

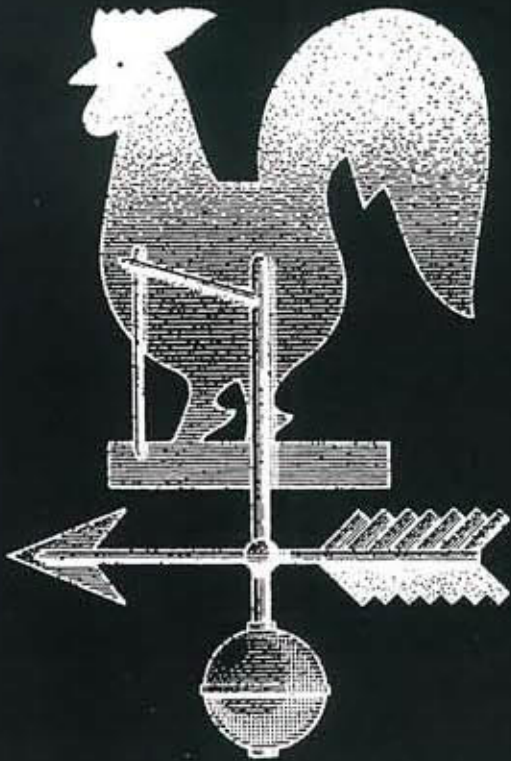
The Alabama Lawyer

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November 1997



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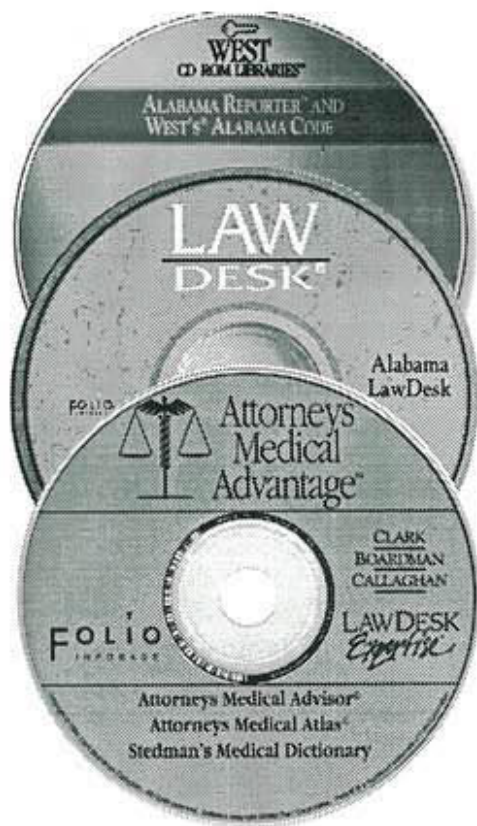
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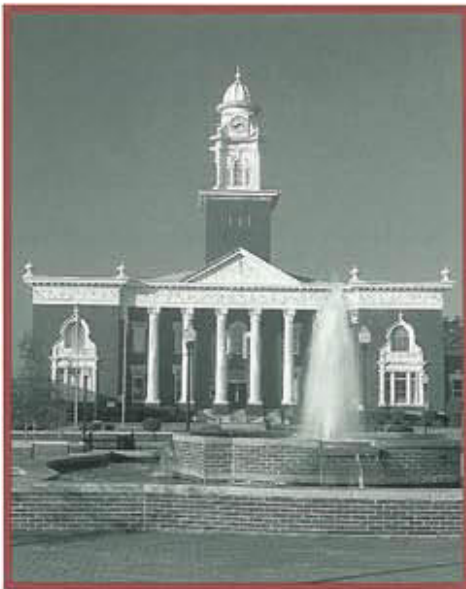
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On the Cover

Early morning sunlight on Lee County Courthouse, Opelika, Alabama. Lee County was created from portions of Russell, Macon, Chambers and Tallapoosa counties by act of the Alabama Legislature in 1866. The county's first election was held January 21, 1867. Construction of the courthouse began in 1896. The courthouse was placed on the National Register of Historic Places in 1973.

—Photo by Paul Crawford, JD, CLU

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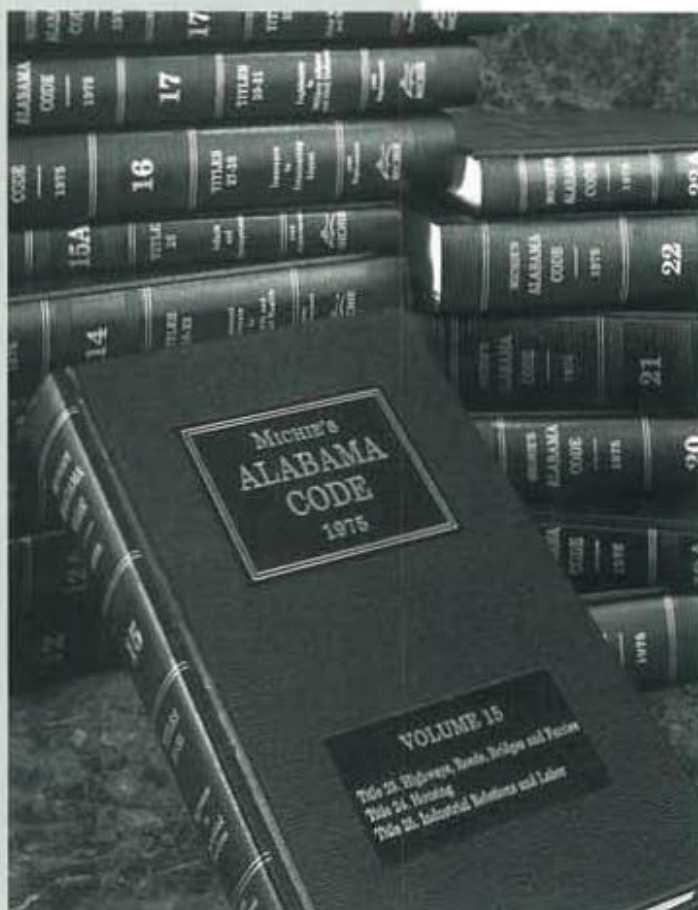
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PRESIDENT'S PAGE

By Dag Rowe

President Rowe's Challenge to New Lawyers



Dag Rowe

The following remarks were given at the October 30, 1997 admissions ceremony in Montgomery by Alabama State Bar President Dag Rowe.

I am delighted to bring greetings from the almost 12,000 members of the Alabama State Bar. My delight in being here is tinged with not a little poignancy and sentimentality because 25 years ago I sat where you now sit (give or take a city block or two). I can't help but note and welcome the beaming faces of so many parents, who have sacrificed much, both financially and emotionally, to get you here today.

I remember well the mixed feelings you have today—delight in having completed law school—relief in having passed the bar exam—concern about how you'll pay your student loans (the average law school grad last year owed \$35,000 in student loans)—apprehension about your practical legal skills—fear as to your career opportunities given the apparent glut of lawyers—and pride in today becoming a lawyer.

The pride you feel in joining our honorable profession is justified. Jim North, one of my predecessors at the state bar, used to say that in the small Alabama town where he was reared, there was a saying about someone who entered the legal profession that she or he "made a lawyer." That was an honor accorded to only one other profession, medicine. It simply reflected a tacit recognition of the fact that it took something special to make a lawyer.

What I'd like to talk to you about today are those professional goals and ideals which undergird the strength and value of the legal profession. Becoming a lawyer is more than just arming yourself with a technical understanding of procedural and substantive laws; it's also about the formulation of a *personal* code of professional values. Georgia Chief Justice Robert Benham recently said that professionalism for lawyers is not about learning rules; it's about aspirations.

I would ask you to consider including in your professional armor and in your unique persona the following aspira-

tions: The first is a basic commitment to *integrity and ethics*. In simple terms this means telling the truth, doing what you say you're going to do when you say you're going to do it, and complete and unwavering honesty in dealing with the money and property of others.

In your professional life when you are confronted with an ethical issue, I encourage you to develop from the start the habit of reflection. Stop and think: Is it right? Is it fair?

It may be "hokey" and it may be old-fashioned, but I'll wager you that the number of disciplinary cases handled by the Alabama State Bar would diminish to a trickle if each of us would simply stop and ask before acting: Is what I'm contemplating doing something I would be comfortable with my mother seeing or knowing? Can it stand the light of day? Would I want it done to me?

The second aspiration that I'd urge you to adopt is *independence*. This includes the ability to say "no" to a client. Lawyers are often too anxious to please a "win-at-all-cost" client. We're too afraid to lose a client. Elihu Root once said, "About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop." You know, true professionals lead their clients; toadies get in trouble and embarrass their colleagues by shuffling along following what are often base machinations of regrettable clients.

Independence also involves escaping the trap of deficit personal spending. A friend of mine is fond of saying, "If you really want to see time fly get a 90-day note." As John Capozzi recently wrote, "too many [lawyers] are spending money they don't have, to buy things they don't need, to impress people they don't even like."

Independence also involves escaping the trap of alcohol or other substance abuse. This is truly an occupational hazard for lawyers that can't be overstated.

Statistics show that as much as 50 percent of disciplinary charges against lawyers stem in part from alcohol or other substance abuse.

Independence also involves the realization of how easy it is for lawyers to become prisoners of the efficient and productive use of their time. You already know, and I need not remind you, that success in the legal profession requires hard work and long hours. In this regard, I'm reminded of an experience of Bill Paul when he was president of the Oklahoma Bar. Bill was asked by a senior at the University of Oklahoma Law School if there was "life after law school." Bill said the answer is one of those good news/bad news things. The good news is the answer is "yes." The bad news is that "life" starts ten years after you graduate.

When time becomes more than just a commodity or unit of merchandise, but increasingly the coin of our professional realm, then it is extremely important that we use our discretionary time wisely—with our families, with our hobbies, and with the causes that inspire us and, indeed, define us. Your daughter will soon forget whether you won a particular case, but she may remember all her life that you missed her dance recital.

The third value or professional attribute I would like you to consider is a commitment to *civility*, which has suffered in recent years. Some have said that the loss of civility by lawyers is simply an inescapable reflection of a general decline of civility in society. While there is undeniably less civility in society, that is no excuse in our profession in which the tradition of courtesy and gentility were founding, bedrock principles. As you start your career, realize that zealous advocacy and success do not require Rambo-tactics that are characterized by intimidation, hostility, and the rough-shod abuse of the sensibilities of opposing counsel or parties.

The breakdown of civility is just one aspect of the broader deterioration of professionalism. Professionalism is more than ethics, which is a minimum standard *required* of all lawyers. As Justice Harold Clarke of the Georgia Supreme Court said, professionalism "is a higher standard *expected* of all lawyers...This is the kind of standard which leads to a satisfaction for a job well done and a life well spent."

Civility, though, is more than courtesy and courtliness to other lawyers. In this month's *ABA Journal*, President Jerry Shestack said, "[I]t is an approach that seeks to diminish rancor, to reconcile, and to be open to nonlitigious resolution." In short, it's the ability and willingness to convert contention into consensus, to be a problem solver, and not just a mercenary warrior.

Each of us is troubled by the public perception of the legal profession. The proper response to that concern leads us to the last aspirational commitment I would ask you to make, which is "*Service*." Albert Einstein said, "The value of a person should be seen in what that person gives and not in what he [or she] is able to receive."

You are today receiving a great empowerment. It's yours to use as you deem fit. You can use it only for yourself or you can use it for others. As my old law professor, Martin Lipton, said at a recent N.Y.U. graduation, "It's a watchword of the legal profession that if you do *good* I'm sure you'll do *well*, and if you do *well*, it's your obligation to do *good*."

Too many of our professional colleagues, however, are putting very little bread back on the water, their thoughts and

hours are dedicated to either their income or their entertainment. Too often the community activities which are undertaken are chosen to maximize visibility and social prestige, while minimizing real commitment and hands-on service. Like the kamikaze pilot who flew 18 missions, we are involved but not committed. I urge you to make commitments, whether it's a civic club, your church, the United Way, Little League, the community chorus, or the Alabama legislature.

Unless you take those same talents that you will use in your legal career and employ them to make life better for others, then you're not only denying yourself a lot of pure joy, you're not pulling your weight. You're a taker and not a giver. It's one thing to be a good lawyer, but it takes more to be a good citizen.

These are the aspirations, commitments, and goals that I would ask you to embrace as you start on your legal career:

Integrity
Independence
Civility
and
Service

Best wishes and Godspeed! ■

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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

Committees and Task Forces Serve the Public and Profession



Keith B. Norman

There are 40 bar committees and task forces that are currently carrying out a number of worthy and important projects. There may be those who doubt the utility and the success of these committees and task forces. For them, I need only call to their attention past works as an illustration of the good that has been accomplished. The lawyer referral service, the volunteer lawyers program, the law office management program and the dispute resolution center are but a few of the many programs benefiting the public and our profession. Each of these programs began as ideas at the committee level.

I call to your attention one new committee and two new task forces. They are the **Committee on History and Archives**, the **Task Force on Lawyer Discipline** and the **Task Force to Study the Alabama State Bar's Rules and Procedures Governing Admission**. These three groups of lawyers appointed by **President Dag Rowe** are representative of all the lawyers who serve on the other 37 committees and task forces. They also highlight the significance of the missions of these bodies.

Committee on History and Archives

This committee is chaired by **Sam Rumore** of Birmingham with **Reggie Hamner** of Montgomery as the vice-chair. The committee's principal charge is to promote an appreciation of the traditions of the Alabama State Bar and to create an archives collection for the state bar. Some of the committee's functions will be:

- oversight of the newly created historic milestone program;
- coordination of the newly established memorial resolution book for deceased members;
- review the possibility of publishing a history of the Alabama State Bar;

- work toward completing the gallery of past presidents' plaques in the board room of the state bar headquarters; and
- consider appropriate displays concerning the history and archives of the state bar at state bar headquarters.

As a 119-year-old institution, our bar's history is relevant to the development of the legal profession in Alabama as well as the administration of justice in this state. Likewise, the history of the state bar is significant to national developments including the first code of ethics for the legal profession and the bar unification movement in this country.

Task Force on Lawyer Discipline

This task force is headed by **Phil Adams** of Opelika. **Bill Scruggs** of Ft. Payne will serve as vice-chair. Both are former state bar presidents. The purpose of lawyer discipline is to protect the public and it is important that our disciplinary process not only accomplish that purpose but that it also be perceived by the public as being fair and responsive. The system must avoid the criticism of too slow, too secret, too soft and too regulating. Plainly, the system must be fair to lawyers and to the public and be perceived to be so. The task force members are charged with studying the entire process of lawyer discipline in Alabama and make recommendations for improvement. Among the areas to be examined are:

- the complaints process—intake, screening and investigation;
- the disciplinary process—structure, control, form of discipline, confidentiality and funding;
- possible utilization of an administrative law judge in disciplinary proceedings;
- allow assessment of costs of disciplinary proceedings against lawyer who has been disciplined, declaring such

cost a judgment for which execution could issue, and allow judgment interest thereon; and

- specifically define, by rule, the participation of the disciplinary authority in character and fitness matters.

Recommendations of a similar task force in 1991 resulted in several changes in the disciplinary process by the Alabama Supreme Court, with the most notable of these being the inclusion of lay persons on the five disciplinary panels that hear the evidence against attorneys accused of violating the Rules of Professional Conduct.

Task Force to Study the Alabama State Bar's Rules and Procedures Governing Admission

This task force will be chaired by **Robert Potts** of Florence.

Delores Boyd of Montgomery, who chairs the board of bar examiners, will serve as vice-chair. The task force will study the admission rules with particular emphasis given to the bar examination. The task force has been charged with considering all aspects of the testing and grading process in light of the bar's public responsibility to license attorneys who are "minimally competent." The task force will review the experiences of jurisdictions which have utilized the written version of the multi-state examination, performance testing and other testing mechanisms.

Nearly a decade has passed since the bar's admission process was studied. Many changes have occurred since then, not the least of which is the large increase in the number of examinees sitting for the bar exam each July and February. This task

force is composed of former bar examiners as well individuals who have been involved with bar examination issues on a national level. They are sure to have recommendations that will help improve the admissions process.

The lawyers serving on these three task forces and committees will give hundreds of hours of their time. These hours will be but a portion of the many thousands of hours of public service that Alabama lawyers will render this year. Public service has long been a tradition of the legal profession. The legal profession is a noble calling and public service has always been the spirit of our profession's calling. ■

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Robert S. Thomas announces a change of address to 402 Briarwood Road, Scottsboro, 35768. Phone (205) 574-3210.

Joseph G. Stewart, Jr. announces a change of address to 200 S. Lawrence

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Velma D. Carr announces the relocation of her office to 2121 8th Avenue, North, Suite 1623, Birmingham, 35203. Phone (205) 322-7217.

J. Stephen Salter announces a change of address to 100 Age Herald Building, 2107 5th Avenue, North, Birmingham, 35203. Phone (205) 252-9751.

Byron Todd Ford announces a change of his mailing address to P.O. Box 407, Eutaw, 35462. Phone (205) 372-9635.

Helmsing, Jr., Kathryn W. Petersen and **Bradley S. Copenhaver** are associates. Offices are located at Riverview Plaza, Suite 500, 63 S. Royal, Mobile, 36602. The mailing address is P.O. Box 350, 36601. Phone (334) 432-5300.

The **Law Offices of Beth Stiller** announces that **Lori A. David**, former law clerk to the Honorable U.W. Clemon of the U.S. District Court for the Northern District of Alabama, has become an associate. Offices are located at 225 S. Decatur Street, P.O. Box 1071, Montgomery, 36101. Phone (800) 843-5542.

Battaglia Law Office announces that **Lee M. Russell, Jr.** has become an associate. Offices are located at 5950 Carmichael Place, Suite 102, Montgomery, 36117. Phone (334) 244-2983.

Sasser & Weathers announces the relocation of its offices to 1008 6th Avenue, SE, Decatur, 35601. The mailing address is P.O. Box 3043, 35602-3043. Phone (205) 351-1184.

Feld, Hyde, Lyle & Wertheimer announces that **William J. Bryant** has joined the firm as a shareholder. The new firm name is **Feld, Hyde, Lyle, Wertheimer & Bryant**. Offices are located at 2000 SouthBridge Parkway, Suite 500, Birmingham, 35209.

Daniel E. Boone announces that **Scott C. Shimer** has joined the firm as an associate. Offices are located at 300 W. Tennessee Street, Florence, 35630. Phone (205) 760-1002.

Anderson & Carr announces that **Jerry M. Twiggs**, formerly general manager of Dixie Electric, has joined the firm as an associate. Offices are located at the Sterling Centre, Suite 304, 4121 Carmichael Road, Montgomery, 36106. Phone (334) 272-9880.

Thomas O. Kotouc, P.C. announces that **Nick Y. Shimoda** has joined the firm as *of counsel*. Offices are located at 4142 Carmichael Road, Montgomery, 36106-2802. Phone (334) 409-0088.

Among Firms

Todd Russell announces his departure as executive director of the Alabama House Republican Caucus and that he is the newly-appointed executive assistant to the **Commissioner of Insurance for the State of Alabama**. His new mailing address is P.O. Box 303351, Montgomery, 36130-3551. Phone (334) 269-3550.

Jo Allison Taylor, formerly in private practice at New South Federal Building in Birmingham, announces that she has accepted the position of attorney/director of **Legal Counsel for the Elderly, University of Alabama**, P.O. Box 870392, Tuscaloosa, 35487. Phone (205) 348-4960.

Joel P. Williams announces a change of address to the **Office of Congressman Terry Everett**, 100 W. Troy Street, Suite 101, Dothan, 36303. Phone (334) 794-9680.

Jerry A. McDowell, Michael D. Knight, William C. Roedder, Jr., Edward S. Sledge, III, Forrest C. Wilson, III, P. Russel Myles, Brian P. McCarthy, Walter T. Gilmer, Jr., and Archibald T. Reeves, IV, former members of Hand Arendall L.L.C., announce the formation of **McDowell, Knight, Roedder & Sledge L.L.C. Frederick G.**

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McDaniel, Hall & Conerly announces that the firm name has changed to **Hall, Conerly, Mudd & Bolvig**. Offices are located at 1400 Financial Center, 505 N. 20th Street, Birmingham, 35203-2626. Phone (205) 251-8143.

Gregory D. Crosslin, Clifton E. Slaten and **Michael B. O'Conner**, former shareholders of **Sasser & Littleton**, announce the formation of **Crosslin, Slaten & O'Connor**, and that **James D. McLaughlin** and **James William League** are associates. Offices are located at 207 Montgomery Street, Suite 900, Montgomery, 36104. Phone (334) 262-8882.

Blum, Gersen & Wood announces that **David R. Baker**, formerly a partner of **Afridi & Angell**, has become a partner. The firm name has been changed to **Gersen, Baker & Wood LLP**. Offices are located at 270 Madison Avenue, New York, New York 10016-0601, and Boca Raton, Florida. Phone (212) 683-6383.

Luther Strange and **Jack Selden** announce the formation of **Strange & Selden**. Offices are located at 2101 Highland Avenue, Suite 420, Birmingham, 35205. Phone (205) 939-0450.

Gregory S. Cusimano, Larry H. Keener, Michael L. Roberts and **David A. Kimberley** announce the formation of **Cusimano, Keener, Roberts & Kimberley**. Offices are located at 153 S. 9th Street, Gadsden, 35901. Phone (205) 543-0400.

Albrittons, Clifton & Alverson announces that **Benjamin M. Bowden** has joined the firm as an associate. Offices are located at 109 Opp Avenue, Andalusia, 36420. Phone (334) 222-3177.

D. Robert Stankoski, Jr. and **J. Clark Stankoski** announce the opening of **Stankoski & Stankoski**. Offices are located at 314 Magnolia Avenue, Suite C, Fairhope, 36533. The mailing address is P.O. Box 521. Phone (334) 928-3776.

White, Dunn & Booker announces a change of address to 290 N. 21st Street, Massey Building, Suite 600, Birmingham, 35203.

Floyd Minor and **John Olszewski** announce the formation of **Minor & Olszewski**. Offices are located at 458 S. Lawrence Street, P.O. Box 164, Montgomery, 36101-0164. Phone (334) 265-6200.

Beers, Anderson, Jackson & Smith announces a name change to **Beers, Anderson, Jackson, Hughes & Patty** and that **Winston W. Edwards, Constance T. Buckalew** and **Judy B. Van Heest** have become associates. Offices are located in Montgomery and Birmingham.

Herring, Dick, Wisner, Adams & Walker announces that **Eric F. Adams** has joined the firm. Offices are located at 100 Washington Street, Suite 200, Huntsville, 35801. Phone (205) 533-1445.

Jason P. McCartha and **C. Franklin Snowden, III** announce the formation of **McCartha & Snowden**. Offices are located at 1 W. Jeff Davis Avenue, Montgomery, 36104. Phone (334) 269-9908 and (334) 265-3000.

Scott M. Roberts and **Michael I. Fish** announce the formation of **Roberts & Fish**. Offices are located at 3125 Independence Drive, Suite 301, Birmingham, 35209. Phone (205) 870-8611.

Goldberg & Simpson announces that **Stephanie L. Morgan** has become an associate. Offices are located at 101 S. 5th Street, Suite 3000, Louisville, Kentucky 40202-3118.

Sasser & Littleton announces that **Rebecca Wright Pritchett** and **Tamara A. Stidham** have become shareholders. Offices are located at Colonial Financial Center, One Commerce Street, Suite 700, P.O. Box 388, Montgomery, 36101-0388. Phone (334) 834-7800.

Ben L. Zarzaur and **David Schwartz** announce the formation of **Zarzaur & Schwartz**, and that **Thomas W. St. John** has become an associate. The mailing address is P.O. Box 11366, Birmingham, 35202-1366.

Friedman & Pennington announce that **Heather D. Carnes** has become an associate. Offices are located at 2000-A SouthBridge Parkway, Suite 210, Birmingham, 35209. Phone (205) 879-3033. ■

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BAR BRIEFS



Thomas M. Stevens

• The Mobile firm of **Johnstone, Adams, Bailey, Gordon & Harris** celebrated its centennial anniversary this year. **Tom Stevens** founded the firm in 1897. Its members have included many distinguished lawyers, including a past president of the Alabama State Bar, president of the Alabama Law Foundation and a Fellow of the American Bar Foundation.

• **Charles R. Johanson, III**, a member of the Birmingham firm of Engel, Hairston & Johanson, P.C., was elected president of the Commercial Law League of America at its annual meeting in July. For the last 104 years the Commercial Law League has been the national professional organization in the creditors' rights field. Its approximately 5,000 members include representatives of every group interested in commercial law.

In addition to holding numerous offices in the CLL, Johanson is a member of the Executive Committee of the Birmingham Bar Association and a charter member of the Bankruptcy and Commercial Law Section of both the Alabama State Bar and the Birmingham Bar Association. He is a former president of the Municipal Judges Association of Alabama, and served for several years as an adjunct professor at the Cumberland Law School, teaching Bankruptcy and the Uniform Commercial Code.

Chris Steve Christ, also of Birmingham, was recently admitted to membership in the Commercial Law League. ■

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George F. Wooten

"Few local bar groups have the good fortune to count among their number a man of the caliber of **George F. Wooten**." After 60 years of service as a lawyer and as a circuit judge in Talladega, George Wooten and his wife,

Jane, moved to Charlottesville, Virginia to live closer to their son and his family.

Dean Albert Farrah was dean of the University of Alabama School of Law when George Wooten was a student there. He served as judge of the Seventh Judicial Circuit from 1943 to 1946; was elected vice-president of the Alabama State Bar in 1973; and served as a member of the board of bar commissioners of the state bar from 1967 to 1979. "As long as lawyers practice their profession in this ...area, the personal and professional life of George F. Wooten will serve as an inspirational guide. Ours is a nobler profession because he practiced law."

—William T. Campbell, Jr.
President, Talladega County Bar Association

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.



Monroe County

Established: 1815

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. 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.



The Masonic Lodge, now at Perdue Hill, once served as the Monroe County Courthouse.

Monroe County

The area that is present-day Monroe County has deep historical roots. From 1519 to 1700 the area was claimed by Spain as part of Florida. From 1700 to 1763 it was claimed by France as part of Louisiana. From 1763 to 1780 England claimed the territory as part of west Florida. And from 1780 to 1795 Spain claimed it again. In 1795 the land became a part of the United States.

Two more decades passed before this wilderness in the "Old Southwest" became a county. Settlement of the area required reliable transportation. The Alabama River flows through the county, so water transportation made a portion of the territory easily accessible. However, land transportation to other parts of the area proved to be a problem.

Until 1805, there were only Indian trails and footpaths through the territory. On November 14 of that year, Secretary of War Henry Dearborn, representing the United States, and William McIntosh, as head of a delega-



tion of Creek Indian chiefs, signed a treaty whereby the United States purchased the right to use a pathway through the Indian country. Although the passage was only a horse path, by the terms of the treaty the Indian chiefs kept boats at rivers and large streams for the use of men and horses. They also maintained accommodations for travelers. The prices charged for the ferry service and for the inns were regulated by an agent for Indian Affairs.

In 1811 a subsequent treaty allowed the United States to enlarge the pathway so that vehicles—wagons, carts and the like—could pass along the path. It was at this time that the roadway was designated as the Federal Road. This Federal Road extended from Milledgeville, the capital of Georgia, to Mobile. It entered Alabama at Fort Mitchell, near present-day Phenix City, and continued to New Philadelphia, present-day Montgomery. From there the road proceeded southwesterly to Fort Deposit and Burnt Corn. Burnt Corn is in



Monroe County Courthouse

present-day Monroe County. At Burnt Corn, the road divided into two branches. One proceeded due west to St. Stephens and then due south to Mobile. The other continued southwesterly to Mims Ferry and then to Ft. Stoddert on its way to Mobile. Thus, an important junction of two branches of the Federal Road met in and traversed through the future Monroe County.

The naming of Burnt Corn is an interesting tale. The main path from Pensacola to the Upper Creek Nation passed by a spring. A group of Indians traveling on the path were forced to leave an ailing companion there. They provided him with a supply of corn. When he recovered, he had no way to carry the leftover corn so it stayed on the ground and eventually burned in his camp fire. Other travelers came along the trail and noted that they camped at a spring where the "corn had burnt." The name Burnt Corn has remained there ever since.

With the coming of more settlers into the territory, friction between settlers and the Creek Indians naturally arose. Scattered skirmishes gradually led to the Creek Indian War of 1813-1814. The clashes ultimately culminated in the massacre at Fort Mims on August 30, 1813, where over 500 settlers were killed. This battle was the single bloodiest defeat of white settlers by Indians in American history.

During the war, General Ferdinand L. Claiborne established a fortification on the Alabama River in the future Monroe County as a base for his supplies. The site chosen was on a high bluff known as Alabama Heights. This fort became known as Fort Claiborne. It was located near John Weatherford's Ferry on the Federal Road.

A famous incident of the war, a canoe fight involving Sam Dale, took place within the future Monroe County. "Big Sam" was a scout, trader and Indian fighter. At this time he was also a captain in the militia. On November 12, 1813, he and his small detachment encountered a war party of 11 Indians in a canoe. Captain Dale and three companions paddled out into the Alabama River to fight the Indians. Americans on both sides of the river watched the encounter.

Since their primers had gotten wet, Dale and his men could not fire their rifles. So with one of his companions holding the canoes side by side with a firm grip, Dale and the two others under his command fought the Indians in hand-to-hand combat using their weapons as clubs. Two of the Indians jumped from the canoe. The other nine were killed in the scuffle. Although a very brief encounter, the ferocity of the

hand-to-hand fighting was witnessed by a number of soldiers on the riverbank and assured Sam Dale's reputation as a hero. Dale County, Alabama is named for him.

The Creek Indian War ended with the Treaty of Fort Jackson on August 9, 1814. As a part of that treaty, the Creeks ceded their claims to a substantial amount of territory that extended from the corner of present-day Franklin County through central Alabama, all the way to the Spanish territory in Florida. This area consisted of approximately 21,500 square miles. By proclamation dated June 29, 1815, Governor David Holmes of the Mississippi Territory created Monroe County from these Creek lands. It was named for then Secretary of State James Monroe. Holmes' proclamation was as follows:

"Whereas, by a treaty entered into by Major General Andrew Jackson, on the part of the United States, with the Chiefs, Deputies and Warriors of the Creek Nation on the 9th day of August, 1814, the title of the said Creek Nation has been extinguished to a certain tract of Country lying within this Territory. And Whereas it is essential to the preservation of good order, and to prevent the laws of the Territory from being infringed with impunity, that the Jurisdiction of the civil officers thereof should be extended over the said tract of Country.

"Therefore, Know Ye, That by virtue of the powers in me vested as Governor of the Mississippi Territory, I do hereby erect all that tract of Country to which the Indian title was extinguished by the treaty aforesaid into a County, and do hereby order and declare that the said County shall be called and known by the name of Monroe, and I do further declare, the Laws of the Mississippi Territory, and the Ordinances and Acts of Congress relative thereto, are in force within the said County.

"And Moreover I do enjoin the Inhabitants of the said County of Monroe, to be obedient to the laws, and to respect the rights that have been secured to the Creek Nation of Indians by the treaty aforesaid.

"In Testimony Whereof, I have caused the seal of the Mississippi Territory to be hereunto affixed, and signed the same with my hand.

"Done at the Town of Washington, the twenty-ninth day of June A.D. one thousand eight hundred and fifteen, and in the thirty-ninth year of the Independence of the United States of America.

— David Holmes "

In the years preceding the creation of Monroe County, James Monroe had performed great service for his country in many different capacities. During the Revolutionary War he served as a



lieutenant and fought gallantly in a number of battles. In 1782 he began his political career by winning election to the Virginia Assembly. In 1783 he was elected to the Congress of the Confederation. In 1786 he returned to the Virginia Assembly. And in 1790 he took a seat in the United States Senate.

President Washington appointed Monroe Minister to France in 1794. In 1799 he was elected Governor of Virginia. In 1803 he helped negotiate the purchase of the Louisiana Territory. And in 1806 President Jefferson named him Minister to Great Britain. In 1811 he was elected Governor of Virginia again.

In 1812 President Madison named Monroe to be his Secretary of State. War with Great Britain could not be avoided, and so Monroe headed American foreign policy during the War of 1812. Unfortunately, in 1814 the British invaded and burned the capital city of Washington. President Madison subsequently dismissed his Secretary of War for ineptitude and named Monroe to be Secretary of War as well as Secretary of State for the duration of the conflict which ended in 1815. It was during this time that Governor Holmes of the Mississippi Territory established Monroe County, choosing the name to honor a unique public servant who held two major cabinet positions simultaneously.

In 1816 Monroe was elected president of the United States and he served from 1817 to 1825. During his administration, Mississippi became a state in 1817 and Alabama entered the Union in 1819. Monroe was the first sitting president to visit Alabama when he made a surprise stop in Huntsville on June 1, 1819.

Monroe is most remembered for his warning to European nations against interfering in the affairs of countries in the Western Hemisphere. His "Monroe Doctrine" was designed to preserve the freedom of newly independent Latin American states. Monroe died on July 4, 1831, five years to the day following the deaths of John Adams and Thomas Jefferson. It is an interesting side note of history that three of the first five presidents died on July 4, the birthday of the nation.

On December 9, 1815, the Mississippi Territorial Legislature named Fort Claiborne on the Alabama River as the county seat for the large county of Monroe. Because many settlers began moving into the Fort Jackson area in the northern part of the county, the legislature carved Montgomery County out of Monroe County on December 6, 1816, leaving Monroe County with approximately 10,600 square miles of territory. The subsequent creation of Dallas County on February 9, 1818 and Conecuh County on February 13, 1818 left Monroe with a more manageable 2,100 square miles. Further reduction in territory took place the next year when Butler and Wilcox counties were created on December 13, 1819, leaving approximately 1,300 square miles in the county.

The original county seat town of Claiborne grew up around the fort of the same name. In the early days of the county it was the largest settlement. By 1819 the town was platted into lots and had grown to approximately 2,000 citizens. There are no descriptions available of a courthouse building in the earliest days of Monroe County.

Claiborne became a large cotton shipping port. Because it was located on a high bluff with a steep slope, cotton bales were sent down a slide to the river wharf for loading onto steamboats. Paralleling the slide were tracks and steps. On the tracks ran a car which was tied to a rope and operated by a mule-powered pulley. The car carried goods and baggage. Passengers had to climb 365 wooden steps from the river edge to the top of the bluff.



A description of Claiborne in 1825 listed a hotel, a jewelry store, four tailor shops, three carpenters, and seven principal merchants. There were six attorneys, four doctors, a county judge, and a federal judge.

In April of 1825, General LaFayette visited the town during his farewell tour of the United States. A reception was held in his honor at the home of James Dellet, the first Speaker of the Alabama House of Representatives. According to accounts of the affair, the attendees feasted on six hams, eight roast turkeys, six roast pigs, 24 fowls, 12 ducks, six

dishes of roast beef, and ample vegetables for the gathering.

LaFayette also visited the newly constructed Masonic Lodge Number 3, completed in 1824. The desk from which he spoke still contains a silver plate commemorating the visit. The lodge is significant in Monroe County courthouse history because one room was used as a courtroom for a number of years. Today it is the oldest building in Monroe County. It was relocated to the town of Perdue Hill in 1884. This building is one of two structures in Alabama, the other being at New St. Stephens in Washington County, which are still standing today and which were used for Masonic as well as court purposes.

A number of famous citizens resided in and around Claiborne. Besides James Dellet who served in Congress from 1825 to 1829, two governors of Alabama called Claiborne home: John Murphy, governor from 1825 to 1829, and Arthur Pendleton Bagby, governor from 1837 to 1841. Murphy later served in the U.S. House of Representatives and Bagby later became a U.S. Senator. Also, Charles Tait, the first United States District Judge of Alabama, lived in Claiborne. And, William B. Travis, one of the heroes of the Alamo, practiced law in Monroe County and lived nearby for a period of time.

By 1831, an effort began for the movement of the county seat to a more centralized location. An election authorized the removal of the seat of justice to the most suitable site within four miles of the geographical center of the county. A three-man commission set out to determine the site.

Local historians maintain that the geographic center of the county is northwest of present Monroeville in the vicinity of Limestone Creek and that the commissioners located this site. In traveling back to make their report, the commissioners stopped at Major Walker's tavern to refresh themselves. After learning the nature of their business, he offered them drinks on the house. They spent the night with him, so the story goes, and after many more free rounds the commissioners determined that the geographic center of the county was actually located precisely at Major Walker's Mill and Store.

Walker had settled in the area in 1815. In 1822 he erected his first gristmill on Walker Creek. He later built a small store and tavern. The place had become known as Walker's Mill and Store. After it was chosen for the county seat due to its "central" location, it was called Centerville. However, since a Centerville already existed in Alabama, the name was permanently established in 1832 as Monroeville.

The town of Claiborne continued as a prominent cotton shipping port and commercial center throughout the antebellum period. However, its fortunes deteriorated as the cotton economy was destroyed by the Civil War. By 1872, the town had only 350 residents. Today only a few homes mark the area where once stood a fort, a county seat, and the location of the state's largest cotton shipping port.

In 1832, Judge Henry Taylor selected a site for the first of the four courthouses that would be built in Monroeville. This site is believed to be between the location of the two present courthouses. It was built of logs and burned in the 1830s. Many early records were lost.

A new brick courthouse was soon built. The actual construction date is unknown. A photo taken years later shows a two-story building with wrought iron stairways on both sides leading up to an iron porch. The windows appear to have wooden shutters. It was from this courthouse in April 1865 that Probate Judge T. M. McCorvey rode out to meet northern soldiers on the outskirts of town and persuaded them not to burn Monroeville.

After a new courthouse was built following the turn of the century, the older structure continued to serve the county as the location of county archives. It also contained law offices and businesses, including a drug store. Unfortunately, like its predecessor, this building burned. The year was 1928. Many more of the early Monroe County records lay in ashes.

By 1900 Monroeville was incorporated, had passenger train service, daily mail and a thriving business community. Probate Judge Nicholas Stallworth dreamed of a new, larger and grandly designed courthouse. Andrew J. Bryan of New Orleans, a prominent southern architect, was hired for the project.

Bryan designed a three-story domed courthouse of Neo-Classical and Eclectic styles. It was built in three sections with each section having a different shape. The eastern portion is two-stories high, constructed in the form of a maltese cross, and topped by an octagonal clock tower with four clock faces. Entrances are located at the corners which create triangular-shaped offices around the lobbies. The central section is a three-story oval structure. The lower level housed the probate office flanked by curved, covered walkways on the outside. The rest of this section contains the two-story oval courtroom. The western section is a three-story rectangular unit with additional office space as well as witness and jury rooms.

Bryan designed other courthouses in Georgia, Mississippi and Louisiana. Several of these had features similar to the Monroeville Courthouse. He designed an almost identical structure in 1904 for Troup County at LaGrange, Georgia. Unfortunately, Monroe County's sister courthouse building burned in 1936.



Monroe County Heritage Museum



John Barnett and Judge Sam Welch unveil monument, Law Day 1997. Alice Finch Lee looks on (far right).

M. T. Lewman and Company, contractors of Louisville, Kentucky, built the tan brick structure. Bricks and building supplies had to be shipped to Monroeville by train. When the courthouse was completed, the *Monroe Journal* boasted, "The new courthouse is one of the handsomest and most conveniently appointed in the state, and one that would do credit to a county far exceeding Monroe in wealth and population."

Over the years, the building has undergone remodeling and renovations. Records show that the first such projects took place in the late 1920s and early 1930s. In the late 1940s, other improvements were made and a vault installed to store county records. Still, as the county grew, the building became inadequate to meet its needs.

Probate Judge Eugene T. Millsap, a staunch fiscal conservative, took on the construction of a new courthouse as his pet project. The fulfillment of his plans took some time, because they called for the courthouse to be paid for with cash in hand leaving no debt for the county. He accomplished this task in 1963, the year he died while in office, leaving more than one million dollars in the county coffers after the building debt was paid.

Fortunately for Monroe County and the State of Alabama, the 1903 courthouse had been built on only about one-third of the large town square. Two-thirds had been left as a park. When plans were made for a new courthouse, there was no need to

demolish the old courthouse to make room for a new structure. This pattern of tearing down the old to make room for the new has been a common practice in Alabama. However, Monroe County was able to save its architectural jewel, which could not be cost-effectively reproduced today.

The 1963 Monroe County Courthouse was described by its architects as containing "design elements reminiscent of early southern buildings." This building has a long open porch with rocking chairs, a second floor balcony, and cypress window shutters. It is of modern design, constructed of reinforced concrete, and covered with salmon pink brick. The two courthouses on the town square provide a striking contrast of architectural styles.

The new courthouse cost approximately one-half million dollars and was debt-free when the building opened. The architectural firm which designed the project was Sherlock, Smith & Adams, Inc. of Montgomery. The project designer was Eugene T. Millsap, Jr., son of Probate Judge Millsap. The general contractor was S. J. Curry & Company of Albany, Georgia.

No story about Monroe County and its courthouse would be complete without describing the building as a prominent Alabama literary landmark. Monroeville is the hometown of Harper Lee, author of *To Kill A Mockingbird*. The fictional Maycomb, Alabama was patterned after Monroeville. The courthouse played a pivotal part in the Pulitzer prize-winning novel. Actor Gregory Peck visited the town and its courthouse in preparation for his Oscar-winning portrayal of attorney Atticus Finch.

Also, famous author Truman Capote frequently visited Monroeville and spent summers with relatives in the town. In his autobiographical short story, *A Christmas Memory*, he made reference to the courthouse when he wrote that "the courthouse bell sounded so cold and clear."

After the new courthouse was built, the old courthouse was used for law offices, other businesses and the Chamber of Commerce. It was placed on the National Register of Historic Places on April 16, 1973. A movement began in the 1980s to restore and preserve the old courthouse and to turn it into a museum. A play based on *To Kill A Mockingbird* is performed in



Justice Gorman Houston at dedication ceremony



Gorman Houston and his grandchildren at ceremony

the courthouse each year during the first two weekends in May.

In 1997 the Alabama State Bar initiated a Legal Milestone Program to focus the public's attention on the law and its place in America's life. Two markers were dedicated on May 1, Law Day, 1997. One of these two markers was unveiled at the Monroe County Courthouse in a ceremony attended by Alabama Supreme Court Justice J.

Gorman Houston, Jr., who wrote the marker text, Circuit Judge Samuel H. Welch, bar commissioner John Barnett, III, and Alice Finch Lee, a Monroeville lawyer and the sister of author Harper Lee. The marker pays tribute to fictional lawyer Atticus Finch, who represents an ideal and role model for all lawyers. Note the source of his last name.

Despite the successful effort to save the Monroe County Courthouse, much more work needs to be done. The initial phase of preservation focused on the building's exterior: the roof, the bricks, the windows,

and the tower clock. Other funds were used to refinish the courtroom floor, install structural ties on the third floor, and improve electrical service to the building. Now work must be done to completely replace the 1930s wiring in the building, to install a new heating and air conditioning system, renovate the plumbing for restrooms, install an elevator, refinish the floors, repair plaster, and paint the interior.

The Monroe County Heritage Museum still seeks financial assistance from individuals, corporations and foundations to complete the final phase of courthouse restoration. The mailing address of the museum is P.O. Box 1637, Monroeville, Alabama 36461. The museum is open Monday through Saturday. The citizens of Monroe County have exhibited great vision by preserving their treasured courthouse landmark.

The author acknowledges the assistance of Jane Ellen Cason, Monroe County Heritage Museum; Monroeville attorneys Nicholas S. Hare, J. Milton Coxwell, Jr., and John B. Barnett, III; Montgomery attorney John R. Wible; Mobile attorney Lionel C. Williams; and the Alabama Historical Commission for assistance in obtaining information or photos used in this article. ■

SOURCES:

The Monroe Journal's Centennial Editions 1966 and 1969; From Cabins To Mansions, Mary E. Brantley, no date; *Early Settlers Along the Old Federal Road In Monroe and Conecuh Counties, Alabama*, Mary E. Brantley, 1976; *Alabama Rural Electric Association Magazine*, March 1988, page 12; *Alabama Magazine*, June 1990, page 35; *Alabama Historical Association Newsletter*, September 1994, page 3; *Legacy: The Magazine of the Monroe County Heritage Museum*, Monroeville, Alabama, Summer/Fall 1994; "To Kill A Mockingbird In Israel", *The Monroe Journal*, Thursday, June 27, 1996; *Southern Living*, May 1997, page 148; *The Monroe Journal*, May 8, 1997; *The Alabama Lawyer*, July 1997, page 144.



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, and is a member of *The Alabama Lawyer* Editorial Board.



LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

Special Session

The Legislature met in a Special Session in September to pass an education and general fund budget. In addition to these funding bills, the Legislature passed two major revisions drafted by the Institute.

Amendments to the Revised Limited Partnership Act

Act 97-921

Sponsored by Representative Mark Gaines and Senators Ted Little and Roger Bedford

Background

In 1983, the Alabama Legislature enacted our present limited partnership statute, superseding an earlier 1916 statute based on the Uniform Limited Partnership Act. Two years after the enactment of Alabama's 1983 Act, the National Uniform Act was updated in 1985.

After a two-year study, the Alabama Law Institute recommended bringing current the Alabama Act, now 14 years old, to bring it into line with the national model. This will result in the following substantive changes.

A. The New Short-Form Certificate and the Role of the Partnership Agreement

The present Alabama Act requires that the limited partnership certificate set forth a substantial amount of information concerning the capital and finances of the partnership, the identity of the limited

partners and other matters. Following the lead of the 1985 NCCUSL Act, section 201 of the proposed Alabama Act opts for a more streamlined "short-form" certificate. At the same time, the Act recognizes an expanded role for the partnership agreement.

B. Withdrawal of a Limited Partner

Alabama's present Act provides that a limited partner may withdraw from a limited partnership only at the time or upon the happening of events specified in the certificate of limited partnership and in accordance with the partnership agreement, but if the certificate fails to specify a time or the events that would trigger a limited partner's right to withdraw, upon six months' written notice. Under current Internal Revenue Service rulings, this six-months rule has been a problem.

C. Merger and Conversion Provisions

The 1983 Act did not contain any provision dealing with mergers of limited partnerships with other limited partnerships, much less other business entities. Taking its cue from the provisions of the new general partnership act passed in 1996, this act contains provisions that permit mergers of limited partnerships with other "business entities."

D. Clarifying What Activities Do Not Constitute Participation in Control

Our present Act sets forth a catalog of actions (frequently referred to as a "safe harbor") that a limited partner can take without being deemed to have participated in control, with loss of limited liability. The proposed Act adds several activities to those that will be protected by the safe harbor, and introduces clarifying language as to some current provisions.

E. Miscellaneous

A number of miscellaneous changes have been made at various points in the

statute to conform the Limited Partnership Act with recent revisions to the Partnership and Limited Liability Partnership Act of 1996, Business Corporation Act of 1994, and the Limited Liability Company Act of 1993. It further adopts other clarifying language in the National Uniform Act of 1985.

Limited Liability Company Amendments

Act 97-920

Sponsored by Representative Mark Gaines and Senator Steve Windom

The Alabama Limited Liability Company Act has been amended to reflect developments in this area of the law since Alabama enacted its law in 1993. When Alabama passed its LLC law we were the 14th state to enact such a law. Now all 50 states have passed one. Two provisions that are addressed in these amendments allow a one-person LLC where now it requires two or more. Further, merger provisions are added to allow other business entities to become Limited Liability Companies.

A. Check the Box

Another important development is the adoption by the United States Treasury of the "check-the-box" regulations under which an entity can elect to be treated as a partnership or as a corporation without satisfying complex tests. These regulations make it possible to substantially simplify the Act without endangering the status of limited liability companies as partnerships for federal income tax purposes.

B. Fiduciary Standards

The amendments adopt fiduciary standards to govern the relations between the company and its members and among the members. These standards are based on the recently promulgated uniform limited liability company act by



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.

the National Conference of Commissioners on Uniform State Laws. These standards are similar to the standards for partners under the Alabama Uniform Partnership Act (1996). The proposed amendments are more specific than the other laws in governing access and use of information.

C. Definitions

Many minor additions and modifications have been made in light of experience with the existing law. A definition of "business entity" has been added. The amendments provide for an "organizer" to form the limited liability company. The requirement for an initial report has been deleted as unnecessary. The term "dissociation" has been eliminated entirely. The concept has no function now that "continuity of life"—as used in the Treasury Regulations—is not a concern. The term "dissociation" has been replaced with "cessation of membership" where necessary.

D. Withdrawal of Member

The rules governing purchase of a member's interest after withdrawal are deleted. However, the buyout provisions of the professional corporation statute have been added to the rules governing professional limited liability companies in the event interests in a limited liability company are transferred to persons who are not eligible to own interests in professional organizations. This does not represent a substantial change as to professional limited liability companies.

E. Members

A number of provisions have been modified to provide for single member limited liability companies. Such companies will be ignored for income tax purposes. Rules have been added allowing the heirs to continue a single member limited liability company after the member dies or becomes incompetent. Rules have been added to make explicit the authority to create classes of mem-

bers and managers. These subsections are derived from Delaware law.

F. Transition

After December 31, 2000, it will be effective for all limited liability companies. Before January 1, 2001, limited liability companies formed under prior law may elect to be subject to the new Act.

During the Special Session there were 379 bills introduced. The January 1998 *Alabama Lawyer* will review any bills affecting lawyers.

Anyone wishing further information concerning the Institute or any of its projects may contact Bob McCurley, Director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, FAX (205) 348-8411, Phone (205) 348-7411. Institute Home Page - www.law.ua.edu/ali ■

This issue marks the 90th edition of "Legislative Wrap-Up," which has appeared regularly since January 1983.

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MEMORIALS

Judge Donald H. Patterson

The Lauderdale County Bar Association has bestowed on me the distinct honor of writing a tribute and drafting a resolution honoring my former law partner and our late Circuit Court Judge Donald H. Patterson. This task is personally daunting, for my initial reaction is unworthiness to undertake such a responsibility. I find it very difficult to write objectively about a person for whom my respect has no limit; it is even harder to write about a person I loved. There is just so much about

counsel, uncanny common sense, formidable intelligence and unshakeable faith provided me and many others with a compass for living. It is these thoughts I wish to share with fellow members of our bar.

With Judge Donald H. Patterson's untimely death on May 28, 1997, the Lauderdale County Bar lost a judge of the highest rank. He was simply the embodiment of a circuit court judge. The daily discharge of his judicial responsibilities evidenced an insight and understanding of his role that should be an example to his peers and all who are entrusted to follow in his footsteps.

Judge Patterson relished his role, not because of the position, but because of the opportunity he had to constructively affect the lives of so many people. As much as his loss will be felt by his fellow judges and the lawyers who appeared before him, it is the people of Lauderdale County, those whom he directly served, who will be most affected. From the personal interest he showed in criminal defendants through his stern yet wise admonitions, to the attempts to craft the most equitable of divorce settlements, to his concise yet infallible application of the law to facts in complex litigation, Judge Patterson adeptly administered the responsibilities of his office. He possessed the rare gift of drawing on a limitless reservoir of everyday examples to illustrate legal points. In analyzing a difficult case, he could apply his unique style of wit and wisdom and make a young lawyer (and older ones too) better appreciate the true issues in their cases and the potential weakness and deficiency of their arguments. There has seldom been a judge or lawyer who could more quickly grasp the gist of a case.

But it was more than the easy competence of a person born to his role as a judge which distinguished Judge Patterson. It was his keen understand-

ing of people, of human nature, of the human condition that set him apart from the rest of us. He was simultaneously a philosopher and theologian, a humorist and an academician. Judge Patterson was simply an uncommon man among us commoners, not because of birth or position, but simply because of the wealth of respect he earned. He was comfortable in any company and made everyone comfortable around him, from his fishing buddies, to the members of the Sunday school class he taught at Florence First Methodist, to his lifelong friends. He was completely unaffected and unpretentious; he was the real article—a genuine individual. The words of Antony to Crassus describing Brutus apply to Judge Patterson,

"His life was gentle and the elements so mixed in him that nature might stand up and say to all the world, 'This was a man.'"

And so he was, totally dedicated to his wife, Dee, and to his three children, Ben, Donald and Elizabeth. He constantly provided us all with daily examples of personal service and propriety.

However, as admirable as were all of the foregoing characteristics, there was one aspect of Judge Patterson's life that undergirded and permeated all others, and that was simply his faith in and relationship to God. Don Patterson did not simply practice Christianity, he lived it. He understood that he was a mere trustee of the gifts God had given to him and that his greatest service was being able to share them with others in the context of his profession and calling, not necessarily by public witness or verbal profession, but simply through his lifestyle and the thoughtful approach to the matters he was asked to resolve. Judge Patterson's life was a living witness to the beliefs he held so dear.

This fact could not be better epitomized than the manner in which he faced his final challenge. Realizing that



Judge Donald H. Patterson

Judge Patterson that I would want to include in a memorial, so many personal anecdotes that describe his unique personality and paint his portrait more clearly than mere recitals of his considerable accomplishments. The limits of time and space preclude this and I am left, for the most part, with my personal recollections of a true friend and mentor who, by his wise

his illness was fatal, he did not give in to normal human reactions of regret and self-pity. Rather, he continued to see as many of his friends as possible, many more than his doctors would allow, constantly talking and joking with all of them as if nothing were wrong, as if he would be back on the bench next week, putting everyone at ease although knowing that his end was near. I personally have never seen anyone face death with more dignity and resoluteness than Judge Donald H. Patterson.

Upon being asked by one of his associates how he maintained such optimism given his circumstances, he predictably had the answer. "I remember reading," Judge Patterson said, "That the noted newspaper man and atheist, H.L. Mencken, once observed that if Christianity is all that it's cracked up to be, why does every Christian go kicking and screaming to his death? I resolved then and there that if ever I got the opportunity, I was going to prove Mr. Mencken wrong." Judge Patterson did just that. By his death, the State of Alabama lost more than its finest circuit court judge, it lost a unique individual whose life and service was truly the epitome of his profession.

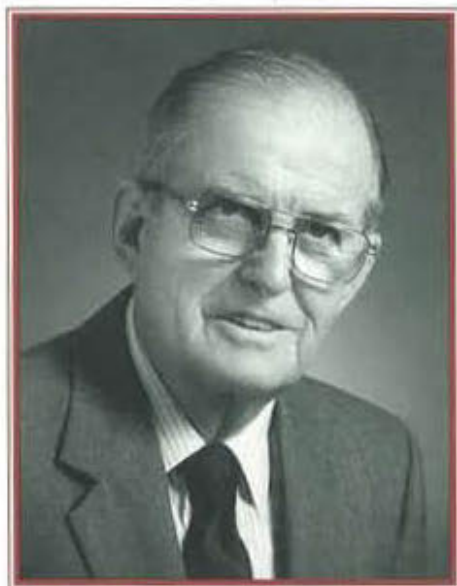
He is greatly missed.

— Gary L. Jester
Lauderdale County Bar Association

James E. Moore

Whereas, the Mobile Bar Association wishes to honor the memory of James E. Moore, a distinguished member of this Association, who died on Friday, April 25, 1997 and the Association, desiring to remember his name and recognize his contributions to our profession and to this community; now, therefore, be it remembered.

James E. Moore, known to all as "Jimmy," was a native of Cleveland,



James E. Moore

Ohio and a lifelong resident of Mobile, Alabama. He graduated from McGill Institute, Springhill College and the University of Alabama School of Law.

Jimmy had been in the practice of law in Mobile County for over 50 years and was Mobile County Attorney for 16 of those years while still maintaining his private practice.

At the time of his death he was a member of Christ the King Catholic Church, a member of the Knights of Columbus Council #666, a Charter Member of the Friendly Sons of St. Patrick and a former board member of the Providence Hospital.

Jimmy practiced general law during his lifetime. He focused on administrative and municipal law along with a practice in the field of real property. He represented his clients in an exemplary manner and treated his clients and fellow practitioners with dignity and courtesy.

He was never too busy to take time to offer assistance to those who were in need, whether clients or acquaintances. It was evident in each day of his life that courtesy and consideration were his outstanding traits and for which he will be missed the most by those with whom he associated.

Jimmy was a devoted father and family man, leaving surviving him his wife, Margaret Levet Moore, two daughters,

Otis R. Burton

Talladega

Admitted: 1957

Died: July 23, 1997

James Howard Caldwell

Lanett

Admitted: 1948

Died: May 4, 1997

Houston Thomas Eddens

Birmingham

Admitted: 1947

Died: July 2, 1997

Michael Carlisle Farrow

Houston, Texas

Admitted: 1972

Died: August 22, 1997

John Lawrence Godbold

Camden

Admitted: 1938

Died: July 5, 1997

James E. Moore

Mobile

Admitted: 1948

Died: April 25, 1997

William Alfred Stevenson

Birmingham

Admitted: 1950

Died: April 8, 1997

Billie Anne Tucker

Lafayette

Admitted: 1959

Died: July 13, 1997

Barry Reed Tuggle

Birmingham

Admitted: 1995

Died: June 30, 1997

Albert J. Tully

Mobile

Admitted: 1935

Died: May 22, 1997

Robert T. Wilson

Jasper

Admitted: 1950

Died: July 36, 1997

George W. Witcher, Sr.

Gardendale

Admitted: 1947

Died: August 10, 1997

Mrs. Terry (Peggy) Taunton and Mrs. Gregory (Mary) Funk, and one son, Mr. Jimmie M. Moore.

He is survived by his brothers, George J. Moore, a local attorney, and Brother Michael Moore, S.J., and Brother John Moore, S.C., two religious brothers.

Jimmy served in the European Theater in World War II. He fought in and survived the Battle of the Bulge.

He was a tenacious advocate who was firm and efficient in his representation of clients but, as with all great men, he was constantly aware of the importance of courtesy.

Now, therefore, be it resolved, by the Mobile Bar Association on this 20th day of June 1997, that the Association mourns the passing of James E. Moore and acknowledges his long and honorable service to the Association, his profession and the community and that this resolution be offered as a memorial to his family.

— **Cooper C. Thurber**
President, Mobile Bar Association

Ralph Gans Holberg, Jr.

Whereas, Ralph Gans Holberg died on April 7, 1997, closing a remarkable career of service spanning 88 years of life, 64 years as a lawyer following graduation from the University of Alabama School of Law, active duty as a Lieutenant in the United States Navy during World War II, all the years of his

adult life as a volunteer civic leader in his community and country, and 59 years as a devoted husband and father, and, more recently, as an equally devoted grandfather. Those who practiced law with him as partners or associates loved, respected and learned from him how to be better lawyers and better people. His clients and his contemporaries at the bar savored firsthand his intellect, wisdom, integrity and his mastery of each legal matter undertaken—so thoroughly and thoughtfully prepared, so candidly and persuasively presented.

Only his wife, Mimi, and those persons closest to him can know the personal sacrifices he and they shared together in terms of the time and material goods which he gladly bore in serving his fellow man as a private citizen. The list is so extraordinary that only a portion will be here recorded.

As a member of the Junior Chamber of Commerce he was instrumental in forcing the installation and use of voting machines in Mobile County, and was among the founders of the Mobile Azalea Trail. A former president of the Mobile and Alabama Jaycees he received the J.N. Carmichael Memorial Award in 1984. At various times he served as chairman or president of the Mobile County Board of Pensions and Security, the Mobile Exchange Club, of which he was a charter member, and the Mobile Public Library Board. He also served as an active member of the boards of the Mobile YWCA, the Mobile Community Chest and Council, the Gordon Smith Center, the Council of the National Multiple Sclerosis Society, and the Mobile Historical Development Commission. For all of this and much more than can be recorded his fellow citizens recognized him as Mobilian of the Year in 1963.

One charitable organization particularly absorbed his multiple talents for over 60 years—The American Red Cross. After serving in every leadership capacity in the local chapter he became and remained until his death an active emeritus director, regularly attending meetings where his sage advice was constantly sought and his delightful wit was always enjoyed. Beyond the chapter he was a chairman of the Southeastern Area Advisory Council, and later served two terms as one of the 30 elected members of the board of governors of the

American Red Cross, a singular honor and a position of great responsibility.

His faith combined with his other qualities drew him into the affairs of the Spring Hill Avenue Temple, which he served for a time as its president, and also to service on the American Council for Judaism.

A leader in his chosen profession, he was a past president of the Mobile Bar Association, a past president of the Mobile Estate Planning Council, and a Fellow, American College of Trust and Estate Counsel.

Now, therefore, be it resolved, by the Mobile Bar Association, in meeting assembled this 20th day of June 1997, that the Association commemorates the life of Ralph Gans Holberg, Jr., and with it, the peerless example he has set as a lawyer, citizen, patriot, spouse, and parent, the hallmark of his life having been unselfish service to others, tendered with faith, wisdom, integrity, wit, and kindness, enriching the lives of all who have known him;

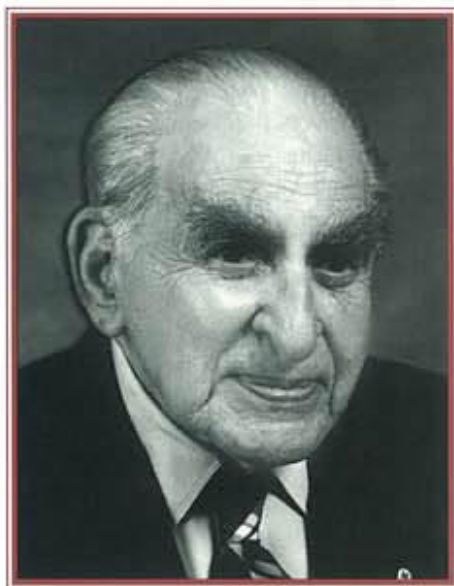
Resolved further, that this resolution be spread upon the minutes of his meeting; and copies hereof, suitably inscribed, be presented to Mimi Holberg, to the members of his family, to his secretary of 57 years, Gertrude "Miss Mac" McCorquodale, and the Alabama State Bar.

— **Cooper C. Thurber**
President, Mobile Bar Association

Forrest Lamar Adams

Whereas, Forrest Lamar Adams was born and reared in Texasville, the son of the late Samuel Kinsey Adams and Pearl Butts Adams. He attended school in Texasville but later transferred to Dothan where he graduated from Dothan High School in 1939. In the fall of 1939, he entered the University of Alabama, enrolling in the school of commerce and business administration.

While at the University, he was inducted into Alpha Kappa Psi, later becoming president of the National Honorary Commerce Fraternity. He received a bachelor's degree from the University of Alabama in March 1943 and a commission as a second lieutenant in the Coast Artillery Corps in July 1943. He served in the Army from 1943 until 1946, serving three years in the Pacific Theater. He was



Ralph Gans Holberg, Jr.



Forrest Lamar Adams

discharged from the service in 1946 as a captain in the U.S. Army Reserve, later retiring as a major. Upon being discharged from the military he enrolled in the University of Alabama School of Law and received his LLB degree in 1948.

In 1949, Forrest Lamar Adams was admitted to the practice of law in Abbeville. He later was associated with L.H. Adams, Jr. in the law firm of Adams & Adams.

In 1952, he was appointed county solicitor (district attorney) for Henry County, and held that position until 1957 when he was appointed circuit solicitor of the 20th Judicial Circuit of Alabama, composed of Henry and Houston counties. He was later elected president of the Alabama Circuit Solicitors Association. During the time he practiced law in Abbeville, he was very active in civic and church affairs, having been elected president of Abbeville Lions Club and serving as a steward on the official board of the Abbeville United Methodist Church, superintendent of Sunday School, Master of the Henry Masonic Lodge No. 91 for two terms, member of the Eastern Star, a Shriner and a 32nd degree Mason, and lay speaker for the Methodist Church.

In 1966, Adams was appointed a circuit judge in the 20th Judicial Circuit of Alabama. In 1977, he was elected president of the Alabama Circuit Judges Association. He became the presiding judge of the 20th Judicial Circuit of

Alabama upon the death of Judge Keener Baxley, a position he retained until 1979, at which time he retired.

Surviving are his wife, Ann Koeppl Adams; two daughters and sons-in-law, Julia and Randy Roark and Margaret and Wayne Thornton; a son and daughter-in-law, Samuel L. Adams and Mary Earle Adams; seven grandchildren; and other close relatives.

— **John Emory Waddell**
Dothan

John Lawrence Godbold

Whereas the Honorable John Lawrence Godbold departed this life on Saturday, July 5, 1997 at the age of 84 years.

John L. Godbold was born December 4, 1912 in Wilcox County, Alabama to Stanley Clifford Godbold and Mildred McCaskey Godbold; and

John L. Godbold was a descendant of prominent families in the Alabama Black Belt; and attended public schools



John Lawrence Godbold

in Wilcox County, Alabama, attended Marion Military Institute, and graduated from Erskine College in 1934 and received his Bachelor of Law degree from the University of Alabama on May 23, 1938; and,

Whereas John L. Godbold served his country in World War II in the Pacific Theater in the United State Air Force from 1943 to 1946; and practiced law in Camden, Alabama, excepting his mili-

tary service, from June 13, 1938 until his retirement in 1995; and,

Whereas John L. Godbold, who as a lawyer in an age of specialists, was an accomplished generalist, being highly admired and respected among the bench and bar and in his community; and was a highly qualified attorney, representing an extensive clientele including individuals, the Bank of Camden, the Bank of Pine Hill, the Town of Camden, businesses, corporations, and timber companies; and,

Whereas John L. Godbold possessed the high ethical standards and polished manners of a southern gentleman and through his life and work set an example of which the bench and bar takes great pride and holds great respect; and was a man of great integrity and personal character; and was active in serving his community in many ways, including membership in the Camden Exchange Club and the American Legion and being instrumental in the formation of Wilcox Academy and in serving on its first board of directors; and,

Whereas John L. Godbold was a life-long active member of the Camden United Methodist Church, where he served as trustee and steward; and married the former Mary Scott Leckie. Left surviving him are his wife; his son, John Lawrence Godbold, Jr.; and his grandchildren, Frances Ann Godbold and John Lawrence Godbold, III; and,

Whereas John L. Godbold was always loyal to his faith, his family, his ideals and high character, and to his clientele; and the passing from this mortal life of John L. Godbold represents a great loss to the bench and bar and to the community; and the friendship, wise counsel and good humor of our departed brother will be greatly missed.

— **Donald M. McLeod**
Wilcox County Bar Association



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Sister Lynn Marie McKenzie outside the Cullman County Courthouse

Back in 1994, Sister Lynn Marie McKenzie got a phone call from an attorney, asking the nun and fellow attorney for her help. A young illegal Mexican woman named Maria, who spoke no English and had no money, had allowed a Blount County couple to care for her baby boy for a time, and now they were trying to adopt him. Maria needed an advocate.

Sister McKenzie, a partner with Knight & Griffith in Cullman and a Benedictine



Susan Cullen Anderson

Susan Cullen Anderson is a graduate of the University of Alabama and the University's School of Law. She practiced law for three years and is currently an editor with

Coastal Living Magazine in Birmingham, a Time Warner Publication.

The Faces of Pro Bono

By Susan Cullen Anderson

Sister with Sacred Heart Monastery, took the pro bono case without hesitation. The Blount County couple, unable to have children of their own, had gone baby shopping in Texas, where Maria lived. "I don't know that she knew they were baby shopping," Sister McKenzie says. The couple offered Maria a job in Alabama with their business, and also offered to take the baby since she would have her hands full with other children on the long trip. Maria wasn't able to follow immediately, and the couple began the process to obtain custody of the boy.

Sister McKenzie filed a petition in Blount County to return the child to his mother, and the couple told Maria they would turn her in to the Immigration and Naturalization Service if she pursued it, which "I'm sure they did," Sister McKenzie says. Despite the dangers, Maria was determined to get her son back, and Sister McKenzie spent a good bit of time working with the Mexican consulate's office getting permission for Maria to travel from Texas for the trial.

Her friend who had referred the case to her acted as Maria's interpreter at the day-long trial. In the end, the judge returned Maria's son to her, Sister McKenzie says. Afterward, the Sister bought Maria a car seat for the return trip to Texas, knowing that the couple would be looking for reasons to have custody removed from Maria and returned to them.

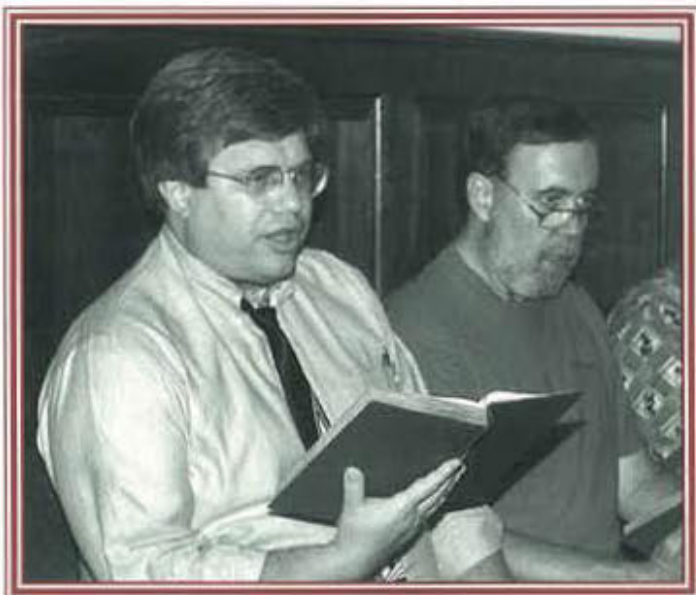
Maria's is one of many pro bono cases Sister McKenzie has handled. She feels strongly that lawyers have an obligation to do pro bono work, and not for the thanks they might receive, which sometimes isn't forthcoming. "You don't do

this work because you're going to be patted on the back and thanked by a grateful client," Sister McKenzie says. "You do it because it's the right thing to do."

Maria surely would have lost her baby boy without Sister McKenzie's free help. A penniless illegal alien who speaks no English would have no options if not for pro bono representation. With private practitioners charging \$100 per hour or more, many families wonder if the legal system offers them any relief.

With the assistance of the private bar, however, some poor Alabamians are getting the legal help they need. Through the Volunteer Lawyers Program (VLP), members of the Alabama State Bar volunteer their time to aid poor Alabamians with their legal problems, which can range from consumer matters to probate difficulties. Attorneys in every county in the state have joined the VLP to offer assistance to residents, says Kim Oliver, head of the program for the Alabama State Bar. Three areas—Mobile, Birmingham and Huntsville—operate their own pro bono programs which work closely with the VLP, she says.

Created in 1991 by the Alabama State Bar Board of Bar Commissioners, the VLP asks every member of the bar to accept two pro bono cases per year. To make sure that recipients of these services are truly in need, Legal Services and the VLP have adopted 125 percent of the poverty level established annually by the federal Department of Health and Human Services as the maximum income level. This means a single person can make no more than \$9,864 per year, and a four-person household can have an income of no more than \$23,064 to be eligible for free legal assistance through the program.



Luke Coley (left) practicing with the choir for Sunday church service

Until not long ago, all cases referred to the Volunteer Lawyers Program had been processed through a Legal Services office. Now, the program receives referrals from social service agencies, churches and attorneys as well, says Ms. Oliver. Most cases still originate from Legal Services, though. "I probably talk to 15 people a day I can't help," says Rebecca Brooks, managing attorney for the Tuscaloosa

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The 1998

Bench-Bar Meeting



Thursday, January 22, 1998 • Embassy Suites Hotel • Montgomery, Alabama

This year's program, "The Judge's Role as Gatekeeper: Responsibilities and Powers," features nationally known Harvard law professor Arthur R. Miller, among others. Professor Miller will serve as moderator to 12 Alabama judges and attorneys examining the relationship of judge to witness and jury. Included in the discussion will be the exploration of the judge's responsibility for overseeing the quality and sufficiency of circumstantial and scientific evidence, as well as the use of court-appointed experts.

The registration fee of \$50 will include lunch and several afternoon discussions. A reception will be held that night at the Embassy Suites at 6 p.m.

For more information, call Callie Dietz, administrator, Alabama Judicial College, at (334) 242-0300.



Rebecca Brooks engaging in one of her favorite pastimes, working in her garden at home

regional office of Legal Services Corporation of Alabama. "We can't handle all of the demand," she says, adding that her office refers out cases which don't take a significant amount of time and "aren't too messy."

The Volunteer Lawyers Program is especially successful in Mobile, says Luke Coley, a Mobile solo practitioner who is the immediate past chairman of the state bar's Committee on Access to Legal Services. The Mobile pro bono program, with more than 350 of its 800 eligible lawyers participating, is "a gigantic success—by far the best in the state," he says. Nationally, about 17 percent of attorneys do pro bono work, says Ms. Oliver. In Alabama, 20 percent of licensed attorneys are members of the VLP, she says, and many lawyers do pro bono work outside the VLP.

Coley's participation in the VLP can be attributed to "a combination of religious, professional and philosophical reasons," he says. "I think we are better off as a country when more people feel like the legal system is open to them," Coley says. He repeated a story about Andrew Jackson as military governor of Florida, who intervened when a land speculator tried to take advantage of two orphaned girls. In response to the situation, Jackson said, "In general, the great and the rich can protect themselves, but the poor and the humble require the arm and shield of the law." Jackson's comment sums up Coley's philosophy on pro bono work, Coley says.

The ultimate goal is for each local bar association to have its own mechanism for referring out pro bono cases, Coley says. While Mobile is a success story, Coley says with some diplomacy that other areas have work to do.



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In rural areas, many attorneys do pro bono work outside of an organized program, says Ms. Oliver, so it is hard to measure the real level of success. "I think we have pretty committed people and a pretty good interest," Ms. Oliver says. "The program is growing and the number of attorneys is increasing."

A good relationship between the private bar and Legal Services helps a local program to succeed, since the "vast majority" of the cases come from Legal Services, Coley says. Ideally, cases are assigned based on expertise and experience, he says.

Volunteer attorneys designate the areas of law in which they are willing to accept referred cases, but even where the assigned attorney is unfamiliar with the relevant area of the law, she has plenty of help. The VLP and the Access to Legal Services Committee sponsored the creation of a manual on nine "bread and butter" areas of law, including divorce, collections and mortgage foreclosures, which guide the volunteer attorney through unfamiliar territory. More seasoned lawyers can act as mentors or co-counsel to less experienced attorneys, as well.

In the long term, the plan is to build a separate pro bono program in each area of the state, Coley says. Even though some areas have proven to be more of a challenge than others, there are lawyers willing to serve and needs that need to be met all over Alabama, he says.

Ms. Brooks, who works full-time for Legal Services, says the rewards are plenty. "There have been as many gratifying situations as have been sad ones," she says. One of her most satisfying results came with a client named Glenda Hall. In 1995, destitute from her son's lost battle with leukemia and unable to work because of a disability, Ms. Hall, of Tuscaloosa,

was overwhelmed by her son's unpaid medical bills.

She had tried over the previous 20 years to collect the long-overdue child support owed by her ex-husband for their two sons, but "he never paid a dime, never," Ms. Hall says. "He wouldn't even help me bury my son." In 1984, after their son, John Hall, Jr., died, she hired a lawyer, without results.

Because John's treatment was experimental and he lived with leukemia for three years, his medical bills were monumental, and she had barely made a dent by 1995. It was then that her niece told her about Rebecca Brooks. Ms. Brooks went to court for Ms. Hall to collect her child support.

"She really fought for me," Ms. Hall says. "I don't know what I would have done if she had not come along." Ms. Brooks collected \$33,000 from Ms. Hall's ex-husband, which while only a portion of what he owed, was a godsend for Ms. Hall.

For people like Maria and Ms. Hall, pro bono assistance and Legal Services have opened the door to the legal system, a door which otherwise would have been locked tight. If Alabama attorneys continue to answer the call of the VLP, more Marias will have their day in court. ■

If you have comments or would like to join the VLP, please contact the 1997 Committee on Access to Legal Services chairman, Professor Pamela H. Bucy, University of Alabama School of Law, or Kim Oliver, director of the VLP, at the Alabama State Bar. Visit our website at www.alabar.org or e-mail us at vlp@alabar.org.

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Why Was Your Petition for a Writ of Certiorari Denied?



The Importance of Procedural Compliance With Rule 39, ALA.R.APP.P.

By Michael Skotnicki¹

"RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

"(a) Method.

"In all other cases, decisions of the courts of appeal may be reviewed by the Supreme Court upon petition for writ of certiorari only after a court of appeals has overruled an application for rehearing directed to the point, issue, or decision complained of.

"....

"(c) Grounds. The petition [to the Alabama Supreme Court] for writ of certiorari ... in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on appeal of the case, and will be granted as a matter of right. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

"(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

"(2) From decisions that affect a class of constitutional, state or county officers;

"(3) From decisions where a material question requiring decision is one of first impression in Alabama;

"(4) From decisions in conflict with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or the Alabama courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and the part of the prior decision with which the conflict is alleged; or it shall state with specificity and particularity wherein such decision is in conflict; and,

"(5) Where petitioner seeks to have controlling Supreme Court cases overruled which were followed in the decision of the court of appeals.

"....

"(k) Scope of Review. The review shall be that employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If a court of appeals issues an opinion containing a statement of facts and if a party applying for rehearing is not satisfied with that statement of facts, the party applying for rehearing in that court may present to the court of appeals a proposed additional or corrected statement of facts or the applicant's own statement of facts, and move that court to supplement or correct its statement of facts or to adopt the applicant's proposed statement; or if a court of appeals issues a 'no opinion' decision pursuant to Rule 53 or 54 or issues an opinion not containing a statement of facts, the applicant may move the court to adopt the applicant's statement of facts. If the court does not grant the motion, the petitioner may copy the statement in the petition to the Supreme Court, with references therein to the pertinent portions of the clerk's record and the reporter's transcript, and, if found to be correct, it will be considered along with any statement of facts in the opinion of the court of appeals."

Michael Skotnicki

Michael Skotnicki received his undergraduate and graduate degrees from Auburn University and his Juris Doctor, *magna cum laude*, from the Cumberland School of Law. He served as a judicial law clerk for Chief Justice Sonny Hornsby and as a staff attorney for Justice Henry Steagall of the Alabama Supreme Court. He is now a staff attorney for Justice Terry L. Butts.

Introduction

Compliance with the procedural requirements of Rule 39, Ala.R.App.P., is of critical importance to the success of a petition for a writ of certiorari. *Such petitions can be denied by the Supreme Court of Alabama without review on the merits, because of a failure to comply with Rule 39.* The appellate lawyer must understand that certiorari review is not granted by the supreme court as a matter of right in any civil case and it is only granted as a matter of right in criminal cases only if the defendant has been sentenced to death.

The fact that many lawyers have had difficulty complying with the appellate rule governing certiorari review has been well-noted by the supreme court and by legal commentators. See *Ex parte Winchester*, 544 So.2d 967 (Ala. 1989); *Ex parte Save Our Streams*, 541 So.2d 549 (Ala. 1989); *Ex parte Moore*, 493 So.2d 988 (Ala. 1986); *Ex parte Grear*, 484 So.2d 382 (Ala. 1986); H.A. Henzel, *Complying with Rule 39(k), A.R.A.P. (How to Succeed on "Cert")*, 45 Ala. Law. 270 (Sept. 1984); B. McKee, *Alabama Supreme Court Practice — Avoidable Errors and Oversights*, 44 Ala. Law. 320 (Nov. 1983). Because the jurisdiction of the court of civil appeals has been quite limited until recent years, most civil cases were directly appealable to the supreme court and many lawyers practicing only civil law have been unfamiliar with the procedural requirements for seeking a writ of certiorari.

Ignorance, however, is no longer bliss. The Alabama Legislature increased the court of civil appeals' jurisdiction by amending Ala. Code 1975, § 12-3-10,² to raise that court's jurisdictional limit from cases involving claims for \$10,000 to those involving claims of up to \$50,000. Even more important is the fact that Ala. Code 1975, § 12-2-7(6), now allows the supreme court to transfer—"deflect"—almost any civil appeal over which it has appellate jurisdiction to the court of civil appeals for an initial decision by that court.³ Because of the amendment to § 12-3-10 and the enactment of § 12-2-7(6), the supreme court now receives fewer direct appeals from the circuit courts, but its caseload has shown a corresponding increase in the number of certiorari petitions seeking review of rulings by the court of civil appeals.

As noted previously, many certiorari petitions do not comply with the procedural requirements of Rule 39 and are denied on that basis, without a review on the merits. The purpose of this article is to assist lawyers in meeting the most critical requirements of Rule 39.

Procedural Stumbling Blocks

So what are Rule 39's procedural stumbling blocks to obtaining certiorari review? The first is the requirement that the petition establish a proper ground for review under Rule 39(c). Rule 39(c) lists five possible grounds on which a petitioner may seek certiorari review. Probably the most commonly asserted grounds for a writ of certiorari are those provided by Rule 39(c)(4), conflict with a prior decision of the United States Supreme Court, the Alabama Supreme Court or an Alabama court of appeals, and that provided by Rule 39(c)(3), a material question of first impression.

The second stumbling block for is the requirement that one comply with Rule 39(k). As noted in *Ex parte Save Our Streams*, supra, noncompliance with this rule can mean that the supreme court has properly before it few facts or no facts from which it

can determine whether the petition for the writ of certiorari may be meritorious. The appellate lawyer must remember that the supreme court does not have the trial court record before it when it considers a petition for the writ of certiorari. The only facts properly before the court when it is determining whether to grant a certiorari petition are those facts stated within the opinion of the court of appeals and those stated in the Rule 39(k) statement of additional facts that was submitted to the court of appeals on application for rehearing — if such a statement was presented. Thus, if the court of appeals affirmed the trial court's judgment by an unpublished memorandum setting out no facts and the certiorari petition does not comply with the requirements of Rule 39(k), the petition will be denied because the supreme court will have no facts properly before it to review. The exception to the necessity of compliance with Rule 39(k) is when the memorandum or opinion issued by the court of appeals itself sets out sufficient facts for the supreme court to make a judgment whether the petition has sufficient merit to be granted.

A. The First Step: Grounds for Certiorari Review under Rule 39(c)

1. Conflict with Prior Caselaw — Rule 39(c)(4)

Many petitioners have difficulty establishing a ground for certiorari review under Rule 39(c)(4), try as they might. The difficulty lies in a failure to heed the rather unambiguous language of the rule. The petition must demonstrate that the court of appeals ruling conflicts with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or one of the Alabama courts of appeal. It is not enough for the petitioner to simply allege that the court of appeals erred in ruling against the petitioner, or that published opinions exist that conflict with the court of appeals' ruling. For example, the following statements excerpted from certiorari petitions do not comply with the Rule 39(c)(4) requirement of alleging a conflict with prior caselaw:

Example 1

"The basis for this petition for a writ of certiorari is that the opinion of the court below was wrongly decided."

Example 2

"The petitioner requests that the controlling Supreme Court cases be reviewed under the facts of this case and either be distinguished by exception or overruled as to the facts presented herein."

Example 3

"The basis of this petition for the Writ is that the decision of the Alabama Court of Civil Appeals is in conflict with prior decisions of the Supreme Court of Alabama on the same point of law."

Example 4

"Petitioner alleges as grounds for the issuance of the writ the following: The holding in the instant case and the holding in *Ex parte Thomas*, 625 So.2d 1156 (Ala. 1993), are in conflict and the issue here is which holding should be followed on this principle of law."

Example 5

"The Petitioner seeks to have this Honorable Court review the instant case, as the decision below is in conflict with the following decisions of the Alabama Court of Criminal Appeals: *Vo v. State*, 612 So.2d 1323 (Ala.Cr.App. 1992),

Cowan v. State, 540 So.2d 99 (Ala.Cr.App. 1988), and *Davis v. State*, 467 So.2d 265 (Ala.Cr.App. 1985)."

All these above examples are insufficient because Rule 39(c)(4) requires either that the conflict be shown by quoting "that part of the opinion of the appropriate court of appeals, and the part of the prior decision with which the conflict is alleged," or that the petition "state *specifically* and with *particularity* wherein such decision is in conflict." (Emphasis added.) Thus, if the petitioner does not show conflict by using direct quotes (such as when there is no court of appeals opinion to quote from, (i.e., when the court of appeals has affirmed without opinion"), the petition must allege conflict through a detailed discussion of the opinions which the petitioner alleges are in conflict with the holding of the court of appeals, and it must describe how the holding of that court conflicts with the earlier opinions. In other words, the petition itself, and not its supporting brief, must clearly demonstrate that a conflict exists, and it must describe the nature of that conflict. The purpose of the supporting brief is to fully establish the petitioner's legal arguments for a reversal, once the petitioner has demonstrated that the petition has some merit.

The following statements excerpted from certiorari petitions adequately allege conflict as a ground for certiorari review under Rule 39(c)(4):

Example 1

"The Court of Criminal Appeals has here ruled that when the accused admits to drinking two beers and there is even testimony from a witness at the scene of the homicide that she fears for the safety of others because the defendant had been drinking, as a matter of law the evidence is insufficient to raise a reasonable doubt as to the Petitioner's intent at the time of the homicide. The ruling of the Court of Criminal Appeals in this case is in conflict with the opinion of that court in *Fletcher v. State*, 621 So.2d 1010, 1011 (Ala.Crim.App. 1993), in which that court stated that where there is evidence of intoxication, the extent to which the accused is intoxicated is a jury question. The *Fletcher* court went on to hold that the trial court invades the province of the jury when it determines the accused's degree of intoxication. Here, the Court of Criminal Appeals has invaded the province of the jury [and the province of] the trial court.

"Petitioner's requested charge 29 asked the trial court to instruct the jury that it could consider the fact that the defendant may have been under the influence of alcohol in determining the defendant's intentions at the time of the homicide. The trial court denied this charge, from which a timely exception was made, and the Court of Criminal Appeals affirmed that decision. The affirmance of the denial of that instruction is in conflict with the Court of Criminal Appeals' opinion in *Owen v. State*, 611 So.2d 1126, 1128 (Ala.Crim.App. 1992), wherein the court said that when there is evidence of intoxication and the crime requires a specific intent, an instruction on the effects of intoxication and how it relates to any lesser included offense should be given. Even where the evidence of intoxication is weak, the Court of Criminal Appeals has held that an instruction on intoxication should be given. *Silvey v. State*, 485 So.2d 790 (Ala.Crim.App. 1986)."

Example 2

"In its opinion, the appellate court held that evidence relating to specific acts of incompetency of an employee were not admissible to prove that the employer was on notice of the employee's incompetence in making subsequent collection calls, notwithstanding the Petitioner's presentation of substantial evidence of tortious acts of the employee involving collection calls on the Petitioner's account. The Petitioner offered evidence of [the defendant bank's] internal memorandum which indicated that [the defendant bank] was on notice of the employee's incompetence in handling the Petitioner's account. The Petitioner also offered testimony of the Petitioner's mother who was subjected to the employee's lack of training and incompetence in collecting accounts.

"In *Big B, Inc. v. Cottingham*, 634 So.2d 999 (Ala. 1993), the Supreme Court held that an employer may be held responsible for its employee's incompetence when that employer has notice or knowledge, whether presumed or actual, of such incompetence. Evidence of specific acts of alleged incompetency is not admissible to prove that the employee was negligent in doing the act complained of, but is admissible to prove that the employer had notice of the employee's incompetency.

"These statements of the law and the substance of the appellate court opinion are in conflict, and the appellate court erred in failing to follow the decision of the Supreme Court on the same point of law.

2. Material Question of First Impression — Rule 39(c)(3)

Numerous petitions attempt to raise the grounds set out in Rule 39(c)(3) — a material question of first impression of Alabama law — as a basis for certiorari review. However, few petitions truly allege material questions of first impression. Many petitions simply allege that it is a question of first impression as to whether summary judgment entered under Rule 56, Ala.R.Civ.P., was proper under a set facts not identical to the facts of any prior case. However, that is not the type of question Rule 39(c)(3) contemplates. If a petitioner could claim a material question of first impression based on a slight variation in the facts of his or her case from those of published cases, then that ground would exist for every case because each fact situation is different in some degree from all others. Rather, Rule 39(c)(3) anticipates true material questions of first impression, issues not yet addressed by the United States Supreme Court or an Alabama appellate court. The following are examples of true material questions of first impression raised in recent certiorari petitions:

Example 1

"Whether Rule 3.8, Ala.R.Crim.P., authorizes the issuance of an 'anticipatory search warrant,' (a warrant based on a law enforcement officer's affidavit that probable cause will exist at a future time, but does not presently)?"

Example 2

"Whether the death of an alleged tortfeasor tolls the running of the statute of limitations on the tort action while the alleged tortfeasor's estate is established and a personal representative is named, so that the estate can be named as a party in interest?"

Example 3

"Whether a writing purported to be a will may be probated even though it does not fully meet the statutory requirements of Ala. Code 1975, § 43-8-131, if it substantially complies with those requirements?"

B. Rule 39(k) and the Statement of Additional Facts

As noted previously, it is critical for an appellate lawyer to understand that the *only* facts before the supreme court during its review of a petition for a writ of certiorari are: (1) those facts set out in the opinion or memorandum of the court of appeals, and (2) those facts set out in the petitioner's copy of the Rule 39(k) "motion to adopt additional facts" that was included in the application for rehearing in the court of appeals, and then subsequently attached to the certiorari petition as an exhibit. One must remember two important points. First, the record on appeal is not forwarded to the supreme court from the court of appeals until a writ of certiorari is issued. Thus, the appellate record is not before the supreme court for review when that court is deciding whether to grant the petition. Second, although a petitioner may bind together his petition and its supporting brief when they are filed with the supreme court, unless the petition is found to be in procedural compliance with Rule 39 the supreme court will not review any discussion of facts or legal argument presented in the brief.

Thus, to comply with the procedures of Rule 39(k), the petitioner must: (1) upon receiving an adverse judgment in the court of appeals, file with that court an application for rehearing and attach to the application a Rule 39(k) motion asking that court to adopt a statement of additional facts not already set out in the court's opinion or memorandum; and (2) if the application for rehearing in the lower appellate court is denied, the petitioner must include with his certiorari petition a copy of the Rule 39(k) motion for adoption of additional facts that was filed in the court of appeals on application for rehearing and must request the supreme court to consider those additional facts when determining whether to grant the petition for certiorari review.

The Rule 39(k) motion and statement of additional facts to be filed with the application for rehearing in the court of appeals may be combined in one document, or the statement of additional facts may be an exhibit attached to the motion to adopt those facts. Thereafter, if the application for rehearing is overruled by the court of appeals and a petition for a writ of certiorari is filed with the supreme court, the petitioner should photocopy the Rule 39(k) motion and statement of additional facts and attach the copies to the certiorari petition. Remember, it is the petition that must aver that there was compliance with Rule 39(k) in the court of appeals and it is in the petition, and not the supporting brief, that the statement of additional facts must be set out. Further, by attaching to the petition photocopies of the original Rule 39(k) motion and statement of additional facts, the petitioner demonstrates to the supreme court that he or she is seeking review of the court of appeals ruling based on the same facts that were before the court of appeals on application for rehearing; the supreme court will not put a court of appeals in error based on facts that were not presented to that court.

One's understanding of this process may be assisted by the following example of a petition for writ of certiorari and an attached Rule 39(k) motion:

Example

"To the Honorable Justices of the Supreme Court of Alabama: Petition for a Writ of Certiorari to the Court of Criminal Appeals"

"Comes now your Petitioner, [John Doe], and petitions this Honorable Court for a writ of certiorari to issue to the Court of Criminal Appeals of Alabama in this cause pursuant to Rule 39, Ala.R.App.P. As grounds for issuance of the writ of certiorari, the petitioner submits the following:

"....

"6. The petitioner respectfully requests that this Honorable Court consider as facts in support of this petition, those facts set out in the Court of Criminal Appeals opinion and those facts set out in petitioner's Rule 39(k), Ala.R.App.P., motion filed along with the application for rehearing on September 15, 1995, a copy of that Rule 39(k) motion being attached hereto as petitioner's Exhibit No. 2.

"....

"EXHIBIT 2

"IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

"John Doe, Appellant v. Court of Criminal Appeals No. CR-95-XXX

"State of Alabama, Appellee

"Appellant's Request for Additional Statement of Facts Under Ala.R.App.P., Rule 39(k)"

"Pursuant to Ala.R.App.P., Rule 39(k), the Appellant respectfully requests that this Honorable Court add the following additional facts, and correct any facts in its opinion of September 8, 1995, which are inconsistent with these facts, to any revised opinion, as follows:

"...."

Conclusion

With the expanded jurisdiction of the court of civil appeals, the Alabama Supreme Court is reviewing many more petitions for writs of certiorari to that court, as well as petitions for writs to the court of criminal appeals. However, many petitions do not comply with the procedural requirements of Rule 39, Ala.R.App.P. and are therefore denied by the Alabama Supreme Court on procedural grounds. Thus, the ability of an appellate lawyer to comply with Rule 39 is more critical now than ever. The examples set out here indicating how to comply with rules 39(c)(3), 39(c)(4), and 39(k) should be useful to the lawyer petitioning the Alabama Supreme Court for a writ of certiorari. ■

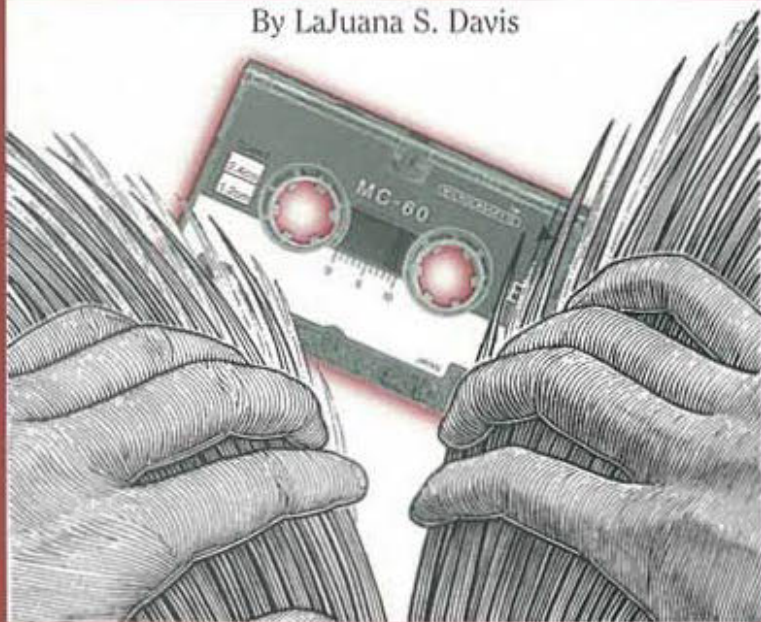
Endnotes

1. This article is based on the author's experience as a staff attorney with the Alabama Supreme Court. However, the content of this article is not necessarily endorsed by the Alabama Supreme Court, and it is not to be understood as binding on the Alabama Supreme Court.
2. Effective January 1, 1995.
3. Section XII of the Unified Judicial System docketing statement for appeal to the Supreme Court asks the appellant to list reasons why the appeal should not be deflected to the Court of Civil Appeals.

Discovery in Criminal Cases:

Obtaining Evidence and Information Necessary for An Effective Defense

By LaJuana S. Davis



The attorneys representing Walter McMillian, who had been convicted of a capital murder in Monroeville, Alabama, made a startling discovery during postconviction proceedings while listening to a tape provided through discovery requests. The cassette tape was a recorded statement of the key prosecution witness at trial. The first side of the cassette tape contained a version of the witness' statement to the police, consistent with his trial testimony, implicating Mr. McMillian in the robbery-murder of a clerk in a dry cleaning store. The first portion of the taped statement ended, and defense counsel, occupied with other work, allowed the tape to continue playing. It was then that another, previously undisclosed, interrogation of the key witness appeared on the tape. In this statement, the state's main witness complained that the police were coercing him into falsely implicating Walter McMillian. In a case of many loose ends and unresolved questions, this statement proved to be a turning point. To obtain the wrongful conviction of Mr. McMillian, local officials had to suppress several exculpatory pieces of information. The most shocking suppression was this statement, which had never been turned over to the defense at trial. Because of this and other discovery violations, the Alabama Court of Criminal Appeals reversed his conviction and death sentence, setting in motion the process that would eventually release an innocent man from Alabama's death row. See *McMillian v. State*, 616 So.2d 933 (Ala.Cr.App. 1993).

Defense counsel's task during a capital trial is to obtain the information and evidence necessary to challenge the state's evidence and to support the defense's theories. Much of this critical information is in the hands of the state. Discovery motions and requests are thus primary tools in the defense's

stockpile of resources. This article addresses the defendant's important right to discovery. In capital cases, Alabama has recognized that the state has a heightened duty to provide discoverable materials. *Ex parte Monk*, 557 So.2d 832 (Ala. 1989). This heightened duty is discussed in the second section of this article. The article also examines the state's continuing duty at trial to disclose favorable material. Included as well are special topics

that the defense may face during the discovery process: discovery about state witnesses, preservation of potentially favorable evidence, and expert witness discovery.

General Principles of Discovery

Criminal defendants are entitled to any information the state has that is exculpatory or favorable to the defense when the evidence is material to guilt or punishment. In *Brady v. Maryland*, 372 U.S. 83 (1963), the United States Supreme Court held that the prosecution is required to provide exculpatory and favorable evidence to safeguard defendants' due process rights under the Fifth Amendment and Fourteenth Amendments to the U.S. Constitution. The Supreme Court has also specifically obligated the prosecution to provide *Brady* information that is mitigating at the penalty phase of a capital trial. *Green v. Georgia*, 442 U.S. 95 (1979).

Evidence is discoverable under *Brady* when it is material. Material evidence is that evidence where there is a reasonable probability that, if it had been disclosed to the defense, the result of the proceeding would have been different. *U.S. v. Bagley*, 473 U.S. 667 (1985). This materiality test is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490, 506 (1995). This test does not require a reasonable probability of acquittal; it requires only that confidence in the outcome was undermined by the failure to disclose the evidence. *Kyles* also holds that materiality can be determined by the cumulative effect of all of the withheld evidence. Information does not have to be written to constitute *Brady* information. See *Kirby v. State*, 581 So.2d 1136 (Ala.Cr.App. 1991) (prosecutor's failure to disclose

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information obtained from victim's psychiatrist in conversation entitles defendant to a new trial).

In addition to the constitutional duties to disclose favorable evidence, Alabama law also protects defendants' discovery rights. Under Rule 16 of the Alabama Rules of Criminal Procedure, the prosecution must disclose all exculpatory information and all statements made by the defendant, codefendants or any accomplices.

The state bears the burden of producing all exculpatory or favorable evidence in its possession. "Possession" must be interpreted broadly. Often, prosecutors will argue that other county or state agencies possess the information sought by the defense. However, even where the district attorney's office does not itself physically possess *Brady* material, the state has a duty to learn of any favorable evidence known to other state actors, including law enforcement. See *Patton v. State*, 530 So.2d 886 (Ala.Cr.App. 1988) (knowledge of an exculpatory phone call to the police imputed to the state). The prosecution's "good faith" in failing to disclose this information is irrelevant to a *Brady* question. See *Kyles*, 131 L.Ed.2d at 505; *Ex parte Cammon*, 578 So.2d 1089 (Ala. 1991) (court held that good faith of the state is irrelevant when there has been a *Brady* violation); *Duncan v. State*, 575 So.2d 1198 (Ala.Cr.App. 1990) (state's belief that a legal pad on which police employees recorded callers' information did not contain exculpatory evidence was irrelevant to whether the destruction of the pad violated *Brady*).

Although the prosecution's burden to produce favorable evidence arises whether or not defendants specifically request the evidence, the state's obligation to provide discovery is heightened when the defense makes a specific demand. *U.S. v. Agurs*, 427 U.S. 97, 107 (1976); *Duncan*, 575 So.2d at 1203. Therefore, it is critical that defense attorneys file extensive and specific discovery requests in criminal cases.

Broadened Discovery in Capital Cases

In capital cases, the Alabama Supreme Court has held that expanded discovery is warranted. Following the line of "death is different" cases, in *Ex parte Monk*, *supra*, the state supreme court held that "[t]he hovering death penalty is the special cir-

cumstance justifying broader discovery in capital cases." *Monk*, 557 So.2d at 837. *Monk* emphasizes that evidence in capital cases in the possession of the state that is favorable to guilt or punishment must be produced to the defense. Because of concern that the prosecution may be unable to determine reliably whether evidence is mitigating, many circuit courts have ordered "open file discovery," where the defense is permitted to review the entire prosecution file. The *Monk* court noted that it is impossible for prosecutors to screen files for potential mitigation because "[w]hat one person may view as mitigating, another may not." *Monk*, 557 So.2d at 837 (citations omitted). The Alabama Supreme Court viewed the broad definition of favorable evidence at a capital penalty phase as justifying broad discovery. However, as noted above, defense counsel should not rely on the prosecution's assertion that its "open file" contains all exculpatory or favorable material. Motions directed to state agencies other than the district attorney's office should be made in capital cases.

The State's Continuing Duty to Disclose

Even in the most serious criminal cases, defense attorneys seeking discovery cannot assume that the prosecution's offer of "open file discovery" means that the defense is actually getting every piece of material information. Unlike an average civil case where litigants may obtain information about any relevant, non-privileged matter, when a defendant's life or liberty is at stake, the defense can expect to be initially offered only a fraction of the available information. Aggressive effort has to be made to discover material facts because criminal discovery rules allow the prosecution to decide what is relevant, material and favorable to the defense. It is equally important that these requests are filed as early in the capital trial process as possible because while the state's duty to disclose continues throughout trial, tardy disclosure of favorable evidence is not reversible error unless the defendant can show that the delay denied him or her a fair trial.

Alabama Rule of Criminal Procedure 16.3 requires the state to continue to disclose discoverable information to the defense. This continuing duty is critical because pretrial discovery motions often

are heard early in the trial process before the state has had time to uncover all of the material information. Alabama's appellate courts have repeatedly reversed convictions when the prosecution did not timely reveal discoverable information that should have been produced before trial.

In *Ex parte Brown*, 548 So.2d 993 (Ala. 1989), the Alabama Supreme Court reversed a criminal conviction when the state failed to make a timely disclosure of the defendant's clothing and a birth certificate which was introduced against him at trial. The Court noted that the defense had been granted discovery which placed a continuing burden on the prosecution to produce discoverable information. See also *Padgett v. State*, 668 So. 2d 78 (Ala.Cr.App. 1995) (court reversed the defendant's capital conviction because the state delayed four days in disclosing exculpatory blood type evidence to the defense, even though the evidence would have been critical to the cross-examination of the state's DNA witnesses); *Ex parte Watkins*, 509 So.2d 1064 (Ala. 1984) (prosecution's delay until just before trial in disclosing police report where witness had identified two other persons as having committed the robbery "substantially affected" the defendant's right to a fair trial); *Peal v. State*, 491 So.2d 991 (Ala.Cr.App. 1985) (state's failure to disclose defendant's tape-recorded confession violated the continuing duty to disclose under Rule 16.3).

Because the prosecution may obtain favorable evidence throughout the proceedings, defense attorneys must specifically demand that information be provided under a continuing obligation throughout the trial. When some discovery is received, defense counsel then must sift through the material which will invariably lead to other evidence that needs to be produced. Discovery should be viewed by defense counsel as a continuous process.

Impeachment of State Witnesses

The state must disclose information that could be used to impeach witnesses. *Giglio v. U.S.*, 405 U.S. 150, 154 (1972); *Hamilton v. State*, 677 So.2d 1254 (Ala.Cr.App. 1995) (evidence that key witness received favorable treatment in exchange for his testimony against the

defendant was *Brady* material, and thus the state's suppression of it was reversible error). Defense counsel must be provided with any evidence of a promise of lenience toward or benefit to a state witness or someone known to the witness (for example, a spouse). This is legitimate impeachment information that can undermine a state witness' credibility. See *Williams v. State*, No. 92-0328, slip op., at 18 (Ala.Cr.App. Aug. 23, 1996) (prosecution must disclose impeachment evidence). The failure to disclose information that testifying codefendants, informants or other state witnesses have received deals violates a defendant's rights to due process and to confront witnesses. See *Ex parte Womack*, 541 So.2d 47 (Ala. 1988) (due process violated when the prosecution did not disclose that a state witness negotiated a plea bargain). Evidence that a witness has made statements contrary to trial testimony are also discoverable. See *Jacobs v. Singletary*, 952 F.2d 1282, 1287-98 (11th Cir. 1992) (due process violated when state failed to disclose witness's statements to a polygraph examiner regarding doubt about defendant's role in shooting because the witness' statements were contrary to trial testimony); *Ex parte Kimberly*, 463 So.2d 1109 (Ala. 1984) (case reversed when state did not produce codefendant's statement who said the defendant was not in the area of the robbery). In their motions for discovery of witness information, defense attorneys should also consider asking the court to instruct the state and police to refrain from telling witnesses not to cooperate with the defense.

The Right to Have Evidence Preserved

A frequent issue in criminal cases is the preservation of forensic evidence. Sometimes the state's investigators and forensic examiners will test critical evidence and destroy or discard that evidence in the process. Or, evidence may not be able to be tested because it was not properly preserved. To counter this, defense counsel should move to have critical forensic evidence preserved for testing if needed by the defendant's experts.

The prosecution is required to preserve evidence "that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). This evidence must have apparent

exculpatory value before its destruction and the defendant must be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489. Alabama's courts have long held that forensic evidence must be made available upon request. In *Gurley v. State*, 639 So.2d 557 (Ala.Cr.App. 1993), the Court of Criminal Appeals reversed a capital conviction because the state destroyed evidence it used against the defendant. *Gurley* held that a court must review a claim of loss or destruction of evidence "by weighing the culpability of the state for the loss of the evidence, the materiality of the lost evidence, and the prejudice to the accused. . . ." *Gurley*, 639 So.2d at 567-68. See also *Warren v. State*, 288 So.2d 826 (Ala. 1973) (failure to provide a sample of the prohibited substance was violation of due process); *Moton v. State*, 524 So.2d 381 (Ala.Cr.App. 1988) (trial court's denial of the defendant's motion to obtain a sample of contraband substance was reversible error); *Ex parte Dickerson*, 517 So.2d 628 (Ala. 1987) (state failed to preserve a potentially exculpatory videotape).

If defense counsel has to challenge the destruction of potentially exculpatory evidence, the benefit of expert assistance on that question should not be ignored. An expert will be able to convey to a trial court the importance of the destroyed evidence, ways that the evidence could have exculpated the defendant or provided an alternative theory of the offense.

Special Issues: Discovery of Information about Jurors, Experts and Law Enforcement

Trial courts are at times reluctant to permit discovery about law enforcement officers, jurors, and experts. This reluctance is not usually based on any law, but instead on courts' vague notions of privacy and uneasiness in providing personal data about citizens called for jury service or the police officers who appear daily in the county's courtrooms. Defense counsel should be especially prepared for a battle when requesting criminal record information about state witnesses or potential jurors. One common excuse that the prosecution offers for not disclosing criminal record information is that the reports that law enforcement officers have access to are protected under a confidentiality agreement. Commonly, prosecutors refuse to disclose criminal record infor-

mation maintained by the FBI in National Crime Information Center (NCIC) reports because of a confidentiality agreement with the provider. However, the true confidentiality concerns in NCIC reports are the FBI's computer access codes and symbols which identify authorized users and confidential sources of the information in its reports. See *Putnam v. DOJ*, 873 F. Supp. 705, 710 (D.D.C. 1995). Although these symbols and codes are protected, the prosecution cannot credibly argue that all of the information contained in these records—which contain arrest and conviction data that are matters of public record—are shielded from discovery. Nor should the prosecution be allowed to retreat from its obligation to provide impeachment evidence by placing the burden back on the defense to search out every criminal record of the state's witnesses when the state has the information at its fingertips. Defense counsel should argue that since the state already has the information, it would be infinitely more cost-effective and fair to require that it turn the information over to the defense.

Defense counsel must contend that this type of impeachment evidence is fully within *Brady's* rule. See *Bagley*, 473 U.S. at 676. The Alabama legislature, by providing for impeachment of witnesses by their prior convictions, see ALA. CODE § 12-21-162(b) (1975), has made a legislative finding that such impeachment is likely to be material to the outcome of a trial. Thus, a district attorney must, upon request, disclose the prior convictions of its witnesses prior to trial.

Likewise, defense counsel's motions to require disclosure of information about prospective jurors that may be favorable to the defense and to require the state to provide information on these jurors' contact with the district attorney's office may be met with resistance by trial courts. Defense counsel should nevertheless pursue this information. The Alabama Supreme Court has repeatedly stated that "[n]o right of an accused felon is more basic than the right to 'strike' a petit jury from a panel of fair-minded, impartial prospective jurors." *Ex parte Beam*, 512 So.2d 723, 724 (Ala. 1987); see also *Hunter v. State*, 585 So.2d 220 (Ala.Cr.App. 1991).

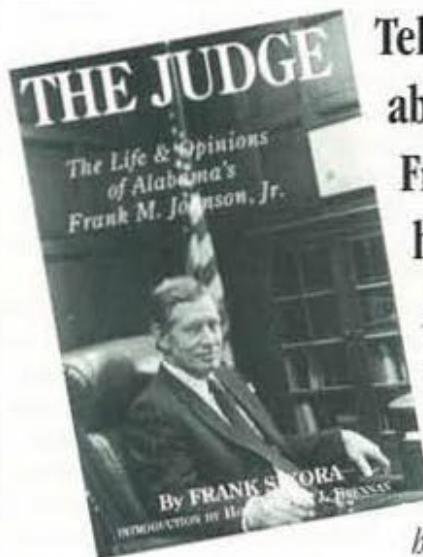
Courts in other jurisdictions have taken an increasingly expansive view of the nature of the interests requiring dis-

closure about potential jurors, ranging from a venireperson's contributions to the district attorney's reelection campaign to indirect relationships with the law enforcement community. See, e.g., *Randolph v. Commonwealth*, 716 S.W.2d 253 (Ky. 1986) (conviction reversed for failure to disclose prior juror-prosecutor relationship); *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985) (any relationship between prospective jurors and prosecutor justifies challenge); *Falsetta v. State*, 280 S.E.2d 411 (Ga. App. 1981) (reversed on grounds of non-disclosure of juror affiliation with law enforcement agency). Defense counsel should maintain that this information about potential jurors is critical to the defendant's rights to an impartial jury and to the exercise of peremptory strikes.

Alabama's discovery rules also provide for discovery of all reports of any examinations, tests and experiments performed by the state's experts. See Rule 16.1(d), *Ala.R.Cr.P.* (1991). In addition to written reports, the defense must also request any oral reports provided to the state by expert witnesses. The experts may have

reached new conclusions by the time of trial or had some concerns about their conclusions. It is only by discovering the substance of what the state has been told by its experts that the defense can reasonably assess the scientific case against it. Failure to disclose expert information can also result in the defense being ambushed at trial by testimony that required expert rebuttal evidence. Thus, it is critical that the defense receive discovery to gain a clear picture of the state's forensic case.

It is important for attorneys handling criminal cases to be fully familiar with the discovery rules and caselaw under state and federal law. Counsel should review Rule 16 of the Alabama Rules of Criminal Procedure before preparing discovery pleadings and review the cases that provide for discovery in specific situations. By the time a capital case reaches trial, mountains of information compiled by the state's investigative forces have been amassed. Defense counsel must request all of this information to ensure a fair trial, and, possibly, a successful defense. ■



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Where To Turn In A Post-Punitive Damages World:

The "Qui Tam" Provisions of the False Claims Act¹

by Pamela H. Bucy



In 1996, private citizens who brought lawsuits under the False Claims Act² won verdicts of \$9 million, \$2.86 million, \$1.6 million, \$1.53 million, \$1.5 million, \$1.46 million, and \$1 million, among others.³ By comparison, the largest punitive damage awards affirmed by appellate courts in Alabama in 1996 were \$3 million,⁴ \$1 million,⁵ \$210,000,⁶ \$79,598,⁷ \$75,000,⁸ \$30,000,⁹ and \$10,000.¹⁰ Large verdicts are not the only virtue for plaintiffs suing under the False Claims Act (FCA) for this statute provides a mechanism to help rid the federal government of fraud and abuse. To win an FCA case, the plaintiff must prove that the defendant knowingly filed false claims with the federal government. In this respect the FCA mobilizes the private bar to serve as "private attorneys general" who pursue "public interest for profit."¹¹ The FCA also is a typical white collar statute in that it blends criminal and civil law. To prevail on this civil cause of action, the plaintiff must prove a crime: that the defendant knowingly submitted, or conspired to submit, false claims to the federal government.¹² This blending of civil and criminal law makes FCA cases complex and procedurally unique.

Background

Sawdust and diseased mules led to the passage of the False Claims Act in 1863. Union soldiers discovered that crates of arms purchased by the Union Army were full of sawdust, not muskets.¹³ Allegedly fit mules purchased by the Army were delivered diseased, blind, overpriced or had already been purchased (several times).¹⁴ There was no federal law enforcement machinery to stop corrupt war profiteers: no Federal Bureau of Investigation or Inspectors General; a very small Department of Justice; and no investigators in the War Department to monitor contractors.¹⁵ Thus, federal lawmakers turned to an available resource—private citizens.

For a variety of reasons, the FCA was not particularly effective until 1986.¹⁶ By 1986, however, Congress was ready to invigorate the FCA as a major fraud-fighting weapon. High profile frauds had convinced many in Congress that new and innovative tools were needed to combat fraud. Originally most FCA cases filed concerned fraud by defense contractors. In recent years, however, the majority of FCA cases have involved fraud by health care providers. In 1996, for example, 40 percent of pending *qui tam* cases alleged health care fraud, while 38 percent alleged defense fraud.¹⁷

Qui Tam Provisions

A. Overview

The FCA provides that the federal government or any "person" may bring an action under the Act.¹⁸ In this way, the FCA empowers "private attorneys general" to supplement the federal government's



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efforts against fraud upon the government. During the 1986 revision of the FCA one legislator summed up the rationale for this dual prosecuting authority: "[i]n the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."¹⁹ Interestingly, unlike other private attorney general provisions, such as RICO,²⁰ the FCA does not require the private plaintiff to show any injury to the plaintiff from the defendant's conduct.²¹

When an FCA case is brought by an individual (or entity) other than the United States Attorney General, the case is known as a "*qui tam*" action and the party bringing the action is known as the *qui tam* "relator." *Qui tam* comes from the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*" which means "[w]ho sues on behalf of the King as well as for himself."²²

B. Rights of the Parties

Elaborate procedures exist to protect the federal government's role in *qui tam* FCA lawsuits. Upon filing a *qui tam* action, the relator must provide the government with a copy of the complaint and "substantially all material evidence and information the person possesses."²³ The complaint is sealed for at least 60 days to allow the government time to determine whether it will join as a plaintiff in the suit.²⁴ Even if the government chooses not to join the lawsuit at the time the complaint is filed, it may join later for "good cause" shown,²⁵ and is entitled to copies of pleadings filed throughout the case even if it does not join.²⁶

History has shown that relators fare better when the government joins the FCA action as co-plaintiff. A study of all *qui tam* actions filed between 1986 and July 1996 revealed that "the average recovery for *qui tam* cases where the government intervened [was] approximately \$6.0 million. In stark contrast, the average recovery for *qui tam* cases where the government declined to intervene [was] approximately \$33,000."²⁷

One reason it is difficult for *qui tam* relators to be successful without the government as co-plaintiff is that relators have fewer resources for investigating and

preparing the complaint. The government, by comparison, may use civil investigative demands, which permit broad discovery prior to filing a complaint.²⁸ Even if relators are current employees of the offender and thus possess inside information about the fraud, these employees may be barred by employment contracts from revealing the information or removing copies of documents, even regarding acts of fraud.²⁹ Another common source of relators, attorneys who obtain informa-

***Qui tam* comes from the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*" which means "[w]ho sues on behalf of the King as well as for himself."²²**

tion while representing clients in unrelated matters, will have to overcome the jurisdictional bar hurdle (discussed *infra*) as well as the additional hurdle posed by the Code of Ethics preventing disclosure of confidential information about a client obtained during representation of the client.³⁰ This ethical duty does not apply if a reasonable attorney in the same circumstances would find convincing evidence of alleged fraudulent activities. However, the attorney seeking to make the disclosure bears a "heavy burden" of proving this test.³¹ Still other relators may obtain information from on-going lawsuits. Yet, gaining access to information in these lawsuits is difficult. While the public has access to judicial records,³² material generated through discovery may not be publicly available, especially if protective orders have been obtained.³³ Furthermore, even if this *qui tam* relator gains such access, the jurisdictional bar provision ultimately may disqualify the relator.

Thus, it is good news for a relator when the government decides to join the *qui tam* action. However, once that happens, the dynamics of action can become complex. Often the government, after intervening as a plaintiff, aggressively seeks disqualification of the relator. There are reasons for this. By filing the FCA action

the *qui tam* relator may have preempted or interfered with ongoing civil or criminal government investigations or cases. Also, because the relator is allowed to remain active in the case after the government has intervened, there is the potential for conflicts over strategy. Lastly, if the suit is victorious the relator pockets proceeds that would otherwise go to the government. Interestingly, sometimes the relator and defendant team up against the government. In *United States ex rel. Killingsworth v. Northrop*,³⁴ for example, the government accused the relator and the defendant of structuring a settlement so as to deprive the government of funds it would otherwise receive under the FCA.³⁵

Because of the potential for conflicts over strategy, the government³⁶ or in an unusual case, the defendant,³⁷ has the right to seek limits on the relator's participation in the lawsuit. Even if the government or defendant obtains restrictions on the relator's involvement, however, the relator enjoys unusual rights as a litigant. First, the relator may bring an FCA action with a minimal showing of standing. Second, even if the government intervenes, the relator retains some ability to participate as co-plaintiff,³⁸ including the potential ability to block a settlement or dismissal.³⁹ Third, and most significantly, the relator shares in the judgment. If the FCA action is successful and the government does *not* intervene, the *qui tam* relator is entitled to 25-30 percent of the proceeds of the recovery or settlement⁴⁰ with the court determining the ultimate amount. If the FCA action is successful and the government intervenes, the relator is entitled to 15-25 percent of the proceeds of the recovery or settlement, with the amount depending upon "the extent to which the person substantially contributed to the prosecution of the action."⁴¹ If a successful FCA lawsuit is based primarily on publicly disclosed allegations or transactions *other* than information from the relator but the *qui tam* relator qualified as an original source, the *qui tam* plaintiff is entitled to no more than 10 percent of the award.⁴² In setting the award in this situation the court is to consider "the significance of the information and the role of the person bringing the action in advancing the case to litigation."⁴³ If the relator participated in sub-

mitting the false claims the court may reduce the relator's share of the recovery "to the extent the court considers appropriate."⁴⁴ If the relator is convicted "of criminal conduct arising from his or her role in the violation," the relator is dismissed from the lawsuit and receives none of the recovery.⁴⁵ In every successful FCA suit the *qui tam* relator is entitled to receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs, all of which shall be awarded against the defendant.⁴⁶

C. Qualifying as a *Qui Tam* Relator

To qualify as a *qui tam* relator a party must overcome the "jurisdictional bar" provision of the FCA which provides:

"No court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."⁴⁷

The relator bears the burden of proving that a court has jurisdiction over the case.⁴⁸ There are two major questions to resolve in applying the jurisdictional bar provision: (1) whether the allegations or transactions in the FCA action previously have been disclosed publicly, and (2) if so, whether the *qui tam* plaintiff is an "original source" of the public information.⁴⁹ If the allegations in the lawsuit have been publicly disclosed, the relator is jurisdictionally barred from bringing the lawsuit unless the plaintiff was an "original source" of the public information. If the relator does not qualify as an original source, the FCA lawsuit continues only if the Attorney General continues as plaintiff; otherwise when the *qui tam* relator is dismissed, the case is dismissed.

1. Public Disclosure: Has It Occurred and Is the Complaint Based Upon the Public Disclosure?

The FCA lists a number of sources which constitute public disclosure: criminal, civil or administrative hearings; congressional, administrative or

Government Accounting Office reports, hearings, audits or investigations; and, the news media. Two major questions have arisen regarding the public disclosure issue: (1) when is the *qui tam* complaint based upon the public disclosure, and (2) must the allegations or transactions actually be publicly disclosed or is it sufficient if they are only potentially available to the public?

a. Is the *Qui Tam* Complaint "Based Upon" the Public Disclosure?

The question has arisen as to whether the *qui tam* action is based upon the public disclosure when some or all of the information in the relator's FCA complaint was publicly available prior to filing the complaint but the relator claims to have obtained the information in her complaint independently of the publicly disclosed information.⁵⁰ There is no clear-cut answer. As one court noted, there is no "mathematical formulae ... [for] quantum or centrality of nonpublic information that must be in the hands of the *qui tam* relator in order for suits to proceed."⁵¹ The courts have handled this situation in several ways. The District of Columbia and the First, Fourth, Eighth and Eleventh circuits have adopted approaches favorable to the relator.⁵² The District of Columbia Circuit, for example, strictly construes the statutory language, "based upon the public disclosure of allegations or transactions" holding that only if a *qui tam* lawsuit is based upon publicly disclosed "allegations or transactions," not just publicly disclosed "information," will it fit within the first prong of the jurisdictional bar provision.⁵³ The First Circuit has indicated that it will look to the underlying purpose of the FCA in applying the "based upon" language to determine whether the *qui tam* action "seeks recovery from alleged defrauders of the government for fraud that has not yet been the subject of a claim by the government" and whether it "has the potential to restore money to the public fisc that would not and could not have been restored in [a related] case."⁵⁴

The Fourth Circuit has adopted another approach, also favorable to the *qui tam* relator. Instead of distinguishing between "allegations or transaction" and "information," the Fourth Circuit focuses on whether the relator actually derived

knowledge from the public disclosure of the facts underlying the action.⁵⁵ *United States ex rel. Siller v. Becton*⁵⁶ demonstrates this approach. The court found that the relator was not jurisdictionally barred from bringing his *qui tam* lawsuit even though many of the facts alleged in the lawsuit had been publicly disclosed during discovery and settlement of related litigation. Finding it "certainly possible that, as Siller contends, Siller actually learned of [the defendant's] alleged fraud entirely independently of the [prior lawsuit], and derived his allegations from that independent knowledge," the Fourth Circuit remanded the case for further findings by the lower court on the issue.⁵⁷

In *Cooper v. Blue Cross & Blue Shield (BCBS) of Florida*,⁵⁸ the Eleventh Circuit employed an approach similar to the Fourth Circuit's focus on whether the relator actually based his lawsuit on the public disclosure, but the Eleventh Circuit analyzed the issue as whether the relator could qualify as an "original source" of the information that had been disclosed. While receiving medical treatment, Herbert Cooper learned that Blue Cross Blue Shield (BCBS) was engaged in "secondary payer" fraud and had filed false claims with Medicare resulting from this fraud.⁵⁹ Secondary payer fraud occurs when Medicare is billed as the primary insurer when another insurer is responsible for primary coverage and Medicare is only responsible as secondary payer.⁶⁰ Cooper conducted his own investigation and made repeated complaints to the BCBS and government agencies prior to filing a FCA suit. By the time Cooper filed his suit, secondary payer fraud had received extensive publicity in General Accounting Office (GAO) reports, Congressional hearings, OIG reports and newspaper articles.⁶¹ Finding that Cooper's lawsuit was based upon publicly disclosed allegations or transactions, the court addressed the question whether Cooper qualified as an "original source" of the information.⁶² Finding that Cooper obtained his information "directly and independently" of the public information,⁶³ the court found that Cooper qualified as an "original source." The Court rejected defendant's argument that "Cooper's knowledge is not substantive information that seriously contributes to the disclosure of fraud."⁶⁴ Instead, it found that Cooper's "information is more than

background information which enables him to understand the significance of a more general public disclosure.⁷⁶

Unlike the above courts, the Second, Third and Tenth circuits have adopted views less favorable to the relator.⁷⁷ According to the Second Circuit, the relator is jurisdictionally barred from bringing the FCA when the *qui tam* plaintiff's allegations are "the same as those that ha[ve] been publicly disclosed . . . regardless of where the relator obtained his information."⁷⁸ In *United States ex rel. Doe v. John Doe Corp.*,⁷⁹ the Second Circuit was faced with a *qui tam* action instituted by an attorney privy to fraud, discovered during the course of representation. The attorney's client had been subject to investigation concerning a defense contract scam allegedly undertaken by his employer. In exchange for use immunity, negotiated by the attorney, the client provided sworn testimony implicating the corporation. Subsequently, the attorney obtained a waiver of the attorney-client privilege from the client and brought a *qui tam* action under the FCA.⁸⁰ In barring the attorney/relator's claim, the court adopted a broad interpretation of the jurisdictional bar provision.⁸¹ Quoting the Second Circuit, the Fourth Circuit held: "[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred."⁸²

The Third Circuit's approach is similar for it holds that *qui tam* suits are jurisdictionally barred if based upon information that would have been available to others if they had looked for it.⁸³ Similarly, the Tenth Circuit holds that the relator's suit is barred if it is "substantially identical to the allegations contained in the public disclosure," regardless of whether the relator actually got the allegations in her suit from the public disclosure.⁸⁴

b. Actual v. Potential Public Disclosure

Another issue which has arisen is whether public disclosure for purposes of the FCA occurs only when the allegations or transactions are *actually* disclosed to the public or also occurs when the allegations or transactions are *potentially* accessible to the public. In *United States ex rel. Ramseyer v. Century Healthcare Corp.*,⁸⁵ the Tenth Circuit addressed this

issue and concluded that in order to be publicly disclosed, "the allegations or transactions upon which the suit is based must have been affirmatively disclosed to the public."⁸⁶

In *Ramseyer*, the District Court dismissed the *qui tam* action brought by Ramseyer, a consultant and then clinical director of a mental health facility operated by Century Healthcare Corporation (Century). During her eight months of employment with Century, Ramseyer observed widespread noncompliance with Medicaid requirements. Although Ramseyer communicated this noncompliance to the defendants, the defendants did nothing to correct the problems and continued to send noncomplying claims to Medicaid. Defendants terminated Ramseyer's employment after eight months of service.⁸⁷

During this time period and completely independent of Ramseyer's efforts to alert defendants of the problems, a routine audit and inspection by the Oklahoma Department of Human Services (DHS) uncovered the same problems. A DHS program supervisor, Roy Hughes, prepared a report summarizing these findings. Three copies of the report were made: one copy was given to the defendants; one remained in DHS files; and one was given to a DHS administrator. The only way a member of the public could obtain a copy of this report was to specifically request it in writing and obtain approval for its release from DHS legal counsel.⁸⁸ This was not done.⁸⁹

The Tenth Circuit viewed the issue as "whether theoretical or potential accessibility—as opposed to actual disclosure—of allegations or transactions is sufficient to bar a *qui tam* suit that is based upon such information."⁹⁰ Following the approach adopted by the Ninth Circuit⁹¹ and District of Columbia Circuit⁹² and rejecting the view of the Third Circuit,⁹³ the court held that actual disclosure to the public was necessary to find "public disclosure" under the FCA.⁹⁴ The court reasoned that the common usage and understanding of the term "public disclosure" implies actual disclosure. The court also found that finding public disclosure to exist merely upon the possibility that the public might gain access to the information would frustrate the goal of the FCA of "encourag[ing] private citizens with

first-hand knowledge to expose fraud."⁹⁵ Applying its reasoning to the case before it, the court found that "DHS did not affirmatively disclose either the existence of the contents of the Hughes Report; instead DHS simply placed the report in its investigative file and restricted access to those persons clairvoyant enough to specifically ask for it."⁹⁶ As such, the allegations and transactions in Ramseyer's FCA *qui tam* suit had not been publicly disclosed. The Tenth Circuit reversed the District Court's dismissal of Ramseyer's suit.⁹⁶

2. "Original Source"

Even if the first prong of the jurisdictional bar provision is met and the *qui tam* complaint is found to be "based upon" publicly disclosed allegations or transactions, the relator is not jurisdictionally barred if the relator is "an original source" of the publicly disclosed information.⁹⁷ The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."⁹⁸ The major controversies concerning the "original source" requirement are the interpretation of "direct and independent" and whether the *qui tam* relator must have disclosed information to the source which publicly disclosed the allegations or transactions, in order to qualify as an "original source."

a. "Direct and Independent"

The specificity and uniqueness of the

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complaint and the manner and timing in which the *qui tam* relator obtained the information in the complaint appear to be the key factors in determining whether the *qui tam* relator obtained the information "directly and independently" so as to qualify as an original source. In *United States ex rel.*

Precision v. Koch,⁹⁸ for example, the Court found that the relator's information was not obtained directly and independently but was "weak, informal and strikingly redundant" of allegations previously disclosed in civil lawsuits, a congressional hearing and news releases.⁹⁹ Thus, the court ruled, the plaintiff did not qualify as an original source.⁹⁹

In contrast is *Cooper v. Blue Cross, Blue Shield of Florida*.¹⁰⁰ As in *Precision*, there was substantial prior publicity of the allegations contained in the relator's FCA action prior to the filing of the FCA complaint. The Eleventh Circuit, however, held that the relator's information qualified the plaintiff as an "original source." The court noted that the relator had conducted a thorough investigation on his own prior to the publicity, and that his information was "potential-specific" and was "more than back-

ground information which enables him to understand the significance of a more general public disclosure."¹⁰⁰

The courts have provided at least one clear-cut test for judging this issue. A relator's knowledge is deemed to be "direct" if the relator learned of the false claims through the relator's own efforts rather than from the labors of others. As the Ninth Circuit explained, relators must "see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else. ..."¹⁰¹

b. Disclosure

There is a disagreement among the Courts of Appeal as to what is needed to find adequate disclosure by an "original source." The Second and Ninth circuits have adopted a restrictive interpretation.¹⁰² The Fourth and Eleventh circuits have adopted a more expansive interpretation.¹⁰³ In *United States ex rel. Dick v. Long Island Lighting, Co.*,¹⁰⁴ the Second Circuit held that the relator "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based."¹⁰⁵ The Second Circuit focused on statutory language in

reaching this conclusion.¹⁰⁶ The Ninth Circuit reached a similar result but with different reasoning. In *Wang v. FMC*¹⁰⁷ the Ninth Circuit found the statutory language to be ambiguous, but focused on the legislative history: "*qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based."¹⁰⁸ The Ninth Circuit also considered policy arguments, reasoning that the "conscientious or enterprising person" brave enough to bring the fraud to the public's attention should be rewarded with the bounty provided in the FCA rather than the person who "sat quietly in the shadows and breathed not a word" of the fraud.¹⁰⁹

The Fourth and Eleventh circuits disagree.¹¹⁰ The Fourth Circuit has characterized the Second Circuit's approach as "wholly indefensible" and constituting "misreading of the legislative history ... to create an ambiguity in the statute where none exists. ..."¹¹¹ These courts hold that:

"In addition to having direct and independent knowledge of the information on which the allegations in the public disclosure is based, he need only provide his

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information to the government before instituting his *qui tam* action. ...¹⁰⁵

The latter view seems preferable. Holding that a *qui tam* relator qualifies as an original source only if the relator disclosed the information in the FCA lawsuit to the entity that publicly disclosed the allegations or transactions, would seem to turn on fortuities that have nothing to do with a relator's eligibility to bring a lawsuit. Such a holding would also seem to discourage individuals from fully investigating the facts surrounding possible false claims before they file a *qui tam* action, for fear that they may lose the "race to publicize."

Whistleblowers

The most common *qui tam* relators are disgruntled current or former employees.¹⁰⁶ To protect employees and encourage them to come forward, Congress included § 3730(h) in the 1986 Amendments to the FCA. This section provides a cause of action for whistleblowers:

"[a]ny employee who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee ... in furtherance of an action under this section. ... [The Employee] is entitled to reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."¹⁰⁷

To prevail on a whistleblower retaliation claim, an employee must demonstrate a causal link between whistleblower activities and the discriminatory employment action. *X Corp. v. Doe*¹⁰⁸ demonstrates this requirement. Former in-house counsel (Doe) counterclaimed under § 3730(h) in a suit brought by X Corp. against Doe for breach of a confidentiality agreement. In his counterclaim Doe alleged that he had been fired as in-house counsel in retaliation for Doe's filing a *qui tam* action against X Corp.¹⁰⁹ The court dismissed the counterclaim, finding that Doe failed to demonstrate a causal connection between his firing and the filing of the *qui tam* action.¹¹⁰ The court explained that in

order to prevail, "Doe must prove (i) he took acts in furtherance of a *qui tam* suit; (ii) X Corp. knew of these acts; and (iii) X Corp. discharged him because of these acts."¹¹¹ The court found that all but one of the acts Doe identified as those he took in furtherance of a *qui tam* action were, in fact, an exercise of his responsibilities as in-house counsel. Furthermore, Doe was unable to prove that the Management Committee of X Corp. was aware of the one act that he took in furtherance of the *qui tam* action (secretly copying and removing documents) much less retaliated against him because of this act.¹¹²

To qualify as a whistleblower under the FCA, the whistleblower must demonstrate status as an employee, not as an independent contractor. *Godwin v. Visiting Nurse Ass'n*¹¹³ provides guidance as to what courts will look at to determine FCA whistleblower status. In *Godwin*, the court looked to the relationship "under the facts and applicable rules of law and not [at] the way in which the parties regarded this relationship."¹¹⁴ Focusing on factors such as how much the worker controlled the results of her work and who held the authority to direct how the work would be done, the court held that Godwin, a bookkeeper-accountant, was an employee of the defendant, a Visiting Nurse Association.¹¹⁵ Other factors to consider are "the skill required, the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."¹¹⁶

Another issue which has arisen in whistleblower FCA suits is whether the whistleblower must file a *qui tam* action under the FCA in order to qualify as a plaintiff in a retaliatory action suit under § 3730(h). Thus far the courts have ruled in the employees' favor, holding that it is not necessary for the whistleblower to so file.¹¹⁷

Another common issue in FCA whistleblower cases is whether federal employees

suing the federal government qualify as whistleblowers. Courts have cited two reasons for holding that federal employees cannot invoke the whistleblower provisions of the FCA: sovereign immunity and preemption. Noting that sovereign immunity¹¹⁸ protects the federal government from lawsuits "if judgment sought would expend itself on the public treasury or domain. ...,"¹¹⁹ the courts have permitted FCA whistleblower actions only when the federal government has unequivocally waived sovereign immunity.¹²⁰ The courts have reasoned that because § 3130(h) does not address the sovereign immunity issue, much less unequivocally waive it, the FCA does not waive this immunity.¹²¹ Secondly, the courts note that Congress intended the Civil Service Reform Act¹²² to provide the exclusive remedy for federal employees who suffer retaliation for whistleblowing and thus preempts actions under the FCA.¹²³

Conclusion

Although a potentially lucrative cause of action, the *qui tam* provisions of the False Claims Act are complex. This is for several reasons. First, both the hybrid civil/criminal nature of the Act (establishing civil liability by proving the commission of a crime) and the dual plaintiff system (the government and/or a private

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party may bring the case) complicate the procedural aspects of these cases. Second, much of the law on the FCA, historically and currently, is judge-made, a fact further complicated by the 1986 amendments which dramatically changed the FCA and rendered much of the existing judicial precedent on the FCA out-of-date, inapplicable, or of questionable guidance. Third, there are significant issues left unresolved by the FCA. For example, it is not clear when FCA actions are jurisdictionally barred, how to calculate damages, how to apply the statute of limitations, or to what extent the Federal Rules of Procedure regarding pleading apply to FCA complaints.¹²⁴ Creative lawyering as well as careful attention to the FCA and existing and evolving precedent is essential for those who wish to venture into *qui tam* litigation. Failure to follow statutory provisions and applicable precedent could be costly: the FCA allows defendants sued under the FCA to collect reasonable attorneys' fees and expenses if the court finds the suit "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."¹²⁵ ■

Endnotes

1. Portions of this article are reprinted, with permission, from Pamela H. Bucy, *Health Care Fraud: Criminal, Civil and Administrative Law* (LJSP 1996). Copyright © 1996. All rights reserved. Law Journal Seminars Press.
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112. *Id.*
113. 831 F.Supp. 449 (E.D. Pa. 1993), *aff'd* 39 F.3d 1173 (1994) (citing Jones v. Century Oil U.S.A., Inc., 959 F.2d 84, 86 (3d Cir.1992)).
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RECENT DECISIONS

By David B. Byrne, Jr. and Wilbur G. Silberman

BANKRUPTCY

Fifth Circuit attempts to find middle ground on interest due secured creditors post-petition

In the matter of *T-H New Orleans Limited P/S*, 116 F.3d 790; 1997 U.S.A pp. LEXIS 17180; 31 Bankr. Ct. Dec. 114 (July 9, 1997). This case involved the time worn question of post petition interest to a secured creditor. Financial Security Assurance (FSA) argued that because the value of its collateral (a hotel) was increasing post-petition, while at the same time the obligation to it was decreasing from cash collateral payments, at some point between the date of its valuation and the date of confirmation, FSA became over secured. It argued that as FSA was over-collateralized on the confirmation date, under §506(b) it was due interest since the inception of the case. The Fifth Circuit partially agreed, but not as to the inception date. It first discussed the determination of the valuation date. It showed that at the hearing on the confirmation of the plan, the original claim of \$18,424,000 had, through post-petition payments, been reduced to \$13,748,055, which was greater than the fair value of the hotel of \$13.7 million. The bankruptcy court held FSA to be an undersecured creditor and not entitled to interest due to

the law that a collateralized creditor is not entitled to interest unless it becomes oversecured. The Fifth Circuit in its review quoted the portion of §506(b) "to the extent that an allowed claim is secured by property, the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim interest on such claim." It held that section 506(b) can apply only from the date of filing through the confirmation date, but that in the application, it is most important to establish a valuation date. It concluded that in cases of this type where value is increasing, or the debt decreasing through cash collateral payments, at some point in time, the creditor will become oversecured; that it is the duty of the secured creditor to prove by a preponderance of the evidence that its claim was oversecured, to what extent, and when it became oversecured. This flexible approach was adopted by the court, but with the admonition that the interest could not be paid until confirmation, even though it would be accruing interest from the time the claim became oversecured, but not before. Also, do not overlook that the Court held that the amount of interest when added to the amount of the allowed claim cannot exceed the value of the collateral.

Comment: The Fifth Circuit has, similar to its holding in *Rash* (later overruled by the U.S. Supreme Court) (*Assoc. Com. Corp. v. Rash*, 1997 WL 321231, 616-97), effected a compromise. The opinion may meet the same fate as *Rash*. However, it does not happen too often that value of collateral increases during the pendency of a case. Regardless, the question in our jurisdiction is whether the Eleventh Circuit will follow the Fifth. In the case *sub judice*, the Court mentioned *In re Delta Resources*, 54 F.3d 722 (11th Cir.) but distinguished it on the facts as being "inappropriately narrow."

Discrimination lawyers should read this: Bankruptcy Court, without jury, estimates age claim at \$353,804

Matter of Interco, Btkcy E.D. Mo. (July 22, 1997, Chief Judge Barta), 31 B.C.D. 226. The lawsuit was filed prepetition in 1988. In June 1991, proof of claim was filed by Wittes. In December 1991, the bankruptcy court denied a motion for relief from stay. Wittes' lawsuit claimed violation of age discrimination under both the federal and state laws. The bankruptcy court denied the claimant's requests of withdrawal of the reference, transfer to the Massachusetts bankruptcy court, and appointment of a special master. Finally, the case was tried before the bankruptcy court which found that the claimant had been an excellent employee from the time he was hired in 1966, having performed many responsible functions, until he was discharged in 1986. The court, after a very lengthy opinion in which the facts were set out in depth, found for the claimant as follows: back pay \$89,398; lost benefits \$14,384; lost pension benefits \$16,885; liquidated damages \$120,677.70; pre-judgment interest \$112,469, all for a total of \$353,804.60.

Comment: I have reviewed this case to show that although the claimant's lawyer tried everything possible to



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.



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 & Belsler and covers the criminal decisions.

remove the case from the bankruptcy court, the bankruptcy judge who refused to relinquish the case, rendered a very substantial judgment.

Seventh Circuit says "no thanks" to \$50 case

In the matter of *June M. Heath*, 115 F.3d 521, June 10, 1997 (7th Cir.). In this chapter 13 case, the U.S. Postal Service deducted \$50 on a one-time service charge on a withholding order under a five-year plan of the debtor to pay \$32 weekly. The bankruptcy court order of confirmation contained the customary wording "the debtor's income and other assets including accounts receivable remain estate property to the extent necessary to fulfill the plan." The chapter 13 trustee sued to recover for the debtor the unauthorized \$50 deduction by the Postal Service. Circuit Judge Posner in reviewing the case on appeal (the district court had reversed the bankruptcy court's holding for the trustee), discussed the possibility in a chapter 13 case of the court controlling all of the debtor's income and assets, and construed sections 1306(a)(2) and 1327(b) to mean that "while the filing *** places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." He then determined that the \$50 taken by the Postal Service was not property of the estate, that this was not a related proceeding as the outcome was unlikely to affect the debtor's estate, and thus the bankruptcy court had no jurisdiction.

Comment: I doubt if there is a sufficient amount involved to take this matter further, but it does appear that if the actions of the trustee brought about the situation, the bankruptcy court would have jurisdiction to determine the issue—also, is it not a dangerous precedent to allow an employer to charge a fee to the debtor on a withholding (garnishment) order?

CRIMINAL

"Knock and Announce" rule survives review

Richards v. Wisconsin, No. 96-5955, ___ U.S. ___, 1997 WL 202007 (April

28, 1997). May police with court warrants to search for drugs enter someone's home without knocking and announcing their presence? The Supreme Court answered no.

In deciding the case, the Justices had to revisit their 1995 ruling in *Wilson v. Arkansas*, 514 U.S. 927 (1995), in which they said that police with search warrants generally must knock and announce themselves before entering a home. The Wisconsin Supreme Court said such an emergency always exists when police searches are linked to "felonious drug delivery."

The Supreme Court, through Justice Stevens, rejected a call to adopt a blanket exception to the knock and announce requirement for the execution of a search warrant in a felony drug investigation. The fact that felony drug investigations may frequently present circumstances warranting a "no-knock entry" does not remove the issue—the reasonableness of the police decision not to knock and announce in a particular case—from the neutral scrutiny of a reviewing court or magistrate. Indeed, in each case it is the duty of a court confronted with a question to determine whether the facts and circumstances of the particular entry justified dispensing with a knock and announce requirement. In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of the evidence.

However, the Supreme Court ultimately determined that the police officers' no-knock entry into a hotel room did not violate the Fourth Amendment. Even though the magistrate who signed the search warrant had deleted the portion of the proposed warrant that would have given the officers permission to execute a no-knock entry, the Supreme Court held that the reasonableness of the officers' decision to enter without knocking had to be evaluated as of the time the officers entered the hotel room.

Search and seizure/routine traffic stop

Ohio v. Robinette, No. 95-891, ___ U.S. ___, WL 662461 (November

1996). Does the Fourth Amendment require police to tell motorists stopped for routine traffic violations that they are free to go before seeking permission to search their vehicles for drugs? The Court unanimously said no.

Chief Justice William H. Rehnquist wrote for the Court that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." Voluntariness must be determined by examining the totality of the circumstances.

Chief Justice Rehnquist's opinion observed that "...the Fourth Amendment does not require that a lawfully seized defendant be advised that he is free to go before his consent to search will be recognized as voluntary." The amendment touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances. In applying this test, the Supreme Court has consistently eschewed bright line rules,

(Continued on page 366)



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Recent Decisions

(Continued from page 365)

instead emphasizing the fact-specific nature of the reasonableness inquiry. Indeed, in rejecting a per se rule very similar to the one adopted below, the Supreme Court has held that the voluntariness of consent to search is a question of fact to be determined from all circumstances. *Schenckloth v. Bustamonte*, 412 U.S. 218, 248-249, 93 S.Ct. 2041, 36 L. Ed. 2d 854 (1973). The Ohio Supreme Court erred in holding otherwise. It would be "unrealistic to require the police to always inform the detainees that they are free to go before a consent to search may be deemed voluntary."

Police may order passengers to exit during traffic stop

Maryland v. Wilson, No. 95-1268, ___ U.S. ___, 117 S.Ct. 882 (February 17, 1997). May police officers order passengers, as well as drivers, to get out of vehi-

cles stopped for routine traffic violations? The Court said yes by a seven-to-two vote.

During a traffic stop, a police officer ordered Wilson to step out of the car in which he was a passenger. As Wilson got out, he dropped a quantity of crack cocaine which the officer then seized. Wilson successfully moved to suppress the evidence. The State of Maryland appealed, losing at both the intermediate and highest court of appeals in Maryland.

The Supreme Court of the United States granted certiorari, and held that a police officer may, without probable cause to stop or detain the passenger but merely to ensure the officer's own safety, order passengers in a lawfully stopped car to exit the vehicle pending completion of the stop.

Sentencing guidelines—reduced federal sentences cannot stand

U.S. v. LaBonte, No. 95-1726, ___ U.S. ___, (May 1997). A United States Sentencing Commission policy that

shortened prison terms for repeat offenders in violent or drug-related crime conflicts with federal law and cannot stand, the United States Supreme Court ruled May 27, 1997 in *United States v. LaBonte*. "Congress surely did not establish enhanced penalties for repeat offenders only to have the U.S. Sentencing Commission render them a virtual nullity."

Justice Clarence Thomas wrote the majority opinion for a badly split court (six to three). Justice Stephen G. Breyer wrote a dissent joined by Justice Stevens and Justice Ginsburg.

Justice Thomas observed that "federal law instructs the panel to require sentences 'at or near the maximum term authorized' by law for career offenders convicted of violent or drug-related felonies." Other federal laws provide longer maximum sentences for three-time offenders. Since 1994, the Commission had sought to avoid "unwarranted double-counting" by telling judges not to include the longer maximum sentence provision in their calculations. ■

Letters to the Editor

Thank you for Thomas L. Methvin's excellent article in the July 1997 issue ("Alabama's Poverty Industry"). In important ways, one could do a "search and replace," putting "Texas" in lieu of "Alabama," and the article would fit the Lone Star State just as well as the Heart of Dixie.

In both Texas and Alabama, recent data showed the poverty rate to be 17.4 percent of the population (*Statistical Abstract of the United States—1995*). Since 1980, this represented an improvement for Alabama from 21.2 percent, and a worsening for Texas from 15.7 percent. In both Alabama and Texas, the majority of poor persons are working people. The maximum cash assistance for a mother and two children under the "Temporary Assistance to Needy Families" program (f/k/a) is \$188 per month in Texas, as opposed to \$164 per month in Alabama. In either state, such assistance helps relatively few, meaning that most poor persons in both Alabama and Texas are earning their living. It is not too much that such persons be shielded from predatory practices.

As attorney Methvin's article makes clear, one necessary shield is better education. In Texas, a recent survey of adult literacy found that about one-third of adults functioned in the lowest literacy ranges. Mr. Methvin's other proposed shield—improved regulation of pawn shops, check cashing outlets, and other elements of the poverty industry—will also be needed.

Mr. Methvin's article is as comprehensive and focused a discussion as can be found concerning the fringe economic practices that, in effect, are an added regressive tax on working poor people.

Bruce P. Bower
Austin, Texas

I enjoyed reading Michael A. Kirtland's article "Civilian Representation of the Military Client" (September 1997) and found it to be very informative. As a Judge Advocate in the Alabama Army National Guard, I do feel that the following comment should be made.

Any attorney who has not practiced law in the area of military justice should carefully consider whether he should undertake representation of a military client who is charged with an offense under the Uniform Code of Military Justice. Although LTC Kirtland, who apparently is not a certified Judge Advocate, suggested the use of the military defense attorney as a source of information, I believe that the better practice would be to refer the case to or associate one of the many fine Alabama attorneys who are certified as Judge Advocates by the Judge Advocate General of one of the military services. Many of these attorneys were Judge Advocates on active duty as a trial counsel (prosecutor) or as a defense counsel, or have had a great deal of training and experience with the UCMJ as reservists.

Military justice is a tool for enforcing good order and discipline in the services, and as such is a commander's prerogative. In addition to being unfamiliar with the UCMJ, Military Rules of Evidence, procedures, etc., an attorney without experience in the military may not comprehend the subtleties and nuances of dealing with commanders, particularly in offenses that are peculiar to the military.

Members of the Military Law Committee should be able to refer the practitioner to very good attorneys with experience in military justice should the need arise.

Jack W. Wallace, Jr.
Assistant Attorney General
Alabama Dept. of Examiners of Public Accounts



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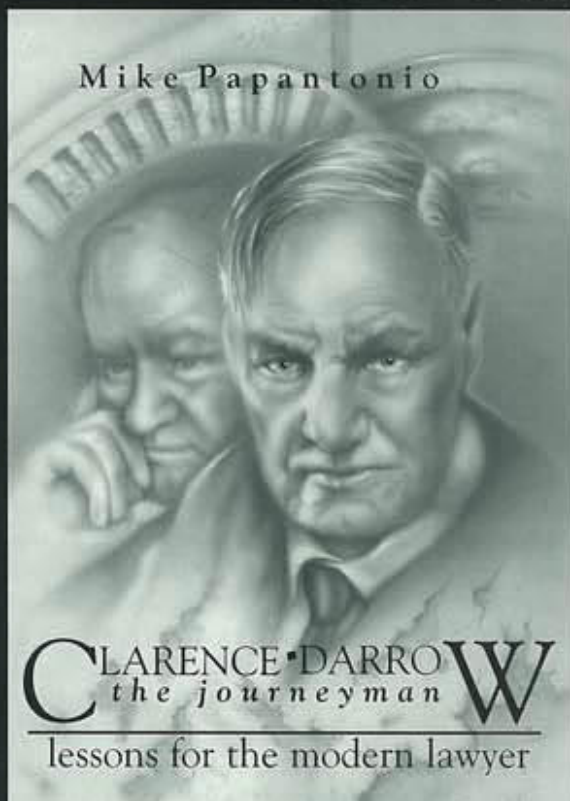
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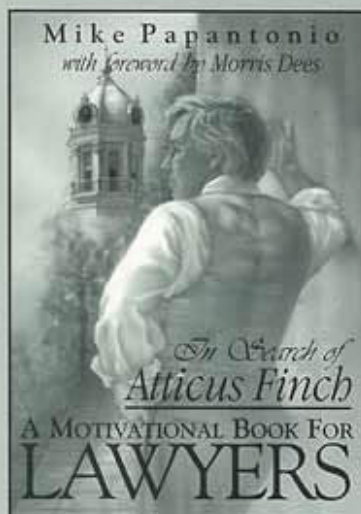
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OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Retention, Storage and Destruction of Client Files



J. Anthony McLain

Question:

"I am seeking an ethics opinion from the Alabama State Bar Association regarding the retention, storage, and disposing of closed legal files.

"My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage, and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

"I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the files remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes, rules of conduct relating to this process, and any other ethics opinions.

"Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six-year interval, what is the appropriate method of disposing of a client's file?"

Discussion:

A lawyer does not have a general duty to preserve all his files permanently. However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed. ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).

While there are no specific rules in the Alabama Rules of Professional Conduct regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time,

the Disciplinary Commission established the following guidelines in Formal Opinion 84-91.

The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation. For that reason, the file should be examined and the contents segregated in the following categories: (1) Documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.; (2) documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him; (3) documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and (4) documents which fall in neither of the above categories.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her.

With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances. Since the file is the property of the client it theoretically may be immediately returned to the client when the legal matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging from a few years to permanent retention. The length of time is more a matter of the lawyer or firm's policy

rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file dispo-

sition. First, the client should be informed of the disposal plans and given the opportunity of being provided the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the Commission's view that six years is reasonable) and then destroyed with the exception of those documents classified as category 1 above. Prior to destroying any client file, the file should be screened to ensure that perma-

nent type (category 1) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer's or law firm's office or at some secure off-site location. Any medium that preserves this integrity of the documents in the file, whether microfilm or by electronic scanning, is appropriate. ■

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Disability

- Florence attorney **Mark Anthony Sanderson** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective August 1, 1997. [Rule 27(c); Pet. 97-08]
- On August 7, 1997, the Disciplinary Board of the Alabama State Bar placed Huntsville lawyer **Lance Kuykendall** on disability inactive status pursuant to Rule 27 of the Rules of Disciplinary Procedure. [Rule 27(c); Pet. No. 97-007]

Suspension

- On August 26, 1997, the Alabama Supreme Court suspended **Beatrice E. Oliver** from the practice of law for a period of 91 days effective that same date. Oliver had been previously found guilty of violating Rules 1.4(a), 1.15(c), and 8.4(c) of the Rules of Professional Conduct by the Disciplinary Board of the Alabama State Bar. Oliver currently resides in the State of Texas. Suspensions in excess of 90 days require a lawyer to petition for reinstatement to active status. [ASB No. 95-181] ■

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Notice

Notice is hereby given to **Charles Timothy Koch** who practiced law in Mobile, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 25, 1997, he has 60 days from the date of this publication (November 15, 1997) to come into compliance with the Mandatory Continuing Legal Education requirements for 1996. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 97-08]

Notice is hereby given to **Charles Rae Allen, Jr.** who practiced law in Alabaster, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 25, 1997, he has 60 days from the date of this publication (November 15, 1997) to come into compliance with the Mandatory Continuing Legal Education requirements for 1996. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 97-02]

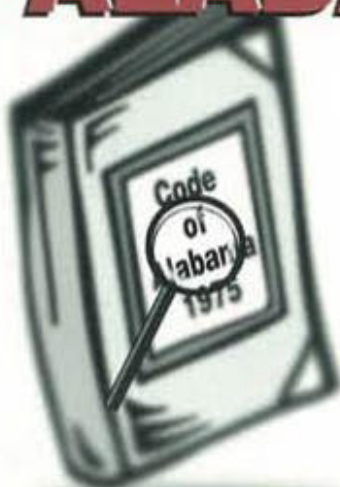
Gary Wayne Weston, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 1997 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 97-029(A) before the Disciplinary Board of the Alabama State Bar. [ASB No. 97-029(A)]

CODE OF ALABAMA 1975

Alabama lawyers are now realizing the benefits of competition in the legal publishing business. The benefits have come at the cost of some clarity, however. This article is to clarify the confusion regarding the publication of the Code of Alabama 1975 and to inform code users of the ramifications of using different versions of the code.

The Michie Company published the Code of Alabama 1975 for many years under a series of contracts with the state. In 1994, pursuant to a competitive bid process, a contract to publish the code was entered into with Lawyers Cooperative Publishing Company. The cost savings over the prior contract were dramatic, with a new set of the code going from \$638 to \$295, and each replacement volume dropping from \$30 to \$12.

The overall effect of the cost reduction is that one can now expect to spend somewhere between \$1,250 and \$1,500 less for acquiring and maintaining the code for ten years than under the prior contract.



By Jerry L. Bassett

While both of the bids were less than the prior contract, the Lawyers Cooperative Publishing Company bid was significantly lower than the bid from Michie.

Confusion arises because now two codes are being published. It was believed that, due to market size and other economic factors, if The Michie Company did not receive the contract, it would cease publishing an Alabama Code. This did not turn out to be the case. Michie has not only continued to publish a supplement and replacement volumes for its prior code, it is also publishing a new proprietary Code of Alabama with the copyright in their name.

(Continued on page 373)

Jerry L. Bassett

Jerry L. Bassett is the director of the Legislative Reference Service, which is the principal bill drafting and legal research agency of the Legislature of Alabama. Bassett is *ex officio* the Code Commissioner of the State of Alabama, the secretary of the Legislative Council, a member of the governing council of the Alabama Law Institute, a member of the Alabama Uniform State Laws Commission, and a member of the National Conference of Commissioners on Uniform State Laws.

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(Continued from page 371)

The Legislature enacts an annual codification bill that incorporates and adopts the supplement and replacement volumes published by the company holding the code publishing contract.

Accordingly, the annual codification act will adopt and incorporate into the Code of Alabama 1975 the supplement and replacement volumes published by Lawyers Cooperative Publishing Company (See Act 97-216). While no statute designates one version or the other as the "official" code, when there is a discrepancy, the version of the annual supplement and replacement volumes the Legislature has declared as the law is the version published by Lawyers Cooperative Publishing Company.

This issue is further confused by the fact that Michie published an "interim supplement" for the 1997 Regular Session that was compiled without the supervision of the Code Commissioner. As a result, Michie was unable to make most of the editorial changes the Code Commissioner made pursuant to Section 29-7-8(a), Code of Alabama 1975, as well as many section designations contained in the supplement and replacement volumes published by Lawyers Cooperative Publishing Company. Accordingly, the code sections set forth in Michie's interim supplement will be different from what appears in the supplement and replacement volumes prepared by Lawyers Cooperative Publishing Company. Michie has made an appropriate disclaimer at the front of the 1997 interim supplement, but the difference in language and section designations is yet another source of confusion.

Finally, shortly after the current contract went into effect on October 1, 1995, the parent company of Lawyers Cooperative Publishing Company acquired West Publishing Company. The resulting merged company is called the West Group. ■

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Correction

In the September issue of *The Alabama Lawyer*, "What Every Lawyer Should Know About Reaffirmation and Redemption in Chapter 7 Bankruptcy Cases" contained a typographical error. On page 297, the last sentence in the third paragraph of the right-hand column should have read as follows:

"Sears has admitted that it did not file the reaffirmation agreements in 2,733 cases, but there may have been instances where the debtors were represented by counsel during the reaffirmation process and a reaffirmation agreement was signed without the debtor's counsel's knowledge or approval."

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(Continued from page 375)

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(Continued on page 380)



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