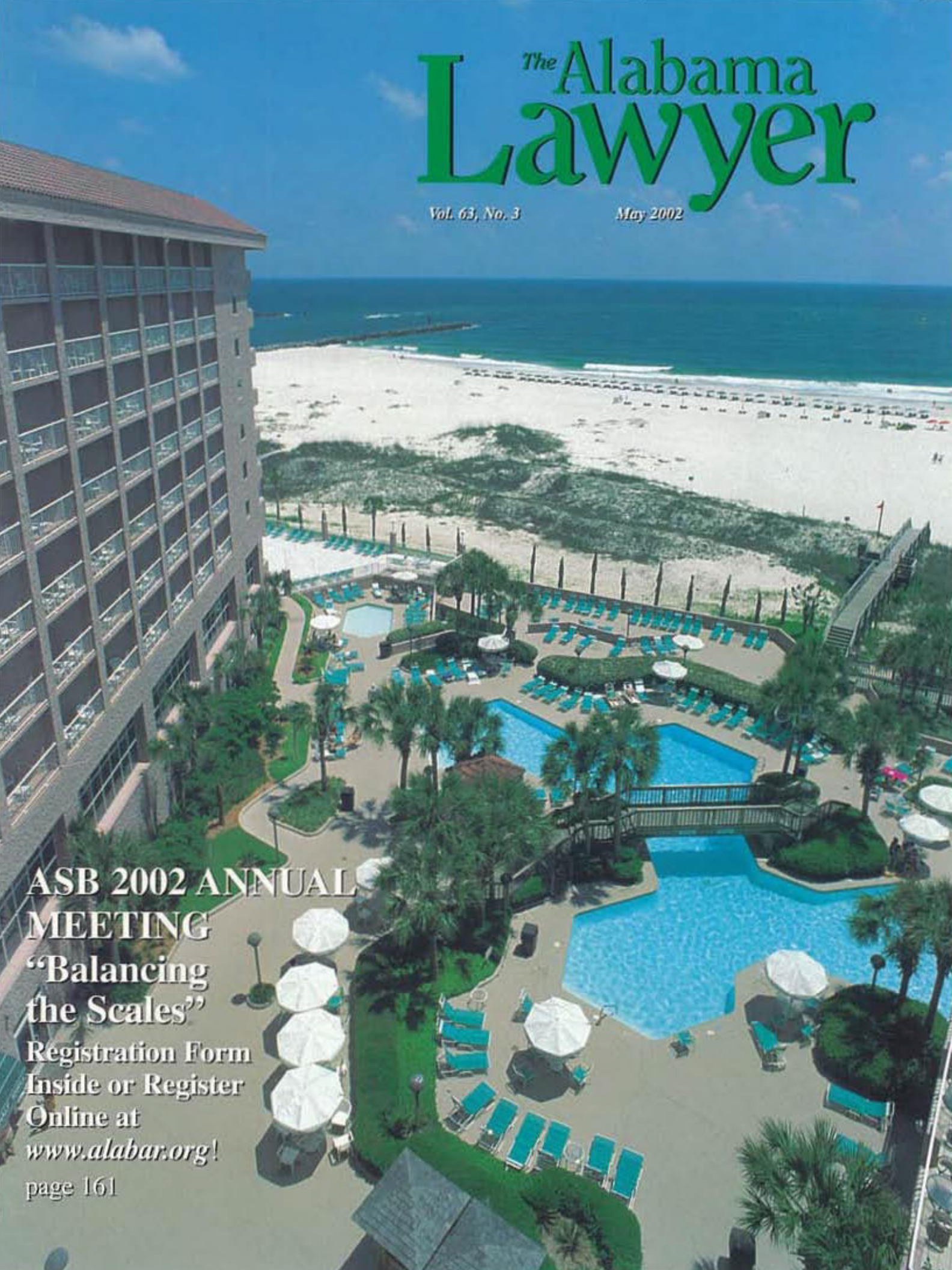
The Alabama Lawyer

Vol. 63, No. 3 May 2002



ASB 2002 ANNUAL MEETING "Balancing the Scales"

Registration Form Inside or Register Online at *www.alabar.org*!

page 161

Having trouble communicating with your commercial malpractice insurer?

Call AIM: We're willing to talk!

Attorneys Insurance Mutual of Alabama, Inc.
200 Inverness Parkway
Birmingham, Alabama 35242-4813

Telephone (205) 980-0009
Toll Free (800) 526-1246
FAX (205) 980-9009

"A Mutual Insurance Company Organized by and for Alabama Attorneys"

www.AttysInsMut.com

Alabama Bar Institute for Continuing Legal Education

Advancing the Legal Profession through Education and Service

ABICLE's seminars are the best deal going for CLE. The topics are geared to Alabama practice, and the quality of the programs is second to none. ABICLE's seminars are simply a good investment of your time and resources.

Larry Vinson
Bradley, Arant, Rose & White
Birmingham, Alabama

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

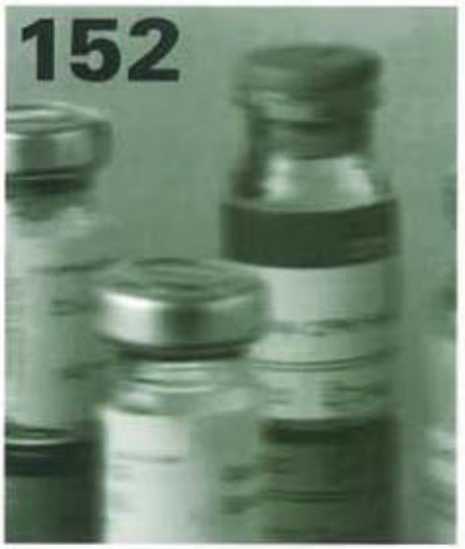
Call ABICLE at 1-800-627-6514 or 205-348-6230 for program information.
www.abicle.org

THE ALABAMA LAWYER
Vol. 63, No. 3 / May 2002

On the Cover:

View from an eighth-floor room at the Perdido Beach Resort in beautiful Orange Beach, Alabama, site of the 2002 Alabama State Bar Annual Meeting.
—Photography by Paul Crawford, JD

Features



161

BALANCING The SCALES

Departments

THE ALABAMA LAWYER

Vol. 63, No. 3
May 2002

The Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101-4156. Phone (334) 269-1515 • www.alabar.org

Robert A. Huffaker ..... Chair & Editor
Susan Shirock DePaola ..... Vice-Chair & Associate Editor
Susan H. Andres ..... Staff Liaison & Communications Director
Margaret L. Murphy ..... Staff Liaison & Managing Editor
Shannon Elliott ..... Communications & Publications Assistant

The Alabama Lawyer (ISSN 0002-4287) is published seven times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O.Box 4156, Montgomery, AL 36103-4156.

ALABAMA STATE BAR HEADQUARTERS STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6310 • E-mail: info@alabar.org
Web site: www.alabar.org

Executive Director ..... Keith B. Norman
Executive Assistant ..... Margaret Boone
Information Technology Assistant ..... Jason H. Jones
Director of Programs ..... Edward M. Patterson
Administrative Assistant for Programs ..... Rita Gray
Lawyer Referral Secretary ..... Carol Thornton
Mandatory Continuing Legal Education Director ..... Kim Oliver Ward
CLE Administrative Assistant ..... Angie Crowe
CLE Secretary ..... Christina Lawrence
Director of Communications & Public Information ..... Susan H. Andres
Publications Director ..... Margaret L. Murphy
Communications & Publications Administrative Assistant ..... Shannon Elliott
Membership Services Director ..... Diane Locke
Membership Administrative Assistant ..... Myrna McHenry
Pro Hac Vice Administrative Assistant ..... Mary Corbitt
Volunteer Lawyers Program Director ..... Linda Lund
VLP Administrative Assistant ..... Katherine L. Church
Director of Admissions ..... Dorothy D. Johnson
Admissions Administrative Assistants ..... Heidi Alves, Sonia Douglas
Law Office Management Assistance Program Director ..... Laura A. Calloway
Bookkeeper ..... Gale Skinner
ASB Foundation Assistant ..... Ann Rittenour
Graphics Arts Director ..... Maggie Stuller
Graphics Arts Assistant ..... Roderick Palmer
Receptionist ..... Stephanie Oglesby
Alabama Lawyer Assistance Program Director ..... Jeanne Marie Leslie (834-7576)
LOMAP and ALAP Administrative Assistant ..... Sandra Clements
Alabama Law Foundation, Inc. Director ..... Tracy Daniel
ALF Administrative Assistant ..... Jennifer Bacchus
Alabama Center for Dispute Resolution Director ..... Judith M. Keegan (269-0409)
ADR Administrative Assistant ..... Jackie Heartsill

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6311 • E-mail: info@alabar.org

General Counsel ..... J. Anthony McLain
Secretary to General Counsel ..... Vivian Freeman
Assistant General Counsel ..... L. Gilbert Kendrick
Assistant General Counsel ..... Milton L. Moss
Assistant General Counsel ..... Robert E. Lusk, Jr.
Complaints Intake Coordinator ..... Kim Ellis
Disciplinary Clerk ..... Bonnie Mainor
Paralegals/Investigators ..... Cheryl L. Rankin, Carol Wright
Client Security Fund Coordinator ..... Laurie Blazer
Receptionist ..... Melissa Burgess

Sirote & Permutt
Birmingham, Alabama

design to reflect your culture

Bradley Arant Rose & White LLP
Huntsville, Alabama

Wallace Jordan Ratliff & Brandt
Birmingham, Alabama

the garrison barrett GROUP
architecture + interior design
205.870.3090 / www.garrisonbarrett.com

Larry W. Morris

By Larry W. Morris

I Don't Know Where I Am Going But I Am On My Way

Years ago many of us were asked to try out for law review. We were directed to write an article of our choosing and to submit it to one of the senior law review "brains" who would then pick individuals for apprenticeship and membership on law review. Seems like my topic was something like "The Legal and Sexual Propensities of Portuguese Descendants As It Relates to Alabama Law." Some 30 years later, I have yet to hear whether I made the squad. The old country and western song, "If the Phone Don't Ring, You'll Know It was Me," comes to mind. I know some who did and I have not been waiting all this time to vent my frustration at not being chosen for law review. I am merely making a point to let you know that, first, obviously I am not a very gifted writer and, second, the agony and pain of writing this article is awful. Many spouses, as does mine, always say, "You should write a book like John Grisham." What a crazy thought. I can hardly write the "President's Page," much less anything longer than two pages.

There are two excellent qualified lawyers, **David Boyd** and **William Clark**, running for president-elect of the Alabama State Bar. I can offer some excellent advice to both. Before you are elected, hire two ghost writers to author six separate articles. If you win, you will have already have completed one of your most difficult tasks. If you lose, you will be able to sell most of them to your victorious opponent for large sums of cash. He will probably attempt to write the first one, but after that you will be wealthy.

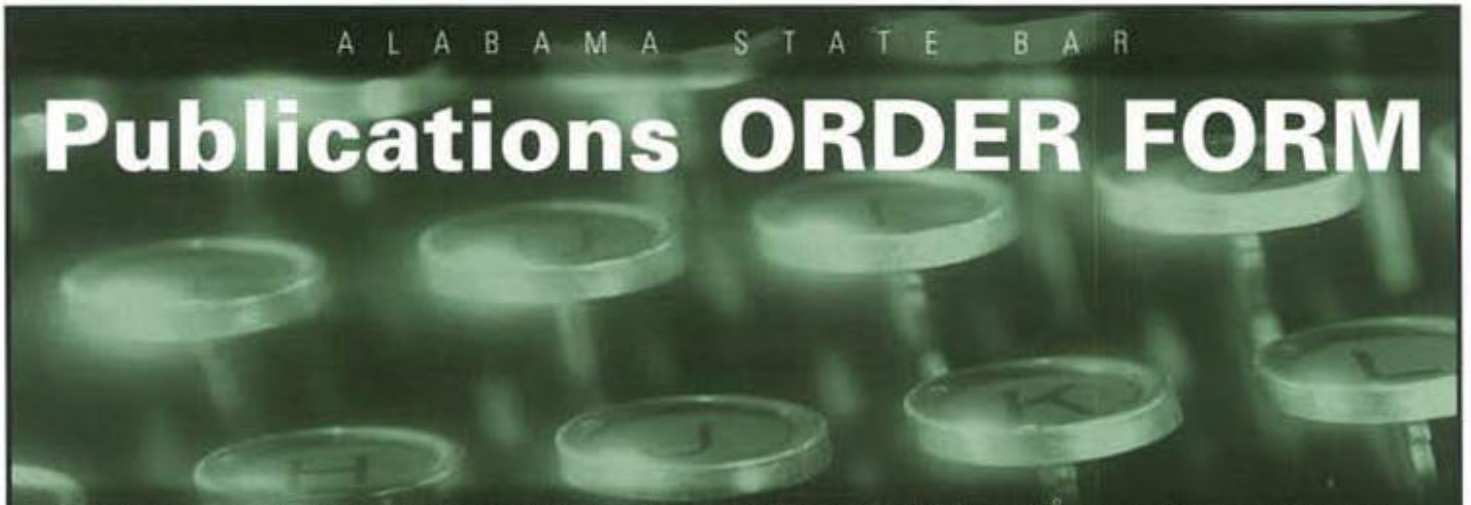
I have never been encouraged to become a judge nor have I aspired to be one. The prospect of background checks and interviews by the FBI of local people who know you have nipped that fleeting thought in my mind. If, however, I have entertained that thought for more than 30 seconds, it vanishes immediately upon the realization that I would have to write opinions that other people read. So, I suppose something good has come from having to produce this article. The other good news is after this, only one more article has to be written.

Several people have inquired about what I have been doing as president. That can be taken two ways. First, they are interested. Second, they know nothing I have done. The second is probably correct but being positive, I take the first as the reason they ask. Other than writing this article, being president has been very enjoyable and enriching. I have met and talked with a lot of people. Recently I was talking to a junior high class attempting to explain how the law serves us as well as others. I was asked, "If we are on this earth to help others, what are the others here for?" I have yet to answer. Another group had been studying the *Scopes* trial. A boy asked, "If we all came from monkeys, why do we still have monkeys? Did they not make it?" I developed a coughing spell and left early. At a bar meeting in north Alabama, they ask the oldest lawyer to stand to be recognized. When asked afterwards to what he attributed his longevity, he replied, "Red meat and gin." He is the same lawyer who told me when he sees a pretty girl smile at him he looks down to see what is unzipped.

So what is this article about? It is to let you know your state bar is working for you. The entire staff is doing their job extremely well. The annual convention is planned at Orange Beach with emphasis on family and fun. Someone informed me that a dysfunctional family is any family with more than one person in it. This may be true. I encourage you to come to your bar's annual meeting and bring your family. I also encourage you in the words of Charles M. Schwab, "Be kind. Every person you meet is fighting a hard battle. Lead the life that will make you friendly to everyone about you and you will be surprised what a happy life you will lead." I look forward to seeing you. ■

ALABAMA STATE BAR

Publications ORDER FORM



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

Below is a current listing of public information brochures available from the Alabama State Bar for distribution under established guidelines.

BROCHURES

To Serve the Public ..... **$10.00 per 100** **Qty.** _____ **$** ____
...details of bar public service programs highlighted in the *TO SERVE THE PUBLIC* video presentation

Law As A Career ..... **$10.00 per 100** **Qty.** _____ **$** ____
...opportunities and challenges of a law career today

Lawyers and Legal Fees ..... **$10.00 per 100** **Qty.** _____ **$** ____
...a summary of basic information on common legal questions and procedures for the general public

Last Will & Testament ..... **$10.00 per 100** **Qty.** _____ **$** ____
...covers aspects of estate planning and the importance of having a will

Legal Aspects of Divorce ..... **$10.00 per 100** **Qty.** _____ **$** ____
...offers options and choices involved in divorce

Consumer Finance or "Buying on Time" ..... **$10.00 per 100** **Qty.** _____ **$** ____
...outlines important considerations and provides advice on financial matters affecting the individual or family

Mediation...Another Method for Resolving Disputes ..... **$10.00 per 100** **Qty.** _____ **$** ____
...provides an overview of the mediation process in question-and-answer form

Arbitration Agreements ..... **$10.00 per 100** **Qty.** _____ **$** ____
...answers questions on arbitration from the consumer's perspective

Acrylic Brochure Stand ..... **$5.00 each** **Qty.** _____ **$** ____
...individual stand imprinted with individual, firm or bar association name for use at distribution points
One stand per brochure is recommended.

Name to imprint on stand: _____

Mailing Address

_____

_____

Subtotal $ ____

Shipping & Handling $ 5.00

TOTAL $ ____

Please remit *CHECK OR MONEY ORDER MADE PAYABLE TO THE ALABAMA STATE BAR*
for the amount listed on the TOTAL line and forward it with this order form to:
Susan Andres, Director of Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

Pursuant to the Alabama State Bar's rule governing the election of president-elect, the following biographical sketches are provided of David R. Boyd and William N. Clark. Boyd and Clark were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2001-2002 term, and the winner will assume the presidency in July 2003.

David R. Boyd

David R. Boyd

Dave Boyd was born in Greenville, Alabama in 1950. He attended the public schools in Greenville and the University of Alabama, from which he graduated in 1973. At Alabama, he was vice-president of the student body and elected to Jasons and ODK. He attended the University of Alabama School of Law, graduating in 1976 as a member of the Order of the Coif.

Boyd spent a year as a law clerk for United States District Judge Sam C. Pointer, Jr. in the Northern District of Alabama before moving to Montgomery in 1977 to practice law. He has practiced in Montgomery since that time, first with the firm of Smith, Bowman, Thagard, Crook & Culpepper, and, since 1983, with Balch & Bingham LLP, following a merger of those firms. Boyd is the managing partner of Balch & Bingham's Montgomery office.

While engaging in an active litigation practice for the past 24 years, Boyd has been very involved in state bar and other professional activities. He is currently completing his second term on the ASB Board of Bar Commissioners and served as state bar vice-president and a member of the Executive Council in 1998-99. He is chairman of the Disciplinary Commission, on which he has served since 1997. Previously, he was a member of the Disciplinary Board.

Boyd has also had extensive involvement in bar admissions, one of the state bar's other main functions. He was a bar examiner for four years before chairing the Board of Bar Examiners from 1986 to 1990. At the national level, he is currently a member of the Board of Trustees of National Conference of Bar Examiners and chair of the Multistate Bar Examination Committee, on which he has served throughout the 1990s. Boyd earlier was a member of the Multistate Professional Responsibility Examination Committee, and served three years on the ABA's Bar Admissions Committee.

Since 1993, Boyd has served as treasurer of the Alabama Law Foundation, which has responsibility for IOLTA and other programs. As a bar commissioner, Boyd has frequently acted as a liaison for the bar with the Alabama Supreme Court. He has served on various state bar task forces, including long-range planning and bar admissions rules. Boyd was the recipient of the state bar's Award of Merit in 1985.

In other professional activities, Boyd has been a member of the Lawyers Advisory Committee for the Middle District of Alabama since 1990, and served for a number of years on the Alabama Supreme Court's Advisory Committee on the Rules of Civil Procedure. He has been active in the Alabama Law Institute, where he presently serves on the Executive Committee. Boyd served as president of the Alabama Council of School Board Attorneys from 1985-86. A fellow of the American Bar Foundation and the Alabama Law Foundation, Boyd has been listed for a number of years in The Best Lawyers in Alabama.

Boyd is also heavily engaged in community and civic affairs. He is the incumbent president of the Boys' & Girls' Clubs of Montgomery, and is the immediate past chair of the Administrative Board of Montgomery's First United Methodist Church. He serves on the Montgomery Area Chamber of Commerce's Committee of 100, an organization devoted to economic development, and chaired the United Way's Lawyers' Division in 2000. Boyd has served on the Board of Trustees of the Montgomery Academy for a number of years and currently is vice-chair of the board.

Dave Boyd is married and the father of four. ■

LIFEPLAN VIDEO NOW AVAILABLE!

Last October, the Alabama State Bar, the Medical Association of the State of Alabama and the Alabama Hospital Association, with support from the Alabama Department of Public Health and the Alabama Organ Center, joined together for a statewide project to educate Alabama citizens about health care directives. The LIFEPLAN 2001 campaign involved over 200 volunteer attorneys and physicians and reached over 16,000 citizens. Because of continued interest in this important topic, an informative video on health care directives has been produced. The ten-minute video highlights the importance of having a health care directive and answers questions about the new Alabama form. A copy of the video is available by request, at no charge, for use by hospitals, senior citizens groups, schools and any community group. To request a free copy of the video, contact the Alabama State Bar at 800-354-6154 or order on-line at www.alabar.org. Copies of the LIFEPLAN Consumer Guide and the new Alabama Health Care Directive form can also be downloaded from the Web site.

William N. Clark

Bill Clark was born in Meridian, Mississippi on January 16, 1941. He attended elementary and high school in Birmingham and Jefferson County public schools. After graduating from Shades Valley High School, he entered the United States Military Academy at West Point where he was Secretary of the Cadet Honor Committee, Superintendent of the Primary Department of the Sunday School for children of officers stationed at West Point, the Circulation Manager of the Howitzer, the Cadet yearbook, and a varsity football letterman. He received a B.S. degree from West Point in 1963, and served five years on active duty as an Infantry Officer in the United States, Germany and Vietnam.

Following his service in Vietnam, Bill left the active service and entered law school at the University of Alabama. While in law school he was awarded the Phi Alpha Delta Outstanding Senior award, elected to Omicron Delta Kappa and served as Managing Editor of the Alabama Law Review. Upon graduation, he served as law clerk to the Honorable Walter P. Gewin, United States Circuit Judge, Fifth Circuit Court of Appeals. Since that time he has been in the private practice of law, and is a partner in the law firm of Redden, Mills & Clark. His practice is principally devoted to white collar criminal defense, criminal defense, domestic relations, and civil litigation, including both trials and appeals.

Bill continued his military service in the United States Army Reserve, and retired as a Major General in 1999. Key assignments in the Army Reserve included Commander of the 348th Engineer Group; Chief of Staff and Deputy Commander of the 121st Army Reserve Command. At the time of his retirement he was the Commanding General, 87th Division (Exercise) headquartered in Hoover, Alabama, with units in Alabama, Mississippi, Kentucky, Georgia, Florida and Puerto Rico during his command. His military decorations include the Distinguished Service Medal, Legion of Merit, Bronze Star Medal and Republic of Vietnam Gallantry Cross with Bronze Star.

William N. Clark

Committed to improvement of the legal system, Clark was awarded the Alabama State Bar Association Award of Merit in 1981 for his service in the area of indigent defense. In that regard, he served as Chair of the Alabama State Bar Committee on Indigent Defense from 1975 to 1981 and also as Chair of the Alabama Supreme Court Advisory Committee on Indigent Defense Services. In 1989 he received the Walter P. Gewin Award from the Alabama Bar Institute for Continuing Legal Education for Outstanding service in that area. In 1994 he was awarded the Roderick Beddow, Sr. Award for Distinguished Service in the field of criminal defense by the Alabama Criminal Defense Lawyers Association. He served as a member of the Advisory Committee to the Supreme Court of

Alabama which drafted the first Alabama Rules of Criminal Procedure, and served as Chair of the Alabama Law Institute Committee which drafted a new Alabama Adoption Code which was adopted by the Alabama Legislature in 1991. He was an *ex officio* member of the Advisory Committee which drafted the Alabama Rules of Evidence.

Clark has been an active member of the Birmingham, Alabama and American bar associations. He served as secretary-treasurer, president and as a member of the Executive Committee of the Birmingham Bar Association, and president of the Birmingham Bar Foundation. Also active in the Alabama State Bar, Bill has served as chair of the Federal Judiciary Liaison Committee, as well as being a member of various other state bar committees. In the American Bar Association, he has served as vice-chair of the Criminal Justice Section Committee on State Legislation and as a member of the Criminal Justice Section, Defense Services Committee. He is a member of the Alabama Criminal Defense Lawyers Association. In 1990-1991, he served as president of the University of Alabama Law School Alumni Association, and, in 1991, was selected as the Outstanding Alumnus of the University of Alabama School of Law by the Student Farrah Society. In 1992 he was elected a Fellow in the American College of Trial Lawyers. He is currently the president of the University of Alabama Law School Foundation. Bill is an adjunct professor at the University of Alabama Law School, and is listed in The Best Lawyers in America in the areas of criminal defense and domestic relations.

Active in the community, Clark has served as a Sunday School teacher and church school superintendent at the First United Methodist Church, on the Administrative Board at Canterbury United Methodist Church, and on the church council at Highlands United Methodist Church. He currently teaches an adult Sunday School class at Highlands United Methodist Church, and serves on the Board of Trustees of the Church. He has served as president of the Board of Directors of the Wesley Foundation at the University of Alabama, president of the John C. Persons Chapter of the Association of the U.S. Army, chair of the Vulcan District of the Boys Scouts of America, chair of the Birmingham Metropolitan YMCA Board, chair of the Jefferson County Indigent Defense Commission, and chair of the Jefferson County Criminal Justice Management Committee. Bill has been a member of the boards of directors of the North Alabama United Methodist Foundation, the Boys and Girls Clubs of Central Alabama, the Kiwanis Club of Birmingham, and the Wesley Foundation at the University of Alabama. He is also a graduate of the Leadership Birmingham program.

Bill's wife, Faye, holds a Ph.D. from the University of Alabama at Birmingham. Their daughter, Helen Catherine Smith, a homemaker, is married to Clinton Smith, vice-president of Stewart Perry Construction Company. The Clarks' son, Will, is in the MBA program at Harvard University and is married to Anne Holmes Clark, an elementary art teacher. ■

Keith B. Norman

By Keith B. Norman

Refurbishing the Bar Building To Better Serve You!

This year marks the 10th Anniversary of the completion of the renovations of the bar building and the new addition. The expanded facilities and renovations have provided bar members from across the state with conference rooms for depositions, mediations, CLE programs, client meetings, committee meetings, and arbitrations. Since 1992, over 2,000 meetings have been scheduled involving more than 20,000 people. These figures include lawyers, clients, civic group members, teachers, and others.

Bar members and others who come to the building for the first time routinely complement our facilities and the hospitality of our receptionist, **Stephanie Oglesby,** and programs assistant **Rita Gray**, who both make every effort to ensure that visitors are accommodated. Out-of-state lawyers usually marvel that the use of these facilities is free of charge to members of the Alabama State Bar.

The tremendous use of these facilities over the past decade dictated the need for a refurbishment of the original building and the first and second floors of the addition added in 1992. (You will recall that a partial build-out of the third floor was completed in 1999, adding additional office space for new programs, as well as a video-conference facility.) The refurbishment started in January 2002 and should be completed next month. The interior refurbishment includes: painting all offices, meeting rooms and public areas; reupholstering or replacement of meeting room chairs; and the addition of systems furnishings in several areas of the building.

The new parking area across Hull Street from the bar building

In addition to the interior work, we are resurfacing and improving the parking area behind the bar building and a new parking area located across Hull Street

from the bar building. This new parking area, with the vehicle entrance on Hull Street and fronting the Judicial Building on Dexter Avenue, will be convenient for lawyers visiting the state bar or appellate courts. Because the parking area will be gated, lawyers wishing to use it will need to call the bar to obtain an access code.

This refurbishment will help us keep the bar facilities nice for our members and the public. Based on the many comments from lawyers who use these facilities, I know bar members are proud of these facilities and desire to see them well maintained. I hope that the next time you are in Montgomery that you will make a special point to visit the bar building. We hope that the refurbishment and the new parking area will help us to serve you better! ■

Improvements are being made to the parking area directly behind the bar building.

CEELI Attorneys Wanted

The Central and East European Law Initiative (CEELI), a public service project of the American Bar Association, seeks attorneys, with five+ years' experience, to develop, coordinate and implement legal reform projects in Central and Eastern Europe and the NIS. Positions of various lengths are available throughout the region to work with local judiciaries, bar associations, attorneys and legislative drafting committees on criminal, environmental, commercial, or gender issues or civil law reform. Participants receive a generous support package. E-mail Alison at *ceeli@abanet.org* or visit *www.abanet.org/ceeli* for an application and information.

The recent events in New York, Washington, D.C. and Pennsylvania underscore the need for updated and thorough disaster preparedness and response plans. These plans can save lives, and help protect and give direction to staff and leadership in the midst of an emergency. With this in mind, the Alabama State Bar has produced a concise, easy-to-implement guide that features a crisis management checklist, steps for putting together a bar association or legal practice emergency preparedness plan, and resources for providing volunteer legal services. The guide is available, at no cost, on-line at *www.alabar.org* or upon request by calling 800-354-6154, extension 132.

★ ★ ★

- In January, another **Legal Milestone** marker was put in place, this time in front of the **Macon County Courthouse** in Tuskegee. Among those attending the ceremony were **ASB President Larry Morris, ASB President-elect Fred Gray, former ASB Commissioner Ernestine Sapp, Macon County Bar Association President Linda Henderson,** and **presiding Judge Howard F. Bryan, Fifth Judicial Circuit.**

  The marker highlights Macon County's distinction in Alabama history. According to the text of the marker, "In the 1950s, due to civil rights-era hysteria, the legislature targeted the county to be abolished. In December 1957, the citizens of Alabama, by a two-to-one majority, approved Amendment No. 132 to the Alabama constitution, which authorized the legislature to appoint a committee to study and determine the feasibility of abolishing Macon County or reducing its area by making it part of the surrounding counties. This amendment remained a part of the Alabama constitution until the voters repealed it in 1982 with Amendment No. 406."

  In addition, several Alabama landmark cases are based on events occurring in Macon County, including one of the first instances of civil rights litigation and the lawsuit involving the infamous Tuskegee Syphilis Study.

Pictured above with the newest Legal Milestone marker, at the recent dedication ceremony, are Jesse Upshaw, chairman, Macon County Commission; Fred Gray, ASB president-elect; Linda Henderson, president, Macon County Bar Association; Ernestine Sapp, former ASB Commissioner; Judge Howard F. Bryan, presiding judge, Fifth Judicial Circuit; and Larry Morris, ASB president.

The Legal Milestones Program recognizes important cases, events or personalities in Alabama's legal history by placing bronze plaques at designated sites. Other current sites include Monroeville, Huntsville, Montgomery, Mobile, Tuscaloosa, and Florence.

Pictured above during the ABA's BLI are Keith Norman, ASB executive director; Robert Hirshon, ABA president; and Fred Gray, ASB president-elect

- Joining other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute in March was **Fred D. Gray** of Tuskegee, president-elect of the ASB. The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer organizations and bar foundations. It provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff and other experts on the operation of such associations.

- Three teams from **Cumberland School of Law, Samford University**, represented the southeast region in separate national competitions this spring.

- Trial team members **Josh Briskman, Jeremy Hazelton** and **Rachel VanNortwick** qualified for National Trial Competition after winning regional honors in Durham, North Carolina in February. Their coach is Tuscaloosa attorney **James Roberts**.

- Mediation team members **Tanya Tidwell** and **Ali Shamsiddeen** won the American Bar Association's regional mediation competition in February. Their coach is Cumberland **Professor Stephen Ware**.

- Tidwell and Shamsiddeen also won the regional ABA Client Counseling Competition in February in Macon, Georgia. Their coach is Birmingham attorney **James S. Lloyd**.

- The **Middle District of Alabama Federal Defender Program, Inc.** issued a resolution of commendation of **John W. Focke, II**, who died September 12, 2001, in recognition of his service and outstanding performance on behalf of the federal defenders. According to the resolution, "He devoted his working hours to the tasks of exemplary representation of indigent criminal defendants, to sincere assistance to and support of his clients, to the education and improvement of the federal criminal defense bar, and to the acquisition of justice for all. . .He performed his tasks at all times with grace, professionalism and humor."

- **Thomas F. Garth**, a managing partner with the Mobile firm of Lyons, Pipes & Cook, has been named president of the 2002 Alabama Federal Tax Clinic.

- In the March issue of The Alabama Lawyer, it was reported that December 11, 2001 was named in honor of Mobile attorney and civic volunteer **Billy C. Bedsole**. On March 23rd, the City of Mobile, through councilman Steve Nodine, dedicated a street in Joseph Langan Municipal Park to Bedsole. It will be known as "Billy Bedsole Run" and will lead up to the athletic fields.

During the opening ceremonies of the Municipal Park Youth Baseball Association, Bedsole was again recognized for his legal, social and voluntary contributions to the Mobile community, Springhill Baptist Church and the Mobile and Alabama State bar associations.■

Billy Bedsole

The Alabama Lawyer ***no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.***

About Members

Sheryl T. Dacsco announces that she is no longer with Jenkens & Gilchrist and her new address is 5925 Kirby Drive, Suite 218, Houston 77005-3146. Phone (713) 522-4100.

H. Chase Dearman announces the relocation of his office to 152 Tuscaloosa Street, Mobile 36607. Phone (251) 648-1281.

Faye Edmondson, PC announces the opening of her office at 135 N. Tallassee Street, Dadeville 36853. Phone (256) 825-9559.

Tonya G. Johnson announces the relocation of her office to 117 1st Avenue, NE, Suite A, Vernon 35592. Phone (205) 695-8504.

William B. McGuire, Jr., PC announces the relocation of his office to 2207 Jack Warner Parkway, Suite 1, Tuscaloosa 35401. Phone (205) 752-6002.

Anne R. Moses, PC announces the relocation of her office to the Emmet R. Johnson Building, 3500 Blue Lake Drive, Suite 295, Birmingham 35243. Phone (205) 967-0901.

Thomas P. Ollinger, Jr. announces the relocation of his office to 2513 Dauphin Street, Mobile 36606. Phone (251) 478-9775.

Braxton Schell, Jr. announces that he is no longer with Whatley Drake, LLC. His new address is 1125 Financial Center, 505 20th Street, N, Birmingham 35203. Phone (205) 320-1482.

John Wesley Trice announces the relocation of his office to 454 19th Street, W, Jasper 35501. Phone (205) 221-9100.

Among Firms

James M. Corder, John Plunk and **Mitchell Shelly** announce that their former partner, **Robert M. Baker**, was appointed to the bench in January and they will continue to practice under the firm name of **Alexander, Corder, Plunk & Shelly**.

Alford, Clausen & McDonald, LLC announces that **Pamela A. Moore, W. Benjamin Broadwater** and **Paul V. Lagarde** have become partners, and **James T. Patterson** has joined the firm as an associate.

Ashe, Tanner & Wright, PC announces that **Missy Homan Hibbett** and **Reagan D. Wise** have become associated with the firm.

Austill, Lewis & Simms, PC announces that **William K. Bradford** has joined the firm as an associate.

Ball, Ball, Matthews & Novak, PA announces that **N. Gunter Guy, Jr.** has joined the firm.

Batchelor & Simpson, PC announces that **Gordon L. Blair** has become associated with the firm.

Beasley, Allen, Crow, Methvin, Portis & Miles, PC announces that **David B. Byrne, III, Ted G. Meadows** and **Benjamin E. Baker, Jr.** have become shareholders with the firm.

Bennett, Hyman & McDaniel, LLC announces that **Emily Scott McDaniel** has joined the firm.

Benton & Centeno, LLP announces that **C. Steven Ball** has become a partner.

Bland, Harris & McClellan, P.C. announces that **Jacqueline R. Mills** has become associated with the firm.

Ralph Bohanan, Jr. and **Keith T. Belt, Jr.**, formerly of Pittman, Hooks, Dutton & Hollis, PC, announce the formation of **Bohanan & Belt, PC.** Offices are located at 2151 Highland Avenue, Suite 310, Birmingham 35205. Phone (205) 933-1500.

Elizabeth McAdory Borg and **G. Shane Cooper** announce the formation of **Borg, Cooper & Associates, PC** with offices located at 121 Mitcham Avenue, Auburn 36830. Phone (334) 502-4529.

Brown, Hudgens, PC announces that **David Alan Strassburg, Jr.** became associated with the firm.

Burnham & Klinefelter, PC announces that **Timothy C. Burgess** is now a partner, **Jeffrey C. Ford** has joined as an associate and the firm name now is **Burnham, Klinefelter & Burgess, PC**.

Burr & Forman, LLP announces that **Robert E. Battle, Stephen J. Bumgarner, Edward R. Christian, Patrick J. Clarke, Allen D. Cope, Damon P. Denney, Rita H. Dixon, Wilson F. Green, Jack G. Kowalski,** and **Harlan F. Winn, III** have become partners, and that **Geoffrey S. Bald, Elizabeth E. Bosquet, Scott A. Boykin, Howard Burchfield, III, Martin E. Burke, Patricia K. Carlton, Brian D. Hancock, Bradley M. Harris, Mieke A. Hemstreet, James A. Hoover, Kendall T. Jones, Kwende B. Jones, Robert R. Maddox, William S. Morris, Mitchell S. Mudano, R. Frank Springfield,** and **Christian N. Watson** have joined as associates.

R. Michael Caddell, Jr. and **Stephen W. Thompson** announce the formation of **Caddell & Thompson**, with a mailing address of P.O. Box 59802, Homewood 35259. Phone (205) 913-7347.

Capell & Howard PC announces the opening of its Opelika office and that **Robert T. Meadows, III,** formerly with Walker, Hill, Adams, Umbach, Meadows & Walton, joined the firm as a member. **R. Brooke Lawson, III** and **Robert D. Rives** became members.

Kirby H. Williams, formerly with Rushton, Stakely, Johnston & Garrett, announces that he has joined **Clark, Partington, Hart, Larry, Bond & Stackhouse**.

Coale, Dukes, Kirkpatrick & Crowley, PC announces that **Harwell E. Coale, III** has become associated with the firm.

Constangy, Brooks & Smith, LLC announces that **Mandi Smith T** has become a partner with the firm.

Dominick, Fletcher, Yeilding, Wood & Lloyd, PA announces that **Thomas B. Hanes** has become a partner with the firm.

Frederick T. Enslen, PC announces that **Susan Berman Norris** has joined the firm as an associate and **George H. Wakefield, Jr.** has become of counsel.

Gaines, Wolter & Kinney, PC announces that **Tracy N. Hendrix** has become a partner.

Michael Gillion, PC announces that **Scott W. Hunter** has become associated with the firm.

Hamilton, Westby, Antonowich & Anderson, LLC announces that **Joseph T. Brasher** has become a member.

Hand Arendall, LLC announces that it has merged with the firm of **Gladden & Sinor, PC.**

Hatcher, Stubbs, Land, Hollis & Rothschild, LLP announces that **Bradley R. Coppedge** has become a partner.

Haygood, Cleveland & Pierce, LLP announces that **Philip O. Tyler** has joined the firm as an associate.

Helmsing, Leach, Herlong, Newman & Rouse, PC announces that **J. Casey Pipes** has become a member of the firm.

Jackson & Shuttlesworth, PC announces the relocation of its offices to Black Diamond Building, 2229 First Avenue, North, Birmingham 35203. Phone (205) 252-3535.

Kimberly P. Griffin-Kervin and **Carol Cook**, formerly of J. Myron Smith & Associates, announce the formation of **Kervin & Cook**, with offices located at 1300-D E. Main Street, Prattville. Phone (334) 358-0085.

Kutak Rock LLP announces that **Elizabeth M. Davis** has become a partner of the firm.

Lange, Simpson, Robinson & Somerville, LLP announces that **Robert T. Gardner** has become a partner, and **Melanie K. Dotson, Scott R. Haller, Laurence J. McDuff, Paul D. Satterwhite,** and **J. Martin Sheffield** have become associated with the firm.

Lusk & McAlister, PC announces that **Kenneth A. Dowdy** and **David L. Dean** have become shareholders in the firm.

Lyons, Pipes & Cook announces that **Kathryn M. Cigelske** has joined the firm.

McDowell, Faulk & McDowell, LLC announces that **Joy Pace Booth** has become associated with the firm.

James H. McFerrin, James L. Stirling, Jr. and **Rhonda Steadman Hood** announce that Southeastern Legal Group, LLC was dissolved and the firm of **McFerrin, Stirling & Hood, LLC** was formed. Offices are located at 1920 Huntington Road, Birmingham 35209. Phone (205) 870-5704.

McGarrah & Davenport announces the firm's new address at 3180 Cahaba Heights Road, Birmingham 35243. Phone (205) 972-8989.

McKinney & Braswell announces that **Cliff Hill** has become a partner with the firm, and the new firm name is **McKinney, Braswell & Hill, LLC**.

Melton, Espy & Williams, PC announces that **Benjamin J. Espy** has become associated with the firm.

J. Kevin Moulton, J. Christopher Capps and **R. Aaron Gartlan** announce the formation of **Moulton, Capps & Gartlan, PC**. Offices are located at 1133 W. Main Street, Dothan 36301. Phone (334) 678-7994.

Najjar Denaburg, PC announces that **Donna K. Bird, Scott W. Ford** and **Sara J. Senesac** have become shareholders.

Stephen Davis Parker and **Annette Irons-Parker** announce the opening of **Parker & Parker, PC**, with offices at 422 2nd Avenue, SW, Suite 200, Cullman. Phone (256) 775-4444.

Ogletree, Deakins, Nash, Smoak & Stewart, PC announces that **David L. Warren, Jr.** has become a shareholder.

Sexton, Cullen & Jones, PC announces that **Frederick M. Garfield** has joined the firm.

Wallace, Jordan, Ratliff & Brandt, LLC announces that **Phillip D. Corley, Jr.** has become a member of the firm, and that **Heather M. Harvill** has become an associate.

Walston, Wells, Anderson & Bain, LLP announces that **Paul O. Woodall, Jr.** has become a partner, and **Casey L. Jernigan** and **Ryan K. Cochran** have become associated with the firm.

Watson, Jimmerson, Givhan & Martin, PC announces that **Rebekeh Keith McKinney** has become a partner and the firm name is now **Watson, Jimmerson, Givhan, Martin & McKinney, PC**.

Whitfield & McAlpine, PC announces that **Mark Sterling Gober**, formerly of Shepherd & Gober, has become a member of the firm. ■

Orzell Billingsley

Orzell Billingsley, a long-time member of the Bessemer Bar Association, went to be with the Lord on Friday, December 13, 2001. He truly and honorably served the citizens of the State of Alabama and the United States, as well as serving in the movement for civil rights in this country for African Americans and all other citizens.

He was also the organizing force behind the incorporation of several small towns in Alabama, affording each of them their right to self-government. He was instrumental in efforts to desegregate schools and gain equal access for African Americans to public education, places and services in Alabama and throughout the country.

Mr. Billingsley grew up in southwest Birmingham, and was a graduate of A.H. Parker High School. He graduated from Talladega College with honors and earned his law degree from Howard University School of Law in Washington, D.C. in 1950.

He will be long remembered for his candid conversation, outspoken language and common-man attitude toward the plights of the underprivileged in this state and in this country. He has served as a role model for lawyers, both in the Bessemer area and the state at large, for those who seek to represent the common man against the state in criminal prosecutions and corporations in civil actions.

Mr. Billingsley was preceded in death by his beloved wife, Geselda Billingsley, and a brother, Thomas Billingsley. His memory will be cherished by his daughter, Shaune Billingsley Howden; son-in-law Reverend Caple D. Howden; grandsons Brian and Brenden Howden; granddaughter Brielle Howden, all of DeBary, Florida; brother Lawrence Billingsley, Jr., Mansfied, Ohio; nieces Lauretta Billingsley, Lisa Billinglsley, Cynthia Davis and Sylvia Strothers; nephews Lawrence Billingsley, Jr., Lee-Austin Johnson and Eddie Johnson; sisters-in-law Hannah Billingsley McIver of Massachusetts and Ola M. Daniels Billingsley of Birmingham; and a host of other relatives, friends and colleagues.

—H. Jadd Fawwal, president
Bessemer Bar Association

John Adair Hagood

John Adair Hagood was born July 10, 1917 in Jasper, Alabama and was a resident of Mobile for the past 45 years. He died April 16, 2002, a respected member of the Mobile Bar Association.

He was a 1942 graduate of Vanderbilt University Law School and was admitted to the Alabama State Bar that same year. He served as an estate tax examiner for the Internal Revenue Service. John was highly respected by local practitioners in estate matters because of his genteel manner and fairness in dealings. He retired in 1979, at which time he entered private practice.

He was preceded in death by his wife, Doris Warnock Hagood. He is survived by two children, Patti Hagood (Kenneth) Norris and J. Adair (Peggy) Hagood, Jr., all of Mobile; two brothers, Edward Scott (Lil) Hagood, of Medirna, New York, and George Truitt (Frances) Hagood, of Tallapoosa, Georgia; one sister, Virginia Hagood (G. Stanley) Powell, of Atlanta, Georgia; six grandchildren, Carrie Scott Norris, Kenneth Campbell Norris, Katherine Adair Norris, John Harrison Hagood, Anna Lynd Hagood, and Mary Clare Hagood.

—Larry U. Sims, past president
Mobile Bar Association

Ray Gordon Riley

Ray Gordon Riley, a respected member of the Mobile Bar Association, died May 16, 2001 at the age of 61. He was a native Mobilian and a member of the University of Alabama Law School Class of 1968.

Ray returned to Mobile after graduation and began the practice of law in the real estate section of the United States Corps of Engineers and there became a real estate law specialist. Ray subsequently was with the firm of Tonsmeire & McFadden and, thereafter, for many years, continued his specialty as a real estate and closing attorney as a sole practitioner.

Ray was active in the Mobile Real Estate Association, and the Federal, Mobile and Alabama State bars.

He liked to build things with his hands and always had some building project ongoing around his house. He was a golfer, a member of the Mobile Country Club and lately had taken up fishing with his grandsons. He was a member of the Spring Hill Presbyterian Church.

Ray left behind a devoted wife, Moren, a daughter, Jan, grandsons Riley and Gordon, and many friends and colleagues who will long mourn his passing.

—Larry U. Sims, past president
Mobile Bar Association

Thomas D. Motley

On December 13, 2001, the members of the Houston County Bar Association learned of the tragic loss of their colleague and friend, Tom Motley. Tom and two close friends and associates were lost in an aircraft accident on the preceding evening. To Tom's wife, Cheryle, and his stepson, Derek Yarbrough, each a member of our association, and to the other members of Tom's family, we extend our deepest sympathies.

To know Tom means to be familiar with two consistent character traits. First, he was not a patient man, and almost certainly would appreciate the brevity of this resolution. On the other hand, Tom Motley never lacked for confidence, and was justifiably proud of what he accomplished as a husband, father and lawyer. If he could be here, he would tell us so without hesitation. It was his way. Tom has moved on, however, and it falls to us members of the Houston County Bar Association to resolve to remember him "in our own words." We sincerely hope that Tom and Cheryle will be pleased with our effort.

Tom Motley was born in Augusta, Georgia on May 26, 1950, and moved to Geneva in 1961. After serving two tours in Vietnam with the United States Army, Tom attended Troy State University and was awarded a bachelors and masters degree. Following his graduation from the Cumberland School of Law, Tom began his law practice as a solo practitioner in Geneva in 1984. He moved his practice to Dothan in 1986, and built a successful litigation practice that became Motley, Motley & Yarbrough. Tom was a member of the Alabama State Bar, the Houston County Bar Association and the Alabama Criminal Defense Lawyers Association. He was also a founding member of Cyber-Services Technology, LLC, a successful Internet services provider.

To be sure, Tom Motley was an exceptionally aggressive advocate and one always eager to get into the fight. Tenacity did not yield, however, to professionalism. Many of us can personally attest that even in the most hard fought cases, Tom did not deny a professional courtesy or consideration. For that spirit of professionalism, we remain most grateful.

Tom's tenacity as an advocate was not, however, confined to the courtroom. He knew one speed and one speed only, and it was most assuredly not a low gear. Whether flying his plane, dancing the fox trot (a side some of us didn't know about) or trying a lawsuit, Tom approached any challenge with a childlike zeal that most of us only dream of capturing.

We suspect that had they known one another, Tom Motley and Mark Twain would have been fast friends. They shared a perspective on work and on play from which we can all learn:

> "What a mistake we make in setting up two arbitrary definitions of effort and calling one work and the other play. You can't measure effort in that way. Whatever a man likes most to do, the thing into which he puts all his energy heartily without ever thinking whether he is doing enough or too much—that thing is play to him, no matter whether he works at it by way of diversion or to earn his living."
>
> Mark Twain, *What I Am Thankful For*

Tom, we thank you for the lesson.

—Benjamin E. Meredith, president
Houston County Bar Association

Robert T. Cunningham, Sr.

On October 1, 2001, the Mobile Bar Association lost one of its finest members upon the death of Robert T. Cunningham, Sr. He was born in Mobile on March 23, 1918, and received his law degree from the University of Texas in 1940.

He served as an FBI agent and in the United States Marine Corps during World War II. He was admitted to the Texas State Bar in 1940 and to the Alabama State Bar in 1949.

Robert Cunningham was the founding member of the present law firm of Cunningham, Bounds, Yance, Crowder & Brown, having begun in 1958. He was a pioneer in the legal profession in the personal injury trial specialty, having been the first Alabama attorney to obtain a six-figure dollar judgment in such a case.

Robert Cunningham was extremely active in his profession, serving as president of the Mobile Bar Association in 1964, president of the Alabama Trial Lawyers Association from 1963-63, president of the International Society of Barristers from 1972—73, and as director of the International Academy of Trial Lawyers from 1964-68.

He was highly regarded for his ethics, attention to detail and legal ability by all of the lawyers and judges with whom he came in contact. He was designated a special judge of the Mobile County Circuit Court from 1989 to 1994.

He left surviving him his wife of 29 years, Susan Trotter Cunningham; two sons, Robert Thomson Cunningham, Jr. and Cleve Pardue Cunningham; a daughter, Dorothy Eugenia Harris; two stepsons, James Vincent McConnell, II and Mitchell Trotter McConnell; three brothers, George Douglas Cunningham, Richard Berkley Cunningham and John Malcolm Cunningham; a sister, Narvie Lucille Beville; and seven grandchildren and two great-grandchildren.

—Donald Briskman, president,
Mobile Bar Association

Leon G. Duke, Jr. (with photo)

Leon G. Duke, Jr., a highly respected member of the Mobile Bar Association, died January 9, 2002. Pete Duke, as he was known, was born October 13, 1924 in Gulfport, Mississippi. He grew up in Long Beach, Mississippi and attended Long Beach High School. After graduation, he was drafted into the U.S. Army in 1943, where he served with the Third Army in France during World War II.

After returning home from the war, he attended the University of Southern Mississippi, after which he set his sights on a career in law. He then attended law school at the University of Alabama, graduating in 1951.

He then moved to Mobile and began work as an insurance adjuster with State Farm. However, in 1957, he was invited to join the firm of Seale, Marsal & Seale, where he practiced law for the next 17 years. In 1973, he was chosen as boss of the year by the Legal Secretaries Association of Mobile.

In 1975, he joined Robert Campbell, III and Peter Sintz, in the firm that would later be known for most of his remaining career as Sintz, Campbell, Duke & Taylor.

In 2001, Pete was honored by the Mobile Bar Association in recognition of his 50 years of service to the legal community. He was a close friend of Senior U.S. District Judge Richard Vollmer, Jr., who had known Pete since shortly after he came to Mobile and they both were practicing attorneys. In the words of Judge Vollmer, "Pete was a personal friend, we did a lot of things together, and I will miss eating with him and talking about old times."

Robert Campbell, III, of the firm of Campbell, Duke & Sherling, remembered his partner as a man of integrity and stated, "Pete was my good friend and law partner for 27 years. I will dearly miss him. He was a man of great faith, honor, courage and insight." IN fact, Pete was a friend to all lawyers, especially young lawyers, and he was known in his practice for compassion and grace, patience and wisdom.

Pete lived each day in close communion with God and found great happiness in church leadership. He was a charter member and served as chairman of the administrative board of the Western Hills Christian Church, and later was involved in Kingswood United Methodist Church as board member, legal counsel and financial/stewardship leader. In the recent past, he was an active member of Christ United Methodist Church, where he taught adult Sunday School.

Pete left surviving him his beloved wife of 52 years, Elaine, and four children, Dr. Andrew Duke and his wife, Lynn, of Mobile; Barbara Duke Pleasant of Huntsville; Dr. Chris Duke and his wife, Ann, of Ocean Springs, Mississippi; and Russell Duke and his wife, Judy, of Mobile. Pete Duke also left surviving him eight grandchildren, as well as the children of his sister, Annette Long Tsipouras.

—Donald Briskman, president
Mobile Bar Association

Boutwell, Terry Buse
Pensacola, Florida
Admitted: 1987
Died: February 12, 2002

Bradford, James Philip
Birmingham
Admitted: 1938
Died: February 27, 2002

Callahan, Artemas Killian
Tuscaloosa
Admitted: 1926
Died: May 19, 2001

Cloud, Earl Edward, Sr.
Huntsville
Admitted: 1950
Died: January 22, 2002

Cunningham, Robert T., Sr.
Fairhope
Admitted: 1949
Died: October 1, 2001

Danner, Joseph F.
Mobile
Admitted: 1981
Died: September 22, 2001

Duke, Leon G., Jr.
Mobile
Admitted: 1951
Died: January 9, 2002

Ferrell, John Pelham
Phenix City
Admitted: 1952
Died: January 24, 2002

Heaps, Carlos E.
Birmingham
Admitted: 1958
Died: December 13, 2001

Motley, Thomas Daniel
Dothan
Admitted: 1984
Died: December 12, 2001

Nice, Charles M., Jr., Hon.
Birmingham
Admitted: 1948
Died: December 5, 2001

Poole, Joseph Neil, III
Montgomery
Admitted: 1976
Died: December 9, 2001

Shores, James Layet, Jr.
Birmingham
Admitted: 1956
Died: September 25, 2001

Smitherman, Joseph Thomas, Jr.
Fairhope
Admitted: 1980
Died: October 20, 2001

Stevens, Frederick Hansen
Evergreen
Admitted: 1990
Died: October 20, 2001

Wright, L. Charles, Hon.
Montgomery
Admitted: 1948
Died: November 27, 2001

Position Offered—Executive Director, Alabama Appleseed Corporation

Alabama Appleseed, a non-profit corporation founded in July 1999, seeks a full-time executive director who will play a leading role in the establishment of the center's institutional base and ambitious advocacy program.

Alabama Appleseed's mission is to make legal and social systems better serve Alabama's citizens. Rather than deliver legal services to individuals, Alabama Appleseed identifies structures within the state's social and legal systems that cause unfair treatment of our citizens or fail to protect our citizens, and develops strategies to improve those structures. Alabama's initial projects stem from two areas of concern to the state: (1) the need for reform of judicial selection; and (2) the need to establish a living wage which can then serve as a benchmark in establishing economic policy. Alabama Appleseed's projects, as well as its areas of concentration, will vary over time as the needs of the state change.

The executive director is expected to work closely with the center's board of directors in shaping Alabama Appleseed's programs and in the initiation, design and implementation of its various projects. Thus, the executive director must be resourceful in identifying opportunities for action, and be sophisticated in identifying projects that best apply the organization's resources. In addition to providing staff support and direction for its projects, the executive director will coordinate and help recruit a network of volunteers and help the board to identify others who can play a major role in shaping and executing Alabama Appleseed's projects.

Alabama Appleseed has applied for its exemption under Section 501(c)(3) of the Internal Revenue Code. Alabama Appleseed's board, which includes a prominent and diverse group of lawyers in the private practice sector and in academia, will play a major role in fundraising. The executive director will facilitate the center's fundraising program, and will be principally responsible for preparing the center's annual budget and for managing its overall operations.

The executive director must have strong analytic and communication skills. The executive director must also be able to work effectively with the media and to serve as Alabama Appleseed's principal representative to the community at large, as well as to lawyers and others who will contribute time and money to the center. As the center's sole starting staff, the executive director must be able to handle and prioritize a range of pressing responsibilities.

While it may be desirable for the new executive director to be a lawyer, this position is not restricted to lawyers. However, familiarity with Alabama law and the Alabama legal system is desirable.

Compensation will be commensurate with experience and will be competitive with comparable public interest and non-profit positions. The location of Alabama Appleseed's office within the state has not yet been determined, and can be negotiated. The board plans to hire additional staff in the future, but its ability to do so will depend in part on the success of its fundraising activities, which the executive director will help lead.

All applications will be held in strict confidence. The center is an equal opportunity employer.

For more information, go to the Appleseed Foundation's Web site at *www.appleseeds.net* or contact:

Alabama Appleseed Center
Attention: Cyndi Russell-Albach
727 15th Street, NW, 11th Floor
Washington, DC 20005
E-mail: crussell@appleseeds.net

Robert L. McCurley, Jr.

By Robert L. McCurley, Jr.

Elections

Congress, the Alabama Senate and House of Representatives and the State Board of Education were all reapportioned (Acts 2002-57; 2001-727; 2001-729; 2002-73). The Justice Department has cleared the congressional plan and the redistricting of the Alabama legislature.

The primary election will be held June 4, 2002 with run-off election being June 25, 2002. All candidates who have been put in nomination by any caucus, convention, mass meeting or other assembly of any political party or faction must be certified on or before 5 p.m. on the date of the first primary election. Any independent candidate must also be certified by that time. Previously all primary candidates could be placed in nomination six days after the second primary. Known as the "sore loser" law, this change in the nomination date was made by Act 2001-1131 and is still pending Justice Department approval before it can become effective.

The legislature also abolished on-site absentee voting which permitted electors who would be out of the county or state on election day to vote on the Saturday falling ten days prior to the election, by going to the courthouse or courthouse annex. This voting procedure, which has been tried for five years, found very few electors taking advantage of the early voting opportunity and did not justify the cost. This bill, Act 2001-1097, has Justice Department approval.

The legislature has, by Act 2002-1130, provided that election officials must be excused from their employment to perform election duties without a penalty of loss of time or benefits for election day. This only applies to businesses who employ over 50 employees.

Two "election" bills which have received a great deal of interest are "voter ID" and "restoration of felon voting rights." The "voter ID" bill, HB. 36, passed the House of Representatives early in the session. This bill permitted the use of most government issued identifications, such as drivers' license, military card, passports, hunting license, gun permit, and Social Security cards. Some provide a picture, while others do not. The "restoration of felon voting rights" bill will automatically restore a felon's voting rights upon completion of the sentence and making restitution. No longer is one required to make application to the Pardon and Parole Board before the rights are restored. HB. 40 also passed the House of Representatives and is on the Senate calendar. Both of these bills will pass or both will die. Should they pass, the bills will still require Justice Department approval before they will become effective.

Constitutional Revision

The six Articles of the constitution revised by the House of Representatives failed to be approved in the Senate. The joint resolution calling for a Constitutional Convention for the fall of 2003, HJR 152, was considered by the House of Representatives but opposition to the proposal caused **Sponsor Marcel Black** to remove it from consideration.

Institute-Prepared Legislation

Alabama Uniform Interstate Enforcement of Domestic Orders Act, SB. 33, sponsored by **Senator Rodger Smitherman** and **Representative Joe Carothers** has passed the Senate and is on the House Calendar awaiting final approval.

Alabama Uniform Institutional Funds Act, HB. 96, sponsored by Representative Marcel Black and **Senator Tom Butler** has passed the House and is on the Senate Calendar awaiting final approval.

Alabama Uniform Anatomical Gift Act, HB. 71 and SB. 51, sponsored by **Representative Demetrius Newton** and **Senator Ted Little,** are on the Calendar of each house.

Pending Legislation

With only six days remaining in the 2002 Regular Session, of the more than 1,200 bills introduced, only nine statewide bills, and 25 local bills, plus 11 bills to continue state agencies, have been enacted. This represents approximately 3 percent of the bills introduced. There are another 197 bills which have passed one house and are on the calendar in the second house for possible passage. The next "Legislative Update" in July 2002 will include all legislation enacted during the session.

Annual Law Institute Meeting

The Annual Meeting of the Alabama Law Institute for all members of the Institute will be Thursday, July 18, 2002 at 11:30 a.m. during the Annual Meeting of the Alabama State Bar.

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

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

J. Anthony McLain

What To Do When Your Client Perpetrates A Fraud

By J. Anthony McLain, general counsel

Question:

"I am currently representing a client who is the Administratrix of the Estate of her late husband. My client's late husband, John, was killed in a motor vehicle accident on March 8, 1994, and subsequently, I was retained to represent her as Administratrix of the Estate of John, and as the spouse of John, regarding a wrongful death claim against the adverse party in the motor vehicle accident. John was survived by my client, two majority age daughters and a minor son. To be formally named as Administrix of the Estate of John, my client was required to post a surety bond and obtain waivers from the other heirs consenting to her being named Administratrix. When applying for such a bond with Company A, my client was required to complete a bond questionnaire. One question listed on the questionnaire asked if my client had any pending lawsuits and she answers, 'No'. Thereafter, Company A denied my client a bond due to a pending Chapter 13 bankruptcy. Subsequently, I contacted bonding Company B about bonding my client in such matter. Company B's representative requested that I fax him Company A's bond application for his review. Thereafter Company B agreed to issue a bond with a requirement that joint control be exercised by me as client's counsel and I agreed. Also, Company B required that their bond application be completed and returned prior to issuing such bond. Such bond application did not inquire about pending litigation against my client.

Thereafter, wrongful death negotiations with the insurance company of the adverse party led to a settlement of the wrongful death claim. This settlement was for the amount of the limits of the policies of the adverse party. Out of the settlement proceeds were paid my attorney's fees and expenses, with my client receiving the remaining amount, such being in accordance with the law of distribution and the wrongful death statute. Subsequent thereto, I was advised by the attorney representing an heir of the Estate of John, that my client had a lawsuit pending against her in that she had been sued for divorce from an alleged common law marriage by a former live-in acquaintance. This action was pending at the time my client completed the bond application of Company A referenced supra. It is worth mentioning that another attorney has been representing

my client regarding the pending divorce action since she received service on such. However, my client contends that there was not a common law marriage and that she feels that such suit is frivolous. Also, she has advised me that because there was a two-month period without any pleadings or communications between counsel for the parties in this divorce action, that she thought the matter had been dropped, thus explaining why she completed the bond questionnaire as she did.

Obviously, this is a serious matter for my client for if she is unsuccessful in her defense against the common law marriage divorce action, her subsequent marriage to John could be held invalid and she could lose any claim to John's Estate that she would have as surviving spouse. Her status as Administratrix of the Estate too, could be removed. Also, any monies received as surviving spouse in the wrongful death settlement could be required to be paid back into the Estate of John.

Questions for Opinion:

1. Do I have a duty to advise bonding Company B of the omission on bonding Company A's questionnaire which was sent to Company B and probably relied upon by Company B, knowing such would be against my client's interest?
2. Do I have a duty to notify the Probate Court where the Estate of X is pending of the facts outlined above knowing such action would be against my client's interest?
3. Do I have a duty to withdraw as counsel for the Administratrix of the Estate of John knowing such action would be against my client's interest?"

Answer:

Rule 1.6 of the Rules of Professional Conduct applies to the facts you have set out. It provides as follows:

"Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

Rule 1.6(a) says that all information relating to a lawyer's representation of a client is confidential. Therefore, nothing gained during the representation may be disclosed to anyone unless one of Rule 1.6's exceptions applies, or there is authorization from the client or a court.

Rule 1.6(b)'s two exceptions are limited ones. First, a lawyer disclose confidential information to prevent a client from committing a criminal act only if it could result in "imminent death or substantial bodily harm". The second exception is essentially a self-defense provision for situations where there is a controversy between the lawyer and client regarding an aspect of the representation. In the latter exception, only such information as is necessary to establish the claim or defense may be disclosed. Your facts do not come within either of these exceptions.

Your client's failure to answer truthfully on the first bond application could be construed as an ongoing fraud, particularly since she has not taken any remedial action to correct it. The issue of a possible prior marriage is certainly a material one, under the circumstances. A lawyer cannot disclose facts about a client's past crimes or fraud under Rule 1.6. However, if a lawyer's services are going to be used to further a fraud, then the lawyer must mandatorily withdraw. In RO-90-76, the Disciplinary Commission noted that once the lawyer has withdrawn, he or she is no longer responsible for the client's continuing fraudulent conduct.

You cannot unilaterally disclose anything to the bonding company. You cannot disclose anything to the probate court at this point. There is nothing to rectify with the court now. The bonding company may elect to stay on the bond, and the divorce case may be frivolous as your client contends it is. You should counsel your client to advise the bonding company of the error in the first application or authorize you to do so. If she refuses, you should withdraw.

[RO-94-09] ■

Drug & Medical Device

Litigation Under

The Alabama Extended Manufacturer's Liability Doctrine

BY TRIPP HASTON

A. INTRODUCTION

Snap your local newspaper open these days and you are likely to find an article about the latest drug or medical device advancement. You are also likely to find an advertisement claiming that some other drug or medical device is defective and injurious. In the past several years, these articles and advertisements have become more and more prevalent. Make no mistake about it; drug and medical device litigation is a growing trend in our state that will likely continue as drugs and medical devices continue to evolve to meet our demand for better, stronger, and faster remedies to cure what ails those weakening parts of our bodies that are attacked from without, or deteriorate from within.

The issues presented are complex and intriguing. Even as this article goes to press, our nation is considering whether to innoculate against smallpox, a highly contagious disease that has killed and disfigured millions upon millions of human beings. Yet we know that to innoculate 300,000,000 Americans will likely result in fatal adverse reactions to approximately 1 in 100,000, or 3,000 people. Similar concerns are being voiced over anthrax inoculations. As we all know, no prescription drug, however therapeutic, is risk free. The question often posed under Alabama law is whether the inherent risks attendant with a drug or medical device render the product 'defective.'

Although various tort or contract claims may come into play in drug and medical device litigation, a common denominator in nearly all of this litigation is a claim under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"). Indeed, many courts have found that standard tort claims, such as negligence and failure to warn, are subsumed under the AEMLD. *See, e.g., Spain v. Brown & Williamson Tobacco Corp.*, 230 F. 3d 1300 (11th Cir. 2000) (applying Alabama law); *Rudd v. General Motors Corp.*, 127 F. Supp 2d 1330,1347 (M.D. Ala. 2000) (same); *Tillman v. Reynolds Tobacco Co.*, 89 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000) *(citing Veal v. Teleflex, Inc.*, 586 So. 2d 188, 191 (Ala. 1991)). Due to the unique nature of the products at issue and the identity of the entities usually involved, this litigation presents issues novel to other products liability cases.

B. ALABAMA EXTENDED MANUFACTURER'S LIABILITY DOCTRINE

The AEMLD was judicially created in 1976 and is Alabama's modified version of the strict liability set out in section 402A of the *Restatement (Second) of Torts. See Casrell v. Altec Indus.*, 335 So. 2d 128 (Ala. 1976); *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976). Rather than adopting the strict liability standards of section 402A, the AEMLD retains the fault concept of negligence actions. *Casrell*, 335 So. 2d at 132; *Atkins*, 335 So. 2d at 137; *Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984). In other words, it is not enough to simply show that a plaintiff took a drug or used a medical device and suffered injury as a result, rather, there must be proof that the product was 'defective or unreasonably dangerous' and that the claimed injury was causally related to the defect. *See Casrell*, 335 So. 2d at 132.

1. Pleading

Under the AEMLD, plaintiffs can pursue claims for (1) defective manufacture; (2) defective design; or (3) failure to warn. *See Casrell*, 335 So. 2d at 132. As described below, prescription drugs, and presumably certain medical devices, are treated differently than standard products under the AEMLD in certain respects.

In the seminal case where the AEMLD and prescription drugs first intersected, *Stone v. Smith, Kline & French Laboratories*, the Alabama Supreme Court recognized that prescription drugs are considered "unavoidably unsafe products" under comment k of section 402A of the *Restatement (Second) of Torts*. 447 So. 2d 1301, 1303 (Ala. 1984). In a nutshell, comment k recognizes that there are certain products which are, by their very nature, "quite incapable of being made safe for their intended and ordinary use"; therefore, the question becomes whether the manufacturer or seller adequately warned the plaintiff of the risks attendant with the product's use, as opposed to whether the plaintiff suffered damages as a result of risks attendant with the product's use. *Id.* at 1303 n.1. By quoting comment k in its entirety, the Alabama Supreme Court recognized that sometimes, to treat a disease, an individual must be willing to assume the risk of some untoward consequences or side effects of the cure. *See id.* More specifically, comment k cited as an example the risk of certain side effects from the vaccine for the "dreadful" disease of rabies and stated that these potential side effects did not render the vaccine "defective," but rather:

> Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warnings given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.
>
> *Id.* (emphasis in original).

See also Purvis v. PPG Indus., Inc., 502 So. 2d 714 (Ala. 1987) (recognizing Alabama's adoption of comment k). Accordingly, the Alabama Supreme Court held in *Stone* that, "in the case of an 'unavoidably unsafe' yet properly prepared prescription drug, the adequacy of the accompanying warning *determines* whether the drug, as marketed, is defective or unreasonably dangerous" and therefore is an element in establishing a prima facie case under the AEMLD. *Id.* (emphasis added). Under *Stone* then, with a properly prepared product, the element of "defect" in a drug or medical device case under the AEMLD turns on the adequacy of the warning that accompanied the product. *Id.*

With this understanding of what constitutes a "defect" in drug and medical device cases, consideration of the other elements in typical AEMLD claims is in order. In a defective manufacture claim, in addition to the element of "defect" as addressed above,

a plaintiff must also plead that (1) he suffered injury or damages, (2) the injury or damages were caused by a "defective" product, (3) the defendant was a manufacturer or seller engaged in the business of selling such a product, and (4) the product was expected to, and did, reach the plaintiff without substantial change in the condition in which it was sold. *See Casrell,* 335 So. 2d at 132; *Atkins v. American Motors Corp.,* 335 So. 2d at 137. For defective design claims, the plaintiff must also allege that (5) a safer, practical, alternative design was available to the manufacturer at the time the product was manufactured, the utility of which outweighed the utility of the design actually used. *See Beech v. Outboard Marine Corp.,* 584 So. 2d 447 (Ala. 1991). Finally to allege a claim for failure to warn under the AEMLD, a plaintiff must plead that (1) the defendant was under a duty to warn the plaintiff regarding the product in question's danger when used in its intended or customary manner, (2) the warning the defendant provided breached that duty because it was inadequate, and (3) the breach proximately caused the plaintiff's injuries. *See Chase v. Kawasaki Motors Corp., U.S.A.*,140 F. Supp.1280,1287 (M.D. Ala. 2001) (applying Alabama law). As discussed below, manufacturers and certain distributors of drugs and medical devices have a unique defense under the "learned intermediary" doctrine with regard to warning claims.

2. Proof

As with pleading such claims, proof of claims under the AEMLD involving a drug or medical device also presents unique issues.

a. Causation and Damages

With regard to causation and damages, the Alabama Supreme Court has made clear that a plaintiff cannot assert a claim for mere exposure to an allegedly defective product and the resulting "fear" that arises from this exposure. *See Pfizer, Inc. v. Farsian,* 682 So. 2d 405 (Ala. 1996); *Ford Motor Co. v. Rice,* 726 So. 2d 626 (Ala. 1998). Similarly, if the plaintiff suffered injury as a result of an uncommon allergic reaction to a product, which risk was unknown to the defendant, then the defendant is not required to warn of such risks and the product is not considered "defective." *See Griggs v. Combe, Inc.,* 456 So. 2d 790, 792 (Ala. 1984). Finally, consistent with *Farsian,* the Alabama Supreme Court has recently held that no claim exists under Alabama law for medical monitoring as this is an anticipatory and unripe claim for possible injury. *See Hinton v. Monsanto Co.*, 2001 WL 1073699 (Ala. Sept. 14, 2001). Instead, the plaintiff must be able to demonstrate some

manifest and present injury, of which the defendant failed to adequately warn, proximately caused by use of the drug or medical device. *See id.* at * 1; *Smith,* 447 So. 2d at 1303. Given the complex nature of proving a given drug's or device's effect on the human body, expert testimony is usually required to establish proof of causation and damages. *See Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.,* 395 So. 2d 991, 995 (Ala. 1981); *Townsend v. General Motors Corp.,* 642 So. 2d 411 (Ala. 1994).

b. Alleged "Defect"

Mere failure of a product does not presuppose the existence of a defect. *Townsend,* 692 So. 2d at 415; *Jordan v. GMC,* 581 So. 2d 835 (Ala. 1991); GMC *v. Edwards,* 482 So. 2d 1176 (Ala. 1985). Instead, the plaintiff must prove that the defective condition of the product proximately caused him injury. *See Taylor v. General Motors Corp.,* 707 So. 2d 198 (Ala. 1997); APJI § 32.12 (1999). As the Alabama Supreme Court established in *Stone,* however, if the manufacturer or seller adequately warned of the risk of plaintiff's injury, then the drug is not considered "defective" as a matter of law. *See* 447 So. 2d at 1303.

In a drug or medical device case, a given product is likely to have weathered a battery of pre-clinical animal studies, clinical trials, and a thorough review process overseen by the U.S. Food & Drug Administration. These proceedings also critique and approve all warnings provided with drugs and certain medical devices. Accordingly, expert testimony is usually required to prove a plaintiff's claim *both* of the alleged "defect" and the causation of any claimed damages. *See Brooks v. Colonial Chevrolet-Buick, Inc.,* 579 So. 2d 1328, 1332 (Ala. 1991); *Haven Hills Farm, Inc.,* 395 So. 2d at 995; *Townsend,* 642 So. at 416.

c. Manufacturers and Sellers

The Alabama Supreme Court has held that a plaintiff can invoke the AEMLD only as to manufacturers and sellers of allegedly defective products. *See Turner v. Azalea Box. Co.,* 508 So. 2d 253, 254 (Ala. 1987). Plaintiffs must demonstrate that the defendant was "engaged in the business of selling" the product at issue and, in that business, sold or otherwise put the product into the stream of commerce that directly reached the plaintiff. *See First National Bank of Mobile v. Cessna Aircraft Co.,* 365 So. 2d 966, 968 (Ala. 1978); *Huprich v. Bitto,* 667 So. 2d 685, 687 (Ala. 1995); *Hicks v. Vulcan Engineering Co.,* 749 So. 2d 417, 422 (Ala. 1999).

A frequent issue that arises in this litigation is whether a given defendant can properly be considered a "manufacturer" or "seller" for purposes of the AEMLD. While it is clear that manufacturers of the products at issue are subject to such claims, there is some debate about the AEMLD's applicability to others. For example, in recent litigation, prescribing physicians, hospitals, pharmacies, and individual employees of a drug manufacturer responsible for detailing the product to physicians have been sued under the AEMLD.

(1) Physicians

While the Alabama Supreme Court has not spoken to the precise issue, it seems clear that a prescribing physician cannot properly be considered a "manufacturer" or "seller" of a drug or medical device that he prescribes for a patient. Physicians are in the business of providing medical *service;* not the *sale* of medical products. Therefore, by merely writing a prescription or selecting a medical device for use in a surgery, a physician should not have transformed himself into a "seller" for purposes of the AEMLD. *See Koehring Cranes & Excavation, Inc. v. Livingston,* 597 So. 2d 1354 (Ala. 1992) (holding that AEMLD defendant must be "engaged in the business" of sales of the product at issue). Moreover, the provisions of the Alabama Medical Liability Act ("AMLA") dictate what a plaintiff must plead and prove to establish liability against a physician in connection with any medical care the physician may have rendered. *See Ala. Code* §§ 6-5-480 to -488; §§ 6-5540 to -552 (1999). A physician's liability under the AMLA is premised solely on his adherence to the applicable standard of care. *See* Ala. *Code §* 6-5-548(a) (Ala. 1999). This would necessarily include the physician's prescription of a drug or use of a medical device in surgery. *See Clements v. Stewart,* 595 So. 2d 858 (Ala. 1992) (AMLA applies to all causes of actions against a healthcare provider).

(2) Hospitals

Hospitals are covered by the AMLA's provisions as a "health care provider." *See Ala. Code* § 6-5-481(7); *Ala. Code* § 6-5-542(1). Therefore, any claim against a hospital concerning a plaintiff's use of a drug or medical device is subject to the more stringent pleading requirements, standards of proof, and affirmative defenses of the AMLA. *See e.g. Ala. Code* § 6-5-551 (pleading requirements of AMLA); *Ala. Code* § 6-5-549 (heightened proof requirements of AMLA); *Ala. Code* § 6-5-482 (AMLA's statute of limitations). The Alabama Supreme Court has also suggested, however, that hospitals, unlike physicians, "maybe" considered "sellers" for purposes of the AEMLD. *See Delchamps v. Mobile Infirmary,* 642 So. 2d 954, 957 (Ala. 1994); *Skelton v. Druid City Hosp. Board,* 459 So. 2d 818, 822 (Ala. 1984). Therefore, while a hospital can be considered a "seller" for purposes of the AEMLD, the provisions of the AMLA provide both a plaintiff and the hospital with pleadings, proof, and defense issues unique to other AEMLD "sellers."

(3) Detail Representatives/ Individual Employees of Manufacturer

Recently, individual employees of pharmaceutical companies have been joined as defendants in suits against their employers/pharmaceutical manufacturers. A typical complaint asserts that these individual employees somehow contributed to the plaintiff's injury through their role as an employee of the manufacturer of the product at issue.

While no Alabama court has squarely addressed the issue with any detailed analysis, Judge Lewis Kaplan of the Southern District of New York recently entered an exhaustive opinion in an action from Alabama and ultimately concluded that, under Alabama law, typically no AEMLD claim lies against an individual employees of manufacturing defendants. *See In re:*

Rezulin Products Liability Litigation, 133 F. Supp. 2d 272, 286-87 (S.D.N.Y. 2001). In the case before judge Kaplan, the uncontroverted evidence established that the individual employee had neither sold any product to the plaintiff nor made any representations concerning the product to the plaintiff. *Id.* This absence of any connection between the individual employee's acts and the plaintiff's claimed harm was fatal to the plaintiff's claims against the individual employee. *Id.* In addition, Judge Kaplan found that the policies of the AEMLD supported his decision:

The AEMLD is founded on "broader moral notions of consumer protection and on economic and social grounds, placing the burden to compensate for loss incurred by defective products on the one best able to prevent the distribution of these products." *See Atkins v. American Motors Corp.*, 335 So. 2d 134, 139 (Ala. 1976). Accordingly, the AEMLD imposes liability only on manufacturers, sellers, and suppliers. *See Turner v. Azalea Box Co.*, 508 So. 2d 253, 254 (Ala. 1987); *Atkins*, 335 So. 2d at 139; *King v. S.R. Smith, Inc.*, 578 So. 2d 1285, 1287 (Ala. 1991).

The sales representative joined in the Alabama case neither manufactured, sold nor supplied Rezulin. Rather, he was an agent of the manufacturer and seller. As a corporate employee; he was not "the one best able" to prevent sales of defective drugs.

Id. at 287-88.

Judge Kaplan's opinion is also consistent with section 20 of the *Restatement (Third) of Torts: Products Liability.* Section 20 provides an explicit definition of "One Who Sells or Otherwise Distributes" for purposes of the *Restatement (Third) of Torts: Products Liability* (1997). Comment G to section 20 provides:

> *Other means of commercial distribution: product distribution facilitators.* Persons assisting or providing services to product distributors, are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. *Sales personnel* and commercial auctioneers *are also outside the rules of this Restatement.*
>
> (emphasis added).

[4] Pharmacies

Local pharmacies have also recently been the target of drug and medical device litigation. Plaintiffs typically allege that a pharmacy's distribution of a "defective" drug or medical device contributed to their injury in some manner. As with hospitals, pharmacies are considered "healthcare providers" under the AMLA and, therefore, claims against pharmacies are subject to the AMLA's dictates. *See Ex parte Rite Aid of Alabama, Inc.*, 768 So. 2d 960, 961 (Ala. 2000).

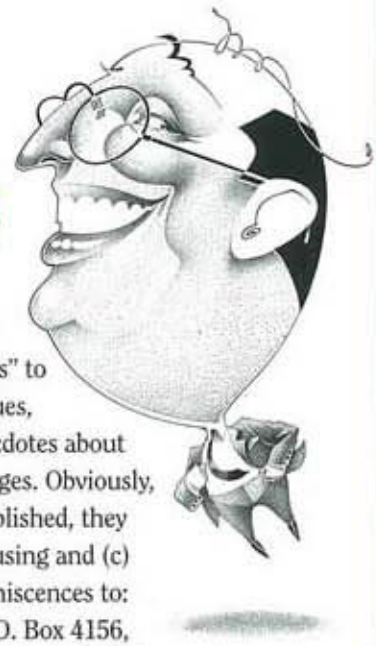
A number of Alabama state and federal courts have reviewed the propriety of suing pharmacies when the claim is essentially that the pharmacy is liable solely because it was in the chain of distribution for the prescription drug at issue. With one known exception, these courts have uniformly concluded that no such claim lies against pharmacies. *See Orr v. Wyeth-Ayerst Laboratories, Co.*, Case No.: 98-3000-DIET (Circuit Court of Mobile County, Alabama, Aug. 2,1999); *Sanks v. ParkeDavis*, Civil Action No. 00-S-1122-E, slip op. (M.D. Ala. Nov. 2,2000); *Franks v. American Home Products Corp.*, Civil Action No. CV-00-C-1936-S (N.D. Ala. Sept. 6, 2000); *Lansdell v. American Home Prods.*, Civil Action No. 99-S-2110-NE (N.D. Ala. Oct. 26, 1999); *Harrell v. Wyeth-Ayerst Laboratories*, Slip Op., Civil Action No.: 98-1194-BH-M (S.D. Ala. Feb. l, 1999). In the each of these opinions, the courts held that the "learned intermediary" doctrine barred the plaintiffs' claims against the pharmacies. *See id. But see Stevens v. American Home Products, Inc., et. al.*, slip op. CV 00-T-1108-N (M.D. Ala. Sept. 11, 2000) (remanding case that included an in-state pharmacy on the grounds that the pharmacy had not been fraudulently joined). The learned intermediary doctrine is a defense unique to drug and medical device litigation and discussed in some detail below.

In another recent opinion involving an over-the-counter product sold by a pharmacy, the plaintiff claimed that his child had suffered injury as a result of ingestion of an over-the-counter medication that contained phenylpropanolamine ("PPA"). *See Wiggins v. American Home Prods., et. al.*, slip op., CV 01-J-2303-W (N.D. Ala. Oct. 2, 2001). The plaintiff did not allege any specific act taken by the pharmacy other than simply being in the chain of distribution of an allegedly defective product. The *Wiggins* court held, on this allegation alone, that no causal relation existed between the plaintiff's injuries and the pharmacy's act of selling the product. *Id. But see Kent v. Miller Drug Co., Inc., et. al.*, slip op., CV 02-AR-0275-S (N.D. Ala. Feb. 18, 2002) (concluding fraudulent joinder had not been established).

3. Defenses

Beyond defeating a plaintiff's claims based on the absence of required elements under the AEMLD, Alabama law provides a host of other defenses to defendants in this litigation. These

---



War Stories

The Alabama Lawyer is looking for "war stories" to publish in upcoming issues, humorous tales and anecdotes about Alabama lawyers and judges. Obviously, for such stories to be published, they must be (a) true, (b) amusing and (c) tasteful. Send your reminiscences to: *The Alabama Lawyer*, P.O. Box 4156, Montgomery 36101. **Be sure to include your name, address and a daytime telephone number, in case we need to contact you.**

include the familiar defenses from other tort litigation of assumption of risk, no causal relation, contributory negligence, and product misuse. In addition, another defense known as the learned intermediary doctrine is often available to the manufacturer or seller in this litigation.

a. "Learned Intermediary" Doctrine

In this litigation physicians are usually the individuals who select the product at issue for the plaintiff, unlike typical products liability actions in which the plaintiff purchased the product directly without intervention from a third party. As discussed more fully below, as a result of this intermediate involvement by a trained and licensed professional, in Alabama, a manufacturer or seller can be shielded from liability under the AEMLD if it provided an adequate warning to the intermediary of the product's risks.

Developed by the New York Supreme Court in *Marcus v. Specific Pharmaceuticals,* 77 N.Y.S.2d 508 (N.Y. 1948), and adopted by the Alabama Supreme Court in 1984 in the opinion of *Stone v. Smith, Kline & French Laboratories,* the learned intermediary doctrine discharges a drug or medical device manufacturers' duty to warn of risks associated with a given drug or medical device to ultimate users if the manufacturer has provided adequate warnings of these risks to a physician or other "learned" intermediaries. 447 So. 2d 1301 (Ala. 1984). The *Stone* court explained the doctrine as follows:

> We cannot quarrel with the general proposition that where *prescription* drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use. This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in his products. (citation omitted). Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

Id. at 1304-05 *(quoting Reyes v. Wyeth Laboratories,* 498 So. 2d 1264, 1276 (5th Cir. 1974). In accord with this recitation of the learned intermediary doctrine, the *Stone* court concluded that if an adequate warning of a drug's risks are provided to a prescribing physician, the drug is not defective or unreasonably dangerous, and the manufacturer has fully discharged any duty it has of warning of the dangers inherent with its product's use. *Id.*

Since its adoption in *Stone,* there have not been any additional Alabama cases that have further construed the learned intermediary's boundaries or impact in the context of drug and medical device litigation, though there have been other cases that have dealt with similar issues in the context of manufacturers and distributors of industrial materials. *See Purvis v. PPG Indus., Inc.,* 502 So. 2d 714 (Ala. 1987) (affirming summary judgment in favor of chemical manufacturer where manufacturer provided warning to distributor who, in turn, failed to pass the warning on the consumer); *Ex parte Chevron Chemical Co.,* 720 So. 2d 922 (Ala. 1998) (holding that manufacturer of plastic pipe discharged its duty to warn of dangers associated with its product by providing such warnings to the employer of the plaintiffs). *See also Toole v. McClintock,* 999 F.2d 1430 (11th Cir. 1993) (discussing learned intermediary doctrine). As drug and medical device litigation continues to develop in Alabama, the importance of the learned intermediary defense will grow for all parties to this litigation.

b. No Causal Relation

Under this defense, the defendant pleads and proves that there is no causal relationship between his alleged acts and the plaintiff s claimed injuries. *Atkins,* 335 So. 2d at 143. A defendant establishes this defense through proof of the following elements: (1) the defendant is in the business of either distributing or processing for distribution finished products, (2) the defendant received the product in the same condition as the plaintiff, (3) the defendant did not contribute to the defective condition, or (4) the defendant had neither knowledge of the defective condition or an opportunity to inspect the product superior to the knowledge or opportunity of the plaintiff. *Atkins,* 335 So. 2d at 143. With regard to the defendant's opportunity to inspect the product, the opportunity must be a "meaningful" one and if the defect is latent and the defect could not be have been discovered by either the consumer or defendant by a reasonable inspection, neither had a superior opportunity to inspect the product *See Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.,* 365 So. 2d 968, 971 (Ala. 1978). Considering the condition in which drugs and medical devices reach distributors and suppliers, this defense is particularly appropriate in drug and medical device litigation under the AEMLD. *See Charpie v. Lowe's Home Centers, Inc.,* 930 F. Supp. 1498 (M.D. Ala. 1996) (granting summary judgment to a retailer of power tool equipment on no causal relation defense).

c. Assumption of Risk

As in other products liability cases, defendants in this litigation may assert that the plaintiff was fully informed of the risks attendant with use of the drug or medical device, accepted these risks in the hopes that the product could perform its intended purpose, and therefore, the defendant should not be liable for any claimed harm. In order to mount a successful defense, the defendant must show that any danger associated with its product was either apparent to the consumer or was adequately disclosed through warnings that accompanied the product. If the user or consumer knew of the alleged defect and attendant risk, and nevertheless proceeded to make use of the product and was injured, he is barred from asserting a viable claim against the manufacturer or seller. *See Atkins,* 335 So. 2d at 143. This defense is particularly

applicable in drug and medical device cases considering the warnings that typically accompany prescription medication.

d. Contributory Negligence and Product Misuse

Contributory negligence as a defense under the AEMLD is defined as the plaintiff's failure to use reasonable care with regard to the product at issue. *See General Motors Corp. v. Saint*, 646 So. 2d 564 (Ala. 1994). An example in the context of this litigation would be a plaintiff's ingestion of an amount of a drug in excess of the prescribed amount or the plaintiff's use of a prescription drug with another product contra-indicated for use with the prescription drug.

One form of contributory negligence in a drug case is a plaintiff's failure to read a manufacturer's or seller's warnings. In *E.R. Squibb & Sons, Inc. v. Cox,* the Alabama Supreme Court held that a plaintiff who failed to read an allegedly inadequate warning could not maintain a negligent failure to warn action unless the nature of the alleged inadequacy was such that it prevented him from reading it. 477 So. 2d 963 (Ala. 1985).

Product misuse under the AEMLD is defined as the plaintiff's use of the product in a manner not intended or unforseen by the manufacturer or seller. *See Dennis v. American Honda Motor Co.*, 585 So. 2d 1336 (Ala. 1991). The marketing of most drugs and medical devices is strictly regulated by the U.S. Food & Drug Administration (the "FDA") under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-397 (1999). The practice of medicine, however, is not regulated by the FDA. Therefore, physicians, in their expert opinion, may use drugs for the purposes the manufacturer has been permitted to market the product (often called an "on-label" use), or may choose to use the product for a purpose he believes beneficial for his patient, though this purpose is one in which the FDA has not permitted the manufacturer or seller to market the product (often called an "off-label" use). An unaddressed question under Alabama law is whether a manufacturer can be held liable for misuse of its product in an "off-label" manner when the decision to use the product in this manner was made by the plaintiff s physician, and not the plaintiff.

C. CONCLUSION

Alabama law remains relatively undeveloped in the area of drug and medical device litigation, despite the tremendous growth of this type litigation in recent years in our state. In the coming years, the Alabama Supreme Court will surely be asked to build upon its decisions in *Stone, Farsian, Cox* and *Griggs* in the further development of Alabama law to address new issues presented by this significant litigation. ■

Tripp Haston

Tripp Haston is partner with Bradley Arant Rose & White LLP in Birmingham, Alabama. Haston received his B.A. from Auburn University and his J.D., *summa cum laude*, from the University of Alabama. Following graduation, he served a judicial clerkship with the Hon. Emmett R. Cox of the United States Circuit Court of Appeals for the Eleventh Circuit.

A Closer Look

Alabama Law Foundation Fellows: SYDNEY SMITH

Today women in business, women doctors and women lawyers are practically commonplace. But in the mid-sixties, the idea of women leaving the kitchen for the workplace was not a popular one, at least among the establishment. It was popular among young women, though. Across the country, women like **Sydney Smith** from Phenix City, Alabama were developing an independent spirit and realizing that they had a lot to offer society. Smith knew early on that she wanted the chance to make her own way in the world. She also knew that she would need more education and more skills than a man might to get the same job. After graduating from Randolph-Macon Woman's College in Lynchburg, Virginia, she applied to the University of Alabama Law School. "I got out of college in the era when women were just beginning to work," Smith said. "I had the desire to make it on my own, and I knew that would require some additional training. My father was a lawyer, and I had been exposed to the law all my life, so law school seemed the obvious choice." Smith was accepted and received her JD in 1972. Her class was the first to graduate very many women and African Americans. She returned home to Phenix City and has been practicing law there ever since. She has fulfilled her dream of independence and done much more than make a living. Sydney Smith has made a difference in her community. In recognition of her dedication, she was inducted as a Fellow of the Alabama Law Foundation in 1999.In 1995, the Alabama Law Foundation established the Fellows program to honor Alabama bar members who have made a significant contribution to their profession and their community. There are currently 127 Fellows of the Alabama Law Foundation. Fellows pay an initiation fee and yearly dues. These funds are used for law-related charitable purposes that the Fellows themselves decide upon. Smith considers it an honor to be a part of such prestigious group, and believes in the work that the foundation and the Fellows are doing. "I was so honored to inducted into the Fellows," she said. "I was actually quite humbled. I believe in its purpose and think it is a wonderful avenue to help people." Smith didn't need the Fellows to start helping people though. Through her practice, she has had a noticeable positive impact on education in Phenix City and other areas. In 1970, federal law began requiring schools all over central Alabama to desegregate. Because of this, many Alabama schools are still operating under the scrutiny of federal court as they try to reach and maintain desegregation. Building new facilities, closing facilities and even making the smallest changes have been subject to federal approval. Smith has been working with several school systems in her area to help them achieve desegregation and ultimately, unitary status, which takes them out from under federal control and gives the authority back to the local communities. "By helping these systems achieve unitary status, I have helped to improve the quality of education," Smith said. "Returning control of schools back to the local community is very positive." Both Phenix City and Russell County school systems were declared unitary in the first months of 2002 thanks to Smith's work. Smith also gets involved outside her profession. "By virtue of legal work in a small town, I have had the opportunity to participate in many civic programs. I feel my skills as a lawyer have allowed me to make contributions to these programs too," she said. Smith was president of the Chamber of Commerce, president of The Rotary Club, will be president of the Alabama Law School Foundation, served on the board of Bar Examiners and is active in the Alabama Association of School Board Attorneys. Through all that she has done, Smith has seen the need for organizations like the Alabama Law Foundation because of the chance it provides lawyers to give back to the profession and the community at large." Over my close to 30 years it seems that the practice of law has become a business. Historically, the idea has been that lawyers are to help those that need assistance, all those that need assistance, but because of today's economics, that is sometimes hard," Smith said. "The Alabama Law Foundation enables lawyers to help in ways that they might not be able to do without it. That is why the foundation and its programs are so important." ■

BALANCING The SCALES

Alabama State Bar
Annual Meeting 2002

July 17-20, 2002 • Perdido Beach Resort
Orange Beach, Alabama

CLE • SECTION MEETINGS • TECHNOLOGY WORKSHOPS
ALUMNI MEETINGS • KIDS' CHANCE GOLF TOURNAMENT
MEMBERSHIP RECEPTION • ENTERTAINMENT & MORE!

BRING YOUR FAMILY FOR A
GREAT BEACH GETAWAY!

Visit our website www.alabar.org for updates and additional information!

BALANCING The SCALES

SPEAKERS & HIGHLIGHTS

Thursday

Plenary

"The Nightmare Before Christmas: Personal vs. Professional Life Inside the Media Maelstrom of Bush vs. Gore"

Robert Craig Waters, esq.
Public Information Officer
Florida Supreme Court
Tallahassee, Florida

The entire world focused its eyes on Florida for 36 days leading to the election of the 43rd President of the United States. Our speaker reflects "how strange life becomes when you have to have armed guards when you go outside, and there are police snipers on the roofs of nearby buildings." This is a dynamite multi-media presentation you'll not want to miss. It's the inside story from the man who, using anecdotes from lawyers and judges as well as his own, will tell both the humorous and the serious, interspersed with information about how the broadcast media operates during a 24/7 new events when it is in its so-called "news as entertainment mode." — The news equivalent of "Through the Looking Glass"

Bench & Bar Luncheon

Speaker: Honorable
William W. Bedsworth
California Court of Appeals
Santa Ana, California

The nationally syndicated columnist and author will share his real-life story of personal crisis in a blend of humor and insight that will inspire you.

Membership Reception

Poolside

Friday

Plenary

"Winning Your Life While Winning Cases: Maintaining Joy and Health in the Practice of Law"

John V. McShane, esq.
Dallas, Texas

Family & Criminal law specialist and nationally acclaimed author specializing in achieving peak performance, career resilience and quality-of-life issues.

Five minutes into his presentation, John McShane will have you convinced of his notoriety as a CLE speaker on high performance lawyering. Combining his passion for law and helping others, our Friday keynote speaker, a board-certified specialist in family and criminal law, will start you on your way to "balancing the scales."

Two-hour workshop to follow

- **Alabama State Bar Cocktail Party**
- **Alumni Receptions**

Saturday

Grand Convocation

Speaker:

Michael Wermuth
Arlington, Virginia
Member of the ABA Standing Committee
on Law and National Security

Wermuth is Senior Policy Analyst for RAND. He is project director for the work of RAND in connection with the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction. He has served as Deputy Assistant Secretary of Defense for Drug Enforcement Policy and been extensively involved in implementation of the President's National Drug Control Strategy. Wermuth is a native of Alabama and a member of the Alabama State Bar.

PLUS . . .

- **CLE Opportunities in the Mornings — Afternoons Free!**
- **Alabama Law Foundation Annual Golf Tournament**

FEATURED WORKSHOP

Terrorism — Counter Terrorism: Justice vs. Security

Co-sponsored by the Alabama State Bar and the
USAF Counter Proliferation Center of Air War College, Maxwell AFB, Alabama

PANELISTS:

- Dr. Barry Schneider, director, USAF Counter Proliferation Center, Air War College, Maxwell AFB, Alabama
- Robert T. Thetford, esq., FBI (ret.). Montgomery, Alabama
- Laurie Wood, director of research, Southern Poverty Law Center, Montgomery, Alabama
- Gregory Nojeim, associate director and chief legislative counsel, American Civil Liberties Union, Washington, D.C.

September 11 changed the way we think about our world. The world is also changing. Al Qaeda is not the only threat. Who has the capacity to destroy us? Mass casualties vs. maintaining a political base? What about the Patriot's Bill and other legislation and administrative acts? What about domestic threats of all kinds (hate groups, anti-government, environmental threats)? What about the loss of civil liberties? What about the rule of law? Where is the balance? Is there a balance?
This timely workshop is a featured showcase of the 2002 convention program. Ample time has been built in so you can have your questions answered by the experts.

ALABAMA STATE BAR

ANNUAL MEETING 2002

July 17-20, 2002 • Perdido Beach Resort

TENTATIVE SCHEDULE

Visit our website www.alabar.org for updates and additional information!

NOTE: ALL SECTION CLE PROGRAMS ARE OPEN TO ALL REGISTRANTS.

WEDNESDAY, JULY 17, 2002

2:00 p.m. - 4:00 p.m.
BOARD OF BAR COMMISSIONERS' MEETING

4:00 p.m. - 5:00 p.m.
MCLE COMMISSION MEETING

DISCIPLINARY BOARD MEETING

4:00 p.m. - 6:00 p.m.
EARLY REGISTRATION

LEGAL EXPO 2002
EARLY BIRD PREVIEW

THURSDAY, JULY 18, 2002

7:30 a.m. - 8:45 a.m.
ALABAMA LAW FOUNDATION TRUSTEES' BREAKFAST

7:30 a.m. - 8:45 a.m.
CHRISTIAN LEGAL SOCIETY BREAKFAST

8:00 a.m. - 4:00 p.m.
ANNUAL MEETING REGISTRATION

8:00 a.m. - 2:00 p.m.
LEGAL EXPO 2002

9:00 a.m. - 10:00 a.m.

OPENING PLENARY SESSION
"The Nightmare Before Christmas: Personal vs. Professional Life Inside the Media Maelstrom of Bush vs. Gore"
Robert Craig Waters, esq.
Public Information Officer
Florida Supreme Court
Tallahassee, Florida

10:00 a.m. - 10:15 a.m.
BREAK — VISIT LEGAL EXPO 2002

10:15 a.m. - 11:15 a.m.
"Alabama Constitutional Reform: Is It Really Broken? How Do We Fix It?"
Business Law Section

10:15 a.m. - 11:15 a.m.
"Mandatory Arbitration of Employment Disputes — Practical Considerations and Practice Tips"
Labor and Employment Law Section

10:15 a.m. - 11:15 a.m.
"Lawyers, Clients & Moral Responsibility: Can a Good Lawyer Be Good?"
Christian Legal Society and the Alabama State Bar

10:15 a.m. - 11:15 a.m.
"Balancing the Scales: Integrating Electronic Case Management into Trial Preparation"
Sponsored by Digital Imaging Resources, LLC

10:15 a.m. - 11:15 a.m.
ALABAMA LAW INSTITUTE COUNCIL MEETING

10:15 a.m. - 11:45 a.m.
"Basic Issues in Estate Planning for the General Practitioner"
Real Property, Probate and Trust Section

10:15 a.m. - 12:15 p.m.
"Certainly Suing Soldiers Is Not Simple!"
Committee on Volunteer Lawyers Program (VLP)/Access to Legal Services Committee of the Alabama State Bar

11:15 a.m. - 11:30 a.m.
BREAK — VISIT LEGAL EXPO 2002

11:30 a.m. - 12:30 p.m.
"Balancing Your Workload: How to Reduce Stress and Lighten the Load with Proper Utilization of the Consulting Expert"
Economic Forensics, LLC
Orlando, Florida

11:30 a.m. - 12:30 p.m.
"Appellate Update: 2002"
Litigation Section

11:30 a.m. - 12:30 p.m.
"Surfing for Solutions? What Every Attorney (Plaintiff or Defense) Should Know About ADR Today"
Alabama Center for Dispute Resolution, the Alabama State Bar and the Birmingham Bar Association Committee on Alternative Methods of Dispute Resolution

11:30 a.m. - 12:30 p.m.
"Protecting Your Client's Intellectual Property Assets"
Intellectual Property Section

11:30 a.m. - 12:30 p.m.
ATTORNEYS INSURANCE MUTUAL OF ALABAMA, INC. ANNUAL MEETING

12:30 p.m. - 2:00 p.m.
BENCH AND BAR LUNCHEON
Special Presentations
Speaker: Hon. William W. Bedsworth
California Court of Appeals
Santa Ana, California

ENJOY YOUR AFTERNOON AT ORANGE BEACH!

2:00 p.m. - 2:30 p.m.
YOUNG LAWYERS' SECTION BUSINESS MEETING

4:15 p.m. - 5:30 p.m.
VLP RECEPTION
Sponsored by the University of Alabama School of Law; Cumberland School of Law; Maynard, Cooper & Gale, P.C.; Berkowitz, Lefkovits, Isom & Kushner, P.C.; Lange, Simpson, Robinson & Somerville, LLP; and Lightfoot, Franklin & White, LLC

5:00 p.m. - 6:00 p.m.
INTELLECTUAL PROPERTY SECTION RECEPTION
Sponsored by Balch & Bingham, LLP and Intergraph Corporation

5:30 p.m. - 7:00 p.m.

MEMBERSHIP RECEPTION
Featuring a selection of hors d'oeuvres from Perdido Beach Resort's Gulf Coast Jubilee (cash bar)
Beach Deck (Ballroom in case of rain)

FRIDAY, JULY 19, 2002

7:30 a.m. - 8:45 a.m.
FARRAH ORDER OF JURISPRUDENCE ORDER OF THE COIF BREAKFAST

JONES SCHOOL OF LAW ALUMNI BREAKFAST

BIRMINGHAM SCHOOL OF LAW ALUMNI BREAKFAST

PAST PRESIDENTS' BREAKFAST

THE ALABAMA LAWYER BOARD OF EDITORS' BREAKFAST

8:00 a.m. - 4:00 p.m.
REGISTRATION

8:00 a.m. - 2:00 p.m.
LEGAL EXPO 2002

9:00 a.m. - 10:00 a.m.

PLENARY SESSION
"Winning Your Life While Winning Cases — Maintaining Joy and Health in the Practice of Law"
John V. McShane, esq.
Dallas, Texas

10:00 a.m. - 10:15 a.m.
BREAK — VISIT LEGAL EXPO 2002

10:15 a.m. - 11:15 a.m.
"Family Law/Domestic Relations Update: 2002"
Family Law Section

10:15 a.m. - 11:45 a.m.
"Disability Law Update 2002"
Disability Law Section

10:15 a.m. - 12:15 p.m.
Breakout: "Winning Your Life While Winning Cases — Maintaining Joy and Health in the Practice of Law"
John V. McShane, esq.
Dallas, Texas

10:15 a.m. - 12:15 p.m.
Workshop: "Terrorism — Counter Terrorism: Justice vs. Security"
Alabama State Bar and
USAF Counter Proliferation Center
of Air War College
Maxwell AFB, Alabama

10:15 a.m. - 12:15 p.m.
Technology Workshop
"Winning with Hardball Courtroom Technology"
"Hacker Hardball"
Law Office Management/ Solo & Small Firm Committee

11:15 a.m. - 12:30 p.m.
"Update: Regulation of Assisted Living Facilities"
Elder Law Section

11:30 a.m. - 12:30 p.m.
"Issues in Private International Law"
International Law Section

"Partnership vs. Parenthood: Strategies to Successfully Do Both"
Women's Section

12:45 p.m. - 2:00 p.m.
THE MAUD MCCLURE KELLY AWARD LUNCHEON
Women's Section

12:30 p.m. - 5:00 p.m.
KIDS' CHANCE GOLF SCRAMBLE

ENJOY YOUR AFTERNOON AT ORANGE BEACH!

5:00 p.m. - 6:00 p.m.
PRESIDENT'S RECEPTION

5:30 p.m. - 7:30 p.m.
UNIVERSITY OF ALABAMA SCHOOL OF LAW ALUMNI RECEPTION

5:30 p.m. - 7:30 p.m.
CUMBERLAND SCHOOL OF LAW ALUMNI RECEPTION

7:30 p.m.
DINNER ON YOUR OWN

SATURDAY, JULY 20, 2002

8:00 a.m. - 9: 00 a.m.
HEALTHY START CIRCUIT BREAKFAST
Join bar commissioners, judges and colleagues from your circuit for an informal breakfast get-together.

9:15 a.m. - 11:15 a.m.
GRAND CONVOCATION
Speaker: Michael Wermuth
Arlington, Virginia
ABA Standing Committee on Law and National Security

11:15 a.m.
BOARD OF BAR COMMISSIONERS MEETING

KIDS' CHANCE GOLF SCRAMBLE

Join us for an afternoon of golf at Orange Beach made even more rewarding by knowing that you're making a difference in a young person's life. Sign up to play in the 8th Annual Kids' Chance Golf Scramble at Soldiers Creek Golf Preserve.

The Kids' Chance Scholarship Fund provides scholarships for children who have had a parent killed or permanently and totally disabled in an on-the-job injury. Kids' Chance was established in 1992 by the Workers' Compensation Section. Since then we have awarded scholarships to 74 students, many of whom would not be able to attend college without our help. In 1975, Pell grants would cover up to 84 percent of a low-income student's college costs. By last year, that amount had dropped to 39 percent.

If you are unable to play in the tournament, please consider sponsoring a hole. The Workers' Compensation Section appreciates your support.

Frank Cauthen, chair

GOLF SCRAMBLE ENTRY FORM

Name _____

Address _____

City _____ State ____ ZIP Code _____

Office Telephone _____ Home Telephone _____ Handicap _____

Individual Player	$ 85	$ _____
Hole Sponsorship	$250	$ _____
Hole Sponsorship & 1 Player Slot	$300	$ _____
Hole Sponsorship & 4 Player Slots	$500	$ _____
TOTAL ENCLOSED		$ _____

PLEASE MAKE CHECKS PAYABLE TO:
KIDS' CHANCE SCHOLARSHIP FUND or
Please bill my credit card: ❍ VISA ❍ MasterCard ❍ AMEX

Card No. _____

Expiration Date _____

Signature _____

If you do not have a team, you will be paired with another player.
For further information, contact Tracy Daniel at 800-354-6154.

ALABAMA STATE BAR

ANNUAL MEETING 2002

July 17-20, 2002

PERDIDO BEACH RESORT HOTEL RESERVATION REQUEST

To ensure that you receive the guaranteed room rate, you must reserve your room no later than **JUNE 14, 2002**. Requests after this date will be honored based on availability, and regular rack rates will apply.

THE HOTEL RESERVATION FORM MUST ACCOMPANY YOUR ANNUAL MEETING REGISTRATION FORM.

Name _____

Address _____

City _____ State _____ ZIP _____

Firm _____ Daytime Telephone _____

Arrival Day/Date _____ Departure Day/Date _____

Number of Rooms _____ Number of Adults _____ Number of Children _____

Children stay free in parent's room. Rates are for single or double occupancy. Add $10 for each additional adult in room. There is a $10 charge for each rollaway bed or crib. The special rate applies to king and double rooms.

CHECK THE ROOM RATE PREFERRED:

O STANDARD/DOUBLE: $155	O POOL VIEW:* $165	O SMOKING
O STANDARD/KING: $155	O GULF FRONT:* $205	O NON-SMOKING

*Pool View & Gulf Front — limited number, first come, first served

SPECIAL REQUESTS: _____

_____

_____

IN ORDER TO CONFIRM THIS RESERVATION REQUEST, A DEPOSIT EQUAL TO ONE NIGHT'S DEPOSIT RATE IS REQUIRED.
PLEASE ENCLOSE YOUR CHECK OR MONEY ORDER, OR PROVIDE CREDIT CARD INFORMATION BELOW:

Please bill my credit card:

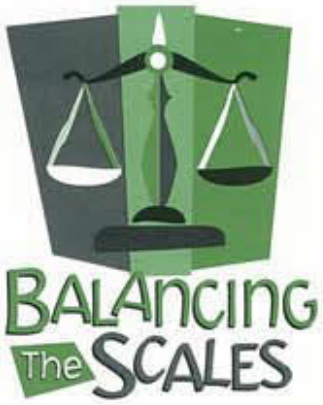
O VISA	O MasterCard	O Discover
O American Express	O Diner's Club	O Carte Blanche

Card No. _____ Expiration Date _____

Cardholder's Signature _____

PLEASE MAKE CHECK PAYABLE TO PERDIDO BEACH RESORT. DO NOT SEND CURRENCY.

CANCELLATION POLICY: Should cancellation of this reservation be necessary, there will be no penalty provided the reservations office is notified no later than 4:00 p.m., three days prior to your arrival day. Should cancellation occur after this time or if the hotel is not notified of cancellation, the deposit will not be refunded. When canceling, please record your cancellation number. In the event you need to check out prior to your confirmed departure date, please notify the resort prior to or at check-in. After check- in, there will be an early departure fee of 50 percent of the daily rate. **CHECK-IN TIME** is 4:00 p.m. **CHECKOUT TIME** is noon.



ALABAMA STATE BAR

ANNUAL MEETING 2002

July 17-20, 2002 • Perdido Beach Resort

ADVANCE REGISTRATION

Advance registration forms **MUST BE RECEIVED NO LATER THAN JUNE 28, 2002.** Cancellations with full refunds may be requested through noon, **Friday, July 5, 2002.**

PLEASE PRINT

Name (as you wish it to appear on name badge) _____

Check categories that apply: ○ Bar Commissioner ○ Past President ○ Local Bar President ○ Justice/Judge

Firm _____ Office Telephone: _____

Address _____

City _____ State _____ ZIP Code _____

Spouse/Guest Name _____

Please indicate any dietary restrictions: ○ Vegetarian ○ Other: _____

Please send information pertaining to services for the disabled. What is the nature of the disability? ○ Auditory ○ Visual ○ Mobility

REGISTRATION FEES *(A limited number of reduced registration fee scholarships are available. Contact the Alabama State Bar for details.)*

Advance Registration	**By June 28**	**After June 28**	**Fees**
___ Alabama State Bar Members	$195.00	$235.00	$_____
___ Full-time Judges	$97.50	$117.50	$_____
___ Attorneys admitted to bar 5 years or less	$97.50	$117.50	$_____
___ Non-Member (does not apply to spouse/guest of registrant)	$295.00	$315.00	$_____
		TOTAL REGISTRATION FEES	$_____

OPTIONAL EVENT TICKETS

Thursday, July 18, 2002	**No. of Tickets**		**Cost**	
___ Christian Legal Society Breakfast	___		N/C	$_____
___ Bench & Bar Luncheon	___	@	$20.00 ea.	$_____
___ Membership Reception/Gulf Coast Jubilee (Cash bar, children 12 or under are free)	___	@	$30.00 ea.	$_____
Friday, July 19, 2002				
___ Farrah Order of Jurisprudence/Order of the Coif Breakfast	___	@	$15.00 ea.	$_____
___ Jones School of Law Breakfast	___	@	$10.00 ea.	$_____
___ Birmingham School of Law Breakfast	___	@	$12.50 ea.	$_____
___ The Maud McClure Kelly Award Luncheon	___	@	$25.00 ea.	$_____
___ President's Farewell Reception (Limit 2 tickets per registrant)	___	@	N/C	$_____
___ Cumberland School of Law Reception	___	@	$25.00 ea.	$_____
___ University of Alabama School of Law Reception	___	@	$25.00 ea.	$_____
Saturday, July 20, 2002				
___ Healthy Start Circuit Breakfast	___	@	$5.00 ea.	$_____
			TOTAL EVENT TICKETS	$_____
			TOTAL FEES TO ACCOMPANY FORM	$_____

APPROPRIATE PAYMENT MUST ACCOMPANY REGISTRATION FORM.

Payment by check or credit card is requested. Checks for registration/tickets should be made payable to the Alabama State Bar.

OR Please bill my credit card: ○ VISA ○ MasterCard Card No. _____

Cardholder's Signature _____ Expiration Date _____

MAIL REGISTRATION FORM & PAYMENT TO: 2002 Annual Meeting, Alabama State Bar, P. O. Box 671, Montgomery, AL 36101


Residency Requirement...
Search of the real property records...
Certificate of Authority...
The Alabama Title Insurance Act of 2001
Limits amount of time in which title policy can be issued...
Title insurers must file premium rates...
Purchaser must acknowledge in writing the receipt of notice that owner's title insurance is available...
Insurance Commissioner may revoke agent's Certificate of Authority...

The Alabama Title Insurance Act of 2001

BY JAMES A. BRADFORD and G. WARREN LAIRD, II

On May 17, 2001, Governor Don Siegelman signed into law Act No. 2001-496, known as the Alabama Title Insurance Act of 2001 (Act), and which has been codified at section 27-25-1 *et seq.*, *Code of Alabama* (Supp. 2001). The provisions of the Act became effective October 1, 2001. Before passage of this legislation, the business of title insurance in Alabama was unregulated. Existing statutes had only defined "title insurance"[1] and addressed concerns over whether non-lawyers engaged in that business infringed upon the practice of law.[2] More than a quarter of a century after the Alabama Supreme Court ruled that the issuance of title commitments and policies did not constitute the unauthorized practice of law,[3] and with the prevalence of title insurance in today's real estate transactions,[4] the enactment of some form of regulation of the business of title insurance in this state was overdue.[5] This article reviews the key provisions of the Act, explains how they will affect the business of issuing title commitments and policies, and then discusses how adoption of the Act should affect certain legal issues arising in the context of title insurance.

Summary Of Key Provisions Of The Act

With respect to the business of issuing title commitments and policies in the state, the Act:

- Establishes a residency requirement in order for persons or legal entities to serve as an agent of a title insurer.
- Requires, as a condition to the issuance of a preliminary report, commitment or title policy, a search of the real property records maintained in the office of the judge of probate in the county in which the real property is situated through such period of time as established by the title insurer, or the obtaining of an abstract or title opinion.
- Requires title insurers to obtain a Certificate of Authority for each agent of the insurer in the state, and pay the fee associated therewith.
- Limits the amount of time in which a title policy can be issued, and provides a method by which an extension of that time may be obtained.
- Establishes a requirement that, in certain transactions, a purchaser must acknowledge in writing the receipt of notice that owner's title insurance is available.
- Requires title insurers to file premium rates, and prohibits charging a premium for title insurance in an amount that is less or greater than the filed rate. If re-issue rates are available through the title insurer, those rates must also be filed and a prior policy must be provided before the re-issue credit can be applied.
- Authorizes the Insurance Commissioner, in cases of violation of the Act, to revoke an agent's Certificate of Authority, revoke the license issued to a title insurer, and/or impose a fine ranging from $500 to $5,000 for each violation.

The Act's Impact On The Title Insurance Industry In Alabama

Scope

The Act applies to all title insurers and title agents who are engaged in the business of title insurance. A title agent is defined as "any person who is authorized in writing by a title insurer to . . . (a) solicit title insurance business; (b) collect premiums; (c) determine insurability in accordance with underwriting rules, standards and guidelines prescribed by the title insurer; and (d) issue title commitments, policies or endorsements of the title insurer." § 27-5-3(7). A title insurer is defined as "[a] company organized under the laws of this state or licensed in this state for the purpose of transacting as insurer, the business of title insurance . . . , and any foreign or alien title insurer licensed to be engaged in this state in the business of title insurance. . . ." § 27-25-3(9). The Act adopts the definition of "the business of title insurance" as set forth in section 27-5-10, *Code of Alabama* (1975), namely, "insurance of owners of property, or others having an interest therein or liens or encumbrances thereon against loss by encumbrance, or defective titles, or invalidity or adverse claim to title." Id. The Act does not regulate the practice of law.

Who Can Be An Agent

Section 4(a) of the Act establishes residency requirements for agents. In pertinent part, this provision prohibits issuance of a policy insuring an interest in property situated in Alabama "[u]nless the person or agent issuing the title insurance policy is domiciled in or is otherwise a bona fide resident of and resides within this state, or is a partnership, association, corporation, or other legal entity properly organized or existing under the laws of this state" (emphasis added). § 27-25-4(a). Therefore, in order to qualify as a title agent, a person must: (1) if an individual, be domiciled in or a resident of Alabama; or (2) be an existing entity, such as a partnership, corporation, or limited liability company; or (3) organize and create an entity, such as a partnership, corporation, or limited liability company, under an Alabama business organization statute.

The legislative intent of the Act was to limit the authority of title insurance agents to resident individual citizens and to business entities organized under the laws of Alabama. The impact of this restriction has been felt most by national agents of title insurers (i.e., agents whose agency contract with a title insurer permits the agent to write in multiple states) and agents from neighboring states. Even though Section 10-2B-1.28, *Code of Alabama* (1975), establishes the framework for foreign corporations to obtain authorization to transact business within the state, a corporation being qualified to conduct business in Alabama is no longer sufficient. Likewise, Section 10-8A-1006 provides a mechanism for the registration of foreign registered limited liability partnerships. Section 10-9B-901 provides a similar mechanism for foreign limited partnerships and Section 10-12-47 established the means by which a foreign limited liability company acquires authorization to conduct business in Alabama. However, a foreign entity exists pursuant to the statute within the state in which it is organized. Only entities organized pursuant to one of the Alabama organizational alternatives are "organized or existing under the laws of this state" and, therefore, qualified to have an application for a certificate of authority to act as an agent of a title insurer in Alabama filed on their behalf. § 27-25-4(a).

The Certificate of Authority

Title insurers must obtain an annual Certificate of Authority from the Insurance Commissioner for each agent of the company within the state. Agents writing for multiple title insurers will possess a Certificate of Authority obtained from the Department of Insurance by each title insurer for whom the agent writes. It is not necessary to obtain a certificate for each person within an agency who is authorized to sign commitments, policies and endorsements. The certificate attaches to the agency, and any member of the agency that is authorized by the title insurer to sign commitments, policies and endorsements is authorized to do so under that certificate. The responsibility for obtaining the agency's certificate rests upon the title insurer. An annual issuance fee of $50 is imposed. It is the responsibility of the title insurer to obtain and pay the issuance fee for each Alabama agent of the insurer.

The responsibility to accomplish compliance with the residency requirements of the Act is placed upon the title insurers.

• Establishes a residency requirement in order for persons or legal entities to serve as an agent of a title insurer.

Therefore, agents from outside the state, as well as agents within the state organized under the laws of another state and desiring to write title insurance in Alabama, must, as a condition of the insurer's making application for a Certificate of Authority on behalf of the agent, satisfy the insurer of its compliance.

The Department of Insurance will only approve a title insurer's applications for Certificates of Authority for title insurance agents if the agents for whom application is made are (a) individuals residing within Alabama, or (b) an Alabama-domiciled entity (i.e., an entity organized pursuant to one of the Alabama organizational alternatives). There are no limitations as to who can own a title insurance agency or any interest therein. A non-resident individual can, therefore, form an Alabama corporation, limited liability company, etc., which can then receive a Certificate of Authority from the Department of Insurance on application made by the title insurer, even though the individual is not a resident of Alabama. In addition, a title insurer may also require the agent to execute an Alabama agency contract rather than allow the agent to act pursuant to an existing contract with the insurer.

Time Within Which To Issue Policies

Section 4(c) of the Act imposes limitations on the length of time in which a title policy can be issued. For transactions in which commitments are not issued, but premiums for title insurance are collected, title policies must be issued within 60 from the effective date of each policy. The "effective date of the policy" is defined as "[t]he date and time the instrument conveying the interest to be insured is recorded." § 27-25-4(c). If a commitment is issued and a premium is paid, the policy must be issued within 60 days after the Schedule B-1 requirements and conditions are satisfied. The time within which policies must be issued may be extended under certain circumstances. For example, if an insurer is asked to insure an interest of a proposed insured whose title is derived by virtue of an instrument recorded prior to the date that the request is made, the "60-day rule" does not apply. Insurers may also authorize a later date within which to issue policies in particular transactions.

This provision of the Act is process sensitive. As a result, agents and insurers with direct operations, who did not have a system for monitoring the satisfaction of Schedule B-1 requirements of commitments and the time in which policies are ultimately issued, have had to implement a system of tracking and issuing policies in a timely manner. Agents and insurers with systems in place have had to review their process for compliance with this provision.

• Requires, as a condition to the issuance of a preliminary report, commitment or title policy, a search of the real property records maintained in the office of the judge of probate in the county in which the real property is situated through such period of time as established by the title insurer, or the obtaining of an abstract or title opinion.

Title Examination Required

As a condition precedent to issuing a "preliminary report, commitment, binder, policy or contract of title insurance," section 5 of the Act requires insurers and agents of insurers issuing the policy to perform, or have conducted on their behalf, a search or examination of title, or to obtain an abstract, or to obtain a title opinion.

The term "search/examination" of title is defined as a "search of the records in the office of the judge of probate in the county where the real property is situated through such period of time as is acceptable to the title insurer." § 27-25-3(10). If this search is performed in connection with the issuance of a preliminary report, commitment or binder, this search/examination is deemed to be performed "solely for the benefit of the title insurance company requested to issue its policy or policies of title insurance." Id. The term "abstract of title" is defined as a "compilation or summary of all instruments of public record of whatever kind or nature which in any manner affect title to a specified parcel of real property." § 27-25-3(1). The term "opinion of title" is defined as a "written expression of the status of title . . . based upon an examination by an attorney at law who is licensed to practice law in this state, of instruments of public record or an abstract thereof affecting title to a specified parcel of real property . . . ." § 27-25-3(3).

Title Insurers Must File Rates

Pursuant to section 6 of the Act, each title insurer doing business in Alabama must file with the Insurance Commission its schedule of premium rates. In connection with the filing of rates, the Act prohibits: (1) A "person, title insurer, agency, or agent" from charging "any premium rate for any policy or contract of title insurance except in accordance" with the filed rates; (2) premium rebates to the insured; (3) the filing of negotiated or bid rates; and (4) the applying of re-issue credit unless the prior title insurance policy is physically produced. § 27- 25-6.

In order to understand the prohibition, it is important to consider the Act's treatment of the term "premium." This term is defined as "the fees charged for

assuming liability and risk under a title insurance policy." § 27-25-3(6). While the Act does not regulate the agreement between the underwriter and the agent as to the division of the premium, the definition of premium includes "any amount retained by or paid to an agent under an agreement between the agent and the title insurance company." Id. The term "premium" does not include: (1) expenses for the performance of services such as abstracting, searching and examining titles, or obtaining a title opinion; (2) fees for document preparation; (3) fees for handling escrows, settlements, or closings; (4) fees incurred to cure defects in title; and (5) fees incident to the issuance of a commitment to insure title or a title insurance policy, such as a binder fee or the cost of reinsurance. Id.

• Requires title insurers to obtain a Certificate of Authority for each agent of the insurer in the state, and pay the fee associated therewith.

The Department of Insurance has exempted transactions from the filed rate requirements in which commitments had been issued prior to October 1, and in which premiums have also been quoted in connection therewith, but which do not close until after October 1. Therefore, premium agreements or quotes made prior to October 1 for transactions closed on October 1, or thereafter, will not be affected by the filed rate provisions of the Act so long as the commitment has been issued prior to October 1. The issuance of the commitment, of course, must be preceded by an examination of the title pursuant to underwriting standards of the insurer. Also exempt are premiums for policies issued in connection with transactions which closed prior to October 1 in which the policy is issued after October 1.

While neither the Act nor the Department of Insurance requires title insurers to offer reissue rates, both require the filing of reissue rates if title insurers intend to make such rates available. As a result, most, if not all, title insurers which write insurance in Alabama or which otherwise have agents in Alabama have filed reissue rates. A reissue rate is a lesser rate which may be charged for a policy insuring a purchaser of real estate from a seller whose title thereto has been previously insured. Likewise, when an application for a loan policy is made and the borrower's interest in the property is insured under an owner's policy on the property, the borrower may be entitled to receive a reissue rate for the loan policy which would be a lesser rate than what the borrower would encounter had the borrower not obtained owner's title insurance. Reissue rates may be applied by a title insurer even if the immediately preceding policy was issued by another company.

In order to receive the benefit of reissue credit, section 6(a) of the Act requires the insured to "physically [produce] the prior title insurance policy, including schedules associated therewith, issued by a title insurer licensed to be engaged in the business of title insurance in this state." § 27-25-6(a). The Department of Insurance has suggested that a photocopy of the prior policy is sufficient for purposes of this requirement.

The Notice Of Availability Of Owner's Coverage

At or prior to closing, title insurance agents must obtain from purchasers of fee simple or possessory interests (including easements and lease transactions) in real property in Alabama in which the interest of a lender is being insured, a signed Notice of Availability of Owner's Title Insurance. § 27-25-7(a). The contents of the notice are set forth in the Act. It is not necessary to obtain this notice in transactions involving (1) foreclosures; (2) court- ordered sales; (3) # tax sales; (4) # transfers in which deed tax is not collected as provided by law (i.e., transfers to cure defects in title); (5) an existing owner who transfers a security interest to a lender (i.e., re-finances); and (6) when a purchaser has elected to obtain owner's title insurance at or prior to closing, or if a seller has elected or is required by contract to provide owner's title insurance to the purchaser. § 27-25-7(c).

In the event that a title agent inadvertently fails to secure the purchaser's signature on the notice, the Act provides that this failure can be cured at any time after the transaction has closed, by sending a Notice of Availability to the purchaser at the purchaser's last-known address, by certified mail-return receipt requested. This omission, however, must be cured prior to receiving actual or constructive notice of a claim or potential claim against the title.

Penalties For Violations

The provisions of the Act do not create any private cause of action, but are enforceable by the Insurance Commissioner. Penalties include the revocation of the Certificate of Authority of Agents and Insurers, as well as fines ranging from $500 to $5,000, or a combination of both. Title insurers are prohibited from paying, directly or indirectly, fines imposed on agents. § 27-25-9.

The Act's Impact On Legal Issues Arising In The Context Of Title Insurance

Act Clarifies That Title Policy Is Contract Of Indemnity

Section 27-25-3(5) defines the synonymous terms "preliminary report, commitment or binder" as:

> Reports furnished in connection with an application or request for title insurance and/or offers to issue a title insurance policy subject to certain requirements and exceptions stated in the report, commitment or binder, and such other matters as are incorporated by reference therein.

This definition is consistent with the provisions of the standard commitment form developed by the American Land Title Association (ALTA), an organization comprised of representa- tives of title insurers, lenders and others involved in real estate transactions, which has developed the title commitment and policy forms most commonly used throughout the country. While a commitment does constitute an "offer" to issue a title policy, upon compliance with all of its conditions and payment of the policy premium, it has the effect of an agreement on the part of the title insurer to issue a policy upon such compliance, and therefore may give rise to a duty to defend and indemnify prior to the actual issuance of the policy.[6] All terms of the title policy, however, are incorporated by reference into the commitment, including the arbitration clause.[7]

Section 27-25-3(8) defines a "title insurance policy" as:

> A contract insuring or indemnifying against loss or damage arising from any or all of the following existing on or before the date of the policy:
>
> (a) Defects in or liens or encumbrances on the insured title;
>
> (b) Unmarketability of the insured title;
>
> (c) Invalidity or unenforceability of liens or encumbrances on the property described in the policy;
>
> (d) Lack of priority of liens or encumbrances.

Again, this definition is consistent with insuring clauses of the standard ALTA policy forms, which provide indemnity, up to policy limits, against actual loss or damage sustained by the insured, which arises out of certain listed events.[8] It is also consistent with the majority view among the courts that title insurance is a contract of indemnity, and does not constitute a guarantee or representation of title.[9] Thus, in return for the payment of a one-time premium, and in accordance with the terms and conditions of the policy, the title insurer agrees to indemnify its insured in the event that actual loss or damage is caused by a specified defect in title.

Act Eliminates "Abstractor's Liability" In Issuance Of Title Commitments And Policies

Section 27-25-5 provides that no title commitment, binder or policy shall be issued unless the title insurer or agent issuing the policy has done any one of the following:

(1) Caused to be conducted a search or examination of the title as defined in this act; or

(2) Obtained an abstract of title; or

(3) Obtained an opinion of title.

While there are instances in which a title insurer or agent would decide to obtain an abstract of title, or even a title opinion from an attorney before issuing a title commitment or policy, it seems clear that compliance with this provision most often will be accomplished through a title search or examination performed by or on behalf of the insurer or agent.

Section 27-25-3(10) defines "title search" or "title examination" as:

> A search of the records in the office of the judge of probate in the county where the real property is situated through such period of time as is acceptable to the title insurer. The search of the public records relating to matters of title, performed in connection with the issuance of a preliminary report, commitment or binder, shall be solely for the benefit of the title insurance company requested to issue its policy or policies of title insurance.

By contrast, an "abstract title" is defined as a "compilation or summary of all instruments of public record of whatever kind or nature which in any manner affect title to a specified parcel of real property." § 27-25-3(1) (emphasis added).

By the very definitions of these terms, and by recognition that a search of the public records in connection with the issuance of a title commitment is "solely for the benefit of the title insurance company requested to issue its policy," § 27-25-3(10), Alabama has legislatively embraced the majority view that neither the title agent nor title insurer should have tort liability to the insured or proposed insured, in connection with its title examination performed in connection with the preparation of a title commitment or the issuance of a title policy.[10]

Before enactment of this legislation, recent Alabama case law had equated the title search performed by a title insurer or agent, prior to the issuance of a title commitment or policy, with the preparation of an abstract of title, and thereby recognized a duty on the part of the title insurer or agent to search for, and disclose to the insured, all matters of records affecting title to the property. See Ex parte Steadman, 2001 W.L. 564304 (Ala. 2001); Soutullo v. Commonwealth Land Title Ins. Co., 646 So. 2d 1352 (Ala. 1994); Parker v. Ward, 614 So. 2d 975 (Ala. 1992).[11] The adoption of the Act should change this rule of law, just as the passage of similar legislation in California resulted in the abrogation of abstractor's liability on the part of title insurers and agents in the context of the issuance of title commitments and policies.

• Limits the amount of time in which a title policy can be issued, and provides a method by which an extension of that time may be obtained.

In California, the leading case imposing abstractor's liability on a title insurer was Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975). In that case, the court concluded that, when the title insurer presented a buyer with both a preliminary title report and title policy, two distinct responsibilities were assumed. In connection with the preparation of the preliminary title report,

- **Establishes a requirement that, in certain transactions, a purchaser must acknowledge in writing the receipt of notice that owner's title insurance is available.**

the court concluded that the insurer served as an abstractor of title and, therefore, must list all matters of public record regarding the subject property. If that duty were breached, then the title insurer could be held liable, in tort, for all damages proximately caused by that breach. In the issuance of the policy, indemnity obligations to the insured were undertaken, which, in the event of loss, would be addressable through a claim for breach of contract. Six years later, the California legislature enacted amendments to the California Insurance Code that defined an "abstract of title" and a "preliminary report" or "commitment."[12]

In Southland Title Corp. v. Superior Court, 231 Cal. App. 3d 530, 282 Cal. Rptr. 425 (1991), the court held that the 1981 amendments, by making a "formal distinction" between an abstract of title and a title commitment and policy, eliminated any cause of action for abstractor's liability when a title search was undertaken in the context of the issuance of a title commitment or policy. The court stated:

> It is also clear that a preliminary report is not an abstract of title (i.e., not a 'written representation, provided pursuant to a contract') and therefore does not carry the 'rights, duties, or responsibilities' associated with the preparation and issuance of such a written document. Thus, under [the amended statute], preliminary reports cannot be construed as, or constitute, a representation, by the title insurance company, of the condition of the title of the property about which the prospective buyer has inquired.
>
> These statutory changes recognize a fundamental truth about title insurance as contrasted with the practice of abstracting and representing the status of title to property. 'Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. [Citations] The policy of title insurance, however, does not constitute a representation that the contingency insured against will not occur. [Citations] Accordingly, when such contingency occurs, no action for negligence or negligent misrepresentation will lie against the insurer based upon the policy of title insurance alone.

282 Cal. Rptr. at 429. Only if the title company was hired to prepare an abstract would the duty of an abstractor be imposed. The court, therefore, concluded that the California legislature had "set the public policy" for the state through these amendments, thereby overriding the holding in Jarchow. Id. at 428. This conclusion was reinforced in Siegel v. Fidelity National Title Ins. Co., 46 Cal. App. 4th 1181, 54 Cal. Rptr. 2d 84 (1996).

With the passage of the Act, Alabama joins California and other jurisdictions in recognizing that a title search performed prior to the issuance of a title commitment is not in the nature of an undertaking to prepare an abstract for the benefit of a proposed insured; rather, it is something done solely for the benefit of the title insurer. This is consistent with the view that a title insurer performs an examination of title to reduce or eliminate its underwriting risks. Careless underwriting should result only in greater claims for indemnity under the policy, not in tort liability predicated on abstractor's negligence or suppression.

Act Recognizes That Purchaser Is Not Third-Party Beneficiary Of Lender's Title Policy

A number of appellate decisions outside Alabama have confronted the issue whether a purchaser of property, who did not obtain a separate owner's policy of title insurance, could make a claim against a title insurer as a third-party beneficiary of a policy issued to the mortgage lender. The clear majority rule is that the purchaser is not a third-party beneficiary of a loan policy of title insurance. Jimerson v. First American Title Ins. Co., 989 P.2d 258 (Colo. App. 1999); Capital Am., Inc. v. Indus. Discount, Inc., 383 So. 2d 936 (Fla. App. 1980); Sherrill v. Louisville Title Ins. Co., 214 S.E.2d 410 (Ga. App. 1975); Trosclair v. Chicago Title Ins. Co., 374 So. 2d 197 (La. App. 1979). While no appellate case in Alabama has specifically addressed the issue, there is language in Ex parte Steadman, supra, that might be used to argue for such third-party beneficiary status.

In recognition of the separate existence of owner's title insurance, through the requirement that a signed Notice of Availability of Owner's Title Insurance be obtained from the purchaser, the Act appears to embrace the prevailing view that a purchaser or owner may not recover under the loan policy. This approach is consistent with the insuring clauses contained in the ALTA owner's and loan policies, and the coordination of benefits provision, in which the lender is indemnified in connection with the validity and priority of its mortgage, while the owner is indemnified to the extent of his equity.

Conclusion

The adoption of the Act brings the title insurance industry in Alabama in line with the overwhelming majority of states. The state should benefit from premium tax revenues no longer being lost to other states because of the new requirement that a premium must be paid for interests insured in Alabama. The parties to real estate transactions should benefit from the filing of rates and the provision of notice regarding owner's coverage. The title industry in Alabama should benefit from the ability to earn a premium for risks insured in Alabama, the uniform requirement of a title examination before issuance of a commitment or policy, and the clarification of its legal position in the performance of this task.

Finally, the public should benefit from better conveyancing practices that ought to result from the implementation of the Act's provisions. ■

Endnotes

1. *Ala. Code* § 25-5-10 (1975) (defining "title insurance" as "insurance of owners of property, or others having an interest therein or liens or encumbrances thereon against loss by encumbrance, or defective titles, or invalidity or adverse claim to title").
2. *Ala. Code* § 27-25-1 (1975) (empowering Attorney General to bring an action to permanently enjoin a title insurer from violating the provisions of Section 34-3-7, *Code of Alabama*).
3. Land Title Co. v. State ex rel. Porter, 292 Ala. 691, 299 So. 2d 289 (1974). There, the court held that a commitment for issuance of a title policy fell short of a "title opinion" which constituted an "analysis of the recorded instruments as they might affect the claims of title down to a present owner," and which opinion could be given only by a licensed attorney. Nine years later, in Coffee County Abstract & Title Co. v. State, 445 So. 2d 852 (Ala. 1983), the court ruled that while statutes relating to the unauthorized practice of law prohibited title companies from preparing deeds or giving an "opinion" as to title, the statutes did not prohibit the issuance of title policies, or even the preparation of affidavits for the title company's use.
4. For example, as of March 1, 1995, all residential mortgages sold to the Federal National Mortgage Association (FNMA) were required to have title insurance written by a company having an acceptable rating from one of the independent rating agencies approved by FNMA. Title insurance is utilized in many of the real estate transactions in Alabama,

• Requires title insurers to file premium rates, and prohibits charging a premium for title insurance in an amount that is less or greater than the filed rate. If re-issue rates are available through the title insurer, those rates must also be filed and a prior policy must be provided before the re-issue credit can be applied.

which is attested to by data from the year 2000, showing that those transactions generated over $43 million in title insurance premiums, ranking Alabama in the top half of the country.

5. Prior to the adoption of the Act, Alabama was one of only nine states in which the business of title insurance was unregulated. This lack of regulation resulted in a number of problems. For example, significant premium tax revenue was lost over the years to the coffers of other states that have regulatory schemes in place. Bids for title insurance involving multiple-state transactions often resulted in extremely low, or even no, premiums charged for the interest to be insured in Alabama, so as to offset the fixed premiums required in those states with title insurance premium regulations. New products on the market placed the consumer at a disadvantage, by allowing title problems to go unnoticed for extended periods of time, thereby complicating the process of any ultimate resolution of the title defect. Moreover, some purchasers may have walked away from the closing table having no idea that owners' title insurance was available to them. The Act addresses each of these problems.

6. While failure to pay the premium will negate the existence of a contract, Mayo v. Title Ins. Co., 423 So. 2d 1357 (Ala. 1982), the duty to defend an insured is said to arise at the time the commitment is issued, assuming compliance with its requirements. See Goettler v. Peters, 639 N.Y.S.2d 843 (App. Div. 1996).

7. McDougle v. Silvernell, 738 So. 2d 806 (Ala. 1999).

8. The insuring clauses in the standard ALTA owner's policy, subject to exclusions, exceptions and other policy conditions, are:

   1. Title to the estate or interest being vested other than as stated in the policy;
   2. Any defect in or lien or encumbrance on the title;
   3. Unmarketability of the title; and
   4. Lack of a right of access to and from the land.

   ALTA Owner's Policy Form (10/17/92). Four additional insuring clauses are provided in the standard loan policy:

   5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
   6. The priority of any lien or encumbrance over the lien of the insured mortgage;
   7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
      (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
      (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
   8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

   ALTA Loan Policy Form (10/17/92).

9. See Youngblood v. Lawyers Title Ins. Corp., 923 F.2d 161 (11th Cir. 1991) (applying Alabama law) (title insurance provides "indemnity for loss as opposed to a guarantee of clear title"); Chicago Title Ins. Co. v. McDaniel, 875 S.W.2d 310 (Tex. 1994) (issuance of a title insurance policy does not constitute "a representation regarding the status of the property's title; rather, it constitutes an agreement to indemnify the insured against losses caused by any defects"); Carstensen v. Chrisland Corp., 442 S.E.2d 660 (Va. 1994) (title insurance "indemnifies the policyholder for those discoverable, but undiscovered, defects in title").

10. See Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 562 A.2d 208, 219 (N.J. 1989) (the "prevailing view remains not to impose liability in tort on a title company").

11. An exception to this rule is Upton v. Mississippi Valley Title Ins. Co., 469 So. 2d 548 (Ala. 1985), which, as one commentator writing in 1987 observed, had placed Alabama among those jurisdictions not imposing abstractor's liability on title agents or insurers. J. Palomar, Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title, 20 Creighton L. Rev. 455, 492 (1987). It was the Upton decision, however, that was later construed by the Supreme Court in Parker v. Ward as recognizing a duty to "search (and disclose) at least those records that, by law, impart constructive notice of matters relating to land." 614 So. 2d at 978. A close reading of the facts and holding in Upton suggests that it was misapprehended in the subsequent opinions that imposed abstractor's duties on a title insurer. The narrow issue in Upton was whether a title policy provision, excluding liability for easements or other matters "not shown by the public records," was applicable when the document establishing an easement over the subject property (a circuit court judgment) had not been recorded in probate court, and could only be found in the circuit clerk's files. The Upton court ruled that the exclusion applied, noting that the title insurer had limited, by contract, the records providing "public" notice to those maintained in the probate court. While the court did speak in terms of the title insurer's "duty" to search being limited by the terms of the contract, the court's discussion was in the context of where the instrument would have to "appear" in order to trigger either policy coverage or the policy exclusion. If it had been of record in the probate court, then the exclusion would clearly have been inapplicable, regardless of whether the title insurer actually searched those records and found it. But, because it was undisputed that the easement was not in the "public records," as defined by the policy, the exclusion was applicable even if no actual search in probate had been made.

12. Calif. Ins. Code §§ 12340.10 & 12340.11. These provisions, as well as § 12340.2, distinguish among a "title policy," "commitment" and "abstract of title." Similar to the Alabama statute, an "abstract of title" is defined as a report listing "all" recorded instruments or documents imparting notice with respect to the chain of title of a parcel of real property

• Authorizes the Insurance Commissioner, in cases of violation of the Act, to revoke an agent's Certificate of Authority, revoke the license issued to a title insurer, and/or impose a fine ranging from $500 to $5,000 for each violation.

James A. Bradford

James A. Bradford is a partner in the Birmingham office of Balch & Bingham LLP. He received his B.A. from The University of the South and J.D. from the University of Alabama School of Law. He is a past chair of the Title Insurance Litigation Committee of the American Bar Association, and is a member of the American College of Mortgage Attorneys.

G. Warren Laird, II

G. Warren Laird, II, is Assistant Vice President and Regional Counsel for Chicago Title Insurance Company. In this capacity, he is responsible for legislative and regulatory affairs, and acts as chief underwriter in both commercial and residential transactions in Alabama, Arkansas, Louisiana, and Mississippi. He received his B.S. from the University of Alabama, and J.D. from Cumberland School of Law at Samford University.

Join the Alabama State Bar Volunteer Lawyers Program

Join the Volunteer Lawyers Program and receive the "Basic Issues of Law" manual on a 3-1/2" disk, free. This manual covers nine "bread-and-butter" areas of the law, including adoption; bankruptcy; collections litigation; divorce, custody and post-divorce; guardian and conservator by court appointment; mortgage foreclosure; powers of attorney; and will drafting. To join, simply complete the form below and mail to: Volunteer Lawyers Program, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. Upon receipt of your enrollment form, the VLP will mail to you the "Basic Issues of Law" disk.

Enrollment Form

Alabama State Bar Volunteer Lawyers Program
P.O. Box 671, Montgomery, Alabama 36101
Phone (334) 269-1515, ext. 301 • Fax (334) 261-6310 • *www.alabar.org*

Name

Address

Telephone/Fax Number

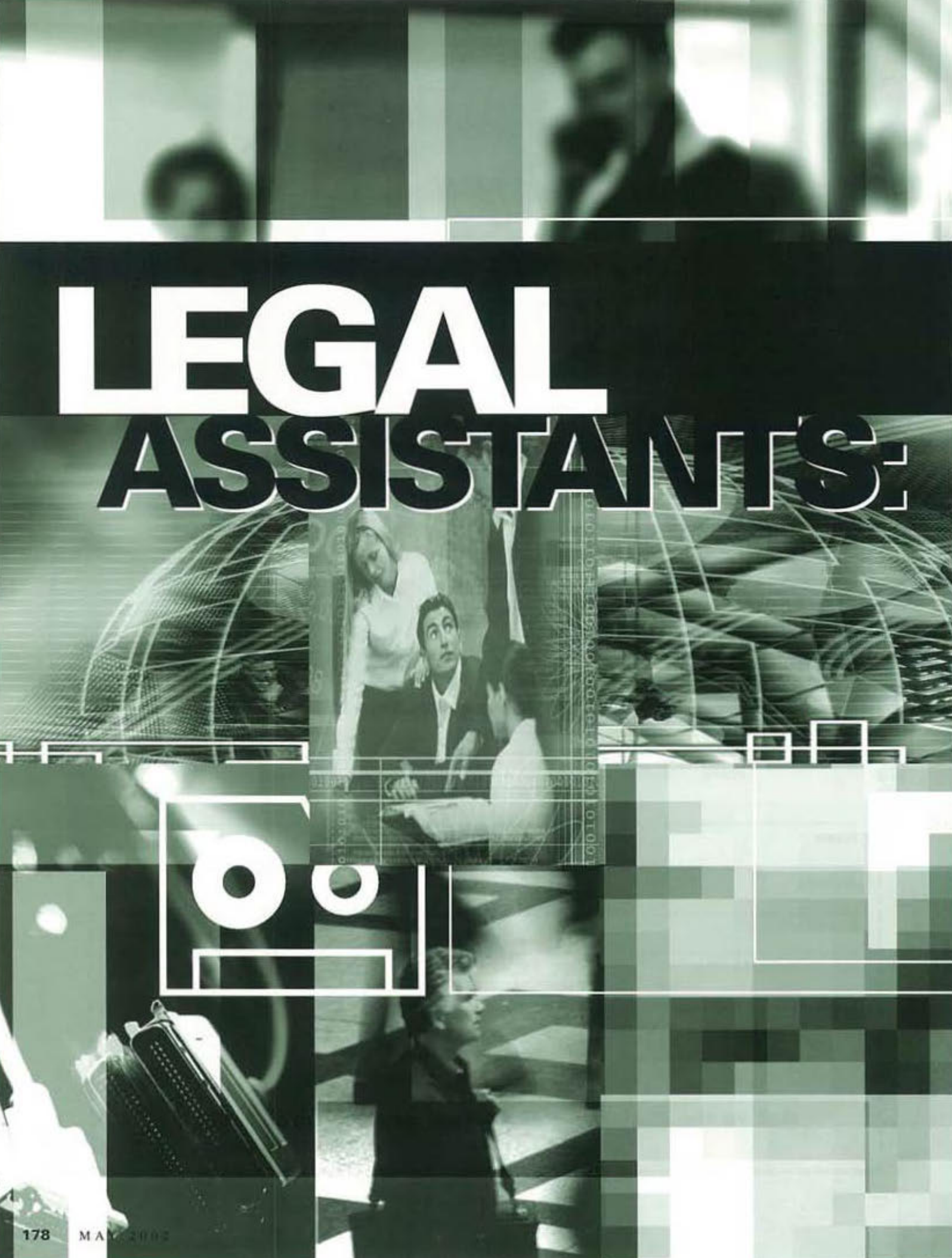
Signature

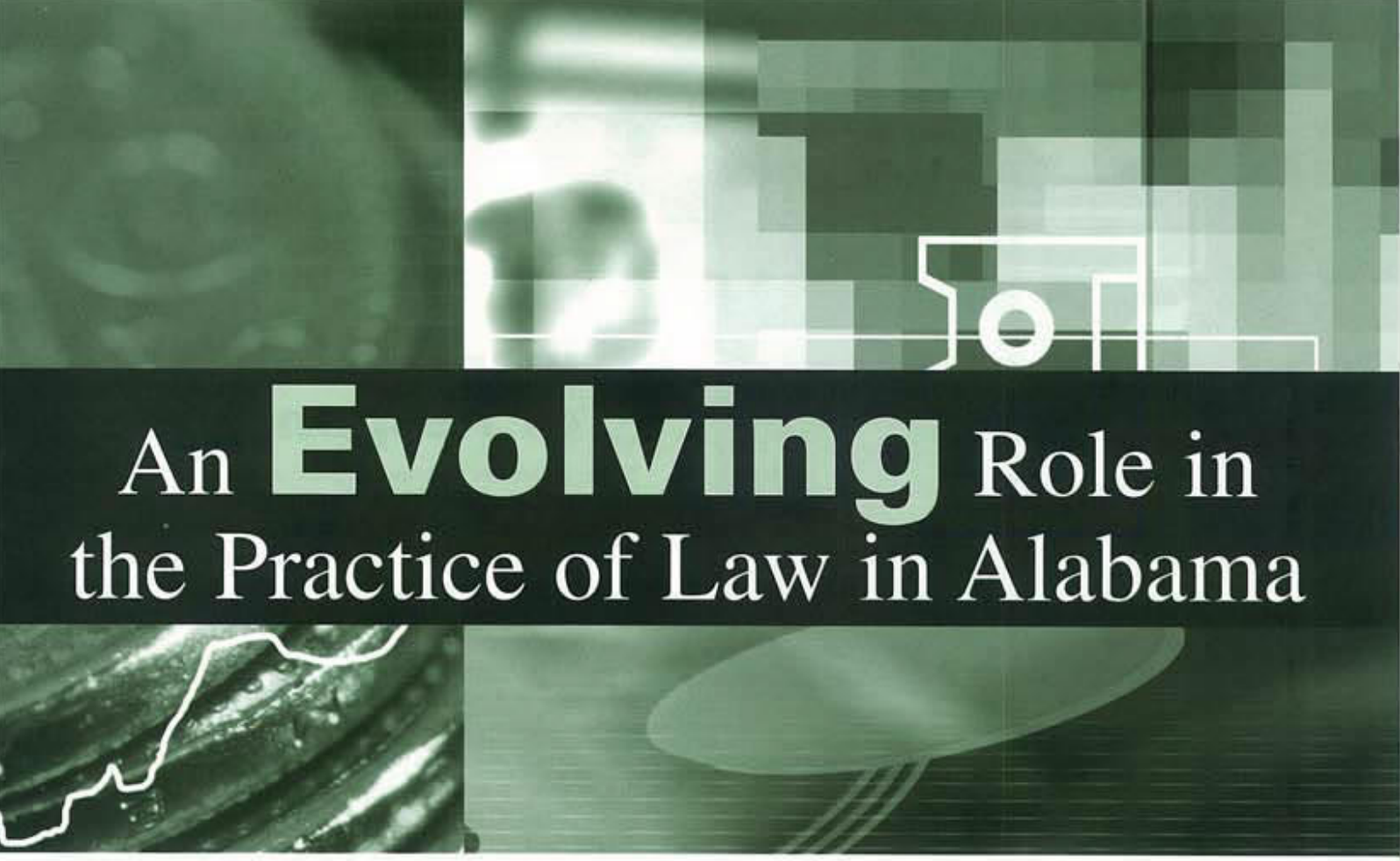
I will accept two case referrals in the following areas:

- ☐ Adoption/Legitimations
- ☐ Bankruptcy
- ☐ Family Law
- ☐ Real Property
- ☐ Probate
- ☐ Where you need me

Get on the list of very important people. Enroll today!!

LEGAL ASSISTANTS:





An Evolving Role in the Practice of Law in Alabama

BY GLORIA McPHERSON

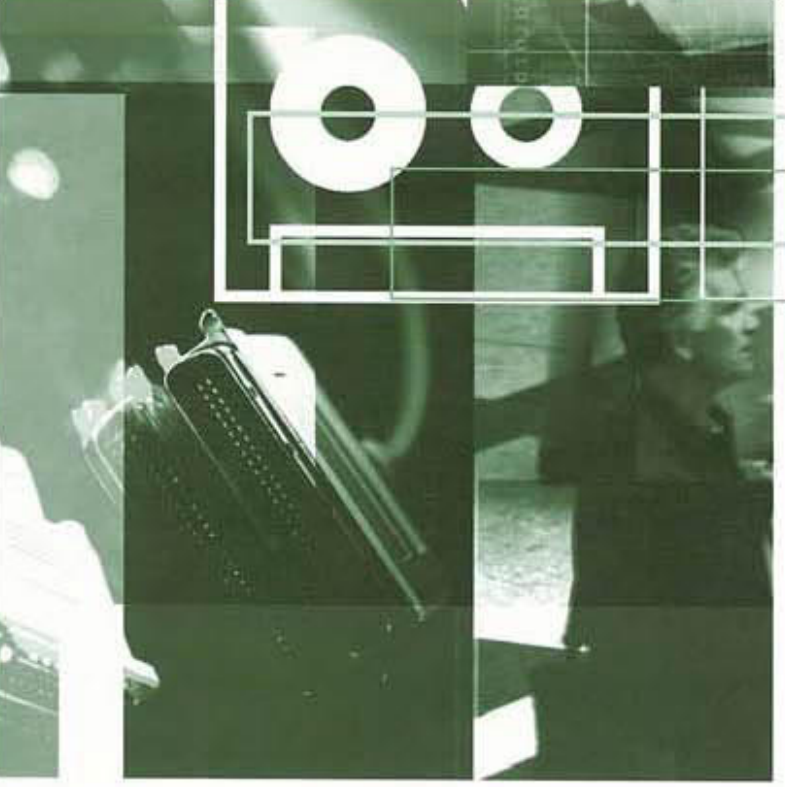
It was about a decade ago that an article appeared in *The Alabama Lawyer* focusing on the growing role of legal assistants in the practice of law in Alabama. This July 1991 article was an in-depth and thorough report on various aspects of the legal assistant career as well as the utilization (or underutilization) of legal assistants by Alabama lawyers. During the past ten years, this new and evolving legal assistant career has experienced unprecedented growth, and it remains one of the fastest growing, most dynamic professions of the new millennium.

As you know, attorneys have been around for centuries, but paralegals are a relatively new phenomenon; thus, the history of the profession is rather brief. Some say the origin of the profession began in the 1960s when lawyers used nonlawyers in federally funded programs to reduce the cost of providing legal services to the poor. Others say that experienced legal secretaries, who had acquired considerable knowledge of substantive and procedural law, were the forerunners of the profession. Although this profession may have been perceived as a novelty in the 1960s and 1970s, the evolving role of today's legal assistants includes being a *source of profit* while using their specialized skills and knowledge as support to attorneys in their law practices. Regardless of the profession's origin and its rapid growth over the past three decades, the legal assistant's role in the practice of law in Alabama is still being defined. Coincidentally, so are the very terms "legal assistant" and "paralegal."

Legal professionals and the general public find it somewhat confusing that the terms "legal assistant" and "paralegal" identify the same profession. However, these terms are used interchangeably in Alabama and in most regions of the nation. Since the terms are used synonymously - similar to the usage of "attorney" and "lawyer" - they are being used interchangeably throughout this article.

As I reviewed the 1991 article, I was struck with the reality that within a short span of time a significant and positive evolution has been taking place in the legal assistant career field in Alabama and throughout the United States. Primarily, my observations in this report are not based on scientifically designed studies, but rather on my previous experience as a legal secretary, legal assistant and paralegal supervisor; my current experience as a licensed attorney and paralegal educator; and my conversations with current and former legal assistants.

In preparing this article, I discovered that several of the highly competent legal assistants identified in the previous article had undergone major career changes. The writer of the 1991 report, Kathleen Rasmussen, is an extraordinary example of the professional growth achieved by some highly motivated legal assistants. At the time she submitted her article to *The Alabama Lawyer*, Rasmussen worked as a legal assistant with the Alabama Department of Economic and Community Affairs (ADECA). Today, she is addressed as Dr. Rasmussen, having



earned her Ph.D. from Auburn University in 1998, and is currently serving as ADECA's Juvenile Justice Program Specialist. Apparently, the flexibility and adaptability of paralegals allow them to grow and change as the profession matures or to change careers within the legal field and beyond.

For instance, several of the legal assistants who provided insightful comments in the 1991 article later earned law degrees and are now Alabama lawyers. This is not surprising when you find that in addition to having had extremely busy and responsible legal assistant positions with some of Alabama's most respected law firms, they also served as outstanding leaders in regional and state paralegal associations.

Although some paralegals have changed or are changing career objectives, most experienced, entry-level and aspiring legal assistants express a strong commitment to their profession. They believe the legal assistant career offers them the unique opportunity to do important, high-level work without years of additional education earning a law degree and the burden of law school loans. Today, there are many Alabama legal assistants with 20 or more years' experience in general and specific practice areas. As a result of the strong commitment of these paralegals to their profession, a vast number of Alabama lawyers and law firms support the evolving role of the paralegal professional in several ways. First and foremost, attorneys are discovering the benefits of hiring legal assistants to become an integral part of the legal team.

Paralegals accept the fact that some in their field choose to become lawyers or have other career objectives. Likewise, they also accept the fact that changes are occurring in the legal field, and that these inevitable changes are affecting the legal assistant professional. Today, and during the last decade, they are encountering important issues impacting on the evolving role of Alabama legal assistants, namely:

- increased job responsibilities;
- technological advances; and
- movements to regulate the profession.

Increased Levels of Responsibility

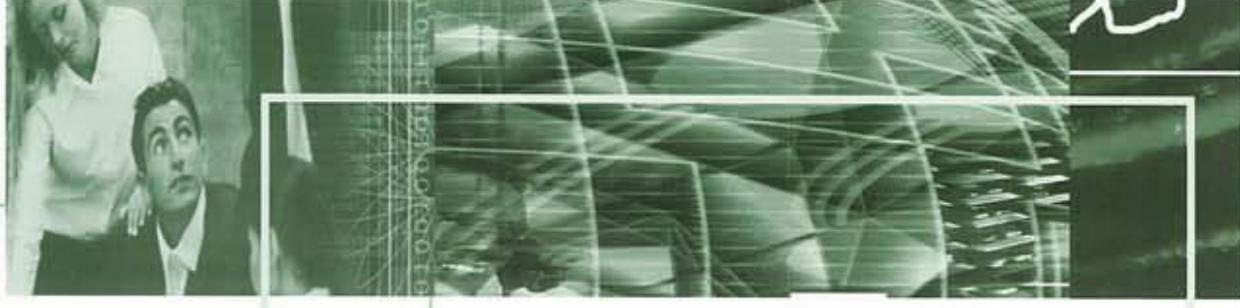
As the profession continues to grow and evolve, the level of responsibility assumed by legal assistants in law offices and professional organizations will most certainly continue to rise. The majority of Alabama legal assistants believe that as the full potential of today's paralegals are realized, attorneys will give them especially challenging and rewarding assignments that go beyond those traditionally given to nonlawyers.

Interestingly, many of these same legal assistants quickly acknowledge that they are confident that by increasing their levels of responsibility, both attorneys and paralegals can enjoy a higher degree of job satisfaction. They also contend that higher degrees of responsibility and extremely cost-effective legal services will be the catalyst for improving the utilization of legal assistants. Finally, they agree this expansion of the legal assistant's role will ultimately lead to higher salaries and benefits and more recognition of the paralegal career.

The 1991 article began with an acknowledgment by the American Bar Association (ABA) of the importance of the legal assistant's role and the ABA's definition for this profession. Recently, the ABA recognized that "while we are witnessing dramatic changes in the world around us and in the pressures faced by lawyers, there continues to be a need for our efforts to educate lawyers and the public on the benefits of utilizing legal assistants in the delivery of legal services." *ABA Standing Committee on Legal Assistants (SCOLA) Update*, winter 2002, volume 4, number 2. Thus, to a certain extent, the purpose of this article is simply to increase the awareness of Alabama lawyers on what paralegals can do, especially using high technology, and to provide a brief update on the issue of regulating legal assistants.

Currently, more than 26 states define the term "legal assistant" or "paralegal" by statute, state supreme court rulings or guidelines promulgated by state bars. In Alabama, several provisions in the Alabama Rules of Professional Conduct provide guidance to members of the bar regarding their ethical responsibilities for "nonlawyer" assistants.

Since this profession began emerging in the 1960s and 1970s, it remains a challenging task to precisely describe the duties of legal assistants. It can be argued that this is, in part, because the legal assistant profession is a relatively new one and partly because the profession is unregulated. Because the profession is constantly defining itself, some attorneys seem to have unclear or unrealistic expectations of what to expect of a legal assistant. Many legal assistants are encouraged, however, by indications that Alabama lawyers, law firms, other paralegal employers and the public are gradually discovering the best



means and the benefits for using and increasing the responsibilities of legal assistants. Despite some growing pains, especially during the 1980s and 1990s, the legal assistant profession continues to grow and mature; it is evolving.

In 1997, in order to acknowledge the evolving role of legal assistants, the ABA revised its definition for this profession as follows:

> A legal assistant or paralegal is a person qualified by education, training or work experience, who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.

In addition to the ABA definition, the two leading national paralegal associations, the National Association of Legal Assistants and the National Federation of Paralegal Associations, and an organization that promotes high standards for legal assistant education, the American Association for Paralegal Education, also have developed specific definitions for the terms paralegal and legal assistant. Notably, however, *all four* of these definitions include the important element that members of the profession perform "substantive" legal work. Substantive legal work indicates that legal assistants, although nonlawyers, are expected to perform work that was traditionally undertaken only by attorneys.

In a landmark U.S. Supreme Court case dealing with the awarding of fees for the work performed by legal assistants, Justice William Brennan noted that "paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate." *Missouri v. Jenkins,* 491 U.S. 274, 288 n.10 (1989). Justice Brennan went on to say that the work of legal assistants might include:

> factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories and document production; compilation of statistical and financial data; checking legal citations and drafting correspondence. Much of this work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal. *Id.*

Since this case, it is now widely accepted by Alabama attorneys that they may bill clients for worked performed by paralegals working under attorney supervision. Of course, the amount charged must be fair, must be paralegal - not clerical - work, and must be documented.

In 1994, for the first time, a court distinguished clerical duties from legal assistant duties chargeable to a client. The Oklahoma Supreme Court held that legal research, both conventional and computer-assisted, was one of the "substantive" duties that a legal assistant could bill for performing. *Taylor v. Chubb,* 874 P.2d 806 (Okla. 1994). The Oklahoma court held that legal assistants could also perform the following responsibilities:

> interview clients; draft pleadings and other documents; research public records; prepare discovery requests and responses; schedule depositions and prepare notices and subpoenas; summarize depositions and other discovery responses; coordinate and manage document production; locate and interview witnesses; organize pleadings, trial exhibits, and other documents; prepare witness and exhibit lists; prepare trial notebooks; prepare for the attendance of witnesses at trial; and assist lawyers at trials. *Id.*

Following these court decisions, there has been an unprecedented demand by attorneys for competent legal assistants as well as an increased expectation by their clients for quality legal services at affordable prices. In Alabama law practices, all signs point to more increased levels of responsibility being taken on by qualified, competent legal assistants in order to provide clients with more affordable *and more available* legal services. It is predicted that the levels of responsibility that must be assumed by paralegals to effectively and efficiently provide legal services at a lower cost will continue to nurture the evolution of the legal assistant profession.

Paralegals held about 188,000 jobs in 2000, and the Bureau of Labor Statistics predicts that the profession will continue to grow at a faster-than-the-average rate at least through 2010. Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2002-03 edition. This growth in employment "stems from law firms and other employers with legal staffs increasingly hiring paralegals to lower the cost and availability and efficiency of legal services." *Id.* In a word, the increased hiring of paralegals benefits lawyers, law firms and their clients.

As these statistics demonstrate, Alabama lawyers, law firms and other paralegal employers are discovering the benefits of hiring qualified legal assistants to get certain tasks completed proficiently and competently and bill their client less. Such tasks, which do not constitute the unauthorized practice of law, can be accomplished while the lawyer's time can be used to complete matters that can be handled only by a licensed attorney. Because unauthorized practice of law statutes and rules have been designed to protect the public, the Alabama Supreme Court has strictly enforced these statutes by holding that it is clear that their purpose is to ensure that "laymen would not serve others in a representative capacity in areas requiring the skill and judgment of a licensed attorney." *State ex rel. Porter v. Alabama Assn. of Credit Executives,* 338 So. 2d 812 (Ala. 1976). Accordingly, Alabama paralegals are permitted to use their knowledge of substantive and procedural law to assist

attorneys, but they are prohibited from giving legal opinions or advice, establishing attorney-client relationships, setting legal fees, signing legal documents, or representing a client before a court (unless authorized to do so by the court). Alabama courts, the Alabama State Bar and many other law-related organizations recognize there is a need for low-cost legal services; nevertheless, practicing law without a license cannot be condoned.

Although Alabama paralegals are subject to the same laws concerning the unauthorized practice of law as are other non-lawyers, it is often said that the type of work that can be performed by a legal assistant is limited only by the individual's ability and the magic words "unauthorized practice of law." The evolving role of legal assistants in Alabama, working under the supervision of an attorney, clearly indicates that attorneys are delegating increased levels of responsibility to experienced, competent legal assistants to ensure the delivery of low-cost (and sometimes, "no-cost") legal services to those in need. In other words, it is simply a matter of serving and protecting the public and economics.

Even in the event of an economic downturn, however, Alabama lawyers can protect their firm's investment by combining two valuable resources: technology and legal assistant expertise.

High-Tech Paralegals

The traditional tasks performed by legal assistants when working under the supervision of an attorney have not changed significantly over the last ten years. However, the use of technology to automate the practice of law has remarkably changed law office procedures and the legal assistant's workplace.

With the rapid growth of technology, legal assistants who are proficient with the latest technology are able to expand their functions and levels of responsibility to assist attorneys and clients. For example, the lower cost of computer-assisted legal research, the Internet and formal paralegal education in legal research, legal writing and computer applications in law courses provide today's paralegals with the necessary resources, education and skills to efficiently and inexpensively assist lawyers with legal and factual research.

In the introduction to her recently published book on paralegal careers, Chere Estrin, a legal staffing expert, says that while many legal assistant duties "remain the same over the years, the methodology for delivering legal services has changed dramatically." She adds:

> Technology has changed the paralegal field by creating new positions, standards and expectations. The new business world demands fast delivery, 24 / 7 / 365 service, expanded research capabilities, and low-cost legal services. Paralegals without technology skills are clearly left behind.

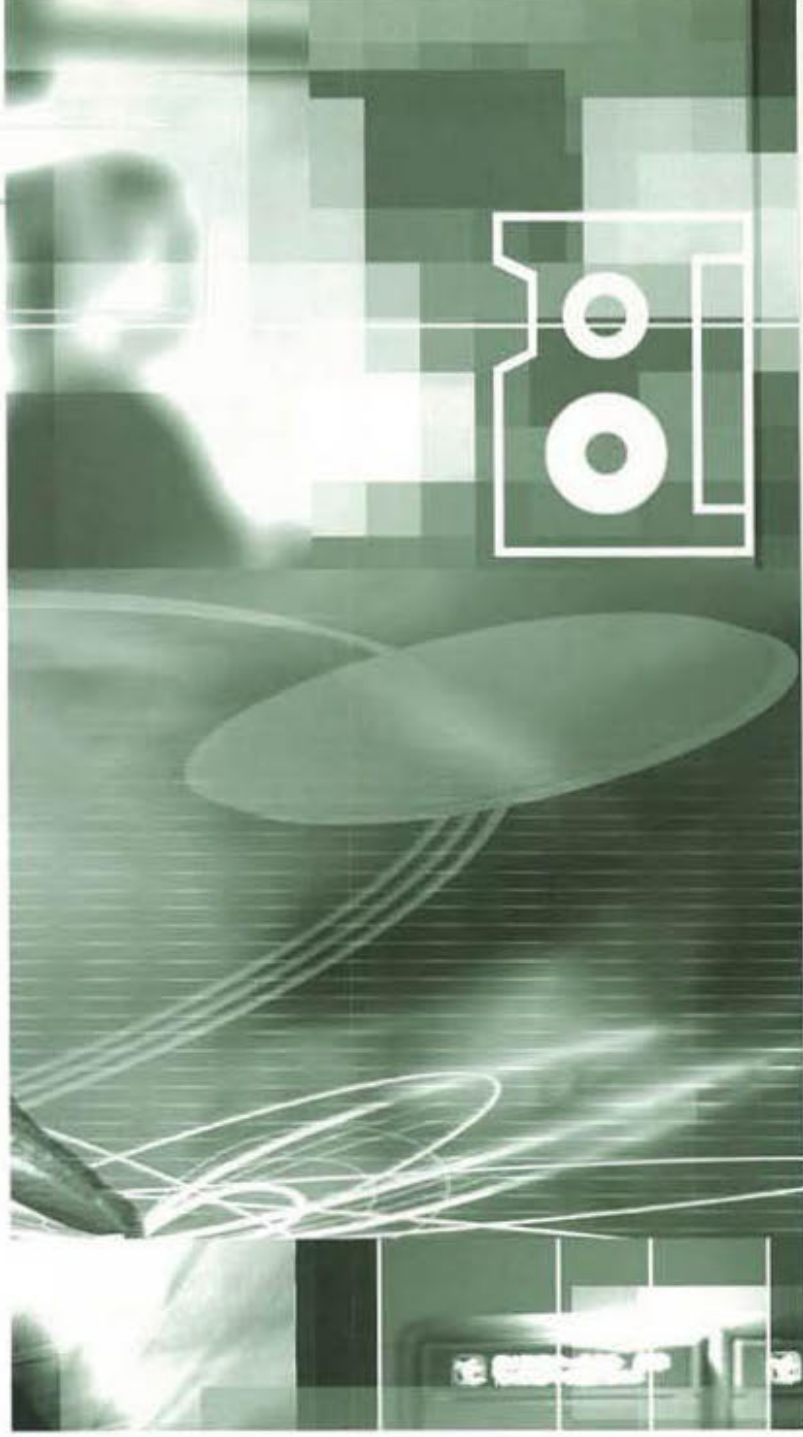
Paralegal Career Guide, Chere B. Estrin, 3rd ed., 2002, Pearson Education, Inc. Clearly, today's legal assistant is expected to know and keep up with technology trends and many Alabama attorneys and law firms offer training opportunities for computer and database courses on the latest technological advances. Otherwise, attorneys must admit they also will be left behind if they do not have legal assistants with the required knowledge and skills to successfully manage the accessibility of the vast amount of information that can be obtained.

During the last decade, more and more legal assistants find they are spending most of their time on the computer performing their jobs. Often, legal assistants find themselves surrounded by a personal computer, printer, fax machine, e-mail, cell phone, beeper, imaging and scanning equipment, voice mail, laptop, etc. As Alabama attorneys have been forced to change the way law will be practiced in the 21st century, paralegals also have been forced to change.

In looking back over the past decade, there is no doubt that the development of technology has particularly challenged and enhanced the role of litigation paralegals. Just two years ago, Edilia Cerda-Henderson, a legal recruiter, observed:

> All these wonderful changes to the modern practice of law have made it possible for attorneys to handle even greater amounts of data in litigation. This, in turn, has increased their need for experienced paralegals who have the ability to jump into a case at any stage, knowing what needs to be done and how to do it.

Tomorrow's Paralegal: The Enhanced Role of Paralegals in Litigation, Edilia Cerda-Henderson, *Texas Lawyer*, Vol 16, No. 5, 2000. While paralegals acknowledge that technological



advances can place additional demands on them, experienced legal assistants also recognize that in many ways technology has also made their jobs easier. Overall, legal assistants agree that their evolving role in the use of technology in the practice of law allows them to gain valuable new skills while making an important contribution in providing cost-effective legal services. As previously noted, it is apparent that the flexibility and adaptability of paralegals allows them to grow and change as their profession evolves.

In addition to the growth and change required by the demands of technological advances and for increased levels of responsibility, today's paralegals are also encountering issues surrounding the regulation of their profession.

Legal Assistant Regulation

During the past decade, the issue of legal assistant regulation has been the most controversial topic encountered by legal assistants, paralegal educators and leaders, state bar associations, and the courts. Although there have been movements underway in many states for the *mandatory* registration, certification, or licensing of legal assistants, there are currently no minimum education requirements, nor are there any mandatory rules for certification or licensing. Therefore, except in California, anyone can call himself or herself a "paralegal" or a "legal assistant" whether or not they are qualified by education, training, or work experience.

California recently enacted legislation that defines the title "paralegal," sets standards for persons to use "paralegal" and comparable job titles, and defines the functions that paralegals can perform. The new law makes it unlawful for persons to identify themselves as paralegals unless they work under the supervision of an attorney. In addition, the law provides that a paralegal is "a person who either contracts with or is employed by an attorney, law firm, corporation, governmental agency or other entity, and who performs substantial legal work under the direction of an active member of the State Bar of California . . .." (The law can be found at California Business & Professional Code, §§ 6450 through 6456.)

However, one of the first and most ambitious plans for the regulation of legal assistants took place in New Jersey. In 1998, a vast number of attorneys, paralegals and legal assistant educators were confident that New Jersey was on the brink of enacting a regulatory plan that called for paralegals to be regulated and licensed by the supreme court, as are New Jersey attorneys. Following a five-year study, a committee submitted their report to the court, but nine months later the New Jersey Supreme Court rejected the committee's recommendations. In May 1999, in an administrative determination, the court found that the wide-reaching proposal was not feasible. The court concluded that "direct oversight of paralegals is best accomplished through attorney supervision, rather than through a Court directed licensing system."

Currently, there are other plans for regulating legal assistants being proposed in several other states. Robert LeClair, the current president of the American Association for Paralegal Education and a member of the Hawaii Bar since 1972, knows firsthand that such legal assistant certification proposals can raise strong feelings and generate a great deal of controversy. Recently a mandatory paralegal certification proposal was rejected by the Hawaii State Bar and later by the Hawaii Supreme Court. Ostensibly, the Hawaii State Bar successfully argued that there was a lack of evidence that mandatory paralegal certification would improve legal assistants or legal services.

Regardless of the view that Alabama judges and attorneys may hold on the need for regulation, paralegals generally agree that unduly restrictive regulatory measures may have a negative impact on the healthy growth the profession has experienced over the past decade. Apparently, they believe the evolving role and function of paralegals in the delivery of legal services is "best accomplished through attorney supervision" within the ethical guidelines set forth by the Alabama Supreme Court.

Conclusion

In 1995, the Governor proclaimed the first Wednesday in May as Legal Assistant/Paralegal Day in Alabama. The proclamation declared, in part, that "legal assistants comprise a group of men and women, who with the highest professional responsibility and ethics, strive to enhance the public service provided by Alabama's lawyers, judges, administrative agencies and a multitude of other community minded organizations and individuals."

Alabama legal assistants acknowledge that they are deeply gratified by the support expressed in this proclamation and for the establishment of a Legal Assistant/Paralegal Day that coincides with the celebration of Law Week. Moreover, they are grateful for the recognition of their achievements and contributions to the practice of law in Alabama.

In conclusion, over the next decade, it is anticipated there will be dramatic changes in the evolving role of Alabama paralegals. Increasing the levels of responsibility of legal assistants, coupled with leveraging the high-tech paralegals, is generally considered to be best strategy for Alabama lawyers to provide cost-conscious clients with legal services, while still keeping the bottom line in the black. ■

Gloria McPherson

Gloria McPherson is an assistant professor at Auburn University Montgomery and the director of the ABA-approved Legal Assistant Education Program. She received her J.D., *cum laude*, from the Thomas Goode Jones School of Law in 1994, and graduated with honor from Auburn University Montgomery with a B.S. in Justice & Public Safety. She is a member of the American Bar Association, Alabama State Bar and Montgomery County Bar Association.

The Alabama Lawyers' Assistance Program at Work:
The Why and How of ALAP

The lawyer gets the call just before noon, as he's arranging lunch with his wife at a nice restaurant downtown. His secretary says: "It's Joe Anybody and he says it's an emergency". The lawyer is a volunteer for the Alabama Lawyer Assistance Program (ALAP) and a member of the Lawyers Helping Lawyers Committee (LHL). He is also a member of the recovery community and has himself been that "emergency" at one time in his life. He understands the seriousness and knows that minutes are crucial and urgency vital in the life-threatening battle with addiction, depression and other mental illnesses. When a fellow lawyer finally reaches out, action must be swift – a life and success at recovery may depend upon it.

The volunteer's wife understands when she hears the familiar words, "I have to cancel honey, I'll be home when I can. I love you." The volunteer arrives at the law office of your friend, your colleague or maybe even your office, within an hour of the call. He is taken to a small kitchen in the rear of the office and introduced to a young associate. The associate is unshaven, disheveled and belligerent as the volunteer reaches out his hand. Clearly the associate is in acute distress.

More than an hour passes as the volunteer and the associate exchange experiences and develop rapport. The volunteer empathetically conveys his concerns for the health of his new friend. As the end of the second hour draws near, the associate is persuaded to go with the volunteer for evaluation at a healthcare facility that works closely with ALAP. The associate informs the volunteer that he has no medical insurance and no money for any sort of medical treatment. The volunteer says a silent prayer that the facility will at least see the associate and stabilize him until other arrangements can be made.

The emergency room is packed and the ER Psychiatric Department is several patients behind when the lawyers arrive at 3 p.m. The associate's conduct and demeanor grow steadily more hostile and uncooperative as the volunteer uses every argument he and another volunteer, present by telephone, can generate to keep the distressed fellow lawyer at the facility. At 12:45 a.m., the volunteer leaves the facility after the associate is finally admitted for minimal treatment of an acute psychotic episode, exacerbated by the high level of work and financial stress that has accumulated on the associate. The volunteer quietly crawls into bed at 2 a.m., as his wife asks how it went. The volunteer says, "It went well. He is safe for tonight."

Three days later, the associate is released with a prescription and some follow-up appointments. With no insurance and no money, even the most generous facilities must minimize their involvement.

Three nights later, the volunteer is asleep when his telephone rings at 11:30 p.m. The voice is that of a longtime lawyer friend from south Alabama, "We just found John. He tried to kill himself today. He's in ICU. What do we do?"

"I'll be there by six, " says the volunteer. He kisses his sleeping wife at 3:30 a.m. and says, "I'll be home when I can. I love you."

Drug addiction, alcoholism and mental illness kill. The battle is oftentimes waged with hand-to-hand combat between the disease, the victim and a volunteer who has found the way out. The volunteers on the LHL committee are grateful for the opportunity to help their fellow lawyers regain their physical, mental and emotional health and re-establish their careers. The frustration is that all too often by the time a lawyer in need is identified and ready to accept help, all financial means for obtaining it have been exhausted. As committee members and volunteers, we need your help to ensure that these lawyers, our colleagues and often our friends, are not denied appropriate treatment because they cannot afford to pay for it. This is not a giveaway, but, rather, a humane way to help our colleagues help themselves at a desperate time in their lives. As one committee member eloquently put it, "They are *us* – and if we don't help, who will?" ■

- Notice is given to **Harry Searing Pond**, whose whereabouts are unknown, that a default order was filed in these formal charges on September 24, 2001 and a hearing to determine appropriate discipline is to be held at the Alabama State Bar on June 12, 2002 at 1 p.m. Pond is hereby advised that he is entitled to be represented at such hearing by counsel, to cross-examine witnesses and to present evidence concerning appropriate discipline in his own behalf. [ASB nos. 96-223, 96-319 and 97-164]

Reinstatement

- The Supreme Court of Alabama entered an order reinstating Birmingham attorney **John Thomas Long** to the practice of law in the State of Alabama, effective January 10, 2002. This order was based upon the decision of Panel I of the Disciplinary Board.

Disbarments

- The Supreme Court of Alabama adopted an order of the Disciplinary Commission, dated January 28, 2002, disbarring Birmingham attorney **John Stewart Davidson** from the practice of law in the State of Alabama to be effective retroactive to November 16, 2001. On October 11, 2000, Davidson pled guilty to three criminal charges in the U.S. District Court for the Northern District of Alabama. The charges consisted of bankruptcy fraud, concealment of assets from a trustee in bankruptcy and perjury in bankruptcy court. All these crimes constituted felony offenses under the United States Code. Davidson was sentenced to serve one year in a federal correctional facility. On November 16, 2000, Davidson was interimly suspended pursuant to Rule 20 of the Alabama Rules of Disciplinary Procedure. Davidson was released from prison on August 12, 2001. The Disciplinary Board, Panel V, entered an order on October 23, 2001, determining that Davidson's crimes constituted "serious crimes" under rules 8(c)(2) and 22(a)(2) of the Alabama Rules of Disciplinary Procedure. Prior discipline was considered.

- **Lamar Farnell Ham, III** was disbarred from the practice of law in the State of Alabama effective February 14, 2002 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

  In ASB No. 00-252(A), formal charges were filed against Ham alleging that he was the closing attorney in a real estate transaction and that he did not satisfy the outstanding mortgage as disclosed on the HUD-1 settlement statement. Ham satisfied the mortgage five weeks after the loan closing. Ham failed to respond to numerous requests for information regarding the matter during the course of the bar's investigation. Ham failed to answer the formal charges. On October 23, 2001, a default judgment was entered into against him finding him guilty of violating rules 1.3, 1.4(a), 1.15(a), 1.15(b), and 8.4(a), (c), (d) and (g), A.R.P.C.

  In ASB No. 01-83(A), formal charges were filed against Ham alleging that he had served as closing attorney in a transaction wherein his clients refinanced their home. Ham satisfied the clients' first mortgage, but failed to satisfy the home equity mortgage as represented on the HUD-1 settlement statement. Ham then abandoned the practice of law and failed or refused to render an accounting for the receipt and disbursement of the loan proceeds as represented in the HUD-1 settlement statement. Ham failed to answer the formal charges. On October 23, 2001, a default judgment was entered against him finding him guilty of violating rules 1.3, 1.4(a), 1.15(a), 1.15(b), and 8.4(a, (c), (d) and (g), A.R.P.C.

In ASB No. 01-84(A), formal charges were filed against Ham alleging that he was the closing attorney in a real estate transaction and, based on an agreement between the seller and the purchaser, Ham withheld $500 in escrow to cover the costs of repairs to the property. Upon completion of the repairs, the contractor presented Ham with a bill for $125. Ham paid the repair bill with a trust account check that was subsequently returned for insufficient funds. Ham failed to remit the $375 balance to the seller. Ham failed to answer the formal charges. On October 23, 2001, a default judgment was entered against him finding him guilty of violating rules 1.3, 1.4(a), 1.15(b) and 8.4(a), (c), (d) and (g), A.R.P.C.

In ASB No. 01-85(A), formal charges were filed against Ham alleging that Ham was the closing attorney in a real estate transaction and failed to satisfy an existing mortgage in the amount of $174,558.30 as represented in the HUD-1 settlement statement. Ham then abandoned the practice of law and closed his office. Ham failed to answer the formal charges. On October 23, 2001, a default judgment was entered against him finding him guilty of violating rules 1.3, 1.4(a), 1.15(a), 1.15(b) and 8.4(a), (c), (d) and (g), A.R.P.C. [ASB nos. 00-252(A), 01-83(A), 01-84(A) and 01-85(A)]

- Madison attorney **William Richmond Stephens** was disbarred from the practice of law in the State of Alabama effective September 14, 2001 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

In ASB No. 94-265(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 8.4(b), 8.4(c), 8.4(g), 1.15(b), 1.15(c), 1.16(d), and 8.1(b), A.R.P.C., based upon allegations that Stephens was retained to represent the complainant in a divorce action and that the complainant gave Stephens $5,000 to hold in trust for her. Stephens asked the complainant if he could use the money and promised to pay it back at the end of the month. He paid back the complainant with a check that was returned because of non-sufficient funds and since that time, Stephens has repaid only $1,600 to the complainant. Stephens did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter.

In ASB No. 95-30(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.3, 1.4(a), 1.15(b), 1.15(c), 1.16(d), 8.1(b), and 8.4(g), A.R.P.C., based upon allegations that Stephens was retained to represent the complainant in a transfer of guardianship matter and that he was paid $300 for his services. He did not perform any work on behalf of the complainant and failed to communicate with the complainant and failed to refund the unearned portion of the retainer. Stephens did not respond to requests for information or otherwise cooperate with the bar's investigation of the matter.

In ASB No. 95-97(A), the Disciplinary Board entered a default judgment, finding that Stephens had violated rules 1.3, 1.4(a) and 8.1(b), A.R.P.C., based upon allegations that Stephens was retained to handle three separate matters. During the course of the representation, Stephens did not communicate with the client regarding the representation and he performed no work in the matters, refused to release the files and did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter.

In ASB 95-121(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 8.4(b), 8.4(c), 8.4(g), 1.15(b), and 8.1(b), A.R.P.C., based upon allegations that Stephens borrowed $5,000 from a client and that he repaid him with a check for $5,000 that was returned "account closed." Stephens also failed to communicate with the client and he did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter.

In ASB No. 95-317(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 8.4(g), 3.1, 8.1(b) and 5.5, A.R.P.C., based upon allegations that Stephens was retained to represent a client in an action to obtain child support and that during the course of representation he engaged in sexual relations with the client. He engaged in improper conduct in his attempts to collect his attorney's fees and he continued to represent the client during a period of time in which he did not have an occupational license to practice law. Stephens did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter.

In ASB No. 95-352(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.1, 1.3, 1.4(a), 1.15(b), 8.1(b), 8.4(g), and 5.5(a), A.R.P.C., based upon allegations that Stephens was retained to represent clients in a real estate matter and that Stephens took possession of the file, which contained original documents, to copy and return. He did no work in the matter, failed to communicate with the clients regarding the matter, did not copy the file or return it, and continued to represent the clients during a period of time in which he did not have an occupational license to practice law. Stephens did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter.

In ASB No. 96-13(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.15(b), 8.4(b), 8.4(c) and 8.4(g), A.R.P.C., based upon allegations that Stephens was retained to represent a client in a worker's compensation case. He settled the case and converted $5,000 of the settlement to his own use without the client's consent. The board also ordered restitution in the amount of $5,000.

In ASB No. 96-62(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.1, 1.3, 1.4(a) and 8.4(g), A.R.P.C., based upon allegations that Stephens was retained to represent the complainant in a boundary line dispute and that Stephens did no work in the matter. He failed to communicate with the client regarding the matter.

In ASB No. 96-209(A), the

Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.1, 1.3, 1.16(d), 8.4(g), and 5.5(a), A.R.P.C., based on allegations that Stephens was retained to represent the complainant in a divorce action. Stephens was paid $500 but did not disclose that he had been suspended from the practice of law prior to taking the $500 retainer. Stephens did not advise the court of his suspension and did not refund the $500.

In ASB No. 96-315(A), the Disciplinary Board entered a default judgment finding that Stephens had violated rules 1.1, 1.3, 1.16(d), 8.4(g), and 5.5(a), A.R.P.C., based upon allegations that Stephens was retained to represent the complainant in a divorce action. Stephens was paid $416 and he filed the divorce action, but took no further action in the matter. He did not notify the complainant or the court that he had been suspended from the practice of law and he did not communicate with the complainant. He failed to refund the unearned portion of the retainer. [ASB nos. 94-265(A), 95-30(A), 95-97(A), 95-121(A), 95-317(A), 95-352(A), 96-13(A), 96-62(A), 96-209(A), and 96-315(A)]

- Alexander City attorney **John Richard Waters, Jr.** was disbarred from the practice of law in the State of Alabama effective January 25, 2002 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

In ASB No. 00-94(A), formal charges were filed alleging that Waters failed to take any action on behalf of the complainant after having been appointed to represent the complainant on appeal from the denial of a Rule 32 petition. It was further alleged that during the course of representation, Waters requested, and was paid, $250 to obtain a copy of the trial transcript, which was never obtained and should have been provided at no cost. It was also alleged that during the course of the representation Waters requested and was paid $500 to obtain an early hearing for the complainant before the Alabama Board of Pardons and Paroles, which Waters never pursued. Waters did not answer the formal charges and a default judgment was entered against him on November 30, 2000.

In ASB No. 00-133(A), formal charges were filed alleging that Waters was retained to represent a client in a divorce case and paid $1,000. Waters drafted a settlement agreement and told the client that he could have the divorce settled in one week if the client paid him an additional $300, which the client paid. The divorce did not settle and the matter was eventually set for trial. Prior to the trial of the divorce, Waters was suspended from the practice of law in the State of Alabama. However, Waters did not inform his client of his suspension. On the date of trial, Waters did not appear for trial. Waters did not answer the formal charges and a default judgment was entered against him on November 30, 2000.

In ASB No. 00-246(A), the complainant filed a grievance against Waters alleging that Waters contacted the complainant about a potential class action suit against a local industrial plant, that Waters delayed the case for some time and that Waters advised the complainant that there was no statute of limitations for such matters and then referred the case to other counsel. After additional time had passed, the receiving lawyer advised that the statute of limitations had run. Waters did not respond to requests for information during the Alabama State Bar's investigation of the grievance, so formal charges were filed alleging that Waters had violated Rule 8.1, A.R.P.C. Waters did not answer the formal charges and a default judgment was entered against him on October 24, 2001.

On December 12, 2001, Panel I of the Disciplinary Board of the Alabama State Bar conducted a hearing to determine appropriate discipline in the above-referenced cases. Waters was notified of the time, date and place of the hearing in accordance with Rule 12(e), A.R.D.P. Waters did not appear at the hearing. After considering the evidence and argument presented by the Office of General Counsel, the board ordered that Waters be disbarred, that the disbarment be consecutive with the three-year suspension

imposed in ASB nos. 98-51(A) and 98-173(A), and further ordered that Waters make restitution in the amount of $750, plus interest, in ASB No. 00-94(A) and make restitution in the amount of $1,300, plus interest, in ASB No. 00-133(A). [ASB nos. 94(A), 00-133(A) and 00-246(A)]

Suspensions

- Foley attorney **Preston Lee Hicks** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, dated February 4, 2002. The Disciplinary Commission found that Hicks's continued practice of law is causing or likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. 02-01]

- Birmingham attorney **Joe Wilson Morgan, Jr.** was suspended from the practice of law in the State of Alabama for a period of two years, effective December 12, 2001, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

  In seven separate cases, Morgan pled guilty to multiple counts of violating the Alabama Rules of Professional Conduct. Among the rules violated were rules 1.1, 1.3, 1.4(a), 1.16(d), 8.1(b), and 8.4(a), (c) and (g), A.R.P.C. In each case, Morgan was either appointed or retained to represent a client. In some, but not all, of the retained cases Morgan was paid a retainer. In each case, after undertaking the representation, Morgan did little or no work in the matter and failed to communicate with the client or respond to the client's request for information about the status of the legal matter. Morgan abandoned the client and did not refund the unearned portion of the retainer. When the client filed a grievance with the Alabama State Bar, Morgan did not respond to requests for information from the Office of General Counsel or the local grievance committee assigned to investigate the matter. [ASB nos. 98-276(A), 98-277(A), 99-132(A), 99-147(A), 99-311(A), 01-06(A), and 01-132(A)]

- On January 3, 2002, Mobile attorney **Eric Brandt Reuss** received a 90-day suspension from the practice of law in the state of Alabama, effective December 19, 2001. The Office of General Counsel was notified by Reuss that his license in the State of Georgia had been suspended for a period of two years. On June 20, 2001, the State Bar of Georgia sent the Alabama State Bar a copy of the decision rendered by the Supreme Court of Georgia. The misconduct involved Reuss's receipt of attorneys' fees in a bankruptcy case without the bankruptcy court's knowledge or prior approval. Reuss was paid $93,177.09 by a solvent subsidiary corporation of his Chapter 11 client/debtor. Disgorgement of these fees was sought by the trustee in bankruptcy. Reuss is now paying back that money to the trustee in graduated payments. A reciprocal discipline hearing was held by the Alabama State Bar on November 14, 2001. The Disciplinary Board recommended a 90-day suspension which was accepted by Reuss. [Rule 25(a), Petition No. 01-01]

- Birmingham attorney **Calvin Seely Rockefeller, 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, dated March 12, 2002. The Disciplinary Commission found that Rockefeller's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule20(a); Pet. 02-04]

- Madison attorney **William Richmond Stephens** was suspended from the practice of law in the State of Alabama effective September 14, 2001, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. The Disciplinary Board entered a default judgment finding that Stephens violated rules 8.1(b) and 8.4(g), A.R.P.C., based upon allegations that he made sexual advances toward the complainant and offered to exchange sex for legal services, and that after the complainant spurned Stephens's sexual advances, he began attempts to extort money from the complainant. Stephens did not respond to requests for information or otherwise cooperate during the bar's investigation of the matter. [ASB No. 94-264(A)]

Public Reprimands

- Huntsville lawyer **Alphonso Beckles** received a public reprimand without general publication for violating rules 1.1, 1.3 and 1.5(a), Alabama Rules of Professional Conduct.

  Beckles was retained on April 19, 1999 to defend a client who had been indicted for robbery first degree, rape first degree, two counts of sodomy first degree and sexual torture. The client's wife paid Beckles's requested retainer of $7,500. At the time Beckles was retained, he was made aware that DNA evidence would be at issue in the trial and indicated that he was competent to deal with that issue.

  During the course of representation, Beckles did not adequately communicate with his client. After the client was released on bond in August 1999, the client contacted him regularly to inquire about the status of the case and whether there was anything that they needed to discuss. Each time Beckles assured the client that everything was fine and that he was continuing to prepare for trial. Beckles advised the client that he was going to hire a private investigator to assist in the preparation of the defense for trial, but did not do so. Beckles was made aware, as early as December 1999, that the state's DNA test results were negative with regard to his client. This was significant exculpatory evidence critical to the defense of the case. Beckles failed to prepare this line of defense.

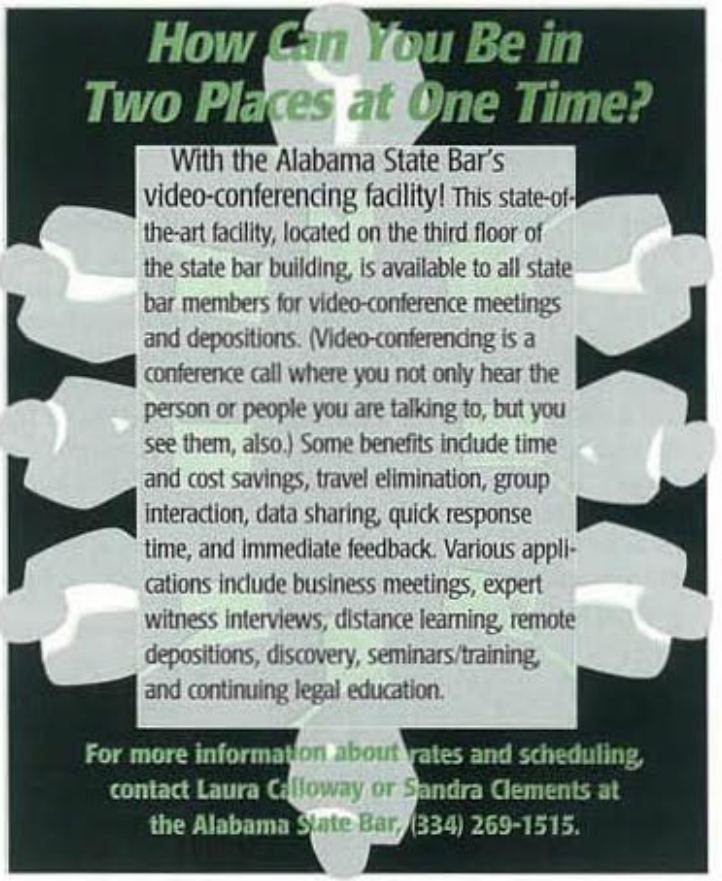
  The trial was originally set for January 24, 2000. For obvious reasons, the state did not offer the exculpatory DNA evidence. The trial court judge continued

the case until January 25, 2000 to allow Beckles additional time to prepare. When Beckles offered the DNA evidence, he was not prepared or able to establish the necessary evidentiary foundation for its admission. In fact, Beckles acknowledged that he was not aware of any law that required the defense to present foundational evidence prior to admission of the state's DNA evidence. The trial court refused to admit the evidence and, therefore, the jury did not consider the exculpatory DNA evidence when deliberating Beckles's client's guilt or innocence. Beckles's client was found guilty as charged and received an aggregate sentence of 105 years in the state penitentiary. [ASB No. 00-142(A)]

- On March 1, 2002, former Montgomery attorney **John Oliver Cameron** received a public reprimand without general publication, in connection with the complaint filed against him by Amy Ussery of Troy, Alabama. On or about July 20, 1996, Ussery hired Cameron to handle a Chapter 7 Bankruptcy with a reaffirmation of her bank loans on her home and automobile. Cameron filed the bankruptcy on September 16, 1996. Legal counsel for the bank holding these notes sent Cameron a "reaffirmation agreement" for Ussery's signature on October 24, 1996. The bank wrote to Cameron in October and November 1996, requesting the return of the presumably executed affirmation agreement. Cameron failed to return it. On January 10, 1997, the bank notified Ussery that it would no longer accept payments from her and demanded surrender of the collateral. Ussery tried to obtain financing for her house and automobile but was unable to do so. She gave up that property in August 1997. She sued Cameron but ultimately had to settle for payment of her attorney's fees. Cameron was in violation of Rule 1.3 [diligence] of the Alabama Rules of Professional Conduct. [ASB No. 97-249(A)]

- On January 18, 2002, suspended Mobile attorney **LeMarcus Alan Malone** received a public reprimand without general publication based on the Disciplinary Board's acceptance of Malone's consolidated guilty plea in three pending disciplinary matters. In each case, he was ordered to make restitution of $300 to the client and to receive a public reprimand without general publication.

  In ASB No. 96-50(A), on or about March 2, 1996, Shelby J. Crisley paid Malone $300 to represent her son in a criminal case. Malone never met with the son prior to his scheduled court date. Malone failed to show up in court for the client's scheduled appearance. Malone failed to refund Chrisley's money and did not respond to the complaint she filed with the state bar. Malone's actions violated rules 1.5(a) [fees], 1.3 [diligence], 1.4 [communica-



tion] and 8.1(b) [bar admission and disciplinary matters] of the Alabama Rules of Professional Conduct.

In ASB No. 96-132(A), on or about August 25, 1995, Cecil J. Oliver, Jr. paid Malone $300 to represent him in a criminal case. At the time that Malone accepted this money, he was interimly suspended. Malone did not return Oliver's phone calls seeking a refund, nor did he cooperate in the investigation of this bar complaint. His conduct violated rules 1.5(a) [fees], 8.1(b) [bar admission and disciplinary matters] and 8.4(c) [misconduct] of the Alabama Rules of Professional Conduct.

In ASB No. 96-175(A), on April 12 and 26, 1996, Malone accepted two $150 payments from Terrell Carson for legal representation. Malone had been interimly suspended by the bar effective April 12, 1996. Carson learned about Malone's suspension through a notice in the Mobile newspaper. He was unable to obtain a refund of his money from Malone. Malone did not cooperate in the investigation of his bar complaint. His conduct violated rules 1.5(a) [fees], 8.1(b) [bar admission and disciplinary matters] and 8.4(c) [misconduct] of the Alabama Rules of Professional Conduct.

- Auburn attorney **Michael Sharp Speakman** received a public reprimand with general publication for violating Rule 8.4(d), ARPC. On June 27, 1998, Lee County Circuit Judge Robert M. Harper found Speakman in contempt of court based upon his conduct at a hearing on June 4, 1998 before Circuit Judge Richard D. Lane in the Lee County Juvenile Court. At that hearing, Speakman represented an individual charged with contributing to the delinquency of a minor. Before the case was called for trial, Speakman saw the complaining witness and her mother waiting in the lobby of the Lee County Justice Center. He approached them and engaged them in a conversation about the case, which lasted about five minutes. Later that morning, when the case was called for trial, the assistant district attorney announced that the complaining witness was not present and requested a continuance. Speakman did not inform the court about his conversation with the complaining witness and her mother earlier that morning in the lobby. Speakman asked that the case be dismissed due to the absence of the complaining witness. The judge continued the case. Later, it was discovered that the complaining witness and her mother were present at the courthouse, albeit in another part of the building, at the time the case was called for trial.

  Speakman was found in contempt of court because he remained silent when the assistant district attorney asked for a continuance due to the absence of the complaining witness, knowing that he had had a conversation with the complaining witness and her mother in the lobby that morning prior to the call of the case for trial. [ASB No. 98-224(A)]

- On October 24, 2001, the Disciplinary Commission of the Alabama State Bar determined that Birmingham attorney **Terri Murrell Snow** should receive a public reprimand with general publication, in connection with the complaint filed by Jimmy Edward Stone. On or about March 5, 2000, Stone hired Snow to handle the probate of his deceased mother's will. He paid her a $200 retainer and a $200 advance toward costs. After six months had passed without any word from Snow, Stone began efforts to contact her. He left numerous phone messages, which were not returned. After Stone filed a complaint with the Alabama State Bar, Snow failed or refused to respond to three letters from the bar regarding Stone's complaint. Finally, on March 19, 2001, Snow mailed Stone's original documents and a check for $250 to an investigator with the Birmingham Bar Association's Grievance Committee. Stone hired another lawyer and successfully concluded the probate work, albeit one year later. The Disciplinary Commission found that Snow's conduct constituted violations of rules 1.3 [diligence] and 1.4(a) [communication] of the Alabama Rules of Professional Conduct. These particular rules cover the willful neglect of a legal matter entrusted to a lawyer and the failure to respond to reasonable requests for information by a client. [ASB No. 01-010(A)] ■

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117, 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

RATES

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 2002 issue—deadline March 5, 2002; July 2002 issue—deadline May 5, 2002; September 2002 issue—deadline July 5, 2002. No deadline extensions will be made.

Send classified copy and payment, payable to *The Alabama Lawyer*, to: *Alabama Lawyer* Classifieds, c/o Shannon Elliott, P.O. Box 4156, Montgomery, Alabama 36101.

Services

- **SECURITY NEGLIGENCE:** National expert on crime liability; shopping centers, hotels, schools, clubs. Director of renowned university graduate program; author of 8 books and 35 articles on criminology, security. Police academy director. Appeared on CNN news, Today Show, Donahue. Dr. Michael Clay Smith, J.D., Ed. D., LL.M. Phone (601) 264-2906.

- **ENGINEERING/CONSTRUCTION EXPERTS:** Drainage, structural, mechanical, roofing, electrical, process chemical, EIFS (stucco), mold and mildew, HVAC; for residential housing, industrial and chemical facilities, pipelines, compressor stations, commercial buildings, and port structures. Provide expert construction claims and dispute analysis. Provide computer animation of structural behavior under loads. Experienced testifying experts with licenses and credentials. Company engineering and contractor licenses in Alabama and Louisiana. Contact Hal K. Cain, Mobile. Phone (251) 661-2605. E-mail: *hkcain@hkcain.com*. Web site: *www.hkcain.com*.

- **EXPERT WITNESS DEVELOPMENTAL DISABILITIES:** Developmental disabilities/mental retardation/special education/mental health/nursing home & hospital standard of care—Expert witness services provided related to standard of care issues in health and human service agencies. William A. Lybarger, Ph.D. Phone (620) 221-6415. E-mail: *tlybarger@yahoo.com*. Web site: *www.tonylybarger.com*.

- **SECURITIES AND TRUST INVESTMENT EXPERT:** Twenty-five years' investment experience. Former vice-president/portfolio manager Chase Manhattan, SunTrust Banks, United Jersey Banks. Chartered financial analyst. Cum Laude, Wharton School, University of Pennsylvania. B.S. Economics, dual major Economics/Finance. Registered investment advisor. Steven Stern, CFA, P.O. Box 310157, Miami, FL, 33231. Call (305) 374-8493 (voice), (305) 374-8494 (fax), or e-mail: *SternInves@aol.com*.

- **STATISTICS, DATA ANALYSIS, SOFTWARE EXPERT:** Litigation support on matters involving analysis of large sets of data and information systems practices. Custom programming also available. We use the SAS system and other products. Consultants with years of experience in finance, manufacturing, pharmaceuticals, travel, credit. Call Heidi Markovitz, CDP at (305) 365-0439 or visit our Web site: *www.Simply-Systems.com*. Simply Systems, 161 Crandon Blvd., Ste. 325, Key Biscayne, FL, 33149.

- **DOCUMENT EXAMINER:** Examination of questioned documents. Certified forensic handwriting and document examiner. Thirty-four years' experience in all forensic document problems. Formerly, chief questioned document analyst, USA Criminal Investigation Laboratories. Diplomate (certified)-ABFDE. Member: ASQDE; IAI, SADFE; NACDL. Resume and fee schedule upon request. Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia, 30907. Phone (706) 860-4267.

- **TRAFFIC ACCIDENT RECONSTRUCTIONIST:** This engineer has reconstructed over 3,000 accidents in 23 states on highways, streets, railroads and highway construction zones involving trucks, vans, cars, pedestrians, trains, and farm implements. Computer-generated drawings are prepared to illustrate his opinions. Over 46 years' engineering experience. Registered professional engineer and full board certification by ACTAR. Contact John T. Bates, P.E. Toll-free (800) 299-5950.

- **INSURANCE EXPERT WITNESS:** Fee-only expert witness. Twenty years' experience in risk management insurance consulting. Pre-filing evaluation, deposition and trial. Policy coverage, captives, excess, deductibles, self insurance, agency operations, direct writers, property loss preparation. Member S.R.M.C. Contact Douglas F. Miller, Employers' Risk Management. Phone (205) 995-0002, Birmingham or WATS (800) 462-5602.

- **HIGHWAY SAFETY AND TRAFFIC ENGINEERING:** Roadway and roadside hazards, intersections, grade crossings, work zones, accident reconstruction, failure to warn, etc. GE Lohr, PE, Box 12339, Charleston, SC, 29422-2339. Phone (843) 795-7218. E-mail: *lohrg@msn.com.*

- **AUTO INJURY REVIEW:** Board certified medical specialists in Alabama for review of medical records relating to motor vehicle accidents. For defendant. Prompt turn-around. Available for expert testimony. Phone (256) 539-1211. Fax (256) 529-4007. E-mail: *ehlmd@hiwaay.net.*

- **FORENSIC HANDWRITING & DOCUMENT EXAMINER:** Twenty years' experience in document examinations; testified in state and federal courts. Retired senior documents examiner and discipline chief, Alabama Department of Forensic Sciences. Member, Questioned Document Section—American Academy of Forensic Sciences; Southeastern Association of Forensic Document Examiners; Southern Association of Forensic Scientists; Alabama State Association of Forensic Sciences (past president). Contact Richard A. Roper, Ph.D., 7956 Vaughn Road, #141, Montgomery 36116. Phone (334) 260-2552. Fax (334) 260-7929. E-mail: *richroper@aol.com.*

- **REGISTERED FORESTER:** Forty-one years' experience in private, industrial and federal forest management and practices. Specializing in timber trespass evaluations and acquisition appraisals. Elwyn A. Spence, Anniston. Phone (256) 237-4309.

- **HANDWRITING EXPERT/FORENSIC DOCUMENT EXAMINER:** ABFDE certified. Formerly Chief, Questioned Documents Division, U.S. Army Criminal Investigation Laboratory. American Society of Questioned Document Examiners. American Academy of Forensic Sciences. Civil and criminal cases accepted. Farrell Shiver, Shiver & Nelson Document Investigation Laboratory, 1903 Lilac Ridge Drive, Woodstock, GA, 30189. Phone (770) 517-6008.

- **PHYSICIAN TEAM:** Will provide free consultation to public defenders on criminal cases involving substantial medical evidence. Willing to assist with case review, medical research and defense lawyer preparation for trial. Contact us at: *md_review@hotmail.com.*

- **CONSULTING ENGINEER/EXPERT WITNESS:** Professional engineer with 24 years of industrial, construction, safety, machinery, and pulp & paper experience. I am a "hands-on" engineer with an extremely strong mechanical aptitude. I worked as a technician and mechanic before getting my degree in engineering. I have superb troubleshooting abilities, with a thorough knowledge and understanding of machinery, industrial accidents, OSHA, building codes, automobile accidents, product liability and defense. Robert T. Tolbert, P.E. Phone (205) 856-9922. Fax (205) 853-4353.

- **MEDICAL LEGAL CONSULTANT:** Medical legal consultant for case analysis, impairment ratings, expert witness, over 25 years' experience in neuromuscular skeletal conditions, accidents, worker's comp., personal injury, and chiropractic malpractice. Available for evaluations in several Birmingham locations. Please contact: Consulting Services, Dr. John E. Cabral at (770) 736-0300. Fax (770) 736-1199. Birmingham phone (205) 410-2161. E-mail: *jec917@aol.com.*

Positions Offered

- **ATTORNEY POSITION:** Leitman, Siegal & Payne, P.C. is seeking an attorney in the field of business litigation. Two to five years' experience is desired. Send resume to the firm in care of Hiring Partner at 600 North 20th Street, Suite 400, Birmingham, 35203. Compensation based on experience.

- **ATTORNEYS WANTED:** Part-time, Montgomery, U.S. Army Reserve JAG. Must be willing to complete three weeks basic training. Contact: *pgm@webshoppe.net* or *wscallahan@mindspring.com*. Phone (205) 933-1155, (256) 329-9450, (404) 875-9587.

- **ATTORNEY POSITION:** Birmingham law firm seeks an attorney with a minimum of three years' experience in business transactions. Send confidential resume to Najjar Denaburg, P.C., Attn: Charles Denaburg, 2125 Morris Avenue, Birmingham, 35203.

- **ASSOCIATE POSITION:** Growing insurance defense firm seeks lawyers with one to three years' experience in the field of civil defense litigation. All inquiries kept confidential. Send resume to: Hiring Partner, Austill, Lewis & Simms, P.C., P.O. Box 11927, Birmingham, 35202-1927.

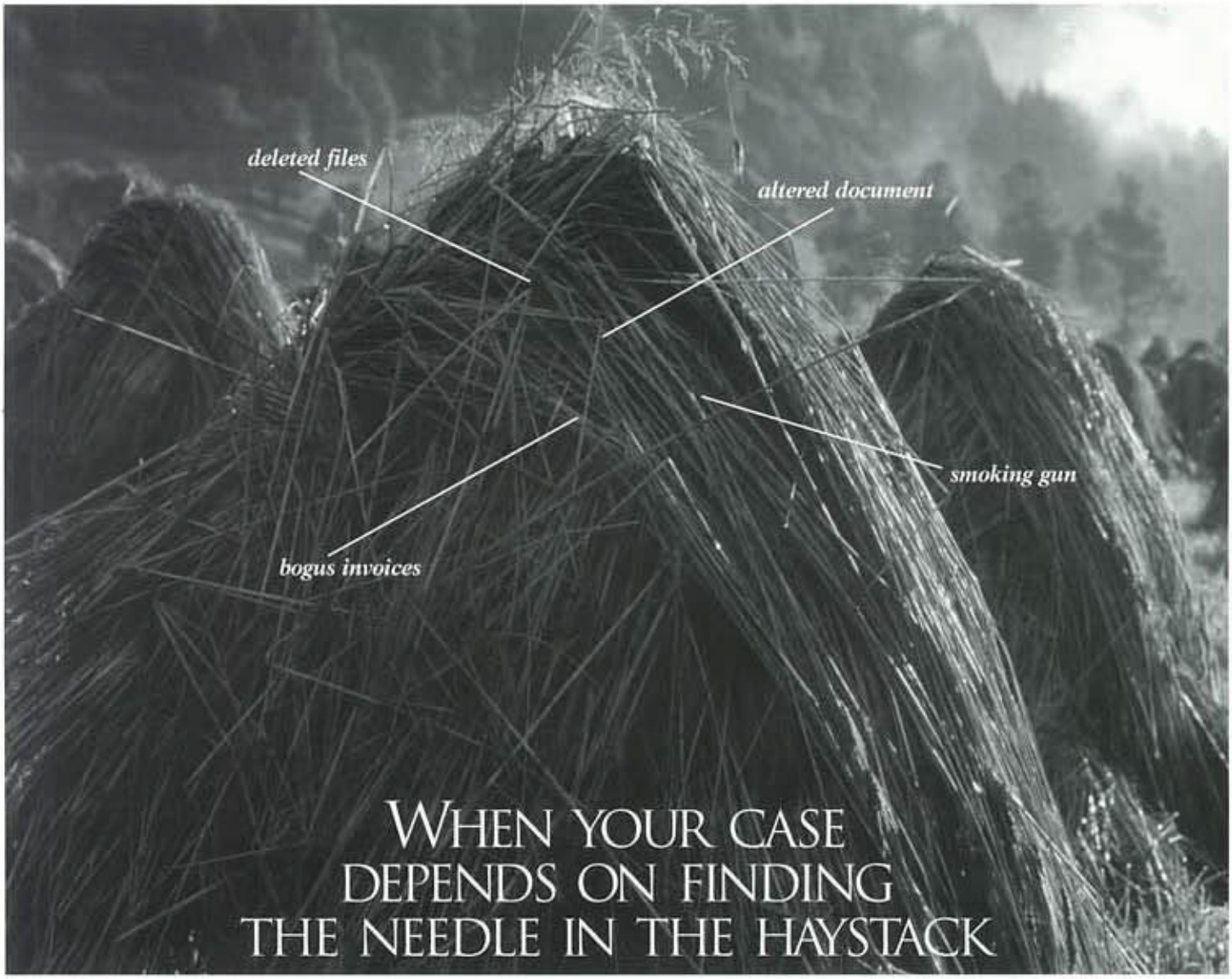
- **ASSOCIATE POSITION:** Feld, Hyde, Lyle, Wertheimer & Bryant, P.C., a 15-lawyer tax and business law firm located in Birmingham, seeks a three-to-five-year associate attorney for its corporate/business planning department. The attorney being sought will be a member of the Alabama State Bar and will have experience in some or all of the areas of formation, maintenance and dissolution of entities; drafting and reviewing various types of contracts; business succession planning; financings; real estate transactions; and mergers and acquisitions. Send resume to the firm in care of Chairman-Corporate Department at 2000 SouthBridge Parkway, Suite 500, Birmingham, 35209.

For Rent/Lease

- **FOR RENT:** Gulf Shores, 2 bedroom/1 bath and 4 bedroom/3 bath fully furnished houses. Quiet community, no crowded beach, no red lights, in Ft. Morgan area. Phone (334) 283-6945, or e-mail *scarboroughj@mindspring.com*.

- **BIRMINGHAM OFFICE SPACE-SOUTHSIDE:** Nice furnished office space in Southside with free parking. Phone-secretary available, utilities furnished, library and conference room available, copier, fax reception. Located at 2153 14th Avenue, South-Highland Area. Phone (205) 939-1327.

- **FIVE POINTS SOUTH LAW OFFICE:** Office space available in a newly remodeled office building located at 1117 22nd Street, South. Situated within 10 minutes from the courthouse, our rental units offer such ancillary services as conference room, receptionist, telephone w/ voice mail, fax machine, copier, hi-speed DSL internet connection, and free parking. "Virtual" office is also available. Spaces available range from 200 to 3,000 sq. feet. These services are provided at one flat rate starting at $575. Please call Tom Plouff, esq., at 939-0000.



WHEN YOUR CASE DEPENDS ON FINDING THE NEEDLE IN THE HAYSTACK

At Dixon Odom our Fraud Investigators and Forensic Accountants have years of experience diving into haystacks and finding the smallest piece of information that attorneys and their clients often need to help make their case. Our broad range of knowledge and technological capabilities can help attorneys sift through data to find valuable information. From forensic accounting and expert witness testimony to fraud investigations and on-target valuations we work with attorneys and business owners every day to find all the needles hidden in the haystack.

For more information about our Fraud Investigators and Forensic Accountants call us today at 205-930-9111.

DO

DIXON ODOM PLLC

Fraud Investigators and Forensic Accountants

RALPH SUMMERFORD
CPA,
CFE, CVA

KELLY TODD
CPA,
CVA

ROBIN TAYLOR
CPA/ABV, CFE,
CVA, CBA

TOM GOBER
Insurance &
Healthcare Consultant