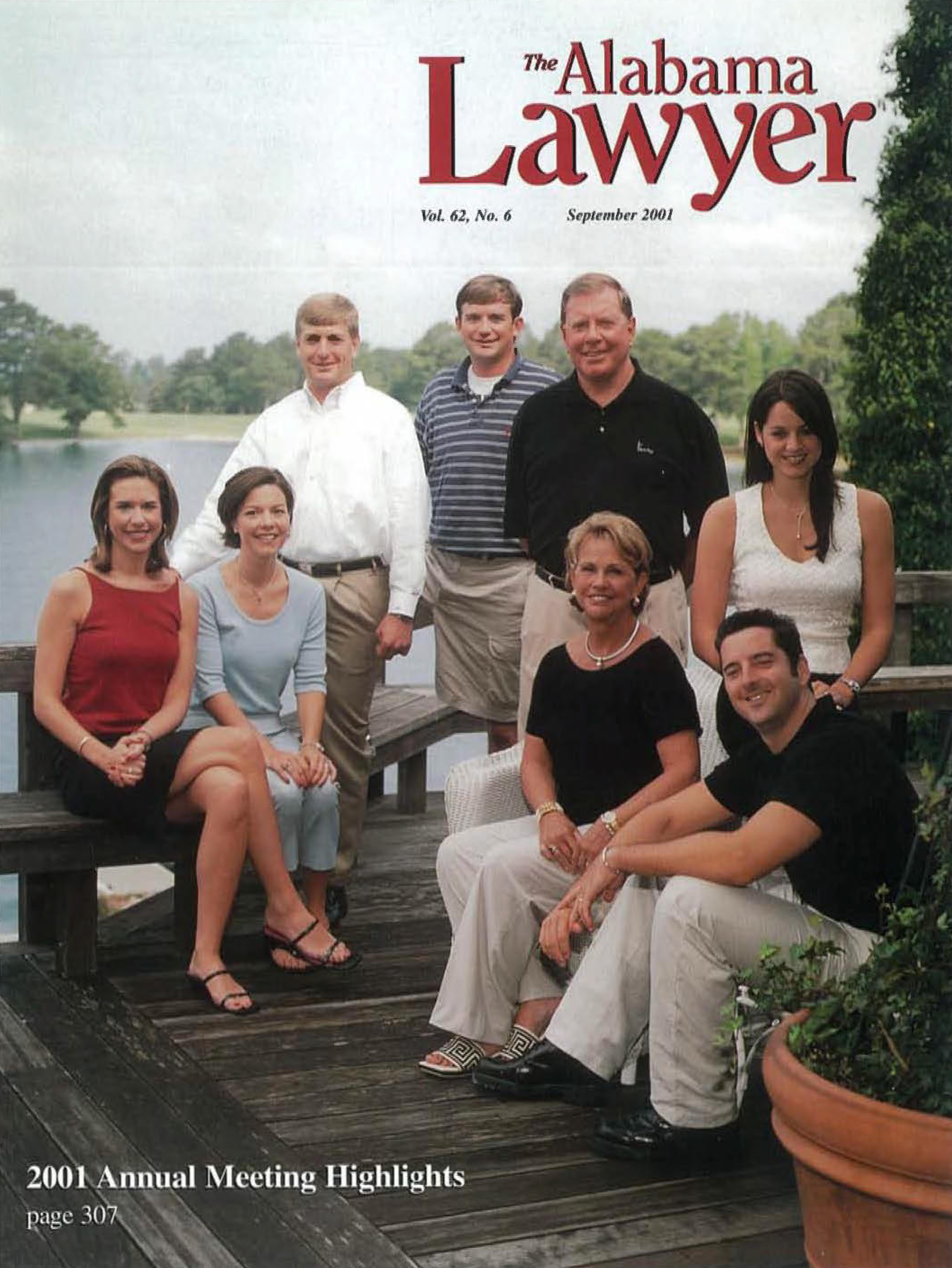
The Alabama Lawyer

Vol. 62, No. 6 September 2001



2001 Annual Meeting Highlights

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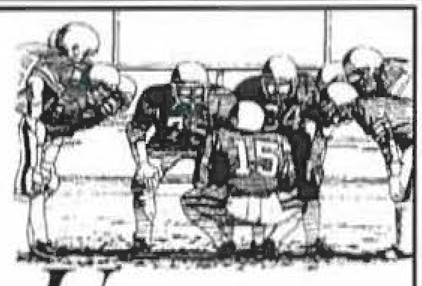
ABICLE's Fall 2001 *CLE Line-Up*



SEPTEMBER	7	Social Security Disability Law in Tuscaloosa
	28	Practical Criminal Defense Law in Tuscaloosa
OCTOBER	5	Collections Law in Birmingham
	12	What Every Real Estate Lawyer Needs to Know in Birmingham
	19	Pre-Trial Practice and Procedure in Birmingham
	19-20	Family Law Retreat to the Beach in Gulf Shores
	26	Federal Practice and Procedure in Birmingham
NOVEMBER	1	Tort Law Update in Birmingham
	9	Depositions in Birmingham
	16	Bankruptcy in Birmingham
	28	Trial Skills in Mobile
	30	Trial Skills in Montgomery
	30	Estate Planning in Birmingham
DECEMBER	6	Jury Selection in Birmingham
	6	Alabama Update in Mobile
	7	Alabama Update in Montgomery
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	13	Trial Skills in Huntsville
	14	Alabama Update in Huntsville
	19	Depositions in Montgomery
	20	Trial Skills in Birmingham
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	21	Alabama Update in Birmingham

DECEMBER 2001- JANUARY 2002

Dec. 27, '01 - Jan. 3, '02 Ski and CLE in Beaver Creek, Colorado

Register Now for Fall Seminars:

Go to http://www.abicle.org. or Call us at 1-800-627-651

ABICLE

ALABAMA BAR INSTITUTE FOR CONTINUING LEGAL EDUCATION

THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

Advancing the Legal Profession Through Education and Service

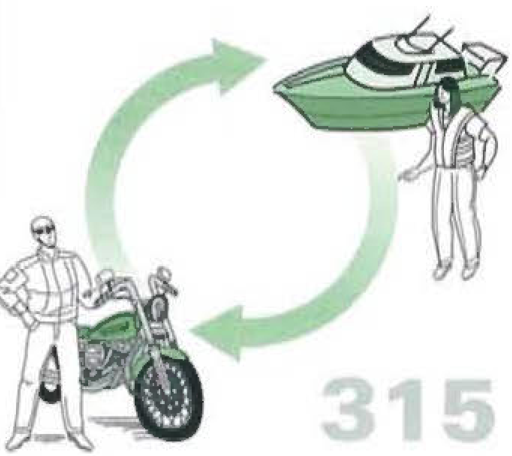
THE ALABAMA LAWYER
Vol. 62, No. 6 / September 2001

On the Cover

ASB President Larry W. Morris and family*—Front row, left to right: Clark, Rebecca, Beverly and Mark. Back row, Ben, Kevin, Larry and Tracy.*

—Photography by the Robertsons, Montgomery

Features



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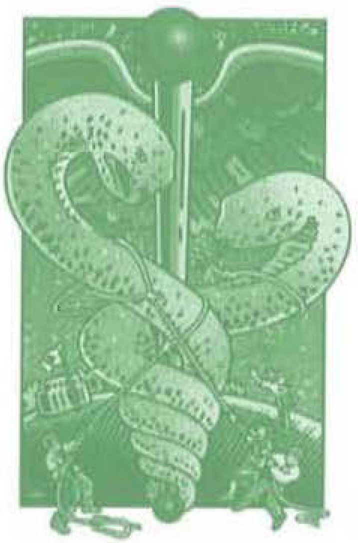

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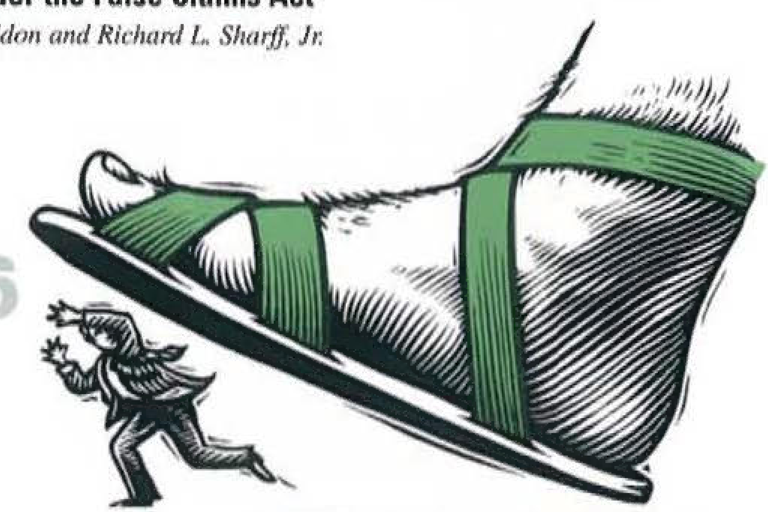

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Departments

THE ALABAMA LAWYER

Vol. 62, No. 6
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President's Page

By Larry W. Morris

Larry W. Morris

Enjoy the Journey

As one wag said to me shortly after being installed as the 125th Alabama State Bar president, "Morris, Mother always told me as a kid, *anyone* could become president. With you, I believe it." As compliments continue to flow from my colleagues, I received the following, "You are now president? Damn, there's hope for all of us." Despite the continuing comments such as "out of his depth" and "over his head," my enthusiasm as your president has not dampened. I am heartened by the fact that I am sure only my immediate family and high school English teacher will read this article. Being honest, the only "President's Page" I have read from beginning to end was President Rumore's last report. It was then that I realized, with a panic, that words written by me were actually going to be published. That is not a comforting thought. I pondered hiring ghost writers since we usually employ experts to advance our cause but I did not know any. I sought other presidents' reports around the country but they appeared scholarly and well written—dead giveaways to stolen goods. I called an older lawyer who told me to write like I talked and I explained this publication would never print such language. I contacted two former bar presidents, both of whom told me to have a central theme or goal. I explained my goal was to get through the year without being embarrassed. They asked me to get a more realistic goal. They suggested I write about something I know. I didn't think that barbecue joints or catfish houses would be appropriate here. I decided to ramble.

"New beginnings" and "obtainable goals" are buzz words usually accompanying a new president. The problem is our bar and bar staff are doing an excellent job and the last thing we need is a crusade to save the bar when it doesn't need saving. I have had the pleasure of attending bar association meetings in the surrounding states this summer and to put it in the vernacular, we have the best staff in the SEC. I do not intend to change this. I intend to encourage the good work they are doing.

In 1993, I had the pleasure of serving on the state bar's Long-Range Planning Task Force. We conceived a broad five-year plan that was adopted by the board of bar commissioners. This is the only task force or committee on which I served that every goal was subsequently met. Reviewing these proposals, I was astounded that every plan was implemented and every goal reached within the five-year period. It is now time for me to appoint another Long-Range Planning Task Force and I believe the results will be equally as good. At your request, a committee is being appointed to review our annual meeting programs. Many lawyers feel since we are often in adversarial positions with each other, it would help to have more social interaction and this committee will address this suggestion. Advertising continues to be a continuing complaint and concern for most bar members and your state bar will closely monitor and examine this issue.

Harry Truman, in sizing up our 13th President, Millard Fillmore, said, "I'll tell you, at a time when we needed a strong man, what we got was a man that swayed with the slightest breeze." Beuchamp Clark was President Woodrow Wilson's Vice-President. With World War I raging in Europe in 1917, Clark's biggest concern was what he smoked when he said, "What this country needs is a good five-cent cigar."

I promise you, as your 125th president, I will not bend nor sway from the things that have made our profession great nor will I flippantly address this job. I will strive to preserve and improve our tradition of excellence without taking myself too seriously. During this year, I would urge all of you to pause and enjoy the journey, not the destination. It can be a lot of fun being a lawyer. It is truly a wonderful profession.

STATE OF THE BAR ADDRESS

Alabama Attorney General Bill Pryor (right) greets 2000-2001 ASB President Sam Rumore before Rumore's address to the Supreme Court of Alabama.

Taking a front row seat at the State of the Bar Address were ASB Commissioner Carol Stewart; Pat Rumore; Mrs. Rumore's mother, Grace Boyd, and sister, Bonnie Boyd; and family friend Diane Lala. Not pictured was Mrs. Rumore's brother, Spence Boyd.

NEW COMMISSIONER ORIENTATION

Jeanne Marie Leslie, director, Alabama Lawyer Assistance Program, and Tony McLain, ASB general counsel, were among the ASB staff who explained the structure of the state bar to incoming bar commissioners.

Listening to ASB Executive Director Keith Norman (not pictured) are new commissioners (left to right): Tommy Siniard, Huntsville; Don Jones, Montgomery; Steve Moore, Mobile; Bob Meadows, Opelika; and Brent Thornley, Jasper.

Keith B. Norman

Gramm-Leach-Bliley Act: Déjà Vu All Over Again

By Keith B. Norman

Congress enacted the Financial Services Modernization Act in 1999. This act is commonly referred to as the Gramm-Leach-Bliley Act. Title V of this act requires that financial institutions disclose to their clients their privacy policy and explain how they share nonpublic, personal information with affiliates and third parties. Following the act's adoption, the Federal Trade Commission (FTC) adopted regulations for Title V (16 CFR Part 313). The potential effects of these new regulations on the legal profession went largely undiscovered until recently.

Although the act was drafted to apply to financial institutions, institutions that are significantly engaged in "financial activities" are included under the broad terms of the regulation adopted by the FTC. This broad definition appears to include law firms that provide tax-related services, real estate settlement services, debt collection services and employee benefit or compensation planning services, among others. Areas of practice where nonpublic information is obtained, such as domestic relations, also appear to be included under its terms.[1] The regulation requires institutions providing these services to notify clients about the disclosure of their nonpublic personal information. The regulation required institutions to provide this notice by July 1, 2001.

The application of these regulations to law firms is unnecessary. Rule 1.6 of the Alabama Rules of Professional Conduct and similar ethics provisions in other states require lawyers to protect the confidentiality of their clients. In fact, the profession's rules of confidentiality are far more stringent than the feral requirement. The FTC's interpretation of the Gramm-Leach-Bliley Act and its promulgated regulation under the act are simply the latest effort by the FTC to regulate the legal profession.

In 1979, the FTC commenced a nationwide investigation of the legal profession. State bar associations across the country were besieged with lengthy interrogatories seeking detailed information about their operations and activities. This "strong-arm" tactic caused a national uproar and it was quickly abandoned. Although the FTC withdrew the mandatory questionnaire, a "voluntary" one was sent to the state bars in 1981. The FTC intimated that it might resort to a compulsory process and compel answers if the voluntary responses were insufficient. Although most state bars completed and returned the questionnaires, the FTC later dropped the investigation altogether. With this new FTC regulation, however, we see that "the camel is attempting to enter the tent" again. This time his nose is farther under the tent than ever.

I think it is safe to say that few lawyers welcome the FTC's latest foray. This new regulation not only threatens state regulation of the profession, but unless the regulation is changed, a federal agency could soon be determining important issues of confidentiality for lawyers and law firms. I do not think that the Financial Services Modernization Act of 1999 was ever intended to include lawyers and law firms among those entities regulated by its provisions.

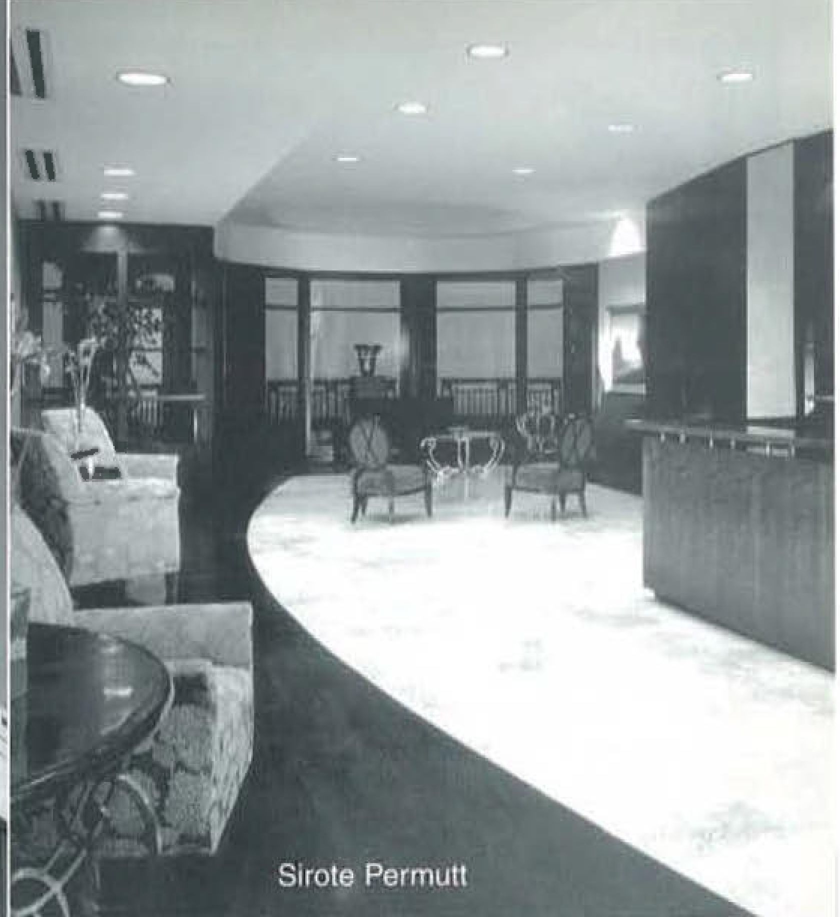
The American Bar Association is urging the FTC to exclude the lawyers in the practice of law from the regulations regarding nonpublic consumer information. As the licensing and regulatory authority for lawyers in Alabama, we have made known to our congressional delegation that oversight of the legal profession at the state level already requires a higher degree of privacy protection than mandated by the regulation.

I encourage you to write your congressman and Senator Shelby and Senator Sessions to express your concern about this new regulation. Let them know that the legal profession is best regulated at the state level and encroachments by a federal agency are unnecessary and will only impair your ability to effectively represent your clients.

Endnote

1. Additional information is available on the American Bar Association's Web site, www.abanet.org/tax.


The vision to achieve
your goals...our mission
Morgan Keegan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Wallace Jordan

- The **Alabama Criminal Defense Lawyers Association** elected officers for 2001-2002. They are: **Kenneth A. Nixon**, president; **Christine Freeman**, president-elect; **Bruce A. Gardner**, vice-president; **James H. Roberts, Jr.**, secretary; and **Joseph P. Van Heest**, treasurer.
- Alabama State Bar member **Bruce P. Bower** recently received the State Bar of Texas's J. Chrys Dougherty Legal Services Award for outstanding pro bono work for the poor. Bower is a 1976 ASB admittee; he is director of client and advocacy services at Texas Legal Services Center in Austin.

New Advance Health Care Directive Law

In its last session, the Alabama legislature passed, and the Governor signed, a major revision to the Advance Health Care Directive. This revision rewrites the mandatory language of the directive, making it much clearer to understand, a major problem of the previous mandatory language. The new form took effect August 1, 2001. The Governor of Alabama has proclaimed October as LIFEPLAN 2001 month and the Alabama State Bar, as state co-sponsor with the Alabama Hospital Association and the Medical Association of Alabama, will participate in statewide LIFEPLAN 2001 events, beginning October 1, as well as a nationwide program to enhance the public's knowledge and understanding of advance health care directives with public programs during National Health Care Decision Week, October 21-27, 2001. For more information, contact Susan Andres at the ASB, (334) 269-1515, ext. 132 or *sandres@alabar.org*.

LIFEPLAN 2001

Planning Ahead for Your Future Health Needs

Alabama State Bar • Medical Association of the State of Alabama • Alabama Hospital Association

Legal and Health Professionals Team Up for LIFEPLAN 2001

Help Alabama Citizens Prepare for Future Health Needs

In October 2001, Alabama attorneys, physicians and health care professionals are delivering a valuable public message—planning for future health needs is a gift to your family.

LIFEPLAN 2001 is a statewide public information campaign to encourage people to discuss health care wishes with their families and document them now, rather than during a crisis. The campaign also aims to improve the way legal and health professionals provide such services by offering seminars statewide for attorneys, physicians, other health care provicers and clergy involved in advance care planning. With Alabama's new advance directive form now in effect, it is important for citizens to be familiar with health care directive options.

LIFEPLAN 2001 workshops will be presented by attorneys from local bar associations, physicians from county medical societies and health care professionals from hospitals and clinics across the state.

The campaign, to be held during the entire month of October, is sponsored by the Alabama State Bar, the Medical Association of the State of Alabama and the Alabama Hospital Association, with support from the Alabama Department of Public Health and the Alabama Organ Center, and reaches out to adults of all ages. Consumer guides will be distributed free at local LIFEPLAN 2001 events and information is available online at *www.alabar.org* by accessing the LIFEPLAN 2001 icon.

For more information, contact Susan Andres at the Alabama State Bar, at (800) 354-6154.

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

Joseph E. Powell announces the formation of **Joseph E. Powell, P.C.** Offices are located at 911 Main Avenue, Northport, 35476. Phone (205) 345-8755.

Martha Durant Hennessy announces the opening of her office at 209 N. Joachim Street, Mobile, 36601. Phone (251) 431-6000.

Twala Grant Wallace announces the opening of her office at 111 N. 19th Street, Suite 100, Birmingham, 35203.

Among Firms

Tanner & Guin, L.L.C. announces that **Ralph M. Clements** has become associated with the firm.

Kaufman & Rothfeder, P.C. announces that **J. Scott Pierce** and **Carla Cole Gilmore** have become shareholders in the firm and **John A. Howard, Jr., Cheairs M. Porter** and **Davis H. Smith** have joined the firm as associates.

Norman, Wood, Kendrick & Turner announces that **Mark P. Williams** has joined the firm as a partner and **Matthew W. Robinett** has become associated with the firm.

Morris, Cary & Fisher, L.L.C. announces that **S. Mark Andrews** has joined the firm as a partner and the firm name has changed to **Morris, Cary & Andrews, L.L.C.**

Jackson, Rhodes, Moulton & Capps announces that **R. Aaron Cartlan** has joined the firm as an associate.

Cochran, Cherry, Givens & Smith, P.C. announces that **B. Shannon Saunders** and **Lance H. Swanner** have joined the firm.

Atchison, Crosby, Saad & Beebe, P.C. announces that **Derek Atchison** has become associated with the firm.

Wilson, Pumroy, Turner & James, L.L.C. announces that **Robert C. Dillon** has joined the firm.

Roberts & Fish, P.C. announces that **Ethan R. Dettling** has joined the firm.

Mary A. Turner and **R. Hays Webb** announce the formation of **Turner & Webb, P.C.** Offices are located at 601 Greensboro Avenue, Suite 1-A, Tuscaloosa, 35402. Phone (205) 758-5576.

Richard Maples, Jr. and **Gilbert L. Fontenot** announce the formation of **Maples & Fontenot, L.L.P.** Offices are located at the LaClede Building, 150 Government Street, Suite 1004, Mobile, 36602. Phone (334) 432-2629.

Roberts, Shields & Green, P.C. announces that **Thomas G. F. Landry** has joined the firm as a member.

Melton, Espy, Williams & Hayes, P.C. announces that **J. Flynn Mozingo** has become a member of the firm and **C. Mark Bain** has joined the firm as an associate.

Hinshaw & Culbertson announce that **Steven Worley** has joined the firm. Offices are located in Jacksonville, Florida.

Berkowitz, Lefkovitz, Isom & Kushner, P.C. announces that **Al Watkins** has joined the firm as a member, **Gary S. Schiff** and **Marion F. Walker** have become members of the firm, and **Matthew S. Geller** has become associated with the firm.

Gillenwaters & Lowe announces that **Joseph D. Ficquette** has become associated with the firm.

Lynn Campisi and **Anne Moses** announce the formation of **Campisi & Moses.** Offices are located at 3008 Pump House Road, Birmingham, 35243. Phone (205) 967-1010.

Diamond, Hasser & Frost announces that **Stuart Y. Luckie** has become a partner.

Brantley & Parker, L.L.C. announces that **Tammy L. Stinson** has become associated with the firm.

Miller, Hamilton, Snider & Odom, L.L.C. announces that **Scott W. Corsadden** has joined the firm.

The Law Offices of Joseph T. Carpenter announces that **Winston W. Edwards** has become associated with the firm.

Huie, Fernambucq & Stewart announces that **Jason Robert Watkins** has become an associate with the firm.

Redden, Mills & Clark announces that **Laura S. Gibson** has joined the firm as an associate.

Lanier, Ford, Shaver & Payne, P.C. announces that **David L. Berdan** has become a shareholder in the firm.

Hand Arendall, L.L.C. announces that **Steven C. Pearson** has become an associate of the firm.

Cheryl Eubanks Corte and **Naomi G. Drake** announce the formation of **Corte & Drake**. Offices are located at the Daphne Executive Center, 2210 Main Street, Suite B, Daphne, 36526. Phone (251) 625-227.

Hornsby, Watson & Meginniss announces that **David H. Meginniss**, a member since 1980 and a partner since 1988, has been awarded the degree Master of Divinity. He has left the practice of law for ministry in the Episcopal Church, effective with his ordination in May. The firm also announces that **Jeffrey G. Blackwell** has been made a member and the firm name has changed to **Hornsby, Watson, Hornsby & Blackwell.**

James V. Roberts, Jr., of the firm of **Roberts, Shields & Green, P.C.**, has been appointed as the first municipal judge of Spanish Fort.

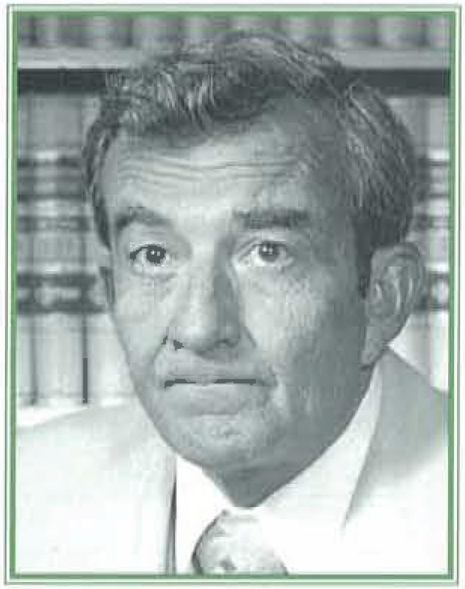
Ronald W. Wise announces that **Richard F. Matthews, Jr.** has become associated with the firm.

Watson, deGraffenried, Hardin & Tyra, L.L.P. announces that **David A. Huges** has joined the firm as a partner.

Lanier, Ford, Shaver & Payne P.C. announces that **George W. Royer, Jr.**, **Johnnie F. Vann** and **David L. Berdan** have become members of the firm and that **Kenneth D. Graves**, **J. Clark Pendergrass** and **Anita S. Damian** have become associated with the firm.

Albert Jackson Seale

Albert J. Seale, a highly respected member of the Mobile Bar Association, died Sunday, February 25, 2001. He was born in New York City April 29, 1925 and moved to Denver, Colorado and then to Long Beach, Mississippi, where his parents retired. He graduated from the University of Southern Mississippi and earned his L.L.B. degree from the University of Alabama in 1951. He practiced with the Mobile firm of Seale, Marsal & Seale for 50 years.



Albert J. Seale

Al joined the Navy at age 17, right out of high school, and while in the Navy, attended the V-12 program for bright students. Thereafter, he was assigned to Torpedo School and, after graduation from it, served in the Pacific during World War II.

Al and his wife, Rosemary, married in Long Beach in 1947 in a Baptist church with services conducted by a Presbyterian minister. Rosemary was a Baptist and Al was a Presbyterian, and they compromised on their wedding day. They had five children, Sidney Seale, Vincent Seale, Susan Roberts and Stacy Seale, all of Mobile, and Kelly Seale, of Dallas, and four grandchildren.

During his busy life as an attorney, he also took time out to enjoy his beach home at Gulf Shores. He was an avid fisherman, an accomplished photographer and a camellia enthusiast. Al grafted several hundred camellias on his 22-acre homesite in Mobile and was a member of the Mobile Camellia Society.

Judge Ferrill D. McRae said, "I was told that every time a good person leaves this earth, a star was lit in the heavens, and if that be true, a very bright star now burns for Al Seale."

Al was known by his many close friends to have one of the best legal minds at the Mobile Bar, and his word was his bond. He was a friend to all lawyers, especially young lawyers, who sought his help and advice, and over his years of practice, he represented many lawyers personally, never charging a fee for his representation. He was also highly respected and loved by the judges before whom he practiced.

According to his wife, Rosemary, they were married in a Baptist Church by a Presbyterian minister and Al was buried by a Methodist minister. She feels that all bases have been covered.

—Larry U. Sims, president
Mobile Bar Association

Lybrand, Fred Ray, Sr.
Anniston
Admitted: 1958
Died: June 13, 2001

Morris, Kathleen Brooks
Montgomery
Admitted: 1997
Died: June 1, 2001

Slate, Rudolph Wright
Hartselle
Admitted: 1967
Died: June 11, 2001

Starlin, Thomas Winston
Columbus, Georgia
Admitted: 1937
Died: May 31, 2001

Justice McKinley Legal Milestone Marker Erected

BY WILLIAM E. SMITH, JR.

May 1, 2001 was a very special Law Day for the Alabama State Bar, the Lauderdale County Bar Association and the City of Florence, Alabama. It marked the unveiling of the most recent Alabama Legal Milestone Marker in honor of former United States Supreme Court Justice John McKinley. McKinley was appointed to the high court in 1838 while a resident of Florence. Florence Mayor William D. Jordan proclaimed May 1, 2001 as Justice John McKinley Day. The event also celebrated the 221st birth date of Justice McKinley.

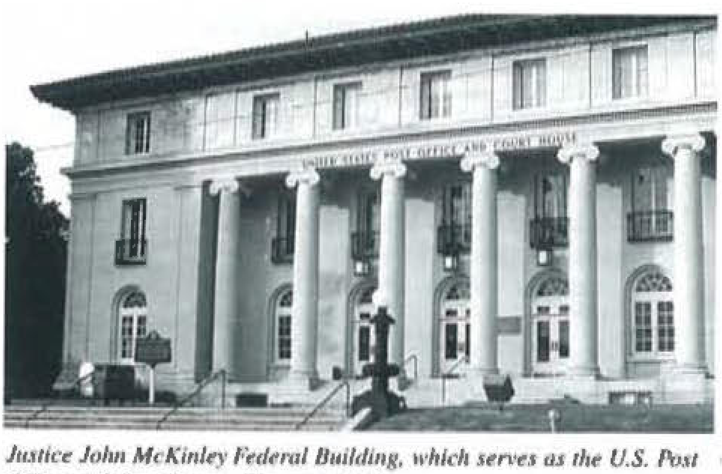
The marker is located in front of Florence's United States Post Office and Courthouse, which was renamed the Justice John McKinley Federal Building. The name change occurred on October 27, 1998, when President Bill Clinton signed Public Law 105-299. The text of the marker reads as follows:

> Named for Alabama's first United States Supreme Court Justice, John McKinley made his home in Florence, Alabama, from about 1821 to 1842. Born May 1, 1780, in Culpepper County, Virginia, he died July 19, 1852, and is buried in Louisville, Kentucky. McKinley was an early settler of Huntsville, Alabama, and resided in the Howard Weeden Home. As a member of the Cypress Land Company, he was one of the seven founders of Florence in 1818. McKinley helped establish one of Florence's first schools and its first church, First Presbyterian Church.
>
> McKinley was an early benefactor of public education in Alabama by donating land for the current Athens State University and serving on the original Board of Trustees for the University of Alabama. As a local lawyer, he gained regional status as an Alabama legislator and national status in both the U.S. House and Senate. His work in Congress on the first Florence Canal establishes him as the "Spiritual Father of TVA." While a resident of Florence in 1838, McKinley was sworn in as the 23rd Associate Justice of the United States Supreme Court where he served until his death.

Pictured above with the McKinley marker are: 11th Circuit Bar Commissioner Robert L. Gonce; 2000-2001 ASB President Samuel A. Rumore, Jr.; retired U.S. District Court Judge, Northern District of Alabama, E.B. Haltom, Jr.; Lauderdale County Bar Association President Ralph E. Holt; and master of ceremonies William E. Smith, Jr.

The marker is part of the Alabama State Bar's program designed to recognize the state's legal history. Five other legal milestone markers have been erected throughout the state. These include one in Huntsville to honor the state's constitutional convention of 1819; one in Mobile, which is the 14th oldest bar association in the nation; one in Montgomery at the Alabama State Bar headquarters; one in Monroeville to honor "To Kill a Mockingbird" lawyer Atticus Finch; and one in Tuscaloosa at the University of Alabama School of Law. The McKinley marker was funded by the Alabama State Bar, the Lauderdale County Bar Association, the McKinley Young Lawyers and the Florence Historical Board.

Appointed by President Martin Van Buren, McKinley was the first justice to serve on the newly created Ninth Circuit. Much of his tenure was devoted to his "circuit-riding duties" which in one year had him traveling over ten thousand miles. McKinley's contribution to constitutional legal theory includes his opinions in *Groves v. Slaughter* and *The Passenger Cases*.



Justice John McKinley Federal Building, which serves as the U.S. Post Office and Courthouse, Florence, Alabama

Photo by Roberta S. McKinney

William E. Smith, Jr.

William E. Smith, Jr. is a native of Florence, Alabama and former president of the McKinley Young Lawyers. He received both his bachelor of arts and master of business administration degrees from the University of North Alabama and his Juris Doctor from Cumberland School of Law of Samford University. Smith practices in Florence and is an adjunct professor of business law at the University of North Alabama. He is currently preparing a law review article on Justice McKinley

By Robert L. McCurley, Jr.

Robert L. McCurley, Jr.

Reapportionment

The Special Session that called for reapportionment lasted a week. The reapportionment plans proposed by the House and Senate Permanent Reapportionment Committees were passed. The Senate Reapportionment Committee was chaired by Senator Jeff Enfinger while Representative Marcel Black chaired the House of Representatives' Committee.

The house plan, Act 2001-729 (HB. 1), establishes house districts. The Senate redistricting plan is in Act 2001-727 (SB. 2). A third act, Act 2001-728 (HB. 2), passed, which requires any contest of a redistricting plan must be brought in Montgomery Circuit Court.

The 2000 Census indicated that Alabama had grown from 4,040,587 persons in 1990 to 4,447,100, a more-than-10 percent growth. The 105 house districts ideally should each have 42,353 persons, while a senate district should be composed of 127,060 people.

The 1970, 1980 and 1990 plans all were "nested" (three house seats comprised one senate seat). This year's plan is not "nested." The senate devised their own district plan and the house drew their own districts. Each plan was drawn without regard to matching the other boundaries. Very few states have "nested" house and senate districts.

The legislators' criteria for drawing districts was to assure compactness, community of interest, geographic boundaries, county boundaries, city boundaries, and racial makeup as primary factors to be considered in the makeup of each district.

The 2000 Census indicated the demography of race in Alabama was 71.121 percent white; 26.287 percent black; 0.850 percent Asian; 1.705 percent Hispanic; and 1.238 percent other.

Interestingly, we have 62.89 percent of the citizens registered voters.

Until the 1960s, Alabama districts were generally along county lines. After the 1960 census, a new standard for districts was imposed. In 1964 the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), required both houses of the legislature to be apportioned on a population basis. New reapportionment plans were filed in both the 1965 Regular Session and a subsequent Special Session. A federal court accepted the senate plan but rejected the house plan and prepared its own plan.

When the legislature did not reapportion itself in 1970, a federal court in *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), divided the state into 35 senate districts with each containing three house districts. In 1973 the legislature tried to draw its own districts but the federal courts rejected the Legislature's plan and the court plan became effective.

After the 1980 Census, the legislature again passed a plan only to see it rejected by the U.S. Justice Department. The legislature passed a second plan in 1982 which was used on an interim basis for elections. In 1983, the legislature met in special session to approve a plan which had been presented in federal court by black citizens. This plan was accepted by the Justice Department and federal court but new elections were ordered. *See Burton v. Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983), Opinion of the Justices, No. 305, 442 So.2d 42 (Ala. 1983).

During 1992, the legislature passed a redistricting plan. This plan was litigated by a group of African-American plaintiffs in one case and by plaintiffs identifying themselves as Republicans in another. These cases were consolidated and subsequently the legislative plan was rejected by the federal court. *See Brooks v. Hobbie*, 631 So. 2d 883 (Ala. 1993).

This 2000 redistricting plan was crafted after extensive public hearings by the Permanent Legislative Committee on Reapportionment. Lawsuits have again been threatened. The plan is now subject to review under the "Voting Rights Act of 1965," 42 U.S.C. § 1972 *et seq.* The Justice Department must approve or disapprove within 60 days or obtain a declaratory judgment from the District Court in Washington, DC.

For more information about these redistricting bills, go to the legislature's Web site, *www.legislature.state.al.us/*.

Annual Meeting

The Law Institute held its Annual Meeting July 18, 2001. Officers for the 2001-2002 year are: President Demetrius Newton, Birmingham; Vice-President Roger Bedford, Russellville; and Secretary Bob McCurley, Tuscaloosa. Other members of the Executive Committee are: David Boyd, Montgomery; Jim Campbell, Anniston; Mark Gaines, Birmingham; Ken Guin, Carbon Hill; Richard S. Manley, Demopolis; Oakley Melton, Jr., Montgomery; Yetta Samford, Jr., Opelika; Rodger Smitherman, Birmingham; and Steve Windom, Mobile.

Legislators were recognized at the Annual Bench and Bar Luncheon for their sponsorship of Institute-drafted legislation. UCC Article 9 Act sponsors are Senator Roger Bedford, Jr., Senator Rodger Smitherman, Senator Wendell Mitchell and Representative Marcel Black. Electronic Transactions Act sponsors are Senator Ted Little, Senator Rodger Smitherman, Senator Wendell Mitchell, Representative Marcel Black, Representative Mark Gaines, and Representative Ken Guin. Athlete Agent Act sponsors are Senator Gerald Dial, Senator Rodger Smitherman, Representative Gerald Allen and Representative Jack Venable.

New Web Site

Our new Web address is *www.ali.state.al.us*.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, fax (205) 348-8411, or phone (205) 348-7411.

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

J. Anthony McLain

CONFIDENTIALITY—Can You Keep A Secret?

By J. Anthony McLain, general counsel

The cornerstone of the attorney-client relationship continues to be loyalty. The fiduciary relationship created when the client retains the attorney requires absolute commitment by the attorney to the client, and zealous representation by the attorney in pursuit of the interests and rights of the client.

Inherent in such a relationship is the need for the attorney to maintain confidentiality as it relates to any and all information gained by the attorney during the representation of the client. However, many attorneys continue to confuse or mix the concepts of confidentiality and privilege.

Confidentiality is governed by Rule 1.6, Alabama Rules of Professional Conduct, which states as follows:

"Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

As the Comment points out, information governed by Rule 1.6 is more expansive than that generally recognized by the legal principle or concept of privilege. The Comment to Rule 1.6 states as follows:

> "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

While the concept of privileged communications appears to be more restrictive, as a matter of law, than the term confidentiality, as a matter of ethics, consider the opinion of the Supreme Court of Alabama in the case of *Richards v. Lennox Industries, Inc.*, 574 So.2d 736 (Ala. 1990). Therein, homeowners filed a products liability action against the manufacturer and distributor of a gas furnace that exploded and injured the homeowner. At trial, the former law clerk of the homeowners' attorney testified, over objection, that he had observed a test conducted on the valve assembly in question prior to its removal from the home, that he had removed the valve assembly from the furnace at the homeowners' residence with no assistance from anyone, and that to his knowledge there were no "parts broken off of [the valve assembly]" at the time he removed it, and that he had returned the valve assembly to his former employer's [homeowners' attorney] office.

On appeal, the Supreme Court of Alabama considered *Code of Alabama* 1975, §12-21-161, which states that an attorney or his law clerk is not competent to testify against a client as to information concerning any matter which may have been acquired during the representation of that client.

The objection to the law clerk's testimony was grounded in this statutory provision, with the homeowners contending that the former law clerk had gained this information during his employ by their attorney, and during that representation.

The supreme court, in reviewing significant case law on the matter of privileged communications, determined that the "acts" performed by the former law clerk were privileged communications, knowledge of which was obtained from a confidential attorney-client relationship, and the trial court's admission of that evidence, over the objection of the homeowners, violated §12-21-161.

Dissecting Rule 1.6, there are exceptions to the absoluteness of confidentiality, as well as recognition of authorized disclosure of information which would otherwise be deemed confidential.

The first and most obvious exception to the attorney's requirement to maintain confidentiality of information occurs when the client consents, "after consultation," to disclosure of confidential information. However, the attorney should exercise extreme caution when consulting with a client about waiver of confidentiality, since once the waiver occurs, in all probability, it cannot be revoked. Further, the waiver could lead third parties to discover information which would otherwise would not be subject to disclosure pursuant to the rules of applicable criminal or civil procedure.

Rule 1.6 also *allows* the attorney to reveal confidential information if the attorney reasonably believes such is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in imminent death or substantial bodily harm. As noted by the italicized language of the previous sentence, disclosure in this instance is permissive, not mandatory.

The former Permanent Code Commission of the Alabama State Bar, in considering possible drafts to be submitted to the Alabama Supreme Court for adoption, weighed the possibility of making this provision mandatory, i.e., the attorney had to disclose this information if such became known to him. However, the eventual proposed rule, as adopted by the Supreme Court of Alabama, effective January 1, 1991, contains the permissive language of "may," concerning revelation of such information by the attorney.

An attorney also may disclose confidential information otherwise protected by Rule 1.6 to establish a claim or a defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client.

Interpreting subsection (2) of paragraph (b), the Office of General Counsel and the Disciplinary Commission have generally determined that where an attorney's conduct is called into question with regard to claims of malpractice, ineffective assistance of counsel, or ethical misconduct, confidentiality is waived by the client asserting same to the extent reasonably necessary to allow the attorney to establish a defense to said claims.

However, the rule allows disclosure of only that information which is reasonably necessary to respond to the specific allegations of malpractice, ineffective assistance of counsel or ethical misconduct. In certain instances, attorneys have exceeded this restriction, apparently in an effort to exact a toll upon the client alleging misconduct or malpractice against their attorney. The rule prohibits such, and an attorney's engaging in this type of conduct subjects him to disciplinary action, and possible civil liability.

Recent ethical inquiries disclose an increasing amount of activity in litigation where attorneys are subpoenaed to testify concerning their representation of a client, and are even requested to produce client files. The Office of General Counsel and the Disciplinary Commission consistently maintain the position that the attorney subjected to such a request for testimony or documents assert confidentiality, and privilege, and resist disclosure of this information. The rule specifically allows the attorney to contest such attempts to require disclosure of confidential information, with disclosure only being permitted upon consent of the client after consultation, or by order of a tribunal.

If the tribunal orders disclosure of the information, the attorney is ethically protected from disciplinary action as to any violation of Rule 1.6. The attorney is not required to further appeal or contest the order of the court, and may comply with same without exposing himself to disciplinary action.

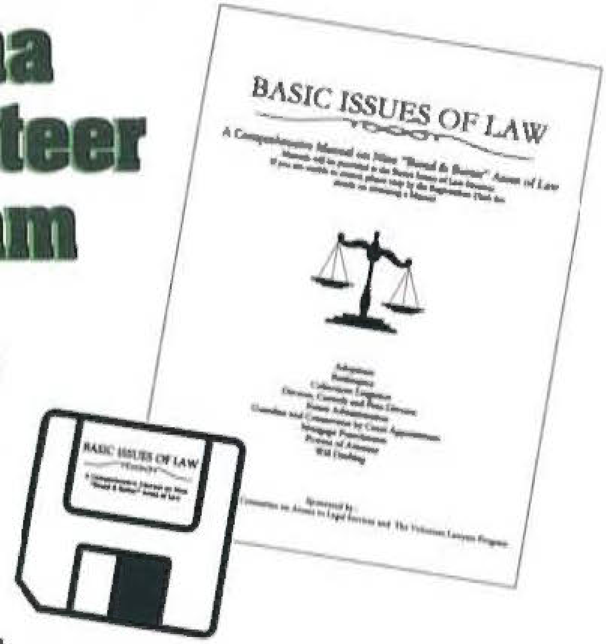
The public has heard horror stories as they relate to confidentiality and privileged information in the attorney-client relationship context. The classic example is where the attorney representing the criminal defendant accused of murdering the child victim cannot disclose to the parents of the victim the whereabouts of the child's body. The media spin given to this story places the legal profession in a bad light, and generally seeks no explanation as to why the attorney must withhold the information in question.

What the public fails to perceive, and the media refuses to acknowledge, is that but for the confidentiality concept of the fiduciary relationship between the attorney and client, the attorney would be handicapped in representing the client, by not receiving any and all information necessary to allow effective and zealous representation of the client. Likewise, the client may be chilled from disclosing certain information to the attorney for fear that the information would eventually be disclosed to a third party.

Attorneys should exercise the utmost care to protect confidential information obtained by them during the representation of their clients. The attorney should be aware that the confidentiality requirements of Rule 1.6 cover a much greater amount of information than that considered to be privileged information as a matter of law. The opinions of the Office of General Counsel and the Disciplinary Commission restrict themselves to an interpretation of the Rules of Professional Conduct, as a matter of ethics, and in no way attempt to interpret legal principles applicable to the concept of privilege.

In view of the fact that confidentiality does cover a more expansive area of information, attorneys are encouraged to err on the side of asserting confidentiality when disclosure of information is sought concerning representation of the client, and to also seek counsel of the Office of General Counsel or the Disciplinary Commission if the circumstances of the representation dictate the need for further ethical guidance. ■

Join the Alabama State Bar Volunteer Lawyers Program



Join the Volunteer Lawyers Program and receive the "Basic Issues of Law" manual on a 3-1/2" disk, free. This manual covers nine "bread-and-butter" areas of the law, including adoption; bankruptcy; collections litigation; divorce, custody and post-divorce; guardian and conservator by court appointment; mortgage foreclosure; powers of attorney; and will drafting. To join, simply complete the form below and mail to: Volunteer Lawyers Program, Alabama State Bar, P.O. Box 671, Montgomery, Alabama 36101. Upon receipt of your enrollment form, the VLP will mail to you the "Basic Issues of Law" disk.

Enrollment Form

Alabama State Bar Volunteer Lawyers Program
P.O. Box 671, Montgomery, Alabama 36101
Phone (334) 269-1515, ext. 301 • Fax (334) 261-6310 • *www.alabar.org*

Name

Address

Telephone/Fax Number

Signature

I will accept two case referrals in the following areas:

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Get on the list of very important people. Enroll today!!

Samuel A. Rumore, Jr.

Vanderburgh County Courthouse, Evansville, Indiana, completed 1890
Photo taken June 2001

Another view of Evansville, Indiana courthouse

Vanderburgh County Established: 1819

Vanderburgh County—Evansville, Indiana

By Samuel A. Rumore, Jr.

Evansville, Indiana is a historic Ohio River city. It was incorporated in 1819, the same year that Alabama became a state. It is the county seat of Vanderburgh County. But what is its significance to the theme of "Building Alabama's Courthouses"?

Several years ago, inspired in part by my interest in Alabama courthouses, I began collecting books on the courthouses of other states. A fine book that I acquired in 1999 was *The Magnificent 92 Indiana Courthouses*. The book was quite interesting because on page after page there were pictures of beautiful old courthouses throughout Indiana that were still being used for their original purpose or that had been preserved and renovated for other uses.

The entries in the book are arranged alphabetically by county. Capsulized information on each courthouse is easy to view at a glance. When I came to Vanderburgh County I was taken completely by surprise. The courthouse was built between 1887 and 1890. The architect was Henry Wolters (1845—1921) of Louisville, Kentucky. And the contractor was Charles Pearce & Co. of Indianapolis, Indiana.

What was surprising about this courthouse was that the second courthouse in Birmingham was built at the same time, was designed by the same architect, and was constructed by the same contractor. (See "Building Alabama's Courthouses," *The Alabama Lawyer* January 1991, page 16, and March 1991, photo, page 84). The costs of the courthouses were also comparable. The only real difference was that the Birmingham courthouse had been replaced in 1931 and razed in 1937. The Evansville courthouse was replaced in 1969 but was still standing. This discovery made a side-trip to Evansville a necessity in order to see the similarities, if any, between the two structures, and to view a tangible link with an historic Alabama courthouse that had been taken down more than 60 years previously.

The courthouse site in Evansville has historic significance that pre-dates the courthouse itself. Evansville was the southern terminus for the Wabash and Erie Canal. The courthouse site had been the canal's terminal basin. Here the canal boats were unloaded and their cargo was hauled overland the short distance to the Ohio River for

Cornerstone showing architects and contractors

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.

Restored courtroom at old Vanderburgh County Courthouse

trans-shipment. When the canal-era ended, the canal was filled in. The courthouse was completed on the site in 1890.

Henry Wolters was born in Germany. His design for the Vanderburgh County Courthouse created an elaborate Neo-Baroque styled structure. The building contains many sculptured figures with carvings of fruit, flowers and vegetables indigenous to southern Indiana. There were also 14 human figures produced for the building. The interior was built with finely carved woodwork that gave the impression of elegance.

Vulcan and friend

Vulcan with his plow

Pictures of the Jefferson County Courthouse, designed at the same time, show a building with a similar central clock tower and dome with cupola. And the Birmingham courthouse contained a number of elaborate carvings as well. It, too, appeared to be a grand building and gave an impression of civic importance. However, the basic building material was brick rather than Indiana limestone. The courthouse in Birmingham appeared to be slightly smaller than the Evansville structure, but one must remember that Birmingham had only 26,178 citizens in 1890 while Evansville was at the time the principal commercial city in Indiana and second in population to the state capital.

Jefferson County Courthouse 1889-1931

Photo provided by Birmingham Public Library Department of Archives and Manuscripts

Upon walking through the Evansville courthouse I received one additional surprise that made the connection complete between this courthouse and Birmingham. In the basement rotunda stands a nine-and-a-half foot high statue. That in itself is not unusual but the subject of the statue was Vulcan, Roman god of the forge and symbol of Birmingham, Alabama. The only difference was that this Vulcan was standing with a plow. A marker placed with the statue explained that Evansville had been the home of the Vulcan Plow Company, and that the statue of Vulcan had been placed on the factory roof in 1910. When the factory was torn down in 1957, the Vulcan statue was saved, restored and placed in the courthouse basement rotunda. The marker mentioned that a huge statue of Vulcan was in Birmingham, Alabama. This statue clearly completed the tie between Birmingham and the 1890 Evansville, Indiana courthouse.

When the Vanderburgh County government moved to its new Civic Center Complex in 1969, the building was slated for demolition. A group of concerned citizens came to the rescue and established an Old Courthouse Preservation Society. They saved the building using as its theme "Some History Cannot Repeat Itself." It was estimated that the replacement cost for the courthouse building would be well over $40 million if the skilled craftsmen and materials could be located.

The old courthouse is now used for various public and private offices. Community theater groups and civic and arts organizations also use the building. Visitors can view a restored courtroom. There is a large room on the second floor, called Wedgwood Hall, that is available to rent for meetings, catered functions and wedding receptions. The building is truly an architectural treasure and the citizens of Evansville should be proud that they saved this magnificent edifice.

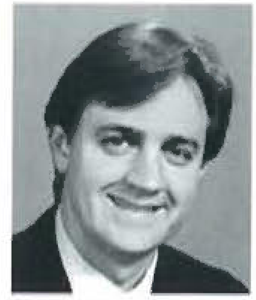
Any community in Alabama that has a historic courthouse building could take note that there is an alternative to the wrecking ball. Historic Alabama courthouses can be re-adapted for other uses when it is time for them to be replaced. The key ingredients for success are the interest and concern of citizens who will not let their historical and architectural heritage die. As learned in Indiana, with respect to older buildings, some history cannot repeat itself.

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 Tenth Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He is a retired colonel in the United States Army Reserve JAG Corps. Rumore served as the 2000-2001 president of the Alabama State Bar.

Young Lawyers' Section

By Cole Portis, 2000-2001 YLS president



Cole Portis

My tenure as president of the Young Lawyers' Section is completed. As I ponder the events of the past year, I am reminded of my initial journey into the legal profession. I remember my three years of law school. During those years, I thoroughly enjoyed many of the relationships that I established with my classmates. Many of those classmates have long ago "aged out," but for many who began law school directly out of college, they remain a young lawyer for one more year.

Each spring some of these former law school classmates of mine journey to the beach to play golf. These are friendships that will endure forever. I appreciate the fellowship of these men. Not surprisingly, each one of them has made a mark in the legal profession. All of them are very bright, with my being the lone exception, and they thoroughly enjoy their chosen professions. A few of them concentrate on the plaintiff's practice of law, a few others primarily defend civil cases, one is a corporate attorney, another has a small town practice, one dabbles in politics and real estate, and one is even a judge. Each one of these men recognizes that they have been blessed in their careers.

Soon, neither I nor my friends will be considered "young lawyers." We will become lawyers who are "young at heart." A new group of bar admittees will take our places. It is my hope that these new admittees will bond together and continue the heritage established by young lawyers long ago to promote the honor of the profession of the law.

Fortunately, I am passing the leadership of this group to **Todd Strohmeyer**, a Mobile lawyer who has already been instrumental to the YLS by bearing the responsibilities associated with the Sandestin seminar. This year's seminar, spearheaded by Todd, attracted attendance larger than any of our past seminars. The CLE program and activities at the Sandestin seminar were the best I have attended. A young lawyer from Georgia who was drawn to the seminar commented to me, "This is amazing!"

The young lawyers who work tirelessly are amazing! Such a legacy was born long before my involvement and will continue long after I am gone. Young lawyers possess the energy and the vision to accomplish great things. For some reason, I have noticed that as some lawyers age they become more cynical, believing that they can no longer have an impact on our society. I reject such a notion and will remain committed to improving the lives of those around me.

My service as president of Young Lawyers' Section provided me with an appreciation for our profession. Thank you for the opportunity to serve.

ALABAMA STATE BAR

Spring 2001 Admittees

Statistics of Interest

Number sitting for exam	349
Number certified to Supreme Court of Alabama	158
Certification rate*	45.3 percent

Certification Percentages:

University of Alabama School of Law	65.5 percent
Birmingham School of Law	23.5 percent
Cumberland School of Law	64 percent
Jones School of Law	55 percent
Miles College of Law	11.4 percent

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

For full exam statistics for the February 2001 exam, go to *www.alabar.org*, click on "Members" and then check out the "Admissions" section.

Alabama State Bar Spring 2001 Admittees

Albertson, Sherry Michelle
Alexander, Amy Noelle
Alonzo, Ramon Edward
Amason, Billy Brewer
Anderson, Richard Dearman
Andrews, David Michael
Atkins, Vickie Sexton
Ayres, Chad Wayne
Baer, Charles Arthur
Balli, James Alan Wilson
Barfoot, Charles Williamson
Barlow, Davis Arthur
Bell, Timothy Scott
Bennefield, Rebecca Lynn
Berry, Elizabeth Elliott-Melton
Blackmon, Elizabeth Braswell
Blum, Sean Patrick
Booth, Prentiss Christopher
Brandon, Mary Kate Cochrane
Brown, Deirdra Jeneva
Brown, Thomas Benjamin
Bryant, Anna Laurie
Burke, Paul Willard
Carr, Danny Darnell
Carroll, George Delbert
Carter, Marcus Palmer
Chhablani, Sanjay Kishin
Clark, Daniel Kevin
Compton, Jeffrey Michael
Conboy, Thomas Joseph Jr.
Cook, Carol Diane
Cook, Clay Conley
Crabb, Stacy Claunch
Craddock, Michael Jerome
Crawford, Lisa Lee
Crowson, Daniel Alford Jr.
Cunningham, Sarah A.
Damian, Anita Sani
Day, Brent Thomas
Dearing, Allison Michelle Lee
Dell, Laura Lea Averett
Dillingham, Lydia Curtis
DiLorenzo, Joel Lee
Doss, Michael Logan
Driggers, Bennett Ray Sr.
Drowns, Jayne Amani
Dupuy, Stephen James
Edwards, Elizabeth Reynolds
Elliott, Emmett Woodward
Ellis, Matthew Terrell
Ficquette, Joseph Dwayne
Ford, Kenya Sari
Frankowski, Richard Stanislaw
French, Tommy Allen
Garrison, Jessica Lynn Medeiros
Geller, Matthew Shane
Gentry, Dana Posey
Gil, Rafael III
Goodwin, Jennifer Leigh
Gray, Colette Ann Barrett
Green, Matthew Stafford
Gupta, Ragini
Haack, Shanon Dale
Hale, Wendy Leigh
Hall, Debbie Reeves
Hamilton, Brian Paul
Harris, Christina Marie
Harrold, Thomas Randolph
Haynes, James Matthew Jr.
Healey, Kathleen Ann
Herrington, Charles Michael
Hicks, Joseph Bryant
Hinson, Melanie Darlene Glass
Holden, Kevin Stacy
Holt, L. D.
Holton, Michael Guy
Hood, Shelly Denise
Huelskamp, Karen Kathleen
Huffstutler, Todd Lloyd Hunter
Ivker, Naomi Anne Cohen
Jannik, Joanne Maria
Jett, Errek Paul
Johnson, Kristin Elizabeth
Johnson, Matthew Raleigh
Jones, Marcus Nolan
Judge, Nicole Leah
Keck, Paula Waynett
Kelley, Christopher Robin
Kelly, Thomas Frank Jr.
Kemp, Paul Michael
Kent, Robert Andrew Jr.
King, Sondra Denise
Kirby, Carey Neal
Kleinberg, Elizabeth Allison
Lambert, Frank Leslie
Lane, Joshua Jones
Lang, Erica Lynne Tucker
Lauderdale, Kent Michael
Lawrence, Ann Day
Lazarus, Jason Aaron
Ledbetter, Judy Machelle
Liggan, Charles Jason
Lones, Billy Maloy
Lopez, Temo
Madison, Daniel Wilkins
Matthews, Richard Franklin Jr.
May, Christina Lauren
McAlister, Carolyn Ann
McCallister, Anthony Brian
McCarty, Ernest Lee III
McGeary, Judith Ilana
McKinnon, James Shawn
McWhirter, Julie Ann
Mendor, William Shane
Miller, Holly Sue
Miller, John Christopher
Mitchem, Jared Edward
Mittleman, Linda Ruck
Moore, Charlotte Y. Trimble
Moore, William Jeffrey
Morrison, Ramona Johnson
Mountcastle, William Randolph III
Neff, Jason Carl
Nichols, Virginia Lynn
Nixon, Kenneth Harold Jr.
Norris, Susan Lee Berman
Pace, Joy Ruth
Page, Shannon Craig
Parrino, Warren Mitchell
Parson, Nyya Connyse
Patterson, James Taylor
Pawlik, Ruth Teague
Peevy, Keith Jackson
Plunk, Molly Katherine
Pool, Gregory Mitchell
Pope, Ricky Lynn
Pote, David Allen
Price, Jeffrey Brian
Redd, Harold Douglas Sr.
Robinson, Geraldine Williams
Rone, Matthew Eston
Roth, James Martin
Ruffin, Jethro Dwight
Rundlet, Alexander Taylor
Ryan, Alison Trowbridge
Ryan, Kathy Drew Dancy
Sanders, Kindaka Jamal
Sanford, Kristi Messer
Schlager, Ron
Scogin, Sarah Marie
Seiffert-Fletcher, Sherry Ann
Shaw, Morris Lonnie Jr.
Sims, Patrick O'Brian
Smith, Robert Earl Jr.
Smith, Ronald Wayne
Spelle, Lane Thackeray
Spurling, Antonio Delfonjia
Stanford, James Arthur Jr.
Stinson, Tammy Lynn
Stoddard, Sara E. Oswald
Swanner, Lance Harrison
Taylor, Angela Christine
Taylor, Scott Parker
Thomas, Symantha Christeen
Thompson, Rodney Darrin
Thompson, Stephen Warren
Tindal, Clay Alan
Townsend, Tyrone
Tranter, David Verlin
Traudt-Bowdoin, Mary Elizabeth
Tucker, Carrie Elizabeth
Vollmer, James Burke
White, Daniel Jay
Wilcox, Derry Olive
Williams, Franklin Gene
Wilson, Julie Louise
Winter, Irving Morris Jr.

Lawyers in the Family

Elizabeth Braswell Blackmon (2001), Alexander F. Braswell (2000) and Nicholas T. Braswell (1966)
admittee, husband and father-in-law

Katie Plunk (2001), John Plunk (1978) and Benjamin Spratling (1971)
admittee, father and cousin

Colette Barrett Gray (2001) and John Philip Gray (1998)
admittee and husband

P. Christopher Booth (2001), Alfred Q. Booth (1979) and Joy R. Pace (2001)
admittee/fiance', father/future father-in-law, and admittee/fiancee'

Gregory Mitchell Pool (2001) and Benjamin Erwin Pool (1972)
admittee and father

Clay C. Cook (2001) and J.N. Buckner, Jr. (1984)
admittee and father-in-law

Kent M. Lauderdale (2001) and Lauryn A. Lauderdale (1996)
admittee and wife

David Michael Andrews (2001) and Stephen Mark Andrews (1997)
admittee and brother

Matt Green (2001) and Norm Davis (1975)
admittee and uncle

Rafael Gil, III (2001) and Gary A.C. Backus (1997)
admittee and brother-in-law

Lawyers in the Family

Elizabeth Reynolds Edwards (2001), Bingham D. Edwards, Jr. (1996) and Bingham D. Edwards (1968) admittee, brother and father

Richard Dearman Anderson (2001), Judge Mark Anderson, III (1962) and Mark Anderson, IV (1996) admittee, father and brother

Tommy Allen French (2001) and Robert B. French, Jr. (1963) admittee and father

James Burke Vollmer (2001), Judge Richard W. Vollmer, Jr. (1953) and Richard W. Vollmer, III (1982) admittee, father and brother

Lane Thackeray Spelle Ellis (2001) and Mark Ellis (1981) admittee and husband

Stephen W. Thompson (2001) and Tracy M. Thompson (1997) admittee and wife

Daniel Wilkins Madison (2001) and Donald Gordon Madison (1984) admittee and brother

Joshua J. Lane (2001) and Wilford J. Lane (1978) admittee and father

Daniel A. Crowson, Jr. (2001) and Judge D. Al Crowson (1973) admittee and father

Scott Parker Taylor (2001) and Lloyd Earl Taylor (1968) admittee and father

ASB 2001 Annual Meeting Highlights

See What You Missed...

Plenary session speaker Toby Brown, Pat Rumore and Beverly Morris visit during the Membership Luncheon.

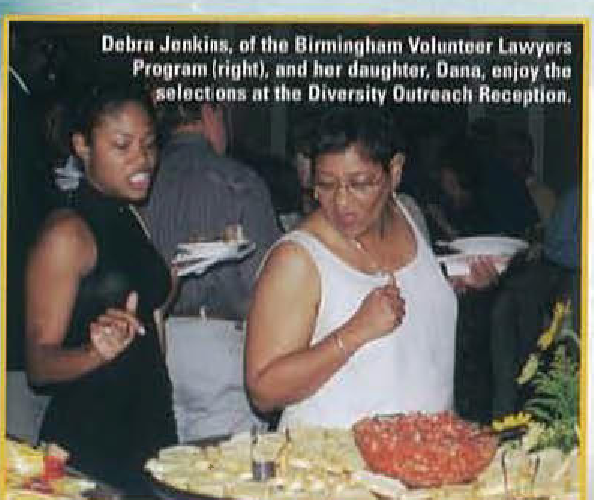
ASB President Sam Rumore and Membership Luncheon speaker Charles Morgan

Cumberland Professor Paul Kuruk (left) visits with Bar Commissioner Scott Donaldson of Tuscaloosa at the Diversity Outreach Reception, co-sponsored by the ASB Task Force on Diversity in the Profession, the Alabama Lawyers Association, the Women's Section and the ASB.

The Bar & Grill Singers entertained *everyone* during the Membership Luncheon!

Pam Higgins, Sandra Lewis and Gilda Williams share a laugh before the Women's Section's "How to Deal with Obnoxious Litigators" begins.

Bar Commissioner Everett Price "admires" speaker John Peek's tie before his presentation, "Case Management Shootout: Comparing and Contrasting the Most Popular Case Management Software Programs."



Debra Jenkins, of the Birmingham Volunteer Lawyers Program (right), and her daughter, Dana, enjoy the selections at the Diversity Outreach Reception.

Ron Schlager, 2000 new admittee from Sherman Oaks, California, with (left to right) Ernestine Sapp, Dawn Wiggins Hare, Celia Collins, Gerrilyn Grant, Donna Pate and (kneeling) Caryl Privett

ASB 2001 Annual Meeting Highlights

The Past Presidents' Breakfast always draws an enthusiastic group.

Frank Cauthen visits with Alabama Law Foundation Executive Director Tracy Daniel at ALF's booth.

Cameron Murphy of Montgomery and Zachary Skinner of Wetumpka are mesmerized by magician Gary Ledbetter at the ALF Ice Cream Social.

ASB President Sam Rumore and his wife, Pat (left), share a moment with soon-to-be President-Elect Fred Gray and his wife, Carol Gray, at the President's Reception.

Past presidents Wade Baxley, Alva Caine and Broox Holmes can relax at annual meetings now.

Dana Jenkins, Volunteer Lawyers Program intern Russell Franklin and Jimmy Thomas catch up at the VLP Reception.

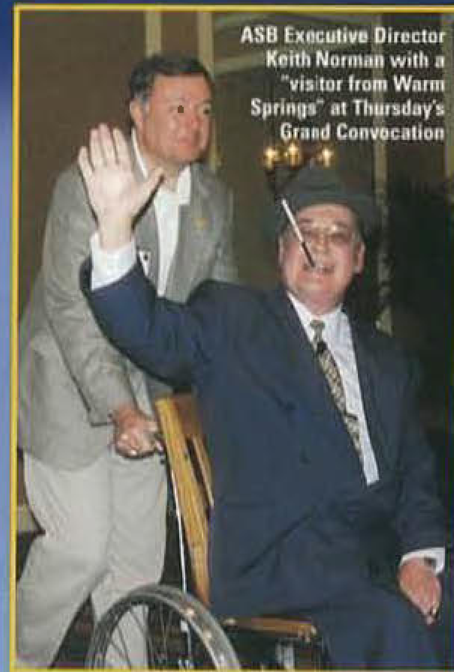
Judge Sandra Ross Storm received the Judicial Award of Merit.

Elouise Williams, recipient of the ASB Award of Merit, and President Rumore

Anita Hamlett, ABICLE associate director, enjoys a moment with her son, Landon, and her mother.

ASB 2001 Annual Meeting Highlights

Serious issues were discussed during the Committee and Task Force Breakfast.



ASB Executive Director Keith Norman with a "visitor from Warm Springs" at Thursday's Grand Convocation

Lighter conversation was shared by ASB commissioners Carol Stewart and Dwight Sloan of Birmingham and Dave Boyd of Montgomery.

Retiring Bar Commissioner Ernestine Sapp is thanked by President Rumore for her service to the board.

Tom Keith, with Legal Services Corp. of N. Central Alabama, receives the ASB Award of Merit from President Rumore.

Among those honored for 50 years' in the profession were Oakley Melton, Jr. (center) of Montgomery and Leon G. Duke, Jr. of Mobile.

President Rumore presents Miss Nina Miglionico with the ASB Presidential Award as the longest-practicing female attorney.

Past President Wade Baxley thanks Charline Bailey for her assistance to President Rumore during the past year.

ASB 2001 Annual Meeting Highlights

Katy Campbell, chair of the Committee on Volunteer Lawyer Programs, presents solo practitioner William Roe of Oneonta with the VLP Award.

Ed Patterson presents Ben Bowden with the Local Bar Achievement Award for the Covington County Bar Association.

Bar Commissioner Doug McElvy, Tuscaloosa County Bar President Cooper Shattuck, Madelene Hollingsworth and Commissioner Scott Donaldson with the Local Bar Achievement award

Jack Clarke, chair of the Committee on Alternative Methods of Dispute Resolution, (left) and Bar Commissioner Joey Morris swap plaques.

President Morris and Past President Rumore share a final laugh.

Past presidents Wade Baxley and Sam Rumore, 2001-02 President Larry Morris and President-Elect Fred Gray

President-elect Gray is congratulated by Past President Rumore.

. . . See You Next Year!

In Recognition Of

Alabama Law Institute Legislative awards

Jim Campbell, Anniston

Representatives Mark Gaines, Birmingham; Jack Venable, Tallassee; Mike Hubbard, Auburn; Gerald Allen, Cottondale; Ken Guin, Jr., Carbon Hill; and Marcel Black, Tuscumbia

Senators Gerald Dial, Lineville; Ted Little, Auburn; Rodger Smitherman, Birmingham; Roger Bedford, Russellville; and Wendell Mitchell, Luverne

Walter B. Gewin award (Alabama Bar Institute for CLE)

Robert F. Prince, Tuscaloosa

Alabama State Bar Judicial Award of Merit

Judge Sandra Ross Storm, Birmingham

Alabama State Bar Award of Merit

Thomas G. Keith, Huntsville
Elouise Williams, Birmingham

Alabama State Bar Local Bar Award of Achievement

Covington County Bar Association (Benjamin M. Bowden, Andalusia, president)

Mobile Bar Association (Larry U. Sims, Mobile, president)

Pickens County Bar Association (John A. Russell, III, Aliceville, president)

Tuscaloosa County Bar Association (R. Cooper Shattuck, Tuscaloosa, president)

Kids' Chance Scholarship recipients

Robin E. Beasley, Millry
Ashley Bice, Verbena
Jonathan L. Chance, Dora
Robin Crane, Birmingham
Holly Dutton, Jasper
Cassey Harris, Anniston
Kelley Huffstutler, Albertville
Gregory Kimbrough, Birmingham
Brandye Maddox, Pleasant Grove
Amy Maulden, Ozark
Terry Nunley, Flat Rock
Jennifer Partain, Tuscaloosa
Rajeeni Patterson, Birmingham
Emmett Pollard, Jr., Birmingham
Angela Pridmore, Pleasant Grove
Brooke Skipper, Ashford
Amalee Smith, Birmingham
Misty Vincent, Hanceville
Natasha Walton, Tuscaloosa

Alabama State Bar Commissioners' Award

Honorable Howell T. Heflin, Tuscumbia
Honorable C.C. Torbert, Montgomery
Honorable E.C. Hornsby, Tallassee
Honorable Perry O. Hooper, Sr., Montgomery

Presidential Award

Nina Miglionica, Birmingham

Fifty-Year Certificate Recipients

Howard Cobb Alexander, Montgomery
James Ernest Anton, Birmingham
James Ralph Beaird, Athens, GA
Leo Berryman, Jr., Sheffield
Orzell Billingsley, Jr., Birmingham
Loyal Ray Blackwood, Ridgeland, MS
Eugene Willis Brabston, Birmingham
Walter Glenn Bridges, Bessemer
Roscoe Braden Chandler, Jr., Memphis, TN
Marvin Cherner, Birmingham
William Roy Cherry, Jr., Birmingham
James Roy Cleary, Huntsville
Coy McClesky Cooper, Birmingham
Hoyt Wayne Copeland, Gadsden
James Varris Corr, Atlanta, GA
Robert Oliver Cox, Florence
Virgil Cecil Curtis, Jr., Phenix City
Walter Wood Dean, Tuscaloosa
Charles Senn Doster, Jr., Anniston
Leon Gordon Duke, Jr., Mobile
Julian Bernard Edwards, Baltimore, MD
Orris H. Florence, Birmingham
George Bridges Foss, Jr., Cuernavaca, Mexico
William Goodwyn Fowler, Calera
Victor Gold, Falls Church, VA
Marion Jefferson Goode, Newark, DE
Bryce Uraldine Graham, Tuscumbia
John William Green, Jr., Huntsville
Malvern Ulysses Griffin, II, Huntsville
Robert Earl Gunter, Huntsville
Robert Lea Harris, Montgomery
Hubbard Henry Harvey, Sr., Demopolis
William Maynard Heard, Jr., Mobile
James Austin Hendrix, Summerdale
Harold Francis Herring, Gurley
John Jeptha Hill, Mobile
John Neal Holt, Birmingham
Edward Lee Hopper, Huntsville
George Washington Howell, Jr., Asheville, NC
Harry Jack Huddleston, Sheffield
Richard Lowe Hundley, Hartselle
Thomas Hall Jackson, Jr., Bessemer
Thomas Brooks Jones, Anchorage, AK
Albert Bernard Jordan, Dothan
Charles Ludford Kerr, Moody
Bruce Key, Birmingham
John Thomas King, Birmingham
Robert Hugh Kirksey, Carrollton
James Louis Klinefelter, Anniston
Irvin James Langford, Mobile
Donald Nickerson Lathemabaster
Wilbur Edward Lewis, Birmingham
James Edwin Loftis, Prattville
Roy Hunt Manly, Jr., Birmingham
Palmer S. Maxwell, Birmingham
Robert Hamilton Maxwell, Atmore
Francis Butler McGill, Jr., Opp
Daniel John Meador, III, Charlottesville, VA
Oakley Webster Melton, Jr., Montgomery
Benjamin Meek Miller Childers, Selma
Paul Jackson Miller, Jr., Phenix City
Louis Poe Moore, Fayette
John Stephen Moraitos, Cincinnati, OH
Edgar Rae Nelson, Mobile
John Rufus Phillips, Anniston
Reginald Richardson, Greensboro
Ferris Salim Ritchey, Jr., Birmingham
George Edward Rivers, Springfield, VA
Wilkes Coleman Robinson, Destin, FL
William Henry Russell, Huntsville
William Morgan Russell, Jr., Tuskegee
Joseph Thaddeus Salmon, Montgomery
William Hewitt Sanders, Naperville, IL
Newman Crumpton Sankey, Montgomery
Edward Tisdale Sauls, Gulf Breeze, FL
Thomas Darrington Semple, Jr., Sarasota, FL
John Williams Sibley, Jr., Farmington Hills, MI
Stanford Joyner Skinner, Birmingham
Virgil McDaniel Smith, Gadsden
Charles Allen Speir, Homewood
James Calvin Stivender, Jr., Gadsden
Rufus Vance Swindle, Birmingham
George Peach Taylor, Tuscaloosa
Haffred Neil Taylor, Russellville
John Caius Tyson, III, Montgomery
Charles Harvie Volz, Jr., Montgomery
Durell Whiddon, Headland
Calvin Mercer Whitesell, Montgomery
Morrison Bohling Williams, Montgomery
Robert Von Wooldridge, Jr., Tuscaloosa
Hubert Harvey Wright, Gadsden

Retiring member, Board of Bar Examiners

Gary G. Stanko, Anniston

Retiring members, Board of Bar Commissioners

Ernestine S. Sapp, Tuskegee
Mac B. Greaves, Birmingham
Caine O'Rear, III, Mobile
Pat Nelson, Jasper
James E. Williams, Montgomery
Oliver F. Wood, Hamilton
Roy W. Williams, Jr., Cullman
J. Tutt Barrett, Opelika

Special recognition

John C. Clarke, Montgomery, chair, Committee on Alternative Dispute Resolution

Joseph A. Morris, Dothan, chair, Lawyer Referral Service Committee

Alabama State Bar Pro Bono awards (Committee on Access to Legal Services)

William H. Roe, Oneonta (attorney award)

Berkowitz, Lefkovits, Isom & Kushner, Birmingham (firm award)

University of Alabama School of Law Public Law Institute (law student award)

Alabama's Legal Services Programs Receive Significant Grants from the Alabama Law Foundation

Mindy thought Tom was a nice guy. He treated her well, had a steady job and didn't mind about Scott, her son from her previous marriage. In fact, after they got married, he wanted to adopt the young boy. It seemed as if things were finally going Mindy's way. Then a harsh reality hit her. After four years of what she believed was a good marriage, Mindy found out that Tom had been sexually abusing her son. The truth came out when Tom tried to molest one of Scott's friends, and that child told his mother. Unfortunately, Tom will probably end up in a sex-offender treatment program and spend little time in jail. Legal Services of North-Central Alabama is handling Mindy's divorce and working to ensure that Tom is denied all visitation with Scott.

Approximately 1,000 people, like Scott and his mom, will receive free legal help this year from Alabama's three legal services programs, thanks to the Alabama Law Foundation's IOLTA (Interest on Lawyers Trust Accounts) grants.

Legal Services of North-Central Alabama, Legal Services of Metro Birmingham and Legal Services of Alabama are non-profit organizations that provide free legal resources to those in need. Their lawyers and support staffs give Alabama's poor a voice in the justice system. This year they received a total of $421,875, 44 percent of IOLTA grants. The majority of this money will go to fund projects that protect the victims of domestic violence and abuse. Most of these victims are women and children, innocents caught in a cycle. The Legal Services programs give them renewed hope.

Legal Services of North-Central Alabama is based in Huntsville and serves Madison, Morgan, Cullman, Jackson, and Limestone counties. They received $81,000 from the foundation to continue serving victims of domestic violence.

Thomas G. Keith, executive director of Legal Services of North-Central Alabama, recognizes their relationship with the Alabama Law Foundation as a partnership vital to their program, especially their domestic violence work.

"Every day we see victims of domestic violence who desperately need our help," he said. "The IOLTA funds help us explain to them their rights and offer our resources like legal representation."

The foundation has supported Alabama's legal services programs for over ten years with IOLTA grants, but this support is now more important than ever. All three of the Legal Services programs are federally funded. In 1995, this funding was cut. While their federal funding is now creeping back up, these organizations depend on IOTLA money to supplement these funds.

The Legal Services Corporation of Alabama is based in Montgomery and serves 60 of the state's 67 counties. They received $259,875 to continue their domestic violence project.

Executive Director Melinda M. Waters expressed her gratitude to the foundation and knows that their program could not exist without the foundation's support.

"This grant is absolutely vital to our work providing free legal services to low-income women and children in domestic abuse situations," she said. "The Alabama Law Foundation has supported us for years and allowed us to help thousands of women and children escape life-threatening situations."

Legal Services of Metro Birmingham serves Shelby and Jefferson counties and received $81,000 from the foundation this year. They will also use the funds to continue their work with domestic cases.

Kenneth Cain, Jr. is the executive director and said that they are always in need of additional resources.

"There are a large number of domestic violence and domestic relations issues in the Birmingham-metro area," he said. "This grant enables us to serve a population who can't afford attorneys and would otherwise not receive assistance."

This year approximately $1 million was given in grants, and since 1989, the Alabama Law Foundation has provided over $10 million in grants through the IOLTA program. With the continued distribution of IOLTA grants to the Legal Services programs and other organizations, the foundation furthers its mission to protect innocent futures and help make dreams come true.

The following organizations also received grants this year from the Alabama Law Foundation's IOLTA program.

Legal Aid to the Poor:

Legal Services Corporation of Alabama	$259,875
Legal Services of Metro Birmingham	$81,000
Legal Services of N. Central Alabama	$81,000
Alabama State Bar Volunteer Lawyers Program	$85,000
Birmingham Volunteer Lawyers Program	$76,650
Mobile Bar Association Volunteer Lawyers Program	$76,650

Administration of Justice:

Child Protect (Montgomery)	$7,500
Alabama Court-Appointed Special Advocate Network (Irondale)	$3,000
Alabama Disabilities Advocacy Program (Tuscaloosa)	$62,500
Court-Appointed Juvenile Advocate of Marshall County	$3,000
The Tuscaloosa Visitation Center	$26,000
The Baldwin Family Violence Center (Robertsdale)	$10,000
The Family Sunshine Center (Montgomery)	$5,000
Administrative Office of Courts (Montgomery)	$5,000
Equal Justice Initiative (Montgomery)	$80,000
Alabama Prison Project (Montgomery)	$55,000
Leadership Montgomery	$10,000

Law-Related Education:

YMCA Youth Judicial Program (Montgomery)	$10,000
Tuskegee-Macon County YMCA	$10,000
Boys & Girls Club of Limestone County	$5,000
Sumter County District Court	$1,500
Alabama Center for Law and Civic Education (Birmingham)	$12,000

Law Libraries:

Bullock County	$1,193
Huntsville-Madison County	$1,093
Jefferson County	$2,000
Montgomery County	$3,500
Perry County	$2,000
Pike County	$2,500
Supreme Court	$9,000
TOTAL	**$976,311**

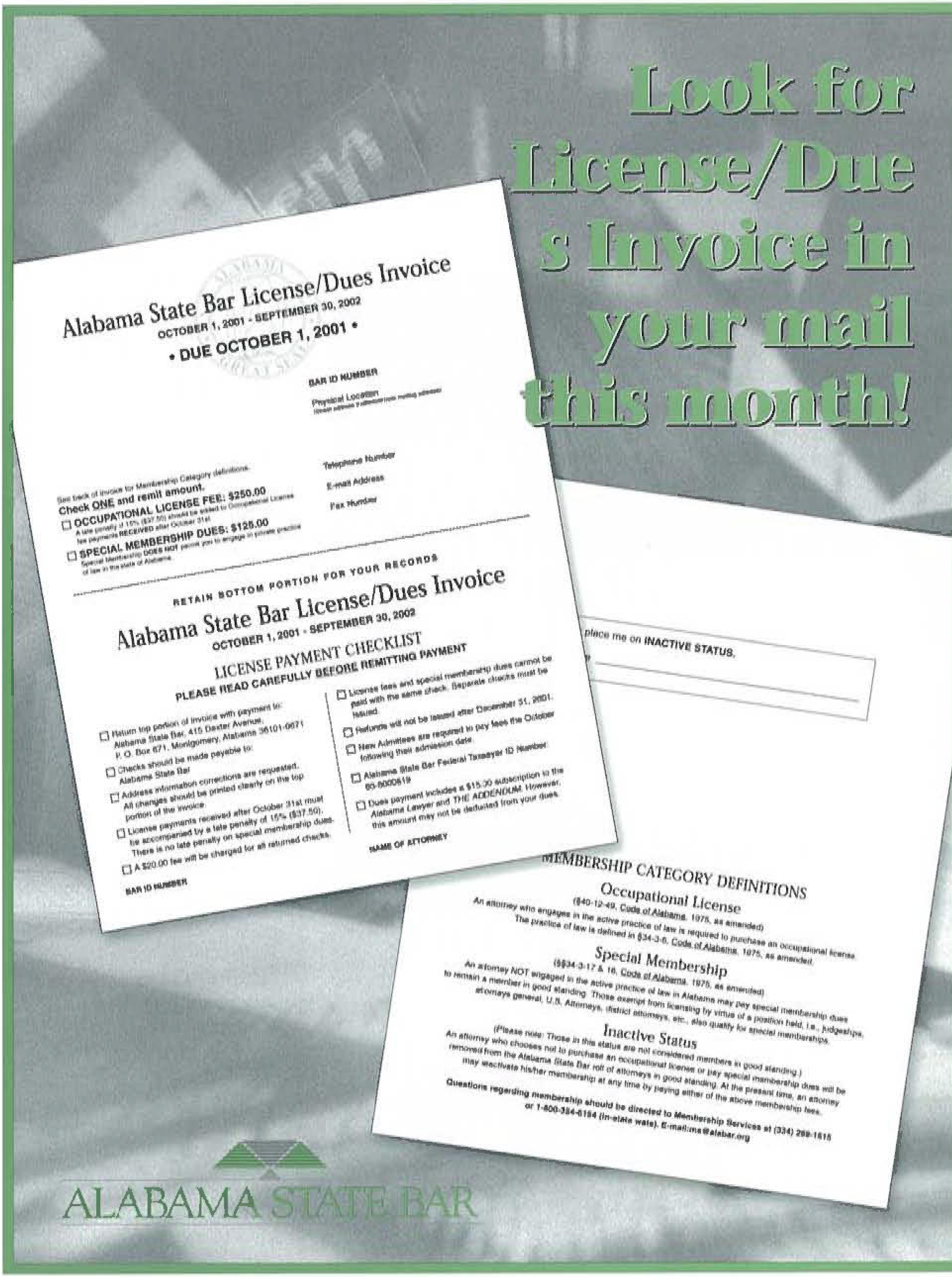
UA Law School International Program More Than Doubles In Size

The University of Alabama School of Law will host 15 international students during the 2001-2002 school year as part of its growing International Graduate Program.

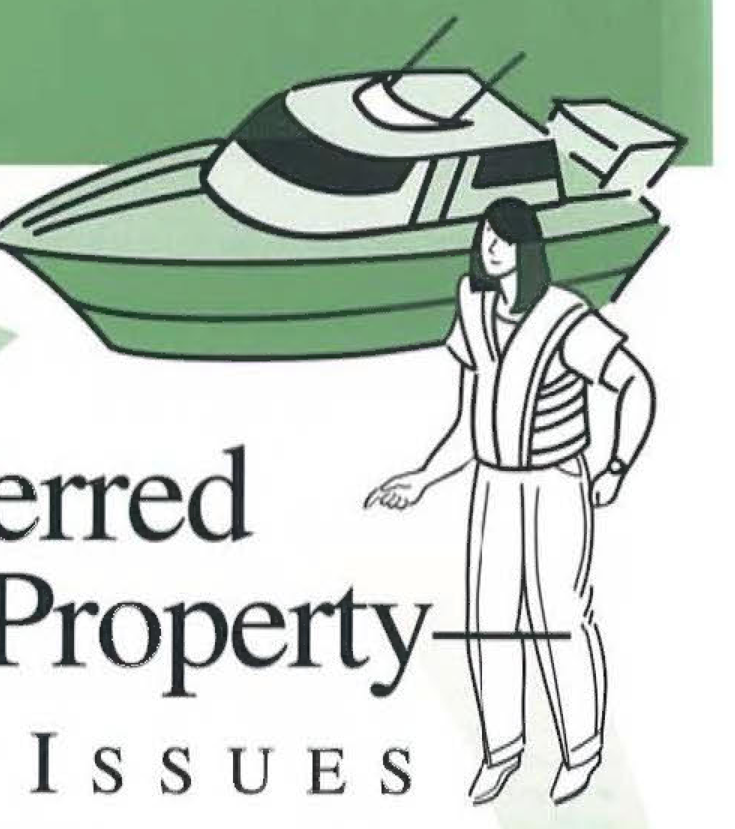
The program offers attorneys from other countries the opportunity to earn a Master of Laws (LL.M.) degree after completing 24 hours of course work at the law school. Students may focus on developing knowledge in specific areas of the law such as international business law or environmental law, or they may tailor a custom course of study to suit individual interests or professional needs. This year's class of international lawyers has more than doubled in size since last year's class and includes students from Brazil, Bulgaria, China, Germany, India, Korea, Sweden, Switzerland, and Thailand.

"The program provides our students with an opportunity to meet attorneys from abroad and challenges all of us to a greater awareness of our expanding global economy," Timothy Hoff, Gordon Rosen Professor of Law and director of the International Graduate Program, remarked.

Enrollment in the LL.M. program is limited. Visit *www.law.ua.edu/mcl* for more information.



Look for License/Dues Invoice in your mail this month!
Alabama State Bar License/Dues Invoice
OCTOBER 1, 2001 - SEPTEMBER 30, 2002
• DUE OCTOBER 1, 2001 •
BAR ID NUMBER
Check ONE and remit amount.
OCCUPATIONAL LICENSE FEE: $250.00
SPECIAL MEMBERSHIP DUES: $125.00
RETAIN BOTTOM PORTION FOR YOUR RECORDS
Alabama State Bar License/Dues Invoice
OCTOBER 1, 2001 - SEPTEMBER 30, 2002
LICENSE PAYMENT CHECKLIST
PLEASE READ CAREFULLY BEFORE REMITTING PAYMENT
NAME OF ATTORNEY
BAR ID NUMBER
place me on INACTIVE STATUS.
MEMBERSHIP CATEGORY DEFINITIONS
Occupational License
Special Membership
Inactive Status
ALABAMA STATE BAR



Tax-Deferred Exchanges of Property—

Selected Issues

BY GILBERT F. DUKES, III

An article on tax-deferred exchanges has no better place to start than with the definition of an "exchange," a simple yet often misunderstood concept which clarifies the necessity of using a qualified intermediary. *An "exchange" occurs when a taxpayer conveys property (the "relinquished property") to the same party from whom such taxpayer acquires "replacement property."* Contrary to what many taxpayers believe, if a taxpayer conveys relinquished property to a purchaser and acquires replacement property from someone other than the purchaser, an exchange has not occurred even if the sale and purchase close simultaneously. Absent an exchange, section 1031 is inapplicable and the taxpayer must recognize gain for income tax purposes.

Prior to the 1990s the requirement of an "exchange" created problems in that a taxpayer desiring tax deferral under section 1031 was forced to require that the purchaser become a party to the taxpayer's acquisition of replacement property, as only then would the taxpayer be deemed to have conveyed property to the same party from whom the taxpayer acquired replacement property. The purchaser would get nervous and hire a lawyer, complex documents would be drafted, etc.

Fortunately, these problems were alleviated when 1031 regulations authorized the use of a "qualified intermediary" to accommodate a taxpayer's exchange. Pursuant to such regulations, if prior to a sale of relinquished property a taxpayer (i) executes an exchange agreement with an intermediary and (ii) assigns to the intermediary his "rights" under a real estate sale agreement (such assignment accompanied by written notice thereof to all parties to the purchase agreement), then for income tax purposes the taxpayer will be "treated as if" he conveyed the relinquished property to the intermediary followed by the intermediary's conveyance of such property to the purchaser (although at the closing the taxpayer may simply deed the relinquished property directly to the purchaser). Likewise, if prior to the taxpayer's acquisition of replacement property the taxpayer assigns to the intermediary his "rights" under a real estate purchase agreement (such assignment accompanied by written notice thereof to all parties to the purchase agreement), then for income tax purposes the taxpayer will be "treated as if" the intermediary acquired the replacement property and conveyed such property to the taxpayer (although at the closing the seller may simply deed the replacement property directly to the taxpayer). In other words, by executing an exchange agreement and assigning to the intermediary rights under real estate sale/purchase agreements (with written notice thereof to all parties to such agreements), the taxpayer is "treated as if" he conveyed relinquished property to the same party (the intermediary) from whom the taxpayer acquired replacement property (an "exchange"). By following the regulations, no longer must a taxpayer request that a purchaser become a party to the taxpayer's acquisition of replacement property. Neither the purchaser's cooperation nor participation is required for purposes of the taxpayer's exchange and for this reason there is generally no need to insert language in the real estate sales agreement implying otherwise.

There are generally three major types of exchanges: a "simultaneous" exchange (taxpayer conveys relinquished property and simultaneously acquires replacement property), a "deferred" exchange (taxpayer conveys relinquished property and subsequently acquires replacement property), and a "reverse" exchange (taxpayer acquires replacement property and thereafter conveys relinquished property). Regardless of the type of exchange being conducted, to use a qualified intermediary the taxpayer must execute an exchange agreement and assign to the intermediary rights under real estate sale/purchase agreements (generally with written notice of assignment to all parties thereto). With respect to deferred exchanges, the taxpayer must also (i) "identify" replacement property within the 45-day "identification period," (ii) acquire replacement property within the "exchange period," and (iii) avoid "constructive receipt" of the sales proceeds in the meantime (which is usually accomplished by placing in escrow the sales proceeds with the intermediary pursuant to an exchange agreement which restricts the taxpayer's ability to receive, pledge, borrow or otherwise obtain the sale proceeds).

The "identification" rules for deferred exchanges are tricky. Within 45 days after the sale, the taxpayer must identify one or more properties as potential replacement properties for the exchange. A taxpayer may identify up to three properties without worrying about any additional restrictions (the "three-property rule"). If a taxpayer identifies more than three properties, then the total value of all identified property may not exceed twice the value of the relinquished property (the "200 percent rule") unless the taxpayer acquires 95 percent of everything identified (the "95 percent rule"). If an identification rule is violated, the exchange will fail and 100 percent of the gain must be recognized.

Any property acquired during the 45-day period is deemed to be identified. Thus, the identification letter need only identify properties which may be acquired after the end of the 45-day period. However, for purposes of the three-property rule and the 200 percent rule, any property acquired during the 45-day period counts. In other words, if a taxpayer acquires one property during the 45-day period and identifies three more properties, then the total value of the four properties cannot exceed twice the value of the relinquished property absent compliance with the 95 percent rule.

The identification must be specific. With respect to condominium units, for example, a taxpayer must identify a specific unit. Stating "a unit at Shoreline Towers" will not suffice. Also, within the exchange period the taxpayer must acquire substantially the same property as identified. If a taxpayer identifies a unit, but acquires only a half interest in the unit (the other half for example being acquired by a spouse, friend, etc.), the half interest is not substantially the same property as identified. In this case regulations indicate that if a taxpayer acquires at least 75 percent (in size and value) of what was identified, then the acquired interest is substantially the same as what was identified. Obviously, if a taxpayer intends to acquire merely a half interest, a half interest (or at least no more than an undivided 66.67 percent interest) should be identified.

The "exchange period" can be tricky, as well. Most taxpayers believe the exchange period is six months beginning with the date of the sale. *Actually, the exchange period ends on the earlier of the 180th day following the sale or the due date for the taxpayer's income tax return for the year in which the sale takes place.* Assume an individual taxpayer conveys relinquished property on December 15, 2001. His exchange period will end on April 15, 2002 (approximately two months earlier than the 180th day), absent an extension of the due date for his 2001 income tax return. Individuals, partnerships and trusts must be cognizant of this rule with respect to any sale occurring after October 15th (as the due date for their income tax return is April 15th of the following year). Corporations using the calendar year for income tax purposes must be cognizant of this rule with respect to any sale occurring after September 15th (as the due date for their income tax return is March 15th of the following year).

Within the exchange period the taxpayer must acquire replacement property (identified within the 45-day identification period) of "like kind" to the relinquished property. Generally, any "realty" is of like-kind to other "realty." A taxpayer may convey timberland and acquire a condominium unit. A taxpayer may convey a condominium unit and acquire a commercial building, vacant lot or any other realty.

Not only must the relinquished and replacement properties be of like-kind, the relinquished property must have been held "for investment" (or for use in a trade or business) and the replacement property must be acquired with an intent of holding such property "for investment" (or for use in a trade or business). I often receive calls from individuals who desire to conduct an exchange, yet soon learn the relinquished property is owned by a partnership or limited liability company having other owners with no desire to conduct an exchange. In other words, one partner desires to conduct an exchange with "his share" of the sales proceeds while the other partners simply want cash. The problem relates to the basic requirement that a taxpayer convey relinquished property which has been held for investment. Under these facts the partnership, not its partners, has held the relinquished property. Under one option, the partnership could be dissolved with its assets distributed to the individual partners. The individuals (who then would be tenants in common with respect to the distributed property) could begin holding the relinquished property for investment. After the property has been held for investment, the owners could market the relinquished property for sale. At the closing any owner may conduct an exchange with his share of the net sales proceeds while other individuals simply cash out. Under a second option, the partnership could distribute an undivided interest in the relinquished property to the partner who desires to conduct an exchange. The relinquished property (which then would be owned by the partnership and the distributee as tenants in common) could be held for investment. After the property has been held for investment, the partnership and the distributee could market the relinquished property for sale. At the closing the distributee may conduct an exchange with his share of the net sales proceeds while the partnership simply cashes out. Inevitably, the problem with either approach is that the relinquished property is either already under contract or at least already on the market for sale. In either case, even if the partnership distributes the relinquished property or an interest therein to one or more partners desiring to conduct an exchange, and even if such distribution takes place quite some time prior to closing, such property may never have been held "for investment" by the individuals desiring to conduct an exchange in that it was "for sale" during their entire period of ownership.

An often misunderstood concept involves the amount of gain which must be recognized when less than 100 percent of the net sales proceeds is invested in replacement property. Assume a taxpayer owns property with an income tax basis of $100,000 which will be sold for $300,000. Two things are clear to most taxpayers. First, if the taxpayer sells the property for $300,000 and does not conduct a tax-deferred exchange, the taxpayer's "realized gain" would be $200,000, all of which must be "recognized" and reported on the taxpayer's income tax return. Second, if the taxpayer conducts a tax-deferred exchange and acquires one or more replacement properties of like kind at a cost of $300,000 or more, none of the $200,000 realized gain need be recognized, as the entire gain is deferred under section 1031. What many taxpayers and their advisers do not understand is the amount of realized gain which must be recognized if, in this example, the taxpayer acquires replacement property at a cost of $250,000. The answer is $50,000. Realized gain must be recognized to the extent the net sales proceeds of $300,000 exceed the $250,000 cost of the replacement property. Taking this a step further, if the taxpayer sells the relinquished property for $300,000 and reinvests only $100,000 in replacement property, the entire gain of $200,000 must be recognized. *If the taxpayer does not reinvest in replacement property an amount which exceeds his income tax basis in the relinquished property, the tax consequences of an exchange are exactly the same as the tax consequences of a sale.* A taxpayer does not start deferring tax under section 1031 until he has reinvested in replacement property an amount which exceeds his income tax basis in the relinquished property.

A related concept involves financing issues upon the conveyance of relinquished property or acquisition of replacement property. Assume a taxpayer conveys property for $300,000 but

Web-PACER Implemented in Bankruptcy Court

The United States Bankruptcy Court recently began using Web-PACER (Public Access to Court Electronic Records), an electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts, and from the U.S. Party/Case Index. Web-PACER allows users to view the docket sheet and basic case information, as well as allowing users to view images of pleadings, orders and other documents that have been filed. An access fee of $.07 per page will be assessed for access to PACER service on the Internet.

Web-PACER users accessing this court's records may view document images if the document was filed on or after November 1, 2000. You must have Internet access and a Javascript-enabled Web browser to use Web-PACER.

Why Use Web-PACER

The PACER system offers an inexpensive, fast and comprehensive case information service. The data is displayed directly on your PC screen within a few seconds. The system is simple enough that little user training or documentation is required. Web-PACER is available days, nights and weekends.

How to Register

Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing and technical support center. To register, complete the registration forms available on the PACER Web site, finances $200,000 of the sales price for the purchaser. In other words, the purchase price is payable via $100,000 in cash at closing with the balance represented by the purchaser's promissory note secured by a vendor's lien or mortgage on the relinquished property. In this example many taxpayers believe they may then acquire replacement property for $300,000 via $100,000 down with the balance borrowed from a bank. This is incorrect. In such an exchange the taxpayer would have given up relinquished property worth $300,000 and executed a $200,000 note to the bank in exchange for replacement property worth $300,000 and the purchaser's $200,000 promissory note. The purchaser's promissory note of $200,000 constitutes "boot" (something other than real estate of like kind to the relinquished property). Generally, taxpayers must recognize gain to the extent of the "boot." The question becomes whether the taxpayer may offset the receipt of such boot by executing a note to the bank. The answer is no, leaving the taxpayer with up to $200,000 of realized gain to be recognized. Taxpayers may not offset the receipt of boot by executing a note to a bank. To defer 100 percent of the gain in this example, the taxpayer should consider "infusing" $200,000 into the exchange from a source other than a bank loan secured by the replacement property. If properly structured a cash infusion of $200,000 should offset the purchaser's promissory note and fully reduce the "boot" in this example. Another way to salvage the exchange would be to find a seller of replacement property willing to accept the purchaser's promissory note as part of the sales price, an unlikely event.

Related to the above is the belief of many taxpayers that to defer 100 percent of the realized gain they need only reinvest in replacement property an amount equal to or in excess of their "equity" in the relinquished property. This is incorrect. For example, if a taxpayer conveys relinquished property for $300,000, and $200,000 of the sales proceeds are applied in satisfaction of the taxpayer's mortgage on the relinquished property (leaving $100,000 to be placed in escrow with the intermediary), to defer 100 percent of the gain the taxpayer must not only reinvest the $100,000 of net sales proceeds but must also either infuse $200,000 of cash or borrow at least $200,000 in connection with the acquisition of replacement property.

Changing topics, in September 2000 the IRS issued Revenue Procedure 2000-37 which sets forth a safe harbor for purposes of structuring what may otherwise constitute an invalid "reverse" exchange under section 1031. As contemplated by the Revenue Procedure, the taxpayer generally executes a "Qualified Exchange Accommodation Agreement" with an "Exchange Accommodation Titleholder" (the titleholder). The replacement property is then "parked" with the titleholder. Within 180 days thereafter the taxpayer executes a real estate sale agreement with a purchaser, assigns his rights under such agreement (with written notice to the purchaser) to a Qualified Intermediary pursuant to an Exchange Agreement, and "direct deeds" the relinquished property to the purchaser. Simultaneously with such conveyance the taxpayer assigns to the Qualified Intermediary his rights under the Qualified Exchange Accommodation Agreement (with written notice to the titleholder), then acquires the replacement property via direct deed from the titleholder. Under an alternative structure, pursuant to an Exchange Agreement with a Qualified Intermediary, the taxpayer acquires replacement property from a seller and simultaneously parks the relinquished property with the titleholder which would hold such property for no more than 180 days pursuant to a Qualified Exchange Accommodation Agreement.

The Revenue Procedure includes the following requirements which should be expressed in the Qualified Exchange Accommodation Agreement:

1. The taxpayer must have a bona fide intent to acquire the replacement property in an exchange intended to qualify for non-recognition of gain under section 1031.
2. The titleholder must hold the replacement property (or the relinquished property, as the case may be) for the benefit of the taxpayer in order to facilitate the taxpayer's exchange under section 1031 and the Revenue Procedure.
3. The taxpayer and the titleholder must agree to report the acquisition, holding and disposition of the "parked property" as provided in the revenue procedure. In this regard, the titleholder must be treated for income tax purposes as the beneficial owner of the "parked property" until such property is conveyed to another party.
4. The relinquished property must be "identified" within 45 days after the acquisition of replacement property.
5. The exchange must be completed within 180 days.

With respect to the third requirement set forth above, *understand that "reverse" exchanges have not been authorized by the IRS.* When replacement property is parked with a titleholder pursuant to the requirements of the Revenue Procedure, the titleholder must is treated as the true owner of such property for income tax purposes rather than as the taxpayer's agent. Given this treatment the taxpayer has yet to acquire the replacement property. The taxpayer later conveys relinquished property to a purchaser (through the use of a Qualified Intermediary) and simultaneously or subsequently acquires the replacement property from the titleholder (through the use of a Qualified Intermediary). On the Form 8824 the transaction is reflected as a simultaneous exchange or a deferred exchange, as the case may be, either of which is specifically authorized by the Code and regulations. If the terms of the Revenue Procedure are not met, the titleholder would be considered the taxpayer's agent, and the titleholder's acquisition of the replacement property would be treated as an acquisition of replacement property by the taxpayer prior to the taxpayer's conveyance of relinquished property—a "reverse" exchange which in the eyes of the IRS is not allowed under section 1031.

The issuance of Revenue Procedure 2000-37 was certainly a surprise. Even more surprising was the release of PLR 200111025 on March 16, 2001. Making a long story short, an "Accommodation Party" borrowed funds (the repayment of which was guaranteed by the taxpayer for a fee), acquired replacement property, executed a triple net lease of the replacement property to the taxpayer, and executed an agreement under which the taxpayer would later acquire the replacement property from the

Accommodation Party. The Accommodation Party and the taxpayer reported the transaction as if the Accommodation Party was not the taxpayer's agent. The arrangement between the taxpayer and the Accommodation Party made it appear as if the Accommodation Party had some risk of loss and potential for gain. Although the replacement property was to be "parked" with the Accommodation Party far longer than 180 days, the IRS presented the following three requirements for a successful 1031 exchange—(i) the taxpayer must demonstrate its intent to achieve an exchange and the properties to be exchanged must be of like kind and for a qualified use, (ii) the steps in the various transfers must be part of an integrated plan to exchange the relinquished property for the replacement property, and (iii) the party holding the replacement property must not be the taxpayer's agent. Regarding the agency issue, the IRS applied the "National Carbide factors" and surprisingly stated as follows:

> With respect to the first factor, Accommodation Party has operated and will operate in its own name and for its own account. The Operating Agreement of Accommodation Party states "[a]ll business of Accommodation Party will be conducted in the Accommodation Party name" and that "Accommodation Party will own and hold title to all of its property in the name of Accommodation Party." Consistent with its operating agreement, Accommodation Party entered into the Property Acquisition Agreement, the Taxpayer Acquisition Agreement, the Lease, the Bank Loan, and the Taxpayer Loan each in its own name and each for its own account. Accommodation Party operates its business through its own bank accounts, which are held in its name and for its account. In none of the operative documents is Accommodation Party referred to as Taxpayer's agent. With respect to the second factor, Taxpayer has not contractually authorized Accommodation Party to bind Taxpayer by Accommodation Party's actions. With respect to the third factor, Accommodation Party does not transmit money it receives for its account to Taxpayer. Under the Lease, Taxpayer is obligated to pay Accommodation Party a monthly base rent for Accommodation Party's account. Applying the fourth factor, Accommodation Party's rental income under the Lease is pursuant to its lessor-lessee relationship with Taxpayer and Accommodation Party's ownership of the Property. Taxpayer's rental income from the subtenants under the subleases is pursuant to Accommodation Party's assignment of such subleases to Taxpayer under the assignments of lessor's interests in leases and assumption of liability under the leases. The fifth factor is that "the agency relationship must not be dependent upon the fact that the principal owns it." Accommodation Party and Taxpayer are separate legal entities. Neither Accommodation Party nor Exchange Company is owned by or related to Taxpayer. Furthermore, as demonstrated by the preceding analysis, Accommodation Party is not acting on behalf of Taxpayer, but rather is acting for its own account. Exchange Company, as the sole member of Accommodation Party, will report Accommodation Party's rental income and expenses on its tax returns. With respect to the sixth factor, Accommodation Party's business purpose is not to carry on the normal duties of an agent. As stated in its operating agreement and as demonstrated by its actions, (1) Accommodation Party is engaged in the business of acquiring, owning, holding, leasing, financing, refinancing and disposing of real property and its associated personal property and (2) Accommodation Party will conduct its business and will hold title to all of its property in its own name and for its own account. Further, the Tax Court has consistently held that the fact that an accommodator is used to facilitate a like-kind exchange does not mean that the accommodator is an agent of the taxpayer....Thus, the fact that Accommodation Party is facilitating Taxpayer's exchange of the Park for the Property does not mean Accommodation Party is Taxpayer's agent. Accordingly, Accommodation Party is not Taxpayer's agent.

Since relying on a private letter ruling has obvious risks, taxpayers should structure "reverse" exchanges within Revenue Procedure 2000-37 whenever possible. However, in instances where the relinquished property will not be conveyed within 180 days of the initial transfer to the "accommodator," a transaction based on the facts of PLR 200111025 might be explored.

Changing topics again, many taxpayers desire to sell one condominium unit and exchange into another unit on a "pre-construction" basis. This type of improvement exchange usually presents problems in that the replacement unit may not be completed within the taxpayer's 180-day exchange period. Unless the taxpayer receives a deed to a completed unit within the exchange period, the exchange will fail. This generally requires that the developer complete the condominium, obtain a certificate of occupancy and close the conveyance to the taxpayer prior to the end of the taxpayer's exchange period. In an attempt to alleviate this problem, some developers offer to convey to the taxpayer (within the taxpayer's exchange period) an undivided interest in the overall uncompleted condominium project, such conveyance to be followed by a simultaneous exchange of such undivided interest for the actual unit once a certificate of occupancy is obtained. This presents risks. In this case the taxpayer would "identify" the undivided interest in the uncompleted project. However, under the "step transaction doctrine" the IRS could successfully argue that the completed unit, not the undivided interest in the uncompleted project, constitutes the replacement property for the initial exchange. The IRS could then point out that the completed unit was neither identified during the 45-day period nor was it acquired during the 180-day period.

Focusing on a more common type of improvement exchange, assume a taxpayer (using an intermediary) conveys a condominium for $300,000 and desires to acquire a vacant lot for $75,000 and construct improvements thereon at a cost of $225,000. There are three crucial requirements. First, not only must the lot be identified within the 45-day period, the improvements must be identified as well (generally by attaching the plans to the identification letter). Second, amounts must be spent on the improvements prior to the date on which the taxpayer takes title to the replacement property. This is usually accomplished by "parking" the replacement property with the intermediary (i.e. the intermediary takes title to the replacement property) and having the improvements constructed prior to the date on which the intermediary conveys such property to the taxpayer. Third, regardless of whether the improvements are completed, the intermediary must convey the replacement property to the taxpayer prior to the end of the exchange period.

Before concluding, related party issues should be discussed. Most advisers understand that as a general rule taxpayers may conduct a tax-deferred exchange with a "related party" such as a family member, a corporation in which the taxpayer owns a majority of the outstanding stock, etc. In other words, a taxpayer may convey relinquished property to a related party in exchange for the related party's conveyance of replacement property to the taxpayer. The kicker is that for a period of two years following an exchange with a related party, both the taxpayer and the related party must refrain from disposing of their property acquired in the exchange. To understand the logic of this requirement, consider the following example:

> Father owns "Parcel A" worth $100,000 with an income tax basis of $10,000. Son owns "Parcel B" worth $100,000 with an income tax basis of $90,000. Purchaser desires to purchase Parcel A for $100,000. Father realizes that if he sells Parcel A to Purchaser, he must recognize a $90,000 gain. Thus, Father instead conveys Parcel A to Son in exchange for Parcel B. Father then owns Parcel B with a substituted income tax basis of $10,000, and Son owns Parcel A with a substituted income tax basis of $90,000. Son then sells Parcel A to Purchaser for $100,000 and recognizes a $10,000 gain.

The proposed outcome is that by conducting a tax-deferred exchange prior to the sale, and by shifting Son's high income tax basis to Parcel A prior to the sale, Father and Son as a family unit have reduced their gain from $90,000 to $10,000. To avoid this "shifting of basis" the Code imposes the two-year holding period subsequent to an exchange between related parties. Generally, if the taxpayer or the related party disposes of his exchange property within two years after the initial exchange, then the taxpayer's exchange with the related party will become taxable.

Straight exchanges between two related parties are uncommon. What is common is a taxpayer's desire to convey relinquished property to an unrelated party and acquire replacement property from a related party through the use of an intermediary. Many taxpayers (and many tax advisers) believe this type of exchange will qualify for tax deferral, provided the taxpayer holds the replacement property for two years following the exchange. This is incorrect. Consider the following example:

Father owns "Parcel A" worth $100,000 with an income tax basis of $10,000. Son owns "Parcel B" worth $100,000 with an income tax basis of $90,000. Purchaser desires to purchase Parcel A for $100,000. Father realizes that if he sells Parcel A to Purchaser, he would need to recognize a $90,000 gain. Thus, as part of an exchange through the use of an intermediary, Father conveys Parcel A to Purchaser for $100,000 and acquires Parcel B from Son for $100,000.

The result of the second example is identical to the result in the first example. Purchaser ends up owning Parcel A. Father ends up owning Parcel B with a substituted income tax basis of $10,000. Son ends up with $100,000 and recognizes a $10,000 gain. For this reason, as a general rule, if a taxpayer conveys relinquished property to an unrelated party and acquires replacement property from a related party, the IRS will treat the exchange as an immediately taxable "transaction structured to avoid the purposes of the related party rules" (i.e., an immediate violation of the two-year holding period applicable to related party exchanges). Generally, a taxpayer may convey relinquished property to a related party and acquire replacement property from an unrelated party, but a taxpayer generally may not convey relinquished property to an unrelated party and acquire replacement property from a related party.

In conclusion, an article such as this is far too short to cover in detail all issues which can arise in a section 1031 exchange. This article simply skimmed the surface with respect to issues which were discussed, and many areas which present risks were not discussed at all. For a much more detailed discussion of tax-deferred exchanges, obtain *Tax Free Exchanges Under 103!* by Jeremiah M. Long and Mary Foster, published by Clark, Boardman & Callaghan (800-328-4880), or receive an expanded version of this article by contacting the author at *gdukes@cdklaw.com*.

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Closing Future Medical Benefits for Injured Workers

BY MELISA C. GEORGE and BENNETT L. PUGH

For the past several years, Medicare[1] has been paying medical expenses for injured employees even when those expenses stemmed from work-related accidents or occupational diseases. The Medicare Secondary Payer statute was enacted to prevent the burden of such expenses, which should rightfully be paid by other insurance plans, including workers' compensation, from being shifted to Medicare. Pursuant to the Medicare Secondary Payer statute, the Center for Medicare and Medicaid Services (CMS),[2] the federal agency that administers Medicare, has recently undertaken a comprehensive effort to collect money owed to Medicare for the payment of these expenses.[3]

The Medicare Secondary Payer statute provides, in part, that Medicare may not pay for an individual's medical treatment if payment can "reasonably be expected to be made promptly" under a workers' compensation law or under an automobile or liability insurance policy or plan.[4] In such instances, Medicare is the "secondary payer" while the insurance company or other responsible party remains the "primary payer." This statute further provides that, in the event Medicare does pay such expenses, those expenses shall be paid subject to reimbursement. If such reimbursement is not made within the established time period, interest may be charged on the amount of reimbursement until such reimbursement is received by Medicare from the primary payer.

In order to recover payments described in the statute, the United States is authorized to bring an action against the primary payer "directly, as a third-party administrator, or otherwise." In addition, the statute provides that *double damages* may be collected from the primary payer. The statute further establishes a private cause of action for damages "in an amount double the amount otherwise provided" when a primary payer fails to provide for payment or reimbursement under the Medicare Secondary Payer statute.

In addition to paying and then seeking reimbursement for an injured employee's medical expenses, Medicare also has the option under the Medicare Secondary Payer statute simply to refuse to pay such expenses in the first place. This could occur if the injured employee has previously reached a lump sum settlement with the primary payer regarding future medical benefits. Under the Secondary Payer statute, Medicare will not pay for medical treatment until the expenses incurred equal the amount of the settlement attributed to future medical expenses. In the event that no part of the lump sum settlement is specifically allocated for future medical expenses, Medicare has a formula for apportioning an amount of the settlement itself. It *must* be noted that "[i]f a settlement appears to represent an attempt to shift to Medicare the responsibility for payment of medical expenses for treatment of a work-related condition, *the settlement will not be recognized*."[5]

To deal with this issue, Medicare Set-Aside Custodial Agreements and Medicare Set-Aside Agreements have been developed. If either of these agreements is properly utilized, an employer or workers' compensation insurance carrier may settle a workers' compensation claim closing future medical benefits without fear of Medicare attempting to make a claim for reimbursement of medical expenses resulting from a work-related injury, or refusing to pay an injured employee's medical expenses. Utilization of a Medicare Set-Aside Custodial Agreement or a Medicare Set-Aside Agreement should allow employers to settle future medical claims with greater ease, since the employee will have insurance, through Medicare, for future treatment. Furthermore, trial courts are more likely to approve a settlement that includes this safeguard. Finally, these agreements often result in a substantial cost savings to employers and workers' compensation carriers. Medicare recognizes that, in order to settle a claim for future medical benefits, the employer or workers' compensation carrier will put less money into the custodial account or the annuity than it would likely expend over the remainder of the injured employee's life. This type of compromise with an injured employee is accepted by Medicare as an incentive to the employer or workers' compensation insurance carrier to settle claims for future medical expenses.

Medicare Set-Aside Custodial Agreements and Medicare Set-Aside Agreements should be used if a determination is made that the employee will become eligible for Medicare within 30 months of the date of the settlement or currently is a Medicare recipient and future medical treatment is likely. Individuals become eligible for Medicare after they have been receiving Social Security disability benefits for 24 months. Social Security disability benefits do not begin until five months after the date of the accident, injury or other disabling event. In order to qualify for Social Security disability benefits, an individual must be unable to perform any kind of substantial, gainful work because of a physical or mental impairment, or a combination of both, which is expected to either last at least 12 months or end in death. There are additional ways to qualify for Social Security disability benefits including, but not limited to:

1. The claimant being 50 years old or older and unable to perform past work (his own occupation) due to a physical or mental impairment;[6]
2. The claimant has any physical or mental impairment and a long history of heavy, unskilled work;[7]
3. The claimant has a physical or mental condition that appears to satisfy the "medical listings" in the Code;[8] or
4. The claimant is illiterate with any physical or mental impairment.[9]

If an injured employee meets any of these criteria, a Medicare Set-Aside Custodial Agreement or Medicare Set-Aside Agreement should be included in settlement negotiations regarding the employee's future medical benefits.

Medicare Set-Aside Custodial Agreement

Medicare Set-Aside Custodial Agreements have been recognized as a way of balancing Medicare's interests in a workers' compensation settlement that purports to close future medical benefits and an injured employee's entitlement to Medicare benefits after receiving a workers' compensation settlement. The Medicare Set-Aside Custodial Fund is funded with a lump sum of money designated to cover future medical expenses which Medicare would ordinarily cover. The beneficiary of the fund may either submit the bills for medical treatment related to his or her work-related injury to the custodian of the fund or the bills may be sent directly to the custodian by the medical treatment provider. After the fund is exhausted, the beneficiary becomes eligible for Medicare to pay any and all future medical expenses which Medicare would normally cover.

In order to determine the amount which should be placed in the custodial fund, numerous factors regarding the injured employee's injury and his or her medical treatment must be considered. Such factors include, but are not limited to, the following:

1. The date of entitlement to Medicare;
2. The basis for Medicare entitlement (disability or age);
3. The type of injury or illness;
4. The age of the beneficiary (including an evaluation of whether the beneficiary's condition would shorten his or her life span);
5. The classification of the beneficiary's disability, such as permanent, total;
6. Prior and future medical needs of the beneficiary due to the injury or illness;
7. Is the commutation for the beneficiary's lifetime or for a specific period of time? If not for the lifetime, what is the basis? What is the state law governing how long workers' compensation is obligated to cover the services related to the injury or illness;
8. Is the beneficiary's condition stable or is medical deterioration possible; and

9. The living arrangement of the beneficiary and the level of continued care required.

It is important to remember that only the medical expenses Medicare would usually pay need to be set aside. It is also important to remember that no "form" agreement should be used, as several factors must be considered and appropriately addressed in each agreement.

If the amount necessary to establish the custodial fund exceeds a certain threshold, prior approval must first be obtained from CMS. Care must always be taken, however, to insure that the amount placed in the custodial fund is sufficient and that Medicare's interests are reasonably considered in the settlement. If Medicare determines that its interests were reasonably considered in the settlement, Medicare will not later make a claim against the employer or insurer for the employee's medical treatment expenses.

Medicare Set-Aside Agreement

This type of agreement is very similar to the Medicare Set-Aside Custodial Agreement. Instead of a trust or custodial fund, however, the employer or insurer may purchase an annuity or structured settlement from which a designated amount each month will go toward the injured employee's medical care. Under a Medicare Set-Aside Agreement, Medicare will pay for the cost of the employee's medical care above that monthly amount. The annuity may be purchased through any structured settlement company. It should be noted, however, that, because the expenses for most injured employees' medical treatment vary from month to month, CMS generally prefers, and sometimes requires, that a Medicare Set-Aside Custodial Agreement be used as opposed to an agreement funded through an annuity.

Conclusion

Medicare Set-Aside Custodial Agreements and Medicare Set-Aside Agreements have proven instrumental in allowing the closure of future medical benefits on almost any claim while avoiding reimbursement actions brought by CMS. In addition, these agreements have saved substantial amounts of money for employers and workers' compensation carriers. Medicare Set-Aside Custodial Agreements and Medicare Set-Aside Agreements may be used in any state and are revolutionizing the way future medical benefits are settled in workers' compensation cases. ■

Endnotes

1 Medicare differs substantially from Medicaid. Eligibility for Medicaid is based upon an applicant's assets and income whereas eligibility for Medicare is not based upon an individual's financial condition.

2 CMS was previously known as the Health Care Financing Administration ("HCFA").

3 New Health and Human Services Secretary, Tommy Thompson, announced on June 14, 2001 that the name Health Care Financing Administration was being changed to "Centers for Medicare and Medicaid Services." *See HHS Fact Sheet*, http://www.hhs.gov/news.

4 42 U.S.C. § 1395 Y(b)(2).

5 42 C.F.R. § 411.46(b)(2)(emphasis added).

6 20 C.F.R. § 404.1561.

7 20 C.F.R. § 404.1562.

8 20 C.F.R. § 404.1520, 1520a, 1525.

9 20 C.F.R. § 404.1564.

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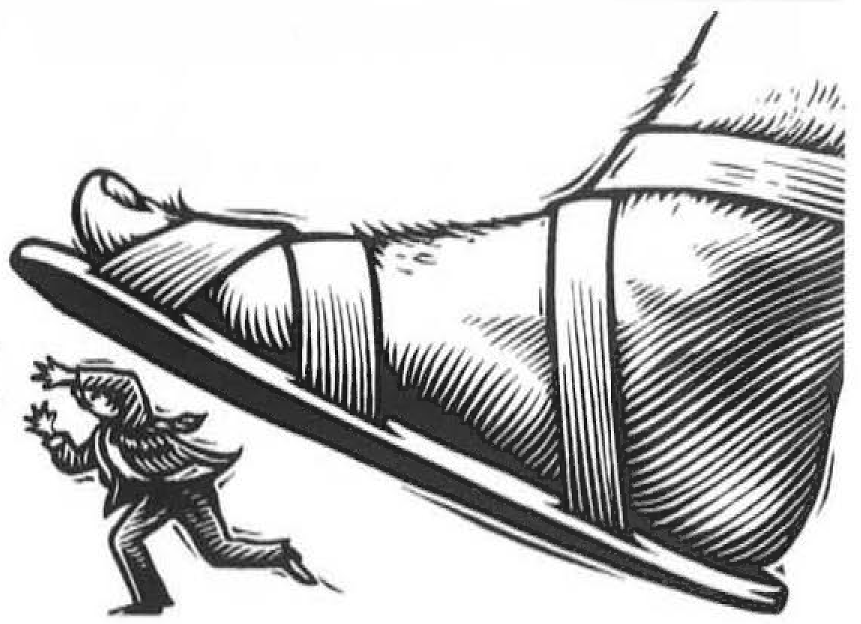
Defending *Qui Tam* Lawsuits Brought Under the False Claims Act



BY JACK W. SELDEN and RICHARD L. SHARFF, JR.

If you represent a business which sells goods or services to the United States or one of its agencies, your client may be the subject of a multi-million dollar fraud lawsuit filed in federal court months ago, and neither you nor your client knows about it. The lawsuit has been filed by a private citizen (quite possibly a disgruntled former employee) under seal and served only on the United States, which is discussing the case with the plaintiff and secretly investigating your client's actions. By the time you and your client find out about the lawsuit, you will already be far behind the other side in terms of fact-finding and analysis of the case. In fact, the Government may have formed its "final" opinions about your client's culpability before you even have had an opportunity to respond to the allegations. Then, when you finally learn of the lawsuit, you may not actually be allowed to see a copy of the complaint, or to serve your own discovery requests, as you would in defending a normal civil lawsuit.

Sounds a bit unfair, doesn't it? Fair or not, such is life in the world of defending companies and individuals against *qui tam* lawsuits filed by private citizens on behalf of the United States under the federal False Claims Act (FCA). The unique framework established by the FCA's *qui tam* provisions, designed to encourage private citizens to assist the United States in ferreting out fraudulent conduct by federal government contractors, creates a number of unique issues and potential strategies for defense lawyers in this area.

Basics of the False Claims Act and Its *Qui Tam* Provisions

The FCA was enacted during the Civil War, in response to several egregious incidents where private contractors swindled the United States in providing war materiel. *See* B. Yuill "High Court Hears Argument on Right of Qui Tam Whistleblowers to Sue States," 8 BNA Health Law Rep. 1874-78 (Dec. 2, 1999). Under the current version of the law, any person who "knowingly" presents (or causes to be presented) to the United States a false or fraudulent claim for payment or approval is liable to the United States for civil penalties of $5,500 to $11,000, plus three times the amount of the damages suffered by the United States in paying the false or fraudulent claim. Making false statements in order to get a false or fraudulent claim paid, as well as conspiring to get a false or fraudulent claim allowed or paid, are also prohibited by the FCA. 31 U.S.C. § 3729(a). As a result of amendments to the law in 1986, the term "knowingly" is broader than it might otherwise appear: it includes, in addition to actual knowledge, acting in "deliberate ignorance" of the truth or falsity of information, and acting in "reckless disregard" of the truth or falsity of information. Thus, the statute makes it clear that specific intent to defraud is not a prerequisite to liability. *Id.* at § 3729(b).

In order to encourage private citizens (often called "relators") to expose cases of fraud against the United States, the original statute included unique provisions allowing private individuals to bring and maintain suits on behalf of the United States, and to retain a percentage of any recovery obtained by the United States as a result of the claim (under the current version of the statute, the relator's percentage of the take can range from 15-30 percent. *See* 31 U.S.C. § 3730(d). These lawsuits are commonly referred to as "*qui tam*" cases.[1] After a period of relative disuse due to restrictive amendments to the FCA passed in 1943, Congress jump-started the *qui tam* provisions with liberalizing amendments in 1986. *See Cooper v. Blue Cross Blue Shield of Florida*, 19 F. 3d 562, 565 n. 2 (11th Cir. 1994). These changes definitely succeeded in encouraging the filing of more *qui tam* lawsuits under the FCA: in the year after 1986, only 33 cases were filed; in fiscal year 1999, 483 cases were filed. *See* Department of Justice Press Release, "Justice Department Recovers Over $3 Billion in Whistleblowers False Claims Act Awards and Settlements," February 24, 2000.

While the initial wave of *qui tam* actions primarily involved the defense industry, in the mid-1990s, the focus of relators shifted dramatically toward the health care industry. One explanation for this shift is the significant reduction in defense spending by the federal government during the 1990s, and the corresponding relative rise in federal spending in the health care area. In addition, while the defense industry cases were often fairly lucrative due to the often expensive nature of the goods being sold to the United States, the recoveries in some of the health care industry cases have been staggering, due to the sheer number of claims that can be involved in such cases. Because health care providers often repetitively submit large numbers of the same type of claim for health care services rendered to patients who are beneficiaries of the federal Medicare program, a pattern of false or fraudulent billing that exists for a significant period of time can lead to potentially massive liability under the FCA, particularly when the $5,500—$11,000 *per claim* penalty is applied.

The increase in *qui tam* filings in the health care industry has coincided with the Government's high profile and politically popular effort to combat fraud and abuse in the health care industry. The Department of Justice's statistics illustrate the Government's enforcement focus in this area: Over half of the more than *$3.5 billion* recovered in cases brought under the *qui tam* provisions of the FCA have involved health care fraud allegations. Department of Justice Press Release, February 24, 2000. Over $1.5 billion has been paid by FCA defendants, most of them in the health care industry, just since the end of fiscal year 1998. Perhaps more to the point, as of February 2000, the Department of Justice had paid relators over *$550 million* as their statutory shares, and that figure is rising in seemingly exponential fashion, as United States Attorneys across the country continue to announce settlements of FCA cases, most of which involve the health care industry. *Id.*

In a few of the more publicized cases, *qui tam* relators and their counsel have been awarded statutory shares in the tens of millions of dollars. In one recent high-profile case, National Medical Care, which is now a subsidiary of Fresenius Medical Care, the world's largest dialysis provider, agreed to pay $375 million to settle a *qui tam* case alleging, among other things, that the company filed false claims to Medicare for laboratory tests. *See* Department of Justice Press Release, *supra*, February 24, 2000. In the health care industry, settlements in the $5-10 million range have become fairly common; in such cases, the relator's share will often be in the seven figure range. Given these numbers, it should be no surprise that United States Attorneys are very busy investigating allegations made in complaints filed under the *qui tam* provisions of the FCA against health care and other businesses which do business with the Government.

Dealing with the Government's Investigation

As noted, a *qui tam* relator files his or her complaint in federal court under seal and serves only the United States (specifically, the Attorney General of the United States) with a copy of the complaint. The relator should also deliver a "disclosure statement" to the Government, describing the basis of the allegations in further detail. The Government will then begin its investigation of the allegations, typically by interviewing the relator and reviewing any documents the relator has provided. The Government will also take advantage of other sources of information at its disposal, including information in the possession of Medicare carriers or intermediaries, the private contractors who administer the Medicare program on behalf of the Government. In addition to these "informal" methods of investigation, the Government can also take advantage of two more formal avenues–subpoenas from the applicable agency's Office of Inspector General (OIG subpoenas), and civil investigative demands (CIDs). Often, the receipt of one of these documents is the first inkling a defendant has that a *qui tam* case has been filed against it.

The OIG's subpoena power arises out of the Inspector General Act of 1978, which, like the FCA, was enacted to combat a perceived "epidemic" of fraud and abuse in federal programs. *Inspector General of the United States Dept. of Agriculture v. Glenn*, 122 F.3d 1007, 1009 (11th Cir. 1997). The scope of the OIGs' subpoena power is broad, and courts will enforce OIG subpoenas as long as: (1) the investigation involved is within the applicable OIG's authority, (2) the demand is not overly burdensome or indefinite, and (3) the information sought is reasonably relevant and not already in the Government's possession. *United States v. Medic House, Inc.*, 736 F. Supp. 1531, 1534-35 (W.D. Mo. 1989). The Government enjoys a certain flexibility with respect to its use of information obtained through OIG subpoenas, as the information the Government obtains through such subpoenas can be shared freely with others, including the relator and his or her counsel. As a result, the Department of Justice and/or responsible United States Attorney will often request that the applicable OIG issue a subpoena in connection with the Government's *qui tam* investigation.

CIDs are issued by the Attorney General under the authority of the FCA. Section 3733 of the FCA provides detailed requirements governing the use of this discovery tool, which the Attorney General can use to require the production of documentary material, answers to interrogatories or oral testimony, as long as the information sought is relevant to a false claims law investigation. A recipient can seek to have the CID set aside by filing a petition in the United States district court for the recipient's federal judicial district within 20 days after the date of service, but a district court's discretion to restrict the enforcement of a validly-issued CID is "limited." *United States v. Markwood*, 48 F. 3d 969, 976 (6th Cir. 1995). In essence, because CIDs are treated like other administrative subpoenas, they are enforced unless the recipient can convince a court that the request is irrelevant or overly burdensome, or that the DOJ is acting in bad faith or abusing the court's process in issuing the subpoena. *See id.* at 978. Countering the usefulness of this broad power to the Government, on the other hand, are considerable restrictions on the Justice Department's ability to share the information obtained through a CID. In fact, the DOJ can only disclose such information to investigators in the case, to Congress or to another federal agency with a "substantial need for the use of such information in furtherance of its statutory responsibilities." 31 U.S.C. § 3733(i)(2)(C).

It should be noted that the Government's power to use CIDs to obtain discovery in connection with an unsealed *qui tam* case can be challenged. The statute allows the Attorney General to serve a CID only "before commencing a civil proceeding under" the FCA. *Id.* at § 3733(a). Given that the *qui tam* relator has "commenced" an FCA case by filing his complaint, it can be argued that a CID issued by the Government as part of its investigation into the merits of the relator's allegations comes too late. Moreover, since the United States never truly "commences" a *qui tam* case–it either intervenes in the already commenced case or declines to do so–the language of the statute cannot be read literally, or the United States would technically be able to continue the use of the CID to obtain *ex parte* discovery even after the case is unsealed. The only court to address this argument directly has rejected it, however. In *Avco Corporation v. United States Department of Justice*, 884 F.2d 621 (D.C. Cir. 1989), the D.C. Circuit held that the filing of a *qui tam* action by itself does not deprive the Attorney General of the power to issue CIDs. On the other hand, the *Avco* court strongly indicated (without actually holding) that CIDs cannot be issued after the Government has intervened in a *qui tam* case. *Id.* at 624. Often the Government will indicate during its investigation that it has decided to intervene in a case, or at least a portion of it. In such cases, the defendant should consider resisting any effort by the Government to enforce a CID, on the grounds that the Government has already effectively decided to intervene in the case, thereby making use of the *ex parte* CID discovery power inappropriate.

On the other side, the defendant is left with few options for conducting its own discovery, since the Federal Rules of Civil Procedure do not apply until the case is unsealed and officially served on the defendant. Despite that fact, there are several tactics the defense lawyer can and should pursue in response to a Government investigation triggered by a *qui tam* complaint:

Find out as much as you can about the nature of the allegations from the Government. The United States Attorney is restricted by the statute in what can be disclosed to the defendant about a case under seal. However, the Government can ask the district court for a "partial lifting of the seal," in order to discuss the issues with the defendant and thereby further the investigation. The scope of that order can vary, but often the Government will agree to seek permission to inform the defendant of the allegations made in the complaint, or even to provide a copy of the complaint itself to the defendant (usually with the names of the relator and the relator's attorney redacted). Generally speaking, the Government has no interest in making the wrong decision on intervention, especially if that wrong decision results simply from a failure to obtain the defendant's side of the story. In most cases, the sooner the defendant can initiate this dialogue, the better.

Work with your client to conduct an internal investigation of the matter (at your direction, subject to the attorney-client privilege), using whatever information is available. For example, if the client has received an OIG subpoena or a CID, you can often obtain a good idea about the issues involved by reviewing the requests. Ask the client to consider whether it has been involved in any particularly contentious issues relating to legal compliance. Many relators are former employees in areas involving financial matters or claims submission–have any of the client's employees recently resigned or been terminated? For health care clients in particular, have they been subject to unusual audit activity from the Medicare carrier or intermediary?

Prepare key witnesses for Government interviews which, in most cases, will eventually take place as the Government proceeds with its investigation and attempts to determine whether or not to intervene in the case. In this regard, it is critical for defense counsel representing the corporation to evaluate the often difficult issue of whether individual employees of the company need separate counsel, and to prepare the client for the decision of whether to pay for such separate counsel. Although this issue is beyond the scope of this article, an understanding of the issues which arise in this area is essential if one is to navigate through the waters of an FCA investigation while avoiding the shoals of insurmountable conflicts in representation.

Become familiar with the statutes and regulations which are or might be at issue. In health care cases particularly, the applicable standards can be extremely voluminous and complex. Often, defense counsel will need to consult with an attorney who concentrates in the laws and regulations applicable to the industry involved.

Motions to Dismiss *Qui Tam* Complaints

Suppose you have helped your client deal with the initial shock of learning that it is the subject of a lawsuit claiming hundreds of thousands or millions of dollars in damages on behalf of the United States, as well as enormous potential penalties; you have worked with your client to conduct a thorough internal investigation of the issue; you have guided the defendant through the Government's investigation and obtained what you believe is the ultimate victory—convincing the Government not to intervene in the case brought by the *qui tam* relator. At this point, while you should be well satisfied with your work so far, don't break out the champagne just yet. The relator still has a shot left to take, if he or she wishes, because the FCA allows the relator to proceed with the case, even if the Government elects not to intervene. 31 U.S.C. § 3730(c)(3).

Typically, once the Government notifies the federal court of its election not to intervene in the case, the relator can choose to dismiss the case before it is unsealed and served on the defendant, or the relator can allow the complaint to be unsealed and served on the defendant. History and statistics reflect that in almost all cases the true battle is waged over the Government's intervention decision–only about 6 percent of the total recoveries in FCA *qui tam* cases have been obtained by relators who litigated their claims after the Department of Justice declined to pursue the case. Department of Justice Press Release, February 24, 2000. Nevertheless, many relators elect to proceed with their cases in the face of a Government rejection, and one can assume that such claims will increase as overworked United States Attorneys are forced to be more selective in taking on FCA cases.

Once the complaint is served on the defendant, the case proceeds like a normal federal lawsuit, pursuant to the Federal Rules of Civil Procedure, with a few exceptions. The Government may ask to be served with copies of all pleadings and deposition transcripts in the case. *Id.* In addition, the Government may be allowed to intervene at any time later in the case, if good cause exists. *Id.* Defense counsel should also keep in mind that if the relator elects to proceed without the Government and the defendant eventually prevails in the case, the court can award the defendant's reasonable expenses and attorney's fees, if the claim was "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment." *Id.* at § 3730(d)(4).

In the event a relator elects to proceed with a case against your client without the Government, there are a number of arguments that should be considered at the motion to dismiss stage. A number of jurisdictional arguments are presented by the specific language of the statute. *See id.* at § 3730(e). The most prominent of these appears at § 3730(e)(4)(A), which bars *qui tam* actions based on "public disclosure" of the allegations, unless the relator is an "original source" of the information. Under the statute, a person can be an "original source" only if he or she has (i) "direct and independent" knowledge of the allegations and (ii) has voluntarily provided the information to the Government *before* filing the case. A number of interesting issues arise in the context of jurisdictional challenges under § 3730(e)(4); the case law in this area is extensive and varies from circuit to circuit. (The reader is referred to Professor Bucy's November, 1997 article in *The Alabama Lawyer* for an excellent discussion of these issues.)

Historically, defendants have also made constitutional challenges to the *qui tam* provisions in motions to dismiss. These challenges generally have involved two principal arguments. First, defendants have argued that *qui tam* relators lack standing under Article III of the United States Constitution to maintain their lawsuits without the Government because relators have not experienced any personalized injury. Second, defendants have contended that, by allowing private individuals to conduct litigation on behalf of the United States, the *qui tam* provisions unconstitutionally encroach upon the Executive Branch's exclusive powers. One part of this argument is that *qui tam* cases violate separation of powers principles and Article II, § 3 of the Constitution, which requires that the Executive "take Care that the Laws be faithfully executed." In addition, defendants posit that *qui tam* lawsuits violate the Appointments Clause (Article II, § 2) of the Constitution, which requires in part that the President nominate and, by and with the advice and consent of the Senate, appoint all officers of the United States whose appointments are not otherwise provided for.

Unfortunately for defendants, the Article III standing argument was laid to rest by the United States Supreme Court last year, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). That case involved a *qui tam* action filed against the State of Vermont's Agency of Natural Resources. The United States declined to intervene, and Stevens elected to proceed by himself. The Agency moved to dismiss, arguing, (i) as a state agency, it was not a "person" subject to FCA liability, and (ii) the State was immune from *qui tam* actions in federal court by virtue of the Eleventh Amendment to the Constitution. Both the district court and a panel of the Second Circuit denied the motion to dismiss, and the Supreme Court granted certiorari. 529 U.S. at 770, 120 S. Ct. at 1861. Thus, the issue directly presented to the Court in *Stevens* was whether a State or state agency could be subject to FCA liability in a *qui tam* case when the Government does not intervene, not the broader question of whether *any relator* can proceed with his or her case after the Government has declined to intervene.

Nevertheless, just ten days before oral argument, the Supreme Court expanded the scope of the case and requested the parties to brief the issue of whether Stevens had any standing at all to bring his claim. B. Yuill, *supra* 8 BNA Health Law Rep. at 1875. The Supreme Court heard arguments as scheduled and issued its opinion on May 22, 2000. On the direct issue involved in the appeal, seven Justices ruled in favor of the Vermont Agency of Natural Resources, holding that States are not subject to *qui tam* liability because States are not "persons" under § 3730(b)(1). *Stevens*, 529 U.S. at 787, 120 S. Ct. at 1870.[2]

On the standing issue, all nine Justices confirmed that the relator possessed the "irreducible constitutional minimum" of standing under Article III of the Constitution to maintain his lawsuit without the Government. The critical issue in this regard was whether the relator could demonstrate "injury in fact," or a "'concrete private interest in the outcome of [the] suit.'" *Id.* at 1862 (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 573, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). To get around the argument that the relator's "interest" in the lawsuit–the right to a bounty upon any recovery for the United States–is not actually related to the injury to the United States, the Court invoked the concept of *representational* standing: "[A]dequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 1863. In light of the "long tradition of *qui tam* actions in England and the American Colonies," the Court was comfortable holding that the United States' injury in fact was enough to confer standing on the relator.[3] *Id.*

Critically, however, in a footnote, the Court expressly left the door open to continued constitutional challenges to the FCA's *qui tam* provisions under Article II of the Constitution. The Court explained that in concluding that a *qui tam* relator has constitutional standing to bring an action under Article III, "we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3." *Id.* at 1865 n. 8. Thus, the Article II constitutional defenses arguably remain viable, and battles continue to be waged on this front in the lower courts.

Most recently, the full Fifth Circuit rejected the Article II arguments, in *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 2001 U.S. App. LEXIS 10832 (May 25, 2001 5th Cir.). In 1997, the district court dismissed *qui tam* relator Riley's claims on jurisdictional grounds, concluding that Riley lacked Article III standing to sue because she had not suffered any injury-in-fact. *See United States ex rel. Riley v. St. Luke's Episcopal Hospital*, 982 F. Supp. 1261, 1263-69 (S.D. Tex. 1997). On appeal in 1999, a three-judge panel of the Fifth Circuit panel disagreed with the district court's decision on standing (a decision which, as we have seen, was later validated in *Stevens*), but it *affirmed* (by a 2-1 decision) the dismissal of the case on Article II grounds. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 196 F. 3d 514, 523-24 (5th Cir. 1999).

In making this decision, the panel focused on the test announced in *Morrison v. Olson*, 487 U. S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988), where the Supreme Court upheld the constitutionality of the independent counsel statute. In *Morrison*, the Court stated that the test of constitutionality of congressional action that might undermine the Executive's conduct of litigation is "whether the Executive Branch retains sufficient 'control' over the litigation 'to ensure that the President is able to perform his constitutionally assigned duties.'" *Riley*, 196 F. 3d at 525 (quoting *Morrison*, 487 U. S. at 696). The panel then considered the *qui tam* provisions particularly and concluded that they fail the *Morrison* test because when the Government does not intervene, "important safeguards that ensure the Attorney General's control of the independent counsel are lacking." *Id.* at 527. The panel specifically pointed to the Executive's lack of control over both the decision whether to pursue an FCA claim, and control over the litigation as it goes forward. The Court also drew stark contrasts on a number of fronts between the independent counsel law approved in *Morrison* and the delegation of Executive power involved in *qui tam* actions. *Id.* at 525-29.

Pursuant to Fifth Circuit rule, the panel's decision was immediately vacated, and the Court reconsidered the case *en banc*. *See id.* at 516 n.1. After that rehearing, the Court reversed the panel's dismissal of Riley's lawsuit and remanded the case to the district court. First, the Court stated that the long history of *qui tam* statutes in our country's jurisprudence, which the Supreme Court found to be persuasive support for the statute in addressing the Article III defense, is just as persuasive when considering the Article II defenses. *Id.* at *5-6. Second, the Court held that *qui tam* cases do not violate the Take Care clause of Article II because the Executive retains "significant control" over the litigation even when it has not intervened. *Id.* at *7. In fact, the full Court disagreed with the panel's application of the *Morrison v. Olson* control test because "it involves an entirely different lawsuit and requires entirely different control mechanisms." *Id.* at *15. Finally, the Court summarily rejected the Appointments Clause argument, stating that *qui tam* relators are not officers of the United States. *Id.* at *20.

Circuit Judge Jerry E. Smith, who authored the *Riley* panel opinion, issued a vigorous dissent to full court's decision. Judge Smith was even more strident in dissent than he was in his panel opinion in arguing that the *qui tam* provisions violate separation of powers principles it putting "unaccountable, self-interested relators... in charge of vindicating government rights." *Id.* at *46-47. In short, defendants asserting the Article II defenses should study this opinion carefully, as it provides a lengthy and well-reasoned argument attacking the constitutionality of the *qui tam* provisions.

A final common ground for moving to dismiss *qui tam* cases is Federal Rule of Civil Procedure 9(b), which requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake [be] stated with particularity." Claims made under the FCA are subject to 9(b). *See, e.g., Cooper*, 19 F. 3d at 568-69. Thus, in the Eleventh Circuit, a *qui tam* relator must include the "who, what, where and why" in the complaint: (1) "precisely" what false or fraudulent statements or omissions were made; (2) who made such statements or omissions, as well as when and where; (3) how the United States was misled by the statements ; and (4) what the defendant obtained as a result of the fraud or false statement. *United States ex rel. Butler v. Magellan Health Services*, 101 F. Supp. 2d 1365, 1368 (M.D. Fla. 2000). Relators often argue for application of a relaxed standard under Rule 9(b) in cases alleging widespread fraud where the relator can allege that the necessary information is within the defendant's control, but courts will not allow this exception to support speculative and conclusory allegations. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F. 3d 899, 903 (5th Cir. 1998). *Qui tam* relators relying on mere information and belief must still set forth some factual basis for that belief, and courts appear to be increasingly skeptical of broad, speculative and unsupported fraud claims asserted under the FCA. *See, e.g., id.* (dismissing allegations that the defendant provided medically unnecessary services which were supported by only statistical studies); *Butler*, 101 F. Supp. 2d at 1368-69 (dismissing entire complaint where the relator could not identify any specific occurrences of a false claim in furtherance of the general fraudulent scheme alleged); *United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F. 3d 304, 308-09 (5th Cir. 1999) (affirming dismissal of complaint on Rule 9(b) grounds); *United States ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 2000 U.S. Dist. LEXIS 17162 (N.D. Ga. Nov. 29, 2000) (rejecting theoretical allegations of wrongdoing without identification of an actual false claim submitted).

Conclusion

A clear understanding of the unique complexities of the Federal False Claims Act, along with an ability to communicate with the United States Attorney and assigned Department of Justice attorneys, is critical for the effective defense of the *qui tam* lawsuit. Defendants face tremendous potential exposure in these ever-growing cases, including treble damages, enormous monetary penalties and significant costs. And while most incorrect claims submitted to the Government are merely inadvertent mistakes which should result simply in repayment, a defense which is not well thought out and prepared as early as possible during the Government's investigation of a *qui tam* relator's allegations may result in an intervention by the United States. Early discovery of the lawsuit, a thorough corporate investigation and an aggressive defense are a must in order for defendants in *qui tam* cases to be successful. Remember, the relator and the relator's counsel seek a bounty—the larger the better. The Government, while seeking to do justice, relies largely upon the relator's allegations and evidence and is obviously not averse to recovering for the United States Treasury as much money as possible. Since the largest payments almost always occur in cases where the Government decides to intervene, the primary role of defense counsel is to convince the United States not to intervene in the relator's case. Then, if necessary, the defendant can take on the relator without the Government, under the more balanced framework provided by the Federal Rules of Civil Procedure. ■

Endnotes

1. The phrase "*qui tam*" is the short version of a Latin phrase meaning, "who pursues this action on our Lord the King's behalf as well as his own." *See* 31 U.S.C. § 3730 for substantial, detailed requirements regarding the filing and conduct of *qui tam* actions, which are beyond the scope of this article. For an excellent discussion of many of these issues, particularly from the relator's perspective, *see* Pamela Bucy, "Where To Turn In a Post-Punitive Damages World: The 'Qui Tam' Provisions of the False Claims Act," *Alabama Lawyer*, November 1997.
2. The decision appears to leave open the question of whether the Eleventh Amendment further prohibits the *United States* from pursuing an FCA case against a state or state agency. *Stevens*, 529 U.S. at 789, 120 S.Ct. at 1871 (J. Ginsburg, concurring).
3. Another important facet of the *Stevens* opinion for some defendants is the Court's statement that after the 1986 amendments, the FCA "imposes damages that are essentially punitive in nature." 529 U.S. at 784-85; 120 S. Ct. at 1869-70. The Fifth Circuit Court of Appeals and at least two district courts have relied on this language to hold that a relator may not pursue a *qui tam* action against a county or other local governmental entity, on the grounds that such entities are immune from punitive damages. *See United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F. 3d 486 (5th Cir. 2001); *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000); *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 118 F. Supp. 2d 902 (N.D. Ill. 2000); *but see United States ex rel. Rosales v. San Francisco Housing Authority*, 2001 WL 370176 (N.D. Cal. Mar. 26, 2001).

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- **John Richard Waters, Jr.,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2001, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 00-246(A) before the Disciplinary Board of the Alabama State Bar.
- **Lamar Farnell Ham, III,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2001, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 00-252(A), 01-83(A), 01-84(A) and 91-85(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Supreme Court of Alabama entered an order on July 2, 2001 based upon the decision of Panel II of the Disciplinary Board suspending **David Jerome Harrison** from the practice of law in the State of Alabama for a period of 30 months, effective retroactively and concurrently with an interim suspension imposed by consent by the Disciplinary Commission effective May 30, 1997. This discipline was based upon Harrison's plea of guilty in ASB No. 97-25(A) to violating rules 8.4(b), (d) and (g), A.R.P.C. On March 6, 1997, Harrison was convicted in the United States District Court for the Middle District of Alabama on one count of conspiracy to distribute and possession with intent to distribute methamphetamine. Harrison was sentenced to 30 months imprisonment.

  After a hearing on Harrison's petition for reinstatement pursuant to Rule 28, A.R.D.P., Harrison was reinstated to the practice of law in the State of Alabama on a probationary basis for two years. [ASB No. 97-25(A) and ASB Pet. for Rein. No. 01-02]
- The Supreme Court of Alabama entered an order reinstating Birmingham attorney **Rose Marie Jones** to the practice of law in the State of Alabama effective June 4, 2001. This order was based upon the decision of Panel VI of the Disciplinary Board. Jones was previously suspended for noncompliance with CLE requirements. [ASB Pet. No. 00-11]
- The Supreme Court of Alabama entered an order based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar reinstating Birmingham attorney **Calvin Seely Rockefeller, III** to the practice of law in the State of Alabama, effective February 21, 2001. [ASB Pet. No. 00-09]
- The Supreme Court of Alabama entered an order based upon the decision of Panel IV of the Disciplinary Board of the Alabama State Bar reinstating Alabaster attorney **Richard Wayne Mizell, Jr.** to the practice of law in the State of Alabama, effective June 8, 2001. [ASB Pet. No. 01-03]

Disbarment

- On April 13, 2001, the Supreme Court of Alabama entered an order based upon the decision of the Disciplinary Board of the Alabama State Bar disbarring **Richard Jude Spurlin** from the practice of law in the State of Alabama.

  In ASB No. 98-337(A), Spurlin was appointed by the Covington County Circuit Court to represent a defendant on appeal to the Alabama Court of Criminal Appeals. Spurlin did not file briefs on behalf of his client and failed to respond to requests for information during the course of the bar's investigation of the matter. In ASB nos. 99-041(A), 99-41(A), 99-48(A), 99-49(A), 99-72(A), 99-80(A), 99-125(B), 99-134(B), and 00-02(A), Spurlin "purchased" the law practice of retiring attorney Vreeland Gerald Johnson. Thereafter, Spurlin accepted fees from former clients of Johnson and from new clients who had never been represented by Johnson. After accepting these fees, Spurlin did little or no work on behalf of the clients. In ASB nos. 00-154(A) and 00-155(A), Spurlin was retained to represent clients in various civil actions. After accepting the representation, Spurlin did little or no work on behalf of the clients. On or about December 1, 1998, Spurlin abandoned his clients and the practice of law in the State of Alabama. Spurlin did not notify the clients that he was terminating the representation, nor did he refund the unearned portion of the retainer fees paid by the clients. During the course of the bar's investigation of these matters, Spurlin failed to respond to repeated requests for information. [ASB nos. 98-337(A) *et al*]

Suspensions

- **John Richard Waters, Jr.,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2001, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 00-246(A) before the Disciplinary Board of the Alabama State Bar.
- **Lamar Farnell Ham, III,** whose whereabouts are unknown, must answer the Alabama State Bar's formal

disciplinary charges within 28 days of September 15, 2001, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 00-252(A), 01-83(A), 01-84(A) and 91-85(A) before the Disciplinary Board of the Alabama State Bar. The Supreme Court of Alabama entered an order confirming the order of the Disciplinary Board, Panel II, suspending Mobile attorney **Larry Clinton Odom** from the practice of law in the State of Alabama effective March 12, 2001, for a period of 91 days. Odom was found guilty of violating rules 1.3 [diligence]; 3.2 (expediting litigation); 8.1(b) [bar admission and disciplinary matters]; and 8.4 (g) [misconduct]. Sometime in 1996, Odom was paid $1,500 to represent a client in a contested divorce. The case was settled just prior to trial. Odom was ordered to prepare the necessary documents, have a commissioner take testimony, and file the documents for a judgment of divorce. Odom failed or refused to comply with this order. After the complaint was filed with the bar, Odom wrote the bar on November 1, 1999, and stated that the allegations of the complaint were true but he was unable to refund the fee paid to him. Odom offered to complete the divorce and assured that he could handle it within a few days. The complaint was held pending Odom's completion of the divorce. Odom failed or refused to complete the divorce. Odom also failed or refused to respond to the Alabama State Bar on a timely basis, or to otherwise cooperate with the bar in the course of its investigation of said complaint. [ASB No. 00-21(A)]

- Birmingham attorney **James Vincent Low** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective May 24, 2001. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Low, on more than one occasion, had co-mingled trust funds with personal funds and failed to promptly account for and remit trust funds to clients or third parties. [Rule 20(a); ASB Pet. No. 01-10]

- On December 22, 2000, former Birmingham attorney **Dennis Michael Sawyer** received a two-year suspension, with special conditions, effective December 1, 1998.

In ASB No. 93-043(A), on or about May 12, 1992, Sawyer was employed to represent the complainant in a divorce proceeding. Afterwards, Sawyer failed to provide the complainant with adequate representation and failed to communicate with her regarding the status of her case. Thereafter, Sawyer had his telephone disconnected, closed his law office, and moved without notifying the complainant.

In ASB No. 93-267(A), during March 1991, Sawyer was retained by the complainant in a worker's compensation claim. The complainant also wanted to bring a wrongful termination lawsuit against her employer. Sawyer declined to represent her in the wrongful termination lawsuit, and referred her to another attorney. In 1992, Sawyer presented a settlement and release agreement to the complainant, and advised her that this would not affect her wrongful termination suit. Based on this representation, the complainant signed the agreement. Later the complainant's attorney filed a wrongful termination suit. The defendant filed for summary judgment which was granted based on the worker's compensation settlement agreement. Afterwards, Sawyer failed to provide the complainant with adequate representation and failed to communicate with her regarding the status of her case. Thereafter, Sawyer had his telephone disconnected, closed his law office, and moved without notifying the complainant.

In ASB No. 93-350(A), Sawyer was employed to obtain an uncontested divorce, and was paid $500 in attorney's fees. Afterwards, Sawyer failed to provide the complainant with adequate representation and failed to communicate with the complainant regarding the status of his case. Thereafter, Sawyer had his telephone disconnected, closed his law office, and moved without notifying the complainant.

In ASB No. 93-387(A), Sawyer was employed to represent the defendant (complainant) in connection with an automobile accident. Sawyer negotiated a settlement whereby the defendant was to make quarterly payments to the insurance carrier USF&G. In June 1992, the complainant gave Sawyer a sum of money which was to be paid to USF&G. Sawyer failed or refused to remit the funds to USF&G as agreed.

Sawyer voluntarily transferred to disability inactive status in February 1994 due to a substance abuse problem, and enrolled in a substance abuse program in Birmingham. Sawyer successfully completed the substance abuse program. However, he failed to keep the bar informed as to his whereabouts. Because these four cases were still pending, the Office of General Counsel ran a notice in *The Alabama Lawyer* preparatory to taking a default judgment. In response to the notice, Sawyer contacted this office. As discipline in the four cases, Sawyer has submitted a conditional guilty plea to a two-year suspension with credit for time already spent on disability inactive status. Sawyer has informed the bar that he has no immediate plans to return to Alabama nor does he have any plans to resume the practice of law. However, as a condition of his suspension, should he apply for reinstatement, he will have to have a hearing before the Disciplinary Board. Sawyer pled guilty to violations of rules 1.1 [competence], 1.3 [diligence], 1.4(a) [communication], 1.15(b) [safekeeping property], and 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. [ASB nos. 93-040(A), 93-267(A), 93-350(A), and 93-387(A)]

- Fort Payne attorney **Steven George Noles** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated June 20, 2001. The Disciplinary Commission found that Noles's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); ASB Pet. No. 01-012]

- The Supreme Court of Alabama entered an order adopting the order of the Disciplinary Board, Panel III, suspending Killen attorney **John Ottern Morrow** from the practice of law in the State of Alabama effective May 23, 1996, for a period of two years to run concurrent with his disbarment. Morrow entered a guilty plea to violations of rules 8.1(b), 8.1(c), and 8.1(d) [bar admission and disciplinary matters] Rules of Professional Conduct. On May 23, 1996, Morrow surrendered his license and agreed to disbarment. Morrow had misappropriated and/or converted clients' funds to his personal use. Morrow subsequently entered a guilty plea to federal charges of mail fraud and was sentenced to serve time in the penitentiary. On March 21, 2001, Morrow submitted a signed conditional plea. In 1995, Morrow represented a client in an estate matter involving a residence which was sold. Morrow misappropriated and converted the funds to his use. Morrow reimbursed these funds to the client prior to criminal charges being filed against him. [ASB No. 96-333(A)]

- Bessemer attorney **Rita Davonne Hood** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar effective May 18, 2001. The order of the Disciplinary Commission was based upon Hood's failure to participate in formal disciplinary proceedings conducted by the Disciplinary Board of the Alabama State Bar. [Rule 20(a); ASB Pet. No. 01-08]

- The Supreme Court of Alabama adopted an order of the Disciplinary Board, Panel I, suspending Birmingham attorney **Thomas Allan Wingo, Jr.** from the practice of law in the State of Alabama, effective February 20, 2001. Wingo had been on inactive status since January 7, 1997, for non-payment of dues and fees. Wingo failed or refused to respond to numerous requests for information from a disciplinary authority during the course of the disciplinary proceedings by the Alabama State Bar and the local grievance committee of the Birmingham Bar Association. Wingo also failed or refused to appear at his hearing at the Alabama State Bar. Therefore, Wingo was found guilty of rules 1.4(a) [communication] and 8.1(b) [bar admissions and disciplinary matters] in ASB No. 96-356(A), and rules 1.4(a), 1.4(b) [communication] and 8.1(b) [bar admissions and disciplinary matters] in ASB No. 98-87(A).

- Scottsboro attorney **Eileen Robinson Malcom** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated May 1, 2001. The Disciplinary Board found that Malcom's continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. On May 22, 2001, the Disciplinary Commission issued an order denying Malcolm's petition to dissolve the summary suspension. [Rule 20(a); ASB Pet. No. 01-006]

- On May 16, 2001, the Alabama Supreme Court adopted an order suspending Birmingham attorney **Donald Towns Trawick** from the practice of law in Alabama for a period of 91 days effective March 22, 2001. On November 17, 1994, Trawick was suspended from the practice of law for a period of 181 days. Since that date, Trawick has not been reinstated to the practice of law pursuant to Rule 28 of the Rules of Disciplinary Procedure. Even so, on or about May of 1999, Trawick engaged in the unauthorized practice of law by representing clients in connection with a fence line dispute. On May 21, 1999, Trawick sent the adjacent landowners a letter on letterhead which identified him as an attorney at law. In doing the above-described acts, Trawick was guilty of violating Rule 5.5(a) [unauthorized practice of law] of the Rules of Professional Conduct. [ASB No. 00-71(A)]

- Montgomery attorney **Paul Whiting Copeland** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated April 26, 2001. The Disciplinary Commission found that Copeland's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); ASB Pet. No. 01-007]

- Mobile attorney **Thomas Michael Tompkins** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated May 30, 2001. The Disciplinary Commission found that Tompkins's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); ASB Pet. No. 01-011]

- Florence attorney **Dennis Neal Odem** pled guilty before the Disciplinary Commission of the Alabama State Bar to violating rules 1.4(b) [communication] and 1.5(a) [fees], Alabama Rules of Professional Conduct. Odem admitted that he was retained to represent a client to obtain damages for injuries that she sustained as a result of a motor vehicle accident. The client signed an employment agreement agreeing to pay Odem 50 percent of the total recovery obtained in the event suit was filed. After a bench trial, the court awarded a judgment for $8,000. Subsequent to the trial, the respondent attorney learned that the client had $5,000 in med-pay benefits available through her insurance carrier. Odem made a demand for payment under the med-pay provision of the policy and received an additional $5,000. Thereafter, Odem disbursed $6,500 to himself in attorney fees; $6,000 to a chiropractor who had treated the client based upon Odem's referral, and paid case expenses of $181. The client's net recovery was $319. Odem did not provide a complete accounting to the client at the time of disbursement and failed to respond to the client's requests for information regarding the disbursement. In accordance with the terms of the plea agreement, Odem was suspended from the practice of law in the State of Alabama for a period of 91 days. The imposition of the 91-day suspension was stayed and held in abeyance during a two-year period of probation. Odem was ordered to make restitution to the client in the amount of $6,500. Other conditions of probation were ordered. [ASB No. 00-178(A)]

Public Reprimands

- On May 18, 2001, Montgomery attorney **Daniel Reese Farnell, Jr.** received a public reprimand without general publication in conjunction with a plea agreement entered into with the bar. Farnell pled guilty to having violated Rule 8.4(g) of the Alabama Rules of Professional Conduct by engaging in conduct that adversely reflected on his fitness to practice law. Farnell was involved in an incident at the security entrance of the Montgomery County Courthouse on March 16, 1998. [ASB No. 98-298(A)]
- On May 18, 2001, the Disciplinary Commission issued a public reprimand without general publication to Montgomery attorney **Harry Arthur Lyles**. Lyles is also required to make restitution to the complainant in the amount of $500. Lyles agreed to this proposed disposition. On May 29, 1998, the complainant hired Lyles to represent her in a child custody matter. She paid a retainer of $3,500, which Lyles did not deposit in his trust account. Ten days later the complainant informed Lyles that she had obtained other counsel and asked for the return of her money. Finally, in March 1999, Lyles refunded $2,500. In the meantime, the complainant had to pay another lawyer $500 to write Lyles three letters concerning her refund. Lyles failed to provide the complainant with an accounting for the $1,000 he continued to withhold. Later, Lyles made an additional $500 refund with a letter of apology. After the complainant filed a complaint with the Alabama State Bar, Lyles refunded the last $500. Lyles violated rules 1.15(a) [safekeeping property] and 1.16(d) [declining or terminating representation] of the Rules of Professional Conduct. [ASB No. 99-093(A)]
- On May 18, 2001, Florence attorney **William Marshall Gardner** received a public reprimand without general publication in connection with the complaint filed against him by Judge Deborah Paseur of the Lauderdale County District Court. On September 8, 2000, Judge Paseur sent a letter of complaint to the bar stating that for the preceding six months Gardner's conduct in her court, during four trials, was, "...totally unacceptable, offensive to parties and officers of the court, as well as to this judge..." On September 7, 2000, during a criminal trial in which Gardner acted as defense counsel, Judge Paseur had to admonish him for continually making inappropriate comments in response to objections by the district attorney, or in response to an adverse ruling on Gardner's objections by the court. The Disciplinary Commission found that such conduct violated rules 3.5(c), [impartiality and decorum of the tribunal], 8.4(d), and 8.4(g) [misconduct] of the Rules of Professional Conduct. [ASB No. 00-222(A)]

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