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Vol. 67, No. 2

The Alabama Lawyer



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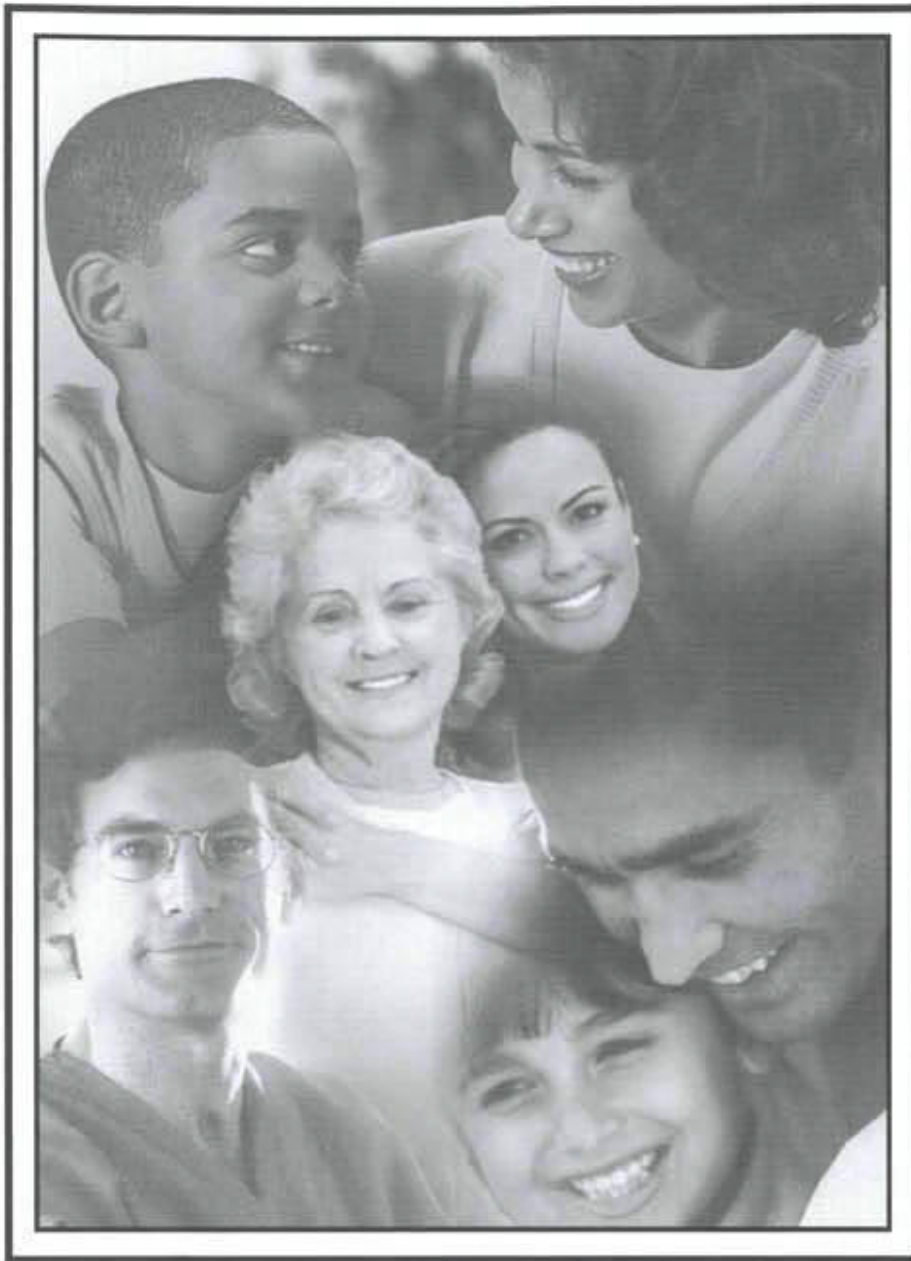
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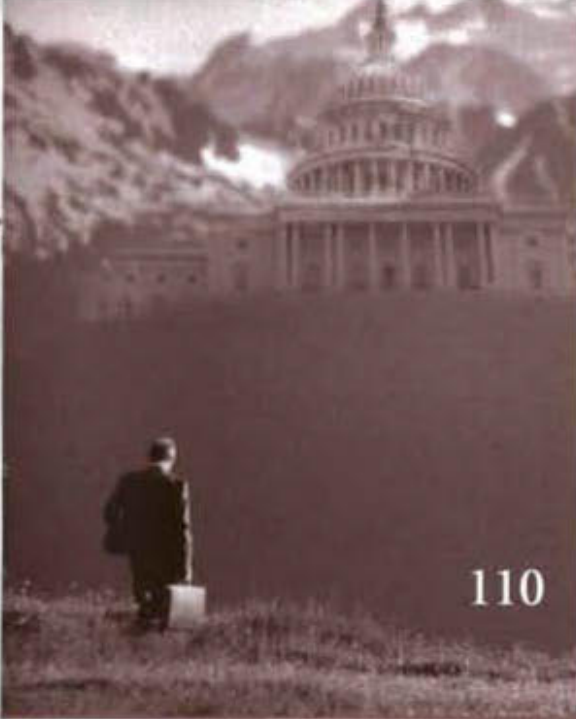
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The Alabama Lawyer

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ON THE COVER

J. Kelly Fitzpatrick, American, 1888 - 1953
Alabama Foothills, 1938
 Oil on canvas, 30 x 40 inches
 Montgomery Museum of Fine Arts, Montgomery, Alabama; Gift of the artist 1938.9

Kelly Fitzpatrick lived in Wetumpka, and was the most important artist working in central Alabama in the mid-twentieth century. He is known for his brightly colored and loosely painted landscapes such as *Alabama Foothills*, a depiction of the rolling topography of his native Elmore County. Fitzpatrick received only minimal formal art training, taking his inspiration from his appreciation of the French painters whose works he saw while traveling in Europe—artists such as Paul Cezanne and Henri Matisse.

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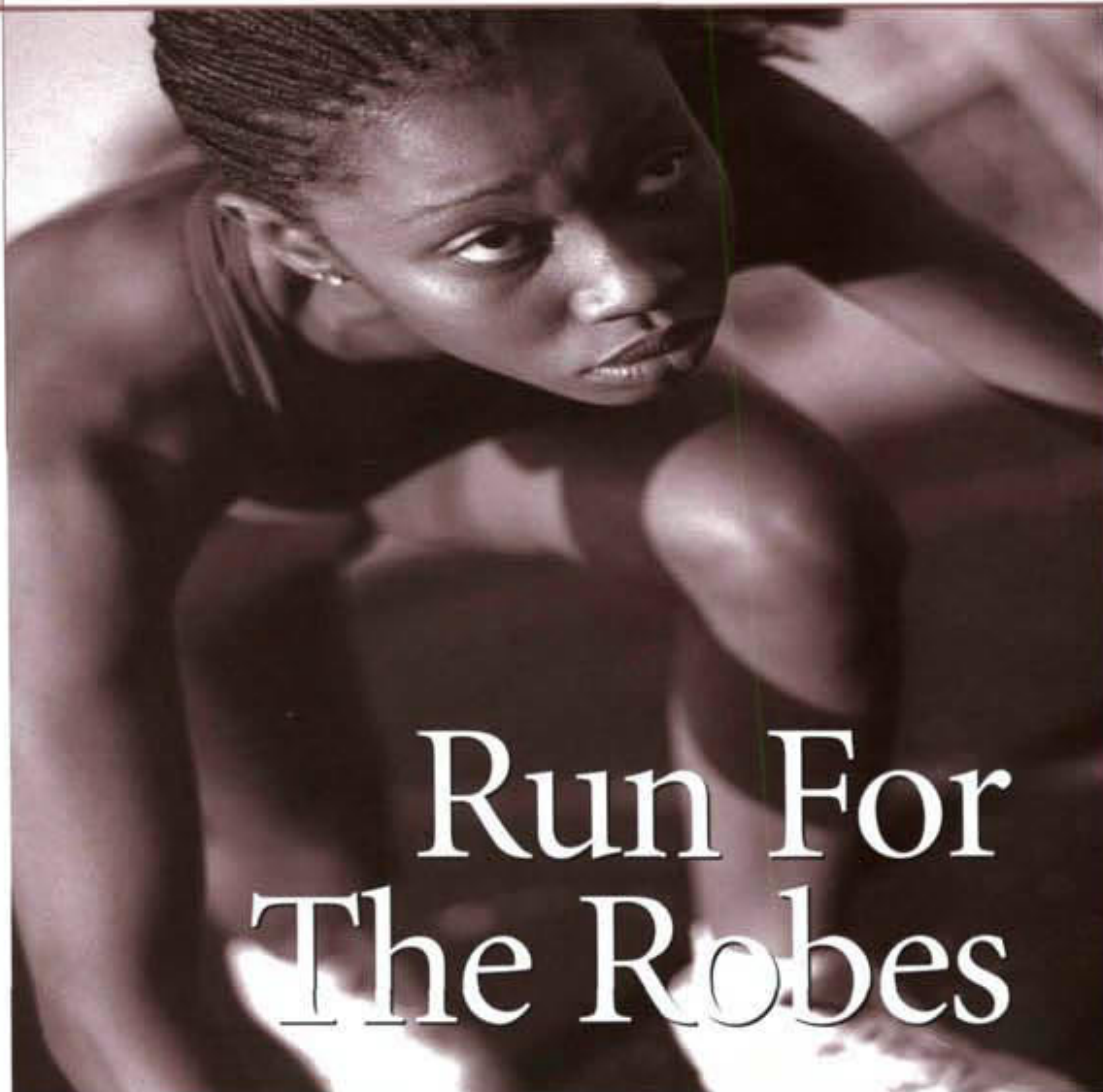
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Bobby Segall



Run For The Robes

Get ready!
The carnival has
come to town.

Your favorite judges and judicial candidates have entered the greased mud-wrestling event, and there should be some pretty entertaining scratching and clawing (for votes)—no holds barred. Yeah, it'll probably be (a little) more sophisticated than in years past. So much attention has been focused on the (crummy) way we select judges that dignified candidates will attempt to preserve (semblances of) dignity. It won't work, but your friendly state bar¹ is trying to help.

In years past, the bar's help wasn't needed as much as in this election year.

That's because the Alabama Supreme Court, in 1998 and 2000,² caused Judicial Campaign Oversight committees to be formed. Those committees, totally lacking in any real authority, nevertheless answered candidate questions about the propriety of particular campaign ads and tactics and—on rare occasions—filed administrative complaints against alleged campaign perps. For reasons beyond my capacity to grasp, but likely related to supreme court seats presently in play, the court has determined to stay out of the campaign oversight business this year.

So has the bar. Well, not entirely. At the urging of an army of (three) people (well, lawyers), I appointed a task force to (I hope) tell me what I already knew—that we desperately need to maintain some

level of decorum in judicial elections and that a citizens' judicial campaign oversight committee is the ticket. I also asked the task force if it determined that an oversight committee made sense, to facilitate the formation of such a committee—and to make that committee independent of the bar.

The conclusion reached by the task force³ was less than startling. It determined that judicial candidates—all of them, from the chief to the tiniest tenderfoot—should practice what Chief Justice Nabers preaches in his new book.⁴ Character does indeed matter, and like 23 other states that have some form of judicial campaign oversight, Alabama needs a citizens' committee to help make *The Case For Character* in the conduct of judicial elections.

Appropriately inspired, the task force has now facilitated the formation of a citizens' judicial campaign oversight committee comprised of individuals—lawyers and lay people—in whose character the chief, and the rest of us, can easily impose trust and confidence.⁵ And, the Oversight Committee is completely independent of the bar and of the court. It will neither take direction from, nor report to, either one. Rather, in its effort to preserve (or at least salvage) the esteem in which our judiciary is held, it will be guided only by principles of law, ethics and good judgment. The role of the committee is not as an enforcer, but more as an urger and encourager,⁶ untainted by color of authority.

Admittedly, the committee is no cure-all. For the conduct of some judicial candidates, there simply will be no solution. A newspaper piece I read today (in early January) convinces me of that. If I read the column by one of our presently sitting supreme court justices correctly, he (aka Associate Justice Tom Parker) lambasted his brethren and sisthren (or whatever you call his sisters) on the court for not knowingly and purposely ruling contrary to binding United States Supreme Court precedent.⁷ And, His Honor engaged in this bit of judicial intemperance *before* announcing his

widely rumored candidacy for chief justice. Won't his campaign ads be colorful? I can see it now: "My Rule of Law girly and girly boy opponents don't have the

'konk' to overrule those dirtbag liberals on the U.S. Supreme Court. I say put the Justice back in the position of Chief Justice. Elect Me. I'll Disregard the Law."⁸



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Fortunately, the Alabama Judicial Campaign Oversight Committee remains undeterred. Its work has already begun. The committee, co-chaired by retired Montgomery Circuit Judge William E. Gordon and Judy Belk, a successful Orange Beach businesswoman, has created a pledge that encourages all candidates for judicial office to conduct their campaigns in a manner consistent with the dignity and integrity of our judicial system, to maintain the dignity of a judicial officer, and to adhere to the highest ethical

standards. Yeah, I know. This committee is a threat to take all the fun out of the political season. After all, what's more fun than a skunk following a guy in a judicial robe across the television screen, or than one appellate judicial candidate screeching about another's failure to overrule a United States Supreme Court decision?

I could go on, but Wade Baxley has already complained that this column is the *President's Page*, not the *President's Unending Ramblings*. Anyway, you get the picture. A Judicial Campaign Oversight Committee can't help but help, and Alabama has one—for which we can be thankful and of which I believe we'll be proud. I hope we'll also be proud of our judicial candidates, especially those who are elected. ■

Endnotes

1. By "bar," I'm referring to your Alabama State Bar. That bar (you know, the one that may publicly reprimand you if you publicly drink too much) will try to alleviate the headaches you will suffer from observing our partisan, contested judicial elections. Patronizing your other favorite bar (the one that will be offended if you drink too little) may be more effective.
2. In 1998, Chief Justice Perry Hooper created a Judicial Campaign Oversight Committee with Mark White of Birmingham as chair. In 2000, at the request of Chief Justice Hooper, Montgomery's (and Belch & Bingham's) Maury Smith served as chair.
3. The task force included Mark White of Birmingham's White Arnold law firm; retired Montgomery Circuit Judge William Gordon; Connie Barker of Montgomery's Capell & Howard law firm; Carlos Williams, the federal public defender for the Southern District of Alabama; Robert Huffaker of Montgomery's Rushton Stakely law firm; retired Court of Criminal Appeals Judge and former Judicial Inquiry Commission Chair William Bowen of Birmingham; Herman Watson of Huntsville's Watson, Jimmerson law firm; and former Congressman Jack Edwards of Mobile's Hand Arendall law firm.
4. Drayton Nabers, *The Case For Character*
5. The Alabama Judicial Campaign Oversight Committee includes co-chairs Judy McCain Belk of Orange Beach and retired Judge William E. Gordon

of Montgomery. Other committee members include William Bernard Barker, general manager of Cumulus Broadcasting in Montgomery; Birmingham attorney Laveeda Morgan Battle; retired Court of Criminal Appeals Judge and former Judicial Inquiry Commission Chair William M. Bowen, Jr.; Judge John L. Carroll, dean of Cumberland School of Law; Decatur attorney Robert H. Harris; Dothan attorney Alan C. Livingston; Macon County attorney Walter E. McGowan; Kay Malone Scruggs, career educator and community volunteer from Fort Payne; Reverend Karl K. Stegall, senior minister of First United Methodist Church in Montgomery; Stephanie DeFreese Walker, director of St. Stephen's Episcopal Preschool and chairman of Brewton City School Board; and Carlos A. Williams, federal defender for the Southern District of Alabama.

6. The Oversight Committee, of course, like you or me, can file complaints with the appropriate regulatory authority, the Judicial Inquiry Commission, in connection with judges running for a judicial office, and the state bar in connection with lawyers running for judgeships.
7. In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), the Supreme Court held that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. Based on that decision, the Alabama Supreme Court had no choice but to reduce the sentence of Renaldo Adams, who had committed a capital crime when he was 17 years old, to life without parole.
8. I don't mean to suggest that Alabama has no place for this kind of rhetoric. It does. It's called the governor's race. We created this race years ago to entertain us every four years in the fall (sometimes football just isn't enough). And, because the governor's race serves primarily as entertainment value, the winners don't get to serve in any position nearly as important as judge. They only get to be governor.
Almost anyone—literally, anyone—can run for governor, even each of you. And, you not only can have a history of promising to disregard the law and still be part of that election, but also you can have been kicked out of your previous office for actually having done so. Heck, to run for governor you can be facing trial. Even women can be successful (as long as one of their husbands has run before). And, as long as you attempt to raise taxes by a billion dollars in your previous term as governor, the media—and likely I—will ignore anything negative you do the rest of your life. In short, running for governor is all about rhetoric and entertainment, and any kind of oversight committee in that context would be totally inappropriate. Judicial elections should be different.

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Bob Noone maintains a successful legal practice yet he manages to step into the third person and parody the law life around him in a funny, thought-provoking manner which everyone enjoys. For several years, he hosted "Legally Speaking," a live radio legal talk show, which provided humorous topics for his music.

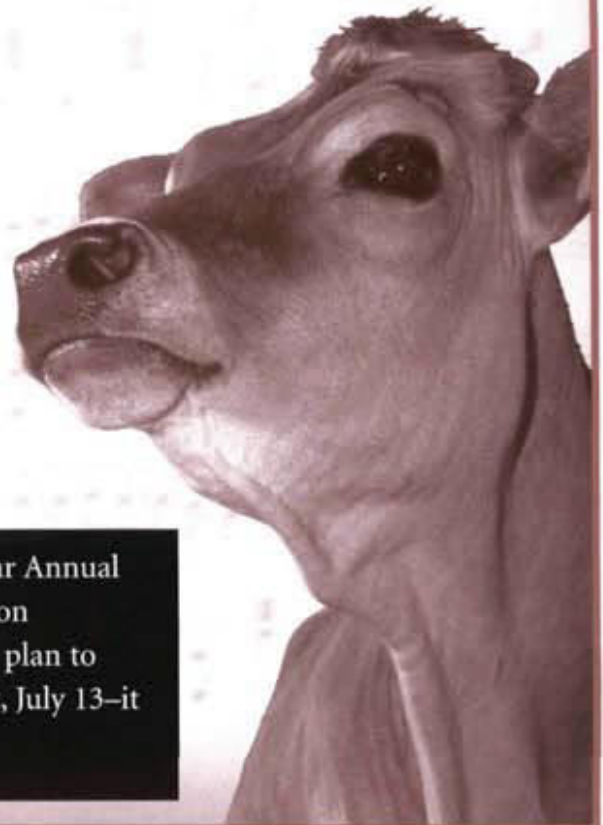
Noone has been writing and performing music for over 20 years; his venture into satirizing the realm of the legal world started when he was in law school. Over the years he has performed his distinctive brand of musical humor before thousands, meriting standing ovations from convention participants.

RECENT REVIEWS/COMMENTS:

"Anyone having any experience with a lawyer can relate to Noone's show and the type of music he performs. With beats ranging from rich, throaty jazz to the twangs of country guitars in the track 'Mommas, Don't Let Your Babies Grow Up to Be Lawyers,' this show is sure to amuse everyone."

"The best part of Bob's music is that you don't have to be a legal eagle to enjoy it . . . but he does provide a needed service to the profession—getting people to laugh at their legal experiences. You certainly don't have to be a lawyer to enjoy Bob Noone's newest legal wanderings . . . filled with witty, solid-sounding tunes ranging from a parody on the McDonald's hot coffee lawsuit to his irreverent topic of 'When You Find Yourself Disbarred.' No sacred cows here."

Mark your calendar now—for the 2006 Alabama State Bar Annual Meeting. "RENEW. RELAX. RECONNECT." at the Hilton Sandestin Beach Golf Resort & Spa on July 12-15. Then plan to attend Bob Noone's hit performance on Thursday night, July 13—it will bring a new meaning to the term *RELAX!*





By Keith B. Norman

Hello—Goodbye

Welcoming New Staff Members and Saying Farewell to Those Leaving

This past year we welcomed six new Alabama State Bar staff members. Those joining the state bar staff were Cathy Sue McCurry, David Russell, Sam Partridge, Marcia Daniel, Anita Hamlett, and Jeremy McIntire. Sadly, we bid farewell to Myrna McHenry, Kimberly Barnhart, Milton Moss, Kim Oliver Ward, and Gil Kendrick.



McCurry



Partridge



Daniel



Hamlett



McIntire

Myrna McHenry began working with the state bar part-time in 1993 and then moved to full-time in 1996. Throughout her time here, Myrna was a dedicated and hard-working staff member. She worked in the membership department but was always quick to assist other departments when they needed help. Emily Farnior, who was hired in 2003 was promoted from *pro hac vice* clerk to fill Myrna's position as membership assistant. We were delighted that Cathy Sue McCurry was able to join the staff to assume the responsibilities of *pro hac vice* clerk.

After 14 years of service, Milton Moss retired as assistant general counsel. Milt had extensive experience as a private practitioner and served stints in



McHenry



Farnior



Moss

Alabama and Alaska as an Assistant United States Attorney before joining the state bar staff. His extensive experience will be missed, but we are pleased that **Sam Partridge** has followed Milt as assistant general counsel. He comes to the bar from the Autauga County District Attorney's Office.

Kimberly Barnhart joined the bar's communication department as an assistant in 2003. She did an outstanding job helping us launch the bar's new online directory. Although we hated that Kimberly chose to leave after only two years, we are proud that she wanted to complete her college degree and spend more time with her family. We were very fortunate that **Marcia Daniel** was available to become the new assistant for the communications department, after having worked for BASS for 15 years before the company's move to Florida.



Barnhart

Last May, **David Russell** joined the staff as our first full-time Web site administrator. David and his wife moved last month to pursue a wonderful opportunity in Washington, D.C. In his short time here, David did a great deal to make the ASB Web site (www.alabar.org) more user-friendly and a better tool for bar members and the public. By the time this issue goes to press, **Amy Shell** will have joined the ASB as the new Web site administrator.



Russell

Kim Oliver Ward served for ten years before leaving last July. Kim initially



Ward

served as the director of the Volunteer Lawyers Program prior to moving the MCLE department. Kim's decision to spend more time with her two sons and husband, Robert, who is a Montgomery attorney, was understandable. We were very fortunate that **Anita Hamlett** was willing to move to Montgomery and assume the reins as director of the MCLE department following Kim's departure. She was no stranger to the field of continuing legal education. She worked at the Alabama Bar Institute for CLE for a number of years, most recently as its associate director. Consequently, Anita was able to hit the ground running as soon as she arrived.

After 15 years of devoted service, **Gil Kendrick** retired as assistant general counsel. Prior to coming to the bar, Gil had established his reputation as an

excellent lawyer, both in government service as an assistant attorney general and in private practice. I am pleased to report that **Jeremy McIntire** recently joined the bar staff as assistant general counsel. He previously worked in the attorney general's office.



Kendrick

Myrna, Milt, Kimberly, Kim, Gil, and David represent more than a half century of combined bar service. Their experience will be missed, but we are confident that each of our new staff members—Emily, Sam, Cathy Sue, Marcia, Anita, Jeremy, and Amy—will render the same dedicated service to the state bar as their predecessors. ■

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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, 2006. Nominations should be prepared and mailed to:

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P.O. Box 671
Montgomery, AL 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.

Notice of Election

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

Elected Commissioners

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

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1, 2006 and vacancies certified by the secretary no later than March 15, 2006.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 28, 2006).

Ballots will be prepared and mailed to members between May 1 and May 15, 2006. Ballots must be voted and returned to the Alabama State Bar by 5 p.m. on the last Friday in May (May 26, 2006).

United States District Court, Northern District of Alabama, Birmingham

VACANCY ANNOUNCEMENT

Position Title: Clerk of Court

Salary Range: \$134,867-\$146,800 (JSP 17)

Application Closing Date: March 31, 2006

NATURE OF THE POSITION

The Clerk of Court is appointed by the judges of the Court. This is a high-level management position that functions under the direction of the chief judge of the United States District Court. The Clerk of Court is responsible for managing the administrative activities of the Clerk's office and overseeing the performance of the statutory duties of the office. Included among the responsibilities are policy implementation and monitoring, long-range planning, budgeting, financial management, automation, human resource management, property procurement and management, and public relations.

QUALIFICATIONS

A minimum of ten years of progressively responsible administrative experience in public service or business which provides a thorough understanding of organizational, procedural and human aspects in managing an organization. At least three of the ten years' experience must have been in a position of substantial management responsibility. Applicants also must have an understanding of automated systems, have administrative abilities and possess strong leadership and interpersonal skills.

EDUCATIONAL SUBSTITUTIONS

A bachelor's degree from an accredited college or university may be substituted for three years of general experience. Completion of a two-year master's degree program (60 semester hours or 90 quarter hours) in an accredited university (or completion of a Juris Doctor Degree) may be substituted for two years of general experience.

INFORMATION FOR APPLICANTS

The United States District Court is part of the judicial branch of the United States Government. Court employees are not included in the Government's civil service classification. They are, however, entitled to similar benefits as other federal employees, including paid vacation, sick leave, choice of health benefit plans and participating in the Federal Employees' Retirement System. This position is subject to mandatory electronic fund transfer participation for payment of net pay. The best qualified applicants will be invited for interviews. Applicants selected for interviews will be responsible for paying for expenses, including travel, associated with the interview. Relocation expenses are currently not available for the selected

candidate. As a condition of employment, the selected candidate must successfully complete a ten-year background investigation and every five years thereafter will be subject to an updated investigation similar to the initial one.

APPLICATION PROCEDURE

Qualified persons are invited to submit a detailed resume including educational, work and salary history as well as a narrative statement, not to exceed two pages in length, addressing the applicant's ability to plan and implement the most effective use of resources, both human and financial: to achieve objectives; to interpret, understand and implement the policies of the Court; to interact with various types of people including superiors, peers, subordinates and the public; and the applicant's basic management philosophy. Letters of recommendation are desirable. All applications must be received by 5 p.m. on March 31, 2006.

Please submit application materials in an envelope marked confidential. No phone calls.

Clerk, U.S. District Court
1729 5th Avenue North
Birmingham, AL 35203
Attention: Personnel Specialist

The United States District Court is an Equal Opportunity Employer.

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 2006 Annual Meeting, July 12-15, at Sandestin.

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, 2006. 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.

(Continued on page 96)

WRITING COMPETITIONS

The Warren E. Burger Writing Competition, designed to encourage outstanding scholarship "promoting the ideals of excellence, civility, ethics and professionalism within the legal profession," invites judges, lawyers, professors, students, scholars, and other authors to participate in a competition by submitting an original unpublished essay of 10,000 and 25,000 words on a topic of their choice addressing issues of legal excellence, civility, ethics and professionalism. Material submission date is June 15, 2006. The winner will be announced September 1, 2006 and will receive a cash prize of \$5,000, and the winning essay will be published in the *South Carolina Law Review*. The prize will be presented to the author October 21, 2006 at the American Inns of Court annual Celebration of Excellence at the United States Supreme Court. (Other submitted works may also be eligible for the law journal publication or featured in *The Bench*, the national magazine of the American Inns of Court.) Rules may be downloaded at www.innsforcourt.org Click "Awards" and then "Burger Writing Prize." For additional information, contact Cindy Dennis at (800) 233-3590, ext. 104, or cdennis@innsforcourt.org.

SEAK, Inc. announces the Fifth Annual National Fiction Writing Competition for Lawyers. The format is a short story or novel excerpt in the legal fiction genre, not to exceed 2,500 words. This submission should be typed and sent to SEAK, Inc., Attention: Steven Babitsky, P. O. Box 729, Falmouth, MA 02541 by June 30, 2006. The top three entries will be awarded, with the winner receiving \$1,000 cash plus lunch with Lisa Scottoline

and Stephen Horn on October 21, 2006 at the Sea Crest Resort, Falmouth, Massachusetts. Notice of the winner will be sent to over 100 New York literary agents and to the Associated Press. For more information, contact Kevin J. Driscoll at (508) 548-4542 or kevin.driscoll@verizon.net.

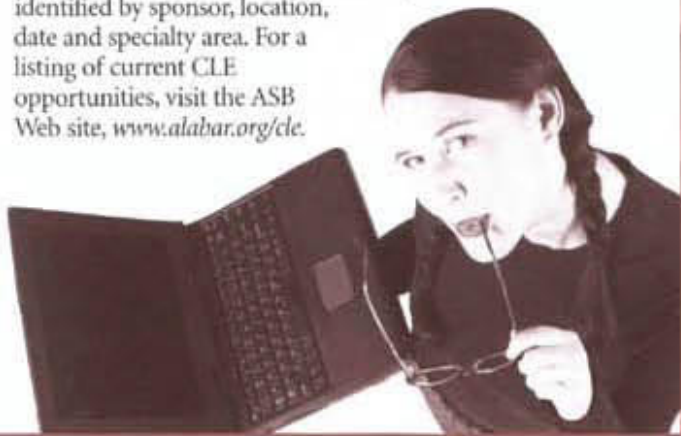
WILLIAM D. SCRUGGS, JR. SERVICE TO THE BAR AWARD

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, long-term 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 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; and
 - (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. The deadline is March 15, 2006 for submitting an application. ■

CLE COURSE SEARCH

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, www.alabar.org/cle.



LEADERSHIP FORUM II

Twenty-Four Hour Orientation Session and Retreat for Future Leaders

An orientation session and overnight retreat for the Leadership Forum II class was held January 26-27 at the NorthRiver Yacht Club and the Westervelt Warner Lodge in Tuscaloosa. The diverse group of 30 young lawyers selected for participation in the 2006 Forum had a chance to get acquainted in a relaxed, quiet setting away from busy offices and schedules. Thursday evening activities included a private dinner, a "town hall meeting" with a panel of distinguished judges and lawyers and an informal reception. Friday morning the class heard from the Hon. Walter Maddox, the mayor of Tuscaloosa, on "The Role of Lawyers in Community," and then the lawyers participated in an interactive exercise in the language of leadership led by Dr. John R. Dew, director of Continuous Quality Improvement and Planning at the University of Alabama. A private luncheon and closing session were held in the Harborview Room of the Yacht Club. Four all-day sessions held at the Alabama State Bar include "Principles of Leadership" (February 24), "Leadership through Service" (March 31), "Ethics, Justice and Values" (April 21) and "Professionalism" (May 18), with a graduation banquet the evening of May 18. The ASB Board of Bar Commissioners has heartily endorsed the development of a new generation of



Members of the Leadership Forum II class exchange ideas and share a laugh during the January retreat.

lawyers for leadership in the state bar as well as in Alabama communities at large. Alyce Spruell of Tuscaloosa and Tripp Haston of Birmingham are co-chairs of the 2006 planning committee. ■

ALABAMA STATE BAR LEADERSHIP FORUM CLASS OF 2006

Christopher F. Abel	Private Practice	Gadsden	Champ Lyons, III	Lyons, Kittrell, Rowan & Horn	Birmingham
F. Wendell Allen	Bradley Arant Rose & White	Birmingham	Foster F. Marshall	Assistant District Attorney	Anniston
A. Vernon Barnett, IV	Deputy Legal Advisor-Governor	Montgomery	Kim B. Martin	Bradley Arant Rose & White	Huntsville
Robert E. Battle	Battle, Fleenor, Green, Winn & Clemmer	Birmingham	Robert G. Methwin, Jr.	McCallum, Methwin & Terrell	Birmingham
Brannon J. Buck	Maynard, Cooper & Gale	Birmingham	Matthew C. Minner	Hare, Wynn, Newell & Newton	Birmingham
Tracy W. Cary	Morris, Cary, Andrews, Talmadge & Jones	Dothan	Julie S. Moody	Albrittons Clifton Alverson Moody & Bowden	Andalusia
Shayana B. Davis	Johnston Barton Proctor & Powell	Birmingham	Joseph E. Powell	Spruell & Powell	Northport
Heien Kathryn Downs	Johnston Barton Proctor & Powell	Birmingham	Thomas A. Radney	Radney & Radney	Alexander City
Missy H. Hibbett	Ashe & Wright	Tuscumbia	Patrick Sefton	Sasser, Bolton, Stidham & Sefton	Montgomery
James F. Hughey, III	Lightfoot, Franklin & White	Birmingham	Roman Ashley Shaul	Beasley, Allen, Crow, Methwin, Portis & Miles	Montgomery
Wyndall A. Ivey	Maynard, Cooper & Gale	Birmingham	Pamela B. Slate	Slate Kennedy	Montgomery
B. Keith Jackson	Riley & Jackson	Birmingham	R. Brian Smith	Private Practice	Livingston
Tracie B. Lee	Private Practice	Mobile	Sandra I. Speakman	Assistant Attorney General	Montgomery
Tara W. Lockett	Carr Allison	Daphne	Aldos L. Vance	Stames & Atchison	Birmingham
Jonathan M. Lusk	Lusk & Lusk	Guntersville	Jon G. Waggoner	Counsel to Auburn University President	Auburn

JUDGE CAIN J. KENNEDY

Judge Cain J. Kennedy, a distinguished judge, lawyer and Navy captain, died in Mobile May 20, 2005 at the age of 68.

Judge Kennedy, a native of Thomaston, graduated from California State University in Los Angeles in 1966 with a B.A. degree, and in 1967 completed his graduate studies. Judge Kennedy graduated from George Washington University-National Law Center in Washington, D.C. in 1971 and, thereafter, began the practice of law in Selma as the legal counselor for Southwest Alabama Farmers' Cooperative. In 1973, Judge Kennedy began practicing in Mobile with the firm of Crawford & Blacksher, and in 1974, became a partner of the firm. From 1975 to 1979, he was a partner in the firm of Kennedy, Wilson & Davis.

In 1974, Judge Kennedy was elected to the Alabama House of Representatives, and in 1978, was re-elected. In the house of representatives, he served as chairman of the Committee on Insurance and as a member of the Committee on Rules and the Judiciary Committee. In 1976 and 1978, he was elected to the Alabama State Democratic Executive Committee. In 1976, he was a delegate at the Democratic National Convention.

In 1979, Governor Fob James appointed Judge Kennedy to circuit court judge in the Domestic Relations Division of Mobile County. This appointment made Judge Kennedy the first African-American to serve as a circuit court judge in the state of Alabama. In 1982, he was elected to continue to serve as circuit court judge, and was re-elected in 1988 and 1994. In 1998, Judge Kennedy retired from the bench. After retiring, he formed the firm of Kennedy, Bell & Adam.



Judge Kennedy enlisted in the U.S. Navy in 1955. His combined active and reserve duty was in excess of 40 years. He attended the Naval War College in Newport, Rhode Island and retired from the Navy in 1997 with the rank of captain.

Judge Kennedy was a member of the Alabama State Bar, District of Columbia Bar, U.S. District Court for the Southern District of Alabama, U.S. Fifth Circuit Court of Appeals, and U.S. Court of Appeals for the Armed Forces. He was a member of the American Bar Association, Naval Reserve Association, American Judicature Society, American Association of Trial Lawyers, National Bar Association, Vernon Z. Crawford Bay Area Bar Association, National Naval Officer Association, and Reserve Officers Association. He was chairman of the Friends of the Library-Prichard, Alabama and Sickle Cell Disease Association of America, and on the board of directors for the Alabama Association for Sickle Cell Disease, Sickle Cell Association-Gulf Coast, Comprehensive Sickle Cell Center-USA, Prichard Federal Credit Union, Penelope House of South Alabama, Volunteers of America, and Association of Family and Conciliation Courts, and a member of Mt. Sinai Missionary Baptist Church in Whistler, Alabama.

Judge Kennedy left surviving him his wife, Brenda J. Kennedy; two children, Celestine Carrie Johnson Kennedy and Richard Arthur Johnson Kennedy; three brothers, Marcus Kennedy, Cleophus Kennedy and John Kennedy; and two sisters, Fannie K. Woodson and Essie M. Kennedy.

—Beth Rouse, president,
Mobile Bar Association

WILLIAM H. BRIGHAM

William H. Brigham, a prominent and highly respected member of the Mobile Bar Association, died August 4, 2005.

Brigham was born in Lincoln, Illinois on March 8, 1926. After his graduation from high school in 1942, he entered the Army College Program, upon the completion of which he was commissioned as an officer in the United States Army and served overseas in the European Occupation at the end of WWII.

When he completed his military service, he graduated from the University of Illinois with a degree in engineering. Subsequently, he moved to Alabama, which he always called "God's Country." He moved to Mobile County to pursue



his lifetime ambition, dairy farming.

In 1953, he married Carol Thomas and together they continued to operate a large dairy farm in western Mobile County, until he entered the University of Alabama School of Law. After graduation and a short period of private practice, Brigham accepted the position of assistant

city attorney for the City of Mobile. During that time, he performed outstanding service for the benefit of the city, specializing in improving the numerous contracts into which the City of Mobile had entered in prior years. He served as assistant city attorney for 32 years, at which time he retired. During his active service as an outstanding city attorney and after his retirement from the city, he continued to

work on his dairy farm until the time of his death.

Brigham was active in various civic matters and was a longtime member of the Episcopal Church. He was predeceased by his wife, Carol Thomas Brigham; his son, Dr. Thomas Erwin Brigham; and a grandson, Madison Thomas Brigham. He is survived by his daughter, Robin B. Thetford, a member of the Mobile Bar Association; his son, William H. Brigham, Jr.; his daughter, Larkin B. Summer; his daughter-in-law, Susan Harrold Brigham; and nine devoted grandchildren. He is also survived by his brother, Erwin R. Brigham, and his sisters, Jane B. Gamble, Frances B. Johnson and Robin B. Mayer, together with many nieces and nephews.

—Beth Rouse, president,
Mobile Bar Association

JUDGE ROBERT G. KENDALL, III

Robert G. Kendall, III, presiding judge of the Thirteenth Judicial Circuit and a member of the Mobile Bar Association, died October 20, 2005.

Judge Kendall was born in Evergreen on November 15, 1939, the son of Robert Gordon Kendall, Jr. and Mary Watson Kendall. He attended public schools in Evergreen, and graduated from the University of Alabama and the University's School of Law. In law school, Judge Kendall was a member of the Board of Editors of the *Alabama Law Review*.

After graduation, Judge Kendall served in the United States Army from 1963 to 1965 as an infantry officer. Following his discharge from the Army, he was appointed law clerk to the Hon. John L. Goodwyn of the Supreme Court of Alabama. He entered private practice in Mobile as an associate, and later as a partner, in the firm ultimately known as Johnston, Johnston & Kendall.

From 1968 through 1971, he served as a part-time U.S. Magistrate for the Southern District of Alabama. He was appointed circuit judge, by Governor George C. Wallace,



for the Thirteenth Judicial Circuit in 1984 and was re-elected without opposition in 1986, 1992, 1998 and 2004. He was selected by his fellow judges to serve as presiding judge in 1999, a position he held until his death.

Judge Kendall served the MBA as president of the Young Lawyers' Section and as secretary

and Executive Committee member, and served the Alabama State Bar as a member of the Board of Bar Examiners. He served his colleagues on the bench as a member of the Board of Directors of the Alabama Association of Circuit Judges, beginning in 1995, and as secretary-treasurer and vice-president before assuming the presidency of that organization in 2003-04. He served the citizens of Alabama as a judge on the Alabama Court of the Judiciary, as chair of the Mobile County Judicial Commission and as a member of the Alabama Criminal Justice Information Center Commission. He was honored in 2004 as the recipient of the Howell T. Heflin Award presented by the Mobile and Baldwin County bar associations.

Judge Kendall was also renowned for his superior intellect, legal mind and extraordinary wit. It was often remarked that when he entered the courtroom, he was the brightest person present. He was a great sportsman who loved the outdoors. He enjoyed the reputation as an extraordinary wing shot and was a skilled angler who loved the challenge of fly fishing.

Judge Kendall was a lifelong Democrat whose knowledge of politics was well respected and whose advice was widely sought.

He was a member of St. Andrews Episcopal Church and Christ Church Cathedral.

Judge Kendall is survived by his mother; his wife, Mary Van Brussel Kendall; three children, Dr. Lee Kendall Metcalf, Mary Margaret Kendall Bailey, esq. and Kathryn Kendall Travis; his sister, Zilda Kendall Christopher; his brother, Bill Kendall; and seven grandchildren (to whom he had, at times, affectionately referred to as his cousins); and his faithful hunting dog, Bo.

—Beth Rouse, president,
Mobile Bar Association

HENRY BUCK FONDE

Henry Buck FONDE, a distinguished member of the Mobile Bar Association, died May 24, 2005 at the age of 90.

Mr. FONDE attended the University of Alabama School of Commerce and Business Administration and graduated from Chattanooga College of Law. He continued his education at the University of Alabama School of Law. In 1943, Mr. FONDE volunteered for service in the U.S. Army. Following his graduation from Officer Candidate School as a lieutenant, he was assigned to the 69th Infantry Division in Germany. He was the recipient of two



Bronze Stars with citation for bravery and the Purple Heart.

Mr. FONDE served the U.S. Air Force as an attorney with the Judge Advocate General in a variety of capacities, including Air Material Command at Brookley Air Force Base in Mobile and Air Force Systems Command at Eglin Air Force Base in Florida. Upon retire-

ment, Mr. FONDE was commended with the citation for outstanding service as chief of the Contracts and Patents Division of the Office of the State Judge Advocate.

Mr. FONDE was recognized in 1999 by the Alabama State Bar for his dedicated

service to the nation, state and community for more than 56 years. He worshiped at St. Paul's Episcopal Church and Dauphin Way United Methodist Church of Mobile and the Church of the Good Shepherd of Cashiers, North Carolina.

Mr. FONDE was predeceased by his wife of 56 years, Polly Thompson FONDE, and recently by his wife, Anne Bolling FONDE, and by his sister, Mary Elizabeth FONDE Bixler. He is survived by his son, Henry Buck FONDE, Jr. of Jacksonville, Florida and his brother, John Phillip FONDE of Mobile. He also leaves four grandchildren and one great-grandson.

—Beth Rouse, president,
Mobile Bar Association

Barnes, Charles Henry
Clanton

Admitted: 1963

Died: October 28, 2005

Beumer, Joseph Henry
Huntsville

Admitted: 1956

Died: October 3, 2005

Davis, Robert Chandler
Gadsden

Admitted: 1993

Died: October 3, 2005

Hamner, Jodie Pinnell
Roanoke

Admitted: 1993

Died: December 7, 2005

Jernigan, Clarence Earl
Mobile

Admitted: 1968

Died: July 28, 2005

Murphy, Alberta Brown
Tuscaloosa

Admitted: 1953

Died: May 11, 2005

Paulk, Flora Nell
Ozark

Admitted: 1979

Died: November 13, 2005

Porter, James Herrin, Jr.
Gulf Shores

Admitted: 1965

Died: January 25, 2005

Rhea, Clarence Frost
Gadsden

Admitted: 1948

Died: December 27, 2005

Sheppard, Elizabeth Ann
Homewood

Admitted: 1999

Died: May 22, 2005

Steakley, L.J.
Huntsville

Admitted: 1950

Died: April 28, 2005

Trawick, George Howard
Ariton

Admitted: 1984

Died: December 7, 2005

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The Deferential Review of Compensatory Damages

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Montgomery, Alabama 36101

- An endowment has been established at the University of Alabama School of Law Foundation to fund a scholarship in memory of Mobile Circuit Judge Robert G. Kendall, III who died October 20, 2005 after a year-long battle with cancer. Judge Kendall served as a circuit judge in Mobile County beginning in 1984, and was presiding judge from 1999 until the date of his death. (See memorial on page 99.)

Contributions to the scholarship should be made payable to the "University of Alabama School of Law Foundation" and mailed to Cynthia Almond, University of Alabama School of Law, Box 870382, Tuscaloosa 35487-0382. Note on your contribution that it is for the Judge Robert G. Kendall, III Scholarship. Contributions are fully tax-deductible.



Kendall

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- **Slade Gordon Watson**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2006 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 05-16(A) by the Disciplinary Board of the Alabama State Bar.
- **Stephen Duane Fowler**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2006 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 04-214(A), 04-215(A) and 04-231(A) by the Disciplinary Board of the Alabama State Bar.

Disbarments

- Gadsden attorney **John David Floyd** was disbarred from the practice of law in the State of Alabama effective November 7, 2005 by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. The Disciplinary Board's order was based on a Request for Disbarment by Consent filed by Floyd pursuant to Rule 23, *Alabama Rules of Disciplinary Procedure*. Floyd's consent to disbarment was based on his having been found guilty in the United States District Court for the Northern District of Alabama on four counts of tampering with a witness, violations of 18 U.S.C. §1512(b)(1). [Rule 23; Pet. 03-02 and ASB nos. 00-65(A), 03-40(A) and 03-79(A)]
- The Alabama Supreme Court adopted the order of the Disciplinary Board, Panel II, disbarring former Birmingham attorney **Katrina Mu'Min** from the practice of law in the State of Alabama, effective October 27, 2005. In ASB No. 98-071(A), Mu'Min was found guilty of violating Rule 3.4(c) [Fairness to Opposing Party and Counsel], *Alabama Rules of Professional Conduct*, arising from her obligation to make restitution. In ASB No. 95-359(A), Mu'Min had entered a guilty plea, which resulted in a public reprimand with general publication and was to make restitution of \$3,000. Mu'Min only paid \$700 of the

\$3,000, and then abandoned the obligation. On May 13, 1998, Mu'Min entered into a sworn agreement with the ASB Client Security Fund to repay, in the form of \$100 installments, a total of \$1,400 of that obligation. Mu'Min was also found guilty of violating Rule 8.4(g), [Misconduct], *Alabama Rules of Professional Conduct*. In ASB No. 02-163(A), Mu'Min was convicted of violating rules 5.3, [Responsibilities Regarding Non-Lawyer Assistants], and 8.4(c), and (g), [Misconduct], *Alabama Rules of Professional Conduct*. Mu'Min represented the wife in a divorce proceeding. She filed or caused to be filed, a notarized "Answer and Waiver" on behalf of the husband, who, at the time, was incarcerated in a state prison. Both the signature of the husband and the notarial acknowledgement by an employee of Mu'Min were false. Another notarial acknowledgement on an additional affidavit of the husband, relating to child support, was also false, and was filed by Mu'Min in the domestic proceedings. In ASB No. 03-234(A), Mu'Min was convicted of violating rules 1.15(b), [Safekeeping Property], 8.4(b), 8.4(c), 8.4(d), and 8.4(g), [Misconduct], *Alabama Rules of Professional Conduct*. Mu'Min represented a minor in a personal injury case, and as part of a court-approved settlement (which, among other things, established Mu'Min's fee), set aside the sum of \$7,000 from the settlement to pay a compromised amount on a hospital bill of some \$13,141.

Mu'Min did not pay the hospital debt, but converted the \$7,000 to her personal use. Eventually, Mu'Min agreed with the mother of the minor child to repay the diverted funds, but paid only one installment of \$400 in April 2003. The failure to pay the hospital settlement exposed Mu'Min's client and her mother to collection proceedings for the entire \$13,141. Mu'Min was also ordered to make restitution to the Alabama State Bar Client Security Fund in the sum of \$1,400 and restitution to the mother of the minor child in the amount of \$7,000, to be paid through the Alabama State Bar. Prior discipline consisting of three private reprimands and one public reprimand without general publication was considered. Mu'Min was assessed all costs incurred during the disciplinary proceedings. [ASB nos. 98-071(A), 02-161(A), 03-234(A) and Rule 22]

- Birmingham attorney **Derek Maurice Quinn** was disbarred from the practice of law in the State of Alabama effective October 25, 2005 by order of the Alabama Supreme Court. The supreme court's order was based upon the decision of the Disciplinary Commission under Rule 22, *Alabama Rules of Disciplinary Procedure*, that Quinn be disbarred. The Disciplinary Commission based its decision on a finding by the Disciplinary Board that Quinn had been convicted of a serious crime. Quinn was admitted to the practice of law in the State of Alabama on September 28, 2001. Shortly thereafter, Quinn hosted a Halloween party at his home, attended mostly by teenagers, some as young as 13 to 14 years old. During the party, Quinn was videotaped smoking a marijuana "blunt" and handing it to minors to smoke. The videotape also showed several minors who appeared to be drunk and/or "high." The videotape was impounded that night by deputies during an inventory search of a vehicle that had been stopped because it was being driven erratically. Although the male driver of the vehicle fled, two 14-year-old female passengers were taken into custody. The deputies played the video-

tape and subsequently attempted to contact the girls' parents. One of the girls identified Quinn as her father—he was not. Quinn appeared at the police station and identified himself as the father of one of the girls. Deputies immediately recognized Quinn as the adult male in the videotape distributing marijuana to the minors because he was wearing the same clothes he was wearing in the videotape. Quinn pled guilty to contributing to the delinquency of a minor based upon the underlying offense of distribution of a controlled substance. [For a thorough discussion of this case see *Alabama State Bar v. Derek Maurice Quinn*, [Ms. 1030869, August 26, 2005], ___ So.2d ___, (Ala. 2005). [Rule 22; Pet. 02-02; BDA No. 03-01]

Suspensions

- Russellville attorney **John Frederick Pilati** was suspended from the practice of law in the State of Alabama by order of the Alabama Supreme Court for a period of three years, effective October 24, 2005, with credit to be given for time served since the imposition of the interim suspension on June 3, 2004. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar. Pilati entered a conditional guilty plea to violations of rules 8.4(a), 8.4(b) and 8.4(g), *Alabama Rules of Professional Conduct*. Pilati pled guilty in the United States District Court for the Northern District of Alabama to one count of making a false statement to the FBI in violation of 18 U.S.C. §1001. [ASB No. 04-165(A)]
- On June 24, 2005, an order was entered interinely suspending the license of Pell City attorney **Tommie Jean Wilson**. This order was based upon a petition of the Office of General Counsel and accompanying affidavit. Wilson provided false testimony to the Office of General Counsel when she initially indicated that she had a trust account and later denied having a trust account. During the Office of General Counsel's

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*Are they telling you they
have it under control?*

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They can't.

*Maybe they're telling you it's
none of your business.*

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dependencies can't see
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investigation, a trust account was discovered. However, it was opened for only a month, from July 2004 until the end of August 2004. During that time, she had two overdraft charges for insufficient funds. On July 1, 2005, Wilson petitioned the bar for a dissolution or modification of the interim suspension. Wilson entered a guilty plea in which she agreed to a private reprimand, participation and compliance with the Alabama Lawyer Assistance Program and the Law Office Management Assistance Program and probation for one year, during which she would provide monthly reports to the Office of General Counsel. On July 15, 2005, an order was entered with the above-referenced conditions. Wilson filed a modification request regarding her probation, requesting that she not be required to comply with the Alabama Lawyer Assistance Program. On September 20, 2005, a hearing was held regarding the bar's August 5, 2005 petition to revoke the Order of Probation. Panel V of the Disciplinary Board found Wilson not in compliance with the previous order and ordered that Wilson's license be suspended for a period of 91 days. Wilson filed an appeal on October 3, 2005. On October 31, 2005, Wilson filed a motion to dismiss her appeal, which was granted on November 1, 2005. On December 13, 2005, the Supreme Court of

Alabama entered an order suspending Wilson for a period of 91 days, effective December 13, 2005. [Rule 20(a), Pet. 05-07; BDA 05-01; ASB No. 05-79(A)]

Public Reprimands

- Tuscaloosa attorney **John Alan Bivens** received a public reprimand with general publication on December 2, 2005 for violations of rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct*. Bivens accepted a \$12,500 retainer to represent a client in a sex discrimination case against her employer. Bivens did not file a response to the defendant's Motion for Summary Judgment, nor did he communicate with his client about the matter. After summary judgment was entered against his client, Bivens filed a motion to reconsider, which was subsequently denied. Bivens did not notify the client that her lawsuit had been dismissed until three months later. Bivens did not reasonably communicate with his client about the case, did not devote sufficient time to investigate and prepare the case, and was generally inattentive to the client and her case. [ASB No. 03-69(A)]
- On October 21, 2005, Birmingham attorney **Marshall Rena Jackson** received a public reprimand without general publication for a violation of Rule 1.1, *Alabama Rules of Professional Conduct*.

The reprimand was in connection with a matter in which Jackson represented a client in the Probate Court of Jefferson County, Alabama. On February 24, 2003, a hearing was held in the probate court on a petition for declaratory judgment. During the hearing, opposing counsel produced an agreement wherein the parties had resolved their dispute over ownership of estate property. The agreement was executed approximately two years prior to its production. The agreement was signed by Jackson and her client. Jackson represented to Probate Judge Mike Bolin that neither she nor her client had ever signed the agreement. Jackson also offered to hire a handwriting expert to determine the authenticity of her signature and of her client's signature. Judge Bolin accepted this proposal and continued the hearing. After employing a handwriting expert, an examination of the document was made and it was determined that the signatures were authentic. During the course of this investigation, Jackson ultimately admitted that she could not remember having signed the agreement. [ASB No. 04-213(A)]

- Selma attorney **George E. Jones, III** received a public reprimand with general publication on October 21, 2005 for violations of rules 1.3, 1.4(a), 1.4(b) and 8.4(a), *Alabama Rules of Professional Conduct*. Jones was also

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ordered to make restitution in the amount of \$1,000. Jones was retained to represent a client in an action against the Alabama Department of Corrections to recover tools and equipment belonging to the client (an inmate) valued at \$1,200 and to take over the prosecution of a *pro se* action filed by the client. Jones was paid \$2,000 of a \$2,500 retainer. During the representation, Jones did not respond to the client's requests for information concerning the status of the case and, for at least six of the 14 months Jones represented the client, he did not communicate with him at all. The court subsequently ordered return of the property or payment of the value of the property, but the matter was still pending because Jones did not follow up and file a list of the property or its value. [ASB No. 04-241(A)]

- On December 2, 2005, Birmingham attorney Gregg Lee Smith received a public reprimand with general publication for violations of rules 1.1, 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. In March 2000, Smith was employed by a client to represent him in a discrimination suit arising out of the client's termination from employment. In November 2000, Smith wrote a letter to the employer and made a demand for settlement. In December 2000, Smith received correspondence from opposing counsel denying the claim. However, Smith never discussed this correspondence with his client. Thereafter, Smith had many telephone conversations with his client regarding the status of his case. Smith indicated to the client that the matter was moving along and was looking promising. Smith further stated to his client that he expected a settlement soon. In early 2004, Smith became non-responsive to the client's repeated requests for information about the status of his case. On May 24, 2004, the client filed a grievance with the Alabama State Bar. Repeated requests to Smith from the Alabama State Bar to respond to the

grievance went unanswered. A subsequent investigation revealed that Smith never filed a claim with the EEOC. This should have been done within 180 days of the occurrence of discrimination.

Furthermore, no suit was ever filed in any court by Smith on behalf of this client. Smith only responded to this grievance after repeated requests for information. [ASB No. 04-172(A)] ■

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



RECIPROCITY ARTICLE

To the editor:

I read with great interest Gregory Buffalow's article on whether Alabama should adopt reciprocity with other state bars (*Addendum*, December 2005). As a longtime member of the Alabama State Bar who moved to Colorado and had to take the Colorado bar exam as a result of Alabama's head-in-the-sand attitude toward reciprocity, I say it's about time we re-adopted a reciprocity rule.

The Colorado reciprocity rule, in plain English, says, "We'll admit your lawyers without exam if you'll admit ours without exam." Because Alabama won't admit Colorado's (or any other state's) lawyers without exam, despite having practiced for over ten years in good standing in Alabama, having a JD and an LLM, I had to take the Colorado bar exam. Colorado uses the national

multi-state exam format, as does Alabama. What a waste of time and money.

The multi-state exam is based on common-law and black letter law questions. The result is it tests virtually nothing on actual state law, so you're not proving anything about your knowledge of "real" law. You simply have to pay a significant amount of money and waste a significant amount of time taking a bar review course so you can relearn the useless answers the bar examiners want to see. The perfect example is the criminal law section. It tests common-law principles. Of course, the fact that no state's criminal law code uses the common-law criminal standards is completely missed by the bar examiners. As the law professor who taught the criminal law section in the bar review course I took said, "Essentially, I'm going to spend eight hours teaching you the criminal law as it existed in England in the 1700s!"

I thought the bar exam didn't really test the quality of a lawyer the first time I took it. Over ten years later, I KNOW it doesn't test anything of value. In fact, you find yourself having to remember not to say, "That's ridiculous, no judge would permit that," and

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instead think, "Oh well, it's just a bar exam, answer it their silly and wrong way."

A more practical standard would be to look at the disciplinary record of the attorney seeking admission from another state. When I applied in Colorado, they did look at my disciplinary record (actually, my lack of disciplinary record), which I find entirely appropriate. I'd be much more concerned about the ethics of the attorney seeking admission than how she or he scored on an ivory-tower academic bar exam. If the attorney has a spotty disciplinary record, then consider insisting on examination before admission.

Interestingly, Colorado insisted on nine letters of reference (six of which had to be from attorneys) for my application. But, before you get impressed by that, hear the rest of the story. They never sent one request for reference information to any of those nine individuals.

What is the purpose of the bar exam for an experienced, practicing attorney? If it is to test the legal knowledge of that attorney, it doesn't accomplish its purpose. If it's just to create barriers and raise money for bar review companies, it's doing that quite well. With more and more of the law being based on model codes and uniform state laws, and with less and less of the bar exam being based on state law questions, insisting on sitting for examination to be admitted is a waste of time, effort and money, and doesn't defend the quality of state bar members in any meaningful way. ■

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Michael A. Kirtland, JD, LLM

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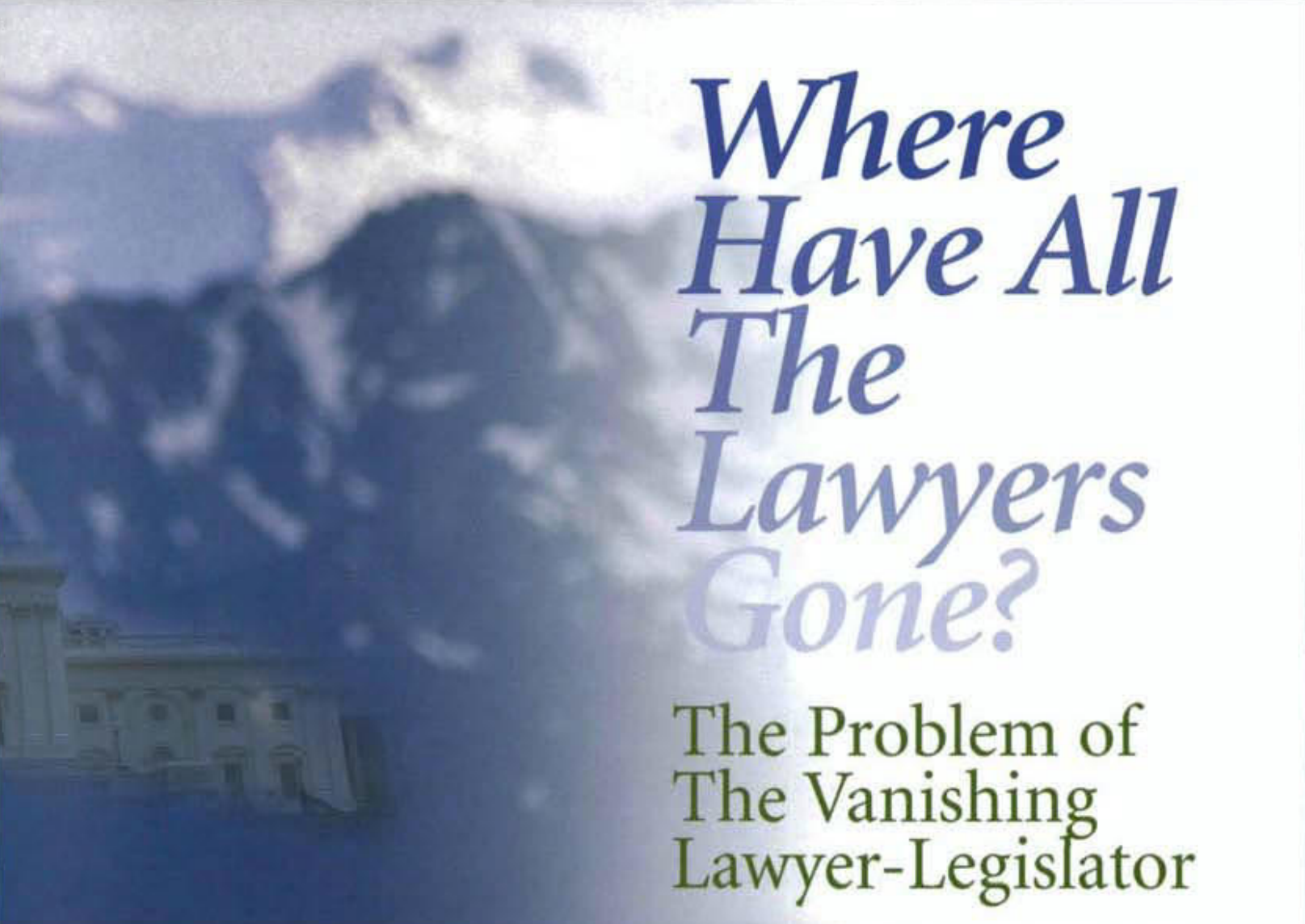
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Where Have All The Lawyers Gone?

The Problem of The Vanishing Lawyer-Legislator

BY TRACY W. CARY

Introduction

If you were to take a poll, you would likely find that most of Alabama's citizens believe lawyers make up the majority of our legislature. The fact is lawyer-legislators are an endangered species. This trend appears to be true across the United States. The American Bar Association recently conducted a survey of all 50 states to determine the numbers of lawyer-legislators and the results are disappointing. From a low of four percent (North Dakota), to a high of 33 percent (Massachusetts), the number of lawyers serving in legislative bodies is declining.¹

Lawyers in Alabama have long been active in public service. Lawyers give their time, talent and resources as much as, if not more than, any other group of citizens in this state. Lawyers' legal training and participation in the dispute resolution process make them uniquely qualified for service in law-making bodies. So why aren't lawyers serving? Why are there considerably fewer lawyers in the legislature than in the past? This article discusses the decline in lawyer-legislators, seeks to address

some possible reasons for the decline and presents some arguments why lawyers should run for public office, particularly the legislature. Several current and former legislators also weigh in on this topic with their unique insights.

Lawyers Have Historically Served

It is fair to say that lawyers were the primary social architects of this nation.² Twenty-five of the 56 signers of the Declaration of Independence were lawyers, and 35 of the 55 delegates to the Constitutional Convention were lawyers or had legal training. Alexis de Tocqueville's commentary on the United States indicated as much: "[T]he authority [Americans] have entrusted to members of the legal profession, and the influence that these individuals exercise in the Government, are the most powerful existing security against the excesses of democracy."³

Obviously lawyers have a vested interest in the judicial branch of government. Additionally, lawyers have historically taken a very active role in the executive branch of government. Thirteen of the first 16 American presidents were lawyers and of the 43 presidents who have served since the country was founded, 27 were lawyers.⁴ Lawyers in Alabama have also served in high numbers in the executive branch. All but 16 of Alabama's 52 governors have been lawyers.⁵

On a national level, lawyers have served with distinction in the legislative branch of government. One-third of the members of the first U.S. House of Representatives were lawyers. The figure got as high as 70 percent in 1840 but today it is back to about one-third. In the U.S. Senate, the number of lawyers rose in 1979 to 65 but it hovers at just over 50 today.⁶ Because legislative bodies constitute the essence of a republican form of democratic government, the role of state legislative institutions is especially important in the context of U.S. federalism as formatted in the national Constitution.⁷ As one commentator noted: "Legislatures are weighing some of the most far-reaching, ideologically-driven policy choices affecting modern government from budget shortfalls and immigration policy to health care and education crises to widening trade gaps and homeland security concerns."⁸

Alabama's original constitution in 1819 created a system in which the legislature was the dominant branch of government. The legislature was empowered to govern with relatively few legal restraints with the exception of electoral accountability.⁹ Lawyers work with the enactments of the legislature on a daily basis. Yet lawyers are not making themselves available for public office as often as they did in past generations. A legislature with only a few lawyers is not in the best interest of the people.¹⁰ Lawyers are uniquely gifted for public service, so why is the number of lawyer-legislators declining?

The Vanishing Lawyer-Legislator

In the 1970s, lawyers comprised approximately 25 percent of all state legislatures in the United States. Today, the number is about 15 percent.¹¹ Alabama follows this trend. There are more than 13,000 lawyers in Alabama, but only 16 lawyers serve in Alabama's 140-member legislature. The number of lawyers in

the Alabama legislature has decreased to the current levels of five percent in the 105-member house and 29 percent of the 35-member senate, for a total of 11 percent of Alabama legislators who are lawyers.¹²

Alabama's decrease in the number of lawyer-legislators is not unique. Take Arkansas for example: After Arkansas voters enacted term limits in 1992, the state bar there began to note the decline in the number of lawyers serving in the legislature. In fact, the number of lawyers in the Arkansas legislature fell to the point that in 1999, only 13 lawyers served in the 135-member Arkansas legislature. This year, only one lawyer served on the Arkansas Judiciary Committee. The Arkansas State Bar reacted by creating a legislative task force to identify ways in which the bar association could improve the law-making process. Among other things, the task force

identified the decrease in the number of lawyers serving in the legislature as a growing problem.

Thirty years ago, the California legislature was made up of 48 percent lawyers. Now, it is at a 35-year low with 24 percent lawyers.¹³ The New York legislature is 27 percent lawyer-legislator; 30 years ago it was 61 percent. The number of lawyers in the Missouri legislature is at an all-time low, with lawyers representing only 13 percent of the legislature,¹⁴ down from 30 percent not many years ago.¹⁵ In Indiana, only ten percent of the legislature lists their occupation as attorney, down from 27.6 percent as an average in the last century.¹⁶

North Carolina has similar numbers. In 1981, 46 of 120 house members were lawyers, and in 2005 only 17 were lawyers.¹⁷ South Dakota has 21 lawyers out of 105 members of the legislature.¹⁸ In Oklahoma, only 13 of the 101 house members are lawyers.¹⁹ In Colorado, there are 14 lawyers out of 100 legislators, down from 30 in 1965.²⁰

Iowa has also experienced the exodus of lawyers from the legislature. Currently, only 12 of the 150 members of the Iowa legislature (eight percent) are lawyers where 30 years ago there were almost three times as many lawyer-legislators.²¹ David Beckman, former president of the Iowa Bar Association, summed up the quandary in eloquent fashion:

"Try to persuade lay people that there is no such thing as a legal loophole. Try to persuade them that it is the absence of lawyers from the legislative process that tends to breed 'crazy laws.' Try to persuade them there are good reasons for the rules of evidence. Try to persuade them that due process

really is better than being tried and convicted on Monday, having the conviction affirmed on appeal Wednesday, and being executed Friday. At best, your statements will seem self-serving; at worst they will seem ludicrous. And in between, people will say, 'He or she is a lawyer, a powerful arguer that no person can compete with argumentatively. And that is what is wrong with the system. I know I am right, even if their arguments seem persuasive.'²²

Beckman suggests that to counter these reactions, we need more good lawyers in our legislatures.

Reasons for the Decline

There are a number of reasons that may account for the decline in the number of lawyer-legislators across the country. Some of the reasons vary by state. In Alabama, many point to the change from bi-annual to annual legislative sessions in 1976 as one of the reasons for the decline in the number of lawyers serving in Alabama's legislature. Although the legislature meets for only 36 legislative days, it is given 105 calendar days to complete the regular session. Legislators can count on spending Tuesdays through Thursdays in Montgomery from February 1 to May 1 for the regular session. Many will recall televised scenes of the legislature unplugging the official clock just before midnight at the end of the regular session so the session could continue as long as was necessary to hammer out the state's

budgets. Once compromises (and sufficient exhaustion) were reached, the votes were taken, the clock was plugged back in and session adjourned before midnight.

Certainly the change to annual sessions has made serving in the legislature a more onerous task. In addition, the timing of special sessions cannot be predicted accurately but it is certain that there will continue to be special sessions which take away additional time from the practice of law. For lawyers located relatively long distances from Montgomery, the time spent driving to and from sessions can be a hardship. Too much time away from practice causes lawyers to have a difficult time promptly serving their client's needs.

Other possible reasons that lawyers may not want to get involved in legislative races are:

- There are four or five times as many lobbyists as there are legislators. The pressure of special interests with their persuasive voices and campaign contributions can cause legislators to feel pulled in many directions.
- The annual salary may be seen as a deterrent from serving. The amount of time taken away from practice in order to serve in the legislature may not be viewed as a fair trade-off for the salary.
- Campaigns are too expensive. The average cost of campaigns has increased substantially over the past decade and this requires lawyers to take additional time away from practice to raise funds for an election.



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- Negative advertisements can make the process of campaigning very mean-spirited. Many feel they do not want to put themselves or their families through the rigors of campaigning, especially during an era when so many campaigns are increasingly negative.
- Dealing with the constant scrutiny of an intrusive 24/7 media is sometimes seen as too much of a burden.
- Excessive partisanship almost makes it a requirement that one oppose anything put forward by the opposing party, and, at all costs, prevent the opposing party from obtaining any credit for a good idea, even if the people of the state might benefit from it.
- Some lawyers have no interest in serving the public interest. However, public service is a noble calling and throughout the history of our nation and state, lawyers traditionally have had a proud record of public service.
- Before lawyers advertised, running for public office was seen as an effective way for lawyers to get their names in front of the public. Now that advertising is more widely accepted, some may feel there is no need to run for public office in order to become known in the community.
- Aside from fundraising and campaigning, serving the public as a legislator is no easy task. Although designated as a part-time job, the work is anything but part-time. Legislators must spend considerable time in Montgomery when the legislature is in session (including special sessions

called with little advance notice), and thereafter remain active with committee and subcommittee meetings. In addition, legislators must spend time in the district and be responsive to the needs and concerns of the electorate.

Reasons to Get Involved

As discussed above, there are many possible explanations why lawyers don't make themselves available to run for public office. However, there are several excellent reasons why lawyers should get involved. Alexis de Tocqueville wrote that lawyers are the most powerful existing security against the excesses of democracy, supplying the sobriety and stability which every good society requires.²³ Many find inspiration in the famous Edmund Burke quote, "All that is necessary for the triumph of evil is that good men do nothing."²⁴ However, with all the extra "busy-ness" in an already crowded life, why bother running for elected office?

Many choose to serve in order to make a difference and to help enact good laws that function properly, operate fairly and are thoughtfully and carefully drafted. Our legislature has a number of smart and capable legislators. However, raw ideas are simply no substitute for the experience that comes from practicing law, appearing in court, trying cases, closing transactions, and applying the law the legislature enacts and amends. In addition, as South Dakota Bar President James S. Nelson stated, "No matter how well intentioned they may be, lay legislators often introduce bills that just won't work, and it is lawyer-legislators who will correct their mistakes and keep them from screwing up our laws in general. If

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we did not have lawyers in the legislature, there would be some really weird laws passed.²⁵ Lawyers should get involved for the sake of good legislation. Lawyers serve a critical role in drafting legislation that is clear and constitutional. Lawyers have a unique opportunity to directly create or change the law.

Former Colorado state legislator Jerry Kopel wrote:

"Lawyers are, by training, prepared to become legislators. Law school courses include legislative drafting. Mock courtroom debates mimic the 'give and take' arguments in the House and Senate. And knowing when to stand fast or back off and compromise on a bill is the same as negotiating points on a contract dispute. But being trained to serve is not the same as being willing to sacrifice for public duty."²⁶

Some of the many other good reasons why lawyers run for public office are:

- Lawyers serving in the legislature who do a good job may well assist the legal profession with its declining image.²⁷
- Lawyers are trained to participate in negotiations and advocacy on behalf of clients' interests and zealously represent clients while at the same time practice civility toward opposing counsel. These skills are even more important when a lawyer is involved in public service.
- Lawyers are trained to be analytical and to see both sides of an issue. It is important that there be enough lawyers to serve on certain key legislative committees such as judiciary committees.
- Lawyers who serve in the legislature answer one of the noblest callings of our profession—public service. Dean Roscoe Pound's definition of a "profession" is probably the one that is most frequently quoted. Dean Pound defined a "profession" as "a group . . . pursuing a learned art . . . in the spirit of a public service . . ."²⁸
- Service in the legislature can raise a lawyer's profile and the profile of his or her firm.
- Lawyers, as trained advocates, help ensure a high quality of debate in legislative bodies. If the quality of debate is poor, the quality of legislation will almost certainly decrease.
- Lawyers serve as a valuable resource for colleagues who are not lawyers and are able to interpret and explain why laws may be unconstitutional or vague.
- Lawyers are trained to pay close attention to detail and this likely reduces the number of mistakes in legislative drafting. Lawyers work with laws on a more intensive basis than any other segment of society and can benefit the public with the expertise they bring from everyday experience.

...raw ideas are simply no substitute for the experience that comes from practicing law, appearing in court, trying cases, closing transactions, and applying the law the legislature enacts and amends.

- Lawyers are trained in such legal skills as negotiation, mediation and advocacy and the art of compromise. Lawyers are trained to listen to both sides and this is perfect training for service in the legislature.
- Lawyers help ensure that even the poorest among us have equal access to justice.
- Lawyers, more than any other group, are aware that the judiciary is the third and co-equal branch of government. Lawyers know how important to the effective administration of justice it is that the judiciary be adequately funded.

Again, to quote former South Dakota State Bar President James S. Nelson, who served for three terms in his state's legislature:

"It was an experience that I cherish. It gave me a unique insight and a special understanding of the law. My legislative experience made me a better practicing lawyer. I left the legislature with a sense of contributing to a better world."²⁹

Former Iowa State Bar President David Beckman noted that:

"[A]nyone can name a hundred reasons not to run for the legislature. The political process itself tends not to be hostile to lawyers. The problem is with

our own motivation. If you have even the slightest political bent, give it a chance; consider giving it a go. While there may be some short-term sacrifice, the long-term personal reward should more than compensate, particularly if the time and situation are right for you. You are needed."³⁰

What Other States Are Doing to Address the Decline

After the Arkansas State Bar noted the decline in the number of lawyer-legislators, a task force of that bar recommended the formation of a political action committee to create a pool of campaign funds to be used exclusively to assist bar association members in campaigns for legislative seats.³¹ In 2004, the PAC made contributions to nine lawyer candidates in their 2004 campaigns.

The Iowa State Bar has also created a political action committee that supports legislators' campaigns and encourages lawyers to run for office.³² The Iowa State Bar asks every lawyer to contribute a minimum of \$50 per year to the PAC. The Washington State Bar also encourages lawyers to serve in the legislature.³³

The Missouri State Bar enacted an initiative to increase the number of lawyers in the General Assembly consisting of several planks, not the least of which was a seminar at the bar's annual meeting on how to get started to run for the legislature,

how to campaign, how to raise funds and how to balance family and the practice of law.³⁴ In addition, because 89 percent of Missouri legislators are not lawyers, the Missouri bar hosted a "Law School for Legislators" to educate legislators on substantive areas of the law.³⁵ In some states, lawyers may automatically obtain the continuance of a trial setting, motions or even depositions while the legislature is in session.³⁶

A few years ago, under then bar president Fred Gray, the Alabama State Bar adopted as its theme, "Lawyers Render Service." Doug McElvy made this topic an important part of his tenure as president, speaking about it regularly and writing about it in the September 2004 issue of *The Alabama Lawyer*.³⁷

Thoughts from Current and Former Lawyer-Legislators

Not surprisingly, the current lawyer-legislators hold many key leadership positions. In both the house and senate, lawyers serve as majority leader. Several former and current legislators were kind enough to share their thoughts on the need for lawyers to get involved in the legislature.

Senator Bradley Byrne (R-Mobile) said, "People, and particularly lawyers who possess a strong commitment to moral excellence and character, should run for office. Values of integrity, honesty, diligence and putting others before oneself are particularly helpful in order to balance service in the legislature with the practice of law." Senator Byrne noted that, "It is a sacrifice, now more than it ever has been," to serve in the legislature but future generations of Alabamians benefit from quality individuals serving the state. Sen. Byrne practices with a large firm and enjoys the support of his colleagues which makes his service in the legislature less onerous.

Representative Ken Guin (D-Carbon Hill) serves as the house majority leader. Rep. Guin believes, "It's a bad thing that there are so few lawyers in the legislature. Who knows more about writing laws than those who have to deal with them on a daily basis?" However, he understands why lawyers don't run for public office. "We have become a more partisan nation. Why would you want to subject yourself and your family to the battles?" Also, the compensation has not increased in many years and, "It's getting to the point that unless you're retired or wealthy, the legislature is not a place for you. But we want our legislature to be a good cross section of the state. We don't want a legislature of only the wealthy and the retired."

Rep. Guin has a small general practice in Carbon Hill. He manages to balance his law practice with his political career by doing a lot of legal work at home or after hours or in Montgomery after his legislative duties. "I seem to keep work with me all the time and I rarely take cases in federal court or outside my county."

Representative Paul DeMarco (R-Homewood) has an interesting perspective because he is the newest lawyer elected to the legislature and he is also one of relatively few litigators in the

legislature. DeMarco said that, "From the very beginning you have to have law partners who support you. I didn't even commit to being a candidate until I had talked to my partners because of the time it would take to campaign and, if I won, then serve. My partners have been 100 percent supportive and almost every judge has accommodated my legislative schedule."

Rep. DeMarco noted that, "You can be as busy as you want to be. I try to be proactive and so I stay pretty busy with my legislative duties and with my law practice. During the session, the meeting days are on Tuesdays and Thursdays with committee meetings on Wednesday, so I can practice when I'm not in Montgomery. When the legislature is not in session I'm practicing but also working on different issues for my constituents. It's extremely tough to juggle but with supportive partners you can make a difference and do a good job at both."

Senator Myron Penn (D-Union Springs) is from a small firm in a rural area. "A two-lawyer law firm is as busy as you make it, and it makes for very full days when serving in the senate for you to also meet with clients, write briefs, take depositions and practice law." Senator Penn stated that, "Being a lawyer in the legislature has been a good thing because regardless of whether one has a plaintiff or defense practice, it's an asset to have members of the legislature who can analyze and have the ability to foresee issues that might arise from legislation. Certainly, members of other professions bring valuable insight, but lawyers bring particular insight that is helpful. More lawyers aren't involved because of the demands of practicing, the constant scrutiny, public cynicism, etc. It's also important to remember that there are very capable lawyers who might not choose to run for office but who can serve the public in different ways."

Senator Jimmy Holley (D-Elba) is not a lawyer, but he gains insight from colleagues, particularly lawyers, who serve as a source of valuable information. Senator Holley noted that when he first was elected to the legislature in the mid-1970s, Hartwell Lutz from Decatur was serving in the legislature after having served as a circuit judge. Sen. Holley noted, "I remember looking to Mr. Lutz for good counsel in complicated issues and he was always willing to help. He would give his impressions on what legislation would or would not do and he had a keen mind for seeing potential problems so we could deal with them."

Frank C. Ellis, Jr., from Columbiana, spent 11 years in the senate representing Shelby, St. Clair and Bibb counties. Ellis said that in order to successfully serve, "It's absolutely essential that you have enough of a law firm behind you to take care of business while you're gone. It can be a real struggle. I know those who have lost a big part of their practice as a result of being gone. I tried to counter this by carrying a big box of files and correspondence and dictating equipment, and if a long debate or filibuster broke out, I immediately went back and worked on legal work and made contact with my office staff."

William H. Stewart, Ph.D., professor emeritus of political science at the University of Alabama, has followed Alabama politics for many years. Dr. Stewart believes, "[a] balance of different occupations would be preferable. We need doctors, lawyers, educators, etc. It would not be helpful for us to end up with no

lawyers in the legislature because we need the legal viewpoint. Lawyers definitely have something to contribute to the legislative process, and in addition they are also trained in argument and debate and bring knowledge of parliamentary procedure to the table. The numbers of lawyers serving in the legislature now are less than historically was the case. Some don't run because they are disillusioned and because the public tends to lump all politicians together and call them crooks. The truth is politicians are more honest today than they were in the days when there was less public and media scrutiny."

Conclusion

Whether practicing as a solo practitioner in a small town or in a large firm with the support of many colleagues, some of our fellow bar members are finding ways to serve in the legislature while still practicing law. All who serve as our state's lawyer-legislators would agree that it is important that we have more lawyers in the legislature.

All 35 senate districts and all 105 house seats are up for election in 2006. Primaries are in June and it is not too late to file the necessary paperwork with the Secretary of State to be listed on the primary ballot. Thus, a lawyer interested in the legislature still has time to run for a seat in the house or the senate. Now is the time for all of us to identify, encourage and support lawyers who can run for the legislature. Weigh the pros and cons and realize that you don't have to serve forever. "But don't begin until you count the cost. For who would begin construction of a building without first getting estimates and then checking to see if there is enough money to pay the bills?"³⁶

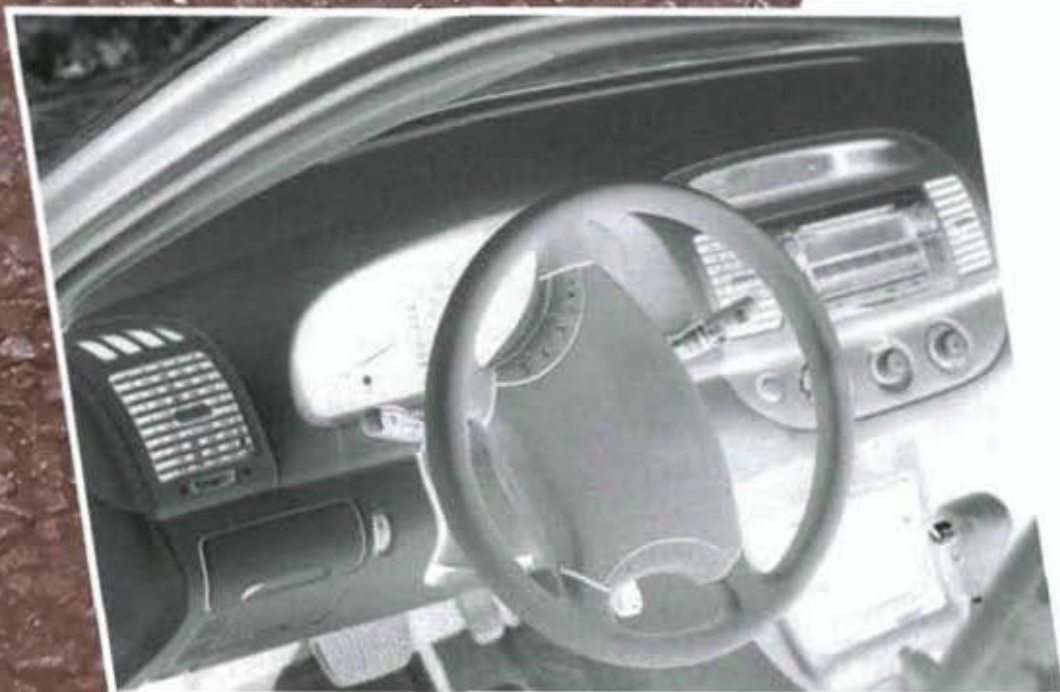
If we're going to make our good state better, lawyers need to rise to the challenge and make the sacrifices that so many who have come before us have made. Lawyers have historically taken a vested interest in the legislative well-being of our state. The current generation of lawyers should assume this political mantle and carry it for the sake of those of future generations. ■

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Preemption In Automotive Crashworthiness Cases:

Post-Geier v. American Honda Motor Company

BY TINA M. PARKER

In May 2000, the United States Supreme Court discussed the potential preemptive effect of federal regulations upon state law product liability claims in *Geier v. American Honda Motor Company*, 529 U.S. 861, 120 S. Ct. 1913 (May 22, 2000). This article discusses the *Geier* decision's impact on the law of preemption in automotive crashworthiness cases.¹

History of Preemption

Federal preemption is firmly embedded in Article VI of the United States Constitution, referred to as the Supremacy Clause. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, the states are bound by obligations imposed by the United States Constitution and by federal statutes. U.S. Const. art. VI, cl. 2; see also *Alden v. Maine*, 144 L. Ed. 636, 119 S. Ct. 2240 (1999); *Printz v. United States*, 138 L. Ed. 2d 914 (1997). The Supremacy Clause accords all federal rights, whether created by treaty, statute or regulation, priority when they conflict with state law. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979).

Federal regulations pertaining to automotive crashworthiness are Federal Motor

Vehicle Safety Standards (FMVSS) promulgated by the U.S. Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, originally 15 U.S.C. § 1381 *et seq.* (1988 ed.), now codified as amended at 49 U.S.C. § 3010130169 (1994 & Supp. II 1998)); see also *Schwartz v. Volvo North America Corp.*, 554 So.2d 927 (Ala. 1989).

In order to preempt state law, federal regulations must be properly adopted in accordance with statutory authorization. *New York v. FCC*, 486 U.S. 7, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988); *De Canas v. Bica*, 424 U.S. 351, 47 L. Ed. 2d 43, 96 S. Ct. 933 (1976). Further, the federal law or regulation has to be in effect at the time a defendant allegedly breaches state law.²

Modern application of the preemption doctrine allows federal law to preempt state law under three circumstances:

- (1) Express Preemption: Congress explicitly defines the extent to which its enactments preempt state law;
- (2) Implied Field Preemption: State law regulates conduct in a field that Congress intended the federal government to occupy exclusively; and
- (3) Implied Conflict Preemption: State law actually conflicts with federal law.³

However, every preemption analysis should begin with the presumption that states are independent sovereigns in the federal system, and their historic police powers are not to be superseded by a federal act unless it was the "clear and manifest purpose of Congress."

A. Express Preemption

Courts should start their preemption analysis by interpreting whether a statutory provision expressly preempts state law. *Cipollone*, 505 U.S. at 516; *Medtronic v. Lohr*, 518 U.S. 470 (1996). Express preemption occurs when a federal statute includes a clause that explicitly withdraws powers from the states. *Pacific Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983).

B. Implied Preemption

The fact that a state cause of action is not expressly preempted does not foreclose the possibility of implied preemption. *Freightliner Corp.*, 115 S. Ct. at 1488; *Lady*, *supra*; *Geier*, 120 S. Ct. at 1919; *King*, *supra*. Federal preemption can be "implied" by (1) "field preemption" if the federal law is so entrenched in an area of law that it impliedly preempts the whole field of law, and/or (2) "conflict preemption" if the state law conflicts with federal law. In determining the scope of preemption, courts are initially guided by two presumptions:

- (1) Congress does not cavalierly preempt state law causes of action; and
- (2) The purpose of Congress is the "ultimate touchstone" in every preemption analysis.⁴

"Implied field preemption," the second type, occurs when courts determine that federal statutory and regulatory structure so wholly occupies the particular field that

Congress must have intended to preempt all state lawmaking power in that field. *English*, 496 U.S. at 79; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Generally, this is an extension of the rule that presumption against preemption does not apply when the state regulates in an area where there has been a history of significant federal presence.³ "Implied field preemption" is very limited in products liability personal injury actions because states in their police powers traditionally have the authority to "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic*, 518 U.S. at 485 (1996)(citing *Rice*, 331 U.S. at 230).

Closely related to implied field preemption is the doctrine of "complete preemption," which allows a defendant to remove a plaintiff's state law claims to federal court under the legal theory that the federal law's preemptive force is so powerful that it entirely displaces any state cause of action converting a state law complaint into one stating a federal claim. Complete preemption, also called "super preemption," only occurs in three limited areas:

- (1) Claims under the Labor Management Relations Act by a labor union against an employer;
- (2) ERISA suits by a beneficiary; and
- (3) Native-American land grant rights.⁴

"Implied conflict preemption" is found when the federal enactment actually conflicts with state law, occurring when compliance with both the state and federal law is a physical impossibility, or when state law is an obstacle to accomplishment of the full purposes and objectives of Congress.⁷

State laws and federal regulations on the same subject may stand together where the state law is not in conflict with, and may be construed consistently with, federal regulations and in keeping with their purpose. *Buck v. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502 (1952). Therefore, in deciding whether there is implied preemption, a court should look to the federal statute's structure and purpose to see if it contains intent to preempt. *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), cert. den. 455 U.S. 1000, 71 L. Ed. 2d 866, 102 S. Ct. 1631 (1982). Congress's "intent" is discerned from the language of the statute, the statutory framework surrounding it and the structure and

purpose of the statute as a whole, including the way that Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law. *Medtronic*, 518 U.S. at 485 (citing *Rice*, 331 U.S. at 230); *King*, supra.

The Geier Decision

In *Geier*, the plaintiff was injured in a car accident and brought a common-law products liability suit against the manufacturer of the car, alleging that it was defective because it was not equipped with an air bag. The car was equipped with manual shoulder and lap belts, both of which the plaintiff was using at the time of the accident; however, the car was not equipped with air bags or other passive restraint devices. The issue was whether FMVSS 208, which required auto manufacturers to equip some, but not all, of their 1987 vehicles with air bags, preempted her state law claim. The United States Supreme Court held: (1) that plaintiff's claims were *not expressly* preempted by FMVSS 208, but (2) that plaintiff's claims were *impliedly* preempted by FMVSS 208 because a common-law products liability action based on the failure to install an air bag "actually conflicts with FMVSS 208."

A. Express Preemption

At issue in *Geier* was a savings clause in the National Traffic and Motor Safety Act, 15 U.S.C. § 1397(k)(1988 ed.)(now codified at 49 U.S.C. § 30103 (e)(1994)), which stated:

"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

The *Geier* Court concluded that, under the MVSA, a preempted state law "standard" was not the same thing as a state common-law tort "requirement." The *Geier* Court held that clearly there was no express preemption because: (1) the Act's preemption provision, 15 U.S.C. § 1392(d), does not expressly preempt this lawsuit; (2) the presence of the saving clause requires that the preemption provision be read narrowly to preempt only state statutes and regulations; and (3) the federal law was only intended to create a minimum safety standard.

Therefore, under *Geier*, if there is a saving clause in the statutory structure, this fact alone seems to remove tort actions from the scope of the express preemption clause:

[A] reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving room for state tort law to operate—for example, where federal law creates only a floor, i.e., a minimum safety standard. . . . The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read. 120 S. Ct. at 1918.

B. Implied Conflict Preemption

The Court's finding of no express preemption did not complete its inquiry. It went on to consider whether a tort-based requirement conflicted with the overall scheme of the federal statute. The Supreme Court made clear that courts should apply normal implied preemption principles in order to determine if a state common-law action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸

First, the *Geier* Court undertook a lengthy analysis of the savings provision of the MVSA to conclude that it does not forbid implied preemption, stating:

We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.

Nothing in the language of the saving clause suggests an intent to save state law tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt," (15 U.S.C. § 1397(k)(1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the federal government meant that standard to be an absolute requirement or only a minimum one.

Id. at 869, 120 S. Ct. at 1919.

Second, the *Geier* Court ruled that the statutory structure should be evaluated

independently within the context of the state law claims presented to discern whether it has any preemptive effect.⁹ The *Geier* Court found that FMVSS 208 was intended to give manufacturers an option of several different choices; one of the choices was to have air bags, another was to not have air bags. The Court found that it was the Department of Transportation's (DOT) objective to give an automobile manufacturer a range of choices among different passive restraint systems that would be gradually introduced because there were concerns:

- (1) About costs of implementing air bags;
- (2) That the air bag system needed more technological development for safety concerns; and
- (3) That consumers would not accept the air bag.

See also 49 Fed. Reg. 28962 (1984).

Therefore, it wanted to allow manufacturers to create a mix of different devices, including air bags, automatic belts or other passive

restraint technologies, that would be introduced gradually over time. Moreover, the DOT had rejected a proposed FMVSS 208 "all-air bag" standard, which went exactly to the heart of the *Geier* plaintiffs' allegations of the defect. Therefore, the *Geier* Court concluded that a state common-law requirement of air bags conflicted with the policy behind the MVSA, which was to have a "variety and mix" of passive restraint systems, to have a "gradual . . . phase-in" of passive restraints, and that "no air bag" tort lawsuits impliedly conflict with the objectives of FMVSS 208. Thus, the *Geier* plaintiffs' claims were impliedly preempted by the Federal Motor Vehicle Safety Act.

Post-Geier Decisions

James v. Mazda Motor Corp., 222 F.3d 1323 (11th Cir. 2000)

This is perhaps the most important post-*Geier* case for those of us who practice within the Eleventh Circuit because it

firmly establishes that the *Geier* holding is identical in every respect to pre-*Geier* Eleventh Circuit law set out in *Irving v. Mazda Motor Corp.*¹⁰ In *James*, the plaintiffs' decedent was killed when the car she was driving was forced off an interstate by an unidentified driver, and she crashed into the freeway median. The car was manufactured and distributed by two Mazda corporations. The car employed a passive (automatic) two-point shoulder belt and a manual lap belt. The decedent was not wearing her lap belt at the time of the accident. The plaintiff brought suit in state court alleging that the manual lap belt had been defectively designed and that Mazda had negligently failed to warn consumers that the car was dangerous unless the manual lap belt was worn.

The case was removed, and the district court entered summary judgment on the grounds that the common-law actions were preempted by FMVSS 208. The Eleventh Circuit affirmed. The sole issue presented in this case was whether *Geier* changed any

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of the rules previously set out in *Irving*. In *Irving*, the plaintiff had filed suit against Mazda on behalf of a deceased daughter who was killed in a single-car accident while driving a Mazda vehicle. The *Irving* plaintiff claimed that the seat belts were defectively designed and that Mazda failed to adequately warn consumers of the risks of not utilizing all portions—particularly the manual lap belt portion—of the safety belt system. The safety belt system used a two-point passive shoulder restraint (automatic shoulder belt) with a manual lap belt. This kind of restraint system was one of the three options provided to car manufacturers by FMVSS 208. Plaintiff contended that the design represented by this option was defective. The Eleventh Circuit held that (1) the common-law “defective-design claim was not expressly preempted by [FMVSS 208];” (2) the plaintiff’s “suit . . . for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus, [was impliedly] preempted;” and (3) the failure-to-warn claim—which was, in this case, dependent on the preempted defective design claim—was also preempted.

The Eleventh Circuit in *James* held that *Irving* was good law because it complied with *Geier*; specifically, the Eleventh Circuit held that *Geier* ruled that, despite the saving clause of § 1397(k), courts should apply normal implied preemption principles to determine if a state common-law action “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and that this was the exact analysis used by the *Irving* court.¹¹

***Fisher v. Ford Motor Co.*, 224 F.3d 570 (6th Cir. 2000)**

In this case, the plaintiff sustained serious head injuries when the driver’s side air bag of her car deployed during a collision. She brought claims of tortious failure to warn and product defect due to inadequate warning. Due to her short stature, the plaintiff was seated very close to the steering column in which the air bag was contained. She did not see and did not read the warning sign posted on the sun visor cautioning drivers not to sit close to the air bag; nor did she read the driver’s manual, which the visor sign advised motorists to read, containing additional information on air bags and

repeating the warning. The district court granted Ford partial summary judgment, ruling that the plaintiff’s failure-to-warn claim was impliedly preempted by FMVSS 208, which requires a uniform air bag warning sign on the sun visor. The Sixth Circuit affirmed.

In regards to express preemption, the Court undertook an analysis similar to the Supreme Court in *Geier* and held that state tort law was not expressly preempted. Also, in conformance with *Geier*, the Court analyzed the purposes and regulatory commentary on the safety regulations in question and held that state law could not require alternative warning labels contain-

Geier reaffirmed the principle that state laws and federal regulations on the same subject may stand together where a state law is not in conflict with a federal regulation, and state laws may be construed consistently with federal regulations and in keeping with their purpose.

ing different language than that mandated by NHTSA, and that any such state law duty to warn is impliedly preempted. Additionally, the Court analyzed whether additional labels, placed elsewhere in the vehicle than on the sun visor, could contain language different than that mandated by FMVSS 208, e.g., to warn drivers of short stature about added risks to them. Because NHTSA policy indicated that NHTSA thought of its warning language as not simply the minimum, but as the *sole* language it wanted on the subject and NHTSA feared “information overload,” i.e., that additional warnings would distract from the warnings it had determined were critical, additional and different warning labels were impliedly preempted.

***Hurley v. Motor Coach Industries*, 222 F.3d 377 (7th Cir. 2000)**

In this case, a bus driver was injured in a collision. He filed suit against the manufacturer of the bus alleging that the bus was equipped only with a standard two-point seat belt, with no air bag or any structural enhancements that would provide additional protection to the driver in the event of a high speed crash. The plaintiff filed suit in state court and it was removed to federal court on diversity grounds. The magistrate judge ruled that the plaintiff’s claims were preempted by FMVSS 208 because the design of the bus forecloses a manufacturer’s choice between seat belts and air bags. The Seventh Circuit held that the plaintiff’s theory was “remarkably close” to the one the Supreme Court rejected in *Geier*. Therefore, because federal law gives bus manufacturers a choice as to the driver protection systems installed in a particular bus, a tort suit that rests on a theory that forecloses that choice is preempted. The Court noted that even before *Geier*, previous Seventh Circuit case law would have mandated the same result. Citing *Gracia v. Volvo Europa Truck*, N.V., 112 F.3d 291 (7th Cir. 1997).

***Choate v. Champion Home Builders*, 222 F.3d 788 (10th Cir. 2000)**

In this case, the owner of a manufactured home was injured during a fire in the home, and a rescuer died while trying to rescue the owner from the fire. A products liability suit was brought on behalf of the owner and the estate of the rescuer against the manufacturer and seller of the home, alleging that absence of a battery-powered backup smoke detection device or warning of absence of such protection rendered the home unreasonably dangerous. The District Court granted defendants’ motion for summary judgment on preemption grounds and plaintiffs appealed. The Court of Appeals reversed, holding that: (1) a products liability claim was not expressly preempted by the National Manufactured Housing Construction and Safety Standards Act; and (2) a claim was not impliedly preempted by Act.

The Court of Appeals, in analyzing *Geier*, reasoned that the plaintiffs’ claims in the instant case were different from the *Geier* claims:

Under the plaintiffs’ claim asserted in [*Geier*], manufacturers should have

used air bags instead of the other options presented [in FMVSS 208]. This would have effectively eliminated use of the other choices offered under the federal standards. Thus, the Court found that the rule of state common law sought by the plaintiffs would have stood "as an obstacle to the accomplishment and execution of" the important identified federal objectives of having a variety and mix of passive restraint devices, and promoting a gradual passive restraint phase-in. The rule of law sought [by these plaintiffs], on the other hand, would not eliminate the chosen federal method of providing smoke detection in manufactured homes. It would simply increase the effectiveness of that method. [Plaintiffs'] claim is therefore one of those actions preserved by the saving clause because it "seek[s] to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor."

222 F.3d at 796. Thus, the Court found that plaintiffs' claims were neither expressly nor impliedly preempted.

Conclusion

Despite the attention given to the *Geier* decision by many commentators, *Geier* simply approved rules of preemption law that had been consistently applied by nearly all of the United States Circuit Courts of Appeal for many years. The *Geier* Court did not change the preemption law that was already being applied by nearly all of the federal circuit courts of appeal at the time *Geier* was litigated.¹² *Geier* reaffirmed the principle that state laws and federal regulations on the same subject may stand together where a state law is not in conflict with a federal regulation, and state laws may be construed consistently with federal regulations and in keeping with their purpose. See *Buck v. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502 (1952). *Geier* may require, however, that air bag and passive restraint litigation be pursued in a slightly different manner than in the past. Most cases involving a manufacturer's failure to install air bags will fail. However, cases involving defective air bag systems may be easier to pursue. In fact, the U.S. Government's *amicus curiae* brief in *Geier*

actually stated that defective air bag cases should not be preempted.¹³ The position of the United States in its *amicus* brief limits the scope of the preemption holding in *Geier*. The brief presents implied preemption arguments that only specific no-air bag claims are preempted, and these arguments were adopted by the *Geier* Court. The Court actually left the door open for these types of claims. Numerous federal courts have held in the wake of *Geier* that mere "minimum standards" issued under federal regulations are not, in and of themselves, sufficient to trigger a finding of implied conflict preemption.¹⁴ ■

Endnotes

1. Crashworthiness cases in Alabama are brought pursuant to the Alabama Extended Manufacturer's Liability Doctrine, a hybrid of strict liability and traditional negligence theories. The Alabama Supreme Court extended the original manufacturer's liability doctrine in 1976 to include not only manufacturers, but also sellers and suppliers of defective products. *Casrell v. Altec Industries, Inc.*, 335 So.2d 128 (Ala. 1976). Under the AEMLD, "A manufacturer who markets a product not reasonably safe when put to its intended use in the usual and customary manner, and causes injury to a user of the product, is negligent as a matter of law." *Bailey v. Collier*, 465 So.2d 381, 384 (Ala. 1985); *Dennis By and Through Dennis v. American Honda Motor Co., Inc.*, 585 So.2d 1336 (Ala. 1991).
2. *Cortez v. MTD Products, Inc.*, 927 F. Supp. 386, 392 (N.D. Cal. 1996) (since no federal regulation on this subject was in effect at the relevant time, there can be no federal preemption); see also *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 514 U.S. 280 (1995) (absence of regulation itself does not constitute regulation); *Pennington v. Vistrion Corp.*, 876 F.2d 414 (5th Cir. 1989) (claim that cigarette manufacturers failed to provide adequate warnings before effective date of regulation was not preempted); *Johnston v. Deere & Company*, 967 F. Supp. 574, 578 (D. Me. 1997) (a standard proposed and then withdrawn left nothing "in effect" to preempt the states).
3. *English v. General Electric Co.*, 496 U.S. 72, 7980, 110 S. Ct. 2270, 2275 (1990); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517518, 112 S. Ct. at 2617 (1992); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 n. 1 (5th Cir. 1995); *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000); *Lady v. Marine*, 228 F.3d 598 (5th Cir. 2000).
4. *Cipollone*, 505 U.S. at 518; *Medtronic*, 518 U.S. at 485 (1996); *Leipart*, *supra*; *King*, *supra*; *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 662-664, 113 S. Ct. 1732, 1737, 123 L. Ed.2d 387 (1993); *New York State Conference of Blue Cross*, *supra*.
5. *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000); *Lady*, *supra* (no presumption in case alleging that manufacturer designed a defective boat by failing to include a propeller guard—relates also to maritime activity—an area traditionally within the purview of federal regulation); *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp.2d 643, 64849 (E.D. Mich. 2000) (given

Congress's well-established power to regulate the railroad industry, a presumption against preemption does not arise in deciding whether a state statute was preempted by the Federal Railway Safety Act).

6. See *AVCO Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)(LMRA); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987)(ERISA); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983).
7. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Freightliner Corp.*, 514 U.S. at 287; *Locke*, 120 S. Ct. at 1148; *Lady*, *supra*; *Michigan Cannery & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 104 S. Ct. 2518, 2522 (1984).
8. *Id.* at 873, 120 S. Ct. at 1921 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 499, 404, 85 L. Ed. 581 (1941)).
9. See also *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), cert. den. 455 U.S. 1000, 71 L. Ed. 2d 866, 102 S. Ct. 1631 (1982) (in deciding whether there is implied preemption, a court should look in the federal statute's structure and purpose to see if it contains an intent to preempt).
10. 136 F.3d 764 (11th Cir.), cert. denied, 525 U.S. 1018, 119 S. Ct. 544, 142 L. Ed.2d 452 (1998).
11. See also *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002).
12. See *Harris v. Ford Motor Co.*, 110 F.3d 1410, 14131415 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 11211125 (3rd Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825827 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 412414 (1st Cir. 1988).
13. United States as *amicus* brief in *Geier* at 21N.3.
14. See *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063, 1070 (9th Cir. 2000) (no preemption of common-law tort claims against a glass shower door manufacturer where the federal law merely created a minimum safety standard "above which state common-law requirements were permitted to impose further duties"); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 795 (10th Cir. 2000) (no preemption of common-law tort claims involving defective smoke detector where governing federal safety standard merely constituted "a minimum rather than a maximum standard"); *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 401 (8th Cir. 2000) (common-law tort claims involving defective lighting on tractor trailer not preempted where the federal regulation merely established a "minimum federal safety standard"); *Kent v. DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208 (N.D. Cal. 2002) (common-law tort claims against vehicle manufacturer based on alleged transmission design defect not preempted by federal minimum safety standard).



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By adding **restrictions** to the approval of class actions settlements, and by providing a federal forum for most interstate cases,... Congress clearly intended to severely restrict the use of the class action device.

Settlements Under the Class Action Fairness Act of 2005

BY EDWARD A. HOSP

Introduction

It is often said that class action lawsuits are filed in order to be settled, and not to be tried. Congress, in passing the Class Action Fairness Act of 2005 ("CAFA"), clearly demonstrated that they either did not understand this, or did not like it. The provisions of CAFA relating to settlement make it much more difficult to settle class actions in federal court. In fact, the settlement provisions are such that both defendants and plaintiffs should seriously weigh the issues relating to the forum in their original pleadings (for plaintiff), and when considering removal (for defendant) if they want to preserve the flexibility to settle the class at a later date.

Background

The Class Action Fairness Act of 2005, which had been introduced in the 109th Congress as Senate Bill 5, was signed into law by President George W. Bush on February 18, 2005 and became Public Law No. 109-2. Slightly different versions of the Act had been proposed numerous times in the past, including in the 106th, 107th and 108th congresses. While the more conservative House of Representatives had generally given final approval to prior versions without much trouble, the proposals had fallen short of attracting the 60 votes necessary to end a filibuster in the Senate—in 2004 by just one vote.

The version proposed and passed in the 109th Congress had as its primary sponsor Senator Charles Grassley, Republican of Iowa. The primary co-sponsors included Herb Kohl, Democrat

of Wisconsin, and Orrin Hatch, Republican of Utah. The bill was one of the primary agenda items for President Bush in his second term, and was passed pursuant to a compromise on provisions that were agreed to by certain key Democratic and Republican senators.

In general, the bill was intended to address what the Senate Judiciary Committee's Report described as "the numerous problems with the current class action system."¹ S. REP. NO. 14, 109th Cong., 1st Sess. at 4. Although the report states that the "abuses [were] undermining the rights of both Plaintiffs and Defendants,"² it is clear that Congress believed that the perceived abuses, whether real or not, typically favored Plaintiffs. More accurately, the language of the Senate Report indicates a belief that the perceived abuses worked to the benefit of plaintiffs' lawyers, especially in the area of class action settlements. In order to address these abuses, which occurred primarily in state courts, the Act made radical changes to the federal statute relating to diversity jurisdiction, adding a new sub-section to the code that eliminated the complete diversity requirement for class actions. PUB. L. NO. 109-2, 119 Stat. 9-12, *codified at* 28 U.S.C. § 1332(d). The Act further imposed significant restrictions on the settlement of class actions in federal court. PUB. L. NO. 109-2, 119 Stat. 5-9, *codified at* 28 U.S.C. § 1711-15.

This article addresses the statutory language of CAFA relating to settlements as informed by the stated purposes of the Act set forth in the Senate Report. While cases have begun to be removed or filed in federal court based on the expanded federal jurisdiction provided by CAFA, it does not appear that any cases have progressed to the point at which the case could have been settled under the new provisions that the Act provides. As such, it may be some time before we have the benefit of any judicial interpretation of the settlement provisions of the Act.

The Act's Effective Date And Application

Section 9 of the Act states that the law "shall apply to any civil action commenced on or after the date of enactment of this act." PUB. L. NO. 109-2, 119 Stat. 14. Any case filed prior to February 18, 2005 does not fall within the ambit of the Act's provisions relating to federal jurisdiction or settlement. As a practical matter, therefore, federal courts examining class action settlements will, for many years, be required to apply both pre- and post-CAFA rules depending on the date the case was commenced. By way of example, a class action filed in federal court on February 17, 2005 and settled in January 2007 would not be subject to the Act's provisions related to settlements and coupon-based relief. In contrast, a case filed on the next day, February 18, 2005, but settled a year earlier in January 2006 would be subject to all of the procedural restrictions of CAFA.

Stated Purpose Of the Act's Provisions Relating to Settlements

One of the perceived evils sought to be addressed by the Class Action Fairness Act was the "dramatic explosion of class actions" in certain magnet jurisdictions, such as Madison County, Illinois. S. REP. NO. 14, 109th Cong., 1st Sess. at 13. According to the Senate Judiciary Committee, one reason for this development was that certain state court judges were believed to be lax in applying the procedural requirements set forth in Rule 23 of the *State Rules of Procedure*.³ *Id.* at 14.

According to the Senate Report, the failure of the state courts to, in its view, properly apply the requirements of Rule 23 was not necessarily the fault or intention of state court judges. Rather, the Report pointed out, state courts often lacked the resources they needed to supervise large, multi-state class action settlements. For example, most state court judges do not have law clerks, nor is there a system in place such as the magistrate system in federal court, or processes for the appointment of special masters for complex litigation. *Id.* The Class Action Fairness

Act therefore was designed to provide a federal forum, and, thus, the necessary resources, for most interstate class actions to address several perceived abuses in class action settlements.

According to Congress, the primary problems with state-based class action settlements were the following:

- (1) Lawyers rather than class members benefited most from settlements;
- (2) Corporate defendants often were forced to settle frivolous claims in order to avoid costly litigation. The settlements of these lawsuits resulted in increased costs to consumers;
- (3) The due process rights, presumably of defendant corporations, were ignored in state-based class actions; and
- (4) Copy-cat lawsuits forced defendants to litigate the exact same cases in multiple jurisdictions, again with increased consumer costs as the result.⁴ S. REP. NO. 14, 109th Cong., 1st Sess. at 14-23.

Although the Report discussed each of the abuses noted above, it reserved its most vitriolic attacks for coupon-based settlements. These settlements were presented as proof that it was generally the lawyers and not the class members that benefited from class action settlements. In support of this contention, the Report listed more than six pages of what it believed to be unfair class action settlements, and detailed the relief provided to the class—often in the form of a coupon or certificate—as compared to the attorney fees received by class counsel. S. REP. NO. 14, 109th Cong., 1st Sess. at 14-20. Leading this parade of "horribles" was what the Report called the "now infamous *Bank of Boston*" case, which had its roots in Alabama. See *Kamilewicz v. The Bank of Boston*, 92 F.3d 506 (7th Cir. 1996). In this case, class members' escrow accounts were debited in order to pay attorneys' fees. This debit resulted in class members actually losing money from their account as a result of the settlement in order to pay attorneys' fees.⁵ In contrast, little attention is given in the Report to the possible benefits obtained by defendant corporations in coupon settlements where large numbers of certificates are never redeemed. *But see* S. REP. NO. 14, 109th Cong., 1st Sess. at 33 (noting the lost opportunity for deterrence when a meritorious class action is settled too cheaply, and acknowledging the defendants' interest in quick resolution of claims).

Consumer Bill of Rights

In order to correct the perceived abuses of class action procedures and settlements, Congress included in the Class Action Fairness Act what it termed a "Consumer Bill of Rights" governing class action settlements. PUB. L. NO. 109-2, 119 Stat. 4. The Bill of Rights was contained in Section 3 of the bill and was designed to "help insure that class actions do not hurt their intended beneficiaries." S. REP. NO. 14, 109th Cong., 1st Sess. at 30. Provisions were codified at 28 U.S.C. § 1711, *et seq.* The provisions of the Consumer Bill of Rights that relate to class action settlements apply to *all* class actions in federal court, not just those subject to the expanded jurisdiction provisions of CAFA.

Coupon Settlements

New federal code provision 28 U.S.C. § 1712 specifically addresses coupon settlements, and the attorneys' fees payable as a result of such settlements. As noted in the Senate Report, for years studies had demonstrated that huge percentages of coupons made part of class action settlements go unredeemed. In fact, at least one study indicated that coupons relating to food and beverage class action settlements were generally redeemed at rates between two percent and six percent.⁶ Therefore, the use of coupons had the effect of increasing the paper value of the settlement, without actually increasing the cost to the defendant or the value to the class. Coupons had the additional effect of increasing the justifiable amount of fees to be paid to plaintiffs' counsel operating under a contingency fee arrangement.

According to the Act, therefore, contingent fees in coupon-based settlements must be based solely on the value of the coupons that are *actually redeemed* by class members. 28 U.S.C. § 1712(a). Although not specified in the Act, the requirement that fees be based on coupons redeemed also means that fees would not be payable until the redemption period has expired, thus resulting in a potentially lengthy delay in the receipt of fees by class counsel. The Act specifically allows the Court to receive expert testimony from witness regarding the actual value to the class members of the coupons. 28 U.S.C. § 1712(d). Presumably, this testimony would be used by the Court to determine whether or not the proposed settlement protects the rights of the class members, not for the fixing of attorneys fees, as the value of the coupons redeemed (after redemption) would not require an expert.

Where attorneys' fees are awarded on a basis other than a contingency fee in a coupon settlement, the fee must be based on the amount of time counsel actually spent working on the action. 28 U.S.C. § 1712(b)(1). The Act specifically indicates that the application of the Lodestar method and the use of a multiplier in determining attorneys' fees are not prohibited. 28 U.S.C. §§ 1712(b)(2), 1712(c)(2).

In cases where the relief is mixed and there is an award of both coupons and equitable relief, including injunctive relief, the amount of attorneys' fees that is based on coupons must be based on the value of the coupons actually redeemed. 28 U.S.C. § 1712(c)(1). The fee awarded to class counsel based on other relief must be based on the actual time spent by class counsel or use of the Lodestar method. 28 U.S.C. § 1712(c)(2).

As was the case prior to the Class Action Fairness Act, any award of attorneys' fees is subject to the approval by the Court.

The Act also requires a Court to approve a proposed settlement utilizing coupons only after a hearing and upon a finding that a settlement is "fair, reasonable and adequate for class members." 28 U.S.C. § 1712(e). This provision appears to make no substantive changes to the law which previously required a fairness hearing and a determination by the Court that the interest of class members was advanced by the settlement.

Finally, Congress included a *cy pres* provision which allows the parties to provide that unused coupons may be distributed to

charitable or government organizations. 28 U.S.C. § 1712(e). However, any coupons so designated are not permitted to be included in the calculation of attorney's fees. *Id.*

Settlements That "Cost" Class Members

New code section 28 U.S.C. § 1713 contains provisions that are specifically directed to the extremely rare cases such as the *Bank of Boston* case, noted *supra*.⁷ In that case, class members appear to have actually lost money as a result of the class action settlement when amounts used to pay attorneys' fees were deducted from their accounts.

Section 1713 provides that a Court may approve a proposed settlement under which a class member must pay class counsel in a manner that would result in a loss only if the Court finds *in writing* that the non-monetary benefits to the class substantially outweigh the monetary loss. Although there is likely some benefit to the codification of this principle, in reality, because courts

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were already required to determine the fairness of a proposed settlement to class members, this new subsection simply states what was already the law.

Notification of Government Officials

The section of the Class Action Fairness Act that may provide the greatest disincentive for defendants to remove cases that they believe they might settle is codified at 28 U.S.C. § 1715. That section requires the appropriate state and federal officials to be notified of any proposed class action settlement within ten days of the filing of that settlement with the court. 28 U.S.C. § 1715(b). The purpose of the notice provision is to combat so-called "clientless litigation" in which no class member holds a significant enough monetary interest in the lawsuit to provide any meaningful oversight of his or her attorney's actions. S. REP. NO. 14, 109th Cong., 1st Sess. at 34. Notification of federal and state officials is therefore intended to allow these officials "to voice concerns if they believe that the class action settlement is not in the best interest of their citizens." S. REP. NO. 14, 109th Cong., 1st Sess. at 5. Despite this apparent expanded role for state and federal officials, the Act specifically states that § 1715 should not be construed to expand the authority of or impose any obligations or responsibilities on any state or federal official. 28 U.S.C. § 1715(f).

In most cases, the appropriate federal official will be the Attorney General of the United States. 28 U.S.C. § 1715(a)(1)(A). It is somewhat curious that the Act did not require notification of the Federal Trade Commission which appears to have an existing expertise and mission to examine class action settlements on behalf of the consumers. Moreover, it is uncertain what section of the Attorney General's Office or the Department of Justice will have responsibility for examining proposed settlements.

The appropriate state official for notification purposes is the person with primary regulatory responsibility with respect to the particular defendant, or the state official who licenses or otherwise authorizes the defendant to conduct business in the state. 28 U.S.C. § 1715(a)(2). According to the Act, where there is no primary regulator or where the matter alleged in the class action is not subject to regulation by the licensing authority, then the appropriate official is the states' Attorneys General. *Id.*

Responsibility for providing notice is given to "each" defendant. *Id.* Notice must be given to the appropriate state official in every state in which one class member resides. 28 U.S.C. § 1715(b). The notice must include the following: (1) a copy of the complaint and any materials filed with the complaint; (2) notice of any scheduled hearings; (3) any proposed or final class notice; (4) the proposed settlement; (5) any other agreement made contemporaneously between class counsel and counsel for the defendants; (6) any final judgment; (7) the names of class members who reside in each state and the estimated proportionate share of the claims of

those members in relation to the entire settlement or reasonable estimate of the number of class members residing in each state; and (8) any written judicial opinions relating to the matters contained in the class. 28 U.S.C. § 1715(b)(1)-(8). The Act prohibits an order approving any settlement for a period of 90 days after the date on which the appropriate state and federal officials are served with the required notice. 28 U.S.C. § 1715(d). If notice is not provided to the appropriate officials, class members may refuse to comply with and not be bound by a settlement agreement or consent decree. 28 U.S.C. § 1715(e).

Report on Class Action Settlements by The Judicial Conference

The Senate Report indicated that while it believed that CAFA was "a modest, balanced step that would address some of the most egregious problems in class action practice . . . [it] is not intended to be a 'panacea' that will correct all class action abuses." S. REP. NO. 14, 109th Cong., 1st Sess. at 5. Perhaps in an effort to provide an avenue to revisit these issues, therefore, Section 6 of the Act requires the Judicial Conference of the United States to prepare, not later than one year after the effective date of the Act, a comprehensive report on class action settlements. PUB. L. NO. 109-2, 119 Stat. 13. This report is to recommend "best practices" to ensure that settlements are fair to class members and to ensure that fees awarded to counsel are appropriate. *Id.*

Possible Effects Of the Class Action Fairness Act of 2005

Given the newness of CAFA, and the fact that it will likely be some period of time before its provisions relating to settlement are applied by any court, we can only speculate as to what the impact

might be. Clearly, though, the expanded jurisdictional provisions of the Act will result in more, if not most, multi-state class actions being litigated in federal court. Therefore, it may be that the provision of federal jurisdiction in combination with the restrictions placed on attorney fees will result in fewer class actions being filed—as appears to have been the intent of Congress in passing the law. Obviously, this would be of great benefit to potential class action defendants. However, there are other possible consequences of the Act, and defendants who do find themselves in a class action lawsuit should be wary of the knee-jerk reaction to remove the case to federal court, particularly in Alabama.

In the past five years, developments in class action law in Alabama have unquestionably made litigating in state court more palatable for defendants than it was in the past. Specifically, the Alabama Supreme Court has made it clear that fraud-based class actions are particularly disfavored due to the numerous individual issues related to misrepresentations, suppressions and the reasonable reliance of class members. *E.g.*, *Disch v. Hicks*, 900 So. 2d 399 (Ala. 2004); *Regions Bank v. Lee*, 2004 Ala. LEXIS 207 (August 20, 2004); *University Federal Credit Union v. Grayson*, 878 So. 2d 280 (Ala. 2003). This is in contrast to some recent developments in federal court, even in the generally conservative Eleventh Circuit. *See, e.g.*, *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, *United Health Group, Inc. v. Klay*, 160 L. Ed. 2d 825, 2005 U.S. LEXIS 287 (U.S., Jan. 10, 2005). As such, a class action defendant in Alabama may want to consider leaving a case in state court, particularly where it is one based on fraud allegations.

Additionally, in cases where a defendant may want to settle a class action lawsuit for any of a number of reasons, not the least of which might be the meritorious nature of the claims, the new provisions of federal law relating to settlements may make state court a more favorable forum. The use of coupons redeemed rather than those issued for the purposes of calculating attorneys' fees is likely to make it much more difficult to settle these cases—at least where class counsel seeks a contingency-based fee. Class counsel are likely to be more adamant about including direct cash relief in settlements, thereby increasing the real cost of a settlement to the defendant. CAFA's virtual prohibition of coupon-based settlements therefore almost completely removed what was arguably a cost-effective method of settling class actions.

Finally, the provisions requiring notice of any settlement to federal and state officials should give defendants some pause. Although the Act does not specify what these officials are supposed to do with the notice that they receive, it is likely that many defendants will not welcome the inclusion of officials, particularly state officials who are often elected, in any discussion of alleged malfeasance by the corporation, even where a proposed settlement provides (as it most certainly will) that the defendant does not admit any wrongdoing or liability.

It appears likely, therefore, that class actions either brought or removed to federal court are more likely to actually go to trial—or at least make it through to the class certification decision rather than settle. Ironically, this could have the effect of increasing legal costs to the corporate defendants that the Act seeks to protect. Further, by restricting coupon-based alternatives, those class actions actually settled in federal court may be more costly to defendants than they might otherwise have been.

Conclusion

Although the Class Action Fairness Act of 2005 worked substantial changes to the way multi-state class actions will be handled, it did not, for the most part, change class action law. The requirements of Rule 23 remain the same, as do the requirements that a court, whether federal or state, presiding over a class action settlement ensures that any settlement is fair and reasonable. By adding restrictions to the approval of class actions settlements, and by providing a federal forum for most interstate cases, however, Congress clearly intended to severely restrict the use of the class action device. This is likely to provide potential class action targets with some measure of protection. However, it is equally likely that many of the Act's provisions, particularly those related to class action settlements, will make these cases—once filed—more difficult to resolve. ■

Endnotes

1. This article makes numerous references to the "Senate Report." Such references are to the majority report unless otherwise noted, and are not meant to imply that the views expressed in the Report were universally held either by the members of the Senate Judiciary Committee or by the Senate as a whole. The House Judiciary Committee did not issue a report. Additionally, it should be noted that the Senate Report was not published until February 28, 2005—ten days after the legislation had been signed into law. Although the Report was clearly produced contemporaneously with the passage of CAFA by Congress, its publication date might create questions as to what weight the Report should be given.
2. *Id.*
3. The Committee noted that this was despite the fact that the language of Rule 23 in the federal system had been adopted by 36 states, and that most of the remaining states (with the exception of West Virginia and Mississippi) have rules that generally parallel federal class action rules. S. REP. NO. 14, 109TH CONG., 1ST SESS. at 13-14.
4. The Senate Report also included as a fifth abuse the apparent forum-shopping prevalent in class action filings that resulted in the creation of certain "magnet" jurisdictions. Singled out by the Report, in addition to Madison County, Illinois, was the Mobile, Alabama-based *Masonite* settlement. *Naef v. Masonite Corp.*, No. CV-94-4033 (Cir. Court, Mobile County, Alabama). This case was cited as an abuse of proper class action process based on a Louisiana federal court's subsequent determination that certification in an identical lawsuit was improper. *In re Masonite Hardboard Siding Prods. Litig.*, 170 F.R.D. 214 (E.D. La. 1997). While it is undoubtedly true that certain jurisdictions receive more than their share of class action filings, it is unclear what in CAFA would prevent the same sort of forum-shopping in federal courts.
5. Another Alabama-originated case cited by the Senate Report was the 1995 settlement of claims related to polybutylene pipes. S. REP. NO. 14, 109TH CONG., 1ST SESS. at 18.
6. Judge Thomas A. Dickenson and Brenda V. Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Short-Changed?* *ADVANCING THE CONSUMER INTEREST*, vol. 12, no. 2, fall/winter, 2000.
7. It is unclear exactly how many class action settlements fall into this category. However, the *Bank of Boston* case was the only such case mentioned in the Senate Report.



Edward A. Hosp

Edward A. Hosp is a shareholder in the Birmingham office of Maynard, Cooper & Gale, PC. He received his J.D., cum laude, from Fordham Law School in 1994. Following law school, he served as law clerk to the Honorable Harold Albritton, United States District Judge for the Middle District of Alabama.



By Christy Crow
Jinks, Daniel & Crow PC
Union Springs

A Step That May Lead Us to Better Things

Diversity is an on-going challenge in all professions, including the legal field. I was looking for something on the state bar's Web site earlier this week and happened upon a statistic that surprised me—only 5.6 percent of the members of the bar are African-American. Considering that statistic in light of the fact that 28.8 percent of the population in Alabama is African-American means that we are doing a poor job of ensuring that our profession encourages minorities to join our ranks and then doing what is necessary to help them succeed once there.

The Minority Pre-Law Conference was started over 15 years ago by members of the Executive Committee of the ASB Young Lawyers' Section. Teenagers from schools around central Alabama are invited to participate in a real case study and given actual fact scenarios, and then a trial is held. Students are often given the opportunity to participate in the trial as jurors. In Montgomery, the Capital City Bar Association now runs the Minority Pre-Law Conference in conjunction with the YLS. Montgomery's Minority Pre-Law Conference for this year is scheduled for April 7.

This year, the YLS decided to expand this program to Birmingham. Under the leadership of Kimberly Ward and Bob Battle, a minority pre-law conference is now scheduled in Birmingham at Cumberland School of Law for April 10. Area schools are invited to send students who are interested in legal-related fields to participate in the program.

Both young and not-so-young lawyers are needed to help with this project.

First, it costs a great deal of money to host these events. To encourage student participation and make this a "professional" experience for the students, we host a luncheon at the program. This significantly drives up the costs. In addition, we have the cost of providing the program materials. Between Birmingham and Montgomery, we anticipate having 500 students involved. We have solicited sponsors in the past for this event and will be doing so again this year. The sponsors receive recognition on the students' handouts, along with just knowing that they are making a difference in these students' lives.

If you feel called to become personally involved in these events, you may also help out by volunteering to organize the events and/or help out on the day of the event.

For more information, contact Kim Ward at (334) 269-2343 or kimberly.ward@beasleyallen.com, Bob Battle at (205) 397-8161 or rbattle@bfgwc.com or me at (334) 738-4225 or ccrow@jinkslaw.com.

Robert F. Kennedy once said: "Few will have the greatness to bend history itself; but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation." Alone, the Minority Pre-Law Conference is not going to change the staggering statistics relating to the number of minority lawyers we have in the state versus the total population, but it is a step in the right direction. And no matter how small of a step it is, it may be the step that will lead us to better things. ■

ALABAMA STATE BAR
2006-2007 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 FOURNIER J. "BOOTS" GALE, III
PRESIDENT-ELECT

In the upcoming year we want very much 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, 2006 and expire July 2007. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee (c) or task force (tf).

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| <input type="checkbox"/> Alabama Lawyer, Editorial Board (c) | <input type="checkbox"/> Insurance Programs (c) |
| <input type="checkbox"/> Alabama Lawyer, Bar Directory (c) | <input type="checkbox"/> Lawyer Referral (c) |
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SUGGESTIONS FOR NEW COMMITTEES OR TASK FORCES:

INSTRUCTIONS FOR SUBMISSION

Please complete and mail this form no later than May 5, 2006 to be considered for an appointment, to Programs, P.O. Box 671, Montgomery, AL 36101-0671; by facsimile to 334-261-6310; or by e-mail to rita.gray@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 2006.** You may also download this form from our Web site, www.alabar.org, and submit the completed form via email to rita.gray@alabar.org.



By Robert L. McCurley, Jr.

2006 Alabama Legislature

The 2006 Alabama legislature is off to a fast start. In the first week the senate introduced 281 bills and 42 of them were immediately considered by a committee and were placed on the calendar for passage. The house of representatives introduced 354 bills and 54 of them were voted out of committee and placed on the calendar for passage.

Governor Riley has proposed a number of bills concerning corrections. Receiving early consideration by the house of representatives are the following bills affecting prisons and sentencing:

- HB 115 Adopts the voluntary sentencing standards for 26 felony offenses as proposed by the Alabama Sentencing Commission and amends Section 12-25-35 with the *Code of Alabama* to extend the time for the presentation of additional truth in sentencing standards to the legislature.
- HB 116 Amends Section 13A-8-4 to correct the monetary amounts for theft of property in the second degree concerning receiving stolen property.
- HB 117 Amends Section 32-5A-191 to provide that a prior conviction from another state for driving under the influence of alcohol or a controlled substance may be considered for enhancement of sentencing in Alabama.
- HB 118 Amends section 13A-5-11 and 13A-5-12 to increase the fines for felonies and misdemeanors as follows:
- Class C felony penalty increased from \$5,000 to \$15,000
 - Class B felony penalty increased from \$10,000 to \$30,000
 - Class A felony penalty increased from \$20,000 to \$60,000
 - Class C misdemeanor penalty increased from \$500 to \$1,500
 - Class B misdemeanor penalty increased from \$1,000 to \$3,000
 - Class A misdemeanor penalty increased from \$2,000 to \$6,000
 - A violation increased from \$200 to \$600
- HB 119 Amends Section 13A-12-231, trafficking in illegal drugs, to increase the maximum fine of \$100,000 to \$250,000 and will require a person convicted of the most serious offense for trafficking in illegal drugs to be sentenced to life in prison without parole in addition to paying the fine.
- HB 120 Amends sections 13A-7-5 and 13A-7-6 to provide that a person convicted of committing burglary in the first degree with a deadly weapon would be sentenced to a Class A felony, while a person who just threatens the use of a deadly weapon while committing a burglary would be committing a Class B felony.
- HB 121 Amends Section 12-15-100 and Section 15-19-7 to provide that juvenile and youthful offender records would be available to judges, prosecutors, victim service officers, probation and parole officers, and others who have a legitimate interest in the case at the discretion of the judge.

HB 122 Amends Section 13A-5-5 to provide that pre-sentence reports in felony cases filed after the effective date of this act would be in electronic format.

Other bills concerning corrections were not immediately filed at the beginning of the legislature.

It appears that a third of the legislature will concern itself with passing many of the bills that were under consideration in the 2005 Regular Session. Many of them had passed one of the two houses but failed to receive consideration in the second house. During the 2005 Regular Session, only six bills of general concern were passed by the legislature. It appears that the legislature will be more productive this year.

Also under consideration is the Alabama State Bar bill to increase bar license fees from \$250 to \$300. This is House Bill 59.

The following major revisions drafted by the Alabama Law Institute are currently pending in the legislature. See the January 2006 "Legislative Wrap-up" for discussion of the following bills:

Alabama Trust Code

HB 49 Representative Lesley Vance

SB 157 Senator Rodger Smitherman

Alabama Securities Act

HB 48 Representative Marcel Black

SB 260 Senator Roger Bedford

Alabama Election Code

HB 100 Representative Randy Hinshaw

SB 158 Senator Zeb Little

Residential Landlord-Tenant Act

HB 287 Representative Jeff McLaughlin

SB 151 Senator Lowell Barron

Committees of the Legislature

The Law Institute is again providing legal counsel to committees of the legislature. The lawyers serving as committee counsel during the 2006 legislative session are as follows:

Senate Judiciary, LaVeeda Morgan Battle, Birmingham

House Judiciary and House Boards and Commission Council, Pamela R. Higgins, Montgomery

Constitution and Elections, Flynn Mozingo, Montgomery

Commerce and Education, Charlanna Spencer, Montgomery

State Government and Agriculture, Forestry & Natural Resources, Sandra Lewis, Montgomery

Tourism and Travel, Karen Mastin, Montgomery

Health and Banking, Christopher Pankey, Opelika

Public Safety, Robert Ward, Montgomery

County and Municipal Government, Ben Espy, Montgomery

House Majority Leader, Peck Fox, Montgomery

House Minority Leader, William Sellers, Montgomery

Capital Interns

For the 29th year, the Law Institute is conducting an intern program whereby gifted college students work as interns with legislative leadership in the house and senate. The legislative interns this year are:

Robert E. Perry

Mechanical Engineer

Expert Witness

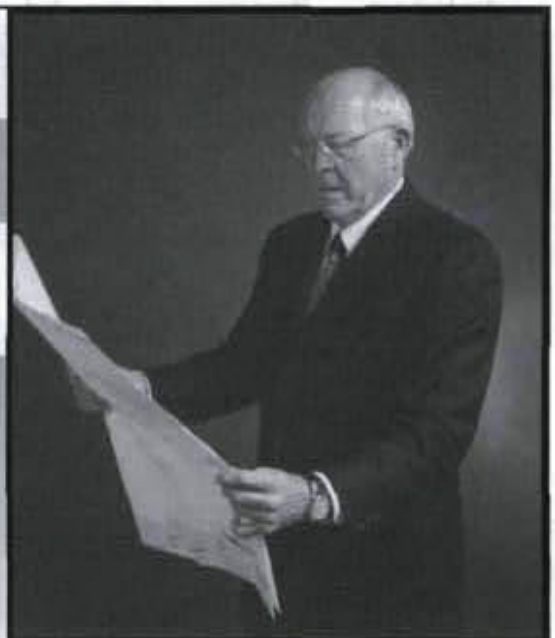
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- Adjunct Professor at UAB
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Clarence Garden, Alabama State University
Taylor Minus, University of Alabama
Jason Munford, Alabama State University
Allison Miller, University of Alabama

House Legislative Interns

A new program conducted by the Law Institute, at the request of Speaker Seth Hammett, is to provide legislators with interns to assist them in constituent services. This new program consists of the following five interns:

Jeremy Bartlett, Jacksonville State University
Tanae Hampton, Alabama State University
Bobby Martin, Auburn University
Larry Dean Pender, University of Alabama
Joon Suh, University of Illinois

The interns' responsibilities consist of:

1. Answering constituent letters;
2. Providing constituent services;
3. Hosting student groups visiting the capitol;
4. Tracking local legislation for each representative in the district;

5. Conducting legislative research;
6. Copying legislative documents; and
7. Handling other responsibilities as assigned by supervisor.


Specific functions not to be performed:

1. Campaigning;
2. Lobbying;
3. Performing personal services for legislators; or
4. Drafting legislation.

For more information about the Institute or any of its projects, contact Bob McCurley, director, at P.O. Box 861425, Tuscaloosa 35486-0013, or (205) 348-8411 (fax), (205) 348-7411 (phone) or www.ali.state.al.us. ■

Robert L. McCurley, Jr.

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



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By J. Anthony McLain

City Attorney Who Is Also Defense Attorney in City Court Has Waivable Conflict of Interest

QUESTION:

A municipal judge, and an attorney whose law firm represents the municipality in civil matters only, have both submitted opinion requests concerning the conflict of interest the attorney, and the other attorneys in his firm, would have if they undertake to defend criminal clients in municipal court. The following opinion is a joint response to both requests. The city attorney acknowledges that he and his firm would have a conflict, however, the mutual inquiry from both the attorney and the judge is whether, and subject to what conditions, this conflict may be waived.

ANSWER:

It is the opinion of the Office of General Counsel that this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed here.

DISCUSSION:

The general rule governing conflicts of interest is Rule 1.7 of the *Rules of Professional Conduct*. This rule prohibits an attorney from simultaneously representing two clients whose interests are adverse. It provides, in pertinent part, as follows:

“Rule 1.7 Conflict of Interest: General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation."

It is obvious that the interests of the city and the interests of a criminal defendant being prosecuted by the city are "directly adverse" within the meaning of paragraph (a) of the above-quoted rule. It is equally obvious that an attorney who simultaneously represents the city and a criminal defendant being prosecuted by the city would be "materially limited" in his ability to represent both clients within the meaning of paragraph (b). Such representation creates an archetypical concurrent conflict

of interest situation for the lawyer and his firm. However, Rule 1.7 also obviously provides for a waiver of conflicts. If an attorney can make a good faith determination that the representation of one client will not "adversely affect" the representation of the other client, then the attorney may, in most instances, ask both clients to consent to the representations.

However, the Comment to Rule 1.7 discusses the fact that there are some situations in which waiver and consent is neither a prudent nor ethically advisable option.

"Consultation and Consent

"A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with

respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The conflict which confronts this law firm comes very close to falling within that category of conflicts described in the Comment. By virtue of the firm's representation of the city, the attorneys in the firm are in a position to use the attorney-client relationship as leverage to persuade the city to accord their clients more

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favorable treatment than would be afforded the clients of other attorneys. No waiver, regardless of how it is worded, can change this fact.

This office does not suggest that the attorneys in the firm would take advantage of the firm's position or improperly use their leverage with the city. However, assurances, no matter how sincere, that they would not do so would be insufficient to overcome the perception of impropriety which would prevail, not only in the legal profession, but perhaps more significantly, on the part of the public.

On the other hand, the client of a city attorney who gets convicted may well feel that the city attorney did not oppose the

prosecution or cross-examine city police officers as aggressively as would an attorney whose firm did not represent the city. The attorney could be open to the accusation that his representation of the client was "materially limited," within the meaning of Rule 1.7(b), by his, and his firm's, "own interests." The perception by the client, and by the public, could well be that the attorney was reluctant to employ an aggressive defense which might antagonize city officials and jeopardize his firm's continued employment.

Such a contention could easily provide the basis for a post-conviction motion alleging ineffective assistance of counsel. While waiver on the part of the client might provide an arguably persuasive

defense to such a motion, it is equally possible that the waiver could be found ineffectual, particularly if obtained from an uneducated and unsophisticated client.

Both opinion requests raise questions concerning the extent to which the involvement of city police officers impacts upon the conflict. When a police officer testifies as a prosecuting witness the city attorney, if he is to do the best possible job for the defendant, is placed in the almost untenable position of undermining the credibility and discrediting the testimony of his own client. However, police testimony only goes to the degree, not the existence, of the conflict. The attorney's representation may be "materially limited"

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to a lesser degree when the prosecution is not dependent on police testimony but the underlying basis for the conflict is no less. The fact that a police officer testifies obviously exacerbates the conflict but it is not the basis for the conflict. In other words, the elimination of police testimony from the equation would by no means eliminate the conflict because the city attorney is still simultaneously representing two clients whose interests are "directly adverse" to each other.

If waiver and consent is sought from the city, it must be executed by someone with authority to act on behalf of, and unquestionably bind, the city and its governing body. In most instances, a blanket or standing waiver covering all cases defended by the firm will probably be sufficient. However, there may be certain cases in which the conflict is of such a nature and extent that a fact-specific waiver should be required. Such a determination would lie within the sound discretion of the municipal court. The consent from the criminal defendants should

be couched in readily understandable language easily comprehensible by a layperson of no more than average intelligence.

Finally, it is the opinion of this office that in any case in which the city police, or other city official, decides to dismiss the criminal charges against a defendant represented by a city attorney, the court should carefully scrutinize the reasons for dismissal in order to minimize the appearance of impropriety. The court, of course, would have discretion to disqualify the city attorney and/or appoint a special prosecutor if the court were of the opinion that the ends of justice so require.

In summation, it is the opinion of the Office of General Counsel that this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed herein. [RO-2005-01] ■

Heard the News?



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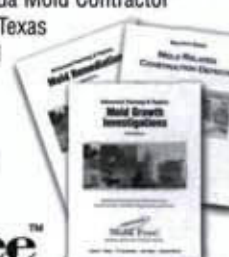
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About Members, Among Firms

The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice.

Among Firms

The Birmingham office of Adams & Reese announces the election of the Jeffery S. DeArman and T. Craig Williams to partnership, and J. Doyle Horn and D. Hiatt Collins as associates. The Mobile office announces that John Lyle, III has been elected to partnership, and Andrew B. Freeman and April M. Dodd are new associates.

W. John Daniel has been appointed counsel for the University of Alabama Office of Counsel.

Copeland, Franco, Screws & Gill PA announces that James G. Hawthorne, Jr. has become of counsel.

Ryan deGraffenried, Jr. and Ryan deGraffenried, III announce the opening of deGraffenried & Associates LLC at 1300 McFarland Blvd, NE, Suite 350, Tuscaloosa 35406. Phone (205) 345-1314.

Richard E. Dick of Dick & Miller and Howell Roger Riggs combined their practices to create Dick, Riggs, Miller & Stem LLP with offices now located on the 10th floor of the AmSouth Center in Huntsville. Phone (256) 564-7317.

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West Coast Life Insurance Company \$500,000 Level Term Coverage Male, Super Preferred Annual Premium

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G20	\$285	\$290	\$400	\$695	\$1,100	\$1,675	\$2,785

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For all other inquiries, contact:

Brannon Ford, Esq. brannon@americanlegalsearch.com

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Nashville New York San Francisco Washington DC

Fees & Burgess PC announces that Leah M. Green has joined the firm as an associate.

Ford & Harrison LLP announces that Marion F. Walker has joined the firm as senior counsel for the Birmingham office.

Gaines, Wolter & Kinney PC announces that Aubrey J. Holloway, Ronald J. Gault, Wendy F. Pope, Peter M. Wolter, and Davis A. Barlow have become partners and Ashley T. Robinson, David E. Miller, Jr., Ashley E. Manning, Shelley D. Lewis, M. Elizabeth McIntyre, and Travis G. McKay, Jr. have joined the firm as associates.

Gathings Law announces that Wesley L. Phillips and Richard Warren Kinney have joined the firm as associates in its Birmingham office.

R. Kent Henslee, John T. Robertson, IV and Ralph K. Strawn announce that Joshua B. Sullivan has become a member and the firm name is now Henslee, Robertson, Strawn & Sullivan LLP.

Ingram & Associates LLC announces that Thomas Logan Davis and Suzanne M. Zimmerman have become associated with the firm.

Lamar, Miller, Norris, Haggard & Christie PC announces that Lee H. Stewart has become a partner.

Leitman, Siegal & Payne PC announces that Hubert G. Taylor has become a shareholder.

McCallum, Methvin & Terrell PC announces that Perry Michael Yancey has become a shareholder.

McKinney & Braswell LLC announce that Clint W. Butler has become a member of the firm.



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Shumacker Witt Gaither & Whitaker PC announces that Morgan W. Jones has joined the firm as an associate.

Sirote & Permutt PC announces that Ronald A. Levitt has joined the firm as a shareholder.

John Foster Tyra, formerly of Watson, deGraffenried & Tyra LLP, announces the opening of the Law Office of John Foster Tyra PC at 1661 McFarland Boulevard North, Tuscaloosa, and that Mitchell M. Mataya has joined the firm as an associate.

Wainwright, Pope & McKeekin PC announces that Jacob A. Maples has joined the firm as an associate.

Webster, Henry & Lyons PC announces a name change to Webster, Henry, Lyons & White PC. ■

Parkman, Adams & Associates announces that William C. White, II has joined the firm as a partner and the firm's name has been changed to Parkman, Adams & White.

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