

The Alabama Lawyer

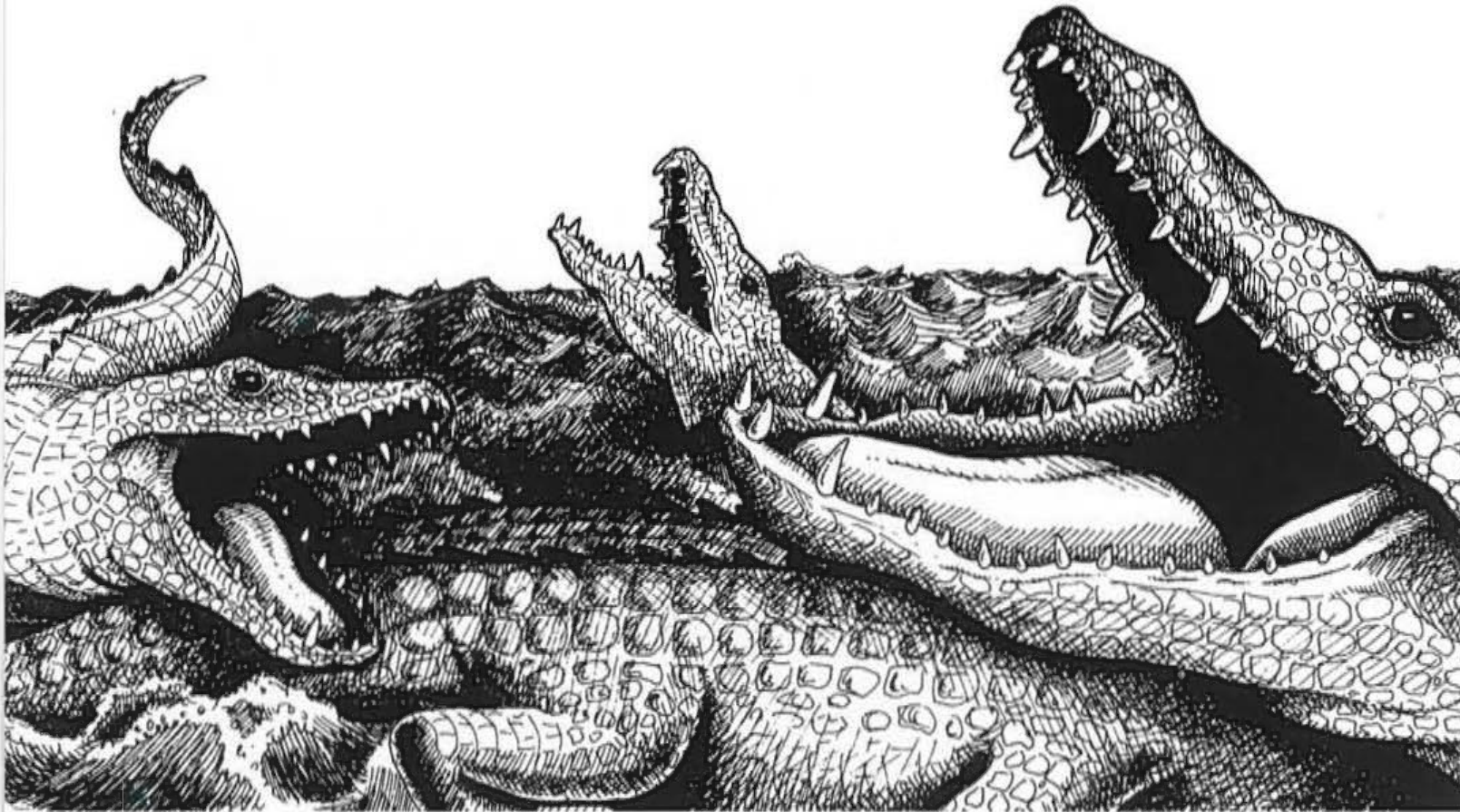
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The Alabama Lawyer

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On the Cover

ASB President Sam Rumore and family — The Rumores are standing before Arlington, built in 1842, owned by the City of Birmingham and Birmingham's last remaining Greek Revival antebellum home. The scene is appropriate since Mr. Rumore served as chair of the Jefferson County Historical Commission for many years. From left to right are son Samuel Rumore, 17, a senior at John Carroll Catholic High School; wife Pat Rumore, also a member of the Alabama State Bar; Mr. Rumore; daughter Claire Rumore, 21, a senior at Auburn University; and daughter Theresa Rumore, 19, a sophomore at the University of Alabama.

—Photograph by Joe Aloia, Birmingham

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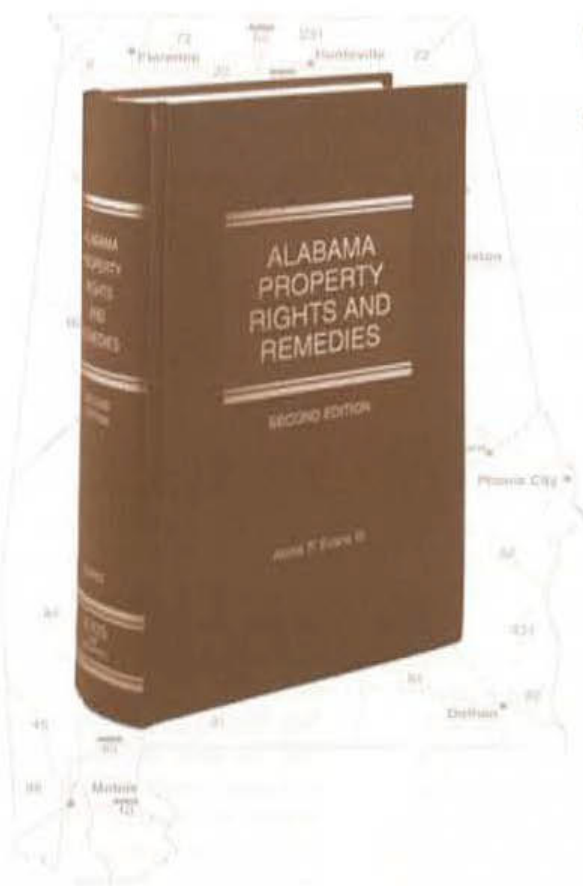
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PRESIDENT'S PAGE

By Samuel A. Rumore, Jr.

Wow! It Happened

An Open Letter to the Members of the Alabama State Bar

July 15, 2000



Samuel A. Rumore, Jr.

One year ago I learned that you had selected me to be your president-elect. What tremendous news! The emotions—excitement, joy, elation. After receiving the call, I hugged my wife, Pat, and the first words I remember saying were: "Wow! It happened." So here it is, one year later, and I can take this opportunity to say to you members of the Alabama State Bar "thank you" for making it happen. I was honored to serve as your president-elect last year, and I am honored to serve now as your president for the 2000-2001 term.

It was exactly ten years ago that I became a bar commissioner. I still remember the words of my law partner and mentor in the law for more than 25 years, **Nina Miglionico**. Miss Nina said to me: "As a commissioner, you will meet some of the best lawyers in the State of Alabama. And you know, the bar presidents come from the commission." Well, I have met some of the best lawyers, and I can call them my friends. Also, I can truly say that our bar commission is a thoughtful, dedicated, hard-working association. Thank you, commissioners, for your service to and interest in your profession.

Most of you know that besides my love for the law I also have a love of history. This letter reflects that. In the first paragraph, I looked back one year. In the second paragraph, I looked back ten years. Now I am going back 100 years. Both of my grandfathers were immigrants to this country. I never knew my

father's father, but he lived a challenging life and took advantage of the opportunities offered in America. He died in the 1930s. My mother's father also emigrated as a young man. I knew him as a boy. He was a great provider and raised a large family. He died in the 1960s. Both of these men came to this country from Italy in 1900, exactly 100 years ago this year. I hope that they would be proud that their grandson became a member of the Alabama legal profession and is now its president.

In conclusion, what does the future hold? I am the 124th president of this association. I am the first to take office in the 21st Century. I am possibly the first Alabama State Bar president to be married to a member of the Alabama State Bar. Our association continues to evolve and change as the times change. We have a diverse membership. There are more women and black lawyers in our association than ever before. Our leadership needs to reflect this diversity. I am hopeful in the not too distant future that the Alabama State Bar will elect a woman lawyer as president and a black lawyer as president. We need to get these historic firsts behind us. My wish for the future is that any lawyer who works hard in this profession and for this profession can be selected to lead this profession. I hope that one day that lawyer can say as I did, "Wow! It happened." ■

Sincerely yours,
Samuel A. Rumore, Jr.



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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

A Juror's Modest Proposal



Keith B. Norman

Lawyers often say they wish that they could serve on a jury and find out what goes on the jury room. They are routinely called but seldom serve because they are struck. Last spring, I was called for jury duty. Naturally, I imagined that I would spend the week being assigned to different cases only to get struck. Miracle of miracles, however, I did not get struck. I got the chance to serve as a juror in a criminal trial.

The trial lasted a day and a half. The judge did an excellent job of conducting the trial and was most solicitous of the jurors. The assistant district attorney did a good job of prosecuting the case and defense counsel vigorously represented his client. At the conclusion of the trial, the judge charged the jury and we retired to the jury room to deliberate. Our first item of business was to select a foreman to preside over the deliberations. To my surprise I was elected foreman. During our deliberations I was impressed with how serious the members of the jury were about their responsibility in reaching a verdict. They all understood, as I did, that the jury's decision could result in another citizen's losing his freedom. I believe this burden weighed heavily upon each of us as we studied the physical evidence admitted during the trial and recalled the testimony of the witnesses. Our deliberations resulted in finding the defendant guilty on all counts.

After serving as a juror, I believe there are at least a couple of simple ways that we can improve the deliberation process of Alabama juries. For example, serving as a juror and being a lawyer, I had a better understanding of the court's instructions and the elements of the crimes with which the defendant was charged than the lay members of the jury. I believe that not

allowing the jury to have a copy of the court's instructions in the jury room impedes its effectiveness in applying the law to the facts. I think this is true for both criminal and civil cases. Although I am not exactly sure of the rationale for not giving juries a written copy of the court's instructions, I do not think doing so would interfere with the province of the jury as the finder of fact or infringe on the role of the court as interpreter of the law. Can we really expect a jury to justly apply the law when it has been read to them by the court in a long-winded monologue which they then must remember, word for word, and apply to facts gleaned from the trial?

I think jurors would welcome having a copy of the court's instructions to review during their deliberations. I also think jurors would appreciate assistance in determining how to organize their discussions in the jury room. Jurors are given little in the way of guidance of what to do or expect once the jury room door is closed. The American Judicature Society (AJS) has studied this problem and developed "A Guide for Jury Deliberation." This guide is a pamphlet designed in a question-and-answer format for jurors. According to the AJS, research indicates that jurors often are uncertain about how to best select a presiding juror, resolve disputes, clear up confusion about testimony or evidence, or interpret the court's instructions. This guide could be adapted with little difficulty for use in Alabama and distributed during juror orientation.

Tennessee has studied jury reform for the last two years. The Jury Reform Commission of the Tennessee Bar Association recently released the final draft of its report which will be presented to the Tennessee Supreme Court for

action. The proposed changes include treatment and selection of jurors, opening statements, expert testimony, jury instructions, and the number and unanimity of jurors. Other states are studying jury reform as well. The AJS offers guidance in the area of jury reform with its guide, "Enhancing the Jury System—A Guidebook for Jury Reform."

Unquestionably, the jury plays a pivotal role in the American and Alabama legal systems. Sitting in the jury box made me appreciate this fact even more. Perhaps we can take a cue from the Volunteer State, the AJS and other states by at least adopting some basic measures to help improve jury deliberations. By doing so, we can help reassure the public of impartial verdicts rendered by peers, thereby improving public confidence in Alabama's judicial system. ■

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BAR BRIEFS



ASB President-elect designate Larry W. Morris, President Wade H. Baxley and President-elect Samuel A. Rumore at the annual meeting of the National Conference of Bar Presidents this past July in New York

• **Herman J. Russomanno**, a graduate of Cumberland School of Law, Samford University, and a member of the Alabama State Bar since 1976, recently became president of The Florida Bar. Russomanno practices in Miami with the firm of Russomanno & Borrello, P.A.



Herman J. Russomanno

• **Joel L. Williams** of Troy recently took over as governor of the Alabama District of Kiwanis International.



Joel L. Williams

• **Jerry C. Oldshue, Jr.** of the Tuscaloosa firm of Rosen, Cook, Sledge, Davis, Cade & Shattuck, P.A. has been admitted to membership in the Commercial Law League of America. The CLL, founded in 1895, is North America's premier organization of bankruptcy and commercial law professionals.

• The Alabama Criminal Defense Lawyers Association has elected new officers for 2000-2001. They are: **John A. Lentine**, president; **Ken Nixon**, president-elect; **Christine Freeman**, vice-president; **Richard Keith**, secretary; and **Bruce Gardner**, treasurer.

• **Sammye Oden Kok** of Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A. of Birmingham has been named president-elect of the American Academy of Matrimonial Lawyers.

• **Peyton Lacy, Jr.** of the Birmingham office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. has been selected a Fellow of the College of Labor and Employment Lawyers.

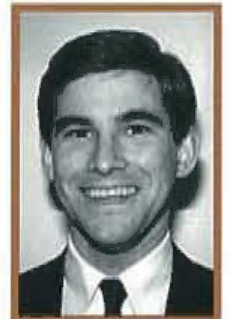
• Alabama State Bar Executive Director **Keith B. Norman** has been elected State Bar Director for the 2000-2002 National Association of Bar Executives Board of Directors.



Keith B. Norman

• **George M. Walker**, a partner in the Mobile firm of Hand, Arendall, L.L.C., has been admitted as a member of the Product Liability Advisory Council.

• Alabama **Attorney General Bill Pryor** has been elected to become a member of the American Law Institute, a select group of only 3,500 legal scholars from throughout the world, whose mission is to improve the law and its administration. Pryor is the first attorney general of Alabama ever elected to the Institute.



Bill Pryor

Organized in 1923, the Institute's purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

• The **Montgomery Chapter of the Federal Bar Association** again will sponsor a full-day, six-hour seminar on the fundamentals of federal practice, on Friday, December 1, 2000, at the Montgomery Civic Center. This year, the seminar will focus on the fundamentals of federal criminal practice, federal employment law practice, and federal evidentiary issues. Speakers will include federal judges and experienced litigators.

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Mac B. Greaves
W. McCollum Halcomb, '82
Joel R. Hamner, '95
Judge Don L.
Hardeman, '79
Alicia K. Haynes, '87
Stephen D. Heninger, '77
Delacie C. Hester
Edwin E. Humphreys, '80
David M. Hunt
David G. Hymer
Judge Inge P. Johnson
Frank Steele Jones
Robin Windham Jones, '94
Roy F. King, '85
John T. Kirk
Robert W. Lee, Jr., '78
John A. Lentine, '87
Bruce M. Lieberman, '86
Curtis O. Liles, III
David W. Long-Daniels
Judge John L.
Madison, Jr., '76
Thomas J. Mahoney, Jr.

Karen L. Mastin
J. Anthony McLain, '77
Steven T. McMeekin
Judge Vanzetta Penn
McPherson
R. Boyd Miller
T. Kurt Miller
Anne W. Mitchell, '78
Judge Tamara O. Mitchell
Judge Roger M.
Monroe, '72
Patricia N. Moore
Allan L. Marton
Amy K. Myers
Russel Myles, '86
G.M. "Jack" Neal, '77
Carol Sue Nelson, '77
Judge Edwin L. Nelson, '69
Steven L. Nicholas
Ralph R. "Reyn"
Norman, III, '82
Thomas L. Oliver II, '89
Judge Jahn E. Ott, '81
Lewis W. Page, Jr.
Lenora W. Pate, '85
Adam K. Peck
John M. Peek
Mark B. Polson, '74
Denise J. Pomeroy, '89
Charles A. Powell, IV
Patricia J. Pritchett, '90
Caryl P. Privett
R. David Proctor
Judge T. Michael Putnam
C. Michael Quinn, '75
Bruce A. Rawls, '79
Donald R. Rhea
Daniel M. Roberts
James E. Robertson, Jr.
Bruce F. Rogers
J. William Rose, Jr.

Judge William R. Sawyer
John D. Saxon
Assoc. Justice Harold
F. See
Barber "Bob"
Sherling, Jr., '75
Wilbur G. Silberman
David C. Skinner
Judge James S. Sledge
Dianne Smitherman, '93
E. Berton Spence
Tommy Spina, '78
William B. Stewart, '90
Anne R. Strickland, '92
Henry C. Strickland
Joseph W. Strickland
Sidney C. Summey, Jr., '77
Will Hill Tankersley, Jr.
Wendy N. Thornton, '96
Jill Lolley Vincent
Judge J. Scott Vowell
Charlie D. Waldrep, '76
James F. Walsh, '76
Howard P. Walthall
A. Brand Walton
John D. Watson, III
Jeffrey H. Wertheim
J. Mark White, '74
John P. Whittington, '72
Brian T. Williams, '79
James C. Wilson, Jr.
Judge Thomas A. Woodall
Rolph H. Yeilding
Lee H. Zell

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



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Tina Stamps announces the opening of her office at 1206 Broad Street, Suite

208, Phenix City, 36867. Phone (334) 448-0302.

John W. Waters, Jr. announces the opening of his office at 214 N. Prairie Street, Union Springs, 36089. Phone (334) 738-5505.

H. Marie Thigpen announces the opening of her solo practice at 422 S. Court Street, Montgomery, 36104. Phone (334) 832-4445.

G. Warren Laird, Jr. has joined Chicago Title Insurance Company and Ticor Title Insurance Company as assistant area counsel.

Robert K. Jordan announces the opening of his new office at 202

Alabama Avenue, Southwest, Fort Payne, 35968. Phone (256) 845-2423.

Among Firms

Sexton, Cullen & Jones, P.C. announces that **Byron W. Phillips** has been made a shareholder in the firm.

Taylor & Smith, P.C. announces that **Tommy C. Ritter, Jr.** has become associated with the firm.

John M. Laney, Jr. and **Roger C. Foster** announce the formation of **Laney & Foster, P.C.** Offices are located at Two Perimeter Park, South, Suite 404, East, Birmingham, 35243. Phone (205) 298-8440.

Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers," he says. "They have simply learned how to market their services."

A successful sole practitioner who once struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals

are unpredictable. You may get new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of new clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a FREE copy of this report by calling 1-800-562-4627, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>

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Watson, Jimmerson, Givhan & Martin, P.C. announces that **LaTasha A. Meadows** has become associated with the firm.

Nisen & Elliott announces that **Elena A. Lovoy** has become an associate of the firm.

Gilberg & Kiernan announces that **Barry W. Walker** has joined the firm as an associate in the firm's Washington, D.C. office.

Lietman, Siegal & Payne, P.C. announces that **Suzanne D. Paulson** has joined the firm as a shareholder.

Janecky Newell, P.C. announces that **Harry V. Satterwhite** has been named a partner in the firm.

Spain & Gillion, L.L.C. announces that **Walter F. McArdle** has become a member of the firm and that **Jon M. Hughes, Frances H. Jackson** and **J. Clinton Pittman** have become associated with the firm.

Intergraph Corporation announces that **David Vance Lucas** has joined the company as vice-president and general counsel.

James W. Killion and **Edward P. Rowan** announce the formation of **Killion & Rowan, P.C.** Offices are located at 169 Dauphin Street, Mobile, 36633. Phone (334) 432-4600.

Crumpton & Associates, L.L.C. announces that **G. Hal Walker, Jr.** has joined the firm as an associate.

Thigpen & Tipper announces that **Charlotte C. Christian** has joined the firm.

Hogan & Hartson, L.L.P. announces that **T. Robert Rehm, Jr.** has joined the firm. Offices are located in McLean, Virginia.

The University of Alabama announces that **George B. Gordon** has been named university counsel.

Wills & Simon announces that **Elizabeth S. Wills** has become an associate of the firm.

Gladden & Sinor, P.C. announces that **Roland H. Beason** has become associated with the firm.

Burr & Forman L.L.P. announces their merger with **Veal & Associates, L.L.C.**

Thomas A. King, Attorney, P.C. announces that **Donna F. McCurley** has become a partner in the firm and that the firm name has changed to **King & McCurley, Attorneys, P.C.**

Christopher P. Turner, P.C. announces that **Gregory L. Watt** has become associated with the firm.

Hall, Conerly, Mudd & Bolvig, P.C. announces that **Christy C. Osborne** has become associated with the firm.

JM Family Enterprises, Inc. announces the recent promotion of **L. Taylor Howard, III.** Howard has been named vice-president and general counsel for Southeast Toyota.

Wilmer, Cates, Fohrell & Kelley, P.A. announces that **Shannon S. Simpson** has become a shareholder in the firm.

Hare, Wynn, Newell & Newton, L.L.P. announces that **Michael D. Ermert, Nolan E. Awbrey** and **Donald P. McKenna** have become partners of the firm.

Berkowitz, Lefkovits, Isom & Kushner, P.C. announces that **James H. White, IV** has joined the firm as an associate.

Constangy, Brooks & Smith, L.L.C. announces that **Minda R. Campbell** has become associated with the firm.

Thomas Franklin Campbell and **G. Richard Baker** announce the formation of **Campbell & Baker, L.L.P.** Offices are located at 150 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 278-6650.

Ferguson, Frost & Dodson, L.L.P. announces that **Champ Lyons, III, James R. Buckner, Jr.** and **William Bradford Kittrell** have joined the firm as associates.

Rogers, Young, Wollstein, Jackson & Whittington, L.L.C. announces that **George D. Robinson** has joined the firm as partner and that **Polly E. Russell** has become a partner.

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- Mike Lusk, Attorney, Fresno, CA

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MEMORIALS

Judge Richard L. Holmes

When Judge Richard L. Holmes died on May 2, 2000, Alabama lost a unique individual who possessed amazing talents. Over the course of his career he shared those unique gifts with all three branches of state government. He served as director of the Alabama Department of Industrial Relations and as the legal advisor to Governor Albert P. Brewer. Later, he served as a reading clerk for the Alabama Senate. But Richard Holmes is probably best known for his service as judge on the Alabama Court of Civil Appeals from 1972 until his "first" judicial retirement in 1989. He returned to active status in October 1993 at the request of the judges of the court and remained active until January 1999.



He excelled in his ability to understand and achieve results in all three branches of government. He enjoyed his roles of leader and statesman and achieved results through both compromise and power but never misused either, remaining focused on the objective of achieving a result that was correct and responsible. Many people we consider important and powerful in this state were a little more intelligent after seeking Judge Holmes' counsel. When Richard Holmes spoke, you listened. He was never guilty of being too subtle. One did not have to waste time wondering what he really meant when he spoke on an issue.

Born in Birmingham, Alabama on January 1, 1937, Judge Holmes was raised in Mobile. He attended Rhodes College and received his B.A. from the University of Alabama and his L.L.B. from the University of Alabama School of Law. He served in various teaching capacities at the University of Alabama School of Law, Huntingdon College, Jones School of Law and Auburn University of Montgomery. Judge Holmes served in the Judge Advocate General Corps of the United States Army prior to entering the practice of law. He loved his God, his family, the

State of Alabama and its citizens, and the law, in that order. Even on those occasions when duty compromised his ability to be with his family, his priorities remained constant.

No person who stood with him in any battle ever had to worry about his loyalty or courage. Those of us who had the privilege to stand beside him in time of conflict or struggle must recognize that our courage can never rise to the level exhibited by his wife, Jackie, and his daughters, Ashton and Leigh, as together they stood with him and fought the final battle.

Judge Holmes's commitment to ethics was unconditional. He served as chief judge of the Court of the Judiciary from 1987 to 1989. He served as chairman of the Judicial Inquiry Commission, and served on the Advisory Commission to the Canons of Judicial Ethics. Recently, he served as vice-chairman of the first Judicial Oversight Committee. His service on the Oversight Committee was recognized in July 1999 when he was presented the Commissioner's Award by the Alabama State Bar.

Judge Holmes was dedicated to any task he undertook. He allowed nothing, not even cancer, to prevent him from continuing his work as a member of the Board of Trustees of the University of Alabama. He attended the meetings regardless of how he felt or what anyone said. "I've got a few things I promised to do," was his typical response if anyone was bold enough to suggest that he compromise his schedule.

Judge Holmes possessed an uncanny ability to make people agree to do something whether they wanted to or not. Shortly before he was informed of his medical diagnosis he told me: "White, there will be no hand-wringing about me and this brain thing and you must promise me that you will see to that." Then, we set about to accomplish keeping our relationship the same up to our last visit three days before his death. We continued our typical rude dialogue in trying to accomplish the "schemes" he considered important.

It is always difficult when we have to deal with the final journey of a friend. Holmes made it easy and we traveled first class.

Ash, Joseph
Van Nuys, California
Admitted: 1938
Died: May 2000

Berry, Robert Allen
Montgomery
Admitted: May 5, 2000
Died: July 16, 2000

Capell, Jack Lowery
Montgomery
Admitted: 1935
Died: June 26, 2000

Hayes, Millard Brooks
Blountstown, FL
Admitted: 1942
Died: November 1999

Hillman, Charles H.
Mobile
Admitted: September 28, 1990
Died: July 7, 2000

Kierce, James Brunson, Jr.
Bessemer
Admitted: September 7, 1966
Died: July 9, 2000

Robison, Blanchard G., Jr.
Carrollton
Admitted: 1946
Died: January 1, 1999

Strickland, James Tyler
Mobile
Admitted: 1952
Died: April 5, 2000

Thrift, Thomas E.
Birmingham
Admitted: 1927
Died: July 30, 1999

Vann, David Johnson
Birmingham
Admitted: 1951
Died: June 9, 2000

Whaley, Harold Evans
Birmingham
Admitted: September 25, 1981
Died: May 23, 2000

Wilson, Jim Lester
Gadsden
Admitted: September 4, 1969
Died: June 7, 2000



He ignored pain in an effort to make others feel better. He would not approve of these observations. He accepted criticism much easier than he accepted praise. Yet, I think he would appreciate the maxim by Mark Twain: "Few things are harder to put up with than the annoyance of a good example." In dying, Judge Holmes showed all of us how to live with courage, with fearlessness and with consideration for one's neighbor.

George W. Cameron, Jr.

George W. Cameron, Jr. died on May 3, 2000, at his home in Montgomery. He is survived by his wife of 49 years, Rosemary Oliver Cameron, and two sons, John Oliver Cameron and Joseph David Cameron. A third son, George W. Cameron, III predeceased him, having died May 11, 1995.

He graduated from Hurt School 1944, entered the army on June 6, 1944 and served in the European Theater of Operations as an infantryman with the Rail Splitter Division.

Upon his return from service, George attended Huntingdon College for two years. He entered the University of Alabama in the summer of 1948 and graduated with an L.L.B. degree in August 1950.

He opened his law practice in Montgomery the same year and practiced continuously until the time of his death except for the time he served as trustee of debtor cases with the

He enjoyed laughter as much as anyone I have ever met. We can best preserve his memory by never forgetting those many things he did that made us laugh or made us better humans—often they were the same. We can also honor him by supporting the Richard L. Holmes Brain Tumor Treatment and Research Center at the University of Alabama in Birmingham.

— *J. Mark White, Birmingham*

United States District Court of Alabama, Northern Division, Middle District. He was an astute lawyer, dedicated to the profession and quick to share knowledge with the younger members of the bar.

George was a devoted husband and father. He spent his spare time in Snowdown, hitting golf balls.

Some would say he was eccentric, particularly members of his family, in that he never carried his wallet. He would park his Volkswagen on an incline so he could jump start it in case the battery was dead, which it usually was. He would ride home from Tuscaloosa the morning of the football game when everyone else was going to the game.

Montgomery County lost one of its best lawyers, and he will be sorely missed by all who knew him.

— *James W. Cameron, Montgomery*

Huey Dwight McInish

The Alabama State Bar lost one of its prominent members with the passing of Huey Dwight McInish on November 20, 1999.

Huey Dwight McInish was born in Houston County, Alabama, on December 11, 1923, the son of D.H. McInish and Willa Daughety McInish. After graduating from Houston County High School, Mr. McInish entered the University of Alabama and two years later he enlisted in the United States Army at the height of World War II. Mr. McInish was a member of the 406th Regiment of the 102nd Infantry Division and saw extensive action during the three years he served in the European Theater of Operations. Following the conclusion of his military service, Mr. McInish returned to the University of Alabama, where he concluded his education and received his law degree in 1949.

Mr. McInish was admitted to the Alabama State Bar in 1949, and returned to his hometown of Dothan to enter into private practice of law with the firm that would become, and to this day remains, Lee & McInish.

Mr. McInish was married to the former Clara Jean Wise of Samson, Alabama. He is survived by his beloved wife, Clara Jean, and by his son, Peter A. McInish, who is a partner in his law firm, daughter Ruth M. Williamson, a career law clerk for the Honorable Joel F. Dubina, and five grandchildren.

Mr. McInish was tireless in his devotion to his profession, and continued throughout his career to be actively involved in various leadership roles including service as president of the Houston County Bar Association in 1959 and as president of the Alabama

Defense Lawyers Association from 1982 to 1983. In addition to his membership in the Alabama State Bar, the Houston County Bar Association, the American Bar Association and the Alabama Defense Lawyers Association, Mr. McInish held distinguished memberships in the International Association of Defense Counsel and the International Society of Barristers. Mr. McInish was also a Fellow of the American College of Trial Lawyers.

As an active member of the First Baptist Church in Dothan, Mr. McInish served his church tirelessly in committee work, in individual ministry and in leadership roles as trustee, Sunday School teacher and deacon. Mr. McInish was equally giving of his time and talents within the Wiregrass community.

As a mentor to young attorneys, Mr. McInish provided a service to his profession and to his community that can not be overstated. Many a young lawyer, whether co-counsel or adversary, has turned to Dwight McInish for advice and guidance in a quiet, confident and unassuming manner that can only be appreciated by those who had the privilege of receiving it.

The Houston County Bar Association extends its heartfelt sympathies to Clara Jean, Pete, Ruth, and the grandchildren. The members of the Houston County Bar Association also express to the family, and to Mr. McInish's law partners, their heartfelt grief over their loss of our brother, mentor and friend. He was, to many of us, our moral compass. May God grant us the wisdom to find our way without him.

— *William C. Carn, III, president
Houston County Bar Association*

ARBITRATION AGREEMENTS

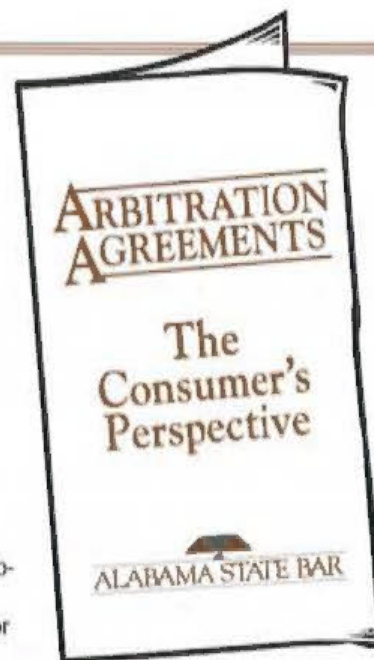
The Consumer's Perspective

Advantages and disadvantages to the consumer of mandatory binding arbitration, including the definition of arbitration and an arbitration agreement, the costs involved, what to expect in an arbitration and what consumers need to know in today's marketplace

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Professionalism Requirements for New Admittees— Change to Rule 9.A

In the Supreme Court of Alabama

August 23, 2000

Order

It is ordered that Rule 9.A., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, is amended to read as follows:

"A. Within twelve (12) months of being admitted to the Bar, or within twelve (12) months of being licensed to practice law in Alabama, whichever shall last occur, each lawyer shall complete a six- (6-) hour course in professionalism; provided, however, that lawyers who are exempt from these Rules pursuant to Rules 2.C.1. shall also be exempt from the provisions of this Rule 9.A. while they are so exempt. Once a lawyer's exemption under Rule 2.C.1. ends, the lawyer must complete the course in professionalism during the calendar year following the year in which the exempt status ends."

It is further ordered that this amendment is effective immediately.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 9:

"Note from the reporter of decisions: The order amending Rule 9.A., effective August 23, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 2d."

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

Certification of Lawyer—Change to Rule 7.1(d)

In the Supreme Court of Alabama

August 23, 2000

Order

It is ordered that Rule 7.1(d), Alabama Rules of Professional Conduct, be amended to read as follows:

"(d) communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4."

It is further ordered that this amendment be effective immediately.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 7.1:

"Note from the reporter of decisions: The order amending Rule 7.1, effective immediately, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So.2d."

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.



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LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

Institute's Annual Meeting

The Alabama Law Institute held its annual meeting during the Alabama State Bar's Annual Meeting in Orange Beach in July. The following were elected officers:

President: **James M. Campbell**, Anniston

Vice-President: **Representative Howard Hawk**, Arab

Vice-President: **Senator Roger Bedford**, Russellville

Secretary: **Bob McCurley**, Tuscaloosa

Executive committee members include:

David Boyd, Montgomery

Representative Mark L. Gaines, Birmingham

Richard S. Manley, Demopolis

Representative Demetrius C. Newton, Birmingham

Oakley W. Melton, Jr., Montgomery

Yetta G. Samford, Jr., Opelika

Senator Rodger M. Smitherman, Birmingham

Lt. Governor Steve Windom, Mobile

The Institute proposed, and the legislature passed, three bills during the 2000 Regular Session:

Mergers and Consolidation of Business Entities—Act No. 2000-211

Effective date: October 1, 2000

The sponsors were **senators Roger Bedford, Steve French and J.T. Waggoner** and **Representative Bill Fuller**.

Uniform Principal and Income Act—Act No. 2000-675

Effective date: January 1, 2001

The sponsors were **senators Rodger Smitherman and Zeb Little** and **Representative Mike Rogers**.

Uniform Determination of Death Act—Act No. 2000-710

Effective date: July 1, 2000.

The sponsors were **senators Ted Little, Larry Dixon and George Clay** and **representatives Mark Gaines and Bill Fuller**.

It was announced that the Institute was looking toward presenting several major revisions in the 2001 Legislature.

(Continued on page 300)

NEW 2000 Edition ALABAMA LAW OFFICE PRACTICE DESKBOOK, NINTH EDITION

by Robert McCurley, Jr.

This book has been a popular lawyer's handbook with attorneys since 1982. The new edition includes updated chapters on child custody, Corporations, Partnerships, LLCs, LLPs, and the new laws through the 2000 Regular Session of the Alabama Legislature.

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Revised UCC Article 9

Already adopted in 25 states, there is a target date for adoption in all states by July 1, 2001. The bill makes extensive changes in the current Article 9. One change will require filing of UCC statements to follow the borrower's residence, not where the property is located. This will mean that UCC filings for individuals living in Alabama will continue to be filed in Alabama. For those living outside of Alabama, such as a business entities formed in another state, the filing will be in the state of the domicile of the borrower, not Alabama. Further, the revision will provide that all filings in Alabama will be with the Secretary of State's Office, rather than some filings being in the local probate office and business filings in the Secretary of State's Office. This committee is chaired by Birmingham attorney **Larry Vinson** and is expected to complete its work this fall, with drafts available for review in December 2000.

Congress has enacted the "Electronic Signatures in Global and National Commerce Act." President Clinton signed Senate bill 761 into law June 10, 2000, with the section on electronic signatures effective October 1, 2000 and electronic

records provision effective March 1, 2001. The Institute is now beginning its study of the "Uniform Electronic Transactions Act" to complement the Act. This study is expected to be completed also in time for the 2001 Regular Session of the legislature. Upon completion it is expected that the committee will then look at the Computer Information Transactions Act.

HB-82 (Act 2000-677)

This DUI bill was changed after the July 2000 article went to press. The new DUI law, as signed by the Governor, amends section 32-5A-191 and provides that each person convicted for the first time must complete a DUI course; on second conviction serve a mandatory minimum of five days in jail or 30 days of community service; third conviction, a minimum of 60 days in jail; and upon a fourth conviction, the offense becomes a class C felony with a minimum mandatory jail sentence of ten days. Further, two convictions within a five-year period will cause the suspension of the offender's motor vehicle registration during the driver's license suspension.

Legislative Interns

The Institute is again accepting applications for interns to work in the

Governor's, Lt. Governor's, and Speaker of the House of Representative's Office during the 2001 Legislative Session, which will begin February 6, 2001. Those wishing for more information concerning this intern program may contact Penny Davis, associate director of the Institute.

For more information concerning the Institute or any of its projects contact Bob McCurley, director, Alabama Law Institute, by mail at P. O. Box 861425, Tuscaloosa, 35486-0013, by fax (205) 348-8411, by phone (205) 348-7411, or through the Institute's home page, www.law.ua.edu/ali.



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

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.



Coffee County

Established: 1841

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.



Enterprise Courthouse circa 1986 (photo by Sam Rumore)

Coffee County - Part II

As Coffee County continued to grow, another community began to rival Elba. Originally known as Drake Eye, it was approximately 18 miles southeast of Elba and had been settled before the Civil War. Three local families, the Carmichaels, Edwards and Bruners, donated the land to establish the town. One account claims that the name was changed from Drake Eye to Enterprise in 1884 at the suggestion of Reverend W. J. Hatcher, a Baptist minister and postmaster who considered this settlement an enterprising venture. Another account for the name claims that it was actually the name of the post office in the area and that the post office had moved to at least four different locations. This version of the story states that the name was selected by Congressman William Calvin Oates from a list of three that was submitted by Reverend Hatcher. When the "Enterprise" post office was finally moved to the

Carmichael Store, that place became known as Enterprise. In any event, no matter which version is correct, the town of Enterprise was incorporated in 1896.

According to the census of 1900, Elba had a population of 635 and remained the largest town in Coffee County. But upstart Enterprise was close behind with a population of 610. The next decade saw Enterprise bypass Elba significantly in population. The 1910 census showed Enterprise more than doubling Elba, 2,322 to 1,079. The gap between the two towns would grow even wider over the ensuing years. Today Enterprise has more than five times the population of Elba.

As Enterprise grew in significance, its citizens wanted the courthouse for their town. However, a provision in the 1901 Alabama Constitution stated that no county seat location could be changed within 20 years after the erection of a



Enterprise Courthouse in the 1930s



Enterprise Courthouse in the 1990s (photo by Shelley Brigham)

new courthouse building. The last Elba courthouse had been built in 1882. Shortly after the adoption of the 1901 Constitution, construction began on a new courthouse at Elba, effectively stifling consideration of a new county seat location. This may have been the real reason for the timing on building the new and elaborate courthouse at Elba completed in 1903.

In response, the citizens of Enterprise felt that if they could not get *the* courthouse, they would settle for *a* courthouse. As early as 1903, a local act was passed that authorized a branch courthouse for Enterprise. Other counties had established branch courthouses for the convenience of their citizens. However, for such an effort to be successful, the convenience factor had to outweigh the expense issue of maintaining two facilities. This effort failed when the 1903 Act was declared unconstitutional.

A new local law was passed in 1907 through the efforts of local legislator and attorney Richard Henry Arrington. This time Coffee County was divided into two separate jurisdictional divisions which would hold two separate terms of court. One would be at Elba and the other would be at Enterprise. Each division would keep its own records and have its own probate office.

The act creating the new divisional county seat did not provide for the funding of the courthouse building. The citizens of Enterprise had to pay for the courthouse at their expense. They raised the money to build a large frame structure at the intersection of Edwards

Street and College Street. The building had a long front porch, where county business was sometimes conducted outdoors. The structure served as the courthouse at Enterprise until it burned in a 1915 fire.

A local act passed soon thereafter provided for the construction of another suitable building at Enterprise to serve as the courthouse. Funding was again a problem. The first courthouse at Enterprise had been built on town-owned property. The town offered this real estate to the county if it would pay for and build a new courthouse. The deed also had a reverter clause. The courthouse would have to be built within a year and if the property ceased to serve as the site of the courthouse, the land would be returned to Enterprise. The county refused that arrangement.

After much discussion and delay, the town proposed a fee simple deed to the county if the courthouse was built within two years. The mayor of Enterprise, W. B. Glenn, signed this deed on December 13, 1919. In the meantime, courts and county offices in Enterprise had been housed in rented facilities for a period of five years beginning in 1915. Finally, in 1920, the county completed a new courthouse at the cost of approximately \$27,000, a brick building that the county hoped was fireproof. Unfortunately, like its predecessors, this courthouse was totally destroyed by fire on January 23, 1924, after only four years of use.

Fire insurance money was used to build a new brick and concrete court-

house, a two-story structure with a basement, constructed to be as fireproof as possible. Safety storage vaults housed the permanent county records. This courthouse was completed in 1925 at a cost of approximately \$35,000.

No story about this period in Enterprise's history would be complete without a discussion of the economy. Much of the farmland in the area was planted in cotton. The boll weevil infested this area in 1915 with the loss of 60 percent of the cotton crop. Devastation was even greater the next year. In 1917 this problem forced farmers to diversify their crops and peanuts became the major cash commodity. Over a million bushels were harvested that year.

Near the courthouse site, at the intersection of Main and College streets, the citizens of Enterprise erected a memorial. The Boll Weevil Monument stands over ten feet tall and appears to be a classical Greek goddess holding a bug above her head. This is the only known monument in the world that glorifies an insect pest. It was unveiled on December 11, 1919 as a symbol of the spirit of the community in overcoming agricultural adversity. The inscription on the monument reads: "In profound appreciation of the boll weevil and what it has done as the herald of prosperity this monument was erected by the citizens of Enterprise, Coffee County, Alabama."

In addition to the devastation caused by the boll weevil, Coffee County has also suffered a number of other natural disasters. Most pronounced of these is the flooding that has plagued Elba over

the years. It was previously mentioned that Elba was named for an island, in part because it was surrounded by the Pea River, Whitewater Creek and Beaver Dam Creek. The courthouse square is located near the Pea River.

According to the Bible, Noah persevered through one great flood. But the people of Elba have had to endure at least seven. Minor flooding took place in 1888, 1938, 1960 and 1975. Devastating flooding occurred in March 1929, March 1990 and March 1998.

During the 1929 flooding which submerged the town, many people in Elba were trapped on the second floors of buildings for two days, without food or water, and two persons are reported to have died. After this disaster, the probate judge, J. A. Carnley, appealed to federal and state authorities seeking assistance. He wrote: "In behalf of our people, I am urging the demands for relief, and I trust that you can devise means of help by the strong arms of our federal government. The strong arms should help the weak, protect, preserve, and prosper them again. We shall be grateful to you."

Later that year Judge Carnley wrote an article describing the suffering that he witnessed at Elba. In part he stated: "It was distressing to see the people as the boats would land them. No photographer can picture, no pen can portray, and no artist can paint the distress which I saw in the faces of the people. People were rescued from trees, shaken and falling buildings."

The response to the plight of the people came from the Army Corps of Engineers. In the 1930s, the Corps built a 3.2 mile levee that almost completely encircled the town of Elba. The levee held during the floods of 1938, 1960 and 1975. The town was not so fortunate in the 1990s.

Sixteen inches of rain fell in 36 hours on March 15-16, 1990. At approximately 6:30 p.m. on Saturday, March 17, the levee east of Elba broke and Whitewater Creek poured into the town. The downtown area lies in what can be described as a basin. It filled up like a bathtub. The flood waters damaged 737 homes, 130 businesses, 86 mobile homes, and eight churches. The high water mark reached the first floor ceiling at the courthouse.

Once the flood waters receded, courthouse workers found that circuit and dis-



Bull Weevil Monument (photo by Shulley Brigman)

trict court files, probate records, and county commission documents had all been under water. In order to save these important papers, a company from Fort Worth, Texas, which does disaster salvage work, was called in. Large refrigerated trucks came to Elba. Soon coffee was not the only freeze-dried item in Coffee County. All of the county records were placed in refrigerated trucks and freeze-dried. They were taken to the company in Texas and placed in tanks where a vacuum was created. The vacuum caused the water in the records to evaporate. Once completely dried, they were cleaned and restored. It was a tedious process but the county records were preserved.

Almost eight years later to the day, Elba suffered another devastating flood. The levee held where it had been repaired in 1990. This time a break occurred on the western part of the levee along Beaver Dam Creek when up to ten inches of rain fell by March 8, 1998. The 1990 flood was basically re-created in the town. Again the waters inundated the town square and courthouse. Though the flood waters were not as high as in 1990, one resident put the situation in perspective when she said that a little water is just as devastating as a lot.

Elba residents once again cleaned up their town. Pumps had been installed after the 1990 flood and a minor flooding in 1994. These helped the water to recede. A proposal was made to relocate the town in order to avoid future flooding. However, life in Elba returned to normal and the effort to move the town failed.

There have been campaigns over the years to either relocate or consolidate the two Coffee County courthouses. One aspect of the county seat issue revolved around the location of the county jail. The jail was located at Elba, but by the 1970s it was in a run-down condition. Further, the citizens of Enterprise contended that the law of Alabama passed in 1907 concerning a second courthouse required Enterprise to have its own county jail because circuit courts were held there. A lawsuit was filed to force Coffee County to build a county jail at Enterprise. The county commission was cited for contempt of court and given 90 days to purge itself by making plans to build a new jail.

The county commission was saved from contempt in 1982 when the legislature passed a bill providing for the erection of a new jail in New Brockton, halfway between Elba and Enterprise. However, once the pressure of contempt was lifted, the county still did nothing about a new jail. In 1989 an inmate filed another lawsuit protesting the conditions at the existing Elba jail. This motivated the county to take action and a new jail was built at New Brockton.

The jail controversy somewhat clouded the issue of courthouse location and divided the interest of the citizens in Coffee County. Any action on the courthouse would cost more money. However, several petition drives were started. One called for the erection of a new county courthouse at Elba. Another petition drive was for a New Brockton site. Still another petition sought a single courthouse at Enterprise. All of the petitions failed to get the necessary 50 percent plus one of registered voters required for the governor to call a county seat election. Coffee County retained its two-courthouse system.

The conditions at the Enterprise courthouse deteriorated from terrible to deplorable. On two occasions, the lower floor was flooded with sewage, calling attention to the inadequate and outdated plumbing in the building. Also, the facility only contained one large courtroom. Over the years the judicial circuit grew from one to three circuit judges. In 1984, Probate Judge Marion Brunson had the large courtroom divided so that at least two judges could hold court at the same time.



Elba Courthouse during 1998 flood (photo courtesy of The Dothan Eagle)

In 1985 the Enterprise courthouse was remodeled. The front porch was enclosed to provide office space and courtrooms were renovated. Improvements were made throughout the building, and a town clock was placed in the building's clock tower. Further improvements took place in succeeding years with the enclosing of windows in 1987, replacement of the roof in 1988, and beautification of the courthouse grounds in 1989.

The district attorney had previously moved his office from the crowded courthouse, renting space in town for his staff.

In 1988 construction began on a new office building for the district attorney. Unfortunately the county did not entirely own the site where work had started for construction of the new building. The project had to be halted and restarted at a new location on the back portion of the courthouse parking lot. This office was fully completed and finally dedicated on April 14, 1991, and was named in memory of the late circuit judge, Eris Paul, and the late district attorney, Lewey Stephens.

The need for an adequate courthouse at Enterprise continued through the 1980s and 1990s. The effort to consoli-

date the county into one courthouse was not successful. Finally, on June 9, 1997, the Coffee County Public Building Authority approved a four million dollar contract for the construction of a new courthouse at Enterprise. The architectural firm was Donofro & Associates of Dothan, who also designed the Houston County Courthouse. Saliba Construction Company of Dothan was the contractor.

The old courthouse constructed in 1925 was demolished and a new structure was built on the same site. The new courthouse is a combination of modern and classical design which should serve the citizens of Coffee County for many decades. The new Coffee County Courthouse, Enterprise Division, was dedicated on Sunday, June 27, 1999. ■

The author thanks Enterprise attorneys **Dale Marsh** and **Blaine King** for their help in obtaining research materials and photographs for use in this article. Photographs of Enterprise courthouses and the Boll Weevil Monument were provided through the courtesy of Shelley Brigman, Enterprise, Alabama.

SOURCES: *Early History of Coffee County*, J. D. Smith, Elba, Alabama, no date; *Coffee Grounds: A History of Coffee County, Alabama, 1841—1970*, Fred S. Watson, 1970; *Pea River Reflections*, Marion Bailey Brunson, 1975; *Dateline: Enterprise*, Roy Shoffner, 1987; *Elba Flood... March 17, 1990*, a publication of the Elba Chamber of Commerce, 1990; *Enterprise, The First 110 Years 1882-1992, A History of This Enterprising Alabama City*, Roy Shoffner, 1996; *Articles, The Birmingham News*, March 1990 and March 1998.



Coffee County Courthouse, Enterprise Division, 1999 (photo by Shelley Brigman)



Samuel A. Rumore, Jr.

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the

Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore served as the bar commissioner for the 10th Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He served as the 1999-2000 state bar president-elect and took over the presidency at the state bar's annual meeting in July. He is a retired colonel in the United States Army Reserve JAG Corps.



OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Ex Parte Communications Between the Court and a Guardian Ad Litem



J. Anthony McLain

Question:

"I am serving as an appointed guardian *ad litem* in a juvenile case. I have not attended any formal training or other courses pertaining to an attorney's responsibilities as a guardian *ad litem*, however, I have read the guardian *ad litem* manual prepared for the Children's Justice Task Force. I have become aware from other sources that certain jurisdictions consider it appropriate for a guardian *ad litem* to communicate directly and *ex parte* with the court.

"This is a request for a formal opinion on the following question: Under the Alabama Rules of Professional Conduct, may a guardian *ad litem* communicate *ex parte* with the court?"

Answer:

An attorney who has been appointed guardian *ad litem* is ethically prohibited from communicating *ex parte* with the trial judge concerning any substantive issue before the court.

Discussion:

The argument has been advanced that guardians *ad litem*, rather than being advocates for their wards, are more appropriately considered advisors to the court, and, therefore, should be permitted to have *ex parte* communication with the judge. However, this is not the case in Alabama.

The Court of Civil Appeals of the State of Alabama has conclusively held that guardians *ad litem* are advocates for their wards and the role of the guardian *ad litem* in the adjudicatory process is not different from that of any other advocate.

"The guardian *ad litem* ... is an officer of the court and is entitled to argue his client's case as any

other attorney involved in the case." *S.D. v. R.D.*, 628 So.2d 817, 818 (Ala. Civ.App. 1993)

Additionally, the statutory provision which governs the appointment and payment of guardians *ad litem* in juvenile cases expressly states that it is the duty of the guardian *ad litem* to act as advocate for the ward. *Code of Alabama*, 1975, § 15-12-21(b) & (c), provides as follows:

(b) If it appears to the trial court in a delinquency case, need of supervision case, or other judicial proceeding in which a juvenile is a party, that the juvenile is entitled to counsel and that the juvenile is not able financially or otherwise to obtain the assistance of counsel or that appointed counsel is otherwise required by law, the court shall appoint counsel to represent and assist the juvenile or act in the capacity of guardian *ad litem* for the juvenile. *It shall be the duty of the appointed counsel, as an officer of the court and as a member of the bar, to represent and assist the juvenile to the best of his or her ability.*

(c) If it appears to the trial court that the parents, guardian or custodian of a juvenile who is a party in a judicial proceeding, are entitled to counsel and the parties are unable to afford counsel, upon request, the court shall appoint counsel to represent and assist the parents, guardian or custodian. *It shall be the duty of the appointed counsel, as an officer of the court and as a*

member of the bar, to represent and assist the parties to the best of his or her ability. (emphasis supplied)

It is, therefore, the opinion of the Disciplinary Commission that attorneys who are appointed guardians *ad litem* are advocates for their wards just as, and in the same manner as, retained attorneys are advocates for their clients. Accordingly, guardians *ad litem* are subject to the same prohibition against *ex parte* communication with the court as are all other lawyers involved in the adjudicatory process.

The prohibition applicable to attorneys is codified in Rule 3.5 of the Rules of Professional Conduct which provides as follows:

"Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate *ex parte* with such a person except as permitted by law;"

A similar prohibition applicable to judges is found in the Canons of Judicial Ethics. Canon 3(A).(4) of the Canons of Judicial Ethics provides as follows:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications concerning a pending or impending proceeding."

While Alabama appellate courts have never specifically addressed the issue of *ex parte* communication with the court by a guardian *ad litem*, other jurisdictions have expressly ruled on this issue and have held such *ex parte* communication to be ethically prohibited. See, e.g., *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991); *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977); *Riley v. Erie Lackawanna R. Company*, 119 Misc. 2d

619, 463 N.Y.S.2d 986 (1983); *De Los Santos v. Superior Court of Los Angeles County*, 27 Cal. 3d 677, 613 P.2d 233 (1980).

The question of *ex parte* communication by a guardian *ad litem* has also been addressed in a treatise on the role of the guardian *ad litem*.

"The guardians are usually afforded the same rights as the parties' attorneys (e.g., of making opening statements and closing arguments). Guardians cannot be called as witnesses.

Guardians *ad litem* may not have *ex parte* communications with the judge." Podell, *The Role of the Guardian Ad Litem*, 25 Trial 31, 34 (April 1989).

For the reasons cited above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney who serves as a guardian *ad litem* may not have *ex parte* communications with the trial judge regarding any substantive issue before the court. ■

[RO-00-02]



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The One-Hour VLP Case

By Professor Pamela H. Bucy



“Oxygen in Use. No Sparks. No Open Flames,” warned the cardboard sign on the front door of the small white house. Above the door were Christmas decorations (in March). The ancient furniture on the tiny porch was well-kept, just as every inch of the house proved to be. When I rang the doorbell, Mrs. Branson¹ slowly came to door, welcomed me with a smile, and invited me in. Limping, she led me to a room dominated by a large bed. To the side of the bed was an oxygen tank. She let herself down onto in the bed, gasped for air, and smiled again. Books, especially Bibles, were everywhere.

Soon after she settled into place, Mrs. Branson's face lit up. “Hi, Baby,” she said as her husband of 39 years shuffled in. Mr. Branson, age 84, and stooped over, was dressed church-neat in a bright orange shirt. His smile was brighter than his shirt. Mr. Branson shook my hand firmly, welcomed me to their home, and silently backed out of the room as Mrs. Branson told me their story, between her smiles and gasps for air.

Several years ago Mr. and Mrs. Branson bought a new furnace for their home. In the summer of 1999, they bought an air-conditioning unit. Both

were installed in the crawl space under the house. When fall came and the weather turned cool, they turned on their furnace, but there was no heat. They called the company that had installed the heating unit, for which there was a current warranty on the unit. A company repair man came, crawled under the house and came out declaring that someone had “intentionally sabotaged” the unit by cutting a wire. He stated that such damage was outside the warranty, and he wasn't going to fix it. The Bransons called the company that had put in the air conditioning unit. A repair man from that company came out, crawled under the house, and declared that his company didn't cut the wire on the heating unit, wouldn't do such a thing and wasn't responsible for fixing it.

About this time Mrs. Branson, who is in her late sixties, had been hospitalized and released. She came home to a freezing house. Her doctor explained in a letter addressed “To Whom it May Concern: Mrs. Branson [has]...emphysema, heart disease and diabetes [and] is in dire need of having her heat turned on as the weather has suddenly turned cool. Her medical conditions will be

adversely affected by failure to turn her heat on or having her furnace repaired as soon as possible." The Bransons were running out of options.

Because she had "heard talk about how much good they do," Mrs. Branson called Legal Services. They invited her down. Mrs. Branson was too ill to go so Mr. Branson went. The Bransons live entirely on their Social Security benefits, so they qualified financially for Legal Services. Since they also presented a meritorious and non-complex case, Legal Services referred them to the Volunteer Lawyers Program.² Within two weeks, Brad Cornett, an attorney in private practice who had agreed to handle VLP cases, met with the Bransons at his law office.

"He was just beautiful." Flash of smile. That is how Mrs. Branson described Cornett. She glowed as she described their visit to Cornett's law office: "I can't go upstairs. He came to me, downstairs. We took him all the papers." Cornett graduated from the University of North Carolina School of Law in 1995 and has been practicing in Gadsden ever since. As I heard him begin to describe the Bransons' case, it became clear that he is one good lawyer. "Because it was already cold when they came in, we had to get some action

quick. So, I told them we would file in small claims court for whatever it cost to hire someone to come out and repair the furnace right now. Then we would sue both the heating company and the air conditioning company and let them fight it out. We knew one of them was to blame. It's a cinch neither Mr. nor Mrs. Branson had been crawling around under their house since last winter. I told the Bransons to look up a heating repairperson in the phone book and ask that person to come out and give a free estimate of what it would take to fix the furnace. I told them to tell the repairperson we would hire him to do the job when we won in court."

"Well," continued Mr. Cornett, with a big grin, "the Bransons called back in a day or so and said, 'It's all fixed!' The repairman crawled under the house and came out saying, 'It's no big deal. I fixed it.'"

Would the Bransons have called a repairman if a lawyer hadn't explained a way they could pay for the repair and been willing to pursue their legal rights to obtain such payment? Probably not. As Mrs. Branson explained, "We didn't have any money to get anything fixed. My medicine took it all." As this case showed, sometimes representing a client simply involves explaining their

options. The VLP gives poor people some options.

Brad Cornett has been a VLP attorney for about three years, he guesses, and the Bransons were his third VLP referral. "The VLP cases certainly are not a burden," explains Cornett. "They never come close to 20 hours." Why did he enroll in the VLP? His words: "If you're a professional, you have privileges. You should give something back. There is a satisfaction in doing good. It's different than your paying cases. You can't do these cases for anything but doing good. It's satisfying to know you helped someone just because you cared." ■

Many thanks to Linda Lund, Wythe Holt and especially to Brad Cornette.

Endnotes

1. A pseudonym.
2. The Volunteer Lawyers Program (VLP) began statewide in Alabama in 1991. Modeled after the highly successful Mobile Bar Association Volunteer Lawyers Program, it provides a way for lawyers in Alabama to help their communities. Attorneys enroll in the program by agreeing to provide up to 20 hours, per year, of free legal service to poor citizens of Alabama. Cases are referred to the VLP from Legal Services offices around the state. Before referral, the cases are screened for merit and complexity (each case should be resolvable in 20 hours or less) and the potential client is screened for income eligibility (must live at or below 125 percent of poverty level, currently \$1,776 monthly, for a household of four).

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Dear Fellow Alabama State Bar Member:

Lawyers have been at the heart of every major reform movement in our state and in our nation and, in addition, Alabama lawyers give of their time and their talent everyday in their own communities. To further this involvement I am writing in support of the Volunteer Lawyers Program ("VLP") and its efforts to encourage pro bono and charitable legal work within the State of Alabama. As Governor, and as a lawyer, I know how important it is to provide legal assistance to those who can not afford it, and those in need. I ask that you join this effort to help the people who need it most by signing up for the VLP.

As of February 1, 2000, Alabama had approximately 10,800 licensed attorneys. Of these 10,800 licensed attorneys, 24% are performing pro bono work through the state's recognized volunteer programs. To the lawyers who are already signed up, I say thank you. My guess is that your experiences on these cases have been among the most rewarding of your professional life. To the lawyers who are not yet part of VLP, I say help your fellow Alabamians through the VLP. Alabama is a great state, but we can make it even better.

To sign up, or for more information, call Linda Lund, the Director of the Volunteer Lawyer's Program at 269-1515.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Siegelman".

Don Siegelman
Governor

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Spring 2000 Admittees



STATISTICS OF INTEREST

Number sitting for exam	343
Number certified to Supreme Court of Alabama	140
Certification rate*	40.8 percent

Certification Percentages:

University of Alabama School of Law	63.9 percent
Birmingham School of Law	23.6 percent
Cumberland School of Law	42.4 percent
Jones School of Law	49.0 percent
Miles College of Law	7.1 percent

**Includes only those successfully passing bar exam and MPRE*

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Craddock , Patrick Carr	Johnson , Devona Lynn	Poole , Debra Lorraine Haynes	Wyatt , James Alexander III

Lawyers in the Family



*Stephanie Northcutt (2000) and
Walter Northcutt (1986)
admittee and brother*



*James R. Buckner, Jr. (2000) and
Anna Funderburk Buckner (1999)
admittee and wife*



*Ruth Miller Priest (2000) and
Christopher Michael Priest (1999)
admittee and husband*



*Katherine McLean Taylor (2000)
and L.M. McLean (1983)
admittee and father*



*Christy M. Miller (2000) and
George W. Miller (1995)
admittee and father*



*William Scott Brower (2000) and
William J. Brower (1985)
admittee and father*



*Joseph T. Conwell, III (2000), Joseph Thomas Conwell, Jr. (1976), John G.
Butler, Jr. (1983) and Henri Butler McDaniel (1977)
admittee, father, uncle and aunt*



*Mary Elizabeth Byrne-Crutchfield
(2000) and Judge Bradley E.
Byrne (1979)
admittee and uncle*



*Elizabeth S. Wills (2000) and
Robert A. Wills, Sr. (1974)
admittee and father*



*Sybil Corley Howell (2000) and
Glenn Chaffin (1982)
admittee and brother-in-law*



*Debra Haynes Poole (2000) and
Joseph N. Poole, III (1976)
admittee and husband*

Lawyers in the Family



Bret M. Gray (2000) and Kenneth F. Gray, Jr. (1998) admittee and brother



William Brian Benton (2000), Bill Benton, Sr. (1960) and Billy Benton, Jr. (1979) admittee, grandfather and father



Mary Windom (2000), Lt. Governor Steve Windom (1974), Mike Windom (1986) and Roxanne Windom (1995) admittee, husband, brother-in-law and sister-in-law

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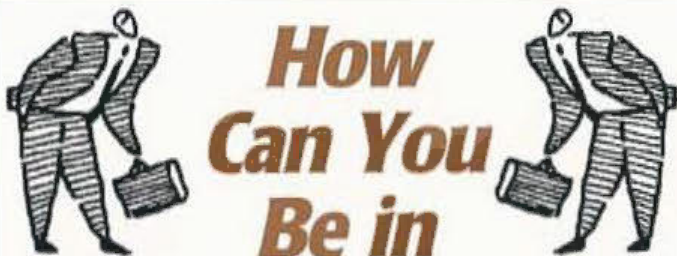
Notice of New Business Hours for the Office of the Clerk, United States Bankruptcy Court, Middle District of Alabama

Effective October 1, 2000, the Bankruptcy Court Clerk's Office at One Court Square, Montgomery, Suite 127, will be open to the public from 8:30 a.m. to 4:30 p.m. on all business work days. An after-hours repository box will be available to accommodate the filing of documents outside of the normal business hours. Documents placed in the after-hours repository will be retrieved at 8:30 a.m. each business day, and file stamped as of the previous business day. Anyone who has an emergency filing after hours can contact the duty clerk at pager number (334) 516-2547.

Thanks

The Alabama Center for Dispute Resolution thanks the following mediators who performed pro bono mediations in 1999.

Helen Johnson Alford, Esq.	Thomas B. Kliner, Esq.
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For more information about rates and scheduling, contact Laura Calloway or Sandra Clements at the Alabama State Bar, (334) 269-1515.

WAR STORIES

Recently, *The Alabama Lawyer* asked our readers to contribute "war stories" to be published in upcoming issues of the magazine. We were looking for humorous tales and anecdotes about Alabama lawyers and judges. Here are a few contributions:



Lady Catherine

"During 1985, I was an assistant district attorney in Baldwin County and was responsible for prosecuting an individual charged with a sexual offense. In reading the investigative reports, I noticed that the defendant stated that 'he was under a spell of witchcraft' at the time of the offense. He, thus, appeared to be invoking the 'devil made me do it' defense.

"On the day of the trial, construction work on the courthouse was in progress and the trial was conducted in an interior room with no windows. I noticed a stately woman sitting on the front row, wearing a turban or head-wrap and who dressed in attire that reminded me of a psychic or palm reader. The prosecutor informed me that this was 'Lady Catherine' who was a witness for the defense. Lady Catherine had apparently removed the spell of witchcraft from the defendant and was there to testify in his behalf that on the night of the offense he was, in fact, under a spell of witchcraft.

"During the course of the trial, I was sitting on the edge of my seat ready to object the moment the defense of 'witchcraft spell' was interjected into the case. When the defense began their case, unknown to me and everyone else in the courtroom, an afternoon thunderstorm, common to south Alabama, has started outside. When defense counsel called Lady Catherine to the stand, I stood and objected to her testimony on the basis that being under a 'spell of witchcraft' was not a valid defense in Alabama.

The very instant the word 'witchcraft' was mentioned, the lights in the courtroom suddenly flickered off and a loud clap of thunder shook the entire building.

"The courtroom fell silent as I glanced over at the jury and then saw the judge's facial expression. It was at this point that the trial judge called counsel to a side bar conference and we were almost unable to maintain a professional demeanor in the presence of the jury. At some point, I informed the judge that he could be confident in his decision to sustain my objection because it was clear that my objection had been sustained by a higher judge. The 'witchcraft spell' defense did not work—the defendant was convicted."

— Gregory S. Combs, Mobile

"When I was in private practice I was often appointed as guardian *ad litem* for individuals whose families were seeking to have them committed to a mental hospital due to their having a mental illness. One of those individuals was fascinated with electricity and had wired a car to his house to shock cats and dogs and, sometimes, relatives who may happen to touch his car.

"At the commitment hearing, despite my advice that he should not testify, my client wanted to take the stand to 'defend' his actions. After I let him have his say, which clearly showed his need for commitment, the attorney for his family started his cross examination. He asked my client if he ever heard voices and he said that he did. Opposing counsel then asked what the voices said. I immediately rose to my feet and objected on the grounds of hearsay. Much to my amazement, the judge, with a grin, sustained my objection."

— Robert K. Lang, Moulton



Montgomery's First Lady Combines Role with Judicial Duties

By Elizabeth Via Brown

Lynn Clardy Bright went to law school because her father said the knowledge would help her in any career she chose.

In 1983, while working for the late attorney Richard Piel, she was appointed as a Montgomery County District Judge by then-Gov. George Wallace to fill the unexpired term of Mark Kennedy, who became a circuit judge.

In November 1999, Judge Bright became the First Lady of Montgomery when her husband, Bobby Bright, was the victor in a heated mayoral race with Emory Folmar, who had held the office for more than 20 years. Now, after a morning presiding in court, she might spend her lunch hour cutting ribbons at the opening of a new business. Back in the courtroom for the afternoon, she may have to dash off to pour tea at a meeting of any of the community organizations which have deluged her with invitations since her husband took office.

"I just covered my face with my hands and shook my head," said Judge Bright, of the day her husband told her he planned to run for mayor.

It would be tough to compete against such a dominant mayor as Folmar, but, said her husband, he had a vision for positive change. Judge Bright agreed. "Bobby wants to do what's right," she said.

When their parents talked to them about their father running for such a high-profile office, the Brights' three children also agreed. Even after being warned that negative comments could be

said about their family, Neal, 17, Lisa, 14, and Katherine, 11, encouraged their father to run for mayor and appeared in his campaign advertisements.

Combining her new duties as a first lady with her well-established career as a judge has taken skilled organization. After a busy start, when she agreed to too many public appearances, she has reached a balance between the courtroom, city functions and the activities of her children.

Upon completing Kennedy's term, she won a full six-year term in 1984 and was re-elected in 1990 and 1996. When her current term is up in two years, she plans to run again, which means that if her husband chooses to run for a second term as mayor, they will be conducting political campaigns at about the same time.

As the 13th of 14 children, Mayor Bright grew up on a farm in Dale County and was taught by his parents that serving the public in a political office is an honor. Also an attorney, he has been as supportive of his wife's career as she has been of his.

"I feel like I followed a course chartered by my father," said Judge Bright, explaining that Leon Clardy, now deceased, encouraged both his daughters, Lynn and Janice, to attend law school.

In 1973, Judge Bright, the class salutatorian, received an Associate of Arts degree from Alabama Christian College, now Faulkner University. Also an honor student at Auburn University at Montgomery, she earned a Bachelor of Science



Mayor Bobby Bright and Judge Lynn Clardy Bright arrive at the Alabama State Capitol for a dinner party to benefit the Landmarks Foundation of Montgomery.

degree, then attended Jones School of Law, where she received a Juris Doctorate in 1978.

Her judicial responsibilities include small claims and civil cases up to \$10,000. Driving while intoxicated, drugs, misdemeanors and preliminary and bond hearings in felony cases constitute the criminal cases she hears.

She began a Domestic Violence Docket requiring counseling and alternative sentences for defendants.

Convicted DUI offenders must confront victims of traffic accidents involving alcohol in her Victims Impact Panel, a program she required her son to attend when he got his driver's license.

The Brights' daughters will have to do the same when they get their licenses, and as Montgomery's new First Lady, Judge Bright plans to open the program to local school students.

"In prison attire and with guards, the inmates make a big impression on high school students," said Judge Bright.

A new member of the board of the Montgomery Ballet, Judge Bright is also a member of the board of the Alabama Shakespeare Festival, as well as of other civic and cultural



Judge Bright on the bench in her courtroom in the Montgomery County Courthouse

groups. On the faculty of the National Judicial College and the Alabama Judicial College, she trains new district judges. She also serves on the Montgomery County Domestic Violence Task Force.

The Brights are active at First Baptist Church, where Judge Bright is chairman of Community Ministries and Mayor Bright is a deacon. In 1989, the Brights were named Family of the Year by the *Montgomery Advertiser/Alabama Journal*.

For her contributions to Alabama's Court Referral Program, Judge Bright received the Howell Heflin Award in 1996 and was also honored with the Justice for Victims Award by the Family Sunshine Center. Named the Public

Citizen of the Year for the Montgomery Unit of the National Association of Social Workers, she was also inducted into the Robert E. Lee High School Hall of Fame in 1995 and has been the recipient of numerous other awards. ■

Elizabeth Via Brown, a columnist for the Montgomery Advertiser, is a freelance writer living in Montgomery.



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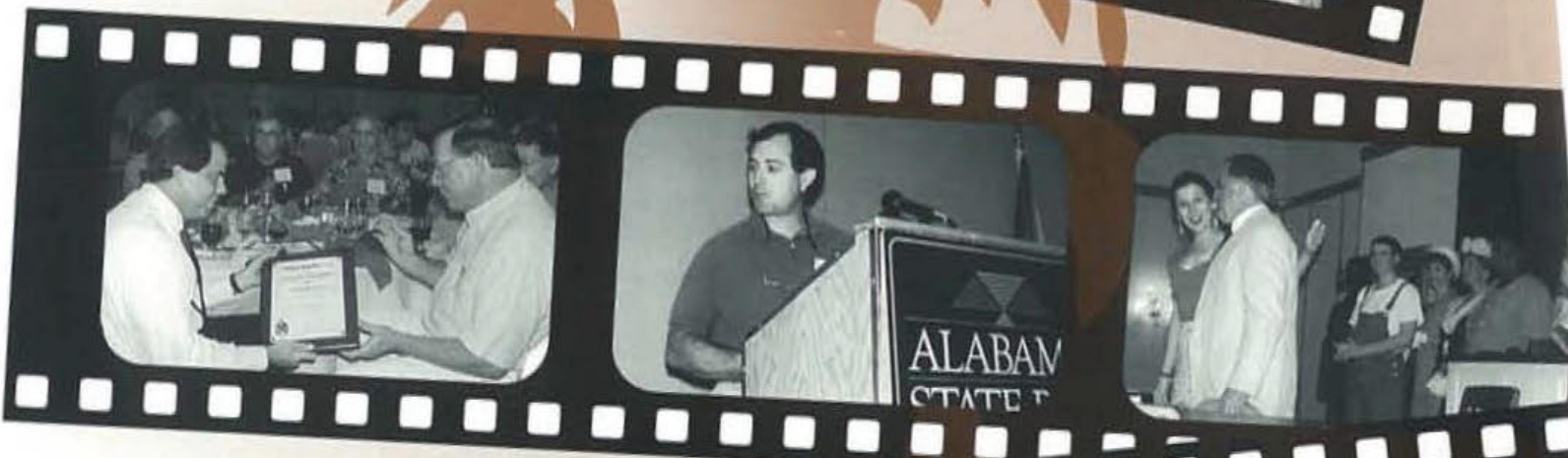
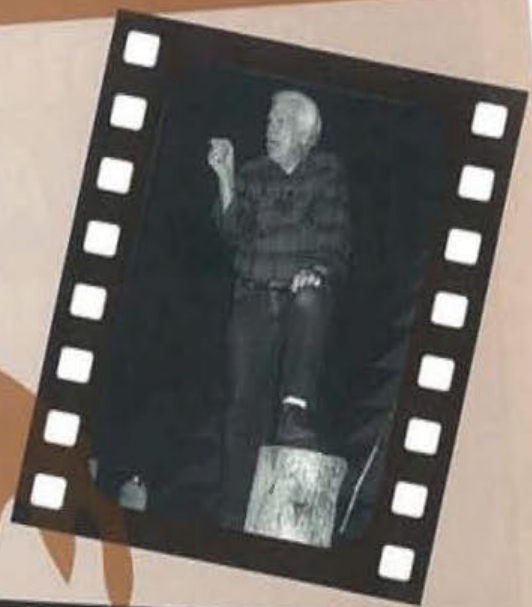
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PHOTO HIGHLIGHTS







Negotiating and Litigating With the Alabama Department of Environmental Management

Introduction

You represent a manufacturing facility, contractor, municipality or some other entity which has been a good client for many years. You know that your client is regulated by the Alabama Department of Environmental Management (ADEM), but you have not had any involvement with ADEM because most environmental issues have been handled by your client directly and its environmental consultant. Assume now, however, that ADEM has just notified your client that it is in violation of the State's environmental regulations, or that ADEM has refused to grant your client's air or water permit application. Your client disagrees with ADEM's decision and wants you to take action. What do you do?

Attorneys facing this situation must first decide whether to refer the matter to a lawyer with experience in environmental law. In many cases, particularly those involving permitting issues, or certain

types of enforcement actions, it may well be in the best interest of your client to refer the case to a lawyer with considerable environmental experience, or to associate such a lawyer as co-counsel. On the other hand, there are situations where such expertise may not be necessary to represent your client well before ADEM. Further, the situation may require that you take steps to protect your client's rights to due process before you can enlist the expertise of an attorney who specializes in environmental matters. This article discusses the fundamentals you need to know to evaluate these issues and to decide whether to proceed with the representation yourself. Included is a discussion of ADEM's statutory authority, tips for dealing with ADEM, and the procedures used to bring the case before the Alabama Environmental Management Commission (EMC). In addition, this article addresses appealing adverse EMC decisions to circuit court if necessary despite your best efforts.

The Alabama Department of Environmental Management

A. Creation and Purpose

In 1982, the Alabama Legislature enacted the Alabama Environmental Management Act (Act) which, among other things, created the Alabama Department of Environmental Management. See 1982 *Ala. Acts*, No. 82-612 (now codified at *Ala. Code* §§ 22-22A-1, *et seq.* (1997)). The purpose of the Act was to establish "a comprehensive and coordinated program of environmental management." *Ala. Code* § 22-22A-2. The Legislature charged ADEM with primary responsibility for administering environmental legislation, implementing the State's environmental programs, and developing a unified environmental regulatory permit system. *Ala. Code* § 22-22A-2(1). In doing so, the Legislature created an executive branch agency that would assume the responsibilities of the former Air Pollution Control Commission, the Water Improvement Commission, the Alabama Water Well Standards Board, and some of the functions of the State Health Department. *Ala. Code* § 22-22A-4. ADEM also was designated as the department responsible for implementing and enforcing federally approved or federally delegated environmental programs. *Ala. Code* §§ 22-22A-4(n) and 22-22A-5(4).

B. Statutory Authority

ADEM's statutory powers are enumerated in *Ala. Code* § 22-22A-5. In addition to its numerous specific grants of authority including staffing, collection of fees and rulemaking, perhaps ADEM's most significant authority for lawyers representing a client is its power to issue permits and to enforce the State's environmental laws and regulations by assessing administrative civil penalties and requiring specific actions. See *Ala. Code* §§ 22-22A-5(12), (17), (18) and (19). This authority gives ADEM broad discretion and a powerful mechanism for compelling compliance with the State's environmental laws and regulations against your client.

Bear in mind that the vast majority of ADEM's permitting decisions and enforcement actions are taken as "administrative" actions and not through civil litigation. Thus, the forum in

which these actions must be contested is ordinarily before ADEM (informally) and then before the EMC (formerly), not in a circuit court.

Perhaps ADEM's most potent enforcement authority is to assess an administrative penalty against your client. The Act authorizes ADEM to assess penalties of up to \$25,000 per violation, and also specifies that each day a violation occurs constitutes a separate violation. Thus, a failure to comply with a permit condition over two days could result in administrative penalty of \$50,000. Of course, the Act also provides for a minimum penalty of \$100 per violation, and ADEM is empowered to choose the amount of the penalty from within this range. However, ADEM's discretion regarding the amount of a civil penalty is not unbridled.

In determining the amount of any civil penalty, the Act requires the department to consider the following factors in proposing an administrative penalty:

- (I) The seriousness of the violation, including any irreparable harm to the environment or threat to public safety or health;
- (II) The standard of care manifested by the violator;
- (III) The economic benefit, if any, gained from the delayed compliance;
- (IV) The nature, extent and degree of success of the violator's efforts to minimize or mitigate the effects of the violation upon the environment;
- (V) The respondent's history of previous violations; and
- (VI) The violator's ability to pay such penalty.

ADEM is required by the Act to consider these factors. *Ala. Code* § 22-22A-18(c). In turn, any discussions with ADEM staff about a civil penalty, and certainly any challenge of a penalty before the EMC, should address these factors as well.

ADEM's authority to issue civil penalties or instigate civil litigation is not unfettered. According to the Environmental Management Act, the department may not impose an administrative civil penalty in excess of \$250,000. *Ala. Code* § 22-22A-5(18)(c) ("Any civil penalty assessed or recovered . . . shall not be less than \$100.00 or exceed \$25,000 for each violation, provided however, that the total penalty assessed in an order issued by the department . . . shall not exceed \$250,000."). Moreover,

ADEM does not have the authority to assess punitive damages. See *Alabama Dept. of Env. Management v. Wright Bros. Const. Co., Inc.*, 604 So. 2d 429, 433 (Ala. Civ. App. 1992).

The department may seek civil penalties greater than \$250,000 only through litigation in court. See *Ala. Code* § 22-22A-5(18)(c) (limiting amount assessed in an "order" issued by department). Under the principles of administrative law your client is not entitled to a jury for administrative actions, but if ADEM seeks an enforcement action in circuit court, you may demand a jury trial. See *Alabama Dept. of Env. Management v. Wright Bros. Const. Co., Inc.*, 604 So. 2d 429, 433-34 (Ala. Civ. App. 1992) (constitutional right to jury trial not applicable to administrative proceedings) (citing *Tull v. U.S.*, 481 U.S. 412, 107 S. Ct. 1831 (1987)). As you might imagine, ADEM typically pursues its enforcement actions using its administrative enforcement mechanisms rather than by initiating litigation in circuit court. The statute of limitations for assessing a civil penalty or filing a civil action is two years from the date of the violation. *Ala. Code* § 22-22A-5(18)(c).

C. ADEM Enforcement Mechanisms

ADEM employs a "graduated" enforcement strategy using both formal and informal administrative procedures. ADEM's graduated enforcement options consist of the following:

- (I) Site inspection;
- (II) Warning letter;
- (III) Notice of Violation or "NOVEMBER";
- (IV) Administrative Order/Consent Order (with or without penalty); and
- (V) Litigation in circuit court.

1. Informal Enforcement Methods

A telephone call, warning letter or site inspection should be taken seriously. They often indicate that ADEM has received a complaint or tip from some source concerning the facility. ADEM's field personnel will almost always follow-up with later contact. Significantly, there is no right to "appeal" a position taken by ADEM in a warning letter or during a telephone call or site visit. Your client's rights to an administrative appeal of an ADEM enforcement action are limited to only those enforcement methods which fall within the statutory definition of "administrative actions." See *Ala. Code* § 22-22A-3(8); see also *Solid Waste Disposal Application of Blount County Disposal, Inc., et al. v. ADEM*, EMC Dkt. No. 93-17 (1993) (warning letters not appealable); *W. J. Bullock, Inc. v. ADEM*, EMC Dkt. No. 878-14

(1987) (ADEM statements interpreting its regulations not appealable); *Kimberly-Clark Corp. v. ADEM*, EMC Dkt. No. 89-19 (1989) (ADEM declaratory rulings not appealable). The Act limits administrative appeals to only those enforcement mechanisms falling within the definition of "administrative action(s)," to witness and Exhibit List: the issuance, modification, repeal or denial of any permit, license, certification, or variance, or the same actions with respect to any order, notice of violation, citation, rule or regulation issued by ADEM. § 22-22A-3(8). Other "lesser" actions cannot be challenged using the administrative appeal process contained in the Act. Even so, recipients should respond to these "lesser" actions in writing. The response should provide enough detail to refute ADEM's position or to demonstrate that the facility has remedied the perceived violation. In addition, the alleged violator should request an opportunity to meet with ADEM informally to discuss the situation.

2. Notice of Violation

A NOVEMBER is a more formal type of enforcement mechanism, and should be viewed as a sign of more things to come from ADEM. It typically signals the recipient that an administrative order is forthcoming absent immediate action to remedy the referenced violation. A NOVEMBER often requires the submission of an engineering report and implementation schedule setting forth the respondent's plan for addressing the alleged violation. Such reports frequently must be submitted in an expedited fashion, and can be expensive. On the other hand, NOVEMBERS may be appealed to the Environmental Management Commission (a procedure which is discussed later in this article). See *Ala. Code* § 22-22A-7(c) and *Ala. Code* § 22-22A-3(8). The recipient of a NOVEMBER should always request a meeting with ADEM to discuss the situation in an effort to avoid further administrative action. Given the very short time a recipient has to challenge a NOVEMBER in an administrative appeal, the first and immediate step should be to critically evaluate the merits of the NOVEMBER with your client to determine if an administrative appeal is merited. Of course, given the very short time period the Act allows for filing an administrative appeal (only 15 days in the case of direct notice to your client) it may be wise to file an appeal as a matter of preserving your client's rights and to allow further negotiations with ADEM.

3. Administrative Orders

The administrative mechanism ADEM has for assessing civil penalties is through an administrative order. However, safeguards in the Act often make this administrative procedure somewhat more manageable. By statute, ADEM must provide the intended recipient of an administrative order with an opportunity to meet informally with the department before the order is issued. *Ala. Code* § 22-22A-5(18)(a)(4) ("An order shall not be issued . . . until the person subject thereto has been afforded an opportunity for an informal conference . . . concerning the alleged violation and the penalty assessment."). As a result, ADEM will issue a "proposed" or "draft" administrative order to the alleged violator with a cover letter informing the respondent of its right to have a conference with ADEM. If the recipient exercises the statutory right to request an informal conference, the final administrative order will not be issued

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until after the meeting. The fact that an administrative order has been proposed is commonly a mixed blessing. It represents a serious situation because ADEM normally only proposes an administrative order when it finds conditions that it believes are serious in meriting not only corrective action but also administrative penalties. On the other hand, the statutory right to confer with the department before an administrative order is issued in final form provides an opportunity to discuss all aspects of the situation with ADEM officials in a face-to-face meeting. In turn, this often leaves the opportunity to negotiate regarding the terms of any order even if ADEM officials can not be persuaded to withdraw the proposed order altogether and either take some lesser enforcement action or no action whatsoever. ADEM is often willing to modify the proposed order before final issuance based on facts presented at the informal meeting. If the violator does not request an informal conference within the allotted time, the administrative order will be issued as proposed. Most administrative orders include the assessment of a civil penalty.

4. Consent Orders

Another enforcement option is the issuance of a consent order, which results from negotiations between ADEM and the respondent. A consent order may or may not include a penalty, and typically requires the respondent to take certain actions (usually requiring expenditures) to come into compliance with the regulations. Consent orders are not unilateral enforcement mechanisms. By their nature, the respondent must agree to the terms. It is now fairly common for ADEM to propose a consent order in its initial communication with a client, but they are also frequently the product of negotiations between ADEM and the respondent after a NOVEMBER or proposed administrative order has been issued.

5. Criminal Referrals

One other enforcement option not listed above is referral of a matter to the attorney general's office for criminal prosecution. Although discussion of such criminal prosecutions is beyond the scope of this paper, it is important for the company attorney to recognize that his or her client's employees and management personnel may be subject to criminal conviction, fines and incarceration for violating certain environmental laws. Prosecution of environmental crimes typically are associated only with repeated, wanton and knowing violators. As a result, in particularly egregious situations which may give rise to criminal prosecutions, it is important to recognize that conflicts of interest may exist in representing the corporate entity and individual targets at the same time.

Dealing With ADEM

A. Be Proactive

Perhaps the single biggest mistake made by members of the regulated community is to ignore ADEM's initial efforts to compel compliance. It is rare that an attorney receives a call from a client after the client has received a warning letter or even a site visit from ADEM. Frequently, clients do not inform their attorneys even after they have received an NOV. This is unfortunate because it is a grave mistake not to respond imme-

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diately and in writing to *any* contact initiated by ADEM. Never decline an opportunity to meet with ADEM officials for an informal conference concerning a actual or perceived violation.

Although a warning letter and notice of violation do not contain civil penalties, they do signal future action or inspection by ADEM. Therefore, it is important to respond meaningfully and, if appropriate, to contest the allegations made by ADEM. By doing this, the respondent may be able to avoid future action by ADEM, which likely would include a civil penalty.

Actions taken by ADEM are documented in the department's compliance files. As a result, if a problem develops with a particular facility again in the future, past actions will be used against the facility to establish it as a repeat violator, having the effect of increasing future civil penalties. If ADEM's allegations are not contested at the time they are made, or if compliance is not demonstrated affirmatively for the file, it will be difficult to challenge the allegations later or to prove that the facility came into compliance immediately after receiving notice from ADEM.

B. Be Prepared

ADEM is a professional organization concerned with substance. When responding in writing to a warning letter, notice of violation or proposed administrative order, it is critical that the response be factual and detailed. The response should be signed by the regulated entity or its environmental consultant. If your client receives a NOVEMBER or a proposed administrative order, you should immediately request a meeting with ADEM even if, with regard to a NOVEMBER, an administrative appeal has been filed to protect the client's due process rights. Again, it is critical to be prepared on a substantive and technical level for these informal conferences. The client or its environmental consultant should be prepared to discuss the nature and reasons for the violations (if they occurred), past efforts of the respondent to avoid such violations, and the respondent's current plan to achieve compliance. The attorney should be prepared to discuss the respondent's legal position, lack of economic benefit achieved by the violator if applicable, lack of ability to pay if applicable, and the respondent's past history with the department. If lack of ability to pay a civil penalty is an issue, the respondent must be prepared to prove its financial status. ADEM will request tax returns and schedules for at least the most recent three-year period. It is sometimes helpful to discuss the money a client has spent, or will spend, in attempting to achieve compliance, such as the purchase of new equipment, in negotiating a reduced penalty amount.

C. Be Reasonable

Above all, be reasonable with ADEM. ADEM's technical staff and attorneys primarily are concerned with achieving compliance as quickly and efficiently as possible. Threats of litigation or use of political influence are unavailing. Best results often come from presenting ADEM with a comprehensive plan presented by an engineer to bring the facility into compliance under a reasonable time frame. Keep in mind that the decision-makers at ADEM are engineers and scientists by training and they respond



best to thorough and reasoned technical presentations.

D. Document the File

Document the file concerning all discussions with ADEM. If a proposed plan of action is discussed at the informal conference, bring adequate copies to provide to ADEM's

technical staff and a clean copy for their permanent file.

Although ADEM's senior technical staff and attorneys tend to have longevity with the department, you should anticipate that you may be dealing with a different engineer, inspector or attorney the next time you appear at the department. If the file is not properly documented, your past efforts may be lost.

Appealing Agency Actions to the Environmental Management Commission

A. The Commission

When informal efforts to reach an agreement with ADEM fail, any "aggrieved" party may apply to the Alabama Environmental Management Commission (EMC) or "Commission" for a contested hearing.

ADEM and the EMC are two distinct entities. The EMC is the governing oversight body for ADEM. Like ADEM, the commission was established by the Legislature through the Environmental Management Act. *See Ala. Code* § 22-22A-6. The EMC is comprised of seven appointed members from varying backgrounds as required by statute. *See Ala. Code* § 22-22A-6(b) (requiring membership of a physician, engineer, attorney, chemist or veterinarian, member certified by the National Water Well Association certification program, biologist or ecologist, and one at-large member being a resident of the state for at least two years). Members are appointed to six-year terms by the governor, "with the advice and consent of the Senate." The terms are staggered to ensure that a single governor will not make all of the appointments. *See Ala. Code* § 22-22A-6(b) and (c).

The Commission's duties are to:

- (1) Select the director of ADEM;
- (2) Establish rules, regulations or environmental standards for ADEM;
- (3) Develop environmental policy for the State; and
- (4) Hear and determine appeals of administrative actions.

Ala. Code § 22-22A-6(n)(1)-(4).

The EMC was granted the authority to promulgate its own rules of procedure for hearing appeals. *Ala. Code* § 22-22A-7(a)(1). The "Rules of Procedure" can be found in Division 2 of ADEM's Administrative Code. They are cited as *ADEM Administration. Code R. 335-2-1, et seq.* The EMC is exempted from the contested case provisions contained in the Alabama Administrative Procedures Act (*Ala. Code* §§ 41-22-12), although the Administrative Procedures Act provisions regarding judicial

review of final agency decisions are applicable to the extent they are not inconsistent with Section 22-22A-7(c)(6) of the Environmental Management Act. See *Ala. Code* § 41-22-27(f).

The Commission's jurisdiction is limited to consideration of ADEM's "administrative actions" as defined by the Environmental Management Act. *Ala. Code* § 22-22A-3(8). However, once jurisdiction attaches, the EMC's review is plenary. In other words, EMC hearings are *de novo*. See *Bates Motel, Inc. v. Alabama Envir. Management. Comm'n.*, 596 So. 2d 924 (Ala. Civ. App. 1991). Thus, in enforcement actions, the EMC assesses the correctness of ADEM's actions in light of the evidence presented at the hearing (and not based on the evidence ADEM had at the time it made the decision). See *McRight, et al. v. ADEM*, EMC Dkt. No. 92-30 (1992). In hearings to contest permit decisions, the merits of the permit are at issue, and not whether ADEM's decision on the permit was arbitrary or capricious. See *Citizens For a Better Environment v. ADEM*, EMC Dkt. No. 96-08 (1996).

B. Filing a Request for Hearing Before the Commission

1. Standing

The EMC rules of procedure and the Environmental Management Act each provide that any person "aggrieved" by an "administrative action" of the department shall be entitled to a hearing before the EMC or its designated hearing officer. See *ADEM Administration. Code R. 335-2-1-.03*; *Ala. Code* § 22-22A-7. Under the regulations, "aggrieved" is defined as "having suffered a threatened or actual injury in fact." *ADEM Administration. Code R. 335-2-1-.02(b)*. "Administrative action" means "the issuance, modification, repeal, or denial of any permit, license, certification, or variance, or the issuance, modification or repeal of any order, notice of violation, citation, rule, or regulation by the Department." *ADEM Administration. Code R. 335-2-1-.02(a)*.

The Alabama appellate courts have not scrutinized the meaning of "aggrieved," although the Alabama Supreme Court has held that "matters of environmental protection or regulation are of great significance ... [and] a citizen's statutory right to appeal an ADEM decision should be interpreted broadly." *Graves v. Fowl River Protective Ass'n.*, 572 So. 2d 446 (Ala. 1990). A significant volume of federal caselaw does exist as to the standing requirements under certain federal environmental laws. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (plaintiff must show individual, concrete harm to have standing); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (plaintiffs failed to show specific actual injury); *SCRAP v. U.S.*, 412 U.S. 669 (1973) (law students demonstrated standing by showing they used the forests and streams in specific area); *Sierra Club v. Morton*, 405 U.S. 727 (1992) (seminal "injury-in-fact" case). The EMC seems to have adopted the fundamental elements of standing required under the *Lujan v. Defenders of Wildlife* case, requiring an individualized injury in fact, causal connection between the challenged administrative action and the threatened or actual injury, and redressability. See *Friends of Ball Play Basin v. ADEM*, EMC Dkt. No. 97-13 (1997).

The overall statutory scheme requires that an aggrieved person pursue the established administrative remedies before resorting to the courts. Failure to do so has resulted in the dismissal of a plaintiff's civil action for lack of standing. See *Island Bay Utilities, Inc. v. Alabama Dept. of Envir. Management.*, 587 So. 2d 1210 (Ala. Civ. App. 1991); but see *Dawson v. Cole*, 485 So. 2d 1164 (Ala. Civ. App. 1986) (discussing exceptions to exhaustion of remedies requirement).

2. Timeliness

The Act and the EMC rules of procedure provide three separate time periods for filing requests for hearings (commonly referred to as appeals). These time periods correspond to the type action being challenged and the method of notice of such action given by ADEM. These time limitations are extremely important because they are strictly enforced and late filing will result in dismissal of the appeal. As such, clients should be advised to contact their attorneys immediately with regard to any action taken by ADEM.

The Act and the rules of procedure provide that administrative actions, other than the issuance of any rule, regulation or emergency order, must be appealed by filing a request for hearing within 15 days after notice to the aggrieved party of such action by the department. *Ala. Code* § 22-22A-7(c)(1); *ADEM Administration. Code R. 335-2-1-.04(1)*. If no notice to the aggrieved party is given or required, a request for hearing must be filed within 30 days of such action. *Id.* The issuance, modification or repeal of any rule or regulation by the department may be appealed by filing a request for hearing within 45 days of the adoption of the rule or regulation by the EMC. *Ala. Code* § 22-22A-7(c)(2); *ADEM Administration. Code R. 335-2-1-.04(2)*. An emergency order by the department should be appealed immediately to the EMC, but no later than 15 days from the date such order is issued. *ADEM Administration. Code R. 335-2-1-.04(3)*.

These time limits are absolute. The EMC has held that a request for hearing filed after the statutory time limit must be dismissed for lack of jurisdiction. See *BP Realty v. ADEM*, EMC Dkt. No. 92-32 (1992); *Citizens For The Environment v. ADEM*, EMC Dkt. No. 94-05 (1994).

3. Content and Filing of Request for Hearing

In years past, a request for hearing could be general in nature. This is no longer the case. Under the rules of procedure, the request for hearing must be in writing and shall contain, among other information, a short and plain state-

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ment identifying the following: the administrative action of the department being contested, the threatened or actual injury suffered by the person making the request (to demonstrate standing), the alleged error made by the department in the administrative action, and the terms and conditions which the person making the request proposes that the commission should include in an order modifying or disapproving the department's administrative action. *ADEM Administration. Code R. 335-2-1-.04(4)(a)-(g).*

A request for hearing must be filed directly with the EMC either by private express delivery, mail or personal filing. Requests may not be filed by facsimile. *ADEM Administration. Code R. 2-1-04(5).* The request is deemed filed on the date of mailing if sent by certified, registered or express mail. *ADEM Administration. Code R. 335-2-1-.04(5).* A copy of the request for hearing must be served upon the department. *ADEM Administration. Code R. 335-2-1-.05.*

4. Parties

The person filing a request for hearing is, of course, a party to that action, (commonly referred to as the Petitioner). The Commission's rules also make ADEM a party (commonly referred to as Respondent). *ADEM Administration. Code R. 335-2-1-.06(1)&(2).* Most hearings proceed with this configuration. However, this can change, and often does, with respect to appeals of ADEM's permit decisions. It has been common for the last several years to find ADEM's permit decisions being contested by third par-

ties, not the permittee. Thus, with respect to a permit decision, your client may find that the terms of a permit issued to it by ADEM are perfectly acceptable only to see that permit appealed by an aggrieved third party. In such situations, the EMC's rules grant to the permit recipient an absolute right to intervene and participate fully as a party to the hearing. *ADEM Administration. Code R. 335-2-1-.06(3).* It is normally in a permittee's best interest to participate fully in such proceedings in order to assure that sufficient evidence is presented to the EMC which demonstrates that the permit as issued complies with all applicable regulatory requirements and that, consequently, the permittee is entitled to the permit. Participation by the permittee also allows the permittee to appeal any adverse decision to circuit court. ADEM is precluded from taking such an appeal because the Act provides that the decision of the commission shall become the final action of the department. *Ala. Code § 22-22A-7(6).*

5. Selection of the Hearing Officer and Pre-hearing Procedure

Once a request for hearing is filed, the commission typically selects a hearing officer to handle pretrial matters and conduct the hearing. Such hearing officers must be attorneys licensed to practice law in the State of Alabama. *ADEM Administration. Code R. 335-2-1-.27(1).* A hearing officer may hear all matters other than challenges to an emergency order or requests to stay an administrative action. *ADEM Administration. Code R. 335-2-1-.27(2).*

The hearing officer is required to hold at least one pre-hearing conference with the parties, which in function and form resembles pretrial conferences in circuit court. *See ADEM Administration. Code R. 335-2-1-.10.* Discovery is limited except as permitted by the hearing officer under *ADEM Administration. Code R. 335-2-1-.11.* *See Ex parte Alabama Dept. of Envir. Management., 627 So. 2d 927, 930 (Ala. 1993)* (holding that parties to administrative proceeding have no absolute right to take depositions). However, EMC rules require that ADEM's files on an administrative action be made available immediately to the parties. *ADEM Administration. Code R. 335-2-1-.10(1).* Hearing officers have subpoena power, and such subpoenas are served in accordance with the Alabama Rules of Civil Procedure. *Id.* at 335-2-1-.12.

6. The Hearing

The EMC rules of procedure provide that a hearing will be conducted within 45 days of the filing of a request for hearing, although the parties to the proceeding may agree to waive the 45-day time period. *ADEM Administration. Code R. 335-2-1-.14(1)-(2).* Nonetheless, because this is an administrative forum, you should expect the evidentiary hearing to be conducted within a relatively short time after the request for hearing is filed. The hearing is conducted much like a non-jury proceeding in circuit court where testimony is taken under oath and recorded by a court reporter. *Id.* at 335-2-1-.14(4). The rules of evidence utilized by the courts are not applied in EMC administrative hearings. In fact, the EMC rules of procedure provide that the hearing officer "shall admit all evidence that is not irrelevant,

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immaterial, unduly repetitious, confidential, privileged or otherwise unreliable or of little probative value, except that offers of compromise are not admissible." *Id.* at 335-2-1-14(5). The commission may consider hearsay evidence, although it cannot base its decision solely on such evidence. *Sierra Club v. ADEM*, EMC Dkt. Nos. 92-16, *et seq.* (1992).

The hearing is conducted as a *de novo* proceeding. *Id.* at 335-2-1-14(6). The burden of proof is on the party making the request for hearing. *Id.* The petitioner must establish by a preponderance of the evidence that ADEM's action should be disapproved or modified. *ADEM Administration*, Code R. 335-2-1-27(5); *Four Seasons Condominium Ass'n. v. ADEM*, EMC Dkt. No. 94-15 (1994).

C. Final Agency Action

The Environmental Management Act provides that the EMC shall issue an appropriate order modifying, approving or disapproving the department's administrative action within 30 days of the hearing. Ala. Code § 22-22A-7(c)(3). As a practical matter, at the close of the evidence the hearing officer generally will order that the "hearing" remain open for additional evidentiary submissions for some period of time. At the close of this time, the hearing officer will issue his or her findings of fact, conclusions of law, and recommendations to the Commission. At that point, the Commission has 30 days in which to accept, reject or modify the hearing officer's recommendations. See *ADEM Administration*, Code R. 335-2-1-17. The rules provide that the hearing officer's "recommendation shall be given due weight but is not binding on the Commission." *Id.* at 335-2-1-17(4). The hearing officer does not have co-equal statutory authority with the commission, and the commission may reject the hearing officer's findings even though not clearly erroneous, if the "other" evidence provides sufficient support for its decision. *Alabama Environmental Management Commission v. Fisher Industrial Service, Inc.*, 586 So. 2d 908, 910 (Ala. Civ. App. 1991).

The commission's rules allow parties to file objections to a hearing officer's recommendations. *ADEM Administration*, Code R. 335-2-1-28(1). Objections must be filed within ten days after service of the hearing officer's recommendation and must set forth alternative proposed findings and conclusions along with a proposed order for the commission's consideration. *Id.* Responses to objections are also permissible if filed within specified time periods. *ADEM Administration*, Code R. 335-2-1-28(2).

D. Judicial Review of EMC Decisions

Final orders of the EMC constitute a "final agency action" of the department and are appealable directly to the Montgomery County Circuit Court or to the circuit court in which the appellant does business or resides. Ala. Code § 22-22A-7(c)(6). An appeal to circuit court must be filed within 30 days after issuance of the final order of the EMC, and such judicial



review shall be had on the administrative record. *Id.* Judicial review is said to be pursuant to certiorari, although the standard is the same as provided for in the Alabama Administrative Procedures Act. See *Fisher Industrial*, 586 So. 2d at 910. The standard of review is as follows:

"The circuit court should affirm the decision of the [commission] unless its findings and conclusions are contrary to the uncontradicted evidence or it has improperly applied those findings viewed in a legal sense.

If there is any evidence to sustain the [commission's] decision, th[e] court must affirm. It may not assess the truthfulness of conflicting testimony or substitute its judgment for that of the [commission]."

Fisher Industrial, 586 So. 2d at 910 (quoting *Thompson v. Alabama Department of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985)). This "any evidence" standard obviously places a tremendous burden on any party challenging a decision of the EMC in circuit court.

Conclusion

Most attorneys, even those without extensive experience in environmental matters, can represent their clients well in many types of ADEM administrative actions provided they know the fundamentals set forth herein and the EMC Rules of Procedure. ■



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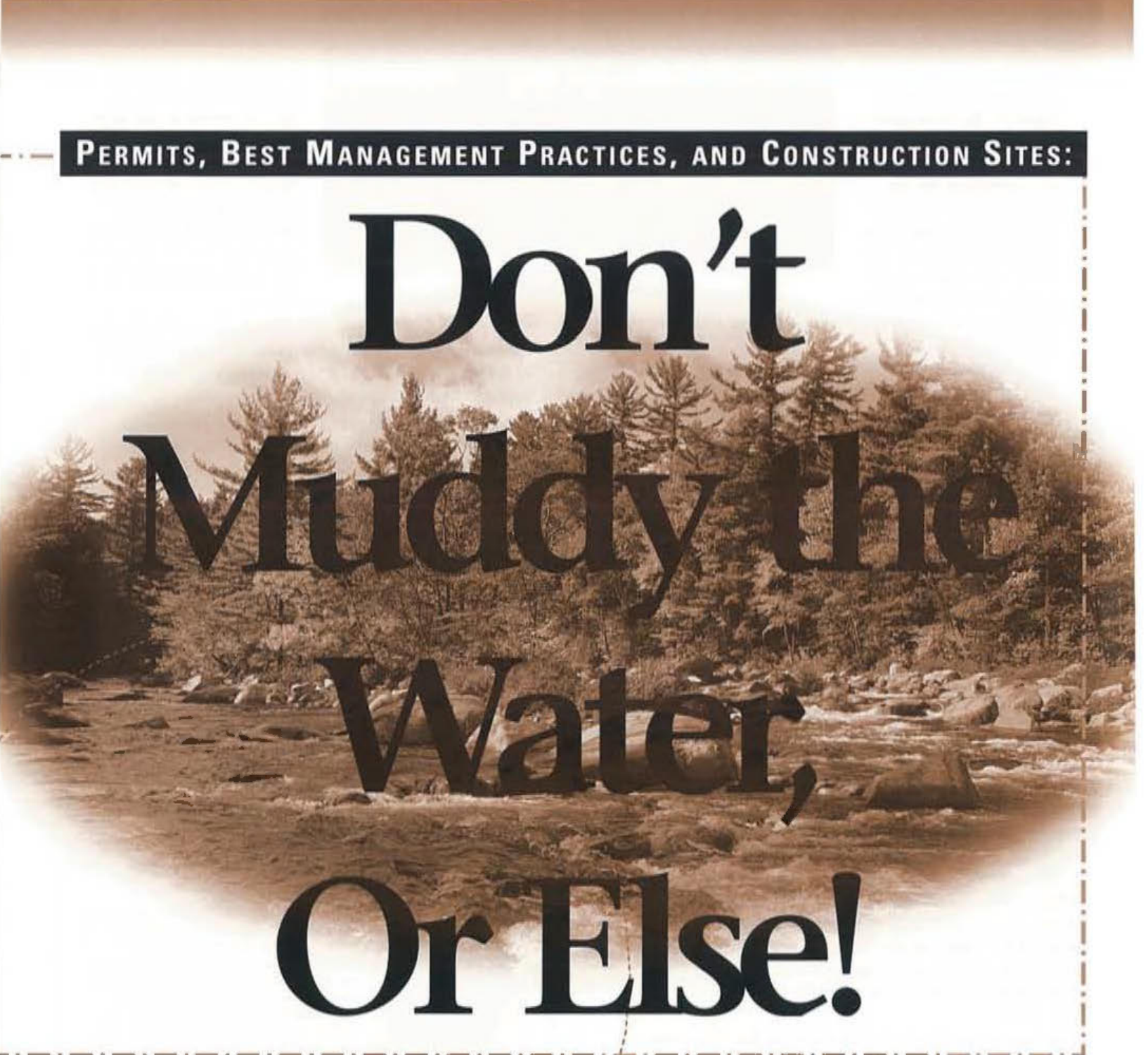


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PERMITS, BEST MANAGEMENT PRACTICES, AND CONSTRUCTION SITES:



Don't Muddy the Water, Or Else!

By Neil C. Johnston and Richard Eldon Davis

T

he geological process of erosion caused by wind and water has been a major force shaping our landscape; however, when erosion is caused by stormwater in conjunction with man-induced activities associated with construction, the process is accelerated. Erosion and the resulting sedimentation are major contributing pollutants to our waters and water quality. The Environmental Protection Agency (EPA) recognized that:

Even a small amount of construction may have a significant negative impact on water quality in localized areas. Over a short period of time, construction sites can contribute more sediment to streams than previously deposited over several decades.

55 Fed. Reg. 47990, 47992 (November 16, 1990).

The preparation of a construction site typically includes land clearing, bulldozing ground cover, and grading operations that strip away protective vegetation and root systems that otherwise would help hold soil and sediments in place. As rain falls against the exposed ground, the impact dislodges soil particles allowing the runoff to suspend the loose sediment particles and transport them offsite to nearby waterways. Erosion controls must be properly used and put in place to keep the stormwater and soil onsite.

What, Generally, Are Best Management Practices?

Best management practices, or BMPs, are defined by the Alabama Department of Environmental Management (ADEM) as:

those methods, structures and non-structural procedures designed to avoid, minimize or control pollution from a construction site from getting into stormwater and into state and federal waters.

General Permit, Part III.J.4; ADEM Admin. Code. R. 335-6-6-.02(e); *see also* 40 C.F.R. § 122.2. In other words, BMPs are the erosion and sediment control procedures required to control stormwater discharge on construction sites.

What Law Mandates the Use of BMPs?

The 1987 amendments to the Clean Water Act (Water Quality Act of 1987 or CWA) recognized, in part, the need to require National Pollutant Discharge Elimination System (NPDES) permits to discharge stormwater from construction sites, and Congress required the EPA to promulgate regulations for certain categories of stormwater discharges in two phases. 33 U.S.C. § 1342(p). Phase I regulations, issued in 1990, focused, in part, on discharges from construction activities which disturbed five acres or more. In the phased approach, the EPA granted a moratorium for certain industrial activities, including construction sites smaller than five acres. *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1525 (11th Cir. 1996). The final rule, issued December 8, 1999, for Phase II was effective as of February 7, 2000 and applies to construction sites greater than one acre but less than five acres. ADEM is considering how the rules will be administered at this time.

Soil transported during the erosion process (mud, sand and silt) is a pollutant (33 U.S.C. § 1311; *Ala. Code* § 22-22-1(3)), and the construction site is a point source (33 U.S.C. § 1342). *See Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 43 (5th Cir. 1980); *Molokai Chamber of Commerce v. Kukui (Molokai) Inc.*, 891 F. Supp. 1389, 1401 (D. Haw. 1995). No pollution may be discharged from a point source without a valid permit. 33 U.S.C. § 1311(a); § 1342. Stormwater can be discharged only when allowed by and in compliance with all conditions of a permit issued pursuant to the National Pollutant

Discharge Elimination System (NPDES) program under the CWA. 33 U.S.C. § 1342. A discharge permit is required before any construction site activity such as land clearing, bulldozing, grading, or other land disturbance that will discharge stormwater is conducted. 40 C.F.R. § 122.26(a)(1), 122.26(b)(14)(x).

Under Phase I, any person proposing to clear a construction site of five acres or more in size, or smaller if the site is actually a part of a larger common plan of development or sale, 40 C.F.R. § 122.26(14)(x), must first have authorization from EPA or the state agency authorized to administer the NPDES stormwater program pursuant to 33 U.S.C. § 1342(b)—in Alabama, ADEM. A general, group, or individual NPDES permit, *see* 40 C.F.R. § 122.26 (c)(1), may be granted allowing certain stormwater discharges so long as the requirements of the permit are met and maintained in full compliance. A general permit is essentially a regulation that covers a broad classification of discharges that do not typically require individualized permits. ADEM has adopted a general NPDES permit (General Permit) (ALG610000) that regulates storm water and waste water discharges from construction activities, excavation, reclamation, land clearing, and other land disturbance activities.

The General Permit

Alabama's General Permit for construction activities is designated ALG610000, was first issued by ADEM in 1992, and generally follows the EPA's permit format. The General Permit was issued for a five-year period which automatically expired in 1997 when it was reissued by ADEM for an additional five years. The current General Permit will expire in 2002. Any party authorized to operate prior to August 1997 should have received notice of expiration requiring resubmission of a permit fee and information for coverage under the

reissued permit. Failure to do so (and there are some sites continuing to operate under expired permits) is a violation that may result in substantial penalties.

No one can operate under the General Permit without fully complying with its terms, including: (a) first filing a notice of intent (NOI) to use and be covered by the General Permit and (b) filing all required information including a comprehensive BMP plan addressing erosion and sediment control measures for stormwater discharges. Alabama's General Permit applies to discharges from all construction sites regardless of the size of the project. General Permit, Part II A.3. The federal regulations, however, refer to sites five acres or larger, unless a smaller site is part of a larger common development greater than five acres. Even though ADEM's permit recites its application to all sites, in practice ADEM requires permits only for those discharges of stormwater from construction sites that meet the federal five-acre threshold unless the discharges from smaller sites adversely affect water quality of state waters and require an individual permit.

The General Permit is a legal document based on federal and state laws and regulations that impose numerous legal duties on a defined class of persons and activities. For a clear understanding of the requirements, duties and liabilities imposed, the General Permit should be thoroughly reviewed in its entirety. Some of the highlights and details are described below.

Notice of Intent (NOI)

Unlike the federal permit, 40 C.F.R. § 122, and procedures in some states such as New York, discharges from a construction project in Alabama will not be covered by the General Permit until the owner or discharger has properly completed a Notice of Intent (NOI) to be covered, the complete NOI has been submitted to ADEM, ADEM has reviewed and approved the NOI, and the discharger has actually received an acknowledgment from ADEM. 40 C.F.R. 122.28(b)(2)(iv) and ALG610000, Part II, A.1. The ADEM-approved NOI form

must be completed by the person seeking coverage under the General Permit. The NOI must specify the construction activity, the location of the site, describe and include a BMP plan prepared and certified by a qualified credentialed professional (QCP), identify past violations, describe the schedule of activity, describe and locate receiving waters, and include a certificate by the responsible person or official seeking coverage.

The Stormwater Pollution Prevention Plan and BMPs

According to the EPA, the best way to manage stormwater pollution is by use of a stormwater pollution prevention plan (SPPP) based on the use of BMPs. 55 Fed. Reg. 47990, 48034 (Nov. 16, 1990); *Molokai*, 891 F. Supp. at 1393. The SPPP is required as a part of the EPA general permit applicable in states without approved NPDES programs. In Alabama, the SPPP counterpart is called the "BMP plan," which also focuses primarily on planning and management of stormwater onsite by using erosion and sediment control procedures.

Although the General Permit contains other requirements which must be met, BMPs are the most critical and the most visible elements necessary for protecting adjacent waters from stormwater discharge and preventing violations of the permit conditions. BMPs do not have to be the "best" in each instance, but they are required to be appropriate for the specific site and based on good engineering practices. General Permit, Part II, B.2(b). BMPs are designed to be dynamic practices that must be continually maintained and modified to address the progressive changes in the construction site and to respond to variable weather conditions. Although the General Permit contains requirements that must be met—such as development of a comprehensive plan, implementation, maintenance and modification of the practices where and when necessary—it is apparent that the General Permit requires minimum standards based on subjective engineering practices, professional judgment and common sense "that is necessarily

required in any complex project driven by the vagaries of weather, topography, topology, soil condition, and the unforeseen or unforeseeable construction contingencies." *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 908, 924 (S.D. N.Y. 1995).

Storm events are unpredictable. Due to the nature of construction activities and the potential for the release of pollutants, ADEM relies heavily on permit requirements using BMPs designed on a site-specific basis by a QCP hired by the permittee. The General Permit requires a permittee at all times properly to operate and maintain all erosion and sediment control procedures. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate quality assurance procedures. Permit requirements in every aspect specifically focus on BMPs. The most important part of the NOI is the BMP plan. The BMP plan submitted with the NOI provides the description of the conditions of the construction site and the project by identifying sources of pollution in stormwater discharges as well as the appropriate management and control procedures that will reduce or prevent pollutants in stormwater discharges.

According to ADEM, each BMP plan:

- must be prepared by a QCP;
- must be comprehensive and describe structural and non-structural practices to prevent and minimize discharges of all types;
- must be updated and modified as necessary to address any changes in deficiencies; and
- must address pre-construction activities to divert up-slope water around the site, to limit the exposure of disturbed areas to precipitation to the shortest amount of time, to minimize the amount of surface area disturbed by phasing, to correct any deficiencies in BMP implementation and maintenance, to remove sediment, nutrients, and other pollutants from stormwater before they leave the site, and to properly and promptly remediate sediment deposited offsite.

Any revisions or additions to the BMP plan must include updated maps, a history of the location and description of the BMPs implemented, an analysis of deficiencies, and periodic inspection reports. Updates and amendments will be considered a part of the General Permit. At a minimum, the BMP plan must address implementation and maintenance of effective, applicable BMPs utilizing good engineering practices according to at least two specific reference materials:

- (1) the *Alabama Non-Point Source Management Program*, 1989, adopted by ADEM and approved by EPA (even though construction sites are recognized as point sources),¹ and
- (2) the *Stormwater Management for Construction Activities—Developing Pollution Prevention Plans and Best Management Practices* adopted by EPA. In addition, any other appropriate BMP manuals or documents submitted by the permittee (or qualified credentialed professional) as part of the BMP plan that are approved by ADEM will become part of the General Permit. However, any additional material referenced in the NOI and approved by ADEM becomes part of the permit requirements and must be utilized. The BMPs are the most visible part of the control procedures and the most critical elements necessary for protecting adjacent waters from stormwater discharges.

Other Requirements

The General Permit and the NOI contain other important requirements and duties that must be met in order to maintain compliance.

Inspection and Monitoring—The importance of BMPs is noted in other permit requirements such as required inspections, monitoring and reports. The applicant is required to have a QCP make periodic inspections of the site and BMPs to prove that the BMPs were properly designed and installed and that they are continually maintained. Maintenance may include repairing or

replacing damaged structures, as well as modifying BMPs to address project site conditions and changes in weather conditions. Inspections must be made regularly once a month and within 72 hours of any rain event of 3/4 of an inch or more in any 24-hour period. An ADEM Inspection Certification Report form must be used to provide an annual report to ADEM summarizing the periodic inspections. Monitoring and sampling are not required if the QCP determines and certifies on reports that sampling of discharges is unnecessary to prove that the BMPs are effective. A rain gauge onsite or nearby should be erected and monitored. Sampling of discharges is not required if the QCP determines and certifies on reports that such sampling is unnecessary to prove that the BMPs are effective. Any non-compliance must be identified and reported using forms adopted by ADEM within five days of any discharge that is unpermitted, threatens water quality, contains a hazardous substance, exceeds permit conditions, or results from failing to comply with BMP requirements. Since dischargers are required to provide periodic reports to ADEM, compliance issues can be raised after the fact by a review of the reports or if the discharger fails to submit required information.

Spill Prevention Control and Countermeasures Plan (SPCC)—If fuel, chemical or pollution storage tanks are to be used and located onsite, a SPCC plan must be included and implemented to prevent spills and expedite cleanup of any that may occur. General Permit, Part II, B, 3.

Other Duties and Responsibilities—The General Permit is riddled with affirmative duties imposed on the permittee and others, for example: (a) a duty to comply with all requirements of the General Permit, the NOI, and any supporting documents; (b) a duty to display a facility identification containing sufficient information to clearly identify the permittee, ADEM authorization number and other required information; (c) a duty to mitigate adverse impacts that result from any discharge of non-compliance; (d) a duty to allow ADEM access

Eleventh Circuit Lawyers' Advisory Committee

The Eleventh Circuit Lawyers' Advisory Committee writes to inform or remind Alabama lawyers of its existence and purpose.

By statute, there is, for each federal circuit, a "Lawyers' Advisory Committee." The chief judge of each federal district in the circuit—covering Florida, Alabama and Georgia—nominates to the chief judge of the Eleventh Circuit one lawyer to represent the district on the committee, and the chief judge of the circuit appoints the committee, nearly always from all those nominated.

The Alabama representatives on the committee are **Carol Sue Nelson** for the Northern District of Alabama, **Richard Cohen** for the Middle District of Alabama, and **David Bagwell** for the Southern District of Alabama (additionally, of course, each district in Florida and Georgia has a representative). The Lawyers' Advisory Committee and the Rules Committee of the United States Court of Appeals have worked together on several proposals for amendments to the rules.

The committee meets once or twice a year, and otherwise corresponds by e-mail or post. The job of the committee is to serve as a lawyers' sounding board for rules or procedural proposals by the court and also to make suggestions and pass on ideas from the bar to the bench. Most recently, the committee was heavily involved in proposals respecting the handling of motions for extensions of time and related matters.

If you have suggestions or ideas about Eleventh Circuit civil or criminal practice, feel free to pass them on to your representatives. Naturally, the committee can't help you with the result of particular cases, but if you have a general suggestion, we exist to consider it and pass it on if it is good.

David A. Bagwell, chair
P.O. Box 290, Mobile AL 36601

to inspect the property and records; (e) a duty to report and correct any upset condition; (f) a duty to comply with all other statutes and regulations; (g) a duty to notify ADEM of commencement and termination of activity; (h) a duty to have reports and forms properly completed and signed; and (i) a duty to maintain records for a minimum of three years unless the permit is subject to litigation or enforcement action.

Who Applies For and Who Is Responsible For Permit Compliance?

These questions have several answers according to the provisions of the General Permit. If all terms of the General Permit were defined, we would certainly have a better idea of the liability exposure to parties at the construction site. No one, no person, may discharge stormwater without a permit. 33 U.S.C. § 1342. "Person," "owner," "operator," and "permittee" are all terms used in the General Permit. However, "person" is the only term defined by statute and regulation. The definition describes a broad collection of parties, including individuals, corporations, partnerships, government entities, limited liability companies, etc. *Ala. Code* § 22-22-1(b)(7); ADEM Admin. Code Reg. 335-6-6.02(ii). Persons who will or who desire to discharge stormwater from a construction site are required to have an NPDES permit. General Permit Part II, A.(1). A person meeting signatory requirements of the water quality regulations must sign all documents (General Permit Part II, A.2.(d)(1)), and any person tampering with equipment or falsifying records will be subject to civil and criminal liability.

Once the NOI is filed and accepted by ADEM, ADEM will grant authorization to a named party, the permittee. The permittee has the ultimate responsibility for compliance with the law and the permit conditions, although other persons, including individuals, will be exposed to liability if compliance is not maintained. The permittee must make sure all other persons are continually in compliance

onsite. Any violations by any contractor, subcontractor or employee will be deemed violations by the permittee. General Permit, Part II, E.1.(e). The permittee must sign the NOI, certifying thereby that the NOI, the BMP plan, and all attachments were prepared at the permittee's direction by a QCP, that inspections will be made, and that the BMPs implemented will be maintained.

The BMP plan can only be prepared by a QCP—who must certify on the NOI that a comprehensive BMP plan was prepared under the QCP's direction and that the permittee has been advised of the plan contents and requirements. It is the permittee's responsibility to see that the plan is put into effect and maintained. The QCP is defined by the General Permit to include professional engineers or certified professionals in erosion and sediment control as well as others that may be approved by ADEM. It is interesting to note that several categories of "certified erosion control persons" may be allowed to operate onsite. The QCP who prepared by BMP plan can (and should), if hired by the permittee, conduct the monthly and periodic inspections as well as the final inspection onsite. Owners, developers or other persons who would not normally qualify as QCPs may take certain state-sponsored erosion control short courses to obtain a "certification" that will allow them to make the monthly and rainfall inspections but which will not allow them to prepare a BMP plan, make modifications or conduct final inspections.

Any report or monitoring data must be signed by the permittee, a designated agent of the permittee, or a responsible official of the permittee. ADEM Admin. Code R. 335-6-6-.09. The information must be certified to be accurate and to have been gathered at the signatory's direction with the awareness that the submission of any false information would be subject to civil and criminal penalties. ADEM Admin. Code R. 335-6-6-.09.

Enforcement and Liability

Permittees and those who should, but do not, have permits must be concerned about alleged regulatory violations *and*

claims based in the common law. Potential regulatory violations include making prohibited discharges without a permit, the violation of or omission to comply with any permit term or condition, and the knowing making of any false statement, representation, or certification by a QCP or responsible official, or tampering with any monitoring device or method required by the permit. Potential common law claims include negligence, nuisance and trespass.

Regulatory Violations

Pursuant to ADEM's regulations, an explicit duty to comply is imposed:

The permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the AWPCA and the FWPCA and is grounds for enforcement action, for permit termination, revocation and reissuance, suspension, modification; or denial of a permit renewal application.

ADEM Admin. Code R. 335-6-6-.12(a)(1); see General Permit, Part II, E.1.a. The regulations provide that "[a]ny person who violates a permit condition is subject to a civil penalty as authorized by *Code of Ala. 1975*, § 22-22A-5(18) (1987 Cum. Supp.) and/or a criminal penalty as authorized by the AWPCA [Alabama Water Pollution Control Act]." ADEM Admin. Code R. 335-6-6-.12(a)(3). The permittee also has a duty to mitigate permit violations or any adverse impact from violations. ADEM Admin. Code R. 335-6-6-.12(d); see General Permit, Part II, C.1. Enforcement may be directed against "[a]ny person required to have a NPDES permit pursuant to this Chapter and who discharges pollutants without said permit, who violates the conditions of said permit, who discharges pollutants in a manner not authorized by the permit, or who violates this Chapter or applicable orders of the Department or any applicable rule or standard under this Division." ADEM Admin. Code R. 335-6-6-.18(2). Primary enforcement authority for regulatory violations lies within the administrative agency

charged with responsibility for administering the statute B again, in our state, ADEM. (EPA, however, will always maintain that it has reserved its own, independent, enforcement authority. See, e.g., 33 U.S.C. § 1319(a)(1), (2).) Enforcement action may take the form of an administrative order "requiring abatement, compliance, mitigation, cessation of discharge, clean-up, and/or penalties"; an action for damages; an action for injunctive relief; or an action for penalties. ADEM Admin. Code R. 335-6-6-.18(2)(a)-(d).

Making prohibited discharges without a permit is, essentially, self-explanatory, thus meriting no lengthy discussion, and is, in any event, well illustrated by the *Wright Brothers* and *Brown* cases discussed below. Examples of violations of permit conditions include, but are not limited to, the following:

- discharges in violation of the state's water quality criteria as set forth in ADEM Admin. Code R. 335-6-10-.01 *et seq.*
- failure to design, implement and maintain effective and appropriate BMPs
- failure to conduct monthly inspections and make periodic reports
- failure to maintain facility identification and
- failure to retain and produce records.

The AWPCA prescribes the following penalty for such violations:

Any person who willfully or with gross negligence violates any provision of the chapter, or rule, regulation or standard adopted under this chapter, or any condition or limitation in a permit issued under this chapter shall be punished by a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this subsection, punishment shall be by a fine of not less than \$5,000.00 nor more

than \$50,000.00 per day of violations or by imprisonment for not less than one year and one day nor more than two years, or by both.

Ala. Code § 22-22-14(a). Note that the statute is somewhat more liberal than the General Permit itself. The General Permit recognizes only two defenses to liability for permit violations—"bypass" and "upset." General Permit, Part II, D.1 and 2. Also implicit in the statute are the defenses that the defendant's act or omission was not willful nor was it grossly negligent.

A "bypass" is "the intentional diversion of waste streams from any portion of a treatment facility." General Permit, Part III, J.3; see 40 C.F.R. § 122.41(m)(1). A bypass is permissible (1) if no discharge limitation is exceeded, and the bypass is necessary for "essential maintenance" for "efficient operation" of a treatment or control facility or system, General Permit, Part II.D.1.b.; or (2) if it "is unavoidable to prevent loss of life, personal injury, or severe property damage," no feasible alternatives exist, and ADEM approves a written request authorizing the bypass ten days prior (if possible). General Permit, Part II.D.1.c. An "upset" is "an exceptional incident in which there is an unintentional and temporary noncompliance"—in the construction context, an extraordinary rain event—but an upset does not include "noncompliance caused by operational error . . . lack of preventive maintenance, or careless or improper operation." General Permit, Part III, J.24; see 40 C.F.R. § 122.41(n). To have the benefit of the "upset" defense, the permittee must orally report the "occurrence and circumstances of the upset" to ADEM within 24 hours, and, no more than five days later, furnish ADEM with evidence, including operating logs, that:

- (i) an upset occurred; (ii) the permittee can identify the specific cause(s) of the upset; (iii) the permittee's facility was being operated properly at the time of the upset; and (iv) the permittee promptly took all reasonable steps to minimize any adverse impact

on human health or the environment resulting from the upset.

General Permit, Part II.D.2.a. The permittee has the burden of proof regarding both bypass and upset. General Permit, Part II.D.1.d.; II.D.2.b.; see 40 C.F.R. § 122.41(n)(4). The AWPCA also provides for a civil action, in the name of the state or the Attorney General, "for damages for pollution of water of the state," including both compensatory and punitive damages and "all reasonable costs" of the department that investigates the pollution. *Ala. Code* § 22-22-9(m). If the violations result in a fish kill or the death of other wildlife, the violator will be responsible, in addition to other penalties, for paying the state to restock the waters and replenish the wildlife. *Ala. Code* § 22-22-9(n). Finally, injunctive relief is available. See *Ala. Code* § 22-22-9(i)(4); ADEM Admin. Code R. 335-6-6-.18(2)(c); General Permit, Part III, A.3.b.(3).

If enforcement is undertaken by EPA pursuant to the CWA, administrative

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penalties of up to \$125,000 may be imposed, 33 U.S.C. § 1319(g), or, in a judicial proceeding, a civil penalty not to exceed \$25,000 per day for each violation, 33 U.S.C. § 1319(d), as well as injunctive relief, 33 U.S.C. § 1319(b). The CWA also qualifies when criminal penalties may be assessed for negligent violations, 33 U.S.C. § 1319(c)(1), for knowing violations, 33 U.S.C. § 1319(c)(2), and knowing endangerment, 33 U.S.C. § 1319(c)(3). While it seems unlikely that the knowing endangerment (placing "another person in danger of death or serious bodily injury") would come into play in conjunction with BMPs and construction sites, negligent and knowing violations are certainly implicated. Criminal penalties for negligent violations are "a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both." 33 U.S.C. § 1319(c)(1). Criminal penalties for knowing violations are "a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three years, or both." 33 U.S.C. § 1319(c)(2). If the person in violation has a prior conviction under the statute, each of these penalties can be doubled. See 33 U.S.C. § 1319(c)(1) - (2). Good faith is also not, in and of itself, a defense to Clean Water Act violations. See *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) (pursuant to 33 U.S.C. § 1319(d), good faith should be a factor considered in assessing a penalty but it cannot be the only factor).

False certification embraces all reports and forms required to be submitted under the General Permit, including, but not limited to, the NOI and any inspection and monitoring reports. Both the NOI form and the General Permit form require the signatures of the QCP and the "Permittee Responsible Official" as certification "under penalty of law." The specific penalty of law is not specified, although presumably, *Ala. Code* § 22-22-14(b) is intended:

Any person who knowingly makes any false statement, representation or certification in any appli-

cation, record, report, plan or other document filed, or required to be maintained, under this chapter or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall, upon conviction, be punished by a fine of not more than \$10,000.00 or by imprisonment for not more than six months, or by both.

If prosecuted by the EPA, the same conduct "shall upon conviction" be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both." 33 U.S.C. § 1319(c)(4). The penalty may be doubled if there is a prior conviction. 33 U.S.C. § 1319(c)(4).

Under certain circumstances, citizens too can play an enforcement role. A citizen suit may be brought pursuant to 33 U.S.C. § 1365.² Except in certain instances, citizen suits cannot be filed prior to 60 days after notice has been given per 33 U.S.C. § 1365(b)(1)(A) (to the Administrator, the State, and the alleged violator) or (b)(2) (to the Administrator). An action may not be commenced "if the Administrator or State has commenced and is diligently pursuing a civil or criminal action . . . but the citizen may intervene in any such action as a matter of right." 33 U.S.C. § 1365(b)(1)(B). Citizen suits do not preempt or restrict other statutory or common law causes of action. 33 U.S.C. § 1365(c). The court may, in its discretion, award litigation costs, including attorney and expert witness fees, to any substantially prevailing party. 33 U.S.C. § 1365(d).

Common Law Causes of Action

Apart from the statutory enforcement mechanisms, state common law causes of action can address damage caused by erosion, siltation and sediment.³

Negligence—For a negligence cause of action, the plaintiff must establish (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the plaintiff suffered loss or injury; and (4) that the

defendant's negligence was the actual and proximate cause of the plaintiff's loss or injury. See, e.g., *Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236, 238 (Ala. 1995) (citing *Lollar v. Poe*, 622 So. 2d 902 (Ala. 1993)). The duty may be breached by failure to exercise due care, which is relative and depends on the facts of each particular case. See, e.g., *Cox v. Miller*, 361 So. 2d 1044, 1048 (Ala. 1978) (citing *Tyler v. Drennen*, 51 So. 2d 516 (Ala. 1951)). Whether an act or omission to act is negligent will be judged by what a reasonably prudent person would have done under the same or similar circumstances. See *Ford Motor Co.*, 661 So. 2d at 238 (citing *Elba Wood Products, Inc. v. Brackin*, 356 So. 2d 119 (Ala. 1978)). Thus, the failure to use appropriate best management practices for a given site in accordance with good engineering practices could be a breach of the duty. So long as the elements of causation and damage were proximately established, a cause of action for negligence could be maintained.

For the element of causation to be established, there must be a reasonable connection between the act or omission of the defendant and the plaintiff's injury. See, e.g., *Wassman v. Mobile Co. Commissions Dist.*, 665 So. 2d 941, 945 (Ala. 1995) (quoting Prosser and Keeton on The Law of Torts, § 41 at 263 (5th ed. 1984)). That is, the failure to use good engineering practices must be the proximate cause of the subsequent pollution of the water. In addition to other well-established defenses to a negligence cause of action, a defendant in the construction context should look for intervening and superseding causes of any pollution, siltation or sedimentation. To be effective in defense, "[a]n intervening cause must be unforeseeable and must have been sufficient to have been the 'sole cause in fact' of the injury." *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1210 (Ala. 1999). It is not, however, sufficient for the defendant simply to point to the existence of other possible causes. See *Springer v. Jefferson Co.*, 595 So. 2d 1381, 1383-84 (Ala. 1992).

Additionally, violation of a statute may be negligence per se, or negligence

as a matter of law, if the statute or ordinance was enacted for the protection of the persons injured. See *Keeton v. Fayette County*, 558 So. 2d 884, 887 (Ala. 1989). Thus, a plaintiff could argue that a violation of a permit requirement—including, but not limited to, the failure to follow a BMP plan—was negligence per se. The defendant should counter with the argument that the statute was adopted to protect the interests of the general public—for example, “scenic, recreational, and other environmental values.” See *Alabama Power Co. v. Dunaway*, 502 So. 2d 726, 730 (Ala. 1987) (violation is not sufficient to impose liability upon defendant if purpose of statute or regulation is to secure to individual enjoyment of rights and privileges to which citizens are entitled only as members of the general public).

Nuisance—A cause of action might lie for nuisance. See *Ala. Code* §§ 6-5-120-127. The law of nuisance rests upon the common law principle “that every man must so use his property as not to injure that of his neighbor.” *Acker v. Protective Life Insurance Co.*, 353 So. 2d 1150, 1152 (Ala. 1977) (citing *Fariss v. Dudley*, 78 Ala. 124, 127 (1884)). The law of nuisance applies, in the traditional sense, where there is interference with the use and enjoyment of one’s property. *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529-30 (Ala. 1979). To establish a cause of action for nuisance, the plaintiff must show conduct by the defendant, in breach of a legal duty, that proximately caused the injury, inconvenience or damage. See, e.g., *Hilliard v. City of Huntsville Electric Utility Board*, 599 So. 2d 1108, 1113 (Ala. 1992).

The *Borland* case is highly significant because it held that compliance with pollution control laws does not relieve a defendant of liability from damages for nuisance. Although the defendant company was found to be in compliance with the Alabama Air Pollution Control Act, *Code* §§ 22-28-1 *et seq.*, the defendant was still exposed to liability for damages caused by pollutants emitted from its smelter that formed a dangerous accumulation of lead particulates and sulphoxide deposits which made the plaintiff’s property unsuitable for rais-

ing cattle or growing crops. See *Borland*, 369 So. 2d at 525-26. *Borland* also held that the fact that the plaintiff’s property had a much higher value as commercial property than as residential or farm property because of its proximity to defendant’s lead plant did not bar recovery. *Id.* at 530.

Trespass—Conduct that constitutes a nuisance may also constitute a trespass if the conduct results in the actual invasion of the possessor’s interest in exclusive possession of the property. See *Borland*, 369 So. 2d 523 (Ala. 1979). The polluting substance does not have to be placed directly on plaintiff’s property to constitute a trespass. In the case of *Rushing v. Hooper-McDonald, Inc.*, 300 So. 2d 94 (Ala. 1974), the Alabama Supreme Court held that a complaint alleging that an adjoining landowner dumped asphalt and asphalt-like material so that in due course the materials entered a stream which carried them into a fish pond (in which the plaintiff had a leasehold interest) polluting the pond and killing fish was sufficient to allege a cause of action in trespass notwithstanding the fact that the material was not dumped directly onto the plaintiff’s land. However, the complaining party must actually have possessory rights in the land or water at issue. See, e.g., *Jones v. Newton*, 454 So. 2d 1345 (Ala. 1984) (where complaining adjacent landowners did not enjoy any possessory rights in the land at issue and there was no evidence that developers built any structure on or over property owned by the adjacent landowners, developers did not trespass on that property).

Damages—Compensatory damages maybe awarded for each of these torts.⁴ *Ala. Code* §§ 6-11-20 *et seq.* governs awards of punitive damages. Punitive damages are not available for simple negligence, *Bradley v. Walker*, 93 So. 634, 635 (Ala. 1922), but may be recovered if there is clear and convincing evidence that the defendant’s act or omission was wanton, see *Ala. Code* § 6-11-20(a); *Hamme v. CSX Transportation, Inc.*, 621 So. 2d 281, 284 (Ala. 1993). Punitive damages may also be awarded for nuisance and trespass where the act

on which the claim is based is wanton or malicious. See *Abbott v. Braswell*, 265 So. 2d 871 (Ala. 1972) (nuisance); *Rushing v. Hooper-McDonald, Inc.*, 300 So. 2d 94 (Ala. 1974) (trespass). Injunctive relief is also available for nuisances. See, e.g., *Ala. Code* §§ 6-5-122, -125.

Illustrative Cases

While the reported court opinions and administrative decisions concerning construction and stormwater permits are few in number, it stands to reason that they would, for the most part, focus on the necessity of acquiring a permit and on the manner of implementation and maintenance of BMPs. An instructive recent federal case from our jurisdiction is *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1961 (2000). Adams owned 76 acres of land, and the Driscolls owned approximately five adjacent acres. The Galbreaths owned two acres adjacent to the Driscolls. A stream flowed downhill from Adams’s property through a pond on the Driscolls’ property, and then through a pond on Galbreaths’ property, before the stream merged with the Notterly River, which united across the Georgia-Tennessee border with the Tennessee River.

Without seeking approval from any federal, state or local government, Adams harvested timber, cut and graded roads, graveled the roads, built culverts and dams to channel stormwater runoff, and subdivided his property into residential lots. The development caused erosion (which Adams did little to prevent) and damaged the Driscolls’ and Galbreaths’ properties. Adams finally sought a state permit a year and a half after he began to develop his property. He did not procure a county development permit until two months after the Driscolls and Galbreaths sued him for violations of the CWA and for nuisance, trespass and negligence under Georgia state law. Adams never obtained an NPDES permit. The issues on appeal were (1) whether the CWA’s zero-discharge standard, 33 U.S.C. § 1311(a), applied to a discharger who could not

obtain an NPDES permit because none was available and (2) whether Adams's discharges fell within the scope of prohibited discharges under the Act.

On the first issue, the appeals court looked to the narrow exception it had previously established in *Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11th Cir. 1996), to the general rule of liability for discharges without an NPDES permit. The exception would be deemed to apply if:

- 1) compliance with the zero discharge standard was factually impossible because there would always be some stormwater runoff from an area of development; 2) there was no NPDES permit available to cover such discharge; 3) the discharger was in good-faith compliance with local pollution control requirements, which substantially mirrored the proposed NPDES discharge standards; and 4) the discharges were minimal.

Driscoll, 181 F.3d at 1288, 1289 (citing *Hughey*, 78 F.3d at 1530). In other words, *Hughey* created a narrow exception to the CWA's zero-discharge standard for any "minimal discharge that occurs despite a developer's best efforts to reduce the amount of it and comply with applicable law." *Driscoll*, 181 F.3d at 1289 (citing *Hughey*, 78 F.3d at 1530). The *Driscoll* court distinguished the case before it from *Hughey*, finding that developer Adams did not satisfy the third and fourth elements of the exception:

Adams did little or nothing to limit erosion or stormwater discharge before beginning construction. He sought none of the required permits until after considerable damage had been done to the [plaintiffs'] properties. . . . [T]he amount of Adams' stormwater discharge and the resulting damage were substantial. . . . 64 tons of sediment were deposited into their ponds as a result of Adams' activities.

Driscoll, 181 F.3d at 1289.

On the second issue, Adams argued that he did not discharge a pollutant from a point source into a navigable

water. The appeals court summarily rejected this argument. The definition of "pollutant" is broad and specifically includes sand and silt such as was left in the plaintiffs' ponds. See *Driscoll*, 181 F.3d at 1291 (citing 40 C.F.R. § 122.2 and *Hughey*, 78 F.2d at 1525 n.1). "Point source" is also broadly defined and, because Adams collected stormwater through pipes and other means prior to discharge into the stream, he was within the meaning of that term under the CWA. *Driscoll*, 181 F.3d at 1291 (citing 40 C.F.R. § 122.2). Finally, the Eleventh Circuit had previously spoken authoritatively on the term "navigable waters":

The CWA defines "navigable waters" as "waters of the United States, including the territorial areas." 33 U.S.C. § 1362(7). This broad definition "makes it clear that the term 'navigable' as used in the Act is of limited import" and that with the CWA Congress chose to regulate waters that would not be deemed navigable under the classical meaning of that term. . . . Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States" under § 1362(7). Likewise, there is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently.

United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (holding that a man-made drainage ditch was a navigable water under the Clean Water Act) (citations omitted) quoted in *Driscoll*, 181 F.3d at 1291. The stream into which Adams discharged was thus a "navigable water" under the CWA.

The federal district court cases of *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389 (D. Haw. 1995), and *City of New York v. Anglebrook*, 891 F. Supp. 908 (S.D.N.Y.), *aff'd*, 58 F.3d 35 (2d Cir. 1995), are also instructive. In *Molokai*, the defendants were alleged to be in violation of the CWA (and applicable state statutes) because they (1) failed "to

obtain a proper and timely stormwater permit before and during construction"; (2) failed "to comply with the state's general stormwater permit conditions"; and (3) discharged pollutants into waters of the United States without a permit. Because the defendants began construction without having their BMP plan accepted by the state and before they had received a Notice of General Permit Coverage, they were held to be in violation of the CWA. The fact that the defendants stopped construction as a result of receiving a Notice of Violation (NOV) from the state was not a defense because there was "a total absence of erosion controls, extensive runoff, heavily stained with top soil, silt, and other debris, running from the project site into the ocean." 891 F. Supp at 1395-1396. The court observed,

[The defendant's argument] loses sight of the focus of the Act: the water. It fails to account for the interplay of rainwater and the construction site, and interaction that the act and its regulatory scheme is intended to manage. It is the discharge of water without permit coverage that violates the Act, not the construction activity itself.

891 F. Supp. at 1400. The defendants should not then have been surprised when they subsequently received notification that their NOI was incomplete. No BMP plan had even been submitted: there was no grading plan, no sediment and erosion control plan, no permit approving plans from the relevant county agency, and no detailed description of the installation and location of silt fences being used.

In *Anglebrook*, 891 F. Supp. 908 (S.D.N.Y. 1995), New York City sued the developer of a golf course, claiming that the developer's SWPPP violated section 402(a) of the CWA. Under the State of New York's program, the General Permit required that a SWPPP "include detailed descriptions of plans for erosion and sediment controls, monitoring, and record keeping"—a standard EPA permit condition. *Id.* The trial court found the critical issue to be whether the General Permit's guidelines are "hitching posts" or "sign

posts"—that is, whether they are "mandatory" or "aspirational." *Id.* The court looked to the language of the General Permit itself and observed:

the regulations governing the contents of an SWPPP are cast in considerably more open-textured terms than the City would concede. Part III of the General Permit states that the plans should be prepared in accordance with "good engineering practices." In its description of various sediment and erosion control and stormwater management practices, the General Permit requires that permittees prepare plans which "conform to" or are "implemented in a manner consistent with" those measures. Further, the Appendices which set forth in more detail various stormwater runoff prevention approaches are self-entitled "Guidelines"—not requirements. Moreover, each Appendix explains that its purpose is to "provide guidance" and each includes the provision that it is "not fixed and inflexible" but is to be applied in a manner which considers the "particular facts and circumstances of a particular project."

In review of this text and context, we find that the Guidelines are intended to be flexible rules which contemplated—and indeed require—applications to exercise good engineering practices, informed by professional judgment and common sense. This interpretation best harmonizes permit compliance with the practicalities and realities of construction and landscape architecture. The preparation of a SWPPP contemplates the interaction of many disciplines: wetland biology, biology, biochemistry, engineering, agriculture, agricultural engineering, turfgrass studies, landscape architecture, limnology, soil science, hydrology, architectural history, and horticulture. The Guidelines tacitly recognize the practical difficulties of synthesiz-

ing these areas by leaving space for professional judgment.

Id. at 915-16 (citations omitted). The developer's SWPPP demonstrated various erosion and sediment control measures—including diversions, earth dikes, surface roughening and grading, interior silt fences, perimeter silt fences, sediment traps, sodding, temporary seeding, and mulching. The SWPPP also included stormwater management controls, including detention ponds, vegetated swales, vegetated buffers, filter strips, oil/water separators, and biofilters ("a ditch with foliage which intercepts overland runoff and filters it"). The developer's SWPPP also required a field inspection once a week and within 24 hours after every rainfall of two inches or more and monthly testing of on-site streams and ponds for various chemicals and pesticides. Finally, the developer hired a "qualified professional monitor" (at a cost of \$163,000) for the immediately neighboring town and posted a \$2.3 million erosion and sedimentation bond "to insure remediation of any damage." The developer was not even required by the General Permit to take those last two steps. The court concluded as follows:

[T]he design requirements at issue are Guidelines. They accommodate themselves to the sound professional judgment that is necessarily required in any complex project driven by the vagaries of weather, topology, soil condition and the unforeseen or unforeseeable construction contingencies.

While the SWPPP in question may not be completely immune from criticism of the wisdom of certain of its design choices, considered as a whole, the SWPPP is a carefully conceived plan that falls well within the boundaries of good engineering design judgment. If it is implemented in accordance with its design, the proof at trial showed no real threat of real harm to the City's water supply and certainly no danger of immediate irreparable harm.

SGA's SWPPP contains adequate erosion and sediment controls.

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The Plans adequately describe the erosion and sediment controls set forth in the General Permit. Defendants have established that in each instance where greater than five acres is exposed, that area will be protected by adequate erosion and sediment controls including diversions, earth dikes, surface roughening and grading, interior silt fences, sediment traps, sodding, temporary seeding and mulching. The SWPPP also provides adequate measures for maintaining stormwater quality. As indicated above, the first flush of runoff is treated adequately through detention ponds, biofilters, vegetated filter strips, swales and vegetated buffers and its Turfgrass Management System.

Id. at 924. Because the plaintiff city did not demonstrate that the defendant's plan would cause the release of pollutants into the water supply, the court rendered judgment for the defendants.

Two other decisions—one from the Alabama Court of Civil Appeals and one by the Environmental Management Commission—are also worth noting. In *ADEM v. Wright Brothers Construction Co., Inc.*, 604 So. 2d 429 (Ala. Civ. App. 1992), defendant, the site grading contractor for a shopping center developer, was contractually responsible for erosion and pollution control. There was some effort to mitigate erosion, but soil flowed from the construction site into two tributaries of a creek. Sampling by ADEM indicated that water from the site did not meet state water quality criteria, and inspection revealed violations of departmental regulations. The grading contractor had not obtained a permit for discharge into state waters, so ADEM issued a notice of violation. The contractor was required, among other things, to monitor engineering plans and implementation schedules for sediment and stormwater control constructs and for pollution control structures for preventing the discharge of waste water. After a number of deadline extensions without compliance by the contractor, ADEM issued an administra-

tive order assessing monetary penalties and ordering the contractor to cease all unpermitted discharges from the site. The order was appealed, was determined to be reasonable by the hearing officer, and was approved by the Environmental Management Commission. The contractor appealed various issues to the circuit court, and the circuit court entered an order that did not please either the contractor or ADEM, leading to cross-appeals to the court of civil appeals. What the appeals court held that is immediately pertinent to the present topic is this: "Since Wright Brothers failed to obtain a permit to discharge the sediment, pollutants, and other wastes, every time discharges from the construction site resulted in new or increased pollution, Wright Brothers violated [the Alabama Water Pollution Control Act]." *Id.* at 433.

Finally, *Brown v. ADEM*, 1999 WL 956675 (Ala. Dept. Env. Mgmt. October 12, 1999), is a very short, straightforward order that denied an appeal from an ADEM order assessing a penalty against the petitioner because, even a year after the initial inspection, he was not using BMPs, and sediment from his 40-acre construction site was running into a creek. The petitioner, the hearing officer found, had "no convincing explanation... as to why he failed to obtain a permit or initiate proper remedial or preventive measures." 1999 WL 956675 at *2.

Conclusion

The foregoing only highlights what should be of concern to lawyers and their clients. In order to fully understand the complexity of this evolving part of the NPDES program and to avoid costly penalties and other sanctions, counsel should undertake a thorough review of the permits, statutes and regulations. ■

Richard Davis thanks John G. Thompson, Cumberland School of Law, Samford University, for his excellent research assistance.

Endnotes

1. ADEM and the Auburn University Environmental Institute have collected data for revisions to the management program, and, during March 2000, ADEM held public outreach meetings across the state to receive comments. Written comments were also accepted through April 7, 2000. After further ADEM, EPA and stakeholder review, the revisions were expected to be finalized in July 2000.
2. A thorough discussion of CWA citizen suits is beyond the scope of this article.
3. A full-blown discussion of the possible common law claims and defenses in this context is beyond the scope of this article.
4. For a thorough discussion of damages issues, see Jenelle M. Marsh and Charles W. Gamble, *Alabama Law of Damages* (4th ed. and Supp. 1999). See also Alabama Pattern Jury Instructions Civil 11.01-11.03 (2d ed. and Cum. Supp. 1999). Damages for continuous trespass



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Neil C. Johnston is a member in the Mobile office of Hand Arendall, LLC. He received his B.A. from Rhodes College and his J.D. degree from the University of Alabama School of Law. He has served

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Richard Eldon Davis is a partner with Cabanias, Johnston, Gardner, Dumas & O'Neal in their Birmingham office. He received his B.A. from Auburn University, his M.A. from the University of

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ALABAMA STATE BAR



DISCIPLINARY NOTICES

Notices

- **Clarence Christopher Clanton**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2000, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 00-87(A) before the Disciplinary Board of the Alabama State Bar.

- Notice is hereby given to **William Graham Carroll**, who practiced law in Birmingham, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 24, 2000, he has 60 days from the date of this publication (September 15, 2000) to come into compliance with the Client Security Fund assessment requirement for 2000. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 00-2]

Reinstatements

- On July 5, 2000, the Alabama Supreme Court affirmed a prior order of the Disciplinary Board (Panel IV), reinstating Birmingham attorney **William Edward Ramsay** to the practice of law. Ramsay had been on disability inactive status since February 1, 1992. He was reinstated subject to certain conditions regarding CLE and mentoring. He fulfilled these requirements prior to the issuance of the supreme court's order. [ASB Pet. No. 97-004]
- The Supreme Court of Alabama entered an order reinstating Atlanta, Georgia attorney **Paul Ransom Knighten** to the practice of law in the State of Alabama effective May 23, 2000. This order was based upon the decision of Panel II of the Disciplinary Board. [ASB Pet. No. 00-04]
- The Disciplinary Board, Panel IV, upon hearing the petition for reinstatement of Anniston lawyer **Daniel Eugene Morris**, ordered that Morris be reinstated to the practice of law effective June 12, 2000. The board's order was adopted by the Supreme Court of Alabama by order dated July 17, 2000. (Prior public discipline considered: transferred to disability inactive status effective 12/3/99) [ASB Pet. No. 00-02]

Suspension

- Enterprise lawyer **Gary Wyatt Stout** received an 89-day suspension from the practice of law in the State of Alabama with the imposition of the suspension to be suspended and held in abeyance pending successful completion of a two-year probationary period. Probation was conditioned, among other things, on the receipt of a public reprimand without general publication based upon his plea of guilty to violating Rule 8.4(g), which provides that "it is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on his fitness to practice law." The facts upon which this discipline is based are as follows:

In April 1997, a child was hit by a train. As a result of this accident, her foot was severed and she was hospitalized at the Southeast Alabama Medical Center in Dothan. Mr. Stout's partner's wife, Carrie Brock, was employed at the time with MedAssist, which provided services to patients at Southeast Alabama Medical Center. In the scope of her employment, Brock met with the child and the child's grandmother. Subsequent to this meeting, Stout appeared at the hospital room, introduced himself to the child's grand-

mother as a lawyer and indicated his desire to represent them regarding the injuries the child sustained in the train accident. The next day, Stout again appeared at the hospital room and was advised at that time that they had retained the services of another law firm. It does not appear that Stout had further contact with the child or the grandmother after that time. The facts and circumstances surrounding Stout's appearance at the hospital beside of the child almost immediately after she sustained severe injuries in a train accident were disputed. The matter was resolved by a negotiated settlement agreement upon Stout's admission to violating Rule 8.4(g). No prior discipline was considered. Other conditions of probation were ordered. [ASB No. 97-228(A)]

Public Reprimands

- Birmingham attorney **Donald Towns Trawick** received a public reprimand without general publication for accepting a fee for an uncontested divorce during the time his license was suspended. [ASB No. 95-172(A)] Trawick received a public reprimand without general publication for his failure to appear to receive a previously imposed public reprimand. [ASB No. 95-48(A)] Trawick also received a public reprimand without general publication for improperly handling a foreclosure proceeding with the result that the foreclosure deed was determined to be void, causing the complainant to sell the property at a loss. [ASB No. 95-49(A)]
- Birmingham attorney **David Malcolm Tanner** received a public reprimand with general publication. Tanner represented some clients in a property dispute. The case was settled favorably to Tanner's clients. They filed a grievance when Tanner failed to pursue litigation against the bonds of a title company and real estate broker. They alleged neglect and a failure to

communicate with them. Tanner did not cooperate in the investigation of the complaint and failed to respond to three letters and several telephone calls from the bar. His conduct was a violation of rules 1.3, 1.4(a) and 8.1(b), Alabama Rules of Professional Conduct. [ASB No. 99-085(A)]

- Tuscaloosa attorney **James D. Smith** received a public reprimand without general publication. In July 1995, he took a case involving the overcharging of mortgage payments by a bank. It was a contingent fee case. He put the bank on notice of the claim in August 1995. After that he did little else on the case. Thereafter, the client had an increasingly difficult time communicating with Smith. He contacted another lawyer in the fall of 1997 and learned that no suit had been filed and that the statute of limitations had run. The conduct violated rules 1.3 (willful neglect) and 1.4(a) (failure to communicate), Alabama Rules of Professional Conduct. [ASB No. 98-226(A)]
- Bessemer attorney **Ralph Lowry Armstrong** received a public reprimand without general publication in two separate cases pursuant to his plea of guilty in each case to failing

to respond to lawful demands for information from a disciplinary authority, a violation of Rule 8.1(b), Alabama Rules of Professional Conduct. In both cases, although the respondent attorney communicated with the Office of General Counsel of the Alabama State Bar regarding the matters, he failed or refused to substantially comply with their repeated requests for information. [ASB nos. 97-278(A) & 98-258(A)].

- Birmingham attorney **William E. Friel, II** received a public reprimand without general publication on July 13, 2000 as reciprocal discipline pursuant to Rule 25(a), A.R.D.P., based upon a January 28, 2000 order of the United States Court of Appeals for the 11th Circuit publicly reprimanding the respondent attorney for his failure to timely file the brief of the appellant in 96-6761, *U.S. v. Sandifer*. [Rule 25(a); Pet. No. 00-01]

Disability Inactive Status

- Cullman attorney **Victor Benjamin Griffin** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective June 8, 2000. [Rule 27(c); Pet. No. 00-02] ■

Notice

Addition to the Alabama State Bar Rules of Disciplinary Procedure Effective August 1, 2000

(h) Employment of Lawyers on Disability Inactive Status or Lawyers Who Have Been Suspended or Disbarred.

- (1) A disbarred lawyer may not engage in the practice of law or in any employment in the legal profession.
- (2) A lawyer on disability inactive status or a suspended lawyer may seek permission from the Disciplinary Commission to seek employment in the legal profession. Permission will be granted only if the lawyer has complied with all the conditions of suspension or disability inactive status and has demonstrated exemplary conduct indicative of reinstatement. In the event that permission is granted, the lawyer shall not have any contact with the clients of the office either in person, by telephone, or in writing.
- (3) A law firm may not employ, retain, contract with, or hire a disbarred lawyer to provide services, advice, or labor of the type customarily related to the provision of legal services. This specifically includes, but is not limited to, paralegal services, law-clerk services, research assistance, clerical assistance, secretarial services, office-management services, administrative-support services, or any other services where the subject lawyer could have access to clients, clients' files, or client confidences. If, however, permission has been granted to a suspended lawyer or a lawyer on disability inactive status as provided in paragraph (h)(2) of this rule, a law firm may employ the lawyer for purposes that do not conflict with paragraph (h) (2).

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YOUNG LAWYERS' SECTION

By Thomas B. Albritton, YLS president

Young Lawyers' Phone Drive a Success



Thomas B. Albritton

I am pleased to announce that thanks to the efforts and hard work of many young, and not-so-young, lawyers throughout Alabama, our phone drive was a huge success. We have collected over 600 cell phones which will be distributed to domestic violence shelters throughout our state. If you gave a phone to either a YLS representative in your area or you sent one directly to me, please understand that your contribution could be the one thing that saves a family or an individual from abuse. Reports from other states that have conducted similar phone drives show that these drives have actually saved the lives of adults and children. None of this would have been possible without your help.

This project was coordinated by the YLS Executive Committee, but the affiliates did all of the hard work. The Young Lawyers' sections of Birmingham,

Tuscaloosa and Mobile all received press coverage, both in print and television, for their collection efforts, and as a result, those local bar associations were highlighted, as well. It is our hope that this year's project will be the first of many in the future that will involve the collaborative efforts of young lawyers throughout Alabama. By doing this, we not only hope to strengthen ties among Alabama's young lawyers, but also to bring recognition to the good work done by all lawyers for the public in Alabama.

In closing, I thank the Executive Committee for a great year as president. As well, I also thank the staff of the Alabama State Bar and Keith Norman for all of their help. I especially thank Margaret Murphy who, with the exception of some slight verbal abuse on the phone, was extremely patient in waiting on my articles this year.

Again, thanks for everything. ■

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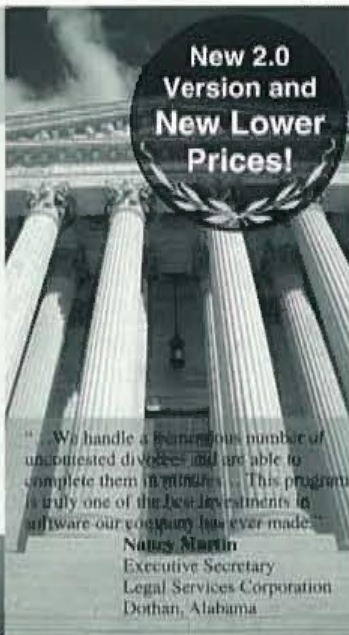
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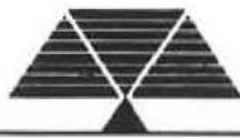
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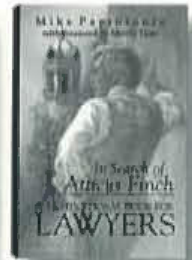
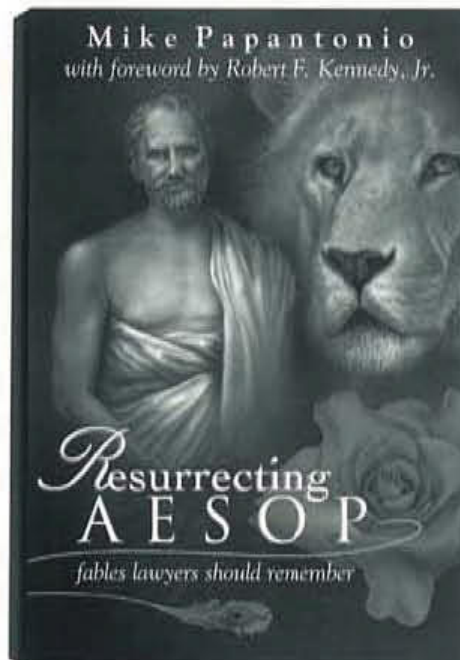
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