners and the firm's name has changed to **McCallum, Hoaglund, Cook & Irby LLP.**

McDowell Knight Roedder & Sledge LLC announces that **Karen Tucker Luce** has been named a member of the firm.

Bernard D. Nomberg announces the formation of the **Law Offices of Bernard D. Nomberg PC,** 2151 Highland Avenue, Suite 120, Birmingham. Phone (205) 930-6900. **David P. Nomberg** is an associate of the firm.

North, Pursell, Ramos & Johnson PLC announces that **Edward A. Hadley** and **J. Eric Miles** have become members of the firm.

Page, Scrantom, Sprouse, Tucker & Ford PC announces that **Josh R. McKoon** has joined the firm as an associate.

Ray, Oliver & Ward LLC announces that **Jonathan K. McGee** is now a member of the firm and the firm name is **Ray, Oliver, Ward & McGee LLC.**

Reynolds, Reynolds & Duncan LLC announces that **Justin B. Little** has become an associate.

Sabel & Sabel PC announces that **Marcia Bennekin Woodham** has joined the firm as an associate.

Sasser, Bolton, Stidham & Sefton PC announces that **Joel D. Connally** and **Lee Martin Russell, Jr.** have become shareholders with the firm.

Spriggs & Hollingsworth announces that **Robert M. Lichenstein** has been named an associate of the Washington, DC-based firm. Lichenstein previously served as law clerk to the **Honorable Sharon Lovelace Blackburn,** U.S. District Court, Northern District of Alabama.

Wallace, Jordan, Ratliff & Brandt LLC announces that **William B. Stewart** has been elected managing member of the firm and **Oscar M. Price, III** has joined the firm. Price previously clerked for U.S. **Magistrate Edwin Nelson.**

Walston, Wells, Anderson & Bains LLC announces that **Alan M. Warfield** has become a partner in the firm.

White Arnold Andrews & Dowd PC announces that **Jonathan Cross** has joined the firm.

Yearout, Spina & Lavelle PC announces that **Jason R. Smith, Tina J. Hayes** and **Joshua A. Bell** have joined the firm as associates. ■

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TALMADGE H. FAMBROUGH

Talmadge H. Fambrough, a legend in the St. Clair county legal community, died November 10, 2004.

Fambrough, 78, began practicing in Pell City in 1954 after receiving his degree from the University of Alabama. With that began a long career of accomplishments highlighted only by the friendships he made.

"When I came here in 1974, I faced him many times on opposite sides of the table," Pell City attorney William Trussell said. "He was always an advocate for his client's position, but he was always a gentleman."

Trussell said he had the privilege of working with Fambrough for nearly 20 years and considered him a friend.

"I was a young lawyer, and he was so nice to me, even though I know several times he must have though I didn't know what I was doing.

"Everyone in the bar association just loved him. He will be terribly missed."

Fambrough was recently honored by the Alabama State Bar for 50 years of service in the legal profession. In his career, he served not only as a lawyer, but as a political and civic leader.

One noteworthy accomplishment came in 2000 when he sat for the Texas bar examination.

"What amazes me is that when he left here when his wife got transferred to Texas, he decided he wasn't going to sit at home, so he took the test for the Texas bar," St. Clair County Circuit Judge Charles Robinson said. "He took it, and passed it, at 74 years old. That's a real credit to him and his intelligence."

Robinson said Fambrough was an avid fisherman who loved to tell fish tales.

"He was a colorful character. He was in the mold of lawyers a generation before me, such as Frank Embry and Ed Holladay," he said. "He's another one of the good guys that's gone on."

Fambrough attended the National College of District Attorneys and graduated in 1978. He also served as St. Clair County's assistant district attorney.

"I worked with him for several years," St. Clair County Assistant District Attorney Lamar Williamson said. "I came into this office in 1981 and he was already here.

"He taught me how to try cases and how to deal with people. He just had a way of putting people at ease. I didn't know what I was doing, and he taught me how to deal with the job and how to not take it home. That's the reason I'm still here."

Former St. Clair District Attorney Fitzhugh Burttram also has fond memories of Fambrough as a young attorney. Burttram appointed Fambrough as an assistant district attorney, and they served together for 12 years.

"When I was appointed as St. Clair District Attorney by Gov. George Wallace, I appointed Talmadge as my assistant, " Burttram said. "It's hard to summarize a lifetime relationship."

Burttram said he remembers taking Fambrough to a prosecutor's class in Houston.

"We stopped on the way and bought Chilton County peaches," he said. "Every night, our room was raided by peach-seekers, and Talmadge figured we couldn't have done anything better to make friends than buying peaches. We had a lot of fun and we did a lot of work together, but our whole relationship was a series of stories like that."

Fambrough is survived by his wife, Jo Ann Fambrough; his children, Mike Fambrough (Dottie) of Gadsden; Rosemary Turner (Henry) of Florida; David Parnell of California; Cindy Oliver (Shannon) of Oxford; and his grandchildren.

Circuit Judge Bill Hereford was also a close friend of Fambrough's and summed up his friend's career in a simple statement. "He was always a good example for young lawyers," he said. "He really was a perfect gentleman—in the courtroom and out."

(This article originally appeared in the December 5, 2004 issue of the ***Daily Home****.)*

IRBY A. KEENER, JR.

On March 2, 2004, the senior member of the Cherokee County Bar departed this life. He was a pillar of the bar and of the community and was widely respected for his honestly, integrity and his love for his fellow man.

Irby A. Keener, Jr. was born on July 8, 1926 to Irby A. and Eunice Gunter Keener in Centre. He graduated as valedictorian of his senior class in 1942 and served as president of the student body, president of the Beta Club, editor of the annual and a member of the band.

Following graduation from high school, Mr. Keener entered the University of Alabama and, upon reaching 18 years of age, entered the United States Army, where he served until the end of World War II. He returned to the University and earned his B.S. degree in 1948 and his J.D. degree in 1949. During his student years, Mr. Keener was a member of Phi Alpha Delta, Lambda Chi Alpha and the Farrah Law Society.

After graduating from law school in 1949 and being admitted to the bar that same year, Mr. Keener returned to Centre, where he became a partner with his father in the firm of Keener & Keener, until his father's death in 1965. After the death of his father, Mr. Keener continued in the practice of law until December 2003, when he closed his office and "officially" retired. Mr. Keener was active in civic affairs as well as in his profession. He was a member of the American Judicature Society, the American Legion, the Centre Lions Club, Who's Who in Alabama, Who's Who in the World and Who's Who in the South and Southwest. Mr. Keener served as special assistant attorney general of Alabama from 1959 to 1963, and he was the attorney for and served as a director of Farmers & Merchants Bank. He was the attorney for the Cherokee County Hospital Board from 1955 until 2000, served on the Cherokee County Democratic Executive Committee and was elected president of the Centre Chamber of Commerce in 1958.

Mr. Keener is survived by his wife, Sara Lou Coffey Keener, of Centre, and his daughter, Elise Alexander Keener, of Vestavia Hills.

—Albert L. Shumaker, Centre

C. THEODORE STRICKLAND

C. Theodore Strickland was born September 16, 1960 in Tuscaloosa. He graduated from Tuscaloosa County High School and attended the University of Alabama beginning in 1978. Ted graduated from the University of Alabama in 1982 with a bachelor of arts degree in communication. After spending four years in business, Ted enrolled in the Cumberland School of Law at Samford University in Birmingham. He graduated from Cumberland in 1989 with his Juris Doctorate and began the private practice of law.

Immediately after completing his undergraduate studies at the University of Alabama, Ted began a professional career with Olan Mills, Inc. He was eventually promoted to district manager where he was responsible for the management of 50 studios throughout Alabama, Mississippi and Florida. Ted left this career when he decided to return to school by enrolling in Cumberland School of Law.

Upon graduation from Cumberland School of Law, Ted began practicing in Tuscaloosa. In 1991, he was hired by the National Council on Compensation Insurance to serve as the legal team leader in the special investigations unit. Here, Ted managed an 11-member fraud investigative team specializing in evidence collection for insurance fraud for both criminal and civil prosecutions.

Ted left this position in 1995 to return to private practice. While in private practice, in 1998, Ted served as an assistant attorney general for the Department of Human Resources. In this capacity, he focused on matters involving dependant and multi-needs juveniles and adults in need of protective services. Ted left this position in December 2001 and began his association with the firm of Fisher, Skidmore & Strickland, PC.

Ted's practice spanned many areas, as he had a broad background of experience. He practiced primarily in the areas of bankruptcy, domestic relations and juvenile law. He also maintained a significant caseload in criminal law and civil litigation for both the plaintiff and defense.

Ted was a longtime member of Flatwoods Baptist Church, and, more recently, Lord of the Harvest Baptist Church, where he served as a deacon. Ted was also on the board of directors for Emergency Youth Services.

Ted is survived by his wife, Tami, and two daughters, Mallory and Maleah. He was a great husband and father, and a fantastic friend. This world is definitely a better place for Ted having been here. The legacy he leaves behind, in his family, friends and work, is a true measure of the wonderful man Ted Strickland was.

—John T. Fisher, Jr., Fisher, Skidmore & Strickland, PC, Tuscaloosa

Continued from page 107

Caine O'Rear, Jr.

The Walker County Bar Association lost one of its most well-respected members in the passing of Caine O'Rear, Jr. He died Monday, August 25, 2003, following a struggle with cancer. Mr. O'Rear was 81 years old at the time of his death. He is survived by his wife of 54 years, Kathryn Isbell O'Rear; his three sons, Caine O'Rear, III of Mobile and wife Gwen, George Isbell O'Rear of Birmingham and wife Kathy, and Griff O'Rear of Jasper and wife Melissa; his sister, Emmalu (Mrs. James) Foy of Auburn; eight grandchildren; and daughter-in-law, Suzanne O'Rear Snow of Jasper.

Mr. O'Rear was born in Jasper on June 26, 1922, the third child of Caine O'Rear, Sr. and Lulu Dodd O'Rear. He attended the University of Alabama and received his B.S. degree in 1943. He served in WW II from 1943 through 1946 as an infantry officer stationed in England, France and Belgium, and participated in the Allied invasion of Normandy. After the war, he attended the University of Alabama School of Law and received his L.L.B. degree in 1949.

He practiced law in Jasper from 1949 until his death, and was in partnership with his son, Griff, from 1984 under the firm name of O'Rear & O'Rear. Mr. O'Rear's practice encompassed the full range of general legal services, though he was best known as one of Walker County's foremost practitioners of real estate and banking law. He also served as Jasper city judge from 1953 through 1971 and city prosecutor from 1971 until his death. He was admitted to practice before the United States Supreme Court, and served the Alabama State Bar as a bar commissioner from Walker County.

Mr. O'Rear retired from the United States Army Reserves at the rank of colonel. In 2001, he was honored with the Liberte Medal from the French government for his participation in the Normandy invasion and the liberation of France from Nazi Germany.

Mr. O'Rear was a lifelong member of the First United Methodist Church of Jasper, where he served as chairman of the administrative board and sang in the choir for many years. He was a member of the board

of directors of Security Federal Savings Bank in Jasper, and was an active golfer and member of Musgrove Country Club.

Mr. O'Rear will be remembered as a man of distinction and integrity who exemplified the highest ideals of our profession and who faithfully served his family, friends, clients, church, and community. We are fortunate to have known him.

—Hoyt Elliott, Jr., president, Walker County Bar Association

Baker, Jerry DeWitt
Decatur
Admitted: 1988
Died: December 24, 2004

Boyanton, Benjamin Lee
Huntsville
Admitted: 1997
Died: December 19, 2004

Burt, Leonard Irl
Sheffield
Admitted: 1949
Died: June 20, 2004

Byrd, William Ivy
Daphne
Admitted: 1948
Died: November 26, 2004

Fullan, James Michael, Jr.
Birmingham
Admitted: 1950
Died: December 11, 2004

Langan, Joseph Nicholas
Mobile
Admitted: 1936
Died: November 9, 2004

Lee, Joseph Allen
Scottsboro
Admitted: 1950
Died: December 1, 2004

McDonald, Robert Gene
Anniston
Admitted: 1994
Died: March 7, 2004

Newell, Neal Curtis
Birmingham
Admitted: 1947
Died: January 14, 2005

Richardson, Patrick William
Huntsville
Admitted: 1948
Died: November 14, 2004

Tanner, Malcolm Leon
Birmingham
Admitted: 1952
Died: December 10, 2004

Tunstall, David Morgan
Tuscaloosa
Admitted: 1978
Died: January 5, 2005

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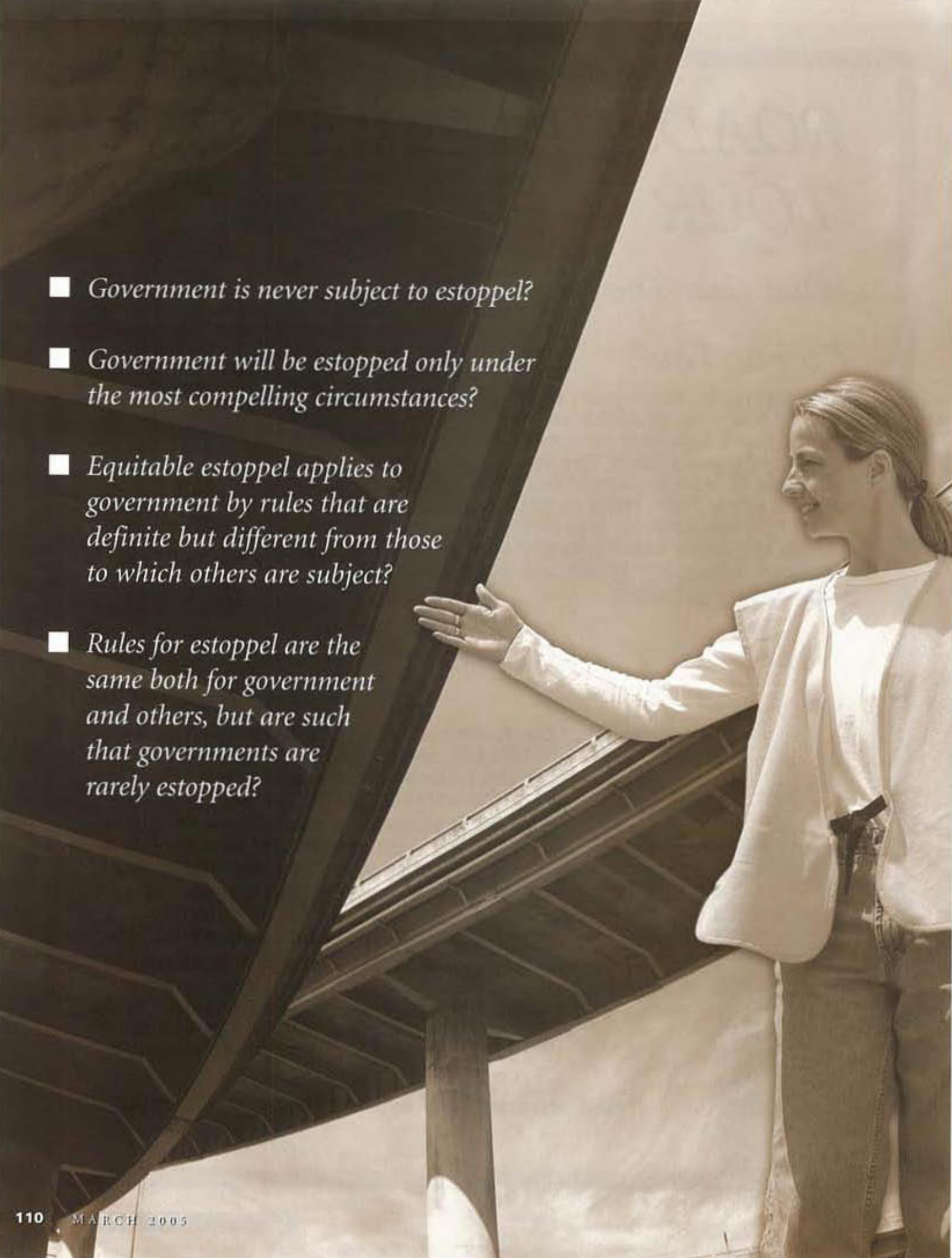


- *Government is never subject to estoppel?*
- *Government will be estopped only under the most compelling circumstances?*
- *Equitable estoppel applies to government by rules that are definite but different from those to which others are subject?*
- *Rules for estoppel are the same both for government and others, but are such that governments are rarely estopped?*

Equitable Estoppel Against The Government In Alabama

BY WILLIAM D. LITTLE

In the 2001 case of *Allen v. Bennett*[1], the Alabama Supreme Court revisited the questions of whether and under what circumstances equitable estoppel applies against a governmental entity. The court there repeated an oft-stated general rule that, "Equitable estoppel is to be applied against a governmental entity only with extreme caution or under exceptional circumstances." Previously, the court had stated that equitable estoppel "does not generally apply to" governmental entities.[2] Similarly, in 1950, the court stated flatly that "the principle of estoppel applicable to individuals is not applicable to the State or its municipal subdivisions or to state created agencies."[3] In 1986, the court, however, stated that "the doctrine of estoppel may apply against a municipal corporation when justice and fair play demand it."[4] In an earlier case, the court observed that, "[T]he doctrine of equitable estoppel may be asserted against a municipal corporation when the character of the action and the facts and circumstances are such that justice and equity demand that the corporation be estopped... ." and then quoted from another case that "when a sovereign submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are justiciable by every other principle and rule of equity applicable to the

claims and rights of private parties under similar circumstances."[5] Still later, the court stated, "It appears that the state, as well as its subdivisions, is to have its rights determined by the same rules which apply to private persons contracting and dealing with each other."[6]

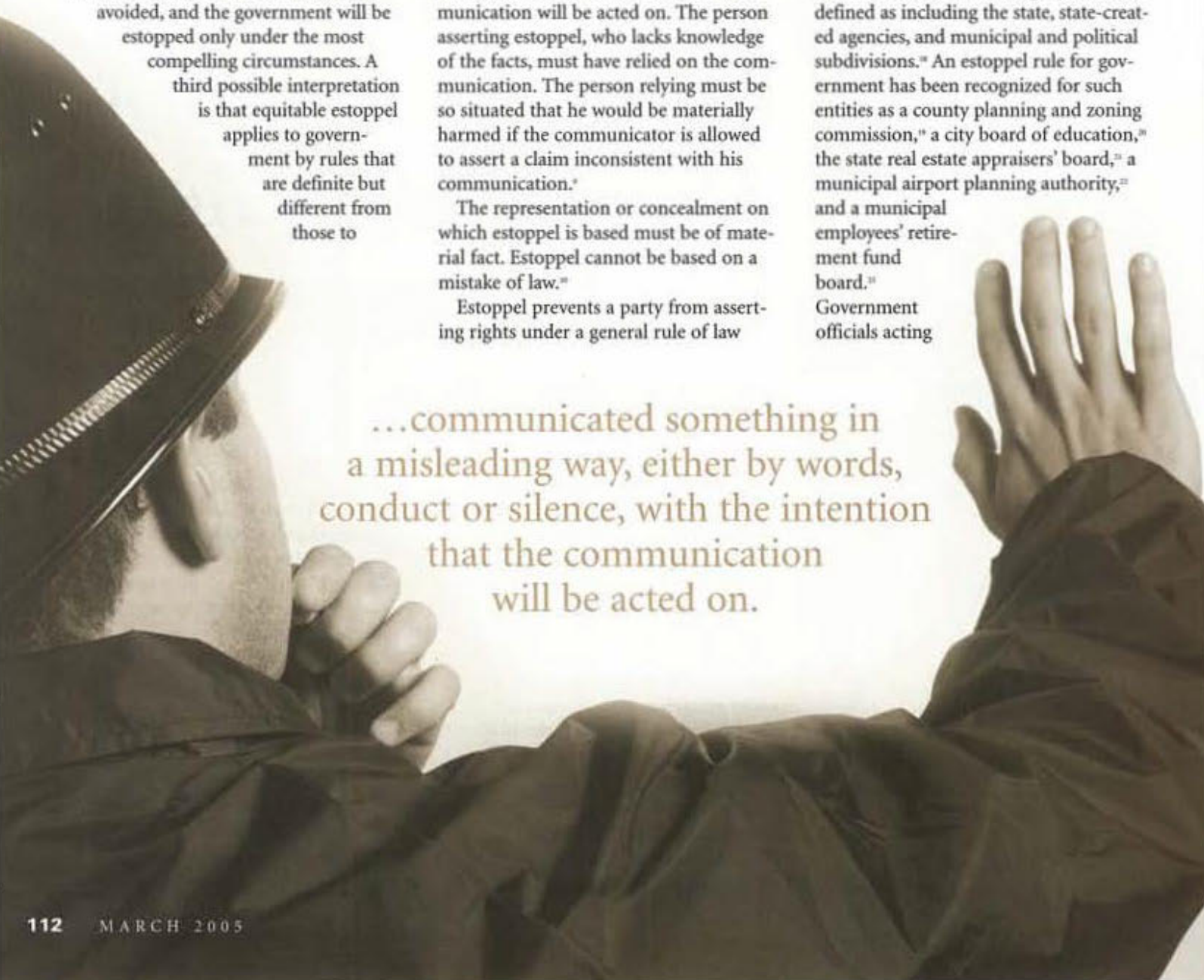
These vague and seemingly contradictory general statements can be interpreted in at least four different ways. The first is that government, at least when it performs certain functions, is never subject to estoppel. A second possible interpretation is that the application of equitable estoppel is different for governments, but the difference is not formulated in clear rules; instead, estoppel applies depending on the nature of the unfairness to be avoided, and the government will be estopped only under the most compelling circumstances. A third possible interpretation is that equitable estoppel applies to government by rules that are definite but different from those to which individuals and other entities are subject. A fourth view is that the rules for estoppel are the same both for government and for other entities, but those rules are such that in their application governments are rarely estopped. This article both provides a brief survey of the law of equitable estoppel with regard to government and considers which of these four statements is most consistent with that law.

The traditional elements of estoppel are clearly established.[7] The one against whom estoppel[8] is asserted, who usually must have knowledge of the facts, has communicated something in a misleading way, either by words, conduct or silence, with the intention that the communication will be acted on. The person asserting estoppel, who lacks knowledge of the facts, must have relied on the communication. The person relying must be so situated that he would be materially harmed if the communicator is allowed to assert a claim inconsistent with his communication.[9]

The representation or concealment on which estoppel is based must be of material fact. Estoppel cannot be based on a mistake of law.[10]

Estoppel prevents a party from asserting rights under a general rule of law when his own conduct renders that assertion contrary to equity and good conscience.[11] The doctrine is protective, to be invoked as a shield and not a sword.[12] It will not serve to create a cause of action or primary rights[13] and will not create a contract where no contract exists.[14] Despite this clear definition of estoppel as a defense, however, the Alabama courts, on numerous occasions, have considered a claim of estoppel used offensively against a governmental entity[15], and in two cases, have recognized a right created against such an entity by estoppel.[16]

Any special governmental rule for equitable estoppel is applicable to "governmental entities."[17] This category has been defined as including the state, state-created agencies, and municipal and political subdivisions.[18] An estoppel rule for government has been recognized for such entities as a county planning and zoning commission,[19] a city board of education,[20] the state real estate appraisers' board,[21] a municipal airport planning authority,[22] and a municipal employees' retirement fund board.[23] Government officials acting



…communicated something in a misleading way, either by words, conduct or silence, with the intention that the communication will be acted on.

in their official capacities are also beneficiaries of a government rule.[24] In the situation where a government holding land makes a representation and later passes title to the land to another, the person taking the property is subject to estoppel if the government itself would be.[25] Unlike in the area of sovereign immunity, where state-created entities may not be "the state" for purposes of immunity,[26] there appear to be no cases in Alabama testing the limits of what is considered "the government" for purposes of estoppel.

The first statement as to the nature of estoppel against government—that the government is not subject to estoppel—is most accurate in two specific situations. The first is in the area of taxation. In the first Alabama case to recognize this explicitly, the court stated, "In the assessment and collection of taxes, the State is acting in its governmental capacity and it cannot be estopped with reference to these matters."[27] This rule has been repeated in similar language in subsequent cases.[28] This rule for taxation has been applied most often when revenue officials, either by inaction or by positive statement, have led taxpayers to believe that a certain piece of property or transaction would be treated in a particular way for tax purposes.[29]

This taxation rule, however, is limited to the actual collection of taxes. The supreme court has refused to apply it where a revenue official had misrepresented the date of a decision, leading a taxpayer to file an untimely administrative appeal.[30] Misrepresentation regarding facts in an appeal, and whether the proper steps for filing a claim have been followed, have also been recognized as a basis for estoppel in other situations.[31]

From the language used by the courts in stating this rule for taxation, it would appear that the rule is grounded in the governmental function itself, and, thus, would apply wherever the government is acting in a governmental rather than a proprietary role. The case law touching on this issue, however, is inconsistent. The supreme court has stated several times *in dicta* that a propriety (rather than a governmental) role for government may be a reason for applying estoppel.[32] That court has also indicated that estoppel will not prevent the governmental action of billboard regulation.[33] However, the court has not laid down a general rule that estoppel will not apply to governmental activities.

A strict rule against estoppel where a government is concerned also appears to exist generally in another particular situation: governmental non-enforcement of laws.[34] This is true even where a party has spent significant amounts in reliance on continued non-enforcement.[35] In addition, estoppel is not available simply because civil laws are enforced against the plaintiff but not against others.[36]

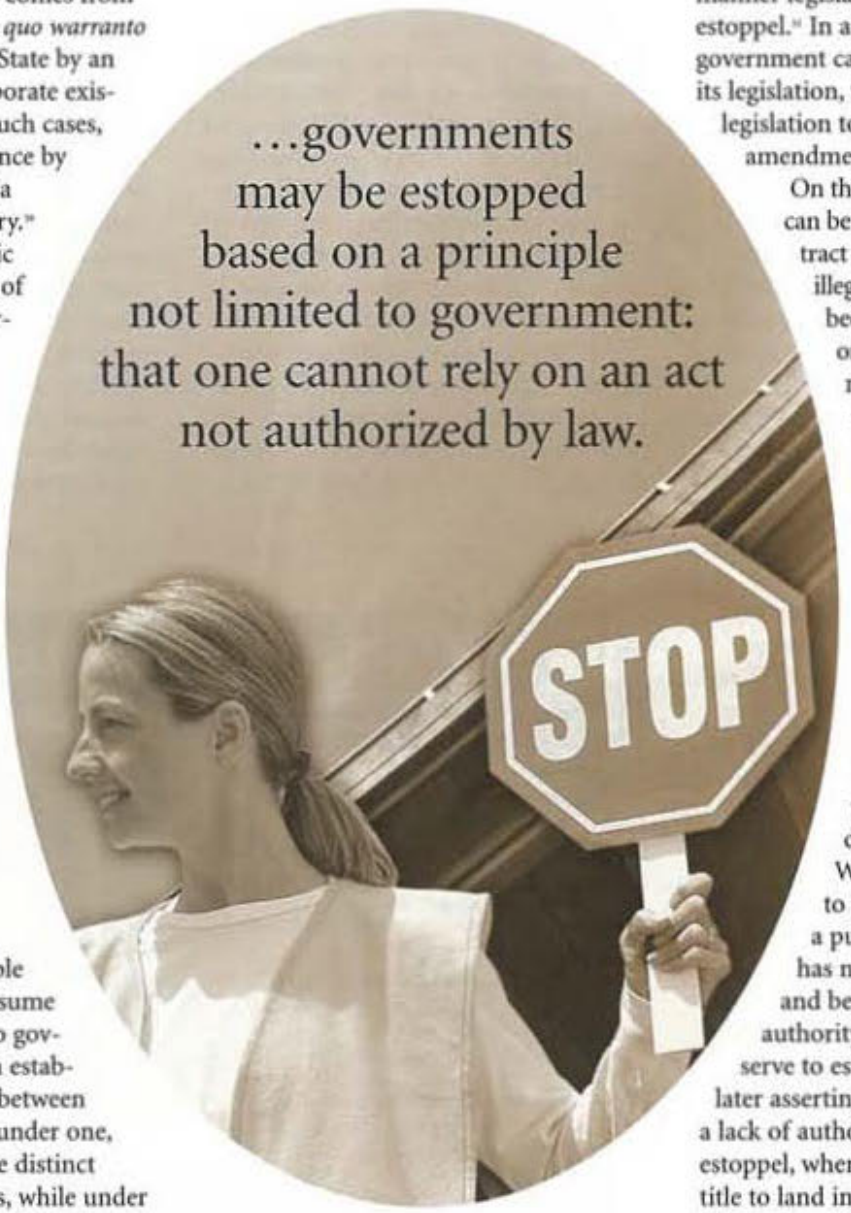
The second statement above of how estoppel applies to government—that it can apply to government but only based on a balancing of equities and not based on definite rules—is suggested by language in some old cases. For example, the Alabama Supreme Court has stated, "Estoppels against the state are not favored, and this rule is based upon public policy for the enforcement of a public (right) or to protect a public interest."[37] This statement suggests that the public interest of the State prevents the assertion of estoppel against the State except where great injustice would otherwise result. However, few, if any, cases reflect consideration of the relative equities involved in particular situations. Furthermore, if government is entitled generally to a special exemption from estoppel as a favored litigant unless great injustice cannot otherwise be avoided, a suspension of the exemption, or at least a modification of it, would logically result in cases where governments are on both sides. However, a reading of Alabama cases involving two governments does

not suggest such a result. Instead, whether a government is subject to estoppel appears not to hinge in any way on whether the entity asserting estoppel is also a government.[28]

The only suggestion of a rule derived from a balancing of equities comes from a very narrow class of cases: *quo warranto* brought in the name of the State by an official to challenge the corporate existence of a municipality. In such cases, acquiescence in and acceptance by the State of the existence of a municipality bars this inquiry.[29] This rule is based on a public policy against the forfeiture of the charter of municipal corporations.[30] Acquiescence can result from legislative acts recognizing the municipality's existence.[31] While this defense has been labeled acquiescence[32] and also laches[33] and waiver,[34] it also has been recognized as an application of estoppel, even without any requirement of reliance.[35] In *quo warranto* cases brought in the name of the State, but by an interested individual, there appears to be even greater latitude for a finding of estoppel.[36]

The two remaining possible rules, set out above, both assume that estoppel is applicable to government in accordance with established rules. The difference between these two principles is that under one, the rules for government are distinct from those for other entities, while under the other, the rules are the same but are such that in fact governments are rarely estopped. The question of which of these is most correct is best answered after considering cases involving two areas where estoppel has often been asserted—contracts and ownership of land—because these cases involve a single idea: government cannot be estopped based upon an act that is beyond its authority.

The contract cases typically involve a private party that has entered into a contract with government, acted in reliance thereon, and then discovered the contract to be in some sense illegal and, thus, not directly enforceable. In such a case, the application of estoppel generally depends on the nature of the illegality. Where the contract itself is beyond the authority of the particular government, there can be no estoppel,[37] as where the contract would cause the government to exceed its debt limits.[38] A contract in violation of the competitive bid law is also considered *ultra vires*.[39] A contract by a person not authorized to act for the government cannot be enforced by estoppel.[40]



Because a government has no authority to enter into an agreement to limit or bind its legislative discretion, an agreement to act or not to act in a particular manner legislatively will not support estoppel.[41] In a similar vein, because a government can always amend or repeal its legislation, there can be no reliance on legislation to estop government from amendment or repeal.[42]

On the other hand, a government can be estopped where the contract itself is authorized but it is illegal and, thus, voidable because it was not entered into or ratified in the required manner.[43] Estoppel may apply in such a situation where a board does not itself act but one member of the board merely acquiesces to the representation relied upon.[44]

The above principle—that a basic lack of authority for the act on which reliance was placed will not support estoppel but an authorized act will[45]—also runs through decisions involving land.[46] Where the land is dedicated to public use, as for a street or a public park, the government has no authority to alienate it, and because of this lack of authority no action or inaction can serve to estop the government from later asserting ownership.[47] There is also a lack of authority, and no resulting estoppel, where the government holds title to land in trust for its own agency.[48] Where the state land is mistakenly, and without authority, sold for taxes, estoppel cannot be asserted even if one receiving the tax deed has paid taxes for 50 years or more.[49]

This principle—that lack of authority for the act bars estoppel—is also the determining factor in a number of other areas: certification of election returns[50]; payment of health benefits[51]; payment of

disability benefits[60]; zoning variance[61]; and job promotion.[62]

This principle based on authority, or the lack thereof, does not, however, control in all cases involving land. Where the government itself acquires land pursuant to a sale for taxes or assessment, delay in asserting a claim and acceptance of taxes and assessments from one in possession may estop the government from asserting its ownership[63], and also one who asserts ownership derived from the government's interest.[64] This result may be based in part on the government's role as a proprietor in acquiring the property in such a manner.[65] Where the state leases its own land from one presently claiming title, the state may be estopped from denying the leasor's ownership.[66]

Where the land is a public street, technically an easement, acceptance of taxes is not inconsistent with the easement because the fee never passed from the city.[67] The granting of a building permit will not estop a city from asserting ownership of the underlying land because this does not indicate a recognition of ownership in the person in possession.[68] Acceptance of taxes on a wharf does not prevent a city from claiming ownership for the underlying land.[69]

Thus, the availability of estoppel often depends on the underlying authority of the governmental entity to act in a particular manner. Given this, the question of whether this represents a separate rule for government depends on whether this principle based on authority extends to individuals and non-governmental entities. It apparently does, because the Alabama Supreme Court has recognized that a corporation cannot be estopped with regard to a contract beyond its corporate authority.[70] The lack of case law on this point with regard to individuals is perhaps due to the fact that whereas corporations and governments are granted specific authority to act and cannot act outside that authority, individuals generally may act in any manner unless limited by general laws applicable to all persons. Thus, the issue of a lack of authority on the part of individuals rarely arises.

Moreover, this rule regarding lack of authority is apparently derived from a more general one: estoppel cannot be based upon a mistake of law.[71] The lack of authority is a limit imposed by law, and because all persons are presumed to have knowledge of the law, no one can reasonably rely upon an unauthorized act.[72] This principle—that the representation asserted as the basis for estoppel cannot be contrary to the law—exists generally in estoppel outside of cases involving governments.[73]

In sum, it appears that governments may be estopped based on a principle not limited to government: that one cannot rely on an act not authorized by law. A flat rule against estoppel for government exists only in taxation. A strong policy in favor of estoppel can be found in the narrow area of *quo warranto* challenging the corporate existence of a municipality. ■

Endnotes

1. 823 So.2d 679 (Ala.2001).
2. *Ex parte Fields*, 432 So.2d 1290, 1293 (Ala.1983)
3. *City of Birmingham v. Lee*, 254 Ala. 237, 247, 48 So.2d 47, 55 (1950).
4. *City of Guntersville v. Alfred*, 495 So.2d 566, 568 (Ala.1986).
5. *Brown v. Tuskegee Light & Power Co.*, 232 Ala.361, 367, 168 So.159, 165 (Ala.1936)
6. *Kimbrell v. State of Alabama*, 272 Ala. 419, 427, 132 So.2d 132, 139 (1961).
7. The Alabama courts have used the terms estop and estoppel regarding defenses against the state in criminal prosecutions. *Congo v. State*, 455 So.2d 894 (Ala.Crim.App.1983), reversed, *Ex parte State*, 455 So.2d 896 (Ala.); *Shepard v. State*, 347 So.2d 1017 (Ala.Crim.App.1977). This article does not consider these criminal cases.
8. While there are other types of estoppel, such as judicial estoppel and estoppel by deed, the terms estoppel and estop when used in this article refer to equitable estoppel only.
9. *Allen v. Bennett*, supra.
10. *Id.*; *City of Orange Beach v. Benjamin*, 821 So.2d 193 (Ala.2001).
11. *Robinson v. Boohaker, Schillacia & Company*, 767 So.2d 1092, 1094 (Ala.2000).
12. *Hendrick v. Blake*, 291 Ala. 575, 285 So.2d 82 (1973); *Reynolds v. Four Seasons Condominium Assoc.*, 462 So.2d 738 (Ala.Civ.App.1984), cert.denied, No.84-278 (Ala.1985).
13. *B.F. Goodrich Co. v. Parker*, 282 Ala. 151, 209 So.2d 647 (1967); *Emergency Aid Ins. Co. v. Plummer*, 35 Ala.App. 520, 49 So.2d 680 (1950).
14. *Pendley v. Pendley*, 581 So.2d 470 (Ala.1991).
15. E.g., *City of Wetumpka v. Central Elmore Water Authority*, 703 So.2d 907 (Ala.1997); *City of Prattville v. Joyner*, 698 So.2d 122 (Ala.1997); *Crest Construction Corp. v. Shelby County Board of Education*, 612 So.2d 425 (Ala.1992); *City of Attalla v. Dean Sausage Company, Inc.*, 2003 WL 21569481 (Ala.Civ.App. July 11, 2003) cert.den. No.10217796 (Ala.2004).
16. *City of Prattville v. Joyner*, 661 So.2d 1158 (Ala.1995), *overruled on other grounds, City of Prattville v. Joyner*, 698 So.2d 122 (Ala.1997); *City of Mobile v. Sumrall*, 727 So.2d 118 (Ala.Civ.App.1999).
17. *State Highway Dept. v. Headrick Outdoor Advertising, Inc.*, 591 So.2d 1202 (Ala.1992).
18. *Ex parte Fields*, supra; *Marsh v. Birmingham Board of Education*, 349 So.2d 34 (Ala.1977).
19. *Ex parte Fields*, supra.
20. *Marsh v. Birmingham Board of Education*, supra.
21. *Alabama Real Estate Institute v. Alabama Real Estate Appraisers Board*, 689 So.2d 199 (Ala.Civ.App.1997).
22. See, *Muscle Shoals Aviation, Inc. v. Muscle Shoals Airport Authority*, 508 So.2d 225 (Ala.1987).
23. *Ex parte Mathers*, 541 So.2d 1110 (Ala.1989)
24. See, *Security Life Insurance Co. v. Weaver*, 579 So.2d 1359 (Ala.Civ.App.), cert.denied, No.1901049 (Ala.1991); *Childree v. Health Care Authority of the City of Huntsville*, 548 So.2d 419 (Ala.1989).
25. *Burke v. Caton*, 274 Ala. 263, 147 so.2d 791 (1962).
26. E.g., *Alabama State Docks Terminal Railway v. Lyles*, 797 So.2d 432 (Ala.2001); *Rodgers v. Hopper*, 768 So.2d 963 (Ala.2000); *Stallings & Sons v. Alabama Bldg. Renovation Finance Authority*, 689 So.2d 790 (Ala.1996).
27. *State v. Maddox Tractor & Equipment Co.*, 260 Ala.136, 69 So.2d 426 (1953). This holding was foreshadowed by *Durr Drug Co. v. Long*, 237 Ala. 689, 188 So. 873 (1939).
28. *Boswell v. Abex Corp.*, 294 Ala.334, 317 So.2d 317 (1975); *Crutcher Dental Supply Co. v. Raben*, 286 Ala.686, 246 So.2d 415 (1971); *State v. Norman Tie & Lumber Co.*, 393 So.2d 1022 (Ala.Civ.App.1981); *State v. Hunt Oil Co.*, 49 Ala.App. 445, 273 So.2d 207 (1973); see, *Merriwether v. State*, 252 Ala. 590, 42 So.2d 465 (1949).
29. *Boswell v. Abex Corp.*, supra; *State v. Maddox Tractor & Equipment Co.*, supra; *Crutcher Dental Supply Co. v. Raben*, supra; *State of Alabama v. Delaney's*, 668 So.2d 768 (Ala.Civ.App.), cert.denied, No. 1941181 (Ala.1995).
30. *Ex parte Four Seasons, Ltd.*, 450 So.2d 110 (Ala.1984).
31. *Ex parte State Department of Human Resources*, 548 So.2d 176 (Ala.1988); *City of Montgomery v. Weldon*, 280 Ala. 463, 195 So.2d 110 (1967); *American Real Estate Institute v. Alabama Real Estate Appraisers Board*, supra.; *East Colbert Store, Inc. v. Alabama Alcoholic Beverage Control Board*, 661 So.2d 757 (Ala.Civ.App.1994), cert.denied No.1940242 (Ala.1995).

32. *Powell v. City of Birmingham*, 258 Ala.159, 166, 61 So.2d 11, 16 (1952); see, *Brown v. Tuskegee*, supra; *State v. Mobile & O.R.Co.*, 201 Ala.271, 78 So.2d 47 (1918).

33. *State Highway Department v. Headrick Outdoor Advertising, Inc.*, 594 So.2d 1202 (Ala.1992).

34. *Department of Public Safety v. Freeman Ready-Mix Co.*, 292 Ala. 380, 295 So.2d 242 (1974); *Security Savings Life Insurance Co. v. Weaver*, supra; see, *State Highway Department v. Headrick Outdoor Advertising, Inc.*, supra.

35. *Id.*

36. *Greenwood v. State ex rel. Bailes*, 230 Ala. 405, 161 So. 498 (1935).

37. *Capital Transport Company, Inc., v. Alabama Public Service Commission*, 268 Ala. 416, 420, 108 So.2d 156, 160 (1959); see, also, *Union Central Life Insurance Co., v. State ex rel.Whetstone*, 226 Ala. 420, 147 So. 187 (1933).

38. See, *City of Wetumpka v. Central Elmore Water Authority*, supra; *Childree v. Health Care Authority of the City of Huntsville*, supra; *City of Leeds v. Town of Moody*, 294 Ala. 496, 319 So.2d 242 (1975); *County Board of Education of Coffee County v. City of Elba*, 273 Ala. 151, 135 So.2d 812 (1961); *City of Birmingham v. Lee*, 254 Ala. 237, 48 So.2d 47 (1950); *State ex rel. Lott v. Brewer*, 64 Ala. 287 (1879).

39. *State ex rel. Kinney v. Town of Steppville*, 232 Ala. 407, 168 So. 433 (1936); *State ex rel. Roberson v. Town of Pell City*, 157 Ala. 380, 47 So. 246 (1908); see, *State ex rel. Martin v. City of Gadsden*, 216 Ala. 243, 113 So. 6 (1927)

40. *State ex rel. Kinney v. Town of Steppville*, 232 Ala. at 410, 168 So. at 435; *State ex rel. Roberson v. Town of Pell City*, 157 Ala. at 383, 47 So. at 247.

41. *Id.*

42. *State ex rel. Kinney v. Town of Steppville*, supra; *State ex rel. Martin v. City of Gadsden*, supra.

43. *State ex rel. Roberson v. Town of Pell City*, supra

44. *State ex rel. Martin v. City of Gadsden*, supra.

45. *See, Id.*

46. See, *State ex rel. Martin v. City of Gadsden*, supra.

47. *Alford v. City of Gadsden*, 349 So.2d 1132 (Ala.1977); *Marsh v. City of Birmingham*, supra; *County Board of Education v. City of Elba*, 273 Ala. 151, 135 So.2d 812 (1961); but see, *City of Wetumpka v. Central Elmore Water Authority*, supra (city estopped with no discussion of authority); *Kimbrell v. State*, supra; *Brown v. Tuskegee Light & Power*, supra.

48. *County Board of Education v. City of Elba*, supra.

49. *Layma's Security Co. Waterworks & Sanitary Sewer Board of Prichard*, 547 So.2d 533 (Ala.1989); *Maintenance Inc. v. Houston Co.*, 438 So.2d 741 (Ala.1983); but see, *Kimbrell v. State*, supra (recovery allowed under unjust enrichment).

50. *Marsh v. Birmingham Board of Education*, supra; but see, *City of Wetumpka v. Central Elmore Water Authority*, supra (estoppel based on apparent authority of board chairman).

51. *Orange v. Bailey*, 548 So.2d 424 (Ala.1989); *Ex parte Fields*, supra; *City of Leeds v. Town of Moody*, supra; *City of Birmingham v. Holt*, 239 Ala. 248, 194 So.2d 538 (1940); but see, *City of Prattville v. Joyner*, 661 So.2d 1158 (Ala.1995), overruled, *City of Prattville v. Joyner*, 698 So.2d 122 (Ala.1997).

52. *Ebony Club, Inc. v. State ex rel. Simpson*, 294 Ala. 421, 318 So.2d 282 (1975).; *General Electric Co. v. Town of Ft. Deposit*, 174 Ala. 179, 56 So. 802 (1911).

53. *City of Guntersville v. Alfred*, 495 So.2d 566 (Ala.1986); *Alford v. City of Gasden*, 349 So.2d 1132 (Ala.1977).

54. *Talladega City Board of Education v. Yancy*, 682 So.2d 33 (Ala.1996).

55. This lack of authority principle was perhaps taken to its limit in the tax case of *State v. Maddox Tractor & Equipment Co.*, supra. The supreme court there held that although revenue officials had the statutory authority to issue revenue rulings, they had no authority to issue incorrect rulings, so taxpayers had no right to rely on such incorrect rulings.

56. Some very old cases hold that an express grant of land will bind the state by way of estoppel. *State v. Mobile O.R Co.*, 201 Ala. 271, 78 So. 47 (1918); *State ex rel. Lott v. Brewer*, 64 Ala.287 (1879). This appears, however, to be an application of estoppel by deed, which is distinct from equitable estoppel. *See, Dominex, Inc. v. Key*, 456 So.2d 1047 (Ala.1984).

57. *West Dauphin Limited Partnership v. Callon Offshore Production, Inc.*, 725 So.2d 944 (Ala.1998); *Brock v. City of Anniston*, 244 Ala. 544, 14 So.2d 519 (1943); *Webb v. City of Demopolis*, 95 Ala. 116, 13 So. 289 (1892).

58. *State ex rel. Attorney General v. Tarleton*, 279 Ala. 555, 188 So.2d 516 (1966).

59. See, *State ex rel. Attorney General v. Ward*, 272 Ala. 646, 133 So.2d 383 (1961); see, also, *West Dauphin Limited Partnership v. Callon Offshore Production, Inc.*, supra.

60. *Allen v. Bennett*, supra.

61. *Childree v. Heathcare Authority of the City of Huntsville*, supra.

62. *Rushing v. City of Georgiana*, 374 So.2d 253 (Ala.1979).

63. *Alabama Farm Bureau Mutual Casualty Insurance Company v. Board of Adjustment of the Town of Hanceville*, 470 So.2d 1234 (Ala.Civ.App.), cert.denied, No.84-599 (Ala.1985).

64. *City of Birmingham v. Lee*, supra.

65. *Burke v. Caton*, supra; *Powell v. City of Birmingham*, supra.

66. *Burke v. Caton*, supra.

67. See, *Powell v. City of Birmingham*, 258 Ala. at 166, 61 So.2d at 792.

68. *State ex rel. Attorney General v. Wilkinson*, 283 Ala. 45, 214 So.2d 321 (1968); *State v. Mobile O.R. Co.*, supra.

69. *Fort Payne Co. v. City of Ft. Payne*, 216 Ala. 679, 114 So. 63 (1927).

70. *Messer v. City of Birmingham*, 243 Ala. 520, 10 So. 2d 760 (1942).

71. *Murray v. Barnes*, 146 Ala. 688, 40 So. 348 (1906).

72. *Alabama Red Cedar v. Tennessee Valley Bank*, 200 Ala.622, 76 So. 980 (1917).

73. *State Highway Department v. Headrich Outdoor Advertising, Inc.*, supra.

74. *Marsh v. Birmingham Board of Education*, supra; *City of Birmingham v. Lee*, supra.

75. *Whitfield v. Hatch*, 235 Ala. 38, 177 So. 149 (1937).

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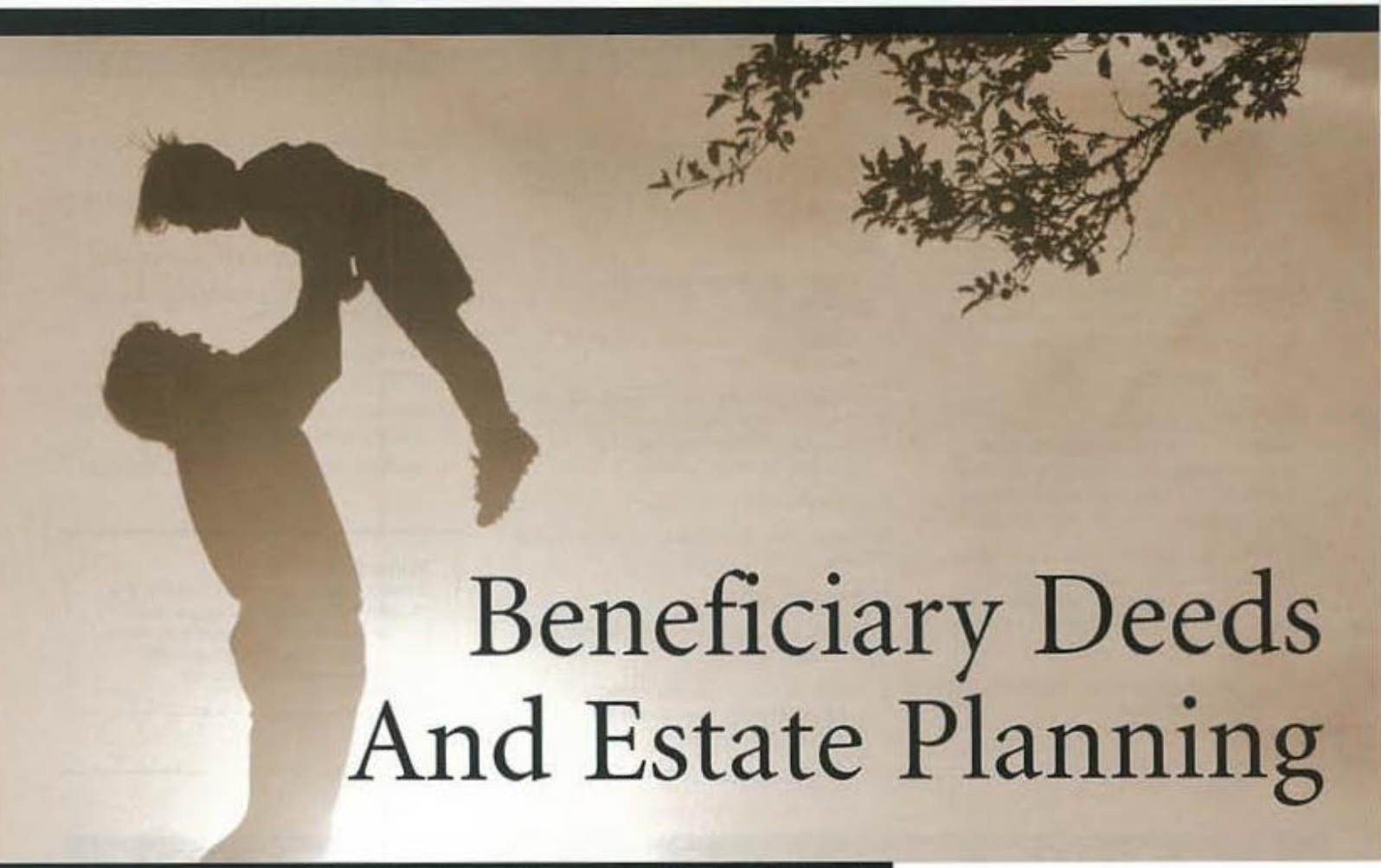


Beneficiary Deeds And Estate Planning

BY MICHAEL A. KIRTLAND AND CATHERINE ANNE SEAL

It sometimes seems there is a never-ending crusade to find new ways to avoid probate proceedings. While in some states there are good reasons for attempting to avoid probate, Alabama is not one of those. Alabama is fortunate to have one of the most straightforward, least complex and least expensive probate systems in the entire nation. Nevertheless, as probate attorneys, we often find ourselves probating small estates, the only major asset of which is a house or other piece of land. Many Alabama lawyers routinely find themselves dealing with a client who wishes to add a child or children to his/her deed to avoid probate proceedings.

The newest method of dealing with such property outside of probate, the *beneficiary deed* or *transfer on death deed*, is now an available tool in seven states (Arizona, Colorado, Kansas, Missouri, Nevada, New Mexico, and Ohio). While avoidance of probate is cited in many of these states as a major reason for adopting the beneficiary deed, it has major advantages for probate-friendly states, such as Alabama, as well. Alabama has already recognized the concept of transfer on death of assets, having passed the Uniform Transfer on Death Security Registration Act in 1997.

Problems with Attempted Real Property Transfers Outside of Probate

"Heirship Property"

Under the *Code of Alabama*, title to real property is vested at death in the heirs of a decedent as a matter of law. This has resulted is what is commonly known as

"heirship property." The result of this "heirship property" system is that many people, especially in more rural areas, do not take legal action to record title in the name of the heirs, sometimes for multiple generations. People often simply say, "We all *know* that John was intended to have the land." The problem comes for "John" when he attempts to sell or mortgage the land years, even decades, later, only to discover his title to the property is unmarketable because no actions have been accomplished to place the property into his name. A title search often finds numerous actual owners of property in which the family simply "knew John owned the property." This heirship system results in a cumbersome web of heirship affidavits, too often executed by persons with only partial information on the family situation, or where some of the true heirs are accidentally or even intentionally left off the heirship affidavit. Where the attempt to correctly record title comes not just years, but generations, later, it is often the case that no person remains alive who can attest to having known the decedent and the succeeding lineage in order to document title. The result is mortgage and title companies which insist on a quiet title action prior to warranting title or loaning money against the property. While the beneficiary deed is not a panacea solution to this problem, its use would significantly lessen the title problems under the heirship system of title transfer.

Placing Children on The Deed

Another commonly seen tactic to avoid probate is to place a child or children on the deed as the current owner ages and contemplates his or her own mortality, but this situation creates more problems than it solves. Adding another individual to a deed is a completed gift, vesting a current interest in the real property at the time the deed is executed. Should the current owner later decide to change the intended joint owner, this cannot be accomplished without the consent and cooperation of the person originally added as a co-owner of the real property. Unfortunately, it is common that the reason the current owner wishes to change the joint owner is because the current owner and added joint owner no longer get along and the current owner wishes to "cut out" the joint owner from an inheritance. Only years later, when this occurs, does the current owner realize s/he has made a completed gift, and only by obtaining the signature of the now-estranged joint owner may the current owner change his "estate plan." Even if this cooperation is obtained, the second transfer still constitutes an additional taxable gift from the old joint owner to the new joint owner. (Whether the gift actually creates tax due is a question of the value of the property, any other previous gifts made and their value. In any event, the transfer results in a reduction in the $1,000 lifetime gift tax exemption and requires the filing of federal and state gift tax returns.)

Even where relations between the current owner and the added joint owner remain positive, the current owner cannot sell or mortgage the property without the consent of the added joint owner. Adding the name of a joint owner to property subjects that property to attachment in legal proceedings against the added joint owner. Property jointly owned is subject to division in divorce proceedings and to satisfy judgments and tax liens. While only the interests of the joint owner may be attached, this can still result in a forced sale for division to satisfy the judgment or lien. The unwitting current owner, by placing the name of a child (or any other person) on the deed may have avoided probate, but in the process subjected the real property to claims of creditors and courts on behalf of the joint owner. In a worst-case scenario, the current owner can even find himself evicted from his/her own property through the neglect or malfeasance of his/her joint owner.

Because the grantee-beneficiary does not have any current interest in the property, the current owner does not need the consent, signature or cooperation of the grantee-beneficiary to revoke the beneficiary deed or execute a new deed.

The Basics of Beneficiary Deeds

While the beneficiary deed laws vary somewhat among the states using them, they share most of the same features (See, for example, § 15-15-402 *et seq.* Colorado Revised Statutes). Under a beneficiary deed, an owner (or joint owners) of real property may execute a deed naming the successor owner (the "grantee-beneficiary") at the death of the current owner. For joint owners with right of survivorship, the beneficiary only takes title to the property upon the death of the last surviving joint owner. What makes the deed most useful as an estate planning and/or probate avoidance technique is that the grantee-beneficiary has no vested interest in the property until the actual death of the current owner. The current owner is free to change the grantee-beneficiary at any time simply by executing a new deed (a beneficiary deed, quit claim deed, warranty deed or any other form of deed) and recording that new deed. Because the grantee-beneficiary does not have any current interest in the property, the current owner does not need the consent, signature or cooperation of the grantee-beneficiary to revoke the beneficiary deed or execute a new deed.

Safeguarding the System

New ideas, such as the beneficiary deed, often seem excellent solutions to perceived problems, only to become riddled with unintended consequences. In the case of the beneficiary deed, the enacted versions of the legislation in each state have been very careful to attempt to deal with potential unintended consequences in advance, providing clarity in the law and short-stopping potential unfortunate results.

To prevent surprise through "pocket deeds," the statute requires that the deed be recorded (for example, § 33-405 Arizona Revised Statutes). In most of the states, there is an additional requirement that the deed be recorded prior to the death of the grantor. (for example, § 15-15-504 Colorado Revised Statutes) By requiring recordation prior to death, the possibility of undue influence or "deathbed transfers" can take place. A deed not recorded prior to death is simply void.

The requirement that the deed be recorded to be valid also eliminates the possibility of dueling deeds made to multiple beneficiaries. The reality of many elder law situations dealing with transfers of real property is that often the elderly property owner is fearful of angering any of the children and so succumbs to the wishes and influence of each child, sometimes executing many deeds in a short period of time, as each child discusses with the elderly parent their estate plan, with each child separately telling the elderly parent why they deserve the property. The parent executes a new deed to each child in order to keep the peace, but in the process creating a legal tangle only undone by litigation after the death of the parent.

When properly executed, the beneficiary deed becomes effective upon death. The grantee-beneficiary, after the death of the current owner, simply records the death certificate of the current owner, and the grantee-beneficiary has secured their interest in the property outside of the probate process. To ensure that the beneficiary deed is not used as a method of avoiding creditor claims, each state's beneficiary deed statute permits claims to be filed against the estate and including the property transferred by beneficiary deed in property covered by the normal statutory claims period provided by law. As with other transfers of real property at death, liability for any outstanding mortgage upon the real property runs with the land and thereby transfers to the grantee-beneficiary at that time. (See, for example, § 15-15-407 Colorado Revised Statutes.) Finally, to ensure that property does not unintentionally pass to a former spouse after divorce or legal separation due to failure to revoke a beneficiary deed or execution of a new deed, the statutes often specifically revoke transfers through beneficiary deed after divorce. (See, for example, Missouri Revised Statutes § 461.051.)

To ensure that the beneficiary deed is not misused, the laws of the various states require specific language be prominently displayed in the deed indicating that the interest does not pass to the grantee-beneficiary until the death of the current owner. The statutes further state that the right to revoke and the requirement to record the deed are also prominently noted in the deed itself. (See, for example, § 15-15-404 Colorado Revised Statutes.)

Medicaid Transfer Planning And Beneficiary Deeds

For many of the states which have passed beneficiary deed statutes, a major issue was the effect such transfers would have on Medicaid qualification, the countability of such land as an available Medicaid resource, and the calculation of any potential disqualification period based upon the deed being considered a transfer of assets from the Medicaid applicant. This concern stems from the presence in some states of an instrument known as a "Lady Bird Deed" which permits the transfer of real property through a beneficiary deed-like instrument, revocable by the grantor, yet considered a non-countable asset for Medicaid qualification purposes.

Alabama has always taken a very restrictive view of transfers, especially transfers which permit the grantor access to the asset, which result in divestiture of assets while retaining interest. For example, unlike many states, the Alabama Medicaid Agency takes the position that execution of life estate deeds are a transfer of 100 percent of the value of the property at the time the transfer is made, based on an Alabama Medicaid Agency interpretation that the value of a life estate for Medicaid disqualification purposes is always zero. Many of our sister states use Internal Revenue Service life expectancy tables to determine the value of the life estate and the value of the remainder interest gift. The result of this is that transfers of property through a life estate deed in Alabama result in a longer period of disqualification from Medicaid benefits because Alabama considers 100 percent of the value of the property to have been transferred. To ensure equitable treatment of this issue in the use of beneficiary deeds, most of the states which have created beneficiary deed statutes have also, either through state Medicaid agency directives or in the beneficiary deed legislation itself, specifically noted that use of a beneficiary deed disqualifies the individual from Medicaid eligibility based upon the mere presence of a beneficiary deed in the assets of the Medicaid applicant.

This interpretation seems harsh to some Medicaid advocates, as the Adisqualification period" where a beneficiary deed exists

is effectively unlimited, as opposed to being a limited period of disqualification based on the value of the transfer. To avoid unjust results in this interpretation, the statutes specifically permit recapture of the real property under a beneficiary deed by use of a statutory revocation of beneficiary deed. The Medicaid applicant is allowed to "unwind" his/her prior transfer under the beneficiary deed in order to properly qualify for Medicaid assistance, placing the home in the same status (countable or uncountable) as it would have been without the beneficiary. As with some other notice requirements under the statute, some states require notice be prominently placed in the deed itself stating that the deed is a disqualifying instrument for Medicaid purposes. While this position is contrary to Lady Bird deeds, it is certainly reflective of the current budgetary times the states face.

Dealing with Clients with Diminished Capacity

The reality is that in the majority of cases when beneficiary deeds are executed (though see below other useful times for their use), the attorney drafting the beneficiary deed is dealing with an elderly client. It is incumbent upon the attorney to discuss with the client his/her reasoning behind wanting to executed such a deed. Two potential scenarios readily present themselves with such an elderly client in which the capacity to execute the deed or the revocation are impacted.

Where the client informs the attorney s/he wishes to execute a beneficiary deed, having been brought to the attorney's office by an adult child or other relative or friend who will also be the grantee-beneficiary, the attorney needs to evaluate the influence the proposed grantee-beneficiary may be having on the client in executing the beneficiary deed. While this is a classic, textbook example of a potential undue influence situation, it may not immediately present itself as such to the attorney, especially if the attorney does not regularly deal with elderly clients. The proposed grantee-beneficiary may easily come across as simply wanting to assist the current owner is placing into effect their desires. Careful discussion as to the motives and intent of the current owner, however, need to be held to ensure that the execution of the beneficiary deed is, in fact, an independent act by the current owner and not the product of thoughts and ideas imposed upon the current owner by the proposed grantee-beneficiary. Where the determination is made by the attorney that the execution of the beneficiary deed is inconsistent with the remainder of the estate plan of the client, or where it appears questionable whether or not the client understands the significance of execution of the beneficiary deed, it may be proper to suggest that a single transaction conservatorship be considered to execute the beneficiary deed. (This is true of placing the grantee-beneficiary's name on currently existing types of deeds as well, including joint tenancy with right of survivorship, quitclaim and tenant in common deeds.) Expect the client and the proposed grantee-beneficiary to resist such a suggestion.

The other common situation likely to present itself concerning the incapacity of the client and the beneficiary deed is the situation in which the client has previously executed a beneficiary deed, then later needs to qualify for Medicaid nursing home care assistance. Because the beneficiary deed disqualifies the current owner from Medicaid assistance, the current owner will need to revoke the beneficiary deed. What if, however, as is quite common, the client suffers dementia which makes them unable to execute a revocation of the beneficiary deed? Again, use of the too-often forgotten single transaction conservatorship provisions of the *Probate Code* will resolve this issue. If, for example, the owner is a joint owner with his/her spouse of the beneficiary deed property, revocation of the beneficiary deed would make the property a non-countable asset for Medicaid qualification, potentially making the client immediately eligible for Medicaid assistance. However, a grantee-beneficiary may challenge the revocation on the grounds that the current owner lacks capacity to execute a revocation. A full-blown conservatorship may be overly cumbersome and expensive, but the single transaction conservatorship provisions of the *Probate Code* are ideally suited to ensure the validity of the revocation while at the same time permitting Medicaid qualification.

Effective Uses of the Beneficiary Deed

The beneficiary deed is not a one-size-fits-all document, but, where carefully considered, it can be quite effective in a variety of situations.

Small Estates

The small estate provisions of the Alabama *Probate Code* do not permit transfers of real property, and even if such real property transfers were permitted, the maximum value of the estate qualifying for small estate provision ($3,000) is woefully out of date.(' 43-2-692 *Code of Alabama*) Where the only reason a probate administration of the estate is the transfer of real property, use of a beneficiary deed statute would preclude the expense of probate for such transfers.

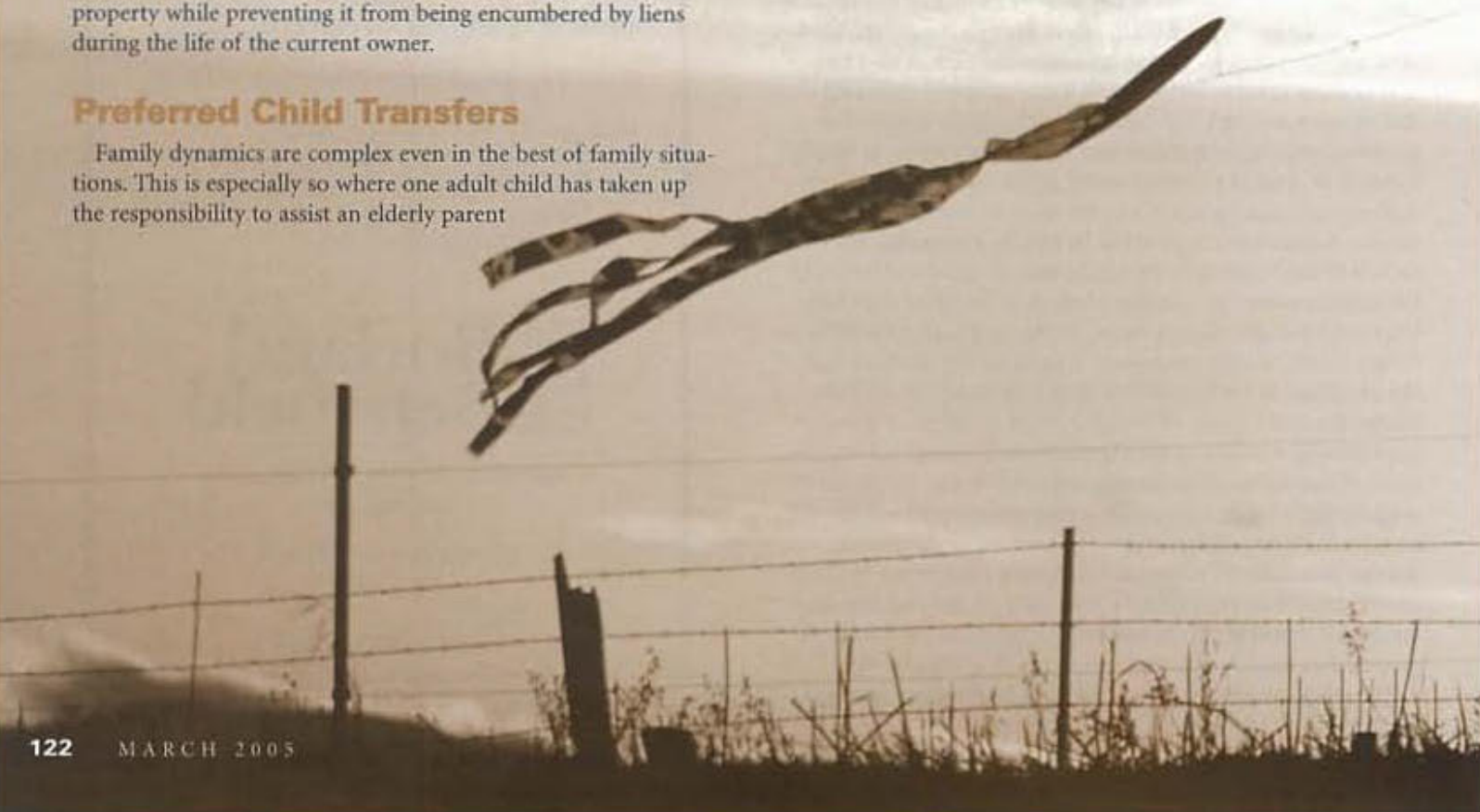
Joint Tenancy Estates

It is not at all unusual today to find even sizeable middle class estates in which all property, real or personal, is owned between a husband and wife as joint tenants with right of survivorship. Unfortunately, it is also not uncommon to discover that the house is titled in the name of the decedent only; as joint tenants, but without survivorship provisions; or as tenants in common, often for reasons outside of the client's intent that the property become the property of the surviving spouse at death (property kept in one spouse's name for tax reasons, as a result of prior divorce decrees etc., or even through simple neglect). Existence of a beneficiary deed would permit transfer-on-death of such property while preventing it from being encumbered by liens during the life of the current owner.

Preferred Child Transfers

Family dynamics are complex even in the best of family situations. This is especially so where one adult child has taken up the responsibility to assist an elderly parent with aspects of daily living which permit the elderly parent to continue to reside in the home, rather than needing to move to an assisted living facility or nursing home. Often, parents wish to benefit the adult child who assists the parent, but also wish to have a will in place which divides the assets of the parent equally among the children. The adult child assisting the elderly parent may move into the home with the parent in order to facilitate such care and assistance. The parent may feel that the child should accede to the home at the death of the parent, but for reasons of family peace and harmony does not wish to transfer the house at death through the will. While to an objective attorney this desire may seem insignificant, it is often a very real issue for the elderly parent. Additionally, the parent may fear that transferring the home to the adult child care provider may cause challenge to the will after death. Use of a beneficiary deed fulfills the intent of the parent to benefit the child providing care and assistance, while eliminating the transfer as a probate issue, and without the tax and liability issues that placing the single child's name on the deed would cause.

In addition to these considerations, use of a beneficiary deed would ensure that the child who has promised to provide such care and assistance follows through with that care. Unfortunately, it occasionally happens that once property is deeded to the care-providing child during lifetime, either by outright gift or joint tenancy, that child ceases to perform such care. By use of a beneficiary deed, the parent would have the right and ability to revoke the gift based upon the non-performance of the child.



Non-Traditional Relationships

In today's society, a number of non-traditional relationships exist which the law does not recognize as equivalent to husband and wife relationships, including both same-sex relationships and "live-in" heterosexual relationships. Real estate attorneys often find themselves dealing with litigation as a result of such non-marital relationships when they go bad. In the good times of the relationship, one partner often places the name of the partner on the deed to an existing home or other real property, believing the other person to be their "life-partner." However, unlike a marital situation, no legal process exists to equitably divide the property upon the separation of the parties. Existence of the beneficiary deed option would permit the partner owning the property prior to the beginning of the relationship to add the partner as a grantee-beneficiary. If the relationship does, in fact, last for the remaining life of the current owner, the partner receives the property at death as intended. On the other hand, if the relationship sours and ends, the current owner may simply revoke the death benefit interest of the partner, without needing to obtain the cooperation of that partner. While not a substitute for a prenuptial agreement, the beneficiary deed would eliminate a significant amount of litigation between separating "life partners."

Substitute for Revocable Living Trusts

Alabama is a state in which revocable living trusts are not common. This is because of the uncomplicated and relatively inexpensive probate process in Alabama. Yet, even in Alabama, revocable living trusts are set up specifically to ensure effective transfer of assets either during lifetime as a result of incapacity, or at death due to controversial relationship and a few other reasons. Where the estate is relatively small in value, however, the cost of creating and administering a revocable living trust can be prohibitive. Often the main, if not only, asset actually transferred into the revocable living trust is real property. With a beneficiary deed statute, the necessity of a revocable living trust in such situations would be avoided, along with its accompanying costs.

Conclusion

Simplification of people's lives is an essential purpose of government. Rightly or wrongly, avoidance of probate is seen as a good thing by many people. Creation of a beneficiary deed statute facilitates the simplification of real property transfers in a variety of situations, benefits our clients and eliminates problems which exist with the current methods of property transfers. Perhaps the time has come for Alabama to consider joining the growing list of states that sees the merit in this type of deed. ■

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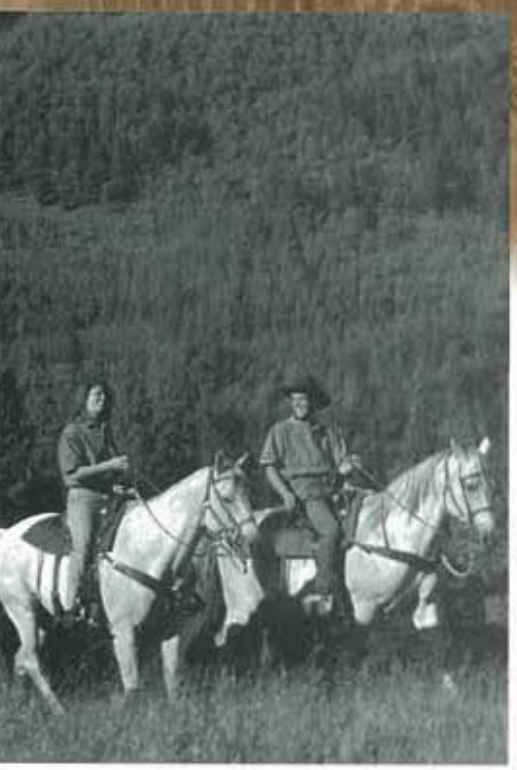
CONSERVATION EASEMENTS

As Qualified Conservation Contributions

BY HARWELL E. COALE, III



Introduction

Preservation of aesthetic, environmental, historic and recreational values on private lands is difficult to accomplish. Government entities often do not have the funding to purchase and preserve these lands in an undeveloped state. Income tax incentives in return for the donation of conservation easements by private landowners provide a useful tool for accomplishing these preservation goals.

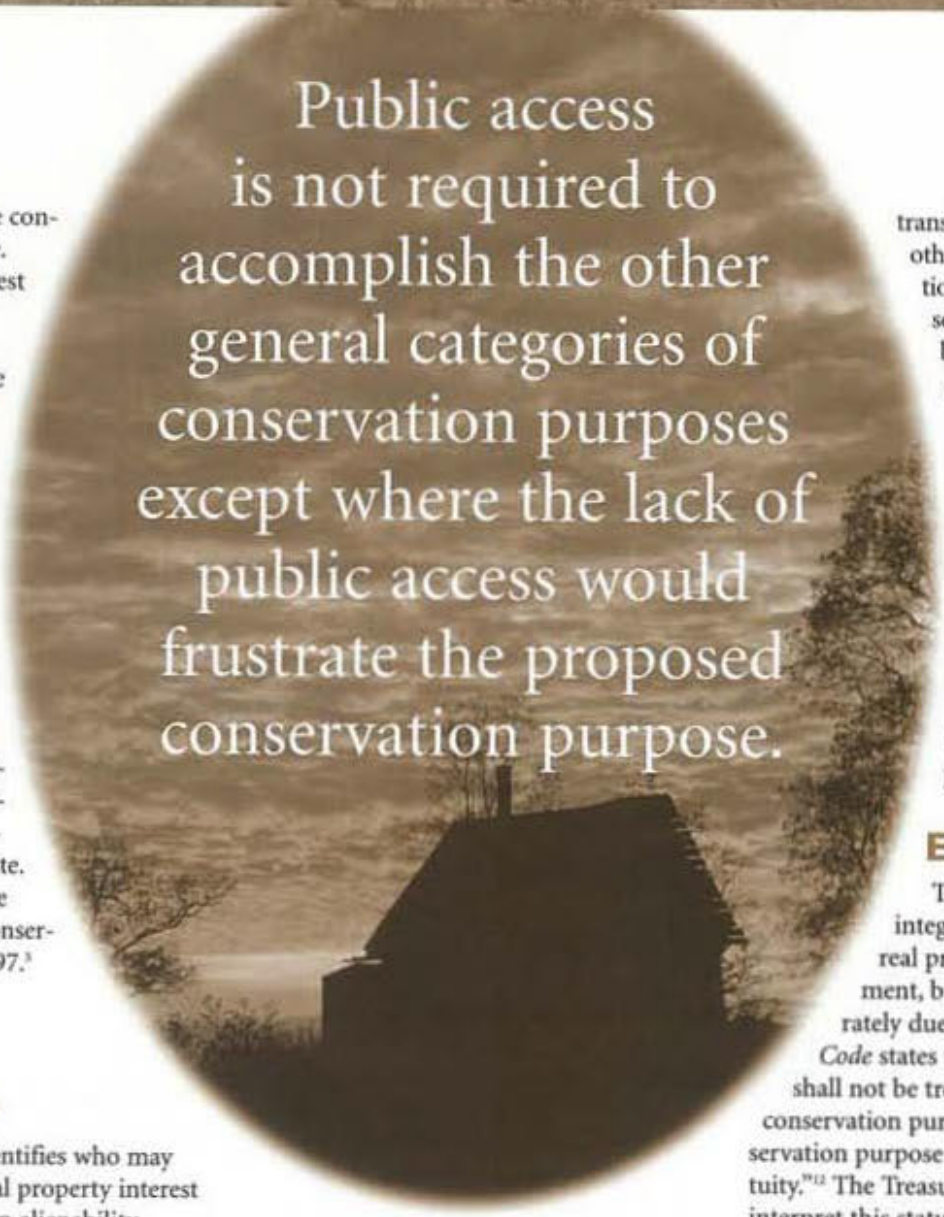
The *Internal Revenue Code* (hereinafter the *Code*) allows for income tax deductions for charitable contributions under Section 170. One type of these charitable contributions is a conveyance of a partial property interest which qualifies under the *Code* as a "conservation contribution."[1] The most common form of these contributions is a conservation easement, and it must meet specific requirements outlined in the *Code* and Treasury Regulations in order to qualify for the income tax deduction.[2] A qualified conservation contribution is generally defined as "a contribution of a qualified real property interest, to a qualified organization, exclusively for conservation purposes.[3] This definition presents the following four primary elements: 1. What constitutes a qualified real property interest; 2. What is a qualified organization; 3. What constitutes exclusivity; and 4. What are conservation purposes?

Qualified Real Property Interest

The *Code* identifies three categories of "qualified real property interests." These interests include: "(A) the entire interest of the donor other than a qualified mineral interest, (B) a remainder interest, [and] (C) a restriction (granted in perpetuity) on the use which may be made of

the real property."[4] The conservation easement (i.e. restriction on use) is best suited to a landowner who wants to retain some limited use of the property while ensuring the property will not be further developed in the future.

A conservation easement is a type of negative easement which is generally unenforceable under common law due to its intangible nature. As such, many state legislatures have specifically authorized conservation easements by statute. The Alabama legislature specifically validated conservation easements in 1997.[5]



Qualified Organization

This requirement identifies who may receive the qualified real property interest and what restrictions on alienability must be imposed on the donee. Generally, the organization must "have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions."[6] Treasury Regulations identify four classes of organizations which qualify under this definition:

1. A governmental unit described as a State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made exclusively for public purposes;[6]
2. An organization described as one which normally receives a substantial part of its support ... from a governmental unit ... or from direct or indirect contributions from the general public;[7]
3. A charitable organization described in I.R.C. § 501(c)(3) [i.e. tax-exempt] that meets the public support test of ' 509(a)(2);[8] or
4. A charitable organization described in I.R.C. § 501(c)(3) that meets the requirements of I.R.C. § 509(a)(3) and is controlled by an organization [qualifying under one of the three foregoing categories].[9]

In addition to the requirement that the grant must be made to a qualified organization, it also must include certain restrictions on transfer of the interest. Subsequent transfers can only be made to other qualified organizations and the original conservation purposes must be carried out by the grantee organization.[10] However, if surrounding conditions have changed to such an extent such that it is impossible to continue the original conservation purposes, the proceeds from the transfer must be used in a manner consistent with the conservation purposes.[11]

Exclusivity

This requirement is an integral part of the qualified real property interest requirement, but is identified separately due to its importance. The *Code* states that, "[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity."[12] The Treasury Regulations further interpret this statutory provision to require that a mortgagee of the conservation property must subordinate its rights to those of the qualified organization and to limit surface mining of reserved mineral interests.[13] However, the regulations do include *de minimis* provisions for the exclusivity requirement regarding remote future events and minor mining impacts.[14] The taxpayer must substantiate the condition of the property at the time of gift by providing the donee organization with appropriate baseline documentation where a retained use may potentially impact the conservation purpose.[15]

Conservation Purpose

While the preceding three requirements are relatively straightforward, the

determination of whether a particular contribution satisfies the conservation purpose requirement can be difficult to ascertain. This is because every tract of land possesses a unique mix of conservation values. The Code identifies four general classes of conservation purposes:

1. The preservation of land areas for outdoor recreation by, or the education of, the general public;
2. The protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem;
3. The preservation of open space (including farmland and forest land) where such preservation is—for the scenic enjoyment of the general public, or—pursuant to a clearly delineated federal, state or local government conservation policy and will yield a significant public benefit; or
4. The preservation of a historically important land area or a certified historic structure.[16]

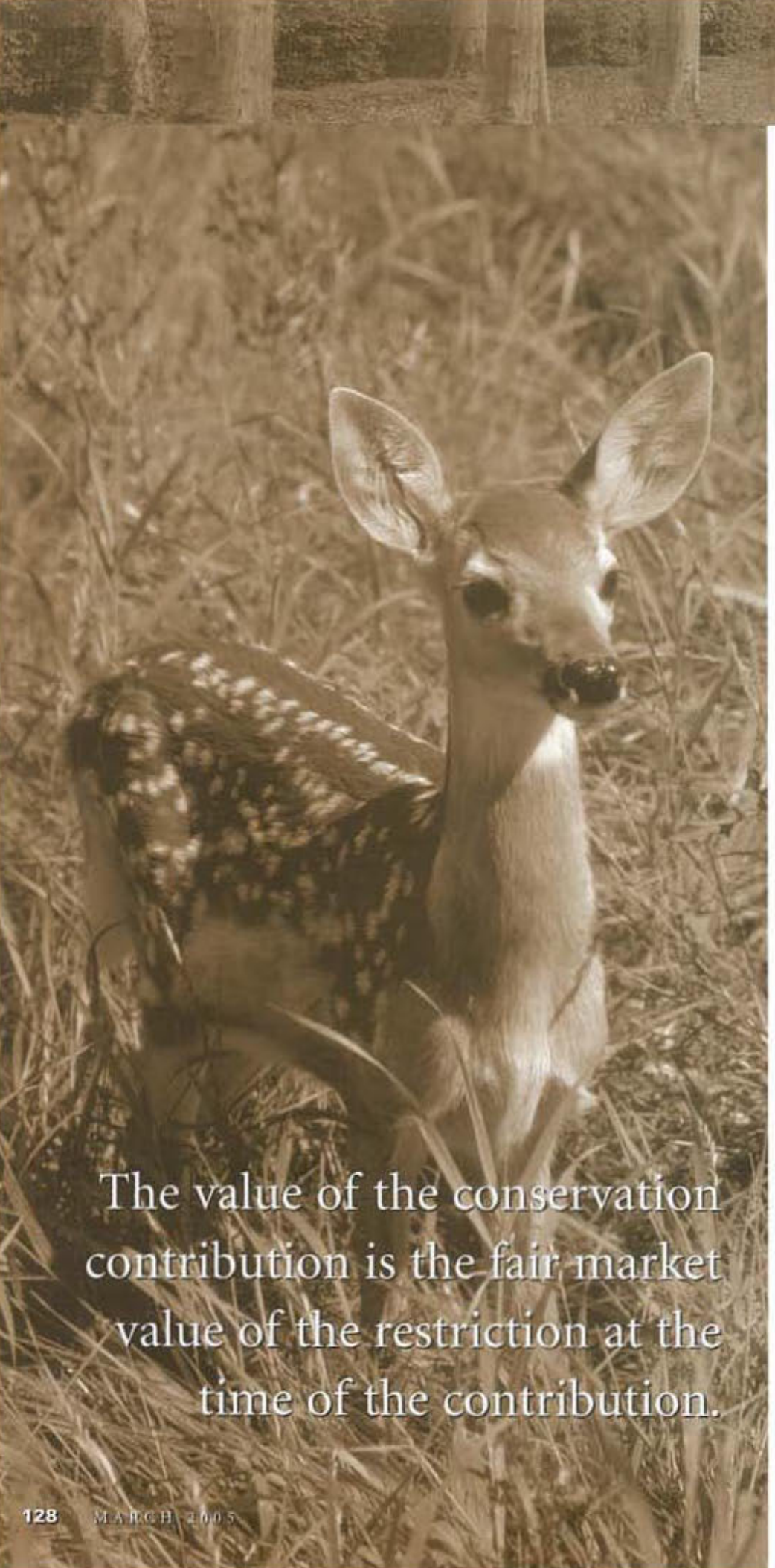
The Treasury Regulations attempt to further define these broad categories and provide some specific examples;[17] however, it is impossible to identify the infinite different circumstances which qualify as conservation purposes. The regulations do identify that public access is required where the conservation purpose is for the preservation of land areas for outdoor recreation by, or the education of, the general public. Public access is not required to accomplish the other general categories of conservation purposes except where the lack of public access would frustrate the proposed conservation purpose.[18]

Given the wide variety of individual circumstances which would qualify as conservation purposes, the determination is inherently a case-by-case analysis. Such uncertainty could seemingly cause taxpayers to shy away from making conservation contributions for the fear they would invite an IRS audit. The only certain way to determine whether a particular taxpayer's contribution will qualify for a conservation deduction is to request a private letter ruling from the IRS. A request in writing must be submitted which outlines the facts of the particular conservation contribution, the controlling law (e.g., "under § 170(h) of the I.R.C. a deduction is allowed for ..."), and ask the IRS to rule whether the contribution qualifies. The problem with requesting private letter rulings is that they are quite expensive (present application fee is $6,000[19]) and time-consuming (possibly taking over a year). Additionally, the IRS will not rule on whether the valuation of the deduction (discussed below) is correct.[20]

While requesting a private letter ruling often is not an appropriate course of action for determining how to create a conservation contribution which will qualify for an income tax deduction, analysis of past private letter rulings provides useful insight into how to structure the transaction. It should be noted that a private letter ruling applies solely to the taxpayer who requested it, and it cannot be used or cited as precedent.[21]

Forty-five private letter rulings issued during the time period of 1982 to 2004 were found which directly addressed the issue of whether a particular contribution constituted a qualified conservation contribution and was, thus, available for an income tax deduction. The rulings involved a wide variety of conservation purposes, and were all determined to be valid conservation contributions pursuant to I.R.C. § 170(h). This high approval rate could be attributable to the fact that a taxpayer would not undertake the effort and expense to obtain a private letter ruling without presenting a strong case. Further, it may reflect that the qualified organization receiving the easement helps ensure the significance of the donation. On the other hand, it may simply indicate a somewhat tolerant approach by the IRS in the interpretation of conservation purposes under I.R.C. § 170(h)(4) given the volume of litigation in regards to valuation discussed in the next section.[22]

Often, the conservation easements involved contributions which asserted they fulfilled several of the broad categories of conservation purposes identified in the *Code*. Many of the easements involved agricultural/livestock farms or ranches. In general, these taxpayers proposed to restrict the land from commercial and residential



The value of the conservation contribution is the fair market value of the restriction at the time of the contribution.

development while continuing farming/ ranching activities. An easement to preserve structures or areas with historic significance was another common purpose. Other easements involved retained uses such as forest management and harvesting, mineral rights, outdoor recreation, water use, limited residential development, commercial campgrounds, summer camps, and guest ranches. Most of the rulings involve some combination of the above-listed uses. Often, the subject property is located in close proximity to a public recreation area and/or ecologically sensitive area such as a park, national forest, wildlife refuge or public waterbody. Other properties are located in areas which are experiencing rapid growth and development where there are express governmental policies and goals for preserving and maintaining undeveloped lands.[23]

Conservation Contribution Deduction Valuation

The value of the conservation contribution is the fair market value of the restriction at the time of the contribution.[24] Such fair market value can be determined through a comparable sales appraisal approach using sales of similar easements in the area, however such information is often limited. Therefore, the fair market value of the contribution will often be determined as the fair market value of the property prior to donation of the easement (its highest and best use) less the fair market value of the property after donation of the easement.[25] Such before-and-after valuation wmust take into account not only the current use of the property but also an objective assessment of how immediate

or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use."[26]

A deduction in excess of $5,000 for a donation of a conservation easement must be substantiated by the submission of a qualified appraisal by a qualified appraiser.[27] The intangible nature of conservation easements can lead to widely varying opinions as to value of the easement by equally qualified appraisers. The Senate Finance Committee recently announced that legislation will be introduced this year increasing fines and penalties for the excess valuation of historic facade easements and the abusive deductions taken thereon.[28] Thus, large deductions for conservation contributions seem to provide potential fertile ground for IRS audit.

Indeed, as mentioned above, much of the litigation in this area has been regarding the valuation of the donation. In some cases, the IRS has taken the position that the easement donation was worth nothing, arguing that there has been no change in highest and best use of the property. For example, *Schwab v. C.I.R.* involved the preservation of a waterfowl preserve on a 1,500-acre farm where Taxpayer claimed $900,000 value for the easement and the IRS asserted $0 value for the easement on basis of no change of highest and best use. The Tax Court ruled the easement value to be $544,000.[29] *Fannon v. C.I.R.* involved a donation of a scenic easement over a farm through restricting development where Taxpayer claimed $236,752 value for the easement and the IRS asserted a $0 value for the easement on basis of no change in highest and best use. The Tax Court ruled the easement value to be $90,956 and on further appeal, the Fourth Circuit increased the easement value to $121,781.[30]

Overall review of several cases regarding valuation indicates a general trend of both the U.S. Tax Court and U.S. District courts to recognize at least some value for the conservation contribution usually (but not always) somewhere between the extremes of valuations presented by the taxpayer and IRS experts and more recently leaning toward the taxpayer's valuation:[31]

Case	Taxpayer	IRS	Court
Browning v. CIR (1997)	$254,000	$0	$209,000
Schwab v. CIR (1994)	$900,000	$0	$544,000
Dennis v. U.S. (1992)	$50,610	$7,700	$50,610
Clemens v. CIR (1992)	$910,000	$110,000	$703,000
Schapiro v. CIR (1991)	$595,031	$388,000	$595,031
Dorsey v. CIR (1990)	$245,000	$46,000	$153,422
Higgins v. CIR (1990)	$110,000	$50,150	$103,000
Griffin v. CIR (1989)	$195,000	$35,000	$70,000
Richmond v. U.S. (1988)	$150,000	$59,000	$59,000
Losch v. CIR (1988)	$235,000	$70,000	$130,000
Fannon v. CIR (1986)	$236,752	$0	$90,956
Symington v. CIR (1986)	$150,000	$0	$92,370
Todd v. CIR (1985)	$353,000	$31,000	$31,000

The review of the preceding listed cases clearly demonstrated that the valuation of a conservation contribution is a highly fact based inquiry and largely dependent on expert opinion.[32]

Conclusion

Conservation easements are useful tools for preserving aesthetic, environmental and historic values on privately owned lands. Furthermore, they can provide significant income tax deductions for the donor landowner. Ambiguities in the *Code* and Treasury Regulations as to what constitutes a qualified conservation contribution may tend to cause taxpayers to shy away from donating conservation easements and claiming an income tax deduction. Application for private-letter rulings on the validity of a given contribution can be obtained, but are expensive and time-consuming. However, analysis of past private-letter rulings, while not available as precedent for future determinations, provides valuable insight into how to structure a valid conservation easement. Furthermore, past rulings indicate that the IRS typically approves proposed conservation easements as qualified conservation contributions under I.R.C. § 170(h), saving its argument as to the easement value. The intangible nature of conservation easements can lead to dispute with the IRS over the value of the deduction; however, the Courts have recognized the value of such deductions over IRS objection. Proof of the change, due to the easement, in the highest and best potential use of the property has been shown to be instrumental in supporting valuations of the easement and, thus, the deduction taken by the taxpayer. ■

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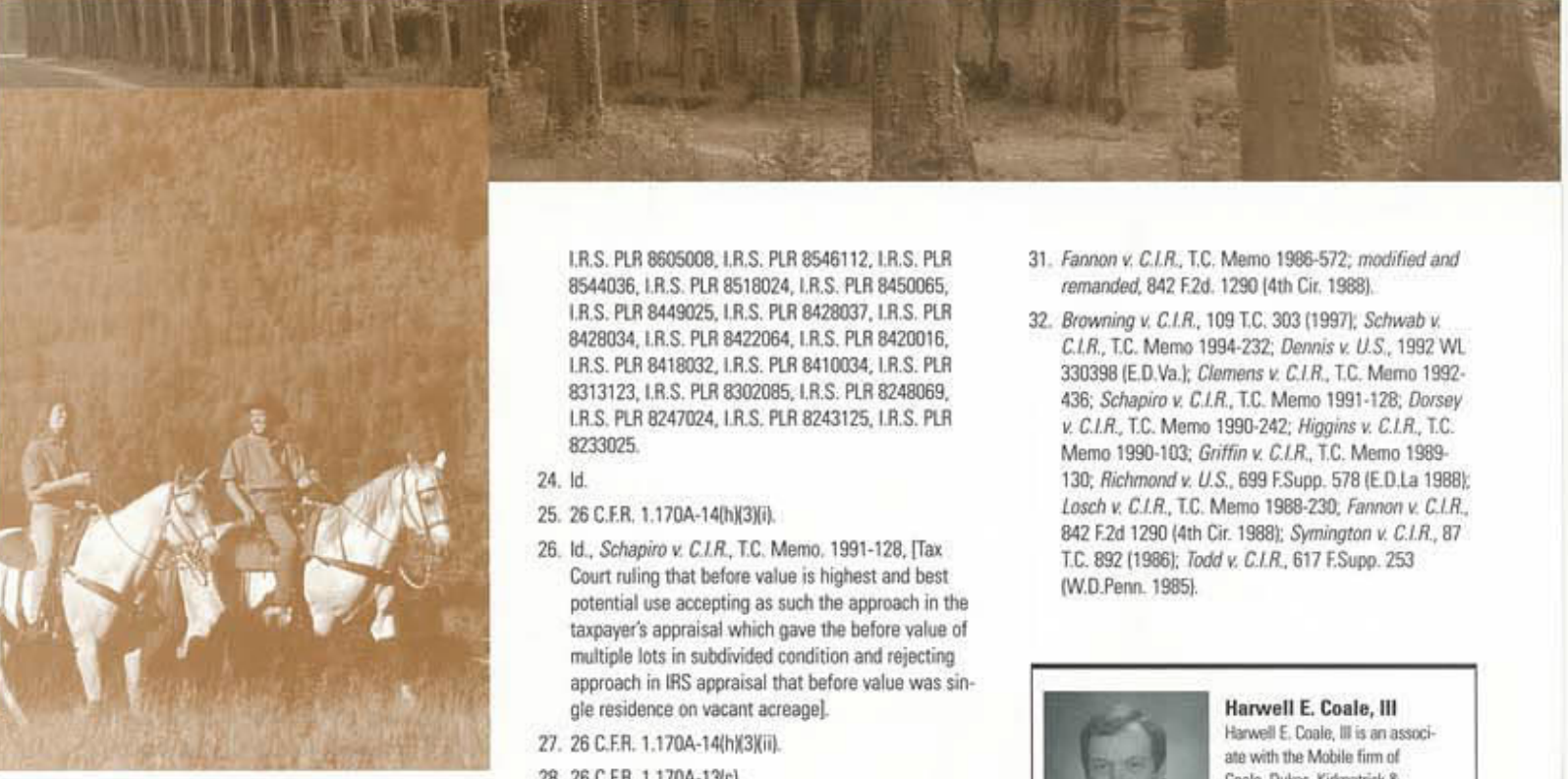


Endnotes

1. I.R.C. § 170(f)(3)(B)(iii).
2. I.R.C. § 170(h); 26 C.F.R. § 1.170A-14.
3. I.R.C. § 170(h)(1).
4. I.R.C. § 170(h)(2).
5. *Code of Alabama*, 1975, áá35-18-1 et seq.
6. 26 C.F.R. § 1.170A-14(c)(1).
7. 26 C.F.R. § 1.170A-14(c)(1)(i); I.R.C. § 170(c)(1).
8. 26 C.F.R. § 1.170A-14(c)(1)(ii); I.R.C. § 170(b)(1)(A)(vi).
9. 26 C.F.R. § 1.170A-14(c)(1)(iii).
10. 26 C.F.R. § 1.170A-14(c)(1)(iv).
11. 26 C.F.R. § 1.170A-14(c)(2).
12. Id.
13. I.R.C. § 170(h)(5)(A).
14. 26 C.F.R. § 1.170A-14(g)(2).
15. Id.
16. 26 C.F.R. § 1.170A-14(g)(5)(i).
17. I.R.C. § 170(h)(4)(A).
18. 26 C.F.R. § 1.170A-14(d)-(f)
19. 26 C.F.R. 1.170A-14(d).
20. Rev. Proc. 2004-1 Appendix A(3)(c) [fee reduction to $500 is available for letter rulings where gross income is less than $250,000].
21. Rev. Proc. 2004-3 Section 4.02(1).
22. I.R.C. § 6110(j)(3).
23. I.R.S. PLR 200403044, I.R.S. PLR 200208019, I.R.S. PLR 199952037, I.R.S. PLR 199933029, I.R.S. PLR 199927014, I.R.S. PLR 9736016, I.R.S. PLR 9632003, I.R.S. PLR 9603018, I.R.S. PLR 9537018, I.R.S. PLR 9420008, I.R.S. PLR 9318027, I.R.S. PLR 9318017, I.R.S. PLR 9218071, I.R.S. PLR 9052028, I.R.S. PLR 8810009, I.R.S. PLR 8753015, I.R.S. PLR 8729061, I.R.S. PLR 8722047, I.R.S. PLR 8721017, I.R.S. PLR 8713018, I.R.S. PLR 8713016, I.R.S. PLR 8711054, I.R.S. PLR 8652013, I.R.S. PLR 8638012, I.R.S. PLR 8630056, I.R.S. PLR 8626075, I.R.S. PLR 8623037, I.R.S. PLR 8605008, I.R.S. PLR 8546112, I.R.S. PLR 8544036, I.R.S. PLR 8518024, I.R.S. PLR 8450065, I.R.S. PLR 8449025, I.R.S. PLR 8428037, I.R.S. PLR 8428034, I.R.S. PLR 8422064, I.R.S. PLR 8420016, I.R.S. PLR 8418032, I.R.S. PLR 8410034, I.R.S. PLR 8313123, I.R.S. PLR 8302085, I.R.S. PLR 8248069, I.R.S. PLR 8247024, I.R.S. PLR 8243125, I.R.S. PLR 8233025.
24. Id.
25. 26 C.F.R. 1.170A-14(h)(3)(i).
26. Id., *Schapiro v. C.I.R.*, T.C. Memo. 1991-128, [Tax Court ruling that before value is highest and best potential use accepting as such the approach in the taxpayer's appraisal which gave the before value of multiple lots in subdivided condition and rejecting approach in IRS appraisal that before value was single residence on vacant acreage].
27. 26 C.F.R. 1.170A-14(h)(3)(ii).
28. 26 C.F.R. 1.170A-13(c).
29. *Press Release*, December 17, 2004, U.S. Senate Committee on Finance, Sen. Grassley Chairman & Sen. Baucus Ranking Member [Announcing upcoming legislation in early 2005 increasing fines and penalties on the practice of overvaluing historic facade easements for charitable contributions and calling on the IRS commissioner to make review of historic facade easements a priority for audit.]
30. *Schwab v. C.I.R.*, T.C. Memo 1994-232.
31. *Fannon v. C.I.R.*, T.C. Memo 1986-572; *modified and remanded*, 842 F.2d. 1290 (4th Cir. 1988).
32. *Browning v. C.I.R.*, 109 T.C. 303 (1997); *Schwab v. C.I.R.*, T.C. Memo 1994-232; *Dennis v. U.S.*, 1992 WL 330398 (E.D.Va.); *Clemens v. C.I.R.*, T.C. Memo 1992-436; *Schapiro v. C.I.R.*, T.C. Memo 1991-128; *Dorsey v. C.I.R.*, T.C. Memo 1990-242; *Higgins v. C.I.R.*, T.C. Memo 1990-103; *Griffin v. C.I.R.*, T.C. Memo 1989-130; *Richmond v. U.S.*, 699 F.Supp. 578 (E.D.La 1988); *Losch v. C.I.R.*, T.C. Memo 1988-230; *Fannon v. C.I.R.*, 842 F.2d 1290 (4th Cir. 1988); *Symington v. C.I.R.*, 87 T.C. 892 (1986); *Todd v. C.I.R.*, 617 F.Supp. 253 (W.D.Penn. 1985).

Harwell E. Coale, III

Harwell E. Coale, III is an associate with the Mobile firm of Coale, Dukes, Kirkpatrick & Crowley, PC. He received his undergraduate degree from the University of the South and his J.D. from the University of Alabama School of Law. He also holds masters' degrees in forest resources from the University of Georgia and environmental law from Vermont Law School and is scheduled to complete his LL.M. in taxation from the University of Alabama this August.

By Brannon Buck

Young Lawyers Render Service

The Alabama State Bar recently adopted the motto "Lawyers Render Service." I am proud to report that this year, as in prior years, young lawyers in Alabama have helped the ASB live up to its motto. Indeed, in the past six months, young lawyers have answered the call to serve the citizens of our state in many different ways and on many different occasions.

Most notably, young lawyers, led by **Bob Bailey** of Huntsville, have literally answered the calls of nearly 75 Hurricane Ivan victims in need of *pro bono* legal services. The ASB, in conjunction with the Federal Emergency Management Agency (FEMA), established a toll-free number that disaster victims could call for free legal assistance. **Linda Lund**, ASB Volunteer Lawyer Program director, and Bob Bailey have coordinated the volunteer legal services effort. The volunteer lawyers have assisted with all types of legal issues affecting disaster victims, including insurance claims, landlord-tenant issues and many others. To all of the lawyers who volunteered in this effort, we thank you for your time and service. For those of you who have not yet volunteered to assist disaster victims but would like to do so in the future, please let me know.

Young lawyers are also volunteering to work with high school students from the Birmingham city schools on a new debate program. Birmingham lawyer **Stephen Black** started the program, known as **SpeakFirst**. Young lawyers train and mentor talented high school students who participate in SpeakFirst. These attorneys are serving as positive role models and are enriching the lives of young people while, at the same time, acting as excellent ambassadors of our profession.

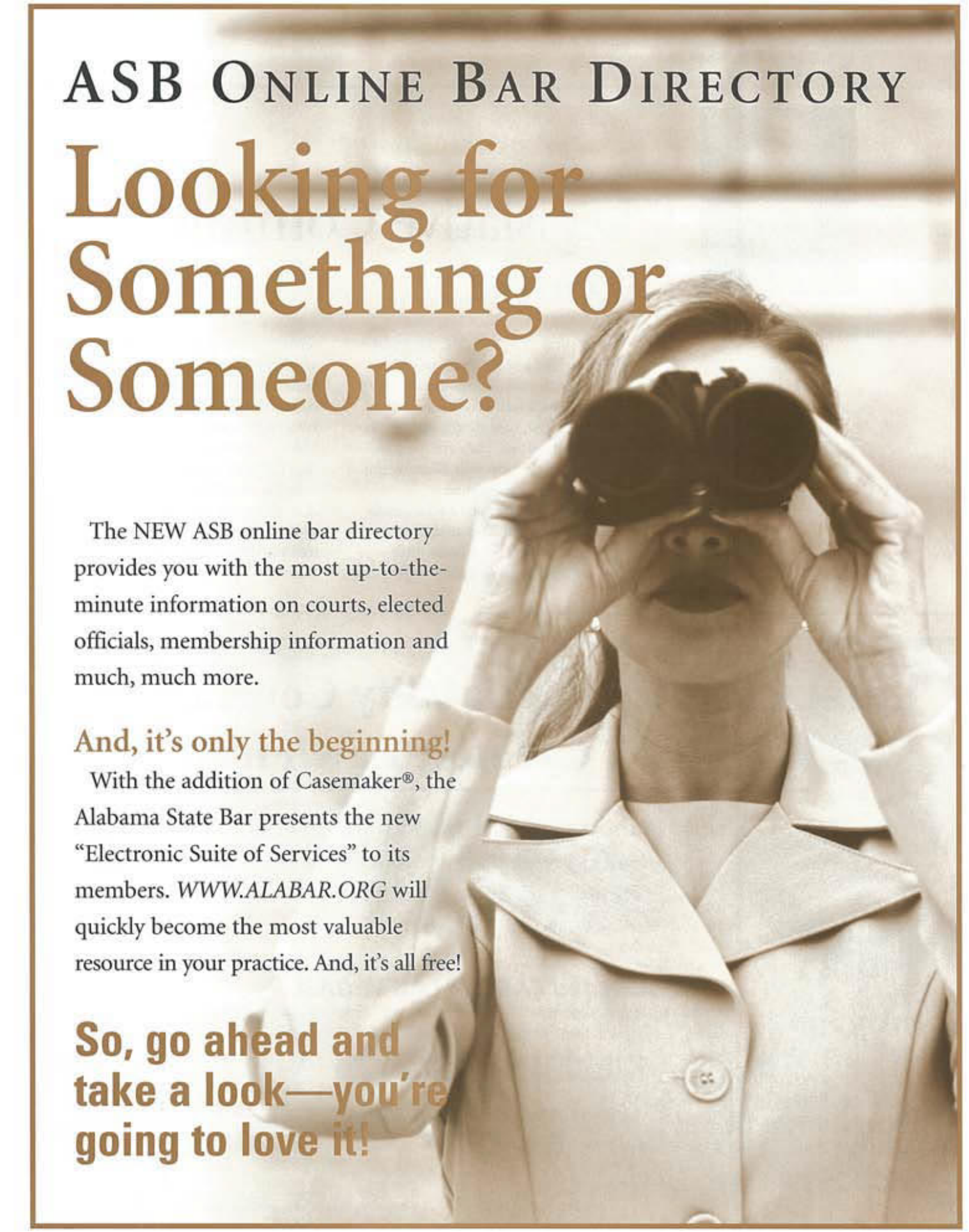
In the Montgomery area, the YLS continues to support the **Minority Pre-Law Conference**. **LaBarron Boone, Kimberly Ward** and **Christy Crow**, among others, assist in the preparation of this annual conference attended by over 200 minority high school students. The purpose of the conference is to educate the students about the legal profession. These three young lawyers work with the **Capital City Bar Association** to ensure that the conference is a success every year.

There are, no doubt, countless other ways in which young lawyers volunteer their time, energy and expertise on a daily basis. I continue to hold the idealistic belief that we, as attorneys, are uniquely situated to impact our communities in a positive way. Although the demands on our time increase every year, I hope that we can continue the tradition of our predecessors and "render service" as the motto suggests. Let us follow the example of the young lawyers who have already answered the calls of disaster victims and volunteered for other worthy projects.

Please consider attending the **Young Lawyers Sandestin CLE** seminar May 20 and 21, 2005. You should be receiving a brochure in the mail soon. As usual, the seminar will be a great time and will feature great speakers. If you have questions about the seminar, please contact **Craig Martin** at (251) 405-1327 or e-mail him at *cdm@ajlaw.com*. ■

ASB Online Bar Directory

Looking for Something or Someone?



The NEW ASB online bar directory provides you with the most up-to-the-minute information on courts, elected officials, membership information and much, much more.

And, it's only the beginning!

With the addition of Casemaker®, the Alabama State Bar presents the new "Electronic Suite of Services" to its members. *WWW.ALABAR.ORG* will quickly become the most valuable resource in your practice. And, it's all free!

So, go ahead and take a look—you're going to love it!

By Robert L. McCurley, Jr.

Legislative Committee Counsel

For more than 25 years, the Alabama Law Institute has been providing legal counsel to both the House and Senate Judiciary. It is through these committees that, historically, one-third of all legislation passes. They are the committees in which most bills affecting the legal profession are assigned.

Alabama legislators do not have individual research staff, and neither do committee chairs. The senate committee chairs are assigned a secretary while other senators must share a secretary with another senator. In the house of representatives, house members, including the committee chairs, must share a secretary with other committee chairs and, in general, members must obtain secretarial support from a secretarial pool.

In the late 1970s, the legislative leadership observing the complexity of the legislation going to the judiciary committees asked the help of the Alabama Law Institute to provide legal assistance to

both the House and Senate Judiciaries. Approximately 30 to 35 percent of all legislation passes through these two committees. Generally, these are the more technical legal issues the legislature is asked to consider.

The senate Judiciary, chaired by lawyer **Rodger Smitherman**, has Law Institute counsel assistance through attorney **LaVeeda Morgan Battle** of Birmingham. Ten of the 14 senate Judiciary members are lawyers. The members are provided an analysis of each bill the committee is considering. The lawyer provides a summary brief for each bill, explains how it changes the current law, and reviews it for any technical errors. The committee's lawyer is also available to provide research and draft amendments for the committee.

Speaker **Seth Hammett**, upon becoming the speaker of the house in 1999, recognized the need for independent counsel for each house committee. The speaker requested the Institute provide staff attorneys for 16 house committees. The only committees without staff attorneys are the budgeting committees. Currently, there are only eight representatives who are practicing attorneys. **Marcel Black**, chair of the House Judiciary, is a lawyer but only one of the other 14 members of the Judiciary is a lawyer. **Pam Higgins**, of Montgomery, serves as counsel to the house Judiciary.

The Institute has obtained the services of the following attorneys to serve as legal counsel for the house committees for 2005: **Pamela R. Higgins, Flynn Mozingo, Charlanna W. Spencer, Sandra Lewis, Karen Mastin, Christopher Pankey, Robert C. Ward, Ben Espy, Peck Fox,** and **William Sellers**. When any of the legal counsel has a conflict, **Bob McCurley** or **Penny Davis** from the Institute substitutes for them at committee meetings.

These attorneys review each bill placed on the house committee calendar, analyze it for technical errors, summarize the bill for the committee members and explain how the bill will change the current law. This information is e-mailed to each committee member prior to the committee meeting.

The printed version of the lawyer's review of each piece of legislation is also made available at the committee meeting. During the committee meeting, the attorneys are available for legal advice and drafting of amendments for committee members.

After the committee meeting is over, these lawyers then review their summaries to make any changes to the report as the bill is reported out of committee. These legal summaries are then available to every house member for review prior to consideration of the bill.

With less than eight percent of the representatives being lawyers, and none of them having independent staff, Speaker Hammett has made available to house members top-notch lawyers. They are made available to the legislature at a cost of less than ten percent of the salary for hiring fulltime legal counsel.

In 2005 the Institute prepared and presented to the legislature the following legislation:

Alabama Election Code

A committee chaired by former legislator and **Speaker Pro Tem Jim Campbell**, with 24 other members who are legislators, lawyers, judges, sheriffs, and clerks,

Legislative Wrap-Up

Continued from page 135

along with the Secretary of State, has reviewed the entire *Election Code*-Title 17. The committee has cleared up inconsistencies and duplications, and has also reorganized election law. This revision will make Alabama's Election Law more assessable and usable.

Alabama's Election Law evolved from paper ballots to machine voting to electronic voting. All three processes have separate voting procedures that remain the law today. The current cumbersome and outdated law has become even more complicated by the passage of the federal "Help America Vote Act," the Secretary of State's Administrative Rules, and voting officials obtaining the attorney general's opinions to interpret the various statutes. The committee has simplified the current law by conforming all the laws, rules and opinions to electronic voting machines to make sure the law coincides with the voting procedure practice.

The most difficult areas to clarify are the voter identification law as it applies to absentee ballots and provisional balloting, which are the two new provisions of Alabama law causing voting officials the most problems.

Alabama Trust Code

Alabama and other states have traditionally relied on case law to determine the trust laws. Alabama and other states have enacted a Trust Powers Act, but, in general, trust law is incomplete. A committee chaired by **Ralph Yeilding** has, for several years, been studying the Uniform Trust Law and comparing it with Alabama law. The committee, with the assistance of the reporter, **Bob Loftin**, has completed their study. A bill is now pending before the Alabama legislature to provide Alabama with its first *Trust Code*.

Alabama Securities Act

Recent investment fraud cases, such as those currently pending with HealthSouth, Enron and WorldCom, have brought both state and federal security laws under review.

A committee chaired by **Mike Waters** and other experts in security law, has completed this Act which provides the basic law for registration of securities, regulation of issues, broker-dealers and investment advisors along with expanded enforcement and investigatory powers for the Alabama Securities Exchange Commission.

Although technical, it clarifies the Alabama security laws and closes the loopholes that now exist between state and federal acts. With the passage of the 1996 National Security Markets Improvement Act and the Sarbanes-Oxley federal law, these Acts specifically preempted state security regulations, causing all of our existing laws to be out of compliance. This revision is also currently before the Alabama legislature.

Uniform Residential Landlord/Tenant Act

For the past few years, the Alabama legislature has been considering a Landlord/Tenant Law. Alabama is only one of two states that do not have a Residential Landlord/Tenant Law. The proposed Act, drafted by a committee chaired by **James Tingle**, is a more landlord-friendly version of the Uniform Residential Landlord/Tenant Act than has been enacted in 20 states, including Tennessee, Florida, Mississippi, South Carolina, Kentucky, and Virginia.

Estate Tax Apportionment

A committee chaired by **Leonard Wertheimer**, with **Fred Daniels** serving as reporter, has recommended that Alabama establish an estate tax law. The *Internal Revenue Code* places the primary responsibility of paying federal and state tax on the personal representative but does not direct from which beneficiary the taxes are to be paid. This is left to state law. Forty-four states have an apportionment of tax law, but Alabama requires the taxes to be taken from the residuary of the account unless the will directs otherwise.

This Act applies only to:

a. Estates over two million dollars,

b. where there is a will and the will does not enumerate who pays the taxes, or

c. to persons who die after January 1, 2007.

The Act does not affect:

a. The total amount of tax paid;

b. estates with no will;

c. estates less than two million dollars;

d. charitable gifts;

e. specifically willed gifts less than $100,000 to any person;

f. persons who are incompetent; or

g. any person who dies before January 1, 2007.

The act generally will allow taxes to be shared by beneficiaries proportional to the amount received when the testator does not direct otherwise.

Copies of all five Acts can be obtained by consulting the Alabama Law Institute Web site at *www.ali.state.al.us.*

The legislature's regular session cannot extend beyond Monday, May 16, 2005.

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.

ALABAMA STATE BAR
2005-2006 COMMITTEE/ TASK FORCE PREFERENCE FORM

ALABAMA STATE BAR MISSION STATEMENT

THE ALABAMA STATE BAR IS DEDICATED TO PROMOTING THE PROFESSIONAL RESPONSIBILITY AND COMPETENCE OF ITS MEMBERS, IMPROVING THE ADMINISTRATION OF JUSTICE, AND INCREASING THE PUBLIC UNDERSTANDING OF AND RESPECT FOR THE LAW.

INVITATION FOR SERVICE FROM BOBBY SEGALL, PRESIDENT-ELECT

We want very much in the upcoming year to broaden participation in bar activities. If you would like to serve our profession in a volunteer capacity, please choose a committee or task force in which you are interested. The Alabama State Bar needs you and will try hard to involve you in an area of your interest.

We also want your suggestions on how the Alabama State Bar can better serve its members and our profession. Please include your suggestions in the space provided below.

_____

_____

APPOINTMENT REQUEST - Terms begin August 1, 2005 and expire July, 2006. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee (c) or task force (tf).

___ *Alabama Lawyer*, Editorial Board (c)
___ *Alabama Lawyer*, Bar Directory (c)
___ Alternative Methods of Dispute Resolution (c)
___ Character & Fitness (c)
___ Client Security Fund (c)
___ Community Education
___ Disciplinary Rules & Enforcement (tf)
___ Diversity in the Profession (tf)
___ Evaluation of CLE (tf)
___ Fee Dispute Resolution (c)
___ Judicial Liaison (c)
___ Insurance Programs (c)
___ Lawyer Referral (c)
___ Lawyer Public Relations (c)
___ Lawyer Assistance Program (c)
___ Military Law (c)
___ Quality of Life
___ Rules Governing Admission (tf)
___ Solo & Small Firm Practitioners
___ Unauthorized Practice of Law
___ Volunteer Lawyers Programs

BACKGROUND INFORMATION

Name: _____
Firm: _____
Address: _____(Street or P.O. Box)
_____ (City, State, Zip)
Telephone: (office) _____ (e-mail) _____ (facsimile)
Year of admission to bar: _____ ☐ check if new address

SUGGESTIONS FOR NEW COMMITTEES OR TASK FORCES:

_____

INSTRUCTIONS FOR SUBMISSION

Please return this form no later than May 7, 2005 to be considered for an appointment, by mail to Programs, P.O. Box 671, Montgomery, AL 36101-0671, by facsimile to 334-261-6310, or by computer to *rgray@alabar.org*. Please remember that vacancies on existing committees are extremely limited as most committee appointments are filled on a three-year rotation basis. **If you are appointed to a committee, you will receive an appointment letter informing you in June 2005.** You may also download this form from our Web site, *www.alabar.org*, and submit the completed form via email to *rgray@alabar.org*.

By J. Anthony McLain

Headaches, Hormones & Hissy Fits

[Based on reader response, the following is a rehash of the previously published article, then entitled, "When Clients & Files Take Flight."]

The reflection in the mirror really is you. Do you like what you see? Published survey results continue to demonstrate a growing dissatisfaction among lawyers who are disenchanted with their chosen profession. We possess the privilege of being a self-policing profession and should strive to retain that right.

In an effort to familiarize the membership of the bar with the overall process of our disciplinary system, some discussion of how it works, and how upcoming changes may further enhance our discipline processes, follows.

How Bar Complaints Are Filed

We presently have some 14,600 lawyers licensed to practice in Alabama. In 2004, the four-member Disciplinary Commission reviewed 1,514 complaints which were filed against Alabama attorneys. The majority of those complaints were filed by disgruntled clients. Some complaints were filed by judges, some filed by opposing counsel, and some were received anonymously, or based upon newspaper articles, court orders or opinions, and the like.

The Office of General Counsel has formulated a screening process, an initial "probable cause" review, of all complaints to determine if a full investigation is necessary. The utilization of this screening

procedure has resulted in more than half of all complaints filed being screened out during this initial review phase.

What to Do When You Get That Letter

If you are one of the unfortunate "respondent attorneys," the best advice is to cooperate in the bar's investigation and be prompt in doing so. Numerous reprimands are being administered to lawyers who refuse or fail to cooperate with attempts to investigate bar complaints filed against them, which refusal or failure, in and of itself, is a violation of Rule 8.1(b), *Alabama Rules of Professional Conduct*.

Be thorough and forthright in your written response, and provide any documentation that is supportive of your response. In a significant number of cases, the complaint is dismissed due to the detailed and comprehensive initial response of the lawyer.

If there are third-party witnesses who may provide corroborating information, supply their names, addresses and telephone numbers. This, too, can reduce the time and effort required of the respondent attorney in having to deal with the disciplinary process.

Lastly, don't attack the process or those who attempt to enforce the rules. In a large number of investigations, the respondent attorney's less-than-professional attitude toward investigators looking into the matter further exacerbates an already unpleasant situation. Demonstrating professionalism and cooperation better serves the lawyer who is the subject of such an investigation.

Just Who Is Big Brother/Sister?

Pursuant to the *Alabama Rules of Disciplinary Procedure*, investigation of a complaint is conducted by the Office of General Counsel or a local grievance committee. There are presently eight local grievance committees: Birmingham, Mobile, Montgomery, Tuscaloosa, Huntsville/Madison, Houston, Talladega, and Baldwin. Once an investigation is completed, a report and recommendation from the Office of General Counsel or the local grievance committee is submitted to the Disciplinary Commission which determines the final disposition of the complaint. The Disciplinary Commission consists of four bar commissioners who are elected from that body for three-year terms.

The Disciplinary Commission can order: (1) dismissal of the complaint; (2) a private reprimand; (3) a public reprimand without general publication; (4) a public reprimand with general publication; or (5) formal charges. If the Disciplinary Commission determines that the lawyer should receive a reprimand, private or public, the lawyer may request that formal charges be filed and a hearing held thereon.

Hearings are conducted before the Disciplinary Board. Pursuant to rules of procedure adopted by the Alabama Supreme Court, effective August 1, 2000, there are six such boards, each consisting of six members; a disciplinary hearing officer, four bar commissioners, and a layperson. The rules provide for the appointment of the six disciplinary hearing officers who shall guide and superintend the disciplinary proceedings of the Disciplinary Board.

If a lawyer is found guilty of misconduct, he or she may appeal to the Board of Disciplinary Appeals, which is composed of five lawyers appointed by the Board of Bar Commissioners. Appeals from a decision of the Board of Disciplinary Appeals lie with the Alabama Supreme Court.

Can the Lawyer Being Investigated Talk to the Complainant?

The best solution in all cases would be for the complainant and the lawyer to work out their underlying problem, especially if the complainant is or was a client. In those instances where the client may have retained new counsel, the lawyer who is the subject of the grievance should be aware of the "no-contact" pro-

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vision concerning communication with a represented party. Additionally, the rules prohibit a lawyer from making an agreement prospectively limiting his liability to a client for malpractice unless permitted by law, and, the client is independently represented. Obviously, the lawyer should not coerce the complainant into withdrawing the complaint or otherwise impede the investigative process through improper influence or actions.

The rules recognize the possibility of such influence, and specifically declare that disciplinary proceedings shall not necessarily be abated because of unwillingness or neglect of the complainant to sign a complaint or cooperate in the investigation or prosecution of a charge, settlement or compromise between the complainant and the lawyer, or because of restitution by the lawyer.

Gruesome Statistics

Of the 1,514 bar complaints filed in 2004, 1,133 were screened out. Of the lawyers disciplined in 2004, 47 received private reprimands, 11 received public reprimands without general publication, eight received public reprimands with general publication, 17 were suspended, and three were disbarred.

Therefore, while the overall number of complaints filed seems substantial in view of the number of licensed lawyers in the state, only a small percentage of the complaints resulted in any actual discipline.

Consistency, Consistency, Consistency

For our system of self-policing to survive, there must be uniform, consistent discipline of those lawyers who violate the rules of conduct. What one reads in *The Alabama Lawyer* in terms of lawyer discipline is obviously a short synopsis of the case. Prior disciplinary history of the lawyer, mitigating factors and other elements or facts of each case are not always included in the public notices of lawyer discipline.

The result is that many who read the Discipline Report contained in each edition of *The Alabama Lawyer* are getting only a portion of the total facts and circumstances involved in each discipline

case. Taken in this limited context, some may conclude that the discipline being meted out to lawyers is inconsistent. However, the rules adopted by the Alabama Supreme Court are designed to eliminate any possible inconsistency concerns, and establish a refined, uniform approach to the disciplinary process. Pretrial conferences, plea deadlines and negotiation cut-offs will eliminate most delays and will create a defined disciplinary structure and hearings calendar within which prosecution of complaints will occur.

If a lawyer is found guilty of violating the *Alabama Rules of Professional Conduct*, a detailed report of the findings of the Disciplinary Board will be prepared. This information will become a part of the bar's disciplinary database, and will serve as the source for publicizing of the misconduct, both in the media, and upon inquiry, to the public. Eventually, the information will contain sufficient detail to allow more uniform discipline, and continued assurances of due process and equal protection in all discipline cases.

Did You See What I Saw?

Rule 8.3, *Alabama Rules of Professional Conduct*, requires (mandatory) that a lawyer possessing unprivileged knowledge of a violation of Rule 8.4 (misconduct) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. An increasing number of lawyers and judges are bringing instances of lawyer misconduct to the attention of the Disciplinary Commission. For the system to be accountable to the public, those governed by the system must be responsive to the rules, even when such requires the reporting of another lawyer to the court or the bar.

While some may question the reporting requirement of Rule 8.3, those who understand that such is essential to maintaining the right to self-police comply with the rule and thereby eliminate further misconduct by the offending lawyer, and possible future harm to clients, the public and our profession.

The privilege of practicing law carries with it significant responsibilities, not the least of which is a commitment to both the substantive rules which govern our conduct, but also a willingness to participate as a bar commissioner, a disciplinary board panel member, or a complainant. ■

Bar Briefs

- **Najjar Denaburg PC** announces that **Sara J. Senesac** has become a fellow of the American Academy of Matrimonial Lawyers.

- **Tameria S. Driskell** was recently installed as president of the 155-member Kiwanis Club of Gadsden. She is the first female president in the club's history.

- **St. Clair District Court Judge Jim Hill** has been chosen the recipient of the 2004 Howell Heflin Award. The award is given each year to an individual who has significantly contributed to the overall success of the Court Referral Officer's Program, even though they are not directly involved or compensated for it. Hill served as a past conference presenter and is a proven supporter of the court referral program, according to the Administrative Office of Courts. He established the Drug Court Program for young adults with drug problems and regularly seeks the input of his Court Referral officer on alcohol and drug cases. Hill has served as district judge and juvenile judge for St. Clair County for the past nine years.

- **William Hairston, Jr.**, former president of the Alabama State Bar and the Birmingham Bar Association, recently was named Lawyer of the Year by the BBA. Lawyers selected for the award, created in 1972, are chosen based on their service to the BBA, the community, the state and the nation, and on their professional achievements in law practice. Hairston is a World War II veteran who was awarded a bronze star, and he's served as a law school instructor and is a former member of the Judicial Inquiry Commission. Among other awards, he was named the Birmingham Legal Secretaries Association's Lawyer of the Year in 1982. He practices with his son, William Hairston, III.

- Two anonymous donors have committed a "challenge" gift of $1.65 million to **Thomas Goode Jones School of Law**, at Faulkner University. The gift is part of the Fulfilling the Promise major gifts initiative, which is designed to raise $3.6 million as the School of Law heads toward the application process for the American Bar Association, this coming fall. The challenge gift, which will match dollar-for-dollar the donations received from the law school's alumni and friends, requires that the matching donations be raised by August 2005. ■

Takes a Licking

When **Morgan County District Court Judge David Breland** says he knows his heart is just ticking along, he means it literally.

Since surgeons installed a stainless steel heart valve in 1999, Breland has been able to hear the valve clicking when all around him is quiet.

"People have asked me if it bothers me to hear it clicking," he said. "I think it would bother me if I didn't hear it clicking."

—*Paul Higgins, **Decatur Daily**, November 10, 2004*

Daphne Firm Holds Reception Honoring Retiring Supreme Court Justice J. Gorman Houston, Jr.

Judges and lawyers from Mobile and Baldwin counties turned out at the Grand Hotel for a reception honoring retiring **Alabama Supreme Court Justice J. Gorman Houston, Jr.** The reception was hosted by the Daphne firm of **Citrin & McGlothren, PC. Andrew T. Citrin**, a longtime friend, felt that Justice Houston's longstanding service to the Alabama Supreme Court should be honored in a special way. The reception was highlighted by a video presentation of Justice Houston's career, as well as live tributes given by **Supreme Court Justice Champ Lyons** and Citrin. Justice Lyons described Justice Houston as "a prince of a man and as a justice, a great role model." He said that Houston's "love of the court as an institution is simply unparalleled" and that he possessed "all of the necessary traditional virtues, including "intellectual honesty," to do a stellar job on the court. Justice Lyons emphasized that Houston "acted with great dignity" when he was thrust into the position of acting chief justice during the Roy Moore/Ten Commandments crisis.

During his 19 years of public service, Justice Houston has achieved numerous significant and outstanding accomplishments. He received his B.S. degree from Auburn University and his LL.B. from the University of Alabama School of Law, where, among other things, he was a member of the Farrah Order of Juris Prudence. He served as a law clerk for **Chief Justice J. Ed Livingston** and as a Judge Advocate in the United States Air Force. After practicing law in Eufaula for 25 years, he was appointed to the position of associate justice of the Alabama Supreme Court in 1985, was elected to that position in 1986, was re-elected in 1992, was re-elected again in 1998, and was acting chief justice from August 2003 to June 2004. He has written 1,403 opinions, and 1,304 petitions of certiorari have appeared in 400 volumes of the Alabama *So. 2d.* Justice Houston has worked hard for

Alabama Supreme Court Justice J. Gorman Houston, Jr.

19 years to "restore the individual's citizens sense of duty and to expand the concept of judicial responsibility."

In one of his campaigns, Justice Houston told a reporter, "Imagine what could happen on a court with a majority of unusually able justices or judges, without an agenda, devoting themselves to fair-minded, top-caliber decision-making, taking contested issues seriously and working through them with the utmost intellectual discipline." Once in office, Houston made this goal for himself a reality.

Among the crowd at the reception was **Mobile County Presiding Circuit Judge Robert Kendall**, who served on the Judicial Ethics Panel that removed Moore from office. Houston, Kendall said, "inherited an extraordinarily difficult job in an extraordinarily difficult time. He devoted his entire energies and abilities to it." Justice Houston filled in the spot that was left open with Moore's departure until June of this year. A complete transcript of Mr. Citrin's live tribute is as follows:

"Good evening. Thank you for joining us.

"We come here tonight to celebrate the life and career of a great public servant—Justice J. Gorman Houston, Jr.

"For 19 years, he has served the people of Alabama with honor and distinction on the Alabama Supreme Court. For my entire career as a lawyer for the past 18-plus years,

(Continued on page 144)

Justice and Mrs. Gorman Houston with members of the Daphne firm of Citrin & McGlothren, hosts of the recent reception

(Continued from page 143)

Justice Houston has been the one constant presence on our state's court of last resort. He has seen us through some challenging and difficult times—from the wave of tort reform measures which passed less than two years into his first term in office, to the numerous constitutional challenges that followed, the ERISA pre-emption issue of the 1990s, the arbitration issue, punitive damage issues, and many, many others. And, that's just a small part of the civil side of his work. In addition, recently he navigated us through the stormy waters of the Ten Commandments issue while serving as acting chief justice. During those tumultuous months, his life was threatened and his car was vandalized, and yet he remained calm and affable as always. As Justice Lyons just pointed out, Justice Houston served us in so many unseen and unreported ways and for that he deserves out heart felt recognition and gratitude. Thank you for your service, Justice Houston.

"Several people have asked me why my firm was sponsoring this reception to commemorate Justice Houston's service on the Alabama Supreme Court. I began my career as an appellate lawyer. From 1986 through 1997, almost all my time was devoted to research and writing and making oral arguments on civil matters. During those years, I had the good fortune to work on many matters of first impression and many constitutional challenges. During those years, I argued many cases before the Alabama Supreme Court and submitted hundreds of appellate briefs. During that time, the faces of the Alabama Supreme Court changed as they do, as justices retire or new justices are voted into office. As I mentioned, the one constant on the court was Justice Houston. And, when I say constant, I don't mean just in the physical sense of just being there on the court. I mean it also in the intellectual sense. You see, after you spend some time before a judge, arguing cases and reading their opinions, you get a glimpse into the character of the man. As a judge, Justice Houston's most abiding presence on the court was his dedication to impartiality and to the rule of law.

"Now don't get me wrong, out of the many matters I've had before the court over the years, Justice Houston has ruled against my client's positions on many, many occasions. In fact, there were many times when I was very disappointed and strongly disagreed with his decision. However, it was not his votes that revealed his character to me, but it was the way in which he went about his work as a judge that generated in me profound admiration and respect for him as both a judge and a man.

"When a person becomes a judge, they undertake a very solemn and sobering task—one that is almost super-human. When a judge takes the oath of office, he promises on everything he holds most sacred to uphold the constitutions of the United States and of the State of Alabama. When he does that, he ceases to be an advocate of a client. He ceases to be an advocate of a special interest group or of a political party or even of a political or religious ideology. While deciding cases and controversies lawfully before him, a judge ceases to be a Democrat or a Republican, a liberal or a conservative, pro-plaintiff or

pro-business. We expect that of all our judges. It is not easy. It takes real discipline, both intellectually and emotionally. There are tremendous pressures placed upon our appellate judges at all levels—the newspaper, TV ads, political PACS, political parties, litigants on both sides, crime victims, and on and on. Judges are not supposed to have constituencies. To avoid the politicizing of the judicial office, a judge must reach deep inside for the very best and most sacred part of himself to remain impartial and beyond the influence of the politics of the day.

"In my experience as a lawyer, working before the court and observing it over the years, Justice Houston has been for me an inspiring example of a judge who succeeded in that task. While I have not always agreed with his decisions, or the rationale for his decisions, I always knew that Justice Houston's motive was pure, his beliefs sincere and his decisions principled. What more can you ask of any judge?

"I also learned that many times Justice Houston agonized over his decisions or the wordings of his opinions. And, he did that because he was such a dedicated man who understood the sacred trust and solemnity of his office. In essence, Justice Houston is a lawyer's judge, a judge's judge and a pure jurist. On top of that, he is a gracious, Southern gentleman, and he and Martha are always an absolute pleasure to visit with.

"As Benjamin Cardozo once said of appellate judges: 'Only experts may be able to gauge the quality of [an appellate judge's] work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith.' Justice Houston, as a member of the lawyer class, who has argued cases before you, and read countless of your 1,500 reported appellate decisions and socialized with you at various bar events over the years, I am here today to testify that your dedicated and principled service has spread to others and has been a magnificent example for all judges to follow."

Justice Houston visits with former Alabama Supreme Court Chief Justice Perry O. Hooper and Mrs. Hooper.

A video, which touches upon his childhood and early years in the military and as a father and grandfather and noteworthy images from his judicial career, will be filed in the Alabama Archives in the invitation of the director of the Archives, Dr. Ed Bridges. A copy of the videotaped presentation, videotaped highlights from the reception, photographs, newspaper articles, and television news reports are available upon request from the Daphne firm of Citrin & McGlothren, PC, at (866) 533-7766. ■

ALABAMA STATE BAR
2005 ANNUAL MEETING

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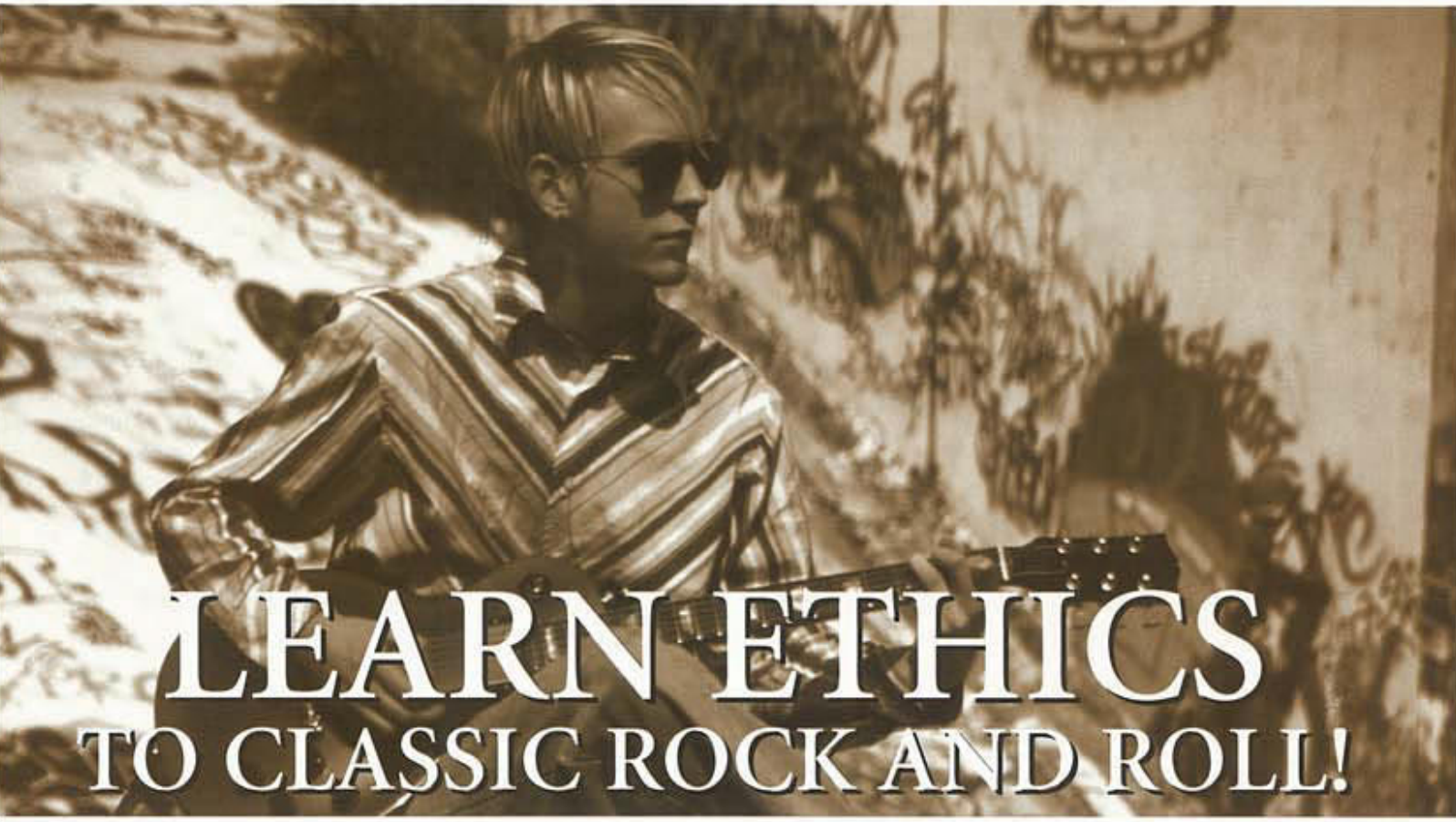

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"It just might be that even in continuing legal education, rock and roll is here to stay."

Who ever heard of opening a CLE seminar with the opening guitar riffs of a rock opera? Well, you have–now! "ETHICS ROCK!" is an award-winning legal ethics seminar presenting complex ethics scenarios as expertly performed parodies of some of the greatest rock-and-roll hits of the '60s, accompanied by acoustic guitar and sung by professional classic rock performers. The Beatles, The Who, Simon and Garfunkel, James Taylor, and others find their works transformed into new versions that tell stories of lawyers facing ethical difficulties while somehow retaining the flavor and spark of the original hit songs—like *"The Day My Ethics Died" (American Pie)* and *Scum and Pain (Fire and Rain)*. Past participants in this interactive seminar give it rave reviews:

"Entertaining and informative–by far the best ethics seminar I've attended."

"Fantastic! I've never sung at a CLE seminar before."

"Legal ethics is a fascinating topic, and yet it has a terrible reputation for making boring seminars," says Jack Marshall, of ProEthics, the consulting firm that created the seminar. "How can you be bored when there is a smile on your face, you're tapping your foot and maybe even singing along?"

Disciplinary Notices

- **Stephen Duane Fowler**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2005, or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 04-31(A) by the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel III, reinstating Bessemer attorney **Richard Larry McClendon** to the practice of law in the State of Alabama effective January 4, 2005. [Pet. for Rein. No. 04-05]
- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel III, reinstating Birmingham attorney **Jacob C. Swygert** to the practice of law in the State of Alabama, effective November 11, 2004. [Pet. for Rein. No. 04-03]

Transfers

- Huntsville attorney **Ronald Frank Suber** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective November 22, 2004. [Rule 27(c); Pet. No. 04-06]
- Birmingham attorney **Adam L. Thrash** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective January 4, 2005. [Rule 27(c); Pet. No. 04-07]

Suspensions

- Somerville attorney **Randal Dean Beck** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated December 3, 2004. The Disciplinary Commission found that Beck's continued practice of law is causing, or is likely to cause, immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 04-18]
- Florence attorney **Basil Timothy Case** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, dated September 27, 2004. The Disciplinary Commission found that Case's continued practice of law is causing, or is likely to cause, immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 04-013]
- Birmingham attorney **Richard Charles Frier** was interimly suspended from the practice of law in the State of Alabama, pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 12, 2005. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Frier had willfully neglected client matters, failed to communicate with clients and failed to account for client funds held in trust, and that such conduct was continuing and causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(a); Pet. No. 04-10]
- On September 23, 2004, the Disciplinary Board, Panel V, of the Alabama State Bar, accepted Huntsville attorney **David Ashby Thomas'** conditional guilty plea to violating rules 1.3, 1.4(a) and 1.4(b), *Alabama Rules of Professional Conduct*, and ordered that he be suspended from the practice of law in the State of Alabama for a period of one year. The one-year suspension will run concurrently with a one-year suspension that Thomas received

in ASB No. 03-64(A), which became effective January 24, 2004. Thomas agreed to abandon any claim for unpaid attorney fees and to make restitution in the amount of $3,500. Thomas was reinstated to represent a client in a divorce matter. After he was retained, he took a six-week leave of absence without notifying the client, returning about two weeks prior to the scheduled trial. Thomas was unprepared for trial and failed to communicate with the client regarding the matter. [ASB No. 02-247(A)]

- Gardendale attorney **John Scott Starkey** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, dated September 21, 2004. The Disciplinary Commission found that Starkey's continued practice of law is causing, or is likely to cause, immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 04-12]
- Arab attorney **Johnny Lee Tidmore** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective October 29, 2004. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel, evidencing that Tidmore was intoxicated at a hearing in Marshall County District Court. [Rule 20(a); Pet. No. 04-02]
- Mobile attorney **Slade Gordon Watson** was suspended from the practice of law in the State of Alabama for a period of one year, effective December 7, 2004. The suspension was based upon the decision of the Disciplinary board, Panel V, of the Alabama State Bar.

During the course of Watson's representation of a client, Watson obtained personal, confidential information from the client, and used the lawyer/client relationship and the confidential information to take advantage of the client and to exert undue influence and control over the client in order to engage in a sexual relationship with the client, violations of rules 1.7(b), 1.8(b), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(g), *Alabama Rules of Professional Conduct*. [ASB No. 00-277(A)]

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Disciplinary Notices

Continued from page 149

- Cullman attorney **Frank Williams, Jr.** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective November 16, 2004. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel, evidencing that Williams had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 04-17]
- On October 29, 2004, Bessemer attorney **Herbert Jadd Fawwal** received a public reprimand without general publication, for violations of rules 1.3 and 8.1(a), *Alabama Rules of Professional Conduct*. In March 2000, Ms. Seals hired Fawwal to represent her in an automobile accident case. The fee was a contingent 25 percent. Ms. Seals' vehicle had been struck by a truck owned and operated by Golden Flake Foods. Fawwal advised Ms. Seals that he would retrieve her vehicle from Ellis Wrecker Company in order to have the airbags inspected. Ms. Seals was notified by Ellis that unless towing and storage fees of $243 were paid by April 13, 2000, the vehicle would be sold. Ms. Seals brought a check to Fawwal's office for the towing and storage charges. The check was dated April 3, 2000. Fawwal deposited the check and it cleared Ms. Seals' mother's account at AmSouth Bank on April 13, 2000. Fawwal made no effort to procure the wrecked vehicle from Ellis until April 15, 2000, at which time he was told that it had been sold. In October 2002, Ms. Seals terminated Fawwal because of his failure to take any legal action against Golden Flake. On May 16, 2002, she filed a complaint with the Alabama State Bar. In Fawwal's response to the complaint, one of the issues dealt with Fawwal's failure to retrieve the wrecked vehicle prior to its sale by Ellis. In defense of that failure, Fawwal stated that Ms. Seals did not give him a check for the money owed to Ellis until April 30, 2000. Fawwal was asked to produce some bank records supporting this assertion, but he never did so. Ms. Seals' bank records clearly showed otherwise. [ASB No. 02-168(A)]
- On December 3, 2004, Birmingham attorney **William E. Friel, II** received a public reprimand without general publication in four separate matters. On August 14, 2002, the Disciplinary

Commission accepted Friel's conditional guilty plea. In exchange for the plea, the Disciplinary Commission dissolved a summary suspension that had been imposed because of Friel's repeated failure to respond to requests for information from a disciplinary authority. The Disciplinary Commission ordered that he be suspended from the practice of law in the State of Alabama for a period of 91 days, but stayed the suspension pending successful completion of a two-year probationary period. The Disciplinary Commission further ordered that upon successful completion of probation, the 91-day suspension would be set aside and Friel would receive a public reprimand without general publication in each case. The facts upon which the decision of the Disciplinary Commission was based are as follows:

In ASB No. 01-158(A), Friel pled guilty to violations of rules 1.3 and 8.1(b), *Alabama Rules of Professional Conduct*. He failed to file an appellant's brief on behalf of his client. He was removed as appellant's counsel and a copy of the order relieving him from the case was forwarded to the bar. Friel failed to respond to requests for information from the bar.

In ASB No. 01-311(A), Friel pled guilty to violations of rules 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. He failed to file a bankruptcy petition on behalf of his client and failed to communicate with his client. Friel also failed to respond to requests for information from the bar.

In ASB No. 02-38(A), Friel pled guilty to violations of rules 1.3 and 8.1(b), *Alabama Rules of Professional Conduct*. He failed to file an appellant's brief on behalf of his client. He was removed as appellant's counsel and a copy of the order relieving him from the case was forwarded to the bar. Friel failed to respond to requests for information from the bar.

In CSP No. 01-773(A), Friel pled guilty to violations of rules 1.3, 1.4(a), *Alabama Rules of Professional Conduct*. He was retained to represent a client in a divorce. More than a year passed and Friel still had not filed the divorce pleadings. The client was unable to communicate with him. Friel did not file the divorce until after the client filed a complaint with the bar. [ASB nos. 01-158(A), 01-311(A), 02-38(A) and CSP 01-773(A)]

- On December 23, 2004, Montgomery attorney **Gwendolyn Thomas Kennedy** received a public reprimand without general publication for a violation of Rule 1.7(a) [conflict of interest: general rule], *Alabama Rules of Professional Conduct*. On or about December 3, 2002, Kennedy was hired by Thomas Ash to represent him in a divorce. Ash paid Kennedy $2,000 for this representation. Mr. and Mrs. Ash later reconciled, and the divorce proceeding was terminated without the entry of a decree. Very shortly thereafter, Kennedy filed a joint Chapter 7 bankruptcy for the Ashes. Mrs. Ash claimed that Kennedy did not have authority to file a bankruptcy on her behalf. The Bankruptcy Court was "troubled" by Kennedy's purported representation of Mrs. Ash in a bankruptcy, so soon after abandoned divorce proceedings, in which Kennedy opposed her interests. The Bankruptcy Court notified the bar about what it perceived to be a violation of the conflict of interest rule. Mr. Ash's complaint was already pending, on other grounds, at the time of the Bankruptcy Court's notification. The Disciplinary Commission concluded that the Bankruptcy Court's concerns were well founded. [ASB No. 03-62(A)]

- On October 29, 2004, Montgomery attorney **Mickey John Glen McDermott** received a public reprimand without general publication for a violation of Rule 4.8(c), *Alabama Rules of Professional Conduct*. On March 22, 2002, a client came to McDermott's office unannounced to sign an affidavit McDermott had prepared for him. After the client signed the affidavit, McDermott realized that the notary in his office was not available. McDermott then signed the notary's name to the affidavit as notary, and affixed her notary's seal to the document. The affidavit was filed with the circuit court as an attachment to a summary judgment motion. When the notary saw the affidavit in the file, she notified McDermott's partner that she had not notarized the affidavit and did not know who had done so. When McDermott's law partner confronted him, McDermott admitted that he had forged the notarization. McDermott's law partner requested that he self-report the matter to the bar. A lawyer called the bar on McDermott's behalf around April 9, 2002, but no file was opened until the matter was reported by another individual, Jay Lewis. McDermott later had another affidavit prepared and properly notarized, but it was not substituted in the court file prior to Lewis' complaint to the bar. [ASB No. 03-123(A)]

- On October 29, 2004, Birmingham attorney **William Kevin DelGrosso** received a public reprimand with general publication for willfully neglecting a legal matter entrusted to him and failing to respond to requests for information from a disciplinary authority. DelGrosso was appointed to represent a defendant on appeal before the Alabama Court of Criminal Appeals and failed to file a brief on behalf of his client within the time allowed by the Alabama Rules of Appellate Procedure. Although notified of this deficiency and allowed additional time to correct the deficiency by filing a brief with the Alabama Court of Criminal Appeals, DelGrosso failed to do so. This resulted in his removal as appointed counsel and the appointment of new appellate counsel by the Circuit Court of Jefferson County, which caused a substantial delay in the criminal case. During a formal investigation conducted by the Alabama State Bar into DelGrosso's failure to comply with the rules and orders of the court, DelGrosso failed to timely file a response to the request for information by the Alabama State Bar. [ASB No. 98-280(A)]

Classifieds

RATES

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

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Classified copy and payment must be received according to the following publishing schedule: **March 2005 issue—due January 1, 2005; May 2005 issue—due March 1, 2005.** NO deadline extensions will be made.

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