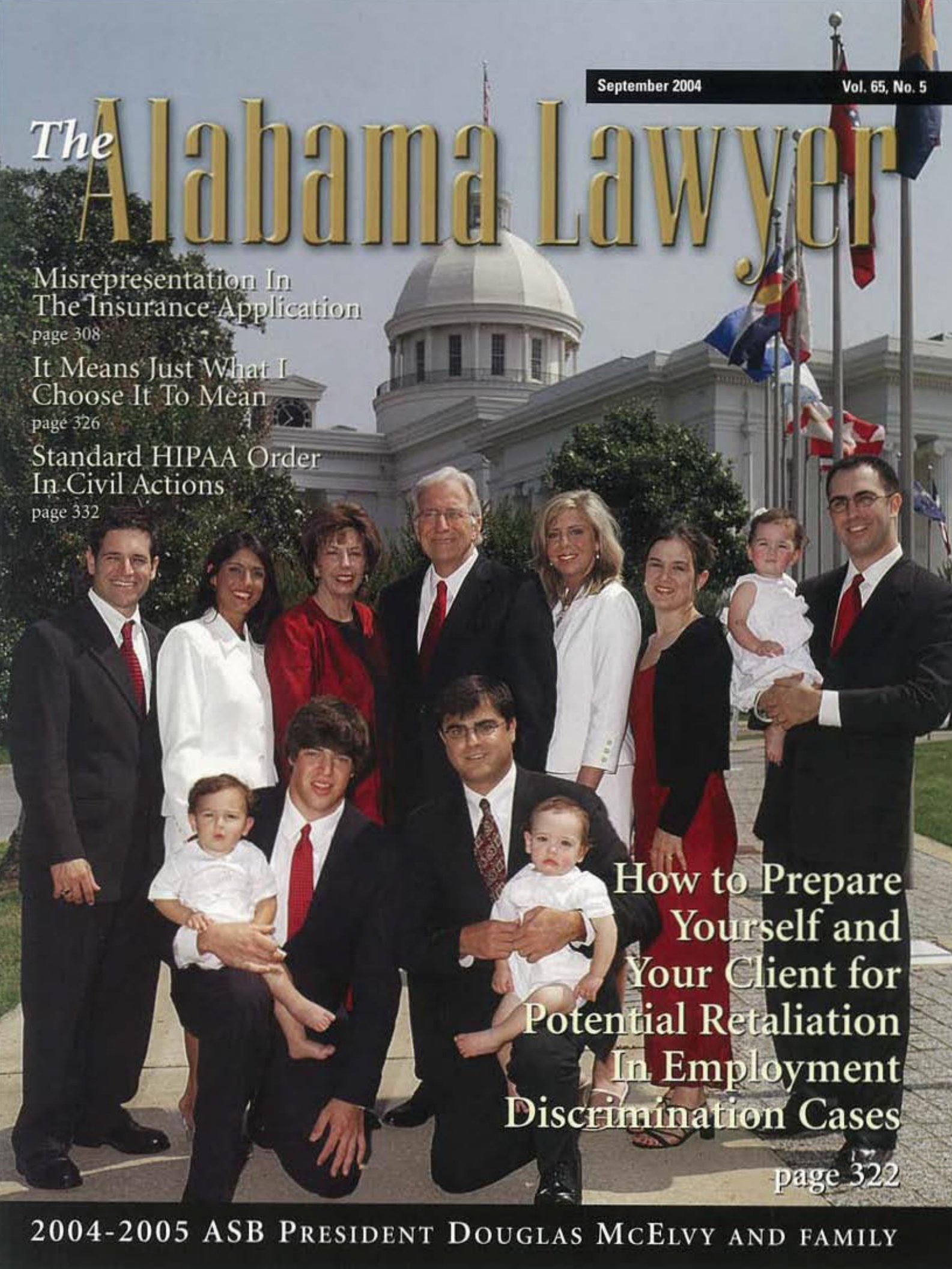


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# The Alabama Lawyer

September 2004

Vol. 65, No. 5

## ON THE COVER

Back row, left to right: Shane Spiller, Liz McElvy Spiller, Eleanor McElvy, Douglas McElvy, Keren McElvy, Katie McElvy, Emily McElvy, Paul McElvy

Front row, left to right: Mike Spiller, Douglas McElvy, Jr., Jonathan McElvy, Mac Spiller

Douglas and Eleanor McElvy are the parents of five children: Paul, the oldest, is a graduate of the Culverhouse College of Commerce at the University of Alabama, and is a CPA working in the tax/audit division of BellSouth in Atlanta, Georgia. He and his wife, Katie, are the parents of Emily, Jonathan, a graduate of the journalism department of the University of Alabama, is the publisher/editor of *The Demopolis Times*. Elizabeth McElvy Spiller is a special education graduate from University of Alabama and is an interpreter for the hearing impaired. She and her husband, Shane, are the parents of Mac and Mike McElvy. Keren is a freshman at Patrick Henry College in Virginia. James Douglas, Jr. is a junior at Trinity Presbyterian School in Montgomery.

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	23	Business Ethics in Government Contracting: <i>How to Make the Most Of Your Relationship with the Federal Government</i>
	30	The Cutting Edge in Courtroom Persuasion featuring Russ M. Herman
October	8	15 <sup>th</sup> Annual Bankruptcy Law Seminar
	15	Understanding Class Action Strategy
	22	Emerging Issues in Business Torts
	29	How to Win in Arbitration
November	5	18 <sup>th</sup> Annual Workers' Compensation Seminar
	12	Corporate Fraud: The Intersection of Civil Suits and Criminal Prosecutions
	19	"Trials of the Century" featuring Todd S. Winegar
December	3	Annual Employment Law Update
	9	Recent Developments in Insurance Fraud & Bad Faith Law
	10	Civil Litigation Update - Mobile
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	29-30	11 <sup>th</sup> Annual CLE By The Hour

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By J. Douglas McElvy

## The Most Powerful Profession

“The first thing we do, let’s kill all the lawyers.”<sup>1</sup> These familiar words from Shakespeare’s *Henry VI* are most frequently cited by those deriding lawyers or the legal profession. In reality, Shakespeare was paying an amazing tribute to the function and importance of lawyers in a society that values individual liberty and freedom. In the play, set in the 1400s, Jack Cade has been hired by the Duke of York to stir up trouble. There was a struggle for the throne, and the Duke thought that if he orchestrated a revolt, he could use the army under his control to still the rebellion and seize the throne. So, Jack is planning this revolt with fellow miscreant Dick the Butcher. Dick suggests that the first thing on the agenda, the top priority, must be to get rid of the lawyers. They knew that for a revolt to succeed, they must eliminate those who are charged with safeguarding the most basic civil rights, freedoms and liberties, which are the foundation of an orderly society.

Shakespeare recognized what Alexis de Tocqueville saw when he visited our country in 1831 to see what a great republic was like. De Tocqueville found

citizens had a great respect for the law, and the authority and influence given to lawyers formed what he called, “the most powerful barrier against the lapses of democracy.”<sup>2</sup> This observation still rings true today. We are members of the most powerful profession. Even though in Alabama, as elsewhere, the bar comes together as a diverse group, we are all united by our common responsibility to seek truth and justice and to protect individual freedom and liberty.

Lawyers have played this important role throughout American history. At the time of our nation’s birth, lawyers played a pivotal role. The Declaration of Independence was written by Thomas Jefferson, a lawyer. Twenty-five of the 56 signers were lawyers.

James Madison, a lawyer, credited with drafting the Constitution, used his lawyerly skills of research and reflection to help him compose this brilliant document. It was said that his greatest strength during the Constitutional Convention was in preparations he made beforehand, spending countless hours researching and studying the issues before they came up for debate. Other lawyers were at the



Convention as well, debating and hammering out the issues to arrive at the final product that is still the law of our land, 215 years later. Twenty-two of the Constitution's 39 signers were lawyers.

After it was signed, the Constitution went to the states for ratification. Here we see lawyers hard at work again. James Madison, John Jay and Alexander Hamilton—all lawyers—wrote the Federalist Papers to convince the states to ratify the Constitution. They were putting into practice the persuasive writing skills they learned in their years of legal practice.

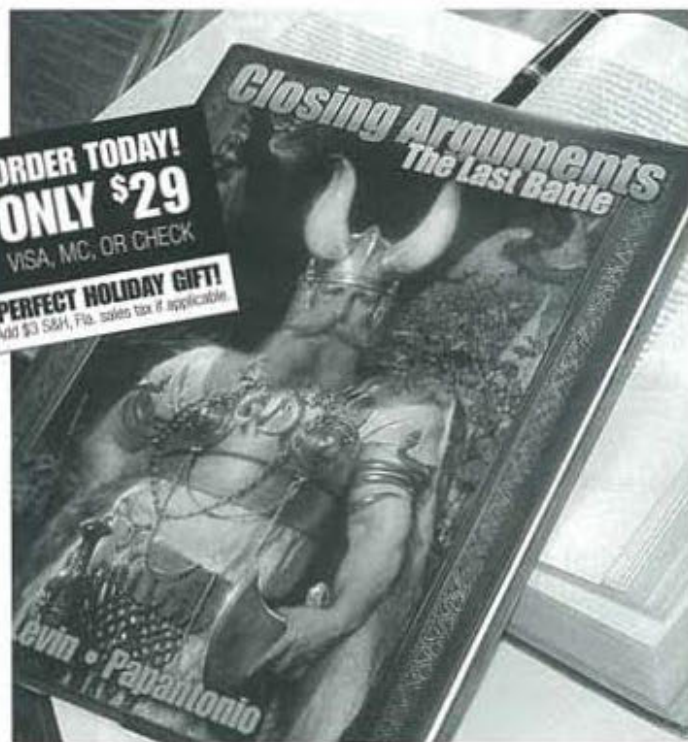
The members of the legal profession of that day realized what a crucial time of history they were living in, and they worked and studied and sacrificed and fought for a cause in which they believed.

John Adams wrote to a friend, "You and I have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live."<sup>1</sup> They realized the importance of their mission. They wanted to get it right. And they, along with others, succeeded in creating the longest standing democratic republic in the history of the world.

The nation grew, and there at the helm were many other lawyers, such as John Marshall, Joseph Story, John Quincy Adams and Daniel Webster. Then there was Abraham Lincoln, another lawyer, who wrote the Emancipation Proclamation, recognizing that all people, whatever their skin color, were entitled to the "unalienable rights" of liberty guaranteed in our founding documents.

Our most important institutions were structured and birthed by the debates and pens of lawyers. Other professions were represented, but the legal profession was by far the dominant group. Today the survival of American liberties and freedoms depends no less on the call to protect those freedoms under the precepts upon which our nation was founded.

When we look around Alabama, we see members of our profession involved in virtually every department of public and private life, not only offering our professional services of guiding and counseling, but also serving as heads of corporations and institutions of education, health, real estate, community organizations, and government. In fact, all but 16 of Alabama's 52 governors have been Alabama lawyers.



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Twenty-five of our nation's 42 presidents have been lawyers. It seems to me that no profession, other than perhaps the ministry, has had such a profound and wide impact on our society.

Yet, there is this confusing conundrum: the perplexing problem of public perception. According to a 2002 Gallup Poll, only two percent of those surveyed rated the honesty and ethical standards of lawyers as "very high." That was the same rating given to labor union leaders, real estate agents and stockbrokers, and just right above the one percent rating given to car salesmen and telemarketers.<sup>4</sup> A study commissioned by the Section of Litigation of the American Bar Association reports, "Americans say that lawyers are greedy, manipulative, and corrupt."<sup>5</sup>

Why are we such a vilified profession? Perhaps it's because we have a duty to represent unpopular clients and causes. Perhaps it's because almost every political and cultural question in the United States is ultimately resolved into a judicial question. Perhaps it's because the legal profession becomes the scapegoat for the so-called insurance, medical malpractice and other crises. Certainly other explanations exist, many of them unreasonable and unfounded, but the depth of the criticism gives rise to the need for self-examination. We may not have control over public perception, but we do have control over our own conduct and character.

Because we are a nation of laws, and not of men, and because attorneys are the guardians and protectors of that concept,

it is imperative that we have character that is beyond reproach. In no other culture do lawyers play such an important role. As Chief Justice Drayton Nabers has said, we must be "worthy stewards" of the rule of law. This requires that we have a zeal for truth and justice. The public has the right to expect from all members of the legal profession the highest standards of integrity and moral virtue. Often the most intimate and personal matters are entrusted to lawyers. Often a client's business and wealth are contingent on the character and virtue of a lawyer. The public, the courts, the bar, our clients—all must be able to trust us without reservation, no substitute, no qualifications, not negotiable.

Alabama has a rich history in the area of legal ethics. Our 1887 Code of Ethics

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was the first in the nation, and it served as the model for many other states and even the American Bar Association.

The Alabama *Code of Ethics* was written primarily by Thomas Goode Jones, a man of integrity and character who served Alabama and the legal profession in many capacities: He was president of the Alabama State Bar, Governor of the State of Alabama, and a federal judge. When he wrote the *Code of Ethics*, he inserted this quote just after his first paragraph:

"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. . . . High moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."<sup>6</sup>

We have tremendous responsibility, serving in this most powerful profession. We have a crucial position in society. We are entrusted with the stewardship of America's rule of law and we must be worthy stewards. Our skills and training provide unique opportunities for us to lead and serve in our communities and government.

For example, Alabama lawyers at one time dominated our state legislative bodies. We are once again needed, not just in state government but also on city councils, county commissions and other offices. I encourage each of you to use your talents and training as you continue serving on the front lines in our state.

The Alabama State Bar celebrates 125 years of professionalism this year. From its inception in 1878, the Alabama State Bar has been a leader among the nation's bars. May we keep up that strong tradition as our journey continues, and may we exceed every other generation of lawyers in honesty, integrity, dignity,

professionalism, and zeal for truth and justice as we fulfill our calling of service to clients, the community and our profession.

When I was growing up, my brothers and sisters and I were all made to believe that we had unique talents and gifts. We often heard this admonishment from our parents which I now share with you, "To whom much is given, much is required." ■

## Endnotes

1. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.
2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 251 (Harvey C. Mansfield & Delba Winthrop eds., The University of Chicago Press 2000) (1835).
3. JOHN ADAMS, *THOUGHTS ON GOVERNMENT* (1776), reprinted in 4 *THE PAPERS OF JOHN ADAMS* 86 (Robert J. Taylor et al. eds., 1979).
4. U.S. DEPARTMENT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 120 (2002) (quoting The Gallup Organization, Inc.).
5. AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, *PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS* 4 (2002).
6. GEORGE SHARPSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (1854) (emphasis added).

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By Keith B. Norman

## He Should Not Have Said It

This past July, the Southeastern Conference (SEC) Media Days were held in Birmingham. One of the big stories of the event was the decision of Tennessee's head football coach, Phillip Fulmer, not to attend. As you may recall, Coach Fulmer stated that he was not attending because of "radical attorneys" involved in litigation on behalf two former University of Alabama assistant football coaches. A story appeared in the *Montgomery Advertiser* the day following Coach Fulmer's remarks to the media via speakerphone from Knoxville, Tennessee. The sportswriter for the *Advertiser*, chiding Coach Fulmer for not appearing in person, included the following statement in his article: "...Once again, I am not a lawyer, and I would dig ditches before I'd be one because it's cleaner, more honorable work. ..."

Jibes of this sort I generally take with a grain of salt. Besides, it never pays to engage in a war of words with someone who buys ink by the barrel. I could not let this statement go unchallenged, though, so the next day I sent the sports writer the following response:

"Dear Mr. Ensey,

"I read your column about Coach Fulmer in this morning's *Advertiser*. I noted in particular your remark: '..Once again, I am not a lawyer, and I would dig ditches before I'd be one, because it's cleaner, more honorable work. ...' I was disappointed to read such an unnecessary statement.

"While there are a few dishonorable people in every profession, including yours, the rest of the lawyers are honorable and, unlike most other professional groups, abide by a written code of ethics that sets a higher standard of conduct than for the ordinary citizen. I would

wager you that lawyers are involved in and serve on more boards of civic groups and churches in Montgomery than any other profession. The same would be true if you go to any community in this nation. Indeed, I doubt that civic groups and churches would allow people who are dishonorable and without integrity to serve among their ranks. Every day, many lawyers volunteer to give their time to represent citizens who have problems, but who are unable to pay. This is hardly the trait of people who are dishonorable.

Despite what you say, lawyers render service: to their clients, to their communities and to their profession. What has gotten lost in all of this is the fact that two former coaches contend that they have been injured by the defendants and are unable to gain reemployment in their chosen profession because the actions of the defendants amount to their being 'blacklisted.' These two former coaches sought out a lawyer to represent them and to protect their rights.

You are certainly entitled to your opinion. In fact, the 1st Amendment, the genius of a lawyer, guarantees you this right. Statements like yours, however, serve no good purpose and are merely divisive. Words are powerful instruments and I think you have an obligation in your position to use them wisely and honestly. Society is not served by one group trying to tear down another. We have seen the results — we have all suffered."

We will never be able to control what people say or think about the legal profession. As long as we continue to serve our clients truthfully, honorably and professionally, though, we can take comfort in knowing that we have rendered the highest service possible. ■





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# Important Notices

## Mandatory Continuing Legal Education (MCLE) Rule and Regulation Changes, effective January 9th, 2004

Effective January 9, 2004, Mandatory Continuing Legal Education Regulation 2.7 was adopted and MCLE Rule 2.C.2, Rule 3, Rule 5.B, Rule 6.A, and Rule 6.B were amended.

Attorneys are now required to earn one hour each year of ethics or professionalism credit. The minimum number of hours remains 12 hours each year.

Other MCLE Rule revisions include an increase of the late filing fee to \$100 and the late compliance fee to \$100. Attorneys who fail to comply with the MCLE Rules for late filing and late compliance will be required to pay an additional \$300 noncompliance fee.

Attorneys who reside and maintain a principal office in another state that requires MCLE and who can demonstrate compliance with his or her principal state of practice are exempt from the 12-hour CLE requirement but must file the year-end Annual Report of Compliance.

The Rules revision clarify that assistant or deputy attorneys general and district attorneys, assistant or deputy district attorneys, and public defenders are not exempt from the MCLE Rules.

For a complete listing of all revisions and the full content of the MCLE Rule and Regulation changes, please visit the Alabama State Bar Member page at [www.alabar.org](http://www.alabar.org). ■

## Mini-Grants for Conflict Prevention, Management and Resolution

The Alabama Supreme Court Commission on Dispute Resolution, through the Center for Dispute Resolution, provides annual mini-grants to promote conflict prevention, management and resolution in both local and state programs. To be eligible, organizations must be non-profit, and file an application by October 1, 2004.

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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- Arrearage Report

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- Certificate of Divorce
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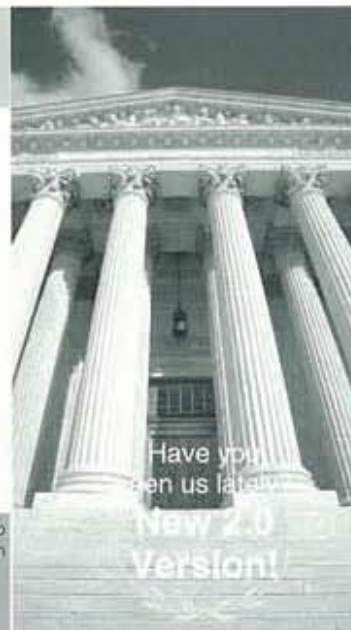
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Clark W. Cain • Senior Underwriter • [ccain@landam.com](mailto:ccain@landam.com)  
Rebecca E. Crook • Agency Representative • [rcrook@landam.com](mailto:rcrook@landam.com)

# About Members, Among Firms

*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

Hendon Blaylock DeBray, formerly of counsel with Rushton, Stakely, Johnston & Garrett PC, announces the opening of her office, The Mediation Center, at 200 S. Lawrence Street, Montgomery 36104. The mailing address is P.O. Box 104, 36101-0104. Phone (334) 240-2421.

Michael G. Graffeo, formerly of John D. Saxon PC, announces the opening of Law Offices of Michael G. Graffeo, PC. Offices are located at 2100 SouthBridge Parkway, Suite 650, Birmingham. The mailing address is P.O. Box 660815, 35266-0815. Phone (205) 871-7979.

Christi A. Roberts announces the opening of her office at 12440 Magnolia Avenue, Magnolia Springs. The mailing address is P.O. Box 1022, 36555. Phone (251) 965-9060.

David W. Vickers announces the opening of his office at 640 S. McDonough Street, Montgomery 36104. The mailing address is P.O. Box 101, 36101-0101. Phone (334) 269-1192.

William B. Ware announces the opening of his office at 3615 Vann Road, Suite 116B, Birmingham 35235. Phone (205) 655-1492.

## Among Firms

Akridge & Balch PC announces that Katherine M. Klos has joined the firm as an associate.

The Alabama Department of Finance announces that Jerry Carpenter has been appointed chief legal counsel.

The Atchison Firm PC announces that Carvine Langham Adams has joined the firm as an associate.

Robert A. Beckerle, Amy Beckerle Smith and Vivian S. Beckerle announce the formation of Beckerle, Smith & Beckerle, with offices at Amy Square, Suite C, 712 Oak Circle Drive, West, Mobile 36609-4224. Phone (251) 660-0261.

Bradley Arant Rose & White LLP announces that John D. Bond, III has joined the firm in its Charlotte office.

Capell & Howell announces that George L. Beck, Jr. has joined the firm as a member.

Richard H. Cater PC announces that Sandra S. Hutchinson and Renee D. Kirby have joined the firm as associates.

Citrin & McGlothren PC announces that Elizabeth A. Citrin has joined the firm of counsel.

The Law Offices of Chris Steve Christ announces that Gregory D. Pugliese has joined the firm.

Frederick T. Enslin and Susan Berman Norris announce the formation of Enslin & Norris PC, with offices located at 6728 Taylor Court, Montgomery. Phone (334) 244-7333.

Hall & Hall LLC announces that Kevin T. Shires and Thomas S. Hiley have joined the firm as associates.

Hare, Wynn, Newell & Newton announces that Sandra Payne Hagood and James R. Moncus, III have joined the firm.

Hubbard, Smith, McIlwain, Brakefield & Browder PC announces that Robert M. Spence, formerly with Crownover, Standridge & Spence, has joined the firm as a partner.

Earl H. Lawson, Jr. announces the opening of The Law Office of Earl H. Lawson, Jr., a staff legal office of the Liberty Mutual Group, and that Gary L. Weaver has joined the firm.

Nakamura, Quinn & Walls LLP announces that Leslie Jeanne Horton has become a partner.

Neurorecovery, Inc. announces that Kristen L. Miller has joined the company as deputy general counsel.

Smith Moore LLP announces that Bill Stewart has joined the firm in its Raleigh office.

Smith, Spires & Peddy PC announces that Thomas M. Little and Martin M. Poynter have joined the firm as associates.

Walston, Wells, Anderson & Bains LLP announces that April S. Rogers has become an associate.

James S. Ward, Jeff W. Parmer and Kenneth Joe Wilson, Jr. announce the formation of Ward, Parmer & Wilson LLC, with offices at 400 Shades Creek Parkway, Suite 100, Birmingham 35209. Phone (205) 879-5997.

Watson, Jimmerson, Givhan, Martin & McKinney PC announces that Tara L. Helms has become a partner. ■



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# Memorials

Beck, Edward Neal  
Huntsville  
Admitted: 1998  
Died: March 8, 2004

Brown, Alton Rives, Jr.  
Mobile  
Admitted: 1954  
Died: February 21, 2004

Canty, Ronald Austin  
Montgomery  
Admitted: 2001  
Died: April 15, 2004

Crownover, Walter Parker  
Tuscaloosa  
Admitted: 1962  
Died: May 10, 2004

Dawkins, Joe Maxwell, Jr.  
California  
Admitted: 1978  
Died: May 20, 2004

Gamble, William Coleman, Jr.  
Mobile  
Admitted: 1991  
Died: November 2, 2003

Green, John William, Jr.  
Huntsville  
Admitted: 1951  
Died: March 2, 2004

Harris, James Douglas  
Montgomery  
Admitted: 1942  
Died: June 7, 2004

Loeb, Bernard Frank  
Charleston, SC  
Admitted: 1950  
Died: May 31, 2004

Lovvorn, Christie Jo Parson  
Huntsville  
Admitted: 2002  
Died: May 7, 2004

Massey, Timothy Alan  
Birmingham  
Admitted: 1977  
Died: June 25, 2004

McDermott, William Henry  
Mobile  
Admitted: 1958  
Died: May 28, 2004

Nelson, Carolyn Berryhill  
Birmingham  
Admitted: 1969  
Died: December 24, 2003

Smith, Hugh Virden, Jr.  
Montgomery  
Admitted: 1965  
Died: June 18, 2004

Smith, Paul Gordon  
Birmingham  
Admitted: 1962  
Died: April 29, 2004

Winston, Norman Green, Sr.  
Orange Beach  
Admitted: 1967  
Died: July 16, 2004



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# Legal Services Alabama, Equal Justice Initiative of Alabama and Alabama Prison Project Receive Alabama Law Foundation Grants

**H**undreds of people in Alabama, who could not afford it themselves, will receive free legal services from Legal Services Alabama this year, thanks to grants from the Alabama Law Foundation's IOLTA (Interest on Lawyers Trust Accounts) grant program. A \$90,000 grant was given to the LSA for 2004.

In February, Alabama's three, separate Legal Services corporations united to form a single, comprehensive, statewide program, Legal Services Alabama. Recommended by the Alabama Task Force on Reconfiguration, this new, integrated system positions the Alabama civil justice community to better provide equal access to justice for all.

Almost 700,000 citizens of this state live at or below the poverty level. These families have approximately 154,644 legal needs a year. Between Legal Services programs and pro bono programs, just over 16,000 of eligible low-income citizens received legal assistance in 2001, a gap between services needed and services received of over 138,000.

As a new vision for delivering legal services to the state's low-income citizens, Legal Services Alabama improves the coordination of resources and improves fundraising.

One of LSA's most integral sources of funding is the IOLTA grant it received from the foundation this year, funds that LSA could not do without, according to LSA Executive Director Melissa Pershing.

The Equal Justice Initiative of Alabama is also receiving a grant from the Alabama Law Foundation's IOLTA program, this

time in the amount of \$19,000 to continue their work assisting attorneys who are representing indigent defendants in the post-conviction stage of capital cases.

Bryan Stevenson, executive director of the organization, acknowledged the large part the foundation has played in the organization.

The Alabama Prison Project, another grant recipient, makes sure that judges and juries in capital cases have all the information they need before sentencing. The Project recently received a \$9,000 grant from the IOLTA program.

The funds will provide general support and further the work of The Alabama Prison Project as it performs investigative functions to aid attorneys appointed to capital cases. The foundation has awarded a grant to the Project every year since 1989, for a total of \$661,215.

The Project's director, Lucia Pendland, expressed her gratitude for the foundation and the grant.

The Alabama Law Foundation is affiliated with the Alabama State Bar and is a charitable, tax-exempt organization dedicated to law-related charities.

The IOLTA program allows attorneys to convert their commingled client trust accounts to interest-bearing accounts. The interest is then forwarded to the Alabama Law Foundation, which uses the money to award grants for law-related charitable projects.

This year, approximately \$128,000 was given in grants, and since 1989, the Alabama Law Foundation has provided over \$12 million in grants through its IOLTA program. ■



# Spring 2004 Admittees



(Photograph by Fouts Commercial Photography, Montgomery, photofouts@aol.com)

## STATISTICS OF INTEREST

Number sitting for exam.....	260
Number certified to Supreme Court of Alabama.....	123
Certification rate*.....	47.3 percent
<b>Certification Percentages</b>	
University of Alabama School of Law.....	59.1 percent
Birmingham School of Law.....	29.7 percent
Cumberland School of Law.....	73.9 percent
Jones School of Law.....	50 percent
Miles College of Law.....	9.1 percent

\*Includes only those successfully passing bar exam and MPRE

For full exam statistics for the February 2004 exam, go to [www.alabar.org](http://www.alabar.org), click on "Members," and then check out the "Admissions" section.



# Alabama State Bar Spring 2004 Admittees

Adams, Carvine  
Akins, Christopher Alan  
Alexander, Desiree Celeste  
Anderson, William Dominick  
Argo, Jacob Dale  
Ary, Angela Stewart  
Barnard, Julie Plant  
Barr, Philip Adam  
Beard, James Will  
Bearden, Joshua Steven  
Beckerle, Vivian Sheffield  
Bedi, Shelia Anne  
Bedsole, Chester McCorquodale  
Bowie, Courtney Alyssa  
Braswell, Kasie Moore  
Brock, Leslie Kristin  
Bruner, Robert Page  
Buch, Vanessa Michelle  
Burgess, Charles Monroe III  
Burns, Steven Andrew  
Butler, Kevin Todd  
Calvert, Tracy Orr  
Carr, Leigh Ann  
Carroll, Price Hugh  
Cash, George Edwin  
Collins, Jane Gunn  
Dean, John Jeffrey  
Dill, Nicole Minetree  
Drasutis, Harry Anthony  
Duerr, Douglas Jeremy  
Durst, Tiffany Anngelee  
Edwards, Amanda Ann  
Ferguson, Jason Malone  
Fetterolf, Pamela Bryant  
Fields, Teri Danielle  
Fountain, Dana Lynne  
Frias, Brenda Moorer  
Gardner, Lisa Frances  
Givan, Juandalynn Deleathia  
Gober, Adam Shea  
Godwin, Lewis Christopher  
Goodson, Laura DeV Vaughn  
Graves, Michael Anthony  
Griffin, Hiram Lee Jr.  
Grissom, Candace Ursula  
Guthrie, Todd Patrick  
Hancock, Robert Daniel  
Harkins, Ronald Hugh

Hart, Tana Vollendorf  
Hayes, Joshua Patrick  
Herke, John Michael  
Hewgley, Laura Renee  
Hix, Howard Ray Jr.  
Hobson, Thomas Michael Sr.  
Holmes, Elizabeth Wilson  
Hooper, Sanford Graham  
Howard, Kelvin William  
Huffstutler, Christopher Mark  
Hughes, Judy Anne  
Hunt, Anthony Paul  
Hunt, Marcus Lee  
Jackson, Alan Lavon  
Jackson, Susan Elizabeth  
Jefferson, Carthenia Walker  
Johnson, Beverly Ernestine  
Johnson, Herman Nathaniel Jr.  
Johnson, Sherry Lynn  
Johnson, Sheryl Stryker  
Jordan, Audrey Kathleen Jones  
Kennedy, John Kirby  
Kim, Ronald Walter  
Kirby, Renee Denise  
Kirpalani, Jagdesh Bhagwandas  
Lambert, Judith Schutzbach  
Lawson, Harry Steven  
Lewis, Billy Wayne Jr.  
Lilly, Sandra Elaine  
Linder, Michael Mark Jr.  
Little, Sonya Marie Toole  
Madison, Lori Anne  
Markham, James Ross  
Marks, Kemberli Latresa  
Masood, Asim Griggs  
McClure, Chester Bennett II  
McGlaughn, Michael David  
Minchin, Jonathan Brock  
Montiel, Joi Tatum  
Montross, William Robert Jr.  
Moseley, Max Anderson  
Nalu, Jennifer Ingeborg  
Nastrom, Karl Steven  
Nichols, Sandra Sarah  
O'Callaghan, Christy Lynn  
Odell, Gordon Wendell Jr.  
Odom, Elizabeth Pugh  
Outlaw, Wanda Diane

Patterson, James Donnie  
Pittman, Alethea  
Price, Charles II  
Pritchett, Nancy Katherine  
Pylant, Michael Alan  
Ramey, Brian Anthony  
Rampy, Julie Anna  
Rawls, Angela Slate  
Reid, Ronald Patrick  
Roberts, Lauren Davis  
Robertson, Michael Finley  
Rogers, Amy Itira  
Runnels, Gathel Oliver Jr.  
Sasser, Tommie Faye  
Senft, Pamela Vera  
Shaw, Joseph Allan  
Shepherd, Steven Grant  
Shores, Joseph Blair  
Sketo, Katherine Riley  
Slaten, Angela Sue Walker  
Smith, William Bradley  
South, Justin Gregory  
Sowatzka, Adam Gerard  
Steely, Kenneth Scott  
Stephenson, David Winn  
Stroud, Robert Charles  
Sullivan, Ward Stephen  
Swickard, Dawn Ann  
Tandet, Steven Neal  
Terrell, Michael Van  
Thrasher, Carla Kay  
Tidwell, Tanya Leigh  
Tisdale, Audrey ChaLea  
Tonder, Michael Jay  
Tudisco, Charley Anthony  
Turner, Glen Elliot  
Vick, Gerald Jones Jr.  
Vines, Edward Benjamin  
Walston, Clifford Hugh  
Walworth, Daniel Richard  
Wayne, Hilary Alison  
White, John Calvin  
Wiggins, Judd Jerome  
Williams, Brian James  
Williams, Tari DeVon  
Willis, LuAnn Bailey  
Windham, Donald Alan Jr.



# Lawyers in the Family



*Lori Anne Madison (2004) and  
Charles Bradford Stinson (2003)  
Admittee and husband*



*Katherine Riley Sketo (2004) and  
Dennis Riley (1976)  
Admittee and father*



*Lauren Davis Roberts (2004) and  
Stuart D. Roberts (1998)  
Admittee and husband*



*Nicole Minetree Dill (2004), Andrew Dill (2002) and Tom Minetree (1988)  
Admittee, husband and brother*



*Angie Slaten (2004) and Jane Evans (1989)  
Admittee and mother-in-law*



*Vivian Sheffield Beckerle (2004), Bob Beckerle (1961) and Amy Beckerle Smith (2003)  
Admittee, husband and daughter*



*Jim Beard (2004) and Will Beard (1973)  
Admittee and father*



# Lawyers in the Family



*Michael McGlaughn (2004), Judge William D. Russell, Jr. (1974),  
James W. McGlaughn (1992) and Elizabeth Golson McGlaughn (1992)  
Admittee, father-in-law, brother and sister-in-law*



*Amy Itira Rogers (2004) and  
Joel S. Rogers, III (1980)  
Admittee and father*



*Steven Grant Shepherd (2004) and  
Leigh Rigby Shepherd (1998)  
Admittee and wife*



*Joi Tatum Montiel (2004) and  
Mark G. Montiel, Sr. (1981)  
Admittee and husband*



*Mark Huffstutler (2004) and  
J. Terry Huffstutler, Jr. (1957)  
Admittee and father*



*Charles Price, II (2004), Susan Price (1990) and Judge Charles Price (1975)  
Admittee, sister and father*



*Ronald H. Harkins (2004) and  
Deborah Mattison (1980)  
Admittee and wife*

*(Photographs by Fouts Commercial Photography, Montgomery, photofouts@aol.com)*





# THE ALABAMA STATE BAR Leadership Forum

BY PATRICK H. GRAVES, JR. AND ALYCE MANLEY SPRUELL

At its May meeting, the Board of Bar Commissioners of the Alabama State Bar unanimously voted to create the Alabama State Bar's Leadership Forum as proposed by then President Bill Clark. The leadership programs adopted by many of our states and cities have given rise to such programs in various bar associations, e.g., Cincinnati, Indianapolis, Louisiana, Pennsylvania, Texas, California, and Florida to name a few. The inaugural class of the Alabama State Bar Leadership Forum will begin in January 2005 and graduate in May 2005.

The mission of the Forum is to produce committed and involved lawyers willing and able to fill significant leadership roles in the local and state bar associations, in communities and in state organizations and to serve as role models in matters of ethics and professionalism. The goals are: (1) To raise the level of awareness of lawyers as to the purpose, operation and benefits of the Alabama State Bar; (2) To build a core of practicing lawyers to become leaders with respect to ethics and professionalism, resulting in raising the overall ethical and professional standards of lawyers in the community; and (3) To form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations, and community organizations can draw upon for leadership and service. In short, it is anticipated that the future leaders of not only the state bar will come from this group, but also leaders of our state, cities and counties.

Potential applicants will be asked to submit an application, a copy of which can be found on the ASB Web site, [www.alabar.org](http://www.alabar.org). For the inaugural class, those applications must be completed and mailed prior to November 1, 2004. A committee of commissioners of the Alabama State Bar will review these applications and make recommendations to the Board of Bar Commissioners as a whole for selection. While there is no age requirement, participants must have practiced law for not less than five years and not more than ten years.

Each class will consist of no more than 30 participants. The program, consisting of four sessions, will begin in January of each year and will meet on Thursdays. A nominal fee will be charged with scholarships provided to those coming from public service areas of the bar. The final session, which will occur in May, will consist of an all-day training session, a social and a dinner with speaker. The graduation or induction exercise will occur the following day at the regularly scheduled meeting of the Board of Bar Commissioners.

The contents of the sessions will include:

## Leadership for Lawyers

This session will provide participants with an understanding of the essential elements of leadership through involved discussions about basic leadership principles, individual leadership characteristics and general leadership obligations, styles and skills.

## Leadership through Service

This session will introduce participants to the opportunities and needs for leadership in the state and local bar associations, legislature, judiciary and the community. Information will be provided regarding service opportunities.

## Ethics, Justice and Values

This session will explore the development of ethics in the Alabama State Bar and review ethics in the practice of law.

## Professionalism

This session will define the nature of and goals involved in professionalism. It will examine those characteristics and behavior of members of the Alabama State Bar which promote high standards of civility and professionalism, as well as those practices which tend to adversely affect leadership and professionalism and tend to destroy congeniality.

## Alabama State Bar

As a part of the various sessions, the operation, programs and benefits of the Alabama State Bar will be examined. Such information will give an overview of the Alabama State Bar, normally received by commissioners.

If you are a lawyer who meets these requirements, please send in the application and become a graduate of the Alabama State Bar Leadership Forum. ■

E. Allen Dodd, Jr., and John David Dodd have donated a substantial gift of \$10,000 to establish the William D. "Bill" Scruggs Leadership Fund which will be used to underwrite the Leadership Forum.



**Patrick H. Graves, Jr.**

Bradley R. Hightower is an associate with Christian & Small LLP in Birmingham. He formerly served as law clerk to the Honorable Margaret A. Mahoney, Bankruptcy Judge for the U.S. Bankruptcy Court for the Southern District of Alabama. Hightower received his undergraduate degree from Auburn University and his J.D. from the University of Alabama School of Law.

**Alyce Manley Spruell**

Alyce Manley Spruell practices with the Tuscaloosa firm of Spruell & Powell PC. She is a graduate of The University of Alabama School of Law and was admitted to the ASB in 1983. She currently represents the 6th Circuit, place no. 2, on the board of bar commissioners, and is a member of the state bar's Indigent Defense Symposium.





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YES (Please complete the remainder of this section)  NO (Please skip to Certification section at bottom of page)

Policyholder's Full Name (LAST, First, Middle) \_\_\_\_\_

Date of Birth ++++++ \_\_\_\_\_ Sex  M  F \_\_\_\_\_

Employer's Area Code and Tel. Number \_\_\_\_\_

Employer's Name \_\_\_\_\_

Employment Status  ACTIVE  RETIRED \_\_\_\_\_

Retirement Date \_\_\_\_\_

Do you or a covered member have Medicare?  YES  NO

Medicare Number with Suffix (None is provided on the back for additional Medicare dependents) \_\_\_\_\_

Do you have?  Part A  Part B \_\_\_\_\_

Part A Effective Date ++++++ \_\_\_\_\_ Part B Effective Date ++++++ \_\_\_\_\_

Name of Other Insurance Company (other than Medicare) \_\_\_\_\_

Address (Street or P.O. Box, City, State, ZIP) \_\_\_\_\_

Insurance Company's Area Code \_\_\_\_\_

Group Name \_\_\_\_\_

Group Name \_\_\_\_\_

Policy Number \_\_\_\_\_

Date Of Coverage \_\_\_\_\_

Cancelled (If applicable) Date \_\_\_\_\_

Other Contract (Check one)  Policyholder Only  Policyholder and Spouse  Family  Policyholder and Children

Type (Check all that apply)  Basic Medical  Hospital  Major Medical\*  Other (Describe): \_\_\_\_\_

Dental  Mental Health  Prescription Drugs \_\_\_\_\_

\*Major Medical often includes extras like prescription drugs, ambulance, emergency room, prosthetics, durable medical equipment and out-of-state physician coverage.

(Required) If Dependent Coverage, please complete the following: Birthdates: Father \_\_\_\_/\_\_\_\_/\_\_\_\_ / Mother \_\_\_\_/\_\_\_\_/\_\_\_\_

IF PARENTS ARE DIVORCED OR SEPARATED: Is there a court decree which establishes financial responsibility for the medical care of the dependent children?  YES  NO

If yes, please enclose a copy of the section of the decree that establishes financial responsibility for medical care.

If no, please indicate who has custody of the dependent(s).

Space is provided on the back for additional dependents.

Dependent Name	Parent Responsible for Ins.	Other Insurance Company	Policy Number	Effective Date of Insurance
1				
2				
3				

Dependent Name	Name of Mother	Birthdate of Mother	Name of Father	Birthdate of Father
1		/ /		/ /
2		/ /		/ /
3		/ /		/ /

## CERTIFICATION

I hereby certify that the above information is true, complete and correct.

\_\_\_\_\_  
POLICYHOLDER'S SIGNATURE AND DATE





# Misrepresentation In The Insurance Application

BY F. LANE FINCH, JR.

Applying for insurance is the first step toward establishing a contractual relationship with an insurance carrier. However, the application process is sometimes taken lightly by the prospective policyholder or by the insurance agent, ultimately resulting in a loss of coverage.

Insurance carriers occasionally learn that the policyholder made one or more misrepresentations (by which I mean either an affirmative statement or an omission of information) in the application for insurance. The insurance carrier may discover this before a loss and decide to cancel the policy or the carrier may not learn of the misrepresentation until after a loss, at which point the carrier could rescind the policy and deny the claim. The grounds and mechanisms for both cancellation and rescission are discussed below.

## Right to Rescind

A carrier can rescind a policy if the insured makes fraudulent or material misrepresentation in the insurance application. The misrepresentation in the application often does not come to light until *after* a loss has occurred. For example, the claims adjuster may learn for the first time that the insured does not have a valid drivers license when he or she reads the accident report prepared by the police. An example from a different context is where the carrier learns post-loss that the insured misrepresented his health in the application for life insurance. See

*e.g. Duren v. Northwestern Nat'l Life Ins. Co.*, 581 So.2d 810 (Ala. 1991). Many states have specific rescission statutes that govern these situations. In Alabama, *Ala. Code* § 27-14-7(a)(3) provides:

All statements and descriptions in application for an insurance policy or annuity contract, or negotiations therefore, by, or on behalf of, the insured or annuitant shall be deemed to be a representation and not warranty. Misrepresentations, omissions, concealment of fact and incorrect statements shall not permit a recovery under the policy or contract unless either:

- fraudulent;
- material either to the acceptance of risk or to the hazardous assumed by the insurer; or
- the insurer in good faith either not have issued the policy or contract, or have not issued the policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in a loss if the true facts had been known to the insurer as required either by the application for the policy or contractor or otherwise.

Alabama cases interpreting this statute have consistently held that a carrier can void a policy if the insured's actions in completing the policy application are made with an intent to deceive

(fraudulent) or if the insured innocently misrepresents a fact which is material to the acceptance of the risk (no intent required), or if the carrier in good faith would not have either issued the policy or would have issued the policy under different terms had the requested information been disclosed (no intent required). See e.g. *Taylor v. Golden Rule Ins. Co.*, 544 So. 2d 932, 936 (Ala. 1989); *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1360-61 (Ala. 1982); *Bankers Life & Cas. Co. v. Long*, 345 So. 2d 1321, 1323 (Ala. 1977); *Clark v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 465 So. 2d 1135, 1139-1140 (Ala. Civ. App. 1984). Note: This statute applies only to applications for initial policies; the carrier cannot rescind a renewal policy based on misrepresentations in the original application. *Alfa Mut. General Ins. Co. v. Oglesby*, 711 So.2d 938 (Ala.1997). Therefore, it is prudent for the carrier to require a new application for each renewal policy.

Under certain circumstances, a carrier may have an obligation to investigate further the representations on the policy application. This requirement is *only* activated where the carrier "has sufficient indications that would put a prudent person on notice so as to induce an inquiry which, if done with reasonable thoroughness, would reveal the truth." *Long*, 345 So. 2d at 1323 (citing *New York Life Ins. Co. v. Strudel*, 243 F. 2d 90 (5th Cir. 1957)). If the carrier fails to investigate further, it cannot cancel or avoid the policy based on the misrepresentations of the insured. Whether the particular information disclosed to a carrier would

have prompted a reasonably prudent insurance company to investigate an applicant is an issue for the jury. *Stephens v. Guardian Life Ins. Co. of America*, 1984, 742 F.2d 1329; *Duren v. Northwestern Nat. Life Ins. Co.*, 581 So.2d 810 (Ala.1991); *Long*, 345 So.2d 1321 (Ala.1977).

The Alabama Supreme Court has held that a carrier may void a policy and refuse to pay a claim if the insured made a false statement that was material to the acceptance of the risk by the carrier or the truth would have caused the carrier to not issue the policy. *National Savings Life Ins. v. Dutton*, 419 So. 2d. 1357 (Ala. 1982). This includes both innocent and intentional misrepresentations on an insurance application, unless the policy itself limits this doctrine by including language stating that only intentional misrepresentation will void the policy. Therefore, it must be determined if the carrier would have issued insurance to the applicant if the carrier possessed the truth. To prove the misrepresentation was material, the carrier must be able to offer more than just testimony from one its own employees that coverage would not have been issued. The carrier must be able to establish that that the misrepresentation was material to the acceptance of the risk. *State Farm General Ins. Co. v. Oliver*. 658 F.Supp. 1546 (N.D. Ala. 1987). A material fact has been defined as: (1) a fact that would increase the risk of loss; or (2) a fact that if known would have prevented the policy from being issued. See *Nat'l Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982); *New York Life Ins. Co. v. Zivitz*, 10 So. 2d 276 (Ala. 1942); *Empire Life Ins. Co. v.*

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*Gee*, 55 So. 166 (Ala. 1911). Whether the representation or omission made by the insured was "material" to the acceptance of the risk is almost always a question for the jury. See *Bennett v. Mutual Of Omaha, Ins. Co.*, 976 F.2d 659 (11th Cir. 1992); *State Farm General Ins. Co. v. Oliver*, 658 F.Supp. 1546 (N.D. Ala. 1987); *First Financial Ins. Co. v. Tillery*, 626 So. 2d 1252 (Ala. 1993); *Clark v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 465 So. 2d 1135 (Ala. 1985). The issue of whether a particular fact increases the risk of loss assumed by the insurance company is also generally one for jury. However, it has been held that there are some conditions which increase risk of loss as a matter of law. *Clark*, 465 So.2d 1135 (prior convictions for crimes of moral turpitude); *Liberty National Life Insurance Co. v. Trammel*, 33 Ala.App. 275, 33 So.2d 479 (1947) (cancer); *Gunn v. Palatine Insurance Co.*, 217 Ala. 89, 114 So. 690 (1927) (misrepresentation of extent of ownership interest). *Compare, Sovereign Camp, W.O.W. v. Harris*, 153 So. 870 (Ala. 1934) (generally, whether disease increases risk of loss to insurer is for jury, although court has declared that some diseases increase risk of loss as matter of law).

The carrier must refund the premiums for the policy rescinded. In the case of property and casualty policies, the premiums must be tendered into court. *Ala. Code* § 27-14-7(b). Alabama's *Code* does not address whether, in the context of other types of policies, the refund must be made into court or can be sent directly to the insured.

## Cancellation Policy

Many states have statutes that govern cancellation of insurance policies. Further, different statutes or standards will apply depending on the type of policy involved. For example, in Alabama, *Ala. Code* § 27-23-20 *et seq.* applies to cancellation of automobile liability coverage; it does not apply to other coverages in the auto policy (such as collision) nor to other types of policies (such as health or life policies).

To illustrate how a cancellation statute affects how and when a carrier can cancel a policy before a loss, we can look at *Ala. Code* § 27-23-20 *et seq.*, which sets out the grounds for canceling private automobile policies. The acceptable reasons for cancellation are set forth in *Ala. Code* § 27-23-21:

An automobile policy may only be cancelled for one of the following reasons:

- (1) Nonpayment of premium;
- (2) *The policy was obtained through a material misrepresentation;*
- (3) Any insured violated any of the terms and conditions of the policy;
- (4) *The named insured failed to disclose fully his motor vehicle accidents and moving traffic violations for the preceding 36 months if called for in the application;*
- (5) *The named insured failed to disclose in his written application or in response to inquiry by his broker, or by the insurer or its agent information necessary for the acceptance or proper rating of the risk;*
- (6)-(9) [subsections 6-9 relate to false claims, membership in a required organization, the drivers ability (legal, physical and otherwise) to operate a vehicle, and the condition or use of the vehicle, etc.]

Thus, three of the nine grounds for cancellation relate to misrepresentations in the application. Each of those three grounds explicitly or implicitly requires a material misrepresentation. That makes sense because the carrier does not care about (at least before a loss) a minor or immaterial misrepresentation and would rather keep the policy in force and the premiums coming in. In order to actually cancel a policy, the carrier must notify the named insured in writing by mailing or delivering the notice to the last known mailing address for the named insured. According to *Ala. Code* § 27-23-26, "Proof of mailing of notice of cancellation or of reasons for cancellation to the named insured at the address shown in the policy shall be sufficient proof of notice." However, the carrier still has the burden to prove mailing:

[W]here an insurer is setting up cancellation as a defense on a policy, it has the burden of proving by clear and convincing evidence that the notice of cancellation was mailed to the insured. Proof of actual receipt of the notice by the insured is not required, and where the insured insists, as in this case, that the notice was never received, it becomes a question of fact as to whether the cancellation notice was properly mailed.

*Strickland v. Alabama Farm Bureau Mut. Cas. Ins. Co., Inc.*, 502 So.2d 349 (Ala.1987), citing *Hilliard v. State Farm Mutual Automobile Ins. Co.*, 451 So.2d 287, 288-89 (Ala.1984).

In *Ex parte Alfa Mut. General Ins. Co.*, 742 So.2d 182 (Ala. 1999), *reh'g den.*, the Alabama Supreme Court clarified that the statutorily required proof of mailing only applies to automobile liability policies. It also held that "in the absence of any other statute governing notice of cancellation of insurance or rejection of an application for insurance, the outcome of this case depends on the common-law rules regarding proof of mailing." *Id.* at 186.

The notice of cancellation must be mailed or delivered to the named insured 20 days prior to the effective date of the cancellation or ten days in advance if the policy was cancelled for nonpayment. See *Ala. Code* § 27-23-23. Of course, you must always look to the policy terms to make sure the carrier has not contractually expanded the notice provision or otherwise limited its ability to rescind the policy.

The notice of cancellation must either include the reasons for cancellation or a statement informing the insured, "that upon written request of the named insured, mailed or delivered to the insurer not less than 15 days prior to the effective date of cancellation, the insurer will specify the reason, or reasons, for such cancellation." *Ala. Code* § 27-23-23. If such request is received, the carrier must reply to the request within five days and provide the insured the reason or reasons for cancellation. See *Ala. Code* § 27-23-26. Furthermore, if the policy is cancelled for any other reasons than nonpayment of premium, the carrier must notify the insured of the possibility of obtaining insurance through the automobile assigned risk plan. See *Ala. Code* § 27-23-26.

In any event, the cancellation must be made by someone with the authority to cancel the policy. The carrier itself can issue the cancellation or a





general agent can cancel the policy. A general agent has been defined as an agent who possesses the power to bind the carrier. According to *Ala. Code* § 27-7-1 a general agent is able to "solicit and negotiate insurance contracts on its behalf, and if authorized to do so by the insurer, to effectuate, issue and countersign contracts." The general agent's actions are deemed to be those of the carrier and the carrier is directly liable for the action of the general agent. *Washington Nat'l Ins. Co. v. Strickland*, 491 So. 2d 872 (Ala. 1985).

The policyholder has no coverage for any losses which occur after the cancellation date. As expected, there are exceptions to this seemingly obvious rule. One such exception is where the policy is intentionally or unintentionally reinstated.

### Effect of Acceptance of Premiums After Cancellation

The carrier's acceptance of a premium after cancellation will reinstate the policy. See *Gulf Gate Management Corp. v. Alliance Ins. Group*, 638 So. 2d 862 (Ala. 1994). In fact, even accepting half of the premium can reinstate the policy if the insured does not have knowledge that the policy has lapsed. *Progressive Specialty Ins. Co. v. First Community Bank*, 2000 WL 640912 (Ala. Civ. App.). "The act of accepting an insured's premium payments constitutes a representation by the insurer that the policy is in full force and effect." 571 So. 2d 1092, 1095 (Ala. 1994) vacated on other grounds, 499 U.S. 956 (1991). See also, *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1343 (Ala.

1988) ("By collecting premiums, [the insurer] was ratifying the existence of a contract, which is inconsistent with its position... that misrepresentations on the part of [the insured] voided any contract."); See also *Gulf Gate Mgt Corp.*, *supra*.

There are several factors to be considered when determining whether acceptance of premiums has reinstated the policy:

whether the insured was billed by the insurer or merely its general agent; whether the insurer had served notice of its election to rescind the policy at the time it accepted the premium; whether the receipt of the premium was inadvertent or intentional; whether retention of the premium was permanent or temporary; and whether the premium was returned within a reasonable time after the payment came to the attention of responsible officials of the insurer.

*Sielski v. Commercial Ins. Co. of Newark, New Jersey*, 605 N.Y.S.2d 599, 600 (1993).

If the premiums were only demanded for a short time subsequent to discovering the misrepresentations in the application,

"It [may be] found as a fact there was no waiver by the plaintiff of the right to maintain this action or to urge fraud. The receipt by the plaintiff of premiums, continuing for a short time after it first had information that a fraud had been perpetrated, did not constitute a waiver. Plaintiff had the right to follow up the information and to investigate what the facts were, and it is found as a fact that the plaintiff acted with reasonable dispatch."



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*Metropolitan Life Ins. Co. v. Di Novi*, 139 Misc. 1, 247 N.Y.S. 578 (1931). This case has been construed as holding, "the continued receipt by the insurer of premiums for a short time after discovery of fraud does not effect a waiver of its right to cancel, there being a right to reasonable investigation, and the insurer having acted with reasonable dispatch." Couch on Insurance 3d *Cancellation & Rescission* § 31:114. Therefore, to avoid waiving this right, if a premium is accepted after discovery of the misrepresentation, the carrier should promptly return the premium. See *Henson v. Celtic*, 621 So. 2d 1268 (Ala. 1993).

## Final Comments

Misrepresentations in the insurance application can be fatal. However, not all misrepresentations are created equal. Whether canceling or rescinding, the carrier's rights are limited. The misrepresentation must be material to the risk. That means the carrier must be able to prove objectively that it would not have written the policy at all or on the same terms (think premiums, limits and exclusions) if it had not relied on the misrepresentation in the application for that policy. The carrier must act promptly and prudently, which may seem contradictory. The carrier must make its decision quickly. If it waits too long (which is a very subjective concept) after learning of the mis-

representation, the carrier may lose its right to cancel or rescind. Conversely, if the carrier reacts too quickly, it may not be able to defend its decision with solid, objective evidence when (or if) it gets sued for bad faith.



**F. Lane Finch, Jr.**

F. Lane Finch, Jr. is a partner with the Birmingham office of Haskell Slaughter Young & Rediker, LLC. Finch has a business degree from the California Polytechnic State University, San Luis Obispo, and a law degree from University of California, Hastings College of the Law, in San Francisco. While in college, he interned in Washington, D.C. for U.S. Congressman Leon E. Panetta and was a student advisor for the SBA's Small Business Institute and a student member of Cal Poly's Business School Faculty Selection Committee. Also, Finch was note and comment editor for the *Hastings Constitutional Law Quarterly* and an extern with Justice Howard B. Wiener at the California Court of Appeals. He was admitted to the State Bar of California in 1987 and to the Alabama State Bar in 1993. He is also admitted to the United States District courts for the Northern and Eastern districts of California and the Northern and Middle districts of Alabama, as well as the United States courts of Appeal for the Ninth and Eleventh circuits. He also practices before the United States Patent and Trademark Office (non-patent cases). Finch is a member of the American Bar Association, the Birmingham Bar Association (serving on the Technology Committee since 1998), the Defense Research Institute, and the Alabama Defense Lawyers Association, and has taught seminars on contracts, intellectual property law and insurance coverage law in Alabama. He has published articles in *DRJ's For the Defense* and the *Alabama Defense Lawyers Association Journal*.

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# 2004 ANNUAL MEETING PHOTO HIGHLIGHTS

## THURSDAY



Stephen Salzburg, plenary speaker, shared "The Top Ten Mistakes Made by Trial Lawyers."



First Lady Faye Clark (left) gets her vendor card signed by Patty McDonald, with BlueCrossBlueShield of Alabama Preferred LTC, during Legal Expo 2004.



Judge Pete Johnson (left), recipient of the Judicial Award of Merit, and Ted Hosp, who accepted the firm VLP Pro Bono Award, on behalf of Maynard, Cooper & Gale, at the annual Bench and Bar Luncheon



Susan Wagner (second from right), recipient of the Judge Walter P. Gewin Award, and her family at the Bench and Bar Luncheon



(Left to right) Linda Lund, VLP director; Melissa Pershing, Legal Services Alabama executive director; Allison Alford, ASB Pro Bono Award recipient; and Beth Dubina, wife of Judge Joel Dubina, at the Bench and Bar Luncheon



Robert Ward (center) talks afterward with attendees of his presentation, "Mediation in Legal Practice: An Invaluable Tool"



Cast members take a break during rehearsals of "Cross that River."



Floyd Sherrod (left) and Ken Wallis (center) congratulate Bob McCurley (right), recipient of the ASB Commissioners' Award



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## THURSDAY



Judge Pete Johnson (left) visits with Tommy Wells (center) and Judge Eugene Verin (right) during the VLP Reception.



Will Broome, Leslie Peacock and Zach Skinner help with the "Putt-Putt, Pizza and Pizzazz" children's party, sponsored by ISI Alabama, Insurance Specialists, Inc.



Mr. and Mrs. Jerry Baxley (she's also known as Wanda Devereaux) during the beachside Membership Reception



ASB President Bill Clark shares the table with grandchildren Marshall, Anderson and Catherine Smith at the Membership Reception.



(Left to right) Tim Lewis, Bill Clark, Kimberly Barnhart and Tommy Kinner watch as ASB members and family take their seats before "Cross That River."



Tim Wells and other cast members performing "Stand Up and Teach"



The cast and crew of "Cross that River" thank the ASB for its support and patronage.

(Continued on page 318)



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## FRIDAY



Past ASB presidents gather for their annual group shot. Left to right are: Sam Rumore, Fred Gray, Drew Redden, John Caddell, Norborne Stone, Walter Byars, Alva Caine, Ben Harris, Brook Holmes, and Jim North.



Cumberland Dean John Carroll is amused by a remark by Ken Starr, Friday's plenary speaker.



Panel members Beth McFadden Rouse, Ernestine Sapp and Donna Pate listen as moderator Martha Jane Patton voices an opinion during "Paying Our Dues: Women In Bar Leadership."



An ASB member takes advantage of the LexisNexis CYBER CONNECTION.



Dawn Hare and Carol Stewart, and Judge Jean Brown and Fred Gray visit during the Women's Section Reception.



Carol Stewart, Bobby Segall and Carol Ann Smith, all candidates for 2004-05 ASB president-elect, visit before the Third Annual Maud McLure Kelly Award Luncheon.



Left to right are David McAlister, Trey Oliver, Tom Oliver and Jerry Wood, whose team won third place in the Kids' Chance Golf Scramble. Tom Oliver is an Alabama Law Foundation trustee.



Judy Keegan, director of the Alabama Center for Dispute Resolution, and Rod Max, one of the panel members of "Bring Your Sunscreen for Sizzlin' Topics in Mediation."



Members enjoy themselves during the President's Reception, honoring President and Mrs. Clark.



Frank Potts and family share matching smiles and outfits at the President's Reception.



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### **On doing good for the community:**

"Our job is never complete. Interacting with kids within the community helps provide more positive role models for today's youth. To see the shock and amazement in their eyes when they learn I am an FBI Agent is phenomenal."

### **On his most rewarding case:**

"When working on fugitive cases you never know who a suspect will imposter. For instance, one particular fugitive was posing as a Deacon in a church. We apprehended this individual for writing bad checks across the country. It was extremely rewarding to capture a fugitive who was so callously deceiving members of the church."



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## SATURDAY



Grande Convocation speaker, former Governor and Cumberland Distinguished Professor of Law and Government Albert P. Brewer focused on "Lawyers Rendering Service" during Saturday's session.



Sharing a laugh with Bill Clark and proving they are still young at heart are long-time practicing members John Caddell, Charles Hoffman and Ashley Dickerson.



Honored for practicing 50 years are Fred Gray, Sam Diamond, Arthur Lovell, Frank Donaldson, and John Blackburn.



Doug McEivy, 2004-05 ASB president, smiles when 2003-04 President Bill Clark "passes the gavel."



Bobby Segall (left) officially becomes ASB president-elect Saturday during the Grande Convocation (and when General Clark tells him he is).



Winner of the 2004 Grand Prize, a "Ritz Island Getaway" to the Ritz Carlton, Amelia Island, Florida, is ASB member Scott Stewart, left, who is pictured here with Bill Bass, Nathan Gardner and Charlotte Gardner, of ISI Alabama, Insurance Specialists, Inc. Prize sponsored by ISI Alabama, Insurance Specialists, Inc. and Ritz Carlton, Amelia Island



The past, the present and the future are represented by ASB President-Elect Bobby Segall, Immediate Past-President Bill Clark and President Doug McEivy. (In the foreground is Faye and Bill Clark's granddaughter, Catherine Smith.)



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# How to Prepare Yourself and Your Client for Potential Retaliation In Employment Discrimination Cases

BY TONI J. BRAXTON

Most clients in employment discrimination cases are concerned about one thing more than any other when they come to an attorney—"What will my employer do when they find out that I filed an EEOC charge?" Unfortunately, this may be a legitimate concern as instances of retaliation in the employment setting are far too common.

When we meet with these clients, as attorneys we must be honest and prepare them for the possibility of retaliation. I tell my clients that, although legally your employer is prohibited from retaliating against you for reporting or complaining about discrimination, there is always that possibility. If any adverse action is taken against your client after the EEOC charge or lawsuit has been filed, your client should know to contact you immediately so that any necessary amendments can be made.

## Administrative Prerequisites

The Eleventh Circuit has determined that there is no need to file a subsequent EEOC charge involving a retaliation claim where the claim "grows out of an

administrative charge that is properly before the court." *Hargett v. Valley Federal Savings Bank*, 60 F.3d 754, 761 (11th Cir. 1995) (quoting *Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981)).

In *Gupta*, the Fifth Circuit held that:

It is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge. . . . It is the nature of retaliation claims that they arise after the filing of the EEOC charge. Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case, a double filing that would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII.

654 F.2d at 414.

However, there is usually great dispute over what "grows out of" an administrative charge and what does not. Some guidance can be found in the Eleventh Circuit's holding in *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1222 (11th Cir. 2000), that a Title VII

action may be based not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.

*Id.* Hence, it appears that claims that are like or related to the initial charge and would have been within the scope of the EEOC's initial investigation are fair game.

In a more recent case dealing with this issue, an employee stated in her EEOC charge that she believed she was terminated as a result of race and gender discrimination. *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277 (11th Cir. 2004). The Court held that a reasonable EEOC investigation would have included an investigation into the possible reasons for her termination, including whether she was terminated for her complaints about the alleged discrimination. *Id.* Of course, for the retaliation claim to relate back, the initial EEOC charge must have been timely filed. See, *Hargett*, 60 F.3d at 761.



# Federal Lawsuit

After the administrative remedies have been exhausted, and you prepare to file a federal lawsuit, you must consider the strength of your retaliation claim.<sup>1</sup> Title VII recognizes two forms of statutorily protected conduct. An employee is protected from discrimination if (1) "he has opposed any practice made an unlawful employment practice by this subchapter" or (2) "he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. Section 2000e-3(a); *Clover v. Total System Servs., Inc.*, 157 F.3d 824, 827 (11th Cir.1998). These are known, respectively, as the "opposition" and "participation" clauses. This discussion will focus on cases involving the "opposition" clause which have been more common in my practice.

On rare occasions, your client may have direct evidence of retaliatory animus. The Eleventh Circuit has found direct evidence where "actions or statements of an employer reflect [ ] a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir.1990). When direct evidence is not available, however, the traditional burden-shifting analysis required in circumstantial cases must be applied.

To establish a *prima facie* case of retaliation, an employee must show that (1) he or she engaged in protected activity; (2) the employer took an adverse employment action against the employee; and (3) there was a causal connection between the protected activity and the adverse employment action. *Johnson v. Booker T. Washington Broad. Serv. Inc.*, 234 F.3d 501, 507 (11th Cir. 2000); *Berman v. Orkin Exterminating Company, Inc.*, 160 F.3d 697, 701 (11th Cir.1998); *Meeks v. Computer Associates*, 15 F.3d 1013, 1021 (11th Cir. 1994).

Although these elements have been clearly set out, what facts will satisfy these elements may not be so clear depending on the facts of your case. Following are examples of a few issues that may be raised regarding proof necessary and sufficient.

## Protected Activity

Filing an EEOC charge or a lawsuit is the most obvious form of protected activity. Sometimes, however, an employee may file a charge based on allegations of discrimination that are not supported by the facts. Nevertheless, an employee engages in "statutorily protected activity" when he or she protests an employer's



conduct which may actually be lawful, as long as the employee can demonstrate "a good faith, reasonable belief that the employer's conduct was an unlawful employment practice. *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 960 (11th Cir.1997). In other words, even if the Court were to determine that the defendant's conduct does not constitute an unlawful employment practice, the employee can nonetheless make out a *prima facie* case by showing that she reasonably believed she was opposing a violation of Title VII by her employer. *Id.*

As the Eleventh Circuit has held:

[o]n a claim for retaliation, the standard is not whether there is a valid hostile work environment claim, but whether [plaintiff] had a good-faith reasonable belief that she was the victim of such harassment.

*Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1188 (11th Cir. 2001).

It should also be noted that an employee's complaints need not be formal or written and may fall short of actually filing an EEOC charge or federal lawsuit.

Informal grievances filed pursuant to an employers' internal grievance procedures are considered protected activities under Title VII. *Rollins v. State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir.1989).

In some rare instances, the employee has merely threatened to file an EEOC charge and been retaliated against. Some courts have held that Title VII protects them as well. *Robinson v. AFA Service Corp.*, 870 F.Supp. 1077, 1083 (N.D.Ga. 1994) ("Simply put, an employer cannot retaliate against an employee because she threatens to bring charges of illegal discrimination."); *Sims v. Montgomery County Com'n*, 766 F.Supp. 1052, 1090 n.82 (M.D.Ala. 1990) (where an employee who threatened to sue his department was subsequently denied a promotion, the employer's action was based on an impermissible retaliatory reason).

## Adverse Employment Action

The most clear-cut cases are those where an employee is terminated or demoted. However, many cases do not fall so neatly into those categories. Whether an action is sufficient to constitute an adverse employment action for purposes of a retaliation claim must be determined on a case-by-case basis. *Gupta v. Florida Board of Regents*, 212 F.3d at 586. Title VII "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

Some courts have held that an employers acts "that have an adverse affect on the future employment opportunities can constitute an adverse employment action," for purposes of a retaliation claim. *Bass v.*



*Board of County Commissioners, Orange County, FL*, 256 F.3d 1095, 1117 (11th Cir. 2001); *Gupta*, 212 F.3d at 587 (A tangible employment action is "a significant change in employment status"); *Bevill v. UAB Walker College*, 62 F.Supp.2d 1259 (N.D. Ala. 1999) (a post-termination employment-related action may be considered an adverse employment action).

Constructive discharge, if proven, can be considered an adverse employment action. *Durley v. APAC, Inc.*, 236 F.3d 651, 657 (11th Cir. 2000); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 n. 2 (11th Cir. 1997); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1230 (11th Cir. 2001) (recognized in ADEA cases); *Griffin v. GTE Florida, Inc.*, 182 F.3d 1279, 1283 (11th Cir. 1999) (recognized in ADA cases).

Denial of overtime opportunities, when it "deprived [the employee] of compensation which he otherwise would have earned clearly constitute adverse employment actions for purposes of Title VII." *Shannon v. Bellsouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (citing *Bass*, 256 F.3d at 1118).

Transfer to a different position can be considered adverse if it involves reduction in "pay, prestige or responsibility." *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F.3d 821, 828 (11th Cir. 2000); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998).

Negative performance evaluations, standing alone, do not constitute a sufficient adverse employment action. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001). See generally, *Davis v. Town of Lake Park*, 245 F.3d 1232, 1241 (11th Cir. 2001) ("[C]ourts are wisely reluctant to treat job performance memoranda as actionable under Title VII where they do not trigger any more tangible form of adverse action such as a loss in benefits, ineligibility for promotional opportunities, or more formal discipline."). "Job performance memoranda must trigger a more tangible form of adverse action such as a loss in benefits, ineligibility for promotional opportunities, or more formal discipline." *Davis*, 245 F.3d at 1241.

## Causal Connection

"[T]he 'causal link' element [requires] merely that the Plaintiff establish that the protected activity and the adverse action were not wholly unrelated." *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 920 (11th Cir. 1993) (citing *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985)). It has long been held that, "[a]t a minimum, the

Plaintiff must demonstrate that his employer knew of his participation in the protected activity at the time of the adverse employment action." *Bass*, 256 F.3d at 1115 (11th Cir. 2001); *Clover*, 176 F.3d at 1354; See *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993).

Additionally, the Eleventh Circuit has held that "[c]lose temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." *Bass*, 256 F.3d at 1115; *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 601 (11th Cir. 1986) (discharge only one month after filing complaint with EEOC is evidence of retaliation); *Taylor v. Renfro Corp.*, 84 F.Supp.2d 1248, 1259 (N.D. Ala., Feb 24, 2000) (a causal link existed where plaintiff was terminated only four months after engaging in protected activity and had an unblemished work record until that time).

Once the employee has submitted substantial proof in support of each element of the *prima facie* case, the burden of production now shifts to the employer to articulate a legitimate, non-discriminatory explanation for taking the adverse employment action. *Meeks*, 15 F.3d at 1021. The Supreme Court has stated that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific" so that "the plaintiff be afforded a full and fair opportunity to demonstrate pretext." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981).

In employment discrimination cases, where the employer's explanation lacks credibility or where retaliation is a likely motive, a case is made for pretext. See *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525 (11th Cir. 1983). Plaintiff can show pretext by pointing to "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 (11th Cir. 1997).

However, "the showing of pretext need not necessarily involve further evidence; the evidence in a *prima facie* case might be strong enough to also show pretext." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1290 (11th Cir. 1998). Some examples of methods for proving pretext are: (1) an employer's failure to establish fixed or reasonably objective standards or procedures regarding employment decisions is a discriminatory practice.

*Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132 (11th Cir. 1984); *Harris v. Birmingham Bd. of Ed.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (citing *Watson v. National Linen Services*, 686 F.2d 877, 881 (11th Cir. 1982)); (2) evidence that similarly situated, non-protesting employee was treated more favorably than plaintiff. *Pollard v. Montgomery County*, 66 F.Supp.2d 1218, 1232 (M.D. Ala. 1999); (3) an employer's failure to follow its own policies. *Bass v. Board of County Com'rs, Orange County, Fla.*, 256 F.3d 1095, 1108 (11th Cir. 2001). Methods for proving pretext are numerous and very fact specific.

## Conclusion

When discussing these issues with your client, you must evaluate the strength of a possible retaliation claim. If the underlying case is weak, the retaliation claim may be as well. However, in some cases, the retaliation claim can be more promising than the discrimination claim. Regardless of your perceived chance of success in pursuing a retaliation claim, your client must be prepared for the possibility of termination or other adverse action. When your client asks that nagging question, "Are they going to fire me if I sue them," you must honestly inform your client of that possibility so they have all the facts when deciding whether to pursue their case. The likelihood that this knowledge may deter them from following through with the lawsuit must not deter you from presenting them with all of the facts, even if it means losing a potential client. ■

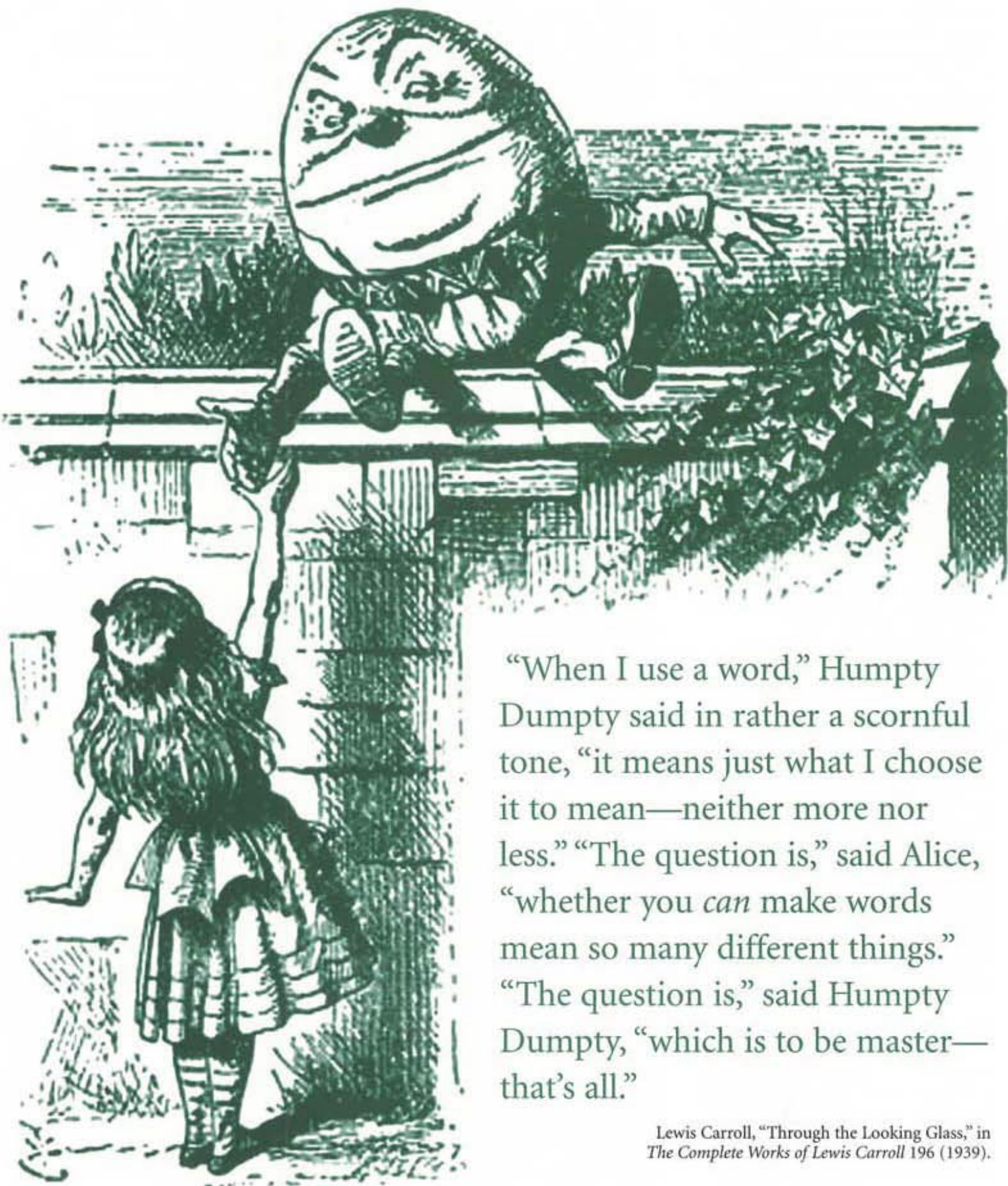
## Endnote:

1. This is assuming that an EEOC charge has been filed. An alternative route, however, in race discrimination employment cases is to file a federal lawsuit pursuant to 42 U.S.C. Section 1981 within two years of the alleged discrimination without the administrative prerequisites. Section 1981 and Title VII "have the same requirements of proof and use the same analytical framework." *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1329 (11th Cir. 1998); *Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1230 (11th Cir. 1998).

### Toni J. Braxton

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“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Lewis Carroll, “Through the Looking Glass,” in *The Complete Works of Lewis Carroll* 196 (1939).



# *It Means Just What I Choose It To Mean:*

## The Preclusive Effect of Divorce Agreements Under § 523(A)(5) of the Bankruptcy Code

BY BRADLEY R. HIGHTOWER

**L**ike debtors in bankruptcy, unhappily married couples often need a fresh start in their lives. They may seek this fresh start by divorcing each other. However, by doing so, they often become debtors in bankruptcy themselves. This scenario is not lost on family law practitioners, who carefully draft a divorce agreement on behalf of their clients to avoid the potentially devastating effects bankruptcy can have on the parties' partition of debt into categories of "support" and "property settlement." Nonetheless, these lawyers' efforts are quickly wiped away by bankruptcy courts that look behind the labels used in the divorce agreement to determine the "true" nature of the debtor's obligations.

Although this result is frustrating to the parties and the attorney who drafted the agreement, its purpose is to effectuate the Bankruptcy Code's underlying policy that individual debtors should generally receive a discharge of their personal debts. Congress purposefully limited the exceptions to discharge, and that purpose would be undermined if creditors were allowed, by agreement, to contract around the discharge policy. Therefore, a divorce agreement that improperly labels a property settlement debt as support to prevent the debtor from discharging it in bankruptcy will not be enforced by a bankruptcy court.

Despite these pronouncements, this article suggests that the doctrine of issue preclusion (collateral estoppel) may be used in an attempt to persuade bankruptcy courts not to second-guess the labels (even those that seem improper) used by parties in a divorce agreement if the agreement contains certain language. To argue that issue preclusion should apply, the divorce agreement should (1) acknowledge that one or both of the parties may file bankruptcy, (2) clearly divide the parties' debt obligations into categories of alimony, maintenance or support and property settlement, and (3) state that the parties intend the agreement to have issue preclusive effect. If all of these elements are included, a bankruptcy court may find it binding in a subsequent bankruptcy discharge exception proceeding.

Bankruptcy courts will resist the idea that a carefully worded divorce agreement may preclude a debtor from relitigating the nature of his obligations; however, this article will discuss why binding divorce agreements do not necessarily undermine the Bankruptcy Code's general discharge policy. The first part will set out the primary Bankruptcy Code sections that apply in discharge exception proceedings involving divorce agreements, the second will discuss why bankruptcy courts typically do not apply issue preclusion to divorce agreements, and the third will suggest why bankruptcy courts should apply issue preclusion to divorce agreements containing certain language.

## Sections 523(a)(5) & 523(a)(15)

For bankruptcy purposes, the most important part of a divorce agreement is the partition of debt between the parties into categories of support and property settlement because an individual debtor may not discharge either his support debts under Section 523(a)(5) or his property settlement debts under Section 523(a)(15).

Section 523(a)(5) states in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) does not discharge an individual debtor from any debt—

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a gov-

ernmental unit, or property settlement agreement, but not to the extent that—

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

11 U.S.C. Section 523(a)(5). Pursuant to Section 523(a)(5), only a debt that is "actually in the nature of" alimony, maintenance or support of a spouse, former spouse or child of the debtor is excepted from discharge. Debts of this type are often referred to in case law simply as "support" debts.

Section 523(a)(15) states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) does not discharge an individual debtor from any debt—

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. Section 523(a)(15). Pursuant to Section 523(a)(15), any debt incurred in the course of a divorce or in connection with a divorce agreement that is not covered under Section 523(a)(5) is excepted from discharge unless the debtor can prove that he does not have the ability to pay the debt or that allowing him to receive a discharge of the debt will result in a benefit to him that is greater than the detrimental consequences that will befall his ex-spouse if he is allowed to discharge the debt. Debts of this type are often referred to as "property settlement" debts. Unlike support debts, which are always excepted from discharge, property settlement debts are frequently discharged in bankruptcy.

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settlement



## Issue Preclusion Typically Does Not Apply to Divorce Agreements

Debtors often argue that they should be able to discharge any debt labeled as a property settlement in their divorce agreements. Similarly, former spouses of debtors argue that any debt labeled as support in their divorce agreement should be excepted from discharge. This argument is commonly known as the doctrine of issue preclusion or collateral estoppel, although courts considering the preclusive effect of a divorce agreement in discharge exception proceedings frequently do not couch it in those exact terms.

The United States Supreme Court has held that issue preclusion principles apply in discharge exception proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). A bankruptcy court must find four elements present to invoke it:

1. The issue in the prior action and the issue in the bankruptcy court are identical;
2. The bankruptcy issue was actually litigated in the prior action;

3. The determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and
4. The burden of persuasion in the discharge proceeding must not be significantly heavier than the burden of persuasion in the initial action.

*Bush v. Balfour Beatty Bahamas, Ltd.*, 62 F.3d 1319, 1322 (11th Cir. 1995)(quoting *In re Yanks*, 931 F.2d 42, 43 n.1 (11th Cir. 1991)). A divorce agreement, like any settlement, will not ordinarily meet these four requirements because it is not actually litigated. *In re Brose*, 242 B.R. 531, 532 n.4 (Bankr. M.D. Fla. 1999)(citing to *Citibank v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1504 (11th Cir. 1990)). Therefore, bankruptcy courts typically look behind divorce agreements to determine the "true" nature of the debtor's obligation.

The Eleventh Circuit Court of Appeals follows this analysis, even though it does not use the terms "issue preclusion" or "collateral estoppel" in its discharge exception decisions. In *Harrell v. Harrell (In re Harrell)*, 754 F.2d 902 (11th Cir. 1985), the Court of Appeals considered whether a debtor's arrearages on his alimony and child support obligations were dischargeable under his separation agreement. Although it found that the debtor's obligations were excepted from discharge, the *Harrell* Court did not merely look to the label attached to the obligations in the parties' separation agreement. *Id.* at 906. Instead, it held that bankruptcy courts should look behind a

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divorce agreement to determine whether a label accurately reflects the nature of the debtor's obligation. *Id.* In a subsequent decision, *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001), the Court of Appeals explained the policy behind its holding in *Harrell*. It stated that in conducting an inquiry into the nature of a debtor's obligations, bankruptcy courts "cannot rely solely on the label used by the parties" in their divorce agreement because "it is likely that neither the parties nor the divorce court contemplated the effect of a subsequent bankruptcy when the obligation arose." *Id.* at 1265 (quoting *In re Gianakas*, 917 F.2d 759, 762 (3rd Cir. 1990)).

These decisions make sense because, as the Court of Appeals correctly points out in *Cummings*, divorcing parties rarely consider that a bankruptcy court may effectively re-write the nature of the obligations listed in their divorce agreement if one of them files bankruptcy. Instead, the parties believe that their divorce agreement is the final settlement of their obligations to each other. It is only later, when the bankruptcy judge informs the parties that the debtor may discharge any marital obligation that is not for support<sup>1</sup> (leaving the debtor's ex-spouse responsible for paying all of the divorcing parties' joint debts), that the parties realize the importance of the labels used in their divorce agreement. Therefore, divorce agreements typically are not given issue preclusive effect in a subsequent discharge exception proceeding.

## Issue Preclusion Should Apply to Certain Divorce Agreements

In both the *Cummings* and *Harrell* cases, the Court of Appeals correctly held that the parties' divorce agreement was not binding in a discharge exception proceeding. However, the divorce agreements it considered did not contain the language necessary to support a finding that issue preclusion may be applied. If the divorce agreements had (1) acknowledged that one or both of the parties may file bankruptcy, (2) clearly divided the parties' debt obligations into categories of alimony, maintenance or support and property settlement, and (3) stated that the parties intended the agreement to have issue preclusive effect, the party arguing that the divorce agreement should be binding would have had a much stronger argument. These three elements may have satisfied the concerns expressed by the Court of Appeals regarding the divorce agreements in the *Cummings* and *Harrell* cases. They are discussed separately below.

First, a divorce agreement should contain a "bankruptcy" clause by which the parties acknowledge that they are aware

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their agreement could be affected by a subsequent bankruptcy filing (i.e., that support obligations are not dischargeable under Section 523(a)(5), but property settlement obligations are dischargeable if the debtor satisfies the requirements of Section 523(a)(15)). The bankruptcy notice clause will show that the parties were given notice of the possible effect of a subsequent bankruptcy when they labeled their obligations. It will also address a concern considered by the Eleventh Circuit Court of Appeals in *Cummings*. In that case, the Court of Appeals found that "a court cannot rely solely on the label used by the parties" because "it is likely that neither the parties nor the divorce court contemplated the effect of a subsequent bankruptcy when the obligation arose." 244 F.3d at 1265.

Second, the divorce agreement should place specific obligations under headers titled "Support" and "Property Settlement." Doing so will indicate to the bankruptcy court that the parties intend the debtor's obligation to fall into a specific category of dischargeable or non-dischargeable debt. The agreement should also contain an integration clause in this section by which the parties acknowledge that the provisions contained in the written agreement are the only ones agreed to and any oral agreements or duties under federal or state law are not considered part of the agreement. See *Harrell* at 904-05 (rejecting the debtor's argument that his support obligations were dischargeable because he had no duty to pay them under state law after his son reached the age of majority). The integration clause should help to persuade bankruptcy courts from considering sources other than the divorce agreement when trying to determine the parties' intent under the agreement.

Finally, the divorce agreement should contain an "issue preclusion" or "collateral estoppel" clause by which the parties indicate that they intend their agreement to have preclusive effect regarding the nature of their obligations. Although divorce agreements typically do not give rise to issue preclusion because they do not meet the four requirements necessary, this clause may give them such effect because the United States Supreme Court has held that issue preclusion is applicable to a settlement agreement in which the parties clearly indicate that they intend their agreement to have preclusive effect. *Archer v. Warner*, 123 S.Ct. 1462, 1468 (2003)(citing to *Arizona v. California*, 530 U.S. 392, 414 (2000)). Additionally, issue preclusion principles apply in discharge exception proceedings. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991). Therefore, a divorce agreement which contains an issue preclusion clause may be binding in a subsequent bankruptcy discharge exception proceeding.

This is not to say that any provision in a divorce agreement which contains an issue preclusion clause will be binding in a subsequent bankruptcy case. The United States Supreme Court has held that issue preclusion is not applicable if it runs counter to the statutory policy of the Bankruptcy Code. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). A provision waiving the debtor's

right to discharge his property settlement debts, for example, would violate the Bankruptcy Code's general discharge policy. *Freeman v. Freeman (In re Freeman)*, 165 B.R. 307, 312 (Bankr. S.D. Fla. 1994). However, the provisions discussed in this article should not violate any policy of the Bankruptcy Code if they are used to merely clarify the parties' intent regarding their support and property settlement debts rather than in an attempt to affect a debtor's substantive right to discharge. See *Cummings* at 1265 (finding that "[a] debt is in the nature of support or alimony if at the time of its creation the parties intended the obligation to function as support or alimony").

Like the  
character

Humpty Dumpty,  
the parties to a  
divorce agreement  
may finally be  
the masters of  
their words

## Conclusion

By including the three elements discussed above in a divorce agreement, a debtor, or his ex-spouse, may be able to use the doctrine of issue preclusion to persuade a bankruptcy court from second guessing their intentions regarding the "support" or "property settlement" label they use to describe a particular obligation. Like the character Humpty Dumpty, the parties to a divorce agreement may finally be the masters of their words, and the labels they use to describe their obligations will mean just what they choose them to mean—neither more nor less.

Although this may allow the parties to improperly label their obligations in some cases, it is a desirable result in most instances. The parties will receive the benefit of their informed bargain; judicial efficiency will be promoted by not requiring bankruptcy courts to look behind divorce agreements that have already been scrutinized by divorce courts; and the Bankruptcy Code's general discharge policy will not be disturbed because the agreement will simply reveal the parties' intent regarding the character of their obligations rather than attempt to take away the debtor's right to a general discharge.

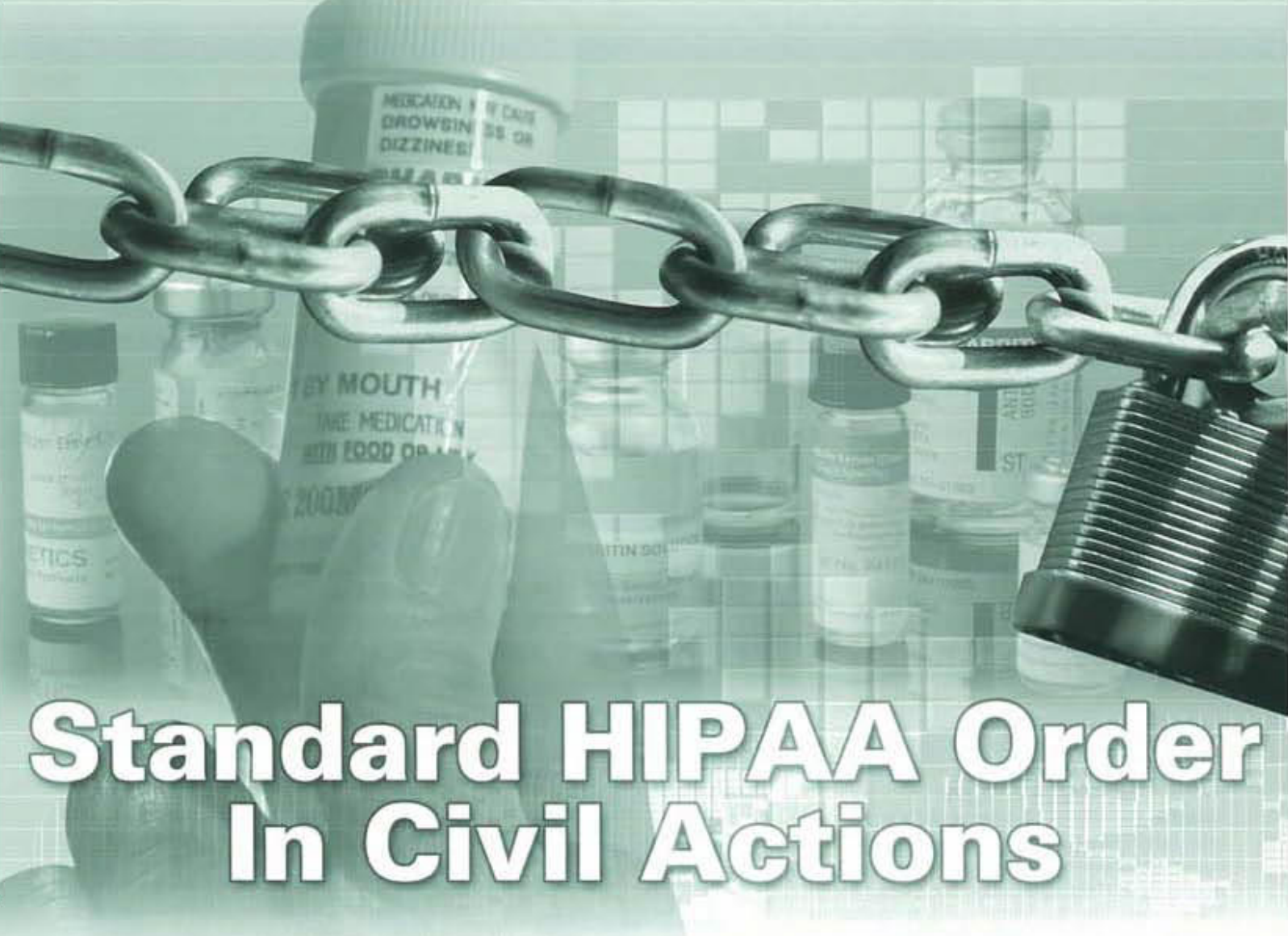
## Endnote:

1. After the debtor has satisfied his burden under Section 523(a)(15) to show that he either does not have the ability to pay the debt or that allowing him to discharge the debt will result in a benefit to him that is greater than the loss that will be sustained by his ex-spouse if the debt is discharged



**Bradley Hightower**

Bradley Hightower is an associate with the Birmingham firm of Christian & Small LLP and formerly the law clerk to the Honorable Margaret A. Mahoney, Bankruptcy Judge for the U.S. Bankruptcy Court for the Southern District of Alabama. He received his undergraduate degree from Auburn University and J.D. from the University of Alabama.



# Standard HIPAA Order In Civil Actions

BY THE AD HOC HIPAA COMMITTEE OF THE TENTH JUDICIAL CIRCUIT





On April 14, 2003, the regulations promulgated to ensure the confidentiality of certain health information pursuant to the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1330(d) *et seq.* ("HIPAA") became effective. HIPAA is one result of the ever-increasing struggle between technology and privacy. One court commented on the relationship between the benefits of technology and the individual's interest in privacy, as follows:

The passage of HIPAA and the enactment of the Privacy Rule mark a dramatic departure from the current state of medical and legal practice. The change is a myopic examination on a lone example of what may be the single most important

question raised in the 21st century by Americans, namely balancing the privacy concerns versus technology advancements. The more accessible that personal information becomes, the more critical it is to create intelligible guidelines to provide an equitable balance between the individual interests in his or her privacy and the national interests, in this instance, HIPAA compliance.<sup>1</sup>

In response to the regulations becoming effective, Presiding Circuit Court Judge Scott Vowell of the Tenth Judicial Circuit appointed an *ad hoc* committee of attorneys from a variety of practice areas to address what methods are available for handling requests for medical information in civil actions. The purpose

of the *ad hoc* committee was to determine how civil litigants could conduct discovery in compliance with HIPAA without placing an unnecessary and undue burden on the courts to resolve privacy issues on a case-by-case basis, bearing in mind that the primary purpose of HIPAA as reflected in its legislative history is aimed at regulating the commercial behavior of the national healthcare industry, not the conduct of parties in civil litigation.<sup>2</sup> The *ad hoc* committee has been meeting regularly since May 2003 and has developed a proposed court order, which attempts to balance the litigant's interest in privacy with the broader interests of the judicial system in facilitating the exchange of health information in civil actions. The committee released one order, and after



# IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Plaintiff(s),

)

vs.

)

CIVIL ACTION NO. \_\_\_\_\_

)

Defendant(s).

)

)

)

## HIPAA ORDER IN CIVIL ACTION

Upon compliance with Alabama law, the attorneys for the parties and/or *pro se* parties to this lawsuit are permitted to obtain all health information, including charges therefore, relating to any Individual who is a party to this case, or of any decedent or other real party in interest, represented by an executor, administrator, guardian, next friend, bailee or trustee. This Order neither broadens nor restricts any party's ability to conduct discovery pursuant to Alabama law, the sole purpose hereof being only to permit compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

This Court Order authorizes any third-party who is provided with a subpoena requesting the production of documents or commanding attendance at deposition or trial to disclose Protected Health Information in response to such request or subpoena. This Court Order is intended to authorize such disclosures under Section 164.512(e)(1) of the privacy regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Nothing in this Order shall be deemed to relieve any party or attorney of the requirements of the Alabama Rules of Civil Procedure. Nothing in this Order permits disclosure of confidential communications, made for the purposes of diagnosis or treatment of a patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family, nor does this Order permit disclosure of records or information relating to HIV testing or sexually transmitted disease.

Nothing in this Order shall be construed to authorize any party or any attorney for any party to release, exchange, submit or share any Protected Health Information with any other person or any other entity, other than an agent or employee of the attorney or party. This Order prohibits the parties from using or disclosing the Protected Health Information for any purpose other than this litigation or proceedings.

At the conclusion of this action and at the written request of an Individual whose Protected Health Information has been disclosed, or such Individual's authorized representative, all recipients of the Protected Health Information shall return to the requesting party the documents and all copies thereof containing Protected Health Information received by them pursuant to this Order, except that Protected Health Information, which is included in insurance claim files and law firm litigation files, may be retained to allow compliance to the extent and for the period that such retention is required by Alabama insurance laws and the Alabama State Bar rules and regulations.

DONE and ORDERED this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
JUDGE





receiving significant and helpful feedback from the legal and medical communities, including many circuit court judges, revised their original order in March 2004.

The regulations implementing HIPAA are collectively known as the "privacy rule." The privacy rule establishes procedures for the disclosure of "protected health information." Protected health information is generally defined as follows:

Any information, whether oral or recorded in any form or medium, that: (1) is created or received by a healthcare provider, health plan, public health authority, employer, life insurer, school or university, or healthcare clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; provision of healthcare to an individual; for the past, present, or future payment for the provision of healthcare to an individual.<sup>3</sup>

The privacy rule regulates health plans, healthcare clearinghouses and healthcare providers ("covered entities") in their disclosure of protected health information.<sup>4</sup> Under the HIPAA regulations, protected health information may be disclosed by a covered entity in the course of a judicial or administrative proceeding primarily in three ways: (i) court order, (ii) subpoena/other lawful process, or (iii) written authorization of the individual whose protected health information is sought.<sup>5</sup> First, a court may order the disclosure of protected health information. Regulation 45 C.F.R. § 164.512(e)(i)

provides that a "covered entity may disclose protected health information in the course of any judicial proceeding" . . . "[i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such court order."

Second, a litigant may also seek protected health information without a court order by issuing a discovery request or other lawful process. However, without a court order, the litigant must (1) give the covered entity "satisfactory assurance" that reasonable efforts have been made to give notice of the request to the individual who is the subject of the protected health information or (2) give the covered entity "satisfactory assurance" that the party seeking the protected health information has made reasonable efforts to secure a "qualified protective order." A qualified protective order, in pertinent part, is an order from the court that prohibits the use of the protected health information for any purpose other than the litigation and requires the return of the protected health information to the covered entity or the destruction of the protected health information.

Satisfactory assurance for purposes of giving notice means that the covered entity receives a written statement and documentation that the party requesting the protected health information has made a good faith attempt to provide written notice to the individual whose protected health information is being sought. The notice must include sufficient information about the litigation in which the protected health information is requested to permit the individual to raise an objection and must state that the time for the individual to raise an objection has lapsed and no objections were filed or the objections have been resolved by the court. Satisfactory assurance that the party has made efforts to secure a qualified protective order means that the covered entity receives a written statement and documentation that the parties have agreed to a qualified protective

order and presented it to the court or the party seeking the protected health information has requested a qualified protective order from the court. Third, HIPAA allows a patient to authorize the release of his own protected health information.<sup>6</sup> In general, a valid authorization must contain a specific description of the information sought, the name of the covered entity authorized to make the disclosure, a description of the purpose of the disclosure, an expiration date, and the signature of the patient.<sup>7</sup>

This maze of regulations has had a profound impact on the practice of law, healthcare providers, and employers. Thus, the *ad hoc* committee was formed to deal with the impact of these regulations on the everyday practice of civil litigation. Because HIPAA permits the disclosure of protected health information in a judicial proceeding by various means, the first question that the *ad hoc* committee had to decide was which method to adopt to facilitate the orderly disclosure of protected health information in compliance with HIPAA. The committee rejected the notion of relying upon a subpoena or other lawful process, without a court order, because the *Alabama Rules of Civil Procedure* do not require that the party seeking records give notice, *i.e.*, satisfactory assurance, under every circumstance. Without satisfactory assurance either by notice and the opportunity to object or a qualified protective order, which meets the minimum requirements under the law, a subpoena or other lawful process in the absence of a court order is defective and invalid under HIPAA regulations.

One example of lawful process without a notice requirement is the trial subpoena. Under Rule 45 of the *Alabama Rules of Civil Procedure*, there is no requirement that a party give notice to the adverse party of service of a trial subpoena on a non-party, covered entity—such as a medical provider—to compel the covered entity's appearance and to produce documents concerning the adverse party. Also, it was generally agreed that it



# IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

Plaintiff(s), )  
 )  
vs. ) CIVIL ACTION NO. \_\_\_\_\_  
 )  
Defendant(s). )  
 )

## HIPAA ORDER IN WORKERS' COMPENSATION ACTION

Upon compliance with Alabama law, the attorneys for the parties and/or *pro se* parties to this lawsuit are permitted to obtain all health information, including charges therefore, relating to any Individual who is a party to this case, or of any decedent or other real party in interest, represented by an executor, administrator, guardian, next friend, bailee or trustee. This Order neither broadens nor restricts any party's ability to conduct discovery pursuant to Alabama law, the sole purpose hereof being only to permit compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

This Court Order authorizes any third-party who is provided with a subpoena requesting the production of documents or commanding attendance at deposition or trial or a request in compliance with the Alabama Workers' Compensation Act to disclose Protected Health Information in response to such request or subpoena. This Court Order is intended to authorize such disclosures under Section 164.512(e)(1) of the privacy regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Nothing in this Order shall be deemed to relieve any party or attorney of the requirements of the Alabama Rules of Civil Procedure. Nothing in this Order permits disclosure of confidential communications, made for the purposes of diagnosis or treatment of a patient's mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family, nor does this Order permit disclosure of records or information relating to HIV testing or sexually transmitted disease.

Nothing in this Order shall be construed to authorize any party or any attorney for any party to release, exchange, submit or share any Protected Health Information with any other person or any other entity, other than an agent or employee of the attorney or party. This Order prohibits the parties from using or disclosing the Protected Health Information for any purpose other than this litigation or proceedings.

At the conclusion of this action and at the written request of an Individual whose Protected Health Information has been disclosed, or such Individual's authorized representative, all recipients of the Protected Health Information shall return to the requesting party the documents and all copies thereof containing Protected Health Information received by them pursuant to this Order, except that Protected Health Information, which is included in insurance claim files and law firm litigation files, may be retained to allow compliance to the extent and for the period that such retention is required by Alabama insurance laws and the Alabama State Bar rules and regulations.

DONE and ORDERED this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
JUDGE



was impractical to draft one uniform patient authorization that could be used in all civil actions. The committee decided in order to reduce the number of requests to the court to rule on what would be a burdensome number of HIPAA objections, promote judicial economy, and yet comply with the express terms of HIPAA, a court order alone would be sufficient. Thus, the committee drafted a proposed court order that could be entered along with a scheduling order in virtually all civil actions.

Undoubtedly, the regulations permit a covered entity to disclose protected health information in the course of any judicial proceeding "in response to an order of a court." Nevertheless, the committee sought to buttress the proposed order with many of the protections that are required in a qualified protective order. These protections, although not required to be in a court order, were adopted by the committee to uphold the spirit of HIPAA and to tailor the order to many of the requirements unique to Alabama law. These include:

- Limitations that the disclosure of protected health information is restricted to the attorneys and parties and their agents;
- A prohibition against the use or disclosure of protected health information for any purpose other than the litigation;
- A requirement that the protected health information be returned to the individual whose protected health information was disclosed under certain circumstances; and

- Provisions that make it clear that the order alone does not authorize the disclosure of mental health records or records relating to HIV testing or sexually transmitted disease.

The committee did not intend to broaden or restrict any party's ability to conduct discovery pursuant to Alabama law, as the proposed order expressly states. For instance, the committee did not intend to and the order does not alter the law of Alabama pertaining to *ex parte* interviews of healthcare providers as it existed prior to the effective date of HIPAA and as the common law continues to develop irrespective of HIPAA. This order does not change whatsoever the state of the law with respect to *ex parte* interviews as articulated in *Zaden v. Elkus*, 2003 WL 22113880 (Ala. 2003), the sole purpose being only to permit compliance with HIPAA. In addition, and perhaps more importantly, the order makes clear that a covered entity may disclose protected health information in response to a discovery request or other lawful process giving much needed comfort to the covered entity that the court authorizes the disclosure.

A second committee has drafted a similar order for Workers' Compensation Act cases. Although HIPAA exempts claims brought under state workers' compensation laws, a second order was developed due to the fact that the Alabama Workers' Compensation Act contains a provision regarding the release of medical information to the employer unique to workers' compensation cases, *see e.g. Ala. Code sec. 25-5-77(b)*, and to reassure the covered

entity that it may furnish the medical information without violating HIPAA. The workers' compensation HIPAA order is virtually identical to the order discussed in this article. Like the HIPAA order in civil actions, the workers' compensation order is not intended to alter the law concerning *ex parte* interviews of healthcare providers in workers' compensation cases as addressed in *Ex parte Smitherman Bros. Trucking, Inc.*, 751 So.2d 1232 (Ala. 1999).

In short, the committee believes that this order allows the orderly disclosure of protected health information, bearing in mind the individual litigant's privacy concerns and preserving the limited resources of the judiciary to handle repeated requests for health information. However, the committee recognizes that this area of the law is developing and that there may be a need to revise the order from time to time. To that end, the committee will continue to meet periodically. ■

## Endnotes

1. *In Re: PPA Litigation*, 2003 WL 222037034 (N.J. Super. L. 2003).
2. *See* 68 F.R. 8334-01.
3. 45 C.F.R. § 160.103.
4. 45 C.F.R. § 160.103.
5. 45 C.F.R. § 164.512(e).
6. *See* 45 C.F.R. § 164.512(e)(2).
7. George J. Annas, J.D., M.P.H., *Regulations—A New Era of Medical Privacy?* THE NEW ENGLAND JOURNAL OF MEDICINE (April 10, 2003).





By Brannon Buck

The Alabama State Bar Young Lawyers' Section has just completed another successful bar year under the leadership of Stuart Luckie of Mobile. This past year, as in all years, the YLS held its annual Sandestin Seminar on the third weekend in May. Once again, the seminar featured excellent speakers and was well attended by young lawyers from around the state. Kim Walker of Mobile deserves a great deal of credit for her leadership in planning and organizing the seminar. Our section also thanks all of the law firms and businesses that generously sponsored the Sandestin Seminar. The support of these sponsors is critical to the success of the conference:

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As I write this article in July, the roster of Executive Committee members is still being finalized. YLS officers for this year are Christy Crow, president-elect, Union Springs; Roman Shaul, secretary, Montgomery; and Bryan Cigelske, treasurer, Mobile.

Looking ahead, the YLS will host its annual Iron Bowl CLE. This year's seminar will be Friday afternoon, November 19, the day before the Iron Bowl. The seminar will be in Birmingham, and we hope that many of you will stop by for some CLE credit on your way to Tuscaloosa for the big game. The YLS will be providing more information about the Iron Bowl CLE in the coming weeks.

I am very excited about a new opportunity for the YLS and for young lawyers throughout Alabama. One of our own, Stephen Black, has organized a non-profit program called "Impact: An Alabama Student Service Initiative." The YLS plans to partner with and support one of the programs under this non-profit that will be known as the SpeakFirst Debate Program. SpeakFirst's mission is to enrich the academic experience of gifted students from our state's largest urban public high schools by participation on citywide debate teams. The program will also provide standardized test preparation, guidance on college admissions/scholarships and substantive summer internships. The SpeakFirst program will begin this fall in Birmingham and will spread to other cities in coming years. The YLS hopes to assist by organizing YLS volunteers to work with the debate teams and to offer summer internships to the participating students. If you are interested in being involved, please contact me.

The YLS will continue to help organize and support the ASB Admissions ceremonies and the annual Minority Pre-Law Conference. We will also continue to work with the Federal Emergency Management Agency to coordinate the provision of free emergency legal assistance when natural disasters strike in Alabama.

I look forward to working with young lawyers from across the state to serve our members and the public. I welcome all questions, comments or suggestions regarding the activities of our section and ways we can improve our programs. ■

*Brannon Buck is a shareholder in the firm of Maynard, Cooper & Gale, P.C.*



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**Please note: There will be no 2004 Alabama Bar Directory. It will be a combined edition (2004-2005) and will be published in February 2005.**

# Bar Directory

- The Trial Lawyers for Public Justice Foundation recently named the finalists for its 2004 Trial Lawyer of the Year Award. The nationally prestigious award is bestowed annually upon the trial lawyer or lawyers who have made the greatest contribution to the public interest by trying or settling a precedent-setting case. One Alabama attorney, **Wyman Gilmore** of Gilmore Law Office in Grove Hill, Alabama and Brentwood, Tennessee, was among the finalists.
- **Mark Daniel Maloney** of Decatur has been named a trustee of The Rotary Foundation of Rotary International, one of the world's largest humanitarian organizations with 1.2 million business and professional leaders in more than 165 countries. Maloney, who joins 15 trustees from around the world on the eve of Rotary's centennial year, will help lead The Rotary Foundation until 2008. Maloney is a member of the firm of Blackburn, Maloney & Schuppert, LLC, in Decatur.
- The Alabama Criminal Defense Lawyers Association (ACDLA) recently elected officers for the 2004-2005 year at its annual meeting and summer seminar. In addition, the statewide association named top recipients of its annual awards at the recent annual awards luncheon.

Elected were **Jim Roberts**, president, a public defender for Tuscaloosa County; **Joe Van Heest**, president-elect, a federal defender for the Middle District of Alabama, Montgomery; **Melinda Morgan Austin**, vice-president, a partner with Holt, Mussleman, Holt & Morgan, Florence; **James J. Jeffries, Jr.**, secretary, with the Sherman Jeffries Law Offices, Mobile; and **Carlos A. Williams**, treasurer, a federal defender for the Southern District of Alabama, Mobile. Elected to the public defenders representative slot was **Bobby Wooldridge** of the Public Defenders Office, Tuscaloosa County. Immediate Past President is **Bruce A. Gardner**, Huntsville.

Re-elected to district vice-president posts were **Robert Tuten**, Huntsville; **Randy Brooks**, Anniston; **John Robbins**, Birmingham; **Bill Blanchard**, Montgomery; **Lisa Clayton**, Mobile; **Gordon Armstrong**, Mobile; **Bill Kominos**, Ozark; and **Michael Upton**, Tuscaloosa.

In addition to electing officers, ACDLA also honored its members for outstanding contributions to the profession of criminal defense this past year. **John Edmond Mays** of Decatur received the association's highest honor, the **Roderick Beddow Award**, for a lifetime of achievement in the field of criminal defense. Receiving



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President's awards this year were Richard Jaffe, Melinda Morgan Austin, Bill Blanchard, Chris Malcom, Bobby Wooldridge, Arthur Madden, Paul A. Young, Jr., Joe Gallo, Wilson Myers, and Joel Sogol.

Receiving Merit awards were Richard Keith, Carlos Williams, Steve Glassroth and Jeff Duffey.

- **Thomas S. Rue** was elected president of the Maritime Law Association of the United States (MLA). Rue is the first Alabamian to lead the organization in its 105-year history. Rue, a member of the Mobile firm of Johnstone, Adams, Bailey, Gordon & Harris LLC, will guide the activities of the 3,100-member professional organization over the next year as it strives to make improvements in maritime law.
- **Ronald Levitt**, a partner with Walston, Wells, Anderson & Bains LLP in Birmingham, recently was named chair of the Committee on S Corporations of the American Bar Association's Section of Taxation. He will serve as chair for a two-year term.
- **Marshall County District Judge Howard Hawk** recently received the Joseph E. Stevens Award. The Stevens Award is a national award given annually to an attorney who is a former Harry S. Truman Scholar and who has established an outstanding record in public service.

The award was presented to Judge Hawk by United States Supreme Court Justice Clarence Thomas in his chambers in Washington, D.C. Justice Thomas praised Hawk for his service as an FBI agent, a legislator and now as a judge.

The Stevens Award was established to commemorate the life and service of U.S. District Court Judge Joseph E. Stevens, who had been a trustee and president of the Harry S. Truman Scholarship Foundation. Stevens had served in the Western District of Missouri, where he had worked with Justice Thomas prior to Thomas's appointment to the U.S. Supreme Court. ■



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By Robert L. McCurley, Jr.

# Bringing Laws into Conformity Takes Time and Effort

For the past 25 years, the Alabama legislature, with the assistance of the Alabama Law Institute, has sought to bring our laws in conformity to those in other states and to generally modernize laws often hundreds of years old. With today's global e-commerce, state lines for commerce become blurred. The norm is no longer for one to be born, grow up and die in the same community. Loans, lumber and jobs cross state lines regularly. The need for lawyers to know the applicable law for their clients is more complicated by the interstate nature of the transactions.

The first major revision for Alabama, undertaken by the Law Institute, was criminal laws. The need for due process, equal treatment of parties and certainty to the law caused Alabama to adopt a criminal code in 1980. It is patterned after the Model Penal Code, the standard in most states.

Alabama's estate law, that dated back to England's 1635 Statute of Elizabeth, was brought into the 20th century in 1983 by adoption of the Uniform Probate Code. This law governing estates is the law in a majority of states.

Business laws have greatly expanded. In 1980, Alabama had a Corporation Act and a Partnership Act. In addition to these two, there are now acts for Professional Corporations, Lt. Partnerships, Limited Liability Partnerships, Limited Liability Companies, Real Estate Investment Trusts, and Non-Profit Corporations. All of these

follow Uniform or Model Acts adopted by most states. Because these acts were added or revised over the past 20 years, now there are inadvertent inconsistencies. Alabama has been in the process of developing a Business Entities Act, which clears up these inconsistencies and makes clear the formation of entities, relationships between entities, accessibility of records, etc. The draft will be completed this year after a six-year study. The drafters of the Uniform Acts, only this year, have formed their own project to synthesize the various entities.

The Uniform Commercial Code was first passed in Alabama in 1965. This year the Institute completed its revision after a 12-year review. Each article was individually reviewed and rewritten and adopted by the legislature. The Uniform Commercial Code is one area of law that is uniform throughout the United States.

The Alabama Supreme Court has likewise modernized its Rules of Civil Procedure (1974), Criminal Rules of Procedure (1991), and Evidence Rules (1996), using models other states have also used.

Some matters remain uniquely state specific as in family law, i.e. marriage and divorce. However, the interstate nature of the parties now require cooperation between the states, and various aspects are governed by the following acts: Uniform Interstate Family Support Act (1998), Uniform Child Custody



Jurisdiction and Enforcement Act (2000) and Uniform Enforcement of Domestic Violence Orders Act (2004).

The federal government has increasingly enacted legislation then allowed states to opt out by passing conforming state legislation. Congress enacted the Electronic Signatures in Global and National Commerce Act or "E-SIGN" but allows states to opt out by passing conforming legislation on the subject, as did Alabama by adopting the Electronic Transaction Act (2002).

In 2002, Congress passed the Help America Vote Act (HAVA). The Act provides that states must pass conforming legislation by 2006; otherwise, federal law applies. As an incentive for state enactment, states will receive a federal grant to enable them to implement the new law. Alabama passed its HAVA conforming Act in (2003).

Legislators learn of other states' laws through the National Conference of State Legislatures and Council of State Governments. "Sunset" of agencies (1976), "Clean Air Act" (2003), and regulation of "Pay Day Loans" (2003) are examples of enacted laws that are neither "Uniform" or "Model" Acts, but, nonetheless, are remarkably similar due to the interchange of state legislation.

The interstate nature of law was recognized by the Alabama State Bar when, in 1972, the ASB made "its" three-day bar exam of all Alabama testing to include one day of "multi-state" and two days of testing by Alabama examiners. In 2003, the bar went one step further and now has two days of "multi-state" and one day of Alabama examiners.

For lawyers, this interstate conformity of laws provides history and interpretations from other jurisdictions. For 112 years, the National Conference of Commissioners on Uniform State Laws has been writing uniform acts. The restatements of the law by the American Law Institute have existed since 1923, and the model acts of the American Bar Association all give background to projects of the Alabama Law Institute. The Institute, at the request of its Council, studies these uniform and model laws and recommends them for Alabama usage.

All laws from whatever source must fit in with the existing and surrounding law on the subject. The Institute, through its

process of committees, studies the recommended law, makes conforming changes and provides commentary explaining the new law. Lawyers have this research available when the new law is enacted. The Code publishers include the committee commentary.

Legislators in Alabama do not have individual research staff. Legislative committees have counsel provided by the Law Institute only during the legislative session. Consequently, the legislature's independent research stems from the Legislative Reference Service and the Alabama Law Institute. These agencies are minimally staffed at best. States with budget shortages, as Alabama, must obtain the benefit of national drafts of uniform and model acts and suggested legislation from other state enactments. The Institute has drafted almost 100 major acts for Alabama while operating with a budget approximately five to ten percent of that in other states. The Institute relies on the generosity of Alabama lawyers who donate hundreds of thousands of dollars of legal services each year to prepare these acts for the legislature. This professional service to the bench and bar is largely responsible for Alabama's legislative progress into the new millennium.

## Law Institute Annual Meeting

The Law Institute held its annual meeting July 23, 2004. Officers elected were: Representative Demetrius Newton, president; Senator Roger Bedford, vice-president; and Bob McCurley, secretary and director. Executive Committee members include: David Boyd, William N. Clark, Richard S. Manley, Representative Ken Guin, Oakley W. Melton, Jr., Representative Marcel Black, James M. Campbell, and Senator Rodger Smitherman.

The meeting featured a discussion of "Accountability in Government." Panelists were: Senator Lowell Barron, president pro-tem of the senate; Representative Seth Hammett, speaker of the house of representatives; Jim Main, finance director for the State of Alabama; and Jim Williams, executive director, Public Affairs Council of Alabama.

For more information about the Institute or any of its projects, contact Bob McCurley at the 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](http://www.ali.state.al.us).

## Thank You

Thank you, President Bill Clark and Commissioners of the Alabama State Bar, for the recognition you gave to the Alabama Law Institute at the 2004 ASB Annual Meeting. I was honored to receive the award on behalf of the hundreds of lawyers who have donated their time and expertise to "Render Service" to the state of Alabama to modernize Alabama's laws.

—Bob McCurley



By J. Anthony McLain

## Lawyer Who Has Formerly Represented a Client May Not Represent Another Person In the Same or a Substantially Related Matter Where the Present Client's Interests Are Materially Adverse to the Former Client

### Question:

"The purpose of this letter is to request a formal opinion from your office regarding whether my law firm should be disqualified from representing the Plaintiff Corporation A in litigation.

"I believe that all of the relevant facts are set out in the following documents which are enclosed:

1. Complaint filed by Corporation A against Corporation B and Mr. Jones for damages arising from an alleged breach of equipment lease and on a personal guaranty;
2. Answer and counterclaims of Corporation B and Jones;
3. Amendment to answer and counterclaims;
4. Corporation A's answer to counterclaims;
5. Appearance of Lawyer A as counsel for Corporation A;
6. Defendant's Objection to Appearance of Attorney, with attached Exhibits A, B and C;
7. Letter from Lawyer X to Judge Rite, with referenced attachments; and
8. Response of Lawyer A's firm in opposition to Defendants' Objection to Appearance of Attorney' with attached exhibits 1 through 6.

"Judge Rite has asked that I request this opinion from your office. Enclosed is a copy of the order which I am submitting to Judge Rite which I expect will be signed shortly."

### Answer:

The documents submitted with your request for opinion show that your firm is presently representing Corporation A against Corporation B and Mr. Jones. Corporation B is in the business of designing and providing printed business forms. Jones is the president and sole stockholder. This lawsuit was filed on and deals with an alleged breach of an equipment lease/ purchase agreement by Corporation B and Jones. There is a counterclaim and a third-party complaint as well. The lease agreement was entered into on July 29, 1988. Corporation A is claiming damages in the amount of \$9,320.00 as a result of the breach.

During 1991, Lawyer A's partner ("Partner") represented Jones when he was considering the formation of another corporation which would offer consulting services to the same clientele that Corporation B serviced. Partner met with Jones on one occasion and with his accountant on another. Prior to this, Partner had never had any dealings with either man. Partner met with the



accountant, Mr. Smith, and sent a letter the next day confirming "the key points we examined." In August, Partner met with Jones about forming the new company. The next day, he sent Jones a four-page letter setting out "the essential facts you imparted to me together with my recommendations for further consideration". After that, there was no further contact between Partner and Jones or the accountant. At the end of August, Partner sent a bill for his services. Partner has submitted an affidavit of his association with Jones and all documents from his file are attached as exhibits. There is no question that Jones was a client of Partner's for a brief period of time and that he obtained information in the course of the representation, which would be confidential under Rule 1.6(a).

Since Jones is a former client of Lawyer A's firm, Rule 1.9 must be addressed when another member of the firm represents another party in a lawsuit against Jones. Any member of the firm is disqualified under Rule 1.10 if Partner himself would be disqualified by any type of conflict of interest. Rule 1.9(a) provides that a lawyer who has formerly represented a client may not represent another person in "the same or a substantially related matter where the present client's interests are materially adverse to the former client." In determining whether two matters are "substantially related," the scope and subject of the two matters must be examined. The issues involved must be very closely connected. Partner's representation of Jones appears to have been brief and limited in scope as opposed to an ongoing representation of Jones' business. If the trial court finds from the facts before it that Corporation A's suit is substantially related to the issues of Partner's prior consultation, then the firm is precluded from representing Corporation A against Jones in the instant

case. If the finding is otherwise, then Rule 1.9(b) must be addressed.

Rule 1.9(b) is directed to the protection of client confidences gained by a lawyer during the former representation. Public information or information generally known is not encompassed in the rule. There is a presumption that a lawyer has gained confidential information in the prior representation of a client. That can be rebutted by the lawyer. There is also the presumption that if a lawyer possesses confidential information that he will potentially use it in a way adverse to the former client. In that sense, if the confidential information is in any possible way disadvantageous to the former client, the lawyer is disqualified.

If it is found that Partner could use the information he gathered during his short representation of Jones, in any adverse way, or that he would have an advantage because of his acquired knowledge, then he and the firm are disqualified from representing Corporation A. If an analysis of the information reveals that it could not be used by Partner, in any way, in the Corporation A case, then the firm is not disqualified.

The Disciplinary Commission is not going to make any factual or other findings determinative of this question. There is a motion to disqualify pending in the trial court and those matters are for the court to decide. The Commission would point out that the "appearance of impropriety" is not the standard at this time and, that, in and of itself, does not require a disqualification. That term is not used in the Rules of Professional Conduct. The application of such a standard tends to result in blanket disqualification because it does not take the actual relationship, if any, between the subject matter of the two representations into account. [RO-1994-13] ■

# Heard the News?

## ASB Lawyer Referral Service

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$25 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.



## Transfer

- Mobile attorney **Wayne Alan Ehlers** was transferred to disability inactive status effective May 20, 2004 by order of the Disciplinary Board of the Alabama State Bar. [Rule 27 (C); Pet. No. 04-02]

## Notices to Show Cause

- Notice is hereby given to **Stephen James Dupuy**, who practiced law in Alexandria, Virginia, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 22, 2004, he has 60 days from the date of this publication (September 15, 2004) to come into compliance with the Client Security Fund assessment requirement for 2004. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 04-28]
- Notice is hereby given to **Richard Wayne Mizell, Jr.**, who practiced law in Alabaster, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary commission of the Alabama State Bar, dated April 22, 2004, he has 60 days from the date of this publication (September 15, 2004) to come into compliance with the Client Security Fund assessment requirement for 2004. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 04-67]
- **Katrina Mu'min**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2004, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 03-234(A), before the Disciplinary Board of the Alabama State Bar. [ASB No. 03-234(A)]
- Notice is hereby given to **Frank Malone Smith, Jr.**, who practiced law in Auburn, Alabama, and whose whereabouts are unknown, that pur-

suant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 14, 2004, he has 60 days from the date of this publication (September 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 04-181]

- Notice is hereby given to **David Morris Sobell**, who practiced law in Cumming, Georgia, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 2, 2004, he has 60 days from the date of this publication (September 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 03-137]

## Disbarment

- The Alabama Supreme Court entered an order adopting the decision of the Disciplinary Board, Panel III, disbarring Mobile attorney **Thomas Michael Tompkins** from the practice of law in the State of Alabama, effective November 5, 2003. Tompkins entered a consent to disbarment on September 25, 2003. Formal charges had been filed in ASB No. 01-035(A) and ASB No. 01-220(A), and Tompkins waived the filing of formal charges in ASB nos. 01-226(A), 01-228(A), 01-229(A), 01-270(A), 01-271(A), 03-233(A), and 03-033(A). These complaints involved Tompkins' acceptance of attorney's fees, after which he performed little or no legal work on behalf of the clients. Tompkins also withdrew clients' funds from his trust account for personal use. These matters involved violations of the following provisions of the *Alabama Rules of Professional Conduct*: 1.3, 1.4(a), 1.4(b), 1.5(a), 1.15(a), 1.15(c), 1.16(d), 8.1(b), 8.4(c), and 8.4(g).



## Suspensions

- The Supreme Court of Alabama ordered that Jacksonville attorney **David Joel Forrester** be suspended from the practice of law in the State of Alabama for a period of 91 days, with credit to be given for 30 days previously served, said suspension to become effective on June 1, 2004. The suspension was based upon a decision of the Disciplinary Board revoking Forrester's probation which had previously been imposed after Forrester pled guilty to violating Rule 5.3(a) and Rule 8.4(g), *Alabama Rules of Professional Conduct*. Forrester admitted that he employed a client in exchange for legal services and, thereafter, provided minimal or improper training and supervision during employment and engaged in inappropriate conduct of a

personal and sexual nature with the employee.

While on probation, the Disciplinary Commission, in separate cases, found that Forrester had violated rules 1.3 and 8.4(a), *Alabama Rules of Professional Conduct*, in connection with his representation of a husband and wife in a bankruptcy matter wherein Forrester had not timely filed and completed the bankruptcy. [ASB No. 99-115(A)]

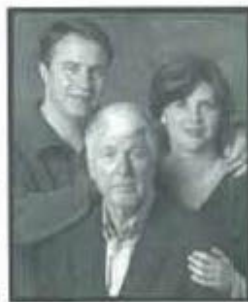
- Montgomery attorney **Mitch McBeal** pled guilty before the Disciplinary Commission of the Alabama State Bar to entering into a business transaction with a client, a violation of Rule 1.8(a), *Alabama Rules of Professional Conduct*. McBeal represented a client who was attempting to collect \$40,000 from two

other attorneys. When McBeal collected the \$40,000, he negotiated with his client for an \$8,000 loan. The agreement was not written, but McBeal promised to pay it back within about a year, plus interest. McBeal did not repay the loan. Pursuant to a conditional guilty plea, the Disciplinary Commission suspended McBeal from the practice of law in the State of Alabama for a period of 91 days, but stayed the suspension and placed McBeal on probation. McBeal was ordered to make restitution. [ASB No. 03-20(A)]

- Russellville attorney **John Frederick Pilati** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the

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Disciplinary Commission of the Alabama State Bar, effective June 3, 2004. Pilati pled guilty in the United States District Court for the Northern District of Alabama to an information charging him with making a false statement to the Federal Bureau of Investigation, a violation of 18 U.S.C. Section 1001. [Rule 20(a); Pet. No. 04-05]

- On April 28, 2004, the Alabama Supreme Court entered an order accepting the March 19, 2004 order of the Alabama State Bar's Disciplinary Commission suspending Troy attorney John Michael Woodham for a period of five years, retroactive to February 20, 2001. Previously, on February 20, 2001, an order was entered by the Disciplinary

Board, Panel VI, placing Woodham on disability inactive status. On March 18, 2004, Woodham consented to discipline consisting of a suspension for a period of five years. Woodham had been convicted of felony offenses. The Disciplinary Commission accepted Woodham's consent to discipline and suspended Woodham for a period of five years, retroactive to the date he was placed on disability inactive status. [ASB nos. 01-13(A), 01-14(A), 01-22(A) and 01-76(A)]

## Public Reprimands

- Michael Hilding McDuffie received a public reprimand without general publication on May 21, 2004, for violating

rules 1.1, 1.3 and 1.4(a), A.R.P.C. McDuffie was retained to represent an individual in a divorce modification for a fee of \$1,500. The client paid a \$500 retainer, and within two weeks, paid another \$100. The client then made arrangements to have his credit union send McDuffie \$50 a week toward payment of the fee. After paying \$850, the client stopped the weekly payments because he had heard nothing from McDuffie, although he had received assurances from McDuffie's secretary that he would return the client's calls.

Subsequently, the client learned that McDuffie had lost his file and he was requested to resend the information to McDuffie. The client complied with the request, but McDuffie did nothing.

## 15th Annual

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McDuffie informed the client that he had only received the initial retainer of \$500 and the he would either have to pay the \$1,000 balance or send proof of payment of the additional amounts paid before he would file the petition. The client sent McDuffie copies of the first two checks he had written and copies of his credit union statements. However, McDuffie told him that was "not acceptable."

Thereafter, the client terminated McDuffie and demanded the return of his file and a refund. McDuffie notified the client that he would return \$650 within ten days. He did not. Finally, after the bar complaint was filed, McDuffie returned \$650 to the client and requested that he drop his complaint. The client would not withdraw the complaint. [ASB No. 03-90(A)]

- Russell Allan McGill received a public reprimand without general publication on May 21, 2004 for violating rules 1.1, 1.3, 1.4(b) and 8.4(a) (c) and (g), A.R.P.C. McGill's firm was retained to pursue a third-party claim on behalf of a client who was injured in a slip-and-fall accident during the course of her employment. The firm was not hired to represent the client in a worker's compensation case or a State Employee Injury Compensation Trust Fund case. The case was assigned to two other lawyers in the firm prior to McGill's assignment to the case in March 1999. At the time the case was assigned to McGill, the statute of limitations was indicated to run in September 1999. The third-party claim was not filed within the statute of limitations, which ran during the time the case was assigned to McGill. McGill did not notify the client or members of his firm that the statute had run. He also misrepresented to the client that the claim had been filed and provided her with a copy of the complaint that he signed, but never filed. The client did not discover that the statute had run on her claim until 2002. [ASB No. 03-57(A)]

- On May 21, 2004, Albertville attorney Steven Vincent Smith received a public reprimand without general publication

for a violation of Rule 8.4(g), *Alabama Rules of Professional Conduct*. In July 2001, Smith was employed by Berry & Associates. Smith began representing Mary Cork in an insurance claim. Cork had signed an employment contract with Berry & Associates. In all correspondence with the client and the insurance company, Smith utilized Berry & Associates letterhead. Once the case was settled, Smith requested that the adjuster make the check payable to him personally and to the client. On August 28, 2001, at the request of Smith, the adjuster sent a check for \$29,000 to Smith's home address. The check was made payable to "Mary Cork and Law Offices of S. Vincent Smith." Smith took the check to the bank where his wife was employed and had the other checks issued to Cork and himself in respective amounts of

\$21,750 and \$7,250. Smith deposited the \$7,250 check in his personal account. On September 6, 2001, Smith sent the signed release back to the adjuster in a Berry & Associates envelope. Smith never advised Berry about the receipt of the Cork settlement check or its disbursement. Smith was paid by Berry & Associates through September 27, 2001. On March 4, 2003, Berry and Smith reached an agreement about this fee and Smith later paid \$5,000 in settlement of this matter. [ASB No. 02-10(A)]

- On May 21, 2004, Selma attorney Bruce Carver Boynton received a public reprimand with general publication for a violation of Rule 1.5 (a), *Alabama Rules of Professional Conduct*. On May 17, 2001, the complainant hired Boynton to assist her in collecting life

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insurance proceeds on policies held by her deceased son. The contract that she signed with Boynton called for a retainer of \$7,000 to be paid from the insurance proceeds. This retainer was for Boynton's efforts in bringing about a criminal prosecution of the person who killed her son and also to file a civil action against such person. A contingent fee of 33 1/3 percent also applied to any lawsuit required to collect the insurance proceeds, and any recovery in a civil lawsuit for wrongful death. On May 25, 2001, a check for \$25,000 was personally delivered to the complainant and Boynton. Boynton cashed the check and gave the complainant \$18,000, keeping \$7,000 for himself. Boynton did not recover under the double indemnity provisions of the policy. Boynton did not pursue any criminal proceedings or civil

action against the person responsible for the complainant's son's death. After obtaining the \$7,000 from the insurance proceeds, Boynton, in effect, took no further action and stopped adequately communicating with the complainant about the remaining matters she wanted him to pursue for her. In conjunction with Boynton's guilty plea, he made a refund of \$7,000 to the complainant. [ASB No. 01-307(A)]

- On May 21, 2004, Tuscaloosa attorney James Dwight Smith received a public reprimand with general publication for violations of rules 1.3 and 8.1(b), Alabama Rules of Professional Conduct, in conjunction with a complaint referred by the presiding judge of the Alabama Court of Criminal Appeals. Smith was appointed to represent a criminal client on appeal from a Rule 32

denial in the Circuit Court of Tuscaloosa County, Alabama. Records indicate that the appeal was filed on August 21, 2001. A briefing notice was sent out that same day. On September 17, 2002, the court granted Smith a seven-day extension to file the appellant's brief. On September 24, 2002, the court granted a 45-day extension, at Smith's request. On November 8, 2002, Smith was granted an additional seven-day extension to November 15, 2002. Smith failed to file a brief by that date. Smith was sent a deficiency notice by the presiding judge, but still failed to file a brief. The appeal was then remanded to the circuit court with directions that Smith be removed as appellate counsel. The court provided this information to the Alabama State Bar. Smith also failed to respond in writing to this complaint, while having been given ample opportunity to do so. ■

## ALABAMA LAWYER Assistance Program

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*Are they telling you they can handle it?*

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# Classifieds

## RATES

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**Nonmembers:** \$35 per insertion of 50 words or less, \$.50 per additional word.

Classified copy and payment must be received according to the following publishing schedule: **November 2004 issue—due September 1, 2004; January 2005 issue—due November 1, 2004.** NO deadline extensions will be made.

Send classified copy and payment to Kimberly Barnhart, P.O. Box 4156, Montgomery 36101-4156. Make check or money order payable to *The Alabama Lawyer Classifieds*.

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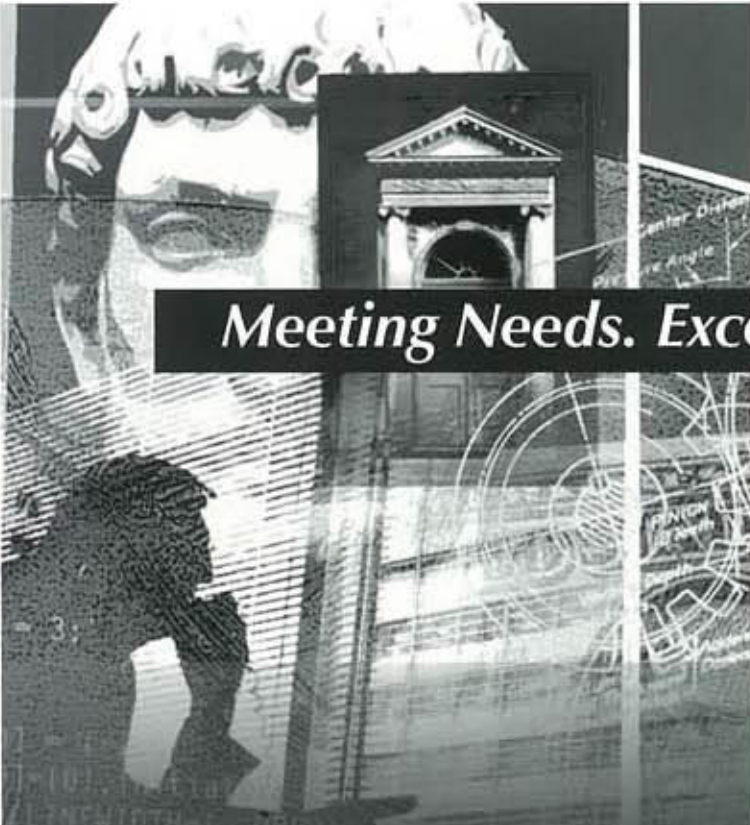
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