

The Alabama Lawyer

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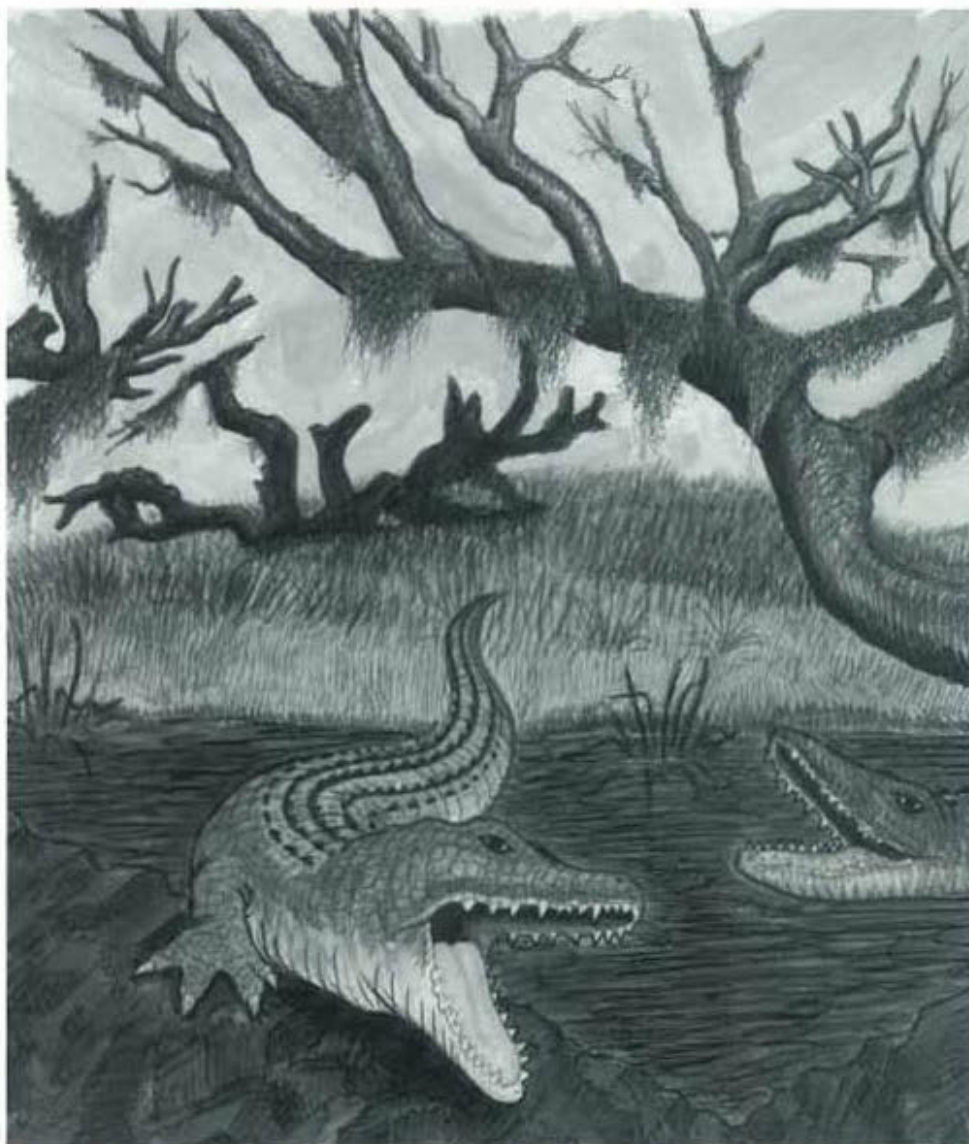
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On the Cover:

Mobile, Alabama

A commercial tugboat works its way up the Mobile River in front of the new Mobile Convention Center. The 2003 Alabama State Bar Annual Meeting will take place at the Adam's Mark Hotel, the large dark building on the left side of the picture.

—Photo by Paul Crawford, JD

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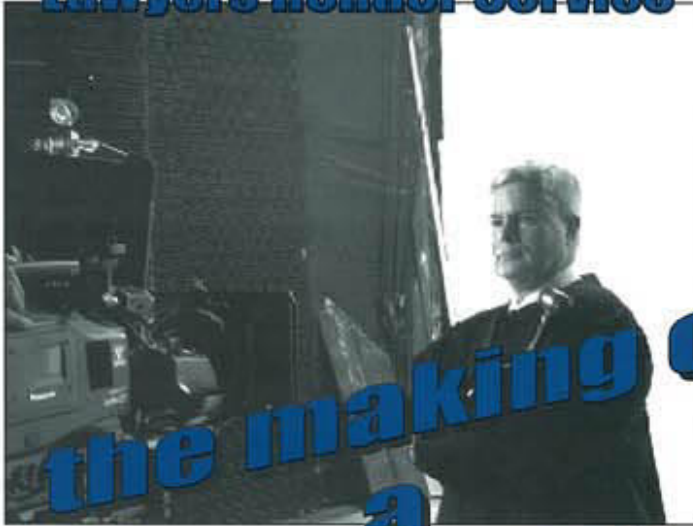
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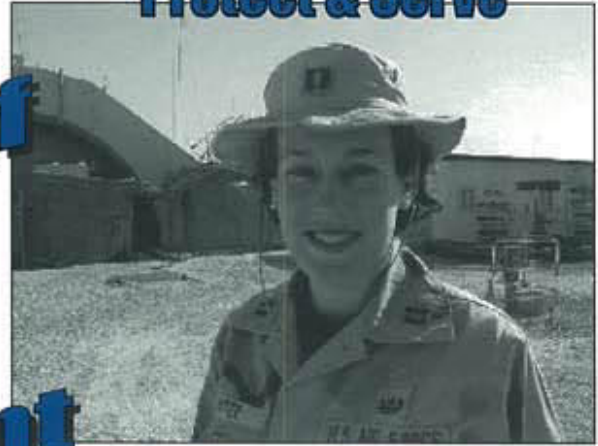
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"Lawyers Render Service"



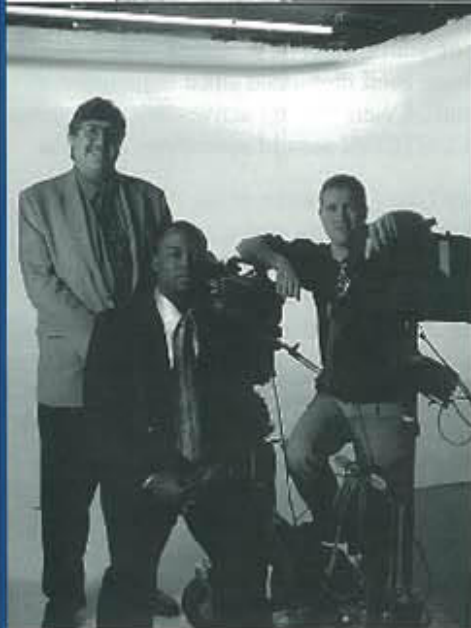
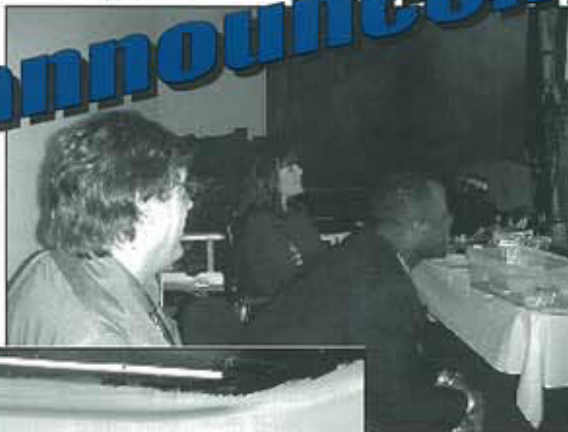
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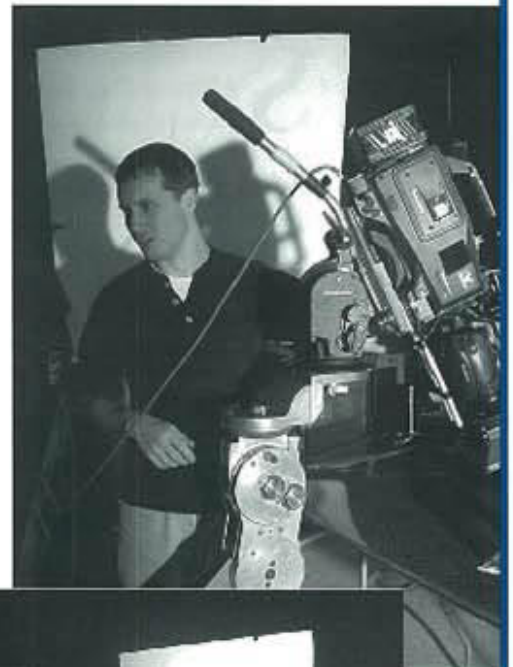
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- **"Serve & Protect"** highlights members of the Alabama State Bar who are serving their country here and away.
- **"Lawyers Render Service"** focuses on how lawyers help during times of change.



LOOK FOR THEM IN YOUR AREA!



Fred D. Gray

By Fred D. Gray

The World Is Changing

Since I became the 126th president of the Alabama State Bar, drastic changes have occurred in Alabama, the United States of America and the world. In Alabama, the residents elected a new governor, a Republican, Bob Riley, by the narrowest margin of any gubernatorial election in the history of the state. Governor Riley, in his state of the State address, gave a vivid description of the precarious financial condition of Alabama. He said changes must be made and there must be substantial cutbacks to bring Alabama's financial house in order. HealthSouth, Alabama's largest health care facility, is in serious financial trouble and is currently being investigated by the Securities and Exchange Commission. The United States of America is at war with Iraq and thousands of Americans are fighting in the Persian Gulf area. We do not know when the war will end, or how much it will cost. However, many lives will be lost. We are able to see the war as it is being fought live on television.

The impact of war with Iraq is now felt in Alabama. On March 26th, Pfc. Howard Johnson, Jr., age 22, of Mobile, was the first Alabamian to make the ultimate sacrifice for his country in this war. Reserve components of the armed forces augment the active components of the United States military in the performance of military duties worldwide. Alabama ranks seventh among the states in the per-capita number of National Guard and Reserve personnel mobilized. Alabama's National Guard is one of the largest guards in the nation, numbering about 15,000. The State of Alabama has mobilized over 6,760 guard and reserve military

members in support of the current war on terrorism. This includes members of the Army National Guard, Army Reserve, Air National Guard, Marine Corps Reserve, Air Force Reserve, and Naval Reserve. Of these, several judge advocates and Alabama State Bar members have been mobilized for active duty and have been assigned to Afghanistan, Iraq and other countries throughout the world and to stateside homeland security duties. As of March 31st, 41 Alabama National Guard units have been mobilized since September 11th, 2001, and 36 were still on active duty, with many deployed to CENTCOM area of operations overseas.

The Military Law Committee of the Alabama State Bar has been very active this spring, assisting citizens and attorneys with federal, state and local laws that pertain to military members and their families during times of mobilization. "Audemus jura nostrae defendere"--we dare defend our rights--is a phrase on the minds of many Americans these days. Active, guard and reserve judge advocates of the Alabama State Bar are continuing to support military commanders, military members and their families in these perilous times--another example of lawyers rendering service. We join Americans everywhere in supporting our military troops here and abroad.

I am now in my ninth month as president. My, how time has flown! Carol and I have represented the Alabama State Bar across this nation. Immediately after my inauguration, we attended the National Convention of the National Bar Association in San Francisco, an association that I served as its 43rd presi-

dent. We traveled to the American Bar Association meeting in Washington, DC, where we joined and met with the National Conference of Bar Presidents and the Southern Conference of Bar Presidents. At the meeting of the NCBP, I was elected to the executive council for a period of three years. So, I will be actively involved in the NCBP until 2005.

I was the first speaker for the first-year students at the University of Alabama School of Law during its orientation program. I challenged them to study hard, finish law school, pass the Alabama bar examination and develop into outstanding lawyers. During my presidency, I have addressed several bar associations across this state, including the Morgan County Bar Association in Decatur, the Birmingham Bar Association and Magic City Bar Association in Birmingham and the Mobile County Bar Association. Additionally, I served as keynote speaker at the Thurgood Marshall Symposium for BALSAs at Cumberland Law School. We attended the Mid-Winter Meeting of the American Bar Association and the National Council of Bar Presidents, and participated in its Executive Council Meeting in Seattle. I served as keynote speaker and represented the Alabama State Bar at Faulkner University; Southern Conference of Bar Presidents in Key West; Martin Luther King, Jr. Celebration at East Stroudsburg University of Pennsylvania; and the Brooklyn Academy of Music. I addressed the Alabama Conference of Circuit Judges, participated in the Oklahoma Bar Association's Diversity Forum and delivered lectures at the University of the Virgin Islands in St. Croix and St. Thomas. In addition, I have maintained an active trial practice. What I have tried to do during this bar year is to demonstrate that lawyers render service: service to their clients, service to the community and service to the profession.

In addition to our travels, I have continued to lead the bar in all of its activities. The bar commissioners approved a plan requesting the legislature to assist in improving diversity on the board of bar commissioners, and to increase diversity in the profession. The commissioners also approved a recommendation from the Task Force on the Alabama Lawyers Hall of Fame to be implemented in bar year 2003-2004. In addition,

the commissioners authorized the creation of a new Appellate Practice Section and adopted by-laws for that section.

The year 2003 marks the 40th anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). In a landmark decision by Alabama's Justice Hugo Black, the Court held that a defendant in a state court has a right to counsel if charged with a felony. Despite the clear call of "Gideon's Trumpet," what would appear to be a fundamental right has not yet been fully implemented. While stating a right, the Court provided no means or mechanisms for funding the right. Left to their own devices, the states have been less than diligent. While the defense of indigents in Alabama has improved over the past 40 years, clearly there is much to be done. President-Elect Bill Clark is beginning plans for a Symposium on Indigent Defense next fall to try to ensure that Gideon's call does not fade. You will be receiving

more information in the near future. This is another example of lawyers rendering service.

Finally, accept this as your personal invitation to join us for the 2003 ASB Annual Meeting in Mobile, July 16th-19th. This convention promises to be one of the most outstanding in the history of the bar. The theme is Lawyers Render Service. Some of the speakers are Robert Sherman, esq., presenting "How to Persuade With More Power and Influence"; Dennis Archer, incoming president of the American Bar Association; Professor James W. McElhaney, presenting "Planning to Win: Trial Tips and Tactics"; Millard Fuller, esq., founder and president of Habitat for Humanity, Inc.; and many more.

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Pursuant to the Alabama State Bar's rule governing the election of president-elect, the following biographical sketches are provided of Douglas McElvy and Caine O'Rear III. McElvy and O'Rear were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2003-2004 term, and the winner will assume the presidency in July 2004.

Douglas McElvy was born on June 29, 1944 in Montgomery, and is married to Eleanor Croft McElvy. Eleanor earned a master's degree in music from the University of Southern California and has taught voice at the University of Alabama and Shelton State. Douglas and Eleanor have five children. Paul, the oldest, is a graduate of the Culverhouse School of Accounting at the University of Alabama, and is a CPA working in the tax/audit division of BellSouth in Atlanta. Jonathan, a graduate of the journalism department of the University of Alabama, is the publisher/editor of *The Demopolis Times*. Elizabeth McElvy Spiller is a special education graduate from the University of Alabama and is an interpreter for the hearing impaired. Keren is a senior in high school and is active in national debating competitions. James Douglas is in the ninth grade and is active in golf, basketball and baseball.

McElvy attended his first two years of college at St. Bernard College in Cullman. He earned a bachelor of science degree from the University of Alabama with a major in accounting, and graduated from the University of Alabama School of Law in May 1971. He was licensed by the Supreme Court of Alabama to practice law in August 1971. After graduation from law school, McElvy clerked for Judge Charles Wright, chief judge of the Alabama Court of Civil Appeals. He then directed and was the sole attorney for a legal services clinic for the poor in Lee County. Following this, he accepted a staff position with the Center for Correctional Psychology at the University of Alabama, where he taught juvenile justice, corrections and related courses and was involved in planning for correctional systems.

McElvy has practiced law since 1971. He is admitted to practice in the United States District Courts for the Northern, Middle and Southern districts of Alabama, and also in the U.S. Court of Appeals for the Eleventh Circuit. In 1978, he was admitted to practice before the Supreme Court of the United States. McElvy has been very active in the Tuscaloosa County Bar Association, serving on the Executive Committee, as secretary/treasurer, and as president of the Tuscaloosa County Bar Association in 1990-91. He was also president of the Tuscaloosa County



Douglas McElvy

Public Defender Commission. He played an instrumental role in drafting and promoting the enactment of the Tuscaloosa County Judicial Commission, which refers nominations for open judicial positions to the Governor. He has also served as special assistant attorney general for the State of Alabama.

McElvy has also been very active in the Alabama State Bar. He was elected to the state bar Board of Bar Commissioners in 1991 and has served as a bar commissioner since that date. On three separate occasions, he was asked by the then-president of the Alabama State Bar to serve on the Executive Council, and each time he was elected to that position by a vote of the bar commissioners. McElvy was elected vice-president of the Alabama State Bar and is currently serving, at the request of President Fred Gray, a fourth term on the Executive Council. During McElvy's

tenure as bar commissioner, he has been extensively involved in numerous committees and projects with the state bar. Some of these include serving as liaison to the Alabama Supreme Court, on the Alternative Dispute Resolution Committee, on the Character and Fitness Committee, and currently as a panel member on the Disciplinary Board, Panel IV. In addition, he helped develop, and now acts as a mediator on, the Alabama State Bar Committee on Resolution of Fee Disputes.

McElvy was elected to the Alabama Law Foundation Board of Trustees, which oversees investment of IOLTA funds and evaluates and approves grants for the IOLTA funds. He was also elected a Fellow of the Alabama Law Foundation. At the request of Dean Kenneth Randall, he allowed his name to be submitted for nomination to the Board of Trustees of the University of Alabama Law Foundation and was elected to that foundation, which oversees the University Law School Foundation funds and activities.


In addition to McElvy's work with local and state bar associations, he is also a certified mediator, being certified by the American Academy of Attorney Mediators. He has served for years as a lecturer for continuing legal education programs, sponsored by the Alabama Bar Institute for CLE, the University of Alabama School of Law and the Alabama State Bar. He has been an adjunct professor of law at the University of Alabama School of Law and now teaches for Oak Brook College of Law and Government Policy. He has also been the past president of the Christian Legal Society of Alabama.

Active in many community affairs, McElvy was a graduate of Leadership Tuscaloosa, and has also served on the Steering and Planning Committee of Leadership Tuscaloosa. He was elected

to the Board of Directors of the Chamber of Commerce of West Alabama and also served as vice-president, chairing the Governmental Affairs Division. He was awarded the Distinguished Service Award by the West Alabama Chamber of Commerce in 1989 and was named the Member of the Year in 1990. For ten years he served as the vice-chairman of the Zoning Board of Adjustment for the City of Tuscaloosa. He supported the West Alabama Area American Cancer Society by chairing its Cancer Crusade and sitting on its Board of Directors. He was formerly on the Board of Directors for Big Brothers/Big Sisters of Tuscaloosa County, and is presently vice-president of the Metropolitan Board of the YMCA. McElvy was the founder of the West Alabama Transplant Trust Fund, which is a nonprofit corporation that raises money and financially supports West Alabama citizens in need of organ or bone marrow transplants. McElvy also helped initiate the Tuscaloosa Coalition for Character and was appointed by the mayor of Tuscaloosa as the chairman of the City of Tuscaloosa Coalition for Character. This initiative has been responsible for many public projects, promoting good character among the citizens of Tuscaloosa, as well as initiating character education in the public school system in Tuscaloosa. A long-time member of First Baptist Church of Tuscaloosa, McElvy has been active as a deacon and has served in many other capacities in the church.

McElvy practiced in Tuscaloosa for many years with the firm of McElvy & Ford, PC, which he co-founded 25 years ago. He still maintains an office in Tuscaloosa, but the McElvy family has recently relocated to Montgomery, where he is also associated with the firm of Azar & Azar, LLC. ■

Are You a Solo Practitioner or a Member of a Small Firm?



If so, read on...

The Alabama State Bar's Solo & Small Firm Practitioner's Committee is seeking to determine whether there is any interest in forming a Solo & Small Firm Section. The Section would:

- create a forum for discussion of small firm issues;
- provide networking opportunities;
- establish benefits for members;
- develop CLE programs designed for members;
- obtain greater representation at the Board of Bar Commissioners; and
- perform all functions permitted of sections of the ASB.

Before a section can be formed, we must identify lawyers who would be interested in joining. If you or someone you know would like to join a section focused on small firm issues, please contact:

Don Wiginton, chair
Solo & Small Firm Practitioners Committee
200 Office Park Drive, Suite 314
Birmingham, AL 35223-2404
don@wiginton.com

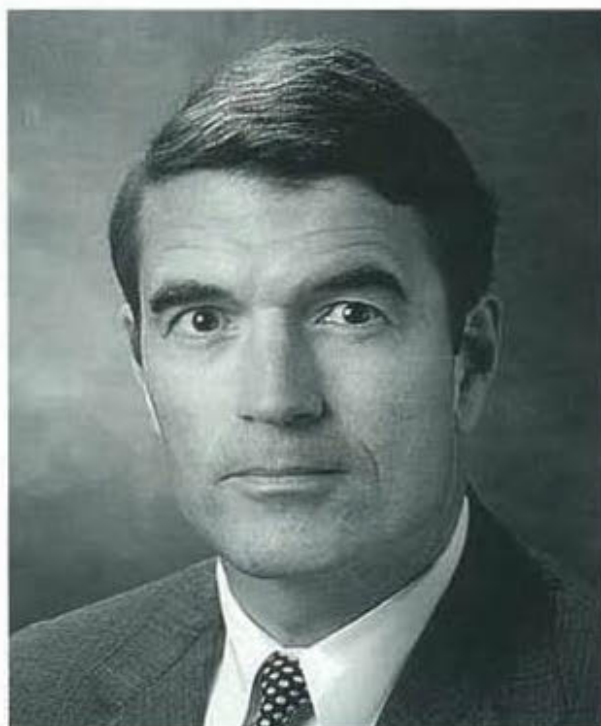
Caine O'Rear was born in Jasper in 1950 and attended the public schools there through high school. Caine's father, Caine O'Rear, Jr., has been in private law practice in Jasper since 1949. Caine obtained his B.S. degree from the University of Alabama in 1972. At Alabama, he was a member of Phi Beta Kappa, Jasons and ODK, and served as vice-president of the student body.

Caine attended law school at the University of Virginia and obtained his J.D. degree in 1975. After law school, he served in the United States Army and Army Reserve as a captain.

Caine has been in private practice in Mobile with the firm of Hand Arendall for 27 years. He is currently chairman of the firm's litigation section. His practice now principally involves commercial- and business-related litigation, although he has handled all types of civil trials and appeals over the years. He is admitted to practice in the Supreme Court of the United States and the Fifth and Eleventh circuits, and he has tried cases in all three federal districts and numerous circuit courts in Alabama, as well as in courts of other jurisdictions.

During his law career, Caine has been active in the Alabama State Bar and other professional organizations. He served on the Board of Bar Commissioners for the maximum three terms from 1992 through 2001, focusing heavily on matters involving lawyer discipline. During that time, Caine served on the Disciplinary Board and was a member and later chairman of the Disciplinary Commission from 1994 through 2001. He also served for nine years as a member of the Mobile Bar Association's Executive Committee and was previously a member of the Mobile Bar Association's Grievance Committee.

Caine is a member of the American Bar Association Litigation Section, the Alabama Defense Lawyers Association and the International Association of Defense Counsel. He has served on the faculty of the IADC's National Trial Academy and has written and lectured on topics involving trial techniques, trial strategy and ethics. He has been listed in *The Best Lawyers in America* for a number of years.



Caine O'Rear III

Caine is active in his church and civic affairs. He is a member of Ashland Place United Methodist Church, where he has served as chairman of the Administrative Board and as a Sunday School teacher. He is a trustee and board member of the YMCA of Metropolitan Mobile and served that organization as board chairman. He currently enjoys serving as a Big Brother and a member of the board of the Big Brothers/Big Sisters program in Mobile. He has previously served on the board of directors of Goodwill Industries of Mobile and on other civic boards. He is active in the alumni associations of both the University of Alabama and the University of Virginia.

Caine and his wife, Gwen, have three sons. ■



ALABAMA STATE BAR
2003 - 2004
Committee Preference Form

Alabama State Bar Mission Statement

The Alabama State Bar is dedicated to promoting the professional responsibility and competence of its members, improving the administration of justice, and increasing the public understanding of and respect for the law.

Invitation for Service from Bill Clark, president-elect

The Alabama State Bar invites you to volunteer to serve on a state bar committee.

We need your help to continue to accomplish our challenging mission. Please choose a committee in which you are interested. We hope you will join us; I appreciate your willingness to serve.

Appointment Request

Terms begin August 1, 2003 and expire July 2004. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee.

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| <input type="checkbox"/> Fee Dispute Resolution | <input type="checkbox"/> Unauthorized Practice of Law |
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| <input type="checkbox"/> Insurance Programs | |
| <input type="checkbox"/> Judicial Liaison | |

Background Information

Name: _____

Firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Office Telephone: _____ Fax: _____

Email Address: _____

Year of admission to bar: _____

Suggestions For New Committees Or Task Forces: _____

Instructions For Submission

Please print this form and mail it to: **Alabama State Bar, Attention: Programs, P.O. Box 671, Montgomery, AL 36101-0671.** You may fax this form to **(334) 261-6310.** We must receive your form **on or before May 9th, 2003** to consider you for a committee appointment.

Please remember that vacancies on existing committees are extremely limited as most committee appointments are filled on a three-year rotation basis. However, several committees are new this year. **If you are appointed to a committee, you will receive an appointment letter informing you in June 2003.** You may also download this form from our Web site, www.alabar.org, and submit the completed form via e-mail to rgray@alabar.org.



Keith B. Norman

More Benefits For You!

Over the course of the next several months, we will introduce you to three new endorsed member benefit programs that will help you personally and professionally. (They may not be new to some of you who may now be using these services.) They are the **American Bar Association Retirement Program**, and two electronic legal research services, **Loislaw** and **VersusLaw**.

The Solo and Small Firm Practitioners Committee, with **Don Wiginton** of Birmingham serving as chair and **Sterling DeRamus**, also of Birmingham, serving as vice-chair, has examined these programs to ensure that they meet needs as expressed by lawyers before recommending them for endorsement by the Board of Bar Commissioners. Other members of the committee include: **Charles Allen**, Birmingham; **Charles Miller**, Montgomery; **Mark Murphy**, Andalusia; **John Peek**, Andalusia; **David Vickers**, Montgomery; **Janet Akers**, Bessemer; **Ted Hull**, Birmingham; **Lewis Page**, Birmingham; **Jeff Sherrer**, Oneonta; **Jack Taylor**, Birmingham; **Paul Toppins**, Tuscaloosa; **Calvin Blackburn**, Birmingham; **Scott Campbell**, Ft. Payne; **Yvonne Davis**, Birmingham; **Walter Heglar**, Birmingham; **Linda Henderson**, Tuskegee; **Anthony Ifediba**, Birmingham; **Wesley Pitters**, Montgomery; **Harry Prim**, Dothan; and **Jeffery Robinson**, Selma.

The ABA Retirement Plan

The last member survey conducted by the state bar was in 1998. It indicated that 55 percent of those in private practice did not have a retirement plan provided through their firm. With this in mind, it was clear that a large segment of bar members might benefit from a well-run, low-cost retirement plan. The ABA Plan has been in existence for over 30 years. Currently, it serves 4,700 firms and 47,000 participants with \$3.7 billion under management.

Lawyers and their staffs are offered a wide array of defined contribution plans such as profit sharing, money purchase and 401(k) plans, with several categories of investment options. As part of the program's services, the program trustee, State Street Bank, assumes certain fiduciary responsibilities for its

clients, including monitoring compliance changes, preparation and filing of annual tax forms and participant distributions. In addition, the program offers ongoing communications to provide participants with the information they need to make knowledgeable choices with their retirement funds.

The truly amazing thing about this program is that there is *no* out-of-pocket cost for plan administration, plan consulting, trustee services, employee communication, or plan set up/exit. Investment funds are subject to expense ratios ranging from .48 percent to 1.10 percent of assets, based on the fund(s) selected. The self-managed brokerage account carries its own discount fee schedule which applies only to those individuals who choose this option.

The Alabama State Bar becomes the 19th state bar to endorse the ABA Retirement Program. Of interest is that 47 Alabama lawyers and firms with 53 plans representing some 670 participants are currently enrolled in the ABA program.

Loislaw and VersusLaw

One of the concerns I often hear expressed by small firms and solo practitioners is the need for lower cost options for online legal research. In an effort to meet this need, the Solo and Small Firm Practitioners Committee recommended, and the Board of Bar Commissioners endorsed, two new electronic research providers. These providers will join Lexis-Nexis, our longtime endorsed electronic research provider. Loislaw and VersusLaw will give bar members two new choices for discounted electronic legal research. Loislaw will provide a month-long free trial subscription and a 25 percent discount off its regular rates to those who subscribe. VersusLaw will offer several levels of service for state bar members that will range from \$7.95 to \$29.95 per month.

Information about all three member benefits will be sent to you and posted with information about all the other member benefits and services on the bar's Web site, www.alabar.org, under the "members" category. I hope that you will take time to review these new benefits and decide if they are appropriate for you. ■

Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and 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 for distribution by bar members and local bar associations.

Brochures

<i>To Serve the Public</i> ... Highlights and details of bar public service programs from the TO SERVE THE PUBLIC video presentation.	\$10.00 per 100	Qty ____ \$ ____
<i>Law As A Career</i> ... Information on the opportunities and challenges of a law career today.	\$10.00 per 100	Qty ____ \$ ____
<i>Lawyers and Legal Fees</i> ... A summary of basic legal procedures and common legal questions of the general public.	\$10.00 per 100	Qty ____ \$ ____
<i>Last Will & Testament</i> ... Aspects of estate planning and the importance of having a will.	\$10.00 per 100	Qty ____ \$ ____
<i>Legal Aspects of Divorce</i> ... Offers options and choices involved in divorce.	\$10.00 per 100	Qty ____ \$ ____
<i>Consumer Finance/"Buying On Time"</i> ... Outlines important considerations and provides advice on financial matters.	\$10.00 per 100	Qty ____ \$ ____
<i>Mediation/Resolving Disputes</i> ... An overview of the mediation process in question-and-answer form.	\$10.00 per 100	Qty ____ \$ ____
<i>Arbitration Agreements</i> ... Answers questions about arbitration from the consumer's perspective.	\$10.00 per 100	Qty ____ \$ ____
<i>Advance Health Care Directives</i> ... Complete, easy to understand information about health directives in Alabama.	\$10.00 per 100	Qty ____ \$ ____

ACRYLIC BROCHURE STAND ... Individual stand imprinted with attorney, firm or bar association name for use at brochure distribution points. One stand per brochure is recommended. Name to imprint on stand: _____ Mailing Address: _____	\$ 5.00 EACH	Qty ____ \$ ____
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Susan Andres, Director of Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

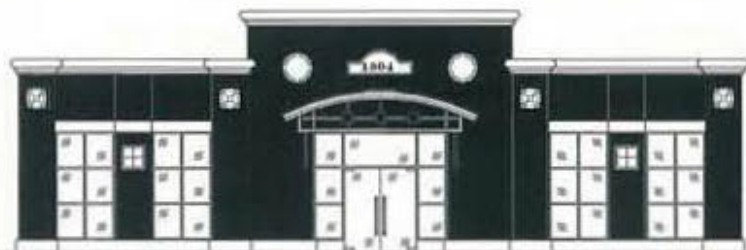


- The Alabama Coastal Foundation (ACF), a non-profit environmental membership organization, has elected **Neil C. Johnston** as the 2003 president of the ACF Board of Directors. Johnston is a member of Hand Arendall, L.L.C. He is listed in the Best Lawyers in America for Environmental Law, and has served as chairman of the Environmental Law Section of the Alabama State Bar. He frequently lectures and writes on topics of permitting, real estate, erosion control, wetlands, conservation easements, endangered species, and forestry.

Johnston has served on the Alabama Coastal Foundation Board since 1999.

Johnston's pet project is the Alabama Coastal Kids Quiz, a conservation scholarship competition for fifth-graders. For more information, contact the ACF office at (251) 990-6002, or go to www.alcoastalfoundation.org. ■

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Pro Bono Award Nominations

The Alabama State Bar Committee on Volunteer Lawyer Programs, (formerly the Committee on Access to Legal Services), is seeking nominations for the Alabama State Bar Pro Bono Award. Nomination forms can be obtained by contacting:

**Linda L. Lund, director
Volunteer Lawyers Program
Alabama State Bar
Post Office Box 671
Montgomery, Alabama 36101
(334) 269-1515**

The Alabama State Bar Pro Bono Award recognizes the outstanding pro bono efforts of attorneys, law firms and law students in the state. The award criteria includes but is not limited to the following: the total number of pro bono hours or complexity of cases handled, impact of the pro bono work and benefit for the poor, particular expertise provided or the particular need satisfied, successful recruitment of other attorneys for pro bono representation, and proven commitment to delivery of quality legal services to the poor and to providing equal access to legal services.

Nominations must be postmarked by May 15, 2003 and include a completed Alabama State Bar Pro Bono Awards Program Nomination Form in order to be considered by the Committee. ■

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.

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Left to Right: Tom Marvin, Gina Matthews, Leon Sanders, Buddy Rawson

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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

James C. Ayers, Jr. announces the opening of his office at 300 Highway 47, South, Columbiana. Phone (205) 670-5575.

John R. Franks, Jr. announces the opening of his office at 2820 Columbiana Road, Suite 210, Birmingham. Phone (205) 313-3966.

Douglas C. Freeman announces the relocation of his office to 5281 Vaughn Road, Montgomery. Phone (334) 264-2000.

Stacy B. Hooper announces the opening of her office at 206 South Pine Street, Suite 207, Florence. Phone (256) 764-4010.

Kimberly Griffin Kervin announces the opening of her firm located at 1300 D East Main Street, Prattville. Phone (334) 358-0085.

Patricia K. Martin announces the relocation of her office to 2090 Columbiana Road, Suite 3200, Birmingham. Phone (205) 823-4552.

Andrew H. McElroy, III announces the relocation of his office to 502 Title Building, Corner of 3rd Avenue and 21st Street, North, Birmingham. Phone (205) 328-2869.

Among Firms

The **Alabama League of Municipalities** announces that **Mary Ellen Wyatt Harrison** has joined their office as a staff attorney.

Alford, Clausen & McDonald, LLC announces that **Benjamin H. Kilborn, Jr.** and **Benjamin C. Heinz** have joined the firm as associates.

Bainbridge, Mims, Rogers & Smith LLP announces that **Sela E. Stroud** has joined the firm as an associate.

Berkowitz, Lefkovits, Isom & Kushner PC announces that **James C. Wilson, Jr.** has become a shareholder of the firm.

Richard G. Brock announces that **American Legal Search LLC** has opened a branch office in New York, NY.

Brunson & Associates PA announces that **Daniel R. Schuler** has been named a partner in the firm.

Burr & Forman announces that **Bruce A. Parsons** has joined the firm as a partner in the Birmingham office.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Joseph V. Musso** and **Ian D. Rosenthal** have become partners of the firm.

Chambless Math PC announces that **Zack M. Azar** has joined the firm as a member, and also the opening of its Birmingham office of **Chambless, Math & Azar**, located at 2107 5th Avenue, North, Suite 200, Birmingham. Phone (205) 251-6565.

Patricia Y. Comer and **William Kent Upshaw** announce the formation of **Comer & Upshaw LLP**. Offices are located at 2107 Second Avenue, North, Birmingham. Phone (205) 250-7670.

Dennis P. Dore, Samuel H. Lanier, R. Daniel Noey and **John F. Fannin** announce the formation of **Dore, Lanier, Noey & Fannin**. Offices are located at 76 South Laura Street, Suite 1701, Jacksonville, Florida. Phone (904) 358-7881.

Emond & Vines and **Gorham & Waldrep** announce the merger of their firms. The new firm is **Emond, Vines, Gorham & Waldrep PC**.

The **City of Fayette** announces that **Merrell Nolen** has been appointed judge of the newly created Municipal Court of Fayette.

Fees & Burgess PC announces that **Jeffrey L. Roth** has become *of counsel* with the firm.

Steven W. Ford, David P. Martin and **James A. Abernathy, II** announce that the firm formerly known as **McElvy & Ford, PC** is now **Ford, Martin & Abernathy, PC** and **Jim Abernathy** has become a shareholder.

Forman, Perry, Watkins, Krutz & Tardy PLLC announces that **Donald C. Partridge** has joined the firm in Jackson, Mississippi.

Friedman, Leak & Bloom PC announces that **Lee T. Patterson** has joined the firm as an associate.

Gaines, Wolter & Kinney PC announces that **Julie D. Pearce** has become a partner in the firm.

Grant, Konvalinka & Harrison PC announces that **Charles G. Fisher** has become director of the firm. Offices are based in Chattanooga, Tennessee.

The firm formerly known as **Harris, Cleckler, Hollis & Shamblin, LLC** is now **Harris, Cleckler & Hollis**.

Haskell, Slaughter, Young & Rediker, LLC announces that **F. Lane Finch, Jr.** and **N. Andrew Rotenstreich** have become members. **Donald L. Rickertsen** will serve as *of counsel*. **Meredith Jowers Lees, Latanishia D. Watters, Paul W. Fowler, Laura Ellen Lewis, Meegan B. Nelson, and Turner C. Seale, Jr.** have become associated with the firm.

Hill, Hill, Carter, Franco, Cole & Black PC announces that **G. Wade Hartley, Jr.** and **Erika Perrone Tatum** have become members. **Jayne L. Harrell** and **David W. Henderson** have joined the firm as associates.

Huie, Fernambucq & Stewart LLP announces that **Thomas E. Bazemore, III** and **R. Gordon Sproule, Jr.** have become partners in the firm and **Gerald C. Brooks, Jr., April M. Willis, Charles J. Fleming, Jr., S. A. Bradley Baker,**

III and **Jason M. Kirschberg** have become associated with the firm.

Ivey & Ragsdale announces that **William R. Adair, Jr.** has become associated with the firm.

Johnston, Barton, Proctor & Powell LLP announces that **E. Alston Ray, J. Patrick Logan** and **James F. Henry** have become partners in the firm. **Meredith L. McCollum, Thomas A. McKnight, Jr.** and **Keri Brooke Adams** have become associates.

Cain J. Kennedy, Raymond L. Bell, Jr. and **John W. Adams, Jr.** announce the formation of **Kennedy, Bell & Adams PC** with offices at 117 East Clark Avenue, Prichard. Phone (251) 452-1321.

Leitman, Siegal & Payne PC announces that **Hubert G. Taylor** has become associated with the firm.

Lightfoot, Franklin & White LLC announces that **J. Bradley Powell** and **William H. Morrow** have become members of the firm.

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G15	\$135	\$135	\$168	\$290	\$443	\$650	\$1,035
G20	\$168	\$170	\$225	\$373	\$575	\$863	\$1,418

West Coast Life Insurance Company \$500,000 Level Term Coverage Male, Super Preferred Annual Premium							
AGE:	30	35	40	45	50	55	60
G10	\$185	\$185	\$230	\$375	\$535	\$930	\$1,495
G15	\$220	\$220	\$285	\$530	\$835	\$1,250	\$2,020
G20	\$285	\$290	\$400	\$695	\$1,100	\$1,675	\$2,785

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A1001(1-03)

London & Yancey LLC announces that Joseph L. Cowan, II and J. Michael Keel have become members of the firm.

Lord, Bissell & Brook announces that Brannon D. Anthony has joined the firm and will be practicing in the firm's Atlanta office.

Elizabeth Golson McGlaughn and James W. McGlaughn announce the formation of McGlaughn & McGlaughn LLC. Offices are located at 804 Walnut Street, Gadsden. Phone (256) 547-1009.

The Dothan firm of Morris, Cary & Andrews LLC announces that Dan Talmadge has joined as a partner. The firm will now operate under the name of Morris, Cary, Andrews & Talmadge LLC.

Nathan & Associates announces a name change to Nathan & Nathan PC.

Janecky Newell PC announces that T. Scott McNally has joined the firm and will be practicing in the Mobile office.

Nix, Holtsford, Gilliland, Higgins & Hitson PC announces that Jay S. Tuley has become a shareholder.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that J. Trent Scofield has become a shareholder, and

Gordon L. Blair and Jerry D. Redmond, Jr. have joined the firm as associates.

Winston V. Legge, Jr. and P. Michael Cole, formerly of Patton, Latham, Legge & Cole, announce the continuation of their practice as Patton, Legge & Cole LLP, with offices located in Athens.

Jason Peevy announces that he is the managing director of the Birmingham office of APEX Legal Support, LLC.

Rogers, Young, Wollstein, Jackson & Whittington LLC announces the election of partner Mike Rogers to the U.S. Congress for Alabama's Third District. The firm continues operation as Young, Wollstein, Jackson, Whittington, Robinson & Russell LLC.

Rushton, Stakely, Johnston & Garrett PA announces that L. Peyton Chapman, III has become a shareholder and R. Mac Freeman, Jr. has joined the firm as an associate.

Shunnarah Injury Lawyers PC announces that Darold A. Mathews has become of counsel for the firm.

Slaten & O'Conner PC announces that Algert S. Agricola, Jr., Mindi C. Robinson, John S. Plummer and M. Andrew Donaldson have become partners with the firm. G. R. Trawick and

Jeff Smith have become of counsel.

Stephens, Millirons, Harrison & Gammons PC announces that Patrick G. Nelson has become a member of the firm.

Stockham & Stockham PC announces that Hunter C. Carroll has become a shareholder in the firm.

The United States Attorney's Office, Northern District of Alabama, announces that John Bradley Felton has joined the office as Assistant U. S. Attorney in the Birmingham office.

Wallace, Jordan, Ratliff & Brandt LLC announces that Phillip D. Corley and Michael J. Velezis have become members of the firm and Heather M. Harvill, Matthew D. Fridy and Laura M. Jackman have become associates of the firm.

Dennis R. Weaver and David Madison Tidmore announce the formation of Weaver Tidmore LLC with offices located at 200 Cahaba Park Circle, Suite 214, Birmingham. Phone (205) 980-6065. Page Stanley Ellis has joined the firm as an associate.

Wilmer & Lee PA announces that D. Ashley Jones and Richard J.R. Raleigh, Jr. have become shareholders in the firm and Nicole L. Stephens has become associated with the firm. ■

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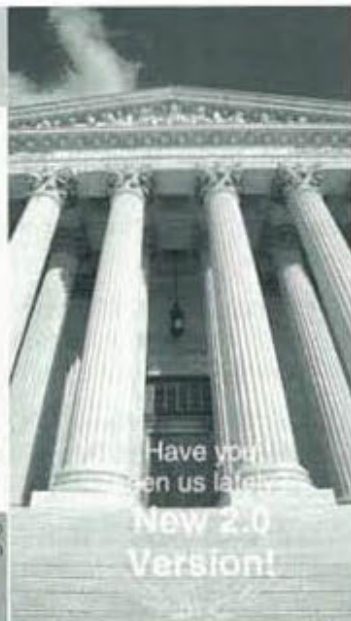
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Legal Services Corporation - Dothan, Alabama



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Sam Perry Given

Sam Perry Given, a lifelong resident of Birmingham, died October 11, 2002, after a long and distinguished career in law and public service. He was a graduate of Ramsey High School, attended the Citadel in Charleston, South Carolina, and graduated from the University of Alabama School of Law. He served as an officer with the 167th Regiment, 26th Infantry Division, United States Army in World War II and later as a lieutenant colonel with the 31st Infantry Division of the Alabama National Guard where he was awarded the Distinguished Service Medal.

Perry was a member of the American Bar Association, the Alabama State Bar and the Birmingham Bar Association, the Farrah Law Society, where he served as a trustee, and Phi Delta Phi legal fraternity. He practiced law as a partner with the firm of Dixon, Dunn, McDowell & Given. He later joined Stockham Valves and Fittings, where he was associated with the company as general counsel, and retired as vice-chairman of the board of directors in 1989.

Perry's service to the Birmingham community was indeed impressive, having been a member of the Associated Industries of Alabama, the Birmingham Business Council, the Monday Morning Quarterback Club and Kiwanis Club of Birmingham, and a past president of the Shades Valley Kiwanis Club. He was a founder of the Alabama Health Council and served on the Board of Directors of the Birmingham YMCA, American Red Cross, and Highlands Day School Foundation and as president of the Board of Trustees,

St. Martin's in the Pines Episcopal Foundation. Perry was a director of Wilkerson Insurance Company and Guaranty Savings and Loan Association.

Perry was a longtime member of St. Luke's Episcopal Church, where he served on the vestry. He was also affiliated with social and heritage organizations as past president of the Redstone Club and Phi Delta Theta fraternity, and had membership in the Country Club of Birmingham, Mountain Brook Club and the Society of Colonial Wars in the State of Alabama.

Perry is survived by his wife, Ellen Wilkerson Given; sons Sam Perry Given, Jr. and Robert Sommerville Wilkerson Given; six grandchildren; brother William Morris Given and sister Juliet Given Calvin.

Perry was known for his integrity, commitment to his profession and community, and unwavering loyalty to family and friends. He will certainly be missed by his many associates and friends at the bar. The executive committee of the Birmingham Bar Association celebrates Perry's life for his contributions to the city, state and nation and to our beloved profession, and his family is assured of the affection, admiration and esteem in which he was held by the members of this association.



—Bruce F. Rogers, *president*
Birmingham Bar Association



Judge William Clinton Sullivan

Talladega County's legal community marked the end of an era with the death of former Circuit Judge William C. Sullivan, 76, of Lincoln. Judge Sullivan passed away on January 30, 2003.

Although best known for serving as Talladega County circuit judge from 1958 to 1995, Sullivan had a lengthy list of accomplishments during his lifetime. In 1952, at the age of 25, he was elected mayor of Lincoln. He was elected to a second term in 1956 before being appointed to the bench.

A native of Birmingham, Sullivan spent the majority of his life in Lincoln. After graduating from Lincoln High School, he spent two years in the United States Navy, from 1944 to 1946. He graduated from the University of Alabama School of Law in 1949, and opened a practice in Leeds before returning to Talladega County in 1952.

He was a member of Lincoln United Methodist Church, where he once served as chairman of the official board for five consecutive years. He also served on the board of directors for National Bank of Talladega from 1971 to his death.

While on the bench, Sullivan graduated from the National College of State Trial Lawyers in Reno in 1967, and was president of the Alabama Circuit Judges' Association from 1974 to 1975.

He was appointed to the Alabama Pattern Jury and Instruction Committee in 1967, and was the last of the six original members still serving. He was appointed chairman of the committee in 1975, and held that position until he died.

From 1975 to his retirement from the bench, he served as a member of the Alabama Court Judiciary, and served on the state court of criminal appeals and supreme court on special assignment on various occasions.

Following his retirement, he renewed his license to practice law and served in of counsel capacity with the firm of Love, Love & Love, P.C. in Talladega.

Sullivan is survived by his wife, Virginia C. Sullivan of Lincoln; his brother-in-law, Robert Parker of Anniston; a niece, Fran P. Quarles of Birmingham; two great-nephews, George Tankersly and Parker Tankersly, both of Birmingham; and numerous cousins.

—*The Daily Home*

Bradley, Dwight William

Phenix City

Admitted: 1960

Died: December 19, 2002

Palughi, Delano Joseph

Mobile

Admitted: 1959

Died: February 22, 2003



Roden, Emmett Norman

Florence

Admitted: 1950

Died: June 10, 2002

Sullivan, William Clinton

Talladega

Admitted: 1949

Died: January 30, 2003



By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

Alabama Law Institute Bills

Pending in the legislature are three revisions completed by the Alabama Law Institute:

(1) Interstate Enforcement of Domestic Violence Orders (SB. 6 sponsored by **Senator Rodger Smitherman**) (HB. 42 sponsored by **Representative Joe Carothers**);

(2) Uniform Anatomical Gift Act (SB. 99 sponsored by **Senator Ted Little** and 30 co-sponsors) (HB. 28 sponsored by **Representative Demetrius Newton**);

(3) Uniform Residential Landlord/Tenant Act (SB. 118 sponsored by **senators Bedford, Smitherman, Dial, Ross, Penn, Benton, Ted Little, Butler, Mitchem, and Lee**) (HB. 200 sponsored by **representatives Laura Hall, McLaughlin, Buskey and Craig Ford**), see March 2003 *Alabama Lawyer*.

Copies of these bills can be obtained from the Law Institute Web site, www.ali.state.al.us.

The Law Institute has also been working for the last several years on drafting a Trust Code for the State of Alabama. It has just been introduced in the session for familiarization. A copy can be obtained from the Law Institute's Web site.

Election Reform

In 2002, Congress passed the "Help America Vote Act" which requires states to revise their election laws. The 2000 Presidential election, plus other problems brought to light by the Alabama 2002 election, have brought about several election reform bills. Bills likely to receive attention in the legislature are: (1) Conforming Amendments required by the "Help America Vote Act," (2) Automatic Recount, (3) Standardized Polling Hours, (4) Appointment of Alternative Poll Workers, (5) Restoration of Rights of Convicted Felons, (6) Voter Identification Required, and (7) Presidential Preference Primary Election Dates. The Law Institute has been asked to revise Alabama's election law during the next year.

Constitutional Reform

Governor Riley's commission on the constitution of Alabama has five topic subcommittees that have made recommendations. These five areas are: (1) limited home rule, (2) earmarking of taxes, (3) governor line item veto, (4) requirements of super majority vote of the legislature to pass additional taxes, and (5) recompilation of the current constitution with its 740 amendments. The Law Institute recompiled Alabama's constitution with its amendments in 2002. A copy can be obtained from the Institute's home page.

Funding Shortage

Governor Riley's initial budget reduced each state agency in the state's General Fund by approximately 18.85 percent and each education recipient in the Special Education Trust Fund by 6.34 percent.

Pay Day Loans

There is a concerted effort to regulate deferred presentment checks. Currently, these pay day loans charge up to a 550 percent A.P.R. and pawn for title loans up to a 300 percent A.P.R. (House Bill 178).

Clean Air Act

Alabama is the only state that does not have a clean air act for buildings. One of the first bills passed by the senate and sent to the house of representatives was the Clean Air Act (Senate Bill 126).

Uniform Trust Code

Alabama, like most states, has statutory trust provisions but relies greatly on the common law to complete its trust law. Much of the trust law in *Alabama Code* Title 19 dates back to acts passed over 60 years ago. The Alabama Law Institute did revise Alabama's Principal and Income law, and the legislature enacted the revision effective January 1, 2001. See *Ala. Code* § 19-3A-101 *et seq.*

In 2000, the Uniform Law Commissioners promulgated the first truly national codification of the law of

trust with the *Uniform Trust Code*. It draws from common law sources, including the Restatements. The existing statutory law is also a source. The objective is to provide a codification of existing law with needed reforms to meet modern needs. The *Uniform Code* provides fundamental rules that apply to all voluntary trusts. This *Trust Code* contains a set of basic default rules that fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part because terms of the trust instrument will govern even if inconsistent with the statutory rules.

Alabama first began work on Chapter 9, the Uniform Prudent Investor chapter of the *Code*, in March 2000. After completing this section, the committee, chaired by Birmingham attorney **Ralph Yeilding**, began a review of the Uniform Trust Law in April 2002. The committee has met approximately every two months over the past three years.

The *Trust Code* is divided into 11 articles:

Article 1—General Provisions and Definitions

Article 2—Judicial Proceedings. Deals with jurisdiction over a trust in any state. The place of the administration of the trust is the place with jurisdiction over the trustee and beneficiaries of the trust. The trust is not supervised by court unless there is a proceeding by an interested person that invokes the court.

Article 3—Representation. This article deals with the issues of who may represent whom in transactions or proceedings relating to a trust. It answers the question of who may be the agent of whom. It provides a clear rule that the trustee represents the beneficiaries of the trust. Some of it is common sense as a conservator represents the ward.

Article 4—Creation, Validity, Modification and Termination of a Trust. A trust is created when property is transferred to a trustee with the intent to create a trust relationship. There must be a definite beneficiary or the trust must be a charitable trust, or a trust for animals. It is not necessary to have a trust instrument to create a trust. Oral trusts are allowed but the standard of proof is the higher "clear and convincing evidence" standard. There are clear default rules that apply upon consent of the parties to the trust or that govern a court in modifying or terminating a trust. A court may apply the doctrine of *cy-pres* to charitable trusts when the charitable purpose is no longer obtainable.

Article 5—Creditors' Claim, Spendthrift and Discretionary Trusts. A spendthrift provision in a trust restricts a beneficiary's creditor from attaching the beneficiary's interest in the trust until it has been distributed to the beneficiary. A spendthrift provision is created simply by general reference to "the spendthrift trust" in the trust instrument. A creditor may not compel a trustee to make a distribution to a beneficiary that is discretionary. However, a beneficiary who owes child support, spousal support or a creditor for services provided to protect the beneficiary's interest in the trust can't rely on the spendthrift provision to avoid attachment of that interest.

Article 6—Revocable Trust. A revocable trust is one in which the settler retains the power to control, amend or revoke the trust. Property held in the trust reverts to the settler if it is revoked. These are used primarily as a will substitute to avoid probate. A trust is revocable unless the trust instruments expressly provides that it is irrevocable. When the settler becomes incapacitated or dies, the beneficiaries control their rights under the trust and the trust is no longer a revocable trust.

Article 7—Office of Trustee. This article deals with the acceptance of the trust by the trustee, bonds for the trustee and decision-making by co-trustees. This includes rules governing compensation of trustees. It also provides grounds for a trustee to be removed as breach of trust, lack of cooperation among trustees, etc. A trustee may also be removed upon request of all qualified beneficiaries showing it is in their best interest and is not inconsistent with trust purposes. The trustee is entitled to a reasonable compensation which the court may review and change.

Article 8—Duties and Powers of Trustee. These are the basic fiduciary obligations of a trustee. These obligations include the duty to carry out the trust and that of loyalty which requires the trustee to manage the trust solely for the beneficiaries and avoid conflicts of interest between the trustee's interest and the beneficiary's interest. They also include impartiality, the obligation of prudent administration to incur only reasonable cost and apply the trustee's special skills when there is a reliance on these skills. A trustee may delegate certain duties and powers but is held to a prudent standard of appointment when doing so. This act also contains an updated list of specific powers of the trustee.

Article 9—Prudent Investor Rule. This article imposes the obligation of prudence in the conduct of investments. It resembles in this respect the "reasonable person" rule of tort law.

Article 10—Liability of Trustees and Rights of Persons Dealing With Trustees. This article provides for remedies when there is a breach of an obligation by the trustee and under what circumstances there is a right of action by anybody. It also includes the trustee's immunity from personal liability when doing business with others on behalf of the trust. A trust instrument may not waive or vary any obligation of good faith or have an exculpatory clause for reckless indifference of the trustee.

Article 11—Miscellaneous Provisions.

Other members of the committee are: **LaVeeda Battle, Douglas Bell, Anna Funderburk Buckner, Sydney Cook, III, Robert Gardner, Lyman Holland, Jr., Ted Jackson, Professor Tom Jones, Cynthia Lamar-Hart, Robert Loftin, Bruce McKee, J. Reese Murray, III, Bruce Rawls, and Leonard Wertheimer, III.**

Due to the length of this article, the discussion of the proposed new Alabama Securities Act will be in a later article.

To find out more about the legislature and its members, go to www.alisdb.legislature.state.al.us/acas/ACASLogin.asp. To find out more about the Alabama senate, check out www.legislature.state.al.us/senate.html. The house of representatives' Web site is www.legislature.state.al.us/house/house.html.

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

Robert L. McCurley, Jr.

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

The Two Most Common Fatal Defects in Petitions for Writs of Certiorari

BY DOUGLAS INGE JOHNSTONE, ASSOCIATE JUSTICE, SUPREME COURT OF ALABAMA

SUPRE

This article does not undertake to address any tension between, on the one hand, the practice of the Alabama Supreme Court of requiring strict compliance with Rule 39 and Rule 40, Ala.R.App.P., and, on the other hand, the mandate of Rule 1, Ala.R.App.P., that these rules "shall be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits." Rule 39 and Rule 40 are intended to produce certiorari petitions that supply the supreme court with all the information it needs to analyze a claim of error assuming the petitioner's representations about the record are true, and to produce, at the same time, petitions that reveal the probability or lack of probability of merit of a claim of error so concisely and recognizably that the supreme court can keep pace with the staggering number of petitions that are filed.

Caveats

I am but one of nine justices on the Alabama Supreme Court. The discussion in this article is my interpretation of Rule 39 and Rule 40 as informed by the text of those rules and by my personal observation of the other justices' interpretations of those rules in actual application to the thousands of certiorari petitions the supreme court has decided since I have been a member. There are individualized nuances among the justices' respective interpretations and there may be some evolution in the interpretations.

The emphasis of this article on the "two most common fatal defects" in certiorari petitions does not suggest that other requirements of Rule 39 or Rule 40 are not just as critical or that other noncompliance is not just as fatal or more fatal. To avoid exacerbating any mis-impression that this article has warned the bar of all of the fatal pitfalls in Rule 39 and Rule 40, this article will not mention any of the others. In other words, the maxim *expressio unius est exclusio alterius* does not apply to this article in its selection and discussion of these two common fatal defects.

Introduction

The success of a petition to the Alabama Supreme Court for a writ of certiorari to one of the courts of appeals usually depends on absolute, not substantial, compliance with Rule 39 and Rule 40. The first of the two most common fatal defects in certiorari petitions is the failure to invoke certiorari jurisdiction in strict compliance with Rule 39(a)(1)(A)-(E) and (2)(A) (*bases* for certiorari jurisdiction) and Rule 39(d)(3) (*form* for invoking certiorari jurisdiction). The second of the two most common fatal defects is the failure to supply the supreme court with procedural and substantive facts in strict compliance with Rule 39(d)(5) (requirement and form for additional facts), which, in most criminal cases and many civil cases, presupposes prior compliance with Rule 39(c)(1) and Rule 40(d) (application for rehearing as prerequisite to certiorari review in most criminal cases but not in civil cases). This article will discuss these two common fatal defects in sequence.



Failure to Invoke Certiorari Jurisdiction

The function of certiorari review by the supreme court is not directly to police the trial courts but to police the courts of appeal (except that, in death penalty cases, the supreme court may redress any “plain error” (as defined by rule and case law) committed by either the trial court or the court of criminal appeals, Rule 39(a)(2)(A) and (D)). Therefore, a certiorari petition must identify the critical error or errors committed by the court of appeals in its holdings, explicit or implicit, on the rulings by the trial court; and *the petition must couch each such error in terms of one or more of the six bases for certiorari jurisdiction specified in Rule 39(a)(1)(A)-(E) (five bases available in any type of case) and Rule 39(a)(2)(A) (one extra basis available only in death penalty cases). The petition may aver that:*

1. The decision by the court of appeals erroneously “initially hold[s] valid or [alternatively] invalid a city ordinance, a state statute, or a federal statute or treaty, or initially construe[s] a controlling provision of the Alabama Constitution or the United States Constitution,” Rule 39(a)(1)(A); or
2. The error by the court of appeals “affect[s] a class of constitutional, state, or county officers,” Rule 39(a)(1)(B); or
3. The error by the court of appeals requires a “decision ... [on] a material question ... of first impression in Alabama,” Rule 39(a)(1)(C); or
4. The holding by the court of appeals “conflict[s] with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of Criminal Appeals, or the Alabama Court of Civil Appeals,” Rule 39(a)(1)(D); or
5. The erroneous holding by the court of appeals results from its following a controlling Alabama Supreme Court

case that should be overruled, Rule 39(a)(1)(E); or

6. The trial court or the Court of Criminal Appeals has committed a “plain error” that “has or probably has adversely affected the substantial rights of the petitioner,” who has been sentenced to death, Rule 39(a)(2)(A) and (D).

The petition must cite apt authority and provide factual and legal explanation for every claim that a court of appeals has committed an error and must explain the applicability of each basis for certiorari jurisdiction under Rule 39(a) invoked to obtain redress of that error.

The Rule 39(a)(1)(D) conflict-with-binding-precedent basis for certiorari jurisdiction does *not* include conflicts with court rules, statutes or even provisions of the Alabama Constitution or the United States Constitution! If a holding by a court of appeals conflicts with one of these sources of law, any error in the holding must be couched in terms of one or more of the *other* bases of certiorari jurisdiction *or* in terms of conflict with a binding precedent by one of the appellate courts specified by Rule 39(a)(1)(D) either:

1. Construing the rule, statute, or constitution in a way favorable to the petitioner; or
2. Stating a rule of construction of rules, statutes, or constitutions which would require a ruling favorable to the petitioner pursuant to the rule, statute, or constitution (for example, the plain-meaning rule might require an application of a statute favorable to the petitioner); or
3. Requiring the courts to obey rules, statutes, or constitutions or forbidding courts to usurp the prerogatives of the legislature.

In short, to couch an error by a court of appeals in terms of the Rule 39(a)(1)(D) conflict-with-binding-precedent basis for certiorari jurisdiction, the petitioner must allege and demonstrate that the holding of the court of appeals conflicts with *binding case law* precedent. The conflict must be demonstrated as specified in Rule 39(a)(1)(D)1. or 2. and in Rule 39(d)(3)(A) or (B) to like effect.

If a court of appeals does not issue a published opinion or an unpublished memorandum which expressly states a

holding adverse to the petitioner, but if the court of appeals could not have entered its judgment without tacitly or implicitly holding against the petitioner erroneously on some critical issue, then, to couch the erroneous tacit or implicit holding in terms of a Rule 39(a) basis for certiorari jurisdiction, the petitioner must first explain, by reference to procedural and substantive facts properly included in the petition pursuant to Rule 39(d)(5), why and how the decision by the court of appeals tacitly or implicitly contains the erroneous holding. Rule 39(a)(1)(D)2. Such an explanation can be accomplished by identifying and explaining the critical issues presented to and decided by the trial court *and argued to the court of appeals*.

Every holding by a court of appeals that the supreme court would need to hold erroneous in order to reverse the judgment of the court of appeals must be couched in terms of one or more of the Rule 39(a) bases for certiorari jurisdiction. For instance, if a court of appeals were to hold, first, that the petitioner’s objection to evidence was insufficient to preserve error, second, that the evidence was admissible anyway, and third, that, even if the objection *was* sufficient and the evidence *was* inadmissible, nevertheless, the error in admitting the evidence was harmless, then every one of these three holdings would need to be couched in terms of at least one of the six bases for certiorari jurisdiction in order for the supreme court to grant the petition and to review the claims of error; for, unless *all three* of the holdings were erroneous, the decision of the court of appeals would have to be affirmed.

Failure to Supply Procedural and Substantive Facts

The supreme court does not already have the record or the briefs filed in a court of appeals when the supreme court receives a petition for a writ of certiorari. The entire function of the petition is to persuade the supreme court to *get* the record and to review it. Without procedural and substantive facts supplied either by a published opinion or an unpublished memorandum decision by a court of appeals or additional facts properly supplied by a certiorari petition, the supreme court, when it receives the petition, has no information whatsoever about the merits of the case, the motions

or objections by the parties, or the rulings by the trial court. Without that information from some source, the supreme court cannot know whether the court of appeals has erred. Whatever the issue, the supreme court needs the facts which create the issue. If the issue is or may be preservation of error, the supreme court needs the procedural facts of such preservation or non-preservation. C the substance and timing of the objection or motion, the arguments presented or critically omitted, and the ruling by the trial court.

To rely on facts not included in either a published opinion or an unpublished memorandum decision by a court of appeals, the petition itself must include those facts in strict compliance with Rule 39(d)(5), Rule 39(c)(1), and Rule 40(d) and (e). The supreme court will not consider any facts not contained in one of these three exclusive sources: a published opinion by the court of appeals in the petitioner's case, an unpublished memorandum decision by the court of appeals in the petitioner's case, or the petitioner's own statement of facts included within the petition itself in strict compliance with Rule 39(d)(5), Rule 39(c)(1), and Rule 40(d) and (e). Rule 39(d)(5) expressly says so.

The petitioner's statement of facts, to avail the petitioner, must fulfill three cardinal requirements. First, each fact stated

must be supported by a reference to the pertinent portion of the clerk's record or the reporter's transcript. Rule 39(d)(5)(A), (B), and (C). Second, the statement of facts must be included within the petition itself. "The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's own brief in support of the petition." Rule 39(d)(5). Third, if the petitioner has, by requirement or by choice, (see Rule 39(c)(1) and Rule 40(d), applied for a rehearing before a court of appeals, the statement of facts must consist of, and only of, a verbatim reiteration of the facts, or additional or corrected facts, "presented to the court of appeals in the application for rehearing" together with "a verification that this statement of facts is a verbatim *copy* of the statement presented to the court of appeals in the application for rehearing." Rule 39(d)(5)(A) and (B) (emphasis added). The word "*copy*" does *not* connote any sort of exhibit or annex to the certiorari petition. Rather, the word "*copy*" connotes the process of copying, word for word, the contents of the statement in the application for rehearing from that document and into the petition itself. See Rule 39(d)(5)(A).

Conclusion

The likelihood is remote that a lawyer will file a successful certiorari petition

without understanding every word of Rule 39 and Rule 40 and the interaction between and among the many requirements. The likelihood of success is nearly as remote if the lawyer has not acquired or does not acquire this comprehensive understanding before the appellate process has even begun in the case. While the supreme court makes some exceptions for non-compliant petitions in extraordinary cases, the exceptions are too rare and too unpredictable for any petitioner to risk failing to comply absolutely with Rule 39 and Rule 40. ■



Justice Douglas Inge Johnstone

Justice Douglas Inge Johnstone is a graduate of Rice University and received his law degree from Tulane University. He served in the United States Army Combat Engineer Corps, attaining the rank of captain. Justice Johnstone was a member of the Alabama House of Representatives from 1974 to 1978 and was named Outstanding Freshman Representative by the Capitol Press Corps in 1975. From 1984 to 1985, he served as a district judge, and then from 1985 to 1999, he was a circuit judge. Justice Johnstone was elected to the Alabama Supreme Court in 1998.

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Civil Law Notaries: Something New In Alabama

BY BOYD F. CAMPBELL AND RONALD G. NEIWIRTH

In 1999, Alabama's first civil law notarial statute became law. Since then the law has been extensively revised, and Alabama is believed to have the model code for other states, except Florida, which do not have civil law notarial statutes. (See *Alabama Code*, § 36-20-50, *et seq.*) The new statutes became effective on September 26, 2001.

The legislative intent was to create the position of civil law notary in Alabama and to give the power of appointment to the Secretary of State to appoint experienced attorneys to serve in that capacity. Such office-holders in other countries are known as *notario publico*, "Latin notary," or *notar* in many developed and developing nations.

A civil law notary—rather than simply serving as a witness to the signing of documents or verifying the identity of the signatory, as a notary public would do—has the power to issue "authentic acts." An authentic act is, effectively, a legal opinion regarding the facts set forth in and surrounding the document—not merely the signatures. Yet the authentic act is accorded a presumption of correctness and is entitled to the same deference and validity as an order issued by a state agency or a state judge.

For example, a will executed as an authentic act serves as confirmation by the civil law notary that (a) the terms of the will are legal and will be given full force and effect by the state; (b) it was executed properly; (c) the testator fully understood exactly what he was signing; and (d) the testator had the requisite testamentary capacity.

Similarly, an agreement between two corporations, such as a merger and acquisition, or a commercial transaction, which is executed as an authentic act, not only will (a) establish the agreement between the parties, but also establish that (b) the agreement is lawful and legally binding; (c) each corporation is in good standing, whether domiciled in Alabama, another state, or abroad; (d) the corporate officers executing the agreement have the legal capacity to enter into the agreement; and (e) the parties have the financial means to pursue and accomplish the terms of the agreement.

The civil law notary's findings with respect to these issues and any other facts that may be included in the authentic act are entitled to a presumption of correctness, similar to the factual findings of a state judge in issuing an opinion or order. The evidentiary effect of such a statutory presumption is to shift the burden of proof in any litigation concerning the substance of the authentic act. One who chooses to dispute the facts certified by the civil law notary in an authentic act must produce clear and convincing evidence to rebut the existence of facts presumed to be accurate under the statute.

Civil law notaries may not authenticate matters in controversy. They may, however, certify facts not in controversy or be called upon to issue findings of fact with regard to particular matters in controversy.

Civil law notaries in other nations enjoy a well-earned reputation for objectivity, neutrality, legal experience and skill. In Spain, for example, one who wishes to challenge the factual certification by a civil law notary must file a separate declaratory action in court to have it set aside.

Civil law notaries, unlike notaries public, are appointed for life, subject to good behavior. §36-20-52. They represent the transaction, not the parties, and all applicants for appointment to the office of civil law notary in Alabama must be practicing attorneys with not less than five years of experience. Applicants for appointment as civil law notaries are required to receive special training, are regulated by both the Secretary of State and the Alabama State Bar, and are subject to discipline, sanctions or expulsion from the roll of civil law notaries for improper behavior.

With respect to a commercial transaction, which the civil law notary certifies as an authentic act, the civil law notary is legally liable for the value of the entire transaction if it is determined that his factual findings are wrong or inaccurate.

Civil law notaries, while new and unique in Alabama and Florida (see Alabama Secretary of State Reg. 820-6-1-.01, *et seq.*; Fla. Admin. Code 1C-18-

001, *et seq.*), represent an international and historical tradition of non-adversarial representation, combined with a recording function in Latin countries, as well as many non-Latin countries.¹ The civil law notary owes a duty to the transaction, rather than to a party. He or she provides services to "interested parties" rather than to "clients." As a result of this distinctive mode of legal representation, the Latin notary is a model of impartial, multi-party counseling. In the United States, in contrast, the notary public developed into a purely clerical function, which it remains today.

This non-adversarial, impartial mode of representation traces its history to ancient Rome.² Roman *tabelliones* were private individuals who wrote and kept wills and other documents. With the decline of the Roman Empire came the decline of the Roman *tabelliones*. During the 10th through 12th centuries, medieval notaries gradually returned to the Roman model of the *tabellio*. Eventually, the Germanic groups developed a semblance of the modern-day notary. He kept the authentication function, but not as a public official—as a private legal professional.

The development of the modern notariat began in earnest in 1228 in Bologna, Italy, with the opening of the Scuola de Notariato. The most influential notary of the period was Rolandino, who published his *Suma Artis Notariae*, in 1234. Italy, France and Spain have had notarial laws since the 13th century.

The contemporary Latin notary is defined by the International Union of the Latin Notariat (the "UINL") as "a legal professional specifically designated to attest the acts and contracts that persons celebrate or perform, to draft the documents which formalize the latter, and to give legal advice to those who require the services of his office."

An Alabama civil law notary, like his historical forebears in other countries, maintains each and every authentic act he has ever issued, including the exhibits appended to it, in his "protocol." The civil law notary's protocol must be maintained in a fireproof location. It must contain an original or certified photocopy of each of his authentic acts in date sequence, along with originals or certified photocopies of any supporting or related documents. The protocol must contain or be accompanied by an index

to its contents in date order. Each entry is required to identify the party or parties who paid a fee to the notary, and the amount of the fee.

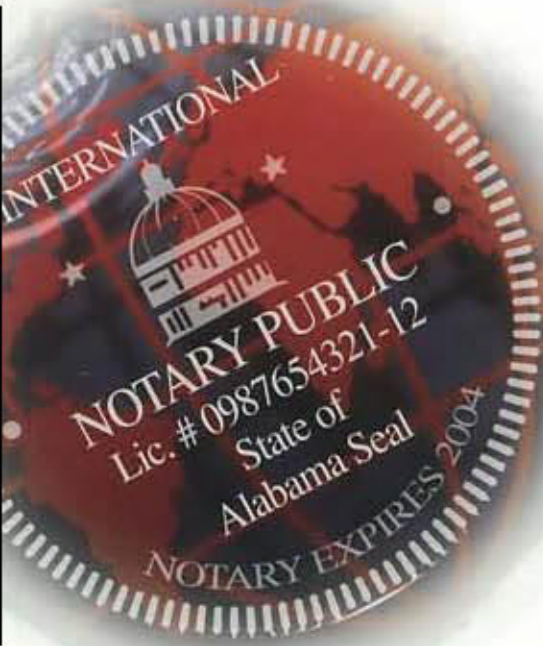
A civil law notary's protocol must be available for inspection by the Secretary of State during regular business hours, and certified copies of any documents contained therein must be furnished to the Secretary of State upon request. The contents of the protocol are otherwise considered confidential and will be made available only to parties who have a legal interest in a particular transaction.

State regulations also make provision for the transfer of the protocol of an Alabama civil law notary to the custody of another civil law notary in the event of such notary's suspension or cessation of practice as a civil law notary. Every Alabama lawyer appointed a civil law notary in this state must file an annual report of his activities and provide the Secretary of State with the name and address of another civil law notary designed to assume his protocol in the event of suspension of or cessation of practice.

While the civil law notary (or "Latin notary") is used in many countries as the only authorized entity to conduct real estate transactions and record them, this is inapplicable to the United States because of the existence of government-run recording systems and private title insurance.

The immediate need for civil law notaries is seen in cross-border and international legal transactions for everything from domestic relations to all manner of commercial transactions. In the 70 other members of the UINL, the drafting and execution of contracts, corporate resolutions, releases, powers of attorney, commercial transactions, and a host of other business documentation as authentic acts provide counsel for the foreign party to the transaction with an increased level of comfort in that they will be receiving documentation from the other side of the transaction in the United States from an official in whom they can have great confidence, and in forms that they readily recognize, appreciate and utilize within the format of their own legal systems.

Similarly, various aspects of family law will be simplified. Where pre- and post-nuptial agreements, marital property settlements, proof of paternity, marriage, and adoption, and like matters are



memorialized in authentic acts, they should be readily recognized in UINL member nations and given full faith and credit by their legal systems.

The concept of the civil law notary represents nothing less than a major philosophical shift in our common-law adversarial way of doing business in the United States. In UINL member countries, the civil law notary has been, for centuries, an efficient, neutral "counsel to the transaction," rather than counsel to one party as against another. The adoption of this system, with some revisions and recognition of previous methods of handling legal transactions, in Alabama and Florida not only will promote better cross-cultural understanding and efficiency on the international business level, but may also serve as a new paradigm for neutral and less costly business and contract counseling in Alabama.

The UINL maintains a high level of interest in the efforts of Alabama, Florida and a few other states, to create a Civil Law Notariat in this country. The National Association of Civil Law Notaries ("NACLN") was formed as an

umbrella organization for the Civil Law Notariat in this country. As such, NACLN has been admitted to the UINL as an observer—the first step toward full membership—and expects to be accorded full membership within a matter of only a few years.

UINL officers from a variety of UINL member nations have attended civil law notarial training in Florida and have shown a keen interest in developing an American tradition of the Civil Law Notariat in the United States.¹

While civil law notaries were established in the late 1990s to meet the increasing demands of foreign parties to domestic and international business transactions, we may look forward to expansion of this concept in state domestic practice as well.

Endnotes

1. Members of the International Union of Latin Notariats (or "UINL") include: Alabama, Argentina, Austria, Belgium, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, Canada, Central Africa, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, Estonia, Florida, France, Gabon, Germany, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Indonesia, Italy,

Ivory Coast, Japan, Letoria, Lithuania, Luxembourg, Mali, Malta, Mexico, Monaco, Morocco, Nicaragua, Nigeria, Panama, Paraguay, Peru, Poland, Romania, Russia, San Martin, Senegal, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Turkey, Uruguay, the Vatican, and Venezuela.

2. Malavet, Pedro A., "Counsel for the Situation: The Latin Notary, a Historical and Comparative Model," 19 *Hastings Int'l. And Comp. L. Rev.*, #3, pp. 369, 392 (1996).
3. Cf. Massa, Maria Evelina, "Comparison of the System of Rules of Societies in the Countries Members of the UINL," (UINL, Buenos Aires, Argentina, 2001—)



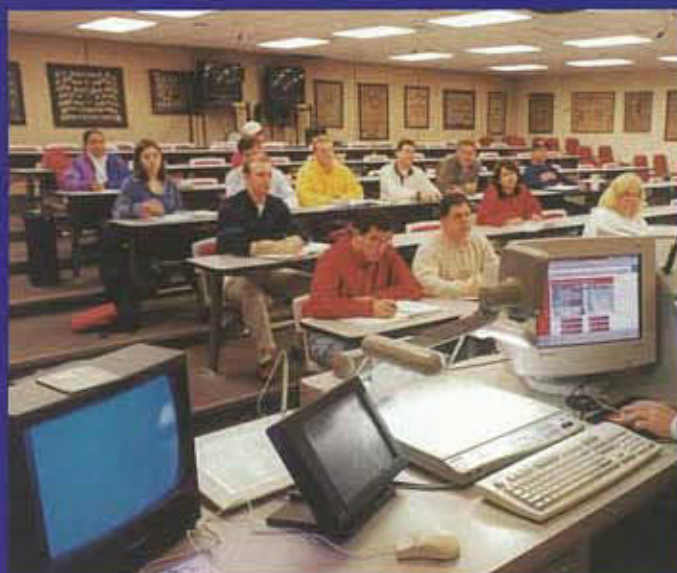
Boyd F. Campbell

Boyd F. Campbell practices in Montgomery. He served as chair of the International Law Section of the Alabama State Bar from 2000 to 2002. He is a director of the National Association of Civil Law Notaries and of the Alabama Association of Civil Law Notaries.



Ronald G. Neiwirth

Ronald G. Neiwirth practices in Miami, Florida. He is chairman of the National Association of Civil Law Notaries and a director of the Florida Association of Civil Law Notaries.



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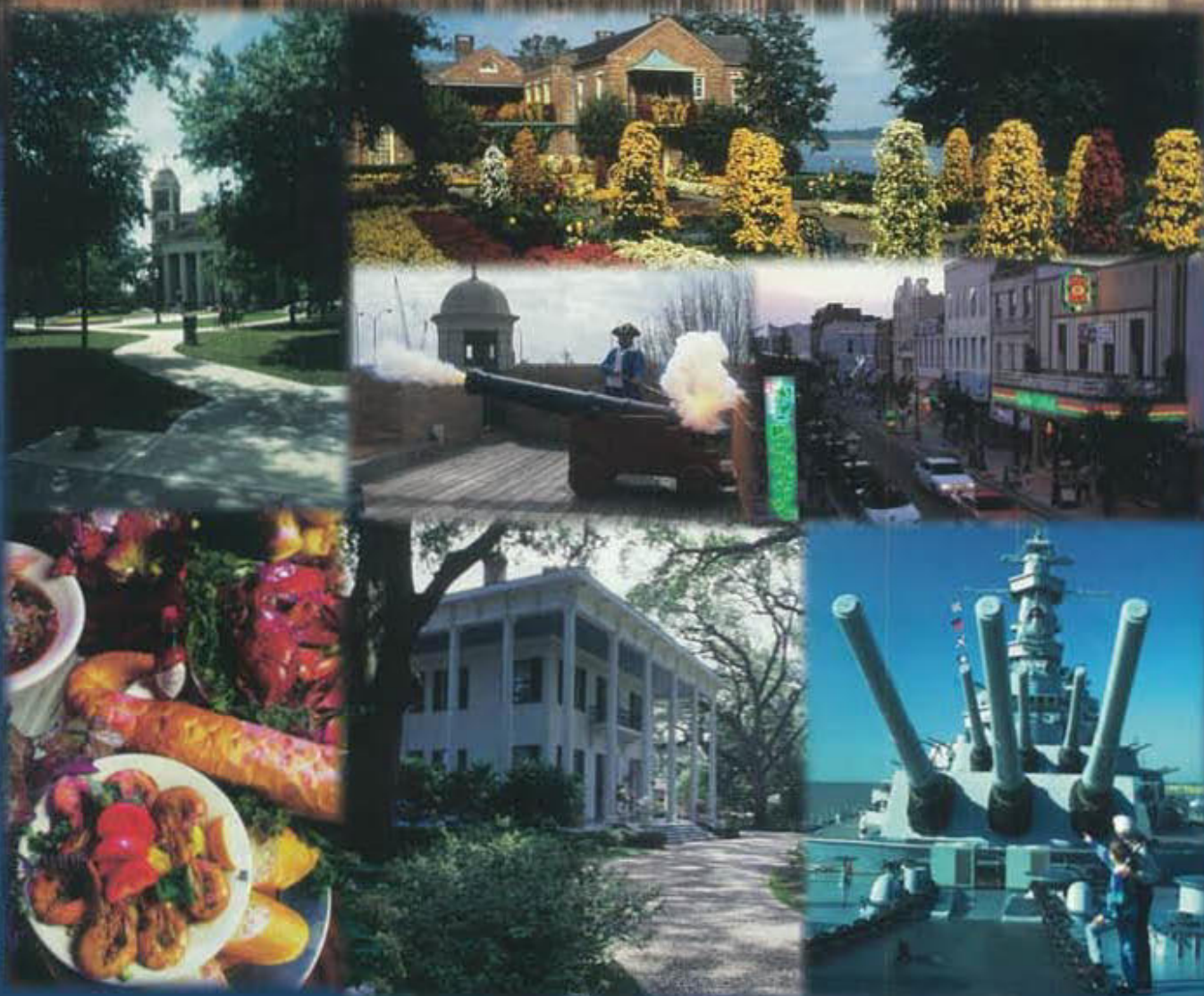
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LAWYERS RENDER SERVICE

ALABAMA STATE BAR

2003 ANNUAL MEETING



Photos courtesy of the Mobile Area Convention & Visitors Bureau

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

ALABAMA STATE BAR 2003 ANNUAL MEETING

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

PROGRAM HIGHLIGHTS

The Solo & Small Firm Committee will sponsor additional technology programming. There will be a half hour on The State of Technology in the State Courts, a half hour on The State of Technology in the Federal Courts and an hour on The State of Technology in the Law Office, with a panel discussion to be led by George Huddleston of Birmingham.

The Alabama State Bar and the Alabama Lawyers Association join to present three programs:

- ▲ "A Century of Progress: A Tribute to African-American Lawyers in Alabama"
- ▲ "Practical Tips from the Bench: Things Every Lawyer Must/Should Know"
- ▲ "Federal Procedure Updates"

Speakers include federal judges Myron H. Thompson and U.W. Clemon and state court judges Aubrey Ford, Eugene Verin, Marvin Wiggins and Herman Thomas.

Technology is prominently featured with exceptional programs:

- ▲ "Emerging Technology in Federal and State Courts and in the Law Firm"
- ▲ "Taking Trial Presentations to the Next Level by Incorporating Sight, Sound and Emotion in the Courtroom"
- ▲ The Solo & Small Firm Committee will sponsor:
 - The State of Technology in the State Courts by Mike Carroll (AOC)
 - The State of Technology in the Federal Courts
 - The State of Technology in the Law Office with a panel discussion to be led by George Huddleston of Birmingham
- ▲ The VLP annual seminar will feature federal Judge W. Harold Albritton, III.

REGISTER EARLY!

The first 75 registrants for the 2003 Annual Meeting will receive a copy of George W. Kaufman's *The Lawyer's Guide to Balancing Life and Work* (a \$50 value). Designed to find ways that the law can fit into your life — not about how your life fits into the law — and about making choices that honor both professional and personal needs.

SPEAKERS



Wednesday, July 16

ALL-DAY CLE

"How to Persuade with Power and Influence"
Rob Sherman

Lawyer, author and founder of the Sherman Leadership Group, Rob Sherman leads this power-packed seminar on negotiation and presentation skills. Whether a seasoned professional or a new associate, today's competitive marketplace demands more effective communications. This is where you will learn how to make it happen.



Thursday, July 17

BENCH & BAR LUNCHEON

Dennis W. Archer

Join your colleagues in being a part of history as the first African-American elected to serve as president of the American Bar Association shares his pride in his profession. Archer, the former mayor of Detroit and a past justice of the Michigan Supreme Court, will bring his thoughts and insight on his presidential agenda to Alabama lawyers.



Friday, July 18

OPENING PLENARY

James W. McElhaney

Used judiciously, humor can be a great tool in the courtroom. You won't want to miss this session with this distinguished scholar in trial practice and lecturer in trial advocacy. McElhaney also serves as senior editor and columnist for *Litigation*, the journal of the ABA Section on Litigation. See why "make 'em laugh" can sometimes make good sense.



Saturday, July 19

MORNING CONVOCATION

Millard Fuller

Millard Fuller is founder of Habitat for Humanity and president of Habitat for Humanity International (HFHI). Since Habitat's founding, his leadership has helped forge Habitat into a worldwide Christian housing organization with more than 625,000 people now having safe, decent, affordable shelter due to Habitat's work around the world. Fuller received the Medal of Freedom, the Harry S. Truman Public Service Award, and the Martin Luther King, Jr. Humanitarian Award. Hear firsthand about his outstanding leadership and contributions toward meeting the goal of eliminating poverty housing worldwide.



ALABAMA STATE BAR
2003 ANNUAL MEETING

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

SCHEDULE AT A GLANCE

ALL CLE PROGRAMS ARE OPEN TO ALL REGISTRANTS.

The section programs have been designed to interest both practitioners who occasionally handle a matter in a particular area of the law, and those who concentrate most of their practice in that area. The presenters reflect the unique age, gender, racial and geographical diversity of our ever-changing bar association. This year's programming has been designed to meet the increased complexity of our members' need to stay abreast of many topics in today's society. With careful planning, most attorneys can satisfy their entire 12-hour CLE requirement for 2003.

We hope you enjoy learning as well as taking advantage of the many opportunities for socializing with associates and making new friends during your stay in Mobile.

Wednesday, July 16, 2003

8:00 am - 5:00 pm

Annual Convention Registration

8:30 am - 4:45 pm

CLE Seminar:

*The Skills Every Lawyer Needs:
How to Persuade with More
Power and Influence*

Rob Sherman, esq.

Sherman Leadership Group

Karr & Sherman

Columbus, Ohio

8:00 am

CLE Registration and Coffee

8:30 am - 11:45 am

Part I: Negotiation Skills

11:45 am - 1:15 pm

Lunch on your own

1:30 pm - 4:45 pm

Part II: Presentation Skills

2:00 pm - 4:00 pm

Board of Bar Commissioners'
Meeting

4:00 pm - 5:00 pm

MCLE Commission Meeting

Disciplinary Commission Meeting

3:00 pm - 5:00 pm

Legal EXPO 2003

Early Bird Preview

Thursday, July 17, 2003

7:30 am - 8:45 am

Alabama Law Foundation

Trustees' Breakfast

8:00 am - 5:00 pm

Annual Convention

Registration

Legal EXPO 2003

9:00 am - 10:00 am

FIRST SERIES OF
CLE PROGRAMS

"Workers' Compensation
Update: 2003"

Workers' Compensation Section

"Alabama Open Meetings &

Records Act: What Public

Officials Need to Know"

Communications Law Section

"Corporate Corruption:

Keeping Your Client

Out of the Line of Fire!"

Business Law Section

"2003 Update: Administrative Law"

The 2003 Eugene W. Carter

Medallion Award

Administrative Law Section

10:00 am - 10:15 am

BREAK

Visit Legal EXPO 2003

10:15 am - 11:15 am

SECOND SERIES OF
CLE PROGRAMS

"Tax and Trust Issues for Elders"
Elder Law Section

"Toxic Torts, Mold Litigation
and State Common Law Causes
of Action"

Environmental Law Section

"Federal Procedure Update"

Alabama Law Institute Council
Meeting

11:15 am - 11:30 am

BREAK

Visit Legal EXPO 2003

11:30 am - 12:30 pm

THIRD SERIES OF
CLE PROGRAMS

"Practical Tips from the Bench:
Things Every Lawyer Must/
Should Know"

*Alabama Lawyers Association
Judicial Council*

"Practical Pointers AND the
Latest Legal Developments
Designed for BOTH the
Regular and Only Occasional
Labor Law Practitioner"
*Labor and Employment
Law Section*

(Continued on next page)



ALABAMA STATE BAR 2003 ANNUAL MEETING

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Thursday, July 17, 2003

(Continued from previous page)

"Trial Presentation Technology Renders Results: Taking Trial Presentations to the Next Level By Incorporating 'Sight, Sound & Emotion' in the Courtroom"

"Real Estate Issues in the Probate Estate and Current Developments In Property Law"

Real Property, Probate & Trust Law Section

Attorneys' Insurance Mutual of Alabama, Inc. Annual Meeting

12:30 pm - 2:00 pm

BENCH AND BAR LUNCHEON

Featured Speaker:

Dennis W. Archer, Detroit
President-elect

American Bar Association

SPECIAL PRESENTATIONS

- Alabama Law Institute
Legislative Awards
- ABICLE Award
- Judicial Award of Merit
- Alabama State Bar Award of Merit
- Alabama State Bar Pro Bono Award

2:15 pm - 3:15 pm

FOURTH SERIES OF
CLE PROGRAMS

"A Century of Progress:
A Tribute to African-American
Attorneys in Alabama"

*The Alabama Lawyers Association
and the Alabama State Bar*

"Successful Rehearing and
Certiorari in the Alabama Courts"

"Review of Interlocutory Orders:
A Roadmap"

Appellate Practice Section

"Coal Bed Methane Gas"
Oil, Gas & Mineral Law Section

"Considerations in Measuring
Commercial & Personal Damages"

"Volunteer Lawyers Annual
CLE Program"

*Volunteers Lawyers Program
of the Alabama State Bar*

3:15 pm - 3:30 pm

BREAK

3:30 pm - 4:30 pm

"Hot Topics in Alabama Evidence"
Criminal Justice Section

"Professionalism in the Workplace:
Shattering the Glass Ceiling—
How Much Remains"

Women's Section

"2003 Update:
Administrative Law"
Administrative Law Section

Alabama Young Lawyers' Section
Business Meeting

4:30 pm - 5:30 pm

Criminal Justice Section Reception

5:00 pm - 6:30 pm

VLP Reception

Administrative Law Section

Reception and presentation of the
2003 Eugene W. Carter
Medallion Award

6:30 pm - 9:00 pm

ANNUAL MEMBERSHIP RECEPTION
"Mardi Gras Redux"

*Hosted by the Mobile Bar
Association and the Alabama
State Bar*

Friday, July 18, 2003

7:30 am - 8:45 am

EARLY MORNING BREAKFASTS

- Christian Legal Society
- Farrah Order of Jurisprudence/
Order of the Coif
- Jones School of Law Alumni
- Birmingham School of Law
Alumni
- Vanderbilt University School
of Law Alumni
- University of Virginia School
of Law Alumni
- Howard University School
of Law Alumni
- Tulane University School
of Law Alumni

- Past Presidents' Breakfast
- *The Alabama Lawyer*
Board of Editors

8:00 am - 3:00 pm

Annual Convention Registration
Legal Expo 2003

8:30 am - Noon

KIDS' CHANCE GOLF SCRAMBLE

9:00 am - Noon

FIFTH SERIES OF CLE PROGRAMS

FEATURED PLENARY SESSION
"Planning to Win: Discovery and
Persuasion in the Courtroom"
Speaker: James W. McElhaney
Houston, Texas

Noon - 2:00 pm

ANCHORS AWAY WITH ISI -
CHILDREN'S PARTY

12:15 pm - 2:00 pm

THE MAUD MCCLURE KELLY
AWARD LUNCHEON
*Women's Section and the
Alabama State Bar*

12:15 pm - 2:00 pm

THE ALABAMA LAWYER
ASSISTANCE PROGRAM
LUNCHEON
*Alabama Lawyer Assistance
Program*

2:15 pm - 3:15 pm

SIXTH SERIES OF CLE PROGRAMS
"Domestic Relations Update 2003"
Family Law Section

2:15 pm - 4:15 pm

"Emerging Technology in
Federal and State Courts and
in the Law Firm"
*Solo and Small Firm Practitioners
Committee of the Alabama
State Bar*

3:15 pm - 3:30 pm

BREAK

3:30 pm - 4:30 pm

SEVENTH SERIES OF
CLE PROGRAMS
"Litigating Technology Disputes
for the General Practitioner"



ALABAMA STATE BAR
2003 ANNUAL MEETING

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

"Update on Intellectual Property Law for the General Practitioner" (including the Alabama Trademark Act)
Intellectual Property Law Section

4:30 pm - 5:30 pm
INTELLECTUAL PROPERTY LAW SECTION RECEPTION

5:00 pm - 6:00 pm
FAREWELL RECEPTION
HONORING FRED D. GRAY
Entertainment: Joseph Mitchell & SUITE— A Jazz Configuration
Co-hosted by the Alabama Lawyers Association, Vernon Z. Crawford, Bay Area Bar and the Alabama State Bar

6:00 pm - 7:30 pm
UNIVERSITY OF ALABAMA SCHOOL OF LAW ALUMNI RECEPTION
CUMBERLAND SCHOOL OF LAW ALUMNI RECEPTION

7:30 pm
"TASTE OF MOBILE" RECEPTION

Saturday, July 19, 2003
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8:00 am - 9:00 am
CIRCUIT BREAKFAST
Join bar commissioners, judges and colleagues from your circuit for an informal breakfast get-together.

9:15 am - 11:15 am
MORNING CONVOCATION - LAWYERS RENDERING SERVICE
Speaker: Millard Fuller
Founder of Habitat for Humanity and President of Habitat for Humanity International (HFHI)

SPECIAL PRESENTATIONS:
• Special Local Bar Achievement Awards
• Kids' Chance Scholarships
• Recognition of 50-Year Members
• Installation of Officers
• Legal EXPO 2003 Prize Drawings

11:15 am
BOARD OF BAR COMMISSIONERS' MEETING

KIDS' CHANCE GOLF SCRAMBLE

Join us for an afternoon of golf in Mobile made even more rewarding by knowing that you're making a difference in a young person's life. Sign up to play in the 9th Annual Kids' Chance Golf Scramble on Friday, July 18, 2003, from 8:30 am to 12:30 pm.

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 104 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.

Linda Pope, chair

GOLF SCRAMBLE ENTRY FORM

Name _____

Address _____

City _____ State _____ ZIP Code _____

Office Telephone _____ Home Telephone _____ Handicap _____

Individual Player	\$125	\$ _____	Please make checks payable to: Kids' Chance Scholarship Fund OR please bill my credit card: <input type="radio"/> VISA <input type="radio"/> MasterCard <input type="radio"/> AMEX
Hole Sponsorship	\$250	\$ _____	
Hole Sponsorship & 1 Player Slot	\$350	\$ _____	
Hole Sponsorship & 4 Player Slots	\$600	\$ _____	
TOTAL ENCLOSED \$ _____			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 2003 ANNUAL MEETING

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

ADVANCE REGISTRATION FORM

Advance registration forms **MUST BE RECEIVED NO LATER THAN JUNE 30, 2003**. Online registration available at www.alabar.org. Cancellations with full refunds may be requested through noon, Thursday, July 3, 2003.

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/Children _____
 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 13	After June 13	Fees
___ Alabama State Bar Members	Wednesday-Saturday programming	\$250.00	\$300.00	\$ _____
___ Alabama State Bar Members	Thursday-Saturday (No Wednesday programming)	\$195.00	\$285.00	\$ _____
___ Alabama State Bar Members	Wednesday Program ONLY (Optional events not included)	\$150.00	\$200.00	\$ _____
___ Full-Time Judges	Wednesday-Saturday programming	\$125.00	\$150.00	\$ _____
___ Full-Time Judges	Thursday-Saturday (No Wednesday programming)	\$ 97.50	\$147.50	\$ _____
___ Full-Time Judges	Wednesday Program ONLY (Optional events not included)	\$ 75.00	\$100.00	\$ _____
___ Attorneys (admitted to bar 5 years or less)	Wednesday-Saturday programming	\$ 125.00	\$150.00	\$ _____
___ Attorneys (5 years or less)	Thursday-Saturday (No Wednesday programming)	\$ 97.50	\$147.50	\$ _____
___ Attorneys (5 years or less)	Wednesday Program ONLY (Optional events not included)	\$ 75.00	\$147.50	\$ _____
___ Non-Member	(Does not apply to spouse/guest of registrant)	\$300.00	\$350.00	\$ _____
TOTAL REGISTRATION FEES				\$ _____

OPTIONAL EVENT TICKETS

Thursday, July 17, 2003

	No. of Tickets	Cost	
___ Bench & Bar Luncheon	___ @	\$15.00 ea.	\$ _____
___ Membership Reception/Mardi Gras Redux (Cash bar; children 12 or under are free)	___ @	\$35.00 ea.	\$ _____

Friday, July 18, 2003

___ Christian Legal Society Breakfast	___	N/C	\$ _____
___ Farrah Order of Jurisprudence/Order of the Coif Breakfast	___ @	\$15.00 ea.	\$ _____
___ Birmingham School of Law Breakfast	___ @	\$12.50 ea.	\$ _____
___ Howard University School of Law Breakfast	___ @	\$11.00 ea.	\$ _____
___ Jones School of Law Breakfast	___ @	\$10.00 ea.	\$ _____
___ Tulane University School of Law Breakfast	___ @	\$15.00 ea.	\$ _____
___ Vanderbilt University School of Law Breakfast	___ @	\$15.00 ea.	\$ _____
___ University of Virginia School of Law Breakfast	___ @	\$15.00 ea.	\$ _____
___ Alabama Lawyer Assistance Program Luncheon	___ @	\$15.00 ea.	\$ _____
___ The Maud McClure Kelly Award Luncheon	___ @	\$25.00 ea.	\$ _____
___ Anchors Away with ISI Children's Party (Ages 4-14) (Note: One adult per family must attend.) ___ Adults ___ Children	___ @	N/C	\$ _____
___ President's Reception (Limit of two tickets per registrant)	___ @	N/C	\$ _____
___ University of Alabama School of Law Reception	___ @	\$25.00 ea.	\$ _____
___ Cumberland School of Law Reception	___ @	\$25.00 ea.	\$ _____

Saturday, July 19, 2003

___ Circuit Breakfast	___ @	\$5.00 ea.	\$ _____
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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 AMEX Card No. _____

Cardholder's Signature _____ Expiration Date _____

MAIL REGISTRATION FORM & PAYMENT TO: 2003 Annual Meeting, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101



J. Anthony McLain

Law Firm May Not "Fire" Present Client And Then Sue Him

By J. Anthony McLain, general counsel

Question:

"I have found myself in a situation where my opponent in litigation contends that Firm ONE must withdraw from representation of a long-time client, A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the new Rules of Professional Conduct which became effective January 1, 1991. I would appreciate receiving a confidential opinion from you as to whether we can take advantage of the comments to Rule 1.7 and withdraw from representing client C and continue to represent client A under Rule 1.9.

"The situation arose when I filed suit on behalf of our long-time client A against B, an Alabama general partnership, and its general partners, C and D, for breach of a construction contract and a fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

"Shortly after filing suit, I learned that another lawyer in our firm, Jane Doe, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved preparing the necessary

legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose. Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

"Legal work on the condominium project for C commenced in April 1989. For several years prior to this date, Firm ONE had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which was not in any way related to the condominium project. In November 1989, client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B and in November 1990, A asked us to file suit against B. C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990. In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

"In January 1991, we were advised by counsel for C (Firm TWO) that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a

copy of the Complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the Rules of Professional Conduct and cites a portion of the comments thereto (under subtitle 'Conflicts in Litigation') which state:

'Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.'

"Since the matter involving C is wholly unrelated to the construction litigation, it seems to me that other comments to Rule 1.7 control how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comments under 'Loyalty to a Client' states:

'Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.'

"Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

"This resolution of the asserted conflict was mentioned to C's counsel who responded by citing *Wolfram's Hornbook on Modern Legal Ethics* and the California bankruptcy case *In re California Cannery and Growers*, 74 B.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to who he would represent. However, the bankruptcy case seems to be distinguishable from our situation since the two matters involved here are totally unrelated and since the case deals with the old code. Additionally, the portions of *Wolfram* cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

"Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent our long-time client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and to continue to represent C in the condominium project, or whether we should do something else. We would appreciate your confidential opinion as to what we should do in this situation and whether we can withdraw from representation of C and continue to represent A in the construction litigation."

Answer:

Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must

withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally, you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

Discussion:

Rule 1.7 of the Rules of Professional Conduct provides the following:

"Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation."

As pointed out in the Comment to Rule 1.7, "loyalty is an essential element in the lawyer's relationship to a client." In the situation where a lawyer takes part in litigation against an existing client "the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the Rules of Professional Conduct provides the following:

"Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client.

In the instant situation, there is no question that you could not continue to represent both client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9).

Indeed, the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that, "Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." We do not believe that this Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, (9th Cir. 1981) where the Court held that:

"The present-client standard applies if the attorney simultaneously represents clients with different interests. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a 'former client' by choosing when to cease to represent the disfavored client." (Supra at 1345, N.4, citing, *Fund of Funds Ltd. v. Arthur Anderson & Co.*, 567 F. 2d 225 (2d Cir. 1977).

For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to your client C. [RO-91-08] ■

Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers", he says. "They have simply learned how to market their services."

A successful sole practitioner who struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals are unpredictable. You may get

new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "**How To Get More Clients In A Month Than You Now Get All Year!**" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a **FREE** copy of this report by calling **1-800-562-4627**, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>

Important Reminder About Your Continuing Legal Education Requirement

If you had a membership status change at any time during 2002, you may have been required to earn and report 12 hours of CLE credit by December 31, 2002. Mandatory Continuing Legal Education Rules require attorneys who hold an occupational license (regular membership) any time during the calendar year 2002 to earn 12 hours of CLE credit. If you are not currently a regular member but were a regular member for part of the year you are still required to comply with MCLE Rules. (MCLE Rule 2.5)

For example, if you were inactive or held a special membership and converted to a regular membership during 2002, you are required to obtain 12 hours of CLE credit. If you were a regular member during 2002 but converted to special member or to inactive status you are also required to comply with the 12-hour CLE requirement.

You are not required to obtain 12 hours of CLE credit if you are eligible to claim an exemption from the MCLE Rules. Your exemption, however, must have been claimed on the 2002 CLE reporting form which was mailed to you in early December. If you need to locate approved CLE programs you may request a calendar of approved CLE programs from the ASB CLE department or from the state bar's Web site at www.alabar.org.

Call the Alabama State Bar's CLE department at (334) 269-1515, extension 158, 156 or 117, for more information.

Gratis



Know your limitations? we do!

...and they're yours for the asking!

ALABAMA STATUTE OF LIMITATIONS QUICK REFERENCE CARD

Simply, tell us how many you need.

e-mail to: professional@gilsbar.com
call: 1-800-445-7227 x 789
or fax firm's letterhead: 1-888-647-7445



www.lawyersinsurance.com

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“Miss Liz Is Here!”

A Lawyer Who Makes a Difference

BY PAMELA H. BUCY

The yellow paint on the one-story, L-shaped building is peeling. To the side of the building are basketball courts that sit on broken cement with crooked hoops and no nets. Once the school for black children, before 1973 when Clanton schools were integrated, the building sits behind the West End housing project in Clanton. Today, it is home to Clanton's Head Start program and “Project GEAR” (Group of Examples Admitting Reality). The idea behind Project GEAR is that even though you can't take kids out of their environments, you can give them alternatives. Project GEAR was created by Elizabeth Humphrey Huntley and her childhood friends, Tommie Agee, Darryl Davis and Clarence Morrow. Project GEAR shows how a few people, with the help of a nurturing community, can make the world a better place.

Liz Huntley, a 1997 graduate of the University of Alabama School of Law and a 1993 graduate of Auburn University, was five years old and living in Huntsville, Alabama when her mother, a drug addict, committed suicide. Living with her father, the drug dealer who supplied her mother and others, was not an option. Liz was placed in the care of her grandmother, Annie Pearl Braxton, who lived in the West End neighborhood of Clanton. Liz mostly lived with her grandmother but her early years were inundated with visits from DHR social workers who would show up at Liz's school and tell her, once again, that it was time for foster care. Such moves occurred when Liz's uncle, Annie Pearl Braxton's son and a paranoid-schizophrenic, became violent and abusive. Liz's uncle's episodes unsettled the lives of all of those around him.

When she was six and it was time for Liz to start school, her grandmother put Liz on the public school bus and told her to get off at the Clanton Elementary School. Years later, Liz realized that her grandmother, who could not read, sent Liz off alone because she was ashamed of being asked to fill out and complete forms she could not read.

The bus pulled up in front of the sprawling elementary school and Liz got off, blending into the crowd of excited children. All, save Liz, were walking in with parents. In 1978, when Liz started first grade, Clanton's population was 20 percent black. There were two black children in the elementary school. Liz watched mothers leading their children to a bulletin board inside the school, look on the board until they found the child's name and proceed off to the room number listed. Liz looked up and down the board until she saw her name. She was in Miss Jones's class. Liz found Miss Jones's room, walked in, and sat down.

Miss Jones came over to Liz and said, “Well, darling, where are you suppose to be?”

“Right here,” responded Liz.

“Where is your mother?”

“I'm here by myself.”

In response to Miss Jones's questions, Liz explained how she had ridden the bus to school and found her room. She held out papers to Miss Jones, “Here are my immunization forms.”

Miss Jones smiled at Liz, “It's nice to meet you, Elizabeth Humphrey. I think you are going to be one of the smartest students I'll ever have.”

That year Miss Jones helped Liz in large and small ways. When class pictures were taken and Liz had no money to buy a set of pictures, Miss Jones bought them for her. When the class performed plays and other skits and the children had to bring props and costumes, Miss Jones brought Liz's. To this day, Miss Jones bakes Liz's favorite pie (strawberry) for her birthday. When Liz and her husband, Tony, went to the hospital to have their second child, Sara Beth, Miss Jones kept their older daughter, Ada Ruth. When Project GEAR was first getting underway, Miss Jones donated \$10,000 of reading program materials for the GEAR kids.

When Liz was in high school, her grandmother became ill with cancer and was unable to care for Liz. There were no other family members in Chilton County. To avoid Liz having to leave Clanton, Liz's

minister and his wife, Elijah and Ruth Good, adopted her. She moved to their home in the country, outside of Clanton.

Liz's story is not complete until you talk to Reverend Elijah Good. As Liz says whenever you ask her how she does what she does, “You gotta know my daddy.”

Reverend Good met Liz when she was eight years old and she came to his church, The World's Church of the Living God. He saw a spark in her. From that moment forward, Reverend Good encouraged and cajoled Liz—whether it was getting her to assume a leadership role in church activities, giving her advice about college (“Make A's and B's,” “Be a young lady,” “To have a friend, be a friend,”) or helping her with law school homework (“Do what is wise”). What was the main advice Reverend Good gave, and still gives, Liz? “When you have something, the burden is on you to give back.”

Liz was bright and excelled in school. Throughout her Clanton education, teachers saw Liz's abilities and helped her in special ways. Liz's eighth-grade teacher, Miss Jean Miller, routinely sent Liz to other classrooms throughout the school to give a book report Liz had written, or to tell about some other project she had completed. In her senior year of high school, Miss Ellison, Liz's calculus teacher, came up to Liz at the beginning of the school year and said, “Congratulations! You've qualified for AP Calculus!”

There was a problem, though. Only five kids had qualified for the class and the school could not afford to have a separate class for just five students. Miss Ellison agreed to teach a special class that would meet,



every day, at 6:30 a.m. The school bus did not run that early and, regrettably, Liz told Miss Ellison that she could not come to the class. Miss Ellison was determined that Liz would be in the advanced class so Miss Ellison, who lived on the other side of Clanton, drove one hour out of her way, every morning, to pick up Liz so that she could be a member of the advanced class.

After graduating valedictorian of Clanton High School, Liz went to Auburn, on scholarship, with Tommie, Darryl and Clarence. Darryl and Liz had grown up together in the West End; they had become close friends with Tommie and Clarence who lived in nearby Maplesville and attended Clanton schools. At Auburn, the friends excelled in many ways. Tommie Agee, who played full-back at Auburn, went on to play for the Dallas Cowboys. Tommie now serves as executive director of the Covington Recreation Center for at-risk kids in Opelika. Darryl Davis now teaches high school in Selma. Liz, who has her own law practice, became the first black attorney in Chilton County. Tragically, Clarence Morrow, who had just graduated from Auburn, was killed in a car accident en route to rendezvous with his three friends for the 1993 Iron Bowl.

Clarence's death was a turning point for Liz, Tommie and Darryl. While growing up in Clanton they had planned how they would come back home and do something to help kids—the high risk kids—just like so many people in Clanton had helped them. With Clarence's death, the friends decided they could not wait any longer. Even though not one of them lived in Chilton County at that time, they started Project GEAR—in Clanton. That was in 1994.

The friends created a tutoring and after-school activity program for kids at risk. They asked community leaders to be on the GEAR Board. They talked the city into donating space, in the old segregated school house. In the early years of Project GEAR, Liz was the after-school tutor—despite the fact that she was also a full-time law student at the University of Alabama School of Law, in Tuscaloosa, 80 miles away. Twice a week after finishing her law classes, Liz left Tuscaloosa and drove to Clanton. By the time she arrived, it was dark. When Liz turned on the light in the GEAR classroom, the GEAR kids, who could see the building from windows in their West End homes, knew it was time for tutoring to begin. Erica, who was seven



when GEAR began, lived closest to the school. Every afternoon, she sat and watched for the light. When she saw it, she ran down the street and shouted for the other kids, "Miss Liz is here! Miss Liz is here!" The kids would come and Liz would tutor. When she was done each night, Liz headed back to Tuscaloosa where she did her own homework for law classes the next day.

Today, Project GEAR is a community endeavor, although its soul remains with Liz, Tommie and Darryl. Tommie holds a football camp every summer in Clanton for the GEAR kids (with help from people like

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Emmitt Smith, Rod Rutledge, Pat Dye, Bobby Humphrey, and Jay Barker). Each summer about 150 kids participate in the summer football camp. Darryl helps run the football camp, shuttling "all of Selma" (Liz's words) up for camp.

This past year 140 kids participated in Project GEAR's tutoring programs. In addition to helping the kids with their day-to-day homework, GEAR offers special tutoring for kids taking the high school exit exam and college-board exams. GEAR summer activities include career training, where GEAR kids spend a day at various offices and work sites in and around Clanton, including banks, Durbin Farms and Peach Park. Leadership, public speaking and etiquette classes are part of the GEAR curriculum. Every year, Project GEAR holds an annual dinner during Black History Month, featuring a catered dinner and an opportunity for the kids to practice their etiquette and poise. Speakers at past dinners have included Judge U.W. Clemon, Justice John England and Demetrius Newton. Project GEAR, using buses obtained by the superintendent of Chilton County schools, takes GEAR kids on college tours to Alabama, Auburn, Alabama A & M and others.

GEAR has outgrown its one-room home in the old segregated school house and is renovating a store-front in "crack alley." As Liz says, "This is exactly the neighborhood we want to be in." With donations, GEAR was able to buy the property for its new home. Volunteers from the Clanton community are helping renovate the cavernous space that previously was home to gangs. The Clanton city electrician, Randol Watts, has donated his time to re-work all of the wiring in the building. Wal-Mart has donated supplies, Alabama Power has donated a heating and cooling unit, and dozens of Clanton residents and GEAR board members spend their weekends pulling down decayed dry wall, blasting out rotten tile floor, putting up new dry wall and painting. The new facility will have a special room—"the college room," where kids will prepare for college boards. As Liz says, "I want these kids to feel special when they enter this room. I want them to know that all things are possible."

Liz Huntley's life is busy. She has a solo law practice. She is the mother of two young girls. A former Auburn cheerleader, she is intimately involved in her husband, Tony's, cheerleading gym,

Central Alabama Cheer. Yet, she joyously puts in many hours each and every week, and has for years, for the GEAR kids. Currently, Liz is involved with other leaders in Chilton County to create a "Family Resource Center," which will coordinate all of the services families may need. When asked Why?, Liz explains:

"Time and again there were people there who believed in me and helped me. They didn't have to. If they had treated me badly because I was at school without a parent, or I lived in the projects, or I didn't have the right clothes, I probably would have become a drug dealer. I'd probably be dead by now. When you show someone that you believe in them, you can make all the difference in their lives. There are lots of angels down here. Everything is possible with God. I am just an example of God at work." ■



Pamela H. Bucy
is the Bainbridge Professor of Law at the University of Alabama School of Law. She had the pleasure of teaching Liz when she was in law school.

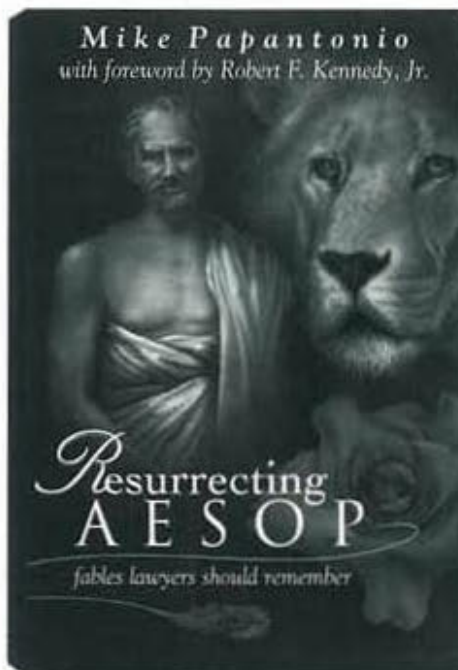
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Considerations In Purchasing **LONG-TERM CARE** Insurance

BY MICHAEL A. KIRTLAND



Over the past few years the government, elder care practitioners and private citizens have awakened to the prospect of growing old. Regardless of how they feel about their inevitable aging, they have also recognized the significant cost involved in caring for an aging population. For the government, this recognition involved a concerted effort, spurred on at least in part by lobbyists from the insurance industry, to control escalating costs of government-funded nursing home care. Through a series of Medicaid nursing home legislation, it has become clear that the government recognizes it cannot pay for nursing home care for an increasingly large elderly population. The result is that recent legislation has had a subtle encouragement toward private long-term care insurance as the solution to the problem of caring for the elderly. For its part, the Alabama State Bar has recognized the valid need for long-term care insurance and now offers such a policy for its members. This paper discusses the various aspects of long-term care insurance that should be considered prior to purchasing a policy of coverage, whether the reader is doing so for himself/herself, or as an advisor to a client considering such a purchase.

Long-term care insurance is an area undergoing significant and constant change. As a relatively new form of insurance coverage, the terms and conditions of long-term care policies vary widely and are being revised rapidly as experience with the insured population creates a data base to determine payout patterns. Beginning as essentially an unregulated area, older long-term care policies provided little benefit to the insured compared to currently issued policies. In addition, the terms and conditions of the policies widely varied.

While this is still true to some extent, as payout experience developed, and especially since the federal government has become more involved in long-term care insurance, policies are becoming more standardized, although along a variety of models. Certain minimum standards now exist in such coverage. As one would expect, cost is a consideration in the terms of the policy, and the old rule of thumb that less expensive equals less quality is normally found to be true in long-term care insurance as well.

Tax Qualification

Federal health care legislation requires certain standardized benefits in order to make a long-term care insurance plan "tax qualified." This tax qualification allows a portion of long-term care insurance premiums to be tax deductible on federal income tax returns. Many states, including Alabama, have provided state income tax benefits for such plans.

As is commonly seen in life insurance, the first dividing line in long-term care insurance is whether the policy is a group policy or an individual policy. Group policies are generally employer provided plans, or offered to closed affiliated groups, such as the Alabama State Bar. They are more likely subject to federal regulation and ERISA requirements. Unfortunately, some companies are still selling non-qualified plans for long-term care insurance. So, the very first question that should be asked is: "Is this a qualified plan?" All qualified plans will have a required statement on the first page of the policy stating that the policy is intended to satisfy the requirements for a tax-qualified policy.

Levels of Care

When we think of long-term care, we tend to think of nursing home care. But, this is not necessarily the case. In fact, long-term care covers a variety of levels of care, including nursing home care, assisted living facility care and home health care. Also included is a division between skilled care and non-skilled care. When considering purchase of a policy, care must be taken to ensure the insured is getting what they believe they are purchasing, as some policies only pay for institutionalized care where skilled nursing care is required, while other policies provide for a broader variety of care, including home health care. Approximately 15 percent of long-term care is provided in a nursing home setting. A policy that includes home health care is likely more expensive than a policy only providing for nursing home care, but may be much more valuable to the client. Do not assume, however, that home health care means round-the-clock nursing care given at home as a substitute for nursing home care. It is not. Home health care includes skilled or non-skilled care to assist a primary care-giver, such as a spouse or adult child. Generally, home health care is an option in long-term care policies. Depending on the policy, the home health care benefit may be the same amount per day as the nursing home amount, or commonly, it is a percentage (usually 75-80 percent) of the nursing home care cap.

Some policies permit unskilled and unlicensed individuals to be paid as home health care providers. Others require that the provider be licensed and regulated, including registered nurses or licensed practical nurses (RN's and LPN's) or that the care be obtained from a licensed health care agency. Other major differences available in long-term care insurance policies include:

- companion care (providing "relief" for the family primary care giver);
- adult day care payments;
- home health care without requirement for a previous nursing home stay; and
- provision of training for unskilled family members acting as care giver.

For Medicare-qualifying nursing home stays, the patient must have had a minimum 72-hour hospital stay prior to admission to the nursing home. It is now illegal to sell long-term care policies

that require a prior hospitalization before paying long-term care costs. This issues can be extremely important, as some disabilities requiring long-term care, such as Alzheimer's disease, often do not begin with a hospital stay.

Daily/Monthly Payment

How the policy pays is another issue in selecting long-term care insurance. Some policies pay a flat daily amount. Others pay actual cost up to a certain dollar limit. Most policies set a daily limit (such as \$100 per day) for care, while more flexible policies set payment limits on a monthly basis. This permits payment of higher daily fee amounts when continual daily care is not required. For example, a daily policy limit of \$100 per day would pay only that amount for each day of patient care. A monthly aggregate policy would permit payment of \$3,000 per month, regardless of actual daily cost. So, a working spouse could pay \$125 per day for week-day care for a disabled spouse, permitting the working spouse to keep his/her job and income stream. A daily rate policy would result in \$550 of uncovered costs each month, while the monthly aggregate policy would pay the entire cost of \$2,750 for a month of Monday-through-Friday care.

Benefit Period

Typically, long-term care policies are written either as "unlimited" policies or "limited" policies. In a limited policy, the policy itself will specify the maximum period of benefits payable under the policy, in months or years of benefit. This maximum benefit may also be specified in terms of dollars paid out (benefit maximum) instead of benefit period limits.

The average stay in a nursing home is 2.4 years. Typically, time-limited policies will be for three-, four- or five-year maximum benefits. This time period is determined by the period of time the insurer is required to payout benefits for long-term care, and is an aggregate of all payout periods of time. But, remember to consider that most long-term care is outside the nursing home.

The unlimited benefit period policy is more expensive, since the insurer's liability is for the life of the insured, not for a limited period of benefits.

Joint Policies

An increasingly common, and popular, form of long-term care insurance is the joint policy. This type of policy insures both spouses under one policy. Typically, this type of policy is less expensive than two separate policies with the same amount of benefits. Varying features of the joint policy may allow an aggregate period of benefit payout for both spouses, may define benefits for each spouse, but allow the surviving spouse to use the unused portion of a deceased spouse's benefits, or may allow varying periods of benefits for each spouse. This last feature can be extremely useful in crafting a cost-effective policy for a husband-and-wife couple. While the average nursing home stay is 2.4 years, there is a wide range of time between the average stay for men and women, with men typically spending considerably shorter periods of time in a nursing home. A joint policy permitting varying coverage

might, for example, provide for a maximum three years of care for the husband, while providing six years of care for the wife.

Elimination Period

The elimination period is the period of time under long-term care prior to the policy providing benefits. Typically, this period is zero to 180 days, with costs varying accordingly. While some policies might have longer periods of elimination, they should be avoided. Often clients choose a 60- or 90-day elimination period based on Medicare rules which permit skilled nursing care for a maximum of 100 days for persons over 65. The elder law advisor should be aware, however, that Medicare-paid stays for skilled nursing care of 100 days are relatively rare. The most restrictive long-term care policies will not permit periods of long-term care paid for by Medicare to be counted toward the elimination period of the policy.

Waiver of Premium/Inflation Protection

The younger a client is when purchasing a policy, the less expensive will be the monthly premiums. But, a policy whose maximum benefits seem reasonable today, if purchased by a relatively young client (45-55 for example), may be woefully insufficient in providing coverage 20 or more years from now when the coverage is actually needed. To protect against this, most insurance policies provide (though often at additional cost) an inflation protection provision. The formula for determining the inflation protection may vary. Some policies provide a set percentage increase in protection annually (5 percent for example). Others provide an inflation increase tied to an index of costs such as the consumer price index.

Long-term care insurance is intended to cover periods of disability requiring extensive skilled or unskilled care. Typically, the care is needed for more elderly clients, but the possibility exists that a relatively young client who purchases a long-term care policy may become unable to work. Still, the premiums must be paid to maintain the policy. Most, though not all, policies, provide for

waiver of premium after a certain period of time based upon benefits being collected. Typically a 90-day period is required for the waiver of premium benefit to apply, though longer periods are also found. Other options abound. *Caveat emptor* should be the motto in reviewing a long-term care insurance policy.

Amount of Coverage

How much is enough? The simplest answer is "as much as you can afford." But that's not much help in committing to a particular policy. The true answer is "that depends." It depends on a variety of factors, financial, social and medical.

Family medical history must be considered in determining the need for long-term care insurance. Certainly a family history including Alzheimer's disease or other debilitating disease cries out for greater coverage. In advising the client concerning long-term care insurance coverage, the advisor must make significant inquiry into the family health history.

Other non-financial factors to be considered include the size and closeness of relatives who might be willing to care for the client in the event of disability, though this factor should be considered with care. Clearly a single person without close family as a source of care is in more need of long-term care coverage than a married person with a large family of social workers and nurses. On the other hand, the client must carefully consider not only who might provide long-term care, but how willing or able those persons are to provide such care. Simply saying "my kids will take care of me" may be the sign of wishful thinking on the client's part. The willingness of a person to care for an elderly or disabled family member is often tempered not only by the personality of the potential caregiver, but also that of the potential caregivers spouse and his/her family. Additionally, even a very sympathetic family member, ready to freely provide assistance, may be hampered in their ability to do so by their work situation or their own family finances.

Ideally, long-term care insurance should be purchased as part of a comprehensive financial plan, including estate planning, insurance planning and other care considerations. The need for long-term care insurance is partially dependent on the financial situation of the client. Not only will the client's financial situation have an impact on the ability to pay for long-term care insurance, but also for the need for that insurance.

What are the assets of the client? The more significant the financial assets of the client, especially those income-producing assets, the less the need for long-term care insurance to pay for care. However, current assets are always subject to reduction or even elimination due to a variety of circumstances, including divorce, lawsuit, natural catastrophe, etc. Unless the client is very wealthy, self insurance is a risky proposition.

Income of the client is an important factor, both in the ability to pay for long-term care insurance and the need for it. In devising a long-term care plan, only those income streams which will survive the disability of the client (Social Security, pension and retirement funds, other vested assets) should be considered. Remember that income from work will cease if the client becomes disabled. Be conservative in considering income available. Often financial planners, especially those selling insurance or investment plans, provide pictures of the client's financial future using inflation indexes, expected gains in value, etc., which paint a very positive financial picture for the future. It is real dollars that count, though. Consider



not only the cost of the nursing home, assisted living facility or home health care, but the financial needs of the spouse or other dependents in determining what impact long-term care costs will have on finances.

While Medicaid is an alternative to long-term care insurance, it is a drastic alternative. The legal and insurance industry trend is against qualifying for Medicaid. Congress in recent years has passed legislation indicating its strong disfavor of attempting to divest assets in order to qualify for Medicaid. Congress has recognized the federal welfare system is unable to care for the increasing elderly population of the nation, and the increasing length of lifespans. In addition, tax considerations have been provided for long-term care insurance which further indicates that Congress is heavily in favor of private funding of long-term care needs, especially through insurance.

Age and Health Factors

As with any insurance, the younger it is purchased, the less expensive it tends to be. With long-term care insurance, there is a low-end point, below which long-term care is generally not cost effective. The first "break point" for most policies tends to be age 50. At and after age 50, the cost of the policies begins to increase in a direct line with the age of the insured. Some argue that the "time value of money" says you're better off waiting to purchase long-term care insurance and investing the money elsewhere until a later age. This idea has two major flaws. First, in almost all cases, the dollars which should be spent on long-term care insurance are not saved and invested elsewhere, but rather simply disappear into the typical spending habits of the client. The client may have "saved" \$10-15,000 over a ten-year period by not buying long-term care insurance, but at the end of the ten-year period, not only do they not have the investment return from that \$10-15,000, they don't have the original funds either. Secondly, even assuming the health of the client remains good, each year after age 50 increases the premium cost to the client. Statistically, the dollars "saved" by not buying long-term care insurance earlier are eaten up in the increased premiums when the insurance is at a later date.

All insurance policies are based on statistical information about payout rates. In long-term care insurance, health is a factor in that statistical base. But the health concern issues in long-term care are very different from the health concern issues for health or life insurance. Factors which are heavily considered in health and life insurance, such as lifestyle, family history of cancer, etc. are of less concern for long-term care insurance. Rejection or rating for life or health insurance does not necessarily mean rejection or rating for long-term care insurance. A previous incident of cancer, for example, is a high negative for life or health insurance, often resulting in lack of insurability. In determining insurability for long-term care insurance, such a previous incident of cancer might be only a nominal factor, as cancer tends not to lead to long stays in nursing or assisted living facilities. Don't let your client reject the idea of applying for long-term care insurance based on difficulties s/he may have had in obtaining life or health insurance.

Income and Estate Tax Issues

While an important estate planning issue, long-term care insurance has little impact on income and estate taxes, except indirectly. Most of the impact that long-term care insurance does have is

favorable on both income tax and estate taxes.

The Internal Revenue Code permits a deduction for long-term care insurance premiums based upon age and other factors. The law permits a deduction as part of Schedule A Medical Expenses for long-term care. A 50-year-old individual, for example can deduct \$430 of long-term care insurance premiums as a medical expense, while an individual over 71 can deduct \$2,860. As with all medical care expenses, deductibility is subject to a 7 percent floor prior to deductibility.

The client should check with his employer concerning availability of long-term care insurance provided through employee benefits. Depending on the individual situation, the premiums paid for long-term care insurance, deducted from employee paychecks, may qualify as pretax dollars. Attorneys providing counsel to corporations should be aware of the tax deduction to the business for long-term care insurance premiums provided to employees as compensation. For self-employed individuals, long-term care insurance premiums are a qualified expense under the Medical Savings Accounts (MSA) available to self-employed individuals and small businesses with less than 50 employees.

Long-term care benefits are not included in the estate of an individual at death. While there is no direct benefit to an individual's estate tax situation for long-term care insurance, it certainly can have a very positive indirect benefit. Without long-term care insurance, depletion of estate assets during a lifetime for an individual requiring long-term care can be drastic and rapid. Consider a couple with \$500,000 in assets, where one of the two individuals requires long-term care. Realistically, even figuring the return on investment of the half-million dollars, the entire sum could easily be consumed in six to seven years, leaving even the best crafted estate plans meaningless at the time of death. This assumes the entire amount is available for investment. Typically, individuals in this wealth bracket have much of their wealth tied up in the family home, and possibly a vacation home or time-share, resulting in less assets available to produce income. The result of this is that in only two to three years, the family home might need to be sold in order to provide income to pay necessary long-term care expenses and living expenses for the healthy spouse.

Long-term care insurance, while a relatively new insurance product, is one that is rapidly becoming increasingly important in an overall estate plan. It is a major planning vehicle for the government in attempting to reduce the spiraling cost of medical care, and a vital tool in ensuring the financial stability of our clients as they grow older. Each of us, whether for our own personal benefit, or for the benefit of our increasingly older clients, should become aware of what it is and how it fits into our plans for the future. ■



Michael A. Kirtland is a solo practitioner in Montgomery. He received his JD from the Jones School of Law and his LLM in taxation from the University of Alabama School of Law. He is a member of the Elder Law Committee of both the American Bar Association and the Alabama State Bar. He currently serves as the vice-chair of the ABA's Long-Term Care, Medicaid and Special Needs Trusts Sub-Committee. He is a book editor for the ABA's Real Property, Probate and Trust Law Section, and is a member of the National Academy of Elder Law Attorneys.



Alabama Lawyer Assistance Foundation Update

The Message of Hope

BY DAVID WOOLDRIDGE

The Alabama Lawyer Assistance Foundation was created for the purpose of helping our fellow members of the bar push away from that other "bar." Whether serving alcohol, drugs or just feeding deep depression, the world of addiction is a living hell for all who live in it and for those who live with them. Alcoholism and addiction destroy careers, marriages, families, partnerships, friendships, and, ultimately, lives.

We all know brothers and sisters in the bar who have problems at the other "bar." Some have become alcoholics or addicted to other drugs. Some suffer deep, clinical depression. Some are just on the road to that fate. *No one is bound to that road!*

There is hope. Although those in the throes of addiction usually can't see it, hope exists for each and every one of them. Through many forms of assistance, guidance and counseling, through rehabilitation, treatment and 12-Step programs (such as AA, NA, AlAnon), and through the caring of their fellow human beings, constructive help and healing is available to any who seek it. And it *works!* Tens of thousands recover every year and escape from this hell.

The Alabama State Bar, its Lawyer Assistance Program (ALAP), its Lawyers Helping Lawyers Committee (LHL), and the Alabama Lawyer Assistance Foundation (ALAF) combine to ensure that members of the Alabama State Bar and their families know of the problem, know of the solution, and know that help is available. The bar's focus naturally is on lawyers, judges and law students, but its help extends to others whose lives the members touch.

The programs available can address each variation of the problem. Truly, no situation is unique, although it often seems so to those involved. The trails have already been blazed, and one need only take the first step and reach out for help.

The Alabama Lawyer Assistance Program (ALAP) is a service division of the Alabama State Bar. Its director, **Jeanne Marie Leslie**, receives inquiries on a confidential basis. Unless a matter is

brought to her from the Disciplinary Committee, an inquiry or a case referred to her remains confidential even within the bar offices. She also entertains anonymous inquiries. She can provide advice and guidance for handling your situation, whether it is your own problem with substances or those of a friend, colleague or acquaintance.

Jeanne Marie at ALAP can provide information about the problem, about treatment options and other resources, and about funding available for financially strapped members. ALAP also provides confidential, structured programs for monitoring recovering attorneys to help assure the member, families, partners, and others of continuing sobriety. Jeanne Marie can be reached at (334) 269-1515 or (334) 834-7576.

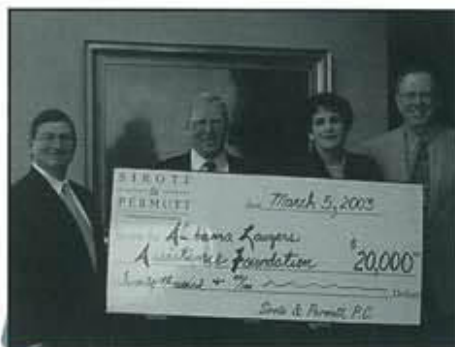
Lawyers Helping Lawyers is a bar committee whose members are committed to assisting their fellow lawyers with problems relating to alcohol, addiction and depression. Their work is confidential and informal. It is not part of any reporting structure with the bar. Its members merely desire to be helpful to any lawyers who are struggling with alcohol or drugs, providing understanding, information and support. You are welcome to contact any member of LHL, and he or she will guide you to the help you seek. Their phone numbers are available through the bar offices or through ALAP.

Finally, the Alabama Lawyer Assistance Foundation was formed to provide a previously missing piece to the puzzle, *financial assistance*. ALAF is a 501(c)(3) charitable foundation. It needs support from you and others, by way of tax-deductible contributions. Its fundraising started in 2002 and has achieved significant success. Over \$75,000 has been pledged or received. More is needed, however, and fundraising will continue to intensify in 2003.

ALAF makes loans (*not grants*) to bar members who demonstrate their inability to get the help they need without financial assistance. The assistance is small but significant. Often it is the difference between the lawyer getting the treatment he needs or sliding further down the slope toward disaster.



Keith Norman, executive director of the ASB, and Jeanne Marie Leslie, ALAP director, were presented with a \$3,500 check by Kenneth W. Hooks, president of the Alabama Civil Justice Foundation, and Thomas Edwards, an ACJF board member.



David Wooldrige, John Cooper and Sanford Mullins of Sirote & Permutt present a \$20,000 check to ALAF Director Jeanne Marie Leslie.



Bob Stallworth and Harry Vance of Southeast Investments donate \$5,000 to ALAF.

Alabama Lawyer Assistance Foundation

Our deepest appreciation is extended to all of the following contributors whose generosity is making a difference.

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ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?

Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

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

It is.

People entrenched in alcohol or drug dependencies can't see what it is doing to their lives.

You can.

Don't be part of their delusion.

BE PART OF THE SOLUTION.

For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.

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sure that assistance
is there.**

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funds) to:

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c/o Jeanne Marie Leslie
Alabama State Bar
415 Dexter Avenue
P.O. Box 671
Montgomery, AL 36101



Disbarment

- Birmingham attorney **James Vincent Low** was disbarred from the practice of law in the State of Alabama effective January 27, 2003, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

In ASB No. 01-052(A), Low was found guilty of violating rules 1.15(a), 1.15(b), 8.4(a), (d) and (g), A.R.P.C. On January 30, 2001, Low self-reported that his trust account was more than \$66,000 overdrawn. Evidence, much of which was submitted by Low, indicated that he had used his trust account for several years to pay office and personal living expenses in an effort to avoid tax liens of the Internal Revenue Service.

In ASB No. 01-53(A), Low was found guilty of violating rules 1.15(a), 1.15(b), 8.4(a), (d) and (g), A.R.P.C. Evidence established that on September 19, 2000, Low settled a motor vehicle accident case for a client for \$30,000. Low represented to the client that the settlement proceeds were in his trust account. Although Low accepted the funds and deposited them into his trust account, the client never received the settlement proceeds because the money was commingled and used by Low to pay personal living expenses and office-related expenses.

In ASB No. 01-120(A), Low was found guilty of violating rules 1.15(a), 1.15(b), 8.4(a), (d) and (g), A.R.P.C. Evidence established that Low served as the closing or settlement attorney on a loan closing. Low disbursed funds to two creditors in the amount of \$19,829 and \$15,950 from his trust account. Those checks were returned for non-sufficient funds. Low did not pay the returned checks, which resulted in foreclosure proceedings on the unpaid loan.

In ASB No. 01-121(A), Low was found guilty of violating rules 1.15(a), 1.15(b), 8.4(a), (d) and (g), A.R.P.C. Evidence established that Low served as the closing or settlement attorney on a loan closing. Low closed the loan on February 6, 2001, but did not satisfy an existing first mortgage in the amount of \$54,486. [ASB nos. 01-52(A), 01-53(A), 01-120(A) & 01-121(A)]

Suspensions

- Florence attorney **Barry Neal Brannon** entered a guilty plea whereby he was suspended from the practice of law in the State of Alabama for a period of one year retroactive to March 1, 2002, the effective date of his interim suspension.

In ASB No. 02-52(A), Brannon pled guilty to violating rules 1.1, 1.3, 1.4(a), 3.2 and 8.4(a) (d) and (g),

A.R.P.C. Brannon failed to file bankruptcy schedules in an accurate and timely manner in approximately 17 bankruptcy cases pending in the United States District Court for the Northern District of Alabama.

In ASB No. 02-68(A), Brannon pled guilty to violating rules 1.1, 1.3, 1.4(a), 1.4(b), 3.2, and 8.4(a) (d) and (g), A.R.P.C. Brannon was retained to represent a client in a bankruptcy case. During the course of the representation he was to also help the client settle a motor vehicle accident case. After being paid an additional retainer for those services, Brannon abandoned the client and her case, which resulted in the dismissal of the client's bankruptcy matter.

In ASB No. 02-95(A), Brannon pled guilty to violating rules 1.3, 1.4(a), 1.16(d) and 8.4(a) (d) and (g), A.R.P.C. Brannon was retained to represent a client in a bankruptcy matter. During the course of that representation, he abandoned the client and the client's case. Further, non-lawyer members of his staff gave the client erroneous legal advice.

In ASB No. 02-135(A), Brannon pled guilty to violating rules 1.3, 1.4(a), 1.16(d) and 8.4(a) (d) and (g), A.R.P.C. Brannon was retained to represent clients in a bankruptcy matter and to resolve problems the clients were having with their mortgage company regarding payments on their mortgage. Brannon abandoned the clients and their case. [ASB nos. 02-52(A), 02-68(A), 0205(A) & 02-135(A)]

- Gadsden attorney **John David Floyd** was intermily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective February 19, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Floyd had destroyed documents having potential evidentiary value by removing pages from medical records containing blood test report results and an incriminating statement by his client. The facts and circumstances indicated that Floyd's professional misconduct is repetitive and continuing and is causing, or is likely to cause, immediate and serious injury to a client and/or the public. [Rule 20(a); Pet. 03-02]
- Centreville attorney **Richard Michael Kemmer, Jr.** was suspended from the practice of law in the State of Alabama for a period of three years, retroactive to December 27, 2000, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. Kemmer was found guilty of violating rules 8.4(a) (b) (c) and (g), Alabama Rules of Professional Conduct.

On December 27, 2000, Kemmer was involved in a single vehicle accident in which he sustained multiple severe injuries. He was permanently blinded as a result of the accident and has not practiced law since the date of the accident.

During his absence from his office, it was discovered that Kemmer and a non-lawyer employee misappropriated funds belonging to the law firm.

Prior to the hearing before the Disciplinary Board, Kemmer agreed to make restitution to the firm, remitting a partial payment and executing a promissory note for the remaining balance. In addition to making restitution, Kemmer presented other mitigating evidence during the discipline phase of the proceedings, including his testimony evidencing great remorse and contrition, his cooperation during the disciplinary proceedings, a lack of prior discipline, and good character and reputation. [ASB No. 01-56(A)]

- On January 27, 2003, the Supreme Court of Alabama adopted the December 24, 2002 order entered by the Disciplinary Board, Panel II, accepting the conditional guilty plea entered by Mobile attorney **Larry Clinton Odom** involving two bar complaints filed against him. The Board entered a 91-day suspension, retroactive and to run concurrent with a separate 91-day suspension imposed on March 12, 2001. Odom was placed on inactive status effective January 5, 2000, for non-payment of dues and fees.

In ASB No. 01-15(A), Odom was hired in May of 1999 to represent the complainant with her divorce. The complainant paid Odom \$200 in attorney's fees and she was to pay the filing fee when the documents were prepared. Odom did not file the divorce proceedings until November 2000. Odom also failed to respond to the bar's written requests for information. Odom entered a guilty plea to violation of rules 1.3 [diligence], 1.4(a) [communication], and 8.1(b) [bar admission and disciplinary matters], of the Alabama Rules of Professional Conduct. All other charges were dismissed.

In ASB 01-91(A), Odom was retained in or about May 1999, to represent the complainant with a child support matter. Odom was paid \$580 in attorney's fees and filing fees. In June 2000, the complainant contacted the Alabama Department of Social Services about the status of her case. She learned that nothing had been filed by Odom. Odom also failed to respond to the bar's written requests for information. Odom entered a guilty plea to violations of rules 1.3 [diligence], 1.4(a) [communication], and 1.5(a) [fees], of the Alabama Rules of Professional Conduct. All other charges were dismissed. [ASB nos. 01-15(a) and 01-91(A)]

- Effective December 13, 2002, attorney **Allen Eugene Perdue, Jr.** of Birmingham, Alabama, has been suspended from the practice of law in the State of Alabama for noncompliance with the 2001 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 02-164]

Public Reprimands

- On September 18, 2002, the Disciplinary Board of the Alabama State Bar accepted Montgomery attorney **Robert Bozeman Crumpton's** conditional guilty plea for a public reprimand without general publication in connection with the complaint of Robert J. Russell. In 1998, Crumpton did some extensive title work surrounding the purchase of 45 acres of land by Larry Curry. This land was located in Montgomery

County, Alabama. On June 9, 1999, Curry sold about 12.5 acres of the land. Crumpton handled the closing. Out of the proceeds of the sale, Crumpton was paid \$7,500 for his past legal work in connection with this property. On October 1, 1999, Curry sold the remainder of the property. Crumpton handled this closing as well. Crumpton kept \$40,000 of the net sale proceeds, claiming that he and Curry had become partners in the development of this particular property. There was no written agreement indicating this situation. Curry objected to Crumpton's claim and filed suit against him. The lawsuit was settled on December 4, 2001. Curry's attorney filed this bar complaint. The Disciplinary Board accepted Crumpton's guilty plea because the operative facts showed that he and Curry did have some business relationships in regard to this property and its possible development. However, since all of Crumpton's dealings were oral and not written, he failed to comply with the requirements of Rule 1.8(a) [conflict of interest] of the Alabama Rules of Professional Conduct, dealing with business transactions between a lawyer and client. [ASB No. 00-108(A)]

- Bessemer lawyer **Richard Larry McClendon** received a public reprimand without general publication for having violated rules 1.4 and 1.5(c), Alabama Rules of Professional Conduct. McClendon was retained to represent the complainant in a matter concerning a motor vehicle accident. McClendon agreed to represent the complainant on a contingency-fee basis, however, there was no written contingency-fee agreement. Between February 20, 1999 and November 2000, the complainant met with McClendon several times regarding her case. However, McClendon never filed suit on her behalf.

In a subsequent meeting with the complainant, McClendon suggested a modification of the contingency-fee agreement under the terms where he would receive a 40 percent contingency and the complainant would pay a "non-refundable" retainer of \$750 and provide advance payment for all case expenses. The proposed amended contingency-fee contract was not reduced to writing. Thereafter, the complainant had difficulty communicating with McClendon. On February 9, 2001, McClendon was suspended from the practice of law in the State of Alabama in a non-related matter. Thereafter, the complainant had no further contact with McClendon. [ASB No. 01-104(A)]

- On January 31, 2003, Clanton attorney **Joel Sims Rogers, III** received a public reprimand without general publication, for violation of rules 1.5(a) and 1.5(c) [fees], of the Alabama Rules of Professional Conduct. On August 20, 2002, the Disciplinary Board (Panel IV) imposed discipline consisting of an abated 45-day suspension, \$6,000 in restitution, and a public reprimand without general publication. In 1995, Rogers was with the law firm of Rogers & Waid and was retained by Sherry Lynn McNeil to represent her in a child support matter. She paid Rogers a fee of \$500. Additional fees were to be sought from the child's father. On July 17, 1995, a child support order was entered by the court requiring the father to pay basic child support of \$113.31 per week, plus \$20 per week for medical expenses. Rogers's firm was awarded attorneys' fees of \$500 plus costs (which were col-

lected from the father). The father was to make his support payments through Rogers's office, and Rogers was to receive \$1 per pay period for receipting and recording the payments. In 1997, the father filed a Chapter 13 bankruptcy. Rogers's partner filed a claim for the \$4,000 in child support arrearage. After the debtor's plan was approved, checks again came through Rogers's office. Rogers began deducting one-third of the monthly payments as attorneys' fees. Between 1997 and the date of Rogers's termination by McNeil, he collected about \$18,000 for her, and withheld about \$6,000 for his fees. Rogers testified at the disciplinary hearing that he told McNeil that she had the option of having her payments made through the circuit court for a small administrative fee, or through his office for a one-third deduction. Rogers testified that it was her choice to be paid through his office. McNeil denied this. She testified that she thought the reduced amount was a consequence of her ex-husband's bankruptcy. [ASB No. 00-211(A)]

- Mobile lawyer **Carroll Hart Sullivan** received a public reprimand without general publication for a violation of rules 1.7(a) and 8.4(g), Alabama Rules of Professional Conduct.

Sullivan was retained in June 1993 by St. Paul Fire & Marine Insurance Company to represent the interests of Dr. Anthony Savoie, an anesthesiologist, Wayne Zimlich, a certified nurse anesthetist, and their employer, Anesthesia Services, P.C., in connection with a medical malpractice claim filed by James R. McGahagin resulting from his wife's having suffered from an adverse consequence during surgery on April 21, 1993 and her eventual death.

The case was styled *James R. McGahagin, et al. v. Springhill Memorial Hospital, et al.*, CV 93-1571 in the Circuit Court of Mobile County, Alabama. While both the hospital and the surgeon were named defendants, they were dismissed before trial pursuant to motions for summary judgment. The trial proceeded against Savoie, Zimlich and Anesthesia Services and resulted in a verdict of \$22.5 million.

In September 1993, Zimlich dictated a narrative of what occurred during the surgery, which was transcribed by Sullivan's office and sent to St. Paul. In this narrative, Zimlich stated that he was instructed to change and falsify the anesthesia record of the surgery at the direction of Savoie. Zimlich's statements created a direct conflict of interest between Sullivan's clients, Savoie, Zimlich and Anesthesia Services, whom Sullivan continued to represent. This conflict remained throughout the entire representation. Further, Sullivan did not obtain the informed consent of his clients to his simultaneous representation of conflicting interests, assuming this was a waivable conflict. The panel noted that during his disciplinary hearing, Sullivan did not present any evidence documenting consultation with the clients about the conflict or the clients' informed consent and waiver of the conflict.

In addition, during the course of trial preparation in the medical malpractice case, Savoie testified in his deposition that Zimlich fell below the standard of care in connection with his

actions during the surgical procedure. Specifically, Savoie testified that Zimlich did not meet the standard of care when he did not timely notify him or the surgeon of complications experienced by the patient. This testimony directly conflicts with and contradicts Zimlich's sworn answers to interrogatories, which were prepared and filed after Zimlich's consultation with Sullivan. At no time were the interrogatory answers amended or changed to conform to the contradicting testimony provided by Savoie, and the record at and during the time of trial reflected this conflict.

Sullivan was well aware of this particular conflict by virtue of a December 5, 1994 letter to Joseph D. Oglesby, senior claim representative of St. Paul, in which he stated:

"If Dr. Savoie cannot be dismissed from the lawsuit or if this case cannot be settled (the prospects for settlement may hinge upon the constitutionality of the cap although this case does involve a survival/personal injury claim), and if the case has to be tried, I believe it would be difficult for me to represent both the interests of Mr. Zimlich and Dr. Savoie. Had Dr. Savoie testified as I thought he would, namely (1) that Mr. Zimlich acted within clinical judgment, and (2) that he did not know the cause of the brain damage, then I saw no conflict of representing the interest of both Dr. Savoie and Mr. Zimlich."

Sullivan did not send a copy of this letter to either Savoie or Zimlich, nor did he write either of them separately about this conflict. Moreover, the conditions to resolve the conflict imposed by Sullivan in the letter, i.e. Savoie's dismissal or settlement, never occurred. Further, Sullivan did not call Savoie as a witness during the malpractice trial yet plaintiff's counsel used the conflicting portion of Savoie's deposition during his cross-examination of Zimlich. The existence of this conflict was the reason motivating Sullivan's decision not to call Savoie to testify during the malpractice trial and adversely affected Sullivan's representation of Zimlich.

Sullivan's simultaneous representation of clients with directly conflicting interests violated Rule 1.7(a), A.R.P.C., which provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client. Further, Sullivan's conduct as outlined above adversely reflects on his fitness to practice law and, therefore, violated Rule 8.4(g), A.R.P.C., which provides that it is professional misconduct for a lawyer to engage in conduct that adversely reflects on his fitness to practice law. [ASB No. 97-333(A)]

- On January 31, 2003, Birmingham attorney **Willie Leon Williams, Jr.** received a public reprimand with general publication. On February 26, 2002, the Disciplinary Board of the Alabama State Bar found Williams guilty of certain ethical violations arising out of the complaint filed against him by the complainant. Williams was retained by Robert Shelborne to assist him in obtaining funds on deposit in a London bank. According to Shelborne, the Nigerian government had deposited \$31,000,000 to his account in this London bank. In order to withdraw the funds, Shelborne had to first remit

\$200,000 to cover applicable "taxes and fees." For a contingent fee of \$1,000,000, Williams was hired to assist in obtaining the release of the money. This included help in raising the necessary \$200,000 from investors.

In May 1998, Shelborne met with the complainant about seeking a loan of \$50,000 in exchange for a promissory note of \$100,000 to be paid in three days. The complainant knew Williams personally, and he told Shelborne that he would loan the money, only if Williams recommended the transaction. In a later meeting with Williams and Shelborne, Williams not only told the complainant it was a "good deal," but also told him Williams had invested his own money in the venture. The complainant later learned that it was Williams's cousin who invested the money. He was never told the cousin's three-day note had long been in default. Further, Williams agreed to "stand behind" the deal, and guaranteed that the complainant would get his money. Williams later denied that he had made this guarantee, but a recorded telephone conversation showed otherwise. The complainant paid the \$50,000, and received Shelborne's \$100,000 promissory note, due in three days. This note was never paid as no money was received from London.

Shelborne soon disappeared. Williams's efforts to contact the London bank were unsuccessful. Inquiries to British commercial authorities revealed that this bank did not exist. It became apparent to Williams that the deal had been a fraud all along.

The complainant repeatedly called on Williams to make good on Williams's guarantee. In September 1998, Williams, as attorney for the complainant and his cousin, filed suit against the absent Shelborne. In December 1998, default judgments in favor of the plaintiffs were rendered against Shelborne, but Williams never recorded these judgments.

Because of pressure from his family, Williams gave his cousin a note for \$100,000 and eventually paid her back. Williams did not take similar action on the complainant's loan, and he filed a bar complaint. The Disciplinary Board found Williams guilty of violating rules 1.9 (a) [conflict of interest] and 8.4(c) [misconduct] of the Alabama Rules of Professional Conduct. [ASB No. 00-201] ■

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Dothan, AL 36302

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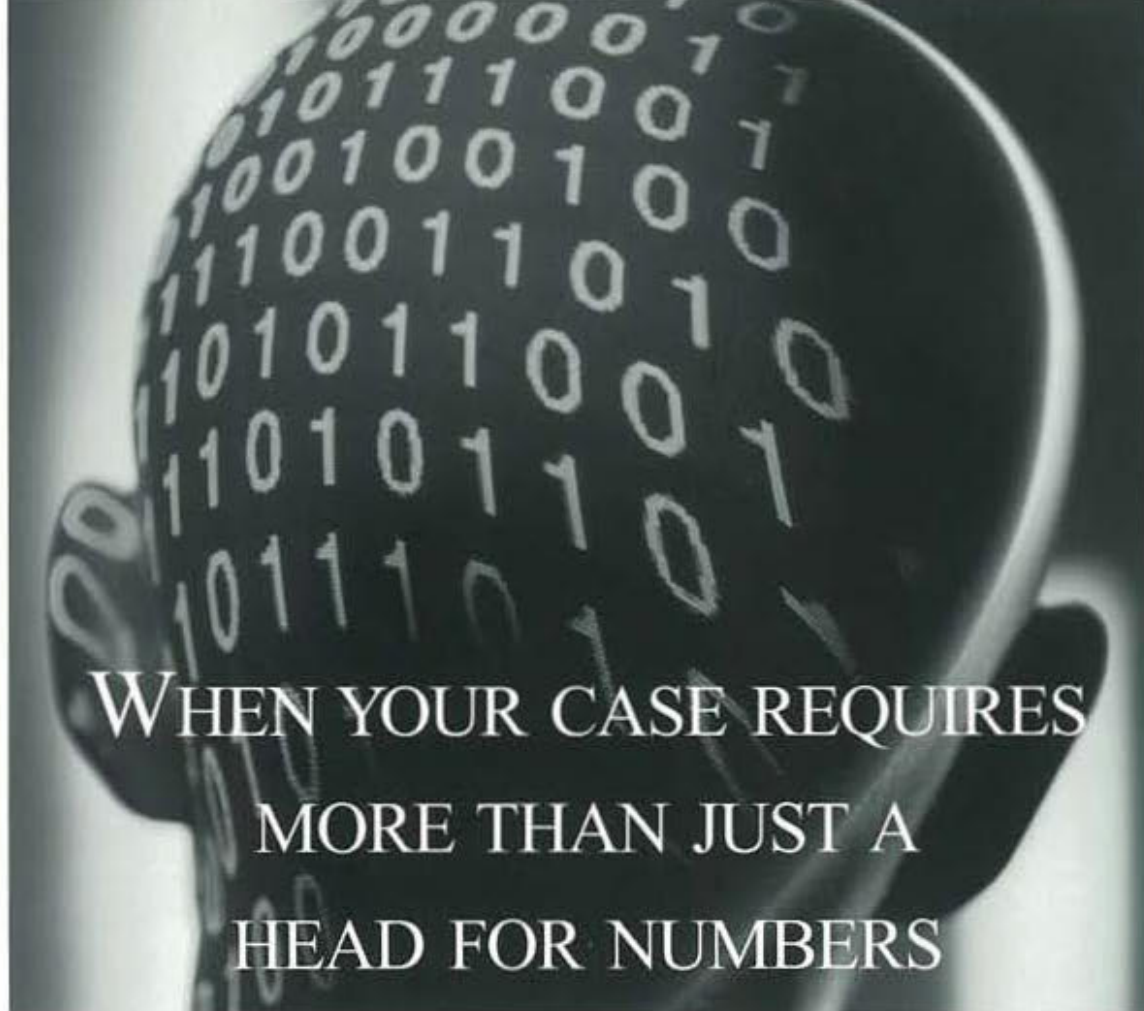
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