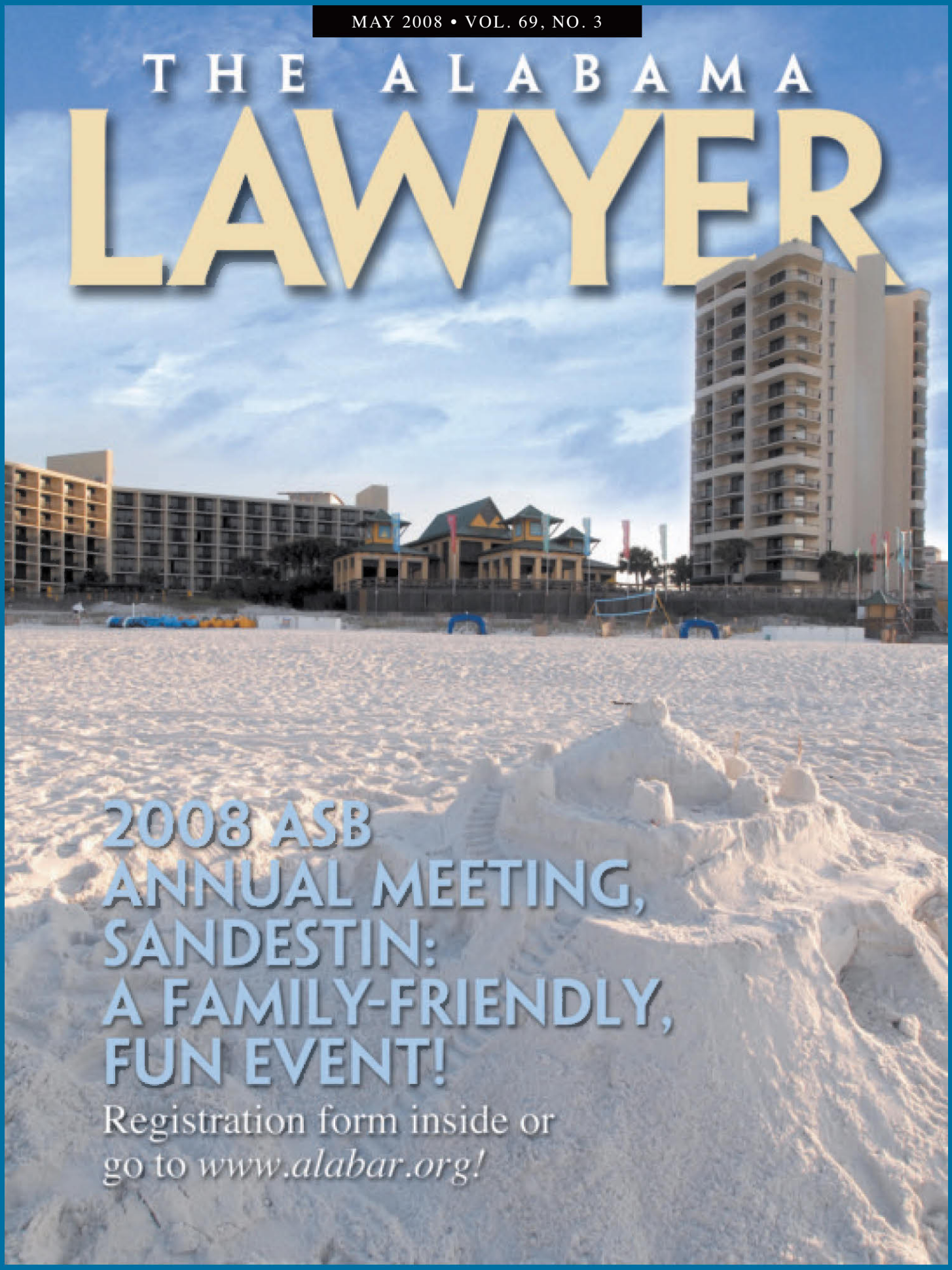
MAY 2008 • VOL. 69, NO. 3

THE ALABAMA LAWYER



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Alabama Bar Institute for Continuing Legal Education

Spring Calendar 2008

Guardian Ad Litem

Friday, April 11
The University of Alabama School of Law, Tuscaloosa

The Administrative Office of Courts and ABICLE are teaming up to provide 6 total hours of CLE for GALs. The AOC will present 2 hours of recertification for existing GALs and ABICLE will present an additional 4 hours of CLE geared especially toward GALs. (Note: This session is approved for 6 hours of CLE credit, which hours cannot be part of the 6-hour requirement for the **initial certification** of GALs. Please contact ABICLE about how to register for this seminar.

6 MCLE Credit Hours

Collections Law

Friday, April 18
The University of Alabama School of Law, Tuscaloosa

No matter whether you represent creditor's or debtor's interests, this seminar will have something for you. Topics include: FDCPA, practical litigation issues, and bankruptcy.

6 MCLE Credit Hours (1 hour ethics)

Divorce from A to Z

Friday, April 25
The University of Alabama School of Law, Tuscaloosa

Just like the title indicates, this seminar will teach attorneys how to handle a divorce case from beginning to end. Join us to learn from the experts on general divorce law, child custody, child support and spousal support!

6 MCLE Credit Hours (1 hour ethics)

To register for these seminars please call 1-800-627-6514 or register online at ABICLE.ORG!

Appellate Practice

Friday, May 2
The University of Alabama School of Law, Tuscaloosa

This program offers you a chance to meet and hear from several appellate judges and successful appellate practitioners. Topics include a view from the 11th Circuit bench, a brief writing session, mandamus and electronic discovery, preserving error, finality and rule 54 (b), and criminal issues. Cosponsored by the Appellate Practice Section of the Alabama State Bar.

6 MCLE Credit Hours (1 hour ethics)

City & County Government

Friday & Saturday, May 9-10
Perdido Beach Resort, Orange Beach, Alabama

Join us for one of our most popular beach seminars! Topics this year will include: economic development, employee leave issues, subdivision development, pre-clearance issues, voting and election law issues, environmental law issues and more. Make your room reservations early by calling the Perdido Beach Resort at 800-634-8001. This annual seminar is cosponsored by the Association of County Commissions of Alabama.

6 MCLE Credit Hours (1 hour ethics)

Intellectual Property

Friday, May 16
The University of Alabama School of Law, Tuscaloosa

If you would like to know the answers to questions regarding intellectual property then join us for this **half-day** seminar and take advantage of an opportunity to learn from the experts about patents, trademarks, copyrights and more!

3 MCLE Credit Hours

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THE ALABAMA LAWYER

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IN THIS ISSUE

ON THE COVER

Sunrise view of the beaches at the Hilton Sandestin Beach Golf Resort & Spa—Photo by Manny Chavez, *www.mcphotos.com*

The site of the 2008 ASB Annual Meeting, the Hilton Sandestin is set against a sparkling backdrop of sugar-white sand and emerald waters. Located within the 2,400-acre Sandestin Golf and Beach Resort Community, this award-winning resort hotel has been northwest Florida's premier Gulf-front resort hotel for more than 20 years. Come find out why July 9-12!

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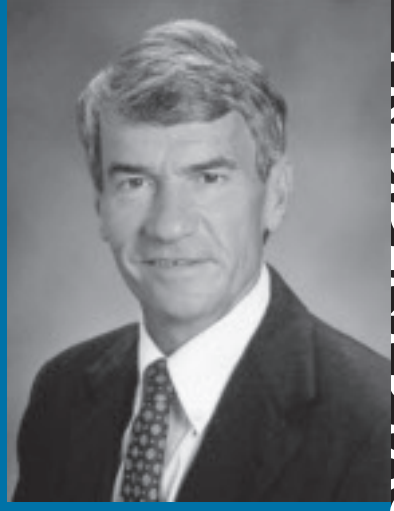

SAMUEL N. CROSBY

While President Sam Crosby has been burning up the roads between his home in Daphne and the far-flung reaches of Alabama he found time to sit down with *Alabama Lawyer* editor Robert Huffaker to discuss the accomplishments of his administration. Sam also addressed the additional goals which he hopes to achieve during the remainder of his administration.

(Attorneys and staff of Stone, Granade & Crosby) Front row, left to right: Shawn Alves, Carolyn Dohn and Sam Crosby. Back row, left to right: Renae Bell, Martha Newell, Brenda Roland and Conrad Kranz

Speaking for Those without a Voice

RAH: Sam, you're about two-thirds through your administration–what do you see as your main accomplishments?

SC: A couple of things immediately come to mind. First, in great acts of leadership, both the Alabama State Bar Board of Bar Commissioners and the Supreme Court of Alabama unanimously adopted an amendment to Rule 1.15 of the *Code of Professional Responsibility*, implementing a mandatory IOLTA plan and appropriate comparability rule for Alabama. This change will mean millions of dollars in funding for indigent legal services to Alabama's citizens. Second, thanks to the partnership of the Board of Bar Commissioners and the supreme court, we were able to increase the pro hac vice fee. All of the additional funds will go to the Alabama Law Foundation for civil legal services to indigent citizens, hopefully adding another $150,000 per year.

PRESIDENT'S PAGE Continued from page 159

RAH: Are those both in effect now?
SC: They both took effect January 1st. With mandatory IOLTA and the new comparability rule, the increase in the interest on each individual IOLTA account is not that significant, but when you multiply the increase by the thousands of lawyers in Alabama who have IOLTA accounts, it is a substantial amount of money. It should more than double the funding for indigent civil legal services and other important charitable efforts.

RAH: Was there controversy over either of these?
SC: There was very little. We worked closely with the banks and counsel for some of the big banks and found it was just more a question of education. Thirty-four other states, including all the states around us except Tennessee, had already implemented mandatory IOLTA. Our efforts went toward making sure all the lawyers in the state and the banks understood what we were trying to accomplish.

RAH: Another goal was to promote the use of teleconferences for bar committees and task forces. How's that?

SC: It's worked out very well. We've provided a toll-free number for every meeting as the 2005 long-range plan encouraged using technology to increase participation by both young lawyers and lawyers in rural areas of the state. Every meeting held this year has included the option of teleconferencing, and it's increased involvement by lawyers throughout the state. Most of the meetings I participate in *are* by teleconference. In a few years some meetings will be via videoconference, while sitting at our computers. Because I live in Baldwin County, I'm aware of the wear and tear involved in running back and forth to Montgomery, and this made me sensitive to the issue.

RAH: What other accomplishments have you noticed?
SC: We've been blessed with remarkable success with the Wills for Heroes Program. The ASB is the fourth state bar in the country to implement, through our Volunteer Lawyers Program, a statewide Wills for Heroes Program. We'll soon become the first state to supplement the clinics being held with a program that allows lawyers to service the first-responders out of their law offices. We've gotten a wonderful response from both the first-responders and volunteer lawyers. I believe that we will come pretty close to providing a will, a durable power of attorney and an advance healthcare directive for every paramedic, fire fighter, police officer and other first-responder throughout the state. People have been very positive about this.

Band practice at Daphne church with Ezra Kwizera (left) and Erin Langley (right)

RAH: What has surprised you the most as president?
SC: Three things have. My friend Boots Gale mentioned this last year, and it's true—we really do have a remarkable and dedicated state bar staff, and executive director in Keith Norman. I may

Sam Crosby, Jr.; Amy Crosby; Ann Crosby; Sam Crosby with Marianne Cheely; Cason Crosby Cheely with Peter Cheely; and Dan Cheely

get into trouble if I mention names, but here are a few examples. Tracy Daniel and Tony McLain have been working very hard and put in some long hours to get the mandatory IOLTA program operational. Linda Lund has worked around the clock to ensure that the Wills for Heroes program is a success. I could go through every single program we have and point to similar efforts by staff members to make sure that the Alabama State Bar programs are effective and that our members are well served. Another surprise is the outstanding public service that lawyers throughout this state are rendering on a daily basis. Virtually every church, synagogue and charity in Alabama has a lawyer within its leadership. There is a wonderful, altruistic spirit among the lawyers in this state. I benefited from this whenever I needed assistance. I was met by the response, "Sam, how can I help?" Finally, I was surprised by the magnificent natural beauty of Alabama. Traveling to almost every corner of the state for functions made me aware of this beauty.

RAH: Any task force news to share?

SC: This year we appointed the ALA Referral Program Task Force. Under the leadership of Laura Calloway, Sandy Speakman and others, the task force is working on a referral program that will be a first among state bars in the country, with the ASB Practice Management Assistance office working with members of the Association of Legal Administrators. Administrators will be referred to young lawyers throughout Alabama to provide them with free one-on-one confidential law firm management and technology assistance. The program is designed to help lawyers who have been in practice for five years or less. Many young lawyers come out of law school with significant debt and little training in managing a firm. The program begins June 1. Then there is the Humor and History Task Force chaired by Rich Raleigh and Cooper Shattuck. Circuits throughout the state are encouraged to preserve, by videotape, the wit and wisdom of senior lawyers for historical and educational purposes. A brief three-chapter film will be the product of the interviews conducted by task force members. It will be available by mid-May thanks to the generosity of Freedom Court Reporting and the hard work of Brad Carr.

RAH: Have there been any humorous moments?

SC: Yes. A video of member benefits was produced by the bar and is available through the ASB Web site, *www.alabar.org*. It was ridiculous how many "takes" it took to get what was needed because Alicia Bennett and I kept flubbing up or laughing when they were rolling the tape. I

PRESIDENT'S PAGE Continued from page 161

can guarantee you that neither Alicia nor I will ever be contacted by the Academy Awards for our performances.

Sam Crosby, Norborne Stone and Fred Granade

RAH: What's special about this year's convention?

SC: The annual meeting will begin with a short film of funny court stories taken from interviews with bar leaders throughout the state. Then there will be a panel discussion on "How Can I Be More Content, Efficient and Productive in My Law Practice?" moderated by Mark White. Panelists include Chief Justice Sue Bell Cobb, Judge U. W. Clemon, Justice Gorman Houston, Dean Charles Gamble, and Leon Ashford. After that, we'll have a short film on leadership within the legal profession, followed by a panel discussion on "Reaching Your Goals" to be moderated by Lenora Pate. Panelists include Fred Gray, Millard Fuller, Dean Ken Randall, Helen Alford, and Tommy Wells. At the Bench & Bar Luncheon, Jan Crawford Greenburg, who is the ABC television correspondent for the United States Supreme Court, will speak. She is a bright, intelligent Alabama native. On the meeting's second day, Howard Dayton, host of the nationally syndicated radio program *Money Matters,* will speak on personal financial planning for lawyers. Later that morning, Danny Sheridan, football analyst for ESPN, will present a program on college football predictions.

RAH: What you see in the future for the ASB?

SC: I was blessed to follow a number of outstanding Alabama State Bar presidents and I have worked closely with the next two presidents, Mark White and Tom Methvin. Both of them are superb lawyers and fine people with a heart for serving this profession. Also, many leaders throughout the state will work to improve the quality of legal services in Alabama and the quality of our court system.

RAH: It seems your predecessors have been concerned with changing the manner of selection of judges, particularly at the appellate level. How's that going?

SC: We are in favor of merit selection but the political reality is that we haven't been able to accomplish that. Part of the state bar's mission statement is to improve the administration of justice, so we'll continue to be in favor of that change. The Board of Bar Commissioners endorsed that change, and before that, non-partisan elections. In working closely with our lawyer-legislators, we decided to identify legislation that was important in improving the administration of justice and that politically we could get signed into law. We focused on two bills. One is a bill to protect the integrity of the mediation process. It will prevent mediators from being subpoenaed into court, having to testify and having to disclose their records. The second is a bill establishing minimum experience requirements for state court judges; so that in order to serve on a district court, you would need to have a law license for three years, to serve on a circuit court, five years, and to serve on an appellate court, ten years. Currently in Alabama a lawyer appointed to defend a death case is required to

have five years of criminal defense experience, while the circuit judge hearing the case could have only had a law license for one day.

RAH: What's on tap for you between now and the end of your term?

SC: We just finished the first Professionalism Consortium in history. It was held at Cumberland Law School and it was great. It was a joint effort of the Alabama State Bar and the Chief Justice's Commission on Professionalism. Chief Justice Sue Bell Cobb appointed former Chief Justice Drayton Nabers to the commission and they are diligently working together to improve professionalism among lawyers and judges in this state and to bolster the public confidence in our legal system. The commission's first director, Judge Harold Crow, is also involved with these efforts.

RAH: What's next for you?

SC: I have numerous speaking engagements scheduled. Serving as president involves a significant management challenge in fulfilling the responsibilities of the office while also taking care of the duties of my law practice. Travel throughout the country is also a part of it. On April 15th, I flew to Washington, D.C. to meet with each member of the legislative delegation from Alabama and encourage them to increase the funding for Legal Services Alabama.

RAH: By the way, what has been the theme of your administration?

SC: Thank you for asking, Robert. The theme is do justice, love kindness and walk humbly with our God. ▲▼▲

Gone fishin' (nice speckled trout!)

Don Siegal, Congressman Artur Davis and Sam Crosby

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If mailing, return entire application with payment to: Alabama State Bar, Attention: Sections c/o Rita Gray, P.O. Box 671, Montgomery 36101-0671; renew online at *www.alabar.org.*

THOMAS J. METHVIN

Pursuant to the Alabama State Bar's Rules Governing the Election of President-Elect, the following biographical sketch is provided of Thomas J. Methvin. Methvin was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2008-09 term and he will assume the presidency in July 2009.

Thomas J. Methvin

Thomas J. Methvin was born in Eufaula in 1963. Tom graduated from the University of Alabama with a degree in corporate finance in 1985. He then earned his law degree from Cumberland School of Law in 1988. Tom's family has been involved in the practice of law in Alabama for over 200 years, and he always knew he wanted to be an attorney.

Tom began his legal career at Beasley Allen in 1988 representing victims of consumer fraud. In 1998, he became managing shareholder of Beasley Allen and continues to hold that position.

Tom has been a very active member of the Alabama State Bar, serving on the Board of Bar Commissioners for nine years, the Executive Council for two years and as vice president in 2005.

Tom is a Fellow in the Alabama Law Foundation and a charter member of the Atticus Finch Society. He is also president of the Montgomery Cumberland Law School Club, and serves on the finance committee for the Access to Justice Commission, formed by Chief Justice Sue Bell Cobb to find new ways to provide access to justice for the poor in Alabama.

Tom is a former president of the Montgomery County Bar Association and of the Montgomery County Trial Lawyers Association. He serves on the Executive Committee of the Alabama Association for Justice.

Tom currently serves on the boards of Let God Arise Ministries, a prison ministry; Brantwood Children's Home, a home for abused and neglected children; the Center for Progress and Opportunity, which explores ways to expand opportunity for all underprivileged Americans; and the Cystic Fibrosis Advisory Panel.

Tom is married to the former Amy Agee of Birmingham, and they have two teenage sons, Rucker and Slade.

ALABAMA STATE BAR

Pledge of Professionalism

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

Therefore, I will

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

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

Date:_____ Signature: _____

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KEITH B. NORMAN

Models of Professionalism

The first ever Professionalism Consortium was held in February at Cumberland School of Law. The consortium was developed by the Chief Justice's Commission on Professionalism. Former state bar president and commission member **Douglas McElvy** chaired the planning committee for the program. The commission was created by former Chief Justice **Drayton Nabers** at the suggestion of the Alabama State Bar and has been embraced by **Chief Justice Sue Bell Cobb**.

The consortium was attended by more than 150 leaders of the legal profession, including federal and state court judges, law school deans and professors, local bar presidents, representatives of various specialty bars, members of the Alabama State Bar Board of Commissioners, and others involved with the legal profession. The half-day event featured a panel discussion entitled "Triage of Professionalism Issues in the Law: Problems, Issues and Visions," moderated by **John Carroll**, dean of the Cumberland Law School. The panelists included **Carol R. Andrews**, professor of law, the University of Alabama School of Law; **Honorable Randall L. Cole**, presiding judge, 9th Judicial Circuit; **John N. Leach**, Helmsing, Leach, Herlong, Newman & Rouse, Mobile; and **Thomas J. Methvin**, Beasley, Allen, Crow, Methvin, Portis & Miles, Montgomery. Panel topics included: 1. A View from the Bench: Problems Prior to Getting into the Courtroom and at Trial; 2. A Snapshot of the Professionalism Concerns that Led to the Formation of the 1887 *Alabama Code of Professional Ethics*; 3. Principles of Professionalism: Complaints Frequently Made Against Judges and How to Improve Professionalism in the Judiciary; 4. A View from the Trenches—Acts of Unprofessional Behavior and Its Impact on the Profession; 5. Setting a Tone by Your Values: What Qualities Do Law Firms Value? What Does Your Firm Do to Promote Professionalism?; and 6. Public

EXECUTIVE DIRECTOR'S REPORT

Continued from page 167

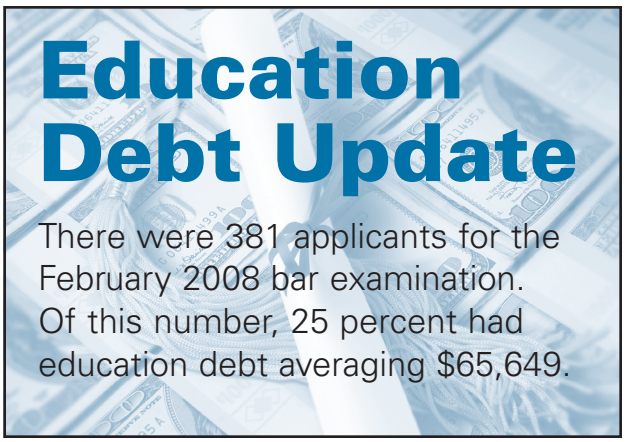
Service and Pro Bono: How Should Lawyers/Judges Contribute to the Community? The interactive panel discussion generated extensive and frank discussions among a broad segment of the bench, bar and law schools. During the consortium, retired law school Professor **Charles Gamble** received the Chief Justice's Professionalism Award. The award's first recipient, former Governor **Albert Brewer**, helped make the presentation.

It has been said that professionalism is "caught" and not "taught." Based on my personal experience, I believe that professionalism can be "caught" and "taught." Growing up in Opelika, I had the good fortune to know most of the community's lawyers. There were four lawyers, in particular, whose legal acumen, public service and professionalism were admired not only in Opelika but across the state. These four were a major influence on me and largely responsible for my choosing to become a lawyer. They are **Yetta Samford**, **C.C. "Bo" Torbert**, **Jacob Walker, Jr**. and the late **Roberts Brown**. I am proud that they have been friends since I was a young boy and that each has been an inspiration and a model of professionalism to emulate. Although they might not be considered mentors in the formal sense, I certainly "caught" the importance of professionalism by observing how they conducted every aspect of their lives.

The consortium engendered much discussion concerning mentoring as an ingredient of professionalism. I believe that mentoring affords the opportunity to "teach" professionalism especially when I reflect on my own experience as a young lawyer and the mentoring I received from several of my law partners, namely **Maury Smith**, **John Bowman** and the late **Frank Hawthorne, Sr**. Each of these lawyers, in his own way, taught me a great deal about the practice of law and how to conduct myself professionally as a lawyer. Unfortunately, many of today's young lawyers do not have access to experienced lawyers who can mentor them. In this regard, **Pam Bucy**, Alabama School of Law professor and bar commissioner, chairs the state bar's Task Force on Mentoring. Professor Bucy and the members of her task force have worked diligently the last two years on a pilot for a statewide mentoring program. The task force will continue to refine the program so that it can, with the help of the bar's experienced lawyers, provide young lawyers with this most necessary form of professional training.

The consortium was a seminal event for the wellbeing and improvement of the legal profession in Alabama and an important catalyst for the Chief Justice's Commission on Professionalism. The commission's new executive director is retired Circuit Judge **Harold Crow.** Under Judge Crow's leadership, we can expect great things from the commission and on the professionalism front. I am delighted that Judge Crow will continue to serve the profession in such a meaningful and important way.

In 2001, then state bar President **Sam Rumore** introduced the Alabama State Bar Pledge of Professionalism (on page 166 of this issue). The pledge was the work of **Pat Graves** of Huntsville, and adapted from the Birmingham Pledge authored by Birmingham lawyer **Jim Rotch.** Jim graciously gave his permission for us to copy the Birmingham Pledge. At the time, about 200 Alabama lawyers chose to adopt the Professionalism Pledge. Because its provisions are as relevant today as in 2000, perhaps it's a good time to reinstitute the Alabama State Bar Pledge of Professionalism and encourage one another to sign and, more importantly, live it. ▲▼▲



N. Q. Adams

N. Q. Adams, a longtime businessman and lawyer, passed away at his home October 9, 2007 at the age of 82.

Adams, a native of Mobile, was born on the 1st day of June 1925, the son of Samuel Boyd Adams and Dora Willie Adams. He attended Barton Academy, Lienkauf and Murphy High School and, after attending Milsaps College, he served in the United States Navy during World War II. He earned his business and law degrees from the University of Alabama. Shortly thereafter, he joined the First National Bank=s trust department.

Mr. Adams was an active member of many Mobile organizations, including Keep Mobile Beautiful, the Camellia Society of Mobile, United Way, Mobile Area Chamber of Commerce, Red Cross, Boy Scouts of America, the Exploreum, and the Mobile Community Foundation. He served on the boards of many major south Alabama corporations, including that of AmSouth Bank.

He served with distinction on the Mobile County School Board and in 1991 he was named Mobilian of the Year.

One of his proudest achievements was the revitalization of Bienville Square in the mid-1980s, which he accomplished by raising funds from the business community**.** He was a dedicated camellia grower and produced many beautiful camellias. He also enjoyed golfing, hunting and fishing.

Mr. Adams is survived by his wife, Eran Jobe Adams; his daughter, Laura Aline Adams; his son, Samuel Russell Adams; his granddaughter, Laura Eran Hanenkrat; and his great-grandson, Damien Hanenkrat, all of Mobile.

—Ian Gaston, president, Mobile Bar Association

Rae M. Crowe

Rae Maurice Crowe, a distinguished Mobile lawyer, died November 24, 2007 at the age of 76.

Rae, a native of Mobile, graduated from Murphy High School, the University of Alabama and, in 1954, the University of Alabama School of Law with honors. He was also an editor of the *Alabama Law Review*. Rae then served his country honorably as a United States Air Force Officer in the Judge Advocate General's Corps.

Rae returned to Mobile in 1956 and entered the practice of law. He was a key member for 50 years in the firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, now Armbrecht Jackson LLP.

He also served as a member of the Executive Committee of the Maritime Law Association of the United States and on the Board of Governors of the Southeastern Admiralty Law Institute. He was a member of the International Law Association, the Tulane Admiralty Law Institute and the U. S. Oil & Gas Association Board of Directors. Rae was listed in "The Best Lawyers in America" and recognized nationally for his counsel and expertise in maritime and oil and gas law.

Rae left surviving him his wife of 54 years, Carol Evans Crowe, and four children: Rae Maurice Crowe, Jr.; Celeste Crowe Grenier, a Birmingham attorney; A. Evans Crowe, a Mobile attorney, and Lillian Crowe Courtney. He is also survived by 13 grandchildren.

–Ian F. Gaston, president, Mobile Bar Association

MEMORIALS Continued from page 169

Judge Michael Orizaba Emfinger

Judge Michael Orizaba Emfinger of Union Springs received his B.A. degree from the University of Alabama and J.D. degree from Cumberland School of Law, Samford University. Mike graduated in the top 10 percent of his law school class and served on the Journal of Trial Advocacy. Following law school, he served as law clerk to the Honorable District Judge Robert Varner. Shortly after completing his clerkship with Judge Varner, Mike served a five-year term as executive director of the State Health Planning and Development Agency (SHPDA). After leaving SHPDA, Mike was appointed District Judge of Bullock County, a position that allowed him to return to his "roots." Judge Emfinger served for over 17 years as district judge, retiring shortly before his death in January of this year.

Judge Emfinger exercised the utmost integrity during his 17 years on the bench, treating each person who came before him with decency. Above all, he demonstrated fairness, impartiality, discretion and an ability to get to the "heart of the matter." His wisdom and compassion were steadfast. Much like his father, Dr. Orizaba Emfinger, Judge Emfinger believed in a life of humility and service.

Judge Emfinger's daughter, Montgomery attorney Brooke Emfinger, remarked, "Dad never desired praise or recognition. During his 17 years of service as Bullock County's district judge, he left an indelible mark on the community by improving the quality of life for the residents of the county. His death is a profound loss for both his family and community. I can imagine no greater father, lawyer, judge or success."

Judge Emfinger is survived by his parents, Ruth and Orizaba Emfinger of Union Springs; wife, Brenda Emfinger; and two children, Brooke Emfinger and Zaba Emfinger.

Adams, David Walter
Moultrie, GA
Admitted: 1996
Died: February 1, 2008

Brewbaker, William Styne Jr.
Montgomery
Admitted: 1970
Died: January 21, 2008

Dickinson, Patricia Gail
Pell City
Admitted: 1985
Died: January 28, 2008

Emfinger, Michael Orizaba, Hon.
Union Springs
Admitted: 1981
Died: January 16, 2008

Fuhrmeister, Patricia Yeager
Columbiana
Admitted: 1980
Died: February 11, 2008

Harris, Alvin Floyd
Mobile
Admitted: 1993
Died: January 15, 2008

Jones, Gorman Robinson Jr.
Sheffield
Admitted: 1943
Died: February 12, 2008

Likins, Floyd Leo Jr.
Opelika
Admitted: 1982
Died: December 16, 2007

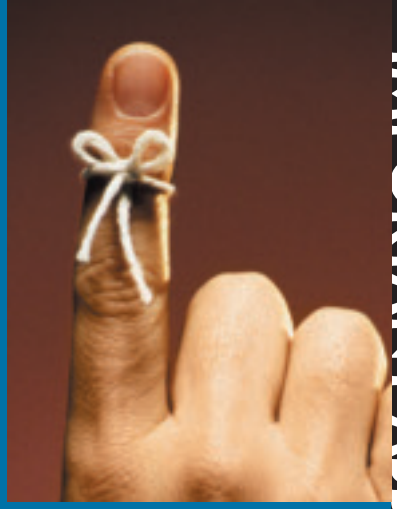
Lloyd, Hugh Adams
Demopolis
Admitted: 1942
Died: February 18, 2008

Terry, Decker Lewis Jr.
Enterprise
Admitted: 1989
Died: February 4, 2008

Thomas, Robert Shelley Jr.
Huntsville
Admitted 1962
Died: January 29, 2008

Thompson, Luther Moorman
Jackson, MS
Admitted: 1990
Died: January 24, 2008

Whitesell, Calvin Mercer Jr.
Montgomery
Admitted: 1988
Died: January 30, 2008



LOCAL BAR AWARD OF ACHIEVEMENT

UNITED STATES BANKRUPTCY COURT

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 2008 Annual Meeting July 12 at the Hilton Sandestin Beach Golf Resort & Spa.

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, 2008. Applications may be downloaded from the state bar's Web site at *www.alabar.org*.

United States Bankruptcy Court

The United States Bankruptcy Court for the Middle District of Alabama no longer uses a post office box. Be sure to use the physical address: One Church Street, B-063, Montgomery AL 36104. ▲▼▲

Chief Justice Sue Bell Cobb, former Governor Albert Brewer and Commission on Professionalism member Ernestine Sapp enjoy a moment with Charles Gamble, former law school dean and professor. Gamble is the recipient of the first Chief Justice's Professionalism Award.

Lawyers and Judges Work to Encourage

Professionalism

Led by Chief Justice Sue Bell Cobb and Montgomery attorney Douglas McElvy, the Chief Justice's Commission on Professionalism invited leaders in the legal profession to attend a Professionalism Consortium in February at Cumberland School of Law in Birmingham. The meeting was entitled a "consortium" (Latin for a partnership) because it was created as a joint effort by the Alabama State Bar and the commission. This conference, the first of its kind in Alabama, was designed to pull together leaders in the law to ensure that attorneys and judges across the state are held to the highest level of professionalism. Law school deans, presidents of legal societies and local bar associations, as well as select leaders from the judiciary and practitioners, were invited to identify common professionalism concerns and to create a plan for addressing those concerns. In fact, Dean John Carroll of Cumberland was credited with first envisioning the plan to create the consortium and offered the law school as the host venue.

At the consortium, Chief Justice Cobb introduced Judge Harold Crow as the first director of the commission. Judge Crow is the past president of the Alabama Circuit Judges Association and highly respected as a former judge and leader among the legal community. The commission's goal is to develop strategies to address professionalism issues among the legal community and to assure Alabama citizens that the Alabama Supreme Court will take necessary steps to confirm that attorneys and judges understand the responsibility that they have to the citizens they serve.

McElvy, the commission's chair and a former state bar president, said, "Upon admission to the bar, an attorney takes an oath to serve in a professional manner. Most Alabama attorneys are conscientious and courteous in their dealings with

their peers, clients, court personnel and the public; nonetheless, it is the goal of Chief Justice Cobb and the commission to promote the highest standards of professionalism." Chief Justice Cobb added, "This commission was first established by former Chief Justice Drayton Nabers and I am very excited that he has agreed to work with me, Judge Crow and the outstanding members of this commission, to ensure that our good lawyers and judges are held to the standards that the public would expect of them."

The commission, comprised of about 25 attorneys and judges in leadership roles throughout the state, will meet soon to determine what steps will be taken to address the concerns addressed at the consortium. One program under consideration is an intervention-type approach to deal "hands on" with unprofessional conduct by attorneys or judges. Alabama State Bar President Sam Crosby of Daphne explained, "I believe that in the near future, Alabama will become the second state in the country to implement an initiative that has been successful in North Carolina in improving professionalism and bolstering public confidence in the legal system. The initiative addresses unprofessional conduct by a lawyer or a judge that does not rise to the level of a violation of the *Alabama Code of Professional Responsibility* or the *Canons of Judicial Ethics*." Another suggestion was to combat problem areas through education. Currently, Alabama attorneys are required to take at least 12 hours of continuing legal education annually, one hour of which must address issues in ethics or professionalism. Chief Justice Cobb suggested, "We need mandatory continuing legal education in Alabama for all our judges—not just for attorneys." Mobile Bar President Ian Gaston added, "Professionalism starts at the top. It is imperative that courts start on time, that judges treat lawyers and all parties with respect and that all rules of court are enforced."

Many attendees offered the commission proposals to consider. Judge Randall Cole, recipient of the Judicial Award of Merit, brought special attention to the state bar's *Pledge of Professionalism* and the *Lawyer's Creed*. Judge Cole urged the Alabama Supreme Court to "consider adopting similar standards for judges in the state." Other suggestions included adoption of standards of professional conduct for judges, expansion of the state bar's mentoring program to include more role models for solo practitioners, promoting the growth of local chapters of Inns of Court, and encouraging participation in *pro bono* legal services and the Volunteer Lawyers Program.

The commission also used the meeting as a time to recognize that most attorneys do strive to act professionally in their calling and to pay tribute to one lawyer in particular for his lifetime commitment to improving the public perception of attorneys. Charles Gamble, former dean and professor at the University of Alabama School of Law who also taught at Cumberland and is perhaps best known for his publications on legal evidence, was presented the Chief Justice's Professionalism Award. The award was presented by Chief Justice Cobb, former Governor Albert Brewer and commission member Ernestine Sapp. Chief Justice Cobb said, "I have known Dean Gamble for many years, and he is the epitome of everything that is good about our profession."

Staff members of the state bar serve on the commission and played a vital role in the planning of the program. Keith Norman, executive director of the state bar, attended the program along with many of the attorneys who serve on the bar's policymaking body, its Board of Bar Commissioners. Norman summarized the events of the day saying, "I think we have given the commission good information with which to work. It was a pleasure to see Dean Gamble rewarded for his outstanding commitment to the bench and bar." ▲▼▲

JOE HILLEY:
Lawyer and Legal Thriller Author

by Charles F. Carr

In 1996, I turned 46 years old and shocked my entire family by asking them to leave Birmingham after 20 years and move with me to Fairhope to open a new branch office for our law firm. After a few months of working by myself, I was fortunate to bring Bill Sisson and Craig Goolsby from the Mobile Brown Hudgens firm in with me.

After getting a few other lawyers in with us, I received another resume. The lawyer's name was Joe Hilley and he too had practiced in Birmingham. I may have passed on Joe at the time, because we really didn't need another lawyer, but I saw that he had worked with Redden, Mills & Clark. I knew from my days in Birmingham that anyone who had worked with Drew Redden, Bill Mills and Bill Clark had to be a real lawyer and not just a civil litigator like me. It was time that our firm had a "real lawyer" in our midst.

Joe Hilley came into the office to meet with me one day shortly after I reviewed his resume. The first thing I thought when I sized him up was that I would want him as my middle guard on my defensive line in a football contest. His shoulders were wider than two of mine. He was not short but he filled up every inch of his body.

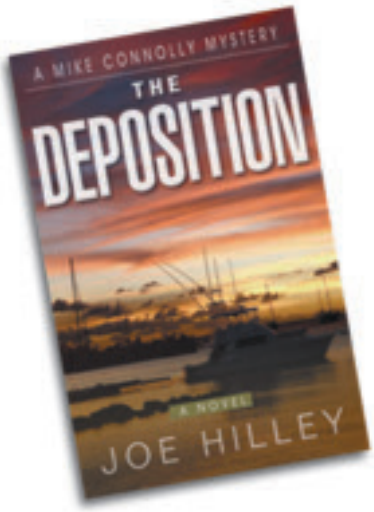
As the interview moved along, I sat fascinated, listening to Joe tell stories about practicing law with Drew Redden and the others at his old law firm. He was packed with short stories and told them in a manner that reminded me of a young Orson Wells.

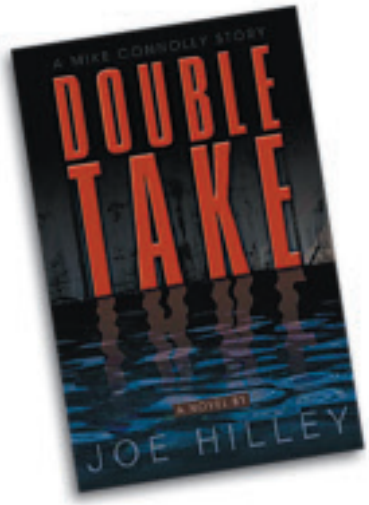
Sisson, Goolsby and the other "Mobile lawyers" in the small branch law firm had changed the landscape of our law practice from what I had been used to in Birmingham. In Birmingham, I had grown up wearing a coat and tie every day. One of the first things Bill Sisson asked me when we started working together was whether I objected to an office policy that allowed the lawyers to dress a little less formally. No coats were ever seen in our office after that day. Joe Hilley fit in well with that atmosphere. Joe's neck was just not built for a coat and tie. Joe also frowns upon wearing socks.

Lunches were a completely different thing in Baldwin County compared to Birmingham. In Birmingham, two or three lawyers might head off to lunch occasionally. More often, we would eat in the office and continue working. If we did go to lunch together as lawyers, the conversation revolved around some tough case or some judge's ruling.

Fairhope lunch was completely different. We probably had 100 percent lawyer attendance at lunch at least three days a week and 60 to 70 percent the other two days. For some reason, "law talk" was forbidden. One day, there was an entire discussion on the difference between beans and peas. While Joe Hilley was with us, we were treated to some fine stories. I had no idea where he got all these experiences but lunches were a lot more fun after Joe came with us.

Left: Author Joe Hilley at one of his book-signings





Joe was a good lawyer and did excellent work for us. I was taken aback when he came in to see me one day and announced that he was leaving. My first impression was that he had finally realized that we weren't real lawyers and that he had teamed up with a firm that knew how to try a criminal case or a divorce case. I wasn't prepared for his telling me that he didn't have another job and that instead he *planned to write a book!* As he talked, I kept wondering if he knew how many people had tried to write a book and quit after a few chapters or how many had written a book and never found a publisher. I knew that for every John Grisham there were a thousand Susan and John Does who wrote and never published.

Joy and Joe Hilley

We tried to talk Joe out of it. I encouraged him to work part time for us and that would give him an extra three to four hours a day to write. He couldn't do it. He said that he needed his entire day free. He wanted to have time with his family and then he wanted to be able to think about nothing but his story without thoughts of work or a caseload.

I wished Joe well, gave him a hug and then he left my life for probably six to eight months without my hearing from him. I realized later that this was my fault. Once again, I had let work and my own life's issues blind me to the problems of good friends from the past.

Joe struggled during this time a lot more than I had realized. He didn't struggle with his writing; he struggled to put food on the table and to simply survive. Perhaps it was Bill Sisson or one of our other lawyers or some other mutual friend of mine and Joe's who told me that Joe had to sell his furniture to afford to keep writing. Now if someone had said that a friend had to sell their IRA stocks or perhaps cash in their insurance or maybe even sell their house, I would have known the person was struggling financially. When I heard Joe was selling his furniture, I knew how desperate things were.

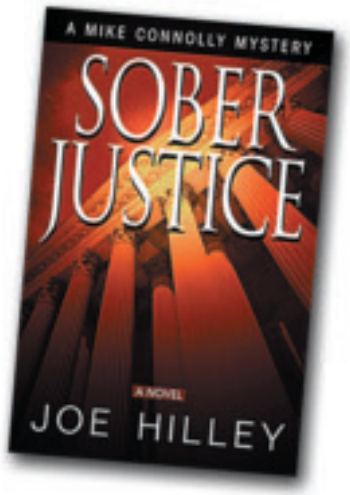
When I talked to Joe, I realized he had become one of my heroes. He had been willing to give up everything in life, other than his family, to reach the one goal that meant everything to him. I thought of people like Martin Luther King and Gandhi. Joe was so much closer to these guys than I would ever be. He was willing to give it all up to do what he understood to be "the right thing."

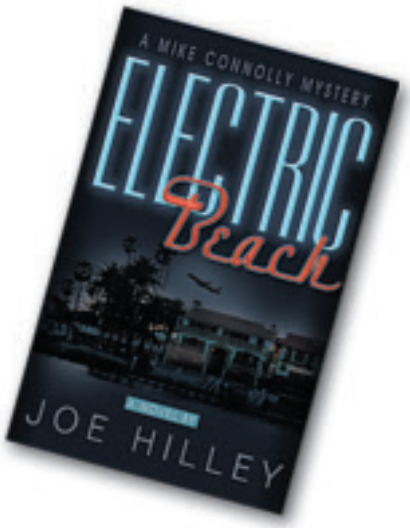
Joe has now written six novels. His debut novel was *Sober Justice*. It follows Mike Connolly, a Mobile criminal attorney who is trying to fight an alcohol addiction and the loss of his family and overcome a reputation that he is destined to be a failure as a lawyer. Connolly is a repeating character in Hilley's novels. His books are set in the Mobile and Gulf Coast areas of Mississippi and Alabama. Other novels include *Double Take*, *Electric Beach*, *Night Rain* and *The Deposition*.

Joe writes good stuff. I have read my share of legal thrillers over the years and Joe's work is as good as anything I've seen. I've wondered why we don't see Joe's sales rank up there with Grisham's. I don't know how many novels Grisham has sold lately, but by the end of 1997, he had sold 20,000,000 hard cover books and 67,000,000 paperbacks.

Scott Turrow has published only one more novel than Joe Hilley, but his books sell like mad. Why haven't you heard of Joe Hilley?

There is so much more to selling books than writing a captivating novel. We all have heard of writers who go from no-names to best-selling writers after being "picked" by Oprah Wynfrey. Joe tells me that his stubbornness, which was such an asset in refusing to give up on writing a novel, has been one of his downfalls in being commercially successful. Joe believed that there was a market for a "clean mystery novel." He refused to sensationalize and he used words that you wouldn't mind your children using. He found himself somewhere between the





writings of the successful Christian authors and the writers of sex-packed, bawdy language-laden best-sellers that we have seen over the years.

If this article makes Joe sound pretty sensational, what does it say about his wife, Joy? Joy was the one who told Joe that they should sell their furniture to get them through those early days before the book was published. She is not just a perfect wife for Joe; she is nothing short of a saint! She and Joe have been married for over 20 years. Joe and Joy have two children, Laura Katherine and Jack. Don't you know these wonderful children will have some beautiful memories of their Dad? He was with them every day during their young years and they probably had no idea of the sacrifices he was making to achieve his goal in life.

I have been blessed to meet so many wonderful people who have had an impact on me in my lifetime. Joe is an inspiration to me. There is no doubt that his books will be best-sellers one day. Material success will never change Joe Hilley. He will always be good to the core and will always have on penny loafers and no socks.

Do yourself a favor. Go to the bookstore or *bn.com* and order one of his books. If you like it, tell your friend who lives in Vermont. Lawyers in Alabama might not be Oprah Wynfrey, but we could be the next best thing. To Joe, in closing, I say, "God Bless you for being such a beautiful chapter in my life." ▲▼▲

Charles F. Carr was a founder of the Carr Allison firm which has offices in Alabama, Florida and Mississippi. He practiced law in Birmingham and Mobile and now is in the Carr Allison Dothan office and resides in his native city of Enterprise.

The Alabama State Bar Diversity in the Profession Committee:

Continuing to Build a More Inclusive Bar

By Aldos L. Vance

It was a Saturday in January like any other, yet markedly different. On January 12, 2008, the Birmingham Civil Rights Institute was filled with attorneys from across the State. We gathered to hear from distinguished members of the Alabama State Bar ("ASB"), all of whom entered the practice of law in a very different era. The program was organized by Jefferson County Circuit Court Judge Eugene Verin and the Magic City Bar Association ("MCBA") as part one of their Silver Anniversary Leadership Series. Judge Verin and the MCBA collaborated with the Birmingham Civil Rights Institute.

In no particular order, the illustrious panel included United States District Court Judge for the Northern District of Alabama U.W. Clemon, Demetrius C. Newton, Earl Hilliard (former United States Representative for the Seventh District of Alabama), J. Richmond Pearson (former Jefferson County Circuit Court Judge, United States Assistant Attorney, and former State Senator), J. Mason Davis, Ralph D. Cook (former Justice of the Supreme Court of Alabama), and W. L. Williams. All of the panelists were African-American. Among the memories and history shared throughout the day, the distinguished panelists retold breathtaking accounts of their entry into the ASB. To put it mildly, they overcame the stifling racial animus of that era to become members of our bar and leaders in our profession.

Undoubtedly, there are similar stories to be told by the first women who joined the bar as well as other firsts. As the crowd listened to the courageous stories of these legal trail blazers, I thought about how many of us often take our admission and the benefits of the ASB for granted. Unlike our heroes and heroines of the past, once we pass the bar examination we are all automatically included in the ASB.

In 1923, the Alabama Legislature adopted legislation integrating the ASB with state government.[1] The ASB's enabling legislation can be found in Ala. Code § 34-3-1 *et seq.*, (1975). Passing the bar exam allows for automatic and mandatory inclusion in the ASB. Mandatory membership allows the Supreme Court of Alabama to better regulate the legal profession. The dual role of the ASB is as follows: (1) the state bar is the licensing and regulatory agency for lawyers in Alabama, and (2) it is a private association with responsibilities largely of a service nature which benefits the legal profession as well as the general public.[2] Even under this legislation, it was the sacrifice and concerted effort of minority pioneers, in the broadest sense, which produced a diverse bar.

As of February 2008, ASB membership totaled 15,580. Current ASB membership is comprised of the following:[3]

Race		Gender	
Caucasian	93.6%	Male	71.8%
African-American	5.9%	Female	28.2%
Other	0.5%		

ASB members come from various backgrounds and walks of life. Because of our varied backgrounds, the ASB in or about 1988-1989 formed the Minority Participation and Opportunity Committee (MPOC). This committee was formed by then ASB President Gary Huckaby. Subsequent ASB past presidents also supported and advanced the MPOC. The MPOC's name was later changed to the Diversity in the Profession Committee.

Under the ASB's first African-American president, Fred D. Gray, Sr., active participation by minorities in the bar became evident and the Diversity in the Profession Committee was reborn. Mr. Gray served as bar president from July 2002 to July 2003. Mr. Gray recognized that while the membership role of the ASB was diverse, the overall active membership was not.[4] Diversity, as he defined it, included "gender, race, geographic region, age, and the whole gambit."[5] This definition is all inclusive.

Under Mr. Gray's leadership a Task Force on Diversity was appointed and chaired by former Justice Hugh Maddox of the Supreme Court of Alabama and former Governor Albert Brewer. Past bar president Warren B. Lightfoot and J. Mason Davis co-chaired the task force. In shaping its objectives, the task force adopted this mission statement "[t]o increase racial and gender diversity at all levels of the legal profession in Alabama by promoting full and equal participation in the legal profession by minorities and women."[6] The task force did an outstanding job in establishing both short-term and long-term recommendations. These recommendations are a blueprint for promoting diversity in the ASB.

Subsequent past bar presidents continued to support diversity efforts. Current ASB President Samuel N. Crosby has given great support to the Diversity in the Profession Committee. The committee is guided by the accomplishments of the Task Force on Diversity. The task force's blueprint directs the committee to: (1) coordinate with other entities within the association and cooperate with national, state and local minority bar associations, judges associations, law schools, law firms and other professional entities to increase educational, professional, and associational opportunities for minorities and women; (2) evaluate the performance of the association and the profession in this regard; (3) devise and report worthwhile programs conducted by other bar associations throughout the country with special emphasis placed upon short term and long term goals to increase the number of minorities and women in the profession; (4) assist the Young Lawyer's Section in its annual Minority Law Conference and programs to promote diversity; (5) act as a clearinghouse to publicize and disseminate written plans and promote their implementation; (6) continue to study and track trends of issues facing minorities and women lawyers; and (7) encourage greater minority participation in the organized bar. Armed with this blueprint, the committee is assisting the bar in reaching every aspect of the profession.

Members of the Diversity in the Profession committee are appointed for staggered terms. Current members of the committee are from Huntsville, Decatur, Birmingham, Tuscaloosa, Montgomery, McIntosh, and Mobile. Its members also differ by age, gender, race and practice area. This year the committee targeted several of the short-term and long-term recommendations previously identified by the task force. Understanding that diversity issues are ever changing, the committee, in keeping with the goals and objectives of the task force, continues to study and track issues facing minorities and women lawyers.

In continuing to advance the goals of the ASB, the committee is dedicated to strengthening the bar's diversity. Specifically, the committee has targeted five areas for the 2007-2008 term: (1) partnering with established ASB mentor program with an emphasis on diversity; (2) getting involved in and establishing programs for high school students; (3) contacting four-year colleges about pre-law programs targeting diverse students and assist in advancing diversity in the profession at the collegiate level; (4) continuing to research and compile information on needs assistance subsidy program for incoming law students in order to address these issues; and (5) continuing to research and compile information on keeping diverse attorneys in state in order to address these issues. Addressing these issues will require the continued diligence of future committee members and members of the bar.

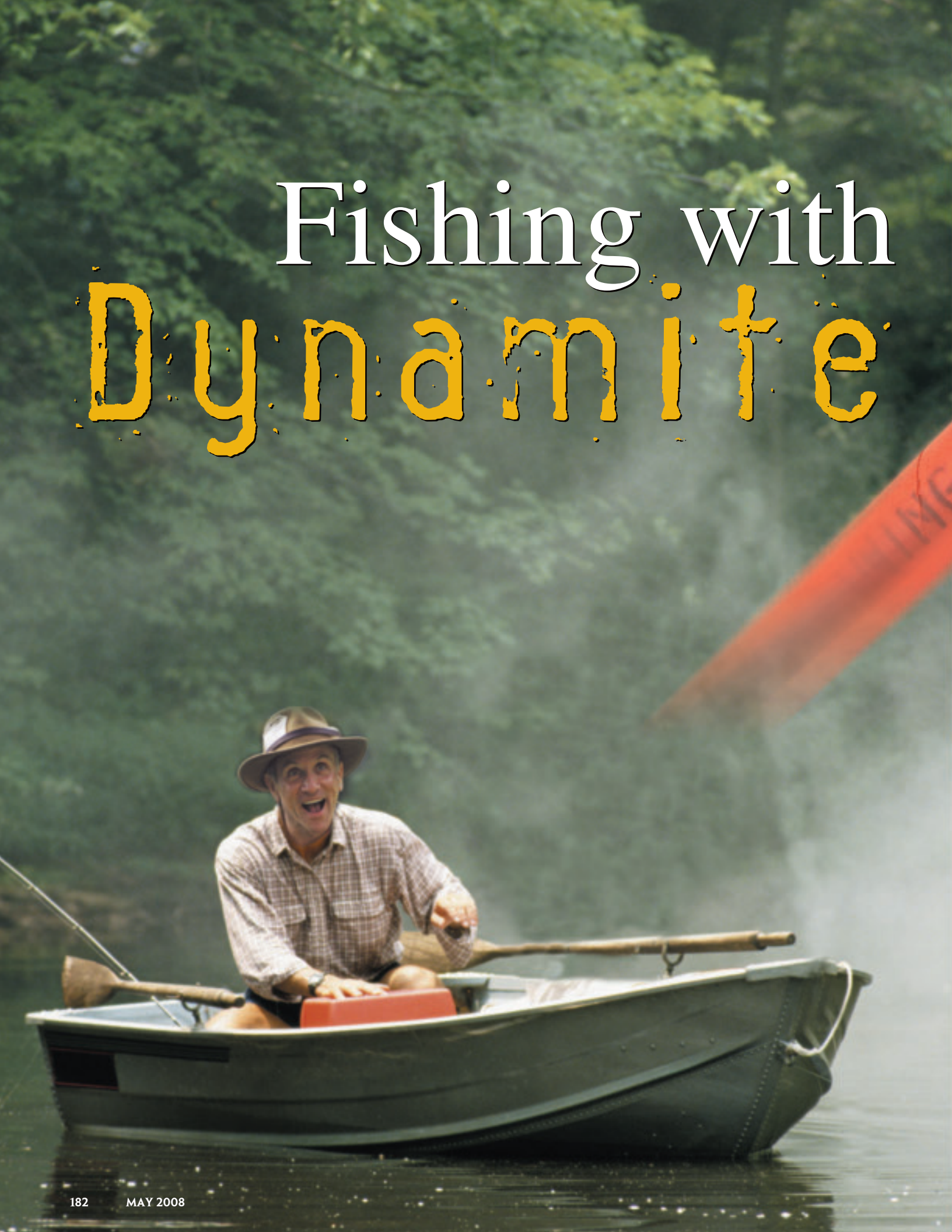
As an extension of the bar, the Diversity in the Profession Committee recognizes the contributions of all of its members and the benefits of a diverse bar. Accentuating these benefits will enrich our legal profession. It has been said that diversity is each of us and all of us. The committee and the ASB are devoted to making this a reality. ▲▼▲

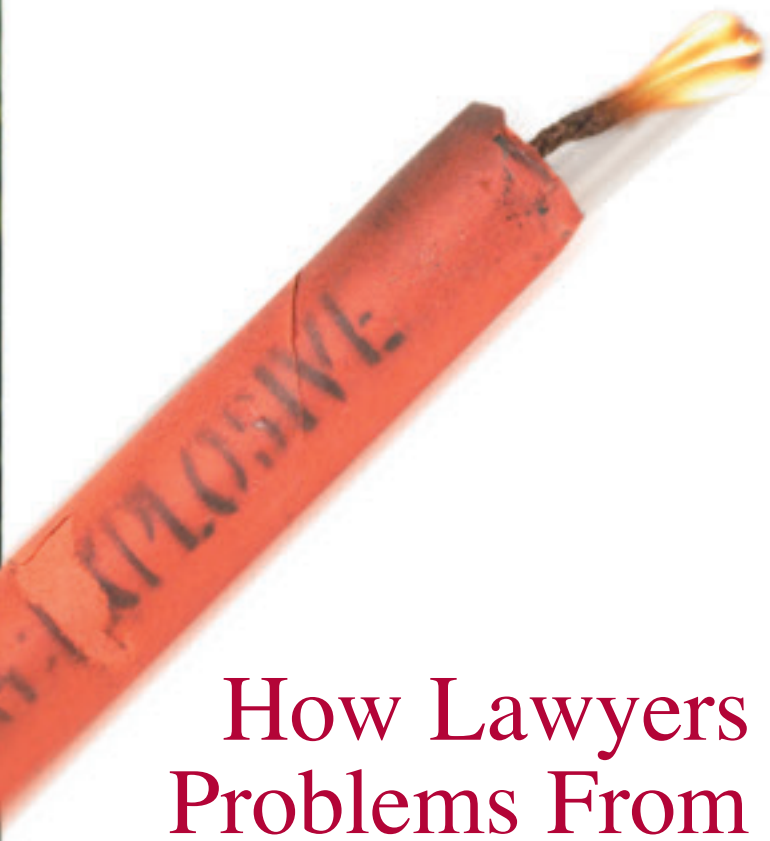
Endnotes

1. *Alabama State Bar Backgrounder* (last visited on Feb. 28, 2008) <www.alabar.org/media/backgrounder.cfm>.
2. *Id.*
3. *Membership Statistics and Information* (last visited on Feb. 28, 2008) <www.alabar.org/members/information.cfm>.
4. Fred D. Gray, Sr., *The Alabama Lawyer*. The President Reflects on a Momentous Year, Vol. 61, No. 5 at 212 (July 2003).
5. *Id.*
6. Alabama State Bar Task Force on Diversity Minutes (Dec. 12, 2002).

Aldos L. Vance is a partner in the Birmingham office of Starnes & Atchison LLP and was admitted to the Alabama State Bar in 2000. He is a co-chair of the state bar's Diversity in the Profession Committee.

Fishing with Dynamite





How Lawyers Can Avoid Needless Problems From "Pretextual Calling"

By Will Hill Tankersley and Conrad Anderson IV

The HP Scandal

In January of 2006, Hewlett-Packard's chairman of the board, Patricia ("Pattie") Dunn, was blind-sided by yet another boardroom leak. The online news source, CNET, had just published an article discussing confidential HP long-term business strategy. Plainly, an insider–a director–who opposed the plan had provided the scoop to CNET in hopes of stymieing the new plan. Dunn decided it was high time to look for the leak. David A. Kaplan, *Phone-Records Scandal at HP*, Newsweek Business–MSNBC.com, *http://msnbc.msn.com/id/14687677/site/newsweek/print/1/displaymode/1098/*.

Dunn and her fellow leak-hunters did not waste time and energy reading corporate e-mails, tapping phones or conducting video surveillance. Rather, they simply hired an investigator to procure the directors' phone records and review them for contacts with CNET journalists. The investigator obtained the records by calling each director's telephone service provider, pretending to be the director, and requesting that his telephone records be sent to him by e-mail. The service provider then sent the call log to an e-mail account set up by the investigator and, from that point, the hunters had their quarry in plain sight. *Id.*

The investigation ultimately was successful, or so it seemed at the time. At a board meeting in April 2006, Dunn identified George A. Keyworth as the source of the leaks and he acknowledged such. Although the hunt for the leak was over, Dunn's problems were just beginning. Tom Perkins, a wealthy venture capitalist and fellow HP director was enraged about the secret investigation. In his view, Dunn's leak-hunting methods were illegal or at least unethical and he believed that, like everything else concerning HP in the previous months, the investigation should be revealed to the public. *Id.*

Dunn was confident about her decisions. She had consulted both the general counsel and chief ethics director of HP prior to taking any action and, according to Dunn, took their advice to mean that the investigative practice was permissible. Even Larry Sonsini, the Silicon Valley legal powerhouse and HP's outside counsel, told the board after the conclusion of the investigation that pretexting "was not generally unlawful." Damon Darlin, *Deeper Spying Is Seen in Hewlett Review*, New York Times, September 18, 2006, *http://www.nytimes.com/2006/09/18/technology/18hp.html.*

Dunn and her advisors, however, failed to anticipate the catastrophic fallout from the secret investigation. There were hearings on Capitol Hill, criminal charges were brought and a civil lawsuit was filed. As a result, Hewlett-Packard paid $14.5 million to the State of California, Dunn was removed from her position as board chairman and two of the top counsel for a Fortune 500 company lost their jobs. Other members of the HP Board maintained that they were unaware of the investigation except in the most vague and imprecise terms.

Ultimately, prosecutors offered to dismiss four felony charges against Dunn in exchange for a guilty plea to one misdemeanor. She refused the deal, but shortly after an announcement that she was suffering from a resurgence of cancer, the judge dismissed all criminal charges against her. Matt Richtel, *Charges Dismissed in Hewlett-Packard Spying Case*, The New York Times, March 15, 2007, *http://www.nytimes.com/ 2007/ 03/15/technology/ 15dunn.html*. Though Dunn appears to be out of the woods, HP itself is still dealing with the fallout. In August 2007, reporters for CNET whose phone records were accessed during the pretextual investigation filed suit against the company in California State Court. Reuters, *3 Reporters Sue H.P. in Spying Case*, The New York Times, August 26, 2007, *http://www.nytimes.com/2007 /08/16/business/16hewlett.html.* Perkins resigned as an HP director and, otherwise, seems to be resting comfortably on the *Maltese Falcon*, his 289-foot $150 million yacht.

Consequently, "pretextual calling" has become an investigative tool that is more feared than understood. Some pretexting is plainly illegal. However, other "pretexting" is not only legal and sometimes necessary, but also expressly permissible according to case law and the opinions of authorities on professional ethics–including Alabama's own Center for Professional Responsibility. This article offers guidelines to determine when and how pretexting can be legal and appropriate.

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What is "Pretexting"?

Pretexting is a simple investigative tool: The investigator approaches the target and, under the "pretext" of being someone else, obtains information that the target would ordinarily provide to such a person. It is this combination of a disguised identity and freely given information that makes pretexting a valuable, but potentially risky, technique.

The information acquired through such practices, if admissible in court, could have a dramatic effect on the outcome. Pretexting has a powerful confessional element with unguarded (and presumably truthful) responses by an investigative target. Information generated through pretexting may be more readily obtained in comparison to traditional discovery methods. Indeed, use of such a technique could reveal that the target is behaving lawfully, thereby avoiding a conflict. Such "deceptive" investigative methods do, however, raise legal and ethical questions. Even if the laws permit them and the ethics rules technically do not proscribe them, are these seemly tactics for lawyers to use or should they be left to others? How will a jury react to such investigative techniques?

Existing Laws

The criminal consequences of the actions by Dunn and her HP advisors were never conclusively determined. They were charged under California laws with fraudulent wire communications, wrongful use of computer data, identity theft and conspiracy to commit each of those crimes. Before a trial commenced, however, charges against Dunn were dropped, one of the HP advisors entered a guilty plea and the charges against the others were dismissed after they agreed to perform community service. Though it is not entirely clear whether the dismissal of Dunn's charges was due to innocence or illness, the unsettled legal landscape in this emerging area of law likely played a role. Matt Richtel, *Charges Dismissed in Hewlett-Packard Spying Case*, The New York Times, March 15, 2007, *http://www.nytimes.com/2007/03/15/ technology/15dunn.html.*

As a result of the HP imbroglio, Congress resolved some of the uncertainty about the legality of Dunn and her advisors' activities by passing the Telephone Records and Privacy Protection Act of 2006 ("TRPPA"). Pub. L. No. 109-476 (2007). The TRPPA prohibits obtaining confidential phone records through the use of false or fraudulent statements, representations or documents. It also prohibits purchasing or receiving the records from another, preventing attempts at outsourcing or willful ignorance. Penalties include fines of up to $250,000 and up to ten years in prison. *Id.*

Prior to the passage of the TRPPA, the Federal Trade Commission used its powers to halt the operations of several online data brokers pedaling consumer phone records. The FTC

Act prohibits "unfair practices," defined as those that are likely to cause consumers substantial injury not reasonably avoidable and not outweighed by benefits to consumers or competition, and gives the Commission authority to seek injunctive and other equitable relief in federal district courts. 15 U.S.C. § 45(a) and 53(b). In May 2006, the FTC filed five lawsuits alleging that the defendants in each case violated the Act by obtaining and selling consumer telephone records without consent. The FTC learned of the activities through the defendants' Web sites advertising their ability to obtain confidential customer phone records. The FTC settled three of the cases and won the other two, with the courts in each entering permanent injunctions barring the defendants from selling consumer phone records and personal information and requiring disgorgement of the profits from their activities.[1] The FTC is currently litigating a sixth suit filed in February 2007.[2]

In early 2007, the FTC was also behind an effort to pass the "Prevention of Fraudulent Access to Phone Records Act," H.R. 936, a bill very similar to the TRPPA but which would allow the FTC to recover civil penalties from violators–currently, injunctions and disgorgement are the only remedies available under the Act. The bill did not make it out of committee.

While the TRPPA clearly protects consumers' telephone records, it does nothing more. However, there are other laws in place relating to the ability to gather or disclose other personal information. For example, the Gramm-Leach-Bliley Act ("GLBA") is now the centerpiece for financial privacy. 15 U.S.C. § 6801 *et seq.* The GLBA requires financial institutions to provide notice of their privacy practices to customers and give them the opportunity to choose how their personal financial information (PFI) is shared. Additionally, the GLBA has a "Safeguard Rule" which requires institutions to design, implement and maintain procedures to protect customer information. The GLBA also contains a specific pretexting section which makes it a crime to obtain, or attempt to obtain, customer information from financial institutions through false, fictitious or fraudulent statements or representations. Penalties include fines of up to $100,000 per violation for organizations, $10,000 per violation for officers and directors, and up to five years in prison.

In addition to the GLBA, consumers find some financial privacy protection from the Fair Credit Reporting Act ("FCRA"). 15 U.S.C. § 1681 *et. seq.* The FCRA allows a person to obtain a consumer's credit report where the person has a "legitimate business need" either in connection with a business transaction initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account. 15 U.S.C. § 1681b(3)(F). Several courts have examined whether a party to litigation has a "legitimate business need" for obtaining an adverse party's credit report and generally find such a need where the litigation concerns the collection activity on an account. *Myshrall v. Key Bank Nat'l Ass'n*, 802 A.2d 419 (Me. 2002); see also *Allen v. Kirkland*, 1992 WL 206285, 2 (N.D. Ill. August 17, 1992) (permitting law firm to obtain a consumer report to prepare for litigation over money owed to its client).

The 8th Circuit held in *Bakker v. McKinnon*, 152 F.3d 1007 (8th Cir. 1998) that obtaining a consumer's credit report to determine whether the consumer is judgment proof for settlement purposes is not a "legitimate business need." *See also Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998) (attorney's use of credit report solely in preparing for litigation not a permissible purpose); *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991) (obtaining adverse party's credit report to determine whether they would be able to satisfy a judgment not a permissible purpose).

In a case specifically concerning pretexting, the Superior Court of Massachusetts held that a group of defendants violated the FCRA when they impersonated consumers to obtain their credit reports and subsequently sold their personal financial information. *Commonwealth v. Source One Assocs.*, 10 Mass. L. Rep. 579 (Mass. Super. Ct. 1999). Such violations of the FCRA can carry severe criminal and civil consequences. The statute provides for fines and/or imprisonment for up to two years for "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. §1681q. A person who obtains a consumer report under false pretenses is also liable to the consumer reporting agency for the greater of $1,000 or actual damages. 15 U.S.C. § 1681n(b). For willful noncompliance with the FCRA, a person will further be liable to the individual consumer for actual loss and possibly even punitive damages. 15 U.S.C. §1681n(a). All of these provisions permit recovery of court costs and attorneys' fees.

Businesses and individuals who use consumer reports for business purposes are also subject to the "Disposal Rule" which requires implementation of measures to dispose of consumer information to prevent unauthorized access or use. 16 C.F.R. § 682 (2007). The Disposal Rule does not have strict requirements applicable to every organization, but rather is flexible and allows for an individualized determination of reasonable measures based on the sensitivity of information, the costs and benefits of various disposal methods and changes in technology.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") does not specifically address pretexting. However, HIPAA requires "covered entities" to safeguard private health information (PHI). 42 U.S.C. § 1320(d) *et seq.* A pretexter attempting to gather HIPAA-protected information nevertheless may be subject to liability under other tort theories such as trespass, fraud and the like.

Notwithstanding the dangers of pretexting for telephone records, PFI or PHI, pretexting could be particularly useful in Intellectual Property ("IP") investigations. For example, pretexting might help a manufacturer determine whether a retailer was infringing on or diluting the manufacturer's trademark. An investigator could simply go into the store and, under the pretext of being an ordinary consumer, engage in a transaction. No telephone, PFI or PHI

...the first consideration is whether the lawyer can ethically engage in the act in question.

records are obtained so none of the previously mentioned laws are violated. Nevertheless, would this pretexting as part of an IP investigation be permissible under the *Alabama Rules of Professional Conduct* ("Rules")? The author of this article posed this very question to the Alabama State Bar's Center for Professional Responsibility ("Center") and the answer was a narrow "Yes." 2007-05 Op. OGC (2007) ("Center's Pretextual Calling Opinion").

Alabama Rules of Professional Conduct

This author submitted to the Center a request for a formal opinion about whether investigators could be hired to investigate intellectual property rights violations before litigation has commenced. In its opinion, the Center stated: **"During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public."** *Id.*

In reaching this conclusion, the Center navigated through the applicable provisions of the Rules and examined the handful of decisions from other jurisdictions addressing this issue:

- Rule 8.4(a) (Misconduct) prohibits a lawyer from circumventing the Rules by using an agent to do what the lawyer is ethically forbidden to do. Therefore, the first consideration is whether the lawyer can ethically engage in the act in question. *Ala. R. Prof. C.* 8.4(a).
- Rule 4.2 (Communication with Person Represented by Counsel) states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Ala. R. Prof. C.* 4.2. The Center concluded that this Rule does not apply in a pre-litigation investigation because one cannot be a "party" until a lawsuit has been filed. 2007-05 Op. OGC (2007).
- Under Rule 4.3 (Dealing with Unrepresented Person), lawyers dealing with an unrepresented person should not state or imply that they are disinterested, nor should they allow their roles as lawyers to be misunderstood. *Ala. R. Prof. C.* 4.3. The Center consulted relevant case law and concluded that this rule applies only where the lawyer is "acting in his capacity as a lawyer–'dealing on behalf of a client'" and not where he acts in the capacity of an investigator and approaches the unrepresented person in the same manner as the general public would. 2007-05 Op. OGC (2007).

Finally, Rule 8.4(c) (Misconduct) provides that it is professional misconduct to "[e]ngage in conduct involving dishonesty,

fraud, deceit or misrepresentation." *Ala. R. Prof. C.* 8.4(c). In interpreting this Rule, the Center opined that it is not meant to apply to misrepresentations as to identity and purpose when used "to detect ongoing violations of the law where it would be difficult to discover those violations by any other means." 2007-05 Op. OGC (2007).

Accordingly, the Center's Pretextual Calling Opinion is narrowly tailored to permit (1) a pre-litigation investigation of (2) possible infringement of intellectual property rights where (3) services are sought in the same manner and on same basis as the general public and (4) only identity and purpose are misrepresented.

IP Cases Involving Pretextual Calling

Courts around the United States have reached conclusions very similar to the Center's Pretextual Calling Opinion. However, some courts permit more latitude to pretextual calling than the Center would bless in its Opinion:

- In *Apple Corps v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998) ("*Apple Corps*"), the plaintiffs and defendant were operating under a consent order in which the defendant was required to refrain from selling stamps featuring the plaintiff's protected trademark. To test compliance with the order, plaintiffs' attorneys and investigators called the defendant's sales representatives and attempted to order the stamps under the pretext that they were ordinary consumers. *Id.* at 462-64. When the defendant moved for sanctions due to the "deceitful" conduct, the court refused, stating that the rule "does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes." *Id.* at 475. The court explained: "The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations." *Id.* Unlike the Alabama Center's Pretextual Calling Opinion, *Apple Corps* plainly permitted pretextual calling in connection with litigation that had been filed.
- In another trademark infringement case, private investigators were hired to go into the defendant's furniture showroom to determine if they were engaging in a "palming off" scheme–using the plaintiff's trademark to lure customers into the store and then selling an inferior piece of furniture which they falsely told customers was the plaintiff's. *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 120 (D.N.Y. 1999) ("*Gidatex*"). In *Gidatex*, the court concluded that even though no lawsuit had been filed, the salespersons consulted by the investigators were parties and were represented by counsel because of the years of prior litigation between them, thus implicating the rule. *Id.* at 125. The court nevertheless refused to enforce the rule, noting that its purpose is protection of the attorney-client privilege, *i.e.*, to prevent parties from inadvertently making statements in the absence of counsel. *Id.* at 126. The undercover investigators posing as ordinary customers did not cause the sales clerks to say or do anything they otherwise would not have. *Id*. Again, the *Gidatex* court gave lesser weight to actual or threatened litigation than did the Center.

- In a recent opinion from a New York District Court, Cartier, the renowned jeweler and watchmaker, had reason to believe that an independent jeweler was violating its trademark by adding diamonds to the bezel of cheap Cartier watches and passing them off to customers as a more expensive model. *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354 (D.N.Y. 2005). A private investigator was hired to attempt to purchase one of the fake watches and successfully did so. *Id.* at 356-57. When Cartier sought an injunction, the defendant asserted that the use of undercover investigators amounted to "unclean hands" and thus the injunction should be denied. *Id.* at 362. The court disagreed and relied on *Gidatex* and *Apple* in finding that this was an accepted means of investigation. *Id.*

Pretextual Communications in the Employment Context

The practice of pretextual calling has also been permitted to detect unlawful discrimination. In *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876 (D. Ill. 2002), investigators were sent to Shell gas stations and, under the pretext of being customers, tested whether Shell employees were requiring black patrons to prepay while allowing white customers to pay after they had pumped their gas. As in the previous cases, the court ruled that even though litigation had already commenced, it was permissible to have investigators seek such services in the same manner as the general public, and it also was permissible to videotape such transactions. *Id.* at 880. The rule prohibiting contact with represented parties (Rule 4.2), it reasoned, is meant to prevent interviewing them without counsel or coaxing them into saying things they otherwise would not. *Id.* at 878 (citing *Guillen v. City of Chicago*, 956 F. Supp. 1416, 1427 (N.D. Ill. 1997)). Rule 4.2 (Communication with Person Represented by Counsel) is not implicated when the normal business routine is simply observed. *Id.* at 880. The court suggested, however, that certain conduct would go too far, such as tricking employees into doing or saying things outside of the normal business routine, interviewing them or asking them to fill out questionnaires. *Id.*

Courts have applied the same rationale to permit undercover investigation of housing and employment discrimination, where a "tester" poses as an interested tenant or prospective employee. *See Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990); *Wharton v. Knefel*, 562 F.2d 550, 554 n. 18 (8th Cir. 1977); *Hamilton v. Miller*, 477 F.2d 908, 909 n. 1 (10th Cir. 1973).

The practice of pretextual calling has also been permitted to detect unlawful discrimination.

The Outer Limits of Pretextual Calling

Even in an IP context, the courts of other states have put limits on pretextual calling. In *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) ("*Midwest Motor Sports*"), the defendant's lawyer hired a former FBI agent to pose as a customer at the plaintiff's snowmobile dealership and secretly record conversations with employees. The agent hoped to obtain admissions from the employees that they had suffered no loss of business from the defendant's conduct and therefore had no damages. *Id.* at 695. The court concluded that this type of conduct violated the rule prohibiting dishonesty and misrepresentations, and it sanctioned the conduct by denying the defendants' use of the statements as evidence. *Id.* at 700-01.

Midwest Motor Sports is somewhat different from the other cases in that the pretexter did not seek to uncover discriminatory practices, trademark violations or other "ongoing violations of the law." Rather, the investigator hoped to catch the employees *saying* something that could be used against the plaintiff in court after litigation had already begun. The court explained that admissions concerning damages constitute "information that could have been obtained properly through the use of formal discovery techniques" rather than "resorting to self-help remedies that violate the ethical rules." *Id.* at 700.

The Supreme Court of Wisconsin made a similar ruling in a case in which an attorney hired an investigator to pretend to be the other party and convince an insurance company to fax a copy of the opponent's automobile insurance policy. *In re Wood*, 190 Wis. 2d 502 (Wis. 1995). The court imposed sanctions, reasoning

that the records obtained could have been subpoenaed without engaging in this type of activity. *Id.* at 514.

Discoverability of the Results of Pretextual Practices

Lawyers who obtain information through pretextual investigations should be aware that they may be forced to produce documents, videotapes and audiotapes relating to such an investigation. For example, in *Qore v. Civil Solutions*, 5:03-CV002755 CLS (U.S.D.C. N.D. Al.) (Doc. 33), the office manager for an engineering company engaged a soon-to-be departing employee in a conversation about that employee's imminent departure. Unknown to the employee, the office manager had concealed a tape recorder in her bra. After a company-orchestrated confrontation and the employee's departure, the employer sued the former employee for trade secret misappropriation. The plaintiff resisted production of the secret tape "in the interest of justice," asserting that she should first be permitted to depose the former employee to see if she testified consistently with the secret tape. The court rejected this argument and directed the production of the tape prior to the employee's deposition. *Id.* ("Litigation is not a game of hide-the-ball.")

Guidelines

The pitfalls to unwise and illegal pretexting are considerable:

- First, an attempt to access telephone records, PFI and PHI through pretextual means is prohibited by federal law. In addition to the threat of discovery sanctions and a formal reprimand, an attorney could face harsh monetary penalties and a jail sentence if convicted of such a violation.
- In Alabama, pretextual communications in the context of pre-litigation investigation are less risky, particularly in the area of intellectual property rights due to the difficulty in otherwise detecting infringement.
- The contact between the pretexter and the subject of the investigation should occur in the same manner and on the same basis as that of the general public.

Lawyers or Investigators

Lawyers should also consider whether such pretexting should be done by a trained professional rather than a lawyer. One court's decision suggests that there may never be justifiable circumstances for a lawyer's deceit. In 1998, a deputy district

One court's decision suggests that there may never be justifiable circumstances for a lawyer's deceit.

attorney in Colorado arrived at a gruesome murder scene where law enforcement was negotiating with the murderer. *In re Pautler*, 47 P.3d 1175, 1177 (Colo. 2002). To bring about an end to the standoff, the deputy DA misrepresented that he was a public defender and would "help" out the murderer. *Id.* at 1178. After his surrender, the murderer learned that he had been duped. The defendant consequently became so distrustful of public defenders that he fired his own and unsuccessfully represented himself, ultimately earning a death sentence. *Id.* Despite the deputy DA's undeniably justifiable motive, the Colorado Supreme Court held that such deception still violates the rules. The attorney argued for some form of an "Imminent Public Harm" exception but the court was not persuaded, stating, "[The attorney] cannot compromise his integrity, and that of our profession, irrespective of the cause." *Id.* at 1181. Evidence as to motive, the court explained, was relevant only in the punishment phase as a mitigating or aggravating factor. *Id.* at 1180.

In another illustrative case, a private practitioner in Oregon suspected that an insurance company and medical review company were scheming to deny benefits to injured claimants by referring them to chiropractors involved in an unlawful conspiracy. *In re Gatti*, 8 P.3d 966 (Or. 2000). To investigate, the attorney made calls to the medical review company and falsely identified himself as a doctor seeking to get involved in the medical review program. *Id.* at 970. After bringing suit against those involved, the attorney found himself the subject of disciplinary proceedings. *Id.* at 973-74. In defense of the allegations, he proposed an investigatory exception to the disciplinary rules, suggesting that "as long as misrepresentations are limited only to identity or purpose and [are] made solely for purposes of discovering information, there is no violation of the Code of Professional Responsibility." *Id.* at 974. He argued that such an exception was necessary for private practitioners to be able to expose schemes such as this one. *Id.* Though sympathetic with the investigating lawyer's motive, the Oregon Supreme Court stated that the rules clearly prohibit an attorney from making false statements or misrepresentations and the court was without the authority to create such an exception. *Id.* Although the lawyer was disciplined for his actions, Oregon subsequently adopted a rule permitting lawyers to "advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights." *Or. Eth. Op.* 2003-173, 2003 WL 22397289, at 2 (Or. St. Bar Ass'n 2003). The new rule defines covert activity as permitting misrepresentations but provides that it can only be done when the lawyer "in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future." *Id.*

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The above decisions illustrate how courts tend to be more exacting when lawyers are the ones doing the pretexting. Outsourcing such work means a loss of control by the lawyer; however, it also removes the lawyer and the lawyer's staff from the role of a potential witness, thereby avoiding issues with *Rule of Professional Conduct* 3.7 (Lawyer as Witness). Further, lawyers should scrutinize the controls used by investigators and may wish to insist that pretextual calls be tape-recorded. If such a tape-recorded call is part of the investigation's work flow, the lawyer should make sure that the call is not being directed to those jurisdictions in the United States that prohibit secret telephone taping. (Recording conversations without the consent of both parties is prohibited by the laws of California, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington.)

A lawyer choosing to tape record his or her own conversations should be mindful of not only the laws of the jurisdiction, but also the ethical rules not applicable to private investigators or the general public. For over 25 years prior to 2001, the ABA was of the opinion that "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation," regardless of whether or not such activity was otherwise legal. ABA Formal Op. 337 (1974). Following the adoption of the Model Rules and the criticism of this stance by several state and local ethics committees, the ABA adjusted its position and now states that nonconsensual recording of conversations is not unethical where permitted by law, but may violate the Model Rules when prohibited by the laws of the particular jurisdiction. ABA Formal Op. 01-422 (2001). Additionally, a lawyer may not falsely represent that a conversation is not being recorded and the ABA advises against recording conversations with clients. *Id.* It should be noted that the circumstances of particular situations have caused some local ethics committees to question the ABA's recent opinion. *See, e.g.,* NY City 2003-02; New Mexico Op. 2005-03; Ariz. Op. 00-04. Alabama's stance originally fell in line with that of the ABA in holding that any nonconsensual recording was unethical, but that opinion was later modified and now states, "Absent fraud or deceit it is not unethical, per se, for an attorney who is a party to a conversation with any person to make a recording of the conversation without prior knowledge and consent of all the parties thereto." 1983-183 Op. OGC.

When engaging in "pretexting," investigators and the lawyers who hire them should take care to operate within the law and to abide by the relevant rules of professional conduct.

The "Seemliness" Question

By implication, the Center's Pretextual Calling Opinion finds that pretextual calling is within the high standards set forth in the Alabama Rules of Professional Conduct's Preamble, which describes a lawyer as "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Nonetheless, the Center was careful to state that the pretexting it was permitting related to investigators hired by lawyers. Alabama lawyers will need to decide for themselves about whether they are comfortable engaging in pretexting. In some instances, where the client has limited resources or trained IP investigators are not readily available, the lawyer may have little choice but to take a more direct role in pretexting. In any event, as the Center has made clear through its repeated invocation of Rule 8.4 (Misconduct), an Alabama lawyer may not evade responsibility by asking an investigator to engage in activity forbidden under Alabama's Rules of Professional Conduct.

Notwithstanding the availability of certain pretextual calling in connection with Intellectual Property cases, Alabama lawyers will need to consider how the jury will react to such a technique. In any event, lawyers using pretextual tactics should expect discovery, testimony and argument about the details of the activity. How the judge or jury will react to such techniques is difficult to predict. However, it might be wise to cover such risks with the client in advance of any pretextual practices.

Conclusion

When engaging in "pretexting," investigators and the lawyers who hire them should take care to operate within the law and to abide by the relevant rules of professional conduct. Miscalculations can be costly. Indeed, like Dunn, the hunters who exceed the limits on pretexting may become the quarry. ▲▼▲

Endnotes

1. *FTC v. Info. Search, Inc.,* No. 1:06-CV-01099-AMD (D. Md.); *FTC v. Integrity Sec. and Investigation Servs., Inc.,* No. 2:06-CV-241-RGD-JEB (E.D. Va.); *FTC v. CEO Group, Inc.,* No. 06-60602 (S.D. Fla.); *FTC v. AccuSearch, Inc.,* No. 06-CV-0105 (D. Wyo.); *FTC v. 77 Investigations, Inc.* No. EDCV06-0439 VAP (C.D. Cal.)
2. *FTC v. Action Research Group, Inc.,* No. 6:07-cv-227-Orl-22JGG (M.D. Fla.)

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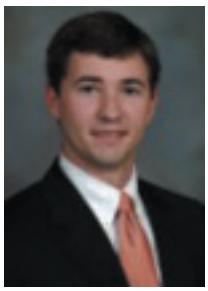

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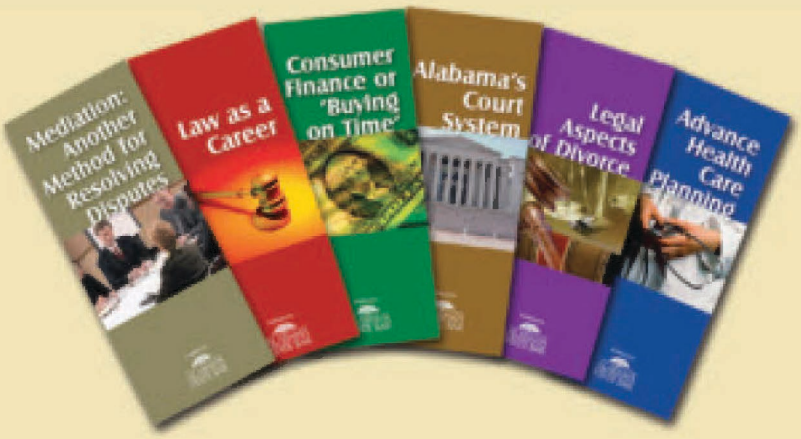

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An Alabama Lawyer's Experience *in the* Middle East

By David R. Clark

When I graduated from the University of Alabama School of Law eight years ago, I had no idea that my law degree was going to take me to the Middle East twice in a soldier's uniform fighting in a war. My employment immediately after law school shed no light on the path that lay ahead of me either. Initially after law school, I worked for a firm in Birmingham as a first-year associate. Then, in January 2001, I went to work for the Alabama Attorney General's Office doing capital litigation.

September 11th drastically altered my career

Like many others, I will never forget the morning of September 11, 2001. I was in north Alabama working on a death penalty case at the Rule 32 stage when I received a phone call from my wife. She asked me if I had seen the news; I had not. She then told me about planes crashing into the towers in New York and into the Pentagon in Washington, D.C. In the days that proceeded, 9-11 proved to change my life and my legal career.

I felt a desire to do something in the cause against terror, but I did not know what to do. At the time, I was working with a colleague at the attorney general's office who, unbeknownst to me and before the 9-11 attacks, had been filling out paperwork to become a JAG in the United States Army Reserves. One day shortly after 9-11, I was with him when he received a phone call regarding his application to become a JAG. When I found out what he was going to do, I knew that was what I should do as well.

My first deployment

I completed the long process of applying and being commissioned as a JAG in the U.S. Army Reserves in October 2002. With the war in Iraq looming, I found myself activated for 330 days and assigned to the 335th Theater Signal Command in early March 2003. Eventually, I was deployed to Camp Doha, Kuwait, assigned as an aide and legal advisor to a two-star general.

For someone in the Army barely long enough to know how to tie his boots, working directly with a two-star general was an incredible experience. I had the

opportunity to observe and advise a general officer who was making decisions affecting military operations throughout the Middle East. I was in Kuwait when Saddam Hussein was captured and, while I personally had nothing to do with his capture, I experienced the morale boost of knowing that this man would have his day in court. By the end of my deployment, I received notice that I had been selected to be accessed into active duty to be a JAG full-time.

My second deployment

My first assignment in the active Army was to Hawaii with the 25th Infantry Division. I served as a military prosecutor assigned to a wide range of cases involving pre-meditated murder, sexual assault, child pornography, forgery, aggravated assault, larceny, and drug distribution, among many others. It was in mid-November 2006, about two weeks before a murder trial, when I received a call informing me that I would be deploying to Iraq as soon as the murder trial was over. I tried the murder case the first two weeks in December 2006 and moved my family back home to Alabama to be closer to family. Then I completed some pre-deployment training in January 2007, and found myself on a plane heading to Iraq in February 2007.

A plan was established to set up an Iraqi court in each province in a secure location with judges traveling in from other locations in Iraq.

When I arrived in Iraq, I was assigned as a Rule of Law attorney covering provinces in Iraq just north of Baghdad all the way to Turkey. Along with another JAG, my main mission was to work with Iraqi judges, the provincial governor and other provincial leaders, the U.S. Department of State, the U.S. Department of Justice, the Iraqi Police, and the Iraqi Army to set up courts in which to prosecute terrorists.

While there was a national court in Baghdad that had been hearing cases for some time, the court system in the individual provinces in our area of operation had shut down with regard to cases involving terrorists. The provincial judges had received numerous death threats from terrorists, to include Al-Qaeda, and some of the threats had been carried out. Consequently, the judges were afraid to try any cases involving terrorists. Some of the cases just languished while others were reduced to minor infractions and the terrorists were released to again terrorize the local populace and attack Coalition Forces.

With their cases going nowhere, the local Iraqi police were frustrated. They were putting their lives on the line to investigate terrorism, yet they had very little hope that the terrorists would ever see the inside of an Iraqi courtroom and be adjudged guilty of the crimes. In fact, some of the hardest hit targets in Iraq were Iraqi police facilities. Consequently, morale among the Iraqi police was suffering.

The people who lived in these provinces had lost any confidence that law and order would be restored. As a result, they were afraid to report terrorist activity for fear they would become the subject of the next terror plot. Not surprisingly, I read case file after case file in which a local Iraqi was murdered outside at midday with witnesses all around, yet "no one saw a thing." With the judges in hiding and the local populace being terrorized by Al-Qaeda, it was apparent that something needed to be done to establish law and order and bring peace to these provinces.

Courts for the terrorists

A plan was established to set up an Iraqi court in each province in a secure location with judges traveling in from other locations in Iraq. The goal was to seat judges who had not been exposed to threats from the local terror organizations. Early rumors had circulated among the citizenry that these courts were simply puppet courts for the Americans. Consequently, it was important that these courts not appear in the least to be American courts; otherwise, the intended message that law and order was coming to the Iraqi people would be lost.

As context for these courts, it is important to understand a little of the Iraqi criminal process, which is considerably different from what we are accustomed to in the U.S. The main players consist of an investigative judge, a prosecutor, trial judges who sit on a three-judge panel for the trial, and a defense lawyer. The investigative judge, the prosecutor and the trial judges all received the same training at a school for judges. At the end of the training,

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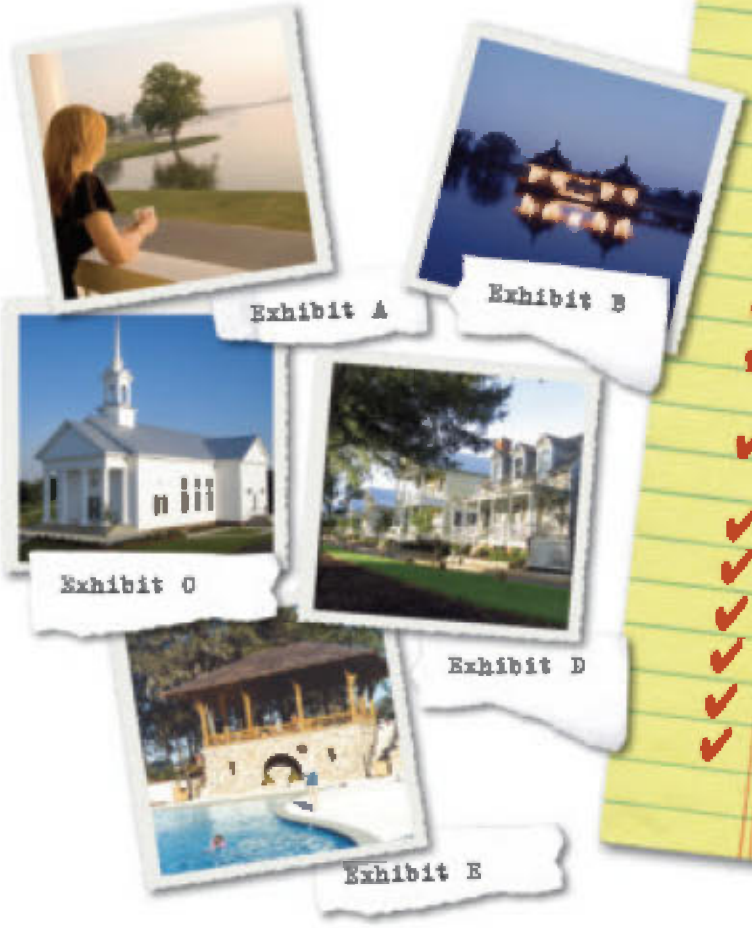

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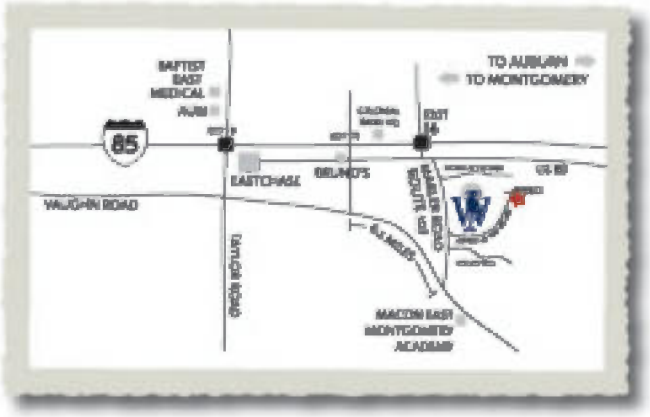

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they are identified either as an investigative judge, a prosecutor or a trial judge. The defense lawyer, while a graduate of law school, has not attended the judicial training. Consequently, the defense bar is often viewed within the judicial community as something less.

After an arrest, an investigative judge reviews the case. The investigative judge takes a very active role in the case directing the investigation. He may have a judicial investigator to whom he assigns various aspects of the investigation. If there is no judicial investigator, the investigative judge may work directly with the Iraqi police to investigate a case. Once the case is ready, the investigative judge holds a hearing that is very similar to a preliminary hearing in the U.S.

At the investigative judge's hearing, the defendant is present along with a defense attorney. The defense attorney often has short notice of these hearings, resulting in limited time to prepare. Witnesses testify based on the investigative judge's examination. Testimony is summarized by an assistant to the investigative judge. If there is sufficient evidence (i.e., something similar to a probable cause standard), the case is set for trial. If there is not sufficient evidence, the investigative judge can order additional investigation or he can dismiss the case.

At trial, the case is heard by a three-judge panel who judge both the facts and the law; there is no jury. A prosecutor is present, but his role is very different from a prosecutor in the U.S. The prosecutor is not necessarily there to advocate for a conviction. In fact, at trial, the prosecutor may advocate for dismissal of the case. The accused is present along with a defense attorney. Witnesses normally do not testify at trial. The judges normally rely on the evidence recorded and presented before the investigative judge at his hearing. As such, the trial normally consists of the judges simply reviewing the case file, deliberating on guilt and a sentence, and then returning to court with a verdict and sentence. In my experience, instead of reaching a verdict, the trial judges, at times, decided to return the case to the investigative judge for further investigation. In any case, the trials sometimes only took a couple of hours from start to finish. In fact, on one day in Mosul, the judges heard four cases and sentenced each defendant to death.

The Mosul court became a model for other provinces

The first of these courts was established in Mosul, Ninewa Province shortly before I arrived. Unsure of the security

that would be provided, the panel of judges chosen was fearful for their personal safety as well as the safety of their families who lived in other parts of Iraq. When the judges said their farewells to their families before traveling to Mosul, extended family and friends assured them that they would take care of their surviving family members because no Iraqi believed the judges would return home alive. These judges, however, accepted this assignment to travel to Mosul and preside over the cases. The court in Mosul remained in session for several weeks and then the judges returned safely to their families after having disposed of dozens of cases.

The process of these traveling judges coming to Mosul to hear cases, remaining for several weeks, and then returning home continued throughout my deployment in Iraq. The judges spent their entire time in Mosul sequestered for their safety. The compound where they lived, the court and the surrounding area were repeatedly bombed in an attempt to kill or, at least, intimidate the judges. These judges sacrificed a lot to support the court in Mosul. They did it because they believed in doing whatever it took to build a safe and secure Iraq.

I often traveled to pick up the judges and escort them to Mosul. While I did not speak Arabic, this experience gave me added insight into the character of these men. On one particular journey into Mosul, we made it as far north as Tikrit, Iraq when a dust storm rolled in and stranded us at a nearby military post. On earlier missions, things had always gone smoothly and any communicating I needed to do with the judges could be accomplished with hand gestures. Being stranded near Tikrit and not knowing when we would be able to resume our mission to Mosul, I suddenly became aware of my inability to explain to the judges where we were and what was occuring.

Eventually, I was able to locate an interpreter. To my surprise, instead of complaining about the predicament we were in, the judges graciously expressed their gratitude to me for my hospitality in taking care of them while we were delayed.

I made plans for us to resume our journey later that night about nine hours after the dust storm had disrupted our travel. At the prearranged hour, the judges and I

On one particular journey into Mosul, we made it as far north as Tikrit, Iraq when a dust storm rolled in and stranded us at a nearby military post.

returned to the appointed place to resume our journey. After waiting for about three hours, we were still unable to leave. Planning for this contingency, I had arranged for some lodging. Unfortunately, as it turned out, there were only three beds and there were four of us. Naturally, in this predicament, I intended to sleep on the floor.

When the most senior judge on the panel saw that I was going to sleep on the floor, he insisted that I sleep in his bed and that he sleep on the floor. I refused his offer, but he insisted rather emphatically that I take his bed. I was amazed that this man–a senior Iraqi judge–would insist I sleep in a bed when it meant he would have to sleep on the hard floor. I thought perhaps he would order one of the other judges to sleep on the floor so he could sleep on a bed, but he made no such order.

The next morning, amazingly, instead of being irritated, the senior judge was happy and, again, appreciative of my efforts to take care of their needs.

This became a blessing, however, as the local judges in Tikrit stepped up and tried these cases themselves.

Fortunately, we were able to resume our journey to Mosul that next morning and we arrived safely at our destination. Through this experience, along with many others I had with Iraqi judges, I gained the highest respect for these men as true and humble patriots for their country.

Courts in other provinces

With the success we were having in Mosul, we began working to create similar courts in Salah ad Din, Diyala and Kirkuk provinces. In the Salah ad Din province, we decided to establish the court in the provincial capital of Tikrit. I made several trips to Tikrit to meet with the Iraqi police, as well as with the investigative judge. I personally reviewed several case files that the investigative judge was preparing to send to trial. Of course, these files were in Arabic which necessitated the use of an interpreter. In reviewing the files, I learned these cases relied almost exclusively on the confessions of the accused. If there was a confession, then the case went forward. If there was not a confession, then the case often was dismissed.

We ran into a number of obstacles that continued to delay the start of the court in Tikrit. Initially, we thought the court would be up and running in March 2007. March turned into April, then May and so forth. By July 2007, we had serious concerns whether we would be able to get the court off the ground.

An unexpected hurdle that really caused problems was getting judges from other areas of Iraq to come to Tikrit. With the continued flow of traveling judges into Mosul and courts being established in other provinces in Iraq, the burden on the other judges became heavy, resulting in a reluctance to send judges to Tikrit. This became a blessing, however, as the local judges in Tikrit stepped up and tried these cases themselves. These were judges

whose lives had been threatened by Al-Qaeda and, due to the threats, had not tried any cases involving terrorists in years.

In September 2007, the Tikrit judges entered the secured compound where the court had been built and heard several cases and, in the face of the terrorists' threats, adjudged many of the defendants guilty and even sentenced some to death under Iraqi law. The concept of having traveling judges go into a province to try cases was seen from the beginning as a temporary solution in order to get terrorist cases to court. Having local judges sit in Tikrit was clear evidence in our eyes that the Iraqi people were coming together to stand up against Al-Qaeda and other terrorist groups to claim Iraqi stability for themselves.

In October 2007, shortly before we left Iraq to return to Hawaii, the court in Kirkuk successfully heard its first cases. While the court in Diyala province was still a work in progress when we left Iraq, we had successfully established courts in Ninewa, Salah ad Den and Kirkuk provinces. In all, these courts had heard well over 200 cases with the majority coming from the Ninewa province. The conviction rate for these cases was in the 60 percent range. The bottom line, however, was the Iraqi people saw that law and order was returning to their cities and towns.

Conclusion

I have now returned to the U.S. Army Reserves and entered private practice in Prattville. Looking back, while I could not have dreamed when I graduated from law school that I was about to use my law degree in Iraq to help establish law and order to a war-torn land, I am extremely thankful for the chance to have served my country. ▲▼▲

David R. Clark is a graduate of the University of Alabama School of Law and was admitted in 2000. He is a solo practitioner in Prattville.

Uninsured/Underinsured Motorist Coverage–

A Desk Reference for Alabama Lawyers

By Walter J. Price, III and David M. Fleming

Introduction

Alabama statutory law requires that any automobile liability insurance policy issued for delivery in this state must include uninsured and underinsured motorist coverage. At its heart, this statute provides that coverage is available to individuals, under their own automobile policies, for damages incurred as a result of an accident involving an uninsured motorist.

Further, if the adverse motorist has insurance coverage, but the limits of that coverage are not sufficient so as to cover the damages incurred, the insured may obtain underinsured motorist benefits. Although the statute requiring this coverage is rather short, the coverage created by the statute has been the subject of much litigation. In any case, it is important for counsel faced with such a claim to be familiar with the coverage and associated procedures.

Statutory Provision §§32-7-23

§§32-7-23. Uninsured Motorist coverage; "uninsured motorist" defined; limitation on recovery

(a) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless injury or death set forth in subsection (c) of section 32-7-6, under provisions approved by the commissioner of insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured request such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy with a named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:

(1) Neither the owner nor the operator carries bodily injury liability insurance;

(2) Any applicable policy limits for bodily injury or below the minimum required under section 32-7-6;

(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the accident; and

(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured party after an accident is less than the damages which the injured person is legally entitled to recover.

(c) The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.

Note that the provisions of this statute are implied in any automobile insurance policy delivered in Alabama. *Safeco Ins. Co. of Am. v. Jones*, 286 Ala. 606, 243 So.2d 736 (1970).

Policy Considerations

In considering whether UM or UIM coverage applies to a given claim, one must recognize that Alabama courts have consistently rejected efforts to limit the statutory coverage obligation:

> The principle is, the uninsured motorist statute is to be construed so as to assure a person injured by an uninsured motorist that he will be able to recover, from whatever source available, up to the total amount of his damages. The insurer will not be permitted to insert any provision in its policy limiting such recovery by the insured.

Alabama Farm Bureau Mutual Casualty Insurance Company v. Humphrey, 54 Ala. App. 343, 346, 308 So.2d 255, 258 (Ala. Civ. App. 1975).

For example, an exclusion rejecting UM and UIM coverage for vehicles of less than four wheels was found to be more restrictive than the statute and, therefore, unenforceable. *Peachtree Casualty Insurance Company, Inc. v. Sharpton*, 768 So.2d 368 (Ala. 2000). While riding a motorcycle, the Sharptons were injured in an accident. The motorcycle was not insured by Peachtree; however, the two automobiles owned by the Sharptons were insured by separate Peachtree policies. In a declaratory judgment action, Peachtree asserted that a motorcycle is not a "vehicle" as defined by the Uninsured Motorist Statute. In response to a certified question from the United States District Court for the Middle District of Alabama, the Supreme Court of Alabama stated that motorcycles are included in the definition of "motor vehicle" in the Uninsured Motorist Statute (*Ala. Code* §§32-7-2(4)).

The court also confirmed that the Sharptons were not barred from claiming UIM benefits since they were not injured while occupying the vehicles listed in the Peachtree policies. Moreover, the court noted that approval of the Peachtree policy by the Department of Insurance did not permit Peachtree to issue a policy more restrictive than the Uninsured Motorist Statute. As noted above, the Supreme Court of Alabama has previously held that any policy exclusion that is more restrictive than the Uninsured Motorist Statute is void and unenforceable.

Rejection

Uninsured motorist coverage (and underinsured motorist coverage) can be rejected by the named insured; however, oral rejection is not sufficient. The rejection of coverage must be in writing. *Insurance Company of North America v. Thomas*, 337 So.2d 365 (Ala. 1976).

However, each named insured must reject uninsured motorist coverage for the rejection to be effective. Rejection by one named insured is not effective as a rejection by other named insureds under the same policy. *Nationwide Ins. Co. v. Nicholas,* 868 So.2d 457 (Ala. Civ. App. 2003).

The named insured, however, can reject for all other non-named insureds. *Funderburg v. Black's Insurance Agency*, 743 So.2d 472 (Ala. Civ. App. 1999). In addition, the named insured can reject uninsured motorist coverage for some, but not all, additional insureds. In *Federated Mutual Insurance Company, Inc. v. Vaughn*, 961 So.2d 816 (Ala. 2007), the Supreme Court of Alabama held that an employer could reject uninsured motorist coverage for insured employees while accepting it for directors, officers, partners, owners, and their family members. Specifically, Vaughn was an employee of the insured, Farmers Tractor Company, Inc. At the time of the subject accident, Vaughn was driving a vehicle owned by Farmers and covered by an automobile insurance policy issued by Federated. Vaughn sought uninsured motorist benefits under the Federated policy; however, the insured, while maintaining UM coverage for its directors, officers, partners, owners, and family members who qualified as insureds, specifically rejected UM coverage for "any other person who qualifies as an insured." In holding that rejection was effective, the court determined that *Ala. Code* §§32-7-23, while providing the right to reject UM coverage, did not qualify or restrict that right. Thus, the named insured was entitled to reject uninsured motorist coverage with respect to some, but not all, additional insureds.

Proof of Uninsured Status

The burden of proving absence of liability insurance is on the insured. It shifts, however, to the carrier upon demonstration by the insured of reasonable diligence in attempting to determine the existence of insurance. On the other hand, simply filing a

lawsuit and taking a default judgment is not proof of "reasonable diligence" so as to shift the burden of proof to the insurer. *Ogle v. Long*, 551 So.2d 914 (Ala. 1989). This would not be the case, though, in the event of an accident involving a "phantom" vehicle. "Phantom" vehicles are deemed uninsured. *Wilbourn v. Allstate Ins. Co.*, 305 So.2d 372 (Ala. 1974).

The Alabama Supreme Court has upheld exclusions that deny uninsured motorist coverage for a vehicle that is covered under the liability portion of the same policy. *Allstate Insurance Company v. Hardnett*, 763 So.2d 963 (Ala. 2000). A vehicle cannot be insured under the policy and, at the same time, be "uninsured" for the purposes of recovery of UM benefits by virtue of the unavailability of liability coverage to a particular person where liability coverage was not available as a result of the insured driver's failure to provide timely notice of the suit to the insurer. *Watts v. Preferred Risk Mutual Insurance Company*, 423 So.2d 171 (Ala. 1982).

A vehicle cannot be insured under the policy and, at the same time, "uninsured" for the purposes of recovery of UM benefits…

Stacking

Pursuant to *Alabama Code* §§32-7-23(c) an insured may stack up to two additional coverages. Thus, under multi-vehicle policies the insured can recover up to three times the policy limit. There is, however, no such limitation on single-vehicle policies. As such, recovery by an insured under single-vehicle policies may exceed the three coverage limitation. *State Farm Mutual Automobile Insurance Company v. Fox*, 541 So.2d 1070 (Ala. 1989). In *Fox*, the court also held that the insured was not entitled to pre-judgment interest. *Fox* was a wrongful death case for which only punitive damages are available. As such, the claim could not be proven with the specificity necessary to recover pre-judgment interest.

Passengers insured under multi-vehicle policies can stack up to two additional coverages or three times the policy limit. *Travelers Insurance Company, Inc. v. Jones*, 529 So.2d 234 (Ala. 1988). However, passengers under single-vehicle policies are limited to one coverage. *State Farm Mutual Automobile Insurance Company v. Faught*, 558 So.2d 921 (Ala. 1990). The claimant first must be an insured before he or she can recover under the policy and, therefore, stack coverages. In *Faught*, since the passenger was not a named insured in the declarations and since the passenger did not meet the definition of "insured" (such as a relative of one named in the declarations), he was not entitled to recover. Likewise, in *Bright v. State Farm Insurance Company*, 767 So.2d 1111 (Ala. 2000), where the named insured was a corporation, an employee of that corporation was not entitled to recover UIM benefits under policies for vehicles not involved in the accident.

Under a fleet policy, both the driver and passengers can stack up to two additional coverage. Note that an insured under a fleet policy must exhaust the stacked coverages of that policy before recovering under his or her personal policy. *Isler v. Federated Guaranty Mutual Ins. Co.*, 594 So.2d 37 (Ala. 1992).

Attempts to limit liability through "other insurance" provisions, "limits of liability" clauses or other restrictive language are void. *Canal Indemnity Company v. Burns*, 682 So.2d 399 (1996); *Higgins v. Nationwide Insurance Co.*, 291 Ala. 462, 282 So.2d 301 (1973); *St. Paul Insurance Company v. Henson*, 479 So.2d 1253 (Ala. Civ. App. 1985).

Exhaustion and Set-Off

The insured is not required to exhaust the tort-feasor's liability limits before recovering underinsured motorist benefits. *State Farm Mutual Automobile Insurance Company v. Scott*, 707 So.2d 238 (Ala. Civ. App. 1997). However, the underinsured motorist carrier is entitled to a set-off of the full liability limits. *Adkinson v. State Farm Mut. Auto Ins. Co.*, 856 F.Supp. 637 (M.D. Ala. 1994). Thus, if the insured settles with the tort-feasor for $15,000 even though policy limits are $20,000, the underinsured motorist carrier's obligation does not begin until the insured has proven that he or she is entitled to recover over $20,000.

Note, however, that the insurer is entitled to only set off the limits of the tort-feasor's automobile liability policy. If, for example, there are liability limits available from a joint tort-feasor, the insured is not required to exhaust the total of that amount before recovering under his or her own underinsured motorist policy. Likewise, the insurer is not entitled to a set-off of the joint tort-feasor's general liability limits. *State Farm Mutual Automobile Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005). *Burt v. Shield Insurance Company*, 902 So.2d 692 (Ala.Civ.App. 2004).

Legally Entitled to Recover

In order to obtain UM/UIM benefits, the insured must prove that he or she is "legally entitled to recover" from the tort-feasor. In such a case, the insurer is not required to pay benefits

where the insured is not entitled to recover against the tort-feasor as a result of a defense available to the tort-feasor. For example, an employee is not entitled to sue a co-employee for negligence under Alabama's Workers' Compensation Act. As such, the injured employee cannot obtain uninsured or underinsured motorist benefits arising out of an accident involving a co-employee. *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003).

In *Ex parte Carlton*, the Supreme Court of Alabama overruled three prior cases in which it was held that uninsured motorist benefits were recoverable as a result of the inability of the injured party to bring a legal claim against the alleged tort-feasor. Thus, in these cases the tort-feasor is *not* deemed uninsured simply because the injured party may not make a claim against the tort-feasor. The cases overruled were *Hogan v. State Farm Mutual Automobile Insurance Company*, 730 So.2d 1157 (Ala. 1998) (claim against tort-feasor barred as a result of Guest Passenger Statute); *State Farm Mutual Automobile Ins. Co. v. Jeffers*, 686 So.2d 248 (Ala. 1996) (Claim against deputy sheriff who was immune from suit) and *State Farm Automobile Insurance Company v. Baldwin*, 470 So.2d 1230 (Ala. 1985)(involving claim against government employee). Note that a guest passenger would be able to recover against the driver for willful conduct and, therefore, could recover UM/UIM benefits if willful conduct is proven.

An insured employee can recover *both* worker's compensation benefits and available uninsured or underinsured motorist benefits.

An insured employee can recover *both* worker's compensation benefits and available uninsured or underinsured motorist benefits. *Johnson v. Coregis Insurance Company*, 888 So.2d 1231 (Ala. 2004).

Additionally, a policy provision requiring that an accident "arise out of the ownership, maintenance, or use of an uninsured motor vehicle" is enforceable. *Rich v. Colonial Insurance Company of California*, 709 So.2d 487 (Ala. Civ. App. 1997). *Rich* involved an attempted car-jacking where the insured was approached by two men who were on foot while his automobile was stopped at a traffic signal.

Contact and Corroboration

As noted above, "phantom" vehicles are deemed uninsured. *Wilbourn v. Allstate Insurance Company*, *supra*. In addition, the Supreme Court of Alabama has determined that any policy provision requiring proof of contact is void. *State Farm Fire and Casualty Co. v. Lambert*, 285 So.2d 917 (Ala. 1973). The question of whether an accident occurred in the fashion claimed by the insured is one of fact for the jury. In addition, any provision requiring that the insured present corroborating evidence where there has been no physical contact is, likewise, void. *Walker v. GuideOne Specialty Mutual Insurance Company*, 834 So.2d 769 (Ala. 2002). Note also that debris in the road is presumed to have been left by a phantom motorist. *Khirieh v. State Farm Mutual Automobile Ins. Co.*, 594 So.2d 1220 (Ala. 1992).

Insurer May Not Exclude Punitive Damages

While punitive damages generally may be excluded from liability policies, an insurer may not do so in the context of uninsured motorist coverage and such an exclusion violates the uninsured motorist statute. *Hill v. Campbell,* 804 So.2d 1107 (Ala. Civ. App. 2001).

Off-Set of Med Pay

Med pay benefits can only be deducted from the uninsured or underinsured motorist benefits if the policy specifically allows for this deduction. *Employers National Insurance Co. v. Parker*, 236 So.2d 699 (Ala. 1970); *Russell v. Griffin*, 423 So.2d 901 (Ala. Civ. App. 1982); *Griffin v. Battles*, 656 So.2d 1221 (Ala. Civ. App. 1995).

Statute of Limitations

The six-year contract statute of limitations applies to uninsured motorist insurance claims. In addition, the failure of the insured to make a claim within the statute of limitations applicable to the tortfeasor does not bar an uninsured motorist claim. *State Farm Mutual Automobile Insurance Company v. Bennett*, 2000 WL 1229210 (Ala.). Note, however, that the statute of limitations for a subrogation claim by the uninsured motorist carrier begins to run on the date of the involved accident. Therefore, the two-year tort statute of limitations applies to the subrogation claim and it begins to run at the time the insured's right to recovery arises. *Home Insurance Company v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So.2d 468 (1973) and *Hardin v. MetLife Auto and Home Insurance Company*, 2007 WL 2460068 (Ala. Civ. App.)

Opting Out

If the uninsured/underinsured motorist carrier is named as a party in a lawsuit against the tort-feasor, the uninsured/underinsured motorist may "opt out" of the litigation and be bound by the results. *Lowe v. Nationwide Insurance Company*, 521 So.2d 1309 (Ala. 1988).

Defense of Uninsured Tort-Feasor

Not only may an insurer opt out of a case in which it has been named as a defendant along with the uninsured tort-feasor, but, further, it may then take over the defense of the uninsured motorist. *Driver v. National Security Fire & Casualty Co.*, 658 So.2d 390 (Ala. 1995).

Tortfeasor Cannot Obtain a Set-Off of UM Benefits

In *Ex parte Barnett*, 2007 WL 2216911 (Ala.), the Supreme Court of Alabama determined that the collateral source rule applies to uninsured motorist and underinsured motorist claims thereby preventing the tortfeasor from obtaining a set-off of amounts paid by the insurer pursuant to the policy. In this holding, the court overruled the prior court of civil appeals' decision of *Batchelor v. Brye*, 421 So.2d 1267 (Ala. Civ. App. 1982). The court rejected Barnett's arguments that the uninsured motorist carrier should be characterized as a joint tortfeasor, stating that the UM insurer's liability is based solely on its contractual obligations as set forth in the policy.

Applicable Law

The law of the state where the policy was delivered applies to the interpretation of coverage issues. *Best v. Auto Owner's Ins. Co.*, 540 So.2d 1381 (Ala. 1989).

Settlement with Tort-Feasor

In *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So.2d 160 (Ala. 1991), the Supreme Court of Alabama set out the general procedure to be followed so as to protect the rights of the insured and the underinsured motorist carrier if the insured settles with the tort-feasor.

(1) The insured, or the insured's counsel, should give notice to the underinsured motorist carrier of the claim under the policy for underinsured motorist benefits as soon as it appears that the insured's damages may exceed the tort-feasor's limits of liability coverage.

(2) If the tort-feasor's liability insurance carrier and the insured enter into negotiations that ultimately lead to a proposed compromise or settlement of the insured's claim against the tort-feasor, and if the settlement would release the tort-feasor from all liability, then the insured, before agreeing to the settlement, should immediately notify the underinsured motorist carrier of the proposed settlement and the terms of any proposed release.

(3) At the time the insured informs the underinsured motorist carrier of the tort-feasor's intent to settle, the insured should also inform the carrier as to whether the insured will seek underinsured motorist benefits in addition to the benefits payable under the settlement proposal, so that the carrier can determine whether it will refuse to consent to the settlement, will waive its right of subrogation against the tort-feasor, or will deny any obligation to pay underinsured motorist benefits. If the insured gives the underinsured motorist insurance carrier notice of the claim for underinsured motorist benefits, as may be provided for in the policy, the carrier should immediately begin investigating the claim, should conclude such investigation within a reasonable time, and should notify its

insured of the action it proposes with regard to the claim for underinsured motorist benefits.

(4) The insured should not settle with the tort-feasor without first allowing the underinsured motorist insurance carrier a reasonable time within which to investigate the insured's claim and to notify its insured of its proposed action.

(5) If the underinsured motorist insurance carrier refuses to consent to a settlement by its insured with the tort-feasor, or if the carrier denies the claim of its insured without a good-faith investigation into its merits, or if the carrier does not conduct its investigation in a reasonable time, the carrier would, by any of those actions, waive any right to subrogation against the tort-feasor or the tort-feasor's insurer.

(6) If the underinsured motorist insurance carrier wants to protect its subrogation rights, it must, within a reasonable time, and in any event before the tort-feasor is released by the carrier's insured, advance to its insured an amount equal to the tort-feasor's settlement offer.

Lambert, 576 So.2d at 167. The primary reason for advancing the tort-feasor's offer would be to prevent release of the tort-feasor which not only preserves the underinsured motorist's right of subrogation, but, further, allows it to opt out and see the claim defended by the tort-feasor's carrier.

Attorney's Fees

In *Eiland v. Meherin*, 854 So.2d 1134 (Ala.Civ.App. 2002). *Eiland* sued his insurer, State Farm, seeking uninsured motorist benefits. Eiland also sued Meherin claiming that she had negligently struck his (Eiland's) vehicle from the rear. Meherin's insurer tendered to State Farm its policy limits of $100,000 to settle the claims against Meherin. State Farm, in turn, advanced to Eiland the $100,000 policy-limits offered pursuant to *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So.2d 160 (Ala. 1991) in order to protect its potential subrogation interest against Meherin.

Next, State Farm decided to "opt out" of the trial proceedings pursuant to *Lowe v. Nationwide Insurance Company*, 521 So.2d 1309 (Ala. 1988). As such, it would be bound by the findings at trial.

The jury awarded $50,000 in favor of Eiland. Meherin's liability insurer paid this amount into court. The trial court then held that State Farm was entitled to the $50,000 paid by Meherin's insurer. This was because it protected its subrogation right pursuant to the procedure outlined in *Lambert*. Moreover, the trial court held that there was no "common fund" generated by Eiland's work since State Farm was the only party entitled to recover. Thus, State Farm was not required to pay attorney's fees.

The court of civil appeals confirmed that State Farm was entitled to the entire $50,000 awarded to Eiland. However, even though there had been no common fund generated by the work of Eiland's attorney, the court held that State Farm must pay attorney's fees so as to avoid a "manifestly unjust" result. *Eiland,* 854 So.2d at 1138-39.

The "common fund doctrine," however, can apply in uninsured motorist cases. In *Government Employees Insurance Company v. Capulli*, 859 So.2d 1115 (Ala.Civ.App. 2002). Capulli was injured in a motor vehicle accident. She was a passenger in a vehicle owned and driven by GEICO's insured. The adverse driver was insured by Alfa. Capulli retained an attorney to represent her in a personal injury claim against the adverse driver. She agreed to a one-third contingency fee arrangement.

When the claim was settled, GEICO claimed a subrogation interest for medical expenses it had paid. Capulli sought to withhold one-third of GEICO's recovery as attorney's fees. The court of civil appeals agreed, finding that the "common fund doctrine" applied. Capulli's attorney's efforts had resulted in a common fund (monies that both Capulli and GEICO were entitled to) and the services of Capulli's attorney benefitted GEICO.

Conclusion

Uninsured and underinsured motorist coverages are unique in that in the case of a claim for either the insurer and its insured are in an adverse relationship. As such, all involved need to be familiar with the statutorily-required coverage as well as its associated procedures. Of course, as is the case in any insurance-related matter, review of the policy itself is necessary. However, as indicated above, one must also be familiar with the issues specific to this coverage such as the total amount of benefits available, the obligation to prove both that the tort-feasor is uninsured and that the insured is legally entitled to recover, and the specific steps required in a settlement with the tort-feasor. ▲▼▲

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J. ANTHONY MCLAIN

Preface

In recent months, the Office of General Counsel has received ethical inquiries, as well as bar grievances, dealing with a lawyer's billing of case expenses and costs to the client. There is apparently some degree of misinformation or a lack of communication between some lawyers and their clients as to what is and what is not considered an "expense" of client representation. The following formal opinion, which was ratified by the Disciplinary Commission of the Alabama State Bar in 2005, attempts to establish parameters for lawyers' and law firms' billing of costs and expenses to their clients. Lawyers who do such client file expense and cost billing should review this opinion to ensure that their billing practices and procedures comply with the mandates of this opinion. If there is an issue not specifically addressed in the opinion, lawyers with questions about this matter should contact the Office of General Counsel at (334) 269-1515 for further advice and direction.

Billing Client for Attorney's Fees, Costs and Other Expenses

The Disciplinary Commission, in RO-94-02, addressed the issues surrounding a lawyer's billing a client for attorney's fees, costs and other expenses incurred during the representation of the client. Basically, the Disciplinary Commission's opinion adopted ABA Formal Opinion 93-379.

The instant opinion reaffirms the Disciplinary Commission's adoption of and adherence to that referenced formal opinion of the ABA.

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DISCUSSION:

One of the primary factors considered by a client when retaining a lawyer is the fee to be paid by the client for the lawyer's providing legal representation to the client. Incidental to the lawyer's fee, for which the client will be responsible, are those expenses and costs incurred by the lawyer during the representation of the client.

Rule 1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation.

Inherent in this initial consultation with a client would be some discussion of the fee to be charged by the lawyer, and possible reimbursement to the lawyer for expenses he or she incurs during the representation of the client.

In those situations where there is no pre-existing lawyer-client relationship, Rule 1.5(b), *Alabama Rules of Professional Conduct*, encourages the lawyer to communicate to the client, preferably in writing, the basis or rate of the fee to be charged by the lawyer for representing the client. The Rule suggests that this communication occur "before or within a reasonable time after commencing the representation." *A.R.P.C.*, 1.5(b).

The Comment to Rule 1.5 encourages that "… an understanding as to the fee should be promptly established." The lawyer is also given an opportunity at the outset of representation to fully discuss and address any concerns which the client may have concerning the total fee, which would obviously include costs and expenses to be reimbursed to the lawyer by the client.

Additionally, Rule 1.5(c) states:

> "Rule 1.5–Fees
> (c) … A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated."

Rule 1.5(a), *A.R.P.C.*, also prohibits a lawyer from entering into an agreement for, or charging or collecting a clearly excessive fee. In the past, the Disciplinary Commission has reviewed allegations of clearly excessive fees in the disciplinary process. Due consideration is given, in addressing those types of complaints and fee disputes, to the total fee to be charged to the client by the lawyer, which would necessarily include reimbursed costs and expenses.

For that reason, the lawyer should, when assessing the reasonableness of the fee, take into consideration not only the basic attorney fee, but the total amount to be paid by the client, including costs and expenses reimbursed to the lawyer. The primary focus of the assessment should be to determine whether the total charges to the client are reasonable.

The basic costs or expenses incurred by the lawyer in representing the client can be broken down into two basic categories: (1) Those costs which are incurred by the lawyer within the firm itself, e.g., photocopying, postage, audio- and videotape creations, producing of exhibits, and the like; and, (2) Costs incurred external of the law firm or outsourced by the law firm in further representation of the client, e.g., depositions, production of records from a third party, travel and lodging, and the like.

In ABA Formal Opinion 93-379, charges other than professional fees are broken down into three groups, for discussion: (A-1) General overhead, (B-2) disbursements and (C-3) in-house provision of services. With regard to overhead, said opinion states:

> "In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services."

Therefore, that opinion does not consider overhead as an expense which is to be passed along to the client independent of the basic fee for professional legal services.

With regard to disbursements (B-2) above, the opinion points out that it would be improper "… if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item." This would include, but not be limited to, litigation expenses such as jury consultants, mock trials, focus groups and the like. The opinion also points out that if a lawyer receives any type of discounted rate or benefit points, then those discounted rates or benefit points should be passed along to the client.

With regard to (C-3) above, the opinion states that "… the lawyer is obliged to charge the client no more than the direct cost associated with the service … plus a reasonable allocation of overhead expenses directly associated with the provision of the service …". The obvious reasoning behind this approach is that the lawyer should not utilize the lawyer-client relationship, beyond the fees for professional services, to "manufacture" a secondary source of income by inflating costs and expenses billed to a client. This approach philosophically agrees with Rule 1.5's prohibition against clearly excessive fees. Since the basic lawyer's fee is governed by a "reasonableness" approach, likewise, all fees and expenses which are charged back to a client during the course of the representation should be reasonable, and not considered as a secondary opportunity for a lawyer to generate additional income from the lawyer-client relationship.

In reviewing this aspect of the lawyer-client relationship, it is also necessary to consider possible abuses by lawyers of a lawyer-client relationship with regard to fees charges for the lawyer's professional services. ABA Formal Opinion 93-379 recognizes two possible scenarios where a lawyer's

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billing practices would contravene the *Rules of Professional Conduct*. In one situation, the lawyer bills more than one client for the same hours spent. If a lawyer appears on behalf of multiple clients for one docket call, with each client being a separate case file and separate lawyer-client relationship, may the lawyer bill each file for the total number of hours spent at the docket call? The obvious answer to this would be no. Otherwise, the lawyer would be guilty of using a multiplier for his time spent on behalf of a client which not only would be misleading, but, in some instances, rise to the level of fraud. The classic example would be a lawyer appointed to represent indigent defendants in criminal cases. The lawyer receives notices that he has three separate clients on the same morning docket. The lawyer sits and participates throughout the docket which spans some two hours. Upon returning to his office, the lawyer then bills each of the client files the two hours expended in court, totaling hours in multiple of the number of client files presented during that docket.

The situation would develop whereby a lawyer would actually be billing more hours than actually expended by the lawyer, which would contravene not only public policy, but also the *Rules of Professional Conduct*.

A second situation involves a lawyer who performs work for one client while engaged in an activity for which he bills another client. The classic example is the lawyer who flies from one city to another for a deposition on behalf of Client A. The time spent by the lawyer in traveling to and conducting the deposition would be billed to Client A.

However, during the flight, the lawyer works on files for Client B. May the lawyer also charge Client B for the same time for which he is billing Client A? Again, the obvious answer would be no. To allow otherwise would constitute double billing by the lawyer for his or her time.

Lastly, there is a possibility that lawyers "recycle" documents and research on behalf of clients. The classic example arises where a lawyer has done a significant amount of research and drafted memoranda, pleadings or other documents on behalf of a client. The client is billed for this research and these documents.

Later, the lawyer is hired by a new client, but in discussing the case with the new client, the lawyer realizes that he or she may be able to utilize the research and documents created for the predecessor client. May the lawyer now charge the same number of hours billed to the initial client, to this subsequent client, even though the actual time will not be necessary to recreate the research and documents in question? Again, the obvious answer would be no.

The Commission suggests that lawyers review their office practices with regard to fee contracts and letters of engagement to ensure compliance with the above-discussed fee and expense issues. [RO-2005-02] ▲▼▲

GEORGE R. PARKER

Bradley Arant Rose & White LLP, Montgomery

Become Active in the YLS– Join Us for the Sandestin CLE

I remember two years ago reading an *Alabama Lawyer* article written by **Christy Crow**, our YLS president in 2005-2006, entitled "Be Careful What You Wish For" where she described some of the demands on her time that the YLS presidency entailed. I now know exactly where she was coming from as she wrote that article. After countless e-mails, phone calls, letters, conferences, and meetings, the 2008 YLS calendar of activities is planned and underway. Thanks to the assistance of many, including the YLS Executive Committee and especially **Jimbo Terrell** (YLS vice president) and **Clay Lanham** (YLS treasurer), 2008 should be another great year for the group.

We will have our annual YLS Sandestin seminar this month, May 16-17. Each year, young lawyers from around the state gather for a weekend of fun and learning at the beach. The seminar is the largest attended event the YLS organizes each year. Typically, approximately 125 lawyers and their families attend this Sandestin get-together and participate in the many events held during the weekend. As always, this year we will have some great speakers. This CLE seminar which offers 6.2 hours of credit (with at least one CLE ethics hour), will be a great networking opportunity. In addition, a golf tournament, beach party, silent auction and evening reception are planned. The Sandestin CLE is made possible by the hard work of **Tucker Yance, Shay Lawson, Katie Hammett, Clay Lanham, Norman Stockman, Larkin Hatchett,** and **David Cain**. It is not too late to sign up. Feel free to give me a call at (334) 956-7607 and I will send you a registration form. At $300 (with a reduced fee of $250 for first-year lawyers) this CLE is a bargain. I strongly encourage your participation this year.

YOUNG LAWYERS' SECTION

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Thanks to the hard work of **Navan Ward** and **J.R. Gaines**, the YLS, along with the **Alabama Lawyers Association** and the **Capitol City Bar Association**, hosted its annual "Minority Pre-Law Conference" in Birmingham and Montgomery in April. The conference introduces 11th- and 12th-grade students to the American civil and criminal justice system and provide them with a unique opportunity to talk one on one with practicing minority lawyers. During the programs, the students were given the opportunity to view a simulated trial performed by practicing attorneys. The experience is designed to give students a better understanding of how courts in the United States resolve legal conflicts and the roles that judges, lawyers, juries and witnesses play in the system. Through participating in the mock trial as jurors, students gained an inside perspective on courtroom procedure. Approximately 500 students from the Birmingham and Montgomery areas participated in this year's program.

Our "Lawyer in Every Classroom" program is in its second full year and provides lawyers with the experience of going into high school classes and speaking with students about a variety of legal issues**. Mitesh Shah** and **Gray Borden** are the committee chairs and have partnered with the **Alabama Center for Law and Civic Education** to make this a very successful program. It is anticipated that this year alone, hundreds of students will benefit from the messages of our attorneys during these classroom sessions.

I am especially proud to announce that beginning this month the Alabama State Bar Admissions Ceremony will be held at the new Renaissance Montgomery Hotel and Spa in its performing arts theater. The theater seats 1,800 people and should be a great location for the admission ceremony for years to come. The first ceremony in the new theater will be May 20, and the fall admission ceremony is scheduled for October 29. Thanks to ceremony Chair **Leslie Ellis** for her hard work on this committee.

The YLS always needs volunteers from all areas of the state to assist with its many programs. If you want to help, contact me at (334) 956-7607. Or, take a look at our Web site at *www.alabamayls.org* to learn more about what's going on and how to get more involved. See you at Sandestin! ▲▼▲

Reinstatements

- In the March 2008 edition of *The Alabama Lawyer*, the notice announcing the suspension of Dothan attorney **Winfred Clinton Brown, Jr.** from the practice of law for noncompliance with the 2006 Mandatory Continuing Legal Education requirements should have stated: On October 22, 2007, Brown came into compliance with the MCLE Rules. On November 14, 2007, the Supreme Court of Alabama made an entry on the roll of attorneys dismissing the order of suspension against Brown and reinstating him to the practice of law effective October 26, 2007. [CLE No. 07-05]

- In the March 2008 edition of *The Alabama Lawyer*, the notice announcing the suspension of Montgomery attorney **Sarah A. Rutland Cook** from the practice of law for noncompliance with the 2006 Mandatory Continuing Legal Education requirements should have stated: On October 31, 2007, Cook came into compliance with the MCLE Rules. On December 13, 2007, the Supreme Court of Alabama made an entry on the roll of attorneys dismissing the order of suspension against Cook and reinstating her to the practice of law. [CLE No. 07-07]

Transfers to Disability Inactive

- Clanton attorney **Donald Gautney** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective December 18, 2007. [Rule 27(c); Pet. No. 07-69]

- Dadeville attorney **Anthony Paul Hunt** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective January 4, 2008. [Rule 27(c); Pet. No. 08-02]

Disbarments

- Carrollton attorney **Ira Benjamin Colvin** was disbarred from the practice of law in the state of Alabama effective January 24, 2007, the date of his interim suspension, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Colvin's consent to disbarment. At the time Colvin consented to disbarment, formal charges were pending against him in ASB No. 07-59(A), which charges were based on his arrest August 14, 2006 in Lowndes County, Mississippi for unlawful possession of a controlled substance in violation of *Ala. Code* §13A-12-212(A)(1), a felony. [ASB No. 06-157(A); Rule 20(a); Pet. No. 07-02; and Rule 23; Pet. No. 07-19]

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Suspensions

- Alabama attorney **Richard Hughes Batson, II**, who is also licensed in Tennessee, was suspended from the practice of law in the state of Alabama for a period of one year, effective November 22, 2006, by order of the Supreme Court of Alabama. The supreme court entered its order, as reciprocal discipline, pursuant to Rule 25, *Alabama Rules of Disciplinary Procedure*. The supreme court's order was based upon the November 22, 2006 order of the Supreme Court of Tennessee, suspending Batson for a period of one year for violations of DR 1-102(A)(1)(4)(5)(6), DR 6-101(A)(1)(2)(3) and DR 7-101(A)(1)(2)(3)(4), *Tennessee Code of Professional Responsibility,* and rules 1.1, 1.2, 1.3, 1.4, and 8.4(a) and (d), *Tennessee Rules of Professional Conduct*. The Supreme Court of Tennessee issued its order based on Batson's guilty plea in file number 27021c-5-LC and number 27699-5-LC.

  In addition, the Disciplinary Board of the Alabama State Bar ordered that Batson receive a public reprimand with general publication as reciprocal discipline for a public censure issued by the Supreme Court of Tennessee for violations of rules 1.4 and 8.4(a), (d) and (g), *Tennessee Rules of Professional Conduct*. Batson failed to notify his clients of his one-year suspension from the practice of law as ordered by the Supreme Court of Tennessee on November 22, 2006. [Rule 25; Pet No. 07-48]

- Birmingham attorney **Coker Bart Cleveland** was summarily suspended from the practice of law in the state of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure,* by order of the Disciplinary Commission of the Alabama State Bar, effective November 30, 2007. The Disciplinary Commission found that Cleveland's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 07-67]

- Effective August 15, 2007, attorney **William Tazewell Flowers** of Dothan has been suspended from the practice of law in the state of Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-08]

- Decatur attorney **Daniel Lee Forman** was suspended from the practice of law in the state of Alabama for a period of 18 months, retroactive to December 19, 2006, the effective date of his interim suspension. The remaining period of suspension is to be deferred pending successful completion of a two-year probationary period, by order of the Disciplinary Commission of the Alabama State Bar. Forman pled guilty to violating rules 1.3, 1.4(a), 1.4(b), 1.15(a), and 8.4(a), *Alabama Rules of Professional Conduct*, in two separate cases. Also, as part of the plea agreement, his previous interim suspension was dissolved, effective November 30, 2007.

  In ASB No. 06-143(A), Forman was retained to represent a client in a criminal matter. Thereafter, Forman failed to return the client's calls and failed to appear for scheduled appointments. Forman was not present for the client's arraignment and the client had to have an attorney appointed. Forman agreed to make restitution to the client in the amount of $500.

  In ASB No. 07-65(A), Forman was paid $680 to represent a client in a child support matter. Forman never completed the documents for the client's signature, nor did he return the client's phone calls. Forman agreed to make restitution to the client in the amount of $680.

  Certain other conditions of probation were also ordered. [ASB nos. 06-143(A) and 07-65(A)]

- Mobile attorney **Wesley Dale Rogers** was summarily suspended from the practice of law in the state of Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure,* by order of the

Disciplinary Commission of the Alabama State Bar, effective January 22, 2008. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Rogers had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation.

- Effective February 6, 2008, attorney **Paul Christopher Williams** of Birmingham has been suspended from the practice of law in the state of Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-26]

- Effective February 6, 2008, attorney **Richard Pleasant Woods** of Dothan has been suspended from the practice of law in the State of Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-28]

Public Reprimands

- Mobile attorney **Gregory Miles Hess** was ordered to receive a public reprimand without general publication for violation of rules 1.3, 1.4(a) and 8.4(c), *Alabama Rules of Professional Conduct*. Hess was hired by a client to file a sexual harassment case against International Paper Company and one of its employees. The client paid Hess $750. Hess filed suit in the United States District Court for the Southern District of Alabama on July 14, 1997. However, service on the defendants was never obtained. An order was entered September 23, 1997, directing Hess and his client to show cause why there had been no compliance with the service order. Hess ignored this order. The court dismissed the case without prejudice because of the failure to obtain service. Hess did not inform the client of this fact, but continued to tell her that he was taking care of the matter. She was told by the defendant's attorney that her case had been dismissed. The client confronted Hess, and he admitted to her that he

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had failed to perfect service. Hess told her that he would get it done and that she should not worry about her case. The client spoke with Hess at least three times after she learned that her case had been dismissed and each time Hess told her he would take care of things. Hess failed to do so. [ASB No. 98-135(A)]

- On January 25, 2008, Centreville attorney **Michael Lynn Murphy** received a public reprimand without general publication for violation of rules 5.5(a), 8.1(b), 8.4(a), 8.4(b), and 8.4(g), *Ala. R. Prof. C.* On or about November 9, 2006, Murphy contacted another attorney and left a message on her voice mail identifying himself as an attorney. The attorney contacted the Membership Department of the Alabama State Bar and confirmed that Murphy's law license was suspended. The attorney then returned Murphy's telephone call. Murphy informed the attorney that he was calling about a divorce matter in Autauga County in which another attorney represented the husband. Murphy stated that he now represented the husband. However, a final decree of divorce had already been entered October 16, 2006. At the time of this conversation, Murphy's law license was suspended due to his non-compliance with the Alabama State Bar Mandatory Continuing Legal Education requirements. Murphy failed or refused to respond to two letters from the Office of General Counsel informing him that a formal investigation had been opened, although he had been instructed to do so, and he was warned that a possible order of summary suspension of his law license would be issued if he failed to respond to the third letter of inquiry. On July 13, 2007, in Murphy's eventual written response to the Office of General Counsel, he admitted he was guilty of practicing law while his license to practice law was suspended. [ASB No. 06-209(A)]

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Butler

- Starnes & Atchison partner **M. Warren Butler** was recently appointed chair of the Medical Defense and Health Law Committee of the International Association of Defense Counsel (IADC). This committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions, health law advisory and regulatory support.

- **Alvin L. Fox**, a shareholder with Maynard, Cooper & Gale, has been elected to the State Law Resources Board of Directors.

- **David Gespass** of Gespass & Johnson has been elected a national vice president of the National Lawyers Guild and co-chair of its international committee. Founded in 1937 as an alternative to the American Bar Association, which did not admit people of color, the Guild is the oldest and largest public interest/human rights bar organization in the United States.

- **George M. Neal, Jr.,** a shareholder in Sirote & Permutt PC, will serve as president-elect of the Birmingham Bar Association for 2008. In addition, Neal serves as a bar commissioner of the Alabama State Bar for the 10th Judicial Circuit of Jefferson County, a member of the Birmingham Regional Chamber of Commerce Board of Trustees and a member of the Rotary Club of Birmingham.

- **Charles B. Paterson** is the new chair of the Montgomery Area Chamber of Commerce's board of directors. Paterson is the managing partner at the Montgomery office of Balch & Bingham. He served a two-year term as chair of the Montgomery Area Committee of 100, the economic arm of the chamber.

- Four River Region attorneys have been named officers for the local chapter of the Federal Bar Association. They include 2008 President **Cheairs M. Porter**, with the Alabama Attorney General's Office; first Vice President **R. Austin Huffaker, Jr.**, a shareholder with Rushton, Stakely, Johnston & Garrett PA; second Vice President **Terrie Scott Biggs**, with Capell & Howard PC; and Secretary-Treasurer **Matt Bledsoe**, also with the attorney general's office.

- **Marvin Rogers** has been elected to serve as chair of the Council of State Oil and Gas Attorneys, a national association of oil and gas attorneys. Rogers and the Council recently participated in the drafting of model legislation addressing the storage of carbon dioxide, which will mitigate the release of carbon dioxide into the atmosphere. Rogers serves as assistant attorney general for the Alabama Oil and Gas Board and is an adjunct professor at Cumberland School of Law.

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When this article went to press, the legislature was exactly half over, with 15 days having elapsed in the legislative session and 15 legislative days remaining. At this time, 1,329 bills have been introduced in the legislature and only nine local bills have found their way into becoming law. The house of representatives passed 179 bills while the senate passed 44. Thirty-two of the senate bills were "Sunset Bills" to continue the existence of an existing agency or board.

The following Law Institute bills passed the house of representatives, been considered by a senate committee and now need only one day to be considered by the senate before obtaining final passage. These are:

- HB-19: Redemption from Ad Valorem Taxes
  Representative Mike Hill and Senator Wendell Mitchell
- HB-131: Uniform Revised Limited Partnership Act
  Representative Cam Ward and Senator Roger Bedford
- HB-8: Uniform Prudent Management of Institutional Funds Act
  Representative Richard Lindsey and Senator Tom Butler
- HB-39: Uniform Parentage Act
  Representative Demetrius Newton and Senator Kim Benefield
- HB-476: Uniform Anatomical Gift Act
  Representative Robert Bentley and Senator Ted Little
- Uniform Satisfaction of Residential Mortgage Act (HB-111, SB-32)) is still pending in committee—Representative James Buskey and Senator Myron Penn

LEGISLATIVE WRAP-UP Continued from page 221

Other legislation:

Budgets

The governor's 2009 General Budget is below the current 2008 budget and back to the 2007 budgeted amount. His Education Budget for 2009 is also $400 million below the current budget. Much of the last half of the session will be spent considering these two budgets.

Immigration

Immigration has been a hot topic in Alabama, as well as in other states. This is not an easy issue. Congress was unable to come to an agreement on immigration law, so states are left to devise their own ways of dealing with illegal aliens.

Gambling

A proposal has been introduced to allow gambling at dog tracks and to tax them to help raise revenue to meet the short fall in the budgets. It is expected that this item will be addressed several times by the legislature.

Workers' Compensation

Both the business community and the trial lawyers have introduced bills dealing with various aspects of the workers' compensation law. With this being a complex matter, it is unlikely that a major overhaul will be accomplished this year.

Sunset bills

Each year the legislature reviews approximately one-fourth of the agencies that have licensing boards. This year the review began in the senate where the 32 Sunset bills were first reviewed. Next year these bills will originate in the house. Unless a bill is passed to continue these bills, they will automatically terminate at the end of the fiscal year. All 32 bills have been recommended to be continued.

Local legislation

A great deal of the second half of the session is generally dedicated to considering bills that only affect one county. Of all the bills that ultimately will pass, between one-third and one-half of the bills will affect just one county. This is due to Alabama's very limited Home Rule.

Institute Fellow

John Tanner, formerly chief, Voting Rights Section, Civil Rights Division, U.S. Justice Department, Washington, D.C., will be spending the next year on sabbatical with the Alabama Law Institute as a visiting Fellow. He will be writing a handbook on "pre-clearance" issues, teaching election law at both the University of Alabama and Cumberland School of Law and lecturing to lawyers and various governmental groups.

Annual Meeting

The Institute's annual meeting will be held during the annual meeting of the Alabama State Bar at Sandestin. This year's Insitute meeting will be Friday, July 11 at 10:15 a.m.

Institute President Demetrius Newton will preside over a program that will include:

- 2008 Legislation of Interest to Lawyers Panel:
  - Senator Roger Bedford
  - Senator Zeb Little
  - Representative Marcel Black
  - Representative Cam Ward
- Business & Non-Profit Entities Code
  - Professor Howard Walthall
- Pre-Clearance Election Issues under the Voting Rights Act
  - John Tanner, Institute Fellow (see above)

Check out the revised Law Institute Web site at *www.ali.state.al.us*, where you one can find Institute legislation, both the official bill and the ALI draft with Comments, as well as a list of legislators and all bills pending in the legislature.

PLEASE E-MAIL ANNOUNCEMENTS TO MARCIA DANIEL marcia.daniel@alabar.org

About Members

Erin Bell announces the opening of her firm at Two North 20th St., Ste. 920, Birmingham 35203. Phone (205) 251-8747.

Ashley E. Cameron announces the opening of her firm **Ashley E. Cameron LLC** at 155 Dauphin St., Mobile 36602. Phone (251) 432-8432.

Chip Cleveland announces the opening of **Chip Cleveland, Attorney at Law** at 703 McQueen Smith Rd., S., Prattville 36066. Phone (334) 365-6266.

Ramsey Duck announces the opening of **The Duck Law Firm** at 2100 Southbridge Parkway, Ste. 650, Birmingham 35209. Phone (205) 414-7554.

Barney Andrew Monaghan announces the opening of **B. Andrew Monaghan, Attorney LLC**. The mailing address is P.O. Box 1036, Magnolia Springs 36555. Phone (251) 581-3328.

Gregory A. Reeves announces the opening of **The Reeves Law Firm** at 232 Moulton St., E., Decatur 35601. Phone (256) 355-3311.

Among Firms

Matt Abbott and **W. Van Davis** announce the opening of **Abbott & Davis LLC** at 308 Martin St., N., Ste. 200, Pell City 35125. Phone (205) 338-7800 or (800) 690-7302.

W. Barry Alvis announces the opening of **W. Barry Alvis & Associates LLC** at 2450 Valleydale Rd., Birmingham 35244. Phone (205) 444-4773. **Lara L. McCauley** has joined the firm as an associate.

W. Percy Badham III and **Brannon J. Buck** announce the opening of **Badham & Buck LLC** at 2585 Wachovia Tower, 420 20th St., N., Birmingham 35203. Phone (205) 521-0036.

Ball, Ball, Matthews & Novak PA announces that **William D. Montgomery, Jr.** has become a partner and **John W. Marsh** has joined the firm as an associate.

Balch & Bingham announces that **R. Alan Deer** has joined the firm as a partner.

Black Warrior Riverkeeper announces that **John J. Keeling** has joined the non-profit organization as staff attorney.

ABOUT MEMBERS, AMONG FIRMS

Continued from page 223

Bradley Arant Rose & White LLP announces that **Paul P. Bolus, Robert R. Maddox, Gary L. Howard, Jamie L. Moore, D. Brian O'Dell**, **Ray D. Gibbons,** and **Christian Watson Hancock** joined the firm as partners and **Jeremy A. Smith, Jason A. Walters** and **Ann T. Taylor** joined as associates.

Brady Radcliff & Brown LLP announces that **Craig D. Martin** has joined the firm as a partner.

Carr Allison announces that **C. Steven Ball** and **Legrand H. Amberson, Jr.** have joined the firm as shareholders.

Christian & Small announces that **Chirayu M. Shah** has become a partner and **Jeremy L. Carlson** and **Robert H. Harris, II** recently joined as associates.

Cobb, Derrick, Boyd & White announces that retired Circuit Judge **Denny L. Holloway** has become associated with the firm.

Constangy, Brooks & Smith LLC announces that **Carla J. Gunnin** has been promoted to partner.

Daniell, Upton, Perry & Morris PC announces that **David A. Busby** has joined the firm as an associate.

Dick, Riggs, Miller & Stem LLP announces a name change to **Dick Riggs Miller LLP.**

John A. Donsbach announces the formation of **Donsbach & King LLC** at 504 Blackburn Dr., Martinez, Georgia 30907. Phone (706) 650-8750.

Fees & Burgess PC announces that **Bryant L. Lewis** has become associated with the firm.

Michael I. Fish, Mary Stewart Nelson and **Joshua G. Holden** announce the opening of **Fish Nelson LLC** at 3100 Lorna Rd., Ste. 104, Birmingham 35216. Phone (205) 332-3430.

Friedman & Downey PC announces that **Raymond M. Lykins** and **Jessica L. Fleming** have joined the firm as associates.

Ronald J. Gault and **Tracy Hendrix** announce the opening of **Gault & Hendrix LLC** at 5346 Stadium Trace Parkway, Ste. 114, Birmingham 35244. Phone (205) 987-6935.

Harbert Management Corporation announces the promotion of **R.A. Ferguson III** to vice president and assistant general counsel.

Harris, Caddell & Shanks PC announces that **Phil D. Mitchell** has joined the firm as a partner.

Gerald Hartley and **Wade Hartley** announce the formation of **Hartley & Hartley LLC** at Park Place Center, 8650 Minnie Brown Rd., Ste. 124, Montgomery 36117. Phone (334) 481-6904 or (334) 481-6902.

Haskell Slaughter Young & Rediker LLC announces that **Robert Adams, Kim Glass, Thomas G. Mancuso, A. Lee Martin,** and **Kirk D. Smith** have joined the firm as members and **Staci G. Cornelius** has become *of counsel.*

W.A. Hopton-Jones, Jr. and **Jennifer S. Precise** announce the formation of **Hopton-Jones Precise PC** with offices at 710 29th Ave., Tuscaloosa 35401. Phone (205) 409-2210.

Huie, Fernambucq & Stewart LLP announces that **J. Patrick Strubel** and **David L. Brown, Jr.** have become partners, and **E. Bryan Paul** has become associated with the firm.

Jackson Lewis LLP announces that **Rhonda S. Nabors** and **Mieke A. Hemstreet** have become associates.

ABOUT MEMBERS, AMONG FIRMS

Continued from page 225

Brent H. Jordan and **Joseph S. Greer** announce the formation of **Jordan & Greer LLP** at 2319 Market Place, Ste. C, Huntsville 35801. Phone (256) 489-8930.

The Law Office of Earl H. Lawson, Jr. announces that **J. Brooks Leach** has joined the firm.

Lloyd, Gray & Whitehead announces **William B. Beckum, Aaron Ashcraft** and **Meghan Eshbaugh** have joined the firm as associates.

Maynard, Cooper & Gale PC announces that **John David Collins, W. Clark Goodwin**, formerly *of counsel*, **Edward M. Holt, M. Lee Huffaker,** and **Ashley E. Swink** have been named shareholders.

Shinbaum, Abell, McLeod & Campbell announces a name change to **Shinbaum, McLeod & Campbell.**

B. Scott Shipman PC announces that **Marcia E. Lamar** has become associated with the firm, and the firm name is now **Shipman & Associates PC**.

The Southern Law Group PC announces that **Carmen S. Ferguson** has as an associate and **Joe Morgan, III** is *of counsel*.

Starnes & Atchison LLP announces that **George E. Newton II**, **Joshua H. Threadcraft** and **Jackie H. Trimm** have been named partners, and **Todd H. Cox** has joined as an associate.

Stephens, Millirons, Harrison & Gammons PC announces that **Robert E. Rawlinson** has become a partner.

Charley A. Tudisco and **Scott W. Gosnell** have formed **Tudisco & Gosnell LLC** at 1901 Cogswell Ave., Ste. 2, Pell City 35125. Phone (205) 814-1146.

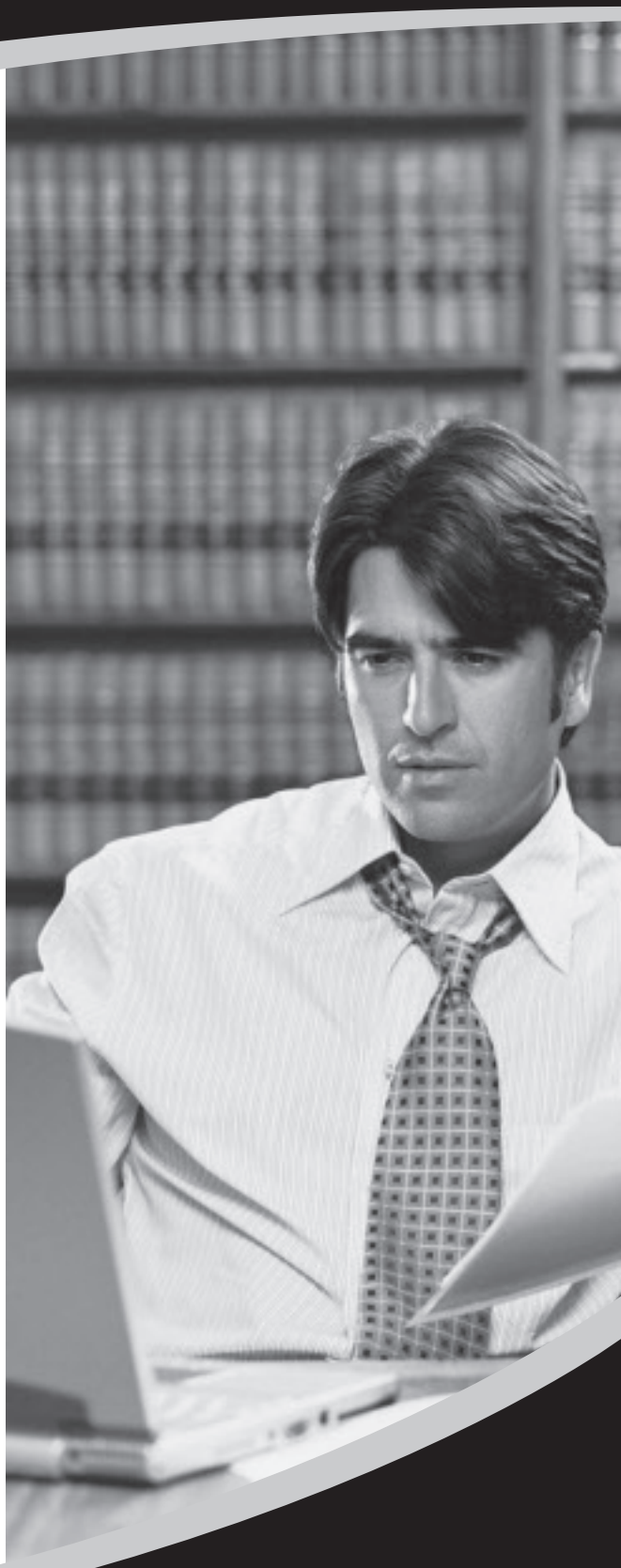
The **United States Air Force** announces that **Gordon O. Tanner** has been named Deputy General Counsel (Environment and Installations), a member of the Senior Executive Service in Washington, DC.

Jake Watson of the **Watson Law Firm PC** announces that **Aaron Ryan** has become associated with the firm.

John F. Whitaker, William A. Mudd, K. Donald Simms, K. Phillip Luke, and **David R. Wells** announce the formation of **Whitaker, Mudd, Simms, Luke & Wells LLC** at 2001 Park Place N., Ste. 400, Birmingham 35203. Phone (205) 639-5300. **Andrew P. Anderson, Douglas H. Bryant, Lindsay P. Hembree** and **James M. Strong** have become associates.

White Arnold Andrews & Dowd PC announces a name change to **White Arnold & Dowd PC.** George W. Andrews, III, a partner, has retired. ▲▼▲

Build your Case on a Solid Business Valuation



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