

September 2006

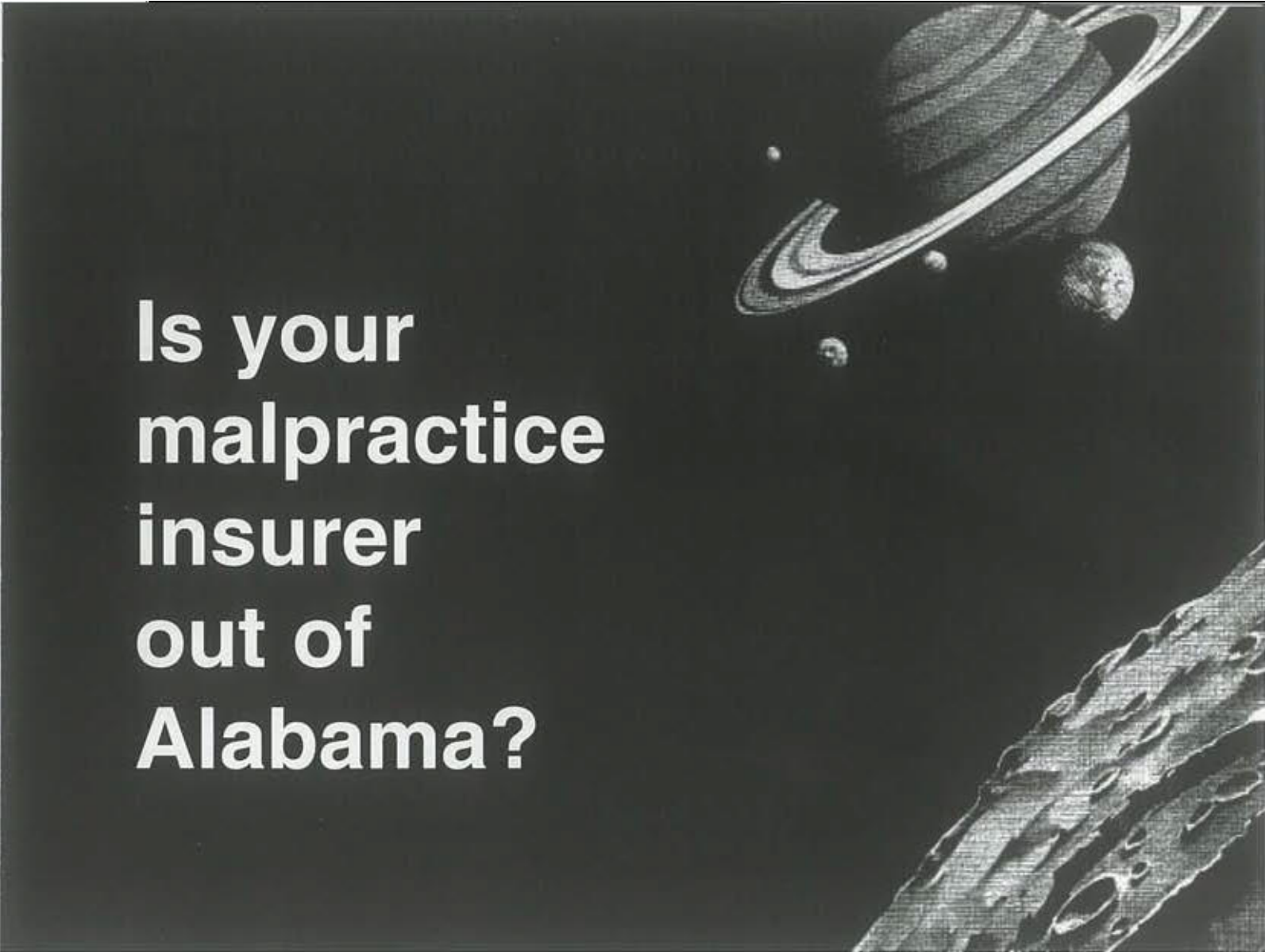
Vol. 67, No. 5

The Alabama Lawyer



2007 ASB Leadership Forum
Update and General Selection Criteria
page 330

A Perspective on the ASB 2006
Leadership Forum Class II
page 332



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Fall Calendar 2006

SEPTEMBER	22	Friday, Criminal Defense Law - Tuscaloosa
OCTOBER	6	Friday, DUI Defense - Tuscaloosa
	6-7	Friday - Saturday, Family Law Retreat - Orange Beach
	13	Friday, Real Estate - Birmingham
	13	Friday, Litigating the Automobile Accident - Tuscaloosa
	20	Friday, Fundamentals of Will Drafting - Tuscaloosa
	20	Friday, Hot Topics for the Litigator - Birmingham
	26	Thursday, Professionalism - Montgomery
NOVEMBER	2	Thursday, Professionalism - Birmingham
	3	Friday, Employment Law - Tuscaloosa
	10	Friday, Social Security Disability - Tuscaloosa
	16	Thursday, Pre-Trial Issues - Birmingham
	17	Bankruptcy Law Update - Birmingham
	29	Wednesday, Alabama Update - Mobile
	30	Thursday, Alabama Update - Montgomery
	30	Thursday, Estate Planning - Birmingham
DECEMBER	6	Wednesday, Alabama Update - Huntsville
	6	Wednesday, Gamble on Evidence - Montgomery
	14	Thursday, Tort Law Update - Birmingham
	19	Tuesday, Video Replays - Tuscaloosa
	20	Wednesday, Alabama Update - Birmingham
	21	Thursday, Gamble on Evidence - Birmingham

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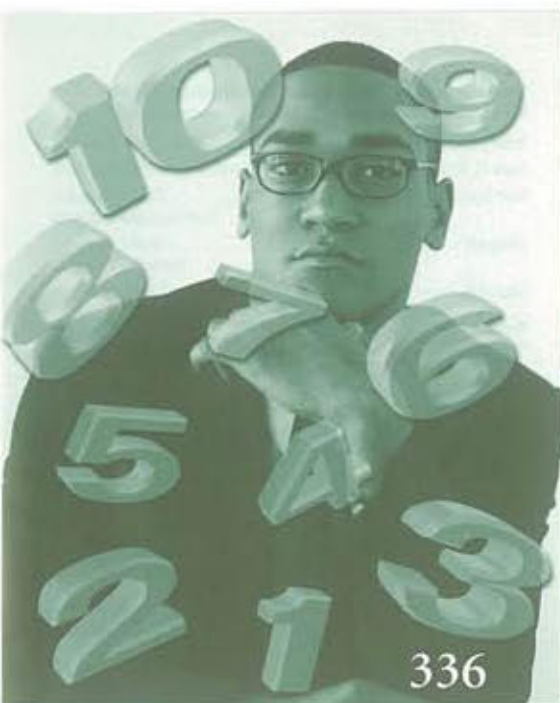
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The Alabama Lawyer

September 2006 Vol. 67, No. 5

ON THE COVER

Fournier "Boots" Gale, 2006-07 president of the Alabama State Bar, is pictured with his family in Sandestin.

Left to right are: Cy Partridge (daughter), Shepard Partridge (son-in-law), Houston Partridge (grandson), Louise Gale, Boots, Steele Partridge (grandson), Taylor Saphier (granddaughter), Jenny Saphier (daughter), and Adam Saphier (son-in-law).

Photo by Manny Chavez
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325 SPRING 2006 ADMITTEES:

LEADERSHIP FORUM:

- 330 2007 Alabama State Bar Leadership Forum Update and General Selection Criteria
By Tripp Haston
- 331 2007 Leadership Forum Application
- 332 A Perspective on the ASB 2006 Leadership Forum Class II
By Keith Jackson
- 336 The Top Ten Things Your In-House Counsel Wants from You
By Allison D. Garrett
- 340 The Care and Feeding of In-House Counsel
By Albert L. Vreeland, II and Jennifer L. Howard
- ASB ANNUAL MEETING:
- 351 Photo Highlights
- 357 Prize Winners

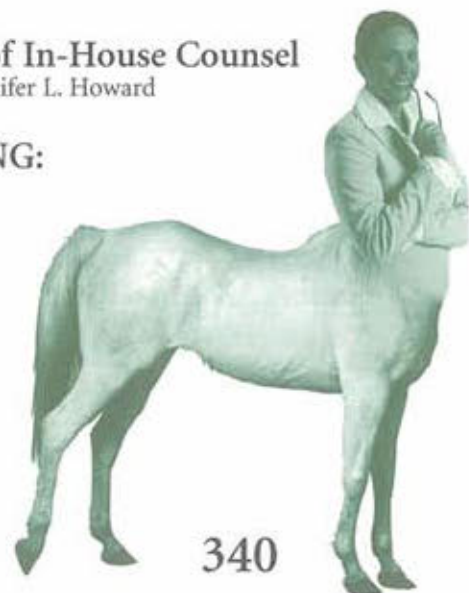


Table of Contents >> continued on page 312



- 358 **The Alabama Trust Code**
By Robert L. Loftin
- 368 **Report of the Alabama State Bar Quality of Life Survey**
By Mary Ellen W. Harrison
- 372 **Guardians of Justice Campaign-Inaugural Event at the Alabama Shakespeare Festival**
- 375 **Alabama Center for Dispute Resolution 2006 Pro Bono Mediators Honor Roll**



- 384 **Legislative Wrap-Up Residential Landlord Tenant Act**
- 388 **Opinions of the General Counsel**
An Attorney May Pay an Expert Witness a Reasonable and Customary Fee for Preparing and Providing Expert Testimony, but the Expert's Fee May Not Be Contingent on the Outcome of the Proceeding
- 390 **About Members, Among Firms**

DEPARTMENTS

- 316 **President's Page**
The Very Best Among Us
- 320 **Executive Director's Report**
The New House Counsel Rule
- 322 **Memorials**
- 376 **Disciplinary Notices**
- 380 **CLE Corner**
99 CLE Days Left

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Fournier J. "Boots" Gale, III

The Very Best Among Us

I write this the week following our 130th Annual Meeting, which was held at Sandestin. The meeting is fresh in my mind, and it may be that way for a long time because it was a superb convention. President Bobby Segall, Keith Norman, Ed Patterson and countless others deserve special thanks for the great effort put forth in planning and executing one of the most fun and meaningful programs you can imagine.

As most of you know, Bobby Segall makes everything enjoyable. This convention will long be remembered for many laughs, countless stories, great CLE, good friends, a few occasional libations—all calculated to make us "Renew, Relax and Reconnect" which was the theme for this year. For those who missed the annual meeting it is worth spending some time here to describe the highlights.

One of the principal speakers was Sean Carter of Mesa, Arizona, now a

humorist, but once a lawyer in both private practice and as in-house counsel. He spoke twice—on "Cleaning Up the Stress Mess" and "Practice Makes Perfect . . . Except In the Law." As a true stand-up comedian, he entertained the crowd with stories of lessons learned while practicing law. Everyone enjoyed him and he enjoyed being with Alabama lawyers. Our speaker quickly realized he had met his equal when he and President Segall exchanged impromptu one-liners. If Segall is hard to find in the coming months you may look for him on the road with Sean, if he can afford the pay cut.

In addition to some very good CLE, which was varied and interesting, the highlight of the meeting was the Friday morning plenary session where our own Dean Charles Gamble made a truly remarkable and inspiring presentation regarding truth and courage in the practice of law. As you know, you really have

to hear Charlie speak to get the full flavor with his inflections and tone. (I hope this was recorded for others to experience.) Often, the very best are among us and Charles Gamble is a treasure of this bar. He is always inspirational and thoughtful, always humble and careful, always a true gentleman. I cannot do justice by trying to describe what he presented or what he means to our profession. He epitomizes what is good about lawyers. I am proud to call him a friend and only wish I had been younger and able to take every class he ever taught. *Someone please make sure that Dean Charles W. Gamble sees this because I'm going to save some postage and issue this invitation to him to be our principal speaker at the Friday morning plenary session next year in Point Clear, July 20, 2007 at 9:00 a.m.* Mark your calendars—it will be well worth the trip.

During the annual meeting your bar also recognized several lawyers who received and deserved special awards. Chief Justice Nabers, after delivering a very fine report on the "State of the Judiciary," presented the first Chief Justice's Commission on Professionalism Award. This commission, after careful review, narrowed a large and impressive field down to two and the ASB Board of Bar Commissioners selected former Governor Albert Brewer as the first recipient of this award. It recognizes a lawyer who has conducted himself throughout his career with the highest degree of professionalism and civility. Governor Brewer was present to receive this award and is well-deserving to be its first recipient. He has meant a great deal to our state and profession.

The Judicial Award of Merit is not given often by the bar, but this year President Segall presented this special award to the Honorable U. W. Clemon, chief judge of the United States District Court for the Northern District of Alabama. Judge Clemon's long and distinguished service was detailed. He has been recognized by numerous colleges and universities, his alma mater

(Columbia Law School), national organizations of all kinds and bar groups from around the country. Again, we often find the very best among us.

Two very special members of the bar were also honored for their long and devoted work in the vineyards. The Alabama State Bar Award of Merit was

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Invoices for 2006-07 ASB occupational license fees and special membership dues will be mailed in early September and will reflect an increase approved by the Alabama legislature. Occupational license fees will increase from \$250 to \$300 and special membership dues will increase from \$125 to \$150. The 2005-06 occupational licenses and special memberships expire **September 30th, 2006**. Payment of license fees and special membership dues for 2006-07 is due in the Alabama State Bar office by **October 31st, 2006** and will be delinquent after that date. Occupational licenses purchased after October 31st will have a 15 percent late penalty added to the license fee. Payments may be mailed to the Alabama State Bar or made online at www.alabar.org. Contact the ASB Membership Department by e-mail, ms@alabar.org, or telephone (334) 269-1515 if you have questions.

presented to Sam Franklin of Birmingham. Sam was the unanimous choice of the board of bar commissioners for this award which also is not given annually. He has served the bar in so many ways—always quietly and with dignity—never seeking personal recognition. Sam ably served nine years on the board of bar commissioners, was a longtime member of the Disciplinary Commission and a leader of the Alabama Bar Foundation where he worked tirelessly for those most in need of legal services. The list of his many contributions is very impressive and no one deserves the Award of Merit more than Sam.

The very special William D. "Bill" Scruggs, Jr. Service to the Bar Award was awarded for only the second time. Bill

Scruggs would have been extremely happy to have this award presented to Dave Boyd of Montgomery. Dave, like Sam, has quietly and without fanfare devoted untold hours in service to our profession. Dave was a bar commissioner for many years and a longtime treasurer of the Alabama Bar Foundation. He served as chair of the board of bar examiners—a critical job with very little recognition. He served on the National Board of Bar Examiners and is only the second Alabamian to have been elected chair of that organization. (Robert L. Potts, originally a Florence attorney and now chancellor of the North Dakota University System, was the first.) Dave also has an endless list of other meaningful positions he has held. He truly deserves the very

special Bill Scruggs Award.

All of those honored—including others detailed later in this issue—bring special meaning to the phrase "Lawyers Render Service" adopted by Past President Fred Gray as the theme of our bar.

I close by thanking Bobby Segall for his splendid work over the past year. He is a true leader in the best sense of the word—intelligent, tireless, honest, persistent, courageous, always courteous and thoughtful of others, and, of course, a very funny man. He and his wife, Sandy, have been very able representatives of our association and we are grateful to them.

Thank you for giving me this opportunity to serve. I welcome your thoughts and need your help. ■

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The Alabama Sentencing Commission has been holding regional workshops since May to explain the voluntary sentencing standards which go into effect October 1, 2006 and how to complete the worksheets. Separate workshops will be held on Thursday and Friday in each location, with the Friday workshops scheduled for judges, district attorneys, lawyers and local legislators. Thursday's workshop is primarily for court clerks and their employees, probation and parole officers, community correction directors and employees, court referral officers, and others who may be interested in attending. The programs will be approved for 5.8 hours of CLE credit. Because space is limited, pre-registration is required. You may pre-register online through our Web site sentencingcommission.alacourt.gov, by calling (334) 954-5095, by e-mailing sentencing.commission@alacourt.gov or by faxing (334) 954-5201. All workshops begin at 9 a.m. and end at approximately 4 p.m.

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Keith B. Norman

The New House Counsel Rule



If you are serving as house counsel in Alabama and are a lawyer licensed in a jurisdiction other than Alabama, you need to know about a new rule. Beginning October 1, 2006, lawyers who serve as house counsel in Alabama and are not licensed members of the Alabama State Bar must register to become authorized house counsel. The purpose of the rule is to facilitate the relocation of individuals who are employed by and provide legal services exclusively for business organizations in Alabama without the necessity of taking and passing the Alabama bar exam.

The requirements of the authorized house counsel rule as promulgated by the Alabama Supreme Court are covered under Rule IX of the *Alabama State Bar Rules Governing Admission*. In a nutshell, the rule establishes a registration process so that house counsel in Alabama, not admitted to the Alabama State Bar, can become authorized house counsel. The

rule provides for registration as well as termination or withdrawal of the registration. An authorized house counsel can furnish legal advice to his or her employer but is precluded from making an appearance in court on behalf of the employer. Below I have briefly highlighted some of the major components of this new rule. These highlights should not suffice for a complete reading of the rule.

Who can become an authorized house counsel?

A person must be employed by a business organization and not be a member of the Alabama State Bar. He or she must be licensed to practice law in another state and be a member in good standing with that jurisdiction's licensing authority. The person can neither be subject to a disciplinary proceeding in another jurisdiction nor disbarred or suspended from practice

at the time of this application and must agree to be bound by all Alabama disciplinary rules. On the date of the application, the applicant must be exclusively employed with a business organization in Alabama or within six months of submitting the application be relocating to Alabama in furtherance of such employment.

What constitutes a “business organization?”

For the purposes of this rule, a business organization is a corporation, partnership, association or other legal entity, e.g., subsidiary, affiliate, etc., that is authorized to transact business in Alabama that is not itself engaged in the practice of law or rendering of legal services whether it charges a fee or not. It does not include a governmental entity, governmental subdivision, political subdivision, school board, or any other entity that has the authority to levy a tax.

What are the permissible activities of an authorized house counsel?

He or she may give legal advice to the directors, officers, employees and agents of the business organization relating to the affairs of the organization. Authorized house counsel may negotiate or document matters for the business organization. Although authorized house counsel may represent the organization in its dealings with any administrative agency or commission having jurisdiction over it, he or she may not make appearance as counsel in any court, administrative tribunal, agency or commission in Alabama unless the rules of such court or body permit it. In undertaking permissible legal services, approved house counsel must make appropriate disclosure of the fact that he or she is not a member of the Alabama State Bar licensed to practice law in Alabama. Under no circumstances is an authorized house counsel permitted to personally represent any shareholder, owner, partner, officer, employee, servant, director, or agent of the business organization or to provide legal opinions to be relied upon by any person other than in the course of representing the business organization by which he or she is employed.

What does the registration process entail?

Registration includes the filing of the following forms and documents with the Alabama State Bar: a) a completed registration application provided by the state bar; b) a certificate of good standing and clear disciplinary record from every jurisdiction to which the applicant is admitted to practice law; c) a sworn statement that the applicant has read and is familiar with all of Alabama’s disciplinary rules, submits to the jurisdiction of the Alabama State Bar and the Alabama Supreme Court for disciplinary purposes, and is not currently subject to a disciplinary proceedings of any type; d) a certificate from a business organization

stating that it is aware the registrant is not licensed to practice law in Alabama and is not in any way relying on the Alabama State Bar in employing authorized house counsel; and e) a filing fee of \$725.

Is there an annual renewal for authorized house counsel and how much is it?

There is an annual registration renewal for authorized house counsel that is consistent with license renewals for lawyers licensed to practice law in Alabama. Registration renewal is contingent upon the authorized house counsel’s continued good standing in all jurisdictions to which he or she is admitted to practice law and the payment of an annual fee of \$300.

For what reasons can authorization for authorized house counsel be terminated?

There are several reasons: a) termination of employment with the business organization for which registration was filed, unless authorized house counsel begins employment with another business organization within 30 days of the termination; b) withdrawal of certification by the business organization; c) withdrawal of registration by authorized house counsel; d) the relocation of authorized house counsel outside Alabama for a period greater than 160 days; e) authorized counsel’s disbarment or suspension from the practice of law by a court or disciplinary agency of another state; or f) failure to comply with any of the provisions under Rule IX.

Authorized house counsel must notify the Alabama State Bar of any of these occurrences within 30 days or face disciplinary action under Alabama’s disciplinary rules. Unless registration has been permanently terminated for disciplinary reasons, an individual may re-register as authorized house counsel if previous authorization has been terminated.

Is there any liability for the unauthorized practice of law by foreign lawyers serving as house counsel prior to this rule?

No.

If you are not house counsel but advise Alabama companies or businesses that have house counsel who fall within the provisions of Rule IX, I encourage you to make them aware of this new registration procedure. Information and forms are available online at www.alabar.org. Anyone who has questions about the authorized house counsel rule may contact our membership department. ■

DONALD EUGENE HOLT

The north Alabama legal community lost a giant with the passing of Don Holt on May 28, 2006 after a brief bout with cancer. Don was born February 9, 1937 in Cloverdale, Alabama. With the exception of law school and a brief stint in the U. S. Army, Don lived his entire life in Lauderdale County, Alabama. He graduated from Florence State College (now the University of North Alabama) and the University of Alabama School of Law.

Early in his career, Don established himself as a pre-eminent trial lawyer, particularly in the area of criminal defense. For 43 years, he continued that tradition of excellence, representing clients from all walks of life. He never forgot his rural roots in Cloverdale, and, in fact, took great pride in his humble beginnings there.

On more than one occasion, court opponents deemed him a "worthy adversary" and an expert in jury selection. Don was a master of reading jurors, drawing frequently from his rural roots in the course of voir dire. He related well with jurors and they, in return, related well to him. A tenacious advocate for his clients, he never backed down from a fight.

A local police chief described Don, "When you went against him, you had better be prepared, because he was going to be prepared. I know he made me a better officer." It comes as no surprise that when local law enforcement found themselves in need of legal services, it was Don to whom they often turned.

Don was gracious in mentoring young lawyers, rarely missing an opportunity to share his legal wisdom, usually intertwining it with a war story—of which he had volumes. Often, the mentoring might



include gentle chastising usually focusing on the mentored lawyer's "incomplete education" which referenced the said attorney's inability to recite a particular line from a Hank Williams song—all of which Don could both recite and sing.

While his practical ability to apply the law at trial was unrivaled, his technical application is evidenced as well by more than 50 appellate opinions, state and federal, in which he had a role.

Too, Don had a life beyond the courtroom. He loved time with his family and the outdoors. He relished hunting, fishing and simply being in the country. He built a cabin in the Cloverdale woods where he spent countless hours hunting rabbit, squirrel and deer with friends and family. His unique humor and wit which he wove into tales of growing up in Cloverdale and of law practice were a much-anticipated part of such gatherings. He never allowed the practice of law to interfere with time shared with his

beloved wife, Betty, his children and his grandchildren.

Don was active in professional organizations as well. He was a charter member of the Alabama Criminal Defense Lawyer's Association and, in 1992, was awarded the Roderick Beddow, Sr. Award for outstanding achievement and distinguished service in the field of criminal law. He was past president of the Lauderdale County Bar Association and a member of the ABA, the Alabama State Bar, the National Criminal Defense Lawyers Association, ATLA, and the

American Judicature Society. He was listed in White's Best Lawyers in America and was a fellow of the American Board of Criminal Lawyers. He was also a member of First United Methodist Church of Florence, Elks Lodge 820, Turtle Point Yacht and Country Club, Shoals Red Elephant Club, and the American Treeing Feist Association.

Don and Betty Holt were married nearly 46 years before Betty's death 42 days before Don's. They are survived by two children, Ralph Holt (who joined his father in the firm in 1990) and Kenda

Holt Rusevlyan; five grandchildren; and a brother, Col. (Ret.) Rex Holt. Don was predeceased by his brother, Ben Holt, who also practiced with him for 27 years, and brother, Ralph, an ATF agent who died in the line of duty.

Don's death has left a void in our legal community—one which will unlikely ever be fully filled. Those who practiced with him as well as many who sat opposite him are better lawyers for having experienced the practice of law with Don. We shall greatly miss him.

—Lindsey Mussleman Davis

Centers, Roger Dale
Albertville
Admitted: 1983
Died: November 1, 2004

Hawkins, Ernest Hank
Montgomery
Admitted: 1973
Died: June 25, 2006

McKnight, Linda Kathryn
Gordo
Admitted: 1982
Died: May 11, 2006

Coley, David Robert III
Mobile
Admitted: 1954
Died: May 27, 2006

Key, Brian Christopher
Jasper
Admitted: 1998
Died: July 18, 2006

Shreve, James Wilford
Mobile
Admitted: 1948
Died: June 22, 2006

Harris, Lyman Howard
Birmingham
Admitted: 1967
Died: May 1, 2006

Martin, Charles DeWitt
Gadsden
Admitted: 1975
Died: April 6, 2006

Vарner, Hon. Robert Edward
Montgomery
Admitted: 1949
Died: May 17, 2006

Spring 2006 Admittees



(Photograph by Fouts Commercial Photographs, Montgomery, photoofouts@aol.com)

STATISTICS OF INTEREST

Number sitting for exam.....	277
Number certified to Supreme Court of Alabama.....	140
Certification rate*.....	50.5 percent
Certification Percentages	
University of Alabama School of Law.....	71.4 percent
Birmingham School of Law.....	37.0 percent
Cumberland School of Law.....	66.7 percent
Jones School of Law.....	0.0 percent
Miles College of Law.....	7.4 percent

*Indicates only those successfully passing bar exam and MPRE

For full exam statistics for the February 2006 exam, go to www.alabar.org, click on "Members," and then check out the "Admissions" section.

Alabama State Bar Spring 2006 Admittees

Alexander, Jr. David Carl
Andrews, William Mac
Arndt, Shannon Renee Thomas
Averett, Jr. William Murphy
Baker, Johnna Faye
Ballard, Elizabeth Lee
Barnard, Jr. Joe Graham
Bartlett, Ranae
Bell, Franklin Leaston
Berry, Gregory Scott
Bertella, Renay
Boll, Robert Jeffrey
Brock, Carin Dorman
Brown, Monique Nicole
Bufford, Jr. Luther Lane
Burdick, Austin
Byrd, Ella Louise
Cabral, John Edward
Campbell, Robert Edward
Cash, Mary Elizabeth
Causey, Billy Joe
Cheves, Jr. William Morris
Collins, Angie Avery
Conway, Malcolm Bailey
Crawford, Jerald Dewayne
Davis, Jennifer Mae
Denniston, Jr. Dwain Chruchill
Dolive, Devin Clarke
Dooley, Robert Scott
Dunn, Linda Cook
Dunsmore, Deborah Lynn
Duvernay, Lauren Miranda
Edelmann, Lindsey Camp
Espy, Jonathan Kaz
Fairbanks, Misty Shawn
Fewell, Kenitra Irma
Finan, Sean Lyons
Fleenor, Lauren Elizabeth
Floyd, Jeremy Chad
Floyd, Mitchell Scott
Ford, Matthew Jason
Fordham, Daniel Dale
Foxy, Marcus Tirrell
Frederick, Wymon Jerone
Gerogiannis, Alexander Nicholas
Giudice, Raymond Victor
Green, Norma Nicole
Hall, Randall Wesley
Hargrove, Travis Carlisle
Hargrove, Trisha Dodd
Harrison, Jackson Brett
Harvey, Thomas Andrews

Harwood, Cydney Lynn
Hassinger, IV William Henry
Hedlund, Jocelyn Esther
Held, Jr. Michael Franklin
Hinton, Jr. Donald Everett
Holden, Kristopher Michael
Holder, Millicent Leigh-Ann
Holmes, Scott Bradley
Holzer, Rachel Sora
Hood, Marlin Brian
Hoppe, Jessica Scanlon
Howard, Georginia Beth
Howell, Theodore Randolph
Huffman, Nicole Collins
Jenkins, Zachary Thomas
Johnson, LaShawn Michelle
Johnson, Sandy Fochtman
Kamath, Anjali Arvind
Kamprath, Michael Thomas
Keeling, John Jerome
Kent, Jr. Camden Joseph
Kiley, Rebecca Catherine
King, Rachel Allison
Konrad, Robin Corinne
Kramer, Jodi Dunn
Kreller, Stephen Skelly
Lang, Gregory Alan
Lawrence, Kimberly Jeanette
Leskovska, Diana Kirilova
Lewis, Benjamin Harrison
Lilly, Meredith Yvonne
Lynch, Ruth Marguritte Williams
MacKenzie, Andrew George
Majoue, Troy Preston
Maloy, David Zachary
Martine, John Vincent
Martz, Michael Reed
Mazyck, Paul Maxwell
Mbanugo, Obinna Kenneth
McCreedy, Suzanne Kathryn
McKenzie, IV William Henry
McLaughlin, Jane Ilene Robinson
Mendler, Joel Arthur
Miller, Brian Keith
Minor, Charles Randall
Montminy, Briana Marie
Moon, Terinna Saul
Moore, Patricia Ann Reliford
Morrison, Marcelyn Mary
Mujumdar, Aron Thomas
Munson, Matthew Edward
Nelson, Nikki Leigh

Odem, John Stanford
Pelekis, Georgian Denise
Perez, Laura Rene
Perry, Timothy Joseph
Petersen, Philip Bran
Poe, Joseph Matthew
Powers, Amanda Nichole
Puccio, Ann Marie
Pugh, Harry Wade
Ralls, Jr. John Greel
Rigsby, Robert Alan
Riley, Chandler Williams
Roberts, Claude Patrick
Robinson, Jayson Breck
Roper, Timothy David
Royer, III George Washington
Rumsey, Marcus Ryan
Sadler, Ryan Robertson
Sample, Gregory Scott
Sanders, Steven Darryl
Sargent, David Clifton
Sneed, III Rowlett Wilson
Snow, Kimberly Jean
Sokolow, Dena Holly
Steen, Sonny James
Stephenson, Barry Kenneth
Stewart, William Taylor
Stewart-Magee, Brian David
Stokes, Paula Pringle
Strickland, III William Berthel
Sullivan, Nicole Elise
Tabereaux, Christina Leles
Taylor, Logan Ryan
Thomas, Stacey LaShun
Townsend, Julia Ann
Turner, Sara Marie
Tyler, Deena Renee
Van Loock, Joseph Eric
Vansant, Aaron Daniel
Vines, William Patton
Wadsworth, William Barclay
Wales, Jennifer Kathryn
Weathers, Matthew Glenn
Williams, Jr. David Carl
Williamson, Davis Alison
Willingham, Jr. Thomas Wasson
Wilson, Brian Godfrey
Wilson, Patrick Clinton
Winfrey, Tonia Nanette
Wolfe, Robert Wayne
Yoder, Stephen Alan

Lawyers in the Family



*Sara Marie Turner (2006),
Kile Trivison Turner (1994)
Admittee, husband*



*John Stanford Odem (2006),
Dennis Neal Odem (1976)
Admittee, father*



*William M. Averett, Jr. (2006),
Joy B. Averett (2005)
Admittee, wife*



*Nicole E. Sullivan (2006),
David A. Sullivan (1979)
Admittee, father*



*William Taylor Stewart (2006),
Donald W. Stewart (1965)
Admittee, father*



*David Carl Williams, Jr. (2006),
Walter A. Williams, Jr. (2001)
Admittee, uncle*



*Gregory Scott Berry (2006),
James Radford Berry (1989)
Admittee, father*



*Jackson Brett Harrison (2006),
Donald Richard Harrison (1973)
Admittee, father*



*Kenitra Irma Lacy Fewell (2006),
Hugh G. Lacy (1990)
Admittee, father*

Lawyers in the Family



*Renay Bertella (2006),
Charles E. Robinson, Jr. (1996)
Admittee, brother-in-law*



*Joe Graham Barnard, Jr. (2006),
Julie Plant Barnard (2004)
Admittee, wife*



*Marlin Brian Hood (2006),
Rhonda Steadman Hood (1996)
Admittee, wife*



*M. Ryan Rumsey (2006), Robert Lee Rumsey (1972), Reagan Rumsey (2004)
Admittee, father, brother*



*David Carl Alexander, Jr. (2006),
Marshall Douglas Ghee (1975),
Admittee, father-in-law*



*Johnna Baker (2006), Charles D. Baker (1973), Thomas Burgett (1995),
Tina Burgett (1996)
Admittee, husband, brother, sister-in-law*



*Daniel Fordham (2006),
Florence Mangum Cauthen (1979)
Admittee, aunt*

Lawyers in the Family



*Meredith Lilly (2006), Alan L. Foster (2002),
Nedra McClinton-Garrett (2002)
Admittee, cousin, cousin*



*Paula Pringle Stokes (2006), Tyrone C. Means (1977),
Fred E. Bell (1983)
Admittee, cousin, cousin*



*Jonathan Kaz Espy (2006),
Collier Espy, Jr. (1976)
Admittee, father*



*George W. Royer, III (2006),
George W. Royer, Jr. (1972)
Admittee, father*



*Suzanne McCreedy (2006),
Bill Chandler (1997)
Admittee, husband*



*Scott Bradley Holmes (2006),
David F. Holmes (1985)
Admittee, father*



*Jennifer Mae Davis (2006),
Michael Guy Holton (2000)
Admittee, fiancé*



*Morgan Butler (1981), Mary Cash (2006)
Stepfather, Admittee*

JANIE L. SHORES

Scholarship

Established to Honor First Female Justice on the Alabama Supreme Court



Justice Janie L. Shores
Photo Credit Ken Ives Studio

Along with the Women's Section of the Alabama State Bar, the Alabama Law Foundation has established the Justice Janie L. Shores Scholarship in honor of the first female justice on the Alabama Supreme Court.

"We chose to honor Justice Shore because she has accomplished so many groundbreaking achievements in the legal field and has been such a great role model for the women who have followed in her footsteps," said Mary Margaret Bailey, chairwoman of the Women's Section of the Alabama State Bar.

The scholarship will be awarded annually to one or more female residents of Alabama attending an Alabama law school.

"The Women's Section wanted to do something positive to benefit women lawyers in Alabama. A scholarship seemed to be the perfect vehicle for accomplishing this because it would not only help women entering the profession but also unite women already in the profession," said Bailey.

Janie L. Shores was elected to Alabama's highest court in November of 1974. Since her election, she has received numerous professional and civic awards, including the Alabama State Bar Commissioners' Award of Merit in 1998,

and she has served on the boards of numerous community and government organizations.

Before being elected to the Alabama Supreme Court, Justice Shores was a professor at the Cumberland School of Law. She graduated from the University of Alabama School of Law with honors, and she received her LL.M. from the University of Virginia.

To help fund the scholarship, the ASB's Women's Section held a silent auction during the state bar's Annual Meeting in July and raised over \$7,000.

Bailey said, "The Justice Janie L. Shores Scholarship Fund will be a perpetual project that we can all contribute to and all work together to raise money to help the fund grow through the years."

For more information, contact Tracy Daniel at (334) 269-1515. Contributions may be sent to the Alabama Law Foundation, P.O. Box 671, Montgomery 36101. ■

The Alabama Law Foundation, a non-profit organization comprised of attorneys from throughout the state, is administering the scholarship. The law foundation is dedicated to law-related charities and is primarily funded by donations from its members, other individuals and corporations.

2007 ALABAMA STATE BAR LEADERSHIP FORUM Update and General Selection Criteria

BY TRIPP HASTON

In 2005, the ASB Board of Bar Commissioners initiated the ASB Leadership Forum. The Leadership Forum's missions are to:

Raise the level of awareness of lawyers as to the purpose, operation and benefits of the ASB;

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;

Form a pool of lawyers from which the ASB, state and local governmental entities, local bar associations and community organizations can draw upon for leadership and service.

With a mere two years of graduates, the Leadership Forum has achieved meaningful success, by any measure. Speak with any graduate of the Leadership Forum about his or her experience and you are assured an enthusiastic response about the program itself and the relationships formed while a member. In terms of public service, the Leadership Forum alumni now include a member of the state house of representatives, candidates for Alabama judgeships and new members of the ASB Board of Bar Commissioners.

The second class of the Alabama State Bar Leadership Forum graduated May 18, 2006 during a graduation banquet at the Capital City Club in Montgomery. ASB President Bobby Segall acted as emcee. Boots Gale, then president-elect of the ASB, introduced the guest speaker, William J. Canary, president and CEO of the Business Council of Alabama. John Earnhardt, 2005 graduate, spoke on behalf of the 2005 class. President Segall and President-Elect Gale presented each of the 29 graduates with a boxed compass inscribed with their name "for participation

in the Alabama State Bar Leadership Forum 2006." Graduates Tracy Cary, Sandy Speakman and Matt Minner gave inspired responses.

If you have been a member of the ASB for more than five years, but no more than 15 years, please consider applying to become a member of the 2007 ASB Leadership Forum. Following receipt of all applications, the Selection Committee, appointed by the president of the state bar and comprised of Leadership Forum alumni, reviews the applications for the following criteria in making the initial selection decisions:

1. Demonstrated leadership ability based on past accomplishments and current engagements;
2. Practice diversity (criminal; civil; governmental and corporate);
3. Geographic diversity;
4. Racial diversity; and
5. Previous application to the Leadership Forum.

Each year, the Selection Committee seeks to draw a broad and representative class of between 25 to 30 members from throughout the ASB membership. The initial class suggested by the Selection Committee is reviewed by the Executive Committee of the ASB and the final selection is made and approved by the board of bar commissioners. Alumni of the Leadership Forum are listed below if you wish to contact one of them concerning their experience. ■



Tripp Haston

Tripp Haston is a partner with Bradley Arant Rose & White in Birmingham. He is a graduate of Auburn University and the University of Alabama School of Law, *summa cum laude*, in 1993. Following law school, he clerked for the Hon. Emmett R.

Cox of the United States Court of Appeals for the Eleventh Circuit. He is co-chair of the 2007 Alabama Leadership Forum.

2006 LEADERSHIP FORUM GRADUATES

Christopher E. Abel
F. Wendell Allen
A. Vernon Barnett, IV
Robert E. Battle
Brannon J. Buck
Tracy W. Cary
Shayana B. Davis
Helen Kathryn Downs
James F. Hughey, III
Wyndall A. Ivey

B. Keith Jackson
Tracie B. Lee
Tara W. Lockett
Jonathan M. Lusk
Champ Lyons, III
Foster F. Marshall
Kim B. Martin
Robert G. Methvin, Jr.
Matthew C. Minner
Julie S. Moody

Joseph E. Powell
Thomas A. Radney
Patrick Sefton
Roman Ashley Shaul
Pamela B. Slate
R. Brian Smith
Sandra L. Speakman
Aldos L. Vance
Jon G. Waggoner

2005 LEADERSHIP FORUM GRADUATES

M. Bradley Almond
Melissa K. Atwood
Mary Margaret Bailey
Jennifer McCammon Bedsole
Anna-Katherine Graves Bowman
Ryan G. Brake
Kathleen A. Brown
Anna Funderburk Buckner
Paul J. Demarco

John A. Earnhardt
T. Charles Fry, Jr.
Fred M. Haston, III
Pamela R. Higgins
Christopher R. Jones
Kelly T. Lee
Heather F. Lindsay
Reta A. McKannan
William J. Miller

Teresa G. Minor
Robert L. Minor
Paige Carpenter Oldshue
Anthony C. Portera
Gabrielle Reeves Pringle
David E. Rains
Richard J.R. Raleigh, Jr.
John A. Smyth, III
Rhonda F. Wilson

ALABAMA STATE BAR LEADERSHIP FORUM CLASS III-2007

DO YOU HAVE WHAT IT TAKES?
We want you to take a chance on yourself
and see if you have the "right stuff."

Mission: 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

Applicants should submit a completed application to the Alabama State Bar, Attn: Edward M. Patterson, P.O. Box 671, Montgomery 36101-0671, along with (a) your personal resumé (not to exceed two pages), (b) one letter of recommendation and (c) a narrative summary addressing why you should be selected as a participant in the Leadership Forum Class, what you consider to be your most important contribution to the legal profession and to the community, and what you hope to gain from participation in the Leadership Forum. The narrative summary should conclude with a signed statement that you understand attendance is a requirement for the successful completion of the program. Applicants must have practiced law for not less than five years and for not more than 15 years (based upon first admission to any state bar).

Applications must be completed and received no later than November 1, 2006. Successful applicants will be notified December 15, 2006. Each class will consist of no more than 30 participants. The program will consist of five sessions: an overnight orientation session January 25-26, 2007 and four all-day sessions: February 22, March 22, April 19 and May 17 with a graduation banquet on the evening of May 17. Some overnight travel may be required. One excused unexpected personal or professional absence is allowed. Applicants are encouraged to apply only if they expect to attend all sessions. For more information, direct all questions either to *Tripp Haston* at (205) 521-8303 or thaston@bradleyarant.com or to *Keith Jackson* at (205) 879-5000 or kj@rileyjacksonlaw.com.

Name _____ Position _____

Employer/Firm _____

Business address _____

Street/Suite/City/State/Zip _____

Business phone (____) _____ Fax (____) _____ E-Mail _____

What is your area of practice? _____


Year of first bar admission _____ States admitted _____

A \$300 tuition fee for each participant will be due by January 15, 2007. Payment plans are available. A limited amount of scholarship money is available. If accepted in the Leadership Forum, will you find it necessary to seek scholarship assistance toward the tuition fee, and if so, what percentage?

Please check one: Yes _____ % No

I understand (a) the mission of the Leadership Forum 2007, (b) that attendance is mandatory and (c) I will devote the time and energy necessary to make it a successful experience if I become a participant.

Signature



A PERSPECTIVE ON THE ALABAMA STATE BAR'S 2006 LEADERSHIP FORUM CLASS II

BY KEITH JACKSON

In this country, our courts are the great levelers, and in our courts all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality."

Those words are as meaningful today as they were when Atticus Finch spoke them to the jury empanelled to hear the trial of Tom Robinson in Harper Lee's classic tale *To Kill a Mockingbird*. In Atticus Finch, Harper Lee gave us a man, a lawyer, who without aggrandizing or engaging in self-promotion, managed to exude the spirit of a humble leader. Atticus Finch did not attain his status as a leader by receiving a meaningless title or designation. Rather, he obtained his status as a leader through service—service to his clients, service to his family and service to what is right and true.

Before I was introduced to the Alabama State Bar Leadership Forum, I had never considered the meaning underlying the Alabama State Bar's motto, "Lawyers Render Service." I realized that using my law license to serve was important, and I certainly would have identified Atticus Finch as the embodiment of that which is good in the practice of law. Like most of us, I would have agreed that we, as lawyers, are particularly well-suited to serve others in our community by virtue of our training and knowledge of the legal system. When I had the privilege to

participate in the 2006 class of the Leadership Forum, however, I recognized the ASB's motto as more than a pleasant mantra. I recognized it as a call for action.

"Servant leadership" is a phrase used often in the Leadership Forum as a logical extension of the ASB's motto. But it took time for me to appreciate the meaning of those three simple words, "Lawyers Render Service." I was guilty of immediately associating the word "leader" with elected officials, military commanders and those possessed of impressive titles in their chosen fields. As I considered the phrase servant leadership, however, it made perfect sense. The men and women posterity recognizes as great leaders are admired for their service to others, not for their attainment of a title. For those who wish to learn how we, as Alabama lawyers, can walk out this noble purpose of leadership through service, I strongly recommend that you apply to participate in the 2007 class of the Leadership Forum.

The mission of the ASB Leadership Forum is to produce committed and involved lawyers who are willing and able to fill significant leadership roles in local and state bars, in communities and in state organizations, and who will serve as role models in matters of ethics and professionalism. Approximately 30 members of the ASB were selected to participate in the 2006 class. The group had a diverse racial background and came from throughout the state. Our practices



include plaintiff and defense firms, private and public practice, and civil and criminal practice. Some of us work in small family firms, while others are with the largest firms in the state. From these varied backgrounds a group of lawyers came together for one unifying purpose: To learn how we can better lead through service and, in so doing, benefit our communities and the ASB, and perhaps in the process find a way to better ourselves.

Ed Patterson, ASB director of programs, with assistance from many bar members, including the planning committee co-chaired by Alyce Spruell and Tripp Haston, implemented a carefully designed program of five sessions beginning in January and ending with a graduation in May. The forum began with an overnight leadership retreat and orienta-

tion session at the North River Yacht Club resort in Tuscaloosa. The retreat gave us an opportunity to learn more about our classmates and our purpose in the forum. A panel session with attorneys from various public service sectors provided new insight into the role of lawyers serving on the bench, serving the indigent and serving constituents in the Alabama legislature.

The remaining four sessions, which were held in the boardroom at the ASB in Montgomery, focused on a specific trait of servant leaders and included "Principles of Leadership," "Leadership Through Service," "Ethics, Justice and Values" and "Professionalism." To achieve the goal of raising lawyers' level of awareness as to the purpose, operation and benefits of the ASB, we learned how

the ASB is organized and administered. We learned about the Alabama Law Foundation's mission, the jobs performed by the board of bar commissioners and the work done by the ASB's committees and task forces. Two field trips to the Judicial Building to view the Alabama Lawyers Hall of Fame, the appellate courtrooms, the library, the historical rooms, the private chambers of supreme court justices, and the supreme court conference room added to the variety of programming offered through the spring.

Judges, lawyers, professors and other servant leaders from throughout Alabama gave selflessly of their time to help us work toward the stated goals of the Leadership Forum. Discussing all of the considerable knowledge our speakers shared with us would be impossible, but

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a brief summary of a very small part of what we learned includes the following:

Major General Bentley Rayburn motivated us with a personal message defining the roles of leaders and followers and illustrating how true leaders work for the betterment of others.

Retired Judge Harold Albritton explored with us the meaning of the phrase "Lawyers Render Service" in today's society.

Professor Bryan Stevenson gave a deeply personal and moving speech about his work as executive director of the Equal Justice Initiative and his representation of death row inmates who have little or no resources to afford the quality of representation available to more affluent defendants.

Judge Randall Cole presented us with a case study on justice against the backdrop of *To Kill a Mockingbird* and led a frank and candid discussion about how we can work against unwelcome influences on the civil and criminal justice systems.

Jefferson County Presiding Judge Scott Vowell offered valuable insight into the minds of jurors while explaining recent amendments to the Alabama Pattern Jury Instructions.

Retired Justice Gorman Houston devoted an entire day to overseeing our session on professionalism and led us through a group consideration of how servant leaders in the ASB should respond in difficult situations with potentially conflicting interests to serve.

Judge Karen Bowdre, Judge Sue Bell Cobb, Judge Joseph Battle, Judge Ralph Cook, Senator Rodger Smitherman, Rep. Paul DeMarco, Lenora Pate, Boots Gale, Maibeth Porter, and many others too numerous to mention participated in panel discussions on various topics that enriched, inspired and enlightened all of the forum participants.

At key points throughout the sessions, the discussion moved from the speakers to the forum participants. It was this interaction among the group and between mem-

bers of the group and the speakers that truly set the Leadership Forum apart from other programs that are structured to be more like a seminar. Our discussions were not confined to easy points of consensus. Rather, we discussed difficult issues that we, as lawyers, face by virtue of our profession, our differing socioeconomic backgrounds and our individual practices. Various and sometimes conflicting points of view were shared and discussed to the benefit of all the participants. It was truly edifying to be part of a diverse group of attorneys who engaged in this type of consideration and discussion of sometimes differing but always valid and well-reasoned opinions with mutual respect and civility.

Through this process, all of us who participated in the 2006 class formed new friendships and gained new perspective that we will carry forward in both our practices and our personal lives. I consider it an honor to have associated with my classmates through this process, and I consider it a privilege to call my classmates friends. By sharing this experience, we ensured that none of us will fall victim to the trappings of anonymity in any future dealings we may have with each other, and we all benefited from the thoughts and experiences of others whom otherwise we may never have met. It is through focused, meaningful programs like the Leadership Forum that I believe the ASB has its best chance to ensure civility and professionalism between and among the members of our bar.

Every member of the ASB has achieved what I believe is a special distinction. We are lawyers. We are members of a noble and meaningful profession, but along with our membership in this profession come moral and ethical obligations that we must embrace. In my practice, I primarily represent plaintiffs in civil litigation. The economic reality of such a practice is that attorneys in my position benefit financially from unfortunate circumstances suffered by others. This is true in some form for

almost all practicing lawyers. Whether through the work of civil litigation lawyers, criminal defense lawyers, prosecutors, public servants, state employees, or transactional lawyers, the very nature of our profession is such that our clients seek us out because of a problem or a need.

Along with that considerable responsibility to our clients comes a responsibility to our profession and other members of the ASB. We should be cautious of referring to a resumé as evidence of any accomplishments we may have achieved. I do not intend to diminish personal or professional accomplishments, but in the practice of law we are judged most by our peers on how we conduct ourselves on a daily basis and by the attitude and personality we bring to the practice of law. With the Leadership Forum, the ASB has created a wonderful opportunity for individual attorneys to work toward improving our state bar and our profession not only by learning how to lead through service, but also by remaining mindful of the importance of honoring our profession through ethical and professional conduct.

If you are a member of the ASB who has practiced not less than five and not more than 15 years, I again urge you to consider applying for membership in the 2007 class of the Alabama State Bar Leadership Forum. You will be asked only to give a few days to the forum. What you will take away will leave you enriched, inspired and able to call a new group of lawyers your friends. ■



Keith Jackson

Keith Jackson is a shareholder in the Birmingham firm of Riley & Jackson, PC. He graduated from the University of Alabama and Emory University School of Law. He is admitted to practice in Georgia and Alabama. He is co-chair of the 2007

Alabama Leadership Forum.

Lawyers Make Change.

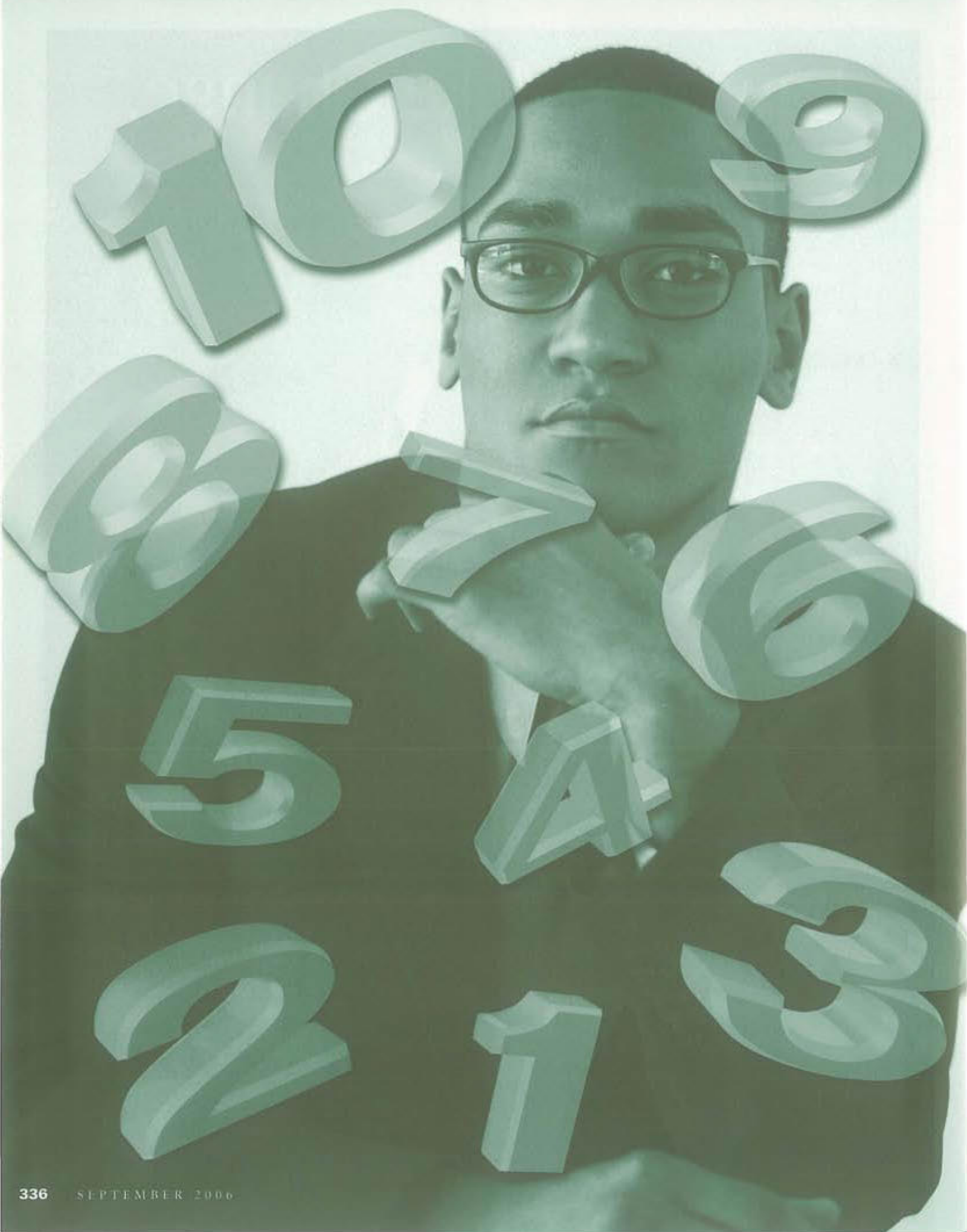
You are an invaluable guide in helping your clients develop and execute charitable giving plans. Discuss various giving options with your clients. Explore the ways they can support what is closest to them while benefiting their financial situation at the same time.

To learn more about your clients' charitable giving options, ask your local bar association about providing the 2 hour CLE course "Change Alabama with Giving Alternatives" or contact your local community foundation at www.cfalabama.org.



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The Top Ten Things Your In-House Counsel Wants from You

BY ALLISON D. GARRETT

Few companies have enough in-house lawyers to handle all of the company's legal work. Working as outside counsel for these companies can be lucrative and, through networking with professionals outside the local practice area, can enhance a firm's reputation and skills. For nine years, I worked with law firms all over the United States and around the world while I was in Wal-Mart's legal department. As my in-house colleagues and I developed professional relationships with these law firms, we also developed appreciation of factors that influenced our selection—and continued employment—of outside counsel. This article outlines some important things to keep in mind when working with in-house counsel.¹

1. Be prompt.

Wal-Mart called this a "sense of urgency." Recognize that in-house attorneys have clients, too. If counsel leaves a voice mail message for you or sends you an e-mail message, they would like an acknowledgement within an hour or two.² If you wait until the next day to respond, they may have found someone else to handle the matter. The "crackberry" and voice mail are your friends; use them often.

Of course, in-house counsel understands that if we call with a knotty question, you may need to do some research. We are not seeking an instant answer, but the ability to report to our clients that outside counsel is researching the matter and will have an answer by the end of the day tomorrow.

If you promise counsel a memorandum by the close of business the next day, make sure you deliver. In-house counsel have deadlines, too. Just like you, we want to impress the people with whom we work. If you provide the information a couple of days late, the next time a project requires a quick turn time, another firm may well get the project.

2. Be attentive to detail.

You are paid to handle the company's work in a professional manner. Details matter. If your letters, memoranda or e-mail messages consistently contain typographical or grammatical

errors, in-house counsel may conclude that it is representative of your other work product.³ In addition, these types of errors require in-house counsel to waste valuable time proofreading your work. In-house attorneys are not copy editors, and it is not their responsibility to proofread your work. At the rates you are paid, your work should be error free.

3. Hire a great assistant.

Your assistant should know in-house counsel. When in-house counsel calls, an offer to interrupt you or find you is greatly appreciated. In-house counsel will try not to abuse the privilege of interrupting you unless it is an emergency, but they appreciate the offer. If you are out of town, let in-house counsel know, and have your assistant monitor your voice mail and email. Your assistant should feel free to respond to a message to let in-house counsel know that you are out of town. Your assistant should ask whether it is an emergency, whether someone else can help and whether the matter can wait until you return.

4. Staff projects with the right amount of expertise.

Some projects require outside attorneys who have a great deal more specialized knowledge than their in-house counterparts. Even though I had SEC experience and an LL.M. in securities law, I still relied on outside securities law attorneys with a substantial amount of experience in particular matters. Make certain that the engagement partner on a particular matter is a genuine expert in his or her field. In-house counsel will lose confidence in your abilities when they have to point out too many issues that you overlooked.

In many instances, in-house attorneys send out what they describe as "commodity work." Commodity work is boring, redundant work that can and should be performed by junior associates or law clerks. General counsels know that an easy way to boost the morale of their in-house staff is to allow the staff attorneys to work on interesting projects in-house and farm out the boring work.⁴

5. Be cost effective.

If your firm is assigned routine legal work, managing billings to minimize client costs is extremely important. There is a lot of competition within the legal community for this bread-and-butter kind of legal work, so it is crucial that the work be handled efficiently and by the lowest hourly billing attorney capable of competently completing the work. Do not overstaff the commodity work with a partner when a junior associate will do.

6. Provide close air support.

Expect in-house counsel to call you for what amounts to a second opinion. It may be that counsel has already explained the law to the company executive, and the executive did not like the advice. Recognize that in some instances in-house counsel is looking for support for their position. If your legal analysis supports the position of the in-house counsel, say so. That is not a license to rubber stamp in-house counsel's advice. But if you disagree with in-house counsel, try not to embarrass him or her in front of company executives.

7. Increase your firm's bench strength.

If the engagement partner is out of town or unavailable, a firm that has other attorneys who can handle the work has a significant advantage over a firm that is out of commission when the partner is tied up. Expect prudent in-house counsel to ask you what will happen if you are hit by a bus tomorrow and be prepared to discuss your firm's contingency plans. Although in-house counsel is reluctant to pay for your firm to train young associates by double-staffing the work, it is comforting to know that other attorneys at your firm can help us in a pinch. Lateral hires might be needed to fill gaps in your firm's bench strength.

8. Avoid unpleasant surprises.

Like all clients, in-house attorneys expect consistently excellent work from you. They also expect predictability in billing. If counsel negotiates a flat or capped fee on a particular project, unpleasant billing surprises will prompt them to look elsewhere for future legal work. If the project is more complicated than expected, call counsel well before you hit the cap to discuss changes to the fee agreement.

In addition to excellent work product and good billing practices, predictability of results is important. Business people make decisions on the basis of the most likely outcome. For example, negotiations over indemnification provisions should focus on realistic contingencies. The company does not want to pay you to negotiate what happens if an asteroid hits the company's office building. Similarly, if you win 95 percent of the company's cases that you take to trial, you may be too focused on risk avoidance. Maybe you should recommend trying more cases. Because in-house attorneys are business people in addition to being lawyers, they focus on acceptable risks. Predictability is good, but acceptable risk is part of business. Help identify what is acceptable risk and avoid risks that are unacceptable and predictable.

9. Give in-house counsel some breathing room.

It may be counterintuitive, but visiting in-house counsel's office might actually harm your relationship, even if you do a fair amount of ego stroking in the process. Like all clients, in-house attorneys like it when you pretend that we are the smartest people in the room and act as if our pronouncements are inspired. But, in-house attorneys are extremely busy. When we have to drop our work to hold an audience with outside counsel, it can be annoying, especially if we did not request the meeting.

So give in-house counsel some breathing room. Occasional messages about a recent case, a new law or our competitors' activities are helpful. Unless requested, meetings are not usually helpful.

10. Be fun.

Several years ago, Wal-Mart's Finance Department gave a special award to a law firm that had done a tremendous amount of high quality work for the company for several years. In praising the firm, the executives in the Finance Department noted that these attorneys were professional, hard working and—above all—fun.

Humor goes a long way in business. It is far easier to negotiate a 50-page document in the wee hours of the morning if you like the people with whom you are working. Given a choice between hiring competent, pedantic and boring attorneys, or competent, pleasant and fun attorneys, in-house counsel will hire the fun attorneys every time.

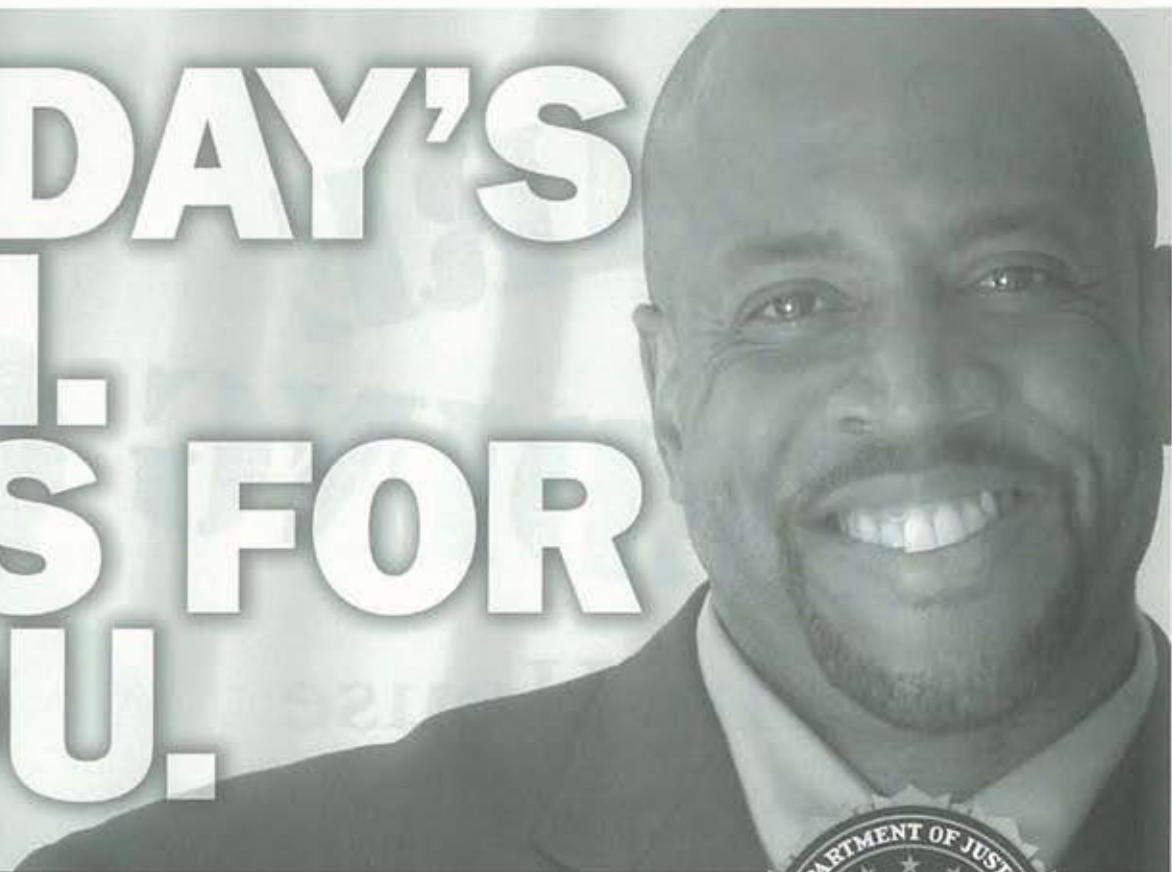
ENDNOTES

1. As you review this list, you may feel that in-house lawyers are too picky. Worse, you might conclude that in-house lawyers are petulant and demanding. Perhaps these are valid criticisms. Yet, because in-house counsel makes the hiring—and firing—decisions when it comes to outside counsel, it may be worth a few minutes to consider what pleases them.
2. Admittedly, in-house attorneys do not always reciprocate. Many of you have probably been frustrated trying to get in-house attorneys to return your calls as you prepare responses to discovery.
3. As with return of phone calls, there is a double standard here, too. There may be errors in the work product of in-house counsel, but that does not excuse errors in your work.
4. Or, perhaps, in-house attorneys simply kept the project long enough to bungle it before sending it to you. It happens.

Allison D. Garrett

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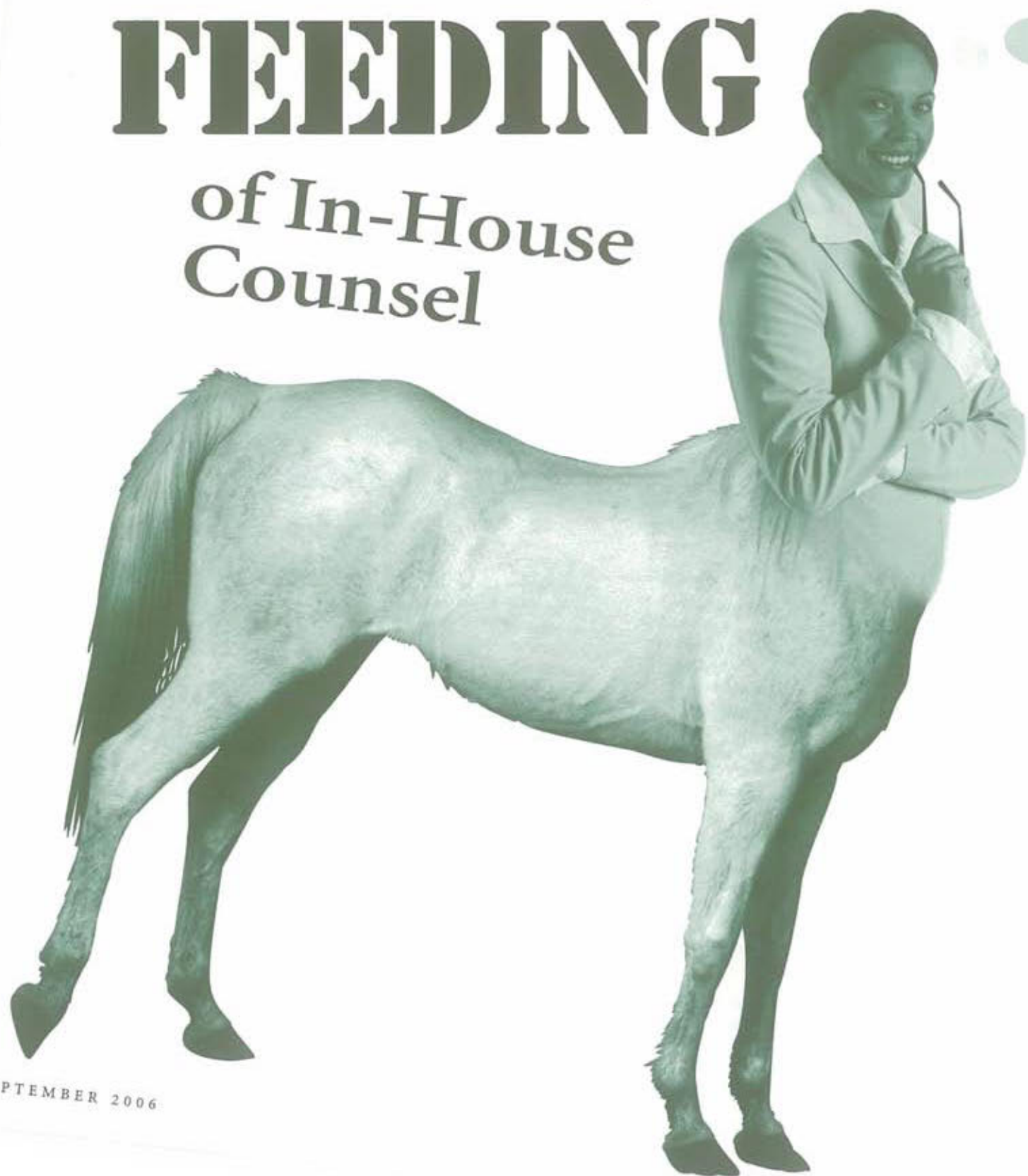
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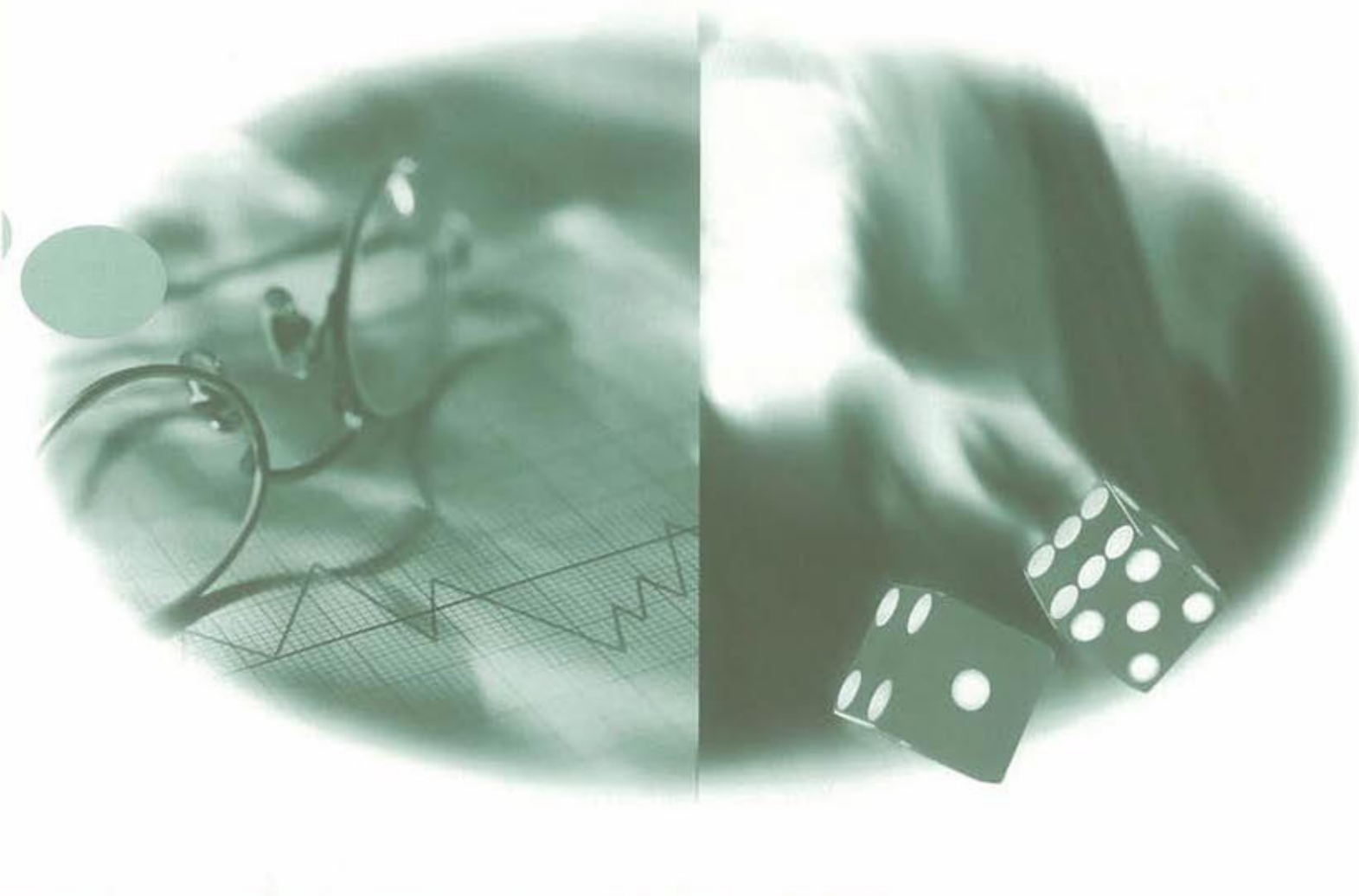


The **CARE**
and
FEEDING

of In-House
Counsel



SEPTEMBER 2006



BY ALBERT L. VREELAND, II AND JENNIFER L. HOWARD

They are much loved for their ability to dole out legal work, much feared for their ability to understand (and assess) the work we do, and much misunderstood for their divided allegiance to both business and the law. We speak, of course, of the in-house counsel—that Centaur-like half lawyer, half businessperson. They embody an uneasy combination of conflicting traits: a cautious eye toward risk analysis and an aggressive, roll-the-dice attitude toward business decisions. And for this reason, they remain an utter mystery to the private practitioner.

The results, unfortunately for us, show it. The Association of Corporate Counsel's 2005 survey released in October indicates that more than half of in-house counsel terminated relationships with at least some of their outside counsel in the previous year. (*2005 ACC/Serengeti*

Managing Outside Counsel Survey Report, Assessing Key Elements of the In-house Counsel/Outside Counsel Relationship.) Another recent survey of corporate counsel indicates that client satisfaction is dropping—less than a third of clients would recommend their primary law firm. (BTI Consulting Group, Inc., *How Clients Hire, Fire, and Spend: Landing the World's Best Clients 2006.*)

Many moons ago, you kept clients by doing good work. If you won the case, the client called you the next time they were sued. Those idyllic, seersucker days of the practice are gone; you can lose a client without ever knowing what happened (sometimes without knowing that it has happened). What can you do to preserve and strengthen your relationship with your favorite in-house counsel? The answer begins with a better understanding of their world.

Understanding the In-House Counsel

It has been said that where one stands depends on where one sits. To work more effectively with any client, it is necessary to understand their perspective. Most in-house counsel have multiple perspectives because they wear multiple hats: legal advisor, risk manager, compliance monitor, manager of lawyers (and legal expenses), and, usually, business advisor.

As private practitioners, we are trained to see legal issues, often to the exclusion of everything else. When we look at a child's toy, we see design elements that need protection against piracy and parts that can be swallowed and cause personal injury. The in-house counsel sees this too, but also sees the bigger picture of how the many legal issues impact the toy's manufacture, distribution and marketing.

When the folks in the executive suite ask the in-house counsel for advice, they expect more than the standard lawyerly risk analysis which concludes that every possible course of action has its own legal risk. Most lawyers are great hand-cappers who never actually pick a pony but just explain why each pony may lose. The in-house counsel has to pick a pony to win and explain why—without legal disclaimers, qualifications and financial statement footnotes. Corporate-level executives want advice on what makes business sense in light of the various risks, and they want it in a user-friendly form.

Helping the In-House Counsel

Wearing as many hats as Carmen Miranda, the in-house counsel needs your help to get the job done, but that assistance has to be delivered at the right time, to the right address and in the right package (and often at the right price).



Most in-house counsel have multiple perspectives because they wear multiple hats: legal advisor, risk manager, compliance monitor, manager of lawyers (and legal expenses), and, usually, business advisor.

Give Them What They Need When They Need It

Many in-house counsel struggle under ever-increasing workloads. Their time is at a premium, and one of the primary reasons in-house counsel terminate their relationships with outside counsel is the outside attorney's lack of responsiveness.

You can't over-estimate the importance of promptly responding to your client. Clients want the comfort of knowing that they have access to their lawyers when they need them. Keep in mind that what is "prompt" in the business world is a different thing than what often passes for "prompt" in the legal world. Same-day service is the standard for most in-house counsel. If you do not receive their inquiry in time to respond the same business day, you certainly should not wait longer than 24 hours.

True, you are not a fast food restaurant, and putting together a brief or a

legal opinion letter is not like serving the daily special. If you need more time to complete the work requested, communicate with the in-house counsel about your availability and a reasonable timetable for how long the work will take; a quick e-mail or phone call may be all it takes to make the client feel that you are not ignoring them. Then beat the time table. If you are out of the office, don't leave your client wondering if you received their inquiry—have someone else return the call or e-mail and handle the issue if it's time sensitive.

In-house counsel have different management styles in terms of how involved they want to be. Some may be overseeing so many cases or transactions that they simply do not have time to be integrally involved with them all. Others may want to be intimately involved with every decision. Find out your in-house counsel's preference in this regard to help her most efficiently manage her workload. Be particularly mindful of the following:

1. Policies and procedures for outside counsel

Most larger companies have standard guidelines for outside counsel with procedures for everything from how to bill to what forms to use in reporting your actions. In general, these guidelines have been designed to automate certain functions and thereby help in-house counsel manage their burgeoning workloads. If your client has guidelines, review them carefully and make sure to adhere to them. If you ignore them, you create more work for your in-house contact—who doesn't want more work and will likely hire somebody who follows the guidelines next time.

2. Keeping your client informed

With every client, you have an ethical duty to keep them informed about the status of their matter and the progress of your work. Because they oversee many legal matters, most in-house attorneys have a preference as to how you keep them informed. Some have very specific procedures for keeping them apprised of your actions, such as specific forms to be

submitted at specific intervals. Some are happy to be copied on all correspondence and pleadings, while others don't want to sort through the mountain of paper and prefer a summary of new developments by phone or e-mail when something significant happens. Don't wait until you're told that you got it wrong. At the very beginning of your relationship, find out what information they want and how they want it. Make sure you keep them informed in the manner that best suits their needs.

3. Give them plenty of time to respond to you

Although you must be extremely sensitive to your in-house counsel's schedule, you cannot expect that he will be keeping your time constraints on the top of his mind; he often has too much going on to keep up with everyone else's schedule and, after all, he's the client. If you need a response from your in-house counsel, such as when he wants input into briefs or other documents, do not wait until the day of the filing deadline to send it. Like many clients, you cannot assume that the in-house counsel will be in the office or, even if he is in the office, that he will have time that day to review your matter. Find out in advance what your in-house counsel's schedule is and how much time he will need to review documents and make changes before they are filed. Let him know your timeline. Even if you informed him of your current deadline months ago, a little reminder wouldn't hurt.

4. Respect your in-house counsel's wisdom

Remember that the in-house counsel knows more than you about the company and its needs. They know the personalities, the politics and the priorities (and usually know where the skeletons are buried). Take advantage of this knowledge—it can save you time and embarrassing missteps. For example, how you posture a case and the claims you pursue can affect who the critical witnesses will be. The in-house counsel may want to forego an otherwise good claim or take a different

tack to avoid putting a particular executive on the stand who makes a bad witness or who doesn't like to be bothered with lawyers. It's much easier and more discreet to find out about these issues beforehand than to try to

backpedal after the fact. In-house counsel's willingness to get involved will depend on the importance of the matter, but it should be their choice. Keep them as involved as they want to be in strategic decisions.



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Some companies (wrongly, we think) view legal budgets as nothing more than a drain on profits, and most in-house counsel are under constant pressure to contain and even reduce the company's legal expenses.

5. **Money, money, money, MONEY. (Money!)**

Some companies (wrongly, we think) view legal budgets as nothing more than a drain on profits, and most in-house counsel are under constant pressure to contain and even reduce the company's legal expenses. Because of this pressure, many in-house counsel are obsessively fee-conscious, asking for rate concessions, scrutinizing bills and negotiating alternative fee arrangements. Their companies are asking them to do more with less, which explains why cost is another major reason why in-house counsel go shopping for new legal representation.

The uncomfortable dance over rates and fees is usually dictated by the type of work you do, whether the client considers it a commodity (and therefore negotiable) or mission critical (and therefore price is no object). But whatever type of work you do and whatever fee arrangement you strike, the in-house counsel should never be (unpleasantly) surprised by the size of a bill. Though it may seem like tedious corporate bureaucracy to us, in-house counsel request budgets for a reason. They understand that legal budgets are only estimates and are contingent on many factors beyond our control, like unexpected rulings from the court, unreasonable opposing counsel and messy, newly-discovered facts. The budget nevertheless gives in-house counsel a benchmark on which they and the bean counters can base their financial planning.

When the unexpected does arise, however, alert the client as soon as possible and revise the budget accordingly. If a particular bill is larger than anticipated, don't wait for the client to call you about it; send a letter with it that explains what caused the spike and what it portends for future bills. Also, just because a line item makes it into the budget doesn't mean that it has to be done. As a matter progresses, be prepared to provide your analysis of whether the cost of a particular action is worth the likely benefit. For example, in-house counsel may not want you to file for summary judgment if the likelihood of winning is minimal.

When it comes to the actual bill, review yours carefully before sending it

to the client. If in-house counsel see entries on the wrong bill, typos or misspellings of the client's name, at best they assume you haven't reviewed the bill with care and therefore will scrutinize it carefully themselves. At worst, they may assume that you are as careless with their legal work, and this may be your last bill to them. Use descriptions that convey the importance of your activity (i.e., "developing strategy for ...") and avoid entries that sound like a couple of lawyers shooting the breeze over coffee (i.e., "conference with attorney in next office re: case status"). Finally, don't nickel and dime the client; it's like an expensive hotel that charges you extra for the morning paper. Nothing irks in-house counsel like paying separately for minor activities (leaving phone messages) and expenses (conference room coffee) when they already pay you handsomely for the real work.

When it comes to billing format, the client holds the trump card—the check. If you don't bill in their preferred format, you don't get paid. To you, it may seem like a trivial administrative matter in light of the excellent result you just achieved through brilliant lawyering. But to in-house counsel, your non-compliant bill creates more work for them. Make it easy for them to pay you; take a few extra minutes to make sure that you submit bills in the way they want them.

Do they want every charge to be itemized with a breakdown of how much time was spent on each task by each time keeper? Or would they be happy with a "block bill" that has the total amount of time spent and a description of all work done that month? Do they limit or altogether exclude certain overhead types of expenses, like copying and deliveries? Many companies now require you to use e-billing or Web-based matter management systems. Often, it saves in-house counsel time if you reference an internal cost center code or organize your tasks by matter rather than chronologically. Give it to them chiseled onto a stone tablet if that's their preference. You put a lot of effort into doing the legal work; don't let a few minutes of administrative housekeeping keep you from getting paid for your good work.

If they don't look good, you don't look good

Because they have many irons in many fires, in-house counsel rely on you to give them the information and advice to make good decisions. Remember, however, that it's ultimately their decision, and therefore the credit for good results should go to them. Don't hog the corporate glory; your reward will come when the in-house counsel sends you more work.

Making the in-house counsel look good, though, doesn't mean telling them whatever they want to hear. If the news is bad, deliver it on time and without whitewash. No one likes bad news, but it's easier to take if you haven't been lulled into believing that all is well. Keep in mind that in-house counsel have their own clients—internal constituents who often are the ones who sign their paycheck. If they've been preaching sunshine, they look foolish to their bosses when the thunderstorm rolls in. Give them a candid assessment of vulnerabilities and problems so that they can make informed decisions about the matter and so they can prepare their internal clients for the likely outcome.

On a related note, keep your in-house counsel informed of things they may get asked about—particularly when discovery and trial activities require the involvement of major players in the company. Even if in-house counsel don't want to be involved in the grunt work, managers and executives expect in-house counsel to monitor your activities. If they aren't aware of witness interviews, depositions of executives or witness preparation sessions, they appear to be out of the loop, or worse yet, unconcerned about something that the executive cares about (because it involves them personally). It also undermines in-house counsel if they appear to be unaware of some legal strategy you are pursuing—formulate legal strategies with the in-house counsel first before discussing them with others in the corporation.

The corollary of the make-them-look-good principle is to take ownership of your mistakes. We all make them, but the worst are those we try to hide. If you slip

up, inform your in-house counsel and propose possible solutions. If you delay disclosing the error, you lose opportunities to implement a fix, and you likely damage your credibility with your client. The cover-up is always worse than the crime. Fess up, early.

Working with the in-house counsel in litigation

Because in-house counsel often negotiate deals, conduct or direct internal investigations and offer input into business decisions, it is not unusual for them to be a witness in your case. This can be a tricky deposition for you on two fronts: preparing a witness who may not think he needs preparation and defining and defending the boundary of the attorney-client privilege.

Do not assume your in-house counsel will be a good witness

There are few absolutes in the world, but there is one of which we are sure: Lawyers (all lawyers) make horrible witnesses. Let's face it, as attorneys, we like to be in control, and there are few places where you have less control than the witness chair in a deposition. The topics can be wide-ranging and sometimes personal. You are required to talk only about what the questioner asks and, even then, only in the context she asks it. It's frustrating to any witness, but exponentially so to someone who is a trained advocate.

We also hate to admit that we do not know the answer to something (really anything); after all, that's what we're paid for, knowing the answer. This urge is especially strong among in-house counsel who are involved in almost every aspect of the company's business. Their clients rely on them to know the inner workings of the business and to keep them on the straight and narrow. To admit that they don't know some detail often feels to them like an admission that they haven't done their job, even if it's not accurate.

On a related note, we like to advocate—to pick a position (any position), to dig in and defend it. This can be fun for most lawyers when serving as an advocate, but it doesn't work at all for a witness in a deposition (or in a marriage, for that matter). Depositions are about real world events; they require witnesses to acknowledge imperfect facts and imperfect decisions. Hard line advocacy makes the witness look foolish at best and disingenuous at worst.

Most in-house counsel have sat through countless witness preparation sessions and depositions. They know the rules by heart: "Listen to the question carefully, just answer the question asked, don't volunteer . . ." If you ask them, they don't need preparation. *Au contraire, mon freire.* They need *more* preparation to fight these urges hardwired in every lawyer. You may have to exercise a little tough love here to expose these primordial urges to them, but they will appreciate it afterwards. They will feel these urges rumbling inside, but will be able to suppress them and to admit that they don't know an answer or that they acted on imperfect information. In the end, they and their case will be better for it.

While we're talking about bad witnesses, let's say a word about the corporate litigation hot potato, the deposition of the CEO. The conventional wisdom is that if the CEO gets deposed, the lawyer gets fired. What's the basis of this urban legal myth? The only group who consistently make worse witnesses than lawyers are the residents of the corner office. All of the attributes that make CEOs great business people make them horrible witnesses: unflinching confidence in their own judgment, the ability to make quick decisions without analyzing an issue to death, willingness to take risks without looking back and the belief that they can sell anything.

The CEO's deposition is a career moment for every in-house counsel, and you have to treat it accordingly. Work with your in-house counsel to manage the politics and personalities, take responsibility for the inconvenience to their crowded schedules and, above all, never, ever let anyone tell you that a CEO doesn't need thorough preparation.

Prepare for privilege issues

If the in-house counsel will be a witness in litigation, you can expect to encounter unique attorney-client privilege issues. The attorney-client privilege protects confidential communications made between a *client* and his lawyer for the purpose of facilitating the rendition of *legal* services to the client. When dealing with conversations between a company's in-house counsel and one or more employees of the company, the trick is determining who is the "client" and whether the communication related to "legal" advice.

Since every conversation that in-house counsel has with his company likely relates in some way to the company's business, the line between "legal" and "business" advice can sometimes be about as clear as mud. That line may be even harder to draw if the in-house counsel is an officer or director of the company—for example, was she wearing her "attorney hat" or her "business-person hat" when participating in a particular conversation? The difficulty of drawing this line may mean trouble in claiming that one or more of the in-house counsel's conversations with another employee of the corporation was protected by the attorney-client privilege.

Consider the various roles in-house counsel can play in an internal investigation. If they actually conduct the investigation themselves and the investigation is at issue in the litigation (perhaps as justification for the company's actions), then their communications are not privileged, or at least would be waived. What if the in-house counsel hires you to conduct the investigation? Then, your communications with the in-house counsel may be privileged. But, when the in-house counsel turns around and advises management on what to do with the results of your investigation, the question gets sticky. Was the advice legal or business?

In truth, it was probably both since few people draw bright lines between their various roles.

A relatively new line of cases wrestles with this issue and has limited application of the attorney-client privilege because of in-house counsel's mixed legal and business roles. Different tests have been applied, but generally in order for the communication to be privileged it must be primarily legal in nature, and the communication must have been made in the attorney's professional legal capacity.


Courts have not provided much guidance in how to distinguish between

was serving at the time of the communication. To invoke the privilege a corporation must also show that the communication was made in the attorney's "professional legal capacity." Where the communication is clearly given in the attorney's capacity as a business advisor or officer of the company, the communication will not be privileged even if some legal advice is included.

Because it is often difficult to determine when an attorney who serves in multiple roles is working in a "business" or "legal" capacity, courts examining this issue have handed down some surprising results. For example, in *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*, 1996 WL 29392 (S.D.N.Y. 1996), the court refused to apply the

attorney-client privilege to protect communications between an in-house counsel and the corporation he represented. In that case, the in-house attorney reviewed a proposed agreement between the company and Georgia-Pacific. Prior to execution, the attorney told a company executive that the environmental provisions of the proposed contract

might not cover certain types of claims and made recommendations as to how changes might be negotiated. The attorney then negotiated changes to the contract before it was adopted by the parties. When the agreement broke down and Georgia-Pacific sued, the court held that since the attorney negotiated the terms of the agreement, he was not exercising a "lawyer's traditional function" and was acting in a "business" capacity. Since the court found that the attorney was acting in a "business" capacity rather than "legal" capacity, it allowed Georgia-Pacific to discover all of the attorney's advice, including advice the court characterized as legal advice, about whether or not certain events were covered by the agreement and the degree to which his negotiations had left the company protected or unprotected.



Since every conversation that in-house counsel has with his company likely relates in some way to the company's business, the line between "legal" and "business" advice can sometimes be about as clear as mud.

"legal" and "business" advice. Some courts will not apply the privilege unless the communication was made primarily for the purpose of rendering legal services. Under this test, if there was a business purpose that was sufficient cause to make the communication, it will not be privileged. See *United States v. Chevron Corp.*, 1996 WL 264769, *3 (N.D. Cal. 1996). Courts have also suggested that advice is legal in nature if it concerns legal rights and obligations or where it evidences other professional legal skills such as a lawyer's judgment and recommended legal strategies. See *Rossi v. Blue Cross and Blue Shield of Greater New York*, 540 N.E. 2d 703, 706 (N.Y. 1989).

It can be even more difficult to determine the capacity in which the attorney

As courts struggle to determine which “hat” in-house attorneys are wearing when participating in discussions about company business, the unfortunate result is that some have resolved any ambiguity against the claim of privilege. In *Grimes v. LLC International, Inc.*, 1999 WL 252381 (Del. Ch. 1999), the minority shareholders of Microcell brought a shareholders derivative suit against the board of directors of Microcell and that of Microcell’s majority shareholder, LLC International, for breach of fiduciary duties. In discovery, the plaintiffs sought production of certain documents containing communications between Peter DeLiso and representatives of Microcell and LLC International. DeLiso was general counsel of both Microcell and LLC International. He also served as chairman of Microcell’s board of directors. The court held that the documents must be analyzed according to the capacity in which DeLiso was acting at the time the communication was made. Only communications made *solely* in his capacity as counsel could be privileged. However, the court recognized that some of the documents might not clearly disclose which of DeLiso’s three hats he was wearing at the time he generated or received the communication in question. The court, therefore, held that where DeLiso’s capacity was not readily ascertainable from the document, the doubt would be resolved against the claim of privilege.

The ABA has criticized this line of cases as providing less protection for the advice of in-house attorneys as compared to that of outside counsel. Nevertheless, the courts have persisted in giving higher scrutiny to claims of privilege involving in-house attorneys, and you must be aware of these cases in preparing your case.

After determining whether a given communication is “legal” in nature, you must determine if the people involved count as the “client.” Technically, an in-house counsel’s “client” is the corporation she represents. However, you cannot have a conversation with a corporation. (And if you did, you have more problems than just figuring out attorney-client privilege issues.) Corporations act through people, so it is not self-evident

who is the “client” when determining application of the privilege. If the in-house counsel had a conversation with the corporate CEO, it’s probably a conversation with the client. Change this hypothetical company employee from the CEO to the custodian, and the answer is not as clear. There are two tests generally used in determining whether a corporate employee counts as the “client”—the “control group” test and the “subject matter” test.

Under the control group test, the court will examine whether the employee making the communication is in a position to control or to take a substantial part in directing the company’s actions in response to legal advice. An attorney’s conversations with any of those employees who are part of this “control group” will be considered privileged. Conversations with any lower-level employees are not privileged under this test.

The subject matter test focuses on the subject matter of the conversation, rather than the decision-making authority of the employee in the corporation. A conversation with an employee at any level of the corporation can be privileged if the communication was made at the direction of corporate superiors and the subject matter of the communication is within the scope of the employee’s corporate duties. This test typically applies in federal courts, following the U.S. Supreme Court’s decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which rejected the control group test.

You should decide in advance where you will draw the line in deposition. (After a question has been half-answered is no time to decide that the answer is privileged). Find out about all of the conversations that in-house counsel had with employees of the company that might pertain to the subject matter of the testimony. Review with your in-house counsel the purpose of each conversation—business, legal or both. Also weigh the implications of waiver. Disclosing some conversations may help you, and the mere appearance of concealment (like pleading the Fifth) may hurt. But also follow the waiver to its natural end—will waiving the privilege open the

door to a much broader waiver? These are all difficult questions which should be answered with the luxury of time and careful deliberation, not during the heat of a deposition.

Growing your relationship with in-house counsel

We long for bygone days when you kept clients by doing good work and producing good results. Those days aren’t coming back (they’re bygone, after all). In addition to exhibiting your legal genius, you now have to help your in-house counsel do more with less. That means following their rules for handling their matters (however silly they may seem to us), keeping them informed (but not overwhelming them), responding to their needs on time and generally making their jobs easier. ■



Albert L. Vreeland, II

Albert L. Vreeland, II is the managing shareholder of Lehr Middlebrooks & Vreeland, PC. He received his law degree with honors from the University of Michigan Law School and his undergraduate degree from Cornell University’s School of

Industrial and Labor Relations.



Jennifer L. Howard

Jennifer L. Howard practices with Lehr Middlebrooks & Vreeland, PC. She received her law degree *cum laude* from the University of Georgia School of Law and her undergraduate degree *magna cum laude* from Vanderbilt University.

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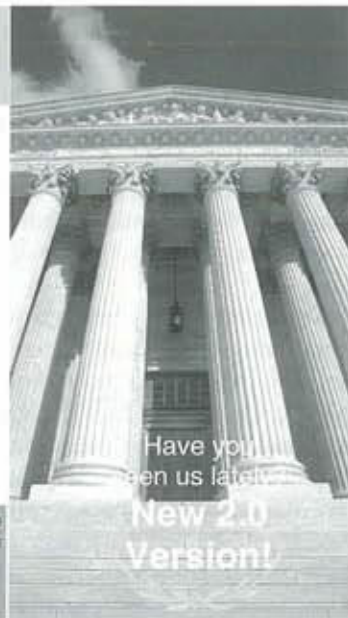
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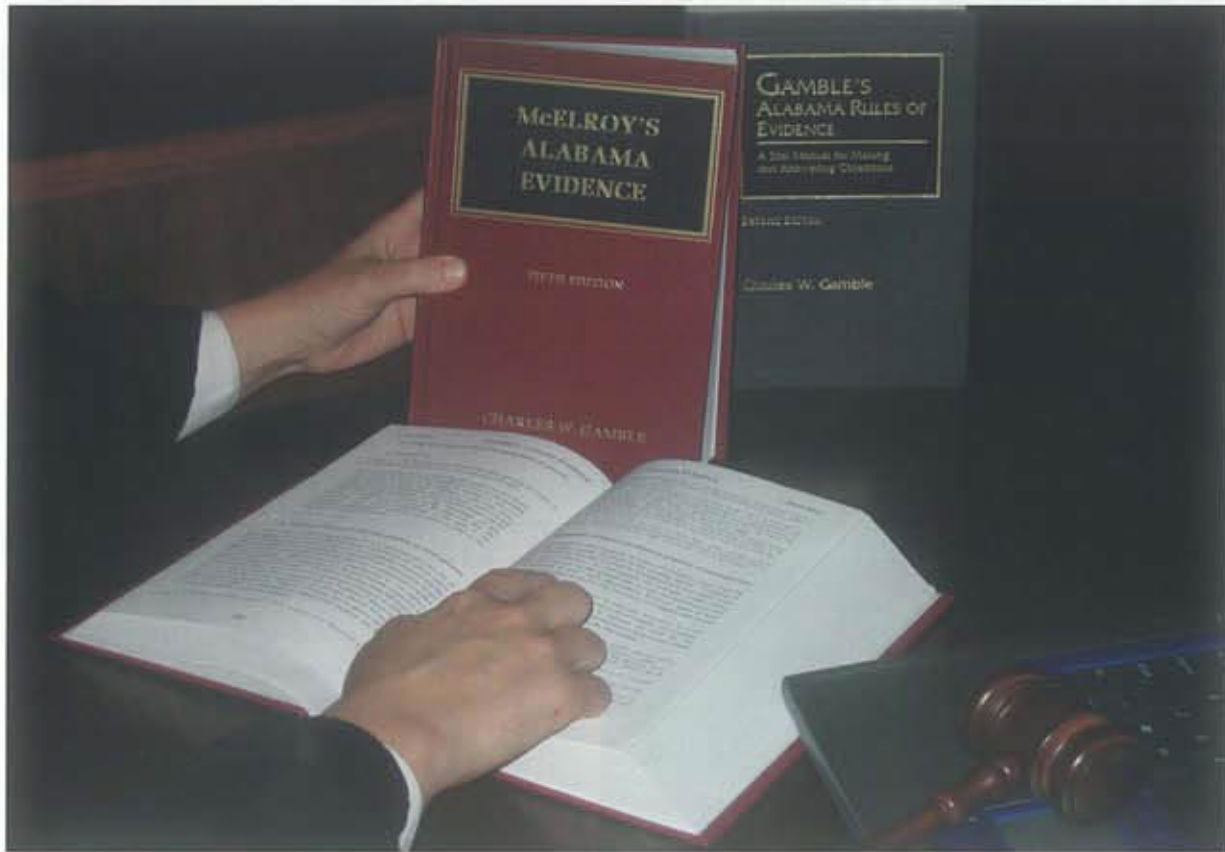
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PHOTO HIGHLIGHTS

THURSDAY



Ready and waiting for the ASB members to visit their booths are Robye Reat and Debbie Stein (left and right) and Kate Morris (center) with Palmetto Addiction Recovery Center.



Julie Palmer, immediate past chair of the Family Law Section (left), with officers and members of the section, Robert Smith, Sam Kok, Jim Jeffries, Wendy Crew, Charles Dunn, and Carole Medley after "Recent Developments in Family Law."



Bobby gets a laugh from Bench and Bar Luncheon speaker Sean Carter, who also presented "Cleaning up the Stress Mess" during Thursday's opening plenary session.



During "Legal Ethics Update," ASB Assistant General Counsel Robert Lusk talks about the "one that got away."

2006 ALABAMA STATE BAR ANNUAL MEETING



ABICLE Director Steve Emmons presents Carol Wallace with the Walter F. Gwynn Award.



U.S. District Judge U. W. Deimon is given the Judicial Award of Merit by Bobby.



Playing "catch-up" at the BSB Luncheon are Nancy Foster and Babs McCauley (both seated) and Anita Hamlett.



Pro Bono Award recipients are Rocky Watson, accepting the Law Student Award for his daughter, Tamara J. Watson; Ann Stein, accepting the Attorney Award for Henry H. Coddick; and Christy Crow, accepting the Firm Award for the Disaster Relief Committee of the ASB Young Lawyers' Section.



Sam Franklin, ASB Commissioners' Award recipient, and Bobby Byars heading into the Membership Reception.



Anne Stone Sumblin, Norborne and Patricia Stone and Walter Byars heading into the Membership Reception.



Enjoying a rare quiet moment are Charles Griggs and Kelley Belmont with BCBS Preferred LTC.

Photos by Marcia Daniel and Margaret Murphy

Renew. Relax. Reconnect.



Jeanne Marie Leslie, Alabama Lawyers Assistance Program director, convinces Bobby that he needs to bid on a piece of jewelry at the ALAP silent auction fundraiser.



ASB Director of Programs Ed Patterson and wife Beverly appear "stumped" by Alva Caine's comments.



Claire Wilson, her mother, Margaret, and Bonnie and Ken Wallis enjoy Thursday evening's entertainment, after which Ken named Bob Noone Alabama's newest honorary son.

THURSDAY



Helping their parents shop or volunteer at the Silent Auction are (top row) Culle Leslie and Zach Skinner; (middle row) Hannah, Helen and Hayden Lusk; and (bottom row) Jenna and Kali McIntire.



Thursday night entertainer Bob Noone in not-so-rare form

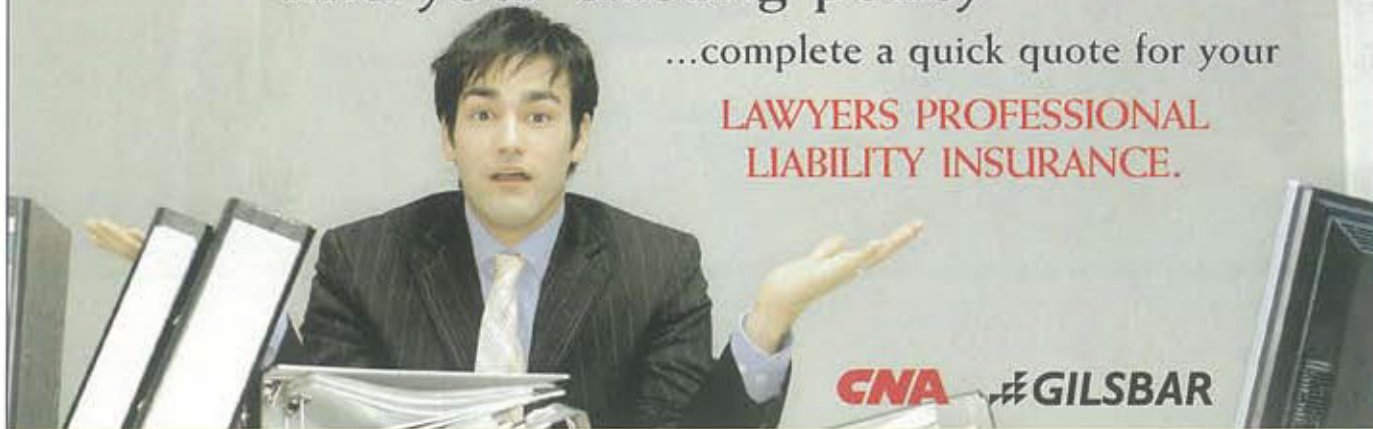


ASB Commissioner David Law, wife Nicole and two of their four children enjoy Noone's costumes, singing and dancing.

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FRIDAY



Relaxing together and practicing together are Sam Crosby, ASB 2006-07 president-elect; Norborne Stone, 1982-83 president; and Fred Granade.



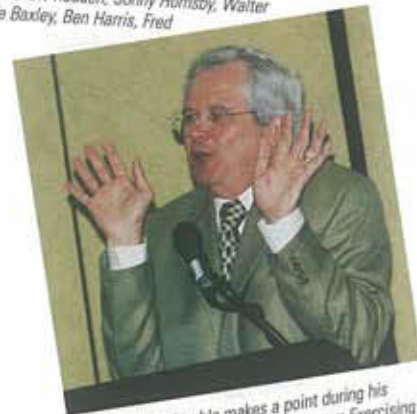
Still an entertaining group after all these years are ASB past presidents Drew Redden, Sonny Hornsby, Walter Byars (all seated, left to right), and Johnny Owens, Doug McElvy, Wade Baxley, Ben Harris, Fred Gray, Alva Caine, Jim North, and Bill Clark (standing, left to right).



Hayden Lusk, working hard to keep her father, Robby, and his ASB co-workers, Sam Partridge and Jeremy McIntire, in line



Dave Boyd and Cleo Thomas, checking their e-mail at the alacourt.com exhibit, truly can't "leave it at the office."



Dean Charles Gamble makes a point during his presentation, "Speaking Truth to Power: Exercising Your Right Not to Remain Silent."



Former Alabama Attorney General Bill Baxley recounts his experiences as the prosecutor of the 16th Street Baptist Church bombing case...



... while Bobby and son Jacob listen to this first-hand account of the Civil Rights movement.



Even lunch with Bob Noone, Thursday's entertainer, is a "laughing matter."



Noah Funderburg, senior assistant dean, University of Alabama School of Law, and Judy Keegan, director, Alabama Center for Dispute Resolution, get very comfortable during "Seal the Deal: Power Skills to Get Agreement in Negotiation and Mediation."



Circuit Judge John England amuses fellow panelists of "Progress of Minorities in the Legal Profession."



While discussing "Firm-Wide Marketing Plans," is presenter John Remsen recounting another fish tale?

Renew. Relax. Reconnect.

FRIDAY



A representative from Atlanta Custom Tailors carefully watches James Skinner enjoying the Friday afternoon break, sponsored by Beasley, Allen, Crow, Methvin, Portis & Miles.



During the President's Reception, Bobby and Bill Clark (second from right) congratulate Judge Greg Shaw and his son, First Class Cadet Gregory Shaw, who is a senior at West Point Military Academy. (Clark is a former ASB president and a graduate of West Point.)



Former ASB President John Owens and wife, Dot, help their grandchildren choose just the right one.



Mark White "serenading" wife Carol Ann Hobby, Celia Collins and Martha Jane Patton

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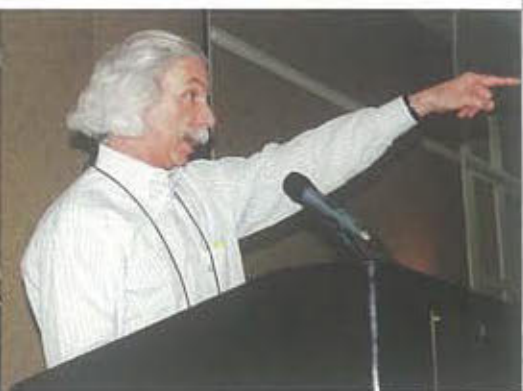
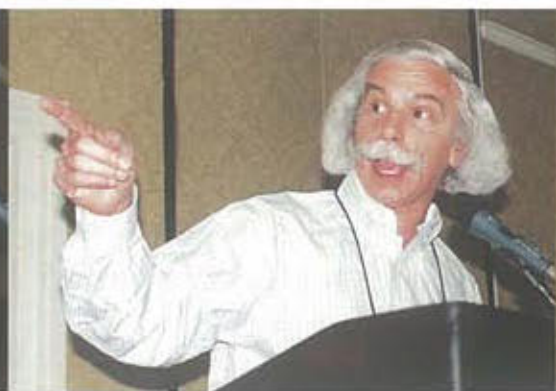
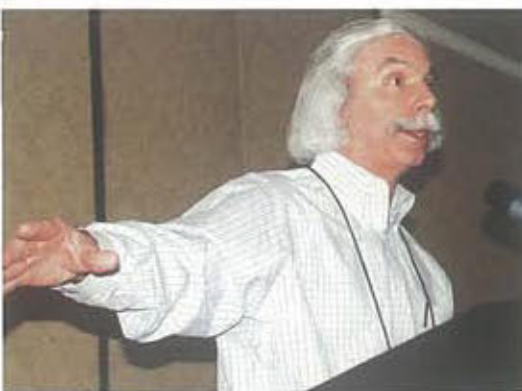
Bill Bass, president of Insurance Specialists, Inc., congratulates 2006 Grande Prize winner Billy Cunningham.



Jacob and Sandy Segall, and Bobby's assistant, Della Bryan, and her husband, Mike, laughing with (or at) Bobby



Dave Boyd (far right), recipient of the William D. (Bill) Scruggs, Jr. Service to the Bar Award, shares the moments before with his brother, Ron, and sister-in-law Floranne, and Dave's daughter, Ann Boyd Bethea.



The many sides of Bobby Segall, 2005-06 Alabama State Bar president



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The Alabama Trust Code

BY ROBERT L. LOFTIN

In February, Alabama became the 16th state to enact the Uniform Trust Code. The Trust Code states the law relating to express trusts, which are distinguished from what are known as resulting or constructive trusts, remedial devices imposed by the courts and which are excluded from the Trust Code. While much of the Trust Code codifies the common law, it does make some significant changes.

Default Rules

Much of American trust law consists of rules subject to override by the terms of the trust. Prior to the Trust Code, however, neither the Restatement, treatise writers nor state legislatures had attempted to describe the principles of law that are *not* subject to the settlor's control. The Alabama Trust Code collects these principles in § 19-3B-105(b). Included are the requirements for creating a trust; the requirement that a trustee act in good faith and in accordance with the trust purposes; the power of the court to take certain actions, such as to remove a trustee, to modify or terminate a trust on prescribed grounds and to specify a trustee's compensation; the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust; and the rights of third parties in their dealings with the trustee.

Procedural Rules

The Trust Code specifies numerous procedural rules for administering a trust, all of which are subject to override in the terms of the trust. Among the procedural issues addressed are the method for transferring a trust's principal place of administration to or from another country or American state (§ 19-3B-108); the method for revoking or amending a revocable trust (§ 19-3B-602); the requirements for declining or accepting appointment as trustee (§ 19-3B-701); the division of responsibilities among co-trustees (§ 19-3B-703); the procedure for appointing a successor trustee (§ 19-3B-704); and the requirements for an effective trustee resignation (§ 19-3B-705).

The Trust Code generally prefers the honoring of intent over required formalities; consequently, absent specific provision in the terms of the trust, a trustee may accept office (§ 19-3B-701) or a settlor may revoke or amend a revocable trust by any method indicating the necessary intent, provided, however, that a written revocable trust may only be revoked by a written instrument delivered to the trustee (§ 19-3B-602(c)(2)(B)). Under § 19-3B-705, a trustee may resign by giving notice to the "qualified beneficiaries" (defined in § 19-3B-103(14)).

While the court is always available, a trustee may transfer the principal place of administration upon notice to the qualified beneficiaries (§ 19-3B-108); absent a successor appointment in the terms of the trust, a successor trustee may be appointed upon unanimous agreement of the qualified beneficiaries (§ 19-3B-704).

standard. The Alabama Trust Code differs from the Uniform Trust Code, which prohibits the delegation of the performance of a function that the "settlor reasonably expected the trustees to perform jointly"—a subjective standard. This provision specifically contemplates the delegation of certain functions to a co-trustee who is more

become more difficult. Co-trustees may be located in different states, or a corporate trustee's personal trust officers may be located in one state, its investment division in another and its operations facilities somewhere else. Also, a variety of non-trustees, such as advisors and trust protectors, may play a role in the trust's administration.

The Trust Code does not and probably cannot resolve the difficult cases. For cases in which determining a trust's principal place of administration is important, settlors are encouraged to address the issue in the terms of the trust. Under § 19-3B-108(a), a provision in the trust terms designating the principal place of administration is valid and controlling as long as a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the trust's administration occurs in the designated place.

Frequently it becomes necessary to change a trust's principal place of administration. While this issue ideally should be addressed in the terms of the trust, § 19-3B-108(b)-(f) specifies the procedures for transfer. The transfer must facilitate the trust's administration, and the trustee must inform the qualified beneficiaries of the transfer at least 30 days in advance.

Alabama includes a provision (§ 19-3B-108(g)) which provides that unless otherwise designated in the trust instrument, the principal place of administration of a trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust.

Representation and Settlements

The Trust Code strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to the beneficiaries. Other actions can be accomplished upon consent of the beneficiaries. Because trusts commonly last for decades, achieving notice to or the consent of all of the beneficiaries is often difficult. The current



...specifying the powers, duties and divisions of responsibilities among **co-trustees** is among the more important issues to address in drafting.

Co-Trustees

While appointment of co-trustees is common, the situations under which co-trustees are appointed are so varied that designing default rules is difficult. Given this difficulty, specifying the powers, duties and divisions of responsibilities among co-trustees is among the more important issues to address in drafting. Among the matters the trust instrument should address is "Would the settlor have preferred that the co-trustees act by majority or unanimity?" Section 19-3B-703(a) opts for efficiency by allowing the co-trustees to act by majority.

"To what extent did the settlor intend to allow co-trustees to delegate responsibilities to each other?"

Section 19-3B-703(e) allows the delegation of the performance of a function by one co-trustee to another co-trustee unless the terms of the trust expressly require that the function be performed jointly by the co-trustees—an objective

appropriate or able to perform the task, such as the delegation of investment management or record keeping duties to a professional who is the co-trustee.

"To what extent should a nonparticipating co-trustee be liable for another trustee's breach?"

Section 19-3B-703(f) generally immunizes a nonparticipating trustee from liability. However, the Code also assumes that the settlor did not intend for the trustee to totally neglect his or her duties—each trustee must exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach of trust (§ 19-3B-703(g)).

Principal Place of Administration

As trust administration has become more complex, determining a trust's principal place of administration has

beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation.

The Trust Code provides comprehensively for the representation of beneficiaries and others unable to represent themselves, both with respect to notices and consents. Among the representation concepts are while the settlor is competent, the rights of the beneficiaries of a revocable trust are within the settlor's exclusive control (§ 19-3B-603(a)). Because the Trust Code generally treats the holder of a power of withdrawal the same as the settlor of a revocable trust (§ 19-3B-603(b)), the rights of beneficiaries whose interests may be eliminated by the holder's exercise of the power are similarly subject to the holder's exclusive control. Absent a conflict of interest with respect to the particular question or dispute between the representative and the person represented: a conservator may represent and bind the estate the conservator controls (§ 19-3B-303(1)); a guardian may represent and bind the

ward if a conservator has not been appointed (§ 19-3B-303(2)); an agent having authority to act with respect to the particular matter or dispute may represent and bind the principal (§ 19-3B-303(3)); a trustee may represent and bind the beneficiaries of the trust (§ 19-3B-303(4)); a personal representative of a decedent's estate may represent and bind persons interested in the estate (§ 19-3B-303(5)); and a parent or other direct ancestor may represent and bind the minor or unborn issue if neither a conservator nor guardian for the issue has been appointed (§ 19-3B-303(6)).

A virtual representative may represent and bind someone having a substantially identical interest in the trust. Virtual representation is available only to the extent there is no conflict of interest between the virtual representative and the person represented (§ 19-3B-304). Whether or not a person is otherwise represented, the court may appoint a special representative to represent a minor, incapacitated or unborn individual, or a person whose identity or location is unknown.

Alabama substantially modified Section 302 of the Uniform Trust Code by providing that a holder of a lifetime power to appoint to oneself may repre-

sent and bind persons whose interests are subject to the power. To the extent that there is no conflict of interest between the holder of a power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests are subject to the power (§ 19-3B-302(b)). Alabama added § 19-3B-302(a) in order to create a class of holders of a lifetime power to appoint to oneself who can bind any person by virtue of the fact that this particular class of holders has immediate access to the property that is subject to the power of appointment. This class of holders has a broader power of representation in that the condition that there be no conflict of interest is not applicable.

Alabama also modified Section 304 of the Uniform Trust Code, which deals with the representation by a person having a substantially identical interest, by providing that a presumptive remainder beneficiary may represent alternative remainder beneficiaries with respect to matters in which there is no conflict of interest. The definition of "presumptive remainder beneficiary" is taken from the Alabama Principal and Income Act (see *Ala. Code* § 19-3A-102(11)).

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Trust Modification and Termination

Because of the increasing use of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply when a trust may be terminated or modified other than as provided in the instrument. The Trust Code provides for this increased flexibility without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent.

Section 19-3B-411 follows traditional doctrine in allowing for termination or modification of an irrevocable trust by unanimous agreement of the settlor and beneficiaries. This section also follows traditional doctrine in allowing for termination of an irrevocable trust by unanimous agreement of the beneficiaries, but only if it no longer serves a material purpose, or modification by the beneficiaries alone only if the modification is not inconsistent with a material purpose. It is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust (§ 19-3B-411(c)).

Section 19-3B-412 confirms, but at the same time expands, the traditional doctrine of equitable deviation. The court may apply the doctrine to modify not only administrative terms but also dispositive provisions. Without regard to unanticipated circumstances, the court may modify an administrative term if continuation of the trust on its existing terms would be impracticable, wasteful or impair the trust's administration.

Section 19-3B-414 authorizes the court to terminate an uneconomical trust of any size. Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration. This section also allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less.

Section 19-3B-415 clarifies that the doctrine of reformation may be applied to testamentary as well as *inter vivos* trusts. This doctrine may be applied to correct a mistake of fact or law even if the original terms of the trust, as originally but mistakenly created, are unambiguous.

Section 19-3B-416 expands the court's ability to modify a trust to achieve the settlor's tax objectives. The court may modify the trust in any manner not contrary to the settlor's probable intention.

Such broad authority is appropriate because the settlor's objective—to achieve tax savings of a particular type—is usually abundantly clear. The court may also give the modification retroactive effect.

Section 19-3B-417 authorizes a trustee to divide a trust or combine trusts without approval of court. Prior notice to the qualified beneficiaries of a proposed combination or division is required. The term "qualified beneficiaries" excludes beneficiaries having remote remainder interests.

Spendthrift Provisions and Rights of a Beneficiary's Creditors

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest until paid out. Spendthrift provisions are not recognized in England, where trust law originated, and they are of limited utility in the United States. A spendthrift provision provides only limited protection to the beneficiary. The creditor or assignee may pounce upon the trust funds as soon as distribution is made, but even funds retained in trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary or the time when the claim is made.

Article 5, which contains the Trust Code's provisions relating to spendthrift protection and the rights of a beneficiary's creditors, was the most widely debated article of the Trust Code. The more significant of the rules include that a trust is not spendthrift unless the instrument specifically so states (§ 19-3B-502(b)); a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest (§ 19-3B-502(c)); and exceptions to spendthrift for alimony and child support claims are recognized (§ 19-3B-504).

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The Trust Code creates an exception for claims by governmental units to the extent a state statute or federal law so provides (§ 19-3B-503(b)(3)). The Trust Code does not create a specific public policy exception for a provider of necessities but allows a judgment creditor who has provided services to the beneficiary to reach the beneficiary's interest (§ 19-3B-503(b)(2)).

To protect a trust from an immediate attachment as soon as a payment becomes due, whether current or upon termination of the trust, § 19-3B-506 provides that spendthrift protection is lost only after the trustee has had a reasonable time in which to make the distribution. Alabama substitutes the word "compel" for the word "reach" in Section 506 of the Uniform Code. In addition, the prepositional phrase "to a beneficiary" is added for clarity. This change makes it clear that, while a creditor may force a mandatory distribution to be made, the distribution may still be made to the beneficiary and not necessarily direct to the creditor. A failure to make a required distribution within a reasonable period of time does not change the role of the trustee to that of a receiver or arbitrator of the claims and obligations of the beneficiary.

The Alabama Trust Code is silent on the issue of whether a settlor can defeat the right of a surviving spouse to an elective share under *Ala. Code* § 43-8-70, by transferring the bulk of his or her estate to a revocable *inter vivos* trust (*but see Russell v. Russell*, 758 So.2d 533 (Ala. 1999), which permits such a transfer to avoid the elective share).

Revocable Trusts

The revocable trust is the most common trust created today in the United States. The provisions of the Trust Code on revocable trusts are among its most important and most innovative, dealing largely with issues unaddressed at common law. The Trust Code recognizes that on many issues the revocable trust should be treated as the functional equivalent of the will.

Reflecting the trend in the case law, § 19-3B-601 provides that the capacity

required for creating, amending, revoking, adding property to a revocable trust, or otherwise directing the actions of a trustee, is the same as that required for a will.

Section 19-3B-602(a) adopts the minority rule that a trust is revocable unless stated otherwise. While professional drafters routinely state whether the trust is revocable or irrevocable, because the Trust Code's presumption reverses the Alabama rule, § 19-3B-602(a) provides that the presumption of revocability is prospective only.

Section 603 provides that while the settlor has capacity, all of the rights of the beneficiaries are subject to the settlor's exclusive control. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consents on a beneficiary's behalf. Access to the trust document is also within the settlor's control. Upon a settlor's loss of capacity, however, the beneficiaries may exercise

their rights as beneficiaries, absent contrary intent in the terms of the trust.

Contest of a will is typically barred after six months following notice of probate. Section 19-3B-604 provides that a potential contestant of a revocable trust must file a contest within the earlier of six months following receipt of a notice from the trustee or two years following the settlor's death. In addition, to encourage expeditious distribution of trust assets, § 19-3B-604 absolves a trustee from liability for making distributions even before the contest period has expired as long as the trustee does not have actual knowledge of a pending contest. In these cases, liability is solely on the distributees.

Section 19-3B-112 provides that the rules of "wills" construction apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

Section 19-3B-505(a)(3) clarifies that the assets of a revocable trust are liable for the

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claims of a settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and homestead allowance, exempt property and family allowance to a surviving spouse and children to the extent the probate estate is insufficient. In light of the policy considerations set forth in the Uniform Trust Code and the comments, the Alabama drafting committee believed that it made sense to create a procedure parallel to that permitted for estates to bar the claims of creditors. If a probate proceeding has commenced, then the applicable statute would come into play. The procedures set forth in § 19-3B-505(b) would only operate in situations where there is no probate process underway. For more complete protection, use of the probate courts will still remain the better alternative.

Trustee Removal

Removal of a trustee typically has been based on a good cause standard, focusing primarily on misconduct or unfitness of the trustee. Section 19-3B-706 retains a standard based in part on misconduct of the trustee, allowing a trustee to be removed for such grounds as serious breach of trust, unfitness and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed due to lack of cooperation among co-trustees. Removal for serious breach of trust or lack of cooperation among the co-trustees requires no additional findings. Removal for unfitness, unwillingness or persistent failure to effectively administer the trust additionally requires a finding by the court that removal would best serve the interests of the beneficiaries.

In deciding whether to remove the trustee, § 19-3B-706(b) authorizes the court also to consider whether a substantial change of circumstances has occurred or whether removal was unanimously requested by the qualified beneficiaries. In neither case, however, may the trustee be removed unless the court also concludes that: removal of the trustee would best serve the interests of the beneficiaries; removal of the trustee is not inconsistent with a material purpose of the trust; and a suitable co-trustee or successor trustee is available.

The Trust Code changes the common law on removal of a trustee of irrevocable trusts in two respects. First, it allows removal for less serious but still ineffective performance, in particular the persistent failure to effectively administer the trust. Second, in situations where the link between the settlor and trustee has been broken (which is usually upon the death of the settlor), the emphasis turns to whether the particular trustee is appropriate for the trust, not whether the trustee has committed particular acts of misconduct. The trigger for this alternative test is substantial change of circumstances or a request by all of the qualified beneficiaries (§ 19-3B-706(b)(4)(i)).

Duty to Keep the Beneficiaries Informed

Section 19-3B-813 addresses the trustee's duty to keep the beneficiaries informed of administration. The Trust Code imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration as well as several specific notice requirements.

A trustee is required to notify the current permissible distributees of trust income or principal of the trustee's acceptance of office and of any change in the method or rate of the trustee's compensation (§ 19-3B-813(b)). Regular reporting by the trustee is required, and the trustee must furnish the qualified beneficiaries at least annually with a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation (§ 19-3B-813(c)). The trustee must also promptly respond to any beneficiary's request for information, unless unreasonable under the circumstances (§ 19-3B-813(a)). This includes a requirement that the trustee provide a copy of the trust instrument to a beneficiary upon request (§ 19-3B-813(b)(1)).

The most discussed issue in the drafting of the Uniform Trust Code is the extent to which a settlor may waive the requirements of Section 813 under Section 105(b). While most of the specific notice requirements

can be waived, not waivable is the trustee's obligation to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust (§ 19-3B-105(a)(8)). In other words, if a beneficiary finds out about the trust and makes a request for information, then the trustee must respond to the request even if the trustee was not obligated to inform the beneficiary about the trust in the first instance. Section 105(a)(8) of the Uniform Trust Code, which provides that the duty of the trustee to notify all qualified beneficiaries age 25 or older of the existence of an irrevocable trust and the right of the qualified beneficiaries to request trustee reports is not waivable, was not adopted by Alabama.

The waiver issue brings into direct conflict the goal of carrying out settlor intent

with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise of which some on both sides of the issue will not be satisfied. The extent to which a settlor may waive notices and other information requirements is not a new issue. Limitations on the ability to waive are found in case law and in the Restatement (Second) of Trust Law. Considering the issue in the form of a statute brings the issue into much sharper focus, however.

Alabama changes the language in Section 813 from that in the Uniform Trust Code with respect to the use of the term "qualified beneficiaries" in subsection (a) and paragraph (b)(4). This term has been replaced with the words "current permissible distributees of income or principal of the trust," thus limiting the class of those beneficiaries entitled to notice.

Remedies for Breach of Trust

The Trust Code contains comprehensive provisions both specifying and at the same time limiting a trustee's liability for breach of trust. The measure of damages for breach of trust is designed to restore the beneficiaries to the position they would have been in had the breach not occurred. But it also serves another purpose—to prevent the trustee from profiting from the breach. Consequently, § 19-3B-1002 provides that the trustee is liable for the greater of the profit made by the trustee or harm caused to the beneficiaries. Section 19-3B-1002(b) is contrary to the traditional common law rule that still prevails in Alabama—that, generally, there

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is no right of contribution among joint tortfeasors. This section enacts a limited form of contribution that applies to liability for breach of trust. While the damages provided in this section are intended to be the exclusive measure for damages available for a claim of breach of trust, this should not change the current state of Alabama law regarding the measure of damages that may be available pursuant to other potential claims brought against the trustee.

The Trust Code contains a series of provisions limiting a trustee's exposure to liability. Following the sending of a trustee's annual or other report, a beneficiary must commence an action for breach of trust within two years but only if the report adequately disclosed the existence of a potential claim for breach of trust (§ 19-3B-1005).

A settlor may absolve a trustee from potential liability, but such an exculpatory provision is not enforceable in all circumstances. Section 19-3B-1008 provides that an exculpatory term cannot be used to immunize a trustee for breach of trust if the breach was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Even absent bad faith or reckless indifference, an exculpatory term is unenforceable if it was inserted as a result of the abuse of a confidential or fiduciary relationship between the trustee and settlor.

A trustee is entitled to rely on the trust instrument. While the entire terms of a trust are normally contained in the trust instrument, extrinsic evidence may be admissible to clarify ambiguities, many of which may not be apparent from a reading of the instrument. Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous terms. To enable a trustee to administer a trust with some dispatch and without concern that reliance on the language of the trust instrument is misplaced, § 19-3B-1006 provides that a trustee is not liable for a breach of trust to the extent the breach resulted from reasonable reliance on the trust instrument.

A trustee is entitled to rely on reasonable inferences as to a beneficiary's family or other status. Section 19-3B-1007 provides that whenever the happening of an event (including marriage, divorce, performance of education requirements or death) affects the administration or distribution of the trust, a trustee who exercised reasonable care to determine that the event occurred is not liable for any loss attributable to lack of knowledge.

A beneficiary who has consented to a trustee's action is also precluded from suing for breach of trust (§ 19-3B-1009). Alabama modified language in paragraph (2) of Section 1009 of the Uniform Code,



by providing that "...at the time of the consent, release, or ratification, the beneficiary did not know of the material facts relating to the alleged breach and the trustee had actual knowledge of the facts relating to the alleged breach." The Alabama drafting committee felt that the Uniform Code language had the impact of placing the trustee in the position of legal counsel to the beneficiary—an inappropriate conflict.

In § 19-3B-1010(b) Alabama clarifies the Uniform Code in its retention of traditional *respondeat superior* liability. Liability in such situations is imposed on the trustee personally only if the trustee, the trustee's employee or agent was personally at fault, either intentionally or negligently. Consistent with traditional principles, outside professionals engaged

by the trustee, such as lawyers, stockbrokers, investment counselors, investment companies, and investment trusts, would normally be categorized as independent contractors (for whose acts *respondeat superior* liability would not attach). Section 19-3B-1010(b) is also intended to protect a trustee from personal liability for violations of environmental law, unless the trustee, the trustee's employee or agent was personally at fault.

Summary

The Alabama Trust Code is a significant work—both in its expansive scope of subject matter regarding trust law and its codification of the common law of trusts in Alabama. The drafting included estate and trust planning lawyers, bankers, financial planners and plaintiff lawyers.

During our work, it became clear that all members of the committee entered into the discussions with different views on what the common law of trusts provides—the case law in Alabama is that thin.

Because trusts are now commonplace in estate and financial planning, practitioners and trustees (both corporate and individuals) must become conversant with the new trust code. Both the Uniform and Alabama commentary will be published as a part of the statute and can be found in Chapter 3B of Title 19. ■

Endnote

As reporter for the Alabama committee and author of this submission, I thank David English, W.F. Fratcher professor of law at the University of Missouri-Columbia, for his permission to borrow heavily from his written works on the Uniform Trust Code. David also made himself available, both in person and on the phone, during our work in Alabama.



Robert L. Loftin

Robert L. Loftin has been certified as an estate planning law specialist, and was the reporter for the Alabama Trust Code Committee.

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In partnership with the Alabama State Bar's Spanish Outreach Project, Legal Services Alabama has launched a dedicated statewide toll-free legal hotline for Spanish-speaking persons in Alabama. The Spanish Legal Hotline has its own separate toll-free number (888-835-3505) and calls are answered and routed by Spanish-speaking staff members at call centers across the state.

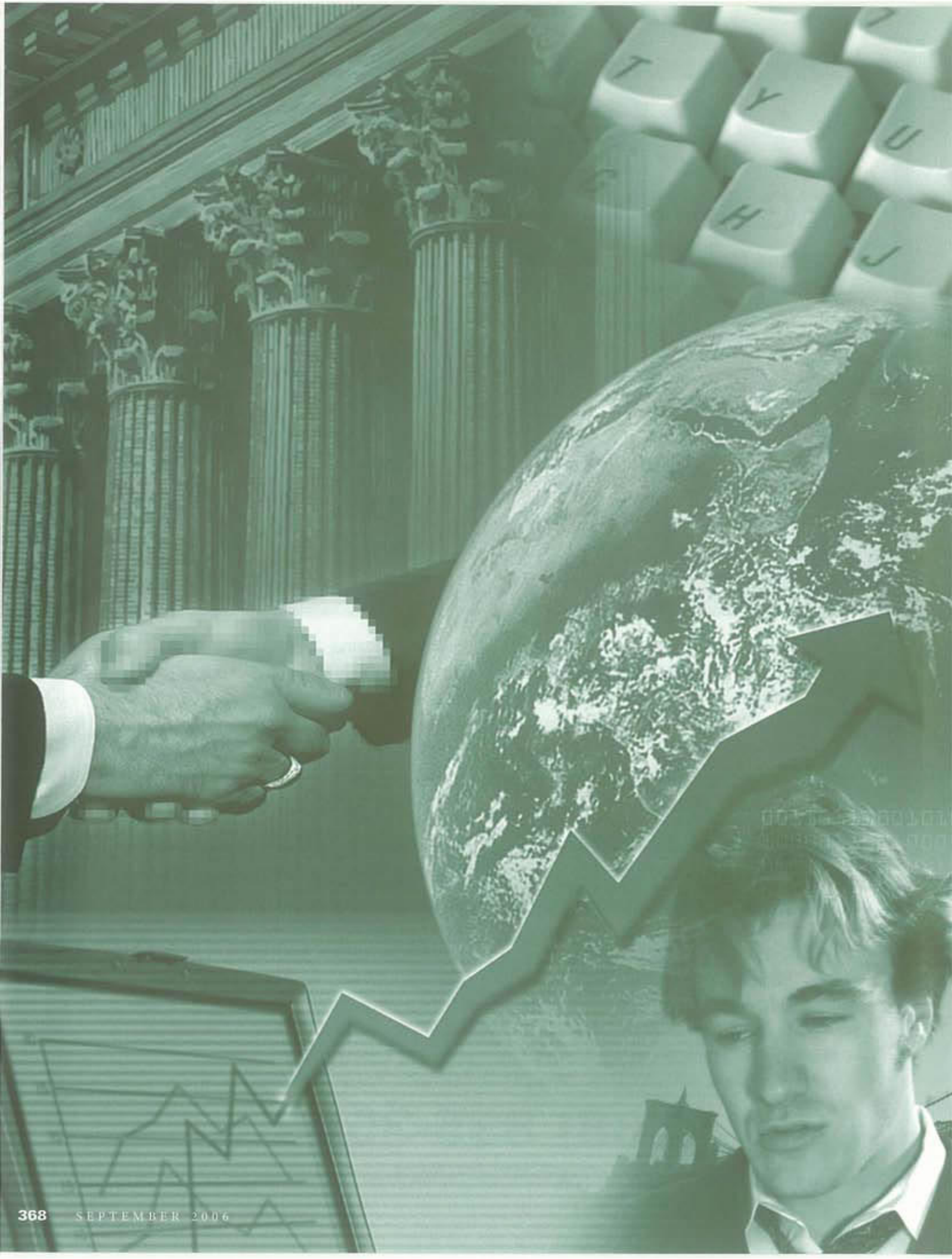
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Services Alabama, the Volunteer Lawyers Program of the Alabama State Bar or the state bar's Lawyer Referral Service for legal assistance.

Other core partners in this project include the **Auburn Cooperative Extension System; Hispanic Interest Coalition of Alabama (HICA); Alabama Latin American Association; Cumberland School of Law; and KPI Latino.**

Spanish Legal Hotline information is available at the state bar's Web site www.alabar.org, as well as at the Legal Services Alabama Web site www.alsp.org. Brochures are available upon request from the Alabama State Bar or may be picked up at any county Auburn Cooperative Extension System office.

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Report of the Alabama State Bar Quality of Life Survey

BY MARY ELLEN W. HARRISON

Introduction

In 2004, then-Alabama State Bar President William N. Clark appointed a new statewide Quality of Life Standing Committee to study and implement ways to seek to improve the quality of life among Alabama lawyers. The committee represents a cross-section of Alabama attorneys with an emphasis upon a younger generation of lawyers who perhaps seek a different approach for their own careers than following the model of older, more established lawyers. Presidents Douglas McElvy and Bobby Segall and, now, Boots Gale, have continued to encourage and support the work of the committee under the leadership of Matthew W. White, Carey B. McRae, Honorable Tommy Bryan and Mary Ellen W. Harrison.

The committee's initial project was to consider whether to update the 1992 Survey of Alabama Lawyers. After lengthy study and hearing proposals from a number of companies, the Quality of Life Committee's recommendation to conduct a new survey and hire the firm of Blankenship & Seay Consulting Group, Inc. of Birmingham was approved by the board of bar commissioners. In the summer of 2005, the quality of life survey was mailed to a random sample of 4,500 ASB members. In total, 1,109 surveys were completed, returned and analyzed.

The results indicate that 73 percent of Alabama lawyers are generally satisfied with their profession and enjoy representing their clients. Overall, 72 percent desire to remain in law practice for the remainder of their careers. Attorneys who work more hours per week tend to experience less career satisfaction. Career satisfaction was positively related to good management practices and a sense of teamwork, and negatively related to billing pres-

ures. While few differences exist across demographic groups, African-Americans tend to take a more positive view toward the profession. Most attorneys report having positive relationships with other attorneys and judges, although 20 percent report that a negative relationship with a judge is a significant source of stress in their life.

Seventy-seven percent of attorneys have experienced stress or anxiety in the past year, and the rate of depression is at 26 percent. Feeling a sense of work overload bears a strong relationship to career satisfaction. Older lawyers find it easier to put work aside and relax, and tend to experience less stress and anxiety. Incivility among attorneys is seen as a problem. Student loan debt is also perceived as having a negative impact on the careers of beginning attorneys.

Survey Sample

The total number of mailed surveys was 4,500, of which 1,019 were returned and entered, for an overall response rate of 22 percent. A total of 74 African-Americans (7.3 percent of the total sample) returned the surveys, for a response rate of 15 percent. Other minorities represented include Asians (.2 percent) and Hispanics (.3 percent). Caucasians comprised 91 percent of the sample.

The sample consists of 73 percent males, which is congruent with the makeup of the state bar membership (72 percent male). Age ranges were evenly distributed. Seventy-eight percent were married and 66 percent with children.

The largest group represented in the survey was litigators (36 percent), followed by general practice (22 percent), family practice

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Notice

Robert Cooper Wilson, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 6, 2006, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 03-333(A) before the Disciplinary Board of the Alabama State Bar.

Transfer to Disability Status

- Birmingham attorney Kimberly Jane Dearman-Davidson was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective June 19, 2006. [Rule 27(c); Pet. No. 06-45]

Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar reinstating Pell City attorney Tommie Jean Wilson to the practice of law in the State of Alabama, effective June 27, 2006. [Pet. No. 06-03]

Disbarment

- Huntsville attorney Reid George Webster was disbarred from the practice of law in the State of Alabama effective February 23, 2006, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. The Disciplinary Board's order was based on a request for disbarment by consent filed by Webster pursuant to Rule 23, *Alabama Rules of Disciplinary Procedure*. In lieu of answering the formal charges filed against him in two disciplinary matters and in lieu of filing a response during the investigation of another complaint pending against him, Webster consented to disbarment. [Rule 23; Pet. No. 06-27; ASB nos. 05-161(A), 05-162(A) and 05-316(A)]

Suspensions

- On July 6, 2006, the Supreme Court of Alabama entered an order accepting the order entered on June 7, 2006, of the Disciplinary Board, Panel IV, accepting the conditional guilty plea of former Birmingham attorney John Erland Acres and suspending his law license for a period of 180 days, effective July 6, 2006. This order involved five complaints.

In ASB No. 02-102(A), in July 2001, Acres was appointed to represent a client in three criminal cases involving the distribution of narcotics. Although Acres had been court-appointed to represent his client in December 2001, he accepted attorney's fees in the amount of \$5,000 from his client's mother. Two of the cases went to trial January 16, 2002 and resulted in guilty verdicts, and the third case was dismissed. Acres told the mother that if her son went to prison, he would refund \$4,500 of the attorney's fees. His client was sentenced to serve 20 years, to run concurrently, split to serve four. Acres did not refund the \$4,500. Acres claimed that he accepted the fees for the third case which was dismissed and he only submitted fee vouchers for the two cases in which his client was convicted. Acres did not give prior notification to or get approval of the appointing court before accepting the \$5,000. Acres thereby violated Rule 1.5(f), *Ala. R. Prof. C.* All other charges were dismissed. The Client Security Fund paid Acres' client's mother \$5,000 on October 14, 2003. Acres will be required to make restitution to the Client Security Fund, should he seek reinstatement.

In ASB No. 02-141(A), around December 1999, Acres was to represent a client and his family members in connection with a legal dispute with a private school. Acres was paid a \$4,000 retainer and was given \$8,369 to hold in his trust account. This was money ostensibly owed to the school by Acres' client. Acres contended that the \$12,369 was "good faith money" to which he was entitled. Acres filed suit against the school in the Circuit Court of Perry County. Afterwards, the client and his family began experiencing great difficulty in communicating with Acres. During his handling of the case, Acres neglected issues, failed to complete discovery in a timely manner, sought unnecessary continuances and constantly misrepresented the status of the cases to his clients. Shortly prior to the trial date, Acres advised his clients that he had a murder trial that took priority over their civil case, and that they did not need to appear in court on February 4, 2002. However, Acres' clients learned from the clerk's office that the case had been dismissed because no one appeared for court. Acres filed a motion to have the dismissal set aside. At the hearing on the motion, Acres produced a conflict letter which was addressed to Judge Jack Meigs and Judge Alfred Bahakel. Judge Meigs was the trial judge in the clients' case. Neither of these circuit judges received this letter, nor was the letter found in the clerk's files. There was also no record of the criminal case being set for February 4, 2002. The court changed the dismissal of the clients' case from a dismissal with prejudice to one without prejudice. After Acres was terminated, he failed to return any money to his clients. Acres thereby violated rules 1.3, 1.4(a), 1.5(a) and 1.15(a), *Ala. R. Prof. C.* All other charges were dismissed.

In ASB No. 02-220(A), sometime around January 2000, Acres was retained to represent a client as plaintiff in a motor vehicle accident case on a 30 percent contingent fee basis for all

money collected over the sum of \$1,300. Acres associated another attorney to assist him. On October 15, 2001, the other attorney took two depositions in the case. Without knowledge of the other attorney or the client, Acres settled the case for \$17,500. Acres deposited the check into a personal credit union account, after he had forged the client's name on the check. Acres signed the release and a stipulation for dismissal and returned it to defense counsel. The court dismissed the case with prejudice. Acres never paid any of the \$17,500 to the client. Acres failed or refused to respond to requests from the client regarding the status of her case. Afterwards, the other attorney learned that the case had been settled and notified the client of this fact. The other attorney then wrote to Acres seeking payment for the depositions he had

handled. During the Birmingham Bar Association's investigation, Acres told the investigator that the funds were in his trust account. The investigator requested that Acres provide his bank records. However, Acres failed or refused to provide his bank records to the investigator. Acres was found guilty of violating rules 1.2(a), 1.4(a), 1.15(b) and 8.1(b), *Ala. R. Prof. C.* All other charges were dismissed.

In ASB No. 03-22(A), during late summer of 2000, Acres was retained to represent a client in a collection matter regarding insufficient funds checks and was paid \$500 in attorney's fees. Acres told his client that he had \$200 in his possession that he had collected from the debtor. Acres failed or refused to release the \$200 to the client. Acres also told his client that a judgment had been entered against the debtor. When

C O U R S E S E A R C H

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, www.alabar.org/cle.

www.alabar.org/cle

Acres' client researched the court file, he found that the case had been dismissed. Acres thereby violated Rule 1.4(a), *Ala. R. Prof. C.* All other charges were dismissed.

In ASB No. 03-176(A), in 2001, Acres' wife filed for divorce. On May 3, 2002, the Circuit Court of Jefferson County entered a *pendente lite* order in Acres' divorce. Paragraph 15 of the *pendente lite* order dealt with Acres' fee awards from three specific cases. Acres was directed to forward his share of any attorney's fees in these cases to the trust account of his wife's attorney's law firm. This money would be held in trust until the final adjudication of the divorce. Acres had filed a Chapter 7 bankruptcy in March 2002. In November 2002, Acres received a referral fee in one of the three cases covered in the *pendente lite* order. The amount of his fee was \$516,510.53. Acres did not forward this money to the wife's law firm's trust account. He did not inform his divorce attorney nor his bankruptcy attorney about his receipt of this money. Acres used the money for personal expenditures, to include expensive vehicles, a new home, jewelry and a vacation for four people. On May 5, 2003, the Circuit Court of Jefferson County found Acres in civil contempt and ordered that he be placed in the county jail until he purged himself of his contempt of the *pendente lite* order. Acres thereby violated Rule 8.4(c), *Ala. R. Prof. C.*

- Selma attorney George Edward Jones, III pled guilty to violating rules 1.3, 1.4(a) and 1.15(a), *Ala. R. Prof. C.*, in two separate cases. Jones was suspended from the practice of law in the State of Alabama for a period of 91 days. The 91-day suspension was suspended and held in abeyance pending a two-year period of probation.

In ASB No. 05-155(A), Jones was retained March 25, 2003 to file suit against a company for breach of contract.

The client paid the court costs at the time she retained Jones. After that, Jones admitted that he did not do any work on the case, nor would he return the client's phone calls. Jones was ordered to make restitution to the client in the amount of \$230.

In ASB No. 05-282(A), Jones was retained December 6, 2004 to handle a collection matter for a client. The client paid Jones a \$310 filing fee. Jones admitted that he did not follow up on the matter, did not return the client's phone calls and failed to appear for an appointment. Jones was ordered to make restitution in the amount of \$310.

Upon successful completion of probation, Jones will receive a public reprimand without general publication in each case.

- Pelham attorney Irvin Harry Lyon was suspended from the practice of law in the State of Alabama by order of the Supreme Court of Alabama for a period of 90 days effective May 12, 2006. The supreme court's order was based upon an order entered by the Disciplinary Board accepting Lyon's guilty plea to violating rules 3.5(c), 8.4(a), 8.4(b) and 8.4(d), *Ala. R. Prof. C.* The facts upon which the plea was based were as follows: Lyon was convicted of the misdemeanor criminal offense of menacing in the Circuit Court of Shelby County. Upon automatic reinstatement to the practice of law, Lyon will be placed on probation for a period of two years. [ASB No. 01-44(A)]
- On June 29, 2006, the Supreme Court of Alabama entered an order adopting the May 31, 2006 order issued by Panel IV of the Disciplinary Board of the Alabama State Bar suspending the license of Birmingham attorney Robert Matthew Pears for a period of 90 days effective May 30, 2006. Pears waived the filing of formal charges and entered a conditional guilty plea to

having violated Rule 1.15(a), *Ala. R. Prof. C.* A review of Pears' trust account records showed unethical trust account practices by him. On occasion, Pears had withdrawn money from his trust account for his personal use. In a previous bar complaint, Pears was ordered to refund an excessive fee to a complainant, and received a public reprimand. The amount of the refund was \$8,350. Pears took that money out of his trust account when he repaid the complaining client in that case. Also, in several of Pears' cases, there was an average of three months' delay between the time Pears received clients' settlement checks and the time he made the disbursements to the clients. [ASB No. 05-85(A)]

- Jasper attorney Mark Bishop Turner pled guilty to violating rules 1.4(a), 1.15(a) and (b) and 1.16(d), *Ala. R. Prof. C.*, in two separate cases. Turner was suspended from the practice of law in the State of Alabama for 91 days. The 91-day suspension was suspended and held in abeyance pending a two-year period of probation.

In ASB No. 05-125(A), Turner was retained February 10, 2005 and paid a \$2,500 retainer to obtain a deed to his clients' house. Subsequently, the clients terminated Turner's services because he would never return their phone calls. Turner admitted that he had not responded to their requests for a copy of their file, nor had he provided an itemized statement and refund of the unearned retainer.

In ASB No. 05-302(A), Turner was retained in June 2005 to represent a client in a divorce case. Turner's client's ex-husband was ordered to pay the attorney's fees. Turner admitted that his client's ex-husband paid the fees, but he had not sent them to his client.

Upon successful completion of probation, Turner will receive a public reprimand without general publication in each case.

Public Reprimands

- Birmingham attorney Henry Clyde Dailey, Jr. received a public reprimand with general publication on May 19, 2006, for a violation of Rule 7.3, *Ala. R. Prof. C.* An investigator employed by Dailey contacted a potential client who had been involved in an automobile accident for the purpose of soliciting professional employment in the automobile accident case. Dailey had no familial or current or prior professional relationship with the client. The investigator had Dailey's contingency fee contract and medical records release forms with him, which the client signed. After the insurance company refused to settle, Dailey advised the client that he could not represent her. [ASB No. 04-292(A)]
- Albertville attorney Lawton Dale Fuller received a public reprimand with general

publication on May 19, 2006 for violations of rules 1.1, 1.2, 1.3, 1.4(b), and 8.1(b), *Ala. R. Prof. C.* Fuller was retained to file an appeal with the United States Court of Appeals for the Eleventh Circuit. The client paid \$500 toward the \$1,500 fee and agreed to pay the balance upon completion of the appeal. After examining the file, Fuller determined there was no legal basis to support a reversal of the trial court's ruling and filed a motion to dismiss the appeal without discussing the matter with his client, whom he thought was on active military duty in Iraq. The docket sheet indicates that Fuller was granted two extensions to file the appellant's brief, allowing him until May 1, 2004 to do so. On May 7, 2004, the case was dismissed due to Fuller's failure to file a brief. Although Fuller filed a motion to dismiss the appeal dated May 6, 2004, the Eleventh Circuit returned the motion because

the appeal had been dismissed. Fuller admitted that he never communicated or attempted to communicate with his client regarding dismissal of the appeal. [ASB No. 05-143(A)]

- Birmingham attorney Johnny Mac Turner received a public reprimand without general publication on May 19, 2006 for a violation of Rule 8.4(a), *Ala. R. Prof. C.* In 2003, Turner worked with an associate attorney on various real estate closings. During that year, his notary commission expired. Thereafter, Turner improperly used the associate's name and notary seal to notarize documents in numerous files. It is noted that Turner's improper use of the notary's name and seal was due more to his inaction and indifference in obtaining the renewal of his notary commission and not with the intent to deceive or defraud. [ASB No. 04-280(A)] ■



Alabama Lawyer Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?
Are they telling you they have it under control?

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Are they telling you they can handle it?

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Maybe they're telling you it's none of your business.

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For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.



Anita Hamlett
MCLE director, Alabama State Bar

99 CLE Days Left

I am a nerd—ask anyone who knows me. I am a bonafide, undeniable worry wart. Let's face it: How many normal people would lie awake at night pondering life's probing questions such as whether "half the instruction" (as referenced in MCLE regulation 4.1.14) was meant to require more than 50 percent of speakers to be from outside a sponsoring firm or merely 50 percent of the substantive lecture to be presented from outsiders? Given to eternal optimism, I prefer to label myself as a "conscientious-minded" servant of the bar. Whatever you call me, I begin to get sweaty palms, waves of nausea and trouble taking deep breaths as September 24th approaches. Why September 24th? Because that is the official day that the countdown for CLE compliance begins with only 99 CLE days left for you to get your credit before December 31st, 2006.

While those of you who are less nerdy (aka "conscientious") and didn't buy all your Christmas presents in July are counting shopping days 'til Christmas, my staff is spinning their wheels thinking of the 504th new, creative way to say that ethics is "already calculated in the overall general

CLE credit hours and NOT TO BE ADDED BACK AS ADDITIONAL HOURS."

In the spirit of trying to calm my panic attacks and urge early compliance (have you noticed a theme in these columns?), our Web adminster, Amy Shell, has added a "CLE Countdown" to our section of the Web site, www.alabar.org/cle, to allow you to see exactly how much time you have (down to the very second) to complete your CLE credit before year-end.

As that day of fright approaches, it might help to address some specific issues that have arisen since the last article was printed.

Question: Where can I view my carry-over credit online?

We have had many inquiries about online transcripts since the July column. Thank you for this immediate feedback. The most frequently asked question has been, "Where do I locate carry-over credit on my online transcript?" Carry-over credit is listed on your online transcript directly above the field labeled "Credits."

Date last Annual Report of Compliance received was 12/05/2005 for CLE compliance year 2005

2002 Carryover Credits: 1.0 Ethics Carryover: 0.00

Sponsor	Start Date	Description	Credits		
			CLE	Teaching	Ethics
No courses recorded					

Previous Year

Printer-Friendly

Next Year

If this carry-over does not appear to be correct, please let us know as soon as you discover any error so that we can correct it immediately.

Question: In 2006, will I get earlier notice of my non-compliance?

Last year, we received requests for early reminders of non-compliance. In response to those requests, this year some of you (hopefully, not many of you) will receive a letter from our office in late October or early November indicating that our records do not reflect that you have completed the required courses for 2006. You should not receive that letter if you have taken your credits early. While we would like to send golden watches to

all compliant individuals in October, the budget just does not allow it; so we opted to send early notices just to the folks who might need a gentle reminder this year.

This letter is being generated this year simply as a courtesy to our members because of requests last year for earlier notification of non-compliance. That letter will not include a reporting form or transcript. We hope it will serve as a reminder that you have until December 31st to complete your required CLE courses.

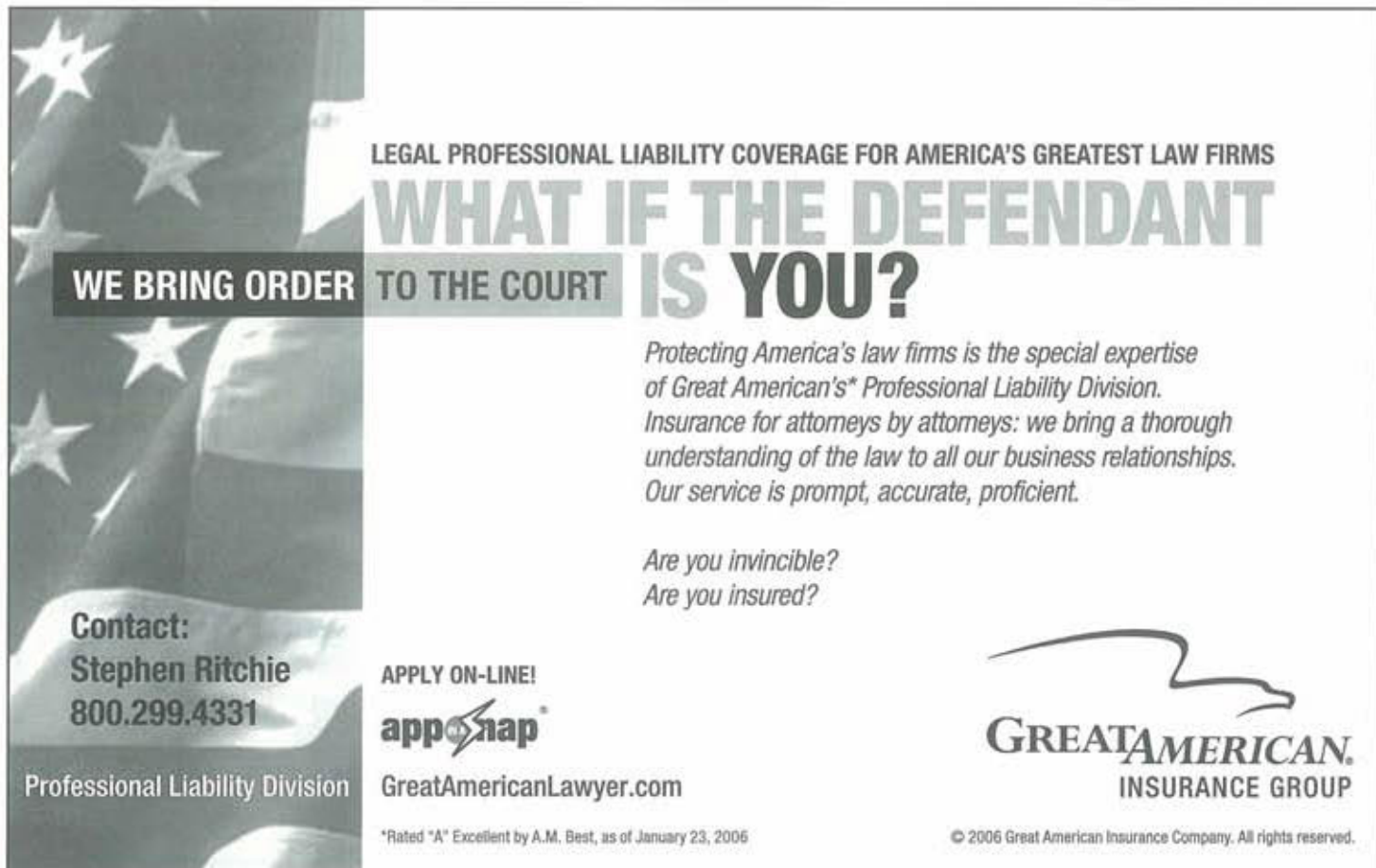
Question: Will I get a written form again this year? If so, when?

The colored-forms system seemed to work well in 2005 and we intend to implement a similar reporting system for 2006.

It is our goal to send the reminders to non-compliant attorneys in October or November, but to delay sending transcripts until late December. There are many reasons for waiting until late December.

We estimate that at least 4,000 attorneys come into compliance in the month of December. Sponsors have up to 30 days after a program to report attendance. So it stands to reason that transcripts mailed prior to the end of December are certain to omit attendance records for at least 4,000 people.

It is simply more efficient to send out forms when as many courses are posted on the transcripts as possible. It reduces the number of non-compliant (pink) forms that must be mailed and returned to our office and it increases the accuracy of all colored forms.



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While no change can occur without some transition, I hope that our members will come to appreciate the added benefit of being able to view "live" transcripts online and will learn to check their transcript periodically and report any errors to our office rather than waiting for the snapshot of their transcript that we will mail in late December.

Question: What if I get a pink form this year?

We plan on mailing all forms by December 31st, 2006. If you are among the group of attorneys (hopefully an ever-shrinking number) who receives a non-compliant (pink) form, please view and print your *online transcript* and compare it to the one mailed to you.

Chances are the online transcript will have already been updated (especially if you completed a course in late December). If so, you can staple that online transcript to the pink form to reflect your timely compliance. Use of the online transcripts is the best step we can all take toward efficient processing of CLE reports.

Courses taken in January (yes, even online courses completed at 2 a.m. on

January 1st) are not accepted for 2006 courses. Note that you will owe a fee of \$100 for late compliance if you do not get all your CLE completed by December 31st, 2006, even if you write them on your pink form.

Question: What if I can't log in or if my contact information is incorrect?

If you can't log in to check your transcript, first check your ASB number. It should be four numbers followed by a letter of the alphabet, two numbers and a letter of the alphabet. We get many calls when a zero has been entered for an "o" or a one for an "l."

If you still can't log in or if you haven't provided the state bar with your e-mail address, you should send an e-mail to membership services at ms@alabar.org.

If you find that any "contact information" is incorrect on your online transcript or your form mailed to you, you should also e-mail that correct information to ms@alabar.org.

I make light of the September 24th

deadline approaching, but not getting your CLE is not something you can take lightly. Despite our best efforts, we certify attorneys every year for non-compliance. We are here to serve you and are trying to encourage you to get compliant now (or else talk to you about CLE until you are so sick of it that you get your hours just to get us to leave you alone.) In December, the volume of calls that we receive is enormous and I am "conscientious" enough to feel guilt-ridden that I can't answer your questions as quickly as you would like at the end of the year. So, keep sending us your questions now and we will do our best to address them.

By the way, the MCLE Commission has determined that it is over 50 percent of the lecture time—not just number of faculty members, and in case you were planning for 2007, Christmas wrap can usually be found for half-price the day after December 25th!

So, relax, get your CLE credits now—and enjoy whatever holiday you celebrate this winter without the stress of last-minute CLE compliance. If you need a little encouragement from a nerd like me, just check the countdown at www.alabar.org/cle. ■



99 CLE Days Left

Publications Order Form



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

Below is a current listing of public information brochures available for distribution by bar members and local bar associations.

BROCHURES

<i>To Serve the Public</i> ... Highlights and details of bar public service programs from the TO SERVE THE PUBLIC video presentation.	\$10.00 per 100	Qty ____ \$ ____
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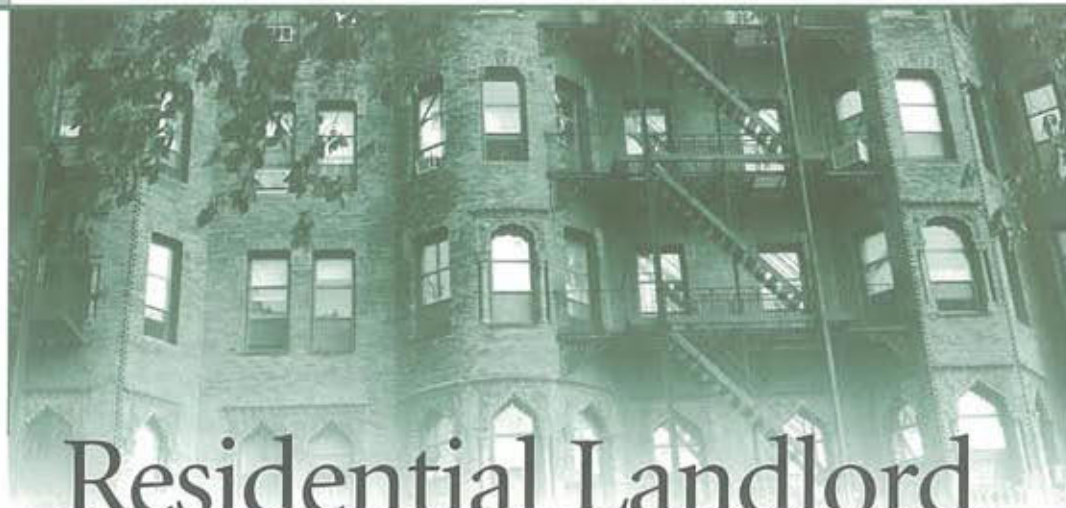
TOTAL \$ ____

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

Marcia N. Daniel, publications assistant, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101



Robert L. McCurley, Jr.



Residential Landlord Tenant Act

On January 1, 2007, Alabama will have its first Residential Landlord Tenant Act. This law is basically the Uniform act that has been the law in Mississippi, Florida and Tennessee for many years. The full act with commentary can be found on the law institute's Web site, www.ali.state.al.us/.

The following is an outline of the act:

Uniform Residential Landlord and Tenant Act

Article I – General Provisions

Part I – Title, Construction, Application and Subject Matter

35-9A-101-106

- Maintain and improve the quality of housing
- Injured party must mitigate damages

Part II – Scope and Jurisdiction

35-9A-121 Territorial Application

- Affects only residential landlord-tenant relationships
- Preempts county and city landlord-tenant codes
- Does not create or deprive any tort actions

35-9A-122 Exclusions

- Public institutions
- Lease sale contracts
- Fraternities
- Hotels
- Condominiums
- Primarily agriculture

35-9A-123 Jurisdiction

- District and circuit courts shall have jurisdiction

Part III – General Definitions and Principles of Interpretation

35-9A-141–144 Definitions

- Obligation of “good faith”
- Building and housing codes
- Unconscionable—court may refuse to enforce “notice”

Part IV – General Provisions

35-9A-161 Absent rental agreement:

- Tenant must pay “fair rental value”
- Rent to be paid month to month at the beginning of the month

35-9A-162 Rental agreement binding on landlord/tenant if signed by one party and accepted by the other, even if not signed by both

35-9A-163 Prohibited provisions:

- Waiver of rights
- Confession of judgment
- Payment of attorney’s fees or cost of collection
- (No longer required to be in writing)
- Exculpatory clause
- Damages for willful inclusion of unenforceable provisions by landlord in a lease (effective 1/1/08)

35-9A-164 Payment of rent is a prerequisite for enforcement of remedies under the act

Article II – Landlord Obligations

35-9A-201 Security Deposits

- Landlord may hold one month’s rent plus pet deposit and other exceptions
- Landlord may deduct itemized damages
- Must return the full deposit or an itemized list of deductions within 35 days after termination of lease
- Tenant must provide a valid forwarding address
- Landlord sends refund by mail to the tenant’s forwarding address or last known address will be sufficient if done within 35 days
- Any unclaimed deposit or outstanding check is forfeited by tenant to landlord after 180 days
- Failure to refund, landlord must pay double amount of original deposit

35-9A-202 Disclosure

- Name of manager
- Name of owner

35-9A-203 Delivery of Possession

- Landlord must deliver premises to tenant according to lease

35-9A-204 Landlord to Maintain Premises

- Comply with applicable housing codes which materially affect health and safety
- Maintain house in an habitable condition
- Clean and safe condition
- Electrical, plumbing, garbage removal
- Running water (hot and cold) and heat
- Tenant may not withhold rent to enforce tenant’s rights
- Parties may agree for tenant to make specified repairs

35-9A-205 Limitation of Liability

- Landlord who sells premises is no longer obligated to tenant except for security deposit (new owner assumes remaining obligations)

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Article III – Tenant Obligations

35-9A-301 Tenant to Maintain Dwelling Unit

- Comply with housing codes which materially affect health and safety
- Dispose of garbage
- Keep premises clean and safe
- Keep plumbing clear
- Reasonable use of utilities
- Not commit waste or do damage to the premises

35-9A-302 Rules and Regulations

- Landlord may adopt rules
- Rules must apply to all tenants
- Tenant must know about rules at signing
- Substantial modification of rules not binding unless accepted by tenant

35-9A-303 Landlord Access

- Tenant must permit landlord to inspect and repair premises
- Landlord must give tenant notice of intent to inspect

35-9A-304 Tenant Use and Occupancies

- Use only for dwelling
- Tenant must notify landlord within five days of extended absences in excess of 14 days

Article IV – Remedies

Part I – Tenant Remedies for Landlords

35-9A-401 Noncompliance by Landlord in General

- Noncompliance of rental agreement must be material
- Tenant must give landlord 14 days notice of landlord's non-compliance
- Tenant may terminate lease when material noncompliance is not corrected in a timely manner
- When landlord in bad faith violates lease, tenant may recover actual damages plus attorney's fees

35-9A-402 Failure to Deliver Possession to Tenant

- Rent suspended until possession delivered
- May terminate lease upon written notice
- Willful failure to deliver possession: The tenant may recover three times actual damages plus attorney's fees from person in possession

35-9A-403 Self-Help for Minor Defects Omitted

35-9A-404 Failure to Make Available Heat, Water, Hot Water or Essential Services

- Tenant must give 14-day written notice of breach
- Tenant may terminate lease
- Landlord not responsible to pay utilities unless in the lease

35-9A-405 Noncompliance as Defense to Nonpayment of Rent

- Landlord sues for nonpayment of rent
- Tenant may counterclaim for money owed to tenant by landlord
- If tenant remains in possession the tenant must pay rent into court and let court decide who receives the money
- If tenant's counterclaim is without merit and not made in good faith the landlord may recover attorney's fees

35-9A-406 Fire

- Total destruction—tenant may terminate with 14 days' notice
- Partial destruction—prorate rent
- If lease is terminated the landlord must return security deposit

Part II – Landlord Remedies for Tenants

35-9A-421 Noncompliance with Rental Agreement

- Failure to cure breach of lease
- Landlord may terminate lease with 14 days' notice

Failure to Pay Rent

- Non-payment of rent, landlord may terminate lease with seven days' notice
- Willful noncompliance, landlord may recover attorney's fees
- Landlord may recover actual damages and injunctive relief and attorneys fees.

35-9A-422 Failure to Maintain

- Tenant's noncompliance affecting health and safety must be remedied within seven days

35-9A-423 Abandonment

- Tenant's absence in excess of 14 days may constitute abandonment
- Tenant leaves property in unit more than 14 days after lease is terminated, the landlord has no duty to store or protect personal property

35-9A-424 Waiver of Landlord's Right to Terminate

- Acceptance of past unpaid rent is not a waiver

35-9A-425 Landlord's Liens on Residential Property

- Abolished under act (see, Amendment to 35-9-60)

35-9A-426 Remedy after Termination

- Landlord may recover possession of house, rent and attorney's fees

35-9A-427 Recovery of Possession

- Landlord may not interrupt utilities to gain possession

Part III – Periodic Tenancy; Holdover

35-9A-441 Periodic Tenancy; Holdover Remedies

- Week to week—either party may terminate with seven days' notice
- Month to month—either party may terminate with 30 days' notice
- Landlord may recover three months' rent or actual damages plus attorney's fees from tenant, for willful not moving after lease terminates

35-9A-442 Remedies for Abuse of Access to property

- Either party may obtain remedies
- Injunctive relief
- Actual damages

Part IV – Eviction

35-9A-461

- Unlawful Detainer § 6-6-310 *et seq.*
- Court action seven days to answer and seven days to appeal (reduced from 14 days)
- Repealed: Sanderson Act § 35-9-1 *et seq.*

Article V – Retaliatory Conduct

35-9A-501 Prohibited

Landlord may not raise rent or decrease services, when

- Tenant complains to governmental agency
- Tenant complains about failure of landlord to maintain premises
- Joins a tenant organization
- No presumption of retaliatory conduct

Article VI – Effective Date, Savings Clause, Severability

35-9A-601 Effective Date

- January 1, 2007
- Applies only to leases entered into or renewed after effective date
- Penalties for including prohibited provisions in lease effective January 1, 2008

35-9A-602 Savings Clause

35-9A-603 Severability

- Invalidity of a provision does not affect other provisions

6-6-350 Eviction (amended)

- Parties have ~~14~~ seven days to appeal judgments entered against them

35-9-60 Landlord's Lien (amended)

- Removes landlord's lien from residential property

ALI Annual Meeting

The Annual Meeting of the Institute was held Thursday, July 13th during the Alabama State Bar Annual Meeting. The following officers and members of the Executive Committee were elected for the 2006-2007 year.

President: Representative Demetrius C. Newton

Vice-President: Senator Roger Bedford

Secretary: Robert L. McCurley, Jr.

Executive Committee: Representative Marcel Black, David Boyd, James M. Campbell, William N. Clark, Peck Fox, Representative Ken Guin, Richard S. Manley, Oakley W. Melton, Jr.*, Senator Rodger Smitherman, and Yetta Samford*

* *Emeritus Members*

The program for the meeting was "A Review of 2006 Legislation" given by legislators who were instrumental in sponsoring and passing the legislation, with Representative Demetrius Newton presiding.

Election Laws
Representative Ken Guin

Business and Tax Laws
Senator Roger Bedford

Criminal Laws, Sentencing Laws and Tort Laws
Representative Marcel Black

Laws Affecting Courts
Representative Paul DeMarco

Residential Landlord/Tenant Act
Representative Jeff McLaughlin

For more information, contact Bob McCurley, director, at P.O. Box 861425, Tuscaloosa 35486-0013, fax (205) 348-8411, phone (205) 348-7411 or visit our Web site at www.ali.state.al.us. ■

Robert L. McCurley, Jr.

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



J. Anthony McLain

An Attorney May Pay an Expert Witness a Reasonable and Customary Fee for Preparing and Providing Expert Testimony, but the Expert's Fee May Not Be Contingent on the Outcome of the Proceeding

QUESTION:

Under what circumstances can an attorney pay a witness who offers testimony at trial or by deposition for an attorney's client?

ANSWER:

Witnesses who offer testimony at trial fall generally into two categories, expert witnesses and lay or fact witnesses. An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding. An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income.

DISCUSSION:

The prohibitions against paying fact witnesses and against paying experts contingency fees are found in Rule 3.4(b) of the *Rules of Professional Conduct* of the Alabama State Bar, which provides that a lawyer shall not "offer an inducement to a witness that is prohibited by law." However, the Comment to this rule recognizes that the prohibition does not preclude payment of a fact witness's legitimate expenses as long as such payment does not constitute an inducement to testify in a certain way. This Comment is consistent with DR 7-109 of the old *Model Code of Professional Responsibility* which specifically authorized a lawyer to pay "expenses reasonably incurred by a witness in attending or testifying" and "reasonable compensation to a witness for his loss of time in attending or testifying."



Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute "expenses of litigation" within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee. However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he

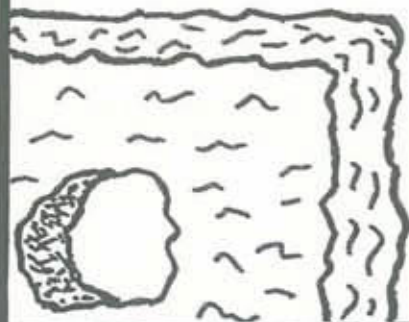
actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.

In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way.

An expert witness may be paid his reasonable, usual and customary fee for preparing and providing expert testimony, provided such fee is not contingent. This opinion is consistent with previous opinions of the Disciplinary Commission on similar or related issues in RO 81-549, 82-699 and 88-42. [RO-1997-02] ■

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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.

About Members

Grover E. Asmus announces the opening of Grover E. Asmus LLC at 107 Saint Francis St., Ste. 1500, Mobile 36602. Phone (251) 439-7600.

Yvonne M. N. Beshany announces the opening of Beshany Law Group LLC at 1117 22nd St., S., Birmingham 35205. Phone (205) 368-6407.

Kevin L. Boucher announces the opening of Kevin L. Boucher LLC at 2600 Dauphin St., Mobile 36606. Phone (251) 479-4414.

James V. Doyle, Jr. announces the opening of Doyle Law Firm PC in Birmingham. Phone (205) 824-0254.

Richard A. Freese announces the opening of The Freese Law Firm PC at The Morgan Keegan Center, 2900 Highway 280 S., Ste. 240, Birmingham 35223. Phone (205) 871-4144.

Jackson B. Harrison announces the opening of The Harrison Firm LLC at 8425 Crossland Loop, Montgomery 36117. Phone (334) 391-0856.

Billy W. Lewis, Jr. announces the opening of Law Office of Bill Lewis LLC at 1009 Jackson Trace Rd., Wetumpka 36092. Phone (334) 514-9470.

Theodore D. Morgan announces the opening of Ted D. Morgan PC in Georgia.

William S. Poole, III announces the opening of William S. Poole III, Attorney at Law at 2205 4th St., Ste. 23, Tuscaloosa 35401. Phone (205) 752-8338.

Matthew E. Rone announces the opening of Law Offices of Matthew E. Rone at 812 Crystal Wells Ct., S., Fairhope 36532. Phone (251) 990-6715.

Joseph W. Spransy announces the opening of his office in the Alexander House, 2320 Arlington Ave., Birmingham 35205. Phone (205) 930-9800.

Among Firms

Elizabeth B. Young announces her association with Aiken County Judicial Center (NC) as assistant solicitor, Second Judicial Circuit.

A. Vernon Barnett announces his association with the Alabama Department of Corrections as chief deputy commissioner.

Joana S. Ellis announces her association with the Alabama Department of Insurance.

M. Chad Tindol has joined the University of Alabama Office of Counsel.

Marcus T. Foxx announces his association with Alford, Clausen & McDonald LLC.

Crystal S. Boudreaux announces her association with the Baldwin County District Attorney's Office.

Jennifer L. Allen announces her appointment as assistant district attorney, Seventh Judicial Circuit.

Ariel S. Blocker announces that she is now with the City of Tuscaloosa.

Misty S. Fairbanks announces her association with the Office of the Attorney General, Constitutional Defense Division.

Scott W. Hunter, Robert F. Lamkin and Terry Moore announce their association with Austill, Lewis & Simms, Pipkin & Moore PC.

Bill D. Bensinger announces his association with Baker, Donelson, Bearman, Caldwell & Berkowitz PC.

Balch & Bingham LLP announces that T. Craig Williams, Jack B. Levy and Laura S. Robinson have joined the firm as partners and that Judd A. Harwood joined as an associate. The firm also announces that Barbara Gallo, Scott Hitch and Kerry Nelson have become members.

James L. Webb announces his association with Bradley Arant Rose & White LLP.

Margaret M. Miller announces her association with Briskman & Binion PC.

Regina M. Massetti announces her association with Buckley King LPA.

Kevin W. Brady announces his association with Choctaw Legal Defense.

J. Tim Coyle, Randall K. Richardson and John Maurer III announce the opening of Coyle, Richardson & Maurer LLP at 2737 Highland Ave., S., Birmingham. Phone (205) 251-2900.

Dickstein Sharpio Morin & Oshinsky LLP announces the firm name has changed to Dickstein Sharpio LLP and the firm is now located at 1825 Eye St., NW, Washington, DC 20006. Phone (202)420-2200.

Richard C. Duell, III and Burt W. Newsome announce the formation of Duell & Newsome LLC and the association of Marcus L. Hunt with the firm. Offices are located at 4320 Eagle Point Pkwy., Birmingham 35242. Phone (205) 408-3025.

Christopher L. Albright announces his association with Ellis & Bloom LLC.

Vania L. Hosea announces her association with Faulkner University.

Patrick Montgomery and Jay Tidwell have joined Ferguson, Frost & Dodson LLP as associates and Michael Gregory has joined *of counsel*.

Daniel H. Chambers announces his association with Gorham & Cason LLC.

Spencer W. Danzey announces his association with Gunter & Peterson, LLC.

Ham, Stankoski, Stankoski & Zundel LLP announces that the firm name has changed to Ham, Stankoski LLP and that the firm is now located at 55 N. Section St., Fairhope 36532.

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10	\$9	\$9	\$11	\$18	\$25	\$42	\$67
15	\$11	\$11	\$13	\$24	\$37	\$53	\$86
20	\$13	\$13	\$18	\$30	\$47	\$70	\$118
30	\$22	\$24	\$33	\$48	\$72	\$140	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Monthly Premium							
AGE:	30	35	40	45	50	55	60
10	\$15	\$15	\$19	\$31	\$45	\$80	\$130
15	\$18	\$18	\$23	\$44	\$70	\$103	\$168
20	\$23	\$23	\$31	\$56	\$90	\$137	\$231
30	\$39	\$44	\$62	\$91	\$139	\$276	

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Jesse P. Evans, III and Margaret M. Fullmer announce their association with Haskell Slaughter Young & Rediker LLC.

James A. Todd announces his association with Hawkeye Oil & Gas, Inc.

Matthew S. Atkins announces his association with ING Investment Management.

Johnston Barton Proctor & Powell LLP announces that Heather F. Lindsay, Angie G. McEwen and Susan V. Simpson have become partners, and that Elizabeth F. Sublette has joined the firm as an associate.

Charles A. Ray, IV announces his association with Johnston, Moore, Maples & Thompson.

C. Joseph Norton announces his association with Kopesky & Britt LLC.

Katherine A. Herndon announces her association with Lyons, Pipes & Cook.

Claude P. Roberts announces his association with MacNeill & Buffington PA.

Chad E. Stewart announces his partnership with Marsh, Cotter & Stewart.

David W. Steeleman announces his association with Marsh, Rickard & Bryan PC.

Anthony A. Joseph announces that he has become a shareholder with Maynard Cooper & Gale PC and that Robert H. Adams and Kimberly B. Glass have become associates.

Alexander W. Jones announces his association with McDermott, Will & Emory.

Kerry McDonald announces that the firm of McDonald & Dowdy has changed to McDonald & McDonald.

Brian K. Miller announces his association with McNamee & Liddon.

Judith Dolan and Wayne Morse announce the formation of Morse & Dolan PC with offices at Colonial Plaza Bldg., 2101 Sixth Ave. N., Ste. 700, Birmingham 35203. Phone (205) 327-8376.

Steven D. Altmann announces his association with Najjar Denaburg PC.

James I. Averitt announces his association with Nexson Pruet Adams Kleemeier.

Megan K. McCarthy announces her association with Nix Holtsford Gilliland Higgins & Hitson PC.

Ryan M. Aday, Beverly P. Baker, Thomas S. Kelly and James A. Patton, Jr. announce their association with Ogletree, Deakins, Nash, Smoak & Stewart PC.



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Travis C. Hargrove announces his association with Page, Scrantom, Sprouse, Tucker & Ford PC.

H. Samuel Prim announces the formation of Prim, Freeman & Mendheim LLC at 207 West Adams St., Dothan 36303. Phone (334) 671-9555.

Billy J. Causey announces his association with Progressive Insurance.

Vera B. Williams announces her association with Protective Life Corporation.

Sonny J. Steen announces his association with Robertson & Associates PC.

Jayson B. Robinson and Matthew T. Self announce their association with Robinson & Self PC.

Renay Bertella announces her association with The Robinson Law Firm PC.

Andrew B. Koplán announces his association with Rome & Koplán.

W. Bradford Roane, Jr. and David E. Rains have become shareholders with Rosen, Cook, Sledge, Davis, Shattuck & Oldshue PC and Amanda L. Cutshall is associated with the firm.

David W. Rousseau announces the opening of The Law Offices of David W. Rousseau at 211 W. Adams St., Dothan 36303. Phone (334) 699-9000. He also announces that Barbara W. Wade is now associated with the firm.

Daniel A. Feig recently joined the Birmingham office of Rumberger, Kirk & Caldwell PA as an associate.

Lauren Duvernay announces her association with Rushing & Guice.

Julie W. Jordan announces her association with Sirote & Permutt.

Amy A. Slayden, Susan C. Conlon, Page A. Banks and Sandra H. Parker have formed Slayden, Conlon, Banks & Parker PC at 218-A Randolph Ave., Huntsville 35801. Phone (256) 288-1100.

Jennifer B. Morrison announces her association with Southern Company Services, Inc.

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About Members, Among Firms

Continued from page 393

Tameka A. Coaker announces her association with Stewart Title Guaranty Company.

James K. Sheek, IV announces his association with Stifel, Nicolaus & Company, Inc.

Marlin B. Hood announces his association with Stirling & Hood.

Leslie M. Trippe announces her association with Teledyne Brown Engineering.

Christopher K. Whitehead announces his association with Thomas, Means, Gillis & Seay PC.

Marcus S. Lawrence, Jr. announces the formation of Thorn Lawrence PL at 402 East Oak Ave., Ste. 101, Tampa 33602. Phone (813) 514-8355.

Ariel S. Blocker announces that she is now with the City of Tuscaloosa.

Frank W. Myers, Sr. is serving as a Rule of Law advisor with the Department of State's International Narcotics Law Enforcement Bureau at the United States Embassy in Iraq. Wilson had previously served for 14 months as an advisor to the Iraqi Ministry of Justice, the senior legal consultant to the Iraqi Commission on Public Integrity and the representative for the Project and Contracting office and the Iraqi Reconstruction Management office to Northern Iraq.

Jeremy C. Floyd announces his association with Upshaw Williams Biggers Beckham & Riddick LLP.

David R. Hanbury announces his association with Welborn Cabinet, Inc.

Alexander M. Weisskopf announces his association with Weathington & Moore PC.

Derrick J. Carruth announces his association with Whatley Drake LLC.

Katherine A. Rogers announces her association with White, Arnold, Andrews & Dowd PC.

Marcus A. Huff announces his association with Wilmer & Lee PA. Nicole L. Schroer has become a shareholder with the firm and Anita S. Damian is now of counsel.

Mary E. Cash announces her association with John M. Wood Law Center.

Jenifer Schniper-Thornton announces her association with YWCA Central Alabama.

Do you represent a client who has received medical benefits, lost wages, loss of support, counseling, or funeral and burial assistance from the Alabama Crime Victim's Compensation Commission?



When your client applied for benefits, a subrogation agreement was signed pursuant to §15-23-14, *Code of Alabama* (1975). If a crime victim received compensation benefits, an attorney suing on behalf of a crime victim must give notice to the Alabama Crime Victims' Compensation Commission, upon filing a lawsuit on behalf of the recipient.

For further information, contact Kim Ziglar, staff attorney, Alabama Crime Victims' Compensation Commission at (334) 242-4007.

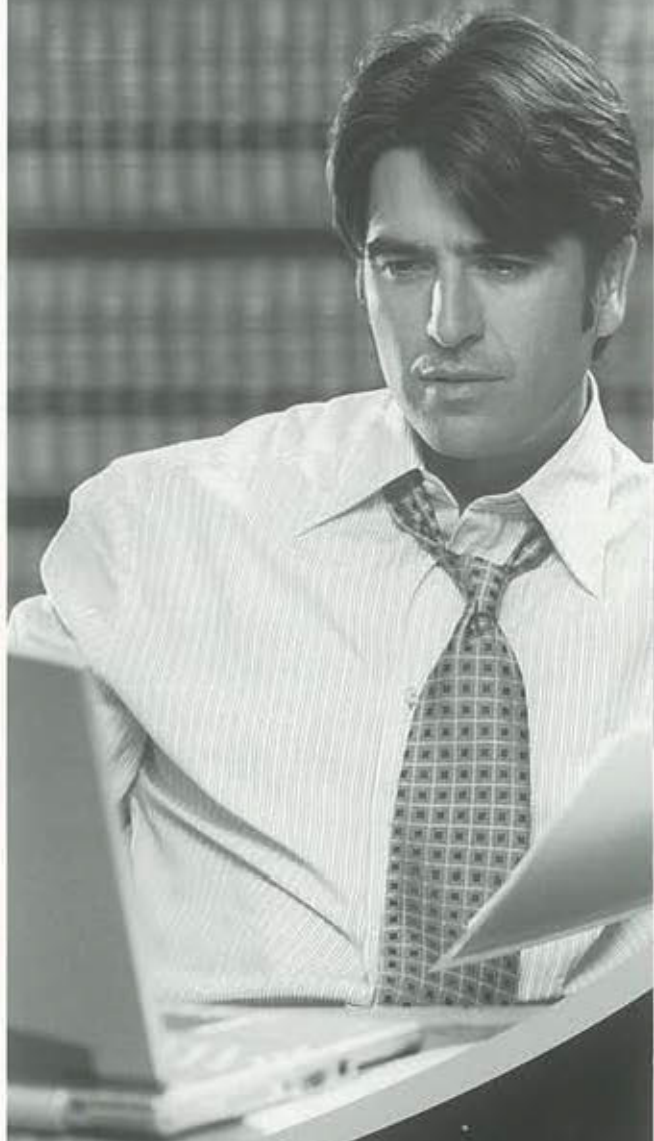


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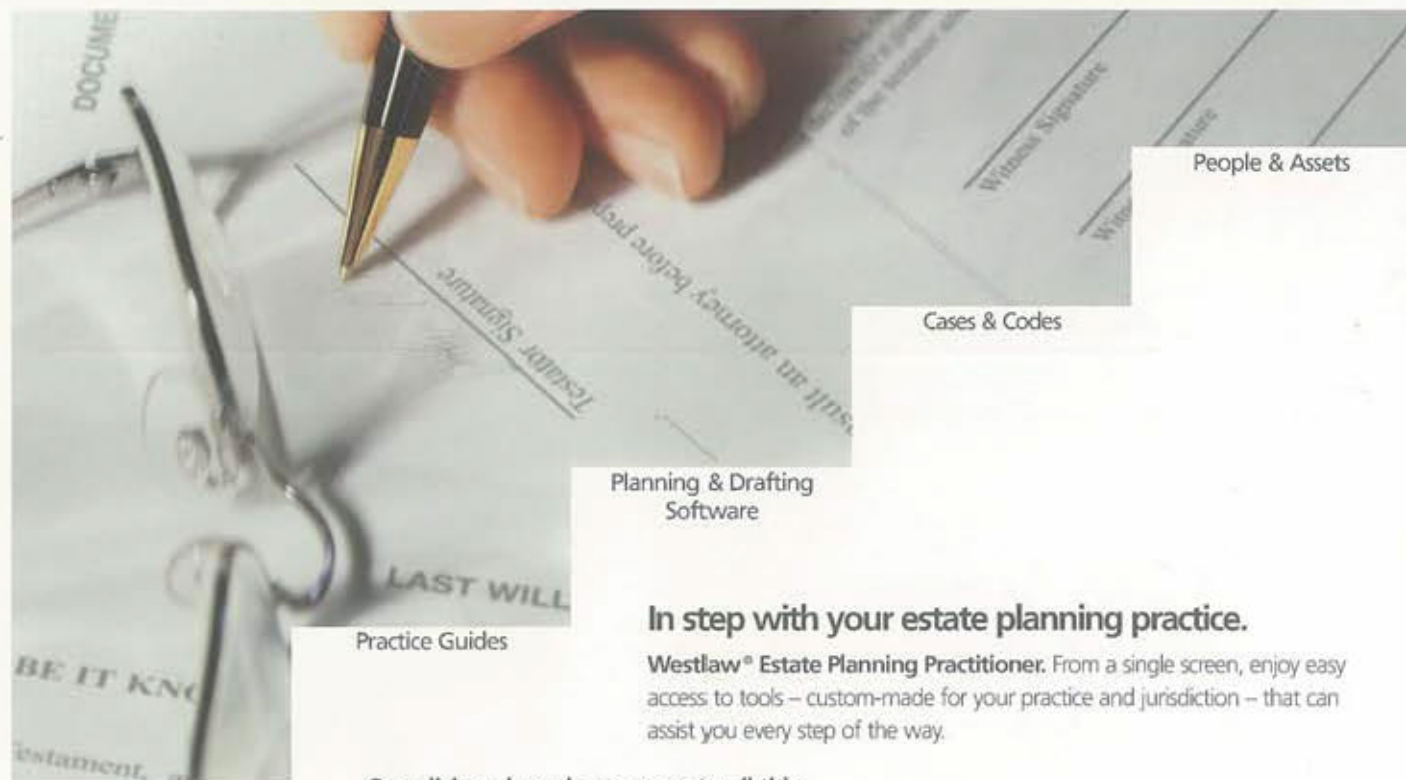
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