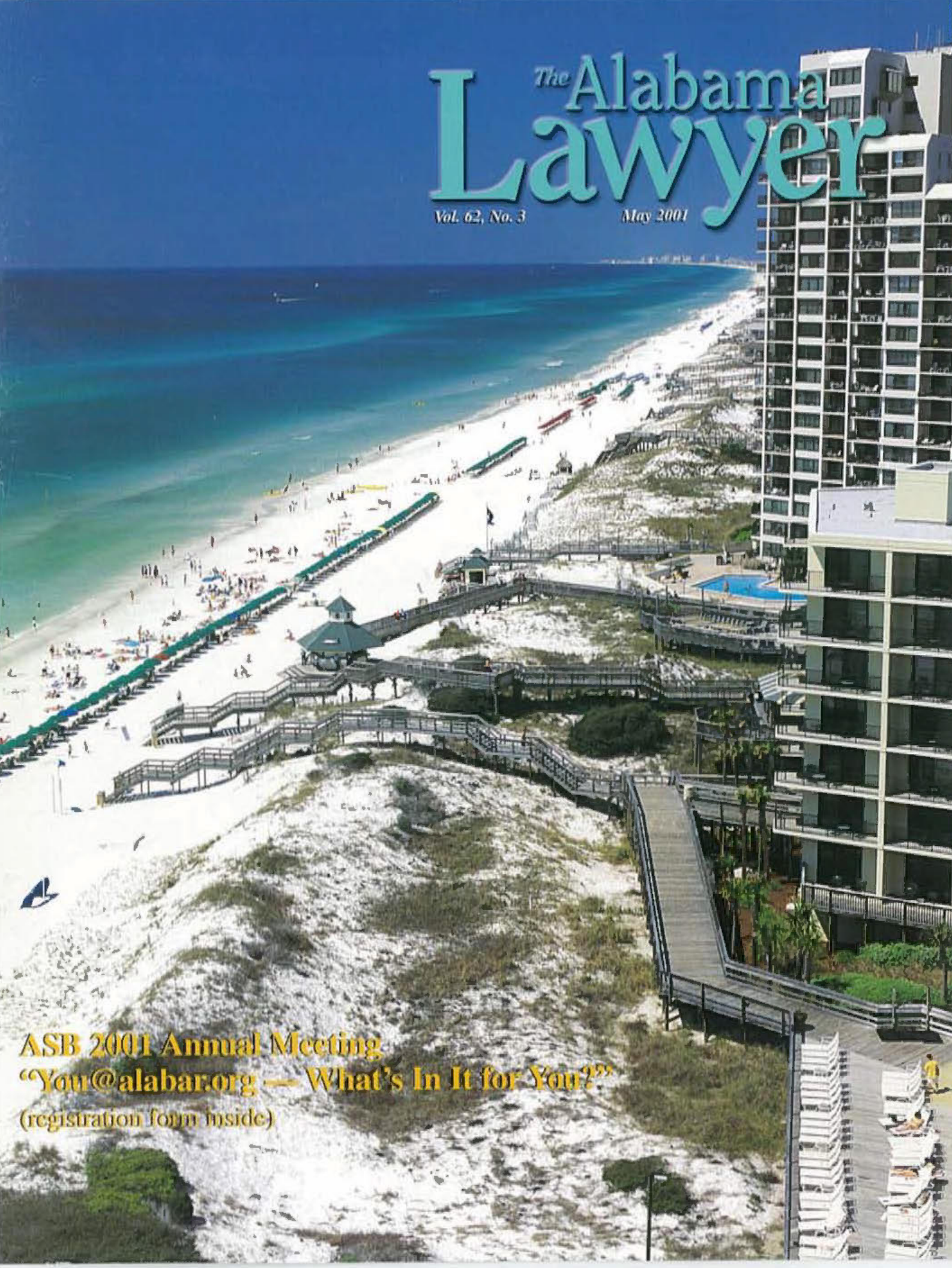

The Alabama Lawyer

Vol. 62, No. 3 May 2001

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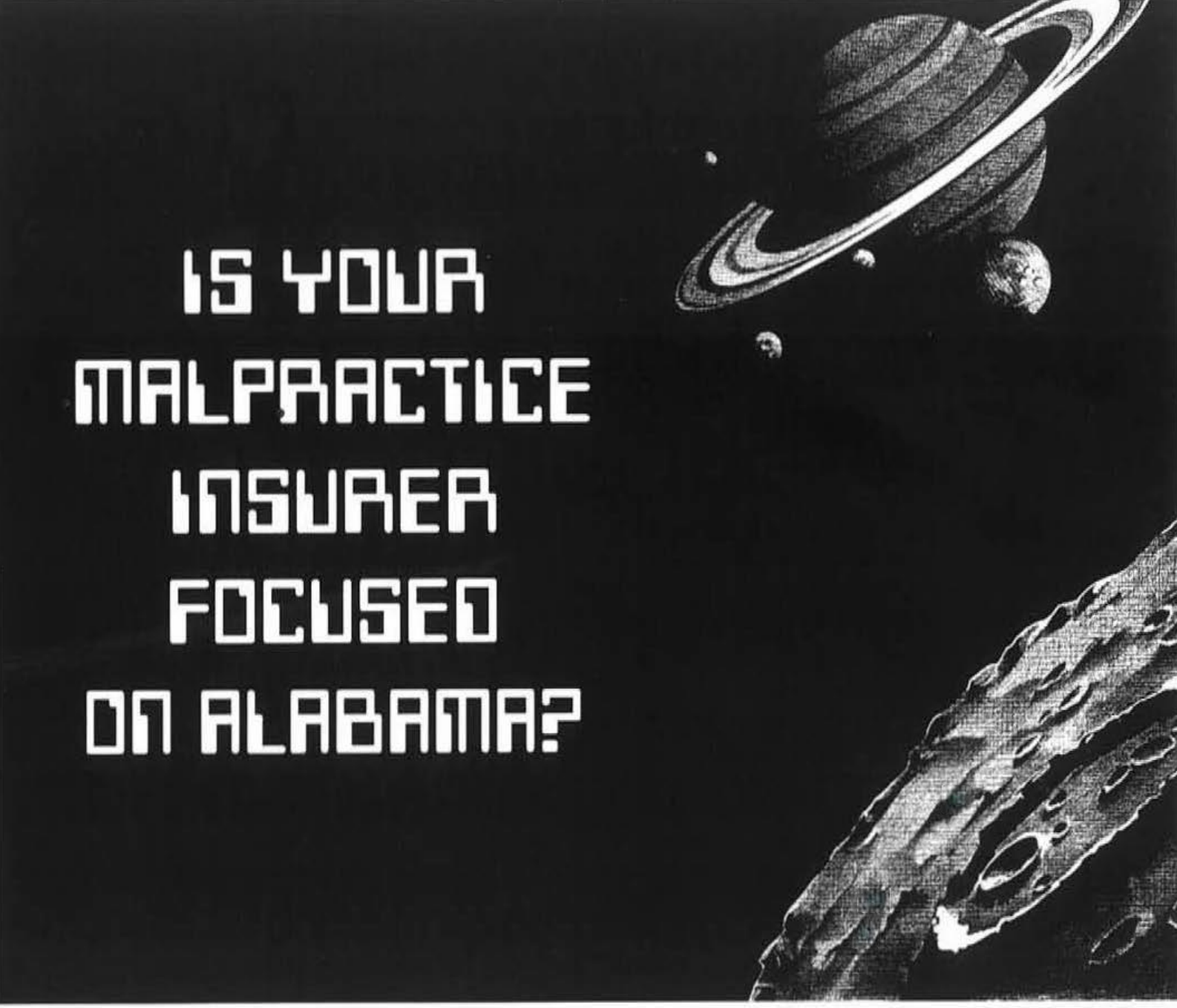

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THE ALABAMA LAWYER
Vol. 62, No. 3 / May 2001

On the Cover

A view from the 13th floor of the Hilton Sandestin Beach & Golf Resort, the "Jewel of the Emerald Coast," in Destin, Florida. The resort is the site of this year's ASB Annual Meeting, July 15-19. (See the insert in this issue of the *Lawyer* for more information.)

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THE ALABAMA LAWYER

Vol. 62, No. 3
May 2001

Departments

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An Interview With Sam Rumore

Editor's Note: We continue the annual interview of *The Alabama Lawyer* with the Alabama State Bar President.

The Alabama Lawyer: Sam, you are more than half way through your term as president of the Alabama State Bar. What have been your most, and your least, pleasant experiences as state bar president?

Rumore: I suppose the most pleasant experience is the simple fact of being state bar president. It was a tremendous honor bestowed on me by the lawyers of Alabama. And believe me, you don't forget for one day that you are president. Lawyers who I practice with at the courthouse, those I meet on the street, and the ones I see on social occasions invariably greet me with, "Hello, Mr. President," or "How is the state bar, Mr. President?" It is truly gratifying to be acknowledged that way.

The only real negative that I have encountered is the juggling of time. I have court appearances several times each week. It is a balancing act to take care of the bar's business, my client's business, my own personal and family responsibilities, and also get enough sleep. But most lawyers know that to be successful they must manage their time wisely. Overall, the positives outweigh the negatives and I have thoroughly enjoyed my year as bar president.

AL: Were you surprised at the amount of time it takes to serve as the state bar president?

Rumore: Not really. I became a bar commissioner in 1990. To be a responsible bar commissioner, you are going to spend time in committee work, or on disciplinary panels. I had budgeted that time into my practice for nine years. When I decided to run for president, I knew what to expect. Also, during my last year as a bar commissioner I served on **President Vic Lott's** Executive Council. That was an eye-opening experience because I got to see the work that the leadership of the bar puts forth before each commission meeting. And there is a continuity of leadership because the immediate past president, as well as the president-elect, also serve on the Executive Council. I was most impressed with **Dag Rowe's** continued involvement after his year as president. Vic Lott and **Wade Baxley** also shared their experience and counsel in their year as past president.

AL: What advice would you give a lawyer who might one day aspire to be the bar president?

Rumore: First of all, they should become a staff writer for *The Alabama Lawyer*! That's just a joke, but seriously, a bar president needs to be involved with the work of the bar. I had served on local committees of the Birmingham Bar Association from my earliest days as a lawyer. Doing bar-related work is its own reward as far as personal and professional satisfaction. However, there is the added benefit of working with lawyers you would not normally meet. My suggestion is to get involved with programs that you really enjoy. I served on the Law Day Committee in Birmingham for many years and when **Charles Najjar** became bar president, he asked me to be the overall chairman of Law Day. This was a great opportunity to show leadership.

Wade Baxley, 1999-2000 ASB president, offering new President Sam Rumore "words of advice"

Over the next few years, other opportunities opened up. State Bar **President Bill Hairston** knew that I practiced family law and he appointed me chairman of a committee to work on the creation of a Family Law Section. That was most enjoyable and because of that experience I had to appear before the bar commission to seek their approval of the section. A few years later, the number of commissioners was expanded based on lawyer population. Formerly, each circuit had only one bar commissioner. Birmingham, with its thousands of lawyers, had only one commissioner, just like the smallest circuit. This changed in 1987 and so I ran for one of the new positions, but lost. Three years later I ran again for bar commissioner, and won. I have thoroughly enjoyed my experiences with the bar.

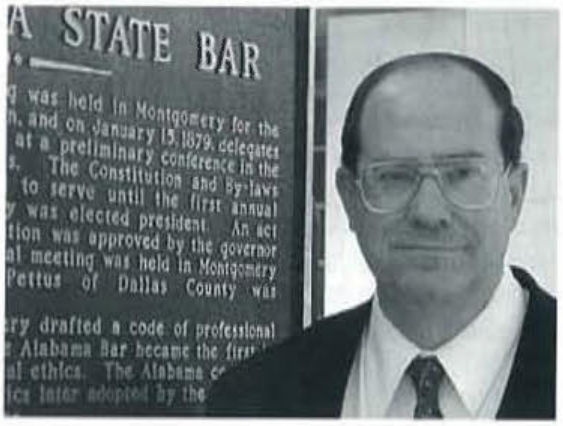
Finally, I was fortunate enough to have a passion for history and some skill at writing. My series in *The Alabama Lawyer* on the courthouses started as a Bicentennial hobby to visit each county seat in 1976. Who would have thought that history could take you so far! Over the years I received scores of letters from lawyers and judges who appreciated my articles. So, in any event, here I am today as state bar president. Fundamentally, the recognition as president is given for your work over your entire career.

AL: What have been your goals as president this year?

Rumore: Basically I wanted to improve the image of lawyers, enhance lawyer collegiality and get lawyers involved in some important issues.

AL: What have you done to reach these goals?

Rumore: First, we have continued the bar's partnership with the Alabama Broadcasters' Association. The radio and TV spots that were produced have appeared all over the state and we have gotten much favorable response from them.



Sam Rumore beside ASB Legal Milestone marker

Also, this year the Board of Bar Commissioners approved a Pledge of Professionalism. This is a written declaration that a lawyer will aspire to specific standards of conduct. This pledge was patterned after the Birmingham Pledge where signees promise to avoid racism in their personal lives. Each lawyer who signs the pledge will receive a letter from me, a certificate acknowledging their commitment, and an original design lapel pin. Professionalism has to start with each individual lawyer and how we treat each other.

Another way I hope to improve collegiality is through the continued work of the Bench and Bar Relations Committee chaired by **Carol Ann Smith** of Birmingham and the Intra-Bench and Bar Communication Task Force chaired by **Terry Brown** of Montgomery. Through these committees, lawyers of different backgrounds and judges share their common concerns and work on bar-related matters.

AL: In what issues have you been interested?

Rumore: Possibly the greatest need of the State of Alabama is a new constitution. The present one is 100 years old this year. It has been amended hundreds and hundreds of times. So many of the problems in our state can be linked to shortcomings in our constitution. Perhaps the most important task force that I established was the one on constitutional revision. **Judge Sam Pointer** agreed to serve as chair. The purpose of the task force is to get the organized bar involved in the dialogue on constitutional reform efforts. It may take many more years before we get a new constitution, but we have to begin somewhere and I hope this task force contributes to the discussion.

Another project we initiated this year is the Lawyer Campaign for Legal Services. I mentioned the problem of funding for Legal Services in one of my "President's Pages." I sent a letter to each member of the bar asking them to pledge the equivalent of one billable hour in money to Alabama Legal Services for a period of three years. The purpose of the campaign is to get lawyers involved in the efforts to see that poor people have access to legal representation.

AL: Have there been any other accomplishments this year?

Rumore: I would say that one little-publicized but very important action took place this year involving the future of our bar building. Our building was constructed with room for expansion as the need arose. We have now built out the third floor. If there is a need for further expansion, we will probably have to take in the parking area underneath the bar building. If that happens, we will need alternate parking. The Board of Bar Commissioners authorized **Keith Norman** to inquire about the availability of the small strip of land directly across Hull Street from our building. It was not actively on the market, but, as is always the case, prices can be negotiated to persuade a sale. That is what we did and we will soon own that property. In my opinion, this was good stewardship since there is no other vacant property on Dexter Avenue.

AL: Do you have any other concerns that you wish to share with our readers?

Rumore: Yes, I wrote in my "President's Page" that we have a very diverse bar and that the leadership of the bar needs to reflect that diversity. I mentioned that our association has never had a woman as president and has never had a black lawyer as president. I am pleased to say that one of these historic firsts will soon take place. **Fred Gray** of Tuskegee was the only lawyer to qualify for president-elect by the deadline date of March 1. Fred has had a long and fulfilling legal career which includes representation of

"Professionalism begins with each of us."

This quote from ASB President Sam Rumore in his "President's Page" serves as the beginning of the bar's special efforts to have every member sign the Professionalism Pledge, as approved by the Board of Bar Commissioners. The pledge is located below, or may be downloaded from the bar's Web site at *www.alabar.org*. A personal letter from President Rumore has been sent to all bar presidents, and special certificates and original design lapel pins will be sent to all participants. All Alabama lawyers are encouraged to participate in this positive program!

ALABAMA STATE BAR
PLEDGE OF PROFESSIONALISM

I believe that our judicial system binds together the fabric of our democracy. I believe that, in order to maintain our judicial system, lawyers must maintain a high degree of professional courtesy and decorum. I believe that every lawyer has a professional duty to maintain a courteous and collegiate atmosphere in the practice of law. I believe that a courteous and collegiate atmosphere begins with me.

Therefore, I will

- never knowingly deceive another lawyer.
- honor promises and commitments made to another lawyer.
- make all reasonable efforts to schedule matters with opposing counsel by agreement.
- maintain a cordial and respectful relationship with opposing counsel.
- seek sanctions against opposing counsel only where required for the protection of my client and not for mere tactical advantage.
- not make unfounded accusations of unethical conduct about opposing counsel.
- never intentionally embarrass another lawyer and will avoid personal criticism of another lawyer.
- attempt to always be punctual.
- seek informal agreement in procedural and preliminary matters.
- shake hands with the opposing counsel at the close of adversarial proceedings and will refrain from engaging in any conduct which engenders disrespect for the court, my adversary or the parties.
- recognize that advocacy does not include harassment.
- recognize that advocacy does not include needless delay.
- be ever mindful that any motion, trial, court appearance, deposition, pleading or legal technicality costs someone time and money.
- never have ex parte communications with the court.
- stand to address the court, be courteous and not engage in recrimination with the court.
- dress in proper attire during any court proceeding, whether in the courtroom or chambers, to show proper respect for the court and the law.
- not become too closely associated with my client's activities, or become emotionally involved with my client.
- always remember that the purpose of the practice of law is neither an opportunity to make outrageous demands upon vulnerable opponents nor blind resistance to a just claim; being stubbornly litigious for a plaintiff or a defendant is not professional.

(This pledge is adapted from the Alabama State Bar Code of Professional Courtesy adopted by the Board of Bar Commissioners on April 10, 1992)

Date:_____ Signature: _____

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Rosa Parks and Martin Luther King, Jr. Fred is now our president-elect designate and will serve as the 126th Alabama State Bar President for the 2002-2003 term.

I also encourage more women lawyers to get involved in bar activities. We now have a Women's Section and many leaders among the female members of our bar. Our bar association presently is more than 25 percent female. It is hoped that next historic first of having a woman president in our bar will come about soon.

AL: What are your plans after you leave office in July?

Rumore: Unlike General MacArthur, I do not intend to just fade away. The immediate past president serves on the Executive Council, and I hope to give my advice and support to my successor, **Larry Morris**. There will be other projects. I would like to complete my courthouse series and compile the articles into a book. Also, I may help out on a project to write a history of the Alabama State Bar in time for our 125th Anniversary in 2004. And I am certain that I will help out whenever called upon by future presidents. Our bar association needs a new long-range plan. We need to actively develop young lawyer leadership. And we need to continue our efforts at diversity in the profession.

AL: Any last thoughts?

Rumore: Serving as state bar president is the highest honor that can be bestowed by one's peers. I will always be grateful to the lawyers of Alabama for this privilege. We are an honorable profession that over the years has helped to make our country a great country. I sincerely appreciate the opportunities given to me in this land because all four of my grandparents, as well as my father, were immigrants. This country and this profession have been very good to my family and me. ■

Sam Rumore and family at 2000 ASB Annual Meeting at Orange Beach

Profile

Fred D. Gray

Pursuant to the Alabama State Bar's rule governing the election of president-elect, the following biographical sketch is provided of Fred David Gray. Gray was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2001-2002 term, and will assume the presidency in July 2002.

Fred David Gray is a native of Montgomery and a civil rights lawyer. He was educated at the Nashville Christian Institute, Alabama State University and Case Western Reserve University.

An admittee to the Alabama and Ohio bars, Gray is also admitted to practice in the following courts: Supreme Court of Ohio, Supreme Court of Alabama, United States District Court for the Middle District of Alabama, Supreme Court of the U.S., U.S. Court of Appeals for the Fifth Circuit, U.S. District Court for the Northern District of Alabama, U.S. Court of Appeals for the Sixth Circuit, U.S. Court of Appeals for the Eleventh Circuit, and the Tax Court.

Gray's legal career spans a period of 45 years. Out of law school less than a year, he represented Rosa Parks, who was arrested because she refused to give up her seat on a bus to a white man, which ignited the Montgomery Bus Boycott. *City of Montgomery v. Rosa Parks.* He was Dr. Martin Luther King, Jr.'s first civil rights attorney.

Gray was also one of the first Blacks to serve in the Alabama Legislature since Reconstruction (1970-1974). He received the Capitol Press Corps Award for Best Orator in the House of Representatives in 1972, and was a member of the National Society of State Legislators from 1970-1974. He served as the 43rd president of the National Bar Association and was inducted into the NBA Hall of Fame in August 1995.

Gray is the senior partner in the firm of Gray, Langford, Sapp, McGowan, Gray & Nathanson, with offices in Montgomery and Tuskegee.

In October 1999, he became a Fellow of the American College of Trial Lawyers, and in March 2000, a Fellow of the International Society of Barristers. Gray has been the recipient of numerous awards and honors, including the American Bar Association's Spirit of Excellence Award in 1996.

Fred D. Gray

A recent author, *Bus Ride to Justice* was released in February 1995 and *The Tuskegee Syphilis Study* in May 1998. He also wrote *The Sullivan Case: A Direct Product of the Civil Rights Movement.*

An elder of the Tuskegee Church of Christ, Gray has four children and six grandchildren. ■

Keith B. Norman

Professionalism: One Word That Says It All

By Keith B. Norman

Our profession has taken several positive steps to instill in our newest members, and remind those already in practice, what it means to be a "professional." This year begins the second year of mandatory professionalism training for new bar members. The training program covers such topics as "An Attorney's Relationship with the Profession," "Courtroom Decorum," "Building Your Practice and Your Relationship with Your Clients," and "The Joy of Being a Lawyer." The training sessions are held four times a year.

Last year, nearly 500 new members attended the day-long training sessions to hear from a faculty of Alabama's finest and most highly regarded judges and lawyers. Last year's faculty members included: **John Pappanastos**, Montgomery; **Ralph Gaines**, Talladega; **Judge Art Hanes**, Birmingham; **Fred Gray**, Tuskegee; **Stan Starnes**, Birmingham; **Steve Glassroth**, Montgomery; **Justice Ralph Cook**, Montgomery; and **Skip Ames**, Mobile. In addition to Judge Hanes, Skip Ames, Stan Starnes and Justice Cook, this year's faculty includes former **Governor Albert Brewer**, Birmingham; **Judge Ben Fuller**, Prattville; **Ken Simon**, Birmingham; **Laura Petro**, Birmingham; **John Lentine**, Birmingham; **Carol Ann Smith**, Birmingham; and state bar **President Sam Rumore**, Birmingham.

The Alabama Bar Institute for CLE (ABICLE) organized and administered the first year's training sessions. Last year's training sessions went very smoothly thanks to **Steve Emens**, associate dean, University of Alabama School of Law, and ABICLE director, and **Anita Hamlett**, ABICLE associate director. This year's professionalism training will be administered by Cumberland Institute for CLE (CICLE) under the able direction of **LaVone Warren**, assistant dean for CLE at Cumberland School of Law. Steve, Anita and LaVone, as well as the lawyers and judges serving as faculty for the professionalism training programs, deserve our praise and thanks.

Another positive step being considered is one hour of professionalism or ethics training for all licensed members. The MCLE Commission is proposing a change in the MCLE rules to have one hour of the annual CLE requirement devoted to ethics or professionalism with an accompanying increase in the annual minimum number of hours from 12 to 15. The MCLE Commission is proposing two additional changes that would help facilitate the two changes mentioned above. One would be a "comity" rule that would allow a non-resident bar member in compliance with the CLE rules in the jurisdiction where he or she resides to be in compliance in Alabama. The other change would permit members to obtain up to six hours CLE credit for interactive instruction received via the Internet. These proposed CLE rule changes are posted on the bar's Web site, *www.alabar.org*.

Finally, I encourage every lawyer to read and sign the "Pledge of Professionalism," adopted by the Board of

Commissioners this past October. The pledge and accompanying form are posted on the bar's Web site. (Also, see page 158 of this issue.) You can print a copy of the pledge form, sign it and return it to state bar. Your name will be posted on the bar's Web site with the other bar members who have signed the pledge. Abiding by the pledge will not only engender the public's respect and trust, but will make us feel better about the future of our profession.

Educational Debt Continues to Increase

Educational debt for those sitting for the Alabama bar examination has increased the last two examination periods. The chart below reflects the education debt load of bar examinees over the past five years. ■

Educational Debt For Bar Examinees

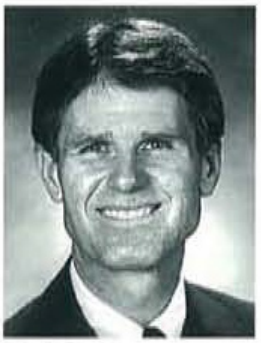
	Feb 01	Feb 00	July 00	Feb 99	July 99	Feb 98	July 98	Feb 97	July 97	Feb 96	July 96
Examinees With Educational Debt	137 (39%)	122 (36%)	317 (57%)	144 (41%)	297 (54%)	125 (44%)	310 (60%)	105 (53%)	317 (68%)	148 (51%)	327 (73%)
Average Debt	$48,920	$44,865	$50,441	$46,500	$50,070 (Total Debt $14,870,800)	$41,885	$50,418	$35,308	$44,528	$35,000	$40,892
Debt Service 7.5% For 10 Years	$580 Per Month	$533 Per Month	$599 Per Month	$552 Per Month	$594 Per Month	$497 Per Month	$599 Per Month	$420 Per Month	$528 Per Month	$415 Per Month	$474 Per Month

- **William C. Thompson**, judge of the Alabama Court of Civil Appeals, has been appointed chief judge of the Court of the Judiciary.

- **William J. Bryant**, a shareholder with the Birmingham firm of Feld, Hyde, Lyle, Wertheimer & Bryant, P.C., was recently named chairman of the national board of directors of the American Heart Association. He will be involved in the overall administration of the AHA's public relations, advocacy and fund-raising activities. Bryant is the first Alabamian to chair this national voluntary health agency, with four million volunteers and 3,000 employees.

- **Bryan Stevenson**, an attorney with the Equal Justice Initiative of Alabama, recently was awarded the Olof Palme Prize for outstanding achievement. The prize, named for an assassinated Swedish prime minister, is given annually by the Olof Palme Memorial Fund for International Understanding and Common Security, and comes with a $50,000 cash prize and a diploma. The Equal Justice Initiative originally was the Alabama Capital Representation Resource Center. In 1995, it was reorganized as the Equal Justice Initiative, a non-profit organization. Stevenson is a 1987 admittee to the Alabama State Bar.

- **Paul Myrick**, a partner in the Mobile firm of Adams & Reese LLP, was recently appointed a fellow of the College of Labor and Employment Lawyers. Myrick is a past chair of the ASB Labor and Employment Law Section and is the co-author of the *Alabama Employers Handbook.*



Paul Myrick

- Cumberland School of Law at Samford University recently honored several Alabama attorneys as among its most loyal alumni and friends. **W. Stancil Starnes** of Birmingham was named Distinguished Alumnus for 2001, **E. Mark Ezell** of Butler was named 2001 Friend of Cumberland and **Steve Brackin** of Dothan was named Volunteer Alumnus of the Year.

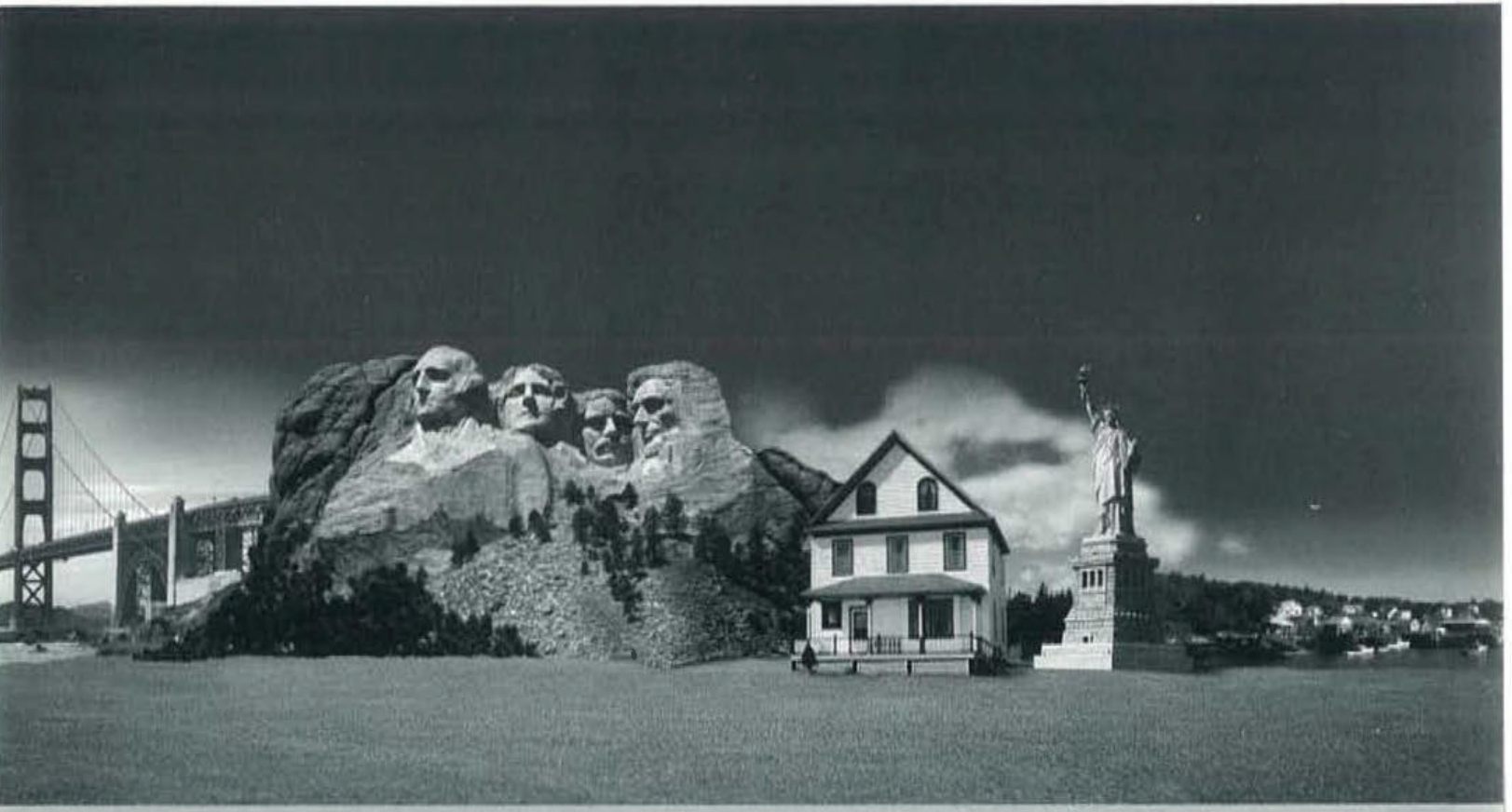
  Starnes, who is a senior partner with the firm of Starnes & Atchison, graduated *summa cum laude* in 1972 from Cumberland School of Law, where he was a member of Curia Honoris and the Order of Barristers, and was editor-in-chief of the *Cumberland Law Review*. Starnes has served as president of the Cumberland National Alumni Association, and as a member of the law school's Advisory Board and of two Dean Search committees. He has also chaired the *Cumberland Law Review* Foundation. One son, J.T. Thompson, is a first-year student at Cumberland.

  Ezell, who practices in Butler, graduated in 1966 from the University of Alabama School of Law. He inaugurated the Parham H. Williams Scholarship in honor of a former dean and has helped to build the scholarship's corpus to more than $170,000. He has two sons who have attended law school at Cumberland.

  Brackin, a partner in the Dothan firm of Lewis, Brackin, Flowers & Hall, graduated *cum laude* in 1978 from Cumberland School of Law, where he was a member of Curia Honoris. He is president of the Dothan Area Cumberland Club.

- Recently elected officers of the Alabama chapter of the American Academy of Matrimonial Lawyers are **Sammye Oden Kok**, president, and **Denise J. Pomeroy**, secretary, both of the firm of Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A. **Randall W. Nichols** of Massey & Stotser, P.C. was elected vice-president and **L. Stephen Wright, Jr.** of Najjar, Denaburg, P.C. was elected treasurer.

- **Sharon Byrd Patterson** recently was awarded the Department of the Army Superior Civilian Service Award for her outstanding support in providing legal advice to the United States Army. She is a member of the Office of the Chief Counsel, Acquisition Law Division, U.S. Army Aviation and Missile Command, Redstone Arsenal, Alabama. ■



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About Members

Kathleen A. Brown, formerly of Robison & Belser, P.A., announces the opening of her office at 423 S. Hull Street, Suite 2F, P.O. Box 1606, Montgomery 36102-1606. Phone (334) 954-4445.

Raymond C. Bryan announces the opening of his office at Suite 2C, Lyric Square, 1302 Noble Street, Anniston, 36202. Phone (256) 237-5018.

Harry V. Satterwhite announces the opening of his office at 1203 Dauphin Street, Mobile, 36604. Phone (334) 432-8120.

Sidney W. Jackson, III announces the opening of his new office, **Sid Jackson & Associates, L.L.C.** Offices are located at the AmSouth Bank Building, Suite 1704, 107 St. Francis Street, Mobile, 36602. Phone (334) 433-6699.

Among Firms

Michael A. Fritz, Sr. announces that he has become the bankruptcy attorney for the **United States Bankruptcy Administration, Middle District of Alabama.**

Lee A. McIver and **Debra Haynes Poole** announce the formation of **McIver & Poole, P.C.** Offices are located at 321 N. Hull Street, Montgomery, 36104. Phone (334) 834-2135.

Nadler & Associates, P.C. announces that **Frances W. Motches** has become associated with the firm.

Hubbard, Smith, McIlwain, Brakefield & Browder, P.C. announces that **Gary E. Sullivan** has become a shareholder and **Travis R. Wisdom** has become associated with the firm.

Rhea, Boyd & Rhea announces that **Gina D. Coggin** has become a member of the firm. The firm name is now **Rhea, Boyd, Rhea & Coggin.**

James H. Richardson and **John J. Callahan, Jr.** announce the formation of **Richardson & Callahan, L.L.P.** Offices are located at 301 Washington Street, Suite 450, Huntsville, 35801. Phone (256) 533-2440.

Hill, Hill, Carter, Franco, Cole & Black, P.C. announces that **Doy Leale McCall, III** has become a member of the firm, and **Michael J. Cohan** and **Shawn Junkins Cole** have become associates.

Clark & Scott, P.C. announces the opening of their new office at 2450 Valleydale Road, Birmingham, 35244. The firm also announces that **Jack Harrison** has become *of counsel* to the firm and **Barry W. Hair** and **Bradley J. Smith** have joined the firm as associates.

Albrittons, Clifton, Alverson & Moody, P.C. announces that **Benjamin M. Bowden** has become a shareholder and the firm name is now incorporated under the name of **Albrittons, Clifton, Alverson, Moody & Bowden, P.C.**

Mann & Cowan, P.C. announces that **Robert Potter** has become a shareholder in the firm and the firm name has been changed to **Mann, Cowan & Potter, P.C.**

David P. Shepherd and **Mark S. Gober** announce the formation of **Shepherd & Gober.** Offices are located at 913 Plantation Boulevard, Fairhope, 36533. Phone (334) 928-4400.

Hatcher, Stubbs, Land, Hollis & Rothschild announces that **Neal J. Callahan** has become a partner in the firm. Offices are located in Columbus, Georgia.

Andrew T. Citrin and **Michael S. McGlothren** announce the formation of **Citrin & McGlothren, P.C.** Offices are located at 1703 Main Street, Daphne, 36526. Phone (334) 626-7766.

Gladden & Sinor, P.C. announces that **Sheri J. Lowder** has become associated with the firm.

McKenzie & Taylor, P.A. announces that **Joseph A. Zarzaur, Jr.** has become associated with the firm. Offices are located in Pensacola.

Wallace & Wyatt, P.C. announces that **C. Brian Davidson** has joined the firm as partner and the firm name is now **Wyatt & Davidson, P.C.**

Corley, Moncus & Ward, P.C. announces that **Annette T. Ruff** has joined the firm as an associate.

Oliver, Maner & Gray, L.L.P. announces that **Robert B. Gray** has become associated with the firm.

Robert W. Lee & Associates, P.C. announces that **Wendy N. Thornton** has become a shareholder of the firm and the firm name has changed to **Lee & Thornton, P.C.**

Smith, Spires & Peddy, P.C. announces that **Samuel Ray Holmes** has joined the firm as an associate.

Paul, Frank & Collins announces that **Lynda L. Marshall** has joined the firm as counsel. Offices are located in Burlington, Vermont.

Michael K. Abernathy announces the formation of **Abernathy & Associates, L.L.C.** Offices are located at One Chase Corporate Drive, Suite 490, Birmingham, 35244. Phone (205) 982-9810.

Lyons, Pipes & Cook announces that **S. Wesley Pipes, James D. Jeffries, Jr.** and **Roger E. Cole** have become partners in the firm and **S. Travis Bartee, Nathaniel A. Bosio** and **Brandy B. Osborne** have become associated with the firm.

J. Myron Smith & Associates announces that **Jim T. Norman, III** has become associated with the firm.

Spain & Gillon, L.L.C. announces the formation of the **Spain Gillon Mediation Center**. Mediators are **Quentin Brown, Jr., Eugene P. Stutts, Samuel H. Frazier** and **Myla Calhoun Choy**. The center is located at 2117 Second Avenue, North, Birmingham, 35203. Phone (205) 715-6589. Spain & Gillon, L.L.C. also announces that **Roderick K. Nelson** and **Mark W. Macoy** have become members of the firm, **Thomas A. Jones, III, Adam M. Milam** and **Patricia A. Gill** have become associated with the firm, and **Quentin Brown, Jr.** and **James E. Clark** have become *of counsel* to the firm.

Wolfe, Jones & Boswell announces that **Joel R. Hamner** and **Behrouz K. Rahmati** have become partners in the firm.

Dominick, Fletcher, Yielding, Wood & Lloyd, P.A. announces that **Marc C. Dawsey** has become associated with the firm.

Capell & Howard, P.C. announces that **Barbara J. Gilbert, David B. Byrne, Jr.** and **Robert F. Northcutt** have become members of the firm.

Haskell, Slaughter & Young L.L.C. announces that **J. Michael Rediker, Thomas L. Krebs, Patricia C. Diak, William K. Holbrook, Michael C. Skotnicki,** and **Andrea C. Hurt** have joined the firm, and **Peyton D. Bibb, Jr.** has become *of counsel* to the firm.

Constangy, Brooks & Smith, L.L.C. announces that **Thomas A. Davis, Tammy L. Dobbs** and **Charles A. Powell, IV** have become members of the firm.

Eyster, Key, Tubb, Weaver & Roth announces that **Carl A. Cole, III** and **Heather L. Necklaus** have become associated with the firm.

Crittenden Martin announces that **Candace E. Brannen** has joined the firm as an associate.

Burns, Cunningham & Mackey, P.C. announces that **Gary Filllingim** has been made a partner in the firm, and the firm name has changed to **Burns, Cunningham, Mackey & Fillingim, P.C.** The firm also announces that **Melissa A. Thomas** has become associated with the firm.

Bradley Arant Rose & White LLP announces that **Jay Bender, F.M. Haston, Abdul Kallon, Kim Martin, Rodney Moss, Dorothy D. Pak,** and **Richard Sharff** have become partners in the firm.

Ulmer, Hillman, Ballard & Nikolakis, P.C. announces that the firm name has been changed to **Ulmer, Hillman & Ballard, P.C.**

Hare, Wynn, Newell & Newton announces that **Justice Ralph D. Cook** has become *of counsel* to the firm.

Ambrecht, Jackson, Demouy, Crowe, Holmes & Reeves, L.L.C. announces that the firm name has been changed to **Ambrecht Jackson L.L.P.** and that **Judge Edward B. McDermott** has become *of counsel* to the firm.

Lightfoot, Franklin & White, L.L.C. announces that **Melody L. Hurdle** and **Robin H. Graves** have become members of the firm.

Cassady, Fuller & Marsh, L.L.P. announces that **M. Chad Tindol** has become a partner in the firm.

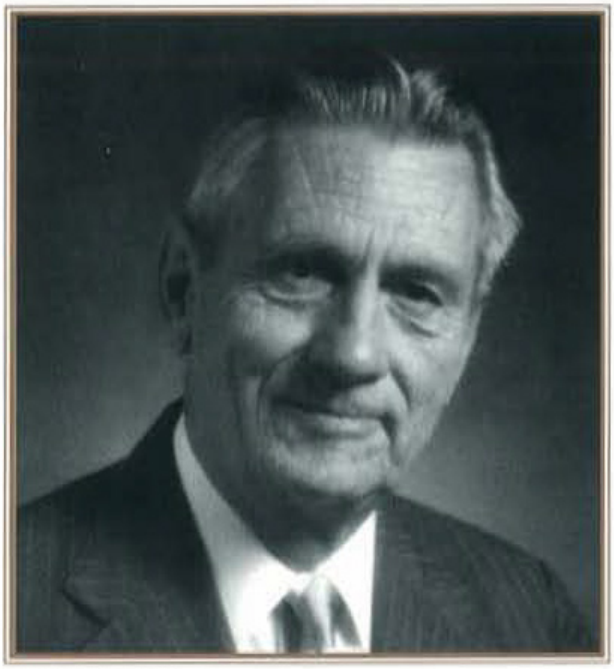
Hand Arendall, L.L.C. announces that **Frank C. Galloway, Jr.** has joined the firm as a member, **Douglas W. Fink, Brooks P. Milling** and **E. Luckett Robinson, II** have become members of the firm, and **Andrew J. Crane, Christopher M. Gill, Tracy R. Davis, Lisa Darnley Cooper,** and **Louis C. Norvell** have become associated with the firm. ■

Otto Ernest Simon

Otto Ernest Simon, a native of Mobile, had a distinguished career as a soldier, legislator and lawyer. After graduating from Murphy High School in 1936 and working briefly for the GM&O Railroad, he entered the Army Air Corps during World War II and was honorably discharged as a master sergeant. His undergraduate studies were at Spring Hill College, and he obtained his law degree from the University of Alabama School of Law in 1949. During the Korean War he served as a captain for the Judge Advocate General for the 26th Air Division Eastern Air Defense Force. Thereafter, until his retirement in 1985, he practiced in Mobile as a member of the firm of Simon, Wood & Crane.

In addition to his active private practice he represented Mobile County in the Alabama legislature from 1955 to 1959; served with the Alabama Insurance Commission, as a chairman to the Alabama Education Study Commission, and as a city attorney for Prichard and for the Prichard Waterworks and Sewer Board; and was active in Masonic and other local organizations. Always seeking new challenges, after his retirement he began a new career in mediation.

A member of the Spring Hill Avenue Methodist Church, he is survived by his wife, Catherine Doyle Simon; two sons, Otto M. Simon and Eric H. Simon; a daughter, Lee Simon Hightower; two grandchildren, Cody and Haley Hightower; stepsons James Gnessett Hickman, III, Robert D. Hickman and Gregory A. Hickman; four sisters, Barbara Lewis, Vesta Simon Evans, Katherine Elizabeth Simon and Martha Simon Henderson; and other relatives.



Otto Ernest Simon

The Mobile Bar Association honors the life and mourns the death of Otto Ernest Simon on September 30, 1999, after 50 years of faithful service to his profession, who served his country in war, his community and state throughout a distinguished career, and brought honor and respect to his family.

—Fred W. Killion, past president
Mobile Bar Association

George Joseph Moore

George Joseph Moore, a highly respected member of the Mobile Bar Association, departed this life on Thursday, January 20, 2000.

This association memorializes his accomplishments as a proficient practitioner of his profession and his beneficent influence on those who knew him.

George Joseph Moore was born in Mobile on the 10th day of September, 1918, and was a graduate of McGill Institute, Springhill College and the University of Alabama School of Law, receiving his LLB degree in 1948. He was a member of the Mobile and American bar associations, as well as the American Trial Lawyers Association. He began his legal career in Mobile where he operated a private law practice for 51 years.

He was a member of St. Ignatius Parish, St. Vincent DePaul Society, and Knights of Columbus and was a past president of the Friendly Sons of St. Patrick. He was a Navy Veteran of WWII.

George Joseph Moore is survived by his wife, Roberta S. Moore of Mobile; daughters Catherine M. McCorkle of Mobile and Elizabeth M. Leonard of North Palm Beach, Florida; a son, Gerard J. Moore of Marietta, Georgia; a son-in-law, James Leonard of North Palm Beach, Florida; a daughter-in-law, Benedette S. Moore of Marietta; a granddaughter, Erin A. Moore of Marietta; two brothers, Brother John Moore, SC (Brother of Sacred Heart) and Brother Michael Moore, SJ (Society of Jesus) of Grand Coteau, Louisiana; a sister-in-law, Sister Anne Roberta Schilling, SL (Sisters of Loretto) of Nerinx, Kentucky.

—Alex F. Lankford, past president
Mobile Bar Association

Sidney Moxey Harrell

Sidney Moxey Harrell, a native of Sunflower, and a longtime resident of Mobile, a graduate of the University of Alabama School of Law, a Veteran, and a retired major in the United States Army, attained wide renown as an expert in real property law throughout South Alabama, where he practiced law, invariably displaying an aura of quiet dignity, until his death on November 20, 1999.

He is survived by his wife, Anne Boudousquie Harrell; three children, Cathy Harrell Pennington of Atlanta, Mollie Louis Harrell and Sidney Moxey Harrell, Jr., a Mobile attorney; a granddaughter, Mary Slade Pennington; a brother, Claude Eugene Harrell, Jr.; and other relatives.

—Alex F. Lankford, past president
Mobile Bar Association

James Tyler Strickland

On Wednesday, April 2, 2000, James Tyler Strickland, a distinguished jurist and member of the Mobile and American bar associations, departed this life, and the Mobile Bar Association recognizes and memorializes his very colorful and outstanding career as an attorney, judge and political analyst, as well as a dedicated supporter of his community.

James Tyler Strickland was born in Bastrop, Louisiana, on October 22, 1926. He was a longtime resident of Mobile, living in the Toulminville area and West Mobile. Judge Strickland graduated from Murphy High School. He served in the U.S. Army from 1945 to 1947, and then enrolled at the University of Alabama, graduating from the University's School of Law in 1952. He practiced law in Mobile from the mid-1950s to 1965. He also served as a part-time assistant district attorney, and his aggressive style as a prosecutor garnered him the nickname of "Tiger." In 1965, he was appointed part-time juvenile court judge and was later appointed as circuit judge, becoming the first full-time juvenile court judge. He was recognized throughout the State of Alabama as a leader in juvenile justice. In the late '60s, due to his political genius, he was able to convince the local legislative delegation from Mobile County to sponsor and pass a bond issue of one million dollars to establish the first youth center in the State of Alabama, in Mobile County. In 1984, the center was renamed in his honor by the Mobile County Commission and is now known as the Strickland Youth Center.

Judge Strickland was known as a political power in Mobile County and was extremely powerful and influential with state leaders as well for nearly 50 years. Judge Strickland had the unique ability to analyze political matters throughout Mobile County, and due to his political acumen, he developed close friendships with many leaders of all races in Mobile County, and was credited with helping many political figures with tough campaigns to win elections in Mobile County, as well as throughout the State of Alabama.

Judge Strickland is survived by his wife, Joan Keeler Strickland; a son, Wayne Tyler Strickland, a daughter, Mary Lowery; grandsons James Donald Lowery and Daniel Tyler Lowery, all of Mobile; and a sister, Gertie Strickland Grubbs of Jacksonville, Florida.

—Alex Lankford, past president
Mobile Bar Association

Black, William Verbon
Huntsville
Admitted: 1959
Died: December 31, 2000

Duke, William Stephen
Montgomery
Admitted: 1929
Died: January 3, 2001

Large, Earnest Ray
Birmingham
Admitted: 1951
Died: January 13, 2001

Lumpkin, William H., Hon.
Cherokee County
Admitted: 1939
Died: March 9, 2001

Metcalf, Ramsey Neil
Bay Minette
Admitted: 1948
Died: January 18, 2001

Schmarkey, John Carl
Mountain Brook
Admitted: 1957
Died: March 8, 2001

Seale, Albert Jackson
Mobile
Admitted: 1951
Died: February 25, 2001

White, William Bew, Jr.
Birmingham
Admitted: 1946
Died: January 17, 2001

Whiteside, David Powers
Birmingham
Admitted: 1975
Died: January 29, 2001

Robert L. McCurley, Jr.

By Robert L. McCurley, Jr.

With one-third of the legislative session over, no bills have been passed. Nor were there any bills passed in the first Special Session that was held during February. The first third of the session did see 1,100 bills introduced. If experience of prior sessions holds true, most of the legislation will pass during the final two weeks of the session, with the last possible day that the legislature can meet being Monday, May 21, 2001.

It is hard to give busy, practicing lawyers an alert to possible bills pending in the legislature. The following bills have been identified and listed by category. This, by no means, infers there may not be local bills affecting a particular county or city and other pieces of general legislation of interest. These, however, are the most probable bills that would be of interest to lawyers.

I am listing the topic along with the bill numbers in the event that you wish to contact the Secretary of the Senate or Clerk of the House to obtain a copy of the bill or wish to review the entire bill on the Legislature's public Web site which is: *www.legislature.state.al.us/.*

Constitutional Revision

One bill calls for a constitutional convention (HB. 143, HB. 3), and another authorizes the legislature to revise the constitution (SB. 2, HB. 66). Four bills are a part of the House of Representatives' systematic revision of the constitution. They are Article I revision (HB. 63), Article II (HB. 64), Article XII (HB. 452) and Article XIII (HB. 451).

Courts

There is the annual bill for nonpartisan election of judges (SB. 280 and HB. 411), another requiring interpreters for witnesses (SB. 32), and another which creates an international civil notary (SB. 403 and HB. 440).

Estates

A bill would allow the executor to file an affidavit stating there are no taxes due rather than wait for the Department of Revenue to send a notice (SB. 388, HB. 362).

Business

One bill calls for the revision of Article 9 of the UCC (SB. 146, HB. 134) (see January 2001 *Alabama Lawyer*), and another for the Electronic Transactions Act (SB. 132, HB. 170) (see January 2001 *Alabama Lawyer*). A bill calls for the registration of foreign LLPs and LLCs; failure to register would cause the entity to not be able to enforce their contracts the same as business corporations (SB. 377).

Real Estate

Several bills call for the reduction of the statutory right of redemption. Some bills limit the reduction to property sold for taxes, and others for all redemptions. Some of the bills reduce the one-year statutory-of-redemption period to 90 days, and others to 180 days or nine months (SB. 44, SB. 172, HB. 423, HB. 125). A new provision is pending for the vacation of roads (SB. 101). There is a bill making changes to the mechanic's lien law (SB. 268, HB. 97, HB. 408). There are two diametrically opposite approaches to the landlord and tenant law, one by the Realtors and another by tenants' groups (HB. 433 and HB. 40). Introduced again this year is a bill that would require for deeds to be recorded in addition to the current requirements as to who prepares them, the marital status, etc., that the deed must state the price paid and this must be certified by a party as the true and correct price (SB. 37 and HB. 104).

Family Law

A bill deals with the Uniform Interstate Enforcement of Domestic Orders Act (SB. 55, HB. 112) (see March 2001 *Alabama Lawyer*). There is also a bill that would create a cause of action against the custodial parent if they deny visitation (SB. 231). The most active bill is one that would effect a change of custody if the custodial parent moves out of the state or more than 75 miles from the other party (SB. 177, SB. 155, SB. 65, and HB. 95). Another bill dealing with custody is one concerning grandparent custody in certain instances (HB. 158). There is also a bill that will require a permanency hear-

ing within 12 months from placing a child in a foster home (SB. 401).

Sports

There is a revision of Alabama's Athlete Agent Act (SB. 153 and HB. 105) (see March 2001 *Alabama Lawyer*). Another bill is aimed at athletic boosters (HB. 641), and a third bill is directed at the harassment of sports officials (SB. 299).

Criminal Law

Various bills create the crime of identity theft (SB. 15, SB. 23, SB. 144, HB. 123). Several bills concern the death penalty. One creates a moratorium on the death penalty (SB. 14, SB. 292), while another changes the execution method to lethal injection (SB. 52, SB. 229, HB. 121). The following bills affect a specific area of criminal law: redefinition of violent offenses (SB. 34); new crime for filing claims against the State of Alabama (SB. 64); assisted suicide (SB. 110, SB. 95); counting nolo contendere pleas as guilty pleas for habitual offenders (SB. 130, HB. 277); creation of a committee to compensate persons for wrongful incarceration (SB. 166, HB. 473, HB. 582); alteration of boat identities (SB. 252); regulation of bail business (SB. 304, HB. 459); creation of a higher offense for aggravated child abuse (SB. 305, HB. 507); allow juvenile proceedings to be conducted by video communication (SB. 390); creation of the Indigent Defense Commission (SB. 433, HB. 57); expansion of the definition of serious, physical injury (SB. 422); a redistribution of DUI fines (SB. 370, HB. 421); a new definition of aggravated rape (HB. 159); and an additional bill allowing for chemical castration for sex offenders (HB. 209).

Other

There are other bills proposing for a "Structured Settlement Act" in civil cases (HB. 460, also HB. 258), and service of process by publication on non-residents the same as on residents under Rule 4.3 (HB. 476).

During the final two-thirds of the session it is expected that the general fund budget and the education budget will consume much of the legislature's time. The official census figures were delivered April 1st which will cause the Joint Committee on Reapportionment to spend a great deal of time readying themselves for an expected Special Session to handle reapportionment not only of the Alabama legislature but the congressional districts.

To look up any of these bills, go to the legislature's Web site at *www.legislature.state.al.us/*. ■

For more information on the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013, fax (205) 348-8411, or phone (205) 348-7411.

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

J. Anthony McLain

Former Client Conflict of Interest

By J. Anthony McLain, general counsel

Question:

"I wish to thank you for your response on Tuesday when I called you concerning a conflict of interest question. Judge Rite, at my request when defense counsel did not withdraw, has asked that I write you to see if I could get a formal opinion on this issue so as to guide our next steps. In case you don't remember, I am involved in the case because I am still working part time in the District Attorney's Office trying felony cases as I am needed and was assigned to try this case this week.

"The issue is whether an attorney may ethically represent a defendant in a murder case who is charged with killing the brother of a former criminal client of the attorney when that former client was the only eyewitness to the incident giving rise to the murder charge and will be the key witness for the State and the Defense.

"The facts, as I understand them, are that some years ago [between 1991 and 1993], prior to the incident that gave rise to this charge, Attorney John represented Client A in a DUI case in municipal court in Anytown. There is a dispute whether he represented him in anything else, but for the sake of this argument, I will assume that he did not. At the preliminary hearing docket of September 15, 1994, Attorney John told Chief Assistant Pete that the victim and his brother were part of a pitiful situation and he knew them from having represented Client A in the past. He seemed at that time to be familiar with their situation. He told Mr. Pete that he might have a conflict and may need to withdraw from the case, but he did not do it at that time. When I began my preparation for the trial of the case, I came across the memo and when I called Client A to come to my office to be interviewed, I asked him whether Attorney John had represented him in the past. He said that he had.

"I told him that anything he told Attorney John in the course of that representation was privileged and not to tell me any details of that communication unless he wanted to waive the privilege. He told me he did not want to waive the privilege and only told me that there were things that he told Attorney John in the course of his representation that he did not want to become known outside of the attorney-client privilege.

"I do not know what, if any, information Client A gave Attorney John in the course of his representation which may amount to impeachable material and have been careful not to breach the privilege to find out. It is my opinion that an actual conflict exists and that Attorney John will have to be removed from the case if he does not withdraw voluntarily. Attorney John's position is that he did not learn anything in the course of his representation that would be suitable for impeachment and that he would absolutely keep any confidences he had with Client A private. He further says that he has associated another lawyer, a Attorney Bill from Bigcity, AL, to be co-counsel in the case and that he has kept any information he knows about Client A confidential as regards Attorney Bill. Although the Motion to Remove was filed yesterday, Attorney Bill has been in the case for two months.

"I have not enclosed the Motion to Remove, the supporting affidavit or brief which was filed in this case, but I can forward it to you if you like. The preliminary hearing information I spoke of is also documented in a file memo that I have not sent, but will if you want me to do so. The thing we need now is an opinion from you discussing the ethical ramifications of this situation. The Judge, as I understand it, would like the following questions answered:

"1. Whether Attorney John's continued representation of the Defendant constitutes an actual conflict of interest considering his former representation of Client A, the key prosecution witness?

"2. Can Client A be compelled to make known to the court what part of the communications with Attorney John he considers privileged and why?

"3. If this is an actual conflict of interest, is there any way Attorney John can remain in the case representing the Defendant?

"4. Whether Attorney Bill, under the facts of this case, can undertake the representation of the Defendant on his own, with or without Attorney John's assistance or whether his involvement in the case so far has resulted in his being tainted by any ethical duties Attorney John owes to Client A?

"I appreciate your attention in this matter. At this time, I believe Judge Rite is going to reset the case for September, so the sooner we have your answer the better."

Additional facts provided by Attorney John:

"I represented Client A on a charge of driving under the influence of alcohol in Anytown Municipal Court. This was before the murder charge was made against Client B, my current client. I never met face to face with Client A; all of our discussions were over the telephone. At that point in time, he resided in Sandy Beach, Florida.

"Zealously guarding the confidentiality of his statements to me I shall state only in general terms the subject of our communications. I discussed the details of the driving under the influence offense and he communicated to me his criminal history.

"I was compelled to withdraw as counsel for Client A when the case was called for trial and he failed to appear. I also listed another reason to the court. That reason was my refusal to move for a continuance upon representations from my client I knew to be false (the case was continued two times previously).

"I have never represented or advised Client A in any matter other than described above. About six months ago he had another driving-under-the-influence case and called up my office to represent him. I told him I would not take his case and the discussion lasted less than a minute, yielding no details of anything except the fact he was charged with DUI.

"During the chambers hearing Inquiry Lawyer told Judge Rite that because I was familiar with Client A's criminal history I would be in a position to impeach him if he denied under oath parts of that history. I was astounded at his statement. If a district attorney places a witness on the stand and has in his file an NCIC sheet showing that history and such witness lies about his criminal history I hope that that district attorney would inform the court that the witness was swearing falsely. I hope no district attorney in this state would allow what he personally knew to be perjury to go to a court and jury as fact.

"At the hearing in chambers I stated on the record that my previous representation of Client A yielded knowledge of only two things: (1) the details of the DUI, and (2) his criminal history. The district attorney has not alleged I possess any other knowledge."

Additional facts provided by Attorney Bill:

"I am Attorney Bill and I have entered an appearance on behalf of Client B, in the above referenced case. Inquiring Lawyer, a deputy district attorney for This County, Alabama, has requested a formal opinion about Attorney John's continued representation of Client B. I would like to address additional facts regarding this matter and correct some of the statements of facts that Inquiry Lawyer has made in his correspondence dated June 28, 1995.

"I represented Client B, in a hearing before Judge Rite, concerning Attorney John's continued representation of him. Attorney John gave a statement in open court and on the record: He had in fact represented Client A in the past on a D.U.I. charge and had received no confidential information of an impeaching nature from him. He had informed Client B that he had represented Client A in the past. Client B confirmed Attorney John's statement. Client B made it clear he wants Attorney John to represent him in this case.

"Approximately two months prior to this hearing, Attorney John contacted me pertaining to this case. We discussed the possibility of trying this case together. During the course of our discussions, over the next two months, it was evident I was not going to be able to try the case. I had a capital murder case pending in Another County, which was scheduled on the same date. Attorney John did not enter my name in the case.

"It became apparent Monday I would be available to aid in the defense of Client B, after the capital murder case in Another County was settled. I contacted Attorney John. He informed me he had received a motion from the District Attorney's Office, Inquiring Lawyer, specifically, asking that he be removed as the lawyer for Client B. On learning this, I informed Attorney John I would be glad to serve as co-counsel for Client B and proceeded to Anytown.

"On my arrival, I discussed my Pro Bono representation with Client B. He requested I represent him with the objective of keeping Attorney John as his lawyer. Additionally, if Attorney John could not for some reason represent him, he requested that I would represent him in the murder case.

"My Notice of Appearance was entered to the Court on the afternoon of Tuesday, the 27th of June 1995. A hearing was set on the motion to disqualify Attorney John. The Court insisted on an in-chambers hearing. Present were myself, Attorney John, Inquiring Lawyer, Client B, Judge Rite, and a court reporter. I requested the State to make a proffer, of the confidential information which might be disclosed by Attorney John, because of his representation of Client A. They were unable to do so. I asked to conduct an examination of Client A for the Court to determine whether or not there was in fact anything that would be discoverable or could be construed to be confidential, which Attorney John might use to impeach the witness. The Court denied this motion. Further, the Court was informed I would examine Client A. Attorney John would not participate in the examination of Client A.

"I have never represented Client A, nor had Attorney John divulged any information which could be remotely thought to be confidential concerning Client A.

"Inquiring Lawyer makes the assertion that Attorney John, by knowing something or possibly knowing something, or speculatively knowing something, there would be a taint to Attorney John which would somehow flow to me. That is absolutely ludicrous. Once I agreed to do the examination of Client A, any claim that could arise from ineffective assistance of counsel based upon Attorney John's representation of Client A in the past became moot. I have never represented Client A; I am not a legal partner with Attorney John."

Answer, Question One:

Yes, Attorney John has a conflict of interest that disqualifies him.

Answer, Question Two:

No, Client A cannot be compelled to reveal past attorney-client communications in an effort to determine whether Attorney John has a present conflict.

Answer, Question Three:

No, if there is a conflict of interest, then Attorney John is disqualified from the case. He could not participate short of cross-examining his former client.

Answer, Question Four:

Attorney Bill can continue on the case unless confidential information about Client A has, in fact, been communicated to him by Attorney John. He says that nothing has been communicated.

Discussion:

There is a presumption that during the course of his prior representation of the victim's brother Attorney John obtained confidential information.

"Confidential information" as it is used in the context of the Rules of Professional Conduct is broader in scope than information subject to the attorney-client evidentiary privilege. It extends to all information about a client acquired by the lawyer during the course of the representation. Rule 1.9(b) precludes the adverse disclosure of a former client's confidential information. Therefore, Attorney John cannot disclose any information about Client A if he learned of it from Client A or during the prior representation.

Attorney John states all he knows about Client A is his criminal history (at the time of the DUI), and facts about that offense. If it is likely that there would be a disclosure of this information, that is enough. The rule is not violated only when a lawyer actually uses confidential information to a former client's disadvantage.

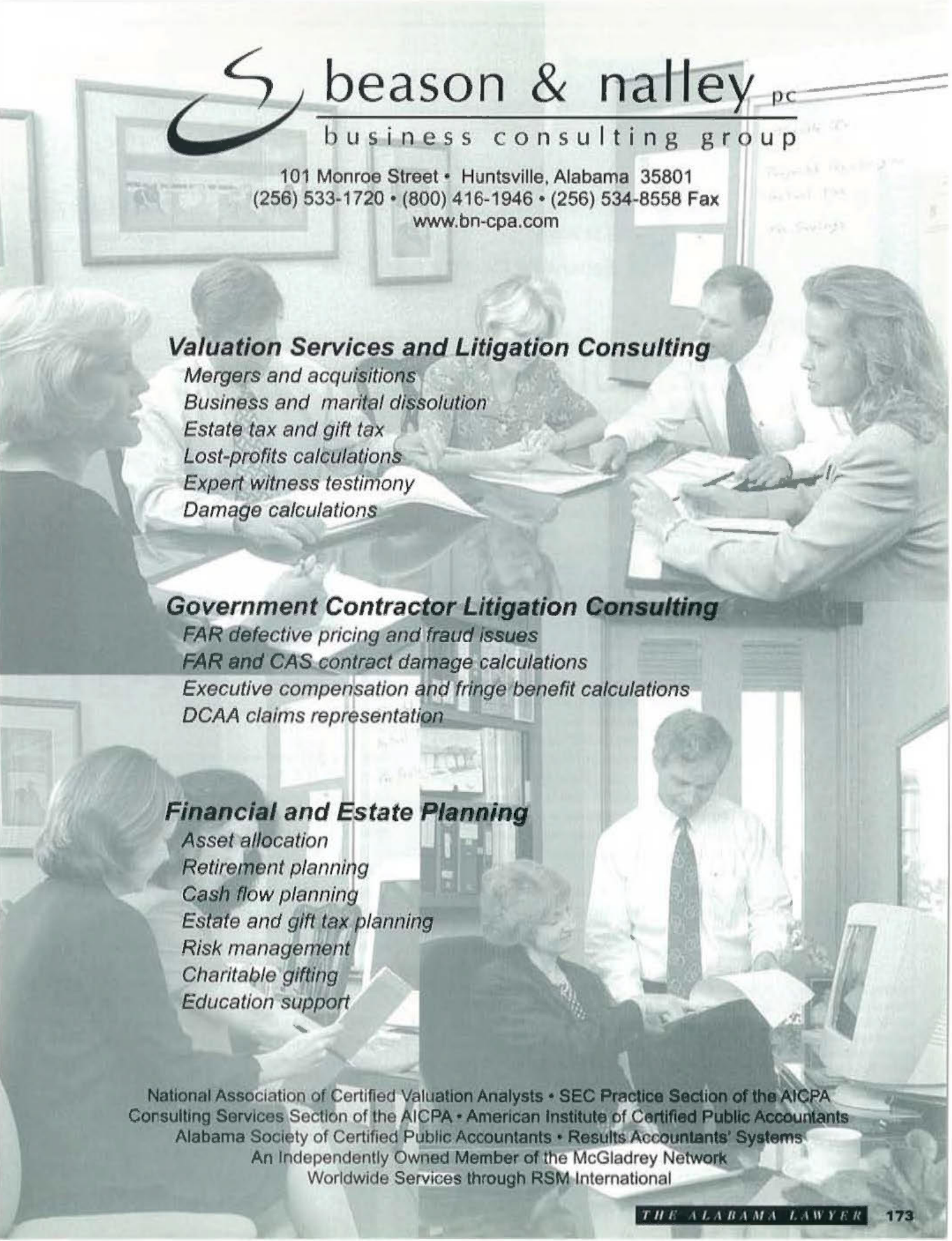
Whenever there is a real risk of disclosure, there should be a disqualification. In the setting of a trial, an adverse disclosure can be inadvertent as well as intentional.

There is no question that being impeached or having your credibility attacked is a disadvantageous use of information, as far as Client A is concerned. Attorney John has a duty to provide his present client with an effective criminal defense. However, he may be limited in his ability to cross-examine an eyewitness. Therein lies a true conflict, and Attorney John must withdraw as defense counsel. Client A should not be compelled to make any disclosure regarding communications with his lawyer in the prior case. Legally, he cannot be compelled, but he is in a difficult situation. Professor Wolfram points this out.

> "As discussed earlier, if a client was required to offer evidence on the contents of confidential communications in order to have the client's former lawyer disqualified, the confidentiality of the information would be lost in the very process of attempting to protect it. That point has been appreciated both by courts, in the development of the common law rules that disqualify lawyers because of a former client conflict, and by the framers of the 1983 Model Rules." Wolfram, *Modern Legal Ethics*, Section 7.4.3. p. 369 (1986)

There is no limited way that Attorney John can remain in the case if he is subject to disqualification. His remainder in the case, in any fashion, would only continue the risk that there would be an unauthorized disclosure of his former client's confidences.

Attorney Bill is co-counsel with Attorney John. If he were a member of Attorney John's law firm, he, too, would be disqualified because there is a presumption of shared confidences among firm members. That presumption does not exist with respect to co-counsel arrangements between lawyers from separate firms. In order for Attorney Bill to be disqualified, there must be proof that he has acquired actual knowledge of confidential information from Attorney John. Attorney Bill can remain in the case subject to that. He states that nothing has been related to him. In view of nothing to rebut that, he can continue to represent the murder defendant. ■



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Escambia County Established: 1868

Samuel A. Rumore, Jr.

Escambia County

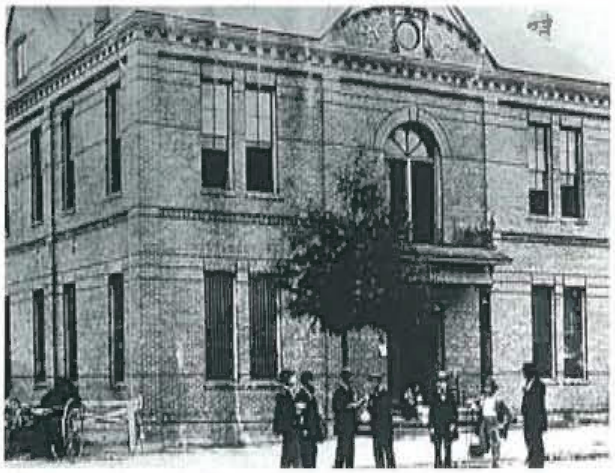
By Samuel A. Rumore, Jr.

Escambia is another Alabama county whose Indian name is open to speculation. One opinion is that the name is of Creek Indian derivation from the word "schamba" and means "clear water." Another source states that the name comes from two Choctaw words, "oski" meaning "cane" and "ambeha" meaning "therein," for a literal translation of "cane therein." This theory is plausible because "oski ambeha" could be contracted into "oskambeha" and then slurred by pioneering Americans into Escambia. Under either theory, the county was well-named because it has abundant clear water and in its early days grew dense stands of cane.

The Creek Indian War was fought in the land that would become Alabama during 1813 and 1814. After the war, several fortifications were built throughout the territory to protect settlers from hostile Indian activity and to monitor the Spanish in Florida. Around 1816, Major General Andrew Jackson ordered the construction of a fort in the future Escambia County. It was named Fort Crawford in honor of a young Georgia officer, Joel Crawford, who had fought gallantly in the Creek Indian War and then returned to his law practice in Georgia.

Fort Crawford was located near the Conecuh River, between Burnt Corn and Murder creeks. A settlement soon grew up in the area. The earliest name for the settlement was "The Crossroads" because the Old Wolf Trail and the Sparta Road crossed in the area. Later it was called Newport because it was a landing place for the two large creeks nearby. Two of the earliest settlers in the area were brothers Benjamin and Joseph Bruton. In the 1830s their nephew, Emanuel, came to the area from Georgia. Although spelled differently, their family name would ultimately become the name of the town which evolved from this early settlement, the town of Brewton.

The future Escambia County was once part of Washington, Baldwin, Monroe and Conecuh counties. After Conecuh was established in 1819, the area experienced a period of stable boundary lines that lasted almost a half-century. Sparta became the county seat of Conecuh County in 1820. Over the next decades, the building of the railroads would help make possible the creation of Escambia County after the Civil War.



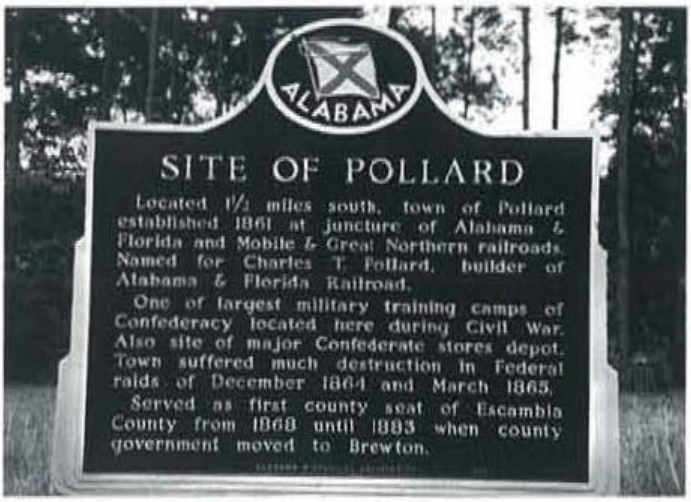
First courthouse in Brewton, completed in 1885

Charles T. Pollard, the man most responsible for bringing railroads to south Alabama, was born in Virginia in 1805. As a young man he came south with his uncle to make his fortune. He eventually settled in Montgomery where he became a wealthy planter and investor. He soon had a vision about the future of trade and transportation in the state of Alabama which he helped bring to reality. He recognized that commerce between north and south Alabama would remain severely limited unless transportation between the two areas improved. As early as the 1830s he worked to build a railroad system that would connect the two sections of the state as well as link the port of Mobile through Montgomery with the eastern United States.

Pollard's involvement with railroad construction lasted more than 30 years. His first venture was the Montgomery Railroad that linked Montgomery to Columbus and West Point, Georgia on the Chattahoochee

The following continues a history of Alabama's county courthouses — their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.

River. The next venture was the Alabama and Florida Railway Company that sought a rail connection to the Gulf. This effort went through bankruptcies, reorganizations and government involvement before it was completed. Another company in which Pollard had an interest, the Florida and Alabama Railway Company, pushed northward from Pensacola. Finally, the railroads joined at a spot just inside the Alabama state line. The link-up was made in November 1861, and for the first time there was a continuous railroad line from the Gulf Coast at Pensacola to the Atlantic Ocean at Savannah and Charleston. The junction point for the railroads in south Alabama was called Pollard, in honor of the railroad president who never gave up on the success of his venture.



Historic marker at Pollard

During the Civil War, the town of Pollard served as a Confederate military outpost. It was the headquarters for a detachment assigned to gain information on federal activity in Pensacola. In January 1865, Confederate General J. H. Clanton, for whom Clanton, Alabama was named, fought off federal raiders near Pollard. In March 1865, Union General Steele's army, on its way to Blakely, burned the public buildings and the railway property at Pollard.

Following the war, an effort began in Conecuh County to move the county seat north from Sparta to Evergreen. The courthouse in Sparta burned on November 10, 1866, and the county seat moved to Evergreen in 1867. This action placed the citizens of southern Conecuh County farther away from their courthouse. On December 10, 1868, the Alabama legislature created Escambia County from southern Conecuh County and a portion of Baldwin County.

One of the strong supporters for the creation of Escambia County was Mark Lyons. Lyons had settled in Pollard following the Civil War. He acquired pine lands, exported timber, ran a general store, and ultimately became involved in politics by serving as a state representative from Escambia County in 1878 to 1879. Lyons was the maternal grandfather of Senator Lister Hill. He was also the great-grandfather of Alabama Supreme Court Justice Champ Lyons.

The Alabama legislature appointed George P. Weaver, Joseph J. Jackson and Thomas J. Jernigan to hold an election to choose county officials and to select a courthouse site. The town of Pollard became the first county seat of Escambia County. It was chosen primarily because of the business centered at the railroad junction there. Besides a depot, Pollard had a roundhouse, turntable and repair shops for the railroad. Three rail lines converged on the town. The Alabama and Florida connected Montgomery to Pollard, the Florida and Alabama connected Pensacola to Pollard, and the Great Northern connected Tensaw, near Mobile, to Pollard.

The first commissioners' court was held February 22, 1869 to organize the county. The commission rented a house from M. R. McLellan for ten dollars a month to serve as the temporary courthouse. The Alabama and Florida Railroad donated Block 17 in the town to the county for the construction of a courthouse and jail.

Because the county had no newspaper, bids were published in the Conecuh County paper, *The Evergreen Observer*. The bids were opened on March 22, 1869 and John Gladden was low bidder for the courthouse while W.B. Amos was low bidder for the jail. The jail was completed first and accepted by the county on November 1, 1869. The cost was $2,950.

The first courthouse for Escambia County remained under construction for approximately three years. It was accepted on January 6, 1873 and cost $4,000. No picture exists of this first courthouse but it was described as two stories

Marker on Historic Leigh Place


Courthouse after renovation into residence for C.H. Conoley


Courthouse remodeled into office building — Historic Leigh Place

Second courthouse in Brewton, completed in 1902

in height and constructed of pine lumber that had been milled in the area. The county had to levy a special tax in order to pay for the courthouse. County records reveal that in 1877 the commissioners purchased lightning rods for the courthouse at a cost of $50, payable $25 a year in two installments.

Perhaps the lightning rods were defective. Or, more likely, a disgruntled litigant decided to vent his wrath against the courthouse. In any event, in July 1879, the courthouse was destroyed by a fire. Many of the records at the courthouse were lost. A grand jury indicted an individual, but he was never tried due to lack of evidence. The county then rented a house from Joe Jernigan to use as another temporary courthouse. The citizens of Pollard sought to rebuild their courthouse, but a rival town challenged Pollard for the county seat.

In 1868 the town of Brewton had sought the courthouse but lost to Pollard. Since 1868, the fortunes of Brewton had improved while those of Pollard had declined because, in the meantime, the railroads had moved their junction from Pollard to Flomaton. Brewton was now a more thriving location than Pollard and it was centrally located in the county. Also, some time during this period, an incident occurred that raised the ire of many Brewtonians, provoking them to vigoriously pursue relocation of the county seat.

A special jury had been summoned to attend court in Pollard. Unfortunately, the date on the summons was incorrect by two days. Approximately 70 men walked the 16 miles from Brewton to Pollard along the railroad track only to be told that a mistake had been made and court would not be held for two more days. It was reported that the men were given no pay for their time, and they were very upset. Soon thereafter the effort re-surfaced to relocate the county seat.

The legislature called for an election to determine the county seat. The residents of Pollard argued during the campaign that they already had the county seat and if a new site was chosen, then the county would have to relocate and build a new jail as well. The boosters for Brewton countered that they were nearer to the geographical center of the county, the old jail was worn out anyway and needed to be replaced, and most of the business of the county took place at Brewton.

The election was held on April 12, 1881. Pollard was declared the winner. However, it was discovered that there were at least 131 more votes cast from Pollard than there were registered voters there. Brewton contested the election and Judge J. P. Hubbard of Greenville ordered a recount. The recount uncovered 215 more votes from Pollard than there were registered voters.

When Judge Hubbard sought an explanation from the Pollard officials, they were quick to point out that the legislation in calling for an election did not specify that "qualified" voters must vote, but it referred only to "inhabitants." Since there were many railroad workers from Mobile, Montgomery and Pensacola in Pollard on election day, they were allowed to vote as inhabitants of Pollard.

Upon hearing this interpretation of the law, a citizen wrote to the *Brewton Blade* newspaper as follows: "Gentlemen of Escambia County, are not such transactions a stench in your nostrils; has honor, purity, and justice fallen so low that it is besmeared with all the filth of the Augean stables and no redress? Will we be taxed to build a courthouse at Pollard where such a ring as that controls it? Sir, my language fails me to express my indignation at such doings. When the Father of all created the heavens and the earth it was great! When he placed the starry firmament on high and ordered the god of day in its course, it was magnificent! When he created man in his own image it was sublime; but when he made an honest man it was the noblest work of all." Needless to say, this reader did not believe that there were many honest men in Pollard.

Another view of 1902 courthouse

City park, Brewton, early 1900s

After the first election was voided, the legislature passed another act stating that qualified voters only could vote in the new election. When the votes were counted, Brewton had won by 54 votes. Still, this did not settle the controversy. Pollard appealed and employed the best legal talent in the state to fight the result. County officials were not certain of the outcome. One reader of the *Brewton Blade* stated in a letter: "The courthouse issue has resolved into a Kilkenny cat fight. Brewton and Pollard have their tails tied together, and are hung across the beatline of the precincts and on that line they will have to fight." The next week, a respondent from Pollard replied that if it was a cat fight Brewton wanted, it was a cat fight they would get. Mysteriously, a boxcar loaded with cats and kittens appeared in Brewton one night and the animals were turned loose on the town. Hundreds of frenzied felines roamed the streets. One account called the condition a "cat-astrophy."

Judge Hubbard issued an order to the county officials to show cause why they should not remove the county offices to Brewton. Meanwhile some local citizens of Brewton took matters into their own hands. One night they slipped into Pollard, broke into the temporary courthouse, and loaded two wagons with county records. They rapidly raced to Brewton but one of the wagons overturned and some of the books were thrown into a stream. Because of the hurried effort and the darkness, some files were never found. Today there are gaps in the Escambia County records due to both the Pollard courthouse fire and this Brewton courthouse "theft."

Finally, on January 23, 1882, Brewton was officially declared the county seat of Escambia County. Despite this ruling the county commission refused to leave Pollard and the controversy continued into 1883. As late as April 9, 1883, the commissioners stated that the Hawkins House in Pollard where they met was still the official county courthouse. The commission also called for another election on courthouse location to be held April 17, 1883. This was done because an Act passed by the legislature on February 19, 1883 mandated that another election be held.

Pollard did not give up easily. When the residents of Pollard realized that they would be out-voted, they joined with others to support Flomaton, then called Whiting, as the county seat. The courthouse controversy, which had lasted several years, was resolved when Brewton won this election. On May 14, 1883 the county received a report that the election commission had rented a two-story frame building from W. W. Jernigan for one year beginning April 30, 1883 at $275 per quarter. Brewton was now legally and actually the county seat.

On May 29, 1883, the county bought a 200 by 300 foot lot for a permanent courthouse and jail for $100. The lot was purchased from Eliza Brewton, who was Mrs. Emanuel Brewton. This purchase is noteworthy because Emanuel *Brewton* was the same Emanuel *Bruton* who had come to the area from Georgia as a young man in the 1830s. Eliza and Emanuel's son, Edmund Troupe Bruton, was employed by the railroad as the first station agent when the railroad arrived. That first train came on May 13, 1861. The depot was spelled B-R-E-W-T-O-N. How this spelling came about is not clear, but it was a common practice to name railroad towns for railroad employees. For example, nearby Atmore was named for Charles P. Atmore, the general passenger agent for the railroad. At any rate, all of the Brutons in the area changed the spelling of their name to Brewton and the former town of Newport became Brewton in honor of its first station agent there and the Brewton family.

In June 1883, the county entered into a contract with A. M. Williamson for the construction of a jail at Brewton. The low bid was $2,248.75. The jail was designed by H. C. Knox. It was completed and received by the county on November 1, 1883.

The construction of a courthouse in Brewton took longer and was more expensive. On November 3, 1884, the county petitioned the legislature for permission to issue $8,000 in bonds,

Third courthouse in Brewton, completed in 1960

payable over five years, in order to finance the courthouse construction. The petition was approved and the county employed Rudolph Bundye to serve as architect and to supervise all construction. Charles Sneider of Mobile received the contract to build the courthouse for $7,740. The contract was signed March 14, 1885, the bonds were sold in May, and construction soon began.

The new courthouse was a two-story brick building with wooden floors and plaster walls. County offices were located on the first floor and a large courtroom and other offices for the judge, jury and witnesses were on the second floor. One interesting point is that the lumber for the construction of the courthouse came from Oshkosh, Wisconsin. Newspaper reports at the time expressed the anger of local lumbermen who could not believe that their product was not used to build their own courthouse. The building was received as complete by the county on September 10, 1885.

The town of Brewton prospered after it became the county seat of Escambia County. The economy was based on timber, lumber, naval stores and the railroad, creating much wealth in Brewton. In fact, according to the 1890 census, Brewton, Alabama, together with Pasadena, California, had the highest per capita wealth of any cities in the United States. Therefore, the county commission decided that the county needed a newer, bigger, more elaborate, and more stylish structure for its courthouse.

In July 1901, the county sold a $30,000 bond issue to be used for building a new courthouse. A committee visited recently-built courthouses in Evergreen, Montgomery, Opelika and LaFayette to get ideas for the new Escambia Courthouse. Lockwood and Smith, Architects of Montgomery, designed the new building. F. M. Dobson served as contractor. The contract price was $26,500.

Historic Leigh Place — 2001

The new courthouse was accepted as complete by the county on June 9, 1902. It was built of buff-colored pressed brick and stone. It was trimmed in terra cotta and had multicolored glass above the doors and windows. The building contained a soaring central tower and four smaller turrets. The structure had Romanesque and Gothic features. It was a grand courthouse for the town of Brewton. In 1905, the county obtained two cannons from Fort Barrancas near Pensacola and had them placed on the courthouse lawn together with a pyramid of cannon balls constructed beside each cannon.

The first courthouse at Brewton was no longer needed by the county, and on June 19, 1902, the probate judge offered the old courthouse and lot for sale. It stayed on the market until August 25, 1904, but there were no interested buyers. In the meantime, the building was used by the Brewton Rifles and it remained a National Guard Armory for several years. After the armory moved out, the building was sometimes invaded by curious neighborhood youths. However, they stayed away from the upstairs because of a huge, stuffed rattlesnake hanging in the attic window. In 1909, the building was sold to the president of the Escambia Tobacco Company who used the property as a tobacco warehouse. On August 1, 1910, the property was sold to businessman C. H. Conoley who renovated the building and converted it into a colonial style home. On November 20, 1911, Mr. Conoley deeded the property to his wife. And on August 8, 1919, Mrs. Conoley sold the home to Mabel C. Leigh. The "Leigh Place" was acquired by Thomas E. McMillan and was completely remodeled for offices in 1969. The structure is still used as an office building today and is listed on the Alabama Registry of Landmarks and Heritage.

Brewton is located between the Conecuh River and Burnt Corn and Murder creeks. It has suffered many floods over the years, but in 1929 Brewton experienced one of the worst floods in its history. Many streets were completely covered over with water. Sightseers flocked to Brewton. In response, the town passed a famous ordinance making it illegal to drive a motor boat up the middle of a downtown street, because it was believed that the wakes created by the

Conference room at Leigh Place that was formerly the sheriff's office

Interior view of glass doors and fan window on second floor

Escambia County Courthouse — 2001

boats caused storefront glass windows to break. This law remained in place for years and was commented upon worldwide. Unless one knew the history of Brewton, it did seem odd to outlaw the driving of a motor boat on the main street of town.

By 1938 the county needed more room and a Courthouse Annex and County Activities Building was constructed. This work was completed as WPA Project No. 4169. This annex still stands today.

Brewton and Escambia County continued to grow. Since the county owned the property north of the courthouse, county officials decided to build a new courthouse adjoining the old one. Construction began in 1959 and the building was completed in 1960. The cost of the third Brewton courthouse was $613,000. The building was designed by Charles H. McCauley of Birmingham and the contractor was Bear Brothers Construction Company. The open house took place on Sunday, October 2, 1960. Congressman George Grant delivered the speech.

The newest Escambia County Courthouse is built of steel and concrete. Marble is used throughout the interior. It was originally built with more than 40,000 square feet of space and 126 rooms. It has two stories and a basement and is completely air-conditioned.

Shortly after the new courthouse was completed, an article appeared in the *Mobile Press-Register* proclaiming Brewton a city of courthouses. It noted that the citizens had built three courthouses in less than 75 years, and all three were still standing and were located within a radius of 250 feet. However, the 1902 structure was soon sold for $650 to the U.S. Wrecking Company of Montgomery. The building was then razed and the grounds landscaped.

Courthouse Annex — completed in 1938

Two additional courthouse projects took place in the 1980s. In 1985, an elevator addition was completed to make the courthouse wheelchair accessible. Dampier, Harris & Associates, Architects, Engineers & Planners, designed the project. Larry Hall Construction, Inc. was the general contractor. The other project was a Veterans' Memorial on the courthouse grounds. It was dedicated November 11, 1987 and it listed the Escambia County native sons who died in the World wars, Korea and Vietnam. It also listed Escambia's two Medal of Honor recipients, Sidney E. Manning from World War I, and William W. Seay, who was killed in action in Vietnam.

The author acknowledges with grateful appreciation the assistance of the late **Judge of Probate Martha Kirkland** for obtaining the historic photos and certain information used with this article. The author also thanks Atmore attorney **Bert Rice** for his help in obtaining research materials. And the author thanks **Earl Cooper** for allowing him to tour the historic Leigh Place, Brewton's first permanent courthouse, and to take photos of the interior. ■

Sources: *From Cabins to Mansion: Gleanings from Southwest Alabama*, Mary E. Brantley, no date; *History of Escambia County, Alabama*, Annie C. Waters, 1983; Articles, *Mobile Press-Register*, "Life in Pioneer Escambia County Told Vividly by Old Documents," Ford Cook, Sunday, January 11, 1959; *Mobile Press-Register*, "Brewton is City of Courthouses," W. Emmett Brooks, Sunday, August 28, 1960, page 5-G; *Montgomery Advertiser*, "Escambia County's Pollard Has Heritage," Sam Duvall, Tuesday, January 10, 1978.

Samuel A. Rumore, Jr.

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore served as the bar commissioner for the 10th Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He served as the 1999-2000 state bar president-elect and took over the presidency at the state bar's annual meeting in July. He is a retired colonel in the United States Army Reserve JAG Corps.

Cole Portis

By Cole Portis, YLS president

Recently, I met with the members of the Executive Committee for the Alabama Young Lawyers' Section. This group of young lawyers from around the state has been a remarkable one. Each one of these lawyers is selfless with their time and they expend great energy on worthwhile projects.

This world is strewn with half-completed projects and people who do not finish what they start. The lawyers on the YLS Executive Board are models of successful people because they persevere, persevere and persevere. In other words, they follow the advice of Winston Churchill who forcefully proclaimed in one of his most famous speeches, "Never give up! Never, never, never, never give up!"

Allow me to share the following worthwhile projects that have begun and will be completed before my term ends in July. These projects include:

Disaster Assistance

Along with the leadership of the Alabama State Bar, **Bob Bailey, Appie Millsaps** and **Steve Marshall** were involved in helping citizens of our state deal with unexpected problems caused by the devastating tornadoes in Tuscaloosa and Marshall counties. Historically, the YLS has always responded to assist people in need during these times of natural disasters. Obviously, responding to this need requires preparation and organization. Along with **Keith Norman**, the ASB executive director, and FEMA, we are organized and are prepared to help others immediately. Lawyers from across the state have agreed to be a part of the organizational structure. I am overwhelmed by their acts of service.

Mentoring

Laura Calloway of the Alabama State Bar has developed a mentoring program, and **Jim Hughey** of the YLS Executive Committee is working with Laura to ensure that the program is implemented. The basic idea of this program is to have two tracks: a structured track with one-on-one mentoring for younger lawyers and a "call-as-needed" advice track for all others. In the one-on-one track, mentors are asked to commit to mentor a minimum of one protégé for six months. In the "call-as-needed" track, mentors are asked to commit to being available to mentor a minimum of three protégés by phone over a one-year period. Mentoring phone conferences would be established by appointment at a time that is mutually acceptable to all parties and would not last greater than 30 minutes.

We believe that this program will benefit our state bar. Thus, we will wholeheartedly endorse the program and do whatever is necessary to ensure that it is a success.

Minority Law Conference

LaBarron Boone, with the help of **Christy Crow**, once again has developed a minority law conference for the benefit of high school minority students. This one-day conference was held May 4 at Alabama State University's Acadome. Each year, respected attorneys speak to minority high school students, and this year is no exception. **Lee Loader**, city councilman and attorney from Birmingham, and **Judge Herman Thomas**, circuit court judge for the Thirteenth Judicial Circuit, will be the featured speakers. In addition, **Judge Marvin Wiggins** of the Fourth Judicial Circuit will preside over a mock trial which will also involve **Lewis Gillis** and **Wesley Pitters**. I am grateful to each of these attorneys for their commitment to helping young people.

Admission Ceremony

For many years, **Lisa Van Wagner** has organized the admissions ceremony that is a highlight for our new admittees. This ceremony always receives high praise from those who have attended and from members of the Alabama Court of Criminal Appeals, the Alabama Court of Civil Appeals and the Alabama Supreme Court. Next year, **Roman Shaul** and **Christy Crow** will coordinate the ceremony. They will do an outstanding job.

Sandestin Seminar

Todd Strohmeyer and the other attorneys on the YLS Executive Committee from Mobile have done another outstanding job of planning continuing legal

education for Alabama's young lawyers. The seminar, to be held May 18th and 19th in Sandestin, will feature **Judge U.W. Clemon, Bryan Stevenson, Warren Lightfoot, Jere Beasley,** and **Lee Cooper**. Each participant will offer insight to young lawyers and encourage young lawyers to develop a passion for the law. If you have not already registered for this seminar, do so today by contacting Todd Strohmeyer at Sims, Graddick & Dodson in Mobile.

Not only will you enjoy these seminar speakers, but you will also enjoy the good fellowship with other young lawyers, the sunny beaches of Sandestin, and the fun parties held each evening. We are grateful to the sponsors of this seminar, especially the law firm of **Taylor, Martino & Hedge**, which sponsors the Friday night party. **Beasley, Allen, Crow, Methvin, Portis & Miles,** which sponsors our breakfasts, and **Lucas, Wash & Petway,** which sponsors our golf tournament. In addition, **Hare, Wynn, Newell & Newton, Foshee & Turner Court Reporters** and **Henderson Court Reporters** are supporters of our seminar.

Teen Court

The Sandestin Seminar allows our group to support special projects that are being implemented across the state by local young lawyer groups. For example, in Andalusia, **Patrick McCalman** had a vision to implement a teen court in Covington County. Now, over 50 teen volunteers are certified to participate in teen court. Teenagers have tried lawsuits and been involved as jurors on cases involving their peers. Teen Court works to deter teens from being involved in illegal activity. These courts also provide confidence and skills that will be used later in life by the teenagers.

I have only touched on some of the worthwhile programs that young lawyers oversee. We are fortunate to be given an opportunity to make a difference in our communities. We must continue to persevere. ■

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 Annual Meeting, July 15-19 in Sandestin.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2001. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, ext. 161, or P.O. Box 671, Montgomery 36101.

The Volunteer Lawyers Program Student Award

BY MELISSA BRIGGS HUTCHENS

The Alabama State Bar Volunteer Lawyers Program (VLP) Student Award was instituted by the Alabama State Bar Board of Bar Commissioners in 1999 to introduce law students at Alabama's accredited law schools to pro bono legal work.

To earn the student award, law students must work for 50 hours at a Legal Services office during their law school career. The work cannot be compensated through course credit or remuneration. Students are also encouraged to attend the annual *Bridge the Gap* Continuing Legal Education program offered by ABICLE since this CLE reviews areas of law provided by the VLP. Additionally, the student must indicate his or her intention to join a pro bono program upon graduation and passage of the bar exam.

Students who earn the award are recognized during graduation ceremonies at their law schools. In May 2000, **Dawn Oliver** and **Robin Kelley** were recognized at the University of Alabama School of Law's graduation as the first two recipients of the VLP student award.

In addition to recognition at graduation, recipients of the VLP student award will be honored at the Alabama State Bar Admissions Ceremony and recognized in *The Alabama Lawyer*.

Hamp Baxley, a third-year law student and president of the Student Bar Association at the University of Alabama, participated in the VLP student program this past summer by working at the Legal Services Corporation of Alabama Regional Office in Dothan, which is Baxley's hometown.

Baxley said, "Working at Legal Services is like day and night from my previous legal work experiences. Usually at a firm you don't deal directly with clients but here at Legal Services I come face to face with clients. Volunteering at Legal Services is a good way to keep grounded, and lets you realize that there are many aspects of the law."

Baxley said the VLP student program gave him an outlet to continue his own service to the community. "In law school, you have to devote so much time to your classes, this program is a good way to give back to the community."

Ishmael Jaffree, managing attorney at Legal Services Corporation of Alabama, Dothan Regional Office, feels the VLP student program "gives students an opportunity to get a view of law that they won't experience in private practice." Jaffree said he is "very much in favor of the student VLP program. It has been wonderful having Hamp with us. He has maintained a sense of humor despite austere surroundings and a less than sophisticated clientele."

Robin Kelley, a 2000 graduate of the University of Alabama School of Law and clerk for the **Hon. Charles Price** of Montgomery, completed his hours of service for the VLP student program at Legal Services Corporation of Alabama in Montgomery. Kelley's hands-on experience enlightened him as to the type of assistance Legal Services provides. By volunteering with Legal Services he "was able to meet the lawyers and the people who work at the courthouse." His time at Legal Services made him "realize that Legal Services is filling a void by providing legal representation for those who cannot afford an attorney."

Hamp Baxley, Nicole Gautier and Robin Kelley enjoy the VLP reception during the ASB 2000 Annual Meeting.

Jim Smith, managing attorney at Legal Services Corporation of Alabama, Montgomery Regional Office, supervised Kelley and is enthusiastic about the student VLP program: "It is a wonderful program and an experience that allows law students exposure to problems real people have and experience on a day to day basis." Smith feels the program allows students the opportunity to realize that "law isn't just theories in a case book but real people whose lives are affected."

Nicole Gautier, a third-year student at the University of Alabama School of Law, completed her volunteer hours at Legal Services Corporation of Alabama in her hometown of Mobile under attorney **Joe Carr**. Gautier said, "Working at Legal Services made me appreciate what it is like to be in legal need and not be able to afford legal representation. Also, I really appreciated the job that the Legal Services attorneys do and the great need for pro bono work by attorneys within the state." Gautier added, "Working at Legal Services was a humbling experience. It gets you out of the shell of privilege you have as a law student. By participating, you do something good for others and for the legal profession."

Pamela Bucy, member and former chair of the Access to Legal Services Committee of the State Bar, professor of law at

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WE NEED YOUR HELP

The promise of equal justice is one of the basic foundations of our democracy. Alabama attorneys continuously strive to make the promise of "justice for all" a reality for Alabama's poor. Alabama lawyers provide pro bono services through the Volunteer Lawyers Program, they support non-profits and work to increase resources for this important purpose. The public, however, knows little about this important work. **Support the promise of "Justice for All" and advertise the outstanding work performed by our profession** by purchasing a specialty license plate. Please make your commitment to providing access to justice today. Just complete the attached form and send it with your check made payable to your county licensing official to:

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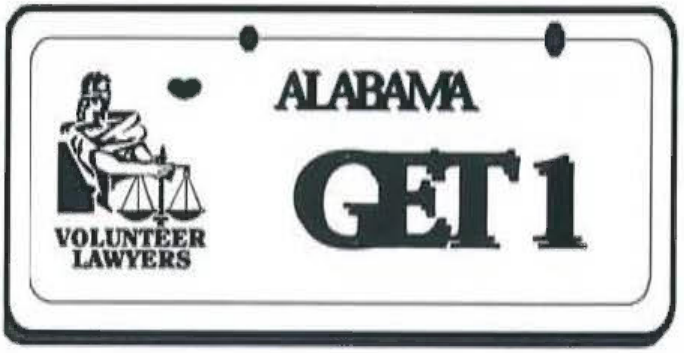

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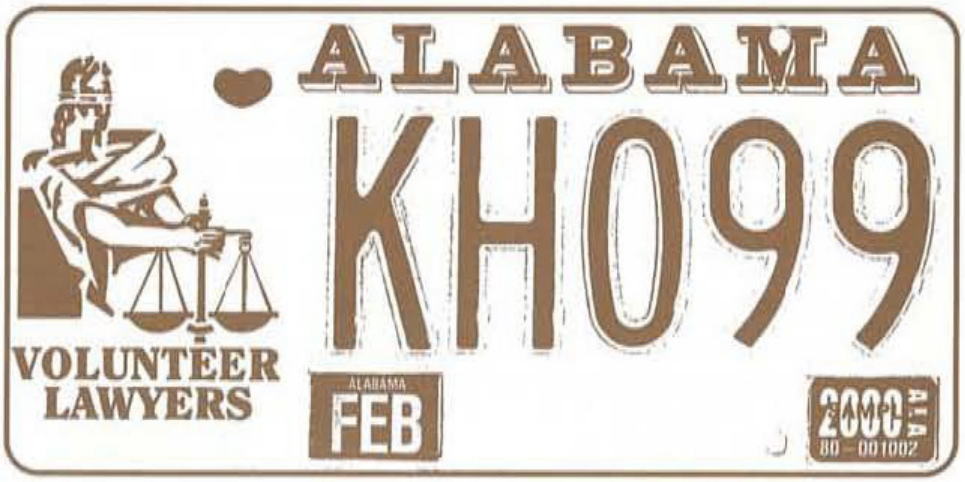
The square dancers have one. The firefighters have one. The Realtors have one. Even the Sons of Confederate Veterans have one. But, until now, Alabama lawyers haven't had one to call their own.

What is it? A distinctive license plate, of course. You probably have noticed that a sizable percentage of Alabama motorists sport a distinctive license plate on their vehicles, proclaiming their affiliation with their favorite school or organization. Now, Alabama lawyers have their own worthy cause to support with a tag: the Volunteer Lawyers Program.



Tag purchases, which are not limited to volunteer lawyers, will raise money for the four volunteer lawyer programs in the state (Jefferson County, Madison County, Mobile County and the Alabama State Bar program which covers the rest of the state). Of the tax-deductible $50 fee, $41.25 goes to the sponsoring organization, which is the Alabama Law Foundation. The foundation then will distribute those funds to the particular Volunteer Lawyers Program which services the county where the tag was purchased.

According to **Linda Lund**, director of the Alabama State Bar's VLP, "This tag will have several benefits. Most importantly, it will increase awareness of the Volunteer Lawyers Program among low-income citizens who otherwise don't know where to turn for help. Also, it will help expose the program to members of the general public, most of whom have no idea that lawyers make such a large organized effort to provide free legal services to the indigent."

The Mobile Bar Association's Pro Bono Committee worked with Tom Mason of Mason Communications on a design for the tag. Perhaps because of the proliferation of distinctive license tags, in 1998 the state legislature tightened the requirements for such tags. A distinctive plate cannot go into production until at least 250 applications and fees have been received, and the tag design is limited to the left side of the plate until 1,000 tags have been purchased. The VLP tag design has been approved under the 250-plate category and must receive that many applications before November 1, 2001 to go into production.

"We'll make it easy for you," explains **Tracy Daniel**, director of the Alabama Law Foundation. "If you will fill out the form and send it to the Alabama Law Foundation with your check, we'll take responsibility for getting it turned in to the appropriate license office or probate court. We'll also let you know when the tag has gone into production and send you the material you need to pick up your tag."

For more information, contact Linda Lund, VLP director, at (334) 269-1515, ext. 118. ■

The Volunteer Lawyers Program Student Award

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the University of Alabama School of Law, and student VLP coordinator at Alabama, sees the VLP student program as a work in progress. She feels the program "taps into the tradition of service law students have when they enter law school." Professor Bucy hopes the program will encourage law students to be involved in the VLP once they are licensed and view their pro bono contributions as a privilege. "You always get back more than you give," she said.

Jan Jones, assistant director of career services and coordinator of the VLP student program at Cumberland School of Law, initiated the program during the 2000-2001 school year. "Our dean, administration and faculty wanted to raise awareness of public service work in the legal profession. The VLP student program gets students involved in service, lets them learn about opportunities in public service, and give back to the community. The VLP shines a bright light on the legal profession," said Jones.

According to Bucy, the Access to Legal Services committee, realizing the program is still in its infancy, looks forward to expanding it. The committee invites any kind of suggestions for the improvement and development of the program.

If you have questions or suggestions for the Volunteer Lawyers Program Student Award, please contact Linda Lund at (334) 269-1515, ext. 118. ■

Melissa Hutchens
Melissa Hutchens is currently a second-year law student at the University of Alabama School of Law. She served as a NVSLC fellow with the Alabama State Bar Volunteer Lawyers Program in the summer of 2000.

Thanks!

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The Alabama State Bar Environmental Law Section announces that this year's annual seminar will be at the Grand Hotel in Point Clear. On Friday afternoon, June 8th, and Saturday morning, June 9th, learn how to navigate regulatory shoals in a new millennium and under the Bush administration. We have invited distinguished speakers and political leaders from Washington and Montgomery, as well as local officials who can tell us how to keep our clients out of legal and regulatory difficulties. As always, there will be a family social event Friday evening, set against the backdrop of the sunset on Mobile Bay.

Save the date and plan to bring your family for a "grand" time at the Grand Hotel! **For reservations, phone (800) 544-9933 and request the Environmental Law Section rate of $169 per night.** A block of rooms has been reserved for Friday and Saturday nights, but they will go fast!

What is "Fair Value" Under Alabama's Dissenting Shareholder Statute?

BY CAROLINE SMITH GIDIERE

I guess it has been since childhood that I had a black-and-white sense of what is "fair." I was reminded of that on a recent outing with my nephews. It seemed to me (as they fought over the discrepancy in the number of French fries included in their kids' meals, the amount of time allotted on the shared Game Boy, and any other discrepancy real or perceived) that what was "fair" was not only excruciatingly clear to each of them but that it was also a very high priority. As I have matured, I have learned, along with most other "grownups," that "fair" falls somewhere in the gray area *between* black and white, and that what is "fair," for the most part, is inconsequential in the business world.

Nevertheless, Alabama's dissenting shareholder statute entitles a qualifying shareholder to "fair" value for their shares. *See* Alabama Code §10-2B-13.02 (1994). To make matters worse, there is no case law in Alabama interpreting that statute. Whether the courts have purposefully eluded musing on what "fair" (the form of which even Plato feared to address) value is or whether the courts truly have not been confronted with the issue yet is unclear.

What is clear is that, given certain changes in other areas of the law, Alabama courts likely will have to address this issue in the coming years, and you may be in the unfortunate position of having to argue or determine the issue of first impression. One impetus likely may be the Internal Revenue Service's recent revision of 26 U.S.C. §1361 to enable banks to qualify for "S" Corporation status where there are fewer than 75 shareholders. Such a change allows the corporation to avoid the double taxation incurred by regular "C" corporations and their shareholders. Many banks in other jurisdictions have undertaken reverse reorganizations in order to take advantage of §1361, eliminating shareholders in order to profit from the lucrative tax savings. Alabama banks are sure to follow. And with a reverse reorganization comes the inevitable dissent.

The Alabama Business Corporations Act, §§10-2B-1.01 *et seq.* (1994) (the Alabama Act), permits certain reorganizations for legitimate business purposes. Those reorganizations include, among other things, mergers with another corporation; exchanges of all shares with another, acquiring corporation; liquidation of all assets other than in the usual course of business; and reduction of the number of shares to a fraction. *See* Alabama Code §10-2B-13.02 (1994) (§13.02). A qualifying shareholder disagreeing with any of those corporate actions may dissent and obtain payment for shares (commonly referred to as "the appraisal remedy"), but may not challenge the action, unless it is "unlawful or fraudulent." §10-2B-13.02 (b) (1994); *see also* §10-2B-13.02 Drafter's Commentary at 3 ("'dissent' pursuant to section 10-2B-13.02 [is] an exclusive remedy for the shareholder"). Further, the dissenter is entitled to the "fair value" standard of value for his shares.

Statutory Definition of "Fair"

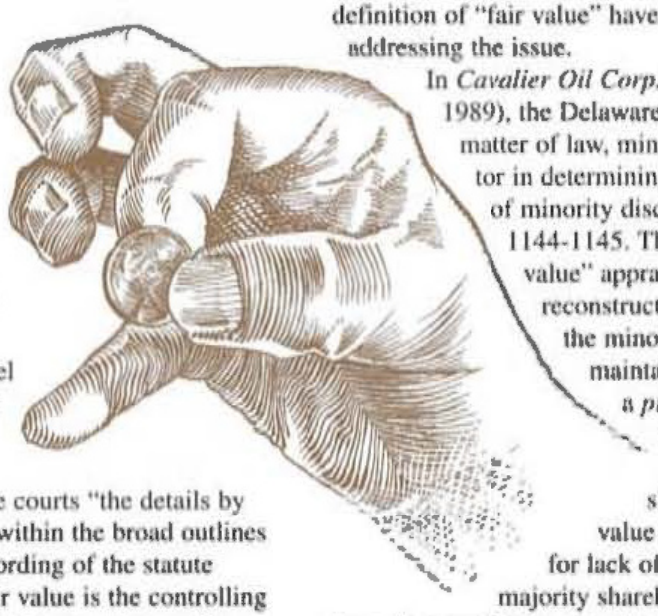
> Under the Act, "fair value" in the context of dissenters' shares, means the value of shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Ala. Code §10-2B-13.01(4) (1994). Given its vagueness, that definition and 50 cents (well, a dollar and 50 cents) will buy you a cup of coffee.

Fortunately, 30 other jurisdictions have adopted a definition of "fair value" identical or substantially identical to Alabama's, all of which were based upon the Model Business Corporation Act of 1984 (the 1984 Model Act or the 1984 Act). The 1984 Act provides, in pertinent part:

> "Fair Value" with respect to a dissenter's shares means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion is inequitable.

1984 Act at §13.01(4). The 1984 Model Act is silent on how fair value is to be determined, and the Official Comment to the 1984 Act provides only that the intention is to leave to the courts "the details by which 'fair value' is to be determined within the broad outlines of the definition." Regardless of the wording of the statute adopted, most courts have held that fair value is the controlling interest value, the marketable minority interest value, or the non-marketable minority interest value. Because the two latter values employ discounts for minority status and/or lack of marketability (collectively referred to as "minority discounts"), the typical battleground in interpreting "fair value" is the applicability of those discounts.



Understanding the Terminology

As always, the most important first step in unraveling a complicated issue like this is hiring a good expert, preferably a chartered financial analyst with experience valuating corporations in the relevant industry.

Generally, there are three possible levels of business valuation: (1) The *controlling interest value* is the value of the enterprise as a whole; (2) The *marketable minority interest value* or *freely tradable interest value* represents the hypothetical value of the enterprise derived from discounting the controlling interest to account for minority status; and (3) The *non-marketable minority interest* represents the value of the enterprise derived from discounting the controlling interest to account for minority status and for lack of marketability and is most commonly associated with closely held corporations.

See generally Z. Christopher Mercer, *Quantifying Marketability Discounts* 1-32 (1997). The second- and third-listed discounts involve reducing the value of a dissenting shareholder's shares because of their minority status and, when applicable, because of their lack of marketability.

Relevant Case Law

Of course, there is room for the attorney. The attorney must decide on the appropriate level of value upon which the expert is to opine.

If you intend to argue that minority discounts are inapplicable, a good place to start is Delaware case law. Although Delaware's statutory definition of fair value is not identical to Alabama's, it is similar. *See* Del. Code Ann. tit. 8, §262. The body of law is well developed, as is suggested in the drafters' "Commentary" to §13.01 (4) of the Alabama Act, and the majority of other courts that have adopted the 1984 Model Act's definition of "fair value" have followed Delaware's lead in addressing the issue.

In *Cavalier Oil Corp. v. Harnett*, 564 A. 2d 1137 (Del. 1989), the Delaware Supreme Court held that, as a matter of law, minority status was not a relevant factor in determining "fair value," so that application of minority discounts was inappropriate. *Id.* at 1144-1145. The court explained that the "fair value" appraisal is not intended to assume or reconstruct a *pro forma* sale, but to assume the minority stockholder was willing to maintain his position and someday share a *pro rata* portion of the entire corporation as a going concern and that "to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out dissenting shareholders, a clearly undesirable result." *Id.* at 564 A.2d at 1145. Accordingly, the court held that the corporation must first be valued as an operating entity, and the dissenting shareholder's proportionate interest is determined without application of discounts for minority status or lack of marketability. *Id.* at 1144.

A number of states considering the issue have adopted the Delaware Supreme Court's reasoning in *Cavalier Oil* prohibiting the application of minority discounts. A long, but useful, string cite of these cases follows: *HMO-W Inc. v. SSM Health Care System*, 598 N.W. 2d 577, 583 (Wis. Ct. App. 1999) (recognizing that, as a matter of law, minority discounts are inappropriate in dissenters' rights cases); *Arnaud v. Stockgrowers State Bank*, 992 P.2d 216, 220 (Kan. 1999) (holding that discounts should not be applied); *Lawson Mardon Wheaton, Inc. v. Smith*, 734 A.2d 738, 749 (N.J. 1999) (recognizing and adopting the majority view that shares should not be discounted absent "extraordinary circumstances"); *Foy v. Kapmeier*, 992 F.2d 774, 780-81 (8th Cir. 1993) (holding that imposition of a minority discount was erroneous under Minnesota law and noting majority rule against discounting minority share values); *Fisher v. Fisher*, 568 N.W. 2d 728, 732 (N.D. 1997) (following *Cavalier*, and noting that minority discounts should not be applied simply because it is a minority interest); *Walter S. Cheesman Realty Co. v. Moore*, 770 P.2d 1308 (Colo. App. 1988) (holding that minority discounts were improperly applied); *In re McLoon Oil Co.*, 565 A.2d 997 (Me. 1989)

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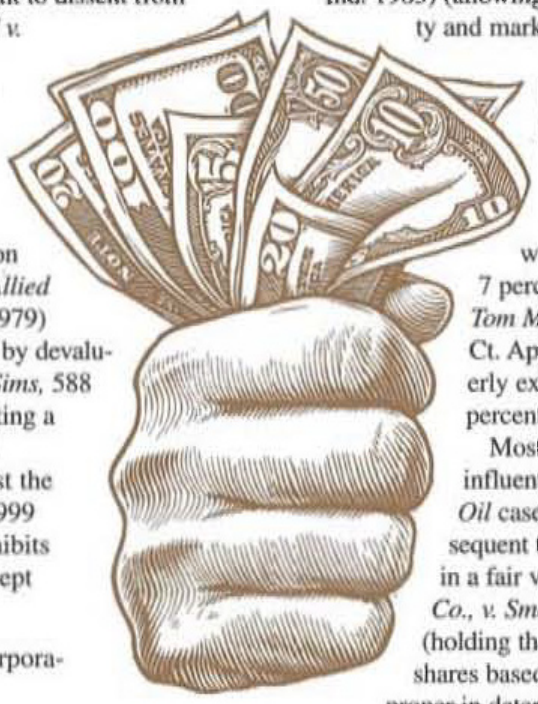
(rejecting minority and marketability or "illiquidity" discounts); *MT Properties, Inc. v. CMC Real Estate Corp.*, 481 N.W. 2d 383, 387 (Minn. App. 1992) (prohibiting minority discounts, and noting that this is the majority view); *Hansen v. 75 Ranch Company*, 975 P.2d 32 (Mont. 1998) (minority discounts are inappropriate); *Rigel Corp. v. Cutchall*, 511 N.W. 2d 519 (Neb. 1994) (citing *Cavalier* and finding that neither minority nor marketability discounts are appropriate); *Woolf v. Universal Fidelity Life Ins. Co.*, 849 P.2d 1093, 1095 (Okla. App. 1992) (recognizing and adopting the Delaware rule of not allowing minority discounts); *Security State Bank v. Ziegeldorf*, 554 N.W. 2d 884, 889-90 (Iowa 1996) (holding that marketability or minority discounts prevent minority shareholders from receiving fair value of their pro rata shares); *MT Properties, Inc. v. CMC Real Estate Corp.*, 481 NW 2d 383 (Minn. Ct. App. 1992) (finding that minority discounts destroyed legislation enacted to protect minority's right to dissent from fundamental corporate changes); *Charland v. Country View Golf Club, Inc.*, 583 A.2d 609 (R.I. 1991) (shares not to be discounted because of minority status); *Columbia Management Co. v. Wyss*, 765 P.2d 207, 214 (Or. Ct. App. 1988) (finding that minority discounts serve to penalize the dissenters while allowing the corporation to cheaply purchase his shares); *Brown v. Allied Corrugated Box Co.*, 154 Cal. Rptr. 170 (1979) (holding the majority commissioners erred by devaluing minority shares); *BNE Mass. Corp. v. Sims*, 588 N.E. 2d 147 (Mass. App. Ct. 1992) (indicating a minority discount would be inappropriate).



Another good source for arguing against the application of minority discounts is the 1999 Revised Model Act, which expressly prohibits the application of minority discounts, except under qualifying circumstances:

> "Fair value" means the value of the corporation's shares determined:
>
> (i) immediately before the effectuation of the corporate action to which the shareholder objects;
>
> (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
>
> (iii) without discounting for lack of marketability for minority status except, if appropriate, for amendments to the articles to section 13.02(a)(5).

Model Business Corporation Act of 1999 (the 1999 Model Business Act or the 1999 Act), §13.01(4). While a few jurisdictions have adopted the 1999 amendments, Alabama has not.

The Official Comment to the 1999 Act explains that subsection (iii) of section 13.01 represents the modern view that discounts are inappropriate because, among other things, "discounts give the majority the opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction." The Comment further provides that:

> Subsection (iii), in conjunction with the lead-in language to the definition, is also designed to adopt the more modern view that appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone.

See 1999 Act at §13.01, Official Comment.

The field is not as plentiful if you choose to argue in favor of discounts, but it is not completely devoid of promise. A number of cases have approved discounted valuation of minority shares. *See Hernando Bank v. Huff*, 609 F. Supp. 1124, 1126 (N.D. Miss. 1985) (holding that a minority discount should be applied when determining the value of the minority shareholders' interests); *Perlman v. Permonite Mfg. Co.*, 568 F. Supp. 222, 231-32 (N.D. Ind. 1983) (allowing trial court expert witness to apply minority and marketability discounts); *Atlantic States Constr. v. Beavers*, 314 S.E.2d 245 (Ga. App. 1984) (holding that it is not against public policy to apply a minority or marketability discount but that it should be done "with caution"); *King v. F.T.J., Inc.*, 765 S.W.2d 301, 306 (Mo. App. 1988) (holding that it was appropriate for the trial court to apply a 7 percent minority discount); and *McCauley v. Tom McCauley & Son, Inc.*, 724 P.2d 232 (N.M. Ct. App. 1986) (holding that the trial court properly exercised its discretion when it applied a 25 percent discount).

Most of those cases were decided before the influential 1989 Delaware decision in the *Cavalier Oil* case. However, two Illinois cases decided subsequent to *Cavalier Oil* approved minority discounts in a fair value appraisal. *See Weigal Broadcasting Co., v. Smith*, 682 N.E.2d 745, 608 (Ill. App. 1996) (holding that discount of fair value of dissenters' shares based on illiquidity and minority status was proper in determination of "fair value"), *appeal denied* 689 N.E.2d 1147 (Ill. 1997), and *Stanton v. Republic Bank*, 581 N.E.2d 678 (Ill. 1991) (upholding the trial court's application of discounts for minority status and lack of marketability).

So, in the end, what's "fair" in the context of a dissenting shareholder suit will probably come down to which side you're on. If you represent the majority shareholder, you will be arguing that discounts should apply, which will leave more money in your client's pocket. From the minority shareholder's perspective, what's "fair" certainly will not include discounts. And until Alabama courts weigh in on the issue, there will be room for both sides to argue that their chosen valuation is the only "fair" one. ■

Caroline Smith Gidiere
Caroline Smith Gidiere practices with the firm of Campbell, Waller, McCallum & Loper, LLC in Birmingham. She received her J.D. from the University of Alabama School of Law.

Three statewide associations, the Alabama State Bar, the Medical Association of the State of Alabama and the Alabama Hospital Association, with support from the Alabama Public Health Department and the Alabama Organ Center, are participating in a program to deliver a valuable public service and give Alabama citizens the opportunity to meet and work with attorneys and health professionals in a non-adversarial setting.

It's called *LIFEPLAN 2001.*

It is a unique opportunity for legal and medical professionals to demonstrate their cooperation by providing a valuable service to their communities.

WHAT IS LIFEPLAN 2001? It is a statewide PUBLIC EDUCATION campaign to promote future health care planning, encouraging families to discuss health care wishes and to prepare advance directives now, rather than in a time of crisis.

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WHERE? Service clubs, church groups, student organizations, community centers and even local businesses or libraries all will be venues to help citizens better understand health care issues.

WHY? Working together, legal and medical professionals will help the public prepare for future health needs. Lifeplan 2001 will help ensure that peoples' wishes are accurately documented, shared with families and ultimately carried out correctly.

WHEN? Kickoff date for the campaign is October 1, 2001. Attorneys interested in participating should contact their local bar president, who has already received information on the project. Initial training for volunteers is scheduled for May. Local organizers begin work in June, with a statewide publicity campaign planned for September and October. Along with local speaking engagements, this campaign will help raise awareness about the issues of advance care planning, including powers of attorney for health care, declarations to physicians and organ and tissue donation. The publicity campaign will include a toll-free number for more information.

For more information, check the Alabama State Bar Web site at www.alabar.org or contact Susan Andres, director of communications, Alabama State Bar, at 334.269.1515 or via e-mail at sandres@alabar.org.

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INSURANCE AND CYBER-LOSSES:

Coverage for Downloading Disaster

BY SPENCER M. TAYLOR AND SEAN W. SHIRLEY

In the world of electronic commerce (e-commerce) and the Internet, businesses have become more dependent on technology in their day-to-day operations. With this dependence comes a new vulnerability. In the time it takes to say "I love you,"[1] a virus can invade a company's electronic mail (e-mail) system; a power surge can cause a server crash; or defective software can create a computer freeze. After the static on the monitor clears, a question emerges: Is this covered by insurance?

An Overview of Electronic Technology

To appreciate the risks that accompany use of the Internet and computer equipment, a brief overview of what is happening in electronic technology (e-technology) is pertinent.

Electronic Data Interchange (EDI) is the electronic transmission of information between the computers of cooperating partners, such as businesses or organizations, government agencies, and individuals. This system was developed to save both time and money by physically linking, through an integrated line or modem, two individuals in order to facilitate the fast transmission of information. In the insurance business, EDI allows claims adjusters to quickly determine damages and liability, enables policy underwriters to efficiently assess insurance risks in assigning policy value, expedites the compilation of Insurance Service Organization (ISO) statistics, and reduces the cost and volume of paper documents.

Electronic Imaging is a process for electronically storing and managing documents by computer. This process reduces the need for storing volumes of documents in the office, allows businesses to access documents by punching a keypad, and facilitates document management.

While most of us are aware of e-mail, few of us utilize it to full capacity. Today, many courts allow e-filing of pleadings. For example, the Eleventh Circuit allows e-filing of pleadings by three methods: providing IBM-formatted 3 1/2 floppy disk, an ISO CD-ROM, or Internet Uploading. *See* 11th Cir. R. App. P. 31-5.

These devices, despite their benefits, create potential problems that traditional insurance may not be designed to address. For example, when computers are networked through an EDI system, users could unknowingly transmit a virus to one another. This simple hypothetical implicates a number of insurance issues: Is there a direct physical loss? Does the virus infiltration constitute physical damage? Is computer data covered property? Does loss of system access constitute a business interruption?

Alabama courts will be faced with answering these and other questions. In developing this body of law, Alabama courts likely will turn to other jurisdictions for guidance; therefore, an understanding of trends in other jurisdictions will aid practitioners in assessing their clients' susceptibility to cyber-losses.

First-Party Losses: Property Damage and Business Interruption

Although the exact language varies with each policy, all risk commercial property policies generally cover "direct physical loss of or damage to covered property." In the world of e-commerce, it is difficult to determine when property is physically lost or damaged. Has there been a loss when sensitive legal theories vanish into cyberspace due to a computer mysteriously performing "an illegal operation?" Has property been damaged when access is denied due to a systems failure? There is some precedent addressing loss of use that may be applied in the

computer context. *See Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (holding that a direct physical loss results when asbestos has to be removed from a structure due to the loss of use of that structure); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. App. 1993) (holding that the cost of removing odors from methamphetamine plant caused physical injury to home due to loss of use).

In *American Guarantee & Liability Insurance Company v. Ingram Micro, Incorporated*, No. 99-185 TUC ACM, 2000 WL 726789 (D. Ariz. Apr. 18, 2000), *leave to appeal granted* (D. Ariz. June 14, 2000), a United States District Court of Arizona was faced with the question of whether the temporary loss of power resulting in the loss of computer data constitutes a physical injury. Ingram Micro., Inc. (Ingram) operated a worldwide computer network to track its customers, products and daily transactions. All of Ingram's customer orders were tracked through its integrated system; therefore, Ingram's business operations depended on a functioning network.

On December 22, 1998, Ingram's systems operations headquarters suffered a power outage which resulted in the loss of all of the programming information stored in its temporary memory, requiring Ingram employees to reload the lost information. Ingram made a claim under its commercial property damage policy with American Guarantee & Liability Company (American), which insured against "all risks of direct physical loss or damage from any cause." American denied the claim and filed a declaratory judgment action, and Ingram filed a counterclaim for breach of contract.

In awarding Ingram summary judgment, the court found that the loss of power for nearly two hours constituted "physical damage," despite the fact that the computers retained the ability to operate in their pre-outage capacity. The court construed the term "physical damage" broadly and held that "physical damage is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality."[3] In support, the court relied on the federal computer fraud statute[3] and statutes from Connecticut, Minnesota, Missouri and New York.[4] The court found significant that lawmakers around the country determined that a computer was damaged when services were interrupted or software or networks were altered.

Unlike *Ingram*, other courts have declined to hold that computer failure amounts to a business interruption under commercial property coverage. *See, e.g., American States Ins. Co. v. Creative Walking, Inc.*, 16 F. Supp. 2d 1062 (E.D. Mo. 1998) (holding that a slowdown of operations is not a business interruption); *Royal Indem. Ins. Co. v. Mikob Properties, Inc.*, 940 F. Supp. 155 (S.D. Tex. 1996) (finding that a decrease in income due to loss of occupancy of apartment complex caused by fire is not a business interruption); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987 (D. Kan. 1995) (discussed below); *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249 (N.C. App. 1997) (holding that a snowstorm causing loss of profits did not constitute a business interruption); *Keetch v. Mutual of Enumclaw Ins. Co.*, 831 P.2d 784 (Wash. App. 1992) (finding that damage from a volcanic explosion causing reduction in business is not a business interruption); *Hotel Properties, Inc. v. Heritage Ins. Co. of America*, 456 So. 2d 1249 (Fla. App. 1984) (holding that loss of business at the hotel due to the closing of the restaurant because of a fire was not a business interruption); *Rothenberg v. Liberty Mut. Ins. Co.*, 153 S.E.2d 447 (Ga. App. 1967) (holding that the loss of inventory due to theft was not a business interruption). *But see Pressman v. Aetna Cas. & Surety Co.*, 574 A.2d 757 (R.I. 1990) (finding that a power outage preventing a doctor from using his office due to the failure of a computer chip was a business interruption); *General Acc. Ins. Co. v. 80 Maiden Lane Assoc.*, 675 N.Y.S.2d 85 (N.Y. App. Div. 1998) (insurance company paid its insured pursuant to business interruption clause in insured's commercial property policy for damage to computer caused by power failure).

In *Home Indemnity v. Hyplains Beef, L.C.*, 893 F. Supp. 987 (D. Dan. 1995), a United States District Court for Kansas entertained a question similar to the one considered by the *Ingram* court. Hyplains Beef (Hyplains) operated a beef packing plant and cattle feed lot in Dodge City, Kansas. In 1993, Hyplains installed a computer fabrication network designed to collect electronic data and create inventory records of the beef. After installation, Hyplains became aware that the computer system did not operate properly, but continued to operate to the best of its ability. After numerous attempts to correct the system, Hyplains submitted a claim for loss of business income to its insurance carrier, The Home Indemnity Company (Home).

Hyplains' commercial property coverage contained a provision that stated "[w]e will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations'" and "the suspension must be caused by direct physical loss of or damage to property at the premises." Home sought a declaration that the business interruption clause did not cover a slowdown of operations due to computer inefficiency.

In awarding Home summary judgment, the court found that decreased efficiency and production did not amount to a suspension of operations. Despite Hyplains' documented evidence of lost profits and business, the court reasoned that coverage was not triggered absent a complete cessation of business.

The distinguishing feature of the two cases is that in *Ingram* the computer equipment completely shut down whereas in *Hyplains* the computer equipment continued to function, albeit at an inefficient pace. The conclusion that can be drawn from these cases is that in the field of computers, as with other forms of property, there must be a complete cessation of operations in order to trigger the business interruption clause.

An interesting question remains: How long must the computer system be inoperable in order for there to be a business interruption? Companies that depend on the Internet for business could suffer substantial financial losses in a matter of minutes. *See, e.g., America Online, Inc. v. National Healthcare, Inc.*, 121 F. Supp. 2d 1255 (N.D. Iowa 2000) (holding that genuine issue of material fact existed as to whether submitting numerous e-mails caused an "impairment to the integrity or availability of data, a program, a system, or information" thereby

making the defendant liable under the Computer Fraud and Abuse Act). Only time will tell if there is a durational requirement for business interruptions.

Third-Party Losses

The standard commercial general liability (CGL) policy covers losses that "the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" 1 Susan J. Miller & Philip LeFebvre, Miller's Standard Insurance Policies Ann. 409 (4th ed. 1995). The policy defines "property damage" as "physical injury to tangible property, including resulting loss of use of that property . . ." or "loss of use of tangible property that is not physically injured." *Id.* at 439. The policy also provides protection for personal and advertising injury liability. *Id.* at 424.

A. Physical Injury

1. Computer Data as Tangible Property

There is a split among courts regarding whether computer-related tape and data constitute "tangible property" for commercial general liability purposes. *Compare Ingram*, 2000 WL 726789, at *3; *Retail Sys., Inc. v. CNA Ins. Co.*, 469 N.W.2d 735 (Minn. Ct. App. 1991) (holding that computer tape is tangible property when integrated with a tangible medium); *State Farm Fire & Cas. Ins. Co. v. White*, 777 F. Supp. 952 (N.D. Ga. 1991) (finding that architectural plans in a blueprint were tangible property), *with Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808 (3d. Cir. 1994) (holding that loss of use of system design was not loss of tangible property); *Schaefer/Karpf Productions v. CNA Ins. Co.*, 76 Cal. Rptr. 2d 42 (Cal. Ct. App. 1998) (holding that videotape is tangible property, however idea on tape is not); *St. Paul Fire & Marine Ins. Co. v. National Computer Sys.*, 490 N.W.2d 626 (Minn Ct. App. 1992) (holding that theft of computer information was not theft of tangible property where information and not medium was stolen).

Courts finding that computer data is not tangible property reason that the *idea*, not the *medium*, is the true source of value. Since an idea cannot be touched, the loss is intangible and outside the scope of coverage. However, in today's high-tech world, the value lies not in the tangible medium, but in the information contained therein. While it is true that the idea has the intrinsic value, technology and the thought process have become so integrated that the medium may be the only place where the idea is contained.

In the future, courts may look to the originality of the data lost in determining tangibility. If the data is mass produced and capable of being duplicated, the loss should be held to be intangible because the idea still remains. If the data is unique and prototypical, the data should be deemed to be tangible and within the scope of coverage.

2. Integration of a Defective Component

As businesses upgrade their computer technology in order to compete in a changing economy, they become vulnerable to faulty installations or defective components that are integrated into their systems. In *Seagate Technology, Inc. v. St. Paul Fire & Marine Insurance, Company*, 11 F. Supp. 2d 1150 (N.D. Cal. 1998), the Northern District of California addressed whether the integration of defective components into a computer system constituted property damage. In *Seagate*, Amstrad integrated Seagate disk drives into Amstrad's computers which resulted in hard drive failure and computer data loss. Amstrad sued Seagate alleging that the drives were defective.

When the initial suit was filed, Seagate tendered its insurance coverage claim to St. Paul Fire & Marine Ins. Co. (St. Paul) based upon the suit filed by Amstrad. Seagate's commercial liability umbrella policy provided coverage for "bodily injury and property damage liability;" property damage means "physical damage to tangible property of others, including all resulting loss of use of that property; or loss of use of tangible property of others that isn't physically damaged." *Seagate*, 11 F. Supp. 2d at 1153.

In finding that the integration of the defective disk drives did not constitute physical damage to Amstrad's computers, the court relied on previous cases holding that the integration of a defective product does not constitute property damage unless the integrated product is inherently dangerous.[5] The court reasoned that computer drives are not inherently dangerous products; therefore, no physical injury occurred. As a matter of risk assessment, the possibility of replacing a defective product is considered a commercial risk that is not passed on to the insurer.

A. The Internet and Advertising/ Personal Injury

The Internet also creates the possibility for losses that trigger advertising or personal injury coverage under a commercial general liability policy. While the coverage analysis generally is the same, Internet related causes of action for defamation and trademark infringement present unique problems that should be considered.

1. Defamation

The Communications Decency Act of 1996 makes Internet Service Providers immune from defamation liability. *See* 47 U.S.C. §230 (West Supp. 1999); *see also Ben Ezra, Weinstein, & Co. v. America Online Co.*, 206 F.3d 980 (10th Cir. 2000) (holding that the Communications Decency Act barred plaintiff's claims against an Internet service provider), *cert. denied*, 121 S. Ct. 69 (U.S. Oct. 2, 2000);

Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (same), *cert. denied*, 118 S.Ct. 2341 (U.S. June 22, 2000); *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (finding that an Internet service provider was a "distributor," not a publisher, and could not be held liable for defamation). Under the Act, Internet providers such as AOL, Yahoo and Netscape are not publishers; therefore, they cannot be held liable for defamatory statements. *See* 47 U.S.C. §230(c)(1) ("No provider or user of an interactive service shall be treated as the publisher or speaker of any information provided by another information content provider"). The Act makes it clear that individual Web site operators are the proper parties to sue in a defamation action. *See, e.g., Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (defamation suit against Web site operator). Consequently, suits against these Web site operators for publishing defamatory material are likely to lead to claims for advertising injury.

2. Trademark Infringement

A hotly contested technology issue is whether trademark infringement is an advertising injury subject to commercial general liability coverage. There is a split among courts,[6] with the majority holding that a trademark infringement claim arises out of an advertising injury; therefore, it is covered under a commercial general liability policy.

The Internet has led to at least three different types of trademark infringement that may trigger advertising injury claims:[7] Unauthorized use of a domain name,[8] meta-tagging,[9] and unfair linking practices.[10] Creative lawyers may attempt to fit these claims within the scope of a CGL policy.

Alabama Insurance Case Law—What is Tangible Property?

Alabama courts have not yet had the opportunity to interpret commercial property or commercial liability policies in the context of cyber-losses. However, there is case law in Alabama addressing what is and what is not tangible property.[11]

In *American States Insurance Company v. Martin*,[12] the Alabama Supreme Court held that economic losses are not tangible property for insurance losses. In *Martin*, the court defined tangible property as:

> property [that] may be felt or touched; such property as may be seen, weighed, measured, and estimated by the physical senses; that which is visible and corporeal; having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities and the like. Tangible property must necessarily be corporeal, but it may be either real or personal.

Martin, 662 So. 2d at 248 (quoting *Prince v. Higgins*, 572 So. 2d 1217, 1219 (Ala. 1990) (quoting 73 C.J.S. Property §15, at 184 (1983)).

Unlike tangible property, intangible property "has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, and franchises." *Martin*, 662 So. 2d at 248 (quoting *Prince*, 572 So. 2d at 1219) (quoting 73 C.J.S. Property §15, at 184). Another distinction is that intangible property "cannot be readily located, and there is no method by which its existence or ownership can be ascertained in the state of its situs, except, perhaps, in the case of mortgages or shares of stock. The value of intangible property is not easily ascertained." *Id.*

With respect to claims involving damage to computer data and information, perhaps the most important language in the case is "that tangible property, unlike an economic interest, is *generally subject to physical damage or destruction*." *Id.* at 249 (emphasis added). An argument can be made that computer data can be destroyed and physically damaged and is therefore tangible property.

In *Wal-Mart Stores, Incorporated v. City of Mobile*, 696 So. 2d 290, 291 (Ala. 1996) the Alabama Supreme Court held that computer software is tangible property that is subject to the gross receipts tax. The court reversed *Alabama v. Central Computer Services, Incorporated*, 349 So. 2d 1160 (Ala. 1977), which originally held that computer software was intangible property and was not subject to the gross receipts tax. The court in *Central Computer Services* reasoned that the buyer of software sought information rather than the medium in which it was conveyed; therefore, there was only an incidental commingling of the intangible information sought. In reversing its previous holding, the *Wal-Mart* court held that the sale of computer software has become more prevalent, and is like the sale of a book—purchasers desire the information inside and not the form containing the information. As such, computer software is tangible property, the sale of which is subject to gross receipts sales tax.

The holding in *Wal-Mart Stores* could be applied in the context of commercial property and commercial general liability insurance. Since courts apply the definition of words that have been established in that particular jurisdiction, the Alabama Supreme Court might apply its definition of tangible property in the context of sales tax to insurance law. If the sale of computer software has become so prevalent that it should be taxed, it may be protected under all risk commercial property and commercial general liability policies.

Preventing Cyber-Losses: Additional Coverage[13]

Besides taking steps to prevent cyber-losses, there are a number of specialized coverages that can be purchased that specifically protect losses experienced through the Internet. Most of these policies are based upon traditional standard policies; however, due to the necessity of using specialized terms, there is very little judicial construction. As a result, typical disputes may arise over the extent of coverage, the effect of the specialized coverage on more traditional coverage, and whether there are gaps in coverage. Some of the new policies are as follows:

INSUREtrust writes a Technology Errors and Omissions Policy that protects against third-party claims for loss of data, access to e-mail, or e-commerce that arises out of the use of the Internet.

Lloyd's syndicates offers a Web site and Internet Security Program that covers lost Web site and advertising revenue due to unauthorized entry, viruses, employee error, theft of credit card data, and first- and third-party virus cleanup, as well as some intellectual property claims. Additional coverage may be purchased that protects against claims of Internet libel, slander, defamation and invasion of privacy. The additional coverage also expands coverage for trademark infringement and errors and omissions.

CIGNA developed Secure Systems Insurance, which protects the insured from first-party losses caused by hackers. The policy specifically insures against loss of data integrity and system availability (system failure or system crash). CIGNA's policy has several demanding conditions precedent to receiving coverage. The policyholder must record log-ins, install surveillance and intrusion detection equipment, frequently change passwords, and provide computer backups.

AIG, like INSUREtrust, has developed a Technology Errors and Omissions policy for Internet Service Providers, companies providing Internet access, consultants creating Web sites, advertisers supplying content for Web sites, and organizations monitoring Web sites, such as Cyber Nanny.

Chubb has created a Multimedia Liability policy that is designed specifically for software developers. The insurance protects against publishing claims, and trademark or copyright infringement. The most unique feature is that the policy is explicitly written to protect against all possible exposures in cyberspace, which applies to claims worldwide.

Stuckey & Company developed a program called SafetyTek, which is a comprehensive first- and third-party policy that covers losses associated with the Internet. This policy is designed for the specific purpose of eliminating gaps in coverage that could be created by more traditional policies.

Conclusion

As new trends in technology emerge, so will trends in insurance. Business interruption, property damage, advertising injury and other claims are likely to take new forms as businesses suffer computer- and Internet-related losses. While it is uncertain how Alabama courts will treat these issues, understanding the scope of your client's coverage and the possibility for these losses will help avoid a future coverage dispute. ■

Endnotes

1. The **Love Bug** was a VBScript worm that spread rapidly through company e-mail systems on May 4, 2000 and caused an estimated $15.30 billion in damages worldwide. The "Love Bug downloads and installs an

executable file . . . from the Internet" into company e-mail systems in order to steal company passwords and crash e-mail systems. *See* David R. Cohen & Roberta D. Anderson, *Insurance Coverage For "Cyber-Losses,"* 35 Tort & Ins. L.J. 891, 894 (Summer 2000).

2. *Ingram*, 2000 WL 726789, at *2; *see also Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 F. Supp. 36 (S.D.N.Y. 1972) (holding that the terms "access to such property" should be liberally construed in order to afford coverage for loss of use of computers due to fire damage in basement); *Aluminum Co. of America v. Accident and Cas. Ins. Co.*, No. 92-2-28065-5 (Wash. Super. Ct. Oct. 17, 1995) (holding that the term "all risk" implies that the policy protects against all property loss regardless if the damage is physical or not).

3. The federal computer fraud statute makes it a crime to cause damage to a protected computer and defines damage as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030 (West. Supp. 1999). In 1994, the statute was revised and provides: "Any person who suffers damage or loss by reason of a violation of this statute may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C. § 1030(g). The term "damage" is defined by the statute as "any impairment to the integrity or availability of data, a program, a system or information that ... causes loss aggregating at least $5,000 in value during any 1-year period to one or more individuals; ...." 18 U.S.C. § 1030(e)(8)(A).

4. The *Ingram* court interpreted these statutes to include interruption and not just physical damage to the computer. Conn. Gen. Stat. § 53a-251 (2000) (stating a person is guilty of a computer crime when he "disrupts or degrades or causes the disruption or degradation of computer services"); Minn. Stat. § 609.88 (1999) (defining computer damage to include "the alteration of any computer, computer system, computer network or computer software"); Mo. Ann. Stat. § 569.093 (West 1999) (defining damage to a computer as "any alteration, deletion, or destruction of any part of a computer system or network"); N.Y. Penal § 156.20 (McKinney 1999) (stating a person is guilty of computer tampering in the fourth degree when he "intentionally alters in any manner or destroys computer data or a computer program of another person"). Notably, under *Ala. Code* § 13A-8-103 (1999), a person commits a class A misdemeanor (and possibly a Class C felony depending on the element of intent) when that person willfully, knowingly and without authorization "destroys, uses, takes, injures, or damages equipment or supplies used or intended to be used in a computer, computer system, or computer network." Section 12A-8-103(b)(2)(b) goes further to make it a class B felony "if there is an interruption or impairment of governmental operation or public communication, transportation, or supply of water, gas or other public utility service, ..."

5. *See Golden Eagle Ins. Co. v. Travelers Co.*, 103 F.3d 750 (9th Cir. 1996) (holding that integration of faulty concrete in construction was not physical injury), *overruled on other grounds by Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998); *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696 (9th Cir. 1991).

6. *Compare Elan Pharm. Res. Corp. v. Employers Ins. of Wausau*, 144 F.3d 1372 (11th Cir. 1998) (holding that the advertising injury provision covers injury arising out of patent infringement); *Letro Products, Inc. v. Liberty Mut. Ins. Co.*, 114 F.3d 1194 (9th Cir. 1997) (unpublished opinion) (same); *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611 (N.D. Tex. 1999) (same); *American Employers Ins. Co. v. Delorme Publ'g Co.*, 39 F. Supp. 2d 64 (D. Me. 1999) (same); *Gemmy Indus. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698, at *3 (N.D. Tex. 1998) (same), *aff'd* 200 F.3d 816 (5th Cir. 1999); *Applied Bolting Tech. Prods. v. United States Fidelity & Guar. Co.*, 942 F. Supp. 1029 (E.D. Pa. 1996), *aff'd* 118 F.3d 1574 (3d. Cir. 1997) (same); *P.J. Noyes Co. v. American Motorists Ins. Co.*, 855 F. Supp. 492 (D. N.H. 1994) (same); *Altou Health & Beauty Care, Inc. v. Aetna Cas. & Surety Co.*, 703 N.Y.S.2d 253 (N.Y. App. 2000) (same); *First State Ins. Co. v. Alpha Delta Phi Fraternity*, 39 U.S.P.Q.2d 1905 (Ill. App. 1995) (same), *with Callas Enter. Inc. v. Travelers Indem. Co. of America*, 193 F.3d 952 (8th Cir. 1999) (holding that trademark infringement is not covered by the advertising injury provision of commercial general liability policy); *Advance Watch Co. v. Kember Nat. Ins. Co.*, 99 F.3d 795 (6th Cir. 1996) (same); *Tradesoft Tech., Inc. v. Franklin Mut. Ins. Co.*, 746 A.2d 1078 (N.J. App. 2000) (same).

7. Terry Budd, *Traditional Coverage Arguments for Intellectual Property Claims and Their Intersection with Cyberspace: Vintage Wine in a New Bottle*, A.B.A. Sec. of Lit. Ins. Coverage, Midyear Meeting Mar. 2-4, 2000, at 15.

8. *See, e.g., Interstellar Starship, Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1161 (Feb. 22, 2000).

9. *See, e.g., Niton Corp. v. Radiation Monitoring Devices, Inc.*, 27 F. Supp. 2d 102 (D. Mass. 1998); *Playboy Enters., Inc. v. Asiafocus Int'l, Inc.*, No. Civ. A. 97- 734-A, 1998 WL 724000, at *3,*6- *7 (E.D. Va. Apr. 10, 1998).

10. *See, e.g., Ticketmaster v. Microsoft, Inc.*, No. 97-3055 DPP (C.D. Cal. filed April 28, 1997); *Washington Post v. Total News Inc.*, 97 Civ. 1190 (PKL) (S.D.N.Y. filed Feb. 20, 1997)).

11. Alabama courts, for example, have referred to a car that had been involved in a wreck as physically injured property. *See, e.g., Spooner v. State Farm Mut. Auto. Ins. Co.*, 709 So. 2d 1157, 1558 (Ala. 1997). Further, Alabama courts look to the plain and ordinary meaning of a word in construing insurance contracts. *See Cannon v. State Farm Mut. Automobile Ins. Co.*, 590 So. 2d 191, 194-95 (Ala. 1991).

12. *See American States Ins. Co. v. Martin*, 662 So. 2d 245, 248 (Ala. 1995) (holding that the loss of investment potential was an intangible economic loss) (citing *Oxford Lumber Co. v. Lumbermen's Mut. Ins. Co.*, 472 So. 2d 973 (Ala. 1985) (finding that the failure to provide medical benefits was an intangible economic loss); *Keating v. National Union Fire Ins. Co. of Pittsburgh*, 995 F.2d 154 (9th Cir. 1993) (holding that economic loss is not damage or injury to tangible property covered by a comprehensive general liability policy); *Allstate Ins. Co. v. Russo*, 829 F. Supp. 24 (D. R.I. 1993) (finding that lost investments and lost deposits are not tangible property); *Graber v. State Farm Fire & Cas. Co.*, 797 P.2d 214 (Mont. 1990) (holding that lost business and injury to reputation and goodwill are not damage to tangible property under a business owner's policy); *L. Ray Packing Co. v. Comm. Union Ins. Co.*, 469 A.2d 832 (Me. 1983) (finding that antitrust action claiming loss of profits and financial interests resulting from insured's alleged price-fixing scheme not covered); *Travelers Indem. Co. v. Arizona*, 880 P.2d 1255 (Ariz. App.1984) (holding that loss of investment represented by an investment certificate is not a loss of tangible property).

13. *See* Randy K. Paar, *Coverage for Losses Arising Out of Use of the Internet*, A.L.I.-A.B.A. 1095, 1113-14 (2000). This list is not meant to be exhaustive, but merely illustrative of the types of polices that are now available.

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SMITH V. ATKINSON: The Supreme Court of Alabama Holds That Liability Can Be Imposed On a Third Party For Negligent Spoliation of Evidence

Persons accepting responsibility for evidence to be used in trial must be able to put up the evidence, or pay up on the plaintiff's claims.

BY BRIAN W. WARWICK

A client walks into your office and explains that he has just been released from the hospital after being involved in an automobile accident in which some part on his newly purchased sport-utility vehicle failed, causing the accident, as well as his injuries. For the sake of argument, assume that his story points directly to what you believe is a valid products liability claim against the manufacturer of the vehicle. You learn that your client's vehicle was taken from the scene of the accident to the impound lot owned by the insurance company that insured his automobile. Your client explains that he has notified the insurer that the vehicle is to be used as evidence in a potential lawsuit and that the insurer has agreed to preserve the vehicle. For good measure, you call the insurer to confirm that it has voluntarily agreed to preserve the vehicle for the foreseeable future. Everything seems to be in order.

After several weeks of investigation and numerous scheduling conflicts, you and your automotive expert travel to the insurer's impound lot to inspect the vehicle for the purpose of determining what may have caused the accident. When you arrive, the attendant graciously directs you to the "red one in the back." Upon reaching this vehicle, you discover that, apart from being red, it does not even resemble your client's vehicle. After scouring the lot, the attendant, who has joined you on your desperate search, admits that "your guy's car must have been accidentally sold for scrap along with the others we sent about two weeks ago." He makes a brief telephone call which confirms that your client's vehicle was, in fact, sold for scrap and has been destroyed. "I'm real sorry," he says as you leave.

Until recently, "I'm real sorry," would have been the only solace you could have offered your client in such a scenario, because a products liability action against the manufacturer would have been futile without the defective vehicle. See *Townsend v. General Motors Corp.*, 642 So. 2d 411, 415 (Ala. 1994). However, faced with these facts today, your client may have some recourse after all. However, the recourse will not be against the manufacturer of the vehicle under a products liability theory but against the third-party insurance company for negligent spoliation of evidence.

On February 4, 2000, the Supreme Court of Alabama recognized, for the

first time, negligence claims arising from third-party spoliation of evidence. *Smith v. Atkinson*, 771 So. 2d 429(Ala. 2000). Although the court previously held that a cause of action for spoliation of evidence cannot be brought against a party to the underlying action, the court recognized in *Atkinson* that spoliation by a third party presents a very different situation.

Atkinson involved an insurance company that had mistakenly destroyed Smith's minivan, along with his potential products liability claim against Chrysler Corporation, the manufacturer of the minivan. On four occasions, Smith had informed his insurance company of his intent to sue Chrysler and of the importance of preserving the minivan as evidence. However, after voluntarily assuming the duty to preserve, the insurance company mistakenly allowed the minivan to be destroyed. Smith sued the insurance company, alleging, among other things, negligent spoliation of evidence. The insurer removed the case to federal court on diversity grounds, and the United States District Court for the Middle District of Alabama certified two questions to the Alabama Supreme Court, asking whether Alabama recognizes a cause of action for the independent tort of spoliation of evidence against a third party, and, if so, what are the elements of that tort?

Writing for the court, Justice Champ Lyons, Jr. answered the district court's first question affirmatively, and set out the following test:

> "We announce today a three-part test for determining when a third-party can be held liable for negligent spoliation of evidence. In addition to proving a duty, a breach, proximate cause, and damage, the plaintiff in a third-party spoliation case must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff's pending or potential action. Once all three of these elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation; the defendant must overcome that rebuttable presumption or else be liable for damages."

771 So. 2d at 432-433.

By formulating a "three-part test" to be used in addition to the elements of a traditional negligence claim and shifting the burden of proof, the supreme court added some sturdy protections for potential defendants. The court, in essence, created a negligence hybrid in the tort of negligent spoliation. The three-part test specifically affects only the duty and proximate cause elements of negligence, and the burden shift operates as a final cautionary measure to protect defendants from liability, even if all other elements have been established. At first glance, this tort may look convoluted, but a close examination will reveal that the process of applying the test it is actually rather simple.

...by requiring notice to be given before the spoliation, the court virtually eliminated the number of manufactured spoliation lawsuits...

Duty

No general duty to preserve evidence exists in Alabama, and the court was careful not to create such a duty in *Atkinson*. To do so would certainly place too heavy a burden on society by requiring oppressive retention policies. However, a majority of the court obviously believes that, if a third party who is in possession of important evidence agrees or volunteers to preserve that evidence, that party should bear the risk of loss when the evidence is later found to be unavailable. In order to protect our court system from being overrun with spoliation cases, the court added two additional prongs to the duty element of this negligence action; these additional prongs are designed to avoid frivolous spoliation claims.

First, the party in the underlying lawsuit seeking to use the evidence that is no longer available must have given the third party actual notice of the pending or potential litigation prior to the spoliation. The court noted in *Atkinson* that Smith had informed the insurance company on numerous occasions that his minivan should be preserved for litigation purposes. The court specifically held that the notice must be actual, rather than constructive. Although the court did not indicate what form the notice must take, the best notice would be in writing and would include a specific description of all relevant evidence sought to be preserved. However, notice to the third party or its agent by telephone appears to be adequate under *Atkinson*.

Requiring notice to be given to the third party before the evidence is lost or destroyed eliminates the possibility of a not-so-ethical plaintiff waiting to pounce on a spoliation claim the moment a third party innocently destroys or loses property previously belonging to the plaintiff. Without a notice requirement, a potential plaintiff, for example, could return to the garage where his brake shoes had recently been replaced and demand to have the old pads returned, alleging that those pads were going to be the basis of a lawsuit against the manufacturer. Without examining the pads, the garage would find it difficult to

disprove a spoliation claim. However, by requiring notice to be given before the spoliation, the court virtually eliminated the number of manufactured spoliation lawsuits, because it would be senseless for one to claim that a lawsuit is pending on the off chance that the third party would coincidentally lose the evidence specified in the notice. This rationale supports the court's position that allowing recovery for negligent spoliation protects parties in pending or potential lawsuits from being unduly punished through the negligent acts of a third party.

The second prong the court added to the duty element is designed to protect defendants by specifying the three ways a duty to preserve can be created. The court determined that a duty to preserve can arise: (1) by the third party's voluntarily undertaking to preserve the evidence and the plaintiff reasonably and detrimentally relying thereon to his or her detriment; (2) by an agreement between the third party and the plaintiff to preserve; or (3) by the plaintiff's specific request to the third party to preserve a particular item, accompanied by an offer to pay any associated costs or to otherwise bear the burden of preserving. *Atkinson*, 771 So. 2d at 433. (citing *Johnson v. United Serv. Auto. Assoc.*, 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234 (Dist. Ct. App. 1998)).

In the opening hypothetical, the insurance company voluntarily agreed to preserve the vehicle after the insured gave notice that the vehicle would be needed in a potential lawsuit against the manufacturer. This action by the insurance company constitutes a "voluntary undertaking" and, thus, created a duty to preserve. If the insurance company had not volunteered to keep the vehicle but had instead agreed to keep the vehicle after the client requested a storage arrangement, the result would be the same. However, the duty would arise because of the agreement rather than because of a voluntary undertaking.

The more interesting and difficult question involves the third circumstance in which a duty to preserve can arise—when the third party has not yet agreed or declined to keep the evidence, but simply receives a specific request accompanied by an offer to pay the cost of storage or otherwise bear the burden of preserving the evidence. Because these circumstances were not present in *Atkinson*, the court did not discuss in that case the specifics of when such a duty would arise. It appears that, if the evidence was already in the third party's possession when it received notice that the evidence would be needed in a potential lawsuit, it would have a limited duty not to destroy the evidence until it could be delivered to the plaintiff at his cost or until an agreement could be reached. However, the court emphasizes in *Atkinson* that "[i]f a third party does not wish to take responsibility for evidence, it can decline the responsibility, shifting the risk of loss back to the plaintiff." *Atkinson*, 771 So. 2d at 433. The court then gives a hypothetical in which the third party sells the evidence to the plaintiff. By analogy, a third party that provides copies of written evidence to a plaintiff, or that sells evidence to the plaintiff, or that simply turns evidence over to the plaintiff cannot be held liable for negligent spoliation, because no duty to preserve can be established under *Atkinson*.

Accordingly, parties regularly in possession of evidence that might be used in litigation should be informed of their potential liability if that evidence is lost or destroyed after they have agreed to make it available for litigation purposes. Hospitals, insurance companies, garages, etc., should institute a procedure for dealing with evidence in order to protect against inadvertently assuming such a duty to preserve. For instance, adopting a policy of copying documents that may later be used as evidence and sending them to the plaintiff at his cost will place the evidence in the hands of the party who needs it and may also prevent a substantial burden from being placed on the third party. Remember that such a duty cannot arise until the plaintiff has given actual notice and has specifically requested that the third party preserve the evidence. Simply holding evidence relevant to some litigation, even with constructive knowledge of that litigation, does not create a duty to preserve.

Breach

Breach is by far the easiest element of negligent spoliation to understand. The third party breaches its duty to preserve if a duty has been established and the third party cannot produce the evidence at issue.

Proximate Cause

Atkinson also tailors the element of proximate cause to further protect defendants in third-party negligent spoliation cases. Obviously, not every piece of evidence that is lost or destroyed through the negligent act of a third party warrants a claim for negligent spoliation. In *Atkinson*, the court held that only the loss of "vital" evidence is actionable. No other court in the nation places such a protective restriction on spoliation claims. As a result, the question in Alabama becomes what evidence is considered "vital."

In *Atkinson*, the court defined "vital evidence" as evidence without

...only the loss of "vital" evidence is actionable.

which the plaintiff cannot survive a summary judgment. 771 So. 2d at 435. In other words, if a summary judgment is due to be entered because the plaintiff cannot prove one or more elements of the underlying cause of action that would have been provable with the lost evidence, that evidence is "vital" to the plaintiff's claim. For example, a products liability claim cannot survive a summary judgment without the product alleged to be defective.

In the opening hypothetical, when the insurance company mistakenly destroyed the vehicle alleged to be defective, the client's fate with regard to his potential claim against the manufacturer was sealed. Without the opportunity to inspect the vehicle, the plaintiff's products liability claim will not survive a summary judgment. See *Capital Chevrolet v. Smedley*, 614 So. 2d 439 (Ala. 1993).

On the other hand, suppose that the products liability claims raised in the opening hypothetical involves the defective design of the seat belt in the vehicle. Although an examination of the restraint system while that system is still installed in the vehicle is best, if the restraint system was removed from the vehicle before it was destroyed, experts could still testify as to the defective nature of the restraint system based on an examination of the system independent of the vehicle. Thus, the remainder of the vehicle would not be deemed vital to the plaintiff's defective-seat-belt claim. Although destroying the vehicle may have significantly hampered the plaintiff's ability to prevail on the merits of his claim, it does not appear to present a cause of action for negligent spoliation under *Atkinson*.

In addition, it should be noted that the plaintiff need not actually have to suffer a summary judgment in order to show that the spoliated evidence was vital. The court in *Atkinson* determined that a showing by the plaintiff that a summary judgment would have been properly entered absent the missing evidence will suffice. Judicial resources would be wasted by forcing a plaintiff to file futile litigation simply to have a judgment entered against him in order to be able to preserve a spoliation claim.

Burden Shift

Once the plaintiff has established a duty, a breach and proximate cause and has satisfied the underlying three-part test, he has established a prima facie case of negligent spoliation of evidence. However, it is conceivable that a plaintiff could establish a prima facie case by showing the above criteria when, for one reason or another, the plaintiff could never prevail on the merits against the underlying tortfeasor. Rather than holding the third party liable for damages, the court in *Atkinson* created a rebuttable presumption designed to safeguard potential third-party defendants from such situations.

The rebuttable presumption assumes that "the plaintiff would have prevailed in the underlying action but for the loss or destruction of the evidence by the third-party spoliator." *Atkinson* 771 So. 2d at 435. In the opening hypothetical, the following presumption would arise—the client would have successfully litigated his products liability claim against the manufacturer of the allegedly defective vehicle. In order for the third-party defendant to avoid liability, the third party must rebut this presumption. In essence, if a third-party spoliator can show any reason why the plaintiff would not have prevailed against the underlying tortfeasor, the third party can rebut the presumption and thereby avoid liability. For instance, if a third party discovers that the statutory limitations period has run on the plaintiff's claim against the underlying defendant before the plaintiff gave notice of the potential litigation to the third party, that fact could rebut the presumption and the third party would avoid liability. This would be true even if the third party was grossly negligent in losing or destroying the plaintiff's evidence. Other examples may include situations in which the underlying defendant could have proven assumption of the risk or contributory negligence. The basis of the rebuttable presumption is that the plaintiff must have had the possibility of prevailing against the underlying defendant before the third party will be held liable for negligently destroying evidence.

> ...upon receiving notice that evidence in its possession may be used in potential or pending litigation, a third party has the option of refusing to accept responsibility for such evidence.

Damages

Usually the damages element of a negligent spoliation case gives pause to most courts. At first glance, it seems inherently unfair to hold a third party liable for compensatory damages caused by another's wrongful conduct when it is not certain whether the plaintiff had a winning claim in the first place. In *Atkinson*, the court expressed the basis for such reluctance as follows:

> "The appropriate measure of damages is difficult to determine in spoliation cases because, without the missing evidence, the likelihood of the plaintiff's prevailing on the merits cannot be precisely determined."

771 So. 2d at 436.

Recognizing that this fact weighs against the plaintiff as well as the defendant, the court refused to do as other states have done and tie the plaintiff's recovery to the likelihood of success on the merits. See, e.g., *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. 1987). Instead, the court reasoned that "courts have long recognized the need to remedy a wrong despite the fact that a proper award of damages is difficult to determine." 771 So. 2d at 436. Thus, after listing the additional protections provided to third-party spoliators in Alabama through the three-part test and the burden shifting, the court determined that a successful plaintiff in a negligent spoliation case is due damages equal to the compensatory damages that would have been recovered in the underlying action. 771 So. 2d at 438. In the opening hypothetical, the client would be eligible to recover for property damage, injuries, pain and suffering, and any other compensatory damages caused by the allegedly defective vehicle.

The court also specifically excluded the recovery of any punitive damages that might have been awarded in the underlying action. 771 So. 2d at 428. Because punitive damages are intended to punish the wrongdoer and not to reward the victim, it stands to reason that punitive damages should not be levied against a merely negligent third-party in a spoliation case.

Conclusion

A third party who accepts responsibility for vital evidence and who subsequently loses or destroys that evidence can be held liable for all the compensatory damages that would have been recovered by the plaintiff against the original tortfeasor. In recognizing cause of action for spoliation under traditional negligence, the Alabama Supreme Court has attempted to provide some protection to potential third-party defendants, while at the same time providing a remedy to plaintiffs who have lost a viable cause of action through the negligent conduct of a third party.

However, third parties do not have to bear the risks associated with this tort. To the contrary, upon receiving notice that evidence in its possession may be used in potential or pending litigation, a third party has the option of refusing to accept responsibility for such evidence. After all, such a precious commodity is best placed in the hands of the proponent of the evidence. Nevertheless, a third party that commits to keeping evidence had better take a good, hard look at the potential damages for which it may be held accountable. In other words, third parties should be prepared to put up, or pay up, in light of *Atkinson*. ■

Brian W. Warwick

Brian W. Warwick practices with Campbell, Waller & Loper, L.L.C. in Birmingham. He received his B.B.A. from the College of Saint Francis, his M.B.A. from Samford University, and his J.D. from Cumberland School of Law. Following graduation, he served as law clerk to the Honorable Champ Lyons, Jr. of the Supreme Court of Alabama.

Quick Analysis

The following analysis can be used to quickly determine whether a claim for negligent spoliation exists under *Atkinson*.

A. Duty

1. Did the defendant have actual knowledge of pending or potential litigation prior to the spoliation?

   If Yes—Proceed to #2

   If No—No spoliation claim

2. Was a duty imposed upon the defendant in one of the following ways?

   a. Voluntary undertaking;

   b. Agreement;

   c. Specific request accompanied by an offer to pay costs;

   If Yes—Duty established, proceed to B

   If No—No spoliation claim

B. Breach

If the evidence at issue cannot be produced, proceed to C.

C. Proximate Cause

Was the missing evidence vital to the plaintiff's claim against the underlying tortfeasor, i.e., could the plaintiff survive summary judgment in favor of the underlying tortfeasor without the missing evidence?

If Yes—No spoliation claim

If No—Proceed to D.

D. Burden Shifting

Can the third-party defendant show that the plaintiff would not have prevailed against the underlying tortfeasor even with the missing evidence?

If Yes—No spoliation claim

If No—Proceed to E

E. Damages

The elements of third-party negligent spoliation have been established and the third-party defendant shall be liable for all compensatory damages that the plaintiff would have recovered against the underlying tortfeasor if successful on the merits.

- **Mark Dwyer McKnight,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 15, 2001, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 00-23(A), 00-24(A) and 00-221(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- Effective November 17, 2000, attorney **Allie Vincent Ciovacco** of Birmingham, was suspended from the practice of law in the State of Alabama for noncompliance with the 1999 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On February 6, 2001, Ciovacco came into compliance with the MCLE rules and was reinstated to the practice of law in the State of Alabama. [CLE No. 00-43]

- The Disciplinary Board, Panel V, upon hearing the petition for reinstatement of Birmingham lawyer **Robert William Graham,** ordered that Graham be reinstated to the practice of law in the State of Alabama. (Graham was disbarred by consent on September 28, 1993.) The board's order, dated January 30, 2001, was adopted by the Alabama Supreme Court effective January 16, 2001. [ASB Pet. No. 00-08]

- The Disciplinary Board, Panel VI, upon reviewing the petition for reinstatement of Sarasota, Florida lawyer **Jean Carleen Marcantonio,** and based upon the Georgia State Bar's reinstatement, ordered that Marcantonio be reinstated to the practice of law in the State of Alabama, without the necessity of a hearing. Marcantonio was reciprocally suspended based upon her Georgia State Bar suspension. [ASB Pet. No. 00-10]

Disability Inactive

- Mobile attorney **George Guy Hayes** was transferred to disability inactive status effective March 1, 2001, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27; ASB Pet. No. 01-02]

Disbarments

- On March 9, 2001 the Alabama Supreme Court entered an order based upon the January 30, 2001 decision of the Disciplinary Board, Panel V, wherein former Jackson attorney **James Arthur Tucker, Jr.** was disbarred from the practice of law in the State of Alabama effective January 16, 2001 pursuant to Rule 23 of the Alabama Rules of Disciplinary Procedure.

  Tucker was served with charges in both complaints, however, Tucker failed or refused to submit his answers. On April 26, 2000, Panel V issued an order granting the motion for default judgment in both matters. Tucker entered a consent to disbarment on the date set for his hearing, January 16, 2001, which he signed and dated January 12, 2001.

  In ASB No. 95-350(A), Tucker represented an elderly client who died on February 13, 1994. Tucker had obtained power of attorney for her prior to her death. After the client's death, it was discovered by the heirs

of her estate that Tucker had written checks for his personal use in excess of $134,500 from the client's checking account. On July 2, 1996 a hearing was held in Clark County Circuit Court on charges brought against Tucker as a result of his theft from his client and her estate. During the course of the hearing on July 2, 1996, counsel for Tucker advised that Tucker wished to repay the heirs of the estate in an effort to avoid another criminal trial. Between July 2, 1996 and July 16, 1996, Tucker's attorney contacted the investigator of the Alabama Attorney General's office and advised that a settlement had been reached between the heirs of the estate and Tucker. As a result, the Attorney General's office closed their file against Tucker. On December 9, 1998, counsel for the heirs of the client's estate advised the bar that he was unaware of any settlement being reached between the heirs of the estate and Tucker. Tucker was served with charges on December 10, 1999 for violations of rules 1.15(a), 8.4(a), 8.4(b), 8.4(c), and 8.4(g) of the Alabama Rules of Professional Conduct.

In ASB No. 97-323(A), Tucker was hired in August 1992 to represent the complainant with a divorce matter and she sent him a check in the amount of $127. In March 1993, the complainant wrote Tucker stating that he had not been in touch with her nor returned her calls and to "speed up" her divorce. On August 19, 1993, legal services of the State Department of Mental Health wrote Tucker on behalf of the complainant. Tucker did not respond to either of these letters. Tucker took no action in the complainant's divorce. Tucker was served with charges on July 16, 1999 for violations of rules 1.3, 1.4(a) and 8.4(g) of the Alabama Rules of Professional Conduct.

Tucker was previously disbarred effective March 28, 1996 based upon his plea agreement, pursuant to Rule 23(a)(2), of the Alabama Rules of Disciplinary Procedure. Tucker's prior discipline was also a consideration in this matter.

- The Alabama Supreme Court affirmed an order of the Disciplinary Board, Panel II, disbarring former Birmingham attorney **Dennis Michael Barrett** from the practice of law in the State of Alabama, effective November 22, 2000. Barrett was served with disciplinary charges on December 27, 1999, and upon his failure to answer or otherwise plead to the charges, a motion for default judgment was filed by the bar on February 17, 2000. The motion for default was granted by order of the chair of Disciplinary Board, Panel II, entered on March 2, 2000. An order setting the date and place of hearing for November 14, 2000 was sent to Barrett on October 10, 2000. However, Barrett did not appear at the hearing. The Disciplinary Board proceeded to receive evidence and render judgment. Barrett was found guilty by the entry of default for repeated violations of rules 8.4(b), 8.4(c) and 8.4(g) [misconduct], and the specifications of Count I include many items also separately set out in Rule 1.15 [safekeeping of property of others], of the Rules of Professional Conduct. Barrett has left the State of Alabama and now resides in Tennessee, where he has filed bankruptcy proceedings, the effect of which may be to thwart the rights of his clients against him. Prior discipline was considered, and the evidence established that Barrett engaged in a deliberate, complex, concealed scheme by which, over a period of months, large sums of money—as much as $400,000 or more—belonging to clients were misappropriated either in the form of expenditures for the use of Barrett or his law firm, or cash. Barrett displayed a pattern of misconduct and multiple offenses; filed a false sworn affidavit intended to mislead and obstruct the bar's investigation and process; refused to acknowledge the wrongful nature of his conduct, but sought false evidence to conceal and justify it; preyed on the vulnerability of his victim, being a small company which relied upon Barrett; and showed indifference to making restitution, but took active steps to conceal assets and avoid restitution. [ASB No. 99-312 (A)]

- Huntsville attorney **Carter Alan Robinson** surrendered his license to practice law and consented to disbarment in the State of Alabama. In so doing, Robinson acknowledged that the consent to disbarment and surren-

der of his license was made in order to avoid further prosecution in the above referenced matters, which involve allegations that he willfully neglected legal matters entrusted to him, failed to reasonably communicate with clients, engaged in conduct involving fraud, deceit or misrepresentation, failed or refused to refund unearned retainer fees, failed to respond to requests for information from a disciplinary authority, and failed or refused to comply with terms and conditions of probation as ordered by the Disciplinary Board.

The Disciplinary Board of the Alabama State Bar ordered that the disbarment be effective February 5, 2001. [Rule 20(a), Pet. 99-07; ASB nos. 01-03(A), 00-122(A), 99-245(A), 99-255(A), 99-256(A), 99-285(A), and 99-286(A)]

Suspensions

- On February 9, 2001, the Disciplinary Board of the Alabama State Bar, Panel V, ordered that Bessemer attorney **Richard Larry McClendon** be suspended from the practice of law in the State of Alabama for a period of 91 days effective immediately. In January 2000, the Disciplinary Board had ordered that McClendon be suspended from the practice of law in the State of Alabama for a period of 91 days with the imposition of the 91-day suspension to be suspended and held in abeyance pending McClendon's successful completion of a two-year probationary period. This discipline was based upon McClendon's guilty pleas in two separate cases. In ASB No. 98-09(A), McClendon pled guilty to violating rules 1.3 and 1.4(A), A.R.P.C. McClendon had been retained to represent a client in a worker's compensation/wrongful discharge case. Although there were questions regarding the involvement of another attorney and the referral of the matter to McClendon, there was evidence that McClendon was the attorney for the client and responsible for her case. After being retained, McClendon did little or no work and failed to communicate with the client regarding her case. The communications that he did have with the client were misleading. Eventually, the case was dismissed for failure to prosecute. The client subsequently sued McClendon for malpractice and obtained a sizable judgment. McClendon discharged the judgment in bankruptcy.

  In ASB No. 99-193(A), McClendon was retained to represent a client in a bankruptcy matter. He did little or no work and failed to promptly respond to reasonable requests for information regarding her case. The information that McClendon provided was misleading or incorrect. The client eventually retained the services of different counsel to assist her in her bankruptcy. Upon terminating the representation, the client requested that McClendon return her file, but he did not honor that request. Based upon McClendon's failure to comply with the terms and conditions of probation, the Disciplinary Board revoked his probation and ordered that the 91-day suspension be placed into effect immediately. [ASB nos. 98-09(A) and 99-193(A)]

- Birmingham attorney **Lamar Farnell Ham, III** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective March 5, 2001. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Ham had served as the closing attorney in more than one real estate transaction and failed to promptly disburse funds held in trust as represented in the HUD-1 settlement statements. [Rule 20(a), ASB Pet. No. 01-01]

- Athens attorney **Cynthia Jane Bridgeman** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective March 5, 2001. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Bridgeman had knowingly failed to respond to repeated requests for information from a disciplinary authority in violation of Rule 8.1(b), Alabama Rules of Professional Conduct. [Rule 20(a), ASB Pet. No. 01-02]

- Birmingham attorney **Joe Wilson Morgan, Jr.** was suspended from the practice of law in the State of Alabama for a period of 16 months effective December 12, 2000 by order of the Alabama Supreme Court dated November 28, 2000. The supreme court entered the order based upon the decision of Panel I of the Disciplinary Board. In addition to the suspension, Morgan received two public reprimands with general publication and two public reprimands without general publication, and was ordered to make restitution to various clients in the total amount of $12,000. The suspension and reprimands were the result of formal charges brought against Morgan on the basis of nine different disciplinary complaints. All the cases involved a similar pattern of conduct on the part of Morgan of accepting employment from a client, failing or refusing to provide any legal services to the client, failing or refusing to communicate with the client, and failing or refusing to communicate with the Alabama State Bar in response to the complaints filed against him. Morgan was found to have violated the following Rules of Professional Conduct: Rule 1.1 requiring a lawyer to provide competent representation; Rule 1.3, which prohibits willful neglect of a legal matter; Rule 1.4(a), which requires an attorney to keep a client reasonably informed and to comply with reasonable requests for information; Rule 8.1(b), which provides that an attorney shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority; and Rule 8.4(g), which prohibits an attorney from engaging in conduct that adversely reflects on his fitness to practice law. [ASB nos. 97-300(A), 97-135(A), 98-060(A), 97-159(A), 98-032(A), 98-230(A), 98-058(A), 98-076(A), and 97-238(A)].

- The Alabama Supreme Court adopted an order of the Disciplinary Board, Panel V, suspending Montgomery attorney **Kenneth Talvin Hemphill** from

the practice of law in the State of Alabama effective February 18, 2001 for a period of one year. Hemphill entered a guilty plea to violating rules 1.15(a) and 1.15(b) of the A.R.P.C. [safekeeping property]. Hemphill represented an estate in connection with a timber sale and received sale proceeds of $220,500, which he deposited into his trust account on November 10, 1998. From November 10 until November 30, 1998 Hemphill drew a series of checks or other debits against the trust account totaling in excess of $45,089, none of which were for timber sale expenses, heir distributions or attorney fees. On December 30, 1998 Hemphill issued checks in partial distribution to some of the heirs. After being contacted by an attorney regarding the issuance of the remaining heirs' portions, Hemphill issued five checks but only delivered four. In February 1999, the same attorney contacted Hemphill again and Hemphill hand-delivered a check to that heir the same day.

- On October 23, 2000, the Disciplinary Board of the Alabama State Bar accepted **Carl Brandon Sellers's** plea in two pending disciplinary matters. Sellers received a 91-day suspension, to be held in abeyance for a two-year probationary period. Conditions of this probation demand compliance with certain requirements set for Sellers by the Alabama Lawyers Assistance Program, and the imposition of this public reprimand with general publication. In ASB No. 99-140(A), Alfa Insurance Company hired Sellers to handle several subrogation claims. During the period from 1997 to 1999, the Alfa subrogation claims manager wrote Sellers numerous letters requesting status updates on the various cases referred to him. Sellers did not respond to these letters or otherwise communicate with Alfa. Alfa sent a letter of complaint to the bar. A copy of the complaint letter was sent to Sellers on April 20, 1999, with a request for a response. Sellers did not respond until August 9, 1999. Sellers stated that he had since been in touch with Alfa about the matters contained in the complaint, however, according to the claims manager, Sellers had not contacted Alfa.

  In ASB No. 00-059(A), Sellers was hired to represent a client in a divorce. The client paid Sellers a $700 attorney's fee. Sellers never filed a divorce action for the client and misrepresented this fact to him for almost two years. After the client learned of Sellers's failure to file the divorce, he filed a bar complaint. Sellers failed to respond to requests for information from the bar about the matter. On January 26, 2001, Sellers was given a public reprimand with general publication for violation of rules 1.3, 1.4(a) and 8.1(b), of the Rules of Professional Conduct. No prior discipline was involved or considered. [ASB nos. 99-140(A) and ASB 00-59(A)]

- Effective November 15, 2000, attorney **Margaret Helen Young** of Florence has been suspended from the practice of law in the State of Alabama for noncompliance with the 1999 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 00-40]

Public Reprimands

- On March 2, 2001 Montgomery attorney **David Martin Folmar** received a public reprimand without general publication. Folmar and an individual named Mike Warren founded an investment company called HMW, Investments, LLC (HMW). Warren was rendered paraplegic in an automobile accident. He received a very large settlement from a trucking company and he used part of his settlement to fund the company. Folmar's role was to manage the company and seek out investment opportunities. Profits were to be split equally. On or about January 2, 1997, Folmar sold some property that was owned jointly by him and his wife to HMW, for $155,000. Folmar prepared a deed, signed it and forged the signature of Joyce Hill as notary on both the deed and a mortgage. Later, Folmar and his wife sold their property at Lake Martin directly to HMW. Folmar again prepared the documents, forged his wife's signature and that of Joyce Hill as notary. None of the above documents were recorded by Folmar. In Folmar's response to the complaint filed against him by an attorney for Warren, Folmar stated that he dealt with these legal documents as he did because he was "replacing" originals which had been lost by Warren. Warren has denied ever having them in his possession.

  The Disciplinary Commission accepted Folmar's conditional guilty plea for violation of Rule 8.4(g) of the Alabama Rules of Professional Conduct. No prior discipline was involved or considered. [ASB No. 98-270(A)]

- Birmingham attorney **Mary Riseling Amos** was publicly reprimanded by the Disciplinary Commission of the Alabama State Bar for willfully neglecting a legal matter, for failing to adequately communicate with a client, for making a false statement to a tribunal, for making a false statement to a third person, for failing to make reasonable efforts to ensure that the conduct of her non-lawyer staff was compatible with her professional obligations, for violating the Rules of Professional Conduct through the acts of another, and for engaging in conduct prejudicial to the administration of justice, violations of rules 1.3, 1.4(a), 3.3(a)(1), 4.1(a), 5.3(b), and 8.4(a) and (d), respectively. Amos met with a client at an initial conference regarding a divorce matter. She did not meet with the client at any time thereafter. The client and her husband were left to consult only with non-lawyer staff regarding their divorce. Amos delayed filing the divorce for more than five months and did not respond to the client's numerous attempts to obtain information regarding the status of the matter during the course of the representation. The client was finally able to talk to Amos about the status of her divorce after she contacted the bar and threatened to file a grievance against Amos. At that time, Amos advised the client that the divorce had been filed when, in fact, it had not and was not filed for another month. When the divorce was finally filed, the client's signature on the testimony filed in support of the complaint for divorce was notarized and dated January 5, 2000, even though the client had signed it in June 1999.

- Mobile lawyer **Timothy Wayne Fleming** received a public reprimand without general publication for improper solicitation of prospective clients, a violation of rules 7.3(a), 8.1(b) and 8.4(a), Alabama Rules of Professional Conduct. Both cases involve facts and circumstances that are substantially the same and, therefore, were consolidated for purposes of consideration by the Disciplinary Commission. The facts upon which this discipline was based are as follows:

  A young female was involved in a motor vehicle accident, but sustained no significant injuries. A police report of the accident was made. Several days after the accident, she received a call from "Clinic Scheduling of New Orleans," who advised that they were aware of her accident and referred her to Dauphin Health Clinic for a free examination. She and her parents were under the mistaken impression that their insurance company had requested the examination.

  At the clinic, she was first examined by a doctor and then referred to a chiropractor. The chiropractor referred her to Fleming at The Mobile Law Center for possible legal representation. After consulting with Fleming, she and her father chose not to pursue legal action. Later, they learned that their insurance company had no connection with Clinic Scheduling of New Orleans, Dauphin Health Clinic or Fleming. Based upon this information, a grievance was filed with the Alabama State Bar.

  During the bar's investigation, Fleming admitted consulting with the young female and her father. Fleming also acknowledged that he knew the doctors at Dauphin Health Clinic and that, on occasion, they recommended clients to him. However, Fleming did not address whether or not the case was a referral from Dauphin Health Clinic and denied any relationship with Clinic Scheduling of New Orleans. Fleming also denied that he had ever solicited business from Dauphin Health Clinic or Clinic Scheduling of New Orleans and denied that he was involved in any solicitation scheme with Dauphin Health Clinic or Clinic Scheduling of New Orleans.

  In his response to the second grievance, Fleming denied personally soliciting prospective clients and denied having agents or employees solicit clients. He explained that when he went to work for The Mobile Law Center he was advised that a chiropractor and medical doctor had a list of lawyers, including The Mobile Law Center, and that they would often refer patients to lawyers on that list. Fleming also advised that as a result of the grievances filed with the bar, he concluded that the chiropractor and doctor may have reduced the number of lawyers on the list and sent most of their patients to The Mobile Law Center, and therefore, terminated his association with The Mobile Law Center on May 8, 1998.

  Later, when responding to the local grievance committee of the Mobile Bar Association, Fleming acknowledged that he had not made a full and complete disclosure when he initially responded to the bar's inquiry. [ASB nos. 97-361(A) & 98-183(A)]

- Albertville attorney **Roger Dale Centers** received a public reprimand without general publication. Centers was handling a criminal appeal from the Circuit Court of Marshall County. On November 3, 1999 Centers filed a "no merit" brief. On February 4, 2000, the Alabama Court of Criminal Appeals ordered Centers to file a supplemental brief addressing certain issues. The court gave Centers 14 days to file the supplemental brief. Centers did not file a brief within the time ordered. When the court contacted Centers on February 25, 2000 he stated that his brief would be filed within one week. However, no brief was filed. On March 13, 2000 the court of criminal appeals remanded the case to the circuit court and directed that Centers be removed as appellate counsel, and disallow his fees and expenses. After being notified of the complaint from the court, Centers failed to submit a response to the bar. On January 26, 2001, the Disciplinary Commission issued a public reprimand without general publication, for violation of rules 1.3 and 8.1(b) of the Rules of Professional Conduct. No prior discipline was involved or considered. [ASB No. 00-064(A)]

- Birmingham attorney **Lewis Daniel Turberville** received a public reprimand without general publication for violating rules 1.15(b), 8.4(c), (d) and (g), *A. R. P. C.* Turberville submitted a court-appointed indigent defense fee declaration to Integrity Capital, Inc. Integrity purchases fee declarations from court-appointed attorneys at a discount. This allows the court-appointed attorney to be paid immediately for his services. In exchange, the court-appointed attorney assigns the voucher to Integrity and agrees to deliver the total amount received from the state comptroller to Integrity. Integrity purchased the fee declaration for 80 percent of its value or $22,400. Turberville assigned the voucher to Integrity and agreed to deliver the check to Integrity as soon as it was received from the state comptroller. However, when Turberville received the check, he cashed it. Integrity was forced to file a civil action against Turberville to recover the amount due. Integrity obtained a judgment in the amount of $34,370.82. [ASB No. 00-20(A)].

- On November 22, 2000, the Alabama Supreme Court affirmed an order of the Disciplinary Board imposing a public reprimand with general publication on Mobile attorney **Ernest Eugene Warhurst**. On March 2, 2001, Warhurst received the reprimand. On April 10, 1997, Ms. Delphia Washington signed a 33 1/3 percent contingent fee contract with Mobile attorney Ronald Herrington in connection with a serious automobile accident. Approximately two days later, Warhurst and his partner went to see Ms. Washington to discuss her case. Although Ms. Washington told Warhurst that she had already retained an attorney, he explained his experience with auto accident cases and urged her to give more thought to whom she wanted to represent her in her case. On April 15, 1997, Ms. Washington signed a 25 percent contingent fee contract with Warhurst, and he notified Herrington that Ms. Washington had terminated his services. The next day Ms. Washington told Warhurst that she wanted Herrington to represent her. At Ms. Washington's request, Herrington had to lower his contingent fee to 25 percent. Shortly thereafter, Herrington filed a bar complaint against Warhurst for solicitation. Later, Warhurst employed Herrington's former secretary. Warhurst filed a sexual harassment suit on behalf of this secretary against Herrington. While both matters were pending, Warhurst tried to have the bar complaint withdrawn by Herrington in return for a dismissal of the sexual harassment suit. Herrington refused two separate overtures to do this. The sexual harassment case was ultimately dismissed for failure to make discovery and after Warhurst and his partner withdrew from the case.

  The Disciplinary Commission found Warhurst's actions constituted a violation of rules 7.3(a) [direct contact with prospective clients] and 8.4(d) [misconduct] of the Alabama Rules of Professional Conduct. No prior discipline was involved or considered. [ASB Nos. 97-188(A) & 97-262(A)] ■

WANTED:
Historic Baldwin County Court Information

In recognition of the 190th anniversary of Baldwin County's first superior court term on March 4, 1811, a revised local court history containing funny court stories will be published by the Alabama Law Foundation.

All sales proceeds will be paid to Kids' Chance, a scholarship fund for children whose parent or parents have been disabled or killed in an on-the-job accident, or to help provide legal services to the indigent in this state.

Send copies of any court-related photographs, historical notes or funny local court stories to Maura Dismuke, 7133 Stone Drive, Daphne 36526 or e-mail them to *med@sgclaw.com.*

All items need to be received on or before July 1, 2001 to be included in the book.

Rates:

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

Nonmembers: $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

May 2001 issue—deadline March 15, 2001; ***July 2001 issue—deadline May 5, 2001.*** No deadline extensions will be made.

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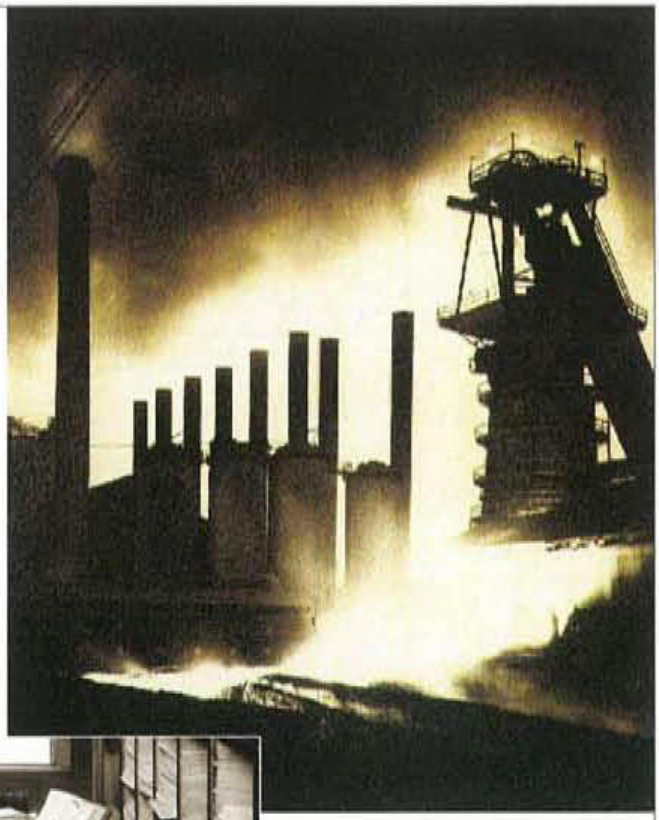

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