

The Alabama Lawyer

Vol. 25, No. 6

September 1997



1997-98 Alabama State Bar President

Dag Rowe

Page 266

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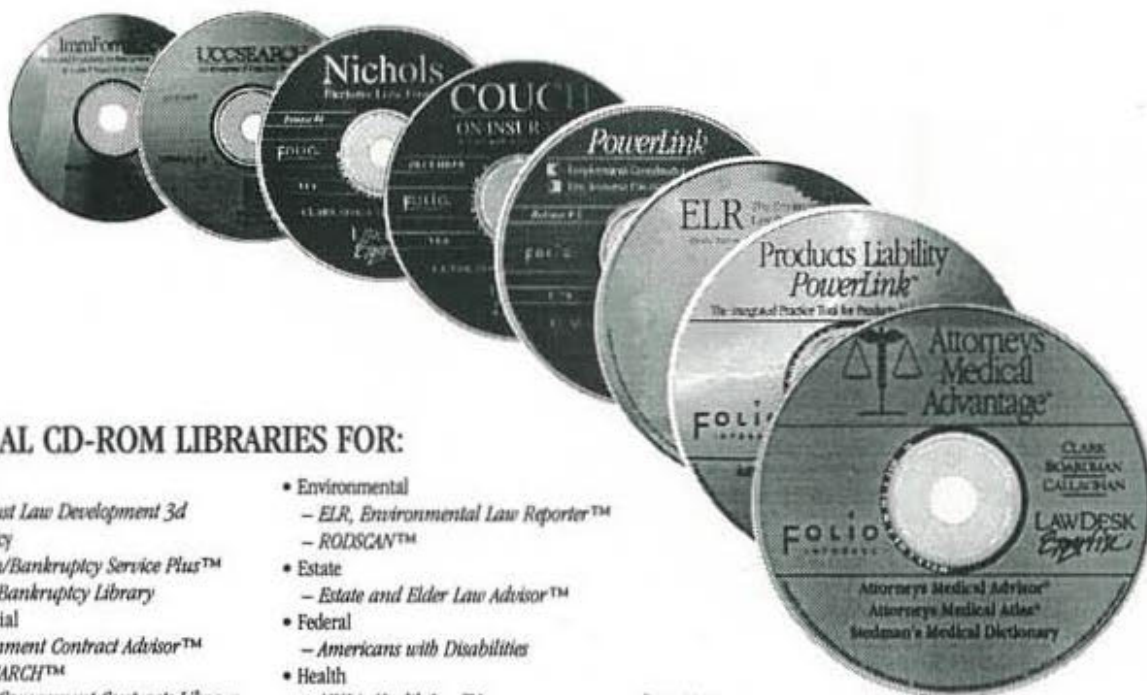
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On the Cover

The cover photograph features 1997-98 Alabama State Bar President S. Dagnal (Dag) Rowe and his family at their home in Huntsville. From left to right are daughter Anna, Dag, wife Melissa, and son Dag, Jr. Mr. Rowe practices in Huntsville with the firm of Burr & Forman LLP.

IN THIS ISSUE

THE FIRST ANNUAL VANCE CUP TEE-OFF:
ALABAMA VS. GEORGIA279

CIVILIAN REPRESENTATION OF THE
MILITARY CLIENT
By Michael A. Kirtland288

WHAT EVERY LAWYER SHOULD KNOW ABOUT
REAFFIRMATION AND REDEMPTION IN
CHAPTER 7 BANKRUPTCY CASES
By M. Donald Davis, Jr.296

QUALIFIED IMMUNITY AND ITS EVOLUTION
IN THE ELEVENTH CIRCUIT
By Lisa Huggins300

NEW LAW OFFICE MANAGEMENT
ASSISTANCE PROGRAM DIRECTOR:
LAURA A. CALLOWAY306

(Continued on page 264)



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What's New...

- Publications
- On-Line Community
- OGC Opinions
- CLE Calendar
- On-Line Change of Address

DEPARTMENTS

President's Page
266

Executive Director's Report
268

About Members, Among Firms
270

Bar Briefs
274

Building Alabama's Courthouses
276

Legislative Wrap-Up
277

Memorials
278

Disciplinary Notice
282

Recent Decisions
286

Opinions of the General Counsel
294

CLE Opportunities
311

Classified Notices
314

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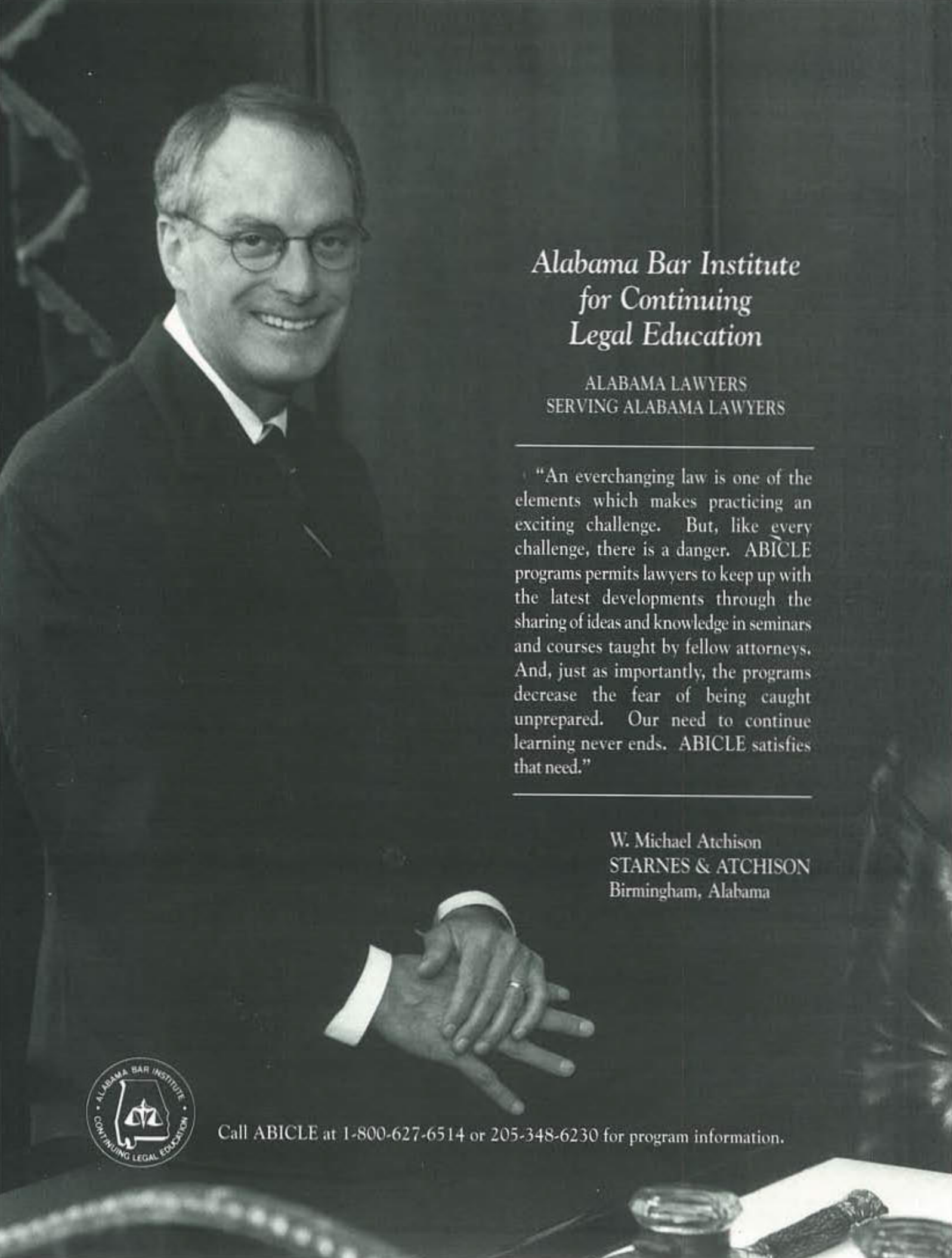
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PRESIDENT'S PAGE

By Dag Rowe

Unity, Professionalism, Service

The following remarks were delivered by the 1997-98 Alabama State Bar President, Dag Rowe, on July 19 during the annual meeting's Grande Convocation. Vic Lott of Mobile was confirmed as the 1997-98 state bar president-elect.



Dag Rowe

In accepting this gavel from Warren Lightfoot, I must first acknowledge with humility my gratitude for the honor you have bestowed on me and my pride in having this opportunity to serve this honorable profession and our state bar.

In accepting this responsibility, I am mindful that I stand on the shoulders of my 120 predecessors in this office who worked mightily and accomplished much for this profession and for our bar. I also realize that despite those efforts, there remain alarming trends in our profession and much to be done. The challenges we face are not new. Indeed, it is their chronic and seemingly intractable nature that is particularly alarming.

As we together start this year in the life of our bar, I would like to share with you some of my reflections and plans.

First, I believe it is critical that the trend toward factionization of this bar be reversed. The theme of this annual meeting has been "Coming Home to Montgomery." In the broader sense of our need to unify the bar, an appropriate theme and goal for the coming year might be "Coming Home to the Alabama State Bar." I invite you to join in our efforts and activities to insure that this bar serves *all* its members: plaintiff's lawyers and defense lawyers, male lawyers and female lawyers, white lawyers and black lawyers, city lawyers and "country" lawyers, big firm lawyers and solo lawyers. There is a place at the table for us all.

I realize that we cannot adequately represent or serve this diverse membership if we are not aware of our members' professional needs and concerns. Consequently, as I travel the state this year and visit local bars, I plan to spend as much time listening as I do talking.

This input from our members will be critical to our success, so I encourage you to communicate and participate. Frances Hare, who was president of this body in 1950, wrote that the bulwark of

our profession is not the small group of its publicized leaders, but the rank and file members "who speak up and pitch in." That observation has never been truer than it is today.

This problem of factionization of our profession is related to and exacerbated by a troubling decline in professionalism and civility among our members. Some have said that the loss of civility by lawyers is simply an inescapable reflection of a general decline of civility in our society. While there is undeniably less civility in sports, in schools, in the streets and in business, that is no excuse for boorish behavior in this profession. Our profession is one that was founded on principles of collegiality, courtesy and professionalism. Some would argue that these are outdated notions from days gone by and that zealous advocacy and success in the marketplace require hired guns whose practice is characterized by intimidation, hostility, abrasiveness, confrontation, and bullying. To the contrary, Rambo-tactics are shortsighted and counterproductive to the "practitioners" who use them and enhance the misperception of lawyers as ruthless parasites profiting by the misfortune of the public.

We all recognize the trend, but what can we do about it? As an individual, I urge you to be a role model and a mentor. I suggest that we continually ask ourselves: Is my action something of which I can be proud at the end of the day? What would my spouse and children think? Can it stand the light of day?

As a bar, we have adopted and sent to the supreme court for its approval Rule 9 to the MCLE Rules which will require new admittees to take a one-time, mandatory six-hour course in professionalism within one year of admittance. Also, we are studying a mentor program through the joint efforts of the state bar and the Young Lawyers' Section. In the meantime, we will ask

every local bar to sponsor at least one program each year on professionalism and civility.

This breakdown of civility is just one aspect of the broader deterioration of professionalism. A recent ABA report of a three-year study of professionalism cites as a root cause the widespread perception that economic demands interfere with our devotion to the traditional ideals of integrity, competence, independence and devotion to public service. In this vein, as Judge Bill Bowen once said:

"No one can deny that some lawyers are moved more by consideration of bread and butter than right and wrong and that they seem to be more eager to have their names in the newspaper than on St. Peter's roll. They constitute a small percentage of all the members of the bar, but like black sheep in any flock, they are very conspicuous. While it is not true of lawyers, as of apples, that a single one in a barrel can spoil all the rest, one can nevertheless give a bad odor to the collective reputation."

At the recent Eleventh Circuit Judicial Conference, Georgia Chief Justice Robert Benham observed that we as professionals and individuals are too involved in billable hours and too little involved in building bridges—bridges in our families, in our profession and in our communities. We need to set the moral tone for our communities, aspiring *not* so much to be president of the country club, but rather to be president of the heart fund. As

Matthew Kleiner said at NYU's recent law school graduation:

"Time is not just something you bill, but something you make; [we need to] make it for ourselves and make it for others."

Each of us is—or should be—troubled by the public perception of our profession. We see it in the media, we hear it on the street and we even endure it from our friends. Three years ago, Spud Seale surveyed the bar commissioners, the presidents of the local bars, our committee and task force chairs, and the past-presidents of this bar. Overwhelmingly, they indicated that the most important issue facing the bar is the image of our profession. I don't believe that concern is any less today. The proper response to that concern is not hand-ringing, passive resignation, or apology. Former ABA President George Bushnell said it succinctly:

"The best way, the only way, to improve our image is so startlingly obvious that we often overlook it. You must serve the public. . . The priority of this profession always and primarily has been one of service—service to others without thinking of ourselves. . . And that is not the responsibility of just [this] bar, it is the obligation of every lawyer."

Those will be the themes for the coming year—Unity, Professionalism and Service. I ask you now to join me (and join your bar) in that effort.

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September	12	Developments and Trends in Health Care Law 1997 - Birmingham
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	26	Lawyering Skills 101 - Birmingham
October	3	8th Annual Bankruptcy Law Seminar - Birmingham
	10	Evidence Law featuring <i>Thomas A. Mauet</i> - Birmingham
	17	Essentials of Elder Law Practice - Birmingham
	24	Medical Malpractice Update - Birmingham
	31	Civil Procedure/Appellate Practice Seminar - Birmingham
November	7	11th Annual Workers' Compensation Seminar - Birmingham
	14	Litigating the Class Action Lawsuit - Birmingham
	21	The Art of Effective Speaking for Lawyers featuring <i>Steven D. Stark</i> - Birmingham
December	5	Recent Developments for the Civil Litigator - Mobile
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	11	Current Issues in Employment Law - Birmingham
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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

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www.alabar.org—A Hit!

The Alabama State Bar homepage continues to undergo changes, with improvements being made daily to make the website more user friendly and provide more information. Our goal is to maintain a convenient site for you to access useful information. We are receiving numerous favorable comments about the homepage, from many of you and also from members of the public, both inside and outside Alabama.

In one seven-day period in July, our web server recorded a total of 9,880 successful hits or an average of 1,411 hits per day. Of the identifiable hits, nearly 4 percent were from outside the United States. The identifiable hits from within the U.S. indicated that web browsers from the state of Virginia accessed our homepage the most, followed by browsers from the states of Alabama and Georgia, respectively.

We will continue to improve the bar's homepage. As we do, we hope that you will help us grow with this new information tool by giving us your suggestions and comments.

It's Never Too Early To Think About Retirement

The American Bar Association Members Retirement Program is worth considering if you are looking for a retirement plan. Established more than 30 years ago, the program's goal has consistently been to help law firms, both large and small, establish and maintain retirement plans. The program offers multiple IRS pre-approved plans (pension, target benefit, money purchase, profit-sharing, 401(k)), investment options, and fiduciary and participant

services, as well as consulting and administrative services that make it very easy and cost-effective for the firm to offer a comprehensive retirement plan. The program is available to any firm that employs at least one partner or shareholder who is a member or associate of the ABA or of a state or local bar association that is represented in the ABA's House of Delegates.

Presently, the ABA Program has 52 plans from Alabama, involving 623 participants with more than \$32,000,000 invested. Contact the program administrator, State Street Bank and Trust Company, at 1-800-826-8901 for more information.

Legal Services Corporation Still Facing Uncertainty

In July, the House Appropriations Subcommittee on Commerce, Justice, and State, and the Judiciary and Related Agencies included only \$141 million for Legal Services Corporation in its version of the appropriations bill for fiscal year 1998. By comparison, LSC received \$283 million in 1997. The Senate Appropriations Committee accepted without debate the recommendation that LSC receive \$300 million for fiscal year 1998.

The House subcommittee report comes despite the fact that LSC has labored under the restrictions imposed over the last several years limiting the types of civil cases which LSC offices across the nation can handle.

During the last session of Congress, a bi-partisan effort saved LSC from being dismantled. The fight still continues. Unfortunately, some in Congress believe that if LSC funding is abolished, the



Keith B. Norman

private bar *can and should* handle the hundreds of thousands of civil cases for our poorest citizens. While we are doing more in light of the latest round of budget cuts for LSC, the private bar alone cannot handle this enormous burden.

I hope that you will let your congressional representative know the importance of continued federal funding for legal services for our poorest citizens. As a lawyer, I hope you will speak up for those who can't.

A Good Service To Know About

Not long ago, my association colleague, Robert B. Finley, executive director of the Alabama State Troopers Association, called me to tell me about a service that is offered by their association. He told me that as a result of having received many telephone inquiries as to the availability of retired troopers for special projects, he has collected a number of biographies of retired troopers interested in special details as well as full-time employment. This service is available and may be of particular interest to lawyers or law firms for such things as accident reconstruction, for example.

This service is open for requests from anywhere in Alabama with trooper retirees located throughout the state. If you are interested, you may call the Alabama State Troopers Association at (334) 265-2782. They will send copies of the biographies for the troopers located in your area for you to review and to contact. If you have any questions, you may also call Robert Finley. ■

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Here's what attendees said about Steve's presentation in 1996:

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- "He kept the audience involved, used good examples to make points, and is enthusiastic about his topic."
- "One of the best seminars I have attended!"

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About Members

Wilson Myers announces the opening of his office at 317 20th Street, North, Suite 210, Birmingham, 35203. Phone (205) 322-8684.

Arthur T. Powell, III, formerly with Knizley & Powell, announces the opening of his office at 920 Dauphin Street, Mobile, 36604. The mailing address is P.O. Box 40456, 36640-0456. Phone (334) 433-8310.

Richard W. Vickers announces the relocation of his office to 230 Bearden Road, Pelham, 35124. Phone (205) 664-6991.

Beth H. Gerwin, formerly with Charles Tyler Clark, announces the opening of her office at the Brown Marx Tower, Suite 403, 2000 First

Avenue, North, Birmingham, 35203. Phone (205) 715-4445.

Clyde D. Baker announces a change of address to 1516 Wyeth Drive, Guntersville, 35976. Phone (205) 582-8681.

James F. Burford, III announces the relocation of his office to 1318 Alford Avenue, Suite 101, Birmingham, 35226. Phone (205) 822-3433.

Amy E. Gallimore announces a change of address to 1905 14th Avenue, South, Birmingham, 35205. Phone (205) 930-9800.

Charles G. Crawford, IV, formerly with the Area Agency on Aging, announces the opening of his office at the Gateway Office Center, 407 Fourth Avenue, SE, Decatur, 35601. Phone (205) 355-8870.

Cynthia Cargile McMeans announces the relocation of her office to 809-B2 Daphne Avenue, P.O. Box 640, Daphne 36526. Phone (334) 625-0880.

Diane M. Porter announces the relocation of her office to 1108 EastPark Drive, Suite 100, Birmingham, 35235. Phone (205) 836-4821.

Michael G. Graffeo announces the relocation of his office to 3800 Colonnade Parkway, Suite 630, Birmingham, 35243. Phone (205) 968-9100.

Richard D. Greer announces a change of address to 600 Luckie Drive, Suite 412, Birmingham, 35223. Phone (205) 991-8440.

Arnold Charles Freeman has retired from active duty as district attorney of the Sixth Judicial Circuit, Tuscaloosa, and will be serving as supernumerary district attorney as needed. His new address is 338 Riverdale Drive, Tuscaloosa, 35406. Phone (205) 349-1252.

Sydney Albert Smith, formerly general counsel to the Alabama Board of Pardons and Paroles, announces his retirement as chief assistant district attorney for the twelfth Judicial Circuit and prosecutor for the twelfth Circuit Drug Task Force. His new address is

P.O. Drawer 389, Elba, 36323. Phone (334) 897-3658.

Among Firms

Jonathan Cross, formerly with Prince, Poole & Cross, has accepted a position with the **Tuscaloosa County District Attorney's Office**. Offices are located at 714 Greensboro Avenue, 410 County Courthouse, Tuscaloosa, 35401-1894. Phone (205) 349-1252.

E. I. DuPont de Nemours Company announces that **Evelyn H. Brantley** has become associate general counsel for Delaware litigation, with offices located at 1007 Market Street, D-7142, Wilmington, Delaware 19898.

Watson, Fees & Jimmerson announces that **C. Gregory Burgess** has become an associate. Offices are located 200 Clinton Avenue, West, Suite 800, Huntsville, 35804. The mailing address is P.O. Box 46. Phone (205) 536-7423.

Adedapo T. Agboola and **Darryl Bender** announce the formation of **Bender & Agboola**. Offices are located at 711 18th Street, North, Birmingham, 35203-2207. Phone (205) 322-2500.

Gregory S. Cusimano, Larry H. Keener, Michael L. Roberts, David A. Kimberley, and Philip E. Miles announce the formation of **Cusimano, Keener, Roberts & Kimberley**. Offices are located at 153 S. 9th Street, Gadsden, 35901. Phone (205) 543-0400.

Rushton, Stakely, Johnston & Garrett announces that **Amy Vibbart Bowman** has become a member of the firm. Offices are located at 184 Commerce Street, Montgomery, 36104. Phone (334) 206-3100.

Harris & Brown announces that **Nancy Howell**, former staff attorney for Judge Roger Monroe of the Alabama Court of Civil Appeals, has joined the firm as an associate. Offices are located at 2000-A SouthBridge Parkway, Suite 520, Birmingham, 35209. Phone (205) 879-1200.

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announces that **Katherine M. Thomson** has joined the firm. Offices are located at SunTrust Center, 424 Church Street, Suite 1900, Nashville, Tennessee 37219-2387. Phone (615) 244-5200.

White, Dunn & Booker announces a change of address to 290 N. 21st Street, Massey Building, Suite 600, Birmingham, 35203.

Motion Industries of Birmingham announces that **Johann R. Manning** has been appointed to the newly created position of vice-president, human resources, and corporate counsel.

Jeffrey L. Luther and **Rudene C. Oldenburg** announce the formation of **Luther & Oldenburg** and that **Danny J. Collier, Jr.**, **Michael A. Montgomery** and **Betsy M. Turner** have become associates. Offices are located at Riverview Plaza, Suite 609, 63 S. Royal Street, Mobile, 36602. The mailing address is P.O. Box 1003, 36633. Phone (334) 433-8088.

McDavid, Noblin & West announces that **Donald E. Eicher, III** has become an associate. Offices are located at The Trustmark Building, Suite 840, 248 E. Capitol Street, Jackson, Mississippi. 39201. Phone (601) 948-3305.

Capouano, Smith, Warren & Kliner announces the relocation of offices to 322 Alabama Street, Montgomery, 36104. Phone (334) 834-3891.

D. Robert Stankoski, Jr. and **J. Clark Stankoski** announce the opening of **Stankoski & Stankoski**. Offices are located at 314 Magnolia Avenue, Suite C, Fairhope, 36532. The mailing address is P.O. Box 521, Fairhope, 36533.

Larry B. Moore and **Albert J. Trousdale, II**, formerly with Ashe, Tanner, Moore & Wright, announce the formation of **Moore & Trousdale**. Offices are located at 201 S. Court Street, Suite 510, SunTrust Bank Building, Florence, 35630. Phone (205) 718-0120.

Robison & Belser announces the relocation of offices to 200 Coosa Street, Montgomery, 36104. Phone (334) 834-7000.

Adler Rothschild and **David B. Zimmerman** announce the formation of **Zimmerman & Rothschild**. Offices are located at 100 Commerce Street, Suite 900, Montgomery, 36104. Phone (334) 262-2400.

David R. Donaldson, **David J. Guin** and **Pamela D. Beard** announce the

formation of **Donaldson & Guin**. Offices are located at The Carriage House, 1314 Cobb Lane, Birmingham, 35205. Phone (205) 933-5758.

Bainbridge, Mims, Rogers & Smith announces that **Thomas Werth Thagard, III** has become a partner. Offices are located at 600 Luckie Drive, The Luckie Building, Suite 415, Birmingham, 35223. The mailing address is P.O. Box 530886, 35253. Phone (205) 879-1100.

Ezell Sharbrough, L.L.C. announces that **M. Stephen Dampier** and **Kristin J. Westphal** have become associates. Offices are located at 407 Conti Street, P.O. Box 996, Mobile, 36601-0996. Phone (334) 432-1413.

Lloyd, Schreiber & Gray announces that **Perry G. Shuttlesworth, Jr.**, **Howard Y. Downey**, **Tessa M. Thrasher** and **James A. Patton, Jr.** have become associates. Offices are located at Two Perimeter Park, South, Suite 100, Birmingham, 35243. Phone (205) 967-8822.

Law Offices of Richard S. Jaffe announces that the firm name has changed to **Jaffe, Strickland, Beasley**

& **Drennan**, and that **Stephen A. Strickland**, **Cecilee R. Beasley** and **J. Derek Drennan** continue as associates. Offices are located at 1905 14th Avenue, South, Birmingham, 35205. Phone (205) 930-9800.

John T. Alley, Jr. and **John W. Waters, Jr.** of the firm of **Alley & Waters** announce the close of the office at 214 N. Prairie Street, P.O. Box 5006, Union Springs, 36089. All correspondence should be mailed to 2941 Zelda Road, Suite A, Montgomery, 36106. Phone (334) 279-8866.

Gaines, Wolter & Kinney announces that **Tracy N. Hendrix** has joined the firm. Offices are located at 22 Inverness Center Parkway, Suite 300, Birmingham, 35242. Phone (205) 980-5888.

Community Bank announces that **Thomas J. Buchanan** has been named vice-president and assistant general counsel and **Benjamin R. Wall, III** has been named a staff attorney. Offices are located at Main Street at Joy Road, P.O. Box 1100, Blountsville, 35031. Phone (205) 429-1002.

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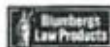
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About Members, Among Firms

(Continued from page 271)

announces that **Scott D. Waldrup** has joined the firm. Offices are located at 2340 Woodcrest Place, Suite 150, Birmingham, 35209 and 301 S. Fourth Street, Gadsden, 35901. Phone (205) 546-9666.

Rosen, Cook, Sledge, Davis, Carroll & Jones announces that **W. Bradford Roane, Jr.** has become an associate. Offices are located at 2117 River Road, P.O. Box 2727, Tuscaloosa, 35403-2727. Phone (205) 344-5000.

Simmons, Brunson & Sasser announces that **Rebecca A. Walker**, formerly an associate of the firm, has become a partner and the firm name has changed to **Simmons, Brunson, Sasser & Walker**, that **Clarence Simmons, Jr.** is now of *counsel*, and that **J. Eric Anderson, Melanie L. Looney** and **Vann A. Spray** have become associates. Offices are located at 1411 Rainbow Drive, Gadsden, 35901. Phone (205) 546-9205.

Proctor & Vaughn announces that **J. Bradley Proctor** has become an associate. Offices are located at 201 N. Norton Avenue, Sylacauga, 35150. The mailing address is P.O. Box 2129. Phone (205) 249-8527.

Andre' M. Toffel announces the formation of **Andre' M. Toffel, P.C.** **Steven D. Altmann** and **David S. Moyer** are associates. Offices are located at 925 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 252-7115.

Lucas, Alvis & Wash announces that **J. Steve Clem, Leigh Ann King** and **Stewart Springer** have become shareholders. Offices are located at 250 Park Place Tower, Birmingham, 35203. Phone (205) 251-8448.

Balch & Bingham announces that **Felton W. Smith, Glenn G. Waddell** and **Lois S. Woodward** have become partners, and that **Martin E. Burke, Charles A. Burkhart, Kendall C. Dunson, Robert P. Fowler, Miriam G. Harris, Jamison H. Hinkle, M. Leah Hudson, Douglas B. Kauffman, William D. Lineberry, John W. McCullough, John Pickering, William W.**

Stewart, Gary E. Sullivan, Spencer M. Taylor, Angela F. Thornhill, and Josephine R. Wright have joined the firm as associates. Offices are located in Birmingham, Huntsville and Montgomery, Alabama and Washington, D.C.

Charles L. Anderson and **Bernard B. Carr**, former shareholders in **Parnell, Crum & Anderson**, announce the formation of **Anderson & Carr**, and that **Betty Bobbitt Byrne, Jennifer M. Chambliss** and **Kyle D. Massengale** are associates. Offices are located at the Sterling Centre, Suite 304, 4121 Carmichael Road, Montgomery, 36106.

W. McCollum Halcomb and **Jeffrey H. Wertheim** announce the formation of **Halcomb & Wertheim**. Offices are located at 2231 First Avenue, North, Birmingham, 35203. Phone (205) 251-0007.

Rives & Peterson announces that **Daniel D. Sparks**, formerly a shareholder in **Toffel & Sparks**, has become an associate. Offices are located at 1700 Financial Center, 505 N. 20th Street, Birmingham, 35203-2607. Phone (205) 328-8141. ■



ALABAMA DIVORCE, ALIMONY AND CHILD CUSTODY HORNBOOK THIRD EDITION

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BAR BRIEFS



• **Richard W. Moore**, senior litigation counsel for the United States Attorney's Office in Mobile, has been awarded an Atlantic Fellowship in Public Policy. The Fellowship program was established by the British government in 1994 to commemorate D-Day and the United States' contribution to the liberation of Europe. The program provides outstanding American professionals with practical experience in public policy in the United

Kingdom and the European Union.

Moore will be in residence at Oxford University where he will conduct an independent study of the potential use of special juries in complex, white-collar, fraud cases both in England and the United States.

His candidacy for the fellowship was sponsored by J. Don Foster, U.S. Attorney for the Southern District of Alabama. Moore will be on leave from the Justice Department from August 1997 to May 1998.

• The new officers for the **Tuscaloosa County Bar Association** are:

President: **Steve Wiggins**

Vice-President: **Scott Donaldson**

Secretary/Treasurer: **Chuck Malone**

• The Greater Birmingham Defense Lawyers Association has elected officers for 1997-98. They are:

President: **Kenneth J. Gomany**

President-elect: **Richard S. Jaffe**

Executive Vice-president: **J. Massey Relfe, Jr.**

Secretary: **Wendy Williams**

Treasurer: **Richard Izzi**

Immediate Past President: **John A. Lentine**

• Nominations now are open for the 1998 "Spirit of Excellence

Awards," conferred annually by the American Bar Association Commission on Opportunities for Minorities in the Profession.

The first awards, presented in 1996, were launched under the theme "Ad Astra Per Aspera," or "To the Stars Through Difficulty," and each recipient has been chosen to recognize his or her exceptional achievements despite barriers of racial or ethnic bias.

The deadline to nominate recipients for the 1998 awards is September 15, 1997. The awards will be presented during the ABA's 1998 Midyear Meeting in Nashville. Nominating forms and additional information are available from Hale Chan, (312) 988-5655 (voice); (312) 988-5647 (fax); or ABA Commission on Opportunities for Minorities in the Profession, Spirit of Excellence Award, 750 N. Lake Shore Drive, MS - 10.2, Chicago, Illinois 60611.

• **Elizabeth Holland Hutchins**, a member of Walston, Wells, Anderson & Bains, LLP, has been elected a Fellow of the American College of Trust and Estate Counsel. The American College of Trust and Estate Counsel is an association of lawyers who have been recognized as outstanding practitioners in the fields of estate and trust planning and administration, charitable planning, related taxation, business succession, and insurance planning.

• Four members of the Alabama State Bar were honored recently by The Fellows of the American Bar Foundation for attaining Life Fellow status. Having demonstrated their commitment to the ideals and goals of the Foundation, the following lawyers became Life Fellows: **Ben H. Harris, III** of Johnstone, Adams, Bailey, Gordon and Harris, LLC, in Mobile; the Honorable **J. Gorman Houston** of the Alabama Supreme Court; **John H. Morrow** of Bradley, Arant, Rose & White in Birmingham; and **James Jerry Wood**, general counsel for the Alabama Home Builders Association in Montgomery.

The Fellows is an honorary organization of attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession.

Established in 1955, the Fellows encourage and support the research program of the American Bar Foundation. The objective of the Foundation is the improvement of the legal system through research concerning the law, the administration of justice, and the legal profession. Fellows are limited to one-third of one percent of lawyers licensed to practice in each jurisdiction. ■

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Anchorage



Courthouse author Sam Rumore recently took time off for a vacation in Alaska. While there, he learned about salmon, glaciers, earthquakes, and the midnight sun. Sam also visited several courthouses. The newest courthouse in Alaska is the Anchorage Courthouse completed in 1996. This structure has its own ceremonial totem poles.

The regular feature "Building Alabama's Courthouses" will continue in the next issue of *The Alabama Lawyer* ■



Sam Rumore on vacation in the 49th state

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LEGISLATIVE WRAP-UP

The 1996 Regular Session of the Legislature considered a great number of bills that affected the public at large and consequently law practice but very few were enacted.

	Introduced	Passed
House Bills	1113	301
Senate Bills	719	99
Joint Resolutions	386	349

Of the 400 bills that passed, 42 were vetoed, 166 were advertised local bills, 122 were either appropriations to special organizations, "sunset bills," special automobile tags or affected only one city or state agency. Consequently, only 72 bills were of statewide concern.

The five welfare bills were discussed in the July edition of *The Alabama Lawyer*. The "Family Assistance Program" bill reviewed did not pass but will be implemented by administrative rule.

The following Law Institute bills, which passed the Legislature, are all effective January 1, 1998: Uniform Multiple Person Accounts (Act 97-644); UCC Article 5 "Letters of Credit" (Act 97-702); and Uniform Interstate Family Support Act (Act 97-245). Transfer on Death Securities Registration (Act 97-703) was effective August 1, 1997. See March 1997 *Alabama Lawyer*.



Robert L. McCurley, Jr.

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

Additional acts of interest to lawyers are:

Act 97-187 Provides a statutory form for a durable power of attorney for making health care decisions.

Act 97-360 Amends the durable power of attorney act to specifically include powers of attorney for health care.

Act 97-216 Adopts 1996 acts into the Code of Alabama.

Act 97-261 Raises the compensation of court reporters from \$25,850 to \$38,263 per year.

Act 97-411 Requires Coalition Against Domestic Violence, Inc. to establish standards for domestic violence shelters membership to enable the shelters to receive state funds.

Act 97-413 Worthless check charge is increased \$1 per year from \$25 to ultimately \$30.

Act 97-440 To permit creditors to charge a minimum of \$10 or 5 percent of the payment in defaults, whichever is greater.

Act 97-441 Allows two or more counties to establish a regional jail with the authority to operate.

Act 97-442 Bans late-term abortions.

Act 97-485 Prohibits physicians from performing partial birth abortions.

Act 97-492 Limited partnerships are permitted to use the abbreviation "L.P." in its name.

Act 97-494 Imposes an additional \$50 penalty on any person found guilty of driving a revoked, suspended or canceled driver's license.

Act 97-552 Amends the 13A-11-8 criminal harassment statute to clarify harassing communications.

Act 97-554 Extends the time a person may renew their expired driver's license from one year to three years.

Act 97-556 Amends 32-5A-191, the

DUI statute, to increase all fines by \$100 and to place the money in an "Impaired Driver's Trust Fund."

Act 97-621 Amends 12-15-32 to permit the juvenile court to retain jurisdiction over a child beyond their 21st birthday to pay fines, costs and restitution.

Act 97-625 Amends sections of the revenue code to conform state tax treatment of corporations, partnerships and other limited liability business entities to the federal income tax code and delete individuals from the Alabama Multi-State Tax Compact.

Act 97-651 Amends Chapter 22 of Title 17 and Chapter 25 of Title 36 concerning election finance law to regulate and report raising campaign funds and expenditures.

Act 97-712 Amends 13A-7-29, criminal littering, to create a rebuttable presumption when trash is found bearing a person's name.

Act 97-715 Uniform Conservation Easement Act which provides for the creation, enforcement, modification, duration, and termination of conservation easements on real property for conservation, recreation and other purposes.

Act 97-723 Provides for state law prohibiting employees from discriminating on the basis of age in hiring, job retention, compensation and other conditions of employment.

The pocket parts should be delivered the first week in September. Anyone wishing any other or further information concerning the Institute or any of its projects may obtain this information by contacting Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, FAX (205) 348-8411, Phone (205) 348-7411. Check out the Institute home page at www.law.ua.edu/ali. ■



MEMORIALS

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Cullman

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Died: February 12, 1997

John Patrick Carlton

Birmingham

Admitted: 1960

Died: May 18, 1997

Richard Hughes Clem, Sr.

Trussville

Admitted: 1977

Died: April 23, 1997

Michael Donald Cook

Valley

Admitted: 1973

Died: May 11, 1997

Brownell Clifton Franklin

Birmingham

Admitted: 1994

Died: March 28, 1997

Alfred W. Goldthwaite

Montgomery

Admitted: 1948

Died: May 13, 1997

Arthur J. Hanes

Birmingham

Admitted: 1948

Died: May 8, 1997



Henry Heller

Montgomery

Admitted: 1943

Died: March 14, 1997

Ralph Gans Holberg, Jr.

Mobile

Admitted: 1932

Died: April 7, 1997

Vance Reed Hoover

Shreveport, LA

Admitted: 1972

Died: January 25, 1997

Donald H. Patterson

Florence

Admitted: 1959

Died: May 28, 1997

Thomas Kern Selman

Jasper

Admitted: 1938

Died: April 21, 1997

Lisa Michelle Shannon

Birmingham

Admitted: 1996

Died: March 13, 1997



Tee Off Against Georgia

We have waged war over water, battled each other for gridiron glory, and bickered over who is ahead of whom at the end of the line. Now, the Alabama-Georgia rivalry has entered a new arena. This fall attorneys from Alabama will have a chance to gain glory on the greens when they tee-off against their Georgian colleagues at the first annual "Vance Cup."

This event, named in honor of late Eleventh U.S. Circuit Judge Robert S. Vance, is scheduled for September 25 and 26 in Birmingham. The match play format will be patterned after that of the Ryder Cup, which is set to take place the following weekend in Sotogrande, Spain. All proceeds from the tournament will benefit children's hospitals in both Alabama and Georgia.

Tournament organizers **Charles Ham** of Fairhope and **Tim Dillard** of Birmingham would like to see the Vance Cup develop into an annual face-off between the two neighboring state bars. They hope that it will give attorneys on opposite sides of the state line an opportunity to become better acquainted.

The idea for the tournament was putted around for over a year before being formally adopted by the Executive Committee of the Birmingham Bar Association. Organizers are now actively seeking volunteers, participants and corporate sponsors. "After meeting with Robert Vance, Jr. and discussing with him our goals for the Vance Cup," said Charles Ham, "we knew we had an idea that could make a difference to a number of children in the states of Alabama and Georgia."

For more information on the inaugural Vance Cup, contact **Charles Ham** at (334) 928-6733, hamlaw@ibm.net, or P.O. Box 1229, Fairhope, Alabama 36533.



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HOME TO HOMER





DISCIPLINARY NOTICE

Disability

• Mobile attorney **Peter Austin Bush** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective June 26, 1997. [Rule 27(c); Pet. No. 97-096]

Suspensions

• Geneva attorney **David Jerome Harrison** was intermly suspended by order of the Disciplinary Commission of the Alabama State Bar effective May 30, 1997. Harrison was suspended pursuant

to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon his criminal conviction in the United States District Court for the Middle District of Alabama and his consent to said interim suspension.

The Disciplinary Commission further ordered that Harrison be restricted from maintaining a trust account. [Rule 20(a); Pet. 97-10]

• On April 11, 1997, the Disciplinary Board accepted a conditional guilty plea from **John M. Gray, II** in connection with six pending disciplinary cases. Gray accepted an 18-month suspension to run concurrent with an interim suspension he had been serving for 16 months prior to his plea. The six cases were part of the Disciplinary Commission's consideration in the interim suspension. Under the plea agreement, Gray must petition for reinstatement. [ASB No. 94-059(A), et al.]

• Gardendale attorney **Gary Wayne Weston** was intermly suspended by order of the Disciplinary Commission of the Alabama State Bar effective July 2, 1997. Weston was suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon Weston's refusal to comply with repeated requests for information from the Office of General Counsel.

The Disciplinary Commission further ordered that Weston be restricted from maintaining a trust account. [Rule 20(a); Pet. No. 97-11]

Public Reprimands

• On July 16, 1997, Tallassee lawyer **Charles B. Pienezza** received a public reprimand without general publication for violating Rule 8.1(b) of the Rules of

Professional Conduct by failing to respond to a lawful demand for information from an admissions or disciplinary authority. Pienezza had been attempting to have three New York lawyers admitted pro hac vice in the Circuit Court of Talladega County. The applications were deficient, and numerous letters were sent to Pienezza in an effort to clear up the problem over a two-year period. On September 18, 1996, the general counsel asked for a written response explaining the continued deficiencies in these applications. Pienezza did not respond until after he was notified in January 1997 that the Disciplinary Commission determined he should be disciplined. [ASB No. 96-300(A)]

• Gadsden attorney **Virgil McDaniel Smith** received a public reprimand without general publication on July 16, 1997. In September and October 1996 Smith was out of his office for a number of weeks due to health problems. During the time Smith was out of his office a paralegal in his employ prepared divorce papers for a client, signed Smith's name to them, filed them with the court and obtained a divorce for the client. The Disciplinary Commission determined that Smith's actions constituted a violation of Rule 5.3(b) of the Rules of Professional Conduct of the Alabama State Bar which requires a lawyer having direct supervisory authority over a non-lawyer to make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. [ASB No. 96-297(A)]

• Montgomery attorney **Deborah Farrington Coe** received a public reprimand without general publication on July 16, 1997. The reprimand was administered because Coe failed to

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respond to a complaint filed against her by a former client. Despite having been requested in writing to respond to this complaint on seven different occasions by the Office of General Counsel of the Alabama State Bar and by the Grievance Committee of the Montgomery County Bar, Coe failed or refused to respond to these requests or to otherwise provide any information regarding the complaint which has been filed against her. The Disciplinary

Board determined that Coe's failure to respond to these requests constituted a violation of Rule 8.1(b) of the Rules of Professional Conduct of the Alabama State Bar which provides that a lawyer shall not knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority. [ASB No. 96-045(A)]

Anniston lawyer **Huel Wayne Love** received a public reprimand without

general publication on May 16, 1997 as part of a plea agreement. Love failed to keep his client reasonably informed about the status of the client's case, and failed to promptly comply with reasonable requests for information. The Disciplinary Board ordered that Love receive a public reprimand without general publication, and a one-year suspension to be held in abeyance. Love will be on probation for a period

(Continued on page 285)

Notice

Orzell Billingsley, Jr., whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 1997, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 91-126, 92-278, 93-322 and 96-367 before the Disciplinary Board of the Alabama State Bar.

William Felix Mathews, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 1997, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 96-368 before the Disciplinary Board of the Alabama State Bar.

William Felix Mathews, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 1997, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 97-115(A) before the Disciplinary Board of the Alabama State Bar.

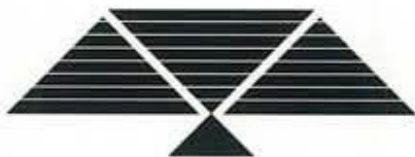
William Felix Mathews, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 1997, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 97-193(A) before the Disciplinary Board of the Alabama State Bar.

Notice is hereby given to **William Felix Mathews** who practiced law in Pelham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 25, 1997, he has 60 days from the date of this publication (September 15, 1997) to come into compliance with the Mandatory Continuing Legal Education requirements for 1996. Noncompliance of the MCLE requirements shall result in a suspension of his license. [CLE No. 97-10]

Notice is hereby given to **Joe Wilson Morgan, Jr.** of Birmingham, Alabama that he must respond to the charges in disciplinary file ASB No. 96-200(A) within 30 days from the date of this publication (September 15, 1997). Failure to respond shall result in further action by the Office of General Counsel. [ASB No. 96-200(A)]

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Disciplinary Notice

(Continued from page 283)

of two years with certain specified conditions. Love was court-appointed to probate the estate of a decedent who had no heirs living in Alabama. He filed a petition for administration and notice to creditors. Over a 13-month period, the decedent's sister contacted Love several times about the status of the estate. Love assured her that all necessary steps had been taken to probate the estate. Some 21 months after being appointed to probate the estate, Love had not concluded the matter. The family then hired another lawyer to look into the matter. That lawyer was unsuccessful in having Love complete the probate of the estate. The Disciplinary Board directed Love to withdraw from handling the estate. [ASB No. 95-264(A)]

•Enterprise lawyer **John Richard Hollingsworth** received a public reprimand without general publication on May 16, 1997 for having failed to explain a matter to the extent reasonably necessary to permit his client to make informed decisions regarding the representation.

Hollingsworth was hired to pursue a medical malpractice claim. Hollingsworth met the client at her home, at which time she provided him with medical records. After more than a year had passed, the client experienced difficulty in communicating with Hollingsworth about the case. The client eventually went to Hollingsworth's office to retrieve her file for the purposes of seeking new representation, at which time Hollingsworth advised the client that the statute of limitations had expired. In responding to the complaint, Hollingsworth contended that he never agreed to take the case, but for almost two years was attempting to find someone else to handle the case for the client. [ASB No. 95-275]

•Bessemer lawyer **Ralph L. Armstrong** received a public reprimand without general publication for violating Rules 8.1(b) and 8.4(a) and (g), Alabama Rules of Professional Conduct. This discipline was imposed because of the respondent attorney's failure to respond to repeated requests for additional information by the Office of General Counsel concerning a complaint filed by a former client. [ASB No. 96-233(A)] ■



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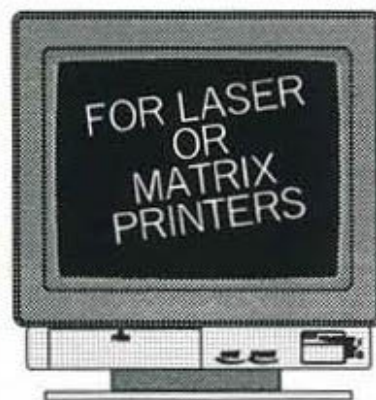
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RECENT DECISIONS

By Wilbur G. Silberman

Bankruptcy Court holds Bankruptcy Code sections 106(b) and (c) unconstitutional

In re NVR L.P., et al., Bankr. E.D. Va., 206 Bankr. 831 (Mar. 7, 1997), 30 B.C.D. 843, Bankr. LEXIS 411. In this chapter 11 reorganization, the debtor's plan requested a construction by the bankruptcy court relative to a refund of state real estate transfer and recordation taxes. The request was granted only a short time after the U.S. Supreme Court case of *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114) which held that when Congress was exercising its powers under Article I of the Constitution, it could not abrogate the immunity of the State allowed by the Eleventh Amendment. The state taxing authorities requested reconsideration by reason of the *Seminole* decision. The debtor resisted the applicability of *Seminole* by arguing (1) that to allow the State's contention would deny the debtor equal protection of the application of the Fourteenth Amendment; (2) that the taxing authorities waived their Eleventh Amendment immunity when they filed a proof of claim. The court in its endnote 1 first called attention to Section 106 of the Bankruptcy Code, by the following:

¹ Section 106 of the Bankruptcy Code consists of three subsections. In §106(a), Congress abrogated the sovereign immunity of all governmental

units with respect to certain sections of the Bankruptcy Code. In §106(b), Congress declared that a governmental unit which files a proof of claim will be deemed to have waived its sovereign immunity with respect to a claim "that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." In §106(c), Congress authorized the estate to offset any claim it may have against the governmental unit notwithstanding a claim of sovereign immunity.

The court then stated that *Seminole* rendered Bankruptcy Code sections 106(b) and (c) as an unconstitutional attempt by Congress to limit the reach of the Eleventh Amendment by exercising its power under the bankruptcy law. The opinion held that the provision that the filing of a proof of claim constituted a waiver, was an attempt by Congress to evade the provisions of the Eleventh Amendment; Congress cannot dictate to the judiciary a standard for determining whether a state has waived its immunity as allowed under the Eleventh Amendment. The Bankruptcy judge discussed the case of *Southern Star Foods*, 190 B.R. 419 (E.D. OK. 1995) which reached a contrary view. The *NVR L.P.* court without hesitation stated that *Southern Star Foods* was decided incorrectly, and that a majority of courts since *Seminole* have refused to follow *Southern Star*. The court further stated that any waiver by a state of the Eleventh Amendment protections must be expressed without ambiguity, and that the mere filing of a proof of claim is insufficient to constitute a waiver.

Comment: It was contended that credence should be given to §106(b) because of the fact that the Fourteenth Amendment was enacted after the Eleventh Amendment, and thus legislation enacted under the Fourteenth

Amendment would supersede the Eleventh. However, the court in this case said that it would not accept the theory that §106 was based upon the Fourteenth Amendment applicability as there was nothing to indicate such a fact. The *Seminole* case has gestated a plethora of articles on its meaning and possible amplification. The issue is that of constitutional law. Until one or more of the cases reaches the Supreme Court, undoubtedly, the states will use *Seminole* as a defense whenever actions are taken under the Bankruptcy Code.

Wyoming U.S. District Judge holds Eleventh Amendment immunity was abrogated by Congress in enactment of Bankruptcy Code

Wyoming Department of Transportation v. Straight, DC Wyo, May 15, 1997, ___B.R. ___, 1997 U.S. Dist. LEXIS 7400. After debtor filed a chapter 13 case, the Wyoming Department of Transportation (DOT) canceled her disadvantaged business enterprise status. The bankruptcy court held the DOT in contempt as violating the automatic stay and anti-discrimination clause of the Code, whereupon the DOT argued the Eleventh Amendment immunized it from any award of fees and costs. On appeal, the District Court in discussing *Seminole Tribe of Florida* (U.S. Sup. Ct. 1996) commented on the recognition in *Seminole* of such immunity being abrogated by laws passed under the Fourteenth Amendment. The court referred to the Oklahoma bankruptcy case of *In re Southern Star Foods*, 190 B.R. 419 (1995) which held that although bankruptcy laws are enacted under Article I of the Constitution, that they are enforced through the Fourteenth Amendment. It commented that although *Southern Star* was "pre-*Seminole*", it was followed in the "post-*Seminole*" case of *In re Headrick*, 200 B.R. 963 (Bkcty S.Ga



Wilbur G. Silberman

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.

1996). The district judge concluded by stating that even if he were wrong in his interpretation of U.S. Constitutional law, the state had waived immunity by filing a proof of claim.

Comment: Flip a coin—*Wyoming* or *NVR L.P.*? Undoubtedly, amplification by the U.S. Supreme Court will be required to decide exactly how far *Seminole* extends in interpreting bankruptcy law.

U.S. Supreme Court decides "value of collateral" in Chapter 13 case

Associates Commercial Corp. v. Rash, ___ S.Ct. ___ June 16, 1997, U.S. LEXIS 3688. Associates Commercial Corp. (ACC) held a lien on a tractor truck owned by debtor Elray Rash. At the time Rash filed his Chapter 13 case, \$41,171 was the balance owed. Under §506(a) of the Bankruptcy Code, the security of ACC was only to the extent of the value of the creditor's interest in the estate's interest in the collateral, with the remainder being unsecured. Rash had three alternatives: (1) have ACC accept his plan, (2) return the collateral, or (3) cram down under §1325(a)(5). He elected cram down which allows payments over the life of the plan, which total the present value of the collateral with the lien being retained by ACC. The question was as to the value of the collateral. ACC claimed replacement value of \$41,000 and Rash contended that foreclosure sale amount estimated at \$31,875 should govern. The Bankruptcy Court and the Fifth Circuit agreed with Rash. The U.S. Supreme Court reversed by an eight-to-one majority, with Justice Ginsburg writing the opinion.

Justice Ginsburg first reflected on the three different value standards in the various circuits, to wit: (1) replacement, (2) foreclosure sale, (3) midpoint between the two. In selecting replacement cost, Justice Ginsburg stated that the first sentence of §506(a) defining security amount to be "to the extent of such creditor's interest in the estate's interest in such property" limits the secured portion to the value of the collateral. Examples of the estate's interest not being the entire value of the collateral would be that of the debtor owning only a part interest in the collateral, or of the creditor holding a junior lien, which would require ascertainment of that interest. Thus, Justice Ginsburg said the first sentence of §506(a) tells what must be evaluated but not how. She then discussed the second sentence concerning "how" value is determined, which is "in light of the purpose of the valuation and of the proposed disposition of the use of such property." She determined that if the debtor proposed to continue using the property (which Rash desired), the foreclosure standard would defeat the actual wording of the statute, as no significance would be given to the debtor's decision as to choices of retention or surrender; that further replacement value will protect the creditor against deterioration and default, stating "that actual use, rather than a foreclosure sale that will not take place, is the proper guide under a prescription hinged to the property's disposition or use." She concluded her opinion with the following sentence: "In sum, under §506(a), the value of property retained because the debtor has exercised the §1325(a)(5)(B) 'cram down' option is the cost the debtor would incur to obtain a like asset for the same 'proposed...use'."

Comment: In a footnote, Justice Ginsburg made it clear that replacement cost was not the purchase of the collateral brand new, but rather fair market value, i.e., the price a willing buyer in debtor's situation would pay a willing seller for property of like age and condition. Justice Stevens, the lone dissenter, in his three paragraph opinion pointed out that §506(a) applies throughout the Code, not just in the Chapter 13 cram down, and that the majority opinion now affords a windfall to the undersecured creditor at the expense of the unsecured creditors. He believes that foreclosure value would be consistent with the statutory scheme by keeping respective recoveries of secured and unsecured creditors the same throughout the Bankruptcy Code. Query: Does the reviewed case apply only in Chapter 13 cases or will it be uniform in all bankruptcy cases? ■

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CIVILIAN REPRESENTATION

of the

MILITARY C*LI*E*N*T

By Michael A. Kirtland



With numerous military bases and one of the largest national guard organizations in the nation, lawyers throughout Alabama may often be called upon to represent military clients in a wide variety of matters. The tendency of many lawyers is to assume that the Judge Advocate General (JAG) office on base will take care of the needs of military personnel. While it is true that office will provide general legal advice and draft simple wills for military personnel, they do not represent individual service members in civilian courts. Generally these matters will be of a civil nature, running from insurance disputes to divorce. However, assuming that the military client in a civil matter should be treated no differently from civilian clients may lead the unwary attorney into legal problems. This article will discuss some basic information that any attorney should be aware of before beginning representation of military clients. The article is limited to active duty military personnel issues, involving both regular military members and members of the national guard and reserve while on active duty, and does not address the extensive area of veterans rights or special areas of the law related to retired military personnel.

The Soldiers' and Sailors' Civil Relief Act

The basic legislation covering civilian courts and military personnel is contained in the Soldiers' and Sailors' Civil Relief Act (SSCRA), 10 USCA §§ 501-593. This Act was originally written in World



Michael A. Kirtland

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He serves on the editorial board of *The Alabama Lawyer*, as a member of the state bar's Military Law Committee and is an adjunct faculty member at the Jones School of Law.



War I to prevent military inductees from being legally harmed by virtue of their military service and their absence from their home jurisdiction. It was extended and revised during World War II and has been updated since then. Most of the case law concerning interpretation of this complex act stems from 1940s era cases. Unfortunately, because of the complexity of the law, it is filled with exceptions, and case law should be carefully researched before staking out a legal position based on the law.

The basic purpose of the act is to ensure that military personnel can "devote their entire energy to the defense needs of the Nation" by providing for suspension or extension of statutes of limitations for civil liabilities involving military members.¹ The term "persons in the military service" is specifically defined as not only active duty members of the Air Force, Army, Navy, Marine Corps, and Coast Guard, but also Public Health Service officers assigned to the Army or Navy, and National Guard or Reserve personnel while in active federal service, from receipt of their orders to a date normally 60 days beyond their release from active duty.²

Most of the basic issues concerning use of SSCRA, regardless of the type of case, involve whether or not local courts can obtain jurisdiction over military members. SSCRA entitles the service member to retain his or her state residency while in military service and prevents other states from claiming the member as a state resident by virtue of being stationed within the borders of the state.³ In Alabama, the legislature has ended any question as to whether the service member is entitled to access to state and local courts as a nonresident, by specifically declaring that military personnel and their spouses shall be deemed residents for the limited purpose of commencing civil actions in court.⁴

The attorney should remember that the purpose of the act is to prevent the service member from being unfairly burdened by civil actions as a result of his or her absence due to military service and not to eliminate the ability of the member to exercise legal rights or to prevent others from seeking civil remedies against military personnel present within the state. Only where the members are absent from the jurisdiction where the case is brought, due to their military service, may the act be invoked. Even then, specific sections of the act must be consulted prior to determining whether SSCRA will apply, as rules within the act differ depending on the type of legal action sought.

SSCRA has generally been determined not to be applicable to career service members, except in circumstances preventing their appearance due to reassignment.⁵ While SSCRA says the service member is protected against suit while in military service, case law has repeatedly staked out the position that the military members rights must be "materially affected by reason of military service."⁶ Hence, mere status as a member of the military does not protect one from suit. The act states that where a person in military service has legal action brought against him or her, the service member may seek a stay of that action, or in the case of a default judgment, have the case

reopened, by filing notice with the court that the member was absent from the jurisdiction and their rights were materially affected by their military service.⁷ In the case of a default judgment, the party seeking the default judgment must file an affidavit with the court stating that the defendant is not in military service.⁸ However, it is at this point that case law complicates the issues. In many jurisdictions, including Alabama, courts have ruled that if a military member even files a notice that they are invoking SSCRA to stay the proceedings, the member has made an appearance in the case and is therefore subject to the jurisdiction of the court. Once the member has made an appearance and submitted to the jurisdiction of the court, SSCRA no longer applies and the case will proceed.⁹

The end result is that the attorney must carefully weigh the course to be taken before submitting any motions or notices to the court. Contact with the base JAG office is appropriate. Allowing the base legal services office to file a standard notice of military service and intent to invoke SSCRA may be the best course, rather than filing the notice on behalf of your client.¹⁰ In many instances, the Act itself when combined with case law have effectively created a "Catch-22" for the civilian attorney or the client who take any actions. However, once successfully invoked, the burden shifts to the plaintiff to overcome the provisions of the act. In order to do this, the plaintiff will have to show that 1) the military member is deliberately and willfully attempting avoidance of the issues, 2) the defendant is not acting in good faith, 3) the defendant has had ample time and opportunity to prepare, and his or her military service has not prevented proper preparation for the case, and 4) that the defendant is using the act to shield wrongdoing.¹¹ Once invoked, the burden to overcome SSCRA defenses is substantial.



Divorce

Perhaps the most common area for civilian representation of military members is divorce. While the causes of divorce among military personnel are the same as in any marriage, military service does affect jurisdictional issues, division of marital assets and child custody matters.

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as legal residents of their home state as well, the military client may come to you with a notice that a divorce action has been filed in the service member's home state.¹² Either state may take jurisdiction of the matter. Should the service member seek counsel from you concerning possible divorce action, you should familiarize yourself with the divorce statutes of the service member's home state before advising him or her whether to file in Alabama or in their home jurisdiction. Despite the trend toward commonality among jurisdictions in domestic matters, jurisdiction still makes a difference, and military members are treated differently depending on the state where the divorce is filed.

An additional jurisdictional consideration when handling a military divorce case is whether the service member is a legal resident of a community property state. If so, depending on the specifics of the case, it may be more advantageous to the client to file in the home state or to avoid community property concerns through an Alabama filing.

In 1982, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), effective February 1, 1983.¹³ This act was in reaction to the U.S. Supreme Court decision in *McCarty v. McCarty*, in which the Court declared that military retirement pay was a personal entitlement and denied community property status to it under California law.¹⁴ The act did not determine military retirement to be divisible, but rather returned to the states the decision as to whether it was a divisible marital asset. In 1993, Alabama became the last state to permit the division of military retirement pay as a property

asset, subject to division in an action for divorce.¹⁵ Hence, whether or not the member is currently eligible for retirement benefits, the attorney must consider this potential asset in planning a division of marital assets. USFSPA further defines the eligibility of former spouses to obtain a portion of the service members retired pay, to be paid directly to the former spouse by the government through a formula which considers the length of the marriage, the length of military service and the overlap between the two periods.¹⁶ In any event, direct payment is limited to a maximum of 50 percent of the disposable retired pay of the service member.¹⁷ Even where military retired pay is not divided as a marital asset, it may still be considered as a source of income for alimony or child support purposes.

Careful consideration must be given to the wording of the settlement agreement concerning division of retired pay. USFSPA specifically allows for the division of "disposable" retirement pay. This is defined as that pay available to the military retiree after deductions for 1) debts to the United States, 2) federal, state and local taxes, 3) government backed life insurance (SGLI or VGLI), and 4) disability pay.¹⁸ It is this last area which can be especially vexing in the settlement agreement. A military member obtaining a disability rating upon retirement must waive an equivalent portion of his or her military retirement pay in order to receive tax free disability compensation from the Veterans Administration.¹⁹ But disability pay is a personal property right of the veteran and may not be assigned. According to case law, it is not subject to division as a marital

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asset, though it may be considered in determining total income for alimony and child support purposes.²⁰ But, since the military member will not be given a disability rating until the time of retirement, that amount will not be known at the time of the divorce settlement agreement. Because the member waives a portion of his disposable retirement income, that portion is no longer divisible as part of the property settlement, thereby reducing the value of the settlement.

Every military member with 20 or more years of military service, still on active duty, is automatically covered by the Survivor Benefit Program (SBP), providing military pension benefits to the spouse or former spouse of the military member, as well as to minor dependent children. This benefit amounts to 55 percent of the member's pension benefit until the spouse remarries or turns 62, at which time it is reduced to offset the availability of Social Security benefits.²¹ At the time of retirement from military service, the spouse must concur in writing to any election of SBP benefits less than the maximum amount allowed by law. While this may seem a very desirable benefit under a divorce settlement, the attorney should carefully weigh the costs of the program and its benefits when compared to a standard life insurance policy. Where the military member is healthy and insurable at the time of the divorce or retirement (not always a valid assumption) a standard life insurance policy often provides more potential income to the former spouse at less cost than is available under SBP. However, where the military member has health considerations which prohibit the ability to obtain civilian life insurance, SBP provides an important asset to be considered in the divorce settlement.

In addition to retirement pay and survivor benefits, continuing benefits for the former spouse, including medical benefits, base exchange and commissary privileges must be taken into account in the settlement process. Like the direct payment of retirement pay, they are determined by a formula considering length of the marriage, length of military service and the period of overlap between these times.

In the area of child support, the military member's entire pay and allowances may be considered in the determination of child support amounts. Collection of child support through direct payment by the Defense Finance and Accounting Service is determined by individual military service rules, which differ drastically from the Air Force's policy of support "sufficient to support" the needs of the former family, to the Navy's policy of providing up to a maximum of 3/5th of pay.²² Involuntary attachment of child support payments is provided for under federal law, and requires a court order.²³

In addition to financial issues, child custody considerations differ for military personnel. Since we are becoming an increasingly mobile society, far less tied to our geographical roots, it is a certainty that the military member will be subject to reassignment, usually in another state or country. Consideration must be given in the settlement agreement to how the service member's reassignment will affect the visitation schedule, as well as to who will bear the logistical and

financial burden of long distance visitation. Many lawyers use a standard clause in their settlement agreements which does not permit the child to be taken outside the state by either parent, without the permission of the other. Clearly, this type of clause causes more problems than it solves if included in a military divorce settlement, whether the military member is

to be the custodial or non-custodial parent. If both parents are military members, the issues of child custody and child support must be even more carefully considered, and "standard" clauses relating to who will cover the child for medical care and other support and custody matters are not appropriate.



Wills and Estate Planning

The emphasis of the legal assistance office is to ensure that the GI has a will, with much less consideration as to how well that will meets the individual's estate planning needs.²⁴ The vast majority of legal assistance offices at military installations make the assumption that the service member needs only a simple will, leaving everything to the spouse or parents, and can't possibly need serious estate planning, which in any event is not a service performed by the JAG. Rarely is the will questionnaire provided by the legal assistance office sufficient to determine whether the service member should be advised to seek more in-depth estate planning. Many civilian attorneys tend to make the same assumption. The young soldier who enters your office and tells you he comes from a poor farm family may in fact be from a Midwestern farm family that is cash poor, but owns a good sized farm, with land values that require sophisticated estate planning. If the individual who comes to you is a senior military officer, he or she may have accumulated significant assets over the course of their career. Because of numerous reassignments throughout the career, those assets may be spread over a number of states. As estate law varies widely from state to state, in depth questioning of the background of the military client is always appropriate before attempting to make a determination of estate planning needs.

In the event of the death of the military member or spouse, while stationed in Alabama, the law permits the probate of the estate in Alabama or the home state of the deceased.²⁵ Alabama's probate expense burden is low compared to many states, and even where the surviving spouse does not intend to remain resident permanently within Alabama, there may be a significant cost advantage in comparison with states which base probate costs on a percentage of the value of the estate. Initial assistance to the military client or spouse is provided by the local base casualty assistance office, which is well versed in the benefits available to the survivor of a deceased military member. Language reflecting the military service of the client should be drafted into the client's will along with language directing the executor to consult with the casualty assistance office of the nearest military installation at the time of death. Even where such language is not provided for in the will, the attorney must be aware of this assistance so as to ensure all available military and veterans benefits may be obtained. One of the most valuable assets of the deceased service member

will likely be his or her Servicemen's Group Life Insurance (SGLI), which is usually \$200,000. While this is normally paid outside the probate estate to the designated beneficiary in the policy, where there are challenges to the insurance payment, the attorney should be aware of at least two major differences between a standard civilian life insurance policy and an SGLI policy. First, the SGLI policy, its payment and other matters, are governed by federal law, and any challenges to the policy payment are, by law, taken to federal court, not state court.²⁶ Secondly, as with the obtaining of child support amounts, procedures for establishing beneficiaries under an SGLI policy differ from service to service, though all are governed by 10 USCA 1965 *et seq.*²⁷

Because military members are often deployed from their regular duty station to locations outside the state and overseas, a durable power of attorney may be appropriate. While this is often written by the base legal office, the civilian attorney handling other matters for the military client may also be asked to draft this document. Many attorneys and clients prefer to have a durable power of attorney which only takes effect upon the deployment of the military member, and in fact, the JAG office will actively discourage any long standing power of attorney. By

using a springing durable power of attorney, a copy of the temporary duty orders can be attached showing that the circumstances which activate the springing power are currently in effect.

Criminal Representation

While criminal representation of the military member is less common, it does occur, and the civilian criminal defense attorney needs to understand the ramifications of military

service in criminal actions. For the military member charged with a crime in state or federal court, the representation is essentially the same as for any other client, though possible non-judicial actions taken by the military against the individual as a result of the civilian criminal action must be considered. In addition, possible sentencing lengths will affect whether or not the military member is kept on the rolls of his or her military service or dropped from those rolls. The civilian attorney should become aware of the service policies concerning sentence lengths before entering into any plea bargain agreements with prosecutors.

The other possibility is that a military member may wish to retain your services for a military court martial proceeding or non-judicial punishment proceeding. In that event the service member will also have the services of the military area defense counsel. The civilian attorney will automatically be considered the lead attorney in the event of retention for military proceedings. However, the civilian attorney should take advantage of the presence of the area defense counsel who can provide substantial assistance in the areas of advice on specifics of military law and court martial procedure, as well as making recommendations on legal strategies and their effectiveness, or lack of effectiveness, in the military court setting. In short, the area

defense counsel can be a tremendous asset to the civilian attorney attempting to practice in a military court or non-judicial punishment proceeding.

Conclusion

Years ago military bases tended to exist far outside the city limits and away from the civilian population. In today's world military members live and work alongside the civilian sector. As a result, the possibility that you may be called upon to represent military personnel is greater today than ever before. Special care must be taken to ensure the numerous special laws pertaining to military personnel are considered, complied with, and invoked when performing legal work for the military member. However, with special care, representing the military client can be a significant and pleasant addition to the civilian attorney's practice. ■

Endnotes

1. 10 USCA 510.
2. 10 USCA 511.
3. 10 USCA 574.
4. Ala. Code § 6-7-20.
5. *Panel v. Continental Can Co.*, 554 F 2d 216 (5 Cir 1977).
6. Allshore, "Overcoming the Obstacles of the Soldiers' and Sailors' Relief Act", 3 Family Advocate 37.
7. 10 USCA 521.
8. 10 USCA 520.
9. *Blankenship v. Blankenship*, 263 Ala. 297, 82 So. 2d 335 (1955).
10. Hooper, "The Soldiers' and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Enforcement Attorney's Perspective", 112 Mil. L. Rev. 93, 94 (1986).
11. Allshore, "Overcoming the Obstacles of the Soldiers' and Sailors' Relief Act", 3 Family Advocate 37 (1981).
12. A legal distinction exists between a person's residence, defined as where the person is currently living, and a person's domicile, defined as the permanent residential relationship between the state and the person. See *Williams v. North Carolina*, 317 U.S. 287 (1942), 325 U.S. 226 (1945).
13. 10 USCA 1001.
14. *McCarty v. McCarty*, 453 U.S. 210 (1981).
15. *Ex Parte Vaughn*, 634 So. 2d 533 (Ala. 1993).
16. 10 USCA 1408 (d) (1).



17. 10 USCA 1408 (e)(1).

18. 10 USCA 1408 (a)(4).

19. 38 USCA 3101.

20. *Mansell v. Mansell*, 490 U.S. 581 (1989).

21. 10 USCA 1441-1455.

22. Hemingway, "The Need for Uniformity in Nonsupport Regulations in the Uniformed Services", 102 Mil. L. Rev. (1983).

23. 42 USCA 465.

24. Gildea, "Computer Assisted Wills Program", 112 Mil. L. Rev. 277 (1986).

25. Ala. Code § 12-13-2.

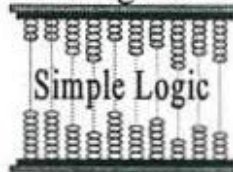
26. 38 USCA 1965 *et seq.* See *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

27. U.S. Army policy, for example, prohibits the use of the term "by law" to designate a beneficiary for SGLI, while Air Force policy encourages it.

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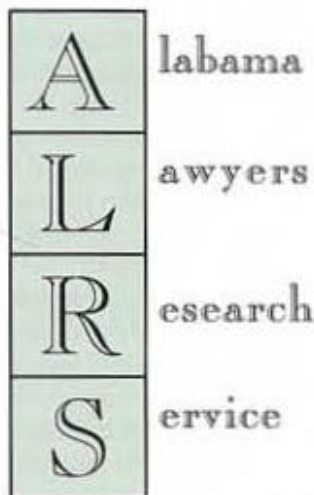
Michael S. Martin of Montgomery was inadvertently left off of the list of spring 1997 admittees to the Alabama State Bar. Martin successfully completed all portions of the bar exam and was admitted to the state bar in April 1997. The Alabama State Bar apologizes for this oversight and any inconvenience it caused.

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OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Restrictions On a Lawyer's Right to Practice Law



J. Anthony McLain

The Alabama Rules of Professional Conduct are constantly reviewed, interpreted and applied by the Office of General Counsel in an effort to provide ethical guidance to Alabama attorneys. The Office of General Counsel issues some 1,700 informal opinions annually to lawyers throughout the state. These informal opinions consist of either a written response to a lawyer's ethical inquiry, or ethical advice imparted by bar counsel via telephone conversations with lawyers.

From time to time, ethical issues which are new, usually of first impression, result in the issuance of a formal opinion by the Disciplinary Commission of the Alabama State Bar, which opinion become binding on the Commission, as well as on lawyers licensed to practice in Alabama. These formalized opinions of the Commission are available from the Office of General Counsel of the Alabama State Bar, and are presently being loaded on the bar's website at www.alabar.org.

In responding to the ethical inquiries of Alabama lawyers, it becomes apparent that certain ethical issues dominate the rendering of services by the practitioner. In an effort to educate the bar, the Office of General Counsel reprints certain formal opinions of the Disciplinary Commission in *The Alabama Lawyer*.

Recently, one ethical issue which has received a substantial number of inquiries, but which has not been dealt with in a formal opinion, involves settlement agreements between parties in litigation wherein counsel for one or

more of the parties agrees not to pursue future cases involving the same opposing party or parties. In an effort to address this issue short of a formal opinion, this column will discuss the applicable provisions of the Alabama Rules of Professional Conduct, which clearly address the ethical ramifications of such an agreement.

Rule 5.6(b), Alabama Rules of Professional Conduct, states: "A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." The Comment to Rule 5.6 states: "Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."

Neither the rule nor the comment contains any exception, modification or interpretation of the simple prohibition contained therein "a lawyer shall not." The prohibition covers both the "offering or making" of any such agreement. The rule prohibits that agreement which contains any provision which places a restriction on the lawyer's right to practice.

Lawyers are encouraged to review this straightforward rule and the comment, and insure that their settlement agreements comply with the ethical mandates of this rule.

The reasons for the prohibition are found in the inherent conflict created by such a proposal wherein the lawyer is confronted with an offer which is very attractive and acceptable to the

client, but would restrict that attorney from representing any future litigants in matters involving the same opposing party or parties. Secondly, this type of restriction would deny potential litigants their choice of counsel by eliminating those lawyers from the pool of available lawyers. Lastly, the overall concept of settling claims would be clouded by the subterfuge provision which in essence is an attempt to "buy off" the lawyers(s) in question.

The Disciplinary Commission has previously rendered an opinion which does deal with the concept of confidentially as to settlement agreements. In RO-91-17, published in the May '93 issue of *The Alabama Lawyer*, the Commission determined that it was ethically permissible for a lawyer to participate in a confidential settlement even though there may be a "possibility of adverse consequences on third parties or the public." The Commission reasoned that such an agreement, even though imposing more restrictions on counsel that the client, was permissible under the Rules of Professional Conduct.

The Rules of Professional Conduct continue to be viewed in a practical sense, so as to assist the practitioner, not impede him. Recognizing the bedrock of the lawyer-client relationship as being loyalty to the client, the prohibition contained in Rule 5.6(b) merely negates the possibility of this loyalty being threatened with improper incentives offered counsel which could impair the lawyer's independent professional judgment. ■

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WHAT EVERY LAWYER SHOULD KNOW ABOUT REAFFIRMATION and REDEMPTION IN CHAPTER 7 BANKRUPTCY CASES

By M. Donald Davis, Jr.



In recent months there has been much discussion about reaffirmation agreements in Chapter 7 bankruptcy cases as a result of Sears, Roebuck & Company's admission that it exercised "flawed legal judgment" in the execution of reaffirmation agreements. The United States Bankruptcy Court for the District of Massachusetts confirmed this statement by ruling in a case that Sears violated the discharge injunction by inviting *pro se* debtors to reaffirm a debt and then not filing the agreement with the Court. The Bankruptcy Court also certified for settlement purposes a class of all debtors who had executed unfiled reaffirmation agreements with Sears. Since then the U.S. Attorney in Boston has filed a civil suit against Sears in an effort to stop its reaffirmation practices. The revelations concerning Sear's practices have brought to light similar practices by other financial institutions and national retail creditors. This article attempts to provide key information concerning the reaffirmation right found in Section 524 of the Bankruptcy Code and discuss the related redemption rights found in Section 722 of the Bankruptcy Code.

Redemption and reaffirmation are two separate, though related, remedies made available to a Chapter 7 individual debtor to enable the debtor to retain certain personal property that serves as collateral securing an indebtedness. Redemption, codified at 11 U.S.C. §722, provides that a debtor may redeem personal property from a lien securing a dischargeable consumer debt by paying to the secured creditor the lesser of the fair market value of the collateral or the amount of the claim owed as of the date of bankruptcy. Reaffirmation, codified at 11 U.S.C. §524(c), contemplates an agreement between the debtor and the secured creditor whereby a debt that is otherwise dischargeable with respect to the personal liability of the debtor, is reaffirmed or renegotiated by the contracting parties. The reaffirmation remedy provides an alternative method pursuant to which a debtor may attempt to retain possession of secured collateral. Such an alternative, obviously attractive to the debtor financially unable to redeem the secured collateral, is the equitable compliment to 11 U.S.C. §722. Simply, a debtor incapable of or unwilling to tender a lump-sum redemption and redeem the secured collateral for its fair market value may reaffirm with the creditor; contrawise, a debtor confronted with the creditor unwilling to execute a renegotiated agreement may retain the secured collateral by redeeming it for its fair market value, which value may be substantially less than the contractual indebtedness.

If an individual debtor's schedules of assets and liabilities include consumer debts secured by property of the estate, 11 U.S.C. §521(2) requires the debtor to file a statement of his intention with respect to the retention or surrender of that property within 30 days of the petition. The debtor is further required to perform his stated intentions within 45 days of filing the statement of intention. Notwithstanding the aforesaid requirement,



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there is no stated penalty for the failure of the debtor to comply with the provisions of 11 U.S.C. §521(2). When confronted with the failure of a debtor to comply with 11 U.S.C. §521(2) courts across the country have approached the matter in different ways. Some courts require debtors to complete the statement upon threat of losing their bankruptcy discharge or being found in contempt of court. Other courts require nothing.

In *Taylor v. AGE Federal Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993), the Eleventh Circuit Court of Appeals held that a Chapter 7 debtor may not retain collateral without either redeeming the property or reaffirming the debt. The *Taylor* Court did not state what happened if the deadline passed and the debtor has done neither. However, as Chief U.S. Judge Tamara Mitchell of the U. S. Bankruptcy Court for the Northern District of Alabama noted in the case of *In re Norman*, No. 94-05643-TOM-7 (Bkrty.N.D.Ala. Jan. 8, 1997), a close reading of the case shows that the court of appeals directed the district court to affirm the bankruptcy court's order compelling the debtor to enter into a reaffirmation agreement or to redeem the property. In *Taylor* the Section 521 deadline had passed by the time the order was entered on motion from the creditor. Therefore, the Eleventh Circuit implicitly held that a debtor may reaffirm or redeem after the deadline date passed. The only deadline date associated with reaffirmation agreements is found in 11 U.S.C. §524(c), which provides that a reaffirmation agreement is only enforceable if it is entered into before a discharge is granted in a case.

The procedure concerning the reaffirmation of a consumer debt depends upon whether the debtor is represented by legal counsel. If the debtor is represented by legal counsel and the following steps are followed, reaffirmation will occur if:

- (1) the agreement is made before the granting of the discharge;
- (2) the agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within 60 days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;
- (3) the agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required by the Bankruptcy Code, under nonbankruptcy law, or under any agreement not in accordance with the provisions of Section 524(c);
- (4) the agreement is filed with the bankruptcy court; and
- (5) the agreement is accompanied by a declaration or affidavit of the debtor's lawyer that represented the debtor during the course of negotiating the reaffirmation agreement that:
 - (a) the agreement represents a fully informed and voluntary agreement by the debtor;
 - (b) the agreement does not impose an undue hardship on the debtor or a dependent of the debtor;and

(c) the lawyer fully advised the debtor of the legal effect and consequences of the agreement and any default under the agreement.

In situations involving a *pro se* debtor or where the debtor's lawyer will not furnish the required declaration or affidavit, the bankruptcy court must approve the reaffirmation agreement. At such hearing the court is required to inform the debtor:

- (1) that the agreement is not required by the Bankruptcy Code, under non-bankruptcy law, or under any agreement not made in accordance with Section 524(c);
- (2) of the legal effect and consequences of the agreement and a default under the agreement.

Additionally, the Bankruptcy Court is required to determine that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor and is in the debtor's best interest.

If you represent creditors there are several points to consider. First, reaffirmation contemplates a consensual agreement. A creditor cannot be required to reaffirm a debt on terms unacceptable to it. Frequently this point becomes relevant where a debtor has several debts owing to the same creditor, some of which are secured and others which are unsecured. Oftentimes the debtor wants to only reaffirm the secured debts and discharge the unsecured debts. In these instances the creditor can require reaffirmation of the unsecured debts owed to it as a condition to reaffirming the secured debt. Second, the reaffirmation agreement needs to be filed with the bankruptcy court prior to the discharge order being granted. Third, the *Sears* case demonstrates that creditors should make sure that reaffirmation agreements involving *pro se* debtors are filed with the bankruptcy court and scheduled for a hearing before the discharge order is entered. Fourth, creditors should be concerned as to whether the *Sears* case will be limited to situations involving *pro se* debtors. *Sears* has admitted that it did not file the reaffirmation agreements in 2,733 cases, but there may have been instances where the debtors were not represented by counsel during the reaffirmation process and a reaffirmation agreement was signed without the debtor's counsel's knowledge or approval.

If you represent a creditor you also need to be aware that depending on the timing of a rescission decision by a debtor,

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the creditor could get caught in a situation where the debtor properly rescinds a reaffirmation agreement after the deadline date has passed for the creditor to file a non-dischargeability complaint against the debtor. Although the reaffirmation remedy is commonly used in situations where there is personal property securing the repayment of a debt, Section 524(c) does not limit the reaffirmation remedy to such situations. Rather, any debt that is dischargeable in a Chapter 7 case can be the subject of a reaffirmation agreement. A creditor may have a type of non-dischargeable debt that requires the creditor to file an adversary proceeding in the bankruptcy case and obtain a judicial determination that the debt is non-dischargeable in bankruptcy (such as where the debt was procured by fraud on the part of the debtor). It is not uncommon for a debtor and creditor to enter into a reaffirmation agreement where there is no dispute concerning the dischargeable nature of the debt. If a lawyer encounters such a situation, it is recommended that at a minimum, a contractual provi-

sion be included in the reaffirmation agreement specifying that if the debtor rescinds the reaffirmation agreement, the debtor waives any defense to the creditor filing a non-dischargeability action within a specified time period following the rescission notice notwithstanding the passage of the bar date. However, such a contractual provision is probably not enforceable in court. To fully protect the creditor that has a non-dischargeable claim against the debtor, the creditor's lawyer should obtain from the bankruptcy court an extension of the deadline date for filing a non-dischargeability action against the debtor to a date that is beyond the date the debtor can rescind the reaffirmation agreement.

If you represent debtors you may consider contacting former clients to determine if they have been involved in an improper reaffirmation process. Likewise, debtors' counsel should be alert to their responsibility in the reaf-

firmation process. If they don't believe reaffirmation of a particular debt is in the best interest of the debtor or the debtor's dependents, counsel should not agree to sign the required declaration or affidavit, and let the bankruptcy court review the matter. Further, it goes without saying, that if debtors'

counsel signs a false declaration or affidavit the lawyer is open for latter attack by the debtor should the debtor regret the reaffirmation decision later.

The next point to discuss is what happens if a debtor refuses to reaffirm or redeem secured consumer property. As noted above, the Eleventh Circuit has held that with regard to personal property securing a debt in the Chapter 7 scenario, the debtor has only three options: reaffirm the debt, redeem the property; or surrender the property. Other circuits provide a fourth option: the debtor keeps the collateral as long as the payments on the secured debt are kept current. However, this option was specifically rejected by the Eleventh Circuit.

The logical remedy available to a creditor where the creditor and debtor reach an impasse regarding reaffirmation of a debt and the discharge order has not been entered, is to request that the automatic stay be terminated to permit the debtor to recover its collateral. Once the discharge order is entered the bankruptcy automatic stay ceases. In such an instance and presuming the property securing the repayment of the debt was claimed exempt by the debtor, the creditor can recover its collateral (but not the underlying debt) through either self-help remedies or use of state court remedies.

Little can be said about redemption. The redemption remedy is derived from the Uniform Commercial Code. The remedy is limited to "tangible personal property intended primarily for personal, family or household use." 11 U.S.C. §722. If an individual debtor wants to redeem property, the debtor must file a motion with the bankruptcy court and obtain permission to do so. Waiver of redemption rights are not enforceable. The bankruptcy court will determine



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the redemption amount. As the moving party, the debtor will have the initial burden of proving what the fair market value of the collateral is and the amount of debt owed. If the creditor disputes either, the creditor must present evidence to rebut the debtor's testimony. Redemption contemplates a lump sum payment by the debtor to the secured creditor, although a secured creditor can agree to redemption on an installment payment basis.

The reaffirmation and redemption remedies are two important aspects to Chapter 7 bankruptcy, with which every lawyer who finds himself in the bankruptcy arena, either as debtor's counsel or as creditor's counsel, should be familiar. ■

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LAW SUIT

QUALIFIED IMMUNITY

and its Evolution in the Eleventh Circuit

by Lisa Huggins

For the public official subject to civil rights lawsuits, qualified immunity is a weapon of greater power than almost any in his arsenal. Unlike other affirmative defenses, qualified immunity is one that must be overcome by the plaintiff once raised, rather than proven by the defendant. It is intended to have broad coverage so as to protect as many public officials as possible, excluding only "the plainly incompetent and those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity covers a public officer sued in his individual capacity. It is not applicable to the official sued in his official capacity, as an official-capacity claim is essentially a suit against the government and therefore subject to the immunities applicable to the employing entity, such as Eleventh Amendment immunity. *Kentucky v. Graham*, 473 U.S. 159 (1985). Qualified immunity does not bar an action against a public officer in his *official* capacity for prospective

relief, as opposed to money damages. *Graham*, 473 U.S. at 167 n. 14.

A crucial feature of qualified immunity is the opportunity it affords a public officer to appeal a court's denial of immunity without waiting for a final judgment. Interlocutory appeals from summary judgment orders denying qualified immunity have become a routine practice in civil rights litigation. In 1995, the United States Supreme Court's decision in *Johnson v. Jones* called into question the defendant's ability to rely on immediate appeals on this issue. 515 U.S. 304 (1995). But since the *Johnson v. Jones* decision, the Eleventh Circuit Court of Appeals seems to be raising the hurdles that plaintiffs must clear in order to overcome qualified immunity, while continuing to entertain appellate jurisdiction where a factual issue is construed to constitute a "core qualified immunity" issue. A core qualified immunity issue is whether given conduct, supported



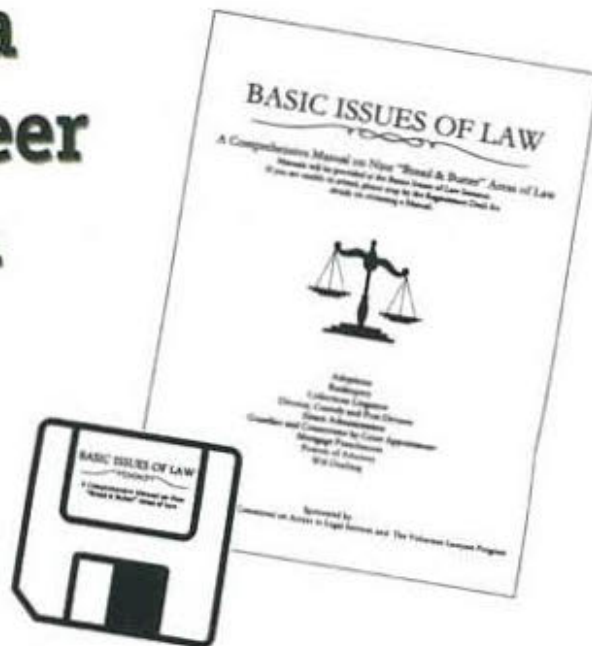
Lisa Huggins

Lisa Huggins, of the Office of Counsel for the University of Alabama at Birmingham, is a graduate of the University of Tennessee at Chattanooga and the University of Alabama School of Law. She served as law clerk to the Hon. Sam Taylor, Alabama Court of Criminal Appeals, and the Hon. James H. Hancock, United States District Judge. She formerly was an assistant city attorney

for the City of Birmingham after several years in private practice. Huggins is a member of *The Alabama Lawyer* Editorial Board.

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by evidence sufficient that a jury could base a decision on it, is objectively reasonable in light of clearly established law.

In his special concurrence in *McMillian v. Johnson*, 101 F.3d 1363 (11th Cir. 1996), Judge Robert Propst quoted an unidentified speaker as saying, "Keeping up with qualified immunity is a full-time job." *Id.* at 1366. By the time this article is published, the Eleventh Circuit will undoubtedly have issued roughly a dozen more decisions addressing qualified immunity. For the reasons explored below, lawyers representing individual government officials would do well to keep track of those opinions.

History and Purpose of the Immunity

The recognition of a qualified immunity for public officers is the result of a judicial balancing of interests between the need for a private damages remedy in the event of abuses of authority, and the need to shield public servants from the consequences of litigation. Lawsuits attacking the discretionary performance of public duties adversely affect officials' zealous pursuit of their public function. They also decrease productivity by taking the officials away from those functions. The social costs of allowing actions for damages against public officials include a detrimental effect on the ability to attract qualified persons to serve in those positions.

Harlow v. Fitzgerald, 457 U.S. 800, 814 (1992).

Harlow changed the face of qualified immunity, formerly known as "good faith" immunity, by eliminating any subjective component from its analysis. In most cases, a determination as to the presence of subjective good faith involves extensive discovery and will ultimately present a question of fact. Thus, the *Harlow* Court concluded, the inclusion of good faith as a component of qualified immunity is inimical to the countervailing interest of having immunity decided quickly on a motion to dismiss or for summary judgment. 457 U.S. at 816. Largely for this reason, the Supreme Court held that qualified immunity should be based on the objective reasonableness of the defendant's conduct in light of clearly established federal law. The standard established by *Harlow* is that:

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known.

Id.

Thus, when the defendant raises qualified immunity, the plaintiff has the burden of proving that a reasonable public officer would *not* have believed her actions to be lawful in light of clearly established law. This requires a showing that the right the plaintiff claims to have been abrogated was clearly established at the time of violation. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996). Rights may be clearly established by enactment of statutes or ordinances. More often, they are established by case law interpreting constitutional standards.

Anderson addressed the criteria for a rule of law to be "clearly established," and declined to recognize broad, general rights as sufficient to withstand this test. Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." 483 U.S. at 640 (emphasis added.) The factual framework of the right alleged-

ly violated must be clear enough to allow the reasonably prudent officer to recognize when he is infringing upon it.

Eleventh Circuit case law provides some guidance as to what constitutes a violation of a clearly established constitutional right. For example, in *Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996), the court affirmed the denial of qualified immunity to a social worker at a state mental health facility. The defendant social worker knew that the plaintiffs' son had threatened suicide and tried to injure himself, yet took him off close observation within two days after he had attempted to hang himself. The social worker also failed to notify any psychiatrist or psychologist about this behavior, and failed to continue protective measures that had been put in place for the boy. If the jury found this evidence to be true, the court said, it would constitute deliberate indifference to the boy's serious medical needs in light of a prior case with very similar facts. At the time of the boy's injury, there was a clearly established Eighth Amendment right for the professionals at the defendant mental health center not to be deliberately indifferent to his mental health needs. 74 F.3d at 1042-43. As in the prior case (*Greason v. Kemp*, 891 F.2d 829 [11th Cir. 1990]), a reasonable person in the social worker's position would have known that her conduct constituted deliberate indifference to the decedent's rights.

Also, in *Cooper v. Smith*, the court denied qualified immunity to a Georgia sheriff who refused to renew the commission of the plaintiff, a deputy sheriff, after the plaintiff cooperated with the Georgia Bureau of Investigation on a probe into corruption in that sheriff's department. 89 F.3d 761 (11th Cir. 1996). At the time of the deputy's non-renewal, it was clearly established that it was a violation of an employee's First Amendment rights to take adverse employment action because of the employee's cooperation with a law enforcement inquiry into corruption. Prior cases put a reasonable sheriff in the defendant's position on notice that it was unconstitutional to refuse to continue the plaintiff's employment for cooperating with the investigation.

Another sheriff was refused qualified immunity in *Tindal v. Montgomery County Comm'n.*, 32 F.3d 1535 (11th Cir. 1994). There, the plaintiff dispatcher was terminated after she testified against the sheriff in a sex and race discrimination case brought by other employees. In the discrimination case, the trial judge had warned the sheriff not to retaliate against the dispatcher for her testimony. In *Tindal*, the Eleventh Circuit found that the dispatcher's testimony was protected by the First Amendment; that there was no evidence that it impeded her work or that of the sheriff's office; that there was sufficient evidence from which a jury could find that the stated reason for the dispatcher's termination was pretextual; and that, given the judge's warning, no reasonable person in the sheriff's position could have failed to realize that terminating the dispatcher would constitute retaliation for her protected speech. Therefore, the sheriff was not entitled to qualified immunity.

In *McMillian v. Johnson*, the court of appeals denied qualified immunity to a county sheriff, an investigator, and an Alabama Bureau of Investigation agent. 88 F.3d 1554 (11th Cir. 1996), *modified*, 101 F.3d 1363 (11th Cir. 1996), *reh'g en banc denied* 109 F.3d 773 (11th Cir. 1997). The plaintiff, McMillian, was charged with murder, tried and convicted. Witnesses later recanted and the conviction was overturned on appeal. The

Eleventh Circuit denied qualified immunity on the basis of evidence that the three conspired to hold the plaintiff on death row at Holman Prison while awaiting trial, for the purpose of punishing the plaintiff.

The plaintiff in *McMillian* had a clearly established Fourteenth Amendment right, as a pretrial detainee, not to be punished until he was convicted. The appellate court said that even though it found no case involving similar facts, the evidence of intent to punish precluded qualified immunity, as any reasonable official in the defendants' positions should have known that it was unconstitutional to intentionally punish a pretrial detainee. Because intent or purpose is an essential element of a Fourteenth Amendment violation, the evidence of defendants' intent could be considered in the qualified immunity analysis. The appellate court also found, based on evidence that the defendants presented coerced and perjured testimony in the plaintiff's criminal trial, that "every reasonable official would have known that coercing [a co-defendant] to testify falsely" would violate plaintiff's rights. 88 F.3d at 1570.

The issue of whether subjective intent may be considered in the qualified immunity analysis can be sticky. A comparison of *McMillian* and *Walker v. Schwalbe*, 112 F. 3d 1127 (11th Cir. 1997) with the *en banc* opinion in *Jenkins v. Talladega City Board of Education*, 115 F. 3d 821 (11th Cir. 1997), indicates that the legal analysis applicable to the particular constitutional right at issue determines the extent to which the official's intent may be considered.

Plaintiff's Burden in Overcoming Qualified Immunity

When a public official raises the defense of qualified immunity, the plaintiff bears the burden of showing that the rights allegedly violated were clearly established at the time of the constitutional transgression. *Barts v. Joyner*, 865 F. 2d 1187, 1190 (11th Cir. 1989). The Eleventh Circuit has for some time recognized the following two-part analysis for qualified immunity claims:

1. The defendant claiming immunity must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."

2. When defendant's burden is satisfied, the plaintiff bears the burden of proving that defendant's conduct "violated clearly established constitutional law."

Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988), quoting *Zeigler v. Jackson*, 716 F. 2d 847 (11th Cir. 1983). The second part of the test may be split into two analytical subparts, both of which are questions of law: the court must determine (a) the state of the clearly established law at the time of the defendant's act, and (b) whether there is a genuine issue of fact as to whether that conduct violated clearly established legal rights. *Courson v. McMillian*, 939 F. 2d 1479, 1487 (11th Cir. 1991) citing *Rich, id.*

Many recent Eleventh Circuit cases seem to skip over this two-part analysis, probably because in most cases it is somewhat facile. Only rarely is it disputed that the official was acting within the scope of his discretionary authority as a government officer. See, e.g., *Suissa v. Fulton County*, 74 F. 3d 266, 269 (11th Cir. 1996).

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Usually, the real issue to be addressed at the outset is whether the right that the plaintiff claims was indeed clearly established.

If the violation claimed by the plaintiff has *not* been established at the time of the incident at issue, then the defendant is due to be dismissed based on his immunity. The clearly established nature of the right is a question of law for the trial court. If the court determines that the right is clearly established, the question becomes whether a reasonable public official could have believed that his conduct was lawful. *Johnson v. Clifton, id.*

This year, the Eleventh Circuit expressed the plaintiff's burden in terms of another two-part test which apparently assumes that defendant has met his burden under the first step of the *Rich* test. According to the panel in *Vista Community Services v. Dean*, in order for a plaintiff to defeat the qualified immunity defense, he must show:

- (i) that Defendants' conduct violated his clearly established [constitutional] rights, and
- (ii) that a reasonable government official would have been aware of those rights.

107 F.3d 840, 844 (11th Cir. 1997).

Since the purpose of qualified immunity is to avoid, to the extent possible, even participating in the litigation, these questions will usually be addressed in either a motion to dismiss pursuant to Rule 12(b)(6), or in the context of a motion for summary judgment.

The United States Supreme Court has recognized that qualified immunity questions should be addressed at the earliest possible stage of the litigation. *Siegert v. Gilley*, 500 U.S. 226 (1991); *Hunter v. Bryant*, 502 U.S. 224 (1991).

In many cases, particularly those involving the actions of police officers, there will be a factual dispute over exactly what did happen (e.g., how much force the officer used in effecting an arrest.) Because *Fed. R. Civ. P. 56* requires the courts to examine the record in the light most favorable to the non-movant, the question of whether the plaintiff's rights were violated must be decided based on the assumption that the plaintiff's evidence is taken as true, and all inferences drawn in her favor. *Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996).

Even so, the plaintiff's burden is heavy. Since the *Johnson v. Jones* decision, the Eleventh Circuit has honed the standard set forth in *Harlow*, *Malley* and *Creighton* such that even if the law alleged to be violated is clearly established, the plaintiff still has the burden of showing that "when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *Post v. City of Ft. Lauderdale*, 7 F. 3rd 1552, 1557 (11th Cir. 1993), *modified*, 14 F. 3rd 583 (11th Cir. 1994).

The *Post* opinion as modified withdrew language in the original opinion to the effect that a plaintiff must produce evidence to allow a fact finder to find that *no* reasonable person in the official's position could have thought the situation justified the acts at issue. However, *Foy v. Holston*, 94 F. 3d 1528

(11th Cir. 1996) strengthened the *Post* panel's modified conclusion with double negatives:

No jury could find that it would have been unlawful for [workers in defendants' situation] to do as Defendants did *if* the worker lacked discriminatory intent. More important, *no jury* could find that reasonable child custody workers *would never have done* the things defendants did but for a discriminatory intent.

94 F. 3d at 1535 (emphasis added.)

The *Foy* panel held that even with evidence in the record of discriminatory intent on the part of the defendants, qualified immunity may be available. "That state officials can act lawfully even when motivated by a dislike or hostility to certain protected behavior by a citizen is well established. [Citation omitted.] That state officials can be motivated, in part, by a dislike or hostility toward a certain protected class to which a citizen belongs and still act lawfully is likewise well established. [Citation omitted.]" 94 F. 3d at 1534.

Foy's conclusion that, under the facts in that case, evidence of discriminatory intent was not enough, of itself, to overcome a motion based on qualified immunity is consistent with post-*Harlow* Eleventh Circuit and

Supreme Court precedent establishing that an official's subjective intent is irrelevant to the analysis of objective reasonableness. *See Lassiter v. Alabama A&M University*, 28 F. 3d 1146, 1150 (11th Cir. 1994)(on rehearing *en banc*), *citing Anderson*, 483 U.S. at 641. *Lassiter* quoted with approval the decision in *Post*, which declared,

[I]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. 7 F. 3d at 1557.

Foy also emphasized the fact that there was evidence of sufficient lawful motivation, along with the evidence of discriminatory intent, on the part of the defendants. This evidence essentially made it a case of mixed motives. In the presence of evidence of valid reasons for the actions, the defendants were entitled to qualified immunity. 94 F.3d at 1535-36.

While the facts of the case at bar need not be the same as those in the case law held up as showing that the defendant violated a clearly established constitutional right, they do "need to be materially similar" in order for the plaintiff to overcome a claim of qualified immunity. *Adams v. St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1573 (11th Cir. 1992), *quoted in Lassiter, id.* For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violated federal law *in the circumstances*.

28 F.3rd at 1150 (emphasis in original).

The language in *Lassiter* and *Foy* strongly indicates that, with-



out a case "on point" with regard to the specific conduct undertaken by the defendant official, the official is probably due to be dismissed as an individual defendant. Two other cases contain even stronger statements about the need for a plaintiff to cite a case with nearly identical facts. Consider the Circuit's language in *Bates v. Hunt*:

We know of no appellate decision on the Equal Protection clause that holds that the length and the nature of experience in government service cannot be relied on in fixing the pay of employees doing similar work...Nothing in the Equal Protection clause plainly says that relevant experience cannot be considered.

3 F.3d 374, 379 (11th Cir. 1993). Two years later, in *Barnette v. Folmar*, the court said:

No case binding in this circuit clearly established as a legal matter that plaintiffs' resignations were, in these circumstances, discharges. And, no case has been cited to us that clearly established (in 1990 before Wilson spoke publicly) that a violation-of-liberty-interest claim would arise where the employee *resigned* his employment...and where the employer's stigmatizing statements were made *after* the employee had resigned.

64 F.3d 598, 601 (11th Cir. 1995) (emphasis in original). See also *Suissa*, 74 F.3d at 269-70.

Finally, in *Jenkins v. Talladega City Board of Education*, an en

banc court of appeals vacated a panel decision refusing to grant qualified immunity to school officials in a search context. 115 F.3d 821 (11th Cir. 1997). The parents of two eight-year-old girls sued the school board and individual teachers claiming that the elementary school students' Fourth Amendment rights were violated by a strip search conducted to find another student's missing seven dollars. The court held:

Applying the principles explicitly stated in *Lassiter*, we conclude that, at the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible.

115 F.3d at 828.

Seemingly to the contrary, however, *Walker v. Schwalbe*, 112 F.3d 1127 (11th Cir. 1997), held that in First Amendment retaliatory discharge/demotion claims, subjective intent or motivation "is a critical element of the alleged constitutional violation" and therefore must be considered as part of the qualified immunity analysis. Since the plaintiff produced substantial evidence that his protected speech embarrassed the defendant and provided a motive for retaliation, the court assumed at the summary judgment stage that the defendants did indeed retaliate against him for his speech. The *Walker* court found that the facts of several earlier First

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Amendment employment cases from the Supreme Court and the Eleventh Circuit were "materially similar to the instant case." This factual similarity seems to be the only way to reconcile *Walker* with *Foy* and *Jenkins*.

Digression on State Immunities

Qualified immunity, as discussed in this article, is a defense against federal causes of action. Suits against individual officials and employees based on state causes of action are barred by sovereign immunity as contained in Article I, Section 14 of the Alabama Constitution, which bars suit against the state in all but certain given circumstances. Article I, Section 14 also bars suits against an official when the suit is, in effect, one against the state. *Alabama State Docks v. Saxon*, 631 So. 2d 943 (Ala. 1994). However, sovereign immunity does not bar a suit against state officers for "torts committed willfully, maliciously, and outside the scope of their authorities." *McMillian*, 88 F3d 1554, at 1572.

If a suit against the officer in his individual capacity is based upon the officer's performance of a discretionary function, the officer also has the defense of the discretionary function immunity. *Nance v. Matthews*, 622 So. 2d 297 (Ala. 1993). Discretionary function immunity protects officials from liability for their errors in judgment in performing discretionary acts, "those as to which

there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances." *Wright v. Wynn*, 682 So. 2d 1, 2 (Ala. 1996). This state-law immunity does not, however, protect an official acting in bad faith, willfully, maliciously or fraudulently. *Id.*

To make the whole area more confusing, Justice Cook's concurring opinion in *Rorer v. State*, 674 So. 2d 1277 (Ala. 1996) equates the terms "discretionary function immunity" and "qualified immunity." In *Rorer*, the Alabama Supreme Court declined to adopt the federal courts' doctrine allowing immediate appeals where state employees are denied immunity. However, in *Rorer*, the issue on appeal was not an individual employee's qualified immunity, but the state agency's sovereign immunity pursuant to Article I, Section 14. The United States Supreme Court

upheld the state courts' right to decline to follow the federal procedural rules regarding interlocutory appeals earlier this year in *Johnson v. Fankell*, ___ U.S. ___, 117 S. Ct. 1800 (1997).

Appealability

The immediate appealability in federal court of an order denying qualified immunity is a powerful tool. If the court denies a motion to dismiss or for summary judgment which is based on

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The Alabama State Bar recently named Montgomery attorney **Laura A. Calloway** director of its Law Office Management Assistance Program, becoming one of only 14 other state bars in the nation to implement such a pro-



Laura A. Calloway

gram. Last year, the bar's Solo Practitioners and Small Firms Task Force recommended the formation of the program to provide office management information and services to the large percentage of the bar engaged as solo practitioners or in firms of five lawyers or less. A library of materials on law office management will be housed at state bar headquarters.

Calloway most recently was engaged in the private practice of law as a shareholder of Blanchard & Calloway, P.C. She was previously employed as assistant legal officer of Regions Bank. She is a graduate of Troy State University and received her law degree from the Jones School of Law in January 1981.

qualified immunity, public official defendants have traditionally been allowed an interlocutory appeal from that decision. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This was one of the few exceptions to the general rule against interlocutory appeals except in those cases specifically set forth in 42 U.S.C. § 1292 and Fed. R. Civ. P. 54(b). Sometimes this can result in repetitive appeals. See, e.g., *Vista Community Services, supra*.

In the case of qualified immunity, the courts reasoned, allowance of an interlocutory appeal was part and parcel of the defense. Without it, the public officer would effectively be denied the benefits of immunity in the event that the trial judge misinterpreted the law or chose not to acknowledge the strength of the doctrine. *Mitchell* at 526-28; see also *Flinn v. Gordon*, 775 F.2d 1551 (11th Cir. 1985).

Johnson v. Jones arguably reined in the seemingly automatic right to appeal a denial of qualified immunity. *Johnson* arose from the Seventh Circuit's refusal to exercise appellate jurisdiction over an appeal from the district court's denial of qualified immunity. 515 U.S. 304, 115 S.Ct 2151, 2153, 132 L. Ed. 2d 238 (1995). *Jones*' suit alleged that he was arrested after police found him on the street in an insulin seizure. He sued five policemen, claiming that they used excessive force in his arrest and that they later beat him at the police station.

Three of the officers filed a motion for summary judgment at the conclusion of discovery on the ground that, whatever evidence there might be against other defendants, there was no evidence of excessive force or other wrongdoing against those three officers. The district court, however, ruled that there was

substantial circumstantial evidence to support a theory that they were at least present when *Jones* was beaten. Citing Seventh Circuit precedent establishing potential liability if police officers allowed others to beat the plaintiff, the trial court denied their motions.

When the defendants appealed this decision, the Seventh Circuit dismissed on the ground that the appellants were challenging the trial court's determination that sufficient evidence existed to present a triable issue of fact. This was not an appealable "final decision," according to the high Court. In order to be appealable, the issue must be "purely legal": Does a given set of facts support a claim of violation of clearly established law? Since the defendants were appealing the trial court's determination of evidentiary sufficiency, as opposed to its construction of clearly established law, there was no appellate jurisdiction.

Had the respondent in *Jones* cast his appeal in terms of a challenge to the district court's conclusion that Seventh Circuit law established a right not to have police officers stand by while other police officers attack an arrestee, would the result have been the same? The answer to this question is far from clear. Justice Breyer's opinion indicates that the holding is based largely on the police officers' specific argument that there was no evidence of their personal involvement in the beatings. See *id.* at 2153-54.

The Eleventh Circuit Court of Appeals has interpreted *Johnson* as posing no impediment to its appellate jurisdiction over "core qualified immunity" issues. *Cottrell v. Caldwell*, 85 F. 3d 1480, 1484 (11th Cir. 1996), citing *Johnson v. Clifton*, 74 F.



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3rd at 1091. Any issue which is defined as an abstract issue of law relating to qualified immunity is subject to appellate jurisdiction; if the denial is based even in part on a "disputed issue of law," then appellate jurisdiction obtains, according to *Cottrell*. After *Cottrell*, it is clear that a decision based on a "disputed issue of law" may constitute a judicial recognition of whether the facts of other cases as compared to the facts of the case at bar compel a determination that the defendant official "violated clearly established constitutional rights of which a reasonable person would have known."

The court in *Cottrell* recited in detail the facts before the trial court in order to undertake its legal analysis. The Eleventh Circuit panel acknowledged the *Johnson v. Jones* rule that appellate jurisdiction does not extend to a trial court's findings regarding evidentiary sufficiency, relying on the Court's subsequent decision in *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed. 2d 773 (1996).

In *Behrens*, the Ninth Circuit had declined jurisdiction over a second appeal of a qualified immunity claim from a district court's nonspecific order stating that there were factual issues remaining as to defendant Behrens on a constitutional claim. 116 S.Ct. At 838. The Supreme Court granted certiorari, and distinguished Behrens' case from *Johnson* by stating that the latter case did not overrule the principle that summary judgment determinations on qualified immunity which involve "abstract issues of law" are appealable. "*Johnson* permits petitioner to claim...that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'" *Id.*

The latter statement by the *Behrens* court is probably the best definition of a core qualified immunity issue. To be appealable, the issue must not be whether the evidence is sufficient to support the fact finder's inference that the defendant actually participated in activity which violated clearly established constitutional rights. Rather, it must be whether, taking the evidence of the defendant's

particular wrongdoing in the light most favorable to the plaintiff, and applying the principles enunciated in *Harlow* and other qualified immunity cases:

- (1) the constitutional right which the plaintiff claims to have been violated was clearly established; or
- (2) the defendant's conduct violated clearly established law.

See *McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir. 1996). Therefore, it appears that a "core qualified immunity" determination over which an appellate court may exercise jurisdiction ascertains whether the plaintiff's version of the defendant's alleged constitutional violation is not objectively reasonable in light of established law showing that the particular conduct alleged is unconstitutional.

Practical Applications

Sometimes, the best defense is a good offense. Lawyers representing government officials sued individually for constitutional or other federal violations should strongly consider the advantages of asserting the qualified immunity defense very early in the litigation. If there is no clearly established law regarding the subject of the complaint, the individual officer should be dismissed. Even if the law is clearly established, but there is no statutory authority or case law encompassing a fact situation very similar to that described in the complaint, the defense should be difficult for a plaintiff to overcome based on recent precedent.

If the defense fails in the trial court, even at an early stage, there is the option of an interlocutory appeal. In such appeals, the appellate argument must be based on a core qualified immunity issue, rather than the sufficiency of the evidence. On the other hand, an opponent may be able to convince the appellate court that it has no jurisdiction to hear the appeal by arguing that the trial court's decision did not involve a question of law on a core qualified immunity issue, but merely a determination of evidentiary sufficiency. ■

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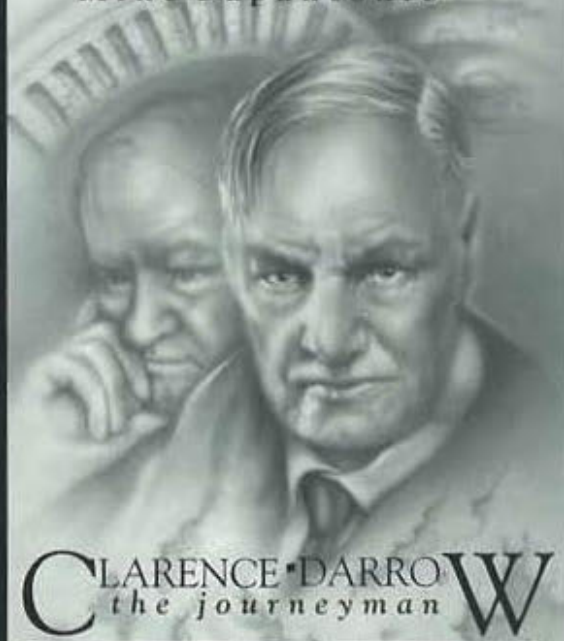
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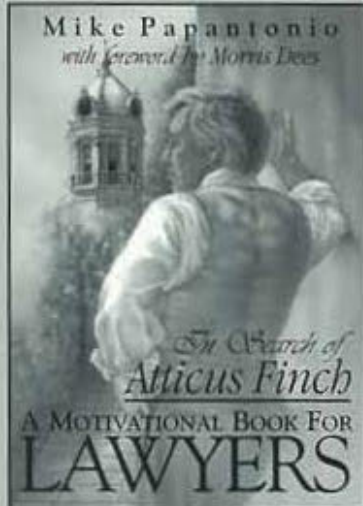
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