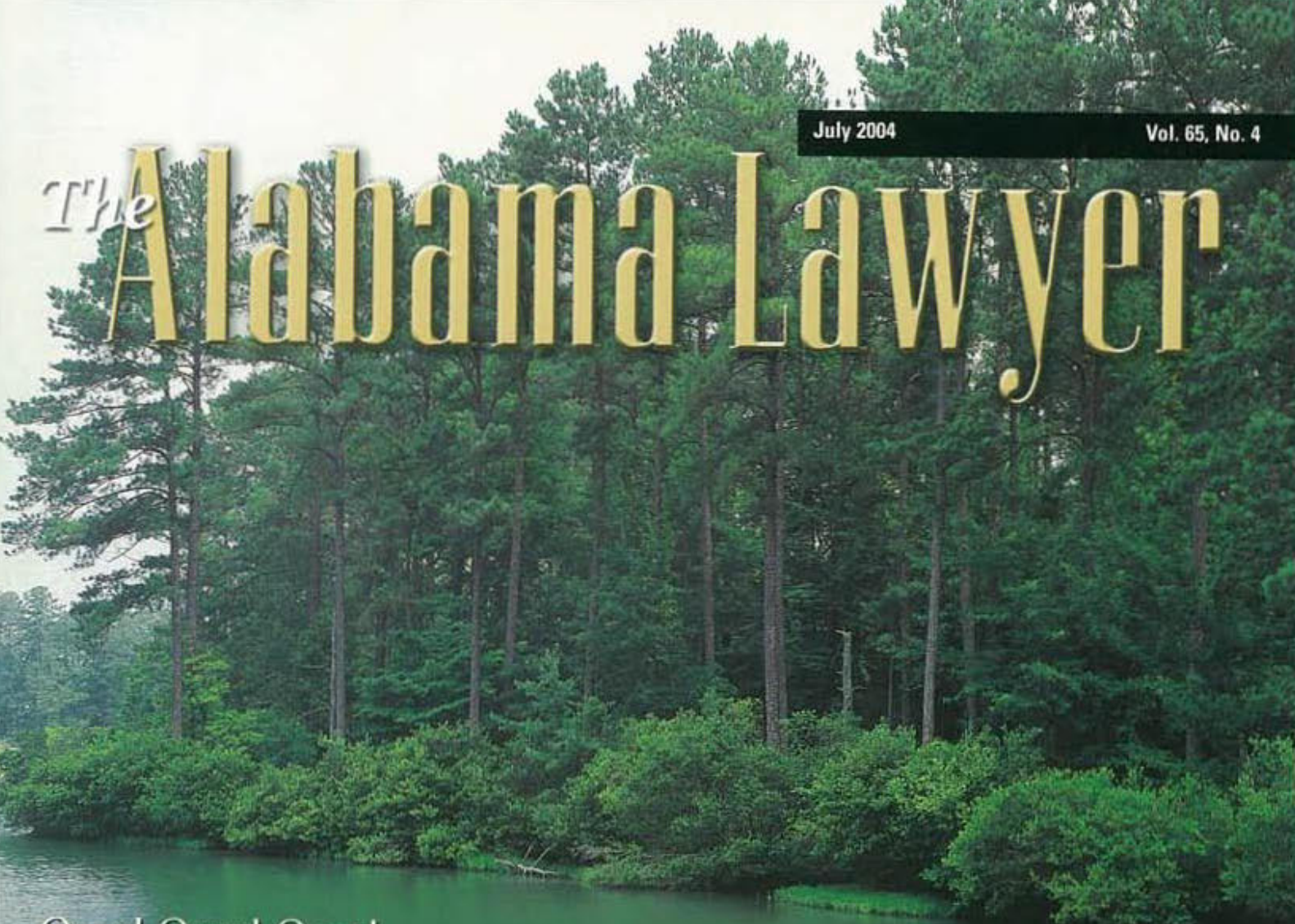
July 2004 Vol. 65, No. 4

The Alabama Lawyer



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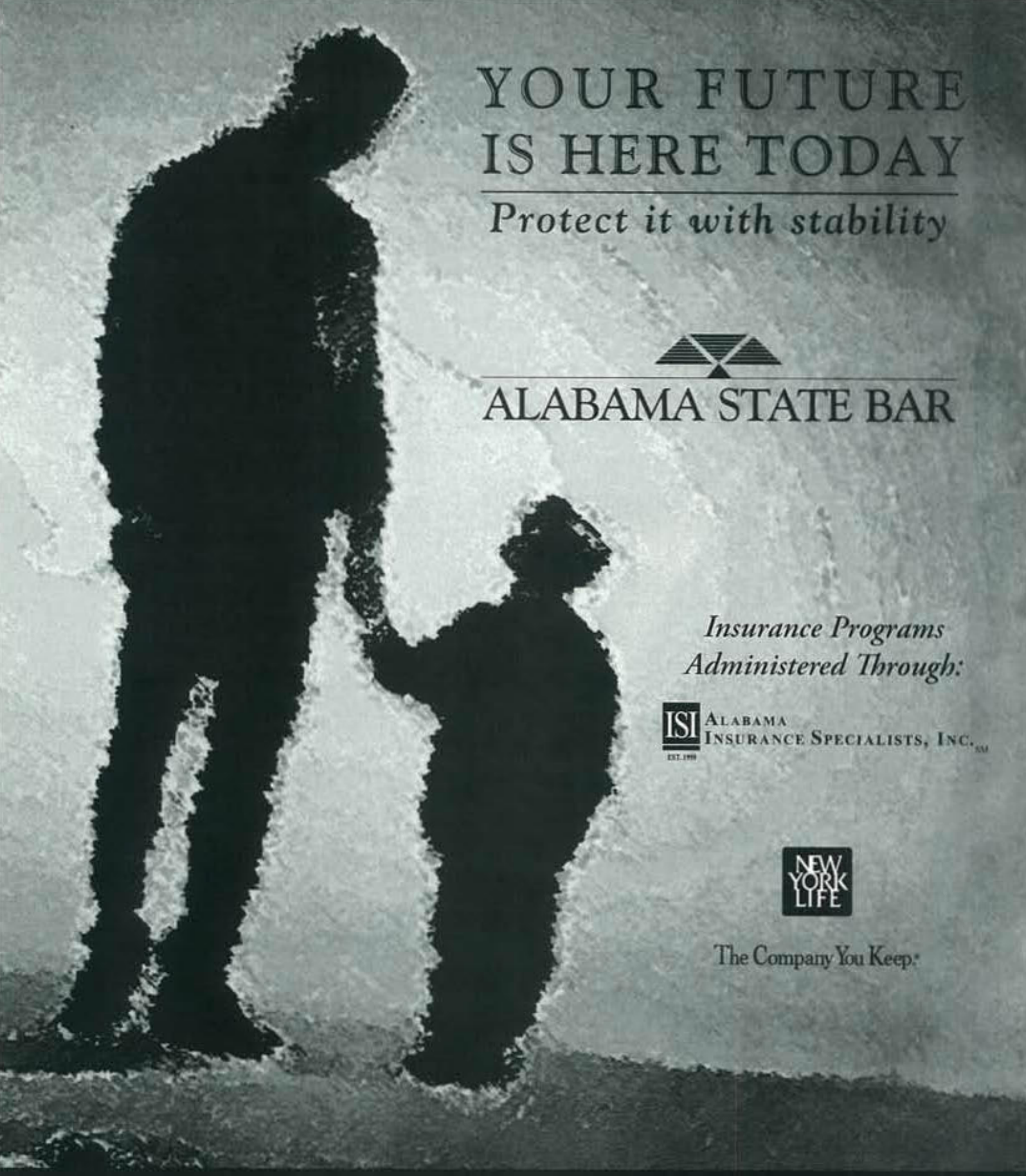

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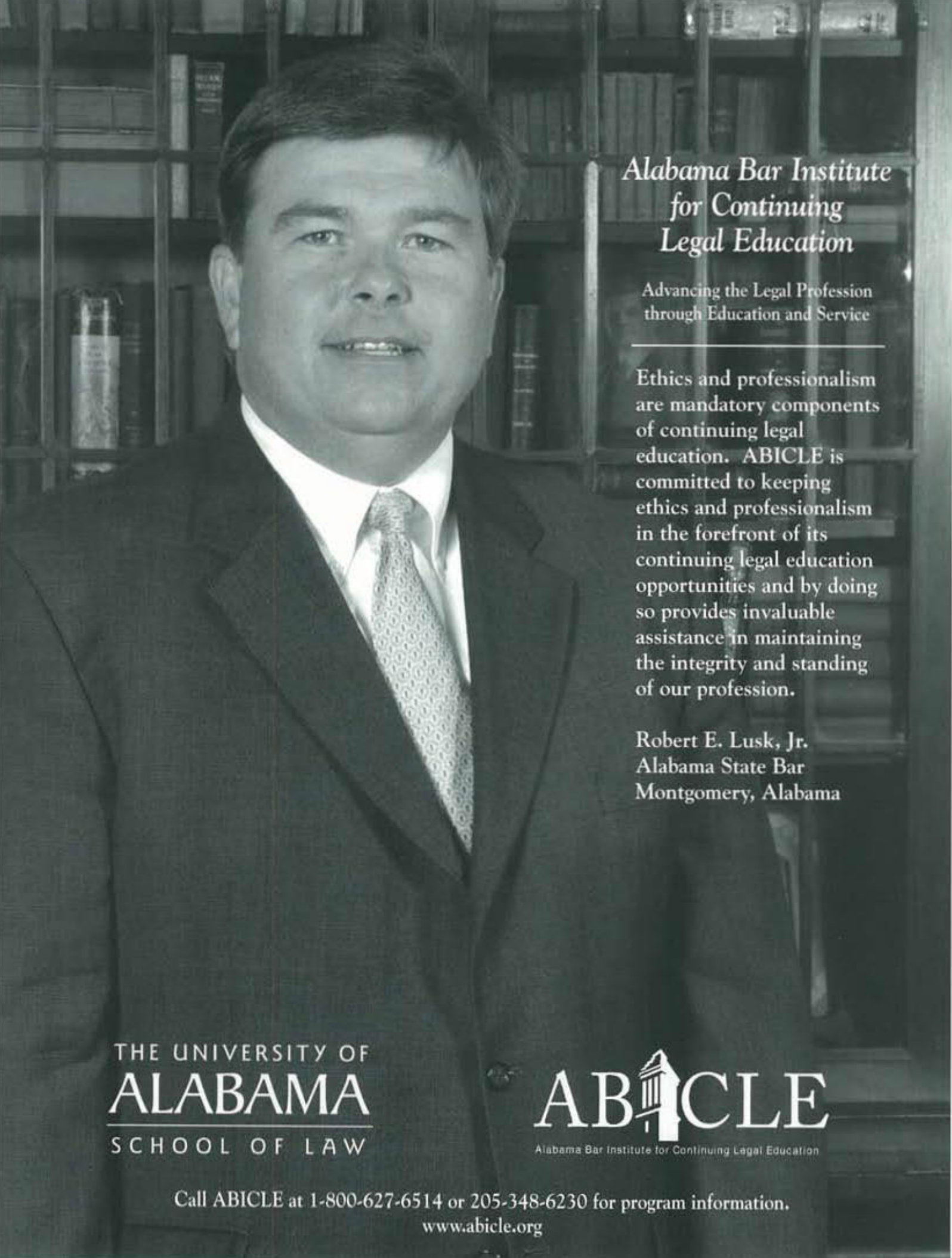

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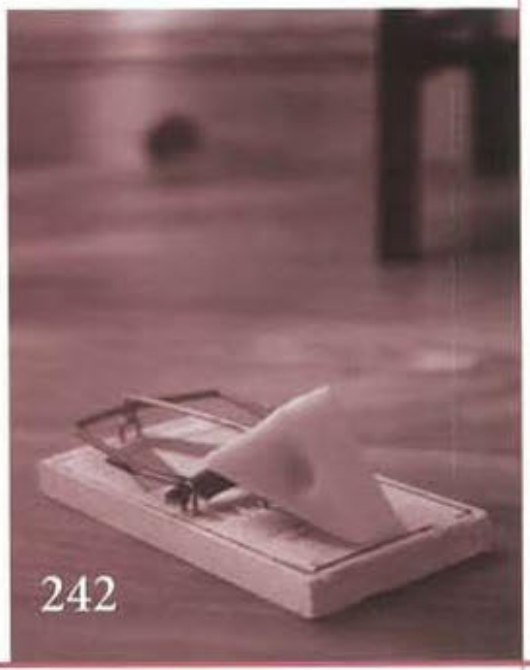

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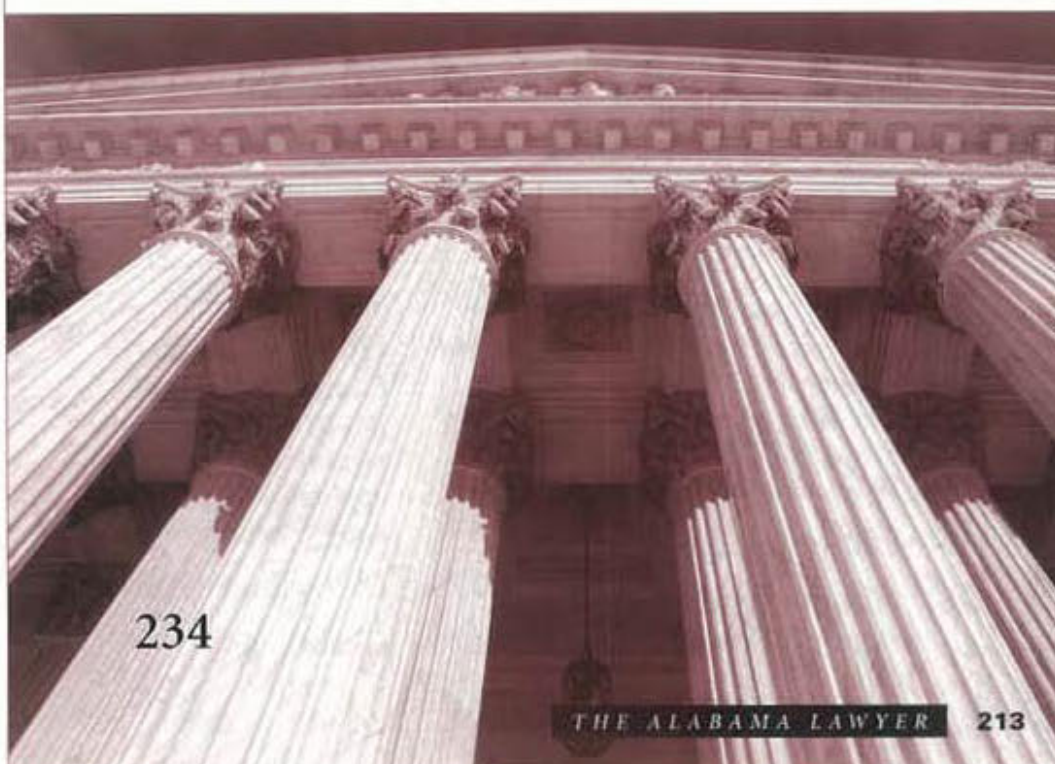
ON THE COVER

Oak Mountain State Park, Shelby County, Alabama
Photo by Paul Crawford, JD



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By William N. Clark

William N. Clark, 2004-2004 Alabama State Bar President, winds up a busy year traveling the state and meeting fellow attorneys. He talks with **Alabama Lawyer** *editor Robert Huffaker about what he's learned this past year.*

A Year in Focus

"Wild-eyed radical" Bill Clark talks about everything from merit selection to indigent defense to a death penalty moratorium.

(left to right) Tim Lewis and Tommy Klinner, ASB Law Day Committee co-chairs, Gov. Bob Riley, ASB Director of Communications Susan Andres and President Clark, at the signing of the proclamation designating May 1st-May 8th for Law Day celebrations

The Alabama Lawyer: Bill, you are nearing the end of your tenure as bar president. How would you assess your presidency?

Bill Clark: My initial assessment is how rapidly a year has gone by, and my second assessment is about the quality of the state bar staff and the lawyers who serve as Bar Commissioners and on various committees and task forces. Their commitment to the bar and to the community is just outstanding.

AL: What was the theme of your administration?

BC: Fred Gray's theme was "Lawyers Render Service." One of the first things that the Board of Bar Commissioners did this year was to adopt his theme as the motto of the Alabama State Bar. As far as I know, we are the only state bar that has a motto. I did not have a formal theme, however, since this is the 125th anniversary of the Alabama State Bar, our theme could be "Professionalism." The theme of our annual meeting this year is "125 years of Professionalism… The Journey Continues." On several occasions, I have spoken to new admittees on the importance of professionalism, as a part of the annual requirement for new lawyers.

AL: What is the state of professionalism within our profession? Has it deteriorated over the years?

BC: I think the dilemma that the ASB faces is one that all professions face. Whether it's medicine or ministry or the military–the conflict is between service and money. Doctors had to confront it earlier

"Alabama lawyers have an important role in helping the public understand such a significant proposal for change of our tax laws." On informing the public on the pros and cons of Governor Riley's proposed tax plan. More than 10,000 brochures were distributed.

than lawyers, that conflict between being a service profession and a business. Unfortunately, it often changes the practice of law. It even happens in the ministry–at least in denominations where ministers move to bigger churches and get paid more money. Sometimes that is the criteria rather than where the ministers can best serve. I think it's a real challenge for young lawyers in law school today who begin with huge debts. They're faced with having to make the decision whether to follow their hearts and go to work for a public service organization, such as Legal Services or a public defender's office where they will not make enough money to help pay that debt, or take the best paying job.

(left to right) Then-ABA President-Elect Dennis Archer, ASB Executive Director Keith Norman, then-ASB President-Elect Bill Clark and then-ABA President A.P. Carlton, Jr. at the Bar Leadership Institute, March 2003

AL: Have you found that lawyers, as a whole, do give to the profession? You said that you were continuing Fred Gray's

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(left to right) ASB Immediate Past President Fred Gray, Fay Clark, ASB President Bill Clark and ASB Executive Director Keith Norman at the 2003 Southern Conference of Bar Presidents in San Antonio

theme of lawyers rendering services. Have you been surprised at the number of lawyers who perform public service?

BC: I wouldn't say I've been surprised; I had been aware of the many things that lawyers do. This year I have been made *more aware*. For many years, I have been a champion of the role that lawyers play in serving the community. There are more lawyers coaching their children's athletic events and serving on non-profit boards probably than in any other profession. One of the concerns that we have had as a bar is to continue this trend since young lawyers, as they come out of law school and have the challenges that they do with their families, their business and as lawyers, may not feel they have the time to provide service in the community or service to the bar. The Board of Bar Commissioners approved and adopted a proposal to establish an ASB Leadership Forum designed to educate young lawyers, or lawyers who have not been practicing for more than ten to 15 years, about the aspects of leadership and service. The program begins next January. It will be helpful in encouraging lawyers to take an active role in the bar, as well as in their community and even in the legislature or in the judiciary.

AL: We're in the midst of the primary elections, including judicial seats. I have asked your predecessors in previous interviews what the current status is of the bar's position on judicial elections. Bring us up to date.

BC: About seven years ago, as a result of an extensive study, the ASB adopted a resolution and, in fact, endorsed a bill that would change the way judicial selection occurs in appellate races from popular election to merit selection. That bill did not pass the legislature. There has been some interest and some discussion within the ASB leadership about the possibility of reviewing that legislation and possibly pursuing it again. Because of the process and the enormous costs involved in the elections, the attitude of some of the members of the public was that when that much money is put in, justice is for sale.

AL: One of the bills introduced this year drew some discussion and that was whether to have supreme court justices run by district. Did the ASB take a position on that?

BC: We did not. While the bill probably would have increased diversity on the court, one concern was that a justice serves the state as a whole rather than a district. It would not be the best thing to have a justice committed simply to a district, when his or her constituency is the state as a whole.

AL: Describe the current status of the disciplinary process. Does it seem to be working?

BC: It's working very well, and we have an excellent staff. Tony McLain, the general counsel, and his staff are very responsive to inquiries that lawyers make about whether something is ethical or violates the ethical standards. When complaints are made, they are extremely efficient in following up and conducting investigations. The disciplinary process is working well in meting out the appropriate discipline for a particular offense.

AL: As the ASB president, don't you have the task of actually administering the public or private reprimands to attorneys who are being disciplined?

"We want to encourage these student atheletes, while in high school, to consider the importance of education in preparing for a career in the law — or in other professions." *President Clark's program, "Athletes, Academics and the Law: Play It Smart!" which has been presented to more than 500 students statewide and is still going strong*

"The rule of law and the allegiance to the rule of law are essential to our democratic government. ...It is our hope that however the impending legal issues may be ultimately decided, the rule of law will be followed."

Pres. Clark's statement on the issue of the Ten Commandments monument which was located in the Judicial Building in Montgomery

BC: I do private reprimands by letter. As for public reprimands, the individual lawyer who is being reprimanded has to come to the Board of Bar Commissioners' meeting. He or she then stands in front of the commissioners, and I read the reprimand. That is one of the most difficult tasks that a state bar president has.

AL: Is there any common theme that you see running throughout these reprimands that would serve us well so that we don't run into problems?

BC: Often, it is lawyers who are not responsive to the clients. They have a matter that a client inquiries about—they don't respond promptly, the matter is put on the back burner or the lawyer simply does not respond. The public reprimands that we're talking about are generally those that are not so much intentional conduct as much as it is negligence or just not being responsive to the client in a variety of ways. So I think the lesson for all of us is to pay attention to our business and when clients call, to respond as soon as possible. I know that's awfully difficult if you're busy but I think that's something we need to be conscious of.

AL: What's on tap for you for the next couple of months before you end your presidency?

BC: There are several things we initiated this year that we're trying to pursue. At the beginning of my presidency we initiated a program called "Athletes, Academics and the Law: Play It Smart." It is a program in which lawyer athletes go into public schools and talk about the importance of academics in order to try to encourage the young people while they're in high school to pay attention to those things that they need to go on to college not just to be athletes but to perhaps be lawyers or doctors, whatever. We're continuing that and I very much support that program. Susan Andres, our director of communications, and Scotty Colson, chair of our Public Relations Committee, have done an outstanding job with this project.

Another project that we initiated early on was a new committee, the Community Education Committee, that I tasked to try and help fulfill that portion of the bar's mission to educate the public—to keep the public informed about the law. That committee has been working on two projects. One was a pamphlet to educate the public

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about both sides of the issue on constitutional reform. Another was intended to educate the public about both sides of the issue on the death penalty moratorium issue. We are moving along on the constitutional reform project, but have had some difficulty in getting cooperation from the Attorney General for the prosecution side of the project about the moratorium on the death penalty.

Early in my term we published a brochure that presented information in an objective way about Governor Riley's tax and accountability proposal. It was very well received around the state by lay people, as well as lawyers.

AL: Do you think that the bar, as an entity, and its staff adequately serve the needs of the members of the bar?

Reggie Hamner (left), former ASB executive director, visits with Bill Clark at a retirement luncheon for a committee volunteer.

BC: Absolutely. I think sometimes our membership doesn't realize that the Alabama State Bar performs all of the functions that in other states are sometimes fragmented among several different organizations. For example, the Alabama State Bar is responsible for the admissions process, the examination process, the disciplinary process and the administration of CLE. In some states the discipline is put under the supreme court or admissions is placed under some agency. In our state, all of these things are done by our state bar staff and volunteers. I think that helps the bar function so much better. After talking with other bar presidents, I am satisfied we have a lot less conflict than other states. I think that's a real service to the bar.

The various programs of the state bar are largely run by volunteers, who provide great service not only to the bar but to the public as a whole. We have staff persons assigned to most programs. For example, in our law office management program, Laura Calloway, the director, travels all over the state conducting programs about how to manage a small law office. She has excellent resource information and material. We also have an outstanding Lawyer Assistance Program that Jeanne Marie Leslie heads up. A lot of lawyers don't know about it, but those who have had alcohol and drug problems know. Jeanne Marie showed me a letter she had received from a lawyer thanking her for all that she had done in getting his life back together. This is an invaluable service that the bar provides.

The Board of Bar Commissioners adopted what may be one of the most popular services that the state bar has ever provided, the Case Maker Legal Research System that will be made available to the members of the bar at no cost. This is a program that was started by the Ohio State Bar some years ago. The Ohio State Bar created a consortium of other states that they invited to participate. I think 14 states are now involved. It doesn't go back as far as some of the other research systems, but for solo and small firms it will be a real, real asset.

AL: When will that go online?

BC: We adopted it; we'll have to sign the contract and get the library established. It takes about nine months from the time we actually sign the contract to get that in place. Georgia has recently adopted it. Texas had their own legal research system that they abandoned and have now adopted Case Maker. Mississippi is considering adopting it. Case Maker has some limitations; for example, if you want all the states in the United States, you won't get that on Case Maker. However, you get all the states that are in that consortium. In the federal system we anticipate going back in the appellate decisions to 1981 to the beginning of the Eleventh Circuit. Texas has the Fifth Circuit going back further and we will have access to whatever Texas has. And then, of course, we'll have all the Alabama material. It's a good system—it's easy to use. I think it's exciting.

The ASB, under the leadership of its president Bill Clark, convened a day-long symposium on the status of indigent defense in Alabama. ***"There is no statewide advocate for indigent defense. One response many states have made is to create a statewide indigent defense commission to oversee indigent defense in their respective states."***

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**The year following some names denotes alumni of Cumberland School of Law*

President's Page

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AL: Are there any other bar projects you hope to see continued?

BC: Yes. This past February the state bar sponsored its first Alabama Indigent Defense Symposium at which we were looking at indigent defense in Alabama, where it's been and where it is. We had judges, lawyers and others from out of state discussing what has been done in their states. A general consensus was reached among those who participated that one of the major needs that we have is for some institutional body to oversee indigent defense in Alabama. The type of entity that's most commonly used is a statewide indigent defense commission. Several years ago the Judicial Study Commission under former Chief Justice Hooper, made such a proposal. It was not successful in the legislature. We have been looking at that since the meeting in February and I would like to see that pursued so that it can become a reality. I think it would be really meaningful for Alabama.

IOLTA Director Tracy Daniel and President and Mrs. Clark at the 2003 Annual Meeting

AL: What is Bill Clark going to do when his presidency is over?

BC: I hope to continue to serve the bar in some of the projects that we started. Beginning in January I will begin serving as the chair of the Church Council at my church. Being president of the state bar has been an exciting experience, but it takes a considerable amount of time. I could not have done it without the outstanding support from the other lawyers and staff in my firm, and particularly my secretary, Rhonda Bollen. This interview could not conclude without recognition being given to my wife Faye. She has given a tremendous amount of her time to drive me around the state so I could work while traveling. It was fitting that we celebrated our 40th wedding anniversary in February of this year — we were able to spend more time than normal together because of our frequent travels. Someone on the bar staff suggested that I write an article for the Alabama Lawyer entitled "The Other Partner," referring to my wife. Not a bad idea. ■

"William N. Clark is not the guy who comes to mind when you think, 'wild-eyed radical.'... Clark proposes the state bar play a neutral but informative role on the government's awesome power to take life." *President Clark's proposal for an educational brochure on the death penalty moratorium*

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By Keith B. Norman

"This Is Not Your Father's Oldsmobile"

The announcement in April that the last Oldsmobile automobile had rolled off a General Motors assembly line in Lansing, Michigan caused me to wax nostalgic at the once proud car's demise. My parents had a 1962 Olds Delta 88. My grandparents also drove Oldsmobiles. The car I took to college was a 1966 Olds Dynamic 88. Our family had a strong affection for Oldsmobiles. When my father left the clothing business, he went into the automobile business selling—you guessed it—Oldsmobiles!

Many of you will recall Oldsmobile's successful marketing campaign of the late '70s, that declared, "This is not your father's Oldsmobile!" to convince a younger generation of drivers that Oldsmobiles were stylish and hip and not just for the older crowd. Things change and time marches on. There will no longer be a division of General Motors producing Oldsmobiles. Apparently, sales of Oldsmobiles were no longer sufficient to justify the continuation of an automobile brand that had been in continuous production longer than any other. With a wider variety of makes and models from which to choose, purchasers evidently felt that the Olds brand was no longer relevant or meeting their needs.

What do Oldsmobiles have to do with the Alabama State Bar? More than you might think. One of the comments I regularly heard from lawyers when I first started working here was that the state bar was controlled by the "silk stocking" law firms. I soon knew, however, that this perception was a myth. That is because from the very first day I was here, I realized the work of the state bar is "service," and service is not about firm size, areas of practice or the geographic location of a firm. Yet, sometimes perception can be reality. The bar presidents and commissioners with whom I have had the pleasure to serve have done much to destroy this perception through bar programs and activities that attempt to address the needs of *all* members of the legal profession. The enactment of Senate Bill 154 during this year's legislative session is a good example.

SB 154 creates nine appointed at-large positions in addition to the Board of Bar Commissioners' current 61 elected positions. This legislation was the culmination of one of several recent recommendations of the **Task Force on Diversity in the Profession**. ASB President **Fred Gray** appointed former Governor **Albert Brewer** and retired Alabama Supreme Court Justice **Hugh Maddox** as co-chairs of the task force. Former state bar President

Warren Lightfoot and longtime bar commissioner **Mason Davis** served as task force vice-chairs. State bar President **Gary Huckaby** appointed the first diversity task force in 1988.

In its report to the Board of Bar Commissioners, the task force noted that African-American lawyers represented 5.22 percent of the members of the bar, but had only 1.67 percent representation on the commission. Likewise, 24.48 percent of Alabama lawyers were female, but only 5 percent of the commission members were female. The task force also noted that 24.42 percent of Alabama's lawyers were between the ages of 30-39, but accounted for only 6.67 percent of the commission membership. SB 154 will be the first significant change in the commission structure in almost two decades. Prior to 1987, each judicial circuit elected a single commission member. Following changes in the bar's election rules in 1987, the number of commissioners for each judicial circuit has been based on the number of lawyers in the circuit. In addition, the president-elect has been elected by mail ballot instead of ballots being cast at the annual meeting.

SB 154 was enacted with the support of lawyer legislators. Senator **Rodger Smitherman** of Birmingham, chairman of the Senate Judiciary Committee, served as the sponsor of the legislation in the Senate. **Marcel Black** of Tuscumbia, chairman of the House Judiciary Committee and Speaker Pro Tem **Demetrious Newton** of Birmingham guided the legislation through the House. The Board of Bar Commissioners will select the bar members to fill these at-large positions. The terms will begin July 1, 2005. The commission will draft appropriate rules to govern the selection of the at-large members. The nomination rules should be published early next year.

I no longer hear the remark that the state bar is "controlled by" one group of lawyers or another. Perhaps, that perception has been laid to rest for good because of the electoral changes in 1987, the diverse participation of bar members on bar committees and the support by bar leaders of programs like LOMAP and ALAP and other resources that are available to all lawyers. For whatever reason the state bar's image has changed, I think it is fair to say, "This is not your father's bar association." ■

Education Debt Climbs For February 2004 Bar Examinees

There were 260 examinees sitting for the February bar examination. Of the examinees, 36 percent had education-related debt averaging $63,452.

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Electronic Filing Is Being Implemented in the U.S. District Court, Northern District of Alabama

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- Concurrent access to case files by multiple parties;
- Secure storage of documents; and
- Potential reduction in courier fees.

What Do I Need to Use CM/ECF?

- A personal computer;
- Word processing software;
- Internet access and a browser;
- Software to convert documents into PDF; and
- Scanning equipment, which may be useful.

How Does It Work?

The electronic case files system accepts documents in a portable document format (PDF). PDFs retain the way a document looks, so the formatting is preserved. Filing a document with the court's CM/ECF system is easy:

- Create the document using word processing software;
- Save the document in PDF format;
- Log onto the court's CM/ECF system, using court-issued login and password;
- Follow the simple instructions on the screen; and
- Save or print the CM/ECF electronic receipt e-mailed from the court confirming that the document was filed.

Are There Fees?

There are no added fees for filing documents over the Internet using CM/ECF. Filing fees and other statutory fees for certification will still apply. Electronic access to court data is available through the Public Access to Court Electronic Records (PACER) program. Attorneys and litigants receive one free copy of documents filed electronically in their cases; additional copies are available for viewing or downloading at seven cents per page.

How Will I Sign Documents?

The court will issue logins and passwords for each attorney. Use of your login and password to file a document replaces your signature, so this password should be kept secure.

When is CM/ECF Coming to This Court?

CM/ECF is coming in November 2004. Implementation is underway. The court anticipates allowing attorneys to electronically file documents by January 2005.

What Kind of Training Will Be Provided?

Training will be provided at the courthouses in Birmingham and Huntsville. The court will also be working with all counsel to provide training at other locations in the district. Check our Web site at *www.alnd.uscourts.gov* for additional information and a hyperlink to training on PACER.

Contact Information

You may obtain additional information about CM/ECF or request training for any group of 20 or more at your site or a court location by contacting Sharon Harris in the clerk's office at (205) 278-1717. ■

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About Members, Among Firms

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

About Members

Jan M. Eberhardt, formerly of Parsons & Eberhardt, announces the opening of his office at 110 W. Section Avenue, Foley 36535. Phone (251) 970-1099.

Van C. Gholston announces that he is no longer with the Law Office of Jerry L. Thornton in Hayneville. He also announces the opening of the **Law Office of Van C. Gholston**, P.O. Box 638, Luverne 36049. Phone (334) 335-3666.

G. William Gill, formerly of McPhillips, Shinbaum and Gill LLP, announces the opening of his office at 207 Montgomery Street, Suite 1222, Montgomery 36104. Phone (334) 834-7606.

James V. Spencer, III announces the opening of his office at 1200 Corporate Drive, Suite 107, Birmingham 35242. Phone (205) 995-5080.

Sherry H. Thomas announces that she is no longer with Shelby & Cartee. She also announces the opening of her office at Chase Commerce Park, 3821 Lorna Road, Suite 109, Birmingham 35244. Phone (205) 682-9006.

Johnny L. Tidmore announces his return to Arab and the opening of his office at 16 Fourth Avenue, NW, Arab 35016. Phone (256) 586-6666.

Among Firms

The **Alabama Department of Homeland Security** announces that **Dennis M. Wright**, formerly of the Alabama Attorney General's Office, has joined the department as general counsel, following completion of 14 months on active duty with the United States Army in support of Operation Iraqi Freedom.

The Atchison Firm PC announces that **Gregory Evans** and **Andrea L. McClellan** have joined the firm as associates.

Ernest W. Ball & Associates announces that **Bryan Andrews** and **Kevin R. Kusta** have joined the firm as associates.

Beard & Beard announces that **Jim Beard** has joined the firm.

Bond, Botes, Shinn & Hughes PC announces that **S. Reid Dunlap** has joined the firm as an associate.

Bryan S. Brinyark, Robert J. Lee, S. Scott Hickman and **P. Douglas Smith, Jr.**, formerly of Brinyark & Nelson PC, announce the opening of their offices, **Brinyark & Lee PC**, at 2501 6th Street, Tuscaloosa 35401. Phone (205) 345-5330.

Burr & Forman announces that **Dawn S. Carre, Allan R. Wheeler** and **Turner B. Williams** have joined the firm.

CB&I announces that **Walter G. Browning** has been named vice-president, general counsel and secretary of the company.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Michael E. Turner** and **Jarrod J. White** have become partners, and **Rebecca Donelson Parks, John Allen Roberts** and **Joseph D. Stutz** have become associates.

Carr, Allison, Pugh, Howard, Oliver & Sisson PC announces that **Thomas F. Monk, II** has joined the firm.

Espy, Nettles, Scogin & Brantley PC announces that **W.A. Hopton-Jones, Jr.** has joined the firm as an associate.

Fees & Burgess PC announces that **Michael M. Linder** has joined the firm as an associate.

Daniel B. Feldman and **Daniel Patrick Lehane** announce the formation of **Feldman & Lehane LLC**, with offices located at 2229 1st Avenue, N., Birmingham 35203. Phone (205) 241-9669.

First American Title Insurance Company announces that **Jeffrey R. Lees** has joined the Alabama office as the agency representative.

Gaines, Wolter & Kinney PC announces that **David R. Hanbury** has joined the firm as an associate, and that the **Hon. Jerry L. Fielding** has joined as *of counsel*.

Hand Arendall LLC announces that **Kelly A. Thrasher** has joined the firm as an associate.

Hatcher, Stubbs, Land, Hollis & Rothschild LLP announces that **Dustin T. Brown** has become an associate.

Frank H. Hawthorne, Jr. and **Randy Myers**, formerly of Hawthorne & Hawthorne LLC and Richard Jordan, Randy Myers & Ben Locklar PC, announce the formation of **Hawthorne & Myers LLC**, at 322 Alabama Street, Montgomery 36104. Phone (334) 269-5010.

Husch & Eppenberger LLC announces that **Karen G. Biagi** has joined the firm as *of counsel* in the Chattanooga office.

James C. Ayers, Jr. and **Brian C.T. Jones** announce the formation of **Jones & Ayers LLC**, located at 209 S. Jefferson Street, Athens 35611. Phone (256) 230-6626.

Michael Johnson, Sandra Parker Hoffpauir and **J. Clark Pendergrass** have become shareholders in **Lanier Ford Shaver & Payne PC. George Kobler** has become an associate.

Lightfoot, Franklin & White LLC announces that **Andrew S. Nix, Natasha L. Wilson, Philip McCall Bridwell** and **Sarah Oliver Warburton** have become associated with the firm, **Anne Sikes Hornsby** and **Stephen J. Rowe** have become members and **Ivan B. Cooper** and **Craig N. Rosler** have become *of counsel*.

Luker, Cole & Associates LLC announces that **Amber L. Ladner** and **R. Lance Bell** have joined the firm as associates.

Lloyd, Gray & Whitehead PC announces that **J. Rick Wallis** has joined the firm.

Governor Bob Riley announces the appointment of Gadsden attorney **Shaun Malone** as circuit court judge in the **16th Judicial Circuit**, effective June 1. Malone will fill the remainder of the term of **Judge Donald Stewart**, who is retiring.

Stanley Jay Murphy and **Marita Murphy** announce the opening of **Murphy & Murphy LLC**, with offices located at 1426 22nd Avenue, Tuscaloosa 35401. Phone (205) 349-1444.

Mark C. Nelson, Joel F. Dorroh, Patrick O. Gray and **Burt W. Newsome** announce the formation of **Nelson, Dorroh, Gray & Newsome LLC** at 2216 Fourteenth Street, Tuscaloosa 35401. Phone (205) 349-3449.

The **United States Attorney's Office for the Northern District of Alabama** announces that **Laura Hodge** has joined the office as an Assistant U.S. Attorney. Hodge formerly served as an assistant district attorney for Jefferson County.

The Prince Law Firm PC announces that **Josh Hayes** has joined the firm as an associate.

The **Law Office of Raymond C. Winston** announces that **Norman G. Winston, Jr.** has become a partner, and the firm name is now **Winston & Winston LLC**.

JOSEPH CABOT KELLETT

Joseph Cabot Kellett departed this life on December 1, 2003. He was born on January 16, 1924 in DeKalb County, where his father, Joseph C. Kellett, Sr., served as probate judge from 1932 until his death in 1941. Joe graduated from DeKalb High School that year, and was voted both "most popular" and "most conceited" by his senior class. He attended Alabama Polytechnic Institute until June 1942, when he received an appointment to the United States Naval Academy in Annapolis. He attended the naval academy until February 1943. Having then attained the age of 19 years, he enlisted in the United States Marine Corps to serve his country in World War II.

After completing Officer Candidate School in Quantico, Virginia, Joe received an appointment as a second lieutenant and was assigned to the 5th Marine Division in December 1943. He was the youngest commissioned line officer in the history of the Marine Corps. He served in combat duty on the island of Guam and then was assigned to direct artillery fire as an aerial observer in connection with the invasion of Iwo Jima in February 1945. He was awarded the Air Medal in recognition of his mastery of gunnery techniques, his courage and devotion to duty. By the end of the war, he had achieved the rank of first lieutenant.

Thereafter, Joe completed undergraduate school at the University of Alabama. He was a member of Alpha Tau Omega fraternity, and his ATO brothers bestowed upon him the honor of representing the fraternity at football games as its "horizontal cheerleader." He entered the University of Alabama School of Law, and became a member of the illustrious class of 1950, together with his close friends Howell Heflin, former United States Senator and chief justice of the Alabama Supreme Court; former Governor Albert Brewer; John Patterson, former governor and judge of the Alabama Court of Criminal Appeals; John Tyson, former judge of the Alabama Court of Criminal Appeals; Tom Bevill, former United States Congressman; Claude Kirk, former governor of Florida; as well as W. W. Watson, John Wear and Max Howard, his colleagues of the DeKalb County Bar, and many others. Throughout his life, he served his beloved University of Alabama. He was vice-president of district eight of the University of Alabama National Alumni Association, which encompassed seven counties. In the early 1970s, he was appointed to a committee comprised of 100 business and professional leaders to work with the University's administration and deans to improve the curriculum of the school. Joe served as a member of the University of Alabama's Law School Council and the Law School Foundation. He was a member of the Farrah Law Society. Dr. Richard Thigpen, former acting CEO, executive and academic vice-president of the University of Alabama, recalled that Joe's lifelong support and faithfulness to his alma mater covered all aspects of the institution. Dr. Thigpen remembered Joe, as do we all, as an extraordinary leader and an ambassador for the ideal of excellence.

After law school, Joe opened a general practice in Fort Payne, but after only five months, his career was interrupted when North Korean forces invaded South Korea on June 25, 1950. Joe and other reservists were placed on active duty. He was sent to Korea, and served as an artillery officer with the 1st Marines. In November, the Marines had advanced to within a few

miles of the North Korean border with China at the Chosin Reservoir. Chinese forces, numbering more than 100,000 troops, ambushed the United States forces. The Marine infantry companies were surrounded and suffered tremendous casualties. Joe assumed command of a provisional infantry platoon comprised of some of the survivors of the ambush. The epic "breakout" from the Chosin Reservoir began. Joe was wounded by a Chinese grenade, but continued to direct fire and encourage his men. He was awarded the Purple Heart, the Bronze Star with the Combat "V," and Presidential and Navy Unit citations. It is difficult to imagine the measure of sacrifice that he and others of his generation gave through their military service. Joe was released from active duty in March 1952, but remained in the reserves until he was honorably discharged with the rank of major from the U.S.M.C. in 1958.

After returning to Fort Payne, Joe maintained a general practice for many years. Later, he specialized in insurance defense, banking and corporate law and the representation of municipal boards. He served on the Board of Directors of Fort Payne Bank for 31 years, and as interim president for one year after AmSouth purchased the bank. He was the attorney for DeKalb-Cherokee Counties Gas District for over 30 years. He incorporated the Industrial Development Board of the City of Fort Payne in 1964, and represented that board until he retired in 2000. He represented the Fort Payne Water Board for many years, and was the Fort Payne city attorney for 16 years. Joe was the first city judge of Fort Payne, and of the towns of Rainsville, Fyffe, Geraldine, Crossville, and Collinsville. He was an Alabama State Bar commissioner from 1964 through 1967.

Joe Kellett was an outstanding lawyer who was highly respected throughout the state. His exceptional skill and intellect were matched only by his noble character and unquestionable ethics. He honored the principles of truth and fairness that the law embodies in all respects, and set a strong and admirable example for others engaged in the practice of law.

Joe was committed to his community, the state of Alabama and the welfare of others. He was a charter member and former president of the Fort Payne Jaycees, and was named as its "Young Man of the Year" in 1954, when he chaired a committee which raised private funds to purchase land for a new city school, and then chaired a citizens committee that rallied voters to approve a millage tax increase to finance the construction of the school. Joe was a longtime member and former president of the Rotary Club. He was a Mason. He was a member of the First United Methodist Church in Fort Payne and taught a men's Sunday School class for many years. He was a force in bringing new industries to Fort Payne when the sock mills were the only manufacturers. He was one of a small group of community leaders, many now gone, who laid the groundwork for the community we have today.

At the state level, Joe served on the Road and Bridge Commission during Governor "Big Jim" Folsom's administration. The commission obtained agreements with Alabama Power Company and the T.V.A. to design all hydroelectric dams to accommodate roadways. This allowed the state to construct roads across the dams, eliminating the need for bridges at those locations. Joe also served as assistant counsel to the Alabama Milk Control Board. It was the responsibility of the board to protect dairy farmers from unscrupulous pricing adjustments of distributors. Governor Albert Brewer appointed Joe to serve as a member of the Alabama Prison Commission.

Joe retired from the practice of law in 2000, having been a member of the bar for 50 years. The DeKalb County Bar Association sponsored a retirement dinner in his honor, which was organized by Judge David A. Rains. Buck Watson served as the master of ceremonies and chief entertainer of the evening. Buck, Judge Heflin and Governor Brewer recounted stories of their times with Joe and told of their admiration for the services that he performed for his country, his state and his profession. Many fine things were said, all of which were abundantly deserved. It was fitting for Joe to be honored in such a memorable way.

Joe left a wonderful heritage to his children, Diane Kellett Mitchell, Patricia Kellett Roberts and JoAnne Kellett. It was obvious that his family provided him with great joy and he took pride in his girls. In fact, Patricia was his law partner for nearly 20 years.

Joe's accomplishments came from his contributions to the world around him. He truly embodied the attributes of character and sacrifice that distinguished his generation. The professionalism and dignity which he brought to the practice of law provided a model that lawyers who came after him could only seek to emulate. I feel privileged to have known and worked with Joe, and I shall always remember him fondly and with the deepest respect.

—Randall L. Cole, judge, Ninth Judicial Circuit, Cherokee and DeKalb counties

Bell, Gene Elbert
Gardendale
Admitted: 1956
Died: March 19, 2004

Harris, Stephen Lee
Chelsea
Admitted: 1978
Died: January 19, 2004

Henry, Robert Daniel
Selma
Admitted: 1990
Died: April 20, 2004

Hillman, Jerry Dean
Tuscaloosa
Admitted: 1992
Died: April 18, 2004

Jetton, William Douglas
Guntersville
Admitted: 1961
Died: April 25, 2004

Lamkin, Griffin, Jr.
Birmingham
Admitted: 1939
Died: March 28, 2004

Matthews, John Randolph, Jr.
Montgomery
Admitted: 1950
Died: April 28, 2004

McMillan, Samuel Martin
Mobile
Admitted: 1954
Died: April 3, 2004

Miles, Albert Schneider
Tuscaloosa
Admitted: 1986
Died: November 6, 2003

Thompson, Woodford Ross, Jr.
Hoover
Admitted: 1949
Died: February 24, 2004

ASB Law Day 2004 Observance Includes "Cross that River: *Brown v. Board of Education*"

Cast and crew of this year's exciting Law Day production are packing up and heading to Sandestin for one final performance – Don't Miss it!

Destinee Thomas, who protrayed young Ruby Bridges, and ASB President Bill Clark

This year marks the 50th anniversary of *Brown v. Board of Education*. The production of "Cross that River: *Brown v. Board of Education*," performed in the courtroom of the Alabama Supreme Court, celebrates this momentous decision that changed the face of America forever by ending segregation in our schools. The stories of the plaintiffs involved in the case and the dramatic re-enactment of the oral arguments give the audience a greater understanding of the human face of *Brown*. Little Ruby Bridges, depicted in the famous Norman Rockwell painting, *The Problem We All Live With*, is representative of the response in the South of the enforcement of the integration of schools.

Montgomery area students, lawyers and others volunteered their time and talents, working since February to bring together this production. **Judge John B. Crawley,** of the Alabama Court of Civil Appeals, **Shirley Zeigler Brown**, with the Department of Industrial Relations, and **Mike Jackson**, with the firm of Beers, Anderson, Jackson, Hughes & Patty, have parts in the play, as does Brown's daughter, Jimia. **Tim Lewis**, supreme court marshal and librarian, and Montgomery attorney **Tommy Klinner**, co-chairs of the ASB Law Day Committee, volunteered long hours working backstage, as did **Mary Edge Horton**, executive assistant, Alabama Supreme Court. **Jane Garrett**, part-time librarian in charge of special projects for the supreme court, and **Rebecca Gregory**, a retired Montgomery schoolteacher, co-wrote the play. In addition to helping sponsor "Cross that River," the ASB held its annual Law Day Poster and Essay contest for students statewide in grades K-12. The 2004 winners are:

Essays, Grades 7-9

1st Place: Cameron Proper, Hartselle Jr. High, Hartselle

2nd Place: Emi Raycraft, Booker T. Washington Magnet, Montgomery

3rd Place: Wilder Queen, Hartselle Jr. High

Essays, Grades 10-12

1st Place: Adrienne Knight, Booker T. Washington Magnet

2nd Place: Nic Powell, Hartselle High School

3rd Place: Foy Collins, Booker T. Washington

Posters, Grades K-3

1st Place: Ellison Moore, Advent Day School, Birmingham

2nd Place: Halley Henderson, Advent Day School

3rd Place: Franklin Williams, Advent Day School

Posters, Grades 4-6

1st Place: Thomas Olesen, Dalraida Elementary, Montgomery

2nd Place: Haley Knight, Dalraida Elementary

3rd Place: Callie Foscue, Monrovia Elementary, Huntsville

Judges' Award for Creativity

Travis Miller, Dalraida Elementary

Law Day Co-Chair Tommy Klinner with Law Day 2004 winners on the steps of the Judicial Building

Dale County Celebrates Law Day

In **Dale County**, through the efforts of **District Judge Bill Filmore**, lawyers and judges went into the classrooms at Daleville High School, Carroll High School (Ozark) and Dale County High School (Midland City) to share the Law Day theme with the high school students. The theme of Law Day this year focuses on desegregation of our school systems and the 50th anniversary of *Brown v. Board of Education*, but according to Judge Filmore, the school systems in Dale County and the surrounding areas were not desegregated by consent decrees until the early '70s. ■

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Oyez! Oyez! Oyez!

Admission to the Bar of the Supreme Court of the United States of America

BY TRACY W. CARY

Introduction

Several years ago, I read an article about one lawyer's account of his experience being admitted to the United States Supreme Court Bar. The idea sounded fascinating so I decided to apply for membership, even though I never expected to have the opportunity to argue a case before the nation's highest court.

At the time I applied for membership in the Supreme Court Bar, I was unable to attend a session of the Court so I was admitted through the mail. Recently, two of my partners decided they wanted to apply for admission to the United States Supreme Court Bar. The Bar's rules allow a current member to move for admission of new applicants, so the three of us decided to travel to Washington, DC when the Court was in session and experience in person the admission ceremony in open court with me serving as the movant for the admission of my two partners.

This article is intended to provide a brief history of the Supreme Court, an overview of some aspects of the Supreme Court building, and an informational sketch about the process of application to the United States Supreme Court Bar. It is hoped that some who read this will consider applying for membership in the relatively small group that comprises the United States Supreme Court Bar.

Historically, Very Few Lawyers Become Members of the Supreme Court Bar

Admission to the United States Supreme Court Bar is an accomplishment that relatively few choose to pursue, but it is well worth the modest price of admission even if one never intends to brief or argue a case before the Court. Very few of the Court's bar members ever have the opportunity to argue a case. The Court's 2003-2004 calendar revealed only 38 days out of the entire year on which oral arguments were scheduled. The Court generally schedules two to four cases for argument on each of the 38 days on which arguments are calendared. Obviously, many cases are argued by two or more attorneys per side, but if each case argued before the Court featured only one attorney per side, a minimum of 152 lawyers would have the opportunity to argue before the Court each year. Of course, in many cases that the Court accepts, oral arguments are not granted, and the cases are decided only on briefs. Nevertheless, many, if not most, of those who are members of the Court's Bar may never argue a case before the Court.

Since the United States of America was founded, nearly a quarter-million lawyers have been admitted to the United States Supreme Court Bar. To be exact, 249,061 lawyers have been admitted to the Supreme Court Bar according to the United States Supreme Court's Public Information Office. However, the Supreme Court does not track when members die or cease practicing for any reason. For that reason, it is impossible for the Clerk's office to provide an accurate count of current members of the bar. While a quarter-million lawyers over America's history might sound like a high number at first glance, it is actually quite small when one considers that the United States Supreme Court has existed for more than 200 years and during that time, there have been several million attorneys admitted to practice law in America. According to the American Bar Association, there are currently more than one million lawyers in the United States. Yet only about 1,000 lawyers per year are admitted in open court to the Supreme Court Bar.

In some ways, the process of admission in open court to the bar of the highest court in the United States of America is the ultimate tourist experience for attorneys. The history, traditions and ceremony of the Court are certainly worth learning about; the Supreme Court is incredible to tour; and when a lawyer becomes a member of the Supreme Court Bar, there are certain privileges of membership that continue for life. For example, members of the Supreme Court Bar have an open invitation to attend oral argument, and they are permitted to sit in a reserved seating area close to the bench. In addition, Supreme Court Bar membership entitles a bar member to the use of the Supreme Court library.

The Beginnings of America's Highest Court

Membership in our nation's highest court carries with it an obligation to consider at least a brief history of the beginnings of the Supreme Court. Article III, § 1 of the United States Constitution provides that "[t]he Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Supreme Court of the United States was created in accordance with this provision and by authority of the Judiciary Act of September 24, 1789 (1 Stat. 73).

Despite the current power of the Court, some might suggest that the third branch of government, the judicial branch, has in some ways been treated as the stepchild of American government. The Supreme Court first assembled on February 2, 1790 in the Merchants Exchange Building in New York City. It was nearly 150 years into the American experiment before the United States Supreme Court had a home of its own. Of course, no one could accurately predict in 1787 how the Supreme Court would evolve or what its needs would be.[1] The Judiciary Act of 1789 established three circuits and directed circuit courts to meet in each district of each circuit to perform trial and some appellate functions. Each circuit court was to be manned by a district judge and two Supreme Court Justices, and the Justices had to participate in grueling circuit riding in order to provide the new nation with local justice. Given the size of the circuits and the primitive state of roads in most parts of the young country, the Justices usually spent more time traveling than they did where the Court was based. Most Justices understandably hated the circuit-riding aspect of the position. In fact, the Justices wrote President Washington in 1792 and complained of existing in exile from their families. Eventually, the circuit courts were established and the judges were able to stop the practice of circuit riding, but it took 100 years from the formation of the Court before Congress officially ended the practice of circuit riding for Supreme Court Justices.

In 1800, when the United States Capital was moved from Philadelphia to Washington, the President moved into the White House and the Congress moved into the Capitol. However, the Supreme Court had no home in Washington. Through a last-minute request to the Congress, the Court moved into a small, empty room in the Capitol.[2] During the time the Supreme Court met in the Capitol, it changed its meeting place a half dozen times. During the time the Court met in the Capitol, a newspaper reporter of the day alleged that "a stranger might traverse the dark avenues of the Capitol for a week without finding the remote corner in which Justice is administered to the American Republic."[3] In the early days of the Court, the Justices sometimes left their Capitol space and went to Long's Tavern to conduct their deliberations.

As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law, and so the Court functions as guardian and interpreter of the Constitution. The Supreme Court is distinctly American in concept and function, as Chief Justice Charles Evans Hughes observed. Few other courts in the world have the same authority of constitutional interpretation and none have exercised it for as long or with as much influence as has the United States Supreme Court.[4] Yet the Court continued to meet in borrowed space in the Capitol for 135 years despite ongoing complaints of inadequate space for Justices, their staff and attorneys who argued before the Court.

Quill pens have remained part of the courtroom scene. Twenty ten-inch white quills are placed on counsel tables each day that the Court sits, as has been done since the earliest sessions of the Court.

A President Becomes Chief Justice and Helps the Court Get a New Home

Finally, in 1929, Chief Justice William Howard Taft, who had been President of the United States from 1909 to 1913, persuaded Congress to end the space-sharing arrangement in the Capitol and authorize the construction of a permanent home for the Court. Chief Justice Taft charged Cass Gilbert, Sr., the project's architect, to design "a building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States."[5] Unfortunately, neither Chief Justice Taft nor Gilbert lived long enough to see the building completed. Taft resigned from his position due to ill health and died a few months later.

Construction began in 1932 and three years later, the Court was able to move into its own building in 1935. The first session in the new Supreme Court building began on October 7, 1935 and there were no cases argued in that first session. In fact, the only business conducted on the Court's first session was the admission of new attorneys to the bar. As a point of trivia, the first case to be argued in the new building was *Douglas v. Willcuts*, argued on October 14, 1935.

Not all the Justices wanted a new building, and some Justices and many in Congress opposed Taft's relentless pursuit of the Supreme Court building. Oddly, even when the new building was completed, the Justices could not agree on whether they wanted to move into it. The Justices were so accustomed to their customary way of doing things that it took ten years before all nine Justices established their offices in the new building. In fact, when the building first opened, only two Justices moved into it. Alabama's Hugo Black was the first Justice appointed to the Court after the completion of the new building. When Justice Black moved into the building, he found it so sparsely populated that he was able to move into a choice corner suite.[6] The building cost $94,000 less than the nearly $10 million Congress authorized for its construction and when the project was completed, nearly $94,000 was returned to the United States Treasury. The building appears today virtually as it did when completed in 1935.[7] The Supreme Court building is located at One First Street, NE, Washington, DC 20543.

No longer a stepchild of America's three-branch system of government, the beautiful building sheds the notion and image that the third branch of government is inferior to the other two branches. The classical Corinthian architectural style of the building is "on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the United States Government, and as a symbol of the national ideal of justice in the highest sphere of activity."[8]

The building rises four stories above the ground floor and measures 385 feet from front to back and 304 feet from left to right. The front steps lead to a 252-foot wide oval plaza flanked with various symbols of justice. The architrave prominently features the carved quote, "Equal Justice Under Law." In another location, the building features the carving, "Justice the Guardian of Liberty." The building's impressive exterior features statues of great lawgivers including Moses, among others. The bronze carved doors at the main entrance to the building weigh six and one-half tons. Marble is used throughout the building, and more than $3 million worth of marble was gathered from foreign and domestic quarries. Above the basement level, the walls and floors of all corridors and walls are either wholly or partially covered in Madre Cream marble quarried in Alabama.[9]

Some of the Court's Traditions

For all of the changes in its history, the Supreme Court has retained many traditions since its inception. The nine Justices are seated by seniority on the bench with the Chief Justice in the center and the associate Justices alternating right and left by seniority. Interestingly, Justice Harlan F. Stone was the only Justice to sit in every chair on the bench. He progressed from the most junior to the most senior Justice before he was appointed Chief Justice. In the beginning, all attorneys wore formal morning coats when arguing cases before the Court. The tradition of formal dress is now followed only by lawyers who serve as advocates for the United States government and by the Court's Marshall and Clerk.

Quill pens have remained part of the courtroom scene. Twenty ten-inch white quills are placed on counsel tables each day that the Court sits, as has been done since the earliest sessions of the Court. The "conference handshake" has been a tradition since the days of Chief Justice Melville W. Fuller in the late 19th century. When the Justices assemble to go on the bench each day and at the beginning of the private conferences at which they discuss decisions, each Justice shakes hands with each of the other eight. Chief Justice Fuller instituted the practice as a reminder that differences of opinion on the Court did not preclude overall harmony of purpose.

The Supreme Court has a traditional seal, which is similar to the Great Seal of the United States, but which has a single star beneath the eagle's claws—symbolizing the Constitution's creation of "one Supreme Court." The seal of the Supreme Court of the United States is kept in the custody of the Clerk of the Court and is stamped on official papers, such as certificates given to attorneys newly admitted to practice before the Supreme Court. The seal now used is the fifth in the Court's history.[10]

Application to the Supreme Court Bar

The Supreme Court's rules provide that a lawyer who has been admitted to practice law for a period of at least three years and who is in good standing with his or her state's highest court may apply for membership to the Supreme Court Bar. The application is relatively short, especially when compared with the very lengthy applications required for admission to take the Alabama bar examination. Admission requires endorsement by two sponsors who are members of the Supreme Court Bar and who know the applicant personally but who are not related by blood or marriage. One of the sponsors or another member of the Bar, including a relative, may move your admission.

Applications for membership to the Supreme Court Bar may be downloaded at the Supreme Court's Web site: *www.supremecourtus.gov/bar/baradmissions.html*. The entire process can be done through the mail, but it is highly recommended that applicants travel to Washington, DC and complete the process in open court. If you decide you will travel to Washington and seek admission in open court, visit the Supreme Court's web site (*www.supremecourtus.gov*) or call the Supreme Court Clerk's office at (202) 479-3030 to find out when the Court will be in session. Although the Court's session begins in October of each year, the Court's oral argument schedule is fairly limited.

The Court's Hours of Operation and Schedule

The Supreme Court building is open to the public from 9 a.m. to 4:30 p.m., Monday through Friday. The building is closed on weekends and federal holidays. The Supreme Court's library is open to members of the Bar of the Court, attorneys for the various federal departments and agencies and members of Congress. The term of Court begins on the first Monday in October and continues until the last Monday in October of the following year. Each year during the course of a term of Court, the Court receives 8,000 petitions and 1,200 applications of various kinds that can be acted upon by a single Justice.

The Court's caseload has increased steadily to a current total of more than 7,000 cases on the docket per term. The increase has been rapid in recent years. In 1960, only 2,313 cases were on the docket, and in 1945, only 1,460. Plenary review, with oral arguments by attorneys, is granted in about 100 cases per term. Formal written opinions are given in 80 to 90 cases per year. Approximately 50 or 60 additional cases are disposed of without granting plenary review. The publication of a term's written opinions, including concurring opinions, dissenting opinions and orders, approaches 5,000 pages. Some opinions are revised a dozen or more times before they are announced. A case selected for argument usually involves interpretations of the U. S. Constitution or federal law. At least four Justices have selected the case as being of such importance that the Supreme Court must resolve the legal issues.[1]

Specifics About Oral Argument

Oral arguments at the Court are renowned for the strenuous questioning to which advocates are subjected. Oral arguments begin in October and continue through April. The Court typically hears oral arguments only two or three days per week, beginning on either Monday or Tuesday and running through Wednesday. Close attention to the Court's calendar is recommended. The Court publishes its argument calendar in advance listing the names of all cases to be argued and it is recommended that if your schedule has any flexibility, you choose a day to be admitted when there is a case to be argued that particularly appeals to you. However, you can assume that if the case appeals to you, it will appeal to many others and because space is limited, you need to reserve your admission early.

All oral arguments are open to the public, but seating is limited and on a first-come, first-seated basis. Before a session begins, two lines form on the plaza in front of the building. One is for those who wish to attend an entire argument, and the other, a three-minute line, is for those who wish to observe the Court in session only briefly. The Court will not allow you to hold a space in either line for others who have not yet arrived. Seating for the first line begins at 9:30 a.m. and 12:30 p.m. Seating for the three-minute line begins at 10 a.m. and 1 p.m. The locations for the lines are marked with signs, and there is a police officer on duty to answer your questions. The Court does not recommend taking infants or small children into the courtroom.

Security Concerns

Americans can boast of having some of the most open government buildings in the world. Even so, in a post-September 11th world, security concerns dictate that large areas of the building be placed off-limits to visitors. Visitors should be aware that cases often attract large crowds, with lines forming before the building opens. Obviously there are unavoidable delays associated with processing and seating large numbers of visitors and the process requires some measure of patience. Court police officers make every effort to inform visitors as soon as possible whether they can expect to secure a seat in the courtroom.

You will go through a security checkpoint as you enter the building and again as you enter the courtroom. Weapons or other dangerous or illegal items are not allowed on the grounds or in the building. The Court notifies visitors that certain items are prohibited in the courtroom when Court is in session: cameras, radios, pagers, tape players, cell phones, tape recorders, other electronic equipment, hats, overcoats, magazines and books, briefcases, and luggage. Sunglasses, identification tags (other than military), display buttons and inappropriate clothing may not be worn. A checkroom is available on the first floor to check coats and other personal belongings. Coin-operated lockers for cameras and other valuables are available. The checkroom closes 30 minutes after Court adjourns.

At the Court

At 10 a.m., the marshal, dressed in morning clothes, announces the Justices with the traditional greeting: "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" Incidentally, "oyez" is an archaic French term meaning "hear ye." Once the Court is called to order, the first order of business is the announcement of opinions released by the Court. There was a time when the entirety of opinions was read to the public, but that time-consuming process is now curtailed to a brief summary of the decision and sometimes a summary of the dissent if there is one. Before the Court began announcing opinions in summary form, it is said that some Justices would use the opportunity to rehash the Court's decision and vocally underscore the wisdom of the dissenting opinion.

Next comes admission of attorneys to the Supreme Court Bar. One of the Court's first rulings in 1790 was that any attorney who has been practicing for three years in the supreme court of his own state may seek admission to the Supreme Court Bar. About

1,000 lawyers do so each year in open court, and many more are admitted by mail. The Clerk of the Court administers the oath, and a fee of $100 is charged. For the first 100 years, the Court's Clerk took a keen personal interest in collecting admission fees because the clerks received no salary but were permitted to keep any filing fees paid to the Court. Because of this practice, the clerks were sometimes paid more than the Justices they served.

After attorneys are admitted, cases are argued. Except in very exceptional cases, each side is limited to 30 minutes. This is a dramatic departure from the early Court's practice of permitting an extended period of time for oral arguments for each case that sometimes stretched into more than one day for each case. The Court's marshal signals with a white light on the attorney's podium when five minutes remain, and when the red light goes on, the speaker must stop in mid-sentence if need be. Only if he or she is in the middle of a question posed by a Justice is any extra time permitted.[12]

Our Admission Experience

My partners and I traveled to Washington, DC this past fall and it was an experience we will treasure for the rest of our lives. Because we probably will not have an opportunity to argue a case before the Court, and the odds are that we will not have the Court accept a case we have handled, we viewed the experience more from a historical appreciation standpoint than anything else. We have all agreed that if scheduling permits, the next time we are in Washington we will definitely return to the Court to take in the experience of observing oral argument.

Once we went through security, received a briefing on the process and stood in the lines that took us into the courtroom, we were seated. The applicants are seated together in a group near the left side of the bench, while the movants are in the front rows of the spectators' gallery nearer the center of the bench. In the few minutes I had to talk to those seated around me, I met a federal judge, a law professor and an attorney who had argued more than 50 cases before the Court. The Court was called to order and the Justices entered the courtroom. We each looked at each Justice and thought about the career path that each traveled to receive the coveted appointment to the nation's highest court.

The Court delivered opinions that were released and then Major General William K. Suter, USA (Ret.), clerk for the U.S. Supreme Court, called each movant's name one by one. As movant for my two partners, I approached the podium and waited for Chief Justice Rehnquist to recognize me. When he did, I read a few sentences from a script that was provided to us in our earlier briefing. When I reached the podium, I was somewhat nervous as I quickly took in the grandeur of the courtroom and glanced at the attorneys anxiously waiting to begin their arguments and then looked into the faces of the nine most recognized jurists in America. Addressing the Chief Justice, I quoted from the prepared script that concluded with the following, "I am confident each possesses the necessary qualifications." Chief Justice Rehnquist responded, "Your motion is granted." I sat down and the next movant came to the podium. The entire process took only a few minutes but it was certainly worth it to all of us.

The atmosphere is decidedly formal and can cause even the most calm and experienced to get a touch of nerves. One federal judge inadvertently departed from the script and forgot to add that the applicants she was sponsoring possessed the necessary qualifications. The Chief Justice asked, "Are you confident that each possesses the necessary qualifications?" The judge, somewhat embarrassed, added, "Yes, Mr. Chief Justice, I am confident each possesses the necessary qualifications."

Following the admission, the Clerk administers the oath, "Do you solemnly swear that as an attorney and as a counsel of this court you will conduct yourself uprightly, and according to law, and that you will support the Constitution of the United States so help you God?" Most admittees and movants stayed for oral arguments although the Court permits visitors to reverently leave the courtroom during arguments. On the day I moved for my partners' admission to the Supreme Court Bar, we were not blessed with the most exciting of cases being argued to the Court. One was an ERISA case and the other was a case about a housing issue. Even so, the process was intriguing as the Justices started off slowly but before the end of the argument, each Justice peppered the attorneys with difficult questions.

One of the reminders of admission to the Supreme Court bar is a beautiful certificate of membership. Interestingly, the certificate of admission contains not only the full name of the applicant, but also the full name of the movant.

Conclusion

Although none of us will always agree with every decision of the United States Supreme Court, Americans can be proud that the founding fathers had the foresight to create the judicial branch of government. Our judiciary is a big part of what makes America great. Even though no one could accurately predict in 1787 how the Supreme Court would change or what its needs would be, the Court has evolved into a powerful branch of American government. The Court is no longer the afterthought that it once was during the time it had to beg for space in the Capitol. Now, the Court's building is one of the most visited tourist sites in Washington, DC and particularly so for lawyers. Admission in open court to the bar of the highest court in the United States of America is the ultimate tourist experience for attorneys. The Court's history, traditions and ceremony are worth a special trip to Washington, DC; the Supreme Court building is breathtaking; and becoming a member of the Supreme Court Bar is something all attorneys should consider. ■

Endnotes

1. Kermit L. Hall, The Oxford Companion to the Supreme Court of the United States (1992).
2. Fred J. Maroon and Suzy Maroon, The Supreme Court of the United States at 17 (1996). *Id.*
3. *Id.*
4. Taken from a booklet prepared by the Supreme Court of the United States, and published with funding from the Supreme Court Historical Society, available online at *www.supremecourtus.gov*
5. *Id.*
6. Maroon and Maroon.
7. Maroon and Maroon.
8. *Id.*
9. *Id.*
10. See footnote 5.
11. See footnote 5.
12. *Id.*

Tracy W. Cary

Tracy W. Cary, a partner in the Dothan firm of Morris, Cary, Andrews & Talmadge, LLD, is a graduate of the University of Florida and the University of Alabama School of Law. He is admitted to the United States Supreme Court and is licensed to practice in Alabama, Florida, Georgia, Tennessee, and the District of Columbia. Cary served as an artillery officer in the U.S. Army, and later as a JAGC officer in the Alabama Army National Guard. He served as a staff attorney to Justice Hugh Maddox of the Alabama Supreme Court. He is a member of the editorial board of *The Alabama Lawyer* and is a founding member of the Wiregrass Inns of Court. He is a past president of the Houston County Bar Association.

State of Alabama

House of Representatives

MONTGOMERY, ALABAMA

Resolution

HJR95

By Representatives Newton (D), Albritton, Allen, Baker, Ball, Bandy, Barton, Beasley, Beason, Beck, Bentley, Black (L), Black (M), Boothe, Boyd, Brewbaker, Bridges, Buskey, Carns, Carothers, Carter, Clark, Clouse, Coleman (L), Coleman (M), Collier, Davis, Dolbare, Dukes, Dunn, Faust, Fite, Ford (C), Ford (J), Gaines, Galliher, Garner, Gaston, Gipson, Glover, Graham, Grantland, Greer, Greeson, Grimes, Guin, Hall (A), Hall (L), Hammett, Hammon, Hawkins, Hill, Hinshaw, Holmes, Hubbard, Humphryes, Hurst, Ison, Jackson, Johnson, Kennedy, Knight, Laird, Layson, Letson, Lindsey, Love, Major, Martin, McClammy, McClendon, McClurkin, McDaniel, McLaughlin, McMillan, Melton, Millican, Mitchell, Moore, Morrison, Morrow, Morton, Newton (C), Oden, Page, Payne, Perdue, Robinson (J), Robinson (O), Rogers, Salaam, Sanderford, Schmitz, Sherer, Singleton, Spicer, Starkey, Thigpen, Thomas (E), Thomas (J), Vance, Venable, Ward, White and Wood

RECOGNIZING THE ALABAMA STATE BAR ON ITS 125TH ANNIVERSARY DURING FEBRUARY 2004

WHEREAS, it is with highest commendation that we recognize the Alabama State Bar Association on its 125th Anniversary of exemplary service to the citizens of the State of Alabama; and

WHEREAS, the Alabama State Bar Association is an organization of men and women committed to improving the community through the effective action and leadership of trained lawyers; and

WHEREAS, the Alabama Bar Association, whose theme is "Lawyers Render Service," holds annual meetings which provide an opportunity for lawyers to present papers on subjects of intellectual and professional interest, as well as a convivial atmosphere for renewing old acquaintances and professional education; and

WHEREAS, by an act of the Legislature in 1923, every lawyer licensed to practice law in the State of Alabama became a member of the Alabama State Bar Association; and, as a self-regulated profession, the Supreme Court's rules are carried out by groups of volunteer bar members, including the Character and Fitness Committee, the Board of Examiners and the Board of Legal Specialization, among others; and

WHEREAS, the contributions that the Alabama State Bar Association has made to the welfare and improvement to the State of Alabama and its citizens have been invaluable, and it is appropriate on this milestone occasion that the members of the Alabama State Bar Association receive special recognition and tribute; now therefore

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That on this landmark 125th Anniversary, February 2004, highest commendation and congratulations are herein extended to the members of the Alabama State Bar Association, for which a copy of this resolution is provided for appropriate display as a measure of our gratitude and esteem.

IN WITNESS WHEREOF, I have hereunto set my hand and have caused the GREAT SEAL of the State of Alabama to be affixed by the Secretary of State at the Capitol in the City of Montgomery on this the 13th day of April, 2004.

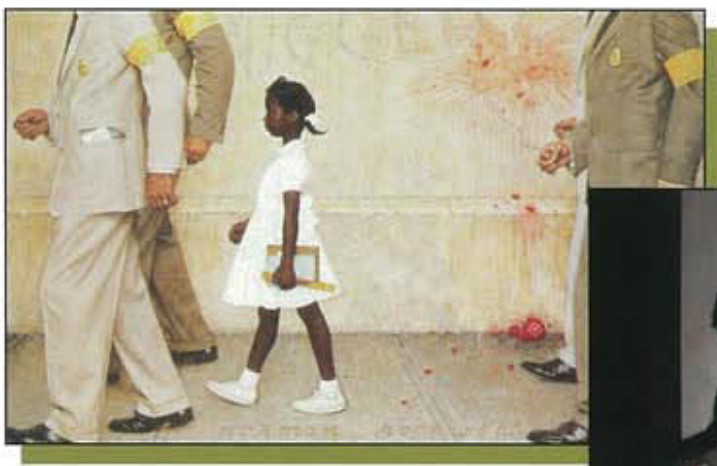
GOVERNOR

Secretary of State

Don't miss this "MUST SEE" EVENT at the 2004 ANNUAL MEETING!

The original LAW DAY 2004 production of

"CROSS THAT RIVER: *Brown v. Board of Education* & the People Who Lived It"



"The play really educated me on the people – the children, their parents, the justices – involved in the drama." – Mike Jackson, attorney & cast member

"I think the fact that the play is a musical makes the telling of the story even more compelling." – William N. Clark, ASB President

Thursday, July 22 ***8:00 PM***

Coral Ballroom

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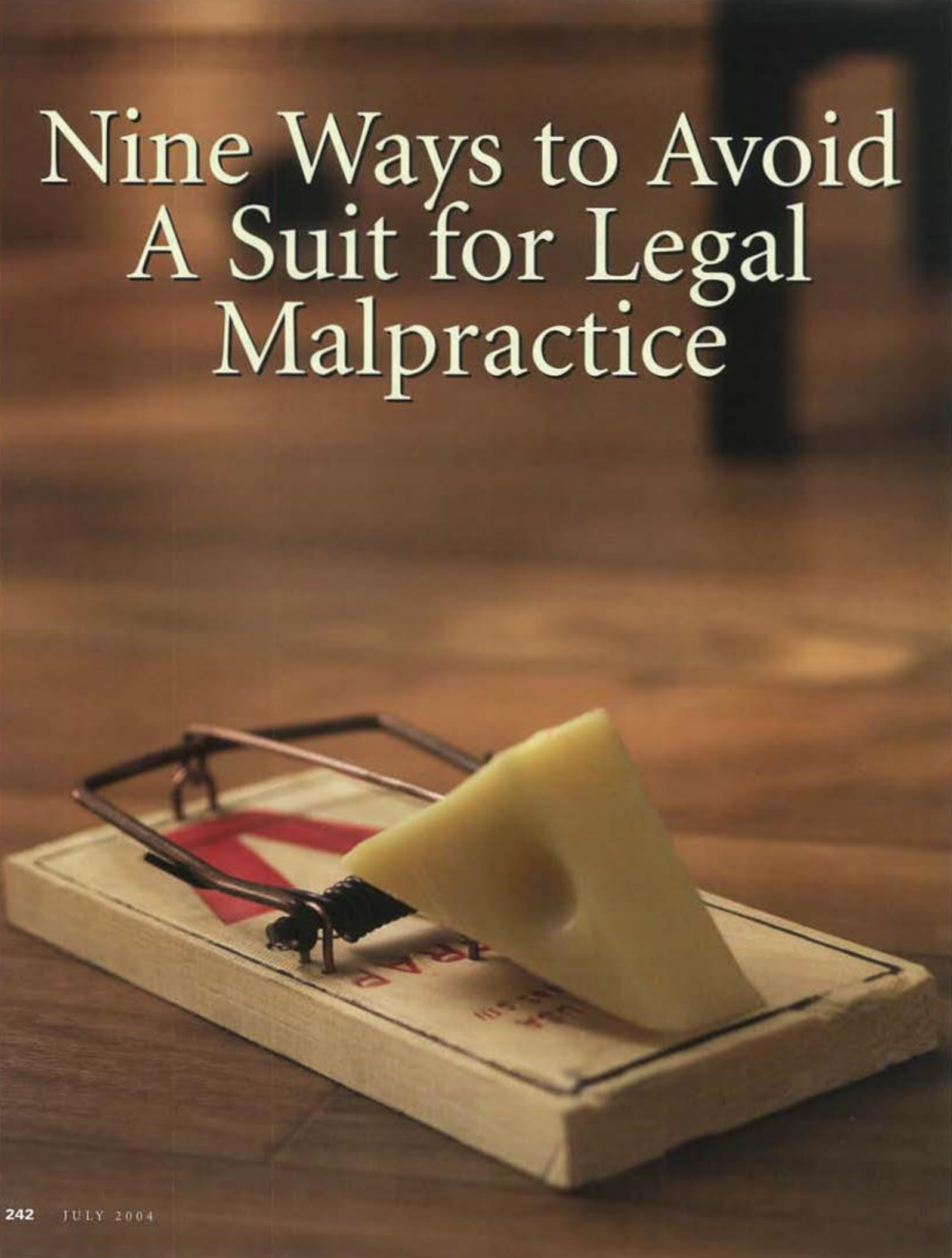

BY W. MICHAEL ATCHISON AND ROBERT P. MACKENZIE, III

On April 12, 1988, the Alabama legislature enacted the Alabama Legal Services Liability Act ("ALSLA") to remedy a growing crisis in the delivery of legal services, and provide attorneys with protection similar to what is offered to physicians under the Alabama Medical Liability Act. See, "The Professional Liability of Attorneys in Alabama," 30 *Cumb. L. Rev.* (1999-2000). Despite its intent, the ALSLA has failed to reduce the number of legal malpractice suits. While every attorney is potentially subject to a claim of malpractice, careful handling of a client's matter can reduce one's exposure. The following factors should be recognized as potential causes of suits, and steps available to address them.[1]

1 Conflict of Interest

There is perhaps no more compelling reason for a legal malpractice suit than when the attorney's actions prejudice the client's position. The duty owed to a client is to provide reasonable legal services. *Ala. Code* § 6-5-572(3)(a) (1975). From the onset of any attorney-client relationship, an attorney should not perform any service which will adversely affect the client. *Alabama Rules of Professional Conduct* (ARPC) 1.7 and 1.8. Foremost to resolving a conflict of interest is to first acknowledge the attorney's duty under the ALSLA is to the client only. *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002). Careful attention must be given any time there are multiple clients, and whether the representation of one will affect the interest of another. In suits involving more than one client, such as a principal and agent, an employer and employee, or a partnership and a partner, a decision must be made whether separate representation is required. In *Leighton Avenue Office Plaza, Ltd. v. Campbell*, 584 So. 2d 1340 (Ala. 1991), limited partners brought suit against the partnership, other limited partners and the partnership's attorney over disputed ownership of an office building. Among the issues was the duty owed by the attorney to the various parties interested in the business venture. Portions of the complaint were eventually dismissed based upon the statute of limitations but other claims survived.

In the event an attorney represents more than one client, it is highly recommended that the clients sign an acknowledgment consenting to the multiple representations. The acknowledgment should reflect the clients' understanding of all existing conflicts, and that continued representation of multiple parties nevertheless is acceptable. The clients should be told to promptly inform the attorney if a conflict arises in the future. *ARPC* 1.7(b)(2). Even if separate representation is provided, an attorney's conflict may not be sufficiently resolved if information already obtained by the attorney prejudices the former client. In those situations where the conflict cannot be resolved even with separate attorneys, the original attorney should withdraw. *ARPC* 1.9; See also *Goldthwaite v. Disciplinary Board of the Alabama State Bar*, 408 So. 2d 504 (Ala. 1982). Otherwise, a former client wishing to disqualify a lawyer need only show that the matter involved in the pending case is substantially related to the matter of prior representation. *Ex parte State Farm Mutual Auto Ins. Co.*, 469 So. 2d 574 (Ala. 1985).

In addition to the representation of multiple parties, a conflict may arise out of the subject matter at issue. *ARPC* 1.8.

An attorney must be extremely cautious when the attorney and client become involved in a joint business transaction. In *Ex parte Seabol*, 782 So. 2d 212 (Ala. 2000), the client brought suit against his former lawyer for legal malpractice and fraud as a result of the attorney's purchase of client-owned property. The client contended he sold the property to the lawyer at an unreasonably low price. The Supreme Court of Alabama refused to dismiss the claim based upon the statute of limitations. *Haston v. Crowson*, 808 So. 2d 17 (Ala. 2001), speaks to a client's claim against her former attorney for negotiating the sale of a newspaper owned by the client where the lawyer failed to disclose his financial involvement with the purchaser. Summary judgment was entered for the attorney upon a showing that after the plaintiff discovered the attorney's interest, the client had the opportunity to stop the sale but failed to do so.

The opportunity for a conflict arises when a lawyer is alleged to have received an extraordinary benefit from the client, or has a relationship with one client to the exclusion of another. In *Peterson v. Anderson*, 719 So. 2d 216 (Ala.Civ.App. 1997), third-party beneficiaries to a will brought suit against the attorney who drafted the will and was a prime beneficiary. The case was ultimately dismissed when the court held the plaintiffs had no standing to bring suit. Likewise, a conflict may arise where there is a contention the attorney is biased in favor of one client. In *Kuhlman v. Keith*, 409 So. 2d 804 (Ala. 1982), the plaintiff lost custody of her children after signing a consent agreement drafted by her ex-husband's father who happened to be a lawyer. The case was ultimately dismissed because the plaintiff could not demonstrate she relied upon any act by the attorney, or that the outcome would have been different but for the lawyer's actions.

The potential for personal and transactional conflicts should be closely examined. In those situations, the clients must be well informed of the right to separate counsel. The individual client's permission for continued representation should be documented. To minimize the chance for a conflict claim, the transactional documents should be drafted by independent counsel. *ARPC* 1.8(a)(2).

To avoid a misunderstanding as to the scope of representation, an engagement letter should be sent at the very beginning of the attorney-client relationship.

2 Scope of Representation

The attorney and client should have a clear understanding as to who is to be the client and the scope of the representation. (*ARPC* 1.2). In *Sessions v. Espy & Metcalf, P.C.*, 854 So. 2d 515 (Ala. 2002), the attorney was retained in a commercial dispute arising out of the purchase of a business. The plaintiffs later brought suit alleging the attorney had agreed to represent them in an individual capacity in addition to the corporation in which they had a vested interest. On appeal, the summary judgment was reversed given there were disputed facts concerning the scope of representation. *Sampson v. Cansler*, 726 So. 2d 632 (Ala. 1998), also involves an attorney's agreement to represent a client in a limited fashion. After being sued for personal injury arising out of an automobile accident, the client sought representation from the attorney. The lawyer did not enter an appearance, but agreed only to contact the client's insurance carrier and to advise the plaintiff's attorney of the insurance coverage. The personal injury action proceeded and a default judgment was taken against the client. The plaintiff simultaneously appealed the default judgment and brought a separate claim for legal malpractice. Thereafter, the default judgment was fortunately set aside which allowed the legal malpractice suit to be resolved.

To avoid a misunderstanding as to the scope of representation, an engagement letter should be sent at the very beginning of the attorney-client relationship. The letter should set forth the identity of every client, provision of services to be rendered, and the fee arrangement. If representation is declined, a letter should be provided to the potential client outlining the reasons why the matter cannot be accepted and describe in layman's terms, any statutory time problems with the filing of the claim. If termination of the attorney-client relationship occurs after the client's receipt of legal services, any unused retainer should be returned along with an itemization of the work performed. As described in *Alabama State Bar v. Chandler*, 611 So. 2d 1046 (Ala. 1992), the failure to promptly refund any money due the client may lead to a complaint and bar investigation. A closing letter should be delivered after the case has been resolved. This letter will confirm all matters have been completed, including payment of legal fees, and that the client has no expectation for further legal services.

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Attorneys should be mindful that while their duty remains only to the client, there is, nevertheless, exposure to suits from dissatisfied non-clients.

3 Responsibility to Third Parties

The performance of legal services may have an impact on third parties who are not clients. In those situations where there is a third party, the attorney's duty under the ALSLA remains only to the client. *Shows v. NCNB National Bank of North Carolina*, 585 So. 2d 880 (Ala. 1991). There is no duty owed by the attorney under the ALSLA to those parties whose interests are in conflict with the client. *Carraway Methodist Medical Center, Inc. v. American Indemnity Company*, 642 So. 2d 973 (Ala. 1994). However, careful attention should be given to third parties who have a contractual right to the client's share. *Birmingham News v. Chamblee & Harris*, 617 So. 2d 689 (Ala. Civ. App. 1993). The duty to be a zealous advocate, however, does not bestow the right to ignore standards of civility. Further, the mere fact that ALSLA does not provide a forum for a third-party action does not make attorneys immune to suits by non-clients. In *Kinney v. Williams*, Ala. Sup. Ct. 1020412 (Dec. 30, 2003), the court determined the plaintiff had standing to bring a claim for fraud given the plaintiff was a third-party beneficiary of the attorney's advice.

The dissatisfaction by a non-client who was beneficiary of a will led to a suit against the attorney who had drafted the will. In *Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002), the attorney had been instructed by the decedent/client to make certain changes to a will, including, at one point, instructions to destroy it. When the will was not destroyed and the client died, the proceeds of her estate were divided in a manner disagreeable to the plaintiff. The suit for legal malpractice was dismissed as the lawyer's duty had been to the maker of the will, not the beneficiary.

Attorneys must be specifically aware of their vulnerability to claims brought by third parties whose interests are adverse to the client. In *Dickinson v. Echols*, 578 So. 2d 1257 (Ala. 1991), a physician was sued for medical malpractice. After the trial court had granted a judgment as a matter of law in the underlying medical malpractice suit, the doctor sued the plaintiff's lawyer for malicious prosecution. The Alabama Supreme Court affirmed a summary judgment because the plaintiff had not satisfied the elements of malicious prosecution. In *Walker v. Windom*, 612 So. 2d 1167 (Ala. 1992), the attorney and his law firm represented a bank in a collection action over a credit card dispute. Suit was filed and in response, a counterclaim made against the attorney. Summary judgment was affirmed.

How the reasonable representation of a client can lead to suit by a non-client was examined in the companion cases of *Averette v. Fields*, No. 1992171 (Ala. May 18, 2001) and *Morrow v. Gibson*, 827 So. 2d 756 (Ala. 2002). The supreme court reaffirmed an attorney owed no duty to a non-client. The supreme court, however, did not fully address the issue of whether a claim brought by a non-client against an attorney arising out of the performance of legal services is subject to the ALSLA. Where a non-client's position is affected by the performance of legal services, and suit is filed, the ALSLA should control. Such application is consistent with the statutory language of *Ala. Code* § 6-5-570 (1975). Attorneys should be mindful that while their duty remains only to the client, there is, nevertheless, exposure to suits from dissatisfied non-clients.

4 Failure to Communicate and Document

Clients are entitled to be adequately and timely informed about their case. *ARPC* 1.4. Uncertainty by the client may lead to dissatisfaction. A bad outcome is made even worse if it is a surprise. Whether the cause is the attorney's workload or simply inattention, the results can threaten the attorney/client relationship. In *Thompson v. D.C. America, Inc.*, 951 F.Supp. 182 (M.D. Ala. 1996), the client

moved to set aside a settlement agreement reached by her attorney, whom she later fired. As part of her argument that she should not have been bound to the agreement, the client contended she had been unable to communicate with the former attorney. The court refused to set aside the settlement.

Communication does not have to be overbearing as certain cases are slow-paced, and sometimes there is little to report over a period of months. The client, however, needs to be apprised of the litigation process and understand that the absence of a report does not mean the case does not have the attorney's attention. The client should be informed well in advance of events which could substantially affect the course of action. A Web site, form letters or e-mails sent out in mass should be avoided, and are no substitute for a direct, personalized communication from the attorney to client. It should be remembered that the goal of communication is to advise and share information with the client.

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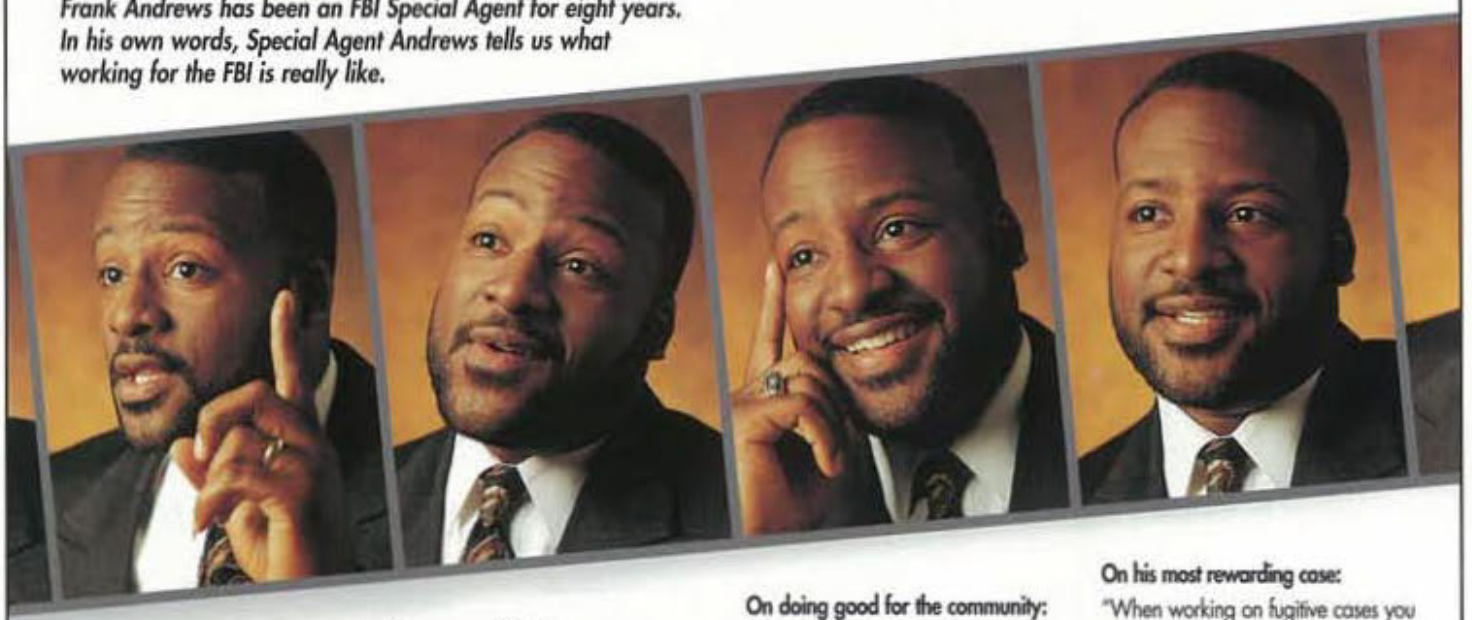
FBI Special Agent Frank Andrews

Frank Andrews has been an FBI Special Agent for eight years. In his own words, Special Agent Andrews tells us what working for the FBI is really like.



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Through communication, clients are able to evaluate and choose their options. Clients, particularly those knowledgeable about the legal process, should be actively involved in all aspects of making decisions. While attorneys are retained for their advice and skill, the ultimate determination regarding the resolution of a legal matter remains with the client. An informed client makes the best decisions. Failure to communicate has been the basis for numerous malpractice suits. In *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994), a client brought suit against her lawyer after settlement of a will contest. The plaintiff alleged the settlement was entered without her permission. Summary judgment was granted when the court determined the plaintiff was not the real party in interest. The Supreme Court of Alabama noted that while the plaintiff disputed the settlement, she nevertheless was present during the court proceeding where the settlement was discussed and the plaintiff offered no objection. In *Ex parte Panell*, 756 So. 2d 862 (Ala. 1999), the client contended he instructed his attorney to file a suit which was delayed for unknown reasons. The client was then sued and the attorney instructed to file a counterclaim. Instead, the attorney negotiated a settlement which required the client to execute warranty deeds conveying his interest in the real property. Despite the affirmative act of executing the deeds, the client asserted the attorney never had permission to affect the settlement. The suit was ultimately dismissed for failure to comply with the statute of limitations.

Documentation is needed where the client fails to follow the attorney's advice or does not disclose all relevant information. The Alabama Supreme Court has recognized that an attorney may assert contributory negligence as an affirmative defense. *Ott v. Smith*, 413 So. 2d 1129 (Ala. 1982). The court has also determined assumption of the risk is a viable defense. *Simpson v. Coosa Valley Prod. Credit Assn.*, 495 So. 2d 1029 (Ala. 1986). Obviously, a documented file will support the attorney's effort to prove the client was adequately informed.

With reasonable communication, the client is able to make informed decisions, and is not placed in the position of simply responding to an unfortunate result. If the client is knowledgeable about the decisions, the client will be more knowledgeable about the risks. Given this position, the client will recognize that all options were explained, understood and informed decisions made.

5 Failure to Act

The client expects an attorney to perform in a prompt and efficient manner and with proper attention to each individual case. At the beginning of the case, the attorney and client should set forth a plan of action. The plan should include the client's desire to resolve the dispute by settlement or trial and the amount of time and money to be invested. The plan should be reviewed and modified as needed. The failure to have a reasonable and properly executed plan has resulted in disciplinary action and the filing of suits for various reasons. The Alabama Supreme Court has affirmed sanctions against an attorney for "an unmanageable case load" which prevented the delivery of quality legal services. *Davis v. Alabama*

State Bar, 676 So. 2d 306 (Ala. 1996). The court cited, as an example, associate attorneys having the responsibility for 600 active cases.

In civil actions, a claim has been made for an lawyer's alleged failure to properly investigate or to diligently pursue the express wishes of a client. *McDuffie v. Brinkley, Ford, Chestnut & Alldridge*, 576 So. 2d 198 (Ala. 1991). A suit was filed in *Cribbs v. Shotts*, 599 So. 2d 17 (Ala. 1992) for the attorney's failure to attend a condemnation hearing where the plaintiff's property was allegedly given a low appraisal by the trial court. In another action, suit was brought for the law firm's alleged failure to properly handle a bankruptcy matter. *Independent Stave Co., Inc. v. Bell, Richardson & Sparkman*, P.A., 678 So. 2d 770 (Ala. 1996). In *Green v. Nemish*, 652 So. 2d 243 (Ala. 1994), the plaintiff argued the attorney failed to contact witnesses, timely file a motion to illegally suppress seized evidence and conduct a pretrial investigation. Likewise, in *Adams v. Erben*, 681 So. 2d 594 (Ala. 1996), the plaintiff contended he was provided ineffective counsel and, as a result, was sentenced to prison. Notably, in all these cases, the alleged failure was determined not to have caused any damage to the plaintiff and summary judgment was granted.

The failure to act on behalf of the client should never be the result of improper influence by third parties. The most compelling examples are guidelines submitted by insurance carriers to a defense attorney outlining the litigation and discovery process. Similar guidelines have been determined by the Alabama State Bar to conflict with an attorney's duty to the client. "Third-Party Auditing of Lawyer's Billings—Confidentiality Problems and Interference With Representation," *The Alabama Lawyer* (January 1995). Such guidelines can interfere with the attorney's representation of a client by imposing measures which are too restrictive.

A well thought-out plan of action is one with joint input by the client and attorney. Both the client and attorney should have realistic expectations about when and how the plan should be implemented. The client shares the responsibility to provide sufficient information so that the plan may be initiated and followed. The attorney has the responsibility to assure he/she has the capability to enact the plan. If there are occasions where there is a failure to act either by the client or the attorney, prompt attention needs to be given to the omission. There needs to be a sound relationship upon which both the client and attorney can discuss such failures and the best means for remedy.

6 Compliance With Statutory Time Limitations and Court Orders

The best lawsuit or most crucial appeal may never be heard if statutory time limitations are not met. Every attorney should have a diary system with a suitable backup. Often, the failure to comply is simply the result of a miscalculation. In order to avoid missing a statutory deadline, one should not wait until the last day to file a pleading. Too often, uncertainties or unexpected consequences can prevent the timely filing of a document with the court.

The failure to timely file an appeal was the subject in *Childers v. Jewell*, 677 So. 2d 232 (Ala.Civ.App. 1995). Following a criminal conviction, the attorney filed a notice of appeal which was dismissed as being untimely but then subsequently reinstated. The attorney was fired and another lawyer retained to continue the criminal appeal. In a suit for legal malpractice, the plaintiff claimed to have been prejudiced when the original appeal was dismissed. Summary judgment was granted to the attorney on the basis that even though the initial appeal had been dismissed, it was later reinstated. To avoid a similar problem, one should calculate and double check the statutory time table and then file the pleading or response at least two to three days before the deadline. A stamped copy of the document should always be in the file.

In addition to time limitations, attention must be given to statutory procedures

and court orders. While there is a never-ending spectrum of rules and orders, almost every case includes a pretrial order. Among the terms, the pretrial order may govern the time to designate expert witnesses, identify exhibits or stipulate to the reasonableness and necessity of medical expenses. Pretrial orders may require the plaintiff to set forth each theory of liability and the defendant to describe each defense. In the Circuit Court of Jefferson County, for example, certain judges require theories of liability and defenses to be set forth with particularity. A general claim of negligence or denial of liability will not suffice. These pretrial orders do not allow the parties to rest upon the allegations of the complaint or the defenses set forth in the answer. Failure to comply may cause a party to waive an argument. In the Circuit Court of Mobile County, the general pretrial order requires the parties to timely object to such critical issues as the reasonableness of medical expenses and agency, or the issue is waived. In the United States District Court for the Northern District of Alabama, the failure to be listed as trial counsel in the pretrial order may preclude an attorney from participating at hearings or trial.

On occasion, the pretrial order becomes buried in a mound of pleadings and motions, and surfaces only weeks before a trial and after the time for compliance may have passed. The failure to comply may be devastating. When the pretrial order is not followed, a party may be precluded from obtaining necessary discovery, *Gonzalez v. Blue Cross/Blue Shield of Alabama*, 689 So. 2d 812 (Ala. 1997); may not be allowed to call an expert witness, *Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995); or introduce certain exhibits at trial, *USA Petroleum Corporation v. Hines*, 770 So. 2d 589 (Ala. 1999). Whether to amend a pretrial order is within the discretion of the trial judge and a ruling will not be reversed unless there is a clear abuse of discretion. *Electrolux Motor AB v. Chancellor*, 486 So. 2d 414 (Ala. 1986). The requirements of a pretrial order should be fully understood, the time limitations documented and a system be in place to assure compliance.

In defending legal malpractice actions, there is perhaps no more difficult an argument to overcome than a failure to comply with statutory and court orders. Laypersons have the expectation that lawyers should be held accountable to following schedules and orders by a court. The failure to comply with a statutory time limitation or court order is rarely the result of a tactical decision and likely will not be understood by the client. To avoid such an omission, the attorney should make sure all statutory and court orders are docketed; that the attorney along with another responsible party act upon these deadlines; and that there is a system in place to assure compliance.

7 Office Staff

Attorneys delegate to their office staff critical responsibilities such as conducting investigations, drafting pertinent documents and filing information with the court and opposing parties. The supervision of these employees is the attorney's responsibility. *ARPC* 5.3.

The omissions of a secretary were responsible for a claim against the firm

in *Sanders v. Weaver*, 583 So. 2d 1326 (Ala. 1991). In the suit for legal malpractice, the plaintiff alleged the law firm had negligently permitted the dismissal of suit against the plaintiff's former employer. The dismissal was the result of conduct by the firm's legal secretary who was described as obsessive and compulsive, and apparently acted beyond the line and scope of her employment. The case was dismissed without the knowledge of the firm, yet, the firm had to answer for the secretary's conduct.

The actions of a law clerk were at issue in two related cases of unusual facts as described in *Richards v. Lennox Industries, Inc.*, 574 So. 2d 736 (Ala. 1990) and *Richards v. Robertson*, 578 So. 2d 673 (Ala. 1991). A former law clerk employed by the plaintiff's attorney was sued by the client for violating the attorney-client privilege. The original lawsuit was filed after the plaintiff had been injured from a defective gas furnace. The law clerk assisted in the preparation of the case, including the dismantling and handling of parts of the furnace. During the trial, the law clerk was called by the defense to testify about the inspection and removal of the valve assembly. The law clerk's testimony was allowed over the plaintiff's objection. A jury verdict was rendered for the product manufacturer. Following their products liability action, the plaintiffs, in a second suit, sued the law clerk for violating the attorney-client privilege for giving his testimony at trial. Ironically, both suits were brought by the same attorney. The suit against the law clerk was dismissed based upon the failure to state a claim.

In a more recent and unreported case, the attorney was retained to file suit for personal injury arising out of an automobile accident. The pre-suit investigation revealed a case of defendant's liability and substantial plaintiff's damages. The complaint was properly drafted and signed by the attorney. A copy was sent to the client advising that suit had been filed and that discovery would be undertaken. The complaint, unfortunately, was misplaced by the secretary and never filed with the court. Approximately one month after the statute had lapsed, the file was reviewed to determine the status of service of process. The unfiled complaint was discovered. The attorney properly brought the omission to his client's attention though, unfortunately, a suit for legal negligence followed. The case was settled.

To avoid a claim arising out of an employee's misconduct, all employees should be well trained and instructed in their areas of responsibility. The employee's scope of responsibility should be limited to his/her areas of expertise. Office procedures, though not necessarily reduced to writing, must be understood by all. Clearly, there must be sufficient supervision and an organized chain of command.

...an attorney would not be wise to promise more than what can be delivered.

...the client who expects nothing less than perfection is one whom you will never satisfy.

8 Determination and Distribution of Settlement Proceeds

There is an increasing trend for legal malpractice suits to be based upon cases being settled for an unreasonable amount, or that the proceeds were improperly distributed. These suits range from the individual personal injury claim to those clients who receive a settlement in mass tort litigation. The theory is premised upon the attorney's failure to properly investigate and evaluate the plaintiff's injury. In *Edmondson v. Dressman*, 469 So. 2d 571 (Ala. 1985), the plaintiff entered into a settlement agreement for the wrongful death of her husband. The plaintiff later sought to be released from the agreement based upon the alleged negligence of her attorney. The plaintiff claimed to have suffered damage when she accepted an offer substantially less than the value of the case. The case was dismissed by summary judgment. In *Green v. Ingram*, 794 So. 2d 1070 (Ala. 2001), plaintiff filed suit for legal malpractice following the settlement of a workmen's compensation claim. The plaintiff argued that the settlement did not reflect the plaintiff's degree of injury and, as a result, was unreasonably low. Summary judgment was granted based upon the attorney's affidavit that his legal services were reasonable.

Even if the settlement amount is reasonable, there are still pitfalls as to the correct distribution of the proceeds. Before the settlement and distribution of funds, it is necessary to confirm the identities of those individuals who are proper parties to the action and who may be entitled to the settlement distribution. Court approval should be obtained if there is a question about the standing of any party who may have an interest in the settlement proceeds. An improper distribution may leave an attorney responsible to later pay a share to an individual who is unknown until after the settlement proceeds have been spent.

In a recent wrongful death action, suit was brought by the mother, as the administratrix of her son's estate, following the son's death in a construction accident. Based upon the investigation by the plaintiff's attorney and information received from the mother, the mother was the only known relative. Suit was filed and after negotiations, a reasonable settlement was reached. The settlement proceeds were paid and the case dismissed. An adult daughter born out of wedlock later gave notice of her intent to seek a share of the settlement proceeds. The settlement proceeds unfortunately had already been distributed and a substantial sum spent by the decedent's mother. A suit for legal malpractice was brought against the plaintiff's attorney for failure to have disbursed the appro-

priate sum to the daughter. The case was dismissed on the statute of limitations. The court was not required to consider the argument that the attorney's duty was to the administratrix and not to the beneficiaries of the estate.

Once a settlement is agreed upon and proper beneficiaries are confirmed, the distribution should be made without delay or impropriety. The failure to timely send clients their share of the settlement proceeds has resulted in a suit and judgment against an attorney. In *Oliver v. Towns*, 770 So. 2d 1059 (Ala. 2000), the defendant attorney had been hired to represent the plaintiff in a personal injury suit. The claim settled for $12,000. Instead of properly distributing the settlement proceeds as had been agreed, the attorney forged the clients' endorsement and kept the entire settlement for herself. Following the filing of the malpractice complaint, a default judgment was taken against the defendant attorney. Ultimately, a judgment in the amount of $75,000 in compensatory and $249,000 in punitive damages was affirmed by the Supreme Court of Alabama.

Settlements ought to provide satisfaction to all parties. Particularly in tragic cases, the settlement is viewed as closure by all parties. It should be the final step in the litigation process for financial and emotional reasons. To achieve a proper settlement, an attorney must evaluate the case for a reasonable value, confirm the authority to settle and distribute the proceeds in a timely manner to the appropriate parties. If a settlement is not properly handled, this intended resolution unfortunately may only be the beginning of a new problem.

9

Satisfying the Client's Expectations

The practice of law is becoming more and more a competitive business. Television and newspaper advertisements proclaim the expertise and success of many attorneys. The label of "complex litigator" may be adopted without reservation. All the while, the law becomes more and more complicated. These factors converge to create unrealistic expectations for the client and place pressure on attorneys to accept matters with little regard. Too often, a matter is received by an attorney who is not experienced in the particular area of law. An attorney should refrain from handling a matter beyond his or her expertise unless the attorney can reasonably educate himself on the issues so as to protect the client's interest. A client dissatisfied with the outcome may question the attorney's experience.

It is incumbent upon the attorney to provide an accurate picture of the client's position and the chance of prevailing. Often the most difficult client is the one with the highest and sometimes most unrealistic expectations. Clients should not be given slanted views of the potential outcome. Attorneys should avoid the temptation to exaggerate the probable success of a case. In *Lawson v. Cagle*, 504 So. 2d 226 (Ala. 1987), a Mississippi attorney found himself the subject of a suit when the client failed to receive the $1,000,000 settlement which the attorney had allegedly guaranteed. The client claimed he was pursued by the Mississippi attorney and persuaded to transfer the suit from another lawyer based upon the Mississippi attorney's representation of success. The Alabama Supreme Court ultimately ruled that the statement, even if made, was only a prediction upon which the client had no right to rely.

Perhaps the most extreme example of the failure to satisfy a client's expectation is the California case of *Sims v. Gibson, Dunn & Crutcher*. As reported in the *Wall Street Journal*, the client's belief that a seemingly simple business dispute would be properly handled was shattered. *WALL ST.J.* July 31, 1995. The client was referred to the law firm and, particularly, to the senior litigation partner for representation concerning a real estate transaction. Before the attorney-client relationship ended, the client was caused to pay legal expenses sometimes exceeding more than $100,000 a month. A review of the firm's work product revealed the law firm spent 552 hours preparing the initial complaint. An additional 323 hours of research was devoted to a motion. The research, unfortunately, missed the leading California Supreme Court case on the issue. The billing records reflected a total of 10,000 attorney and paralegal hours and were charged by 54 different attorneys and paralegals. The client fired the law firm and retained another to handle the real estate dispute. The suit for legal malpractice followed.

In this day of advertisements and statements of almost guaranteed success, an attorney would not be wise to promise more than what can be delivered. A sound practice is to review the applicable law before accepting an assignment. If you do not and cannot reasonably educate yourself on the law at issue or adequately represent the client for whatever reason, the case should be referred or turned down. Likewise, the client who expects nothing less than perfection is one whom you will never satisfy. For the attorney who hears the client say, "If you do your job, I will win," careful consideration should be given as to the benefit of continued representation.

Summary

Suits for legal malpractice continue to rise in Alabama. Unfortunately, there is no magic formula or set of rules to follow so as to avoid being subject to a claim. The above factors, however, continue to be primary causes for suits to be filed. It is hopeful the recognition of these problems will limit one's exposure. ■

Endnote

1. The case examples are not all legal malpractice actions, and further, are not intended to imply a breach of the standard of care by the attorneys.

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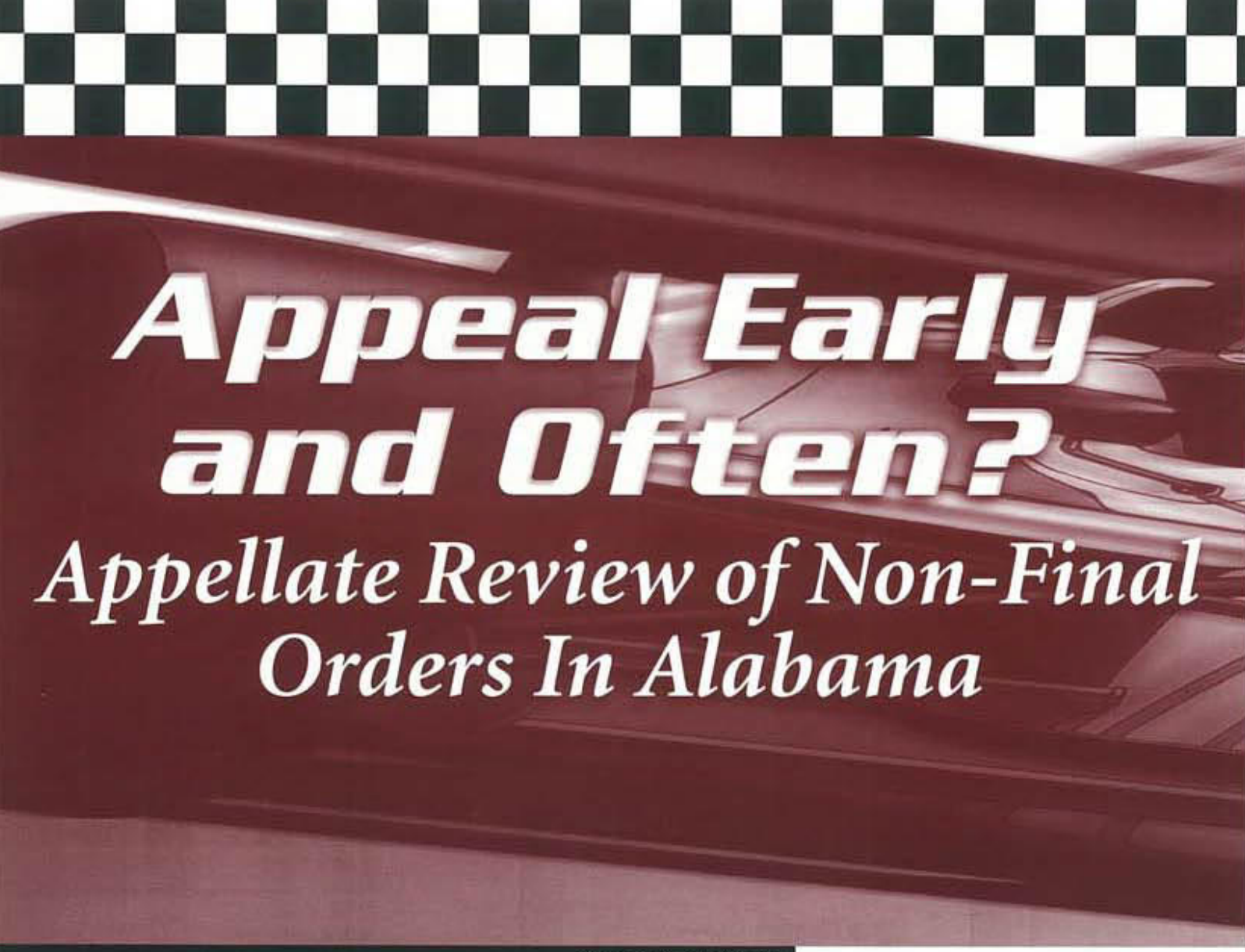
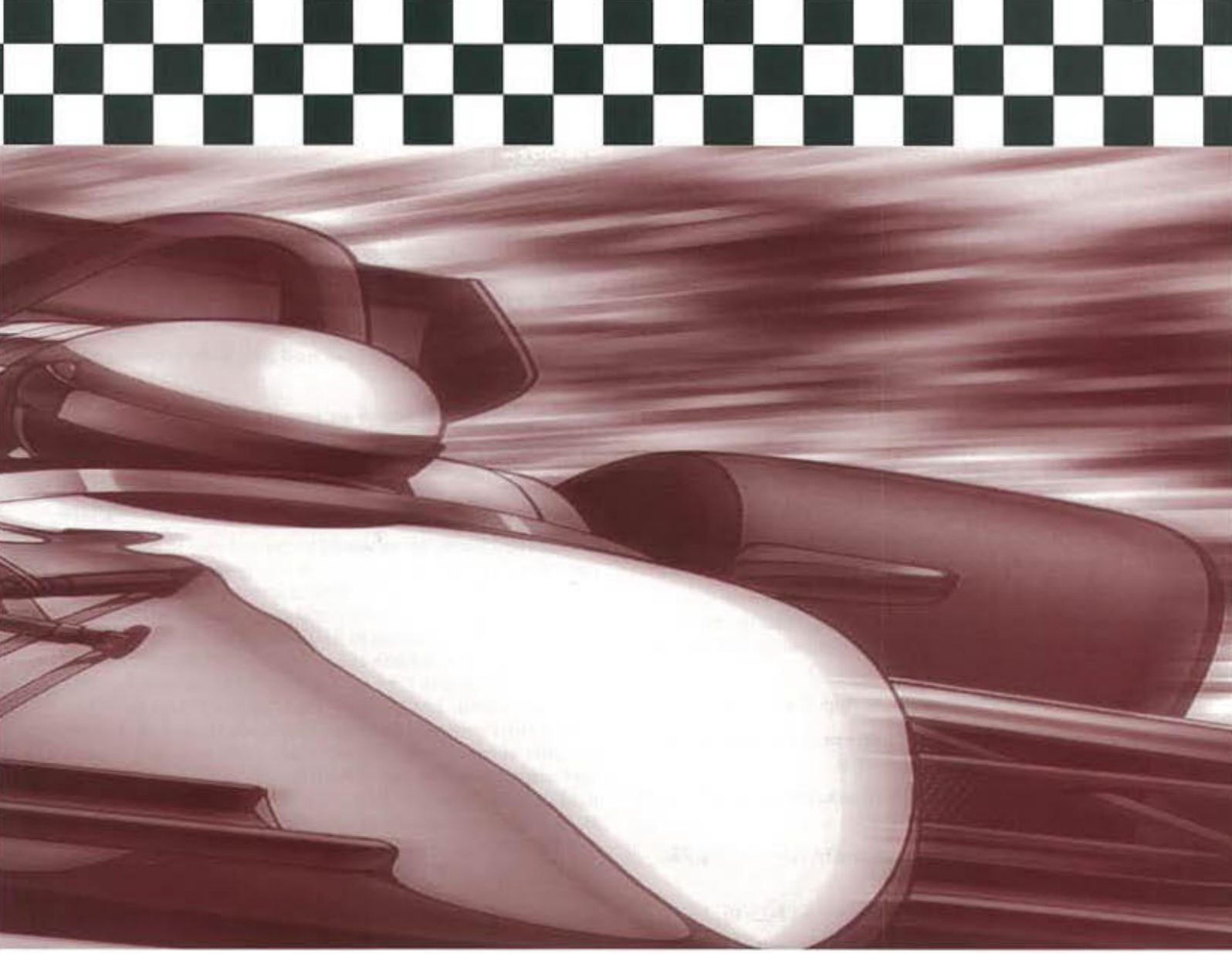


Appeal Early and Often?

Appellate Review of Non-Final Orders In Alabama

BY SUSAN S. WAGNER

Generally, only "final" judgments are appealable. *Ala. Code* § 12-22-2 (1995). Occasionally, though, a non-final or "interlocutory" order can be so damaging that you're afraid your case or your client will not make it to the final lap. In limited circumstances, immediate appellate review may be available, particularly if the order might impermissibly injure a party, unnecessarily protract the litigation, or lead the case down the wrong track. Because the rules and statutes permitting immediate appeal are scattered, however, finding the right provision requires a roadmap. This article is designed to help you navigate those statutes and rules–to identify those non-final orders that are appealable of right and to select the appropriate vehicle (if any) to challenge those that are not.



Is Your Order Worthy?

Your first step is to consider whether the offending order is worthy of an immediate challenge. There are many bad reasons for making this decision. Among these are anger, wounded pride, a desire for vindication and an attempt to stall the trial court proceedings. Before going further, you must objectively analyze:

- If the appellate court were to review the order, would you have a reasonable chance of winning?
- Is the order sufficiently harmful to justify the cost of appellate review? and
- Would an appeal at the conclusion of the case be unavailable or inadequate?

If you answered "no" to any of these questions, your analysis should be at an end.

Is Your Order Final?

A final order is usually–but not always–the last order entered in a case. Some orders that appear to be interlocutory are regarded as final for appeal purposes. If your order is final, the time to appeal is running and will not be renewed by a later order. The Alabama Supreme Court has defined a final judgment as "a terminative decision by a court of competent jurisdiction which demonstrates there has been a complete adjudication of all matters in controversy between the litigants within the cognizance of that court. That is, it must be conclusive and certain in itself." *Ford Motor Co. v. Tunnell,* 641 So. 2d 1238, 1240 (Ala. 1994) (quoting *Jewell v. Jackson & Whitsitt Cotton Co.,* 331 So. 2d 623, 625 (Ala. 1976)). Despite this definition, however, the issue of finality can be complex and is often unclear. For example, if an order grants or denies relief on some claims, but does not mention others, it may be difficult to judge whether the order is a "complete adjudication of all matters in controversy."

Here are some particular potholes that you might want to watch for:

- Where cases are consolidated for pretrial proceedings or trial, an order disposing of all claims in one case may be final. *See League v. McDonald,* 355 So. 2d 695 (Ala. 1978);
- In cases involving the sale of real property, there may be more than one "final" judgment–*i.e.*, one ordering the sale and one confirming it. *Ex parte Gloria Ann Kurtts,* 706 So. 2d 1184 (Ala. 1997);
- Failure to tax costs does not suspend finality. *Morton v. Chrysler Motor Corp.,* 353 So. 2d 505 (Ala. 1977);

- Dismissal of a complaint with leave to amend is final for appeal purposes if the plaintiff does not amend within the time permitted by the dismissal order. The time to appeal runs from the date of the order, not from the expiration of the time to amend. *Hayden v. Harris*, 437 So. 2d 1283 (Ala. 1983); and
- If the trial judge has directed the entry of a final judgment under Rule 54(b), *Ala. R. Civ. P.*, the order is final for purposes of appeal (see further discussion below).

Is Your Order Appealable of Right?

Some interlocutory orders are appealable as a matter of right under Rule 4, Ala. R. App. P., by other statute or rule, or by case law. Examples include:

- An order granting, continuing, modifying, refusing, dissolving, or refusing to dissolve or modify a preliminary injunction. Ala. R. App. P. 4(a)(1)(A);
- Certain receivership orders. Ala. R. App. P. 4(a)(1)(A);
- An order denying a petition to intervene as of right. *Thrasher v. Bartlett*, 424 So. 2d 605 (Ala. 1982);
- An order granting or denying a motion to enforce an arbitration agreement. Ala. R. App. P. 4(d);
- An order certifying or refusing to certify a class action. *Ala. Code* § 6-5-642 (Supp. 2003); and
- An order granting a new trial. *Ala. Code* § 12-22-10 (1995).

In federal courts, the "collateral order doctrine" (a/k/a, the "*Cohen* doctrine") permits immediate appeal of right from interlocutory orders that (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from the final judgment. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989). The Alabama Supreme Court has refused to adopt the collateral order doctrine, however. *Ex parte Franklin County Dept. of Human Resources*, 674 So. 2d 1277 (Ala. 1996).

If your interlocutory order is appealable of right, the appeal is perfected by a timely notice of appeal in the trial court. Note that notices of appeal from interlocutory orders designated in Ala. R. App. P. 4(a)(1), including appeals from preliminary injunction orders, must be filed within 14 days.

Can Your Order Be Certified as Final Under Rule 54(b), Ala. R. Civ. P.?

Rather than allowing appellate courts to review non-final orders, Rule 54(b), Ala. R. Civ. P., allows trial courts to transform non-final orders into final judgments by incantation (usually called "certification"). Rule 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

As the Rule indicates, it can be used only if the following conditions are met:

- Multiple claims or parties are present in the case;
- The order fully adjudicates at least one claim against at least one party; and
- There is "no just reason for delay" in the entry of final judgment.

Rule 54(b) certifications should be granted only in exceptional cases; they "'should not be entered routinely or as a courtesy or accommodation to counsel.'" *Ex parte James*, 836 So. 2d 813, 878 (Ala. 2002) (citation omitted). A trial court should certify a non-final order as final pursuant to Rule 54(b) only "where the failure to do so might have a harsh effect." *Brown v. Whitaker Contracting Corp.*, 681 So. 2d 226, 229 (Ala. Civ. App. 1996), *overruled on other grounds, Schneider Nat'l Carriers, Inc. v. Tinney*, 776 So. 2d 753 (Ala. 2000). Piecemeal appellate review is not favored. *Id.* Because the entry of a final judgment under Rule 54(b) permits not only immediate appeal, but also immediate collection of a money judgment, the trial court must consider whether there is any "just reason" to delay collection proceedings.

If the trial court directs a final judgment under Rule 54(b) unwisely or in an inappropriate case, the appellate court may determine that the Rule 54(b) direction was "improvidently granted" and dismiss the appeal on the basis that the order is not final. Here are some examples of inappropriate certifications:

- Certification of summary judgment on plaintiff's claims is inappropriate, where later resolution of defendant's counterclaim could affect the amount of damages awarded on the plaintiff's claims. *H.P.H. Props., Inc. v. Cahaba Lumber & Millwork, Inc.*, 811 So. 2d 554 (Ala. Civ. App. 2001).
- An order relating to recoverability of some, but not all, of the damages a party may be seeking on a claim does not adjudicate a "claim" and is not, therefore, proper for certification. *Ex parte Simmons*, 791 So. 2d 371 (Ala. 2000).
- Partial summary judgment in favor of a defendant on its contract counterclaims should not have been certified as final, because the plaintiff's fraud claims arose out of the same set of operative facts, and the claims were closely intertwined. *Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp.*, 834 So. 2d 88 (Ala. 2002).

In order to effect the transformation from non-final to final order, the trial court ideally should utter the following magic words: An express determination that there is no just reason for delay; and an express direction for the entry of judgment.

In *Brown v. Whitaker Contracting Corp.*, the court of civil appeals attempted to engraft an additional requirement on the Rule. The court held that a trial judge certifying an order as final under Rule 54(b), in addition to making a finding that "there is no just reason for delay," also must state the reasons it finds "no

just reason for delay." 681 So. 2d at 229. In *Schneider Nat'l Carriers, Inc. v. Tinney*, 776 So. 2d 753 (Ala. 2000), however, the Alabama Supreme Court overruled *Brown*.

The *Schneider* court stated that it was "not generally approving the omission of language stating that the court has made 'an express determination that there is no just reason for delay,' because Rule 54(b) explicitly calls for such a determination." 776 So. 2d at 755. Contrary to *Brown*, however, it found that Rule 54(b) does not require "findings to buttress the conclusion 'that there is no just reason for delay.'" *Id.* at 755-56. The court pointed out, "We held in *Sho-Me [Motor Lodges, Inc. v. Jehle-Slauson Constr. Co.*, 466 So. 2d 83 (Ala. 1985),] that if it is clear and obvious from the language used by the trial court in its order that the court intended to enter a final order pursuant to Rule 54(b), then we will treat the order as a final judgment . . . ." 776 So. 2d at 755. Since *Schneider*, an order might be regarded as final under Rule 54(b) even if it makes no reference to Rule 54(b) and no "express determination that there is no just reason for delay." *See Buford v. Buford*, No. 2020163, 2003 WL 21040002 *5 (Ala. Civ. App. May 9, 2003) (Murdock, J. dissenting), *cert. denied, Ex parte Buford*, No. 1021372, 2003 WL 22221305 (Ala. Sept. 26, 2003).

One word of warning: Trial judges sometimes include Rule 54(b) language even if they are not asked to do so. Once the trial court directs the entry of a final judgment under Rule 54(b), the time to appeal begins to run. Therefore, care must be taken in reviewing dispositive orders–particularly orders dismissing claims or parties or granting partial summary judgment–to determine whether the order may be read as directing the entry of final judgment under Rule 54(b).

If the trial court has not directed the entry of final judgment *sua sponte*, a party may request that it do so. Although there is no time limit for such a request, any order that merits immediate appeal should merit prompt action in seeking Rule 54(b) certification. The time for appeal does not begin to run until the order becomes final.

Rule 54(b) certification can be useful not only for the party who has lost and wishes to take an immediate appeal, but also for the prevailing party. Do not neglect the value of a Rule 54(b) certification in (a) gaining closure for your defendant client who has been dismissed from an ongoing action or (b) enabling your plaintiff client to begin collecting its judgment against one defendant before its claims against other defendants are resolved. The entry of final judgment under Rule 54(b) also starts the post-judgment interest clock running. *Burlington N.R.R. v. Whitt*, 575 So. 2d 1011 (Ala. 1990).

Does Your Order Qualify for Appeal by Permission Under Rule 5, Ala. R. App. P.?

To qualify for appeal by permission under Rule 5, Ala. R. App. P., an order need not dispose of a claim or party. It must, however, "involve a controlling question of law." Therefore, while orders *granting* motions for partial summary judgment can often be certified as final under Rule 54(b), Ala. R. Civ. P., permissive appeals under Rule 5 of the appellate rules may be taken from an order *denying* a summary judgment motion, if the order is based on a close question of law. *See Thompson Props. v. Birmingham Hide & Tallow Co.*, 839 So. 2d 629 (Ala. 2002); *Coates v. Guthrie*, 707 So. 2d 204 (Ala. 1997). Other appropriate orders would be those denying governmental immunity (mandamus also available); denying a motion to dismiss based on a forum selection clause, *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997); denying a motion to dismiss based on a settlement, *Gates Rubber Co. v. Cantrell*, 678 So. 2d 754 (Ala. 1996); or ruling on substantive law or choice of laws.

Rule 5 permissive appeals are available only in "those civil cases which are within the original appellate jurisdiction of the Supreme Court." Ala. R. App. P. 5(a). Thus, Rule 5 does not apply to criminal cases or to cases appealable to the court of civil Appeals, such as domestic or workers' compensation cases.

Obtaining permission to appeal under Rule 5 is a two-step process: (1) obtaining a "certification" from the trial court for immediate appeal, and (2) filing a "petition for permission to appeal" in the Alabama Supreme Court. Each step has its own very specific requirements and its own time limitation.

Like a direction of finality under Ala. R. Civ. P. 54(b), a Rule 5 certification may be entered by the trial court on its own motion. Usually, though, a trial court will not certify an order for immediate appeal unless asked by one of the parties to do so. To satisfy the Rule, the certification must state that, in the judge's opinion:

- "The interlocutory order involves a controlling question of law";
- There is a "substantial ground for difference of opinion" as to the question of law;
- "An immediate appeal from the order would materially advance the ultimate termination of the litigation"; and
- "The appeal would avoid protracted and expensive litigation."

In addition, the certification must identify the "controlling question of law" to which it refers. Ala. R. App. P. 5(a).

Originally, Rule 5 provided no time limit for the trial judge to certify interlocutory orders for immediate appeal. In 2001, the Alabama Supreme Court adopted a new Rule 5(a)(1), Ala. R. App. P., which provides that "[t]he presumptively reasonable time for the trial judge to enter the certification . . . is within 28 days of the entry of the interlocutory order sought to be appealed." This is not a jurisdictional time limit. If the trial judge enters a certification more than 28 days after the order, however, the party seeking to appeal must provide an adequate explanation for the delay.

Once the trial judge enters the certification, the party seeking to appeal has only 14 days to file a petition in the Alabama Supreme Court. The requirements for the petition itself are exacting and time-consuming, so the process of preparing the petition must begin immediately. The petition must contain statements of the following:

- The facts necessary to understand the controlling question of law, supported by record references to the materials accompanying the petition;
- The question itself, as stated by the trial court in its certification;
- The reasons why a substantial basis exists for a difference of opinion on the question;
- The reasons why an immediate appeal would materially advance the termination of the litigation;
- The reasons why the appeal would avoid protracted and expensive litigation; and
- If the trial judge's certification was entered more than 28 days after the original order, the circumstances constituting "good cause" for the delay. Ala. R. App. P. 5(a)(1), (b).

The trial court will not prepare a record on appeal in response to a petition for permission to appeal, so the only "record" available to the supreme court will be those materials submitted with the petition. Rule 5, therefore, requires that the following papers be included or attached to the petition:

- A copy of the order from which appeal is sought and any findings of fact, conclusions of law and opinion relating to the order; and
- A copy of the certification required by Rule 5(a). Ala. R. App. P. 5(b).

Petitions for extraordinary writs should be filed only if no other procedure is available to obtain appellate review.

The cover of the petition should be white, the petition cannot exceed 20 pages, and nine copies should be submitted to the Alabama Supreme Court, along with a $50 check. The party opposing immediate appeal may file an answer in opposition within 14 days, addressing the reasons why permission to appeal should be denied. If the court grants the petition, more forms and fees will be due, the record on appeal will be submitted, and a briefing schedule on the merits will follow.

Most petitions for permission to appeal are denied. Of the petitions that are granted, only about half result in reversal. It is not unheard of for the supreme court to decide, after briefing on the merits, that permission to appeal was improvidently granted. For the 2002-2003 term, the supreme court granted only 20 of the 56 petitions for permission to appeal; seven of those resulted in affirmance, and three were dismissed. Only ten out of the 56 resulted in reversal. Because of the costs and possible delay occasioned by this procedure, it should be reserved for special cases.

Is Your Order Appropriate for a Petition for Writ of Mandamus or Prohibition?

Petitions for extraordinary writs should be filed only if no other procedure is available to obtain appellate review. If the order would qualify for certification of finality under Rule 54(b), Ala. R. Civ. P., or certification for permissive appeal under Rule 5, Ala. R. App. P., those avenues should be pursued. The Alabama Supreme Court has said that in the "normal case" in which a party may petition for permission to appeal, the appellate courts will not entertain a petition for a writ of mandamus. *Ex parte Burch,* 730 So. 2d 143 (Ala. 1999).

Mandamus is a "drastic and extraordinary remedy." *Ex parte State ex rel. C.M.,* 828 So. 2d 291, 293 (Ala. 2002). The petitioner must show "(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent [the trial judge] to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." A writ can issue if the trial court clearly abuses its discretion by acting in an arbitrary and capricious manner. *Ex parte Rollins,* 495 So. 2d 636 (Ala. 1986). In short, a simple abuse of discretion will have to wait for another day.

Although these requirements are strict, mandamus petitions can provide a means to challenge orders, actions or inactions

that could not otherwise be appealed. Some examples of proper subjects for mandamus include:

- Denial of a motion for change of venue. *Ex parte State ex rel. C.M;*
- Denial of a plea of double jeopardy. *Ex parte Ziglar,* 669 So. 2d 133 (Ala. 1995);
- Failure of a trial judge to rule on a pending motion or enter judgment within a reasonable time. *See Ex parte Monsanto Co.,* 794 So. 2d 350 (Ala. 2001);
- Disqualification or refusal to disqualify an attorney or the trial judge. *Woodward v. Roberson,* 789 So. 2d 853 (Ala. 2001); *Ex parte Lammon,* 688 So. 2d 836, 838 (Ala. Civ. App. 1996);
- A ruling on a discovery motion that results in undue hardship. *Ex parte Union Sec. Life Ins. Co.,* 723 So. 2d 34 (Ala. 1998);
- An order granting or denying a trial by jury. *Ex parte Cupps,* 782 So. 2d 772, 775 (Ala. 2000);
- Denial of a motion to amend a complaint. *Ex parte Clarke C. Yarbrough,* 788 So. 2d 128 (Ala. 2000);
- An order granting or denying a motion to transfer venue. *Ex parte National Sec. Ins. Co.,* 727 So. 2d 788 (Ala. 1998);
- An order granting a motion to set aside a default judgment. *Ex parte King,* 821 So. 2d 205 (Ala. 2001);
- Denial of a motion to dismiss based on lack of personal jurisdiction. *Ex parte Phase III Constr., Inc.,* 723 So. 2d 1263 (Ala. 1998);
- An untimely order granting a post-trial motion. *Ex parte Johnson,* 715 So. 2d 783 (Ala. 1998); and
- An order denying summary judgment based on the pendency of unnecessary discovery. *Ex parte Wal-Mart Stores, Inc.,* 689 So. 2d 60 (Ala. 1997);

A writ of mandamus generally will not issue to compel a trial court to grant a motion for summary judgment, *Ex parte Empire Fire & Marine Ins. Co.,* 720 So. 2d 893 (Ala. 1998), to certify an order as final under Rule 54(b), Ala. R. Civ. P., or to certify an order for immediate permissive appeal under Rule 5, Ala. R. App. P.

A writ of prohibition is a preventive, rather than corrective, remedy to prevent exercise of excess jurisdiction by the trial court and is issued only in cases of extreme necessity. *Ex parte Segrest,* 718 So. 2d 1 (Ala. 1998).

A petition for a writ of mandamus or prohibition is filed in the appellate court that would have jurisdiction over an appeal from the case. Although there is no jurisdictional time limit, Rule 21, Ala. R. App. P., has been amended to provide a "pre-

sumptively reasonable" time for filing a petition for a writ of mandamus or prohibition. The presumptively reasonable time is the same as the time for taking an appeal, *i.e.*, 42 days in most cases. This presumptively reasonable time is not suspended by a "motion to reconsider" the order at issue. *Ex parte Troutman Sanders, LLP*, 866 So. 2d 547 (Ala. 2003).

Like a petition for permission to appeal, the requirements for a petition for a writ of mandamus or prohibition are exacting. The petition must contain:

- A statement of the facts necessary to understand the issues presented by the petition;
- A statement of the issues presented and of the relief sought;
- A statement of the reasons why the writ should issue, with citations to supporting authority; and
- Copies of any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition;
- If the petition is filed beyond the "presumptively reasonable" time, a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding the delay; and
- A certificate of service on the trial judge, as well as on counsel for the other parties. Ala. R. App. P. 21(a).

The petition, which cannot exceed 30 pages and should have a white cover, must be filed in the appropriate appellate court (number of copies depends on court), along with a $50 check. The court will advise whether an answer to the petition should be filed and will establish a deadline for any answer. Ala. R. App. P. 21(b). The trial judge can decline to file an answer without admitting the allegations of the petition; the parties other than the petitioner are also considered respondents for purposes of answering. *Id.* The appellate court also will advise whether and when briefs should be filed and may schedule oral argument. *Id.*

A few years ago, writs of mandamus were relatively common, because orders compelling arbitration and orders granting or denying class certification could be challenged only by mandamus. That is no longer the case. Although available statistics are incomplete, it appears that the success rate for mandamus petitions is even lower than that of petitions for permission to appeal.

Will Interlocutory Appellate Review Delay the Upcoming Trial or Otherwise Stay Proceedings in the Trial Court?

Sometimes, interlocutory appellate review is sought in the mistaken belief that the filing of a mandamus petition or a petition for permission to appeal will automatically delay proceedings in the trial court. A party hoping to trigger the continuance of a trial generally will be disappointed. The filing of a mandamus petition does not automatically stay the trial court proceedings, nor divest the trial court of jurisdiction. If a stay of proceedings below is necessary to afford meaningful relief, a motion for stay should be filed in conjunction with the mandamus petition. *See, e.g., Ex parte State ex rel. C.M.*, 828 So. 2d at 293.

A petition for permission to appeal likewise has no affect on the proceedings below. If a petition for permission to appeal is granted, however, or if an interlocutory appeal is permitted of right, a partial stay is effected. The Alabama Supreme Court has said, "'[T]he general rule [is] that jurisdiction of a case can be in only one court at a time.' . . . 'While a case is pending in an appellate court, the trial court may proceed in matters entirely collateral to that part of the case that has been appealed, but can do nothing in respect to any matter involved on appeal that may be adjudged by the appellate court.'" *Ex parte Webb*, 843 So. 2d 127, 130 (Ala. 2002).

A party seeking the trial court's certification of an order for permissive appeal under Rule 5, Ala. R. App. P., should consider asking for a stay as part of the same motion. Otherwise, a request for stay can be made by separate motion. Rule 8(b), Ala. R. App. P., dictates that a motion for stay ordinarily should be addressed first to the trial court. A motion to stay can be filed in the appellate court if the trial court denies or fails to rule on a requested stay or if asking the trial court to stay the case is not "practicable." In a true emergency, the appellate court will consider an "emergency" motion for stay. *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So. 2d 758, 761 (Ala. 2002).

Although preliminary injunctions are appealable of right, an appeal does not stay the effect of the injunction or divest the trial court's jurisdiction to enforce it. Stay of the injunction may be sought in the trial court under Rule 62(c), Ala. R. Civ. P., but the court should require a bond or other security. If the trial court denies relief, a motion may be filed under Rule 8, Ala. R. App. P.

Conclusion

If you find that none of these avenues for immediate review seems to apply to your case, you are not alone. Because of the policy against "piecemeal appeals," the opportunities for appellate review of interlocutory orders remain limited, and most orders simply do not qualify. Moreover, unsuccessful efforts to appeal in the midst of trial court proceedings can be costly in terms of time, money, and goodwill. If immediate appellate review is available, however, it can sometimes lead to earlier success on the merits or avoid unnecessary proceedings. Knowing which procedure to use and using it correctly can improve the odds, while minimizing the costs to your client. ■

Susan S. Wagner
After graduating from the University of Alabama School of Law and clerking for United States District Judge Sam C. Pointer, Jr., Susan S. Wagner joined the Birmingham firm of Berkowitz, Lefkovits, Isom & Kushner. In 2003, the firm merged to form Baker, Donelson, Bearman, Caldwell & Berkowitz PC, with offices across the southeast. Wagner is a former chair of the Appellate Practice Section and the Business Torts & Antitrust Section of the Alabama State Bar.

Times are changing and we'd like to hear from you!

The Bar Directory of the Alabama State Bar is one of the most utilized services provided to you as a member. To keep in step with the needs of you and your staff, we would like to know how to make the online directory more efficient and user friendly.

Many bar associations are going exclusively online instead of a hard-bound version. This saves the cost of printing a paper directory and ensures that the information is up to date. Currently, our online directory lists only member contact information.

Please take a moment to survey your staff and let us know your thoughts.

How often do you use the printed directory? _____

_____

How often do you use the online member directory? ____

_____

Would you use the online directory more frequently if it contained:

- ☐ Alabama State Bar Organization, Programs and Operations
- ☐ Alabama Rules of Professional Conduct
- ☐ Alabama Standards for Disciplinary Procedure
- ☐ Alabama Standards for Imposing Lawyer Discipline
- ☐ Attorney Rosters
- ☐ The Courts and Administrative Officers
- ☐ Alabama Law Schools
- ☐ Alabama Specialty Bars
- ☐ Client Security Fund Rules
- ☐ Legal Services Corporation
- ☐ MCLE Rules & Regulations
- ☐ Membership Services
- ☐ Pro Hac Vice Admission Rules
- ☐ Rules of Specialization
- ☐ State Bar Associations

What other information other than that listed above, would you like to see included as part of an electronic/online directory? _____

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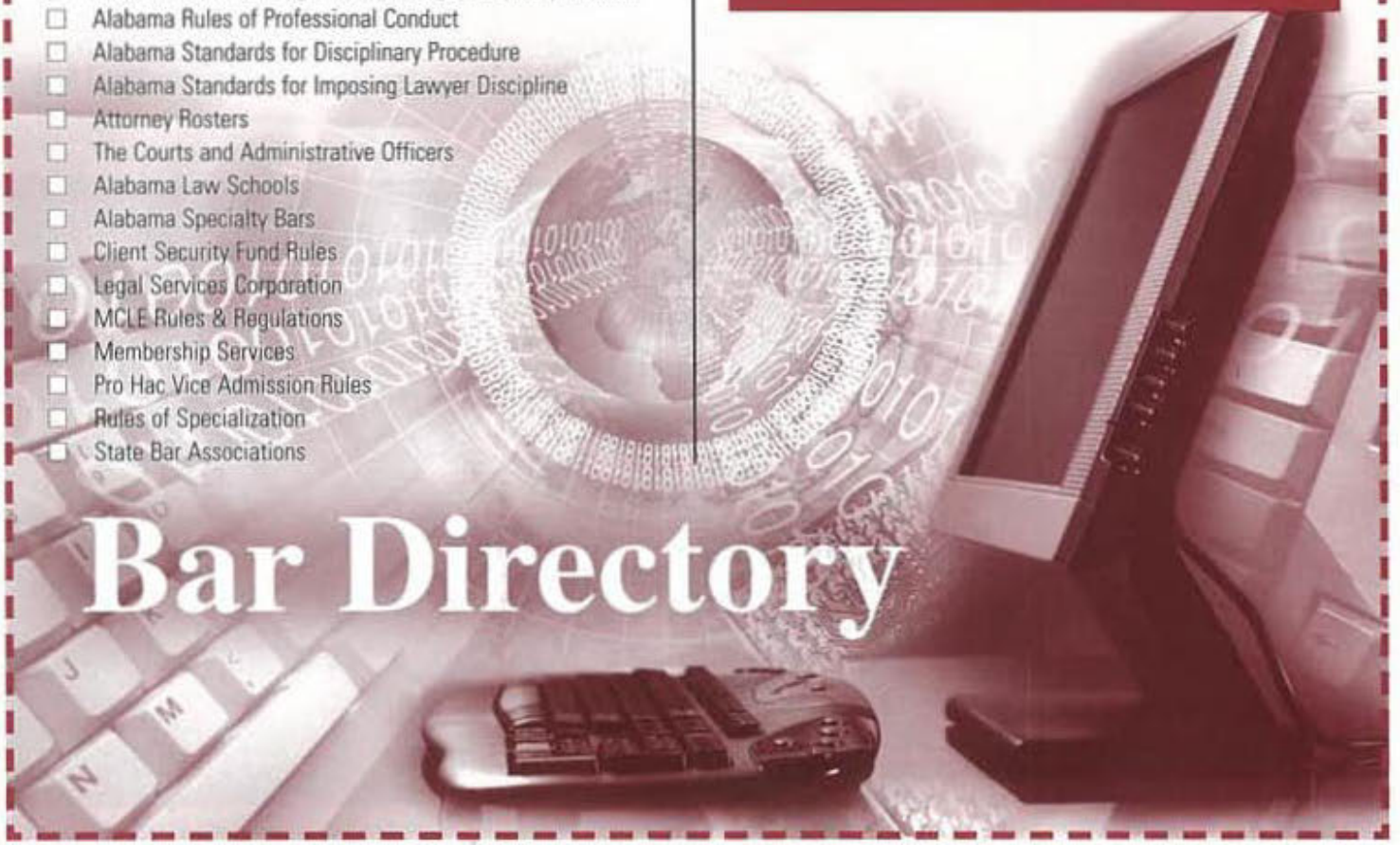
Please fax or mail your completed survey to 334-261-6310 or to Susan Andres, director of communications, P.O. Box 671, Montgomery, AL 36101. This survey is also available online on the members page of www.alabar.org.

Please note: There will be no 2004 Alabama Bar Directory. It will be a combined edition (2004-2005) and will be published in February 2005.



Rosa Gerhardt

- The late **Rosa Gerhardt**, who was the first woman to be elected president of the Mobile Bar Association, recently was inducted into the Alabama Women's Hall of Fame.

  Gerhardt, who died in January 1975, graduated from the Cumberland School of Law in Lebanon, Tennessee in 1930 and became MBA president in 1948. Mary Margaret Bailey, a Mobile attorney, nominated Gerhardt for the Hall of Fame honor.

  As Bailey explained, to be elected to the position of president of the MBA in the 1940s, when the profession was almost completely male-dominated, "really says something about what kind of woman she was."

  In 1945, Gerhardt began working part-time as a federal court reporter, but gradually worked that into a full-time position, while practicing law less and less. After her retirement, she went back to the practice of law for a short time, until her health declined. She died in 1975.

  Gerhardt was also elected president of the Mobile Business and Professional Women's Club in 1941.

- **Ernestine Sapp**, Alabama State Bar ABA House Delegate, was one of four recipients of the National Bar Association's 2004 Gertrude E. Rush Award. This award commemorates the life of Rush,

Rosa Gerhardt's family members and friends gather at the Alabama Women's Hall of Fame at Judson College in Marion.

NBA Gertrude Rush 2004 Award Honorees: (left to right) Frankie Muse Freeman; Dean Alice Gresham Bullock; Ernestine S. Sapp; and Congressman John R. Lewis

the only woman founder of the National Bar Association, as well as the other founders and their commitment to law and service. Sapp, a partner with the Tuskegee firm of Gray, Langford, Sapp, McGowan, Gray & Nathanson, currently serves as the president of the Hugh Maddox American Inns of Court in Montgomery. She also has served as chair of the NBA's foundation, the National Bar Institute.

- The Alabama house and senate have approved a joint resolution naming the Alabama Judicial Building in Montgomery after former chief justices and a U.S. Senator who left their marks. The resolution names the building the **Heflin-Torbert Judicial Building** after former **Chief Justice and U.S. Senator Howell Heflin** of Tuscumbia and former **Chief Justice C.C. Torbert, Jr. of Opelika.**

Howell T. Heflin

C.C. Torbert, Jr.

Heflin-Torbert Judicial Building

- Retired **District Court Judge Clyde Traylor** was recently awarded the Alabama Child Support Association's Judge of the Year award for his outstanding service in the child support arena for 2003-2004. Judge Traylor began his career as a jurist serving 18 years as a municipal judge for the City of Fort Payne. He was appointed DeKalb County District Judge in May 1988 by Governor Guy Hunt. He

 Continued from page 263

District Attorney Mike O'Dell (L) presents Judge Lee Clyde Traylor with his award.

served in that capacity until his retirement in January 2003. Judge Traylor is the first retired judge to win this award and he is the first district judge to take over full responsibility for hearing and deciding all DHR child support cases, even those normally handled by the local circuit judges.

Reginald T. Hamner

District Attorney Mike O'Dell was given the honor of presenting the award due to his selection as recipient of the 2002 John Hulet Lifetime Achievement Award.

- The University of Alabama National Alumni Association recently named **Reginald Turner Hamner** the 2004 Distinguished Alumnus Award Winner for his contributions to the University and the NAA. Hamner also served as executive director of the Alabama State Bar for 29 years, and is now deputy clerk for the U.S. District Court in Montgomery.

- Samford University's Cumberland School of Law honored Florida **Attorney General Charlie Crist** and Mobile attorney **Marion Quina** recently during its annual reunion weekend.

Crist, named distinguished alumnus, is a 1981 Cumberland graduate and

Crist receives award from Cumberland Dean John S. Carroll.

Quina receives award from Dean Carroll.

was elected Florida's first Republican attorney general in November 2002.

Quina, a 1974 Cumberland graduate and a partner in the Mobile firm of Lyons, Pipes & Cook, is chair of the Law School Advisory Board. In recognition of his 30th reunion year, Quina led his classmates to establish the Class of 1974 Scholarship Committee.

- **Charles Hoffman**, a Mobile attorney who is still practicing at age 94, was recently honored by the Mobile Bar Association as the state's oldest active lawyer.

Hoffman was born in Mobile in 1909 and attended Georgia Tech and Emory Law School. Before graduating from Emory, though, he took and passed the Alabama State Bar examination. Hoffman opened his office in 1931 in the First National Bank Building in Mobile. ■

By Robert L. McCurley, Jr.

Legislature's 2004 Regular Session Ends

The Alabama legislature adjourned Monday 17, 105 days after it first convened. There 1,397 bills introduced, of which 317 passed. Most of these affected one county or one state agency. Although lawyers may be interested in a local bill or a bill dealing with a particular agency, I have chosen to discuss only 24 bills that may be of general concern to lawyers.

Alabama Law Institute Bills

Uniform Commercial Code Article 1–"General Provisions" (SB 68) and UCC Article 7–"Documents of Title" (SB 168)

Both passed the legislature and will be effective January 1, 2005.

The Alabama Uniform Securities Act, Alabama Trust Code and Alabama Uniform Residential Tenant Act all were reported out of committee, but were not enacted. For copies of any of our bills with their commentary, please consult our Web site at: *www.ali.state.al.us.*

Criminal Law

SB-58–*Interstate Compact for Juveniles*

Creates a new interstate compact for juveniles whereby juveniles committing offenses in one state but escaping or running away to another state will be returned to the state in which they reside. This will replace *Alabama Code* Section 42-2-1 *et. seq.*, and is not effective until the 35 states have adopted the compact.

HB-4–*Custodial Sexual Misconduct*

Any prison or jail employee who engages in sexual conduct with a person who is in their custody commits this felony.

HB-113–*Charitable Theft*

A new crime of theft of property is created which includes the taking of a donated item left on the property of a charitable organization or near a charitable organization's container and it amends §13A-8-2.

HB-539–*Pardon and Parole*

Section15-22-36 is amended to provide that notices of parole hearings that must be sent to victims are to be mailed to the last address of the victim in the Board's files.

SB-385–*Controlled Substance*

Section 20-2-190, relating to the possession of ingredients to be used in unlawful manufacturing of a controlled substance, is amended.

Commercial

SB-68–*UCC Article 1-"General Provision"*

Makes conforming amendments to the first Article of the Uniform Commercial Code relative to definitions and general provisions to coincide with amendments previously made in other articles that have been revised over the past 12 years. *(See AL Lawyer Article May 2004)*

SB-168–*Uniform Commercial Code Article 7– "Documents of Title"*

Brings current the Article previously known as Warehouse Receipts. *(See AL Lawyer Article May 2004)*

HB-684–*Uniform Disposition of Unclaimed Properties Act*

Revises the current unclaimed property law §35-12-20 *et. seq.*, which concerns the receipt and disposition of unclaimed

property that has been reported to the state treasurer.

Probate Trusts and Estates

HB-38–*Annuities*
Amends §27-15-28.1 relating to the minimum interest rate for individual deferred annuities to allow a contract owner to request a paid up annuity benefit or allow companies to defer payment upon a written request.

HB-39–*Trusts*
Amends §19-3-328 to clarify certain statutory prohibitions concerning actions by trustees of express trusts.

SB-142–*Marriages*
Amends §30-1-7 to allow judges of probate to perform marriage anywhere in the State of Alabama.

SB-169–*Involuntary Commitments*
To require an order for involuntary commitment of a person to be forwarded to the Criminal Justice Information Center and subsequently to the National Instant Criminal Background Check System.

Family

HB-3–*Child Support Payments*
This authorizes the court to provide for rebate of interest entered on delinquent child support payments under certain circumstances with the rebate being applied retroactively.

SB-228–*Foster Parents Bill of Rights Act*
Establishes such an Act through the Department of Human Resources.

SB-245–*Adult Adoption*
Amends §26-10A-6 to provide that an adult may be adopted under certain circumstances.

County Government

SB-331–*County Commission Vacancies*
Amends §11-3-6 to authorize the legislature by local law to provide a manner for filling vacancies in the office of county commissioner.

Real Estate

HB-405–*Out-of-State Acknowledgments*
Amends §35-4-26 relating to who is authorized to take acknowledgments in other states and foreign countries for members of the armed services, and to cure any defect of those previously filed.

HB-534–*Deed Recording*
Amends §35-4-62 to allow for the recording of a deed mortgage etc. in counties that have more than one courthouse in either division and require that the record be electronically stored and indexed for retrieval from either of the courthouses or courthouse annexes.

SB-304–*Revolving Line of Credit*
Amends §40-22-2 to provide for recording fees on mortgages securing revolving lines of credit.

Unemployment Compensation

HB-169–*Unemployment Compensation Weekly Benefits*
Amends §26-4-72 to provide a $10 increase on unemployment weekly benefits.

Bar, Courts and Lawyers

HB-90–*Senior Judge Status*
Provides any circuit court or district court judge who has served for ten or more years and who retires, except for disability, may be appointed as a senior judge for special cases or temporary assistance.

HB-303–*Income Tax Set Off*
Amends §40-18-10 to provide the judicial system, may set off from any income tax return refund owed a taxpayer to collect fines and court costs owed by the taxpayer.

SB-154–*Bar Commissioners*
Amends §34-3-40 to provide for nine additional at large members of the state bar Board of Commissioners who shall be selected to represent the racial, ethic, gender, age, and geographical diversity of the membership of the Alabama State Bar.

HB-308–*Court Costs*
Amends §12-19-71 and §12-19-72 to increase the filing fees for civil cases in circuit and district courts. The Act provides varying docket fees depending on the amount of the suit filed, number of parties and action taken.

For more information, one may access this on the legislature's public Web site at: *alisdb.legislature.state.al.us/acas/ACASLogin.asp.*

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

By J. Anthony McLain

Law Partners of Substitute Municipal Judge May Represent Clients In Municipal Court Provided Said Matters Are Completely Unrelated to Those Wherein Partner Presided as Substitute Judge

Question:

"The City of Anywhere has a full-time municipal court judge. I am one of four attorneys designated by the City Council to serve as a substitute judge on the rare occasions when the full-time judge is on vacation, or is otherwise unavailable. We are paid by the hour. To the best of my memory, I have been asked to substitute on three or four afternoons and one or two morning sessions over the past year.

"Once I was designated a substitute judge, I stopped taking any city court cases. My question, however, is whether my designation as a substitute judge on this rare basis would disqualify other members of my firm from representing city court clients? We obviously check before I substitute to ensure that no one has a case on the same day."

Answer:

The *Alabama Rules of Professional Conduct* allow your law partners to represent criminal defendants in municipal court, even though you serve as a substitute municipal court judge, provided that the matters wherein your law partners represent these criminal defendants are completed unrelated to those wherein you presided as a substitute judge.

Discussion:

The Disciplinary Commission, in RO-91-18, dealt with the issue of whether a lawyer was prohibited from representing applicants before a state agency licensure board where that lawyer's partner served as a hearing officer. The Commission held that the lawyer could represent applicants before this same licensure board even though the lawyer's partner served as a hearing officer for that same agency, provided that the representation involved matters completely unrelated to those in which the partner presided as a hearing officer. Quoting from RO-89-115, the Commission determined that if the matters are unrelated, representation would not be prohibited subject to consent by both parties involved, and the attorney's determination that he could render undiluted and vigorous representation to the client.

In RO-84-190, the inquiring attorney served as a municipal judge. The lawyer had been contacted by a police officer of that same municipality, concerning possible representation of him in a criminal case in circuit court. The case arose out of the shooting and killing of a suspect while fleeing from police officers, one of whom was the lawyer's prospective client.

The Disciplinary Commission determined that there would be no ethical

impropriety in the lawyer representing the police officer should he be indicted, and in representing the city should a civil suit be filed against the city by the personal representative of the slain man if, in the capacity as a municipal judge for that same city, the lawyer did not and would not act upon any facet of the merits concerning the possible indictment or civil suit against the city.

Acknowledgment is made of Rule 1.10(a) of the *Alabama Rules of Professional Conduct*, which states:

"Rule 1.10 Imputed Disqualification:

General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."

However, the Disciplinary Commission interprets this rule to apply to general conflicts questions and issues, since the rules specified in 1.10(a), with the exclusion of Rule 2.2, deal with conflict of interest.

While there would obviously be a conflict in your handling representation of criminal defendants in municipal court wherein you preside from time to time as a substitute municipal judge, such a conflict would appear to be more personal in nature, rather than firm-wide and, thus, not imputed to your law partners.

Due to the personal nature of this conflict, and the conflict not being imputed to your remaining law partners, your law partners are therefore not prohibited from representing criminal defendants in the same municipal court where you, from time to time, preside as substitute judge, provided that the matters being handled by your law partners are in no way related to those matters which are presided over by you in your capacity as substitute judge.

The Disciplinary Commission would also encourage you to disclose to the governing body of the municipality that employs you in this substitute municipal court judge capacity that your law partners will continue to represent criminal defendants in municipal court, but only in those cases in which you have absolutely no connection or participation.

This determination is consistent with a previous decision of the Disciplinary Commission, specifically, RO-93-12, wherein the Commission determined that a lawyer could represent clients before a state agency even though that lawyer's partner served as a hearing officer for the agency, provided that the lawyer's representation involved matters completely unrelated to those in which the partner presided as a hearing officer. The Commission relied upon Opinion 1990-4 of the Committee on Professional Ethics of the Association of the Bar of the City of New York which had held that a lawyer or members of his firm could not represent claimants before a Commission for whom the lawyer served as an administrative law judge or a mediator. The qualification was that the lawyer served frequently and repeatedly as a part-time administrative law judge for this agency. On the other hand, the opinion also held that the lawyer and members of his firm would be allowed to represent claimants before this same commission *if the lawyer served only occasionally and sporadically as a judge pro tempore.*

The Commission also pointed out, consistent with other opinions and provisions of the prior Code of Professional Responsibility, that the frequency of a lawyer as a part-time judge or administrative hearing officer would dictate whether that lawyer or his law partners could represent clients before those same agencies or boards.

The Commission would reference Rule 8.4, which concludes that it is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official. Pursuant to this provision, the Commission obviously considers the frequency of appearance as administrative law judge or hearing officer a primary factor in determining whether the law partners of such a hearing officer or substitute judge could represent clients before the same agency or tribunal.

Absent such frequency, the Commission is of the opinion that your infrequent service as substitute municipal court judge does not prohibit your remaining law partners from handling cases for clients appearing in this same court provided that you are in no way involved in or connected with said proceedings. [RO-1999-03] ■

Disciplinary Notices

Notices to Show Cause

- Notice is hereby given to **William Donald Kelly, Jr.**, who practiced law in Columbus, Georgia, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 2, 2004, he has 60 days from the date of this publication (July 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 03-137]

- **Stephen Daniel Phillips**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2004 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 03-129(A) and 03-130(A) before the Disciplinary Board of the Alabama State Bar. [ASB nos. 03-129(A) and 03-130(A)]

Reinstatements

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary board, Panel III, reinstating Centreville attorney **Richard Michael Kemmer, Jr.** to the practice of law in the State of Alabama, effective April 12, 2004. [Pet. for Rein. No. 04-01]

- The Disciplinary Board, Panel II, upon hearing the petition for reinstatement of Dothan attorney **Stephen Glen McGowan**, ordered that McGowan be reinstated to the practice of law in the State of Alabama, effective March 12, 2004. (McGowan was suspended for two years, effective September 29, 2000.) The board's order, dated February 19, 2004, was adopted by the Alabama Supreme Court on March 16, 2004. [Pet. No. 03-10]

Disbarment

- The Alabama Supreme Court adopted an order of the Disciplinary Board, Panel IV, disbarring Heflin attorney **Wayne Harris Smith** from the practice of law in the State of Alabama effective March 29, 2004. On March 5, 2004, Smith entered an "affidavit of consent to disbarment" in the above-referenced complaints. Following is a summary of the complaints:

ASB No. 02-243(A)–On August 16, 2000, the Disciplinary Commission dismissed the complaint in ASB No. 00-116(A) and directed Smith to meet with Laura Calloway, director, Law Office Management Assistance program (LOMAP). On September 5, 2000, a letter was sent to Smith directing him to contact Calloway. In a memo provided by Calloway to this office, she stated that Smith did not comply with her August 26, 2002 recommendations. She also stated that based on his personal appearance, and the appearance of Smith's office, it could be possible that he was suffering from depression. Smith had to be written or called numerous times before he would respond to the bar's requests for information. Smith violated rules 3.4, 8.1(b) and 8.4(g), *Alabama Rules of Professional Conduct.*

ASB No. 01-272(A)–Smith received a check in or about January 1998, in the amount of $157,500 from Betty Cosper. Smith had been named as trustee for the "irrevocable" "Betty Cosper Family Trust." Smith was to invest the money and pay Cosper a monthly income. Cosper stated that she could not get an accounting of her funds from Smith, although he had been making monthly payments to her. Cosper had also hired another lawyer for purposes of getting an accounting of the investments made by Smith for Cosper. That attorney was unable to get Smith to comply with a request for documentation on any investment accounts. Smith failed to provide the bar with any adequate and detailed accounting of his handling and investment of Cosper's funds. Smith violated rules 8.1(b) and 8.4(g), *Alabama Rules of Professional Conduct.*

ASB No. 03-267(A)–In a complaint received May 28, 2003, Jonathan Joanes of Chicago stated that on March 25, 2003, his bank transferred $500 to Smith's trust account, as part of a diamond investment. Joanes never received any money from this investment and Smith would not communicate with him. Smith did not respond to requests from the bar for information within the allotted time. On July 21, 2003, Smith faxed a letter to the bar in which he admitted that he was allowing third parties to use his attorney's trust account as a conduit for an investment.

"He, Larry Stephens and Vernon Banks were involved in the situation discussed by him (Joanes). The money was received by me on behalf of these parties and given to Mr. Banks on behalf of Mr. Joanes.

"I have stopped any funds relative to Mr. Banks or Mr. Stephens from coming to me and informed them that they must make settlement or agreement in this situation. I now receive no funds on behalf of Mr. Banks or his related parties."

Afterwards, the bar requested that Smith supplement his letter with "… more specific information concerning the transaction between Joanes, Stephens and Banks, together with a detailed account of your role and participation in the matter." Smith failed to respond. Smith violated rules 8.1(b),

8.4(b), 8.4(c) and 8.4(g), *Alabama Rules of Professional Conduct.*

ASB No. 03-101(A)–On or about March 21, 2003, the Office of General Counsel received information and documents indicating that Smith's cousin, Vernon Banks, was using Smith's trust account as a conduit for funds contributed by investors in an investment scheme. Smith did not respond to a letter from Assistant General Counsel Gil Kendrick requesting an explanation pursuant to previous information received regarding a similar incident. Additional letters were mailed and/or faxed to Smith. By the date of the formal charges, Smith had failed to respond with any information regarding this possible trust account impropriety. Smith violated rules 8.1(b) and 8.4(g), *Alabama Rules of Professional Conduct.*

ASB No. 03-291(A)–Lucille White retained Smith to represent her in a divorce and paid him $550. The divorce was not completed. Smith failed or refused to respond to requests from the bar for an explanation. Smith violated rules 1.3 and 8.1(b), *Alabama Rules of Professional Conduct.* [ASB nos. 01-272(A), 02-243(A), 03-101(A), 03-267(A), and 03-291(A) (formerly CSP No. 03-1192(A)]

Suspensions

- The Supreme Court of Alabama adopted the order of the Disciplinary Board, Panel IV, dated October 1, 2003, suspending Phenix City attorney **Danny Lawrence Dupree** from the practice of law in the State of Alabama effective April 15, 2004, for a period of 91 days. Dupree was once also licensed to practice in Georgia and Florida. On April 23, 1992, Dupree was disbarred by the Supreme Court of Georgia. Under Rule 25, *Alabama Rules of Disciplinary Procedure*, Dupree was required to "promptly inform" the Office of General Counsel of his disbarment. Dupree never notified anyone in the Office of General Counsel of the Alabama State Bar about his being subjected to the disciplinary action in Georgia. On May 6, 2002, the Office of General Counsel of the Alabama State Bar received documents from the Supreme Court of Georgia indicating Dupree's disbarment in that state. In 1987, disciplinary proceedings were initiated against Dupree in Georgia. In 1992, the Supreme Court of Georgia entered a *per curiam* order disbarring Dupree from the practice of law for the alleged mishandling of settlement proceeds. Panel IV found Dupree guilty of rules 2 and 25, *Alabama Rules of Disciplinary Procedure*, and Rule 8.1(b), *Alabama Rules of Professional Conduct.* [ASB No. 02-120(A)/Rule 25, Pet. No. 02-01]

- On June 24, 2003, the Disciplinary Commission of the Alabama State Bar accepted Huntsville attorney **David Ashby Thomas'** conditional guilty plea to violating Rule 8.4(b), *Alabama Rules of Professional Conduct*, and ordered that he be suspended from the practice of law in the State of Alabama for a period of one year, with the imposition of said suspension to be suspended and held in abeyance pending Thomas' successful completion of a two-year probationary period. As a condition of probation, Thomas was ordered to serve 90 days of his suspension effective June 24, 2003. Thomas failed to abide by the terms and conditions of probation, and on January 24, 2004, consented to revocation of probation. Thomas was ordered to serve the remainder of his one-year suspension effective January 27, 2004, with credit for 90 days for the period of suspension served between June 24, 2003 and September 22, 2003. [ASB No. 03-64(A)]

Disciplinary Notices

Continued from page 271

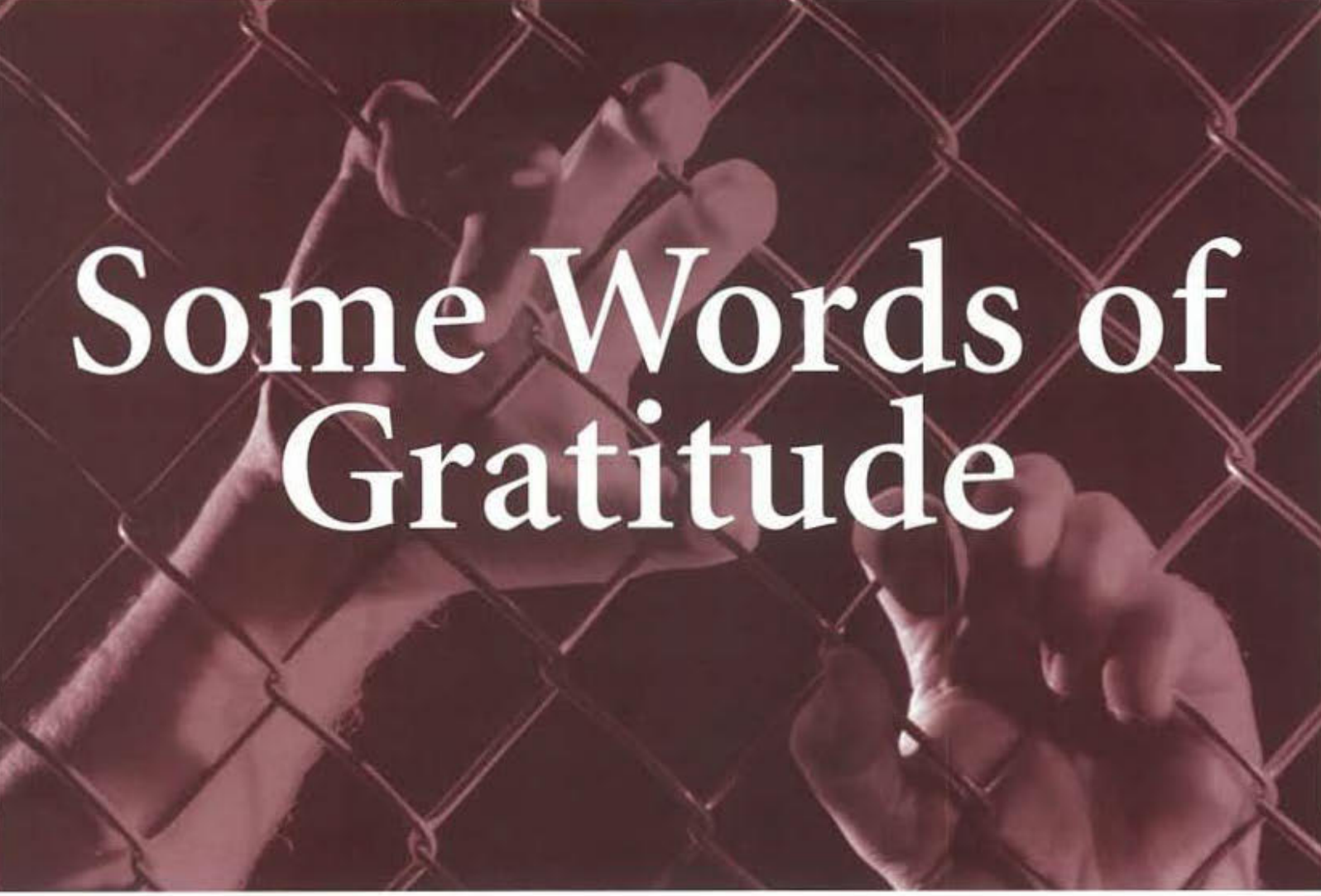
Public Reprimands

- On September 12, 2003, the Disciplinary Commission of the Alabama State Bar granted a partial reconsideration of the discipline previously determined in connection with the complaint filed by Deputy Sheriff Mitchell McRae of the Mobile County Sheriff's Department against Mobile attorney **James Murray Byrd.** The discipline agreed to by Byrd consists of a public reprimand without general publication and documented proof of Byrd's obtaining counseling for anger management for violation of Rule 8.4(g), Alabama Rules of Professional Conduct. On October 18, 2002, Byrd attended a bond hearing for one of his clients before a judge of the Mobile County District Court. Bond was denied, and Deputy McRae left the courtroom for the magistrate's office in order to sign a warrant on Byrd's client. Byrd later appeared at that office and asked Deputy McRae for a copy of the police report. He told Byrd that he would have to get it from the district attorney. At that point, Byrd began to engage in highly unacceptable conduct for a lawyer. Byrd asked Deputy McRae's name and when he gave Byrd his business card, Byrd threw it back in his face. Byrd also directed a number of very profane remarks to Deputy McRae. According to McRae and other witnesses, Byrd also approached him in a threatening manner, standing within a few inches of his face while repeating that he "be a. . .man!" Deputy McRae did not know Byrd prior to this incident. [ASB No. 03-003(A)]

- Selma attorney **George E. Jones, III** received a public reprimand with general publication on April 2, 2004 for violating rules 1.1, 1.3, 1.4(a), 1.4(b), and 1.5(b), *A.R.P.C.*, and was also ordered to make restitution in the amount of $1,500. Jones was retained to represent a client in a divorce matter. Three and one-half years later, the client was not divorced. Jones did little or no work in the matter and caused unnecessary delay. At one point during the representation, he lost the file and had to obtain copies of documents from opposing counsel.

  The client also retained Jones to represent her in an unemployment matter. Jones neglected that matter. He failed to communicate to the client the basis or rate of his fee within a reasonable time after commencing representation. Jones also failed to communicate with the client concerning the status of both matters. [ASB No. 03-18(A)]

- Pell City attorney **James Calvin McInturff** received a public reprimand with general publication on April 2, 2004 for violating rules 1.3, 3.6 and 8.4(b) 9d) and (g), A.R.P.C. McInturff revealed information concerning a juvenile court case to a reporter with the Birmingham News in violation of Alabama Code Section12-15-100. [ASB No. 03-79(A)] ■



Some Words of Gratitude

The Alabama Lawyer Assistance Program helps lawyers, judges and law students suffering from addictions and other mental health illnesses. Many times seeking help from ALAP is a last resort. The behaviors associated with these illnesses are not a result of weak or bad character, but, rather, the result of a disease process. Below is one lawyer's personal account with addiction and his journey to get well. Testimonials offer hope to lawyers in need. It is important to know they are not alone; however, unfortunately, too many succumb to the disease and die before ever experiencing the joy of recovery.

I am an alcoholic, a drug addict and a compulsive gambler. I am also a lawyer who has used television, reading, exercise, food, sex, and probably other substances and activities to escape from anything that I found painful or even unpleasant.

In the late summer of 1996, I was finding everything about life itself to be quite painful and unpleasant. A year before, as a direct result of my addictions, my wife of 24 years had divorced me. So, now I was drinking almost everyday and I was gambling when I had the money to do so. For the most part, I had abandoned my three wonderful daughters, my brothers and sisters, my father, and all of my friends. In my sick, alcoholic mind, abandonment seemed like the natural course of action because I owed most of them money and I really did not want to face them. I was neglecting my law practice. I was consumed with the guilt of the things I had done in the past and with the fear of what was to come in the future. Actually, I did have three friends left. These three friends were also my three gods—alcohol, drugs and the racetrack.

In late August 1996, I walked out of my law office. I left behind my client's files, my furniture, my law library, my computer, and everything else that had anything to do with my practice. More importantly, though, I left behind something that it would take me many years to recover–my self-respect. It was the beginning of a horrendous journey that would continue for a period of over six years–until November 6, 2002. When I left that day, I vowed to myself that I would never return to that office nor would I ever return to the practice of law. I never did return to that office. Today, though, it is my fervent hope that someday I will be allowed to return to the practice of law.

I suffered a lot of self-induced misery and caused a lot of problems, both for myself and for others during those six years. I bounced around from menial job to menial job. I landed in jail on a couple of occasions on alcohol-related charges. I went to two treatment centers and actually stayed sober, one time for eight months and another time for 17 months. I would always return to alcohol, though, or to drugs, or to gambling, or to anything that

would numb my senses and my feelings about what my life had become.

In 1997 it was suggested that I contact the director of the Alabama Lawyer Assistance Program, Jeanne Marie Leslie. I did so. Jeanne Marie seemed eager to help, but she also mentioned the word "accountability" and phrases like "rigorous honesty" and "facing my problems." I quickly lost interest. I would tell people that I really did not like the idea of asking for help. The truth was that I really did not like the idea of doing the things that the people who were willing to help would require me to do. So, the horrendous journey continued.

In October 2001, I met with a longtime member of Alcoholics Anonymous by the name of John. I told him my woeful tale of everything I had lost, my family, my friends and my law practice. I told him that I was homeless, deep in debt and virtually unemployable. I sensed that he had heard this sort of story before. Together, we called Jeanne Marie, and again, Jeanne Marie was ready to help. They agreed that it really came down to a simple choice. I could go on like I was to the bitter end, blotting out the consciousness of my intolerable situation or I could accept the help they were offering, follow the steps that they were suggesting and have my life restored. The choice seemed obvious to them. In the true alcoholic tradition, I said, "Well, let me go home and think about it." (The irony that was pointed out to me was that I had no home).

At about this same point in time, I was talking to a friend of mine by the name of Jane. She told me that she could not just stand by and watch me kill myself with alcohol. I remember my response. I said, "You don't have to worry about that. I died five years ago." And indeed, in my mind, and more importantly in my heart, I had died. I was, to coin a phrase, " a dead man walking."

In December 2001, I was finally able to obtain employment–I was hired by a suburban restaurant at $2.13 an hour, plus tips. That is not much money, but it was enough to enable me to increase my drinking. I drank virtually every night from late December 2001 until late October 2002. It was the most drinking I had ever done in my 40-year drinking career. It was the lowest point in my life. I was powerless and hopeless.

At the end of October 2002, I was the recipient of a gift and a miracle. My brother came to see me at the restaurant and told me what Jane had told me the year before–that he could not stand by and watch me kill myself. He had talked to Jeanne Marie and asked if I would agree to meet with her. I agreed to do so. Five days later, I met with my brother and Jeanne Marie. She asked me two questions, "Did I want to get sober?" and "Did I ever want to practice law again?" When I responded "yes" to both questions, Jeanne Marie told me for the third time that she thought she could help me. And this time, help me she did. The Alabama Lawyer Assistance Foundation lent me the money to go to Palmetto, a recovery center that specialized in treating health care and legal professionals with substance abuse problems. I entered the center on November 6, 2002 and stayed until February 19, 2003. At Palmetto, I learned, among many other things, the most important lesson of my life–that it was time to start living life on life's terms, not on my terms.

Since leaving Palmetto, as prophesied by Jeanne Marie and by my friend, John, at our October 2001 meeting, much of my life has been restored. I have a meaningful relationship with my children, with my brothers and sisters, and with many of my old friends. I work at a job that I love. I am active in Alcoholics Anonymous and with the Alabama Lawyer Assistance Program. And, most importantly, today I am sober.

The most important word in my vocabulary today is the word *gratitude*. I am so very grateful to the Alabama Lawyer Assistance Program, to Jeanne Marie Leslie, to a AA sponsor who led me through the early and difficult days of sobriety, to my children, to the many friends who believed in me, even when I did not believe in myself, to my brother, and finally, but most importantly, to the God of my understanding. I am grateful to these people, institutions and entities for the gift they have given me because now I am getting on with the business of living and I no longer worry about the business of dying.

Somewhere along the way, I have learned that gratitude is not a feeling. Rather, it is an action. It is the act of remembering the way your life used to be before you got the gift. And, I have also learned that the only way to thank those who gave you the gift is to give it away to someone else. That is the purpose of this story. It is my hope that someone, somewhere–who thinks, like I did, that they are dead, that there is no hope, that there is no way out–will read this and realize that there is always hope and that help is available. All you have to do is ask. ■

—Anonymous

Several lawyers died last year in Alabama, too afraid, too sick and too ashamed to ask for help. Like many other potentially fatal diseases, addiction affects every aspect of one's life. The very characteristics that enable lawyers to succeed often become the obstacles in getting sick lawyers help. Lawyers are trained to be self reliant, and to argue and rationalize. Their denial is highly developed and entrenched. It is a humbling privilege to serve as the director of ALAP. It is through education that the stigma and discrimination about these illnesses can begin to change. ALAP offers several educational programs. Each year the Alabama State Bar co-sponsors "The International Conference on Addiction for Medical, Legal and Law Enforcement Professionals (ICA)." For more information, call ALAP at (334) 834-7576.

—Jeanne Marie Leslie, RN, M.Ed ALAP director

Alabama State Bar President Bill Clark welcomes legal professionals during the 2004 International Conference on Addiction in Birmingham.

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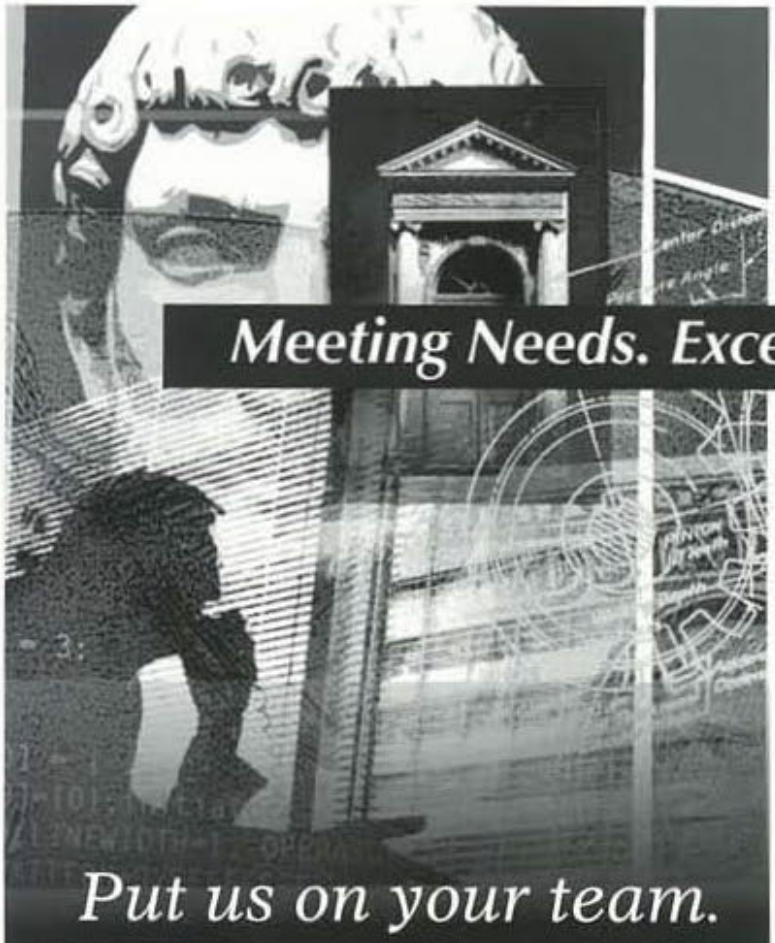

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