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The Alabama Lawyer

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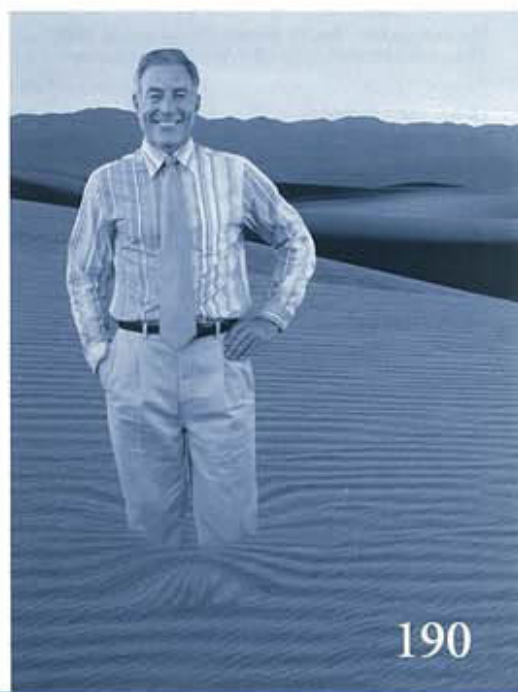
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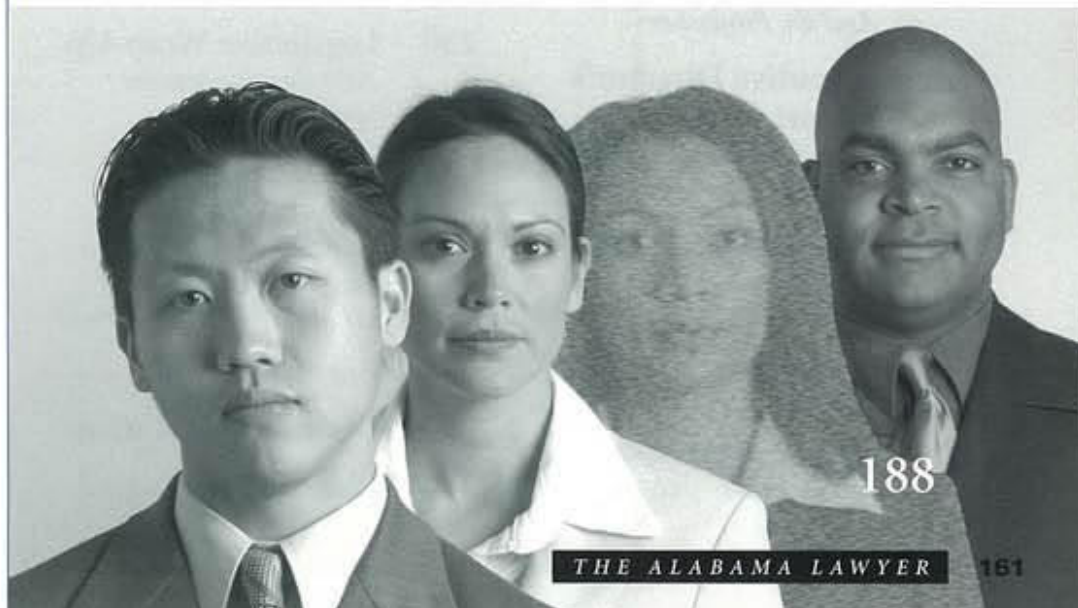
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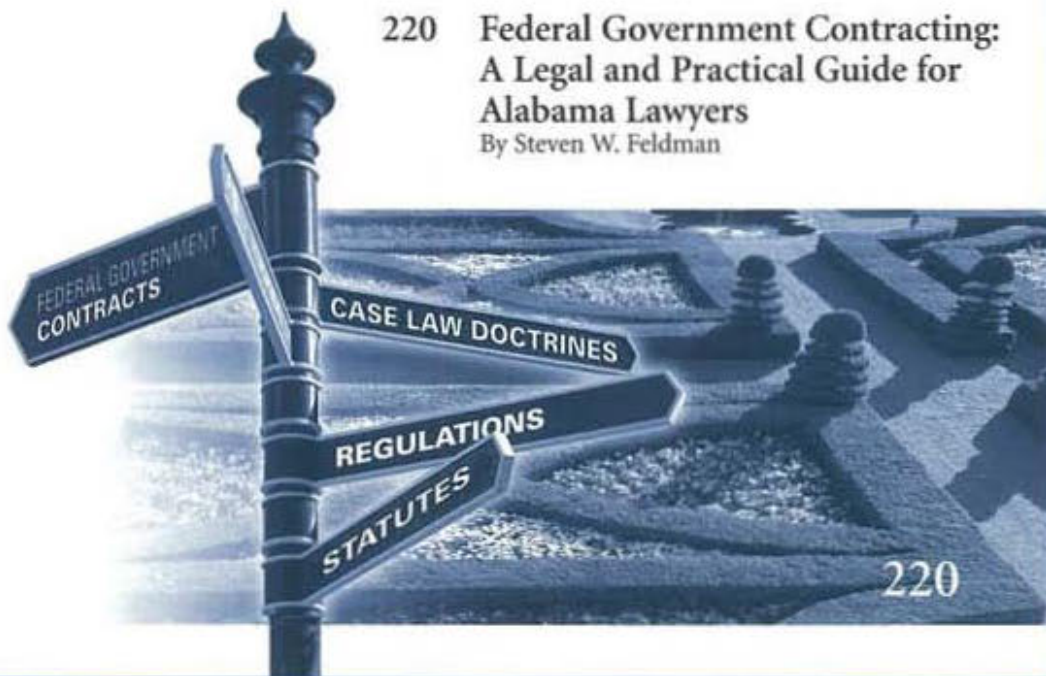


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The Alabama Lawyer (USPS 743-090) is published seven times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36103-4156.

The Alabama Lawyer is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment; \$15 of this goes toward subscriptions for The Alabama Lawyer. Other subscribers do not receive the directory edition of the Lawyer as part of their subscription. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. The Alabama Lawyer reserves the right to reject any advertisement. Copyright 2005, The Alabama State Bar. All rights reserved.

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*As Doug McElvy enters the final four months as 2004-05 president of the Alabama State Bar, he looks back on the past year with *The Alabama Lawyer* Editor Robert Huffaker.*

The Alabama Lawyer: Doug, describe your experience so far as the bar president. Has it been what you anticipated?

Doug McElvy: It's really been more than I anticipated. One of the things that I decided to do when I was elected was to visit as many of the local bar associations as I could during my year as president. That has probably been one of the most rewarding things I have ever done. Yesterday, as a matter of fact, I was in Athens in Limestone County. Not long ago I was in Geneva County. Last week, I was in Baldwin County and Mobile County. I've been from one end of the state to the other, from the smallest and most rural bars to the largest. It's been a great experience.

AL: What feeling have you gotten from visiting the local bar groups as to the state of our profession at this time?

DM: Based on what I've seen, the legal profession in Alabama is very healthy and robust. We have great lawyers all over the state who care deeply about their clients, the quality of services they render, the communities they live in, and the legal system. My view is that we have an outstanding bar and the quality of the legal profession in Alabama is equal to or far exceeds the legal profession anywhere. However, many lawyers have expressed a common concern about the declining public perception of the legal profession and the misunderstanding of the role of lawyers.



"The Alabama State Bar...continues to be a national leader." Pictured above with the ABA 2004 Outstanding Law Day Activities Award for the play, "Cross That River," are Tommy Kliner, Montgomery attorney and Law Day co-chair; ASB President Douglas McElvy; Alan Kopit, chair, ABA Division for Public Education; Tim Lewis, Montgomery attorney and committee co-chair; and Jane Garrett, Montgomery librarian and co-author of "Cross That River."

AL: What's been the theme of your administration?

DM: The main focus has been oriented toward our professional responsibilities as lawyers and how the Alabama State Bar can assist our lawyers in fulfilling their duty of service to their clients, the public and the profession. The Alabama State Bar does an excellent job in fulfilling our regulatory responsibilities and lately we've been asking ourselves how we can better serve the lawyers of Alabama? In fact, one of the questions we're asking is, if the law of Alabama did not require lawyers to belong to the Alabama State Bar, are our services good enough that they would want to belong anyway? I guess that really amounts to two things, but they're interrelated.

AL: How have you focused on the professional responsibility of lawyers?

DM: In January 2004, the supreme court adopted a rule that requires every lawyer in Alabama to have one CLE hour annually in professionalism/ethics. I got the bright idea that if I offered a free CLE to fulfill that requirement, then the lawyers in local bar associations would come. I've had great turn-outs when I visit the local bars. I am able to not only talk about professionalism/ethics but also the services the bar offers. The seminar in part emphasizes that one way to counteract the declining public perception of the legal profession is to keep the core values of our profession (truth, integrity and service) in mind. It also focuses not just on core values but also on what the character of a lawyer should look like in order to fulfill the high calling of the legal profession. Rote obedience to the rules of ethics does not make a lawyer a professional. We all choose whether we will embrace the core values of our profession and the personal character necessary to live out those values. The bar has also played a very active role in working with Chief Justice Drayton Nabers on the development of his **Commission on Professionalism**. The legal profession nationally is devoting a lot of attention and energy to the whole issue of professionalism, and the chief justice's commission is



"I decided to visit as many of the local bar associations as I could." President McElvy traveled the state to present free ethics CLE to local bar associations and meet with members of the ASB. He's pictured here with Gadsden attorneys at Pas'ghetti's Italian Restaurant.

one of only a few in the nation. I know the bar will continue to play an important role in the commission which will give some formal structure to addressing problems associated with our legal system.

AL: What are the services the bar is providing of which you are proud?

DM: The programs and services offered by the Alabama State Bar to its members are being followed by the bars of many other states. I was at the American Bar Association Mid-Year Meeting in February in Salt Lake City, and our programs and services were being showcased. Our new **membership directory** is second-to-none and is being copied by many other state bars for their members. In addition to that, the Alabama State Bar **professionalism programs**, **Alabama Lawyers Assistance Program**, **communications programs** and the **Alabama Law Foundation programs** are receiving national attention. At that same ABA meeting, the Alabama State Bar received a national award for "Cross That River: *Brown v. Board of Education* and the *People Who Lived It*." It's been very gratifying to me to see the Alabama State Bar continue to be recognized as a national leader for its programs and services. Perhaps many are not aware that the Alabama State Bar has been a national leader for over 100 years. We passed the first *Code of Ethics* which was emulated by the American Bar Association and many other states, and then we were one of the

very early states to adopt **continuing legal education requirements**. These are just a few areas. My goal for the state bar is not so much national recognition as it is that the lawyers of Alabama have at their fingertips the best cutting-edge tools, services and programs, and that the ASB serve as a great asset to their professional practice and careers. The **Casemaker®** project is a good example of the quality of services we are offering to Alabama lawyers.

AL: Bring us up to date on the status of the Casemaker project.

DM: Casemaker® is an online research engine scheduled to be available in May. All Alabama lawyers will be able to access Casemaker® simply by going to the Alabama State Bar Web site at www.alabar.org and clicking on Casemaker®. They will have available a powerful research tool that is state-of-the-art, has a complete Alabama and 11th Circuit library, is equipped with a cite check mechanism and will be very user-friendly. Best of all, there will be no access charge, and Alabama lawyers will be able to access the complete state and federal libraries included in over 20 other member states of the Casemaker® Consortium. This will save Alabama lawyers hundreds of dollars a year. All this is covered in the bar license fee.

AL: Have you appointed any task forces during your term?

DM: Yes. The bar's **Long-Range Plan** was adopted in 1994, and the goals of that five-year plan largely have been



President McElvy (above, standing, second from left) with fellow attendees at the recent annual meeting of the Southern Conference of Bar Presidents.

accomplished. I asked Caine O'Rear and Karen Bryan to head a task force to recommend a new five-year plan for the Alabama State Bar. The task force is doing an outstanding job and it is hoped that the plan will soon be ready for adoption. Our goal is to continue to offer to Alabama lawyers the most advanced and effective programs and services while promoting the highest standards of professional conduct. I also appointed a task force headed by Dag Rowe to study our election rules for president-elect of the Alabama State Bar. In some ways, our rules were very antiquated and didn't even allow for online solicitation. The task force did an excellent job, and our election rules are now up to date. In fact, they are in force for this current election cycle. Anthony Joseph chaired our task force to develop the procedures for expanding the bar commission. The legislature passed a bill last year to expand the bar commission by nine at-large commissioners to promote the racial, ethnic, gender, age, and geographic diversity of the ASB. The Board of Bar Commissioners is now accepting nominations for those at-large positions based on the work of the task force. We have another task force chaired by Steve Rowe, reviewing our Mandatory Continuing

Legal Education Rules to make sure they're up to date. As I mentioned, Alabama was one of the first states in the nation to adopt Mandatory Continuing Legal Education. We are reviewing our rules to make sure that they're effective and meet the needs of Alabama lawyers. Sam Stockman is chairing the Access to Justice Task Force. The task force is designed to investigate and determine if some forms of *pro se* litigation projects are appropriate for Alabama. The Task Force on Rules Governing Admission to the Alabama State Bar headed by Michael Waters is in the process of completing a rule authorizing a new category of membership for "authorized house counsel." We're hopeful that we will soon be able to present this rule to the Supreme Court of Alabama.

AL: Besides task forces, have you appointed any other committees?

DM: We activated a Judicial Liaison Committee headed by Jere Beasley and Sam Franklin which has been very active. We want to have a concerted effort to deal with issues of lawyers and the judiciary, and this is an excellent committee. They've done a great job. The committee is looking at ways to improve the relationship between the bench and bar, and they are seeking solutions to problems

such as lack of funding for education programs for new judges, response to criticism of the judiciary and several other issues. There's another program that was initiated last year that should be mentioned. Alyce Spruell and Patrick Graves and their task force did an outstanding job putting together the Leadership Forum. The forum is an excellent program that trains lawyers to become leaders not just in the bar but also in their communities. There has been a great response to that program. There are some great young lawyers involved who already are leaders in their communities. We also have the Archives and History Committee chaired by Ben Spratling working on the history of the Alabama State Bar. We have a Quality of Life Committee chaired by Matthew White. There are some studies that show that the legal profession is by far the most stressful occupation. Lawyers are almost four times more likely to have major depressive disorders. One in three lawyers suffers either from depression, alcohol abuse or drug abuse. Lawyers are more than twice as likely as the general adult population to become alcoholics. There's one statistic that indicates that lawyers are twice as likely to be divorced than the general population. That's pretty sobering. One of my real concerns, and I talk about this in the professionalism seminar, is that we ensure that we keep our priorities in the right place. For me, that's faith, family, then work. What we do is so important that it does cause stress. No lawyer I've talked to has disagreed with the fact that it's a stressful profession. We want to see if we can take off some of the stress and help lawyers. We don't need to be losing lawyers to depression, alcohol and drug abuse. Of course, we have some great programs in Alabama that deal with that. I've already mentioned Jeanne Marie Leslie's program, the Alabama Lawyer Assistance Program, and we also have the Alabama Lawyers Helping Lawyers Committee headed by David Wooldridge.

AL: Are you concerned about the availability of legal services to the needy of this state?

DM: Access to justice has been a concern of mine. Legal Services Alabama is doing a great job, but they need more lawyers and the easiest way to approach that is through our Volunteer Lawyers Program. I was glad Gibson Vance, the new president of the Montgomery County Bar Association, is focusing on getting more lawyers involved in the VLP. This is the kind of initiative we need. Mobile does an excellent job with 56 percent of their lawyers involved in the program. Many counties have less than 20 percent involvement, and I want to challenge them to get more involved. I have already mentioned the Access to Justice Task Force chaired by Sam Stockman. Sam and his task force are investigating other avenues to address access to justice issues, and to remove barriers and difficulties facing *pro se* litigants. Other jurisdictions, like Arizona for example, have instituted *pro se* litigation plans, and Sam's task force is considering whether those types of plans would be appropriate for Alabama. Melissa Pershing, the new director of Legal Services Alabama, is doing an excellent job. Unfortunately, her resources are limited, so we're also investigating how we can better assist her in fulfilling her responsibilities.

AL: Are there any other problems you would like to see addressed?

DM: In my view, we do not have enough lawyers in Alabama's legislative bodies. Out of 105 legislators in the house, only eight are lawyers. In the senate, only 11 of the 35 members are lawyers. I think we need more lawyers in the legislature. I'm not saying all legislators need to be lawyers, but it wasn't that long ago when Alabama's house and senate were populated by lawyers. In my view, if we had more lawyers in our legislative bodies, issues like adequate court funding, indigent defense and other problems would be addressed much more efficiently. No other profession is better trained and more equipped in the law-making process than the legal profession. Historically, we've done a good job of that. As I travel around the state, I emphasize the importance of lawyers

being involved in the legislative process and actually urge lawyers to once again run for public office.

AL: Speaking of the bar, as we're conducting this interview, the legislature is in

session and is considering a bill to raise the license fees of attorneys. Why did the bar feel the necessity to do that?

DM: The last license increase was in 1993. Since 1993, lawyers in Alabama



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have paid \$250 a year for a license. The bar is almost completely supported by the license fee. It's our main source of revenue by far. Over the last five years, our expenses have been rising at the rate of \$184,000 a year. Our revenues have been increasing at the rate of \$85,000 a year. As you can see, that created a collision course and, unfortunately, that collision occurred in fiscal year 2001/2002 for the bar. That year our expenses exceeded revenues by \$14,000. The next fiscal year, the expenses exceeded revenues by \$116,000, and last year it was by \$83,000, so the bar has to have a license fee

increase. Nobody I've talked to will deny that their business expenses have increased in the last 12 years. And, the bar and our staff have been excellent stewards of bar money. The Board of Bar Commissioners elected not to accept reimbursement for themselves for some of their expenses incurred on behalf of the bar, saving \$40,000 last year, because they knew that things were tight. As I said, we ended up having an \$83,000 loss.

AL: How much is the licensing fee increase that is being proposed?

DM: The license fee increase that is being proposed is \$50 a year, which will raise it to \$300 a year. That's only a \$50 increase over a 12-year period. Over that time, the Consumer Price Index has risen 30 percent and our requested dues increase is only 20 percent, so in real dollars, Alabama lawyers will still be paying less than they did in 1993. I think it's important that our lawyers understand that the Alabama State Bar offers more services than practically any other bar association in the country. In fact, the only one that is even close is the Oregon State Bar. Their minimum dues are \$432 a year, but they also have a mandatory legal malpractice insurance requirement that raises the minimum license fee to over \$3,000 a year. They are really the only other bar in the country that offers the same services as we do. Alabama lawyers are getting a real bargain for what they get from our bar. And, when you

consider the services we offer, we are way ahead of any other bar association.

AL: Are there any other matters of interest to the bar pending before the legislature this session?

DM: A crisis has developed in our indigent defense reimbursement system. The state comptroller, pursuant to an opinion of the attorney general's office, stopped paying the overhead expenses of lawyers appointed to represent indigent defendants. This is devastating to the criminal defense bar that takes appointed cases and provides a great service to our state. They get \$40 an hour for out-of-court time and \$60 an hour for in-court time. The state pays lawyers who take civil cases \$85 an hour. I know that's what they're paying in condemnation cases and perhaps more in some other kinds of cases. The lawyers taking these criminal appointed cases are not getting paid much for their work. In the past they were allowed to charge moderate overhead expenses which they were receiving up until just a couple of weeks ago when the comptroller said that the state would no longer reimburse for overhead expenses. So there's a bill right now pending in the house to allow lawyers to cover overhead expenses. There is also an Indigent Defense Bill, which provides for the creation of an Indigent Defense Commission for the State of Alabama. The Indigent Defense Commission concept will centralize and make uniform the provision of legal services to indigent defendants as well as providing centralization of payment issues for attorneys representing indigent defendants. There are bills pending in both the senate and house calling for the nonpartisan election of judges. Alabama is one of only eight states which allows for the partisan election of appellate court judges. Many other bills have been introduced which would have an effect on our legal system, such as a bill pending in the house calling for the election of the supreme court justices by districts. There is a bill which has been introduced in the senate calling for mandatory attorney liability insurance. There are many other bills of interest to



lawyers, and we try to follow these as best we can. Those are the main bills right now.

AL: What's on tap for the remainder of your term?

DM: I'm going to continue speaking at local bar associations and civic clubs when invited. At the civic clubs, I have talked about America's rule of law and the declining respect for our legal system. It seems to me that the attacks leveled against our legal system by many special interest groups can have a very damaging effect if the public respect and confidence in our legal system is destroyed. Shakespeare's admonition to "kill all the lawyers," was taken up by Marx, Lenin, Stalin, Hitler, Mao, Pol Pot, and others. They literally wanted to, and, in fact, did kill members of the legal profession so they would not be an obstacle

to their way of government that abhorred rights like those guaranteed by our founding documents. The attacks by special interest groups on our jury system and other aspects of our legal system unfortunately are eroding public confidence in what I believe is the greatest legal system in the world. These efforts, if successful, will have a devastating effect. This is a message I think the public needs to understand. Drastic changes to our legal and judicial systems would most likely be at the expense of rights that Americans have held dear for over 225 years. Since America was birthed, lawyers have been guarding and protecting the liberties and rights guaranteed by America's founding documents, and as I visit local bar associations, I am encouraging lawyers to continue to fulfill this professional responsibility with the high-

est standards of integrity, character and virtue.

AL: You've got an interesting background in that you practiced for many years in Tuscaloosa and then moved 100 miles away to Montgomery. How was it to pull up stakes and move?

DM: Challenging. I was raised in Montgomery, so being back in Montgomery has been a great experience for my family and me. Tuscaloosa is a great community with great people and great lawyers. We have certainly missed our friends and community, but we have really enjoyed being here. No regrets!

AL: What are you going to do when you finish your term?

DM: I'm going to continue practicing law and continue my mediation practice. Of course, I'll continue to support the bar in every way that I can. ■

4 BOOKS FOR TODAY'S ATTORNEYS



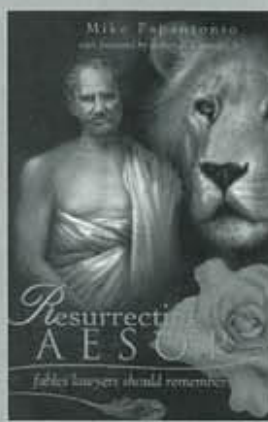
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Pursuant to the Alabama State Bar's Rule Governing the Election of President-Elect, the following biographical sketches are provided of Fournier J. Gale, III, and W.N. Watson. Gale and Watson were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2005-06 term, and the winner will assume the presidency in July 2006.



Fournier J. Gale, III

Fournier J. Gale, III (Boots) is the managing partner of Maynard, Cooper & Gale in Birmingham, where he has practiced since 1969. Boots was born and raised in Mobile and Baldwin counties. He graduated from McGill Institute in 1962 and then attended the University of Alabama on a debate scholarship. At the University, Boots was a National Champion Debater, president of ODK and a Jason. Upon graduation with honors in 1966, Boots enrolled at the University's law school, where he graduated first in his class, was Order of the Coif and served as editor-in-chief of the *Alabama Law Review*.

After entering private practice, Boots became active in various bar activities at the local and state levels. He served on numerous committees and task forces of the state bar, including those dealing with prison reform and judicial selection of judges. He has served as state Law Day chairman and currently is serving on the Task Force on Merit Selection of Appellate Judges. Boots was elected president of the Alabama State Bar Young Lawyers' Section (1977-78). He was a member of the Judicial Conference of Alabama and the lawyer representative to

the Permanent Study Commission for Alabama Courts (1977-83). He has also served as chairman of the Environmental Law Section of the ASB (1977).

In the Birmingham Bar Association, Boots has also been very active, serving on numerous committees (Grievance, Law Day, Budget and Executive) and was president of the BBA in 1989. Boots was elected as the bar representative on the Jefferson County Judicial Nominating Commission (1994-2000).

On the national level, Boots has served on the ABA Standing Committee of Federal Judiciary (Eleventh Circuit) (1997-99) and the Standing Committee on Environmental Law (1982-88). He is a Fellow of the American Bar Foundation and served on the Board of Directors of the American Judicature Society (1980-85).

With respect to legal honors, Boots was selected to the International Academy of Trial Lawyers, is a Fellow of the Alabama Bar Foundation and has been listed in *Best Lawyers in America* since the inception of that publication. He was the recipient of the Sam Pipes Distinguished Alumnus Award of the University of Alabama School of Law (2004).

Boots has also been active in many religious, civic and community organizations, including Leadership Birmingham (1986), Leadership Alabama (1991), and president of the University of Alabama Law School Foundation (1987-89) and currently serves as its treasurer. He was a member of the Alabama Commission on Higher Education for nine years and its chairman in 1998-99.

Boots' law practice has been based in Birmingham for over 35 years. He began with Cabaniss Johnston and was a founding partner of Maynard, Cooper & Gale in 1984.

Boots has been married to Louise Smith Gale since 1965. He has two daughters, Carolyn Partridge and Jenny Saphier, and three grandchildren.



W.N. Watson

W.N. (Rocky) Watson was born in Tuscaloosa while his father was attending law school after World War II. Rocky was raised in DeKalb County, Alabama where he graduated from the public schools of the City of Fort Payne. After graduating from high school in 1967, Rocky attended Auburn University, where he graduated with honors in 1971. Subsequent to his graduation from Auburn, Rocky attended the University of Alabama School of Law on scholarship, graduating in 1974.

While attending law school, Rocky participated in the John A. Campbell Court Board, and served as chairman of the board during the 1973-74 school year. Rocky was also selected to the Order of the Coif and the Order of Barristers. Additionally, he served on various student facility committees while in law school.

Rocky entered the private practice of law with his father in 1974. W.W. Watson had been practicing since 1950 in Fort Payne. Rocky and his father continued to practice together until his father's death in 1994. Subsequent to that, he participated in the formation of the firm of Watson, Gillis & Carver with Terry Gillis and Sheri Carver. That firm now is Watson & Gillis, with Sheri Carver's election to the bench.

After having served two years as president of the DeKalb County Bar Association in the late 1970s, in the mid-1980s, at the

urging of William D. (Bill) Scruggs, Rocky became active in the Alabama State Bar. He served one year as the bar commissioner from the Ninth Judicial Circuit (1986-87) when Bill Scruggs vacated that seat to serve as ASB president. Upon Bill's retirement as a bar commissioner in 1993, Rocky returned to serve an additional ten-year stint as commissioner of the Ninth Judicial Circuit (1993-2003).

While serving as bar commissioner, Rocky served in other capacities with the bar, including as a member of the Executive Committee of the ASB (2000-01) and as an eight-year member of the Disciplinary Commission (1994-2000 and 2001-03). The last year of his service as a bar commissioner, he served as chairman of the Disciplinary Commission (2002-03).

Legal honors received by Rocky include selection as a Fellow of the Alabama State

Bar Foundation, and in 2002-03, the ASB President's Award for services rendered to the bar.

During his time in Fort Payne, Rocky has been active in many religious, civic and community organizations, including two times as president of the Fort Payne Chamber of Commerce, president of the DeKalb County Arts Council, member of the DeKalb County Economic Development Authority, and Sunday School teacher at First United Methodist Church of Fort Payne.

Rocky represents both the City of Fort Payne and DeKalb County, and is a qualified mediator.

Rocky is married to Donna M. Watson and they have three children, Alyson, Tamara and Derek, and two grandchildren, Libba and Kady. ■

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By Keith B. Norman

The Alabama Lawyers Hall of Fame

In March 2003, the Alabama State Bar Board of Bar Commissioners approved the report of a task force recommending the creation of a hall of fame to honor Alabama lawyers. ASB President Fred Gray appointed the task force to explore the feasibility of forming a hall of fame and developing guidelines for its operation. The task force included the following members: David Bagwell, Fairhope; Gordon Bailey, Anniston; Wade Baxley, Dothan; Linda Braye, Tuskegee; Camille Cook, Tuscaloosa; Shayana Davis, Birmingham; Robert Gonce, Florence; Judge Vanzetta McPherson, Montgomery; Harry Prim, Dothan; Bobby Segall, Montgomery; Jock Smith, Tuskegee; Carol Ann Smith, Birmingham; and Henry Williams, Birmingham. Sam Rumore, of Birmingham, served as chair and Terry Brown, of Montgomery, served as vice-chair of the task force. The Alabama Lawyers Hall of Fame is the second such statewide hall of fame in the country, following the Illinois State Bar Association Academy of Illinois Lawyers.

When approving the recommendations of the task force, the commission adopted the following criteria to govern the selection of individuals to be included in the hall of fame:

1. Honorees must have a record of extraordinary skill and service to the bar and in the profession of law;
2. Honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national or international level;

3. Honorees must demonstrate a lifetime of achievement; and
4. Candidates need some, if not all of the following qualities to qualify:
 - a. A breadth of achievement rather than a single achievement;
 - b. A profound respect for professional ethics;
 - c. A leadership role in advancing the interests of the community; and
 - d. A recognized ability to mentor, lead, or to inspire others in the pursuit of justice.
5. Only deceased lawyers will be considered.

The commission also approved the task force recommendation about the number of inductees chosen each year. In the first year, four inductees were to be selected. In subsequent years, three inductees are to be chosen with two of those selected having been deceased for at least two years and one having been deceased at least 100 years.

Under the guidelines approved by the commission, a panel of 12 people serves as the selection committee. The 12 members of the panel are:

1. The director of the Alabama Department of History and Archives.
2. Four persons named by the Board of Bar Commissioners for a term of three years.
3. The immediate past president of the Alabama State Bar.
4. The executive secretary of the Alabama State Bar or his designate.

Debt Load for February 2005 Bar Examinees

Eighty-seven, or 56 percent, of the first-time examinees taking the February bar exam had educational debt. The average debt was \$73,545. This was a ten percent increase over the average debt for July examinees.



ALBERT JOHN FARRAH
1863 - 1944

Educator, innovator in legal education, Dean of the University of the Alabama School of Law (1912-1944)



ALABAMA LAWYERS HALL OF FAME
2004

PRESENTED BY THE ALABAMA STATE BAR



ANNIE LOLA PRICE
1903 - 1972

First female to serve as legal advisor to the Governor of Alabama (1947-1951), first female appellate judge in Alabama (1951-1972), prominent role model for women lawyers



ALABAMA LAWYERS HALL OF FAME
2004

PRESENTED BY THE ALABAMA STATE BAR



ARTHUR DAVIS SHORES
1904 - 1996

Among the first African American attorneys licensed in Alabama, noted civil rights attorney, public servant and mentor to a generation of black attorneys



ALABAMA LAWYERS HALL OF FAME
2004

PRESENTED BY THE ALABAMA STATE BAR



FRANK MINIS JOHNSON, JR.
1918 - 1999

Pivotal practitioner, United States Attorney (1946-1953), courageous federal judge during the stark turbulent civil rights era (1955-1999)



ALABAMA LAWYERS HALL OF FAME
2004

PRESENTED BY THE ALABAMA STATE BAR

5. One person nominated by the chief justice of the Alabama Supreme Court.
6. Three persons nominated by each of the chief judges of the federal district courts in Alabama for a term of three years.
7. A representative of the Alabama Bench and Bar Historical Society.

The selection committee was given broad discretion in selecting honorees for the hall of fame and the discretion to select its own chair and establish its own procedures for soliciting nominations and considering nominees.

This past year was the first year for the selection committee to meet and consid-

er nominations. Serving on the first selection committee were: Sam Crosby, Daphne; Fred Gray, Tuskegee; Reggie Hamner, Montgomery; Judge Helen Shores Lee, Birmingham; Tim Lewis, Montgomery; Jerry McDowell, Mobile; Keith Norman, Montgomery; J. Richet Pearson, Birmingham; Drew Redden, Birmingham; Fred Simpson, Huntsville; and Dr. Ed Bridges, Montgomery. The committee elected Sam Rumore, Birmingham, as its chair. More than 30 nominations were submitted for the inaugural class of inductees. Nominations came from lawyers, county historical societies and interested citizens. After thoroughly reviewing all of the

nominations, the committee recommended and the commission approved Dean Albert Farrah, Judge Frank Johnson, Judge Annie Lola Price and Arthur Shores as the first members of the Alabama Lawyers Hall of Fame.

An induction ceremony will be held at the Judicial Building this month honoring these four individuals and their families. The ceremony will be followed by a reception. The hall of fame will be located on the bottom floor of the Judicial Building, and will serve as a permanent reminder of the tremendous contributions made by Alabama lawyers to the legal profession, their communities, this state and our nation.

Pro Bono Award Nominations

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

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

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

Nominations must be postmarked by May 15, 2005 and included a completed Alabama State Bar Pro Bono Awards Program Nomination Form in order to be considered by the Committee.

Amendments to Alabama Rules of Appellate Procedure *(See article, page 217)*

The Alabama Supreme Court has adopted amendments to Rule 21(a), Rule 28, Rule 31(b), Rule 32(a) and (b), Rule 34(a), Rule 39, and Rule 40(g), *Alabama Rules of Appellate Procedure*, and has adopted a new rule, Rule 25A, *Alabama Rules of Appellate Procedure*, "Signing Briefs, Motions, and Other Papers; Representations to Court." The amendments of the rules and the adoption of Rule 25A are effective June 1, 2005. The order amending the rules and adopting Rule 25A appears in an advance sheet of *Southern Reporter* dated on or about February 24, 2005.

Rule 39 has been significantly revised, in part to eliminate the requirement that a brief be filed with a petition for a writ of certiorari and to clarify that a statement of the facts should be included with the petition for the writ of certiorari. The brief will be filed after the writ, if any, issues. Rule 28 has been revised in part to reflect the changes effected by the amendment to Rule 39.

Amendments to Alabama Rules of Criminal Procedure

The Alabama Supreme Court has adopted amendments to Rule 18.4(b), Rule 32.1(f), and Rule 32.2(c), *Alabama Rules of Criminal Procedure*. The amendments are effective June 1, 2005. The orders amending the rules appear in an advance sheet of the *Southern Reporter* dated on or about February 24, 2005. The amendment to Rule 18.4(b) requires the court to administer an oath to the jury upon calling the case. The amendment to Rule 32.2(c) requires that a Rule 32 petition for an out-of-time appeal from the denial or dismissal of a previously filed Rule 32 petition be filed no later than six months after the petitioner discovers that the petition was denied or dismissed.

—Bilee K. Cauley, reporter of decisions, *Alabama Appellate Courts*

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 2005 Annual Meeting, July 20-23 at Point Clear.

Local bar associations compete for these awards based on their size—large, medium or small. The following criteria will be used to judge the contestants for each category:

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2005. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, or download one from the ASB Web site, www.alabar.org.

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About Members, Among Firms

The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. 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, or you may change it online at www.alabar.org under "Members." Click on "Member Log-In," and follow the directions.

About Members

Joseph W. Adams and LaDonna B. Spivey announce the dissolution of Adams Spivey & Adams LLC. Joseph Adams continues his practice at the firm's former office at 1278 Andrews Avenue, Ozark. Phone (334) 774-5533. LaDonna B. Spivey announces the opening of her office at 190 W. Reynolds Street, Ozark. Phone (334) 774-3935.

David E. Allred announces the opening of David E. Allred PC, with offices at 1774 Taliaferro Trail, Montgomery 36117. Phone (334) 396-9200.

Lisa M. Burdette announces the opening of her office at 6000-B 20th Avenue, Valley. Phone (334) 756-9505.

Fran Jones-Smith announces the opening of Resolutions LLC.

Christopher R. Miller, formerly of Miller & Mather LLC, announces the opening of Christopher Miller LLC, with offices located at 1206 Dauphin Street, Mobile 36604. Phone (251) 438-1887.

V. Michelle Obradovic announces the formation of Wise Resolution LLC, with offices located at 2100-A SouthBridge Parkway, Suite 650, Birmingham 35209. Phone (205) 414-7589.

Among Firms

The Alabama Department of Environmental Management announces that Antoinette Jones has joined the legal division.

Balch & Bingham LLP announces that Gregory P. Butrus, Jenelle R. Evans, Eric B. Langley and Jennifer R. McCain have been named partners in the Birmingham office, and that Stephen A. Yoder has joined the Birmingham office.

Ball, Ball, Matthews & Novak announces that Eris Bryan Paul has joined the firm.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that Christopher E. Sanspree, Roman Ashley Shaul and W. Roger Smith, III have become shareholders, and Wesley Chadwick Cook has become an associate with the firm.

Beers, Anderson, Jackson, Patty & Van Heest PC announces that William R. Gordon, Jr. has become associated with the firm.

C. Britton Bonner, formerly associated with Adams & Reese in Mobile, Matthew J. Landreau, former of Jones Walker in New Orleans, and Richard O. Kingrea, formerly a sole practitioner in Fairhope, announce the opening of Bonner Landreau Kingrea LLC, with offices in Foley and Fairhope.

Bradley Arant Rose & White LLP announces that William C. Byrd, II has joined the firm as partner in the Birmingham office, and that Kay K. Bains, Shannon L. Barnhill, Julia Boaz Cooper, Dawn Helms Sharff, Warren D. Beason, Erin O. Brooks, David W. Stephenson, and John P. Strohm have joined the firm.

Burr & Forman LLP announces that Jamie L. Moore, D. Brian O'Dell and L. Griffin Tyndall have become partners; Debra Lee Mackey has become *of counsel*; and Margaret K. Clark, Dow A. Davidson, Teri D. Fields, Graham W. Gerhardt, Amy K. Jordan, April McKenzie Mason, Matthew T. Mitchell, Beth A. O'Sheasy, Joanne Patterson, Alphonso Simon, Jr., and David G. Wanhatalo have become associates.

Capell & Howard PC announces that Richard F. Allen, former acting attorney general and long-time chief deputy attorney general of Alabama, has rejoined the firm as a member.

Church, Seay & Minor PC announces that Philip K. Seay was recently appointed by Governor Bob Riley to district

judge, 30th Judicial Circuit, and that **Matt Abbott**, formerly an associate with the firm, **Alan Furr**, formerly of Alan Furr PC, and **Van Davis**, retiring district attorney for the 30th Judicial Circuit, have joined the firm. The firm name has been changed to **Church, Minor, Abbott, Furr & Davis PC**.

Clark, Dolan, Morse, Oncale & Hair PC announces that **Cynthia Norman Williams** has joined the firm as an associate.

Gulas & Stuckey announces a merger with **The Cochran Firm**, creating **Cochran, Cherry, Givens, Smith, Gulas & Stuckey PC**. Offices are located at 2031 2nd Avenue, N., Birmingham 35203. Phone (205) 322-8866.

Goldberg & Simpson PSC announces that **Stephanie L. Morgan-White** has become a partner.

Grace, Evans & Matthews announces that **J. Mark Debro** has become an associate.

Hand Arendall LLC announces that it has merged with the Athens firm of **Sherill, Batts & Black**, and that **Anne G. Burrows** and **Benjamin S. Goldman** have joined the firm as associates.

Hinson & Hinson PC announces that **Norma M. Chaviers** has joined the firm as an associate.

Randall B. James and **Robert Lester Pittman** announce the formation of

James & Pittman PC, with offices at 611 S. Lawrence Street, Montgomery. Phone (334) 262-0500.

Johnstone, Adams, Bailey, Gordon & Harris LLC announces that **Deborah B. Hembree** has joined the firm.

Lightfoot, Franklin & White LLC announces that former Alabama Supreme Court Associate Justice **J. Gorman Houston** has joined the firm, and that **Jacob M. Tubbs**, **Derrick A. Mills** and **Sanford G. Hooper** have become associated with the firm.

Allwin E. Horn, IV and **Champ Lyons, III** announce the formation of **Lyons &**

(Continued on page 178)

CLE OPPORTUNITIES

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

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

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Horn PC, with offices located at 3300 Cahaba Road, Suite 212, Birmingham 35223. Phone (205) 877-8700.

McGlaughn & McGlaughn LLC announces that Michael D. McGlaughn has joined the firm as an associate.

McKinney, Braswell & Hill, LLC announces that Paul J. Marshall has joined the firm as an associate.

Merrill, Harrison & Adams announces that David K. Hogg has joined the firm.

Morris, Conchin & King announces that Joseph D. Aiello has joined the firm as an associate.

Jackson & Hardwick and Morris & Schneider announce their merger, and

the new firm name will be Morris Hardwick Schneider.

The National Legal Aid & Defender Association announces that Catherine Beane has been named director of the National Defender Leadership Initiative.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that Christopher W. Deering has joined the firm as *of counsel*.

Reliance Trust Company announces that Lance T. Studdard has joined the Atlanta office.

Sirote & Permutt PC announces that Peter J. Hardin, James W. King, Kerry Patrick McInerney, Cynthia Ransburg-

Brown, Kyle T. Smith, and Craig Martin Stephens have joined the Birmingham office, and that Richard L. Morris has joined the Huntsville office.

Starnes & Atchison LLP announces that Alfred H. Perkins, Jr. has become a partner.

Walston, Wells, Anderson & Birchall LLP announces that Barry A. Staples has become associated with the firm.

Webb & Eley announces that Scott W. Gosnell has become associated with the firm.

Wolverine Tube Inc. announces that Johann R. Manning, Jr. has become president and chief operating officer. ■

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Culpepper, Jerry Roger
Fyffe
Admitted: 1996
Died: January 24, 2005

Estrada, Laury Gordon
Alexandria, Virginia
Admitted: 1990
Died: November 28, 2004

Key, Robert Edward Lee
Greenville
Admitted: 1949
Died: February 3, 2005

Meador, William Shane
Pensacola, Florida
Admitted: 2001
Died: January 24, 2005

Newell, Neal Curtis
Birmingham
Admitted: 1947
Died: January 14, 2005

Smallwood, Gary Stanton
Anniston
Admitted: 1974
Died: October 7, 2004

Stephens, Elton Bryson
Birmingham
Admitted: 1936
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Tonsmeire, George Augustus
Mobile
Admitted: 1974
Died: February 18, 2005

Tunstall, David Morgan
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The Alabama Law Foundation Announces the 2004 Fellows



Left to right are some of the 2004 Fellows, Phil Butler, Joe Dean, Ernestine Sapp, Thomas Woodall, Sharon Blackburn, Claude Neilson, Scott Vowell, Dale Marsh, William Pryor, Douglas Johnstone, and Tyrone Means.

In 1995, the Alabama Law Foundation established the Fellows program to honor Alabama bar members who have made a significant contribution to their profession and their community. Annually, the Nominating Committee of the Fellows meets to nominate lawyers to be invited into Fellowship. The foundation depends upon Fellows to provide needed financial and personal support. Fellows gifts are tax deductible and will assist the foundation in funding important projects and programs that benefit citizens and the legal community alike.

The Alabama Law Foundation is affiliated with the Alabama State Bar and is a charitable, tax-exempt organization composed of four separate programs including the Fellows, each providing ways for lawyers to better the world around them.

This year's recipients were inducted at the Annual Fellows Dinner on January 28, 2005 at The Capital City Club in Montgomery. The President-Elect of the American Bar Association, Michael S. Greco of Boston, was the special guest speaker.

Fellows accepted into membership for 2004 are:

William H. Albritton, III, Montgomery
Senior Judge, U.S. District Court, Middle
District of Alabama

John B. Barnett, III, Monroeville
Partner, Barnett, Bugg, Lee & Byrd

Sharon Lovelace Blackburn, Birmingham
Judge, U.S. District Court, Northern District of
Alabama

Philip H. Butler, Montgomery
Partner, Bradley Arant Rose & White

Robert T. Cunningham, Jr., Mobile
Partner, Cunningham, Bounds, Yancey,
Crowder & Brown

Joseph L. Dean, Jr., Opelika
Partner, Dean & Barrett

Douglas I. Johnstone, Mobile
Retired Associate Justice, Supreme Court of
Alabama

Thad G. Long, Birmingham
Partner, Bradley Arant Rose & White

M. Dale Marsh, Enterprise
Partner, Marsh, Cotter & Tindol

Tyrone C. Means, Montgomery
Partner, Thomas, Means, Gillis & Seay

Drayton Nabers, Jr., Birmingham
Chief Justice, Supreme Court of Alabama

Claud D. Neilson, Demopolis
Sole Practitioner

Keith B. Norman, Montgomery
Executive Director, Alabama State Bar

Richard F. Ogle, Birmingham
Partner, Ogle, Liles & Upshaw

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Shareholder, Maynard, Cooper & Gale

William H. Pryor, Jr., Birmingham
Judge, U.S. Court of Appeals, 11th Circuit

George W. Royer, Huntsville
Partner, Lanier, Ford, Shaver & Payne

Ernestine S. Sapp, Tuskegee
Partner, Gray, Langford, Sapp, McGowan, Gray
& Nathanson

J. Scott Vowell, Birmingham
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Herman A. Watson, Jr., Huntsville
Partner, Watson, Jimmerson, Givhan, Martin &
McKinney

Thomas A. Woodall, Montgomery
Justice, Supreme Court of Alabama

REMARKS BY MICHAEL S. GRECO

President-Elect, American Bar Association

to the

Fellows of the Alabama Law Foundation Annual Dinner

Capital City Club • Montgomery, Alabama • January 28, 2005

*...the purpose
of the law is to
protect the
powerless from
the powerful.*

—Hammurabi

The American Bar Association—and I believe the organized bars in every jurisdiction—are committed to the fair administration of justice. The ABA's motto, "Defending liberty, Pursuing justice," sums it up well. We believe that lawyers are ethically obligated to make that motto a truth, and that is our goal every day.

I view the law as an engine for social justice. And lawyers are in a unique position to assure true social justice. We work to establish fairness and justice, particularly when disputes or problems need the justice system for resolution. There, we have the ability to level the playing field, right wrongs and ensure fairness within the law.

But, all too often, those who are poor feel locked out of the justice system. As lawyers, working within the ABA and the Alabama State Bar, we can do something about this situation. We can help ensure that all voices can be heard.

We need to change the institutions and address the pressures within our profession to make it possible for more lawyers to help more people who cannot otherwise afford legal services.

When we, as lawyers, take our oath, we undertake an ethical commitment to provide legal assistance to those who need help but cannot afford it. We promote and encourage *pro bono* work and public service.

Hammurabi wrote 1,700 years before Christ, in the first written code of law, that *the purpose of the law is to protect the powerless from the powerful*. I believe that a noble purpose of being a lawyer today continues to be to protect the powerless from the powerful.

I believe that the joy of being a lawyer comes from using our legal training to help human beings in need, and to help improve society for the benefit of all, regardless of their economic or social status. The joy comes from doing well, but also doing good.

Serving the public interest and a desire to improve society is what attracted me to the legal profession as, I am certain, was the case with you in this room. The ideal of true social justice is one that lawyers strive for each day.

During my term as ABA president I will focus on that ideal. I want to rekindle, to reinvigorate, to reenergize the idealism and public service commitment of our profession—and then nurture it, expand it and preserve it for generations to come. I want to lead a “*Renaissance of Idealism*” in our profession—a recommitment to the most noble principles that define the legal profession: to provide legal service to assist the poor, disadvantaged and underprivileged, and to perform public service that enhances the common good.

I need your help to do it.

The opportunity to perform public service and contribute to the public good continues to be the key reason that attracts young men and women to enter the legal profession. The desire to make a difference in society has attracted to our law schools the best and brightest college graduates that each generation has to offer.

Young lawyers today begin the practice of law expecting to do well, but also expecting to find reasonable opportunity to perform public service. But, in time, many of them become disappointed, because the demands of their law practice severely limit the time and the opportunities to contribute to society.

For veteran lawyers, the pressures and the pace of the practice of law continue to intrude on the time available for public service.

We must strike a balance in our lives and our practices, whether in private or government practice. The key to striking that balance is time—freeing up time—in law firms, in government offices, in any setting where a lawyer practices law—for lawyers to engage in *pro bono* and public service. And those of us in bar leadership positions must help the lawyers of America to find that time.

I want to make the case with decision-makers in America’s law offices why it is in the interest of the lawyer, the lawyer’s place of employment, the profession and the American people, that we free up time. Time to honor and deliver on the profession’s long-standing commitment to public service; to provide *pro bono* services to people in need; to participate more fully in our communities; and to give lawyers greater fulfillment in their professional lives.

I have appointed a distinguished Renaissance of Idealism Planning Group that is looking at numerous issues relating to this subject, and next year I intend to appoint a Presidential Commission that will help implement the recommendations made by the planning group.

The problem of addressing the legal needs of the poor in America is bigger than the legal profession can solve by itself. And the problem is that our nation lags far behind other major industrialized countries of the world in providing meaningful help to poor people with legal problems.

And so, I want to begin a national dialogue on how the problem can be solved. I do not expect that it can be solved in one year, but I think it is critically important that we now commit to doing something about it.

When President John F. Kennedy decreed that the U.S. would have a man on the moon by 1969—at that point an unfathomable goal—he reminded us that a journey of a thousand miles begins with the first step.

The main topic of my remarks tonight relates to another long journey, and another goal, one whose attainment—unlike our placing a man on the moon—is long overdue.

You have doubtless heard that inscribed above the doors to the United States Supreme Court building are the words “*Equal Justice Under Law*.” That eloquent statement—in this bountiful land full of hope and promise—today is empty rhetoric to far too many in our society. It is our obligation—yours and mine—to breathe life into those words.

It has been reliably documented that between 70 and 80 percent of the legal needs of poor people in this nation go unaddressed year after year.

An ABA nationwide legal needs study conducted in 1993, in which I was involved, showed that legal help was not obtained for more than 70 percent of the serious legal problems encountered by poor people. This is despite all the efforts of legal aid programs and *pro bono* lawyers.

More than ten years have passed since the ABA survey, and matters have gotten worse. A September 2003 report by the District of Columbia Bar Foundation estimated that less

than ten percent of the need for civil legal assistance is being met.

A similar study in Washington state, also released in 2003, found that 87 percent of the state’s low-income households encounter a civil legal problem each year, and that only 12 percent of these households are able to obtain assistance from a lawyer.

Things are only a little better in my state, Massachusetts, where we have significant legal services resources.

We surveyed the legal needs of poor citizens in 1987, a first-in-the-nation study that I chaired, and again in 2002. We found that the occurrence of civil legal problems among the poor increased significantly over that period. By 2002, at least 53 percent of the poor households in the state had at least one unmet civil legal need, and only 13 percent of those households obtained legal help to resolve those problems.

Similar studies were conducted during the last four years in six other states. Each survey produced similarly dismal statistics.

The 2000 Census found a nearly six percent increase in poverty in the U.S., with more than 35 million people living below the

...a journey of a thousand miles begins with the first step.

—John F. Kennedy

poverty threshold. The number of people in need is increasing while the resources to provide help are shrinking.

Despite our best efforts, we have not made significant strides to serve the legal needs of those whom poverty drags down and keeps down.

The principal national funding source for all our local legal aid programs is the federal Legal Services Corporation—a program created by President Richard Nixon in 1974. This program has never been given adequate resources to do its job.

The LSC reached its highest, but still inadequate, funding level in 1995 with a \$415 million appropriation. But opponents whittled that amount down, and LSC now only receives \$331 million. If the LSC appropriation had not increased, but had merely kept up with inflation since 1995, the LSC would now be receiving \$490 million. So we can see how far behind it has fallen.

President Bush has been supportive of the Legal Services Corporation, and we are grateful for that. But on the whole, and over the years, our political leaders have not found a way to put aside their differences and provide adequate resources to

respond to the desperate need of the poor for legal help. We must all join together to seek an adequate appropriation for LSC.

Our courts have recognized that an indigent caught up in the criminal justice system—constitutionally—must be provided a lawyer before he or she may be imprisoned behind bars of steel. But the same courts have not yet grasped that a lawyer is often necessary for an indigent to avoid lifelong imprisonment by the shackles of poverty or discrimination.

In 1962, the U.S. Supreme Court decided *Gideon vs. Wainwright*, the case that created a right to counsel for those facing criminal incarceration. But, 43 years after *Gideon*, we do not provide such a right for poor people facing equally serious civil legal problems—problems that imprison them in poverty and prevent them from becoming productive members of society.

Our laws and jurisprudence lag far behind that of other Western nations in this regard. The constitutions of the

(Continued on page 186)

Congratulations and thanks to Milton Moss, who recently retired from his position as assistant general counsel for the Alabama State Bar. Milton provided ethics counsel to Alabama lawyers, and investigated and prosecuted bar complaints for 14 years. The lawyers of Alabama owe a debt of gratitude to Milton for his conscientious commitment to our profession by his service in the Office of General Counsel. Milton retires to his hobbies of flying and hunting, and will be sorely missed as a valuable and devoted member of our staff.



Mary and Milton Moss and son Chris enjoy barbecue and all the trimmings at the Smokehouse BBQ restaurant in Millbrook.



Milt cautiously opens one of his retirement gifts during his "going-away" party March 31st.

Netherlands, Italy and South Africa, to name only several, explicitly recognize a right to counsel for the indigent in civil cases when substantial injustice would otherwise result.

In addition, beginning in the late 1800s, most other Western nations recognized some form of right to counsel in civil cases through legislation or court decisions.

When one compares our expenditure of public resources to address the legal needs of the poor in the United States with systems in place in other Western, industrialized nations, we come up sorely lacking.

California Appeals Court Justice Earl Johnson has conducted extensive studies of legal aid systems internationally. He concluded that as of 1999 the *least generous* other industrial democracies (France and Germany) spent 2.5 times more of their gross national product than the United States did in serving the civil legal needs of lower income populations; England spent 17 times more of its GNP than the U.S. to provide access to justice for its poorer people. The ABA is currently conducting research to bring these figures up to date, but there is no reason to believe there has been much improvement.

According to Justice Johnson, if the U.S. were to match the French/German approach, we would be spending about \$1.6 billion annually on legal services for the poor; if we followed the lead of Tony Blair's government, we would be spending about \$10 billion dollars annually on legal services for the poor.

I believe that the time has come for us to recognize, finally, that a poor person, whether facing either a serious criminal or civil matter, must have access to counsel if that person is to receive justice.

Let me be clear—I am not talking about providing a lawyer in every situation where a poor person believes he or she has been aggrieved. But, in matters where a poor person's family, sustenance, health or housing are threatened by a legal problem, our system of justice should provide the necessary legal assistance.

Such critically important assistance should not be measured out by the teaspoonful. It should not be subject to long waiting lists, limited capacity and narrow legal aid priority lists. It should be available to all who qualify.

Yes, there are significant costs attached to a justice system that truly provides legal help to a poor person who faces a serious problem. And, yes, we are in the midst of a struggling economy, not yet fully recovered.

But even in times of a struggling economy, administrations in Washington seek congressional funding in the billions of dollars for other national priorities, and Congress sets priorities for the nation in its budget decisions.

I believe that the time has come to extend the wisdom, the humanity, the rationale and the imperative of *Gideon v. Wainwright* to those who are the most vulnerable in our society.

No one in our nation should have to go unassisted into court when the integrity of his or her family is at stake, when he or she and their children may be thrown out of their home, when they may suffer other grievous harm at the hands of a system that they cannot navigate or even understand on their own.

The following passage from a 2003 Maryland Appeals Court decision involving a child custody dispute, *Frase v. Barnhart*, sums it up pretty well. In his concurring opinion Justice Cathell said this:

Such critically
important
assistance
should not be
measured out
by the
teaspoonful.

While I certainly cannot speak for the individual judges of this Court, it is my belief that there is no judge on this Court that believes in his or her heart or mind, that justice is equal between the poor and the rich—even in the tradition-hallowed halls of our appellate courts. Each of us knows, I believe, that an un-represented parent involved in the appellate process in respect to custody, visitation, or parental termination issues, when opposed by competent counsel for the opposing party (sometimes opposed by an organ of the State with its legions of lawyers), is normally not afforded the equal protection of the laws, *i.e.*, an equal access to justice to which all citizens are entitled.

Equal access to justice for all in America is an unsung national priority, one that should now finally be given rightful attention and action by the Administration and Congress.

I conclude my remarks by making two requests of you:

First, please help me in the next two years in leading a resurgence of *pro bono* and public service by America's lawyers—in leading a *Renaissance of Idealism* in our profession. You will hear more about this from me in the coming months.

And second, I ask you to join me in expanding the reach of *Gideon*, so that the eloquent promise of "*Equal Justice Under Law*" is a promise that finally is kept for the poorest and the most vulnerable among us.

Thank you for your kind attention this evening. And, thank you for all that you and the Alabama Law Foundation do to serve our profession and the public. ■

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Your Partner Needs Help

BY JEANNE MARIE LESLIE

The Alabama Lawyer Assistance Program (ALAP) has come a long way since it was first implemented in 1998. Often, we are asked to present programs to local bar associations and various law schools throughout the state, and the law students are frequently surprised at the services ALAP offers. Many never have thought about the possibility of ever working with an impaired colleague and, therefore, the subject itself gives rise to many questions. What do you do if you have just found out your partner has a drug/alcohol problem or is suffering from depression? How do you get help? What are your ethical and legal responsibilities? Before these questions are answered, let's look at the reality of impairment in the legal community. In 2002, the Substance Abuse and Mental Health Services Administration estimated that 9.4 percent of Americans age 12 and older could be classified as sub-

stance abusers or substance dependent. According to the American Bar Association (ABA), the corresponding figure for lawyers may be nearly double—15 to 18 percent.

The fact that a lawyer, sometime in his/her career, will know, practice with or be a lawyer suffering from addiction or depression, is quite high. The number of calls to ALAP has risen significantly over the years as members gain more insight and understanding about these problems and the resources ALAP offers. The same dynamics that arise when a family member is impaired also arise in a firm when a partner is impaired. The impaired lawyer becomes the focus of the firm's attention. When they arrive for work, how they act, how they look, how they smell, their work product, their billing, and their appropriateness all become matters of concern.

Most law firms are aware of the civil liability associated with an impaired firm member who is unable to follow through with their responsibilities and client needs. Law firms can suffer significant financial loss through malpractice judgments, loss of discontented clients and loss of future clients due to word of mouth. Lawyers themselves are reluctant to report an impaired colleague. Many shy away from their ethical obligation for emotional or personal reasons. Many do not want to get involved, which, in turn, only enables the disease to progress, and more opportunities arise for misconduct and unethical behavior. The ABA issued a formal ethics opinion (03-429), entitled "Obligations with Respect to a Mentally Impaired Lawyer in the Firm," which analyzes the ethical responsibilities of partners to take reasonable steps to assure that the impairment the lawyer suffers will not result in a violation of ethical rules, and to report ethical violations committed by the impaired lawyer. I encourage all law firm management to know the signs/symptoms of impairment, with the most significant being change. Changes in behavior can include increased absenteeism, inability to get along with co-workers, change in job performance, substandard work, complaints from clients, missed court dates, and changes in physical appearance. Adopt firm office policies and procedures for dealing with alcohol/drug and other mental health illnesses. Educate personnel. When co-workers know about the signs and symptoms of these illnesses, the chances of early identification, and recovery, rise significantly. Remember, this is not a moral issue. These are not bad people. They are sick and they need your help and your involvement. Lawyers help people every day prepare for the future, the unexpected and other contingencies of life. Adopting policies and

procedures for handling these issues in your law firm will dramatically decrease the stress and better enable the firm to cope when the situation arises. It is very difficult confronting impaired partners and monitoring their recovery.

ALAP can assist firms in developing policies and procedures regarding these situations and can also help in monitoring and developing back-to-work contracts. Doing nothing, however, can lead to civil liability for the firm and disciplinary exposure for other partners.

Due in large part to the commitment the Alabama State Bar has in serving the public and the enormous volunteer base of the Lawyers Helping Lawyers Committee, the Alabama Lawyer Assistance Program is helping lawyers, every day, recover and return to the practice of law.

You can get involved by calling our direct confidential line. For more information, visit www.alabar.org, or to schedule a firm presentation, call at (334) 834-7576. ■

Jeanne Marie Leslie

Jeanne Marie Leslie is the director of the Alabama State Bar's Alabama Lawyer Assistance Program. She received her BSN from the University of South Alabama and a master's degree in counseling from Auburn University in 1990. She was previously employed with Alabama's Workplace Wellness program, and also has worked with physicians in facilitating and monitoring their recovery.

- *The Voice*, summer 2004 Hazelden, "Impaired Lawyers Overcome Denial, Stigma to Achieve Road to Recovery"
- "When Colleagues Need Help," *GP/Solo Magazine*—October/November 2004—ABA General Practice, Solo and Small Firm Section
- ABA Formal Opinion 03-429(6/11/2003) at p. 4

David M. Wooldridge of Birmingham, chair of the Lawyers Helping Lawyers Committee, will be presenting "Dealing with Partners and Associates Impaired by Alcohol, Substance Abuse and Mental Health Problems" July 21 at 10:30 a.m., during the Alabama State Bar's Annual Meeting in Point Clear (1.5 CLE credits). This program is open to all attendees.





DEEPENING INSOLVENCY IN ALABAMA:

*Is it a tort, a damages theory
or neither of the above?*

BY JAY R. BENDER

The phrase "deepening insolvency" has become common in the bankruptcy bar's vocabulary over the past several years. The deepening insolvency theory is based on the assumption that prolonging a financially troubled corporation's operations may increase its insolvency and thereby further deplete the value of the corporation.

Allegations of deepening insolvency are most commonly brought by bankruptcy trustees appointed in chapter 7 and 11 bankruptcy cases, creditors' committees appointed in chapter 11 cases, and trusts formed pursuant to a corporate debtor's confirmed chapter 11 plan of reorganization or liquidation. The bankrupt corporation's officers, directors and affiliated companies typically are the targets of these claims; however, the bankrupt corporation's former accountants, auditors, attorneys, investment bankers, and its banks and lenders are also routinely named as defendants in deepening insolvency lawsuits.

While first advanced as a theory of damages, deepening insolvency recently

has taken on a life of its own in the wake of several federal court decisions finding that an independent cause of action for deepening insolvency exists under some state laws. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340 (3d Cir. 2001) (applying Pennsylvania law); *In re Exide Tech., Inc.*, 299 B.R. 732 (Bankr. D. Del. 2003) (applying Delaware law); *In re Buildnet, Inc.*, 2004 WL 1534296 (Bankr. M.D. N.C., June 16, 2004) (applying North Carolina law); *In re Unifi Communications, Inc.*, 317 B.R. 13 (D. Mass. 2004); *In re Computer Personalities Sys., Inc.*, 2003 WL 22844863 (Bankr. E.D. Pa., Nov. 18, 2003) (applying Pennsylvania law); see also *MCA Fin. Corp. v. Grant Thornton, L.L.P.*, 687 N.W. 2d 850 (Mich. Ct. App. 2004) ("Courts have recognized [deepening insolvency] as a viable theory of liability on which to base an action for harm against a corporation."). Other courts, however, have rejected deepening insolvency as an independent tort or even as a damages theory. *In re Global Serv. Group LLC*, 315 B.R.



...prolonging a financially troubled corporation's operations may...further deplete the value of the corporation.

451 (Bankr. S.D.N.Y. 2004) (no cause of action for deepening insolvency under New York law); *Coroles v. Sabey*, 79 P.3d 974 (Utah Ct. App. 2003) (rejecting deepening insolvency as cause of action or damages theory under Utah law).

No court has considered whether deepening insolvency is a cognizable cause of action or a viable measure of damages under Alabama law. This article surveys the development in other jurisdictions of the deepening insolvency theory and its potential application by Alabama courts.

Deepening Insolvency as A Theory of Damages

The deepening insolvency theory was first advanced in the 1980s by statutory liquidators of insurance companies, who

sought to recover damages against the defunct insurance companies' officer and directors for conduct that rendered their companies more deeply insolvent. *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.) (*en banc*), *cert. denied*, 104 S.Ct. 508 (1983); *Corcoran v. Frank B. Hall & Co., Inc.*, 545 N.Y.S.2d 278, 283 (N.Y. App. Div. 1989). Defendants routinely challenged the liquidators' standing to bring these claims. They argued that, while creditors or owners of an insolvent insurance company might be injured by the company becoming more insolvent, the insolvent insurance company itself sustains no damage by the worsening of its financial condition. Courts rejected these arguments, finding that a corporation could be damaged uniquely by its deepened insolvency through its increased exposure to creditor liability. *Schacht*, 711 F.2d at 1343. They dismissed the notion that the prolongation of a corporation's life beyond insolvency is automatically to be considered a benefit to the corporation's interests. As one court observed, "[a] corporation is not a biological entity

for which it can be presumed that any act which extends its existence is beneficial to it." *In re Investor's Funding Corp.*, 523 F. Supp. 533, 541 (S.D.N.Y. 1980).

The deepening insolvency theory eventually spread to the bankruptcy courts. Numerous bankruptcy trustees and creditors' committees claimed damages against a debtor's officers, directors and outside advisors for wrongful conduct that caused their companies to deteriorate to the point where bankruptcy was unavoidable. At first, these efforts met with mixed results. Defendants argued that any injury caused by an insolvent corporation becoming more insolvent was sustained not by the corporation itself, but by the corporation's shareholders or creditors. Because a bankruptcy trustee may pursue only those claims belonging to the bankrupt corporation and lacks standing to pursue claims belonging to the corporation's shareholders and creditors, defendants argued that a trustee could not assert a claim for deepening insolvency damages because the corporate entity had not been damaged. Some courts agreed

with these arguments and dismissed the plaintiffs' deepening insolvency claims. *Feltman v. Prudential Bache Sec.*, 122 B.R. 466 (S.D. Fla. 1990); *Holland v. Arthur Andersen & Co.*, 571 N.E.2d 777 (Ill.App.Ct. 1991). Other courts ruled to the contrary, finding that a legitimate corporate entity⁴ could be harmed by wrongful actions that prolonged the corporation's existence and thereby caused it to assume additional, unmanageable debt which it otherwise would not have incurred. *In re Gouiran Holdings, Inc.*, 165 B.R. 104 (E.D. N.Y. 1994); *Allard v. Arthur Andersen & Co.*, 924 F.Supp. 488 (S.D.N.Y. 1996); *Hannover Corp. of Am. v. Beckner*, 211 B.R. 849 (M.D. La. 1997); *In re Walnut Leasing Co., Inc.*, 1999 WL 729267 (E.D. Pa., Sept. 8, 1999); *Smith v. Andersen L.L.P.*, 175 F.Supp.2d 1180 (D. Ariz. 2001); *Bookland of Maine v. Baker, Newman & Noyes, LLC*, 271 F.Supp.2d 324 (D. Me. 2003); *Marion v. TDI, Inc.*, 2004 WL 1175740 (E.D. Pa., May 27, 2004); *Gaia Offshore Master Fund, Ltd. v. Hawkins*, 2004 WL 2496142 (N.D. Cal., Nov. 5, 2004); *In re AgriBioTech, Inc.*, ____ B.R. ____, 2004 WL 3080321 (D. Nev., Dec 8, 2004); *In re Latin Investment Corp.*, 168 B.R. 1 (Bankr. D.D.C. 1993); *In re Vendsouth, Inc.*, 2003 WL 22399581 (Bankr. M.D.N.C., Oct. 10, 2003).

Deepening Insolvency as an Independent Tort Claim

Recently, several courts have opined that deepening insolvency is not simply a theory of damages, but rather an independent tort claim. *Lafferty*, 267 F.3d at 340; *Exide*, 299 B.R. at 732; *Buildnet*, 2004 WL 1534296; *Computer Personalities*, 2003 WL 22844863; *Corp. Aviation Concepts, Inc. v. Multi-Service Aviation Corp.*, 2004 WL 1900001 (E.D. Pa., Aug. 25, 2004). The most significant of these cases are the Third Circuit Court of Appeals' decision in *Lafferty* and the United States Bankruptcy Court for the District of Delaware's opinion in *Exide*.

In *Lafferty*, two corporations filed for chapter 11 bankruptcy after the collapse

The acceptance of deepening insolvency as a separate cause of action is far from universal.

of their "Ponzi scheme." The bankruptcy court appointed a committee to represent the interests of general creditors in the bankruptcy case. The creditors' committee filed suit alleging, among other things, that the corporations' outside counsel, accounting firm and independent underwriters each fraudulently induced the corporations to issue debt securities, thereby deepening the companies' insolvency and forcing them into bankruptcy.

Among the claims advanced by the creditors' committee was a claim for deepening insolvency against the debtor corporations' former professionals. The plaintiffs argued that the outside professionals were liable because of their participation in a fraudulent scheme that wrongfully expanded the corporations' debt out of proportion to the corporations' ability to repay, ultimately forcing them to file for bankruptcy. The outside professionals asserted that the committee's claims should be dismissed due to, among other things, the absence of any injury to the debtor corporations from the alleged misconduct and the lack of any cognizable claim for deepening insolvency under applicable Pennsylvania law. The defendants contended that, while certain creditors and investors may have been harmed by the debtors' worsened financial plight, the debtors themselves did not sustain any injury by their becoming increasingly insolvent. The defendants argued that, because the committee was authorized by the bankruptcy court only to prosecute claims belonging to the debtor corporations, the committee

lacked standing to pursue the deepening insolvency claims.

On appeal, the Third Circuit Court of Appeals rejected the defendants' argument that the committee was attempting simply to recover for injuries to the debtors' creditors. Rather, the Court ruled that the committee had standing to seek recovery on behalf of the debtor corporations themselves. The Court found that, even when a corporation is insolvent, its property may have value and the fraudulent and concealed incurrence of debt can damage that value. To the extent that bankruptcy is not already a certainty, the incurrence of additional debt can push the corporation into bankruptcy, thus causing the corporation to incur additional legal and administrative expenses. The *Lafferty* Court further found that deepening insolvency can injure a corporation by undermining the corporation's relationships with its customers, vendors and employees, resulting in the loss of business and the depletion and demoralization of its work force.

The Third Circuit then considered whether deepening insolvency was a valid theory that gave rise to a cognizable injury under Pennsylvania law. The *Lafferty* Court acknowledged that no Pennsylvania court previously had addressed the issue; however, the Court opined that, where deepening insolvency causes damage to corporate property, the Pennsylvania Supreme Court likely would recognize a cause of action for that injury in order to provide an appropriate remedy. In support of its ruling, the Third Circuit cited the soundness of the deepening insolvency theory, its growing acceptance among courts across the country and the remedial theme in Pennsylvania law. While the *Lafferty* Court found that deepening insolvency was a cognizable independent claim that the creditors committee had standing to pursue, the Court ultimately dismissed the committee's claims on *in pari delicto* grounds because of the unclean hands of the debtor corporations, on whose behalf the litigation was brought.²

The bankruptcy court in *Exide* similarly found that deepening insolvency was a viable cause of action under Delaware law. In that case, the creditors' committee

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filed suit against various financial institutions that loaned money to the debtor corporations before bankruptcy. The committee alleged that Exide's lenders had exercised undue control over the debtor corporations which, though beneficial to the lenders, caused the debtors to suffer massive losses and become more deeply insolvent, costing other creditors substantial value.

Exide's lenders moved to dismiss the lawsuit, arguing that deepening insolvency was not a viable cause of action under Delaware law. The bankruptcy court acknowledged that the Delaware Supreme Court had not yet addressed whether one could assert a tort claim for deepening insolvency under that state's laws. Thus, like the Third Circuit in

basis for asserting a breach of fiduciary duty claim against a debtor corporation's officers and directors. For example, in *In re Unifi Communications, Inc.*, a Massachusetts bankruptcy court found that the allegations in a creditors' committee's complaint that members of the debtor's board had wrongfully prolonged the corporation's existence and caused it to become more insolvent, were sufficient to state a claim for injury to the debtor corporation as distinct from its creditors.

The acceptance of deepening insolvency as a separate cause of action is far from universal. Several judges have flatly rejected efforts to elevate deepening insolvency to the status of an independent tort. Last year, a New York bankruptcy court declined to follow *Lafferty* and

to find that deepening insolvency was an independent cause of action under New York law. The bankruptcy court surmised that if a New York state court considered the issue, that court would rule that no such cause of action existed under state law. The deepening insolvency theory, the *Global Service* court concluded, was fundamentally flawed as it was based on a faulty premise, "that the managers of an insolvent limited liability company are under an absolute duty to liquidate the company and that anyone who knowingly extends credit to the insolvent company breaches an independent duty in the nature of aiding and abetting the managers' wrongdoing." *Id.* at 459. To the contrary, the court wrote, there is no duty under American law to shut down and liquidate an insolvent corporation.

Indeed, the *Global Service* court noted chapter 11 of the Bankruptcy Code is founded upon the principle that a business may be worth more to everyone if it is continued to be operated rather than immediately liquidated. Fiduciaries of an insolvent company, therefore, may continue to operate the company without liability if their decision to do so is protected by with the business judgment rule. Under the business judgment rule, a manager's negligent decision to operate an insolvent business does not give rise to liability for breach of fiduciary duties or for deepening insolvency, so long as the decision was made in good faith and without fraudulent intent. The *Global Service* court then ruled that the plaintiff had failed to plead facts sufficient to state a valid breach of fiduciary duty claim and, thus, dismissed the claim.

The *Global Service* court is not alone in holding that deepening insolvency claims should be considered simply as breach of fiduciary duty claims (or claims for aiding and abetting the breach of a fiduciary duty, where the defendant is not itself a fiduciary) and not as independent causes of action. Other courts faced with deepening insolvency claims have treated them like standard breach of fiduciary duty claims. See *Rahl v. Bande*, 316 B.R. 127 (S.D.N.Y. 2004) (treating deepening insolvency claim as claim for breach of fiduciary duty); *In re RSL COM PRIME-CALL, Inc.*, 2003 WL 22989669 (Bankr. S.D.N.Y., Dec. 11, 2003) (same); *Sharp v. Hawkins*, 2004 WL 2792121 (N.D. Cal., June 8, 2004) (deepening insolvency

...the defendant concealed the deterioration of the company's financial condition, thereby artificially prolonging its life...

...the company suffered harm distinct from that suffered by its creditors...

...the company's insolvency was increased by the incurrence of additional liability or the dissipation of assets...

Lafferty, the *Exide* bankruptcy court was compelled to predict how the state's highest court would resolve the issue if confronted by it. Following *Lafferty*, the *Exide* bankruptcy court concluded that the Delaware Supreme Court would recognize a claim for deepening insolvency when corporate property had been damaged. Finding the deepening insolvency claim to be properly pled, the *Exide* bankruptcy court denied the defendants' motion to dismiss the claim.

Other courts have followed the *Lafferty* and *Exide* opinions. In *In re Buildnet, Inc.*, a bankruptcy court refused to dismiss a deepening insolvency claim brought under North Carolina law against the debtor corporation's officers and directors. In other cases, courts have indicated that deepening insolvency, if not a wholly distinct tort claim, constitutes a viable

Exide and ruled that, under New York law, there was no independent cause of action for deepening insolvency. In *In re Global Service Group LLC*, 315 B.R. 451 (Bankr. S.D. N.Y. 2004), a chapter 7 bankruptcy trustee filed suit on a deepening insolvency theory against the debtor corporation's bank and other insiders of the company. The chapter 7 trustee alleged that the defendants artificially prolonged the bankrupt company's existence through the making of various loans which the defendants knew or should have known the company would be unable to repay. By prolonging the company's life, the trustee argued that the company became more deeply in debt, thus reducing any potential recovery for the company's creditors.

Ruling upon the defendants' motion to dismiss, the *Global Service* court declined

claim pled by plaintiff alternatively as breach of fiduciary duty claim).

Elements of The Deepening Insolvency Tort

Though several courts have recognized an independent cause of action for deepening insolvency, none of these decisions involves the actual litigation of a claim. Therefore, the decisions leave unanswered how a plaintiff may prove its deepening insolvency claim and what the elements of the tort may be. In particular, the courts are unclear whether one must find the existence of a duty owed by the defendant to the plaintiff as a predicate to a deepening insolvency claim. In *Lafferty*, the Third Circuit held that deepening insolvency occurs where (1) corporate property is injured (2) through the fraudulent or concealed expansion of corporate debt and prolongation of corporate life. No mention of a breached duty—fiduciary, contractual or otherwise—is mentioned. *Lafferty*, 267 F.3d at 349-51. The *Global Service* court, however, wrote that one seeking to recover for deepening insolvency "must show that the defendant prolonged the company's life in breach of a separate duty, or committed an actionable tort that contributed to the continued operation of a corporation and its increased debt." *Global Service*, 316 B.R. at 458 (emphasis added).

One commentator has observed that while the case law does not spell out clearly the elements of a deepening insolvency claim, three factors are commonly evaluated: (1) whether the defendant concealed the deterioration of the company's financial condition, thereby artificially prolonging its life; (2) whether the company suffered harm distinct from that suffered by its creditors; and (3) whether the company's insolvency was increased by the incurrence of additional liability or the dissipation of assets, or otherwise realizable value was thereby lost. Mette H. Kurth, *The Search for Accountability: The Emergence of "Deepening Insolvency" as an Independent Cause of Action*, 9 ANDREW'S BANKR. LITIG. REP. 6 (Aug. 27, 2004).

Alabama Courts and Deepening Insolvency

The viability of deepening insolvency as a legal theory is determined by state law. There is no decision by an Alabama court regarding whether deepening insolvency is valid in our state as either a damages theory or an independent cause of action. In the absence of Alabama case law on a state law issue, judges often consult the decisions of other state courts on point, the majority rule on the issue, developing trends in the relevant field of substantive law, and judicial decisions from other jurisdictions whose doctrinal approach to legal matters is substantively the same as that of the Alabama court. See 19 C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure: Jurisdiction* 2d § 4507 at 190-200 (1996).

A review of these relevant resources suggests that while there may be grounds upon which to recognize deepening insolvency as a viable damages theory under Alabama law, there is little compelling authority for recognizing deepening

...while there may be grounds upon which to recognize deepening insolvency as a viable damages theory under Alabama law, there is little compelling authority for recognizing deepening insolvency as a new cause of action.

insolvency as a new cause of action. The majority of courts in other jurisdictions have found that deepening insolvency is a valid way to assess damages in certain cases, such as claims for breach of fiduciary duty against an insolvent corporation's officers and directors and fraud and negligence claims asserted against an insolvent corporation's outside professionals. Recent case law also suggests a trend toward recognizing deepening insolvency as an appropriate measure of the damage sustained by a company as a result of the wrongful prolongation of its existence.

Existing Alabama case law is unclear regarding whether deepening insolvency may be a valid damages theory under Alabama law. The case that perhaps came closest to addressing the issue is *Specialty Container Mfg. Co. v. Rusken Packaging, Inc.*, 572 So.2d 403 (Ala. 1990), in which the Alabama Supreme Court ruled that a plaintiff corporation's poor financial condition did not, as a matter of law, make it impossible for the plaintiff to have been damaged by the defendants' actions. The *Specialty Container* court, however, did not specifically find that the plaintiff was insolvent at the time the allegedly tortious conduct occurred, concluding only that the plaintiff was in "unstable, perhaps bad, financial condition." Thus, whether the Alabama Supreme Court would find that an insolvent corporation—not just a financially troubled one—can be harmed by others' tortious actions remains subject to debate.

There is far less authority supporting the recognition of deepening insolvency as an independent tort under Alabama law. As discussed above, the reported cases are divided on whether deepening insolvency should be regarded as a separate tort claim. There is no clear majority rule on that point. Likewise, contrary to some courts' statements, there is no identifiable "trend" in the current cases or commentaries regarding deepening insolvency as an independent cause of action. See, e.g., *Fla. Dept. of Ins. v. Chase Bank of Texas Nat. Ass'n*, 274 F.3d 924, 935 (5th Cir. 2001) (though citing "trend" toward recognizing deepening insolvency as cause of action, Fifth Circuit openly questioned whether Texas would recognize such a cause of action). Finally, one would be

(Continued on page 196)

hard-pressed to distinguish which of the Third Circuit Court of Appeals, the Bankruptcy Court for the District of Delaware or the Bankruptcy Court for the Southern District of New York—the courts in *Lafferty*, *Exide* and *Global Service*, respectively—generally applies a “doctrinal approach” most similar to that of the Alabama Supreme Court.

In fact, there are ample grounds why Alabama courts would not sanction deepening insolvency as a new, independent tort. First, the Alabama Supreme Court has indicated its general reluctance against enlarging the category of recognized tort claims. See, e.g., *Tanner v. Church’s Fried Chicken, Inc.*, 582 So.2d 1304 (Ala. 1991) (refusing to extend tort of bad faith beyond insurance cases); *Cahaba Seafood, Inc. v. Central Bank*, 567 So.2d 1304 (Ala. 1990) (declining to find independent tort of economic duress); *Ponder v. Lincoln Nat. Sales Corp.*, 612 So.2d 1169 (Ala. 1992) (same).


Second, and more significantly, to the extent that a corporation is damaged by actions which contribute to its deepening insolvency, Alabama law already provides for adequate remedies. Most deepening insolvency claims are brought against officers and directors of the insolvent corporation who owe fiduciary duties to the corporation, its shareholders and, to the extent the corporation is insolvent, its creditors, too. To the extent that a corporation’s officers and directors act inconsistently with those fiduciary duties, the Alabama courts have developed an ample body of case law clearly providing that

officers and directors may be liable for breaching those duties if their actions are not protected by the business judgment rule. As the *Global Service* opinion persuasively argues, justice is best served when courts evaluate the conduct of corporate management within the existing construct of corporate fiduciary duty law, with due recognition being given to the “business judgment” rule and the protections it provides. The tort of deepening insolvency, as formulated by the *Lafferty* and *Exide* courts, provides no express “business judgment” safe harbor and, thus, may unfairly expose corporate fiduciaries to liability even though they acted in good faith and without fraudulent intent.

Third, the tort of deepening insolvency as defined by other courts arguably is inconsistent with fundamental principles of Alabama tort law. Under Alabama law, every action in tort consists of three essential elements: (1) the existence of a legal duty by the defendant to the plaintiff, (2) a breach of that duty and (3) damage as a proximate result. *Dobbs v. Alabama Power Co.*, 549 So.2d 35 (Ala. 1989). In the leading deepening insolvency cases of *Lafferty* and *Exide*, those courts, in defining the tort of deepening insolvency, make no mention of whether a duty owed by the defendant to the plaintiff is an essential element to the cause of action. To the extent this reflects those courts’ belief that the existence of a duty between the parties is not an essential element of a deepening insolvency claim, this theory is inconsistent with Alabama law.

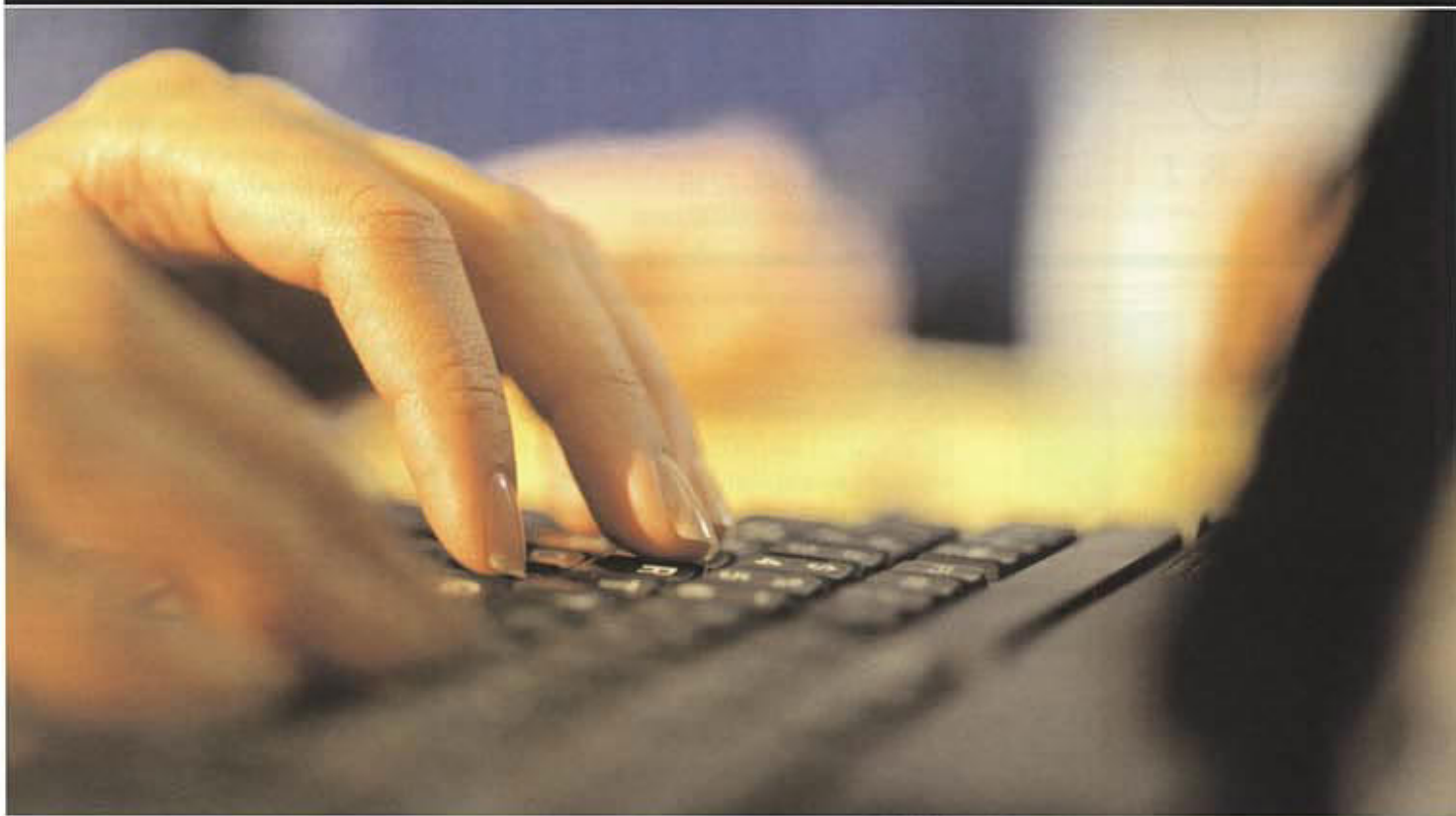
Finding the existence of a duty owed by the defendant to the plaintiff is not difficult, of course, in claims asserted against officers and directors of an insolvent corporation because they clearly owe fiduciary duties to the corporation and its shareholders. However, it is problematic in cases such as *Exide* where outside lenders are the targets of deepening insolvency claims. To the extent that *Exide* implies that a third-party lender owes fiduciary duties to an insolvent borrower and its shareholders and creditors to either refrain from any action that would contribute further to the borrower’s financial problems or disclose the borrower’s financial problems to its investors and creditors, the *Exide* opinion is contrary to Alabama law. Alabama courts consistently hold that the creditor-debtor relationship between a bank and its borrower does not generally impose any fiduciary duties upon the bank. *Baylor v. Jordan*, 445 So.2d 454 So.2d (Ala. 1984) (citing *Brasher v. First Nat. Bank of Birmingham*, 232 Ala. 340, 169 So. 42 (1936)). Absent a finding that an unusual confidential relationship exists between the bank and its borrower, the bank owes no duties to its borrower (or its shareholders or creditors) beyond those set forth in their loan documents. If fiduciary duties arise due to such a confidential relationship or position of control, then the lender’s conduct again is best evaluated under Alabama’s established case law regarding liability for the breach of one’s fiduciary duties.

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Most deepening insolvency claims are brought against officers and directors of the insolvent corporation...

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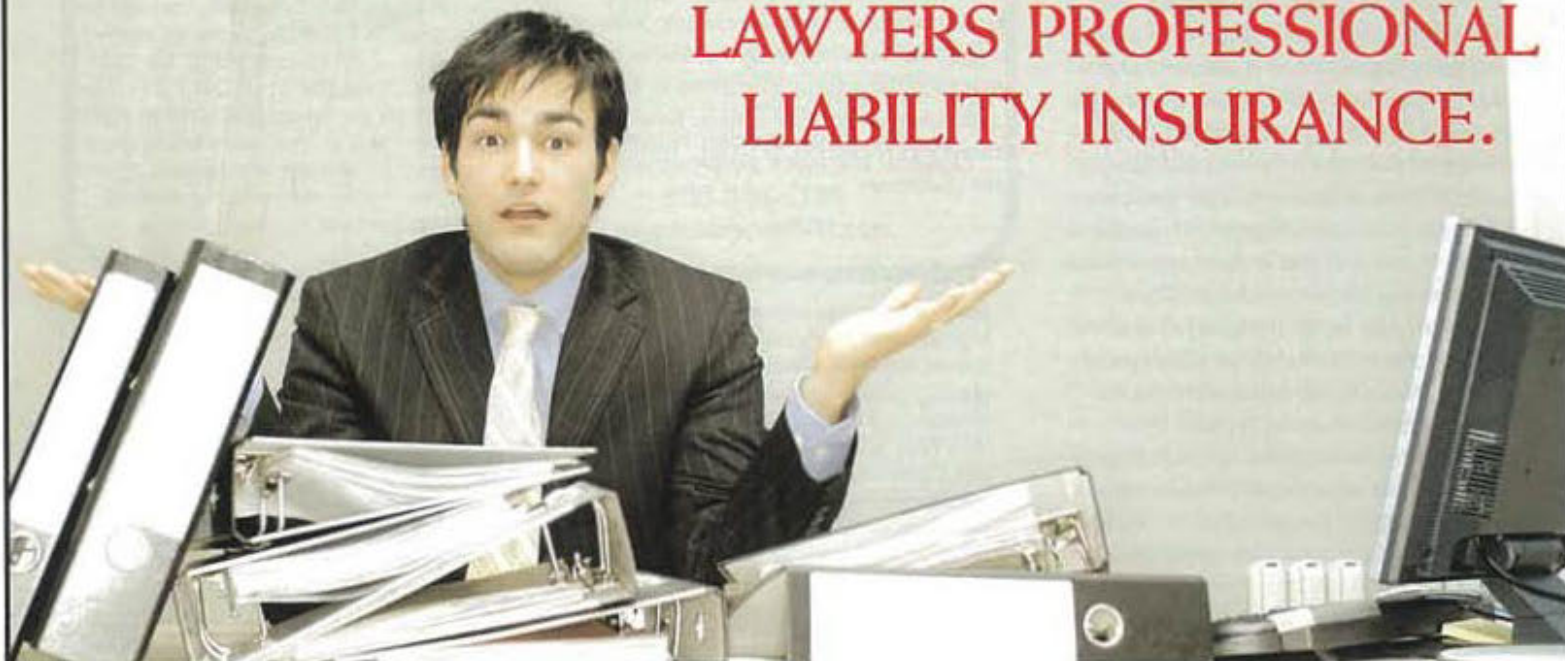
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Advocacy in a Changing World:
Bias and Manipulation In the Jury Box1.5

11:00 am – Noon
ABA Standards and Guidelines for
Indigent Defense In Capital Cases1.0
The Review of Damages on Appeal...1.0
Trade Secrets—Non-Competition.....1.0
Workers' Compensation Update—20051.0

10:30 am – 12:30 pm
Dealing with Impaired Partners and Associates
(includes 30-minute business meeting).....1.5
Electronic Discovery v. Computer Forensics:
What's the Difference? E-Document
Retention, Preservation and Spoilation.....2.0

10:45 am – 12:15 pm
Recent Developments in Alabama
Legislature—2005: (The New Trust Code,
New Securities Act, Election Laws).....1.5

11:30 am – 12:30 pm
Legal Ethics Update—20051.0

2:15 pm – 3:15 pm
Labor & Employment Law Update—20051.0
Turf Wars: Defense Removal Strategies in
Response to Plaintiffs' Efforts to
Defeat Federal Jurisdiction1.0
Current Issues In Criminal Defense1.0

3:30 pm – 4:30 pm
Emerging Issues in Today's Plaintiff's Practice1.0

HOURS

3:30 pm – 4:30 pm
Open Forum: Alabama Supreme Court
Commission on Professionalism1.0

3:30 pm – 5:30 pm
VOIP—What's It to Ya?.....2.0

FRIDAY, JULY 22, 2005

9:00 am – Noon
Ethics Rocks!3.0

1:00 pm – 2:00 pm
Mass Tort Litigation—The Complexities of
Multi-Party Litigation1.0

1:00 pm – 2:30 pm
Christian Conciliation—Producing
Surprising Results in Impossible Cases1.5

Trust Law and Medicaid
Protection Update—2005.....1.5

1:00 pm – 3:00 pm
The Proactive Practice:
Move Your Firm Forward!2.0

2:30 pm – 3:30 pm
Lawyers Leading Lawyers—
Mentoring In the Profession1.0

3:30 pm – 4:30 pm
Family Law Case Update—20051.0

SATURDAY, JULY 23, 2005
Grande Convocation2.0

TOTAL HOURS: 37.5

CLE-At-A-Glance

Maximum CLE Credit Hours Available

Wednesday-Saturday	20.5 hours
Wednesday-Friday	18.5 hours
Wednesday-Thursday	12.5 hours
Thursday-Friday	12.5 hours
Thursday-Saturday	14.5 hours
Wednesday only	6.0 hours
Thursday only	6.5 hours
Friday only	6.0 hours
Saturday only	2.0 hours

ALABAMA STATE BAR 2005 ANNUAL MEETING

Grand Hotel • Point Clear, Alabama • July 20-23, 2005

SCHEDULE OF EVENTS

WEDNESDAY, JULY 20, 2005

8:30 am - 4:45 pm

Basic Issues of Law

*Sponsored by the Volunteer Lawyers Program,
Linda Lund, director, and the Alabama
State Bar (6.0 hours CLE credit)*

8:30 am - 9:00 am

REGISTRATION

9:15 am - 10:15 am

WILL DRAFTING

Anne W. Mitchell, Birmingham

10:15 am - 11:15 am

ESTATE ADMINISTRATION

Nancy C. Hughes, Birmingham

11:15 am - 11:30 am

BREAK

11:30 am - 12:15 pm

POWER OF ATTORNEY

Andrew J. Potts, Birmingham

12:15 pm - 1:15 pm

LUNCH

1:15 pm - 2:30 pm

COLLECTIONS LITIGATION

W. McCollum Holcomb, Birmingham

2:30 pm - 3:30 pm

BANKRUPTCY

Stephen B. Porterfield, Birmingham

3:30 pm - 3:45 pm

BREAK

3:45 pm - 4:45 pm

DIVORCE, CUSTODY AND POST DIVORCE

Sara J. Senesac, Birmingham

4:00 pm - 5:00 pm

MCLE COMMISSION MEETING

DISCIPLINARY COMMISSION MEETING

THURSDAY, JULY 21, 2005

7:30 am - 8:45 am

ALABAMA LAW FOUNDATION

TRUSTEES' BREAKFAST

8:00 am - 5:00 pm

ANNUAL MEETING REGISTRATION

8:00 am - 5:00 pm

LEGAL EXPO 2005 and LEXISNEXIS®

CYBER CONNECTION

9:00 am - 11:00 am

COFFEE/REFRESHMENTS

THURSDAY, JULY 21, 2005

9:00 am - 10:30 am



WELCOME

J. Douglas McElvy

President

Alabama State Bar

Opening Plenary Session

**ADVOCACY IN A CHANGING WORLD:
BIAS AND MANIPULATION IN THE
JURY BOX**

GREGORY S. CUSIMANO, ESQ., Gadsden



The only speaker to receive a spontaneous standing ovation in the past 12 annual conventions, Greg Cusimano, one of our own, combines expert knowledge, passion, common sense and

experience, as well as humility, as he tackles one of the current hot issues. What is happening? Why? With what result? Your practice does matter to the Alabama State Bar. Greg articulates the problems as well as the emerging trends in jury charges and evidentiary matters.

(1.5 hours CLE credit)

WEDNESDAY, JULY 20, 2005

ANNUAL MEETING OFFICIALLY OPENS

1:00 pm - 6:00 pm

ANNUAL MEETING REGISTRATION

2:00 pm - 4:00 pm

BOARD OF BAR COMMISSIONERS' MEETING

JUDICIAL LIAISON COMMITTEE MEETING

(Reception to follow)

10:30 am - 11:00 am

BREAK—VISIT LEGAL EXPO 2005 and
LEXISNEXIS® CYBER CONNECTION

10:30 am - 11:30 am

ATTORNEYS INSURANCE MUTUAL
OF ALABAMA ANNUAL MEETING
(No CLE credit)

11:00 am - Noon

ABA STANDARDS AND GUIDELINES
FOR INDIGENT DEFENSE IN
CAPITAL CASES

Bryan A. Stevenson, Montgomery,
executive director, Equal Justice Initiative
of Alabama and professor of clinical law,
New York University School of Law,
New York, NY

*Sponsored by the Criminal Justice Section,
Richard S. Jaffe, chair, Birmingham*
(1 hour CLE credit)

THE REVIEW OF DAMAGES ON APPEAL

Honorable Drayton Nabers, Jr.,
Chief Justice, Alabama Supreme Court,
Montgomery

M. Christian King, Birmingham
*Sponsored by the Appellate Law Section,
Deborah Alley Smith, chair, Birmingham*
(1 hour CLE credit)

TRADE SECRETS/NON-COMPETITION

Will Hill Tankersley, Jr., Birmingham
Frank M. Caprio, Huntsville
*Sponsored by the Intellectual Property Law
Section, Timothy A. Bush, chair, Birmingham*
(1 hour CLE credit)

WORKERS' COMPENSATION UPDATE—2005

Thomas L. Oliver, Birmingham
Robert W. Lee, Jr., Birmingham
*Sponsored by the Workers' Compensation Section,
Donald B. Kirkpatrick II, chair, Birmingham*
(1 hour CLE credit)

10:30 am - 12:30 pm

DEALING WITH PARTNERS AND
ASSOCIATES IMPAIRED BY ALCOHOL,
SUBSTANCE ABUSE AND MENTAL
HEALTH PROBLEMS

David M. Wooldridge, Birmingham

This program deals with law firm and partner responsibilities and resources when dealing with partners or associates impaired by alcohol, substance abuse, stroke or other mental health problems, including ethical and professional liability issues. The presenter has served since

2003 as chair of Lawyers Helping Lawyers, the Alabama State Bar's committee providing assistance to lawyers, judges and law students with problems in these areas.

Sponsored by the Alabama Lawyer Assistance Program, Jeanne Marie Leslie, director, and the Alabama State Bar

(1.5 hours CLE credit)

Note: A 30-minute business meeting will follow.

10:30 am - 12:30 pm

ELECTRONIC DISCOVERY v. COMPUTER
FORENSICS: WHAT'S THE DIFFERENCE?
E-DOCUMENT RETENTION, PRESERVATION
AND SPOILATION

Harold W. Phipps, esq., vice-president,
the Norcross Group, Atlanta, GA

What is it? How do you do it? Our speaker has a balanced understanding of computer technology and the legal system. Most litigation today requires production and discovery of significant electronic evidence. Moving from the largest, most document-intensive cases to playing a role in many cases, most attorneys will need to have this knowledge sooner or later. The second hour will help you understand what e-document retention, preservation and spoliation actually are, and why it matters to your practice now or in the future. Cutting-edge, sophisticated, practical knowledge at your fingertips.

Sponsored by the Alabama State Bar.
(2 hours CLE credit)

10:45 am - 12:15 pm

RECENT DEVELOPMENTS IN THE
ALABAMA LEGISLATURE—2005
(THE TRUST CODE, NEW SECURITIES ACT,
ELECTION LAWS)

Robert L. McCurley, Jr., director,
Alabama Law Institute, Tuscaloosa

*Sponsored by the Alabama Law Institute and
the Alabama State Bar*
(1.5 hours CLE credit)

11:30 am - 12:30 pm

LEGAL ETHICS UPDATE—2005

J. Anthony McLain, general counsel,
Alabama State Bar, Montgomery
Robert E. Lusk, Jr., assistant general counsel,
Alabama State Bar, Montgomery

(1 hour CLE credit; meets 2005 CLE
ethics requirement)

THURSDAY, JULY 21, 2005

12:30 pm - 2:00 pm

Bench & Bar Luncheon

Tickets: \$ 26.00 each

CO-PRESIDING:



J. Douglas McElvy
President
Alabama State Bar
Montgomery



Honorable Herman Y. Thomas
Circuit Judge
13th Judicial Circuit
Mobile County

INVOCATION:

Christina D. Crow, Union Springs,
President, ASB Young Lawyers' Section

SPECIAL PRESENTATIONS

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

FEATURED SPEAKER

BILL HALTOM, Memphis, TN
President, Tennessee Bar Association



What others say: "Bill Haltom is just plain funny—and more politically correct than he cares to admit" (Judge Martha Craig Daughtrey, U.S. Sixth Circuit Court of Appeals). The truth is that Bill Haltom's

humor columns have kept Tennessee lawyers laughing for decades, and he will have Alabama lawyers laughing for at least 30 minutes! His non-lucrative side bar career as an author and columnist has produced two books, which will be available during the convention. His first book, *Daddies: An Endangered Species*, appeared on the Oxford American's Southern Bestseller list in 1996, although Bill says it was simply a "type-o." His second book, *In Search of Hamilton Berger: The Trials & Tribulations of a Southern Lawyer*, won the National Association of Bar Executives Luminary Award in 2000, but Bill attributes this achievement to the fact that his fellow Memphis lawyer, John Grisham, did not enter the competition.

2:15 pm - 3:15 pm

LABOR AND EMPLOYMENT LAW UPDATE—2005

Marcel L. Debruge, Birmingham

Sponsored by the Labor and Employment Law Section, Marcel L. Debruge, chair, Birmingham
(1 hour CLE credit)

TURF WARS: DEFENSE REMOVAL STRATEGIES IN RESPONSE TO PLAINTIFFS' EFFORTS TO DEFEAT FEDERAL JURISDICTION

Joseph P. H. Babington, Mobile

Sponsored by the Alabama Defense Lawyers Association, William J. Gamble, president, Selma
(1 hour CLE credit)

CURRENT ISSUES IN CRIMINAL DEFENSE

Joseph Van Heest, Federal Defender's Office,
Middle District of Alabama, Montgomery

Sponsored by the Alabama Criminal Defense Lawyers Association, Joseph Van Heest, president, Montgomery
(1 hour CLE credit)

3:30 pm - 4:30 pm

EMERGING ISSUES IN TODAY'S PLAINTIFF'S PRACTICE

Gina D. Coggin, Gadsden

Sponsored by the Alabama Trial Lawyers Association, Scott A. Powell, president, Birmingham
(1 hour CLE credit)

OPEN FORUM ON PROFESSIONALISM

Moderator:

Honorable Drayton Nabers, Jr., Montgomery,
Chief Justice, Alabama Supreme Court

Sponsored by the Alabama Supreme Court Commission on Professionalism
Sharon G. Yates, executive director, Montgomery
(1 hour CLE credit)

3:30 pm - 5:30 pm

VOIP — WHAT'S IT TO YA?

Jerry Baxley, IT-Lex, Montgomery
Mark D. Caudill, Montgomery

Voice-Over Internet Protocol and its attendant regulation will affect your cost of doing business, what you pay for essential services, and how you practice law. Join us for a hands-on presentation. *Includes reception.*

Sponsored by the Administrative Law Section, Jamie A. Durham, chair, Montgomery
(2 hours CLE credit)

4:30 pm - 5:00 pm

**ALABAMA YOUNG LAWYERS' SECTION
BUSINESS MEETING**

Christina D. Crow, chair, Union Springs
(No CLE credit)

5:00 pm - 6:00 pm

VLP RECEPTION

6:00 pm - 8:00 pm

**WELCOME TO L.A. (LOWER ALABAMA)
RECEPTION**

Featuring sumptuous hors d'oeuvres, including a seafood and grill mix with a festive flair—plus musical entertainment! Separate children's menu includes hot dogs, hamburgers and the trimmings.

Tickets: \$55.00 each (includes 2 drink tickets)
Children 10 and under: \$5.00

FRIDAY, JULY 22, 2005

7:30 am - 8:45 am

CHRISTIAN LEGAL SOCIETY BREAKFAST

Keynote Speaker:

Kenneth Sande, president,
Peacemakers Ministries, Billings, Montana

All members are cordially invited to attend. There is no charge, but a ticket is required. Pick up free tickets at the convention registration desk.

BIRMINGHAM SCHOOL OF LAW

ALUMNI BREAKFAST

Tickets \$ 10.00

HOWARD UNIVERSITY SCHOOL OF LAW

ALUMNI BREAKFAST

Tickets \$ 20.00

TULANE SCHOOL OF LAW

ALUMNI BREAKFAST

Tickets \$ 20.00

VANDERBILT UNIVERSITY SCHOOL OF LAW

ALUMNI BREAKFAST

Tickets \$ 20.00

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

ALUMNI BREAKFAST

Tickets \$ 20.00

**FARRAH ORDER OF JURISPRUDENCE/
ORDER OF THE COIF**

Tickets: \$ 17.50

PAST PRESIDENTS' BREAKFAST

THE ALABAMA LAWYER

BOARD OF EDITORS' BREAKFAST

8:00 am - 3:00 pm

**REGISTRATION,
LEGAL EXPO 2005 and
LEXISNEXIS® CYBER CONNECTION**

9:00 am - 11:00 am

COFFEE/REFRESHMENTS
Hosted by: the Alabama State Bar

9:00 am - NOON

OPENING PLENARY SESSION

ETHICS ROCK!

JACK MARSHALL, producer
President of Pro Ethics, Ltd.
Washington, D.C.

(See details on the following page.)

NOON - 12:30 pm

WOMEN'S SECTION RECEPTION

THURSDAY, JULY 21, 2005

8:15 pm

An Evening of Free Entertainment

OH, MR. FAULKNER, DO YOU WRITE?

A drama featuring

JOHN MAXWELL, Jackson, MS



This trip into the mind of a literary legend, perhaps the greatest writer the South has ever produced, is a compelling portrait of William Faulkner.

John Maxwell shifts the audience from being spectators and intruders

into Faulkner's world to being his friends and confidants. A Pulitzer-prize winning author of richly Southern stories and novels says it best: "The carefully prepared and sensitive script and John Maxwell's warm, serious and well-rounded performance give us William Faulkner, the man, in a rewarding evening of theatre." (Eudora Welty). This highly satisfying show will appeal to adults and families with older children and teens, as it brings alive one of the giants of American literature. *The Atlanta Constitution* wrote, "... It should be required seeing for everyone." Don't miss it!

FRIDAY, JULY 22, 2005

9:00 am - Noon

Opening Plenary Session

ETHICS ROCK!

JACK MARSHALL, producer
 President of Pro Ethics, Ltd.
 Washington, D.C.



A brilliant, innovative and entertaining program awaits you! Jack Marshall, president of a national ethics training and consulting firm, and District of Columbia actor and classic rock singer Michael Messer combine

their talents to present legal ethics like you have never heard it presented before—via rock parodies on acoustic guitar! The Beatles, The Who, Simon and Garfunkel, James Taylor and others find their songs transformed into new versions that tell stories of lawyers facing ethical difficulties while retaining the flavor and spark of original hit songs of the '60s and '70s.

Amazingly, it works! After each musical rendition, the complex ethical problems will be analyzed with audience participation and voting on the solution. Lawyers like you in similar gatherings have tested this "new product" and given it rave reviews. The comments include:

- Entertaining and informative—by far the best CLE I've attended.
- Fantastic! I've never sung at a CLE before.
- How can you be bored when there is a smile on your face, you're tapping your foot and maybe even singing along?
- Great discussion on ethical dilemmas ...novel...participatory and informative!
- If you think the idea of music at a CLE is ridiculous, come on anyway. You'll get your ethics credits for 2005 and 2006 (can carry over one year)—and you will leave saying it was the best program you've been to in a long time.

(3 hours CLE credit. Satisfies the 2005 legal ethics requirement)

FRIDAY, JULY 22, 2005

12:15 pm - 1:30 pm

THE GRAND CHEF'S COOKING DEMONSTRATION AND LUNCHEON

Spouses can enjoy this special luncheon while lawyers play golf or attend meetings. Sample unique salads while the chef prepares the main course in front of you using the freshest ingredients and highest quality equipment, and then serves to you at your table. End your culinary experience with a fabulous dessert, and have the rest of the afternoon to enjoy the resort setting. Then take home the recipes home and try them out on your own! *Limited seating. Register early!*
 Tickets: \$37.50



12:30 pm

THE FOURTH ANNUAL MAUD McCLURE KELLY AWARD LUNCHEON

Tickets: \$ 37.50 each

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

12:30 pm

ANNUAL KIDS' CHANCE GOLF SCRAMBLE

12:30 pm - 3:00 pm

BIG APPLE ALABAMA AFTERNOON (CHILDREN'S PARTY)



Join the circus for an afternoon of clowning around with friends! Play carnival games, have your face painted, and cheer on the amazing unicyclist while eating cotton candy and corn dogs under the big top. (Meet in the main lobby at 12:15 pm.

Children, ages 6-15, are welcome.) **No charge, but pre-registration is required.**

Hosted by ISI ALABAMA, Insurance Specialists, Inc.

1:00 pm - 2:00 pm

MASS TORT LITIGATION: THE COMPLEXITIES OF MULTI-PARTY LITIGATION

Donald W. Stewart, Anniston
 Michael L. Bell, Birmingham

*Sponsored by the Litigation Section,
 Jon Terry, chair, Bessemer*
 (1 hour CLE credit)

1:00 pm - 2:30 pm

TRUST LAW AND MEDICAID PROTECTION UPDATE

Clayton K. Davis, Dothan
 Joseph C. Denison, Opelika

Co-sponsored by the Real Property, Probate & Trust Section, Paul E. Burkett, chair, Montgomery and the Elder Law Section, L. Thomas Ryan, Jr., chair, Huntsville

(1 hour CLE credit)

Note: Short business meeting to follow.

Sponsored by the Women's Section, Mary Jane Patton, chair, Birmingham
(1 hour CLE credit)

3:30 pm - 4:30 pm

FAMILY CASE LAW UPDATE 2005

Sara Jay Senesac, Birmingham

Sponsored by the Family Law Section, James Brian Huff, chair, Birmingham

(1 hour CLE credit)

Note: 30-minute business meeting to follow.

5:00 pm - 6:00 pm

PRESIDENT'S RECEPTION

Honoring President and Mrs. J. Douglas McElvy

No Charge: Two tickets per registrant

All registrants are cordially invited to a reception honoring President and Mrs. McElvy. Come by and visit with Doug and Eleanor, and thank them for their excellent leadership this year.

6:00 pm - 7:30 pm

**UNIVERSITY OF ALABAMA SCHOOL OF LAW
ALUMNI RECEPTION**

Tickets: \$25.00

**CUMBERLAND SCHOOL OF LAW
ALUMNI RECEPTION**

Tickets: \$25.00

7:30 pm - 9:00 pm

**JONES SCHOOL OF LAW
ALUMNI DESSERT RECEPTION**

Tickets: \$10.00

SATURDAY, JULY 23, 2005

8:30 am - 9:15 am

COFFEE AND SWEET ROLLS

No Charge (in Lobby area outside Ballroom)

9:15 am - 11:00 am

GRANDE CONVOCATION

STATE OF THE JUDICIARY

Honorable Drayton Nabers, Jr., chief justice
Supreme Court of Alabama, Montgomery

INSTALLATION OF BOBBY SEGALL

129th President of the Alabama State Bar

SPECIAL PRESENTATIONS

- Recognition of 50-year members
- Local Bar Achievement Awards
- Kids' Chance Scholarship
- Grand Prize Drawing

11:15 am

(or immediately following the Grande Convocation)

BOARD OF BAR COMMISSIONERS' MEETING

FRIDAY, JULY 22, 2005

1:00 pm - 3:00 pm

**The Proactive Practice:
Move Your Firm Forward**



TEA HOFFMAN, ESQ.,
Founder and president of
Legal Training Group, LLC,
Nashville, TN

Our speaker has trained thousands of lawyers in the past several years on topics ranging from how to improve their business development skills to how to balance life and work. She is the author of the book, *The Proactive Practice: How to Move Your Firm from Reactive to Proactive*. Her seminar, "Focus on Client Development," was rated the most-viewed online seminar in the country for over 20 weeks during 2003. Since the company's founding in 2002, Legal Training Group has served over 20 of Nashville's top 25 law firms and has since expanded its practice throughout the Southeast.

Sponsored by the Law Office Management Assistance Program, Laura A. Calloway, director, and the Alabama State Bar
(2 hours CLE credit)

2:00 pm - 2:30 pm

WOMEN'S SECTION BUSINESS MEETING

2:30 pm - 3:30 pm

**LAWYERS LEADING LAWYERS:
MENTORING IN THE LEGAL PROFESSION**

Panel Discussion

Moderator:

Elizabeth H. Huntley, Clanton

Panelists:

William M. Cunningham, Jr., Mobile
Honora McKeown Gathings, Gadsden
Claude E. Hundley, Huntsville
Honorable Lyn Stuart, Montgomery
Associate justice, Supreme Court of Alabama

ALABAMA STATE 2005 ANNUAL MEETING

Grand Hotel • Point Clear, Alabama • July 20-23, 2005

OUTLINE OF EVENTS

WEDNESDAY, JULY 20, 2005

- 8:30 am - 4:45 pm**
BASIC ISSUES OF LAW
- 8:30 am - 9:00 am**
REGISTRATION
- 9:15 am - 10:15 am**
WILL DRAFTING
- 10:15 am - 11:15 am**
ESTATE ADMINISTRATION
- 11:15 am - 11:30 am**
BREAK
- 11:30 am - 12:15 pm**
POWER OF ATTORNEY
- 12:15 pm - 1:15 pm**
LUNCH
- 1:15 pm - 2:30 pm**
COLLECTIONS LITIGATION
- 2:30 pm - 3:30 pm**
BANKRUPTCY
- 3:30 pm - 3:45 pm**
BREAK
- 3:45 pm - 4:45 pm**
DIVORCE, CUSTODY & POST DIVORCE

ANNUAL MEETING OPENS

- 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

THURSDAY, JULY 21, 2005

- 7:30 am - 8:45 am**
ALABAMA LAW FOUNDATION
TRUSTEES' BREAKFAST
- 8:00 am - 5:00 pm**
ANNUAL MEETING REGISTRATION
- 8:00 am - 5:00 pm**
LEGAL EXPO 2005
LEXISNEXIS® CYBER CONNECTION
- 9:00 am - 11:00 am**
COFFEE/REFRESHMENTS
- 9:00 am - 10:30 am**
WELCOME
- OPENING PLENARY SESSION
*Advocacy in a Changing World:
Bias and Manipulation in the Jury Box*
Gregory S. Cusimano, esq., Gadsden
- 10:30 am - 11:00 am**
BREAK—VISIT LEGAL EXPO 2005
LEXISNEXIS® CYBER CONNECTION
- 10:30 am - 11:30 am**
ATTORNEYS INSURANCE MUTUAL OF ALABAMA
ANNUAL MEETING
- 10:30 am - 12:30 pm**
DEALING WITH PARTNERS AND ASSOCIATES
IMPAIRED BY ALCOHOL, SUBSTANCE ABUSE
AND MENTAL HEALTH PROBLEMS
- 10:30 am - 12:30 pm**
ELECTRONIC DISCOVERY v. COMPUTER
FORENSICS: WHAT'S THE DIFFERENCE?
E-DOCUMENT RETENTION, PRESERVATION
AND SPOILATION

- 10:45 am - 12:15 pm**
RECENT DEVELOPMENTS IN ALABAMA
LEGISLATURE—2005
The Trust Code, New Securities Act, Election Laws
- 11:00 am - Noon**
ABA STANDARDS AND GUIDELINES
FOR INDIGENT DEFENSE IN CAPITAL CASES
THE REVIEW OF DAMAGES ON APPEAL
TRADE SECRETS/NON-COMPETITION
WORKERS' COMPENSATION UPDATE—2005
- 11:30 am - 12:30 pm**
LEGAL ETHICS UPDATE -2005
- 12:30 pm - 2:00 pm**
BENCH AND BAR LUNCHEON
Invocation
Special Presentations
FEATURED SPEAKER
Bill Haltom, Memphis, TN
President, Tennessee Bar Association
- 2:15 pm - 3:15 pm**
LABOR AND EMPLOYMENT LAW UPDATE—2005
TURF WARS: DEFENSE REMOVAL STRATEGIES
IN RESPONSE TO PLAINTIFFS' EFFORTS TO
DEFEAT FEDERAL JURISDICTION
CURRENT ISSUES IN CRIMINAL DEFENSE
- 3:30 pm - 4:30 pm**
EMERGING ISSUES IN TODAY'S
PLAINTIFF'S PRACTICE
OPEN FORUM ON PROFESSIONALISM
- 3:30 pm - 5:30 pm**
VOIP — WHAT'S IT TO YA?
- 4:30 pm - 5:00 pm**
ALABAMA YOUNG LAWYERS' SECTION
BUSINESS MEETING
- 5:00 pm - 6:00 pm**
VLP RECEPTION
- 6:00 pm - 8:00 pm**
WELCOME TO L.A. (LOWER ALABAMA) RECEPTION
- 8:15 pm**
FREE EVENING ENTERTAINMENT
Oh, Mr. Faulkner, Do You Write?
A drama featuring John Maxwell, Jackson, MS

FRIDAY, JULY 22, 2005

- 7:30 am - 8:45 am**
CHRISTIAN LEGAL SOCIETY BREAKFAST
FARRAH ORDER OF JURISPRUDENCE/
ORDER OF THE COIF
BIRMINGHAM SCHOOL OF LAW
ALUMNI BREAKFAST
VANDERBILT UNIVERSITY SCHOOL OF LAW
ALUMNI BREAKFAST
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
ALUMNI BREAKFAST
HOWARD UNIVERSITY SCHOOL OF LAW
ALUMNI BREAKFAST
TULANE SCHOOL OF LAW
ALUMNI BREAKFAST
PAST PRESIDENTS BREAKFAST
THE ALABAMA LAWYER BOARD OF EDITORS'
BREAKFAST
- 8:00 am - 3:00 pm**
REGISTRATION, LEGAL EXPO 2005 &
LEXISNEXIS® CYBER CONNECTION
- 9:00 am - 11:00 am**
COFFEE/REFRESHMENTS

- 9:00 am - Noon**
MORNING PLENARY SESSION
Ethics Rock!
Jack Marshall, producer
President of Pro Ethics, Ltd, Washington, DC
- NOON - 12:30 pm**
WOMEN'S SECTION RECEPTION
- 12:15 pm - 1:30 pm**
THE GRAND CHEF'S COOKING DEMONSTRATION
AND LUNCHEON
- 12:30 pm**
THE FOURTH ANNUAL MAUD MCLUIRE KELLY
AWARD LUNCHEON
- 12:30 pm**
ANNUAL KIDS' CHANCE GOLF SCRAMBLE
- 12:30 pm - 3:00 pm**
BIG APPLE ALABAMA AFTERNOON
Children's Party
- 1:00 pm - 2:00 pm**
MASS TORT LITIGATION: THE COMPLEXITIES
OF MULTI-PARTY LITIGATION
- 1:00 pm - 2:30 pm**
TRUST LAW AND MEDICAID PROTECTION UPDATE
- 1:00 pm - 3:00 pm**
THE PROACTIVE PRACTICE:
MOVE YOUR FIRM FORWARD!
Tea Hoffman, esq., founder and president of
Legal Training Group, LLC, Nashville, TN
- 2:00 pm - 2:30 pm**
WOMEN'S SECTION BUSINESS MEETING
- 2:30 pm - 3:30 pm**
LAWYERS LEADING LAWYERS:
MENTORING IN THE LEGAL PROFESSION
- 3:30 pm - 4:30 pm**
FAMILY CASE LAW UPDATE—2005
- 5:00 pm - 6:00 pm**
PRESIDENT'S RECEPTION HONORING
PRESIDENT AND MRS. J. DOUGLAS MCELVY
- 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 23, 2005

- 8:30 am - 9:15 am**
COFFEE AND SWEET ROLLS
(In Lobby area outside Ballroom)
- 9:15 am - 11:00 am**
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• Local Bar Achievement Awards
• Kids' Chance Scholarship
• Grand Prize Drawing
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(or immediately following the Grande Convocation)
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CHILDREN'S PARTY (ages 6-15) • Friday, July 22, 2005 • 12:30 pm
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 Carnival games! Face painting! Amazing unicyclist and MORE!



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 Attendees meet in the main lobby at 12:15 pm. Children, ages 6-15, welcome.
 Contact Rita Gray at (334) 269-1515, extension 305, for more information.
 Hosted by ISI ALABAMA, Insurance Specialists, Inc.

Parent's Name _____ Age _____
 Child's Name _____ Age _____
 Child's Name _____ Age _____
 Child's Name _____ Age _____
 Child's Name _____ Age _____
 Telephone: _____
 Mailing Address: _____

KIDS' CHANCE Golf Scramble

Join us for an afternoon of golf at the Grand Hotel—made even more rewarding by knowing that you are making a difference in a young person's life. Sign up to play in the 11th Annual Kids' Chance Golf Scramble on Friday, July 22, 2005.
 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 have been able to attend college without our help.
 If you are unable to play, please consider sponsoring a hole. The Workers' Compensation Section appreciates your support.

Bo Kirkpatrick, chair

Golf Scramble Entry Form

Name _____ Handicap _____
 Firm _____
 Address _____
 State _____ ZIP Code _____ Office Telephone _____ City _____ Home Telephone _____
 E-mail Address _____

PLEASE USE ONE ENTRY FORM PER PARTICIPANT

Individual Player	\$125.00	\$ _____
Hole Sponsorship	\$350.00	\$ _____
Hole Sponsorship & 1 Player Slot	\$350.00	\$ _____
Hole Sponsorship & 4 Player Slot	\$600.00	\$ _____
Total Enclosed		\$ _____

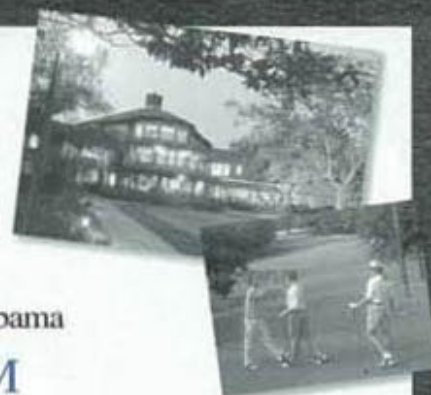
PLEASE MAKE CHECKS PAYABLE TO: KIDS' CHANCE SCHOLARSHIP FUND

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





Alabama State Bar 2005 Annual Meeting

July 20-23, 2005 • Grand Hotel • Point Clear, Alabama

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Room Reservations **MUST BE MADE DIRECTLY WITH THE ALABAMA STATE BAR.**
To ensure your accommodations, reservations should be received
NO LATER THAN WEDNESDAY, JUNE 15, 2005.

Please reserve _____ Room(s) for _____ Person(s)
Name _____
Company or Firm _____
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All reservations are accepted on a guaranteed basis only. An advance deposit of your first night room charge is required to confirm this reservation, or a credit card guarantee. Reservations received after **June 15, 2005** will be subject to space and rate availability. **CHECK-IN TIME IS 4:00 P.M. CHECK-OUT TIME IS 11:00 AM.** Non-smoking rooms available upon request based on availability. All rates are subject to 12 percent resort fee and six percent sales tax. The resort fee is not a tax, and is not subject to exemption.

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Credit Card No. _____ Expiration Date _____

Cardholder's Signature _____

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OPTIONAL EVENT TICKETS

Wednesday, July 20, 2005

___ Basic Issues of Law CLE Program (6 hours CLE credit) _____ No. of Tickets _____ Cost Included in registration fee Total Cost \$ _____

Thursday, July 21, 2005

___ Bench & Bar Luncheon _____ @ \$26.00 ea. \$ _____

___ Welcome to L.A. (Lower Alabama) Reception (includes 2 drink tickets) _____ @ \$55.00 ea. \$ _____

___ (Children 10 and under) _____ @ \$5.00 ea. \$ _____

Friday, July 22, 2005

___ Christian Legal Society Breakfast _____ @ No Charge \$ _____

___ Farrah Order of Jurisprudence/Order of the Coif Breakfast _____ @ \$17.50 ea. \$ - 0 -

___ Howard University School of Law Alumni Breakfast _____ @ \$20.00 ea. \$ _____

___ University of Virginia School of Law Alumni Breakfast _____ @ \$20.00 ea. \$ _____

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___ Tulane University School of Law Alumni Breakfast _____ @ \$20.00 ea. \$ _____

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___ Children's Party (Hosted by ISI Alabama) _____ @ Pre-registration required \$ _____

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___ University of Alabama School of Law Alumni Reception _____ @ \$25.00 ea. \$ _____

___ Jones School of Law Alumni Dessert Reception _____ @ \$10.00 ea. \$ _____

TOTAL EVENT TICKETS \$ _____

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Checks for registration/tickets should be made payable to the ALABAMA STATE BAR

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July 12-15, 2006


ALABAMA STATE BAR



UPDATE ON AMENDMENTS TO THE ALABAMA RULES OF APPELLATE PROCEDURE

EFFECTIVE JUNE 1, 2005

BY CELESTE W. SABEL

On January 12, 2005, the Supreme Court of Alabama amended certain appellate rules and adopted Rule 25A. A summary of the Rule adopted and the amendments follows.

RULE 21(a). MANDAMUS

Rule 21(a) has been amended to require that a table of authorities be included in a petition for the writ of mandamus. The respondent should include a table of authorities in the answer if an answer is ordered.

RULE 28. BRIEFS

Subsection (a)(7) of Rule 28 has been amended to reflect the long-standing rule that, in certiorari petitions, the statement of facts need not be included in the brief because it *must* be contained in, or attached to, the petition. See amended Rule 39(d)(5).

Subsection (h), which indicates the required colors of the covers of appellate briefs, has been added to Rule 28.

RULE 31. FILING AND SERVICE OF BRIEFS

Subsection (b) has been amended to require the filing of 12 copies of documents in the Supreme Court. There is no change in the number of documents required to be filed with the Court of Criminal Appeals and the Court of Civil Appeals.

RULE 32. FORM AND LENGTH OF BRIEFS, PETITIONS, MOTIONS AND OTHER PAPERS; NONCOMPLIANCE

The amendments to Rule 32, governing the form of documents filed with the appellate courts, are primarily housekeeping in nature. Whereas, at one time, Rule 32 applied only to the form of *briefs*, the amendments clarify that the rule now governs the form of *all documents* filed with the appellate courts.

A sentence has been added to subsection (b)(3) clarifying that, if the court orders answer and briefs in response to a petition for writ of mandamus, the number of pages of the answer and brief shall *together* be no more than 30 pages.

RULE 34(a). REQUEST FOR ORAL ARGUMENT

The major change to Rule 34 emphasizes that the granting of oral argument is discretionary with the appellate court.

Rule 34 has also been amended to conform with Rule 28(a)(1), which provides that the words "ORAL ARGUMENT REQUESTED" must be included in a conspicuous place on the front cover of the brief.

RULE 39. PETITION FOR WRIT OF CERTIORARI—REVIEW OF DECISIONS OF COURTS OF APPEAL

The Alabama Supreme Court's Standing Committee on the Rules of Appellate Procedure and the Supreme Court of Alabama have rewritten Rule 39 with the goal of making Alabama's certiorari practice as understandable as possible.

Under Rule 39, effective June 1, 2005, only a petition for writ of certiorari may be filed. Unless the supreme court has ordered otherwise, any brief filed by the petitioner or respondent prior to issuance of the writ will be stricken. Rule 39(b)(4), eff. June 1, 2005.

A copy of the court of appeals' opinion or unpublished memorandum must be attached to the petition for writ of certiorari. Rule 39(d)(4), eff. June 1, 2005. If the court of civil appeals issues a no-opinion affirmance pursuant to Rule 53, Ala. R. App. P., or if the petitioner wishes the court to consider facts not in the court of appeal's decision, the petitioner must include facts in or attach them to the *certiorari petition*. Rule 39(d)(5). Remember, the petition is the *only* document the court looks at in making a decision as to whether to issue the writ of certiorari. The record is not with the supreme court—it is still with the court of appeals' clerk's office, and will not be transmitted unless and until the supreme

court grants the petition and issues the writ of certiorari.

Another change to Rule 39 is that the respondent will not be allowed to file an initial brief addressing the grounds unless and until the writ issues. Consequently, if the court denies the petition, the respondent need not file anything.

Petitioners should keep in mind that certiorari petitions should not address the merits of the case, but should communicate to the court the *grounds* which authorize the court's issuing the writ of certiorari. Only if the court grants the petition and issues the writ will the petitioner file a brief addressing the merits of the case.

If the writ of certiorari issues, then the record will be transmitted from the court of appeals' clerk's office to the supreme court clerk's office. Thereafter, briefing will occur. Following is the briefing schedule should the writ issue:

- *Petitioner's brief* (or a waiver of the right to file such brief) to be filed within 14 days (two weeks) of the issuance of the writ of certiorari by the clerk of the supreme court.¹
- *Respondent's brief* (or a waiver of the right to file such brief) is to be filed within 14 days (two weeks) of the filing of the petitioner's brief (or the petitioner's waiver of filing a brief). The respondent's brief may address the substantive issues presented for review in the petition. The brief may also address whether the petition states grounds as required by subparagraphs (a)(2)(A)-(E), or in a death penalty case, subparagraphs (a)(2)(A) and (B).
- *Petitioner's reply brief*, if any, must be filed within 14 days (two weeks) of the filing of the respondent's brief.

In criminal cases in which the penalty is death, there is no longer a page limitation for the certiorari petition. Rule 39(a)(2), eff. June 1, 2005. See, *Smith v. Jones*, 256 F.3d 1135 (11th Cir. 2001) and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

RULE 40. APPLICATIONS FOR REHEARING

Rule 40 has been amended to clarify that the page limitation of an application for rehearing is 15 pages *and* the page limitation of the brief in support of the application is 15 pages. Thus, the *combined* page limitation for the application and the brief is a total of 30 pages.

NEW RULE: RULE 25A. ALABAMA RULES OF APPELLATE PROCEDURE

On January 12, 2005, the supreme court added a new rule to the *Alabama Rules of Appellate Procedure*. Rule 25A requires that appellate documents be signed by at least one attorney of record. By his or her signature, the attorney or party certifies that the document signed is not being presented for an improper purpose, that the issues presented are warranted by existing law or by a non-frivolous argument for extending, modifying or reversing existing law, and that the factual contentions or denials

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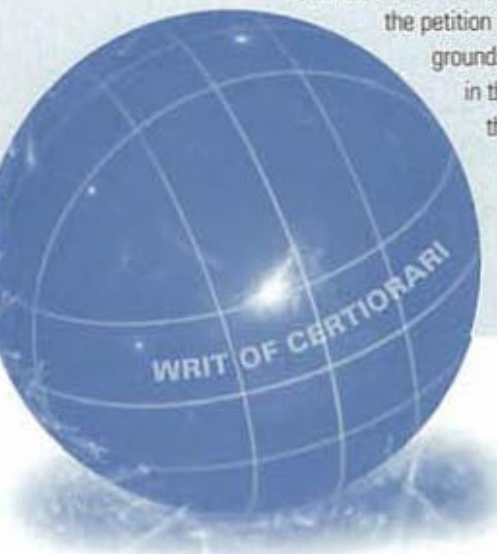
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Some Thoughts—For What It's Worth

1. One of the major misconceptions of attorneys filing certiorari petitions is the belief that certiorari is simply an "appeal" and, therefore, that they can draft the certiorari petition as if it is an appellate brief. Certiorari is an entirely different form of review by the supreme court. For that reason, it is in the best interest of your client that you read Rule 39, as boring as that might seem.
2. An error made by numerous attorneys is to simply use, as a form, a certiorari petition borrowed from another attorney. This has led to the denial of untold numbers of petitions, because the petition copied did not set out grounds and/or facts. Remember, in the petition, an argument that the appeals court erred is not enough—you must argue one of the grounds in subsection



made are supported by the record.

NEW COMMITTEE COMMENT TO RULE 8(a) AND (b). STAYS PENDING APPEALS

A Committee Comment has been added to Rule 8 which explains the course of action to be taken if the appellant, who has had a money judgment entered against it, needs to have Rule 8 suspended. ■

Endnotes

1. Note that in the case of a pre-trial appeal by the state in a criminal case, the time for filing briefs is shortened. See Rule 39(g).



Celeste W. Sabel

Celeste W. Sabel attended undergraduate school at Agnes Scott College and law school at Jones School of Law, where she graduated with honors. Following law school, she served as law clerk to the Honorable Richard L. Jones, associate justice of the Supreme Court of Alabama. She practiced law with the firm of Mandell & Boyd in Montgomery prior to joining the Alabama Supreme Court Clerk's Office legal staff in 1988. She currently is a senior staff attorney and is also the Appellate Mediation Administrator for the supreme court. Sabel is a member of the Alabama State Bar and the American Bar Association, Council of Appellate Staff Attorneys.

(a)(1). With the current emphasis on ethics and professionalism by the bar and the judiciary, evidenced by the 2004 amendment to Rule 3 of the *Mandatory Rules of Continuing Education (MRCE)*, requiring at least one hour of CLE in ethics or professionalism each year, it is especially important to comply with the rules of procedure. Rule 1.1, *Alabama Rules of Professional Conduct (Ala. R. Prof. Conduct)*, requires that a lawyer provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1, *Ala. R. Prof. Conduct*. Use of a form pleading, without reading the rule governing the procedure of the action for which you are representing the client, is—in my opinion—unprofessional.

3. If you have questions regarding the new rules, please call the supreme court clerk's office at (334) 242-4609 and speak with a staff attorney. We can assist you with these newly amended rules.

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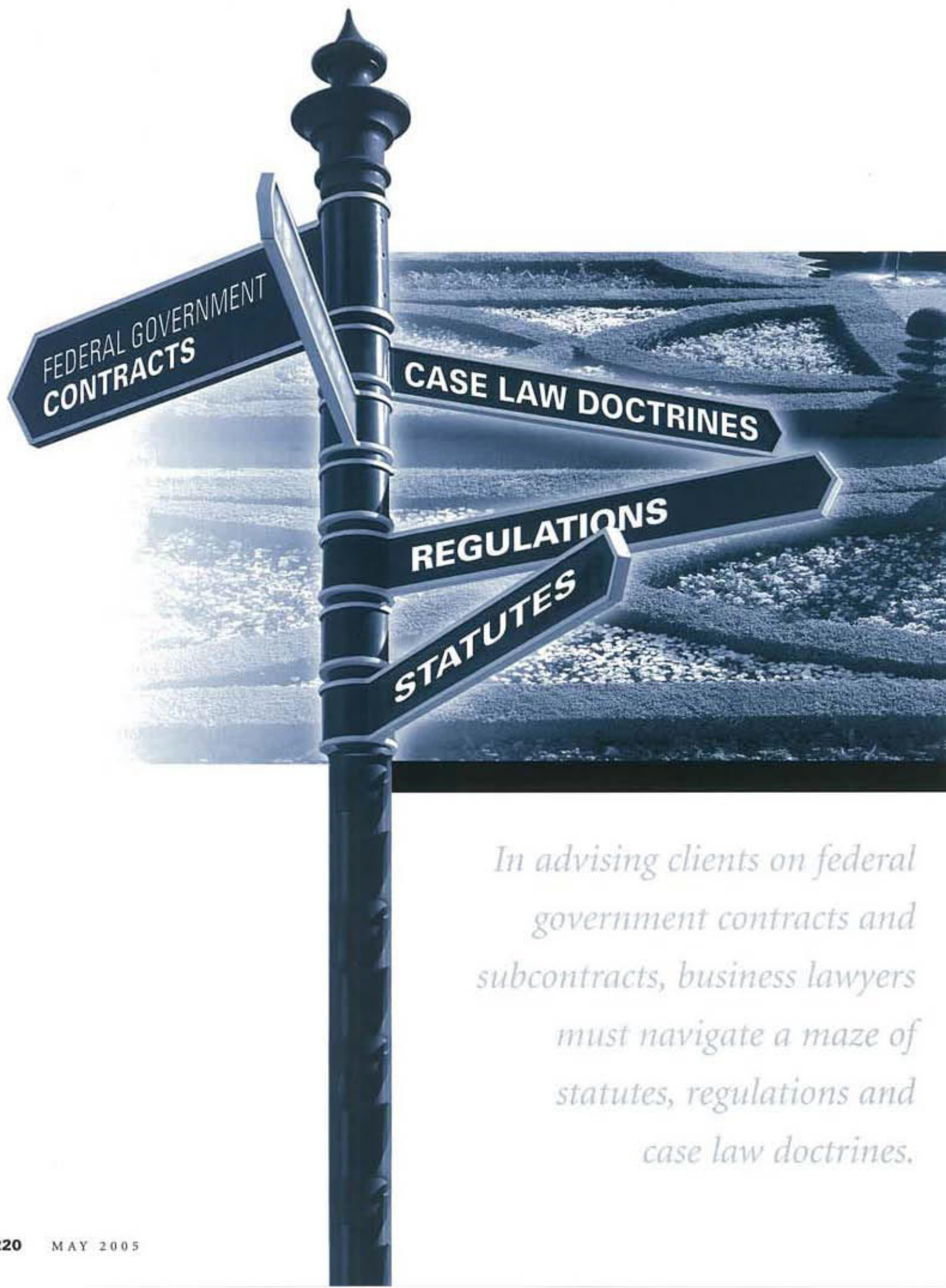
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In advising clients on federal government contracts and subcontracts, business lawyers must navigate a maze of statutes, regulations and case law doctrines.

FEDERAL GOVERNMENT CONTRACTING:

A Legal and Practical Guide for Alabama Lawyers

BY STEVEN W. FELDMAN

Many Alabama business lawyers likely have faced the following situation. Your client is about to be awarded an important federal agency contract. The client sends you the agreement, asking you "to take a day or two to look it over and make sure there are no issues." You examine an eye-wearingly, single-spaced 100-page document, replete with boilerplate, acronyms and dozens of clauses incorporated by reference. Given the short time available for review, you advise the client you do not see any particular problems, but that is the extent of your comfort level.

As with patent or admiralty law, federal procurement is a specialty area about which most business lawyers properly hesitate before advising their clients. This sub-

ject constitutes much of titles 10 and 41 of the United States Code for the military and civilian procuring agencies, respectively. Other statutory titles impact federal procurement, such as Title 15 for small business issues. The procurement regulations in Title 48 of the Code of Federal Regulations (C.F.R.) rival the regulations for the Internal Revenue Code and the Social Security Act in page numbers (4,700) and difficulty. Thus, the United States Court of Appeals for the Fifth Circuit aptly has commented, "Government contracting law is complex, technical, esoteric, important, and monumental."¹

Federal contracting is also "[a]n important part of American economic life."² Indeed, the United States Government is the largest buyer of supplies and services

in the world. In fiscal year 2003, federal agencies spent more than \$274 billion on acquisition,³ and procurement budgets are increasing. Government contractors and subcontractors employ approximately 20 percent of the national labor force.⁴ Furthermore, Alabama has a significant share of federal procurement dollars. In fiscal year 2003, the United States Government placed more than \$6.5 billion in contract work in Alabama, which made our state 13th-ranked in the Union for receiving federal contract dollars.⁵ Based on the pervasive importance of federal contracting for the national and state economies, Alabama business lawyers should have a fundamental understanding of federal procurement to advise their clients effectively.

This short article will not enable readers to become well-versed in every area of federal acquisition. At the same time, this article will: (a) summarize the governing statutes, regulations and policies; (b) identify additional reference material; and (c) focus on common challenges in federal government contracting.

Basic Statutes, Regulations And Policies

Federal statutes, regulations and policies closely control the relationship of the federal procuring agencies with their prospective and actual contractors. Two major statutory schemes affect executive branch procurements. First, the Armed Services Procurement Act (ASPA),⁶ as

amended, applies to Department of Defense (DOD), National Space and Aeronautics Administration (NASA) and Coast Guard procurements where the agency enters the agreement with funds appropriated by Congress. Second, the Federal Property and Administrative Services Act (FPASA),⁷ as amended, applies to most civilian executive branch agencies, including, for example, the departments of Justice, State and Health and Human Services, and the General Services Administration (GSA) in their appropriated fund procurements.

Numerous other statutes also affect federal acquisition. For example, some agencies, such as the Tennessee Valley Authority (TVA), have unique contracting statutes.⁸ Socio-economic programs are important, such as (but not limited to) the Small Business Act (small business concern preferences);⁹ the Service Contract Act (minimum wages, fringe benefits and working conditions for service contracts);¹⁰ and the

Buy American Act (domestic supply and construction material preferences).¹¹ Another special program authorizes emergency relief for contractors in the interests of national defense.¹²

Specialty adjudicators decide pre-award procurement controversies between agencies and vendors. The Comptroller General, the head of the United States Government Accountability Office (GAO), a unique agency within Congress, has statutory authority to consider vendor "protests" against the terms of solicitations for offers or agency source selection determinations.¹³ GAO decisions are found on WESTLAW, LEXIS and (the most recent ones on) on the GAO's Web site, www.gao.gov/. The GAO's bid protest regulations, 4 C.F.R. Part 21, are also on the GAO Web site under "Legal Products." The Tucker Act grants alternative protest jurisdiction to the United States Court of Federal Claims (COFC),¹⁴ with a right of appeal by either the contractor or the

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agency to the United States Court of Appeals for the Federal Circuit (CAFC).¹⁵ The contracting agency also has regulatory jurisdiction to consider protests.¹⁶

Special statutes and forums address post-award litigation between the government and contractors. The Contract Disputes Act of 1978 (CDA) establishes the claims and disputes process for covered agencies.¹⁷ Examples of CDA claims are contractor demands for monetary adjustments, such as for agency-directed contract changes or delays, or a contractor's challenge to the agency's termination of a contract for default. The parallel CDA dispute resolution authorities are the individual agency boards of contract appeals or the COFC, with rights of appeal by either party from a board or COFC to the CAFC.¹⁸ The CAFC has its own Web site, www.fedcir.gov/, as does the COFC, www.uscfc.uscourts.gov/. Most agency boards of contract appeals have a Web site, including the most prominent board, the Armed Services Board of Contract Appeals, www.law.gwu.edu/ASBCA/, which hears appeals from the DOD, NASA and other agencies by agreement. Decisions from all these protest and disputes adjudicators are available on WESTLAW and LEXIS.

Regulations are key drivers of the procurement process. Pursuant to the Office of Federal Procurement Policy Act,¹⁹ the three major procuring agencies—DOD, NASA and GSA—have issued the Federal Acquisition Regulation (FAR), which has the force and effect of law.²⁰ The FAR implements the ASPA, FPASA and many other procurement-related statutes. Under FAR 1.104, the regulation applies to all "acquisitions" as defined in FAR 2.101, except as expressly excluded. FAR is codified in Title 48, Chapter 1, of the C.F.R., and its frequent amendments are initially issued as rules in the *Federal Register*. An electronic version of the FAR is available on the Internet at www.arnet.gov/far/. Some agencies are outside the FAR, such as the TVA.²¹

FAR has eight major subchapters: general principles; competition and acquisition planning; contracting methods and contract types; socio-economic programs; general contracting requirements; special cate-

gories of contracting; contract management; and clauses and forms. In addition, most federal agencies have issued regulations supplementing the FAR. An example is the DOD FAR Supplement, located at Title 48, Chapter 2 in the C.F.R., available at www.farsite.hill.af.mil/VFDFARa.HTM. Indeed, practitioners handling a procurement issue should be familiar with all agency regulations implementing the FAR. Thus, in the U.S. Army Corps of Engineers, the procuring activity also must satisfy the Army FAR Supplement, www.farsite.hill.af.mil/VFAFAR1.HTM, and the Corps' FAR Supplement, www.hq.usace.army.mil/cepr/asp/library/efar.asp?strCat=8&strSubCat=6/. Numerous other policies and directives affect federal contracting, such as Executive Orders, Office of Management and Budget Circulars, and Office of Federal Procurement Policy letters. The FAR implements many of these procedures as well.²²

Reference Material

Readers may consult numerous treatises, articles and other sources that analyze federal procurement. The most accessible source is the U.S. Army Judge Advocate General's Legal Center and School's excellent and comprehensive Contract Attorneys Deskbook, available free of charge at www.louisvillelaw.com/federal/ArmyPubs/contract_law_deskbook.pdf. This deskbook has a readable, outline style with thorough, current analysis. Citing numerous statutes, regulations and case decisions, the deskbook covers federal procurement "cradle to grave." Some important chapters are those on competition, contract types, intellectual property, bid protests, and ethics in government contracting. Additionally, readers further should access an outstanding Web site, "Where in Federal Contracting?," www.wifcon.com, which covers all aspects of federal procurement. This Web site addresses such matters as contracting laws and pending legislation, current and proposed regulations, contracting newsletters and selected analyses of federal acquisition issues. It also discusses state procurement issues.

Common Challenges in Federal Government Contracting

A vendor's knowledge of the technical aspects of procurement can provide only a partial assurance of success in obtaining and performing federal government contracts. The following practical observations indicate how a business lawyer advising a client that seeks or performs government contracts can overcome some common challenges.

Government Buyers May Differ from Commercial Customers

Commercial buyers and sellers commonly focus on the bottom line of exchanging cash for goods or services. Because of this commercial tendency, sources seeking government business sometimes pay little attention to agency rules, procedures and forms, dismissing them as so much government "paperwork." To the contrary, government buyers characteristically seek to adhere strictly to the agency's procurement statutes and regulations. In large measure, agency procurement personnel are selected, promoted and rewarded based on their knowledge of, and compliance with, government purchasing procedures—which is not always consistent with whether the agency has obtained high quality, reasonably priced goods and services.

Another complication is that the government, in conducting acquisitions, will have important collateral goals. For example, the agencies have statutory and regulatory socio-economic objectives to make as many prime contract awards as practicable to small business concerns. In this respect, FAR subpart 19.5 implements the statutory policies on set asides for small businesses, wherein large business concerns are ineligible



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VI. The Business of Arbitration

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for contracts. A second example is that the Buy American Act, 41 U.S.C. § 10a-10d, implemented by FAR subpart 25.1, restricts the purchase of supplies that are not domestic end products. The government's achieving these collateral goals is not necessarily consistent with obtaining high quality products or reasonable prices. Accordingly, vendors should not assume that federal government purchasing agents would seek the same objectives as commercial buyers.

Relief Can Be Available For Bidder Mistakes

The offer preparation process is often hectic, and prone to mistakes, because vendors commonly face tight deadlines as they obtain information from various sources, such as subcontractors, and fill in complex government forms on the amounts and quantities of proposed goods or services. The regulations contain specific avenues for possible relief based on an offer mistake, whether the vendor discloses it to the agency before or after award.²³ Although offerors can obtain relief for mutual mistake, under common law standards,²⁴ most cases concern unilateral (contractor-only) error, as discussed below.

Most pre-award mistake cases arise in conventional sealed bidding under FAR Part 14, wherein the bidders submit sealed bids for public opening, and have no opportunity for revision of offers after the bid-closing deadline and before award.²⁵ The problem of offer mistakes is less frequent (although still possible) in negotiated procurements under FAR Part 15, where bids are not submitted for public opening. Under this procurement alternative, the agency and competitive offerors will commonly resolve errors discovered prior to award through the confidential discussions and proposal resubmission process.

The guiding principle for correction of bid mistakes disclosed before award, under FAR Part 14, is that a bidder may not correct incorrect premises that the vendor discovers after the receipt and opening of bids, because such a bid correction would enable the bidder to submit a bid never intended before the bid opening.²⁶ Instead, the regulations permit the bidder to correct such matters as clear-cut

clerical or mathematical mistakes, or a vendor's misreading of specifications, but not mistakes of judgment.²⁷ When the bidder does make its case, remedies for mistake include bid correction or withdrawal. The burden of proof for bid correction under FAR 14.407-3 is "clear and convincing evidence" on the existence of the mistake and the bid actually intended, and a lesser evidentiary standard pertains to bid withdrawal. If bid correction would displace one or more lower bids, the movant must establish both the mistake and the bid intended substantially from the solicitation and the face of the bid.

Less commonly, a bidder will allege after award that it has made a bid mistake, and will seek an upward contract price adjustment. With a unilateral mistake, the contractor has the difficult burden of showing that the error in the offer was so apparent as to have charged the agency's contracting officer with notice of the probability of the mistake.²⁸ The relief available under FAR 14.407-4 for a post-award allegation of mistake is contract rescission or reformation, provided that in the latter instance,

any price increase may not exceed that of the next lowest acceptable bid under the original solicitation for offers.

The key to success in a vendor's obtaining relief for a mistake is to document the request in strict accordance with FAR 14.407. This regulation requires the bidder to submit extensive documentation to the agency, including a file copy of the bid, the original worksheets and a statement explaining the existence of the error, how it occurred and the bid actually intended. The bidder may file a claim under the CDA if the agency denies relief.

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is bound by, its agreement. The failure to read or understand a contract will not be a defense to its enforcement, absent very rare circumstances, such as agency fraud.

Under the regulations, the government can create a binding contract by a written award or acceptance of a bid or proposal furnished to the successful vendor within the time for acceptance specified in the offer, and without further action by either party.²⁹ In other words, the offeror does not necessarily have to sign the contract to be bound, except that in negotiated procurement, FAR 15.504(a) states if the award document contains information that is different than the offeror's latest signed proposal, both parties must sign the contract award. Given the government's rights in this respect, the prudent vendor will review the documents and ensure full understanding *before* submitting its offer or signing the agreement. Vendors also should assume that

the agency would be strict in contract enforcement. Agencies do not readily sacrifice their rights absent extra consideration or the contractor's sound justification for a modification of the agreement.

Adhere to the Performance Schedule

The government commonly strictly enforces the contractual performance schedule, except where the contractor has an excusable delay, such as an Act of God. If the contractor's performance will be inexcusably late, no guarantee exists that the agency will grant a time extension. In extreme cases, and assuming that the agency has provided the contractor

preliminary notice of its intent through appropriate delinquency advisories,³⁰ the government may exercise its rights under standard contract clauses such as FAR 52.249-8 Default (Fixed Price Supply and Service) (Apr 1984) to terminate the contract for default because of the contractor's late delivery.

On the other hand, the regulations do not require termination for default for late delivery or for any other performance deficiency, especially when the problem is correctable and the agency would receive the benefit of the bargain. The agency contracting officer, when considering a default, must exercise prudent judgment and honor the contractor's rights under standard contract clauses.³¹ When the contractor contests the termination in litigation, the agency has the burden of proving the validity of a default, which it can impose only for good cause and with solid evidence.³² If

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the contractor succeeds in an appeal and a court or board overturns a default termination, the agency's action will be converted to the less-drastic measure of a termination of the contract for the government's convenience.³³ This procedure essentially will transform a fixed price agreement—the most common pricing arrangement—into a cost reimbursement contract, along with compensation for settlement costs and a reasonable allowance for contractor profit on agency-accepted work, but not anticipatory profit.³⁴

The contractor's schedule compliance is a recurring difficulty in the performance of government contracts. The best way to avoid these issues is for the contractor to analyze the schedule requirements in the solicitation *before* the closing date for submission of offers. If the schedule is unfair based on the nature of the product or service, or is unduly restrictive of competition, the vendor should question the agency about the requirements before the closing date, or even file a protest, if the government refuses to amend the solicitation. When the vendor is a small business, and believes that the delivery schedule is unfair, the vendor should remind the agency of FAR 19.202-1(c). This regulation instructs agencies to ensure that delivery schedules are as realistic as possible so that small business concerns will have an equitable opportunity to compete for all contracts that they can perform, consistent with the government's interests.

Ensure Dealings With Authorized Government Personnel

Since the United States government employs almost three million persons,

both military and civilian, federal expenditures would be wholly uncontrollable if government employees had free rein to execute or administer contracts. For agencies to avoid this chaos, federal employees must have actual contracting authority. Many decisions hold that the United States may repudiate and render voidable unauthorized commitments by its agents, even if the agent had apparent authority, i.e., the third party reasonably but mistakenly concluded that the government has held out the agent as having actual authority.³⁵ The United States Supreme Court explained in *Federal Crop Insurance Corporation v. Merrill*,³⁶ "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority," even if "[t]he agent himself may have been unaware of the limitations on his authority."

As with most government contract doctrines, the rule of actual authority has limited exceptions or qualifications. For example, the official could have "implied" actual authority, i.e., the authority is an integral part of the employee's duties,³⁷ or the Government could be bound where an authorized government official later ratifies the original improper action.³⁸ Rather than resort to such exceptions in a protest or dispute, the vendor should verify in a tactful manner beforehand that the government employee has the authority to act in the proposed manner. Generally, the vendor will have this assurance when dealing with the "contracting officer" assigned to the procurement. The quoted term refers either to the agency official authorized to enter into, administer or terminate contracts or that official's authorized representatives acting within the scope of their delegation.³⁹ Otherwise, a party might risk a possible agency repudiation of a commitment when the firm deals with unauthorized advisors or assistants, who can be contract specialists, project managers, or even legal counsel. The private party has the burden to demonstrate that the government agent had the necessary authority.⁴⁰

Resort To The Protest And Disputes Process As Needed

The procurement statutes and regulations grant extensive rights to vendors to challenge government procurement decisions. As discussed in Section I above, the COFC, GAO and the procuring agencies have statutory or regulatory authority to consider protests on solicitations and source selection decisions, and the COFC and the agency boards of contract appeals adjudicate agency/contractor CDA controversies.

Formal challenges could be necessary for a vendor to obtain needed relief from the Government where informal measures fail. Vendors will find, however, that federal agencies are not pushovers in protest and disputes litigation. Vendors also should expect that the opposing agency counsel would be specialists in the applicable statutory, regulatory and case law doctrines. Another challenge is that the courts, boards and the GAO will strictly enforce their procedural rules. Accordingly, vendors should consider retaining counsel specializing in federal procurement, after having explored all viable options short of suing the actual or prospective government customer.

In procurement litigation, the key to success with agencies, to include enhancing the prospects of settlement, is to avoid unnecessary attacks on the integrity of government personnel. A much better approach is to couch criticisms in a respectful tone, with a careful and complete statement of the pertinent facts, along with significant statutory, regulatory and case law support for the vendor's arguments.

Subcontracts Are Essentially Private Arrangements, With Exceptions

Subcontracting under government procurements is very important, exceeding \$35 billion nationwide in Fiscal Year 2001.⁴¹ Generally, however, agreements between prime contractors and subcontractors are private contracts governed by local law.⁴² The procurement statutes and regulations ordinarily apply only to government-prime contractor relationships. This policy is based on the absence of privity—a direct contractual relationship usually is lacking between most agencies and subcontractors.⁴³ When privity is missing, sovereign immunity will protect the government from suit.⁴⁴

Some qualifications exist to these principles. For example, FAR 32.112 requires the agency to take limited steps, mostly informational in nature, in response to a subcontractor's complaint to the government that a prime contractor has failed to make payments under a subcontract pertaining to a prime contract for non-commercial items. Thus, the contracting officer under FAR 32.112-2(a) must promptly advise the subcontractor, upon the latter's request, whether the agency has made final payment under the prime contract or if the prime contractor has submitted requests for progress payments or other payments under the contract.⁴⁵ Another qualification to the privity principle is that federal law controls prime-subcontractor disputes when the litigation touches upon the rights and duties of the United States, and where a uniform national approach is needed to address a legal problem. An example would be the liability of contractors for design defects in military equipment

where the items implicate national security.⁴⁶ Absent such a statutory, regulatory or case law qualification, a subcontractor should expect little involvement from the government regarding prime contractor-subcontractor issues or disputes.

Conclusion

In advising clients on federal government contracts and subcontracts, business lawyers must navigate a maze of statutes, regulations and case law doctrines. This article will assist counsel in learning the basics of acquisition, in knowing where to look for answers on procurement questions, and in overcoming common challenges for clients in the award and administration of federal government contracts. ■

ENDNOTES

1. *In re Gary Aircraft Corp.*, 698 F.2d 775, 779 (5th Cir. 1983).
2. *B.K. Instruments, Inc. v. United States*, 715 F.2d 713, 719 (2d Cir. 1983)(Friendly, J.).
3. General Services Administration, Federal Procurement Report for Fiscal Year 2003 (available at www.fpic.gov/).
4. *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996).
5. See note 3, *supra*.
6. 10 U.S.C. § 2302 *et seq.*
7. 41 U.S.C. § 252 *et seq.*
8. 16 U.S.C. § 831(h).
9. 10 U.S.C. § 2304(b)(2); 41 U.S.C. § 253(b)(2) (citing 15 U.S.C. §§ 638, 644).
10. 41 U.S.C. § 351 *et seq.*
11. 41 U.S.C. § 10a-10d.
12. 50 U.S.C. § 1431 *et seq.*
13. 31 U.S.C. § 3551 *et seq.* The agency's prior name was the "General Accounting Office." See Pub. L. No. 108-271, § 8(b), 31 U.S.C. § 702 note.
14. 28 U.S.C. § 1491(b).
15. 28 U.S.C. § 1295(a)(3).
16. Federal Acquisition Regulation (48 C.F.R.) 33.103 (citing Executive Order 12979, 60 Fed. Reg. 55171 (Oct. 27, 1995)). If the GAO denies relief, the protester can refile with COFC. See 31 U.S.C. § 3556. If the agency denies relief, the protester can refile with GAO, see 4 C.F.R. § 21.2(a)(3), or the COFC.
17. 41 U.S.C. § 601 *et seq.*
18. 28 U.S.C. § 1295(a)(3), (a)(10).
19. 41 U.S.C. § 405a.

20. H.C. Transp. Co., Corp., Comp. Gen. Dec. B-219600, 85-2 CPD ¶ 207, at 4.
21. See Sylvest Management Systems Corp., Comp. Gen. Dec. B-275935, 97-1 CPD 172, at 2-3.
22. See FAR 25.100, 25.200 (implementing Executive Order 10582 (Dec. 1954)(Buy American Act)).
23. See FAR 14.407 (sealed bid procurements); FAR 15.508 (negotiated procurements).
24. See *Dairyland Power Cooperative v. United States*, 16 F.3d 1197 (Fed. Cir. 1994); *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990).
25. See FAR 14.101(c, d), (1). With sealed bidding as governed by FAR Part 14, the agency conducts a public bid opening, except for classified procurements, under the rules in the Invitation for Bids. The agency may then award a contract to the lowest priced, responsive, eligible bidder, considering price and the solicitation's price-related evaluation factors.

Negotiation is the alternative to sealed bidding. "Negotiation" is broadly defined in FAR 15.000 as any procurement award procedure besides sealed bidding. Under FAR Part 15, agencies may award contracts based on price and non-price evaluation criteria as stated in the Request for Proposals or other solicitation instrument. Examples of non-price evaluation factors are the offerors' relevant past performance, technical or management capability, or personnel qualifications. Unlike sealed bidding, negotiation does not involve the public opening of bids or require an award to the lowest priced, responsive bid submitted by an eligible bidder. Negotiated procurements permit bargaining between the agency and the competitive range proposers after receipt of offers, agency discussions with offerors about the terms of their proposals and (ordinarily) the vendor's submission of a revised proposal to address deficiencies, weaknesses or other agency concerns with the offer. In a negotiated acquisition, agencies choosing between offerors for a particular award may issue the contract either to a higher technically rated, but higher priced offeror, or to a lower technically rated, but lower priced firm, based on the agency's reasoned view of the better value offer under the announced selection factors.

Generally, FAR parts 14 and 15 cover contracts exceeding \$100,000, and FAR Part 13 with a more simplified negotiated approach addresses acquisitions at or below that threshold. Special statutes and regulations may address negotiated source selections, such as the Brooks Act, 41 U.S.C. § 541 *et seq.*, implemented by FAR subpart 36.6, for architect engineer services.

26. *Acquila Fitness Consulting Systems, Ltd.*, Comp. Gen. Dec. B-286488, 2001 CPD ¶ 4, at 3.
27. See FAR 14.407-2, 14.407-3; *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987); *United Intern. Investigative Services v. United States*, 56 Fed. Cl. 619, 628 (2003).
28. See FAR 14.407-4(c)(2); FAR 15.508; *Buesing v. United States*, 47 Fed. Cl. 621, 638-39 (2000) (good discussion).
29. See FAR 52.214-10(d) (sealed bidding); FAR 52.215-1(e)(1) (negotiation).

30. See FAR 49.607 (stating procedures for cure notice and show cause notice).
31. See FAR 49.402-3 (procedures for default).
32. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987) (default a "drastic sanction"); *Beacon Cybersport, AGBCA 2002-102-1*, 03-1 BCA ¶ 32,105, at 158,740. See also *Kisco Co. v. United States*, 610 F.2d 742, 750 (Ct. Cl. 1979) (default termination a species of forfeiture that must be strictly construed).
33. FAR 52.249-8(g).
34. See FAR 49.201(a), 49.207, 52.249-2 Termination for Convenience of the Government (Fixed price) (Sep 1996). Compare FAR subpart 49.3 (principles for cost reimbursement contracts terminated for convenience).
35. *Thomas v. Immigration & Naturalization Service*, 35 F.3d 1332, 1339 (9th Cir. 1994); *American Federal Bank, FSB v. United States*, 58 Fed. Cl. 429, 435 (2003); *Sartori v. United States*, 58 Fed. Cl. 358, 361 (2003); *Perri v. United States*, 53 Fed. Cl. 381, 394 (2002); *Estate of Akin v. United States*, 31 Fed. Cl. 89, 97 (1994).
36. 332 U.S. 380, 384, 68 S. Ct. 1, 92 L.Ed. 10 (1947).
37. E.g., *Garza v. United States*, 34 Fed. Cl. 1, 20 (1995).
38. *Id.* at 21; *In re Elter*, ASBCA 52349, 01-2 BCA ¶ 31,547, at 155,809.
39. See FAR 2.101; 1.602-1(a).
40. *In re Elter*, 01-2 BCA ¶ 31,547, at 155,809.
41. Steven W. Feldman, *Subcontractors In Federal Procurement: Roles, Rights & Responsibilities*, 03-03 Briefing Papers 1 (February 2003). See generally Douglas E. Perry & Louis D. Victorino, *Practical Tips & Considerations for Subcontract Negotiations: A Subcontractor's Perspective*, 03-09 Briefing Papers 1 (August 2003) (both available on WESTLAW).
42. *George Hyman Constr. Co. v. United States*, 30 Fed. Cl. 170, 175 n.9 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994).
43. *Id.* at 173. See also *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-54 (Fed. Cir. 1983) (good discussion of privity in government contracts).
44. *Chancellor Manor v. United States*, 331 F.3d 891, 899 (Fed. Cir. 2003).
45. See also FAR 28.106-6 (establishing subcontractor's entitlement to obtain from the agency a copy of the prime contractor's payment bond on a construction contract). When a prime contractor has falsely certified to the agency that it has paid the subcontractor,

the agency must initiate administrative or other remedial action. See FAR 32.112-1(c).

46. See *Boyle v. United Technologies Corp.*, 467 U.S. 500, 504-08 (1988) (cited in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996)).



Steven W. Feldman

Steven W. Feldman received his undergraduate degree from the State University of New York at Stony Brook in 1975 and his law degree from Vanderbilt University in 1978. Feldman serves as an attorney-advisor for the United States Army Engineering Center in Huntsville. This article is adapted from "Get a Grip: How to Handle Government Contracts and Tame the Fury of Federal Forms," which was published in the June 2004 *Tennessee Bar Journal*, a publication of the Tennessee Bar Association. This article represents the personal opinions of the author and does not represent the views of any federal agency, and was written in honor of the author's wife, Ann Feldman.

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By Robert L. McCurley, Jr.

2005 Regular Session: Halfway Point

At the writing of this article, the legislature was at its mid-point, having met for 15 legislative days, with 15 to go. The last possible meeting day is on Monday, May 16, 2005.

At the halfway mark, 1,065 bills had been introduced in both houses. Of these, only five have received final passage. The most notable one is SB-101, a "revised open meetings" Act by which governmental bodies are required to be open to the public, with certain exceptions. Another,

SB-109, is a constitutional amendment banning "same sex marriages." In addition to these two bills, only three other bills have passed both houses. The house has passed 172 bills in 15 days and the senate has passed 29 bills during the same period.

Those of particular interest to lawyers and that stand a good chance of making it through the legislative process this year are the major code revisions drafted by the Alabama Law Institute. These are the Trust Code, SB-138 and HB-391, sponsored by

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Senator Rodger Smitherman and Representative Lesley Vance; the Securities Act, SB-177 and HB-177, sponsored by Senator Roger Bedford and Representative Marcel Black; and the Election Code, sponsored by Senator Zeb Little and Representative Ken Guin.

Other bills of interest to lawyers are:

HB-45

Allows arrest warrants to be executed in a county other than the county or municipality in which it has been issued.

HB-67

A constitutional amendment ratifying and confirming local court costs and compensation of county officials.

HB-91

Concerns workers' compensation and structured settlements.

HB-111

Providing for confidentiality of records and proceedings in mediation.

HB-179

Increases attorneys' annual license fees from \$250 to \$300 per year.

HB-184

Allows the expungement of criminal charges for misdemeanors and traffic offenses where the case was either dismissed or the person found not guilty.

HB-280

Will provide excuses from jury duty where jury service would have an adverse effect on a person's employment or have an undo hardship for caregivers.

SB-118

Provides for expedited hearings in eminent domain cases in probate court.

SB-129

Provides for limited home-rule.

Eleven sentencing reform bills, drafted by the Sentencing Commission, are under consideration. Some of these are:

HB-476

Provides for voluntary sentencing standards.

HB-477

Provides access to juvenile and youthful offender records by judges, prosecutors, probation officers and court personnel.

HB-482

Raises the fines for felonies and misdemeanors.

HB-486

Discretionary medical or geriatric release of inmates.

Next year, the largest election that we have had in many years will occur, with the governor, all constitutional officers, the legislature, five supreme court justices and other appellate court justices, probate judges, circuit clerks, and sheriffs all being elected in one year. With that in mind, there are numerous election reform bills, including a revision of the entire Title 17. This "election code revision" is primarily to clear up inconsistencies in the current law, without making substantive changes. Several bills are making their way through the legislature to make substantive changes. I will enumerate on only a few.

HB-25

Requires computer systems monitoring election results to remain online at all polling places until the polls close at 7:00 p.m.

HB-60

Prohibits PAC-to-PAC transfers.

HB-61

Provides automatic recounts for either side when a ballot measure passes by less than one-half of one percent.

HB-75

Requires paid political advertising to disclose the source of funding for the advertisement.

HB-99

Allows county appointing boards to appoint alternate inspectors and clerks.

SB-220

Requires nonprofit corporations making campaign contributions to disclose the person making donations to the nonprofit corporation.

HB-496

Authorizes uniform voting equipment for use in elections and uniform ballots to be selected by the secretary of state.

HB-528

Allows election officials to be excused from their regular employment.

HB-390

Removes the board of registrars from under the secretary of state's office.

For those wishing to keep up with the legislation on a daily basis, they may consult the Alabama Legislative Information System, *ALISON@online*, at: www.alisdb.legislature.state.al.us/acas/ACASLogin.asp.

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.



By J. Anthony McLain

Association With Foreign Lawyer or Law Firm—What Do the Rules Permit?

Question:

According to your opinion request, your law firm has a growing practice in the area of international trade in which you represent clients who transact business on a global scale. To better serve your clients, your firm would like to establish a network of qualified lawyers in various foreign jurisdictions. In order to accomplish this objective, you propose to enter into several affiliation agreements with foreign counsel. Your letter characterizes these proposed agreements as follows:

“Such agreements would simply be mutual moral commitments to consider using each other when our clients have a need overall. No legal commitments would be undertaken, there would be no sharing of revenues, and neither affiliate would engage in the practice of law outside of the jurisdictions in which they are licensed. We would list the affiliated law firms by name and city on our letterhead as ‘affiliated offices’ or by the use of some similarly descriptive phrase. These agreements would be terminable by either party at any time.”

Your inquiry is whether such affiliation agreements with foreign lawyers are ethically permissible under the *Alabama Rules of Professional Conduct*.

Answer:

The Disciplinary Commission of the Alabama State Bar is of the opinion that the *Alabama Rules of Professional Conduct* do not prohibit an Alabama lawyer from associating or affiliating with a foreign lawyer to assist clients of the Alabama lawyer who are in need of legal services in the country in which the foreign lawyer practices. However, any foreign attorney so associated must be a member of a recognized legal profession in the foreign jurisdiction in which he or she practices and the arrangement must be in compliance with the laws of Alabama and the laws of the foreign jurisdiction.

Discussion:

The *Alabama Rules of Professional Conduct* contain no specific prohibition against an Alabama lawyer associating a foreign attorney to assist in the representation of clients. However, Rule 5.4 of the *Rules of Professional Conduct* does restrict the extent to which an Alabama lawyer may associate or affiliate with a non-lawyer for the purpose of practicing law. Rule 5.4(a) prohibits an Alabama lawyer from sharing legal fees with a non-lawyer. Rules 5.4(b) and (d) prohibit Alabama lawyers from forming a partnership or other professional association with a non-lawyer.

The primary purpose of Rule 5.4 is to ensure that, in the course of representing

their clients, Alabama lawyers exercise independent professional judgment and are not subject to control or supervision by non-lawyers. The Disciplinary Commission is of the opinion, however, that foreign lawyers who are members of a recognized legal profession in the foreign jurisdiction in which they practice would not be "non-lawyers" within the meaning of Rule 5.4, and, therefore, an Alabama attorney who associates or enters into an affiliated relationship with such a foreign attorney would not be in violation of that rule.

Whether a foreign attorney is a member of a "recognized legal profession" requires a factual determination taking into consideration the legal structure of the jurisdiction in which the foreign attorney practices as well as the nature and extent of legal services customarily performed by the foreign lawyer. In most instances, a person who is specially trained to provide legal advice concerning the laws of the foreign jurisdiction

and is licensed by the foreign jurisdiction to represent clients in the legal and judicial system of the jurisdiction would qualify as a member of a recognized legal profession in the foreign jurisdiction.

However, the Disciplinary Commission is aware that in some foreign jurisdictions an individual who is licensed as a *notario* or notary public is permitted to provide legal services which only a duly licensed lawyer could provide in Alabama. An individual who is licensed only as a notary public in a foreign jurisdiction would not be considered, in the opinion of the Disciplinary Commission, a member of a recognized legal profession and would be a "non-lawyer" within the meaning of Rule 5.4. Therefore, an Alabama lawyer may not enter into an association or affiliation with such an individual.

Before affiliating with a foreign lawyer, an Alabama lawyer must take all reasonable steps to ensure that the foreign lawyer is a member of a recognized legal profession authorized to engage in the

practice of law in the foreign jurisdiction and that the arrangement complies with the laws of Alabama and the laws of the jurisdiction where the foreign lawyer practices. If these conditions are met, it is the opinion of the Disciplinary Commission that you may ethically associate a foreign lawyer to assist in the representation of your clients under the terms described in your opinion request.

This opinion is not intended to restrict or impose additional requirements on the formation of any type of professional relationship between Alabama lawyers and lawyers licensed in other states. A lawyer who is duly licensed to practice law in any one of the United States or its territories is clearly a member of a recognized legal profession within the meaning of this opinion.

This opinion is consistent with Formal Opinion 01-423 of the American Bar Association Committee on Ethics and Professional Responsibility and some of the language herein is derived from that opinion. [RO-02-02] ■

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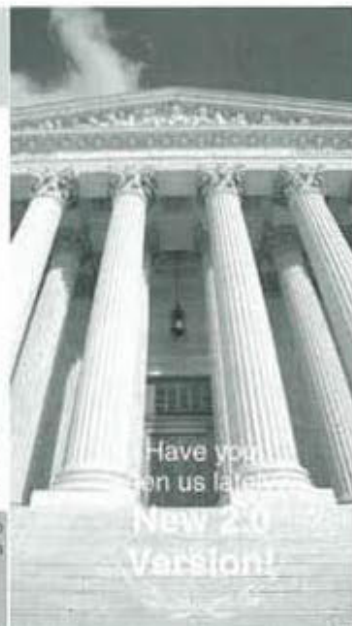
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Pictured above at the ABA's Bar Leadership Institute are Michael Greco, Knith Norman, Bobby Segall and Robert Grey.

• Segall Participates In ABA Bar Leadership Institute

Joining some 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI) in March, was **Bobby Segall**, president-elect of the Alabama State Bar.

The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer associations and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such organizations.

Segall joined ABA President Robert J. Grey Jr. of Richmond, Virginia and ABA President-Elect Michael S. Greco of Boston, in sessions on bar governance, finance, communications and planning.

Various ABA entities briefed the participants on resources available from

the ABA for local, state, national and specialty bar associations and foundations.

The BLI is sponsored by the ABA Standing Committee on Bar Activities and Services and the ABA Division for Bar Services as part of the association's long-standing goal of fostering partnerships with bars and related organizations nationwide. Cooperating ABA staff entities included the Division for Media Relations and Communication Services.

The American Bar Association is the largest voluntary professional membership organization in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. ■

Notices to Show Cause

- **Randal Dean Beck**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2005 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 04-252(A) by the Disciplinary Board of the Alabama State Bar.
- **Deanna Saunders Higginbotham**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2005 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 02-74(A) by the Disciplinary Board of the Alabama State Bar.

Reinstatements

- On December 3, 2004, Montgomery attorney **Deward John Harrison** was suspended from the practice of law in the State of Alabama for noncompliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On March 2, 2005, Harrison came into compliance with the MCLE Rules. On March 18, 2005, the Supreme Court of Alabama made entry on the Roll of Attorneys dismissing the Order of Suspension against Harrison and reinstating him to the practice of law. [CLE No. 04-162]
- On September 15, 2004, Ashland attorney **Kristie Dixon Morris** was suspended from the practice of law in the State of Alabama for noncompliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On December 15, 2004, Morris came into compliance with the MCLE Rules. On February 22, 2005, the Supreme Court of Alabama made entry on the Roll of Attorneys dismissing the order of suspension against Morris and reinstating her to the practice of law. [CLE No. 04-82]

Suspensions

- Effective December 3, 2004, attorney **William Donald Kelly, Jr.** of Columbus, Georgia was suspended from the practice of law in the State of Alabama for noncompliance with the 2003 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 04-137]
- On February 22, 2005, the Supreme Court of Alabama entered an order suspending former Andalusia attorney

James Harvey Tipler for a period of 15 months, effective January 7, 2005.

Tipler is also licensed in the states of Florida and California. He maintains an office in Destin, Florida. Tipler is presently suspended from the practice of law in Alabama, which suspension went into effect on June 18, 2003.

On December 5, 2002, Panel III of the Disciplinary Board of the Alabama State Bar found Tipler guilty of violating rules 8.4(d) and 8.4(g), *Alabama Rules of Professional Conduct*. The board determined that Tipler should be suspended from the practice of law for a period of 15 months. Tipler was also assessed all costs, including an administrative fee.

Tipler represented a female client regarding an assault charge for a fee of \$2,300. Tipler entered into an arrangement whereby he would credit this client's account \$200 each time she engaged in sex with him, and a \$400 credit if she arranged for other females to have sex with him. Tipler admitted that he engaged in sex with this client and another female as a means of crediting their bills for legal services. This was corroborated by a videotape. Tipler also admitted that it was unethical to exchange sexual favors for his attorney's fee.

Tipler appealed to the Board of Disciplinary Appeals of the Alabama State Bar on February 7, 2003. On March 9, 2004, the Board of Disciplinary Appeals affirmed Panel III's order. Tipler then appealed to the Alabama Supreme Court on March 26, 2004. The Alabama Supreme Court affirmed the Board of Disciplinary Appeals on January 7, 2005. [ASB No. 00-102(A), BDA No. 02-05, SC No. 1030994]

Public Reprimands

• On February 4, 2005, Gadsden attorney Russell Allan McGill received a public reprimand without general publication for failing to file a civil action on behalf of a client before the statute of limitations ran. While working with his previous employer, McGill allowed the statute of limitations to run without filing a civil action; failed to notify the client that he had missed the statute of limitations; and misled the client and his previous employer about the case, violations of rules 8.4(a), 8.4(c) and 8.4(g), *Alabama Rules of Professional Conduct*. The Disciplinary Commission noted McGill's cooperation with the investigation and also noted that circumstances beyond his control contributed, at least in part, to the poor case-tracking and

case management that led to the problems in the case. [ASB No. 04-12(A)].

• On February 4, 2005, Birmingham attorney Laurie Boston Sharp received a public reprimand without general publication for violations of rules 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. Robert Roberts hired Sharp on March 6, 2001 to represent him in a dispute over his business lease. Roberts contended that from the time he hired Sharp until July 2002, she did not keep him informed about developments in his case. On July 5, 2002, Roberts received a call from another lawyer and was told that a default judgment had been entered against him and his company for approximately \$20,000. Roberts was unable to get in touch with Sharp and could only talk with the legal assistants

at Sharp's firm. On January 4, 2003, Roberts received a contempt citation for failing to answer post-judgment interrogatories, about which he knew nothing.

Roberts hired two other attorneys to assist him in getting the judgment set aside, but their attempts were unsuccessful. On October 9, 2003, Roberts filed a complaint with the Alabama State Bar alleging that Sharp had neglected his case and had failed to communicate with him. He also hired a lawyer to sue Sharp for legal malpractice. An investigator from the Birmingham Bar Grievance Committee made several attempts to obtain a written response to this complaint, but Sharp failed to provide one. On February 18, 2004, the investigator

(Continued on page 238)

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made one last attempt to reach Sharp by phone. The following day, Sharp faxed him a letter stating that Sharp and Roberts had resolved their dispute and that Roberts had agreed to "withdraw all claims and grievances and complaints filed relating to Sharp." The investigator hand-delivered a letter to Sharp stating that the resolution of the civil matter did not terminate the grievance committee's investigation of Roberts' complaint. This letter gave Sharp an additional three days to submit a written response, which she failed to do. In fact, the first response from Sharp came on June 11, 2004, when Sharp sought reconsideration of the Disciplinary Commission's decision to publicly reprimand her. [ASB No. 03-284(A)]

• On February 4, 2005, Birmingham attorney **Richard Leslie Jones** received a public reprimand with general publication. On September 8, 2004, the Disciplinary Board of the Alabama State Bar found Jones guilty of violating rules 1.3, 1.4(a) and 8.1(b), of the *Alabama Rules of Professional Conduct* and ordered that he receive a public reprimand with general publication. Jones began representing Idora Woods in a workers' compensation case in 1999. Jones ultimately filed suit for Woods against St. Vincent's Hospital on September 21, 2001. St. Vincent's counsel took Woods' deposition on April 2, 2002. Subsequent to this deposition, Jones failed to adequately communicate with Woods about her case. Counsel for St. Vincent's testified at the disciplinary

hearing that after the deposition, she never communicated with Jones about the case again, until April 12, 2004, when a short trial was held. St. Vincent's had previously filed a motion to dismiss for want of prosecution, but the court denied the motion after a hearing and set the case for trial. The Disciplinary Board found that Jones failed to demonstrate that he performed substantive legal work on the case between the date of Woods' deposition in April 2002 and January 2003, the date of her bar complaint. Jones also received three letters from the Birmingham Bar Grievance Committee concerning this complaint but he knowingly failed to respond to any of these letters during the investigation into this matter. [ASB No. 03-060(A)] ■

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Continued from page 241

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