

# The Alabama Lawyer

Vol. 56, No. 7

NOVEMBER 1995





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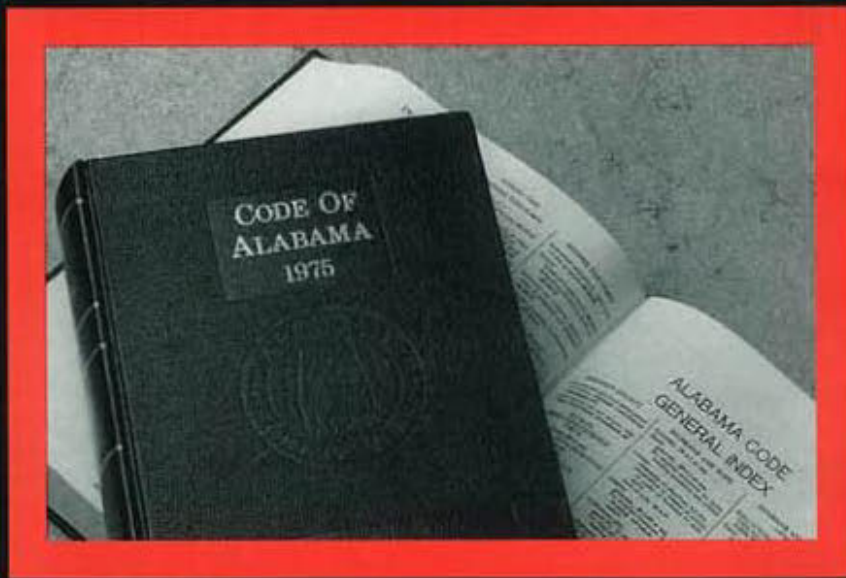
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# IN BRIEF

November 1995

Volume 56, Number 7

## ON THE COVER:

Noccalula Falls, Gadsden, Alabama. This beautiful waterfall cascades over 90 feet into the ravine below. The Noccalula Falls Park area offers gardens, a campground, and a scenic hiking trail through the canyon. For a unique experience, follow the trail to the cavern behind the falls.

—Photo by Paul Crawford

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# The Alabama Lawyer

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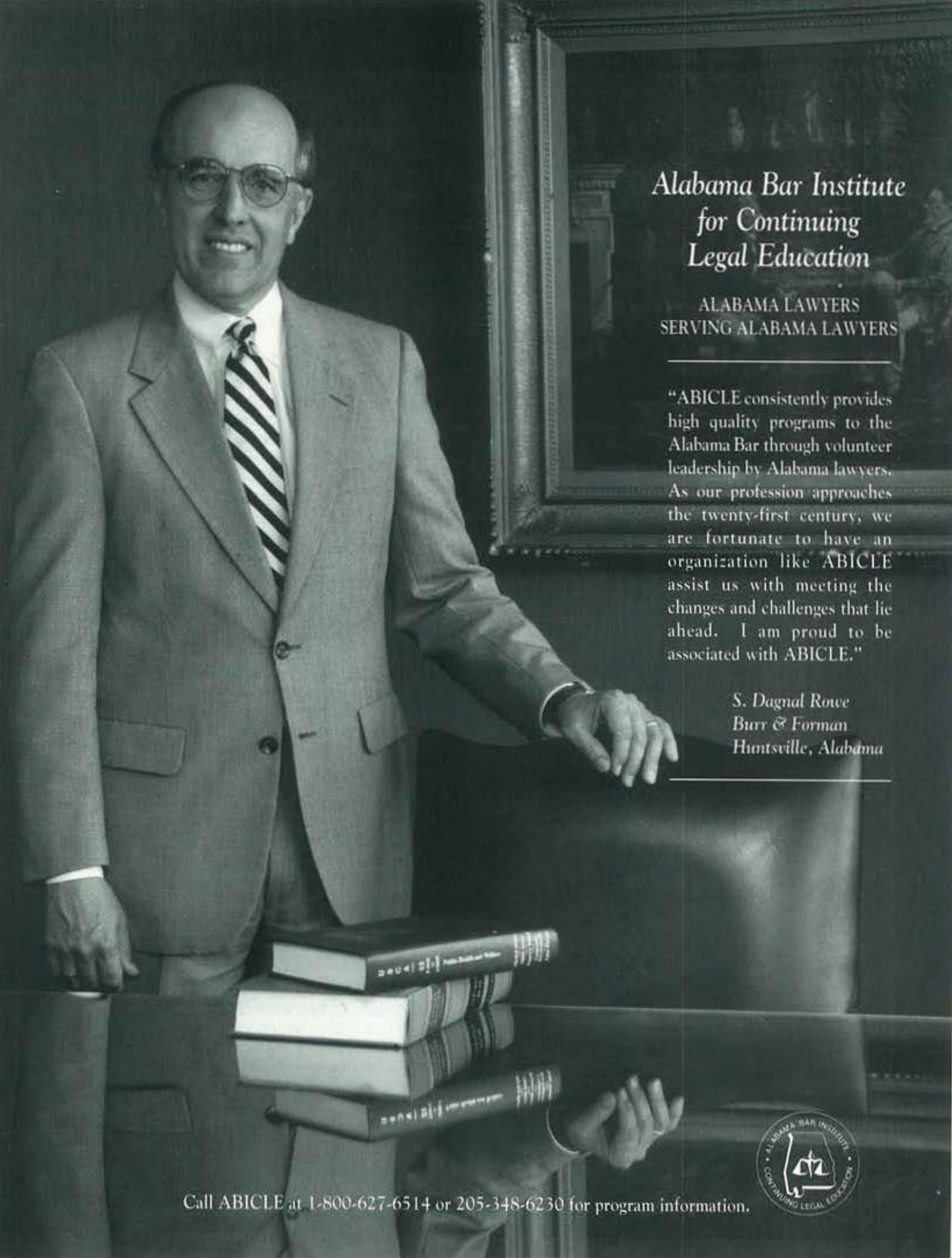
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# PRESIDENT'S PAGE

*"I believe that there is a perception in the bar that the Alabama State Bar is dominated by the defense bar and that, save a token participation, the average general practitioner and particularly plaintiffs lawyers are excluded."*

— This was written by Garve Ivey, Jr. of Jasper, in a recent letter to the Alabama State Bar.

**I**n my conversations with many attorneys around the state, his "perception" is shared by at least a sizable minority of our members. I often hear a similar complaint—that the state bar does nothing for the average practitioner except administer discipline when he or she messes up. Although this perception may be out there, it is incorrect. We are and have been working to correct it and we welcome your ideas and suggestions. This is one reason I will continue to discuss some of the little known work the state bar is doing.

In my article in the September issue, I focused on four new programs the bar is studying, all designed to benefit every lawyer and, in particular, those in solo practice and in small firms. Members there make up over 60 percent of our bar. I will focus this article and at least one other on areas in which approximately 1,000 Alabama lawyers from every county and in every type of practice annually devote huge amounts of volunteer time and energy through the Alabama State Bar to improve the legal profession, the justice system and the ability of lawyers to provide quality service to the public and earn a decent living by doing so. Over 800 of these lawyers serve on a committee or task force. (All of the committees, their chairmen or vice-chairmen, and members are listed on pages 278-281 of the September issue of the *Lawyer*. Task forces are listed on pages 333 of this issue.) The others serve on the board of bar commissioners, as bar examiners, on special ad hoc task forces or in many other ways. These 1,000 do not include the approximately 1,600 lawyers participating in the Volunteer Lawyers Program who have agreed to provide 20 hours of pro bono legal work.

In the September issue I spotlighted the work of the Solo and Small Firm Practitioner's Task Force and the new Fee Dispute Resolution Task Force. In this article I am focusing on the work of the **Committee on Citizenship Education** and the work of the **Client Security Fund Committee**.

## Citizen's Education Committee

**Donna Smalley** of Tuscaloosa is chair and **Linda Conner** of Birmingham is vice-chair. Counting the chair and vice-chair, there are 21 members of the committee. **Tutt Barrett** of Opelika is the board of bar commissioners liaison. **Lynn O'Neal** of Birmingham is the Young Lawyers' Section representative and **Ed Patterson** is the staff liaison. I asked Donna to write what she would like all lawyers to know about the committee. What she wrote was so good that I will adopt it as my own:



**John A. Owens**

It has often been said, "A little knowledge is a dangerous thing." However, that is exactly what the public has about the law! The increased speed of communication technology has not been accompanied by in-depth explanation. So, the public's understanding of what they hear about the law is limited. The news reports of criminal procedures, civil verdicts or class action settlements often make no sense to them. Even worse is the fear and mistrust such a lack of information creates when a person must visit a lawyer for their own personal crises. At the very heart of the most pressing concern of all lawyers today—poor public image—is the lack of edu-

cation of our citizens about the legal system itself. Thus, the importance of the Committee on Citizenship Education and the Law becomes obvious.

Charged with the overwhelming responsibility to increase the public's knowledge and understanding of our legal system, this group of enthusiastic and dedicated bar members is challenged and excited, rather than distraught. "The public is interested and eager to learn about the law. The limited news they do hear is fascinating to them, and piques their curiosity. We need only harness our resources and meet the need to give the public the information they want!" says Donna.

*Continued on page 330*



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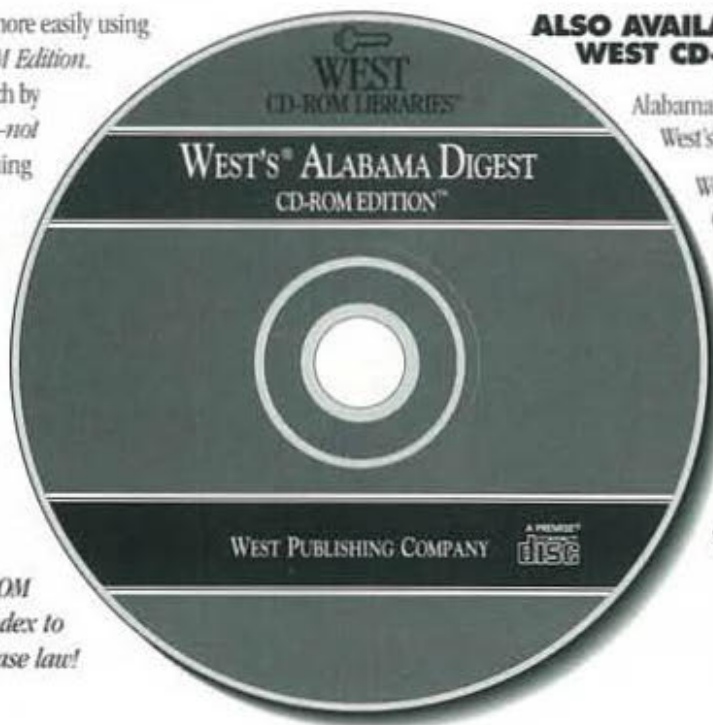
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This particular committee is augmented by the **Center for Citizenship Education and the Law** which is a public, non-profit agency formed several years ago jointly by educator Jan Loomis-Cowen and this particular committee of the state bar, with seed money from an IOLTA grant. Operating under the umbrella of the state bar, the Center is a storehouse of educational resources for Alabama teachers in every school and every age, on a wide variety of legal topics. The Center has made possible the introduction of "Street Law", an American Bar Association-approved text and lesson plan for all tenth grade civics classes. Further, the generous offerings of the agency has fostered an excellent relationship between the bar and the state board of education. The agency is funded mostly with grants, which are always questionable, and a small subsidy from the state education budget. "The material (from the Center) allows busy lawyers to obtain the resources they need to enter the classroom ready to be an effective teacher, with almost no preparation time required," says participating lawyer **Jerome Thompson**, a sole practitioner in Moulton. In Aliceville, volunteer lawyers, under the leadership of local attorney **John Russell**, have taught the "Street Law" course in their high school.

Other committee activities involve a possible cooperative effort with Alabama Public Television; a proposed teacher continuing education course next summer; a fund raising effort for the Center, offering bar members a way to honor their favorite teachers from the past; and a variety of other activities too numerous to name.

What is our greatest need? It is to have the participation of lawyers in every community across the state. The Citizen's Education Committee and I issue this challenge to each of the lawyers reading this article: Every lawyer, be a teacher for one hour. Will you each accept this challenge? We would love to know, and would ask that you fax a confirmation of your participation, voluntarily or otherwise, after you have taught your course, letting us know who you are, where you taught and what you taught.

We will make every effort to live up to the lofty goals established as the purpose of this committee.

### **Client Security Fund Committee**

The **Client Security Fund Committee** is chaired by **Warren Lightfoot** of Birmingham who, as president-elect of the Alabama State Bar, is automatically chair of the committee because of the rules of the Alabama Supreme Court establishing the committee. However, the real working head is the vice-chair. For many years, **Jim Ward** of Birmingham held this position. Under the rules, he no longer can serve so **Michael E. Ballard** of Mobile, who has long worked on the committee, is vice-chair. In addition to the chair and vice-chair, the committee has but seven members—also fixed by the supreme court rules. The board of bar commissioners liaison is **Bobby Segall** of Montgomery and the staff liaison is **Bonnie Mainor**. Jim Ward serves as a valuable volunteer consultant making use of his long work experience with the committee.

I asked Michael Ballard to write what he would like to communicate to the state bar about the work of his committee and it follows:

"The Client Security Fund is the second such fund to attempt to remedy certain wrongs caused by the dishonest conduct of attorneys. The first failed as a result of underfunding and large awards. After a lapse of many years, the Alabama State Bar set up a task force to attempt to reimplement a security fund. Funds of other states were studied and much effort went into the drafting of the fund's governing rules which were finally approved by the Alabama Supreme Court in May 1987. The court's approval of the fund and its rules was needed for funding to be a mandatory assessment on all attorneys with nonpayment of the assessment meaning suspension. Funding is from an assessment of \$25 per year for four years (\$100).

"The governing committee had little work the first year as the fund was not well known. This has changed with an increasing caseload each year. Since reorganization the fund has received 244 claims and concluded 214 claims. Committee members serve at least three years, giving a continuity to the process. At its last sitting, the committee reviewed and disposed of 41 cases. The committee usually meets two to three times a year, depending on the caseload.

"The fund is the remedy of last resort for clients who have had losses caused by the dishonest conduct of their attorneys and who cannot get reimbursed by any other means. Dishonest conduct means the wrongful taking of a client's money or property and does not include dissatisfaction with the service or result. No reimbursement is made for legal malpractice, as those losses are not intentional. The fund generally requires the claimant to exhaust his remedies before the claim will be considered. The fund limits the reimbursement for any one claim to \$10,000 with a cumulative total per lawyer of \$20,000. Where claims are expected to exceed this total, the claims are accumulated and then prorated.

"An investigator of the Alabama State Bar checks out each claim to determine the facts of the claim and presents those facts and the client's proof to the committee for evaluation and determination. When the committee needs additional information to make a decision, the claims administrator of the Office of General Counsel assists the committee. All claims will be investigated and presented to the Client Security Fund Committee. The committee will determine the merit of all claims and also the amount, time and manner of reimbursement. Factors considered by the committee include the amount of money available in the fund, the number of claimants seeking reimbursement, and the degree of hardship suffered by each claimant. When a claim is paid, the claimant must assign any rights they have against the dishonest attorney to the fund by a subrogation agreement which will be provided to the claimant before payment is made.

"The rules of the committee require that any claim be made in writing by the person involved with the attorney and whose money or property was taken. Further, all other remedies must either be exhausted or shown to be fruitless. Where an attorney is working and not suspended, the committee defers the claim as not ripe. The claim must be one that arose after the effective date of the fund and must be made within three years of the loss. The fund takes assignment from the client against future recovery or repayment on application for readmission to the bar by the attorney." ■



# EXECUTIVE DIRECTOR'S REPORT

## ALABAMA STATE BAR BOARD OF BAR COMMISSIONERS: *SERVICE THAT IS DEMANDING, YET REWARDING*

**T**he governing body of the Alabama State Bar is the Board of Bar Commissioners. This governing authority was established by the Legislature in 1923. The board is composed of at least one lawyer elected from each judicial circuit. Section 34-3-40, *Code of Alabama* (1975), which establishes the board of commissioners, also provides for one additional commissioner for each 300 members of the state bar who maintain their principal office in the circuit as of March 1 each year. This provision further provides that no circuit or county is entitled to more than ten commissioners. The board of commissioners presently has 57 members representing lawyers residing in the state's 40 judicial circuits. The judicial circuits with more than one commissioner are:

**6th** (Tuscaloosa)-2

**10th** (Jefferson)-10 (One of the representatives is elected from the Bessemer Cutoff District)

**13th** (Mobile)-4

**15th** (Montgomery)-4

**23rd** (Madison)-2

As the profession has grown and the practice of law has become more complex, the responsibilities of the commission have multiplied as well. As the governing authority of the state bar, the board of commissioners is charged with, among other things: approving the bar's budget submitted to the Finance Department; supervising of the state bar's admission and disciplinary responsibilities; approving personnel policies for state bar employees; approving any policy statement made by the state bar on issues relevant to the legal profession;

electing individuals to serve as state bar delegates to the American Bar Association; and appointing individuals to serve on various state agency boards and service agency boards.

To carry out these responsibilities, the board of commissioners meets eight times a year. Two of these meetings are usually in conjunction with the state bar annual meeting. As I indicated in my column appearing in the September issue of *The Alabama Lawyer*, the commitment of time as a commissioner is not

insignificant. Commissioners receive no salary and are only reimbursed for their travel to and from meetings. The reward for this important service is knowing that in addition to serving one's profession, a commissioner is also performing an important public service because the state bar is the licensing and regulatory agency for lawyers in Alabama.

I routinely receive calls from lawyers who are interested in serving on the board of commissioners but are unfamiliar with the election process. On occasion, callers who believe that the process is open only to certain lawyers are stunned to discover the nomination process is so simple. The only qualification is that a candidate must be a member in good standing (has purchased a current license or paid special membership dues), and maintains his or

her principal office in the circuit he or she seeks to represent. Nomination to the office of commissioner is accomplished by a written petition signed by any five or more members of the bar in good standing who maintain their principal office in the circuit where the nominee maintains his or her principal office. A member in good standing may also become a candidate by filing a written declaration of candidacy. If a candidate is from a



**Keith B. Norman**

### CLE Reminder

All CLE credits must be **earned** by December 31, 1995

All CLE transcripts must be **received** by January 31, 1996



multi-commissioner circuit, the candidate must declare for a designated position. All elections in multi-commissioner circuits are at-large elections. A candidate's nominating petition or declaration of candidacy must be filed with the Secretary of the Alabama State Bar no later than 5 p.m. of the last Friday in April of the election year. A faxed petition is acceptable, but an original must be furnished to the secretary.

Each candidate and his or her supporters are expected to conduct the candidacy in a dignified manner. Each candidate may request a list of persons eligible to vote in his or her circuit. The first list is provided at no charge. There is a charge for additional lists. The Executive Council of the Alabama State Bar is responsible for resolving any complaints or challenges concerning campaign practices. A complaint or a chal-

lenge must be in affidavit form, filed with the Secretary of the Alabama State Bar no later than June 30 of the election year.

A successful commissioner candidate assumes office on July 1 of the year of the election. The term of office is three years and a commissioner may not serve more than three consecutive terms.

The board of commissioners performs a very important service for our profession and the public. We have an outstanding group of commissioners and our bar has been fortunate in the past to have truly dedicated representatives serving on the board. If you are interested in serving your profession, consider representing your judicial circuit as a bar commissioner. Service on the board is time-consuming, but it is service that helps us remain a self-regulated profession. ■



## ALABAMA STATE BAR

### Alabama State Bar Staff Additions

#### Kim Oliver



Kim Oliver of Montgomery has been named director of the state bar's Volunteer Lawyers Program. Oliver succeeds Melinda M. Waters, who was recently named executive director of Legal Services Corporation of Alabama.

Oliver received her undergraduate degree from the University of Miami and her law degree from the University of Alabama School of Law. She worked from 1979 to 1991 in the United States Department of Treasury as a national bank and national trust examiner. She most recently served as deputy attorney general in the State of Alabama Office of Attorney General, criminal appeals division.

#### Greta Chambless



Greta Chambless is the executive assistant to Kim Oliver, director of the Volunteer Lawyers Program. She handles all correspondence involving potential clients, volunteer attorneys and case referrals. She also has charge of special projects, such as recruitment drives and mass mailings to volunteers.

Greta is a native of Montgomery and is working toward a degree in graphic design, as well as obtaining her paralegal certification.

#### Roderick J. Palmer

Roderick J. Palmer is originally from Davenport, Alabama. He attended John M. Patterson Technical College in Montgomery where he received an associate degree in graphic and printing technology. Rod started with the state bar in September of this year as graphic arts assistant and helps with all duties of the bar's print shop.



# ABOUT MEMBERS, AMONG FIRMS

## ABOUT MEMBERS

**John G. Scherf, IV** announces the opening of his office at 2122 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 324-9991.

**Patrick L. Robinson** announces the opening of his office at 307 11th Street, Honesdale, Pennsylvania. The mailing address is P.O. Box 607, Honesdale 18431. Phone (717) 251-9708. Robinson is a 1976 admittee to the Alabama State Bar.

**Frank S. Buck** announces the relocation of his office to 2160 14th Avenue, South, Birmingham, Alabama 35205-3922. Phone (205) 933-7533.

**Donald W. Lambert** announces the opening of his office at 44905 Highway 17, Vernon, Alabama 35592. The mailing address is P.O. Box 1322, Vernon 35592. Phone (205) 695-9691.

**Milton E. Barker, Jr.** announces the relocation of his office to Barrister Hall, 2205 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 251-6666.

**L. Scott Johnson, Jr.** announces the relocation of his office to The Bell Building, 207 Montgomery Street, Suite 718, Montgomery, Alabama 36104. The mailing address is P.O. Box 1547, Montgomery 36102. Phone (334) 834-3221.

**George H. Wakefield, Jr.** announces the relocation of his office to 6825 Halcyon Park Drive, Montgomery, Alabama 36117. The mailing address is P.O. Box 240848, Montgomery 36124-0848. Phone (334) 244-7333.

**Virginia Lacy** announces her termination with Lorant & Associates. She will continue to practice at 104 Second Avenue, West, Oneonta, Alabama 35121. The mailing address is P.O. Box 808, Oneonta. Phone (205) 625-6333. She is resuming the use of her original name, **Virginia R. Smith**.

**Mark A. Sanderson**, a former associate with Potts & Young in Florence and former assistant district attorney of Colbert County, announces the opening of his office at 402 S. Cedar Street, Florence, Alabama 35630. The mailing

address is P.O. Box 311, Florence 35631. Phone (205) 760-8759.

**Cindy M. Calhoun**, formerly of Burnham & Klinefelter, announces the relocation of her office to 1130 Quintard Avenue, Suite 401, Anniston, Alabama 36201. Phone (205) 237-2751.

**Susan C. Conlon**, formerly of Blankenship & Conlon, announces the opening of her office at 200 W. Court Square, Suite 48, Huntsville, Alabama 35801. Phone (205) 536-9008.

**Edward L. Kellett** announces the opening of his office at 131 W. Main Street, Albertville, Alabama 35950. The mailing address is P.O. Box 1936, Albertville 35950. Phone (205) 878-3622.

**Mary Dixon Torbert** announces the opening of her office at 420 S. Lawrence Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 292, Montgomery 36602-0292. Phone (334) 269-3232.

**Michael G. Graffeo**, formerly with Najjar, Denaburg, announces the opening of his office at 2001 Park Place, North, Suite 1010, Birmingham, Alabama. Phone (205) 328-6000.

**A. Evans Crowe** announces the opening of his office at 209 N. Joachim Street, Mobile, Alabama 36603. The mailing address is P.O. Box 655, Mobile 36601-0655. Phone (334) 431-6000.

## AMONG FIRMS

**Connie J. M. Carraway**, former law clerk to senior U.S. District Judge Daniel Thomas and assistant city attorney for the City of Mobile, announces her change of address from 150 Government Street, Suite 101, The LaClede, Mobile, Alabama 36602, and her appointment as an assistant district attorney in Jasper, Alabama. Her new address is **Walker County District Attorney's Office, P.O.**

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**James I. Cohn** has been appointed by Governor Lawton Chiles as a circuit judge of the 17th Circuit in Broward County, Florida. Offices are located at Broward County Courthouse, 201 S. E. Sixth Street, Fort Lauderdale, Florida 33301. Phone (305) 831-7091. Cohn is a 1974 admittee to the Alabama State Bar.

**Robert E. Kirby, Jr.** announces that **Emily J. Hurst** has joined the firm. The new name is **Kirby & Associates**. Offices are located at 3100 Lorna Road, Suite 202, Birmingham, Alabama, 35216. Phone (205) 979-1924.

**Donna Britt Madison** announces her appointment as assistant dean at **Birmingham School of Law**. Madison will continue to practice in her new location at 205 N. 20th Street, Suite 703, Birmingham, Alabama 35203. Phone (205) 328-2298.

**G. William Davenport**, an administrative law judge with the **U.S. Government** and formerly a senior trial attorney for the Equal Opportunity Commission in Birmingham, has been reassigned to a posting in Savannah, Georgia. His new address is U.S. Social Security Administration, Office of Hearings & Appeals, Juliette G. Lowe Federal Complex, 124 Barnard Street, Third Floor, Savannah 31401. Phone (912) 652-4302. Davenport is a 1977 admittee to the Alabama State Bar.

**LaVette Lyas-Brown** announces a change of address to the **Office of the Attorney General**, State of Alabama,

Alabama State House, 11 S. Union Street, Montgomery, Alabama 36130. Phone (334) 242-7300.

**Equifax Incorporation** announces that **Brooks L. Porch** has been promoted to assistant general counsel. Offices are located at 1600 Peachstreet Street, NW, Atlanta, Georgia 30309. Porch is a 1982 admittee to the Alabama State Bar.

**Gordon, Silberman, Wiggins & Childs** announces that **Ann C. Robertson** and **Jim Mendelsohn** have become shareholders, and **Brian M. Clark**, **Joel S. Isenberg**, **Sandra B. Reiss**, **Rebecca J. Anthony**, **Craig L. Lowell**, and **C. Paige Williams** have become associates. Offices are located at 1400 SouthTrust Tower, Birmingham, Alabama 35203-3204. Phone (205) 328-0640.

**Gardberg & Knopf** announces that **C. Greg Thomas** has become an associate. Offices are located at 1015 Montlimar Drive, Suite B-4, Mobile, Alabama 36609. Phone (334) 343-1111.

**Robert P. Fann** and **Patricia K. Rea**, formerly of Clark & Scott, announce the formation of **Fann & Rea** and that **Michael B. Odom** has become an associate. Offices are located at 22 Inverness Center Parkway, Suite 140, Birmingham, Alabama 35242. Phone (205) 991-5045.

**Michael W. Carroll** and **Perryn G. Carroll** announce the formation of **Carroll & Carroll**. Offices are located at Frank Nelson Building, 205 20th Street, North, Suite 615, Birmingham, Alabama 35203. Phone (205) 328-2600.

**Feld & Hyde** announces that **Leonard E. Wertheimer, III**, formerly with Najjar & Denaburg, has joined the firm as a shareholder and **John F. Lyle, III** became a shareholder. The firm's new name is **Feld, Hyde, Lyle & Wertheimer**. Offices are located at 2100 SouthBridge Parkway, Suite 590, Birmingham, Alabama 35209. Phone (205) 802-7575.

**John T. Alley, Jr.** and **John W. Waters, Jr.** announce the formation of **Alley & Waters**. Offices are located at 2941 Zelda Road, Suite A, Montgomery, Alabama 36106. Phone (334) 279-8866.

**Lange, Simpson, Robinson & Somerville** announces that **Atley A. Kitchings, Jr.** has become a resident in the Montgomery office located at 8 Commerce Street, Suite 900, Montgomery,

Alabama 36104-3531. Phone (334) 241-0000. Offices are also located in Birmingham and Huntsville, Alabama.

**Capell, Howard, Knabe & Cobbs** announces that **Frank H. McFadden**, formerly general counsel for Blount, Inc. and former chief judge, United States District Court, Northern District of Alabama, has become a member and **Christopher W. Weller** has become an associate. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104-4045. Phone (334) 241-8000.

**Parnell, Crum & Anderson** announces that **Kyle D. Massengale** has become an associate. Offices are located at 641 S. Lawrence Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 2189, Montgomery 36102-2189. Phone (334) 832-4200.

**G. David Chapman, III** and **Cynthia Cargile McMeans** announce the formation of **Chapman & McMeans**. Offices are located at 144 Cove Avenue, Gulf Shores, Alabama 36542. Phone (334) 968-2402.

**David P. Shepherd** announces the association of **Mark S. Gober**, formerly of the Michie Legal Publishing Company in Charlottesville, Virginia. Offices are located at 913 Plantation Boulevard, Fairhope, Alabama. Phone (334) 928-4400.

**Andrew W. Bolt, II**, formerly a partner with Bolt, Isom, Jackson & Bailey, has become of *counsel* to **Lucas, Alvis & Wash**. Offices are located at One Chase Corporate Center, Suite 490, Hoover, Alabama 35244. The mailing address is P.O. Box 360777, Hoover 35236. Phone (205) 733-0664.

**Gillion, Brooks & Hamby** of Mobile, Alabama announces the opening of a branch office in Citronelle, Alabama. Offices are located at 19680 N. 3rd Street, Citronelle 36522. Phone (334) 866-9117.

**Roianne Houlton Frith & Associates** announces that **Carol Lackey Boone** and **Lisa D. Todd** have become associates. Offices are located at 407 S. McDonough Street, Montgomery, Alabama 36103. The mailing address is P.O. Box 5048, Montgomery 36103. Phone (334) 834-7001.

**Brown-Turner** announces that **Bryan K. Horsley**, formerly of Steiner, Crum & Baker, has become an associate. Offices

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**Gilmore Law Office** announces that **Hardie B. Kimbrough**, former presiding judge of the First Judicial Circuit, has become of *counsel*. Offices are located at 116 Court Street, Grove Hill, Alabama. The mailing address is P.O. Box 729, Grove Hill 36451. Phone (334) 275-3115.

**Lanier, Ford, Shaver & Payne** announces that **Frank M. Caprio** has become a partner. Caprio was formerly an associate with Bradley, Arant, Rose & White in its Huntsville office. Offices are located at 200 W. Court Square, Suite 5000, Huntsville, Alabama 35801. The mailing address is P.O. Box 2087, Huntsville 34804. Phone (205) 535-1100.

**Smith & Lisenby** announces that **David H. Dowdy** has become a member, and the name has been changed to **Smith, Lisenby & Dowdy**. The firm's Tuscaloosa County office has been relocated to 315 Main Avenue, Northport, Alabama 35476. Phone (205) 349-4887. The firm also has an office in Centreville, Alabama.

**Capouano, Smith, Warren & Klinner** announces that **Paul L. Beckman, Jr.** has become an associate. Offices are located at 350 Adams Avenue, Montgomery, Alabama 36104. The mailing address is P.O. Drawer 4689, Montgomery 36103-4689. Phone (334) 834-3891.

**Rosen, Cook, Sledge, Davis, Carroll & Jones** announces that **Sheree Martin** has become a shareholder of the firm. Offices are located at 1020 Lurleen Wallace Boulevard, North, Tuscaloosa, Alabama 35401. Phone (205) 345-5440.

**Goody's Family Clothing** announces that **Marcus H. Smith, Jr.** has joined as a senior vice-president. Offices are located at 400 Goody's Lane, Knoxville, Tennessee 37922. Phone (615) 966-2000. Smith is a 1989 admittee to the Alabama State Bar.

**Steiner, Crum & Baker** announces that **William M. Bowen, Jr.**, former presiding judge of the Alabama Court of Criminal Appeals, has become a member. Offices are located at 8 Commerce Street, Suite 800, Montgomery, Alabama

36104. The mailing address is P.O. Box 668, Montgomery 36101-0668. Phone (334) 832-8800.

**McInnish & Bright** announces that **Lu An Long**, formerly with Circuit Judge Eugene W. Reese, Montgomery County, has joined the firm. The new name is **McInnish, Bright & Long**.

Offices are located on 235 S. McDonough Street, Montgomery, Alabama 36101. The mailing address is P.O. Box 52, Montgomery 36101-0052. Phone (334) 263-0003.

**Pierce, Carr, Alford, Ledyard & Latta** announces that **James H. McDonald, Jr.**, formerly vice-president and general counsel of Delchamps, Inc., has joined the firm. Offices are located at Suite 900,

1110 Montlimar Drive, Mobile, Alabama 36609. The mailing address is P.O. Box 16046, Mobile 36616. Phone (334) 344-5151.

**Rushton, Stakely, Johnston & Garrett** announces that **Daniel L. Lindsey, Jr.** has become an associate. Offices are located 184 Commerce Street, Montgomery Alabama 36101. The mailing address is P.O. Box 270, Montgomery 36101-0270. Phone (334) 206-3100.

**Johnston, Barton, Proctor, Swedlaw & Naff** and **Powell & Frederick** announce their merger, effective September 1. The new name is **Johnston, Barton, Proctor & Powell**. Offices are located at 2900 AmSouth/Harbert Plaza, Birmingham, Alabama. ■

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# BUILDING ALABAMA'S COURTHOUSES

## LEE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. **The Alabama Lawyer** plans to run one county's story in each issue of the magazine. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.

### LEE COUNTY

**T**he area that is now Lee County originally belonged to the Creek Indian nation. By the Treaty of Cusseta, signed in March of 1832, the Creeks ceded it to the United States, along with their remaining lands east of the Mississippi River. The treaty stated that the United States desired the Creeks to move west of the Mississippi River, but it specifically said that no Indians would be compelled to move.

The treaty provided that each one of 90 prominent Indian chiefs had the right to select a section of land, 640 acres, as his own and that each head of a Creek household could claim a half section, or 320 acres. These tracts could be reserved for five years or they could be sold sooner by the Indians selecting them. At the end of the five years, the Indian owner was to be given a deed by the United States.

In order to enforce these rights, the treaty required that all white intruders



The first courthouse in Opelika was modeled after the Montgomery County Courthouse. Its cornerstone was laid on October 10, 1896 and completed in 1898.

be removed from the ceded territory until surveys could be made and the Indians could select their tracts of land. Unfortunately for the Indians, this key aspect of the treaty was never carried out. No settlers were ever expelled. Further, by December 1832, the State of Alabama exerted its sovereignty over the land by creating nine new counties there. Four of the new counties were Russell, Macon, Tallapoosa and Chambers. In 1866, Lee County was carved from them.

The Indians soon called on the United States to honor its treaty. The dispute over the Creek lands led to a confrontation between the State of Alabama and the United States Government, with the governor of Alabama asserting the doc-

trine of states' rights against the federal government. President Andrew Jackson sent Francis Scott Key, famous as author of the "Star Spangled Banner", to mediate. However, the end result was that the Indians lost their lands. They were not even given the five years of peaceful use promised by the Treaty of Cusseta. During the years 1836 to 1837 they were forcibly removed to western lands. Despite the plain wording of the 1832 treaty, the government justified the Indian removal as a means to avoid violence and to keep the peace.

After the Indian exodus, new settlers poured into the area. In 1837, a village

*Continued on page 338*





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## Building Alabama's Courthouses

Continued from page 336

sprang up around the Methodist Lebanon Church. This village became Opelika.

Scholars believe that the name "Opelika" has several possible meanings. Various proponents assert that the name means "owl in the bush", or "owl's roost", or even "red mud." Possibly the name came from an Indian town many miles away. The most popular theory is that the name was derived from two Indian words - "opilwa" or "swamp", and "laka" or "large." In short, the name could mean "big swamp." Because there are no big swamps located nearby, the belief that the town was named for an Indian village located in another area, probably near a big swamp, is all the more credible. The town was originally located in the territory of Russell County.

The town of Salem, located in present-day Lee County, traces its roots as far back as 1835. Popular belief holds that in the early days of Russell County, a district courthouse was located at Salem to serve the northern portion of the county which was a great distance away from the county seat town of Crawford. Perhaps this "courthouse" was simply a building where trials were held.

Another prominent community in the area was Loachapoka. Originally a large Indian village, it was the site of the final Creek council meeting before the Indians moved to Oklahoma. On July 17, 1864, Civil War General Lovell H. Rousseau's raiders attacked Loachapoka and destroyed its train station and tracks.

A fourth important community that grew up in the area was Auburn. This town received its name on the suggestion of Lizzie Taylor, the fiancée of Thomas Harper, a son of Judge John J. Harper, who helped found the town. She had just read Oliver Goldsmith's poem "The Deserted Village" which referred to "Auburn, sweet Auburn, loveliest village of the plain." A Methodist school was chartered here in 1856, opened in 1859, closed in 1862 due to the Civil War, reopened in 1866, and then was transferred to the State of Alabama in 1872. It became the land grant college of Alabama and is known today as Auburn University.

The town of Opelika gained prominence over these neighboring commu-

nities in 1848 when a railroad line from Montgomery reached the town. In 1851, the line extended to West Point, Georgia. By 1855, a branch railroad extended to Columbus, Georgia, giving Opelika railroads running in three directions.

When Opelika was officially incorporated in 1854, the legislative act of incorporation described its boundaries as being one mile in each direction from the railroad station. This description



Dedication ceremonies for the Lee County Justice Center took place on Sunday, November 11, 1984.

placed a portion of Opelika across the Macon County line. In order to keep Opelika within one county, the legislation also extended the boundary of Russell County to include all of the incorporated town of Opelika.

During the Reconstruction Era, the Alabama legislature created 13 new counties. Five of the 13 were established in December 1866, including Lee County, which was created out of land taken from Chambers, Russell, Macon and Tallapoosa counties. The county was named for Robert E. Lee, one of the South's most beloved citizens.

Born into a distinguished southern family at Stratford, Westmoreland County, Virginia, on January 19, 1807, Robert E. Lee was the son of Revolutionary War General Henry "Light-Horse Harry" Lee, and a relative of the only two brothers to sign the Declaration of Independence—Richard Henry Lee and Francis Lightfoot Lee. Robert entered West Point at the age of 18 and graduated second in his class in

1829. He was commissioned a second lieutenant in the Corps of Engineers.

Lee served in numerous assignments, including Chief Engineer of the Army in Washington, coordinator of the defenses of New York, service in the Mexican War, lieutenant colonel of cavalry on the Indian frontier, and commander of troops at Harpers Ferry during the John Brown insurrection.

When conflict between North and

South proved inevitable in 1861, President Lincoln offered Lee command of the Union Army. Lee declined because he refused to lead an invasion of his native state. Instead, he offered his services to the Confederacy and was placed in charge of coastal defenses. He later acted as a military advisor to President Jefferson Davis, who appointed him Commander of the Army of Northern Virginia and, eventually, Commander in Chief of all



**Samuel A. Rumore, Jr.**

Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in

Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four.



Confederate forces. The Civil War essentially ended when Lee surrendered to Grant at Appomattox Courthouse on April 9, 1865. Although defeat was bitter, most Southerners recognized the brilliance of Lee's leadership and appreciated his loyalty and his sacrifice on behalf of the South. As an expression of that appreciation, the Alabama legislature named one of its newly created counties in his honor.

After the war, Lee became president of Washington University in Lexington, Virginia. He died there on October 12, 1870. Following his death, the school was renamed Washington and Lee.

After Lee County was formed, the citizens held an election to determine the county seat. In this election, Opelika received 821 votes, Salem received 532, and Auburn received 225. Opelika won the election in large measure because of its railroad connections. It should be noted that the 1855 branch railroad to Columbus was originally planned for Auburn. Auburn failed to meet certain conditions necessary to accommodate the railroad, conditions which Opelika met, and so Opelika ended up with the branch line. The foresight of Opelika's citizenry thus assured its future as the county seat and the most important town in the immediate area.

The first courthouse in Opelika was modeled after the Montgomery County courthouse, having a raised portico reached by curving external stairs. Little more is known about this courthouse except that it was located southeast of the courthouse later constructed near downtown Opelika to replace it.

By the last decade of the 19th century, Opelika and Lee County had sufficiently recovered from the Civil War and Reconstruction eras to undertake the building of a new courthouse. The cornerstone for this building was laid on October 10, 1896, amid great pageantry and fanfare. The ceremony reflected the tremendous pride that the citizens had in their community. Formal masonic rites were read at the dedication. Many items of local interest were then placed in a receptacle for storage in the cornerstone. Sermons, singing and speeches filled the day. The primary speech was delivered by William J. Samford who would be elected governor of Alabama three years later.

A newspaper report gave the highlights

of his speech, which are of interest today because they illuminate the thinking that led our forefathers to go to war with Alabama's Indians and take their lands with very few, if any, qualms. Lee County had been established only 30 years before, and the Creek Indians had been driven westward only 30 years before then. Samford noted that many people still living in the county could remember the departure of the "primitive race". He alluded to the march westward as "the weary tramp of a fading race". Then in glowing terms he described the building up of civilization on the hunting grounds of the "savage". Needless to say, the Indians would have resented these remarks, but they accurately reflect the thinking in those days.

In 1896 the county secured the services of Andrew J. Bryan and Company of Atlanta to design a two-story, neo-classical revival structure. The design was quite ambitious for a county that was predominantly rural. The building, still in use today, consists of a central section flanked by two wings. The central portion has a portico with six fluted Ionic columns supporting a roof pediment.

An outstanding feature of this courthouse is its windows. On the second floor, above the main entrance, is a Palladian window, a large, arched, central opening flanked by smaller, rectangular openings on each side. This theme is modified in the wings, where each contains a large sash window with smaller side sashes on the first floor and an ornate Venetian window with scroll work on the second floor.

Another prominent feature of the central section of the courthouse is its square brick steeple topped by a cornice. Above the cornice is a section with a louvered Palladian window. Above the window is a clock section capped by a circular cornice. The entire feature is crowned with a small dome and ornament.

The courthouse was completed in 1898. Andrews and Stevens were the contractors. The total cost for the new courthouse and a jail was \$65,000. The red brick structure was added to the National Register of Historic Places on July 23, 1973.

A one-story addition to the probate office was made after World War II. And, as time passed, various modern amenities were added to the building. Even so,

by the 1970s, the plumbing in the building was inadequate and in poor condition; the mechanical system consisted of steam radiators throughout the building; air conditioning was improvised with duct work being exposed in offices and public corridors; and the electrical system was inadequate. In a report made to the county commissioners during this period, the building was described as totally obsolete in meeting current building codes, fire codes, and handicapped code requirements.

Consequently, the county authorities devised a plan for the courthouse which combined renovation of the old building with construction of a large addition annexed to the rear. The plans, along with a sales tax referendum proposal to fund the project, went before the citizens for a vote in May 1978. The referendum was defeated by the voters.

In May 1980, a 12-member Citizen's Advisory Committee was appointed to address the courthouse crisis. The five members of the county legislative delegation each appointed two members to the committee and the county commission appointed two members. The committee selected T. K. Davis, Jr. to serve as its chairman.

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In January 1981, the committee recommended its solution.

It proposed that a new Justice Center be built on a 35-acre tract between the cities of Auburn and Opelika. The center would have a central administration section with a connecting radial detention facility. The historic courthouse would be retained, renovated and used for county offices.

A one-cent county-wide sales tax would be put in place for six years to fund the project, and a Lee County Public Building Authority would be created with the ability to issue revenue bonds.

This proposal was unanimously accepted by the legislative delegation, and then the sales tax was approved by the entire Alabama Legislature. In August 1981, the one-cent sales tax went into effect for a maximum period of six years. The newly created Lee County Public Building Authority subsequently issued revenue bonds. The total cost for the project was \$8.645 million.

Lancaster and Lancaster of Auburn, Alabama served as architects for the project. W. J. Duncan was project manager. And the West Point Construction Company, Inc. of West Point, Georgia was general contractor.

Dedication ceremonies for the Lee County Justice Center took place on Sunday, November 11, 1984. The entire complex was named for T. K. Davis, Jr., chairman of the Citizen's Advisory

Committee, who spent numerous hours putting together people and ideas to make the center a reality.

The court building is a two-story structure which houses the circuit and district court judges, the circuit clerk, the district attorney, the sheriff, the court administrator, and other public offices. The detention facility radiates



*Lee County's Courthouse and Justice Center are located on a 35-acre tract between the cities of Auburn and Opelika. The historic courthouse has been renovated and is used for county offices.*

around a central control area and has minimum, medium and maximum security sections available.

Chief Justice C.C. "Bo" Torbert, Jr., a native of Lee County, gave the principal address at the dedication ceremonies. He called the facility "one of the most modern, efficiently designed, and downright beautiful court structures in the state." He further noted that the struc-

ture had special areas for electronic and print media who could observe the judicial process without disturbing trial proceedings. Torbert went on to say that, "Our courts are open, our trials are public, and our citizens have a right and responsibility to be aware of what is happening in their judicial system."

As proposed in the Citizen's Advisory Committee recommendation, the old Lee County Courthouse was retained and renovated. Work began on the project in December 1985, and was completed in September 1987. During the renovation, the courthouse offices and personnel moved to the old Woolworth location in downtown Opelika. The architect for the project was Charles Muncaster. Billy Duncan served as project manager. This phase of the master plan cost \$2.6 million. The historic Lee County Courthouse today contains the Lee County tax assessor, tax collector, probate judge, and board of education offices.

The county should be commended for saving its nearly century old courthouse as well as for building a new Justice Center that is completely paid for. The total project has become a symbol of public pride and responsible use of taxpayer money.

*The author acknowledges the assistance of Lee County Probate Judge Hal Smith, Lee County Historian Wilbur L. Blackmon, Opelika attorney Bob Meadows, and Birmingham attorney Tim Smith for material used in this article.* ■



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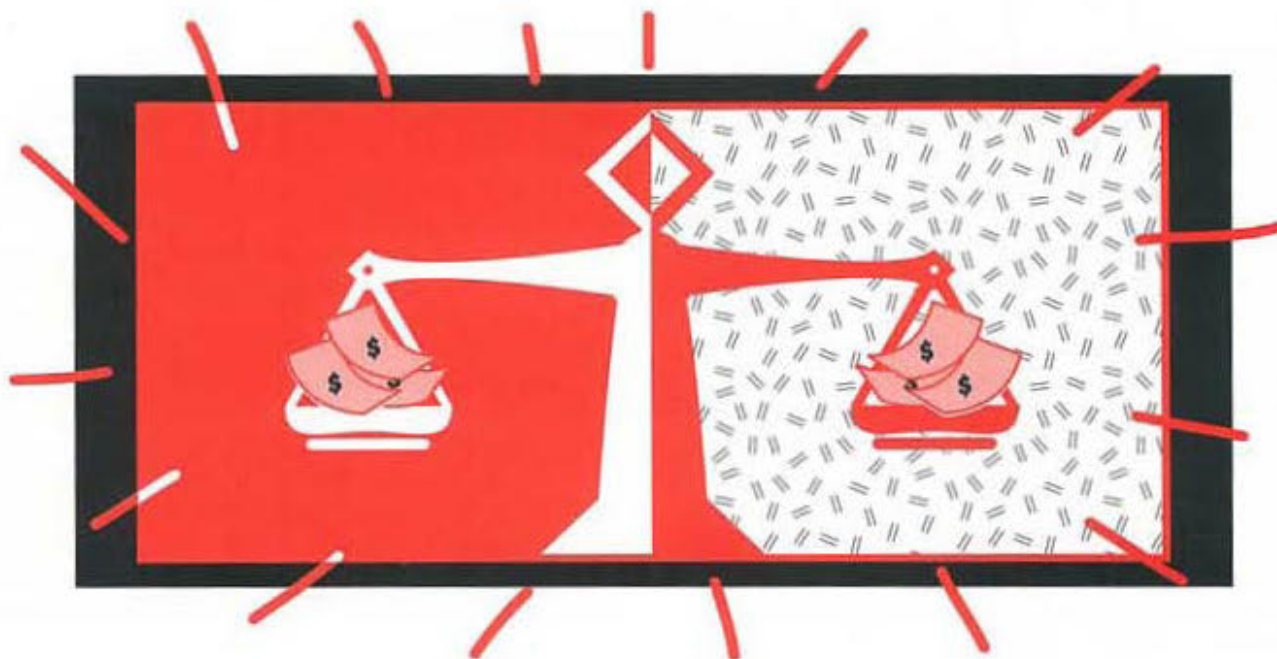
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# Alabama Dispute Resolution Foundation



## A COMMITMENT TO THE BETTERMENT OF SOCIETY AND OUR PROFESSION

*By Marshall Timberlake*

**W**ithin the next few months, the newly-formed Alabama Dispute Resolution Foundation will initiate a fund-raising campaign and begin contacting members of the state bar and the general public requesting a contribution of funds to support of the development of ADR in Alabama. The Foundation, which was created this past summer, has as its primary purpose the continuing financial support for various state and local dispute resolution programs. These programs involve both court-annexed Alternative Dispute Resolution (ADR) efforts as well as community-based conflict resolution projects. The principal recipients of the funding will be the recently established Center for Dispute Resolution in Montgomery, school and neighborhood programs, and local bar association groups.

Why are funds needed and how will they be spent? Since 1992, a lot of hard work has gone into developing a model ADR program in this state. In 1990, 48 states had some form of a state ADR program—but not Alabama, and yes, not Mississippi. This needed to change and it did. In 1992, through the efforts

of the state bar Task Force on ADR, the Alabama Civil Court Mediation Rules were adopted by the supreme court. Next, a Center for Dispute Resolution was created and funded with annual grants from the Alabama Law Foundation. A state court ADR Handbook, with model mediation procedures, forms, etc., was published. Educational programs were developed through CLE seminars for attorneys, formal programs for state judges at their annual and mid-winter conferences, and classes at the Judicial College for newly-elected judges. Training programs for mediators and arbitrators have been sponsored. A statewide mediation panel has been instituted. A resource library on ADR has been established. Work with school conflict management programs and neighborhood dispute resolution projects has been undertaken. Local bar ADR committees have been developed. In 1994, due to the need for a permanent body to oversee the long-range development and implementation of ADR in this state, the Supreme Court Commission on Dispute Resolution was created. This commission is currently reviewing a multitude of projects. For example, the Commission is working



on a Code of Ethics for Mediators in the state court system, and soon will begin considering professional standards for the mediation practice.

Unfortunately, all of this work takes money, and presently there is no reliable income stream. The Alabama Law Foundation grants will soon terminate, and the Center's operating costs will need to be covered. Areas which need funding include school mediation, local neighborhood dispute resolution centers, publication costs, staff mediators in small claims courts, formal mediator training programs, surveys and analyses of ADR results, public information projects, conferences, etc.

Why do we seek funding from private resources such as our own members? The short answer, as selfish as it may sound, is simply that such funding is ultimately for "the good of our profession". The public—our clientele—has both directly and indirectly pleaded that we, as lawyers, provide them with a process to resolve their legal disputes in which the process itself is not destructive of the quality of their lives. The exacting toll of money, time and stress involved in full force litigation does not serve the best interest of every person. Litigation certainly has its firm place in our society, and this will not change. However, far too often, litigants find that once they are in such a process, it is difficult to extricate themselves, particularly when they have exhausted their funds, their emotions have subsided, or their claims have become weakened. This frequently results in lopsided or unfavorable settlements which can leave clients with a bad taste for our judicial system and, unfortunately, even for lawyers, no matter how good a job we did. Finally, there are some disputants who at the outset simply want nothing more than a form of controlled negotiation or fact-finding,

which is brief and inexpensive and enables them to settle their differences and get on with their lives and businesses.

Prior to 1992, when the Alabama Civil Court Mediation Rules were adopted, lawyers in Alabama had only one dispute resolution option to offer clients, namely, litigation. Now, not only is mediation available, but arbitration, mini-trials and summary jury trials, as well as a host of other hybrid forms of ADR, can be offered our clients. This is good because the public now can choose and decide how it wants to resolve a dispute, and we as attorneys can assist in that process.

Why are there not other sources of funds available? There are such sources, but presently these sources are not dependable. We have reviewed, and are continuing to review, all funding options, such as legislative appropriations, filing fees, grants and mediation fees. However, these efforts take time to materialize, and if we are to continue to establish a first class program in this state, one we can literally "show off", we need *immediate* funding. Our state has waited far too long to begin the development of ADR. Fortunately, we have come a long way in a very short time. We must continue to progress, and do so in a manner which will ensure success. When called upon to contribute, please know that you are making a commitment with a long-term implication, one which will serve not only your clients' interests but that of your profession as well. ■

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**Marshall  
Timberlake**

Marshall Timberlake, a Birmingham attorney with the firm of Balch & Bingham, is chairman of the Supreme Court Commission on Dispute Resolution.

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Complete the form below **ONLY** if there are changes to your listing in the current *Alabama Bar Directory*. Due to changes in the statute governing election of bar commissioners, we now are required to use members' office addresses, unless none is available or a member is prohibited from receiving state bar mail at the office. Additionally, the *Alabama Bar Directory* is compiled from our mailing list and it is important to use business addresses for that reason. **NOTE:** If we do not know of an address change, we cannot make the necessary changes on our records, so please notify us when your address changes. **Mail form to: Christie T. Freeman, P.O. Box 671, Montgomery, AL 36101.**

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## *FDCPA Applies to Litigation Activities*

by William Z. Messer

**O**n April 18, 1995, the United States Supreme Court held that the Fair Debt Collection Practices Act applies to lawyers engaged in consumer debt collection litigation. Resolving a split in the circuits, the Court in *Heintz v. Jenkins*, No. 94-367, 63 U.S.L.W. 4266, unanimously ruled that a lawyer who regularly collects consumer debts through litigation is a "debt collector" subject to the Fair Debt Collection Practices Act (the FDCPA).<sup>1</sup>

### **Overview of the FDCPA**

The FDCPA is a federal law which regulates the collection of consumer debts by debt collectors. "Debt collectors" are individuals or businesses who regularly collect consumer debts owed to others.<sup>2</sup> The FDCPA generally prohibits debt collectors from engaging in harassing or abusive conduct, from using any false or misleading representations, or from using any unfair means to collect debts.<sup>3</sup> A debt collector's initial contact with the consumer must contain a "validation notice," and all "communications made to collect a debt" must contain a specific statement concerning the communication.<sup>4</sup> The FDCPA contains other restrictions on a debt collector's contact with the consumer and with third parties.<sup>5</sup> The act also specifies in what venue debt collection actions must be brought.<sup>6</sup> Violations of the FDCPA can result in liability for actual damages, additional statutory damages of up to \$1,000, and attorney fees and costs.<sup>7</sup>

Since July 1986, lawyers who regularly collect consumer debts have been subject to the FDCPA.<sup>8</sup> Pursuant to the Supreme Court's decision in *Heintz v. Jenkins*, the fact that an attorney engages solely in litigation to collect consumer debts will not shield the attorney from FDCPA coverage.<sup>9</sup>

Thus, lawyers in all circumstances must comply with the FDCPA if they regularly collect consumer debts for clients.

### **The Effect of *Heintz v. Jenkins***

#### ***The facts***

*Heintz* arose after a bank's law firm sued Darlene Jenkins in state court to recover the balance due on a defaulted car loan. As part of an effort to settle the collection lawsuit, an attorney with the firm, George Heintz, wrote to Jenkins listing the amount she owed under the loan agreement, including \$4,200 allegedly owed for insurance bought by the bank.

Jenkins then brought this FDCPA suit against Heintz and his firm claiming that Heintz's letter violated the FDCPA. Although the loan agreement permitted the bank to buy insurance to protect the car against loss or damage, Jenkins alleged the \$4,200 policy insured the bank not only against loss or damage but also against her failure to repay the bank's car loan. Hence, Jenkins claimed that Heintz's representation about the amount of her debt was false, amounted to an effort to collect an amount not authorized by the loan agreement, and thus violated the FDCPA. The federal district court dismissed the FDCPA lawsuit on the basis that the attorney was exempt since the letter was part of the ongoing debt collection litigation. The Supreme Court reversed the dismissal of Jenkins' FDCPA action, holding that it should go forward. Because of the procedural posture of the case, the Court did not reach the merits of Jenkins' claims.



### The Supreme Court's rationale

The Supreme Court found "two rather strong reasons for believing that the Act applies to the litigating activities of lawyers." First, the language of the act makes no distinction between litigation and other debt collection activities. Second, when Congress amended the FDCPA in 1986 to encompass attorneys, it did not include any narrower, litigation-related exemption to fill the void.<sup>10</sup>

Heintz had argued that the FDCPA must be read as containing an implied exemption for litigation because many of its requirements would create anomalous results if applied directly to litigating activities.<sup>11</sup> He argued that the provision of the FDCPA which forbids a debt collector to make any threat to take action that cannot legally be taken, if applied to litigation, would automatically make liable any attorney who brought and lost a debt collection lawsuit. The Court noted, however, that the act provides for a "bona fide error" defense so that a debt collector cannot be held liable if he or she shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.<sup>12</sup> The Court concluded: "Thus, even if we were to assume that the suggested reading of Sec. 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers. In any event, the assumption would seem unnecessary, for we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'"<sup>13</sup>

Heintz also argued that the FDCPA's requirement that a debt collector not communicate further with a consumer who has notified the debt collector that he or she refuses to pay or wants the debt collector to cease further communication, would preclude an attorney from filing a lawsuit or a motion for summary judgment.<sup>14</sup> The Court disagreed, since the FDCPA has exceptions allowing communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy."<sup>15</sup> Thus, while expressly stating that: "[w]e need not authoritatively interpret the Act's conduct-regulating provisions now," the Court found that the language of the act's exceptions above would allow for ordinary court-related documents to be filed.<sup>16</sup>

Finally, Heintz argued that the Official Staff Commentary of the Federal Trade Commission, the agency empowered to administratively enforce the FDCPA, stated that litigation activities were not covered by the act. The Court declined to follow the FTC, noting that the commentary states that it "is not binding on the Commission or the public" and more importantly that "we find nothing either in the Act or elsewhere indicating the Congress intended to authorized the FTC to create this exception from the Act's coverage."<sup>17</sup>

### What it all means

First, the FDCPA applies to lawyers who regularly engage in consumer debt collection activity, even when that activity consists of litigation. Second, although the Supreme Court does not explicitly decide the issue, apparently pleadings and other court documents are "communications" within the meaning of the FDCPA. The reason the issue is not entirely clear is that while the Supreme Court's decision discussed

both court filings and other "communications" as apparently covered by the FDCPA, the actual document which Jenkins claimed violated the act was a settlement letter.<sup>18</sup>

In any event, the Supreme Court's ruling has important consequences for collection attorneys. First, lawyers must be very careful not to threaten to take actions that are not intended to be taken, or which are not legally available. For example, lawyers must be careful not to threaten repossession or garnishment if it appears that there is no present right to repossess or that the consumer is not garnishable.<sup>19</sup> Further, while the Supreme Court indicated that losing a collection lawsuit was not a *per se* FDCPA violation, in its discussion it referred to the collection attorney asserting an affirmative "bona fide error" defense.<sup>20</sup> It appears at the very least that the collection attorney might have to show that procedures have been established to reasonably determine that *all* amounts sued for have a legitimate basis. Indeed, in *Heintz v. Jenkins* the FDCPA action was based on Jenkins' allegation that the insurance sued for was not recoverable because it covered not only loss or damage to the car but was also default insurance. In that case, Heintz would not have been able to determine the nature of the insurance without reviewing the policy. How much investigation would be necessary to establish a "bona fide error" defense or otherwise escape FDCPA liability is an open question.

Collection attorneys may also have to be careful in settlement negotiations not to overstate their case to the extent that their statements become "false or misleading representations." Since the standard for determining whether a representation is misleading is whether the "least sophisticated consumer" would be misled, caution is warranted.

Procedural requirements also arise as a result of the Supreme Court's interpretation of the FDCPA. As part of or within five days after a debt collector's initial contact with the consumer, a debt collector must send a validation notice containing specific information.<sup>21</sup> If the complaint is the lawyer's first contact with the consumer, it appears that the validation notice would have to be included in the complaint (or sent within five days thereafter). To make things more complicated, the validation notice must contain a statement that the debt collector will obtain verification of the debt if notified within 30 days that the debt is disputed. If the consumer con-

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tacts the debt collector within the 30-day period, the debt collector must cease collection efforts until the information is provided. Three circuit courts have held that a communication containing both a validation notice and demand for immediate payment or a threat to sue in ten days violates the FDCPA.<sup>22</sup> Thus, not giving the consumer notice and a 30-day period to respond prior to filing suit may be a *per se* FDCPA violation. Further, even if a 30-day pre-suit period is not required, if a collection lawsuit is filed in district court, where the consumer only has 14 days to file an answer, the failure to allow the consumer 30 days to dispute the debt may itself be an FDCPA violation.

A debt collector must "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."<sup>23</sup> If indeed court filings are "communications," at least arguably this section requires that a collection attorney include the statement in all documents filed with the court.

Finally, the mere threat of an FDCPA lawsuit arising out of a collection attorney's representation of a client can cause difficult conflicts issues to arise. For example, where an amount is in dispute a collection attorney, in zealously advocating for his or her client, may be exposing himself or herself to a federal lawsuit and FDCPA monetary liability.

The consequences of the Supreme Court's interpretation of the FDCPA will only be determined by litigation brought against collection attorneys. Wisdom dictates caution in what could become fertile ground for federal litigation. At the very least, a collection attorney must carefully examine and investigate consumer collection accounts to ensure that everything the client is asking for is legitimate and recoverable. Also, a collection attorney must be careful not to make statements which could even arguably be construed as misleading. Finally, a collection attorney must be careful to comply with all of the procedural requirements of the FDCPA. Prudence may dictate that a lawyer send an initial letter to the consumer with a validation notice, wait 30 days, and if there is no response, file suit, including the one-sentence debt collection notice in the complaint and in all subsequent court filings. Learning from *Heintz's* example, collection attorneys should try to avoid being involved in appellate cases under the FDCPA. ■

### Endnotes

1. 15 U.S.C. §§ 1692-1692o.
2. 15 U.S.C. §§ 1692a(5)-(6).
3. 15 U.S.C. §§ 1692d-1.
4. 15 U.S.C. §§ 1692e(11) & 1692g(a).
5. 15 U.S.C. §§ 1692b & 1692c.
6. 15 U.S.C. § 1692(a)(1)-(2).
7. 15 U.S.C. §§ 1692k(a)(1)-(3).
8. Pub. L. 99-361, 100 Stat. 768.
9. An entirely separate issue, which is beyond the scope of this article, is whether a debt collection agency is liable for its attorney's FDCPA violations. Compare *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994) (debt collector liable for attorney's wrongful venue violation) and *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987) (debt collector liable for its attorney's filing of a time-barred lawsuit) with *Anthes v. Transworld Systems, Inc.*, 765 F. Supp. 162 (D. Del. 1991) (debt collector not liable under FDCPA for content of retained attorney's letters).
10. *Heintz v. Jenkins*, 63 U.S.L.W. 4266, 4267 (April 18, 1995).
11. *Id.*
12. 15 U.S.C. § 1692k(c).
13. *Heintz*, 63 U.S.L.W. at 4267.
14. 15 U.S.C. § 1692c(c).
15. 15 U.S.C. § 1692c(c)(2)-(3).
16. *Heintz*, 63 U.S.L.W. at 4267.
17. *Id.* at 4268.
18. *Id.* at 4266.
19. See *Seabrook v. Onodago Bureau of Medical Economics, Inc.*, 705 F. Supp. 81 (N.D.N.Y. 1989) (letter threatening to garnish 10 percent of wages violates the FDCPA where the debt collector does not know whether the consumer makes enough to be garnished).
20. *Heintz*, 63 U.S.L.W. at 4267.
21. 15 U.S.C.A. § 1692g(a).
22. *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *Miller v. Payco-General American Credit, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Swanson v. South Oregon Credit Service*, 869 F.2d 1222 (9th Cir. 1988).
23. 15 U.S.C.A. § 1692e(11).



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### William Z. Messer

William Z. Messer is litigation coordinator for Legal Services Corp. of Alabama. He joined LSCA as a staff attorney after graduating from Duke University School of Law in May 1982 and was promoted to senior attorney in 1989. He was named to his current position in February.



# OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel



## QUESTION BY MR. A:

"I wish to thank you for your response on Tuesday when I called you concerning a conflict of interest question. The judge, at my request when defense counsel did not withdraw, has asked that I write you to see if I could get a formal opinion on this issue so as to guide our next steps. In case you don't remember, I am involved in the case because I am still working part time in the District Attorney's Office trying felony cases as I am needed and was assigned to try this case this week.

"The issue is whether an attorney may ethically represent a defendant in a murder case who is charged with killing the brother of a former criminal client of the attorney when that former client was the only eye-witness to the incident giving rise to the murder charge and will be the key witness for the State and the Defense?

The facts, as I understand them, are that some years ago [between 1991 & 1993], prior to the incident that gave rise to this charge, Attorney X represented A B, in a DUI case in municipal court in D. There is a dispute whether he represented him in anything else, but for the sake of this argument I will assume that he did not. At the preliminary hearing docket in 1994, Mr. W told Chief Assistant John Doe that the victim and his brother were part of a pitiful situation and he knew them from having represented A B in the past. He seemed at that time to be familiar with their situation. He told Mr. Z that he might have a conflict and may need to withdraw from the case, but he did not do it at that time. When I began my preparation for the trial of the case, I came across the memo and when I called B to come to my office to be interviewed I asked him whether Mr. W had represented him in the past. He said that he had. I told him that anything he told Mr. W in the course of that representation was privileged and not to tell me any details of that communication unless he wanted to waive the privilege. He told me he did not want to waive the privilege and only told me that there were things that he told Mr. W in the course of his representation that he did not want to become known outside of the attorney-client privilege.

"I do not know what, if any, information B gave Mr. W in the course of his representation which may amount to impeachable material and have been careful not to breach the privilege to find out. It is my opinion that an actual conflict exists and that Mr. W will have to be removed from the case if he does not withdraw voluntarily. Mr. W's position is that he did not learn anything in the course of his representation that would be suitable for impeachment and that he would absolutely keep any confidences he had with Mr. B private. He further says that he has associated another lawyer, a Mr. F from P, Alabama to be co-counsel in the case and that he has kept any information he knows about Mr. B confidential as regards Mr. F. Although the Motion to Remove was filed yesterday, Mr. F has been in the case for two months.

"I have not enclosed the Motion to Remove, the supporting affidavit or brief which was filed in this case, but I can forward it to you if you like. The preliminary hearing information I spoke of is also documented in a file memo that I have not sent, but will if you want me to do so. The thing we need now is an opinion from you discussing the ethical ramifications of this situation. The judge, as I understand it, would like the following questions answered:

1. Whether Mr. W's continued representation of the Defendant constitutes an actual conflict of interest considering his former representation of A B, Jr., the key prosecution witness?
2. Can Mr. B be compelled to make known to the court what part of the communications with Mr. W he considers privileged and why?
3. If this is an actual conflict of interest, is there any way Mr. W can remain in the case representing the Defendant?
4. Whether Mr. F, under the facts of this case, can undertake the representation of the Defendant on his own, with or without Mr. W's assistance or whether his involvement in the case so far has resulted in his being tainted by any ethical duties Mr. W owes to W, Jr.?

"I appreciate your attention in this matter. At this time, I believe the judge is going to reset the case for September, so the sooner we have your answer the matter. [sic]"

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**ADDITIONAL FACTS PROVIDED BY ATTORNEY X**

"I represented A B on a charge of driving under the influence of alcohol in D Municipal Court. This was before the murder charge was made against D S, my current client. I never met face to face with A B; all of our discussions were over the telephone. At that point in time he resided in Beach, Florida.

"Zealously guarding the confidentiality of his statements to me I shall state only in general terms the subject of our communications. I discussed the details of the driving-under-the-influence offense and he communicated to me his criminal history.

"I was compelled to withdraw as counsel for A B when the case was called for trial and he failed to appear. I also listed another reason to the court. That reason was my refusal to move for a continuance upon representations from my client I knew to be false (the case was continued two times previously).

"I have never represented or advised A B, in any matter other than described above. About six months ago he had another driving-under-the-influence case and called my office to represent him. I told him I would not take his case and the discussion lasted less than a minute, yielding no details of anything except the fact he was charged with DUI.

"During the chambers hearing Mr. Bob told the judge that because I was familiar with A B criminal history I would be in a position to impeach him if he denied under oath parts of that history. I was astounded at this statement. If a district attorney places a witness on the stand and has in his file an NCIC sheet showing that history and such witness lies about his criminal

history I hope that that district attorney would inform the court that the witness was swearing falsely. I hope no district attorney in this state would allow what he personally knew to be perjury to go to a court and jury as fact.

"At the hearing in chambers I stated on the record that my previous representation of A B yielded knowledge of only two things: (1) the details of the DUI and (2) his criminal history. The district attorney has not alleged I possess any other knowledge."

**ADDITIONAL FACTS PROVIDED BY MR. F**

"I am Mr. F and I have entered an appearance on behalf of Mr. Q, in the above referenced case. Mr. B C, a deputy district attorney for D County Alabama, has requested a formal opinion about A B's continued representation of Mr. F. I would like to address additional facts regarding this matter and correct some of the statements of facts that Mr. F has made in his correspondence dated January 28, 1995.

"I represented Mr. Q in a hearing before the judge, concerning the attorney who continued representation of him. The attorney gave a statement in open court and on the record: He had, in fact, represented A B in the past on a DUI charge and had received no confidential information of an impeaching nature from him. He had informed Mr. Q he had represented Mr. B in the past. Mr. Q confirmed the attorney's statement. Mr. Q made it clear he wants the attorney to represent him in this case.

"Approximately two months prior to this hearing, the attorney contacted me pertaining to this case. We discussed the

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possibility of trying this case together. During the course of our discussions, over the next two months, it was evident I was not going to be able to try the case. I had a capital murder case pending in L County, which was scheduled on the same date. The attorney did not to enter [sic] my name in the case.

"It became apparent Monday I would be available to aid in the defense of Mr. Q, after the capital murder case in L County was settled. I contacted Hon. Anthony. He informed me he had received a motion from the District Attorney's Office, Mr. A, specifically asking that he be removed the Lawyer [sic] for Mr. Q. On learning this, I informed the attorney I would be glad to serve as co-counsel for Mr. Q and proceeded to D.

On my arrival, I discussed my pro bono representation with Mr. Q. He requested I represent him with the objective of keeping his lawyer. Additionally, if the attorney could not for some reason represent him, he requested that I would represent him in the murder case.

"My Notice of Appearance was entered to the Court on the afternoon of January 27, 1995. A hearing was set on the motion to disqualify the attorney. The Court insisted on an in-chambers hearing. Present was myself, the attorney, Mr. F, Mr. Q, the judge, and a court reporter. I made requested [sic] the State to make a proffer, of the confidential information which might disclosed by the attorney [sic], because of his representation of Mr. B. They were unable to do so. I asked to conduct an examination of Mr. B for the Court to determine whether or not there was in fact anything that would be discoverable or could be construed to be confidential, which the attorney might use to impeach the witness. The court denied this motion. Further, the Court was informed I would examine Mr. B. The attorney would not participate in the examination of Mr. B.

I have never represented Mr. B, nor had Mr. W divulged any information which could be remotely thought to be confidential concerning Mr. B.

"Mr. F makes the assertion that Attorney X, by knowing something or possibly knowing something, or speculatively knowing something, there would be a taint to the attorney which would somehow flow to me. That is absolutely ludicrous. Once I agreed to do the examination of A B any claim that could arise from ineffective assistance of counsel based upon representation of Mr. B in the past became moot. I have never represented A B, and I am not a legal partner with the attorney. It would be no for any other lawyer representing Mr. Q to examine Mr. B. The allegations of Mr. F are absolutely spurious."



**ANSWER, QUESTION ONE:**

Yes, Mr. D has a conflict of interest that disqualifies him.

**ANSWER, QUESTION TWO:**

No, Mr. B cannot be compelled to reveal past attorney-client communications in an effort to determine whether Mr. D has a present conflict.

**ANSWER, QUESTION THREE:**

No, if there is a conflict of interest, then Mr. D is disqualified from the case. He could not participate short of cross-examining his former client.

**ANSWER, QUESTION FOUR:**

Mr. F can continue on the case unless confidential information about Mr. B has, *in fact*, been communicated to him by Mr. W. He says that nothing has been communicated.



**DISCUSSION:**

There is a presumption that during the course of his prior representation of the victim's brother that Mr. W obtained confidential information. "Confidential information" as it is used in the context of the Rules of Professional Conduct is broader in scope than information subject to the attorney-client evidentiary privilege. It extends to all information about a client acquired by the lawyer during the course of the representation. Rule 1.9 (b) precludes the adverse disclosure of a former client's confidential information. Therefore, Mr. W cannot disclose any information about Mr. B if he learned of it from Mr. B or during the prior representation.

Mr. W states all he knows about Mr. B is his criminal history (at the time of the DUI), and facts about that offense. If it is likely that there would be a disclosure of this information, that is enough. The rule is not violated only when a lawyer actually uses confidential information to former client's disadvantage. Whenever there is a real risk of disclosure, there should be a disqualification. In the setting of a trial, an adverse disclosure can be inadvertent as well as intentional.

There is no question that being impeached or having your credibility attacked is a disadvantageous use of information, as far as Mr. B is concerned. Mr. W has a duty to provide his present client with an effective criminal defense. However, he may be limited in his ability to cross-examine an eyewitness. Therein lies a true conflict, and Mr. W must withdraw as defense counsel.

Mr. B should not be compelled to make any disclosure regarding communications with his lawyer in the prior case. Legally, he cannot be compelled, but he is in a difficult situation. Professor Wolfram points this out.

"As discussed earlier, if a client was required to offer evidence on the contents of confidential communications in order to have the client's former lawyer disqualified, the confidentiality of the information would be lost in the very process of attempting to protect it. That point has been appreciated both by courts, in the development of the common law rules that disqualify lawyers because of a former client conflict, and by the framers of the 1983 Model Rules." Wolfram, *Modern Legal Ethics*, Section 7.4.3, p. 369 (1986).

There is no limited way that Mr. W can remain in the case if he is subject to disqualification. His remainder in the case, in any fashion, would only continue the risk that there would be an unauthorized disclosure of his former client's confidences.

Mr. F is co-counsel with Mr. D. If he were a member of Mr. W's law firm, he, too, would be disqualified because there is a presumption of shared confidences among firm members. That presumption does not exist with respect to co-counsel arrangements between lawyers from separate firms. In order for Mr. F to be disqualified, there must be proof that he has acquired actual knowledge of confidential information from Mr. W. Mr. F can remain in the case subject to that. He states that nothing has been related to him. In view of anything to rebut that, he can continue to represent the murder defendant. ■



# LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

**Uniform Commercial Code. Revised Articles 3 and 4** (Negotiable Instruments and Bank Deposits and Collections). Act No. 95-668. Sponsored by Senator Steve Windom and Representative Mike Hill. See March 1995 *Alabama Lawyer*.

**Uniform Commercial Code.** Revised Article 8 did not pass the Legislature, but will be reintroduced in the next Regular Session which will begin February 6, 1996.

**Unincorporated Nonprofit Associations Act.** Act No. 95-527. Sponsored by Senator Doug Ghee and Representative Mark Gaines, and passed by the Legislature. See November 1994 *Alabama Lawyer*.

**Retirement Benefits as Property Settlements in Divorce.** Act No. 95-549. Sponsored by Senator Pat Lindsey and Representative Tony Petelos. See May 1995 *Alabama Lawyer*.

**Repeal of the Curator Law.** Act No. 95-751. Sponsored by Senator Tom Butler and representatives Marcel Black and Tommy Carter. No longer can curatorships be opened. Existing curatorships which are not converted into conservatorships will automatically become conservatorships on January 1, 1997 to the extent allowed under the current court order for each particular case.

**Alabama Rules of Civil Procedure.** The supreme court approved a revision of the Alabama Rules of Civil Procedure which became effective October 1, 1995. A copy of the changes can be found in the advance sheet of the *Southern Reporter* 654 So. 2d No. 4, dated July 6, 1995.

**Alabama Rules of Evidence.** These rules will become effective January 1, 1996 and be found in *Southern Reporter* Advance Sheets 656 So. 2d No. 3.

**Rules of Evidence.** The Alabama Supreme Court requested the Alabama Law Institute to undertake a study revising the Alabama Rules of Evidence. A committee of lawyers and judges was appointed by the court and the study began September 1988. The committee

was chaired by Patrick H. Graves, Jr. of Huntsville. The advisory committee members were:

Honorable Joseph A. Colquitt  
Gregory S. Cusimano  
Judge Sarah M. Greenhaw  
Judge Arthur J. Hanes  
Broox G. Holmes  
A. Richard Igou



Ralph I. Knowles, Jr.  
L. Tennent Lee, III  
Howard Allen Mandell  
William H. Mills  
C. Delaine Mountain  
Bruce J. McKee  
Frank B. McRight  
Richard F. Ogle  
Abner R. Powell, III  
Ernestine S. Sapp  
Clarence M. Small, Jr.  
Judge C. Lynwood Smith, Jr.  
G. Griffin Sikes, Jr.  
William N. Clark, *ex officio*

Professor Charles W. Gamble served as reporter of this committee.

The committee was charged with proposing Rules of Evidence for the

court to promulgate. The Federal Rules of Evidence were used as the committee's model. A consensus developed that the Federal Rules would be adopted unless there were good reasons to deviate from them. Accordingly, some of these rules differ significantly from the corresponding Federal Rules. The difference usually resulted in either modifying the Federal Rule or replacing it all together with a pre-existing Alabama common law principle. However, the committee agreed to model the work on Privileges after a combination of the Uniform Rules of Evidence and the pre-existing Alabama Privilege statutes, since the original proposed Federal Rules on Privileges had been rejected.

In most instances these Rules continue the historic Alabama Law of Evidence, either identically or with slight modification or expansion. Some Rules, however, do abrogate pre-existing Alabama law. Where change occurs it generally is to implement the overall policy of promoting general greater admissibility. These Rules mark a shift from a system of exclusion to one of admissibility.

The Institute is indebted to members of the committee for their untiring devotion and diligence. Special appreciation goes to Pat Graves who led the committee through the years of debate. The study was first begun under Chief Justice Torbert and received continued supporting encouragement from Chief Justice E. C. Hornsby and the associate justices of the supreme court. Special thanks are extended to Bob Esdale, clerk of the Alabama Supreme Court, who acted as liaison between the court and the committee, and to George Earl Smith for his editorial work in the final version.

The committee's draft of the proposed Rules was first published in a special edition of So. 2d. Advance Sheets dated May 13, 1993. Following that publication, the supreme court considered those proposals and also comments from interested persons concerning the proposed Rules.

The court's advisory committee submitted a revised set of Rules of Evidence which again was published in a special



edition to the So. 2d. Advance Sheets on August 18, 1994.

The court once again considered the proposed Rules, as revised, along with comments from interested persons, and has adopted the Alabama Rules of Evidence to be effective January 1, 1996.

We were fortunate to have Charles W. Gamble, Henry Upson Sims Professor of Law at the University of Alabama School of Law and former dean of the law school, as chief draftsman and reporter of the project. Dean Gamble's background and expertise as teacher and writer in the field of evidence was invaluable. He, along with other members of the advisory committee, has



**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.

agreed to present continuing legal education programs throughout the state prior to the effective date of these Rules.

#### Alabama Law Institute Annual Meeting

At the annual meeting of the Alabama Law Institute the following persons were elected officers and members of the Executive Committee for 1995:

**President:**

James M. Campbell

**Vice-President:**

Yetta G. Samford, Jr.

**Secretary & Director:**

Robert L. McCurley, Jr.

**Executive Committee:**

Richard S. Manley

George Maynard

Wendell Mitchell

Demetrius Newton

Oakley W. Melton, Jr.

Steve Windom

For further information, contact Bob McCurley, Alabama Law Institute, P.O. Box 1425, Tuscaloosa, Alabama 35486, or call (205) 348-7411, FAX (205) 348-8411. ■

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**2 Thursday****DEFENDING WRONGFUL DISCHARGE CLAIMS IN ALABAMA**

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Mobile, Adam's Mark Hotel  
Dixie Land Title Association  
Credits: 10.4 Cost: \$100  
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**2-5****MEDIATION PROCESS & THE SKILLS OF CONFLICT RESOLUTION**

Mobile, Courtyard by Marriott  
Mediation Corporation  
Credits: 27.0 Cost: \$650  
(815) 399-8407

**3 Friday****WORKERS' COMPENSATION**

Birmingham  
Cumberland Institute for CLE  
Credits: 6.0 Cost: \$159  
(800) 888-7454

**8 Wednesday****IMPACT OF THE ADA ON WORKERS' COMPENSATION**

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Lorman Business Center, Inc.  
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(715) 833-3940

**SENTENCING GUIDELINES**

Birmingham  
Lorman Business Center, Inc.  
Credits: 6.0 Cost: \$159  
(715) 833-3940

**10 Friday****TORT LAW**

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Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

**ADVANCED JURY SELECTION: MAKING THE PROCESS WORK**

Birmingham  
Cumberland Institute for CLE  
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(800) 888-7454

**16 Thursday****BANKRUPTCY LAW**

Birmingham, Wynfrey Hotel  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

**OIL, GAS AND MINERAL LAW**

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Alabama Bar Institute for CLE  
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**JURY SELECTION**

Montgomery, Civic Center  
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**16-17****FEDERAL TAX CLINIC**

Tuscaloosa  
Alabama Bar Institute for CLE  
(800) 627-6514

**17 Friday****JURY SELECTION**

Birmingham, Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

**REPRESENTING ALABAMA BUSINESSES**

Birmingham  
Cumberland Institute for CLE  
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National Business Institute  
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**29 Wednesday****WORKERS' COMPENSATION (video)**

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Cumberland Institute for CLE  
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National Business Institute  
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National Business Institute  
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(815) 835-8525



## DECEMBER

### 1 Friday

#### ADVANCED ASPECTS OF MATRIMONIAL LAW

Birmingham, Tutwiler Hotel  
American Academy of Matrimonial  
Lawyers, Alabama Chapter  
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#### LAW OF EMPLOYMENT DISCRIMINATION

Birmingham  
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#### RECENT DEVELOPMENTS FOR THE CIVIL LITIGATOR

Mobile  
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#### ESTATE PLANNING

Birmingham, Pickwick Center  
Alabama Bar Institute for CLE  
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### 6 Wednesday

#### NEW ALABAMA RULES OF EVIDENCE

Birmingham, Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.4 Cost: \$185  
(800) 627-6514

#### PERSONAL INJURY

Birmingham  
Lorman Business Center, Inc.  
Credits: 6.0 Cost: \$145  
(715) 833-3940

### 7 Thursday

#### NEW ALABAMA RULES OF EVIDENCE

Montgomery, Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.4 Cost: \$185  
(800) 627-6514

#### ALABAMA UPDATE

Birmingham, Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

#### RECENT DEVELOPMENTS FOR THE CIVIL LITIGATOR

Birmingham  
Cumberland Institute for CLE  
Credits: 6.0 Cost: \$159  
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### 8 Friday

#### NEW ALABAMA RULES OF EVIDENCE

Mobile, Adam's Mark Hotel  
Alabama Bar Institute for CLE  
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#### THE NEW ALABAMA RULES OF EVIDENCE (video)

Opelika  
Cumberland Institute for CLE  
Credits: 6.0 Cost: \$159  
(800) 888-7454

#### ALABAMA UPDATE

Huntsville, Von Braun Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

### 14 Thursday

#### NEW ALABAMA RULES OF EVIDENCE

Huntsville, Von Braun Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.4 Cost: \$185  
(800) 627-6514

#### ALABAMA UPDATE

Montgomery, Civic Center  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
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### 15 Friday

#### NEW ALABAMA RULES OF EVIDENCE

Birmingham, Civic Center

Alabama Bar Institute for CLE  
Credits: 6.4 Cost: \$185  
(800) 627-6514

#### ALABAMA UPDATE

Mobile, Adam's Mark Hotel  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
(800) 627-6514

#### LITIGATING THE CLASS ACTION LAWSUIT

Birmingham  
Cumberland Institute for CLE  
Credits: 6.0 Cost: \$159  
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### 18 Monday

#### JURY SELECTION

Birmingham, Medical Forum Building  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
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#### TORT LAW

Birmingham, Medical Forum Building  
Alabama Bar Institute for CLE  
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### 19 Tuesday

#### TORT LAW (video)

Tuscaloosa, Law School  
Alabama Bar Institute for CLE  
Credits: 6.0 Cost: \$165  
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### 20 Wednesday

#### JURY SELECTION (video)

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### 21-22

#### CLE BY THE HOUR

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Credits: 12.0  
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# If I Have To Explain Why You Wouldn't Understand

by James G. Stevens

**Nothing in life is more exhilarating  
as to be shot at without result.**  
—Winston Churchill

**E**arly Saturday morning. You are finishing breakfast and are about to suit up for the day. Pulling on your harness boots and tucking them under leather pant legs and pulling on the black leather "victory" jacket over a sweatshirt emblazoned with "LIVE TO RIDE; RIDE TO LIVE" across the front, you kiss your wife and tiptoe past the kids' room.

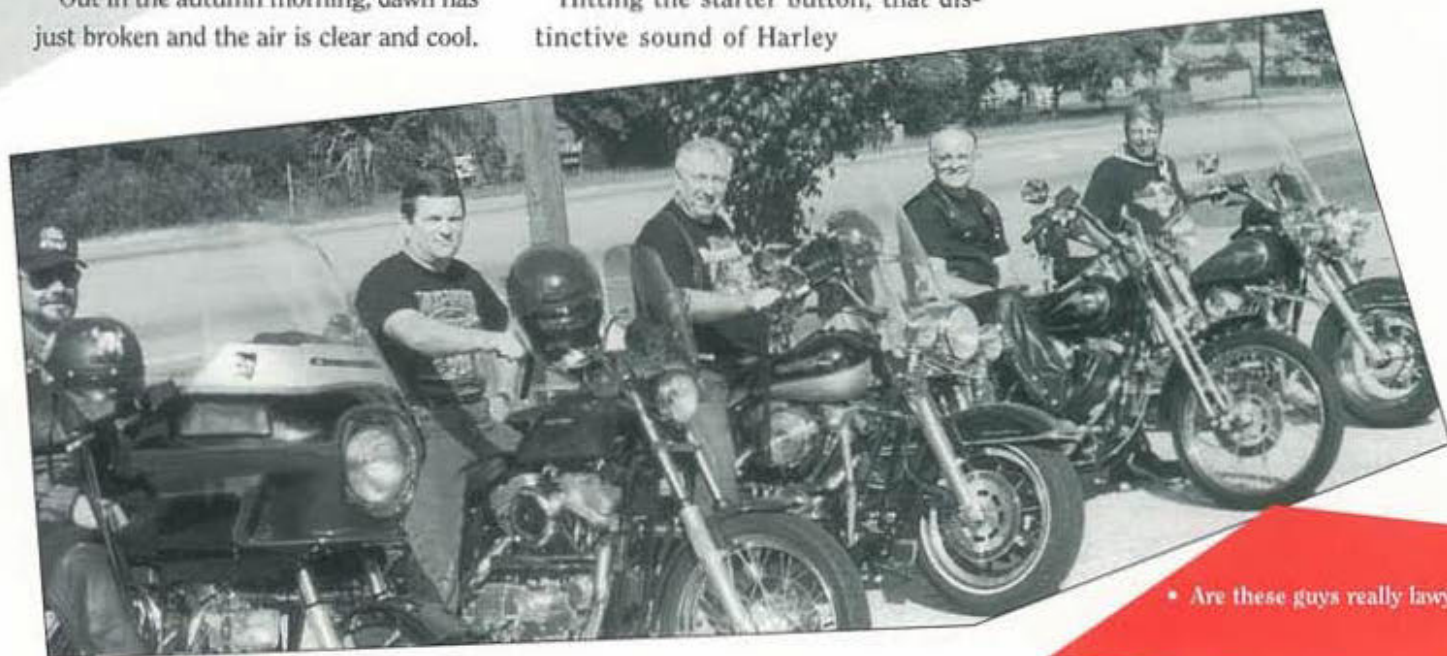
Out in the autumn morning, dawn has just broken and the air is clear and cool.

You stand for a moment in the garage, contemplating the sleek black Softtail Custom as though it were a piece of sculpture. The gleaming chrome "big twin" 1340cc engine and pipes, polished black fenders and gas tank, and the soft and supple leather seat are the ultimate of form and function. It is as near to perfection as any machine can be, and it is American made, well almost.

Hitting the starter button, that distinctive sound of Harley

thunder fills the neighborhood. You kick it into gear and you're off, leaving the busted deals, office politics, court theatrics, telephone antics, petty victories, life-and-death deals, and near misses in the wake of a 70 mph power moment. You're in hog heaven.

Harley-Davidson Motorcycle Company has become one of the two greatest finan-



• Are these guys really lawyers?



cial turnarounds in America. (The other is KinderCare in Montgomery, Alabama.) It is the symbol of the rise, fall and resurrection of American industrial ingenuity. Born in a small Milwaukee garage in 1903, Harley became the icon of heavyweight motorcycle production. Harley survived the invasion from Japan and was born again in 1985; by the 1990s, it became what may be the best manufacturing company in America. By 1973, Harley controlled 75 percent of the market. Harley dropped to 25 percent of the market by 1980 as a result of the on-slaught by the Japanese and its own failure to produce a quality product.

The proof is in the product. Harley manufactures 20 models that range from a base price of \$4,995 to \$17,500 for the Ultra Classic Electra Glide. What is even more astonishing is the fact that the "after-market" price brings the Ultra Classic Electra Glide tab to about \$25,000. Harley manufactures approximately 100,000 bikes a year, and if you want one you need to queue up for about two years.

Go into a Harley retailer and you will see a whole market scheme, ranging from jackets and chaps to cologne and chocolates. During an interview with Tim Peek, the manager of *Riders Harley* in Trussville, it became apparent that the Harley craze is in full swing. His store is awash with several hundred items with the Harley logo. As a result of the demand for new Harleys, Harley merchandising has become the primary source of income.

In addition, the Harley worldwide testing facility is located at the Talladega Motor Speedway.

Catching "Harley fever" is something of an anathema for lawyers. One would suspect that we would be

more aware of the risk associated with motorcycles. After all, there is no warning label attached to the bike alerting the user to every possible contingency. Still, there are lawyers who are so enamored with their "hogs" that caution has been replaced with what most would call a mid-life crisis. I set out to determine if mid-life crisis was the reason for this apparent aberration in lawyer behavior.

Why the fascination? One of my sons tells me "yuppies" are the only people who ride Harleys, because it's cool. Well, I'm not sure about that, but I have a feeling that it is more than being cool. Besides, we all know that only Hell's Angels and the Sons of God ride Harleys— don't we?

So, I contacted several lawyers and on a Sunday morning I "sued up." Into my garage I went where my Chevy Blazer was ready to go. I arrived at Tinks restaurant about 7:00 a.m., just in time to experience the arrival of the group. I call it an experience because the thundering noise level was truly something! On hand were Myron Smith, a 49-year-old from Prattville; Bill Dunn, a 61-year-old from Wetumpka; John Kelly Johnson, a 47-year-old from Rockford; Randall Houston, a 41-year-old from Clanton; and Tommy Mancuso, a 51-year-old from Montgomery.

Myron has been riding Harleys since he was 14 years old. He has nine Harleys and extensive knowledge about all bikes, in particular, Harleys. He rebuilds Harleys and has a firm grasp on the fascination with them. During our conversation he opined that lawyers manage the risks of their clients from day to day and riding gives the lawyer the opportunity to manage his own risks. The risks associated with riding accentuate the senses and you must be in tune with everything that is going around you. At the same time, you are overwhelmed with the sense of, not freedom, but

### How did it start?

My time has come and gone  
And the years keep rushing on  
But, I know what's on my mind.  
I'm afraid its all been a waste of time  
And autumn leaves have got me thinking  
About my time.  
You live from day to day  
You dream about tomorrow  
And the hours go by like minutes.  
And the shadows come to stay  
So, you do a little something  
to make them go away.  
I could have done so many things  
If I could only stop my mind  
From wondering what I left behind  
And from worrying about this wasted time.  
You can get on with your search  
And I can get on with mine  
And maybe someday we will find  
That it wasn't really wasted time.



• "Bad Boy" Mancuso



that you have become a part of the surroundings. You get the impression space and time have engulfed you and you appear to be floating.

Freedom was a word used a lot during the conversation; in fact, the conversation *revolved* around the word "freedom." All of the lawyers talked about the freedom riding gave them but I was struck by the "look" in their eyes and the enthusiasm with which they spoke. At the time I wondered how someone could get so excited about riding a Harley.

Mid-life crisis would be the simple explanation for this fascination. It is not the case, but style is—to an extent. A Harley is the most customized bike in the world and I have never seen two alike, however style only goes so far when trying to appreciate owning and riding a Harley.

We continued to discuss this fascination. Nothing is hurried. Every time you get ready to ride it becomes a ritual. Turn on the gas flow. Unlock the switch. Move the enrichment switch to the "start" position. Make sure that the gear shift lever is in the "neutral." All is done in anticipation of the sound. Your stress level is low because you must make sure that each and every thing is done properly. Riding requires the utmost of concentration. One mistake riding is all you get.



**James G. Stevens**

James G. Stevens serves as associate general counsel for the Alabama Department of Environmental Management. He is a graduate of the Birmingham School of Law and serves as the chair of the EPA's Region IV Underground Storage Tank Program Attorney's Work Committee. He is also a member of The Alabama Lawyer Board of Editors.

Out on the road other riders stop you and ask to borrow a half-inch wrench. You come upon several riders and ride along for a while; then they go their way and you go your's. It never fails that when you stop, someone will look at your Harley and you can see the "look" in their face.

They informed me that there are rider's clubs around the state that include all levels of society, from blue collar workers to professionals, and spanning all age groups. There is one and only one topic of conversation—Harley. After about an hour I realized that I was not going to be able to put this fascination on paper. We finished our conversation and they prepared to leave. They started their bikes and roared off. I was left standing in the parking lot, thinking that I was missing something in my life. I turned and there was my Chevy blazer, ready and waiting. Somehow, it was not the same.

Maybe a T-shirt I recently saw sums it up the best: "If I have to explain why, You wouldn't understand" was printed across its front.

While riding on a Springer Softtail to Birmingham the other day, a van passed me. The man riding on the passenger side of the car turned to look at me at the same time I was making sure that the van was not going to cut in front of me, and I saw it in his eyes. That look was the same look that I had seen in the eyes of the lawyers that day. At that moment, I understood what Myron, Tommy, Bill, John Kelly, and Randall were trying to explain to me that Sunday morning. ■

**Editor's Note:**

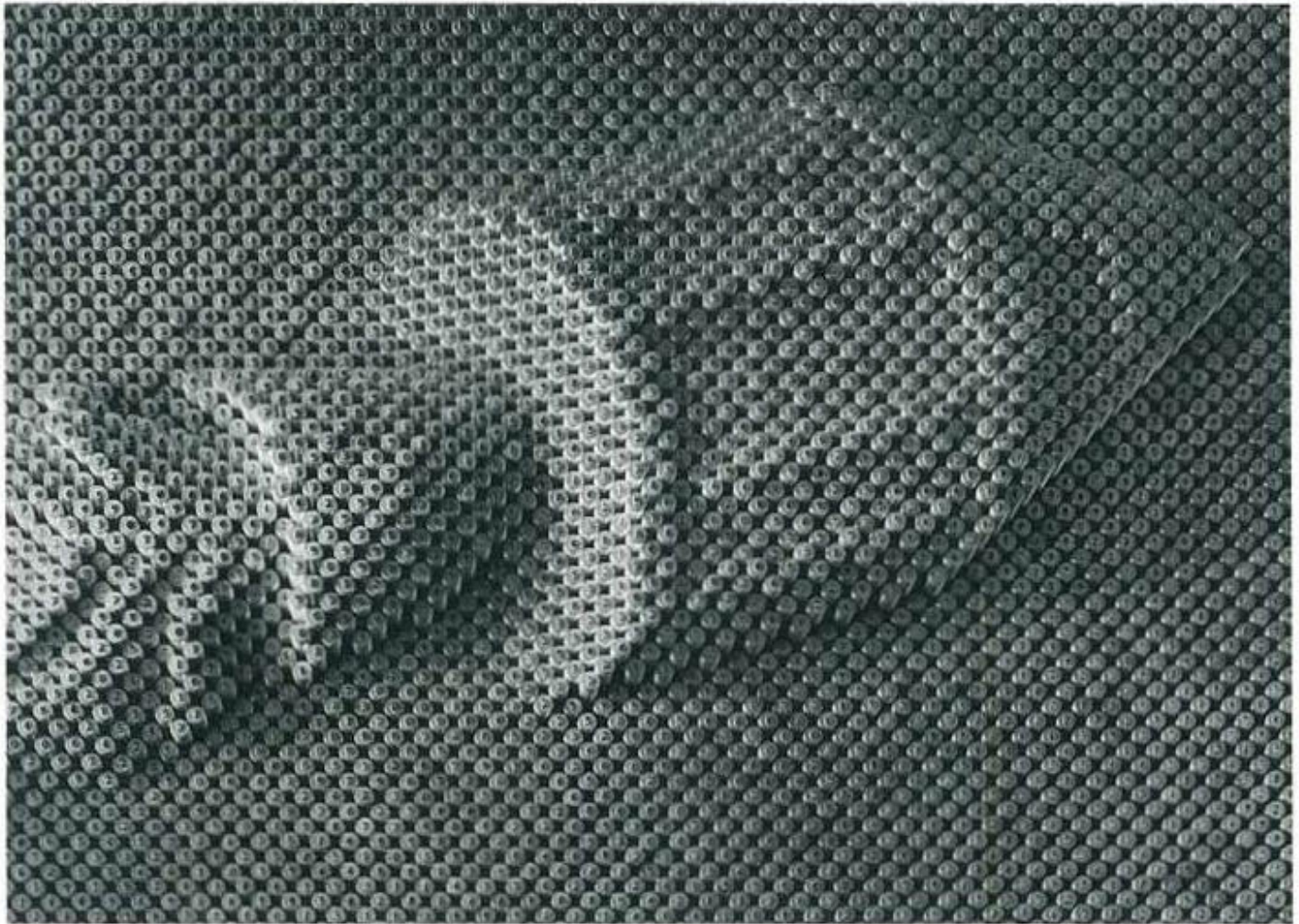
*I extend many thanks to Myron Smith, Tommy Mancuso, Bill Dunn, John Kelly Johnson, and Randall Houston, and Tim Peek of Riders Harley in Birmingham for their help in the preparation of this article. Also, many thanks go to Mark Vaughn from New York for his article on Harley Davidson.*



• L-r, Randall Houston, Myron Smith, Bill Dunn, John Kelly Johnson and Tommy Mancuso.



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# BAR BRIEFS

• **Wilbur G. Silberman** of the Birmingham firm of Gordon, Silberman, Wiggins & Childs was appointed a member of the board of associate editors of **Commercial Law League of America**.

Silberman is certified as a business bankruptcy specialist by the CLLA Academy of Commercial and Bankruptcy Law Specialists. Silberman is a 1941 admittee to the Alabama State Bar.

• The **American Bankruptcy Board of Certification** announced that **Mark P. Williams**, also of the firm of Gordon, Silberman, Wiggins & Childs, has successfully completed the requirements for national certification in business bankruptcy law. Williams is a 1984 admittee to the state bar.

• The **Russell County Bar Association's** officers for the 1995-96 term are:

President: **Charles E. Floyd, III**

Vice-president: **Connie Cooper**

Secretary-Treasurer:

**Richard L. Chancey**

• The **American Bar Association** honored four lawyers and one firm with

its 1995 Pro Bono Publico Awards, recognizing exceptional commitments to providing legal services to poor persons, at a luncheon held August 7 in Chicago.

Among those honored was **David Schoen**, of Montgomery, a sole practitioner who brings civil rights cases involving prisons, jails, foster care, police practices, and election law. He is a 1986 admittee to the state bar.

• New officers of the **Greater Birmingham Criminal Defense Lawyers Association** for 1995-96 are:

President: **Virginia A. Vinson**

President-elect: **John A. Lentine**

Executive Vice-president:

**Kenneth J. Gomany**

Secretary: **Thomas J. Spina**

Treasurer: **J. Massey Relfe, Jr.**

**Albert C. Bowen** now serves as immediate past president.

Also, the following members have been appointed to the association's board of directors:

**Ralph L. Armstrong**

**Richard S. Jaffe**

**Clyde E. Jones**

**C. Tommy Nail**

• **R. Michael Leonard**, who practices with Womble Carlyle Sandridge & Rice in Winston-Salem, North Carolina, was recently appointed by North Carolina Governor Jim Hunt to the board of trustees of the **North Carolina Natural Heritage Trust Fund**. The eight-member board decides which natural areas will be purchased as park and wildlife lands with appropriations from the trust fund. Leonard also was recently re-appointed to the **National Advisory Council of the San Francisco-based Trust for Public Land**. He is a 1978 admittee to the Alabama State Bar.

• The **Bankruptcy and Commercial Law Section** of the Alabama State Bar recently adopted a resolution honoring retired United States Bankruptcy Judge **George S. Wright** of Tuscaloosa. Judge Wright is a 1956 graduate of the University of Alabama School of Law. He was appointed to serve as a U.S. Bankruptcy Judge in the Northern District of Alabama on November 1, 1961, and retired December 31, 1994 after 33 years of service.

• The Alabama Lawyers Association recently elected officers for 1995-96. They are as follows:

President: **Yvonne A.H. Saxon**

President-elect: **Tori Adams-Burks**

Vice-president: **Fred Gray, Jr.**

Secretary: **Daisy Holder**

Assistant Secretary: **Launice Sills**

Treasurer: **Gwendolyn Garner**

Parliamentarian: **Victor Spencer**

NBA Liaison: **Ernestine Sapp**

Northern District Representatives:

**Cheryl Boone**

**LaSherril Brown**

Middle District Representatives:

**Lateefah Muhamad**

**LaVette Lyas-Brown**

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# You Can Get There From Here:

## *Program Accessibility Requirements Under the Americans With Disabilities Act*

*By Lisa Huggins*

**O**f the various issues arising under the 1990 Americans with Disabilities Act ("ADA"), employment discrimination has garnered the lion's share of attention. However, titles II and III of the Act effected sweeping changes in the obligations of public entities and private businesses to disabled citizens. These portions of the Act require physical access as well as equal opportunity to utilize public and private services and programs, allowing disabled citizens to participate as fully as possible in the civic, commercial and recreational life of our society.

This article provides a general overview of Title II, which imposes nondiscrimination requirements on public entities. Title III imposes barrier removal and other accessibility requirements on places of public accommodation and commercial facilities. In instances involving leases, joint ventures or other relationships between government entities and public accommodations, the

practical result of the relationship will usually be that the facility has to comply with the highest standard represented by both titles. Even so, each entity involved is liable only for its failure to insure compliance with the portion of the law that applies to it.

Attorneys advising clients in this area should note two indispensable guides in complying with these titles: the Technical Assistance Manuals for each title, and the Interpretive Guidance accompanying the regulations implementing the statute. All of these are promulgated by the Department of Justice.<sup>1</sup>

Title II of the ADA covers "public entities", which are state and local governments or subdivisions thereof, agencies or instrumentalities of state and local governments, some transit authorities, and AMTRAK. The definition includes departments, agencies, and special purpose districts of state and local governments. Public entities are not covered by title III.

Generally speaking, public entities are prohibited by title II from discriminating against disabled persons, either by denying equal access to or participation in government programs and services, or by affording inferior opportunities for participation and benefit to disabled individuals. In shorthand, the ADA requires "program accessibility" of public entities. Corollaries to this general requirement are that a public entity may not:

- (1) provide significant assistance to an organization that discriminates on the basis of disability in providing government services and benefits;
- (2) accomplish the prohibited discrimination indirectly through a contract or licensing agreement; nor
- (3) administer licensing or certification programs in such a way as to result in discrimination against qualified persons with disabilities.<sup>2</sup>

*Independent Housing Services v. Fill-*



more Center illustrates how public entities should monitor their relationships in order to avoid potential violations of the "significant assistance" and "contract" prohibitions stated in the regulations. There, a federal district court held that a public agency's issuance of bonds to finance residential and other portions of an urban renewal program might violate title II.

The San Francisco Urban Redevelopment Agency had contracted with the owner/developers of the Fillmore Center project to "provide aid, benefits or services to beneficiaries of the Agency's redevelopment program." Ruling on the Redevelopment Agency's motion for summary judgment, the court held that since the low-income housing built with the bond funds was inaccessible to disabled persons, the Agency's bond financing of the project could constitute discrimination outlawed by ADA.<sup>3</sup>

#### Physical access to sites

While public entities are not affirmatively required to remove barriers limit-

ing the physical access of disabled persons to all public structures, access to facilities and sites where government programs and services are made available is obviously a major part of the program accessibility obligation. For instance, in order to have a public hearing or meeting in a city building, the portion of the building itself which is used for the meeting, and the meeting room in particular, must be accessible to walker and wheelchair users.

If there are ways to make programs accessible other than making physical changes to buildings, e.g., changing meeting places, those methods may be utilized instead. The regulations and Interpretive Guidance suggest several other means of providing accessibility to public programs, including:

1. Redesign of equipment;
2. Reassignment of services to accessible buildings;
3. Assignment of aides to beneficiaries;
4. Home visits;

5. Delivery of services at alternate, accessible sites;
6. Construction of new facilities; and
7. Use of accessible rolling stock or other conveyances.<sup>4</sup>

Note that this list is not intended to be exclusive.

As a practical matter, nearly every building owned or leased for public program purposes by a public entity must be wheelchair accessible and have accessible parking. Restrooms, water fountains, telephones, and any other amenities provided for the use of the general public in the area utilized for public programs or services must also be accessible.<sup>5</sup>

#### Auxiliary aids and services

Beyond physical access to the site, public entities also have the obligation to make all aspects of their programs accessible. Once physical access to the program is accomplished, the major concern relating to program accessibility is usually communication. Thus, interpreters or assistive listening devices, Braille materials, readers, audiotaped or videotaped presentations, or other auxiliary aids or services may be required to provide equal participation in and benefit from hearings, public meetings, recreational facilities and other public programs.<sup>6</sup>

Disabled individuals must be given the opportunity to request the aids or services that they wish to use, and that request must be given primary consideration.<sup>7</sup> However, if the public entity can show that another equally effective means of communication exists, or that use of the means requested would result in a fundamental alteration of the program or undue financial or administration burdens, it may use another aid or service which is effective rather than the one specified by the disabled citizen.<sup>8</sup>

For example, citizens have the right to view public records maintained by public entities. In order for disabled citizens to equally benefit from the right to review such public documents, a qualified reader, reading device or other accommodation may be necessary. Qualified readers, magnifying glasses, or Braille materials will often be required in order to afford equal access to examinations administered by public entities.<sup>9</sup> Also, community education or public information

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programs (e.g., fire safety programs, DARE, museum tours) must be made available in alternative, accessible formats such as audiotape or videotape.<sup>10</sup>

The Interpretive Guidance provides that the cost of a qualified interpreter's courtroom services is not taxable as a court cost. However, in at least one case, a federal district court has ruled that a hearing disabled person's failure to request that the state domestic court appoint an interpreter for her hearing, choosing instead to obtain an interpreter on her own, barred her from claiming that the court's inclusion of the interpreter's bill in court costs violated the ADA.<sup>11</sup>

Existing policies, practices, procedures and administrative methods which have either the purpose or effect of discriminating on the basis of disability must be altered so as to eliminate the disparate impact.<sup>12</sup> Often such policies and practices are not intended to be discriminatory, but are the result of longstanding customs and attitudes which simply do not take into account the specific obstacles faced by persons with disabilities. For example, a public entity may have established the practice of requiring a driver's license as identification to obtain a building permit or business license. This clearly has the effect of screening out many disabled persons who cannot obtain a state driver's license, and is prohibited.

Neutral criteria which tend to screen out disabled persons can be used if necessary to insure the safety of either the public or the disabled individual. For instance, proof of a level of swimming proficiency may be required of all participants in a recreational rafting expedition sponsored by a public entity.<sup>13</sup> Eligibility standards based on safety considerations may not be imposed to the detriment of disabled citizens on account of stereotypes, assumptions about disabled persons' skills and abilities, or speculation. The appropriate analysis of such requirements is, should the standard be abandoned or modified, whether an actual risk would be created.

#### **Fundamental alterations**

Modifications that would fundamentally alter the nature of the service, program or activity at issue need not be made.<sup>14</sup> As it is undefined in the Techni-

cal Assistance Manual, Interpretive Guidance or regulations, "fundamental alteration" is one of those terms awaiting judicial interpretation. For now, it may be inferred that a fundamental alteration is one that would significantly impair or destroy the central purpose of the program, service or activity. Neither must the public entity make modifications that would result in undue hardship on the operation of the program. "Undue hardship" is "significant difficulty or expense relative to the operation of a public entity's program."<sup>15</sup> The determination that an accommodation constitutes an undue hardship or would work a fundamental alteration must be made by the head of the public entity (which may, depending upon the program, be a city or state department head) or his/her designee. The decision must be accompanied by a written statement of the reasons for the conclusion. Even where a proposed or requested accommodation would result in undue hardship or fundamental alteration, the public entity has an obligation to determine whether some other accommodation which would not produce the

hardship or alteration would afford disabled persons equal access to and benefit from the program or service.<sup>16</sup>

#### **Licensing and certification**

The ADA specifically forbids practices that effectively, though not intentionally, discriminate against the disabled in the administration of courses, examinations, and other programs attendant or prerequisite to licensing and certification. Public entities may not:

Administer licensing or certification programs in such a manner as to subject qualified persons with disabilities to discrimination on that basis, nor

Establish licensing or certification requirements that subject qualified individuals with disabilities to discrimination based on the disability.<sup>17</sup>

However, the programs or activities carried on by entities who are licensed or certified by the public entity are not, in themselves, covered by the regulation. Thus, while public entities are obligated to make sure that their licensing examinations and administrative procedures do not screen out qualified disabled individuals, they are not obligated to monitor



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the programs and activities of the licensed entities.<sup>18</sup> They need not require, as a condition of licensure, that a private business be accessible.<sup>19</sup> A "qualified person with a disability", as the term relates to licensing and certification, is one who can meet the "essential eligibility requirements" for the license or certification. Whether eligibility requirements are "essential" is a case-by-case analysis, according to the Technical Assistance Manual. The most helpful illustration in the government references is that of driver's license requirements:

"A public entity may establish requirements, such as vision requirements, that would exclude some individuals with disabilities, if those requirements are essential for the safe operation of a vehicle.

But, the public entity may only adopt "essential" requirements for safe opera-

tion of a motor vehicle. Denying a license to all individuals who have missing limbs, for example, would be discriminatory if an individual who could operate a vehicle safely without use of the missing limb were denied a license. A public entity, however, could impose appropriate restrictions as a condition to obtaining a license, such as requiring an individual who is unable to use foot controls to use hand controls when operating a vehicle."<sup>20</sup>

Obviously, the "essential eligibility requirement" could become troublesome, particularly in the area of licensing persons responsible for public safety or health care. The Interpretive Guidance indicates that the definition of "essential functions of a job" utilized in title I will carry over to title II's regulations regarding licensing and certification processes. Thus, for example, in determining whether a driver's license

requirement for a particular type of certification would constitute illegal discrimination under the ADA, it would first be necessary to determine whether the ability to drive an automobile is an essential function of the licensed vocation or activity.

### Historical properties

Historical preservation programs present special problems, as structural alterations to a building or site which would provide access for disabled individuals may impinge upon the historical character or integrity of the property. Alterations to historical properties (those eligible for the National Register of Historic Places or designated as historic under state or local law) need not be made if doing so would:

- (1) threaten or destroy the historic significance of the building or site, or some part thereof; or

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(2) result in a fundamental alteration in the nature of the historic preservation program, or undue financial and administrative burdens.<sup>21</sup>

In that event, alternative standards set forth in the statute may be utilized in order to afford disabled persons with at least minimal program access. These alternatives, which are basically partial exemptions from the general rule of access, include using audio-visual materials to depict parts of the property that cannot be made accessible; assigning persons as guides for disabled persons into or through the inaccessible portions; and "adopting other innovative methods."<sup>22</sup>

### Streets and roadways

Any public entity with responsibility over streets, roads or walkways should have already provided curb ramps whenever a pedestrian walkway crosses a street. Priority in ramping is to be given to areas serving government offices and facilities, transportation facilities, places of public accommodation, employee workplaces, and then other areas.

Also, public entities should provide an "adequate number" of accessible parking spaces in the existing parking areas over which it has jurisdiction. "An adequate number" is not defined.

### Administrative requirements

Information about the existence and location of accessible services, activities and facilities must be made available by public entities to the public. In this regard, consideration must be given as to format, so that such crucial information is readily available to those with hearing and sight impairments. Inaccessible entrances to public facilities must bear signs directing disabled persons to another entrance which is accessible, or to a location where they can obtain information about accessible facilities. The international symbol for accessibility,



must be used at accessible entrances.<sup>23</sup> Signage requirements also apply to the location of telephones equipped with telecommunication devices for the deaf.<sup>24</sup>

Title II also requires the public entity

to devise a scheme of self-evaluation, including the designation of a person responsible for complaints and development of a complaint procedure. All public entities were supposed to conduct a self-evaluation of their services, policies and practices, or the effects thereof, that did not or may not have met the requirements of title II. The evaluation should have been conducted by January 26, 1993. However, entities which had already done such a self-evaluation under §504 of the Rehabilitation Act were not required to repeat the evaluation for the same areas that were evaluated at that time.<sup>25</sup>

Those public entities (including departments) with over 50 employees must keep the self-evaluation on file for three years, along with the following related information:

- (1) A list of the interested persons consulted;
- (2) A description of areas examined and the problems identified; and
- (3) A description of any modifications that were made.<sup>26</sup>

Public entities with more than 50 employees are also required to appoint one or more employee(s) to be responsible for coordination of title II obligations, and to adopt and publish a grievance procedure in order to allow for complaint resolution without going to a federal agency. The name, office address and telephone number of each such designated employee must be made available to any interested person. Any complaints of noncompliance with Title II must be addressed through a complaint procedure, which the public entity must adopt and publish. The regulations do not indicate that the grievance procedure must be a full-blown adversarial hearing, but they do require "prompt and equitable" resolution of a complaint.<sup>27</sup>

If the self-evaluation reveals that structural changes to facilities will have to be made in order to attain program accessibility, public entities with 50 or more employees are required to develop a transition plan. The plan, which was due to be completed by July 26, 1992, should set forth what will be necessary to accomplish the structural changes.<sup>28</sup> The plan should include a schedule for providing the necessary curb cuts for

the wheelchair ramps discussed above.<sup>29</sup>

Persons aggrieved by a perceived violation of Title II may file a complaint with the appropriate government agency. Exhaustion of available administrative remedies through the filing of a complaint with the public entity would *not* be required before going to one of the federal agencies.<sup>30</sup> However, as encouragement to solve disputes at the level nearest the problem, the Interpretive Guidance assures that delays in filing with a federal agency engendered by availing oneself of the remedies available under a local grievance procedure may be considered good cause for an extension of the time to file with a federal agency, which is 180 days from the date of the alleged discrimination.<sup>31</sup>

### Telecommunication Provisions

Public entities must have telecommunication devices for the deaf (TDD's) or "equally effective telecommunication systems" in order to communicate with individuals who have impaired hearing or speech. Entities who already have relay services, in which a relay operator



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# Delinquent Notice Licensing/Special Membership Dues 1995-96

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## **In Active Private Practice:**

Any attorney who engages in the active private practice of law in Alabama is required to purchase an occupational license. The practice of law is defined in Section 34-3-6, *Code of Alabama*, 1975, as amended. (Act #92-600 was passed by the Alabama Legislature and amended Section 40-12-49, *Code of Alabama*, 1975, effective October 1, 1992.)

**Occupational License: \$287.50 (includes automatic 15 percent late penalty)**

## **Not in Active Private Practice:**

An attorney not engaged in the active private practice of law in Alabama may pay the special membership fee to be a member in good standing. Judges, attorneys general, United States attorneys, district attorneys, etc., who are exempt from licensing by virtue of a position held, qualify for special membership. (Sections 34-3-17 & 18, *Code of Alabama*, 1975, as amended)

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using both a standard telephone and a TDD types a voice message to the TDD user, and conversely sends TDD messages to the standard telephone user, may continue to use this service in order to fulfill the requirement of this section.<sup>32</sup>

In the case of emergency services (911 numbers), direct access must be provided for individuals who use TDD's and for those who use computer modems. The type of relay service described above would *not* fulfill the requirement that emergency services provide direct access. No particular technology is mandated by the regulations; public entities are required to use whatever technology is appropriate under the circumstances to enable them to promptly receive and respond to calls from TDD and computer modem callers.<sup>33</sup>

Clearly, the overall intent of title II is equal access and benefit to public programs in the most integrated setting possible, not a "separate but equal" world for disabled citizens. It almost goes without saying — but it is clearly stated in the regulations — that public entities cannot impose burdens on disabled people that are not placed upon others. For instance, disabled persons cannot be required to have an attendant with them when visiting a museum or other facility.<sup>34</sup> Similarly, a public entity cannot extract an additional surcharge or other cost on disabled users in order to defray the cost of providing accommodations.<sup>35</sup>

### Conclusion

Since virtually all of the deadlines for title II compliance have passed, public entities that have unresolved accessibility problems should work quickly to address them. Even if full compliance cannot be achieved, a good faith effort at compliance will be most valuable in the event of



**Lisa Huggins**

Lisa Huggins is an assistant city attorney for the City of Birmingham. A native of Troy, Alabama, she is a 1985 graduate of the University of Alabama School of Law, and also holds a bachelor's degree from the University of Tennessee at Chattanooga. After law school, she clerked for

United States District Judge James H. Hancock.

litigation. Perhaps more important, the value of such an effort to the disabled community will be immeasurable. ■

### Endnotes

1. The Equal Employment Opportunity Commission promulgated the regulations, Interpretive Guidance and Technical Assistance Manual for the employment provisions contained in Title I of the ADA.
2. Title II also prohibits discrimination in employment based on disability. However, Title I also applies to most public entities, and the employment requirements under Title II are identical to Title I for entities subject to the latter. For public entities that escape the application of Title I, the employment provisions of Section 504 of the Rehabilitation Act apply. 28 C.F.R. §35.140.
3. *Independent Housing Services v. Fillmore Center*, 2 A.D. Cases 1674, 1685 (N.D. Ca. 1993).
4. 28 C.F.R. §35.150(b). See also *Tyler v. City of Manhattan*, 3 A.D. Cases 289, 298 (D.Kan. 1994).
5. Title II Technical Assistance Manual ("TAM") §5.1000.
6. Interpretive Guidance to 28 C.F.R. §35.160; TAM §7.1000.
7. 28 C.F.R. §35.160(b)(2).
8. TAM §7.1100.
9. TAM §3.7200.
10. See Interpretive Guidance to 28 C.F.R. §35.130.

11. Interpretive Guidance to 28 C.F.R. §35.130(f); *Baker v. Louisiana*, 2 A.D. Cases 841 (W.D. La. 1992).
12. 28 C.F.R. §35.130(b)(3); TAM §3.5100.
13. Interpretive Guidance to 28 C.F.R. §35.130(b)(8).
14. TAM, §§3.6100 and 5.100.
15. TAM §4.3200.
16. TAM §5.1000.
17. TAM §3.7200.
18. 28 C.F.R. §35.130.
19. *Tyler v. City of Manhattan* at 299.
20. TAM §3.7200.
21. Interpretive Guidance to 28 C.F.R. §35.150(b)(2).
22. *Id.*
23. 28 C.F.R. §35.163(b).
24. Interpretive Guidance to 28 C.F.R. §35.163.
25. 28 C.F.R. §35.105.
26. 28 C.F.R. §35.105(c).
27. 28 C.F.R. §35.107.
28. 28 C.F.R. §35.150(d).
29. 28 C.F.R. §35.150(d)(2).
30. Interpretive Guidance to 28 C.F.R. §35.170.
31. *Id.*
32. 28 C.F.R. §35.161.
33. 28 C.F.R. §35.162 and Interpretive Guidance thereto.
34. Interpretive Guidance to 28 C.F.R. §35.130(b)(8).
35. 28 C.F.R. §35.130(f).

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# BAR LEADERSHIP CONFERENCE



■ Executive Director Keith Norman reviews the bar year, following the morning session welcome by Alabama State Bar President John Owens (right).



■ Ed Patterson, director of programs, conducts an audio-visual presentation on the image of the profession.



■ Susan Andres, director of communications, shares ideas on "Making Meetings Matter."

■ Judy Keegan, director of the Alabama Center for Dispute Resolution, discusses the use of ADR in the state.



■ Luke Coley, chair of the Committee on Access to Legal Services, talks about the success of the Volunteer Lawyers Program.



■ Sandy Mullins, chair of the Lawyers Helping Lawyers Committee, shares insights into the committee's functions during a working lunch.



# BAR LEADERSHIP CONFERENCE

■ *New General Counsel Tony McLain updates attendees on current activities.*



■ *A "standing room only" crowd filled the ASB boardroom for the day-long conference.*



■ *Attendees' enthusiastic responses to the conference included "Give this program an 'A'"; "well done"; "concise"; and "a great program!"*



■ *Five afternoon breakout sessions covered issues affecting the Alabama State Bar.*

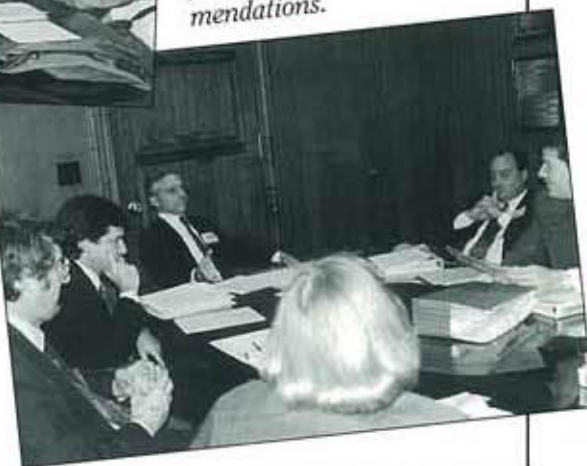


(below)  
■ *Gerald Paulk, third from left, guides a discussion group summary of recommendations.*

■ *Teresa Jacobs, center, led a breakout discussion on lawyer advertising and solicitation.*



■ *Jerry Wood, chair of the Task Force on Membership Services, serves as facilitator for the breakout session on that topic.*





# A Disability Insurance Plan Available to Alabama Lawyers

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The plan is available to all members under age 60, and it offers significant benefits and features in the following key areas:

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- An excellent definition of disability;
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- A variety of benefit periods, such as five-year, to age 65, and lifetime;
- A choice of waiting periods;
- Residual benefits;
- No integration with Social Security or other insurance;
- Guaranteed issue offerings for new members; and
- Cost-of-living benefit.

In addition, Commercial Life and Insurance Specialists, Inc. offer members an optional Business Overhead Expense Disability Plan.

Insurance Specialists, Inc. performs all administration, marketing, policyholder services, claims and sales activities related to these plans.

## Do I really need disability insurance?

When considering the need for disability income protection, keep in mind the following statistics:

- At age 40, the probability of becoming disabled is three times higher than the probability of death;
- Before normal retirement, one in every seven people will become disabled for at least five years;
- About 48 percent of all mortgage foreclosures are caused by disability, while only three percent are caused by death.

**How prepared are you to replace your income in the event of a disabling injury of illness? How will you pay your bills if you suffer a heart attack or require lengthy hospitalization or rehabilitation after an accident?**

Many business owners, while insuring their equipment against casualty losses, fail to think of themselves as business

assets, when in fact they are probably the most critical ingredient in the operation of their business. If you own a business or practice, imagine leaving tomorrow on a six-month vacation—would you have the cash reserves to continue drawing a salary? Would you still be in business when you return? A prolonged absence due to disability would have much the same effect.

Although Social Security provides a disability benefit, the requirements are stringent for collecting benefits. A disability income insurance policy can provide that protection.

## Which policy is right for me?

In evaluating a disability insurance policy with respect to your individual needs, consider these important points:

- How long could you wait before receiving benefits? If you have substantial savings or would be entitled to vacation or sick leave benefits, you can reduce your premium by taking a waiting period.
- How long will you need to receive benefits? Insurance companies offer a variety of benefit periods, i.e. payments for two years, five years, to age 65, and even for a lifetime. Because the insurance company is exposed to less risk, a shorter benefit period means a lower premium.
- What are the provisions for partial or residual disability benefits? Some policies insure only for total disability and periods of complete unemployment with commensurably lower premiums, while others pay benefits for varying degrees of disability and reduced earning ability. The more restrictive the definition of disability, the harder it is to qualify for benefits.
- What types of disability does the plan provide for? Some policies address a wide variety of disability and injury scenarios with such features as accident expense benefits; benefits for fractures; presumed total disability for loss of limb, speech, sight or hearing; rehabilitation benefits; cost-of-living benefits; and survivor benefits.

## Business overhead expense insurance

Even though a business owner may have insured for the loss of his or her own income, a period of disability is likely to depress profits. But office rent, utilities, equipment leases, employee salaries, payroll taxes, and benefits must still be paid. Business overhead expense insurance is designed to cover the costs of operating a business while the owner is disabled by an accident or sickness, and the premiums paid for such policies are generally tax-deductible.

Specified details about the bar's endorsed Disability Income Protection and optional Business Overhead Expense Disability plans are available by calling Insurance Specialists, Inc. in Atlanta at (404) 814-0232 or toll-free at (800) 241-7753. ■



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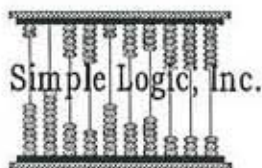


*Pictured above are Alabama State Bar Executive Director Keith Norman, artist Marguerite Edwards, Anne Hamner and Reggie Hamner.*

*The portrait of Reggie Hamner was recently hung in the atrium of the addition to the state bar building. The portrait, by artist Marguerite Edwards of Pike Road, Alabama, was paid for and given to the state bar by the many friends of Reggie to honor him for his 25 years of loyal service as executive director. The portraits of the late John B. Scott, executive director of the state bar from 1950 to 1969, and the late J.O. Sentell, former clerk of the Alabama Supreme Court and long-time editor of **The Alabama Lawyer**, were also painted by Ms. Edwards and hang in the state bar building.*

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# YOUNG LAWYERS' SECTION

By Alfred F. Smith, Jr.

**I** do not understand all the fuss about the Internet, the Information Highway, Windows 95, or the Pentium chip. I rarely use computers. It frustrates me for Jane Pauley to ask viewers to send their comments to "Dateline at NBC.com." What does that mean?

Yes, I confess to being a computer illiterate, laptop challenged technodummy. I come by this honestly. My great-grandfather was never quite comfortable in an automobile. My grandfather does not like airplanes, and my father has not accepted cellular phones. Nevertheless, and with this pedigree working against me, the Young Lawyers' Section has embarked on the mundane, but necessary task of improving its management and operating procedures.

**Robert Hedge** of Mobile began the process last year when he was treasurer of the YLS by, for the first time, utilizing a software program to generate the Section's financial statements and balance sheets. This may seem like a small feat, but for a committee accustomed to doing the work by hand, it was a major step forward.

By the end of this year we expect to have in place a detailed Executive Committee manual that includes all the information and forms necessary to run each of our projects, such as the Bar Admissions Ceremony, the Youth Judicial Program, the Minority Participation Conference, the Sandestin Seminar, and the Federal Emergency Management Act response teams. This emphasis on housekeeping is important, not only for current members of the YLS Executive Committee, but also for future young lawyers who wish to become involved. By institutionalizing the process necessary to run the Section's programs, we hope to enable young lawyers to have meaningful involvement without the lead time typically required to learn what the Section does and how it does it. In other words, we will not be relying

as much on "word of mouth" of how things worked last year in order to make them a success again this year.

Another aspect of improving operations is rooted in evaluating and updating the Section's bylaws. I have asked **Denise Ferguson** of Huntsville to chair a sub-committee for this purpose. You may recall that several years ago **Robert Baugh**, among others, was involved in



Alfred F. Smith, Jr.

drafting new bylaws for the Section. Those bylaws were never formally adopted, but should be helpful to Denise and her committee. I hope that before the next annual meeting the Section will have new bylaws in place, providing more open access to involvement in the YLS and, perhaps, limited terms for members of the Executive Committee.

As a part of our self-examination this year, I have appointed **Cole Portis** of Montgomery to chair a Long-Range Planning sub-committee charged with establishing the Section's priorities over the next several years. Long-range planning is a difficult task and one that requires a great deal of effort. Still, it may prove to be our most important undertaking this year.

Frequently, the Section is called upon to contribute not only time, but also

money to various organizations or projects. It is becoming increasingly more difficult to allocate our limited resources without meaningful guidelines for doing so. Therefore, I have asked **Charlie Anderson** of Montgomery to chair a special Grants sub-committee to develop guidelines and procedures to assist the Executive Committee in making decisions of this type.

It is hoped that our work this year will result in a more efficient and responsive Young Lawyers' Section. If you have any questions or comments concerning the Section, please write me or any of the Executive Committee members listed below — or send it to us by e-mail.

1995-96 Executive Committee

**Anthony D. Birchfield, Jr.,**

Montgomery - President-Elect

**Robert J. Hedge,** Mobile - Secretary

**Gordon G. Armstrong,** Mobile - Treasurer

**Thomas B. Albritton,** Andalusia

**Cynthia Lee Almond,** Tuscaloosa

**Charles L. Anderson,** Montgomery

**Melanie Merkle Bass,** Birmingham

**David A. Elliott,** Birmingham

**Denise A. Ferguson,** Huntsville

**Michael D. Freeman,** Birmingham

**Fred D. Gray, Jr.,** Tuskegee

**Christopher B. Harmon,** Birmingham

**Bryan K. Horsley,** Birmingham

**Christopher J. Hughes,** Montgomery

**Candis A. McGowan,** Birmingham

**Michael D. Mulvaney,** Birmingham

**John H. Nathan,** Birmingham

**J. Cole Portis,** Montgomery

**Archibald T. Reeves IV,** Mobile

**Christopher A. Smith,** Florence

**Elizabeth C. Smithart,** Union Springs

**Jacob A. Walker III,** Opelika

**Judson W. Wells,** Mobile

---

Smith is a partner at Bainbridge, Mims, Rogers & Smith in Birmingham, Alabama.

He is a 1986 graduate of the University of Alabama School of Law. ■



# DISCIPLINARY REPORT

## Reinstatement

• Jasper Newton Powell, Jr., formerly of Decatur, surrendered his license to practice law effective January 13, 1988. Upon filing a petition for reinstatement, Powell was reinstated to the practice of law by order of the Supreme Court of Alabama effective August 25, 1995. [Pet. No. 95-01]

## Transfer to Disability Inactive Status

• Arab, Alabama attorney Fred Seldon Weaver was transferred to disability inactive status, effective June 23, 1995. Weaver's transfer was ordered by the Alabama Supreme Court pursuant to a prior order of the Disciplinary Commission of the Alabama State Bar. [Rule 27(a), Pet. No. 95-002]

## Disbarment

• Scottsboro attorney Richard M. Payne was disbarred from the practice of law by Order of the Supreme Court of Alabama, effective July 19, 1995. Payne had previously been suspended from the practice of law for a period of three years for having misappropriated and converted to his own use funds belonging to his client. As part of the suspension order, Payne was required to repay the misappropriated funds to his client. Payne's disbarment was a result of his failure or refusal to repay the funds in question to his client. [ASB No. 93-091]

## Suspensions

• Effective August 21, 1995, Birmingham attorney Orrin Russell Ford has been suspended from the practice of law for

noncompliance with the Client Security Fund Assessment requirements of the Alabama State Bar. [CSF No. 95-02]

• Effective July 21, 1995, Mobile attorney LeMarcus Alan Malone has been suspended from the practice of law for non-compliance with the Mandatory Continuing Legal Education Rules. [CLE No. 95-12]

• Effective July 1, 1995, Alabama attorney Charles Randolph Holladay, Jr. has been suspended from the practice of law for noncompliance with the Mandatory Continuing Legal Education Rules. Holladay practices law in New York. [CLE No. 95-07]

## Public Reprimand

• On July 19, 1995, Jasper attorney Larry E. Smith was administered a public reprimand without general publication by the Alabama State Bar. Smith was employed by a client in connection with a claim for medical expenses made against the client. Smith failed to respond to the lawsuit and a default judgment was entered against his client. Furthermore, during the period of representation, Smith failed or refused to respond to telephone calls from his client or otherwise communicate with the client concerning the status of the case. The Disciplinary Commission determined that Smith's conduct constituted a violation of Rule 1.3 of the Rules of Professional Conduct which provides that an attorney shall not willfully neglect a legal matter entrusted to him, and Rule 1.4(a), which provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. [ASB No. 94-181] ■

## Attention!

### Members of the Legal Profession

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If you are considering visiting Atlanta during the 1996 Olympics, the Atlanta Bar Association would like to know of your interest in participating in educational and social activities during your visit. Please contact the Alabama State Bar to obtain a questionnaire to submit to the Atlanta Bar Association by December 15, 1995. The Atlanta Bar Association will use the information you provide to determine what activities and services may be of interest to lawyers and judges. If you prefer, you can contact the Atlanta Bar Association by telephone at (404) 521-0781 or facsimile at (404) 522-0269 for more information.



# RECENT DECISIONS

By DAVID B. BYRNE, JR. and WILBUR G. SILBERMAN

## UNITED STATES SUPREME COURT — CRIMINAL

### Wiretap disclosures and obstruction of justice

*United States v. Aguilar*, 515 U.S. \_\_\_, 115 S.Ct. \_\_\_, 132 L.Ed.2d 520 (1995). Did a federal judge's making of a false statement to FBI agents at a time when he knew that a Grand Jury was investigating possible criminal wrongdoing on his part amount to the offense of endeavoring to obstruct the due administration of justice? The Supreme Court, in a six-to-three decision, answered no. However, the Supreme Court voted eight-to-one to uphold Judge Aguilar's conviction for tipping off someone that his telephone may be tapped.

Chief Justice Rehnquist, writing for the majority, held that uttering false statements to an investigating agent who might testify before a Federal Grand Jury is not sufficient to make out a violation of 18 U.S.C. § 1503's prohibition of "endeavoring to influence, obstruct, or impede... the due administration of justice." Chief Justice Rehnquist said that a limited construction needed to be placed on the rather sweeping language of 18 U.S.C. § 1503's catch-all provision. The Supreme Court adopted the "nexus" requirement developed in some circuits under which the allegedly obstructive conduct "must have a relationship in time, causation, or logic with the judicial proceedings." This means that the defendant must have both intended to influence a judicial or Grand Jury proceeding, and *his endeavor "must have the natural and probable effect"* of interfering with the due administration of justice. Under this approach, an accused must take action with the intent to influence such proceeding; it is not enough that there be an intent to influence some ancillary proceeding such as investigation independent of the Court's or Grand Jury's authority.

With regard to Judge Aguilar's conviction for wiretap disclosure, Justice Rehnquist held that a federal law making it a crime to disclose a court order authorizing a wiretap, i.e., 18 U.S.C. § 2232(c), is violated even if the authorization has expired by the time the information is provided.

Materiality is jury question in prosecution for making false statement in violation of 18 U.S.C. § 1001

*United States v. Gaudin*, 515 U.S. \_\_\_, 115 S.Ct. \_\_\_, 132 L.Ed.2d 444 (1995). Must the question of materiality in a prosecution for making false statements in violation of 18 U.S.C. § 1001 be submitted to a jury? A unanimous Supreme Court answered yes.

Justice Scalia reasoned that, "The

Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." "The trial judge's refusal to allow the jury to pass on the 'materiality' of... false statements infringed that right."

### Possession of firearm within 1,000 feet of school falls outside of Commerce Clause

*United States v. Lopez*, 514 U.S. \_\_\_, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The federal criminal statute that prohibits possession of a firearm in or within 1,000 feet of a school, i.e., 18 U.S.C. § 922(q), does not regulate activity that substantially affects interstate commerce and contains no jurisdictional element that might limit its reach to firearm possession that substantially affects interstate commerce, and thus exceeds Congress' authority under the Commerce Clause.

Lopez, a 12th-grade student, carried a concealed handgun into his high school and was charged with violating the Gun-Free School Zones Act of 1990 which forbids "any individual knowingly to possess a firearm at a place that [he] knows... is a school zone." The District Court denied the defendant's motion to dismiss the indictment concluding that § 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. The Court of Appeals reversed, holding that the statute was invalid because it exceeded Congress' power under the Commerce Clause.

Chief Justice Rehnquist, writing for the majority, held that the Act exceeded Congress' Commerce Clause authority. The Court reasoned that possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to

*Continued on page 382*



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

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## Recent Decisions

Continued from page 380

do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity in which the regulatory scheme cannot be undercut unless the intrastate activity were regulated. Second, § 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce.

**Constitutional trial error—time goes to defendant**

*O'Neal v. McAninch*, 513 U.S. \_\_\_, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). O'Neal's federal habeas corpus petition challenged his state court conviction for murder and other crimes. The Sixth Circuit assumed that O'Neal had established "constitutional trial" error with regard to one of the jury instructions,

but disregarded that error on the ground that it was "harmless". The Sixth Circuit's holding required the habeas petitioner to bear the burden of establishing whether the error was prejudicial under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. \_\_\_.

Justice Breyer, writing for a divided Court, held that when a federal court finds a constitutional trial error and is in grave doubt about whether the error had a "substantial and injurious effect or influence in determining the jury's verdict," the error is not harmless, and the petitioner must win.

Justice Breyer observed that reviewing courts normally disregard trial errors that are harmless. O'Neal's case presented the question of whether a federal habeas court should consider a trial error harmless when the court (1) reviews a state-court judgment from a criminal trial; (2) finds a constitutional error; and (3) is in grave doubt about whether or not that error is harmless.

O'Neal's case presented the special

circumstance in which a review of the record leaves a conscientious judge in grave doubt about the likely effect of an error on the jury's verdict. Justice Breyer defined "grave doubt" as an issue which, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error. We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a substantial and injurious effect or influence in determining the jury's verdict.)"

**Holding of *Ake v. Oklahoma*, 470 U.S. 68 extends beyond its application to psychiatric experts**

*State v. Dubose*, 29 ABR 1514 (1995). Dubose was convicted of three counts of capital murder. The primary evidence linking the defendant to the crimes was DNA testing of certain vaginal swabs and other materials. Dubose's defense was alibi based upon the testimony of five witnesses.

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At the outset of the case, Dubose's family and friends had a defense fund of \$10,000. The State contended that Dubose was not entitled to expert funds because the holding of *Ake v. Oklahoma* did not extend beyond psychiatric experts.

The supreme court affirmed the decision of the court of criminal appeals reversing Dubose's conviction on the basis that the trial court had unconstitutionally denied the defendant's request for funds for a DNA expert in violation of the Sixth Amendment.

Justice Shores, writing for the majority, held that if the assets of friends and relatives who were not legally responsible for the defendant are not included in determining a defendant's indigency, then the fact that a friend or relative pays for an indigent defendant's counsel should not be considered in determining whether the defendant is entitled to funds for expert assistance.

The Alabama Supreme Court also concluded that the principles enunciated by the United States Supreme Court in *Ake v. Oklahoma*, and grounded in the due process guarantees of fundamental fairness, apply in the case of non-psychiatric expert assistance when an indigent defendant makes a proper showing that the requested assistance is needed for him to have a fair opportunity to present his defense.

It is important to note that the Supreme Court reaffirmed its decision in *Ex parte Sanders*, 612 So.2d 1199, which established a two-prong requirement for expert assistance with the following words:

The only time a defendant in Alabama, whether indigent or not, has a right to have an independent expert examine physical evidence is when such evidence (1) is critical and (2) is subject to varied expert opinions. *Sanders, supra*. To be critical, the evidence must be the only evidence linking the accused with the crime or proving an element of the corpus delicti. Even if the evidence is indeed critical, it is not subject to independent examination unless it is also subject to varying expert opinions.

Justice Shores reasoned that given the weight that a jury could place on DNA test results and the statistics drawn from them, coupled with the unlikelihood that defense counsel would have

the necessary expertise to challenge that evidence, an indigent defendant against whom DNA evidence will be offered must have access to a DNA expert to assist in his defense.

## RECENT BANKRUPTCY DECISIONS

Eleventh Circuit rules on adequate protection, and payment of interest to oversecured creditor

*In re Delta Resources*, 54 F.3d 722; 27 B.C.D. 501 (11th Cir. June 14, 1995). Orix Credit Alliance, as an oversecured creditor in this Chapter 11 case, moved for relief from stay because of failure of the debtor to furnish adequate protection. The bankruptcy court denied the motion, holding that the collateral was necessary to the debtor for an effective reorganization, and granted adequate protection in the amount of almost \$10,000 monthly. The court rejected the claim of Orix for post-petition interest as part of adequate protection.

On appeal, the district court reversed, stating that an oversecured creditor, as part of adequate protection, was entitled to post-petition interest and also an additional amount to maintain its equi-

ty cushion. The debtor appealed, but pending the appeal, the property was sold with Orix receiving the proceeds. The only question remaining on appeal was whether the post-petition payments previously authorized by the district court were due to be paid. An oversecured creditor is entitled to interest on its claim, and under *Timbers* the interest becomes part of the claim protected by the collateral. However, the question is whether the "interest in property" to be protected entitles the oversecured creditor to post-petition interest payments to ensure against diminution in value of its equity cushion, or only to protect against depreciation of the collateral. The court stated that the adequate protection is only to the extent that the value at the time of filing exceeded the value of the secured claim. Section 506 denies undersecured creditors post-petition interest on their claims and likewise denies oversecured creditors post-petition interest to the extent that when added to the principal, the amount exceeds the value of the collateral. If there is no cushion, there can be no post-petition interest. An undersecured creditor may be entitled to adequate protection to ensure against a decline in the value of the collateral, but not post-petition interest on



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its collateral during the stay as adequate protection.

The court then interpreted sections 506(b) and (c) reasoning that under (c) the debtor is allowed from the collateral reasonable costs and expenses of preserving the collateral. After this allowance, the creditor is entitled to interest on its net allowed secured claim at the contract rate, but the payment must await the completion of reorganization or confirmation of the case. The court then stated: "We hold that an oversecured creditor's interest in property which must be adequately protected, encompasses the decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt." The court concluded by stating that even accepting, although not proved, that Orix was an oversecured creditor, it was not entitled to receive periodic payments for accruing interest as part of adequate protection for any period of time.

**Comment:** This opinion has been given more space and attention than customary because the question of interest arises frequently. Now, in this circuit, it is clear that post-petition interest is not allowed as a part of adequate protec-

tion. There still may be some unanswered questions, such as the extent of the court's discretion in conditioning the continuance of a stay. In particular, the reader should examine footnotes 7 and 9 to the opinion. And, for another offspring of *Delta*, please see below.

Georgia U.S. District Court interprets *Delta Resources*, and also applies it retroactively

*Matter of M4 Enterprises, Inc.*, 183 B.R. 981, (Bkcty N.D. Ga. July 12, 1995). In May 1995, the case trustee moved for use of cash collateral, which motion was ultimately approved subject to granting to the creditor a first security interest in all post-petition assets, subject to the debtor's payment of two months' interest. A consent order approving the adequate protection was proposed, but a dispute arose as the trustee wished to continue paying interest, to which objection was raised because of the *Delta Resources* decision rendered June 14, 1995. The retroactive effect of the *Delta Resources* decision and its applicability to the instant case became an issue.

U.S. Bankruptcy Judge Homer Drake

first held that as there had been no final determination on the question of post-petition interest payments, *Delta Resources* must be followed. As to applicability to this case, he stated that Section 361(1) applies with equal force to the use of cash collateral, and that under *Delta Resources*, a creditor is not entitled to periodic payments of post-petition interest as adequate protection. The opinion further stated that even in the limited exception of an oversecured creditor being entitled to post-petition interest, timing is important, for "the payment of post-petition interest must await the completion of the bankruptcy case and not occur before. *Id.* at 730. This rule applies in all aspects of the bankruptcy case, and not just with respect to the need for adequate protection within the context of the automatic stay or the use of cash collateral." (emphasis supplied—the reference "Id at 730" applies to *Delta Resources*).

Finally, Judge Drake held that even though the parties had entered into a consensual agreement as to payment of post-petition interest, *Delta Resources* prevents the enforcement of such an agreement.

**Comment:** This case, which bolsters *Delta Resources*, effectively disposes of payment of post-petition interest until the case is closed. We must now await further developments in this and other circuits. ■

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**David B. Byrne, Jr.**

David B. Byrne, Jr. is a graduate of the University of Alabama, where he received both his undergraduate and law degrees. He is a member of the Montgomery firm of Robison & Belser and covers the criminal decisions.



**Wilbur G. Silberman**

Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.



# • M • E • M • O • R • I • A • L • S •

## L. A. Farmer



**Farmer**

Whereas, L. A. Farmer, a distinguished and respected member of this association, passed away on May 22, 1995, and

Whereas, the Houston County Bar Association remembers his name, recognizes his contributions both to our profession and to this community, and records this memorial of our colleague;

Whereas, L. A. Farmer was born on March 29, 1920 in Dothan, where he attended the public schools; and

Whereas, Bill, as he was affectionately known, had his study of law at the University of Alabama interrupted when he served his country in combat as a captain with the 35th Infantry Division of the United States Army in Europe during World War II; and

Whereas, upon discharge from the Army he completed his studies at the University of Alabama School of Law and was admitted to the bar in 1947, at which time he entered the private practice of law in Dothan. He served 16 years as an assistant district attorney for the 20th Judicial Circuit and served as president of the Houston County Bar Association in 1957 and again in 1976, and participated in numerous other civic and charitable affairs in and about the city of Dothan, and

Whereas, Bill practiced law in Dothan for more than 48 years, specializing in business and estate law, and was recognized and

admired by his fellow lawyers as being skilled and able in these and other areas of practice; and

Whereas, he took the time to give young lawyers guidance with compassion and understanding; and

Whereas, Bill was a descendant of three generations of attorneys, and this distinguished lawyer acquired the unalterable respect of the bench and bar of the 20th Judicial Circuit. He was held in the highest esteem by judges and fellow lawyers because of his unimpeachable character and highest regard for judicial ethics and he was a model for those of his time and those who were to follow; and

Whereas, Bill was a dedicated and active member of the First Baptist Church of Dothan. He was a devoted family man and left surviving him his wife, Erin Davis Farmer, Dothan; a son and daughter-in-law, James D. and Patricia Farmer, Dothan; a daughter and son-in-law, Anne and Newell Allen, Tuscaloosa; a sister, Frances F. Scott, Panama City, Florida; and three grandchildren, Kate, Alex and Brigman Farmer, all of Dothan.

Therefore, be it resolved by the members of the Houston County Bar Association in meeting duly assembled, that we mourn the passing from our midst of this faithful public servant, L. A. "Bill" Farmer, and that we herewith extend our sympathy and condolences to his family.

—Rufus R. Smith, Jr.  
President  
Houston County Bar Association

## James Edward Arnold

*Mobile*  
Admitted: 1957  
Died: July 3, 1995

## Bruce Valentine Hain

*Selma*  
Admitted: 1941  
Died: August 11, 1995

## Joseph Robert Huie

*Birmingham*  
Admitted: 1936  
Died: March 18, 1995

## William Arthur Jenkins, Jr.

*Birmingham*  
Admitted: 1950  
Died: March 14, 1995

## Edwin Burks Livingston

*Sylacauga*  
Admitted: 1947  
Died: June 3, 1995

## Arthur Ernest Parker

*Birmingham*  
Admitted: 1950  
Died: July 26, 1995

## Irvine Craig Porter, Jr.

*Birmingham*  
Admitted: 1932  
Died: May 28, 1995

## Michael Simonetti

*Birmingham*  
Admitted: 1967  
Died: August 7, 1995

## Truman Charles Steward

*Birmingham*  
Admitted: 1981  
Died: July 18, 1995

## Joseph Clewis Trucks

*Fairfield*  
Admitted: 1940  
Died: July 18, 1995

## Macon Lenny Weaver

*Huntsville*  
Admitted: 1950  
Died: February 9, 1995

## Please Help Us

The *Alabama Lawyer* "Memorials" section is designed to provide members of the bar with information about the death of their colleagues. The Alabama State Bar and the Editorial Board have no way of knowing when one of our members is deceased unless we are notified. Please take the time to provide us with that information. If you wish to write something about the individual's life and professional accomplishments for publication in the magazine, please limit your comments to 250 words and send us a picture if possible. We reserve the right to edit all information submitted for the "Memorials" section. Please send notification information to the following address:

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## John Hedges Tappan



**Tappan**

Whereas, the Mobile Bar Association honors the memory of John Hedges Tappan, a distinguished member of this association who died on February 14, 1995; Now therefore be

it remembered:

John Hedges Tappan was born on August 20, 1916 in Mansfield, Ohio. Known to his friends as "Jack", he graduated from Kenyon College and entered law school at Case Western Reserve in Cleveland, Ohio in 1938. He subsequently received his LLB degree from Tulane University School of Law in 1941. Describing himself as a "damned yankee in the deep South", Jack practiced law on his own in Mobile from 1941 until 1943, using a portion of the office space of Mr. Palmer Pillans. In 1943, he became an associate of the firm of Pillans, Cowley & Gresham, and in 1946 became a partner in the firm of Pillans, Cowley, Reams & Tappan and continued to practice with that firm and its successors until 1981 when he became *of counsel* to the firm then known as Reams, Tappan, Wood, Vollmer, Philips & Killion, P.C.

Jack's primary area of concentration during his career was in maritime law. Joseph M. Allen, Jr. recalled that for a period of years ending only with his retirement, "Jack was involved in nearly all of the major admiralty litigation in Mobile, and it was a privilege and inspiration to work with Jack because even in the most trying of circumstances, he always stayed cool and was a gentleman."

W. Boyd Reeves noted that Jack Tappan was "a master of maritime law and a true gentleman in his dealings with his opponents." U. S. District Judge Alex T. Howard, Jr. described Jack as a "learned admiralty practitioner who most ably represented his clients. Although he was a formidable opponent, he was a perfect

gentleman of absolute integrity."

Senior U. S. District Judge Daniel H. Thomas, who presided over many of the important admiralty cases in which Jack was involved, recalled that Jack was "very deliberate and saw that every 'i' was dotted and every 't' crossed in anything that he handled." Judge Thomas commented that "all lawyers would do well to emulate Jack Tappan." Jack's longtime partner, George F. Wood, noted that Jack was a "kind and gentle man whose sense of ethics and morality was profound".

Jack Tappan was an avid yachtsman, having sailed his boat many times to Bahamas and Canada, and it was at Harbour Island in the Bahamas where Jack maintained a residence that he died. His sailing adventures included trips to British Honduras, and the Leeward Islands and Windward Islands of the Caribbean Sea. In addition to his devotion to law and sailing, Jack was active in local theater, having served as president of the Joe Jefferson Players where he also received an award as best actor. For 17 years Jack served as a director of the Tappan Stove Company of Mansfield, Ohio, a company that had been started by his grandfather in 1891.

Jack and his wife, Louise, resided year-round at their home in Point Clear. In addition to his wife, brother and sister, Jack is survived by three children, Diane Tappan Horst of Mobile, Craig Tappan of Mansfield, Ohio, and Dr. Douglas Tappan of Pensacola, Florida who especially remember their father's gentleness and goodness.

Now, therefore, be it resolved that the members of the Mobile Bar Association mourn the passing of our colleague John Hedges Tappan, and we join with his family and friends in recalling the wit, warmth and wisdom of our fellow lawyer whose legacy of service we honor with this memorial resolution.

—Alton R. Brown, Jr.  
President  
Mobile Bar Association

## Norman K. Brown



**Brown**

Whereas, Norman K. Brown, Sr., a distinguished member of the Bessemer Bar Association, passed away on June 27, 1995.

Whereas, Norman K. Brown, Sr. was a native of Washington County, and later attend-

ed the University of Alabama where he received his undergraduate degree. While attending the University of Alabama he was a member of the Pi Kappa Phi Fraternity and later received his degree from the University of Alabama School of Law.

Whereas, Norman K. Brown, Sr. was distinguished and recognized as a United States Veteran of World War II, a member of the Alabama House of Representatives from 1963-1967, and a member of the First BancGroup Board of Directors, Inc. of Alabama.

Whereas, Norman K. Brown, Sr. who was affectionately known as "Tiger" to his colleagues and friends, was a devoted and distinguished member of the Bessemer Bar Association for a period of time exceeding 40 years. During his lengthy and honorable service to the practice of law, he was elected president of the Bessemer Bar Association.

Whereas, Norman K. Brown Sr. was a devoted husband and father and left surviving him a wife, Dorothy Colquitt Brown, a son, Norman K. Brown, Jr., two daughters, Dorothy B. Ivy and Julia K. Brown, and many other beloved relatives and friends.

It is, therefore, hereby resolved, that we express our enduring regard and respect for our distinguished colleague who served our profession, our state and our country in such an exemplary manner and who has left for all of us who claim the name of "Lawyer" the perfect example of the noble and devoted service to the "Jealous Mistress."

—A. Vincent Brown, Jr.  
Nephew, Norman K. Brown  
—Ralph L. Armstrong  
President  
Bessemer Bar Association



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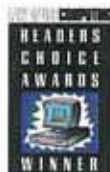


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