

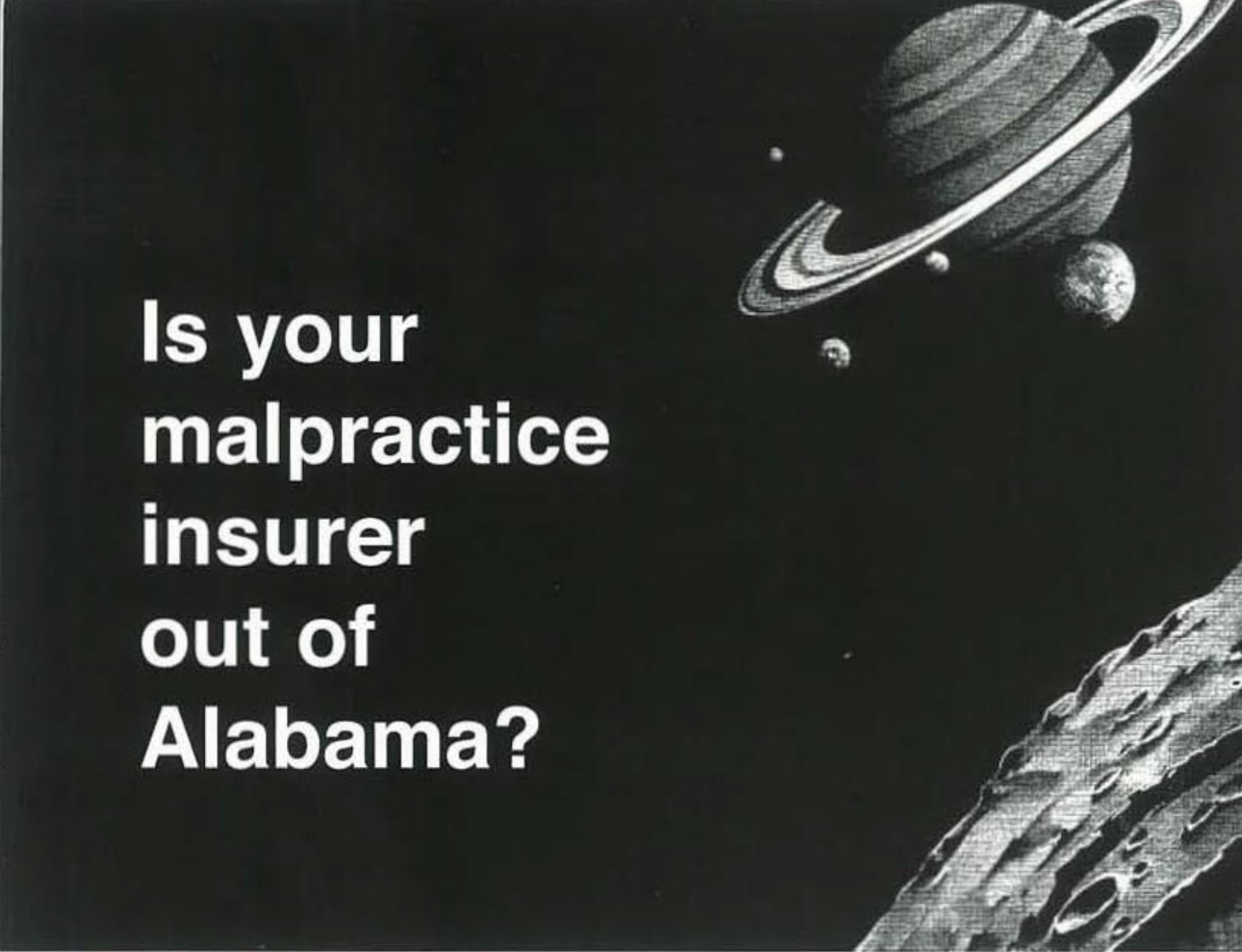
The Alabama Lawyer

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1994-2004

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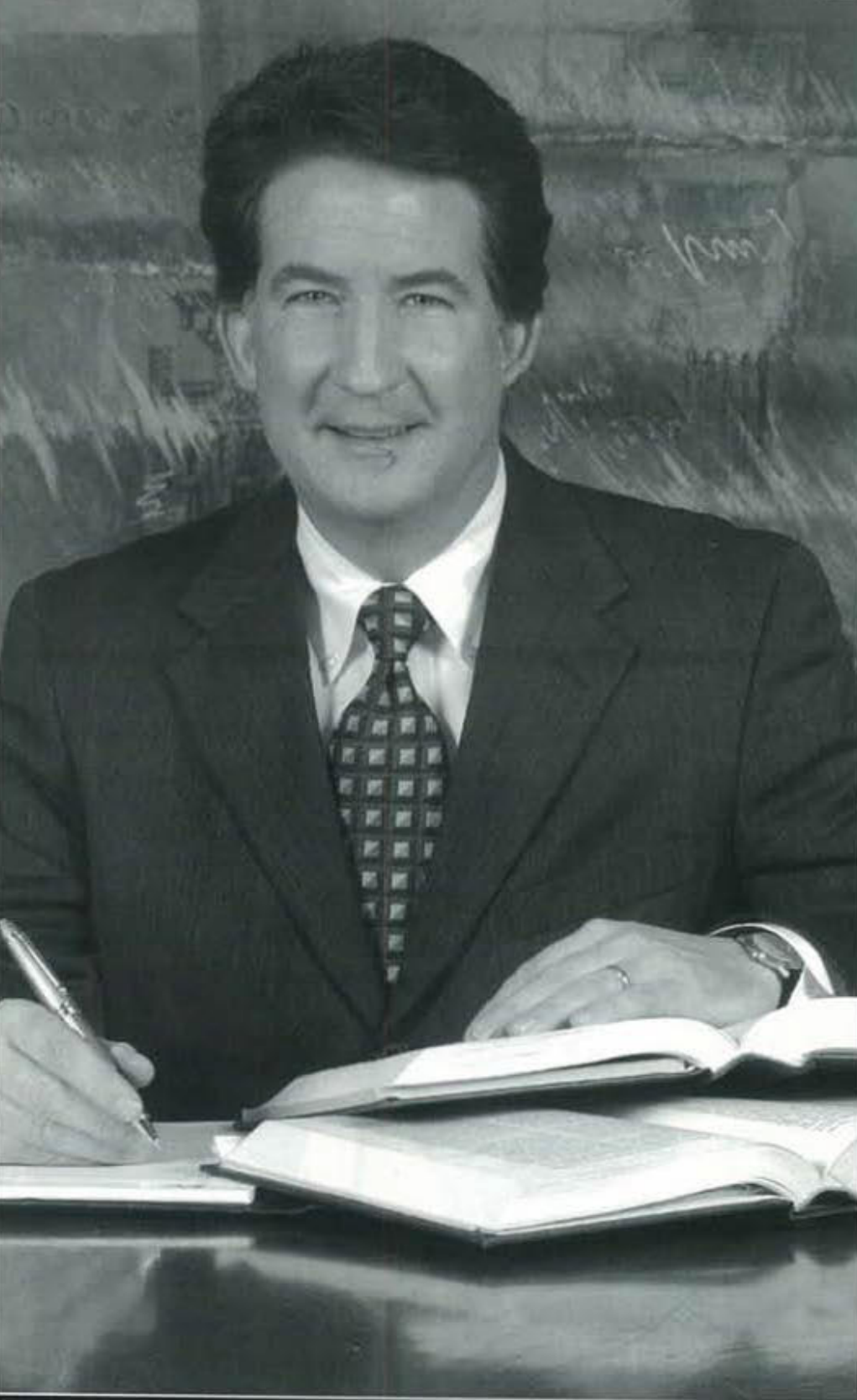
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On the Cover:

Canoeists enjoy a springtime morning at the Hilton Sandestin Beach Golf Resort & Spa, Florida.

The 2,400-acre resort, site of the 2004 Alabama State Bar Annual Meeting, includes seven miles of some of the world's most beautiful beaches along the Gulf of Mexico and Choctawhatchee Bay. The resort also features 14 tennis courts, four championship golf courses and a 98-slip marina. The photo was taken near the beginning of the Jolle Island nature trail, overlooking the bay and marina.

Photo by Paul Crawford, JD

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Are footprints as foolproof as fingerprints?

The prosecutor in a capital offense case wanted to submit footprints taken inside a shoe as evidence. Two nights before the trial, the defense attorney received a Mealey's E-Mail News Report about a case that questioned the admissibility of this evidence.



The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender®, including *Moore's Federal Practice*® on the LexisNexis™ services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis™ Total Research System—It's how you know.



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AL6619



By William N. Clark

Respond to *Gideon's* Trumpet, and Turn Commitment into Action



William N. Clark

Forty years ago last year, *Gideon v. Wainwright*, 372 U.S. 335 (1963) was decided by the United States Supreme Court with an opinion written by Alabama's own **Justice Hugo Black**. That decision provided for counsel in serious criminal cases. However, the case did not provide how counsel was to be provided, or who was to pay for it. During my law school days in the late '60s and early '70s, public defender programs began springing up around the country, although the appointment of counsel was the primary method used to select counsel in most states. Common questions were, what type of system should be established, and who is to pay for it? Forty-plus years later, unfortunately, those questions are still being asked in many states, including Alabama.

In 1975, I was appointed by **ASB President Tommy Greaves** to be the chairman of a state bar committee on indigent defense. That committee later merged with, and became a part of, an advisory committee on indigent defense to the Alabama Supreme Court. The committee worked for some six years in an effort to improve the representation of indigent defendants in Alabama. One of the results was a major statewide study of indigent defense in Alabama lead by **Bob Spangenberg** from Massachusetts, whose services were paid for by an ABA grant. Among the recommendations were suggestions that there be public defender programs in the large metropolitan areas, and some combination of appointed counsel and public defender programs in the rural areas. When the study began, the rate of pay for appointed counsel was \$10 for out-of-court (time) and \$20 for in-court. One of the few fruits of the work of the committee was that the rate of pay was increased from \$10 to \$20 for out-of-court time, and from \$20 to \$40 for in-court. None of the other recommendations of the committee were implemented.

Over the past 20 years or so, Bob Spangenberg has come back to Alabama on a number of occasions to assist us in studying the Alabama indigent defense system, and in attempting to promote positive improvements. The **Supreme Court of Alabama's Judicial Study Commission** has twice made recommendations for change, including creation of a statewide **Indigent Defense Commission**, which would oversee indigent defense in Alabama. Twenty-six states have adopted a similar approach, to try and provide some advocacy for

those who are indigent defendants who are accused of crime, and to provide some direction to the indigent defense system. One of the positive results of such an indigent defense commission would be a degree of accountability that does not otherwise exist statewide.

On February 26th of this year, the Alabama State Bar hosted the first **Alabama Indigent Defense Symposium** held at the state capitol. **Ed Patterson**, the state bar's director of programs, and **John Pickens**, the executive director of the **Alabama Appleseed Center for Law and Justice**, were the key leaders in the planning and implementation of the program. Lawyers, judges, legislators, business people, and representatives from the comptrollers office, the administrative office of courts, and the Governor's office were invited. The program included a presentation by Bob Spangenberg who now is a consultant for the American Bar Association and who has assisted practically every state in the United States, and a number of foreign companies, in trying to improve their indigent defense system. Most recently, he has been in China trying to improve that fledgling system. Bob described the history over the last 25 years of Alabama's efforts at improving indigent defense, some of which I mentioned previously. He also reviewed where other states have been and the progress which they have made. His presentation was followed by a panel of lawyers representing public defender programs and the private sector regarding various methods of providing indigent defense services. The panel of lawyers was followed by a panel of judges who gave their perspective on indigent defense services in Alabama. A third panel was comprised of representatives from Georgia, Texas and North Carolina who described their very successful efforts at reforming their indigent defense systems.

The luncheon speaker for the symposium was **Mark Curriden**, the author of *Contempt of Court: The Turn-Of-The-Century Lynching That Launched 100 years of Federalism*. He is also a lawyer, and former newspaper reporter for the *Dallas Morning News*. His review of the facts and circumstances surrounding his book were fascinating. The book is the story of a turn-of-the-century trial in Chattanooga of a black person accused of a crime which he did not commit, and the courage and innovative lawyering of two black lawyers. The book is well worth reading, and was an

inspiration to all present about the absolute importance of competent counsel.

The day concluded with a panel which included, among others, acting **Chief Justice Gorman Houston** and **Senator Myron Penn** from Union Springs reviewing what actions might be taken in Alabama to improve the Alabama indigent defense system. The general consensus of those present at the meeting was that the place to start is the establishment of a statewide oversight organization, such as an Indigent Defense Commission. Pursuit of that recommendation is currently in progress.

I believe the day was an exciting one for all concerned. There seemed to be a renewed commitment to answering *Gideon's* "Clarion Call" to provide competent counsel to poor people accused of crime. At a time when our state has recently rejected a plan to increase funding by raising taxes, some would say that if our legislature has to choose between funding services such as roads, schools, etc., and the provision of adequate indigent defense services, it is the latter which will lose. However, it does not appear that there should be an "either or" decision. When a citizen's liberty is at stake, it is absolutely imperative that he or she has competent counsel. That should not be an option. Given the enthusiasm and commitment which seemed present at the recent symposium, I am optimistic that we can finally move forward in Alabama toward making significant improvements in our indigent defense system.

One of the panel participants for the recent symposium was **Bryan Stevenson** of Montgomery, who is the director of the **Equal Justice Initiative**, which does an outstanding job in providing representation for indigent defendants in capital cases. While the State of Alabama provides appointed counsel for direct appeals from death penalty convictions, it provides no resources or timely legal assistance to death row inmates in state post-conviction proceedings. To assist his group with this representation, Bryan has often received legal research assistance from law firms outside Alabama. Many times, these are very large firms which do not practice criminal law, but have the resources to assist. From time to time, firms in Alabama have also assisted, and are encouraged to do so in the future. There is a critical need for a statewide capital public defender program to provide counsel for

persons on appeal and in post-conviction proceedings in capital cases. Such an office would also be a resource for training and assistance to appointed counsel in capital cases.

The difficulty in locating lawyers willing to serve as appointed counsel in criminal cases varies from circuit to circuit in Alabama. At the current rates of \$40/hour for out-of-court time and \$60/hour for in-court time and office overhead expenses, the fee is far from exorbitant. What Alabama does not need is any reduction of our current payment system. Nevertheless, a part of Governor Riley's legislative package this year would eliminate the overhead expenses provided to appointed counsel. The ASB Board of Bar Commissioners unanimously passed a resolution opposing such legislation. Appointed counsel receive nothing near the rate paid by the state to civil lawyers contracted by the state. It would be a tremendous disincentive for lawyers to represent indigent defendants if this small benefit were rescinded.

For a long time, the Alabama State Bar has been committed to protecting the rights of our citizens accused of crime. It is time to turn that commitment into action. We are inching closer to what Justice Black had in mind in *Gideon*, but we are far from reaching home plate. To the Alabama lawyers who represent poor people accused of crime, whether public defenders, contract counsel or assigned counsel, I salute you for all you do, and encourage others to follow in your footsteps. For those lawyers who have not heretofore represented indigent defendants, I encourage you to offer your assistance. That assistance may come in a variety of forms. For example, assistance is needed in helping to educate the legislature and the public about how essential it is to our system of justice that competent counsel is provided for indigent defendants. Ironically, as I was completing my writing of this month's "President Page," I received an e-mail from **Wilson Myers**, an Alabama lawyer, now working in Iraq, assisting the Iraqi Ministry of Justice in developing a system of criminal justice. He was lamenting the absence of any system for providing counsel to Iraqi citizens who cannot afford counsel. I applaud Wilson for his service and dedication to implementing the rule of law in Iraq, but what of Alabama? It is time we meet the challenge and respond clearly to *Gideon's* trumpet. ■

Pro Bono Award Nominations

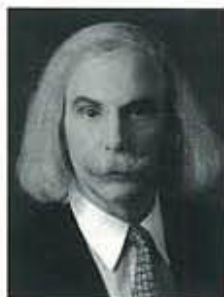
The Alabama State Bar Committee on Volunteer Lawyer Programs, (formerly the Committee on Access to Legal Services), is seeking nominations for the Alabama State Bar Pro Bono Award. Nomination forms can be obtained by contacting:

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The ASB 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, 2004 and include a completed Alabama State Bar Pro Bono Awards Program Nomination Form to be considered by the Committee.

Pursuant to the Alabama State Bar's Rule Governing the Election of President-Elect, the following biographical sketches are provided of Bobby D. Segall, Carol Ann Smith and Carol H. Stewart. Segall, Smith and Stewart were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2004-05 term, and the winner will assume the presidency in July 2005.



Bobby D. Segall

BOBBY D. SEGALL

Bobby Segall attended public schools from kindergarten through high school in Montgomery. He received his undergraduate degree from Vanderbilt University and his law degree from the University of Alabama, where he finished first in his class, was student work editor of the *Law Review*, and became a member of the Order of the Coif. He also received an LL.M degree from Harvard. One of his great experiences was clerking for Judge Frank M. Johnson, Jr. when Judge Johnson sat on the United States Middle District bench.

In private practice, Bobby has been with Copeland, Franco for a little over 30 years. His professional activities have focused on trying to provide legal services to the poor. He served on the board of Legal Services Corporation of Alabama for 27 years, and was president of the board for six years. This past year, he chaired the Transition Committee that organized the merger among Legal Services Corporation in Alabama, Legal Services of Metro Birmingham and Legal Services of North Central Alabama. He now serves on the board of the newly formed program that encompasses the entire state, Legal Services Alabama. He also serves on the Executive Committee of the Access to Justice Commission, which is the state planning entity for all access to justice organizations in the state.

Bobby has been active in bar activities at the local and state levels. He has served as president of the Montgomery County Bar Association. He has been a state bar commissioner for nine years, and for three of those years, including this one, has served on the Executive Council of the state bar. He also has served on numerous state bar committees and task forces, including the Task Force on Diversity. He presently

chairs the Task Force on Organization and Operation of Bar Sections. He also writes a humor column for the MCBA's publication, *The Docket*.

Other law-related activities include serving as president of the Hugh Maddox Chapter of the Inns of Court; a member of the board of the University of Alabama School of Law Foundation; as president of the Montgomery County Trial Lawyers Association; and a member of the Historical Committee and the Special Disciplinary Panel of the U.S. District Court for the Middle District of Alabama. He has spoken at numerous CLE seminars and serves on Alabama's Mandatory CLE Commission.

Bobby has been selected as a member of the American Board of Trial Advocates, is a Life Fellow of the Alabama Law Foundation, and has been recognized in *Best Lawyers in America* since the publication began.

Bobby also has been active in a leadership capacity in many religious, charitable and community organizations, and is a participant in Leadership Alabama.

Bobby's law practice has been varied. He has represented both plaintiffs and defendants in a wide range of litigation, including personal injury and wrongful death cases, business and other complex litigation cases, employment cases and civil rights and constitutional cases. He has represented approximately 75 lawyers on personal matters over the years and has also represented numerous judges. He also has often represented unpopular clients, i.e., other than the lawyers and judges.

Bobby has been married to Sandy Segall for 28 years, and they have two sons, Joshua, who is in law school at the University of Alabama, and Jacob, who is a freshman at Tulane. ■



Carol Ann Smith

CAROL ANN SMITH

Carol Ann Smith has practiced law in Alabama since 1977. The daughter of a Methodist minister who served more than a dozen small Alabama towns, Carol Ann attended school in Camp Hill, Red Bay, Cherokee, Falkville, Alabaster, Inglenook, and Florence. She attended Birmingham Southern College on scholarship, with the benefit of the work-study program, and graduated *magna cum laude* and as a member of Phi Beta Kappa.

After college, Carol Ann was first employed with the Birmingham Public Library as its government documents librarian. There she became determined to pursue a career in law. She attended the University of Alabama School of Law, again on scholarship and through work-study. She served on the editorial board of the *Alabama Law Review* and authored a published article. As a work-study student, she was assigned to Dean Camille Cook in the Alabama Bar Institute for Continuing Legal Education, who gave Carol Ann the job of editing materials submitted for publication by Alabama lawyers.

Following graduation from the University of Alabama School of Law, Carol Ann accepted a position clerking for the Honorable James N. Bloodworth of the Alabama Supreme Court. After her clerkship ended, Carol Ann was employed with the Montgomery firm of Steiner, Crum & Baker for a short time before enrolling in the LLM program at New York University School of Law, again on scholarship.

After obtaining an LLM in taxation, Carol Ann returned to Alabama to practice tax law with Lange, Simpson, Robinson & Somerville. Carol Ann became enamored of the courtroom. Since 1978, Carol Ann has had an active litigation practice in state and federal courts in Alabama. Her trial practice has continued from her early years as an associate with Lange, Simpson; through her position as an associate, and later a partner, with the firm of Starnes & Atchison; and now as senior partner with the firm of Smith & Ely. "I have had the great fortune of practicing alongside and against the most talented trial lawyers anywhere in the country."

Carol Ann became active in local bar work from the beginning of her career. She has served for 26 years on the Birmingham Bar Association Entertainment

Committee, and has served terms on many other local bar committees, including the Executive Committee, the Grievance Committee and as chair of the Public Service Committee. She is a member of the BBA's Women's Section and its Solo and Small Firm Section. She first held elected bar office in the early 1980s, serving on the Executive Committee of the BBA's Young Lawyers' Section, where she served as chair of the Entertainment Committee. In 1984, Carol Ann was elected president of the BBA's Young Lawyers' Section.

In 1995, Carol Ann became the first woman nominated by the Birmingham Bar Association as a candidate for its presidency and, on election, became the first woman president in the association's 110-year history. "That year, the Executive Committee took on a lot of new projects. We decided to sign on with a professional publisher to publish a history of lawyers in Birmingham. We held the Birmingham Bar's first of many annual Bench & Bar Retreats. We paid homage to then recently-deceased Birmingham heroes, Justice Oscar Adams and Arthur Shores, both with a memorial service and with the hanging of their portraits in the bar headquarters. And, we hired a consultant to help the bar begin the process of adopting a formal long-range plan."

The Birmingham Bar Foundation is the charitable arm of the Birmingham Bar Association. Carol Ann has served on its board since 1998 and as its president in 2000. During her term as president, the Foundation held its first lawyer talent show/fundraiser. The talent show made possible a substantial donation by the Foundation to a program sponsored by The Children's Hospital to place child car seats in the cars of impoverished families.

Carol Ann's statewide bar work began early in her career as well. From 1978 to 1989, she served on the editorial board of *The Alabama Lawyer*, serving as associate editor the last three years. From 1982 to 1984, she served on the Executive Council of the Alabama State Bar Young Lawyers' Section. She has served on many Alabama State Bar committees and task forces, including the Task Force on Judicial Selection; the Task Force on Intra Bench-Bar Communication, 1998-1999; and the Alabama State Bar Task Force on Diversity, 2002-2004.

(Continued on page 141)



Carol H. Stewart

CAROL H. STEWART

Carol Stewart was born in Mooresville, North Carolina in 1953 and was educated in the Iredell County public schools. She earned her bachelor of science in chemistry in 1974 at the University of North Carolina at Charlotte. She financed 100 percent of her college education by working part-time jobs in high school, including driving a school bus, waiting tables and serving as a lifeguard and a chemistry lab assistant. Her senior year of college, Carol was awarded an internship in the Charlotte City Crime Laboratory, and after graduating, she worked for the Charlotte City Crime Laboratory, the Mobile City Crime Laboratory, and the Alabama Department of Forensic Sciences as a drug analyst.

In 1979, Carol moved to Birmingham and was accepted at the Cumberland School of Law. While at Cumberland, she served as recent decisions editor of the *Cumberland Law Review* and as Law Day chairman. Under her leadership, the program received the ABA Best Law Day in the Nation award. Carol received her J.D., *magna cum laude*, from Cumberland in 1982. Later that year, she was licensed to practice law in Alabama and Georgia. In 1983, Carol graduated with the inaugural class of the University of Alabama at Birmingham's Masters in Forensic Sciences program. That same year, she became licensed to practice law in Florida.

After graduation from law school, Carol clerked for United States District Judge Sam C. Pointer, Jr. in the Northern District of Alabama. After her clerkship, she joined the firm of Thomas, Taliaferro, Forman, Burr & Murray, now known as Burr & Forman LLP, where she practices today. Carol's practice is primarily as a general business torts litigator, handling cases for both plaintiffs and defendants. She has tried cases in many federal and state courts across the country. Additionally, Carol has a unique niche practice in the area of condominium law. In this capacity, she represents developers of condominiums, condominium associations and condominium unit owners. Carol has published several articles and papers and is a frequent lecturer in the area of condominium law.

Committed to serving her profession and giving back to her community, Carol has been meaningfully involved in

the Alabama State Bar, other professional organizations and many charitable organizations. She currently is serving her third three-year term on the Alabama State Bar Board of Bar Commissioners, and in 2000-01 was appointed by then-President Sam Rumore to serve on the Executive Council of the Board. In 2003 she was appointed to serve on the Disciplinary Commission of the bar, and has served on the Mandatory Continuing Legal Education Commission since 1999. She has also served on the Committee on Disciplinary Rules and Enforcement for three years and is a member of the Women's Section of the state bar. Carol's past involvement with the Alabama State Bar includes serving on the Disciplinary Board (1998-2003) and the Character and Fitness Committee (1994-1998), serving as chair of the Business Torts and Antitrust Section in 1991, as well as many committees, including the *Alabama Bar Directory* Committee (1992-94), *The Alabama Lawyer* editorial board (1990-91) and chairman of the Law Day Committee (1986).

Carol believes that it is very important that each lawyer gives back to his or her school. She currently serves as the Annual Fund chairperson for Cumberland School of Law and serves on the Dean's Advisory Council. In 2002, Carol served as the Birmingham Cumberland Club president. In 2003, she was honored as the Cumberland School of Law Volunteer of the Year.

In other professional activities, Carol has served on the Birmingham Bar Foundation Board of Directors since 2000, and in 2002 she co-chaired a committee which raised funds to retire the note on the Birmingham Bar Center. Currently, Carol serves as a group chair of the Grievance Committee of the Birmingham Bar Association. She has also served on the Executive Committee of the Birmingham Bar and as Grievance Committee chairperson. Committed to the development of women to their full potential in the law, Carol served on the board of the Women's Section of the Birmingham Bar for six years and served as the section's president in 1998. Carol received the Birmingham Bar Association's L. Burton Barnes Award for Public Service in 2001.

(Continued on page 141)

CAROL ANN SMITH

(Continued from page 139)

Carol Ann chaired the 1984 Mentoring Committee and the 2000 Task Force on Bench-Bar Relations. Carol Ann is a Fellow of the Alabama Law Foundation. She is also a member of the state bar's Women's Section. In 2003, Carol Ann was appointed by the Alabama Supreme Court to serve on its Alabama Pattern Jury Instructions Committee.

Carol Ann also has been active in the Alabama Defense Lawyers Association, serving on its board of directors from 1984 to 1987, and as president in 1997. During Carol Ann's term as president, ADLA decided to take action to promote goodwill between the polarized plaintiff and defense sections of the bar. The association drafted a comprehensive set of voluntary guidelines for civility and worked with the Alabama Trial Lawyers Association to obtain their approval and support. Together, plaintiff lawyers and defense lawyers obtained the approval, or adoption, of the guidelines by each of the federal district courts in Alabama. The guidelines were unanimously adopted by the judges of the Tenth Judicial Circuit of Alabama.

Beginning in 1979, Carol Ann served for more than ten years on the Executive Committee of the Alabama Bar Institute for Continuing Legal Education. She has been a frequent speaker at legal seminars and has chaired many CLE planning committees. She served as chair of the MCLE Committee of the ASB Young Lawyers' Section during the time the committee was responsible for planning the annual "Update" seminars presented by the YLS at the state bar's annual meeting. In 1998, Carol Ann was honored as the recipient of the Walter P. Gewin Award for Outstanding Service to the Alabama Bench and Bar in

Continuing Legal Education, an award given annually by the Alabama Bar Institute for Continuing Legal Education.

Carol Ann is active in the Birmingham Inns of Court. She is a member of the American Bar Association and has been selected as a Fellow of the American Bar Foundation. She is also a member of the Federal Circuit Bar Association and the Defense Research Institute.

Carol Ann has also been active in her community, as a member of the Kiwanis Club of Birmingham; on the board of management of the Fourth Avenue YMCA and its Executive Committee; on the board of management of the Metro YMCA; and on the board of management of the Downtown YMCA. In 1997, she was honored by the *Birmingham Business Journal* as one of the Top Ten Women in Birmingham. Recently, Carol Ann was honored by her beloved alma mater, Birmingham Southern College, as a Distinguished Alumna, 2002.

Carol Ann is troubled by the public's growing distrust of the legal system and by its widespread lack of respect for lawyers. "The legal system has become the fault line where the first signs of social change are being felt. Our legal system is threatened by the great upheaval of trust in public institutions that this country is undergoing. As the country becomes increasingly divided, the legal system and lawyers are easy targets for general discontent. I don't know what can be done on a national scale, but here in Alabama, the stereotype does not fit. In this state, lawyers are the work horses of our communities, of our charities, of our churches and of our synagogues, and of our parent-teacher organizations. From Boy Scout Explorer posts, to Little League coaching staffs, to organizations opposing hate crimes, to shelters for homeless families, Alabama lawyers stand tall. Whatever role I play in the future of the Alabama State Bar will be devoted to securing for Alabama lawyers the respect they deserve." ■

CAROL H. STEWART

(Continued from page 140)

Carol was elected as a fellow of the American Bar Foundation and a fellow of the Alabama State Bar Foundation. In addition to the Alabama State Bar, she also is a member of the American Bar Association, the State Bar of Georgia and The Florida Bar. During her 21 years of the active practice of law, Carol has participated on numerous occasions as a lecturer for continuing legal education, has been an adjunct professor of law at Cumberland, and has taught forensic sciences at UAB.

Carol is also very involved in community and civic activities. She serves on the board of directors of Pathways, a shelter for homeless women and children, and participates as a Big Sister in the Big Brothers/Big Sisters program. With her husband, Rusty, Carol has been a Big Sister since 1995 to a remarkable young man named Brint Hardy, who will attend Birmingham Southern College next year on a baseball scholarship. She is also immediate past president of Hand-in-Paw and currently serves on the board of that organization. Hand-in-Paw's programs use "pet therapy" to help sick and special needs children and at-risk youth. In 2003, Carol was honored as the Hand-in-Paw Board Member of the Year. She serves on the Birmingham

Public Park and Recreation Board and is a member of The Women's Network.

Carol is passionate about animals and served on the board of directors of the Greater Birmingham Humane Society for five years, serving as its president for two years. She is currently involved with the foster care program of the Shelby County Humane Society and Alabama Adoption Rescue, Inc., having fostered over 200 homeless mother dogs and puppies. Carol and her husband have seven dogs, some of which were rescued animals.

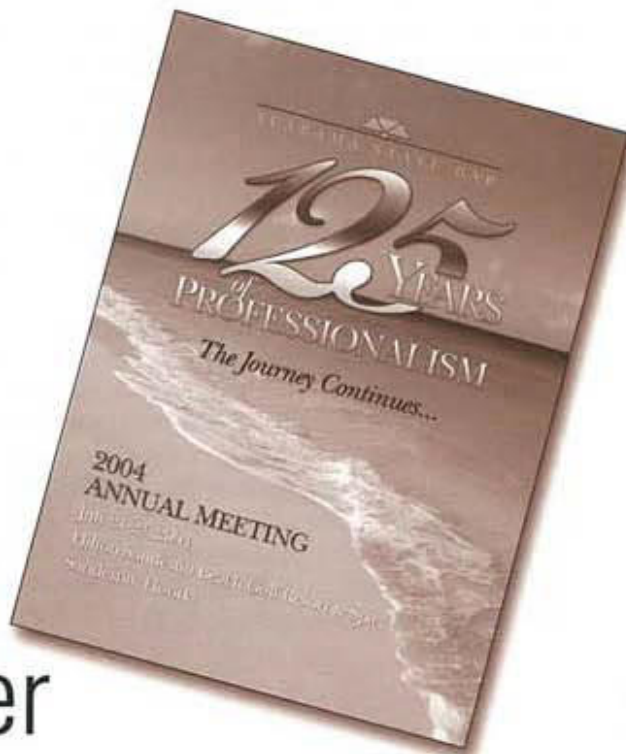
Carol is a member of the Leadership Birmingham Class of 1999, and served on the Program Committee this year. She is also a member of the Project Corporate Leadership Class of 1989. In 2001, Carol was honored as one of Birmingham's Top Women and received the *Birmingham Business Journal's* Top 40 Under 40 Award in 1991.

In 1986, Carol married Lewis "Rusty" Stewart, who is a principal in the real estate brokerage firm of Southpace Properties. Rusty has two children, Judson and Kathrine. Judson, a broker with McGriff Siebels & Williams, an insurance brokerage firm, is married to Buffy Stewart, and they have one son, Judson, Jr. Kathrine, a real estate agent, is married to Mike Messer, who has two children, Sawyer and Anna, and they live in Staunton, Virginia. Carol and her family are active members of the Cathedral Church of the Advent. ■



Keith B. Norman

The 125th Annual Meeting: One to Remember



This year's annual meeting (July 21-24), will be the state bar's 125th. Plans have been made for a meeting that will have something for the entire family! The meeting hotel will be the ever popular Sandestin Hilton. From the beautiful Gulf waters and beaches to an impressive line-up of plenary speakers and CLE programs, as well as an array of enjoyable social activities, this year's annual meeting is certain to rank among our best ever.

Refer to the schedule of events included in this issue of *The Alabama Lawyer*, or visit the bar's Web site at www.alabar.org for complete details. Whether you register online from the bar's Web site or use the registration form that was mailed to you, register early so that you reserve your spot at the 125th annual meeting. We look forward to seeing you there!

The Alabama Center for Dispute Resolution

This issue features the Alabama Supreme Court Commission on Dispute Resolution (the Commission) and the Alabama Center for Dispute Resolution (the

Center) on the occasion of their tenth anniversaries. Created by the state bar, the Center has made impressive strides in the field of dispute resolution in Alabama. The Center has proved to be a valuable resource statewide for promoting mediation and other methods of dispute resolution.

The Center's success these past ten years is due in large measure to **Judy Keegan**, who has served as its first and only director since 1994. She has been a tireless promoter of ADR across the state. Judy's drive and creative energies have led to the development and implementation of programs for dispute resolution in Alabama that have involved lawyers, laypersons, the judiciary, schools, communities, the state and federal government, and businesses. The Center's body of work, under Judy's able leadership and the auspices of the Commission, despite having the smallest budget of any state dispute resolution center, has put our state in the forefront of all statewide programs.

A great deal has been accomplished in Alabama these last ten years in the field of ADR and much remains to be done. With Judy Keegan at the helm, I am sure that the Center's future will be as productive as its past. ■



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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

Angela M. Cooper announces the opening of **Cooper Law Firm**, Hilton Square Building, 3103 Airport Boulevard, Suite 610, Mobile 36606. Phone (251) 473-8180.

Patrick Harris, formerly of Beers & Anderson, announces the opening of his office at 323 Adams Avenue, Montgomery 36104. Phone (334) 262-2770.

Mark Hoffman, formerly of Corley, Moncus & Ward, announces the opening of his office at 2229 First Avenue, North, Birmingham 35203. Phone (205) 241-9643.

William R. Payne, formerly of Lawton & Associates, announces the opening of his office at 1300 Noble Street, Anniston 36202. Phone (256) 237-3560.

Jean M. Powers announces the opening of her office at 155 S. Warren Street, Mobile 36602. Phone (251) 432-3781.

Arthur F. Ray II announces the opening of **The Law Office of Arthur F. Ray II, LLC** at 8244 Old Federal Road, Montgomery 36117. Phone (334) 396-5719.

Among Firms

The **Alabama Court of Criminal Appeals** announces that **Ben Locklar**, formerly with Jordan, Myers & Locklar, is now a staff attorney.

Alford, Clausen & McDonald, LLC announces that **L. Hunter Compton, Jr.** has been promoted to partner, and **Juan C. Ortega**, **Gabrielle Reeves Pringle** and **J. Richard Moore** have joined as associates.

Armbrecht Jackson LLP announces that **Sam David Knight** and **J. Walton Jackson** have become partners, and **Benjamin Y. Ford** has joined the firm as an associate.

Bayer Properties Incorporated announces that **Jeffrey M. Pomeroy** has been named vice-president and assistant general counsel.

Beasley, Allen, Crow, Methvin, Portis & Miles, PC announces that **Scarlette M. Tuley** has become a shareholder with the firm.

Berry & Berry announces a name change to **Berry, Berry & Little**.

Wesley H. Blacksher and **Ronald Herrington** announce the formation of **Blacksher & Herrington, LLC**. Offices are located at 401 Church Street, Mobile 36602. Phone (251) 432-1010.

Bohanan & Belt PC announces that **Morris Lillenthal** has joined the firm as an associate.

Bradley Arant Rose & White LLP announces that **Nathan A. Forrester**, selected in 2002 to be the first solicitor general in the history of the state, has joined the firm as counsel. The firm also announces that **Jeffery R. Blackwood**, **James W. Childs, Jr.**, **Tracy M. Thompson** and **Laura Parchman Washburn** have become partners.

Burr & Forman LLP announces that **Ashley H. Hattaway**, **Bradley W. Lard**, **Theodore M. McDowell, Jr.**, **K. Bryance Metheny**, and **Joel A. Price, Jr.** have become partners.

Capell & Howard PC announces that **George L. Beck, Jr.** has joined the firm as a member, and that **Mai Lan F. Isler**, **John H. Roth** and **Chad W. Bryan** have joined as associates.

Clark Dolan Morse Oncale & Hair PC announces that **Eric David Bonner** has become associated with the firm.

Wendy Brooks Crew & Associates PC announces that **Sybil Corley Howell** is now a shareholder, and the firm name has changed to **Crew & Howell PC**.

Gamble, Gamble & Calame LLC announces that **Valerie Kisor Chittom** has become a member of the firm, and the new firm name is **Gamble, Gamble, Calame & Chittom LLC**.

Ray Gibson, Monica Rodgers and Steven W. Money announce the formation of **Gibson, Rodgers & Money LLC**, with offices at 2315 9th Street, Suite 3-B, Tuscaloosa 35401. Phone (205) 342-9000.

Hand Arendall announces that **J. Fred Kingren** has joined the firm as a member and **M. Allison Taylor** has joined as counsel. The firm also announces that **Jaime W. Betbeze** and **E. Shane Black** have become members.

Haskell Slaughter Young & Rediker LLC announces that **Joseph L. Cowan II, J. Mark Hart, Mark D. Hess, C.**

Dennis Hughes, Bert S. Nettles, and Brennan C. Ohme have become members, and **Khristi J. Doss** and **John H. McEniry, IV** have become associates. The firm also announces that **David R. Baker** has joined the firm *of counsel*.

Stephen D. Springer and **Stewart G. Springer** announce the formation of **Immigration Legal Services LLC** with offices at 950 22nd Street, North, Suite 638, The Medical Forum Building, Birmingham. Phone (205) 447-9610.

McDowell Knight Roedder & Sledge LLC announces that **Richard M. Gaal** has become a member.

Norman, Wood, Kendrick & Turner announces that **Celeste K. Poteat** has become a partner in the firm and **Holly D. Sass** has become an associate.

Dinah Petri Rhodes and **Amy Strain Creech** announce the opening of **Rhodes & Creech** with offices at 115 Manning Drive, Suite D202, Huntsville 35801. Phone (256) 536-1676.

Self, Smith, Burdine & Burdine announces that **Charles J. Kelley** has

become a member of the firm. With the recent death of **Robert Burdine**, the firm name is now **Self, Smith, Burdine & Kelley**.

Sirote & Permutt PC announces that **John R. Baggette, Jr.** and **J. Gregory Carwie** have become shareholders.

Dennis C. Sweet, III and **Richard A. Freese** announce the formation of **Sweet & Freese LLC** with offices at The Morgan Keegan Center, 2900 Highway 280, Suite 240, Birmingham 35233. Phone (205) 871-4144.

The **U.S. Department of Defense** announces that **Wilson Myers** has been appointed to the Coalition Provisional Authority for 18 months as an investigative technical trainer under the senior advisor to the Iraqi Ministry of Justice.

Waddey & Patterson PC announces that **Larry W. Brantley** has been named a principal in the firm.

Waller Lansden Dortch & Davis PLLC announces that **Stanley E. Graham** has become a member. ■

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Honorable George M. Akers

The Honorable George M. Akers, United States administrative law judge, died Tuesday, December 30, 2003 in a Montgomery hospital at the age of 86.

Judge Akers, known as "Stony," a native of Abington, Virginia, served in the U.S. Army Air Force during World War II. He was an A-20 pilot, a twin-engine fighter/bomber. He flew 53 missions in the Southwest Pacific Theater, participating in the Battle of the Bismark Sea. He received the Air Medal with Oak Leaf Cluster. After his discharge from service, he entered the University of Alabama where he received a B.S. degree in commerce and business administration in 1948 and a law degree in 1950. While in law school, he was a charter member of the *Alabama Law Review*, serving as business manager in his senior year. He was a member of Phi Delta Phi Law Fraternity and maintained his membership in the Farrah law Society.

After graduation, Judge Akers served briefly as an assistant attorney general, as clerk to Supreme Court Justice Joel Brown, and as an associate in the Montgomery office of the firm of Martin, Turn, Blakey & Bouldin. Thereafter, he was a partner in the firm of Ballard, Ballard & Akers from 1954 to 1969, and for about two years in the firm of Akers & Russell. Since 1971, he served as U.S. Administrative Law Judge in the Office of Hearings and Appeals, Montgomery, and

served as its chief judge for over 25 years. He was one of the longest serving chief judges in the U.S. He was a member of the American, Alabama and Florida bar associations and served as a past president of the Dixie Lions Club.

In addition to his professional accomplishments, Judge Akers was a generous and philanthropic lawyer, he and his wife having endowed the George M. Akers Endowment Fund at the University of Alabama School of Law in 1987. He was an avid racquetball player, playing in the "A" league of his Montgomery club well into his 70s.

Mrs. Akers, the former Mary Cowles, a native of Montgomery, predeceased him in 2003. She also received her A.B. degree from the University of Alabama in 1942 and her M.A. degree from Troy State University in 1971. She retired as chairman of the English Department of Jefferson Davis High School after 30 years as a classroom teacher. Judge and Mrs. Akers were active in the civic and social life of Montgomery. He is survived by his son, George M. Akers, III; a sister, Nanell A. Barnett; and grandchildren, great-grandchildren and many nieces and nephews.

—Charles A. Thigpen, chief administrative law judge,
Office of Hearings and Appeals, Montgomery

Senator B. Don Hale

Senator B. Don Hale, a Cullman County lawyer and former state senator, died at his home on Thanksgiving Day 2003 at the age of 66.

Hale was born in Cullman County on October 31, 1937. After graduating from West Point High School in 1956, he enlisted in the United States Air Force, where he served his country with distinction before receiving an honorable discharge in 1960.

Hale later attended Jackson State and then St. Bernard College where in 1966 he received a Bachelor of Arts degree in history. Hale went on to earn his law degree from Cumberland School of Law in Birmingham in 1969. After graduation, he returned to Cullman where he practiced law with Jamie Thompson and Asa Hartwig before being recruited by U.S. Attorney Wayman Sherrer to serve as an Assistant U.S. Attorney in the Birmingham office. Within two years of his appoint, Hale was promoted to first Assistant U.S. Attorney and received national recognition for his services from the Department of Justice.

In 1975, Hale returned to private practice in Cullman, where he practiced with Roy Williams under the firm name of Hale & Williams until 1980. It was during the early 1980s that Hale was hired to serve as city attorney for the City of Cullman. Hale would continue to serve in this capacity for almost 20 years and was well recognized by his peers for his keen understanding of municipal law issues. Cullman Mayor Don Green said of Hale, "I always knew him to be a very unselfish person. He was also a very knowledgeable city attorney. He served Cullman and Cullman County well for many years as a state senator and the contributions he made will live on for many, many years."

In 1986, Hale entered into partnership with Greg Nicholas under the firm name of Hale & Nicholas, and he began his first campaign for the state senate shortly thereafter. Hale, a lifelong Republican, was elected to the Alabama state senate later that

year and served a total of three terms. During his tenure in the senate, held key positions in the administrations of Governor Guy Hunt and Governor Jim Folsom, Jr.

Governor Hunt said of Senator Hale, "Don wasn't your typical politician. He had friends on both sides of the aisle and he leaves behind a lifetime of public service that few people can match. I could always depend on him, and his dedication to his district and his state won him friends on both sides of the aisle."

Former Governor Folsom echoed those sentiments. "I appointed Don Rules chairman, which by the way is one of the most powerful chairmanships in the state senate, because we had a job to do and I knew I could count on him to do what needed to be done," Folsom said. "I was a Democrat and Don was a Republican, but we always worked well together. He was an amazing legislator and an even more amazing person. I've never know of anyone who put more of their heart into their job as a state senator and he strove every day to do the best he could for the people of Cullman, Morgan and Madison counties."

Hale was particularly devoted to the cause of economic development and worked tirelessly as senator and as Cullman City Attorney to recruit industry to north Alabama. Shortly after his retirement from public service in 1998, Hale was awarded the prestigious E.G. Plunkett Visionary Award for his courage, vision and dedication to the cause of economic development.

An editorial appearing in the *Cullman Times* perhaps summarized the life of Hale best by noting, "He was a man who achieved power but didn't abuse it, who earned respect and didn't betray it." Certainly this was a fitting tribute to a man who devoted his entire life in service to others.

Don Hale is survived by his wife, Verna Hale; three children, Derrick, Trevor and Heather Hale; and one grandchild, Spencer Hale.

—Greg Nicholas, immediate past president,
Cullman County Bar Association



Gullahorn, William Collier, Jr.

Albertville
Admitted: 1957
Died: February 15, 2004

Kelly, Robert Eugene

Montgomery
Admitted: 1958
Died: February 29, 2004

Mashburn, Telfair James

Bay Minette
Admitted: 1936
Died: January 2, 2004

Miller, Martha Ann

Montgomery
Admitted: 1990
Died: February 2, 2004

Miller, Paul Jackson, Jr.

Phenix City
Admitted: 1951
Died: June 13, 2003



Skinner, Stanford Joyner

Birmingham
Admitted: 1951
Died: February 24, 2004

Watkins, John Franklin, Jr.

Prattville
Admitted: 1947
Died: July 28, 2003

Huel McKinley Love

Huel McKinley Love passed from us at his home in Talladega on the evening of February 18, 2004. He was 82 years old. He had practiced law continuously for over 50 years, and appeared in court on behalf of his client for the final time on the day of his death.

Born in Elmore County, he was raised in Clay County and was a graduate of Bibb Graves High school. He was a combat veteran of the United States Navy during World War II, assigned to the 1st Marine Amphibious Corp. He served for "three years, six months and 17 days" in the Pacific Theater where he fought in battles which included Guadalcanal, Bougainville and the Philippine Islands.

Upon his honorable discharge from the Navy, he attended the University of Alabama, where he received his law degree in 1949. He had hoped for a career with the Federal Bureau of Investigation and was waiting for his application to be processed when he borrowed \$14 from his father, hung out his shingle and fell in love with the practice of law.

In the five decades that followed, he represented thousands of clients with every conceivable legal problem. His knowledge of the law was vast, yet no matter was considered too mundane for his attention. His exploits in the civil arena were legendary. He recently sold his movie rights to a case from the 1950s in which he represented a client in a dispute over the property rights to a meteorite which struck her as it fell from the sky. He was instrumental in having that meteorite placed on permanent display at the University of Alabama Museum of Natural History in Tuscaloosa.

However, his career as a civil litigator was soon overshadowed by his prowess as a criminal defense attorney. He served as counsel for the accused in over 300 murder cases. During one high-profile murder case, he had an automobile blown out from under him. His skill in the defense of persons charged as bootleggers was well-known, and earned him the nickname "Little Jesus"—for if Huel Love couldn't save you, then no one could. Although his career in criminal law was primarily in the defense of those accused, on several occasions he was appointed as special prosecutor to present the state's case in a criminal matter. His career as both counselor and advocate was unparalleled, yet in his own eyes his highest achievement in the law was in being elected by his peers to two terms as an Alabama State Bar Commissioner.

As he watched the legal world evolve into specialization, he continued to practice his own specialty—helping people with whatever problem they had at the moment. In his eyes, poverty was no sin. Once he decided that he could help you, it made no difference to him whether you went to work in a suit or in overalls. You would receive the full measure of his skill whether you had paid his fee in cash or with produce. He was the embodiment of everything that is good and honorable about the practice of law.

This great country lawyer was also my father. He was 52 years old and in the middle of a trial when I was born. By this time he had mastered the art of dashing to the hospital nursery during the court's recess (often with the assistance of a state trooper) to welcome another child into the world. As often as



not, that child was destined to become a lawyer. My mother, Betty C. Love, joined my father in the practice of law in 1965, however they rarely tried a case together. As my father explained, "Neither of us can stand a back seat driver." My brother, Huel M. Love, Jr., joined my father's practice in 1982. In 1988 my sister, D. Leigh Love, joined the firm, and in 1999, I joined the firm. In 2003, my brother, Fred F. Ledbetter, Jr., joined the practice. One of my father's greatest pleasures was in sharing his love of the law. He delighted in nurturing the professional development of those of his children who had followed him to a career in the law, and never lost his patience or became annoyed at their endless requests for assistance.

My fondest childhood memories are of him rocking on the porch in the evenings with my mother, talking about their day. Clients would often come by, bringing vegetables or preserves or whatever else they had of which they felt he might be in need. If business was to be discussed, then they would step off the porch together and walk off to a private corner of the yard.

In "To Kill A Mockingbird," Harper Lee created an idealized country lawyer in the character of Atticus Finch. But to me, Atticus Finch was no fictional character—he was my father. The lessons which my father taught, through his own example, were more about dignity and compassion than any fine point of the

law. His measure of his own wealth was in the lives of those he had touched. We should all aspire to such riches.

During his entire legal career, the door to his office was always open to any person with a question or problem. Now, for the first time, that door is closed. The papers on his desk remain exactly as he left them on February 18, 2004. Each of us has lost something—a father, a colleague, a mentor, a friend. His family would appreciate and cherish any recollections or stories which you feel that you can share. You may contact the family through the office of Julie Love P.C., P.O. Box 20577, Tuscaloosa 35402.

Huel M. Love was a dutiful and loving son to his mother, Mattie Love Ritch, until her death at the age of 100 in May 2003. He is survived by his wife, Betty C. Love; five daughters, Alice Faye Love, Virginia Paige Smith, Carla Ann Love, D. Leigh Love, and Julie Love Templeton; four sons, Huel M. Love, Jr., Fred Franklin Ledbetter, Jr., John Hugh Love and Jason Landers Love; one sister, Edna Sue Pitts, one nephew, Huel Pitts; 13 grandchildren; and nine great-grandchildren.

—As told by Julie L. Love,
with assistance from Huel M. Love, Jr.

U.S. District Judge Edwin L. Nelson

Edwin L. Nelson, U.S. District Judge for the Northern District of Alabama, passed away on May 17, 2003 after over 13 years of service as a district judge, following over 15 years of service as a magistrate judge on the same court. He was born in East Brewton, Alabama on February 10, 1940.

Judge Nelson joined the U.S. Navy in 1958 where he served aboard the destroyer "U.S.S. Lloyd Thomas." After attending the University of Alabama and Samford University, he received an LL.B. degree from Cumberland School of Law, Samford University, in 1969.

Following five years of practice in Fort Payne, he began his judicial life by accepting an appointment on October 17, 1974 as U.S. Magistrate Judge for the Northern District of Alabama. On February 9, 1990, he entered active duty as District Judge following his appointment by President George H. Bush.

Judge Nelson's service in the federal judiciary was not limited to the court on his sat. He served as president of the District Judges Association for the Eleventh Circuit and as a member of the Judicial Council for the Eleventh Circuit. For six years, he was a member of the Judicial Conference of the U.S.

Committee on Information Technology and, at the time of his death, was serving the last year of a three-year term as committee chair. His able and farsighted leadership resulted in a new nationwide case management and electronic case filing system, as well as greatly improved security for electronic communications without compromising individual privacy.

Just as Judge Nelson was a lifetime judge, he was lifetime and devoted husband to his "bride" of over 37 years, Linda Jane Mayes Nelson, the father of their two beloved children, Allison and Patrick, and doting grandfather of four.

Strong spiritually and mentally, dignity and fairness were the hallmarks of his courtroom and chambers demeanor. Always a southern gentleman with a refined manner, Judge Nelson's career as federal judge was august and distinguished. He is remembered for his constant pursuit of knowledge, his high standards for integrity, his hard work, his dedication to public service, his wonderful sense of humor, and his love and care for his family, friends and colleagues. He is greatly missed.

—James H. Hancock, senior judge, U.S. District Court,
Northern District of Alabama, Birmingham

Judge J. Wilfred Tucker

Judge J. Wilfred Tucker, longtime judge, prosecutor and lawyer in Cullman, died December 18, 2003.

Judge Tucker was born February 17, 1932. He was admitted to the practice of law in Alabama in 1955. He served two terms as county solicitor of Cullman County, from 1963 to 1971. Judge Tucker was elected district judge in Cullman County and served from 1981 to 1993.

In addition, Judge Tucker served many years as a municipal judge in the towns of Cullman, Hanceville, Garden City and Holly Pond.

He and his wife, Doris, were married for 47 years and they had four children, Debra Tucker of Cullman, Donna Jacobs of

Cullman, Karen Shedd of Mississippi and Dr. James Tucker of Florida. The Tuckers had seven grandchildren and nine great-grandchildren.

Judge Tucker's late father, Jack Tucker, was one of the original 13 probation officers for the State of Alabama. Jack Tucker also served as police chief for the City of Cullman. Judge Tucker's brother, Kenneth Tucker, served as probation officer in Cullman County for 41 years. Judge Tucker's other brother, Donald, of Decatur, is a retired NASA engineer.

—James R. Knight,
Knight, Griffith, McKenzie, Knight, McElroy & Little, LLP, Cullman



By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

Uniform Commercial Code

Alabama adopted the Uniform Commercial Code in 1965. This Uniform law is the law in all 50 states and was drafted by the American Bar Association and the National Conference of Commissions of Uniform State Laws.

Alabama's UCC remained virtually unchanged for 30 years, except for one partial revision of Article 9 in 1982.

The ABA/NCCUSL conducted a review of the UCC to assure that it had kept pace with modern business practices. As a result, each of the articles has been studied and revised. Alabama revised its 1965 UCC laws one at a time, beginning with the two new articles, Article 2A—Leases and Article 4A—Funds Transfers. The Articles have been revised as follows:

Alabama initially adopted the entire Code in 1965.

UCC—ARTICLES	REVISED
1. "General Provisions"	Pending 2004
2. "Sales"	Unchanged
2A. "Leases"	1994
3. "Negotiable Instruments"	1996
4. "Bank Deposits and Collections"	1996
4A. "Funds Transfers"	1993
5. "Letters of Credit"	1998
6. "Bulk Sales - Repealed"	1997
7. "Documents of Title"	Pending 2004
8. "Investment Securities"	1997
9. "Secured Transactions"	2002

UCC Article 1—"General Provisions"

This provides definitions and general provisions that in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC.

With the other parts of the UCC having been revised and amended to accommodate changing business practices and developments of law, it is necessary that these changes be made and the changes made in the revi-

sions of other articles must be reflected in an update of Article 1.

Revised Article 1 contains technical, non-substantive modifications, such as reordering and renumbering of sections and adding of gender-neutral terminology. In addition, several other changes reflect an effort to add greater clarity to the general provisions of Article 1.

There are two substantive provisions dealing with "Good Faith" and "Choice of Law." Both of these are unchanged by this revision and remain the same as they have been for 40 years.

UCC Article 7—"Documents of Title"

This is the least controversial revision of all the articles of the Uniform Commercial Code that the Institute revised.

Article 7 is the last substantive article of the Uniform Commercial Code to be revised since 1965. The purpose of the revision is to provide a framework for and in recognition of the electronic documents of title which became necessary due to Congress passing the Electronic Signatures in Global and National Commerce Act or E-SIGN in 2000 and, subsequently, Alabama passing the Uniform Electronic Transactions Act in 2002.

The purpose of this project was two-fold: (1) to provide framework for use of electronic documents, and (2) to update the Article for modern times in light of state, federal and international developments that have transpired over the last 40 years.

This Act typically provides documentation of goods that have been placed with another party, either for storage or for transfer to another party. Usually, these are warehouse receipts and bills of lading for truckers and shippers.

Technical changes that have been made include:

1. New definitions of "carrier," "record," "sign" and "shipper" in Section 7-102;

2. Deletion of references to tariffs or filed classifications given the deregulation of the affected industries. See e.g. section 7-103 and 7-309;
3. Clarifying the rules regarding when a document is nonnegotiable. § 7-104;
4. Making clear when rules apply just to warehouse receipts or bills of lading, thus, eliminating the need for former section 7-105;
5. Clarifying that particular terms need not be included in order to have a valid warehouse receipt. Section 7-202;
6. Broadening the ability of the warehouse to make an effective limitation of liability in its warehouse receipt or storage agreement in accord with commercial practice. Section 7-204;
7. Allowing a warehouse to have a lien on goods covered by a storage agreement and clarifying the priority rules regarding the claim of a warehouse lien as against other interests. Section 7-209;
8. Conforming language usage to modern shipping practice. Sections 7-301 and 7-302;
9. Clarifying the extent of the carrier's lien. Section 7-307;
10. Adding references to Article 2A when appropriate. See e.g. sections 7-503, 7-504 and 7-509;
11. Clarifying that the warranty made by negotiation or delivery of a document of title should apply only in the case of a voluntary transfer of possession or control of the document. Section 7-507;
12. Providing greater flexibility to a court regarding adequate protection against loss when ordering delivery of the goods or issuance of a substitute document. Section 7-601; and
13. Providing conforming amendments to the other Articles of the Uniform Commercial Code to accommodate electronic documents of title.

Only the very controversial Article 2, "Sales," has not been revised. Currently, the Institute is not planning a review of this Article. Information concerning these bills can be found on the Institute's Web site or by obtaining a copy from the legislature;

UCC Article 1

HB-217 Sponsor--Representative Cam Ward

SB-68 Sponsors--Senators Zeb Little, Roger Bedford, and Larry Means

UCC Article 7

HB-252 Sponsor--Representative Charles Newton

SB-168 Sponsors--Senators Curt Lee, Ted Little, Zeb Little, Wendell Mitchell, and Rodger Smitherman

Other Institute-Prepared Bills

Uniform Securities Act (pending on the calendar of each house)

HB-301 Representative Marcel Black

SB-290 Senators Roger Bedford, Rodger Smitherman, and Ted Little

Uniform Landlord Tenant Act

HB-274 Representatives Jeff McLaughlin, James Buskey, Marcel Black, Merika Coleman, Priscilla Dunn, Demetrius Newton, and Craig Ford

SB-197 Senators Myron Penn and Rodger Smitherman

Uniform Trust Code

HB Representative Leslie Vance

SB Senator Rodger Smitherman

2004 Regular Session

The 2004 Regular Session began February 3rd, and at the writing of this article is approximately half over. There are pending 420 senate bills and 620 house bills. With more than 1,000 bills having been introduced, only two local bills have found their way into law.

Copies of Law Institute bills are available on the Institute's Web site, www.ali.state.al.us.

A copy of all legislation may be obtained from the Alabama Legislative Information System online: at www.alisdb.legislature.state.al.us/acas/ACASLogin.asp

The legislature is scheduled to adjourn this month, May 17th.

For more information, 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.

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>



- Birmingham attorney **Jack Criswell** has been named chairman-elect of the Automobile Law Committee of the Tort, Trial and Insurance Practice Section of the American Bar Association. His term as chair will begin in August of this year at the ABA's Annual Meeting in Atlanta.

Criswell has been practicing in Birmingham since 1988 and is a graduate of Cumberland School of Law.

- The **Alabama Center for Dispute Resolution** has been named a recipient of the 2004 Pro Bono and Legal Services Dispute Resolution Mini-Grants.
- Earlier this year, the Jackson County Historical Society hosted a ceremony honoring the **Jackson County Courthouse** and the Scottsboro trials, along with the dedication of a Legal Milestones marker. The marker was erected in 2003 as a joint project of the Historical Society and the Alabama State Bar.

Constructed in 1911-12, the Jackson County Courthouse was the site of the first of the Scottsboro Boys trials, where two white women accused nine black youths of rape in 1931. After a series of trials, convictions and overturned decisions, a compromise was reached in 1938, with some of the defendants freed immediately and others released by 1950.

Two landmark United States Supreme Court decisions arose directly from the case: *Patterson v. Alabama* and *Norris v. Alabama*. Many consider the Scottsboro case and its aftermath one of the beginnings of the civil rights movement in Alabama.

- Montgomery attorney **William D. Coleman**, who serves as managing director of Capell & Howard PC, has become a Fellow of the American College of Construction Attorneys. The College is a professional association consisting of approximately 120

lawyers throughout the country who devote the majority of their professional time to the practice or teaching of construction law. Coleman regularly serves as a mediator or arbitrator of disputes arising from construction projects.

- **Ernestine S. Sapp**, a partner with the Tuskegee firm of Gray, Langford, Sapp, McGowan, Gray & Nathanson, recently was elected as state delegate from Alabama to the American Bar Association's House of Delegates. Her three-year term begins this year at the ABA's Annual Meeting in August.
- **Judge Rhonda Jones Hardesty** was recently presented with the Clanton C.I.T.Y. Program's Citizen of the Year award. Judge Hardesty was recognized for her continued assistance to youths in Chilton County through the circuit court system.
- **Huntsville Municipal Judge Charles Rodenhauser** was presented recently with an award from the Southern Conference on Language Teaching. The award was in recognition of his efforts to meet the needs of foreign language speakers who appear in his court.

When the City of Huntsville hired **Polly Blalock** as a city prosecutor, Judge Rodenhauser saw a chance to help Spanish speakers. Blalock speaks fluent Spanish and has conversational skills in French, Italian and Japanese.

Rodenhauser wrote a list of questions and phrases that would help him communicate with Spanish speakers before the bench. Blalock translated the list and coached Rodenhauser in the pronunciation of the words. Court personnel also attended a Spanish class conducted by Blalock. In addition, the court has a list of interpreters on call for arraignments and trial dockets.

- **Dr. Larry O'Neill Putt** was recently named the new dean of the Thomas Goode Jones School of Law at Faulkner University. Putt has been with the law school since 1999, serving as associate dean for Academic Affairs and Professor of Law. He replaces Wendell Mitchell, who will serve as dean emeritus and professor of law. Putt earned a bachelor's degree in economics and political science at Mississippi State University and a master's of law degree and juris doctor degree at the University of Mississippi.

- **Frank M. Bainbridge** was recently named the Birmingham Bar Association's Outstanding Lawyer of the Year. **Richard Vincent**, chairman of the BBA's Lawyer of the Year Committee, presented the award. Bainbridge, of Bainbridge, Rogers & Smith, started practicing in Birmingham in 1956.

In 1970, he was the BBA's chair of the Unauthorized Practice of Law Committee when a scandal broke concerning three disbarred Birmingham lawyers who continued to promote themselves as licensed attorneys to out-of-state clients. Bainbridge mobilized his committee to expose and shut down the "quickie divorce" racket and said two judges involved in the scandal were removed from office and sent to federal prison for mail fraud.

Following the scandal, Bainbridge received an award of merit from the Alabama State Bar, and in 1977, was elected president of the BBA.

In other association news, **J. Mark White** was elected president; **Lee Thuston** was named president-elect; **Circuit Judge Robert S. Vance, Jr.** received the 2004 Judge Drayton James Award for his dedication in helping new or young lawyers; and **Martha Jane Patton** received the Barton Barnes Public Service Award for her work in various organizations including serving as executive director of the Legal Aid Society.

- Walston, Wells, Anderson & Bains LLP announced recently that **Ronald Levitt**, a partner in the Birmingham firm, has been elected to the American College of Tax Counsel. Members must have at least ten years of substantial experience in tax and tax-related matters and demonstrate an exceptional degree of professional commitment to the practice of law through active involvement in the Tax Section of the ABA.

Levitt joined the firm in 1996 to establish the firm's tax practice. He is listed in *Best Lawyers in America* in taxation and serves as vice-chairman of the ABA Taxation Section's S Corporation committee and president of the Birmingham Tax Forum. He has served as chairman of the ASB's Tax Section and as president of the Federal Tax Clinic, Inc. Levitt also has served as an adjunct professor of law for both The University of Alabama School of Law's LLM in taxation program and Cumberland School of Law, teaching partnership taxation. ■

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These Are A Few of My Favorite Things

BY JUDITH M. KEEGAN

Ten years have flown by since “the guys” and I first met in the Lange Simpson room in 1994. It was **Marshall Timberlake**, **Bill Coleman** and **Keith Norman**, the new Alabama State Bar director, and I, fleeing from Washington, D.C. traffic. They hired me to run a **Center for Dispute Resolution** with a long “to-do” list outlined in the Alabama Supreme Court’s order. The Center was to be responsible to the **Alabama Supreme Court Commission on Dispute Resolution** (Commission).

Over the years, the Center and Commission have worked on many ventures with wonderful volunteers, leaders and the bar’s ADR Committee. We have enjoyed making progressive ADR happen in this state. After reviewing our annual reports and scrapbooks, I picked out a few of my favorite things.

1994

Judge Joseph Phelps and I began **peer mediation** at **Chisholm Elementary School** in Montgomery. The judge convinced the principal that allowing kids to problem solve with the help of a fellow student mediator was a good thing. I worked with the faculty, putting them through lots of kid-type activities that teach cooperation, brainstorming and problem-solving, such as building a bridge with marshmallows, gumdrops and toothpicks with no verbal

communication. We had some great bridges, body language and laughs. Later, I helped the faculty who would teach the course in each grade select curriculum and videos. During the following year, the Center hosted the faculty of **Lanier High School** in Montgomery for two days of mediation training. The Commission has continued to fund peer mediation. **Anne Isbell**, Commission member from northern Alabama, has taken that project statewide. She has been assisted in Jefferson County by funding secured by retired **Judge Gerald Topazi, Lt. Governor Lucy Baxley’s** appointee to the Commission.

1995

Public service announcements featuring mediation were heard and seen on Alabama radio and TV thanks to the work of **Susan Andres**, the state bar’s communications director, and the bar’s **PR Committee** and Communication Department’s collaboration with the Center. A partnership with the **Alabama Broadcasters Association** for airtime made it possible to bring mediation to the people. You still might catch one of our TV spots in which Commission members **Bill Coleman** of **Capell Howard** and **Steven Benefield** of **Christian & Small** excel in their roles as mediators.



Acting Alabama Supreme Court Chief Justice Gorman Houston at an appellate mediation training seminar after addressing the participants

1996

The state's first **Mediation/Settlement Week** occurred during the summer in the 15th Judicial Circuit, spearheaded by **Judge Sally Greenhaw**. The purpose of the event was to clear the docket of pending civil cases and to provide participants an opportunity to decide their own cases through mediation. During the "litigation truce," with a limited docket of contested trials and hearings, trained volunteer mediators coordinated by **Wes Romine** mediated pending civil cases. These truces with mediated settlements are still a great idea, and I encourage you to try one in your own circuit.

1997

Alabama's first **community mediation center** was instituted in Montgomery through the work and dedication of **Malcolm Carmichael** of **Balch & Bingham**. Developed as a program of **Leadership Montgomery**, in collaboration with the Center, funding came from the Commission and other organizations. For five years, community mediation was successful here, using trained volunteer mediators, but every year they had to look for funding to keep the administrator position. Now, after a two-year hiatus, and with partial funding, **Leadership Montgomery** is struggling to determine how to keep community mediation afloat. Additionally, the bar's **Attorney Client Fee Dispute Resolution Program**, featuring mediation and arbitration, kicked off its first year under **Rod Max's** leadership. Currently under the administration of **Rita Gray**, the program has had fee disputes ranging from \$50 to \$64,000. It is voluntary, and free to both attorney and client. At the Montgomery District



Gary F. Canner, 11th Circuit mediator, conducts an appellate mediation training seminar at the state bar.

Court, **Judge Lynn Bright** began the longest running **small claims mediation** program in the state. It uses volunteer lawyer mediators and law students to mediate at docket calls. It is administered by **Pam Gooden Cook**, is fully supported by **Judges Peggy Givhan** and **Lucie McLemore**, and is highly successful. By year's end, the Center's **Web site** was up and running.

1998

This was the year the heaven-sent (at the insistence of attorney **Arlene Richardson**) **Jackie Heartsill** joined the Center as my executive assistant. Jackie was judicial assistant to the **Honorable Ted Bozeman** for 20 years. Her help has been invaluable. Jackie maintains all the databases and the finances, and keeps the office functioning perfectly. Executive Orders 42 and 50 started agency ADR in Alabama, and the **Governor's Task Force on State Agency ADR** (Task Force) began its work under the leadership of **Marshall Timberlake** of **Balch & Bingham**, **Karen L. Bryan** of **LaMoreaux & Associates** and me. **Lee County** commenced its small claims mediation program. **Judge Richard Lane**,



Jackie Heartsill

Commission member, and **Judge Nix** were willing to experiment. AOC coordinated the volunteer citizen mediators, and **Ken Dunham** of **Jones Law School** and I trained them. This program has developed to include parenting plans for divorcing couples and peer mediation in Lee County Schools. Commission funding assisted in both agency and small claims mediation. The first special issue of *The Alabama Lawyer* featuring ADR was published. During the year, the **Alabama Academy of Attorney Mediators**, the first professional mediator association, was organized and began meeting in **Charles Denaburg's** office in Birmingham.

1999

Arbitration in Alabama, training for advocates and arbitrators, was developed by a planning committee (including **Bill Coleman**, **Jack Clarke** and the author) and convened by **Anita Hamlett** and **Steve Emens** at **ABICLE**. This interactive course was broadcast in eight cities. The EEOC's Birmingham District Office presented a program on the EEOC's **New National ADR Initiative**. I was a guest speaker, and Commission member **Debra Leo** was as well. She continues to be ADR coordinator at EEOC. The Center and the **Alabama Crime Prevention Clearinghouse** sponsored the Harvard Health teleconference at AUM, "Safe Schools, Safe

Communities." The Jefferson County District Court Mediation Program got a great start as Michele Obradovic found initial funding from the Alabama Dispute Resolution Foundation.

2000

At the Center's request, Governor Don Siegelman proclaimed Mediation Week for Alabama, and the Center invited individuals from various ADR programs to participate in the signing and picture. The Fellows Program, developed by the Task Force to introduce Alabama government executives to ADR, had its first two-day training at the Legends of Capitol Hill. The Center and Rod Max, then at Sirote & Permutt in Birmingham, sponsored a Business Community ADR Seminar at Sirote's new building. I was appointed by Governor Siegelman to attend the first Summit of the States on Conflict Resolution in Lexington, Kentucky, sponsored by the Council of State Governments. The Center was selected to

work on the Gulf of Mexico Collaboration project with participants from Florida, Mississippi, Louisiana and Texas. The Mobile County District Court Mediation Program began as attorney Y.D. Lott recruited volunteer lawyer mediators and was funded by the Commission.

2001

The Children's Trust Fund, under Allison Black's initiative and with technical assistance from the Center, trained mediators for Truce Talks. This program was to develop support and visitation mediation at various fund grantee sites. The State Agency Workplace Mediation Pilot began in November. Mediators from nine participating agencies were trained with Center assistance to mediate workplace disputes at no cost to the state or its employees. Doug Lunsford, with the state personnel agency, administers the program. The Honorable Tracy McCooley of Montgomery, with a Commission grant,

began the first court-connected Victim Offender Conferencing Program in Alabama. This program is extremely successful, and may be replicated in other counties with program materials developed by Judge McCooley's experience.

2002

Justice Champ Lyons convened the Appellate Mediation Committee to study and develop a mediation program for Alabama appellate courts. Justices Harwood and Woodall, the Honorable Sharon Yates (recent Commission chair), Rhonda Chambers of Taylor & Taylor of Birmingham, and I served on the initial Committee. We were later joined by John Wilkerson, Celeste Sabel, Rebecca Oates and Michele Walters. The Center applied for, and the courts received, an appellate mediation grant for \$50,000. In the state agency arena, Governor Don Siegelman and Attorney General Bill Pryor sent a joint memo to chief agency counsel directing them to include a mediation clause in

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state contracts in which Chapter 5, Section 4B(6) of the Alabama Fiscal Policy and Procedures Manual is normally applied concerning contracts and Board of Adjustment cases. **Tori Adams-Burks**, ALJ, of the **Attorney General's Office**, and **John Wible**, general counsel for **Public Health**, became co-chairs of the **Alabama State Agency ADR Support Group** (Agency ADR Support Group), successor organization to the Task Force. Additional leadership included **Mose Stuart**, Finance; **Jim Goodwyn**, Conservation and Natural Resources; **Bill Butler**, Medicaid; **Carolyn Robinson**, Public Health; **Doug Lunsford**, Personnel; **Bryan Morgan**, State Military; and the author. At the bar's annual meeting, the **Christian Legal Society** awarded me the **2002 Peacemaker Award**.

2003

Governor **Bob Riley** issued Executive Order 7, as supported by Commission member and then legal advisor, **Troy King**. This order expanded the **agency workplace mediation program** to include all agencies that want to participate, encouraged more ADR and collaboration in state agency work, and required each agency, board and commission to appoint an **ADR coordinator** to work with the Agency ADR Support Group. There are now 82 ADR agency coordinators. The

first coordinator training occurred in October 2003. The Center hosted over 120 attorneys and judges at **Appellate Mediation Training** with **Gary Canner**, 11th Circuit mediator, as lead trainer. **John Wilkerson**, clerk of the **Court of Civil Appeals**, and **Rebecca Oats** and **Celeste Sabel**, staff attorneys, were responsible for teaching how the appellate mediation program will work in Alabama. **Acting Chief Justice Gorman Houston** sent a letter to all trial judges in Alabama encouraging them to use mediation. This letter accompanied a brochure developed by the Center: *Using Mediation to Resolve Disputes in Your Court*, a primer for Judges. We owe **Hendon DeBray** and **Robert Ward** from **Rushton Stakely**, and members of the ADR Committee for the brochure and letter suggestion. They contacted Judge Ford of the Commission who spoke with Justice Houston about the idea. In one month, the brochure and letter were written and mailed.

2004

Appellate mediation began in January, administered by **Michele Walters** at the supreme court. As I write this, **Wayne Turner**, longtime mediator, has settled one of the first appellate mediation cases. A two-day **Arbitrator training** will be hosted by the Center this month. Seasoned arbitrators **Jack Clarke** of Montgomery and **Cary Singletary** of

Florida will teach. Thanks to the Alabama State Bar and **Robert Huffaker**, editor of *The Alabama Lawyer*, this special ADR issue is being published.

As the tenth year of the Commission and the Center unfolds, I thank the supreme court for their support, and **Justice See**, our Commission member who keeps the Court aware of our work. Also, thanks to the Center's Board of Directors **Bill Coleman**, **Noah Funderburg** and **Judge Aubrey Ford**. I appreciate greatly the work of the bar's **ADR Committee** and **Mary Lynn Bates**, chair. Much gratitude to **Keith Norman**, **Ed Patterson**, **Tony McLain**, **Jackie Heartsill**, and all my colleagues at the state bar with whom it is a pleasure to work.

This issue is dedicated to Marshall Timberlake, who died last year.



Judith M. Keegan

Judy Keegan is a 1986 graduate of Catholic University, Columbus School of Law in Washington, D.C. After practicing law in Maryland, D.C. and Virginia, she moved to Montgomery with her husband, and has been the director of the Alabama Center

for Dispute Resolution for ten years. She began mediating in 1985.

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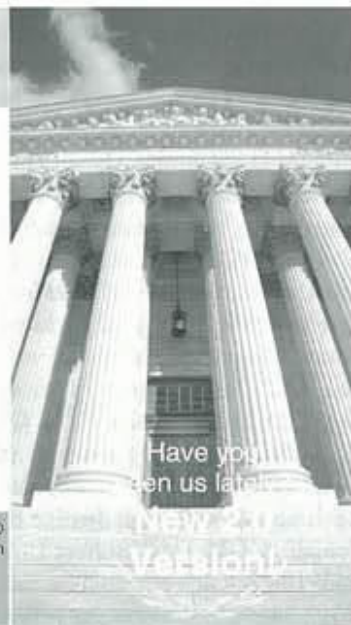
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The Alabama Supreme Court Commission on Dispute Resolution

BY THE HONORABLE AUBREY FORD, JR.

Ten years ago, the Alabama Supreme Court recognized the need for an orderly progress of alternative dispute resolution in our state, and on June 13, 1994 the court established the **Supreme Court Commission on Dispute Resolution**. The mission of the Commission was to develop guidelines for alternative dispute resolution, implement and supervise the Center for Dispute Resolution, develop standards for neutrals, implement community-based ADR programs and provide ADR technical assistance, education and training.

The Commission has a very diverse membership, and members are appointed by the following legal and governmental organizations: the **Alabama Supreme Court, the Alabama Court of Civil Appeals, the Alabama State Bar, the Alabama Trial Lawyers Association, the Alabama Lawyers Association, the Circuit and District Judges associations, the Governor's Office, the Lieutenant Governor's Office, the Speaker of the House, the Attorney General, and the Alabama Defense Lawyers Association**. Three members are designated as at-large and are chosen by the Commission.

Members of the bar and the bench have provided able leadership during the past decade and prior commission chairs include: **Marshall Timberlake** (deceased) of **Balch & Bingham**; **William Coleman** of **Capell Howard**; **Hon. Sharon Yates** of the **Alabama Court of Civil Appeals**; and **Steven Benefield** of **Christian & Small**.

The **Honorable Aubrey Ford**, **Macon County district judge**, is the current Commission chair and the members are **J. Noah Funderburg**, vice-chair, **University of Alabama**; **Steven A. Benefield**, **Christian & Small**; **Charles Y. Boy, Rhea, Boyd & Rhea**; **Hon. Ralph Coleman**, **Jefferson County District Court**; **William D. Coleman**, **Capell Howard**; **Hon. John B. Crawley**, **Alabama Court of Civil Appeals**; **Anne Isbell**, **director, Community Mediation, Better Business Bureau**; **Troy King**, **Governor Riley's former legal advisor and now Alabama's Attorney General**; **Karl Kirkland**, **Ph.D. of Clinical Psychologists, PC**; **Hon. Richard D. Lane**, **Lee County Circuit Court**; **Cheryl Leatherwood**, **mediator, Ozark**; **Debra Black Leo**, **EEOC**; **Hon. John R. Lockett**, **Mobile County Circuit Court**; **William C. McGowin**, **Bradley Arant**; **John J. Park, Jr.**, **assistant attorney general**; **Justice Harold See**, **Supreme Court of Alabama**; **Hon. Gerald Topazi**, **Emond, Vines, Gorchman & Waldrep**; **Justice Bo Torbert, Jr.**, **Maynard, Cooper & Gale**; and **Robert C. Ward, Jr.**, **Rushton, Stakely, Johnston & Garrett**. Liaison members include **Randy Helms**, **AOC**; **Michele Walters**, **Appellate Mediation Office**; **Keith B. Norman**, **Alabama State Bar**; **Alex W. Jackson**, **Supreme**



Members of the Alabama Supreme Court Commission on Dispute Resolution include, front row, left to right: **Robert C. Ward, Jr.**; **Michele Walters**; **Anne Isbell**; **Cheryl L. Leatherwood**; **Debra Black Leo**; and **Judith M. Keegan**. Back row, left to right, are: **Hon. John R. Lockett**; **Justice C.C. Torbert**; **Hon. Ralph Coleman**; **Hon. Gerald S. Topazi**; **Dr. Karl Kirkland**; **Hon. Aubrey Ford, Jr.**; **John J. Park, Jr.**; **William D. Coleman**; **Hon. John B. Crawley**; **Justice Harold See**; and **Hon. Richard D. Lane**. Not pictured are commission members **Steven A. Benefield**, **Charles Y. Boyd**, **J. Noah Funderburg** and **William C. McGowin**, and liaisons **Randy Helms**, **Keith B. Norman** and **Alex W. Jackson**.

Court of Alabama; and **Judith M. Keegan**, **Alabama Center for Dispute Resolution**.

The Commission has provided more than \$187,000 in alternative dispute resolution grants for court programs, school programs for peer mediation training, law school ADR conferences and programs, community and state agency mediation. In 2001, the Commission approved a grant submitted by **Judge Tracy McCooley**, **Montgomery County Circuit Court**, for a restorative justice program for its criminal courts, a first in Alabama.

Additionally, the Commission, through its Center, has provided technical assistance and training for appellate and state agency mediation, presenters for local bar CLE programs, civic and club programs, and conflict resolution training for K-12 teachers. Further, every year the Commission provides a copy of the state court mediator roster to each judge, and makes the mediator roster available to attorneys and members of the public in hard copy and at the Web site, www.alabamaADR.org.

The Commission has completed several technical projects, including a revision of the *Civil Court Mediation Rules*, the drafting of the *Code of Ethics for Mediators*, the development of *Mediator Registration Standards and Procedures* and the *Arbitrator Registration Standards and Procedures*.

Current subcommittee projects include an arbitrator code of ethics, mediation in the schools project, court ADR programs, and the mediator testimonial immunity bill that has been introduced in both the Senate (SB 191, **Senator Rodger Smitherman**) and the House (HB 397, **Representative Demetrius Newton**, and also **Representatives Gaines, Dunn, Robinson, Rogers, McClurkin, Venable, and Robinson**). More information about the Commission and links to other ADR organizations are located at our Web site. ■



Judge Aubrey Ford, Jr.

Judge Aubrey Ford, Jr. is district judge for Macon County and chairman of the Alabama Supreme Court Commission on Dispute Resolution. He graduated from Howard University School of Law in Washington, D.C. and previously practiced with Gray, Seay & Langford (now Gray, Langford, Sapp, McGowan, Gray & Nathanson).

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.

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REPORT OF COMMITTEE ON ALTERNATIVE METHODS OF DISPUTE RESOLUTION – “ADR” Usually Means Mediation



BY MARY LYNN BATES

Mediation and arbitration are two very different methods of resolving a dispute. Each is, however, an alternative method of dispute resolution utilized by the legal profession. Hence, the acronym “ADR” and the bar’s **Alternative Methods of Dispute Resolution Committee** (the “ADR Committee”) relate to both. As past issues of *The Alabama Lawyer* (see vol. 62, no. 1, January 2001) and numerous roadside signs and bumper stickers have illustrated, significant controversy surrounds the subject of arbitration. Mediation, on the other hand, is widely accepted as a useful tool for resolving disputes with less cost, heartache and lingering resentment than often accompany a resolution imposed by the courts. Since it was formed as a successor to the bar’s **Task Force on Alternative Methods of Dispute Resolution**, the ADR Committee has focused most of its efforts on facilitating and encouraging increased use of mediation in the state. We often use

the term “ADR” (which technically includes numerous dispute resolution methods) when what we mean is “mediation.” The resulting confusion may be one reason that the public, and even some lawyers, have been heard to observe that, “Mediation is a license to steal,” an opinion echoing the sentiment of the anti-arbitration road signs that (whether or not fair with regard to arbitration) clearly were not intended to address mediation, a process for facilitating voluntary settlement of disputes.

While the ADR Committee may address alternative methods of dispute resolution other than mediation or arbitration, these are the two methods that have been of the most interest and concern to the bar, and consequently to the committee, in recent years. With respect to arbitration, the committee’s approach has been one of responding to the reality of increasing arbitration in Alabama following the United States Supreme Court’s decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)

and *Citizens Bank v. Alafabco*, 539 U.S. 52, 123 S. Ct. 2037 (2003). This contrasts with its approach regarding mediation, which the committee enthusiastically advocates.

MEDIATION OBJECTIVES

In anticipation of lengthy delays and backlogs resulting from decreased funding for the courts, the ADR Committee's primary focus this year is to encourage and facilitate increased use of mediation to quickly resolve litigation pending in the state's courts. The Committee enlisted the support of the **Alabama Supreme Court Commission on Dispute Resolution** (the "Commission") to approach **Acting Chief Justice Gorman Houston** about encouraging the courts to make more use of mediation to resolve pending cases. The Committee also worked with the **Alabama Center for Dispute Resolution** (the "Center") on publication of a brochure for judges entitled, *Using Mediation to Resolve Disputes In Your Court*. In December, the acting chief justice sent a letter to all circuit and district court judges, enclosing the brochure and affirming his belief that "mediation can be an excellent tool to keep dockets running smoothly, to lower costs, and to generally improve the efficient resolution of cases for Alabama's citizens."

Confidence in the confidentiality of mediation is critical to its success. A bill providing for mediator testimonial immunity, drafted by the ADR Committee and reviewed by the Commission and the Administrative Office of the Courts, is pending in both houses of the legislature at the time of writing. The Committee is working with the Commission and the Center to get the bill passed and encourages members of the ASB to assist in the effort. A copy of the bill may be obtained from the Center.

Consistent with its yearlong emphasis on increased mediation of pending cases, the ADR Committee's education and advocacy efforts are concentrating this year on the bench and bar. They include publication of mediation-related articles, working with local bar associations and other collaborative partners to educate and persuade individual lawyers and judges through presentations and personal contact, and collection and dissemination of information about court-ordered mediation and pro bono or court-funded mediation programs, such as the domestic relations programs in Jefferson County and Shelby County. The Committee is reviewing and revising the ADR Speakers Bureau procedures and presentations in conjunction with these efforts.

One subcommittee is specifically focused on encouraging and facilitating the increased use of mediation in pending domestic relations cases. In conjunction with the Center, a brochure on domestic relations mediation is being prepared and bench and bar presentations are proposed. Because in divorces involving children the parties will continue to have to work together after the "case" is over, resolution of the matter by mutual agreement instead of court order can be especially important. Despite the benefits of mediation to the ongoing relationships following a divorce, of the 8,027 reported mediations from state court roster members in 2002, only 407 were in domestic relations cases.

ARBITRATION OBJECTIVES

Recognizing the potential for increased use of arbitration as a result of U.S. Supreme Court decisions and the feared impending backlog of cases in the state courts, the Committee formed three subcommittees focused on arbitration matters.

In conjunction with the Center, the Committee is sponsoring a formal 12-hour training course for arbitrators this month. The course is unusual because most arbitration training is done by various arbitration organizations only for arbitrators affiliated with the organization. It is hoped that this course will increase the availability of qualified, competent, neutral arbitrators.

Another subcommittee is working with the Commission on ethical requirements that will apply to any arbitrators included on the roster maintained by the Center. Last year, the Commission approved the criteria that must be met by an arbitrator to be included on the roster.

The third subcommittee is considering a draft act, proposed by an earlier ADR Committee, that would provide appropriate procedural safeguards when a case is submitted to arbitration, including provisions for disclosure of conflicts by an arbitrator, appointment or replacement of an arbitrator, and enforcement or setting aside of arbitration awards under various circumstances. The Committee does not intend to seek the introduction of an arbitration procedures act this year, but is soliciting feedback on the draft and whether there is any support for this or some other arbitration procedures legislation. A draft of the act may be found on the Center's Web site, at www.alabamaADR.org.

Meetings and Contact Information

The ADR Committee welcomes the attendance by any interested member of the bar at its meetings which are alternately held in Montgomery at the Alabama State Bar and in Birmingham at Cumberland School of Law. The next meeting is June 4th at the Alabama State Bar. Comments and suggestions on the ADR Committee's plans and objectives can be addressed to Mary Lynn Bates, chair, 1304 Columbia Drive, Birmingham 35226. For more information about mediation programs in the state, the activities of the ADR Committee, the Commission or the Center, or to arrange a speaker on mediation of pending cases, contact Judy Keegan at the Center at (334) 269-0409. ■



Mary Lynn Bates

Mary Lynn Bates, chairman of the Alabama State Bar's Committee on Methods of Alternative Dispute Resolution, graduated *summa cum laude* from Cumberland School of Law in 1978. At Cumberland, she served as chief justice of the Moot Court Board and on the editorial board of the *Law Review*. She is in private practice in Birmingham. Prior to opening her own practice in 1993, Bates was assistant general counsel at Sonat, Inc. in Birmingham. She was the Democratic Party's nominee for the United States Congress from the Sixth

District of Alabama in 1996. She is a past chairman of the ASB's Public Relations Committee and the Birmingham Bar Association's Public Service Committee. Bates is president of The Alabama Solution, serves on the board of Positive Maturity, Inc. and, prior to its recent merger, was secretary/treasurer of Legal Services of Metro Birmingham. She is a pro bono mediator for the Jefferson County District Court Mediation Project.

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RECENT DECISIONS FROM FLORIDA COURTS
AFFECTING MEDIATION CONFIDENTIALITY

MEDIATOR MISCONDUCT
UNILATERAL OR MUTUAL MISTAKE
CONFIDENTIALITY PRIVILEGE
ORAL & UNSIGNED MEDIATED
SETTLEMENT AGREEMENTS

BY WILLIAM A. RATLIFF AND GLENN G. WADDELL

While a collection of Alabama opinions on arbitration could easily fill a large wheelbarrow, the number of such opinions addressing disputes arising from mediation, thus far, is refreshingly small. If trends in our neighboring states are any indication of our future, however, there may be trouble on the horizon. Only time will tell whether the storm clouds on our southern border will pass us by, and, equally important, whether the storms will pack any punch if (or when) they hit.

This article will discuss several recent decisions issued by Florida courts on the scope of confidentiality related to mediation and possible implications of the reasoning behind those decisions on the practice of mediation in Alabama.

Other articles in this issue have covered the basic framework of mediation, including the single importance of confidentiality of the mediation proceedings themselves. According to Rule 11(a) of the *Alabama Civil Court Mediation Rules*, "[a]ll information disclosed in the course of mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute." This rule goes on to expansively define the term "information disclosed" to include admissions, proposals made and views expressed by the mediator or a party.¹

The Florida Picture

While the limits of the Alabama mediation confidentiality rule are largely untested in Alabama, a handful of Florida court opinions have begun to probe the parameters of the confidentiality of mediations in that state. These opinions generally fall into one or both of two categories: (1) cases where one or more parties seek to compel the testimony of the mediator; and (2) cases where a party seeks to set aside a mediated settlement agreement for one of a variety of reasons.

While certified and court-appointed mediators in Florida have an ethical obligation to protect the confidentiality of mediation, evidentiary privileges such as the privilege accorded to the mediation process are within the ambit of legislative, rather than judicial, authority. Stated differently, the Florida courts "recognize privileges when the legislature judges the protection of an interest or relationship is sufficiently important to society to justify the sacrifice of facts which might be needed for the administration of justice." *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517 (Fla. Dist. Ct. App. 1993) (quoting Ehrhardt's *Florida Evidence* §501.1 (1992 ed.)). Prior to 1987, the only Florida privilege arguably applicable to communications in mediation was the privilege associated with offers to compromise a claim. *Cf. State v.*

Castellano, 460 So. 2d 480 (Fla. Dist. Ct. App. 1984) (holding that there was no legal basis for a privilege which would prevent a party from compelling the testimony of a mediator).²

In 1987, perhaps as a result of the court's holding in *Castellano*, the Florida legislature adopted a confidentiality privilege applicable to court-ordered mediation. The current version of that statute reads as follows:

Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the [state public records laws] and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

Fla. Stat. § 44.102(3) (2003). The Florida judicial opinions discussed in this article generally focus upon the text of this statute. While Alabama's statutory and regulatory schemes clearly differ from Florida's, it does not appear that Alabama's approach would foreclose all or even most of the various arguments advanced by Florida litigants.

Allegations of Mediator Misconduct

Perhaps the most significant Florida case addressing a motion to set aside a mediated settlement agreement is *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001). In *Valchine*, one party moved to set aside a mediated settlement agreement on the grounds of coercion and duress by the mediator. The former wife testified at length before a court-appointed general master regarding alleged misconduct by the mediator, asserting that he gave her legal advice, stated his opinion as to how the court was likely to rule, said that he would tell the judge that she was to blame if the matter failed to settle, and generally pressured her to sign the settlement agreement. The court concluded that the alleged conduct, if proven, would be in violation of Florida's mediation ethics rules. Noting that a mediator in a court-ordered mediation "is, for all intent[s] and purposes, an agent of the court carrying out an official court-ordered function," the court held that a trial judge "may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation process." *Valchine*, 793 So. 2d at 1099; *but see Kalof v. Kalof*, 840 So. 2d 365 (Fla. Dist. Ct. App. 2003) (holding that a party who, along with her attorney, signed a mediated settlement agreement was bound to that agreement notwithstanding her allegations of duress); *Gomes v. Texaco Marine Services, Inc.*, ___ F. Supp. 2d ___, 1991 WL 497779 (M. D. Fla. 1991) (reaching the same result in a Jones Act case). The appeals court in *Valchine* remanded the case for a determination of whether the mediator actually committed the alleged misconduct.

Unilateral or Mutual Mistake

At least three recent Florida cases address the argument that a mediated settlement agreement should be set aside because the agreement was a result of



...one party moved to set aside a mediated settlement agreement on the grounds of coercion and duress by the mediator.

either a mutual or unilateral mistake. In *Tilden Groves Holding Corp. v. Orlando Orange County Expressway*, 816 So. 2d 658 (Fla. Dist. Ct. App. 2002), a dispute arose as to whether a mediated settlement agreement in a property condemnation case was intended to exclude an existing leasehold interest or cover the entire fee interest. Because the court viewed the language of the settlement agreement as clear and unambiguous, it held that the condemning authority was not entitled to a rescission due to unilateral mistake. *Tilden*, 816 So. 2d at 661.

In two subsequent cases, both decided by the Fourth District Court of Appeals, the court considered whether a mediated settlement agreement should be set aside

for mutual mistake. In *DR Lakes, Inc. v. Brandsmart USA of West Palm Beach*, 819 So. 2d 971 (Fla. Dist. Ct. App. 2002), a seller of real property argued that the settlement agreement entered into after the conclusion of mediation contained a \$600,000 clerical error. Relying upon the mediation confidentiality statute quoted above, the court noted that "[t]here is, of course, no confidentiality as to 'an executed settlement agreement,'" and held that the mediation confidentiality "privilege does not bar evidence as to what occurred at mediation under the facts of this case." *DR Lakes*, 819 So. at 974. The seller was required to prove on remand that the mistake was mutual, a hurdle the court described as "difficult" in view of the plaintiff's position. Similarly, in *Feldman v. Kritch*, 824 So. 2d 274 (Fla. Dist. Ct. App. 2002), the defendant's insurer filed a motion to set aside a settlement agreement reached in mediation, arguing that the settlement amount set forth in that agreement was intended to be offset by \$40,000 previously paid to the plaintiff. The court observed that "no mention was made during mediation of an offset of \$40,000 to be credited" to the insurer, and concluded that any mistake was unilateral on the part of the insurance company. *Feldman*, 824 So. 2d at 277. Interestingly, the rulings in both *DR Lakes* and *Feldman* were based in part upon the idea that "the reasons for confidentiality are not as compelling" once a settlement agreement has been signed.

Waiver of the Florida Mediation Confidentiality Privilege

Invariably, a party who seeks to overturn a mediated settlement agreement will interject or attempt to interject some

(Continued on page 176)



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PROGRAM HIGHLIGHTS

THURSDAY, JULY 22, 2004

The Top Ten Mistakes Made by Trial Lawyers

Stephen A. Salzborg
Professor of Trial Advocacy,
Litigation and Professional Responsibility
George Washington University Law School
Washington, DC

Bench & Bar Luncheon Speaker

Hon. Haldane Robert Mayer
Chief Judge
United States Court of Appeals for the Federal Circuit
Washington, DC

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FRIDAY, JULY 23, 2004

Professional Responsibility of Lawyers

Featured Speaker: Kenneth W. Starr
Kirkland & Ellis, Washington, DC

Followed by panel discussion

Moderator: John Carroll, Birmingham
Dean, Cumberland School of Law

Panelists:

Kenneth W. Starr, Washington, DC
Kirkland & Ellis
Fred D. Gray, Tuskegee
Gray, Langford, Sapp, McGowan, Gray & Nathanson
Richard H. Gill, Montgomery
Copeland, Franco, Screws & Gill
Albert P. Brewer, Birmingham
Professor of Law, Cumberland School of Law
Susan Rice Andrews, Tuscaloosa
Professor of Law, University of Alabama Law School

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President's Reception

Honoring William N. Clark

University of Alabama School of Law Alumni Reception

Cumberland School of Law Alumni Reception

Jones School of Law Alumni Dessert Reception

SATURDAY, JULY 24, 2004

Circuit Breakfast (prior to start of Grande Convocation)

Grande Convocation & Speaker

SPEAKERS



Thursday, July 22

STEPHEN A. SALZBURG

Stephen A. Salzborg is the Wallace and Beverley Woodbury University Professor at George Washington University Law School where he has taught since 1990. Prior to coming to Washington, DC, he was a professor of law at the University of Virginia for 18 years. He founded and is the director of a masters program in litigation and dispute resolution at George Washington University. He has mediated and served as an arbitrator for a wide variety of disputes involving public agencies as well as private litigants. He has held several government appointments including associate independent counsel in the Iran-Contra investigation, Deputy Assistant Attorney General, United States Justice Department, director of the Tax Refund Fraud Task Force of the US Department of Treasury. He is the author of numerous books and articles on evidence, procedure and litigation.



Bench & Bar Luncheon

HON. HALDANE ROBERT MAYER

Haldane Robert Mayer was appointed by President Reagan to the US Court of Appeals for the Federal Circuit, Washington, DC, in 1987, and assumed the position of chief judge in 1997. He is a graduate of the US Military Academy at West Point, and is a 1971 graduate of Marshall-Wythe School of Law of the College of William and Mary, where he was editor-in-chief of the law review. He has a highly decorated military service record in the Army Infantry and Judge Advocate General's Corps. His distinguished legal career prior to becoming a judge includes private practice with Baker & McKenzie in Washington, DC, adjunct professor at the University of Virginia School of Law and George Washington University National Law Center, and three years as special assistant to Chief Justice Warren E. Burger. He is currently a member of the Judicial Conference of the United States.



Friday, July 23

KENNETH W. STARR

Kenneth W. Starr joined Kirkland & Ellis, Washington, DC, in 1993 as a partner, and is adjunct professor at New York University School of Law, and Distinguished Visiting Professor at George Mason University Law School. He is a 1973 graduate of Duke Law School. He was law clerk to Chief Justice Warren E. Burger from 1975-77. He practiced law in Los Angeles and Washington, DC, with Gibson Dunn & Crutcher where he was a partner in litigation practice. In 1981, he became counselor to US Attorney General William French Smith until he was appointed to the US Court of Appeals for the DC Circuit in 1983. From 1989-1993, he served as Solicitor General of the United States, where he argued 25 cases before the Supreme Court involving governmental, regulatory and constitutional issues of commercial importance. In August 1994, he was appointed independent counsel on the Whitewater matter and served in that capacity until October 1999. He is a member of the California, Virginia and District of Columbia bar associations.

SCHEDULE AT A GLANCE

WEDNESDAY, JULY 21, 2004

1:00 pm - 6:00 pm

ANNUAL MEETING
REGISTRATION

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 2004
EARLY BIRD PREVIEW

THURSDAY, JULY 22, 2004

7:30 am - 8:45 am

ALABAMA LAW FOUNDATION
TRUSTEES' BREAKFAST

8:00 am - 5:00 pm

ANNUAL MEETING
REGISTRATION AND
LEGAL EXPO 2004

9:00 am - 10:30 am

PLENARY SESSION

*"The Top Ten Mistakes Made
by Trial Lawyers"*

Stephen A. Salzburg
Professor of Trial Advocacy,
Litigation and Professional
Responsibility
George Washington
University Law School
Washington, DC
(1.5 hours CLE)

10:30 am - 11:00 am

BREAK
Visit LEGAL EXPO 2004

11:00 am - Noon

*"Mumbo, Gumbo, Jumbo: An
Intellectual Property Case Study"*
Panel Discussion

Moderator:

Timothy A. Bush, Birmingham

Panelists:

Frank M. Caprio, Huntsville

Paul M. Sykes, Birmingham

(1.0 hour CLE)

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Property Section

"Better Writing:

60 Tips in 60 Minutes"

R. Scott Clark, Birmingham

Susan S. Wagner, Birmingham

(1.0 hour CLE)

Sponsored by Appellate Law Section

"What a Difference a Year Makes:

Civil Opinions that Impact

Trial Practice"

Michael K. Beard, Birmingham

(1.0 hour CLE)

Sponsored by Alabama

Trial Lawyers Association

ATTORNEYS INSURANCE MUTUAL
OF ALABAMA ANNUAL MEETING

11:00 am - 12:30 pm

"A Nation At War:

How Do We Protect the Rights of

Our Service Members?"

Capt. Amy M. Zimmerman and

Capt. Kellie C. Johnson

Assistant Judge Advocates

Eglin AFB, Florida

(1.5 hours CLE)

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Program, Alabama State Bar

12:30 pm - 2:00 pm

BENCH & BAR LUNCHEON

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Hon. Haldane Robert Mayer

Chief Judge

United States Court of Appeals for

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• Alabama State Bar Award of Merit

• Alabama State Bar Pro Bono Awards

2:30 pm - 3:30 pm

"The Basics and the Update:

All You Want to Know About

Labor and Employment Law"

Cecilia J. Collins, Mobile

Dawn W. Hare, Monroeville

Marcel L. Debruge, Birmingham

(1.0 hour CLE)

Sponsored by Labor and

Employment Law Section

"Sentencing Standards"

Hon. Joseph A. Colquitt

Professor of Law

University of Alabama

School of Law, Tuscaloosa

(1.0 hour CLE)

Sponsored by Criminal Justice Section

Ethics Update: 2004

Robert E. Lusk, Jr.

Office of General Counsel

Alabama State Bar, Montgomery

(1.0 hour CLE)

3:30 pm - 4:30 pm

"Mediation in Legal Practice:

An Invaluable Tool"

Robert C. Ward, Jr., Montgomery

(1.0 hour CLE)

Sponsored by Alabama Lawyers

Association

Administrative Law Update: 2004

Atley A. Kitchings, Jr., Montgomery

Mark D. Caudill, Montgomery

(1.0 hour CLE)

Sponsored by Administrative Law Section

4:30 pm - 5:00 pm

YOUNG LAWYERS' SECTION
BUSINESS MEETING

5:00 pm - 6:00 pm

ADMINISTRATIVE LAW SECTION
RECEPTION

VOLUNTEER LAWYERS' PROGRAM
RECEPTION

ALABAMA STATE BAR **125** YEARS of PROFESSIONALISM

July 21-24, 2004 • Hilton Sandestin Beach Golf Resort & Spa • Sandestin, Florida

5:30 pm

"Putt-Putt, Pizza and Pizzazz"

Children's Party

Hosted by ISI Alabama,
Insurance Specialists Inc.

6:30 pm - 8:30 pm

MEMBERSHIP BEACHSIDE
BUFFET

FRIDAY, JULY 23, 2004

7:30 am - 8:45 am

EARLY MORNING BREAKFASTS

- Christian Legal Society
- Farrah Order of Jurisprudence/
Order of the Coif
- Howard University School
of Law Alumni
- University of Virginia School
of Law Alumni
- Vanderbilt University School
of Law Alumni
- Tulane University School
of Law Alumni
- Birmingham School
of Law Alumni
- Past Presidents'
- *The Alabama Lawyer*
Board of Editors

8:00 am - 3:00 pm

ANNUAL MEETING
REGISTRATION
LEGAL EXPO 2004

8:30 am - Noon

KIDS' CHANCE GOLF SCRAMBLE

9:00 am - 10:30 am

PLENARY SESSION

"Professional Responsibility of Lawyers"

Keynote Speaker:

Kenneth W. Starr
Kirkland & Ellis
Washington, DC

Panel Discussion

Moderator:

John Carroll
Dean, Cumberland School of Law
Birmingham

Panelists:

Kenneth W. Starr
Kirkland & Ellis
Washington, DC

Fred D. Gray

Gray, Langford, Sapp, McGowan,
Gray & Nathanson
Tuskegee

Richard H. Gill

Copeland, Franco, Screws & Gill
Montgomery

Albert P. Brewer

Professor of Law
Cumberland School of Law
Birmingham

Susan Rice Andrews

Professor of Law
University of Alabama
School of Law
Tuscaloosa
(1.5 hours CLE)

10:30 am - 11:00 am

BREAK

Visit LEGAL EXPO 2004

10:30 am - 11:30 am

*"Paying Our Dues:
Women in Bar Leadership"*

Panel Discussion

Moderator:

Martha Jane Patton, Birmingham

Panelists:

Ernestine S. Sapp, Tuskegee
Donna S. Pate, Huntsville
Beth McFadden Rouse, Mobile
(1.0 hour CLE)

Sponsored by Women's Section

11:00 am - Noon

ALABAMA LAW INSTITUTE
COUNCIL MEETING

(1.0 hour CLE)

Workers' Compensation Update: 2004

Thomas L. Oliver, Birmingham

Robert W. Lee, Jr., Birmingham

(1.0 hour CLE)

Sponsored by Workers'

Compensation Section

*"Preparation for Complex Litigation
And Presentation Technology"*

Andrew C. Clausen, Mobile

William Benjamin Broadwater,
Mobile

Thomas M. Walker, Mobile

(1.0 hour CLE)

*Sponsored by Alabama Defense
Lawyers Association*

*"The ABA Standards for
Death Penalty Representation"*

Bruce A. Gardner, Huntsville
(1.0 hour CLE)

*Sponsored by Criminal Defense
Lawyers Association*

11:30 am - Noon

WOMEN'S SECTION RECEPTION

Noon

THE THIRD ANNUAL
MAUD McLURE KELLY
AWARD LUNCHEON

*Sponsored by Women's Section
and Alabama State Bar*

1:30 pm - 2:30 pm

*"The Americans With Disabilities
Act and Concepts of Impairment"*

R. Taylor Abbot, Jr., Birmingham
(1.0 hour CLE)

*Sponsored by Alabama Lawyer
Assistance Program and
Alabama State Bar*

*"Punitive Damages: Where Do We Go
From Here? A Plaintiff's Perspective"*

Lee E. Bains, Jr., Birmingham
Hon. Ralph D. Cook, Birmingham
(1.0 hour CLE)

Sponsored by Litigation Section

*"Real Estate Drafting Issues When
Representing a Trust or an Estate"*

Lynn Reynolds, Birmingham
(1.0 hour CLE)

*Sponsored by Real Property,
Probate and Trust Section*

*"Computer Forensics and
Electronic Discovery Requests"*

Craig D. Ball, esq., Houston, Texas
(1.0 hour CLE)

*Sponsored by Law Office
Management Assistance Program
and Alabama State Bar*

2:30 pm - 4:30 pm

BRING YOUR SUNSCREEN FOR
SIZZLIN' TOPICS IN MEDIATION
(Refreshments served during
CLE presentation)

Moderator:

Judith M. Keegan, Montgomery

*"Mediating Complex Cases,
Mass Torts and Class Actions"*

Rodney A. Max, Birmingham

"Bad Behavior in Mediation"

Debra Leo, EEOC, Birmingham

"Position, Statements and Evaluations"

G. Martin Van Tassel, Jr.
Birmingham

"Apology"

Hendon B. DeBray, Montgomery
(2.0 hours CLE)

*Sponsored by Alabama Center for
Dispute Resolution, ADR
Committee of the Alabama State Bar,
and Alabama Supreme Court
Commission on Dispute Resolution*

2:45 pm - 3:45 pm**"Use of Power Point and Other
Off-the-Shelf Tools in the Small
Office or Persuasion in the Courtroom"**

Craig D. Ball, esq., Houston, Texas
(1.0 hour CLE)

*Sponsored by Law Office
Management Assistance Program
and Alabama State Bar*

5:00 pm - 6:00 pm**RECEPTION**

Honoring William N. Clark
President, 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 - 9:00 pm

Jones School of Law Alumni
Dessert Reception

SATURDAY, JULY 24, 2004**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**GRANDE CONVOCATION AND
BUSINESS MEETING****"Lawyers Rendering Service"****SPECIAL PRESENTATIONS:**

- Alabama State Bar Commissioners' Award
- Local Bar Achievement Awards
- Kids' Chance Scholarships
- Alabama Lawyer Hall of Fame Announcement
- Recognition of 50-Year Members
- Installation of Officers
- LEGAL EXPO 2004 Prize Drawings

11:15 am**BOARD OF BAR
COMMISSIONERS' MEETING**

KIDS' CHANCE Golf Scramble

Join us for an afternoon of golf at The Raven made even more rewarding by knowing that you are making a difference in a young person's life. Sign up to play in the 10th Annual Kids' Chance Golf Scramble on Friday, July 23, 2004. 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 over 100 students, many of whom would not be able to attend college without our help.

If you are unable to play in the tournament, please sponsor a hole. The Workers' Compensation Section appreciates your support. — *Gina D. Coggin, chair*

GOLF SCRAMBLE ENTRY FORM

Name _____ Handicap _____

Firm _____

Address _____

City _____ State _____ ZIP Code _____

Office Telephone _____ Home Telephone _____

Email Address _____

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	\$350	\$ _____	
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 more information, contact Tracy Daniel at 800-354-6154.

July 21-24, 2004 • Hilton Sandestin Beach Golf Resort & Spa • Sandestin, Florida

ADVANCE REGISTRATION FORM

Advance registration forms **MUST BE RECEIVED NO LATER THAN JULY 7, 2004.**

Register Online at www.alabar.org. Cancellations with full refund, minus a \$25 administrative fee, may be requested through noon, **Friday, July 16, 2004.**

NOTE: In order to claim CLE credit for the annual meeting, you must be registered for the meeting.

**ONLINE
REGISTRATION
www.alabar.org**

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 _____

E-mail Address _____

Spouse/Guest's Name _____

Child/Children's Name(s) _____

Please indicate any dietary restrictions: Vegetarian Other _____

Please send information pertaining to services for the disabled. Auditory Visual Mobility

REGISTRATION FEES (Advance Registration)

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

ADVANCE REGISTRATION

	By July 7	After July 7	Fees
___ Alabama State Bar Members	\$210.00	\$250.00	\$ _____
___ Full-Time Judges	\$105.00	\$125.00	\$ _____
___ Attorneys admitted to bar 5 years or less	\$105.00	\$125.00	\$ _____
___ Non-Member	\$395.00	\$420.00	\$ _____

(Does not apply to spouse/guest of registrant or LEGAL EXPO 2004 vendors)

TOTAL REGISTRATION FEES \$ _____

OPTIONAL EVENT TICKETS

Thursday, July 22, 2004

	No. of Tickets	Cost	
___ Bench & Bar Luncheon	___ @	\$20.00 ea.	\$ _____
___ Membership Beachside Buffet (cash bar)	___ @	\$45.00 ea.	\$ _____
___ Children's Party: Putt-Putt, Pizza and Pizzazz <i>(Hosted by ISI Alabama, Insurance Specialists, Inc. during the Membership Buffet)</i>	___ @	No Charge	

Friday, July 23, 2004

___ Christian Legal Society Breakfast	___ @	No Charge	
___ Farrah Order of Jurisprudence/Order of the Coif Breakfast	___ @	\$17.50 ea.	\$ _____
___ Howard University School of Law Alumni Breakfast	___ @	\$17.00 ea.	\$ _____
___ University of Virginia School of Law Alumni Breakfast	___ @	\$17.00 ea.	\$ _____
___ Vanderbilt University School of Law Alumni Breakfast	___ @	\$17.00 ea.	\$ _____
___ Tulane University School of Law Alumni Breakfast	___ @	\$17.00 ea.	\$ _____
___ Birmingham School of Law Alumni Breakfast	___ @	\$13.00 ea.	\$ _____
___ The Maud McLure Kelly Award Luncheon	___ @	\$25.00 ea.	\$ _____
___ President's Reception <i>(Limit two tickets per registrant)</i>	___ @	No Charge	
___ Cumberland School of Law Alumni Reception	___ @	\$25.00 ea.	\$ _____
___ University of Alabama School of Law Alumni Reception	___ @	\$27.50 ea.	\$ _____
___ Jones School of Law Alumni Dessert Reception	___ @	\$10.00 ea.	\$ _____

Saturday, July 24, 2004

___ Circuit Breakfast	___ @	\$5.00 ea.	\$ _____
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TOTAL EVENT TICKETS FEES \$ _____

TOTAL FEES TO ACCOMPANY FORM \$ _____

APPROPRIATE PAYMENT MUST ACCOMPANY REGISTRATION FORM.

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: 2004 Annual Meeting, Alabama State Bar, P. O. Box 671, Montgomery, AL 36101

July 21-24, 2004 • Hilton Sandestin Beach Golf Resort & Spa • Sandestin, Florida

HOTEL RESERVATION FORM**Hilton Sandestin Beach Golf Resort & Spa**Room Reservations **MUST BE MADE DIRECTLY WITH THE ALABAMA STATE BAR**

To ensure your accommodations, reservations should be received

NO LATER THAN TUESDAY, JUNE 15, 2004.**RESERVE ACCOMMODATIONS FOR (please print or type):**

Name _____

Firm/Company _____

Address _____

City _____ State _____ ZIP Code _____

Business Telephone _____ E-mail _____

Arrival Day/Date _____ Departure Day/Date _____

CHECK-IN TIME is 4:00 pm. **CHECK-OUT TIME** is 11:00 am.

\$50 Early Departure Fee for checkout prior to confirmed departure date.

Group Rate: \$209 Resort View (per night) Single or Double Occupancy \$259 Beach View (per night) Single or Double Occupancy \$309 Beach Front (per night) Single or Double Occupancy*Above rates do not include \$14 per day, per room Sandestin resort fee and 10 percent Florida sales tax. (Subject to change)***Please Check:** King Bed Two Double Beds (Queen) Smoking Nonsmoking

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

ADVANCE DEPOSIT OF ONE NIGHT'S ROOM AND TAX IS REQUIRED TO CONFIRM RESERVATIONS**Method of Payment:** Check Enclosed Type of Credit Card _____

Credit Card No. _____ Expiration Date _____

Name of Credit Card Holder _____

Card Holder's Signature _____

Deposits will be recorded at the time reservation is made. No charge for children under 17 sharing room with parents. A deposit will be refunded if cancellation of reservation is received seven days prior to arrival date.

Write it down!

If you are calling the Alabama State Bar outside of Montgomery's local calling area, please use (800) 354-6154 for all departments other than Lawyer Referral Service.

If you need to contact the Lawyer Referral Service, please be sure to use (800) 392-5660.

Harbingers of Bad Tidings

(Continued from page 168)

material arguably covered by the confidentiality privilege. In a number of cases, it appears the opposing party either waived their right to assert the privilege or failed to appeal an adverse ruling on that objection. For example, the court in *Valchine* discusses in great detail the appellant's allegations regarding the mediator's alleged misconduct, while making only a passing reference to the confidentiality privilege. *Valchine*, 793 So. 2d at 1098; see also *The Florida Bar v. Feinberg*, 760 So. 2d 933, 936 (Fla. 2000) (discussing, without reference to the confidentiality privilege, the testimony of a mediator regarding conversations which occurred during a "quasi-mediation session"). More commonly, as in *DR Lakes*, a party seeking to defend a mediated settlement agreement from challenge asserts the confidentiality privilege.

In *McKinlay v. McKinlay*, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995), one party to a divorce sought to set aside a mediated settlement agreement on the grounds of duress and intimidation. The court concluded that an evidentiary hearing as to the validity, enforceability and potential modification was proper, but chastised the trial court for refusing to allow the mediator to testify. The court based its decision in part upon the fact that a written settlement agreement was in

existence, but also upon its conclusion that the wife had waived her right to invoke the mediation confidentiality privilege. On that latter issue, the following quote is instructive:

"... and most significant is the fact that as the party who objected to the settlement based on allegations of duress and intimidation, Wife availed herself of the opportunity to file a written letter to the trial judge and to testify at the ... hearing. However, with only her side of the story presented, she invoked a statutory privilege to preclude testimony or a proffer from other witnesses such as the mediator. These particular facts lead us to conclude that Wife waived her statutory privilege of confidentiality and that, as a result of the waiver, it was error and a breach of fair play to deny Husband the opportunity to present rebuttal testimony and evidence."

McKinlay, 648 So. 2d at 810; see also *Kalof*, 840 So. 2d at 367 (noting that one party had waived the mediation privilege by moving to vacate a mediated settlement agreement). Note that the Florida statute does not give the mediator the privilege of refusing to testify, although many Florida (and Alabama) mediators include such language in the mediation agreements they require parties to sign in advance of the mediation. In contrast, Rule 11(b)(1) of



the *Alabama Civil Court Mediation Rules* allows a mediator or party to disclose confidential mediation information only "when the mediator and the parties to the mediation all agree to the disclosure."

Similarly, in *Hudson v. Hudson*, 600 So. 2d 7 (Fla. Dist. Ct. App. 1992), the parties to a divorce proceeding reached an apparent oral agreement in a court-ordered mediation, but failed to reduce it to writing. When the husband failed to appear for trial, the wife testified as to what transpired at the mediation proceeding and described the proposed oral agreement in detail. The wife even had the mediator sign the back of her hand-written notes "as a sort of certification that this was what the parties agreed to [at the mediation]." *Hudson*, 600 So. 2d at 8. The appellate court stated that the "interjection of the so-called agreement prepared by the wife and 'certified' by the mediator, and the various testimonial representations of what transpired at said [mediation] between the parties, into the trial court violates the spirit and letter of the mediation statute." *Id.* at 8-9. The court held that the "well was poisoned by the admission of the foregoing evidence of the 'agreement' and so infected the judgment reached that it should be vacated and the matter tried anew." *Id.* at 9.

Oral and Unsigned Mediated Settlement Agreements

Two cases demonstrating the Florida courts' treatment of challenges to mediated settlement agreements where the agree-

ment was oral or not signed by all parties are *Cohen v. Cohen*, 609 So. 2d 785 (Fla. Dist. Ct. App. 1992) and *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515 (Fla. Dist. Ct. App. 1994). In *Cohen*, the Fourth District Court of Appeals overturned a trial court's decision to enforce an oral settlement agreement reached by the parties in a court-ordered mediation. The appellate court flatly stated that "[a]n oral agreement reached during mediation is inadmissible as privileged unless it has first been reduced to writing." *Cohen*, 609 So. 2d at 785 (citing *Hudson*); *accord Modesto*, 614 So. 2d 517 (affirming the trial court's ruling that the plaintiff would not be allowed to subpoena the mediator to testify). *Cohen* relied upon *Hudson* for the proposition that "[t]he confidentiality of the negotiations [in mediation] shall remain inviolate until a written agreement is executed by the parties." *Id.* In *Gordon*, the Fifth District Court of Appeals held that a mediated settlement agreement, although signed by one party and counsel for both parties, was not binding on the party who failed to sign. *Gordon*, 641 So. 2d at 517. Because the parties "did not effectuate a settlement agreement in accordance with the [Florida statutory mediation confidentiality privilege statute], confidentiality afforded to the parties involved in the mediation must remain inviolate." *Id.* (citing *Modesto*).

Conclusion

The principles established and applied by the Florida courts in the cases discussed above are confusing and, in some cases, flatly contradictory. For example, it remains to be seen how a court can preserve inviolate the confidentiality of negotiations in mediations while inquiring, under the authority of *Valchine*, into

alleged mediator misconduct. Regardless, no matter how you shake these Florida cases, two very significant issues fall out—confidentiality of the mediation process and the ability of parties to compel a mediator to testify. While the *Alabama Civil Court Mediation Rules* provide some protection on both of these fronts, it would be nice to see the legislature provide some statutory backing in this area. Although the Alabama legislature has considered mediator testimonial immunity bills a number of times in the past, this statutory protection has not been adopted. That legislation once again is before the legislature, this time under the label of Senate Bill 191, sponsored by **Senator Rodger Smitherman**, along with an identical house bill, House Bill 397, sponsored by **Representative Demetrius Newton**.³ At the time this article was being written, Senate Bill 191 was on the senate calendar for consideration and House Bill 397 was pending in the House Judiciary Committee. While this legislation will not resolve all of the issues raised by the Florida cases discussed above, it would be a nice start down the path of assuring the confidentiality of the mediation process. This, surely, is a goal shared by all members of the bar. ■

Endnotes

1. These rules apply: "(1) In mediations ordered by the courts of this State as provided by statute or by the Alabama Rules of Civil Procedure; (2) In any other mediations by parties in a pending civil action in an Alabama court, other than the Alabama Supreme Court or Alabama Court of Civil Appeals, unless the parties expressly provide otherwise; and, (3) In other mediations if the parties agree that these Rules shall apply." Ala. Civil Ct. Med. Rule1(b).
2. For a comprehensive discussion of developments in Florida mediation case law over the past 20 years, see Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 Nova L. Rev. 87 (2003).

3. The heart of this legislation states that: "Except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator shall not be compelled in any proceeding or judicial forum, including proceedings between persons not parties to the mediation, to testify in regard to the mediation or regarding statements made, actions taken, or positions stated by a party during the mediation, or to produce or divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist." SB. 191, § 3 (2004 Regular Session).



William A. Ratliff

William A. Ratliff is a partner with Wallace, Jordan, Ratliff & Brandt LLC in Birmingham. He graduated from the University of Alabama in 1978 and the Cumberland School of Law in 1981. Ratliff's practice has been principally in the area of commercial litigation and insurance defense, but now focuses exclusively on alternative dispute resolution, both as a mediator and arbitrator. He is a certified mediator with the American Arbitration Association, on the Alabama Center for Dispute Resolution mediator and appellate mediator rosters, and serves as a federal court neutral.



Glenn Waddell

Glenn Waddell is a partner with Wallace, Jordan, Ratliff & Brandt LLC in Birmingham. He obtained a degree in mechanical engineering in 1987 from the University of Alabama and graduated from the University of Alabama School of Law in 1990.

Waddell is a Certified Christian Conciliator, a designation conferred by the Institute for Christian Conciliation, and periodically teaches courses on alternative dispute resolution and environmental law at the Cumberland School of Law and in Samford University's Environmental Masters program. His principal focus is mediating complex disputes in the family, non-profit and business context.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting, July 21st– 24th in Sandestin.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1st, 2004. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, ext. 161, or P.O. Box 671, Montgomery 36101.

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THE ALABAMA APPELLATE MEDIATION PROGRAM:

How and Why It Will Work

BY RHONDA P. CHAMBERS

Why would a party attempt to settle a case that has already been decided in the trial court and is on appeal in the Alabama appellate courts? In the past, that question either has not been raised because there was no mechanism in the appellate rules to do so or has been instinctively rejected. Typically, parties have viewed the idea of appellate settlement skeptically. Everyone involved has different motivations that push him or her toward more litigation in the appellate court.

The courts of appeals in all federal circuits have some form of appellate mediation or settlement program. As of 2002, 30 states had dispute resolution programs at the appellate level.¹ The results of these programs demonstrate that when lawyers and their clients seriously examine whether appellate litigation really serves their interests, a significant number of the cases settle. Experience suggests that if the parties are given the opportunity and thoughtfully approach appellate mediation, their intuitive

resistances to settlement on appeal can be overcome.²

After months of work by the **Supreme Court Committee on Appellate Mediation**³, the Alabama Supreme Court adopted rules and procedures for a new program that gives the state appellate courts the authority to refer any civil case on appeal to mediation. Alabama officially established its **Appellate Mediation Program** effective January 4, 2004.⁴

The Alabama Appellate Mediation Program

Program Establishment

The Committee reviewed state and federal appellate mediation programs from around the country to determine what characteristics made some more effective than others. The Committee ultimately proposed a program similar to the mediation program used by the Fifth District Court of Appeal in Florida. Although participation in the program is mandatory, the mediation is non-binding. Time is of the essence to the program. Early scheduling is intended to give the parties the best opportunity to settle a case before they incur the major expense of having the clerk's record and the reporter's transcript prepared and of filing briefs. The intent of the program is not to greatly delay the course of the appeal if mediation fails, but to help save costs and expenses, if it is successful.⁵

The program is coordinated by an executive director and operates in each court under the direct supervision of an appellate mediation administrator.⁶ The administrator is an employee of each respective court. The executive director of the appellate mediation office is **Michele Walters**. The supreme court administrator is **Celeste Sabel**. The court of civil appeals administrator is **Rebecca Oates**.

Pre-Mediation Procedures

After an appeal is filed and docketed, the appellant and appellee are required to file a mediation case-screening form and a confidential statement regarding the appropriateness of the case for mediation. The confidential statement is not to be served on opposing counsel.⁷ The appellate mediation administrator will review the mediation case-screening forms and the confidential statements completed by the parties. Virtually all civil matters, other than cases involving criminal appeals or pro se litigants, are eligible for mediation.⁸ Selection of cases for mediation is based on the administrator's determination that the case should be referred to mediation after reviewing the facts, the order appealed from, the standard of review the appellate court will apply and the parties' statement regarding the appropriateness of the case for mediation.⁹

If it is determined by the administrator that the case is appropriate for mediation, an order of referral of mediation will be sent which notifies the parties that the case will be mediated and instructs them to attempt to agree on a mediator. Parties will have the opportunity to mutually select a qualified mediator within 14 days.¹⁰ With certain limited exceptions, the parties can choose whom they want as a mediator.¹¹ If the parties are unable to agree on a mediator, the program administrator will appoint one from a roster maintained by the appellate mediation office.¹² The appellate mediators on the roster are attorneys on the Alabama State Court Mediation Roster who have successfully completed a specialized appellate mediation training sponsored by the appellate mediation office.

For cases that are eligible and referred to mediation, all appellate filing timelines will be suspended until the mediation is concluded. Notice is sent to the trial court clerk and court reporter to stay proceedings on appeal.¹³ If an appeal is not selected for mediation, a notice will be sent to the trial court clerk and court reporter to

begin preparation of the record and transcript. It is contemplated that the appellate process will be stayed, at the most, for 63 days after the issuance of the order of referral to mediation.¹⁴

The Mediation Process

The mediator coordinates the time, place and procedure for the mediation, including the submission of any mediation statement.¹⁵ The mediation session is to be held at any location convenient to the mediator and the parties.¹⁶ A mediator does not have the authority to impose a settlement upon the parties. Mediator's fees and incidental expenses will be shared equally between the parties, unless otherwise determined by the final mediation agreement.¹⁷

After a mediation has been completed, the appropriate appellate court will dispose of the case if the mediation was successful. Disposition of the case might involve dismissal of the appeal, remand to the trial court for approval of a settlement agreement which requires court approval or entry of a stipulated order called for by the mediated agreement.¹⁸

If the mediator declares an impasse, the appeal will be reinstated on the appellate docket and the stay of proceedings lifted.¹⁹ All appellate time requirements will then resume. The appellant is then required to make satisfactory arrangements with the trial court clerk and court reporter for preparation of the record on appeal within seven days of when the case is reinstated on the appellate docket.

Confidentiality

Confidentiality is a key element of the program. Although the appellate mediation office is located in the Judicial Building in Montgomery, the administration and operation of the appellate mediation program are completely separate from the appellate court's decision-making process.

Appellate mediation rules prohibit counsel for the parties or anyone else from informing members of the court

about discussions or actions at a mediation. These rules will be strictly enforced to maintain the integrity of the program. Not considered confidential is the fact that the mediation took place and the bare results of the mediation.

Why Mediate A Decided Case?

In the past, counsel has little opportunity to discuss settlement with one another at the appellate level in Alabama. The parties are focused on brief preparation and do not interact to the same extent as they do at the trial court level. Lawyers are conditioned to view the appellate process as the last step in litigation and not as another opportunity to consider an amicable settlement.

Experience has shown, however, that settlement discussions of a decided case at the appellate level are ideally timed. By the time a case has reached the

appellate level, a very significant event in the life of a case has typically taken place—a decision has been reached where one party has won and another party has lost in the trial court. But “winning” should be defined as achieving the best results, all things considered.

There are a number of reasons why appellate adversaries should be motivated to settle even after they have been through the rigors and expense of trial. First, without a crystal ball, it is impossible to predict the outcome of an appeal with precision. While it is possible to obtain a reversal of a lower court decision, an appellant faces a very difficult challenge. Depending on the issue, appellate courts have limited review powers. The available reversal statistics cast a long shadow over an appellant’s chances. Only 14.84 percent of the cases that were submitted on appeal to the court of civil appeals last term were reversed. In the Supreme Court of Alabama, the odds for reversal were even lower, a mere 13 percent. Stated otherwise, appellees won 85.16 percent of the time in the court of civil appeals²⁰ and 87 percent of the time in the Alabama Supreme Court.

An appellee may settle a case because it perceives the trial court opinion or decision to be so favorable as to not want to take any risk that it will be overturned on appeal. A party may be involved

in some other different litigation at the same time as the case on appeal, and it may believe that the other proceeding is better suited to resolution

of its concerns. Another motivation may be to avoid precedent. Sometimes the existence of an unfavorable precedent is more problematic for an appellant than the result, and a joint motion to vacate the lower court decision may satisfy all parties.

The expense of further litigation at the appellate level, and perhaps on remand to the trial court, may make it economical to resolve the conflict through mediation. If the appellate court reviews the decided case, the result could be affirmation of a judgment, whereas in a settlement it is possible to explore structured settlements based on ability to pay and convenience. In contrast to the judgment imposed by a court, in mediation the parties can devise a structured settlement.

Finally, appellate litigation takes time. After proceedings in the trial court, parties are commonly impatient to get to the end of the road. Unfortunately, appellate courts take time to process the ever-increasing numbers of filings. In the Alabama Supreme Court for the most recent term, the average time from the filing of the notice of appeal to final disposition was 345 days.²¹ In the court of civil appeals, the average time was 244 days.²² If you lost in the court of civil appeals and sought certiorari review in the Alabama Supreme Court, it took an average of another 112 days for the certiorari to be decided. Time is an important motivator to settlement.

Typical Cases That Would Be Appropriate For Appellate Mediation

Negotiations involved in appellate mediation conferences are not limited to the narrow issues presented on appeal. Instead, efforts should be made to resolve the entire case and any related litigation between the parties, thus eliminating the risks and expenses associated with continued litigation between the parties to an appeal. Some cases may be particularly appropriate for mediation.²³

Take the scenario involving a personal

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injury case. In this case, the plaintiff was awarded a \$1 million jury verdict. After years of expense and litigation, the plaintiff feels vindicated and compensated by the monetary award. In contrast, the defendant is shocked at the verdict and its size. "We will appeal this legally unsupportable verdict and if necessary take the appeal all the way to the United States Supreme Court."

The plaintiff faces the possibility of losing the verdict on appeal. If the appellate court determines that the plaintiff's claim fails as a matter of law, the plaintiff will have no recovery. If the appellate court determines that the defendant is entitled to a new trial, the plaintiff must return to the trial court for a new trial where he faces uncertain results and inevitably more expense. This also assumes the plaintiff can collect his verdict if the case is affirmed on appeal.

The defendant must face the reality that the verdict will be affirmed. In that event, the defendant will be responsible for the face amount of the verdict as well as post-judgment interest at the rate of 12

percent.²⁴ One year's worth of post-judgment interest would equal \$120,000. The cost of a *supersedeas* bond for a \$1 million dollar judgment is approximately \$15,000. The premium is annual. A defendant will have to pay additional legal fees and costs to its attorney. Thus, by the time the appeal is concluded, the \$1 million dollar verdict against an unsuccessful defendant may involve economic consequences of another \$200,000 or more.

What about cases where summary judgment was entered in the defendant's favor? These cases may be appropriate for appellate mediation when the risk and realities are examined. The plaintiff faces the reality that years of litigation may result in no recovery. This reality may be particularly difficult to grasp because the plaintiff has had no opportunity to present his case to a judge or jury. Instead, the plaintiff's only testimony was taken by defense counsel at a deposition that was contentious, difficult and focused on weak points in his case. Unless the plaintiff is able to come to grips with the grim reality potentially

ahead, he will be unable to focus on what might be a reasonable solution under the circumstances.

On the other hand, the defendant must consider the reality that the appellate court may reverse the summary judgment. In that event, the defendant will have wasted years of litigation and expenses, will face a jury trial with its additional expense and will risk losing at trial. While the defendant may be confident that he will succeed on appeal, the defendant must recognize that some risk of reversal is a reality in every case. If the defendant focuses on these practical considerations, he may consider settling the case by taking into account the costs of appeal and the risks of reversal.

Another scenario of cases that may be appropriate for appellate mediation are appeals on orders regarding arbitration. Appellate mediation of these orders will not be limited to the narrow issue on appeal regarding the scope of arbitration. Some consideration must be given to resolving the entire case. While a defendant may believe that he can win a case outright at

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arbitration, that seldom happens because arbitrators tend to "split the baby." A defendant also gives up his right to appeal the arbitration award. When the risks are weighed, these type cases are perfect for appellate mediation.

Finally, worker's compensation cases and domestic relations cases are particularly appropriate when the human and economic consequences of resolving the cases are considered.

Even if cases do not settle at appellate mediation, the process should be beneficial to the lawyers and litigants. For litigants who lost in the trial court without going to trial, a mediation session will provide them a first-time opportunity to "tell their story" to a neutral third party. The process will provide an outlet for a litigant who has been frustrated by not having had his day in court. For lawyers, a mediation session will frequently include a discussion about the legal issues on appeal and the questions that might be important to the appellate court. Thus, the mediation session may assist the lawyers in streamlining their appellate argument. The process should be beneficial whether or not a settlement is achieved.

Conclusion

In the last ten years, appellate mediation programs throughout the country have proven that significant numbers of parties will settle on appeal when mediation is utilized. Lawyers in civil cases in the Alabama appellate courts will be confronted with mandatory participation in such mediations in the future. If lawyers and parties thoughtfully approach the process, many appellate proceedings will settle. The program should be a "win-win" for everyone involved—the lawyers, the parties and the courts.²³

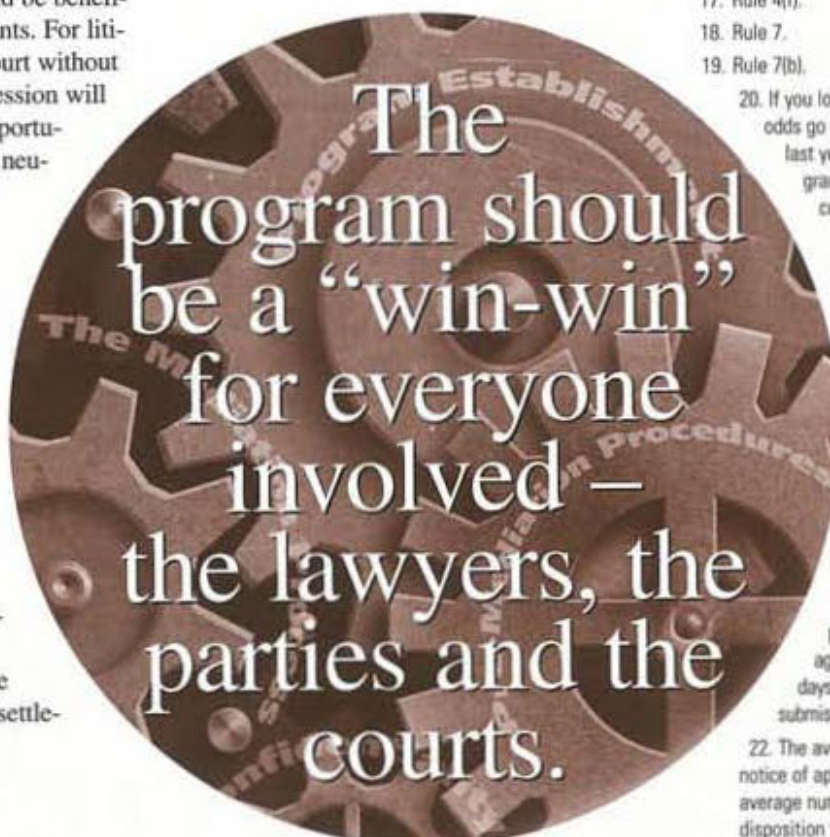
Endnotes

1. Sandra Schultz Newman, "Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future," 5 *J. App. Prac. & Process* 409, 42 (2003).
2. See generally, Stephen O. Kinnard, "Mediating the

Decided Case: What to Expect If You're Looking to Settle at the Appellate Level," *Disp. Resol. Mag.*, pp. 16-17 (summer 1999); Mori Irvine, "Better Late than Never: Settlement at the Federal Court of Appeals," 1 *J. App. Prac. & Process* 341 (1999); Robert J. Niemic, "On Appeal: Mediation Becoming More Appealing in Federal and State Courts," *Disp. Resol. Mag.* 13 (Summer 1999).

3. The committee was chaired by Justice Champ Lyons, Jr. Members of the committee included Justice R. Bernard Harwood, Justice Thomas A. Woodall, Judge Sharon G. Yates, Robert G. Esdale, John H. Wilkerson, Jr., Judy Keegan, and the author, Rhonda Chambers.

4. Ala. R.



App. P. 55 provides the authority for an appellate court to direct the parties to mediation. That rule also includes a provision for the promulgation of rules specifically applicable to appellate mediation. On November 17, 2003, the supreme court adopted the Alabama Appellate Mediation Rules, which govern the mediation procedure. Those rules can be located on the court Web site at www.alacourt.org/Publications/Rules/Index.

5. Court Comment, Rule 1.
6. Rule 1 (a).
7. Rule 2(c)(2).
8. Cases involving termination of parental rights or domestic violence may not be eligible.
9. Rule 3(a).
10. Rule 3(a)(2).
11. Rule 4.
12. Rule 4(a)(1).
13. If you represent the appellant, you are not required to request a reporter's transcript unless and until the stay is lifted.

14. If the mediation is not completed within 63 days of the order of referral to mediation, mediation shall be deemed to be at an impasse, unless an extension has been granted. Only a mediator may request an extension and only if the mediator certifies that he or she is of the opinion that the additional time for mediation would be productive. Rule 5(e).
15. Any mediation statement should be sent directly to the mediator. No forms, notices, statements or other documents that are filed with the appellate mediation office shall contain information relating to the parties' positions regarding settlement or any substantive matter that is the subject of mediation. Rule 2(a).
16. Rule 4(d).
17. Rule 4(f).
18. Rule 7.
19. Rule 7(b).
20. If you lose in the court of civil appeals, your odds go down even more in seeking certiorari. In last year's term, the Alabama Supreme Court granted certiorari in less than a half a percent of civil cases.

21. Of the 2,278 cases filed with the Supreme Court of Alabama in the 2002-2003 term, 913 involved direct appeals. Of the direct appeals, 88 percent were disposed prior to submission within 290 days. The average number of days between the filing of notice of appeal and disposition of pre-submitted cases was 113 days. Of the 913 direct appeals, 404 were submitted to the court for decision. Cases are only submitted to the court for resolution on most direct appeals until after the clerk's record and reporter's transcript are prepared and briefing is completed. On average, this process took approximately 114 days. The average number of days between submission and disposition was 204 days.

22. The average number of days between filing the notice of appeal and submission was 159 days. The average number of days between submission and disposition was 85 days.

23. Joseph A. Torregrossa, "Appellate Mediation in the Third Circuit—Program Operations: Nuts, Bolts and Practice Tips," 47 *Vill. L. Rev.* 1059, 1077 (2002).
24. *Ala. Code*, 1975 § 8-8-10.
25. Additional information about the appellate mediation program may be found on the office's Web site at www.judicial.state.al.us/mediation.



Rhonda P. Chambers

Rhonda P. Chambers is associated with the firm of Taylor & Taylor with offices in Birmingham and Prattville. She is a graduate of Judson College (1986) and Cumberland School of Law, Samford University (1989). Her practice has been devoted to civil appellate litigation. She is the author or co-author of several articles on appellate law topics and has been a frequent lecturer on appellate matters. Chambers is chair of the Standing Committee on the Alabama Rules of Appellate Procedure and a member of the Alabama Supreme Court Committee on Appellate Mediation.



Efficacy of Post-Divorce Mediation And Evaluation Services

BY KARL KIRKLAND, Ph.D.

In the past two decades, alternative dispute resolution in the form of divorce mediation has emerged as the prevailing model for reducing acrimony and harm associated with divorce actions in domestic courts (Emery & Wyer, 1987, Emery 1994). The current available statistics from the Alabama Center for Dispute Resolution reveal that divorce practitioners in the "Heart of Dixie" lag far behind their counterparts in other parts of the country in terms of utilization of mediation in the domestic arena (Judy Keegan, director, Alabama Center for Dispute Resolution, personal communication, March 20, 2001). The majority of the research and clinical literature in this area has focused on pre-divorce mediation. This paper focuses on post-divorce mediation and related evaluation services, unique forms of intervention that are designed to promote the best interests standard far beyond the original disposition and determination of custodial and access issues.

In divorce mediation spouses meet with a neutral mediator to work out a settlement that is satisfactory to both, with final decisions being made by the spouses themselves (Emery & Wyer, 1987). Divorce mediation stresses negotiation, facilitated by the mediator, and is intended to increase parental control over the outcome of divorce proceedings. In mediation, the content and materials of the process are confidential and cannot be subject to discovery or the subject of later testimony (Rule 11, Alabama Civil Court Mediation Rules). In post-divorce mediation, divorced parties work together confidentially with a neutral to reach agreements (that typically revolve around access conflicts) in order to avoid costly return trips to the courtroom. Such return trips are of great financial cost, but of even greater concern is the fact that they further erode positive communication patterns, goodwill and trust between par-

ties who need to be able to forge some sort of positive bond for co-parenting.

In post-divorce evaluation services, divorced parties are court-referred, often by terms of their own divorce decree, to a neutral evaluator (much like a pre-divorce custody evaluator) who evaluates parental capacity and makes recommendations to the parties, their attorneys and possibly the court concerning how the parties are meeting and/or not meeting the best interests standard in their post-divorce parenting relationships. Obviously, the content of these evaluative/post-divorce parenting planning sessions is not barred from discovery. In fact, the possibility of such "feedback" to the court in the form of testimony is often a silent "presence" that gives the evaluator "teeth" as an arm of the domestic court.

Most court orders for post-divorce evaluation services name a specific professional and further make legal parameters known, such as whether the parties are subject to *McLendon* standards (*Ex parte McLendon*) or the best interests standard, in terms of issues surrounding questions of primary physical or legal custody. Often, the focus of such services is *not* to address changes in primary custody. Rather, the focus is more often on modifying access, e.g., changing from supervised to unsupervised visitation or increasing an access schedule. The parties involved have knowledge that the post-divorce evaluator will make regular reports back to the court and the case is placed on an administrative docket and is subject to continued judicial monitoring. Post-divorce evaluations can provide clinical data to assist triers of fact in answering a variety of post-divorce legal questions including parental fitness, moral guidance ability, reasons for relocation, best interests issues, and the ability of a given party to meet developmental needs of specific children at a given point in time.

To those who work regularly in domestic law, it will come as no surprise to hear that the legal end is only the beginning of co-parenting as reorganized by the process of divorce. Conflicts in the post-divorce period typically revolve around one or more of several areas including unresolved marital conflict issues, lingering anger and hurt about the divorce, conflicts with or over new partners, or fruitless power struggles that revolve only around efforts to "win" out over the ex-spouse. In Alabama's 15th Judicial Circuit (Montgomery County), the domestic bench is routinely anticipating post-divorce conflictual disputes by proactively including provisions to utilize a specified court-appointed mediator to resolve conflicts. In addition, these same judges are also routinely ordering post-divorce evaluation services for couples on their docket to help promote formation of positive parenting plans and to aid in preventing unnecessary return trips to court.

The court order specifies whether the service required is mediation with attached confidentiality or post-divorce evaluation services with required reporting back to the court. The judge usually also specifies that parties split the cost of the service through a retainer. The order also specifies that the couple must attempt resolution through mediation prior to returning to the courtroom. If successful, the mediator retreats until services are needed again in the future. The content and process of mediation are confidential except in certain situations where the mediator hears of imminent threats of bodily harm to one of the parties or encounters evidence of some form of child abuse. While some mediators, such as mental health professionals, are mandatory reporters of child abuse (lawyer mediators do not fall in this category), it is recommended as an effective practice to require all mediation participants to sign a release or informed consent agreement that specifies certain conditions, such as abuse, that would require a report to the court.

Factors that influence success in post-divorce mediation or post-divorce evaluation include the acquisition of new communication skills on the part of the parties and the possibility of maturation on the part of children who eventually become much more independent players or variables in the process. The ability of parents to learn and use new positive communication skills, even if highly compartmentalized, is the one factor that consistently emerges in clinical practice and research literature as the *sine qua non* of successful post-divorce mediation and related evaluation services. This approach seems to be very

much appreciated and valued by all parties, particularly judges, because many frivolous or unnecessary return trips to court are prevented.

The philosophical approaches and techniques described in this paper are based on several basic assumptions that emanate from the best interests standard. First, children need both their parents to remain interested, involved and obligated to their needs pre-divorce, at the time of divorce, and throughout the period of post-divorce adjustment until the death of both parents. Rare exceptions to this standard would include a history of abuse from a given parent and the existence of certain psychological disorders, if the disorder directly

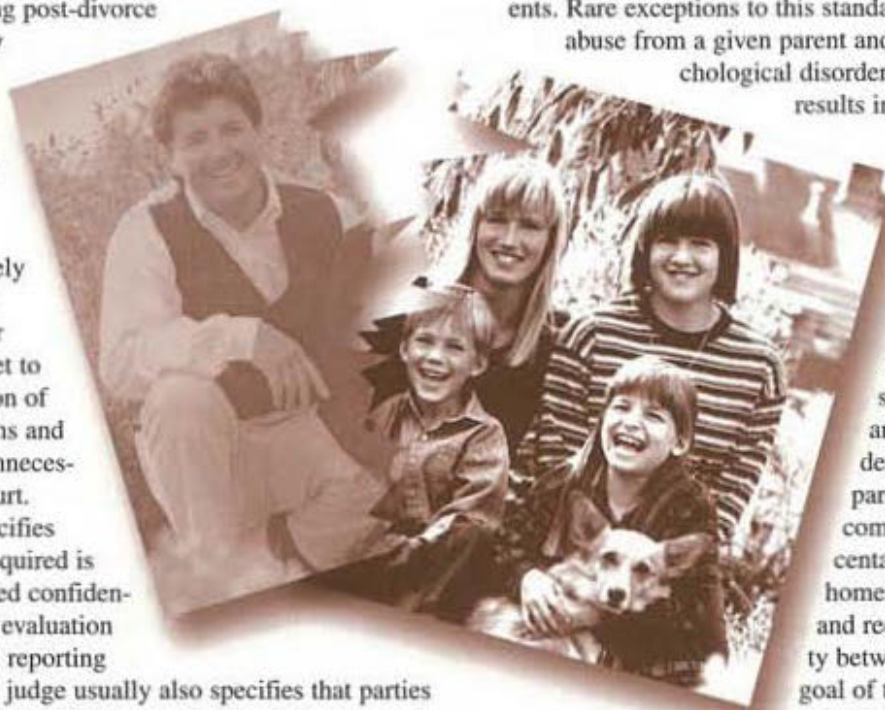
results in child endangerment. In such cases, procedures of supervised visitation or termination of parental rights are put into place.

A second assumption is that while any particular access schedule has strengths and weaknesses, the success of any particular arrangement is far more dependent on the ability of the parents to engage in positive communication than on the percentage of time spent in each home. Processing of divorce issues and reduction of tension and hostility between the parents is a major goal of this assumption. Often, one party is asked to set aside their feelings

as a hurt and injured spouse early in the adjustment process and take on the mantle of positively promoting the role of parent in the lives of the children. While this often feels like a psychologically unhealthy task of compartmentalization of feelings, the best interests standard is the prevailing standard in such cases. Love for the children is the most powerful variable that can be used to guide a rightfully embittered spouse away from wrongfully alienating children from the other parent.

Divorced families need to heal along the lines of reorganization rather than destruction and alienation. Effective pre- and post-divorce mediation services can promote and provide specific guidance for families engaged in this process. The best interests standard exists independently of our work as a Platonic form or legal archetype that can always be utilized as a "true North" type objective standard to guide through individual issues.

Robert Strochak is a forensic psychologist who runs a court-monitored custody conciliation/evaluation program in Bucks County, Pennsylvania. Dr. Strochak has developed a comprehensive conciliation program that includes pre- and post-divorce evaluation and mediation services. His goals are to provide divorcing couples with an integrated experience of evaluation, education, conciliation and counseling objectives in a structured procedure that results either in resolution of the custody dispute or in a



meaningful forensic report to the court (Strochak, 2001). In this innovative model program, all divorcing couples with a custody issue begin the process with a round table custody conference where parties are either routed toward conciliatory settlement or are referred for a full custody evaluation with results reported to the court. Settlement through mediation or conciliation is not precluded at any point on either track. Obviously, formal mediation must again be carefully differentiated from custody evaluation or post-divorce evaluation services along the lines of confidentiality.

Strochak (2001) has proposed a conceptual model of co-parenting that includes four pillars of excellence. This model points out that parents need to realize that, like it or not, they are in a very longitudinal co-parenting relationship with their ex-spouse. There is no real choice about the matter. What can be controlled is whether they are functioning at the hostile, bitter end of the continuum or at the amicable, conciliatory end of the scale. Being stuck in anger and bitterness is often initially very understandable. Spouses certainly hurt each other in horrendous ways. However, remaining in the posture of bitterness chronically violates the best interests standard.

Strochak's (2001) first pillar is that effective co-parents share information with one another in a regular and timely way. E-mail

has proven to be a rapid, efficient, rather emotionally removed way of communicating that also has the advantage of providing a permanent record for all parties. The second pillar is that good co-parents never undermine the other parent's image in the child's mind. This step involves taking a proactive approach in building the reputation and positive image of the other parent.

Examples of problematic cases include the embittered mom who routinely refused to notify the child's dad of any school, leisure or sports events. In addition, she refused to allow the child to notify Dad of any religious or community activities that might have facilitated greater contact. The child in this family developed a bifurcated existence in which he frequently felt conflicted and guilty about wanting to spend time with his dad or wanting to share information "between these worlds." Another case violates the second pillar. In this case, Dad routinely blamed his daughter's anxiety over tests and public speaking on her mom, who was undergoing treatment for a Generalized Anxiety Disorder with discrete episodes of panic. This proved to be a typical theme in his interactions with his daughter, blaming all her "shortcomings" on bad genes from Mom's side of the family. Both cases required court referral for

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post-divorce evaluation services from the judge who had granted the divorces before any improvement occurred.

The third pillar revolves around rebuilding trust. The trust issue is obviously often very difficult and must flow from reasoning such as, "No matter what I think of you as a wife/husband, I know you too love our child/children, and would lay down your life for him/them if necessary." Consequently, a bifurcated, compartmentalized type of trust can be rebuilt (e.g., "I don't trust you at all as a spouse, but I have great trust in you as a parent"). Trust is further regained in the fourth pillar which revolves around each parent striving to be responsible and accountable in terms of compliance with all agreements whether behavioral, social or financial.

Elizabeth Hickey and Elizabeth Dalton (1994) have developed a comprehensive divorce recovery program that is very useful as an adjunct to divorce mediation services. These experienced mediators point out the vital importance of using positive language in describing key elements such as "co-parenting," "shared parenting," "time-sharing" and reframing basic approach thoughts such as, "You still have a family even though your parents live in two different houses" (Hickey & Dalton, 1994, p.66). These thoughts replace negative win-lose words and phrases such as "single parent," "visitation" and "failed marriage/broken home."

Other supportive, positive examples of reframing include: "(1) A divorce is intended to separate husband and wife, not a parent and child. (2) Each parent shares the responsibility for the child, even after divorce. (3) I will pledge to consult with my ex-spouse about decisions concerning our child in the same way that I would consult with a business partner. (4) I recognize that children are capable of giving and receiving love from many people. (5) I see it as a blessing and healthy situation when others love my child. (6) I've learned that holding onto bitterness only hurts me and my child. I will continue to work on forgiveness. (7) I realize that divorce creates financial difficulties and I'll do my part to support/help our child/children. (8) Even though I ache inside over my marriage and divorce, our child/children needs frequent and continuing contact with both of us." (Hinkley & Dalton, 1994, p. 40).

In post-divorce conflicts no one wants to change "first," particularly after all the posturing and power balancing typical of many divorce actions. Often, participants will say, "I got a divorce precisely so that I wouldn't have to compromise or work with him/her any more." It may be helpful to use some perspective adjustment and opine at this point. "You do not have to sleep with, share bills, socialize with, put up with in-laws any more with this person, but you do have to co-parent." Often the focus on release from those areas/burdens noted allows the per-

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son to relish in the distance and at the same time accept the circumscribed role of co-parenting.

Strochak (2001) suggests that the relevant questions for co-parents to ask of themselves are: "What can I do to further the other parent's image in the child's mind? And, how can I share information in a way that will draw them together more?" (p.3). Obviously the mediator must remain neutral and objective throughout the tenure of the relationship. Unlike pre-divorce mediation where the contact is a relatively brief event, post-divorce mediation is a process where relationships can last as long as one to two decades. Being written into a decree of divorce as a post-divorce mediator potentially involves passing through multiple developmental stages with a family.

Attorneys and psychologists (and other mental health professionals) can obviously serve as both pre- and post-divorce mediators. Strochak

In divorce mediation spouses meet with a neutral mediator to work out a settlement that is satisfactory to both, with final decisions being made by the spouses themselves (Emery & Wyer, 1987).

(2001) makes the point that the child custody evaluator can ethically choose to navigate an ongoing custody evaluation into a settled divorce. Attorneys rarely perform true child custody evaluations which have become more the exclusive purview of psychologists because of the almost universal components of general psychological testing, custody-specific psychological testing and collateral interviewing. Attorneys are much more likely to serve in the role of guardian ad litem, but could certainly serve as post-divorce mediators as well.

High conflict divorces are consistently associated with child behavior problems (Kitzmann & Emery, 1994). As Kitzmann and Emery (1994) state, "The cooperative emphasis of (pre-divorce) mediation may promote an improved post-divorce communication between the parents and a better ability to put marital problems aside in order to cooperate in parenting. Even if (pre-divorce) mediation were associated with no changes in the amount or level of parent problems, it may be associated with less child exposure to problems and thus more positive child outcomes" (p.151). Pre-divorce mediation has been shown to dramatically reduce court hearings, to increase party satisfaction with the outcome, and to increase compliance with child support (Emery, 1991, 1994).

Post-divorce conflicts often seem to involve more psychological than legal issues. These issues typically flow from unresolved anger and poor communication patterns between ex-spouses in their new roles as co-parents. Themes and issues frequently encountered include:

unresolved anger from the marriage, adjustment issues surrounding new partners, attempts to continue old patterns of controlling communication patterns from the marital relationship, and legitimate differences of opinion about activities/rules concerning children. Issues surrounding relocation seem to arise frequently as well.

Early intervention through post-divorce mediation and post-divorce evaluative services can prevent serious problems such as estrangement from a parent and more pathological problems such as Parental Alienation Syndrome (Gardner, 1987). Parental Alienation Syndrome is an increasingly rec-



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Parental Alienation Syndrome is an increasingly recognized syndrome caused by conscious and unconscious behaviors on the part of one parent designed to undermine, damage and destroy the affection of a child toward a given parental figure. While this syndrome is not an official DSM IV diagnosis, like Battered Woman Syndrome, it is being increasingly recognized by courts as meeting evidentiary standards, such as Frye and Daubert standards (*Daubert v. Merrill Dow, Frye v. U.S.*). From a clinical point of view, it would be accurate to describe efforts to cause alienation of a child's affection toward a parent as being one of the most malevolent forces ever encountered in the field of child development.

In a number of jurisdictions, attorneys and psychologists are being appointed as independent neutrals to assist families post-divorce with day-to-day disputes, sometimes in a mediation format, sometimes in post-divorce evaluation and sometimes in an arbitration-type role with court-extended authority to settle disputes. These roles are described differently in different areas: Northern California (special masters); Arizona (family court advisors); Boulder, Colorado (case managers or binding arbitrators); and New Mexico (wise persons). Phillip Stahl (2000), a nationally recognized custody evaluator, points out that regardless of the name, the role involves helping quickly resolve differences, unclogging the court docket from more difficult families and integrating knowledge about developmental needs into ongoing parenting plans. Stahl observes that special masters need to keep families out of court and children out of the middle, and to make objective, timely decisions that are firmly guided by the best interests standard with the backing of the court.

In Northern California, the parenting coordinator (Coates, 2001) role is spelled out in the divorce decree, including whether the role will be mediation or post-divorce evaluation with arbitration/decision-making authority. The parenting coordinator role can include assessment of the situation, educational and therapeutic intervention, interfacing with any combinations of the parties involved, as well as collateral contacts, and conflict management techniques leading to resolution of the dispute. In addition, the original trial court also has the option of appointing a special master, usually a psychologist or attorney, to whom the parties stipulate, and who has the court-granted authority to make certain specified decisions in the form of court orders and recommendations regarding certain issues related to custody and visitation. The California Family Code (Section 1815) specifies certain minimum credentialing requirements for special masters.

Post-divorce mediation and evaluation services represent a relatively recent development in family law and forensic psychology. The evolution of post-divorce evaluation and mediation services has truly risen from the "front lines" of practice, in direct response to the needs of divorced families, family lawyers and domestic court judges. The best interests standard has been the guiding standard with appropriate input, where relevant, from developmental and family psychology. The development of these services has given domestic courts a useful and practical tool to help bring about lasting positive outcomes for families undergoing the adjustment and reorganization of divorce. ■

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Karl Kirkland, Ph.D.

Dr. Karl Kirkland is a forensic psychologist and assistant professor of medicine with the UAB School of Medicine, Internal and Family Medicine Residency Programs, in Montgomery. He is a past chairman of the Alabama Board of Examiners in Psychology and past president of the Alabama Psychological Association. His research and practice interests are in the areas of pre/post-divorce mediation, child custody/access evaluations and assessment of criminal responsibility. He has served as a member of the Supreme Court Commission on Alternative Dispute Resolution since 1999.



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Bankruptcy & Mediation

BY J. THOMAS CORBETT



The benefits of mediation are varied and well known. They include a more rapid resolution of disputes, allowing the litigants to remain in control and contribute to their own remedies, a consideration of future needs, an informal atmosphere, and especially a savings of what are often very burdensome economic costs. What better arena to be economically prudent and save, or at least not spend, as much as possible than in a bankruptcy case.

Today, mediation is not limited to traditional areas of practice such as personal injury, construction, employment and domestic relations. Mediation is now available in bankruptcy cases, and best of all, it is free. The **United States Bankruptcy Attorney for the Northern District, Southern Division of Alabama** began offering limited informal mediation services in Birmingham on an *ad hoc* basis in late 1998. In light of the positive results and response to the informal procedure, a **mediation division** was established as a formal practice section within the U.S. Bankruptcy Administrator program for the Northern District of Alabama.

Active support of the mediation division came from the chief judges of the **Eleventh Circuit Court of Appeals, Federal District Court for the Northern District of Alabama** and the

Bankruptcy Court for the Northern District of Alabama and resulted in authority from the **Judicial Conference of the United States** for the appointment of a **chief deputy bankruptcy administrator**. A primary duty of the bankruptcy administrator is to conduct mediation sessions and to organize, develop, coordinate and implement the policies, procedures and practices of the mediation division.

The guidelines, policies and procedures of the mediation division have now been established and implemented for over a year. The **Bankruptcy Mediation Division** has mediated over 125 matters, with approximately 90 percent of those mediation sessions resulting in settlement. The usefulness and willingness to use mediation as a tool of resolution in bankruptcy cases is rapidly gaining momentum.

Most matters in a bankruptcy case are available for mediation. They include, among other issues, such things as disputes concerning claim amounts, violations of the automatic stay, preference and fraudulent conveyance issues, and dischargeability complaints under Bankruptcy Code Section 523. The mediation is typically held within 60 days of the time the mediation is either ordered by the Court or requested by the litigants. An upcoming issue of *The*

Alabama Lawyer will have a full discussion concerning the guidelines, policies and procedures of the Bankruptcy Mediation Division and will include details on what can be mediated in bankruptcy cases, how the litigants may be ordered to or may voluntarily request the free mediation, how and where the mediation will be conducted, and what the litigants can expect if they proceed to mediation. Until then, if you have questions or are interested in a bankruptcy mediation, contact the author, Tom Corbett, chief deputy bankruptcy administrator, at 1800 Fifth Avenue, North, Suite 132, Birmingham 35203, or by phone at (205) 714-3838. ■



J. Thomas Corbett

J. Thomas Corbett is the chief deputy bankruptcy administrator for the Northern District of Alabama. He is a 1988 graduate of the University of Alabama School of Law and a 1985 graduate of the University of Alabama, where he received his degree in

corporate finance and investment management. From 1988 to 1990, he served as law clerk to then Chief Bankruptcy Judge George S. Wright. Corbett was formerly a managing partner in the firm of Burnham, Klinefelter, Halsey, Jones & Cater PC, specializing in bankruptcy and business litigation. He is a registered mediator with the State of Alabama.



Peace Education Through Mediation

BY ANNE ISBELL

Peer mediation
is a program
that trains
students to be
mediators for
their school.

When conflicts begin to develop between students, they are given the choice of being mediated by their peers or letting the school administration handle their problems. Peer mediation enables teachers to concentrate on teaching rather than discipline, and, at the same time, teaches students to resolve their conflicts without fighting. It develops leadership skills and positive communication skills, builds self-esteem, and often improves academics.

Participating schools report an average 30 percent decline in discipline problems after peer mediation has been in use for one year or more. Some have also experienced a decline in suspensions that was attributed to the effect of the peer mediation program.

The training involves selecting approximately 20 students who will be trained over a two-day period. Students are selected based on their leadership ability, communication skills, trustworthiness and the confidence of their peers. The group should be comprised of a good cross-section of the student body, based on nationality, race and gender. The school should have an on-site coordinator for the program who will meet periodically with the student mediators to encourage them, address any problems that may arise and keep statistics on the program. Once the mediators are trained they are ready to begin mediating disputes. Anyone may refer students to mediation, however, mediation is optional for them. Mediations may be done at the same time each day, such as a physical education period, or when the need arises. Mediations take place in a private setting without an adult present. Each disputant is allowed to tell his or her "side of the story". Then the mediators paraphrase what they have said and ask questions about their situation. "What do you want?" is a typical question. "Wants" are easily identified, but mediators are trained to focus on needs. As needs are discussed, solutions usually begin to come. When a solution is agreed upon it is put in writing and both disputants sign it. This record of the mediation is kept by the coordinator. Even when a conflict is not resolved in the mediation session, students are still learning some positive conflict resolution methods as they take part.

Students and teachers recognize that adult intervention isn't always necessary for resolving student conflicts. Students will open up to their peers much more quickly than



to an adult. They also feel that they are more understood by their peers. Student mediators learn how to identify issues that need resolving. By paraphrasing or restating what the disputants tell them they identify how the disputants feel and make the statements more positive by substituting offensive words with more positive ones. This is beneficial in helping disputants vent their anger in a safe way, and at the same time, enabling them to understand the opponent's point of view. Students who are mediated benefit greatly as the process teaches them that fighting is not a good way to resolve conflicts with their peers. Rather than being disciplined by faculty they are given the option of working out their problem with their peers in a private, confidential session.

The need to "save face" in front of your peers is no longer a factor when a dispute occurs. Disputes such as rumors, name-calling, putting down family members, picking on each other, and boyfriend-girlfriend problems are the typical types of disputes mediated. More serious things, such as drugs, alcohol, weapons at school and fighting, are not open for mediation.

Many times the effect of the use of peer mediation carries over into family situations as mediators learn to use the skills for conflicts between siblings. Schools that teach students peaceful ways to resolve conflict are aiding in the reduction of violence in the school, home and community.

The **Alabama Supreme Court Commission on Dispute Resolution** has supported peer mediation since 1994. **Judy Keegan**, executive director of the **Alabama Center for Dispute Resolution**, placed one of the first peer mediation programs in Alabama at **Chisholm Elementary School** in Montgomery

County. The Commission sponsored peer mediation programs for six schools in North Alabama in 1997, through a \$6,000 grant to the **Community Mediation Foundation**. They also formed a **Peer Mediation Committee** to promote the use of peer mediation in Alabama schools. Commission member **Judge Richard Lane** of Lee County has been responsible for establishing peer mediation programs in his county. Another member, **Judge Gerald Topazi**, has been instrumental in obtaining funding for programs in Jefferson County.

Peer mediation is teaching students peaceful conflict resolutions through the use of mediation. It is the best, pro-active way to address the issue of violence in the schools. If we are to bring about change in an ever-increasing violent society, we must do it through our youth. They are open to learning new ways. And, unlike many adults, they are trainable. Let's work together to get peer mediation programs in all Alabama schools. To learn more about peer mediation phone me at (256) 539-2118 or e-mail me at aisbell@northalabama.bbb.org. ■



Anne Isbell

Anne Isbell is the executive director of the Better Business Bureau, Community Mediation Foundation, a member of the Alabama Supreme Court Commission on Dispute Resolution. She conducts peer mediation training in Alabama schools.



J. Anthony McLain

Ex Parte Communication Prohibited Between Guardian Ad Litem and Court

By J. Anthony McLain, general counsel

Question:

"I am serving as an appointed guardian ad litem in a juvenile case. I have not attended any formal training or other courses pertaining to an attorney's responsibilities as a guardian ad litem, however, I have read the guardian ad litem manual prepared for the Children's Justice Task Force. I have become aware from other sources that certain jurisdictions consider it appropriate for a guardian ad litem to communicate directly and ex parte with the court.

"This is a request for a formal opinion on the following question: Under the Alabama Rules of Professional Conduct, may a guardian ad litem communicate ex parte with the court?"

Answer:

An attorney who has been appointed guardian ad litem is ethically prohibited from communicating ex parte with the trial judge concerning any substantive issue before the court.

Discussion:

The argument has been advanced that guardians ad litem, rather than being advocates for their wards, are more appropriately considered advisors to the court, and, therefore, should be permitted to have ex parte communication with the judge. However, this is not the case in Alabama.

The Court of Civil Appeals of the State of Alabama has conclusively held that guardians ad litem are advocates for their wards and the role of the guardian ad

litem in the adjudicatory process is not different from that of any other advocate.

"The guardian ad litem ... is an officer of the court and is entitled to argue his client's case as any other attorney involved in the case." S.D. v. R.D., 628 So.2d 817, 818 (Ala. Civ.App. 1993)

Additionally, the statutory provision which governs the appointment and payment of guardians ad litem in juvenile cases expressly states that it is the duty of the guardian ad litem to act as advocate for the ward. *Code of Alabama, 1975, § 15-12-21(b) & (c)*, provides as follows:

- (b) If it appears to the trial court in a delinquency case, need of supervision case, or other judicial proceeding in which a juvenile is a party, that the juvenile is entitled to counsel and that the juvenile is not able financially or otherwise to obtain the assistance of counsel or that appointed counsel is otherwise required by law, the court shall appoint counsel to represent and assist the juvenile or act in the capacity of guardian ad litem for the juvenile. *It shall be the duty of the appointed counsel, as an officer of the court and as a member of the bar, to represent and assist the juvenile to the best of his or her ability.*
- (c) If it appears to the trial court that the parents, guardian or custodian of a juvenile who is a party in a judicial proceeding, are entitled to counsel and the parties are

unable to afford counsel, upon request, the court shall appoint counsel to represent and assist the parents, guardian or custodian. *It shall be the duty of the appointed counsel, as an officer of the court and as a member of the bar, to represent and assist the parties to the best of his or her ability.* (emphasis supplied)

It is, therefore, the opinion of the Disciplinary Commission that attorneys who are appointed guardians ad litem are advocates for their wards just as, and in the same manner as, retained attorneys are advocates for their clients. Accordingly, guardians ad litem are subject to the same prohibition against ex parte communication with the court as are all other lawyers involved in the adjudicatory process.

The prohibition applicable to attorneys is codified in Rule 3.5 of the Rules of Professional Conduct which provides as follows:

"Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) Communicate ex parte with such a person except as permitted by law;"

A similar prohibition applicable to judges is found in the Canons of Judicial Ethics. Canon 3(A).(4) of the Canons of Judicial Ethics provides as follows:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full

right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding."

While Alabama appellate courts have never specifically addressed the issue of ex parte communication with the court by a guardian ad litem, other jurisdictions have expressly ruled on this issue and have held such ex parte communication to be ethically prohibited. See, e.g., *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991); *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977); *Riley v. Erie Lackawanna R. Company*, 119 Misc. 2d 619, 463 N.Y.S.2d 986 (1983); *De Los Santos v. Superior Court of Los Angeles County*, 27 Cal. 3d 677, 613 P.2d 233 (1980).

The question of ex parte communication by a guardian ad litem has also been addressed in a treatise on the role of the guardian ad litem.

"The guardians are usually afforded the same rights as the parties' attorneys (e.g., of making opening statements and closing arguments). Guardians cannot be called as witnesses. Guardians ad litem may not have ex parte communications with the judge." Podell, *The Role of the Guardian Ad Litem*, 25 Trial 31, 34 (April 1989).

For the reasons cited above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney who serves as a guardian ad litem may not have ex parte communications with the trial judge regarding any substantive issue before the court. [RO-2000-02] ■

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Notice to Show Cause

- Notice is hereby given to **Rayford Lee Etherton, Jr.**, who practiced in Orange Beach, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary commission of the Alabama State Bar, dated February 10, 2004, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2002. Non-compliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 04-01]

Suspensions

- On January 30, 2004, the Supreme Court of Alabama adopted the December 22, 2003 order revoking the probation of Sylacauga attorney **Michael Anthony Givens**, entered by the Disciplinary Board, Panel V, effective December 22, 2003. On July 10, 2003, Givens was summarily suspended from the practice of law. On July 28, 2003, the Disciplinary Board accepted Givens' conditional guilty plea to six violations of the Alabama Rules of Professional Conduct. The Disciplinary Board imposed a one-year suspension. However, the Disciplinary Board suspended the imposition of this discipline and held it in abeyance pending a two-year probationary period, subject to Givens' compliance with a list of probationary conditions. On October 2, 2003, the Office of General Counsel filed a motion to revoke Givens' probation based on his failure to comply with the terms of his probation. On October 16, 2003, the Disciplinary Board determined that an order revoking Givens' suspension be withheld for a period of 30 days, during which time Givens could bring himself into compliance with the probation order. Givens failed to bring himself into compliance with the probation order. [ASB nos. 01-304(A), 02-129(A), 03-17(A), 03-80(A), 03-113(A) and 03-171(A)]
- On February 13, 2004, the Supreme Court of Alabama entered an order adopting the order of the Alabama State Bar Disciplinary Board, Panel IV, suspending **Matthew Travis Holzborn** for five years. Holzborn surrendered his license and accepted a suspension of five years, for violations of the Alabama Rules of Professional Conduct in the following complaints (his suspension was effective February 25, 2004):
 - In ASB No. 03-108(A) and 03-139(A), Holzborn was retained to represent Betty James to recover damages involving two auto accidents on a contingency fee basis. Holzborn would tell her that he was working on the cases and did advance money to her. Holzborn never took any action on her claims. Holzborn reported his actions to the bar and James later filed a complaint with the bar.

In ASB No. 03-140(A), Pauline McLemore retained Holzborn to seek Social Security disability benefits. Holzborn gave McLemore money and provided a place for her to live. McLemore did not believe that Holzborn ever filed anything on her behalf.

In ASB No. 03-182(A), in an administrative proceeding before the Alabama Home Builders Licensure Board, Holzborn represented to the administrative law judge that his stepfather had died. Later, the administrative law judge learned that Holzborn's stepfather had not died when he read the report of discipline in *The Alabama Lawyer*. Holzborn had used this same excuse in a previous proceeding in another court.

In ASB No. 03-318(A), Janice Clemons hired Holzborn to represent her with an auto accident. Holzborn took no action in her case and did not respond to her request for information.

In ASB No. 03-287, Charlene Tarwater retained Holzborn to represent her in a slip-and-fall injury. There was no employment contract. At some point, Holzborn gave Tarwater \$2,000 and indicated it was settlement of her claim. Tarwater never signed a release and Holzborn never provided any documentation regarding the settlement. [ASB nos. 03-108(A), 03-129(A), 03-140(A), 03-182(A), 03-287(A), and 03-318(A)]

- Daphne attorney **Michael Hilding McDuffie** was suspended from the practice of law in the State of Alabama for a period of 91 days, effective January 25, 2004 by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. The Disciplinary Board accepted McDuffie's conditional guilty plea and ordered that he be suspended from the practice of law in the State of Alabama for a period of 91 days, to run concurrently in each case. However, the Disciplinary Board ordered that the 91-day suspension be suspended and held in abeyance pending a two-year probationary period, with McDuffie to serve 30 days of the 91-day suspension.

The grievances contained the same or similar allegations that McDuffie had failed to competently represent clients, wilfully neglected clients' cases, failed to reasonably communicate with clients regarding their cases, failed to keep clients' funds separate from his own funds, failed to refund advance payment of fees, failed to respond to requests for information from a disciplinary authority, and engaged in other conduct that adversely reflects on his fitness to practice law. As part of his plea, McDuffie was ordered to enter a professional enhancement program. In addition, McDuffie was ordered to make restitution in the amount of \$2,500. [ASB nos. 02-41(A) et al.]

Public Reprimands

- On December 5, 2003, former Montgomery attorney **John Oliver Cameron** received a public reprimand without general publication, for a violation of Rule 8.1(b), *Alabama Rules of Professional Conduct*. In 1998, Cameron represented John Henry Ross at the trial level and on the appeal of his criminal conviction. Thereafter, Ross hired Mr. Blevins to handle a post-appellate review of his criminal case. On August 6, 1999, Blevins filed a bar complaint against Cameron alleging that he had not competently represented Ross. The bar sent Cameron a copy of Blevins' complaint on December 29, 2000 and requested a written response. Cameron failed to respond to the bar regarding this complaint. [ASB No. 00-311(A)]

- On February 13, 2004, Birmingham attorney **Michael Benton French** received a public reprimand without general publication. French entered a plea to violation of the following *Rules of Professional Conduct*: Rule 1.1, dealing with competence; Rule 1.8(c), dealing with prohibited transactions with clients; and Rule 1.15(b), dealing with the prompt notification of the receipt of settlement proceeds. In or about March 1997, Martha Vineyard hired French on a 40 percent contingency fee agreement to represent her concerning an injury she received in a Big Lots parking lot from a "runaway" shopping cart. The case was settled for \$12,000 in March 2000, but French did not notify Vineyard of the settlement for some time. Also, Vineyard's claim was subject to a Medicare lien of almost \$12,000. Blue Cross could not legally waive this lien. Vineyard refused to execute the settlement documents under the circumstances. The defendant then had the settlement enforced by the circuit court. French counselled Vineyard to donate her portion of the settlement to a charity in order to prevent Blue Cross from receiving anything. Since she was not going to receive funds from the settlement, she agreed to do this. At that point, French sent \$9,716.67 to a church organization with which he had a longstanding association. [ASB No. 02-140(A)]
- **William Pinkney Powers, III** of Columbiana received a public reprimand without general publication on February 13, 2004 for violating rules 1.1, 1.3, 1.4(g) and 8.4(a) (c) and (g), A.R.P.C. Powers agreed to represent the complainant for

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injuries received in an automobile accident in May 2000. Powers did little or no work on the case, although the complainant contacted him several times and received updates regarding the status of the matter. Powers filed a civil action in May 2001, but was unable to obtain service on the defendant. The complainant paid Powers \$100 in October 2001 to hire a process server. Powers led the complainant to believe that the complaint had been served. However, the return of service was never filed with the court. On March 28, 2002, the court ordered that the case would be dismissed unless service was obtained within 28 days. Powers did not inform the complainant of the court's order, and the action was subsequently dismissed on June 4, 2002. Powers did not notify the complainant of the dismissal. When the complainant discovered that the case had been dismissed, Powers assured the complainant that he would do whatever it took to rectify the situation, but he did nothing. [ASB No. 03-36(A)]

- Mobile attorney **Slade Gordon Watson** received a public reprimand with general publication on February 13, 2004 for violating rules 1.3 and 1.4(a), A.R.P.C. Watson was retained to represent a client in a matter concerning the suspension of his Alabama driver's license and paid a \$500 retainer. Approximately one year later, Watson still had done no work in the matter. During that time, Watson did not communicate with the client, nor did he respond to the client's reasonable requests for information concerning the matter. Watson also refused to refund the retainer after having been requested to do so by the client. [ASB No. 03-18(A)]

- On December 5, 2003, Birmingham attorney **Willie Leon Williams, Jr.** received a public reprimand with general publication for violating rules 1.3, 1.4(a) and 3.2 of the *Alabama Rules of Professional Conduct*. In early 1998, Ms. Robbie McDonald contacted Williams about handling her divorce. She was quoted a total fee of \$1,175. She made a partial payment and Williams filed the divorce complaint. Subsequently, she was unable to pay any additional fees and the divorce was voluntarily abandoned. The court dismissed the complaint on June 28, 1999. On February 2, 2001, McDonald paid Williams \$1,075 to initiate divorce proceedings again. A second divorce complaint was filed on February 21, 2001. Williams took no further action for nine months. McDonald called on a regular basis seeking a status report but Williams did not communicate with her about the case. Williams did not notify McDonald that the second complaint had been dismissed by the court on August 28, 2001. Without McDonald's knowledge Williams filed a third complaint on September 20, 2001. Several of the associated documents were rejected by the court. Williams did not correct and re-file the documents. McDonald sent Williams four letters between September 2001 and January 2002 expressing her frustration at his lack of communication with her. In her last letter, she informed Williams that she would be seeking assistance from the bar if he did not address her concerns. On January 17, 2002, McDonald filed a complaint with the bar. After receiving notice of the bar complaint, Williams filed corrected documents and a divorce decree was ultimately entered on March 11, 2002. [ASB No. 02-061]


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