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[1] The Hartford is the Hartford Financial Services Group, Inc. and its subsudiaries, including issuing company of Hartford Life and Accident Insurance Company. Based on Ratings as of 5/30/03. A+ is the second Highest of 15 A.M. Best Categories.

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ABICLE

The Alabama Bar Institute for Continuing Legal Education

SEPTEMBER	
5	Social Security Disability Law
26	Practical Criminal Defense Law
OCTOBER	
3	We the People: Election Law Changes That May Affect You
10	What Every Real Estate Lawyer Needs to Know
17	Administering the Decedent's Estate
17-18	10th Annual Family Law Retreat to the Beach
24	Intellectual Property in Plain English
31	Law Office Management
NOVEMBER	
6	Effective Motion Practice
7	22nd Annual Bankruptcy Law Update
13	DUI Defense in Alabama
14	Depositions
19	Alabama Update
20	Alabama Update
21	Business Clients and Investigations
DECEMBER	
4	Tort Law Update
5	26th Annual Estate Planning
9	Trial Skills
10	Alabama Update
12	Depositions
17	Video Replays
18	Trial Skills
18	Alabama Update
19	Trial Skills

Learning Together...Through the Years




THE ALABAMA LAWYER
Vol. 64, No. 6 / September 2003

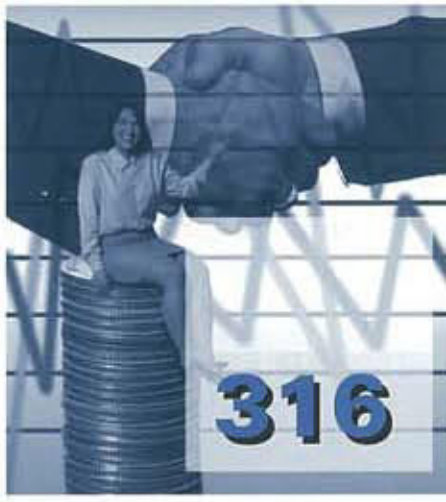
On the Cover:

2003-2004 Alabama State Bar President Bill Clark and his family in Mobile, the site of the 2003 state bar annual meeting

From left to right: Son-in-law Clinton Smith, VP and COO Stewart/Perry Company; daughter Helen Catherine Smith; grandsons Marshall and Anderson Smith; wife Faye; granddaughter Catherine Smith; Bill; son Will Clark, with American Healthways in Nashville; daughter-in-law Anne Clark; and grandson William Clark

Photograph by Jane Tucker Photography, Mobile

Features



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ALABAMA STATE BAR

Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and 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 for distribution by bar members and local bar associations.

Brochures

To Serve the Public — $10.00 per 100 — Qty ____ $ _____
. . . Highlights and details of bar public service programs from the TO SERVE THE PUBLIC video presentation.

Law As A Career — $10.00 per 100 — Qty ____ $ _____
. . . Information on the opportunities and challenges of a law career today.

Lawyers and Legal Fees — $10.00 per 100 — Qty ____ $ _____
. . . A summary of basic legal procedures and common legal questions of the general public.

Last Will & Testament — $10.00 per 100 — Qty ____ $ _____
. . . 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/"Buying On Time" — $10.00 per 100 — Qty ____ $ _____
. . . Outlines important considerations and provides advice on financial matters.

Mediation/Resolving Disputes — $10.00 per 100 — Qty ____ $ _____
. . . An overview of the mediation process in question-and-answer form.

Arbitration Agreements — $10.00 per 100 — Qty ____ $ _____
. . . Answers questions about 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 attorney, firm or bar association name for use at brochure distribution points. One stand per brochure is recommended.
Name to imprint on stand: _____
Mailing Address: _____

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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

William N. Clark

By William N. Clark

It is a very distinct honor to follow in the footsteps of such a truly outstanding lawyer and leader as **Fred Gray**. Frankly, I did not really know Fred, nor did I know of his very significant contributions to our state and the nation prior to becoming president-elect. If you have not read Fred's book, *Bus Ride To Justice,* I urge you to do so. It is a history of the civil rights movement in Alabama, in which he played a very key role.

Fred Gray's significance is not in the past, however. He served as a fine leader as the 126th president of the Alabama State Bar. I intend to ask the Board of Bar Commissioners to adopt Fred Gray's theme, **Lawyers Render Service**, as the permanent motto of the ASB. It is an excellent description of what we do in rendering service to our clients, to the profession and to the public. It would be a fitting tribute to Fred Gray.

In my remarks in Mobile upon taking over as president, I commented that many people had reminded me that Fred was the first African-American president of the ASB, and that I would really not be the first "anything" of the state bar. After reflecting on that thought, I realized that I am, in fact, a first, the first Caucasian to follow an African-American as president of the Alabama State Bar. I hope there are many other opportunities for such successions to occur in the future, or perhaps for a woman to follow a male president.

One of my principal interests in serving as president of the ASB is to carry out that portion of our **Mission Statement** which calls for us to improve the administration of justice and increase the understanding of the public about the law. As a unified or mandatory bar, the Alabama State Bar is a quasi-state agency. We have been given the power to be responsible for the admission of lawyers, the discipline of lawyers and the administration of their continuing legal education obligations. These regulatory functions comprise a great deal of time by the bar's full-time staff, as well as many, many hours of members' time, e.g. writing the bar exams, grading exams, serving on disciplinary panels, serving on character and fitness committees, dealing with admissions, and handling other related tasks. These are essential day-to-day, year-after-year tasks. However, in carrying out that portion of the Mission Statement, we have significant latitude. We can do little or we can do much. I hope this year we can take a sincere interest in rendering service by striving to improve the administration of justice, and to increase the public's understanding of the law.

During Fred's term, with his endorsement, I was able to begin planning for this year. We held a leadership conference to which all of the leaders of the sections, specialty bars and local bar associations were invited. We also began planning for an **Indigent Defense Symposium**, to be held after the first of the year, focusing on the most pressing needs of our indigent defense system. Last year was the 40th anniversary of the United States Supreme Court decision *Gideon v. Wainwright*, which virtually extended the right to counsel in all cases. A book was written about that case entitled *Gideon's Trumpet*. Some have questioned whether 40 years later Gideon's call has waned.

Prior to the annual meeting, we began preparing a draft of a brochure to provide objective information about Governor Riley's tax plan. The brochure, **"The Alabama Tax Reform Decision,"** was completed the

week after the annual meeting and has been distributed to bar commissioners for their use in making it available to lawyers and to the public in general in their communities, as well as to other individuals and groups throughout the state. Whatever position one may take on Governor Riley's plan, it is difficult to dispute that something must be done.

Some of our sections expressed an interest in having the state bar assume more responsibility for their administration. Consequently, I have created a task force to be chaired by **Bobby Segall** to look at the structure and governance of our sections. The task force will be made up of section chairs or their representatives. In addition, we will explore the possibility of instituting a **leadership development program** within the state bar to try and bring in bright young lawyers to get them interested in the bar by helping them to understand early on what it does and might do. The program would be modeled after such programs as "Leadership Birmingham," or "Leadership Alabama." **Pat Graves** of Huntsville has volunteered to lead that effort.

Our new **Quality of Life Committee** will also be looking into establishing a program to assist our new graduates with their **law school loan obligations**. These obligations, in many cases, are almost overwhelming. The ABA has developed a model program which our task force will be reviewing.

We also hope to develop other brochures to educate the people of Alabama about such critical issues as the reform of the **Alabama Constitution**, the **moratorium on the death penalty** as suggested by the ABA, and **judicial selection**. Several years ago, during **Warren Lightfoot's** term as ASB president, the Board of Bar Commissioners approved a resolution encouraging the adoption of **merit selection of judges**. I hope we can provide information to the public to aid them in understanding these critical areas.

We have also formed a new **Community Education Committee** to work with the **Center for Law and Public Education** to increase the understanding of the law by our state's children and young people. It also will be working with our **Public Relations Committee** on a new project entitled **Academics, Athletes and the Law**. This program will identify Alabama lawyers who are former college football players initially, and later other college athletes. We hope to have several television spots this fall in which lawyer/athletes encourage high school students to recognize how very few high school football players go on to play in college, and how many fewer make it to the pro ranks. We hope to encourage these young student athletes to understand the importance of getting a good education and the requirements for admission to college, and to think seriously about their future, particularly about becoming lawyers. We plan to have these lawyers go into the schools to talk about these topics. If you meet the requirements, please give **Susan Andres** a call at the ASB, **(334) 269-1515, ext. 132**. We are interested in your thoughts and participation.

Finally, many of our Alabama lawyers are serving or have served on active military duty during the past two years. On behalf of all the lawyers in the state, I thank you for your service and commend you for your dedication to our nation. **You are truly "twice the citizen."**

If you have ideas or suggestions about the operation of the state bar or its programs, things you would like to see accomplished, speakers for our annual meeting in July 2004 in Sandestin or anything else, feel free to give me or a member of the bar staff a call, (334) 269-1515. We have the finest staff in the United States. I assure you they will be responsive.

Thank you very much for this opportunity, and I am ready to serve.

Keith B. Norman

Thank You, Margaret Boone

By Keith B. Norman

On July 1, 2003, Margaret Boone retired after working 25 years at the Alabama State Bar. Although it would be difficult to catalogue all the changes during her quarter century here, it is worth noting some of them. There were approximately 5,000 bar members when she started work. Today we have nearly 14,000. Margaret was the sixth staff member. We now have 41. When she started in January 1978, former **Chief Justice Sonny Hornsby** was state bar president. She worked with 26 more, including **Harold Huston** of Tuscumbia who died in office and **Broox Garrett** of Brewton who succeeded him. Margaret has worked with 288 bar commissioners and two executive directors. From bookkeeping to managing the computer system, Margaret performed virtually every task at the bar. Along the way, Margaret and her husband, Donald, have raised three fine sons and they now enjoy four grandchildren.

For the last 23 years, Margaret has served as assistant to the executive director. In this position she has basically functioned as the officer manager. I feel sure every lawyer can appreciate how varied the tasks of the office manager are in a law firm environment and how integral the officer manager is to a firm's smooth operation. Margaret's influence on state bar operations was no less significant.

On June 27th, a retirement luncheon was hosted at the Capital City Club on Margaret's behalf. Joining Margaret on this special occasion were family, fellow co-workers and several former co-workers, including my predecessor **Reggie Hamner**. More than these, however, were former bar commissioners and 12 former bar presidents who had served with Margaret. This was a tribute to Margaret and an indication of how much Margaret has meant to this organization.

Margaret possesses many qualities, including loyalty, dedication, impeccable judgment and a wealth of common sense. In short, her qualities are ones that make an organization excel. Chief among her qualities, however, was the resilience she demonstrated in her battle several years ago with breast cancer. Margaret never complained. She just went right ahead with her work no matter how terrible she may have felt from the regimen of prescribed medications. Her demeanor and positive attitude under those difficult circumstances served as an inspiration to the entire staff.

Thank you, Margaret, for all that you did for the Alabama State Bar during your 25 years of service. Most of all, thank you for your example to each of us who worked with you. ■

ASB past presidents Clarence Small, James North, Walter Byars and Wade Baxley were among those who gathered recently to recognize Margaret Boone's contributions to the ASB.

Margaret Boone (center) with past ASB presidents Clarence Small, E.T. Brown, Judge Harold Albritton and Oakley Melton, and former bar commissioner Wanda Devereaux

Donald and Margaret Boone share a laugh and a hug at Margaret's retirement luncheon at the Capital City Club.

Appellate Mediation

Skills and Techniques

(Sponsored by the Alabama Center for Dispute Resolution)

The Alabama Supreme Court and the Alabama Court of Civil Appeals will begin their confidential appellate mediation programs in early October 2003. The courts will supply an approved list of trained appellate mediators to parties ordered to mediation. A mediator must be currently registered on the Alabama State Court Mediator Roster to take this training. Registration is limited to 60 mediators.

Appellate mediators must agree to conduct up to two pro bono mediations per year.

Date: .....**October 1, 2003**

Place: .....**Alabama State Bar Board Room**

Time:.....**9 a.m.– 4 p.m.**

CLE: .....**6 hours**

Cost: **$200**

Call the Alabama Center for Dispute Resolution at (334) 269-0409 for more information.

- **William N. Clark**, then president-elect of the Alabama State Bar, joined 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI) in March 2003.


William N. Clark

The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer organizations and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff and other experts on the operation of such associations.

- **J. Mason Davis, Jr.**, a shareholder with Sirote & Permutt, PC, was unanimously selected by the State University of New York School of Law Students of Color to receive their annual Distinguished Alumni Award. The award was presented at the group's Annual Awards Dinner held in April in Buffalo, New York. Davis received his A.B. from Talladega College prior to attending the State University of New York School of Law, where he was a member of *Law Review*.


J. Mason Davis

- Mobile attorney **Ben H. Harris, Jr.** recently received the University of Alabama's School of Law Sam W. Pipes Distinguished Alumnus Award in Birmingham.


Ben H. Harris, Jr.

- The **Houston County Bar** recently hosted a reception for the **Alabama Supreme Court** in conjunction with an oral argument session, which was held the next day at Troy State University Dothan.

- The Alabama Coastal Foundation, a non-profit environmental membership organization, elected **Neil C. Johnston** as the new president of the ACF Board of Directors. Johnston is a member of the firm of Hand Arendall, LLC. He is involved with the organization because it provides coastal residents with many opportunities for conservation education and activity.


Pictured left to right are: Vivian G. Johnston, III (ASB member); Ashley Johnston; Neil C. Johnston; Katie Johnston; and Vivian G. Johnston, Jr. (ASB member)

- The **Limestone County Bar Association** presented a check in the amount of $500 to the Korean War Memorial Fund. President **Brian Jones** and secretary **Scott Shipman** represented the LCBA.


Pictured above are: Imogean McDonald; LCBA President Brian Jones; Athens Mayor Dan Williams; LCBA Secretary Scott Shipman; and Pat Lewis, Ed McMunn and Richard McElyea, all with the Korean War Memorial.

- **Daniel H. Markstein, III** has been elected secretary of the American College of Trust and Estate Counsel. The College is a professional association consisting of approximately 2,700 lawyers from throughout the United States.

- Burr & Forman partner **Gail Livingston Mills** has been selected to join the American College of Real Estate Lawyers. She is the fifth member from Alabama and the only woman member in the state.


Gail L. Mills

- The International Society of Barristers elected **Scott A. Powell** of Birmingham, secretary-treasurer of the Society for 2003-04. He will also serve as program chair of the group's 2004 annual meeting and will become president in the 2006-07 term.


Scott A. Powell

- **Marion A. Quina, Jr.**, a partner in Lyons, Pipes & Cook, PC, has been appointed as chairman of the Advisory Board for Cumberland School of Law. The Board was assembled to provide advice to the law school in a variety of areas including development, curriculum and placement. Quina graduated with a B.S. from the University of Alabama in 1971 and received his J.D. from Cumberland School of Law, Samford University in 1974.


Marion A. Quina, Jr.

- Burr & Forman partner **Carol H. Stewart** is the recipient of the 2003 Cumberland Volunteer of the Year Award. The award is presented by Cumberland School of Law each year and recognizes an individual who has greatly contributed to the school's activities, including recruiting and fundraising.


Carol H. Stewart

- **Charles A. Stewart**, with Bradley Arant Rose & White LLP in Montgomery, has been elected a member of the Board of Directors of the Defense Research Institute, the nation's largest individual membership organization of civil defense lawyers. ■


Charles A. Stewart

2003-04 License/Special Membership Dues Invoices

Invoices for the 2003-04 occupational licenses and special membership dues will be mailed **September 15, 2003**. Your 2002-03 occupational license or special membership will expire **September 30, 2003.** License fees and special membership dues for 2003-04 are due in the Alabama State Bar office by **October 31, 2003** and will be delinquent after that date. Occupational licenses purchased after October 31, 2003 will have a $37.50 penalty added. Payments should be sent to the Alabama State Bar or may be made online at *www.alabar.org*. If you have a question, please contact the ASB Membership Department by e-mail, *ms@alabar.org*, or by telephone, (334) 269-1515.

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

Les Hayes, III announces the opening of his office at 300-A Water Street, 3rd Floor Suite, Montgomery. Phone (334) 323-0036.

Jerome D. Smith announces the opening of his office at 608 S. Hull Street, Montgomery. Phone (334) 834-4599.

Among Firms

Alford, Clausen & McDonald LLC announces that **Susan L. Potts, Katherine M. McGinley** and **Robert B. McGinley, Jr.** have joined the firm as associates.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Paul Sizemore** has been named a shareholder in the firm.

Beers, Anderson, Jackson & Patty PC announces that **Judy B. Van Heest** has become a shareholder with the firm, and that **Angela C. Taylor, Richard D. Anderson** and **D. Scott Mitchell** have become associated with firm. The firm name has changed to **Beers, Anderson, Jackson, Patty & Van Heest PC.**

Berkowitz, Lefkovits, Isom & Kushner and **Baker, Donelson, Bearman & Caldwell** have merged to form **Baker, Donelson, Bearman, Caldwell & Berkowitz.**

Max Cassady and **Utopia Cassady** of **Cassady & Cassady PC** announce the opening of an additional office in the AmSouth Bank Building, Suite 1407, Mobile. Phone (251) 432-9596.

Thomas H. Claunch, III and **Deborah Q. Harding** announce the formation of **Harding & Claunch LLC** with offices located at 2800 Zelda Road, Suite 100-9, Montgomery. Phone (334) 356-6070.

Cochran, Cherry, Givens & Smith PC of Dothan announces that **Joseph D. Lane** and **J. Farrest Taylor** have become partners in the firm. The firm also announces a name change to **Cochran, Cherry, Givens, Smith, Lane & Taylor PC.**

Federal Express Corporation announces that **Michael E. Gabel** has joined the company as a senior attorney.

Dominick, Fletcher, Yeilding, Wood & Lloyd PA announces that **Arthur J. Hanes, Jr.** and **Ezra B. Perry, Jr.** have joined the firm.

R. Timothy Estes, James L. Sanders and **Matthew C. Williams** announce the formation of **Estes, Sanders & Williams LLC** with offices located at 3800 Colonade Parkway, Suite 330, Birmingham. Phone (205) 949-5500.

Hamilton, Berry & Sexton LLC announces that **Ryan Shaugnessy Silcox** has joined the firm as an associate.

Hare, Wynn, Newell & Newton announces that **Matthew C. Minner** has become a partner in the firm.

Helmsing, Leach, Herlong, Newman & Rouse announces that **Jason R. Watkins** has joined the firm as an associate.

T.K. Jackson, III, Paul D. Myrick, John W. Donald, Jr., Michael T. Estep, Thomas J. Woodford, Cecily L. Kaffer, W.T. McGowin, IV, and **Elizabeth D. Rehm** announce the formation of **Jackson Myrick LLP**. **Kelly C. Woodford** will be special counsel to the firm. Offices are located at 64 N. Royal Street, Mobile. Phone (251) 432-1811.

The Kullman Firm PC announces that **Stephen L. Scott** has become a shareholder practicing in its New Orleans office and that **F. Daniel Wood, Jr.** has become a shareholder practicing in its Birmingham office.

Lamar, Miller, Norris & Feldman PC announces that **Michael L. Haggard** and **Stephen D. Christie** have joined the firm as partners.

Massey, Stotser & Nichols PC announces that **Eric C. Andreae** and **Chesley P. Payne** have joined the firm as associates.

McKenzie & Taylor PA announces that **Joseph A. Zarzaur, Jr.** has become a partner. The firm will now be known as **McKenzie, Taylor & Zaraur PA.**

Patton, Legge & Cole LLP announces its merger with **Wilmer & Lee PA,** with offices in Athens and Huntsville. **Melissa Larsen** and **Chad Ayres** have become associated with the firm.

Phelps, Jenkins, Gibson & Fowler LLP announces that **Robert S. Plott, Terri O. Tompkins** and **Kevin A. McGovern** have joined the firm as associates.

Richardson, Spear, Spear & Hamby PC announces that **T. Scott McNally** as joined their firm.

Rosenzweig, Jones & MacNabb PC announces that **Melissa Darden Griffis** has joined the firm.

Sasser, Littleton & Stidham PC announces that **John M. Acken, Jr.** has joined the firm as an associate.

Jane O. Shuler announces that she has joined the **South Carolina Senate Judiciary Committee** as a staff attorney.

Todd & Floyd PLC announces that **Lawrence B. Hammet, II** has joined the firm's Nashville office.

Turnbach & Warren PC announces that **Jack Lee Roberts, Jr.** has rejoined the firm as a shareholder, and the name of the firm has changed to **Turnbach, Warren, Roberts & Lloyd PC.**

Wallace, Jordan Ratliff & Brandt announces that **Peter Barber** has joined the firm as a partner.

Wesley Pipes LLC announces that **Ginger Davis Johnson** has joined his practice as an associate.

James Eldon Wilson and **Janie Salmon Gilliland** announce the opening of their shared office at 4265 Lomac Street, Montgomery. Phone (334) 409-2003. ■

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*.

Edward C. Greene

Edward C. Greene was born September 1, 1951, in Auburn, Alabama, a son of Dr. James E. and Mary McGehee Greene, and one of four siblings. He was educated in the public schools of Auburn, graduating from Auburn High School in 1969. He attended Auburn University for a year and then transferred to the University of the South. He graduated from Sewanee (*cum laude*, Phi Beta Kappa) in 1973, and from the University of Alabama School of Law in 1976. He practiced law in Auburn for a year before moving to Mobile where he practiced first with McFadden, Riley & Parker, then with Inge, Twitty & Duffy, then with Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, and finally with Frazer, Greene, Upchurch & Baker.

In high school, he was an outstanding student and athlete. His cousin and high school classmate, Clark McGehee, has said that Eddie was "the best and brightest," yet at the same time solicitous of the feelings and concerns of, and a friend to, those who were not. He starred in three sports at Auburn High School and played baseball as a freshman at Auburn and basketball at Sewanee. His college classmate, roommate for three years, and lifelong friend, Claude Nielsen of Birmingham, said this about Eddie: "He transferred to Sewanee as a second-year student; he was initially tentative and homesick but quickly became a person whose company was sought by everyone because of these 'defining qualities.' His 'extraordinary sensitivity to the feelings of others, his uncompromising integrity, which did not waiver even in his self-interest, and his keen sense of humor, generally self-deprecating.'"

What he had been as a young man—as a high school student and as a college student—he remained all his life: He was smart, he was able, he was hardworking, he was responsible. He was among the best and brightest lawyers here, or anywhere. He was loyal to his friends, rejoicing in their triumphs, and genuinely concerned for them when they faced difficulties. He had legions of friends and no enemies. He continued to be possessed of an active, not to say wicked, sense of humor. Many in this association were victims of his wit and practical jokes, but what he handed out, he could take, and the most frequent target of his own humor was himself. He had that great virtue that Claude Nielsen spoke of, a self-deprecating sense of humor.

As a lawyer, he was intensely competitive. He was a litigator and he wanted to win, but he never compromised his sense of honor or his ethical obligations to achieve victory or advantage. He came at you head on, without trick or artifice. His opponents did not sit in their chairs waiting for the next dirty trick to be played. Eddie was truly a lawyer's lawyer.

He was a workaholic, yet he cherished and treasured his family. He married Sally Shields in 1974 and they would have three children, Edward, Coleman, and Sarah Marshall. His family was truly his pride and joy, what he worked so hard for, and he was an outstanding husband and father. He missed few events in the lives of his children.

He was also an outstanding citizen of this community. At the time of his death, he was president of the Athelstan Club, chairman of the Board of Trustees of UMS-Wright Preparatory School, and a member of the Board of Trustees of the University of the South. He was a member of All Saints Episcopal Church where he had served on the vestry.

Our colleague and friend, Edward C. Greene, died November 24, 2002, in a tragic fire that also took the life of his oldest son, Edward, and the life of William Radcliff, the son of Eddie's close friend, Donald C. Radcliff, a member of this association. Eddie is survived by his wife, Sally, by his son, Coleman, and his daughter, Sarah Marshall, as well as by his mother and by Edward's wife, Mindy.

—Michael D. Knight, president, Mobile Bar Association

Judge Delano J. Palughi

The Honorable Delano J. Palughi , a distinguished lawyer and judge, died at his home in the early morning hours on Saturday, February 22, 2003, at the age of 68.

Delano J. Palughi, was born in Mobile on May 30th, 1934. He graduated from the University of Notre Dame in 1956 and received his law degree from the University of Alabama School of Law in 1959. He practiced law in Mobile for more than 40 years. While he practiced law, he was known for his wide range, taking on almost every area of law. He was welcomed and respected in municipal, domestic, district, circuit, federal and appellate courts.

Throughout his practice, his friends remembered that it was his unwillingness or inability to turn down a prospective client who could not afford his services that put Palughi in a league of his own among Mobile lawyers. Juvenile Court Judge John Butler said, "I never knew anyone, any lawyer, with as big a heart as Delano's. He would represent people of all classes and walks of life, whether they had money or not. He represented the poor, the indigent, the downtrodden, and he brought the same approach to the bench." After he assumed the bench, he called things like he saw them in court, even though he knew some of his decisions would not be popular.

Every morning before he started court, Judge Palughi stood in his black robe on the bench and led whatever crowd there was in court in the Pledge of Allegiance to the flag. Circuit Judge William McDermott said, "He was such a big-hearted man, a very religious man, he had a soft spot in his heart for everybody, everybody he saw."

Judge Palughi was a very religious man. He was a longtime active member of St. Mary's Parish, he served 14 years as a CCD instructor in the church and was a past president of the parish council. He was a fourth-degree member of the Knights of Columbus, Mobile Council. He was a past exalted ruler of Elk's Lodge 108 and a longtime regular Red Cross blood donor. In his private life, Judge Palughi attended a Catholic Mass every day and always parted company with friends and associates by telling them, "God Bless."

Mass of Christian Burial was held February 24, 2003 from St. Mary's Catholic Church, conducted by Father Paul Zoghby. In this ceremony, Father Zoghby told the crowd that Delano attended Mass everyday at St. Mary's or elsewhere. "He didn't make a show of it," Zoghby said, "he always sat on the back row."

Zoghby told some 600 mourners present that recently two priests each claimed it was his church that Palughi attended everyday at noon, prompting Zoghby to muse that, "Palughi may have been endowed with the gift of bi-location." Zoghby further commented that, "His gifts included humility, humor, kindness, charity, love of family and friends, and a soft spot for the poor and downtrodden." Further, Father Zoghby said, "If he is not there in heaven, do you think the rest of us has a chance?"

At the church service, Palughi's son, Vincent, told the crowd that when he was growing up, his father always took phone calls from those seeking help, legal or otherwise, even if they were collect calls from jail, always answering, "Palughi here."

Every night after the family dinner and without fail, his son said Palughi would turn to his wife and say, "Thank you for a wonderful meal, Frances." Further, "He was an imitator of Christ," his son said of his father, "he never turned anybody away." His granddaughter, Kristen, told the crowd at the church service, "My grandfather was a great man. Every time I looked at him, he seemed to be happy. I really loved him," she said, "and a lot of you did too."

Judge Palughi is survived by his wife of 33 years, Frances Palughi; two sons, John Anthony Palughi of Mobile, and Vincent Palughi, and his wife Tina, of Houston; one brother, John Peter Palughi of Mobile; two grandchildren, Kristen Palughi and Joseph Palughi, both of Houston; 12 nieces and nephews, Kevin, Mitch, Kim, Jason, Lydia, Cliff, Jeni, Alta, Laura, Libby, Stephen, and Price; four cousins, Peter Paulghi, Peter Palughi, Jr., Pat Palughi, all three of whom practice law here in Mobile, and Mary Palughi. Additionally, on the Knizley side of the family, are Dennis, a Mobile attorney, and his wife, David and Jean Knizley, and Bob and Cheré Knizley, brothers-in-law and their spouses.

—Michael D. Knight, president, Mobile Bar Association

Newman C. Sankey

Newman C. Sankey was born in Montgomery, and lived here for his entire life. He attended the Montgomery schools, and graduated from Lanier High School. He graduated from Auburn University in 1949, and the University of Alabama School of Law in 1951.

Following his graduation from law school, Judge Sankey was drafted into the United States Army where he served as a valuable member of the Signal Corps. After his discharge from the Army, Judge Sankey moved back to Montgomery where he went into private practice with his father, John A. Sankey. The Sankeys practiced law together for many years.

Judge Sankey was elected to one of the first three Montgomery County District Judge positions, where he faithfully and duly served for one term. Judge Sankey then returned to private practice where he continued to serve the citizens of Alabama, until 2001.

In addition to his professional achievements, Judge Sankey was generous and charitable, and served his fellow man and his God in many capacities. He was a past president of the South Central Alabama Girl Scout Council. He was past president of the Exchange Club, and very instrumental in opening public television in Alabama. He was a member of the First Presbyterian Church and Westminster Presbyterian Church, where he served as an elder of each church.

Judge Sankey died April 27, 2002. He is survived by his wife of 50 years, Annesse Sankey; his daughter and son-in-law, Nancy C. Reams and Paul E. Reams; his daughter and son-in-law, Patty J. Eliot and Ken Eliot; and granddaughter Emily H. Reams.

—Montgomery County Bar Association

Sol E. Brinsfield, Jr.

Sol E. Brinsfield, Jr. died Tuesday, August 27, 2002. Sol was one of the most outstanding and respected leaders of the bar in the State of Alabama. He was a past president of the Montgomery County Bar, as well as past president of the Alabama State Bar.

Sol was born July 19, 1910 in a house near the state Capitol on Adams Street. He lived a long eventful life with few regrets. Until six weeks prior to his death, he went to his office daily.

Sol attended Tulane University for one year, but never graduated from college. He was one of the last surviving members of the first graduating class of Jones Law School, now a part of Faulkner University. He and his classmates had keys to the Capitol building to give them access to the Alabama Supreme Court Library where, in the winter, they would build a coal fire and study. He served in the Air Force as an instructor at Maxwell Field. He served as a JAG Officer and was trained at Princeton for a brief period, where he and his fellow officers often walked to class with Albert Einstein.

Sol understood firsthand the darkest side of humanity from his participation in the Japanese War Crimes Trials in Yokohama, Japan. He pleaded before the United States Supreme Court, and practiced law for over 65 years. Sol was the first attorney for the Montgomery Industrial Board and actively participated in the growth of hundreds of local industries, serving in that capacity until his death. He was a member of the Montgomery Kiwanis Club and the Montgomery Committee of 100.

Sol was a founding member of the Finley Avenue Church of Christ and helped dig the basement for the Sunday School classes. He was an active member of the Cloverdale Church of Christ for many years. As his father was, he was a skilled handy man, but a bit of a dangerous electrician. He was a serious grass cutter and lawnmower operator. If Heaven is endless acres of gently rolling hills of St. Augustine, he will be the grounds keeper. He loved any, all and every animal. He believed in the quiet power of Christianity in everyday life. He was a dedicated Bible student.

Throughout his life, Sol believed that integrity, faith, honor, truth, and a good name were the defining traits of all good people, most importantly himself. Sol Brinsfield will be greatly missed by all members of this Association.

Sol is survived by his wife of 59 years, Marcia O'Bryan Brinsfield; his sons, Sol E. Brinsfield, III and Rene Brinsfield and one daughter, Denise Brinsfield Oliver.

—Montgomery County Bar Association

Philip Thomas Shanks, Jr.

Born in Selma, Alabama on December 1, 1911, Philip Thomas Shanks, Jr. died in Decatur on June 7, 2002. With his death, the bars of Alabama and Morgan County lost one of their brightest and noblest stewards of the law.

The life of Philip Shanks was distinguished by devotion to his God and faith, his family, his country and the law, in measures rarely seen.

His love of God and his unshakable faith was made manifest through lifelong service to the Presbyterian Church. He served as a teacher, an elder and in a host of other high church offices. Always concerned with those less fortunate, he served on the Board of Directors of the Presbyterian Home for Children in Talladega, and served faithfully in providing Sunday School and other worship opportunities for several small rural congregations in Morgan and surrounding counties.

Devotion to his family was likewise a hallmark of the nobility of Philip Shanks. Married on November 15, 1947 to Frances Carter of Greenville, Tennessee, Philip and Frances knew and enjoyed the rare bond of a love-filled union that spanned more than 54 years. The marriage was blessed by two sons, Philip Thomas Shanks, III and Marshall Lamar Shanks, both of whom chose the path of their father in the law. Sadly, Marshall died in a tragic accident in 1980.

When war clouds gathered, Philip Shanks offered his service to his country even before any demand was made for it. Volunteering for military service in the United States Army as a private, he served with distinction in North Africa and Corsica. Upon discharge, he had reached the rank of captain.

Upon his return to Decatur after the war, he was elected to the office of county solicitor and served as Decatur's first municipal judge.

As large as they were, the legacies of devotion and service left by Philip Shanks to his faith, his family and his country, perhaps his most enduring legacy will be his constantly demonstrated devotion to the law. For Philip Shanks, serving the law was not just a way to earn a living; it was a matter of passionate dedication. He did not simply practice law; he was a lawyer in the truest and purest sense of the word. He was a lawyer with rare gifts, and was enthusiastic in pursuit of whatever was right, not what might be argued as being right.

Graduating from Davidson College in 1932, Philip Shanks received his law degree from the University of Alabama in 1935. Immediately thereafter, he began practicing law in Decatur with another legend of the law in north Alabama, Charles H. Eyster. Later, before entering military service, he joined W.F. Boswell, Jr. in a law partnership. Soon after returning from military service, Philip Shanks resumed the practice of law in Decatur with John H. Peach and John A. Caddell in the partnership of Peach, Caddell & Shanks. He continued with that firm and its successor, which still bears his name, Harris, Caddell & Shanks, PC, until his retirement in the early 1990s.

His professional leadership was recognized by his selection to serve as a member of the board of bar examiners of the Alabama State Bar for many years. For over 50 years, Philip Shanks was a devoted steward of the law.

—H.M. Nowlin, president, Morgan County Bar Association

Robert L. Cheek, Jr.

Robert L. Cheek, Jr. was born on Nov 4, 1925, bearing a heritage of European nobility and native Cherokee, and died August 29, 2002.

R.L., also known as Bob, joined his peers of that era, with some slight prevaricating aid of his father, and left his home on Gordon Street to join the Eighth Army Air Corps in the European Theater of World War II, where he functioned in many roles of service, from flight engineer to tail gunner. In early 1943, as a master sergeant manning the tail gun of a B-17 Flying Fortress bearing the moniker of Murder, Incorporated, R.L. survived being shot down over Austria in a bombing mission targeting a ball-bearing plant. All members of that crew did not survive the crash and subsequent incarceration in Stalag 17-B for the remainder of the war, where he was identified as prisoner number 100,392. After that R.L. returned to the United States for 12 more years of military service, which provided a high motivation for him to return to Alabama and pursue higher education.

He graduated from the University of Alabama's School of Law in 1957 and was married in that same year to Norma Lee Ferrell. To that union were born a son, Robert, III and a daughter, Rebecca, children to whom he would remain devoted throughout the remainder of his years.

R.L. focused his earlier practice in dissolving domestic relations in association with Maurice S. Bell, and later he withdrew from this area of his practice, due to changes of circumstance and a high ethical bearing, despite strenuous efforts of Maurice Bell to the contrary. He became a prominent trial lawyer, with such a volatile demeanor in court that had he been on a basketball court, he stood every chance of obtaining enough technical fouls to be removed from the game, though he never took this ire outside the courtroom, outside of which he was non-pretentious, avoiding prominence and fanfare. Though R.L. arose from modest estate and achieved material wealth, he was forever the champion of the downtrodden and oppressed, and it was for those clients he fought rather than against opposing counsel. He was instrumental in bringing those clients before juries of their peers and dismantling the system of egalitarian, "blue-ribbon" juries, and he subsequently developed a much-admired acumen in the selection of juries, an insight sought by others in the profession.

R.L. enjoyed his leisure in Macon County, playing with adult-sized bull dozers and dump trucks, and sailing the seas, one of his most-prized vessels being the trimaran *The Pacer*.

R.L. left a lasting legacy of the highest ethics and helped to assure a greater chance for equal access to justice for all.

—Montgomery County Bar Association

Henry B. Hardegree

Henry Hardegree was born June 18, 1936 in Talladega and died June 24, 2002. He attended the public schools in Talladega County and quickly demonstrated great academic aptitude during his elementary and high school years. Henry then attended the University of Alabama where he continued to distinguish himself as a scholar possessing the highest degree of intellect. He was admitted to the University of Alabama School of Law and there he met Anita Bains, the daughter of a prominent Alabama lawyer, Lee Bains. Anita, who some say was one of the few who equaled Henry in the ability to analyze complex legal problems, elected to forsake her career as a lawyer to become Henry's wife. After completing his degree at the University of Alabama, Henry clerked for Alabama Supreme Court Justice Thomas Lawson and served in the United States Army in Germany for two years. Henry then received a Master's Degree in taxation from New York University. His initial private practice was in Louisville, Kentucky before returning to his home state of Alabama and joining the firm of Rushton, Stakely, Johnston & Garrett in January 1967.

Henry was the leader of the tax and business department at Rushton, Stakely until his retirement in 1997. Henry's legal abilities as a tax and business lawyer were known throughout Alabama, the southeast and, indeed, the nation. He represented many corporations which engaged in mergers and acquisitions of a highly complex nature. These transactions created the greatest challenge for Henry and brought out his unmatched skills. On numerous occasions, after the transaction was completed, the lawyers and clients all remarked that Henry's skills as a transaction lawyer were as good as or better than the highest priced Wall Street lawyer. This comment was made so often that it became a trademark in our firm as we fondly remembered his abilities.

Henry possessed a great mind, but also, perhaps because he was the son of a school teacher, had an uncanny command of the English language. He could draft documents which were both understandable and protected the legal rights of his clients.

Henry's intellectual curiosity led him, at times, to become somewhat obsessive about his personal and social interests apart from the practice of law. He loved following athletics at the University of Alabama, but was equally comfortable playing the highest level of competitive bridge. He was intensely devout and serious about his belief in God and was a leader in the Memorial Presbyterian Church.

No greater obsession existed for Henry than his love for his wife, Anita, and their three children. Henry and Anita provided their very academically successful children with educations at the Montgomery Academy, Trinity and institutions of higher learning including Sewanee, Dartmouth and Columbia University. They have all gone on to do very well and now live outside of Montgomery.

One who might not have known Henry as well as I might wonder if a highly proclaimed, intellectual and successful tax lawyer might have the tendency to be, as too many lawyers are, somewhat egotistical. Henry was the opposite. Throughout all of his success and achievement, Henry constantly and unfailingly remained humble, genuinely fond and curious about other people, and never once placed himself above any other human.

The Montgomery County Bar Association extends its sympathy to his family.

—Montgomery County Bar Association

Judge Newton B. Powell

Judge Newton B. Powell, a distinguished citizen of Morgan County, who served almost four decades as judge of the circuit court of Morgan County, died May 25, 2000.

Newton B. Powell was born in 1910 in Falkville, Alabama, the eldest son of Jasper Newton Powell, better known as "Buckner" Powell, and Delia Clark Powell. He graduated from high school in Falkville and subsequently attended the University of Alabama, from which he received his law degree in 1934. He started practicing with his father in Decatur in the throes of the great economic depression. In 1938, he was employed and served as the city solicitor for Decatur, until 1945, when he entered the U.S. Army. After initially serving in a field artillery group, he was appointed to the Office of the Judge Advocate General. He was sent by the U.S. Army to the Philippine Islands. While stationed there and with assistance from other local attorneys transmitting qualifying documents, his name was placed on the ballots to run for circuit judge. The judicial circuit then embraced the four counties of Morgan, Lawrence, Limestone and Cullman. He was elected circuit judge *in absentia*, and assumed office following his discharge from the U.S. Army at the end of World War II.

Judge Powell held office as circuit judge for 36 years. He became a man "for all seasons." He was compassionate, but firm and unyielding in his convictions of right and wrong. So numerous were his friends and so respected, admired and appreciated by members of the bar for his special judicial qualities, he never had opposition for re-election at any time. He retired from the circuit judge's position in 1983, but served as supernumerary judge for many years, slowly retiring. During his retirement he used, as a home base, a desk in the office of his son, Joe Powell, another attorney. In the foyer in their office in Decatur, he performed numerous marriage ceremonies during the last years of his life.

Judge Powell was always involved in community and civic matters. He was a charter member of the Civitan Club in Decatur when it was formed in 1940 at the Lyons Hotel on Bank Street. He was the last surviving charter member when he died. He served on the Alabama Tuberculosis Board, which later became the Lung Association. He was also the oldest surviving circuit judge in the Circuit Judge's Association of Alabama. He served as a member of the Board of Directors of First Federal Savings and Loan Association for more than 40 years, during its great period of economic growth to a multi-million dollar institution, until it was merged into Union Planters Bank.

Judge Powell adhered to democratic ideals, openly supporting his friend, Senator John Sparkman, whose early life and home, not many miles from Falkville, were not unlike those of Judge Powell. He was frequently aligned with the publisher of *The Decatur Daily* for the promotion and sponsorship of local political events, like the visit to Decatur of former President Harry Truman for a giant political rally in the presidential election year of John F. Kennedy.

Judge Powell devoted his life to the legal profession, which he loved. He never intentionally embarrassed an attorney in court and he used to tell the story of an older, unnamed judge, before whom he appeared as a young attorney, who made it a practice of attempting to embarrass attorneys in court, especially ones younger and with less experience, and so he was ever mindful of that and courteous to them, and would sometimes help guide them in forming questions to witnesses to elicit truths in the course of trials.

Judge Powell was a religious man, and a member of Central United Methodist Church, which he attended after locating in Decatur. He was a good judge when it was time to make a decision. He was a good husband when it was time to provide for his family. He was a good father when it was time to rear his two sons. He was a good public servant when it was his time to serve. His life exemplified justice, kindness and humility.

Judge Powell was survived by his wife, Myrtice Newman Powell, and a son, Joe Powell, an attorney. Another son, Philip, predeceased him. He was also survived by other attorneys in the family, including a brother, Sherman B. Powell, Sr., retired; a brother, Miles Powell, retired; a nephew, Sherman B. Powell, Jr.; and another nephew, Tom Drake. His brother, J.N. Powell, an attorney, predeceased him.

—H.M. Nowlin, president, Morgan County Bar Association

Justice Thomas Seay Lawson

The Montgomery County Bar Association and the entire legal profession lost one of its most celebrated and respected members with the death of former Associate Justice Thomas Seay Lawson, who died at age 96.

Justice Lawson, known as "Buster" to his legion of friends and admirers, died after a long and unblemished career, which included five terms on the Alabama Supreme Court. Born in Greensboro, Alabama, Justice Lawson graduated from Davidson College in North Carolina. After college, Justice Lawson enrolled in the University of Alabama School of Law, becoming one of its most outstanding graduates. He later served that institution as president *pro tem*. In that position, his steady hand helped guide that school through turbulent years as it matured into the fine university it is today.

As the grandson of a governor of Alabama, the call to public service came early to Justice Lawson. After law school, he served as an assistant attorney general until 1938, when he was elected to the office of Attorney General. At 32, he was one of the youngest men to ever hold that post. After one term as the state's lawyer, he was called to serve on the Alabama Supreme Court. He ran and was elected on his first try in 1942—without accepting a single campaign contribution. Characteristic of his notions of duty and honor, Justice Lawson could not watch the World War from the sidelines. He answered the bugle's call, took a leave of absence from the court and accepted a commission in the United States Navy. As he did with everything in his life, Justice Lawson served his country with bravery and distinction, participating in some of the bloodiest battles in the Pacific theater, including Okinawa and Iwo Jima.

Upon his discharge, he returned to the Alabama Supreme Court, where he served until his retirement. Known as a brilliant scholar and exceptionally hard worker, he produced thoughtful, well-reasoned opinions that still guide us today. More of his opinions were selected as "lead cases" by *American Law Reports* than any other justice who has served on that court.

Justice Lawson was an excellent role model and his lessons were not lost on his children. His daughter, Jule Lawson Lanier, is a psychologist with a practice in New York City, and his namesake, Thomas S. Lawson, Jr., followed his father's profession, becoming one of the most respected trial lawyers in our bar.

—Montgomery County Bar Association

Samuel Palmer Keith, Jr.

In 1913, Samuel Palmer Keith, Jr., like many of our long-term, distinguished members of the bar, was born in Bessemer, Alabama. In 1930, he was graduated at the top of his class from Bessemer High School and was admitted to the University of Virginia, where he matriculated and began his college career. Almost immediately, however, the Depression hit, and Palmer came back to Alabama. Undaunted, he graduated from the University of Alabama within two years and graduated from the Birmingham School of Law two years later. He immediately took and passed the bar exam and began the practice of law in Bessemer.

After practicing in Bessemer for only a few years, Palmer was selected to serve as Bessemer's municipal judge. Although he only served a short time, many members of the bar continued to address him as "Judge" thereafter.

Palmer continued to practice law and serve as judge until World War II began. At that point, he joined the United States Navy and served our country in the Philippines. Although he was color blind, he was selected to serve in the communications sector of the Navy. He was able to do so by memorizing the shapes and designs of the communication flags. Even though his was not a combat unit, it still came under fire, and Palmer's descriptions of these bombings are remembered as distinctly dramatic and realistic. Palmer was honorably discharged from the Navy with the rank of lieutenant junior grade and returned to the practice of law in Bessemer.

In 1948, Palmer moved his law practice to Birmingham and formed a partnership with Paul Meeks, who later became the probate judge for Jefferson County. Palmer continued as a sole practitioner for 31 years until 1977 when he formed a firm with his son, Wayne. The next year, Alan, another son, joined the firm as well.

In 1986, the Alabama State Bar honored Palmer for 50 years of service. He continued practicing with his two sons until 1987, when Alan left the firm, and 1988, when Wayne left the firm. He practiced as a sole practitioner until he retired in 1992 at the age of 79.

Palmer was always active in the community and in civic clubs. He served as president of both the Elks Club of Homewood and the Lions Club. He was also a member of the Optimist Club and was a Mason and a Shriner. He was a long-time volunteer for the American Red Cross, which he loved.

Palmer's wife Marge died before him. He leaves behind five children, three living in the Birmingham area. Two of his children, Wayne and Alan, are carrying on Palmer's tradition in the law and have been practicing law for 26 and 25 years, respectively.

Palmer Keith died on January 29, 2003, and the Birmingham Bar says a final thanks to him for his long-time service in and to our bar.

—Maibeth J. Porter, president, Birmingham Bar Association

Rudolph Wright Slate

Rudolph Wright Slate was born on April 27, 1934 in Morgan County, Alabama and spent his entire life as a resident there, leaving only to serve his country for four years on active duty with the United States Air Force.

Judge Slate served the legal profession admirably, albeit humbly and without pretension, initially for ten years in a private practice, and 18 years thereafter as a distinguished state court trial judge, first as a district judge and then as a circuit judge. In 1995, he retired from the state court bench and later served as an administrative law judge for the Social Security Administration.

Judge Slate was uncommonly and instinctively careful to consider in balance the societal need for deterrence, restitution and retribution against the divine adjuration that every human being created in God's image, no matter what his transgressions, deserves to be treated with a measure of dignity.

Judge Slate died January 11, 2001, leaving to mourn his passing numerous friends, colleagues, family and kin, each of whom was made a bit richer by having witnessed his sterling character and his refreshing sense of humor.

—H. M. Nowlin, president, Morgan County Bar Association

Johnson, Wayne Thompson, Jr.
Phenix City
Admitted: 1996
Died: May 13, 2003

McCluskey, Murray Patterson
Sylacauga
Admitted: 1971
Died: June 18, 2003

Nelson, Edwin Levon
Birmingham
Admitted: 1969
Died: May 17, 2003

Silberman, Wilbur Gordon
Birmingham
Admitted: 1941
Died: June 6, 2003

Stephenson, Samuel Randall
Mobile
Admitted: 1955
Died: December 7, 2002

Williams, George Kendrick
Huntsville
Admitted: 1956
Died: May 19, 2003

Robert L. McCurley, Jr.

2003 Regular Session Most Productive in Years

By Robert L. McCurley, Jr.

Of the 1,322 bills introduced in the House and Senate, 259 were enacted. However, 205 of these were either local bills or involved only one agency.

Of the remaining 54 bills, I have chosen to alert lawyers to only 30 of them.

Governor Riley's Tax Reform Plan (Special Session)

Governor Riley has proposed for a September 9th election of 14 bills that are tied together in one constitutional amendment to be voted up or down by the citizens. Some of the taxes proposed will be increasing cigarette taxes from 16.5 cents to 31 cents per pack (HB. 2). Another will restructure the property tax system in Alabama by requiring property to be assessed at 100 percent of market value but reducing the mileage rate (HB. 3). Revise the utility tax (HB. 4). One bill doubles the mortgage and deed tax recording fees (HB. 7). Another bill adjusts some sales tax rates and expands the sales tax base to include certain services; not included in this bill is a tax on lawyer's fees (HB. 11). Personal income tax rates will also be changed (HB. 19).

Governor Riley's Constitutional Revision

The re-codification of the constitution includes within one document the 1901 Constitution and the 742 amendments, delete the repealed and modified sections and replace them with the current version. The recodification will place each county's constitutional amendments together in one section HB. 60 (Act 2003-312). Unconstitutional provisions, such as the poll tax and segregation, were repealed in HB. 587 (Act 2003-202). Failing to be acted upon were his recommendations on line item veto, home rule, unearmarking of funds, and the requirement of a super majority vote of legislators for the passage of new taxes.

Family Law

HB. 20 (Act 2003-150)—Minimum age for marriage has been raised from 14 to 16 years.

HB. 157 (Act 2003-364)—Parent-Child Relationship Protection Act requires when the custodial parent moves more than 60 miles from the residence of the non-relocating parent, the custodial parent must give the noncustodial parent notice of the custodial parent's intent to change the principal residence, the proposed new address, school and reason for moving. This notice must be given at least 45 days before the move. There is a rebuttable presumption that relocating a child is not in the child's best interest and the party seeking re-location has the initial burden of proof.

HB. 262 (Act 2003-273)—Child abuse reporting has been amended to include the requirement that clergy are required to report cases of known or suspected child abuse except when the clergy's knowledge is acquired from a confidential and privileged communication under Rule 505 of the Alabama Rules of Evidence.

SB. 6 (Act 2003-380)—Uniform Interstate Enforcement of Domestic Violence Orders, a project of the Alabama Law Institute, provides a uniform system for enforcement of domestic violence protection orders across state lines. It defines the meaning of "full faith and credit" as it relates to interstate domestic protection orders and is required under the Federal Violence Against Women Act.

SB. 121 (Act 2003-383)—Grandparent visitation has been clarified to provide that a grandparent may file for visitation rights when: (1) at least one of the child's parents is deceased; (2) the parents are divorced; (3) the parent abandons the child; (4) the child is born out of wedlock; or (5) the parents refuse to let the grandparents see their grandchild. The best interest of the child is still paramount.

SB. 376 (Act 2003-303)—Federal judges are added to the list of those who may perform marriages in Alabama which already includes ministers and most other state court judges.

SB. 383 (Act 2003-385)—In domestic abuse cases, the plaintiff is to pay no court costs for filing, the registration or service of a protection petition order, or for a witness subpoena when relating to the prevention of abuse. These costs may be imposed upon the defendant.

Criminal Laws

HB. 489 (Act 2003-354)—Under the Alabama Sentencing Reform Act of 2003, voluntary sentencing standards will be phased in over a three-year period culminating in the implementation of truth in sentencing standards.

HB. 490 (Act 2003-353)—The Community Corrections and Punishment Act of 2003 amends the Alabama Community Punishment and Corrections Act of 1991 to provide that community corrections programs may be established by resolution of the county commission and includes specific revisions that ensure accountability of programs and management of funds through the Department of Corrections.

HB. 491 (Act 2003-355)—The Theft Reform Bill allows that the felony threshold for theft has been generally increased from $250 to $500, making values consistent with one another as well as with other states' theft statutes.

HB. 534 (Act 2003-338)—The Cross Burning and Flag Burning Act It is a Class C felony to burn a cross or an American flag on property of another in a public place with intent to put a person in fear of bodily harm.

SB. 49 (Act 2003-300)—A person whose death sentence has been commuted to life imprisonment shall not be eligible for parole.

Business Laws

HB. 178 (Act 2003-359)—The Deferred Presentment Services Act encompasses a transaction that involves advancing funds in connection with accepting a check or holding a check for a time period before payment or deposit, and is sometimes called "payday loans." The maximum amount that can be advanced in this transaction is $500.

HB. 440 (Act 2003-396)—State employees whose pay is $75,000 or less may be permitted to also engage in private sector work as long as the employment is not during their scheduled working hours.

HB. 650 (Act 2003-390)—This Act establishes conditions where out-of-state sales are taxed when that foreign business entities with state affiliates have a nexus with the state for the collection of both state and local sales taxes.

SB. 126 (Act 2003-314)—The Alabama Clean Indoor Air Act prohibits smoking in certain public places and requires others to provide smoke-free areas.

SB. 218 (Act 2003-336)—The Unconscionable Pricing Act provides that a price is unconscionable if, during a state of emergency declared by the Governor, the price of an item exceeds 25 percent of the average price offered in the last 30 days before the state of emergency.

Election Laws

HB. 59 (Act 2003-337)—Polling place hours have been set for elections in Alabama requiring the polling place to be open from 7:00 a.m. to 7:00 p.m. and remain open for 12 consecutive hours.

HB. 104—This Act pertains to the restoration of voting rights of convicted felons (vetoed by Governor Riley).

HB. 113 (Act 2003-339)—An automatic recount is required when in a general election a candidate is defeated by a difference of not more than half of 1 percent of the total votes cast for the office.

HB. 127 (Act 2003-311)—In Presidential elections, certification of party nominees with the Secretary of State has been moved back to September 6th.

HB. 174 (Act 2003-400)—Municipal election laws have been substantially revised.

HB. 193 (Act 2003-381)—Voter ID requires voters to present certain identification at polls.

HB. 419 (Act 2003-313)—The Help America Vote Act is a major revision of the state's election laws as required by federal act. It provides for authority of the Secretary of State, a statewide voter registration list, provisional voting, provisions for the Board of Registrars, voter identification, voter re-identification, voter information, absentee ballots, certification of results, development of the state election plan, administrative review of voter complaints, funding through federal government, and a uniform polling system.

Medical Laws

HB. 28 (Act 2003-347)—This modernizes our current Uniform Anatomical Gift Act, that is now 35 years old, by simplifying the document of gift and clarifying the rights of parties involved in the donation. This was one of the Law Institute's projects.

HB. 199 (Act 2003-273)—The Department of Public Safety may electronically transfer anatomical donation records to the Alabama Organ Transplant Organization.

City/County Government

HB. 47 (Act 2003-344)—The county commission may set speed limits in urban and rural construction zones along county roads and may double the fines when construction personnel are present, as currently allowed by the State Department of Transportation.

HB. 110 (Act 2003-369)—The Blanket Bond Coverage Act, which currently covers state officers and employees, is now available to cover sheriffs, judges of probate, county commissioners, tax assessors, license commissioners, revenue commissioners, and other county elected officials who are required to be bonded.

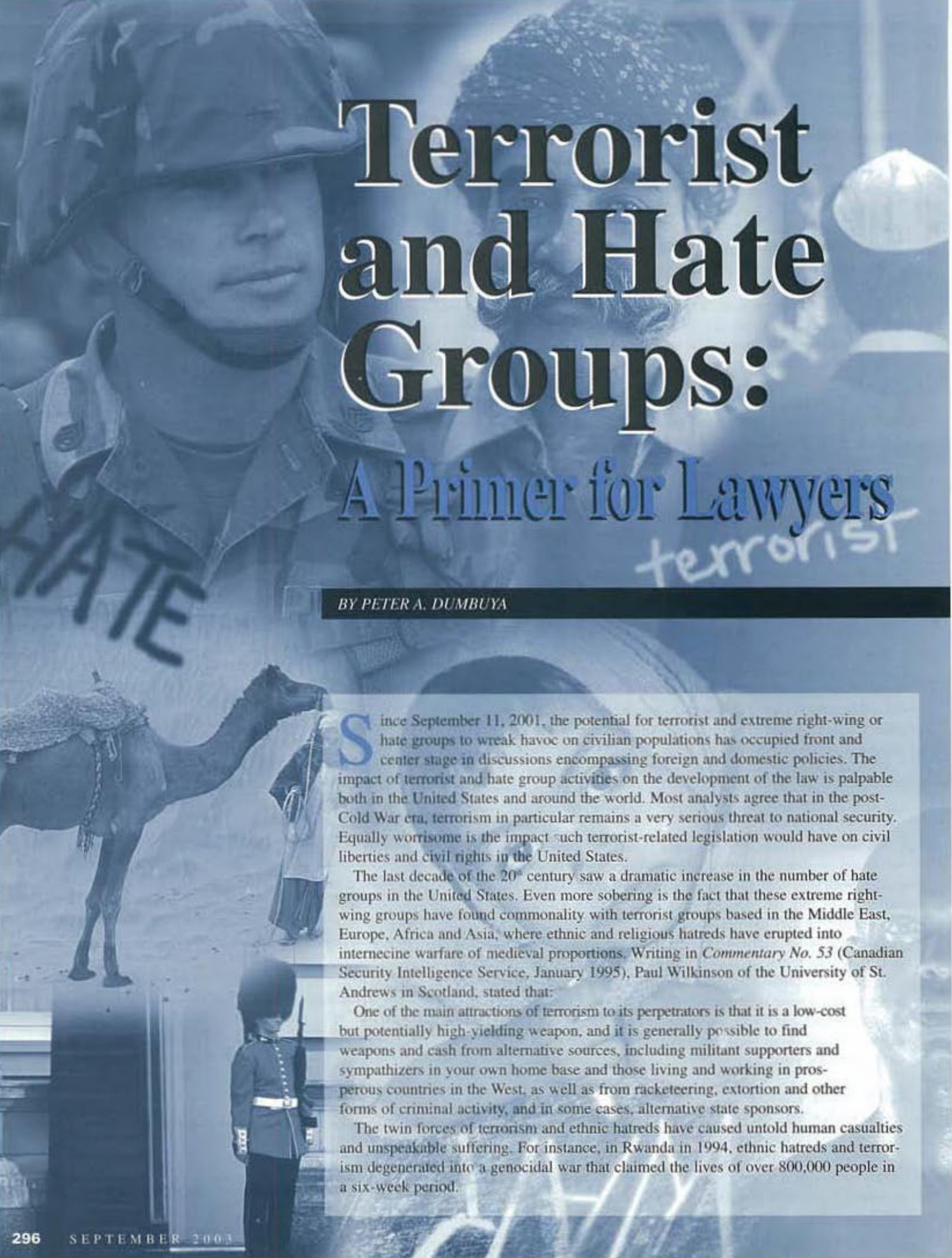
Homeland Security

HB. 335 (Act 2003-276)—The Homeland Security Department is created to coordinate Alabama's security response by establishing a new state agency.

Copies of these bills may be obtained from the Legislature's Web site at *www.alisdb.legislature.state.al.us/acas/ACASLogin.asp.*

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, 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.



Terrorist and Hate Groups:

A Primer for Lawyers

BY PETER A. DUMBUYA

Since September 11, 2001, the potential for terrorist and extreme right-wing or hate groups to wreak havoc on civilian populations has occupied front and center stage in discussions encompassing foreign and domestic policies. The impact of terrorist and hate group activities on the development of the law is palpable both in the United States and around the world. Most analysts agree that in the post-Cold War era, terrorism in particular remains a very serious threat to national security. Equally worrisome is the impact such terrorist-related legislation would have on civil liberties and civil rights in the United States.

The last decade of the 20th century saw a dramatic increase in the number of hate groups in the United States. Even more sobering is the fact that these extreme right-wing groups have found commonality with terrorist groups based in the Middle East, Europe, Africa and Asia, where ethnic and religious hatreds have erupted into internecine warfare of medieval proportions. Writing in *Commentary No. 53* (Canadian Security Intelligence Service, January 1995), Paul Wilkinson of the University of St. Andrews in Scotland, stated that:

One of the main attractions of terrorism to its perpetrators is that it is a low-cost but potentially high-yielding weapon, and it is generally possible to find weapons and cash from alternative sources, including militant supporters and sympathizers in your own home base and those living and working in prosperous countries in the West, as well as from racketeering, extortion and other forms of criminal activity, and in some cases, alternative state sponsors.

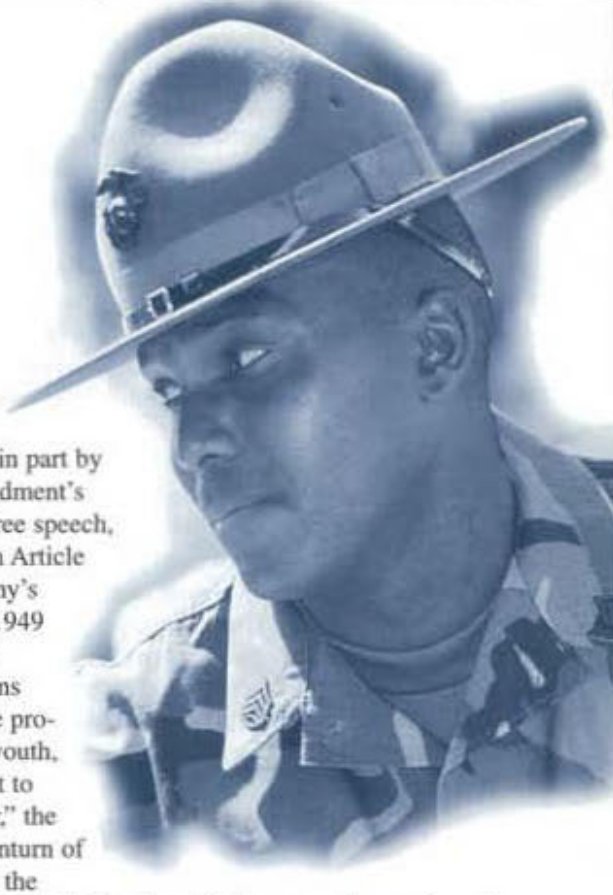
The twin forces of terrorism and ethnic hatreds have caused untold human casualties and unspeakable suffering. For instance, in Rwanda in 1994, ethnic hatreds and terrorism degenerated into a genocidal war that claimed the lives of over 800,000 people in a six-week period.

Terrorist and Hate Groups Defined: Blurring the Lines?

The definition of terrorism is as elusive as the perpetrators and sympathizers of terrorist acts. Attempts to define terrorism have also been obfuscated by the age-old adage that one country's "terrorist" is another country's "freedom fighter." Nowhere is this dichotomy more noticeable than in the Middle East where Islamist radical groups, imbued with religious fervor and ethnic hatred for the state of Israel, the United States and other Western powers have carried out innumerable acts of terrorism in the name of the Palestinian people and Islam.

One of the earliest attempts to define terrorism came in 1937 at the height of German and Japanese aggressions in Europe and East Asia, respectively. Though never implemented, a draft convention by the League of Nations, the precursor of the United Nations (UN), defined terrorism as, "All criminal Acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public." In 1999, the UN General Assembly took the position that, "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them." Currently, in addition to five regional conventions, there are 12 UN conventions and protocols dealing with terrorism. In the United States, a terrorist activity is defined as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any other state) and which involves any of the following": Hijacking or sabotage of an aircraft, vessel or vehicle; the seizing or detaining, and threatening to kill, injure, or continuing to detain another individual for the purpose of compelling a third person, including a governmental organization, to do or abstain from doing an act as an explicit or implicit condition of their release; a violent attack upon an internationally protected person or upon the liberty of such a person; an assassination; the use of biological, chemical, or nuclear weapon or device, or the use of explosive, firearm, or other dangerous device with the intent to endanger the safety of one or more individuals, or to cause substantial damage to property; and a threat, attempt, or conspiracy to do any of the aforementioned acts. 8 U.S.C. § 1182(a)(3)(B)(iii). The United Kingdom's *Terrorism Act 2000* contains similar language in describing terrorism, adding interference with or disruption of electronic systems to the list of terrorist offenses.

According to Mark Potok of the Southern Poverty Law Center (SPLC) in Montgomery, Alabama, hate groups are categorized and defined by their respective ideologies. Author Martin A. Lee, writing in the spring 2002 issue of the SPLC's *Intelligence Report* noted that "leaders of the hard-core racist movement in the United States have seized upon the September 11 attacks as an opportunity to expand their strategic alliance with Islamic radicals under the pretext of supporting Palestinian rights." According to the SPLC, the message of the American radical right, that the United States is the champion of globalization and ethnic diversity, resonates with various Islamic radical groups in the Middle East.



Encouraged in part by the First Amendment's protection of free speech, contrasted with Article 5(2) of Germany's Basic Law of 1949 (*Grundgesetz*) which constrains speech "for the protection of the youth, and in the right to personal honor," the economic downturn of the 1980s, and the strategic alliance with Islamic radical groups, the number of hate groups in the United States increased from 602 in 2000 to 676 in 2001, a 12 percent increase. By 2003, the number had increased to 708. Similarly, the number of hate sites on the World Wide Web has increased from 366 in 2000 to 405 in 2001, a 10 percent increase.

According to Potok, improved methods of accounting have enabled the SPLC to keep track of hate groups in the United States. These hate groups account for about 5 percent of hate crimes committed in the United States; the rest are committed by individuals sometimes claiming to belong to or represent particular extreme right-wing groups. Increasingly, extreme right-wing hate groups utilize the World Wide Web, newspapers and publishing outlets like Gary Lauck's in Lincoln, Nebraska and Willis Carto's Institute for Historical Review, to get the word out to other peddlers of ethnic hatred in the United States and abroad.

According to the SPLC's *Intelligence Report* (spring 2002 issue), hate groups can be divided into Ku Klux Klan, Neo-Nazi, Racist Skinhead, Christian Identity, Black Separatist, Neo-Confederate, and other groups that espouse a eclectic array of hate doctrines. Christian Identity groups, Potok submits, espouse a heretical interpretation of Christianity that is anti-Semitic and racist. In the United States, the Christian identity movement was popularized by American Nazi Party founder George Lincoln Rockwell who was also prominent in the Holocaust denial movement. The largest neo-Nazi group in the United States is the West Virginia-based National Alliance of William Pierce. Neo-Confederate groups glorify antebellum racist ideologies, and in South Carolina, Georgia and Mississippi, they tend to rally around the Confederate flag. The Nazification of extreme right-wing ideology in the United States has united these disparate groups in their hatred of Jews and blacks as threats to ethnically homogenized nations. Hate groups equate the nation state with race.

The attacks of September 11, 2001 underscore the increasing convergence of interests between extreme right-wing hate groups in Europe and the United States on the one hand, and previously despised Islamic radical groups in the Middle East. Both groups perceive common enemies: the United States and its support for the state of Israel, Jews and globalization which they equate with homogenization of distinct cultures. As Martin A. Lee has noted, "The peculiar bond between white nationalist groups and certain Muslim extremists derives in part from a shared set of enemies–Jews, the United States, race-mixing, ethnic diversity."

Hatred of Jews goes back to the Middle Ages. During the crusades (holy wars backed by the popes to recover the Holy Land from Muslim Arabs and Turks) of the 11th and 12th centuries, latent prejudice against Jews surfaced. Many Europeans resented them because they played major roles as merchants in the East-West trade, and loaned money to peasants and nobles alike. Itinerant preachers blamed Jews for the crucifixion of Christ on the orders of the Roman prefect of Judaea, Pontius Pilate. During the Black Death of the 14th century, Jews were accused of poisoning the wells of Christians, leading to the murder of thousands of Jews across Europe.

Modern strategic links between extreme right-wing groups and radical Islamic groups predate the Second World War. According to Lee, the Muslim Brotherhood, established in Egypt in 1928 by Hassan al-Banna, advocated the setting up of Islamic states in the Middle East. British occupation of Palestine after the Great War of 1914-18 helped fuel Islamic radicalism and collaboration with Adolf Hitler's Third Reich. When the Allies defeated Germany in 1945, many Nazis fled to Egypt, Syria and other Middle Eastern states where they collaborated with host governments and the Palestinians. Since the 1980s, when extreme left-wing groups such as Germany's Red Army Faction and Italy's Red Brigade all but disappeared, ethnic hatred has been the catch phrase of extreme right-wing racist neo-Fascist and neo-Nazi groups in Europe and in the United States.

Middle East Terrorism

According to Wilkinson, the Middle East "remains the most dangerous source of terrorist challenges to the wider international community." According to Congressional findings, Middle Eastern terrorism accounted for 60 percent of all international terrorist activities in 1985. There is no sign that those numbers have diminished in recent years. Of the 136 significant terrorist incidents reported by the U.S. State Department for the years 1961–2001, 50 of them were linked directly to Middle Eastern terrorist groups, and involved significant civilian casualties (targets of opportunity).

Wilkinson has identified four basic factors that motivate extreme Islamic terrorist groups in the Middle East:

1. Rejection of the Oslo Agreement between the Palestinian Authority and the State of Israel: Islamic fundamentalist groups that oppose the agreement, including Hamas and Islamic Jihad, view Yasser Arafat as a traitor to the cause of Palestinian self-determination.
2. Extreme Islamic fundamentalism: Inspired by the Iranian Revolution of 1979, Islamic fundamentalists in the region have called for jihads to topple pro-western regimes and set up Islamic republics in their stead.
3. Westerners: Radical Islamic groups target westerners for allegedly providing assistance to pro-western regimes.
4. The Middle East itself is the major region of state sponsors and supporters of terrorism: Iran, Syria, Iraq and others.

U.S. Anti-Terrorism Laws

Up to the 1990s, terrorist incidents in the United States included the use of homemade pipe and fire bombs that inflicted minimal civilian casualties. The worst terrorist incidents involved the bombing of New York City's World Trade Center (WTC) in 1993 by followers of the Egyptian cleric, Umar Abd al-Rahman, and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995 by right-wing extremists Timothy McVeigh and Terry Nichols.

As a result of the bombing of the WTC and the Murrah Federal Building, Congress consolidated into one bill various legislative measures to combat terrorism. The result was the *Antiterrorism and Effective Death Penalty Act of 1996* (P.L. 104-132)(AEDPA). Similarly, after the September 11, 2001 terrorist attacks, Congress passed "The Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism (USA Patriot) Act of 2001" (P.L. 107-56). AEDPA contains nine titles, among them Title I which amends the federal habeas corpus law, 28 U.S.C. § 2241 *et seq.*, by establishing a one-year period of limitation within which a person in custody pursuant to the judgment of a state court must file his/her application for a writ of federal habeas corpus (Section 101). The limitation period is tolled during the pendency of a properly filed application for state post-conviction or other collateral review.

Sections 102 and 103 of the Act amend 28 U.S.C § 2253 and Rule 22 of the Federal Rules of Appellate Procedure to narrow the scope under which a person may appeal a federal district court's denial of a petition for habeas corpus. Other provisions deal with the circumstances under which an application for a writ of habeas corpus on behalf of a person in state custody can be granted (Section 104), limits on second or successive habeas applications by state and federal inmates (section 106), and procedure in death penalty cases (section 107).

Title II empowers courts, when sentencing a defendant, to order such defendant to make restitution to the victim (or victim's estate) for the federal crimes of violence, an offense against property, or an offense relating to tampering with consumer products in which the victim suffered physical injury or pecuniary loss (Section 204). Section 211 subjects foreign governments, designated as state sponsors of terrorism, to liability in U.S. courts for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage and hostage taking among others. Such acts must have been undertaken by an official, employee or agent of such a foreign state while acting within the scope of his/her employment. Actions under this subsection must be commenced within ten years from the date on which the cause of action arose.

The remaining titles criminalize terrorist fundraising, including civil penalties for financial institutions that fail to report funds belonging to terrorist organizations (Title III), provide for the removal and exclusion of terrorist and criminal aliens from the U.S. (Title IV), restrictions on the possession and use of nuclear materials as well as biological, chemical, and other weapons of mass destruction (Title V), the manufacture, import/export, or pos-

session of plastic explosives (Title VI), extraterritorial jurisdiction for certain offenses committed outside the U.S. (Title VII), assistance to law enforcement efforts to deter terrorism in the U.S. and overseas (Title VIII), and miscellaneous matters (Title IX).

The USA Patriot Act contains ten titles. Title I provides for the enhancement of domestic security against terrorism. To that end, Section 101 establishes a counter-terrorism fund to reimburse Department of Justice (DOJ) facilities for costs associated with the detention, in a foreign country, of individuals accused of terrorism, to re-establish the operational capability of DOJ facilities damaged or destroyed by terrorists, pay rewards, and conduct terrorism threat assessments of federal agencies. The law also increased funding for the FBI's Technical Support Center established under the P.L. 104-132 (Section 103).

Apart from condemning attacks against Arab Americans, Muslim Americans and Americans from South Asia and reaffirming respect for their civil rights and liberties (Section 102), the Act instructed the director of the Secret Service to develop a national network of electronic crime task forces to combat terrorism (section 105), and grants to the President economic powers to confiscate property of any foreign person, organization or country that plans, authorizes or engages in hostilities or attacks against the U.S. (Section 106).

Title II provides for a judicially supervised procedure whereby law enforcement officials may intercept wire, oral and electronic communications in connection with investigations of offenses relating to chemical weapons, weapons of mass destruction, violent acts of terrorism transcending national borders, financial transactions and material support for terrorists and terrorist organizations (Section 201). Authority to investigate computer fraud and abuse (Section 202), the disclosure of grand jury information to federal law enforcement officials relating to foreign intelligence or counter-intelligence information (section 203), and the employment of translators on an expedited bases without regard to federal personnel requirements and limitations (section 205) are also provided for in this Act.

Section 206 empowers the court established under the Foreign Intelligence Surveillance Act of 1978 (FISA) to order third parties to provide assistance and information to law enforcement authorities in the surveillance of non-U.S. individuals who are agents of a foreign power, and Section 207 extends the duration of surveillance and physical search orders to 120 days. Other provisions authorize the seizure of voice mail messages (section 209), emergency disclosure of electronic communications to protect life and limb (Section 212), and the elimination of the requirement that limited the use of pen registers and trace devices to facilities used by foreign agents or international terrorists (Section 214).

Title III strengthens measures against international money laundering and the financing of terrorism. Among other things, it requires the Secretary of the Treasury to take appropriate measures and to provide guidance to domestic financial institutions on particular foreign jurisdictions, financial institutions operating outside the U.S., and certain transactions of concern to the federal government (Section 302). Titles IV, V and VI deal with protecting the northern border, including the authority to hire additional border inspectors, mandatory detention of suspected terrorists, multilateral cooperation against terrorism, rewards by the Attorney General and Secretary of State to combat terrorism, and expedited payment for public safety officials

involved in work related to terrorist attacks and victims of terrorism. Titles VII-X deal with sharing information for critical infrastructure protection, strengthening criminal laws against terrorism, improving the intelligence gathering capability of the Central Intelligence Agency, and miscellaneous provisions relating to terrorism prevention.

Conclusion

In this article, I have shown that defining terrorism can be as elusive as tracking down terrorists themselves. The age-old adage that one state's terrorist is another state's freedom fighter still prevails, undermining efforts aimed at combating domestic and international terrorism. The League of Nations and the United Nations have grappled with the problem of international terrorism. Currently, there are 12 UN conventions and protocols and five regional conventions dealing with various aspects of international terrorism. This is a measure of the fact that terrorism is a multifaceted problem that requires international cooperation to defeat. Even more worrisome is the evolution and strengthening of strategic alliances between terrorist groups and extreme right-wing groups that now perceive common enemies.

The AEDPA and the USA Patriot Act resulted from three significant terrorist acts that surpassed all others in the history of the United States. They have instituted sweeping changes in the nation's criminal, immigration and banking laws, strengthened some institutions and created new ones, and given government agencies new authority to collect, intercept and share information previously not subject to inter-agency disclosure. Whether such new authority can make a difference in the fight against terrorism remains to be seen. ■

Peter A. Dumbuya

Peter A. Dumbuya is a solo practitioner in Phenix City. He is also an assistant professor of history at Fort Valley State University in Georgia. He received his Ph.D. in history from the University of Akron (Ohio) and his J.D. from the Jones School of Law. He serves on the editorial boards of *The Alabama Lawyer* and the *Journal of the Georgia Association of Historians*. He is the author of *Tanganyika Under International Mandate*, 1919-1945 (Lanham: University Press of America, 1995).

ALABAMA STATE BAR

Spring 2003 Admittees

Statistics of Interest

Number sitting for exam	399	
Number certified to Supreme Court of Alabama	164	
Certification rate*	41.1	percent

Certification Percentages:

University of Alabama School of Law	60	percent
Birmingham School of Law	31.4	percent
Cumberland School of Law	71.8	percent
Jones School of Law	35.5	percent
Miles College of Law	5.4	percent

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

For full exam statistics for the February 2003 exam, got to *www.alabar.org,* click on "Members," and then check out the "Admissions" section.

Alabama State Bar Spring 2003 Admittees

Abbott, Steven Leslie
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Albin, Ramona Carroll
Allen, Richard David
Anderson, Jennifer Motos
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Anlage, Caryn Lynne
Barnes, Robert Lee
Barrett, Sharon Elizabeth Hicks
Bayless, Howard Hink
Belin, Larry James
Bermel, Jennifer Miller
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Black, James Gary
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Blocton, Nakita Rashea
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Bonham, Vonda Kay
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Boyles, Gordon Richard
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Branch, James Vaughan
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Brown, Dustin Thomas
Bruner, Kelley McNair
Bush, Brooke Towery
Butler, Carl Newton
Butler, Eric Whitney
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Caldwell, Debra Ann
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Capleone, Michael LaRusso
Carnley, Samantha Leigh
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Crowder, Corrie Collins
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England, Russell Lee
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Mitchell, Rebecca Dee
Mitchem, Ryan Wesley
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Murphree, Mark Barry
Musgrove, Michael Jason
Niccolai, Ann-Marie
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Oxford, John McDowell
Padgett, Elizabeth Branch
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Stephenson-Johnson, Patrice
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admittee, father, brother and cousin

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admittee, husband and father-in-law

Kathryn Yarbrough Bouchillon (2003) and Kenneth Edward Yarbrough (1995)
admittee and brother

Julie Schilleci Foster (2003) and Judge Vincent J. Schilleci (1975)
admittee and father

Joseph A. Ingram (2003) and Gilbert M. Sullivan, Jr. (1981)
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For example, mini-grants can be used for court related programs (i.e., small claims mediation using trained volunteer mediators, probate court programs, access and visitation/support programs), school peer mediation training, community mediation, ombuds programs, municipality/city dispute resolution training and programs, state and local agency training and programs, law school clinic programs, victim/offender conferencing, or to duplicate an existing program in your jurisdiction.

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ALABAMA STATE BAR

2003 ANNUAL MEETING

July 16-19, 2003 • Adam's Mark Hotel • Mobile, Alabama

ASB President Fred Gray talks to son Fred at the beginning of the 2003 Annual Meeting in Mobile.

ASB Commissioner Everett Price (center) visits the Jones School of Law booth during Legal Expo '03.

Fred Gray and U.S. District Judge Myron Thompson, who presented the "Federal Procedure Update" CLE program Thursday

President Gray thanks Dennis Archer (center), president-elect of the American Bar Association, for his remarks as the featured speaker of Thursday's Bench and Bar Luncheon as Circuit Judge Charles Price (right) reads over his notes as co-moderator of the luncheon.

Katy Smith Campbell, chair, Committee on Volunteer Lawyers Programs, presents William J.N. Coxwell with the ASB Pro Bono Award, student category.

United States District Judge Charles R. Butler, Jr. (center), with family members, after receiving the 2003 Alabama State Bar Judicial Award of Merit

(Left to right) Circuit Judge Charles Price, immediate past president, Alabama Association of Circuit Judges; Dr. Regina Benjamin, immediate past president, Alabama Medical Association; Fred Gray; Tyrone Means, immediate past president, Alabama Trial Lawyers Association; Hon. Earlean Isaac, president, Alabama Association of Probate Judges; and Earnest A. Holland, immediate past president, Alabama Pharmacists Association

Attendees of the Volunteer Lawyers Program annual reception enjoyed catching up and winding down Thursday afternoon.

Administrative Law Judge Carl Evans (holding plaque), with family members and friends, after being presented with the 2003 recipient of the Eugene W. Carter Medallion Award

ALABAMA STATE BAR

2003 ANNUAL MEETING

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Jack and Jamie Durham share a laugh and show off their "finery" at the annual membership reception, "Mardi Gras Redux," Thursday night.

John L. Carroll, dean, Cumberland School of Law, takes a chance with some "masked merrymakers."

A Mardi Gras greeting!

Everyone enjoyed the "festival" atmosphere of the membership reception, even the younger set!

Barbara Rhodes, executive director of the Mobile Bar Association, went to great "lengths" to make sure everyone had a good time.

The group with the biggest smiles is always found at the Past President's Breakfast. This year's attendees included (left to right) Larry Morris, Norborne Stone, E.T. Brown, Ben Harris, Broox Holmes, John Owens, Sam Rumore, Vic Lott, Drew Redden, Alva Caine, and Walter Byars.

James McElhaney, law professor and the country's most noted speaker on litigation techniques, "works the crowd" during his presentation, "Planning to Win: Discovery and Persuasion in the Courtroom."

Miss Alice Finch Lee (seated), 2003 recipient, Maud McClure Kelly Award, with translator Debbie Isbell (left), and Dawn Wiggins Hare, immediate past chair, Women's Section

At the Legal Expo, venders introduced visitors to the latest legal technology.

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Harold Williams (left) and friend after Mr. Williams is recognized and thanked by President Gray for his photographic contributions through the years.

After a short walk, ASB members and staff gathered on the steps of The Ezell House, before enjoying a "Taste of Mobile" Friday night, hosted by Hand Arendall.

Showing that the annual meeting has something for everyone, Sue and Gerald Paulk from Scottsboro (far left and far right) visit with Wade and Joan Baxley from Dothan (center).

Among those who enjoyed the stroll over to The Ezell House were Justice Gorman Houston (center) and his wife, Martha (second from left).

The Ezell House provided a great venue for catching up with colleagues.

President Gray and ASB Commissioner Greg Ward, who appears a little uncertain of who he is

ALABAMA STATE BAR

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Warm temperatures didn't keep guests from enjoying themselves in the courtyard of The Ezell House, too.

ALAP Director Jeanne Marie Leslie took a break and visited with Jerry Baxley ("Mr. Wanda Devereaux"), at the IT-Lex booth.

Sam Rumore (right) presents Fred Gray with his "Past President" ribbon and plaque during the Grande Convocation.

Fred Gray gives new ASB President Bill Clark some friendly advice on surviving the upcoming year.

Members of Bill Clark's family include wife Faye, grandson William Clark, daughter-in-law Anne Clark, son Will Clark, granddaughter Catherine Smith, son-in-law Clinton Smith, grandsons Marshall and Anderson Smith, and daughter Helen Catherine Smith.

Navy Commander George N. Hardesty, Jr. (standing), U.S. Naval Reserve, is recognized by President Clark for rendering service by protecting our country.

Fred Gray's secretary, Joann Bibb, who was thanked for her hard work during his term as ASB president, and Millard Fuller, ASB member, founder of Habitat for Humanity and Saturday's Grande Convocation speaker

Shannon (Scruggs) Campagna (left), Mark White and Kay Scruggs after Mrs. Scruggs is presented with a copy of the award named in honor of her late husband and former ASB president, Bill.

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E.T. Brown (with plaque) and family members after his being named the first recipient of the William D. "Bill" Scruggs, Jr. Award

ASB 50-year members in attendence at the annual meeting include Lionel Noonan, Fletcher Jones, Charles Langford, A.J. Coleman, William Ray, and Hon. Perry Hooper.

ASB Commissioners Jim Williams, Anthony Joseph and Jim Fry

Incoming "First Lady" Faye Clark is presented with a rose bouquet from 2003 "First Lady" Carol Gray.

ALABAMA STATE BAR

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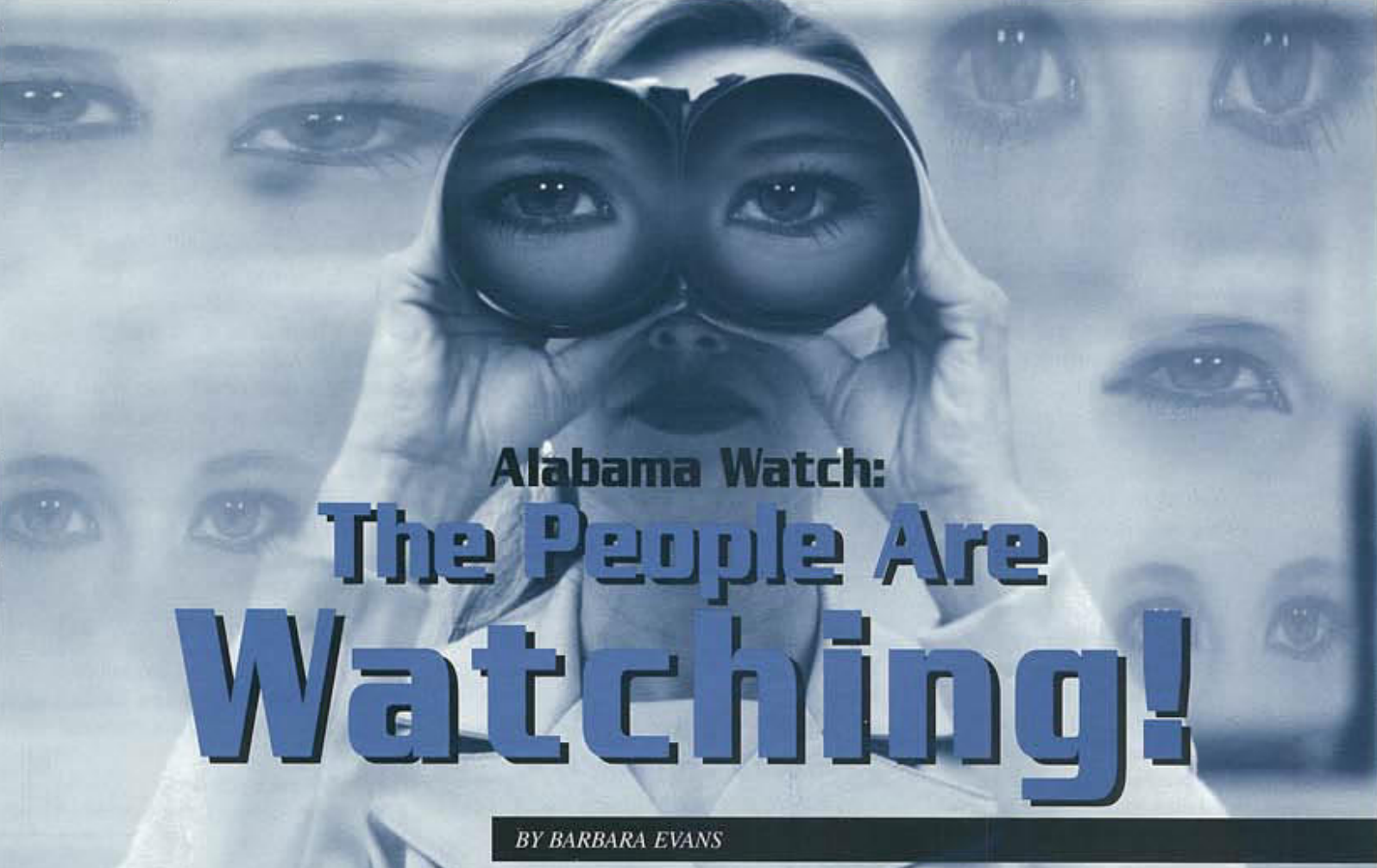

Alabama Watch: The People Are Watching!

BY BARBARA EVANS

In a Lee County courtroom in the year 2001, a young lawyer made history when he prepared a *cy pres* proposal that impressed the judge in an insurance fraud case. The judge awarded $100,000 in *cy pres* funds to the Alabama Department of Insurance to fund an investigator position and $100,000 went to a consumer organization that would work to educate Alabamians and prevent fraud against consumers. The problem was that there was no such organization.

The attorney consulted **Sue McInnish**, long known in Alabama for child advocacy leadership roles, who was executive director of the Alabama Civil Justice Foundation. Together, they came up with the idea for a consumer group that would represent the interests of Alabama families and small businesses.

And so, Alabama Watch was born. My background as a Legal Services paralegal and union organizer in the South seemed perfect for the leadership for Alabama Watch. I had a passion for justice and skin thick enough to lead the fight for consumer rights. I took the helm of the organization. My strength was my background as an organizer. The job was huge: Educate Alabama consumers about the state of consumer law in Alabama.

The first thing we did was put together leaders from all over Alabama. Representatives from business, human services, community groups and advocacy organizations were assembled to serve as the Alabama Watch Advisory Council. Our governing board remains small: **Professor Natalie Davis** of Birmingham Southern; **Dr. Harriett Means** from Troy State University; **Scott Powell**, director of Greater Birmingham Ministries; **Brian Warwick**, the young attorney who started it all; and tax attorney **Edgar Gentle, III**. The founding chair was retired attorney **Francis "Brother" Hare**, who has since retired from the Alabama Watch Governing Board, as well.

Together, we determined that we would be fiercely independent, that we would not compromise on principles, that we would only release carefully researched material and that we would stand firmly for consumer rights. We obtained our status as a non-profit corporation and quickly got two more small *cy pres* awards.

With a tiny staff of one and a half, we decided that we would do a few things well, rather than many things poorly. We had to set priorities. First and foremost, we had to take up the banner of insurance reform. We determined that we would protect the most vulnerable of consumers, children and nursing home residents, and that we would seek accountability and availability of state regulatory agencies.

Within a few months we found ourselves at the Alabama legislature, educating legislators on how insurance bills would truly affect Alabama citizens, how credit scoring hurt our people, how eroding civil rights was consumer unfriendly, and how nursing homes residents needed better protection. We joined with AARP in those education efforts. This year we helped educate on the payday loan issues and put together the "Protect Our Families" Coalition to work on nursing home issues. The Coalition consists of Alabama Watch, AARP, Alabama Arise,

AFL-CIO, and the Alabama Trial Lawyer Association. Despite the differences in mission of these organizations, they learned to work together on issues affecting nursing home residents and the new relationship among the groups will make Alabama a better place.

What makes Alabama Watch a unique entity is that we are not a group of legal scholars, nor are we a political or one-issue organization. We are multi-faceted and nonpartisan with one mission: the education of the Alabama citizen, and consumer protection. We are consumers educating consumers. We call on the legal community for help and support because they understand better than most the terrible plight of the Alabama consumer. We can cut right through the rhetoric and public relations of those who seek to erode consumer rights, and we are credible because of our history and our outstanding research. In just a year and a half we have gained credibility with the media. During the summer of 2003 we are planning a series of town meetings all over Alabama to hear consumer concerns and educate consumers on various subjects.

It is not an easy task. Some who differ with us on issues would label us pro-lawyer because we oppose caps on lawsuits and further tort reform. Others feel like we are uncompromising. And it is true that we are direct and straightforward. We told the legislators that we wouldn't be buying them lunches and dinners, but they could rely on us for honest, well-researched information.

As we grow, we are putting together a formidable group of citizen activists all over Alabama, and our newsletter now reaches nearly 3,000 people.

We have been warned that there are few grants for consumer groups, and we struggle with fundraising on a constant basis, even though donations are tax deductible. We've asked law firms to make us a regular part of their budget, because we are the only consumer group that is publicizing the issues that affect so many clients in Alabama. We know that if Alabama is to grow and prosper we need educated jury pools and educated citizens. We invite you to join us, to support us with donations, with advocacy, with information and with the commitment to change Alabama for the better. Visit our Web site at *www.alabamawatch.org*. We're on the move!

Alabama Watch Advisory Council:

Paul Burkett, Central Alabama Aging Consortium
Joan Carter, Alabama director, AARP
Cassandra Copeland, UAW Community Services Huntsville
Fannie Davis, Lowndes County Emergency Management
Priscilla Duncan, attorney
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Bill Fuller, commissioner, Alabama DHR
Dr. Ellis Hall, retired, Tuskegee University
Debra Harris, Lowndes County Citizens United for Action
Amy Herring, Amy Herring & Associates
Kesa Johnson, activist
Dan Lord, Alabama Securities Commission
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Beverly Ross, director of Public Relations, Trenholm State College
Ann Smith, Tallassee community activist
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Professor Henry Strickland, Cumberland Law School
Billy Tindle, secretary-treasurer, AFL-CIO
Penny Weaver, director of Community Affairs, Southern Poverty Law Center
Mary Weidler, policy analyist, Alabama Arise
Pete Whethington, president, Montgomery Central Labor Council

Barbara Evans
Barbara Evans is the executive director of Alabama Watch.

Retire?
"Not as Long as I Live!"

Harry Markstein, at the age of 90, recently likely became the oldest person to argue before the Alabama Supreme Court. He made the first of six appearances in front of the state's highest court in 1939, before most of today's justices were born.

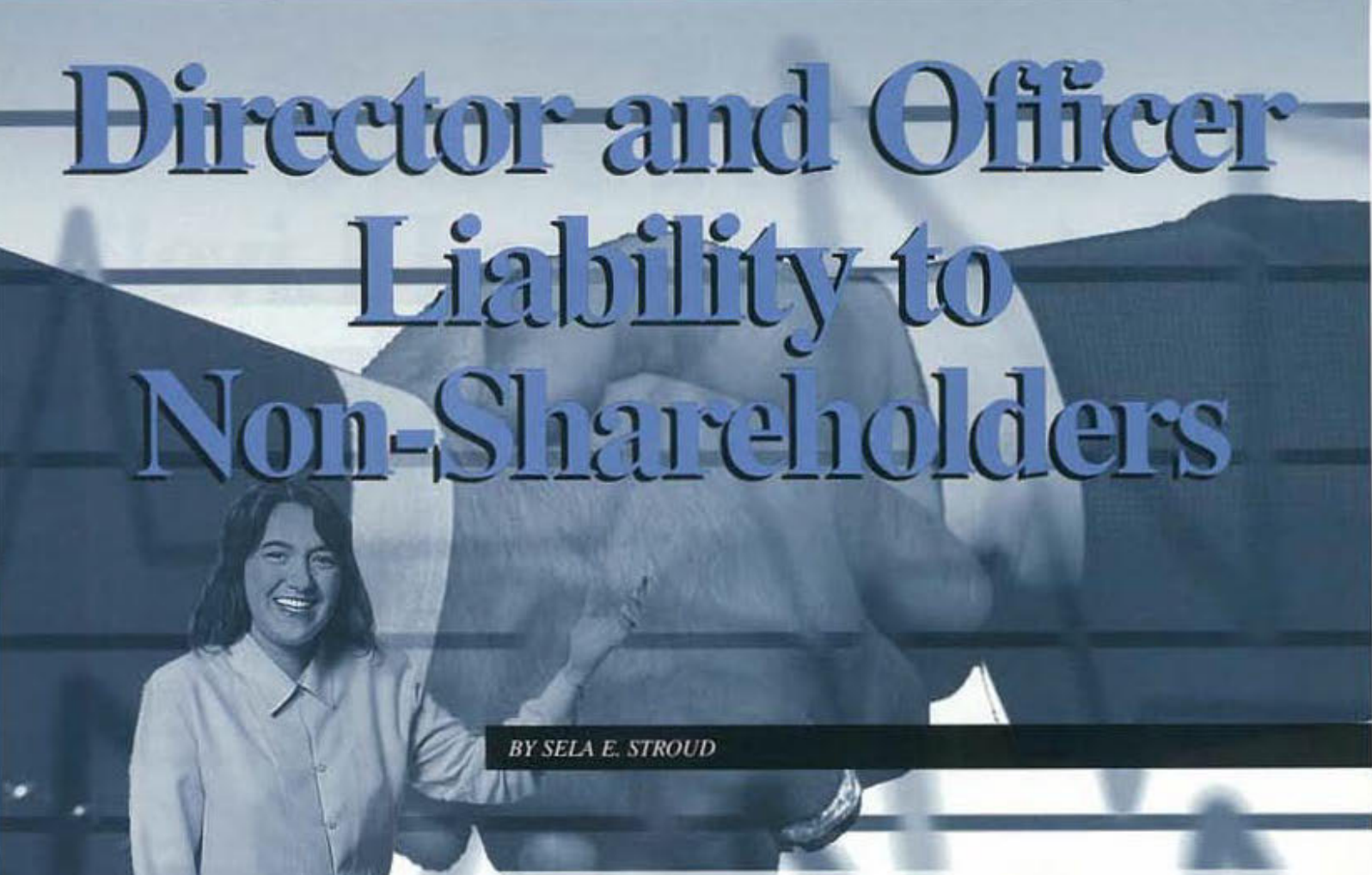
Retirement is still not in his plans. "Not as long as I live! Not as long as I have good health," he said.

Markstein argued a civil case, with the aide of his 62-year-old son, **Daniel H. Markstein, III**, involving distribution of assets from a trust estate.

Robert Esdale Sr., supreme court clerk, said the justices were impressed with Markstein. "We don't have any precedent. He's the first octogenarian," Esdale said.

Bruce Rogers, former president of the Birmingham Bar Association, faced off against the Marksteins. He thanked the older attorney for the privilege. "He is a worthy and skilled advocate," Rogers said. "It's a great example that good lawyers never retire." (source: *The Birmingham News*) ■

Director and Officer Liability to Non-Shareholders



BY SELA E. STROUD

Introduction

In light of several recent well-publicized corporate scandals, much attention has been devoted to director and officer liability to shareholders. Such claims typically are founded on federal and state securities laws. The duty that directors and officers owe to shareholders of Alabama Corporations is codified in the Business Corporations Act. *See Ala. Code* §§ 10-2B-8.30, 10-2B-8.31, 10-2B-8.42 (1975). However, Alabama common law expands the duty that directors and officers owe to non-shareholders who have business relationships with the corporation. Engaging in wrongdoing, even though in an official capacity, may subject the offending director or officer to personal liability to non-shareholders.

Although recent media attention concerning director and officer liability has focused on publicly-traded companies, most lawyers in Alabama encounter director and officer liability issues in connection with closely-held corporations. A close corporation is defined generally as:

> A corporation whose shares, or at least voting shares, are held by a single shareholder or closely-knit group of shareholders. Generally, there are no public investors and its shareholders are active in the conduct of the business. A close corporation is one which fills its own vacancies or in which power of voting is held through manipulation under fixed and virtually perpetual proxies. A corporation, the stock ownership of which is not widely dispersed. Instead, a few shareholders are in control of corporate policy and are in a position to benefit personally from such policy.

Black's Law Dictionary 341 (6th ed. 1990) (citation omitted). This article examines the development of individual liability under Alabama common law of directors and officers of closely-held corporations to non-shareholders.

General Overview

The concept of limited liability normally shields directors and officers from individual liability. *See Restatement (Second) of Agency* §§ 354-57 (1958) (discussing officer liability for acting without authority). Limited liability for directors and officers is one major advantage to the corporate form. Directors and officers must be able to make good faith business decisions about the conduct of their company without the threat of litigation against them personally. The corporate form, however, does not shield directors and officers from liability for all conduct. Alabama case law has attempted to balance the competing interests of protecting directors and officers from individual liability versus preventing the use of the corporate form to shield them from liability for their individual wrongs.

As a general rule, directors and officers of a corporation are not personally liable for torts committed by the corporation, unless they individually participated in or ratified the conduct:

> A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefore. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort. A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible. Liability under those conditions may be recognized by statute. Participation may be found not solely on the basis of direct action but may also consist of knowing approval or ratification of unlawful acts.

18B Am. Jur. 2d *Corporations* § 1877 (2002) (citations omitted). This liability is usually distinct from the concept of piercing the corporate veil, which requires a finding that the directors and officers themselves disregarded the corporate form. *See Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871 (S.D. Ala. 1980). Therefore, even without piercing the corporate veil, directors and officers may be individually liable if they either participated in the wrongdoing or ratified it. This is true despite the fact that the act or omission may have occurred in an official capacity as a corporate representative. *See* 19 C.J.S. § 537 (1990).

Alabama Case Law

In *Alabama Music Co. v. Nelson*, 213 So. 2d 250 (Ala. 1968), restaurant equipment was purchased for the High Street Sandwich Shop, with the purchase price payable in installments. The seller, Helburn Company, assigned the contract to First National Bank of Montgomery. The operator of High Street Sandwich was later hired by Alabama Music Co. and sublet the restaurant premises to Emogean Nelson, who also agreed to assume the purchase contract for the restaurant equipment. A series of sublets ensued, and eventually Alabama Music Co. (through its officer, Joseph Capilouto) acquired a security interest in the High Street restaurant equipment. After default in payments for this equipment, First National Bank planned to repossess, but Alabama Music's Capilouto paid the balance due and received from the bank an assignment of the paper to Alabama Music Co. without recourse. Several different people subsequently operated the restaurant, and ultimately a disagreement arose over who owned the equipment. Believing Alabama Music to be the lawful owner, Capilouto personally removed the equipment from High Street. Emogean Nelson, who originally sublet the restaurant, filed suit against Capilouto individually for conversion.

The court found that Capilouto, though acting as a corporate officer for Alabama Music (which held a security interest in the equipment), was individually liable in tort for his actions. The Alabama Supreme Court first pointed out that "[a] corporation in its relations to the public is represented and can act only through its duly authorized servants, agents or employees." *Alabama Music Co.* 213 So. 2d at 253 (*citing United States Fire Ins. Co. v. Hodges*, 154 So. 2d 3 (Ala. 1963)). This statement reflects the need for a balance in determining when individual director or officer liability is appropriate. On one hand, the nature of the corporate form requires that it be represented by individuals, and therefore individual liability is at times appropriate. On the other hand, the simple fact that a corporation is not a literal person, and that it must be represented by individuals, should not automatically subject those persons to individual liability. The court's ultimate conclusion was that a director or officer cannot escape responsibility by claiming that his or her wrongdoing was commanded by the corporation:

> The general rule of law, that agents properly authorized, acting for a known principal, without any personal undertaking, are not individually responsible, does not apply to torts, because no one can lawfully command another to commit a wrong. It is also clear, that every unlawful intermeddling with the goods of another, is a conversion; and it is no answer to the true owner, that the person so receiving the goods, was ignorant of his title, or that he received them for the use or benefit of another. The taking, or receiving of them, being a conversion, his subsequent disposition of them, will not exonerate him from liability.

Alabama Music Co. 213 So. 2d at 253-254 (*quoting Lee v. Mathews*, 10 Ala. 682 (1846)). The court thus concluded that Capilouto could be held individually liable for his actions as an officer of Alabama Music.

In *Chandler v. Hunter*, 340 So. 2d 818 (Ala. Civ.App. 1976), Katrina Hunter sued Southern Mobile Homes, Inc. and Gary Chandler individually, as the president of Southern Homes, for damages to a mobile home she purchased. Her complaint alleged fraud, breach of the duty of good faith and breach of warranty. Chandler contended that the trial court erred in denying his motion for a directed verdict as to the allegations against him individually, because he acted only as an officer for Southern Mobile

Homes. The court found no error in the trial court's denial of a directed verdict for the defendants on the fraud claim. The court stated that a person is liable for any torts he commits, even if acting in an official capacity, when the agent has personally committed a wrong. As a result, Chandler's personal liability for making false representations was properly presented to the jury. In the court's view, it was more important to prevent the individual from excusing himself from liability simply because of his status as a corporate agent.

Chandler also claimed he was entitled to a directed verdict on the contract count, because he merely acted as an agent of the corporation. He cited *Alabama Transaction Co. v. Selma Trust & Savings Bank*, 117 So. 19, 21 (Ala. 1928), as authority for the proposition that "[a]n agent whose status is understood by the other contracting party, and who has authority to bind his principal, does not bind himself as obligor." The court declined to find error in the trial court's refusal of a directed verdict because there was conflicting evidence as to whether Chandler meant to bind himself personally on the warranty. The issue properly went to the jury, but the court indicated that imposing individual contract liability is generally more difficult than imposing individual tort liability on corporate directors or officers: "[a]n individual who signs a contract on behalf of the corporation is cloaked in the mantle of the enterprise and is not personally liable for action taken in the corporate name." Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 Vand. L. Rev. 1, *7 (1994). According to the Alabama Supreme Court in *Chandler*, the individual must demonstrate a clear intent to substitute his or her personal liability for that of the principal before contract liability is assumed.

Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala. 1980) is another important case in the development of Alabama's common law on director and officer liability to non-shareholders. Citronelle filed suit against officials of the Department of Energy and the Secretary of the Department of Commerce, requesting declaratory and injunctive relief concerning whether or not crude oil sales to a Bahamian company violated the Emergency Petroleum Allocation Act of 1973 (EPAA). The government counterclaimed against Citronelle-Mobile Gathering, Inc., Citmoco Services, Inc. and Bart Chamberlain (a director and officer of both companies) to make restitution for alleged overcharges received in relation to transfers of crude oil. Under the

EPAA, the prices charged for oil were higher than what the defendants could legally have charged had the sales been made in the U.S. All parties filed motions for summary judgment.

The court examined Chamberlain's individual liability by initially stating the basic rule that a corporate officer is liable for any tortious conduct in which he is a central figure:

> When a corporate officer or director is a central figure in tortious conduct, or when he authorizes, participates and approves of that conduct, he is subject to liability based upon that conduct. This doctrine does not depend upon the same grounds as piercing the corporate veil, that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with formalities of organization. Rather, the officer or director is liable as an actor, not an owner.

Citronelle-Mobile, 499 F. Supp. at 881 (citations omitted). The court was careful to make the distinction that such liability is not dependent upon the same grounds as piercing the corporate veil. The officer is liable as an actor for participating, authorizing and/or approving the misconduct at issue. Because Chamberlain was a central figure in the illegal crude oil sales, he was subject to individual liability for any EPAA violations. The court explained that a director or officer may be liable for merely approving wrongful conduct, which eases the burden on a plaintiff seeking to establish individual liability.

In 1983, the Alabama Supreme Court decided *Crigler v. Salac*, 438 So. 2d 1375 (Ala. 1983), a commonly-cited case in the area of director and officer liability. A group of farmers sued Crigler (an officer and principal owner of Modern Mix, Inc.) and Birmingham Trust National Bank (BTNB), seeking damages for conversion, fraud, conspiracy, negligence of a warehouseman, and wantonness of a warehouseman in committing fraud and converting personal property. The lawsuit arose from stored grain in bins owned by Modern Mix on a "stored unpriced" basis, meaning the farmers had the option of selling the grain to Modern Mix in the future, or to have their grain returned when they desired. BTNB extended Modern Mix a line of credit, secured by the grain inventory. An inventory control system was formulated to monitor the Modern Mix inventory for BTNB. This determined how much the bank loaned to Modern Mix. When Modern Mix encountered financial trouble, it sold the farmers' grain and deposited the proceeds in its checking

account. BTNB then appropriated the proceeds of Modern Mix's accounts as partial repayment for the BTNB loans. Modern Mix filed for bankruptcy.

As a preliminary matter, the court had to determine the nature of the transactions. If they were sales, wherein titled passed from the farmers to Modern Mix as inventory, then there could be no individual recovery against Crigler for conversion, fraud, negligence or wantonness of a warehouseman. In this case, the transaction was determined to involve a bailment in which Modern Mix was selling grain which was not part of its inventory, so Modern Mix's sales amounted to tortious conversion.

Next, the court addressed the issue of Crigler's individual responsibility. Crigler claimed that the trial court should have awarded him a directed verdict because the plaintiffs failed to prove his individual liability. The court began by pointing out that a corporate officer "may not participate in a tort perpetrated through the agency of a corporation, or in a fraudulent injury to another, without being civilly responsible." *Crigler*, 438 So. 2d at 1379-80 (*quoting Rudisill Soil & Pipe Co. v. Eastham Soil Pipe & Foundry Co.*, 97 So. 219, 210 Ala. 145 (1923)). It also quoted with approval a section from *Fletcher's Cyclopedia of Corporations*, § 1135, at 202-203 (1975):

> It is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance–as fraud, conversion, acts done negligently, etc.–notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs. The fact that the circumstances are such as to render the corporation liable is altogether immaterial .... Corporate officers are liable for their own torts, although committed when acting officially. In other words, corporate officers, charged in law with affirmative official responsibility in the management and control of corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval.

To hold a director or officer liable for the corporation's wrongful acts, "there must have been upon his part such a breach of duty as contributed to, or helped bring about, the injury; that is to say, he must be a participant in the wrongful act." *Crigler*, 438 So. 2d at 1380 (citing *Fletcher's Cyclopedia of Corporations*, § 1137 at 208). The court concluded that the facts were sufficient to connect Crigler with the conversion. Crigler was president of Modern Mix, held a controlling interest in it, and managed

the business. He decided when to accept and sell grain, and even helped unload it in some instances. He also signed some of the inventory control documents to BTNB. The court found that there was sufficient evidence to show that Crigler authorized, directed or actively participated in the conversion of plaintiffs' grain. Here again, the court indicates that something less than active participation (*i.e.*, authorization or direction) may subject a director or officer to individual liability. In addition, the court examined the facts and concluded that Crigler "knew of Modern Mix's financial instability and of its inability to pay for the grain at the time when the grain was received for storage, and therefore that he actively participated in the fraud." *Crigler*, 438 So. 2d at 1382. The case further illustrates the development of the common law in Alabama to prevent a corporate agent from using his status to shield himself from individual liability to non-shareholders for corporate wrongs.

The Alabama Supreme Court next addressed the issue in *Cornett v. Johnson*, 578 So. 2d 1259 (Ala. 1991). This case involved an appeal of a summary judgment entered in favor of the defendants, Johnson Insurance Agency and its officer, Marshall Johnson. Paul Cornett alleged that Johnson and the agency failed to notify him that his insurance had been canceled and therefore they breached a duty owed to him. The court upheld the summary judgment for the individual. Individual liability, according to the court, is not appropriate "unless there is a showing that, through abuse or manipulation, the corporate form was used to evade personal responsibility." 578 So. 2d at 1261 (*quoting Jefferson Pilot Broadcasting Co. v. Hilary & Hogan, Inc.*, 617 F.2d 133, 136 (5th Cir. 1980)). Cornett failed to allege any wrongs committed by Johnson individually, and the court found no individual liability under the facts of this case.

In *Inter-Connect, Inc. v. Gross*, 644 So. 2d 867 (Ala. 1994), Inter-Connect purchased several items of electronic equipment from Gross Realty. Gross Realty retained a security interest in some of the items. Gross Realty subsequently sued Inter-Connect, alleging default on its payments. A Gross Realty representative entered the Inter-Connect premises without permission and removed several items that were subject to the security interest. Inter-Connect counterclaimed against Gross Realty and filed a complaint against Alvin Gross, president of Gross Realty, alleging conversion, trespass and misappropriation of trade secrets. The trial court granted Alvin Gross' motion for summary judgment.

Inter-Connect appealed the summary judgment, claiming that the sole legal issue was whether Gross' actions could subject him to personal liability, even if he was acting on behalf of the corporation. The court reiterated the general rule:

> It is a well-settled rule in this state that a person is liable for the torts which he or she commits, regardless of the capacity in which that person acts. As stated in *Finnell v. Pitts*, 222 Ala. 290, [293], 132 So. 2, 4 (1930): 'When a person commits a tort, it is wholly immaterial upon the question of his liability, whether he was acting officially or personally.' The reason for finding personal liability is that the agent personally has committed a wrong, independent of the principal's wrongdoing. This rule was reiterated in *Southeastern Constr. Co. v. Robbins*, 248 Ala. 367, 27 So. 2d 705 (1946).

Inter-Connect, 644 So. 2d at 869 (*quoting Chandler v. Hunter*, 340 So. 2d 818, 822). The fact that the corporation, too, is liable does not matter. Based on these rules, Gross was not permitted to avoid personal liability simply because he was acting in his official capacity. The summary judgment in his favor was reversed.

Individual liability for officers and directors was addressed again in *Bethel v. Thorn*, 757 So. 2d 1154 (Ala. 1999). Bethel sued a company and its president, Rex Thorn, alleging breach of contract, fraud, fraudulent suppression and negligence concerning two contracts. The defendants moved to dismiss for failure to state a claim, and the trial court granted Thorn's motion, claiming he had no individual liability as president of the corporation. Bethel appealed, but only on his fraud and suppression claims, arguing that Thorn could be held individually liable for any fraudulent acts or omissions committed in his capacity as president. The court agreed and reversed, citing *Ex parte Charles Bell Pontiac-Buick-Cadillac-GMC, Inc.*, 496 So. 2d 774, 775 (Ala. 1986) ("In Alabama, the general rule is that officers or employees of a corporation are liable for torts in which they have personally participated, irrespective of whether they were acting in a corporate capacity").

However, before resolving the issue, the court considered whether the allegations in Bethel's complaint were sufficient to state with particularity individual claims of fraud and fraudulent suppression against Thorn under Rule 9 of the Alabama Rules of Civil Procedure. Ultimately, it was determined that Bethel had sufficiently alleged his fraud claims.

The Alabama Court of Civil Appeals addressed directors' and officers' liability to non-shareholders in *Yarbrough v. Ledford*, 771 So. 2d 1051 (Ala. Civ. App. 2000). The case involved a suit by four plaintiffs against Alabama Earth Products, Inc. (AEP) and its officer, Robert Ledford, claiming that they wrongfully deposited waste on the plaintiffs' property. Ledford filed a motion to dismiss or, in the alternative, for summary judgment on the theory that he was not personally involved in the activity and that he acted as an employee of the corporation. The trial court granted his motion. On appeal, the court of civil appeals relied on *Fletcher's Cyclopedia of Corporations* § 1135 as authority for the proposition that corporate officers are liable for torts they commit, even if the corporation is found to be at fault as well, and even if the officer was acting in his capacity as an agent of the corporation. However, without explaining in detail, the court determined that based on the facts as presented in the case, Ledford was not personally liable for trespass and nuisance. *Yarbrough*, 771 So. 2d at 1053 (*citing Rice v. Merritt*, 549 So. 2d 508 (Ala.Civ.App. 1989).

In *Sieber v. Campbell*, 810 So. 2d 641 (Ala. 2001), the plaintiff, Jack Campbell, was employed by a computer software company based in Germany that marketed a geographic information system software package (GIS). Ownership of the GIS package was in a subsidiary, Telemap, while the parent was owned by a trust. The defendant, Helmut Sieber, was the trustee as well as a Telemap corporate officer. Campbell's contract to market the GIS system was subsequently renewed through discussions with Sieber, but no payments were ever made to Campbell. As a result, Campbell filed suit against the subsidiary Telemap and Sieber, individually, alleging breach of contract, fraudulent assertion of a corporate existence, misrepresentation, suppression, and promissory estoppel. The trial court entered a judgment against Sieber.

On appeal, Sieber argued that the trial court did not properly exercise personal jurisdiction over him. The evidence suggested that Sieber had verbally guaranteed that Campbell would be paid his salary. The court pointed out that "[a] corporate agent who personally participates, albeit in his or her capacity as such agent, in a tort is personally liable for the tort." *Sieber*, 810 So.2d at 645. Similarly, Sieber's status as a corporate agent did not shield him from personal jurisdiction of a state court for purposes of adjudication. Thus, this case is yet another example of the importance Alabama courts place on ensuring that individual corporate agents do not use the corporate form as a means to avoid liability for individual wrongs.

This issue of personal jurisdiction has become one strategy used, albeit unsuccessfully, by out-of-state directors and officers to try to avoid individual liability. The Alabama Supreme Court has consistently refused to provide corporate agents with such protection. *See Ex parte McInnis*, 820 So. 2d 795 (Ala. 2001) ("[C]orporate agent status does not insulate the agent personally from his or her jurisdictional contacts with a state or from personal jurisdiction in the state"). In *Duke v. Young*, 496 So. 2d 37 (Ala. 1986), the court extended the reach Alabama's long arm statute over non-resident directors of a Georgia corporation who had allegedly engaged in fraudulent activities. The directors claimed that they were acting in their capacity as directors, and that they should therefore be protected from Alabama's exercise of personal jurisdiction, but the court disagreed, finding sufficient contacts to subject them to personal jurisdiction in Alabama:

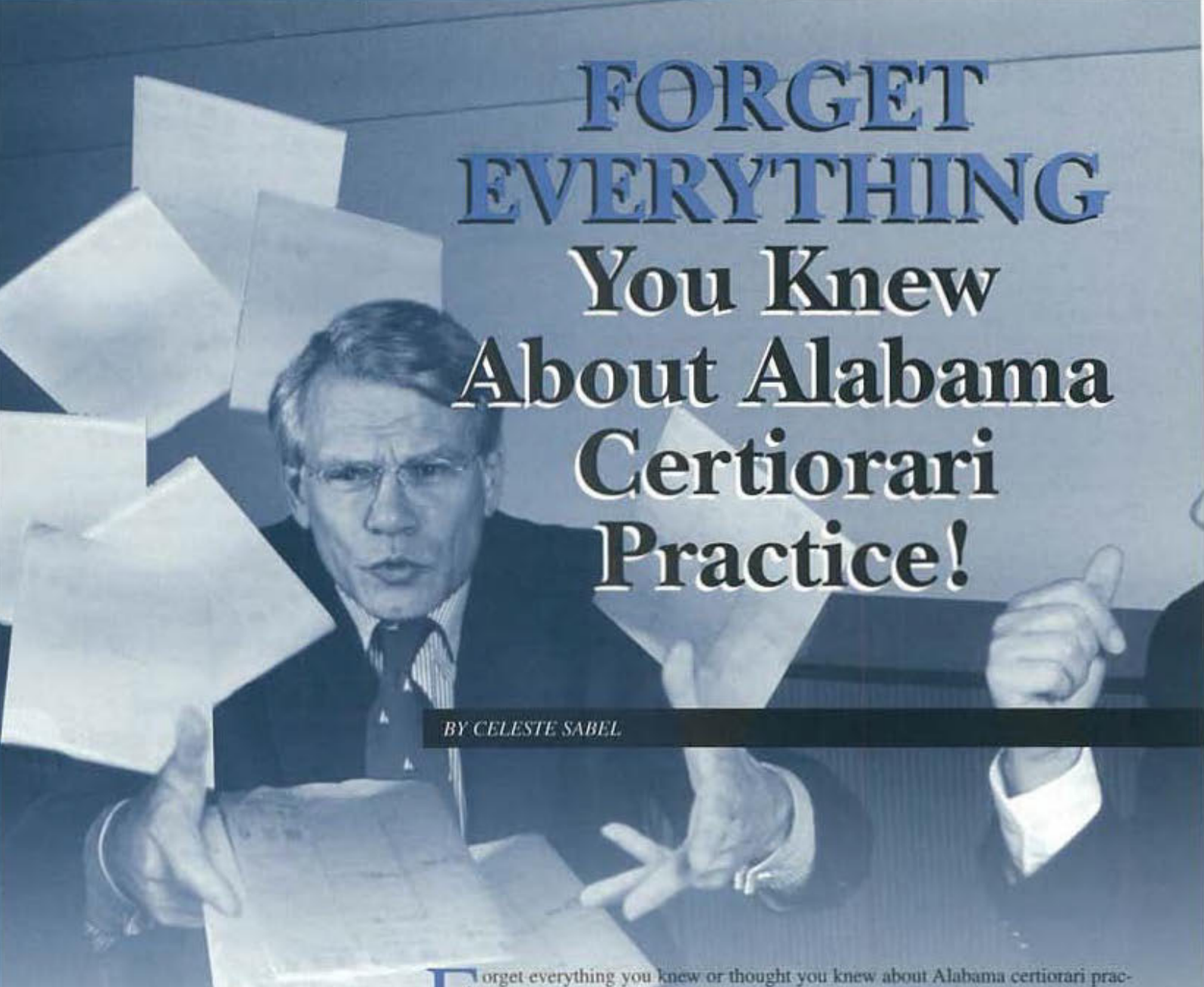
> An individual is not shielded from liability simply because his acts were done in furtherance of his employer's interest. In fact, the Court stated [in *Calder v. Jones*, 465 U.S. 783, 790 (1984)] that the defendants' "status as employees does not somehow insulate them from jurisdiction." Second, the allegations of fraud contemplated that the defendants were acting outside the scope of their employment. Given the nature of the claim, it is not hard to envision how the acts of the other six directors were "a significant aspect of the negotiations which occurred in Alabama and that it was foreseeable that appellants [here, appellees'] transaction would have consequences in this state."

Duke, 496 So. 2d at 40 (citations omitted).

Conclusion

Directors and officers have clear duties to their shareholders, and can be held civilly liable for breaches of those duties. The same is true for director and officer obligations to non-shareholders. Alabama case law places Alabama among the majority of jurisdictions that find directors and officers liable for wrongs if they participate in or ratify the conduct. As the above cases indicate, the analysis is largely a fact-based inquiry. The primary theme throughout the Alabama cases is the focus on whether the director or officer played an active role in participating, authorizing or ratifying the wrongful conduct. ■

Sela E. Stroud
Miss Stroud is a 2002 graduate of the University of Alabama School of Law, where she served on the managing board of the Alabama Law Review. She is an attorney with the Birmingham firm of Bainbridge, Mims, Rogers & Smith, LLP.



FORGET EVERYTHING You Knew About Alabama Certiorari Practice!

BY CELESTE SABEL

Forget everything you knew or thought you knew about Alabama certiorari practice! That's right. FORGET IT! Throw out those old form petitions you have used for years! Forget the Rule 39(k) statement of facts! Unless you are totally up to date with the Rules 39 and 40 of the Alabama Rules of Appellate Procedure, which were amended in 2002, and have read Justice Johnstone's article in the May 2003 *Alabama Lawyer*, it would be better to approach certiorari practice in Alabama with a blank slate.

Alabama certiorari practice has not been known for its simplicity. Consequently, in August 2002, the Supreme Court of Alabama completely rewrote rules 39 and 40 to clarify the procedure for seeking this type of discretionary review. Unfortunately, it appears from the petitions currently being filed with the court that while lawyers have learned about the new font requirement for all appellate filings, many have not learned that rules 39 and 40 have been rewritten.

The purpose of this article is to attempt to reduce the number of dismissals of certiorari petitions for failure to comply with the rules, and to provide guidance for those lawyers who file petitions for the writ of certiorari only occasionally. This article is organized as a list of questions attorneys should ask themselves before filing a petition for the writ of certiorari.

It is crucial to remember that if you are required to file an application for rehearing before seeking certiorari review in the supreme court, you must read and comply with Rule 40, Alabama Rules of Appellate Procedure. If you do not, you may be ensuring the denial of your certiorari petition.

1. What is certiorari?

Too often, it appears, attorneys petition for a writ of certiorari having no idea what the writ is meant to do. According to *Black's Law Dictionary*, a writ of certiorari is "an extraordinary writ issued by an appellate court, at its discretion, directing an intermediate court to deliver the record in a case for review." *Black's Law Dictionary* 220 (7th ed. 1999)(Emphasis added).

What does that mean to you? It means that if you file a petition for a writ of certiorari, unless and until the writ issues, there is no record before the supreme court. So, when you file a petition for a writ of certiorari, the only items before the court are your petition, the opinion of the intermediate appellate court and your brief. Your petition will make or break your chances for certiorari review. You must convince the court, in your petition for the writ of certiorari–not in your brief–that your case is appropriate for certiorari review. In other words, you must convince the court that you have stated at least one of the grounds found in Rule 39, that the court should call for the record, and that there should be further briefing. If you don't get your petition right, you may be out of court.

2. Can any and all decisions by the Court of Civil Appeals or the Court of Criminal Appeals be reviewed by certiorari?

No. Rule 39(a)(1)(A)-(E) and Rule 39(a)(2) list the grounds that must be alleged before the supreme court will even consider granting the writ of certiorari and calling for the record to conduct further review. Remember, certiorari is a discretionary device used by the Alabama Supreme Court to decide whether to review decisions by the intermediate appellate courts. There is no right to certiorari review. It is not enough to allege error on the part of the intermediate appellate court; you must state one of the grounds listed in Rule 39(a)(1). You may wish to advise your client of this fact so he or she will not assume review of the intermediate appellate court's decision by the supreme court is automatic.

3. I have determined that at least one of the Rule 39 grounds is applicable in my case. Now what do I do? Must I file an application for rehearing with the appeals court?

You must determine whether an application for rehearing is a prerequisite to certiorari review in your case. An application for rehearing is a prerequisite in criminal cases, except in the case of a pretrial appeal by the State. See Rule 40(d)(1) and Rule 39(c). An application for rehearing is not required before filing a certiorari petition in a civil case. See Rule 40(d)(2) and Rule 39(b). If, however, you decide to file an application for rehearing with the court of civil appeals, you must comply with Rule 40. See Rule 39(b)(1).

4. Now that I have determined whether or not I must file an application for rehearing, what do I do?

If an application for rehearing is required, it must be filed within 14 days (two weeks) of the date of the decision of the intermediate appellate court.

Then, you must, within 14 days (two weeks) of the issuance of the decision of the intermediate appellate court or that court's decision on the application for rehearing (if one was filed) file a petition for a writ of certiorari with the supreme court. Rule 39(b)(3). The time for filing is jurisdictional. See rules 2(c) and 26(b). This means that if the petition for the writ of certiorari is not filed within two weeks of the issuance by the intermediate appellate court of its decision, the supreme court cannot review it.

5. What must I include in my petition?

You must include the following in your petition:

a. A statement of the grounds.

b. A statement of facts (unless you are satisfied with the statement of facts stated in the opinion of the intermediate appellate court). See answers to questions 7 through 11 for more information on the statement of facts.

c. The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application.

d. A copy of the opinion or unpublished memorandum issued by the court of appeals that you are challenging must be attached to your petition.

7. Isn't the statement of facts found in the brief?

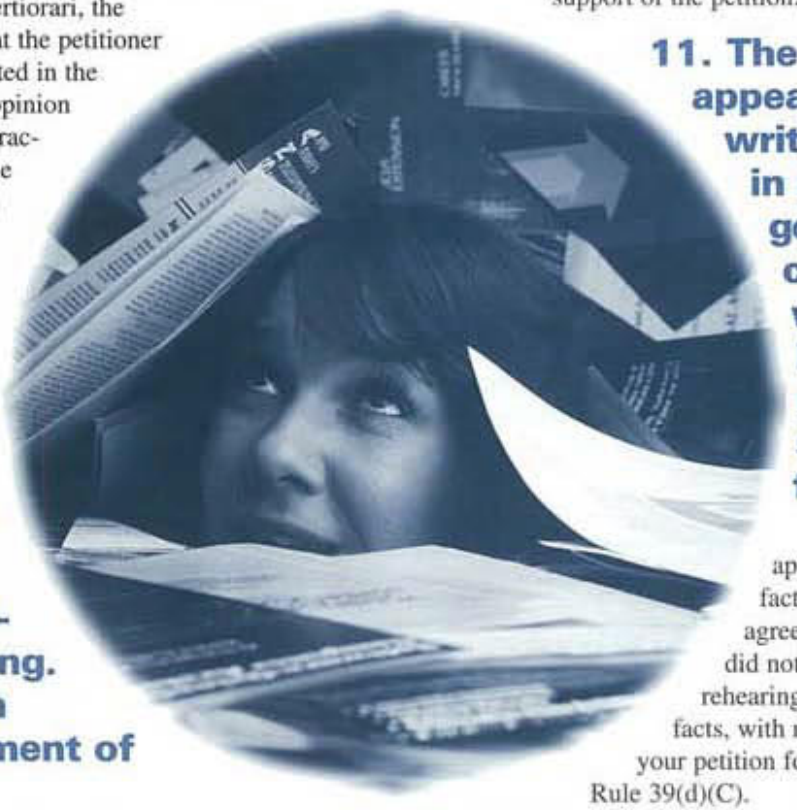
You may include a statement of facts in your brief; however, it will not be counted as the "statement of facts" you are required to include in your petition.

When you file a petition for a writ of certiorari, you must include a statement of facts in the petition. Rule 39(5). Do not attach a "Rule 39(k) Statement of Facts." As noted above, Rule 39 has been completely rewritten. There no longer exists a provision in the Alabama Rules of

Appellate Procedure for a "Rule 39(k) Statement of Facts," and the court will not accept such a motion. Moreover, Rule 39 now provides that "facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition." Rule 39(5).

8. What if I am of the opinion the facts are correctly stated in the decision of the intermediate appellate court?

If you are satisfied with the statement of facts in the opinion or unpublished memorandum issued by the intermediate appellate court, you need not include a statement of facts in the petition. See Rule 39(d)(5)(A) and (C). If no facts are stated in the petition for the writ of certiorari, the supreme court will presume that the petitioner is satisfied with the facts as stated in the intermediate appellate court's opinion or memorandum. It is a good practice, however, to let the supreme court know that you agree with the intermediate appellate court's statement of the facts.



9. I am not happy with the facts as stated in the court of criminal appeals' decision and I must file an application for rehearing. What do I do with regard to a statement of facts?

If you are of the opinion that the court of criminal appeals got the facts wrong (or, if the court stated no facts in its decision), when you file your application for rehearing you must include your statement of the facts in your application. See Rule 40(e). If your application for rehearing is denied, you must include in your petition for the writ of certiorari a verbatim copy of the statement of facts that was in your application for rehearing. See Rule 39(d)(5)(A). Do not put the statement of facts in your brief. Do not "attach" the statement of facts to the petition. Put the statement of facts in the petition and verify that the statement of facts contained in the petition is a "verbatim copy of the statement of facts" that was in the application for rehearing you filed with the intermediate appellate court. See Rule 39(5)(A)-(C).

(If you choose to file an application for rehearing in the court of civil appeals, you must follow the same procedure. Rule 39(5)(A).)

10. The court of civil appeals issued a Rule 53 "no-opinion" affirmance (or did not include a statement of facts in its opinion). What do I do about a statement of facts?

If the court of civil appeals issued a "no-opinion" affirmance pursuant to Rule 53, Ala. R. App. P., or issued an opinion that did not contain a statement of facts, and you did not file an application for rehearing, you should state your version of the facts in the petition for the writ of certiorari. See Rule 39(d)(5)(B). If you do not put a statement of facts in your certiorari petition, there are no facts before the supreme court because the "facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition." Rule 39(5).

11. The court of civil appeals issued a written opinion and, in my opinion, it got the facts completely wrong. What do I do now with regard to a statement of facts?

If the court of civil appeals issued an opinion with facts stated therein, and you disagree with those facts, and you did not file an application for rehearing, state your version of the facts, with references to the record, in your petition for the writ of certiorari. See Rule 39(d)(C).

12. Is there anything special I should know about stating grounds?

Yes. Be sure to read Rule 39(a)(1)(A) through (E). Remember, with regard to an allegation under Rule 39(a)(1)(D)–conflict with a prior decision–it is not enough just to allege conflict. Describe for the supreme court how the opinion issued by the intermediate appellate court in your case conflicts with another case. Quote from each case. Be very specific. Rule 39(a)(1)(D)(2) explains how to handle conflict where the appellate court issues a no-opinion affirmance or it is otherwise difficult to quote from the intermediate appellate courts' opinion. Also, it is highly recommended that you read Justice Johnstone's article, "The Two Most Common Fatal Defects in Petitions for Writs of Certiorari," which can be found in the May 2003, *Alabama Lawyer*.

A revised form for petitions for the writ of certiorari is attached for your convenience.

13. Are there any other rules amendments I should be aware of relating to certiorari petitions?

Yes. Rules 32 and 28 have been amended to require Courier New 13 font in all filings with the appellate courts. In addition, briefs must now be formatted differently. One of the most significant changes for practitioners is that the page limitations for filings have changed. Following are the new page limitations for documents relating to certiorari petitions:

- **Application for rehearing.....15 pages**
- **Brief in Support/Opposition to application for rehearing .....15 pages**
- **Petition for writ of certiorari .....15 pages**
  Death penalty .....20 pages
- **Briefs (Appellant, Appellee, Petitioner, Respondent) .....70 pages**
  Death penalty.....80 pages
- **Reply Brief.....35 pages**
  Death penalty.....40 pages

14. Any concluding advice?

Yes. Be sure to read the amended rules 28 and 32 before preparing briefs for the court, especially Rule 32(c), governing noncompliance with the rules and Rule 32(c)(3), which permits the appellate court to impose a penalty for exceeding the applicable page limitation.

Perhaps the most valuable advice that can be given is to READ THE RULES. Each time the Alabama rules–whether it be the rules of civil procedure, criminal procedure, appellate procedure, etc.–are amended, the amendments are published in the advance sheets of the *Southern Reporter*.

Good luck on your next petition for writ of certiorari! And don't forget to READ THE RULES!

See Form Petition for Writ of Certiorari beginning on page 328.

Celeste W. Sabel
Celeste Sabel attended undergraduate school at Agnes Scott College and law school at Jones School of Law, where she graduated with honors. Following law school, she served as law clerk to the Honorable Richard L. Jones, associate justice of the Supreme Court of Alabama. She practiced law with the firm of Mandell & Boyd in Montgomery prior to joining the Alabama Supreme Court Clerk's office legal staff in 1988. She currently is a senior staff attorney. Sabel is a member of the Alabama State Bar and American Bar Association, Council of Appellate Staff Attorneys. She is also an adjunct faculty member at Jones School of Law.

Form Petition for Writ of Certiorari

NOTE: This form was drafted by Celeste Sabel and has not been reviewed by the Supreme Court of Alabama. It is your responsibility to read the Alabama Rules of Appellate Procedure to ensure your certiorari petition complies with the Alabama Rules of Appellate Procedure.

Form Petition for Writ of Certiorari
[Supreme Court Case Number]
IN THE ALABAMA SUPREME COURT

_____

Petitioner

v.

_____

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF (CRIMINAL, CIVIL) APPEALS

TO THE SUPREME COURT OF ALABAMA:

Comes your petitioner,_____, and petitions this Court for a writ of certiorari to issue to the Court of (Criminal, Civil) Appeals in the above-styled cause, pursuant to Rule 39, Alabama Rules of Appellate Procedure, and shows the following:

Petitioner (was convicted of the charge of_____, or secured or suffered a judgment) in the Circuit Court of _____County, Alabama, on_____. [*date*]

The Court of (Criminal, Civil) Appeals (affirmed, reversed) the judgment on _____. [*date*] [*Because an application for a rehearing is no longer a prerequisite for certiorari review of a decision of the Court of Civil Appeals, include the following sentence only if your case was filed in the Court of Criminal Appeals or if you filed an application for rehearing in the Court is Civil Appeals*: An application for a rehearing was filed on_____ and overruled on _____.] [*date*]_____ [*date*]

A copy of the opinion of the Court of (Criminal, Civil) Appeals is attached to this petition, which shows the case number of the Court of (Criminal, Civil) Appeals to be No._____.

Form Petition for Writ of Certiorari

STATEMENT OF FACTS *[Select one of the following:]*

1. The petitioner agrees with the facts stated in the opinion or unpublished memorandum decision of the Court of (Criminal, Civil) Appeals.

OR

2. The Court of (Criminal, Civil) Appeals issued (an opinion, an unpublished memorandum) which contained a statement of facts that the petitioner was not satisfied with. Pursuant to Rule 40(e), the petitioner presented in (his, her) application for a rehearing with that court (an additional, a corrected, the petitioner's own) statement of facts. I verify, pursuant to Rule 39(d)(5)(A), that the following is a verbatim copy of the statement of facts, with references to the pertinent portions of the clerk's record and/or reporter's transcript, as presented by the petitioner in (his, her) application for a rehearing:

_____

[Signature of the attorney for the petitioner or signature of the petitioner, if proceeding pro se.]

_____

_____

_____

[Here put the petitioner's additional, corrected, or own statement of facts.]

OR

The Court of (Criminal, Civil) Appeals issued (a Rule 53, Ala. R. App. P., "no-opinion" affirmance, an opinion that did not contain a statement of facts). Pursuant to Rule 40(e), the petitioner presented a statement of facts in (his, her) application for a rehearing with that court. The Court of (Criminal, Civil) Appeals did not include the petitioner's statement of facts in its subsequent decision. Pursuant to Rule 39(d)(5)(B), I verify that the following is a verbatim copy of the statement of facts, with references to the pertinent portions of the clerk's record and/or reporter's transcript, as presented by the petitioner in (his, her) application for a rehearing:

_____

[Signature of the attorney for the petitioner or signature of the petitioner, if proceeding pro se.]

_____

_____

_____

[Here put the petitioner's own statement of facts.]

OR [Court of Civil Appeals only]

3. No application for a rehearing was filed with the Court of Civil Appeals from its (Rule 53, Ala. R. App. P., "no-opinion" affirmance, opinion containing no statement of facts). Thus, pursuant to Rule 39(d)(5)(C), the petitioner is including in this petition for the writ of certiorari the following statement of facts, with references to the pertinent portions of the clerk's record and/or reporter's transcript.

_____

_____

_____

[Here put the petitioner's own statement of facts.]

OR [Court of Civil Appeals only]

4. Petitioner is not satisfied with the facts as stated in the opinion of the Court of Civil Appeals. No application for a rehearing was filed with the Court of Civil Appeals from its opinion. Pursuant to Rule 39(d)(5)(C), the petitioner is including in this petition for the writ of certiorari the following statement of facts, with references to the pertinent portions of the clerk's record and/or reporter's transcript.

_____

_____

_____

[Here put the petitioner's own statement of facts.]

GROUNDS

The petitioner alleges as grounds for the issuance of the writ the following: *[Select ONLY those applicable to your case.]*

1. The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals (held valid or invalid a city ordinance, state statute, or federal statute or treaty) or (construed for the first time a controlling provision of the Alabama Constitution or the United States Constitution). The issue is whether the Court of (Criminal, Civil) Appeals erred in holding that .

_____

_____

_____

[State here the claimed error in the holding.]

2. The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals affects a class of (constitutional, state, or county officers), namely, the office of _____. The issue is whether the Court of (Criminal, Civil) Appeals erred in holding that _____

_____

_____.

[State here the claimed error in the holding.]

_____

William (Bill) H. Odum, Jr.
Board Certified Entomologist
Litigation Testimony — Entomology Consultations
P.O. Box 1571
Dothan, AL 36302

Office: 334-793-3068
Facsimile: 334-671-8652
E-mail: who6386@aol.com

3. The basis of this petition for the writ of certiorari is that a material question requiring decision by the Court of (Criminal, Civil) Appeals was one of first impression for the Supreme Court of Alabama. The issue is whether the Court of (Criminal, Civil) Appeals erred in holding that:

_____

_____

_____.

[*State here the claimed error in the holding.*]

4. The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals is in conflict with a prior decision (of the Supreme Court of the United States, of the Supreme Court of Alabama) on the same point of law. In its opinion the Court of (Criminal, Civil) Appeals held:_____.

_____

_____

[*Here quote the alleged conflicting holding.*]
In the case of _____v.

_____,

_____So. 2d _____(Ala._____), the Alabama [*citation*] Supreme Court held:_____

_____

[*Here quote the Alabama Supreme Court holding.*]
(*Or if a United States Supreme Court holding:*

In the case of _____v.

_____

_____U.S. _____(_____), the United States [*citation*] Supreme Court held: _____

_____.

[*Here quote the United States Supreme Court holding.*]
These statements of the law are in conflict and the Court of (Criminal, Civil) Appeals erred in failing to follow the decision of the Supreme Court on the same point of law.)

OR

The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals is in conflict with prior decisions of the Court of (Criminal, Civil) Appeals on the same point of law. In its opinion the Court of (Criminal, Civil) Appeals held:_____

_____.

[*Here quote the alleged conflicting holding.*]

Form Petition for Writ of Certiorari

In the case of _____ v. _____, _____So. 2d _____(Ala._____), etc. The [*citation*] holdings of these cases are _____

_____

_____

[*Here quote the Alabama Supreme Court holding.*]

These statements of the law are in conflict and the issue is which holding should be followed on this principle of law.

OR

The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals is in conflict with its prior decisions on the same point of law or with a prior decision of the (Supreme Court of the United States, Supreme Court of Alabama) on the same point of law. It is not feasible to quote that part of the opinion either because no wording in the opinion clearly shows the conflict or because no opinion was issued. Therefore, in conformance with Rule 39(a)(1)(D)2., the following is a statement that explains, with specificity and with particularity, how the current decision conflicts with a prior decision:_____

_____

_____.

5. The basis of this petition for the writ of certiorari is that the decision of the Court of (Criminal, Civil) Appeals cites controlling cases of the Supreme Court of Alabama that were followed in its decision and these cases should be overruled, viz.: _____ v. _____, _____So. 2d [*citation*] (Ala._____); etc. The holdings of these cases are _____

_____

_____.

The issue is whether the Alabama Supreme Court ought to overrule these controlling cases because _____

_____

_____.

[*State here reasons for overruling these decisions.*]

DEATH PENALTY ONLY:

6. The basis of this petition for the writ of certiorari is that the Court of Criminal Appeals failed to recognize as prejudicial the following error or defect:_____

_____

_____.

[*State here the error or defect.*]

The issue is _____ and warrants plain-error review.

The petitioner respectfully requests that after a preliminary examination, the writ of certiorari be granted and that this Court proceed under its rules to review the matters complained of, and to reverse the judgment of the Court of (Criminal, Civil) Appeals, and for such other relief as the petitioner may be entitled.

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this petition and the brief on the following parties to the appeal and to the Court of (Criminal, Civil) Appeals.

_____

[*Name of counsel of other party (parties)*]

_____

_____

[*Address, phone number of counsel of other party*]

_____

Attorney for Petitioner

_____

_____

[*Address and phone number*]

■

J. Anthony McLain

Various Advertising Issues Addressed

By J. Anthony McLain, general counsel

The Office of General Counsel regularly receives various requests for informal opinions concerning the requirements and limitations imposed upon attorney advertising by rules 7.1, 7.2 and 7.3 of the Rules of Professional Conduct. The Disciplinary Commission has determined that it would be beneficial to consolidate into one formal opinion those informal advertising opinions which appear to be of profession-wide interest. Accordingly, RO-2003-01 will address those questions set forth below.

Question One:

Are an attorney's business cards considered advertising? May an attorney leave his business cards in the offices of other professionals such as doctors and accountants?

Answer, Question One:

The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients. Direct solicitation of prospective clients is governed by Rule 7.3 of the Rules Professional Conduct. Paragraph (a) of that Rule provides as follows:

"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. *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) of this rule." (Emphasis supplied)

In formal opinion RO-91-17, the Disciplinary Commission concluded that it was impermissible for an attorney to participate in a Welcome Wagon sponsorship whereby the attorney's brochure and other advertising material would be distributed by a Chamber of Commerce employee to new residents in the community. The Commission determined that such participation would constitute solicitation by an agent acting on the lawyer's behalf in violation of Rule 7.3 of the Rules of Professional Conduct. Additionally, the Office of General Counsel has held in various informal opinions that attorneys may not leave their business cards or other advertising materials in bars and nightclubs, doctors' offices or the offices of bail bondsmen because to do so would constitute face-to-face solicitation by an agent. It is, therefore, the opinion of the Disciplinary Commission that it would be ethically impermissible for an attorney to provide business cards to other professionals for distribution to their clients, customers or patients.

Question Two:

May an attorney print an advertisement for legal services on the exterior of prescription bags which a pharmacy will disperse to customers?

Answer, Question Two:

The Disciplinary Commission is of the opinion that the ethical concerns discussed in RO-91-17, cited in the previous question, are equally applicable to this inquiry. The Commission determined that attorney participation in Welcome Wagon sponsorships is prohibited because such participation constitutes solicitation by an agent. In this instance, the pharmacist would be soliciting on behalf of the attorney in much the same manner, and to the same extent, as the Chamber of Commerce employee in RO-91-17. Furthermore, the attorney is obviously paying the pharmacist for the right to place his advertisement on the prescription bags. The fact that the attorney's advertise-

ment is on the pharmacist's prescription bags constitutes, or could readily be construed to constitute, an endorsement or recommendation of the attorney by the pharmacist. Rule 7.2 (c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services . . .". Accordingly, it is the opinion of the Disciplinary Commission that it would be ethically improper for an attorney to place an advertisement for legal services on the exterior of a prescription bag or on any other item which is to be distributed to the public by a third party.

Question Three:

Is an offer to provide legal services on a pro bono basis subject to the Rules Governing Advertising and Solicitation?

Answer, Question Three:

Rule 7.3 of the Rules of Professional Conduct governs attorney solicitation of prospective clients. Paragraph (a) of that Rule provides, in pertinent part, as follows:

> "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.* 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) of this rule." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of "pecuniary gain" within the meaning of the above-quoted Rule. Accordingly, offers to provide such services need not comply with the requirements of subdivision (b)(2) of Rule 7.3 and need not contain the disclaimer required by Rule 7.2 (e). The Commission's opinion is consistent with, and supported by, the decisions of the United States Supreme Court in *NAACP v. Button*, 371 U.S. 415 (1963), upholding the right of NAACP attorneys to solicit potential clients in civil rights litigation and in *In re Primus*, 436 U.S. 412 (1978), upholding the right of an ACLU attorney to send a solicitation letter to a woman who had been sterilized as a condition of Medicaid eligibility.

Question Four:

Must written communications sent to former or existing clients for the purpose of soliciting representation of those clients in matters wholly unrelated to the existing or previous representation comply with the direct-mail solicitations requirements of Rule 7.3?

Answer, Question Four:

Direct mail solicitation of prospective clients is governed by Rule 7.3 of the Rules of Professional Conduct. Paragraph (a) of that Rule provides, in pertinent part, as follow:

> "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." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that the above-quoted language exempts written communication directed to former or existing clients from the requirements of Rule 7.3 regardless of whether the communication relates to the existing or prior representation or is for the purpose of soliciting the recipient as a client in a new and unrelated matter. To the extent language in RO-93-02 may be interpreted to indicate otherwise, it is the intent of the Commission to reject such an interpretation and to modify the language of RO-93-02 consistent with this opinion.

Question Five:

The Comment to Rule 7.3 contains the following provision which has generated some confusion regarding the correct interpretation and application thereof:

> "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."

Does this provision mean that such mailings need not comply with the requirements of Rule 7.3?

Answer, Question Five:

The Disciplinary Commission is of the opinion that this portion of the Comment does not mean that such mailings need not comply with the requirements of Rule 7.3. The Comment says that such mailings are "permitted" by the Rule. It does not say that such mailings are "exempt" from the Rule. The correct interpretation, in the opinion of the Disciplinary Commission, is that such mailings are permitted provided those mailings comply with the requirements of Rule 7.3 and also provided they comply with the requirements of Rule 7.2. Any mailing which is a "written form of communication directed to a specific recipient with whom the lawyer has no familial or current or prior professional relationship" must comply with Rule 7.3 and with Rule 7.2. The only exception to this requirement is that discussed in the previous question, i.e., written communication sent to former or existing clients or family members.

Question Six:

Another provision in the Comment to Rule 7.3 about which questions have been raised regarding the meaning thereof is the following:

> "Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule."

Answer, Question Six:

This comment refers to communications which have been solicited by the recipient. For example, if someone who needs legal assistance and, in the process of attempting to determine which attorney to employ, contacts one or more attorneys asking for information on their background and experience, the response to such a request need not comply with the Rule governing direct mail solicitation. Conversely, communications which are sent to prospective clients on an unsolicited basis must comply with the Rule.

Question Seven:

A lawyer proposes to publish an advertisement which contains the following language: "Experienced, Driven & Knows the System—The Lawyer You Choose Makes A Difference." Is this language permissible?

Answer, Question Seven:

It is the opinion of the Disciplinary Commission that such "comparative" language is directly contrary to the intent and purpose of the disclaimer required by paragraph (e) of Rule 7.2, i.e., "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers." The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney, in fact, does provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.

Question Eight:

An attorney proposes to send a brochure to prospective clients with a cover letter worded as follows:

> "Enclosed is a courtesy copy of my firm's July/August 2003 newsletter. I hope that you find it informative. If you would like to receive additional copies of the newsletter in the future, please take a moment to complete and return the enclosed postcard to me, and I will see to it that additional copies are sent to you."

Must the cover letter and brochure comply with the requirements of Rule 7.3 of the Rules of Professional Conduct which govern direct mail solicitation of prospective clients by attorneys?

Answer, Question Eight:

Paragraph (a) of Rule 7.3 provides as follows:

> "(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. 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) of this rule."

It conclusively appears that the proposed cover letter and brochure are "written form[s] of communication directed to a specific recipient." It further appears that the intended recipient is someone "with whom the lawyer has no familial or current or prior professional relationship." Accordingly, it is the opinion of the Office of General Counsel that the letter and brochure must comply with rules 7.2 and 7.3. As discussed in response to Question Four, written communication sent to former or existing clients or family members are exempt from all advertising and solicitation requirements.

Question Nine:

An attorney proposes to send a calendar to prospective clients which would have printed on it the attorney's name, address, telephone number, fax number, and a sketch of the attorney's office building. Must this proposed calendar comply with Rule 7.3?

Answer, Question Nine:

It is the opinion of the Disciplinary Commission that the proposed calendar is not a "written form of communication" within the meaning of Rule 7.3 and, therefore, needs not comply with the requirements thereof. However, if the calendar includes any reference to the attorney's areas of practice, it must contain the disclaimer as required by Rule 7.2(e).

Question Ten:

May advertisements contain "success stories" about cases the attorney has successfully litigated and amounts recovered on behalf of clients? May advertisements contain "client testimonials" relating favorable comments from satisfied clients?

Answer, Question Ten:

Rule 7.1 of the Rules of Professional Conduct provides, in pertinent part, as follows:

> "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:
> (b) is likely to create an unjustified expectation about results the lawyer can achieve . . .".

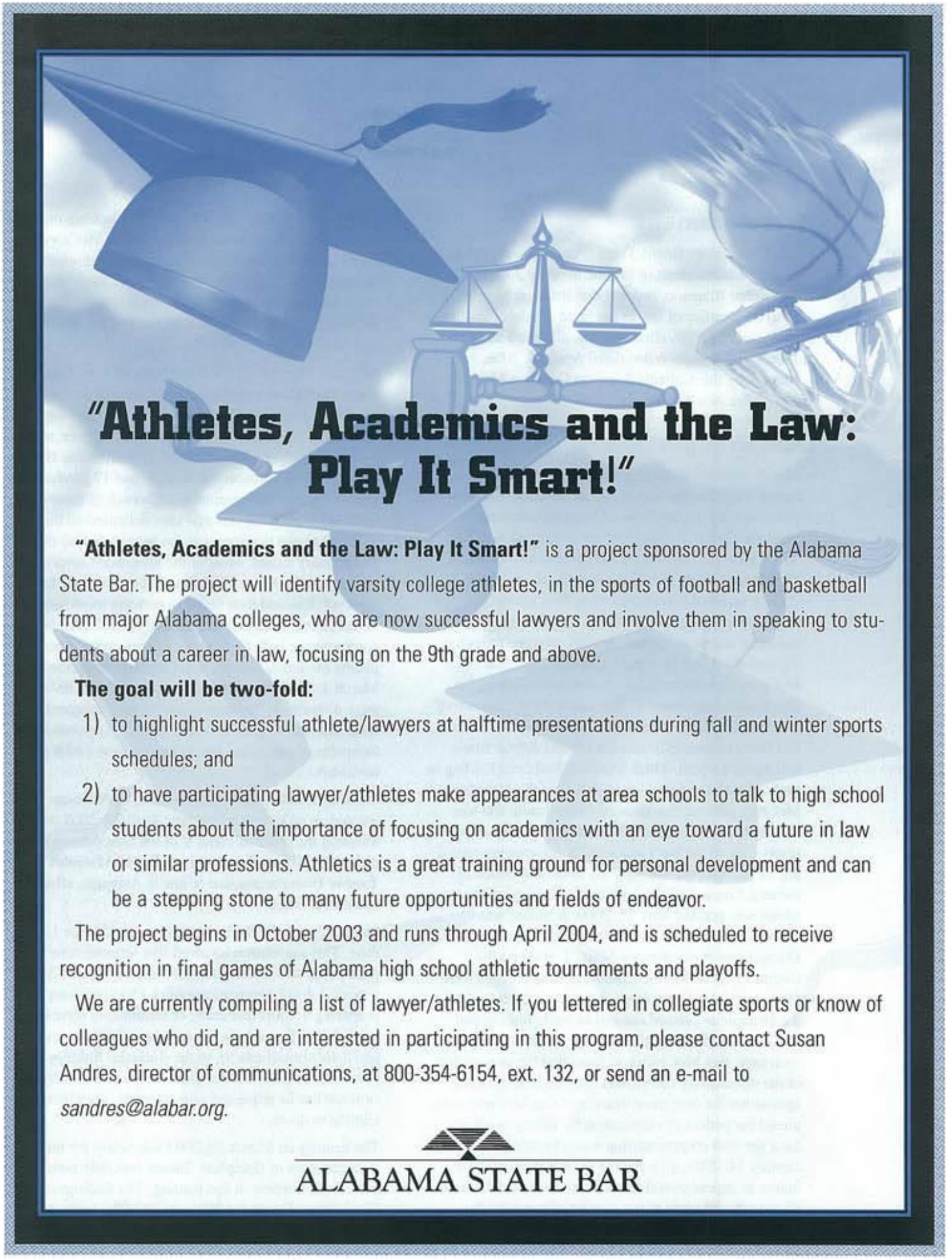
The Comment to the above-quoted provision expands upon this prohibition:

> "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."

In a recent informal opinion, the Office of General Counsel approved an advertisement which included those elements expressly prohibited in the Comment, i.e., references to successful litigation, information concerning amounts recovered and favorable comments from satisfied clients. However, the General Counsel's opinion was predicated on the fact that the advertisement contained the following disclaimer:

> "These recoveries and testimonials are not an indication of future results. Every case is different, and regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, 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."

The Disciplinary Commission concurs in the opinion of the General Counsel that such "success story" and "testimonial" advertisements are permissible, provided such permission is expressly conditioned upon the inclusion of an explicit, comprehensive and appropriately worded disclaimer and provided, of course, that the statements made in the advertisements are true and accurate. [RO-03-01] ■



"Athletes, Academics and the Law: Play It Smart!"

"Athletes, Academics and the Law: Play It Smart!" is a project sponsored by the Alabama State Bar. The project will identify varsity college athletes, in the sports of football and basketball from major Alabama colleges, who are now successful lawyers and involve them in speaking to students about a career in law, focusing on the 9th grade and above.

The goal will be two-fold:

1) to highlight successful athlete/lawyers at halftime presentations during fall and winter sports schedules; and
2) to have participating lawyer/athletes make appearances at area schools to talk to high school students about the importance of focusing on academics with an eye toward a future in law or similar professions. Athletics is a great training ground for personal development and can be a stepping stone to many future opportunities and fields of endeavor.

The project begins in October 2003 and runs through April 2004, and is scheduled to receive recognition in final games of Alabama high school athletic tournaments and playoffs.

We are currently compiling a list of lawyer/athletes. If you lettered in collegiate sports or know of colleagues who did, and are interested in participating in this program, please contact Susan Andres, director of communications, at 800-354-6154, ext. 132, or send an e-mail to *sandres@alabar.org.*

ALABAMA STATE BAR

Reinstatement

- The Disciplinary Board, Panel I, upon hearing the petition for reinstatement of Mobile attorney **Joseph Talmadge Brunson**, ordered that Brunson be reinstated to the practice of law in the State of Alabama effective April 25, 2003. (Brunson was disbarred May 13, 1996.) The Board's order, dated April 25, 2003, was adopted by the Alabama Supreme Court on May 27, 2003. (Pet. No. 03-02)

Disbarments

- Mobile attorney **Ruthann Mott McCrory** was disbarred from the practice of law in the State of Alabama effective May 16, 2003, 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. Beginning in the spring of 2000, a series of complaints were filed against McCrory, alleging that McCrory had been retained to represent clients in various matters, in some cases having requested and been paid a retainer, and that McCrory repeatedly failed to communicate with the clients about the status of their cases. In at least two of the complaints, the clients also alleged that McCrory had failed to promptly account for and deliver funds belonging to them, which McCrory had been holding in trust. During the initial investigation of the complaints, McCrory advised that because of her health she was closing her law practice. Eventually, McCrory stopped responding to the bar's requests for information regarding the complaints. On May 10, 2000, the Office of General Counsel filed a petition for interim suspension, which was granted May 15, 2000. A trustee was appointed pursuant to Rule 29, *Alabama Rules of Disciplinary Procedure,* on May 22, 2000 by the Circuit Court of Mobile County. Formal charges were filed against McCrory in all cases. On March 5, 2003, the Disciplinary Board entered an order finding that McCrory had been duly served with formal charges in each case, that McCrory had frustrated the prosecution of the disciplinary complaints that had been pending against her for over three years, and that McCrory continued her pattern of obfuscation by failing to appear for a pre-trial conference that was scheduled for January 14, 2003, after having been warned that her failure to appear would result in an entry of default on all charges. Because of her continued conduct, the Disciplinary Board struck her pleadings and entered a default judgment of guilty in each case as to all charges. The matter was set for further hearing on April 15, 2003 on the imposition of discipline. McCrory failed to appear. The hearing to determine discipline was conducted in her absence and an order of disbarment was entered in each case. [ASB nos. 00-85(A), 00-86(A), 00-95(A), 00-103(A), 00-112(A), 00-132(A), and 01-67(A)]

- Effective March 5, 2003, Scottsboro attorney **Dennis Gene Nichols** was disbarred from the practice of law in the State of Alabama by order of the Alabama Supreme Court. The supreme court's order affirmed prior action by the Disciplinary Board of the Alabama State Bar. At the time of his disbarment, Nichols had 12 pending disciplinary cases filed against him. In each of these cases he failed to respond and was later defaulted on the merits. Nichols did not appear at the hearing before the Disciplinary Board. Most of the allegations involved circumstances where Nichols collected advance fees for legal services and then failed to perform those services. When clients became problematic, Nichols refused to communicate with them about their matters. After complaints mounted, Nichols was interimly suspended on March 4, 2001. He remained suspended until his ultimate disbarment. In three cases, Nichols accepted fees from individuals after he was interimly suspended and incapable of practicing law in any fashion. [ASB nos. 00-234(A), *et al*]

- On May 3, 2003, the Supreme Court of Alabama entered an order amending their April 24, 2003 order, adopting the order of Panel V of the Disciplinary Board disbarring Birmingham attorney **David Malcolm Tanner** from the practice of law in Alabama, effective March 21, 2003.

  On October 2, 1999, Tanner was suspended for 120 days. This suspension involved five separate complaints. He was found guilty of violating rules 1.3 [diligence], 1.4(a) [communication], 1.15(a) [safekeeping property], 1.16(d) [declining or terminating representation], 8.1(b) [bar admission and disciplinary matters], and 8.4(c) [misconduct], of the *Alabama Rules of Professional Conduct.* He did not contest that suspension nor has he requested reinstatement, even though eligible to do so.

  The hearing on March 19, 2003 was solely for the determination of discipline. Tanner was duly noticed but failed to appear at this hearing. The findings of the Disciplinary Board are fully set out in the enclosed order. Tanner's disbarment involved the nine following complaints.

In February 1997, Tanner was employed by Vera Seals and members of her family to obtain clear title and deed on property that had been owned by Seals's deceased mother. Seals paid Tanner a fee of $500. Tanner failed or refused to obtain clear title or to provide legal services of any kind to Seals and her family. Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered October 16, 2001 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(a) [communication], 8.1(b) [bar admission and disciplinary matters], and 8.4(g) [misconduct], of the *Alabama Rules of Professional Conduct.* [ASB No. 99-168(A)]

On June 4, 1996, Rosalie Evans hired Tanner to probate the estate of her deceased aunt. She paid him an advance fee of $2,000. Tanner never petitioned to have Evans or any other relative appointed as administrator for the estate. On October 9, 1996, the probate court appointed the county administrator to serve for the estate. After Evans notified the court that she had retained Tanner, the county administrator wrote to Tanner to coordinate any activity regarding the estate. Tanner failed or refused to respond to the county administrator. Tanner continued to neglect taking action on the estate. Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered on February 28, 2001 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(b) [communication], 1.5(a) [fees], 8.1(b) [bar admission and disciplinary matters], and 8.4(g) [misconduct] of the *Alabama Rules of Professional Conduct.* [ASB No. 99-251(A)]

During March 1997, Michael Murphree hired Tanner to represent him in personal and business bankruptcies. Between March and September 1997, Murphree paid Tanner $12,500 in attorney's fees. Tanner never filed a bankruptcy of any kind for Murphree. After September 1997, Murphree was unable to contact Tanner, retrieve his files or obtain a refund of the advance fees. Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered February 28, 2001 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(b) [communication], 1.5(a) [fees], 1.15(a) [safekeeping property], 8.1(b) [bar admission and disciplinary matters], and 8.4(g) [misconduct], of the *Alabama Rules of Professional Conduct.* [ASB No. 00-30(A)]

During October and November 1999, Mary Smoot gave Tanner $1,070 in cash, money orders, and a check totaling $1,564.32. This money was to be used to pay Smoot's mortgage payments. Smoot was in Chapter 13 bankruptcy proceedings and was paying her current payments outside of the court. Smoot received notice from the mortgage company that her current payments were also in arrears. Later, Smoot learned that Tanner never gave any of these payments to the mortgage company, but instead converted them to his own use. Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered January 9, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 8.1(b) [bar admission and disciplinary matters], 8.4(b), 8.4(c), and 8.4(g) [misconduct] of the *Alabama Rules of Professional Conduct.* [ASB No. 00-72(A)]

On December 10, 1999, Thomas Lucius hired Tanner to probate his aunt's will and search the title to real property owned by the aunt. Lucius paid Tanner a retainer fee of $2,000. At the time Tanner accepted the retainer from Lucius, he was serving a 120-day suspension from the practice of law. The suspension had become effective October 2, 1999. Tanner did not advise Lucius that he was suspended. Tanner performed no legal services for Lucius and failed to refund the retainer in spite of two requests that he do so. Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered January 9, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 8.1(b) [bar admission and disciplinary matters], 8.4(b) and 8.4(g) [misconduct] of the *Alabama Rules of Professional Conduct.* [ASB No. 00-93(A)]

In or about February 1999, James Lamont paid Tanner $825 to file a bankruptcy for him. In or about May 1999, Lamont paid Tanner an additional $150. In or about January 2000, Tanner told Lamont that his bankruptcy petition had been filed and that he would be contacted by the court within 20 days. In June 2000, Lamont requested a refund of the fees paid. In August 2000, Tanner told Lamont that he had turned his case over to another attorney. Although Lamont requested Tanner transfer the fees paid to the new attorney, Tanner failed to do so. Lamont had to hire a third attorney to represent him. A default order was

entered January 9, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(a) [communication], 1.5(a) [fees], 8.4(c), and 8.4(g) [misconduct], of the *Alabama Rules of Professional Conduct.* [ASB No. 00-235(A)]

During June 1999, Edgar L. Breeland hired Tanner to foreclose a mortgage and paid him $500. Tanner assured Breeland that the matter would be handled within two weeks. Tanner never took any action on the foreclosure and did not refund any attorney's fees. A default order was entered on January 9, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(a) [communication], 1.5(a) [fees] and 8.4(g) [misconduct] of the *Alabama Rules of Professional Conduct.* [ASB No. 00-269(A)]

James W. Kyle paid Tanner $3,000 in cash (at an unspecified date) to represent him in a child custody matter. Later, Kyle discovered Tanner had closed his office and left no forwarding address or telephone number. A copy of Tanner's bar complaint was sent to Tanner on December 6, 2000. It was returned marked, "Return to Sender Bar Closed, Unable to Forward." Tanner also failed or refused to respond to numerous requests from the investigator assigned to investigate this complaint. A default order was entered January 9, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3 [diligence], 1.4(a) [communication], 1.5(a) [fees] and 8.4(g) [misconduct], of the *Alabama Rules of Professional Conduct.* [ASB No. 00-285(A)]

During April 1997, Anita Joyce Hicks hired Tanner to represent her in a bankruptcy case. Hicks paid Tanner $775, which included court costs of $175. Hicks paid the fees in installments, and the final payment was made in February 1998. Tanner never filed a bankruptcy for Hicks. In April 1998, a creditor began garnishment proceedings. Tanner assured Hicks he would handle it. In March 2000, Tanner informed Hicks that he had another lawyer to handle her bankruptcy and all her files had been delivered to him. Tanner did not refund any of the fees Hicks paid him. A default order was entered on April 17, 2002 for Tanner's failure to file an answer to formal charges. Rules 1.3[diligence], 1.4(a) [communication], 1.5(a) [fees], 8.1(b) [bar admission and disciplinary matters], 8.4(c), and 8.4(g) [misconduct], of the *Alabama Rules of Professional Conduct.* [ASB No. 01-43(A)]

Suspensions

- Birmingham attorney **Michael Jackson Hollingsworth** was suspended from the practice of law in the State of Alabama for a period of five years, to run concurrently in multiple cases, with said suspension to become effective retroactive to October 19, 2000, the date of his interim suspension, 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. Hollingsworth was interimly suspended from the practice of law in the State of Alabama on October 19, 2000, pursuant to Rule 20(a), *A.R.P.C.,* based upon numerous allegations that he had either settled cases with his clients' consent and failed to promptly remit the settlement proceeds to his client or only remitted partial payments to his clients or that he settled his clients' cases without their knowledge or consent and kept the proceeds. In all, 43 grievances were filed which included the same or similar allegations or alleged that Hollingsworth had failed to competently represent clients, willfully neglected clients' cases, and/or failed to reasonably communicate with clients regarding their cases. In addition to admitting the material allegations in 41 of the cases, Hollingsworth agreed and was ordered to make restitution in excess of $500,000. [ASB nos. 00-41(A) *et al*]
- On February 24, 2003, the Supreme Court of Alabama adopted an order of the Disciplinary Board imposing an 18-month suspension on Fort Payne attorney **Steven George Noles**. This suspension ran concurrently with an interim and summary suspension previously imposed by the Disciplinary Commission on June 20, 2001. In effect, Noles had already served the suspension by the time of the supreme court's order. Through agreement with the bar, Noles resolved six outstanding disciplinary cases by pleading guilty to separate violations of Rule 8.1(b) of the *Alabama Rules of Professional Conduct,* in return for dismissal of the other remaining charges. Noles had failed to respond to the allegations of the various complaints filed against him over a period of three years. [ASB nos. 99-289(A), 00-29(A), 00-270(A), 01-94(A), 01-153(A), and 01-154(A)]

Public Reprimands

- On December 30, 2002, the Disciplinary Board of the Alabama State Bar accepted Oneonta attorney **William Alexander Ellis's** conditional guilty plea for a public reprimand without general publication. On October 20, 2000, Ellis was appointed to represent a defendant in a criminal case filed in the District Court of Blount County. During early February 2001, Ellis met with some of his client's family members at his office. During this meeting, Ellis discussed the various differences between being represented by a retained counsel versus an appointed counsel. The family then paid Ellis $300 to represent the defendant. Ellis filed a notice of appearance and sent a letter to the district court judge advising him that "...during the course of my representation, Mr. McCurry's family retained me to represent him." In accordance with Ellis's plea, he acknowledged that he violated Rule 1.5(f) by accepting the $300 payment. [ASB No. 01-144(A)]
- On May 9, 2003, Birmingham attorney **Jack Danny Hackney** received a public reprimand without general publication. Hackney entered a guilty plea for violation of Rule 8.1(b), *Alabama Rules of Professional Conduct.* Hackney began representing Michael Early in 1996 in connection with a possible claim he had with Protective Life Insurance Company over his long-term disability payments. In July 1997, Hackney agreed to sue Protective Life for Early. In November 2000, Hackney told Early that he had filed suit, when, in fact, he had not. On June 6, 2001, Early filed a complaint with the bar stating that Hackney neglected to file his suit and was not in communication with him about the matter. The bar sent Hackney a letter on June 11, 2001, asking for a response to Early's complaint. Hackney did not respond. Two additional letters in July and August of 2001 were returned to the bar unclaimed. Hackney did not respond to the October 15, 2001 letter sent to him by the investigator for the Birmingham Bar Grievance Committee. The investigator also left phone messages for Hackney at the law firm where he was employed, but Hackney did not return those calls either. [ASB No. 01-232(A)]

- On March 28, 2003, the Supreme Court of Alabama affirmed a 91-day suspension for Andalusia attorney **James Harvey Tipler**. The suspension went into effect June 18, 2003. Tipler was initially suspended by the Disciplinary Board on March 22, 2001. He then appealed to the Board of Disciplinary Appeals and lost there. The appeal to the supreme court followed.

  In 1997, Tipler won a 2.4 million dollar verdict in a medical malpractice case. This case had been referred to The Tipler Law Firm in 1993 by another Andalusia law firm. There was an agreement for a 40 percent referral fee in the event of recovery. The verdict was affirmed on appeal in August 1999. Defense counsel paid $659,261.20 to the Internal Revenue Service and the Alabama Department of Revenue to satisfy tax liens of The Tipler Law Firm. Tipler received a net payment of $1,779,312.36. This was a sum sufficient to pay the clients according to their contract and to pay the referral fee of $425,000. After disbursing to the clients, Tipler took the remainder of the funds to pay himself and other financial obligations he owed to banks. He told the referring lawyers that he had determined that it would be unethical to pay the referral fee agreed to. However, at the time he had made that known, he had already spent all the funds in question. At his hearing before the Disciplinary Board, Tipler contended that he did not pay the referral fee on advice of his lawyer in Florida. He admitted that he never contacted the Alabama State Bar about the issue. The Disciplinary Board found Tipler guilty of violating Rule 1.15(c) of the *Alabama Rules of Professional Conduct*. That rule required that Tipler hold any disputed funds in trust pending a severance of the respective interests. [ASB No. 99-267(A)]

- Point Clear attorney **Robert Bernard Wilkins, Jr.** was disbarred from the practice of law in the State of Alabama effective June 6, 2003, by order of the Alabama Supreme Court. The Supreme Court's order was based upon the decision of the Disciplinary Commission of the Alabama State Bar. The Office of General Counsel filed a petition pursuant to Rule 22, *Alabama Rules of Disciplinary Procedure*, based upon Wilkins's conviction in the United States District Court for the Southern District of Alabama for possession of stolen mail, a violation of 18 U.S.C. §1708. In May 2002, Wilkins was a special member of the Alabama State Bar. He met a woman during a flight from Atlanta to Zurich. Wilkins told her that he was an attorney from Mobile working in Switzerland and offered to help her with an immigration matter. She paid Wilkins $2,000 as a retainer. When she requested a receipt, Wilkins told her that it was not common to provide receipts in such cases. Thereafter, Wilkins obtained her personal information under the pretense of speeding up the immigration process. Wilkins used this information to obtain unauthorized access to her debit card and withdrew an additional $1,500 from her checking account. Wilkins also convinced her to rent a car for him to use on a trip to Ohio to meet with her. Wilkins did not return the rental car. Over the course of time, Wilkins managed to obtain duplicate credit cards in her name and regular access to her bank accounts, running up a tab of approximately $11,460. [Rule 22(a); Pet. 03-01] ■

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