

The Alabama Lawyer

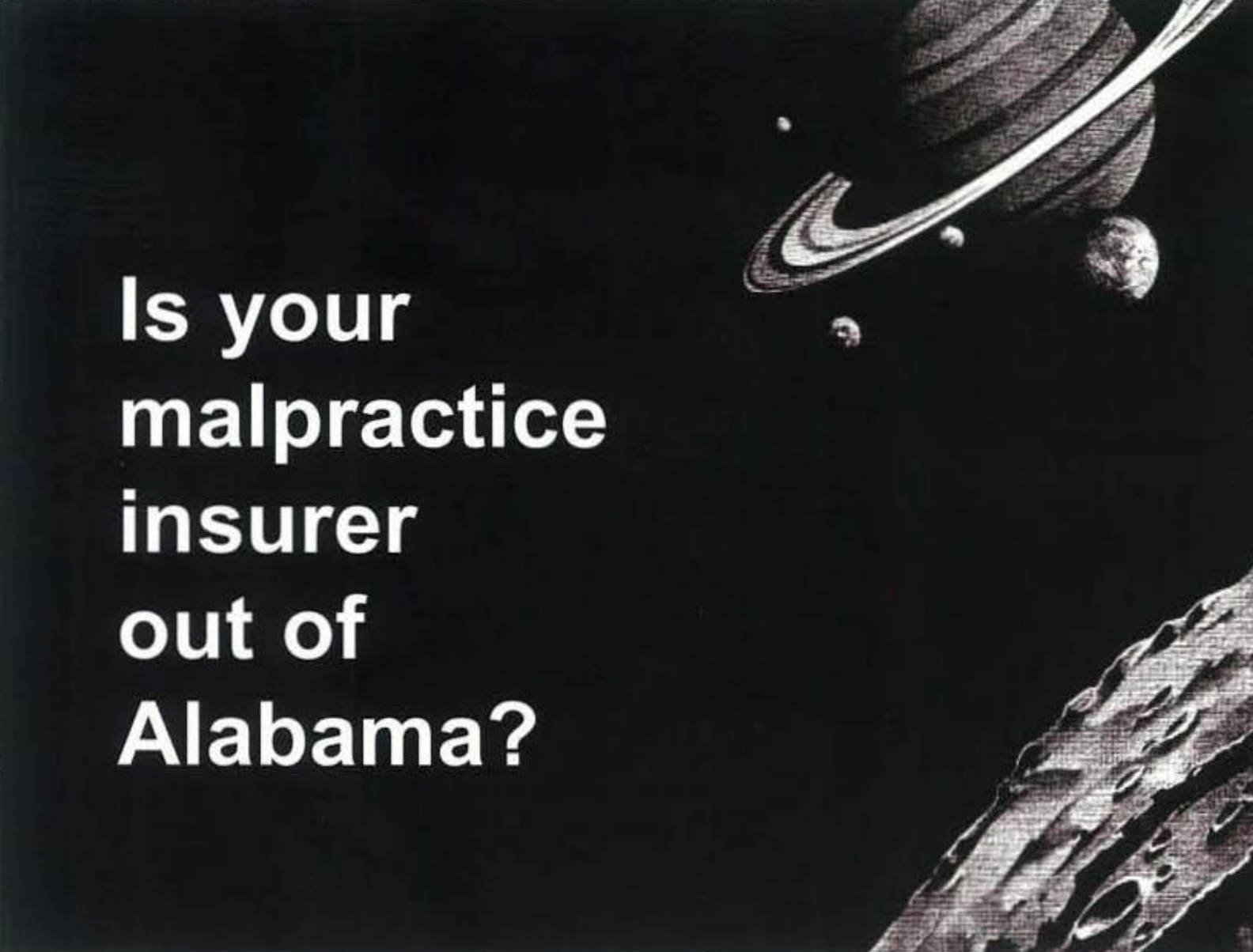
Vol. 63, No. 6

September 2002

Human and Civil Rights Multicultural



ASB PRESIDENT FRED GRAY AND FAMILY AT THE TUSKEGEE
HUMAN AND CIVIL RIGHTS MULTICULTURAL CENTER



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2002 Back to School Fall Calendar

| | | |
|------------------|----|---------------------------------------------|
| SEPTEMBER | 6 | Advising Small Businesses - Tuscaloosa |
| | 13 | Practical Criminal Defense Law - Tuscaloosa |
| | 27 | Social Security Disability Law - Tuscaloosa |

| | | |
|----------------|-------|----------------------------------------------------------|
| OCTOBER | 4 | Domestic Violence Law in Alabama - Birmingham |
| | 11 | What Every Real Estate Lawyer Needs to Know - Birmingham |
| | 25 | Pre-Trial Practice and Procedure - Birmingham |
| | 25-26 | Family Law Retreat to the Beach - Gulf Shores |

| | | |
|-----------------|----|-------------------------------------------------|
| NOVEMBER | 1 | Tort Law Update - Birmingham |
| | 8 | Will Drafting - Birmingham |
| | 15 | Trial Tips to Avoid Trouble - Montgomery |
| | 15 | Bankruptcy Law Update - Birmingham |
| | 20 | Alabama Update - Mobile |
| | 21 | Alabama Update - Montgomery |
| | 22 | Fundamentals of Handling a Divorce - Birmingham |



| | | |
|-----------------|----|------------------------------------------|
| DECEMBER | 4 | Jury Selection - Birmingham |
| | 6 | Trial Tips to Avoid Trouble - Birmingham |
| | 11 | Tort Law Update - Huntsville |
| | 12 | Estate Planning - Birmingham |
| | 12 | Alabama Update - Huntsville |
| | 13 | Video Replays - Tuscaloosa |
| | 18 | Video Replays - Tuscaloosa |
| | 19 | Alabama Update - Birmingham |
| | 19 | Charles Gamble on Evidence - Montgomery |
| | 20 | Charles Gamble on Evidence - Birmingham |



DECEMBER 2002 - JANUARY 2003

Dec. 27 - Jan. 3

Ski and CLE - Beaver Creek,
Colorado

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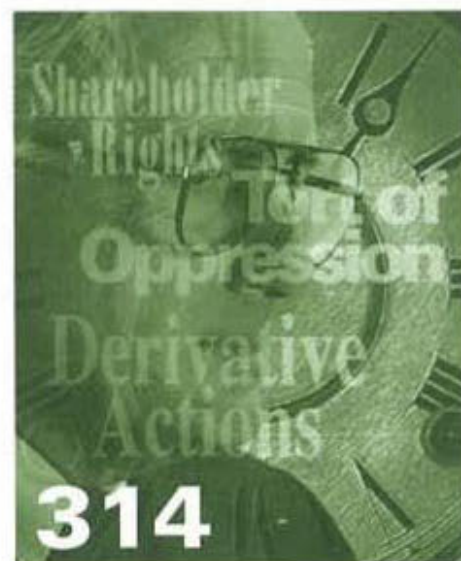
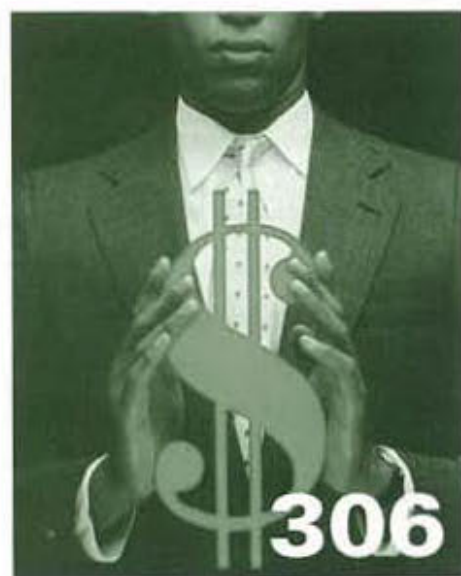
President Fred Gray, wife Carol, children and grandchildren in front of the Tuskegee Human and Civil Rights Multicultural Center located at 108 E. Elm Street, Tuskegee, Alabama

Back row, left to right: Attorney Fred Gray, Jr. and wife Bridgett; daughter Deborah Gray; President Gray; Mrs. Gray; daughter Vanessa and husband Luther Taylor; Lawanda and husband, attorney Stanley Gray; grandson Je'Michael. Front row, left to right: grandchildren Destiny, Doncheree, Alfred, Sierra, and LaDrena

The Tuskegee Human and Civil Rights Multicultural Center is a 501(c)(3) tax-exempt, non-profit corporation. It was co-founded by President Gray and his late wife, Bernice, in 1997. The Center's formation was announced by Mr. Herman Shaw, a participant in the infamous Tuskegee Syphilis Study, at the White House when President William Jefferson Clinton apologized to the participants of the 40-year, government-financed study that violated the constitutional rights of 623 African American males in Macon County, Alabama. In his presentation of President Clinton, Mr. Shaw said, "... In addition to an apology, we want to construct in Tuskegee a permanent memorial. A place where our children and grandchildren will be able to see the contributions that we and others made to this country. I am glad that I have helped form the Tuskegee Human and Civil Rights Multicultural Center, which will be for the purpose of creating such a lasting memorial."

The Center is a museum in development and when fully developed, will educate the public on the contributions made in the fields of human and civil rights by Native Americans, Americans of European descent and Americans of African descent. It will also be the official welcoming center for tourists who visit Macon County.

—Photography by Hawkins Studio, Inc.



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By Fred D. Gray, Sr.



Fred D. Gray, Sr.

The Alabama State Bar bestowed a great honor upon me when **Larry Morris** passed the gavel to me, and the **Hon. Howard Bryan**, presiding judge of the Fifth Judicial Circuit, administered the oath of office installing me as 126th president of the Alabama State Bar before a standing-room only crowd. I use my first presidential page to share with those of you who were not present some of the events that occurred on July 20 at Perdido Beach and request your assistance as we move our bar further into the 21st Century.

I thank the members of the Alabama State Bar for electing me as president-elect last year, without opposition. I also thank each person who played a role in making it possible for me to serve as your president.

As president-elect, on May 31, 2002, I convened a meeting of presidents of local and specialty bars at the state bar for a planning session. I discussed with them my ideas for bar year 2002-2003 and solicited their support. I shared these same views with those present when I became president.

During this bar year we have adopted a theme, "Lawyers Render Service: Service to the Client, Service to the Public, and Service to the Profession." This is not new; rather, lawyers render service to the client, the public and the profession daily. It is a part of the state bar's Lawyer's Creed, a portion of which

says: "To my clients, I offer faithfulness, competence, diligence, and good judgment... To the profession, I offer assistance... To the public and our system of justice, I offer service ..."

Notwithstanding the fact that lawyers render service, the public perception of lawyers is less than admirable. "The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing themselves," according to a recent survey commissioned by the American Bar Association Litigation Section.

I am soliciting the assistance of the staff, the local and specialty bars, and persons working in the area of CLE to design courses and other projects in such a way as to show that lawyers render service.

There are many outstanding lawyers, both living and dead, who have rendered tremendous service to their clients, the community and the profession. However, these lawyers have received very little recognition and much of their service is unknown. I have appointed a task force to explore the possibility of establishing an Alabama Lawyers Hall of Fame. **Past President Sam Rumore** chairs the task force. It is charged with the responsibility of examining the feasibility of establishing a Hall of Fame consisting of outstanding lawyers in this state. Some posthumous recognition is anticipated. Should the task force think it expedient, criteria will be established and delineated for the selection of these

persons and the task force will report to the Board of Bar Commissioners. It is hoped that the first class will be inducted into the Lawyers Hall of Fame in July 2003.

The United States of America is considered to be the melting pot of the world. People of all races, creeds and colors have made outstanding contributions toward making this country what it is. The demographics of this country are drastically changing. It is projected that by the middle of this century, the majority of the population of the United States will consist of persons who are now the minority. The current majority will become the minority. According to the 2000 U. S. Census Bureau, there were 4,447,100 persons living in Alabama; 71 percent were white, and 26 percent were African American. As of August 13, 2002, Alabama State Bar figures show there are 13,504 members of the Alabama Bar; 94.5 percent are white and 5.5 percent are minorities. There are presently 60 elected members on the Board of Bar Commissioners, three of whom are women and one of whom is African American.

There is currently in Alabama one white attorney for every 248 citizens, and one African American attorney for every 1,558 African Americans. Considering this statistic with the changing demographics, there is a real need for additional minority lawyers in our state. This association established a Task Force on Diversity in the Profession in 1988. It has made tremendous progress. I have restructured the task force and charged it with the responsibility to thoroughly investigate diversity in the profession and make recommendations to the Board of Bar

Commissioners as to what we can do to enhance diversity in the legal profession in our state. This blue-ribbon task force will be vice-chaired by both former **Alabama Supreme Court Justice Hugh Maddox** and former **Governor Albert Brewer**. It will be co-chaired by ASB past **President Warren Lightfoot** and past member of the Board of Bar Commissioners **J. Mason Davis**. In addition, it will consist of all deans of Alabama law schools, several other past presidents and other outstanding members of the bar.

There are other issues we must confront and embrace during this bar year. This association should take an active role in the matter of constitutional reform, thus, a task force to work on constitutional reform has been appointed. I have also appointed a task force on admission to the bar as there are also challenging issues in this area. Last and not least, the bar will address the question of multi-jurisdictional practice through the existing task force.

These are some of the issues confronting our state bar. I fully realize that any one person can accomplish little, but with all of us working together, we can accomplish much. I solicit the help of the Board of Bar Commissioners, officers, staff, the local and specialty bar associations, and each member. Let us work together and continue to render service, for lawyers truly render service. I also solicit your sincere effort as we demonstrate to the nation that lawyers render service. I am ready to work and encourage you to join us and continue the great work of this association. ■



From left to right - Stephen Oakes, John Cossar, Carolyn Freeman, Bonnie Woods, Phillip Poitevin, Morton Matrick, Mike Sellari, Mark Higdon

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Keith B. Norman

By Keith B. Norman

In July, several new applications were added to the bar's Web site, www.alabar.org. A member log-on was included so that bar members can now change or update personal information (e.g., address, telephone number, e-mail, etc.) and view current attendance and credit information for the year. We believe access to this CLE information and the freedom to update personal information on a 24/7 basis will better serve the schedule of busy lawyers.

Another application added to the Web site is an electronic version of the Alabama State Bar Lawyer Referral Service (LRS). Clients seeking the services of a lawyer no longer will need to call the LRS, but will be able to go on-line, identify their problem and obtain the name of a lawyer in their area to handle their problem. Presently, the LRS makes 15,000 telephone referrals annually. Telephone records suggest that at least a similar number of callers are unable to get through on the telephone because of the high volume of calls. The on-line LRS will make referrals 24/7 with lawyers on the panels being notified instantly of the referral. The public and the LRS attorneys will be better served by this new feature.

The bar's Web site is handling an average of 25,000 sessions a month. In 2000, the number of sessions averaged about 6,000 a month. The most commonly

accessed pages, excluding the Web site's opening page, are members on-line, CLE calendar, bar exam results, OGC opinions, admissions, ADR, and the divorce brochure. This significant increase in the visits to the bar's Web site indicates that bar members and the public are utilizing the site more frequently as an important source of information.

Future plans for the Web site include on-line registration of CLE programs for program sponsors, as well as expanding the electronic information available for bar members. For example, soon we hope to be able to allow members to elect to receive bar publications, dues invoices and other bar mail electronically, as well as providing through the bar's Web site, a safe and convenient means for paying bar fees and dues electronically. With the continuing increase in printing and mailing costs, the Internet offers a way for us to save significant costs and provide information to bar members in the most timely way possible.

We will continue to add functionality to the bar's Web site that will integrate the bar's services and activities in an electronic format. This will not only enhance access to information for members and the public alike, but it will improve our efficiency, thereby allowing us to respond to the unique situations or problems of our member or the public. ■



Continuing Legal Education Fall 2002 Seminars

| | | |
|-----------|-------|-----------------------------------------------------------------------------------------------------|
| September | 13 | Developments and Trends in Health Care Law 2002 |
| | 20 | Traps for the Unwary |
| | 27 | Basic Estate Planning and Administration |
| October | 4 | 13 th Annual Bankruptcy Law Seminar |
| | 11 | Arrest and Prosecution of DUI Cases |
| | 18 | "Killer" Cross-Examination: How to Dominate a Courtroom featuring Larry Pozner and Roger J. Dodd |
| | 25 | Essential Skills for Appellate Practice |
| November | 1 | 16 th Annual Workers' Compensation Seminar |
| | 8 | Representing Emerging Companies |
| | 15 | Practical Tax: Individual & Estate Taxation for the Non-Tax Lawyer featuring John E. Moore |
| | 22 | Tort and Insurance Law |
| December | 5 | Real Estate/Construction Law Issues |
| | 12 | Annual Employment Law Update |
| | 12 | Hot Topics in Civil Litigation - Mobile |
| | 20 | Hot Topics in Civil Litigation - Birmingham |
| | 30-31 | 9th Annual CLE By The Hour |

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- Montgomery attorney **Tom Methvin** has been named in the *National Law Journal's* feature, "40 Under 40: Promising Young Advocates," that lists the nation's most prominent attorneys under the age of 40. Additionally, Methvin was one of ten attorneys selected for special recognition as an innovator in the field of consumer fraud litigation. Methvin is a partner at Beasley, Allen, Crow, Methvin, Portis & Miles.
- **F.A. Flowers, III** of Burr & Forman LLP has been appointed by the Alabama Supreme Court as a member of the Standing Committee on the Alabama Rules of Appellate Procedure. He will serve a two-year term.
- **Ross N. Cohen** has been elected president of The Birmingham Tax Forum for the 2002-2003 year. The Forum is an organization of approximately 150 tax professionals, including accountants, both in public and industry practice, attorneys, trust officers and academicians. Cohen is a member of the Birmingham firm of Haskell Slaughter Young & Rediker, LLC.

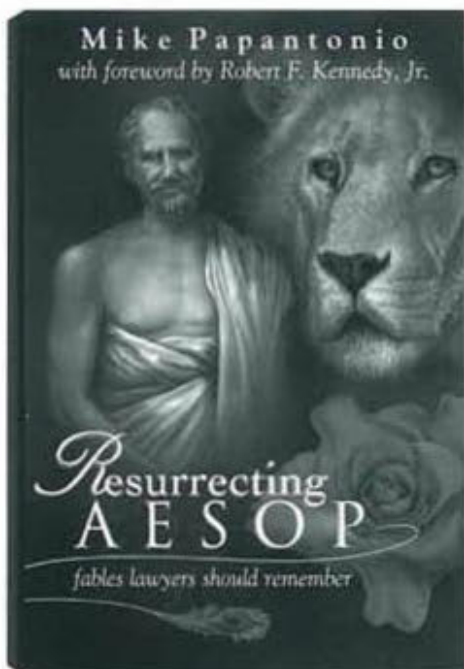
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The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership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

About Members

Kenneth M. Bush announces the formation of **Bush Intellectual Property Law Group, LLC**, with offices at 300 Corporate Parkway, Suite 2, Birmingham 35242. Phone (205) 972-0145.

Clint W. Butler announces the opening of his solo practice. Offices are located at the AmSouth Building, 200 Clinton Avenue, West, Suite 701, Huntsville 35801. Phone (256) 536-0128.

Stephen D. Fischer announces the opening of the **Fischer Law Firm, LLC**, with offices located at 117 S. Main Street, Enterprise. Phone (334) 393-3255.

Kristel N. Gibbons announces the formation of **Gibbons Law Firm**. Offices are located at 143 First Street, Prattville 36067. Phone (334) 361-7240.

John L. Loftis announces the opening of his office at 109 22nd Street, North, Tuscaloosa 35406. Phone (205) 391-9004.

Donna F. McCurley announces the opening of her office at 268 S. 7th Street, Gadsden 35901. Phone (256) 546-4116.

Deborah B. Montgomery announces the opening of her solo practice. Her new mailing address is P.O. Box 9843, Birmingham 35220-0843. Phone (205) 853-0546.

Adam P. Morel announces the opening of **Law Offices of Adam Morel, LLC**, located at 517 Beacon Parkway, West, Birmingham 35209. Phone (205) 945-9210.

Andrew O'Neal announces the opening of his offices at 1614 Queen City Avenue, Tuscaloosa 35401. Phone (205) 343-2841.

Glenn J. Shaul announces the opening of his offices at The Highland Building, 2201 Arlington Avenue, South, Birmingham 35205. Phone (205) 933-8501.

E. Jacobs Watson announces the opening of his offices at 100 Jefferson Street, Huntsville 35801. Phone (256) 536-8373.

Among Firms

Marc A. Starrett announces his appointment as assistant attorney general, **State of Alabama, Attorney General's criminal appeals division**.

Alford, Clausen & McDonald, LLC announces that **Todd P. Resavage** has joined the firm as an associate.

Breibart & Ingram, PC announces that **Paul H. Webb** has joined the firm as an associate.

Bush, Craddock & Reneker, LLP announces that **David C. Hilyer** has joined the firm as an associate.

Caine & Proctor, LLP announces that **Christy Williams Graham** has become associated with the firm.

Carr, Allison, Pugh, Howard, Oliver & Sisson, PC announces that **Joseph H. Driver, Brett A. Ross, Jeffrey B. Carr** and **Thomas S. Thornton, III** have become shareholders in the firm.

Dice & Gregory, LLC announces that **Karen E. Skilling** has joined the firm as an associate.

Vaughan Drinkard, Jr. and **Benjamin H. Brooks, III** announce the formation of **Drinkard & Brooks, PC**. The new partnership will practice in association with **Mike Newton, PC** as **Drinkard, Brooks & Newton**, with offices located at 1070 Government Street, Mobile 36604. Phone (251) 432-3531.

Jim H. Fernandez, D. Charles Holtz and **Gregory S. Combs** announce the formation of **Fernandez, Holtz & Combs, LLC**, with offices located 107 St. Francis Street, Suite 1206, Mobile 36602.

John T. Fisher, Jr., Paul E. Skidmore and **Ted Strickland** announce the formation of **Fisher, Skidmore & Strickland, PC**. Offices are located at 1406 22nd Avenue, Tuscaloosa 35401. Phone (205) 344-4414.

Halcomb & Wertheim, PC announces that **Aparna M. Reddy** has joined the firm as an associate.

Haygood, Cleveland & Pierce, LLP announces that **Thomas S. Melton** has become *of counsel*.

Maria Blanco Katz announces the formation of **Maria Blanco Katz, PC**, and that **Christine Hudson Goldman** has joined the firm as an associate. Offices are located at 2167 14th Avenue, South, Birmingham 35205. Phone (205) 930-0133.

Kellett & Kellett, PA announces that **Julie Baker McCormick** has become associated with the firm.

Dennis J. Knizley and **John C. Williams** announce the formation of **Knizley & Williams, PC**. Offices are located at 7 N. Lawrence Street, Mobile 36602. Phone (251) 432-3799.

Lanier, Ford, Shaver & Payne, PC announces that **David W. Hunter** and **Charles R. Ducker, Jr.** have become associates in the firm.

Lloyd, Gray & Whitehead, PC announces that **Richard E. Trehwella, Jr.** and **David R. Hanbury** have become associated with the firm.

Benjamin E. Meredith, Allen K. Mitchell and **Yvonne Gabrielson** announce the formation of **Meredith, Mitchell & Gabrielson, PC**, with offices at 707 W. Main Street, Dothan 36301. Phone (334) 671-0289.

Morris, Haynes & Hornsby announces the opening of a second location. Offices are located at the Financial Center, 505 N. 20th Street, Ste. 1150, Birmingham 35203. Phone (205) 324-4008.

Morris, Schneider & Prior, LLC announces that **Mark A. Baker** has joined the firm as managing title attorney.

Najjar Denaburg, PC announces that **Donna M. Jennings** has joined the firm as an associate.

Benjamin E. Pool announces that his son, **Gregory Mitchell Pool**, has joined as an associate.

Sanders, Haugen, Sears & Meeker, PC announces that **Melissa Darden Griffis** has joined the firm as an associate.

Sirote & Permutt, PC announces that **Timothy D. Davis, Russell Carter Gache** and **James E. Vann** have become shareholders, **John R. Baggett, Jr.** and **Donald H. Spencer** have become *of*

counsel, and **Jack T. Carney, John Gregory Carwie, Jason W. Connell, Thad A. Davis, Jennifer Jones Galligan, Stephen R. Geisler, William R. Lunsford, Amy E. McMullen, Jeffrey G. Miller, Richard L. Morris, William E. Pipkin, Jr., Shaun Ramey, Kyle T. Smith, and Peter M. Wright** have become associated with the firm.

The **Southern Law Group, PC** announces that **Maxine C. Moses** has become an associate with the firm.

St. John & St. John, LLC announces that **Robert Champ Crocker** has joined the firm.

Sutherland Asbill & Brennan, LLP announces that **Griff Griffin** has joined the firm.

The **United States Attorney's Office**, Northern District of Alabama, announces that **David Estes, Alison S. Blackwell, Angela R. Debro** and **Mary Stuart Rowe** have joined the office as assistant U.S. Attorneys in the Huntsville division, and **Sandra J. Stewart** has joined the

Birmingham office as chief of the appellate division.

Vickers, Riis, Murray & Curran, LLC announces that **Timothy A. Clarke** has become a member of the firm and **Clay A. Lanham** has become associated with the firm.

Will O. Walton, III announces the formation of **Walton Law Firm, PC**, with **Hoyt W. Hill** *of counsel* and **Brent L. Dean** as an associate. Offices are located in Auburn and Montgomery. Phone (334) 321-3000.

Watson, Jimmerson, Givhan, Martin & McKinney, PC announces that **Eric J. Artrip** has become associated with the firm.

Webb & Eley, PC announces that **Lisa Van Wagner** has become a shareholder of the firm.

Wilkins, Bankester, Biles & Wynne announces that **C. Joseph Norton** and **Jason S. McCormick** have become associated with the firm. ■

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| 15 Year | \$135 | \$135 | \$168 | \$290 | \$443 | \$650 | \$1,035 |
| 20 Year | \$168 | \$170 | \$225 | \$373 | \$575 | \$863 | \$1,418 |

West Coast Life
\$500,000 Level Term Coverage
Male, Select Preferred NonSmoker

| AGE: | 30 | 35 | 40 | 45 | 50 | 55 | 60 |
|---------|-------|-------|-------|-------|---------|---------|---------|
| 10 Year | \$185 | \$185 | \$230 | \$375 | \$535 | \$930 | \$1,495 |
| 15 Year | \$220 | \$220 | \$285 | \$530 | \$835 | \$1,250 | \$2,020 |
| 20 Year | \$285 | \$290 | \$400 | \$695 | \$1,100 | \$1,675 | \$2,785 |

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Milton H. Lanier, Jr.

Milton H. Lanier, Jr. was born February 17, 1914 in Huntsville and died October 17, 2001. His family was among the earliest settlers in Madison County, Alabama, and despite traveling to many different places, including around the world to defend our country in World War II, Mr. Lanier's roots were, and always remained, firmly and deeply planted in the Huntsville community.

He graduated from the University of Alabama School of Law in 1938 and began the practice of law in Huntsville with the firm of Lanier, Price & Shaver.

During World War II, Mr. Lanier joined the United States Naval Reserve and later volunteered for active duty overseas. He was stationed in north Africa and bravely defended the cause of freedom in the invasion of Sicily. Mr. Lanier was richly rewarded for his years of military duty and service as during this time he not only made friends with many shipmates, but also met and fell in love with his soul mate, Marie Elodie Hale, affectionately known as DeDe, who was herself on active military duty.

Pete and his lovely bride were married in 1945 and God blessed them with four children, Pete, Frederick, Anne and Robin.

Following the war, Mr. Lanier returned home to Huntsville and became a partner in the firm of Lanier, Price, Shaver & Lanier. He contributed immensely to the economic development of Huntsville and Madison County, serving in numerous civic positions, including as president of the Huntsville-Madison County Chamber of Commerce and as a member of the

Huntsville City Board of Education, playing a major role in the attraction of businesses such as Chrysler and Brown Engineering to Huntsville. He was also instrumental in the formation of many local companies, such as M&S Computing (now known as Intergraph).

Mr. Lanier was a very able and tenacious trial lawyer in the Huntsville-Madison County Bar Association for many years, loved by his clients, feared by his opponents and respected by all. He firmly and steadfastly held to the conviction that the practice of law demands a high calling of honor, integrity and professionalism. For more than 60 years, Mr. Lanier was a lawyer's lawyer who capably and zealously represented his clients regardless of their position or status in life.

Mr. Lanier was known by his law partners and friends as a frugal and thrifty person, having cautioned the younger members of the bar on the occasion of recognition for his 50 years of practice, "If you want to have a short summer, have a note due in the fall!" He was also a gifted athlete, excelling in tennis and golf, winning many championships and having shot his age or under many times on the golf course, including most recently at the young age of 85 having shot rounds of 82 and 84 to win the State Senior Golf Championship for the 80 and over division.

He is survived by his wife and three of his children, having been preceded in death by his dear child, Robin.

—William P. Burgess, president
Huntsville-Madison County Bar Association

Earl E. Cloud, Sr.

Earl Cloud was born May 5, 1924 in Huntsville to Ocie Cloud and Beddie Cleek Cloud. He was educated in the public schools of Huntsville, receiving his diploma from Joe Bradley High School.

Early in his life, he displayed his love and devotion to his country as he was trained by the United States Office of Education in Industrial Chemistry and worked at Redstone Arsenal, making mustard gas bombs which were used during WWII, and then volunteered to serve his country in the U.S. Army Air Corps in 1943. During his military service, Mr. Cloud was stationed in the China, Burma and India theaters as a line chief for B-29 bombers and also served as a tailgunner and navigator on bombing raids Japanese supply lines during the war. He was injured when his B-29 bomber was shot down, however, indicative of his bravery and love of freedom, Mr. Cloud later returned to service and flew over Tokyo Bay during the time the Japanese were signing the terms of surrender, ending WWII.

Following his honorable discharge from military service, Mr. Cloud attended the University of Alabama, completing all undergraduate and law school requirements in only 49 months and earning a law degree in August 1950. He returned to his native Huntsville and began the private practice of law.

He gave generously of his time, serving as president of the Huntsville-Madison County Bar Association from 1975 to 1976 and as a bar commissioner from this circuit to the Alabama

State Bar from 1978 to 1981. He tried hundreds of cases during the course of his illustrious career, including the defense of more than 30 capital murder cases, during which the most severe penalty imposed upon any of his clients was 27 years' imprisonment.

In 1973, Mr. Cloud became the third attorney in the state to be admitted to the National association of Criminal Defense Lawyers.

Mr. Cloud was an active and dedicated member of First Baptist Church, having served as Sunday School teacher, deacon, trustee and building committee chairman. He served in numerous other civic and community organizations, including as a trustee for Judson College and in leadership roles in the United Way, the Lion's Club, the Veterans of Foreign Wars, the American Legion, the Huntsville-Madison County Chamber of Commerce, and the Industrial Development Association.

Mr. Cloud's love of the law was truly passed to the next generation as all three of his children followed him into the legal profession.

He died January 22, 2002 and is survived by his wife, Marjorie Brooks Cloud, his three children, Susan, Earl, Jr. and Joe, and four grandchildren.

*—William P. Burgess, president
Huntsville-Madison County Bar Association*

Hubert H. Wright

The Etowah County Bar Association lost one of its most genial but tenacious members, Hubert Harvey Wright, who died April 1, 2002 at the age of 74.

Hub was a native of Guin and held degrees in history and law from the University of Alabama, where he was a member of Alpha Tau Omega and R.O.T.C. There is an unfootnoted rumor that when he finally left the University, he received a plaque from ATO for having been in school longer than any other member.

He trained in the mountains of Colorado and served as an artillery officer during the Korean War. After law school, he practiced law in Gadsden for 50 years. Most Gadsden lawyers looked up to Hub, and not just because of his height. For most of his years here, he maintained a large criminal defense practice and was noted for his courtroom oratory and refusal to be intimidated by judge, jury, district attorney or defendant.

One tactic, which many have been unconscious, was that when an opposing lawyer would begin to argue at the bench, Hub would put his hand in his pocket and rattle his keys and change, drowning out the lawyer and prompting one judge to

ask Hub to empty his pocket on the bench. He is also remembered for the objection, "Your Honor, there is higher and better evidence." But when the hard arguments were done and the cases were finished, the lawyers shook hands and went home, friends.

Many younger lawyers remember the help he gave them when they first started their practices. He once played Carnack the Magnificent in a legal secretaries' skit, and was known for pulling rabbits out of his hat in many criminal cases. He was an active member of Meadowbrook Baptist Church and a member of their choir.

Hub is survived by his beloved family: his daughters, Cassie Ball of Hoover and Clair McCorkle of Winter Park, Florida, and his son, David Wright of Gadsden; his grandchildren, Cecily and Gavin Ball, and Molly and Louis McCorkle; and his sisters, Sara Jo and Mary Francis Wright of Guin and Gladys Maddox of Sulligent.

*—Charles C. Hart, president
Etowah County Bar Association*

Steven M. Jordan

Coffee County lost one of its best lawyers with the passing of Steven Mark Jordan on May 13, 2002, when Mark was called by his maker to his eternal reward. Mark was born in Enterprise in 1951, graduated from Enterprise High School in 1969 and received his undergraduate degree from the University of Alabama in 1973, where he was a member of Sigma Nu fraternity. He was awarded his JD degree in 1976 from the Cumberland School of Law at Samford University.

Mark is survived by his beloved wife, Pennie, by daughter Ivey Jordan, a high school senior, and son Mitchell Jordan, who is in the eighth grade.

Mark began his career as an attorney in Enterprise in 1976, where he established a reputation as a person of integrity and dignity and distinguished himself in all aspects of community and professional life, and earned the respect of his fellow lawyers, judges and all who knew him.

In 1978, Mark was diagnosed with multiple sclerosis. He struggled valiantly against that disease, which ultimately took his life, never losing his personal commitment to his family, to his profession and to his willingness to learn and experience new aspects of life. His passions included attending sporting events, working with children, especially the physically challenged, and serving as a deacon at First Baptist Church of Enterprise. When Mark's illness progressed to the point that he was no longer mobile, he continued to practice law from his wheelchair, and remained active until his most recent hospital admission and resulting death.

Law school classmates Wayne Morse and Tony Mancinelli wanted to recognize Mark's accomplishments as a lawyer and community leader, which he achieved despite his disabling med-

ical condition. In 2001, they began to raise funds for the Alabama Chapter of the National Multiple Sclerosis Society. Friends contributed over \$10,000, which was given to the Alabama Chapter to fund a lending library for the use of MS patients, their families and friends. The library was officially dedicated on May 24, shortly after Mark's death.

It is always difficult when we have to deal with the final journey of a friend. Mark Jordan made it easy, as he was prepared for death, and faced it with a Christian's confidence that he was going to a better place. He ignored pain in an effort to make others feel better. He enjoyed laughter as much as anyone I have ever met. He often would call during the day to share a joke or funny story with me and other friends. We can best preserve Mark's memory by never forgetting those many things he did that made us laugh or made us better humans—often they were the same. In dying, Mark Jordan showed all of us how to live with courage, and to trust God's promise of the gift of eternal life. If I know Mark, and there are basketball goals in heaven, he is likely running up and down the court or shooting a three-pointer at this very moment.

Mark was one of the of whom it can be said that the void created by his passing will never be filled. We are left with the inspiration that was created by his life here on earth. We can honor him by supporting the Ivey and Mitchell Jordan Scholarship Fund through SouthTrust Bank in Enterprise of the Alabama Chapter of the National Multiple Sclerosis Society—S. Mark Jordan Library Fund.

—M. Dale Marsh, Enterprise



Cobb, David Terence
Ridgeland, MS
Admitted: 1990
Died: January 3, 2002

Johnson, Bradley R.
Tampa, FL
Admitted: 1968
Died: April 17, 2002

Paden, Robert Emmett
Bessemer
Admitted: 1960
Died: June 16, 2002

Hardegree, Henry Barnard
Montgomery
Admitted: 1962
Died: June 24, 2002

Matthews, William B., Sr.
Ozark
Admitted: 1956
Died: May 20, 2002

Wood, George F.
Mobile
Admitted: 1940
Died: March 14, 2002

Arbitration Registration Standards and Procedures

(effective January 1, 2003)

- I. **State Court Arbitration Roster:** The Alabama Center for Dispute Resolution ("Center") shall maintain a State Court Arbitrator Roster ("Roster") which consists of those arbitrators who meet the arbitrator registration standards and procedures herein. This Roster shall be maintained geographically by counties and shall be made available to all state court judges, attorneys and the general public.
- II. **Definition of Registration:** For the purpose of these provisions, the term "registration" and the related forms of this word shall mean only that the standards and procedures set forth herein have been met to the satisfaction of the Center. This term does not imply any degree of arbitration skills or competency on behalf of any arbitrator subject to the provisions.
- III. **Arbitrator Registration Standards:** To be registered on the Roster, a arbitrator must meet the following minimum requirements:
 1. Be of good character.
 2. Be licensed as an attorney by one of the fifty states of the United States or the District of Columbia and in good standing, with eight years' experience in the practice of law; or

Have served professionally as the arbitrator in at least four arbitrations within the three years immediately preceding submission of an application for registration; or

Be currently listed as an approved arbitrator for a neutral administrator for dispute resolution, which is recognized by the Center for maintaining high standards for members of its roster.
- IV. **Procedure for Registration:** Individuals who seek to be registered on the Roster shall submit to the Center a completed application form. Should the individual meet the required standards and pay all applicable fees, his or her name shall be registered on the Roster as an arbitrator. To remain on the Roster, the arbitrator must meet such additional or different standards which may be hereafter imposed for registration. Registration decisions are made by the Alabama Center for Dispute Resolution. Applicants who are denied registration for any reason may appeal within thirty days of that denial to the Committee on Standards for Neutrals of the Alabama Supreme Court Commission on Dispute Resolution, which Committee may grant a hearing to the applicant. The Committee on Standards for Neutrals will make a determination of whether the applicant should be registered. An adverse decision of the committee on Standards for Neutrals may be appealed to the full Alabama Supreme Court Commission on Dispute Resolution within thirty days of the date of such decision. The Commission shall grant a hearing, if requested, to the applicant.
- V. **Fees:** Individuals applying for arbitrator registration by the Center shall pay a \$20 application fee. If registration is approved, an annual fee of \$100 for registration will be assessed; provided, the annual registration fee for an individual listed on the mediator and arbitrator rosters maintained by the Center shall be a total of \$150 for both. Failure to pay the annual assessment or failure to meet the standards effective at the time of renewal will result in the individual being removed from the Roster.

Approved: 6/28/02

The Alabama Supreme Court Commission on Dispute Resolution approved the following *Arbitration Registration Standards and Procedures to be effective January 1, 2003*, at their meeting June 28, 2002. The Commission would appreciate your written comments which may be sent to: Alabama Center for Dispute Resolution, P.O. Box 671, Montgomery, AL 36101. The Center is responsible for arbitrator registration and maintaining a current arbitrator roster, available upon request.



By Robert L. McCurley, Jr.

Annual Meeting of the Law Institute



Robert L. McCurley, Jr.

The Annual Meeting of the Alabama Law Institute was held in conjunction with the Alabama State Bar. Representative Demetrius Newton, institute president, reviewed the Institute-drafted legislation that passed the 2002 Regular Session.

Act 2002-517, **Management of Institutional Funds**, passed the legislature. It will allow churches, Kiwanis clubs, the Alabama State Bar, and other qualified charities, which have foundations, to make investments in stocks, in addition to certificates of deposit. This will permit them to have the same investment capabilities as currently allowed educational institutions. Also passing the legislature was the **Interstate Compact for Adult Offender Supervision Act**, Act 2002-413. This brings current Alabama's existing Interstate Compact that is now 67 years old. It will provide for the management, monitoring and supervision of adult parolees and probationers in states other than the one in which they were sentenced. Because Alabama was one of the signatory states prior to its being adopted nationwide, Alabama will be a part of the administrative decision making for the by-laws and rules that will follow.

Ralph Yeilding, chair of the **Trust Code** Committee, reviewed the committee's two-year long study of the Uniform Trust Code and adapting it for use in Alabama. This study is being undertaken as an extensive project that should be available for review in 2003.

Noah Funderburg, chair of the **Uniform Parentage Act**, reviewed the Institute's study of a new Parentage Act for Alabama which includes such subjects as determination of paternity, genetic testing and paternity registry.

James Tingle, chair of the **Landlord Tenant Act**, reviewed the work of the Institute committee that was created as a result of a request by the legislature for the Institute to draft Alabama's first Residential Landlord Tenant Law. This Act is nearing completion and an extensive review of this Act will appear in the next addition of *The Alabama Lawyer*. It will be available for consideration for the legislature in 2003.

Professor Howard Walthall, chief draftsman for the **Business Entities Code**, reviewed the work of the committee over the past three years, looking to bring some cohesiveness to the current eight business entities that exist in Alabama. The section concerning mergers and consolidations has already been presented to the legislature and enacted.

Life Membership

The Institute recognized 40 individuals who have given 25 years' service to the State of Alabama and to the Alabama Law Institute as members of the Institute. The following individuals were presented Life Memberships:

| | |
|-----------------------|-------------------------|
| Charles Adair, Jr. | Louis B. Lusk |
| Lee E. Bains | William H. McDermott |
| E. T. Brown, Jr. | Richard S. Manley |
| Walter R. Byars | John R. Mathews, Jr. |
| John Caddell | Oakley W. Melton, Jr. |
| T. J. Carnes | Roland M. Nachman |
| Joe C. Cassidy | Robert D. Norman, Jr. |
| A. J. Coleman | E. B. Peebles, III |
| Camille W. Cook | Ernest L. Potter |
| Jerome A. Cooper | James D. Pruett |
| Homer W. Cornett | Ira D. Pruitt, Jr. |
| Robert T. Cunningham | L. Drew Redden |
| Frank Dominick | Morgan Reynolds |
| George P. Ford | William M. Russell, Jr. |
| Conrad M. Fowler, Jr. | Yetta G. Samford, Jr. |
| James M. Fullan, Jr. | Maury D. Smith |
| Ralph Gaines | Robert McD. Smith |
| John W. Johnson, Jr. | Harold Speake |
| Joseph H. Johnson | C. Stephen Trimmier |
| Jack Livingston | Jacob Walker, Jr. |

Maynard Institute Fellow

The Alabama Law Institute bestows the honorary position of "Law Institute Fellow" to individuals based on outstanding service and leadership in carrying out the mission of the Institute. These individuals have fostered reform and modernization of the laws of Alabama through many dedicated years of service as project directors, reporters, committee chairs and members of committees of the Law Institute. George Maynard has been a member of the Law Institute for 26 years, serving 16 years as a member of the Executive Committee. His Institute participation from 1979 to 2000 was his chairmanship of the Business Corporation Committee in 1980 and he chaired the second revision of the Business Corporation Laws in 1995. As a committee member, Maynard assumed an invaluable leadership



At the 2002 ASB Annual Meeting, Bob McCurley presented Yetta Samford with his Life Membership Plaque.

role and was instrumental in the revision of the following laws: Alabama Banking Code, Limited Partnership Act, Revised Article 9 of the Uniform Commercial Code, Non-Profit Corporation Act, Real Estate Acts, Condominium Act, Common Interest Ownership Act, Limited Liability Company Act, Limited Partnership Act, Revised Article 5 of the Uniform Commercial Code, and the Business Entity Act.

Professor Howard Walthall was also given special recognition as project director of the Institute's study of the Alabama Constitution for the Alabama House of Representatives. His work included a recompilation of the Alabama Constitution of 1901 and its 708 amendments. This placed all of the amendments to the Alabama Constitution in their proper place to enable the legislature to have a comprehensive document.

Officers of the Institute

Newly-elected officers of the Institute for the 2002-2003 year are:

Demetrius Newton, president
 Roger Bedford, vice-president
 Bob McCurley, secretary

Executive Committee

David Boyd
 James M. Campbell
 Bill Clark
 Representative Mark Gaines
 Representative Ken Guin
 Richard S. Manley
 Oakley W. Melton, Jr.
 Senator Rodger Smitherman

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

Robert L. McCurley, Jr.

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

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Last year's events in New York, Washington, D.C. and Pennsylvania underscore the need for updated and thorough disaster preparedness and response plans. These plans can save lives, and help protect and give direction to staff and leadership in the midst of an emergency. With this in mind, the Alabama State Bar has produced a concise, easy-to-implement guide that features a crisis management checklist, steps for putting together a bar association or legal practice emergency preparedness plan, and resources for providing volunteer legal services. The guide is available, at no cost, on-line at www.alabar.org or upon request by calling 800-354-6154, extension 132.



J. Anthony McLain

You Make The Rules

In 1983 the American Bar Association adopted the ABA Model Rules of Professional Conduct. Following adoption of the model rules, the Alabama Supreme Court asked the Alabama State Bar to review the rules and submit to the court a comprehensive analysis thereof to determine the advisability of adopting similar rules in Alabama.

The Alabama State Bar, pursuant to the court's directive, charged the Permanent Code Commission with this responsibility. After many hours of research, drafting, meetings and debate, the Permanent Code Commission recommended a version of the model rules to the Board of Bar Commissioners for approval. The board approved the rules, and directed the Office of General Counsel to submit them to the Alabama Supreme Court for adoption.

Following a public comment period, the Alabama Supreme Court allowed oral presentation by those who wished to comment further on the proposed rules. Thereafter, the court adopted the Alabama Rules of Professional Conduct, effective January 1, 1991. Concurrent with the adoption of these rules, the court also adopted the Alabama Rules of Disciplinary Procedure.

Since their adoption, both the Rules of Conduct and Rules of Procedure have been periodically amended and presently the Alabama Supreme Court has under consideration proposed changes to those Rules of Professional Conduct which govern lawyer advertising. (See Advertising Rules, page 280.) Per the order of the Alabama Supreme Court, these proposed advertising rules will be published in the *Southern Reporter* (2d) advance sheets, with the comment period to expire October 1, 2002.

In 1997, the ABA Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000" Commission) was created for the purpose of undertaking a comprehensive evaluation of the Model Rules of Professional Conduct. Following several meetings, ten public hearings and several drafts and redrafts, the "Ethics 2000" Commission submitted a final report in May 2001 for debate by the ABA House of Delegates in August 2001. The matter was continued to the

February 2002 meeting of the House of Delegates, and on February 5, 2002, the House of Delegates adopted a series of amendments which have now been published as the "new" model rules.

Alabama State Bar Leads the Way

In 1887, the Alabama Bar Association adopted the Code of Ethics for lawyers. This was the first such formalized set of rules defining ethical obligations for lawyers. On August 27, 1908, the American Bar Association adopted the original Canons of Professional Ethics which were based principally on Alabama's 1887 Code of Ethics.

Subsequent work of the ABA resulted in the Model Code of Professional Responsibility being adopted by the House of Delegates in 1969, and the Model Rules of Professional Conduct in 1983.

When the "Ethics 2000" Commission was created, 44 states had adopted some version of the model rules, but with significant variations from state to state.

One of the underlying reasons for the creation of the "Ethics 2000" Commission was to develop a uniform set of model rules, with the hope that each state would consider adopting the rules.

Substantive Changes That Could Change the Way You Practice Law

The new model rules elevate the terminology section to rule status. Terminology was previously a part of the preamble. This new rule [Rule 1.0] contains several new definitions, and revises certain terms in the current rules.

Specific rules or areas of practice addressed by the new model rules:

1. Scope of Representation—Expands rule coverage to include the issue of allocation of authority between the lawyer and the client. Also addresses lawyer's withdrawal from representation of the

- client when the lawyer discovers he has inadvertently been assisting an ongoing client fraud or crime by allowing the lawyer to “give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.”
2. **Fees**—In addition to fees, also requires that costs and disbursements be “reasonable under the circumstances.” New commentary to Rule 1.5 notes that contingent fees are also subject to the rule’s reasonableness standard. Comment also explains that the prohibition on contingent fees in domestic relations cases does not extend to post-divorce actions to collect arrearages. Points out that a fee paid in property instead of money may be regarded as a “business transaction” with the client, and thus subject to the provisions of Rule 1.8.
 3. **Confidentiality**—Adds a provision that permits a lawyer to disclose information to obtain legal advice regarding the lawyer’s compliance with the rules. Also broadens the grounds for discretionary disclosure to “prevent reasonably certain death or substantial bodily harm.” [Current Alabama rule: “...lawyer believes is likely to result in imminent death or substantial bodily harm.”] There was also a recommended change, which the delegates did not approve, which would have allowed disclosure to prevent the client from committing a crime or fraud reasonably certain to result in substantial financial injury, if it involved the lawyer’s services.
 4. **Conflict of Interest**—Requires that waiver of conflict by the client be confirmed in writing, though the writing need not be signed by the client. Waiver is now accomplished with “informed consent,” which is defined by Rule 1.0 as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 1.7 also recognizes two types of conflicts involving present clients: (1) those which are “directly adverse”; and (2) those in which representation of the client may be “materially limited.”
 5. **Imputed Disqualification**—Rule 1.10(a) would exempt “personal interest conflicts” that do not present a “significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” Commentary states that the conflicts of a lawyer resulting from prior work as a nonlawyer (including as a law student), are not imputed to others in the firm, though such persons “ordinarily must be screened” from any personal participation in the matter. The commission proposed, but the House of Delegates rejected, a proposal which would permit screening without client consent in the case of lawyers moving between firms, to avoid disqualification of an entire firm where a lateral hire previously worked on the matter.
 6. **Prospective Clients**—A new Rule 1.18 would deal with the relationship between the lawyer and a prospective client. The primary issues addressed are confidentiality and conflict of interest.
 7. **Transactions with Client**—Rule 1.8 is expanded to prohibit “sexual relations” with a client “unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” The Rule also requires that a waiver of the conflict by the client be in writing, *signed by the client*, and obtained only after the lawyer has advised the client, *in writing*, of the desirability of seeking independent legal counsel and the client has been given a reasonable opportunity to do so. All but the sexual relations conflict are imputed to other lawyers in the firm by new Rule 1.8(k).
 8. **Rule 1.14**—Retitled “Client With Diminished Capacity,” currently titled under the Alabama Rules of Professional Conduct “Client Under a Disability.”
 9. **Withdrawal from Representation**—Rule 1.16 eliminates right of permissive withdrawal on “imprudent course of conduct” grounds.
 10. **Client Property**—New provision of Rule 1.15 would require that advanced expenses and fees be held in the lawyer’s trust account until the expenses are actually incurred or the fees actually earned.
 11. **Sale of a Law Practice**—Alabama has adopted nothing comparable to Rule 1.17, which would allow a lawyer to sell his law practice.
 12. **Serving as Third-Party Neutral**—Rule 2.4 addresses the role of lawyers serving as third-party neutrals in alternative dispute resolutions. The closest thing Alabama has to a comparable rule is 2.2, “Intermediary,” which was deleted in the new model rules.
 13. **Candor to the Tribunal**—Amendment to Rule 3.3 deletes requirement of “material” as it relates to lawyer’s obligation not to make false statement of fact or law to a tribunal. Expands obligation of lawyer to take remedial measures when “the lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity.” The lawyer must “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
 14. **Impartiality and Decorum of the Tribunal**—Adds provision to Rule 3.5 which would prohibit communication by the lawyer with a juror or prospective juror after discharge of the jury if “the communication is prohibited by law or court order; or, the juror has made known to the lawyer a desire not to communicate.”
 15. **Respect for Rights of Third Persons**—Adds subsection (b) which deals with the lawyer’s receipt of a document which the lawyer “reasonably should know...was inadvertently sent.” The Rule requires the lawyer to “promptly notify the sender.”
- Other changes would include addressing the multi-jurisdictional practice issue by creation of Rule 8.5, “Disciplinary Authority; Choice of Law,” the issue of misconduct under Rule 8.4 as it relates to discrimination, and limited participation by lawyers in “for-profit” referral serv-

ADVERTISING



7.1 Communications Concerning a Lawyer's Services

(a) **Prohibited Communications about legal services.** A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) contains any reference to past successes or results obtained or is otherwise likely to create an unjustified expectation about results the lawyer can achieve except as allowed in the rule regulating information about a lawyer's services provided upon request;
- (3) or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- ~~(3)~~(4) compares the quality of the lawyer's services with the quality of other lawyers' services, except as provided in Rules 7.5 or 7.6;
- ~~(4)~~(5) communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.6; or
- (6) contains a testimonial.

(b) **Misleading or Deceptive Factual Statements.** Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rule shall not:

- (1) be directly or impliedly false or misleading;
- (2) be potentially false or misleading;
- (3) fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
- (4) be unsubstantiated in fact; or
- (5) be unfair or deceptive.

(c) **Descriptive Statements.** A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients.

(d) **Prohibited Visual and Verbal Portrayals.** Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.

(e) **Advertising Areas of Practice.** A lawyer or law firm shall not advertise for legal employment in an area of practice in which the advertising lawyer or law firm does not currently practice law.

Comment

This rule governs all communications about a lawyer's services, including advertising permitted by 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. ~~The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. This precludes any material misrepresentation or misleading omission, such as where a lawyer states or implies certification or recognition as a specialist other than in accordance with this rule, where a lawyer implies that any court, tribunal, or other public body or official can be improperly influenced, or where a lawyer advertises a particular fee or a contingency fee without disclosing whether the client will also be liable for costs. Another example of a misleading omission is an advertisement for a law firm that states that all the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the same claim. Although this rule permits lawyers to list the jurisdictions and courts to which they are admitted, it also would be misleading for a lawyer who does not list other jurisdictions or courts to state that the lawyer is a member of the~~

Alabama Bar, standing by itself, that otherwise truthful statement implies falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Alabama. The latter 2 examples of misleading omissions also are examples of unfair advertising.

Prohibited information

The prohibition in subdivision (a)(2) of statements that may create “unjustified expectations” precludes advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts, and advertisements containing client endorsements or testimonials. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

The prohibition in paragraph (a)(4) of comparisons of lawyers’ services would preclude a lawyer from representing that the lawyer or the lawyer’s law firm is “the best,” “one of the best,” or “one of the most experienced” in a field of law.

The prohibition in paragraph (a)(6) precludes endorsements or testimonials, whether from clients or anyone else, because they are inherently misleading to a person untrained in the law. Potential clients are likely to infer from the testimonial that the lawyer will reach similar results in future cases. Because the lawyer cannot directly make this assertion, the lawyer is not permitted to indirectly make that assertion through the use of testimonials.

Paragraph (d) prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. Illustrations permitted under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), are informational and not misleading, and are therefore permissible. As an example, a drawing of a fist, to suggest the lawyer’s ability to achieve results, would be barred. Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.

7.2 Advertising

A lawyer who advertises concerning legal services shall comply with the following:

- (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number;

and written or electronic communication not involving

solicitation as defined in Rule 7.3. (b) A true copy or recording of any such advertisement shall be delivered or mailed to the Office of the General Counsel of the Alabama State Bar at its then current headquarters within three (3) days after the date on which any such advertisement is first disseminated; the contemplated duration thereof and the identity of the publisher or broadcaster of such advertisement, either within the advertisement or by separate communication accompanying said advertisement, shall be stated. Also, a copy or recording of any such advertisement shall be kept by the lawyer responsible for its content, as provided hereinafter by Rule 7.2(d), for six (6) years after its last dissemination.

- (c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service.
- (d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.
- (e) Location of Practice. All advertisements and written communications provided for under these rules shall disclose, by city or town, one or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the county in which the office is located must be disclosed. A lawyer referral service shall disclose the geographic area in which the lawyer practices when a referral is made. For the purposes of this rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis. If an advertisement or written communication lists a telephone number in connection with a specified geographic area other than an area containing a bona fide office, appropriate qualifying language must appear in the advertisement.
- (e)(f) No communication concerning a lawyer’s services shall be published or broadcast, either by radio, television or simulcast, unless it contains the following language, which shall be clearly legible or audible, as the case may be: “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.” Lawyer referral service advertisements shall contain the following disclosure: “The hiring of a lawyer is an important decision. Before you decide to hire the lawyer to whom you are referred, ask that lawyer for written

information about that lawyer’s qualifications and experience.” Disclosure statements which appear in type must be no smaller than one-fourth of the size of the largest type otherwise appearing in the advertisement. The disclosure statements which appear in television advertisements must remain on the television screen for at least one-half the length or duration of the television advertisement, or ten (10) seconds, whichever is greater. These disclosures, how-

ever, need not appear in advertisements in the public print media that contain no

illustrations and no information other than that listed in paragraph (n) of this rule.

NOTE: For comparison purposes the disclaimers required by Iowa and Florida are as follows: Iowa: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise."

Florida: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience." Outdoor advertisements may contain, in lieu of the above disclosure, the following abbreviated version: "Before choosing a lawyer, ask for written information about the lawyer's legal qualifications and experience."

(g) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than sixty (60) days following the date of the last publication or broadcast, unless the advertisement specifies a shorter period. For advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(h) Use of Illustrations. All illustrations used in advertisements shall present information that is directly related and objectively relevant to a viewer's possible need for legal services in a specific type of matter. Such illustrations shall be still pictures or drawings and shall contain no features that are likely to deceive, mislead, or confuse the viewer.

(i) Fields of Practice. Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 7.6.

(j) Disclosure of Liability For Expenses Other Than Fees. Every advertisement and written communication that contains information about the lawyer's fee, including those that indicate no fee

will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.

(k) Firm Name. A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.

(l) Payment by Non-advertising Lawyer. No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm. Rule 1.5(e)

(regarding the division of contingency fees) is not affected by this provision even though the lawyer covered by Rule 1.5(e) advertises. (m) Language of Required Statements. Any words or statements required by this subchapter to appear in an advertisement or direct mail communication must appear in the same language in which the advertisement appears. If more than one language is used in an advertisement or direct mail communication, any words or statements required by this subchapter must appear in each language used in the advertisement or direct mail communication.

(n) Permissible Content of Advertisements. The following information in advertisements and written communications shall be presumed not to violate the provisions of paragraph (a) of this rule:

- (1) subject to the requirements of this rule and Rule 7.7, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, Web site addresses, and electronic mail addresses, office and telephone service hours, and a designation such as "attorney" or "law firm";
- (2) date of admission to the Alabama State Bar and any other bars, years of experience practicing law, number of lawyers in the advertising law firm, and a listing of federal courts and jurisdictions other than Alabama where the lawyer is licensed to practice;
- (3) technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received, including dates and institutions, provided, however, attorneys licensed in Alabama may not advertise the fact that they are licensed by the Alabama State Bar;
- (4) foreign language ability;
- (5) fields of law in which the lawyer practices, including official certification logos, subject to the requirements of Rule 7.6 and paragraph (i) and of this rule;
- (6) prepaid or group legal service plans in which the lawyer participates;
- (7) acceptance of credit cards;
- (8) fee for initial consultation and fee schedule, subject to the requirements of paragraphs (g) and (j) of this rule;
- (9) the amount of professional liability insurance coverage which the lawyer or law firm has in effect;
- (10) a listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic, or community program or event; (11) common salutary language such as "best wishes", "good luck", "happy holidays", or "pleased to announce"; and
- (12) a lawyer referral service may advertise its name,

location, telephone number, the referral fee charged, its hours of operation, the process by which referrals are made, the areas of law in which referrals are offered, the geographic area in which the lawyers practice to whom those responding to the advertisement will be referred, and, if applicable, its nonprofit status and the logo of its sponsoring bar association.

- (o) Appearance on Television or Radio. Advertisements on the electronic media such as television and radio may contain, but are not necessarily, limited to containing, some or all of the information listed in paragraph (n) of this rule. The information shall be articulated by a single human voice, or on-screen text, with no background sound other than instrumental music. No person's voice or image, other than that of a lawyer who is a member of the firm whose services are advertised, may be used in a television or radio advertisement. Visual images appearing in a television advertisement shall be limited to the advertising lawyer in front of a background consisting of a single solid color, a set of law books in an unadorned bookcase, or the lawyer's own office, with no other office personnel shown.
- (p) Closed captioning. All television advertisements must be closed captioned in order to be comprehended by the hearing impaired.
- (q) Advertisements originating in other states. These rules shall apply to all radio, television and simulcast broadcast intended to be received by residents of the state of Alabama regardless of the fact that the broadcast may have originated in another state.

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of

advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond speci-

fied facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner. Advertisements utilizing slogans or jingles, oversized electrical and neon signs, or sound trucks fail to meet these standards and diminish public confidence in the legal system.

These rules apply to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. These rules do not apply to communications between lawyers, including brochures used for recruitment purposes.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this rule.

Radio or Television Advertising

Television is now one of the most powerful media for conveying information to the public; a blanket prohibition against television advertising, therefore, would impede the flow of information about legal services to many sectors of the public.

However, the unique characteristics of electronic media, including the pervasiveness of television and radio, the ease with which these media are abused, and the passiveness of the viewer or listener, make the electronic media especially subject to regulation in the public interest. Therefore, greater restrictions on the manner of television and radio advertising are justified than might be appropriate for advertisements in the other media. To prevent abuses, including potential interferences with the fair and proper administration of justice and the creation of incorrect public perceptions or assumptions about the manner in which our legal system works, and to promote the public's confidence in the legal profession and this country's system of justice while not interfering with the free flow of useful information to prospective users of legal services, it is necessary also to restrict the techniques used in television and radio advertising.

This rule is designed to ensure that the advertising is not misleading and does not create unreasonable or unrealistic expectations about the results the lawyer may be able to obtain in any particular case, and to encourage the provision of useful information to the public about the availability and terms of legal services. Thus, the rule allows lawyer advertisements in which a lawyer who is a member of the advertising firm personally appears to speak regarding the legal services the lawyer or law firm is available to perform, the fees to be charged for such services, and the background and experience of the lawyer or law firm. A firm partner, shareholder or associate is a "member" of a law firm within the intent of the rule. Whether other lawyers are "members" of a firm for purposes of this rule must be evaluated in light of criteria that include whether the lawyer's practice is physically located at the firm and whether the lawyer practices solely through the firm. There should be a presumption that lawyers other than partners, shareholders, or associates are not "members" of a law firm for purposes of this rule.

Rule 7.3 Direct Contact With Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is another lawyer; or
- (2) has a current or prior professional relationship with the lawyer; or
- (3) has a familial or close personal relationship with the lawyer.

A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of

communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) paragraph (c) of this rule.

(b) Written Communication

(b)(+) Written Communication. A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

- (+) (1) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days before the mailing of the communication;
- (2) the written communication concerns a civil proceeding pending in a state or federal court, unless service of process was obtained on the defendant or other potential client more than seven days prior to the mailing of the communication, or the written communication concerns a criminal proceeding pending in a state or federal court, unless the defendant or other potential client was served with a warrant or information more than seven days prior to the mailing of the communication;
- (+) (3) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;
- (+) (4) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;
- (+) (5) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;
- (+) (6) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or
- (+) (7) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(c)(+) In addition to the requirements of Rule 7.2, written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements.

- (+) (1) a sample copy of each written communication and a sample of the envelope to be used in conjunction with the communication, along with a list of the names and addresses of the recipients, shall be filed

with the Office of General Counsel of the Alabama State Bar before or concurrently with the first dissemination of the communication to the prospective client or clients. A copy of the written communication must be retained by the lawyer for six (6) years. If the communication is subsequently sent to additional prospective clients, the lawyer shall file with the Office of General Counsel of the Alabama State Bar a list of the names and addresses of those clients either before or concurrently with that subsequent dissemination. If the lawyer regularly sends the identical communication to additional prospective clients, the lawyer shall, once a month, file with the Office of General Counsel a list of the names and addresses of those clients contacted since the previous list was filed;

(ii)(2) written communications mailed to prospective clients shall be sent only by regular mail, and shall not be sent by registered mail or by any other form of restricted delivery or by express mail; (iii)(3) no reference shall be made either on the envelope or in the written communication that the communication is approved by the Alabama State Bar;

(iv)(4) the written communication shall not resemble a legal pleading, official government form or document (federal or state), or other legal document and the manner of mailing the written communication shall not make it appear to be an official document;

(v)(5) the word "Advertisement" shall appear prominently in red ink on each page of the written communication, and the word "Advertisement" shall also appear in the lower left-hand corner of the envelope in 14-point or larger type and in red ink. If the communication is a self-mailing brochure or pamphlet, the word "Advertisement" shall appear prominently in red ink on the address panel in 14-point or larger type; (vi)(6) if a contract for representation is mailed with the written communication, it will be considered a sample contract and the top of each page of the contract shall be marked "SAMPLE." The word "SAMPLE" shall be in red ink in a type size at least one point larger than the largest type used in the contract. The words "DO NOT SIGN" shall appear on the line provided for the client's signature; (vii)(7) the first sentence of the written communication shall state: "If you have already hired or retained a lawyer in connection with [state the general subject matter of the solicitation], please disregard this letter [pamphlet, brochure, or written communication]"; (viii)(8) if the written communication is prompted by a specific occurrence (e.g., death, recorded judgment, garnishment) the communication shall disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule shall be specific enough to help the recipient understand the extent of the lawyer's knowledge regarding the recipient's particular situation.

(ix)(9) a written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem;

(10) every written communication shall be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred. (11) every written communication shall be accompanied by a written statement disclosing the amount of professional liability insurance coverage which the lawyer or law firm has in effect.

(12) if a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter shall include a statement so advising the client.

(13) a lawyer who uses a written communication must be able to prove the truthfulness of all the information contained in the written communication.

(d) Notwithstanding the prohibitions in paragraphs (a) and (b), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses written, recorded or electronic communication or in-person, telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicat-

ing necessary information to those who may be in need of legal services. Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising, rather than direct private contact, to transmit information from lawyer to prospective client will help to assure that the information flows cleanly as well as freely. Advertising is in the public view and thus subject to scrutiny by those who know the lawyer. This informal review is likely to help guard against statements and claims that might constitute false or misleading communications in violation of Rule 7.1. Direct, private communications from a lawyer

to a prospective client are not subject to such third-person scrutiny and consequently are much more likely to approach (and occasionally cross) the line between accurate representations and those that are false and misleading.

Direct written communication seeking employment by specific prospective clients generally presents less potential for abuse or overreaching than in-person solicitation and is therefore not prohibited for most types of legal matters, but is subject to reasonable restrictions, as set forth in this rule, designed to minimize or preclude abuse and overreaching and to ensure the lawyer's accountability if abuse should occur. This rule allows targeted mail solicitation of potential plaintiffs or claimants in personal injury and wrongful death causes of action or other causes of action that relate to an accident, disaster, death, or injury, but only if the communication is not mailed until thirty (30) days after the incident. This restriction is reasonably required by the sensitized state of the potential clients, who may be either injured or grieving over the loss of a family member, and the abuses that experience has shown can exist in this type of solicitation. For similar reasons, this rule permits communication regarding pending civil or criminal litigation only if mailed seven (7) days or more after service of process, warrant or information.

Common examples of written communications that must meet the requirements of subparagraph (b) of this rule are direct mail solicitation sent to individuals or groups selected because they share common characteristics, e.g., persons named in traffic accident reports or notices of foreclosure. Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule. Also not covered by this rule are responses by lawyers and law firms to requests for information from a prospective client or newsletters or brochures published for clients, former clients, those requesting it, or those with whom the lawyer or law firm has a familial or current or prior professional relationship.

Letters of solicitation and the envelopes in which they are mailed should be clearly marked "Advertisement." This will avoid the perception by the recipient that there is a need to open the envelope because it is from a lawyer or law firm, when the envelope contains only a solicitation for legal services. With the envelopes and letters clearly marked "Advertisement", the recipient can choose to read the solicitation or not to read it, without fear of legal repercussions.

The requirement that letters of solicitation and the envelopes in which they are mailed be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

This rule also requires the lawyer or law firm sending the letter of solicitation to reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee.

There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(5), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(4) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

Paragraph (d) of this rule permits a lawyer to contact representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or the law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to

an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Rule 7.4

Computer-Accessed Communications

- (a) Definition. For purposes of this subchapter, “computer-accessed communications” are defined as information regarding a lawyer’s or law firm’s services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer’s or law firm’s services that appears on World Wide Web search engine screens and elsewhere.
- (b) Internet Presence. All World Wide Web sites and home pages accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services: (1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;
- (2) shall disclose one or more bona fide office locations of the lawyer or law firm, in accordance with paragraph (e) of Rule 7.2; and
- (3) are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.5.
- (c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer’s behalf or on behalf of the lawyer’s firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:
- (1) the applicable requirements of Rule 7.3 are met;
- (2) the communication discloses one or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised, in accordance with paragraph (e) of Rule 7.2; and
- (3) the subject line of the communication states “legal advertisement.”
- (d) Advertisements. All computer-accessed communications concerning a lawyer’s or law firm’s services, other than those subject to subdivisions (b) and (c) of this rule, are subject to the requirements of Rules 7.1 and 7.2.

Comment

Advances in telecommunications and computer technology allow lawyers to communicate with other lawyers, clients, prospective clients, and others in increasingly quicker and more efficient ways. Regardless of the particular technology used, however, a lawyer’s communications with prospective clients for the purpose of obtaining professional employment must meet standards designed to protect the public from false, deceptive, misleading, or confusing messages about lawyers or the legal system and to encourage the free flow of useful legal-related information to the public.

The specific regulations that govern computer-accessed communications differ according to the particular variety of communication employed. For example, a lawyer’s Internet web site is accessed by the viewer upon the viewer’s initiative and, accordingly, the standards governing such communications correspond to the rules applicable to information provided to a prospective client at the prospective client’s request.

In contrast, unsolicited electronic mail messages from lawyers to prospective clients are functionally comparable to direct mail communications and thus are governed by similar rules. Additionally, communications advertising or promoting a lawyer’s services that are posted on search engine screens or elsewhere by the lawyer, or at the lawyer’s behest, with the hope that they will be seen by prospective clients are simply a form of lawyer advertising and are treated as such by the rules.

This rule is not triggered merely because someone other than the lawyer gratuitously links to, or comments on, a lawyer’s Internet web site.

Rule 7.5 Information About a Lawyer’s Services Provided Upon Request

- (a) Generally. Information provided about a lawyer’s or law firm’s services upon request shall comply with the requirements of Rules 7.1 and 7.2 unless otherwise provided in this subchapter.
- (b) Request for Information by Potential Client. Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:
- (1) The lawyer or law firm shall promptly furnish (by mail if requested) the written (including computer-accessed) information described in subdivision (c) of this rule.
- (2) The lawyer or law firm may furnish such additional factual information regarding the lawyer or law firm deemed valuable to assist the client.
- (3) If the information furnished to the client includes a fee contract, the top of each page of the contract

shall be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

- (4) Notwithstanding the provisions of paragraph (a)(2) of Rule 7.1, information provided a potential client in response to a potential client's request may contain factually verifiable statements concerning past results obtained by the lawyer or law firm, if, either alone or in the context in which they appear, such statements are not otherwise misleading.
- (c) Information Regarding Qualifications. Each lawyer or law firm that advertises the lawyer's or law firm's availability to provide legal services shall have available in written form for delivery to any potential client:
- (1) a factual statement detailing the background, training, and experience of each lawyer or the law firm;
 - (2) if the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, written information setting forth the factual details of the lawyer's experience, expertise, background, and training in such matters.
- (d) Proof of Statements or Claims. Upon reasonable request by the Alabama State Bar, a lawyer shall promptly provide proof that any statement or claim made in any advertisement or written communication, as well as the information furnished to a prospective client as authorized or required by these rules, is in compliance with Rules 7.1 and 7.2.
- (e) Disclosure of Intent to Refer Matter to Another Lawyer or Law Firm. A statement and any information furnished to a prospective client, as authorized by paragraph (b) of this rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the history of prior conduct by the lawyer in similar matters may be considered.

Comment

Consumers and potential clients often will find it useful to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The rule provides that potential clients may request such information and be given an opportunity to review that information without being required to come to a lawyer's office to obtain it. Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison. This rule does not require a lawyer or law firm to provide information concerning the lawyer's or law firm's services when requested if the lawyer or law firm is not interested in representing the person or entity requesting the information.

Rule 7.4 7.6 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

- (a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
- (b) a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation; or
- (c) a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority, but only if such certification is granted by an organization previously approved by the Alabama State Bar Board of Legal Certification to grant such certifications.

Comment

This rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist," practices a "specialty," or "specializes in" a particular field is not permitted unless in accordance with Rule 7.4(c). These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading.

Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

Paragraph (c) provides for certification as a specialist in a field of law where the Alabama State Bar Board of Legal Specialization has granted an organization the right to grant certification. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience, and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding certification.

Rule 7.5 7.7 Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if the name is not deceptive and it does not imply a connection with a government agency or with a public or charitable organization, does not imply that the firm is something other than a private law firm, and is not otherwise in violation of Rule 7.1 or Rule 7.4. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.
- (b) A lawyer shall not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name shall be in violation of this rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.
- (c) A law firm with offices in another jurisdiction may use in Alabama the name it uses in the other jurisdiction, provided the use of that name would comply with these rules. A firm with any lawyers not licensed to practice in Alabama must, if such lawyer's name appears on the firm's letterhead, state that the lawyer is not licensed to practice in Alabama.
- (d) A lawyer or law firm may indicate on any letterhead or other communication permitted by these rules other jurisdictions in which the lawyer or the members or associates of the law firm are admitted to practice.
- (e) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not practicing with the firm.
- (f) Lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact.
- (g) The name of a law firm may not contain the names of attorneys who are not partners or stockholders in the firm, except that the names of deceased partners or stockholders may be used in the firm name if there has been a continuing succession in the firm's identity.
- (h) A law firm may not include in its name "and associates" unless the firm employs at least one associate.

Comment

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the

use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," ~~an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication.~~ express language must be included wherever the trade name appears which clearly states that the firm is not a public legal aid agency. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Paragraph (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Two examples of such terms are "academy" and "institute." Paragraph (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. Although not prohibited per se, the terms "legal clinic" and "legal services" would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the community for like services.

Paragraph (b) of this rule also precludes a lawyer from advertising under a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name. An example of such an improper name is "A. Aaron Able." Advertising under a law firm name that differs from the firm name under which the lawyer actually practices violates both this rule and paragraph (a) of Rule 7.1.

With regard to subdivision (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Rule 7.6 7.8 Professional Cards of Nonlawyers

A lawyer shall not cause or permit a business card of a non-lawyer which contains the lawyer's or firm's name to contain a false or misleading statement or omission to the effect that the non-lawyer is a lawyer. A business card of a non-lawyer is not false and misleading which clearly identifies the non-lawyer as a "Legal Assistant," provided that the individual is employed in that capacity by a lawyer or law firm, that the lawyer or law firm supervises and is responsible for the law related tasks assigned to and performed by such individual, and that the lawyer or law firm has authorized the use of such cards.

Comment

Lawyers employ various persons who are non-lawyers to engage in activities on behalf of the lawyers. These non-lawyer employees are not subject to the disciplinary process of the

Alabama State Bar, although the lawyer may be disciplined for their conduct in appropriate cases. See Rule 5.3. These employees include secretaries, investigators, legal assistants, paralegals, librarians, law clerks, messengers, accountants, bookkeepers, office managers, firm administrators, etc. In many cases, these employees will come into contact with clients and with the general public. In these cases, a professional card or calling card may be useful to the employee, the client, and the public.

The rule is directed against false and misleading business cards. A lawyer must not permit or cause a business card of a non-lawyer employee to be either false or misleading. Particular care should be taken to ensure that no false impression is given that a non-lawyer is a lawyer. In the design of business cards, the position of non-lawyer employee should be legibly and prominently indicated in close proximity to the employee's name. Cards that visually present a lawyer's or law firm's name in such a prominent manner as to obscure the employee's non-lawyer status are prohibited. The card should serve the function of identifying the name of the individual employee, but it should not be susceptible to an interpretation by the casual observer that it is the card of a lawyer, as opposed to that of an employee of a lawyer or law firm.

Because the term "legal assistant" contains the designation "legal" and thus might reasonably be considered as prohibited by this rule, a safe harbor was provided so as to permit use of the term on business cards. ■

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With the Alabama State Bar's video-conferencing facility! This state-of-the-art facility, located on the third floor of the state bar building, is available to all state bar members for video-conference meetings and depositions. (Video-conferencing is a conference call where you not only hear the person or people you are talking to, but you see them, also.) Some benefits include time and cost savings, travel elimination, group interaction, data sharing, quick response time, and immediate feedback. Various applications include business meetings, expert witness interviews, distance learning, remote depositions, discovery, seminars/training, and continuing legal education.

For more information about rates and scheduling, contact **Laura Calloway** or **Sandra Clements** at the Alabama State Bar, (334) 269-1515.

Check Out The ASB's Latest Member Service:

the NEW members' LOG-IN Section of www.alabar.org all you need is your bar ID# and your E-mail address in our database and YOU'RE IN!

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Contact the Membership Dept. at ms@alabar.org.

War Stories



War Stories

The Alabama Lawyer is looking for “war stories” to publish in upcoming issues, humorous tales and anecdotes about Alabama lawyers and judges. Obviously, for such stories to be published, they must be (a) true, (b) amusing and (c) tasteful. Send your reminiscences to: *The Alabama Lawyer*, P.O. Box 4156, Montgomery 36101. Be sure to include your name, address and a daytime telephone number, in case we need to contact you.



Colorblind

I am a family law practitioner and spend much of my time in the domestic relations courts. A number of years ago, I had a unique experience that I call my most colorful day in court. Our domestic court judges in Jefferson County set motions, petitions and divorce trials on a daily basis. Sometimes regular domestic practitioners may have two or three matters set on a judge’s docket on the same day.

I remember vividly one day, a number of years ago, that I was involved in the case of ***Black v. Black***. My second case was *White v. White*. My third case that day was ***Gray v. Gray***. It really happened and the judge took note of this colorful situation when he called the docket. Coincidentally, on the same docket were the cases of ***Brown v. Brown*** and ***Green v. Green***. I did not represent these litigants but they certainly added to my most colorful day in court!

—Samuel A. Rumore, Jr., Miglionico & Rumore, Birmingham

Publications ORDER FORM

The Alabama State Bar is pleased to make available to individual attorneys, firms and local bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available from the Alabama State Bar for distribution under established guidelines.

B R O C H U R E S

| | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|-------------------|-----------------|
| To Serve the Public | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...details of bar public service programs highlighted in the <i>TO SERVE THE PUBLIC</i> video presentation | | | |
| Law As A Career | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...opportunities and challenges of a law career today | | | |
| Lawyers and Legal Fees | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...a summary of basic information on common legal questions and procedures for the general public | | | |
| Last Will & Testament | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...covers aspects of estate planning and the importance of having a will | | | |
| Legal Aspects of Divorce | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...offers options and choices involved in divorce | | | |
| Consumer Finance or "Buying on Time" | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...outlines important considerations and provides advice on financial matters affecting the individual or family | | | |
| Mediation/Resolving Disputes | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...provides an overview of the mediation process in question-and-answer form | | | |
| Arbitration Agreements | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...answers questions on arbitration from the consumer's perspective | | | |
| Advance Health Care Directives | \$10.00 per 100 | Qty. _____ | \$ _____ |
| ...complete, easy to understand information about health directives in Alabama | | | |
| Acrylic Brochure Stand | \$5.00 each | Qty. _____ | \$ _____ |
| ...individual stand imprinted with individual, firm or bar association name for use at distribution points One stand per brochure is recommended. | | | |

Name to imprint on stand: _____

Mailing Address

Subtotal \$ _____

Shipping & Handling \$ 5.00

TOTAL \$ _____



Please remit *CHECK OR MONEY ORDER MADE PAYABLE TO THE ALABAMA STATE BAR*
 for the amount listed on the TOTAL line and forward it with this order form to:

Susan Andres, Director of Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

ASB 2002 Annual Meeting Photo Highlights



BALANCING The SCALES



Debra Jenkins, of the Birmingham Bar Association VLP, and a visitor at Legal Expo 2002.



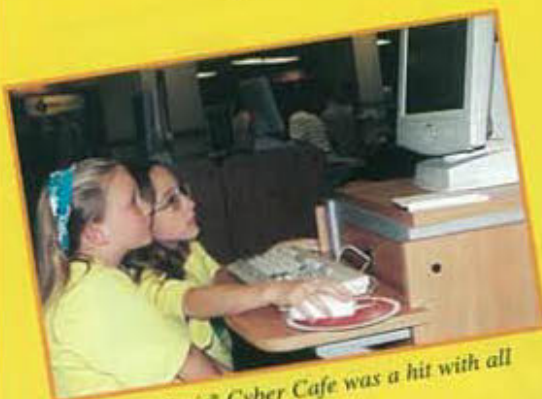
Once again, ASB past president Wade Baxley (right) gets in the picture, this time with Alabama Lawyer editor Robert Huffaker (left) and Jerry Woods, Jere Segrest and Knox Argo.



A popular stop for meeting-goers was the massage chair at Spa Del Ray's booth.



Elaine and Ed Raymon of Tuskegee (far left and far right) are amused by something ASB President Larry Morris (second from right) tells Greg Ward!



The Lexis Nexis® Cyber Cafe was a hit with all ages!



Alabama Supreme Court Justice Gorman Houston greets Darryl Webb of Tuscaloosa.



The Alabama Association of Legal Assistants welcomes attendees to their booth.

Thursday



Alabama Center for Dispute Resolution Director Judy Keegan receives the National Peacemaker Award from Sam Casey, executive director of the Christian Legal Society, as Alabama Supreme Court justices Harold See and Lyn Stuart applaud.



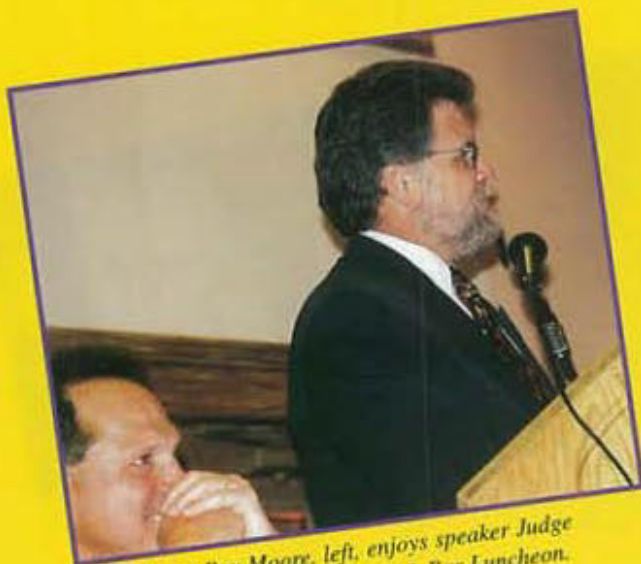
Thursday's plenary speaker, Craig Waters, tells all about the Florida presidential elections.



Tim Smith, Birmingham, is recipient of this year's Pro Bono Attorney Award.



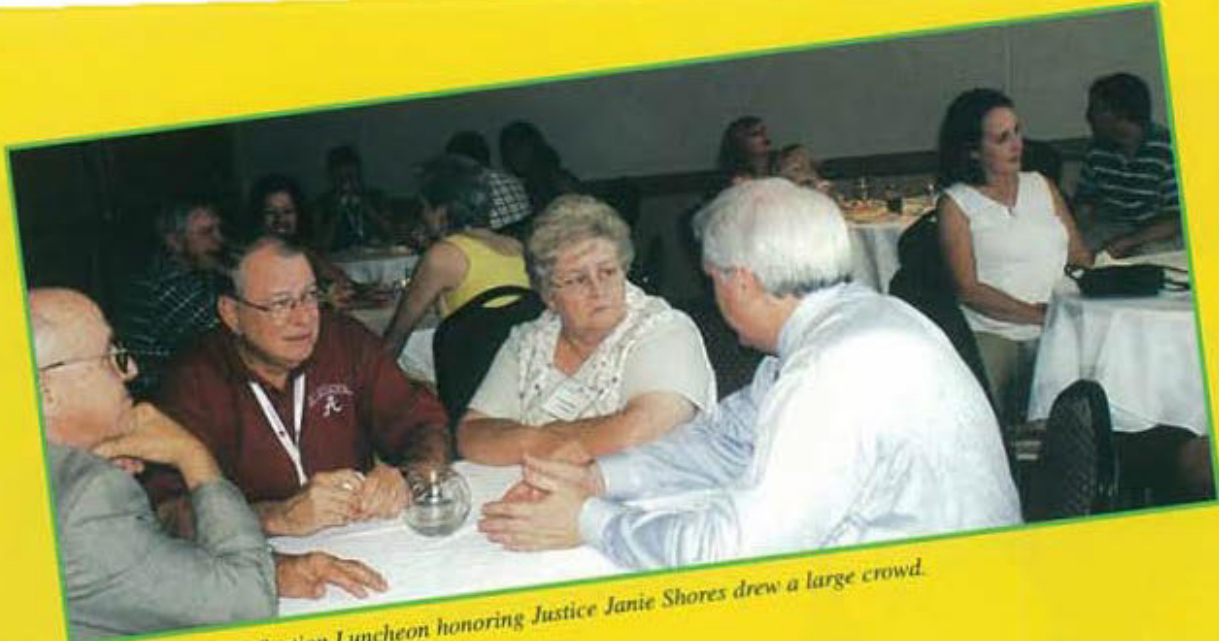
The seaside buffet at the Membership Reception gave Alva Caine of Birmingham and Sonny Cauthen of Montgomery a chance to catch up on the latest in fish shirts.



Chief Justice Roy Moore, left, enjoys speaker Judge William Bedsworth at the Bench & Bar Luncheon.



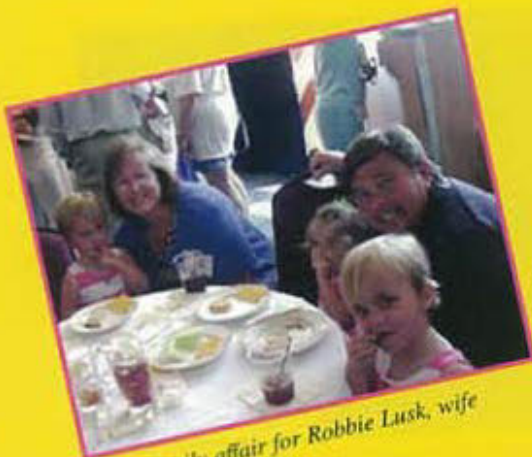
Sea, sand and soft music set the mood for the membership buffet.



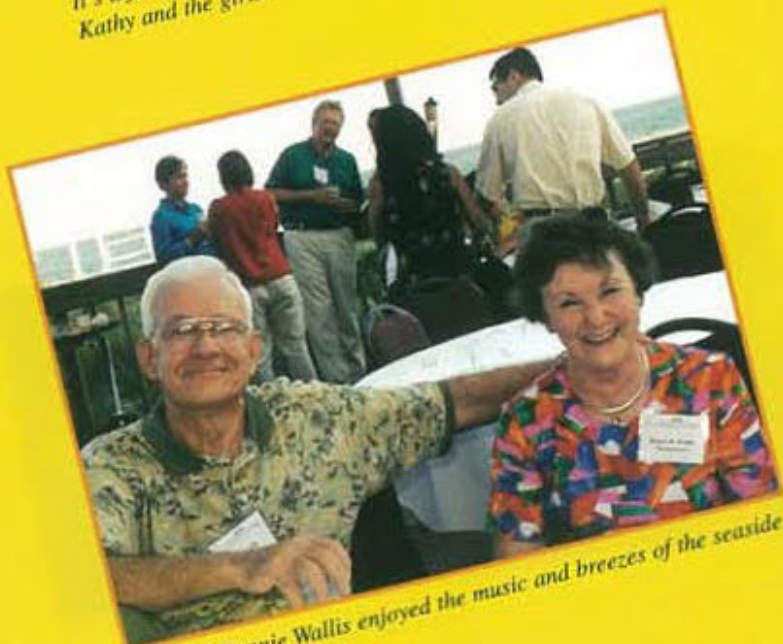
The ASB Women's Section Luncheon honoring Justice Janie Shores drew a large crowd.



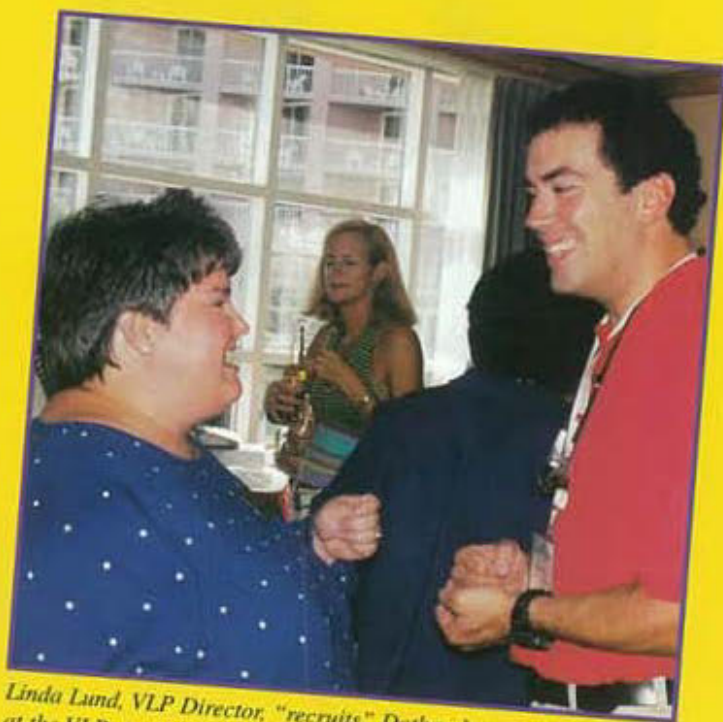
Bar Commissioners David Hyde (left) and Bob Meadows (right) enjoy the VLP reception with former commissioner Everett Price.



It's a family affair for Robbie Lusk, wife Kathy and the girls!

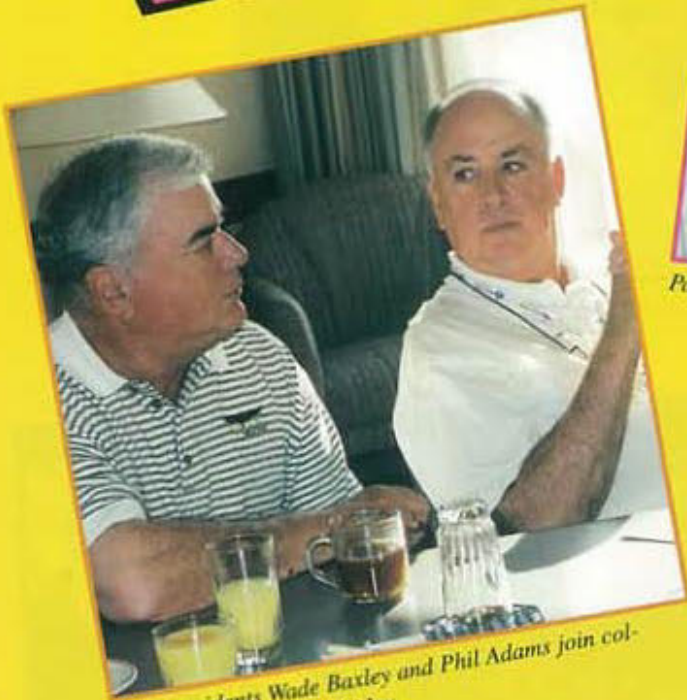


Ken and Bonnie Wallis enjoyed the music and breezes of the seaside reception.

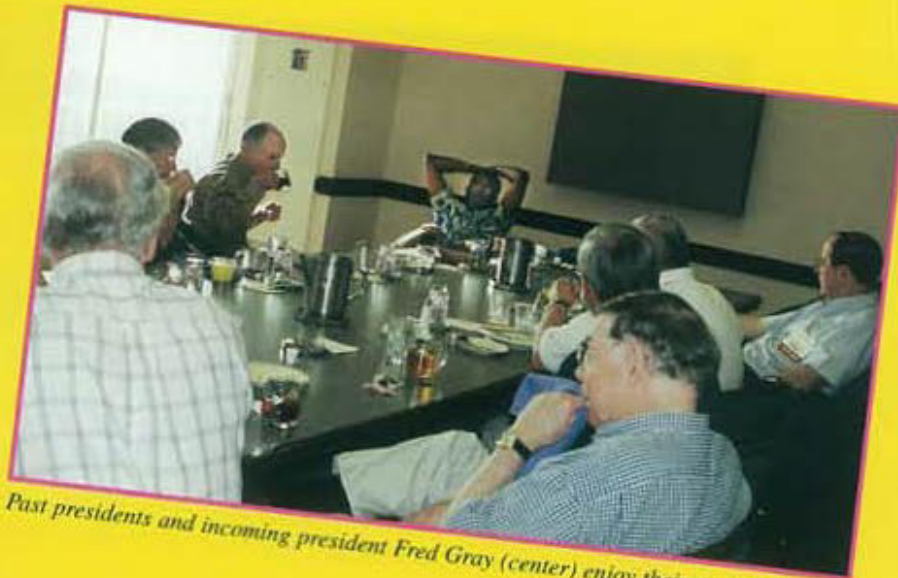


Linda Lund, VLP Director, "recruits" Dothan lawyer Hamp Baxley at the VLP reception.

Friday



Past presidents Wade Baxley and Phil Adams join colleagues for breakfast Friday.



Past presidents and incoming president Fred Gray (center) enjoy their annual breakfast.



Caryl Privett, Debra Jenkins and Linda Lund at the VLP reception.



John McShane wins over the audience sharing real life experiences during Friday's plenary.



Dr. Barry Schneider, left, of the Air War College at Maxwell, led a panel discussion on terrorism, along with Laurie Wood, Bob Thetford and Gregory Nojeim.

Saturday



President Gray's reception brought out many well-wishers. Here Judge Gene Verin and wife Annetta Verin (right) visit with guests.



Fred Gray, left, with wife Carol, center, is sworn in as the first black ASB president by Judge Howard Bryan, a longtime friend.



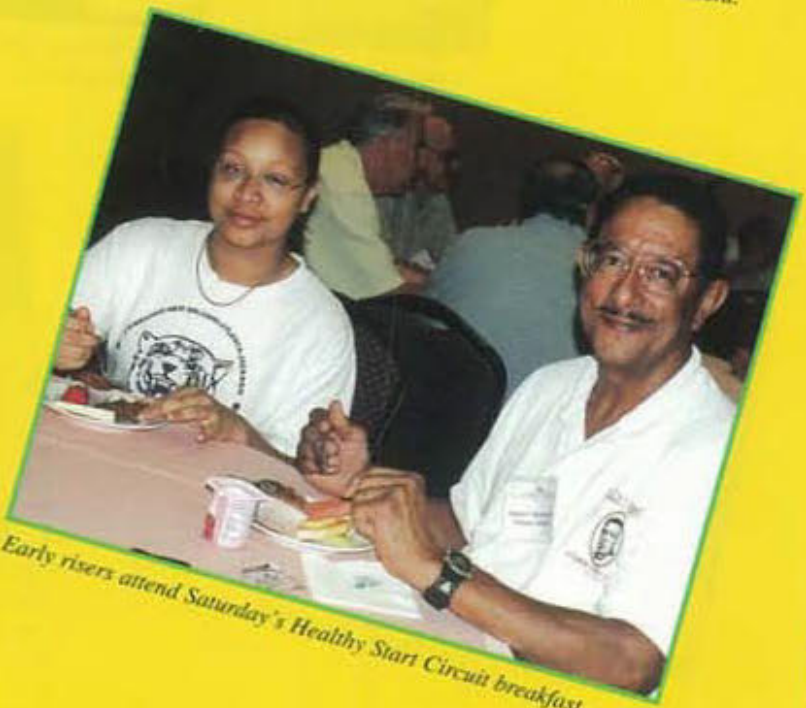
Fred Gray receives the president's gavel from the outgoing ASB president Larry Morris.



A "presidential" gathering includes William Clark, 2002-03 president-elect; Fred Gray, president; Larry Morris, 2001-02 president; Sam Rumore, 2000-01 president; and Wade Baxley, 1999-2000 president.

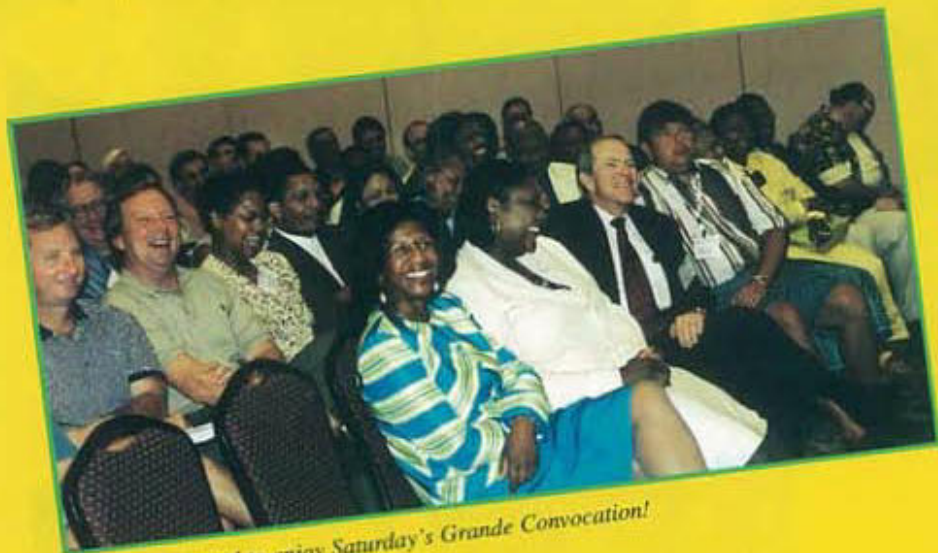


Larry Morris accepts the "retiring" president's plaque from immediate past president Sam Rumore.



Early risers attend Saturday's Healthy Start Circuit breakfast.

Saturday



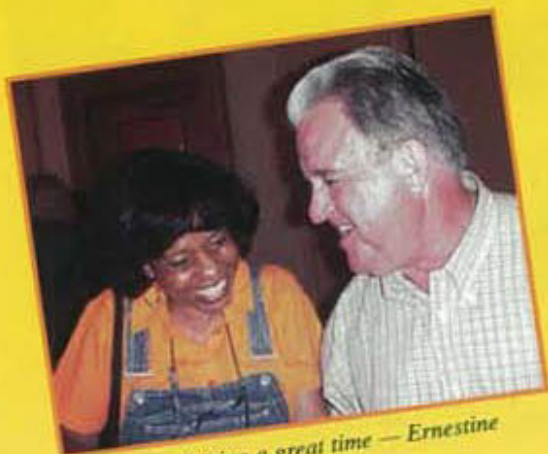
Everyone seemed to enjoy Saturday's Grande Convocation!



Presiding Judge of the 15th Judicial Circuit Charles Price and Bar Commissioner for the 15th Circuit Don Jones



50-year certificate recipients Robert Bowron, Jr.; Alex Lankford; Hon. William Acker, Jr.; Charles Cleveland; Harold Williams; and Walter Byars



Look who's having a great time — Ernestine Sapp and Everett Price!



Harold Williams (left) and Walter Byars (right) receive congratulations from Birmingham attorney Carol Ann Smith for their 50-year certificates.

Spring 2002 Admittees



Statistics of Interest

| | |
|---------------------------------------------------|------------|
| Number sitting for exam..... | 300 |
| Number certified to Supreme Court of Alabama..... | 117 |
| Certification rate*..... | 39 percent |

Certification Percentages:

| | |
|------------------------------------------|--------------|
| University of Alabama School of Law..... | 63.2 percent |
| Birmingham School of Law..... | 23.9 percent |
| Cumberland School of Law..... | 54.5 percent |
| Jones School of Law..... | 40 percent |
| Miles College of Law..... | 2.9 percent |

*Includes only those successfully passing bar exam and MPRE

For full exam statistics for the February 2002 exam, go to www.alabar.org, click on "Members," and then check out the "Admissions" section.

Alabama State Bar Spring 2002 Admittees

Adams, Albert Holman Jr.
Adams, Jerusha Tatiana
Allen, Anthony Scott
Allen, Deanie Clark
Alper, Ty
Arnold, George Wayne
Bagby, Hunter Martin
Banker, Anthony Nicholas
Barnes, Laura Lou
Barnhart, Jason Micheal
Baxter, Jeri Ann
Beam, Matthew Yan
Beedle, Joy Wolfe
Berueffy, Max
Biggs, Terrie Scott
Blackmon, William Drake
Bogan, Adrienne Williams
Bone, Elizabeth Ann Clark
Branning, Jeremy Chase
Brasfield, David Carlton Jr.
Braye, Linda Marie
Breland, Bryan Keith
Brooks, Barry Scott
Bunn, Jonathan Rudman
Burns, James Martinez
Caffey, Rodney Newman
Chesnut, Richard Patrick
Clements, Karen Renee
Cook, Jonathan Neal
Cox, Tyler Lamar
Cross, America Ashley
Culbreath, Susan Musick
Danneman, Adam Daniel
Davis, Ginger Blair
Deas, Vincent Kenneth
Elrod, John Douglas
Estes, Anna Marie
Fay, Katherine Elizabeth
Felice, David Allan
Floyd, Marilyn Scott
Floyd, Shannon Denton
Fulmer, Teresa Whitley
Gamble, Elizabeth Dianne
Garman, Rhonda Mayse
Genereux, Christopher Stephen
Gluck, Kristian William
Gowan, Melissa Storey
Graham, Christy Williams

Gulley, Colette Louise
Hall, Charles Edward Jr.
Hammack, Jennifer Wells
Hancock, Jeremy Allen
Harmon, Susan Kay
Harris, Daniel Jr.
Hasting, James Melvin
Hatcher, Jeffery Dewayne
Hawkins, Kimberly M. Kelsoe
Hendrix, Elizabeth Luricia
Heninger, Erik Stephen
Hilyer, David Cushing
Holland, Jon Elsworth
Holt, Mark Elonzo
Hudson, Tammy Renee
Hulebak, Peggie Sue
Hulsey, Angela Johnson
Hurley, Kathleen Marie
Hurst, Norman Jr.
Janousek, Melissa Mars'a
Johnson, Belinda Elmore
Johnson, Tiffany Nichelle
Johnson-Theodoro, Mitzi Gabbriella
Jones, Elizabeth Anne Thigpen
Jones, Laura Dietz
Kelly, Rebecca Gettys
Kilpatrick, Jay Max
Kuehn, Robert Richard
Larkin, Christopher Joseph
Lovvorn, Christie Parsons
Lozito, Camille Sellers
Lyles, Maria Lynda N.
Mandell, Joshua Francis
Manning, Gregory Scott
Martin, Mintrel D'Angelo
Matthews, Andrew Rayden
McAuley, Wesley Martin
McClelland, Richard Benson
McClinton, Nedra Lashawn
McClusky, Charlotte Kaye
McCormick, Julie Baker
McGinley, Katherine Mehlburger
McGinley, Robert Ball
McHugh, William Michael Jr.
McLeod, Malcolm Stewart
McMath, Byron Gustavis
Mercer, Angelia Lucille
Miller, Stephen Howard

Moore, Patrick Bennett
Murphy, Shannon Leigh
Nobles, Adria Yvette
O'Bannon, Dorene
Ogburn, Brandon Lee
Parham, Stephen Merritt
Parish, Julie Lynn Meadows
Park, Myung Sun
Parker, Tina Michelle
Parnell, Justin Matthew
Pendergraft, Jennifer Carin
Pendleton, Patrick Kerry
Pfeiffer, Gweneth Cameron
Porter, Hubert Merrill Sr.
Printz, Adam Kennedy
Richardson, Byron Mark
Rivers, Keith Stevenson
Robson, Kevin Matthew
Rodgers, Joseph Keith
Rooksberry, Julie Michelle
Rowley, Adrian Manning
Rox, Eddie Bernard Jr.
Rutter, Charles Wayne Jr.
Schoettker, Benjamin Edward
Shanholtzer, Donna Overton
Shaull, Glenn Joseph
Siciliano, Anthony David
Simpson, Marvin Earl
Singley, Scott Fuller
Smith, Daniel Edward III
Smith, Jennifer Wiggins
Smith, William Roger III
Stallings, Rodney Loring
Starr, Henry Brockman III
Stewart, Charles Davis Jr.
Streetman, Jeremy Loyd
Thompson, Nicola Anne
Todd, Tamar
Tomlinson, John Everett
Walsh, Andrew Philip
Watson, Elmer Jacobs
Wellman, Linda Sue
Whittaker, Clayton Maxwell
Williams, Mark Sloan
Winslett, Laura Leigh
Woodward, Douglas Shane
Woodward, Tiffany Taylor

Lawyers in the Family



*Laura Low Barnes (2002) and R. Lee Barnes (1996)
admittee and brother*



*Anna Marie Estes (2002) and Kim Davidson (1997)
admittee and aunt*



*Charles Davis Stewart, Jr. (2002)
and Charles Davis Stewart (1968)
admittee and father*



*Melissa Storey Gowan (2002) and
Ron Storey (1973)
admittee and father*



*Erik Heninger (2002) and Stephen
D. Heninger (1977)
admittee and father*



*Julie Baker McCormick (2002), John Baker (1967), John Cochran (1977), Janie Baker Clarke (1985), Clyde Baker (1977), Gina Baker Hantel (1995), and Susan Baker Perkinson (1985)
admittee, father, uncle, aunt, great-uncle, sister, and cousin*



*Jake Watson (2002), Rebeka Keith McKinney (1996) and Herman Watson, Jr. (1961)
admittee, sister and father*



*Tom Kelly (2001), Rebecca G. Kelly (2002), Julie M. Parish (2002) and Ed Parish, Jr. (1998)
husband/cousin, admittee/cousin, admittee/wife and husband/cousin*

Lawyers in the Family



*David C. Hilyer (2002) and Gerald B. Jones, Jr. (1989)
admittee and brother-in-law*



*Linda Brave (2002) and Greg Griffin (1985)
admittee and cousin*



*Malcolm S. McLeod (2002) and Grover S. McLeod (1952)
admittee and father*



*Camille Sellers Lozito (2002) and Gene M. Sellers (1972)
admittee and father*



*Terrie Scott Biggs (2002) and Greg M. Biggs (1985)
admittee and husband*



*Patrick Chesnut (2002) and Richard Chesnut (1975)
admittee and father*



*Jonathan N. Cook (2002), Billy Earl Cook (1977) and Billy E. Cook, Jr. (1987)
admittee, father and brother*

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ATTORNEY FEE DECLARATION FORMS: Save Yourself Some Time and Trouble

BY ROBERT L. CHILDREE

There are some common statewide problems that have been encountered by the Secretary of State's office in processing Attorney Fee Declaration forms. The following is a list of those and some hints on how to avoid these problems.

First and foremost, some attorneys are somewhat unfamiliar with the "Uniform Guidelines for Attorney Fee Declarations" and the sections of the code relating to indigent defense. Negligence in calculations, using incorrect forms, incorrect information and failure to include required attachments are the primary problem areas. Researching archived records for duplicates and correcting and/or returning incorrect claims are time-consuming chores and if these factors could be eliminated from our daily tasks, attorneys would receive payments more timely.

Attorney Fee Declaration Forms

Always use the correct forms for the time period of work performed. Always calculate the correct rate. The following is a rate/time period schedule to correspond with the forms:

| | | |
|----------------------|------------------------|----------------------------|
| Prior to 06/10/99 | \$40 per hour in court | \$20 per hour out of court |
| 06/10/99 to 09/30/00 | \$50 per hour in court | \$30 per hour out of court |
| Beginning 10/01/00 | \$60 per hour in court | \$40 per hour out of court |

If at all possible, type forms. Do not submit sloppy, hand-scribbled, illegible forms with numerous corrections, white-outs, strike-overs, and write-overs. These are subject to being returned to the attorney.

Always enter the correct case number. If more than one case is handled at the time, type all case numbers in the case number block.

The correct county code number must be entered. Codes are listed in alphabetical order, by county, and not by automobile tag number.

The case type, such as Class C Felony, which sets the allowable dollar limits in fees that can be paid, must be indicated on

the form. Every effort should be made to mark the correct type. This is a major problem. Numerous forms continue to be received with no case type indication. Many probation hearings are indicated on the forms as "post-conviction." This is incorrect. The original charge should be indicated as the case type. Appellate work should be indicated as "Appeal."

The Social Security Number or Federal ID Number (dependent on the W-9 form signed by the attorney prior to being issued a state check) should always be indicated in the proper space.

Quite often, attorneys enter their attorney code in this space in error. For tax purposes, 1099 Forms are mailed in January under the specified SSN or FEIN.

Review forms before submitting for payment to insure that all information is entered and entered correctly. Many forms are received without the attorney's signature. Some are received without the signature of the judge.

Attorneys who print their own forms are required to use a print font that is at least as large as the state's printed form.

Attachments to the Fee Declaration

An overhead order, signed and dated by the judge, must be attached to each fee declaration in order to be paid overhead. Overhead is to be pre-approved and is paid from the date the judge signed the order. *Nunc pro tunc* orders not acceptable. Overhead orders accompanying claims should be from the same county in which the work was performed. Failure to attach a copy of the overhead order to the fee declaration continues to be a problem. Some attorneys argue that their county has a blanket order and we should have it on file and they should not be asked to attach an order to each claim. The rule is, if an attorney is to be paid overhead, we must have an order attached.

In order to pay expert witnesses or other extraordinary expenses, a copy of the pre-approved order, along with a copy of the invoice, must be attached to the fee declaration. These items often are missing from claims received by the state.

The following three items do not require an order:

Mileage: The state rate is allowed, which is now tied to the IRS rate, currently \$.365.

Copies: Allowed \$.25 per copy.

Long distance phone charges.

Itemizations should be clear and concise, with dates of service present and time reported in compliance with the guidelines. Use standard time calculations as stated in the guidelines. Do not use creative software packages that must be figured out and recalculated by the state in order to arrive at the hours reported by the attorney. This is another waste of state time.

The guidelines were written before overhead was allowed. Since overhead normally includes the items above, there should be no need to bill again for these items or delete from total overhead charged.

Miscellaneous Problems

Do not overcharge. Double and triple billing is strictly prohibited. When two or more cases are joined, bill for actual time spent in handling them together. Do not bill the same amount, separately, for each case number. For instance, the attorney handled four cases that were all joined and handled at the same time. Case numbers were JU-00-1, JU-00-2, JU-00-3 and JU-00-4, and the total time spent handling them was ten hours. One

bill for ten hours should be submitted, not four bills for ten hours each. Claims received with the appearance of double-billing or over-billing will be returned to the judge for review.

When the maximum amount allowed in fees on a case has been reached, do not continue to bill for more. An inordinate amount of time and effort is wasted by the state in having to research archived files, recalculate claims, make copies of claims in support of corrections made, reduce claims for processing, or return claims.

Do not send in duplicate billings. This is a real problem and a major waste of state time from beginning of the claim to the final return to the attorney. Please note the statements on the fee declaration which state that the attorney declares that he/she is not duplicating charges and the judge signs to the effect that he/she is of the opinion that the attorney is not duplicating charges.

It would be most helpful if attorneys would file their fee declarations in a timely manner and not wait until the end of the year to flood the system with old claims, resulting in a backlog of statewide claims for this office. We adhere to the six-year statute of limitations and encourage attorneys to file timely. Please be courteous when calling this office. Courtesy is our policy and the same is expected. ■

Robert L. Childree

Robert L. Childree currently serves as the comptroller for the State of Alabama.

2001 Fellows Acceptances

| Nominee | Date Acceptance Received |
|-----------------------------------------|---------------------------------|
| Reneau P. Almon, Montgomery..... | 7/16/01 |
| J. Tutt Barrett, Opelika..... | 8/30/01 |
| William J. Baxley, Birmingham..... | 8/7/01 |
| Jere L. Beasley, Montgomery..... | 8/16/01 |
| John L. Carroll, Montgomery..... | 7/16/01 |
| Ralph D. Cook, Birmingham..... | 7/27/01 |
| Milton C. Davis, Tuskegee..... | 7/19/01 |
| Joe C. Espy, III, Montgomery..... | 7/18/01 |
| Virginia S. Granade, Mobile..... | 8/17/01 |
| Robert B. Harwood, Jr., Tuscaloosa..... | 8/9/01 |
| S. Jack Livingston, Scottsboro..... | 8/16/01 |
| Robert L. McCurley, Jr. | 8/24/01 |
| Nina Miglionico..... | 7/18/01 |
| J. Jerry Wood..... | 7/30/01 |

KIDS' CHANCE SCHOLARSHIPS: Meeting the Need

The Alabama Law Foundation and Kids' Chance have helped one family look on the bright side of things.

When Mickey Skipper fell off a roof and broke his back, he had to depend on his family for support. Now he and his family are counting on the Alabama Law Foundation and the Kids' Chance Scholarship program for its continued support.

While more and more people are attending colleges and universities, for many, higher education is still an unattainable dream. The Alabama Law Foundation, a non-profit organization dedicated to law-related charities, is working hard to change this fact with their Kids' Chance Scholarship Program. The Kids' Chance Program gives students whose parent or parents have been permanently and totally disabled or killed on the job an opportunity to go to college or technical school.

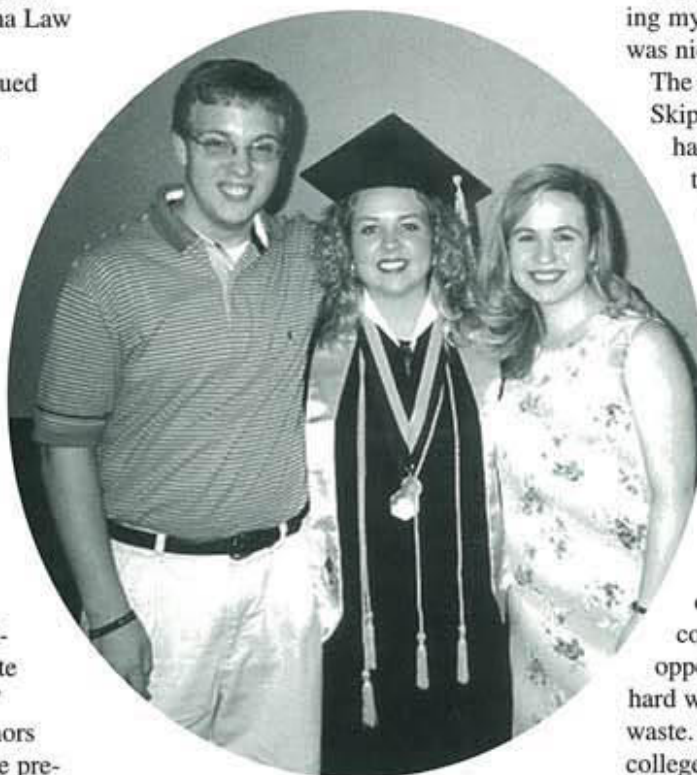
Brooke Skipper is enjoying college life as a freshman at Troy State University thanks, in part, to Kids' Chance. After graduating with honors from Ashford High School, Brooke prepared to go off to TSU.

"I grew up knowing I wanted to go to college," Brooke said. "It was never a question."

How her family would afford to send her was the question, though, a big one. Brooke's dad has been permanently disabled for the nine years since his accident and completely unable to work. Brooke is the middle of three children. Her big sister, Brandi, already knows what a help Kids' Chance can be. Her mom, Sheila, found out about the scholarship program from a lawyer in Dothan.

"After the accident, **Larry Givens**, a lawyer we were working with, told me

about Kids' Chance. I got Brandi an application, and she got it," Sheila said. "It was such a help, so when it came time for Brooke to go to college, we got her an application, too."



Brent, Brooke and Brandi Skipper

Events like Mickey's accident can destroy a family, or bring them closer together. The Skippers chose to keep going and even found a way to find a positive side.

"When something like that happens it is truly devastating," Sheila said. "We didn't know what we were going to do." While Mickey is in pain every day and will be for the rest of his life, he and his whole family feel lucky that he is even alive. And, even though he can't work

and suffered some depression for some time, eventually, he saw how nice it was to be home. "Mickey can look back now and see the good in him being home. He has been able to be with the kids more, more of a father.

His children agree. "I really liked having my dad at home," Brooke said. "It was nice always having him around."

The accident has changed all of the Skippers's lives, and Sheila believes it has changed her children's lives for the better. "There is so much that we use to take for granted," she said. "Now the kids are more aware of the everyday blessings."

None of the three are taking for granted their chance to get a Kids' Chance Scholarship and other scholarships, either. Each has excelled in school and in everything they do.

"What we have gone through as family has really focused them on their goals," Sheila said. "Of course, without the wonderful opportunities like Kids' Chance, their hard work and talents could have gone to waste. Too often, the opportunity to go to college and further their education would be impossible for many students without the Alabama Law Foundation and Kids' Chance."

Brooke is pursuing a degree in marketing and is even thinking about going to law school. Her sister, Brandi, is a teacher after finishing college with a degree in education. Her little brother, Brent, is 15 and still in high school. He plans to apply for a Kids' Chance Scholarship, too.

Kids' Chance relies solely on contributions from corporations, organizations and individuals. More than 100 scholarships have been awarded since the program was established. ■



Overview of the Business Tax Legislation Enacted During the December 2001 Special Session and Other Recent Developments on the "SALT" Front

BY BRUCE P. ELY AND CHRISTOPHER R. GRISSOM

Special Legislative Session, December 2001

Governor Don Siegelman introduced a package of legislation on December 4, 2001 that, in his Finance Director's words, was designed to close several perceived corporate "tax loopholes" and raise an additional \$100 million annually, to shore up a projected \$160 million deficit in the Education Trust Fund. The Finance Director even went so far as to publicly accuse both the corporations and their tax advisers of "legal money laundering." Sean Reilly, "Business leaders say measures give state tax officials 'extremely broad powers'", *Mobile Register*, December 1, 2001, at A1. Recent indications are that, while corporate income tax revenues have increased substantially due to the changes discussed below, they may still fall below expectations. Further efforts at targeting the corporate income tax system are underway, administratively, and we may very well see additional "loophole-closing" legislation introduced during the spring 2003 regular session.

The Business Associations' Tax Coalition ("BATC"), a 34-member group of the state's largest and most influential business and trade associations, was the primary advocate of business interests during the December 2001 Special Session. The BATC was formed in early 1999 at the request of, and was instrumental in assisting, the Siegelman administration in developing a replacement tax package, following the United States Supreme Court's invalidation of Alabama's corporate franchise tax in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999).

As summarized below, the Alabama legislature chose its own path, adopting part of the Governor's proposals and part of the BATC's proposals (several of which endorsed the Governor's

proposals), and then filling the gap with a utility gross receipts tax on cellular telephones and pagers.

Corporate Income Taxes

House Bill 2 (Act 2001-1088)—Perhaps the most controversial of all the bills, which became law without the Governor's signature, suspended the deduction for net operating loss carryovers from previous years, for the first tax year beginning after December 31, 2000. *Ala. Code* § 40-18-35.1(7), as amended by Act 2001-1088. At the insistence of business interests, however, the bill allows the NOL to be claimed in subsequent years. Thus, the NOL will not be lost permanently, but only deferred, with the 15-year recovery period extended by one year.

Payments to related companies of interest and of royalties on copyrights, patents, trademarks and other intangibles will be subjected, retroactively for all tax years beginning after December 31, 2000, to a series of statutory hurdles, similar to those recently enacted in North Carolina and Mississippi. See *Ala. Code* § 40-18-35(b), as amended by Act 2001-1088; 2001 *N.C. Sess. Laws* 327; and 2001 *Miss. Laws* c.586. The concept of the "anti-Geoffrey" language (named after the well-known South Carolina Supreme Court case) is that payments to a related company in a so-called tax haven state such as Delaware or Nevada, or payments offset by the correlative income in the context of a consolidated or combined return, will be presumed non-deductible. *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993). In those circumstances, the taxpayer must show that the add-back was "subject to a tax based on or measured by the related member's net income in Alabama or any other state ... or foreign nation." *Ala. Code* § 40-18-35(b)(1), as amended by Act

2001-1088. Failing that, the taxpayer is faced with proving that the add-back is "unreasonable" or attempting to negotiate an alternative apportionment formula or adjustment with the Alabama Department of Revenue ("ADOR"). See *Ala. Code* § 40-18-35(b)(2), as amended by Act 2001-1088.

The taxpayer may also avoid the add-back by establishing that (a) the affiliated payee was not primarily engaged in the acquisition, licensing, and management of intangibles or in the "financing of related entities," and (b) the transaction giving rise to the payment was not entered into primarily to avoid Alabama taxes. The latter requirement is interpreted to mean that the transaction had a "substantial business purpose and economic substance," and "contained terms and conditions comparable to a similar arm's-length transaction between unrelated parties..." *Ala. Code* § 40-18-35(b)(3), as amended by Act 2001-1088. Attempts to convince the legislature to modify or clarify the added language were only partly successful. The full text of the new provisions is set forth below.

"(b) Restrictions on the deductibility of certain intangible expenses and interest expenses with a related member.

- (1) For purposes of computing its taxable income, a corporation shall add back otherwise deductible interest expenses and costs and intangible expenses and costs directly or indirectly paid, accrued or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions, with one or more related members, except to the extent the corporation shows, upon request by the Commissioner, that the corresponding item of income was in the same taxable year: a. subject to a tax based on or measured by the related member's net income in Alabama or any other state of the United States, or b. subject to a tax based on or measured by the related member's net income by a foreign nation which has in force an income tax treaty with the United States, if the recipient was a "resident" (as defined in the income tax treaty) of the foreign nation. For purposes of this section, "subject to a tax based on or measured by the related member's net income" means that the receipt of the payment by the recipient related member is reported and included in income for purposes of a tax on net income, and not offset or eliminated in a combined or consolidated return which includes the payor.

- (2) The corporation shall make the adjustments required in subsection (b)(1) of this section unless the corporation establishes that the adjustments are unreasonable, or the corporation and the Commissioner of Revenue agree in writing to the application or use of alternative adjustments and computations. Nothing in this section shall be construed to limit or negate the Commissioner's authority to otherwise enter into agreements and compromises otherwise allowed by law.
- (3) The adjustments required in subsection (b)(1) shall not apply to that portion of interest expenses and costs and intangible expenses and costs if the corporation can establish that the transaction giving rise to the interest expenses and costs or the intangible expenses and costs between the corporation and the related member did not have as a principal purpose the avoidance of any Alabama tax and the related member is not primarily engaged in the acquisition, use, licensing, maintenance, management, ownership, sale, exchange, or any other disposition of intangible property, or in the financing of related entities. If the transaction giving rise to the interest expenses and costs or intangible expenses and costs, as the case may be, has a substantial business purpose and economic substance and contains terms and conditions comparable to a similar arm's length transaction between unrelated parties, the transaction will be presumed to not have as its principal purpose tax avoidance, subject to rebuttal by the Commissioner of the Department of Revenue."

House Bill 2/Act 2001-1088 also returned, retroactively to tax years beginning after December 31, 2000, the calculation of a corporation's federal income tax ("FIT") deduction to pre-1999 law, while changing the basis for calculating a multi-state corporation's non-business interest expense from the book value of its assets to historical cost. See *Ala. Code* §§ 40-18-35(a)(2) and (a)(8), as amended by Act 2001-1088. Prior to the changes by Act 99-664, the FIT deduction was calculated based on Alabama income over total income. The 1999 Act inadvertently changed this calculation and required the deduction of the entire amount of FIT paid in calculating Alabama taxable income. Alabama is one of the few states that allows a full deduction for FIT paid by both individuals and corporations. See *Ala. Code* §§ 40-18-15(a)(3)a. and -35(a)(2), as amended by Act 2001-1088. The apportionment formula is designed to match the amount of FIT generated by a multi-state corporation's Alabama-source income.

The change from book value to cost for the determination of non-business interest expense is reportedly a nominal revenue raiser. Corporate taxpayers must now calculate (non-deductible) non-business interest expense based on the cost of their non-business assets over total assets, instead of using the assets' book value. Finally, the federal estimated tax penalty rules for corporations were adopted, except that the current quarterly filing threshold for corporations with annual state income tax liability of \$5,000 or more (vs. \$500 or more under federal law) was retained. *Ala. Code* § 40-18-80.1(f), as amended by Act 2001-1088

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117, 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, www.alabar.org.

Senate Bill 5—This bill would have conformed the state's tax penalty system to the federal counterpart while also imposing new penalties on tax advisers and return preparers who charge a fee based on the amount of the client's tax savings resulting from implementing the planning idea recommended by the adviser's firm. The bill would also have overridden, retroactively for all open tax years, the ADOR Administrative Law Division's pro-taxpayer ruling in *USX Corp. v. Alabama Dep't. of Revenue*, Admin. L. Div. Dkt. No. F. 94-254 (August 13, 1998) (on appeal to Montgomery County Cir. Ct.) that the State's method of calculating interest on tax assessments was incorrect. The ADOR charges interest not only on the tax deficiency but on the interest accrued until the date a final assessment is issued.

At the last minute, portions of Senate Bill 5 were extracted and added to House Bill 2/Act 2001-1088. Those provisions limit contingent fee tax planning services and retroactively approve the ADOR's method of calculating interest on interest. See *Ala. Code* §§ 40-2A-17 and -18, as added by Act 2001-1088. At the request of several interested parties, however, the contingent fee prohibition was narrowed to ban these services, and penalize CPAs and other tax consultants, only if they violate AICPA standards governing contingent fee engagements.

House Bill 4 (Act 2001-1089)—House Bill 4, which also became law without the Governor's signature, restricts the use of consolidated income tax returns in Alabama by requiring each member of the federal affiliated group to have nexus with the state in order to be included in the Alabama group. The bill further limits the benefits of consolidated filing by requiring company-by-company apportionment factors and gives the ADOR the power, under certain circumstances, either to de-consolidate the entire group or a particular member of the group. Additionally, the annual filing fee for the election was doubled and the eight-year "straight-jacket" election period was extended to ten years unless permission to de-consolidate is obtained either from the ADOR Commissioner or the Commissioner of Internal Revenue.

The final version of the bill makes these changes effective for tax years beginning after December 31, 2001. The bill allows the 93 consolidated groups presently filing Alabama consolidated returns the right to opt-out, but the election must be filed no later than March 15, 2002 or the due date, with extensions, of the last return due to be filed under the law prior to amendment by House Bill 4, whichever is later. If no opt-out election is

made, those members of the group with nexus will be deemed to have begun a new ten-year election.

House Bill 5 (Act 2001-1105)—House Bill 5 generally mandates the filing of a composite income tax return by subchapter K entities such as limited liability companies, limited liability partnerships, and limited partnerships, sometimes called limited liability entities ("LLEs"), doing business in the state that have nonresident owners, for tax years beginning after December 31, 2000. The tax is calculated by multiplying the applica-

ble percentage (6.5 percent for corporate owners, 5 percent for non-corporate owners) times the owner's distributive share of the LLE's net income apportioned/allocated to Alabama.

Due to the mass confusion and administrative nightmares created by this Act, as well as a failed attempt in the Spring 2002 regular session to clarify or correct what appeared to be a drafting error in Act 2001-1105, on May 3, 2002, Commissioner of Revenue Cynthia Underwood issued helpful guidance to LLEs and their tax advisers. The Commissioner's Emergency Order granted an extension of time to all LLEs that did not elect corporate tax status, and which have nonresident partners or members ("nonresident owners"), until May 30, 2002 to file their composite return, Form 65C, with the ADOR. If the return was filed by that date, no late filing or late payment penalties would be assessed.

According to the ADOR, based on certain errors in the enabling legislation, the LLE was required to make a composite payment on behalf of its nonresident owners by May 30, *even if the owners have previously made Alabama estimated tax payments with respect to their share of Alabama income*. As some solace, the ADOR advised that once the composite payment was made, the nonresident owners who have previously paid Alabama income tax on their distributive share of the entity's 2001 net income should promptly file refund claims. Alternatively, many tax advisers recommended that nonresident owners might consider crediting any duplicate payments of 2001 Alabama income taxes against their 2002 estimated income tax liabilities, if appropriate.

The commissioner's guidance, although positive, is based on the ADOR legal division's questionable interpretation of Alabama acts 2001-1088 and 2001-1105, the enabling legislation for the composite return provisions. These two acts share a confusing procedural history, insofar as Act 2001-1105 (H.B. 5) was passed by the Alabama legislature on December 20, 2001, one day prior to Act 2001-1088 (H.B. 2). Judging from their respective act numbers, it appears that the two acts may have become



law in the reverse order of their passage. That is, Act 2001-1105 passed the legislature before Act 2001-1088, but 2001-1088 apparently was signed by the Governor before 2001-1105 was passed over his veto (i.e., became law without his signature).

While no one would describe these two statutes as models of clarity, especially considering their interrelationship, the authors believe the most reasonable interpretation permits LLEs to avoid the composite payment requirement for 2001. Here is the statutory language of Section 7 of Act 2001-1088 that we believe supports this interpretation:

"Notwithstanding any other provision of law, including any law enacted at the Fourth Special Session of 2001, if a nonresident owner of a subchapter K entity certifies in writing, under penalty of perjury, to the entity, prior to the filing of the entity's income tax return for the first taxable year beginning in calendar year 2002, that the nonresident owner has fully paid its Alabama income tax attributable to its distributive share of the entity's net taxable income allocated and apportioned to Alabama with respect to its taxable year ending in 2001 the entity shall not be required to pay to Alabama [the composite payment] for the period in question."

(emphasis added)

The statute's reference to the nonresident owners' written certification must relate to the entity's taxable year ending in 2001, but the deadline for filing is the date on which the entity's

income tax return for the first taxable year beginning in calendar year 2002 is filed. Most entities' 2002 tax returns will not be filed until 2003. Accordingly, the statute indicates that nonresident owners' sworn certificates will be effective if provided to the entity before April 15, 2003. The "period in question" in the final line must refer to the taxable year ending in 2001, not to 2002 or subsequent years.

Section 2 of Act 2001-1105 requires LLEs having one or more nonresident owners to file a composite return and make a composite tax payment on behalf of all their nonresident owners for the first taxable year beginning on or after January 1, 2001, but not for any other taxable year. For subsequent tax years (i.e., years beginning after the first tax year which begins on or after January 1, 2001), the filing of a composite return is optional under Section 1 of 2001-1105.

Although the ADOR has not issued a written basis for its interpretation, the ADOR legal division apparently believes that Section 7 of Act 2001-1088 contains a typographical error which causes its relief provisions to affect only tax years beginning in calendar year 2002, rather than 2001 as intended. As a fall-back argument, the legal division indicated that they believe the Section 7 safe harbor was repealed by the later enactment of Act 2001-1105. One source of this belief may be the correction proposed in the failed Technical Corrections Bill, H.B. 486, which would have changed the first reference date from "2002" to "2001," had the bill become law. Based upon a careful reading of the statute, however, and conversations with officials from the Legislative Reference Service of the Alabama legislature, as well as the principal authors of these provisions, it appears that the technical correction was not necessary to avoid the risk of a double tax payment for 2001. The correction only would have reduced the unduly long period provided for filing the nonresident owner tax payment certificates.

For subsequent years, however, this is not an issue since the purported drafting error relates only to tax year 2001. For tax years 2002 and after, the nonresident owner need only file a consent to Alabama jurisdiction with the LLE, in which case the owner is excluded from the composite return. If, however, the owner later fails to remit the proper income tax due for the year, the LLE will become liable for the tax, after being given 60 days' notice and an opportunity to coerce the recalcitrant owner into paying the tax. Fortunately, the contingent liability rule was not extended to S corporations doing business in the state.

House Bill 7 (Act 2001-1113)—On August 4, 2000, the Alabama Supreme Court, in *Ex parte Uniroyal Tire Co. v. State of Ala. Dep't of Revenue*, 779 So. 2d 227, reversed the court of civil appeals and held that the gain on the sale of Uniroyal's partnership interest was non-business income, allocable to the state of its commercial domicile. This landmark statutory construction case involved the proper interpretation of the state's "business income" definition, an issue of first impression in Alabama.

The court of civil appeals found that Uniroyal's gain from the sale of its only asset, a 50 percent interest in a general partnership with B.F. Goodrich, constituted apportionable business income. The administrative law division of the ADOR had previously ruled in favor of the taxpayer in a well-reasoned opinion, concluding that the ADOR regulation was in conflict with the statutory definition of business income found in Alabama's version of the Multi-state Tax Compact.

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The court of civil appeals had relied heavily on the North Carolina Supreme Court's decision in *Polaroid Corp. v. Offerman*, 507 S.E.2d 284 (N.C. 1998). The Alabama Supreme Court noted, however, that the North Carolina statute differed from the Alabama version in that it replaced the critical "and" with "and/or", significantly broadening the scope of the statutory definition.

The court hinted, however, that it might rule differently were the statute amended by substituting "or" (or perhaps "and/or") in place of "and." The legislature took the hint. House Bill 7 (Act 2001-1113) expressly overrules *Uniroyal* and adopts a much broader definition of "business income," patterned after a similar Iowa statute. The bill was made prospective only, for tax years beginning after December 31, 2001. See "Alabama overrules *Uniroyal*; redefines 'business income,'" *State Income Tax Alert*, Feb. 1, 2002, at 8.

Non-Income Tax Legislation

House Bill 62 (Act 2001-1090)—House Bill 62 equalizes the utility gross receipts tax on land lines and cellular telephones, effective February 1, 2002, by reducing land line rates from 6.7 percent to 6 percent, increasing cell phone rates from 4 percent to 6 percent, and imposing the 6 percent tax on interstate long-distance telephone calls, consistent with at least 35 other states. Part of the bill was required by a recent Congressional mandate. Pagers were also included. The revenue estimate on this bill was, and continues to be, the subject of continuing debate.

Charles J. Dean, "Leaders Warn About Effects of School Raise," *The Birmingham News*, March 15, 2002, at A7.

House Bill 58 (Act 2001-1114) and Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Bd., CV No. 01-703-G (September 17, 2001)—The State appealed the Montgomery County Circuit Court's order finding that the disparate tax imposed on out-of-state table wine versus wine produced in Alabama violated the Commerce Clause. The native wine tax exempted Alabama wineries that produce fewer than 100,000 gallons of wine per year from the table wine tax but imposed a special five cents per gallon tax on them. See *Ala. Code* §§ 28-6-1 *et seq.* Out-of-state wineries are taxed at 45 cents per liter, or approximately \$1.70 per gallon, for their products sold to Alabama wholesalers. See *Ala. Code* §§ 28-7-1 *et seq.* It was undisputed that the native wine tax was enacted to assist Alabama wine producers.

While appealing Circuit Judge Sally Greenhaw's ruling, the State simultaneously requested that she reverse her ruling that prohibited the State from continuing to collect the tax on sales of out-of-state wine. On October 10, 2001, Judge Greenhaw amended her prior ruling and permitted the State to continue to assess the tax—while requiring the State to escrow the money until the Alabama Supreme Court decided the issue or the Alabama legislature stepped in.

During the December 2001 Special Session, the legislature quietly passed House Bill 58 (Act 2001-1114), which purportedly corrects the disparate tax treatment of in-state and out-of-



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state wineries. The Act repealed the reduced tax on in-state wineries and their exemption from the 45 cents per liter table wine tax, retroactively effective October 1, 2001.

House Bill 8 (Act 2001-1066)—On June 4, the constitutional referendum authorized by House Bill 8 (Act 2001-1066) was approved by a favorable vote of the people establishing a Rainy Day Trust Fund for the education budget to hopefully prevent another round of pro ration. A number of other states have similar funds, which are now helping them weather the recent economic downturn. The Rainy Day Trust Fund will be created by transferring certain surplus revenues from the Alabama Trust Fund, created by a windfall last year from higher-than-expected oil and gas royalty payments. This concept was a mainstay of the BATC's "permanent pro ration prevention plan," although the final wording of the bill apparently did not adequately address the concerns of many regarding how the borrowed funds will be replenished within the prescribed time and what penalty would be imposed on the Legislature or the Governor if they are not. See "Should the Alabama Trust Fund Be Spent for Short-Term Budget Relief?," *Public Affairs Research Council of Alabama Report* no. 43 (spring 2002).

Failure of the Technical Corrections Bill

As mentioned above, Senate Bill 459 and its House companion, HB 486 ("Technical Corrections Bill"), failed to pass the Alabama legislature in the final days of the spring Regular Session. The bill was prepared to address three problems discovered soon after House Bill 2/Act 2001-1088 was enacted by the legislature in December. Those "glitches" relate to (a) the definition of "large corporation" for estimated income tax purposes; (b) the mysterious last-minute omission of a provision for waiver of interest and penalties regarding the one-time NOL suspension and retroactive limitations on certain related party transactions for 2001; and (c) the reference to certification of payment of Alabama income taxes for nonresident LLE owners for 2002, instead of 2001. The Technical Corrections Bill would have corrected those "glitches," retroactively.

New *Alabama Code* section 40-18-80.1 adopts almost verbatim the federal estimated tax rules for corporations. However, the definition of a "large corporation" refers to a corporation having \$1 million or more of "taxable income"—without refer-

ence to whether "taxable income" is federal or Alabama taxable income. The Technical Corrections Bill would add the word "federal" in the definition to clarify that to be considered a "large corporation," the taxpayer must have at least \$1 million or more in *federal* taxable income.

The initial drafts of Act 2001-1088 contained a provision, which dropped out of the bill mysteriously at the last minute, requiring the ADOR to automatically waive interest and any underpayment penalties for taxpayers who were caught in the retroactive suspension of their NOL carryovers or the limitations on related party interest and/or royalty deductions. The waiver provision is mentioned in the preamble of the Act but not in the body. Recall that the NOL and related party provisions did not pass until December 21, 2001. All four estimated tax payments (if any) for calendar year 2001 *would have already been calculated and remitted* by December 15, 2001 for corporations. No one would have voluntarily paid extra Alabama income tax last year on the prophecy that these provisions would actually pass on December 21. If, for example, a taxpayer with 2001 taxable income (before NOLs) lost the NOL deduction for 2001 as a result of this legislation, its estimated Alabama income tax liability would obviously increase, and depending on the size of the NOL and the taxpayer's 2001 taxable income that *would have been sheltered* by the NOL carryover, the interest and penalties could be substantial.

As discussed above, the change on the LLE composite return/withholding procedure, from tax year "2002" to "2001", was especially important to many LLEs operating in Alabama since the ADOR indicated that without this correction, they believe that the LLE must pay Alabama income tax on the Alabama distributive share of all nonresident partners, generally, on or before May 30, 2002—even if the nonresident owner paid it as well on March 15 or April 15.

As readers may glean from the above discussion, the continuing need for revenue in both the Special Education Trust Fund and the General Fund regrettably again may result in another special session, although many business and education leaders are calling for a renewed effort at comprehensive tax reform—an effort that would likely include tax increases in some areas while reducing the tax burden on the working poor. The authors certainly hope that such an effort soon will be undertaken, regardless of the outcome of the gubernatorial race. ■

The authors served as counsel to the Business Associations' Tax Coalition during the December 2001 Special Session, but the comments expressed herein are solely their own.



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In 1990 and 1991, he served as special counsel to the Alabama Legislature's Commission on Tax and Fiscal Policy Reform. He was one of the principal authors of the Alabama Taxpayers' Bill of Rights/Uniform Revenue Procedures Act of 1992 and of the 1996 Local Tax Simplification Act and Local Tax Procedures Act. He recently served as counsel to the Business Associations' Tax Coalition.

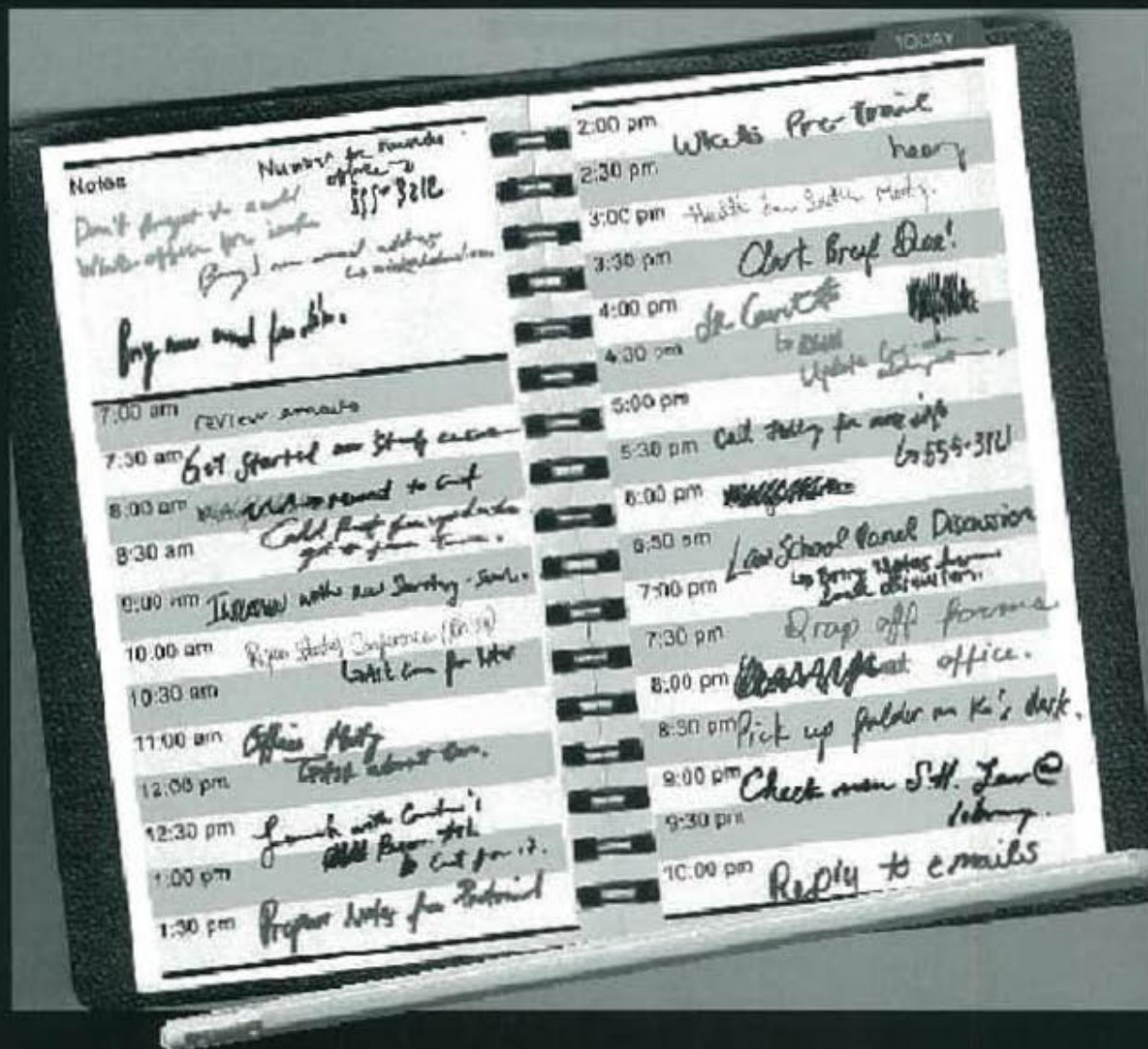
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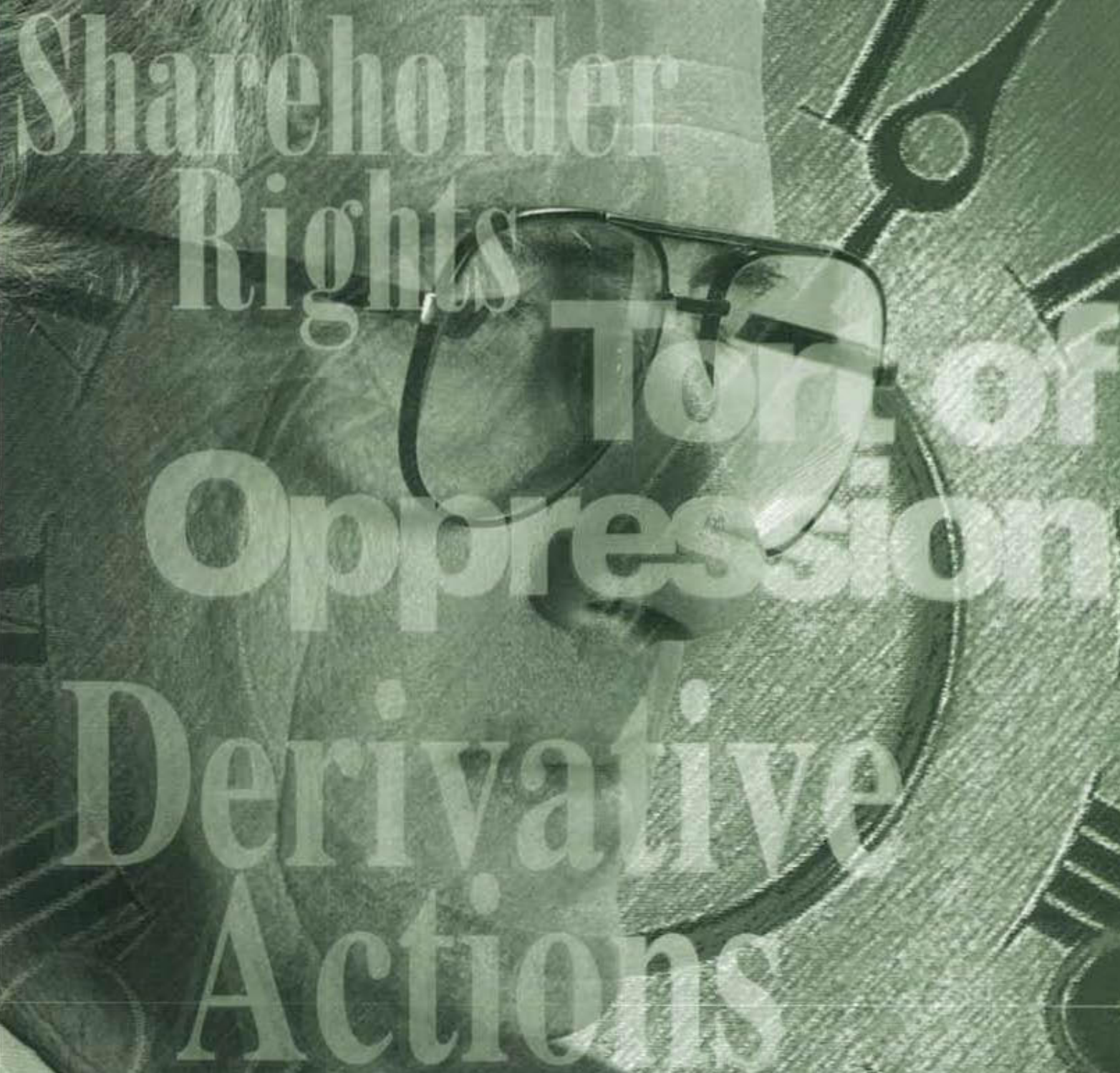
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Shareholder Rights, the Tort of Oppression and Derivative Actions Revisited:

A Time For Mature Development?

BY ANDREW P. CAMPBELL AND CAROLINE SMITH GIDIÈRE

In 1996, one of the undersigned wrote an article outlining the development of the claim of shareholder oppression, the parallels to derivative actions, and the possible remedies available for each. See Andrew P. Campbell, *Litigating Minority Shareholder Rights and the New Tort of Oppression*, 53 Ala. Law 108 (1992). With the continued or increasing popularity of closely-held businesses in this state, particularly those of L.L.C. and subchapter S variety, it is time for another look. Many principles have not changed significantly. But some have. This article will examine whether legal principles governing derivative claims and claims of oppression are in need of mature change to bring them more in line with practicalities of the business world and to offer more certainty to businesses, their investors, and courts grappling with these issues. It is the hope of the authors to shed light, not heat, on this still adolescent area of shareholder rights and offer possible solutions for positive development for both the affected closely-held business and majority and minority shareholders. (Shareholder rights in the context of public corporations implicate numerous other considerations, including a free and open market, that require a different analysis beyond the scope of this article.) In doing so, our guiding philosophy is to

discard formalistic shibboleths in favor of simple rules that make some sense in 21st century commerce.

Oppression: What is it Today?

Alabama courts have not yet fully defined the parameters of the claim of minority shareholder oppression. However, the working definition distilled from cases addressing the claim encompasses the (1) unilateral withholding or denial by the majority shareholder of certain expectations and privileges that a minority shareholder in a closely-held business could reasonably expect to receive where (2) the minority shareholder has no market to sell his shares at fair market value, thus prejudicing the rights of the minority shareholder. There are a limited number of expectations or privileges that accompany ownership of a minority interest in a closely-held business. The most fundamental of these expectations is the minority shareholder's right to a just share of corporate gains in the form of salary, dividends or other monetary benefits. See *Burt v. Burt Boiler Works, Inc.*, 360 So. 2d 327 (Ala. 1978). Often, oppression is measured by comparing the benefits received by the major-

ity shareholder to the quantum of such benefits he has distributed to the minority shareholder to determine whether the minority has received a proportionate share. See, e.g., *Ex parte Brown*, 562 So. 2d 485, 493-94 (Ala. 1990). Oppression exists if there is a systematic discrimination toward the minority shareholder in this regard. See *id.* at 494.

Other expectations or privileges of ownership of a minority interest in a closely-held business that may create a claim of oppression when denied include the rights (1) to participate and to have input in the corporate affairs, (2) to reap the return on the investment (which overlaps with the first expectation of a right to share in profits), and, in certain situations, (3) to employment. O'Neal and Thompson provide use the frequently cited laundry list of squeeze out techniques:

The squeezers may refuse to declare dividends; they may drain off the corporation's earnings by exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, by high rental agreements for property the corporation leases from majority shareholders, or by unreasonable payments under contracts between the corporation and majority shareholders; they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corpora-



tion to sell its assets at an inadequate price to the majority shareholders or to companies in which the majority are interested; they may organize a new company in which the minority will have no interest, transfer the corporation's assets or business to it, and perhaps then dissolve the old corporation; or they may bring about the merger or consolidation of the corporation under a plan unfair to the minority.

F.H. O'Neal & R. Thompson, *O'Neal's Oppression of Minority Shareholders*, ⁴ 3.02 (2d Ed. 1995) (internal footnotes omitted).

The difficulty for litigators and corporate lawyers is applying these standards to the real world of closely-held busi-

nesses. In our experience, there are few black and white cases of oppression anymore; rather, they are blended into shades of gray. Consider, for example, the majority shareholder of a subchapter S corporation who refuses to declare dividends because of a perceived need for additional cash flow. Is this sufficient grounds for a finding of oppression? What if the company is profitable and its net worth has been increased? What about a majority shareholder who, like the majority in *Ex parte Brown*, discriminates against minority shareholders in employment and payment of corporate profits, but builds the corporation's net worth a hundred- or thousand-fold such that the minority (or their children) will recognize a tremendous gain upon the ultimate sale of the business? When does a minority shareholder have a right to a job if he or she and the majority share-

holder cannot get along; how does this square with the doctrines of determination of will; and must the majority shareholder make up for the differential in salaries through increases in dividends paid to the minority shareholder? These are all difficult questions.

And finally, what of the existence of a market? In *Brooks v. Hill*, 717 So. 2d.759 (Ala.759), the Alabama Supreme Court held that a necessary component of oppression was lack of a fair market for the minority shareholders to sell out. But, is there oppression where a buy-sell agreement between the corporation and its shareholders creates a private market, albeit for a less than fair market value price (e.g., book value)? Professional firms and other corporations frequently use such buy/sell agreements that essentially create a private market and give the minority shareholder an out in the event

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of a falling out or disagreement with the majority shareholder.

Difficult as it is to reach certainty with these issues in real life, most oppression cases usually involve several of the examples of squeeze out listed by O'Neal and Thompson, where the majority shareholder is using the capital of the minority shareholder and denying the minority substantial participation in the corporation. The typical case, however, does not include the systematic effort by a majority shareholder to totally squeeze out the minority shareholder through various techniques; instead, the majority, through the use of one or two techniques, treats the minority unfairly, possibly to the detriment of the corporation. A better approach in these "mixed cases" is to move from a finding of oppression to a range of common sense remedies that balance the interests of (1) the minority shareholder in fair treatment, (2) the majority shareholder in the right of control, and (3) the corporation in continued profitable existence.

Do Derivative Claims Still Make Sense in Closely-Held Corporations?

The difficulty in applying these standards to real world businesses is enhanced by the present, wooden distinction between individual oppression claims against the majority shareholder and derivative claims purportedly brought upon behalf of the corporation against the majority shareholder. It is now axiomatic that claims of wrongdoing by the majority shareholder against the corporation's interests must be brought derivatively and not individually by minority shareholders. *See, e.g., Hardy v. Hardy*, 507 So. 2d 409 (Ala. 1987); *Galbreath v. Scott*, 433 So. 2d 454, 457 (Ala. 1983); *Green v. Bradley Constr. Inc.*, 431 So. 2d 1226 (Ala. 1983). And, conversely, oppression

claims against a majority shareholder must be brought individually by the minority shareholder and not derivatively on behalf of the corporation. *See Ex parte Brown*, 562 So. 2d at 491-92; *McDonald v. U.S. Die Casting & Dev. Co.*, 541 So. 2d 1064 (Ala. 1989); *Green*, 431 So. 2d at 1229. In a close corporation, this Chinese wall often represents a distinction without a difference. In most situations, the conduct in both settings is the same, and it injures both the corporation and the minority shareholder.

The clearest example of when this distinction is without a difference is "corporate waste" by the majority. The Supreme Court has long defined corporate waste as majority shareholders misusing corporate assets for its own private purposes and not for their benefit of the corporation. *See, e.g., Brooks*, 717 So. 2d at 761; *Banks v. Bryant*, 497 So. 2d 460, 464 (Ala. 1986); *Finance, Investment, & Rediscount Co. v. Wells*, 409 So. 2d 1341, 1342 (Ala. 1981) (upholding jury award on claim of corporate waste where majority shareholder misused corporate assets and usurped corporate opportunities). The Supreme Court has held that only the corporation has standing to assert a such claim, because the injury to a minority shareholder is "incidental" and "indirect" compared to the injury to the corporation. *See Pegram v. Hedding*, 667 So. 2d 696, 702 (Ala. 1995) ("It is well settled that when injuries sought to be recovered by a plaintiff are incidental to his or her status as a stockholder, the claim is a derivative one and must be brought on behalf of the corporation."); *Galbreath*, 433 So. 2d at 457 ("Waste of corporate assets by majority stockholders is primarily an injury to the corporation itself. The injury to minority stockholders is secondary."). Therefore, claims must be brought derivatively on behalf of the corporation. *See Brooks*, 717 So. 2d at 767 (holding that "a minority shareholder cannot recover on his own behalf for a director's waste of corporate assets, even in the close corporation context"); *Distronics Limited v. Disc Manufacturing, Inc.*, 686 So. 2d 1154,

1164 (Ala. 1996) (*rev'd on other grounds*) (holding individual claim for misappropriation of corporate assets properly dismissed, because "[o]nly through a derivative action can a stockholder seek redress for injury to the corporation in which he owns stock").

But in the situation of a closely-held business where there are two, three, or four shareholders and the majority shareholder misappropriates or wastes corporate assets, why is the damage to a minority shareholder indirect? The traditional analysis breaks down when we examine how a real corporation operates. In the typical closely-held business, substantial corporate waste by the majority shareholder will directly deprive the minority of her fair share of the profits B thus, blurring the line between corporate and individual injury. For example, in *James v. James*, 768 So. 2d 356 (Ala. 2000), the undersigned represented the minority shareholder of a corporation owned by two brothers. The majority shareholder held 57 percent of shares; his brother, the minority shareholder plaintiff, held approximately 43 percent of shares. *See id.* at 357. The evidence at trial showed that the majority shareholder had wasted corporate assets over a period of years without the knowledge of his brother by paying himself excessive salaries and bonuses and by providing himself and other family members benefits that he denied his brother. *See id.* While there was no question that the wasting of corporate assets injured the corporation, the evidence showed that, as a result of the majority shareholder's excesses, the minority shareholder had received less than 20 percent of the overall profits of the corporation (after salaries were added back). In other words, not only had the majority shareholder's actions injured the corporation, but the minority had been oppressed by being denied his just share of corporate gains. Because it was clear that the injury to the minority shareholder in *James* was direct and that the corporation had been injured as a result of the same conduct, the minority shareholder filed both a derivative and an individual claim

for oppression. *See id.* While the supreme court upheld the jury award to the minority shareholder individually due to the special circumstances of the case, it noted that the claims were actually derivative and not individual claims of oppression. *See id.* at 358.

Ex parte Brown, 562 So.2d 485 (Ala.1990), further demonstrates the confusion between a derivative claim of waste and an oppressive denial of a minority's share of income. In *Brown*, the court held that the majority's payment of excessive salaries to controlling shareholders and theft of corporate opportunity, among other things, constituted evidence of oppression. *See id.* at 493-94. Those same facts supported the court's earlier finding of corporate waste by the majority. *See id.* at 487-91. Thus, failure to provide corporate opportunities to the corporation can, in addition to injuring

the corporation, directly injure a minority shareholder by denying the minority of the expectation to receive a just share of corporate gains and to participate fully in management. In sum, the same facts can give rise to either a derivative or an oppression claim, particularly when they involve fraudulent concealment such as secreting corporate opportunities.

Thus, in the closely-held business setting, whether the wrongful acts by a majority shareholder sounds as a derivative claim or one of oppression can depend more on the craftiness of the minority's attorney in the drafting and presentment of claims as opposed to any real factual difference. Investors as well as courts and juries deserve more certainty than a semantic fault line between derivative and oppression actions. Furthermore, for a number of reasons, the distinction has little viability in a closely-held business.

First, most closely-held businesses have few shareholders and are operated more like a partnership than a corporation. *See Galbreath*, 433 So. 2d at 457 ("When shareholders serve on the board of directors and appoint themselves as officers, the enterprise acquires many of the attributes of a partnership or sole proprietorship and ceases to fit neatly into the classical corporate scheme.") (citing 1 O'Neal, *Close Corporations*, * 1.07, 1.10, and 1.12 (2d ed. 1971)). Thus, as a practical matter, designating a claim "derivative" is a distinction without a difference.

Conversely, the corporation, not just the majority shareholders, has a substantial stake in the outcome of an oppression case. Even though in theory, a claim of oppression is a claim brought by the minority shareholder against the majority shareholder(s) for breach of fiduciary duty, the remedies imposed for oppres-

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sive conduct can dramatically effect the existence of the corporation. In cases like *Fulton v. Callahan*, 621 So. 2d 1235 (Ala. 1993), where the majority's conduct is "illegal, oppressive, or fraudulent," a court may order the liquidation or dissolution of the corporation. See Ala. Code § 10-2B-14.30 (2) (ii). Likewise, a majority shareholder guilty of oppression may be removed from control. See *Fulton*, 621 So. 2d at 1254. The corporation clearly has an interest in this remedy, particularly if the majority has operated the company in a profitable manner, apart from its transgression. Additionally, a majority shareholder may advance the assets of the corporation for attorney's fees to defend himself against claims of corporate oppression. See Ala. Code § 10-2B-8.51. Accordingly, the corporation's interests are not limited to a derivative action brought on its behalf, but extend to an individual oppression claim brought by a minority shareholder. Given the disastrous effects many of the remedies may have on the viability of the corporation as a going concern, the courts should take into account the corporation's interests at the remedies stage, separate and apart from the shareholders. One of the interesting questions the supreme court has not yet faced is whether separate counsel should be appointed by the court in the form of a guardian to represent the interests of the corporation in an oppression action, particularly at the remedies stage.

A third reason that the distinction maintains little viability in the closely-held business is that the demand requirement, which is a legitimate prerequisite to a derivative claim in a public company, is no longer a realistic requirement in a closely-held business. In a public company where management by a board of directors is separated from ownership of capital, the demand affords the board or an independent committee an opportunity to investigate alleged wrongdoing and to redress it prior to intervention by courts into corporate affairs. See generally *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1577-79 (D. Kan. 1986). In the closely-held business, the majority usually is or controls the board. It will be

a rare case where the demand is not futile in a closely-held business because (1) the controlling shareholder is almost always in control of the board, and (2) the interests of the controlling shareholder will inevitably be alleged to be adverse to those of the corporation and the minority shareholder. A number of cases have tested the primary determination of whether a demand is futile, and the courts have found the futility requirement easily met even with a specificity pleading standard required under Rule 23.1 of the ALABAMA RULES OF CIVIL PROCEDURE. See *James v. James*, 768 So. 2d at 360; *Elgin v. Alfa Corp.*, 598 So. 2d 807 (Ala. 1992); *Shelton v. Thompson*, 544 So. 2d 845 (Ala. 1989); *American Life Ins. Co. v. Powell*, 80 So. 2d 487 (Ala. 1954).

Finally, the basic argument for disregarding the derivative/oppression distinction is that it is too uncertain and deprives shareholders in a closely-held business of a clear understanding of their rights and duties. A bright line list of duties and rights defining the party's relationship without regard to whether the claim is the corporation's or the oppressed shareholder's is certainly preferable. Eliminating the distinction between corporate and individual claims would also allow for a more practical range of remedies, that take into account the interests of the corporation and investors.

The Maddox Standard: A Guide for the Future?

The starting point for an alternative analysis of conduct is Justice Hugh Maddox's dissenting opinions in *Stallworth v. AmSouth*, 709 So. 2d 458, 469-70 (Ala. 1997), and *Brooks v. Hill*, 717 So. 2d 759, 768-71 (Ala. 1998). In those opinions, Justice Maddox advocated a disregard of the derivative/direct injury approach in favor of a strict application of partnership principles in the

closely-held business setting. While the courts continuously have defined the framework of the oppression claim as arising from the partnership attributes of closely-held corporations, see, e.g., *Galbreath*, 433 So. 2d at 457, Justice Maddox took the analysis one step further. To Justice Maddox, defining the claim at the front end as derivative or individual was not necessary or desirable, because the parties' relationship and relative rights and expectations are most akin to those created in partnership contracts:

By considering the claims raised in this case from that perspective, one may understand the creation of the corporation as the creation of "the long-term relational contract which contemplates that each participant will contribute capital or services and then proceeds will be equitably shared." ...

The articles of incorporation embody the contract establishing the corporation, and that contract governs the duties and responsibilities of the shareholders, directors, and officers. It may be, however, that the written contract does not contain an explicit statement of all the parties' understanding, but it is implicit that "parties who form closely-held firms intend an equitable share of returns." ...

My view of the nature of the cause of action for minority shareholder "squeeze out" is based on the theory of an implicit agreement to share the proceeds from corporate activities.... I believe that a violation of duty to act fairly is a breach of the parties' explicit or implicit agreement and that the appropriate remedy for a breach of that agreement is one that would protect the reasonable expectations of the shareholders.

709 So. 2d at 469-70 (quoting J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders Fiduciary Responsibilities*, 22 Wake Forest L. Rev. 9, 22 (1987) (footnotes omitted)).

In *Brooks*, Justice Maddox went further, opining that a claim for corporate waste should be viewed in the closely-

held context as a question of a breach of covenants between partners:

The distinction I see between closely-held corporations and widely-held corporations is material to my view on the appropriate resolution in this case. I believe that the most appropriate way of approaching a dispute between shareholders of closely-held corporations is to consider it, as discussed above, as a dispute over the breach of explicit or implicit agreements of the shareholders. Further, I believe that this theory is applicable in cases where the cause of action might traditionally be treated as a derivative claim. Where claims involve closely-held corporations, I believe it is more efficient and a better reflection of the true state of affairs among "partners" in such a business to treat such claims as claims of squeeze out.

717 So. 2d. at 769-70.

An examination of a closely-held business reveals the majority and minority shareholders have created a package of covenants creating a relationship between each other, the corporation and the State of Alabama, which creates and regulates the corporate entity and imposes public policy on it. In assessing rights, duties and remedies arising from this relationship, one must consider the interests of all four parties. In defining explicit versus implicit covenants between these parties, one can postulate a set of specific bright-line rules based upon prior cases and statutes that govern the closely-held business. These rules, with ancillary rights and duties, can be broken down into two categories: (1) controlling shareholder misconduct and (2) controlling shareholder mismanagement. Reviewing potential claims in the context of a few bright-line rules, as opposed to a derivative versus individual distinction, offers investors, courts and juries greater certainty in the operations of their business.

With respect to the first category, shareholder misconduct, the relationship among the four parties creates the following duties:

1. A majority shareholder must manage the corporation for the benefit of all shareholders as opposed to simply for the benefit of the majority shareholder. Under this rule, the majority shall not engage in corporate waste, including excessive salaries or misappropriation corporate opportunities, which injure both the corporation and the minority shareholder.
2. A majority shareholder must pay to minority shareholders their proportionate share of gains on profits, considering salaries, bonuses and other benefits, but also giving due credit to the relative contribution of each shareholder to the day-to-day operation of the corporation.
3. The majority shareholder must allow minority shareholders to freely participate in affairs of the corporation. This includes the duty to hold share-

holder meetings on a regular basis, to consult with the minority, and to allow the minority shareholder the right to cast his vote in all matters involving the company. This requirement also recognizes the right of the majority control within these limits.

4. The majority shareholder has a duty to fairly and honestly disclose all records and financial information concerning the company to minority shareholders. This encompasses the right of inspection rule given to minority shareholders by statute, *see* Ala. Code § 10-2b-16.02 (1980), and affirms that this right of a minority shareholder includes the right of access to all corporate records for any proper purpose.
5. The majority shareholder has the duty not to perform any act or omission with the intent to depreciate the market value of stock with the purpose of pricing it less than fair market value. This policy, set out Alabama Code § 10-2b-8.32, creates a separate statutory oppression claim under Alabama law. *See Brooks*, 717 So. 2d at 764; *Fulton*, 621 So. 2d at 1245-46.

The second category of rules, concerning controlling shareholder management of the corporation, is codified at Alabama Code § 10-2B-8.30. Controlling shareholders in a close corporation are statutorily required to manage the corporation in good faith, in a manner they reasonably believe in the best interest of the corporation, and with the care of an ordinary prudent person in a like position under similar circumstances. *See* § 10-2B-8.30(a) (1)-(3); *see also Holcomb v. Forsythe*, 113 So. 516 (Ala. 1927). Under this duty, the minority shareholders in the corporation have a right to competent, good faith management of the corporation. However, this judgment rule protects a controlling shareholder from liability if

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he has exercised good faith and exercised ordinary prudence. Claims of mismanagement will be much more difficult to prove than claims of misconduct.

The advantage to this approach is that, once a shareholder makes a claim of misconduct or mismanagement, the analysis moves to the merits of the claims, rather than engaging in a burdensome analysis of whether the claims are derivative or individual claims of oppression, or both. If the factfinder finds in favor of the minority shareholder on the claim, the remedies imposed by the court should then take into account *both* the rights and interests of the corporation and of the minority shareholder. This approach contemplates different remedies that can both protect the corporation and fulfill the expectations of the minority shareholder.

Flexible But Principled Sliding Scale Approach to Remedies

Upon a finding of a breach of the above duties, the trial court should apply appropriate remedies to protect the corporation and redress the expectations of the minority shareholder. For example, in the *James* case, where the majority shareholder wasted millions of dollars of assets, an appropriate remedy for the minority shareholder was an award of his proportionate share of the amount misap-

propriated by the majority. In order to protect the corporation's interest, an appropriate additional remedy might be an award to the corporation of balance of assets misappropriated by the majority shareholder (representing the majority shareholder's percentage of the misappropriated assets) and, perhaps, the removal of the majority shareholder, as in *Fulton v. Callahan*.

The courts must be careful, however, to frame a remedy that protects the ongoing operations of the successful corporation. For example, the most frequent scenario encountered by the undersigned is a successful corporation where the majority shareholder has successfully built a corporation, thereby substantially increasing the minority's interest and corporate yields, but, at the same time, has abused his position by taking corporate opportunities for himself or his family, while denying those opportunities to the minority. In such cases, the interests of the corporation may be at odds with that of the minority shareholder. In this gray case, the appropriate remedy may be a verdict in favor of the minority shareholder for his proportionate share of the "ill-gotten-gains" the majority made from the theft of corporate opportunities, and the corporation may be entitled to a constructive trust over the corporate opportunity as prospective relief. While a minority shareholder may seek the removal of the majority shareholder, the more appropriate remedy that balances the interests of the corporation may be to appoint a new and independent board of directors, *see Fulton v. Callahan*, to supervise a majority shareholder who has otherwise proved

to be a competent manager. The reality is that, in many closely-held businesses, separating the corporation from the experience and skills of the majority shareholder or, worse, permanently removing him, ultimately would injure both the corporation's and the minority shareholder's interests. Thus, the intervention of an independent board, perhaps answerable to the court for some period of years under a continuing jurisdiction with representation of the minority's interests, may be an appropriate middle ground. This would allow for the continued successful management of the corporation, but protect the corporation and the minority shareholder from future abuses by removing the temptation from the majority shareholder to enrich himself.

At the advent of the 21st century, in the post-Enron world, corporate governance is not a black and white issue. It produces many shades of gray. With this complexity, we should seek a simple set of rules of behavior that govern shareholder relationships in closely-held businesses. As Justice Maddox mentioned, this goal would be advanced by disregarding the derivative/direct dichotomy in favor of bright line rules for conduct along with the application of flexible remedies that take into account the interests of the corporation and its shareholders. Otherwise, courts and investors will continue to be governed by hazy and vague requirements that offer little guidance and are subject to varying interpretation as to whether they are derivative in nature or individual. We need certainty and simplicity. Justice Maddox has set us upon that road, and we should follow it. ■



Andrew P. Campbell

Andrew P. Campbell is the managing partner of Campbell, Waller & Poer, LLC in Birmingham. After graduating from the University of Alabama School of Law in 1978, where he was a member of the *Law Review*, Campbell clerked for Judge Walter P. Gerwin on the Fifth Circuit Court of Appeals. Since that time, he has practiced in Birmingham. He has also served as a member of the Birmingham Bar Association Executive Committee and chairman of the Business Torts Section of the Alabama State Bar.



Caroline Smith Gidiere

Caroline Smith Gidiere practices with the firm of Campbell, Waller & Poer, LLC. After graduating from the University of Alabama School of Law in 1996, she clerked for the Honorable Edward E. Carnes of the United States Court of Appeals for the Eleventh Circuit and practiced for two years with the commercial litigation branch of the U.S. Department of Justice, civil division, in Washington, D.C. before returning to Birmingham. Her article, "What is Fair Value Under Alabama's Dissenting Shareholder Statute?",

appeared in the July 2001 issue of *The Alabama Lawyer*.



Reinstatements

- The Supreme Court of Alabama entered an order based upon the decision of Panel VI of the Disciplinary Board of the Alabama State Bar reinstating Phenix City attorney **Ralph Michael Raiford**, to the practice of law in the State of Alabama, effective May 15, 2002. [ASB Pet. No. 02-01.]
- The Supreme Court of Alabama entered an order reinstating New Orleans attorney **Berney Leopold Strauss** to the practice of law in the State of Alabama effective May 17, 2002. This order was based upon the decision of Panel V of the Disciplinary Board. Strauss was previously suspended for noncompliance with CLE requirements. [ASB Pet. No. 02-04]

Disbarments

- On April 19, 2002, the Alabama Supreme Court entered an order adopting the decision of the Disciplinary Board, Panel V, to disbar Tuscaloosa attorney **Roger Shayne Roland** from the practice of law, effective February 20, 2002. Roland entered a consent to disbarment on February 12, 2002. The disbarment was the result of Roland's violating the Alabama Rules of Professional Conduct in 20 separate disciplinary cases. [ASB nos. 95-125(A), 96-145(A), 96-195(A), 96-275(A), 96-312(A), 96-317(A), 96-344(A), 96-364(A), 96-365(A), 96-373(A); 97-09(A), 97-21(A), 97-26(A), 97-27(A), 97-49(A), 97-71(A), 97-94(A), 97-166(A), 97-167(A), and 97-222(A)]
- Mobile attorney **Frank Dreaper Cunningham** consented to disbarment, and on June 10, 2002, Panel V of the Disciplinary Board of the Alabama State Bar, entered an order accepting the consent to disbarment and ordering that Cunningham be disbarred from the practice of law in the State of Alabama. The board further ordered that the disbarment be retroactive to July 31, 1996, the effective date of Cunningham's interim suspension from the practice of law.
In ASB 95-238(A), formal charges were filed on

April 10, 1996 alleging that Cunningham misappropriated \$7,500 from his client, the Maryland Insurance Group. Cunningham had been retained to collect a subrogation claim. He collected \$7,500 on behalf of the client, but did not remit the client's share of the funds to the client. Cunningham refused to communicate with the client regarding the matter. When the client filed a grievance with the Alabama State Bar, Cunningham refused to respond to repeated requests for information from the Alabama State Bar or the local grievance committee of the Mobile Bar Association. These charges were served on Cunningham on April 15, 1996.

On or about July 18, 1996, the Office of General Counsel of the Alabama State Bar filed a petition for interim suspension. The petition was based, in part, on the allegations contained in ASB 95-238(A) and an additional complaint filed in ASB 96-047(A) alleging that while Cunningham was representing a client in a criminal matter, he accepted property belonging to the client from United States Customs that had been seized from the client at the time of his arrest. Upon receipt of the property, Cunningham did not return it to the client despite the client's repeated demands for return of the property. The petition also alleged that during the investigation of both complaints, Cunningham did not respond to requests for information from a disciplinary authority or otherwise cooperate with the investigations. On July 31, 1996, the Disciplinary Commission entered a restraining order interimly suspending Cunningham from the practice of law in the State of Alabama effective that date. [ASB nos. 95-238(A) and 96-47(A)]

Suspensions

- Montgomery attorney **Silas Crawford, Jr.** 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 July 2, 2002. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Crawford had failed to respond to requests for information from a disciplinary

authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 02-09]

- Birmingham attorney **Paul Archie Phillips** submitted a conditional guilty plea on May 1, 2002 to the following complaints:

Phillips pled guilty to charge III of the formal charges filed against him. On July 1, 1999, Phillips disbursed settlement proceeds to a client, David Arnold. Phillips received 25 percent of the gross settlement. On or about August 24, 1999, Phillips received a second check in the amount of \$1,749, in connection with Arnold's settlement. Although this check was made payable to both Arnold and Phillips, Phillips endorsed Arnold's name as well as his own and converted the proceeds to his own use. Phillips pled guilty to violating Rule 1.15(b) [safe-keeping property] of the Alabama Rules of Professional Conduct. All other charges in this matter were dismissed. [ASB No. 00-66(A)]

Phillips pled guilty to a violation of Rule 8.4(g) of the Alabama Rules of Professional Conduct, arising out of an insufficient funds check Phillips issued to his client, Beverly Palmer. Phillips received a payment on behalf of his client in the amount of \$2,122. Phillips did not recall if the payment was in cash. Phillips wrote Palmer a check from his personal account. The check did not clear his bank. Phillips pled guilty to violating Rule 8.4(g) [misconduct] of the Alabama Rules of Professional Conduct. All other matters were dismissed. Phillips paid Palmer the sum of \$2,122. [ASB No. 01-131(A)]

Phillips will be suspended from the practice of law in the State of Alabama for a period of 91 days; the imposition of the suspension shall be abated pending Phillips's successful completion of a two-year probationary period. Conditions of Phillips's probation state that he shall not violate any Rule of Professional Conduct during the two years. Phillips will remain active in the Alabama State Bar Lawyers Assistance Program under the direct supervision of its director.

- Gadsden attorney **John Edward Cunningham** was interimly suspend-

ed 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 21, 2002. The Disciplinary Commission found that Cunningham'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); Pet. No. 02-07]

- Former Birmingham attorney **James Donald Hughes** was suspended from the practice of law in the State of Alabama for a period of one year, effective May 16, 2002, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

Hughes entered a conditional guilty plea to engaging in conduct involving fraud, dishonesty, deceit or misrepresentation in violation of Rule 8.4(c), Alabama Rules of Professional Conduct. The Disciplinary Board accepted his plea and further ordered that Hughes make restitution to the law firm in the amount of \$69,102.57.

During the time Hughes was employed by his former law firm, he took more than \$40,000 from the firm through a scheme whereby he would receive reimbursement from the firm for airline tickets purchased on his personal credit card, ostensibly for firm business, but which he never used and later returned to the airline for a refund or credit. Hughes did not disclose the credit or refund to the firm and kept the reimbursement. [ASB No. 01-207(A)]

- Phenix City attorney **Gregory Kelly** was suspended from the practice of law in the State of Alabama for a period of 180 days, effective July 1, 2002, by order of the Alabama Supreme Court. Kelly was previously disbarred from the practice of law in the State of Alabama effective June 30, 1999. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

Formal disciplinary charges were served on Kelly on April 20, 1999, alleging that he failed to provide competent representation to a client, knowingly failed to respond to a lawful

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Notices to Show Cause

Notice is hereby given to **Tanita Michelle Cain**, who practiced law in Greenwood, Indiana, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 29, 2002, she has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Client Security Fund assessment requirement for 2002. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF 02-13]

Notice is hereby given to **Sarah A. Cunningham**, who practiced law in Jackson, Mississippi, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 29, 2002, she has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Client Security Fund assessment requirement for 2002. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF 02-19]

Notice is hereby given to **Warren Mitchell Parrino**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the

Alabama State Bar, dated April 29, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Client Security Fund assessment requirement for 2002. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 02-73]

Notice is hereby given to **Christopher Bernard Pitts**, who practiced law in Montgomery, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 29, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Client Security Fund assessment requirement for 2002. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 02-75]

Notice is hereby given to **James Clayton Davie, Jr.**, who practiced law in New Orleans, Louisiana, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall

result in a suspension of his license. [CLE 02-27]

Notice is hereby given to **Elizabeth Potter Graham**, who practiced law in Vestavia Hills, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, she has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE 02-40]

Notice is hereby given to **Boyett Judson Hennington, III**, who practiced law in St. Petersburg, Florida, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-48]

Notice is hereby given to **Gary Alan Smith**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the

demand for information from a disciplinary authority and engaged in conduct that adversely reflected on his fitness to practice law, violations of rules 1.1, 8.1(b) and 8.4(g), A.R.P.C. The basis of the complaint filed against Kelly was that he rendered ineffective assistance of counsel during his representation of a client in an appointed criminal case.

Although served with the formal charges, Kelly did not answer or otherwise plead to the charges and a motion for default judgment was granted on February 18, 2002.

A hearing to determine discipline was held on April 9, 2002. Kelly did not appear at the hearing. [ASB No. 99-22(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 June 20, 2002. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Hood had failed to respond to requests for information from a disciplinary authority during the course of disciplinary investigations. [Rule 20(a); Pet. No. 02-08]
- Mobile attorney **Clarence Christopher Clanton** was suspended from the prac-

tice of law in the State of Alabama for a period of three years retroactive to March 17, 2000 by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of the Disciplinary Board, Panel V, accepting Clanton's guilty plea in four cases.

In ASB No. 00-156(A), Clanton admitted that he was employed to represent a client in a worker's compensation case on a 33 percent contingency fee basis. During the course of the representation he did not return telephone calls or otherwise correspond with the client concerning the status of her case. He refused the client's requests to review her file during the course of

Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-84]

Notice is hereby given to **Wayne Harris Smith**, who practiced law in Heflin, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-87]

Notice is hereby given to **Daniel Wayne Burns**, who practiced law in Bessemer, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-127]

Notice is hereby given to **Martha Renee Bozeman**, who practiced law in Alexandria, Virginia, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, she has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE 02-136]

Notice is hereby given to **Laurie Ann Richardson Burch**, who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, she has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE 02-137]

Notice is hereby given to **Kenneth Holloway Millican**, who practiced law in Hamilton, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of

this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-147]

Notice is hereby given to **Allen Eugene Purdue, Jr.** who practiced law in Birmingham, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-164]

Notice is hereby given to **Richard Leigh Watters**, who practiced law in Mobile, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2002, he has 60 days from the date of this publication (September 15, 2002) to come into compliance with the Mandatory Continuing Legal Education requirements for 2001. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 02-169]

the representation. On the eve of trial, Clanton went to the client's grandmother's house after 10 p.m. and advised the client that her case was set for a hearing the next morning and that she needed to be in court. The client appeared, but Clanton was late. Upon arrival, he instructed the client that they were going to settle her case for \$5,000. The client agreed to the settlement. After the court approved the settlement, the attorney for the defendant delivered a check to Clanton in the amount of \$5,000. Clanton advised the client that he would deduct his fees and remit the remainder to her. Clanton did not remit the client's portion of the settlement to her and, there-

after, abandoned her and her case. Clanton did not respond to the requests for information during the course of the investigation conducted by the local grievance committee of the Mobile Bar Association. Clanton pled guilty to violating rules 1.4(a), 1.4(b), 1.15(c), 1.16(d), 8.1(b) and 8.4(a)(c)(d) and (g), A.R.P.C.

In ASB No. 99-243(A), Clanton was employed by a client to represent him in a racial discrimination case against his employer. The client paid Clanton \$700 as partial payment on a total fee of \$3,400. Thereafter, Clanton filed a lawsuit but not within the applicable statute of limitations. The defendant employer filed a motion for summary

judgment based upon the affirmative defense of the statute of limitations. Although the court granted Clanton additional time to respond to the motion, Clanton did not respond. As a result, summary judgment was granted against the client. Thereafter, Clanton did not notify the client that summary judgment had been granted in his case. He did not return telephone calls or respond to written correspondence or otherwise communicate with the client concerning the status of his case. The defendant then filed a motion to re-tax the cost of defense to the plaintiff. Clanton did not respond to the motion, which resulted in costs in the amount of \$322.60 being taxed against the

client. Thereafter, Clanton did not inform the client that costs had been taxed against him and despite repeated requests by the client, did not return the client's documents and file to him. Clanton did not respond to the requests for information during the course of the investigation conducted by the local grievance committee of the Mobile Bar Association. Clanton pled guilty to violating rules 1.1, 1.3, 1.4(a) and 8.1(b), A.R.P.C.

In ASB No. 00-77(A), Clanton was employed to probate the estate of a client's deceased mother. Thereafter, Clanton failed to probate the estate or to take any other substantive legal action on the client's behalf. He did not return telephone calls or respond to written requests for information or otherwise correspond with the client concerning the status of her mother's estate. He also failed or refused to deliver the client's file and documents to her upon request. Clanton did not respond to the requests for information during the course of the investigation conducted by the local grievance com-

mittee of the Mobile Bar Association. Clanton pled guilty to violating rules 1.3, 1.4(a), 8.1(b) and 8.4(g), A.R.P.C.

In ASB No. 00-87(A), formal charges were filed based upon Clanton's March 14, 2000 arrest for possession of crack cocaine and other illegal substances. The criminal cases were nolle prossed on motion of the State of Alabama on December 12, 2000, based upon Clanton's completion of a drug treatment program. Clanton pled guilty to violating rules 8.4(b), (d) and (g), A.R.P.C. [ASB Nos. 99-243(A), 00-77(A), 00-87(A) and 00-156(A)]

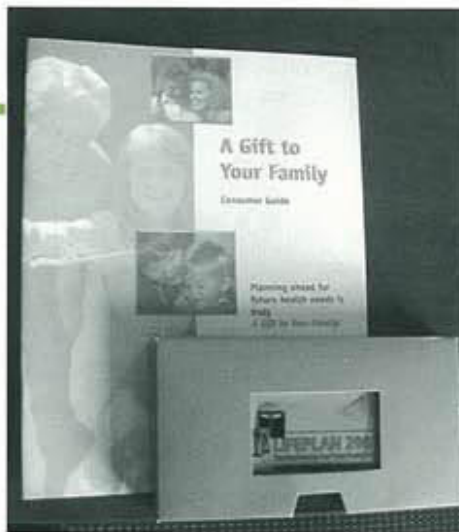
- On June 10, 2002, the Disciplinary Board, Panel V, entered an order dissolving Foley attorney **Preston Lee Hicks's** interim suspension. This dissolution was conditioned on the grounds that Hicks adhere to the terms of the two-year contract he entered into with the Alabama Lawyers Assistance Program and that he enter into a working agreement with the bar's Law Office Management

Assistance Program. Should Hicks not comply with the conditions of the contract, then an order will be entered revoking the dissolution, and Hicks's original interim suspension shall again become fully operational and effective. [Rule 20(a); Pet. No. 02-01]

- Gadsden attorney **John David Floyd** was suspended from the practice of law in the State of Alabama for a period of 91 days by order of Panel I of the Disciplinary Board entered on June 4, 2002. The Board ordered that the imposition of the suspension would be suspended pending Floyd's successful completion of a two-year period of probation. Floyd pled guilty to violating Rule 8.4(d), A.R.P.C. Floyd, who is also a notary public, notarized a document, certifying that the document was executed in his presence by an individual known to him. However, Floyd admitted that, contrary to his certification, the individual that executed the document did not do so in his presence. [ASB No. 00-65(A)]



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Last October, 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, joined together for a statewide project to educate Alabama citizens about health care directives. The LIFEPLAN 2001 campaign involved over 200 volunteer attorneys and physicians and reached over 16,000 citizens. Because of continued interest in this important topic, an informative video on health care directives has been produced. The ten-minute video highlights the importance of having a health care directive and answers questions about the new Alabama form. A copy of the video is available by request, at no charge, for use by hospitals, senior citizens groups, schools and any community group. To request a free copy of the video, contact the Alabama State Bar at 800-354-6154 or order on-line at www.alabar.org. Copies of the LIFEPLAN Consumer Guide and the new Alabama Health Care Directive form can also be downloaded from the Web site.



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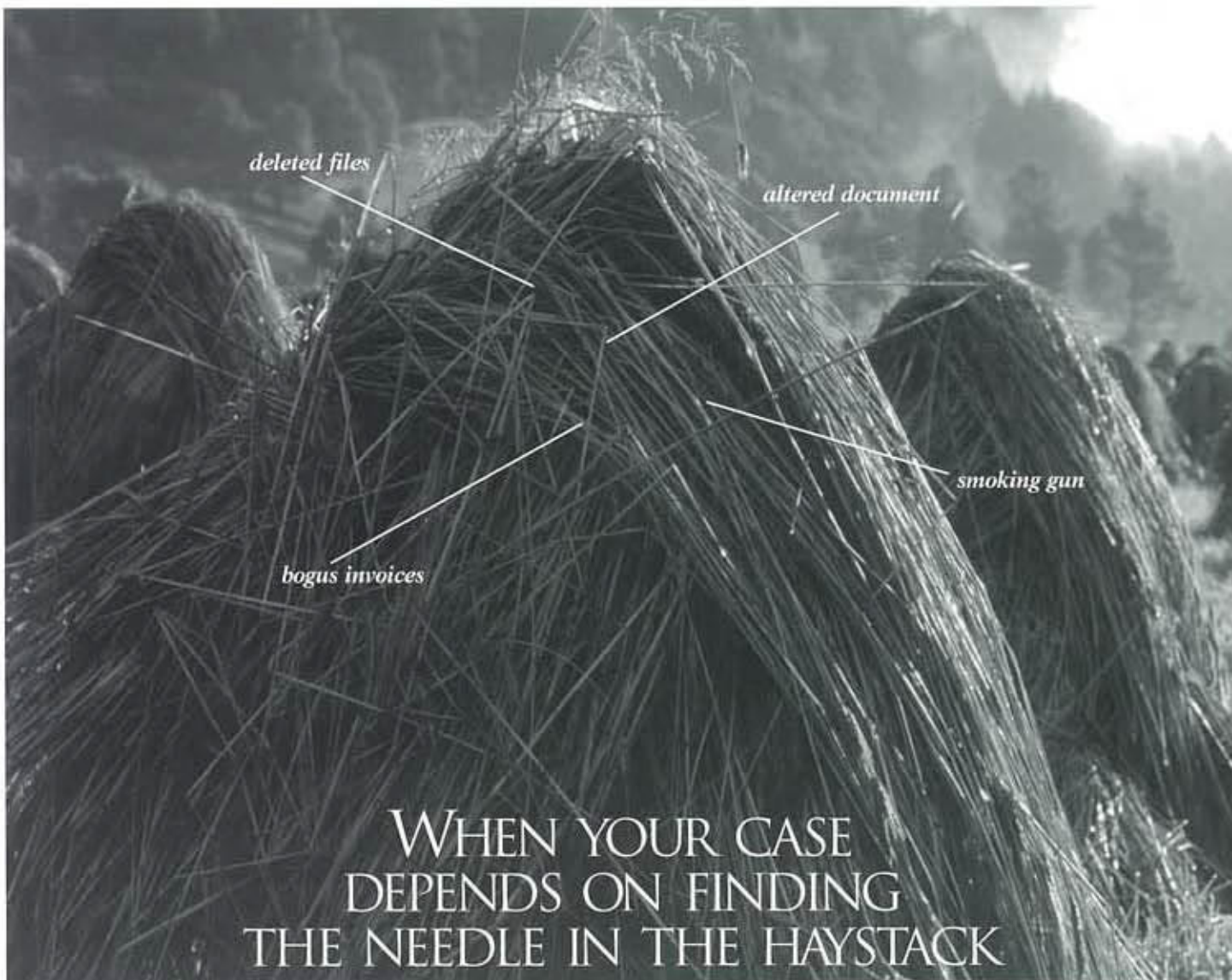
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