



*The* Alabama  
**Lawyer**

Vol. 61 No. 5

July 2003

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page 237



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**On the Cover:  
Millbrook, Alabama**

The cover picture is of Crescent Lake, an oxbow lake near the Alabama River in Millbrook, Elmore County, Alabama. It lies just to the east of the Robert Trent Jones Golf Trail courses near Prattville.

*The photographer is Camille Cook Ashley, who graduated from St. Paul's School in Concord, New Hampshire this spring and is entering Georgetown University, Washington, D.C. this fall as a freshman. She is the daughter of Shapard and Camille Ashley of Montgomery, and the granddaughter of Camille Wright Cook of Tuscaloosa and J. Sydney Cook of Georgia. Her father, grandmother and uncles, Reuben and Sydney Cook of Tuscaloosa, are all members of the Alabama State Bar.*

# Features



**226 Reflections On Ethical Issues**

*By Ralph D. Cook*

**237 The Putative Father Registry:  
Behold Now the Behemoth (A Cautionary Tale)**

*By Shirley Darby Howell*

**245 2003 Leadership Conference**

**246 The Robinson-Patman Act:  
The Law of Price Discrimination**

*By Clinton C. Carter and Kesa M. Johnston*

**253 Montgomery Magnet Schools Sweep Law Day Awards**

**255 Legal Services in Alabama to Unite**

**256 IOLTA Rule Change**

**261 Alabama Law Foundation's IOLTA Program  
Gets Good News From U.S. Supreme Court**



**237**





# THE ALABAMA LAWYER

Vol. 64, No. 5  
July 2003



**President's Page**  
**212**



**Executive Director's Report**  
**216**



**Bar Briefs**  
**218**



**About Members,  
Among Firms**  
**220**



**Memorials**  
**222**



**Legislative Wrap-Up**  
**224**



**Opinions of the General  
Counsel**  
**262**



**Disciplinary Notices**  
**264**



**Classifieds**  
**268**

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Alabama State Bar President Fred D. Gray of Tuskegee chose as his theme "Lawyers Render Service" and issued a special invitation to all local and specialty bar associations to join him in this statewide positive public image campaign.

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By Fred D. Gray



Fred D. Gray

# The President Reflects On a Momentous Year

*As his term as Alabama State Bar President draws to a close, Fred Gray recently spoke with Robert Huffaker, editor of *The Alabama Lawyer*, about how the past ten months have been.*

***The Alabama Lawyer:*** Fred, you're about three-quarters of the way through your tenure as bar president. Has it been as time consuming as you anticipated it would be?

***Gray:*** I anticipated it would be time consuming, and it has been every bit of that!

***AL:*** Much more than you expected?

***Gray:*** I am not sure it was any more than I expected because I have a heavy speaking engagement anyway—particularly during Dr. King's holiday in January and Black History Month in February. But it has been nonstop from the time I became president up to, and including, being in Huntsville, on Tuesday. Judge William Steele invited me to come down and extend greetings on behalf of the Alabama State Bar at his investiture in Mobile. It was a wonderful occasion.

***AL:*** As the first African-American president of the state bar, do you take pride in that accomplishment?

***Gray:*** I take pride in the sense that I am glad that it has occurred. I was not interested in becoming president just to become the first African-American because there are, and have been, outstanding African-American lawyers who are members of this bar since the first one became a member down in Mobile many years ago. But I take some pride in it, and I am glad that the barrier at least has been broken. I hope there will be many others who will come and be president

because there are other persons of color who are well able to be president of the state bar.

***AL:*** Have you witnessed more involvement by minorities in bar activities?

***Gray:*** I have solicited more involvement of the members of the bar generally, and minorities in particular. As president-elect, I invited all presidents of local and specialty bar associations to bar headquarters, to discuss plans for my bar year and to receive their concerns and suggestions. The current president-elect is following this procedure. I also wrote a letter to minority members of the bar, particularly those of color, and invited them to come down to Orange Beach when I became president. I wanted to see them involved in everything that the bar is doing. There was a time when things were not as open as they are now. I wanted them to become very active and not let the fact that some doors may not have been opened in the past to interfere with their active participation in the state bar. Many of them went to Orange Beach and many accepted various positions—I believe everybody I appointed has accepted a position—on various task forces or committees. We have more diversity on all the committees and task forces than we have had in the past.

***AL:*** What should the bar do to continue to have involvement from a more diverse membership, and the junior members of the bar, as well? There has been criticism that younger members of the bar are not as active as they should be.



**Gray:** One of the things that I have been saying all along is that one of the keystones of my tenure this year has been to be sure that there really is diversity in the state bar. When I speak of diversity, I'm talking about gender, race, geographic region, age, and the whole gambit. I appointed a task force on diversity in the profession that was co-chaired by former Justice Hugh Maddox of the Alabama Supreme Court and former Governor Albert Brewer and vice co-chaired by past president Warren

Lightfoot and J. Mason Davis. That task force divided itself into subgroups and did an excellent job of looking at the problems, discussing solutions, and making recommendations for short-term and long-term solutions. They were very concerned that the Board of Bar Commissioners do more than give lip service to diversity in the profession. It should look at itself. There are 60 members on the Board of Bar Commissioners; there is only one



*Fred D. Gray being sworn in July 20, 2002*



*Fred D. Gray, president, and Mrs. Gray with William Clark, president-elect, and Mrs. Clark*

person of color and there has never been more than one person of color serving at the same time. I was the first one in 1980; Ernestine Sapp and J. Mason Davis were later elected, and now Anthony Joseph is a member. So we have had four minorities who have served, but they have all served at different times. There are only three females on the Commission, and all Commissioners are over 40. Therefore, the task force was concerned about improving diversity on the Commission. Among other things, the task force recommended to the Board of Bar Commissioners that, in addition to the way the members are currently elected, the Commissioners request the legislature to amend the law which would provide for ten at-large positions. Persons nominated by various groups of lawyers, and ultimately elected by the Board of Bar Commissioners, would fill these positions. A committee was appointed to draft rules and regulations so that these positions would be filled by persons who would increase diversity on the Commission, including, but not limited to, race, gender, age and geographic region.

**AL:** Have the Commissioners taken formal action in response to the report from this task force?

**Gray:** They accepted the recommendations, and had a bill drafted and introduced, which is currently pending in the legislature.

**AL:** Is the bar advocating any other legislative proposals during this session?

**Gray:** There is another bill that the bar is sponsoring, House Bill 83, which deals with the continuance of the board of bar examiners and is a part of the four-year sunset review process.

**AL:** What did you consider the theme of your administration?

**Gray:** Lawyers Render Service: service to clients, service to the public and service to the profession. I realize this theme is not new, it is old, and it is what lawyers have been doing all the time. It is also what we as lawyers are sworn to do. There is a public perception that lawyers do not always render service. During this bar year, we have focused on lawyers rendering service. There will be seminars at the convention in July on the theme. I hope that successor presidents and commissioners will continue the theme.

**AL:** What is the state of the bar?

**Gray:** Financially, I think the bar is in excellent condition. It is a self-financing state agency with all of our revenue coming from our members. The bar does not depend upon funds from the legislature. However, we may be compelled to cut back, and it is hoped that it won't have a devastating effect on the services provided by the bar. From a service point of view, I think we have excellent programs that cover all aspects of the profession. The Commissioners recently authorized the creation of a new section on appellate practice. The legal profession is gradually changing. Technology is playing a major role. I think our bar is on the cutting edge of being sure that our members are abreast of this new technology. The matter of multi-practice jurisdiction is another matter that bars across the nation are confronting. I think Alabama is prepared to meet the challenge. I think we have an excellent, dedicated, hard-working staff. Executive Director Keith Norman and I have a wonderful working relationship. Ed Patterson, programs director, and Tony McLain, general counsel, continue to do a superb job. Most importantly, the bar is rendering service to its members, the profession and the community.

**AL:** Have you created any other task forces during your administration?

**Gray:** I appointed a task force on an Alabama Lawyers' Hall of Fame. Past President Samuel Rumore, a historian, serves as



chair. The task force made a report to the Board of Bar Commissioners, and the board approved their recommendation to create an Alabama Lawyer's Hall of Fame effective in bar year 2003-2004.



*Dennis Archer, president, American Bar Association, and Carol and Fred Gray at the American Bar Association Annual Meeting in Washington, DC, August 2002*



*Dr. Joe A. Lee, Fred D. Gray and Dr. Benjamin Payton at the Whitehouse Initiative on Historically Black Colleges and Universities, September 2002*

**AL:** Have you had any contact with your counterparts in other bar associations?

**Gray:** On the national scene, the state bar president is a member of the National Council of Bar Presidents. It consists of all bar presidents across the country, and is a part of the American Bar Association. The Council meets twice a year and is governed by an Executive Council. Last year I was elected to serve as a member of the Executive Council for a three-year term. So, for the next two years, even after I am no longer president, I will continue to be a member of the Executive Council. I have trav-

eled from Seattle, Washington to Key West, Florida and from the Virgin Islands to California.

**AL:** And probably parts of Alabama you hadn't seen before.

**Gray:** Yes!

**AL:** What is Fred Gray, the lawyer, going to do when your term is over?

**Gray:** What I would like to do is go someplace, rest for two or three months and write another book. However, Fred Gray, the lawyer during this whole year, has also carried a full trial practice. My office staff and my partners have been very considerate and helped to make the load lighter. Without their help, I could not have made it through this year.

Serving as the 126th president of the Alabama State Bar has been a great honor and a wonderful experience. I am confident that **Bill Clark** and successor presidents will continue the work of our great association, and lawyers will continue to render service. ■



*Fred D. Gray and the producer of Channel One News at Loveless Academic Magnet School, the first school Gray visited, November 2002*



*Included above are: Chief Judge U.W. Clemmons, Rev. Fred L. Shuttlesworth and President Gray at the Birmingham Civil Rights Institute Human Rights Awards Dinner, November 16, 2002*



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Keith B. Norman

## The New Alabama State Bar Exam

Later this month, the July 2003 bar exam will be administered. The examination will be different from previous exams in several respects. First, the examination will be spread over two and a half days instead of three. Second, instead of the Alabama essay consisting of 12, 45-minute essays covering six subjects<sup>1</sup>, the new essay will consist of six, 30-minute essays dealing with one subject—civil litigation. Finally, the new exam format adds the Multi-state Essay Exam (MEE)<sup>2</sup> and the Multi-state Performance Test (MPT)<sup>3</sup> while retaining the Multi-state Bar Exam (MBE)<sup>4</sup> that has been in use in Alabama since the early 1970s. We become the 15th state to use the MEE, and the 30th state to use the MPT. Forty-eight states now use the MBE.

The new examination format was the result of a thorough review of the *Rules Governing Admission to the Alabama State Bar*. Concerns had been raised by bar officers and bar examiners alike about the work-load of the bar examiners because of the increasing number of applicants seeking admission to the bar. As a consequence, a diverse task force of present and former bar examiners, bar members and the deans of all five law schools in Alabama was appointed in 1997 by state bar President **Dag Rowe**. The task force, headed by **Robert Potts** of Florence, concluded that changes were needed to ensure the continued quality, fairness and impartiality of the bar examination. These changes, as noted above, were approved by the Alabama State Bar Board of Commissioners in October 1999 and the Alabama Supreme Court in May 2001. The supreme court's approval followed an extensive comment period (from May—December 2000). The new bar examination rules become effective this July.

The decision to use the MEE and MPT made it clear that the Alabama essay portion of the bar exam needed to be more rigorously developed than in the past. Consequently, in the summer of 2001, **Ed Gentle**, chair of the Board of Bar Examiners (BBE),

**Dave Boyd**, who has had a long history of involvement with bar exams both as member and chair of the BBE and as a board member of the National Conference of Bar Examiners (NCBE), **Dorothy Johnson**, the bar's director of admissions, and I met with representatives of the Auburn University Center for Business and Economic Development (Center) to discuss our need to develop an essay examination for the Alabama segment of the bar exam. We asked the Center to assist us because of their experience in developing professional licensing tests. When we discussed this project with the Center, our goal was two-fold. First, we wanted an Alabama essay exam that would hold its own with the national products that we planned to use. Second, we wanted an exam that would be a fair and objective measure of an examinee's competence in the selected practice area.

The first issue that had to be addressed was selecting the appropriate areas to be tested on the new Alabama essay. After discussions with past and present BBE members, the Center helped develop and administer a survey covering 39 legal practice areas that was sent to 2,500 lawyers with three to six years' experience. Roughly 25 percent of the lawyers surveyed responded. The survey results indicated that the principal practice area not covered by the MEE, MPT and MBE, but critical for a new lawyer, was pleading and practice. With this information, the Center helped us devise a strategy to develop a subject matter outline. Following several meetings facilitated by the Center with law school representatives, past and present bar examiners, and experienced trial attorneys, an Alabama Civil Litigation Outline was developed, revised and finally approved by the BBE.

As required by the new admission rules, the civil litigation outline was completed by June 1, 2002 and sent to all Alabama law schools for dissemination to third-year law students. For the first time, examinees sitting for the Alabama bar exam have a specific outline for the



Alabama segment of the exam. The outline is posted on the bar's Web site, [www.alabar.org](http://www.alabar.org), under "Admissions."

The final development phase of the new Alabama essay commenced last fall. This has ultimately concluded with the actual development of a bank of examination questions with appropriate scoring guidelines. The Center worked closely with three panels comprised of five to eight experienced trial attorneys from across the state to develop an exam syllabus, critical question areas and potential topics for essay questions.

To begin with, each panel of trial attorneys was assigned two topics from the six-part outline and met regularly in Montgomery over the course of eight months. During the first of these meetings, the panel members brainstormed to generate and refine critical incidents and situational scenarios for measuring the topics covered by the civil litigation outline. The panels then met to review the scenarios they had previously developed to ensure that each scenario covered their outline topics, was realistic, accurate, unambiguous, free from bias, and appropriate for an Alabama attorney to handle on his or her first day of practice.

Once the scenarios were put together, the panels developed the response standards for the scoring process for each scenario to be used. The response standards were developed for three anchor points as a part of a seven-point rating scale. The "anchor points" rate answers as 'clearly unacceptable,' 'clearly acceptable' and 'clearly superior.' Simultaneously with the panels' review, each examination question and accompanying instruction were examined by a linguistic expert to make sure there were no verbal distortions that might undermine the tests' validity.

The panels, with assistance from current bar examiners, conducted a final review of each question to provide a formal rating. Individual panel members and examiners rated each question based on four criteria: whether the question was job-related; the extent to which the ability to answer the question distinguishes between levels of competence in the job of attorney; the quality of the question; and the extent the knowledge required for each outline topic would be necessary for responding to the question.

The final step in the preparation of the questions was a statistical analysis of the question ratings necessary to identify

those acceptable for inclusion in the Alabama essay section of the bar exam. To have the requisite content validity for use as a bar exam question, all the following conditions had to be met:

- a. the knowledge tested by the question must be at least moderately helpful in performing the job;
- b. the question must not be rated as biased by any panel member;
- c. the question must receive an average rating of "good" or better; and
- d. the question must be judged to have the capacity to distinguish among average and superior levels of knowledge of examinees.

Under the new examination format, bar examiners will score the MEE, MPT and the Alabama essay exam. Those examiners scoring the MEE and MPT will attend training sessions following each administration of the bar exam conducted by the NCBE to familiarize them with the scoring guidelines, rating scales and procedures for these exams. Likewise, bar examiners scoring the Alabama essay will receive similar instruction conducted by the Center.

The development of the Alabama essay component of the bar exam has been a laborious and time-consuming process. We owe a tremendous debt to the many lawyers who have taken part in these efforts to make the bar exam a fairer and better measure of professional competence. Those who served on the question development panels deserve particular credit for the numerous trips to Montgomery to work with members of their panels and their individual preparations between panel meetings. The panel members included: **Beverly Baker**, Birmingham; **James Bradford**, Birmingham; **Britt Coleman**, Birmingham; **Terry Davis**, Montgomery; **David Donaldson**, Birmingham; **Michael Gillion**, Mobile; **Dawn Hare**, Monroeville; **Tony Miller**, Birmingham; **Flynn Mozingo**, Montgomery; **Malcolm Newman**, Dothan; **Richard Ogle**, Birmingham; **Eddie Parker**, Montgomery; **Lewis Page**, Birmingham; **Barry Ragsdale**, Birmingham; **David Rains, Jr.**, Tuscaloosa; **Vastine Stabler**, Birmingham; **Harold Stephens**, Huntsville; **Gene Stutts**, Birmingham; **Lisa Van Wagner**, Montgomery; **Tom Walker**, Birmingham; **Joe Whatley**, Birmingham; and **Tommy Zieman**, Mobile.

Our involved bar examiners include: **Amy Bowman**, Montgomery; **Steve Brackin**, Dothan; **Bing Edwards**, Birmingham; **Deborah Hembree**, Mobile; **David Hymer**, Birmingham; **Tamara Johnson**, Birmingham; **Warren Mathews**, Montgomery; **Jack Sharman**, Birmingham; **Jim Smith**, Mobile; **Anne Sumblin**, Kinston; and **Hal West**, Birmingham.

I also recognize the Center staff who have helped direct this project from the start including the Center's director, **Dr. Katherine A. Jackson** and **Dr. John G. Veres, III**. Our project supervisor, **Leslie McGlaun**, who is a lawyer, has toiled on this project as have project staff assistants **Cynthia Forehand** and **Paul Wamsted**. The expertise and guidance which Leslie and the Center's project team have rendered ensures that the Alabama essay part of the bar exam will hold its own with its national counterpart, the MEE.

In closing, I note that the implementation of the admission rule changes promulgated by the supreme court has been a Herculean task. Ed Gentle has shepherded this process from the start. His foresight, leadership and perseverance have allowed for a smooth transition from the old exam to the new one that will be administered in a few weeks. Ed's personal investment of time is incalculable, and his steadfastness and focus have allowed us to make these changes with few disruptions. I am pleased to report that in recognition of his work as chair of the Board of Bar Examiners and the implementation of the new bar exam, the Board of Commissioners has awarded Ed Gentle the Alabama State Bar Award of Merit for 2003. The presentation of this award will be made at this year's annual meeting in Mobile. ■

## Endnotes

1. Former subject areas included: UCC; tax; equity; practice and procedure; wills, trusts and estates; and business organizations.
2. The MEE is a three-hour, six-question essay examination covering agency and partnership; commercial paper; conflict of laws; corporations; decedent's estates; family law; federal civil procedure; sales; secured transactions; and trust and future interests.
3. The MPT consists of two 90-minute skills questions covering legal analysis; fact analysis; problem-solving; resolution of ethical dilemmas; organization and management of a lawyering task; and communication.
4. The MBE is a six-hour, 200-question multiple-choice examination covering contract, torts, constitutional law, criminal law, evidence, and real property.





- The Mobile and Baldwin Counties Bench & Bar Conference has given its first Howell T. Heflin Award to former U.S. Senator and former Chief Justice of the Alabama Supreme Court **Howell T. Heflin**. The award will be presented from time to time to distinguished lawyers and judges who have served the people of the Alabama and their profession with honor and integrity. The award was made to Senator Heflin at the Grand Hotel at Point Clear on December 6, 2002, during the 14th Annual Bench & Bar Conference.



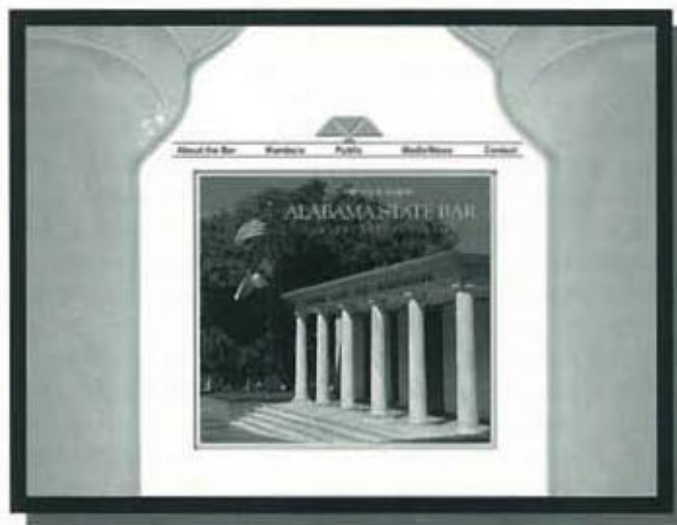
Howell T. Heflin

- Mobile trial attorney **Joseph M. Brown** has been named the 2003 Lawyer in Residence at Cumberland School of Law, Samford University. Each year, the Lawyer in Residence program recognizes the accomplishments of a Cumberland graduate by inviting the honoree to spend two days speaking to classes and meeting with students.

A Birmingham native, Brown is a member of the Mobile firm of Cunningham, Bounds, Yancey, Crowder & Brown.

- **Kerry P. McNerney**, with Sirote & Permutt, PC, was selected by the Defense Research Institute Young Lawyers' Section to serve as their national chair, Legislative Liaison Sub-Committee, and also as their national vice-chair, Liaison to Commercial Litigation Committee. McNerney also serves as a member of the Commercial Litigation Committee. ■

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Alabama State Bar President Fred D. Gray of Tuskegee chose as his theme "Lawyers Render Service" and issued a special invitation to all local and specialty bar associations to join him in this statewide positive public image campaign.

The Alabama State Bar has developed an eight-minute video presentation program entitled "TO SERVE THE PUBLIC." Available at no cost, materials include a handbook with talking points, the video and brochures for distribution. The presentation can be used as a "stand-alone" program or as a part of any meeting program. Perfect for community, civic, church or school groups, this presentation shows the many ways that today's lawyers render service to their clients, their communities and their profession.

Your bar association is invited and encouraged to participate in showing this video at every opportunity during the coming year.

Please complete and return the form below to receive your own association's copy to use for this purpose:

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Contact person \_\_\_\_\_

Telephone \_\_\_\_\_ E-mail \_\_\_\_\_

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Montgomery, AL 36104, by fax to 334-261-6310 or by e-mail to [sandres@alabar.org](mailto:sandres@alabar.org).



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*The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.*

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### About Members

**James W. Cameron** announces the opening of his office at 402 S. Perry Street, Suite 100, Montgomery. Phone (334) 263-6612.

**Eric C. Davis** announces the opening of his office at 118 N. Foster Street, Suite 200-A, Dothan. Phone (334) 671-7169.

**Gary Bryce Holder** announces the formation of **The Holder Law Firm, LLC** at 112 Greensprings Highway, Birmingham. Phone (205) 942-9008.

**David E. Hudgens** announces the opening of his office at 28311 N. Main Street, Suite B-200, Daphne. Phone (251) 625-3011.

**Stephen H. Miller** announces the opening of his office at 114 W. 10th Street, Suite A, Anniston. Phone (256) 741-9292.

**Charles R. Niven** announces the opening of his practice at 2000 Interstate Park Drive, Suite 105, Montgomery. Phone (334) 260-0003.

**Jonathan C. Sapp** announces the formation of **The Sapp Law Firm, LLC**. The office is located at 1923 Third Avenue, South, Jasper. Phone (205) 221-2929.

### Among Firms

**Douglas A. Baymiller** has joined **Warranty Corporation**. Offices are located at One Warranty Plaza, 4400 Government Blvd., Mobile. Phone (251) 660-1901.

**Capell & Howard PC** announces that **Richard H. Allen** and **M. Courtney Williams** have become members of the firm. **Paige R. Jackson** has joined the firm as an associate.

**Copeland, Franco, Screws & Gill PA** announces that **Mitchel Hampton Boles** has become a member of the firm. **Martha Dubina Roby** and **Charles Nelson Gill** have joined the firm as associates.

**Cory, Watson, Crowder & DeGaris** announces that **Jason A. Shamblin** and **Brian D. Turner, Jr.** have joined the firm as associates.

**Emond, Vines, Gorham & Waldrep PC** announces that **Frank O. Hanson, Jr.** has joined the firm.

**First American Title Insurance Company** announces that **Donna J. Snider** has been appointed vice-president.

**Grace & Associates** announces that **L. Ann Grace**, **John W. Evans** and **Jennifer M. Matthews** have become principals in the firm, and **Jeffrey K. Grimes** is now associated with the firm. The firm name has changed to **Grace, Evans & Matthews, Attorneys**.

**Johnston & Coots, LLC** announces the opening of their offices at 1740 Taliaferro Trail, Montgomery. Phone (334) 215-7596.

**Lehr, Middlebrooks, Price & Proctor** announces that **Brett Adair** has become a shareholder in the firm.



**E. Clayton Lowe, Jr., Peter A. Grammas, Brent D. Hitson and John G. Dana** announce the formation of **Lowe, Grammas, Hitson & Dana LLP**, with offices located at 3500 Blue Lake Drive, Suite 209, Birmingham. Phone (205) 380-2400.

**Moore & Trousdale PC** announces that **Ian Michael Berry** and **Christopher Shane James** have joined the firm as associates.

**Ogletree, Deakins, Nash, Smoak & Stewart, PC** announces that **Christopher A. Mixon** has become an associate of the firm.

**Regions Financial Corporation** announces that **R. Alan Deer** has been named chief legal officer and **William M. Phillips, Jr.** has been named vice-president and senior legal officer.

**James V. Roberts, Jr. and Wendy Pierce** announce the formation of

**Roberts & Pierce PC**, with offices at 140 S. Section Street, Fairhope. Phone (251) 928-1499.

**Samford, Denson, Horsley, Pettey, Bridges & Hughes** announces that **Christopher J. Hughes** has become a partner, and **Joshua J. Jackson** has become an associate.

**Sirote & Permutt PC** announces that **Katherine N. Barr, Christopher S. Berdy, Christopher A. Bottcher, Donald E. Johnson, and Peter M. Wright** have become shareholders in the Birmingham office of the firm.

**Smith, Spires & Peddy PC** announces that **Julie W. Jordan** has joined the firm as an associate.

**Virginia R. Smith and Ted Williams, Jr.** announce the formation of **Smith & Williams** with offices located at 104 Second Avenue, West, Oneonta. Phone (205) 625-6333.

**Robert C. Snead, Jr. and Michael E. Gedgoudas** announce the formation of **Snead & Gedgoudas LLC**, with offices at 2 N. 20th Street, Suite 1020, Birmingham. Phone (205) 327-5595.

**Spotswood LLC** announces that **Michael T. Sansbury** has joined the firm as an associate.

**E. B. Strong** announces the formation of **E. B. Strong & Associates PC** with offices at One Perimeter Park, S., Suite 380 South, Birmingham. Phone (205) 970-6868. **Jeffrey M. Chapman** has joined the firm as an associate.

**Phillip A. Stroud and James D. Harper** announce the formation of **Stroud & Harper, PC** with offices at Deerchase Office Park, 5779 Getwell Road, Building D, Suite 5, Southaven, Mississippi. Phone (662) 536-5656. ■

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## Samuel Randall Stephenson

Samuel R. Stephenson, a member of the Mobile, Alabama and American bar associations, died December 7, 2002. He was born July 21, 1928 in Decatur and was a long-time resident of Mobile. He attended the University of Alabama where he obtained a bachelor's degree in ceramics engineering. In 1950, he was drafted into the United States Army, where he remained for a period of two years. For 20 months of his Army career, he was assigned to the Bureau of Standards in Washington, D.C., as a ceramics engineer, making false teeth.

Following his military career, he married Carolyn Bradford. Sam decided he would rather be a lawyer because he liked people and did not want to make false teeth the rest of his life. He attended law school at the University of Alabama, obtaining his degree in 1955. While in law school, he became editor of the *Law Review*, and also was a member of Farrah Order. He was a member of Phi Delta Theta Fraternity.

Shortly after graduation from law school, he and his wife moved to Mobile, where he entered the practice of law, initially with firm of Pillans, Reams, Tappan, Wood & Roberts, and thereafter with the firm of Wilkins, Byrd & Stephenson. He did not particularly like trial work, so in 1963, he was employed by the trust department of the First National Bank of Mobile, where he served until his retirement in 1985.



Sam was an avid golfer and loved the sport of baseball. In his earlier years, he was a member of a group called the "Rowdies," which consisted of about 12 men who played baseball and golf together. Members included Bruiser Castle, Bobby Radcliff and Ross Diamond, Jr., a former member of this association.

Following his retirement in 1985, Sam and Carolyn bought a motor home, and they enjoyed traveling extensively to various parts of the country. They made many trips to Florida to watch professional baseball teams in spring training. They went to Kissimmee, Vero Beach and Orlando, where they were able to watch the Houston Astros, the Atlanta Braves and also the Brooklyn Dodgers. They also went to the College World Series in Omaha, as well as to Michigan, Canada and Colorado with some of their grandchildren.

Sam was a member of the Infant Mystics Mardi Gras Society, Christ Episcopal Church and the Country Club of Mobile.

He is survived by his wife, Carolyn; three daughters, Bess Stephenson Norman, Carolyn Stephenson Jeffers and Margaret Stephenson Troiano; and six grandchildren, Bess Bradford Norman, Samuel Joseph Norman, Richard Lamar Jeffers IV, Samuel Stephenson Jeffers, Elizabeth Bailey Troiano, and Margaret Meador Troiano.

—Michael D. Knight, president,  
Mobile Bar Association



## Daniel Wayne Burns

On October 14, 2002, the Legal Aid Society of Birmingham learned of the death of staff attorney Daniel Wayne Burns, after a lengthy hospitalization. Wayne was born in Birmingham on November 20, 1942 to Velma and Robert Burns. The elder Mr. Burns was a descendant of the famous Scottish poet. Wayne also had two brothers, James Melvin Burns, a Birmingham attorney, and John Luzby Burns, a Tuscaloosa businessman.

Educated at Pratt City Elementary and Ensley High School, Wayne graduated in 1960 and attended the University of Alabama for two years, then transferred to Jacksonville State University, where he met his wife, Janett Maroney. They were married in 1966 and have three adult children, Janelle Burns Monroe, Daniel McKenzie Burns and Jonathan Bradford Burns. He is survived by his wife, mother, two brothers and three children.

After receiving his B. S. degree from Jacksonville State, Wayne worked for the Jefferson County Department of Health as a health inspector for ten years, the latter part of which he attended night classes at Birmingham School of Law and worked during the day. In 1976, he obtained his law degree and opened a part-time solo practice on Lomb Avenue in Ensley. In 1977 he left the health department to practice law full time.

In 1987, Wayne suffered kidney failure and had a kidney transplant. After a three-year recovery, he returned to work for the Legal Aid Society of Birmingham, where he represented indigent defendants at the Birmingham Jail Court docket until 1998 and then children in delinquency and dependency cases at the Bessemer Family Court.

Wayne's individuality was apparent at his funeral, where blues music provided the prelude to remarks by local judges. He will be remembered for his sense of humor, which though frequently not "politically correct" was never mean-spirited and always entertaining. Despite what must have been intense pain and suffering due to his medical condition, Wayne was never known to complain, and his good humor and sense of responsibility for his poor and young clients never wavered. The Birmingham legal community and particularly the Legal Aid Society will long remember Wayne Burns as a loving family man and a caring professional.

*-Martha Jane Patton, executive director,  
Legal Aid Society of Birmingham*

**Baker, James Keaton**  
Helena  
Admitted: 1967  
Died: April 29, 2003

**Bethany, Charles W.**  
Annandale, Virginia  
Admitted: 1948  
Died: March 25, 2003

**Burns, Daniel Wayne**  
Birmingham  
Admitted: 1977  
Died: October 14, 2002

**Franco, Ralph Abraham**  
Montgomery  
Admitted: 1948  
Died: April 6, 2003

**Given, Sam Perry**  
Birmingham  
Admitted: 1949  
Died: October 11, 2002



**Harwell, Ed W.**  
Anniston  
Admitted: 1952  
Died: March 26, 2003

**Holladay, Hugh Edwin, Hon.**  
Pell City  
Admitted: 1950  
Died: April 13, 2003

**Little, Horton H. Sr., Hon.**  
Luverne  
Admitted: 1932  
Died: March 26, 2003

**Riis, Erling Jr.**  
Point Clear  
Admitted: 1953  
Died: March 24, 2003

**Vollmer, Richard W. Jr., Hon.**  
Mobile  
Admitted: 1953  
Died: March 20, 2003



By Robert L. McCurley, Jr.



Robert L. McCurley, Jr.

## 2003 Regular Session

**T**he Regular Session ended June 16, 2003. Before the legislature were the following major revisions that will affect the lives of Alabama citizens and lawyers in their practice: Sentencing Reform; Election Reform; Homeland Security; Landlord and Tenant Laws; Nursing Home Laws; and Constitutional Reform.

When this article was written, the Regular Session was two-thirds over and the legislature had just recessed for a Special Session. At that time only Sunset bills and a special appropriation for prisons had been signed into law. Although the legislature recessed for three weeks, the 105-day session limitation continues, requiring the last possible day for the Regular Session to remain as June 16, 2003.

### First Special Session

Governor Riley asked the legislature to recess from May 19 to June 6, 2003 so that he could call a Special Session to address the financial crises of the state. Governor Riley has asked the legislature to approve funding sources, but will require a special election for public approval, most probably in September 2003. This will necessitate a second Special Session of the legislature to deal with the 2003—2004 budgets.

The results of both the Regular Session and the first Special Session will be chronicled in the next article.

### Alabama Uniform Securities Act

The first state securities law evolved in the 1930s after the events of 1929. A second and third Uniform Securities Act followed in 1956 and 1985. Alabama's most recent securities enactment was in 1990 which revised Alabama's 1959 Act. Both of these acts followed the uniform law.

After Enron, WorldCom and other notorious stock manipulators, it became apparent that changes were needed in both national and state security laws. Congress enacted the Sarbanes-Oxley Act in 2002.

The Alabama Law Institute began its review of the

latest Uniform Securities Act (2002) soon after it was drafted by the National Conference of Commissioners on Uniform State Laws. Montgomery attorney **Mike Waters** is chairing this revision. During our review, Health South made the headlines. This further emphasized the need to update Alabama's laws.

There are two concurrent securities regulating regimes—one at the federal level and the other at the state level.

The states have an important role in securities regulation. There is fraudulent activity at a level that eludes federal law protection, even when federal law applies, and by no means is every security sold a "federal covered security." Many schemes to defraud investors involve locally generated pyramid schemes, misrepresentation and scam sales. Without state regulation, accompanied by civil and criminal enforcement of the law in state courts, there would be little hope of redress for many victimized investors. State enforcement is also available when there are fraudulent schemes involving federal covered securities. In effect, Congress and the SEC have acknowledged that the federal level is unable to cope with all the enforcement that needs to be done.

In 2002, the National Conference of Commissioners on Uniform State Laws approved a new Act for state securities as an effort to give states regulatory and enforcement authority that minimizes duplication of regulatory resources and that blends with federal regulation and enforcement in a more efficient system for investor protection. Uniformity of law among the states is essential for this to happen, but it needs to be a uniform law that coordinates with federal law.

### Registration and Filings

There are three methods for dealing with public offerings of securities under the new Act:

#### (1) Notice Filings.

Notice filing is for certain "federal covered securities." These are securities which by reason of federal preemption are no longer registered at the state level.



The notice filing under the 2002 Uniform Act is for federal covered securities other than listed securities, and includes a consent to service of process, payment of a filing fee, and, depending on the state securities administrator's requirements, can include copies of material filed with the SEC as part of registration there.

(2) Coordination Registration.

Coordination registration at the state level is available for securities that, even though not federal covered securities, are registered with the SEC.

The objective of the coordination is the simultaneous registration of the offering at the SEC and in the states where the offering is to be made.

(3) Qualification Registration.

Qualification registration at the state level applies to all other offerings being made within a state, for which an exemption is not available. These can include intrastate offerings and offerings that are within exemptions from SEC registration because of their relatively small size.

## Broker-Dealers and Investment Advisors

Another area of securities regulation and oversight is that of brokers-dealers and investment advisors, and the individuals who are agents of broker-dealers or issuers or who are investment advisor representatives. This Act systematizes and reorganizes the provisions dealing with these securities professionals and clarifies the federal-state interrelationships to promote efficient coordination of the durability of registration and regulation.

## Enforcement

The third method of securities regulation, of course, is enforcement, against anyone for fraudulent practices in securities trans-

actions and against issuers and securities professionals for failure to comply with the registration regimes applicable to them. The new Act continues the enforcement powers of the state securities regulators. Enforcement includes civil and criminal actions in the courts and administrative proceedings. The new Act authorizes the state securities administrator to issue, under appropriate procedures, cease and desist orders for violations of the Act, and authorizes courts to enforce such orders. Also contained in the Act are authority for conduct of investigations and issuance of subpoenas and provision of assistance to securities regulators in other jurisdictions. The Act also includes civil liability provisions for defrauded persons to obtain damages or rescission with the statute of limitations lengthened to be the same as the federal statute of limitations for securities fraud liability.

This Act is being crafted for Alabama by a Law Institute committee comprised of: Chairman Mike Waters, Montgomery; Ed Ashton, Birmingham; Jerry Bassett, Montgomery; Hamp Boles, Birmingham; Joseph Borg, Montgomery; Carolyn Duncan, Birmingham; Tom Krebs, Birmingham; Othni Lathram, Birmingham; T. Kurt Miller, Birmingham; J. Michael Savage, Birmingham; Bruce McKee, Birmingham; Tommy Mancuso, Montgomery; James North, Birmingham; E. B. Peebles, III, Mobile; Charles Pinckney, Birmingham; James Pruett, Gadsden; Professor Howard Walthall, Birmingham; James Wilson, Jr., Birmingham; and Chris Simmons, Montgomery.

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



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- Arrearage Report

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- CS-47 - Child Support Information Sheet
- CS-41 - Child Support Obligations
- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
- Custody Affidavit
- Wage Withholding Order

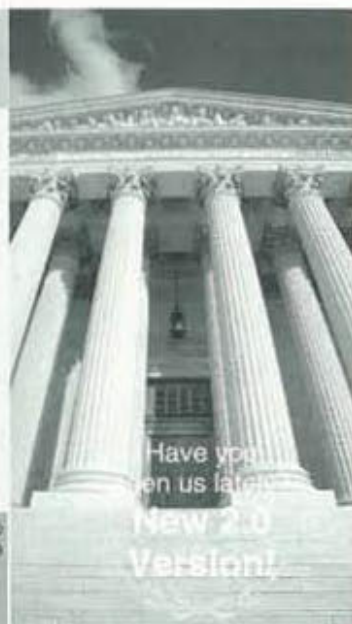
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# Reflections On Ethical Issues

BY RALPH D. COOK







## Civility: Its Decline And a Resolution for Its Restoration

Civility, at its core, is common courtesy. It is the treating of other lawyers and the system of justice with professional courtesy and respect. For almost two decades, civility has become a buzzword in the profession. What has happened over the years to cause us to now openly talk about the way lawyers react to one another as well as how we practice our profession under our ethical and procedural rules? I once thought that if lawyers talked about civility, or the lack thereof, it would be like a confession to the public that there is a decline in the professional status of lawyers. I then began to realize that I was, in fact, far behind the public view of the profession. The public's view was being formed by movies, television, newspapers, other media and, oftentimes, by reports of and about lawyers in trials and other proceedings. The public view, unfortunately, to some extent, is that the profession is in decline. While I also believe that the profession is still looked up to in American society, it is within our domain as practitioners and members of the profession to work toward improving our image. That is why it is important for us to talk about the issues relating to civility and for each of us to do our part, every day, to enhance our profession.

What does incivility do to the profession? As I previously stated, a lack of civility causes a lack of public regard and it can also reduce confidence in the justice system. Additionally, it makes the profession less rewarding. It can take from a lawyer the sense of dignity and self-worth that one should feel from the practice of our learned profession. I have heard from individual lawyers, more than I have wanted to hear, that they are enjoying their practices less and less. Discovery abuses, a lack of truthfulness in relationships, deceit and aggression have been stated as having an impact on the enjoyment of the practice of law. All of these areas encompass the concept and reality of civility.

The reasons for the disregard of common courtesy in the present-day legal profession are many; however, I will give focus to the following: (1) The increase in the size of the bar and therefore increased competition among lawyers for business; and (2) High stakes cases including class actions involving non-social issues and social issues.

### A. Contributing Factors to a Decline in Civility

#### 1. Increase in the size of the Bar and Increased Competition Among Lawyers for Business

The expected increase in United States lawyers within the next three years is almost twice that of other professions at 28 percent. *Out of Court*, [www.EmplawyerNet.com/court/court0502.cfm](http://www.EmplawyerNet.com/court/court0502.cfm). As of December 31, 2001, the current American Bar Association's tally of active lawyers in the State of Alabama is greater than 11,000. American Bar Association, ABA Market Research Dept. (2002). Thus, by 2005, we can expect the number of lawyers to rise above 14,000 in Alabama. As these numbers continue to soar, it is inevitable that the legal profession will continue to see an increase in competition for business that will coincide with the increasing number of active lawyers in the profession. The question remains as to



whether the business will be plentiful for all who seek it. If not, we are likely to feel the effects of the law of supply and demand. But has this competition come about at the expense of civility in the legal profession?

During my tenure as a circuit judge, when I handled civil cases exclusively, I had, by most accounts, a substantial docket. It was so busy that I would set aside a day or two each month to handle motions. A large number of lawyers were required to be in attendance for their motions. An unintended consequence was that it gave lawyers the opportunity to meet and greet. Lawyers had the opportunity to see each other and socialize during those docket calls. I encouraged the lawyers to talk about their cases and to attempt to resolve their disputes. Many of them did. I made conference rooms and the jury room available for lawyers to meet. Over the years, I heard many favorable comments that it gave members of the bar the opportunity to interact. When lawyers have good personal relationships with one another it becomes more difficult for a lack of professionalism to rear its ugly head.

Are we now facing a situation where bar associations are so large that individual members rarely familiarize themselves with one another? In some of the metropolitan areas in Alabama, I suspect that might be the case. Additionally, it is becoming more difficult to teach and cultivate civility in individual law firms because lawyers are focusing on billing hours versus getting acquainted with their colleagues. Sometimes lawyers within fairly large firms do not know each other. But, should our establishing acquaintances conflict with the responsibilities that we have as lawyers?

I don't believe that it should. Our interaction as colleagues and as professionals is a part of our role as lawyers. The point of reference for this can be found in the first Code of Conduct adopted in Alabama in 1887. N. Lee Cooper and Stephen F. Humphreys, "Beyond the Rules: Lawyer Image and the Scope of Professionalism," 26 *Cumb. L. Rev.* 923, 926-928 (1995/1996) (discussing the development of Alabama's first Code of Conduct in 1887). The first Code stated: "The purity and efficiency of judicial administration . . . depend . . . on the character, conduct, and demeanor of attorneys." *Id.* (omissions original). Character, conduct and demeanor are refined through our day-to-day interaction; therefore, the way in which we litigate our cases or negotiate deals are opportunities to exemplify civility in the legal profession. Competition is acceptable, but only so long as it is healthy competition that preserves the integrity of our profession, and it is grounded in civility.

It has been said that lawyers today are perceived as being "less interested in justice and more interested in winning at all costs." Paul J. Kelly, Jr., *A Return to Professionalism*, 66 *Fordham L. Rev.* 2091, 2092 (1998). This external perception, in part, has to do with the manner in which lawyers interact with each other. Perhaps, the increasing commercial direction has weighed heavily on the reputation of the profession. It is likely that the "winning at all costs" mentality has fostered to some extent the present-day environment of incivility among lawyers.

Unfortunately, abusive rhetoric, making personal attacks and overreaching is on the rise in the profession. Adversarial excess is being seen in both oral and written advocacy. In civil litigation, the term "Rambo Litigator" has been used to describe abu-

sive rhetoric and adversarial excess. The term describes the behavior where there is a "need to fight about everything" and where abusive tactics are utilized to achieve goals. It turns lawyers against each other in the courtroom and results in a decline in civility in the bar. In *Dondi Properties Corp. v. Commerce Savings and Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988), the judges of the United States District Court for the Northern District of Texas, sitting *en banc*, responding to the use of abusive tactics in their courtrooms, created a code of civility for litigators appearing in their district. The policy states: "Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them." This code has inspired other jurisdictions facing similar problems of incivility to likewise address the problem by adopting similar codes. I discuss this area in greater detail later.

An example of stepping beyond ethical bounds in written appellate advocacy appears in the *per curiam* opinion overruling the second application for rehearing in *Prudential Ballard Realty Company v. Weatherly*, 792 So.2d 1045, 1060 (Ala. 2000). On original submission, the Supreme Court of Alabama reversed a jury verdict in favor of the plaintiff and remanded the case for a new trial. Plaintiff's attorney filed an application for rehearing submitting meritorious grounds resulting in a withdrawal of the original opinion and the issuing of an opinion affirming the judgment for the plaintiff. However, plaintiff's counsel did not stop with his meritorious argument. He accused members of the court of selling decisions to the highest bidder. The opinion details the offending conduct and cites the behavior as unprofessional. See also the dissenting opinion of Chief Justice Hooper at page 1067 citing a vio-





lation of Rule 3.5(c) of the Rules of Professional Conduct by engaging "in conduct intended to disrupt a tribunal," a violation of Rule 8.2(a) by making statements "with reckless disregard as to [their] truth or falsity concerning the qualifications or integrity" of the members of the court based on the insinuation in the brief that the court's vote can be bought by special-interest dollars. The Chief Justice went on to state, "[h]is derogatory comments made about and to this Court might imply to the public that this Court changed its opinion as to his clients' case and ruled in their favor upon rehearing because of fear of exposure and not based on the law and the facts of this case. Therefore, he violated Rule 8.4(d) by engaging 'in conduct that is prejudicial to the administration of justice.' His explicit remarks in his brief suggesting that our decisions are made in terms of campaign contributions imply that the rich and powerful have an ability to improperly influence Justices in their roles as government officials and therefore violate Rule 8.4(e). These expressions of contempt, threat and intimidation made when he filed his clients' application for rehearing violate Rule 8.4(g), because by making these expressions he has engaged in conduct that adversely reflects upon his fitness to practice law. Not only do his actions cause me to question his maturity to practice law before this Court, but it is exactly this kind of juvenile behavior that reflects poorly on our entire profession."

Let's turn to examine civility in the realm of high stakes cases.

## 2. High stakes cases

Model Rule 3.2 encourages expedited litigation. The comparative Model Code Disciplinary Rule likewise advises against delay when "such . . . would serve merely to harass or maliciously injure another." DR7-102(A)(1). Discovery is viewed as the area that is considered to be the "catalyst" for much of the incivility occurring in the legal profession. See Raymond M. Ripple, "Learning Outside the Fire: The Need for Civility Instruction in Law School," 15 ND L.J. *Ethics & Public Policy* 359, 362-363 (2001). Unnecessarily long depositions, argumentative counsel during depositions, withholding of documents, avoidance of interrogatory answers, scheduling discovery at inopportune times, canceling discovery without notice to the opposing party, and other "stonewalling" tactics so as to delay discovery and, thus, delay litigation are behavior examples that are beyond the pale of civility. See *id.* at 363.

It has been my experience that discovery disputes rarely occur outside of high stakes cases. The examples illustrated appear to occur more consistently with the elevated claim for damages.

Discovery under the federal rules and most states, including Alabama, rests on a theme of broad full disclosure. The theory underlining broad disclosure is that if both parties are obliged to turn over their important information prior to trial, the parties will be in a better position to negotiate toward settlement of the case. However, this theme of open discovery is where the most frequent adversarial encounters occur between counsel and their clients. The aspect of discovery fostering the most incivility between opposing counsel is the deposition.

Over the years, I have had lawyers tell me that during depositions lawyers become unnecessarily argumentative, that on occasion threats of violence are made by one lawyer toward another, that clients are instructed not to answer questions without a good faith legal basis and even the abrupt termination of depositions can occur. Of course, conduct as I have described flies in the face of the purpose of the deposition process, that is, to obtain facts and information from the opposing side. Uncivil behavior therefore erodes the effectiveness of depositions.

Although other discovery processes may not be as confrontational as can occur during a deposition, uncivil behavior can and does occur in other forms of discovery, such as misrepresentations by lawyers in responding or not responding to document requests, not returning phone calls and scheduling discovery so as to frustrate and inconvenience the other party.

In response to this conduct, many courts are adopting civility codes to address the problem. In a 1995-1996 *Cumberland Law Review* article, it was reported that 88 jurisdictions have adopted codes of civility. N. Lee Cooper and Stephen F. Humphreys, "Beyond the Rules: Lawyer Image and the Scope of Professionalism," 26 *Cumb. L. Rev.* 923, 935 (1995/1996). The Seventh Judicial Circuit, the first federal court circuit to adopt a code of civility, cited an example in which a lawyer holding a deposition in his office failed to produce requested documents, violated Rule 30(c) of the Federal Rules of Civil Procedure, ignored a court order, and threatened opposing counsel with violence if he attempted to telephone the judge, even though there was a prior agreed-upon procedure to call the judge in discovery disputes. *Id.* at 934.

## Mini-Grants for Conflict Prevention, Management and Resolution

The Alabama Supreme Court Commission on Dispute Resolution, through the Center for Dispute Resolution, provides annual mini-grants to promote conflict prevention, management and resolution in both local and state programs. To be eligible, organizations must be nonprofit, and file an application by October 1, 2003.

For example, mini-grants can be used for court related programs (i.e., small claims mediation using trained volunteer mediators, probate court programs, access and visitation/support programs), school peer mediation training, community mediation, ombuds programs, municipality/city dispute resolution training and programs, state and local agency training and programs, law school clinic programs, victim/offender conferencing, or to duplicate an existing program in your jurisdiction.

For more information and a grant application, please call the Center at (334) 269-0409.



Prior to adopting their civility code, the Committee on Civility appointed by the Seventh Judicial Circuit compiled survey responses of over 1,500 lawyers and judges within its jurisdiction. These survey responses revealed that out of the attorneys who perceived civility to be a problem, 94 percent viewed depositions and the discovery process as the catalyst for the lack of civility. As noted earlier, incivility is not limited to depositions. It is not uncommon for documents to be withheld and interrogatory answers to be candidly avoided. One Texas lawyer commented during the process where the Texas Rules of Civil Procedure was amended to curtail discovery abuses: "[t]he norm is that one generally responds as narrowly as possible. You keep stonewalling and reply as narrowly as possible. You don't volunteer anything in the hope that they'll wear down." See Raymond M. Ripple, "Learning Outside the Fire: The Need for Civility Instruction in Law School," 15 ND L.J. *Ethics & Public Policy* 359, 362-363 (2001).

## B. A Resolution for Restoring Civility in the Legal Profession

While the number of lawyers admitted to the bar is rapidly increasing, the inevitable competition for clients does not have to come at the cost of lowering the esteem of the legal profession. Whether we are advocating social change or private disputes, civility among lawyers and civility toward our clients must remain intact.

While we can, and must, openly discuss the issues of civility, that does not mean that the legal profession and the system of justice is in a declining spiral. The profession and the system of justice are strong. Improvement in civility will enhance public perception, as well as restore some of the lost enjoyment to practicing members of the profession.

It is incumbent upon us, as practicing members of the bar, to be aware of issues relating to civility and to resolve in our daily activities to do our part to make our profession better. Just as a journey starts with the first step, improving the perception and reality of improved relationships among lawyers begins with the resolve of each of us to take a step toward improving civility.

Let us now briefly examine some ethical issues that could appear in complex litigation: (1) ethical dilemmas of plaintiff's counsel in contacting current and former employees of a corporate defendant; (2) ethical restraints on entering into agreements that restricts the practice of law; (3) sealed settlements; and (4) destroying documents and inadvertent disclosures.

# Ethical Considerations of Plaintiff's Counsel When Contacting Current and Former Employees of a Corporate Defendant

What do you do when you have this wonderful case with which you expect to earn this great fee that will allow you to retire, but you need to talk with current or former employees of

the defendant to prove your case? Of course, you would like to have these conversations without opposing counsel being aware of your actions. Should your case not settle, what a great surprise it would be to offer the testimony of the current or former employees at trial. We will briefly examine the Rules of Professional Conduct applicable to this dilemma.

Rule 4.2 of the *Alabama Rules of Professional Conduct* provides:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Rule 4.3 of the *Alabama Rules of Professional Conduct* states as follows:

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

Note that the rule provides that the waiver of the "no contact" provision belongs to the other lawyer. In addition, the Comment to the Alabama rules defines three categories of employees with whom a lawyer adverse to the employer should not contact *ex parte*: (1) an employee who has managerial responsibility; (2) an employee whose acts or omissions are relevant to the employer's liability, either civil or criminal; and, (3) an employee whose statement may constitute an admission on the part of the employer.

It is clear under the Alabama rule that managerial employees are represented parties; however, it is less clear for other employees. The underlying facts relating to the employee's acts or omissions or status would seem to be determinative. A further complicating question is whether the Rules of Evidence should be applied in interpreting the Rules of Conduct's definition of "employee." See George B. Wyeth, *Talking to the Other Side's Employees and Ex-Employees*, *ABA Journal of Litigation*, Vol. 15, No. 4 (Sum. 1989). Because the Rules of Evidence designate certain statements by employees as admissions, it is critical to know whose statements plaintiff's counsel is seeking. The evidentiary matter, however, appears to be a concern only for current employees, not former employees.

Therefore, under the Alabama rules, the only current employees with whom plaintiff's counsel could speak to without authorization from opposing counsel would be: (1) one who lacks managerial authority; (2) has not participated in the acts subject of the litigation; and, "(3) cannot make an admission." Scott Donaldson, "Ex Parte Interviews with Corporate Party Employees: An Overview," *The Alabama Lawyer* 312, 313 (Sept. 1992). Because this prototype, so to speak, is quite limiting, the risk is great for ethical violations in this situation. In the event any uncertainty exists, alleviating an ethical violation would require consulting opposing counsel before speaking to a current employee. See *supra*, Donaldson, at 315.

In the alternative, questions could be propounded to the corporate defendant requesting the names of employees who are able to speak to plaintiff's counsel. See *id.* at 316. In doing so,





While evidentiary questions regarding admissions do not exist, plaintiff's counsel can still run afoul of ethical restraints in communications with former employees. An ethical pitfall can exist when contacting an unrepresented party. Because the person is no longer employed by the corporate defendant, the former employee is not represented by defendant's counsel. Former employees are likely not to be represented at all when plaintiff's counsel seeks out communications with them. Thus, Rule 4.3 of the Rules of Professional Conduct provides guidance, because the rule explicitly prohibits counsel from presenting himself as disinterested when dealing with unrepresented parties. The rule places on plaintiff's counsel the responsibility, if the former employee does not understand the role of plaintiff's counsel, to correct the misunderstanding, if the lawyer knows or reasonably should know of the misunderstanding of the former employee. Not only must plaintiff's counsel be cautious not to appear disinterested if the former employee is unrepresented, but also plaintiff's counsel must not induce the former employee to divulge privileged information.

## Agreements Restricting the Practice of Law

You are plaintiffs' counsel in a 10,000-member class/collective action where the potential class constitutes some 20,000 members. This is an opt-in action with class action attributes, but more accurately described as a collective action. There is some question as to whether the statute of limitations has expired. At most, there is another year if plaintiffs are correct that the statute has not expired. The defendant has advanced sound argument that the statute has expired, but you feel that you have a good chance to get your better argument accepted by the court. If so, you will have the opportunity to attempt to get the additional 10,000 potential plaintiffs into this or another lawsuit. The defendant, however, has proposed an offer to you to settle the litigation for 50 million dollars. This amount of money will more than compensate your clients for the damages they have sustained, as well as provide a handsome fee. The defendant, being aware of the issue relating to the statute of limitations, rather than waiting for the statute to expire, for tax reasons wants to settle the case in this calendar year. The defendant is also aware of the expertise you have acquired during this litigation and does not want to face you again representing the other potential 10,000 plaintiffs. In order to accomplish its objectives, the defendant, as part of its willingness to pay in excess of money necessary to make plaintiffs whole, wants an agreement from plaintiffs' counsel as part of the consideration for settlement that plaintiffs' counsel will not bring additional litigation against the defendant for a period of two years from the settlement. Can plaintiffs' counsel ethically enter into the agreement?

Rule 5.6 of the *Alabama Rules of Professional Responsibility* addresses this situation:

"A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the right of a lawyer to practice after ter-

plaintiff's counsel appropriately uses discovery to "shift the burden away from the requesting party" to the corporate defendant for compliance with the rules of ethics. *See id.*

Resolving questions relating to former employees do not present as much difficulty. In RO-92-12, the Alabama Disciplinary Commission opined that a strong argument could be made that Rule 4.2 does not apply to a former employee, at any level, reasoning that a former employee could not speak for the corporation. This determination was reconfirmed in RO-93-05 again stating that former employees were no longer in a position of authority, and, thus, not able to bind the corporation.

The American Bar Association, in addressing this matter, has also refused to extend Rule 4.2 to cover former employees. *See* Cynthia A. Coe, "Communicating with an Adversary's Former Employees," *The Practical Litigator* 37-48 (1996) (discussing Formal Opinion 91-359). The ABA interpretation represents the majority view.

# THANKS

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mination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

The rule, therefore, prevents plaintiffs' counsel from entering into a settlement agreement that would restrict the right to practice law. In other words, in the hypothetical provided, plaintiffs' counsel could not, as part of the settlement, agree that for a period of two years additional litigation would not be brought. Note, however, under Rule 5.6, not only is plaintiffs' counsel barred from making an agreement not to bring suit, counsel for the defendant is prohibited from proposing or offering to make an agreement that would restrict the right of the plaintiffs' lawyer from practicing law.

## Sealed Settlements

Under the facts of the settlement previously discussed, the defendant additionally, as a condition of settlement, wants the settlement to be confidential and wants all court records to be sealed. Can you agree to jointly request that the records be sealed and expect that the court will seal the records?

In South Carolina, the state's ten federal judges, in late July of this year, voted unanimously to stop the practice in all cases. I suspect that the practice, in the absence of opposition, varies from circuit to circuit across Alabama. In the latter part of my tenure as a circuit judge, I stopped approving requests to seal records of the court unless there was some compelling reason, such as maintaining trade secrets, protection of a juvenile or instances where secrecy was protected by statute or otherwise protected by law. I did so simply because court records are public. In many instances, requests to seal records come in cases involving products liability. There is a strong and compelling view, in my judgment, that the public has a right to know about issues involving public safety.

The proposed rule change would amend South Carolina's Federal Civil Procedure Local Rule 5.03 following a public comment period. Only Florida and Texas have similar bans, and only at the state level. The South Carolina Supreme Court scheduled the issue for review at its judicial conference in August of this year with any proposed rule changes to be submitted to the state legislature. The South Carolina Supreme Court relies on its decision in *Davis v. Jennings*, 304 S.C. 502 (1991), to handle requests for sealed settlements. That ruling held that the trial court must hold a hearing in response to such requests and balance the public's right to access against countervailing interests such as harm to the parties from disclosure.

Similarly, the Supreme Court of Alabama has addressed the issue. In *Holland v. Eads*, 614 So.2d 1012 (Ala. 1993), the Supreme Court of Alabama was faced with deciding whether a third party should be allowed to intervene to unseal a previously sealed record. The court set out the general rule that allows public inspection of judicial records and then held if a motion to seal is filed, the trial court should conduct a hearing and should not seal court records except upon a written finding that the moving party has proved by clear and convincing evidence that the record should be sealed. The court set forth six criteria to guide the process:

1. The information constitutes a trade secret or other confidential commercial research or information;
2. The information is a matter of national security;
3. The material sought to be sealed promotes scandal or defamation;
4. The material pertains to wholly private family matters, such as divorce, child custody, or adoption;
5. The information poses a threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or
6. The material poses the potential for harm to third persons not parties to the litigation.

Having a bright-line test takes the issue off of the table and should have little or no effect on settlements. These rulings will not affect private settlement agreements that are not filed in court. In most instances, parties normally file a stipulation of dismissal and the settlement documents are not filed in court. There are only a limited number of cases under Alabama law, such as a settlement involving a minor, that must be approved by the court.

## Destroying Documents and Inadvertent Disclosures

In the aftermath of Enron, what do you do if your client calls and wants to know if certain documents can be destroyed? Any such inquiry should raise a red flag.

Rule 3.4 (a) of the *Alabama Rules of Professional Responsibility* provides.

"A lawyer shall not:

"(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]"

A counter inquiry to the client should be made to determine if the client has developed a timetable for destroying documents for space considerations and if the timetable is being strictly complied with. If so, any destruction of documents outside of the timetable will appear suspect. Another inquiry is whether there is an ongoing or pending investigation. If there is potential litigation, there is the question of how it would look to the other side or to the jury if there is litigation and a trial. Even if the records are scheduled for routing destruction, we have learned from Enron that if there is an investigation pending and the lawyer knows that the records are or could be relevant to the investigation, there is the possibility of being charged with obstruction of justice if the records are destroyed.

Additionally, although not an ethical consideration, evidence destruction runs head-on into the rules regarding spoliation, which allows for an inference of guilt or negligence or the basis for a separate action grounded in negligence. See *May v. Moore*, 424 So.2d 596,603 (Ala. 1982); *Alabama Power Co. v. Murray*,



751 So.2d 494, 497 (Ala. 1999) and *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000).

What happens when a party discovers that documents that are privileged have been inadvertently disclosed? Has the privileged been waived by the disclosure or is the other party restricted from being able to use the evidence disclosed in the trial? Two recent rulings highlight the differing approaches jurisdictions take. An article from the October 25, 2002 edition of the *ABA Journal E-Report* discusses the approaches.

"In *Elkton Care Center Associates LP v. Quality Care Management Inc.*, 805 A.2d 1177 (2002), Maryland's Court of Special Appeals adopted an intermediate fact-specific test for determining whether the attorney-client privilege has been waived by inadvertent disclosure. Other jurisdictions, though, have applied strict or lenient tests.

"While this wrongful termination case was in discovery, a lawyer for the plaintiff reviewed a box of documents from the defendant's counsel. The plaintiff's lawyer was to identify the documents to be copied. Accidentally included was a memorandum from a lawyer to the defendant firm's president, who had retained the lawyer to determine available defenses for a wrongful termination lawsuit. Although the memo was marked as privileged, plaintiffs counsel marked it for copying, and a copy was forwarded to plaintiffs counsel along with copies of other selected documents. The defendant later conceded that plaintiffs counsel did nothing improper or unethical in tabbing the memorandum.

"After losing in the lower court, the defendant sought a new trial on the ground that the memo was privileged and should not have been used at trial. In assessing the merits of the appeal, the court identified three basic approaches to resolving such cases. Under Wigmore's strict test, an inadvertent disclosure always constitutes a waiver. At the other end of the spectrum is the lenient test, under which the lawyer's negligence cannot waive the privilege because the client, not the attorney, holds the privilege.

"The court rejected both of these approaches, saying that the strict test prevents the use of pretrial remedies that would preserve the privilege without causing unfair prejudice, and that the lenient test does not provide any incentive for attorneys to take adequate steps to protect privileged documents.

"In adopting its intermediate approach, the court stated that five factors should be considered:

"The reasonableness of the precautions taken to prevent inadvertent disclosure.

"The number of inadvertent disclosures.

"The extent of the disclosure.

"Any delay and measures taken to rectify the disclosures.

"Whether the overriding interests of justice would be served by relieving the party of its error.

"After applying its intermediate test, the court concluded all the factors strongly favored a finding of waiver.

"The ethics panel of the New York County Lawyers' Association reached a different conclusion on how to handle inadvertent disclosures in its opinion, *New York County Lawyers' Association Committee on Professional Ethics*, Op. 730 (July 19, 2002). The opinion says that if a lawyer receives information containing confidences that apparently were not

intended for the lawyer, that lawyer should refrain from reviewing the information, notify the sender and comply with the sender's instructions on return or disposal of the information.

"The panel found that a near majority of states have no ethics opinions on inadvertent disclosure. Moreover, there exists a lack of uniformity among bar associations that have considered the issue. ABA Formal Ethics Op. 92-368, which advises lawyers not to review inadvertently disclosed materials and instead to contact the sender for instruction, remains the leading authority on the question, the panel said, but it is not uniformly followed by state and local bars.

"The ethical obligation to preserve client confidences and secrets is the *sine qua non* of the attorney-client relationship, and lawyers, therefore, have a responsibility to protect not only their own clients' confidences, but also those of other lawyers' clients, the panel reasoned.

"The panel disagreed with critics who argue that this lenient view lacks textual support in the Model Rules. That argument incorrectly implies that a lawyer has no ethical obligations except as expressly set forth in the applicable code, the panel said."

I was not able to find an Alabama case where the issue was addressed from an ethical perspective. The Supreme Court of Alabama in *Bettis v. Marshall*, 549 So.2d 23 (Ala.1989), summarily denied writs of mandamus in a case where a letter from attorneys representing the defendants was inadvertently disclosed. A dissent with two concurrences suggested that the letter was work product and protected by Rule 26(b)(3) A.R.Civ.P., and thus, the mandamus petitions should have been granted.

## Conclusion

The decline in civility and ethical conflicts must be given priority in the legal profession. For the sake of the reputation of our profession, good lawyering must be centered on both civility and strong ethics. We must exhibit civility toward each other and, at the same time, display strong ethics in representing our clients. Although our system of jurisprudence is adversarial, our mission must be two-fold: winning the case and winning public opinion based on the manner in which we handle our cases.

The preamble to the Model Rules of Professional Responsibility states that, "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Preamble, Scope, and Terminology, *ABA Model Rules of Professional Responsibility* (West 2001). Our actions, therefore, require that we act with the highest moral obligations so as not to offend the quality of justice nor lower the esteem of the profession. ■



**Hon. Ralph D. Cook**

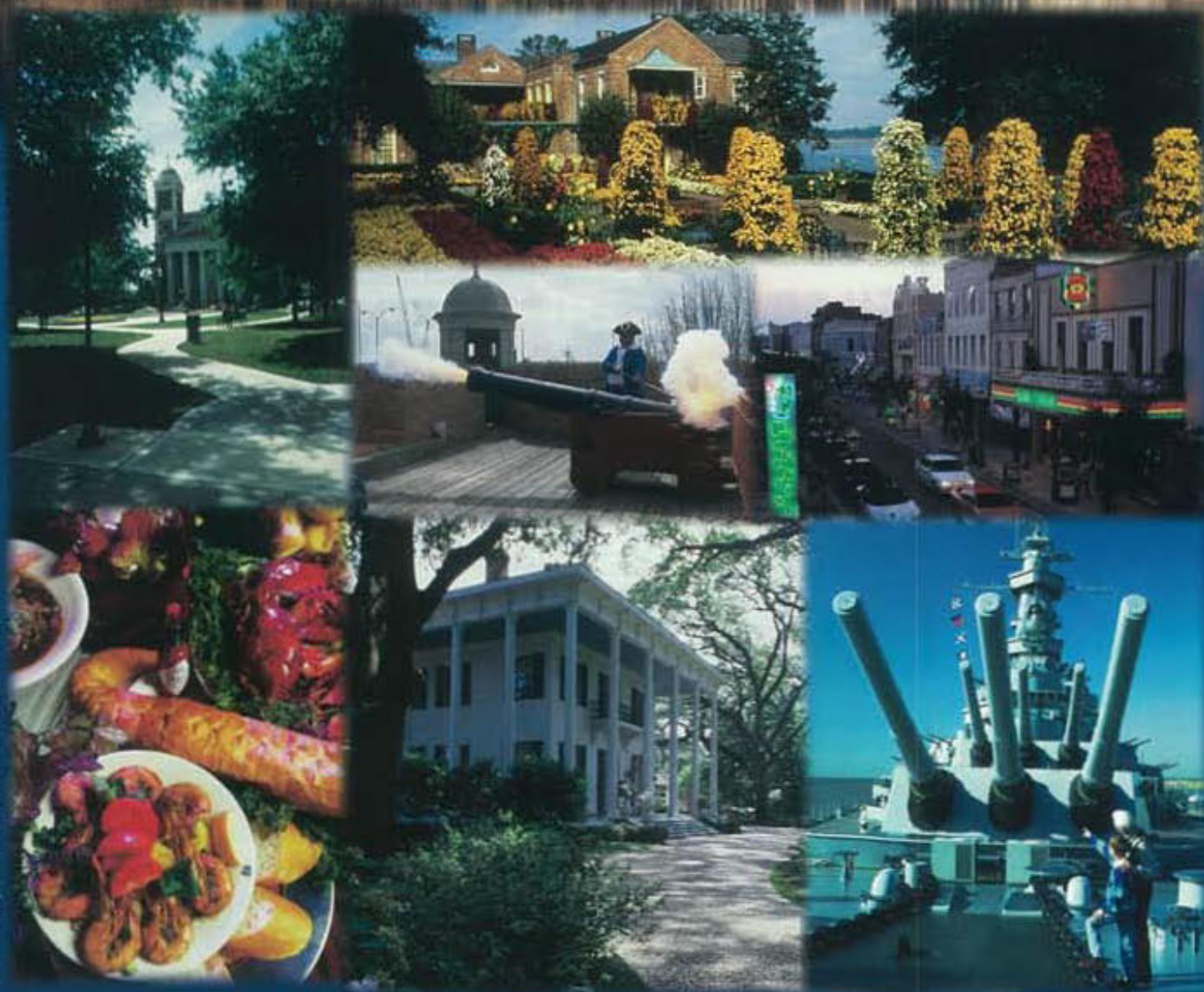
The Hon. Ralph D. Cook has served as a district court judge and circuit court judge, in addition to being appointed an associate justice of the Supreme Court of Alabama in November 1993. He served on the supreme court until January 2001 and now practices with the Birmingham firm of Hare, Wynn, Newell & Newton. Prior to that, Justice Cook served as dean of Miles Law School and as a law professor. He is a graduate of Tennessee State University and Howard University School of Law.



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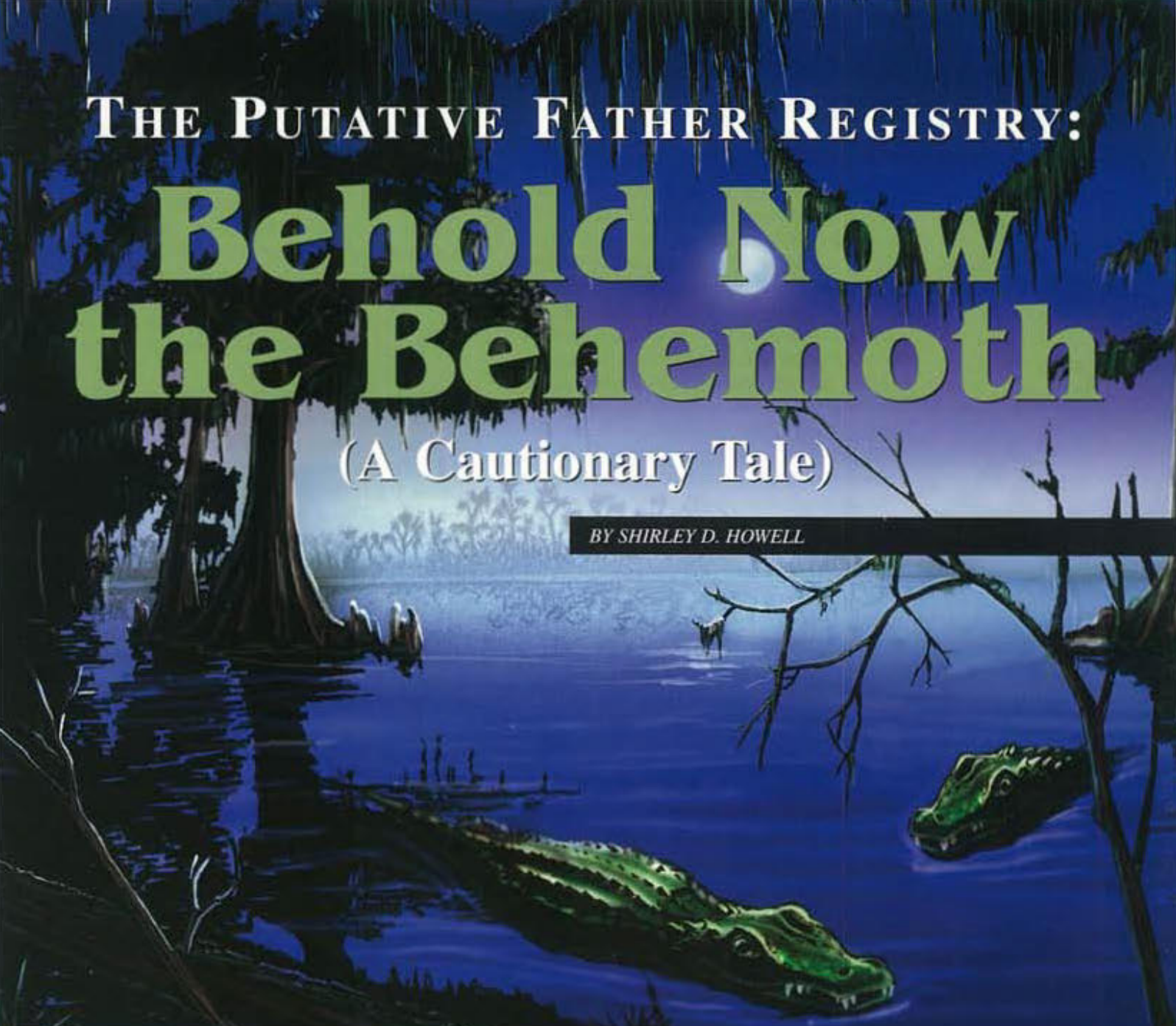
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**THE PUTATIVE FATHER REGISTRY:**  
**Behold Now  
the Behemoth**

*(A Cautionary Tale)*

BY SHIRLEY D. HOWELL

*Look at the behemoth...*

*What strength  
he has in his loins,*

*What power in  
the muscles of his belly!*

*Under the lotus plants he lies,*

*Hidden among the reeds  
in the marsh!*

## **Introduction**

Six years after its enactment, Alabama's Putative Father Registry Act still lurks inconspicuously in the pocket part of Volume 15A of the *Code of Alabama*, 1975, a very muscular and daunting behemoth waiting for the unwary.<sup>2</sup> The Act contains a stunning 30-day statute of limitations that can swiftly extinguish the right of an unwed father to oppose the adoption of his child.<sup>3</sup> While the advent of the registry was not publicized in Alabama, other sister states engaged in vigorous and extensive efforts to educate the public and promote awareness of their new registry requirements.<sup>4</sup> In stark contrast, Alabama's registry passed quietly into the body of laws where it has become a monolithic nightmare for attorneys who have unwittingly run afoul of it.





## An Overview of the Putative Father Registry Act

In January 1997, the legislature of Alabama enacted the Putative Father Registry Act. In doing so, Alabama joined a growing number of states that had enacted similar statutes.<sup>3</sup> It might well be surmised that the outcropping of statutes similar to Alabama's was in reaction to the "Baby Jessica" case.<sup>4</sup> An entire nation was moved as it watched the adoption debacle that resulted in the crying toddler being removed from her adoptive parents to be returned to a father she did not know. Robert Andersen, M.D., may have captured the public mood best in his haunting autobiography, *Second Choice: Growing Up Adopted*, when he stated, "The public tends to glorify adoption in mass empathy with childless couples, seeing it as a lucky break for the infants."<sup>5</sup> If Andersen is correct about the public's sentiment regarding adoption, it is not surprising that many states, including Alabama, began searching for a means to prevent a repetition of Baby Jessica's failed adoption.

Alabama's Putative Father Registry Act is worrisome, however, because it is *not* found where one would expect to find it within the *Adoption Code*. It is found in a pocket part of the *Code* at §26-10C-1 *et seq.* It is easily overlooked. In pertinent part, the Act begins benignly by providing that the Department of Human Resources shall establish a registry wherein a putative father may file his notice of intent to claim paternity.<sup>6</sup> The statute then provides that a putative father who timely and correctly files with the registry shall be given notice of the pendency of any adoption proceedings concerning the designated child.<sup>7</sup> In an overtly protective measure, the statute criminalizes "a knowing or intentional release of confidential information from the registry."<sup>8</sup> The Act then provides for the strict time limitation:

Any person who claims to be the natural father of a child and fails to file his notice of intent to claim paternity pursuant to subsection (a) prior to or within 30 days of the birth of a child born out of wedlock, shall be deemed to have given an *irrevocable implied consent in any adoption proceeding*.<sup>9</sup>

The statute contains no escape clause or savings provision for the unwed father who fails for any reason to file with the registry on or before his

child's 30th day of life. The Act makes no allowance for an unwed father who does not know of his fatherhood until the time for filing has already expired, nor for the unwed father who is out of the country engaged in military service, nor for the man who has been actively deceived by the mother's misrepresentation that she lost the baby. In short, the Act has a mechanical-jaws effect that has already precluded several unwed fathers in Alabama from contesting the adoption of their children. Those adoptions proceeded solely upon the consent of the mother since the father's consent had become *irrevocably statutorily implied* by his failure to sign registry.

On April 17, 2002, Alabama's legislature solidified its intent that there be no exceptions to the 30-day filing requirement by promulgating Act 2002-417.<sup>12</sup> This amendment leaves nothing to the imagination. It provides unambiguously that timely filing with the registry is the *exclusive* method whereby an unwed father can manifest his intent to claim paternity of his child and gain standing to contest an adoption of his child. Yet, a number of significant questions remain unanswered regarding an unwed father's rights to his offspring. The most compelling question is whether a strict application of the 30-day limitation period would be constitutional in every factual setting. While the United States Supreme Court has not answered the question *per se*, the Court began analyzing the periphery of the problematic issue of constitutional protection for the rights of unwed fathers in 1972. A close review of the development of the United States Supreme Court case law is indispensable for an attorney representing an unwed father who has failed to file with the registry, for there is no argument left for such a client except one challenging the constitutionality of the registry as applied.

## United States Supreme Court Case Law: 1972-1983

### (The Four Pillars)

Prior to 1972, there was a conspicuous absence of Supreme Court cases that specifically addressed the rights of unwed fathers with respect to their offspring. Between 1972 and 1983, the United States Supreme Court handed down four landmark decisions that provide the framework for lower courts to use in determining the rights of unwed fathers relative to adoption proceedings involving their chil-



dren. An attorney cannot responsibly address the issues pertinent to unwed fathers without possessing an in-depth command of these cases.

## 1. 1972: *Stanley v. Illinois*

### (An Unwed Father Challenges the Presumption of His Unfitness)

In *Stanley v. Illinois*<sup>13</sup>, an unwed father challenged the constitutionality of an Illinois statute that created an irrebuttable or conclusive presumption that unwed fathers were unfit parents and, hence, could not be heard in opposition to the adoption of their children. Stanley, though not an exemplary father, had in fact parented his children and had lived with his children's mother on and off again for 18 years. Upon the death of the mother, his children automatically became immediate wards of the state and were eligible to be adopted. Because of the existing statutory presumption of his unfitness, Stanley was denied the opportunity to be heard. Stanley appealed, contending that the statute violated the Due Process Clause as well as the Equal Protection Clause. The United States Supreme Court found evidence in the record that Stanley had exercised *de facto* custody of his children though his paternity had never been recognized by the state of Illinois. In view of Stanley's *de facto* custody, the Supreme Court held that the Due Process Clause was violated by the presumption of his unfitness.<sup>14</sup> The Supreme Court concluded that "denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."<sup>15</sup>

It is useful to note that the Court focused throughout upon Stanley's actual custodial relationship with his children, not upon his biological link to the children. That focus would receive further analysis in 1978.

## 2. 1978: *Quilloin v. Walcott*

### (The Best Interest of the Child Supersedes a Father's Opportunity Interest)

In *Quilloin v. Walcott*<sup>16</sup>, an unwed father challenged the constitutionality of the Georgia statute which required an unwed father to legitimate his offspring in order to gain standing to oppose an adoption of his child.<sup>17</sup> Under the Georgia statute, an unwed father could legitimate his child either by marrying the mother and acknowledging the child as his own or by obtaining a court order declaring the child to be his own. Quilloin had failed to legitimate his child by either method. Only when the mother instituted proceedings to

allow her child's stepfather to adopt the child did Quilloin petition to legitimate his child. The trial court denied the legitimation petition and finalized the adoption, opining that "the best interests of the child"<sup>18</sup> dictated the result. Quilloin appealed, claiming an unconstitutional deprivation of Due Process and asserting that the Georgia statute violated the Equal Protection Clause by its disparate treatment of married and unmarried fathers. The United States Supreme Court gave short shrift to Quilloin's deprivation of due process contention. The Court focused upon the fact that Quilloin had never been a *de facto* parent to his child, holding, instead, that the countervailing interests of the child superseded any inchoate opportunity interest Quilloin might have had in his child.<sup>19</sup> Quilloin's Equal Protection Clause argument failed as well. The Court drew a sharp legal distinction between a married father and an unmarried one: A married father had legal custody of his child during the marriage whether he had served the office of fatherhood well or not. An unwed father such as Quilloin could claim neither *de facto* parenthood nor legal custody. In short, the Court held that an unwed father failing to accept significant responsibility for parenting his child forfeits constitutional protections for his parental status.


It is particularly striking to note that the mother made the argument that any constitutionally protected interest Quilloin might have had was automatically foreclosed by his technical failure in not legitimating his child prior to the institution of the adoption proceedings. The court *in dicta* made a portentous statement in response to that argument: "We would hesitate to rest decision on this ground, in light of the evidence in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed."<sup>20</sup> The United States Supreme Court quoted from the record with apparent sympathy the following excerpt:

Q... Had you made any effort prior to this time [prior to the instant proceedings], during the 11 years of Darrell's life to legitimate him?

A... I didn't know that was process even you went through. [sic].<sup>21</sup>

The Court did not have to reach the very delicate question of Quilloin's ignorance of the law because the Court found that Quilloin had not maintained a significant relationship with his child. The unanswered question that could not be





addressed in *Quilloin* was whether an unwed father who has forged a significant and enduring relationship with his child may lose his child to adoption because of his ignorance of technical statutory requirements.

### 3. 1979: *Caban v. Mohammed*

#### (Disparate Treatment of Unwed Mothers and Fathers: A Winning Argument for an Unwed Custodial Father)

In *Caban v. Mohammed*<sup>22</sup>, an unwed father maintained a form of joint custody with the mother of his children until the children were respectively two and four years of age. By that point, the mother had married and given her consent for her children to be adopted by their stepfather, a fact pattern similar in some ways to that of *Quilloin*. *Caban*, like the father in *Quilloin*, brought both due process and equal protection challenges to the validity of the statute which permitted the adoption upon the sole consent of the mother. *Caban*'s equal protection claim rested upon disparate treatment of unwed mothers and unwed fathers who were otherwise similarly situated with respect to de facto parenting of their children.<sup>23</sup> The Supreme Court analyzed the gender and biological differences between the unwed mother-and-child relationship and that of the unwed father-and-child relationship, noting in Justice Stewart's dissent that, "The mother carries and bears the child, and in this sense her parental relationship is clear."<sup>24</sup> One may infer from the Court's observations that the Court found no imperative for a woman to resort to legal process in order to enjoy constitutional protection from arbitrary state actions that infringe upon her relationship with her out-of-wedlock child. It is the Court's recognition of the unwed father's rights that catches the eye. The Court opined that a developed, existing relationship between the unwed father and child would be entitled to the same protection as that afforded an unwed mother against arbitrary state action.<sup>25</sup> The Court upheld *Caban*'s Equal Protection claim upon the ground that both the unwed mother and the unwed father had actually shared custodial parental duties.<sup>26</sup> In other words, while a distinction at times may be drawn between the rights of unwed mothers and fathers, such distinctions fade to extinction when the unwed father has formed an enduring relationship with his child. As it had done in *Stanley*, the United States Supreme Court again protected the rights of an unwed father from arbitrary state

action where he had actively participated in parenting his child.

### 4. 1983: *Lehr v. Robertson*

#### (A Liberty Interest, Absent a Substantial Relationship, Fails)

*Lehr v. Robertson*<sup>27</sup> was the first case to reach the United States Supreme Court from a state in which a putative father registry was in force. New York's 1983 putative father registry was somewhat similar to Alabama's current registry in that a putative father who timely filed with the registry became entitled to receive notice of any proceeding to adopt that child.<sup>28</sup> The New York statute, however, did not contain the irrevocable implied consent clause that looms so ominously for unwed fathers in Alabama's act. *Lehr* had lived with the mother prior to his daughter's birth, though he never lived with her after the child was born. *Lehr* never provided any financial support for his daughter, nor did he file with the registry.<sup>29</sup> After his child was placed for adoption, *Lehr* sought a determination of paternity, an order of support and a visitation order. The trial court dismissed all of *Lehr*'s claims and finalized the adoption.

On appeal, *Lehr* raised both deprivation of due process and a violation of the Equal Protection Clause in support of his contention that New York's statutory scheme was unconstitutional. *Lehr*, like *Quilloin* before him, asserted that his potential or opportunity interest in a relationship with his child constituted a liberty interest that could not be extinguished without due process of the law. The Court agreed "that the relationship of love and duty in a recognized family unit is an interest in liberty."<sup>30</sup> That observation skirted the issue, however, because the unwed father historically has not been a part of the "recognized family unit." The *Lehr* Court reviewed *Stanley*, *Quilloin* and *Caban* in analyzing the issues presented by the unwed father. In the final analysis, the Court reaffirmed its holding in *Caban* and accorded constitutional protection only to those unwed fathers who could demonstrate a pre-existing substantial relationship with his child, opining as follows:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause.<sup>31</sup>

*Lehr* is the culmination of a judicial philosophy of fatherhood by the intimacy of association rather





## A Brief Look at Pivotal Alabama Case Law

### The Alabama Court of Civil Appeals

The Alabama Court of Civil Appeals has held in favor of the adoptive parents in every case in which the putative unwed father failed to file timely with the registry. In *M.V.S. v. V.M.D.*<sup>34</sup> the Alabama Court of Civil Appeals set forth its legal reasoning regarding the constitutionality of the Putative Father Registry Act, and the court has not departed from that analytical framework in any subsequent cases. *M.V.S.* is an odd case in that the unwed father failed to sign the registry, yet the trial court nevertheless afforded the father a full evidentiary hearing in opposition to the adoption. At the conclusion of the presentation of all evidence, the trial court denied the putative father's petition for relief, finding that M.V.S. had "failed to show any apparent interest or concern for the child's welfare, took no action to become a dependable part of the child's life nor established a full social and financial commitment to provide a substantial relationship with the child, J.J.S."<sup>35</sup> The adoption was finalized. The putative father appealed, contending that the Act impermissibly distinguished between fathers who filed with the registry and those who did not. Arguably, the court could have sidestepped the constitutional issue altogether because the 30-day statute of limitations had apparently not been imposed upon the father by the trial court. Nonetheless, the court addressed the question. First, the court rejected the unwed father's contention that strict scrutiny must be applied to the Act since it affects the right of a parent to associate with his child. Rather, the court, following *Lehr*, applied the rational basis test, stating that "a strict-scrutiny analysis does not apply simply because a case involves parental rights."<sup>36</sup>

The *M.V.S.* court held that there is a legitimate state interest in identifying those putative fathers who were willing to parent children born out of wedlock as soon as possible and that the Act is rationally related to the promotion of that interest. The court further stated:

The Putative Father Registry provides a legal means to ascertain within a short time of a child's birth whether the biological father is going to assert

than fatherhood based upon biological happenstance alone. The Court held that *Lehr* had not developed an enduring parental relationship with his child because he had never pursued any significant custodial relationship with her, nor had he made any effort to provide for her financially, nor had he filed with the putative father registry. *Lehr* contended that he, like *Quilloin*, had been unaware of the statutory process for filing his intent to claim paternity. The *Lehr* Court seemed less sympathetic to an ignorance of law defense than the *Quilloin* Court had been five years earlier, stating that the possibility that *Lehr* had not known of the putative father registry "cannot be a sufficient reason for criticizing the law itself."<sup>32</sup> Yet, a careful reading of that case would strongly suggest that it was not *Lehr's* failure to sign the registry that doomed his paternal claims. It was his failure to establish a substantial father-child relationship that had defeated him. The Court allocated far more of its time to evaluating *Lehr's* relationship with his child than in considering the Putative Father Registry aspect of the case. *Lehr* appears to close the door altogether upon an unwed father's arguments based upon a loss of future opportunity interests if an unwed father cannot first demonstrate either a pre-existing substantial relationship with the child or compliance with statutory provisions for establishing a legal relationship to the child. Since *Lehr*, the watchword for unwed fathers is not "father." It is "relationship."

The compelling question left unanswered then is whether an unwed father who has established a *de facto* parent-child relationship can be deprived of that existing relationship by a failure to fulfill statutory requirements such as those imposed by the typical putative father registries. A careful reading of *Stanley*, *Quilloin*, *Caban* and *Lehr* would strongly suggest that the United States Supreme Court would not be inclined to elevate the formalities of statutory compliance over the substance of an established parent and child relationship. To the contrary, the *Stanley* court opined:

Procedure by presumption is always cheaper and easier than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.<sup>33</sup>



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his rights and perform his corresponding duties. If neither biological parent is going to care for the child, then the putative father registry also acts to facilitate adoptions, in order to provide early and uninterrupted bonding of the child with the adoptive parents.... *A putative father who wishes to form such a bond must timely assert his rights under the Act.*<sup>37</sup>

The court, not surprisingly, referred to the Baby Jessica case as having given rise to "compelling reasons for the legislature's providing a specified period within which to assert parental rights as an unwed father."<sup>38</sup> The court emphasized that *M.V.S.* did not involve the constitutionality of terminating an existing parental relationship. It concerned only the termination of an unwed father's opportunity interest in his child. The *M.V.S.* opinion relied heavily upon the United States Supreme Court cases discussed in Part III above, with particular emphasis being placed upon *Lehr*. A very careful reading of *M.V.S.* would be prudent for any attorney who plans to appeal a decision based upon the Putative Father Registry Act.

## The Alabama Supreme Court

In 2001, in *S.C.W. v. C. B.*<sup>39</sup>, the Alabama Supreme Court reversed a final order of adoption, despite the unwed father's failure to file timely with the registry. Although *S.C.W.* did not timely file with the registry, he did file both a legitimation action and a paternity action within 15 days of his child's birth. At that time, the *Adoption Code* provided that a putative father must give his consent to adoption if his identity was "made known by the mother or...otherwise made known to the court provided that he respond[ed] within thirty days to the notice he receive [d] under Section 26-10A-17 (a) (10)."

The supreme court held that the putative father's identity was actually made known to the court within 15 days of his child's birth via his legitimation and paternity claims and that he had responded within 30 days as required by Section 26-10A-7 of the *Code*. In effect, the Alabama Supreme Court held, despite the emphatic language of the Putative Father Registry Act, that there remained other means by which any unwed father could secure his familial rights and that *S.C.W.* had secured his rights by his aggressive and timely litigation. The Alabama Supreme Court was sharply divided in *S.C.W.* Five justices held that the seemingly con-

flicting statutes could be harmonized so that diligent unwed fathers could claim their children by timely filing litigation. Four justices were of the opinion that the Putative Father Registry Act superseded the older statutes and had repealed them by implication. Because the majority was able to reconcile an apparent conflict between the Putative Father Registry Act and the provisions of §26-10A-17 (a) (10) and §26-10A-7, the court reversed the order of adoption, and the case was remanded for a contested adoption hearing.<sup>40</sup> The constitutional issues were never reached since the decision turned upon statutory interpretation. The unwed father's legal victory in *S.C.W.* was fleeting. On April 7, 2002, Alabama's legislature *retroactively* amended sections 26-10A-7 and 26-10A-17 to require compliance with the registry as the *exclusive* method for unwed fathers to acknowledge their intent to claim paternity.<sup>41</sup> Since *S.C.W.*, no case has been decided in favor of an unwed father who failed to file with the registry.

## Conclusion

An ounce of prevention will always be worth more than a pound of cure. Every client who presents as an unwed father must be advised that he must file with the registry either before the child is born or within the first 30 days of the child's life if he wishes to oppose an adoption of the child. Numerous complications can arise that are beyond the scope of this article. An unwed father may not know where the mother and child are. If they have relocated to another state without his knowledge, a father filing in Alabama could manifest his intent to claim paternity, but there can be no assurance that a sister state would give legal effect to that gesture.<sup>42</sup> Arguably and using common sense, however, an unwed father might better serve his interests by timely filing in any state rather than filing in none.

In the very unfortunate event that Alabama's 30-day filing limitation has been missed, the unwed father either has no viable case left, or he has one that must be based entirely upon his actual, enduring and substantial relationship with the child. There is no middle ground left after Act 2002-417. The unwed father's argument can take only one foreseeable tack: He must argue that the Putative Father Registry Act *as applied* to him violates the Due Process Clause and the Equal Protection Clause of the United States Constitution because of his substantial relationship with his child. As all know, constitutional seas are as turbulent as they



are deep. The battle will be long, and the outcome will be uncertain. The child's best interest will become hopelessly blurred in the heat of battle, and every member of the adoption triangle will suffer as years of litigation and uncertainty swirl over them. It cannot be otherwise. This is, after all, a cautionary tale, and it must have its moral as all such tales do.

***Beware, Ardent Advocates, the 30-Day Deadline: Beyond This Point There Be Dragons.*** ■

## ENDNOTES

1. Job 40:15, 40:16, 40:21
2. Ala. Code § 26-10C-1 (Supp. 2002).
3. §26-10C-1(j)
4. See e.g. Ohio Rev. Code Ann. §3107.0 65(B) (requiring its Department of Human Services to "establish a campaign" to promote awareness of the registry).
5. Courts in New York, Nebraska, Utah, Oregon, Oklahoma, and Illinois had grappled with difficult issues arising out of the Putative Father Registry statutes prior to the 1997 enactment of Alabama's statute.
6. *In Re Baby Girl Clausen*, 442 Mich. 548 (1993).
7. Robert Andersen, M.D., *Second Choice: Growing Up Adopted* (Badger Hill Press, Chesterton, Missouri, 1993).
8. §26-10C-1 (a) (c) (5).
9. §26-10C-1 (f).
10. §26-10C-1 (j).
11. §26-10C-1 (i) (emphasis added).
12. 2002 Ala. Acts 417.
13. *Stanley v. Illinois*, 405 U. S. 645 (1972).
14. *Id.* at 656.
15. *Id.* at 658.
16. *Quilloin v. Walcott*, 434 U. S. 246 (1978).
17. *Ga. Code Ann.*, §74-403 (3) (1933).
18. 434 U. S. at 251.
19. *Id.* at 255.
20. *Id.* at 254.
21. *Id.*
22. *Caban v. Mohammed*, 441 U. S. 380 (1979).
23. *Id.* at 385.
24. *Id.* at 397.
25. *Id.* at 389.
26. *Id.*
27. *Lehr v. Robertson*, 463 U. S. 248 (1983).
28. *Id.* at 251.
29. *Id.* at 268, 269, 270; but see *id.* at 268-69 (White, J., dissenting, for a surprisingly different interpretation of the facts).
30. *Id.* at 258 (citing with approval *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944)).
31. *Id.* at 261 (citing *Caban v. Mohammed*, 441 U. S. at 414).
32. *Id.* at 264.
33. 405 U. S. at 657.
34. *M.V.S. v. V.M.D.*, 776 So. 2d 142 (Ala. Civ. App. 1999).
35. *Id.* at 147.
36. *Id.* at 152.
37. *Id.* at 153 (emphasis added).
38. *Id.* at 150.
39. *In re S.C.W. v. C.B.*, 826 So. 2d 844 (Ala. 2001).
40. *Id.* at 852.
41. 2002 Ala. Acts 417 at n 12.
42. See, e.g. *Highland v. Doe*, 867 P.2d 551 (Or. App. 1994).



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*Hon. Sharon Yates participates in a discussion on issues facing the legal profession in Alabama.*



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*ASB President-elect Bill Clark outlines his initiatives for state bar leaders.*



THE ROBINSON-PATMAN ACT:

# The Law of Price Discrimination





BY CLINTON C. CARTER AND KESA M. JOHNSTON

## History of Antitrust Law

The American judicial system was first introduced to the concept of antitrust law when the Sherman Antitrust Act was passed in 1890. The Sherman Act was brought to life during a period of American history when our country was suffering from a series of depressions, while businesses were struggling to survive during the post-Civil War era. Many large companies were organized for the sole purpose of monopolizing the market and restraining free competition in an effort to increase capital gains. The legislative history of the Sherman Act points to Congress's intent to make such tactics illegal where the result is an unreasonable restraint on trade.

The Sherman Act has two important provisions. Section 1 prohibits business combinations in restraint of trade and Section 2 prohibits monopolization. The Supreme Court has interpreted Section 1 as applicable only to agreements that restrain trade unreasonably. Monopolies themselves are not necessarily illegal

under Section 2. However, if a company attempts to obtain a monopoly through unreasonable methods, then it will be deemed to have violated the law unless a legitimate business defense is asserted.

A claim brought under the Sherman Act may be instituted by private individuals, state attorneys general or United States attorneys. Successful Sherman Act suits can result in an award of treble damages and reasonable costs, including attorney's fees. Criminal prosecution under the Act can result in a fine up to \$10,000,000 for corporations, or \$350,000 for individuals and/ or imprisonment for up to three years. There is also an alternative provision allowing for a fine up to twice the amount of the gross pecuniary gain resulting from a violation of the Act.

In 1914, two new federal laws were put in place in response to criticism that the Sherman Act was too broad. The first piece of legislation was the Clayton Act. The Act was introduced in an effort to extend antitrust laws to include price discrimination, either directly or indirectly, among purchasers of like commodities in interstate and foreign commerce where price differentials were not based upon differences in grade, quality, quantity or



cost of transportation, nor made in good faith to meet competition. 15 U.S.C. § 12. It is important to note the controversy surrounding Section 4 of the Clayton Act. In 1977, the Supreme Court decision in *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), began what has become one of the most debated issues in antitrust law. The Court held that indirect purchasers are not permitted to sue for damages suffered as a result of price fixing in violation of antitrust law. Subsequently, some states have enacted "Illinois Brick repealer" legislation which allows actions by indirect purchasers that is not preempted by contrary federal law.

The second law introduced in 1914 was the Federal Trade Commission Act. The Act provided that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" were illegal. A violation of any provision of the Truth in Lending Act is also deemed a violation of the FTC Act. Additionally, the FTC Act established the Federal Trade Commission as a regulatory agency that would enforce and decipher the law. 15 U.S.C. §41. Section 5 of the FTC Act empowers the Federal Trade Commission to arrest trade restraints even where such anti-competitive practices may not amount to violations of specific antitrust laws.

After its enactment, the Clayton Act was perceived as deficient because it included an unconditional exemption of discrimination in price when based on differences in the quantity of goods sold. There were also concerns that the scope of the Clayton Act only covered competition among sellers, thus leaving buyers without recourse for discrimination. To cure this deficiency, the Robinson-Patman Act (RPA) was enacted to amend Section 2 of the Clayton Act. The Robinson-Patman Act makes it unlawful for any person engaged in commerce to "discriminate in price between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce..." 15 U.S.C. §13(a).

Two years after the RPA was passed, the Non-Profit Institutions Act was enacted to amend RPA. This amendment provides an exemption for non-profit

institutions such as libraries, universities, churches and hospitals. To be effective, the exemption must be applied to purchases by the non-profit institution of goods that are for their own use. Resales by covered institutions are only covered under the exemption if the goods in question are sold to another exempt institution. Although few cases have examined the scope of the exemption, courts have held that that the statute itself should be narrowly construed and that purchases by state and local government agencies are not exempt under the Non-Profit Institutions Act. See *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 460 U.S. 1105, 103 S.Ct. 1808, 76 L.Ed.2d 371 (1983).

In 1950, the Clayton Act was amended a second time. The Celler-Kefauver Anti-Merger Act extended coverage under Section 7 of the Clayton Act to include corporate asset acquisitions and stock acquisitions. 15 U.S.C. §18. Originally, the Clayton Act only provided liability for mergers that included stock purchases of rival companies where the purchases substantially lessened competition. Companies avoided this prohibition by completing mergers through asset acquisition. Congress extended coverage under the Act to include asset and stock acquisitions so those transactions could be evaluated under the broad standards of the Clayton Act as opposed to the stricter Sherman Act standard. The Clayton Act now covers vertical mergers, mergers between firms in a buyer-seller relationship and horizontal mergers between competitors.

In 1976, Congress enacted Section 7A of the Clayton Act as part of the Hart-Scott-Rodino Antitrust Improvements Act. This addition to antitrust law provided for pre-merger notification requirements to both the Federal Trade Commission and the Department of Justice where the acquiring party would hold an aggregate of the acquired party's assets exceeding \$200 million dollars. After filing the proper notification forms, parties to a merger must wait 30 days before continuing the transaction. Failure to comply with the pre-merger notification requirement imposes a civil penalty of up to \$10,000 for each day the Hart-Scott-Rodino Act is violated. To have an anti-competitive effect, a merger generally must significantly concentrate the market and make it difficult for effective

new competition to enter the market after the merger.

## Purpose and Scope of the Robinson-Patman Act

The Robinson-Patman Act was originally labeled the "chain store bill." After World War I, there was significant growth of multi-location merchants, or "chain stores." These purchasers became a direct threat to small businesses that had limited purchasing power. To combat this threat, the National Association of Retail Grocers urged Congress to investigate the competitive practices of "chain stores." The Robinson-Patman Act eventually grew out of those investigations, as legislators sought to protect small independent businesses from injury caused by discriminatory pricing. See, e.g., *Great A & P Tea Co.*, 440 U.S. 69, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979). It is evident that Congress was concerned that such discriminatory practices would harm consumers by increasing prices, lowering quality and reducing the availability of goods. Essentially, the basic function of the RPA is to protect competitors, not competition.

### Section 2(a) of the Robinson-Patman Act

The RPA has several provisions that can be used to safeguard purchasers. Section 2(a) of the Act contains a basic prohibition regarding price discrimination among purchasers of commodities. The elements required to establish a prima facie case under Section 2(a) include: (1) two or more consummated sales; (2) the sales must relate to commodities; (3) the goods must be of like grade and quality; (4) the sales must be reasonably contemporaneous; (5) there must be a discrimination in price; (6) by the same seller to two or more purchasers; (7) the sale must affect interstate commerce; and (8) the price discrimination must have an adverse effect or injury to competition. It is important to note that intent is not a necessary element to



establish a valid claim under the RPA. Sellers of goods must be aware of potential violations of antitrust law, and attorneys should be prepared to advise their clients of the proper steps to avoid liability.

To establish that there are two consummated sales involved that are discriminatory, there must be two actual purchases. Although an offer of sale is not a consummated purchase, a signed contract is sufficient to establish completion of the sale. The sale in question must also relate to commodities covered under the RPA. These are general tangible goods and not intangibles such as services. To determine if the goods in question are of "like grade and quality," courts use a variety of tests to examine each case individually. The majority of RPA claims that stem from controversy over like grade and quality most often involve two or more products of the same seller. The physical and chemical identity of the product is scrutinized and a simple difference in labeling or packaging is not sufficient to avoid the effect of the Act. See, e.g., *F.T.C. v. Borden Co.*, 383 U.S.

637, 86 S.Ct. 1092, 16 L.Ed.2d 153 (1966). However, physical appearance coupled with substitutability and identity of performance are factors to be considered.

As part of a prima facie case of price discrimination under RPA, a plaintiff must also show that the sales in question were reasonably contemporaneous. Although this element is not specifically required by the Act, most courts require that the element be met. Generally, courts do not look to the date of delivery of the product to determine reasonableness but rather the date on which the sale was consummated. The discrimination in price requirement, as the Supreme Court has determined, means nothing more than a difference in price. See *Texaco v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990).

The "same seller" doctrine raises many questions regarding a corporation and its subsidiaries, which under antitrust laws are considered one entity and cannot be guilty of conspiracy when interacting with one another. Likewise, the requirement that there be two different pur-

chasers raises issues when subsidiaries are involved. Under the scope of the doctrine, indirect purchasers may also bring claims when the intermediary is considered the "alter ego" of the primary seller. To meet the element of interstate commerce, sales must do more than merely affect such commerce. The seller must be engaged in interstate commerce, the price discrimination must occur in the course of such commerce and one of the purchases must occur in such commerce.

Of all elements involved in a claim for price discrimination, the showing of an adverse effect on competition is the most complex. Commonly known as the "injury to competition" requirement, there are two types of injury generally alleged under Section 2(a), "primary line" and "secondary line." Primary line injury occurs when there is harm to the seller's competition by engaging in predatory pricing. Secondary line injury occurs when there is a harm to the buyer's competition. Typically in a primary-line case, prices will be set lower in one geographic market and higher in another. See, e.g., *Brooke Group Ltd. V.*

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*Left to Right:* Tom Marvin, Gina Matthews, Leon Sanders, Buddy Rawson

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*Brown & Williamson Tobacco Group*, 509 U.S. 209, 113 S.Ct. 2528, 125 L.Ed.2d 168 (1993); *Texaco v. Hasbrouck*, 496 U.S. 543. A third type of injury, tertiary-line, describes injury to customers of the injured buyer. Cases are rarely brought alleging tertiary-line injury due to the complex burden of proof involved. Regardless of the type of injury alleged, a plaintiff must offer proof of being in "functional or geographic competition with the alleged competitor." *DeLong Equip. Co. v. Washington Mills Electro. Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993).

As the Supreme Court has established, "The statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co. v. F.T.C.*, 324 U.S. 726, 742, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). See also *Falls City Industries, Inc. v. Vanco Beverages*, 460 U.S. 428, 103 S.Ct. 1282, 75 L.Ed.2d 174 (1983). In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), the Supreme Court held that an injury to competition might be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." *Id.* at 46-47.

#### Defenses to RPA Section 2(a)

Under RPA, price discrimination is allowed when: (1) justified by cost sav-

ings; (2) the need to meet a competitor's equally low price; or (3) changing market conditions. A fourth defense to an RPA allegation is available if the defendant can show that the lower price at issue was functionally and practically offered to all competing customers, whether utilized or not. See *Borden Co. v. F.T.C.*, 381 F.2d 175 (5th Cir. 1967). The "cost justification" defense requires that the defendant bear a heavy evidentiary burden, which often causes substantial problems for the defendant. Section 2(a) provides that: "Nothing herein contained shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. 13 (a).

Because it is often hard for a defendant seller to provide the appropriate records to prove that "cost savings" justified a discriminatory price, the "meeting-competition" defense is most commonly used. Section 2(b) of the RPA contains statutory language that grants a defendant the ability to assert the "meeting competition" defense. The defense is absolute provided the defendant can show that the lower price was made in good faith in order to meet an equally low price of a competitor. The good faith requirement is measured by using the standard of an ordinarily prudent businessperson in the same situation. In this circumstance, the seller must only show

that it was trying to meet, not necessarily beat, the price of the competition using a reasonable method. See, e.g., *McGuire Oil Co., et al. v. Mapco, Inc.*, 612 So.2d. 417 (Ala. 1992). The "changing conditions" defense is used in limited situations where the marketability of the goods concerned may be affected, such as out-of-date obsolescence of seasonal goods, out-of-date perishable products, or "going out of business" sales.

There has long been debate over whether or not the concept of "functional discounts" can be used as a defense to the RPA. Though the Act does not specifically mention functional discounts, the defense was judicially recognized in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). A functional discount occurs when a seller charges a lower price to a buyer who performs a particular function in the redistribution of commodities that positively affects the seller. There are two categories of functional discounts. The first occurs where different prices are charged to a wholesaler and a retailer. These types of discounts are not in violation of the RPA since wholesalers and retailers do not directly compete with one another. The second type of discount is a performance discount where a customer receives a discount for services it performs. Generally, this type of discount will not be passed on and therefore injury to competition is unlikely. Functional availability is another possible defense statutorily created under





Sections (d) and (e) of the RPA. The defense of functional availability was judicially extended to apply to Section (a) as well. See, e.g. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989). Functionally available occurs when a defendant has made an equivalent price "functionally," "practically" and "realistically" available to all purchasers. *Id.* at 1517.

## Section 2(c) of the Robinson-Patman Act

Section 2(c) provides that, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance, or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise...to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 15 U.S.C. 13(c) Essentially, this section of the RPA creates a claim for buyers who have been damaged by commercial bribery and the practice of "dummy" brokerage. Bribes are also considered an unfair tactic under Section 5 of the Federal Trade Commission Act.

In *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), the United States Supreme Court remanded an Alabama antitrust case involving an automobile dealer who alleged that he was driven out of business due to defendant's illegal price discrimination. The central issue was whether or not a plaintiff who proves price discrimination in violation of RPA Section 2(a) is entitled to automatic damages in the amount of the price discrimination, absent proof of injury. The Supreme Court held that the plaintiff must demonstrate an actual injury to competition to recover treble damages under RPA. This holding also applies to a Section (c) claim of commercial bribery by raising the question of whether a showing that the plaintiff paid an inflated price for goods due to bribery is sufficient to show proof of injury to business. Although caselaw indicates that

courts are split on this issue, it is safe to assume that a plaintiff bringing a claim under this section must also prove direct antitrust injury.

## Sections 2(d) and 2(e) of the Robinson-Patman Act

Section 2(d) of the RPA prohibits a seller from making promotional allowances to favored "customers" and section 2(e) prohibits such allowances to "purchasers." Section (d) provides that it is unlawful "for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of commerce as compensation or consideration...for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products..." 15 U.S.C. § 13(d). Section (e) states that it is unlawful "for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity brought

for resale..." 15 U.S.C. § 13(e). Certain conditions must be met in order to establish a valid claim under either of these sections: (1) allowances must be in connection with the "processing, handling, sale, or offering for sale" of products that relate to resale; (2) both the favored and disfavored customers must compete in the same geographic market; and (3) the promotional allowances or payments at issue must be available on proportionally equal terms. 15 U.S.C. §§13(d)-(e).

The Federal Trade Commission has taken the initiative to ensure that businesses are given guidance on the proper steps to take in order to be in compliance with these sections of the RPA. This "manual" is commonly referred to as the *Fred Meyer Guide* because it was initially created after a Supreme Court opinion suggested that the FTC should assist sellers in their pursuit for conformity to the law. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968).

## Defenses to RPA Sections (d) and (e)

Both sections (d) and (e) provide a statutory defense that allows otherwise

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illegal discriminatory payment for services if such services are made available on proportional terms to all purchasers. Functional availability can only be established as a defense if "a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotional program." *Alterman Foods, Inc. v. F.T.C.*, 497 F.2d 993, 1001 (5th Cir. 1974). Basically, a customer must be aware that a deal is available so that it can be taken advantage of or disregarded. In *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (1990), the Eleventh Circuit recognized that a defendant seller must show that purchasers were given an equal opportunity to participate not only in incentive programs but any advertising and promotional programs also offered by the seller. Cost justification is not a defense to Section (d) and Section (e) claims. See *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959).

## Section 2(f) of the Robinson-Patman Act

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination" which is prohibited by any other parts of the Act. To prove a prima facie violation of this section, the following elements must be established: (1) the defendant must be a person engaged in commerce; (2) who knowingly induces or receives; (3) a discriminatory price; and (4) in violation of Section 2(a). In *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 61, 73 S.Ct. 1017, 97 L.Ed. 1454 (1953), the Supreme Court held that a plaintiff must prove a buyer knew or should have known a cost justification defense was unavailable to the seller. Various courts have established tests that can be used to prove a buyer was put on notice that cost justification was unavailable as a defense. A buyer's knowledge of a particular industry and the buyer's knowledge that considerations other than cost were used to set prices are two factors that may be used to such unavailability. See, e.g., *Kroger Co. v. F.T.C.*, 438 F.2d 1372 (6th Cir. 1971). On the other hand, it has been held that it is unnecessary for a plaintiff to show that the buyer knew or should have known that the meeting competition defense was unavailable to the seller. *Automatic Canteen, supra*.

## Defenses to RPA Section (f)

Perhaps the most obvious bar to proving a Section 2(f) violation is the burden of proof involved to show that the purchaser knew or should have known that the price was discriminatory. In *Automatic Canteen*, the Court also held that a buyer "is not liable under 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." *Id.* at 74. In some situations, courts have allowed the "trade experience" of the buyer to show that he or she should have known the price was discriminatory. *Id.* at 79-80. Other courts have also allowed guilty knowledge of price discrimination to be inferred through a buyer's actions. See, e.g., *Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351 (9th Cir. 1966). Basically this means that a buyer in this situation is not an "unsuspecting recipient of prohibited discriminations." *Id.* at 364. The most important factor a defendant buyer should look to is whether or not a valid claim against the seller has been established under Section 2(a). A Section 2(f) claim is completely dependent on the seller liability, without it the buyer cannot be liable. See, e.g., *Great Atlantic & Pacific Tea Co. v. F.T.C. supra* at 76-77.

## Enforcement and Penalties under RPA

Although enforcement by the Antitrust Division of the Department of Justice is provided for through the antitrust statutes, private parties are almost always the named plaintiffs in claims of price discrimination. The Department of Justice is

granted authority under the RPA to enforce both the criminal and civil provisions of the RPA. Criminal penalties are found in Section 3 of the Act. However, criminal enforcement is so rare that research yielded evidence of only one guilty verdict for criminal activity under antitrust law.

If successful, a plaintiff bringing a claim under the RPA can be awarded treble damages, injunctive relief and reasonable attorney's fees. As previously discussed in the context of Section (c) claims, in *J. Truett Payne*, the Supreme Court distinguished the theory that automatic damages are recoverable under the RPA. While a different price is sufficient to establish a threshold case of price discrimination, the Court held that actual injury must be shown to recover damages. To prove an injury, a plaintiff must show a lost sale to the favored retailer and a showing of the amount profits on each lost sale. *J. Truett Payne*, 451 U.S. 557.

Class actions under the RPA are becoming more accepted but continue to be difficult to certify. Courts have held that such claims are simply unmanageable in that plaintiffs have to show individual injury as well as functional competition between the class and the favored customer. See *Close v. American Honda Motor Co., Inc.*, 1994 WL 761957 (D.N.H. 1994).

## Conclusion

Price discrimination cases appear to be in the rise across the country. As the "Sam's" and "Wal-Marts" of the world continue to gain an increasing share of the marketplace, "Mom and Pop" shops may have legal avenues available to them to halt unfair competition. The Robinson-Patman Act is one available remedy. Accordingly, it is important that litigants become more familiar with claims and defenses under the RPA as set out in this article. ■



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# Montgomery Magnet Schools Sweep Law Day Awards



Elizabeth Via Brown, right, oversees the judging of Law Day essays and answers questions of fellow judges.



Law Day 2003 winners proudly show their medals at a luncheon with ASB President Fred Gray, far left, and Law Day co-chairs, Tommy Klinner, second from left, and Tim Lewis, far right.



Law Day winners in the photography contest

Whether viewed through the creative art of a child's imagination or the imagery of the written word, judges of the Alabama State Bar's Law Day 2003 competition came away with a vivid impression of what freedom and an independent judiciary mean to Alabama's youth. Floyd Middle Magnet entries took six awards, sweeping the photography contest, with Booker T. Washington students winning four of the coveted prizes. Students from Hartselle High School, Red Level School, Head Elementary and Tuskegee Institute Middle School received top honors as well. This year, for the first time, an international student won top honors in the poster contest while a Hartselle youth made it "two-in-a-row" for a first-place essay.

Hundreds of Alabama students competed for honors in the annual statewide

event, focusing on this year's Law Day theme of "Celebrate Your Freedom—Independent Courts Protect Our Liberties." In addition to members of the **Alabama State Bar Law Day Committee**, celebrity judges this year included Montgomery **First Lady Judge Lynn Clardy Bright**; **Michael Briddell**, of WSFA-TV; **Elizabeth Via Brown**, former *Montgomery Advertiser* columnist who is now a free-lance writer; local art teacher **Diddy Vucovich**; third-year law clerk **Dayna Burnett**; and **Col. Ted Fink**, who headed a team of Judge Advocate Group officers from Maxwell AFB.

Montgomery attorneys **Tommy Klinner** and **Tim Lewis**, co-chairs of the state bar's Law Day 2003 Committee, recognized winners May 1 at a special ceremony held at the Supreme Court of Alabama. Following the presentation of awards by **Alabama State Bar President**





Poster contest judges Fink, Briddell, Vucovich and Bright make the hard decisions of choosing winners.

**Fred D. Gray** and the **Hon. John B. Crawley**, Alabama Court of Civil Appeals, the students and their special guests toured the judicial building before attending a luncheon in their honor at the Alabama State Bar.

There are three classifications—grades K-3 and 4-6 for posters, grades 7-9 and

10-12 for essays and grades 7-12 in photography. Winners in the essay contest receive a U.S. Savings Bond in the amount of \$200, \$150 and \$100, respectively; winners in the poster contest receive a bond in the amount of \$125, \$100 and \$75. Bonds of \$100, \$75 and \$50 go to photography winners. All winners receive engraved gold medals and award certificates. Schools of all winners receive special engraved Law Day plaques for permanent display, and teachers of the winners receive a \$25 contribution per award for use in their classrooms. All other participating schools receive certificates.

This year's winners include:

### Posters K-3

- 1st—Peyton Steele, Head Elementary School, Montgomery
- 2nd—Maggie Lambert, Red Level School, Red Level
- 3rd—Brennan Woodham, Red Level School, Red Level

### Posters 4-6

- 1st—Barbara Bokor, Floyd Middle Magnet School, Montgomery
- 2nd—Cowan Woodham, Floyd Middle Magnet School, Montgomery

- 3rd—Ian Kim, Floyd Middle Magnet School, Montgomery

### Essays 7-9

- 1st—Nic Powell, Hartselle High School, Hartselle
- 2nd—Adrienne Knight, Booker T. Washington Magnet High School, Montgomery
- 3rd—Shante Holley, Tuskegee Institute Middle School, Tuskegee

### Essays 10-12

- 1st—Christina Perkins, Booker T. Washington Magnet High School, Montgomery
- 2nd—Julia Collins, Booker T. Washington Magnet High School, Montgomery
- 3rd—Bri Whetstone, Booker T. Washington Magnet High School, Montgomery

### Photography 7-12

- 1st—Justin Spivey, Floyd Middle Magnet School, Montgomery
- 2nd—Lakendrick Knight, Floyd Middle Magnet School, Montgomery
- 3rd—Ronnie Eaton, Floyd Middle Magnet School, Montgomery

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# Legal Services in Alabama to Unite

**T**oo many people spend their days worrying about where the next month's rent will come from, or even their next meal. These citizens don't have the money to retain an attorney, but these same people sometimes need the assistance of an attorney, just like you or me. Leveling the playing field of justice and ensuring that everyone has access to legal counsel regardless of income is one of the driving goals behind the Alabama Law Foundation. For years, the foundation has proven this by supporting the Legal Services programs in Alabama. Now the foundation is working in conjunction with the Alabama State Bar to create a new vision for the future of delivering legal services to low-income people in Alabama.

In Alabama, 698,097 citizens live at or below the poverty level. These families have approximately 154,644 legal needs a year. Between Legal Services programs and pro bono programs, just over 16,000 of eligible low-income citizens received legal assistance in 2001, a gap between need and services received of over 138,000 people.

At present, Alabama is served by three separate Legal Services Corporation (LSC) grantees, all of which receive additional funding through IOLTA grants from the foundation. These LSC grantees are: Legal Services Corporation of Alabama, which is based in Montgomery and serves 60 of the state's 67 counties; Legal Services of Metro Birmingham, which serves Shelby and Jefferson counties; and Legal Services of North-Central Alabama, which is based in Huntsville and serves Madison, Morgan, Cullman and Limestone counties.

Recently, the Alabama Task Force on Reconfiguration recommended that only one Legal Services program be funded as a LSC grantee each year, a new, comprehensive, statewide program to be created from the existing ones.



According to the task force, this integrated system will position the Alabama civil justice community to better provide equal access to justice for all. Alabama currently ranks last in the nation in funding for legal aid to the poor at \$10 per poor person. The national average is \$20 per poor person.

One of the task force's goals is to double the service to the client community over the next five years. To reach this goal, funding will be increased for Legal Services from \$7 million a year to \$14 million, with a goal of \$11 million a year by 2007 (a 50 percent increase). The services provided and the number of people served by 2007 will also be increased from 15,000 cases closed per year to 30,000 cases closed.

The task force believes that one statewide system, and, therefore, one grantee, will improve the coordination of

resources and fundraising. More funds are desperately needed, and one program will give legal services in Alabama one voice, one identity and one purpose, increasing visibility and effectiveness in getting grants.

The task force plans to have the new grantee fully operational no later than January 1, 2005. In the meantime, the three current grantees will retain their LSC grants for grant year 2003. A transitional LSC grant for the grant year beginning 2004 is being proposed by the task force so that the designated state planning body will have a transition period to unify the state around a strong, single Legal Services program.

This is a bold vision for our state. The ultimate goal is to expand services to low-income citizens, while at the same time integrating the best of the old and the new to serve clients ever more effectively. We have an outstanding group of people working to improve access to justice for those who cannot afford lawyers. They are listed below. More members will be added in the coming months, and they will be asking for your commitment to help make sure Alabama no longer is last in equal access to justice. ■

<b>Allison L. Alford</b> , Montgomery	<b>Willie Hereford</b> , Huntsville
<b>J. Tutt Barrett</b> , Opelika	<b>Robin H. Graves</b> , Birmingham
<b>Laveeda Morgan Battle</b> , Birmingham	<b>Fred D. Gray, Jr.</b> , Tuskegee
<b>Pamela H. Bucy</b> , Tuscaloosa	<b>J. Gorman Houston</b> , Montgomery
<b>William P. Burgess</b> , Huntsville	<b>Susan T. Moquin</b> , Huntsville
<b>Katy Smith Campbell</b> , Selma	<b>Lizzie Pullom</b> , Tuscaloosa
<b>John L. Carroll</b> , Birmingham	<b>Lisa S. Robinson</b> , Birmingham
<b>F. Luke Coley</b> , Mobile	<b>Yvonne A. H. Saxon</b> , Montgomery
<b>Kendall C. Dunson</b> , Montgomery	<b>Jane Smith</b> , Huntsville
<b>John H. England, Jr.</b> , Tuscaloosa	<b>Doris Smith</b> , Pine Apple
<b>Irene Farley</b> , Birmingham	<b>Buck Watson</b> , Huntsville



# IOLTA RULE CHANGE

## Appendix A

### Rule 1.15 Safekeeping Property

Definitions. As used in this rule, the terms below shall have the following meaning:

"IOLTA account" means an interest- or dividend-bearing trust account benefiting the Alabama Law Foundation or the Alabama Civil Justice Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons;

"Eligible institution" means any bank or savings and loan association authorized by federal or state laws to do business in Alabama, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Alabama. Eligible institutions must meet the requirements set out in section (g).

"Interest- or dividend-bearing trust account" means a federally insured checking account or an investment product, which is a daily (overnight) financial-institution repurchase agreement or an open-end money market fund. A daily financial-institution repurchase agreement must be fully collateralized by U.S. Government Securities; an open-end money-market fund must invest solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, have total assets

of at least \$250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

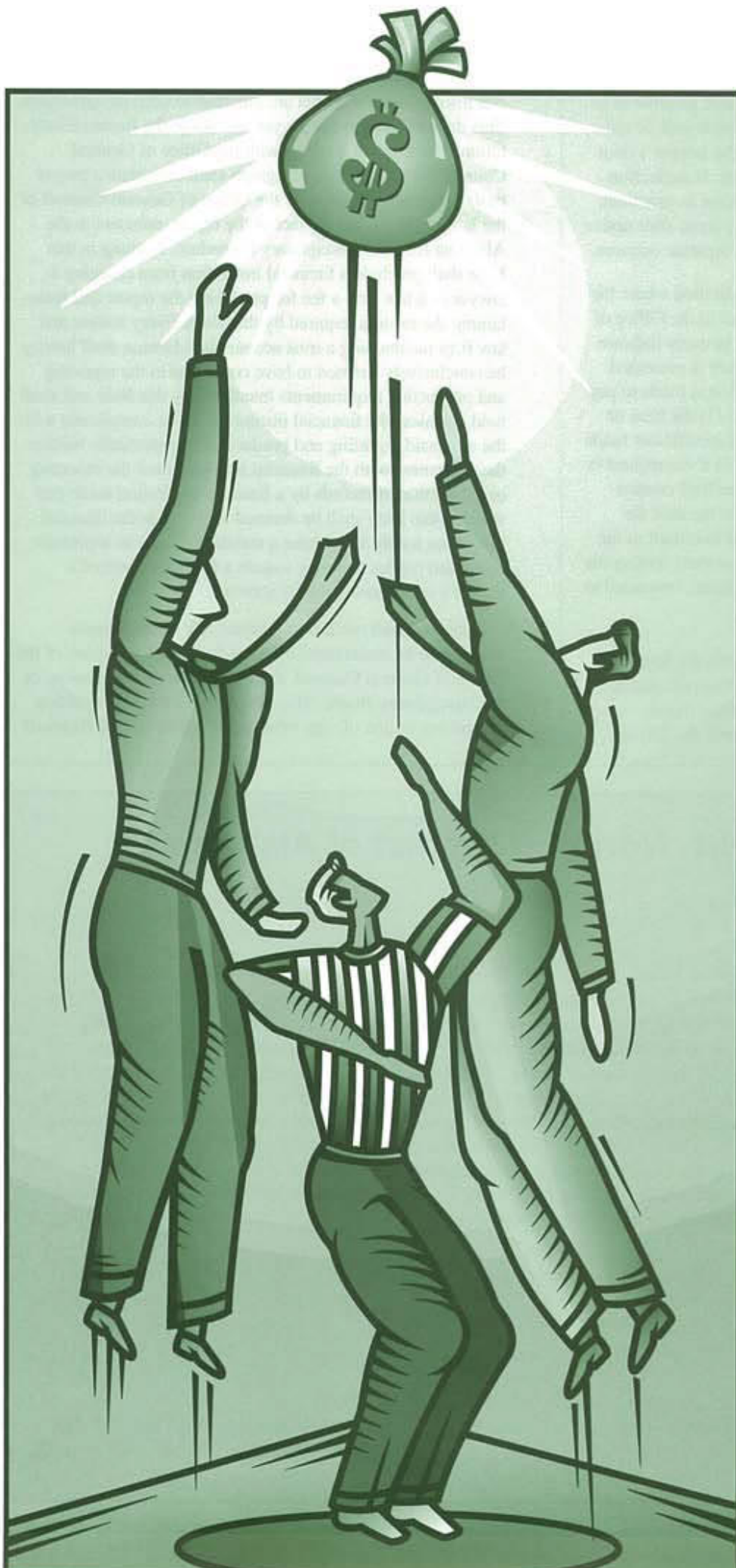
"Reasonable Fees" means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) Federal deposit insurance fees, and (5) a reasonable IOLTA account administrative fee.

"U.S. Government Securities" means U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

- (a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No personal funds of a lawyer shall ever be deposited in such a trust account, except (1) unearned attorney fees that are being held until earned, and (2) funds sufficient to cover maintenance fees, such as service charges, on the account. Interest, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this Rule shall prohibit a lawyer from using any additional description or design-





nation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

- (b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds;



provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse the client's uncollected funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of noncollection, replace the funds in the separate account.

- (e) A lawyer shall request that the financial institution where the lawyer maintains a trust account file a report to the Office of General Counsel of the Alabama State Bar in every instance where a properly payable item or order to pay is presented against a lawyer's trust account with insufficient funds to pay the item or order when presented and either (1) the item or payment order is returned because there are insufficient funds in the account to pay the item or order or, (2) if the request is honored by the financial institution, and overdraft created thereby is not paid within 3 business days of the date the financial institution sends notification of the overdraft to the lawyer. The report of the financial institution shall contain the same information, or a copy of that information, forwarded to the lawyer who presented the item or order.

A lawyer shall enter into an agreement with the financial institution that holds the lawyer's trust account pursuant to which the financial institution agrees to file the report required by this Rule. Every lawyer shall have the duty to

assure that his or her trust accounts maintained with a financial institution in Alabama are pursuant to such an agreement. This duty belongs to the lawyer and not to the financial institution. The filing of a report with the Office of General Counsel pursuant to this paragraph shall constitute a proper basis for an investigation by the Office of General Counsel of the lawyer who is the subject of the report, pursuant to the Alabama Rules of Disciplinary Procedure. Nothing in this Rule shall preclude a financial institution from charging a lawyer or a law firm a fee for producing the report and maintaining the records required by this Rule. Every lawyer and law firm maintaining a trust account in Alabama shall hereby be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall hold harmless the financial institution for its compliance with the aforesaid reporting and production requirements. Neither the agreement with the financial institution nor the reporting or production of records by a financial institution made pursuant to this Rule shall be deemed to create in the financial institution a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of a lawyer's overdrawing a trust account.

A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of

## U.S. Bankruptcy Court, Northern District of Alabama

### Chief Deputy Clerk, Type II

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We are seeking a highly motivated, result-oriented professional to join our management team, which provides support to six judges and over 100 end users in the court. This is a senior level management position which functions under the direction of the Clerk of Court. The Chief Deputy is accountable for the administration and supervision of day-to-day case processing of the Clerk's office. The Chief Deputy assists the Clerk in implementing the Federal Rules of Bankruptcy Procedure and local rules, and has the overall responsibility for case management, records maintenance, statistical reporting, financial management, systems management, long-range planning, and other duties as assigned. We administer almost 23,000 cases per year in four staffed divisional offices (Anniston, Birmingham, Decatur and Tuscaloosa). The duty station will be in Birmingham. Qualified candidates should have a minimum of six years of experience in a responsible administrative, professional or technical position in which they have gained a thorough understanding of organizational management to include administrative and human resource aspects. At least three of the six years of experience must have been in a position of substantial management responsibility, preferably in a court environment. Knowledge of the federal judiciary, including bankruptcy, and its administrative practices is preferred. Additional consideration will be given to those with a degree in accounting, judiciary, public or business administration, or a law degree from an accredited institution.

Submit a cover letter with resume, including at least three references and salary history, to:

Personnel  
U.S. Bankruptcy Court  
1800 5th Avenue, N, Ste. 120  
Birmingham, AL 35203

Position open until filled. For information and a position announcement, visit our Web site at [www.ALNB.uscourts.gov](http://www.ALNB.uscourts.gov) or call (205) 714-4002.

**An Equal Opportunity Employer**



Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

- (f) A lawyer, except a lawyer not engaged in active practice pursuant to Alabama Code 1975, §§ 34-3-17 and -18, shall maintain a separate account to hold funds of a client. If a lawyer does not hold funds for a client, then he or she shall give written notice to the Secretary of the Alabama State Bar that the lawyer will not maintain such an account. A lawyer must so advise the Secretary of the Alabama State Bar within six (6) months of admission to practice or of a return to active practice. A lawyer who has previously given the notice required by this paragraph shall revoke that notice by giving written notice to the Secretary of the Alabama State Bar immediately upon establishing a separate account to hold the funds of a client.
- (g) Unless a lawyer shall have given the notice specified in Rule 1.15(h), a lawyer shall hold the funds of a client or of a third person that are nominal in amount or that the lawyer expects to be held for a short period in one or more IOLTA accounts. A lawyer shall use the account only for the purpose of holding funds of clients or third persons that are nominal in amount or that the lawyer expects to be held in the account for a short period and that the lawyer has determined cannot practicably be invested for the benefit of the client or third person. In no event shall a lawyer receive the interest on an IOLTA account.

Any eligible institution that elects to provide and maintain IOLTA accounts shall do so according to the following terms:

Eligible institutions that maintain IOLTA accounts that are, or are invested in, interest-bearing deposits or daily financial-institution repurchase agreements shall pay no less than the highest interest rate and dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the balance in the IOLTA account, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer may accept, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account into a daily financial institution repurchase agreement or a money-market fund. However, this Rule shall not require any eligible institution to offer or otherwise make available sweep accounts for IOLTA accounts.

Pursuant to a written agreement between the lawyer and the eligible institution, interest on the IOLTA account shall

be remitted, as the lawyer shall designate, to the Alabama Law Foundation or the Alabama Civil Justice Foundation, at least quarterly.

Interest or dividends shall be calculated in accordance with the institution's standard practice for non-IOLTA account customers, less reasonable fees, if any, in connection with the deposited funds.

Reasonable fees, as defined in this Rule, are the only service charges or fees permitted to be deducted from interest earned on IOLTA accounts. Reasonable Fees may be deducted from interest on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for all of its customers with interest-bearing accounts. All other fees and charges shall not be assessed against the accrued interest on the IOLTA account but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

Fees or charges in excess of the interest earned on the account for any month or quarter shall not be taken from interest earned on other IOLTA accounts or from the principal of the account.

A statement should be transmitted to the Alabama Law Foundation or the Alabama Civil Justice Foundation with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the rate of interest applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period. A copy of the statement shall also be sent to the lawyer.

- (h) A lawyer, or a law firm on behalf of its lawyers as disclosed in the notice, may give written notice to the Secretary of the Alabama State Bar that the lawyer does not intend to maintain the IOLTA account otherwise required by Rule 1.15(g). This notice must be given within six (6) months of the lawyer's admission to practice or return to active practice, and may later be given only during the period between April 1 and June 1 of each year, to be effective as of June 1. The notice shall remain in effect until revoked or changed by the lawyer, or by a law firm on behalf of its lawyers. Notice

William (Bill) H. Odum, Jr.  
Board Certified Entomologist  
Litigation Testimony — Entomology Consultations  
P.O. Box 1571  
Dothan, AL 36302

Office: 334-793-3068  
Facsimile: 334-671-8652  
E-mail: who6386@aol.com



given by a lawyer or law firm in compliance with prior DR 9-102(D)(3) to the Executive Director of the Alabama State Bar that the lawyer or law firm opted not to maintain the interest-bearing account required by DR-9-102(D)(2) shall remain effective without annual repetition.

- (i) All interest transmitted to and received by the Alabama Law Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:
- (1) to provide legal aid to the poor;
  - (2) to provide law student loans;
  - (3) to provide for the administration of justice;
  - (4) to provide law-related educational programs to the public;
  - (5) to help maintain public law libraries; and
  - (6) for such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.
- (j) All interest transmitted to and received by the Alabama Civil Justice Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:
- (1) To provide financial assistance to organizations or groups providing aid or assistance to:
    - (a) underprivileged children;

(b) traumatically injured children or adults;

(c) the needy;

(d) handicapped children or adults; or

(e) drug and alcohol rehabilitation programs.

- (2) To be used in such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

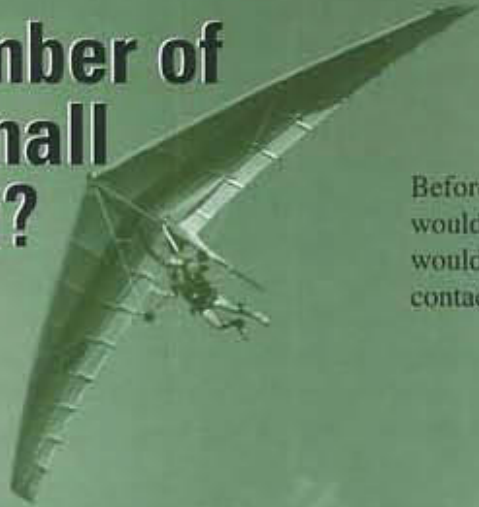
- (k) A lawyer shall not fail to produce, at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board, any of the records required to be maintained by these Rules. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or the Rules of Disciplinary Procedure for the production of documents and evidence.

## Appendix B

### Comment To Rule 1.15 As Amended Effective April 14, 2003

In addition to making stylistic changes, the amendment added the "Definitions" section to the rule and amended section (g) to provide that a lawyer shall hold those funds of a client or a third person that are nominal or that the lawyer expects to be held for only a short period in IOLTA accounts. ■

## Are You a Solo Practitioner or a Member of a Small Firm?



### If so, read on...

The Alabama State Bar's **Solo & Small Firm Practitioner's Committee** is seeking to determine whether there is any interest in forming a Solo & Small Firm Section. The Section would:

- create a forum for discussion of small firm issues;
- provide networking opportunities;
- establish benefits for members;
- develop CLE programs designed for members;
- obtain greater representation at the Board of Bar Commissioners; and
- perform all functions permitted of sections of the ASB.

Before a section can be formed, we must identify lawyers who would be interested in joining. If you or someone you know would like to join a section focused on small firm issues, please contact:

**Don Wiginton, chair**  
**Solo & Small Firm Practitioners Committee**  
200 Office Park Drive, Suite 314  
Birmingham, AL 35223-2404  
[don@wiginton.com](mailto:don@wiginton.com)





# Alabama Law Foundation's IOLTA Program Gets Good News From U.S. Supreme Court

**O**n March 27, The U.S. Supreme Court ruled in a 5-4 decision that it is constitutional for states to pool clients' escrow funds in bank accounts and give the interest to legal aid through IOLTA programs.

IOLTA (Interest on Lawyers' Trust Accounts) programs across the country provide much needed legal aid to the poor, and the ruling was a major victory for the legal aid organizations that depend on IOLTA for much of their funding.

The foundation's IOLTA program has contributed over \$11 million in grants for law-related, charitable projects in Alabama since 1989, and all together, IOLTA programs in the U.S. generated more than \$200 million last year alone for legal aid. The foundation's IOLTA program also funds law-related education, programs that improve the administration of justice.

**Foundation President Tutt Barrett** expressed his feelings about the ruling, saying that it was an important win for IOLTA programs and the foundation. "We are delighted with the Supreme Court's decision in this case," he said. "We were optimistic about the outcome, but to actually get the decision removes any uncertainty about the future of our IOLTA program. Now, we can concentrate on trying to expand and

improve our sources of revenue so that we can continue to make grants that provide much-needed legal services to Alabama's poor."

The recent favorable ruling ended an over 12-year-long battle between IOLTA and the Washington Legal Foundation, Allen Brown and Greg Hayes. They claimed that such programs are a violation of the Fifth Amendment, arguing that the interest earned in the accounts belongs to the clients and cannot be taken by the state without just compensation.

The Supreme Court struck down this notion with their ruling in the case, *Brown vs. Legal Foundation of Washington* (The Legal Foundation of Washington, not to be confused with the Washington Legal Foundation, receives and distributes IOLTA funds in Washington state and Allen Brown and Greg Hayes were real estate purchasers who claimed they lost small amounts of interest due to IOLTA).

Writing for the majority, Justice Paul Stevens wrote, "The overall dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the distribution of these funds as a 'public use' within the meaning of the Fifth Amendment." ■





J. Anthony McLain

By J. Anthony McLain, general counsel

## An Attorney May Pay an Expert Witness a Reasonable and Customary Fee for Preparing and Providing Expert Testimony, But the Expert's Fee May Not Be Contingent On the Outcome of the Proceeding

### Question:

Under what circumstances can an attorney pay a witness who offers testimony at trial or by deposition for an attorney's client?

### Answer:

Witnesses who offer testimony at trial fall generally into two categories, expert witnesses and lay or fact witnesses. An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding. An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income.

### Discussion:

The prohibitions against paying fact witnesses and against paying experts a contingency fee are found in Rule 3.4(b) of the Rules of Professional Conduct of the Alabama State Bar, which provides that a lawyer shall not "offer an inducement to a witness that is prohibited by law." However, the Comment to this rule recognizes that the prohibition does not preclude payment of a fact witness's legitimate expenses as long as such payment does not constitute an inducement to testify in a certain way.

This Comment is consistent with DR 7-109 of the old Model Code of Professional Responsibility which specifically authorized a lawyer to pay "expenses reasonably incurred by a witness in attending or testifying" and "reasonable compensation to a witness for his loss



of time in attending or testifying." Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute "expenses of litigation" within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee. However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he

actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.

In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way.

An expert witness may be paid his reasonable, usual and customary fee for preparing and providing expert testimony, provided such fee is not contingent. This opinion is consistent with previous opinions of the Disciplinary Commission on similar or related issues in ROs 81-549, 82-699 and 88-42. [RO-97-02] ■

## JOIN US!

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$25 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.





### Disability Inactive

- Birmingham attorney **Michael Charles Jordan** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective March 21, 2003. [Rule 27(c); Pet. 03-01]

### Reinstatement

- On April 11, 2003, the Supreme Court of Alabama entered an order based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar reinstating former Florida attorney **Marcus Lavon Whatley** to the practice of law as a special member for 24 months, after which he may change to regular member status, effective March 21, 2003. [Pet. No. 03-01]

### Disbarment

- On April 11, 2003, the Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel III, disbarring Mobile attorney **John Thomas Kroutter** from the practice of law in the State of Alabama, effective October 12, 2005. This disbarment is to run consecutively with the term of disbarment previously imposed effective October 11, 2000. In July 1996, Kroutter was hired to represent a client in connection with an automobile accident case. On or about February 5, 1997, State Farm Insurance Company issued two checks in

settlement of Kroutter's client's claim. One check was payable to Kroutter, his client and Baptist Hospital in the amount of \$538.15. A second check, in the amount of \$3,711.85, was issued in Kroutter's name and his client's name. Kroutter converted these checks to his own use and lied to his client about the status of the payments from State Farm. Kroutter was found guilty of violating rules 8.4(b), 8.4(c) and 8.4(g) of the Alabama Rules of Professional Conduct. [ASB No. 01-162(A)]

### Suspensions

- Gadsden attorney **John David Floyd** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective April 3, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Floyd had been indicted by the Etowah County Grand Jury for violations of §§13A-10-129 and 13A-10-12 of the *Code of Alabama*, and that indictments were filed in United States District Court for the Northern District of Alabama charging Floyd with three separate counts of violating 18 U.S.C. §1512(b)(1). [Rule 20(a); Pet. 03-03]
- On April 3, 2003, the Supreme Court of Alabama entered an order adopting the order of suspension



entered by the Disciplinary Board, Panel I, suspending Dothan attorney **Deanna Saunders Higginbotham** from the practice of law for 45 days, effective February 27, 2003. This order was entered based upon Higginbotham's noncompliance with the June 14, 2002 order of the Disciplinary Board. That order involved two separate complaints filed against Higginbotham with the Alabama State Bar. In ASB No. 01-100(A), Higginbotham pled guilty to violations of rules 1.3, 1.4(a), 8.4(d) and 8.4(g), and in ASB No. 01-139(A), rules 1.3, 1.4(a), 8.1(b) and 8.4(g) of the Alabama Rules of Professional Conduct. Higginbotham willfully neglected a capital murder appeal to which she had been appointed, and she also neglected a child custody matter in which she had been paid a \$2,500 retainer. She refunded the full \$2,500. She also intentionally failed to respond to the Office of General Counsel of the Bar as well as the Houston County Grievance Committee during their investigations. She was placed on two years' probation with special conditions, effective June 14, 2002. She was to provide responses to the bar on all other matters pending against her; make contact with the Alabama State Bar Lawyer Assistance Program and comply with any recommendations; reimburse the Client Security Fund for any payments made in connection with her clients; and provide the bar with a list of her pending cases, the status of each, and the anticipated action and time required to conclude each case. All of the above were to be completed within 14 days of the order. Should Higginbotham

fail to comply with the special conditions of her probation or if it was documented to the Disciplinary Board that she failed to cooperate in a bar investigation, an immediate 45-day suspension would be imposed due to her failure to satisfy these conditions, Higginbotham's suspension was imposed on April 3, 2003. [ASB nos. 01-100(A) & 01-139(A)]

- Birmingham attorney **Marvin Lee Stewart, Jr.** was intermily 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 22, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Stewart's continuing conduct is causing, or is likely to cause, immediate and serious injury to his clients and to the public and is, by his actions, causing great public harm. [Rule 20(a); Pet. 03-04]
- Mobile attorney **Lewis Daniel Turberville, Jr.** was intermily 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 30, 2003. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing a continuing pattern of trust account mismanagement. [Rule 20(a); Pet. 03-05]

## ALABAMA LAWYER Assistance Program

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

Are they telling you they have it under control?

**They don't.**

Are they telling you they can handle it?

**They can't.**

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

**It is.**

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

**You can.**

Don't be part of their delusion.

**BE PART OF THE SOLUTION.**

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



## Public Reprimands

- On May 9, 2003, Enterprise attorney **Edward Spurgeon Brown** received a public reprimand without general publication. Brown began representing the complainant in a divorce case in August 2000. On January 9, 2001, Brown called the complainant and asked her to meet him at the McDonald's in Daleville, Alabama. At this meeting, Brown asked the complainant to borrow \$5,000 and loan it to him. He had already prepared a promissory note for that amount. Due to Brown's representation of the complainant, he was aware of her financial situation at that time. The complainant agreed to let Brown have \$500 to help him with his financial problems. Brown gave the complainant a no-interest note payable in 60 days. Brown failed to pay as promised, and the complainant filed suit against him in the Small Claims Court of Coffee County, and obtained a judgment against him. Thereafter, Brown thwarted her efforts at collection of the judgment. Finally, in February 2003, Brown paid the judgment amount of \$1,054 into the court. Brown entered a guilty plea for violating rules 1.6(a), 1.7(b), and 8.4(g), Alabama Rules of Professional Conduct. Of particular concern was the fact that Brown used confidential information about a client to attempt to benefit himself personally. [ASB No. 01-206(A)]
- On March 14, 2003, Birmingham attorney **Robyn Bufford-Bennitt** received a public reprimand without general publication based upon the decision of the Disciplinary Board, Panel I, in the hearing held on October 8, 2002. Between 1996 and

1997, another Birmingham attorney, Rhonda Steadman Hood, referred three cases to Bufford-Bennitt. It was agreed that one-third of the attorneys' fees received by Bufford-Bennitt would be shared with Hood. Bufford-Bennitt ultimately settled the cases and disbursed money to the clients and to her own firm but did not notify Hood about these settlements, nor did she pay Hood any referral fees. When Hood found out the cases had settled, she verified it through the court records and later with the respective clients. After repeated demands for payment by Hood, Bufford-Bennitt sent her a letter enclosing one check. The letter included a promise to pay the remaining two referral fees. At the October 8, 2002 disciplinary hearing, Bufford-Bennitt testified that she did not owe Hood any money, and the letter which enclosed the one check was sent out through the mistake of an employee, who signed her name.

Hood filed suit against Bufford-Bennitt in the Circuit Court of Jefferson County, Alabama and obtained a \$90,000 verdict from a trial jury. During the conduct of the case, Bufford-Bennitt filed a motion for summary judgment and supported it with an affidavit from one of the involved clients. In this affidavit, the client stated that Hood had not referred him to Bufford-Bennitt and that he had never met her. This client later gave another affidavit withdrawing those assertions. The court struck the original affidavit due to the serious questions about its truthfulness, and the manner in which it was notarized at Bufford-Bennitt's office. The Disciplinary Board found that Bufford-Bennitt's actions violated rules 8.4(c) and 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. [ASB No. 00-168(a)]

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- On March 14, 2003, Daphne attorney, **Matthew Travis Holzborn** received a public reprimand with general publication based upon the decision entered on December 3, 2002 by the Disciplinary Commission. On Monday, April 1, 2002, Holzborn had a trial set before Judge James Wood in the Circuit Court of Mobile County. Holzborn represented the defendant, and Mobile attorney William M. Cunningham, Jr., represented the plaintiff. Holzborn had moved to continue the trial the previous Friday because his case was second on the judge's docket, and it would likely not be heard. Holzborn admitted that he did not prepare for the case the weekend before trial because he was "betting on the continuance." On the morning of trial, the plaintiff asked Judge Wood to let a district judge try the case. While Judge Wood was attempting to find a replacement judge, Holzborn approached Cunningham and told him that he had just received a call on his cell phone advising him that his stepfather had died. Holzborn and Cunningham approached the bench, and Holzborn told Judge Wood that his stepfather had just died. Judge Wood immediately continued the case. Later, Cunningham learned that Holzborn's stepfather had not died and confronted him with that fact. Both Holzborn and Cunningham later appeared before Judge Wood and Holzborn confirmed that he had lied about the death in order to obtain a continuance of the trial.

Holzborn was found guilty of violating Rule 1.3 [diligence], and rules 8.4(c) and 8.4(d) [misconduct] of the Alabama Rules of Professional Conduct. [ASB No. 02-124(A)]



• Florence lawyer **Damon Q. Smith** received a public reprimand without general publication for violating rules 1.1, 1.4(b), 3.4(c), 7.1, 7.5, and 8.4(a) and (g), A.R.P.C. Smith advertised legal services as "Damon Smith and Associates, Attorneys" in the Yellow Pages in almost all counties in Alabama and on the Internet. He was the only lawyer in the firm. He offered low-cost services in bankruptcy and divorce. Generally, "clients" completed a detailed questionnaire that they received through the mail or Internet. Upon receipt of the questionnaire and payment, Smith prepared pleadings and other documents based solely on the information provided to him in the questionnaire. Smith signed the pleadings and forwarded the documents to the client for execution and filing. As a general rule, Smith did not meet with a client in person unless the client wanted to come to his office. The legal advice provided, which Smith referred to as "the basics," was provided to through the questionnaire. Smith left it up to the client to initiate questions or discussions about a particular matter. Most of the legal services Smith provided by mail or Internet, without the benefit of an in-person, face-to-face consultation, involved divorces. Smith did meet all bankruptcy clients in person, usually in court. The general legal information provided in the questionnaire and on the Web site contained incorrect statements of law. The Disciplinary Commission determined that the routine provision of legal services without an in-person, interactive meeting between

the lawyer and a client, especially a client with whom the lawyer has no ongoing or prior relationship, is not a competent method of providing legal services. It also limits the communication, making it unlikely that a lawyer can provide information necessary to allow a client to make informed decisions about the representation. Although Smith provided instructions to the client regarding execution and filing, the pleadings and documents were deficient in many cases. The investigation revealed that in one county, out of 13 divorce cases that Smith "filed" with that court, all but one was deficient. [ASB nos. 02-09(A) & 02-51(A)]

• Anniston attorney **Roy Lynn Vanderford** received a public reprimand without general publication for violating rules 1.3, 1.4(a) and 8.4(c), A.R.P.C. Vanderford was retained to file a false imprisonment action against the Talladega Police Department as a result of the complainant having been arrested during a domestic disturbance call. After the initial interview, Vanderford did not communicate with the client about the matter. Vanderford also moved and failed to notify the complainant of his change of address. Vanderford failed to diligently pursue the complainant's civil case, failed to communicate with the complainant during the course of the representation, and made misleading statements about his representation of the complainant in his response to the bar. [ASB No. 01-239(A)]

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