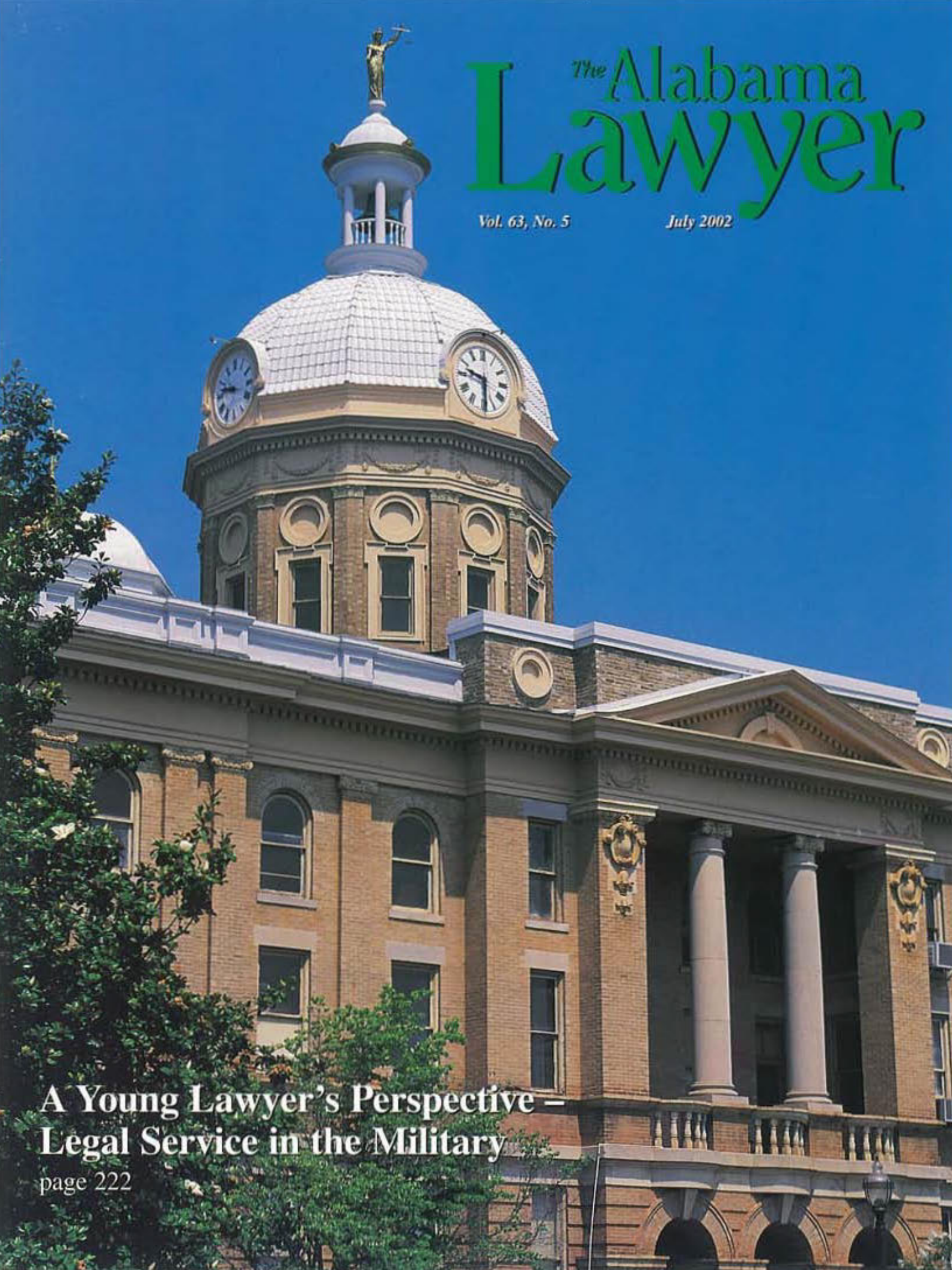

The Alabama Lawyer

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A Young Lawyer's Perspective – Legal Service in the Military

page 222

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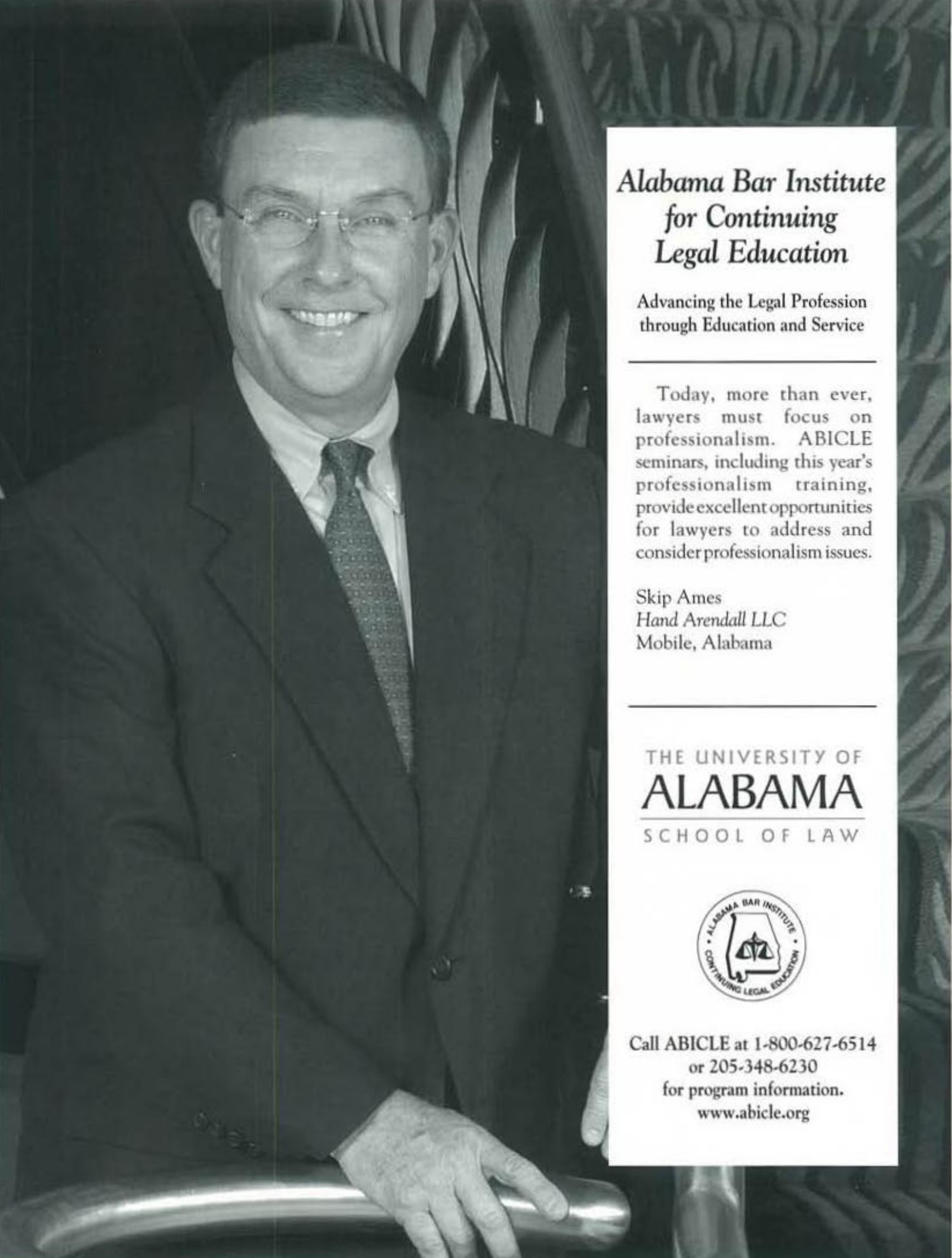

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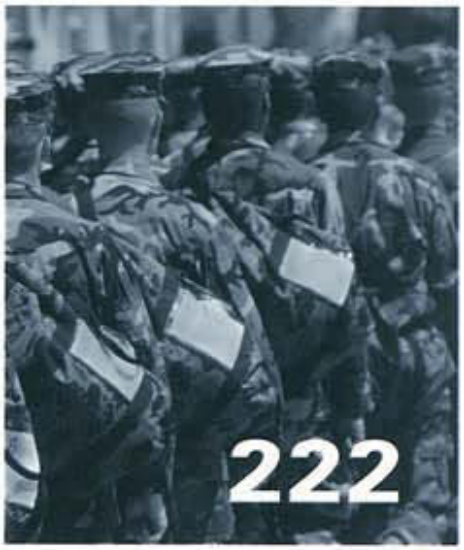
THE ALABAMA LAWYER
Vol. 63, No. 5 / July 2002

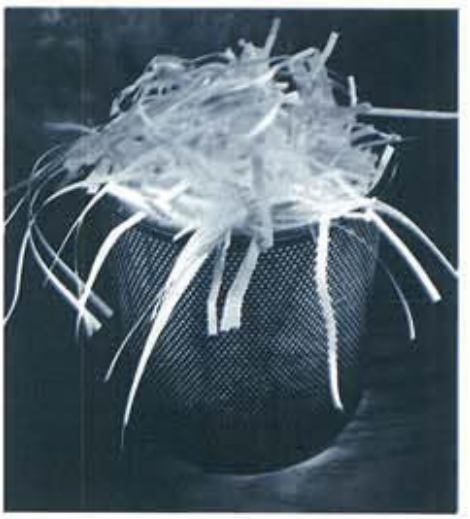
On the Cover:

Morning sunlight on Clay County Courthouse in Ashland, Alabama—Italian Renaissance in architecture, the structure was built in 1906 during the probate judgeship of F.J. Ingram, grandfather of the present probate judge, George Ingram. The courthouse, which centers the square in downtown Ashland, underwent considerable refurbishment in 1999. This is the third courthouse to serve the county since its formation in 1866. Clay County has a population of 14,250.

—Photography by Paul Crawford, JD

Features





THE ALABAMA LAWYER

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Larry W. Morris

Encouragement Is Oxygen to the Soul

By Larry W. Morris

Generally speaking, people have a way of becoming what you encourage them to be. As I pen my last "President's Page," I have been encouraged by so many people and I must admit I have learned a lot. I am not sure what any of the following is worth but throughout the year, I have made notations of things I noticed and I will share them with you.

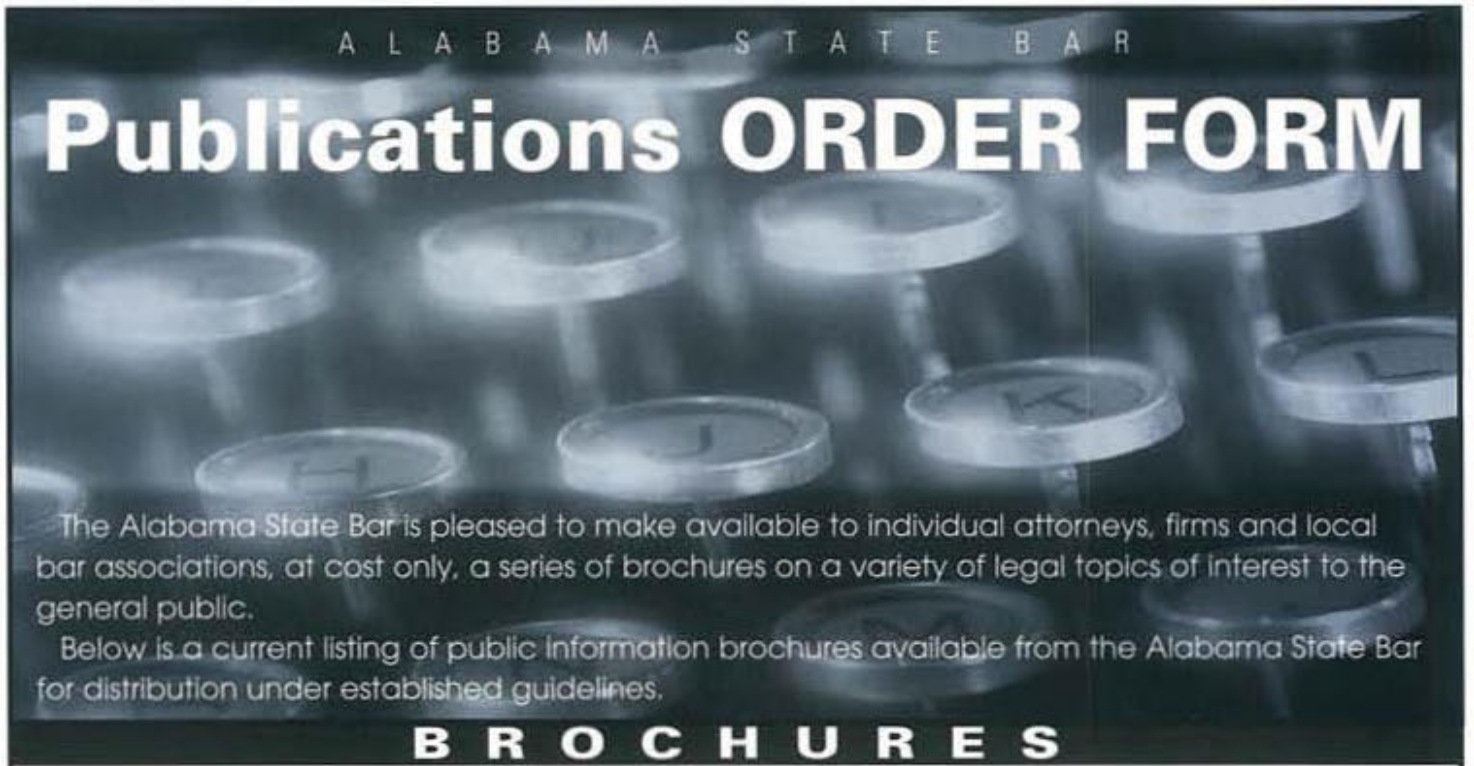
1. Anything that begins, "I don't know how to tell you this" is never good news. I have had the pleasure of speaking to approximately 43 different groups this year. Most are bar associations and others bar related activities. However, at a civic club in Mobile, I was told that some speeches they have heard put them to sleep. Mine put them in a coma. That did not bother me so much but the questions at the end of those speeches always hurt. This is usually a trick to make you think they were actually listening. Inevitably, someone starts a question which is really a statement i.e. "I don't know how to tell you this, but...." I have learned to get ready for that negative, drab, poor-mouthing, attention grabbing soul who is going to gripe. Further, I have learned that most times his position is one of extreme. I usually refer the question to the disciplinary section of the bar even if it concerns the ineptness of my presidency. I know that people generally live up to the compliments that are paid them. One questioner suggested that I could not speak. I ask him to quit being negative and start thinking positively. He said, "O.K., I am positive you can't speak." After a year, I have learned to avoid these negative people.
2. In practicing law, the key word is honesty. Once you have learned to fake that, the rest is easy. Everywhere I go, lawyers complain about how honesty and integrity in our profession have dissipated. I could not disagree more. Those "yesteryear" lawyers would look you in the eye, lie and never blink. The truth never got in their way. Today, we at least make an argument couched in "advocacy" that approximates the truth. We can't tell opposing counsel during settlement talks what we would really take or pay in a certain case because he would think that means "he got some more money" or "he'll take less." What honesty and integrity really means is practicing law with dignity. I will embellish my position, you do the same, but I will treat my adversary with dignity. That is professionalism.
3. We have become too good at erecting walls. It's been my observation that we have become very skilled, professionally, at keeping people at arm's length, resisting any tendency to let people know us or us know them. A western bar association has, for their opening session, something called "Jericho Night." Its purpose is to remove any hard feelings that may have occurred between lawyers, plus to connect, by removing the walls, with other members of the bar. I have found during my year as president, we have become very reluctant to let others see our humanity as well as our vulnerability. The practice of law is tough enough. It seems that if we are willing to share in other lawyers' sorrows or rejoice in their accomplishments, our lives will be more complete. In order to do so, we have to remove the barriers that we have erected.
4. A "has been" is when you know all the answers, but no one asks the questions. It has become painfully obvious, as I approach the final stretch of my presidency, that a setting sun gives off no light and very little heat. The executive council consisting of **Wes Pipes**, as vice-president, **Ed Myerson**, **Steve Griffith** and **Doug McElvy**, has done a wonderful job this year. Now, they seldom return my calls. The bar staff, as always, is courteous and polite but now have begun to ignore me. Your bar commissioners, wise in the ways of the world, have begun hanging out with Fred Gray, our new president, and avoiding me. Even the disciplinary panel is eyeing me like a hawk looking at a chicken. They ought to stop looking at me like that. If it were not for me people like me, those people would be out of a job. Just like my preacher.

What is truly discouraging is that no one seeks your wisdom. One year ago, people wanted my opinion on numerous things. I understand Chester A. Arthur's quote when asked if he was seeking re-election, he replied, "No, I am giving up the job because of illness - people are sick of me."

5. The journey was better than I ever expected. I am not going to be melancholy but I have never been honored as much as serving you as president of the Alabama State Bar. I would be remiss if I did not thank the executive director, the general counsel and the entire staff of the bar for a wonderful job well done. They are simply the best.

Your bar commissioners are special. They run the bar and do a great job. They keep the bar on an even keel and make sure a president like me doesn't otherwise mess up a good thing. Your bar association is on solid ground and something you can be proud of being a member.

So I say, thank you for the wonderful journey. Thank you for accepting me into your local bar associations. Thank you for allowing me to be around as good of lawyers as exists anywhere. Thank you for all the courtesies you have shown my wife and me this year. Most of all, thank you for being a member of the greatest profession on earth. I love being a lawyer and I loved the journey. Thank you for making it enjoyable. ■



ALABAMA STATE BAR

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Below is a current listing of public information brochures available from the Alabama State Bar for distribution under established guidelines.

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Keith B. Norman

Soapbox

By Keith B. Norman

Over the past year or so, I have observed that an increasing number of individuals who wish to become members of the Alabama State Bar desire to do so without meeting all the requirements of the Rules Governing Admission to the Alabama State Bar. They seek waivers from the Alabama Supreme Court to allow them to take the bar exam despite their failure to meet all the admission rules which are no more stringent than those of licensing authorities in other jurisdictions. Here are some examples.

Our admission rules allow applicants to use their multi-state and professional responsibility exam scores for a period of 20 months after taking those exams. This privilege allows those who have taken these exams, usually as a part of a bar exam in another jurisdiction, to transfer an acceptable score without the need to take that particular exam again. This accommodation gives an individual at least two additional exam periods (the exams are administered each February and July) to use a score without it's becoming stale. Twenty months is evidently not long enough for some who petition the supreme court for a waiver to use scores past 20 months. Another situation we have encountered involves those who lack the required pre-legal education, i.e., a baccalaureate level degree or its equivalent, petitioning the court to let them sit for the bar exam. Also, we have had applicants who, despite missing the filing deadlines for the February and July exams, even by several months, believe they should be allowed to sit for the next exam anyway. These are just a few examples where applicants have sought waivers of the admission rules.

Those seeking admission to the state bar in these instances were well aware of the admission rules before they applied. Yet, they were unabashed in seeking a waiver. Of course, this is not to say that those who have sought waivers of these rules did not have reasons supporting their position. They did; however, the only reasons they articulated were ones of personal convenience. Fortunately, the supreme court has turned down most of these petitioners' requests.

I believe the recent spate of waivers and the concept of multidisciplinary practice (MDP) debated several years ago share a common theme. As you may recall, proponents of MDP contended that lawyers should be allowed to split fees with non-lawyers. Fee splitting, so it was argued, would permit lawyers and other professionals, principally accountants, to join together in firms that would provide clients with a "one-stop" shop of services. The argument was that this was the new business model for the legal profession and it was what clients wanted. Opponents, on the other hand, opposed MDP for the simple reason that the core values of the legal profession, e.g., confidentiality, conflict of interest, independence of judgment, etc., could not be preserved if lawyers became partners with non-lawyers. While the MDP supporters would have willingly sacrificed the profession's core values under the guise of economic efficiency, the Enron debacle makes crystal clear what happens when the professional's self interests are elevated above the client's interests.

Dean Roscoe Pound reminds us that the spirit of service is what makes the practice of law a profession. Unfortunately, there are individuals who consider the practice of law as nothing more than a way to earn a living instead of a profession that provides service. There are those presently within our ranks who are too eager to elevate "self" above service. Furthermore, the fact that we are seeing an increasing number of law students wishing to enter the profession by avoiding admission rules does not bode well either. If "self" replaces service as the legal profession's calling, then we will cease to be a profession. The practice of law will simply be just another job in the marketplace. ■

- **Judge Greg Shaw** of the Alabama Court of Criminal Appeals has been accepted into the master's of law program at the University of Virginia School of Law. Judge Shaw was one of 31 state and federal judges selected nationwide, and he is only the third judge from Alabama to participate in the program since its creation in 1982.

- **Hay Kyung Chang**, a member of the graduating class of 1981 from the University of Alabama School of Law, has been selected to be a Fulbright scholar. She will conduct a comparative study of Korean and United States intellectual property laws, in Korea, during the summer and fall of 2002 in affiliation with the Seoul National University. Chang practices with the Office of the Command Counsel, U.S. Army Aviation and Missile Command in Huntsville.

- **Thomas W. Christian** and **William B. Hairston, III**, both of Birmingham, and **Joe C. Cassady** of Enterprise have been named Life Fellows of the American Bar Foundation. Established in 1955, the organization of the Fellows encourages and supports the research program of the American Bar Foundation. ■

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About Members

William D. Hasty, Jr. announces the formation of **William D. Hasty, Jr., PC** and the relocation of his office to 2090 Columbiana Road, Suite 2000, Birmingham 35216. Phone (205) 979-4490.

Deborah B. Montgomery announces the opening of her office. Her new mailing address is P.O. Box 9843, Birmingham 35220-0843. Phone (205) 853-0546.

William R. Myers announces the formation of **William R. Myers, PC,** with offices located at Two Metroplex Drive, Suite 225, Birmingham 35209. Phone (205) 870-7789.

James M. Smith announces the opening of his office at 111 Washington Avenue, 1st floor, Montgomery 36104. Phone (334) 265-7947.

Among Firms

The **Alabama Department of Postsecondary Education** announces that **Joan Davis** has been named vice-chancellor for legal and human resources/general counsel.

Alford, Clausen & McDonald LLC announces that **William R. Lancaster** has joined the firm as a partner and **Patrick K. Pendleton** and **Christopher B. Estes** have joined the firm as associates.

Bainbridge, Mims, Rogers & Smith, LLP announces that **Charles Keith Hamilton** and **James W. Davis** have become partners and that **Elizabeth Neal Pitman** has joined the firm as an associate.

R. Larry Bradford announces the formation of **Bradford Law Firm, PC** and that **Shane T. Sears, Allan R. Wheller, Perry G. Jackson** and **M. Sean Fitz-Gerald** have become associates. **J. Mark Baggett** has become *of counsel.*

Campbell, Waller & Loper, LLC announces that **Charles W. Reed, Jr.** has joined the firm.

Joseph T. Carpenter, Nathan C. Prater, Samuel M. Ingram and **Brian Mosholder** announce the formation of **Carpenter, Prater, Ingram & Mosholder, LLP,** with offices at 303 Sterling Centre, 4121 Carmichael Road, Montgomery 36106. Phone (334) 213-5600.

The Law Offices of Chris Steve Christ announce the association of **James J. Ransom, III.**

Daniell, Upton & Perry, PC announces that **Craig B. Morris** has become a shareholder of the firm, and the firm name has changed to **Daniell, Upton, Perry & Morris, PC.**

Ferguson, Frost & Dodson, LLP announces that **Jinny M. Ray** has joined the firm as an associate.

Jim H. Fernandez, D. Charles Holtz and **Gregory S. Combs** announce the formation of **Fernandez, Holtz & Combs, LLC.** Offices are located at 107 St. Francis Street, Suite 1206, Mobile 36601. Phone (251) 433-0738.

Friedman & Pennington, PC announces that **Heather C. Downey** has become a shareholder and the firm name has changed to **Friedman, Pennington & Downey, PC.**

Haskell Slaughter Young & Rediker, LLC announces that **Donald L. Rickertson** has joined the firm *of counsel.*

Lucas Wash & Petway, PC announces that **William C. Tucker, Jr.** and **Mark A. Stephens** have become shareholders and the firm name has changed to **Lucas Wash Petway Tucker & Stephens, PC**, and **Rodney F. Barganier** and **Kent M. McCain** have joined the firm as associates.

Lyons, Pipes & Cook, PC announces that **Michael D. Sherman** has become associated with the firm.

Miller, Hamilton, Snider & Odom, LLC announces that **A. Lee Martin, Jr.** has joined the firm.

Rushton, Stakely, Johnston & Garrett, PA announces that **William I. Eskridge** has become a shareholder, **Hendon Blaylock DeBray** has joined the firm *of counsel* and **Erin Stark Brown** and **Keith Lichtman** have joined as associates.

W. Hill Sewell and **Karen M. Ross** announce the formation of **Sewell & Ross**, LLC, with offices at #2 Metroplex Drive, Suite 235, Birmingham 35209. Phone (205) 879-7515.

Thomas, Kayden, Horstemeyer & Risley announces that **David L. Berden** has joined the firm as a partner, and **Jon E. Holland** and **Ann I. Dennen** have joined as associates.

Walston, Wells, Anderson & Bains, LLP announces that **Paul O. Woodall, Jr.** has become a partner and that **Ryan K. Cochran** and **Casey L. Jernigan** have become associated with the firm. ■

Last year's events in New York, Washington, D.C. and Pennsylvania underscore the need for updated and thorough disaster preparedness and response plans. These plans can save lives, and help protect and give direction to staff and leadership in the midst of an emergency. With this in mind, the Alabama State Bar has produced a concise, easy-to-implement guide that features a crisis management checklist, steps for putting together a bar association or legal practice emergency preparedness plan, and resources for providing volunteer legal services. The guide is available, at no cost, on-line at *www.alabar.org* or upon request by calling 800-354-6154, extension 132.

★ ★ ★

H.R. Burnham

H.R. Burnham of Anniston departed this life on March 11, 2002. Words cannot adequately express our respect and our feelings for our friend and fellow lawyer. In our small and feeble way, we attempt to convey our esteem and gratitude.

After serving his country as an officer in the Army during World War II, Pat concluded that he could best serve his country as a lawyer. Over a period of 52 years, he exemplified everything a real lawyer is destined to be. During his distinguished career, he represented individuals from all walks of life and represented a wide variety of public and private organizations. Pat lived and practiced his profession in accord with the words of Daniel Webster, who wrote: "Justice is the greatest interest of man on earth." He was predictable. One never had to worry about what he would do where a question of right or wrong was involved.

Pat knew that our system of justice is not a divine gift that came to us full blown and workable. He knew the system and as an integral part of it, he knew it required sweat, toil and tears on the part of lawyers and judges. He also believed that we have to work hard to maintain and improve our judicial system so that those who follow us will receive a system equally as good or better than that which we received. Pat succeeded in reaching that goal and left a son, Rick, who follows in his father's footsteps as he practices in Anniston. Pat was instrumental in forming one of the most respected law firms in the state.

—Ralph Gaines, Gaines, Gaines & Rasco, PC, Talladega

Charles Ward McGowen

Charles Ward McGowen, Jr., age 87, of Vestavia Hills, passed away on Saturday, March 16, 2002. He was a native of Cuba, Alabama, and attended the University of Alabama. He graduated from the Birmingham School of Law and retired from the firm of McGowen & McGowen.

Mr. McGowen was a member of Independent Presbyterian Church, a World War II veteran, and a member of the Alabama State and American bar associations.

Survivors include his wife of 61 years, Ruth Curry McGowen; son Charles (Karen) Curry McGowen of Pompano Beach, Florida; daughter Carol Ward McGowen of Birmingham; granddaughter Lindsey Dee McGowen of Cleveland, Ohio; grandson Charles Curry McGowen of Atlanta; three sisters, Margaret M. Tate and Louise M. Vaughan, both of Cuba, and Nell A. Vintson of Selma.

Frederick Hansen Stevens

Frederick Hansen Stevens departed this life on October 20, 2001. He was born in Conecuh County, Alabama on October 18, 1925. He graduated from Evergreen High School in 1943 and attended the University of Alabama, graduating in 1955. He was also a 1989 graduate of the Jones School of Law.

Mr. Stevens served as corporal in the United States Marine Corps during World War II. He was a member of the 1st Marine Division and served on Okinawa as a radio operator during the invasion of Japan. In addition to serving his country during World War II, he spent almost 15 years as a field agent in the Federal Bureau of Investigation during J. Edgar Hoover's administration. Upon retirement from the FBI, Mr. Stevens moved home to Conecuh County, where he was in the lumber business for almost nine years.

After retiring from the military, the FBI and private business, Mr. Stevens entered the legal profession. The Conecuh County Commission employed him to serve as county attorney and he served in that capacity for approximately nine years. He was serving as city attorney for the City of Evergreen at the time of his death.

Surviving him are his daughter, Sarah, his son, Fred, Jr., and his son, Gray.

Mr. Stevens was a dear friend to all who knew him and served as a resource of informative and interesting stories about World War II and his years of service in the FBI. He will be dearly missed by the community at large and by those of us who were fortunate enough to have practiced law with him.

—Todd B. Watson, president Conecuh County Bar Association

James Ross Forman, Jr.

The Birmingham Bar Association lost one of its distinguished members through the death of James Ross Forman, Jr. on March 27, 2002, at age 85.

Mr. Forman was born in Gadsden, but was a lifelong resident of Birmingham. He graduated from Ramsay High School and the University of Alabama, where he was a member of Phi Beta Kappa, Omicron Delta Kappa and Phi Delta Theta. He graduated from the Harvard Law School in 1941 and joined his father in the practice of law before enlisting in the United States Army and serving during World War II in the Pacific Theatre rising to the rank of major.

Following his service to his country, Mr. Forman rejoined his father in the practice of law, where he practiced for 41 years, retiring in 1987 as senior partner of the successor firm, Burr & Forman.

During his law career, he practiced in the business and litigation sections where he was involved in class action and discrimination litigation. His clients included United States Steel and ACIPCO.

Mr. Forman was married to the former Mary Pritchard for 57 years. He and his wife were avid gardeners and their home was occasionally featured in *Southern Living*.

James Forman was known as a gentleman of unquestioned honesty and impeccable integrity and character and intellect. His son, J. Ross Forman, III, who follows the tradition at Burr & Forman, recalls that when his father introduced him to Judge Seybourn Lynne, Judge Lynne said, "If you become half as good as your father, you will be a great lawyer." He always played by the rules and treated everyone with respect.

James Forman is survived by, in addition to his wife, Mary, and his son, Ross, two daughters, Libby Forman Norwood of Dallas, Texas, and Dalton Forman Blankenship, along with eight grandchildren and a host of friends and colleagues whom he deeply loved and appreciated.

—Bruce F. Rogers, president
Birmingham Bar Association

Adams, Robert F.
Mobile
Admitted: 1937
Died: February 23, 2002

Allen, Carlos Rae, Jr.
Hoover
Admitted: 1977
Died: March 10, 2002

Christopher, Thomas Weldon
Greenville, SC
Admitted: 1948
Died: March 22, 2002

Haley, James O.
Birmingham
Admitted: 1936
Died: May 2, 2002

Hawthorne, Frank Howard
Montgomery
Admitted: 1949
Died: April 8, 2002

Holmes, Alfred P., Jr.
Mobile
Admitted: 1953
Died: March 8, 2002

Jackson, Thomas Hall, Jr.
Hoover
Admitted: 1951
Died: April 12, 2002

Johnson, Charles Randal
Birmingham
Admitted: 1989
Died: March 18, 2002

McDowell, Theron Oscar, Jr.
Prattville
Admitted: 1956
Died: March 21, 2002

Sankey, Newman C.
Montgomery
Admitted: 1951
Died: April 27, 2002

Upchurch, Robert P.
Livingston
Admitted: 1938
Died: February 17, 2002

Warner, Marvin L.
Ocala, FL
Admitted: 1941
Died: April 8, 2002

Robert L. McCurley, Jr.

2002 Regular Session Acts

By Robert L. McCurley, Jr.

The 2002 Regular Session of the legislature adjourned April 17, 2002. There were 1,289 bills introduced and 268 enacted. This is a 21 percent passage rate, a high number for any year. However, 201 bills (75 percent) affect only one county or grant an appropriation to one entity.

The following acts have the greatest impact on the general public. I have not included any of the local acts.

Criminal Law

HB 30—Work Release Programs (Act 2002-497)

No inmate on work release will be deemed to be an agent or employee of the Department of Corrections or the state or county while under the direction or control of the inmate's work release employer. Further, the inmates working in work release programs outside the jail or correctional facility shall have no cause of action against the county or correction agency except for willful neglect.

HB 38—Anti-Terrorism Act of 2002 (Act 2002-431)

An act of terrorism is defined as an offense that is intended to:

a. intimidate the private population;
b. influence the policy of a unit of government by intimidational coercion; or
c. affect of the conduction of a unit of government by murderous assassination or kidnapping.

The punishment is one felony degree higher than the specified offense.

HB 57—Public Service Commission Enforcement Officers (Act 2002-519)

Section 36-21-8 *et al.* is amended to provide for public service commissions, campus police at a state institution and other state agencies that require its officers to be POST-certified to be included in the same retirement benefits as those afforded to other state law enforcement officers and investigators.

HB 95—Imprisonment for Court Costs (Act 2002-415)

Amends §§15-18-62 & 63 to provide that willful non-payment of a fine will subject the defendant to imprisonment in jail. Where the fine does not exceed $250 (previously $20), it will be for no more than ten days; for fines between $250 and $500 (previously $50), it will be for no more than 20 days; and for fines between $500 to $1,000 (previously $100), it will be for no more than 30 days.

HB 231—Interstate Compact for Adult Offender Supervision (Act 2002-413)

Alabama has been a part of an interstate compact since 1937 where each state is responsible for the supervision of adult offenders in the community in which they live. Although the offender may have been convicted of a felony in another state, supervision of the offender will be by the Department of Corrections in the state in which the offender resides. This law will become effective when two-thirds of the states have passed it. Currently, approximately 26 states have passed this revised compact.

HB 355—Deceptive Trade Practice of Tobacco Products (Act 2002-496)

This amends the Deceptive Trade Practice law found in Title 8-19-11 to add the sale or possession of cigarettes which does not comply with federal regulations and possesses a tobacco stamp for the payment of taxes as a deceptive trade practice. Further, these cigarettes may be deemed contraband and seized.

SB 240—Execution of Death Sentence by Lethal Injection (Act 2002-492)

Any person convicted and sentenced to death for a capital crime at any time shall be executed by a lethal injection unless the person affirmatively elects to be executed by electrocution. A person has one opportunity to elect to be executed by electrocution, and the election for death by electrocution is waived unless it is personally made by the person in writing and delivered to the warden within 30 days after the certificate of judgment pursuant to the supreme court's affirming the sentence of death.

SB 263—Sentencing Commission (Act 2002-503)

The bill extends the date for the report of the Sentencing Commission to report to the legislature until 2003. It further provides that the Commission is authorized to obtain information. The Commission shall have access to all offender records maintained by

other state departments and agencies, including the Department of Corrections, Department of Pardon and Paroles, Administrative Office of Courts, Criminal Justice Information Center, etc.

Driving

HB 15— DUI Fines (Act 2002-502)

Amends §32-5A-191 to provide that notice of a conviction for DUI could be made to the employer. For violations of a municipal ordinance where the fine is paid in a partial or installment basis, the act proscribes how funds are proportioned between the state and municipality.

HB 192—Motor Vehicle Dealer License Tags (Act 2002-256)

This amends §40-12-62 by deleting the provision that dealers may only purchase up to five dealer tags and pay only one dollar each. The bill further provides that dealer license tags may be used on vehicles owned by a dealership and being held for resale. These tags cannot be used for leased vehicles. The bill also provides that "no motor vehicle *ad valorem* taxes, registration, or insurance fees imposed by local law, shall be collected by the county officials who issues dealer or manufacturer license tags. In addition, motor vehicle delinquency penalties and interest fees shall not be applicable when issuing dealer or manufacturer license plates."

SB 29—Recreational Water Vehicles and Houseboats (Act 2002-59)

This provides for the regulation of sewage discharge of recreational houseboats, and designates the Alabama Department of Conservation and Natural Resources as the agency responsible for regulating.

SB 124—Graduated Driver's License (Act 2002-408)

This requires that a person under the age of 18 may not apply for a local driver's license until the person has held a temporary instruction or learner's license for at least six months.

At 16 years of age, the applicant may submit to the Department of Public Safety the following:

1. a form signed by parents consenting to the licensing of the applicant to drive without supervision,
2. a form certifying that the applicant has completed a minimum of 30 hours of behind-the-wheel driving practice or a certificate of completion of a drivers' education course.

A 17-year-old person who has been licensed for less than six months, or who is 16 but shall be deemed to have a restricted driver's license may not operate a vehicle between midnight and 6:00 a.m. except under the following circumstances:

a. Accompanied by a parent or licensed driver who is at least 21 years or age, provided the student has the parent's consent;
b. The person is driving to or from a place where they are employed;
c. The person is driving to or from a school-sponsored event;
d. The person is driving to or from an event sponsored by a religious organization; or
e. In the event of a fire, medical or a law enforcement emergency.

A person may not operate a vehicle if there are more than four occupants in the vehicle, not including the parents.

A person who violates this act will have their probationary period extended for an additional six months or until the person is 18. A person driving with restricted privileges who is convicted of two moving violations, or convicted of eluding a law enforcement officer, reckless driving, illegal passing, driving on the wrong side of the road, or other offense where four or more points are assessed, shall be automatically suspended for 60 days unless the rules of the road provide a more serious penalty and the restricted period extends for six months from the date the person would otherwise be eligible, or until the person is 18.

A licensed driver who is 17 years old shall be given an unrestricted driver's license if the license has been issued for a period of six months or longer, and the person has not been convicted of a violation of the rules of the road within the past six months.

The act does not apply to any person 16 and married to a head of the household, a person whose minority has been relieved, or any resident who is 18. Every driver's license issued prior to the effective date of the Act is considered an unrestricted driver's license.

A person who drives in violation of the restrictions on his or her license is guilty of a traffic violation but is not subject to

any criminal penalties or court costs. Information concerning violation of a restricted driver's license is not to be released to any party nor result in any points on a driver's license record.

Any 16-year-old who has not undergone supervision may still obtain a learner's license and be allowed to drive provided the person is accompanied by a licensed driver who is actually occupying a seat beside the driver. A person 15 years old may also receive a learner's license. This entitles the person to operate a motor vehicle when they are accompanied by a parent, legal guardian or certified driving instructor who is actually occupying a seat beside the driver.

Each state, county and municipal police department must maintain statistical information on traffic stops and report on traffic stops where this act applies and information reported monthly to the Department of Public Safety and to the Attorney General.

The act is effective October 1, 2002.

Elections

HB 357—Election Officials (Act 2002-412)

This amends Act 2001-1130, which provided that election officials shall be excused from their employment without penalty or loss of time for work on election day. The law, which previously applied only to employers of 50 persons, now applies to employers of more than 25 persons. The employer is not required to compensate the employee while performing election official duties, but they are required to give them time off from work.

Children

SB 21—Child Protection (Act 2002-457)

This amends the current Child Protection Act §16-22(A)-1 *et.seq*. This will require all current certified and non-certified employees of public educational facilities and current employees of non-public education facilities who have unsupervised access to any child to undergo a thorough criminal history background information check through the Federal Bureau of Investigation National Criminal History Record Information System.

This bill provides for administrative hearing procedures for applicants for certification to challenge the proposed determination of unsuitability. It provides for fingerprinting during reasonable hours in convenient locations and for the use of mobile, digital fingerprint machines. The Department of Education is responsible for the cost. The background checks on public and nonpublic current employees are contingent upon adequate funding.

SB 241—Child Health Care Coverage (Act 2002-404)

This bill adds §27-21b-10 and requires DHR to use federally required medical support notices to employers who are providing employer-based health care coverage to a child whose parent has been ordered to provide health care coverage for the child. Within 20 business days after the date of the medical support notice, the employer of a non-custodial parent who is subject to the order for health care coverage for his or her child shall transfer the notice to the appropriate plan providing the health care coverage under which the child is eligible. Furthermore, the employer shall withhold the necessary compensation from the non-custodial parent employee for coverage for the child and send that amount directly to the health care plan provider.

The bill further provides an opportunity for the employee or obligor to contest the withholding order. The employer is required to promptly notify the department when the non-custodial parent's employment is terminated. Conversely, the department is to promptly notify the employer when there is no longer a current order for medical support in effect for which the department is responsible.

An employer who fails to comply with the requirements set forth in this bill may be held personally liable to the obligee for the failure to withhold contributions for medical support up to the amount of the contributions that were not withheld.

SB 299—Adoption, Implied Consent and Putative Father Registry (Act 2002-417)

The consent to adoption code in §6-10A-7(d) is amended. The old law required the consent of the putative father if he was made known by the mother or otherwise was made known to the court provided he responded within 30 days' notice of the adoption petition. This act adds to the requirement that he must have complied with the Alabama putative father's registry act before his consent is required.

Section 26-10A-9 is amended to provide that a consent or relinquishment that is required in the adoption code may be implied by the father's failure to comply with the Alabama putative father's registry act. Furthermore, subsection (b) is added which provides that an implied consent cannot be withdrawn by anyone.

Section 26-10A-14 is amended to provide that a signed or confirmed consent or relinquishment may by withdrawn upon the dismissal of the adoption after a contested hearing occurs under Section 26-10A-24.

Section 26-10A-17A(1) is amended to provide that notice of dependency of an adoption proceeding does not have to be served on anyone who has impliedly consented to the adoption. Similarly, the notice of the adoption proceeding does not have to be given to a putative father who has impliedly consented to the adoption as provided in §26-10A-9.

Section 26-10A-18 has been amended to provide that an interlocutory decree does not stop the running of time periods described in Section 26-10A-9 relating to implied consent.

Section 26-10C-1(i) of the putative father's registry has been amended. The additional language provides this subsection shall be the exclusive procedure available for any person who claims to be the natural father of a child born out of wedlock, on or after January 1, 1997, to be entitled to notice and the opportunity to contest any adoption proceeding filed or pending on or after January 1, 1997.

Section (2) of this act makes this entire act retroactive effective to January 1, 1997.

Taxes and Estates

HB 96—Uniform Management of Educational Institutional Funds (Act 2002-515)

In 1993 Alabama passed this Uniform Act but limited it to educational institutions (see Alabama Code §16-61A-1 through 8). At the request of various foundations, such as United Methodist churches, Kiwanis clubs and the Alabama State Bar, it was determined that the current act should be broadened from just applying to the investment of governing boards of educational institutions to include every charitable, religious or other eleemosynary institutions

who would benefit from having the opportunity to utilize the investment capability provided for by the act.

This means the governing boards can, for example, invest in growth stock, with low or no dividends, but having a high potential for appreciation in long-term value, rather than concentrate on investment certificates of deposit. The act does not change the standard of care for investment from that currently applied to educational institutions, nor does it affect the current investment policies under the Alabama Educational Institutional Funds Act. Rather, it merely extends the utility of this act to other charitable organizations.

The act defines a charitable institution as an incorporated or unincorporated organization, organized and open for educational, religious, charitable or other eleemosynary purposes, or a governmental organization to the extent it holds funds exclusively for those purposes.

HB 575—Affidavits for Probate Estate Taxes (Act 2002-516)

This amends Alabama Code §40-50-13 which provides when the State of Alabama has a lien for taxes on an estate, a personal representative may execute and record in the county of the decedent and where the decedent's probate estate is pending, an affidavit stating the estate is not taxable, or alternatively that the estate tax is payable and that a proper copy of the state tax return has or will be filed for the department within the proper time limits. The content of the affidavit requires certain information, such as the name and Social Security number of the decedent, legal address and date of death. This bill deletes the provision that requires the approximate value of the estate must be given, and further deletes the provision the personal representative who signs the affidavit is personally liable for any tax later determined to be due by the estate. This affidavit will alleviate the requirement of obtaining an Alabama state tax waiver.

SB 185—Uniform Sales and Use Tax Administration (Act 2002-418)

This provides for Alabama to have a delegation in the multi-states' discussions concerning the simplification of tax administration, including Internet tax sales. This will provide the requirements for multi-state sellers and create a mechanism among member states to administer the sales and use tax from remote sellers. It does not authorize the implementation of an agreement. It does provide for Alabama to participate in the establishing of a single national tax rate on remote sales. This study includes Internet as well as catalog sales.

Real Estate and Commercial

HB 41—Redemption of Property Sold for Taxes (Act 2002-426)

To redeem property sold for taxes from the purchaser at the sale, the redeeming party must pay 12 percent interest. In addition, when the property is located within urban renewal or urban development projects, a reimbursable cost shall also include insurance premiums paid or owed by the purchaser for casualty loss on insurable structures, improvements, 12 percent interest, and any reasonable attorney fees. Regarding any property which contains a residential structure at the time of the sale, regardless of its location, the redeeming party must also pay the value of all permanent improvements made by the purchaser determined in accordance with provisions of this section.

HB 216—Home Inspector Registration (Act 2002-517)

This revises the licensing of home inspectors and amount of liability insurance they are required to carry. It further allows for the building commission to adopt administrative rules and procedures for the purpose of revoking and suspending home inspector licenses.

HB 285—Amendment to Alabama's Small Loan Act (Act 2002-305)

This amends §5-18-4 *et seq.* Alabama Small Loan Act to increase the lending limits of the Small Loan Act from $749 to $1,000. Further, it provides that the lender can charge, in addition to the maximum interest rate, a maintenance fee of $3 each month times the number of months of the loan. This fee is not subject to rebate upon prepayment. Also deleted from §15-18-15 is the restriction that attorneys' fees may not exceed 15 percent of the unpaid debt.

HB 376—Security Interest in Farm Products (Act 2002-518)

This Act amends Article IX of the Uniform Commercial Code to provide that a security interest in farm products will be filed with the Secretary of State and further prescribes information necessary to be given.

City—County Government

HB 20—Reimbursement of Training Costs (Act 2002-424)

Where a municipal court clerk (or ambulance drivers and attendants, water or waste water operators, law enforcement officers, corrections officers, fire protection personnel, fire fighters, and members of the sheriff's department or magistrate of a municipality) employed by one municipality is employed by a second municipality within 24 months after completing the training school for their position, the new employer must reimburse the initial employer for costs related to training. This includes transportation costs paid to the trainee for travel to and from the training facility, room, board, tuition, overtime paid to other employees in their absence, and other related training expenses.

HB 24—National Memorial Day (Act 2002-390)

Alabama Code §1-3-8 is amended to add that schools and colleges shall be closed on National Memorial Day.

HB 29—Abatement of Taxes (Act 2002-265)

It amends Ala. Code §§40-9B-5 & 8 concerning private use industrial property located within the municipality or within the police jurisdiction of the municipality. The governing body of the municipality or municipal industrial authority may not grant an abatement of any county taxes unless the municipality or authority has also abated the corresponding municipal taxes. This act is prospective only.

HB 42—Municipality's Authority to Demolish or Repair Unsafe Structures (Act 2002-522)

A municipality may demolish or repair an unsafe structure that has become a public nuisance. A lien on the property is held for the cost of the work involved in demolishing or repairing the structure. Prior to repairing the property the city must give 45 days' notice to the owner's last known address, to the owner at the address of the property and to all mortgagees of record.

HB 52—Water, Sewer and Fire Protection Authorities (Act 2002-254)

Compensation for directors is increased from $50 to $200 per meeting, not to exceed $2,400 per year (previously $800). The chairman may be compensated $300 per meeting, but not more than $3,600 per year.

HB 170—Compensation, Municipal Boards (Act 2002-501)

This amends §39-7-17 by deleting the $75 maximum compensation amount per meeting that each member of the board can receive. The act allows the amount of compensation to be fixed by the board. It also deletes the provision that the board can also provide fringe benefits, including insurance for board members.

HB 313—State Employees' Donation of Sick Leave (Act 2002-391)

This amends Alabama Code §36-26-35.2 to permit an employee of any branch of state government to donate accrued and unused annual, sick or compensatory leave to another state employee who is qualified to be used by the receiving employee for a catastrophic sick leave or maternity leave.

SB 22—Congressional Redistricting (Act 2002-57)

The plan relating to Congressional districts that are redistricted pursuant to the 2000 federal census has been cleared by the United States Department of Justice.

SB 82—State Employees' Retirement, Deferred Retirement Option Plan (Act 2002-23)

The bill amends §26-25-150 to provide that state employees who are a minimum of 55 years old and who have 25 years of service with the state may participate with the Retirement System in an optional account known as the Deferred Retirement Option Plan (DROP). These employees, who ordinarily would be eligible for service retirement, may continue to work, and the funds they would have received during the following three-to-five-year period would be held in an account which the employee will receive upon retirement as a lump sum payment. The number of years accumulating for retirement purposes is suspended during the period of participation by the state employee in the DROP Program.

Medical

HB 35—Sales Tax on Prescriptions (Act 2002-414)

It amends Alabama §40-26(b)-2 to provide that sales tax will be collected on all prescriptions, not just those with a retail price of $3 or more.

HB 60—Office of Women's Health (Act 2002-141)

This creates an office of women's health within the Alabama Department of Public Health and specifies its purpose as to educate the public and be an advocate for women's health.

HB 61—Unused Prescription Medications (Act 2002-498)

The act permits the donation of legend drugs, except controlled substances. Drugs which are dispensed to a patient in a hospital, nursing home, assisted living facility, or specialty care assisted facility may be donated and transferred to a charitable clinic to be used by the charitable patients, free of charge, when all of the specified conditions are met. One condition is that the drugs are no longer needed by the original patient. The drugs must be properly stored, dispensed by unit dose or individually sealed dose, and must not have expired. The consent of the patient must be obtained, except in the death of the patient, when the patient's family may consent.

HB 221—Medical Disciplinary Actions (Act 2002-140)

Alabama Code §34-24-59 *et al.* is amended to revise the law relating to disciplinary action, conduct hearings and judicial review concerning any physician. It further revises the requirements for passing a United States licensing examination.

SB 293—Mental Health Insurance Coverage (Act 2002-511)

The bill requires that health care service plans are required to offer coverage for mental illness.

SB 333—Woman's Right to Know and Abortion Act (Act 2002-419)

No abortion shall be performed without the voluntary informed consent of the woman, except in case of a medical emergency.

Also, prior to the abortion, the woman must receive the name of the physician who will perform the abortion, the nature of the proposed abortion method, and associated risk, probable gestational age of the child, and the probable anatomical and physiological characteristics of the unborn. Furthermore, if the unborn child is viable, or has reached the gestational age of 16 weeks, the woman must be informed that the unborn child may be able to survive outside the womb and has the right to request the use of abortion that is likely to preserve the life of the unborn child, and that if the unborn child

is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and the health of the child.

Prior to the abortion, the attending physician is required to perform an ultrasound on the unborn child and to have the mother review the ultrasound image of her unborn child or sign a form that she has chosen to reject the opportunity to view the ultrasound image. The woman cannot be forced or required by anyone to have an abortion.

The woman must sign and complete a form that says she has received the information that she is required to receive.

Only a physician may perform an abortion.

Violation of this act for first offense is a Class B misdemeanor, a second offense is a Class A misdemeanor, and a third offense is a Class C felony.

In addition to other remedies provided by law, a violation of this act provides a basis for civil action for compensatory and punitive damages. A violation of this act may also provide a basis for professional disciplinary action. Violation of the act may also provide a basis for the recovery for the woman for the wrongful death of a child, whether or not the child was viable.

Miscellaneous

HB 49 and HB 51—Constitutional Amendments

House Bill 49—Amends Article XIII of the Constitution, "Banks and Banking"

House Bill 51—Revises Article VII of the Constitution, "Impeachment of Public Officials"

Both passed the House of Representatives and the Senate, however, the Senate amended both bills, requiring a special election be held in July. Due to this amendment, the House never reconsidered these constitutional amendments and they failed to be passed.

HB 53—Pre-Need Funeral and Cemetery Act (Act 2002-74)

This authorized the commissioner of insurance to provide for a certification process for the regulation and sale of pre-need funeral or cemetery merchandise and services.

HB 341—Unemployment Compensation Weekly Benefits (Act 2002-432)

It amends §25-4-270 to increase the maximum unemployment benefits by $20 per week, beginning July 1, 2002. The weekly maximum benefit will be raised from $190 to $210.

HB 464—National Guard Leave of Absence (Act 2002-430)

This extends the active duty military protection to members of the National Guard who are called or ordered by the Governor for state active duty for more than 30 days for an emergency. This provides the National Guard personnel called for homeland security with the same protection afforded under the "Soldiers and Sailors Civil Relief Act." This would extend to the National Guard the same rights afforded military personnel who are activated by the President.

SB 65—Codification of 2001 Regular Session Acts (Act 2002-403)

The act adopts and incorporates into the Code of Alabama all general and permanent laws of the state enacted during the 2001 Regular Session that were contained in the 2001 cumulative supplement and in replacement volumes 7, 13 and 19(A).

SB 449—Names of Act Sponsors (Act 2002-306)

This amends §41-4-143 to require the Secretary of State, upon the request of the primary sponsors of an act in both the originating House and the second House, to list at the top of the act both the House sponsor and the Senate sponsor.

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

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

J. Anthony McLain

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

By J. Anthony McLain, general counsel

Question:

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

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

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

Answer:

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

Discussion:

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

Alabama lawyers from forming a partnership or other professional association with a non-lawyer.

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

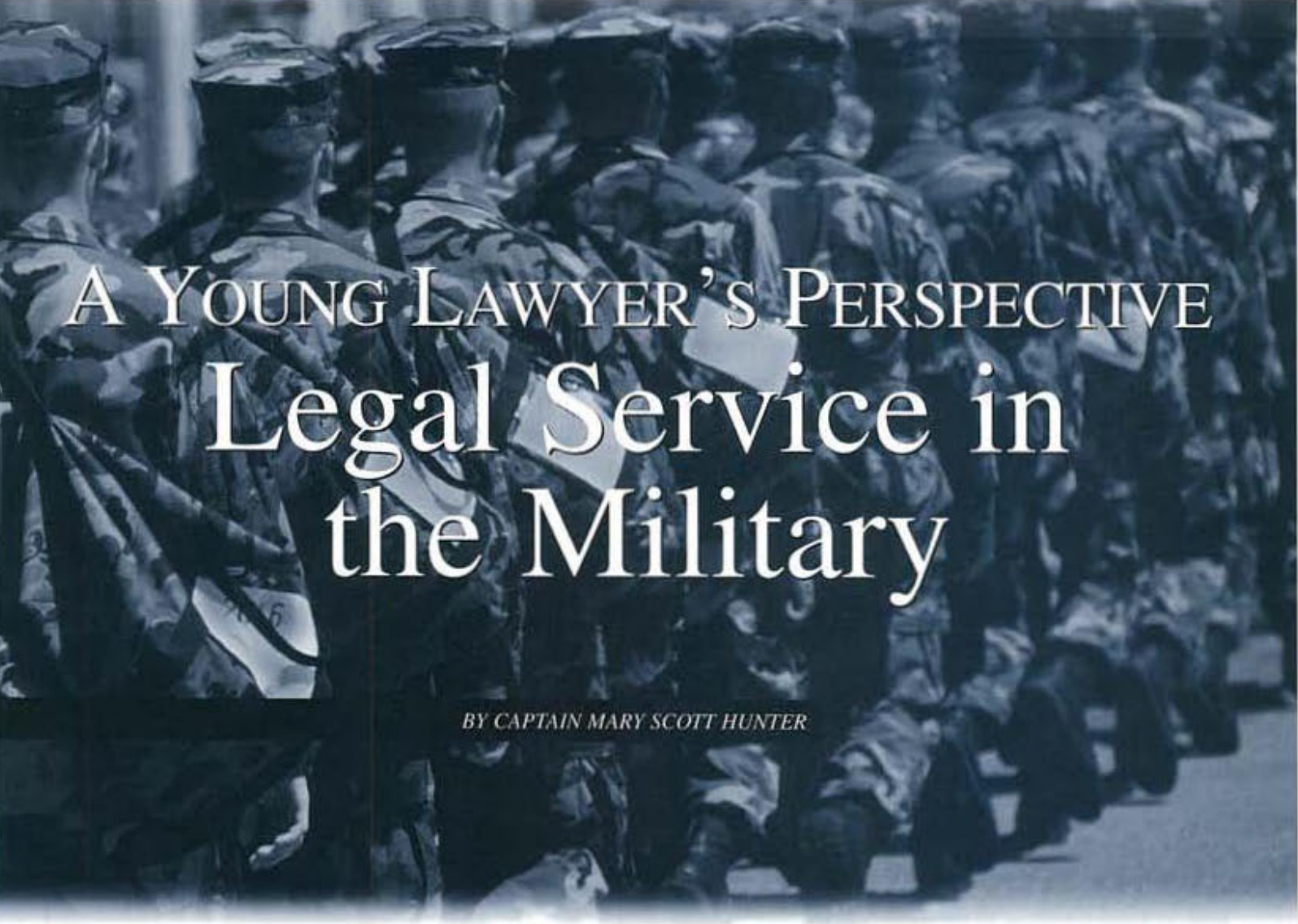
Whether a foreign attorney is a member of a "recognized legal profession" *requires a factual determination taking into consideration the legal structure of the jurisdiction in which the foreign attorney practices as well as the nature and extent of legal services customarily performed by the foreign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

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

Before affiliating with a foreign lawyer, an Alabama lawyer must take all reasonable steps to ensure that the foreign lawyer is a member of a recognized legal profession authorized to engage in the practice of law in the foreign jurisdiction and that the arrangement complies with the laws of Alabama and the laws of the jurisdiction where the foreign lawyer practices. If these conditions are met, it is the opinion of the Disciplinary Commission that you may ethically associate a foreign lawyer to assist in the representation of your clients under the terms described in your opinion request.

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

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



A Young Lawyer's Perspective
Legal Service in the Military

BY CAPTAIN MARY SCOTT HUNTER

Looking at January 2002's edition of *The Alabama Lawyer*, I was struck by the absence of one representative body. I looked at the fresh, young faces of the 2001 admittees to the bar and their proud family members. I looked at the list of people on the Young Lawyers' Section Executive Committee which included Jim Hughey (one of the smartest guys you ever want to meet) and wondered whether he is teaching law yet, or how in world Tucker Yance ever got grown up enough to go to law school! I wondered how much more money than I my old buddy James Pittman is making?

I am part of a huge law firm that hasn't received a lot of coverage in *The Alabama Lawyer*. I am sure you have read or seen on TV all the press about our client (and I am not talking about Enron). We only have one client. My law firm has around 1,300 lawyers worldwide, one or more in every state in the nation and one in almost every country in the world. We have a fleet of aircraft at our disposal to take us anywhere at any time of the day or night, and while we don't have very large salaries, we make up for it with a spit-shine on our combat boots.

Most recently, my law firm sent me to a remote corner of the world called Ali Al Salem Air Base, Kuwait. Al Salem is a dusty, little military installation located in the heart of the Kuwaiti desert, 37 miles from Iraq. You see, my law firm is the Department of the Judge Advocate General, and our client is the United States Air Force.

I joined the Air Force in November of 1998 and was sent to Commissioned Officer Training where I asked myself for four solid weeks, "What am I doing here? Did he say pushups?" I drank from a fire hose of military education and learned to iron my pants inside and out. I passed out from dehydration one morning and had to go to the hospital. My fellow law school graduate, Leigh Falkner, picked me up at the emergency room when I was released early and nearly refused to take me back to the base because I looked like such a scarecrow. I had to tell her three times, "Leigh, I am in the U.S. Military. I will be AWOL if I don't go back." She finally took me.

After a quick, one-year tour at Randolph Air Force Base in San Antonio, Texas, I found myself volunteering for a tour in Korea. I wanted to get to the Pacific Command where they practice war games frequently. I figured I could learn more about the area of law I had become passionate about, the Law of War. (I was also rather passionate about a certain young fighter pilot I was engaged to who was being transferred to Korea as well!)

So, in Korea, I got involved in the war games at every chance. I learned as much as I could about munitions, jets, laws governing war crimes, prisoners, and lawful targets. I briefed pilots on what to do if they became prisoners of war and security forces on how to treat our enemy if we captured any. I carried a 9mm sidearm during those exercises and evaluated such questions as this one from the medical group commander, "Capt. Hunter, the hospital is under ground attack, and we are evacuating. Can we destroy everything we can't take to deny

the enemy our medical resources?" The answer was no.[1]

Little did I know that all these war games I took part in while I spent my year in Korea were preparation for the real war that started on September 11, 2001. I was at Al Salem Air Base in my office. I had two Army privates from the Patriot Missile Battery Command waiting to see me in the next room when I got the call from another Judge Advocate, Major Mark Garney, who was at a nearby base on the other side of Kuwait City. "America is under attack! Get to your Battle Staff!" I told the two privates to get to their stations, and run. I donned my flack vest, my helmet and my chemical protection gear and ran for the bunker where the Battle Staff would convene. There I watched my country that I had sworn to protect and defend become the object of an illegal attack by unlawful combatants, also known as terrorists.

That was a long sleepless night. The military intelligence officer was relaying one frightening message after another to our base commander. We didn't know if Saddam Hussein was going to use the opportunity to kick us while we were down. We prepared for imminent attack. We slept in our uniforms and walked around in the weeks that followed in 135 degree Kuwaiti, desert heat with heavy flak vests on. I lost eight pounds and found I could sleep with combat boots on. I've never been prouder of anything I did.

Before I returned from Kuwait, my husband deployed to a classified location for an unspecified period of time. At this stage of the game, he is closer to the fight defending America from terror than I ever was. I have not seen him in six months. We get to talk on the phone sometimes. I am back in a more conventional setting now. My law firm has seen fit to try and make a litigator out of me. I am now the Chief of Military Justice at Pope Air Force Base, North Carolina.

I am grateful to the United States Air Force for shaping my character. I am grateful to the Department of the Judge Advocate General for letting me practice in an area of the law that I am truly, deeply passionate about. We military lawyers comprise a small section of the Alabama State Bar, but it is a section I hope you are proud to call your own. God Bless America and God Bless Alabama. ■

Endnotes

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, Art 19. Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, para 234.

Captain Mary Scott Hunter
Capt. Mary Scott Hunter currently serves as the chief military justice at the Forty-third Airlift Wing, Base Legal Office, Pope Air Force Base, NC. Capt. Hunter graduated cum laude from the University of Alabama in 1995 with a bachelor of arts in humanities and German. She completed two exchange programs, attending Hunter College—City University of New York and the Paedogische Hochschuele in Weingarten, Germany. In 1998, she received her Juris Doctorate from the University of Alabama School of Law. Capt. Hunter entered the Air Force in November 1998 via the direct commissioning program after being admitted to the Alabama State Bar.

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NOTICE:

Recently, the Supreme Court of Alabama appointed a Standing Advisory Committee to promulgate Rules of Procedure for the Court of the Judiciary and the Judicial Inquiry Commission. The ten members of the committee include an appellate court judge, three circuit court judges, three district court judges, and two attorneys and one retired Supreme Court Justice.

A two-day meeting of the committee to receive comments is scheduled August 1 and 2, 2002, in the Mezzanine Classroom of the Alabama Judicial Building in Montgomery, 300 Dexter Avenue. Members of the Alabama State Bar are cordially invited to make comments beginning at 9:00 a.m. on August 2nd.

Attorneys who may wish to appear and make comments to the committee should contact the Legal Division of the Administrative Office of Courts at 1-800-392-8077, extension 2-0847, to place them on a list, or if they prefer to submit written comments, to direct them to Robert H. Maddox at the Administrative Office of Courts, 300 Dexter Avenue, Montgomery, AL 36104-3741.

A Grand Jury Primer for Corporate Representation

BY ANTHONY A. JOSEPH AND WILLIAM D. JONES, III

Introduction

The federal grand jury is the most powerful weapon in the prosecutor's arsenal. As was clear in the grand jury investigation of Bill Clinton, there are virtually no limits to the grand jury's reach. The grand jury can go in directions never envisioned when the investigation begins (for example, from the Whitewater investigation to the Lewinsky sex scandal).

For most, an encounter with the grand jury process is a foreign and unwelcomed experience. The triggering event is usually the service of a grand jury subpoena for either documents or personal testimony. Any grand jury investigation should be considered a serious matter that demands immediate attention, preparation and planning. This is especially true when the investigation concerns a corporation.

The Grand Jury Process

A. Grand Jury Powers

The grand jury has the "dual function of determining if probable cause exists to believe that the crime has been committed and of protecting the citizens against unfounded criminal prosecutions."[1] To carry out its dual function, the grand jury has the authority to subpoena witnesses to testify and to produce physical and documentary evidence.[2] The grand jury's power also extends to non-testimonial evidence such as voice exemplars and handwriting exemplars.[3] The authority to request documents and testimonial and non-testimonial evidence lasts as long as the grand jury continues its investigation.

The grand jury has the power to serve subpoenas on any person, legal entity or corporation.[4] Service of a subpoena on a corporation may be effected by serving an officer or managing agent for the corporation.[5]

B. Limitations on Grand Jury Subpoena Power

Despite the vast scope of the grand jury's subpoena power, it is not without limitations. It is inappropriate to issue a grand jury subpoena for the purpose of:

1. gathering evidence for a civil case[6];
2. preparing for trial [Note: Once the grand jury has returned an indictment against a defendant, a prosecutor may not use the grand jury to gather additional evidence for trial or to "lock-in" a witness's testimony, unless additional charges are anticipated in the investigation[7]];
3. harassing or intimidating the recipient of the subpoena;
4. investigating cases not in that venue; or
5. compelling a witness's appearance at a U.S. Attorney's office for the sole purpose of conducting an interview.[8]

C. Challenges to the Actions of a Grand Jury

Challenges to a grand jury's actions are rarely successful. A grand jury is designed to act independently and without the constraints of "technical, procedural and evidentiary rules governing the conduct of criminal trials."[9] A grand jury may initiate an investigation on mere "suspicion," without a showing of probable cause.[10]

Once a grand jury decides to indict, it is extremely difficult to get the indictment dismissed. Courts dismiss indictments only in flagrant cases. The movant must be able to show that prose-

cutorial misconduct "substantially influenced" the grand jury's decision to indict, or that there is "grave doubt" that the decision to indict was free from the substantial influence of such misconduct.[11] This task becomes even more difficult when the movant is unable to pierce the grand jury's veil to obtain the information necessary to show that misconduct occurred.

Courts are more inclined to grant relief short of dismissing an indictment, such as: issuing protective orders; quashing subpoenas; suppressing the grand jury testimony; expunging prejudicial language from the indictment; and, in some cases, recommending disciplinary action against the prosecutor. A grand jury can also be challenged on the grounds of the propriety of the selection of the grand jury and the grand jurors' legal qualifications.[12]

D. Motions to Quash

Fed. R. Crim. P. 17(c) provides that a subpoena may be quashed or modified "if compliance would be unreasonable or oppressive." A motion to quash a subpoena must be timely. Before making a final determination on whether to quash a subpoena for documents, the court has the discretion of reviewing the documents *in camera*.

Appropriate grounds to quash a subpoena include the following:

1. The subpoena seeks information protected by constitutional, statutory or common law privileges.[13]
2. The requested information has no relationship to the subject of the grand jury investigation.
3. The subpoena is overly broad.
4. The subpoena covers an unreasonable time frame.
5. The subpoenaed documents are not described with particularity.[14]

Motions to quash grand jury subpoenas are rarely successful. For example, in *In re Grand Jury Proceedings John Doe, Inc. v. U.S.*, 142 F. 3d 1416 (11th Cir. 1998), a grand jury issued a subpoena to the former attorney of the targets of its investigation. The district court denied the targets' motion to quash the subpoena, and the targets appealed. The Eleventh Circuit held that the appeal was moot because, by then, the attorney had already testified before the grand jury. The Eleventh Circuit rejected the targets' argument that the district court could still enjoin the grand jury from considering the attorney's testimony, noting that the secrecy afforded to grand jury proceedings would make an injunction unenforceable. The court emphasized the grand jury's independence and noted that there are limited means of challenging the actions of a grand jury. In dicta, the court observed that even if the grand jury was dismissed, the prosecutor would not be forestalled from presenting the same testimony to another grand jury.

There are, however, instances where constitutional rights will override grand jury subpoenas. In the Bill Clinton/Monica Lewinsky grand jury investigation, independent counsel Ken Starr issued a grand jury subpoena to Barnes & Noble, Inc. to produce all its business records regarding books purchased by Lewinsky. Barnes & Noble filed a motion to quash, arguing that the government had to show both a compelling interest in obtaining the subpoenaed information and a substantial connection between the material sought and the grand jury's investigation. The court ruled that the subpoena implicated First Amendment Rights, and held that the government would have to demonstrate more than mere relevance to defeat the motion to quash.[15]

Responding to a Grand Jury Investigation

Whenever a corporation is served with a grand jury subpoena, general counsel should be contacted immediately. If the corporation is without a general counsel, the company's regular outside counsel should be contacted. If neither general counsel nor the company's regular outside counsel has white collar criminal law experience, an attorney with such experience should be consulted.

A. Determine the Nature of the Investigation

(1) Learn What You Can From the Subpoena
Often the documents requested will provide some idea of the direction of the grand jury investigation. Sometimes the particular individuals subpoenaed to testify before the grand jury can also provide insight into the focus of the investigation.

(2) Contact the Assistant United States Attorney (AUSA)
The AUSA assigned to the investigation should be contacted as soon as possible. The reasons for the contact are twofold: (i) to report counsel's representation and (ii) to determine as much as possible about the nature of the investigation.

The AUSA should be advised that until the nature of the investigation is fully assessed, counsel represents the corporation and its employees, who should not be contacted except through counsel. While most AUSAs have a general distrust of such representations, they understand and will generally comply with their ethical obligation not to contact represented parties.[16]

Notably, the AUSA is under no legal or ethical duty to discuss the investigation with defense counsel. Within limitations, however, most AUSAs will provide some information.

As defense counsel, you want to learn as much as possible about the investigation and, it is hoped, to develop a line of communication with the AUSA. As a general rule, the strategic goal is always to avoid an indictment, convince the AUSA that the case lacks merit, and, where the client/witness has criminal exposure, obtain immunity.

Likewise, the AUSA also has a strategic goal during this exchange: (1) to find out as much as possible from defense counsel; and (2) to show the strength of the investigation.

(a) Documents

With respect to discussions with the AUSA about requested documents, defense counsel's goals are:

1. to limit the time and scope of the request;
2. to seek a reasonable extension of time to respond; and
3. to obtain an agreement that in lieu of the custodian's appearance before the grand jury, the documents may be produced to the case agent or delivered to the U.S. Attorney's office.

(b) Witnesses

With respect to individuals subpoenaed to testify before the grand jury, defense counsel should be initially interested in determining whether the witness is a "subject" or "target" of the investigation. A "subject" is a person "whose conduct is within the scope of the grand jury's investigation."[17] A "target" is a person "as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."[18]

Defense counsel should keep in mind that the government is under no legal obligation to inform a witness that he or she is a subject or target of a grand jury investigation. However, if a subject or target is subpoenaed to testify before the grand jury, it is the policy of the Department of Justice to advise the witness, either in a form attached to the subpoena or in a separate letter, of the general subject mater of the grand jury investigation and the witness's Fifth Amendment privilege against self-incrimination and right to counsel.[19] A witness who is a target will also be advised that his or her conduct is being investigated for possible violation of federal criminal law.[20]

If the prosecutor represents that the individual is a non-target witness, and you have confidence in this representation, the witness can, in lieu of a grand jury appearance, be made available for an informal interview. In the alternative, an affidavit could be submitted. An effort should be made to determine, in advance, the questions that will be asked and the documents that will be shown to the witness at the informal interview. You should also decide whether to allow the interview to be tape recorded. This is especially important where the grand jury is still in session and there remains a possibility that the witness may be called back before the grand jury. Whenever a witness tells his or her story more than once, there is always the possibility that one of those versions could be construed as false or misleading. Any witness faces the prospect of perjury or obstruction of justice if his representations about a "material fact" to the government are considered false or intentionally misleading.[21]

B. Conference With the Client

At this formative stage of the investigation it is crucial that defense counsel have a complete and open conversation with the client/corporation–that is, with key representatives within the organization. This is crucial to learning the nature of the investigation and preserving all of the rights attendant with the attorney-client privilege.

Immediate consideration should be given as to whether any conflicts of interest exist. At the outset, it is often difficult to make this assessment. Counsel should remain alert to potential conflicts until all of the facts are gathered.

It is good practice to seek separate counsel where several members of a corporation have been subpoenaed to testify. Every purported "subject," "target" or witness with potential exposure should have separate counsel.

All non-target witnesses may be represented by the same counsel. The obvious advantage of having one attorney represent all of the non-target employees is that it saves costs and allows one person the opportunity to get a handle on a variety of the facts. It is also good for the morale of lower-level company employees, who could feel slighted or abandoned during this most critical period.[22]

The Alabama Rules of Professional Conduct provide guidance with respect to the representation of multiple clients. Rule 1.7 provides that an attorney may engage in multiple representation so long as each client consents, after having been fully informed of the advantages and risks. When representing both the corporation and one or more of its employees, it is a good practice to have each client to sign a written waiver and consent. The consent should include, among other things, an acknowledgment that neither client is aware of any wrongdoing and that if adverse interests arise, the employee will be directed to seek separate counsel and will not object to the original counsel's continued

representation of the corporation. The corporation should also be made aware that the waiver is not absolute and that, despite the consent, counsel may still be disqualified.[23]

Rule 1.13(e) (Organization as Client) provides:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

Rule 1.13(d) provides that in dealing with the organization's directors, officers, employees and others, counsel for the corporation must fully explain that the organization is the client. Counsel should follow a pre-designed introduction when speaking with members of the corporation. The introduction should include a statement that:

1. the corporation is the client;
2. counsel's role is to learn the facts and to provide legal advice to the corporation; and
3. discussions are confidential; however, the attorney-client privilege belongs to the corporation, and it has the right to waive the privilege, if it wishes.

C. Internal Investigation

In today's environment, every government investigation, no matter how routine it may appear, should be taken seriously.

Every government investigation requires immediate attention and a "game plan," including an internal investigation. Who will handle the internal investigation depends on the size and structure of the organization and the nature of the investigation.

Some corporations lack the resources to have an internal investigation conducted by outside counsel, and must conduct the investigation from within the company. Whenever possible, however, the investigation should be conducted by outside counsel, preferably counsel with white collar defense experience. Experienced counsel will have an appreciation of how to determine the general nature of the government investigation, conduct interviews, resolve conflict issues, and preserve and protect the rights and privileges of the company and its employees.

Self-Incrimination Regarding the Production of Documents

Corporations do not have a Fifth Amendment privilege. Accordingly, records generated by corporations are not shielded by the privilege against self incrimination.[24] Neither a corporation nor its employees may avoid a grand jury subpoena for documents by asserting that the records may expose the corporation to criminal liability.

In *In re Grand Jury Subpoena Dated April 9, 1996*, 87 F. 3d 1198 (11th Cir. 1996), the Eleventh Circuit held that a custodian of records may assert a Fifth Amendment privilege against questions related to the location of unproduced documents. The court reasoned that to compel such testimony would be a direct intrusion into the thought processes of the custodian, and would invade the Fifth Amendment privilege.

In *United States v. Hubbell*, 53 U.S. 27 (2000), the U.S. Supreme Court held that the mere act of producing documents under a grand jury subpoena could result in self-incrimination. A federal grand jury sitting in Little Rock issued a subpoena to Hubbell for certain records. Hubbell objected on the ground that such production would violate his right against self-incrimination. As a result, the government sought and received a grant of immunity for Hubbell, who then submitted over 13,000 pages of documents in response to the subpoena. Thereafter, a separate grand jury sitting in the District of Columbia indicted Hubbell for violation of the tax laws.

Hubbell claimed that the second prosecution was a direct result of information obtained from the documents he produced to the Little Rock grand jury, and, therefore, was barred under *Kastigar v. United States*, 46 U.S. 441 (1972), and 18 U.S.C. §6002. The government argued that it would not introduce the documents it had obtained from the Little Rock grand jury, but was unable to disclaim that the documents had led to the information that resulted in the second prosecution. The Court found that Hubbell's production constituted "testimonial evidence" and was therefore subject to the dictates of the Fifth Amendment.

In contrast, in *Braswell v. U.S.*, 487 U.S. 99 (1998), the Court held that there is no Fifth Amendment privilege against the production of corporation records by a corporate representative, reasoning that corporations are artificial entities and can only oper-

ate through their agents and representatives. Courts have also found that the act of compelling the corporate custodian to identify documents produced does not violate the Fifth Amendment privilege.[25] On the other hand, in *In re Grand Jury Impaneled on April 6, 1993*, 869 F. Supp. 298 (D.N.J. 1994), the court found that a grand jury witness could not be compelled to provide the requisite information that would allow the subpoenaed documents to fit within the business records exception to the hearsay rule. The court held that testimony required under Federal Rules of Evidence 803(6) "may require a custodian to divulge personal knowledge of the type of business conducted and routine practice of the corporation," and that by such an admission the custodian may incriminate himself. *Id.*

Appearance Before the Grand Jury

In an article appearing in *USA Today* regarding the grand jury, the authors astutely noted: "Appearing before a grand jury is intimidating, even terrifying, and unlike any other proceeding known to the American judicial system."[26] In a grand jury proceeding, the prosecutor sets the agenda and controls the order of appearance.[27] Most notably, the prosecutor is under no obligation to present exculpatory evidence to the grand jury.[28]

A person always, and in all settings, has a right to assert his or her privilege against self-incrimination.[29] The right should be asserted if there is even the slightest possibility of criminal exposure.[30]

It is good practice and professional courtesy, especially where there has been open communication between defense counsel and the AUSA, to advise the AUSA that a witness will assert his or her Fifth Amendment privilege if called and questioned before the grand jury. At that point, the AUSA must make a strategic decision as to whether to seek immunity for the witness.

Before seeking a grant of immunity, a prosecutor may sometimes request a proffer. The proffer can come from either the witness or defense counsel. It is preferable for the proffer to come from defense counsel. If defense counsel is credible and honest in dealing with the prosecutor, the prosecutor will usually accept such a proffer. It should be noted that while the proffer cannot be used against the witness in a subsequent prosecution, the prosecution is not precluded from pursuing leads and using that information if the witness later contradicts earlier statements.

A. Forms of Immunity

There are four basic forms of immunity:

1. Use Immunity. Under "use immunity," a witness's compelled testimony cannot be used against the witness in a subsequent criminal prosecution, so long as the testimony is truthful. The prosecutor may, however, use information obtained from independent sources. For example, in *U.S. v. Pielago*, 135 F. 3d 703 (11th Cir. 1998), the defendant entered into a proffer agreement in return for use immunity. The government subsequently prosecuted the defendant. After the defendant refused to testify, the government rescinded its plea agreement. The defendant was later convicted. After an evidentiary hearing, the trial court found that the government had not violated the plea agreement because it was able to show that the information used to prosecute the defendant was obtained from independent sources. The Eleventh Circuit affirmed, noting that the government had specifically reserved the right in the plea agreement to pursue investigative leads derived from the defendant's proffered statements and to use any such derivative evidence against her. The court concluded that even though the government could not directly use the defendant's proffered statements against her, it was well within its rights to use evidence derived from her statements–testimony from a witness who had been identified by the defendant in her proffer–in the prosecution.
2. Transactional Immunity.[31] With transactional immunity, a witness is protected against a subsequent criminal prosecution for the subject matter of the immunity. In other words, the witness is afforded full, complete immunity. Under use immunity, in contrast, a prosecutor may still bring charges against the witness for the underlying crime, so long as the information is independently obtained. A prosecutor may also bring charges for perjury and false statement.
3. Informal Immunity. Informal immunity refers to agreements or contracts between the prosecution and defense counsel. This form of immunity is often the result of a proffer, and rests with the confidence the prosecution has

in the information supplied by either defense counsel or the witness.

4. Act-of-Production Immunity. This immunity primarily refers to production of business records by a sole proprietorship in response to a subpoena.[32] This immunity does not protect corporate or partnership records.

B. Immunity Orders

When a witness refuses to testify, the AUSA may seek a motion to compel, but must first obtain a grant of transactional immunity for the witness. Note that DOJ must approve the request for immunity under 18 U.S.C. §6003.[33] DOJ will often approve such a request based on a witness's reported refusal or likely refusal to testify based on the privilege against self-incrimination. The statute provides that the court must issue the order of immunity upon application by the U.S. Attorney.[34]

Once the AUSA receives an order compelling a witness to testify, the AUSA will bring the witness back before the grand jury and ask him whether, despite the immunity order, he still insists on asserting his Fifth Amendment right. If the response is in the affirmative, the foreperson or the AUSA will read the compulsion order and again request the witness to respond to the grand jury's questions. A witness's failure to comply can subject the witness to contempt charges.

There are two forms of contempt–civil and criminal. Under civil contempt (18 U.S.C. §401), a witness may be incarcerated for the life of the grand jury, but in no event for longer than six months. The witness can purge himself or herself of the civil contempt by complying with the compulsion order.

Under criminal contempt (18 U.S.C. §401 and Fed. R. Crim. P. 42), a witness subject to contempt is punishable by fine or imprisonment (but not both a fine and imprisonment), or a fine and probation. A witness charged with criminal contempt cannot purge himself or herself of the contempt by agreeing to testify. The court may impose a sentence of up to six months.[35]

It is also good practice to try to get local authorities to grant immunity to a witness testifying before the grand jury, or at least a promise from the AUSA and the agents that the federal authorities will not disseminate the witness's testimony to the local authorities.

C. Instructions to Witnesses

(1) Pre-Appearance Conference

Before a witness appears before the grand jury, counsel should provide the witness with some basic instructions on giving grand jury testimony. Those instructions should include the following:

1. While counsel cannot be present in the grand jury room, the witness has the right to confer with counsel, who should be seated outside of the grand jury room.
2. The witness should be careful not to disclose matters protected by the attorney-client privilege. Prosecutors have become increasingly aggressive about questioning witnesses about matters protected by the privilege; some courts view any disclosure as a waiver of all attorney-client information.[36]
3. The witness has the right to confer with counsel on any question.
4. Don't be evasive.
5. Don't argue.
6. Don't overstate or understate.
7. Answer the questions.
8. Avoid speech making: it could lead to disclosure of attorney-client and work product material.

In providing the above instructions, counsel must be careful to never coach a witness to evade questions. Counsel should also be aware that they are not immune from obstruction of justice charges.

(2) Debriefing

As soon as the witness comes out of the grand jury, counsel should ask the witness to list all of the matters that he or she was questioned about. Review those matters with the witness, and follow up within a day or two to see if additional points have been recalled. This exercise will aid in learning more about the direction of the grand jury's investigation.

D. Grand Jury Secrecy

Grand jury secrecy extends not only to testimony before the grand jury, but also to the identity of the witnesses called before the grand jury and documents produced to the grand jury. The only individuals allowed in the grand jury room are (i) attorneys for the government; (ii) witnesses under examination; (iii) interpreters; (iv) stenographers; and (v) operators of recording devices. Only grand jurors may be present while the grand jury is deliberating or voting.[37]

Witnesses, however, are free to discuss their testimony with anyone. Also, there is no prohibition against one witness conferring with other witnesses who have been subpoenaed to testify before the grand jury. While the grand jury secrecy laws do not prevent the witness from discussing his or her own testimony with others, those discussions are not protected by any privilege. When discussing their testimony with others, witnesses should make every effort to avoid the appearance of any attempt to alter testimony or to create any misleading testimony. Again, such efforts can lead to charges of obstruction of justice.

Conclusion

The grand jury has enormous power, and any grand jury investigation should be taken seriously, especially when your client is the focus. Advising a client during a grand jury investigation requires a quick understanding of the nature of the investigation and a continuing effort to avoid conflicts and to preserve and protect all rights and privileges. Remember, your job is not over until the grand jury concludes its investigation and reports that it will not pursue the matter any further, or the statute of limitation expires. Until then, keep up your guard. ■

ENDNOTES:

1. *United States v. Sells Eng'g., Inc.*, 463 U.S. 418, 423, 103 S. Ct. 3133 (1983).
2. *Costello v. United States*, 350 U.S. 359, 362, 76 S. Ct. 406 (1956); *see also United States v. Hubbell*, 530 U.S. 27, 38, 120 S. Ct. 2037, 2044 (2000); *United States v. Calandra*, 414 U.S. 338, 343, 94 S. Ct. 613,617 (1974); *Kastigar v. United States*, 406 U.S. 441, 445, 92 S.Ct. 1653 (1972); Fed. R. Crim. P. 17(c).
3. *United States v. Dionisio*, 410 U.S. 1, 5-15, 93 S. Ct. 764 (1973); *United States v. Mara*, 410 U.S. 19, 22, 93 S.Ct. 774 (1973); *see also Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341 (1988) (holding that disclosure of bank records is not testimonial, thus falling outside the parameters of the self-incrimination privilege).
4. *See Wilson v. United States*, 221 U.S. 361, 374-75, 31 S. Ct. 538, 542 (1911).
5. *United States v. Doe (Schwartz)*, 457 F.2d 895, 898 (2d Cir. 1972) (stating that a "subpoena is served in the same manner as other legal process."); *In re Motorsports Merchandise Antitrust Litig.*, 186 F.R.D. 344, 348 (W.D. Va. 1999); *In re Electric & Musical Indus. Ltd.*, 155 F. Supp. 892, 893 (S.D.N.Y. 1957).
6. *See* F. R. Crim. P. 6(e)(3)(B). In those rare instances where disclosure of this information is requested, the movant must be able to show a "particularized need" for disclosure of the information obtained by the grand jury. *United States v. John Doe, Inc. I*, 481 U.S. 102, 117, 107 S. Ct. 1656 (1987); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222, 99 S. Ct. 1667, 1674 (1979); *see also In re the May 6 Grand Jury*, 76 F. Supp. 2d 1262, 1266 (M.D. Ala. 1999) (stating that "[t]he secrecy of a grand jury proceeding is not to be pierced by such a slender reed: a mere possibility of benefit does not satisfy the required showing of particularized need.") (internal citations omitted).
7. *United States v. Sellaro*, 514 F. 2d 114, 121-22 (8th Cir. 1973); *United States v. George*, 444 F.2d 310, 314 (6th Cir. 1971).
8. *Durbin v. United States*, 221 F. 2d 520, 522 (D.C. Cir. 1954); *see also United States v. O'Kane*, 439 F. Supp. 211, 214-15 (S.D. Fla. 1977).
9. *United States v. Calandra*, 414 U.S. 338, 343, 94 S. Ct. 613, 617 (1974); *see also In re Grand Jury Proceedings*, 142 F. 3d 1416 (11th Cir. 1998); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 298, 111 S. Ct. 722, 726 (1991).
10. *United States v. Morton Salt Company*, 338 U.S. 632, 642-643, 70 S. Ct. 357, 364 (1950); *see also United States v. Williams*, 504 U.S. 36, 48, 112 S. Ct. 1735, 1742 (1992).
11. *Peguero v. United States*, 523 U.S. 23, 29, 119 S. Ct. 961, 965 (1999); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988).
12. *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419 (1998) (holding that a white defendant had standing under the Equal Protection Clause to challenge discrimination against African-Americans in the selection of his grand jury); *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991) (defendant had third-party standing to assert the rights of African-Americans being excluded from serving as foreperson).
13. *See Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996).
14. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 104 S. Ct. 769 (1984).
15. *First Amendment Trumps Grand Jury Subpoena, The Champion* (July 1998).
16. Alabama Rules of Professional Conduct Rule 4.2 (2001).
17. United States Attorney's Manual (USAM), § 9-11.151; *United States v. Wong*, 431 U.S. 174, 179, n.8, 97 S. Ct. 1823, 1826 (1977).
18. USAM, § 9-11.151.
19. USAM, § 9-11.151.
20. USAM, § 9-11.151.
21. *Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805 (1998); *see also* 18 U.S.C. § 1001.
22. Gregory J. Wallace, *Conflicts of Interest, Can You Represent Both Company and Employees After Receiving Grand Jury Subpoenas?*, Business Crimes Bulletin, vol. 6, no. 10 (November 1999).
23. Business Crimes Bulletin, *Id.*
24. *Doe v. United States*, 487 U.S. 201, 206, 108 S. Ct. 2341, 2345 (1988); *Bellis v. United States*, 417 U.S. 85, 94 S. Ct. 2179 (1974).
25. *See e.g., In re Trial Subpoena Duces Tecum to Custodian of Records of Variety Distributing, Inc.*, 927 F. 2d 244 (6th Cir. 1991).
26. Tony Mauro and Kevin Johnson, Grand Jury "Very Lonely" for Witnesses, *USA Today* (March 3, 1998).
27. *Id.*
28. *United States v. Williams*, 504 U.S. 36, 53-54, 112 S. Ct. 1735, 1745 (1992). USAM § 9-11.233 provides, however, that "[w]hen a prosecutor is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, [he or she] must present or . . . disclose . . . [it] to the grand jury before seeking an indictment . . . ."
29. *Kastigar v. United States*, 406 U.S. 441, 444, 92 S. Ct. 1653, 1656 (1972).
30. *United States v. Miranti*, 253 F. 2d 135 (2d Cir. 1958).
31. 18 U.S.C. § 6002.
32. *See United States v. Doe*, 465 U.S. 605, 612-614, 104 S. Ct. 1237, 1242-43 (1994) (protected by Fifth Amendment because possession and control of the subpoenaed witness).
33. USAM § 9-23.130.
34. 18 U.S.C. § 6003(a).
35. 18 U.S.C. § 402.
36. *In re Grand Jury Proceedings*, 219 F. 3d 175 (2d Cir. 2000); *In re Martin Marietta Corp.*, 856 F. 2d 619 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 2000 U.S. Dist. LEXIS 5121 (N. D. Tenn. April 13, 2000).
37. Fed. R. Crim. P. 6(e).

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Alabama's Forgotten Justices:

John McKinley and John A. Campbell

When asked to name a United States Supreme Court justice who hailed from Alabama, the name "Hugo Black" quickly crosses the lips of most attorneys. The senator and justice from Birmingham left an indelible imprint on American judicial history. Hugo Black, however, was not the only Alabamian to serve on the U.S. Supreme Court. John McKinley served as a justice from 1837 until his death in 1852, and John A. Campbell served from 1853 until 1861, when the Civil War prematurely ended his service on the bench. This article examines the lives of each of these two men in turn.

BY JAMES L. NOLES, JR.

John McKinley

John McKinley was born May 1, 1780 in Culpepper County, Virginia. He later moved with his parents to Kentucky, where he read for and was accepted into the Kentucky bar. McKinley's involvement in a duel, however, propelled him unexpectedly from Danville, Kentucky to Huntsville, Alabama. Capitalizing on the legal opportunities that awaited him in the young Alabama Territory, McKinley established a successful law practice. This success enabled him to build a two-story Georgian brick mansion now known as the Weeden House. It was also in Huntsville that McKinley made his first foray into politics by obtaining a seat in the Alabama state legislature in 1820.

McKinley's interests in North Alabama extended beyond law and politics. Joining with six other prominent citizens of northern Alabama, he became a trustee in the Cypress Land Company and promoted the development of the town of Florence. In support of this venture, McKinley moved his law practice and his family to Florence in 1821, where he built for his family an impressive three-story brick home overlooking the shoals of the Tennessee River. From Florence, McKinley oversaw a sizeable financial empire that included plantations across northwest Alabama, property in Memphis and Louisville, a number of inns, several grist mills, and ownership in the ferry which crossed the Tennessee River. In Florence, McKinley went by the honorific name "Major McKinley." An acquaintance described him as "stout,

fine-looking . . . of easy manners." Others were less kind, referring derisively to him as "the Aristocrat."

Despite his financial and social successes, tragedy awaited McKinley in Florence. McKinley's first wife, the former Julianna Bryan of Philadelphia, Pennsylvania, was gored by a pet deer on the grounds of their home. She died soon thereafter in 1822 at the age of 20. This was a great loss for McKinley. Julianna had brought a remarkable degree of culture and education to the young city. She had, for example, established the first choir in Florence at the First Presbyterian Church.

Two years after Julianna's death, McKinley married his second wife, Elizabeth Armistead. Elizabeth was a native of Loudoun County, Virginia, where she was a ward of future president John Tyler and a neighbor of James Monroe. Elizabeth's political and social connections served McKinley well in his later ascent into national politics. Elizabeth also continued the cultural and educational trends set by her predecessor in the McKinley household. She imported a French governess to supervise the McKinley children, and, in the manner of wealthy Alabamians of the time, established a school for their children and those of their neighbors. Less typically, the McKinleys also provided a school for their slaves' children in a brick cow shed behind their home.

In 1826, McKinley achieved national prominence when he successfully ran to fill the unexpired Senate term of Henry Chambers, who had died in office. During this brief stint as a senator, McKinley worked to reform federal land policies to protect small landholders against the perils of speculation. He also succeeded in transferring title of 400,000 acres of federal public lands within Alabama to the state for the purpose of improvement of waterways and roads. McKinley's efforts led to the construction of the first Muscle Shoals Canal, which opened the Tennessee River to navigation beyond the shoals of Florence.

In 1831, Governor Gabriel Moore successfully challenged McKinley for McKinley's U.S. Senate seat. Despite that defeat, McKinley won a seat in the Alabama legislature that same year. He was elected to the U.S. House of Representatives a year later, where he joined the ranks of Andrew Jackson's supporters and became an ally of James Polk and Martin Van Buren. McKinley served in the House for four years, but decided not to seek re-election in 1836. Instead, he returned to Alabama to serve once again in the state legislature. In 1837, he succeeded in defeating Moore and reclaimed his seat in the U.S. Senate.

Despite his senatorial campaign, McKinley had been working behind the scenes with his eyes on another prize: one of two newly-created United States Supreme Court seats. The two new seats

John McKinley
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expanded the total number of justices from seven to nine. A fellow Alabamian, William Smith, had earlier refused a nomination for that seat, and McKinley succeeded in convincing President Martin Van Buren to nominate him to the Roger Taney-led Supreme Court in 1838. At that time, Supreme Court justices were also responsible for hearing federal cases within an assigned circuit pursuant to the Judiciary Act of 1789. McKinley's initial territory included parts of Alabama, Mississippi, Louisiana and all of Arkansas.

McKinley's work on the Supreme Court left little mark on history. He wrote only 18 majority opinions and a limited number of concurring and dissenting ones, many of them reflecting his pro-states'-rights views. In *Groves v. Slaughter*, 40 U.S. 449 (1841), he dissented from the majority and maintained that a Mississippi constitutional restriction on the importation of slaves was valid. In *Pollard v. Hagan*, 44 U.S. 212 (1845), he agreed with the arguments advanced by Alabama attorney and future justice John A. Campbell in holding that submerged waterfront land belonged to the states and not the federal government.

In addition to his work in Washington, McKinley devoted much of his time to traveling his circuit throughout the old Southwest. He once estimated that he had to travel at least 10,000 miles a year to meet his circuit responsibilities. His circuit, the Ninth, was the largest of the judicial circuits, and he complained bitterly to Congress about the expenses of this travel and of such perils as yellow fever. McKinley was not alone in complaining to Congress about the demands of the justices' circuit riding. It was a common source of unhappiness among his fellow justices, and early justices had even agreed to take a reduction in salary if Congress would appoint separate circuit judges. Congress, in the belief that the circuit riding performed an essential task in bringing federal authority and national political views to the distant reaches of the young republic, refused the justices' pleas and did not officially end the practice until 1911.

It was while serving as a circuit judge that McKinley ruled on a series of cases that stunned the business and commercial community for which he is best remembered. As his fellow Justice Joseph Story described McKinley's handiwork: "My brother, McKinley, has recently made a most sweeping decision in the Circuit Court of Alabama which has frightened half the lawyers and all the corporations of the country out of their proprieties. He has held that a corporation created in one state has no power to contract (or, it would seem, even to act) in any other state, either directly or by an agent. So banks, insurance companies, manufacturing companies, etc. have no capacity to take or discount notes in another State, or to underwrite policies or to buy or sell goods." These cases were quickly appealed to the

Supreme Court, where McKinley's decision was reversed in *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

McKinley's travel on his circuit took a toll on his health, and in 1842 he moved to Louisville, Kentucky, where he had strong ties due to his mother's family. In Louisville, which is located on the Ohio River, he was also better positioned to take advantage of that city's water transportation as he shuttled between Washington, D.C. and his circuit responsibilities. Surprisingly, despite the demands on his time imposed by his circuit riding, McKinley found time to pursue more business interests as a member of the firm of Clark, Churchill, and Company, which manufactured hemp bagging and rope.

A decade later, in 1852, McKinley died at the age of 72, still serving as a justice. During his tenure, his numerous absences from his assigned circuits had irritated his constituents and fellow justices, and his unimpressive number of opinions caused future historians to label him "probably the least outstanding of the members of the Taney Court." Nevertheless, Chief Justice Taney eulogized him as "a sound lawyer, faithful and assiduous . . . He was frank and firm in his social intercourse, as well as in the discharge of his judicial duties. And no man could be more free from guile, or most honestly endeavor to fulfill the obligations which his office imposed upon him."

McKinley's death created a vacancy on the Supreme Court that incumbent President Millard Fillmore struggled to fill. He searched in vain for a fellow Whig to fill the vacant seat, but the Republican majority in Congress was not about to allow a lame-duck president to install another Whig. In quick succession, Fillmore nominated, and Congress rejected, three nominees. Time finally ran out on Fillmore. Franklin Pierce, Fillmore's successor, was inaugurated in March of 1853 and wasted no time in nominating another Alabamian, John A. Campbell, for the seat.

John A. Campbell

John A. Campbell was born June 24, 1811 in Washington, Georgia. A child prodigy, he graduated from Franklin College (later the University of Georgia) at the age of 14. Upon graduation, Campbell received a nomination to West Point from Secretary of War John Calhoun. He joined the other new cadets on the plain overlooking the Hudson in the spring of 1825. One of his fellow Southerners in the class of 1829 was a young Virginian with a far more acclaimed rendevous with history: Robert E. Lee.

Campbell, however, was not destined to graduate with his class. His father died suddenly at the beginning of Campbell's first class year. Soon thereafter, claims on their father's estate for missing governmental funds further compounded the surviving Campbells' problems. The family fell on hard financial times.

With his family facing impoverishment, Campbell resigned from the Corps of Cadets in 1828 and returned home. Joining an uncle in Florida, he read law but undertook no formal legal training. Nevertheless, Campbell gained admittance to the Florida bar within a year. Returning to Georgia, he was admitted to the Georgia bar. Given his youth—Campbell was still only 18—his admission required a special act of the state legislature.

Soon thereafter, Campbell moved west down the Federal Road to the frontier town of Montgomery, Alabama. In Montgomery, Campbell met and soon married Anne Goldthwaite, the daughter of a prominent Montgomery family. He formed a successful law partnership with her brother—all before reaching the age of 20.

Campbell's new law practice enjoyed a string of successes, although his practice was briefly interrupted by the Creek War of 1836. He served as the adjutant general for the state's militia forces during that brief conflict. Although his military service was limited, he was nevertheless able to parlay it into a seat on the state legislature in 1836. Campbell soon grew disenchanted with state politics. After one particularly frustrating week, he wrote, "The last week has glided away in doing nothing. We have passed no bills of genuine importance into law. We have discussed no matters of genuine interest. What will we do?" When Campbell's last term expired in 1843, he opted not to seek re-election.

During his tenure in the legislature, Campbell moved his wife, two children, and his law practice to Mobile. In Mobile, he dove into a sea of lucrative land dispute cases. Campbell's strict work ethic, complemented by his impressive intellectual abilities and rigorous attention to detail and preparation, earned the young lawyer an impressive string of victories in the courtroom. Explaining his approach to practicing his craft, Campbell expounded that, in his view, an attorney's preparation should focus on "the petition, demand, or the opposition, or defense of his client, the appropriate testimony, the principles applicable, the precedents that have been established, the precise and particular question to be decided, and the reasons for a particular decision." A colleague testified to Campbell's dedication in this regard: "[His] success at the bar was the result of patient laborious industry . . . [He] went to the bottom of everything that required his attention, and shrank from no drudgery that was necessary to accomplish his purposes."

Applying these principles to practice, Campbell achieved national prominence while handling a number of such cases involving submerged lands along the Mobile waterfront. At issue in these cases was the question of whether the United States government, as the successor to the Spanish crown in Mobile, or those citizens who had received land grants from Spain, owned such land. Sizeable amounts of money were at stake. One such piece of property was valued at $88,000—in 1842 dollars. During these cases, Campbell advanced the concept of "original sovereignty." According to Campbell, states such as Alabama, which entered the Union after the original 13 states, enjoyed the same original sovereignty as had the original 13. The federal government, therefore, had no right to dictate the disposal of property within those states once those states were admitted to the union. It was a concept seized upon by states' rights activists to advance later arguments regarding other types of property, such as slaves.

This ideological contribution to the states' rights movement was somewhat ironic, for Campbell was initially no secessionist. His support of Andrew Jackson during the Nullification Crisis of 1832 had earlier demonstrated his pro-Union sympathies. Modern biographers credit Campbell's position more to zealous client advocacy than to anti-Unionist sentiments. Like many moderate Southerners, however, polarizing events such as the Mexican War, the Wilmot Proviso, and the agitation of the Free Soil Party and radical abolitionists caused him to increasingly question the South's future role within an seemingly hostile Union.

As arguments regarding slavery and states' rights issues progressed from a simmer to a boil, Campbell's fellow

Alabamians selected him as a delegate to the Nashville Convention in 1850. The intent of the Nashville Convention, convened in 1850, was for Southern states to explore possible responses to potentially unfavorable future Congressional legislation. Campbell arrived in Tennessee for the convention with 16 resolutions and succeeded in having 13 of them incorporated into the Convention's final 28 resolutions. Most importantly, he succeeded in preventing any resolutions which would have discussed armed resistance to Congressional action. Perhaps he did so remembering his classmates at West Point. At any rate, historians credit him with foiling the efforts of Southern "fire-eaters" who would have started the Civil War a decade earlier.

In addition to his work in the arena of states' rights, Campbell managed a thriving law practice. He took several of his cases all the way to the U.S. Supreme Court, arguing his first such case before the Court in 1849. By 1852 he had appeared before the Court a dozen times and had become well known to its justices. Campbell's reputation with them, both as a jurist and as a Southern moderate, served Campbell well when John McKinley died in 1852 and the search for McKinley's successor began.

As discussed earlier, Campbell was not the first, or even the second or third, choice to be considered to fill the vacancy. President Millard Fillmore struggled to find a Whig to fill McKinley's seat, but the Democrat majority in Congress succeeded in stalling the nomination process until Fillmore left office. Upon entering the White House in 1853, Franklin Pierce, a Democrat, quickly sought the advice of the sitting Supreme Court justices regarding a suitable nominee. They all counseled selecting Campbell. When Pierce nominated Campbell, he was confirmed within two days without opposition and took his place beside Chief Justice Roger B. Taney and his fellow Justices on March 25, 1853.

Through the remaining years of the decade, Campbell and the Taney Court considered a number of constitutional issues. For example, the Taney Court considered the right of corporations to sue or be sued in federal courts in *Marshall v. Baltimore and Ohio Railroad Company*, 57 U.S. 314 (1853) (Campbell dissented from the majority in arguing that they did not) and whether a state's legislature could nullify a provision of a bank's charter in *Dodge v. Woolsey*, 59 U.S. 331 (1856) (Campbell dissented again, arguing that a charter was not a contract and that a state legislature had the right to enact new controlling provisions as it saw fit). Historians are unanimous, however, in labeling *Dred Scott v. Sandford*, 60 U.S. 393 (1857), as the Taney Court's most infamous case.

In *Dred Scott*, the Supreme Court considered whether the transfer of a slave to a territory in which slavery was prohibited, followed by a return to a slave state, acted to free the slave. The case tore apart an already strained Court—the justices did not even meet to discuss the case for two months and, when they finally considered it, they did so by all writing separate opinions. When the final vote was tallied, the Court, with Campbell in the majority, held that slaves, or even emancipated slaves or their descendants, were not and could never become citizens of the United States. Rather, they were citizens solely of the state in which they resided. Thus, Scott's sojourn in a slavery-prohibiting territory did not serve to emancipate him.

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Most damaging to national order, however, was the Court's ruling that the Missouri Compromise, which had handled precariously but effectively the issue of adding new slave states to the Union for the past 25 years, was unconstitutional.

In addition to considering such cases while sitting on the Supreme Court, Campbell sat circuit for the 5th Circuit. In 1854, his circuit duty exposed him to a particularly explosive controversy in New Orleans—whether the adventurous scheme of former Mississippi governor John Quitman, who planned to raise an army and wrest control of Cuba from its colonial master Spain and thus add another slave state to the Union, would violate President Pierce's neutrality proclamation regarding Cuba. Despite the president's position, many Southerners supported Quitman's plan. Nevertheless, Campbell summoned a grand jury to investigate Quitman's supporters. When it became apparent that Campbell would indict anyone who even financially supported Quitman's invasion, Quitman's backers quickly but noisily disappeared. Four years later, Campbell faced a similar challenge from the adventurer William Walker, who had related designs on Nicaragua. Braving death threats, Campbell used similar methods to intimidate Walker's investors into obeying the neutrality laws.

Unfortunately, the threat to order posed by the likes of Quitman and Walker was only a foretaste of events to come. With John Brown's raid on Harper's Ferry and the election of Abraham Lincoln, the cauldron of national emotion boiled over. In the early spring of 1861, Southern states convened secession conventions, voted to leave the Union, and seized federal forts and arsenals. Although the Union was broken, there was still hope that armed conflict could be avoided.

Such a hope burned brightly in John Campbell. Although an advocate of states' rights, he opposed outright secession at this juncture and recognized the odds of the South achieving a military victory. "You are in no condition to bear even the ordinary burdens of social life in a period of peace," he warned his brother-in-law in Mobile. "How [can you] then carry on a war in which your trade would be stopped by a single steamer?" He pressed for former presidents Pierce and Buchanan to

intercede in the earlier days of the growing crisis, but to no avail. As it became apparent that Fort Sumter, still held by federal troops in Charleston harbor, was becoming the likely flash point to armed conflict, Campbell mediated negotiations between Secretary of State William Seward and a delegation of Southern representatives.

At first, it appeared these negotiations would bear fruit. Seward indicated that the U.S. Navy would evacuate Sumter and allow its occupation without bloodshed. As days passed and the Sumter garrison continued to improve its defenses, Campbell realized that he had been misled. Complaining of "systematic duplicity" and the "equivocating conduct of the Administration," Campbell resigned from the Supreme Court on April 26, 1863. Despite his personal opposition to secession, he crossed the Potomac and returned home to Mobile. The noted Southern diarist Mary Chesnut described Campbell at this seminal event: "Resigned—and for a cause he is hardly more than half in sympathy with. His is one of the hardest cases."

Campbell and his family arrived in Mobile to face social ostracism for his criticism of outright armed rebellion. Unwelcome in Mobile, he moved to New Orleans and then on to Richmond when New Orleans was captured by federal troops. In Richmond, Campbell accepted a position as an Assistant Secretary of War for the Confederate government in 1863. His assigned responsibilities included the issuance of passports for travel through the lines, the review of courts-martial proceedings, and the control of conscription.

Another responsibility was self-imposed: to remain vigilant for any opportunity to bring about a peaceful conclusion to a war which Campbell, as a member of the War Department, could see was unwinnable.

Campbell came closest to achieving his goal of a negotiated peace when he was one of three Confederate commissioners to meet with President Lincoln and Secretary of State Seward in the conflict's only occasion in which the opposing governments explored a negotiated end to the war. The meeting occurred on February 3, 1865 aboard the U.S. naval vessel *River Queen*. Unfortunately, by that stage in the war negotiating lines had been drawn in the ground with the blood of too many American lives. The negotiations failed. Two months later, the North achieved peace through force of arms when the last Confederate armies surrendered at Appomattox and Greensboro.

Upon the Confederacy's capitulation, Campbell was the only member of the former Confederate government to meet with Lincoln when he arrived in the devastated Confederate capital of Richmond. Campbell and Lincoln met several times in Richmond, but any hopes of the conciliatory peace of which they spoke were dashed with Lincoln's subsequent assassination. Following Lincoln's death, Campbell, like many former Confederates, was arrested. He languished in custody for five months at Fort Pulaski, a federal fort on an island off the coast of Georgia.

Once freed, Campbell moved his family back to New Orleans to rebuild a law practice. Although barred at first from arguing cases in federal court due to his role in the Confederate government, Campbell succeeded in once again creating a successful law practice. Before long, he was arguing cases before the same Supreme Court upon which he had once sat as a justice. Notable among his efforts was the so-called *Slaughterhouse Cases*, 83 U.S. 36 (1873), which was the first judicial test of the Fourteenth Amendment. In the *Slaughterhouse Cases*, Campbell argued that the right to earn a living was a privilege guaranteed by the Fourteenth Amendment. Despite Campbell's best efforts, which included an oral argument that spanned two days, a five-member majority ruled in 1873 that it did not.

Defeats such as the *Slaughterhouse Cases* were exceptions rather than the rule. Campbell steered his law practice through the next ten years with considerable success. The death of Anne, his wife of 53 years, in 1883 and Campbell's advancing years, however, sapped his desire to continue the practice of law. In 1886, he retired at the age of 75. He moved to Baltimore, Maryland, where he died three years later. Some of his last written words were directed to his former brethren on the Supreme Court. "Tell the Court that I join daily in the prayer," Campbell wrote, adding, "God Save the United States and its Honorable Court."

Today, despite the relative obscurity of their namesakes, two buildings stand in Alabama cities honor these two justices. Mobile boasts the John A. Campbell Federal Building and United States Courthouse, while Florence is home to the John McKinley Federal Building. ■

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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*.

United States District Court

Northern District of Alabama

In re: The Matter of the Reappointment of T. Michael Putnam as a United States Magistrate Judge

The current term of the office of United States Magistrate Judge T. Michael Putnam at Birmingham, Alabama is due to expire February 8, 2003. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

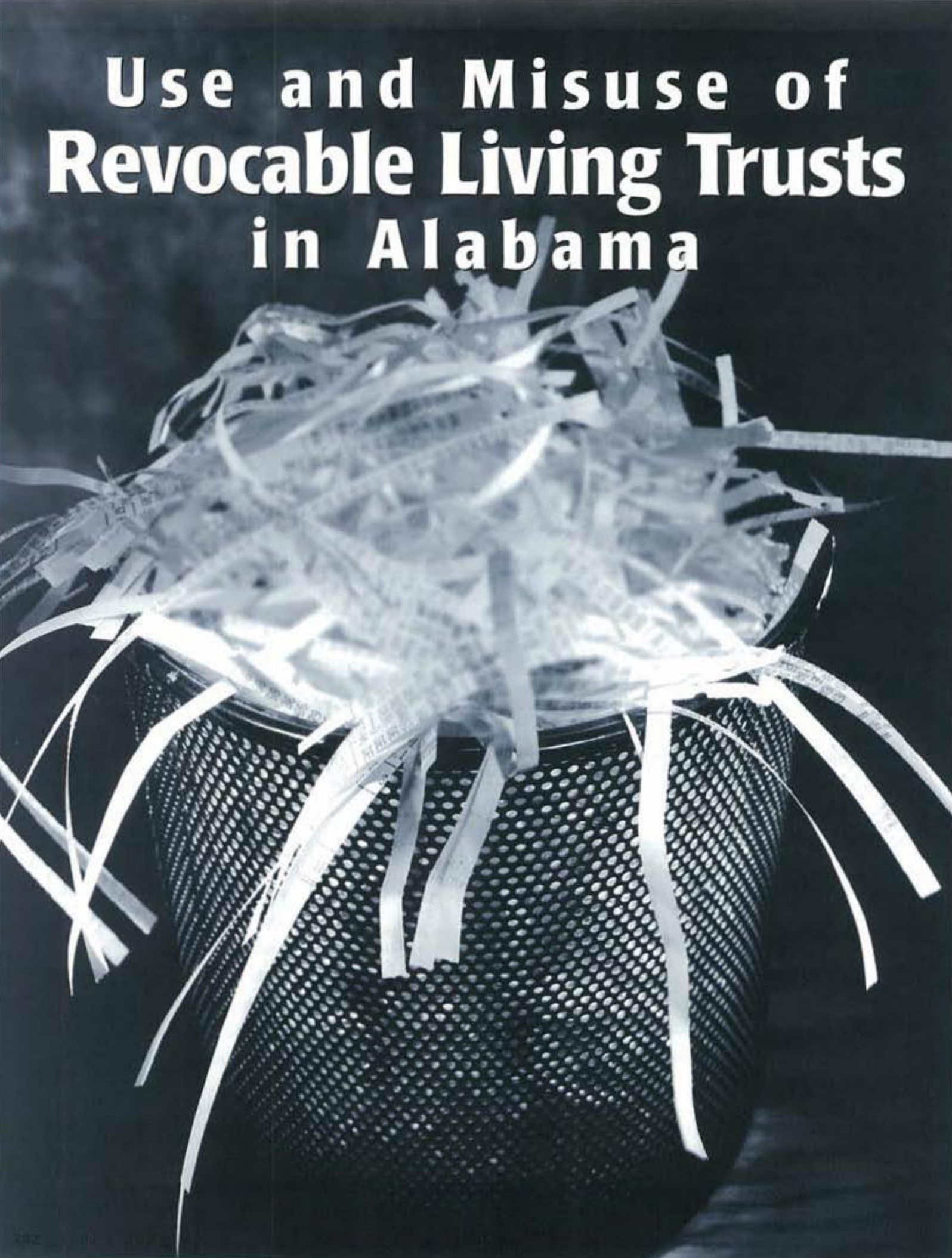
The duties of a magistrate judge's position include the following: (1) conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; (2) the trial and disposition of misdemeanor cases; (3) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; (4) conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and (5) trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Perry D. Mathis, clerk
U.S. District Court
Northern District of Alabama
Room 140, 1729 5th Avenue N.
Birmingham, AL 35203

Comments must be received by August 23, 2002.

Use and Misuse of Revocable Living Trusts in Alabama



BY MICHAEL A. KIRTLAND

One of the easiest ways to begin an argument among estate planning professionals is to raise the subject of revocable living trusts. Few, if any, other subjects create such a division between professionals. Rarely will an estate planning attorney remain neutral on this subject, but rather, most will stake out a position in favor of the revocable living trust and against the probate process, or in favor of the use of wills as the preferred estate planning vehicle and opposed to the use of revocable living trusts. Passions aside, the answer to whether or not a revocable living trust is appropriate is highly state specific. Practitioners need to consider the individual estate situation of the client, the requirements of the probate code and the administrative burden of the trust, prior to recommending a revocable living trust or advising against its use in favor of other estate planning means.

What is a Revocable Living Trust?

A revocable living trust (RLT) is an estate planning technique designed to provide for continuous management of assets in the event of incapacity and to provide an alternative to the probate process in the event of death. The individual, the grantor, transfers assets, both real property and personal property, to the trust. The terms of the trust permit the individual to reclaim the property at any time, revise the terms of the trust or revoke the trust entirely. The grantor is the beneficiary of the trust during his or her lifetime and the trust terms permit as much of the income and principal as the grantor desires to be returned to, or paid out on behalf of, the grantor at any time. Typically, the trust also provides direction on how to distribute the assets of the trust in the event of the grantor's death, either by outright distribution or distribution to a credit shelter trust in order to make maximum use of the estate tax exemption.

The trust does not become irrevocable until the death of the grantor. Because the trust can be revised or revoked at any time, the Internal Revenue Code considers trust assets as remaining the property of the grantor and the trust to be invisible for income tax purposes, thereby avoiding the higher income tax rates normally associated with trusts. (IRC §671 *et seq*) The grantor retains indicia of ownership sufficient for the Internal Revenue Code to treat the assets of the trust as still belonging to the grantor for estate and gift tax purposes as well. No tax identification number need be obtained for the trust during the grantor's lifetime, and no separate income tax return is filed. (Instructions to IRS Form SS-4) In fact, the Internal Revenue Service will not assign a tax identification number to the trust and will reject applications to create such an identification number.

Legal ownership of the assets lays with the trust. Titled property, such a real property, boats, cars and bank accounts, needs

The terms of the trust permit the individual to reclaim the property at any time, revise the terms of the trust or revoke the trust entirely.

to be retitled into the name of the trust. Untitled property is generally assigned to the trust by listing the property in an attachment to the trust. As a result, at the time of the grantor's death the property is not a part of the grantor's probate estate and therefore not subject to the probate process. Ideally, all property of the grantor is assigned to the trust and no probate proceeding is necessary at the time of death. Nonetheless, a pour-over will should be executed by the trust grantor to deal with any miscellaneous assets which are not a part of the trust at the time of death.

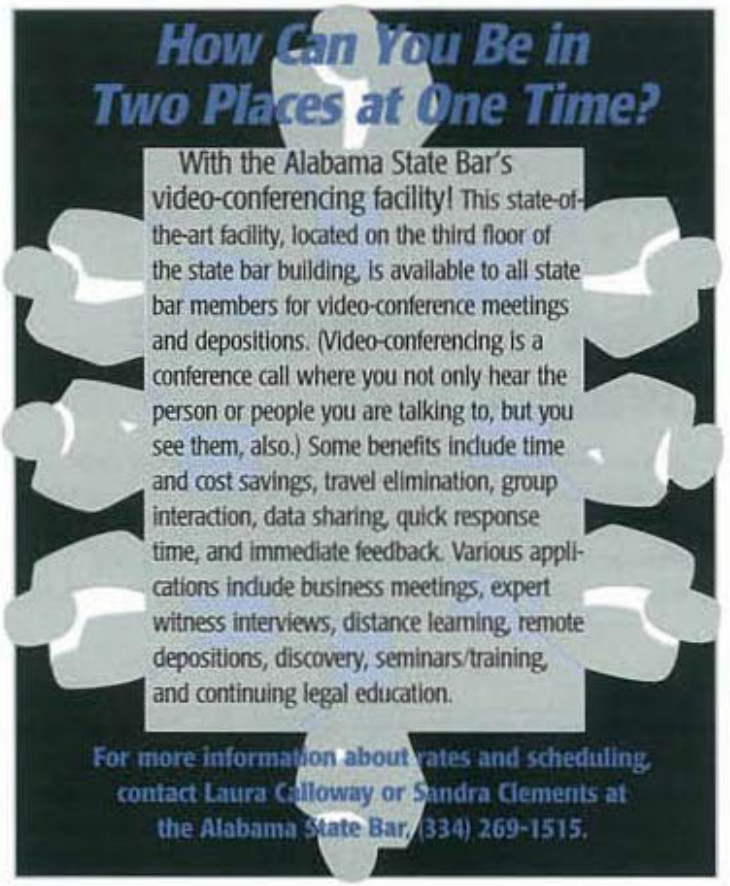
Effective Use of RLTs in Alabama

As a general rule, the RLT is unnecessary and not cost effective in Alabama. Having said this, there are a number of situations where an RLT is a desirable, and sometimes even the preferred, estate planning tool.

Real Property Issues

It is the avoidance of probate proceedings that is often cited as the best reason for establishing an RLT. Real property, normally always subject to probate proceedings at death, is owned by the trust. Since the trust owns the real property, and the trust survives the death of the grantor, probate is unnecessary. The real property is simply distributed out of the trust via deed in accordance with the terms of the trust. Because trust assets are considered to be owned by the grantor for estate tax purposes the assets still enjoy the step up in basis for capital gains tax purposes which is accorded to property at death. (IRC §1014)

This ability to transfer real property outside of the probate process is especially useful in cases where the grantor owns real property in multiple states. In Alabama it is not at all unusual for individuals to have a primary residence within this state and also to own a condominium or other vacation property in other states, especially Florida and Tennessee. If the individual dies owning real property in both states a primary probate proceeding is necessary to transfer the principal residence and other assets of the decedent, and a second, ancillary, probate proceeding is necessary in the state where the vacation property is located. (Code of Alabama, 1975 §43-8-20, 43-8-162) By placing the real property into the RLT, ownership of the property in both states survives the death of the grantor and no probate proceeding is required in either state. For individuals with real property in many states, as is sometimes found in Alabama's many active duty and retired military personnel, and others whose professional life has resulted in residences in various states over the individual's working lifetime, the advantage of avoiding multiple ancillary probate proceedings is magnified, significantly reducing the time, complexity and cost of distributing property at death.



Incapacity Issues

A second valid purpose for establishing an RLT is the ability to ensure management of an individual's assets in the event of incapacity. While the grantor is normally the initial trustee of the RLT, typically the terms of the RLT designate a successor trustee who will serve in the event of death or incapacity, or simply because the grantor no longer desires to perform the duties of trustee. Without an RLT an individual who becomes incapacitated often faces a probate proceeding to establish a conservatorship to manage the assets. This requires petitioning the probate court, normally with the assistance of an attorney, to grant letters of conservatorship. As part of the conservatorship proceedings the assets of the incapacitated individual must be inventoried and the inventory made a part of the court record. A bond must be posted in an amount equal to the value of the individual's estate plus the estimated annual income of the estate. (Code of Alabama, 1975 §26-3-1) Where the size of the estate is large, it is not unusual for the bonding company to insist on joint control of the assets between the conservator and a second, unrelated party, typically the attorney representing the conservator or a bank or other corporate entity, thereby increasing the complexity and cost of administration of the conservatorship. The conservator is required to provide an accounting to the court on an annual basis. (The probate court may extend the period between accountings to as long as three years after the initial annual accounting. See Code of Alabama, 1975 §26-5-2, 26-2A-147) Investment of the assets under conservatorship is subject to the direction and restrictions of the probate court and the Code of Alabama. In the case of real property, if the conservator believes it to be in the best interest of the conservatorship to sell the real property, the conservator must petition the court for permission to sell the real property and report to the court at the completion of the sale. (Code of Alabama, 1975 §26-2A-150)

All of these restrictions and public revelation of the incapacitated individual's estate assets can be avoided if the assets are allocated to an RLT. The incapacity of the grantor who is serving as trustee results in the designated successor trustee assuming the position of trustee. No court proceedings are necessary and no inventory or accounting need be made. The investments of the trust can continue without interruption and if the trustee determines that sale of real property is appropriate, no court permission to conduct the sale is necessary. Even though no court supervision is present, the incapacitated grantor is still protected because the successor trustee is subject to the standards of fiduciary duty required by law. (Code of Alabama, 1975 §19-1-1 *et seq.*, 19-3-120.2, 19-3-129)

As a less expensive alternative to an RLT for incapacity planning some attorneys argue in favor of a well written general durable power of attorney and a durable power of attorney for health care decisions. The general durable power of attorney allows the agent to perform all the tasks the principal could perform, while the durable power of attorney for health care allows for medical decision-making for the incapacitated principal. This often can be a good solution; however, Alabama has no law requiring the power of attorney to be accepted by third parties, nor sanctions for refusing to honor it. (Code of Alabama, 1975 §26-1-2)

Some individuals, especially very elderly clients, are sufficiently concerned about the problem of potential incapacity that they create a standby RLT and a durable power of attorney specifically authorizing the agent to transfer the principal's assets from the principal to the RLT in the event of incapacity. Under this arrangement, the RLT remains unfunded unless the individual becomes incapacitated, at which time all of the assets of the individual are transferred to the RLT, thus avoiding both court supervision and the potential problems of third parties who refuse to honor the power of attorney.

Issues of Controversial Relationships

A third situation in which an RLT may be a good solution, even in probate-friendly states such as Alabama, is where the grantor has a relationship with one or more individuals of which the family of the grantor may disapprove strongly. This relationship may simply be with an individual the family does not like, or it may be the type of relationship itself that is disapproved of, and in fact, may be disapproved of and discour-

aged by a court, such as cohabitation out of marriage or same-sex relationships. Without an RLT the family may determine to challenge the will of the individual at the time of death. Usually this challenge comes in the form of an undue influence claim. While this claim is difficult to prove, even the threat of tying up the estate in legal proceedings is often sufficient to cause the intended beneficiary of the deceased to compromise his or her inheritance under the will in order to avoid the time, financial cost, emotional stress, and possible negative publicity, that the will contest may create. While the family may see this as positive, it is normally at odds with the intended wishes of the decedent, which the Code and Alabama case law says should be the primary focus of any will interpretation. (Code of Alabama, 1975 §43-8-222)

The RLT helps to avoid this situation. Because the RLT is not subject to probate proceedings, the opportunity to contest the trust is restricted. The family has no inherent right to any asset of the trust. Unlike a probated will, the RLT is not a public record document, so the terms of distribution need never be made known to hostile family members. Even in the event the RLT itself is challenged, the burden to show that it is in violation of some civil law or case precedent is difficult, if not impossible, to prove. A trial court is less likely to declare a long-standing trust invalid than it might be to declare a will to be the product of undue influence.

Problems with Revocable Living Trusts

Creating an RLT is just the beginning. As with any trust, administration of an RLT is an ongoing process. While the trust is treated as invisible for tax purposes, that does not mean that there is nothing for the trustee to do. Often, clients who come to an estate planning attorney do so with the desire to create an estate plan, then forget about it. But, the RLT must continually be updated to reflect the current assets of the grantor. As vehicles are bought and sold, they must be added to or removed from the trust. The same is true of real property and other titled assets. Insurance for such property must be acquired in the name of the trust rather than the individual, often with additional administrative steps required by the insurer. More cumbersome is the question of non-titled tangible personal assets. Lists of tangible personal property must be continually updated to reflect the current assets of the grantor. But, as many grantors simply want an RLT they can "put on the shelf," it is not unusual to find the trust falling into disarray in a relatively short period of time. Just as the Internal Revenue Code treats the RLT as invisible for tax purposes, grantor-trustees often ignore the formalities necessary for a well-run RLT, instead seeing the RLT as simply a cover under which they can avoid probate, without any obligation to comply with administrative responsibilities over their own property which happens to be held in trust. RLTs which have been in existence for extended periods of time often do not correctly reflect any part of the grantor's estate. The result is that at the time of death these RLTs can be totally worthless, regardless of how carefully they were originally drafted by the attorney. Any attorney who has practiced in the area of trusts and estates for even relatively short periods of time can regale the willing listener with horror stories of the efforts necessary to untangle estates which supposedly were governed by revocable living trusts.

Misuse of Revocable Living Trusts

In addition to ineffective administration of RLTs, often the RLT itself is created for reasons that do not reflect the reality of probate law in Alabama. Many clients have an innate distrust of government and courts. This distrust is routinely magnified by misinformation as to the nature of probate and estate tax law. Unfortunately, this distrust and misinformation is often enhanced by "trust mills." These organizations, normally headquartered in states outside of Alabama, hold traveling seminars on how to avoid probate. More unfortunate is that the information provided at these seminars is designed to fill the attendees with the horrors of the probate process and the miracles that RLTs can provide. Typically, the presenters then sign the attendees up to create an RLT. In return the attendee receives a

Amendments to Alabama Rules of Criminal Procedure and Alabama Rules of Appellate Procedure

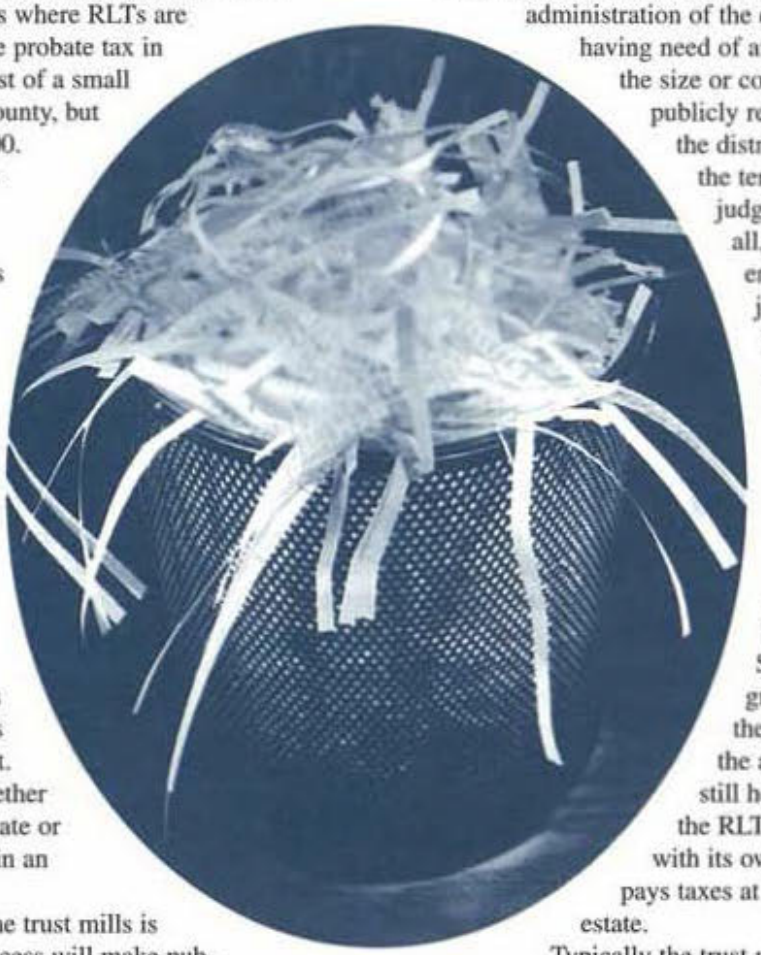
The Alabama Supreme Court has amended Rules 2.2(e), 3.10, 14.3(c) (1), 14.4, 18.2, 26.9, 30.5, 32.1, 32.2, and 32.6(a), Alabama Rules of Criminal Procedure, and Rules 10(a) and 10(c)(1), Alabama Rules of Appellate Procedure. The amendments of these rules are effective August 1, 2002.

The orders amending these rules and adopting Court Comments and Committee Comments to these rules appear in an advance sheet of Southern Reporter dated on or about May 2, 2002. The orders and the text of the amendments and the comments may also be found at the Administrative Office of Courts' Web site at *www.alacourt.org/rulechanges* and at the Alabama State Law Library's Web site at *www.alalinc.net/rulechanges*.

—Bilee K. Cauley, Reporter of Decisions, Alabama Appellate Courts

canned RLT, often reflecting the laws of the presenter's home state, with little or no regard for the actual needs of the client. The trust mill operation then departs for some other location to continue its seminars. The attendee is left with a voluminous document, but often is left to transfer their own titled property without assistance or guidance from the now departed trust mill organization. Even leaving aside the obvious problem of the unauthorized practice of law, the trust mill leaves its clients without proper advice and no one to turn to for continuing assistance with the trust.

The most common tactic of these trust mills is to paint a picture of the probate process as difficult, time consuming and expensive. As a general rule, just the opposite is true in Alabama. Unlike many states where RLTs are common, there is no separate probate tax in Alabama. Probate fees consist of a small filing fee, which varies by county, but which is normally under $100. While the probate code does require the estate to remain open for a period of at least six months to allow creditors to make claims against the estate, even with a well managed RLT these same debts would have to be paid, regardless of when the claim was made. (Code of Alabama, 1975 §43-2-350) Most of the effort in the probate process involves seeing to the gathering of estate assets, payment of debts and distribution of the assets in accordance with the terms of the last will and testament. This process is identical whether the assets pass through probate or whether they are contained in an RLT.



A second scare tactic of the trust mills is to claim that the probate process will make public the financial and other affairs of the decedent for anyone who wants to inquire. While the Alabama probate code requires the posting of a bond, the filing of an inventory and an accounting of the estate at closing, any basic, well written will in Alabama routinely waives these requirements. (Code of Alabama, 1975 §43-2-311) Waiver of the inventory and accounting means that no information exists in the probate file which would tell any reader about the size of the estate, its contents or of the personal affairs of the decedent. Beyond that, the inference that the reading of wills by nosy neighbors is common is simply not consistent with reality. While individuals with no vested interest in the estate might be curious to know the details of the will of a famous person, it is highly unlikely the will of the average person, even if that individual is wealthy, will be of interest to anyone outside the family of the decedent. It simply does not reflect reality to suggest that unrelated parties are lining up at probate courthouses to read the wills of recently deceased persons. In any event, because one never knows exactly when death will occur, it is not at all unusual to have a well drafted RLT and yet still need to proceed with probate to deal with assets which were not transferred to the RLT prior to death.

Trust mills also routinely claim that without an RLT the assets of the deceased will be tied up by court proceedings and left to the whims of a probate judge to determine what will happen to them. This is simply not the case. Again, as with the bond, inventory and accounting, a basic, well written will in Alabama routinely waives the requirement for court supervision of the estate administration. The result is that where a properly written will exists it is not uncommon for the entire administration of the estate to take place without ever having need of any court hearings. No details of the size or composition of the estate need be publicly revealed, and the determination of the distribution of the assets is made by the terms of the will, not by the probate judge. Even where there is no will at all, it is the intestate laws which govern, not the "whims" of the probate judge as the trust mill seminar would have you believe. (Code of Alabama, 1975 §43-8-40 *et seq.*, 43-2-830)

Perhaps the most onerous misinformation that the trust mill seminars provide is the idea that one should have an RLT in order to save taxes. Nothing could be more incorrect. The RLT is ignored by the Internal Revenue Service during the life of the grantor. As a result, the income of the RLT is taxed to the grantor as if the assets earning the income were still held in the grantor's name. At death the RLT becomes a separate legal entity, with its own tax identification number, and pays taxes at the same rate as any other trust or estate.

Typically the trust mill claims that through an RLT you can save estate taxes at death. This claim is based upon the inclusion in the RLT of articles describing the distribution of RLT assets at the time of death of the grantor. By passing the assets of the RLT to a credit shelter trust, and perhaps to a second trust (the marital, or "QTIP" trust) the grantor can double his estate tax exemption. But, it is not the RLT that maximizes the estate tax exemption. Rather, it is the inclusion of a credit shelter trust which allows maximization of the estate tax exemption. The same credit shelter trust, and where appropriate, a marital trust, are used in a last will and testament to maximize the effect of estate tax exemption, usually at much less cost in the drafting of the documents. In any event with the continuing increase of the estate tax exemption amount (currently $1,000,000) fewer and fewer people even need the credit shelter trust as a device to decrease or avoid estate taxes. However, often the most difficult client for an estate planning attorney is the client who comes to see the attorney after hav-

ing attended a trust mill seminar, where the client is warned against unscrupulous attorneys and accountants who might try to dissuade the client from creating an RLT.

Educating the Client

Whether the client has been sold the concept of an RLT by a trust mill or just the bad advice of well meaning friends, educating the new client concerning the need, or lack of need, for an RLT can be a difficult task when the client is predisposed to the "essential" nature of an RLT. One common misconception that drives the individual to desire an RLT is the mistaken belief that by creating an RLT the individual can protect assets from creditors' claims. It is not unusual to have a new client inform the attorney that they "know" that an RLT will prevent creditors from successfully making claims against assets in the event the client is sued, either for debts or as a result of a tort claim. As with other aspects of the RLT, when a judgement or collection action comes against an individual, the existence of an RLT holding the assets of the individual is ignored for the purpose of determining the collectability of the judgment or debt. No barrier to collection is posed by the presence of the RLT.

The education of the client can be especially important where the main reason for the client coming to the attorney is for Medicaid planning purposes. The rules of Medicaid eligibility are complex and strict. Special rules apply to the use of trusts and eligibility for Medicaid. Rumors abound concerning Medicaid seizing the individual's house in the middle of the night and leaving the spouse of the incapacitated individual both homeless and penniless. While the truth of Medicaid eligibility and procedure is far different from these rumors, the rumors leave genuine fear in the client as to what will happen.

Unfortunately, one rumored solution is that by setting up an RLT, the client can transfer his assets to the RLT and then be accepted for Medicaid. Such is not the case. Medicaid considers all available assets of the individual in determining eligibility for Medicaid nursing home assistance. Because an RLT can be revoked at any time and the assets can be obtained by the grantor at any time, Medicaid will ignore the RLT and consider the assets of the RLT to be fully available to the grantor who applies for Medicaid. While the creation of the RLT may not be a transfer for Medicaid disqualification purposes, resulting in penalty periods, the entire RLT will be counted as an available asset. Creation of an RLT to avoid Medicaid transfer rules accomplishes nothing.

Handling Existing Revocable Living Trusts

Often the new client may come to the attorney having already created an RLT at some time in the past, and seeking the attorney's assistance with the RLT. This is especially true of clients who have moved to Alabama from other states where RLTs are common. In this situation the attorney must carefully analyze the RLT from a number of view points. First, does the RLT as written comply with Alabama law? Second, does the trust accurately reflect the assets of the individual? Third, is the RLT the appropriate estate planning vehicle for this individual? Analysis of all of these factors must be made prior to providing advice on what to do with the RLT.

Assuming the RLT is in compliance with Alabama law, and the RLT accurately reflects the assets of the individual, there is no need to unwind the RLT even if it may have been an unnecessary step in the first place. While some "clean up" may be needed to update the assigned personal property list for the trust, where the RLT fairly represents the individual's assets, and the individual is administratively maintaining the RLT, it remains a viable method of estate planning. If the only problem with the RLT is that it was created in another state and requires modifications to comply with Alabama law, drafting amendments to the RLT may be the appropriate solution.

If the client has let the active administration of the trust lapse, the attorney needs to determine if this is because the client does not desire to be burdened with administrative responsibilities or whether simply providing some basic education about management of the RLT would resolve the problem. Where educating the client is a feasible solution, the RLT can be revived for the benefit of the client. In some cases, where the client does not wish to keep up with the administration of the RLT, but still owns property in the state of former residence, it may be an appropriate solution to keep the RLT in place, containing only the real property, and drafting a pour over will for distribution at death of other assets through the trust, or perhaps dealing with the personal property assets directly through a separate last will and testament.

Where the RLT does not accurately reflect the assets of the client, the client indicates an unwillingness to administratively maintain the RLT, or where the purpose of the RLT does not accurately reflect the reality of the law, unwinding the trust may be the appropriate solution. The attorney can draft a letter for the RLT records stating that the trust is revoked. Titled property must then be retitled into the name of the grantor. No court proceeding or recording of the revocation is necessary.

As with virtually every estate planning decision, it is the specifics of the case which govern the appropriateness of an RLT. No blanket solution or canned document can be made to fit all cases. The argument between estate planners of RLTs versus probate inevitably will go on. But, through careful analysis of the individual situation rather than blind adherence to one method or the other, the proper service for the client can be found. ■

Michael A. Kirtland

Michael A. Kirtland is a solo practitioner in Montgomery. He holds a B.A. in history from Coe College and an M.P.A. from the University of Colorado. He received his J.D. degree from Jones School of Law and his LL.M. in taxation from the University of Alabama School of Law. He is a member of the editorial board of *The Alabama Lawyer* and an acquisitions editor for the American Bar Association's Section on Real Property, Probate and Trust Law.

LIFEPLAN VIDEO NOW AVAILABLE!

Last October, the Alabama State Bar, the Medical Association of the State of Alabama and the Alabama Hospital Association, with support from the Alabama Department of Public Health and the Alabama Organ Center, joined together for a statewide project to educate Alabama citizens about health care directives. The LIFEPLAN 2001 campaign involved over 200 volunteer attorneys and physicians and reached over 16,000 citizens. Because of continued interest in this important topic, an informative video on health care directives has been produced. The ten-minute video highlights the importance of having a health care directive and answers questions about the new Alabama form. A copy of the video is available by request, at no charge, for use by hospitals, senior citizens groups, schools and any community group. To request a free copy of the video, contact the Alabama State Bar at 800-354-6154 or order on-line at www.alabar.org. Copies of the LIFEPLAN Consumer Guide and the new Alabama Health Care Directive form can also be downloaded from the Web site.

Disbarment

- The Supreme Court of Alabama adopted the March 25, 2002 order of the Disciplinary Board, Panel IV, disbarring former Birmingham attorney **Charles Robert Poore, III** from the practice of law in the State of Alabama effective October 11, 2000. Poore has been suspended from the practice of law since October 21, 1998.

  In ASB 98-318(A), Poore was found guilty of violating Rules 8.4(b), 8.4(c), and 8.4(g) [misconduct], of the Alabama Rules of Professional Conduct. Charges were filed and an answer was filed by Poore. Poore failed to appear at the hearing of this matter. Poore had engaged in a course of conduct through which he and his partner (previously disbarred) regularly and systematically converted and misappropriated the funds and property of their clients, operating their law firm and paying its overhead and other expenses out of client funds held in trust.

  In ASB 00-74(B), a judgment by default was entered against Poore on September 19, 2001. Poore was found guilty of violating Rules 8.4(b) and 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. The undisputed facts, established by the default and evidence placed of record by the state bar, show that Poore is guilty of having committed a criminal act in that he received settlement funds belonging to his client. Poore forged the name of his client to the settlement check, and thereafter he misappropriated the funds to his own use.

Suspensions

- Effective February 28, 2002, attorney **Leslie Sheldon Johnston** of Daphne has been suspended from the practice of law in the State of Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [ASB CLE No. 01-25]

- Effective February 28, 2002, attorney **Michael Norman McIntyre** of Birmingham has been suspended from the practice of law in the State of Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [ASB CLE No. 01-31]

- Effective April 15, 2002, attorney **Lizabeth Diann Foster** of Asheville, NC has been suspended from the practice of law in the State of Alabama for noncompliance with Rule 9 (professionalism) of the Mandatory Continuing Legal Education requirements of the Alabama State Bar. [ASB CLE No. 01-57]

- Birmingham attorney **Mary Riseling Amos** pled guilty before the Disciplinary Commission of the Alabama State Bar to failing to respond to reasonable requests for information from a client regarding the status of the client's pending case and willfully neglecting a legal matter entrusted to her, violations of Rules 1.3 and 1.4(a), Alabama Rules of Professional Conduct. Amos admitted that she was retained to represent a client in a Chapter 7 bankruptcy matter and was paid $400 for her services. During the course of the representation, she failed to return the client's telephone calls or otherwise respond to his requests for information about the status of the matter and failed to pursue the matter with reasonable diligence on behalf of the client. The Disciplinary Commission ordered that Amos be suspended from the practice of law in the State of Alabama for a period of 45 days. However, the Disciplinary Commission stayed the imposition of the 45-day suspension and placed Amos on probation for a period of two years during which time she shall, among other things, consult with and implement the recommendations of the Alabama State Bar's Law Office Management Assistance Program, attend one mandatory six-hour course on professionalism as provided by Rule 9 of the Mandatory Continuing Legal Education Rules of the Alabama State Bar, which shall be in addition to the 12 hours of Mandatory Continuing Legal Education required annu-

ally, and file written monthly reports regarding the status of her continued practice of law with the Office of General Counsel. Prior discipline was considered as follows: Amos received a public reprimand with general publication on January 26, 2001 and on September 7, 2001. [ASB No. 01-87(A)]

- Birmingham attorney **William Eugene Friel, II** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, effective April 19, 2002. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Friel had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation.

- Cullman attorney **Buel Don Hale** was summarily suspended from the practice of law in the State of Alabama, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, effective April 19, 2002. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Hale had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. ■

CEELI Attorneys Wanted

The Central and East European Law Initiative (CEELI), a public service project of the American Bar Association, seeks attorneys, with five+ years' experience, to develop, coordinate and implement legal reform projects in Central and Eastern Europe and the NIS. Positions of various lengths are available throughout the region to work with local judiciaries, bar associations, attorneys and legislative drafting committees on criminal, environmental, commercial, or gender issues or civil law reform. Participants receive a generous support package. E-mail Alison at *ceeli@abanet.org* or visit *www.abanet.org/ceeli* for an application and information.

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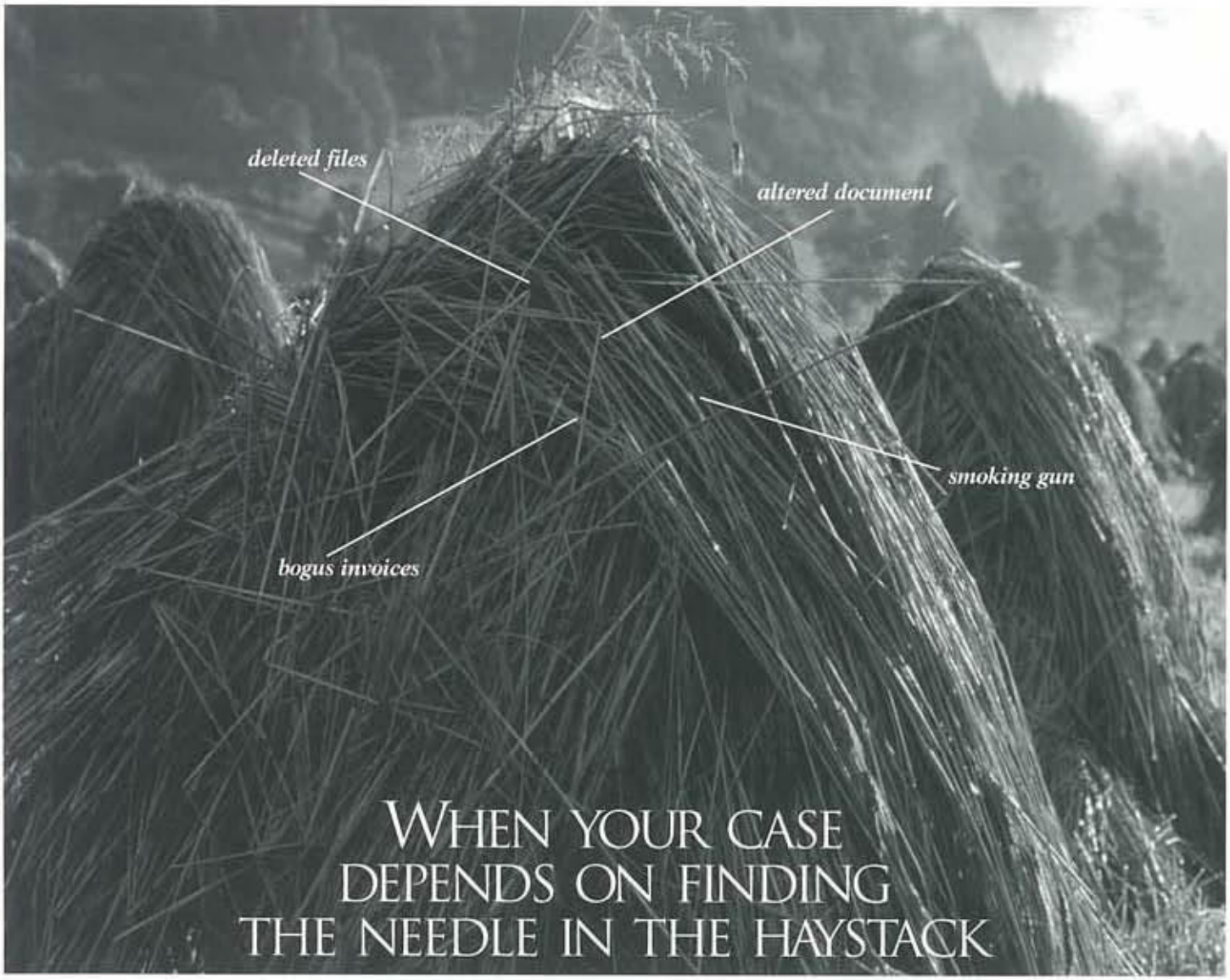

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