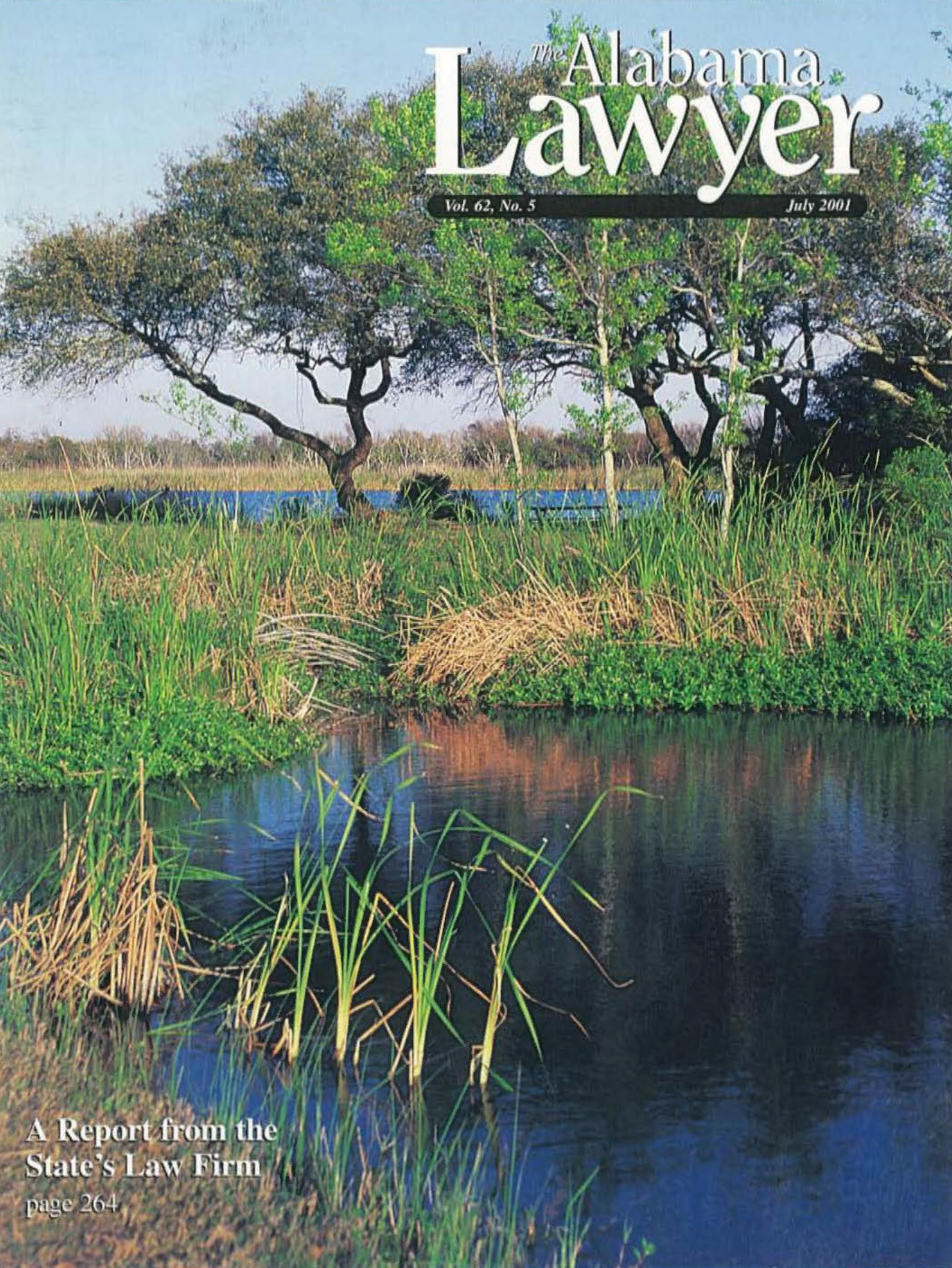
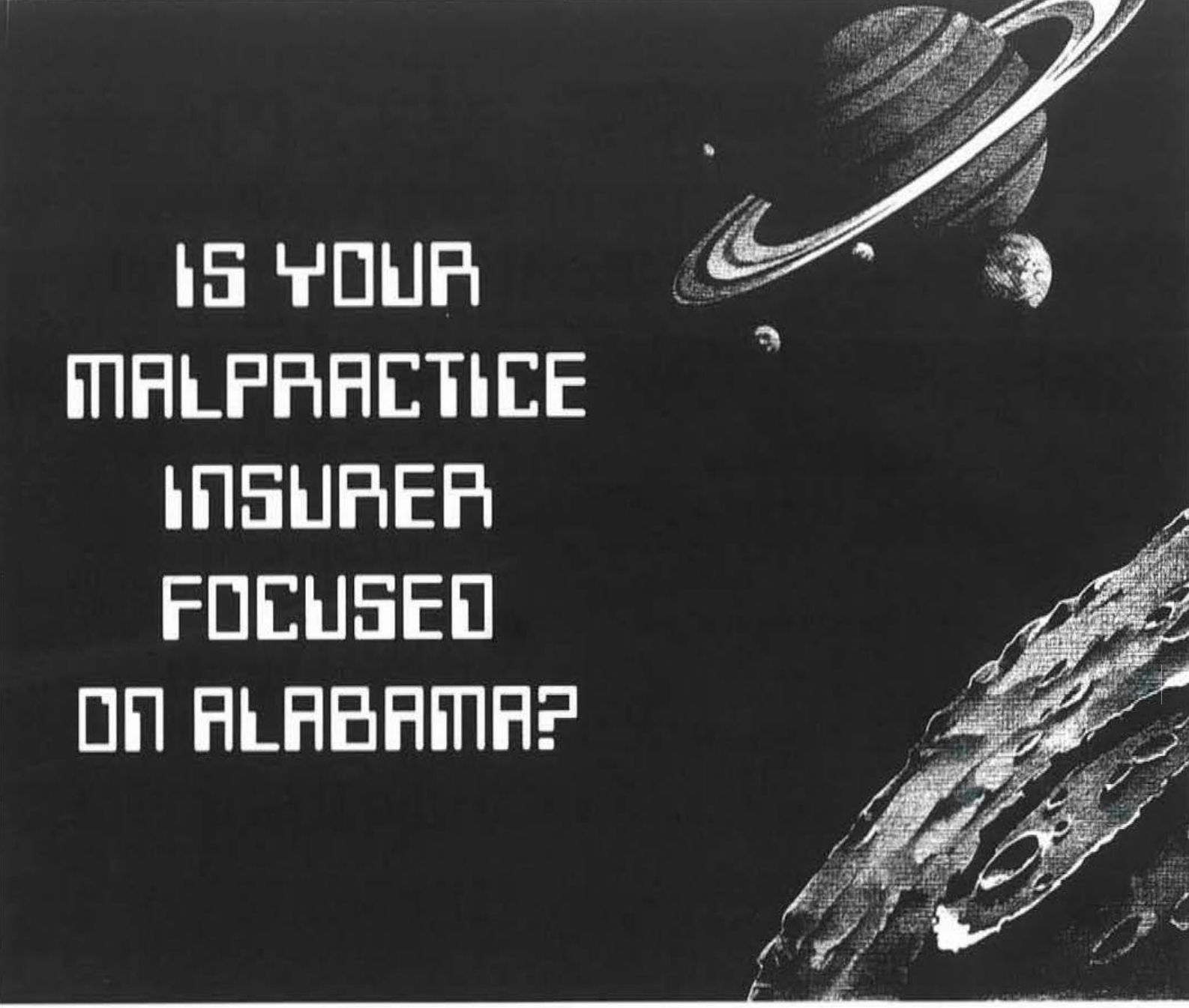


The Alabama Lawyer

Vol. 62, No. 5 July 2001

A Report from the State's Law Firm

page 264



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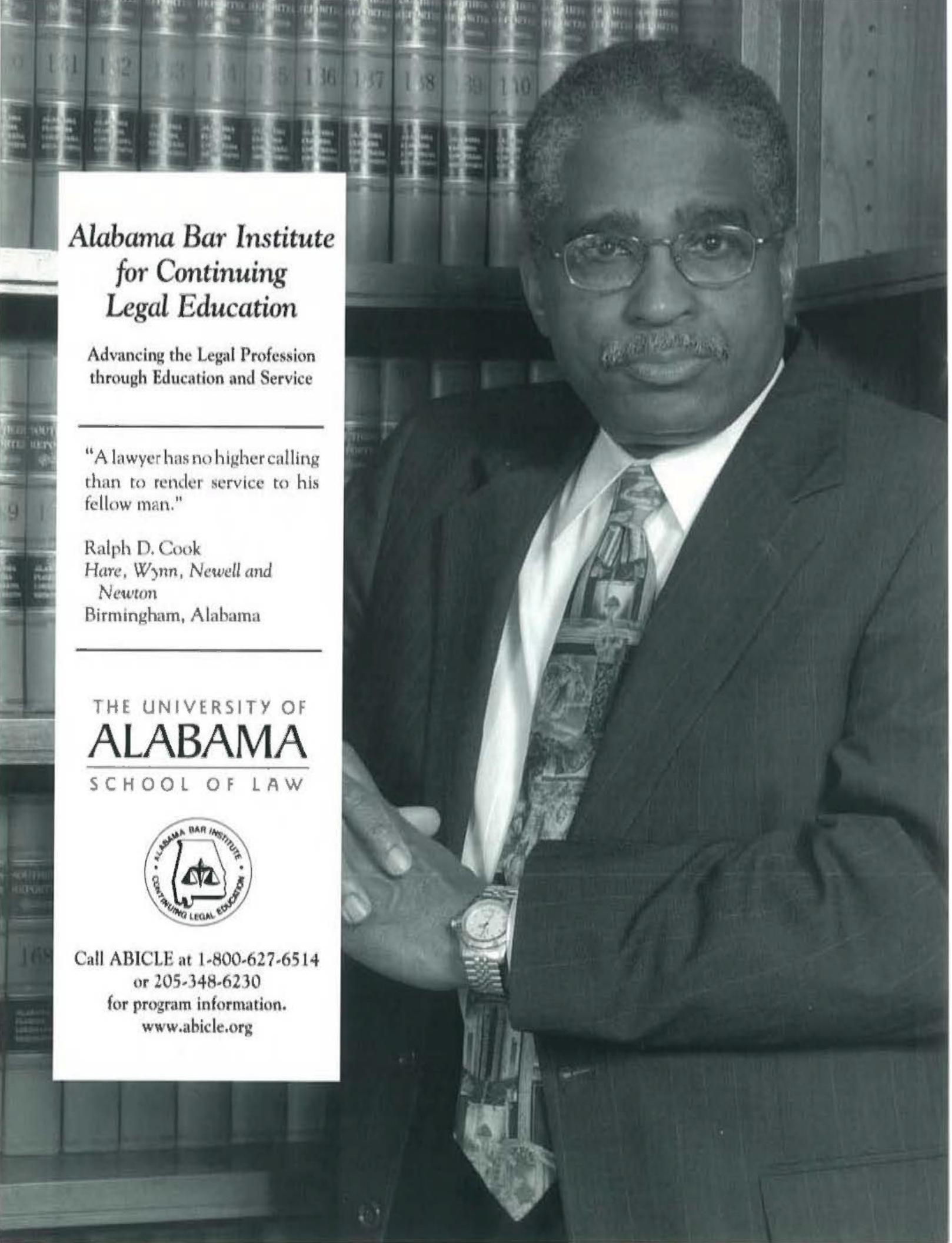

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THE ALABAMA LAWYER
Vol. 62, No. 5 / July 2001

On the Cover

Alabama marshland in Gulf State Park—*Located in Baldwin County, on the Gulf of Mexico, the park includes over two miles of white, sandy beaches, a resort, a lakefront picnic area, a boat launch, and an 825-ft. fishing pier.*

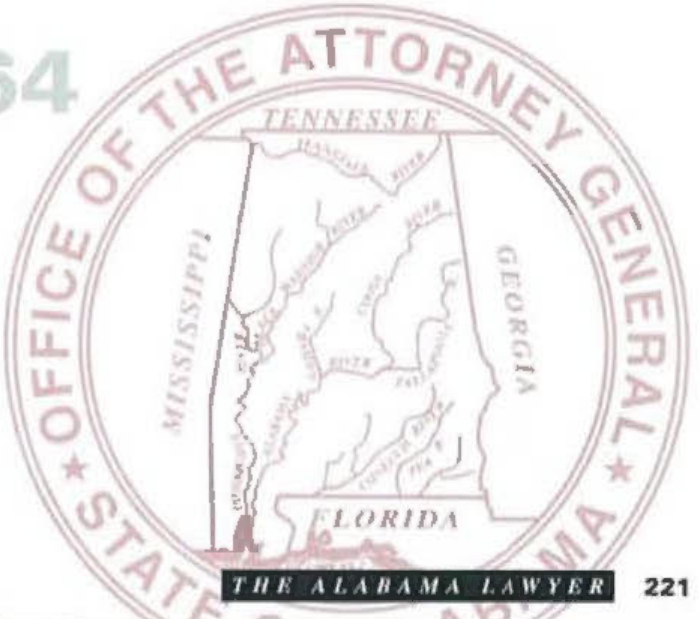
—Photograph by Paul Crawford, JD

Features

246

256

264



THE ALABAMA LAWYER

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July 2001

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Samuel A. Rumore, Jr.

Ten Thousand Words

By Samuel A. Rumore, Jr.

This is my last President's Page as your Alabama State Bar President. The President is given an open forum to write two or more pages on any topic. So, I have decided to present "Ten Thousand Words". I know that seems a bit verbose, but hear me out.

When I went to the Bar Leadership Institute at the American Bar Association in Chicago (this is commonly called "Bar President's School"), the most popular class was the presentation on "How to Write a President's Page." The key words were *personal*, *informative* or *entertaining*, and *brief*. You are encouraged to be innovative and to do things a little differently. You should make your columns interesting by being creative.

Over the past 14 years, I have written more than 75 articles for *The Alabama Lawyer*. This has truly been a labor of love. So how do I arrive at 10,000 words for this President's Page alone? Well, it is traditionally said that a picture is worth a thousand words. So I am going to close my year as your president with ten pictures—representing 10,000 words—both spoken and unspoken. These photos are of people important to me or of significant events during my term as bar president. So here goes.

Photo 1 You can't know where you are going until you know from where you came. This photo is special to me because it is the only one I have that includes my grandfather, **Tony Rumore**. He came to this country from Italy in 1884. He worked, made some money, went back to Italy, and married my grandmother, **Mary**. They had a son, **Sam**, who is in the lower left of the photo, who was born in 1899. In 1900 the family came to stay in America, and my other uncles and aunts were born here.

Photo 2 This picture is treasured because it is one of the earliest of my maternal grandparents. **Phillip** and **Mary LaSusa** also came from Italy. They took seriously the Biblical admonition to be fruitful and multiply. They had 14 children and 13 survived to adulthood. In 1938 they won the *Birmingham News* contest for having the largest family in Birmingham. To feed such a large family you either had to have a farm or a grocery store. My grandfather ran his store for almost 50 years.

Photo 3 Everyone has important people in their lives. Here are my parents, **Sam** and **Theresa Rumore**, and my wife, **Pat**, in a photo taken before kids.

Photo 4 For many years our family visited courthouses around Alabama on weekends. This "three-judge panel" consisted of **Theresa, Claire** and **Samuel**. It was winter time and so they were "on the bench" instead of "on the beach."

Photo 5 Here are two important women in my life—my wife, **Pat**, and my partner, **Nina Miglionico**. This was taken at the Birmingham Bar picnic.

Photo 6 A law firm can only be successful if it is hardworking and cooperative. That best describes the people I have worked with for more than 25 years. Our past and present staff get together each year for a Christmas luncheon. Front row, left to right: **Cindy McGinnis, John Miglionico, Charline Bailey, Nina Miglionico** and **Kathleen Wester**. Back row: **Pat Rumore, Harry Asman, Sam Rumore,** and **Erica Hollins**.

Photo 8 A bar president also needs a good lawyer. The Alabama State Bar has a great one in **Tony McLain**. Here are the four "amigos" (including Tony and **Leah McLain** with Notre Dame "Subway Alum" **Joe Flaherty**) as they visit South Bend, Indiana for a football weekend.

Photo 7 A bar president also depends on the full-time Montgomery staff. Here are **Keith** and **Teresa Norman** at the Southern Conference of Bar Presidents meeting in Savannah. I could not have carried out my duties this year without Keith's help and the assistance of the entire ASB staff.

Photo 9 Law Day, May 1, 2001—This was an important day as we dedicate the sixth Alabama State Bar Legal Milestone Marker in Florence. Present are bar commissioner **Robert Gonce** and Florence attorney and master of ceremonies for the dedication **William Smith**.

Photo 10 Pat and I look forward to spending time at home after my term as president ends.

I close now by thanking everyone who helped me this year. They are too numerous to name, but I particularly thank my immediate predecessors, **Dag Rowe**, **Vic Lott**, and **Wade Baxley** for their encouragement. And, I offer congratulations to **Larry Morris** and **Fred Gray**, both lawyers who love our Alabama State Bar, and to our unknown successors in the future. It has been a great experience to serve as your president. I will have many fond memories of the fine lawyers I met both inside and outside the State of Alabama during my year. The travels have been many. The travails have been few. I hope to keep involved with the Alabama State Bar whenever called on. Our association is a strong one. Our profession is a great one. Let's keep them that way. And, I hope that in the near future, we can get the historic first of a woman bar president behind us. Thank you once again for the greatest honor that can be bestowed on a lawyer by his (or her) peers. ■

Keith B. Norman

Be a Part of LIFEPLAN 2001

By Keith B. Norman

During the next few months you will be seeing and hearing about a program called **LIFEPLAN 2001: Planning Ahead For Your Future Needs.** This public service program is being sponsored jointly by the Alabama State Bar, the Medical Association of the State of Alabama and the Alabama Hospital Association with the support of the Alabama Public Health Department and the Alabama Organ Center. The program will be a statewide public education campaign to promote future health care planning by encouraging families to discuss healthcare wishes and to prepare advance care directives. Alabama citizens will be given an opportunity to meet and work with lawyers and health care professionals to consider advance directives including powers of attorney for health care, declarations to physicians, and organ and tissue donations.

Although **LIFEPLAN 2001** will be statewide, it will be a volunteer- and community-based program. Trained volunteer lawyers and health care professionals will assist in presenting free **LIFEPLAN 2001** workshops to the public in order to help citizens understand advance directives and their legal implications. In addition to workshops, comprehensive consumer guides have been developed to be given free of charge to those attending the workshops. Because this will be a community-based program, facilities housing service clubs, church groups or student organizations, and community centers, local libraries and businesses are some of the locations where the workshops will be held.

The kickoff for the **LIFEPLAN 2001** campaign is October 1. Statewide publicity to raise public awareness about the issue of advance directive and this cooperative program is scheduled for September and October. A number of lawyers have already agreed to participate in the program and receive training. If you are interested in taking part in **LIFEPLAN 2001**, contact Susan Andres, the state bar's director of communications at (334) 269-1515, or *sandres@alabar.org*. You can also get more information about the program from the bar's Web site, *www.alabar.org*. Even if you are unable to be a part of this program, I hope that you will encourage citizens in your area to attend the **LIFEPLAN 2001** workshops. ■

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Cumberland School of Law at Samford University is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our educational seminars during the 2000-2001 academic year. We gratefully acknowledge the contributions of the following individuals to the success of our CLE programs:

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- **Elizabeth Barry Johnson**, of the Birmingham firm of Sirote & Permutt, P.C., has been selected as a recipient of the 2001 American Bar Association Pro Bono Publico Awards.

- Recently elected officers of the Academy of Attorney Mediators are **James E. Turnbach**, of Turnbach & Warren, P.C., president; **Caryl P. Privett**, attorney/mediator, vice-president; **Karen LaMoreaux**, of P.E. LaMoreaux & Associates, Inc., secretary; and **Steven A. Benefield**, of Christian & Small, P.C., treasurer.

- A new slate of officers took over in January for the Mobile Bar Association. They are: **Larry U. Sims**, of Sims, Graddick & Dodson, president; **Donald M. Briskman**, of Briskman & Binion, president-elect; **James A. Brandyburg** of Carter & Brandyburg, treasurer; and **Mary Margaret Bailey** of Frazer, Greene, Upchurch & Baker, L.L.C., secretary. Members of the MBA Executive Committee are **A. Edwin Stuardi**, YLS president, and **Alex F. Lankford**, III, MBA immediate past president. Members of the Alabama State Bar Board of Bar Commissioners from Mobile include **Wes Pipes**, **Billy C. Bedsole**, **Caine O'Rear, III** and **Celia J. Collins**.

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September	7	Developments and Trends in Health Care Law 2001
	13	Alabama's Required MCLE Professionalism Training Program
	21	Mediation Advocacy
October	5	Using Computers in Your Law Practice
	12	12th Annual Bankruptcy Law Seminar
	18	Trying the Personal Injury Case
	19	Trials of the Century featuring Todd S. Winegar
	26	Revised UCC Article 9, Secured Transactions
November	2	15th Annual Workers' Compensation Seminar
	9	Trial Practice in Municipal, District, and Circuit Courts
	15	Alabama's Required MCLE Professionalism Training Program
	16	Criminal Defense in Federal Court
	30	Trial Evidence: Artistry & Advocacy in the Courtroom featuring Thomas A. Mauet
December	7	Employment Law Update
	13	Products Liability
	14	"Hot Topics" in Civil Litigation - Mobile
	20	"Hot Topics" in Civil Litigation - Birmingham
	28-29	CLE By The Hour

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Due to the huge increase in notices for "About Members, Among Firms," The Alabama Lawyer will no longer publish addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.

About Members

Roianne Houlton Frith announces the opening of her new office at 250 Winton Blount Loop, Montgomery, 36117. Phone (334) 215-1988.

Jeremy W. Armstrong announces the opening of his new office at 806 14th Street, Phenix City, 36868. Phone (334) 291-0410.

Kenneth J. Riemer announces the opening of his office at 169 Dauphin Street, Suite 206, Mobile, 36602. Phone (334) 432-9212.

Gene Spencer announces the opening of his office at 119 S. Foster Street, Suite 101, Dothan, 36301. Phone (334) 678-8200.

James S. Robinson announces the opening of his new office at 800 Shades Creek Parkway, Suite 500, Birmingham, 35209. Phone (205) 414-8189.

James A. Johnson announces the opening of his office at 2029 Airport Boulevard, Suite C, Mobile, 36606. Phone (334) 473-1800.

Among Firms

Cochran, Cherry, Givens & Smith, P.C. announces that **Terry G. Key** has joined the firm.

Hall, Conerly, Mudd & Bolvig, P.C. announces that **Terry Alan Sides** and **John M. Fraley** have become members and shareholders of the firm and that **P. Ted Colquett** has become a shareholder of the firm.

Joseph M. Cloud, **Brent L. Parker**, **Jeffrey W. McKinney** and **M. Roy Braswell** announce the formation of **Cloud, McKinney, Braswell & Parker, L.L.C.** Offices are located at 521 Madison Street, Second Floor, Huntsville, 35801. Phone (256) 534-0545.

Keith B. Franklin and **L. J. Stein, III** announce the formation of **Franklin & Stein, P.C.** Offices are located at the Riverview Plaza, 63 S. Royal Street, Suite 1109, Mobile, 36602. Phone (334) 433-0051.

Michael K. Abernathy announces the formation of **Abernathy & Associates, L.L.C.** Offices are located at One Chase Corporate Drive, Suite 490, Birmingham, 35244. Phone (205) 982-8844.

Robinson & Robinson announces that **Alexander M. Weisskopf** has joined the firm.

Haygood, Cleveland & Pierce, L.L.P. announces that **Philip A. Thompson** has become associated with the firm.

Sabel & Sabel, P.C. announces that **Ragini Gupta** has become associated with the firm.

Vickers, Riis, Murray & Curran, L.L.C. announces that **Lisa Bradford Hansen** has joined the firm as a member.

Lightfoot, Franklin & White, L.L.C. announces that **Melody L. Hurdle** and **Robin H. Graves** have become members of the firm.

Cassady, Fuller & Marsh, L.L.P. announces that **M. Chad Tindol** has become a partner of the firm.

Hand Arendall, L.L.C. announces that **Frank C. Galloway, Jr.** has joined the firm as a member and **Douglas W. Fink**, **Brooks P. Milling** and **E. Luckett Robinson, II** have become members of the firm. **Andrew J. Crane**, **Christopher M. Gill**, **Tracy R. Davis**, **Lisa Darnley Cooper**, and **Louis C. Norvell** have become associates of the firm.

Campbell, Waller & McCallum, L.L.C. announces that the firm's name has been changed to **Campbell, Waller & Loper, L.L.C.**

Constangy, Brooks & Smith, L.L.C. announces that **Thomas A. Davis**, **Tammy L. Dobbs** and **Charles A. Powell, IV** have become members of the firm.

Newman, Miller, Leo & O'Neal announces that **Theresa Terrebonne** has become associated with the firm.

Johnstone, Adams, Bailey, Gordon & Harris, L.L.C. announces that **E. Russell March, III** and **Scott A. Browning** have become members of the firm.

Chris A. Barker announces the formation of **Barker, Rodems & Cook, P.A.** Offices are located at 300 W. Platt Street, Suite 150, Tampa, 33606. Phone (813) 489-1001.

The **Talladega County District Attorney's Office** announces that **Chad Edward Woodruff** has accepted a position as assistant district attorney for the 29th Judicial Circuit.

Darwana Hall and **Leon G. Johnson** announce the formation of **Hall & Johnson, L.L.C.** Offices are located at 200 W. Court Square, Suite 103, Huntsville, 35801. Phone (256) 533-9191.

Berkowitz, Lefkovitz, Isom & Kushner, P.C. announces that **Marion F. Walker** and **Gary S. Schiff** have joined the firm as members.

Drew W. Peterson, Mark C. Peterson and **Susan H. Peterson** announce the formation of **Rives & Peterson, L.L.C.** Offices are located at 3100 Independence Drive, Birmingham, 35209. Phone (205) 879-5808.

Lloyd, Dinning, Boggs & Dinning announces that the firm name has been changed to **Lloyd & Dinning, L.L.C.** The firm also announces that **Gregory S. Griggers** has joined the firm as a partner and that **Alexander F. Braswell** has joined the firm as an associate.

State of Alabama Board of Pardons and Paroles announces that **Judge Francis Allen Long, Sr.** has joined the legal staff as *of counsel*.

Christine Sampson Hinson and **James R. Hinson** announce the formation of **Hinson & Hinson, P.C.** and that **JoAnn M. Perez** has become associated with the firm. Offices are located at 4650 Whitesburg Drive, Suite 203, Huntsville, 35802. Phone (256) 880-9150.

Mary A. Turner and **R. Hays Webb** announce the formation of **Turner & Webb, P.C.** Offices are located at 601 Greensboro Avenue, Suite 1-A, Tuscaloosa, 35402. Phone (205) 758-5576.

Frank J. Russo and **Eric Heath Johnson** announce the formation of **Russo & Johnson, P.C.** The firm also announces that **G. Gregory White** and **Robert C. Keller** have joined the firm as associates. Offices are located at 315 Gadsden Highway, Suite D, Birmingham, 35235. Phone (205) 833-2589.

Burr & Forman, L.L.P. announces that **William C. Byrd, II, William C. Collins, Jr., Clark A. Cooper, James F. Fleenor, Jr., Reid S. Manley, Ricky J. McKinney**, and **Cary T. Wahlheim** have become partners in the firm. **Noel G. Delchamps, Christina A. Graham, Jennifer L. Griffin, C. Logan Winkle, Kermit L. Kendrick, G. Travis Maxwell, III, Katherine M. McGinley**, and **Janine L. Smith** have joined the firm as associates.

J. A. Jones Construction Company announces that **John D. Bond, III** has become president and CEO of the company. Offices are located in Charlotte, North Carolina.

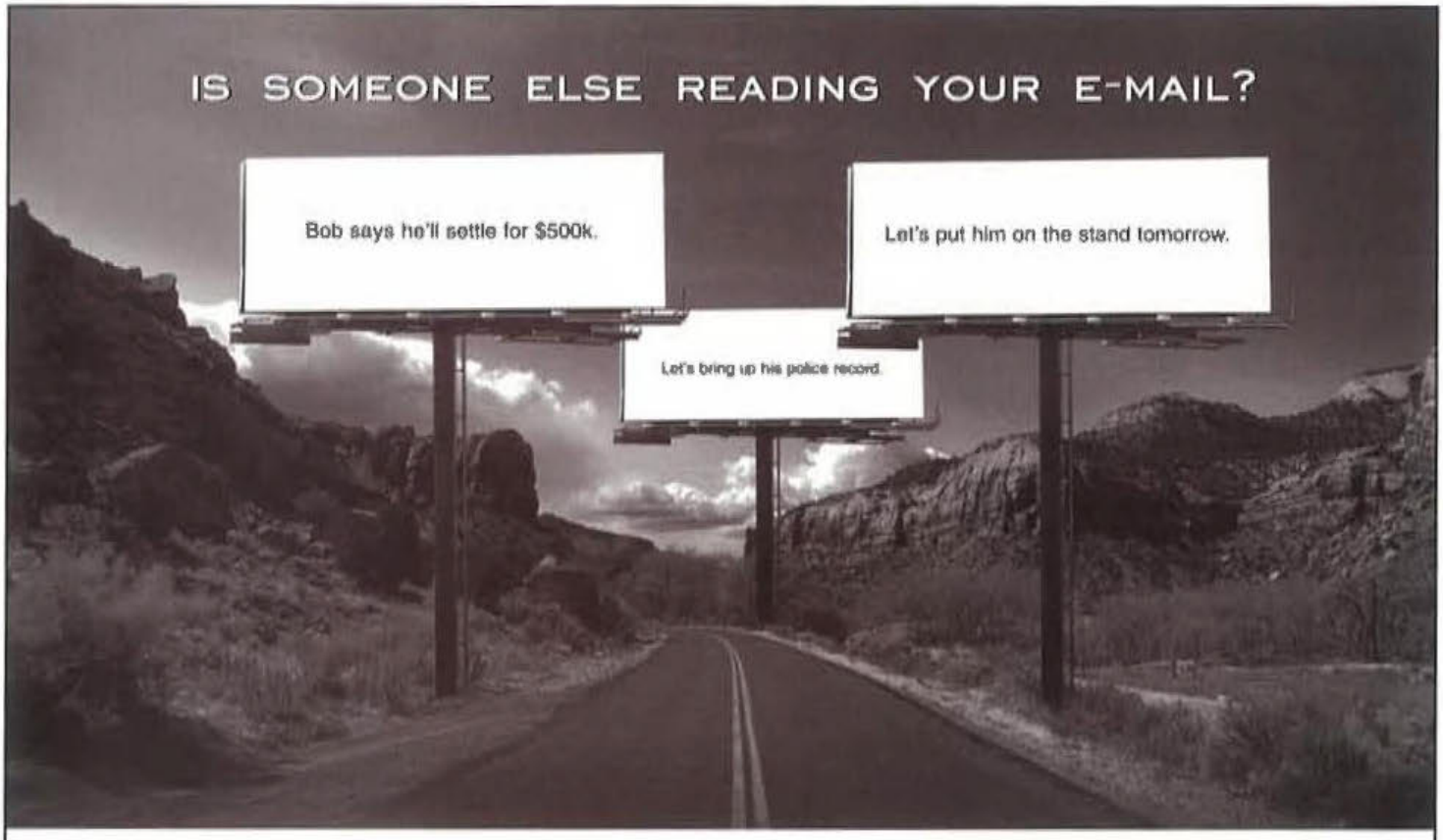
Ferguson, Frost & Dodson, L.L.P. announces that **Stacey A. Linn** has joined the firm as an associate.

Ford & Harrison L.L.P. announces that **Patrick F. Clark** has become a partner.

Christopher E. Malcolm, Angela D. Terry and **Timothy L. Shelton** announce the formation of **Malcolm, Terry & Shelton P.C.** and that **Errek Jett** has become associated with the firm. Offices are located at 734 Main Street, Moulton, 35650. Phone (256) 974-4262.

John E. Warren, III and **Jonathan C. Sapp** announce the formation of **Warren & Sapp, L.L.C.** Offices are located at 1824 Third Avenue, South, Jasper, 35502. Phone (205) 221-1044.

Greene & Phillips, L.L.C. announces that **David J. Wible** has become an associate with the firm. ■



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Thomas G. Greaves, Jr.

Thomas G. Greaves, a highly respected member of the Mobile Bar Association, departed this life on Monday, November 27, 2000.

Thomas G. Greaves, Jr. was born in Lynchburg, Virginia on April 19, 1918. He attended public schools in Mobile and graduated from Murphy High School where he had been student body president. He attended and graduated from the Wharton School of Finance at the University of Pennsylvania with a bachelor's of science degree in economics in 1939; he attended the University of Alabama School of Law and obtained his L.L.B. degree in 1947. While in law school, he was a member of the Farrah Order of Jurisprudence.

He was also a member of the Mobile and American bar associations and past president of the Mobile Bar, as well as past president of the Alabama State Bar. He began his legal career in Mobile as an associate with the firm of Smith, Hand, Arendall & Bedsole. Later he became a partner and the firm name changed to Hand, Arendall, Bedsole, Greaves & Johnston. Tommy was extremely active in local, state and American Bar Association activities. He was a member of the House of Delegates and chairman of the Rules Committee of the ABA, an Alabama State Delegate to the ABA; and also a member of the Board of Governors of the ABA. He served on numerous committees in various capacities for the ABA.

He was a member of the Alabama Law Institute, the Alabama Defense Lawyers Association and a Fellow with the American Bar Foundation as well as other professional associations. In the early 1960s, he was among 17 lawyers appointed by the American Bar Association to work on the organization's Committee on Civil Rights and Racial Unrest.

Tommy was also very active in other civic and charitable endeavors. He served as president of the Mobile Chapter of the American Red Cross and the Child and Family Welfare Service. He was a director of the Mobile Association for the Blind, a Boy Scout Master and a member of the Mobile Area Chamber of Commerce.

Tommy was also a World War II infantryman from 1941 to 1945. His tour of duty included serving in Italy. He was discharged with the rank of captain.

Tommy was a Sunday School teacher and had been active locally and statewide in the Protestant Episcopal Church serving as Vestryman at All Saints and later as St. Paul's in Mobile. He was also president of the Episcopal Churchmen's Association of Alabama.

Tommy Greaves is survived by his wife, Jean Bell Greaves of Mobile, two sons, Thomas Guy Greaves, III of South Carolina and Mac Bell Greaves of Birmingham; a sister, Florence G. Leatherbury of Mobile; two brothers, Walker Radford Greaves of Mobile, and Dr. John Alban Greaves of Birmingham; and five grandchildren.

Tommy Greaves was a beloved, friendly and caring person. His legal and leadership abilities gained him a host of friends all over the United States. In the words of the Honorable Brevard Hand, Senior United States District Judge for the Southern District of Alabama, who shared a lifetime association with Tommy, "Tommy never had a selfish bone in his body and was always anxious to advance his associates. In other words, I could never want for a better friend."

—Larry U. Sims, president
Mobile Bar Association

Judge Daniel Holcombe Thomas

Judge Daniel Holcombe Thomas, United States District Judge for the Southern District of Alabama, Southern Division, departed this life on Thursday, April 13, 2001 in Mobile.

Judge Daniel H. Thomas, the son of C.E. and Augusta Pratt Thomas was born August 25, 1906, in Prattville. He attended both elementary and high school in Prattville and graduated from the University of Alabama School of Law in 1928. He practiced law in Mobile from 1930 to 1951, and was a member of the firm of Lyons & Thomas.

He served his country in the United States Navy from 1943 to 1946, and returned to Mobile where he continued to practice law. He was appointed U.S. District Judge for the Southern District of Alabama by President Harry S. Truman on March 9, 1951, where he continued to serve until his death. He was a member of the Mobile Bar, Alabama State Bar and American Bar associations. Judge Thomas was active in the Boy Scouts of America and served as president of the Mobile Area Council from 1967 to 1968, and was awarded the Silver Beaver Award in 1970, and the Silver Antelope Award in 1975. He was a trustee of the Department of Archives and History for the State of Alabama, a member of the Alabama Alpha Chapter of Phi Delta Theta Social Fraternity, president of the Alabama Alpha Chapter in 1926, and a member of the Phi Delta Phi Legal Fraternity. He was a charter member of Ashland Place United Methodist Church, a member of the International Trade Club, the Mobile Country Club, a Mystic Society and the Pecan Outing Club.

Judge Thomas is survived by two sons, Daniel H. Thomas, Jr. and Merrill Pratt Thomas; his widow, Catharine Jones Thomas; six grandchildren; two stepdaughters, Angela M. McNamara and Catharine M. Moore; and one niece, Ann P. Wells.

—Alex F. Lankford, III, past president
Mobile Bar Association

Daniel T. McCall, Jr.

Daniel T. McCall, Jr., a distinguished lawyer and former jurist, died at his home at the age of 91 on Monday, December 4, 2000.

Judge Daniel T. McCall, Jr. was born in Butler on March 12, 1909, the son of Dr. Daniel Thompson McCall and Caroline Winston Bush McCall. He was a longtime resident of Mobile, where he graduated from the University Military School. He attended the University of Alabama where he received an AB Degree and an LLB and LLD degree from the University of Alabama School of Law. He practiced law in Mobile for 27 years with the firm of Johnston, McCall & Johnston. Thereafter, he served as a circuit court judge from 1960 to 1969, and subsequently was appointed as associate justice to the Supreme Court of Alabama where he served from 1969 to 1975. Judge McCall also was a member of the Mobile Bar Association and the Alabama State Bar, as well as the American Bar Association. He served as president of the Mobile Bar Association in 1953.

Judge McCall was a lieutenant in the United States Navy during WWII, a member of All Saints' Episcopal church and a past vestry member. He held positions in many civic, academic and judicial organizations. He was a trustee of the University of Alabama from 1965 to 1979, then becoming a trustee emeritus. He was also a member of the Alabama Academy of Honor, the American Judicature Society, the Mobile Preservation Society, the Alabama Historical Association and director of the Alabama Law School Foundation. He was also a member of the American Legion.

Judge McCall was preceded in death by his parents and his wife, Mary Edna Montgomery McCall. He is survived by his brother, Winston Bush McCall of Birmingham; three children, Mary Winston McCall Laseter, Nancy McCall Poyner, and Dr. Dan T. McCall, III; seven grandchildren; and two great-grandchildren.

—Larry U. Sims, president
Mobile Bar Association

Charles H. Hillman, II

Charles H. Hillman, II, his wife, Vicky Lyn Leverett Hillman, and their daughter, Katelyn Renea Hillman, departed this life on Friday, July 7, 2000, in a tragic accident on Interstate 10 near Lafayette, Louisiana.

Chuck Hillman was a partner in the firm of Ulmer, Hillman, Ballard & Nikolakis and a member of the Mobile, Alabama State and Mississippi bar associations. He was a captain in the United States Army and served in the Judge Advocate General's Office. He was a well-known Mobile attorney and the Republican candidate for Mobile County District Court Judge, Place 3. He was a member of the Springhill Baptist Church, a member of the American Legion, and a member of the Ole Miss and Mississippi State Alumni.

Charles H. Hillman, II and his wife, Vicky Lyn

Chuck's wife, Vicky Lyn Leverett Hillman, died with him in the accident. She was also a member of Springhill Baptist Church, a part-time employee as an industrial nurse at duPont Corporation, a member of the Alabama Nurses' Association, the Lawyers' Wives' Club, and she was a devoted wife and mother.

Miss Katelyn Renea Hillman, the 14-year-old daughter of Chuck and Vicky, died in the accident with her mother and father, and she was likewise a member of Springhill Baptist Church. She attended Burns Middle School and was an entering freshman at Davidson High School. She was involved in numerous school activities and clubs and the day before the fatal accident, Katy asked someone close to her to come to church, and told her friend, "Promise me that you will, because I want the people I love to be in Heaven with me." Katy was, like her mother and father, a deeply committed Christian.

Chuck Hillman was very well liked by the legal community. He had a wonderful disposition, and his reputation was above reproach. Chuck really had a dream that he was going to be a district judge. His dream was to be a good lawyer, and a devoted and committed family man, and he held the view that he could be of good service to his community as district judge.

Chuck is survived by his son, Dane Hillman, 12 years of age; two brothers, Brett G. Hillman and Andy Hillman; his stepsister, Phyllis Ishee; his stepmother, Marie Hillman; and nieces and nephews. Vicky Lyn Hill is survived by her son, Dane Hillman; her mother, Renea Gaylor; stepfather Reuben Gaylor; grandmother Alyne Leverett Nelson; two brothers, Marc F. Leverett and Gaylen P. Leverett; and nieces and nephews. Katy is survived by her brother, Dane Hillman; her maternal grandmother, Renea Gaylor; and cousins, aunts, uncles and numerous friends.

Funeral services were attended by nearly 1,000 friends and loved ones of Chuck, Vicky and Katy Hillman. Reportedly, it was the largest funeral ever held at Springhill Baptist Church.

—Alex F. Lankford, III
past president, Mobile Bar Association

Thomas Reuben Bell

The Talladega County Bar Association records their deep sorrow and feeling of loss at the death on April 12, 2001 of their esteemed associate, Thomas Reuben Bell.

For those of us who had the opportunity to practice with Reuben, our high regard for him has always centered on the depth of his thinking—his intellectual powers. We have been on the same team and have competed against one another, but always with mutual respect and as professionals. Reuben was always a gentleman, with unusually quick perception and an extraordinary tenacity.

Neither personal exaltation nor emotional impulsiveness ever impaired the clarity of his decision-making. He was a man of extraordinary ability and the highest character who presented that uncommon combination of high academic distinction and extensive practical experience.

Reuben graduated from the University of Alabama School of Law and also was awarded two degrees from Harvard University Law School.

To really know Reuben Bell was to have the highest respect for him as a man and as a lawyer. Not to know him was to cause one to stand somewhat in awe, and in either event one had to respect him. Reuben gained a reputation as an attorney reserved only for a few. Those of us who sat with him and against him at the counsel table, opposed him at the bar and negotiated with him in the conference room will always remember him for just what we found him to be—a lawyer of unbending integrity and extraordinary ability. Ours is a nobler profession because Reuben Bell practiced law.

—Talladega County Bar Association

Charles W. Bates

The Birmingham Bar Association lost one of its distinguished members through the death of Charles W. Bates on April 10, 2001.

C.W. was a graduate of Samford University and the Birmingham School of Law, and was admitted to the Alabama State Bar in 1934.

He was a charter member of the Alabama UC/WC Task Force, serving from 1953-1984, a founding member of the old Roebuck Golf Club, and a member of the Alabama Arabian Horse Association and Wilson Chapel United Methodist Church.

C.W. is survived by his two daughters, Beverly Norrell, and her husband Russell, and Joan F. Bates; two grandchildren, Kristi Cunningham and Michael Norrell; one great-granddaughter, Shannon Lera; and a host of other friends whom he deeply loved.

—J. William Rose, Jr., president
Birmingham Bar Association

Matto P. Scalici

The Birmingham Bar Association lost one of its distinguished members through the death of Matto P. Scalici on February 18, 2001.

Matt was a graduate of the University of Alabama School of Law, and practiced law for 50 years. He was a member in good standing of the United States Supreme Court and the Supreme Court of Alabama and was a veteran of World War II, as a pilot with the 307th Bombardment Group. Matt served as a member of the Executive Committee of the Birmingham Bar Association and as president of the North Birmingham Chamber of Commerce.

He is survived by his wife, Phyllis Scalici; daughter and son-in-law Paul and Ann Rich; sons John Scalici and Matt Scalici; grandchildren Gina Caiola, Jessica Caiola, Matthew Scalici, Lauren Scalici, and Anna Scalici; brothers-in-law Joe Miller and Sam Pillitteri; and other relatives and a host of other friends whom he deeply loved.

—J. William Rose, Jr., president
Birmingham Bar Association

Matthew Scott Ellenberger

The Birmingham Bar Association lost one of its distinguished members through the death of Matthew Scott Ellenberger on March 25, 2001. Matthew was a graduate of Auburn University and the Cumberland School of Law of Samford University. He is survived by his parents, James R. and Peggy M. Ellenberger; brothers Ricky Ellenberger, Mark Ellenberger and Mason Ellenberger; his nephews, James Ellenberger and Stanley Ellenberger; and other relatives and a host of other friends whom he deeply loved.

Matthew Scott Ellenberger was a distinguished member of the Birmingham Bar Association, and this resolution is offered as a record of our admiration and affection for Matthew Scott Ellenberger and of our condolences to his family, friends and colleagues.

—J. William Rose, Jr., president
Birmingham Bar Association

William Bew White, Jr.

The Birmingham Bar Association lost one of its most distinguished members through the death of William Bew White, Jr. on January 17, 2001.

Bew, a graduate of Cornell University and the University of Virginia School of Law, was a long-time senior partner in the firm of Bradley Arant Rose & White LLP. In addition to being a member of the Birmingham Bar Association, he was also a member of the Council of the Section of Business Law of the American Bar Association, the Committee on Corporate Law of that section and of the International Bar Association. Bew served with distinction in World War II in the 3rd Armored Division in the European Theatre and was a member of the 3rd Armored Division Association and Veterans of the Battle of the Bulge Association.

He is survived by h is wife, Gay Comer White; his son and daughter-in-law, William Bew White, II and Wendy; his daughters and sons-in-law, Mike and Gillian Goodrich, John and Bevelle Puffer, and Mary Lee White; his sister, Mary Alice Sample; his 12 grandchildren; and many other relatives and a host of other friends whom he deeply loved; and,

—J. William Rose, Jr., president
Birmingham Bar Association

John Watson Williams, Jr.

The Birmingham Bar Association lost one of its distinguished members through the death of John Watson Williams, Jr. on April 5, 2001.

John was a graduate of Birmingham Southern and the University of Alabama School of Law, and was a member of the Alabama State Bar and the Birmingham Bar Association for over 50 years.

He served the City of Homewood as a municipal court judge and later served the City of Graysville as a municipal court judge. He was instrumental in the development of the Cahaba Heights Volunteer Fire Department.

John is survived by his daughter, Carol Williams Provost, with her husband, Bill Provost; grandsons Todd Haralson and his wife Karen, and John Cleveland Haralson; granddaughter Susan Elizabeth Haralson; brother George B. Williams and sister Mildred Milne; along with a niece, three nephews and other relatives and a host of other friends whom he deeply loved.

—J. William Rose, Jr., president
Birmingham Bar Association

Robert L. McCurley, Jr.

Institute Bills

By Robert L. McCurley, Jr.

The 2001 Regular Session of the legislature ended May 21. The legislature had before it 1,585 bills and passed several noteworthy pieces of legislation.

Revised Article 9 of the UCC

Senate Bill 146 (Act 2001-481) passed the legislature and will become effective January 1, 2002. This is the first major revision of Article 9 in 21 years. The bill, sponsored by Senators Roger Bedford, Rodger Smitherman and Wendell Mitchell and Representative Marcel Black, makes several major revisions as to how security interests are taken and recorded for personal property.

Major features of the act provide:

All filings are in the state where the debtor is domiciled, not where the property is located. This keeps the borrower from losing its security when the goods are taken across state lines.

In Alabama all filings will be with the Secretary of State's office regardless of whether the borrower is a consumer or business.

Filings can be paper or electronic.

Consumer protection is provided for prepayment, disclosures or calculating deficiencies.

Our surrounding states of Georgia, Tennessee and Mississippi make their act effective July 1, 2001, however, Alabama and Florida's laws become effective January 1, 2002. (An in-depth review of this is in the January 2001 *Alabama Lawyer*).

Electronic Transactions Act

House Bill 170 (Act 2001-458), sponsored by Representatives Ken Guin and Mark Gaines and Senator Ted Little, will allow Alabama to opt out of the federal law and be governed by state law for electronic transactions.

This act applies only to transactions in which each party has agreed by some means to conduct the business electronically.

Agreement is essential. Nobody is forced to conduct business over the Internet.

When the parties do agree, the act establishes the legal equivalency of electronic records and signatures with paper filings and manually signed signatures so as to make electronic transactions as enforceable as paper transactions.

State agencies may transact business electronically only if they have agency rule under the Administrative Procedures Act. This act will become effective January 1, 2002. (An in-depth review of this is in the January 2001 *Alabama Lawyer*).

Alabama Uniform Athlete Agents Act

Senate Bill 153, sponsored by Representative Gerald Allen and Senator Gerald Dial, provides reciprocity of registration of athletic agents from one state to another. It regulates the conduct of individuals who contact student athletes for the purpose of obtaining agency contracts and provides both civil and criminal penalties. The act becomes effective October 1, 2001. (An in-depth review of this is in the November 2000 *Alabama Lawyer*).

Alabama Uniform Interstate Enforcement of Domestic Violence Orders Act and Alabama Uniform Anatomical Gift Act

Both House bills were passed by the House and Senate bills passed by the Senate but died on the special order calendar of the second House.

Constitutional Revision

The House of Representatives passed revisions of Article I-Declaration of Rights, Article II-State and County Boundaries, Article XII-Corporations and Article XIII-Banks and Banking. These bills were not considered by the Senate. The Senate defeated a bill that would allow the legislature to rewrite the constitution as one document. There were several resolutions creating commissions and studies of the constitution.

Courts

The legislature again refused to consider non-partisan election of judges.

Estates

House Bill 362 amended § 40-15-13 to allow the personal representative of an estate to execute and record in the county of domicile of the decedent and where the decedent's probate estate is pending a tax affidavit. The tax affidavit certifies that either the estate is not taxable or alternatively that the estate is taxable and that a proper copy of the federal estate tax returns has or will be filed.

House Bill 745 amends § 22-8A-4 and § 22-8A-13 of the Code of Alabama so as to revise the living will statute to change the advance directive of health care form. The form is now much more easily understood.

Business

House Bill 113 and Senate Bill 154 discontinues the provision that counties and cities can receive free subscriptions to the *Alabama Administrative Monthly.*

Senate Bill 146 - UCC Article 9 (see above).

House Bill 170 - Electronic Transactions Act (see above).

House Bill 514 amends § 32-8-61 of the Code of Alabama to provide that a security interest in a vehicle for which a certificate of title is required is perfected if filed within the 30 days instead of 20 days.

House Bill 589, Section 7-4-111 is amended to provide any cause of action under the article relating to bank deposits and collections will accrue from payment of a time deposit to the earlier of (1) when a demand for payment is effective and the due date passes or (2) the latter of (a) the due date established in the bank's last written notice or (b) four years after the last written communications from the bank, or (3) the last day of the taxable year for which the owner reported interest on a federal or state tax return.

An action which is not barred on or before the effective date of this act, in some instances, may not be barred until six months after the effective date of this act.

Senate Bill 38 requires the licensing of persons as mortgage brokers by the Alabama Banking Department.

Real Estate

Senate Bill 133 amends § 34-27-33 *et al* concerning fees of the Alabama Real Estate Commission and license fees.

Senate Bill 246, the Alabama Title Insurance Act, requires all title insurance companies to be registered with the Department of Insurance. The purchaser of land must be given notice of availability of title insurance at closing. This law will become effective October 1, 2001.

Family Law

Senate Bill 55-Uniform Interstate Enforcement of Domestic Violence Orders Act (see above).

Several family law bills that had received much attention did not pass. The first would have required a change of custody if the custodial parent moved out of state or more than 75 miles from the other party. Several bills affecting grandparent custody did not pass.

Sports

House Bill 105-Alabama Athlete Agents Act (see above).

House Bill 200 provides for a moment of silence at the opening of school athletic events and graduation ceremonies.

Criminal Law

House Bill 107 provides every municipality must have a pre-disciplinary hearing prior to the suspension or termination of law enforcement officers and must establish a written due process procedure for governing disciplinary hearings.

House Bill 444 amends § 32-5A-176.1 to provide that the fine for speeding in a construction zone will be double the amount prescribed outside the construction zone.

Senate Bill 144 creates the crime of identity theft when one wrongfully possesses information that identifies a person or person's property that can be used to access another's financial resources, obtain identification, act as identification or obtain goods or services. The law also provides for civil damages.

Senate Bill 152 establishes the crime of prostitution, which applies to both the buyer and the seller.

Senate Bill 296 amends the current boating law. The minimum age for an operator is raised from 12 to 14 years of age. A youthful boat operator, between 12 and 14, may obtain a permit but may only drive under the direct supervision of someone over 21 years of age. The blood alcohol level for boating DUI is lowered from 0.10 to 0.80, the same as for operating automobiles.

Senate Bill 305 adds § 26-15-3.1 to create the crime of aggravated child abuse which is a Class B felony.

Other

Senate Bill 122—Anyone who has a registered handgun in another state which also recognizes Alabama licenses in the other state may carry the handgun without registering in Alabama.

House Bill 21—Alabama State Flag Act provides that each school and educational institution in the state must fly the Alabama flag at all times when the school is in session. Both the United States and Alabama flags will be displayed in front of the main building of the institution within three years of the date of this act. It further provides the state flag must be flown at each county courthouse; each state, county and municipal law enforcement agency headquarters facility; and each building located in this state that is affiliated with any department or agency of the state as well as each municipal building in cities greater than 1,000 persons.

Senate Bill 51 amends § 36-26-28 to allow suspended state employees to appeal their suspension before a review panel.

Senate Bill 75 amends § 32-6-4 to provide that any male between the ages of 18-26 who applies for or renews his driver's license will be registered for the military selective service.

Senate Bill 90 allows state employees to donate annual sick leave to another state employee who has qualified for catastrophic sick leave.

Senate Bill 159 officially codifies the acts passed by the legislature in 1999 and 2000 as a part of the Code of Alabama.

To look up any of these bills, go to the legislature's Web site, *www.legislature.state.al.us/.* ■

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411.

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

J. Anthony McLain

By J. Anthony McLain, general counsel

Reporting Misconduct—It's A Good Thing

The Office of General Counsel has received numerous telephone and written inquiries concerning a lawyer's obligation to report misconduct. The applicable provision of the Alabama Rules of Professional Conduct is Rule 8.3 which states:

"Rule 8.3 Reporting Professional Misconduct

(a) A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

As the Comment to Rule 8.3 states, self-regulation requires that lawyers report misconduct, unless the reporting of the misconduct violates Rule 1.6, Confidentiality.

Based on information from disciplinary files of the Disciplinary Commission of the Alabama State Bar, it appears that fewer than six complaints a year are filed by lawyers reporting misconduct of another lawyer. This is sad commentary, when national statistics show that in at least 75-80 percent of matters involving lawyer misconduct, a judge or another lawyer observed, was subjected to, or was personally aware of the misconduct.

In a recent informal opinion of the Office of General Counsel, the question posed was:

"From time to time, government attorneys learn that another attorney may suffer from the disease of chemical dependency (i.e., alcoholism or other drug addiction) and the disease is believed or suspected to adversely affect the lawyer's ability to practice law. This information may come to the government attorney in a variety of ways including criminal charges, criminal convictions, personnel actions, etc."

The inquiring lawyer asked whether his reporting of the matter to the Alabama Lawyer Assistance Program fulfilled his obligation under Rule 8.3. The Office of General Counsel determined that it did.

The lawyer also asked could he accompany his reporting of the matter to the Lawyer Assistance Program with a request that the report be forwarded to the Office of General Counsel for disciplinary action should the reported attorney fail or refuse to comply with the requirements and conditions imposed by the Lawyer Assistance Program. This question was also answered in the affirmative.

In most instances, the reporting of misconduct brings to a head a bad situation which needs to be addressed, both for the benefit of the lawyer and the public. The system itself is improved significantly by ensuring that those who practice law do so in an ethical and competent fashion. When either of these characteristics of representation is lacking, the lawyer's reputation, and that of the legal profession, suffers greatly.

A significant number of investigations of bar complaints "uncover" personal problems and issues of the lawyer which have been known to other lawyers or judges for quite some time. However, due to a lack of accountability, the problems have worsened, and innocent people have been harmed as a result.

Had the issues of misconduct been reported early on, there would have been contact with the lawyer about the matter, which could have served as a wake-up call for the lawyer thereby providing him a chance to assess his situation, and try to conform his conduct to the profession's canons of ethics. And for many lawyers, this is exactly the "two by four" that gets their attention, and causes them to do the things necessary to make sure they never have to be reported again.

Lawyers who inquire of the Office of General Counsel about the reporting requirement are told that they have the option of reporting the matter to the bar or to the court. They are also advised that the reporting be done within a reasonable time, and at a time so as to not impair or in any way harm their client's case.

Some lawyers or opposing parties will file a motion to disqualify counsel, challenging the legal and ethical propriety of the lawyer's actions. In some instances,

the Disciplinary Commission or the Office of General Counsel is copied with these motions and pleadings.

Pursuant to Rule 8.3, reporting misconduct is mandatory—not discretionary. This, too, may be sad commentary when you realize that the major reason advanced for us to maintain the right to self-police is that we are accountable, and have "things under control." Why, then, the mandatory reporting rule? Answer that one for yourself.

Potpourri

Several recent ethical inquiries suggest that we restate the opinions of the Disciplinary Commission and the Office of General Counsel which deal with the following two issues: contact with former employees and *pro hac vice* requirements.

In RO-93-05, the Disciplinary Commission considered the "no-contact" prohibition of Rule 4.2, as same relates to former employees of an opposing party.

Rule 4.2 provides:

> "Rule 4.2 Communication With Person Represented By Counsel
>
> 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."

Relying upon its earlier position set forth in RO-92-12, that "...there is a strong argument that Rule 4.2 does not even apply to former employees at any level," the Commission did state a possible exception which could arise. If the former employees occupied a managerial level position and were involved in the underlying transaction and being privy to privileged information, including a work product, then counsel would be prohibited from accessing such information without a valid waiver by the organization and/or discovery and evidence rules. This position is consistent with that of ABA Formal Opinion 91-359 (1991).

Rule VII, Rules Governing Admission to the Alabama State Bar, contains those provisions applicable to *pro hac vice* admission. Section A requires any foreign attorney who appears "before any court or administrative agency of the State of Alabama" be admitted *pro hac vice*. The rule further defines "administrative agency" as "any board, bureau, commission, department, hearing officer, or other administrative office or unit of the state."

The rules require local counsel be associated. The bar generally looks to the Alabama lawyer (local counsel) to ensure that the non-resident lawyer has complied with the applicable rules governing *pro hac vice* admission. If you are called upon to participate as local counsel, you are encouraged to familiarize yourself with the rules, particularly those which deal with the application process and the hearing date required for ruling on the *pro hac vice* application.

Lastly, the rules require that a copy of the order granting the application be filed with the Alabama State Bar. Lawyers involved in this process may also request an informative brochure from the Alabama State Bar which details the responsibilities of local counsel, and which outlines the procedures to be followed for *pro hac vice* admission. ■

ALABAMA LAW FOUNDATION
Awards IOLTA Grants

The Alabama Law Foundation, a charitable, tax-exempt organization dedicated to law-related charities, made approximately $1 million in grants this year through its IOLTA program. The IOLTA (Interest on Lawyers Trust Accounts) program allows attorneys to convert their commingled client trust accounts to interest-bearing accounts. The interest is then forwarded to the Alabama Law Foundation which uses the money to award grants for law-related charitable projects.

Since 1989, ALF has provided over $10 million in grants through IOLTA. ■

Legal Aid to the Poor

Legal Services Corporation of Alabama	$259,875
Legal Services of Metro Birmingham	$81,000
Legal Services of N. Central Alabama	$81,000
Alabama State Bar Volunteer Lawyers Program	$85,000
Birmingham Volunteer Lawyers Program	$76,650
Mobile Bar Association Volunteer Lawyers Program	$76,650

Administration of Justice

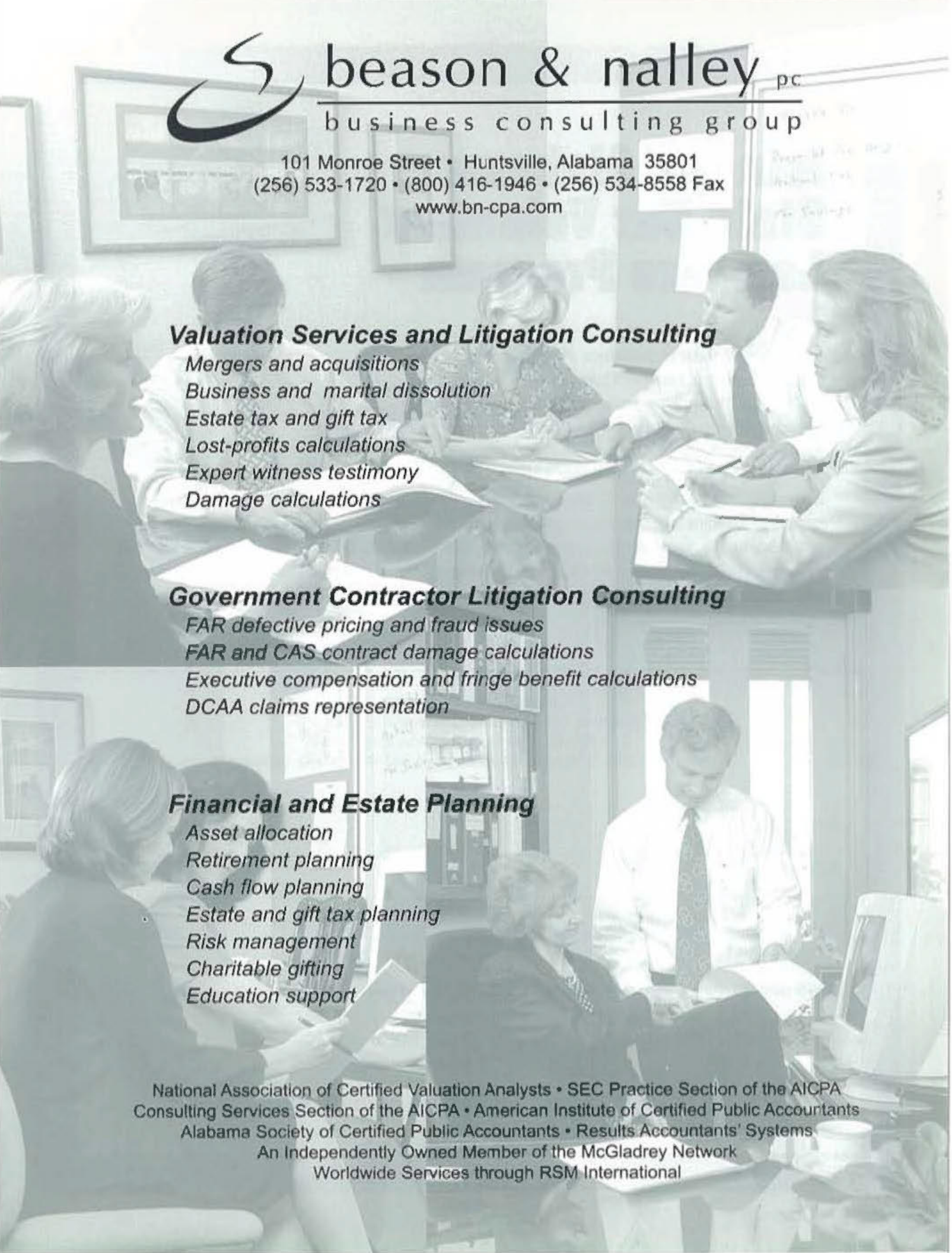
Child Protect (Montgomery)	$7,500
Alabama Court Appointed Special Advocate Network (Irondale)	$3,000
Alabama Disabilities Advocacy Program (Tuscaloosa)	$62,500
Court Appointed Juvenile Advocate of Marshall County	$3,000
The Tuscaloosa Visitation Center	$26,000
The Baldwin Family Violence Center (Robertsdale)	$10,000
The Family Sunshine Center (Montgomery)	$5,000
Administrative Office of Courts (Montgomery)	$5,000
Equal Justice Initiative (Montgomery)	$80,000
Alabama Prison Project (Montgomery)	$55,000
Leadership Montgomery	$10,000

Law-Related Education

YMCA Youth Judicial Program (Montgomery)	$10,000
Tuskegee-Macon County YMCA	$10,000
Boys & Girls Club of Limestone County	$5,000
Sumter County District Court	$1,500
Alabama Center for Law and Civic Education (Birmingham)	$12,000

Law Libraries

Bullock County	$1,183
Huntsville-Madison County	$1,093
Jefferson County	$2,000
Montgomery County	$3,500
Perry County	$2,000
Pike County	$2,500
Supreme Court of Alabama	$9,000
Total	**$976,311**



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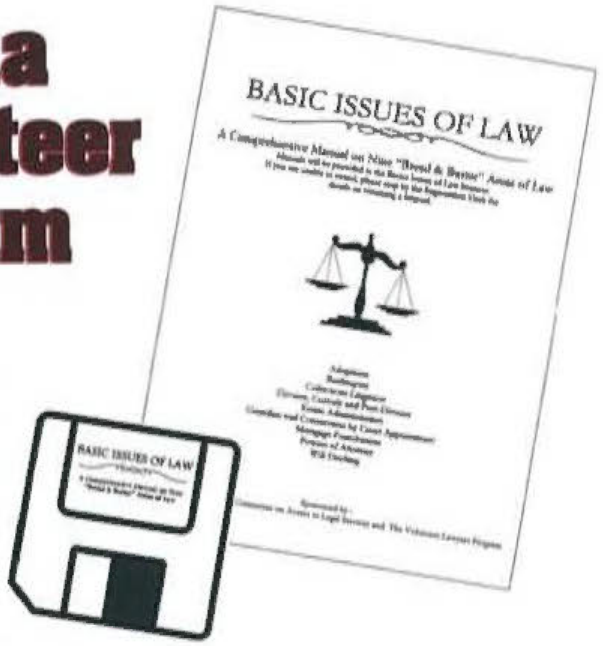

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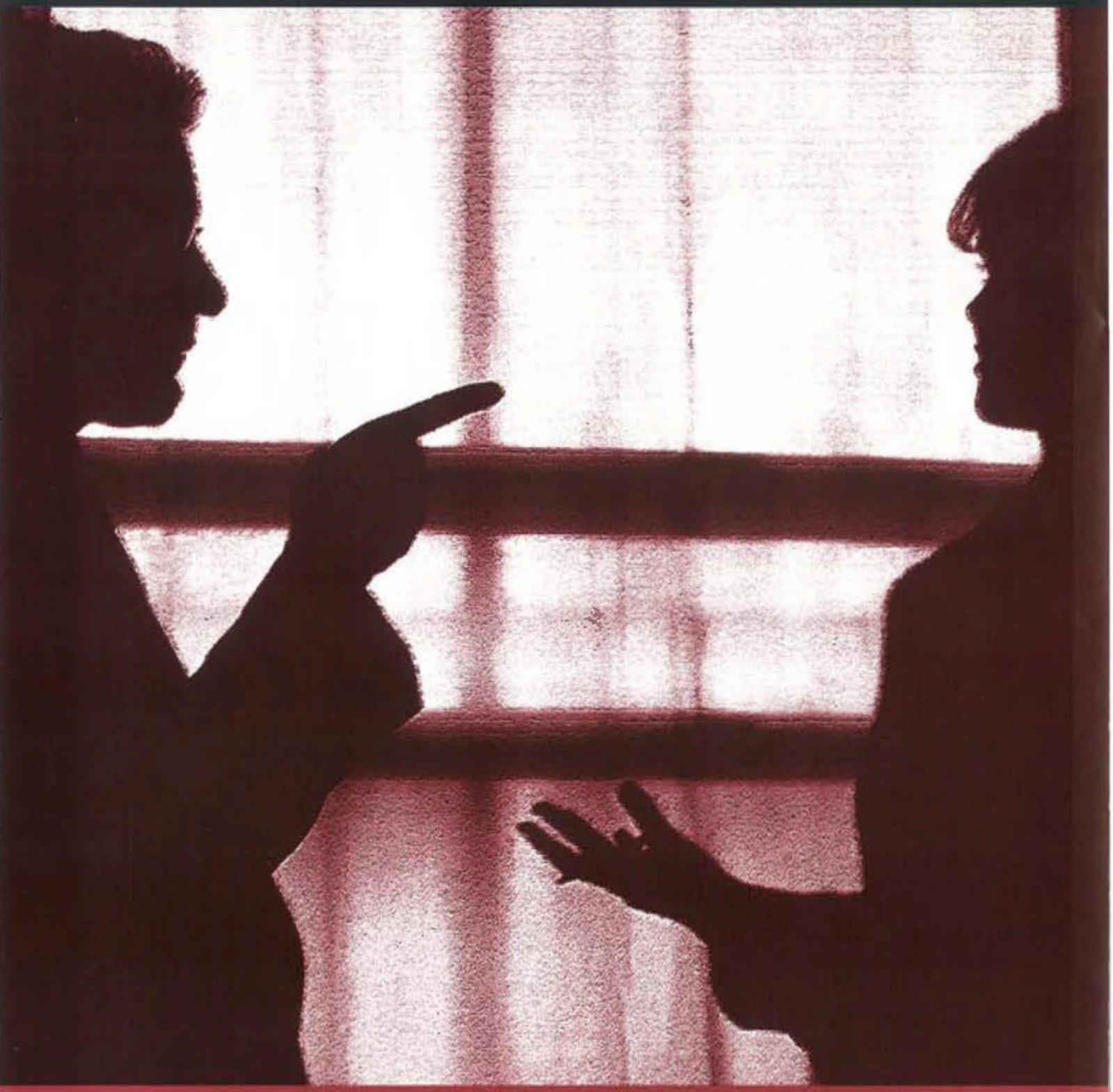

What the General Practitioner Needs to Know to Recognize Sexual Harassment Claims

BY GERALD L. MILLER

For better or worse, sexual harassment continues to be a growing area of the law. Probably most attorneys, at least occasionally, receive a telephone call from a prospective client who has been "sexually harassed" in the workplace, or from an employer who has received a complaint of sexual harassment from an employee. These situations can range from allegations of forcible sexual contact to an isolated crude remark. In 1998, the United States Supreme Court decided three cases which attempted to clarify the law of sexual harassment: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). The Eleventh Circuit and other lower courts are now struggling to apply those decisions and to decide a number of other issues not decided in *Ellerth*, *Faragher* and *Oncale*. Recognizing these issues will help Alabama practitioners to recognize potential sexual harassment claims and to counsel employers about their potential liability. A claim of sexual harassment is not a complaint that should be taken lightly, regardless of the side of the fence on which a lawyer might sit.

United States Supreme Court Cases

The United States Supreme Court first recognized that sexual harassment' is actionable under Title VII of the Civil Rights Act of 1964 in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The harassment in *Meritor* consisted of sexual advances which culminated in repeated sexual intercourse. The Court held that, for sexual harassment to be actionable, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." The Court found that the allegations in that case were "plainly sufficient to state a claim for 'hostile environment' sexual harassment." 477 U.S. at 67.

The U.S. Supreme Court next considered hostile environment sexual harassment in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The issue in *Harris* was whether conduct, to be actionable, must seriously affect the victim's psychological well-being or lead to a tangible injury. The Court took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." 510 U.S. at 21. The Court found that the environment must be both subjectively and objectively hostile. The Court acknowledged that the test is not mathematically precise, and mandated that whether an environment is hostile or abusive be determined only by looking at all the circumstances. The Court suggested those factors may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The Court specifically stated that no single factor is required.

In early 1998, the United States Supreme Court decided *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). In *Oncale*, the Court rejected a categorical rule excluding same-sex harassment claims from the coverage of Title VII. The Court held that male-on-male sexual harassment (and female-on-female sexual harassment) is actionable where the conduct occurs because of the sex of the victim. The Court noted that in the normal male-female situation involving explicit or implicit proposals of sexual activity, the inference can easily be made that the harassment has occurred because of the sex of the victim. The Court also observed that discrimination could be inferred "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." 523 U.S. at 80. The Court stated that a same-sex harassment plaintiff could also offer comparative evidence about how the alleged harassed treated members of both sexes in the workplace in order to prove the harassment was because of the sex of the victim. *Id.* at 80-81.

On June 26, 1998 the United States Supreme Court decided *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S.775 (1998), dealing with the issue of an employer's liability for a hostile work environment created by a supervisor's harassment of his subordinate. Both decisions adopted the same holding: that an employer is vicariously liable for a hostile work environment created by a supervisor, but when the harassment has not culminated in tangible adverse employment action being taken, the employer may raise an affirmative defense consisting of two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The Court expressly held that the affirmative defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." 524 U.S. at 765; 524 U.S. at 807.

On April 23, 2001, in *Clark County School District v. Breeden*, 532 U.S.____ (2001), the Supreme Court again addressed the issue of when offensive conduct is severe or pervasive enough to be actionable. Ms. Breeden, the plaintiff, alleged her employer retaliated against her for complaining to management about a crude comment by her supervisor. Because Title VII's anti-retaliation provision, 42 U.S.C. (2000e-3(a), applies only to such informal complaints made with a *reasonable*, good faith belief that the conduct constituted sexual harassment, the Supreme Court addressed whether one could reasonably believe the incident violated Title VII.

The alleged harassment consisted of a single incident: During a meeting to review job applicants, Ms. Breeden's male supervisor read aloud a comment that one of the applicants had once made to a co-worker ("I hear making love to you is like making love to the Grand Canyon"). The supervisor looked at Ms. Breeden and stated, "I don't know what that means." Another male employee replied, "Well, I'll tell you later," and both men chuckled. The Court, quoting the statement in *Faragher* that simple teasing, offhand comments, and isolated incidents, unless extremely serious, are insufficient, held no reasonable person could have believed this single incident violated the standard.

Is the Conduct Severe or Pervasive Enough?

Despite the Supreme Court's guidance, the Eleventh Circuit and other courts have struggled to define the contours of sexual harassment liability. Perhaps the first issue to be considered in evaluating a possible sexual harassment claim is whether the conduct is severe or pervasive enough to rise to the level of sexual harassment.

The Eleventh Circuit has dealt with this issue in four recent cases. In *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), an *en banc* decision, and in *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000) the Court held the conduct failed to rise to the level of a hostile environment, while in *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417 (11th Cir. 1999) and in *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501 (11th Cir. 2000), the Court held the conduct did rise to the actionable level. A comparison of the facts of these cases should give Alabama practitioners considerable guidance on the issue.

In *Mendoza*, the plaintiff, Mendoza, alleged harassment by her supervisor over a period of 11 months. The alleged harassment consisted of "constantly" watching her and following her in the workplace, looking at her "up and down" on two or three occasions while making a sniffing sound, rubbing his hand against her hip while touching her shoulder as she walked by on one occasion, and once telling her he was getting "fired up" when she entered his office. The Court found none of the conduct was severe or physically threatening or humiliating. The Court noted that, aside from the constant following and staring, the conduct was not frequent. The Court concluded there was no evidence Mendoza's job performance was impaired.

In *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000), the Court was again faced with mild conduct occurring over a brief period of time, six or seven months. Typical of the plaintiff's complaints were her allegations that her supervisor asked her to lunch many times, once told her she looked "very beautiful," and once placed his hand on her knee. The Eleventh Circuit found this conduct exemplified "the ordinary tribulations of the workplace" and was not sufficiently severe or pervasive to be actionable.

In *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417 (11th Cir. 1999), the plaintiff alleged almost daily sexual

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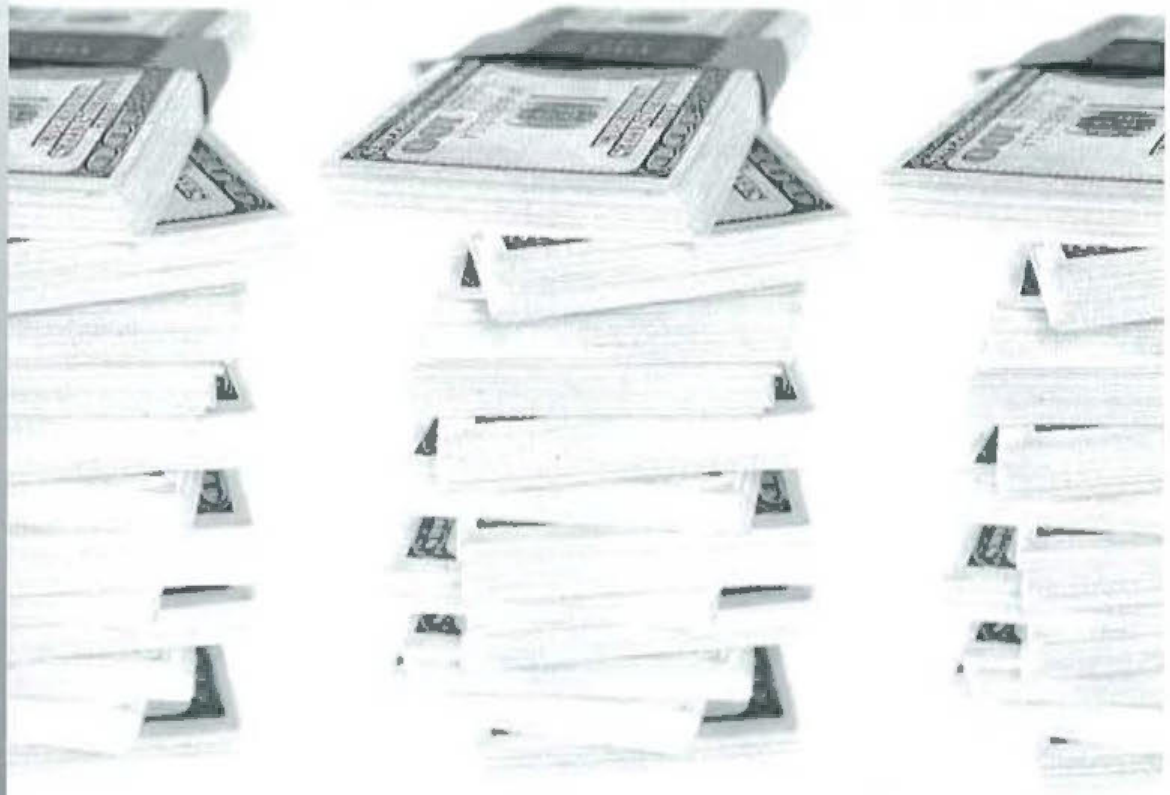

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harassment over three years that took a variety of forms: sexually explicit stories and jokes, comments about her body or those of male co-workers, sexual propositions, and physical harassment such as grabbing her buttocks and groping her leg. With little discussion, *in dicta*, the Eleventh Circuit indicated the facts were sufficient to rise to the actionable level.

Finally, in *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, the Court cited *Dees* with approval and found the conduct "more akin to the continuous barrage of sexual harassment" in *Dees* than to the less frequent, less objectionable conduct in *Mendoza* and *Gupta*. In *Johnson*, the alleged harassment consisted of approximately 15 instances of harassment over the course of four months. The harassment included unwanted massages, standing so close to the plaintiff that the harasser's body parts touched her from behind, and pulling his pants tight to reveal the imprint of his private parts.

Plaintiff Must Subjectively Perceive the Environment To Be Abusive

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court established that the test for a hostile work environment has a subjective component as well as an objective component. The Court held that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." 510 U.S. at 21-22. The Court reaffirmed the subjective and objective components of the test in *Faragher*, 524 U.S. at 787.

Although the Eleventh Circuit has not yet discussed this subjective test, the Sixth Circuit recently discussed the issue in *Williams v. General Motors Corp.*, 187 F. 3d 553 (6th Cir. 1999). In *Williams*, the district court had held the plaintiff had not met the subjective test, in part, because she could not establish that the harassment affected her work. The Sixth Circuit rejected this analysis as inconsistent with Justice Ginsburg's concurring opinion in *Harris* which stated that "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment" but only that the harassment made it more difficult to do the job. Other courts have likewise rejected any requirement that a plaintiff prove that her tangible productivity or work performance declined. *See, e.g., Hathaway v. Runyon*, 132 F. 3d 1214, 1223 (8th Cir. 1997); *Smith v. Northwest Financial Acceptance, Inc.*, 129 F. 3d 1408, 1413 (10th Cir. 1997).

Gender-Related Harassment

Can a sexually hostile work environment be created by demeaning remarks about women generally rather than sexual advances or remarks of a sexual nature? While some courts have rejected such gender harassment cases, it appears that gender harassment is a form of sexual harassment.

The sexual harassment alleged in *Harris v. Forklift Systems* was that the company president often insulted the victim because of her gender and often made her the target of unwanted sexual innuendoes. Some of the insulting remarks were not sexual in nature, but were demeaning remarks about women such as, "You're a woman, what do you know?" and "We need a man as the rental manager," and telling her that she was "a dumb-ass woman." 510 U.S. at 19. The employer apparently did not argue that such "gender-related harassment" does not constitute sexual harassment, and the Supreme Court did not discuss the issue.

In *Oncale*, the U.S. Supreme Court explicitly recognized that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 523 U.S. at 80. The Court recognized that sexual harassment can occur through "sex-specific and derogatory terms" that make it clear that the harassed is motivated by general hostility to the presence of women in the workplace. *Id.* The Court indicated that an important inquiry in such a case is whether the harassed treats members of both sexes differently in the workplace. In *Faragher*, too, the hostile environment consisted partly of "rudely demeaning references to women generally." 424 U.S. at 782.

Eleventh Circuit precedent is fully consistent with *Harris*, *Oncale* and *Faragher*. In *Bell v. Crackin' Good Bakers, Inc.*, 777 F. 2d 1497 (11th Cir. 1985), the Eleventh Circuit expressly recognized that sexual harassment can consist of "threatening bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim of such conduct." The Court noted that the district court had erroneously thought that proof of sexual harassment must consist of "sexual advances, requests for sexual favors [or] other verbal or physical conduct of a sexual nature." 777 F. 2d at 1503. The Eleventh Circuit directly held that the plaintiff was under no obligation to adduce such proof. *Id.* More recently, in *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000) the Eleventh Circuit appears to have recognized the distinction between gender-related harassment and harassment based on sexual remarks or sexual advances. The Court in *Gupta* stated that statements and conduct must be of a sexual *or* gender-related nature, making that distinction throughout the opinion.

Requiring that all sexual harassment consists of overtly sexual remarks or sexual advances ignores the reality that sexual harassment can occur based on *hostility* toward women. A number of other circuits have recently recognized gender-based harassment, based on hostility toward women in the workplace. *See Durham Life Insurance Company v. Evans*, 166 F. 3d 139 (3rd Cir. 1999); *Smith v. First Union National Bank*, 202 F. 3d 234 (4th Cir. 2000); *Williams v. General Motors Corp.*, 187 F. 3d 553 (6th Cir. 1999). As the Fourth Circuit aptly said in *Smith v. First Union National Bank*, "A work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances." 202 F. 3d at 242. It is the cumulative effect of all types of harassment that must be considered. *Durham*, 166 F. 3d at 148-49, 155; *Williams*, 187 F. 3d at 562-64.

Sexual Remarks and Other Conduct Not Directed Toward the Plaintiff

An issue that frequently arises is the effect of sexual remarks and other crude or sexual conduct not directed toward the plaintiff. For example, a plaintiff may allege that explicit, sexual jokes and comments between male co-workers are offensive to her and create a hostile work environment. Or a female plaintiff may complain about pornographic pictures displayed in the workplace. Can such language and conduct support a cause of action, even though the language and conduct is not directed toward the plaintiff?

Neither the U.S. Supreme Court nor the Eleventh Circuit has directly addressed this issue. However, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) the Court cited the Fifth Circuit case of *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) with approval. In *Rogers*, the Fifth Circuit held that a Hispanic plaintiff could establish a hostile work environment by evidence that her employer gave discriminatory service to Hispanic customers. The conduct in *Rogers*, then, was not directed toward the plaintiff. Recently, in *Faragher*, some of the vulgar and sexual remarks and conduct cited by the plaintiff were not directed toward the plaintiff, but were directed toward other female lifeguards.

Other circuits have held that such "secondhand harassment" is relevant in determining the existence of a hostile work environment, but recognize that the impact, or severity, of such harassment is not as great as the impact of harassment directed at the plaintiff. *See Gleason v. Mesirow Financial, Inc.*, 118 F. 3d 1134 (7th Cir. 1997); *Cowan v. Prudential Insurance Company of America*, 141 F. 3d 751 (7th Cir. 1998); *Abeita v. TransAmerica Mailings, Inc.*, 159 F. 3d 246 (6th Cir. 1998).

Employer Liability for Harassment By an Employee

After evaluating whether a hostile work environment can be said to exist, the next step in evaluating a sexual harassment claim is to determine whether the employer could be liable for the harassed's conduct. *Faragher* and *Ellerth*, in addition to formulating an affirmative defense, discussed several grounds for employer liability.

Alter Ego Liability

In *Faragher*, the United States Supreme Court left intact the principle that certain high ranking company officials could be the alter ego or proxy of the company, and thus automatically subject the company to liability. The Court noted that in *Harris v. Forklift Systems* the harassed was the president of the company and the issue of employer liability for the conduct of the harassed was not an issue. While it is not clear how high in management the harassed must be for liability to automatically be imputed to the employer, *Faragher*, by the cases it cites, indicates that a company owner, proprietor, partner or company officer, at least, would be the alter ego of the company.

Tangible Adverse Employment Actions

Ellerth and *Faragher* make clear that when a supervisor's harassment culminates in an adverse tangible employment action being taken against the employee, the employer is liable and no affirmative defense is available. As the Court in *Ellerth* stated,

> [A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability....

Burlington Industries v. Ellerth, 424 U.S. at 762-63. *Ellerth* indicates that an adverse tangible employment action means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* In *Frederick v. Sprint/United Management Company*, 2001 WL 336007 (11th Cir. April 4, 2001), the Eleventh Circuit reaffirmed the principle that a supervisor's request for sexual favors which, when not responded to favorably, results in adverse action, need not be established by a direct and express sexual demand.

Durham Life Insurance Company v. Evans, 166 F. 3d 139 (3rd Cir. 1999) illustrates the application of the tangible adverse employment action rule. The plaintiff, a female life insurance agent, alleged that the new management of Durham Life Insurance Company resented her for being a successful woman

and set out to undermine her, humiliating her with sexist remarks and crude sexual advances, and eventually forcing her to vacate her office and give up her secretary. Eventually, she resigned and alleged a sexually hostile work environment had existed. The Third Circuit held that the loss of her office and secretary, because they were specific, negotiated conditions of her employment and were necessary for her success, constituted tangible adverse actions. 166 F. 3d at 153. The Court implied that action constituting a constructive discharge would likewise constitute a tangible adverse employment action. Further, the Court held that assigning her less desirable books of business than the male agents which cut her earnings almost in half also constituted a tangible adverse employment action. The Court rejected, as contrary to the clear language of *Faragher* and *Ellerth*, *Durham's* argument that the plaintiff should not be allowed to take advantage of the adverse employment actions to impose liability because the plaintiff should have used the company's sexual harassment policy to report the harassment when it first occurred, before it culminated in tangible adverse employment actions.

Liability for Harassment Within the Scope of Employment

While *Faragher* and *Ellerth* recognize that sexual harassment by a supervisor is generally not within the scope of employment, the Court did appear to leave that avenue of liability open for the rare cases in which it might be applicable. In *Ellerth*, the Court stated, "There are instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer." 524 U.S. at 757. The Court cited with approval *Sims v. Montgomery County Commission*, 766 F. Supp. 1052 (M.D. Ala. 1990), in which a supervisor was held to be acting in the scope of his employment where the employer had a policy of discouraging women from seeking advancement and "sexual harassment was simply a way of furthering that policy." In *Dees v. Johnson Controls World Services, Inc.*, 168 F. 3d 417, 421 n.9 (11th Cir. 1999), the Eleventh Circuit, *in dicta*, recognized this ground for liability.

Durham Life Insurance Company v. Evans, 166 F. 3d 139 (3rd Cir. 1999) interpreted *Faragher* and *Ellerth* to authorize automatic employer liability in cases in which supervisors discriminate against women "in work assignments to placate pervasive male hostility" or reprimand women "in harsh or vulgar terms while merely bantering with men for identical behavior." 166 F. 3d at 150. The Third Circuit felt such discrimination would fit within the scope of employment rule. Whether such an interpretation, which would potentially significantly expand employer liability, will be followed by other courts is an open question.

Liability for Negligence

A careful reading of *Faragher* and *Ellerth* reveals that negligence of the employer remains a viable basis for employer liability for the harassment of a supervisor in the post-*Ellerth* and post-*Faragher* era. In other words, an employer can still be liable for the sexual harassment of a supervisor where the employer knew or should have known of the harassment and failed to take proper remedial action. *See Fleming v. Boeing Co.*, 120 F. 3d 242 (11th Cir. 1997); *Farley v. American Cast Iron Pipe Company*, 115 F. 3d 1548 (11th Cir. 1997); *Reynolds v. CSX Transportation*, 115 F. 3d 860 (11th Cir. 1997); *Splunge v. Shoney's Inc.*, 97 F. 3d 488 (11th Cir. 1996); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F. 3d 752 (11th Cir. 1996); *Steele v. Offshore Shipbuilding, Inc.*, 867 F. 2d 1311 (11th Cir. 1989); *Henson v. City of Dundee*, 682 F. 2d 897 (11th Cir. 1982). As the Court stated in *Ellerth*,

> Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII....

524 U.S. at 759.

In *Dees v. Johnson Controls World Services, Inc.*, 168 F. 3d 417 (11th Cir. 1999), the Eleventh Circuit recognized that after *Faragher* and *Ellerth* an employer can still be held liable for a supervisor's harassment under a negligence standard. The plaintiff in *Dees* alleged that her employer was liable for the sexually hostile environment created by its supervisors because it knew or should have known of the supervisor harassment and failed to take prompt remedial action.[2] The Court reversed summary judgment for the employer, holding that Dees had produced evidence that the company's human resources department had been

notified on several occasions before Dees filed her complaint that supervisors in her department were sexually harassing employees, yet the company failed to take any corrective action.

Other circuits have agreed that negligence remains a basis for employer liability in cases of supervisor harassment. *See Sharp v. City of Houston*, 164 F. 3d 923 (5th Cir. 1999); *Wright-Simmons v. City of Oklahoma City*, 155 F. 3d 1264 (10th Cir. 1998).

Employer Liability for Co-Worker Harassment

Before *Faragher* and *Ellerth*, in co-worker harassment cases, the Eleventh Circuit rule was that the employer was liable only if "higher management" knew or should have known of the harassment and failed to take prompt remedial action. See *Fleming v. Boeing Co.*, 120 F. 3d 242 (11th Cir. 1997); *Reynolds v. CSX Transportation*, 115 F. 3d 860 (11th Cir. 1997); *Splunge v. Shoney's, Inc.*, 97 F. 3d 488 (11th Cir. 1996); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F. 3d 752 (11th Cir. 1996); *Henson v. City of Dundee*, 682 F. 2d 897 (11th Cir. 1982).

In *Coates v. Sundor Brands, Inc.*, 164 F. 3d 1361 (11th Cir. 1999), the Eleventh Circuit used a different approach in a co-worker harassment case. The Eleventh Circuit used the employer's sexual harassment policy to find that the employer had "itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures." 164 F. 3d at 1364. The sexual harassment policy in *Coates* directed a victimized employee to contact their line manager, personnel contact or other manager with whom the employee felt comfortable. Thus, notice to "higher management" was not necessary. Instead, an employer is liable for sexual harassment by a co-worker where an employee designated by the company in its harassment policy knows of the harassment and fails to take prompt remedial action.

Recently, in *Breda v. Wolf Camera & Video*, 222 F. 3d 886 (11th Cir. 2000), the Eleventh Circuit, relying on *Coates*, explicitly abandoned the "higher management" requirement. The Court stated that employees of companies that have a sexual harassment complaint policy "need not be concerned with whether they pursued their complaints far enough up the company ladder. The sole inquiry where the employer has a clear and published policy is whether the complaining employee followed the procedures established in the company's policy." *Id.* at 890. The Court held the employer had actual notice of the co-worker harassment because the plaintiff verbally complained to her store manager, who was designated in the policy to receive such complaints.

Liability for Harassment By Both Supervisor and Co-Worker

Suppose a female employee is sexually harassed by both a co-worker and her supervisor. What standard would apply in that case: the negligence standard (for co-worker harassment), or the *Faragher* and *Ellerth* standard of liability subject to the affirmative defense, which applies to supervisor harassment? In *Williams v. General Motors Corp.*, 187 F. 3d 553 (6th Cir. 1999), the Court was faced with a hostile environment created by both a co-worker and the plaintiff's supervisor. The Court held that, in such a situation, a court must consider harassment by all perpetrators combined to determine the existence of a hostile work environment. 187 F. 3d at 562-63. The Court then recognized that a court must separate conduct by a supervisor from conduct by co-workers in order to apply the appropriate standards for employer liability. *Id.* The Court did not further address that issue because it was not addressed by the district court and was not necessary for resolution of the appeal.

The approach of the Court in *Williams*, while perhaps correct, would appear to give the plaintiff the best of all possible worlds. The plaintiff would be allowed to aggregate all incidents of sexual harassment in order to argue the harassment was severe enough and frequent enough to create a hostile work environment, but attach liability on the employer through either co-worker harassment plus negligence by the employer or by supervisor harassment coupled with the employer's lack of

effective anti-harassment policies or the plaintiff's timely sexual harassment complaints.

Faragher/Ellerth Affirmative Defense

In *Faragher* and *Ellerth*, the United States Supreme Court held an employer is liable for an actionable hostile environment created by a supervisor, when no tangible employment action has been taken, subject to an affirmative defense. The defense consists of two necessary elements: (a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Both the Eleventh Circuit and other circuits have begun to flesh out the contours of this defense.

Employer's Reasonable Care to Prevent Sexual Harassment

In *Madray v. Publix Supermarkets, Inc.*, 208 F. 3d 1290 (11th Cir. 2000), the Eleventh Circuit identified two prongs of the first element of the *Faragher* affirmative defense. The first prong is that the employer exercised reasonable care to *prevent* sexual harassment. The Court noted that while the Supreme Court held that a written anti-harassment policy is not always necessary, it implied that promulgating and disseminating an anti-harassment policy is normally fundamental in establishing reasonable care to prevent sexual harassment.

The Court, in *Madray*, also gave some guidance regarding the minimum requirements for an anti-harassment policy's complaint procedure to be considered to be effective. The Court noted that the employer's size, location, geographic scope, organizational structure, and industry segment are some of the characteristics that would have an impact on this analysis. Drawing from *Faragher* and *Ellerth*, the Eleventh Circuit held the anti-harassment policy of the defendant, Publix, sufficient because the policy did not require the employee to complain to the offending supervisor or through the supervisor's chain of command, the policy provided multiple avenues of lodging a complaint to designated representatives who were accessible to employees, and there was no evidence the policy was adopted or administered in bad faith. 208 F. 3d at 1298-99.

As the Eleventh Circuit recognized in *Frederick v. Sprint/United Management Company*, 2001 WL 336007 (11th Cir. April 4, 2001) simply promulgating a facially sufficient policy is not enough; it must also be *effectively published*. In *Frederick* there were disputed issues of fact on this issue because the plaintiff testified she never received the policy and it was not posted in her work area.

Smith v. First Union National Bank, 202 F. 3d 234 (4th Cir. 2000) illustrates another way that employers can fail this first prong. In *Smith*, the employer's sexual harassment policy defined sexual harassment only in terms of sexual advances and other verbal or physical conduct of a sexual nature, and failed to mention discrimination on the basis of gender. The Court held the policy deficient for that reason, because the harassment suffered by the plaintiff was gender-based but not sexually provocative, and the policy did not proscribe that type of harassment.

Employer's Reasonable Care to Promptly Correct Sexual Harassment

The second prong of the first element of the affirmative defense is that the employer used reasonable care to promptly *correct* any sexual harassment of which it has notice. As *Madray* recognizes, of course, the focus is first on when the employer has notice of the harassing behavior, and then on what steps the employer took. The *Madray* Court followed *Coates* in looking to the employer's sexual harassment policy to determine when it would be deemed to be on notice of the harassment. The Court held the plaintiffs' complaints to mid-level managers insufficient because they were not designated by the anti-harassment policy as the appropriate persons to receive such complaints. 208 F. 3d at 1299-1301.

The Court further held that even if the mid-level managers to whom the plaintiffs complained had been the appropriate persons, the complaints were not sufficient because they did not fully explain the dimensions of the harassment to those managers or approach them in a "professional capacity." *Id.* at 1301. For example, one plaintiff complained to an assistant manager at a restaurant during a party for an departing employee. She only told the manager that the harassed's behavior "made her sick." The Eleventh Circuit had earlier appeared to insist upon a formal complaint describing an on-going pattern of harassment to the representatives designated in the company's sexual harassment policy before the employer will be held to be put on notice in *Coates v. Sundor Brands, Inc.*, 164 F. 3d 1361 (11th Cir. 1999).

Employee's Reasonable Use of Preventive Or Corrective Opportunities

The second element of the *Faragher/Ellerth* affirmative defense is "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities

provided by the employer or to avoid harm otherwise." In *Madray*, the Eleventh Circuit signaled that it will require employees to make formal, detailed complaints to the designated, appropriate company representatives to avoid this element of the affirmative defense. The Court did indicate, however, that when a plaintiff reports harassing conduct in accordance with the employer's policy, the employer is charged with knowledge of the harassment and the employee has no duty to report it a second time. 208 F. 3d at 1302.

In *Frederick v. Sprint/United Management Company*, 2001 WL 336007 (11th Cir. April 4, 2001) the Court recognized that extenuating circumstances can sometimes justify an employee's failure to timely use the employer's complaint procedure. The Court noted evidence that the plaintiff did not receive the anti-harassment policy, did not understand how to report a complaint under the company's 20-page *Code of Ethics*, and was advised by one supervisor not to complain to management, in finding issues of fact existed as to whether the plaintiff had unreasonably failed to use the complaint procedure. *See also Smith v. First Union National Bank*, 202 F. 3d 234 (4th Cir. 2000) (evidence that management-level employees discouraged victims from using company's complaint procedure doomed the *Faragher/Ellerth* affirmative defense).

Torres v. Pisano, 116 F. 3d 625 (2nd Cir.1997), although predating *Ellerth* and *Faragher*, illustrates another way in which a plaintiff can fail to reasonably follow the harassment policy. In *Torres*, the plaintiff complained to someone in management that she had been harassed but asked that her complaint be kept confidential for the time being. The Second Circuit, framing the question as whether a supervisor breaches his duty to remedy harassment by honoring an employee's request to refrain from taking action until a later date, declined to answer the question categorically. The Court opined that if the harassment were severe enough or there were a number of employees being harassed, the employer would have a duty to act in spite of the request not to act. In *Torres*, because the harassment was relatively minor, the plaintiff was the only victim, and was the only female employee in the harasser's office, it was not unreasonable to honor the plaintiff's request that no action be taken at that time. The Court affirmed summary judgment for the employer.

Employers should be reluctant to rely on *Torres*, of course. An employer who is advised of sexual harassment but honors a victim's request not to take action against the harasser risks liability, and perhaps punitive damages, if the harasser, as often happens, continues his harassment against other employees. Those subsequently harassed employees would then seem to have a strong case against the employer.

Conclusion

While many issues remain to be fleshed out, and the endless number of factual situations makes evaluating an individual case a challenge, the U.S. Supreme Court, the Eleventh Circuit and the decisions of other circuits have given Alabama practitioners considerable guidance in evaluating sexual harassment claims. The Eleventh Circuit has indicated that relatively brief or infrequent, mild, non-physical harassment is not severe or pervasive enough to create a hostile working environment. It appears that prolonged or frequent sexual or gender-based remarks or conduct, particularly if physical touching or threats are present, are sufficient. Sexual remarks or conduct not directed toward the plaintiff will be viewed as less severe than conduct directed toward the plaintiff.

In cases of supervisor harassment, the employer will be liable if the harassment has culminated in a tangible adverse employment action or if the harasser is an officer, director, owner or perhaps top-ranking company official. An employer will also be liable where it has failed to promulgate a clear, effective anti-harassment policy or where it fails to take prompt remedial action when a complaint is made. The company will be relieved of liability if the plaintiff without justification fails to resort to the employer's clear, effective anti-harassment policy. The Eleventh Circuit has indicated that an anti-harassment policy should provide multiple avenues for lodging a complaint to accessible company representatives, and informal complaints or complaints to persons not designated in the policy may be insufficient. Co-worker harassment will continue to be governed by a negligence standard, which is also an alternative standard for supervisor harassment. The employer will be liable where it knows or should have known of the harassment and failed to take prompt remedial action. At least with respect to employers having an anti-harassment policy, the issue is no longer whether "higher management" knew of the harassment, but the question will be whether a representative designated by the company in its policy knew of the harassment.

Sexual harassment, unfortunately, is a reality in our society. For the lawyer, whether representing the person allegedly harassed, or the corporation employing a supervisor or other employee who allegedly engaged in such inappropriate conduct, the challenge is essentially the same: Did the alleged conduct constitute actionable sexual harassment under the existing law? It is hoped that the information provided here will provide at least a place to begin in evaluating such claims.

Endnotes

1. The courts have recognized two types of sexual harassment claims: *quid pro quo* claims and hostile environment claims. *Quid pro quo* claims are those in which a supervisor conditions job benefits on the submission to sexual advances. Hostile environment claims involve offensive conduct without tangible job detriment. The terms are of limited importance after *Ellerth* and *Faragher*; rather, under *Faragher* and *Ellerth*, the focus is normally on whether the harassment has culminated in a tangible adverse employment action or whether the employer can establish the affirmative defense.

2. The plaintiff also argued that the employer was liable under *Faragher* and *Ellerth*, even absent the employer's negligence. *Faragher* and *Ellerth* had been decided while the case was on appeal.

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Wrongful Transmission of a Sexually Transmitted Disease in Alabama:

Elements and Some Practical Considerations

BY KEVIN WALDING

Introduction

In the 1989 case of *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989), the Alabama Supreme Court recognized and adopted the tort of wrongful or negligent transmission of the sexually transmitted disease genital herpes (herpes simplex type II). The court indicated that "such liability could also be imposed for the transmission of other sexually transmitted diseases."[1] Based on reported case law apparently few cases have arisen using the legal theory. Family law practitioners and litigators should keep these potential theories in mind, however, in case they are faced with the appropriate factual circumstances. This article will review the *Berner* case and the necessary elements of a wrongful transmission claim, and will offer and discuss some practical considerations, by no means exhaustive, an Alabama attorney should consider when facing such a claim.

Berner v. Caldwell and the Elements of a Wrongful Transmission Claim

In *Berner v. Caldwell*, the plaintiff, Sheryl Berner, alleged that her former boyfriend and sexual partner, Don Caldwell, "negligently or intentionally transmitted herpes simplex virus type II (genital herpes) to her during the course of their sexual relationship."[2] Berner sued Caldwell for this wrong under theories of negligence, wantonness, suppression, misrepresentation, and assault and battery.[3] The trial court granted summary judgment for Caldwell because, according to the supreme court, "The trial judge believed either that the inference upon which the plaintiff relie[d] [was] not strong enough to support any of the theories of recovery,[4] or that Alabama does not recognize an actionable claim for the contraction of a venereal disease under any sort of circumstances."[5] The

Alabama Supreme Court affirmed summary judgment as to the wantonness, suppression, misrepresentation and assault and battery claims, but reversed the summary judgment as to the negligence claim.[5] The court also recognized "that a cause of action for the tortious transmittal of herpes simplex virus type II (genital herpes) exists under the law of Alabama" and noted that "liability could also be imposed for the transmittal of other sexually transmitted diseases."[6]

The crux of the opinion reads:

> For over a century, liability has been imposed on individuals who have transmitted communicable diseases that have harmed others. This result is also long been reached in cases dealing with the transmittal of venereal diseases. Several recent decisions in other jurisdictions have specifically imposed liability where the disease involved was genital herpes.
>
> This Court finds the reasoning of these cases persuasive and recognizes that a cause of action for the tortious transmittal of herpes simplex virus type II (genital herpes) exists under the law of Alabama. Our holding is in line with the public policy of this state, which seeks to protect its citizens from infection by communicable diseases. That policy encompasses sexually transmitted diseases, as evidenced by Ala. Code 1975, Section 22-11-21(c) (Supp. 1988), which states:
>
> > Any person afflicted with a sexually transmitted disease who shall knowingly transmit, or assume the risk of transmitting, or do any act which will probably or likely transmit such disease to another person shall be guilty of a Class C misdemeanor.
>
> That civil liability, to be determined according to the traditional rules of tort law, should also attach to allow recovery for damages resulting from the transmission of a sexually transmitted disease is a natural corollary to the legislative will as statutorily expressed. With the rise in the number of reported cases of sexually transmitted diseases, and in view of the harm that results from these diseases, the imposition of such civil liability is clearly warranted.
>
> While we will not discuss all of the elements of a claim for the tortious transmittal of genital herpes, we deem it necessary to provide some guidance concerning the issue of the duty of the infected party. We hold that one who knows, or should know, that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them. * * *
>
> While this Court does not deem it necessary in the present case to give such a detailed ruling, we do

> agree that traditional tort principles, governing both the causes of action and any defenses, apply in a case dealing with liability for the transmittal of genital herpes. We further note that, while the focus of this case is on liability for the transmittal of genital herpes, such liability could also be imposed for the transmittal of other sexually transmitted diseases.[8]

We can glean the following, then, from the *Berner* opinion: (a) a cause of action exists in Alabama for tortious transmission of genital herpes, (b) a similar cause of action for tortious transmission of other sexually transmitted diseases exists,[9] (c) traditional tort principles, including the possible causes of action, the elements of proof necessary, the damages recoverable, and the defenses available, govern, and (d) the duty of an infected person is either to abstain from sexual contact or to warn potential sex partners before intercourse. Also, the *Berner* opinion very clearly states and emphasizes the public policy of this state: to use the potential of both civil and criminal liability to protect Alabama citizens from infection by communicable and/or sexually transmitted diseases.[10]

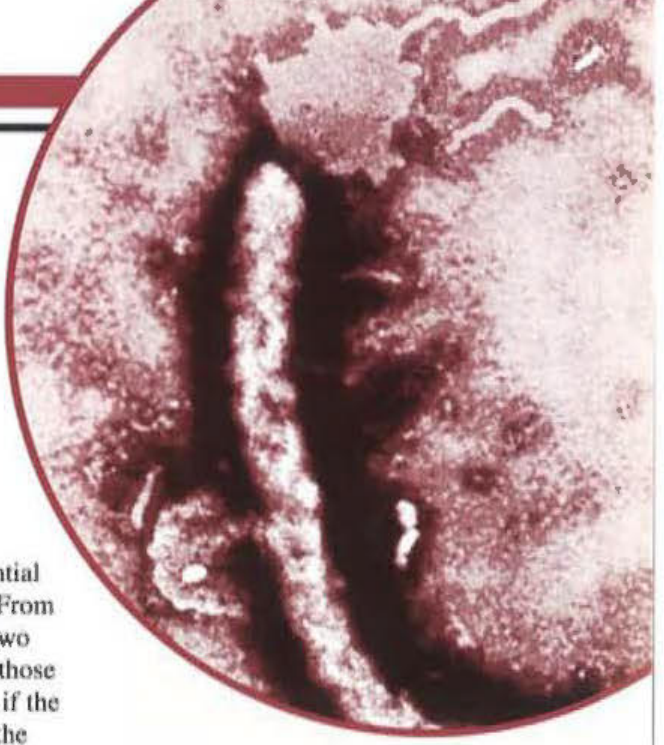
Borrowing from traditional tort principles, as the *Berner* court suggests, the elements of a cause of action for negligent transmission of a sexually transmitted disease would be: (1) the existence of a duty on the defendant's part, (2) the defendant's breach of the duty owed, (3) causation between the defendant's conduct and the plaintiff's injuries, and (4) resulting injury or damage to the plaintiff.[11]

The *Berner* decision, also, very clearly sets forth the duty owed, the class of persons owing the duty, and the class of persons to whom the duty is owed. In relevant part, the court states: "We deem it necessary to provide some guidance concerning the issue of the duty of the infected party. We hold that one who knows, or should know, that he or she is infected with [a sexually transmitted disease] is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."[12] The duty owed is to either abstain from sexual contact or to warn a potential partner before intercourse (and arguably to provide a potential sex partner with an informed or adequate warning); the class of persons owing the duty are those persons who know or reasonably should know that they have a sexually transmitted disease; and the class of persons to whom the duty is owed are persons with whom the infected party anticipates having sexual contact.

The breach of duty element would appear to be met when the plaintiff submits evidence that an infected defendant has sexual contact with the plaintiff without giving an informed or adequate warning. The issue of what is an informed or adequate warning has apparently not been addressed by the court to date. One can foresee, however, future courts borrowing concepts from medical informed consent case law and/or from failure to warn of defect claims under AEMLD. Both potential sources appear to call for a standard of reasonableness under the particular circumstances.[13] Thus, whether a warning is informed or adequate should hinge on whether a reasonable person would deem it so under the circumstances of the particular case.

The causation element of the tort is, perhaps, the most problematic. In the *Berner* case, Berner presented evidence that Caldwell was the only person with whom she had sexual contact and that she did not have the disease prior to her relationship with Caldwell.[14] In today's society this proffer might be difficult. Other avenues of establishing causation, however, must exist and would depend, necessarily, on the particular facts of each individual case. For example, one could assume that evidence of a monogamous relationship for a sufficient amount of time coupled with expert testimony could meet the causation element. It seems plausible, also, that proof of sexual contact only with the defendant for a sufficient time frame, again coupled with expert testimony, could meet the causation element.

The injury or damage element would appear to be met when the plaintiff submits evidence, such as laboratory test results, that he or she has contracted the disease.[15] Assuming proof of actual infection, the plaintiff would arguably be able



to recover special damages such as medical expenses and lost earnings, as well as damages for pain and suffering and mental distress, in addition to any other damages proximately resulting from the wrong.[16]

Discussion of the injury or damage element of the tort leads, quite logically, to the question of whether fear or apprehension of contracting a sexually transmitted disease alone (that is, without evidence of actual contraction of the disease) would support a cause of action. While this issue is beyond the scope of this article, there appear to be no reported Alabama cases recognizing a cause of action for fear or apprehension of contracting a sexually transmitted disease. Arguably, any such claim would run afoul of Alabama's well established law that no cause of action exists in this state for negligent infliction of emotional distress, which is, in reality, what fear or apprehension of contracting such a disease would be.[17]

Discussion of the elements of the tort also raises the question of what affirmative defenses might be available to challenge a claim. Because traditional tort principles govern, under *Berner* defenses such as contributory negligence, assumption of the risk, and the statute of limitations would be available under the appropriate factual circumstances.[18] Also, the defenses of *res judicata*, collateral estoppel and release can apply under the appropriate circumstances, and the practitioner should be mindful of these particular and very powerful defenses especially if the tort arises in a marital setting.

Some Practical Considerations: Joinder, Jury v. Bench Trial, *Res Judicata* and Release

As a practical matter a family law practitioner or litigator would most likely come into contact with a potential wrongful transmission plaintiff in a divorce context.[19] Considering that Berner and Caldwell were unmarried, however, this proposition is not always so.[20] Assuming the lawyer agrees to represent the potential plaintiff in both a tort action and a divorce action, certain practical problems arise. If the lawyer agrees to represent the potential plaintiff in only one of the potential actions, he or she should monitor the other action, including settlement discussions, very closely.

First, there is the practical issue of whether to join the two potential claims, and, if joined, whether to sever the claims for trial. The practical answer to this issue depends on whether the potential tort claimant demands a jury trial. From a practical standpoint, joining the two claims could reduce costs, such as those associated with discovery. Second, if the two claims are not joined, there is the issue of potential *res judicata* effect or release in one action.

The Alabama Supreme Court has given some guidance on these matters. The court has indicated that, at least when the tort claim arises in the marital context, joinder of the claims in one action is best, although the trials might have to be severed.

In *Coleman v. Coleman*, 566 So. 2d 482 (Ala. 1990), the Alabama Supreme Court faced a former wife's claim that her husband, during their marriage, negligently or wantonly, transmitted a venereal disease to her. Mrs. Coleman sued Dr. Coleman for divorce alleging adultery, and then, after settling all issues in the divorce and entering into a settlement agreement containing a mutual release, sued Dr. Coleman in tort for the wrongful transmission.[21] The trial court granted a summary judgment for Dr. Coleman and Mrs. Coleman appealed.[22] The supreme court affirmed the summary judgment holding, in essence, that Mrs. Coleman had released her tort claim in the prior divorce action.[23]

The *Coleman* court discussed prior case law[24] on the issue of marital tort claims and stated, "Those cases, read together, do not establish a general rule that a divorce action routinely precludes a former spouse from suing the other in tort based upon acts that occurred during the marriage. Rather, each case must be examined on its own facts and circumstances."[25] The important "facts and circumstances" appear to be whether the tort action is filed before a final divorce judgment is rendered, whether there was a settlement agreement and how broad the language of that agreement is, and whether the tort issue was actually discussed or used (e.g., for leverage in settlement) in the divorce proceeding.[26]

The *Coleman* court quoted with seeming approval the trial court's reliance on a statement in *Weil v. Lammon*, 503 So. 2d 830, 832 (Ala. 1987) that "With the

merger of law and equity, and given the liberal joinder allowed by the Alabama Rules of Civil Procedure, there is no reason why all known claims between spouses in a divorce action should not be settled in that litigation."[27] Importantly, the court stated:

> We would also recognize, as the trial court properly did, that in situations such as this, a spouse is faced with several avenues of properly preserving a claim for damages: First, if the spouse does not intend a release of all known claims, he or she could expressly reserve a tort claim from the settlement and then subsequently sue in tort. Second, the divorce defendant could counterclaim with a demand for damages based upon any tort claims or the spouse plaintiff could also include a tort claim in the divorce case. Because a trial by jury is not provided for in divorce actions in Alabama, the trial court could sever the claim for damages and set the severed case for a jury trial. Rule 21, A.R.Civ.P.[28]

The trial court should sever the trials of the divorce and the tort claim to preserve the right to trial by jury, assuming that a jury is demanded on the tort claim.[29] The lawyer(s) should be mindful of *res judicata* and collateral estoppel, however, and do their best to separate the tort issue from the issue of fault for the breakdown of the marriage. The Alabama Court of Civil Appeals has indicated that, "Whether that claim [a tort claim] may proceed or whether it is barred by the doctrine of *res judicata* is to be determined by the judge to whom [the tort] claim is assigned, and not by the judge who presided over the divorce matters."[30]

Other Possible Causes of Action for the Wrongful Transmission

I have purposefully referred to the tort here as wrongful or tortious transmission of a sexually transmitted disease because I believe that other possible causes of action could lie for the same conduct. In *Berner,* the plaintiff's complaint contained theories of negligence, wantonness, fraud, suppression, and assault and battery.[31] The court affirmed summary judgment on all theories but negligence because of lack of proof or lack of sufficient proof.[32] This result does not mean necessarily that Berner's other theories would not lie given the proper facts and submission of sufficient evidence. The lawyer should consider these other theories, and perhaps even others, based on the unique facts and circumstances of his client's case.[33]

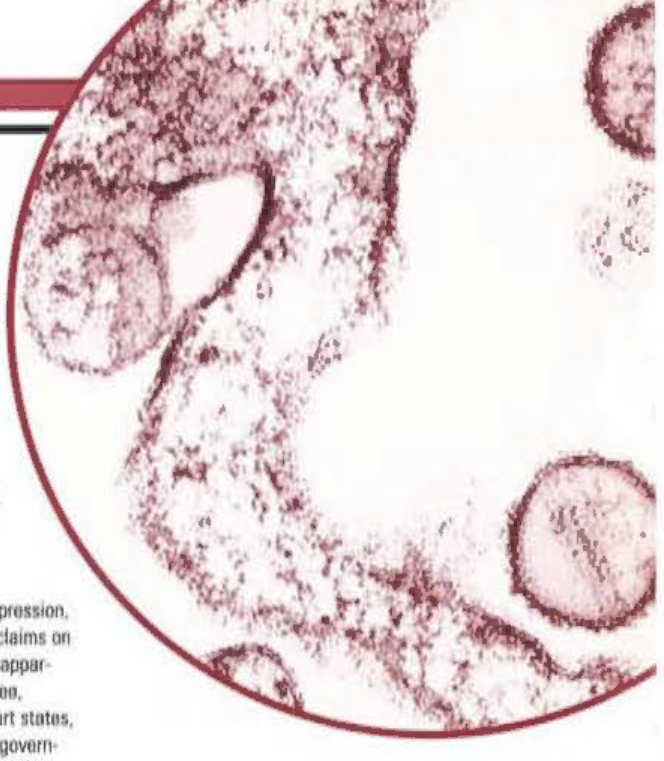
Conclusion

The tort of wrongful transmission of a sexually transmitted disease, established in *Berner v. Caldwell,* 543 So. 2d 686 (Ala. 1987), has apparently been used little by practitioners. This writer has located only one other reported Alabama case involving the tort: *Coleman v. Coleman,* 566 So. 2d 482 (Ala. 1990). The *Coleman* case explores and offers some guidance to practical issues surrounding

the tort and actually pursuing recovery on the theory.

The elements of, and governing principles concerning, wrongful transmission are familiar because they are borrowed from traditional tort jurisprudence. Although many questions concerning this tort remain common sense and reference to traditional tort principles should resolve most questions, at least until the court speaks on the tort again.

The family law practitioner and litigator should keep this tort in mind for use under the proper facts and circumstances. Given the existence of widespread and even epidemic sexually transmitted diseases, such as AIDS, no doubt the legal community will have ample opportunity to use the theory in the future.



Endnotes

1. *Berner v. Caldwell*, 543 So. 2d 686, 690 (Ala. 1989), *citing*, Deane Kenworthy Corliss, Comment, AIDS—Liability for Negligent Sexual Transmission, 18 Cumb. L. Rev. 691 (1988).
2. *Berner*, 543 So. 2d at 687.
3. Id.
4. The inference referred to is an inference that Caldwell was the only person who could have transmitted the disease to Berner. Id. at 688. This inference was supported factually by: (1) Berner having contracted the disease, (2) the disease being one that can only be contracted by sexual contact, (3) Caldwell being the only person with whom Berner had intimate sexual contact, and (4) Berner not having the disease before their relationship. Id.
5. *Berner*, 543 So.2d at 688.
6. Id. The court reversed the wantonness, suppression, misrepresentation, and assault and battery claims on evidentiary (lack of proof) grounds, and not, apparently, because those theories will not lie. See, *Berner*, 543 So. 2d at 688-689, 690. The court states, specifically, "that traditional tort principles, governing both the causes of action and any defenses, apply in a case dealing with liability for the transmittal of genital herpes." Id. at 690.
7. Id. at 689, 690.
8. *Berner v. Caldwell*, 543 So. 2d 686, 688-689, 690 (Ala. 1989) (citations omitted).
9. In *Coleman v. Coleman*, 565 So. 2d 482 (Ala. 1990), the Alabama Supreme Court reviewed a case alleging negligent or wanton transmission of the venereal disease, *condylomata acuminatum*, and states, "This Court recently held that a cause of action for the tortious transmission of a sexually transmitted disease, genital herpes, exists in Alabama. We also noted in *Berner* that while that case dealt with liability for the transmission of genital herpes, liability could also be imposed for the transmission of other sexually transmitted diseases." Id. at 484.

10. See, id. at 689, *quoting and citing* Section 22-11021(c), Ala. Code 1975. The public policy of the state, arguably, has been expanded to protecting Alabama citizens from contracting communicable and/or sexually transmitted diseases by not only potential civil and criminal liability, but also by requiring reporting, examination and treatment, and where necessary, isolation. See, e.g., Section 22-11A-13 (defining sexually transmitted diseases), Section 22-11A-14 (requiring doctors and others to report the name, date of birth, race, sex, marital status, address, telephone number, place of employment, stage of the disease, medication and amount given, and date of onset of any person diagnosed with or treated for a sexually transmitted disease; also, empowering the county or state health officer to take necessary and appropriate actions or measures to protect other persons from infection), and Section 22-11A-18 (requiring testing for or examination of any person reasonably believed to have a sexually transmitted disease; establishing a procedure for compelling someone who refuses to be tested or examined to do so, and requiring that the person obtain and/or continue treatment until the disease is no longer communicable or a danger to public health).

11. Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law*, Section 1.0 and cases cited in n. 2 (3rd edition 2000).

12. *Berner*, 543 So. 2d at 689.

13. See, e.g., Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law*, Sections 17.3 and 19.5.3, and cases cited therein, (3rd edition 2000). On the issue of medical informed consent, Roberts and Cusimano indicate that the standard is "disclosure of the risks that a reasonable physician, in the same general neighborhood, in the same general line of practice, ordinarily would disclose." Id. at 516. On the issue of failure to warn under the AEMLD, Roberts and Cusimano indicate that this theory requires a failure "to exercise reasonable care to inform [those for whose use the product is supplied] of its dangerous condition or of the facts which make it more likely to be dangerous." Id. at 595.

14. *Berner*, 543 So. 2d at 688, wherein the court notes, "The plaintiff in this case has alleged, and presented credible evidence, that she contracted a disease that can be transmitted only by intimate sexual contact; *that the defendant was the only person with whom she had sexual contact; that she did not have the disease prior to their relationship*; and that near the end of their relationship she discovered that she had the disease." (Emphasis supplied).

15. Berner submitted "evidence, including diagnostic laboratory test reports, indicating that she was infected with herpes simplex virus type II,..." Id. at 690. The court noted, also, that "these tests are certainly subject to impeachment at trial,..." Id.

16. Ms. Berner sought compensatory and punitive damages in her case. Id. at 687.

17. See, e.g., *Allen v. Walker*, 569 So. 2d 350, 352 (Ala. 1990) (stating that "there is no cause of action for the negligent infliction of emotional distress."); *Gideon v. Norfolk Southern Corporation*, 633 So. 2d 453, 454 (Ala. 1994) (declining to recognize negligent infliction of emotional distress in a case where the plaintiff saw her son thrown from an automobile and struck by a train); and *Foster v. Po Folks Restaurant*, 675 So. 2d 455, 455 (Ala. Civ. App. 1996) (refusing to recognize negligent infliction of emotional distress in a case where the defendant restaurant served plaintiff food containing a worm). But confer, *Flagstar Enterprises, Inc. v. Davis*, 709 So. 2d 1132, 1140-41 n. 4 (Ala. 1997) (holding that the trial court correctly denied a defense motion for judgment as a matter of law on negligence and AEMLD claims when the plaintiff ingested food tainted with blood sold to her by the defendant and rejecting a defense argument that the plaintiff's only damage was emotional distress for fear of contracting AIDS as not properly preserved; reversing and remanding on a wantonness count). One writer advocates Alabama courts allowing a cause of action for fear or apprehension of contracting AIDS and requiring the plaintiff to show an actual exposure to HIV. Matthew Warren Grill, Comment, *Exploring AIDSphobia in Alabama*, 49 Ala. L. Rev. 1009, 1044-1048 (1998).

18. See, Michael L. Roberts and Gregory S. Cusimano, *Alabama Tort Law*, Section 2.0, *et seq.*, and cases cited and discussed therein (3rd edition 2000); and see the excellent discussion of negligent transmission of AIDS in Deane Kenworthy Corliss, Comment, *AIDS—Liability for Negligent Sexual Transmission*, 18 Cum. L. Rev. 691, esp. 716-720 (1988).

19. See, e.g., *Coleman v. Coleman*, 566 So. 2d 482 (Ala. 1990).

20. *Berner*, 543 So. 2d at 687; and see, *Coleman*, 566 So. 2d at 484 (wherein the court states: "In *Berner* the parties were two single adults;...").

21. *Coleman v. Coleman*, 566 So. 2d 482, 482-484 (Ala. 1990).

22. Id. at 482.

23. Id. at 485 (noting that Mrs. Coleman had used her contraction of the disease as leverage in the divorce settlement negotiations and agreeing with the trial court that "to permit her to bring a subsequent tort action, would seriously undermine the settlement of divorce actions in the future.")

24. *Ex parte Harrington*, 450 So. 2d 99 (Ala. 1984), *Jackson v. Hall*, 460 So. 2d 1290 (Ala. 1984), *Weil v. Lammon*, 503 So. 2d 830 (Ala. 1987), and *Smith v. Smith*, 530 So. 2d 1389 (Ala. 1988).

25. *Coleman*, 566 So. 2d at 485.

26. Id. at 484-485.

27. Id. at 484.

28. *Coleman v. Coleman*, 566 So. 2d 482, 485-86 (Ala. 1990). See, also, *Morgan v. Morgan*, 686 So. 2d 1239, 1241 (Ala. Civ. App. 1996) (stating, "A divorce action does not preclude a separate action against a spouse for damages. In the instant case, the wife expressly reserved her tort claims in the divorce action and demanded a jury trial." *citing, Coleman*, 566 So. 2d 482 (Ala. 1990) and *Ex parte Harrington*, 450 So. 2d 99 (Ala. 1984)).

29. See, *Morgan v. Morgan*, 686 So. 2d 1239, 1241 (Ala. Civ. App. 1996), and Rules 21, 38 and 39, Ala. R. Civ. P.

30. *Howle v. Howle*, 699 So. 2d 177, 179 (Ala. Civ. App. 1997); *Handley v. Handley*, 733 So. 2d 427, 429 (Ala. Civ. App. 1999).

31. *Berner*, 543 So. 2d at 687; and see, *supra* note 6.

32. Id. at 687 (wherein the court states: "The evidence proferred by Ms. Berner in opposition to the summary judgment motion presented genuine issues of material fact on the negligence claim, but did not do so on the other claims under which she sought recovery").

33. Arguably, a claim for suppression best fits what inherently must be the general fact pattern of these type claims. The court in *Berner* imposed a positive duty on a person knowing he or she is infected with a sexually transmitted disease, or who under the circumstances should know, to either abstain from sexual contact or adequately warn. The person to whom the duty is owed, of course, is a person with whom the infected party is about to have sexual relations. These two persons, almost unquestionably, would have a close enough connection or bond of trust that a duty to communicate would arise even absent *Berner*. Section 6-5-102, *Ala. Code* 1975, states that, "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case."

CLE Opportunities

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

Kevin Walding

Kevin Walding is a partner in the Dothan firm of Hardwick, Hause & Segrest. He is a 1988 *magna cum laude* graduate of Huntingdon College and a 1991 graduate of the University of Alabama School of Law. He served as law clerk and staff attorney to Justice Hugh Maddox of the Supreme Court of Alabama. Kevin is a member of the Houston County Bar Association, the Alabama State Bar and the American Bar Association, as well as the Alabama Defense Lawyers Association and the Defense Research Institute. He serves on the editorial boards of *The Alabama Lawyer* and the *ADDENDUM*.

On the Road Again...

Since its inception in 1995, the ROADSHOW has covered the state of Alabama visiting local bar associations. The ASB is proud now to include free CLE components as a benefit to Alabama lawyers. Contact Susan Andres, director of communications, at (334) 269-1515, extension 132, or e-mail *sandres@alabar.org* for details. The following free CLE programs* are available:

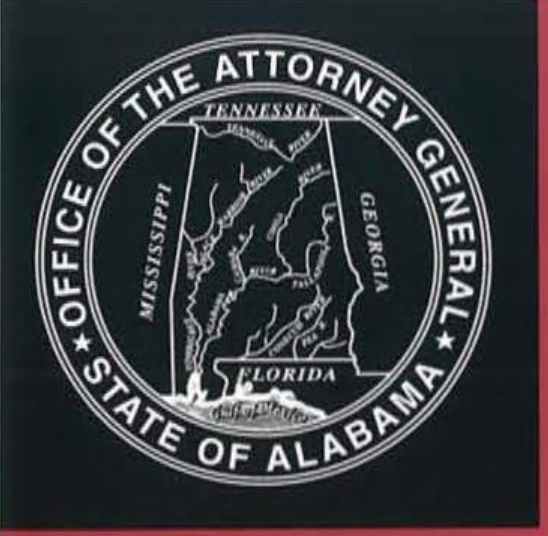
- The ASB's Law Office Management Assistance Program Director Laura Calloway has the answers to your questions on everything from client relations to computer software.
- The director of the Alabama Lawyer Assistance Program, Jeanne Marie Leslie, raises awareness and understanding of substance abuse within the profession and tells you how to be part of the solution to this growing problem.
- Judy Keegan, director of the Alabama Center for Dispute Resolution, brings you a summary of the latest updates and important cases from the fast-growing areas of mediation and arbitration.
- General Counsel Tony McLain keeps bar members informed of the latest in disciplinary issues and major legal developments in Alabama and across the nation.
- Volunteer Lawyers Program Director Linda Lund has developed an ethics and professional component covering significant developments on a local and national level.

*Each CLE component is available in one- to three-hour formats.

All signs lead to free CLE.

ALABAMA STATE BAR

To Serve the Profession



A Report from the State's Law Firm

BY WILLIAM H. PRYOR, JR.

The Office of the Attorney General is the most diverse law firm in the state. I often refer to this office affectionately as the law firm of the people of Alabama. Assistant attorneys general handle a wide range of legal issues in the trial and appellate courts and administrative tribunals. There are approximately 70 assistant attorneys general on the office payroll, and the office is supported by and provides assistance and direction on legal matters to over 130 assistant and deputy attorneys general in other departments and agencies of state government.

In this article, I will provide an overview of the history and functions of the Office of Attorney General. Many lawyers may be familiar with some of our work but unfamiliar with other responsibilities that are potentially relevant to their clients. This overview will help fill that gap.[1]

History of the Attorney General

The attorney general is an office of ancient origin:

> The office of attorney general is older than the United States . . . . As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity . . . .
>
> . . . [T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to public interest.

Florida v. ex rel Shevin v. Exxon Corp., 526 F.2d 266, 268-69 (5th Cir. 1976) (footnotes omitted). *See generally State Attorneys General: Powers and Responsibilities* (Lynne M. Ross ed. 1990) (discussing at length the historical and modern powers and responsibilities of attorneys general of the 50 states).

The Office of Attorney General of Alabama was created in 1819 by the first constitution of Alabama. The attorney general was elected by the legislature until the adoption of the constitution of 1876, which required popular election of the attorney general. The office was part of the judicial branch until 1868 when the office became part of the executive branch. The term of office was also reduced in 1868 to two years, and in 1901 the term returned to four years.

The attorney general was first allowed to hire a clerk in 1896. In 1907, the first assistant attorney general was provided a salary of $1,500 a year. In 1915, the attorney general was given the authority to hire as many assistants as he deemed necessary and set their salaries with the approval of the governor. In 1939, with the passage of the Merit System Act, the hiring and promotion of employees of the office became subject to the rules of the State Personnel Board.

As the chief legal officer of the State, the attorney general enjoys wide discretion in directing litigation. The attorney general "may . . . superintend and direct the prosecution of any criminal case in any of the courts of the state." *Ala. Code* § 36-15-14; *see also Graddick v. Galanos*, 379 So.2d 592 (Ala. 1982). The attorney general also directs and controls all civil litigation concerning the state, *Ala. Code* § 36-15-21; *Ex parte Weaver*, 590 So. 2d 675 (Ala. 1990) and indeed, no lawyer may represent the state or any of its departments, agencies, or instrumentalities unless the lawyer has been designated as an assistant attorney general or a deputy attorney general. *Ala. Code* § 36-15-1. The legislature has also provided that "[t]he attorney general shall have and retain all of the powers, duties, and authority heretofore granted or authorized by the constitution, statutory law, or the common law." *Ala. Code* § 36-15-1.1. Although my office and staff are lodged in Montgomery, in fact, our lawyers respond to demands and travel throughout the state, appearing in federal and state courts, and handling other non-litigation matters statewide.

Divisions and Duties of the Office

With more than 200 assistant attorneys general in service to the State, the Office of Attorney General is organized—like all major law firms—based on areas of specialty. There are ten divisions of attorneys in the office, each with a chief who then reports to the Attorney General, Chief Deputy Attorney General Richard Allen, and Chief Assistant Attorney General Rosa Davis in the executive division. Over time, assistant attorneys general have narrowed their practices, and accordingly new divisions of specialists have been created.

Administrative Hearings

In 1998, partially as a response to litigation challenging the then-existing procedures, I created the Administrative Hearings Division to provide a neutral panel of administrative law judges (ALJs) for hearings of state agencies, boards and commissions. In 1997, the legislature passed the Office of Administrative Hearings Act, but the Governor vetoed that bill. I supported the Act to improve administrative hearings and, after its failure, created this division staffed by four attorneys with broad experience in government practice. These ALJs work in separate quarters and are not exposed to the agency attorneys and employees

involved in administrative hearings. Hearings are conducted not only in Montgomery but around the state; 33 counties were visited last year. The chief of this division is **Walter Turner**, who has served eight attorneys general.

This voluntary model was adopted in Tennessee, which allowed state agencies to use independent and professional ALJs to learn the benefits of this process. Tennessee now has an independent central panel of ALJs with mandatory jurisdiction. I hope Alabama follows that example.

Last year, 26 agencies used the services of the ALJs. Act 2000-718 provided state employees who have been denied benefits related to alleged work injuries the right to appeal to this division. Three of the ALJs are mediators registered with the Alabama State Bar. One ALJ is a Fellow of the State Agency Alternative Dispute Resolution Program.

Capital Litigation

This division represents the State in all appeals of death sentences. This representation includes state direct appeals; state post-conviction proceedings, under Rule of Criminal Procedure 32; federal habeas corpus proceedings; and execution proceedings, all potentially, and often in practice, involving appeals to the United States Supreme Court. In addition, the attorneys in this division advise judges, district attorneys and their assistants, and victims' families about the law of capital punishment. The chief of this division is **Clay Crenshaw**.

The work of this division continues to grow. There are 183 inmates on death row, at least one from each of 42 counties, and their average stay is 13 years. Last year, the State executed four inmates, and this year we expect as many and possibly more executions. Fifteen new appeals were filed last year, however. On May 19, 2000, the Supreme Court of Alabama, at my and the Governor's request, unanimously adopted new rules to streamline this process by subjecting direct appeals to true certiorari, not mandatory, review. Since then, the court has denied certiorari in several cases, thus shaving a year or more off the process and lessening, to a degree, the tremendous workload on my dedicated staff of capital litigation lawyers.

Constitutional Defense

This division was created in 1998 to represent the State in complex civil litigation in primarily the federal courts. This division handles institutional litigation and civil rights, voting rights and employment discrimination cases, and worked in 23 counties last year. A major focus of this work has included representation before the Supreme Court of the United States with victories to report in four important federalism cases: *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (state immunity from money damages in age discrimination cases); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001) (state immunity from money damages in disabilities discrimination cases); *Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000) (dismissed legislative redistricting case where plaintiffs lacked standing); and *Alexander v. Sandoval*, ____U.S.____, 121 S. Ct. 1511 (2001) (no private right to enforce disparate impact regulations against the State). This division also coordinates our non-criminal law work as an *amicus curiae* in the Supreme Court. The chief of this division is **Margaret Fleming**.

Criminal Appeals

This division is the largest in the office. It represents the State in all appeals (from all 67 counties last year) in state and federal court for all non-capital criminal matters. In 2000, the division received 2,141 new case assignments, and in addition, handled many re-hearing applications, responded to numerous petitions for writ of certiorari to the Supreme Court of Alabama, and conducted Rule 32 hearings in 12 counties around the state. Generally the division enjoys a success rate of about 95 percent. This division is currently representing the State in the Supreme Court of the United States in the case of *State v. Bozeman*, no. 00-492, which involves whether the rule of harmless error applies to the transfer of prisoners under the Interstate Agreement on Detainers Act. In addition, the Court granted Alabama's petition for certiorari in *Alabama v. Shelton* to resolve a conflict among the states and the federal circuits on the application of the right to counsel in criminal misdemeanor cases where the threat of imprisonment exists. The chief of this division is **Sandra Stewart**.

Environmental

This division investigates complaints involving air and water pollution, hazardous waste, and other environmental matters. Its attorneys file either civil complaints or prosecute criminal cases. Environmental lawyers from this office traveled to 51 Alabama counties last year. Although this division works closely with the Alabama Department of Environmental Management, this division often initiates independent legal proceedings. This division also develops proposed regulations and legislation. Recent work of this division includes settlements in clean water cases involving the Dalton (Georgia) utilities board and the City of Tuscaloosa. The chief of this division is **Craig Kneisel**.

General Civil and Administrative Law

This division represents the State in civil and administrative matters. The matters directed by this division range from defense of prisoner litigation, defense of agencies in administrative hearings, and the representation of the State in personal injury, commercial, and contractual matters. Lawyers from this division handled matters in 41 Alabama counties in 2000. The chief of this division is **Bill Garrett**, and **Milt Belcher** is section chief for litigation and administrative hearings matters.

The civil division also encompasses two sections that represent the interests of consumers. The first is the *Utilities Section*, which represents the ratepayers in all matters involving public utilities before the courts and the Public Service Commission. This section, for example, last year represented the ratepayers in hearings before the PSC regarding electric restructuring and, before the Circuit Court of Jefferson County, involving the transfer of the Water Works and Sewer Board of the City of Birmingham from that city. **Olivia Martin** is chief of this section.

The other section, *Consumer Affairs*, responds to complaints regarding a variety of consumer transactions. This section operates a toll-free hotline, (800) 392-5658, to receive complaints and receives written complaints by mail and online via our Web site, *www.ago.state.al.us*. This section enforces the Alabama Deceptive Trade Practices Act, which includes both criminal and civil penalties, and the federal antitrust laws. This section also represents Alabama consumers in multi-state actions coordinated through the National Association of Attorneys General. Finally, non-attorney specialists in this section assist in the mediation of consumer complaints. The chief of this section is **Ellen Leonard**.

Opinions

This division provides formal written opinions on questions of law to the Governor; other constitutional officers; heads of state departments, agencies, boards and commissions; members of the legislature; and thousands of other state and local officials. Last year, this division provided 252 written opinions to state officers or local officials in 57 counties. After several attorneys complained to me that these opinions were often difficult to obtain and research, this office posted all opinions dating back to 1979 on our office Web site, *www.ago.state.al.us*. These opinions are fully text searchable. Although these opinions are merely advisory, the Supreme Court of Alabama has stated that "they are entitled to great weight" and are "persuasive" authorities. *Mobile County Constables Association v. Department of Public Safety*, 670 So. 2d 28, 29 (Ala. 1995); *Anderson v. Fayette County Board of Education*, 738 So. 2d 854, 858 (Ala. 1999). The chief of this division is **Carol Jean Smith**, who has served six attorneys general.

Public Corruption and White Collar Crime

I created this division in 1997, in my first year as attorney general, to prosecute cases of public corruption, election fraud, bid-rigging, complex economic crimes, and violations of the ethics code. This division also assists the Alabama Securities Commission and the Judicial Inquiry Commission in their prosecutions. This division regularly works with the U.S. Attorneys, the Federal Bureau of Investigation, the Alabama Bureau of Investigation, the Ethics Commission, the State Examiners of Public Accounts, and our own investigations division. Much of our work in this area involves joint federal-state investigations and prosecutions of election fraud, corrupt law enforcement, and other forms of public corruption. These prosecutions, distributed across 43 counties last year, have been highly successful. This division also has worked successfully with the Department of Industrial Relations to prosecute cases of worker compensation fraud. The chief of this division is **John Gibbs**.

Medicaid and Welfare Fraud Units

The office has two special fraud units for the investigation and prosecution of fraudulent and other criminal behavior regarding payments of government benefits intended for the poorest citizens of Alabama. The *Medicaid Fraud Control Unit* investigates and prosecutes allegations of fraud by healthcare providers against the Alabama Medicaid Agency and the abuse and neglect of residents in Medicaid-funded facilities. The *Welfare Fraud Unit* investigates and prosecutes allegations of fraudulent receipt of or trafficking in food stamps and electronic benefit transfer cards. This unit works with the Department of Human Resources through a toll-free hotline, (800) 392-8048, to receive complaints of welfare fraud. The chiefs of these units, which worked in 66 and 36 counties respectively, are **Bruce Lieberman** and **Ferris Stephens**.

Violent Crimes

This division represents the State in the investigation and prosecution of violent crimes, especially murder and rape cases, throughout Alabama. This division often prosecutes cases at the request of a district attorney who has a conflict or needs more resources. Sometimes, our lawyers are "prosecutors of last resort" for victims or family members who bring cases directly to our office, such as in the George Martin case. A former state trooper in Mobile, Martin was convicted of murdering his wife for $400,000 in insurance money, but not until this division took on the case, four years after

the murder. In Chilton County, the division successfully prosecuted Coy Nix for the shotgun murder of his 17-year-old, defenseless wife. In DeKalb County, David Harris, a county commissioner, was convicted for assaulting his son's high school basketball coach. Last year, this division of five prosecutors appeared before 25 grand juries, conducted 30 trials, and obtained 67 convictions, working in 34 counties. The chief of this division is veteran prosecutor **Don Valeska**, who has served six attorneys general.

Investigations

In addition to the ten divisions of attorneys, investigative support is provided by my staff of 18 in-house investigators, many of whom are former FBI agents. These investigators conduct various types of investigations, including public corruption and white collar crime, violent crime, welfare and Medicaid fraud, and drug cases. These investigations led to 32 convictions in 2000. Overall, this division conducted investigations in 67 Alabama counties last year and currently has 237 open cases. The division chief is **Senior Special Agent Jack Brennan**.

Other Duties and Initiatives

In addition to our duties to represent the State in civil and criminal litigation and provide formal written opinions, the office has several other important missions. The *Victim Assistance Unit* aids victims and their families in understanding and affecting the criminal justice system. The members of this staff file objections and assist victims at hearings of the Board of Pardons and Paroles. They also assist the families of victims in capital murder cases as those cases move toward the execution of the offenders. Recently, at my recommendation, this unit has worked with the Department of Corrections, the Board of Pardons and Paroles, victims' rights organizations, and prison ministries to design a victim/offender mediation program following a Texas model. This unit also sends notices to victims regarding the release of sex offenders.

In August 2000, I formed *Mentor Alabama*, a statewide volunteer initiative to fight juvenile crime by involving committed adult role models in the lives of at-risk youth in Alabama. The goal of Mentor Alabama is to recruit 2,002 new mentors by the end of the year 2002. Mentor Alabama has been designated as the signature partner for Alabama of the National Mentoring Partnership, which is a partner of America's Promise led by Secretary of State Colin Powell. Our office has created an extensive network of more than 200 public, private and faith-based mentoring organizations to accomplish our goal. Through Mentor Alabama, caring adults anywhere in Alabama can obtain a comprehensive list of mentoring opportunities in their region. Our office performs a criminal background check before any person is referred to a mentoring organization. I have made a personal commitment of my time to serve as a mentor and encourage others to join me.

The *Alabama Safe Schools Initiative* is a four-part program administered by our office with the Governor and Superintendent of Education. The first part involves the production and distribution of standardized School Emergency Crisis Notebooks to every school, public and private. The second part involves the statewide school safety hotline (1-888-SAV-KIDS). The third is a public service announcement, "Prevent School Violence" media campaign. The final part involves school safety training for law enforcement,

emergency management, employees and school officials. More information can be obtained at the Safe Schools Web site, *www.ago.state.al.us/schools*.

Another joint initiative of our office and the Superintendent of Education is the distribution of guidelines for education officials regarding issues of religion in public schools. These guidelines offer practical examples and rules to ensure that public school officials neither encourage nor discourage religious activities in schools. The guidelines are based on the latest decisions of the Supreme Court and the Eleventh Circuit. The guidelines respect the rights of public school students to pray or express their religious beliefs when that expression is genuinely student-initiated. *See Chandler v. Siegelman*, 230 F. 3d 1313 (11th Cir. 2000) (vacating an injunction of the Middle District of Alabama that violated the first amendment rights of students in DeKalb County).

Conclusion

It is a privilege to represent the interest of the public in our legal system. Whether our work involves the pursuit of justice in criminal cases, the defense of state interests in civil and administrative matters, the provision of legal advice for public officials, or some other initiative for the public interest, the Office of Attorney General performs a special role in relation to the bench and bar. Our mission is to fulfill the motto of our sovereign state: "We dare defend our rights." ■

Endnotes

1. Much of the material discussed herein is drawn from the Annual Report of the Office of Attorney General for 2000, which is on file at this office, a copy of which was distributed to every member of the Alabama Legislature and every judge and district attorney in Alabama, and which is available on our web site at *www.ago.state.al.us*.

Attorney General William H. Pryor, Jr.

Bill Pryor took office as Attorney General of Alabama on January 2, 1997. He was appointed by Governor Fob James to complete the term of Jeff Sessions who was elected to the United States Senate. At that time, Pryor was the youngest attorney general in the United States. On November 3, 1998, Pryor was elected to a full four-year term.

A native of Mobile, Pryor graduated *magna cum laude* in 1987 from Tulane University School of Law, where he was editor-in-chief of the *Tulane Law Review*.

He began his legal career as a law clerk for Judge John Minor Wisdom of the U.S. Court of Appeals, Fifth Circuit. Before joining Jeff Sessions as a deputy attorney general in 1995, Pryor was in private practice in Birmingham.

He has received the Guardian of Religious Freedom Award from Justice Fellowship and Prison Fellowship Ministries, the Civil Justice Achievement Award from the American Tort Reform Association, the Friend of the Taxpayer Award from the Alabama Citizens for a Sound Economy, and the Harlon B. Carter Award from the National Rifle Association's Institute for Legislative Action.

Pryor is a member of the American Law Institute, the Legal Policy Advisory Board of the Washington Legal Foundation, and the Federalist Society.

- **Charles Robert Poore, III**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2001, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 00-74(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar reinstating Birmingham attorney **Edward Eugene Angwin** to the practice of law in the State of Alabama effective February 21, 2001. [ASB Pet. No. 00-05]

Suspensions

- Birmingham attorney **Edward Eugene Angwin** was suspended from the practice of law in the State of Alabama by order of the Disciplinary Board for a period of 180 days. The suspension was ordered to run concurrently with a 91-day suspension imposed in cases ASB nos. 98-204(A), 98-228(A), and 98-332(A), effective January 19, 2000.

  Between January 21 and 24, 2000, Angwin negotiated a settlement on behalf of a client. He did not advise the client of his suspension. Angwin received a check payable to him and his client. Angwin endorsed the check, but did not promptly remit the amount due to his client. Angwin did not respond to the client's numerous attempts to contact him about the matter between January and May 2000. However, when the client discovered that the settlement check had been issued and contacted the Alabama State Bar, Angwin immediately remitted the total amount to the client, including the amount of the attorney's fee to which Angwin was otherwise entitled. [ASB No. 00-137(A)]

- The Supreme Court of Alabama, based upon the decision of the Disciplinary Board, suspended Birmingham attorney **David Baldwin Champlin** from the practice of law in the State of Alabama for a period of 91 days. The Court further ordered that the suspension would be effective retroactively from January 1, 2000.

  Champlin was licensed to practice law in the State of Alabama on September 26, 1988. In January 2000, Champlin tendered his personal check number 1398, dated January 4, 2000, drawn in the amount of $287.50, made payable to the Alabama State Bar Membership Department. This payment was intended as payment for his 1999-2000 occupational license fee. The check was returned for non-sufficient funds. The membership department of the Alabama State Bar notified Champlin by letter dated January 31, 2000 that his check had been returned for non-sufficient funds and that he was required to remit $307.50 in the form of a cashier's check or money order on or before February 9, 2000. Champlin did not comply with this request or otherwise respond.

  The Office of General Counsel of the Alabama State Bar notified Champlin by letter dated February 14, 2000 that he should respond to the membership department of the Alabama State Bar regarding his 1999-2000 occupational license and returned check. Champlin did not respond to this letter. Champlin was notified by letter dated February 29, 2000, sent via regular and certified mail, that he must respond within seven days from receipt of said letter or disciplinary action would be taken. Although the letter was received by Champlin, he did not respond.

  On January 26, 2001, Champlin was found guilty, by default, of failing to respond to a lawful demand for information from a disciplinary authority, a violation of Rule 8.1(b), A.R.P.C.; and of engaging in conduct that reflects adversely on his fitness to practice law, a violation of Rule 8.4(g), A.R.P.C., Champlin failed to appear for this disciplinary hearing. [ASB No. 00-67(A)]

- Scottsboro attorney **Dennis Gene Nichols** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective March 12, 2001. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Nichols had failed, on more than one occasion, to communicate with clients concerning the status of their legal matters and, upon receipt of funds belonging to clients, failed to promptly remit those funds to the rightful owner. Further, Nichols failed to timely respond to requests for information from a disciplinary authority. [Rule 20(a); ASB Pet. No. 01-03] ■

War Stories

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

ALABAMA LAWYER Assistance Program

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

Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

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

It is.

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

You can.

Don't be part of their delusion.

Be part of the solution.

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

Rates: Members: Two free listings of 50 words or less per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—$35 per insertion of 50 words or less, $.50 per additional word;

Nonmembers: $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

July 2001 issue—deadline May 5, 2001; September 2001 issue—deadline July 5, 2001. No deadline extensions will be made.

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

Services

- **ENGINEERING/CONSTRUCTION EXPERTS:** Drainage, structural, mechanical, roofing, electrical, process chemical, EIFS(stucco), mold and mildew, HVAC; for residential housing, industrial and chemical facilities, pipelines, compressor stations, commercial buildings, and port structures. Provide expert construction claims and dispute analysis. Provide computer animation of structural behavior under loads. Experienced testifying experts with licenses and credentials. Company engineering and contractor licenses in Alabama and Louisiana. Contact Hal K. Cain, Mobile. Phone (334) 661-2605. E-mail: *hkcain@hkcain.com*. Web site: *www.hkcain.com*.

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

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

- **MINING ENGINEERING EXPERTS:** Extensive expert witness experience in all areas of mining—surface and underground mines, coal, quarries, etc. Accident investigation, injuries, wrongful death, mine construction, haulage/trucking, agreement disputes, product liability, mineral property management, asset and mineral appraisals for estate and tax purposes. Joyce Associates (540) 989-5727.

- **DOCUMENT EXAMINER:** Examination of questioned documents. Certified forensic handwriting and document examiner. Thirty-four years' experience in all forensic document problems.

Notice — Amendment to Alabama Rules of Appellate Procedure

The Alabama Supreme Court has amended Rule 4(a)(1), Alabama Rules of Appellate Procedure, and has adopted Rule 4(d), Alabama Rules of Appellate Procedure. The amendment of Rule 4(a)(1) and the adoption of Rules 4(d) are effective October 1, 2001. Rules 4(d) provides that review of an order granting or denying a motion to compel arbitration is by appeal. The amendment to Rule 4(a)(1) recognizes the adoption of Rule 4(d). The order amending Rule 4(a)(1) and adopting Rule 4(d) appears in an advance sheet of *Southern Reporter* dated on or about May 31, 2001.

Formerly chief, questioned document analyst, USA Criminal Investigation Laboratories. Diplomate (certified)-ABFDE. Member: ASQDE; IAI, SADFE; NACDL. Resume and fee schedule upon request. Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia, 30907. Phone (706) 860-4257.

- **TRAFFIC ACCIDENT RECONSTRUCTIONIST:** Evaluation of highway design, maintenance and construction. This engineer has reconstructed over 3,000 accidents in 23 states on highways, streets, railroads and highway construction zones involving trucks, vans, cars, pedestrians, and farm implements. Computer-generated drawings are prepared to illustrate his opinions. Over 45 years' engineering experience. Registered professional engineer and full board ACTAR certification. Contact John T. Bates, P.E. Toll-free (800) 299-5950.

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

- **HIGHWAY SAFETY AND TRAFFIC ENGINEERING:** Highway safety and traffic engineering in the roadway environment, construction work zones, roadway hazards, roadside hazards, RR grade crossings, traffic controls, highway engineering safety standards, accident reconstruction, and driver reactions and expectations. G.E. Lohr, PE, Box 12339, Charleston, South Carolina, 29422-2339. Phone (843) 795-7218. E-mail: *lohrg@msn.com*.

- **FORENSIC DOCUMENT EXAMINATIONS:** Seventeen years' forensic document examinations; 27 years' total forensic experience. Retired senior documents examiner and discipline coordinator, Alabama Department of Forensic Sciences. Member, Questioned Document Section—American Academy of Forensic Sciences; Southeastern Association of Forensic Document Examiners; Southern Association of Forensic Scientists; Alabama State Association of Forensic Sciences (past president). Contact Richard A. Roper, Ph.D., 7956 Vaughn Road, #141, Montgomery 36116. Phone (334) 260-2552. Fax (334) 260-7929. E-mail: *richroper@aol.com*.

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

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

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

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Duties include editing and proofreading; reading the advance sheets of *Southern Reporter (2d)* to ensure that the headnotes accurately state the lega principles in the case and to ensure the accuracy of the reports of the opinions of the Alabama appellate courts; checking lists of decisions without opinions by the Alabama Supreme Court, the Court of Criminal Appeals and the Court of Civil Appeals for publication in the *Alabama Reporter*; drafting and editing amendments to various rules of procedure adopted by the Alabama Supreme Court; preparing the documentation for, and assisting in, releasing the opinions of the Alabama appellate courts to West Group for publication in the official reports; and coordinating publication of the opinions of the appellate courts with West Group.

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