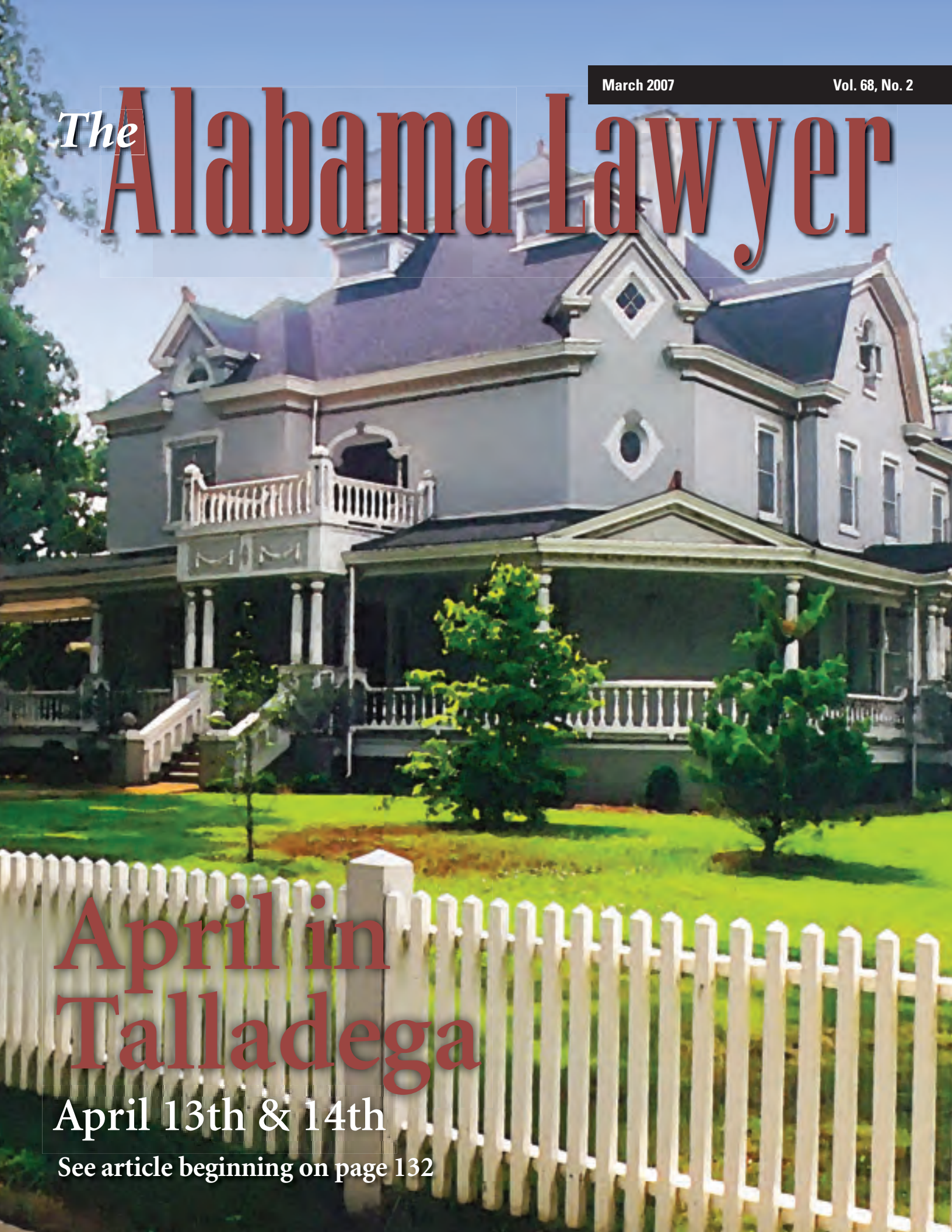
March 2007 Vol. 68, No. 2

The Alabama Lawyer



April in Talladega

April 13th & 14th

See article beginning on page 132

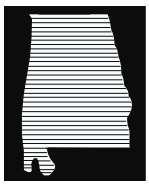
Notice of Redemption

of Attorneys Insurance Mutual of Alabama, Inc.'s (the "Company") 8% Series A Subordinated Surplus Debenture (the "Debenture")

All holders of the Debentures are hereby notified that, pursuant to its terms, the Company has called the Debentures for redemption as of December 31, 2006. The Company has met the financial conditions set forth in the Debentures for redemption and the Commissioner of Insurance of the State of Alabama has approved the redemption.

In accordance with the provisions of the Debentures, the Company will pay the principal of $1,000 per Debenture, less any offsets due the Company, May 1, 2007 to the record holders as of December 31, 2006 at the address in the Company's records. No interest is required to be paid on the redemption of the Debentures. The Company may make earlier payment on the Debentures upon the optional surrender of the Debentures by the holders. If you surrender your Debenture, the Company will make payment on the Debenture to the order of the record holder promptly after you submit your Debenture and the properly executed transmittal forms. You may request transmittal forms after December 31, 2006 by contacting the Company at:

200 Inverness Parkway
Birmingham, Alabama 35242
Attention: Henry T. Henzel, Esq., President



If you have any questions regarding the redemption of the Debentures or the process of surrendering the Debentures, please contact us at 205-980-0009 or 800-526-1246.

Attorneys Insurance Mutual of Alabama, Inc.

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PROTECT YOURSELF, YOUR FAMILY, & YOUR EMPLOYEES

ALABAMA STATE BAR

THIS SPRING INSURANCE SPECIALISTS, INC. IS OFFERING ALABAMA STATE BAR MEMBERS* A GUARANTEED ACCEPTANCE ACCIDENT ONLY DISABILITY PLAN

PLAN FEATURES INCLUDE:

- Availability to Alabama State Bar Members, their Spouses, and their Employees - *under age 60
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PLAN ADMINISTRATOR:

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All benefits are subject to the terms and conditions of the policy. Policies underwritten by Hartford Life and Accident Insurance Company detail exclusions, limitations, reduction of benefits and terms under which the policies may be continued in force or discontinued. Policy Form # SRP-1131 A (HLA) (5350)

IAADGAAOASB

ABICLE

Alabama Bar Institute for Continuing Legal Education

Spring Calendar 2007

March	2	Workers' Compensation Law - Tuscaloosa
April	19-21	Corporate Law - Grand Hotel, Point Clear
May	4-5	City & County Government - Orange Beach
	18	Representing Small Business in Alabama - Tuscaloosa
June	8	Bridge the Gap - Tuscaloosa

MARCH

Workers' Compensation Law

Friday, March 2
The University of Alabama School of Law, Tuscaloosa
A seminar for all levels of experience, this program features a judges' panel addressing important issues in workers' compensation cases. Other highlights include: case law update, return to work issues, medical issues, burden of proof and standard of review, and 10 pitfalls you need to know about! *Cosponsored by the Workers' Compensation Section of the Alabama State Bar.*
6 MCLE Credit Hours (1 hour ethics), $260 Early Fee

APRIL

44th Annual Southeastern Corporate Law Institute

Thursday-Saturday, April 19 - 21
The Grand Hotel, Point Clear, Alabama
Designed for the lawyer representing corporate interests, the 2007 Institute will cover topics such as D & O insurance; business interruption; SEC executive compensation disclosure; 409(A); an international law update; and a polical update from Washington and Montgomery. National speakers will abound! Make your hotel reservations early!
12 MCLE Credit Hours (1hour ethics)
$525 for 3 days, $185 per day

MAY

City & County Government

Friday & Saturday, May 4 - 5
Perdido Beach Resort, Orange Beach, Alabama
Join us for one of our most popular beach seminars! Topics this year will include: economic development, employment law issues, competitive bid law, legislative update, drafting local legislation, open meetings and more. Make your room reservations early by calling the Perdido Beach Resort at 800-634-9001. *This annual seminar is cosponsored by the Association of County Commissions of Alabama.*
6 MCLE Credit Hours (1 hour ethics), $295 Early Fee

Representing Small Business in Alabama

Friday, May 18
The University of Alabama School of Law, Tuscaloosa
This basic to intermediate program is designed for the attorney who may advise small businesses as they establish themselves in Alabama. Topics include: choice of entity, employment issues, immigration issues, financing, worker's compensation and IP issues.
6 MCLE Credit Hours (1 hour ethics), $260 Early Fee

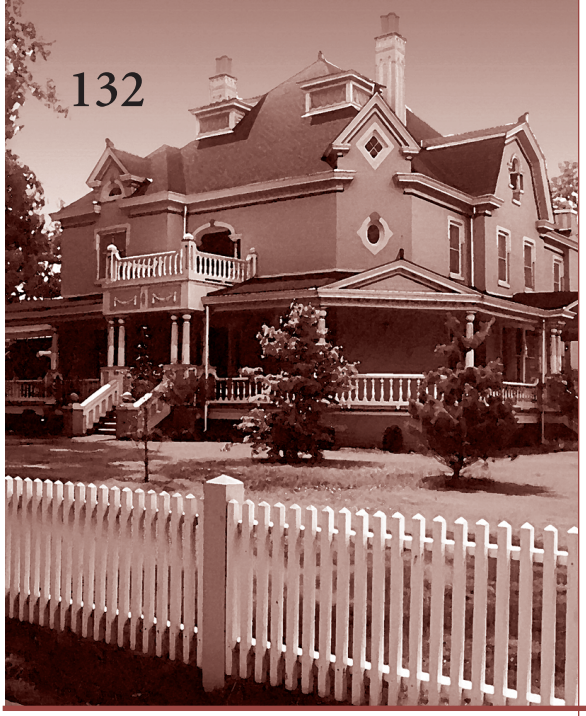
JUNE

Bridge the Gap

Friday, June 8
The University of Alabama School of Law, Tuscaloosa
Whether you are a new attorney or expanding your practice to include new areas of the law, you should not miss this program – a comprehensive overview that will be valuable for anyone interested in exploring a general practice.
6 MCLE Credit Hours (1 hour ethics), $ 260 Early Fee

ABICLE Alabama Bar Institute for Continuing Legal Education • THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

Find your way with ABICLE.



The Alabama Lawyer

March 2007 Vol. 68, No. 2

ON THE COVER

Legal minds in Talladega are coming together–not in the courtroom, but in the streets of the city's Silk Stocking District to host the "April in Talladega" Pilgrimage April 13 and 14. Attorneys Jim Malone, Clint Thomas, Jeanne Rasco and Mark Rasco are leading this community effort as "Talladega Entertains!" For more information contact *www.talladegachamber.com* and see the story and photographs on page 132. Pictured is the Jemison house, one of the featured homes on the tour.

Photo by Bob Crisp

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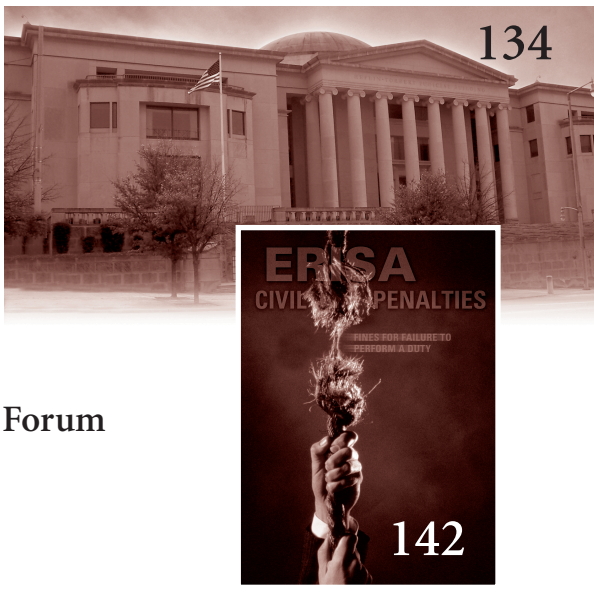

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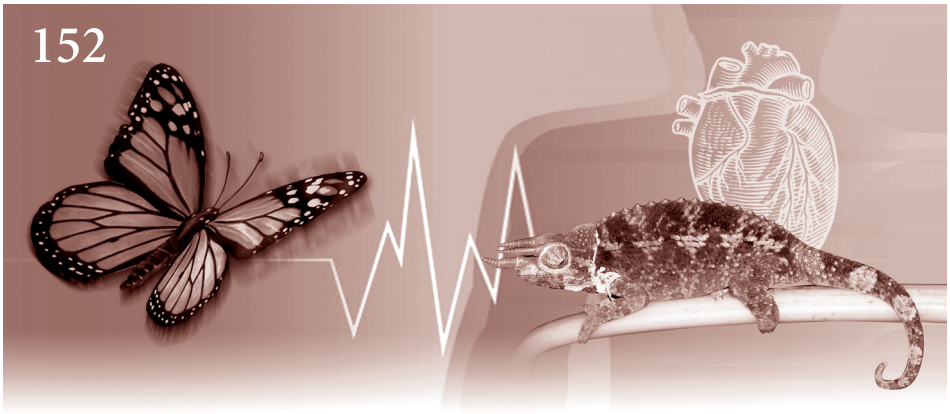

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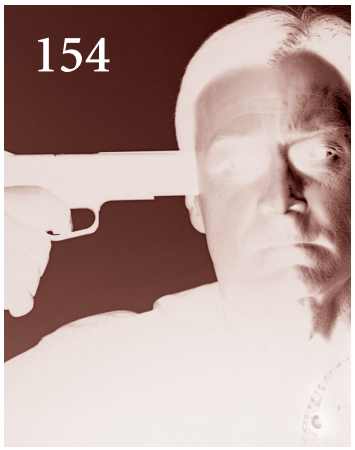

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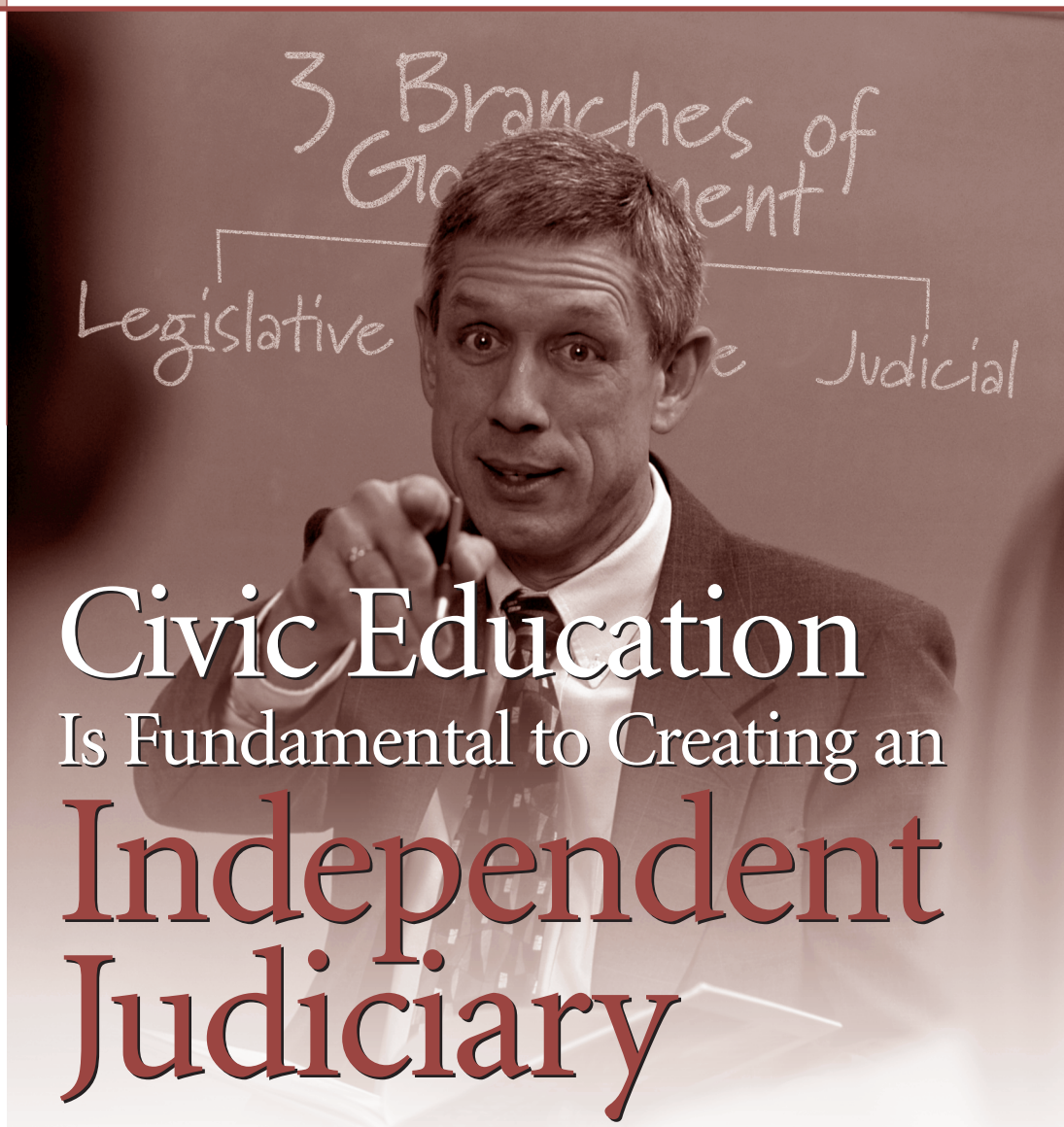


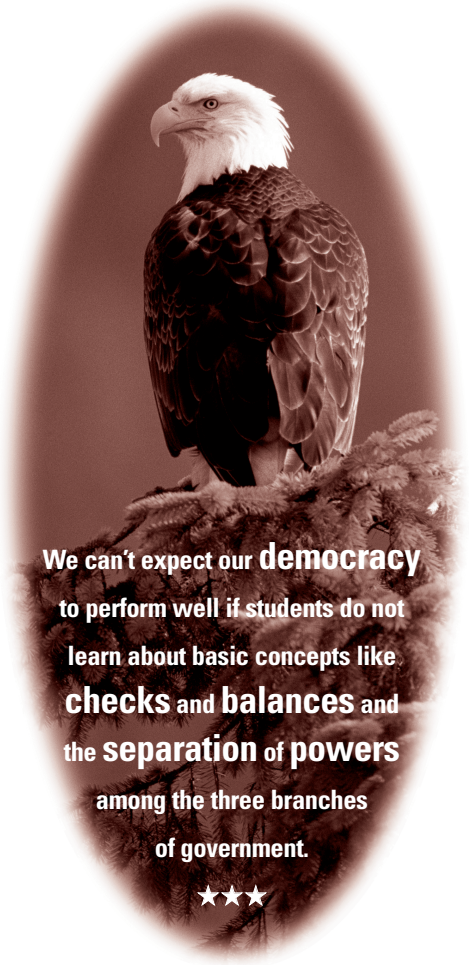
Civic Education Is Fundamental to Creating an Independent Judiciary

As lawyers, we are compelled to understand concepts such as "separation of powers" and "judicial independence." Unfortunately, however, an overwhelming percentage of our population does not appreciate the importance of an independent judiciary. The American Bar Association recently conducted a survey of the nation's adults which revealed that only *55 percent* of those surveyed could name the three branches of government. The past several decades have seen a decline in civic education across the country. The result is a generation of young adults who lack an adequate knowledge and understanding of our government, and in particular of our judicial system. Without proper education, children and young adults are forced to learn from experience which, in Alabama, means that many are being raised to believe that nasty judicial races are the norm and that our judiciary may be bought. This *perception* of our current system has led many to grow discouraged with our courts.

The need for civic education is not unique to Alabama–it has become a nationwide crisis. The American Bar Association (ABA) has appointed a **Commission on Civic Education and Separation of Powers** to "enhance public understanding of the doctrine of separation of powers and the role of an independent judiciary." Former United States Supreme Court **Justice Sandra Day O'Connor** has been appointed honorary co-chair of the Committee. When questioned about the importance of civic

education, Justice O'Connor stated that "[w]e know that the work of our democracy depends on knowledge and learned behavior–it doesn't just happen–and the schools are where much of that teaching and learning has to take place. In recent years, civic learning–social studies–has been pushed aside and two-thirds of 12-graders scored below 'proficient' on the last national civics assessment in 1998. We can't expect our democracy to perform well if students do not learn about basic concepts like checks and balances and the separation of powers among the three branches of government."

As lawyers who understand the importance of our system, and who understand the role of the judiciary in our every day lives, we must step up and help educate our communities about the importance of civic education. The **Young Lawyers' Section** of the Alabama State Bar has developed a pilot program called **"A Lawyer in Every Classroom,"** designed to provide a lawyer to schools in large Alabama cities to educate children about various civic issues. To date, the program has sent lawyers to 16 classrooms in Jefferson County, with hopes of eventually expanding the program statewide. In addition, the **Alabama Center for Law and Civic Education** (the "Center") has developed a collection of materials on civic education to help educate our youth. The Center was founded in 1990 as a 501(c)3 educational resource program and training center with the mission to teach civic knowledge, skills and responsibilities to the children of Alabama. Since its inception, the Center has developed many programs to educate young Alabamians, some of which include: *Teen Court*, a peer-sentencing court for first-time juvenile offenders; *We the People . . . The Citizen and the Constitution*, a statewide constitutional law program and competition for elementary, middle and high school youth; *Street Law*, a high school elective course and a law student outreach program at Cumberland; *Project Citizen*, a statewide public policy problem-solving program focusing on community problems and local government; *Civitas*, an international teacher exchange program with the Ukraine, Poland and Ohio; and *Play by the Rules: Alabama Laws for Youth*, the statewide question-and-answer law book and teacher guide designed to teach civil and criminal laws that affect Alabama's youth and which fits the seventh-grade required citizenship course. With help from the ASB YLS and the state bar's **Citizenship Education Committee,**



Play by the Rules was first published in 2000 and won the ABA's Outstanding Law Day Activity Award. The book is now in its sixth edition, and the Center has been funded by the U.S. Department of Justice to develop a national crime prevention model for adaptation by other states. The Center is holding a national conference October 21-23 at the Wynfrey Hotel in Birmingham for representatives from other states to learn about the *Play by the Rules* program. The Center is a wonderful resource that needs our continued support to help spread its programs around the state. If you are interested in volunteer opportunities with the Center contact Jan Bedford, founding executive director, at (205) 726-2433.

The Alabama course of study for social studies has been recognized nationally as having one of the strongest civic education state mandates in the nation. Mandates, however, don't always mean money or product; teachers need training, quality teaching materials and volunteers to advocate on behalf of strong civic education. Between the ASB and local bar associations across Alabama, we must reach out to our communities and inform the public, both old and young, about the importance of our courts and the need for an independent and impartial judiciary. The public needs to understand that they can make a difference. Thomas Jefferson once said, "I know of no safe depository of the ultimate powers of society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion." Civic education is a lifelong process. We all must help re-introduce civics to our schools and communities to educate the public about government and our judiciary so generations to come will support our system.

* * *

The **Volunteer Lawyers Program** (VLP) is another project sponsored by the Alabama State Bar to provide free legal services to low-income Alabamians in civil matters. I am proud to report that the statewide participation rate in the VLP is 25 percent above the national average of 17 percent. In fact, in some counties such as Mobile, Geneva, Jackson and Perry, we have participation rates over 50 percent. If you are interested in becoming a part of the VLP complete the enrollment form on page 128 in this issue or on the Alabama State Bar Web site at *www.alabar.org*, and contact Linda Lund, program director, at (334) 269-1515 with any questions. This is an excellent program that needs our continued support. ■

Important ASB Notices

Judicial Award of Merit

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, 2007. Nominations should be prepared and mailed to:

Keith B. Norman, Secretary
Board of Bar Commissioners
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 Bar Commissioners.

ELECTED COMMISSIONERS

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 1st; 3rd; 5th; 6th, place no. 1; 7th; 10th, place no. 3 and place no. 6; 11th, place no. 3 and place no. 4; 14th; 15th, place no. 3 and place no. 4; 23rd, place no. 3; 25th; 26th; 28th, place no. 1; 32nd; and 37th.

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, 2007 and vacancies certified by the secretary no later than March 15, 2007.

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 27, 2007).

Ballots will be prepared and mailed to members between May 1 and May 15, 2007. Ballots must be voted and returned to the Alabama State Bar by 5 p.m. on the last Friday in May (May 25, 2007).

AT-LARGE COMMISSIONERS

At-large commissioners will be elected for the following place numbers: 2, 5 and 8.

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 2007 Annual Meeting, July 18-21, at the Grand Hotel in Point Clear.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2007. 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*. ■

Courts Get New Numbers

Beginning March 1, the **Alabama Court of Criminal Appeals** has new phone numbers. The main number for the Clerk's Office is (334) 229-0751 and the fax number is (334) 229-0521.

In addition, the **Court of Civil Appeals Clerk's Office** new phone number is now (334) 229-0733, and the new fax number is (334) 229-0530.

ALABAMA STATE BAR
2007-2008 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 SAMUEL N. CROSBY
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, 2007 and expire July 2008. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee (c).

___ *Alabama Lawyer*, Editorial Board (c)
___ *Alabama Lawyer*, Bar Directory (c)
___ Alternative Methods of Dispute Resolution (c)
___ Character & Fitness (c)
___ Client Security Fund (c)
___ Disciplinary Rules & Enforcement (c)
___ Diversity in the Profession (c)
___ Fee Dispute Resolution (c)
___ Judicial Liaison (c)
___ History & Archives (c)
___ Insurance Programs (c)
___ Lawyer Referral (c)
___ Lawyer Assistance Program (c)
___ Military Law (c)
___ Quality of Life (c)
___ Unauthorized Practice of Law (c)
___ Volunteer Lawyers Programs (c)

BACKGROUND INFORMATION

Name: _____

Firm: _____

Address: _____ (Street or P.O. Box)

_____ (City, State, Zip)

Telephone: (office) _____ (e-mail)_____ (facsimile)_____

Year of admission to bar: _____ ☐ check if new address

SUGGESTIONS FOR NEW COMMITTEES OR TASK FORCES:

_____

INSTRUCTIONS FOR SUBMISSION

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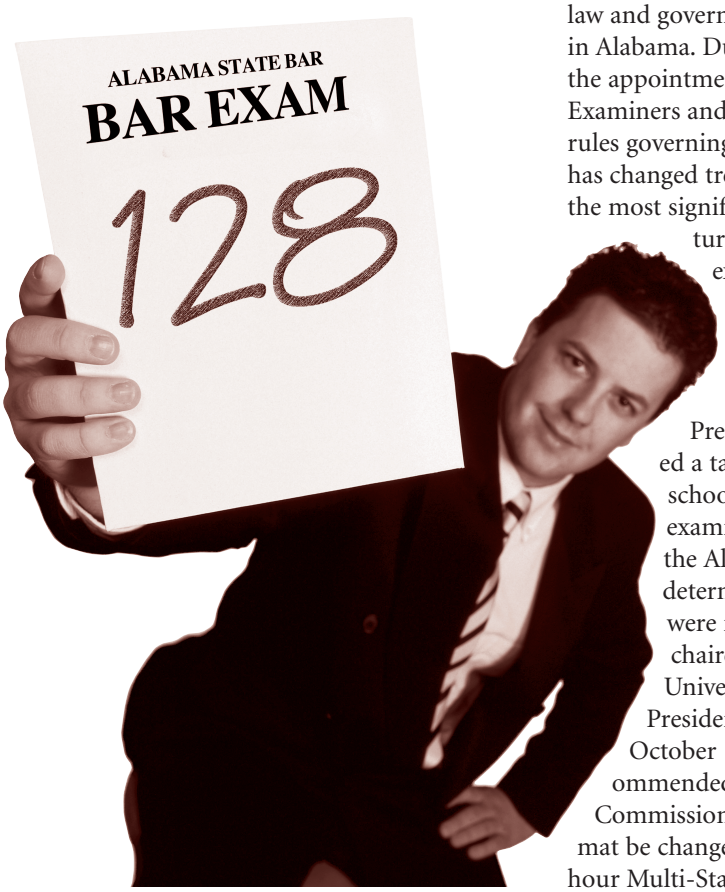
Executive Director's Report

Keith B. Norman

Cut-Score Study Concludes Final Phase of Comprehensive Bar Examination Review



On February 12, 1924 the Board of Bar Commissioners appointed the first Board of Bar Examiners and adopted rules regulating requirements for admission to practice law and governing the conduct of lawyers in Alabama. During the 83 years since the appointment of the first Board of Bar Examiners and the adoption of the first rules governing admission, the bar exam has changed tremendously. Interestingly, the most significant changes in the structure and format of the bar exam have occurred in the last few years. The following chronology traces these changes.

In July 1997, state bar President **Dag Rowe** appointed a task force consisting of law school representatives, past bar examiners and lawyers to study the Alabama bar exam and to determine what, if any, changes were needed. The task force was chaired by attorney and University of North Alabama President **Robert Potts**. In October 1999, the task force recommended to the Board of Bar Commissioners that the bar exam format be changed to include the three-hour Multi-State Essay Exam (MEE), the three-hour Multi-State Performance Test (MPT) and a three-hour Alabama essay component to accompany the six-hour Multi-State Bar Exam (MBE). The changes were accepted by the Board of Bar Commissioners and sent to the supreme court for its consideration. In May 2001, the supreme court approved the recommended changes following an extensive comment period that lasted from December 2000 to May 2001.

The development of the new Alabama essay started in the summer of 2001.[1] The Center for Business and Economic Development at Auburn University Montgomery (the "Center") served as test development consultants to the Board of Bar Examiners. A survey containing 39 practice areas was sent to 2,500 lawyers who had been in practice from three to six years. The survey results concluded overwhelmingly that the subject matter for the Alabama essay should cover practice and procedure, subject matter not covered by the MEE, the MPT or the MBE. In the summer of 2002, the next phase commenced. Teams of law school faculty, past and present bar examiners and experienced trial attorneys met to develop a subject matter outline for the new Alabama essay component of the bar exam. This effort resulted in the development of the *Alabama Civil Litigation Outline*.

The next phase started in the fall of 2002 and brought together experienced trial attorneys to develop a bank of exam questions and scoring guidelines. The intent of the Board of Bar Examiners was to ensure that the Alabama essay exam would hold its own with the national essay products to be used i.e., MEE and MPT. (This development process with experienced trial counsel and the Center's assistance continues in the development of essay questions for the Alabama bar exam.) The first administration under the new format and examination components took place in July 2003.

Although much work had been done and significant changes made to the structure to the bar exam, there remained one significant element of the bar exam that had not been studied–the "cut-score," the minimal score that determines who passes the bar exam. Consequently, the final phase was to conduct a cut-score study and determine if the score should be reset. With the assistance of the Center, the study was conducted between December 2005 and June 2006. In December 2005, a group of recent law school graduates, law professors and practicing attorneys met for two day-long standard-setting sessions. The lawyers included **Rashad Blossom**, **Christopher Boutwell**, **Ryan Daugherty**, **Sim S.W. Johnson**, **Madeline Hinson Lewis**, **Shaunte' Denise McClain**, **John David Owen**, **John Day Peake**, **Daniel F. Pruet**, **Amanda Spain Wells,** and **Jacquelyn H. Wesson**. Each law school was invited to take part in the study and the following law school representatives participated: **Ginger Tomlin**, (Birmingham School of Law), **Howard Walthall** and **Henry C. Strickland** (Cumberland Law School), **Alison Garrett** and **Robert McFarland** (Jones Law School), and **J. Richet Pearson** (Miles Law School).

Cut-off scores must be established through a method which is accepted as fair and valid. A cut-score should not be arbitrarily set and performance standards must be linked directly to the assessment of that score. In this cut-score study, it was necessary to consider the normal expectations of proficiency in the profession and to ensure that the score was set high enough to establish that a minimum level of competence is being met. The Center helped ensure that a generally accepted and well-recognized methodology to determine a valid cut-score was utilized.

The study group reviewed several examples of actual examinees' papers without scoring information and scoring guidelines for each essay component (MEE, MPT and Alabama essay). After the participants reviewed the questions, the score for those questions awarded by the Board of Bar Examiners was provided for each example of each question reviewed. Each study participant then made a judgment as to the passing score for examinees who were minimally competent on that question and used this information to establish his or her Round One judgment. Next, participants were divided into small groups that were diverse with respect to race, gender and participant type (law school professor, recent graduate or established attorney). These small groups discussed differences in Round One judgments, taking into account their definition of minimally competent. Following the small-group discussions, participants were instructed to make an independent Round Two judgment. The participants came back together and as a larger group discussed the differences in the recommended cut-scores for the first question. The medium cut-score for each small group was presented as well as impact data, such as the number of examinees passing the question at each recommended cut-score. Following this step, participants made the Round Three judgment. Again, this was done independently. This process was followed for all six Alabama essay questions, the six MEE questions and the two MPT questions.

The Board of Bar Examiners received the preliminary results of the study in May 2006 and requested the Center analyze additional impact data (e.g., accreditation of school and first-time test-takers versus multiple test-takers) on the results. In June, the final study results with the additional impact data were presented. After considering the results of the study, the Board of Bar Examiners concluded that the existing cut-score of 128 was an appropriate measure of minimal competence. This past fall, Board of Bar Examiners Chair **Anne Sumblin** reported to the Board of Bar Commissioners that the Board of Bar Examiners recommended that the cut-score not be reset and remain, for the time being, 128.

After almost ten years since the first task force was appointed to study the Alabama bar exam, the final piece of the comprehensive bar exam review, the cut-score study, has been completed. Thanks to Alabama lawyers, law school faculty and the Center, Alabama truly has a first-rate bar exam. ■

Endnotes

1. For a more complete discussion of the exam format changes and Alabama essay development, see Executive Director's Report: "New Alabama State Bar Exam," *The Alabama Lawyer*, July 2003, pages 216-217.

CURTIS WRIGHT

The Etowah County Bar Association mourns the loss of one of its most esteemed and distinguished members, Curtis Wright, who passed away on December 26, 2006 at age 76.

Mr. Wright was born and raised in Gadsden. Following his military service, he graduated from the University of Alabama School of Law and served a clerkship with the Alabama Supreme Court. He then returned to Gadsden in 1962 and began his private practice of law with Clarence Rhea and George Hawkins (both now deceased). In 1965, he and Charles Wright formed a partnership with W.B. Dortch (deceased) and Senator James B. Allen (deceased), under the name of Dortch, Allen, Wright & Wright. That firm name survived until Curtis Wright's death. (I was privileged to have practiced with Curtis Wright from 1974 to 1993, when I was appointed to the bench.)

Mr. Wright was a defense attorney. He was a past president of the Alabama Defense Lawyers Association and a fellow of the American College of Trial Lawyers. He was from the "old school," which taught that zealous advocacy can co-exist with civility and common courtesy. As an advocate, he represented his clients zealously within the adversarial system. One of the most important things he taught me was "how to disagree without being disagreeable." He understood how to be an adversary without being antagonistic, how to oppose a contrary position without being oppositional or contrary. His view toward and treatment of the opposing party and the opposing counsel was never demeaning, condescending, rude or offensive. He was a gentleman. Curtis Wright was an advocate, who treated the opposing party and counsel with dignity and respect, though, at times, not receiving the same treatment in return.

Mr. Wright was never unprepared. Proper case preparation was the key element to successful litigation. Preparing his own client for deposition by the opposing counsel was an essential stage in the process. The case cannot be won at the deposition stage, but it can easily be lost. In deposing the other party, he was so courteous and polite that he could often get people to say practically anything, even to their detriment.

Words are truly inadequate to describe the tremendously positive influence that he made upon my legal career. He was my mentor. As I practiced law with him for 19 years, he was a constant source of advice and guidance. He had "been around the block" so many times and on so many legal issues, that he knew the proper way to handle every situation that arose.

The public at large may not know or appreciate this man. Certainly, his wife, his children, his grandchildren and his friends will miss him greatly. The lawyers of the Etowah County Bar Association, with whom he practiced for 45 years, will remember him as one of the best lawyers to have practiced in this county. And, certainly, his clients, those whom he represented and defended honorably, will miss him also.

–District Judge William D. Russell, Jr.

Clyde Dilmus Baker

Guntersville attorney Clyde Dilmus Baker died September 4, 2006. He grew up in Fyffe and Crossville and attended Snead College and Jacksonville State University before earning a degree from Birmingham Southern in 1946.

Mr. Baker spent a year in the Army in Japan. After that, he taught math at Snead. He then went to Keesler Air Force Base in Mississippi to teach radar and on to Huntsville to work in rocket research for eight years. While in the rocket and guidance program, Mr. Baker went to the University of Michigan to study technical writing. During that time, he also attended night school to earn his master's degree in math at the University of Alabama.

Mr. Baker transferred to Marshall Space Flight Center when it was formed in Huntsville in 1960. He began studies in engineering at UAH and optimization techniques at the University of Tennessee.

In all, Mr. Baker studied five different fields: mathematics, radar, rocketry, space, and law. He was the author of 35 scientific and technical publications and was a guest lecturer at the University of Alabama, Rensselaer Polytechnic Institute and Georgia Institute of Technology.

He retired in 1973 as chief of the Astrodynamics and Guidance Theory Division, Aero-Astrodyamics Lab at Redstone Arsenal.

That same year, he began his law studies at the Birmingham School of Law. A year before he started law school, he married Mary Cobb Bennett of Guntersville and moved there. (They had met in the fourth grade in Crossville and dated in high school.) They met again after she was widowed.

He graduated from law school in 1977 and started practicing in Guntersville. He retired in 1999.

Mr. Baker was a member of Guntersville First United Methodist Church, where taught Sunday School. He was a member of the Alabama State Bar, a number of professional societies, VFW and the Guntersville Historical Society.

He enjoyed playing chess and traveling throughout the world, especially countries where he could converse in his fluent Spanish. He also liked to water ski, read, listen to music and go boating.

He is survived by his wife; one daughter, Susan Baker; one stepson, Elliott R. Bennett (Patti); one stepdaughter, Liz Bennett Traylor (Ted); one brother, Carey Baker (Terri); and four grandchildren. He was predeceased by two sons, Martin Baker and Stephen Baker, and three brothers.

Campbell, John Coleman
Montgomery
Admitted: 1977
Died: March 1, 2006

deGraffenried, William Ryan, Jr.
Tuscaloosa
Admitted: 1975
Died: December 7, 2006

Fowler, Conrad Murphree
Tuscaloosa
Admitted: 1948
Died: January 1, 2007

Glover, Julia Christie
Mobile
Admitted: 1986
Died: October 2, 2006

Hunt, William Thomas
Double Springs
Admitted: 1972
Died: October 23, 2006

Johnson, Roy Marvin, Jr.
Birmingham
Admitted: 1948
Died: December 13, 2006

Johnson, William Earle, Jr.
Birmingham
Admitted: 1950
Died: December 9, 2006

Jones, Charles Larimore
Navarre, FL
Admitted: 1989
Died: November 23, 2006

LeMaistre, Sam Angus, Sr.
Eufaula
Admitted: 1946
Died: December 31, 2006

Locke, Hugh Allen, Jr.
Birmingham
Admitted: 1950
Died: December 7, 2006

Pittman, Joseph Stafford
Enterprise
Admitted: 1952
Died: October 16, 2006

Powers, Joseph Maddock
Mobile
Admitted: 1980
Died: August 23, 2006

Savage, Curtis Ray, Jr.
Florala
Admitted: 1993
Died: November 20, 2006

Webb, James Wilson
Montgomery
Admitted: 1956
Died: November 7, 2006

Disciplinary Notices

Notices

- **Dennis Michael Barrett,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2007 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 05-184(A) by the Disciplinary Board of the Alabama State Bar.

- **David Joel Forrester,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 10, 2007 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 05-213(A) before the Disciplinary Board of the Alabama State Bar.

To order copies of the **ASB Fall 2006 Admittees** group photo and/or family photos, please contact Robert Fouts, Fouts Commercial Photography, at (334) 270-9409 or *photofouts@aol.com.*

Suspension

- Birmingham attorney **John Croom Falkenberry** was suspended from the practice of law in the State of Alabama for a period of 18 months effective December 1, 2006 by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of Disciplinary Commission of the Alabama State Bar.

In ASB No. 05-38(A), formal charges were filed against Falkenberry on April 26, 2006, alleging that he retained an individual to provide forensic computer services concerning a client matter. Thereafter, that individual hired a subcontractor to perform the computer forensic work. Falkenberry failed to pay the individual's invoice and did not respond to his requests for payment. Falkenberry failed to respond to written requests for information regarding the matter during the course of the bar's investigation. During the course of the investigation, the Office of General Counsel spoke by phone with Falkenberry. Falkenberry advised that he had paid the invoice and would send a letter confirming payment. Falkenberry did not submit a letter despite numerous requests. Formal charges were filed in this matter and were personally served on Falkenberry on May 8, 2006. Falkenberry did not file an answer to the formal charges. Thereafter, on November 9, 2006, Falkenberry entered a conditional guilty plea. On November 15, 2006, the Disciplinary Commission entered an order accepting Falkenberry's plea wherein he pled guilty to violating rules 8.1(b) and 8.4(a) and (g), *Alabama Rules of Professional Conduct.*

In ASB No. 05-152(A), formal charges were filed against Falkenberry on April 26, 2006, alleging that Falkenberry was retained to represent a client in an action against her employer. Falkenberry communicated with the client over the next few months,

but, thereafter, Falkenberry did not communicate with the client concerning the status of her case. Unbeknownst to the client, the case was dismissed due to Falkenberry's failure to respond to motions filed in the case by opposing counsel. Falkenberry failed to respond to requests for information regarding the matter during the course of the bar's investigation. Formal charges were filed in this matter and personally served on Falkenberry on May 8, 2006. Falkenberry did not file an answer to the formal charges. Thereafter, on November 9, 2006, Falkenberry entered a conditional guilty plea. On November 15, 2006, the Disciplinary Commission entered an order accepting Falkenberry's plea wherein he pled guilty to violating rules 1.1, 1.3, 1.4(a) and (b), 8.1(b), and 8.4(a), (d) and (g), *Alabama Rules of Professional Conduct.*

In ASB No. 06-96(A), formal charges were filed against Falkenberry on July 26, 2006, alleging that Falkenberry, who was suspended for 91 days on January 20, 2006, had been engaging in the practice of law while suspended. On September 19, 2006, Falkenberry filed an answer to the formal charges. Thereafter, on November 9, 2006, Falkenberry entered a conditional guilty plea. On November 15, 2006, the Disciplinary Commission entered an order accepting Falkenberry's plea wherein he pled guilty to violating rules 5.5(a), 8.1(b) and 8.4(a), (b) and (d), *Alabama Rules of Professional Conduct.* [ASB nos. 05-38(A), 05-152(A) and 06-96(A)]

Public Reprimands

- Huntsville attorney **Angela Leigh Daniel** received a public reprimand without general publication on December 8, 2006 for violating Rule 7.3(b)(1)(ii) of

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Disciplinary Notices

Continued from page 109

the *Alabama Rules of Professional Conduct.* In June 2004, Daniel sent a direct-mail solicitation entitled "Free Divorce/Child Custody Seminar" to individuals who were parties to divorce and/or custody proceedings in Madison and surrounding counties. Daniel obtained a mailing list of intended recipients from public records, some of whom were represented by counsel. [ASB nos. 04-166(A), 04-167(A), 04-168(A), 04-169(A), and 04-173(A)]

- Mobile attorney **Larry Charles Moorer** received a public reprimand without general publication on December 8, 2006 for violating rules 1.15(b) and 8.4(g), *Alabama Rules of Professional Conduct*. Moorer settled a case on behalf of a client and did not honor a letter of protection given to one of the client's medical providers. Although Moorer's failure to honor the letter of protection was due to an oversight, when the oversight was brought to his attention, rather than honoring his protection letter, he negotiated a compromise of the amount due with the complainant in exchange for the complainant's request to withdraw the grievance. [ASB No. 05-209(A)]

- On December 8, 2006, Centreville attorney **Michael Lynn Murphy** received a public reprimand with general publication for violations of rules 1.3, 1.4(a), 1.4(b), 8.1(b), and 8.4(g), *Ala. R. Prof. C.* In March 2003, the complainant retained Murphy to represent him as a defendant in a civil matter. Murphy later informed the complainant that an answer had been filed on his behalf. In fall 2003, the complainant informed Murphy that a garnishment had been filed against him. Murphy again stated that he had filed an answer. However, there was no record in the clerk's office of the answer having been filed and Murphy could not produce a copy of an answer file stamped by the clerk of the court. Murphy filed a motion to set aside the default judgment that had previously been granted by the court and the

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motion was granted. The case was set for trial September 1, 2004. As the trial approached, Murphy discovered he had not sent the complainant notice of the upcoming court date. Murphy stated that he attempted to contact the complainant by telephone but was unable to reach him and, therefore, Murphy appeared at trial without him. Murphy requested a continuance, which was denied, and a judgment was entered against the complainant.

After the complainant confronted Murphy about the judgment being entered against him, Murphy stated to him that prior to the trial he discovered that he had not sent him a letter notifying him of the court date. Murphy stated to the complainant that he made approximately six phone calls to the numbers that the complainant had provided. Murphy claimed he attempted to reach the complainant through his son's place of business. The complainant later learned that Murphy did not leave any messages and after reviewing his caller ID he was unable to locate a phone call from Murphy's telephone number.

A complaint was filed by the complainant with the Office of General Counsel of the Alabama State Bar. Murphy failed or refused to respond to numerous verbal and written requests from the bar asking for a response to the complaint. Only under the threat of suspension did Murphy finally respond to the complaint. [ASB No. 05-129(A)]

- Tennessee attorney **Thomas Verner Smith**, who is also licensed in Alabama, was noticed to receive a public reprimand with general publication on December 8, 2006 as reciprocal discipline pursuant to Rule 25, *Alabama Rules of Disciplinary Procedure.* This discipline was based upon the January 30, 2006 order of the Board of Professional Responsibility of the Supreme Court of Tennessee finding Smith guilty of violations of rules 1.8 (a) and (e) and 8.4(a), (b), (c) and (d), *Tennessee Rules of Professional Conduct.* [Rule 25(a); Pet. 06-24] ■

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Bar Briefs

- Haskell, Slaughter, Young & Rediker LLC associate **Khristi Doss Driver** was honored with the "Distinguished Service Award" from the Women Lawyers' Section of the Birmingham Bar Association. Driver was also appointed to serve as chair of the Projects Committee of the section and to serve on the association's Medical Liaison Committee for 2007.

Khristi Doss Driver

- **Carol Sue Nelson,** a shareholder at Maynard, Cooper & Gale PC, was selected as a Fellow of the American Academy of Trial Counsel. The Academy is a legal honorary comprised of lawyers who have exhibited accomplishments in litigation and trial work. Nelson has been in practice for almost 30 years.

Carol Sue Nelson

- **Anthony A. Joseph,** a shareholder at Maynard, Cooper & Gale PC, was selected to serve as a faculty member of the National Trial Advocacy College at the University of Virginia School of Law. The College, a partnership of Virginia Continuing Legal Education and the University of Virginia School of Law, is a program that assists attorneys in refining their trial skills. The college's faculty consists of over 50 trial lawyers, professors and judges from around the country.

Anthony A. Joseph

- Sirote & Permutt attorney **James R. Sturdivant** was named co-chair of an American Bar Association Criminal Justice Section subcommittee. As co-chair, Sturdivant will focus on increasing the committee's participation in the ABA's public policy and educational initiatives by publishing articles, developing continuing legal education programs and luncheons, and drafting committee reports and recommendations for the formulation of official policy of the ABA. ■

James R. Sturdivant

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Roman Shaul

Your YLS Offers Plenty of Opportunities to Serve Our Communities

The past few years, the majority of my practice has been in jurisdictions outside of Alabama. As a result, there were many times when I truly felt like the outsider that I was. As you would expect, I did not have many common bonds with the other lawyers involved in my cases. I did not attend the same college or law school, did not know the same people from various local towns and did not cheer for the same sports teams. Occasionally, this void appeared to affect the very communication and atmosphere of the litigation. I think the lack of a common bond made it easier for some opposing counsel, certainly not all, to act in ways that were less than professional. Issues that should have been contested, but yet done so respectfully, often were not handled in a very dignified manner. History has taught us well that it is always easier to mistreat individuals when you define them as outsiders or something less than human. Of course, it may just have been that I was the one who was stubborn and hard to get along with, but I do not typically experience such a lack of civility among members of our own bar or with professionals with whom a common bond is present. My observation is not a criticism of any other state bar. Clearly, my limited experience does not justify any sort of extrapolation beyond the individuals with whom I dealt.

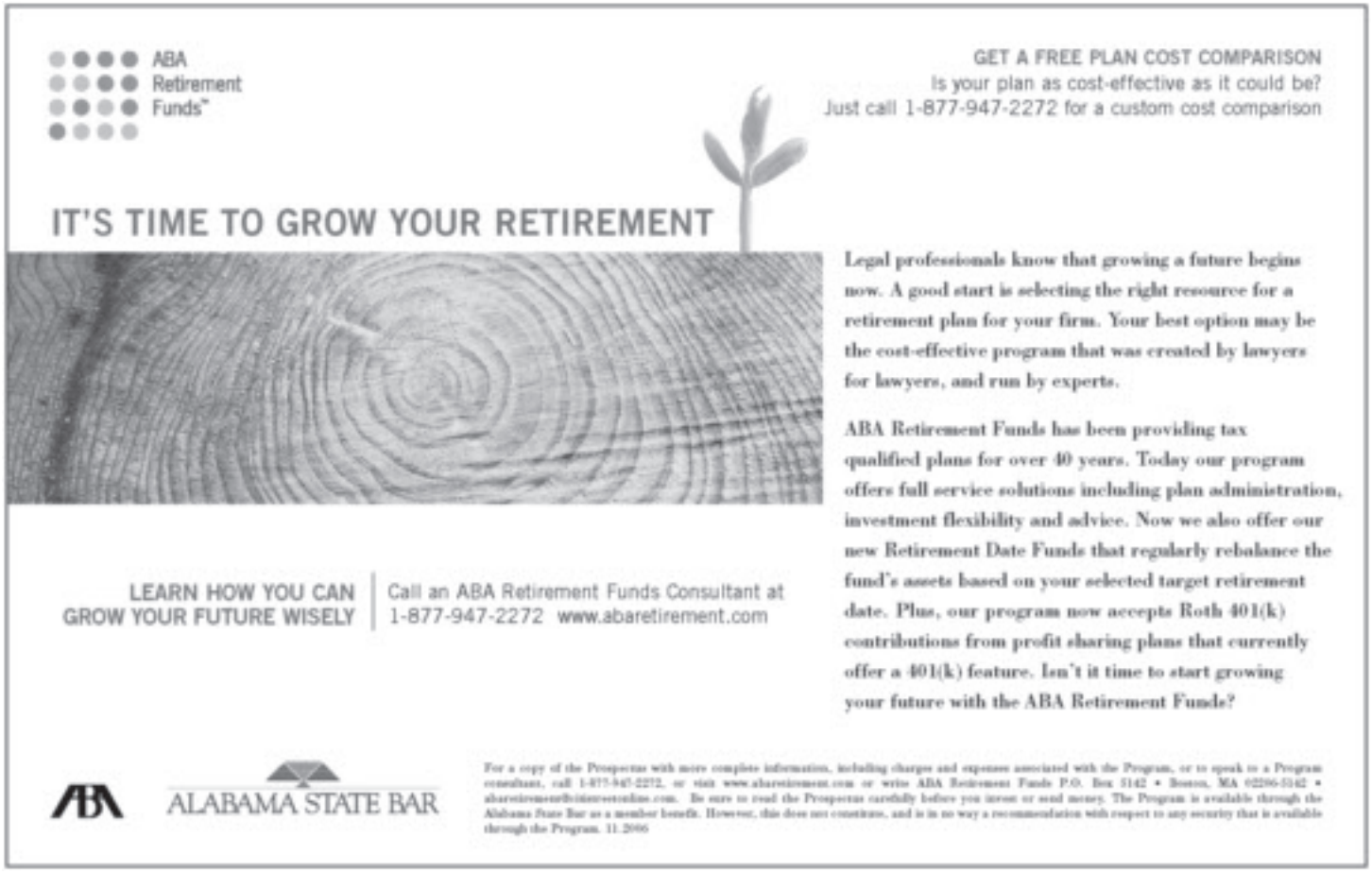
Because of my own experience, I began thinking about the role that communal bonds have on our relationships in and out of the legal profession. For many reasons, our collective rapport with the non-legal community has become more conflicted over the years. The frayed bindings of our relationship with society is evidenced by the recent, and increasing, number of violent attacks against both lawyers and judges

(and/or their families). Of course, I am mindful of the calculated and mostly political attacks against our profession that some have argued is at the root of this wave of violence. Regardless of the actual cause, I am confident that part of the solution lies in a renewed interest in our role in the communities where we serve and live.

The Young Lawyers' Section of the Alabama State Bar provides an excellent opportunity for any person to get more involved in the community. Through the year, we have a large number of service projects where our members really get to make a difference in people's lives. Our service projects are as diverse as our membership. We help many groups in communities all over the state. Some of our activities include mentoring and speaking to students in grades K-12 and visiting and working with children who are physically and mentally challenged. In times of natural disaster, we provide assistance in the cleanup and rebuilding of communities as well as by helping many victims solve their legal problems. Additionally, we are very proud to host minority pre-law conferences in both Montgomery and Birmingham. Our participation in these service projects endear our members both to the communities we serve and to each other. Some of my most fulfilling relationships are those that were developed as a result of my involvement with your YLS.

I once heard former United States Supreme Court Justice Sandra Day O'Connor say, "Personal relationships lie at the heart of the work that lawyers do. Despite our vast technological advances, the human dimension remains constant." Your Young Lawyers' Section strives to honor Justice O'Connor's sentiments and welcomes your participation in our future events. For more information, go to our Web site at *www.alabamayls.org*.

And, don't forget—your Young Lawyers' Section is having its annual CLE in Sandestin May 18-19, 2007. This is always a well-attended event that promises to be lots of fun. Everyone's invited! ■



Reviewed by
Gregory H. Hawley

Business and Commercial Litigation in Federal Courts

Second Edition • Robert L. Haig, editor-in-chief
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A New Bible for Federal Court Litigation

Editor-in-chief Robert Haig and the Litigation Section of the American Bar Association undertook a monumental task when they set out to publish the second edition of *Business and Commercial Litigation in Federal Courts*. The first edition, published in 1998, had been updated through yearly pocket parts, but rapid changes in the relevant case and statutory law resulted in voluminous supplements that caused the first edition to grow unwieldy. Thus, Haig and the Litigation Section marshaled 199 authors, including **N. Lee Cooper** and **Scott S. Brown** of Maynard, Cooper & Gale, to update and expand the second edition. The authors are among the preeminent legal scholars, judges and litigators of our time. For example, the Honorable Shira A. Scheindlin, whose *Zubulake* decisions have commanded the attention of law firms and boardrooms across the country, is one of the co-authors of the "Discovery of Electronic Information" chapter.

Their labor resulted in an eight-volume second edition which totals over 9,000 pages. This edition contains 16 new chapters and 2,500 additional pages that reflect recent changes in the legal profession. The new chapters include electronic discovery issues, litigation technology and litigation management. The 80 chapters from the first edition have been updated and, in many instances, significantly expanded. The second edition also contains an appendix of forms, cases, laws, rules, and jury instructions that will be updated annually. The sample documents will be an invaluable resource for the small firm or solo practitioner who may lack an extensive in-house forms database to consult. The second edition also includes a CD-ROM of all forms, checklists and jury instructions set forth in the appendix, which will prove a true timesaver for busy litigators.

Haig aptly describes the second edition as a "step-by-step practice guide that covers every aspect of a commercial case,

from the assessment that takes place at the inception, through pleadings, discovery, motions, trial, and appeal." 1 West and American Bar Association Section of Litigation, *Business and Commercial Litigation in Federal Courts*, at xv (2nd ed. 2005). The authors and editors were successful in organizing the material in a clear and accessible manner. The chapters move logically through the course of a lawsuit and then address certain topics in depth. The detailed table of contents allows the reader to hone in on an area of interest with ease. A closer examination of the chapter dealing with venue, forum selection and transfer demonstrates the strengths of this second edition.

The venue chapter begins, as is typical throughout the treatise, with an introduction to the topic and an outline for the chapter. The authors highlight the key venue issues that a lawyer should consider before filing suit. With this section's sound guidance, a lawyer should feel assured that she has considered her case from many vantage points before filing suit. The wealth of practical considerations includes a section outlining the differences between diversity and federal question venue statutes; advice on how to determine the residence of a defendant; and direction as to when "special" venue statutes are applicable, such as in admiralty, copyright and patent, and ERISA claims. While the chapter addresses each of these types of claims in cursory fashion, it gives an adequate overview and provides a helpful number of case citations and statutory references to guide more in-depth research.

Forum selection clauses, a common device in modern contracts, are treated thoroughly in the venue chapter. Readers can quickly review the general application of these clauses as well as the difference between the potency of a mandatory "shall" forum selection clause and a permissive "consent but not a limitation" clause. Practitioners gauging whether or not to challenge a forum selection clause will appreciate the authors' identification of scenarios in which these challenges typically arise, along with the appropriate procedural mechanisms to utilize in making such a challenge. The chapter includes a discussion of the substantive grounds on which a lawyer may bring a claim outside of a specified forum–such as an unenforceable contract–and why those claims succeed or fail. This analysis may give the reader further insight into her own case. Lawyers will also find suggestions on drafting enforceable forum selection clauses to control the location of potential litigation. The authors present a thorough treatment of a motion to transfer under 28 U.S.C. § 1404(a), outlining the factors considered, limitations and the governing law after transfer. The chapter concludes with checklists and forms to further aid practitioners in dealing with venue issues.

The second edition of *Business and Commercial Litigation in Federal Courts* strikes a delicate balance that is often lacking in reference materials–this edition manages to contain the necessary breadth of information while simultaneously possessing an exceptional degree of clarity. A practitioner can consult the treatise for questions that may arise throughout the course of litigation, from pre-filing considerations through the intricacies of a trial and appeal. The chapters read with ease and explain complex topics, such as discovery of electronic information, in a straightforward and unpretentious manner, without glossing over subtleties and pitfalls. Litigators in all stages of practice will find this multi-volume set beneficial to their work. No reference library should be without this second edition of *Business and Commercial Litigation in Federal Courts*. ■

Gregory H. Hawley
Gregory H. Hawley is a partner with the Birmingham firm of White Arnold Andrews & Dowd PC. He received his A.B. degree with honors in 1979 from Harvard College and his J.D. in 1983 from Georgetown University Law Center. Hawley currently serves as a member of the Executive Committee of the Birmingham Bar Association, the Birmingham Bar Foundation and the Board of Bar Commissioners of the Alabama State Bar. The author thanks **Katherine R. Brown**, an associate with White Arnold Andrews and Dowd and a graduate of the University of Alabama School of Law, who contributed greatly to this article.

SELECTIONS FROM

"Times Were Tough:

Alabama Law Graduates of the 1930s Tell Their Stories"

AN ORAL HISTORY PROJECT

BY SEBASTIAN WEATHERSBY

"Those of you who fought in World War II, please stand up."

During the end of my first year of law school, in the spring of 2006, I attended the annual banquet of the Farrah Society. During one presentation, the speaker asked World War II veterans to stand and be recognized. When a few stood up–to great applause–I realized that the personal histories of the oldest graduates of the law school would have important historical value and a living record of their achievements should be preserved for future generations. Since so few graduates were still alive, I hastened to act before their stories were lost forever.

I interviewed every surviving alumni, willing and able to talk to me, who had graduated before 1940. The youngest alumnus is currently 90 years old; the oldest, 95. Several alumni still actively practice law. Most are in good health.

After many months of work, I compiled their recordings and transcripts into my oral history project: "Times Were Tough: Alabama Law Graduates of the 1930s Tell Their Stories."

The complete oral history project is approximately 115 pages long and available at the Bounds Law Library, University of Alabama Law School. The following is an abridged version containing selections from each participant's testimony.

Harry Markstein, Jr., '34

Money was so scarce in '33 and '34 because it was the bottom of the Depression. The banks closed in early '34; believe me, every bank in the United States was closed. Times were so hard, a dollar was hard to come by. I had an account in the Tuscaloosa Bank with $3 and some cents, and it broke my heart when that banked closed: I thought I lost my $3. So most extracurricular activities were taken up with just trying to get enough money to pay your tuition to stay in school.

When I was a freshman, as a pledge in a fraternity, most of the upperclassman had Model T Fords. The Model T had three pedals on it instead of gearshifts. Tires would go flat frequently because they weren't puncture proof. We had to wrestle to take the tire off and patch the tube, blow it up, and put it back on. One of the main duties of the pledges was to keep the upperclassmen's tires inflated.

The first time I went to the Alabama Supreme Court was for the Rubber Workers' Union, complaining about something that Goodyear had done. We argued the case in 1939. Our associate counsel was someone named Crampton Harris. He and Hugo Black had been partners–the firm was Harris & Black. Hugo Black was the trial lawyer, good with the jury, but Crampton Harris was the library lawyer, good with the law and books. We lost because the unions were not popular in Alabama in the 1930s, and the supreme court knew it. The unions always had a hard time in court.

My grandfather Max was born in a small town in Germany. He came to this country at seven years of age. His parents didn't have enough money for the whole family to come, so they sent only him. He wound up in Uniontown. Ten years later, in '61, he was 17 and the Civil War came along. He enlisted in the Confederate Army for a two-year hitch but at the end he was still a buck private. He said, "To hell with this," and went home. That was the end of his brief and inglorious Army career.

So that's where the name Markstein came from. I remember him very distinctly, he was bald headed, had watery blue eyes, a big walrus mustache, and this scar across his forehead, which he told us was from a Yankee bullet. Later I found out that was a big lie: He got the scar in a fight in a pool room when somebody hit him over the head with a pool cue.

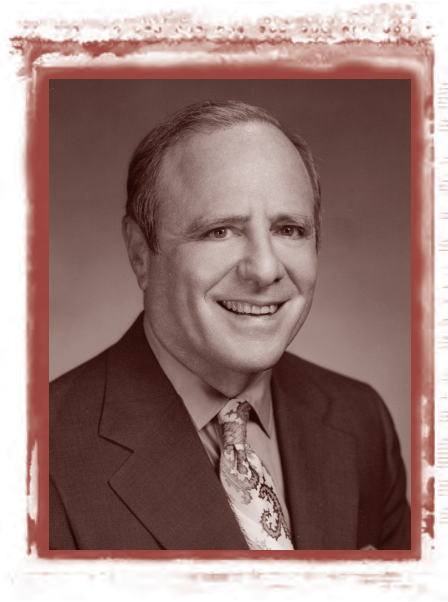
Nick Hare, '35

Dean Farrah was a remarkable man, a real inspiration to all of us. His reputation was excellent all over the South and everywhere else. He taught constitutional law and was an excellent teacher. At that time we were mighty lucky to have such a fine group of professors.

Professor Masters was my favorite. He was not dramatic like Professor McCoy and some of the others, but he was very thorough and he required us to study hard. He taught equity, and his son and I had a lot of contact during and right after the war.

I practiced law in Birmingham until World War II began. In 1943, I went to Officer Candidate School in Miami and got a second lieutenant's rating and was sent to the Army Air Corps. I was assigned to the Air Command School at Wright-Patterson Field in Ohio and was in the Experimental and Development Command until the end of the war. After the war, I went back to practice law. I was elected to the legislature in 1952 and served there for four years.

I later joined MacDonald Gallion who was then attorney general. I was proudest of working with Governor Patterson when we closed down the terrible loan sharks, an evil thing at that time. The biggest and really the most important case I've ever handled was the Tetracycline case. Tetracycline is artificial penicillin and is very valuable to treat all kinds of infections. The case was based on price fixing and became a class action suit against five major drug manufacturers. When we started the action, each pill cost over a dollar; after we won the case, the price dropped to six cents a pill, worldwide.



Bill Loeb, '35

Dean Farrah had the reputation of Lord God Almighty as far as the law school was concerned. We all respected him but knew that he was a stickler. He would say, "The law is a jealous mistress," and brooked no interference from outside sources. He was very restrictive about allowing people to miss class. In January 1934, I told him I was

going to be away from class for about a week. I said, "I'm the basketball manager of a basketball team that's gonna' go up there and win the Southeastern Conference Championship in Atlanta, so I'm gonna' have to miss your class." He said, "Well, you've done pretty good. What you gonna' get out of it?" I said, "I'm gonna' make my letter 'A'." And he said, "That'll be the only 'A' you make this semester." And it was.

We didn't have to take the bar examination. That was the luckiest thing that ever happened to us. When I went to the Supreme Court of the United States, the Attorney General would introduce me to the court, and then the court would ask about my qualifications. I guess they figured if you had successfully come through Dean Farrah's courses, you were fit.

I knew Bear Bryant very well. In fact, while I was there, Bear was on the basketball team, although he never made first string. Oh, he was a delightful fellow. He married one of the prettiest girls in Birmingham, Mary Harmon Black. She was a reigning beauty at that time. He was just a great guy. It wasn't until he got to be such a great coach that I guess he got to the point where people really treated him like he was somebody more than just a just a country boy who could play good football. Bear also was one of the football ends at the same time. The other end was the All-American, Don Hutson. Hutson went on to become one of the outstanding players of the National Football League. They had a quarterback named Howell at that time, and "Howell to Hutson" was the key pass combination. 'Course Bear was also a great defensive end, because in those days they played both offense and defense.

Those were the days when my dad was in the cotton business. He said, "Twenty-cent cotton and 50-cent meat, my God, son, what are we gonna' eat?" 'Cause times were tough. He had bought me an $800 Pontiac convertible with a rumble seat to drive to the University of Alabama. Three days before I was supposed to go, my daddy called me in–this is in 1929, the crash had just come–and he says, "Son, you still wanna' go to the University of Alabama? You gonna' have to go up there in the train." He took the car back from me and got me a ticket as a third-class passenger on the train to Tuscaloosa.

In 1932, I remember there was a tornado. We had just walked out from a movie and I saw it coming but didn't know what it was yet. We ran across the bridge into Northport to find some kind of shelter, but the closest one, the brick shelter, was closed 'cause everyone else was already in there. We were young enough, so we ran the other way, just the two of us. I can remember the noise and the wind. One thing I remember in particular was just beyond that brick building there was a screen around a tennis court. There were some chickens on the hill and the storm blew those chickens right at that screen. I can still remember seeing all the chicken guts—that's the one thing I remember seeing most, besides all those hurt people. Later they set up that old basketball court out there at the university as a temporary hospital. God, that's been so long ago.

I tried the *Thornhill* case involving the anti-picketing statute. In *Thornhill*, even though the union had set up a pathway leading up to the plant, putting machine guns on each side of the entrance, the Court still held that was "peaceful picketing." But I kept telling 'em that wasn't peaceful picketing, because nobody believed the union picketers wouldn't have the guts to shoot. The justices, they'd ask me this question and that question, what I thought about freedom of speech and whether it should be applied to a union. This case became the key to peaceful picketing. I wrote the brief and did most of the argument, which was exciting. The first time I was up there, I had Felix Frankfurter on one end and Hugo Black on the other, with Charles Evan Hughes in the middle, and it felt like I was before Lord God Almighty divided into nine parts. And the problem was they don't give you any time to give your own prepared speech. So you start in, and they immediately interrupt, letting you know they have read the briefs on both sides.

On Sunday, right before Pearl Harbor was attacked, we were at the football game when they announced the news. They called out the names of some generals and admirals who were there to report to duty. Well, I said, shucks, I figured we were headed for it. I was 30 years old then, goodness sakes, I figured I was gonna' get in it too. I didn't want to work anymore so I volunteered for a tank outfit on the next to last day of December, because I had heard that they were going to forgive the taxes of anybody who volunteered for the Army during that year. They're gonna' forgive income taxes, and here I was working for the revenue service. At that time I worked on the excess profits tax of 1942, and I was ready to go into the Army, anything to get rid of that stuff. I ultimately ended up in the Philippines.

Nina Miglionico, '36

Dean Farrah was a wonderful man and he knew all his students. Some of the other professors weren't exactly evenhanded, but Dean Farrah was always fair. We had five girls in our class, the first time in history. I think we were the 21st to 25th girls to go to law school. All five graduated in 1936, the first time in history. Dean Farrah always gave the girls one of the hardest lessons to discuss. He gave me the *Dred Scott* decision. He would question you for 20 minutes and wring you out but he was always very nice about it.

I played the piano for the university orchestra at the time. Dean Farrah called me in one day when I been there about six months. He asked, "Law school does not keep you busy?" And I said, "Oh yes, we stay busy." But he said, "No, you've got time to play for the orchestra." So I took the hint and resigned because he thought law school demanded your full time.

Early on I was greeted with the name of the case. For example, if the divorce case was *Smith v. Smith*, when I entered the courtroom the judge would say, "Come in, Miss Smith." I would answer, "I'm not Mrs. Smith, I'm Nina Miglionico, the lawyer in the case." The judge would apologize, but naturally he didn't know who you were the first time you appeared in court. People even walked into the courtroom to see how I was doing. If the community learned that a woman was the lawyer, all kinds of people gathered on the courthouse steps to see me come in to find out if I looked like other women.

Prejudice comes in many forms. When I was running for office, some people told me, "I won't vote for you because you're a Catholic. The Pope will tell you what to do." The Pope was going to call and tell me whether to pave 20th Street or not? It's ridiculous, but that's what people thought. When I was in school, at nine years old, one teacher said, "You sure come to school clean for an Italian." Prejudice. In high school, a teacher said, "Why do you keep telling people you're Italian? Why don't you tell them you're French?" I said, "'Cause I'm not French!"

Bull Connor was quite a character. He closed the parks so that black and white children couldn't play with each other when integration came. So the bar association worked to go from the commission form of government to a city-mayor council, and by the following April, in 1963, we had our first election. Sixty-seven people ran for only nine places. On the first election I came in third. The KKK had not paid any attention to me because I was one of 67 others. When I came in third, they were absolutely shocked; they couldn't believe it. There were 18 people in the runoff, 'cause nobody could get a majority out of 67. I was only ninth in the runoff. If I had gotten 2,000 fewer votes, I never would have held office.

McDonald Gallion, '37

We were in very bad times: students had to drop out right and left. I don't think anyone in modern days can appreciate the hardships that went on. That was when Albert Farrah was dean of the law school. All the students loved him, but he was no foolishness as far the classroom was concerned. They loved him although they were scared as hell of him.

In 1936, I sailed to Europe as a utility seaman. Later we went to "Gay Paree." We didn't have much money, but we strutted right down through the Arch of Triumph and all, just seeing the sights. There was one thing on my mind all along, the *Folies Bergère*. This was before World War II broke out and they had a great big picture of Hitler on the screen. This clown skidded out on the stage, pointing to Hitler's big picture that covered the whole back wall. And he rattled off in French, but I couldn't follow it. All of a sudden, the clown wheeled around turning his back to the audience. Then came out a stream of water, like he was urinatin' on Hitler's picture. He kept his back to you completely, but you knew what he was imitating and the audience went wild.

Old Dean Farrah was mean in the classroom, but I learned that he was a very fair gentleman at home. When I resumed my studies I could tell right away he was proud that in spite of the Depression, one of his students was determined to come back and finish. I told him the situation and he gave me the job of librarian of the law school. I forget what the compensation was, I think only the tuition. I also did some part-time work, which I didn't tell him about, at a filling station. I knew that wouldn't go over well with him as all he wanted was law, law, law. Of course, times were so bad you had to do what you could. He'd scare you with his manner, no foolishness, but he had a big heart underneath all that.

In undergrad, I became president of the ATO Chapter. We would bring our dates there, mostly just nice girls. But every now and then, we had a girl that wandered upstairs–not for me, let me make that clear. Our house mother found out the girl was upstairs, and some of the guys were terrified because she was at the foot of the stairs yelling, "If she doesn't come down, I'm comin' up!" So they tied some blankets around the gal's waist, and in the rain, lowered her down to the ground. That was dangerous as hell, the wind and rain were blowing hard and you would hear her body bang against the house. Bomp! The house mother down below looked bewildered. The girl wasn't caught, but if they had, because she was a student, I'm sure they would have kicked the girl out.

Did I see any combat come my way? I saw a purple heart come my way! The bloodiest combat was at Saipan, where I was wounded in my right leg. Before we landed at Saipan, we landed at Roi-Namur and my former buddy was killed there. He got the Congressional Medal of Honor. He rushed a pillbox, killed 12 Japs, but they finally killed him. His name was Jack Power, a graduate of Boston College and a football player on their team, a well-built individual but with the nicest tenor voice you ever heard. You think of a star halfback on a football team as being sort of rough and tough, maybe chewing tobacco and spitting—not neat as a pin with a beautiful voice. I'd get him to sing for me. You never would have picked him to be a star football player. Anyhow, I remember this song he would sing to me all the time, "Rosie the Riveter." I'd get him to sing that song over and over, and he was good at it.

I'm sold on the Marines, I think they're the greatest outfit around. Some say I'm prejudiced, I say I am, 'cause I have a right to be. I was wounded at Saipan, I wasn't any big hot shot, but I did get a citation for leading patrols against the enemy. But that was about it, and always to this day I'm proud of the Marines. I guess I'm one of the few still alive from my outfit.

We were not given pistols, but when we were getting ready to go overseas, I bought a pistol from a policeman. Of course, I had my M1 Garand rifle that the Marines gave

me, but I still wanted an extra pistol. In the landing at Saipan the Japanese came out with a barrage. On the beach I was blown up into the air but I landed harmlessly in the sand and wasn't wounded. I didn't realize it at the time but my pistol flew out of its holster and I never got to fire it or use it.

I'll never forget, after the war, a Marine called me and said they were having a big meeting for veterans down at the hotel, and a Navy Commander was the principal speaker. During the luncheon, this Navy Commander got up to speak and Navy ensigns were all around us. He talked about Navy this and Navy that. My friend asked him, "What about the Marines?" The Naval officer said, "Marines? Oh, I'm not here to talk about them. They played only a small part." I looked over at my friend, and he looked over at me. We both got up, turned around, walked right out in the officer's face, and left 'em all staring. But that was then; I don't know about any Marines from my unit who are still living.

Oh yes, I knew Bear Bryant well. Our birthdays were two weeks apart. Back then, though, I didn't like him a damn bit. I was down there early one year when they had a gambling game for nickels and dimes called 21, a blackjack deal. In one of those games I got in, I think there were five of us, I started winning and winning. Well, it got down to me, another guy and Bear Bryant. We kept on going 'till it got late at night, and finally I got the other boy out of the game. I was havin' some luck. We got down to Bear's last nickel, and I won that too. Thank heaven. It must've been 1:30, way past midnight. As I got up to leave, he said, "Sit down." Of course, when Bear Bryant tells you to sit down, you sit down. He reached in his pocket and got out three pennies. And though the stakes had been low, nobody dreamed of betting below a nickel. Finally I took his few pennies.

When I left I thought he was the biggest son-of-a-bitch I have ever dealt with. Later on, though, we became great friends and our association became very close, Bear Bryant and I. There'll never be another like him.

He was a great supporter of mine when I was running for office. There's something I never did tell him. In politics, I had Bear Bryant's "Support me" star. But do you remember a football coach named Shug Jordan? He was Auburn's coach. I met him up at the lake, at a party. We got to be real friendly. Shug was one of my big supporters–I never did tell him that Bear Bryant was too, and I sure didn't tell Bear Bryant that Shug Jordan was also. . . .

I told the secretary I wanted to see the attorney general. When she asked if I had an appointment, I said, "Hell, I'm just out of the Marines. I haven't had time for any appointment." She said, "Just a moment." I told him I'd like to get a job. So we walked to another office and there was the governor, Chauncey Sparks. I told the governor my story and they immediately had my picture taken. He said, "Sign this." I did and he said, "You are now an Assistant Attorney General. When can you come to work?" I said, "Anytime!" And I reported Monday morning, still in uniform. . . .

My friendly governor, Gordon Persons, said, "Mac, I need you here. This Phenix City case is an overwhelming situation, all hell is goin' to break loose." He didn't trust some of the men who were working on the case in Phenix City. I said, "When can I go?" He said, "Just as quick as you can get down there. Just a moment though. I want you to have this." A messenger brought in a box and inside was a snub nosed .38 caliber pistol. I wondered what I was getting into. Every now and then, when I was alone, I couldn't help but look over at it, and wonder what the hell I was getting myself into. I was just out of the Marines and already had my *** blown up there. . . .

We went two or three miles down the country road. Finally we pulled over in front of a house with all the lights on. Inside, I saw a man in the center surrounded by henchmen. I recognized immediately the man in the center. It was Hoyt Shepherd–the kingpin of crime in Phenix City, the Al Capone of the business. . . .

I had a good time of it. I participated in the trials afterwards, of course. Albert Patterson had been murdered and his son, John Patterson, took his place. Nobody opposed him; I certainly wasn't going to oppose him. He was a good young lawyer. I had met him, and we got along fine. He made me chief assistant attorney general after his election in 1954. I later became attorney general myself in 1958. I've had an interesting career, you might say, though I wouldn't want to go through it again.

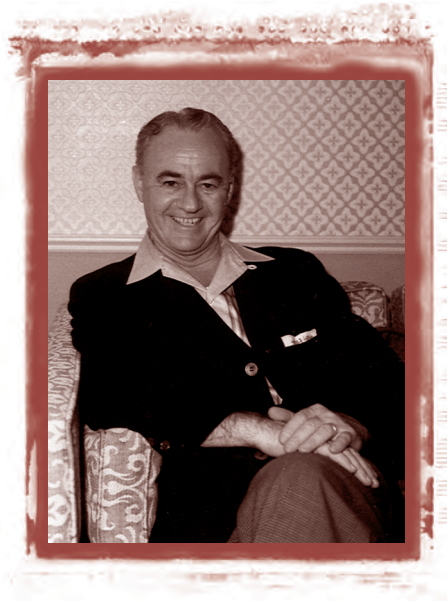
Dick Riley, '37

Back in 1929 my uncle Frank Spain told me, "Son, I think you oughta' go to work. I'll pay you 15 cents an hour." I was glad to do it. After a month Mr. Coleman, the senior partner, gave me a raise to 20 cents an hour. And 'till this day, the only other firm I worked for was the service in World War II.

I went for two years to Birmingham Southern during the very bottom of the Depression. In 1932, Mr. Spain bought his daughter an Austin Roadster, a two-seated red roadster with a canvas top. But his 15-year-old daughter wouldn't drive it, saying it wasn't a real automobile. So Mr. Spain gave me the vehicle and I was big man on campus in that red sporting car. I'll show you a good picture of me at Birmingham Southern; some girls are draped on that car. So I had a good time and I joined the SAE fraternity.

Dean Farrah taught constitutional law. I remember that he would smoke his pipe in class. He was getting kind of old then–you know how you look on people in their 70s as a little old when you are in your 20s–so I looked on Dean Farrah as pretty old.

You couldn't get real close to some of these professors–except Ed Livingston who taught us practice court. He practiced in Tuscaloosa and later was on the state supreme court. He was down to earth. We'd sit out there on the law school steps and he was just one of the fellas. He would sit and tell stories with you. I even made the mistake of being overly informal the first time I went into the supreme court when he was on it.



Robert Hall, '37

Bear Bryant was a fraternity brother of mine in Sigma Nu and I knew him quite well. He was going with a good-lookin' gal named Mary Harmon Black. I also knew Don Hutson quite well. He was president of the Cotillion Club, a nice guy and a real good student and in Phi Beta Kappa. He was a wonderful football player. He was on one end, and Bear Bryant was on the other. Dixie Howell was the quarterback and passed to them both but especially "Howell to Hutson."

I was having lunch with some friends at a restaurant and the proprietor came over and said, "They just bombed Pearl Harbor!" We all said, "Where the hell is Pearl Harbor?" We found out soon enough. I volunteered for the Marine Corps, but had trouble getting in 'cause I was so small; I only weighed 117 pounds at five-feet-four. I had to get special dispensation from the Commandant of the Marine Corps. But I ended up as a lieutenant colonel in the 3rd Battalion, 2nd Marines, 2nd Marine Division. I was second in command of the Battalion, about a thousand troops. I was in the Pacific in four battles: Tarawa, Saipan, Tinian and Okinawa.

At Tarawa I was wounded and have a purple heart to show for it. That's where our boats hung up on coral and the Japanese were shooting at us as we were wading in the water coming ashore. I got wounded by a mortar shell, not badly, but I picked up a bunch of shrapnel in my back.

When the Japanese surrendered and the war was over, I was thrilled and elated. I was at Camp Pendleton in California, preparing to invade Japan. We were thrilled to death that we didn't have to go.

Alto Jackson, '39

Dean Farrah's reputation was very fair, very fine. He built the law school from scratch, you might say. He had a lot of quips about his philosophy and study of the law. He would remind his class, "Boys, I want you to know, the study of law is a jealous mistress, the most jealous mistress I know about." I know now what he meant when he said it. I didn't then. I had to find out for myself.

He had a masterful touch of the law. One day we did the case *Plessy v. Ferguson.* Well, he told us in *Plessy*, "Boys"–that's what he called us in class–"Boys, I just want you to know what the court held because this will be reversed. I don't know when, but probably beyond my lifetime." He was exactly right.

Frank Potts, '39

My grandfather was born right in the place where he died. My dad built a house there on the land of his uncle, Monroe Potts. Monroe was a prisoner in the Civil War, although I never knew him. His house was within a block from where I was born and reared. My grandfather used to tell me stories about the Yankees comin' through when he was about five years old, and how they were throwing him food. See they marched from Shiloh, 'cross the river down at Waterloo, right up this road, right by where my grandfather lived. General Sherman, who marched to Atlanta, landed at Waterloo and stayed at Doctor Sullivan's–that place burned down about two years ago–for a day or two. They marched across our land, up the road, right in front of our house. Of course my granddaddy, on my dad's side, remembered it when he was only about five or six years old. I think he was born in '59, and this march occurred in '64.

Professor Geffs was a good teacher; he was very able. I even remember his little moustache. He taught pleading and trusts. Professor McCoy was a brilliant man, concise in his lectures and got right to the point. He was a great teacher. Professor Masters was a "trusts" man. I knew him well. Professor Hepburn was also a great one. Professor Ed Livingston, I knew him real well, and had respect for him 'cause he was a practicing attorney down in Tuscaloosa. He left about the time I graduated, and went to the supreme court.

I knew only one Confederate veteran, George Sego; one of his daughters married my uncle. They lived on my Grandfather Potts' farm, and I would see him there. He had sort of long hair and a long grey beard. I used to admire talking to him about the Civil War. He was the only one that I knew who was actually a veteran.

George Wallace and I were good friends. There was a little old grocery store, by the football practice and baseball field, where we'd meet. He told the men who ran it that he was gonna' be governor some day. I thought he just had big ideas. I liked him,

and thought he was a good person, but thought he was aiming awful high.

I had started my practice back here and was married to my present wife. We were walking back from the Methodist church down to our apartment. Then somebody told us that they bombed Pearl Harbor and killed some men, sunk some ships and so forth. I remember exactly where we were just before we got back to our apartment. I thought, well, we got to get together to make 'em pay for it, there wasn't any question about running and hiding. Everybody immediately became very determined to support the country. I felt that way too. I was married in August so I just waited for them to draft me, and about nine months later I went into the Air Corps.

I am proud of a lot of cases I handled, and been fortunate to have had very good luck. I never made these multi-million dollar fees. But I'm proud that in the first jury trial that I had, I represented a black boy who had been run over by a drunken white man. That was back before there were blacks on the juries, so I had to try that case before an all-white jury. That was in 1939. In those days we got fair damages for what had been done, and I thought that was a case that showed that people in my county weren't highly prejudiced against blacks. Just three years ago, I represented this same exact man in a sad case. Two of his daughters had tried to take property from his other two daughters, although he'd been successful and treated them all equally well. We had to go to court but fortunately were successful. I was proud that he, through those years, has remained my client, not just 'cause of black and white.

I've been happy with those cases that turned out well, and I've tried not to grieve too much about those that didn't. ■

Frank Potts (right) and longtime friend and client

Sebastian Weathersby

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BMW v. Gore: Ten Years Later

BY ROBERT L. MCFARLAND

This term, the United States Supreme Court re-enters the punitive damages fray in yet another case involving a headline-grabbing punitive verdict. In *Philip Morris USA v. Williams*, an Oregon jury awarded $821,485 in compensatory damages and $79,500,000 in punitive damages. The punitive award resulted from the cigarette manufacturer's fraudulent conduct (misrepresenting and concealing the dangers of Marlboros). The Court granted certiorari to determine whether the punitive award exceeds the constitutional limit it recognized ten years ago in *BMW of North America v. Gore.*[1]

Many are hoping that the Court will use this opportunity to clarify its punitive damages jurisprudence. If oral arguments in the case are any indication, we should not hold our breath. In his questioning of *Philip Morris's* counsel, Justice Breyer worried that the Court was "in a kind of bog of mixtures of constitutional law, unclear Oregon state law, not certain exactly what was meant by whom in the context of the trial, et cetera."[2] Although they remained silent, Justices Ginsberg, Scalia and Thomas, who have consistently referred to the Court's punitive damages jurisprudence as unwarranted and unworkable, had every right to say "we told you so."

This article wades through the punitive damages bog, starting with a summary of the constitutional test announced in *Gore*.

...“grossly excessive” punitive awards violate the Due Process Clause of the Fourteenth Amendment.

The *Gore* Guideposts

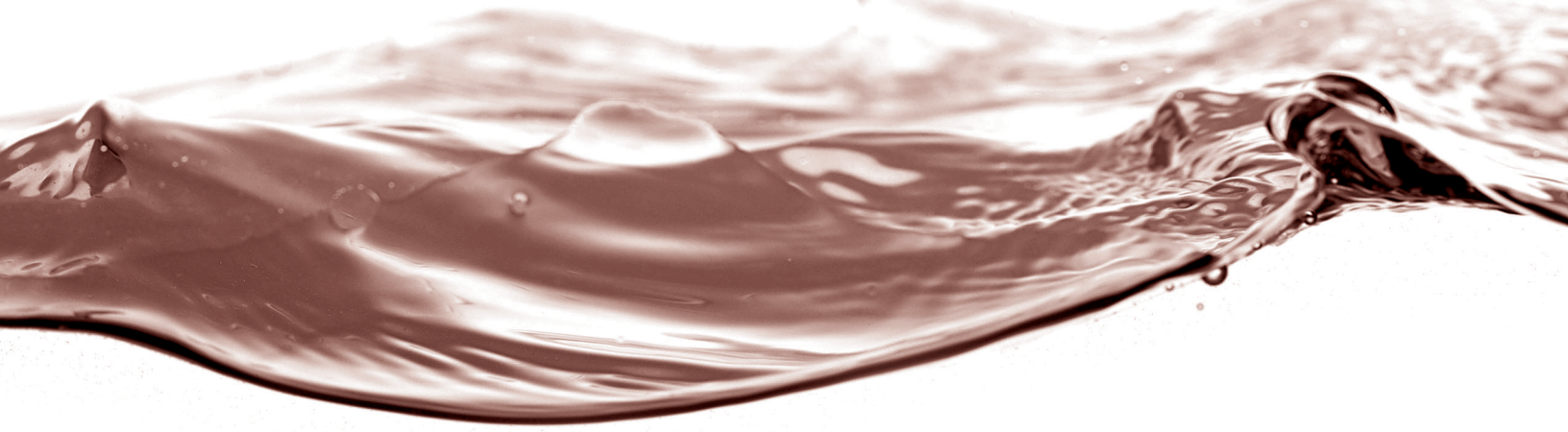
Punitive damages are deeply rooted in common law and for more than 100 years the Supreme Court refused to interfere with state determinations regarding the availability and amount of punitive awards. A little over ten years ago, the Court departed from this historic deference. In *BMW of America v. Gore*, the Court held that “grossly excessive” punitive awards violate the Due Process Clause of the Fourteenth Amendment.[3] Now, every punitive award is subject to a constitutional “federal excessiveness inquiry.” The federal remittitur review of punitive awards begins with identification of a state’s legitimate interests. Two state interests approved by the Court are punishment of misconduct and deterrence of future misconduct. Punitive awards are grossly excessive when they are not reasonably related to these legitimate state interests.

Gore held that due process regulates “the severity of the penalty that a State may impose.” The Court announced three now familiar guideposts to determine when punitive awards are too big: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio between the actual harm and the punitive award; and (3) a comparison of civil or criminal penalties for comparable misconduct.[4] Courts must apply these guideposts to determine whether the punitive award exceeds the due process limit.

Criticism of *Gore*

The *Gore* guideposts, much like the infamous three-pronged *Lemon* test[5], possess the deceptive appearance of utility. It is easy to memorize the three factors, but difficult to know what they mean. In his dissent to *Gore*, Justice Scalia, joined by Justice Thomas, noted “[o]f course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the ‘guideposts’ mark a road to nowhere; they provide no real guidance at all.” [6] In her dissent, Justice Ginsberg, joined by Chief Justice Rehnquist, also criticized the ambiguity of the guideposts: “[The majority] only has a vague concept of substantive due process, a ‘raised eyebrow’ test, as its ultimate guide.”[7]

Gore has generated many difficult questions. The most obvious question relates to the second guidepost: What ratio between actual harm and the punitive award is acceptable? The Court has consistently refused to adopt a specific ratio. Instead, courts must evaluate punitive awards by applying a vague reasonableness standard. “In most cases,” the majority explained, “the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely ‘raise a suspicious judicial eyebrow.’” [8] Perhaps recognizing that this judicial eyebrow



test lacked clarity, the Court in *State Farm v. Campbell* suggested, but did not hold, that punitive damages should normally fall within a single-digit ratio to the actual harm.[9]

Even if the proper ratio were ascertainable, litigants and reviewing state courts face an even more difficult question: To what harm should the punitive damages be compared? The *Gore* majority initially explains that the punitive award must bear reasonable "ratio to the actual harm inflicted on the plaintiff."[10] This suggests a simple comparison of the compensatory damages to the punitive award. Of course it is not that simple. Just two years prior to its decision in *Gore*, the Court approved a punitive award of $10,000,000 where the compensatory damages were only $19,000; a ratio of 521 to 1.[11] In light of that case, the *Gore* majority explained that it is appropriate to consider "harm likely to result from the defendant's conduct as well as the harm that actually has occurred."[12]

Comparing proven compensatory damages to punitive damages is obviously much easier than comparing what future harm might occur to punitive damages. Juries make no factual findings regarding future harm. Without such findings, how is a reviewing court to determine the scope of likely harm?

And what about harms unrelated to plaintiff's compensatory award? Are state courts prohibited from considering the effects of defendant's wrongful conduct on citizens not before the court in setting the amount of the punitive award? *Gore* explains that a punitive award should reflect "the enormity of [the] offense."[13] At first, many assumed that states could continue to assess the enormity of defendant's offense by considering the effect of defendant's conduct on others within the state's borders. It now appears that this assumption was incorrect.

Gore Revised?

Despite *Gore's* explicit approval of consideration of "likely" harm, the Court took a significant step back in *State Farm v. Campbell*.[14] There the Court struck down a punitive award because the jury "awarded punitive damages to punish and deter conduct that bore no relation to the [Plaintiffs'] harm. . . . Due Process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant in the context of reprehensibility analysis."[15] This reasoning narrows the most important variable in the Court's ratio analysis–the scope of relevant harm. After *Gore* it appeared that states were permitted to consider harm to others in the state when examining the propriety of the punitive award. *Campbell* narrows *Gore* by requiring courts to compare the punitive award "to the amount of harm to the plaintiff and to the general damages recovered."[16]

Applying *Campbell* literally, courts are limited to comparison of the punitive award to the plaintiff's general damages. If the punitive award is more than nine times the damages then the court should remit unless "a particularly egregious act has resulted in only a small amount of economic damages."[17]

While such analysis simplifies the math (and results in lower punitive awards) it complicated the relationship between the Supreme Court and the states by ignoring the legitimate purposes of punitive awards. The Court has repeatedly acknowledged that states are legitimately interested in punishing wrongful conduct. Why must a state ignore the impact of defendant's malicious conduct on citizens beyond the particular plaintiff in the case? An individual plaintiff's compensatory damages are not

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based on the scope of the defendant's wrongful conduct. Instead, damages are based on the plaintiff's rightful position. How can a state effectively punish a defendant for the defendant's wrong if the state is constrained to the plaintiff's proof of actual damages? Is the defendant's financial position irrelevant because his wealth is unrelated to plaintiff's compensatory damages? Can a state effectively deter wrongful conduct without considering defendant's wealth? These questions remain unanswered.

Conclusion

After *Campbell* one thing is clear–the Court has significantly restricted state power to punish and deter malicious conduct. The severity of this restriction may be revealed in the Court's decision in *Philip Morris*. One of the issues before the Court is whether the Oregon courts erred by permitting the jury to consider harm to others. The Oregon Supreme Court determined that a 97-to-1 ratio of punitive damages to general damages in that case was warranted, in part, because the defendant "used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians."[18] If the Supreme Court strikes down the punitive award and instructs Oregon courts to turn a blind eye to statewide scope of the cigarette manufacturer's wrongs we should all raise our eyebrows. Such a holding removes important powers from the hands of state courts and marks a significant and dangerous shift in the traditional federal respect for state common law. What's next? "Federal excessiveness" review of state compensatory awards? ■

Endnotes

1. 517 U.S. 559 (1996).
2. Transcript of Oral Argument at 19, *Morris*, *available at* 2006 WL 3085628 *19.
3. 517 U.S. at 568.
4. *See id.* at 574-85.
5. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).
6. *Id.* at 605 (Scalia, J., dissenting).
7. *Id.* at 613 (Ginsberg, J., dissenting).
8. 517 U.S. at 583.
9. 538 U.S. 408, 425 (2003).
10. 517 U.S. at 580.
11. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).
12. 517 U.S. at 582 (citation omitted).
13. *Id.* at 575.
14. 538 U.S. 408.
15. 538 U.S. at 422.
16. *Id.* at 426.
17. *Id.* at 425.
18. W*illiams v. Philip Morris Inc.*, 92 P.2d 126, 143 (Or. 2004).

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The Alabama Law Foundation Awards 2007 IOLTA Grants and Katrina Disaster Funds

The Alabama Law Foundation is committed to increasing access to quality legal assistance for Alabama citizens who cannot afford an attorney. As Alabama's major grant-maker to programs that provide legal aid to the poor, the Alabama Law Foundation annually awards IOLTA grants for three purposes: to provide legal services to disadvantaged citizens, to improve the administration of justice and to support law-related education for the public.

IOLTA (Interest On Lawyer's Trust Accounts) is the financial foundation for the Alabama Law Foundation. The IOLTA program allows attorneys to convert their commingled client trust accounts to interest-bearing accounts. This interest then is disbursed to the Alabama Law Foundation, and a grants committee distributes the funds to law-related charities across Alabama. The IOLTA grants for 2007 total $364,690.

Programs that provide legal services for the poor collectively received IOLTA grants totaling $190,000. **Legal Services Alabama** provides legal aid to economically disadvantaged citizens through ten offices with staff attorneys. An $80,000 grant was awarded for general operating purposes. The **Alabama State Bar Volunteer Lawyers Program** refers cases directly to lawyers in 64 counties and coordinates over 1,000 volunteers. The ASB VLP received a $25,000 IOLTA grant. The **Mobile Bar Association Volunteer Lawyers Program** refers cases to 612 attorneys who provide free legal service to low-income clients in Mobile. A $25,000 grant was awarded for operating expenses. The **Birmingham Volunteer Lawyers Program** refers cases to 641 attorneys in the Birmingham area. The Birmingham VLP received a $60,000 IOLTA grant for operating expenses.

Projects in the category of "Administration of Justice" received IOLTA grants totaling $164,000. The **Equal Justice Initiative of Alabama** assists attorneys appointed to capital cases in the post-conviction stage and supplies some representation to indigent defendants. The Equal Justice Initiative of Alabama received a $50,000 IOLTA grant for general operating funds. The **Alabama Prison Project** helps attorneys research background information of defendants about to be sentenced in capital cases in order to provide critical information to the jury and the judge. The $25,000 IOLTA grant provides the salary for the one full-time mitigation staff employee. The Alabama **Appleseed Center for Law & Justice** identifies and seeks to find solutions to the root causes of injustice and inequality in Alabama. Their $20,000 IOLTA grant is designated for operating expenses. **Aid to Inmate Mothers** provides services that help strengthen the bond between female inmates in Alabama prisons and their children. The $10,000 IOLTA grant partially funds a study of current programs for women and girls at risk of becoming involved in the criminal justice system. **Lauderdale County Family Court** received a $25,000 IOLTA grant to supplement a parenting program that seeks to resolve conflicts regarding visitation and other issues before they escalate and require court involvement.

The **Office of the District Attorney, 19th Circuit,** received a $2,190 IOLTA grant for a trial management software package. The Alabama CASA Network supports CASA (Court-Appointed Special Advocates) by training volunteers to serve as advocates for abused and neglected children in court. The $15,000 IOLTA grant helps hire a second employee. The CASA of **Florence/Lauderdale County** received a $7,500 IOLTA grant to fund a staff position to coordinate volunteers. The **Cumberland Community Mediation Center** trains volunteers to work as community mediators to help settle disputes and avoid going to court. The IOLTA grant of $10,000 is for general program support.

The **Alabama Center for Law & Civic Education** received an IOLTA grant for $10,000 to help pay for their "Play by the Rules" program that educates high school students about the law, their responsibilities and problem-solving skills. An additional grant came this year from the Katrina Disaster Fund. Most of the money collected after Hurricane Katrina was given to the Red Cross and the Salvation Army to meet immediate needs. However, realizing that Katrina's victims would require legal services in the aftermath of the damage, the Alabama Law Foundation kept $25,000 to grant for future needs. This year, the **Alabama Appleseed Center for Law & Justice** received a $15,000 grant to help low-income hurricane victims get clear title to their homes so they can get assistance money to rebuild.

Alabama's IOLTA program was established in 1987 and awarded its first grants in 1989. Since that time, the Alabama Law Foundation has awarded $12.8 million in grants. Through the IOLTA program, the Alabama Law Foundation builds a stronger, more democratic society by making access to justice for all citizens in Alabama a reality.

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April in Talladega

Some great legal minds are coming together in Talladega April 13 and 14, not in the courtroom, but in the streets of the city's Silk Stocking District to host the "April in Talladega" pilgrimage.

Attorneys **Mark** and **Jeanne Dowdle Rasco** are co-chairs of this year's pilgrimage which features a weekend family event of historic home tours, cooking demonstrations, special art and artifact exhibits, a vintage children's section, cemetery tours, and musical entertainment. The tour draws visitors from across the state and raises funds for community projects.

Mark Rasco is a graduate of Auburn University and the University of Alabama School of Law where he served on the Student Bar Association as a school senator. He is a partner in the firm of Gaines & Rasco PC. He is president of the Graham Elementary School PTO and an active member of the Talladega County Farmers Federation, and has served as president of the Talladega County Cattleman's Association and the Talladega Kiwanis Club.

Jeanne Rasco is also a graduate of Auburn University and the University of Alabama School of Law, where she was elected president of the Student Bar Association and received the Dean Thomas Christopher award for her contributions to the law center and legal education. Jeanne now has her own private law practice. She currently serves as president of the Talladega County Bar Association and is vice chair of the Talladega City Schools Foundation. A Rotarian and Girl Scout troop leader, Jeanne has also served as president of the Junior Welfare League and United Way of North Talladega County. Mark and Jeanne are members of First Presbyterian Church and have two children.

Other lawyers joining the April in Talladega lineup are homeowners **Clint Thomas** and **Jim Malone.**

The Victorian-style Boswell-Devries-Thomas Home owned by Clint and his wife Shellye was built in 1890 and is listed on the National Register of Historic

At the McEldery-Malone home are ASB members Jim Malone, Clint Thomas, Jeanne Rasco and Mark Rasco.

Places. Clint, Shellye and their two children are involved in historic preservation and have spent many hours working on their South Street East home. Clint's office is located in Calera and he is also a professor teaching contract law at the Birmingham School of Law. He is a graduate of Auburn University and the Cumberland School of Law at Samford University and earned an LL.M. in taxation from the University of Alabama School of Law. He is the author of a legal textbook and a novel and enjoys collecting antiques and big-game hunting and is a member of Safari Club International.

Restoration of the 7,000-square-foot Thomas Home has been a great adventure with 22 rooms and 11 fireplaces designed by architect Frank Lockwood. Legend has it that the original owner, Dr. Harry Boswell, constructed and flew an airplane just days before the Wright Brothers' successful airplane flight, but he failed to receive any publicity for his aviation attempt.

Attorney Jim Malone was born and raised in Talladega and now practices in Lineville. He is a graduate of Auburn University and Emory University and has served as a municipal judge for the cities of Lineville and Ashland for 14 years. He is the father of two college-age children and very active in the community. He has been a member of the Talladega Rotary Club for 15 years and is active in district activities, including serving as chair of the Youth Exchange program.

A member of First United Methodist Church, Jim enjoys outdoor activities on the farm, travel, fishing, yard work, and "handiwork" around the home originally purchased by his grandparents in 1949.The Victorian-style McEldery-Malone home was built in 1905.

Many new attractions will offer something for everyone as "Talladega Entertains" during its annual April in Talladega pilgrimage April 13 and 14. Headlining the weekend are cooking classes by renowned chef Frank Stitt, noted author and cook Betty Sims and outdoor cooking experts from Bad Byron's and the Alabama Cattlemen's Association. Unique art exhibits and "talking tents" featuring a variety of topics from history to architecture to Indian artifacts will bring added flavor to the tour of historic homes along South Street East. Also new to this year's pilgrimage is a special vintage children's section including storytelling and a Keller Kids area to creatively learn about the everyday life of persons who are deaf and blind.

The Heritage Hall Museum will pay special tribute to portrait artist, the late Sarah Whitson. Whitson studied under several renowned artists and taught in Birmingham at the Little House on Linden and in Talladega for more than 45 years. The exhibit will feature several works recently discovered in her studio. An extensive Indian artifact collection by Walter Farr, president of the Hillsboro Archeological Society, will also be featured at Heritage Hall.

An antique car show, a sundown tour of Oak Hill Cemetery, English Tea at the Gables and a Taste of Talladega luncheon catered by Café Royale at the newly restored North Hill Manor round out a spring day of activities. In the evening, pilgrimage guests can enjoy a musical comedy, "Three Redneck Tenors," at Talladega's historic Ritz Theater. Tickets for the Friday or Saturday evening performances may be purchased through the Ritz Theater.

Special events such as cooking demonstrations, teas, luncheons and cemetery tours require an additional ticket with the purchase of general admission. General admission tickets are good for the two days of the tour. More information and tickets for April in Talladega are now available online through *www.talladegachamber.com* or by contacting the Talladega Chamber of Commerce, P. O. Drawer A, Talladega 35161. ■

The Boswell-Devries-Thomas home

The McEldery-Malone home


HOLY BIBLE

Selecting Alabama's Appellate Judges– A Better Way

BY DANIEL J. MEADOR

A major challenge for the people of Alabama today is to improve the means of selecting the judges of our appellate courts. Those three courts at the pinnacle of the judicial pyramid– supreme court, court of civil appeals, court of criminal appeals–play a crucial role in the state's legal order, one little understood by the public but well known to most lawyers. Thus, lawyers have a unique responsibility to educate and influence public opinion concerning those courts' judges. To its credit, the Alabama State Bar has risen to this challenge by supporting a change in the procedure for filling those appellate judgeships. Lawyers throughout the state should join the state bar in an all-out effort to secure acceptance of this proposal by the legislature and the citizens. Here I undertake to explain why.

It is useful at the outset to remind ourselves of the obvious, that the state's supreme court justices are the ultimate voice of the law in Alabama, interpreting statutes and constitutional provisions and managing the application of common law precedents under ever-changing circumstances. The two intermediate appellate courts perform a similar function in a significant number of cases. The 19 judges on those three courts are housed in one of the finest judicial buildings in the nation. The judicial function in preserving government under law is impressively symbolized in the courtroom in that building. In that distinctive, high-domed, circular space, the proceedings stand in a centuries-long tradition originating in Westminster Hall, transplanted to North American shores and descended to us. The system presupposes–and depends upon–high-minded judges of unblemished character, learned in the law, impartial and independent of external interests.

From sad experiences elsewhere in the world where such judiciaries do not exist, we have learned that judges of that type are an essential feature of civilized society. In Alabama, as elsewhere, the extent to which the judges on the appellate courts embody those characteristics depends in considerable part on the means through which they come to the bench. We need to match the creative architecture of that magnificent structure in which they sit with a creative effort to ensure as much as possible that the appellate judges in the future do possess those ideal qualities.

Among the 50 states, appellate judges are put in office in four basic ways: executive appointment with legislative confirmation; election by the legislature; popular election by the voters; nomination by a non-partisan commission with appointment by the governor. Each of these is in the hands of human beings and thus is imperfect. Considering all the imperfections and the pluses and minuses of each, there can be debate as to which is best. But experience over time has shown which is the worst. Sad to say, it is the system currently prevailing in Alabama–popular election by the voters.

A major reason why this system is bad is money–contributions of vast amounts of money in support of candidates for election to these appellate judgeships, an evil not present in any of the other selection systems. Money began to be a serious problem in the 1990s. In 1994, candidates for four Alabama Supreme Court seats spent more than $6.5 million. In 1996, the victor in a supreme court race raised $2.68 million; the defeated candidate raised $1.76 million. In 1998, seven candidates for three seats spent more than $7 million. The year 2000 set a national record of more than $13 million in races for five seats. Indeed, by the early 2000s, Alabama had set the national record for money spent by candidates in state supreme court campaigns since 1993: a total of more than $41 million, even beating out Texas. This is truly remarkable when one considers that Alabama is far from among the wealthiest states. The pattern continued in the 2006 general election where candidates for four contested supreme court seats raised at least $10.5 million, and this does not include several million dollars spent in the earlier primary elections.[1]

It is especially troubling that a significant amount of money spent in these campaigns comes from out of state. What legitimate interest can anyone outside of Alabama have in determining who sits on its supreme court?

The evil in this money is the threat to, and undermining of, the most fundamental feature of the judiciary–the impartiality and unbiased character of the judges, both in reality and in public perception. The money contributed to these campaigns comes from numerous sources, including individual lawyers and citizens, law firms and organizations of various sorts. Special interest groups are especially heavy contributors. Most of the contributors give to a particular candidate because they believe that candidate, if elected, will decide certain issues and types of cases the way the contributors want them decided. In other words, most contributors typically do not want an independent, objective judge. One might debate whether they always get what they want, but whatever the reality, the damaging perception is undeniable.

The money fueling this selection system gives the unavoidable impression that seats on Alabama's appellate courts are for sale. In Ohio, where spending on statewide judicial elections is also high, at least one of its supreme court justices has candidly acknowledged the unseemly situation. According to a press report, he said, "I have never felt more like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."

Imagine yourself a litigant or lawyer appearing before judges on the supreme court or one of the intermediate courts to whose election your opponents, either parties or lawyers or interests backing them, contributed money and you did not. Although recusal by the judge is in order, experience suggests that there is no clear and enforceable recusal practice in place. Even if such a judge is able to overcome natural human tendencies, and, in fact, hold the scales even, you are likely to be skeptical, especially if you lose the case. And the public is unlikely to believe that a judge who has received contributions from one side of a case and not from the other will be impartial. A basic notion in our legal order is that it is not enough that justice be done; it must also be seen to be done. As Justice Frankfurter once put it, justice must satisfy the appearance of justice. The role that money plays in putting judges on Alabama's appellate courts is inconsistent with that basic concept. This alone is sufficient reason for abandoning the current system of selecting those judges, but there are additional reasons.

Another reason is the damage that campaigns inflict on public respect for the judiciary and on the victorious candidates. It is, of course, well known that campaigns for judgeships began to grow nastier in the 1990s, with opponents attacking each other's character in destructive ways. No matter who is elected, citizens generally will perceive that they now have a judge on one of the highest courts

whose character is seriously blemished, ethics doubted or personal morality drawn in question. Even if all the accusations are in fact untrue, the damage has been done, and public respect for the court diminished. The judge sits under a taint that cannot be entirely erased, a gross unfairness to a truly capable judge of integrity.

The Canons of Judicial Ethics attempt to limit the worst aspects of such abuses as well as other aspects of campaigning, but their main effect in Alabama seems to have been to generate a welter of dysfunctional litigation, further degrading the judiciary in the public eye. Judicial Campaign Oversight committees appear to have had some, but limited, effect in lifting the tone of judicial elections. A suggestion often made to improve the process is to make elections non-partisan, removing party identification from the candidates, but that change would not eliminate the evil of money and demeaning campaign tactics. All of these measures merely tinker with the problem; they treat symptoms but not the disease, which is the popular election of judges.

Campaigning for these judgeships has also led or tempted candidates, one way or the other, to disclose their views on issues that are likely to come before their court and which they must decide, if elected. There is nothing more fundamental in our legal order than the notion that a court must decide in unbiased fashion each case on the law and the evidence as they then appear. Previously revealed positions by a judge cannot be squared with the concept of an objective, neutral judiciary.

Still another reason why political elections for these statewide judgeships are bad is the voters' inability, as a practical matter, to know and evaluate the qualifications of the candidates. Good appellate judges must possess a unique combination of abilities. Like all judges they should, of course, be intelligent, honest, of good character and have a solid grounding in the law. In addition, however, they need a special analytical ability–an ability to synthesize a body of case law and statutory authority, to sort out complicated factual situations and to reason their way to a sound conclusion, one that fits comfortably within the existing legal corpus. They need an excellent writing ability, a facility in the English language that enables them to put all of that into clearly written opinions providing guidance to lower courts and practicing lawyers. The work requires an above-average intellectual interest in the law. And then there is the requisite of wisdom–the product of experience playing on an intelligent mind–and good common-sense judgment. Because appellate judging is teamwork, the judges need the kind of temperament and personality that enables them to work collegially, to accommodate their views with those of their fellow judges in order to reach a maximum degree of consensus.

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It is obvious that the public is unlikely to be aware of these desirable qualifications, much less be able to determine whether a candidate meets them. Indeed, surveys, as well as our own experiences, tell us that a large percentage of the electorate does not even recognize the names of most judicial candidates. Voters are likely to act on the basis of one-line sloganeering, negative TV ads or party affiliation. It is a sad commentary on our system to realize that it is possible for almost any lawyer, regardless of qualifications, to become a supreme court justice if he can afford the filing fee, raise a lot of money and advertise vigorously on TV, especially with emotional pitches and negative attacks on opponents.

Finally, a significant disadvantage of the elective system is that it causes us to lose the services of some highly qualified lawyers. There are Alabama lawyers who would make superb appellate judges but who are reluctant–perhaps unwilling–to undergo the process it takes to get there. There is the time element–days and weeks on the road campaigning and raising money, time that is difficult for a busy lawyer to take away from practice. Moreover, some able lawyers would find such activity unattractive or even unethical and not suited to their personality. Then, perhaps worst of all, there is the high risk of character assassination. Experience shows that regard for truth or relevance is not always the top concern in races for the appellate bench. So, anyone entering the contest, no matter how honorable, becomes fair game for unpredictable, demeaning charges. In short, the political road to the bench is off-putting to many able lawyers who are well qualified, a great loss to the state judiciary.

Realization of these defects in judicial elections led to the formation of the American Judicature Society in the early 20th century. Under AJS aegis, the plan was developed for selecting state judges by gubernatorial appointment from a list of nominees screened on their merits and certified to be well-qualified by a non-partisan nominating commission. Over the years, support for that plan has grown across the nation. Today, 24 states initially choose their supreme court justices in this manner. (Only seven other states use the Alabama system of partisan elections.) [2]

This nominating commission-gubernatorial appointment plan, endorsed by the Alabama State Bar, would entirely eliminate money and character assassination from the process of selecting appellate judges. It would provide assurance that whomever the governor picked from the list would have been thoroughly examined and determined by the commission to possess qualifications along the lines of those described above. Able lawyers could be sought out for judgeships and become appellate judges without the grueling, time-consuming and often degrading process of running for the position.

It is sometimes asked why judges should not be elected by the voters like all other public officials. The answer is that judges are different from all other public officials. Candidates for the governorship and the legislature properly run on platforms, announce positions on controversial issues and make pledges as to how they will act if elected. They are not expected to be objective or neutral. Voters properly support or oppose those candidates based on the positions they expect them to take. It goes without saying–or should–that such advance commitments by a prospect for judicial office are at odds with the principles of independence, objectivity, open-mindedness and unbiased judgment that a judge is expected to embody.

Opponents of merit selection plans sometimes argue to citizens that, "They're trying to take away your vote." This is an emotional appeal that avoids analysis of the proposal. The claim is untrue under the plan supported by the ASB. Under that plan, at the end of a six-year term, each judge, in order to continue in office, would be required to go before the voters, who could vote him or her out of office. Thus, judges are ultimately accountable to the people. In that election the voters would have the benefit of something very important they do not now have, an evaluation of the judge's judicial performance, thus enabling voters to make the kind of informed decision they cannot now make. The evaluation would be done by a balanced, non-partisan Judicial Evaluation Commission established by law, which would review all aspects of the judge's work and release a report to the public. In the 24 states selecting their supreme court justices through nominating commissions there are no complaints from people that their "votes have been taken away," and there has been no substantial move to return to a politically elective system.

It is also said that politics cannot be taken out of judicial selection. To an extent this is so. In a democracy we would not want politics, in the best sense of that term, to be altogether eliminated. But the most baleful aspects of partisan politics can be drastically reduced by a commission nominating system. That system combines in optimum fashion non-partisan merits

screening with the political judgment of the elected governor. Under the bar-supported plan, the commission's membership is required to be fairly balanced and widely representative in every respect, functioning under known procedures. No "back room" here. The governor will have a choice from the multiple names submitted by the commission, but the governor cannot go wrong, because every individual on the list will have been vetted by the Commission and found to meet the requisites for an appellate judgeship. The system will be in the hands of human beings, like any system, and thus may not be perfect. But the test is not perfection. The procedure need only be better than what we have.

It is significant that in England, mother country of our common law system, judicial independence was established (by the Act of Settlement of 1701) on the heels of the emergence of modern-day representative government. The courts and the legislature have coexisted ever since, demonstrating that a non-elected, independent judiciary is consistent with popularly elected representatives exercising political functions. Both are essential in a constitutional democracy, but judicial elections tend to merge the two, undermining the rule of law.

Likewise, it is significant that in the other democratic countries of the common-law world, descended jurisprudentially, like ourselves, from England, judges are not and never have been elected by the people. Indeed, nowhere in the world outside the United States are judges popularly elected. Not that we need follow what others do, but it does cause one to wonder why, if the Alabama system of electing judges is good, no other country has ever adopted it. It is also noteworthy that Alabama's type of elective system has been viewed as both undesirable and detrimental to the rule of law in studies by major national, non-partisan organizations and by numerous independent analysts.

Improving the method of selecting Alabama's appellate judges is not–and certainly should not be–a partisan matter. Over the last decade, this move has been supported by both Republicans and Democrats, as it is now, and consistently supported by the Alabama State Bar.[3] Some may seek to make it a partisan issue, out of narrow, short-run interests or out of insufficient understanding of the proper role of appellate judges. Those who act on partisan grounds do a disservice to the state, its judiciary and its citizens. The lawyers of Alabama have an unusual opportunity to demonstrate true statesmanship–to rise above party attachment and self-interest and to consider in an objective way the long-range public good. The time has come to put in place a method of ensuring that judges come to the appellate benches free of the taint of money and of questions about their character and qualifications. In short, we need a system that will guarantee that in the decades to come Alabama will have appellate judges to match the grandeur of that courtroom in which they sit. ■

Endnotes

1. Information on the financing of judicial elections is compiled by two national, non-partisan organizations and is available on the Web at *www.justiceatstake.org* and *www.followthemoney.org*. See also *www.ajs.org*. The 2006 figures are not final at this writing; they are likely to be higher.
2. Information about state judicial selection methods is collected by the American Judicature Society and can be found at *www.ajs.org*. See Also Ryan L. Souders, "A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States," 25 *The Review of Litigation* 529 (2006).
3. See, e.g., Warren B. Lightfoot, "President's Page," 58 *Ala. Law.* 194 (1997); Wade Baxley, "Merit Selection of Judges–A Concept Whose Time Has Come," 60 *Ala. Law.* 366 (1999); William N. Clark, "President's Page," 64 *Ala. Law.* 280,281 (2003); Bobby Segall, "The Independence of Our Judiciary," 66 *Ala. Law.* 326 (2005). Retired Alabama Supreme Court Justice Gorman Houston, Jr., first elected to office as a Democrat and then as a Republican, is chairing a statewide, bi-partisan committee to enlist support for this proposal.

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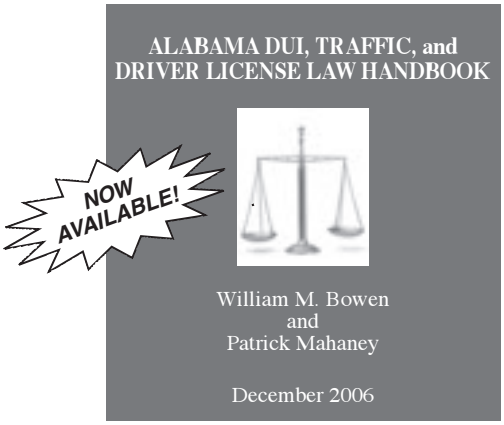

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Daniel J. Meador
Daniel J. Meador is a member of the Alabama State Bar and a former dean of the University of Alabama School of Law. He is the author of numerous articles and books on appellate courts, has served as a consultant to appellate courts in nine states, and has directed a graduate program for appellate judges at the University of Virginia Law School, where he has served on the faculty for many years. This article is an edited version of his talk to the Birmingham Kiwanis Club on February 7, 2006.

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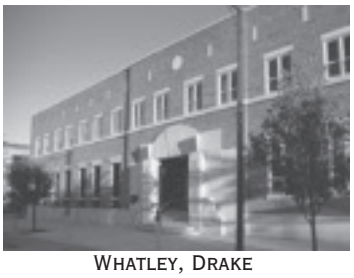

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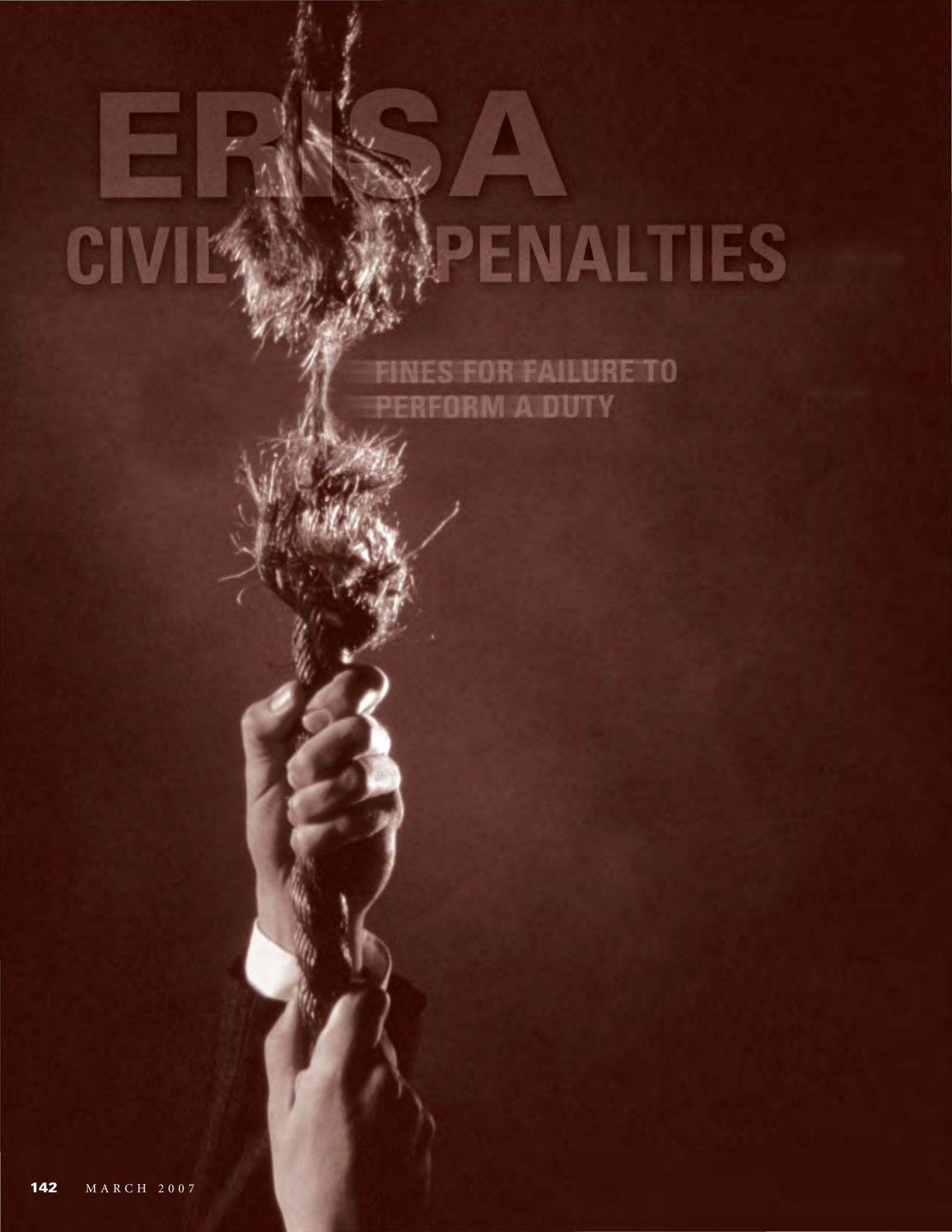
ERISA
CIVIL PENALTIES
FINES FOR FAILURE TO
PERFORM A DUTY

Unraveling ERISA Civil Penalties

BY DAVID P. MARTIN AND JOHN DAVID COLLINS

A potential client came to an attorney's office because his claim for disability benefits had been denied by his employer's group disability insurer. During their initial consultation, the attorney learned that the employee also lost his job as well as his company-provided health insurance. The employee had repeatedly asked his employer for a copy of the long-term disability benefit booklet and for health insurance information, but to no avail.

The attorney took the case and filed in state court what he thought was a clear-cut "bad faith" lawsuit against the insurance company that made the decision to deny disability benefits. He soon learned that ERISA preempted the state law claims and provided a basis for removal to federal court. Next, the case was dismissed for failure to exhaust administrative remedies. A case that was sure to result in significant mental anguish and punitive damages was over before discovery commenced. Unfortunately, the attorney not only failed to exhaust his client's administrative remedies, but also overlooked two potential civil penalty claims that could have been asserted in federal court.

This particular employer had been careless with other employee requests for information and notices as well. The company had been operating under the belief that there was little chance of ever being liable for significant damages since the benefits it offered were "fully insured" and governed by ERISA. The employer let the insurance companies "do all the work," but it was listed as the plan administrator in all plans. The employer laid off 30 employees without providing them with mandated COBRA notices under ERISA § 502(c)(1)(A).

When defense counsel became involved, she calculated that after one year the company's maximum penalty exposure was $1.2 million dollars. Moreover, the company failed to provide its employees with a copy of its most recent disability summary plan description. Twenty-four terminated employees had asked for it without a response for 300 days, thereby exposing the company to an additional $700,000 in potential penalties. This employer was soon to learn that employees do not forfeit all remedies in exchange for receiving the right to participate in an employer-sponsored benefit plan. ERISA's civil enforcement scheme has a variety of remedies, but one form of relief–civil penalties–can potentially result in significant liability for a plan administrator.

I. Why Do We Have ERISA?

The Employee Retirement Income Security Act ("ERISA") was passed in 1974 "to protect … the interests of participants in employee benefit plans … by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefits plans, and by providing for appropriate remedies … and ready access to the Federal courts." ERISA § 2(b). Congress was motivated by a desire to protect against private sector mismanagement of employee benefit plans which placed participants' potential benefits at risk. A key component to the enforcement of these protections is ERISA's civil penalty provision. The circumstances requiring penalties and extent of those penalties, however, are the subject of debate between counsel for plaintiffs and counsel for defendants. To keep a balanced perspective, this article was co-written by two attorneys practicing regularly in this area but on opposite sides of the fence.

II. What Are the Civil Penalties under ERISA?

The civil penalties are fines for failure to perform a duty. There are two civil penalty provisions in § 502 (c)(1). The first part, subparagraph (A), allows for penalties for notice violations of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA). These notices pertain to health insurance benefits. The employee mentioned above had a COBRA notice claim when he was not told of his right to continue health insurance under COBRA. The other notice violations relate to the transfer of excess pension assets and certain pension funding notices. These pension notices are required so that employees know more about the financial condition of their pension fund.

Subparagraph (B) is much broader than (A). It obligates any administrator regardless of the type of plan, (i.e. disability, health, pension, life etc.) to furnish information required by Title I. This title, which concerns Protection of Employee Rights, spans ERISA §§ 2 through 734. While that is much to review, in order to ascertain all of the duties which could give rise to penalties, the task is simplified by the fact that all of the duties are found in Subtitle B which is divided up into seven topical parts.

These seven topics focus on the duties for different aspects of plan management. Part 1 covers general reporting and disclosure duties, and as a result, it provides a frequent basis for civil penalties. Part 2 deals with participation and vesting in pension plans. Part 3 applies to plan funding, and Part 4 regulates fiduciary responsibilities. Part 5 sets out the administration and enforcement provision. Parts 6 and 7 relate to COBRA provisions and concern group health plans.

The penalties under § 502(c)(1)(A), which arise from failure to provide COBRA and pension notices, are distinct from the penalties under §502(c)(1)(B). A penalty arises under (A) merely for failure to provide a required notice, such as the right to continue health insurance. A violation is calculated based on each participant who did not receive the required notice in the 11th Circuit, even though there may be beneficiaries entitled to separate notice. *See, Wright v. Hanna Steel*, 270 F.3d 1336 (11th Cir. 2001). For example, if an employee, his wife and his children are all entitled to a COBRA notice which was not given, only one violation will be found.

Under subparagraph (B), however, there must be a *request* for information and the administrator must fail to provide the information within 30 days before a penalty claim arises. To avoid penalties the administrator must mail all responsive materials requested to the last known address of the participant or beneficiary. If a penalty claim arises, courts have discretion to hold the administrator personally liable to the participant or beneficiary in an amount up to $110 a day, from the date of the failure or the refusal.[1] Additionally, the court may order such other relief as it deems proper.

Each request for information under subparagraph (B) involving a participant or beneficiary can give rise to a separate penalty award. In other words, repeated requests can result in repeated violations. If a beneficiary requested information six times in one year, and never received a response, there will be six potential penalty claims. Additionally, both a participant and a beneficiary are entitled to a separate response to their separate requests for information. In fact, if several beneficiaries in a life insurance plan individually ask for information about the same benefit, each request may result in a penalty claim.

Penalties should be taken very seriously. Many courts have awarded the maximum penalty or substantial penalties.[2] Penalties have been awarded when there was no harm caused, other than the anguish of not knowing why information was not provided or the expense of hiring an attorney.[3] Courts are given broad discretion under § 502(c) to fashion other relief as well. An appeal of a penalty award will only be reviewed for an abuse of discretion.

III. Who Are the Parties in a Penalties Case?

The penalty provision, ERISA §502(c), only allows a participant or beneficiary to bring an ERISA penalty claim. However, both terms are defined very broadly under ERISA § 3(7). A participant includes an employee, a former employee or a former member of an employer organization *who is or who may become eligible* to receive a benefit. Under ERISA § 3(8), a beneficiary is a person designated by a participant or who is so designated by the terms of the employee benefit plan, and *who is entitled or who may become entitled to benefits*.

ERISA § 502(c)(1) permits the imposition of penalties on "any administrator." The term "plan administrator" is broadly defined under ERISA § 3(16) to include not only the person designated in the plan, but also the plan sponsor if an administrator is not designated in the instrument. The plan sponsor is the employer, the committee or the trustees, depending on who established the plan. An employer who believes the insurance company is handling all matters may be surprised to learn that by default it is actually the administrator. The case law has also found employers to be a co-administrator or *de facto* administrator if the entity is exercising control over the plan. *See, Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d. 819 (11th Cir. 2001).

IV. What Specific Violations Can Trigger Penalties?

Section 502(c) does not identify the information that must be disclosed to avoid a penalty, but only makes a general reference to "information … required by this title …." On its face, the statute reflects that basically any violation of a disclosure duty under Title I can give rise to imposition of a penalty. While not all violations of duties have been the subject of a penalty claim and published opinion, at least theoretically under subparagraph (B) *any* disclosure requirement followed by a request for information could potentially trigger application of the penalty provisions.

For example, COBRA notices are required automatically and if not provided may be the basis of penalties under subparagraph (A). However, if a participant also *requests* a COBRA notice and is refused, under the language of §502(c), theoretically a second penalty could be assessed for that violation under subparagraph (B). After all, "information … required" was requested and not provided. Nothing in § 502(c) requires the request to be in writing or in any specific form. However, some disclosure duties specifically provide that a written request is necessary before there is an obligation to act. See, ERISA § 104(b)(4). For this article, only penalty claims addressed by case law are discussed, although the potential for others should be kept in mind.

A. Summary Plan Description (SPD)

Under ERISA § 101 the SPD must be furnished to all participants (and to beneficiaries if they are receiving benefits.) Section 102 lists the requirements for the contents of this document. A participant is to receive the summary plan description within 90 days of being covered by the plan according to § 104(b)(1) (or if a beneficiary, within 90 days after first receiving benefits). Under § 104(b)(4), a *written request* from a participant or beneficiary requires the provision of the latest SPD along with various other plan documents. According to § 107, the SPD and certain other records must be retained by the plan administrator for a minimum of six years.

Frequently, penalty cases involving an SPD request revolve around whether the SPD request was made in writing. However, courts have found that if the SPD was supposed to be automatically provided but was not, an *oral request* for the SPD may give rise to penalties. *See,* e.g. *Crotty v. Cook*, 121 F. 3d 541, 547 (9th Cir. 1997); *Colarusso v. Transcapital Fiscal Systems, Inc.*, 227 F. Supp. 2d 243, 258 (D.J. N.J. 2002); *Brooks v. Metrica, Inc.,* 1 F. Supp 2d 559, 565-66 (E.D.Va. 1998).

B. Annual Report or Summary Annual Report (Form 5500)

Another document required to be produced is the annual report described in § 103 and § 104(b)(3) and (4). The Department of Labor (DOL) prescribes the content in 29 C.F.R. § 2520.104b-10(d) which is satisfied by filing a Form 5500. Form 5500 reports information regarding the plans' financial condition, coverage, source of funding and any changes made to the plan during the year. It also specifies the name of the plan administrator. In *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp 981 (N.D. Ala. 1986) the court found a breach of fiduciary duty for failing to provide Form 5500 to employees, which would have made them aware of the plan's financial shape. After several well-publicized disasters with retirement plans, employers may receive requests for such information more frequently.

C. Other Plan Documents

Section § 104(b)(4) also requires, upon written request, disclosure of any terminal report, the bargaining agreement, trust agreement, contract, or "other instruments under which the plan is established or operated." Although the broad "other instruments" language has understandably caused confusion and allowed for divergent opinions, the DOL clarified this requirement in Advisory Opinion 96-14A (July 31, 1996) wherein it stated that the phrase should be interpreted to encompass any internal procedures, rules, guidelines, protocol, etc. (i.e. "instruments under which the plan is established or operated").[4] The DOL instructed that procedure manuals or other materials outlining procedures to be applied in determining whether a participant or beneficiary is entitled to benefits should be provided.

It should be noted, however, that some courts have rejected the analysis of DOL Advisory Opinion 96-14A, refusing to impose statutory penalties for failure to provide these plan documents. See, *Brucks v. Coca Cola*, 391 F. Supp. 2d 1193 (N.D. Ga. 2005) and *Feree v. LINA*, 2006 U.S. Dist. Lexis 48239 (N.D. Ga. July 17, 2006). However, in the same district, in *Hamal-Desai v. Fortis Ben. Ins., Co.* 370 F. Supp.2d 1283, 1311-15 (N.D. Ga. 2004) *affirmed,* No. 05-11869 (11th Cir. Feb. 2, 2006), penalties were allowed for documents not produced as required by 29 C.F.R. § 2560.503-1 (g) (2000).

D. Pension Information

ERISA § 105 pertains to employee pension benefit plans and requires, upon written request of a participant or beneficiary, the total amount of benefits accrued and the date benefits are non-forfeitable. This type of violation is illustrated in *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990) and again in *Sandlin v. Ironworkers*, 716 F. Supp. 571(N.D. Ala. 1988), *affirmed*, 884 F. 2d. 585 (11th Cir. 1989). Additionally, an automatic notice to each participant is required each plan year for certain pension plans.

E. COBRA Notice

Under ERISA § 601 group health plans involving 20 or more employees must provide notices to participants and their spouses. Section 606 sets out the notice requirements for group health plans. Upon commencement of coverage, notice of COBRA rights is to be provided to both the employee and the spouse. When a qualifying event described in § 603 occurs (such as termination), a COBRA notice is required which reflects the right to continue coverage under § 602. The case of *Wright v. Hanna Steel*, 270 F.3d 1336 (11th Cir. 2001) provides a good example of penalties which were assessed in the amount of $75 per day for COBRA notice violations.

F. Pension Notices

When a pension plan transfers excess assets to a health benefits account, both participants and beneficiaries are entitled to a

notice 60 days *before* the transfer under §101(e)(1). Certain notice requirements must also be met for multi-employer benefit plans relating to the fund's financial condition. *See*, §101(f).

G. Disclosures under Section 503

ERISA § 503 requires employee benefit plans to afford participants a full and fair review after a claim denial. The regulations promulgated by the DOL further define a "full and fair review" by requiring every plan to establish a procedure by which claimants can appeal the denial of their claims. This includes procedures that allow access to "all documents, records and other information relevant to the claimant's claim for benefits."[5] In other words, 29 C.F.R. § 2560.503-1 requires plan administrators to provide all documents relied upon in making their benefits determination, documents that were submitted, considered or generated in a course of making that determination, and any documents that demonstrate compliance with the administrative process and safeguards.

The Eleventh Circuit Court of Appeals has not provided a published opinion yet on whether § 502(c)'s requirement to produce "information … required by this subchapter" is broad enough to encompass 29 C.F.R. § 2560.503-1, although it recently affirmed a district court decision on this issue in *Hamall-Desai v. Fortis Benefits Insurance Company,* 370 F. Supp. 2d 1283, 1311-1315 (N.D. Ga. 2004), *affirmed* No.05-11869 (11th Cir. Feb 6, 2006). However, another district court found differently before this affirmance. *See, Brucks v. The Coca-Cola Co.*, 391 F.Supp.2d 1193 (N.D. Ga. 2005) (holding that § 502(c)'s penalty for failure to produce "information … required by this subchapter" only "embraces an administrator's failure or refusal to provide the documents identified in § 104.)

V. Plaintiff's Perspective on Penalties

ERISA's purpose is to protect participants and beneficiaries and require complete disclosure of certain information. The Secretary of Labor is empowered to further that protection. Whenever this protection is at stake, penalties should be awarded. The statute should be construed as written, and the DOL regulations should also be given effect as long as they are consistent with the statute. With this point of view in mind, there are three common issues that arise in a penalty claim. They are: 1) What "other documents" must be produced; 2) Who is liable for the breach; and 3) Is proof of harm required?

A. What "Other Documents?"

According to the DOL Advisory Opinion noted above and the DOL regulation at 29 C.F.R. § 2560.503-1, documents in the claim file along with claim protocol guidelines and other documents affecting the decision must be produced. These documents help a claimant learn the truth of the matter *before* suit is filed. Claimants are in an inferior bargaining position compared to insurance companies, pension plans or human resource departments that handle plan matters daily. Given the purpose of protection, full disclosure is in order.

An administrator may argue that the DOL language is vague and since claimants are not required to use precise words to obtain documents, how is an administrator to know what is required? It is enough if the administrator *should have known* what documents are responsive to the request. *See, Curry* and *Anderson v. Flexel*, 47 F. 3d 243 (7th Cir. 1995). This is an appropriate and reasonable standard used in many areas of the law, and it has worked well for many years.

Usually there is little debate over what was requested, and more often than not, an administrator refusing to cooperate is holding back documents that could be used against it. If a fiduciary is truly acting as a fiduciary, where is the harm of erring on the side of disclosing documents? However, if the administrator is acting as an adversary, obviously it does not want its decision to be defeated. Its decision should then receive no deference from the courts when it acts as an adversary.

Under *Black and Decker v. Nord*, 538 U.S. 822 (2003) the DOL's position is due to be followed. Some administrators clapped loudly at the Supreme Court's finding that the "treating physician rule," which gave more weight to the treating physicians' opinion in disability determinations, was not applicable under ERISA because the DOL had not issued a regulation on this. However, when the DOL has spoken on what documents must be disclosed, some administrators nonetheless argue that the DOL regulations and opinions should not be followed. A measure of fairness and consistency is in order or the purpose of ERISA is thwarted.

Since courts often look to the "facts known" by the administrator at the time the decision was made in ERISA cases[6], it is important for the requestor to know *all* the facts and not just those the administrator desires to disclose. Unless there is full disclosure as noted in *Hamall-Desai,* the requestor is never allowed the opportunity to correct false information before suit is filed.

B. Who Is Liable?

ERISA § 502(c)(1) allows for penalties against "any administrator." That is broader than "plan administrator." If an insurance company is actually handling a claim as a "claims administrator," then it should be liable for breaching duties. Claimants should not be placed in the posture of guessing who is responsible for responding to a request for information. For example, in a disability claim, many insurance companies routinely produce part of the claim file but refuse to produce the SPD. Instead, the requestor is directed to contact the employer. Of course, this slows down the receipt of vital information, often when a claimant has limited time to assert a claim or request a review. Sometimes the request surprises an employer as well, which thought the insurance company handled these duties. Any administrator should be liable rather than just the default plan administrator.

C. No Proof of Harm is Required

Some administrators argue that a participant must show damages or prejudice before penalties should be awarded. If the statute is construed as written, and deference is given to the DOL, then this argument is wrong. In effect it seeks judicial amendment of the statute. According to *Daughtrey v. Honeywell Inc.*, 3 F.3d 1488 (11th Cir. 1993), it is error for the court to refuse to impose penalties because no prejudice was shown. The Eleventh Circuit ruled previously in the above cited *Curry* decision that prejudice was not a prerequisite to penalties. "Since a plan participant would rarely be able to demonstrate that the failure to provide a timely statement of

benefits in itself prejudiced the participant, the intent of Congress in enacting section 1132(c) would be frustrated by such a requirement." *Id.* at 1494. This is a fair and sensible view.

To require prejudice is tantamount to arguing that a speeding ticket should not be issued, because there was no accident. We all know that the majority of speeding tickets are issued to those who hurt no one. It is hoped that the risk of getting a ticket will cause most drivers to obey traffic laws and create a safer environment than would otherwise exist. Penalties are a deterrent that create a fairer environment for an intransigent administrator to comply with requests of required information.

VI. Defendant's Perspective on Penalties

A. Scope of Participant's Request Should Be Reasonable

Section 502(c) of ERISA unquestionably provides an important mechanism through which participants and beneficiaries can ensure that their employee benefit plan is being properly administered and learn exactly where they stand with respect to the plan. However, it is important to recognize that, as a penalty statute, § 502(c) should be construed narrowly. Indeed, the Eleventh Circuit has recognized that the penalty provision is designed to punish the fiduciary, not to enable the participant-beneficiary to recover some damages.[7] Consistent with the statute's purpose and objectives, courts evaluating a penalty claim should pay close attention to the scope of the participant's request and the reasonableness of the administrator's efforts to comply with the statute.

With respect to the scope of the participant's request, the majority and better reasoned case law authority recognizes that Section § 502(c) should be construed in a way that does not encompass categories of documents described in either DOL regulations or Advisory Opinions. In other words, a participant should not be permitted to advance an overly broad interpretation of § 502(c)'s "other instruments" catch-all provision in an effort to obtain "all" documents "relevant" to the plan and/or her claim for benefits.[8] This is perhaps best illustrated by the Northern District of Georgia's very recent decision in *Ferree v. Life Insurance Company of North America, et al.*, 2006 U.S. Dist. Lexis 48239 (July 17, 2006).

In *Ferree*, a plaintiff/plan participant brought an ERISA action against the insurance company for denying his claim for continuing disability benefits and included a claim for statutory penalties under § 502(c). Although the insurance company/claims administrator provided a complete copy of the administrative record, the plaintiff claimed that the insurer failed to provide other documents (including reports by consultants and reviewers, communications with claims handlers and all policies, procedures and guidelines pertaining to the adjudication of disability claims) relevant to his claim. Relying on DOL Advisory Opinion 96-14A, the plaintiff argued that the documents he requested constituted "other instruments under which the plan is established or operated," which

ERISA Section 104(b) required the insurer to furnish. The plaintiff also argued that the penalties should be imposed because the insurer violated Regulation 2560.503-1, which requires production of documents "relevant" to a claimant's claim for benefits.

The district court began its analysis by noting that the statutory penalty provision must be strictly construed. As such, the court reasoned that a penalty under § 502(c) could be invoked only for a failure to furnish information required by ERISA itself, not by the DOL's claims regulations. The court also concluded that the "other instruments" provision of § 104(b) applied only to formal legal documents governing the plan, not the rules, guidelines and claim review procedures requested by the plaintiff. Accordingly, the court rejected the participant's reliance on Advisory Opinion 96-14A, characterizing the opinion as overly broad. However, the court noted that failure to furnish the documents required by the Regulations could have an impact on the underlying benefits decision, including a possible finding that the administrator failed to afford the claimant a "full and fair" review of her claim.

Although rules provide good fences, district courts are understandably reluctant to broaden the language of the penalty statute through DOL regulations and advisory opinions. Indeed, given the potential exposure for a penalty claim ($110 per day, per request, per document), there should be no ambiguity or confusion as to when a written request triggers the penalty provision. To be certain, ERISA's penalty provision is not designed to be a trap or game of "gotcha" for the inquisitive and/or litigious (yet unharmed) plan participant.

B. Not Every Violation Warrants a Penalty

The standards for awarding penalties have evolved significantly within the Eleventh Circuit. In an early case, the Court suggested that prejudice to the participant or beneficiary is a prerequisite for an award of a civil penalty,[9] only to retreat from that position in a later decision holding that the existence or absence of prejudice is merely an "important" factor to be considered.[10] While the Eleventh Circuit has yet to elaborate on the other "factors" to evaluate in deciding whether and to what extent a penalty should be imposed, a number of district courts have emphasized the following: (1) bad faith or intentional conduct of the administrator; (2) length of delay; (3) number of requests made; and (4) documents withheld.[11] As already noted, the decision of whether and to what extent to award statutory penalties is entirely within the district court's discretion.[12]

One of ERISA's goals is to encourage employers to provide health and welfare benefits to their employees. It goes without saying that most employers have their employees' best interest at heart when designing employee benefit plans because company executives, like all other employees, typically participate in these programs. Moreover, in an ever competitive market place, more and more employers are utilizing employee benefit programs as a means of recruiting and retaining talented workers. If employees are not treated fairly and evenhandedly by the committees and/or insurers that evaluate benefit claims, the company as a whole undoubtedly suffers. When viewed in this light, it makes little sense to indiscriminately impose the maximum penalty on a plan administrator for any failure to promptly respond to a written request by a participant or beneficiary. Instead of applying an unworkable bright line test, courts should consider each penalty claim based on the surrounding facts and circumstances, including the administrator's good faith effort to provide a timely response. ■

Endnotes

1. The statute's penalty of $100 has been increased by the Debt Collection Improvement Act of 1996 to $110 for violations after July 29, 1997. 62 Fed. Reg. 40696.
2. For example, *Hamall-Desai v. Fortis Ben. Ins. Co.,* 370 F.Supp. 2d 1283, 1311-15 (N.D. Ga. 2004), *affirmed,* No. 05-11869 (11th Cir. February 2, 2006) $100 per day; *Wright v. Hanna Steel,* 270 F.3d 1336 (11th Cir. 2001) $75 per day; *Keogan v. Towers,* 2003 U.S. Dist. LEXIS 7999 at 34 (D. Minn. 2003), $100 per day for 649 days; *Gorini v. AMP, Inc.*, 94 Fed. Appx. 913, 916 (3d Cir. April 16, 2004) for an award of $160,780 for an unspecified amount of time.
3. *Curry v. Contract Fabricators Inc. Profit-Sharing Plan*, 891 F.2d 842 (11th Cir. 1990) and again in *Sandlin v. Ironworkers*, 716 F. Supp. 571 (N.D. Ala. 1988), *affirmed*, 884 F. 2d. 585 (11th Cir. 1989).
4. ERISA § 109 (c) provides that the Secretary of Labor may regulate what other documents must be furnished. ERISA § 505 further states that the Secretary has the authority to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this Title."
5. 29 C.F.R § 2560.503-1(g), (h) and (j).
6. See, *Jett v. Blue Cross*, 890 F. 2d 1137 (11th Cir. 1989).
7. See *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1232 (11th Cir. 2002); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 n.11 (11th Cir. 1993).
8. *See Syed v. Hercules, Inc.*, 214 F.3d 155 (3rd Cir. 2000) (remedy for violation of § 503 was not a penalty under § 502(c)); *Groves v. Modified Retirement Plan*, 803 F.2d 109 (3rd Cir. 1986) (recognizing that nothing in ERISA gives the Secretary of Labor authority to decide that a plan administrator's conduct should be penalized); *Doe v. Travelers Ins. Co.,* 167 F.3d 53, 60 (1st Cir. 1999) (reversing penalty award based on purported violation of DOL Regulation 2560.503-1); *Montgomery v. Metropolitan Life Ins. Co.,* 403 F.Supp.2d 1261 (N.D. Ga. 2005) (rejecting request for penalty award based on DOL Regulation 2560.503-1, court notes that, without clear guidance from the Eleventh Circuit, it was "unwilling to exercise any discretion it might have [had] to award statutory penalties for a violation" of a DOL regulation).
9. *Paris v. Profit-Sharing Plan for Employees of Howard B. Wolf, Inc.,* 637 F.2d 357 (5th Cir.), *cert denied*, 454 U.S. 836 (1981). Decisions rendered by the former Fifth Circuit before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Pritchard, Ala.,* 661 F.2d 1206, 1209-1211 (11th Cir. 1981).
10. *Curry v. Contract Fabricators Incorp. Profit Sharing Plan,* 891 F.2d 842, 847-848 (11th Cir. 1990).
11. *See, e.g., Fritz v. ADS The Power Resource, Inc.,* 2001 U.S. Dist. LEXIS 8963 (N.D. Tex. 2001).
12. *Curry*, 891 F.2d at 848-849.

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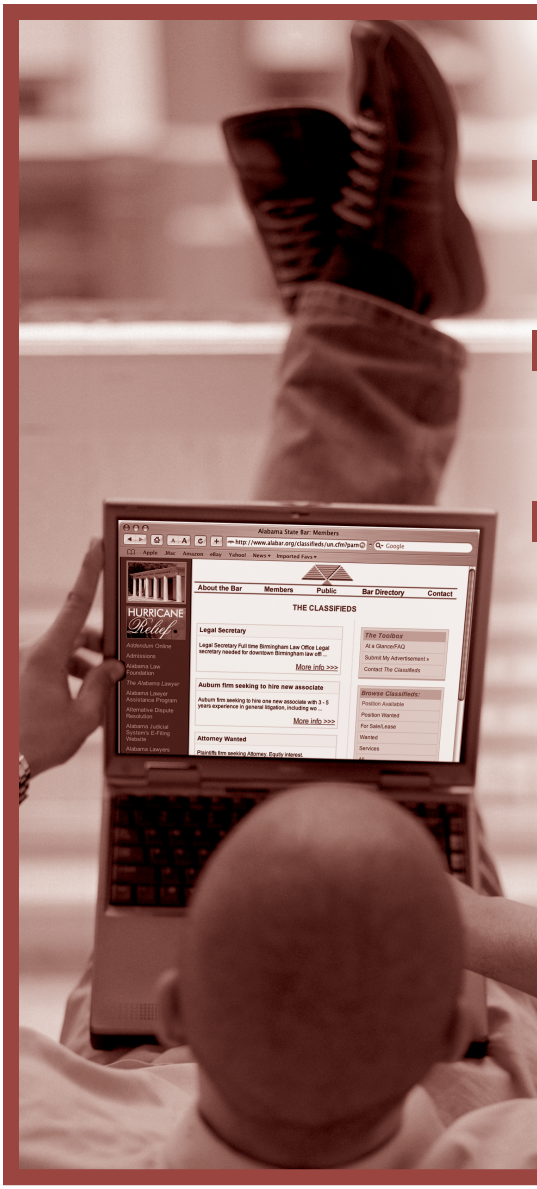

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2007 ALABAMA STATE BAR

LEADERSHIP FORUM TURNS THREE

BY EDWARD M. PATTERSON

In recent years, the Alabama State Bar has joined a small, but growing, number of state bars to develop leadership programs designed to nurture a new generation of young lawyers for key leadership roles in the bar, community and state. Thirty leaders, among the best and brightest young attorneys, met January 25-26 at the Marriott Hotel and Conference Center Grand National in Opelika for an overnight orientation retreat as the ASB gets set to conduct its third Leadership Forum. Thirteen members from the 2006 class were also on hand to greet the new forum members. **ASB President "Boots" Gale** said, "We're making the state and the profession stronger by encouraging the development of leaders. Lawyers are moved naturally toward positions of leadership because it calls into play their creativity and critical thinking skills. As opposed to the traditional law practice setting, which fosters competition, leadership is a collaborative process."

The state bar received 71 applications for the 30 positions. **Keith Jackson** of Birmingham, co-chair of the selection committee, told the bar commissioners who selected the final candidates, "We believe the forum is best served by having a very competitive and selective application process." The class represents the diversity of the bar as a whole as well as the diversity of the eligible applicant pool (admitted to practice between five and 15 years). The class includes 20 men and ten women with the average attorney age being 36. In the class are plaintiff and defense lawyers, government and corporate attorneys, a prosecutor, a district judge, and a law school professor.

Tripp Haston of Birmingham and **Pamela Slate** of Montgomery moderated the various sessions. **Dr. Wayne Flynt,** distinguished professor emeritus at Auburn University, opened the conference with a lecture and discussion of the Alabama Constitution of 1901 as set out in his most recent book, *Alabama in the Twentieth Century–The Modern South.* **Dr. John Dew,** director of Continuous Quality Improvement and Planning at the University of Alabama, led the class in exercises designed to determine individual leadership styles. **Stephen Foster Black,** director of the Institute for Ethics and Social Responsibility at the University of Alabama, challenged the class to care about progress in Alabama and suggested ways to make changes.

Across the board, participants said the orientation session exceeded their expectations. Typical comments included, "I thought the topics were timely and appropriate for our group. The balance of interactive sessions, which gave insights into opinions and personalities of our fellows, interspersed with the informal social mixers and meals, was a great way for us to segue into conversations about serious topics while meeting and getting to know one another on a social basis." Four all-day sessions will be held this spring at the ASB with a graduation banquet in Montgomery the evening of May 17. ■

ALABAMA STATE BAR

LEADERSHIP FORUM CLASS OF 2007

Shawn T. Alves	Stone, Granade & Crosby PC	Bay Minette
Reed Robertson Bates	Starnes & Atchison LLP	Birmingham
David Lee Brown, Jr.	Huie, Fernambucq & Stewart LLP	Birmingham
Joel Edward Brown	Bradley Arant Rose & White LLP	Birmingham
Laura Gibson Chain	White Arnold Andrews & Dowd PC	Birmingham
Christina Diane Crow	Jinks, Daniel & Crow LLC	Union Springs
Leatha Kay Gilbert	private practice	Birmingham
Nicholas Christian Glenos	Bradley Arant Rose & White LLP	Birmingham
Carol Paige Goldman	Energen Corporation	Birmingham
Wilson Franklin Green	Battle Fleenor Green Winn & Clemmer LLP	Tuscaloosa
Gregory Scott Griggers	District Attorney's Office	Demopolis
Frederick George Helmsing, Jr.	McDowell, Knight, Roedder & Sledge LLC	Mobile
Elizabeth Anne Sikes Hornsby	University of Alabama School of Law	Tuscaloosa
Edward Andrew Hosp	Maynard, Cooper & Gale PC	Birmingham
Robert Brent Irby	McCallum, Hoaglund, Cook & Irby LLP	Vestavia Hills
William Lovard Lee, IV	Lee & McInish	Dothan
William Richard Lunsford	Balch & Bingham LLP	Huntsville
Emily Coody Marks	Ball, Ball, Matthews & Novak PA	Montgomery
Marshall Clay Martin	Watson Jimmerson Martin McKinney Graffeo & Helms	Huntsville
Timothy Benson McCool	Kirk & McCool	Carrollton
Juan Carlos Ortega	Alford, Clausen & McDonald LLC	Mobile
George Robert Parker	Bradley Arant Rose & White LLP	Montgomery
Kimberly Till Powell	Balch & Bingham LLP	Birmingham
Sandra Beth Reiss	Ogletree Deakins	Birmingham
Braxton Paul Sherling	District Court of Coffee County	Enterprise
Ronald Howard Strawbridge, Jr.	Strawbridge, Strawbridge & Strawbridge LLC	Vernon
Paige Huddleston Sykes	Rogers & Associates	Birmingham
Melton Chad Tindol	University of Alabama Counsel's Office	Tuscaloosa
William Bernhart Wahlheim, Jr.	Maynard, Cooper & Gale PC	Birmingham
Lane Hines Woodke	U. S. Attorney's Office	Birmingham

Accommodation *or* Transformation

BY DON CARROLL

The heart is the literal and metaphorical center of our lives. We have either an open heart toward life or we may be closed hearted. Our response toward life may be one full of heartache or heartfelt joy.

All of us have issues and challenges from time to time. How we respond will tell us something about our heart, and how we respond will determine something about the health of our hearts. Issues which center on the heart are usually issues of transformation. Those issues not felt so deeply are usually issues of accommodation. Often problems occur for the heart when transformation is needed, but we settle for accommodation.

If I break my leg, I can go to the doctor and get the bone set and a cast placed on the leg. I can use crutches and accommodate my schedule to the injury. Over time it will heal and my heart will probably not be stressed at all in the process. When we are faced with more long-term issues in our lives, chronic illnesses or disorders, such as diabetes, alcoholism, attention deficit disorder or depression, our challenge is going to be different. We no longer have the option of accommodating a short-term inconvenience but we must come to terms with living a life with a disorder we did not anticipate or want. Often this is only possible through a transformation that involves a change of heart about how we see our life.

Lots of times, in talking with lawyers facing difficulties or particular times of stress, I am surprised to learn that their desire to become a lawyer in the first place springs from some early injustice they experienced in their own lives. They might have grown up with a raging and abusive father. Or, they grew up dirt poor and felt the harshness of struggling to survive and to succeed. These lawyers are driven by their desire to help make the world more just and fair for others. This early experience, which was wounding in a way, was what launched them into their career as a lawyer. In a sense, the wound is also a gift. It has given them a sense of determination and a keen sense of what is right and wrong and this has propelled them forward. However, most lawyers will, at some point, have to face up to the negative part of this wound, the part that makes them driven, that makes them feel overly responsible for seeing that justice is achieved. There must be a change of heart, in which they come to terms with the past, and see, often for the first time, the gift that came with their wound. In

so doing, they open their hearts to themselves as well as to the clients they try to serve. Otherwise, they are apt to lapse into depression or addiction or workaholism (or some combination of these) as a way to avoid dealing with the underlying feelings of personally experienced unfairness. They may be an aggressive, hard fighting lawyer on the exterior and unwittingly be stuck in a place of being a victim on the interior.

I remember reading a book on creativity. The author had done his research across many fields of endeavor, musicians, artists, bankers and lawyers. All of the most creative individuals, regardless of their vocation, had one characteristic in common. They all accepted the reality of who they were and their external environment exactly the way it was. Their acceptance of themselves meant that all their energy went into their own creative passion. There was no lost effort in trying to make themselves or the world different from the way they actually were. Acceptance seems to be one of the characteristics of being open-hearted: acceptance of myself regardless of whether I have a chronic condition like diabetes, alcoholism, attention deficit disorder or depression. Such disorders can either be the starting place for acceptance, or an enduring place of struggle that can go on endlessly.

As lawyers, we daily face the choice of accommodation or transformation in how we adapt to the technologies of cell phones, e-mails and computers that all accelerate our lives. Are we accepting them as useful tools, or are these technologies tending to run our lives? If they are running our lives, we are not having the chance to emotionally absorb and enjoy our daily activities. We run the risk of becoming closed-hearted.

Recent research confirms the connection between heart problems and our ability to stay open-hearted. Over the past several years, a number of large studies have been conducted which show that depressed people are more vulnerable to coronary disease, congestive heart failure and heart attacks. Almost everyone who suffers from alcoholism or another chemical addiction is depressed. Often, depression comes from the difficulty in adjusting to the loss of the idealized view that one had in law school of how one's life as a lawyer would be, and accepting the reality of the difficulties and challenges of what practicing law actually is. This is an emotional adjustment that takes time and an open heart, but too often we avoid feeling that loss and close the heart by simply working long hours. What starts off as simple emotional avoidance over time, can become a pattern that leads to the onset of clinical depression. Regardless of the cause of the depression, current studies show that the risk of heart-related problems is significantly greater for those suffering from depressive symptoms.

In a study of 5,000 people over age 65, those who had frequent depressive symptoms were 40 percent more likely to develop coronary artery disease and 60 percent more likely to die than those who did not have depressive symptoms.

A longitudinal study by Johns Hopkins Medical School tracked individuals every five years for 40 years. Those who had suffered clinical depression, even a depressive episode more than ten years earlier, were at twice the risk of developing coronary disease.

In another study, men in their 50s with high levels of depression and anxiety were over three times more likely than average to have a fatal stroke during the next 14 years.

Even among people who are not clinically depressed, these studies confirm what Alcoholics Anonymous has long stressed, that resentment is a killer. People with normal blood pressure, who scored high on a rating scale for anger, were nearly three times more likely to have a heart attack or require bypass surgery within the next three years.

And here is a zinger! In another three-year study, hostility, measured by a personality test, predicted heart attack and heart disease better than other factors such as high cholesterol, smoking or being overweight.

We know that on a simple biological level depressed people react physically as if under chronic stress. Persistent high levels of stress hormones make the heart less sensitive to normal demand signals. Stress hormones stimulate the production of inflammatory substances and oxygen-free radicals. Depression affects the heart in many indirect ways as well. People who are depressed become discouraged, don't eat right, don't exercise well and don't avoid the use of addictive substances. Finally, depression leads to social isolation which reduces the normal support needed from family and friends. Coronary disease rates are substantially higher for older men who live alone.

When there is a tendency toward a long-term chronic illness, or if you have a chronic disease, the mistake most often made is to seek a solution of accommodation rather than transformation. A problem with alcohol most often represents itself with an inability, on occasion, to stop drinking or to handle one's moods without drinking. For the depressed person, the difficulty is often the fear of looking at unresolved emotional issues. For the person with ADD, the issue may be finding the unique gift in what otherwise seems like confusion and wild energy. For the person with diabetes, a key issue is often coming to terms with the need for ongoing medication and diet control. For almost all of these chronic problems, there are a number of things that can be done that help–good nutrition, exercise and medication may all be part of the solution. However, any one factor alone may simply be an accommodation to the problem. What is going to stand the problem on its head will be when the problem is a catalyst to personal transformation. This may involve some or all of the same factors that could be accommodations, but at its core it will involve a willingness to be open-hearted toward oneself and the practice of law, a reordering of priorities and acceptance of whom one is and the willingness to follow a road that brings meaning to one's life by giving the unique gift you have back to the world. ■

The Alabama Lawyer Assistance Program is a confidential program of assistance for all Alabama lawyers. For more information go to www.alabar.org *or call Jeanne Marie Leslie at (334) 834-7576.*

Don Carroll
Don Carroll is the executive director of the North Carolina Lawyer Assistance Program. This article was taken from his recently published book by Hazelden entitled *A Lawyers Guide to Healing Solutions for Addiction and Depression* (this book may be purchased from Hazelton at *www.hazelton.org*).

Addressing The Unthinkable

How You Can Constructively Deal with the Problem of Suicide

BY DAVID M. WOOLDRIDGE

Can We Talk?

Suicide is one of those things that no one likes to talk, or even think, about. It is an awkward and uncomfortable subject. We don't like to acknowledge that, for some people, life seems not to be worth living. We don't like to admit that we might be subject to suicidal thoughts. Such thoughts may seem to be a great weakness or even a serious moral shortcoming. The act of suicide is gruesome and unpleasant to consider.

Perhaps we have had thoughts of suicide at some time in our lives, and the shame of those thoughts keeps us from discussing suicide with others. Perhaps shame comes from a different source–suicide or an attempt at suicide by friends or relatives, for which we (irrationally) feel shame by association. Perhaps, we are afraid that by talking about suicide with someone we increase the likelihood of its happening.

Similar to many problems in our society, we make the problem worse by our reluctance to talk about it, learn about it and do anything about it. But to reduce suicide, we must talk about suicide. We must learn a little about suicide. And we must be prepared to do something about suicide.

Is This Really a Problem?

Suicide is the eighth leading cause of death in the United States.[1] Typically, more than 30,000 people take their lives here each year. Another 250,000 people each year are reported as having attempted suicide and then received some formal medical attention.[2] Firearms are used in 55 percent of completed suicides. Contrary to popular wisdom, more suicides occur in the spring than any other season.

Some groups are more likely to commit suicide than others, but it touches all sociological groups. Men are four times more likely to die from suicide than women, but women report attempting suicide at a rate three times more often than men. Lawyers, as a group, are twice as likely to commit suicide as the general public. Far too many lawyers in Alabama have taken their lives in the last several years.

Can We Do Anything About It?

There are many areas in which professionals in the field would prefer laymen not to meddle. Suicide prevention is NOT one of these areas. Health care professionals have developed various programs, such as "QPR" and "ASIST," to teach laymen when to intervene with a potential suicide and what to do about it.[3] It is not complicated. The layman's role can be only a limited role–limited, but important. Like CPR and the Heimlich maneuver, intervention can be the essential first step to prevent a suicidal act.

The first premise of intervention is the finding by researchers that most individuals who attempted suicide gave identifiable signs to one or more persons in the weeks before the act. The signs were not made solely in the presence of family and close friends, but often were given to coworkers or acquaintances in contact with the individual during this critical period.

The second premise is that even a modest contact with another person–if of the right kind–can dissuade the person from acting, for at least a short critical period. With followup attention by health care professionals, the suicide can usually be avoided altogether.

Spotting the Problem

There is nothing we can do, if we cannot identify a person who may be at risk of suicide. Identifying such people is difficult, and it can never be certain. You should be willing to act on a reasonable suspicion; certainty is not necessary. There can be little harm done, and much good, by merely expressing your concern for another person's health and feelings.

However, this is a great barrier to identifying people at risk–few of us want to believe that the person facing us is capable of suicide. On some level of consciousness, many of us really do not want to see any symptoms. Moreover, many of us don't like to get involved in the personal lives and emotional problems of others. Ignorance is not bliss, if you later realize you might have saved a person's life merely by showing a little concern.

We must get past this reluctance. We can quickly learn to recognize the symptoms. And our modest involvement in intervention can and will saves lives among our colleagues, friends and family members.

There are a number of signs that may indicate that a person is at risk. Not all people at risk will exhibit all, or even any, of these signs. Furthermore, many people who are *not* at risk may exhibit many of these signs. Remember that certainty is not required; suspicion is sufficient for action. You action is not offensive; it is merely a caring inquiry. Reluctance to act, for fear of being wrong, is usually unjustified, and in some cases will be fatal.

The following are lists of most common signs of depression[4] and potential suicidal thoughts. The signs fall into categories:

- The individual may provide obvious direct verbal clues like these:
  - "I've decided to kill myself"
  - "I wish I were dead"
  - "I'm going to end it all"
  - "I'm going to commit suicide"
  - "If such and such doesn't happen, I'll kill myself"
- More often the individual gives only indirect or coded verbal cues like these:
  - "I'm tired of life"
  - "What's the point of going on"
  - "My family would be better off without me"
  - "Who cares if I'm dead"
  - "I can't go on anymore"
  - "I just want out"
  - "You would be better off without me"
  - "Nobody needs me anymore"
  - "I don't fit in anymore"
  - Other statements reflect hopelessness or preoccupation with death.
- Many clues are behavioral, such as these:
  - Abrupt changes in personality
  - Pervasive, exaggerated or inappropriate displays of sadness or anger
  - Inability to tolerate frustration or to cope with stress
  - Withdrawal or unwillingness to communicate
  - Eating disturbances or significant weight changes
  - Sleeping disturbances
  - Abruptly putting business affairs in order or changing a will
  - Sudden happiness in a depressed person may be signal of suicide[5]
  - Unusual reckless or self-destructive behavior, such as sexual promiscuity or excessive use of drugs and/or alcohol
  - Depression or unusual sadness, discouragement or loneliness
  - Extreme or extended boredom
  - Inability to concentrate
  - Unusually long reactions to grief
  - Neglect of work
  - Neglect of personal appearance
  - Giving away prized possessions or donating body to medical school
  - Ceasing activities that they once loved
  - Buying a gun for the first time
  - Stockpiling pills
- Some situations should increase your concern from other clues:
  - Ending a marriage, divorce or separation
  - Ending a romance or long-term relationship
  - Death of someone close (especially if by suicide)
  - Serious illness or trauma to self or loved one
  - Previous suicide attempt
  - Sudden rejection or unexpected separation
  - Diagnosis of terminal illness
  - Anticipated loss of financial security or personal freedom
  - Loss of status, prestige or identity

What Can We Do?– The "QPR" Model

It is a myth that suicide can't be prevented. It can. QPR is one technique that works. QPR stands for "Question" (them about suicide), "Persuade" (them to get help) and "Refer" (them for help). Research shows that the great majority of those who attempt suicide give some signal first. Yet, those in a position to do something about it are often reluctant to get involved.

When deciding whether to intervene, to ask about thoughts or plans for suicide, to break a confidence about a friend's thoughts or plans of suicide–the best rule is safety first. Conflicts, discomforts and embarrassments are resolved much more readily than the pain of losing someone to premature death. Sometimes, because the

thought of death is frightening, we deny the person may be suicidal. Overcoming the denial is an important step.

QUESTION

The first step in the QPR Model is to *question*. Get the person alone or in a private setting and, ultimately, ask them if they are contemplating suicide. You might start by asking questions that express your concern and acknowledge the individual's distress, questions like: "Have you been unhappy lately?" "I've noticed recently that . . .." "I've been concerned about you. How are you feeling?"

Ultimately, you must ask the "*suicide question*" directly: "Do you want to stop living," or "Has it been so bad that you've thought about suicide?" It is important that you directly ask about suicide. Do not be afraid to use the word. Asking the "suicide question" does not increase the risk. Asking actually reduces the risk of suicidal action: first, because it opens the door to help, and, second, because asking conveys an implicit message to suffering individuals that someone cares deeply and that they do not have to be alone in their pain.

After asking the questions, you must actively listen to the responses and concerns. You must be sincere, supportive and understanding. Avoid the lawyer's professional pitfall–giving advice. Advice tends to be easy, quick, cheap and wrong. Listening takes time, patience and courage, but it is always right. Give your full attention and don't interrupt the individual. Do not judge or condemn him. Listen particularly for the problems that he believes death by suicide would solve.

You may conclude that the individual is not suicidal and no further action is needed. The individual will probably appreciate your concern, although admittedly there may be an awkward moment. Or you may get evasion and denial, perhaps even some anger. You must evaluate these responses for yourself, and may conclude that no action is needed.

An affirmative answer opens the door to further action and often is a release for the individual. It can make them feel better, not worse, for getting it in the open. The suicide question is now on the table for discussion. But that also means that you have more work to do.

PERSUADE

The second step is to *persuade* the individual to get help, to get the person to say, *yes,* they will get help. For example, ask: "Will you go with me to see a counselor (doctor, priest, rabbi, minister, nurse, etc.)?" "Will you let me help you make an appointment with . . .." or "Will you promise me to talk to . . .." Accept the reality of the person's pain.

Sometimes, a person will agree to get help. Others may resist the idea. If there is resistance, you might make a "no-suicide" contract with the individual–a promise not to hurt himself until help is sought. Because making a promise appeals to one's honor, and because agreeing to stay safe offers some relief, the answer is usually yes. Thereafter, continue to express your concern and revisit the idea of getting help.

If the individual refuses, decide if he may be a danger to himself or others. You must decide if unilateral action is appropriate. Err on the side of safety. Commitment might ultimately be necessary, but more immediate emergency medical help may be most appropriate. Take the person to an emergency room. Call 911. Do not worry about being disloyal. You are trying to save a life. Do not worry about breaking a trust or not having enough information to call for help.

There are other things to consider. Remove firearms, car keys, medications, knives, and other instruments which may be used to commit suicide. By restricting access to the means of suicide you buy time for another solution to be found. Removing the means to suicide is, in itself, an act of hope.

If someone is contemplating suicide, keep him sober. People who take their lives have to overcome a psychological barrier before they act. This final wall of resistance is what keeps many seriously suicidal people alive. Alcohol dissolves this wall and is found in the blood of most completed suicides.

All of us can challenge an individual's belief that he is a burden or will never fit in. We can reinforce the individual's reasons for living. Remember that small acts of acknowledgement, appreciation and kindness can have tremendous impact on someone in crisis.

REFER

The final step is QPR is to make a "referral." Get the person to someone who can help. Call a crisis line for referrals, or seek the other resources listed in this issue. Go with the individual, and do not leave her alone. The best referrals are when you personally take the person you are worried about to the appropriate professional.

No one in the great emotional pain that such a person feels should be alone with that pain. Also, you should not be alone in the effort to support a desperate person. Sources of immediate help include crisis lines, hospitals, physicians, therapists, and the referral and treatment resources available through lawyer assistance programs. After the crisis, 12-step programs such as Alcoholics Anonymous and mentoring by volunteer lawyers have proved invaluable to attorneys recovering from the mental illness and substance abuse problems often associated with suicidal thinking and behavior. ■

Endnotes

1. The data is from the Web sites of the Centers for Disease Control. Suicide is the third most common cause of death for young people ages 15-24. The rate of suicide among this group is roughly 4,000 out of the 30,000 total suicide deaths each year.
2. However, the number of unreported attempts is believed to be considerably greater.
3. The "QPR" Program, discussed below, is just one of several such programs. Discussion of QPR should not be considered an endorsement of QPR over the other programs.
4. Most of these signs are also those of clinical depression. It is no surprise that depression generally accompanies suicidal thoughts.
5. Since depression saps energy and purpose, sometimes a depressed person is "too tired" to carry out a suicide plan. However, as the depression begins to lift, the person may suddenly feel "well enough" to act.

David M. Wooldridge
David Wooldridge practices with Sirote & Permutt in Birmingham. He is a past chair of the Lawyers Helping Lawyers Committee of the Alabama State Bar.

Assisting One Can Help Hundreds

BY STEVE GRIFFITH

I'm going to tell you about a program that helps lawyers and why our firm has been contributing to it for many years. We're not a large firm. We have six lawyers and we practice in a small town. Like most firms, we budget for monthly expenses we all need to keep our office running. We include in our budget a monthly check to the **Lawyer Assistance Foundation** to do our part in assisting lawyers in need.

I have been practicing law for 39 years. During that time, it has been my privilege to serve on the ASB Board of Bar Commissioners, the Executive Committee and various sub-committees. I support the Alabama Lawyer Assistance Foundation wholeheartedly and encourage you to do the same. Oftentimes, it appears that an individual lawyer in trouble does not deserve our help. However, the preservation of our system of justice demands that we assist lawyers in trouble. As lawyers, we have an almost sacred obligation to make our system work. It is the people's confidence in our system that makes the system work. The clients who are victimized deserve no less than our best efforts.

The purpose of the foundation is to provide financial assistance to Alabama lawyers suffering with addictions and other mental health illnesses. ALAF makes loans to ASB members who demonstrate their financial inability to get appropriate help. This is not a "give-away," but an opportunity to help these lawyers help themselves. A revolving loan fund gives these lawyers an opportunity to get treatment. Loans from the fund are paid directly to the treatment care providers. Repayment is expected once the lawyer is back on his or her feet, so money will always be available to aid the next lawyer in need.

We all know or have practiced beside an impaired lawyer. What most of us don't see is the wreckage that accompanies these illnesses.

Seated, left to right, are Steve Griffith and Jimmy Knight. Standing, left to right, are Todd McLeroy, Emily Niezer, S. Lynn McKenzie and Jason Knight.

Contributing a regular check every month, no matter how small, to the Lawyer Assistance Foundation goes a long way in helping our colleagues and our profession. I encourage all lawyers to get involved. ALAF is a 501(c)(3) charitable foundation so your contributions are tax-deductible. All money goes directly to helping lawyers in need. For more information, go to *www.alabar.com* and click on the "Lawyer Assistance Program," or call Jeanne Marie Leslie, ALAF's director, at (334) 834-7576. ■

Steve Griffith
Steve Griffith graduated from the University of Alabama School of Law in 1968. He practices in Cullman with Knight, Griffith, McKenzie, Knight & McLeroy LLP.

Courage

BY JEANNE MARIE LESLIE

As I write this article, our country is mourning the death of the 38th president of the United States, Gerald R. Ford. President Ford was an instrumental leader during a critical period in the history of our country. My thoughts, however, are on his wife, Betty Ford, a woman of great courage and conviction in her own right. It is amazing that 29 years ago Mrs. Ford entered a hospital for her addiction to sleeping pills, alcohol and other substances. Little did she realize that she would be embarking on a journey that would lend itself to change and hope for the millions of individuals suffering from the disease of addiction. Mrs. Ford was a pioneer for change. Her openness and willingness to share personal battles from breast cancer to addiction continues today to give millions of individuals the courage to deal with their own personal problems. Addiction and depression are issues the legal profession would prefer not to talk about. You don't find many firms discussing wellness or stress management in the board rooms. In fact, the very thought of these topics produces an air of uneasiness. When under extraordinary stress, professionals of all disciplines, including lawyers, perform their obligations at less than satisfactory levels. Lawyers, in an attempt to cope, may turn to addictive substances or addictive behaviors to get through the tough times. It is no surprise to the professionals who treat lawyers that these issues are prevalent in the legal arena and these types of coping mechanisms, in all professions, can lead to malpractice claims, disciplinary complaints and utter disaster.

What most people don't realize is the enormous amount of suffering associated with these illnesses and the desperation for relief that is often sought. Addressing lawyer mental health impairments is tough but what is tougher is attending the funerals of these lawyers. Talking about these issues, bringing them to the forefront, helps remove the stigma, and enables lawyers to seek help.

Working as the ALAP director I experience extraordinary courage every day. I witness individuals make remarkable changes in their lives. They become better people, better fathers, better mothers and better lawyers. The fact that there are lawyers with mental health problems in all venues of the legal profession is a reality that is no different from any other profession, but addressing it, talking about it and reaching out and offering assistance takes courage.

The Alabama Lawyer Assistance Program offers confidential help for lawyers throughout Alabama. We offer assistance for stress, depression and addiction. We know these issues are real and we know how to help. Call for assistance, (334) 834-7576 (office), or (334) 224-6920 (24 hours). ■

Jeanne Marie Leslie
Jeanne Marie Leslie, RN, M.Ed, is director of the Alabama Lawyer Assistance Program.

Publications Order Form

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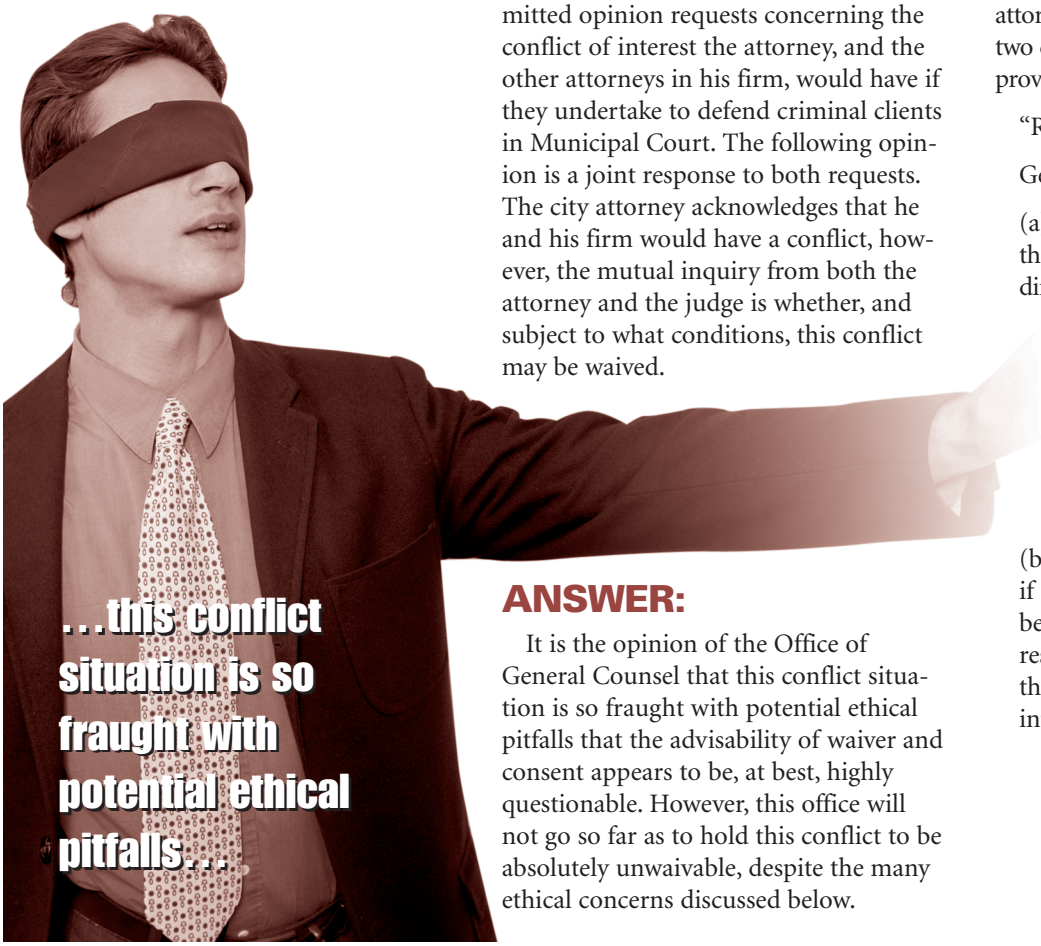
J. Anthony McLain

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 below.

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 favorable treatment than would be afforded the

Continued from page 163

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" 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 by no means would 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 are 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 officials, decide 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] ■

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More info to come!

Robert L. McCurley, Jr.

Alabama Legislature Holds Organizational Session

The Alabama legislature met in an organizational session January 9-16 to elect presiding officers, determine their rules for the next four years and make committee assignments.

The senate, by an 18-to-17 vote, elected Senator Hinton Mitchem pro tem. Senator Mitchem, from Marshall County, has been a member of the senate since 1974. The stated plan is for Senator Mitchem to be the pro tem for the first two years, and Birmingham attorney and **Senator Rodger Smitherman** to serve as pro tem of the senate for the remaining two years. Former Pro Tem Senator Lowell Barron becomes chair of the Rules Committee.

Lawyers in the senate holding positions of leadership are:

Senator Zeb Little, Cullman, majority leader and chair of Local Legislation;

Senator Myron Penn, Union Springs, chair of Confirmations;

Senator Hank Sanders, Selma, chair of Education, Finance and Taxation;

Senator Roger Bedford, Russellville, chair of General Fund, Finance and Taxation;

Senator Ted Little, Auburn, chair of Physical Responsibility & Accountability;

Senator Rodger Smitherman, Birmingham, chair of Judiciary;

Senator Wendell Mitchell, Luverne, chair of Governmental Affairs;

Senator Bobby Singleton, Greensboro, chair of Tourism and Travel; and

Senator Pat Lindsey, Butler, chair of Constitution Campaign Finance, Ethics.

The house of representatives unanimously re-elected Representative Seth Hammett from Andalusia as speaker of the house. Representative Hammett has been in the legislature since 1978.

Lawyers who obtained key positions are:

Representative Demetrious Newton, Birmingham, re-elected as speaker pro tem;

Representative Ken Guin, Carbon Hill, majority leader and chair of Rules; and

Representative Marcel Black, Tuscumbia, chair of Judiciary.

The Judiciary Committee is where bills of interest to lawyers are generally sent. The following lawyers are on the house committee, in addition to its chair, Marcel Black:

Paul DeMarco, Birmingham;
Chris England, Tuscaloosa;
Tammy Irons, Florence;
Mark Keahey, Grove Hill;
Yusuf Salaam, Selma; and
Cam Ward, Alabaster.

The senate Judiciary has the following lawyers in addition to its chairman: Rodger Smitherman;

Roger Bedford, Russellville;
Ben Brooks, Mobile;
Bradley Burns, Mobile;
Pat Lindsey, Butler;
Ted Little, Auburn;
Myron Penn, Union Springs;
Hand Sanders, Selma; and
Bobby Singleton, Greensboro.

Regular Session

The Regular Session begins Tuesday, March 6, and can continue until June 18.

The Institute has completed and will present the following bills to the legislature:

Uniform Apportionment of Estate Taxes;
Uniform Residential Mortgage Satisfaction Act;
Uniform Environmental Covenants Act;
Redemption from Ad valorem Tax Sales; and
Uniform Management of Institutional Funds.

Also to be presented later in the session will be the Uniform Parentage Act and the Business Entities Code.

Apportionment of Estate Taxes

The Internal Revenue Code places the primary responsibility of paying federal and state tax on the personal representative but does not direct from which beneficiary the taxes are to be paid. This is left to state law. Forty-four states have an Apportionment of Tax Law but Alabama requires the taxes to be taken from the residuary of the account unless the will directs otherwise.

This Act applies only to:

1. Estates over $2 million ($3.5 million in 2009);
2. Where there is a will and the will does not enumerate who pays the taxes; or
3. Persons who die after January 1, 2008.

The Act does not affect:

1. The total amount of tax paid;
2. Estates with no will;
3. Estates less than $2 million;
4. Charitable gifts;
5. Specifically willed gifts of personal property less than $100,000 to any person;
6. Specifically willed gifts of money less than $100,000 to any person;
7. Persons who are incompetent; or
8. Any person who dies before January 1, 2008.

Except for a spouse, the Act generally will allow taxes to be shared by beneficiaries proportional to the amount received **when the testator does not direct otherwise.**

Uniform Residential Mortgage Satisfaction Act

Problem:

Due to the booming real estate market over the past several years, in part because of low interest rates and new homes sales, refinancing has been at record highs. The process of clearing a title for residential real estate mortgages when a mortgage is to be paid off or has been fully paid but not satisfied has been complicated by the failure of the mortgagee to render timely payoff statements and mortgage satisfactions.

Legislative Wrap-Up

Continued from page 167

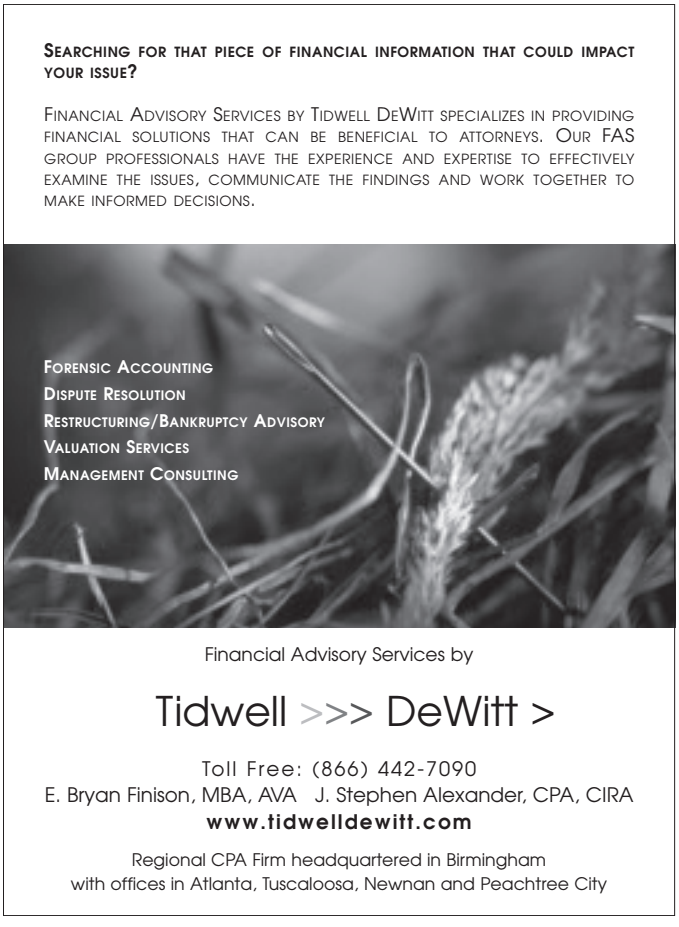
When a mortgage is paid off, the mortgagee generally owes the landowner two things: a document called a payoff statement that provides the landowner proof that the mortgage amount has been paid off, and the secured creditor is also obligated to record a statement that establishes the mortgage is satisfied in the land records. The statement makes it clear to subsequent purchasers and their secured creditors that the title is clear of the mortgage obligation. In this era of remote secured creditors, the timely transmittal of payoff statements and recording of mortgage satisfactions has become more problematic. There is a cost to the landowner, particularly if the landowner has paid off the mortgage in order to sell the real estate to another person. The sale cannot go forward if his or her secured creditor is tardy in providing payoff statements or recording mortgage satisfactions.

In some instances, the original lender is no longer in business and the mortgage has been sold to another party but the assignment has not been recorded or has become lost. With the proliferation of the secondary mortgage market the lender who makes the mortgage sells it to another to collect. Over the last decade this problem has been brought to the forefront with the landowner being required to file a lawsuit to clear the title or asking title companies to insure over the defect of an unsatisfied mortgage.

In frustration, some states, as South Carolina, have gone so far as to provide that a mortgage lender who fails to timely satisfy a mortgage must pay a penalty of $25,000, or half the amount of the mortgage. Alabama's penalty of only $200 for the failure of the mortgagee to satisfy a mortgage is seldom invoked and serves as little incentive to assure mortgage satisfaction.

Solution:

The Act provides the landowner or other entitled person with the right to request a payoff statement and requires secured creditors to record mortgage satisfactions. A request for a payoff statement must be in the form of a "notification." It may be transmitted to the secured creditor by first-class mail or other commercially reasonable delivery service. If there is agreement between the sender and the recipient of "notification" to do so, it may be transmitted by electronic means, including facsimile or e-mail. Upon notification, the secured creditor has 30 days to comply with the request or be liable for damages. A mortgage satisfaction must be recorded within 30 days of the day the mortgage is paid or the secured creditor may face liability for damages. Damages are limited to actual damages plus $500 in



either case. Punitive damages are disallowed. There also may be attorney fees for a payoff statement, if damages plus a penalty are not paid upon demand. Attorney fees are also available if an action is brought for failure to record a mortgage satisfaction.

The Act also provides a self-help title-clearing remedy to a person entitled to the recording of a mortgage satisfaction. An "Affidavit of Satisfaction" may be filed by a "Satisfaction Agent" if the secured lender neglects to file a mortgage satisfaction within the 30-day period. A "satisfaction agent" may be either a title insurance company or a licensed attorney. The satisfaction agent acts under the authority of the landowner. Only a title insurance company or licensed attorney may act as a satisfaction agent because of the liability potential for recording the affidavit. Their expertise and financial soundness provide a sense of security for the secured creditor and the landowner that the affidavit will be correct and recorded correctly. The contents of payoff statements, mortgage satisfactions and affidavits of satisfaction are very particularly established in the Act. This encourages uniformity of documentation, which is particularly important for recording in the land records. There is a specific form for mortgage satisfactions. Using the form guarantees that it may be recorded, and that it may not be rejected when presented to recording officers.

The Act further provides for a "Document of Rescission" with which a secured creditor may rescind an erroneous recording of a mortgage satisfaction, and thereby limit potential liability that may result from the error. A secured creditor also has the ability to limited liability for providing an understated payoff statement by tendering a correction. The Act also provides the secured creditor with a defense against liability for events beyond the secured creditor's control that prevent it from meeting notification requirements.

The Environmental Covenants Act, redemption from ad valorem sales tax and management of institutional funds will be discussed in the next *Alabama Lawyer.*

For more information, contact Bob McCurley, director, Alabama Law Institute, at P.O. Box 861425, Tuscaloosa 35486-0013, fax (205) 348-8411, or phone (205) 348-7411, or visit our Web site at *www.ali.state.al.us*. ■

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

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.

About Members

Joy P. Booth announces the opening of **Law Offices of Joy P. Booth LLC** at 164 Fifth St., Prattville 36067. Phone (334) 233-6873.

Bradley S. Braswell announces the opening of **Bradley Braswell, Attorney at Law** at 219 Prairie St., Ste. 1, Union Springs 36089. Phone (334) 738-3500.

Robert O. Bryan, formerly of King, Bryan & Wiley, announces the opening of **Robert O. Bryan LLC** at 1807 Corona Ave., P.O. Box 2309, Jasper 35502. Phone (205) 384-0655.

David F. Law announces the opening of **David F. Law, Attorney at Law, LLC** at Highway 22 W., P.O. Box 217, Rockford 35136. Phone (256) 377-2100.

Thomas P. Melton announces the opening of his office at The Kress Building, 301 19th St. N., Ste. 516, Birmingham 35203. Phone (205) 458-4556.

Burt W. Newsome announces the opening of **Newsome Law Firm LLC** at 4320 Eagle Point Pkwy., Birmingham 35242. Phone (205) 408-3024.

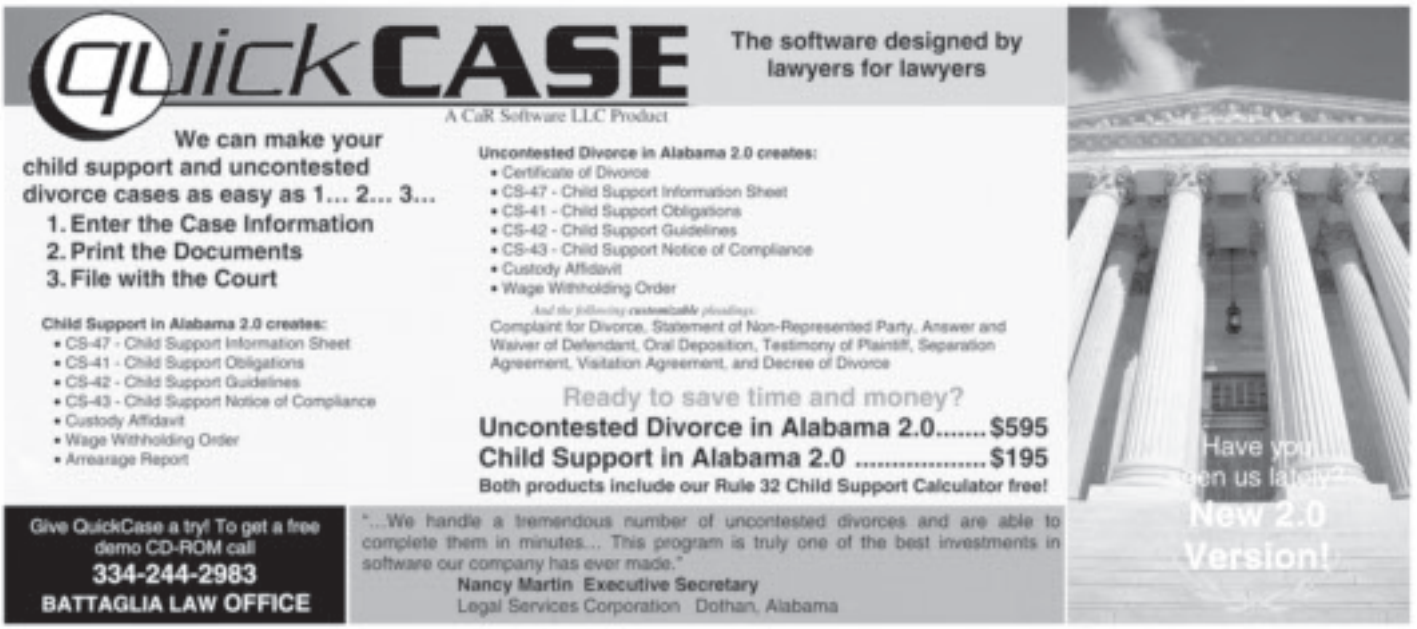
Among Firms

The office of **District Attorney for the 19th Judicial Circuit of Alabama** announces that **Tracy Lowe Griffin** has become an assistant district attorney.

Alford, Clausen & McDonald LLC announces that **Jason B. Nimmer** has joined as an associate and **Juan C. Ortega** has been named partner.

Allison, May, Alvis, Fuhrmeister & Kimbrough LLC announces that **Lara L. McCauley** has joined the firm as an associate.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **Robert T. Gardner** has joined the firm's Birmingham office *of counsel*, and that **Robert C. Divine** has returned to the firm



from his service as Chief Counsel of U.S. Citizenship and Immigration Services (USCIS). Divine left in July 2004 when he was appointed by President Bush to serve as the first Chief Counsel in USCIS, the world's largest immigration services agency within the new Department of Homeland Security. Divine rejoins Baker Donelson as a shareholder.

Balch & Bingham LLP announces that the following attorneys have become partners in the Birmingham office: **Amy Davis Adams, Thomas G. Amason III, Matthew F. Carroll, Allen M. Estes, Monica G. Graveline, Kelly G. Gwathney, James W. King, Peter D. LeJeune, Sean W. Shirley,** and **Pamela Payne Smith.** The new partners in the Montgomery office are **Paul A. Clark** and **JoClaudie Moore.** The new partner in the Huntsville office is **William R. Lunsford.**

Tina M. Parker and **Elizabeth Berry** announce the opening of **Berry-Parker Law Group PC** at 1328 N. Pine St., Ste. B, Florence 35630. Phone (256) 740-5454.

David A. Horton, formerly of the Baldwin County District Attorney's Office, announces his association with **W. Donald Bolton, Jr. PC.**

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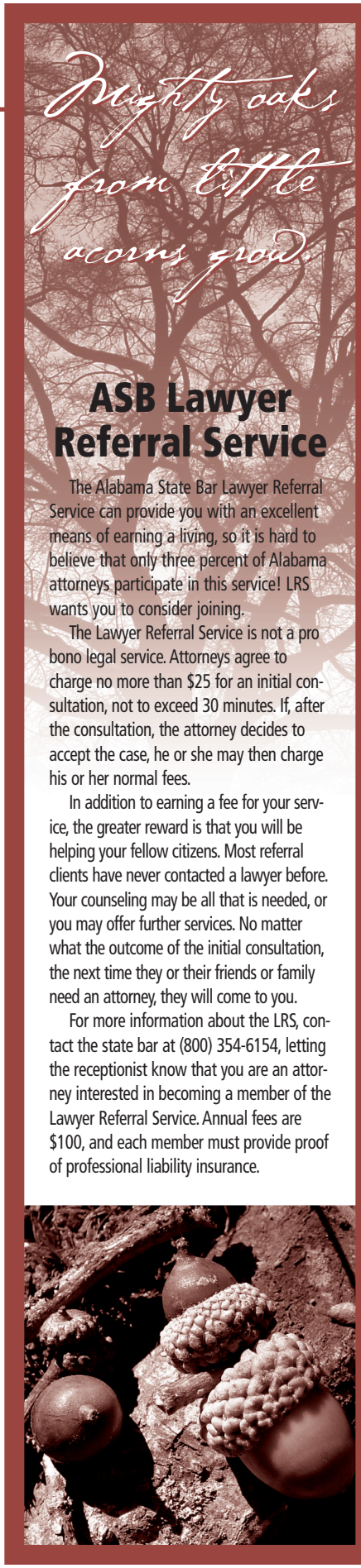

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About Members, Among Firms

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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.*

Bradford & Sears PC announces that **Thomas C. Phelps, III** has become an associate.

Thomas K. Brantley and **Tilden J. Haywood** announce the opening of **Brantley & Haywood** at 401 N. Foster St., Dothan 36303. Phone (334) 793-9009.

Burr & Forman announces that **S. Greg Burge** and **Stuart F. Vargo** have joined the firm.

Cobb, Derrick, Boyd & White, formerly of **Cobb, Shealy, Crum & Derrick,** announce the continuation of their firm at 206 N. Lena Street, Dothan. Phone (334) 677-1000.

Cochran, Cherry, Givens, Smith, Lane & Taylor announces that **Christine Cherry Irwin** has joined as an associate.

Cusimano, Keener, Roberts, Kimberley & Miles PC announces that **David A. Kimberley** has been elected circuit judge for the 16th Judicial Circuit.

Joel F. Dorroh and **Suzanne H. Mills** announce the formation of **Dorroh & Associates PC** at 1800 McFarland Blvd., N., Ste. 180, Tuscaloosa 35406. Phone (205) 345-2800.

Hand Arendall announces that **Lisa Darnley Cooper, Tracy R. Davis, Christopher M. Gill, John S. Johnson,** and **Louis C. Norvell** have become members. Cooper, Gill and Norvell practice in the Mobile office and Davis and Johnson practice in the Birmingham office.

Haskell Slaughter Young & Rediker LLC announces that **Page A. Poerschke** and **Matthew T. Franklin** became members, effective December 1, 2005. **Charles M. Elmer,** formerly *of counsel,* also became a member, effective December 1.

Helmsing, Leach, Herlong, Newman & Rouse announces that **Patrick C. Finnegan** has become a member and **Thomas Ryan Luna** and **David Andrew**

Stivender have become associated with the firm.

Huie, Fernambucq & Stewart LLP announces that **R. Cade Parian, Michael T. Scivley** and **Lucas C. Montgomery** have joined the firm as associates.

Gary Chandler Murton announces his association with **Infinity Insurance Company**.

Maynard, Cooper & Gale PC announces that seven associates, **Scott S. Brown, Thomas J. Butler, Timothy W. Gregg, Wyndall A. Ivey, John T. Lanier, Bradley B. Rounsaville,** and **D. Bart Turner,** have been named shareholders.

Miller, Hamilton, Snider & Odom LLC announces the addition of **Victoria J. Franklin-Sisson** to its Birmingham office.

Murphy, Murphy & McCalman PC of Andalusia announces that **Virginia Williams Grimes** has joined the firm as an associate.

Phelps, Jenkins, Gibson & Fowler LLP announces that **Charyle A. Spiegel** has joined the firm as an associate.

Max C. Pope, Jr. announces that **Joy Beth Bargainer Smith** has joined the firm as an associate.

Rushton, Stakely, Johnston & Garrett PA announces that **T. Grant Sexton, Jr.** has joined the firm as an associate and **Rick L. McBride, Jr.** has become a shareholder.

William Eugene Rutledge and **Gregory F. Yaghmai** announce the formation of **Rutledge & Yaghmai** at 3800 Colonnade Parkway, Ste. 490, Birmingham 35243. Phone (205) 969-2868.

Sadler Sullivan PC announces that **Marcus A. Jaskolka** has become a shareholder.

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About Members, Among Firms

Continued from page 173

Shinbaum, Abell, McLeod & Vann in Montgomery announces a name change to **Shinbaum, Abell, McLeod & Campbell,** and that **Joseph R. Campbell, II** has been named partner.

Siegal & Payne PC announces that **G. Wayne Merchant** has joined the firm as an associate.

Smith, Spires & Peddy PC announces that **Tamera K. Erskine** has joined the firm as an associate.

Starnes & Atchison LLP announces that **Aldos L. Vance**, **R. Todd Huntley** and **P. Andrew Laird** have become members of the firm.

Stephens, Millirons, Harrison & Gammons PC announces that **Andrea H. Gullion** has become an associate and that **Robert J. Wermuth** has become a partner.

Donald W. Stewart PC announces the opening of a second office in Bessemer and that **Benjamin T. Larkin, Tara L. Robinson** and **John F. Halcomb** have joined the firm as associates in that office. The firm also announces the association of **W. Taylor Stewart** with the firm's Anniston office.

Tier One Warranty of Houston announces that **Douglas A. Baymiller** has joined the company as senior vice president and general counsel.

Watson, Jimmerson, Martin, McKinney, Graffeo & Helms PC announces that **Eric J. Artrip** has been named partner. ■

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For further information, contact Kim Ziglar, staff attorney, Alabama Crime Victims' Compensation Commission at (334) 290-4420.

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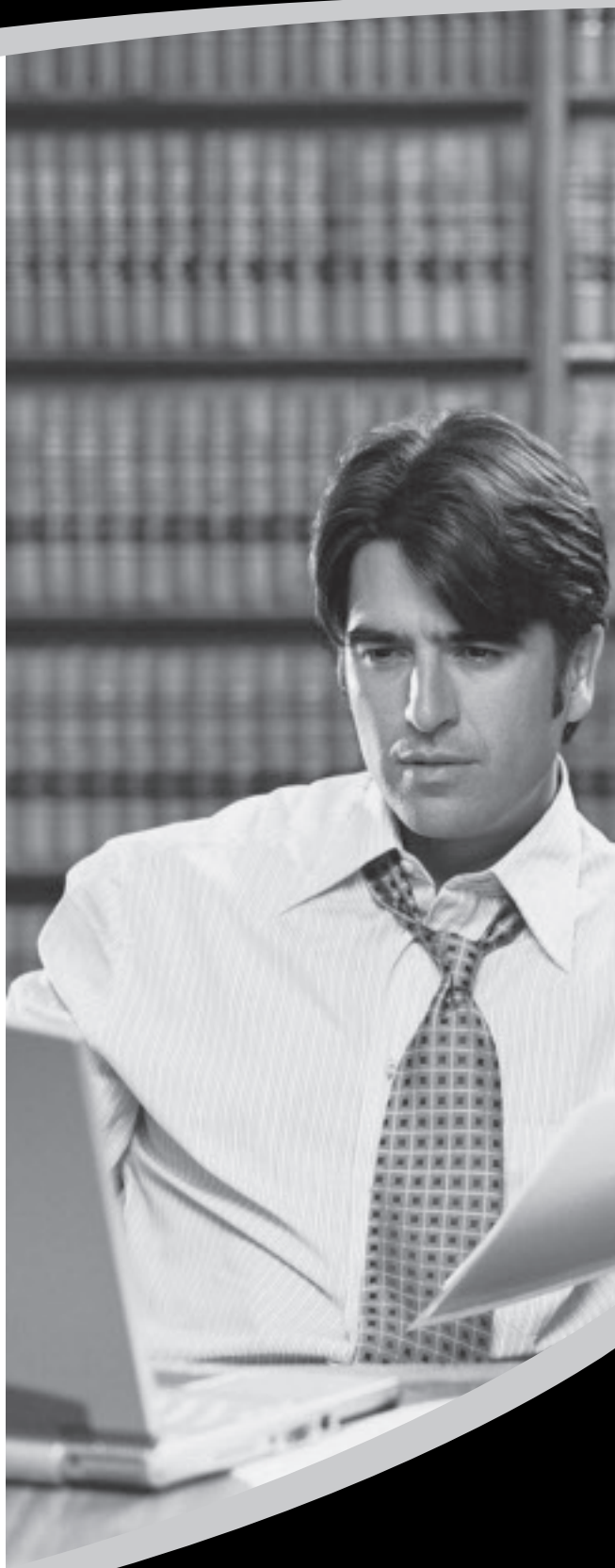

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