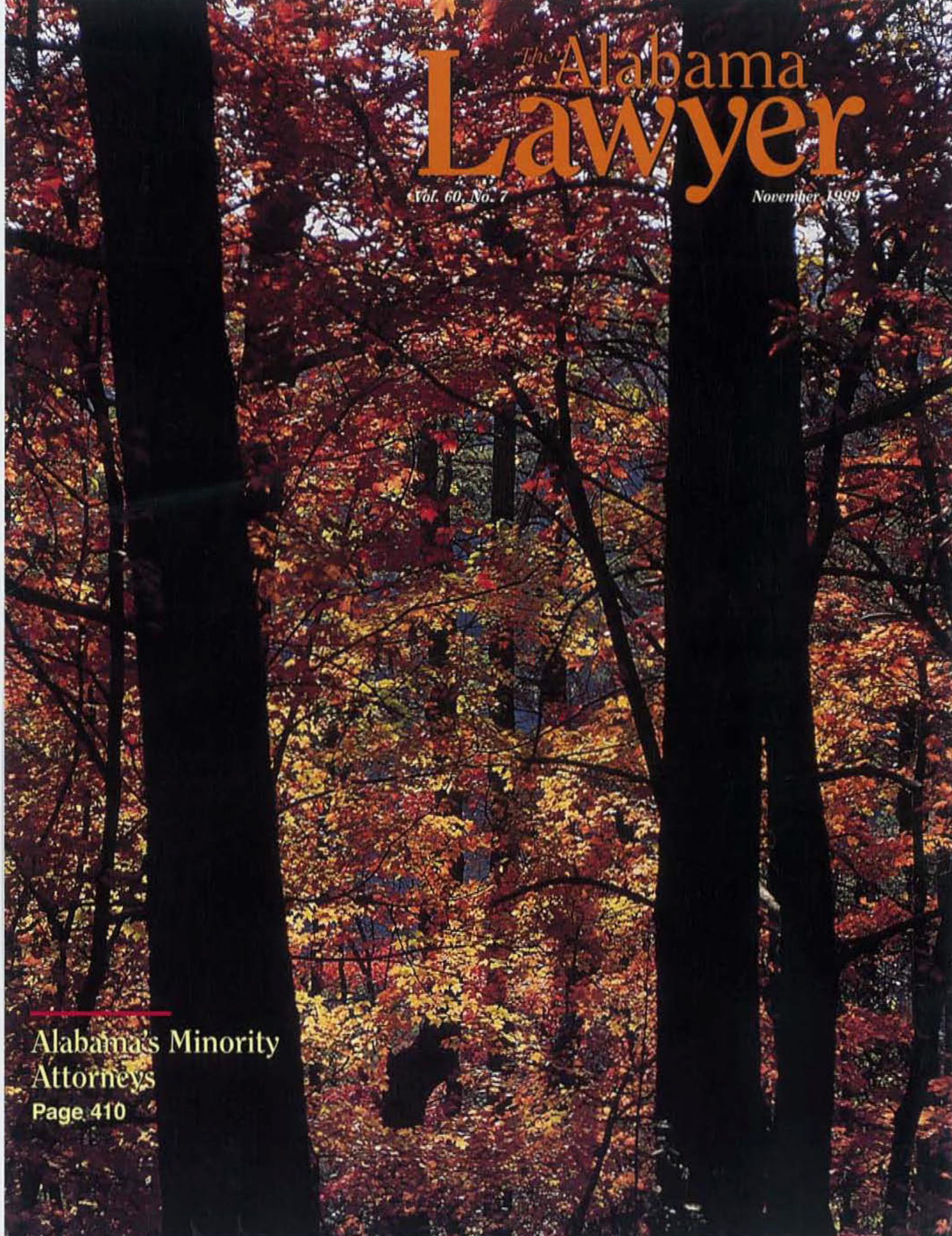


The Alabama Lawyer

Vol. 60, No. 7 November 1999

Alabama's Minority Attorneys

Page 410

Having trouble communicating with your commercial malpractice insurer?

Call AIM: We're willing to talk!

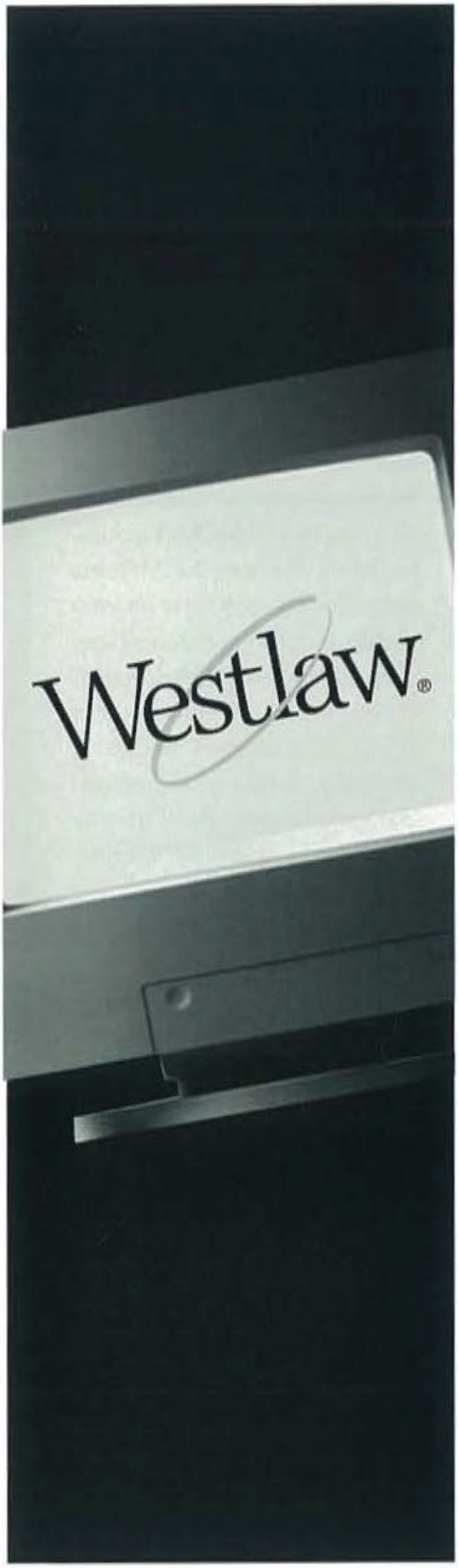
NEW ADDRESS!

Attorneys Insurance Mutual of Alabama, Inc.
200 Inverness Parkway
Birmingham, Alabama 35242-4813

Telephone (205) 980-0009
Toll Free (800) 526-1246
FAX (205) 980-9009

"A Mutual Insurance Company Organized By And For Alabama Attorneys"

www.attysinsmut.com



Unlock the Power of Westlaw for Your Alabama Practice

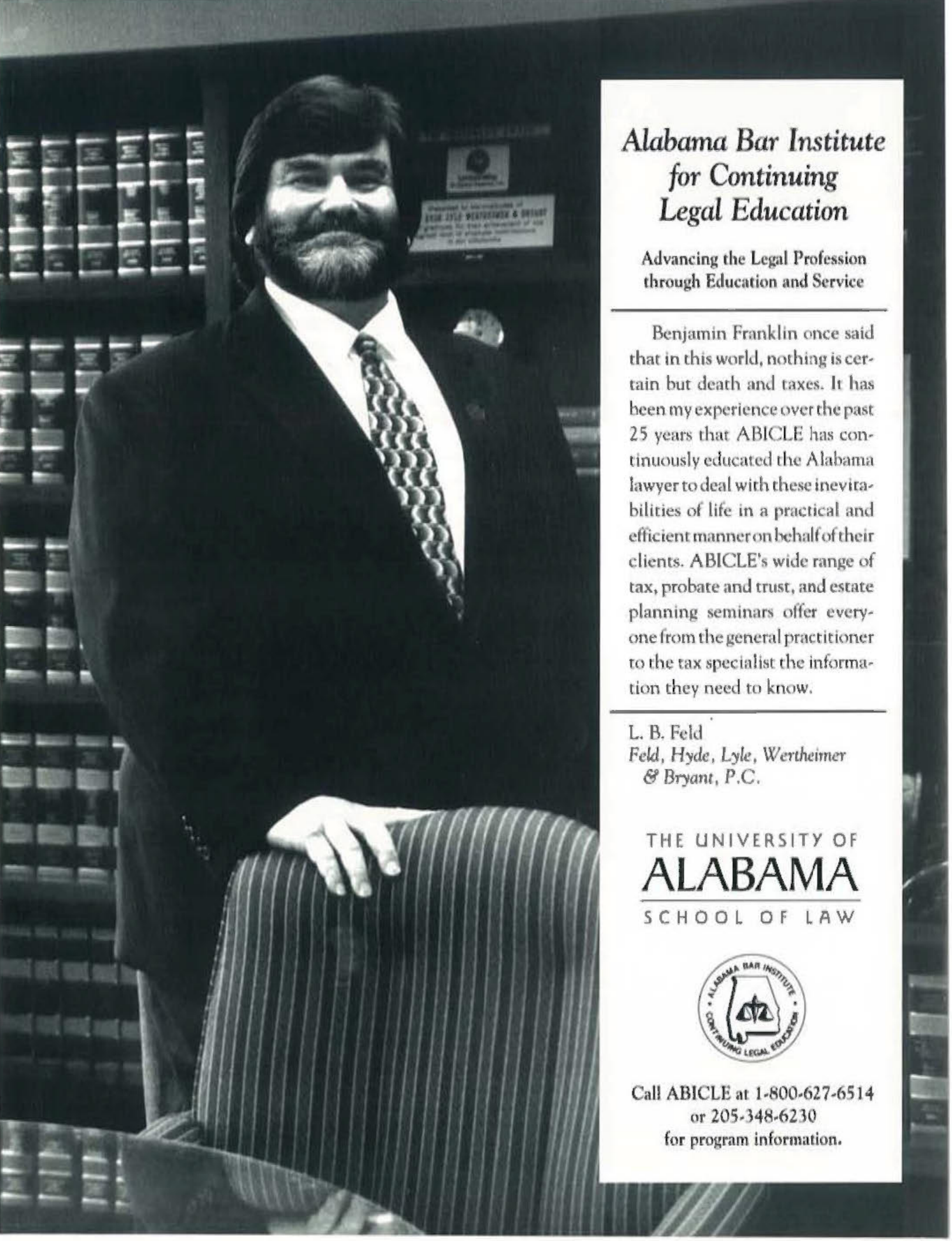
West Group's wide variety of online research packages lets you pick and choose the information that best suits your Alabama practice needs. For one low monthly fee you can get unlimited online access to:

- Alabama case law, annotated statutes, administrative law, journals and law reviews
- Federal District Court Decisions in Alabama, Federal Circuit Decisions for the Eleventh Circuit, United States Supreme Court Decisions, and United States Code Annotated
- KeyCite® – West Group's powerful citation research service
- Bankruptcy Law
- Commercial Law
- Environmental Law
- Insurance Law
- Labor and Employment Law
- Tax Law
- All states case law, all federal case law, analytical products such as Am Jur 2d, ALR, and more!

Call your local West Group representative for all the details.

1-800-762-5272

WEST GROUP



Alabama Bar Institute for Continuing Legal Education

Advancing the Legal Profession through Education and Service

Benjamin Franklin once said that in this world, nothing is certain but death and taxes. It has been my experience over the past 25 years that ABICLE has continuously educated the Alabama lawyer to deal with these inevitabilities of life in a practical and efficient manner on behalf of their clients. ABICLE's wide range of tax, probate and trust, and estate planning seminars offer everyone from the general practitioner to the tax specialist the information they need to know.

L. B. Feld
Feld, Hyde, Lyle, Wertheimer & Bryant, P.C.

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

ALABAMA BAR INSTITUTE • CONTINUING LEGAL EDUCATION •

Call ABICLE at 1-800-627-6514 or 205-348-6230 for program information.

The Alabama Lawyer

Vol. 60, No. 7 November 1999

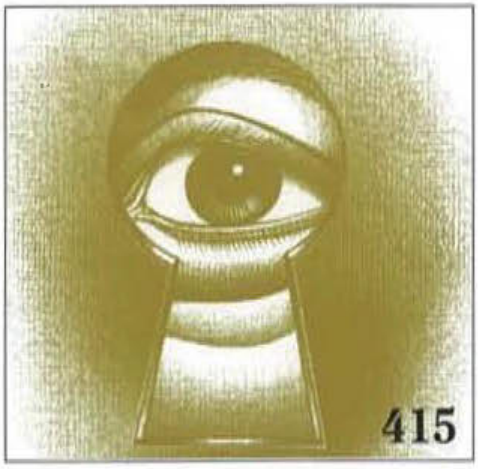
On the Cover

Little River Canyon National Preserve. The Little River Canyon National Preserve is located in northeast Alabama in Cherokee and DeKalb counties. The 14,000-acre preserve contains an outstanding example of an Appalachian Plateau Province canyon system. The canyon and the nearly pristine Little River together form an extraordinary natural feature of Alabama, and offer exceptional opportunities for whitewater kayaking/canoeing, photography, rockclimbing, horseback riding, fishing, hunting, or hiking.

—Photograph by Paul Crawford, JD, CLU

In This Issue

(Continued on page 364)



(Continued from page 363)

DEPARTMENTS

Published seven times a year (the June issue is a bar directory edition) by the Alabama State Bar, P.O. Box 4156, Montgomery, Alabama 36101-4156. Phone (334) 269-1515 • www.alabar.org

Robert A. Huffaker.....Chair & Editor
Susan Shirock DePaola.....Vice-Chair & Associate Editor
David B. Champlin.....Vice-Chair, Finance
Susan H. Andres.....Staff Liaison & Communications Director
Margaret L. Murphy.....Staff Liaison & Managing Editor
Shannon Elliott.....Communications & Publications Assistant

The Alabama Lawyer is published seven times a year for $20 per year in the United States and $25 per year outside the United States by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Single issues are $5.00 for the journal and $25/$60 for the directory. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices.

ALABAMA STATE BAR HEADQUARTERS STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6310 • E-mail facts@alabar.org
Web site: www.alabar.org

Executive Director.....Keith B. Norman
Executive Assistant.....Margaret Boone
Director of Programs.....Edward M. Patterson
Administrative Assistant for Programs.....Rita Gray
Lawyer Referral Secretary.....Carol Thornton
Mandatory Continuing Legal Education Director.....Kim Oliver Ward
CLE Administrative Assistant.....Angie Crowe
CLE Secretary.....Valerie Ross
Director of Communications & Public Information.....Susan H. Andres
Publications Director.....Margaret L. Murphy
Communications & Publications Administrative Assistant.....Shannon Elliott
Membership Services Director.....Diane Locke
Membership Administrative Assistant.....Myrna McHenry
Pro Hac Vice Administrative Assistant.....Mary Corbitt
Volunteer Lawyers Program Director.....Linda Lund
VLP Administrative Assistant.....Katherine L. Church
Director of Admissions.....Dorothy D. Johnson
Admissions Administrative Assistants.....Sonia Douglas, Heidi Alves
Alabama Law Foundation, Inc. Director.....Tracy Daniel
ALF Administrative Assistant.....Jennifer Bacchus
Bookkeeper.....Gale Skinner
Graphics Arts Director.....Maggie Stuller
Graphics Arts Assistant.....Roderick Palmer
Receptionist.....Stephanie Oglesby
Alabama Center for Dispute Resolution Director.....Judith M. Keegan (269-0409)
ADR Administrative Assistant.....Jackie Heartsill
Law Office Management Assistance Program Director.....Laura A. Calloway
Alabama Lawyer Assistance Program Director.....Jeanne Marie Leslie (834-7576)
LOMAP and ALAP Administrative Assistant.....Sandra Clements

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

415 Dexter Avenue, Montgomery, AL 36104 (334) 269-1515 • FAX (334) 261-6311 • E-mail cpr@alabar.org

General Counsel.....J. Anthony McLain
Secretary to General Counsel.....Vivian Freeman
Assistant General Counsel.....L. Gilbert Kendrick
Assistant General Counsel.....Milton L. Moss
Assistant General Counsel.....Robert E. Lusk, Jr.
Complaints Intake Coordinator.....Kim Ellis
Client Security Fund Coordinator.....Bonnie Mainor
Paralegals/Investigators.....Peggy Garrett, Cheryl Rankin, Robin Key
Receptionist.....Melissa Burgess

The Alabama Lawyer, (ISSN 0002-4287), the official publication of the Alabama State Bar, is published seven times a year in the months of January, March, May, June (bar directory edition), July, September, November. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive *The Alabama Lawyer* as part of their annual dues payment; $15 of this goes toward subscriptions for *The Alabama Lawyer*. Other subscribers do not receive the directory edition of the *Lawyer* as part of their subscription. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement.

President's Page

By Wade Baxley

Merit Selection of Judges–A Concept Whose Time Has Come

Wade Baxley

I suspect that only a small percentage of lawyers in our state (and an even smaller percentage of the voting public) realize that Alabama is one of a handful of states remaining which still holds partisan popular elections to fill places on its appellate courts. Has the time arrived for us, as lawyers and officers of the court, to take the lead role in persuading legislators and the general public of the need for judicial reform? I have become convinced that the time for our state to institute a merit selection process for judicial offices has not only arrived, but is overdue.

Contested judicial races for appellate and trial court positions were extremely rare in Alabama until the 1980s when a viable two-party system began to evolve. Prior to 1980, judicial offices generally were filled through appointments by the governor when vacancies occurred as a result of the death or retirement of a sitting judge. Of course, this was during a period of time when a single-party (or a no-party) political system dominated the Alabama electoral process. To fill a vacancy created by the death or retirement of a circuit judge or circuit solicitor/district attorney in the 20th Judicial Circuit (Houston and Henry counties), the presidents of our respective county bar associations would call a joint meeting of the lawyers practicing in the circuit and eventually select one of its members by unanimous consent whose name would then be presented to the governor for appointment. I understand that this same method was routinely utilized by bar associations in other circuits in that day and time to fill vacancies. This consensus selection process changed somewhat with the election of George Wallace as governor when the designated appointee was required to have some connection with insiders in the local or state Wallace camp in order to secure the appointment. In today's highly partisan political climate in Alabama, I believe that a recommendation to the governor from a county or a circuit bar association would be routinely ignored.

During the last decade, the Alabama State Bar, through its Board of Bar Commissioners, has taken the following stands as concerns the issue of judicial selection:

1. December 14, 1990–In response to a merit selection recommendation of the Alabama State Bar Task Force on Judicial Selection chaired by Robert Denniston of Mobile, the Board of Bar Commissioners adopted a resolution calling for the nonpartisan election of judges to the appellate, circuit and district courts in the State of Alabama.
2. February 9, 1996–On this date, the Board of Bar Commissioners considered a report of the Third Citizen's Conference co-chaired by former Governor Albert Brewer and Alabama Supreme Court Justice Oscar Adams and reaffirmed its support of nonpartisan election of judges by unanimous consent.
3. July 16, 1997–A report of the Merit Selection Drafting Committee was made to the Board of Bar Commissioners. Chairman Frank Wilson of Montgomery noted that the merit selection plan drafted by this committee closely followed the

Denniston Task Force report presented in 1990 except that this new proposal only included the appellate courts. The proposal also set forth the establishment of a judicial nominating commission and a judicial evaluation committee. After a lengthy and sometimes heated debate among the bar commissioners, the Board of Bar Commissioners approved a motion to accept the draft of the Merit Selection Drafting Committee by a vote of 24 to 19.

The most widely used argument put forth by opponents of a merit selection process is that this method will take away a citizen's "right to vote" for the candidate of his/her choice. Opponents compare this merit selection process as being similar to the lifetime appointment of federal court judges in an attempt to stir up opposition in the public forum. However, voters generally have a total lack of knowledge regarding the personal or professional qualifications of candidates for judicial offices including the incumbents. This "right to vote" argument tends to ring hollow when you review polls taken over the past decade which have generally shown the same results. These polls and/or surveys disclose that voters do not identify with or recognize the names of candidates running for appellate court positions. For example, in October 1996, one month prior to the general election in five state appellate court races on November 5th, the USA Polling Group conducted a survey of 400 Alabama residents 18 or older with the results showing:

a. Only one in 100 could name any of the Democrats or Republicans in races for three seats on the Alabama Court of Criminal Appeals.
b. Only one in 100 could name at least one of the nominees in the Alabama Court of Civil Appeals race.
c. Even after an intensive battle of television spots aimed at influencing the race for a seat on the Supreme Court of Alabama, only 18 percent of the poll respondents could name either Democratic incumbent Kenneth Ingram or Republican challenger Harold See.

(Results published in the October 6, 1996 edition of the *Mobile Press-Register*)

A more viable objection to merit selection by those who oppose this process is the fear of who would "control" the judicial nominating commission. It is interesting to note that four judicial circuits in Alabama–Jefferson, Madison, Mobile and Tuscaloosa counties–currently utilize nominating commissions to fill vacancies in the offices of circuit judge and district judge by submitting a list of nominees to the governor for appointment. Based upon reports of which I am aware, these commissions have worked extremely well. Further, it is my understanding that lawyers in these circuits have been quite pleased with both the general makeup of the membership of the commissions and the selection process in particular. The makeup of the membership of the judicial nominating commission set forth in the proposed Constitutional Amendment endorsed by the Merit Selection Drafting Committee appears to be workable and fair. The proposed membership would consist of four non-attorneys selected by the governor, lieutenant governor and speaker of the house as a group and four attorney members selected by the ASB Board of Bar Commissioners, Alabama Trial Lawyers Association, Alabama Defense Lawyers Association and Alabama Lawyers Association together with a judicial member selected by the appellate court justices and judges.

As a lawyer, I am deeply concerned about the current public perception of our judicial system in Alabama. An independent and impartial judiciary cannot continue to absorb the abuse to which it has been subjected over the past several statewide contested judicial elections. The more hotly contested campaigns for judicial positions have been very negative and demeaning which has resulted in diminishment of the prestige of our justice system. The cost of running a campaign for a statewide judicial office has become exorbitant. Informal polls tend to show that judges do not enjoy having to raise large sums of money for these campaigns. Additionally, lawyers dislike being called upon by judges or their representatives to make contributions. Due to the involvement of special interest groups who contribute huge sums of money in support of one candidate or the other in these judicial races, members of the public perceive that the winning candidate will lean toward issues supported by a particular special interest group and decide cases in favor of the special interest group which financed that candidate's campaign.

Are nonpartisan elections the answer to these problems? It is definitely a step in the right direction, but I do not believe that it will prevent expensive and demeaning campaigns between special interest groups. The Judicial Campaign Oversight Committee established in 1997 by the Alabama Supreme Court did an outstanding job in monitoring the 1998 elections and helped to substantially prevent the negative campaigns which we had witnessed in previous statewide judicial races. An excellent article authored by Glenn C. Coe entitled "Alabama Judicial Election Reform: A Skunk in Tort Hell," *Cumberland Law Review*, volume 28, no. 1, contains a thorough discussion of the pros and cons of the various judicial selection reforms currently in progress in Alabama. The author concludes that "the merit selection plan would best prevent the types of campaign practices that have troubled voters" in past supreme court elections. I believe that a great majority of lawyers in Alabama agree with this conclusion.

I am a practical idealist. As an idealist, it is my opinion that a merit selection process for both appellate and trial court positions will enhance the public perception of our judicial system. However, in considering how to accomplish this from a practical viewpoint, I understand that we will have to overcome obstacles in convincing the legislature and the general public to make this Constitutional change. It is hoped that after the next general election in 2000, the Alabama State Bar will have enough support in the legislature to introduce the proposed Constitutional Amendment to Article 6 providing for the merit selection of appellate judicial candidates together with a bill providing for the nonpartisan election of trial court judges. When the time comes, I urge you to actively and publicly support this amendment and the nonpartisan bill in your local communities. ■

Executive Director's Report

By Keith B. Norman

Looking Backward[1] on 60 Years of Alabama's Legal Profession

Keith B. Norman

As we approach the year 2000 and a new millennium, we also begin *The Alabama Lawyer's* 60th year of publication. For the last six decades, *The Alabama Lawyer* has recorded much about the profession. With a new century at hand, I thought I would look back at previous issues of the *Lawyer* and share with you some of the interesting things I found. In this month's column, I will cover the 1940s. The decades of the '50s, '60s and '70s will be featured in the next issue while the '80s and '90s will be included in the third and final installment.

With vol. 1, no. 1, appearing in 1940, *The Alabama Lawyer* became the official organ of the Alabama State Bar, containing legal articles to assist the practitioner, disseminating information of interest to the profession and recording relevant legal events. Judge Walter B. Jones was the *Lawyer's* first editor. He began what would become for him a labor of love for the next 24 years. Prior to the *Lawyer's* publication, bar members received a printed journal of the proceedings of the annual meeting of the bar. The journal usually included the annual meeting address, a necrology of deceased attorneys and papers written by leading practitioners of the day.

Richard T. Rives of Montgomery, who would later be appointed to the old Fifth Circuit, served as state bar president in 1940. He penned the first president's article for the bar's new publication entitled, "A New Era of Usefulness for the State Bar." In this article, Judge Rives discussed the new disciplinary process (hearings before the Board of Bar Commissioners instead of jury trials), legal institutes, the unauthorized practice of law and the newly published *Alabama Lawyer*. The bar's first "legal institute" was held November 16, 1939 in Montgomery at the Whitley Hotel. The seminar lasted all day with more than 140 lawyers and judges attending. These institutes were the beginning of the bar's involvement with continuing legal education for the profession and a precursor to ABICLE, the Alabama Bar Institute for Continuing Legal Education.

In 1940, Harold M. Cook of Birmingham served as secretary of the bar. In his report, "Trends In Bar Admission Requirements," Mr. Cook noted that of the then 48 states, Alabama was one of nine states which still retained the diploma privilege. He highlighted an emerging trend initiated by the states of California and Texas, both of which had recently abolished reciprocal membership with other states. He also mentioned that character and fitness reviews for bar examinees was quickly becoming a standard practice across the country. Alabama had begun requiring character and fitness reviews the previous year.

The Houston County Bar Association was organized in 1940 with the merger of the separate Dothan and Houston County organizations. J.R. Ramsey was elected as president of the newly organized association. The annual state license fee for attorneys was $25. Fifteen dollars of the state fee went to the state bar, which had a budget that year of $7,500.

Overshadowing all the activities of the state and local bars was the war in Europe and America's looming involvement. Judge Rives remarked in his annual report of the president of the state bar that year:

> In these dark days, when democracy is on trial for its life, the lawyer with his understanding of the value of our free institutions and our sacred liberties, can and should resume his historic position of leadership. More, the lawyer himself by a scrupulous

performance of his full duty in every respect can make plain to all men that *democracy does work*. (Italics in the original.)

During the war years, the pages of *The Alabama Lawyer*, not surprisingly, reflected the nation's and the profession's concern with the war effort. "Freedom of Speech and Press v. National Security," "Army-Court Martial System," and "Termination of War Contracts" were just a few of the war related articles appearing the *Lawyer*. In spite of the attention given the war effort, the profession continued to address concerns relating to the practice of law. The first comprehensive rules governing admission were adopted in 1941, and the reciprocity rule was repealed in 1944. That same year, the American Bar Association's Section of Legal Education and Admission to the Bar, which was chaired by William A. Rose of Birmingham, released its study. The study recommended apprenticeships and probationary plans as a prerequisite for admission to the bar. Lawrence F. Gerald of Clanton was elected secretary of the bar at the annual meeting the previous year.

With the conclusion of World War II in 1945, *The Alabama Lawyer* reported that a post-war planning meeting was held to focus on assisting lawyers returning from the war. Also in 1945, the category of "special member," a category that still exists today, was created. For the first time, lawyers, who because state or federal office prohibited them from practicing law, could still receive the privileges and benefits as full members of the bar. Following the war, law office management techniques were for the first time discussed as having a valuable role in the practice of law. In a 1946 article entitled, "Lawyers' Need for Better Business Understanding," Ben Leader of Birmingham wrote:

> We must now apply sound business methods to the handling of law business, to the conducting of law office and to receiving proper compensation for services rendered.

Richard T. Rives' eloquent remarks made in 1946 opposing the adoption of the "Boswell Amendment" in 1946 were reprinted in the *Lawyer*. The purpose of the constitutional amendment had been to legally disenfranchise Alabama's black voters. In response to the reprint of the Rives remarks, Circuit Judge Horace C. Wilkinson posed his not-so-subtle arguments for the amendment's passage. Sadly, the amendment was ratified, but was later found unconstitutional by the Federal District Court for the Southern District of Alabama. Alabama's first black member of the supreme court, Oscar W. Adams, was admitted to practice on September 30, 1947. The first black female lawyer, Mahala Ashley Dickerson, was admitted to practice a year later on October 9, 1948. A year after completing his term as Governor, Chauncy Sparks, who served from 1943–1947, offered several examples of how the practice of law helped during his term as Governor. In an article entitled "How Knowledge of the Law Helped Me," former Governor Sparks wrote:

> A knowledge of the law, of its making and construction can be very helpful. This does not mean

that someone other than a lawyer cannot efficiently administer government. But it did mean, for me, that a general knowledge of the law and the process of law making and construing were very helpful the four years I was Governor.

As the decade of the '40s came to a close, William Logan Martin of Birmingham authored an article entitled, "Alabama Judges Under Elective System—40% Originally Appointed By Governor—Rise and Fall of Pay of Judges." Mr. Martin reported that in addition to the 40 percent of trial judges having been first appointed to office, 57 percent of the appellate court judges had been originally appointed by the Governor. He discussed the variance of compensation for judges as well as the historical increase and decreases in judicial pay. Because of county supplements, the pay of trial judges at the time varied from $6,000 to $9,000. Concerning the county supplements, Mr. Martin observed:

> It cannot be contended that this is the best system. A circuit judge is a state official. His entire salary should be paid by the state and, it may be added, it should be adequate to keep the ablest lawyers on the bench and to invite other lawyers to join them.

It would take another 50 years with House Bill 53 becoming law this past June before the practice of county supplements and the disparity in judicial compensation would be eliminated.

In 1949, a plan of group insurance first became available for bar members. In that same year, a bar survey indicated that there were 1,490 lawyers practicing in Alabama; seven supreme court justices; three state court of appeals judges; 48 circuit judges; and four federal judges. The ten counties with the largest number of practicing lawyers were:

Birmingham	425
Mobile	147
Montgomery	115
Tuscaloosa	53
Gadsden	47
Bessemer	34
Dothan	33
Huntsville	26
Anniston	25
Decatur	24

The Committee on Public Education and Public Relations, chaired by Calvin Poole of Greenville, released its report in 1949, stating that in order to improve the public image of the profession, lawyers must be instilled with "...higher ideals and greater accomplishments in the way of service to our fellow men." That same year, *The Alabama Lawyer* documented that The Florida Bar became a mandatory bar. The Alabama State Bar had become the nation's second mandatory bar in 1923.

In the next issue I will look back on the next three decades of *The Alabama Lawyer*. ■

Endnote

1. Not to be confused with Edward Bellamy's book, *Looking Backward*.

BAR BRIEFS

Left to Right: Linda Whitaker (chair of NCWBA Public Service Award Committee), Anne Moses (president of BBA Women's Section), Martha Jane Patton (vice-president of NCWBA and board representative of BBA Women's Section), Anne Martin (NCWBA president), and Helen Kathryn Downs (president-elect for BBA Women's Section)

• The **Women's Section** of the **Birmingham Bar Association** has won the National Conference of Women's Bar Associations' 1999 Public Service Award. One of the NCWBA's objectives is to advance issues of concern to women in the profession and women in general. The NCWBA gives this annual award as part of fulfilling that charge.

The project submitted by the Women's Section for consideration for this award was the section's partnership with the YWCA. According to Anne Martin, president of the NCWBA, the Women's Section's "partnership with a non-profit group such as the YWCA to lend financial and professional support is exactly the type of project that women's bar sections and organizations have found to be successful and rewarding. The advice and support that women lawyers can provide, and the skills that we possess, are unique. The YWCA has many worthy projects that truly benefit from this assistance, and this coordination of efforts helps both organizations succeed in their work. These projects, which I understand run the gamut from providing legal advice to victims of domestic violence to collecting clothes for needy families and raising money for public service projects, is admirable."

Anne Moses, president of the Women's Section of the Birmingham Bar Association, accepted the Eleventh Annual NCWBA Public Service Award on the section's behalf at the NCWBA's annual meeting held in conjunction with the ABA Annual Meeting in Atlanta in August.

• **Mark Daniel Maloney** of Decatur was introduced to more than 17,000 Rotarians and guests attending the Rotary International convention in Singapore, Malaysia as part of the team which will determine the global service organization's policies and programs July 1, 1999 through June 30, 2001.

Mark Daniel Maloney

Maloney is one of nine new members of the Rotary International Board of Directors whose 19 members are from ten different nations. Maloney will help implement the global theme, "Rotary 2000: Act With Consistency, Credibility and Continuity." Under that theme, the world's 29,000 Rotary clubs, with their 1.2 million members in 161 countries, will be encouraged to focus their activities on projects addressing the needs of children at risk around the world.

Maloney is a member of the firm of Blackburn, Maloney & Schuppert, L.L.C.

• The National Child Support Enforcement Association recently honored Anniston attorney **Gordon F. Bailey, Jr.** at the association's annual convention in Chicago. With more than 2,100 in attendance, Bailey was presented with the President's "Child Support Community Service Award" and become only the second recipient of the recognition.

Bailey practices with the firm of Isom, Jackson & Bailey, P.C.

• Birmingham attorney **David C. Skinner** has been appointed to the Human Resources Certification Institute National Practice Analysis Task Force. HRCI is the credentialing affiliate of the Society of Human Resources Management and administers the "Professional in Human Resources" and "Senior Professional in Human Resources" certification examinations to qualified human resources professionals worldwide.

• **Elouise W. Williams**, wife of Birmingham attorney **Harold Williams**, was recently chosen president-elect of the American Lawyers' Auxiliary. ■

Elouise and Harold Williams

MEMORIALS

Judge John Percival Oliver

Whereas, Judge John Percival Oliver was a member of the Tuscaloosa County Bar Association since 1946 and departed this life on July 27, 1999; and

Whereas, be it remembered that John Percival Oliver was born in Dadeville, Alabama on October 31, 1921. He graduated from the Tallapoosa County High School and attended the University of Alabama and received a bachelor's of science in chemistry degree. He served as an officer in the United States Marine Corps, assigned to the Third Division, and was a highly decorated Marine who served in Guadalcanal, Iwo Jima and Guam, among other assignments. He remained in the USMC Reserve for over a decade after being released from service in 1946.

Whereas, upon discharge from the Marine Corps, he attended the University of Alabama and earned his LL.B. degree and opened his practice in Dadeville, Alabama. He was admitted to the Alabama State Bar in 1949. Judge Oliver was appointed district judge for Tallapoosa County in 1976 and served 14 years on the bench before retirement.

Whereas, Judge Oliver served the community through various organizations and was a faithful member of the First Methodist Church of Dadeville. He was a member of the Dadeville Kiwanis Club, serving as president and in other leadership roles. He was the Little League baseball coach for the Kiwanis team for 25 years. As a volunteer, he spent over 20 years promoting the American Red Cross and organizing blood drives, himself donating over 110 pints of rare AB negative blood.

Whereas, Judge Oliver survived two of his sons, John Percival Oliver, Jr. and Francis Weston Oliver. He is survived by his wife of 53 years, Julia Jervey (Smith) Oliver, a former Governor's cabinet member and a retired state employee (DHR); two sons, Edward Banks Oliver of Dadeville and William H. Oliver of Marbella, Spain (also a member of the Alabama State Bar); and grandchildren Allison Banks Oliver, Abigail Vaughn Oliver, Amelia Elizabeth Oliver, Jonathan Henry Oliver, Sarah Julia Oliver, and Joshua Tift Oliver.

Now, therefore, this resolution is offered as a record of our admiration and affection for Judge John Percival Oliver and in recognition of a life of service to his community, his love of his neighbor and a sense of humor that will be missed. Most importantly, he taught us the value of always doing one's best to do what is right, rather than doing what appears to be popular.

— Mark Allen Treadwell, III, president, Tallapoosa County Bar

Frank Minis Johnson, Jr.

Frank M. Johnson, Jr. was born October 30, 1918 in Winston County. He was the oldest of the seven children of Frank Minis Johnson, Sr., the only Republican legislator in Alabama during the 1940s. His father also served as probate judge of Winston County and postmaster of Haleyville. His mother, Alabama Long Johnson, a school teacher, taught him how to read and spell before he entered school. Frank Johnson grew up in Winston County.

He left Winston County to attend Gulf Coast Military Academy in Gulfport, Mississippi, where he was a star end on the football team. Upon graduation, he was admitted to Birmingham-Southern College on a football scholarship. When Birmingham-Southern dropped its football program, Johnson enrolled in Massey Business College in Birmingham.

He met his wife, Ruth Jenkins of Haleyville, when he was 15. She was two years his junior and by the time he was 19, he knew she was the love of his life. On January 16, 1938 they were married in Birmingham, and began a life-long storybook romance. U.S. Circuit Judge Lanier Anderson recently noted, "No matter what was happening at court, at 5:00 p.m. each day, Frank would stop and call Ruth—his talks with her were obviously the most important part of his day."

After Massey Business College, he attended law school at the University of Alabama, where he met and became friends with George C. Wallace. He received his LL.B from the University of Alabama in 1943, then entered World War II as a commander of an infantry platoon, which landed in Europe five days after D-Day. He was wounded twice and received the Bronze Star, leaving the Army as a captain.

After the war, Ruth and Frank moved to Walker County so that he could set up a private law practice in Jasper with Herman Maddox and Jim Jack Curtis. He also found time to be active in the Republican Party and served as campaign chairman for Eisenhower's first presidential campaign. When Eisenhower was elected, he appointed Frank Johnson as U. S. Attorney for the Northern District of Alabama, where Johnson successfully prosecuted the last slavery/peonage case in the United States.

In 1955 Judge Charles B. Kennemer, the U. S. District Judge for the Middle District of Alabama, died. President Eisenhower chose Frank Johnson to be the next U. S. District Judge for the Middle District of Alabama. At the age of 37, he became the youngest federal judge in the country.

One of his first important decisions, as part of a three-judge panel with Richard Rives and Seybourne Lynne,

was *Browder v. Gayle*, where segregation on the Montgomery buses was ruled unconstitutional, thereby effectively overruling *Plessey v. Ferguson*. The decision caused a firestorm in Alabama. A press editorial said that the judges had "forfeited their right to be buried on Southern soil." A state senator from Macon County said he hoped "the white people of Alabama never forget the names of Rives and Johnson [and] this great wrong they have done to the good people of this state." Thereafter, a bomb exploded at his mother's home, in Montgomery.

Judge Johnson went on to desegregate the Alabama public school system, the Alabama State Troopers, the Alabama Department of Transportation, the Alabama Civil Service, Alabama colleges and universities, the Montgomery public libraries, swimming pools, the Montgomery YMCA, and a host of other public entities. His rulings were truly color-blind, for he also found that the predominately black Alabama A&M University had discriminated against whites. He permitted the Selma-to-Montgomery March and also issued landmark decisions concerning voting rights and the constitutional rights of prisoners and the mentally impaired. Judge Johnson was fond of a quote from Abraham Lincoln, where Lincoln said:

> "I've done what I consider to be right, and I intend to keep doing so until the end. If the end brings me out all right, what's said against me will amount to nothing. If the end brings me out wrong, ten angels swearing I was right would make no difference."

The end did prove Judge Johnson right. Alabama recognized his contributions to the state when he was inducted into the Alabama Academy of Honor. Over 20 academic institutions, including Princeton and Yale, and his alma mater, the University of Alabama, awarded him honorary degrees. Perhaps the biggest honor came in 1995, when Congressman John Lewis, who was severely beaten when a student in Montgomery during the Freedom Rides, sponsored a bill to name the federal courthouse in Montgomery after Judge Johnson. Howell Heflin shepherded the bill through the Senate. As a lasting tribute to his legacy, the United States Courthouse in Montgomery, where so many of the landmark civil rights decisions were made, is now called the Frank M. Johnson, Jr. Courthouse and Federal Building.

Judge Johnson is survived by his beloved wife, Ruth, a brother Jimmy, and two sisters, Mary Ann and Ellen Ruth, plus a host of nieces, nephews, grand-nephews, and nieces, of which, I am proud to be one.

— Lauren Johnson Whiteside, Birmingham

Judge James Howard Caldwell

Judge James Howard Caldwell, 76, of Phenix City died Sunday, May 4, 1997 at Phenix Regional Hospital, Phenix City.

Mr. Caldwell was born July 21, 1920 in Birmingham, the son of the late Otis J. and Shirley Ayers Caldwell. He was a veteran of World War II, having served as a Navy carrier pilot in the South Pacific for two tours. During his military career serving aboard the *USS Saratoga, USS Yorktown* and *USS Lexington,* he received the Distinguished Flying Cross and six Air Medals. He graduated from the University of Alabama (B.S. 1947; LL.B 1947). He was appointed district attorney in 1955 during the Phenix City "Cleanup Campaign" and a circuit judge for the 26th Judicial Circuit from 1960 to 1978. He was known as an excellent trial judge. Since 1986 he had been a partner in the Johnson, Caldwell & McCoy firm. He was a 50-year member of the First Baptist Church of Phenix City and taught the senior men's Sunday School class. He was also a member of the Chambers County Bar Association, Alabama State Bar, Sigma Nu fraternity, Phenix City Moose and the Phenix City VFW. Judge Caldwell was also a charter member and the first president of the Phenix City Rotary Club.

Survivors include his wife, Peggy Roper Caldwell of Phenix City; two daughters, Carol Lee Caldwell, Alpharetta, Georgia and Mary Katherine Caldwell, Phenix City; son James Kirk Caldwell, Martinez, Georgia; stepson, Philip R. Blu, Phenix City; sister-in-law, Juanita Caldwell, Birmingham; grandson, Austin Bryant Caldwell, Martinez, Georgia; and several nieces, nephews and cousins.

— Homer W. Cornett, Phenix City

Douglas Schelling Webb

Whereas, Douglas Webb was born on November 25, 1921 in Atmore, at the home of his parents, Dr. A.P. Webb and Ida Stewart Webb, attended by his father. He was the seventh son in a row, and there is a saying that, "The seventh son will be a wise man or a fool." We know that there is some basis for this saying as Douglas was a very wise man, with a very keen intellect, and;

Whereas, he attended Atmore Grammar School in May 1940, immediately afterward enlisting in the Signal Corps as a "buck" private. He remained in the service for five years and was honorably discharged as a captain in the U.S. Air Force. After being discharged from the service, he attended the University of Alabama where he received a B.S. degree and later, in 1951, an LL.B from the University of Alabama School of Law. He entered private practice in Atmore with Frank G. Horne, and they were later joined by Robert Tucker, forming the firm of Horne, Webb &

Tucker, and;

Whereas, Douglas Webb had a distinguished career in the Alabama Senate serving from 1959 until 1962, representing Baldwin, Monroe and Escambia counties. Many of his colleagues sought his advice and direction to the various proposals and bills that came before the Legislature. He always remembered his constituency back home and was always more than willing to spend time with anyone discussing the problems faced by the state and counties he represented, and;

Whereas, although he had a distinguished career as a practicing lawyer and as a senator, we remember him best as "Judge Webb." Judge Webb served as the Circuit Judge of the 21st Judicial Circuit, then including Monroe, Conecuh and Escambia counties, from 1964 until his retirement in 1986. He was a warm and true gentleman to his colleagues at the bar and always adhered to the highest ethical and intellectual standards. Mere words are not sufficient to define or explain Douglas as a circuit judge, however, it can certainly be stated that he was dedicated, compassionate, fair, just, reliable, a lawyer's judge. He also had a great sense of humor, and;

Whereas, Douglas Webb was an active member in the Atmore First Methodist Church, serving on its board. He was a man of strong character with an unparalleled reputation for honesty and integrity. He was a quiet, but forceful leader, a wise counselor, a kindly man, and a very dear friend. Because his love for his God, his family and his fellow man was so evident, he was loved, admired and respected by all who knew him. We know of no greater words of commendation that to say that Douglas Webb always conducted himself in such a manner as to bring and glory to God and His Kingdom. He lived an honorable life every day of his life, and;

Whereas, although this was not evident to everyone, Judge Webb had a great love of music. He played the piano and spent many hours his last few years listening to tapes of his favorite musicians. It was Douglas Webb's privilege to make for himself a fortunate life and to be given the satisfaction of knowing that the ample fruits of his labors were to remain for the enrichment of his family, community and state, and;

Whereas, Judge Webb departed this life on June 16, 1999 and left surviving him his wife of 57 years, Jean Jones Webb, and four children, Ricky Webb, Letha W. Stuckey, Jean W. Therkelsen and Pellar Webb, and;

Whereas, the members of the Escambia County Bar Association express their great appreciation of these qualities and this service and to adopt this resolution as a testimony to the memory of one we could ill afford to lose.

— Reo Kirkland, president
Escambia County Bar Association

G. Sage Lyons

Whereas, G. Sage Lyons, a long-standing and highly respected member of the Mobile Bar Association, died on March 5, 1999 at the young age of 62 after a courageous battle with a deadly disease; and

Whereas, this association desires to memorialize his accomplishments as a proficient practitioner of his profession and a gifted politician, who always followed the highest standard of his profession and put public service over politics and political parties;

Now, therefore, be it known that G. Sage Lyons graduated from the University Military School in Mobile in 1954 and Washington and Lee University in 1958 and earned a law degree from the University of Alabama in 1960. He served as an officer in the U.S. Army, JAG Corps from 1960-62 with his principal service as Chief Military Justice, U.S. Army Infantry Center in Fort Benning, Georgia. He began his legal career in 1962 at the firm of Lyons, Pipes & Cook, but quickly turned down the familiar voice that lured many sharp men with a taste for politics to Montgomery. Sage was elected to the House of Representatives in 1969 at the age of 32 and went on to become Speaker of the House after only two years—the youngest representative, at age 34, ever to take the post.

Sage was one of Alabama's exceptional public servants. He served his city, county and state in numerous positions throughout his career. He chaired the Alabama Commission on Higher Education from 1971 to 1978, and as a State Representative from 1969 to 1975 he helped secure funding to establish the University of South Alabama School of Medicine, now a prominent feature of the University. He was also a director of the First National Bank of Mobile from 1973 to 1985 and served on the executive committee of the Alabama Petroleum Council. He served four years as Speaker of the House from, 1971 to 1975, and left office in 1975 when his term expired, without seeking re-election.

Sage continued his law practice in Mobile at Lyons, Pipes & Cook from 1975 to 1993, but for an 18-month interval, when he was the counselor for the Alabama State Docks. Sage was active in both the Alabama State Bar and the Mobile County Bar Association, having served as its president in 1984. He was admitted to practice before the United States Supreme Court, Fifth and Eleventh Circuit courts of appeal, all three U.S.

District courts in Alabama, the Supreme Court of Alabama, U.S. Tax Court, U.S. Court of International Trade, and the U.S. Court of Military Appeals. He was a member of the Maritime Law Association of the United States, the Council of the Alabama Law Institute and a Fellow of the American Bar Foundation.

Sage was also president of the Coastal Land Trust, president and director of Providence Hospital Foundation, former director and past president of the Mobile Area Chamber of Commerce, a member of the Advisory Board of Bishop State Junior College, director and past president of the Mobile County Wildlife and Conservation Association, and former trustee of U.M.S.-Wright Preparatory School. He was a member of "Who's Who in American Law" and "Best Lawyers in Corporate America," and he was a member of St. Paul's Episcopal Church, having served on their vestry.

In 1996, Sage resigned from Lyons, Pipes & Cook, and the State of Alabama again called him to public service. Governor Fob James tapped him to fill the key office of director of finance in which he served until 1997. Governor Siegelman recently issued a statement that, "Sage Lyons was a man who commanded respect and a man who made significant contributions to Alabama throughout his lifetime,...[and] I am proud to have had his support and help throughout my political career, and, most of all, I am proud to have been his friend."

Sage was an avid sportsman and conservationist. He loved golf, fishing and especially spring turkey hunting.

Sage is survived by his wife, the former Elsie E. Crain; his two children, George Sage Lyons, Jr. and Amelia Lyons; and his three grandchildren, Sage Lyons, III, Lee Lyons and Crain Rogers. Sage is also survived by a sister, Dr. Ruth Lyons Shields, and three brothers, Mark Lyons, III, William Hunter Lyons and James Kelly Lyons.

— Fred W. Killion, Jr., president
Mobile Bar Association

John Bertolotti

John Bertolotti passed on to his greater reward on January 10, 1999 leaving behind with our members both admiration and remorse over his untimely demise; and

Whereas, John graduated with honors from McGill High School in 1969, winning both individual and team awards in debate and oratory, capturing the state debate championship with his teammate, Bob Galloway, and serving as president of the national, regional and local Debate Honor societies; and

Whereas, John attended the University of Alabama on a debate scholarship, graduated with honors from the University and, thereafter, the University of Alabama School of Law in 1978, and served on the editorial staff of the *Law & Psychology Law Review*, contributing various articles to that publication, including "Response to *Lynch v. Bailey*, An Evaluation," and was inducted as a member of Omega Delta Kappa Honor Society; and

Whereas, John was voted an outstanding orator in the Tennessee Regional Moot Court competition and served as captain of the Alabama Law School Moot Court Team; and

Whereas, John gave freely of his time and talents to the Downtown Mobile Business Association; and

Whereas, John was a respected member in good standing of the American, Alabama State and Mobile Bar associations; and

Whereas, John will long be remembered as a storyteller extraordinaire, and an attorney of great wit, intellect, professionalism and civility; and

Whereas, John devoted the vast majority of his shortened legal career unselfishly giving of himself with little or no remuneration to defending many hundreds of indigent criminal defendants both at the trial and appellate levels; and

Now, therefore, be it resolved by the Mobile Bar Association, in its meeting assembled this day, that the members of this association deeply mourn the death of John Bertolotti, whose exemplary life and service to others has been an inspiration to all of us who knew him; and whose diverse talents and warm friendship and understanding have enriched the lives of all the members of this association who have been privileged to know him; and whose unfortunately abbreviated career has done honor to his chosen profession.

— Fred W. Killion Jr., president
Mobile Bar Association

Bonnerrae Hastings Roberts

Whereas, Bonnerrae Hastings Roberts, a highly respected member of the Mobile Bar Association, departed this life on October 11, 1998, and

Whereas, this association desires to memorialize his accomplishments as a proficient practitioner of his profession and his beneficent influence on those who knew him;

Now, therefore, be it known that Bonnerrae Hastings Roberts was born in 1913 in the Semmes community of Mobile County. He was a graduate of Murphy High School, Springhill College and the University of Alabama School of Law and was admitted to the Alabama State Bar in 1946. He began his legal career employed by the United States Corps of Engineers in Albuquerque, New Mexico, but, after a year, he returned to Mobile to open a private practice. In 1948 he was associated with the firm which became known as Pillans, Reams, Tappan, Wood & Roberts, and remained with that firm through its various name changes until his retirement in 1980.

Bonnerrae was well versed in real property law. He was known for his competent representation of the Mobile County School Board in its frequent real estate acquisitions. He also was skilled in oil and gas law and in writing drilling opinions and distribution orders. He frequented the recording offices of the probate courts of southwest Alabama, reading the recorded documents and dictating abstracts thereof to his secretary.

Handicapped from childhood, Bonnerae was forced to walk slowly and painfully with the use of a cane, yet he never complained and greeted everyone with a jovial expression and pleasant salutation. He was of the Baptist faith and was a loyal and supportive member of his church.

Preceded in death by his wife, Lois Evans Roberts, he is survived by their two children, Shirley R. Short of Mobile, his son, Robert R. Roberts, a CPA, of Selma, eight grandchildren and one great-grandchild.

— Fred W. Killion, Jr., president
Mobile Bar Association

Byron H. Hess, III

Whereas, Byron H. Hess, III, better known to us as Barry, died on April 21, 1999 at the young age of 60, after a long battle with cancer; and

Whereas, the Mobile Bar Association desires to memorialize his accomplishments as a highly skilled, compassionate and proficient lawyer who epitomized all of the highest qualities of our profession and always put his client, and the cause of his client, first and foremost while ever maintaining a respectful attitude toward the judges and lawyers with whom he practiced his profession in which he will be deeply missed and long remembered with both love and respect; and

Now, therefore, be it known that Barry Hess was born in Mobile on May 10, 1938. He graduated from McGill Institute in 1956, after having been judged and awarded debate honors in both statewide and regional competition in which he performed splendidly in the area of impromptu oratory. He was awarded a scholarship and attended Springhill College. He then went on to the University of Alabama School of Law where he received law review honors and his J.D. in 1962. From the very beginning as he began his practice in Mobile, he quickly earned the reputation of always preparing himself for any case that was in litigation. His practice was general, but most of his effort and skill were devoted to defending individuals in both state and federal criminal proceedings in the Mobile area and in this region of the country.

Barry always loved, as he called it, the flora and the fauna and helped organize an orchid society and grew orchids for many years. He became interested in the breeding, racing and sale of quarter horses and participated in this avocation for a number of years. He loved the water and sailed several different vessels during most of his adult life until his later years.

He excelled in his profession and, as a result, served as city attorney for the City of Mobile and as a special assistant to the Attorney General of Alabama for many years. He was active in continuing legal education, speaking at seminars, and had published legal writings in *The Alabama Lawyer* and other periodicals. He was a member of the Mobile Bar Association, Alabama State Bar and the American Bar Association. He also was a member of the Alabama Criminal Defense Lawyers Association, serving as an officer. He belonged to the Alabama Trial Lawyers Association and the Association of Trial Lawyers of America. He devoted a great deal of time to the American Board of Criminal Lawyers, serving on the board and attending meetings all over the United States. He also was active in the National Association of Criminal Defense Lawyers and was instrumental in persuading many lawyers in this area to join and participate in that organization. Barry was a founding member of the Paul W. Brock Chapter of the American Inns of Court.

Barry's name can be found in the various publications in his profession, including "Best Lawyers in America" and he had an AV rating in Martindale-Hubbell. For many years he shared his vast knowledge and understanding of all aspects of the law with the public by conducting, on a weekly basis, a law show known as "Law Line" and many of our local judges and lawyers were invited to participate in this television call-in, live presentation.

Barry Hess is survived by his wife, Tress; his daughter, Sonya Van Cleave, of Dundee, Mississippi; his son, Byron Hess, IV, of Hueytown; three stepchildren, Forrest Floyd of Magnolia Springs, John Peter Floyd of Mobile and Mary McCurdy of Foley; four brothers; four sisters; and three grandchildren.

— Fred W. Killion Jr., president
Mobile County Bar Association

A Tribute to Lee C. Bradley, Jr.

(1897-1999)

"When an old man dies, a library burns down."

In the case of Lee C. Bradley, Jr., the archives of the library envisioned by this African proverb were voluminous and substantial. Born in 1897, Mr. Bradley (as all of us called him) was an astounding resource of information: about his long-time home, Birmingham, about Alabama and the South, and about his profession. He had personally seen Birmingham rise from a small steel town, with its dirt roads and railroads, to take its place as the largest city in Alabama. He had witnessed his state and the South go through tremendous economic and social change. And, he had watched his beloved legal profession grow in complexity and adapt to incredible changes in technology. Through it all, Mr. Bradley contributed his intellect and energy to improving his home and his profession, while maintaining the highest standards of ethics and civility.

A recitation of Mr. Bradley's credentials is indeed impressive, but only touches the surface of the life of a man that spanned over 101 years. In fact, Mr. Bradley had confided to his family that he hoped to live to the year 2000, because that would mean he had lived in three different centuries: he came ever so close to fulfilling that dream. That is one of the few failures experienced by this remarkable man who excelled in college at Princeton and law school at Harvard, before returning in 1921 to Birmingham to practice in his father's law firm, then known as Tillman, Bradley & Morrow. With his photographic memory, mastery of the tax code, work ethic, and attention to the smallest detail, he quickly established himself as one of the preeminent tax and corporate attorneys in Alabama. Perhaps the greatest compliment to be paid to Mr. Bradley as a lawyer is to note that he was so well respected for his legal abilities, lawyers from other firms would send their clients to him for tax advice. In turn, when he had concluded his tax work for that client, Mr. Bradley sent them back to their attorney for any other legal matters that needed handling. He defined professionalism.

Mr. Bradley, on the occasion of his 100th birthday, seated under a portrait of himself painted in 1940

It would be impossible even to outline the many accomplishments in his stellar career, which would necessarily include how he developed an ingenious legal plan to save Birmingham Trust National Bank following the crash of 1929, how he worked with Mrs. Oscar Wells in drafting her will to provide the funds used to establish the Birmingham Museum of Art, and how he would dictate—in one sitting and in final form—complex, detailed documents and briefs completely from memory, long before the days of tape recorders and computers. Moreover, he was instrumental in building the law firm that now bears his name first. In addition to his own consummate legal skills, Mr. Bradley was a mentor for a number of young lawyers who, under his tutelage, developed into excellent lawyers in their own right. He was never too busy to help a lawyer, young or old, who came to him for advice.

That advice could come in a myriad of forms. For instance, my partner, John J. Coleman, tells of the time as a young lawyer when he accompanied Mr. Bradley to a conference with an Internal Revenue Service agent in an attempt to resolve a dispute regarding a client's tax problem. During the negotiations, when neither party had budged, a silence ensued. After a minute or so, John decided he needed to break the stalemate and help Mr. Bradley out with a few cogent remarks. Just as he opened his mouth to speak, John felt a sharp pain on his left shin, and realized immediately the source had been a swift kick under the table from Mr. Bradley. John wisely decided to say nothing. After a few more minutes, the agent made an important concession, and soon thereafter the matter was resolved satisfactorily. On the way back to the office, Mr. Bradley explained to the now-limping young lawyer, "John, you need to understand that silence is one of the most important techniques in negotiations." John never forgot that lesson.

Mr. Bradley also realized the importance of family, and this was attested to by the obvious affection he had for his three children, seven grandchildren, and five great-grandchildren, as well as for his wife who preceded him in death. He also thought of his firm as part of his family, and we regarded him for

many years as our patriarch, long after he had officially retired from the active practice of law. Furthermore, he was active in the community where he was a member of the Redstone and Rotary clubs, and served on the boards of Birmingham Trust National Bank and Avondale Mills. He gave of his time and money to numerous civic and charitable organizations, often without seeking any public recognition for his generosity.

Mr. Bradley continued to go snow skiing and horseback riding well into his 80s, and he came to the office every day until he was in his late 90s. One could hear Mr. Bradley dictating letters to the editor of a newspaper about some political issue in which he was interested, or to various state officials about public education and teaching methods, subjects about which he was passionately concerned. Even at this stage in his life, he maintained a keen interest in his firm and its lawyers. Moreover, every now and then a senior partner would come by and shut the door, a sure sign that the firm was faced with an important issue about which Mr. Bradley's sage advice was being solicited. His son, Dr. Merrill Bradley, once asked his father why he continued to go to the office each day, since he no longer practiced law, to which Mr. Bradley replied, "They need to know someone is watching them." And we did!

A rare photo of Mr. Bradley in "casual" attire, also taken in his home on his 100th birthday

The passing of this prodigious human library truly marks the end of an era. Our bar, indeed our state, will miss the likes of Lee C. Bradley, Jr.–his wisdom, his love for the law, his interest in political issues, and his civility. Whether you knew him or not, we are all his beneficiaries, for he left us an enduring legacy of devotion and service to family, profession and community.

— Norman Jetmundsen, Jr., Birmingham

Bolton, Arthur P., III
Flourtown, PA
Admitted: 1974
Died: July 20, 1999

Howard, Don Alan
Huntsville
Admitted: 1979
Died: May 29, 1999

Johnson, Judge Frank M., Jr.
Montgomery
Admitted: 1943
Died: July 23, 1999

LeCroy, Alton C.
Birmingham
Admitted: 1932
Died: July 30, 1999

Poll, Michael Alan
Birmingham
Admitted: 1994
Died: July 23, 1999

Tate, Ralph Bryant
Birmingham
Admitted: 1936
Died: May 27, 1999

Tatum, James Thomas, Jr.
Huntsville
Admitted: 1962
Died: September 8, 1999

Justice McKinley Honored

By William E. Smith, Jr.

On May 4, 1999, a dedication ceremony was held to rename the United States Post Office and Courthouse in Florence, Alabama to the Justice John McKinley Federal Building. A crowd of over 200 people attended the event to honor one of Alabama's most under-appreciated and overlooked political figures. Throughout his life, Justice McKinley contributed in many capacities. He was one of the founders of Florence and served in the Alabama State Legislature. McKinley represented Alabama in both the United States Senate and the United States House of Representatives prior to becoming a United States Supreme Court Justice.

Birmingham attorney and former American Bar Association president Lee Cooper was the keynote speaker at the ceremony. The event included speakers from various branches of government reflecting McKinley's public service. Some of the speakers were U.S. District Court Judge Inge Johnson, University of North Alabama President Robert Potts, Florence Mayor Eddie Frost, and Alabama State Bar Executive Director Keith Norman.

The effort to honor Justice McKinley was initiated in 1996 by William E. Smith, Jr., the McKinley Young Lawyers and the Lauderdale County Bar Association. It came to fruition on October 27, 1998 when President Bill Clinton signed Public Law 105-299. Lee Cooper called the action "long overdue when you consider just a few of the achievements of Justice McKinley." Prior to the movement, the only recognition of McKinley in Florence was an isolated historical marker where his home once stood. Judge Inge Johnson noted this tribute is "not only to Justice McKinley but to all judges."

John McKinley was born in Culpepper County, Virginia in 1780. At an early age, his father died and his family moved to Kentucky. In 1800, McKinley began the practice of law in Louisville and Frankfort, Kentucky. John McKinley and other Kentuckians moved to Huntsville, Alabama in 1818. He was one of the early settlers of Huntsville. While a resident of Huntsville, he lived in the house known today as the Howard Weeden Home. It is listed on the National Register and located in Huntsville's Twickenham Historic District.

Photo by Roberta S. McKinney

Left to right—William Smith (speaking), Robert Potts, Keith Norman, representative for Congressman Cramer, Lee Cooper, Judge Inge Johnson, Gloria Tyson, Dan Gursky

Photo by Roberta S. McKinney

Justice McKinley

In 1818, McKinley, along with members of the Alabama Land Company and the Tennessee Land Company, formed the Cypress Land Company. This company was created to buy land from the federal government and develop the new town of Florence, Alabama. As one of the acting trustees of the Cypress Land Company, he is considered one of the founders of Florence, and he oversaw much of the town's early development. McKinley served on the original board of trustees of Florence's First Presbyterian Church and is credited with starting one of the area's first schools.

In 1838, while a resident of Florence, John McKinley was appointed the 23rd Associate Justice of the United States Supreme Court by President Martin Van Buren. Upon installation, he became the first justice to serve on the newly-created Ninth Circuit and much of his tenure was devoted to his "circuit riding duties." In just one year, McKinley was reported to have traveled over 10,000 miles.

Justice McKinley's contribution to constitutional legal theory include his opinions in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841) and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). He was on the court when the decision in *United States v. The Libellants and Claimants of the Schooner Amistad*, 15 Peters 518 (1841) was issued. This case served as the basis for Steven Spielberg's epic movie "La Amistad."

Traveling requirements, age and stress took a toll on McKinley's health. In 1842, he moved to Louisville, Kentucky to reduce his traveling requirements.

Photo by Roberta S. McKinney

Lee Cooper and William Smith with plaque honoring Justice McKinley

McKinley continued serving on the Supreme Court until his death in 1852. He is buried in Louisville's Cave Hill Cemetery.

Prior to ascending to the high court, McKinley made a substantial impact on the state's history. He represented North Alabama in the Alabama State Legislature. Justice McKinley represented Alabama in Congress as both a United States Senator and a member of the United States House of Representatives. In Congress, he was a leading advocate of public land sales and introduced legislation which many consider to be the forerunner of the Tennessee Valley Authority.

History regards McKinley as one of the leading benefactors of public education in Alabama. As an original member of the Board of Trustees of the University of Alabama, he helped design, plan and develop the University. In addition, McKinley donated the property for the educational institution known today as Athens State University.

Throughout his life, McKinley developed many contacts and friendships. In Kentucky, he performed legal work for Henry Clay. They became friends and McKinley supported him in the Presidential election of 1824. In Florence, he developed friendships with John Coffee, James Jackson and Andrew Jackson. While a member of the U.S. House, he developed a close friendship with then-Speaker of the House and Columbia, Tennessee native James K. Polk. It was Polk who advocated McKinley's appointment to the Supreme Court. President Van Buren, who appointed McKinley, may have felt some obligation to McKinley after he helped ensure Van Buren's 1838 Presidential election. On the Court, McKinley and Chief Justice Roger Taney shared a boarding room in Washington, D.C. while the Court was in session.

Justice McKinley is one of three Alabamians to serve on the United States Supreme Court. John Archibald Campbell filled the vacancy on the Court created by the death of Justice McKinley, and the federal courthouse in Mobile is named in his honor. The Hugo Black Federal Courthouse in Birmingham is named after the third Alabamian to serve on the U.S. Supreme Court.

The Lauderdale County Bar Association plans to have an Alabama Legal Milestone Marker erected in front of the McKinley Federal Building. A plaque, marker and portrait of Justice McKinley will be displayed inside the building. ■

William E. Smith, Jr.

William E. Smith, Jr. is a native of Florence and former president of the McKinley Young Lawyers. He received both his bachelor's of arts degree and master's of business administration from the University of North Alabama and his Juris Doctorate from Cumberland School of Law. Smith practices in Florence and is preparing a law review article on Justice McKinley.

About Members, Among Firms

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish address changes for firms or individual practices. *It will continue* to publish announcements of the formation of new firms or the opening of solo practices, as well as the addition of new associates or partners. Please continue to send in address changes to the membership department of the Alabama State Bar.

About Members

Norman Bradley, Jr. announces the formation of his solo practice at 207 Eustis Avenue, Huntsville, 35801. Phone (256) 536-2292.

Captain C. Brandon Halstead, Jr. announces his transfer from the U.S. Coast Guard to the U.S. Air Force JAG Corps. He will be stationed at RAF Lakenheath, England, and can be reached via e-mail at *juliehalstead@hotmail.com.*

Among Firms

James & James announces that **Christopher Michael Sledge** has become an associate. Offices continue to be located at 104 N. Cotton Street, Andalusia, 36420. Phone (334) 222-1051. E-mail: *jandj@alaweb.com.*

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. announces that **S. Andrew Scharfenberg** has joined the firm as an associate. Offices are located in Alabama, Georgia, South Carolina, Illinois, Texas, Tennessee, North Carolina, and Washington, D.C.

Dominick, Fletcher, Yeilding, Wood & Lloyd, P.A. announces that **Douglas L. McWhorter, Anne R. Moses** and **Denise J. Pomeroy** have joined the firm. Offices are located at 2121 Highland Avenue, South, Birmingham, 35205. Phone (205) 939-0033.

Hand Arendall announces that **Heather H. Crumpton** has joined the firm. Offices are located at 3000 AmSouth Bank Building, 107 Saint Francis Street, Mobile, 36602. Phone (334) 432-5511.

Starnes & Atchison, L.L.P. announces the opening of its Mobile office and that **Chris N. Galanos** has joined the firm as a partner. Offices are located at Riverview Plaza, Suite 1106, 63 S. Royal Street, Mobile, 36602. Phone (334) 433-6049.

B. Boozer Downs, Jr. and **Lonette Lamb Berg** announce the formation of **Downs & Berg, L.L.P.** and that **Elizabeth Patterson Wallace** has become associated with the firm. Offices are located at 27447 Highway 5, Woodstock, 35188. Phone (205) 938-2024.

W. Kirk Davenport announces the formation of **Law Offices of W. Kirk Davenport, P.C.** and that **Ted G. Meadows** has joined the firm. Offices are located at 3829 Lorna Road, Suite 302, Birmingham, 35244. Phone (205) 988-4038.

Burgess & Hale, L.L.C. and **Lamar, Miller & Norris, P.C.** announce the merger of their firms into **Lamar, Burgess, Hale, Miller, Norris & Feldman, P.C.** Offices are located at 300 Financial Center, 505 N. 20th Street, Birmingham, 35203. Phone (205) 326-0000.

Smith & Ely, L.L.P. announces that **Susan Rogers** has joined the firm as a

partner and that **Susan C. Haygood** and **J. Toby Dykes** have joined the firm as associates. **Lisa B. Singer** and **Kelly Pirnie Lamberth** have become *of counsel* to the firm. Offices are located at 2000A SouthBridge Parkway, Suite 405, Birmingham, 35209. Phone (205) 802-2214.

Balch & Bingham, L.L.P. announces that **Charles B. Paterson** has joined the firm's partnership. Offices are located in Birmingham, Huntsville, Montgomery and Washington, D.C.

Jim L. DeBardelaben and **Dorothy Norwood** announce that **Milton J. Westry** has joined the firm, which will now be known as **DeBardelaben, Norwood & Westry, P.C.** Offices are located at 1505 Madison Avenue, Montgomery, 36107. Phone (334) 265-9306.

Robert J. Veal and **Kenneth M. Bush** announce the formation of **Veal & Bush, LLC** and that **N. Alexander Nolte** and **Robert M. Jackson** have joined the firm as associates. Offices are located at 200 Cahaba Park Circle, Suite 125, Birmingham, 35242. Phone (205) 991-0082.

Clark, Scott & Sullivan, P.C. announces that **Margaret Deakle** and **David Bright** have joined the firm as associates. Offices are located on the 10th Floor, Regions Bank Building, Mobile, 36602. Phone (334) 433-1348.

Wilkins, Bankester, Biles & Wynne announces that **Kenneth R. Raines** has become a member of the partnership. Offices are located in Bay Minette, Fairhope and Robertsdale.

Pettus & Smith announces that **Mary Frank-Brown** has become a partner of the firm and the firm name is now **Pettus, Smith, Brown & Associates, L.L.C.** Offices are located at 217 S. Court Street, Suite 206, Montgomery, 36104. Phone (334) 264-8484.

Langston, Frazer, Sweet & Freese, P.A. announces that **James S. Robinson** has joined the firm as an associate. Offices are located at 2900 Highway 280, Suite 240, Morgan Keegan Center, Birmingham, 35223, and in Jackson, Mississippi. Phone (205) 871-4144.

Stone, Granade & Crosby, P.C. announces that **T. Deven Moore** has become a member of the firm and that **James E. Gentry** and **Jonathan B. Head** have become associates. Offices are located in Bay Minette, Daphne and Foley.

Walker, Hill, Adams, Umbach, Meadows & Walton announces that **Patrick C. Davidson** has joined the firm. Offices are located at 205 S. 9th Street, Opelika. Phone (334) 745-6466.

Watson Jimmerson, P.C. announces that **M. Clay Martin** has become a partner. Offices are located at AmSouth Center, 200 Clinton Avenue, West, Suite 800, Huntsville, 35801. Phone (256) 536-7423.

Thomas & Crumley, L.L.C. announces that **Benjamin L. Boyanton** has joined the firm as an associate. Offices are located at 301 Franklin Street, Southeast, Huntsville, 35801. Phone (256) 551-0103.

Davidson, Wiggins, Jones & Coleman, P.C. announces that **Roman Ashley Shaul** has joined the firm as an associate. Offices are located at 2625 8th Street, Tuscaloosa, 35401.

W.O. Kirk, Jr. announces that **Timothy B. McCool** has joined the firm of **Curry & Kirk** and a new partnership has been formed under the name of **Kirk & McCool**. Offices are located at 100 Phoenix Avenue, Carrollton. Phone (205) 367-8125.

Rogers, Young & Willstein, L.L.C. announces that **William H. Jackson** and **Joseph E. Whittington** have become members of the firm. The firm's new name will be **Rogers, Young, Willstein, Jackson & Whittington, L.L.C.** Offices are located at 1304 Quintard Avenue, Anniston, 36201. Phone (256) 235-2240.

Ables, Baxter, Parker & Hall, P.C. announces that **Jonathan W. Pippin** has become an associate. Offices are located at 315 Franklin Street, Huntsville, 35801. Phone (256) 533-3740. ■

BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

France

In the spring of 1999 my family and I took a vacation that included several days in Spain and France. Pictures of courthouses we visited in Spain were featured in the July 1999 issue of *The Alabama Lawyer*. We also saw several law-related facilities in France. Because the French flag was one of the "Six Flags over Alabama," it is appropriate to consider Alabama's French heritage.

Alabama's first permanent settlement was French. The LeMoyne brothers, Pierre, known as Iberville, and Jean Baptiste, known as Bienville, established Fort Louis de la Mobile in 1702 on the west bank of the Mobile River, approximately 27 miles north of the river's mouth. In 1711, this fort, named for Louis XIV of France, was moved to the present location of Mobile. Early Alabama remained under French control until the Treaty of Paris in 1763 ceded the territory to the English.

While in France, we toured the historic wine country and saw "bastides" or fortified towns that dated back to the 1100s. In this area we saw the courthouse at Bergerac, the home of French author and soldier, Cyrano, who was known for his skill in sword fighting as well as for his long nose. The courthouse was located on a public square.

In Paris, we visited the Palais de Justice located on the Ile de la Cite, an island in the middle of the Seine River, near Notre Dame Cathedral. This building was constructed around the Sainte-Chapelle Church which was built in the 13th Century. There is also evidence of the French Revolutionary Period in this building. The three portals of one entrance-way are crowned by the words: "Liberte," "Egalite," and "Fraternite." ■

Courthouse at Bergerac, France

Entrance to Palais de Justice - Paris, France

Main facade of Palais de Justice

Opposite entrance of Palais de Justice. Note Sainte-Chapelle Church to the left.

Working entrance to Palais de Justice

Visitors from Alabama

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 served as the bar commissioner for the 10th Circuit, place number four, and as a member of *The Alabama Lawyer* Editorial Board. He is a retired colonel in the United States Army Reserve JAG Corps.

The regular feature "Building Alabama's Courthouses" will continue in the next issue of *The Alabama Lawyer*.

Do Something Different

By Jeanne Marie Leslie, director
Alabama Lawyer Assistance Program

As the holiday season approaches, it may be wise to remember there have been books written, workshops given and many articles published about the increased stress, anxiety and depression associated with this time a year. It is real.

Leslie

Lawyers are already more susceptible to depression and stress, and are at greater risk for seeking relief in alcohol/drugs, than most other professions. At a time when alcohol is abundant, and stress factors are high, keep in mind many this holiday season will attempt to drink away their worries, stuff their loneliness down with another helping of cake, "max out" their credit cards to increase their feelings of worthiness, set family expectations beyond the limit, and be left feeling hung-over, fat, broke and alone with all the "would of's," "could of's," and "should of's" dancing in their heads. Does this sound familiar?

Individuals who find themselves in this unique position are usually puzzled and confused about what happened. They know it wasn't supposed to turn out this way, so they find themselves declaring, yet again, with all the earnestness and determination they can muster, "Next year will be different."

The definition for insanity, I've been told, is continuing to do the same things over and over and expecting the results to be different.

If you would like for things to be different this year just follow a few simple suggestions.

- Set realistic expectations. Expecting people to be different from the way they are is only inviting disappointment.
- Seek out the support of *healthy* family and friends. Make sure you ask people who are capable of giving it. Or guess what? You won't get it.
- Limit your alcohol intake. Alcohol is a depressant and, contrary to what you think it does for you, it will make you feel depressed.
- If you have never been invited to that spectacular Christmas party on the hill, with the "who's who", don't expect to go this year either.
- Spend precious time with your children; their Christmases as children are few.
- Say "thank you" more, and mean it.
- Don't dwell on what this holiday season could be or should be; celebrate what it is.
- Get proper rest and nutrition. Take a break and a bath, and have a banana.

Take a break and a bath, and have a banana.

On behalf of the Lawyers Helping Lawyers Committee, and the Alabama Lawyers Assistance Program, have a safe and joyous holiday season. Please keep our loved ones safe–don't drink and drive. ■

The Law Office Management Assistance Program

The Law Office Management Assistance Program (LOMAP) is a clearing-house for information on all aspects of the operation and management of the modern law office.

For more information or to request confidential assistance with your office operations contact:

Laura A. Calloway, LOMAP Director
The Alabama State Bar
P. O. Box 671 • 415 Dexter Avenue
Montgomery, AL 36101
(334) 269-1515, ext. 116
lcalloway@alabar.org

What if no one would give you the time of day?

Imagine what it must feel like to have a problem–and not know where to go for help. Or to know what you needed to do, but not have any money to do it? That is what hundreds of Alabama citizens feel like every day when it comes to legal problems. They don't know what to do. They don't make enough money to afford legal counsel. Sometimes, they feel like no one will even give them the time of day.

That is where the **Volunteer Lawyers Program** steps in to help. Over 1,600 judges and lawyers volunteer their time to help their fellow citizens who cannot afford to pay for legal assistance. They encourage and recognize their colleagues who join them in providing this important public service. They donate thousands of hours every year as their gift to communities throughout Alabama.

Call and volunteer to participate in the VLP. By assisting with only one or two cases a year, you have the opportunity to truly make a difference.

The Time is Now.

ALABAMA STATE BAR

To Serve the Profession

Alabama Supreme Court Commission on Dispute Resolution and Alabama Center for Dispute Resolution Celebrate Five Years of Accomplishments

It has been five years since the Supreme Court of Alabama established the Alabama Supreme Court Commission on Dispute Resolution by court order June 30, 1994. At that time, the court requested that the commission develop and oversee a center which would act as the central office for the state regarding alternative dispute resolution (ADR), and take the lead in developing, among other important items, mediator ethics and standards, and a roster of trained mediators.

Keegan

Commission members, appointed from various organizations as stipulated in the order, have met every other month since 1994 to work on the development of ADR in Alabama. In August of that same year, when the center opened, Alabama became the 18th state to have a state office of dispute resolution.

From the very beginning, there was a commitment to be broad-based, and the commission and the center have awarded grants and technical support for community/neighborhood mediation, school conflict resolution and peer mediation, court programs, and alternatives for administrative agencies. Original programs are now being duplicated in additional Alabama counties. The commission and the center have been local sponsors for "Partnership for Preventing Violence," a six-part teleconference over a three-year period from the Harvard School of Mental Health that networks and unites people in every state to prevent school violence through successful school-community partnerships.

Part of the work of the commission has been to formulate the Alabama Code of Ethics for Mediators, and the Interim

Mediator Standards and Registration Procedures. The roster of trained Alabama mediators has grown to 360. Where there was no mediation or arbitration training offered in the state, there are now 25 to 30 courses a year. A roster of Alabama arbitrators is currently available.

The commission and the center, in conjunction with the Alabama State Bar, have published a handbook on ADR entitled *Alternative Dispute Resolution Procedures in Alabama with Mediation Model*, a public information mediation brochure, and an issue of *The Alabama Lawyer* devoted to ADR, and have developed television and radio promotional spots on mediation as part of an NCSA media partnership with the Alabama Broadcasters Association. Commission members and the center director are available to speak about ADR for any organization requesting a speaker.

The center responded to over 800 requests for written information in 1998, an increase of 20 percent over 1997. Its Web site, *www.alabamaADR.org*, answers questions about ADR in Alabama, includes a county map of the state which can be used to locate mediators in any county, and contains training information, a conference calendar, opportunities of interest, ADR legislation and standards, and links to national ADR organizations. The center works with many ADR organizations, in and outside Alabama, but particularly with the ADR Committee of the Alabama State Bar, and the Governor's State Agency ADR Task Force.

The center's director, Judy Keegan, has been written about, interviewed and quoted in national publications and on radio and television. Ms. Keegan has published numerous articles, has a law review article forthcoming, and has been a guest speaker and CLE presenter at over 150 programs. She has represented Alabama at many national meetings, has developed and taught mediation courses, including training for the Administrative Office of the Courts. Ms. Keegan has over 100 hours of mediation and arbitration training, and has conducted 29 pro bono mediations in the last year and a half. She has been appointed coordinating director of the Governor's State Agency ADR Task Force.

Current commission members and their appointing organizations include: Judge Sharon G. Yates (court of civil appeals), chair; Judge John H. Alsbrooks, Jr., (district court); Steven A. Benefield, (Alabama State Bar); Charles Y. Boyd, (Alabama Trial Lawyers); William D. Coleman, (Alabama State Bar); Judge Aubrey Ford, Jr. (district court); J. Noah Funderburg, (at large); Judge Philip Dale Segrest (circuit court); Anne Isbell (at large); Thomas McPherson, Jr. (at large); John J. Park, Jr. (attorney general); Ted Hosp (Governor); Justice Harold See (Alabama Supreme Court); James R. Seale (Alabama Defense Lawyers); Judge P. Wayne Thorn (circuit court); Marshall Timberlake (Alabama State Bar); Justice C.C. Torbert, Jr. (Speaker of the House); and Robert C. Ward, Jr. (Alabama Lawyers Association). Liaison members include Frank W. Gregory (Administrative Office of the Courts), Keith B. Norman (Alabama State Bar), Alex W. Jackson (Alabama Supreme Court), and Judith M. Keegan (Alabama Center for Dispute Resolution).

Contact the Center at (334) 269-0409 or (334) 269-1515, ext. 111, for ADR training, copies of the rosters, videos, reading materials, promotional items, school conflict resolution and peer mediation information, a speaker for your program, community mediation, and court pilot examples. ■

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2000. Nominations should be prepared and mailed to:

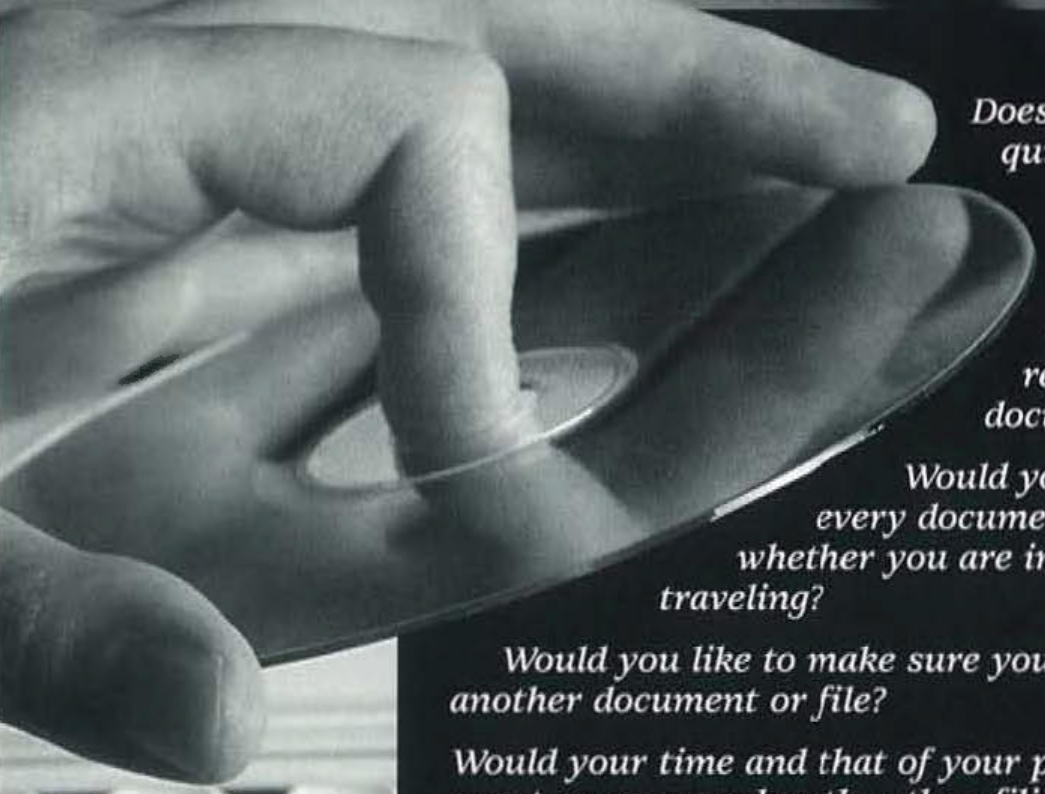
Keith B. Norman, Secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

Legal matters should be left to the experts... document handling should be, too!



Does your law firm need quick cataloging and Bates stamping of case documents?

Do you need accurate, reliable and quick retrieval of your documents?

Would you like to have access to every document in your case whether you are in the office, at home, or traveling?

Would you like to make sure you never lose or misplace another document or file?

Would your time and that of your paralegal be better spent on case work rather than filing and searching for documents?

If you answered "yes" to any of these questions, our document storage and retrieval is for you. Century Document Imaging has an impeccable reputation. For 25 years we have specialized in document management. We are fast, accurate, reliable and confidential. Our past has been built on these qualities, and our future depends on them.

Century can scan all your case documents and put them on a CD, enabling you to retrieve them on your laptop computer anywhere you go. Carry the entire case documents, up to 15,000 pages on a single CD. You never lose or misplace a document or file because each one is instantly retrievable from the CD. You can even have duplicate CD's made for others working on the case. When you have to produce documents to the "other side", you can give them a duplicate CD, without privileged documents.

No matter where you are located, you may send your documents to Century for imaging, or we can arrange for pickup. If you prefer, we will even do the document imaging on site without ever removing a file from the premises.

Paper handling is a necessary part of any business, especially the legal profession. Let us save you and your staff time and headaches. ***Legal matters should be left to the experts; document handling should be, too!*** Call Century.

CENTURY DOCUMENT IMAGING

Call today and ask for ***"Litigation Support."***

Atlanta, GA	Birmingham, AL	Montgomery, AL
404-262-2300	205-591-7755	334-270-1755

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

Revisions Under Study

In between the legislative sessions, the Law Institute has committees studying and revising laws for presentation to the Legislature. These studies usually take two to four years. The uniform acts undergo great scrutiny by a committee of lawyers and judges who are knowledgeable in the area under study. Even the best law has to be made to accommodate the Alabama law surrounding the subject and may require some modification.

Often an Institute committee will simplify laws which do not have a model to follow. The revisions currently under study are: Uniform Principal and Income Act, Determination of Death Act, Business Entities, Uniform Commercial Code Article 9, Eminent Domain, Uniform Public Employees' Pension Fund, and Rules of Criminal Procedure.

The Institute is making three bills ready for introduction into the Legislature.

Mergers and Conversions of Business Entities

During the past few years the number of business entities available in Alabama and throughout the United States has greatly expanded and virtually all existing business entities have been revised. Alabama now has eight choices of business entities, and not only has kept pace with the rest of the nation, but, in some cases, has been out front in providing a range of business entities available.

This act is intended to provide a convenient and simple way for the different types of business entities for profit to convert or merge with each other. Business entities allowed to merge under this act include the following with their effective dates: business corporation (1995), limited liability company (1993), general partnership (1997), limited partnership (1998), limited liability partnership (1997), real estate investment trust (1995), and professional corporation (1984).

These laws, having been created and revised at different times, may provide clear laws for mergers and conversions of entities of like kind but, when entities of different kinds merge or convert, the laws are often incomplete and conflicting. This act is not exclusive. Business entities may be converted or merged in the manner provided in their own acts or under this act.

This bill was written by the Business Entity Committee chaired by Jim Pruett of Gadsden with Professor Howard Walthall serving as reporter. Senator Roger Bedford and Representative Bill Fuller are sponsors of the bill.

Determination of Death Act

This act provides a comprehensive basis for determining death in all situations. Alabama's current law found in *Ala. Code §22-31-1 et seq.* was passed in 1979. This uniform law has been adopted in 41 states, including Georgia and Mississippi, since Alabama passed its version.

The interest in this statute arose from modern advances in life-saving technology. A person may be artificially supported for respiration and circulation after all brain functions irrevocably cease. The medical profession has also developed techniques for determining loss of brain functions while cardiovascular support is administered. At the same time the common law definition of death cannot assure recognition of these techniques. The common law standard for determining death is a cessation of all vital functions traditionally demonstrated by an absence of spontaneous respiratory and cardiac functions. There is then a potential disparity between current and accepted bio-medical practice and the common law.

Part 1 codified the common law basis for determining death–total failure of the cardiac respiratory system. Part 2 extends a common law to include the new procedures for determination of death based upon irreversible loss of brain functions. The overwhelming majority of cases will continue to be determined according to Part 1. While artificial means of support preclude a determination under Part 1, the act recognizes that death can be determined by alternate procedures. Under Part 2 the entire brain must cease to function irreversibly. The "entire brain" includes the brain stem as well as

the neocortex. The concept of "entire brain" distinguishes determination of death under this act and "neocortical death" or "persistent vegetative state." These are not deemed valid, medical or legal bases for determining death.

This act also does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or organ donors, and protection of dead bodies. These subjects are left to other laws.

This act is also silent on acceptable diagnostic tests and medical procedures. It sets the general, legal standard for determining death but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practice and to utilize new, biomedical knowledge, diagnostic tests and equipment.

Time of death also is not specifically addressed. In those instances in which time of death affects legal rights, this act states the basis for determining death. Time of death is a fact to be determined with all others in each individual case and may be resolved, when in doubt, upon expert testimony before the appropriate court. This bill will be presented to the 2000 Regular Session of the legislature after its review by the Alabama Law Institute Council.

Alabama Uniform Principal and Income Act

There have been two uniform principal and income acts prior to the current 1997 Uniform Principal and Income Act. This act has already been adopted in seven states and is under review in many others. The first act was the 1931 Uniform Principal and Income Act (UPAIA) and followed by the 1962 Revised Uniform Principal and Income Act. Alabama has the basic 1931 Uniform Principal and Income Act with some amendments and additions made through the years.

The 1931 UPAIA was drafted when the nation was beginning to recover from "the Great Depression of 1929" and reflected financial attitudes relative to fiduciaries of that period. Except for a few minor bumps in the graph, our nation's economy generally has been on the rise and, to some extent, inflationary since 1931. The 1962 UPAIA, which Alabama never adopted, reflected changes in attitudes over three decades and generally gave fiduciaries broader powers and more discretion.

The 1997 UPAIA continues that trend of giving fiduciaries more flexibility with broader powers and more discretion. As stated below, one of the major considerations in drafting the 1997 UPAIA was that financial instruments and investment opportunities have been developed over six decades that were not even conceptualized in 1931. A second major change was that today fiduciaries, and particularly corporate fiduciaries, conduct multi-state operations as fiduciaries. Thirdly, much of the large holdings of property interests, particularly of timber and other natural resources, is held by property owners who operate interstate. Generally, with respect to real property, the law of the state of the property controls. The Alabama Supreme Court has stated, in *Englund v. First National Bank of Birmingham*, 381 So.2d 8 (Ala. 1980), that even though a testamentary trustee was granted very broad power to allocate trust receipts between principal and income, the trustee was not authorized to make allocations where proper allocation is not a matter of honest doubt. If a trustee is attempting to apply the principal and income acts of difference states to different portions of the same trust, attempting to determine when "a proper allocation is not a matter of honest doubt" may put a trustee in some jeopardy. The latter two considerations make uniformity of legislation dealing with principal and income allocations imperative among the various states.

The harm from Alabama's inattention to the developing law regarding fiduciary investments has been minimized, because most, if not all, of the statutory requirements can be changed by good drafting of instruments creating fiduciary relationships. Alabama attorneys, through very good drafting, have provided most fiduciaries with the flexibility and discretion necessary for them to very ably perform their fiduciary duties and responsibilities.

This revision of Alabama's version of the 1931 Uniform Principal and Income Act has two purposes. One is to revise the 1931 Act. Revision is needed to support the now widespread use of the revocable living trust as a will substitute, to change the rules in the act that experience has shown need to be changed, and to establish new rules to cover situations not provided for in the old act, including rules that apply to financial instruments invented since 1931.

The other purpose is to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the principle of investing for total return rather than a certain level of "income" as traditionally perceived in terms of interest, dividends and rents. The current *Alabama Code* contains some language that seems to adopt the concepts of the Uniform Prudent Investor Act, but a comparison of the Uniform Prudent Investor Act and the *Alabama Code* provisions also is necessary.

One major provision changed by the Institute committee is Section 104 of the Uniform Act. This provision grants the trustee the power to make adjustments between principal and income. The Institute committee requires the settler to expressly provide for a trustee to elect to reallocate between principal and income rather than give the trustee the inherent authority to do so.

The committee is chaired by Leonard Wertheimer from Birmingham. Professor Tom Jones, who serves as reporter, provided this brief overview of the bill. This draft must be approved by the Legislative Council before introduction in the 2000 Regular Session which will begin February 1, 2000.

For more information about the Institute or any of its projects contact Bob McCurley, director, at P.O. Box 861425, Tuscaloosa, Alabama 35486-0013, fax (205) 348-8411, phone (205) 348-7411, or through the Institute's Web site, *www.law.ua.edu/ali.* ■

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.

Alabama State Bar Volunteer Lawyers Program Receives National Fellowship

Lund

The Volunteer Lawyers Program of the Alabama State Bar recently learned that it was one of only 60 fellowship winners in the nation. According to VLP Director Linda Lund, the summer fellowship is the result of the partnership between the National Association for Public Interest Law and the Corporation for National Service and AmeriCorps*VISTA. The program places 60 first- or second-year law students at nonprofit organizations around the country. The application included a description of a project on which the student would work.

The Alabama project will be to develop a model and organize community education programs for individuals with income at or below the federal poverty level. The program will cover various legal topics, including child support collection, divorce, wills, bankruptcy, and collection law.

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117, 156 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

Changes to Form 1099, Reporting Payments to Attorneys

There has been a change in Form 1099 reporting requirements concerning payments to attorneys. It will probably apply to all businesses at some point in their existence. For example, if you use the services of an attorney in your trade or business, then the recently enacted Internal Revenue Code § 6045(f) may apply to you.

What does the new law require?

Beginning January 1, 1998, Internal Revenue Code § 6045(f) adds new requirements to the existing law for filing information returns on reporting payments to attorneys. If you make a payment in the course of your trade or business to an attorney in connection with legal services and the attorney's fees cannot be determined, the total amount paid to the attorney (gross proceeds) must be reported in box 13 with new Code A on Form 1099-MISC.

For example, an insurance company pays an attorney $100,000 to settle a claim. The attorney's fee cannot be determined by the insurance company. Therefore, the insurance company must report $100,000 in box 13 of Form 1099-MISC with Code A. If the insurance company knows that the attorney's fee is, for example, $34,000, the insurance company must report $34,000 in box 7 and nothing in box 13.

Further, these rules apply (a) whether or not the legal services are provided to the payer and (b) whether or not the attorney is the exclusive payee (e.g. the attorney's and claimant's names on one check). However, these rules do not apply to profits distributed by a partnership to its partners that are reportable on Schedule K-1 (Form 1065), Partner's Share of Income, Credits, Deductions, etc., or to wages paid to attorneys that are reportable on Form W-2, Wage and Tax Statement. The term "attorney" includes a law firm or other provider of legal services.

The exemption from reporting payments made to corporations no longer applies to payments for legal services. Therefore, for 1998 and later years, you must report attorneys' fees (in box 7) or gross proceeds (in box 13) as described above to corporations that provide legal services.

The information return, Form 1099-MISC, must show the name, address and taxpayer identification number (TIN) of the attorney and the aggregate amount of all payments.

The necessary information regarding the attorney must be secured via Form W-9 or the 31 percent backup withholding rules apply. If the required information is not secured on Form W-9 and backup withholding is not withheld from the attorney, then the 31 percent will be assessed against the payer.

Any person failing to file Form 1099 may be subject to the penalties under IRC § 6723. This section states that any person who fails to furnish a required 1099 may be subject to a penalty of $50 per Form 1099, up to a maximum of $100,000 in any calendar year. If the failure is due to intentional disregard, the penalty is the greater of $100 per Form 1099, or 10 percent of the amount required to be shown on the return.

When are the information returns due to be filed?

The Form 1099-MISC must be furnished to the attorney on or before January 31 of the year following the calendar year for which the return is required. For example, payments made during 1998 must be furnished via Form 1099-MISC to the attorney by January 31, 1999.

The same information, Form 1099-MISC, must be furnished to the Internal Revenue Service, by February 28 of the year following the calendar year for which the return is required. For example, payments made during 1998 must be furnished via Form 1099-MISC to the IRS by February 28, 1999.

The Internal Revenue Service has many ways to access IRS tax help and forms. For detailed information for getting information you may order Publication 2053, *Quick and Easy Access to IRS Tax Help and Forms*, or visit *www.irs.ustreas.gov*.

OBJECTION!

If you're not insured with the Attorneys' Advantage Professional Liability Insurance Program... you should object to your current insurer on the following grounds:

1. **You may be paying too much for your liability coverage.**
2. **You may not have the broad coverage you really need.**

Attorneys' Advantage Professional Liability Insurance offers broad coverage...up to $10 million in limits. Program benefits include:

- **First Dollar Defense**
- **Claims Expense in Addition to Liability Limits**
- **Risk Management Program**
- **Full Prior Acts Coverage Available**

Best of all, it's underwritten by TIG Insurance Company, A.M. Best rated "A" (Excellent), XI.

Don't delay! For more information, including a no-obligation quotation, call today. Plus you'll receive a free copy of *The Quarter Hour*, the newsletter for Attorneys' Advantage insureds that contains useful, practical information on ways to manage risk in your practice.

Professional Liability Insurance, Inc.
300 Delaware Avenue • P.O. Box 2287
Wilmington, DE 19899

PLI *Professional Liability Insurance, Inc.*

1-800-441-9385

Fax: 1-800-716-3411
www.zutz-pli.com/lawyers.html

TIG INSURANCE

Attorneys' Advantage®
Professional Liability Coverage On Favorable Terms

The Alabama Religious Freedom Amendment: A Lawyer's Guide

By Thomas C. Berg and Frank Myers

Introduction

In the November 1998 election, Alabama voters approved a constitutional amendment protecting the free exercise of religion from unnecessary restriction by government. The Alabama Religious Freedom Amendment (ARFA) provides that "government shall not burden a person's freedom of religion" unless it demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that" interest. ARFA, § V. Alabama joins several other states (Arizona, Connecticut, Florida, Illinois, Rhode Island, and South Carolina) that have enacted such a rule in recent years; but Alabama is the only state to do so by constitutional amendment rather than ordinary legislation.

ARFA is an important and wide-ranging civil liberties enactment. It aims to ensure that religious exercise, a constitutionally protected activity, will not automatically be subject to every law in our highly regulated society without regard to severe effects on religious conscience. But because ARFA covers all actions of the state and its subdivisions, it will raise many issues of interpretation. This Article is meant as a guide for lawyers and judges dealing with the Amendment. We review its background and enactment, defend its constitutionality under the Establishment Clause of the U.S. Constitution, and set forth principles for interpreting it sensibly.

I. The Background Dispute Over Free Exercise

ARFA addresses the most important legal issue arising today concerning the "free exercise" of religion, a right guaranteed in the First Amendment to the U.S. Constitution. There is wide consensus that the government may not punish someone solely for her religious opinions and that a law or regulation may not single out religious conduct for prohibition, for example banning the killing of animals only when it is done for religious reasons. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking down animal-cruelty ordinances targeting only Santeria religious rituals). However, few laws intentionally target religion; most conflicts between religious conscience and the law occur when conduct subject to a general, religion-neutral law happens, in a particular case, to be required or strongly motivated by the faith of a religious individual or group.

Such conflicts between religious conscience and general laws are frequent and wide-ranging, because America has a great variety both of laws and of religious practices. Laws against serving alcohol publicly can ban the Catholic mass or Jewish seder; laws against sex discrimination in hiring can bar a male-only clergy; laws requiring certification of teachers can ban home schooling by many parents; laws forbidding the wearing of headgear in particular circumstances can force Orthodox Jews and others to violate their religious tenets.

From the 1960s through the 1980s, the U.S. Supreme Court held that even a facially neutral, generally applicable law could violate the First Amendment's Free Exercise Clause in a particular case if the law imposed a significant burden on religion and was not justified as the least restrictive means to serving a "compelling" or "overriding" state interest. Applying this test, the Court held in *Sherbert v. Verner*, 374 U.S. 398 (1963), that a state could not deny unemployment benefits to a Seventh-Day Adventist because she refused to accept a job that would require her to work on Saturday, her Sabbath. Accord *Thomas v. Review Board*, 450 U.S. 707 (1981). The Court also held, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that a state could not apply compulsory school-attendance laws to Amish parents who refused to send their children to school after age 14 because the children would be "expose[d] to worldly influences" at a sensitive time and drawn away from the insular Amish community.

The application of the compelling interest test did not always lead to religious exemptions from generally applicable laws. No one argues that a religious cult would be free to practice human sacrifice on unwilling victims. Compelling interests that override religious exercise have included the prevention of publicly-supported racial discrimination, see *Bob Jones University v. United States*, 461 U.S. 574 (1983) (upholding denial of tax exemption to

racial discriminatory college); and the preservation of a universal Social Security system, see *United States v. Lee*, 455 U.S. 252 (1982) (refusing to exempt Amish employers from social security taxes). Some observers claimed that the compelling interest test had come to have no teeth. But it at least required the government to give a good reason for restricting behavior required by religious faith.

However, in 1990 the Supreme Court surprisingly abandoned the test. In *Employment Division v. Smith*, 494 U.S. 872, two drug-rehabilitation counselors in Oregon were fired from their jobs because they ingested the drug peyote at a worship service of the Native American Church, to which they belonged. The state denied them unemployment benefits, and the issue might have been framed as whether the state had a compelling interest in discouraging the use of peyote—which is a hallucinogenic drug but is also central to the historic Native American ritual and is seldom used outside that limited context. Instead, the Supreme Court held that because the state had an "across-the-board" criminal prohibition on peyote use, the case raised no free exercise issue. Because the law against peyote was "neutral and generally applicable" (*id.* at 877), its application to the Native Americans did not require any constitutional justification, no matter how the seriously the law hampered their sincere religious practices. The Court limited the compelling interest test of *Sherbert* and *Yoder* to a few situations—potentially important ones, but not immediately relevant here.

Smith's reasoning rested largely on concerns about judicial activism. The majority argued that applying the compelling interest test strictly would create anarchy, allowing each religious believer to become a "law unto himself" (*id.* at 885), but that applying the test more moderately would require courts to balance the importance of a religious belief against the importance of a particular law, a prospect the majority found "horrible to contemplate" because it would depend heavily on the subjective impressions of judges (*id.* at 889 & n.5). The Court did not, however, disapprove of special accommodation for religious conduct in general: it virtually invited legislatures to protect religious liberty themselves by enacting "nondiscriminatory religious-practice exemption[s]" in statutes. *Id.* at 890.

Immediately after *Smith*, several lower courts read it to limit severely any protection for religious exercise against general laws. For example, a federal district judge reluctantly denied relief to a family of Vietnamese Hmong immigrants when a county coroner performed an unnecessary and unauthorized autopsy on their dead son, an act that under their beliefs was a mutilation of the boy's soul. *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990).

Religious and civil liberties groups, both liberal and conservative, were startled by the implications of the *Smith* decision. They feared that leaving protection for religion to legislatures would tend (as *Smith* itself acknowledged) to favor politically powerful groups and religious practices "widely engaged in" (494 U.S. at 890). A broad-based coalition, including entities as divergent as the ACLU and the Traditional Values Coalition, sought to have Congress restore the compelling interest test across the broad as a statutory right. Congress eventually did so in the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 *et seq.*, known as "RFRA." RFRA decreed that federal, state, and local governments could not "substantially burden" the exercise of religion, even pursuant to a generally applicable law, unless imposing the burden was the least restrictive means of accomplishing a compelling government interest.

However, RFRA soon became embroiled in challenges to its constitutionality. Congress had relied on its power under Section 5 of the Fourteenth Amendment to enforce the provisions of the Amendment by "appropriate legislation." RFRA, it asserted, enforced the right of free exercise, "incorporated" in the Fourteenth Amendment's Due Process Clause. However, the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), held that RFRA exceeded Congress's power to enforce the Fourteenth Amendment against state and local laws, because the meaning of the (incorporated) Free Exercise Clause was set by the Court's decision in *Smith*. Citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court said that its interpretation of the Free Exercise Clause must control over Congress's, and that RFRA could not be seen as a "proportional" response to laws discriminating against religion (the standard of *Smith*); instead, the statute legislated the broader rule protecting religious conscience from even non-discriminatory restrictions. *Id.* at 2167-71.

After *Boerne*, the responsibility for protecting religious freedom from state and local laws has returned largely to states themselves. Some state courts have retained higher scrutiny under their own constitutions, but the RFRA coalition did not want to rely solely on judicial decisions. It formed a task force to seek RFRA-like legislation in the states (see Web site at *www.religious-freedom.org/coalition.html*). Alabama is one of the states where such an enactment has become law, but our provision differs from others in important respects.

II. The Enactment of ARFA

Alabama was among the states where a legislative response was necessary in order to protect religious conduct from generally applicable laws. Alabama courts had several times rejected the claim that general laws unconstitutionally interfered with religious practices. *Rheuark v. State*, 601 So. 2d 135 (Ala. Crim. App. 1992), app. dism., 625 So. 2d 1206 (Ala. Crim. App. 1993) (laws against drug possession); *Hill v. State*, 38 Ala. App. 404, 88 So. 2d 880 (1956) (law against handling dangerous snakes). Therefore, shortly after the *Boerne* decision, state Attorney General Bill Pryor had his office draft legislation modeled on RFRA. Like RFRA, the draft forbade government to burden religion, even through "a rule of general applicability," without a compelling reason. At the same time, a slightly different strategy was being pursued by Eric Johnston, a Birmingham lawyer associated with the conservative civil liberties group the Rutherford Institute. Johnston's draft largely tracked RFRA as well, but it styled the provision as an amendment to the Alabama Constitution rather than as ordinary legislation. For several reasons, the bill eventually emerged in the form of an amendment rather than a statute.

The first reason for seeking an amendment was that such an enactment would be immune from challenges based on the state constitution. (A possible challenge based on the U.S. Constitution still remains because of the Supremacy Clause of Article VI, § 2.) There were two possible state constitutional challenges to a religious freedom statute. Opponents have argued that such statutes, by legislating a general standard for religious freedom claims,

violate the separation of powers by interfering with the courts' power to interpret the Constitution. We believe that those arguments are erroneous,[1] but they could have cast doubts on a statute.

Alabama's existing constitutional provision on religion could also have raised difficulties. Article I, section 3 states, among other things, "that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." That language could be read to forbid exempting any citizen from a generally applicable law because of a conflict with his religious principle. The language need not be so read—its purpose is to protect citizens from disabilities based on their religion, not to forbid government from showing special concern for religious freedom. See *Robertson v. State*, 384 So. 2d 864, 867 (Ala. Crim. App. 1980) (provision abrogates common law rule requiring witness to swear a belief in God and disqualifying atheists from testifying). The federal Establishment Clause, as we will see, permits exemptions to protect religious freedom; and Alabama's provision on religious establishments is interpreted no more restrictively than the federal provision. *Alabama Education Assn. v. James*, 373 So. 2d 1076, 1081 (1979). In any event, enacting protection through an amendment rather than a statute has avoided any potential state constitutional difficulties. If there is a conflict between Article I, § 3 and ARFA, controls. A later statute cannot override an existing constitutional provision, but a later constitutional amendment can. When two constitutional provisions apparently conflict, the later and more specific enactment controls over the earlier and more general one. See *Jefferson County v. Braswell*, 407 So. 2d 115, 119 (Ala. 1981). ARFA would prevail over Article I, § 3 because it was enacted later and it speaks directly to the specific issue whether religious exercise should ever be exempted from a generally applicable law.

The second reason to seek a constitutional amendment was that once it was enacted, it could not be limited by ordinary legislation. Freedom for religious conduct is often unpopular in particular instances, especially freedom for the minority faiths that ARFA seeks to protect. Under a statute, the legislature could reverse court rulings protecting particular religious practices, but reversing a ruling giving protection under ARFA requires another constitutional amendment.

On the other hand, it was more difficult to pass ARFA in the first place as a constitutional amendment rather than a statute, since the legislative vote for an amendment merely puts it to the people for decision by referendum. At the federal level, securing a constitutional amendment is very arduous (requiring approval of three-quarters of the states). But Alabama has a tradition of rather easily accepting constitutional amendments by referendum—a corollary of the fact that so many issues, often minor or local ones, are dealt with in the constitution. See Albert P. Brewer and Charles D. Cole, *Alabama Constitutional Law* vi-viii (2d ed. 1997) (noting frequency of Alabama constitutional amendments). Thus, pursuing Alabama's version of RFRA through constitutional amendment proved a sound strategy, although it might have failed in other states.

ARFA passed both houses of the legislature in May 1998 and was approved by the voters on November 4 by 55 to 45 percent. Neither in the legislature nor before the referendum was there substantial discussion of the Amendment's terms. Three groups raised objections to ARFA, but only one succeeded in getting the proposal modified. Prison officials argued that applying the compelling interest standard would undermine security and order in their institutions, but no exception was made for them, because the record of RFRA litigation showed that courts almost always treated prison discipline and security as a compelling interest. Ira C. Lupu, *The Failure of RFRA*, 20 U. Ark. Little Rock L. J. 575, 591 (1998) (only 9 of 99 RFRA claims in federal and state prison succeeded from 1994 to 1997); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996) (Alabama requirement that Islamic prisoner list both his names served compelling interest in prison security under RFRA). In addition, the Alabama Preservation Alliance complained that ARFA would allow churches to "mow down historic houses to build parking lots" and would create "a caste system" where religious institutions were above the law. Speech of Brandon Brazil, APA Executive Director, Montgomery, August 3, 1998 (on file with authors). But the preservationists failed to mobilize other groups to join them. Finally, the Alabama Education Association, the state teachers' union, did succeed in inserting language in the Amendment implying that some educational policies amount to compelling interests (ARFA, § II(5)).

The House sponsor of ARFA stated that the Amendment was necessary "because of liberals determined to destroy the foundation of this country." Campaign Materials, Rep. Al Knight (R-Shelby) (on file with authors). But as the breadth of the pro-RFRA coalition indicates, this is not an issue that necessarily pits liberals against conservatives. The protections of ARFA have little to do with the well-known disputes over public religion in Alabama, such as Judge Roy Moore's posting of the Ten Commandments and Judge Ira DeMent's order limiting religion in public ceremonies in DeKalb County public schools. Those cases raise the question whether the government itself may promote the majority religion in official activities. ARFA protects the religious exercise of private citizens and groups, often of religious minorities whose unfamiliar practices are inadvertently restricted by generally applicable secular laws.

III. The Constitutionality of ARFA

Because ARFA is now part of the Alabama Constitution, the only potential challenge to it comes under the U.S. Constitution, particularly the First Amendment's prohibition on laws "respecting an establishment of religion." Critics are sure to claim that ARFA violates the Establishment Clause by favoring or promoting religion over other activities that are not eligible for exemption from generally applicable laws.

The U.S. Supreme Court's Establishment Clause jurisprudence remains in a confused state. For a long time the Court employed the test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to forbid government to advance religion or become "excessively entangled" with it. Recently, however, the Court has sometimes looked to other general tests, while still sometimes relying on *Lemon*. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (test of whether government action endorses religion); *Bd. of Ed., Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687 (1994) (test of whether government action is "neutral" toward religion). More helpful than these general tests are the decisions in which the Court has specifically reviewed attempts by Congress and the states to accommodate religion.

The Court has allowed the government to show special concern for religious freedom and protect it from the burdens imposed by generally applicable laws. For example, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), unanimously upheld a provision of Title VII exempting religious organizations from the prohibition on religious discrimination in employment. The Court distinguished protecting religion from promoting it, saying that "[a] law is not unconstitutional simply because it *allows* churches to advance religion"; rather, an establishment of religion "connote[s] sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 337. *Amos* also unanimously held that it is a legitimate government purpose to "lift a regulation that burdens the exercise of religion," that the government may act even when the burden would not itself violate the Free Exercise Clause, and that such accommodations of religious exercise need not "come packaged with benefits to secular entities." *Id.* at 336, 338. Each of these principles solidly supports ARFA's protection of religious exercise.

The Court has reached similar conclusions in other cases. *Sherbert v. Verner* itself said that protecting the practices of a minority faith from being suppressed by a generally applicable law shows not favoritism, but rather "neutrality in face of religious differences." 374 U.S. at 409. The Court has also commended "'our happy tradition' of 'avoiding unnecessary conflicts with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971) (upholding draft exemptions for religious conscientious objectors). And it has said that to forbid accommodations for religious activity would "show a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (allowing schools to release students early to attend off-campus religious instruction). Even *Employment Division v. Smith*, while holding that exemptions are seldom required by the Free Exercise Clause, said that a state may be "solicitous of the [free exercise] value in its legislation" and suggested that "nondiscriminatory religious- practice exemption[s are] permitted, or even desirable." *Smith*, 494 U.S. at 890.

Although enactments like ARFA give distinctive protection to religious conduct, this is consistent with the overall structure of the First Amendment's religion provisions. The Establishment Clause places a unique, and often controversial, limit on government action sponsoring or promoting religion. The public schools may promote democracy, free-market capitalism, or any number of other views to their students, but they may not promote religion or any particular faith. In striking down government-sponsored prayers at public high school graduation ceremonies, the Court reemphasized that the Constitution treats religion differently from other ideas and activities: "the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). This removal of government from active promotion of religion has a corollary: religious activity is "committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.* at 589. Laws like RFRA and ARFA reflect that special concern for the autonomy of religious individuals and groups. Without such special concern, the constitutional structure would

be skewed against religion.

In some cases the Court has struck down particular exemptions of religion under the Establishment Clause on the ground that they went beyond accommodating religious conduct and instead affirmatively promoted it. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), struck down a state law that gave employees an absolute right to refuse to work on their Sabbath day; and *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), struck down an exemption of religious publications from state sales taxes. But the Court has continued to affirm that many accommodations of religion are permissible. See *Kiryas Joel*, 512 U.S. at 705-06 ("the Constitution allows the State to accommodate religious needs by alleviating special burdens"); *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) ("[w]e in no way suggest that all accommodations of religion are unconstitutional unless required by the Free Exercise Clause").

These decisions set forth several principles for analyzing ARFA. First, the state may not simply accommodate one religious group or sect without accommodating others that are similarly situated; exemptions must extend to all believers who engage in a given practice. *Kiryas Joel*, 512 U.S. at 706-07 (striking down a special school district created to accommodate practices of one insular Jewish sect, and holding that "neutrality among religions must be honored"). This principle strongly supports a general enactment like ARFA, which applies the same standard – the compelling interest test – to all claims of religious conscience, rather than leaving it solely to the legislature to choose which groups to exempt. Individuals and groups that are not large or organized enough to lobby the legislature can have their interest evaluated and balanced against the state's interest in the relatively neutral forum of a court.

Second, an exemption that imposes substantial or disproportionate burdens on other individuals is more likely to be unconstitutional. In *Caldor*, for example, the Court objected to giving workers an absolute right to have their Sabbath days off. The statute reflected an "unyielding weighting" of religious interests over all others; it made no exception even when accommodating a worker's Sabbath would "cause the employer substantial economic burdens or [impose] significant burdens on other employees required to work in place of the Sabbath observers." 472 U.S. at 710. See also *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (an exemption should not "impose substantial burdens on nonbeneficiaries"). Enactments such as ARFA do not give any such unqualified right. The compelling interest standard provides a means for balancing the rights of other individuals against those of the religious claimant. And as the next part will discuss, courts have been willing to interpret the test in a way that does not allow religious believers to impose significantly on other individuals.

Finally, the plurality opinion in *Texas Monthly* also suggested that exemption of religious conduct should not occur when it removes only a minimal legal burden from religious conduct. In *Texas Monthly*, the exemption removed no more than a financial burden, small in percentage terms, caused by the application of sales taxes to religious literature. The plurality noted that there was no evidence that paying the tax conflicted with the religious beliefs of religious publishers, or that it substantially deterred the publication of religious magazines. 489 U.S. at 15-18. The fact that the burden being removed was not "significant" counted against the exemption.

ARFA may face difficulties under this factor, because its compelling interest test appears to be triggered by any burden on religious exercise. ARFA's section V(a) states simply that "[g]overnment shall not burden a person's freedom of religion" – unlike RFRA and other state enactments, which are qualified to say that government shall not "*substantially* burden" religious exercise. Critics will no doubt argue that the omission of such a limit as "substantial" or "significant" makes ARFA statute favor religion excessively in violation of the principles of *Texas Monthly*. For example, does ARFA require the state to show a compelling interest in imposing a general $10 license fee on a van owned by a church?

These concerns about excessive favoritism have some force, but they should not be enough to strike down ARFA. First, the Alabama courts should construe the Amendment sensibly and hold that it does not cover burdens that have only a minimal effect on religious exercise. A government action that neither conflicts with religious conscience nor imposes significant costs on religiously motivated activity should not be considered a "burden" triggering ARFA's the compelling interest standard. Examples would include the modest vehicle license fee, or the sales tax at issue in *Texas Monthly*. Under both federal and Alabama law, enactments should be presumed constitutional and should be construed in a way that avoids constitutional difficulties. *Edmond v. United States*, 117 S. Ct. 1573, 1578 (1997); *House v. Cullman County*, 593 So. 2d 69, 71-72 (Ala. 1992). The Alabama courts would not have to stretch in order to interpret "burden" in such a sensible way. When the federal RFRA was first introduced, it did not contain the qualifier "substantial" before "burden," and yet no one then thought that it thereby freed religion even from minimal regulation. This does not mean that the standard for a burden triggering ARFA's protection must be stiff or high. Laws and regulations can restrict religious activity in a variety of ways that are more than minimal, as we discuss in the next section.

Second, even assuming that some applications of ARFA might give excessive accommodation to religion, that is no reason to strike down the statute as a whole. Most applications of the compelling interest standard are perfectly permissible protections of religious conscience, and if the standard goes too far in a particular case, that application can be invalidated alone. In recent years the U.S. Supreme Court has been very reluctant to strike down statutes altogether because of some unconstitutional applications. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (a statute should be upheld on its face unless "no set of circumstances exists under which [it] would be valid"); see also *Bowen v. Kendrick* , 487 U.S. 589 (1988); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 761 (1976) (both upholding statutes against facial Establishment Clause challenges).

IV. Interpreting ARFA

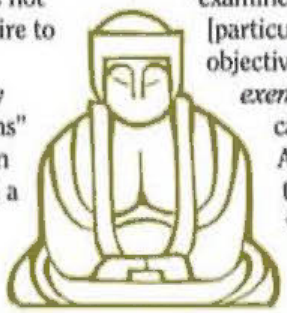
Interpreting the provisions of ARFA is complicated because the Amendment occasioned very little legislative or public debate. However, for the most part ARFA was modeled on RFRA, which in turn sought to reinstate the principles of *Sherbert v. Verner* and *Wisconsin v. Yoder*. ARFA should be interpreted in that light except where its text dictates otherwise.

The first key issue is what constitutes a "burden" on religious freedom that triggers the government's duty to show a compelling interest. Clearly, a burden exists when the government forces a religious believer or group to violate a mandatory tenet of its faith, for example, when laws forced the Amish to send their teenage children to school (*Yoder*). However, in interpreting the Free Exercise Clause the U.S. Supreme Court has often refused to treat other effects on religious practice as significant burdens. The Court held that there is no burden from an general government action that "make[s] it more difficult to practice" a religion but does not "coerce individuals into acting contrary to their religious beliefs." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450-51 (1988) (government did not burden Native American believers by destroying sacred sites located on federal land, even though destruction would make worship there impossible). The Court also held that there is no "constitutionally significant" burden unless the general law forces a person to "violate[his] sincere religious belief," either mandating "conduct proscribed by a religious faith" or preventing "conduct mandated by" the faith. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391-92 (1990) (no burden from sales tax, applied to sales of Bibles, because organization had no doctrinal objection to paying tax). This limit could set aside protection for much religious activity that derives not from some mandatory tenet but from the believer's desire to please God in her own way.

ARFA should not be read to incorporate these narrow interpretations. ARFA's broad, unqualified term "burdens" should not be read narrowly. A law can seriously burden religious activity even though it does not interfere with a specific mandatory tenet of the faith. For example, there may be no specific tenet requiring that a person pursue the ministry, or that a church open a welfare agency in a particular neighborhood—yet if a law had the effect of barring someone from the ministry, or if a zoning rule bars a church or shelter from a neighborhood, the result is certainly a serious restriction on religious activity.

But as we have indicated in part III, some limitation on the burden concept is probably necessary in order to ensure that ARFA does not unduly favor religion in violation of the Establishment Clause. As we said there, modest increases in the cost of religious activity because of legal regulation should not trigger the compelling interest test. For example, if a zoning or preservation ordinance makes it somewhat more costly for a church to enter a location or expand in its existing one, the compelling interest test should not be triggered. On the other hand, if the regulation effectively bars the church from locating in a particular place—even if there is no doctrinal requirement for the particular location—then the burden is significant and the state should be put to the test.

The other key issue is the interpretation of "compelling interest" and "least restrictive means." Those two concepts together require that the government prove that the law is necessary not just in the abstract, but as applied to the particular religious believer or group. As *Yoder* put it, even if the state's assertions have "validity in the generality of cases," the court must "examine the interests that the State seeks to promote by its [particular] requirement . . . and the impediments to those objectives that would flow *from recognizing the claimed [ ] exemption*." 406 U.S. at 221 (holding that although education was a compelling interest generally, exempting Amish teenagers from school would not harm educational goals). If exempting the religious believer alone would not cause serious harm, then the interest in denying an exemption is not compelling, and exemption is a less restrictive means of serving the



state's goals. Moreover, the government's justification must be "searchingly examined" (*id.*) and may not rest on mere speculation. See *Sherbert*, 374 U.S. at 407 (rejecting as insufficient the mere "possibility" that giving Mrs. Sherbert benefits would encourage fraudulent unemployment claims). However, the compelling interest test does not give absolute protection from generally applicable laws. It requires a case-by-case analysis in order, in the words of ARFA, to "strik[e] sensible balances between religious liberty and competing governmental interests." ARFA, § II(5).

Some kinds of governmental interests are simply not compelling. The application of the law must prevent "some substantial threat to public safety, peace, or order." *Yoder*, 406 U.S. at 230 (quoting *Sherbert*, 374 U.S. at 403). Thus, for example, courts have held that historic preservation laws and some zoning laws serve only aesthetic interests and cannot overcome a church's right to serve the poor in its neighborhood or alter its building for religious reasons. *Western Presb. Church v. Bd. of Zoning*, 849 F. Supp. 77, 79-80 (D.D.C. 1994); *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174, 185 (1992). By contrast, other zoning regulations may be justified as necessary to prevent crime or excessive noise or congestion.

Protecting the health and safety of others is a compelling interest generally. Even there, however, the state must show that the religious activity actually poses a threat and that methods short of prohibiting it run too great a risk of being unsuccessful. For example, young men of the Sikh faith are required to carry ceremonial knives with them at all time; when a school forbade Sikh students to bring the knives to school, the court ruled for the students under RFRA based on evidence that the knives would be safe if they were sewn securely into their sheaths. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995). Some courts might conclude the opposite under the compelling interest test, but the decision shows the case-specific nature of the analysis.

ARFA has specific language referring to interests underlying public education, specifically listing "pedagogical interests" and "regulations necessary to alleviate interference with the educational process." ARFA, § II(5). These phrases, added at the behest of the public teachers' union, identify educational interests but still simply say that "sensible balances" should be struck "between religious liberty and [such interests]." Thus the added language does not do away with the balancing test in cases involving public schools. *Wisconsin v. Yoder* itself carefully balanced educational interests against religious freedom. The Court there protected the Amish from the pressure of assimilation posed by modern education, but it also stated that "reasonable," generally applicable educational standards could be applied to religious private schools without violating religious freedom. *Id.* at 235-36. Courts applying the compelling interest test have distinguished between necessary and unnecessary regulations. Cf., e.g., *State v. Delabruere*, 154 Vt. 237, 577 A.2d 254, 264 (1990) (finding compelling interest in requiring religious schools to report enrollment and curriculum); with *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127, 141 (1993) (striking down requirement that home school teachers be state-certified, because standardized testing was less restrictive means of ensuring quality education).

Other factors are highly relevant to the compelling interest analysis. Courts must examine whether a law contains exemptions for other interests besides the religious claim at issue. If the government restricts religious conduct but not other conduct producing similar harm, the government's interest is not compelling. *Lukumi*, 508 U.S. at 546; see also *Thomas v. Anchorage Equal Rights Comm.*, 165 F.3d 692, 716-17 (9th Cir. 1999) (no compelling interest in forcing religious landlord to rent to unmarried cohabiting couple, because state itself confers many benefits only on married couples). In addition, if other jurisdictions have granted the claimed exemption without difficulty, the state's interest in denying it is not likely to be compelling. See, e.g., *Sherbert*, 374 U.S. at 407-08.

On the other hand, courts will often consider whether the claimant's behavior is the sort in which many people would like to engage, so that granting one exemption will require granting scores of others, in order to be consistent, and so undermine a law's basic purposes. See, e.g., See *Smith*, 494 U.S. at 914-15 (Blackmun, J., dissenting) (defending exemption for limited Native American peyote use but not for marijuana use, which is far more widespread and is associated with organized trafficking); *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (R. Ginsburg, J.) (same); *United States v. Lee*, 455 U.S. at 260 (denying Amish claim for tax exemption and expressing concern about "myriad" potential objections to taxes). However, the concern about multiple claims must be based on specific, credible evidence, not on speculation or a mere "possibility." *Sherbert*, 374 U.S. at 407.

Conclusion

Freedom of religious exercise was a central concern of our founding generation, and it is one of America's great contributions to the world. In a highly regulated society, religious exercise will not be free if it is subject to every law that applies to other activities or institutions. ARFA seeks to ensure that general laws will not restrict religion except for strong reasons. The Amendment does not and cannot give absolute rights, but it does require real justification before even a general law can applied to coerce religious conscience. Our hope is that courts will indeed use it to "strik[e] sensible balances" between religious liberty and social interests. ■

Endnotes

1 See Thomas C. Berg, *The New Attacks on Religious Freedom Legislation And Why They Are Wrong*, 21 Cardozo. L. Rev. __ (forthcoming 1999); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. Ark. Little Rock. L. Rev. 715 (1998).

Thomas C. Berg
Thomas C. Berg is a professor of law at Cumberland School of Law, Samford University. He has written extensively, and twice testified before Congress, on religious freedom legislation.

Frank Myers
Frank Myers is a 1999 graduate of Cumberland School of Law, Samford University, and serves as law clerk to Justice Gorman Houston, Alabama Supreme Court.

Public Notice For Reappointment of Incumbent Magistrate Judge

The current term of the office of United States Magistrate Judge Vanzetta Penn McPherson is due to expire April 5, 2000. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

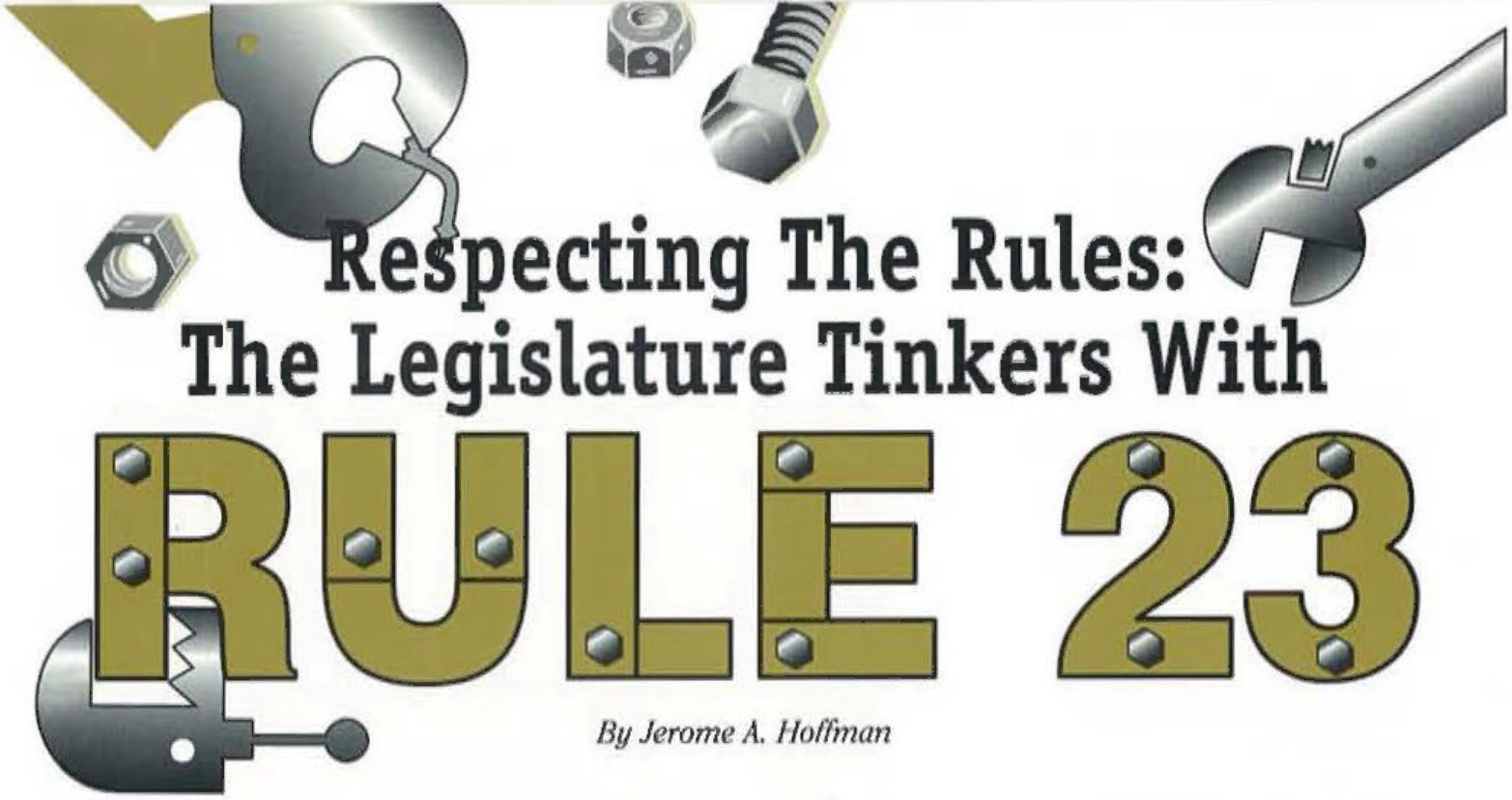
The duties of a magistrate judge position include the following:

(1) conduct of most preliminary proceedings in criminal cases;
(2) trial and disposition of misdemeanor cases;
(3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court;
(4) trial and disposition of civil cases upon consent of litigants; and
(5) examination and recommendation to the judges of the district court in regard to prisoner petitions and claims for Social Security benefits.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate should be recommended by the panel for reappointment by the court and should be directed to:

Chair, Merit Selection Panel
c/o Debra P. Hacket, Clerk
U.S. District Court
P.O. Box 711
Montgomery, AL 36101-0711

Comments must be received by December 10, 1999.



Respecting The Rules: The Legislature Tinkers With RULE 23

By Jerome A. Hoffman

Act No. 99-250, effective May 25, 1999, which will become §§ 6-5-640 through -642 of the Alabama Code, inundates the general provisions of Rule 23(c)(1) with a mass of detail. The text of the Act, bearing its prospective code section numbers, reads as follows:

§ 6-5-640. Scope and effect on other laws or rules.

This article shall apply to and govern all civil class actions brought in the state courts of Alabama pursuant to Alabama Rule of Civil Procedure 23. The provisions of this article, where inconsistent with any Alabama Rule of Civil Procedure, including, but not limited to Ala. R. Civ. P. 23, shall supersede such rules or parts of rules.

§ 6-5-641. Certification of classes.

(a) No class of civil litigants shall be certified or recognized by any court of the State of Alabama unless there shall have been compliance with the procedures for certification of the class set forth in the article.

(b) As soon as practicable after the commencement of an action in which claims or defenses are purported to be asserted on behalf of or against a class, or as soon as practicable after such assertions in an amended pleading, but in no event prior to the time allowed by law for each party (including, but not limited to, counterclaim, cross-claim, and third-party defendants) to file an answer or other pleading responsive to the complaint, counterclaim, cross-claim, or third-party claim, the court shall hold a conference among all named parties to the action for the purpose of establishing a schedule, in the same manner and to the same extent contemplated by Ala. R. Civ. P. 16, for any discovery in which the parties may wish to engage which is both (1) allowed by Ala. R. Civ. P. 26-37, and (2) germane to the issue of whether the requested class should or should not be certified. At this conference, the court may set a date for a hearing on the issue of class certification, but such hearing may not be set sooner than 90 days after the date on which the court issues its scheduling order pursuant to the conference unless a shorter time is agreed to by all parties.

(c) Upon motion of any party, the court shall, except for good cause shown and even then only if the interests of justice require that it not do so, stay all discovery directed solely to the merits of the claims or defenses in the action until the court shall have made its decision regarding certification of the class. In considering such a motion, the court shall consider whether any prejudice to the plaintiff exists because of the filing by the defendant of a Rule 56 motion for summary judgment prior to the court's decision regarding class certification.

(d) The court shall, on motion of any party, hold a full evidentiary hearing on class certification. The hearing shall be recorded, and all named parties to the action shall be given notice of the date, time, and place of the hearing by written notification given to the party's attorney (or if appearing pro se, to the party) no later than 60 days prior to the date set for the hearing. At the hearing, the parties shall be allowed to present, in the same manner as at trial, any admissible evidence in support of or in opposition to the certification of the class.

(e) When deciding whether a requested class is to be certified, the court shall determine, by employing a rigorous analysis, if the party or parties requesting class certification have proved its or their entitlement to class certification under Ala. R. Civ. P. 23. The burden of coming forward with such proof shall at all times be on the party or parties seeking certification, and if such proof shall not have been adduced, the court shall not order certification of the class. In making this determination, the court shall analyze all factors required by Ala. R. Civ. P. 23 for certification of a class and shall not order certification unless all such factors shall have been established. In announcing its determination, the court shall place in the record of the action a written order addressing all such factors and specifying the evidence, or lack of evidence, on which the court has based its decision with regard to whether each such factor has been established. In so doing, the court may treat a factor as having been established if all parties to the action have so stipulated on the record and if the court shall be satisfied that such factor could be proven to have been established.

(f) Nothing in this article shall affect, or be construed to affect, Ala. R. Civ. P. 12 or Ala. R. Civ. P. 56, including the provisions of Rule 56(f).

§ 6-5-642. Appeal of certification order.

A court's order certifying a class or refusing to certify a class action shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action. Such appeal may only be filed within 42 days of the order certifying or refusing to certify the class. The filing of such appeal, the failure to file an appeal, or the affirmance of the certification or denial order shall in no way affect the right of any party, after the entry of final judgment, to appeal the earlier certification of, or refusal to certify, the class. If the appeal is not the first appeal taken by the party, the subsequent appeal shall be based upon the record at the time of final judgment and shall be considered by the court only to the extent that either the facts or controlling law relevant to certification have changed from that which existed or controlled at the time of the earlier certification or refusal to certify. During the pendency of any such appeal, the action in the trial court shall be stayed in all respects. Following adjudication on appeal (or, if the initial appeal is to an intermediate appellate court, adjudication of the action on any writ of certiorari granted by the Supreme Court of Alabama), if the class is not to be certified, the stay in the trial court shall automatically dissolve and the trial court may proceed to adjudicate any remaining individual claims or defenses. If, after such appeal or procedure on writ of certiorari, the class is to be certified, the stay shall likewise dissolve and the trial court shall proceed with adjudication on the merits, except that the trial court shall at all times prior to entry of a final order retain jurisdiction to revisit the certification issues upon motion of a party and to order decertification of the class if during the litigation of the case it shall become evident to the court that the action is no longer reasonably maintainable as a class action pursuant to the factors enumerated in Ala. R. Civ. P. 23(b).

Although the Act works few changes in Rule 23 as the Alabama Supreme Court has already interpreted it, it does effect extensive additions to the text of Rule 23(c)(1). In net effect, these additions impose nondiscretionary burdens of preparation and documentation upon circuit court judges.

Present Rule 23(c)(1) provides simply that, "[a]s soon as practicable after the commencement of an action brought as a class action," a circuit court "shall determine by order whether it is to be so maintained." It makes no express provision for the case in which a party amends an action not originally brought as a class action to include class allegations. Beyond the aspirational "[a]s soon as practicable," it places no limits, either inside or outside, on the circuit court's discretionary timing of its certification order. It makes no provision about discovery directed solely at producing information bearing upon the appropriateness vel non of certification. It makes no provision about regulating the time of discovery directed to the merits of the action. It does not require a hearing, either ex parte or adversary, about the appropriateness vel non of certification. It makes no provision for precedence or priority between or among competing actions seeking certification of the same class, either in the same court or in different courts. It says nothing about whether, when or how certification orders are to be reviewed.

The Alabama Supreme Court and the Alabama Court of Civil Appeals have, case by case, filled or narrowed most of Rule 23(c)(1)'s gaps.[1] Act No. 99-250 has duplicated some judicial solutions already in place and filled or narrowed some remaining gaps. It has also replaced judicial solutions with its own here and there.

Act No. 99-250 extends its timing provisions (and, by implication, other provisions, as text and context require) to "such assertions [on behalf of or against a class first appearing] in an amended pleading."[2] It repeats Rule 23(c)(1)'s discretionary "[a]s soon as practicable after . . . commencement" timing provision,[3] but—unlike Rule 23(c)(1)—the provision relates only stepwise to the timing of the order granting or denying certification. Instead, it relates most directly to the scheduling of a mandatory conference to plan discovery relevant to the appropriateness of certification vel non.[4] In further contrast to Rule 23(c)(1), the Act qualifies the discretionary timing provision with an inside limitation. That is, the circuit court may, "in no event," schedule the discovery confer-

ence "prior to the time allowed by law" for all responsive pleadings required by the action's particular configuration of claims and parties.[5] The Act also requires a circuit court, with very little discretionary leeway, to "stay all discovery directed solely to the merits of the claims or defenses in the action until the court shall have made its decision regarding certification of the class."[6]

Under the Act, a circuit court must, "on motion of any party, hold a full [on-the-record] evidentiary hearing on class certification."[7] The circuit court may set a date for this hearing either at the discovery scheduling conference or (by implication) at some other time, but it may not schedule the hearing "sooner than 90 days after the date on which the court issues its [discovery] scheduling order," unless all parties agree upon an earlier time.[8] Thus, even supposing (1) that service of process occurs the same day as plaintiff's initial filing, (2) that the pleadings include no counterclaims, cross-claims, or third-party complaints and (3) that the circuit court issues its discovery scheduling order on the day of the discovery scheduling conference, the evidentiary hearing cannot take place earlier than 120 days (four months) after commencement of the action. Accordingly, even supposing that the circuit court issues its order granting or denying certification on the day of the hearing, the order cannot issue earlier than 120 days after commencement. The actual intervals between discovery scheduling conference and discovery scheduling order and between evidentiary hearing and the order granting or denying certification will, one supposes, be measured respectively by the "as soon as practicable" standard.

Act No. 99-250 requires a circuit court's decision about certification to rest upon the "rigorous analysis" anticipated by pre-existing caselaw.[9] In reaction to the reported practice of some circuit courts of certifying conditionally without any showing and then requiring parties opposing certification to show good grounds for decertification,[10] the Act provides that "[t]he burden of coming forward with such proof [of all elements of entitlement to class certification] shall at all times be on the party or parties seeking class certification."[11] The Act requires a circuit court to support its decision granting or denying certification with "a written order addressing all such factors [required by Rule 23 for entitlement to class certification] and specifying the evidence, or lack of evidence, on which the court has based its decision with regard to whether each such factor has been established."[12] In so doing, a circuit court need not accept a unanimous stipulation treating "a factor as having been established."[13]

The Act makes orders granting or denying class treatment appealable "in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action."[14] It does not, however, require that an aggrieved party *must* appeal immediately from an order concerning certification or lose its right of appeal. To the contrary, it preserves the parties' rights to challenge, on appeal from the final judgment, an unfavorable order concerning certification, provided only that this appeal "shall be based upon the record at the time of final judgment and shall be considered by the court only to the extent that either the facts or controlling law relevant to certification have changed from that which existed or controlled at the time of the earlier certification or refusal to certify."[15] The Act provides for a stay pending appeal and goes into some detail concerning the circumstances under which such a stay dissolves.[16]

The second and final sentence of Rule 23(c)(1) provides: "An order under this subdivision may be altered or amended before the decision on the merits." Act No. 99-250 provides: "[T]he trial court shall at all times prior to entry of a final order retain jurisdiction to revisit the certification issues upon motion of a party and to order decertification of the class if during the litigation of the case it shall become evident to the court that the action is no longer reasonably maintainable as a class action . . . ."[17] On its face, this provision suggests that a circuit court may belatedly decertify a class, but may not belatedly certify a class.

Recall that neither Rule 23(c)(1) nor any other part of Rule 23 makes provision for precedence or priority between

or among competing actions arising from the same action-provoking conduct and seeking certification of the same class, either in the same court or in different courts. Act No. 99-250 doesn't make provision either, thus leaving contests over precedence or priority to judicial resolution under evolving caselaw.

If writing on a clean slate, the community would most likely draw its rule from among five alternatives: (1) bright-line priority to the first-certified action; (2) rebuttable priority to the first-certified action with case-specific equitable considerations weighing in the balance; (3) bright-line priority to the first-filed action; (4) rebuttable priority to the first-filed action with case-specific equitable considerations weighing in the balance; or (5) no assumptive priority with case-specific equitable considerations controlling the outcome.

When duplicative class actions began to emerge as a problem, the Alabama Supreme Court first experimented with bright-line priority to the first-filed action, resting its choice inadvisedly upon jurisdictional doctrine.[18] The court next turned to bright-line priority to the first-certified action, applying Alabama's "two-action" statute[19] to class actions "pending at the same time for the same cause and against the same party,"[20] even when nominally prosecuted by different class representatives,[21] especially when "brought by the same lead attorney, and . . . containing the identical class allegations and claims, on behalf of the same alleged class."[22] When the pending actions were all class actions, a motion to dismiss invoking the "two-action" statute became appropriate only when at least one of the actions had been certified.[23] According to the court: "Once a certification occurs in any court, that certification abates all other pending actions and the named plaintiffs in the other actions . . . become members of the certified class in which the certification has occurred."[24] That did not mean, however, that the "two-action" statute was self-executing; in order to abate other class actions after one had been certified, "the defendant must file a motion [invoking the statute]."[25]

Although neither apparently did so, both the court and commentators should have foreseen that this rule would induce unseemly races to certification. Lawyers showed themselves quicker on the uptake. Both first-filers and claim-jumpers quickly got the message, urging the circuit courts ever closer to "drive-by certification."[26] In response, the court backed away from its first-to-certify rule of priority.[27] At latest reading, the court wavers between bright-line priority to the first-filed action[28] and rebuttable priority to the first-filed action with case-specific equitable considerations weighing in the balance.[29]

The four justices advocating bright-line priority support their position by supposing that Alabama's "two-action" statute applies to class actions "pending at the same time for the same cause and against the same party." They extol the obvious virtue of any bright-line rule, that is, its certainty of application.[30]

They prefer to overlook the perhaps less obvious Achilles' heel of bright-line rules, that is: *Any rule that can be subverted will be subverted, and all bright-line rules can be subverted.* As what should be an obvious example, counsel for target defendants will quickly see and seize the opportunity for pre-emptive strikes, filing their own class actions in friendly courts at the first sign of trouble to cut off the anticipated class action filed later by good-faith representatives. They might do this either by causing a marionette class representative to file against their target defendant in a friendly court or by causing their potential class target to file a declaratory judgment action against the putative class in a friendly court.[31]

The four justices advocating rebuttable priority wisely do not overlook the soft spot of bright-line rules, preferring a flexible first-to-file rule less vulnerable to manipulation. They deny or, at least doubt, the wisdom of extending the "two action" statute to class actions. As Justice Lyons has insightfully observed:

> The ["two action"] statute [Ala. Code § 6-5-440] deals with the plaintiff who deliberately has filed two cumulative actions. I have difficulty with the concept of applying it generally to a member of a class because it ascribes an intent to proceed in cumulative actions, an intent that cannot logically be found merely from a person's status as a member of a class.[32]

Justice Lyons concluded:

> While we need to ameliorate the problems caused by redundancy of

claims in the class-action setting, I am not convinced that a creative application of § 6-5-440 is appropriate. We should invite the Advisory Committee on Rules of Civil Procedure to propose an amendment to Rule 23 that deals with multiple claims in the context of separate individual actions and class actions as well as multiple class actions dealing with the same subject.[33]

Justice Lyons's suggestion has much to recommend it.

Indeed, the wisdom underlying Justice Lyons's suggestion might have persuaded a wiser, less captive legislature to forebear any intervention in matters of class action procedure. The Alabama Supreme Court had, case by case, already filled or narrowed most of Rule 23(c)(1)'s gaps.[34] It seemed to have unruly applications of Rule 23(c)(1) well in hand. Act No. 99-250 failed to address the only problem the court had not already successfully addressed, i.e., "the problems caused by redundancy of claims in the class-action setting" that Justice Lyons would refer to the court's advisory committee.

Time will tell whether Act No. 99-250 has contributed anything to the law but inflexible, mandatory complications that a rational system of procedure does not need. Lawyers must now look, at their peril, beyond the Alabama Rules of Civil Procedure for regulations they might justifiably have expected to find in those Rules or not at all. Courts, both trial and appellate, now face the prospect of interpreting and applying a second source of regulations that contains several times as many words, many of them vulnerable to competing interpretations, as Rule 23(c)(1). To the considerable extent that Act No. 99-250 overregulates details, it violates a widely accepted canon of good rulemaking, that is, provide general rules and trust a well-chosen judiciary to work out the details as questions about them arise in actual cases. Furthermore, a principal reason for adopting sets of rules like the Alabama Rules of Civil Procedure and the Alabama Rules of Evidence was to site those rules in one conveniently accessible place. One carelessly considered Act after another, our legislature puts that important aspiration beyond reach. ■

Endnotes

1. *See* Jerome A. Hoffman, Cumulative Supplement (1999) To Alabama Civil Procedure § 5.134 (1990).
2. New § 6-5-641(b).
3. *Id.*
4. *Id.*
5. *Id.*
6. New § 6-5-641(c).
7. New § 6-5-641(d).
8. New § 6-5-641(b). New § 6-5-641(e).
9. *See, e.g.*, Ex parte Citicorp. Acceptance Co., 715 So. 2d 199, 202 (Ala. 1997).
10. New § 6-5-641(e).
11. *Id.*
12. *Id.*
13. New § 6-5-642.
14. *Id.*
15. *Id.*
16. *Id.*
17. *See Ex parte Liberty Nat. Life Ins. Co.*, 631 So. 2d 665 (Ala. 1993) (first-filed action also first certified; but Court's opinion emphasized first filing). Later, in *Ex parte First Nat. Bank of Jasper* ("Jasper III"), 717 So. 2d 342 (Ala. 1997), four justices would have magnified this error by pronouncing the judgment in a subsequently filed action void! *Id.* at 351. *See also Ex parte Harris*, 711 So. 2d 467 (Ala. 1998). In a subsequent case, a majority of the Court has undertaken to repair the doctrinal damage, saying: "[T]he [jurisdictional] language quoted . . . from . . . Jasper III means only that the court in which the second class action is filed should refuse to exercise jurisdiction over the case once it is apprised of the fact that another court has assumed jurisdiction of substantially the same case . . . ." *First Tennessee Bank v. Snell*, 718 So. 2d 20, 23 ((Ala. 1998).
18. ALA. CODE § 6-5-440 (1993 repl. vol.): No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times.
19. *Id.*
20. *Ex parte First Nat'l Bank*, 675 So. 2d 348 (Ala. 1995).
21. *Id.* at 348.
22. *Ex parte First Nat'l Bank*, 675 So. 2d 348 (Ala. 1995).
23. *Id.* at 349.
24. *First Nat'l Bank of Jasper v. Crawford*, 689 So. 2d 43, 46 (Ala. 1997). It also should not mean that the defendant in a certified plaintiffs' class action under Rule 23(b)(3) can force the abatement of individual actions maintained by plaintiffs other than the class representatives. *See Ex parte DeArman*, 694 So. 2d 1288, 1292 (Ala. 1997) (Almon, J., concurring specially).
25. *See, e.g., Ex parte Equity Nat. Life Ins. Co.*, 715 So. 2d 192, 194 (Ala. 1997) (certification granted same day motion filed; no notice to defendants; no hearing).
26. *See Ex parte First Nat. Bank of Jasper* ("Jasper III"), 717 So. 2d 342 (Ala. 1997) (Cook, J.); *Ex parte State Mutual Ins. Co.*, 715 So. 2d 207 (Ala. 1997) (Cook, J.).
27. *See Ex parte The Water Works & Sewer Board of the City of Birmingham*, 1998 WL 865963 (Ala.).
28. *See Ex parte First Nat. Bank of Jasper* ("Jasper III"), 717 So. 2d 342 (Ala. 1997) (Cook, J.); *Ex parte State Mutual Ins. Co.*, 715 So. 2d 207 (Ala. 1997) (Cook, J.). Some of the language in the sometimes internally inconsistent opinions even suggests the fifth alternative, i.e., no assumptive priority with case-specific equitable considerations controlling the outcome.
29. *See, e.g. Ex parte State Mutual Ins. Co.*, 715 So. 2d 207, 223 (Ala. 1997) (See, J., concurring in the result: "the certainty and predictability afforded by" bright-line abatement).
30. *See, e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORN. L. REV. 851 (1995); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORN. L. REV. 1159 (1995);Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U.L. REV. 514 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors "Side Saddle" Fuel Tank Litigation*, 31 LOY. L.A.L. REV 409 (1998); Omari L. Winbush, *Tackling the Problem of Unfair Class Action Settlements: Making Sure the Settlement Action Isn't Unsettling*, written for Professor Jerome A. Hoffman's Seminar, Special Problems in Civil Procedure; Knox Boteler, *An Overview of the Problematic State Class Action*, written for Professor Jerome A. Hoffman's Seminar, Special Problems in Civil Procedure.
31. *Ex part LaCoste*, 1998 WL 737342, at 6 (Ala.) (Lyons, J., concurring in the judgment).
32. *Id.*
33. *See* Jerome A. Hoffman, Cumulative Supplement (1999) To Alabama Civil Procedure § 5.134 (1990).
34. *See* Jerome A. Hoffman, Cumulative Supplement (1999) To Alabama Civil Procedure § 5.134 (1990).

Jerome A. Hoffman

Professor Jerome A. Hoffman received his A.B. degree in 1962 and his J.D. in 1965 from the University of Nebraska, where he graduated Order of the Coif and served as editor-in-chief of the *Nebraska Law Review*. He was in private practice in California with the firm of McCutchen, Black, Verleger & Shea. Prior to coming to the University of Alabama, he was assistant professor of law at the University of New Mexico. Professor Hoffman came to the School of Law as an associate professor in 1971. He teaches civil procedure and evidence and is the Elton D. Stephens Professor of Law.

ALABAMA STATE BAR
SECTION MEMBERSHIP APPLICATION

To join one or more sections, complete this form and attach separate checks payable to each section you wish to join.

Name _____

Firm or Agency _____

Office Address _____

_____

Office Location _____

_____

Office Telephone Number _____

Section	Annual Dues
☐ Administrative Law	$20
☐ Bankruptcy and Commercial Law	$20
☐ Business Law	$10
☐ Business Torts and Antitrust Law	$20
☐ Communications Law	$15
☐ Corporate Counsel	$30
☐ Criminal Law	$10
☐ Disabilities Law	$20
☐ Elder Law	$15
☐ Environmental Law	$20
☐ Family Law	$30
☐ Health Law	$15
☐ Intellectual Property Law	$20
☐ International Law	$30
☐ Labor and Employment Law	if practicing less than 5 years–$10 if practicing 5 or more years–$30
☐ Litigation	$15
☐ Oil, Gas and Mineral Law	$15
☐ Real Property, Probate and Trust Law	$10
☐ Taxation	$15
☐ Women in Law	$20
☐ Workers' Compensation Law	$20
☐ Young Lawyers'	0

Remember: Attach a separate check for each section. TOTAL _____

Mail to: Sections, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

Alabama's Minority Attorneys

By Patrick R. Cotter and James G. Stovall

Have Alabama's minority attorneys experienced discrimination in their careers?

How did they get into the legal profession?

How do their careers compare to those of white attorneys in the state?

Those are just some of the questions the Task Force on Minority Participation in the Alabama State Bar set out to answer earlier this year. They did so, in part, by commissioning Southern Opinion Research of Tuscaloosa to conduct a survey of minority members of the bar.

What the survey found was that Alabama's minority attorneys exhibit many similarities to their white counterparts, but there are also some striking differences. Southern Opinion Research had also conducted a survey of bar members in 1998. Many of the questions were the same for both surveys, thus allowing a comparison of the results.

One fact should be noted at the start. Alabama has fewer than 610 minority members out of more than 12,800 members overall.

So just what are the problems that minority attorneys face? Racial discrimination, condescending treatment, and even harassment were problems mentioned by significant numbers of minority attorneys. Almost six-in-ten (58 percent) minority lawyers say that during their career they have experienced, as a result of their race, "condescending treatment" from a non-minority attorney or judge (Table 1). About 33 percent have experienced "discrimination in work assignments" while 30 percent has been excluded from "social functions or groups.

About one-in-four minority lawyers have experienced "a lack of training or mentoring activities" (29 percent), "verbal abuse or harassment" (26 percent) or "hiring discrimination" (25 percent). Fewer respondents report experiencing "pay discrimination" (22 percent), "problems in working with people" in their firm or organization (21 percent), "unsupportive leadership" (21 percent) or "discrimination in promotions" (20 percent). More than nine-in-ten (94 percent) minority lawyers believe that the "old boy" network existing among Alabama attorneys has constituted a serious problem for their legal careers. Almost the same number (88 percent) believe that "minority lawyers' lack of visibility within the profession" has been a serious problem in their career. About three-quarters (74 percent) of the respondents report that "the relatively small number of minority compared to non-minority lawyers" has been a serious career problem.

Table 1

"As a result of your race, have you experienced any of the following during your career as a lawyer?"

	Percent "Yes"
condescending treatment by non-minority attorneys or judges	58%
discrimination in work assignments	33%
exclusion from social functions or groups	30%
a lack of training or mentoring activities	29%
verbal abuse or harassment	26%
hiring discrimination	25%
pay discrimination	22%
problems in working with or "fitting in" with people in your firm or organization	21%
unsupportive leaders within your firm or organization	21%
discrimination in promotions	20%
your firm or employer's membership in clubs which do not have minority members	17%
reduced opportunities for court appearances	16%
difficulties in developing good working relationships with clients	12%

Characteristics of Minority Lawyers

The typical minority lawyer in Alabama is less than 40 years of age, married (for the first time) and the parent of one or two children. Women make up about half the minority lawyers in the state. The median annual personal income for minority lawyers in Alabama is between $50,000 and $60,000. Typically almost all of this income comes from law-related work.

Using data gathered from the 1998 survey, we found that minority lawyers in Alabama are younger and less likely to be married than their white counterparts. About eight-in-ten white lawyers are male, compared to the roughly even gender division among minority attorneys. White attorneys also have a median personal income of between $70,000 and $80,000, higher than that found for minority lawyers. Whites lawyers are also more likely to have non-law related sources of income. (Table 2)

Minority attorneys are generally quite satisfied with their careers as lawyers (Table 3). On a ten-point "very dissatisfied" to "very satisfied" scale, about 27 percent of minority lawyers rate their career as a "10." Only about 7 percent of minority lawyers express dissatisfaction (i.e. scores 1-4) with their career.

Minority and white attorneys express generally the same level of satisfaction with their careers as lawyers.

About 64 percent of minority lawyers are in private practice, while 22 percent work in government. Of the minority attorneys who say they work for government, about half (51 percent) are employed at the state level. About two-thirds (66 percent) of minority lawyers have been admitted to the Alabama bar since 1988. Most work in the state's largest counties, particularly Jefferson and Montgomery counties. About one-in-four (28 percent) minority lawyers say that they have worked at their present organization for two years or less. About 16 percent of minority lawyers are also members of the bar in some other state.

In the survey, minority lawyers who are in private practice were asked a series of questions concerning how many people their firm employs in different positions and how many of these positions were filled by minorities.

About 70 percent of private practice minority lawyers (compared to about 40 percent of white attorneys) work in an organization in which there are one or more "lawyers who are solo practitioners or proprietors." Most private practice minority attorneys work in organizations in which there are no "lawyers who are partners or shareholders" (67 percent), "lawyers who are of counsel" (88 percent), or "associates" (67 percent). About half (50 percent) of private practice minority lawyers work in organizations which employ a paralegal. Most firms, however, do not employ any law school student clerks (75 percent), non-lawyer administrators (60 percent), accountants (69 percent), messengers (64 percent), or investigators (84 percent).

Among non-private practice minority lawyers, about 35 percent work in organizations which employ more than ten attorneys. About 41 percent work in organizations in which there is a single minority attorney.

Table 2

Social characteristics of minority and white lawyers in Alabama*

	Minority attorneys	*White attorneys*
AGE		
20-30 YEARS	21%	15%
31-40 YEARS	33	28
41-50 YEARS	33	32
51-60 YEARS	10	16
61-70 YEARS	2	5
71+ YEARS	1	5
MARITAL STATUS		
Married	63%	79%
Separated	2	1
Divorce	5	6
Single	30	14
NUMBER TIMES MARRIED		
None	25%	12%
Once	60	70
Twice	12	16
Three or More	3	3
NUMBER OF CHILDREN		
None	36%	28%
One	17	18
Two	25	35
Three	15	15
Four or More	6	5
GENDER		
Male	50%	84%
Female	50	16
TOTAL INCOME		
Less Than $10,000	2%	2%
$10-20,000	5	1
$20-30,000	6	4
$30-40,000	12	8
$40-50,000	14	9
$50-60,000	11	10
$60-70,000	12	8
$70-80,000	10	10
$80-90,000	8	6
$90-100,000	3	4
$100-125,000	5	12
$125-150,000	3	8
$150-200,000	4	7
$200-250,000	2	3
$250-300,000	1	4
More Than $300,000	2	5
PERCENT OF INCOME FROM LAW-RELATED WORK		
50 Percent or Less	8%	11%
51-75 Percent	2	6
76-90 Percent	11	29
More Than 90 Percent	78	53

** Missing data deleted*

Table 3

"Imagine a scale ranging from 1 to 10, with 1 being very dissatisfied and 10 being very satisfied. On this scale how satisfied are you overall with your career as a lawyer?"*

	Minority attorneys	*White attorneys*
1 Very Dissatisfied	1%	2%
2	1	0
3	3	1
4	2	2
5	9	9
6	6	7
7	12	23
8	25	24
9	14	14
10 Very Satisfied	27	17
MEAN	7.8	7.5
MEDIAN	8.0	8.0

* *Missing data deleted*

Table 4

(Employed attorneys only) "Do you personally feel that you have more work than you can handle, about the right amount of work, or not enough work to keep you busy?"

	Minority attorneys	*White attorneys*
More Work Than Can Handle	40%	38%
About Right Amount	50	53
Not Enough	5	8
DK/NA	5	2
	271	363

(Employed attorneys only) "Does your firm have more work than it can handle, about the right amount of work or not enough work to keep it busy?"

	Minority attorneys	*White attorneys*
More Work Than Can Handle	41%	35%
About Right Amount	46	56
Not Enough	4	6
DK/NA	8	3
	271	363

Amount of work

About 40 percent of employed minority attorneys say that they have "more work" than they can handle (Table 4). Similarly about 41 percent say that their organization has more work than it can handle. Those in private practice are less likely (35 percent) to say that they have more work than they can handle compared with other employed minority attorneys (48 percent). Private practice attorneys are also less likely (34 percent) to say that their firm has more work than it can handle work.

About 48 percent of employed minority attorneys say they spend, on average, more than 50 hours a week on professional work. Those in private practice (mean=53 hours) spend more time on professional work than do other employed minority attorneys (mean=44 hours).

About 44 percent of employed minority attorneys say that their employer has a policy encouraging them "to devote time to providing free legal services for low income individuals." Among those in private practice, about 58 percent say that their employer has such a policy. Among employed minority attorneys, the median number of hours spent providing free legal services is 40 hours per year.

Cases and fees

About 10 percent of private practice minority attorneys never handle any cases on a "contingency basis." About 8 percent say that all their cases are handled this way. About half (51 percent) of those who handle contingency cases say they receive 33 percent of the award if successful. Among minority private practitioners, the median hourly rate charged clients is $125. About 2 percent charge clients more than $200 per hour.

White lawyers in private practice are somewhat less likely to handle cases on a contingency basis. However, the amount of award received if successful on a contingency case is about the same for minority and white private practitioners. Similarly, the hourly rate charged is about the same for minority and white attorneys in private practice.

Table 5

"How did you obtain your first full-time job as an attorney?"

Personal Invitation to Interview	25%
Offer After Summer Clerkship/Internship	18
Directly Contacted Employer	17
Started Own Practice	12
Law School Interview Program	8
Used Family/Friends/Colleagues	3
Judicial Clerkship	3
Based on the Recommendation of Someone Else	2
Other	8
DK/NA	4

* *Question not included in the 1998 survey*

Initial and current employment

Minority lawyers were asked how they obtained their "first full-time job as an attorney." Table 5 shows that about 25 percent say they obtained their first full-time position through a "personal invitation to interview." Slightly fewer respondents obtained their first full-time position after a summer clerkship (18 percent) or by directly contacting the employer (17 percent).

These attorneys were also asked what factors affected their decision to work for their current employer. About 21 percent say that a desire for "independence" or "flexibility" was the most important factor in their decision. Private practice attorneys (30 percent) are more likely than others (3 percent) to cite this reason as the most important factor affecting their current employment decision.

About 18 percent say that the most important factor affecting their choice of employment was a need for a job or money. Private practice attorneys (15 percent) are less likely than others (24 percent) to mention this factor.

An additional 17 percent say that the "type of work" was the most important factor influencing their choice of employment. Non-private practice attorneys (23 percent) were more likely to mention this factor than were those in private practice (14 percent).

A note on the survey

This report presents the results of a survey of minority lawyers in Alabama. One purpose of the survey was to collect information about the characteristics of the state's minority lawyers. Additionally, the survey examined minority attorney's attitudes concerning different services and activities of the Alabama State Bar. Finally, the survey investigated what types of race-related problems are encountered by minority lawyers in Alabama.

The survey of minority lawyers was commissioned by the Task Force on Minority Participation of the Alabama State Bar and was conducted by Southern Opinion Research, a private survey research firm located in Tuscaloosa, Alabama. The study began by having the state bar send a letter to each minority lawyer in the state. This letter explained the purpose of the project and asked the individual receiving it to participate in the survey. Next, a Southern Opinion Research interviewer called each respondent and either completed the telephone interview at that time or scheduled a time to conduct the interview.

A total of 276 telephone interviews were completed between May 3 and June 29, 1999.

A total of 426 minority lawyers were included on the list provided by the state bar. Current telephone numbers were available for 386 of these individuals. An additional 12 individuals were unavailable for interviewing because of illness, traveling or similar reasons. Thus, the response rate for the minority lawyer survey (number of completed interviews/total number available respondents) is 74 percent. ■

Patrick R. Cotter
James G. Stovall

Patrick R. Cotter and **James G. Stovall** are co-directors of Southern Opinion Research, an independent survey research firm in Tuscaloosa. They both teach at the University of Alabama.

THE BIRMINGHAM PLEDGE

A Lawyer Who Has Made a Difference

Jim Rotch will be the first one to tell you, the Birmingham Pledge is not about one individual. The Birmingham Pledge is, however, the brainchild of Birmingham lawyer James E. Rotch. The pledge is a simple and eloquent statement of one's belief in humanity and the dignity and the respect every person should enjoy. It is about the elimination of racial prejudice in our time, and for all time.

To understand the pledge, one must first recall the racial history of Birmingham and, for that matter, of the South, and the resultant shame. What better name to adorn the pledge than "Birmingham," a name synonymous with racial discrimination in the '60s? In the 1992 Leadership Birmingham Class, for the first time Jim really learned and understood the racial history of Birmingham and the impact that is still carried in the community. In the 1997 Leadership Alabama Class, he and other members were challenged by Marsha Folsom, wife of former Governor Jim Folsom, to think of a way to make a positive impact on racial harmony in the state of Alabama.

The Birmingham Pledge was penned by Jim Rotch on the long drive back to Birmingham from that Leadership Alabama meeting in Mobile. It occurred to him that if the personal pledge were made public, not only would it motivate the person making the pledge to honor it, but it would also perhaps motivate other people to make the same commitment.

Jim and Lou Willow, III, a fellow member of the Community Affairs Committee of Operation New Birmingham (CAC), took the pledge Jim had written to the CAC and asked the CAC to sponsor the project. The CAC readily agreed. The CAC was born in Birmingham in 1969, growing out of the racial strife so prevalent in Birmingham and across the country in the '50s and '60s. It was formed by a group of prominent local black and white leaders who came together searching for racial peace in Birmingham. Following the adoption by the CAC, members of the Birmingham City Council and the Jefferson County Commission also lent support to the pledge. On January 19, 1998, the pledge was officially launched at the Birmingham Martin Luther King Unity Breakfast. At that time, some 2,000 people stood up and together recited the pledge.

People from all over the world have signed and returned the pledge, over 50,000 to date. Among those persons are President William Jefferson Clinton and First Lady Hillary Rodham Clinton.

You, the lawyers of Alabama, are encouraged to read this pledge, sign it, cut it out, and either mail it or fax it to the number provided. But above all, LIVE IT. ■

THE BIRMINGHAM PLEDGE

SIGN IT • LIVE IT

I believe that every person has worth as an individual.

I believe that every person is entitled to dignity and respect, regardless of race or color.

I believe that every thought and every act of racial prejudice is harmful; if it is my thought or act, then it is harmful to me as well as others.

Therefore, from this day forward I will strive daily to eliminate racial prejudice from my thoughts and actions.

I will discourage racial prejudice by others at every opportunity.

I will treat all people with respect; and I will strive daily to honor this pledge, knowing that the world will be a better place because of my effort.

(Signature) .....

(Please Print Name) .....

(Street Address) .....

(City/State) .....

(ZIP Code) .....

(Organization)-Optional .....

(Date) .....

PLEASE COPY AND RETURN THIS FORM TO:
Birmingham Pledge
P.O. Box 370242
Birmingham, AL 35237-0242

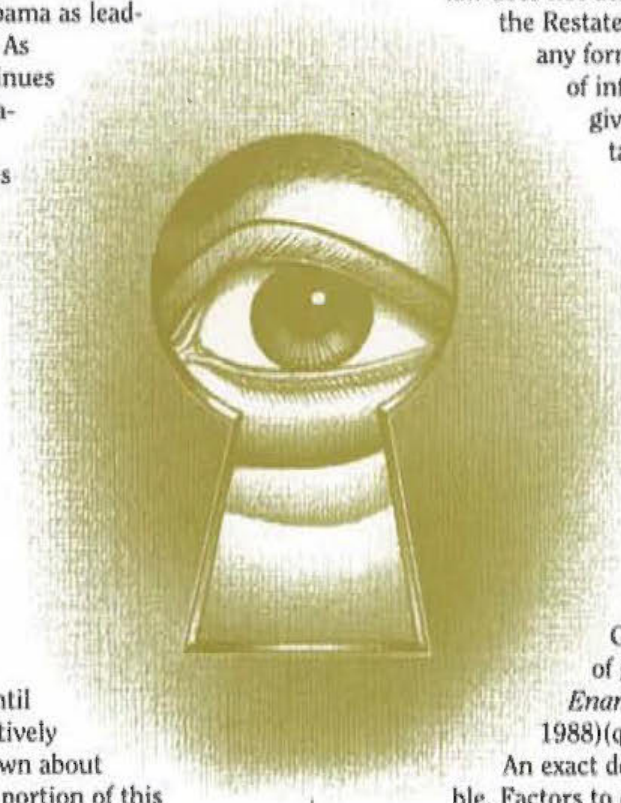
OR FAX US AT:
205/324-8799
www.onb.org

A project of the Community Affairs Committee of Operation New Birmingham

BUSINESS TORTS FROM A PLAINTIFF'S PERSPECTIVE

By Thomas J. Methvin

The intensity of business competition is steadily rising. Though businesses of equal economic power are capable of meeting the competition blow for blow, the smaller competitor may be driven from the arena. Oftentimes, those forced out of competition have been the victim of illegal business practices. In 1997, Dun & Bradstreet Corporation reported Alabama as leading the nation in startup businesses. As Alabama's business community continues to grow, the need for legal representation of business interests grows as well. Numerous cases with businesses as parties have arisen across the State. The following is a synopsis of the most commonly seen claims.



I. The Alabama Trade Secrets Act, ALA. CODE § 8-27-2 (1993)

Though relatively unknown to the traditional litigator, trade secrets are an increasingly important legal consideration when representing innovative companies which have made Alabama their home. Because the Alabama Trade Secrets Act (ATSA) was not passed until 1987, that area of the law is still relatively undeveloped. Because so little is known about trade secrets litigation, a substantial portion of this article is devoted to that topic.

Under the ATSA, a trade secret is information that:

a. is used or intended for use in a trade or business;

b. is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique or process;

c. is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;

d. cannot be readily ascertained or derived from publicly available information;

e. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and

f. has significant economic value.

The ATSA draws heavily on common law, particularly as it is embodied in the original Restatement of Torts. Common law does not define "trade secret," but *comment b* to the Restatement explains: "A trade secret may be any formula, pattern, device or compilation of information used in a business which gives an opportunity to obtain an advantage over competitors." The information must be presently or continuously used in a trade or business. "Negative" information, i.e. what will *not* work, can be a trade secret and is used when unworkable approaches are avoided. The secret is not the object, process, etc. but is specific information.

The categories listed should be construed broadly since the purpose is to protect individual property rights and, thereby, foster and encourage the development of new products, technology and ideas. Generally, it relates to the production of goods. *Saunders v. Florence Enameling*, 540 So.2d 651 (Ala. 1988)(quoting Restatement of Torts § 757).

An exact definition of "trade secret" is not possible. Factors to consider are 1) extent to which the information is known outside of the business; 2) extent to which it is known by employees and those involved in the business; 3) extent of measures taken to guard the secrecy of the information; 4) value of the information to the owner of the secret and his competitors; 5) amount of effort or money expended by him in developing the information; and 6) ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

The information must not be readily ascertainable or derivable from information that is publicly available. Courts have protected information as a trade secret despite evidence that such information could be easily duplicated by others compe-

tent in the given field. *Mason v. Jack Daniel Distillery,* 518 So.2d 130 (Ala. Aug. 5, 1987). The ability to combine elements into a successful product may be a trade secret entitled to protection. *Id.* The fact that every ingredient is known to the industry is not controlling for the secret may consist of the method of combining them which produced a product superior to that of competitors. *Id.*

One is liable for disclosure or use of a trade secret without privilege to do so, if it constitutes a breach of confidence reposed in that person by the other. Additionally, when someone uses a trade secret of another with notice that the secret has been misappropriated, they too, are liable for that use. If you innocently acquire a trade secret and discover that it was misappropriated, you must terminate your usage or be held liable. See *IMED v. Systems Engineering Assoc.,* 602 So.2d 344 (Ala. 1992).

Several remedies exist for actual or threatened misappropriation. To the extent that they are not duplicative the following are available:

a. injunctive or other equitable relief;

b. recovery of profits or benefits attributable to the misappropriation; and

c. actual damages.

Reasonable attorney's fees may also be awarded to the prevailing party if:

a. the misappropriation claim is made or resisted in bad faith;

b. a motion to terminate an injunction is made or resisted in bad faith; or

c. willful and malicious misappropriation exists.

The remedies are not necessarily alternative remedies, and the court has broad discretion when fashioning equitable relief. If actual damages do not cover all the profits of the misappropriator attributable to the misappropriation, then such profits may be awarded and vice versa. The intent is to make sure the plaintiff is made whole and that the misappropriator recognizes no profit from its wrongdoing. Punitive damages are permitted even if only nominal actual damages are awarded as long as the wrongful acts were committed with malice, willfulness, or wanton and reckless disregard of the rights of others. *Mason, 518 So.2d 130 (Ala. 1987.)* The duration of an injunction normally is for the period the trade secret is expected to remain a secret.

Because Alabama case law on this subject is relatively undeveloped, a reference to case law of jurisdictions with a substantial history on the subject can be insightful. Generally, there are three broad categories of alternative remedies: 1) plaintiff's lost profits; 2) defendant's unjust enrichment; and 3) that agreed to by the parties in contract. Courts and commentators have suggested that in choosing among competing theories, the measure which 'affords the plaintiff the greatest recovery' should be selected. *Pioneer v. Holden,* 35 F.3d 1226 (8th Cir. 1994). The standard for measuring damages is very flexible. An imaginative approach should be used, and each case is controlled by its own peculiar facts and circumstances. *University Computing v. Lykes-Youngston,* 504 F.2d 518 (5th Cir. 1974).

When measuring damages that are difficult to prove, "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *ALPO v. Ralston Purina,* 913 F.2d 958 (D.C.Cir. 1990). The governing test: "If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated." *Pioneer v. Holden,* 35 F.3d 1226 (8th Cir. 1994).

When a defendant has no profits by which its gain may be measured, alternative methods to determine gain are utilized. If the plaintiff is unable to prove specific injury, damages may be calculated by the money spent by plaintiff in research and development of the secret that the defendant wrongfully took.

In *Salsbury,* defendants were employed by plaintiffs after signing non-compete and confidentiality agreements. While employed, defendants learned plaintiff's trade secret. Defendants were recruited by a competitor and began developing and selling a substantially similar product. The Court found that plaintiff spent one million dollars on research and development and two million dollars on marketing and advertising. By improperly taking advantage of the plaintiff's work, the defendant received a "headstart" in the business. The Court awarded plaintiff one million dollars, representing the savings in research, development and marketing enjoyed by defendant, discounted by an amount from which the court found plaintiff still benefited. Punitive damages of $500,000 were awarded as well as attorney's fees. *Salsbury v. Merieux,* 908 F.2d 706 (11th Cir. 1990).

When plaintiff fails to prove its lost profits or defendant's gain, courts have resorted to the "reasonable royalty" theory for measuring damages. *Biodynamic Technologies v. Chattanooga Corp.,* 658 F.Supp. 266 (S.D. Fla. 1987). This theory adopts and interprets the fiction that a license was to be granted at the time of the infringement and then requires a determination of what the license price should have been. *University Computing v. Lykes-Youngston,* 504 F.2d 518 (5th Cir. 1974). The primary inquiry is what the parties would have agreed upon, if both were reasonably trying to reach agreement. *Id.* It is for the Court to determine a reasonable royalty which represents the value of that which has been wrongfully taken by the infringer. While a certain amount of speculation is involved in this highly theoretical reconstruction of a sale which never took place, the aggrieved plaintiff must be permitted to present its best evidence on damages and not be foreclosed from seeking damages it deserves due to difficulty in measurement. *Id.* Courts should be reluctant to penalize an aggrieved plaintiff by a too unrealistic and sterile requirement of proving that the defendant *would* have agreed to the price the plaintiff thinks is fair. *Id.*

In calculating a fair licensing price, the trier of fact should consider: 1) resulting and foreseeable changes in the parties' competitive posture, 2) the prices which past purchasers or

licensees may have paid, 3) the total value (profit) of the secret to the plaintiff, including the plaintiff's development costs and the importance of the secret to the plaintiff's business, 4) expert testimony, 5) plaintiff's future ability to stay in business, 6) advantages the infringer would have received had it negotiated a license, 7) ready availability of alternative processes, and 8) other unique factors. *Id.*

An important variation of the reasonable royalty standard is the "comparison method" wherein the damages constitute the difference between the defendant's cost of developing the trade secrets on its own and the actual development costs of the plaintiff. *University Computing, 504 F.2d 518 (5th Cir. 1974.)* The cost expended by another company not a party to litigation in an unsuccessful effort to develop the secret might be a persuasive indicator of the weight to be afforded other evidence in measuring what the misappropriator's cost might have been. *Servo v. G.E.,* 393 F.2d 551 (1968).

This method is frequently inadequate in that it fails to account for the commercial context in which the misappropriation occurred. If the defendant used the secret in only a few situations, was not in direct competition with plaintiff, developed the secret by refining existing trade practices, and ceased use of the plaintiff's trade secret, such a limited measure of damages may be appropriate. *University Computing, 504 F.2d 518 (5th Cir. 1974.)* Most courts adjust the measure of damages to be in accord with the commercial setting of the injury, the likely future consequences of the misappropriation, and the extent of use had by defendant after misappropriation. While plaintiff is not required to prove lost profits, it must be proven that the secret was misappropriated and that the defendant actually put the trade secret to use. *Id.*

Litigation over trade secrets can become expensive and burdensome. A vast amount of time, energy and resources will be required to properly prepare a trade secret case for trial. Though each case has its unique circumstances, a variety of factors may enter the equation when handling business litigation on a large scale.

In a pending case, a textile manufacturing company contacted a law firm for representation after discovering in a newspaper article that its trade secrets had been stolen. According to the article, the company was one of several which defendants targeted in a large scale spying campaign. The information was revealed in a lawsuit recently settled on those allegations.

Discovery in trade secrets cases is different from discovery in traditional litigation. By its nature, much information sought from the opposing parties is "secret." Protective orders are commonly entered before meaningful discovery takes place. Once discovery gets underway, the production of documents can be so voluminous that it overwhelms the unexpecting recipient. Various methods or computer systems should be in place to manage the voluminous documentation. Even exceptional management of documents, however, is unlikely to equip the lawyer with skills necessary to fully interpret all documents provided. Depending on the nature of the trade secret, experts in engineering or of an appropriate background may be retained to testify to the unique nature of the information at issue. Moreover, certain cases will require that an economist, market analyst, accountant or other such expert be retained to support the allegation of damages. Though trade secret cases have a tendency to seem complicated, the prepared litigant with adequate resources can handle such cases with relative ease.

II. Fraud and Breach of Contract

Fraud and breach of contract often go hand in hand in business-related claims.

A contract is established by showing an agreement, consideration, a legal object and two or more contracting parties with capacity. *Gonzalez v. Blue Cross Blue Shield,* 289 So.2d 812, 819 (Ala. 1997). Whether ambiguity exists in any contractual term is a question of law determined by the trial court. *Underwood v. South Central Bell Telephone Co.,* 590 So.2d 170, 175 (Ala. 1991). If the court finds any ambiguity, the true meaning of the contract is a question of fact, resolved only by a jury. *Sealing Equipment Products Co. v. Velarde.* 644 So.2d 904, 908 (Ala. 1994). Whether the parties have performed under the contract is also a jury question.

Generally, damages are awarded to the extent that they return the injured party to the position in which it would have been had the contract been performed. *Pate v. Rollinson Logging Equipment, Inc.,* 628 So.2d 337 (Ala. 1993). Plaintiff may recover damages which were the natural and proximate consequence of the breach. *Pate v. Rollinson Logging Equipment, Inc.,* 628 So.2d 345 (Ala. 1993). A jury need not achieve "mathematical precision" when calculating damages since a plaintiff will not be denied a substantial recovery if he has produced the best evidence available, and it is sufficient to afford a reasonable basis for estimated loss. *Mannington Floor Woods, Inc. v. Port Epes Transport, Inc.,* 669 So.2d 817, 822 (Ala. 1995); quoting *United Bonding Insurance Co. v. W.S. Newall Inc.,* 285 Ala. 371, 380, 232 So.2d 616, 624 (1969).

Fraud is committed by: 1) a false representation; 2) of a material fact; 3) relied upon by the plaintiff; 4) who is damaged as a proximate result of the misrepresentation. *Underwood v. So. Central Bell Tel. Co.,* 590 So.2d 170, 173 (Ala. 1991). An action for fraud may arise if the misrepresentation is made willfully to deceive, recklessly, or by mistake. *Ala. Code* § 6-5-101 (1993.)

The plaintiff's reliance on the misrepresentation must have been reasonable; a standard which the Alabama Supreme Court has held is more practical, allowing "the factfinder greater flexibility in determining the issue of reliance based upon all of the circumstances surrounding the transaction, including mental capacity, educational background, relative sophistication and bargaining powers of the parties." *Foremost Ins. Co. v. Parham,* 693 So.2d 409, 421 (Ala. 1997).

Compensatory damages may be awarded as well as punitive damages if the plaintiff shows the fraud was gross, malicious, oppressive, and that the fraudulent statement was made with

knowledge of its falseness, or so recklessly made that it amounts to intentional fraud. *Underwood,* 590 So.2d at 174. Several tips on discovery and how to work up a fraud case include the following:

1. Study the applicable industry regulations.
2. Try to find ex-employees of the defendant to testify about the company's practices. This can be invaluable. Depositions are useful in obtaining that information.
3. Find similar occurrence information. Do this by getting the customer list of the defendant, contacting the customers and asking if they have had similar action perpetrated on them. Hopefully, they will agree to be witnesses for you. See the cases of *Ex Parte Asher, Inc.*, 569 So.2d 733 (Ala. 1990); *Ex Parte State Farm,* 452 So. 2d 861 (Ala. 1984) which allow this discovery.
4. Also, if you are hooked into the Administrative Office of the Courts (AOC) computer, you can find other similar lawsuits against the defendant. If you are not hooked in, you can use the AOC network by going to any circuit clerk.
5. Do a Westlaw search to see if the company has been sued for other similar occurrences.
6. Contact the American Trial Lawyers Association. They have a database which may have some information regarding the companies.
7. Check with the Attorney General's Consumer Division to see if there has ever been any investigation of the company.
8. Check with the Better Bosiness Bureau to see if there have ever been any complaints regarding the company.
9. Additionally, the Internet is a great resource for endless information of a wide variety.

In the majority of cases, companies conduct business with each other under an oral or written contract. When the contract is breached, whether the wrongdoer's intent to perform the conduct was in good faith or fraudulent is almost immediately called into question. Thus, these claims are alleged together and arise in innumerable contexts.

The poultry industry has recently seen substantial business tort litigation of this nature. As discussed below, farmers who raise chickens for large integrators have alleged that they are being taken advantage of by the company for which they grow. Contracts to grow contain provisions which require farmers to raise chickens by the stringent standards of the company without any input from the farmer. The large companies dictate when the birds are fed, watered, medicated and delivered. The farmers allege that the companies force farmers to incur huge amounts of debt to finance the "latest technological advances" in poultry farming. Oftentimes, however, serious questions exist regarding the benefits of the latest equipment requirements. The end result is that the farmer foots the bill for the companies' capital investment, while the companies reap the profits.

Poultry companies rarely enter into lasting contractual relationships with growers. Most contracts exist for one grow-out for each flock. Generally, the companies will not guarantee the next flock will be delivered for growth, but the farmer maintains huge debt services arrangements with local lending institutions to accommodate the demands for updates by the company. Farmers fear being "cut-off" if they refuse to upgrade their farms. Although companies do not usually cut-off growers for failure to upgrade, the farmers allege that the companies find ways to pay the farmer less for the same amount of work.

Oftentimes, the companies catch a farmer's flock for immediate delivery to the plant to be weighed, only to have the company leave the birds on the trucks for hours losing weight from dehydration and, eventually, death. This costs the individual farmer thousands of dollars which he needs to finance the upgrades required by the company.

There are numerous remedies available to the farmer, including: breach of contract, fraud, negligence, intentional interference, conversion, antitrust, RICO, and more. Success with these types of cases depends on the credibility of the witnesses, the documentation available from the plaintiff, the documentation produced by the integrator and any particularly dramatic facts that may lead to an award of punitive damages for intentional conduct.

Other common cases deal with the plight of new business owners. Many people are looking to fulfill their dream of owning and operating a small business. Oftentimes, salespeople lead them to a small business that is not yet on the market for sale. When asked for the business' financial performance information, the defendants' agents produce financial statements which are inaccurate and misleading. Relying on the information, the plaintiffs purchase the business. After quitting their jobs, mortgaging their homes and personally guaranteeing the financing, the new business owners set out to fulfill their dream. Shortly after the purchase, many plaintiffs have learned that the business did not generate the revenue that had been claimed.

Of course, discovery is the most important part of these cases. Typically, there are other small businesses which have been misled in similar transactions. Obtaining the defendant's customer list is vital in developing a pattern and practice of conduct. Any documentation that reveals the commissions on such a sale are also important to show the defendants' motive for misrepresenting the truth.

As one last example, the timber industry has also seen a rise in litigation, regarding breach of contract and fraud. Large companies, owning thousands of acres of timberland, contract with numerous timber companies for the cutting and hauling of timber. In what appears to be a common practice, the company contracts with more timber companies than is necessary to satisfy the company's needs by the year's end.

In a pending case, a timber company spent several hundred thousand dollars in purchasing equipment to handle the large contract and invested practically one hundred percent of its resources in the venture, respecting the size of the operation. When the defendant later determined the timber company's

services were not needed, the contract was blatantly breached. Several hundred thousand dollars in debt, the timber company now faces bankruptcy.

Cases involving breach of contract and fraud abound. The aforementioned ones are only a small sample of common ones pending.

III. Interference with Business

Prior to 1986, one could not recover against third parties for interference with business or contractual relationships, unless that relationship was between an employer and employee or if a party to a lease was induced by fraud or coercion to breach his contract. *Gross v. Lowder Realty Better Homes & Gardens*, 494 So.2d 590 (Ala. 1986). Moreover, the distinction between intentional interference with business relations and intentional interference with contractual relations as two separate causes of action caused significant confusion in interpreting the validity of those claims. *Id.* at 593.

The Alabama Supreme Court's decision in *Gross* ushered in welcomed relief for Alabama businesses by combining the claims and stating the general rule that "one who, without justification to do so, induces a third person not to perform a contract with another is liable to the other for the harm caused thereby." *Gross*, 494 So.2d at 596 (citations omitted). Claims of intentional interference with business or contractual relations now require: 1) the existence of a contract or business relation; 2) defendant's knowledge of the contract or business relation; 3) intentional interference by the defendant with the contract or business relation; 4) absence of justification for the defendant's interference; and 5) damage to the plaintiff as a result of defendant's interference. *Mutual Sav. Life Ins. Co. v. James River Corp. of Virginia*, 716 So.2d 1172, 1180 (Ala. 1998), quoting, *Gross*, at 597 (Ala. 1986).

Justification for the interference, however, is an affirmative defense. *Gross*, at 597, n. 3. To determine whether the defendant's acts are justified, the importance of the defendant's objective is balanced against the importance of the interest interfered with, taking into account the surrounding circumstances. *Id.* citing *Restatement (Second) of Torts* § 767 (1979) and Comments. Generally, the factfinder determines the existence of justification. *Polytec, Inc. v. Utah Foam Products, Inc.*, 439 So.2d 683 (Ala. 1983).

Damages associated with interference claims include punitive damages as well as a compensatory recovery. *Southern States Ford, Inc. v. Proctor*, 541 So.2d 1081, 1088 (Ala. 1989). Claims are not subject to the statutory cap on damages when asserted against a municipality. *City of Birmingham v. Business Realty Inv. Co.*, 1998 WL 599492, (1998).

The following are a couple of examples of scenarios from which these claims arise. A real estate management company sued a homeowners' association when its interference with the company's customer relationships and contracts caused a substantial loss of income. Plaintiff was a relatively new owner of the company. Shortly after the change in ownership, differences arose between the new owner and the association. As a result, officers and friends of the association approached several of the company's customers and encouraged them to rent from or through an alternate management company.

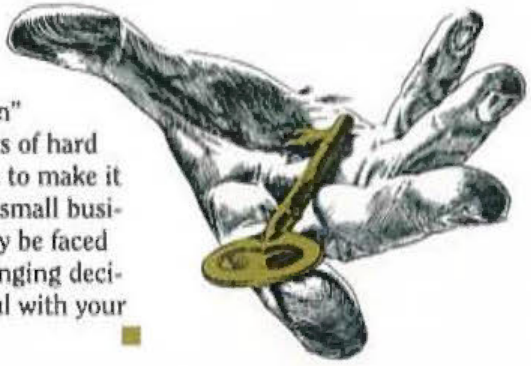
In another case, plaintiff and defendant were engaged in the wholesale grocery business to small companies and stores. Plaintiff competed with defendant to purchase a particularly profitable division of business. When plaintiff secured the purchase, defendant surreptitiously contacted the employees of plaintiffs' new division. After holding secret meetings with the employees, defendant convinced the employees of the entire division to "walk out" on plaintiff on a designated day and begin working for defendants.

IV. Tort Reform

Tort reform hurts small businesses more than most because businesses cannot get mental anguish. For all civil suits filed by businesses after the effective date, a cap on punitive damages of three times compensatory damages or $500,000, whichever is greater, is applied. Since businesses cannot get mental anguish, their compensatory damages will be only economic loss. Therefore, they will almost always fall under the absolute cap on punitive damages of $500,000.

Conclusion

A particular concern for the litigator representing any business is the circumstances under which a business plaintiff is operating when considering litigation. Oftentimes, a company has been sent nearly into bankruptcy by the defendant's wrongful activities. The client can be in a tough position—attempt to independently recover from near bankruptcy or get out of the business entirely. Smaller businesses commonly are run by individuals who started the business as their "dream" and spent years of hard work and time to make it succeed. Your small business client may be faced with a life-changing decision. Be careful with your advice. ■



Thomas J. Methvin
Thomas J. Methvin is the managing shareholder of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. He is the past president of the Montgomery County Bar Association and the Montgomery County Trial Lawyers Association. He is currently a member of the Alabama State Bar Board of Bar Commissioners, 15th Circuit, place number four.

Opinions of the General Counsel

By J. Anthony McLain, general counsel

Rule 4.2—Plaintiff's Counsel Contacting Former Employees of Corporate Defendant

J. Anthony McLain

Question:

"I have filed two complaints against ABC Credit Union. The suit in Anywhere County is a proposed class action which alleges improper mortgage balances and interest rates charged to ABC customers. The suit charges ABC Credit Union with fraud and breach of contract. The crux of the complaint filed is outrage, slander, invasion of privacy and intentional infliction of emotional distress arising out of the branch manager's treatment of an ABC Credit Union customer.

"The ABC president has been named as a defendant in both suits. Mrs. Doe, the president's former secretary, has retained our firm to represent her in connection with sex discrimination arising out of the president's treatment of her [Mrs. Doe] when she became pregnant and took maternity leave. Upon return after maternity leave, Mrs. Doe learned that she had been replaced.

"As stated, Mrs. Doe was employed by ABC Credit Union as the president's former secretary. She types correspondence to and received correspondence from ABC's legal counsel pertaining to the two cases I have pending. Mrs. Doe also had specific conversations with the president about the two cases I have pending.

"I need a written opinion as to whether Rule 4.2 or any other rule of professional conduct precludes me from asking Mrs. Doe about facts or information she knows concerning the two previously filed cases."

Answer:

You are not precluded from communicating with this former employee under the set of facts you have described in your request.

Discussion:

Rule 4.2 of the Rules of Professional Conduct prohibits communication about the subject matter of the representation with a "party" known to be represented by other counsel. Consent of the other counsel obviates the problem. Rule 4.2 is a successor to Alabama DR 7-104(A)(1) and the two provisions are substantially identical. In RO-88-34 (also published in *The Alabama Lawyer*), the Disciplinary Commission held that a plaintiff's counsel in a tort claim action could contact and interview current corporate employees/witnesses. There can be no ex parte contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party by his/her testimony, or if the employee was the actual tort feasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required.

Ex parte contact with a *former* employee, as here, is not subject to the same scrutiny. In fact, there is a strong argument that Rule 4.2 does not even apply to former employees at any level. A former employee cannot speak for the corporation. The ABA Committee on Ethics and Professional Responsibility in Formal Opinion 91-359 (1991) stated

that former employees of a corporation may be contacted without consulting with corporation's counsel because they are no longer in positions of authority and thus, cannot bind the corporation. The Disciplinary Commission believes that contact with a former employee is ethically permissible, unless the ex parte contact is intended to deal with privileged matter, i.e., the inquiring counsel is asking the former employee to divulge prior communications with legal counsel for the adverse party, and these communications were conducted for purposes of advising the adverse party in the litigation or claim. If the former employee was the actual person giving rise to the cause of action, contact is also permissible so long as that person is not represented by counsel. [RO-92-12]

DISCIPLINARY NOTICES

Notices

- **William Richmond Stephens**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 1999, or thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 96-013 (A), 94-265 (A), 94-264 (A), 95-030 (A), 95-097 (A), 95-317 (A), 95-352 (A), 95-121 (A), 96-062 (A), 96-029 (A), and 96-315 (A) before the Disciplinary Board of the Alabama State Bar.

- Notice is hereby given to **Paul Martin Foerster, Jr.**, 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 July 19, 1999, he has 60 days from the date of this publication (November 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-10]

- **Thomas Allen Wingo, Jr.**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 1999, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 96-356 (A) and 97-087 (A) before the Disciplinary Board of the Alabama State Bar.

- **John A. Acker, Jr.**, whose where abouts are unknown, must appear before the Disciplinary Commission of the Alabama State Bar on December 8, 1999, at the Alabama State Bar Headquarters at 10:00 a.m. for a hearing on Rule 22 (a), Pet. No. 99-002.

- **Robert Cooper Wilson**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 1999, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 98-039 (A), 99-01(A) and 99-36(A) before the Disciplinary Board of the Alabama State Bar.

- Notice is hereby given to **William Morgan Butler**, who practiced law in Northport, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 28, 1999, he has 60 days from the date of this publication (November 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-39]

- Notice is hereby given to **William Lee Hanbery**, who practiced law in Florence, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 19, 1999, he has 60 days from the date of this publication (November 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-12]

- Notice is hereby given to **Kenneth H. Millican**, who practiced law in Hamilton, Alabama, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated July 28, 1999, he has 60 days from the date of this publication (November 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-42]

- Notice is hereby given to **Peter A. Bush**, 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 July 28, 1999, he has 60 days from the date of this publication (November 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-38]

Disbarments

- Phenix City attorney **Gregory Kelly** was disbarred from the practice of law by order of the Alabama Supreme Court effective June 30, 1999. Kelly's disbarment was a result of his failure to respond to disciplinary charges filed by the Office of General Counsel and his failure to appear at a disciplinary hearing before the Disciplinary Board of the Alabama State Bar. [ASB No. 98-264(A)]

Suspensions

- Tuscaloosa attorney **William Morgan Butler** was interimly suspended from the practice of law by order of the Disciplinary Commission of the Alabama State Bar effective July 14, 1999. [Rule 20(a); Pet. No. 98-11]
- On August 13, 1999, the supreme court affirmed a 91-day suspension which had previously been ordered for Dothan attorney **Kenneth Coy Sheets** by the Disciplinary Board of the Alabama State Bar. The suspension became effective on August 16, 1999 and was the result of a plea agreement between Sheets and the Alabama State Bar. Sheets left Alabama to go on temporary active duty with the military, but failed to notify his clients. His clients were unable to contact him. During his absence, client matters were neglected. The plea agreement resolved six individual pending disciplinary cases. Sheets will be required to petition for reinstatement at the conclusion of his suspension.
- On August 26, 1999, the Disciplinary Commission of the Alabama State Bar ordered that Eufaula attorney **Christie Gregory Pappas** receive a 91-day suspension from the practice of law in the State of Alabama, with the imposition of said position to be suspended and held in abeyance pending Pappas' successful completion of two years' probation. Pappas pled guilty to violating Rule 1.15(a), *Alabama Rules of Professional Conduct*, which provides that a lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. [Rule 20(a); Pet. No. 97-08]
- On August 13, 1999, the supreme court affirmed a five-year suspension which had been previously ordered by the Disciplinary Board for Birmingham attorney **Whitmer A. Thomas**. The suspension was made retroactive to March 13, 1998 which is the date that Thomas was interimly suspended. Thomas effectively abandoned his law practice, causing numerous clients to file complaints about willful neglect of their legal matters. Thomas entered into a plea bargain with the Alabama State Bar, which called for the suspension and restitution in the amount of $32,188.85. The restitution was primarily a return of attorney's fees paid to Thomas. The plea bargain resolved 22 outstanding cases pending on Thomas. [ASB No. 98-132(A), et. al.]
- Daleville attorney **Donald Cecil McCabe** was suspended from the practice of law in the State of Alabama for a period of two years effective September 1, 1999. On July 27, 1999, the Supreme Court of Alabama affirmed the judgment of the Disciplinary Board of the Alabama State Bar finding McCabe guilty of the following: (1) acquiring a pecuniary interest in a cause of action or subject matter of litigation, a violation of Rule1.8(j), *Alabama Rules of Professional Conduct;* (2) falsifying evidence, counseling or assisting a witness to testify falsely, or offering an inducement to a witness that is prohibited by law, a violation of Rule 3.4(b), *Alabama Rules of Professional Conduct;* (3) practicing law in a jurisdiction where doing so violates the regulation of the legal profession, i.e., engaging in the unauthorized practice of law, a violation of Rule 5.5(a), *Alabama Rules of Professional Conduct;* and (4) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, a violation of Rule 8.4(c), *Alabama Rules of Professional Conduct*. The respondent attorney appeared as counsel for plaintiffs in a will contest filed in 1992 in Dale County, Alabama. During the course of his representation of the plaintiffs, the respondent attorney paid a plaintiffs' witness substantial sums of money and conferred other things of value upon this witness and other witnesses in exchange for their favorable testimony. McCabe also filed an appearance on behalf of the plaintiffs' witness in a related civil action filed in Florida. At the time this action was filed, McCabe was not licensed or otherwise authorized to practice law in the state of Florida. [ASB No. 96-248(A)]
- On September 20, 1999, **Gregory Miles Hess** was interimly suspended by order of the Disciplinary Commission of the Alabama State Bar. Hess was suspended pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*. The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon Hess' failure to appear for the administration of a public reprimand. The Disciplinary Commission further order that Hess be restricted from maintaining a trust account. [Rule 20(a), Pet. No. 99-005]
- On September 20, 1999, **Paul Martin Foerster, Jr.** was interimly suspended by order of the Disciplinary Commission of the Alabama State Bar. Foerster was suspended pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*. The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon Foerster's failure to cooperate in the

investigation of pending disciplinary cases. The Disciplinary Commission further order that Foerster be restricted from maintaining a trust account. [Rule 20(a), Pet. No. 99-004]

- Effective February 9, 1999, attorney **Gregory Kelly** of Phenix City has been suspended from the practice of law in the State of Alabama for non-compliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 98-41]

Public Reprimands

- Birmingham attorney **Edward Eugene May** received a public reprimand with general publication from the Disciplinary Board of the Alabama State Bar on September 17, 1999. May was employed to represent and Mrs. Edward Stephens in connection with a tax lien which has been imposed on their business by the Alabama Department of Revenue. On April 27, 1997, Mr. and Mrs. Stephens gave May $7,931.87 with which to pay the tax lien. May placed this sum in his trust account and later transferred it to his tax account but failed to pay the Department of Revenue, with the result that the bank account of Mr. and Mrs. Stephens was garnished on October 8, 1997. Thereafter, May paid the sum due the Department of Revenue, plus interest and penalty from his personal funds. In addition to the reprimand the board also determined that May should refund to Mr. and Mrs. Stephens the attorney's fee which they paid him and should reimburse them for the money which was garnished in their bank account with interest at 12 percent per anum. May was also ordered to pay for an independent audit of all bank accounts maintained by him from January 1, 1997 to the present and to spend a minimum of six hours in consultation with the director of the Law Office Management Assistance Program. May was found to have violated Rules 1.3, 1.15(a), 1.15(b) and 8.4(g) of the *Alabama Rules of Professional Conduct* of the Alabama State Bar. [ASB No. 98-017(A)]

- Eufaula attorney **Sabrie Gracelyn Graves** received a public reprimand with general publication on September 17, 1999 as part of the discipline imposed pursuant to her plea of guilty to failing to make reasonable efforts to ensure that a non-lawyer employee's conduct was compatible with her professional obligations as a lawyer, a violation of Rule 5.3, *Alabama Rules of Professional Conduct*. The non-lawyer employee, Gracelyn Graves, requested or encouraged present clients to solicit prospective clients on the firm's behalf in various legal matters in violation of Rule 7.3, *Alabama Rules of Professional Conduct*.
  Although there was no direct evidence that attorney Sabrie Gracelyn Graves engaged in any improper solicitation, her failure to properly supervise her non-lawyer employee resulted in the imposition of discipline in this case. Attorney Sabrie Gracelyn Graves was placed on probation for a period of one year. Other conditions of probation were ordered. [ASB No. 98-93]

- Tuscaloosa lawyer **Joseph Sprately Dice** received a public reprimand without general publication and was placed on probation for a period of two years for having violated Rule 1.15(a) and (b), *Alabama Rules of Professional Conduct*. The respondent attorney pled guilty to creating a trust agreement on behalf of a long-standing client and, at the client's request, naming himself as trustee. During the respondent attorney's tenure as trustee, the respondent attorney used a portion of the trust funds to pay personal expenses. It was noted that upon discovery of the respondent attorney's mismanagement of the trust funds, the respondent attorney immediately made restitution and paid all costs associated with a third-party audit of the trust account. The respondent attorney's full cooperation, acknowledgment of guilt and payment of restitution in full were considered as mitigating factors in imposing discipline in this case. [ASB No. 98-38(A)]

Disability

- Athens attorney **William Christopher Wise** was transferred to disability inactive status pursuant to Rule 27 (c), Alabama Rules of Disciplinary Procedure, effective September 21, 1999. [Rule 27(c); Pet. No. 99-04] ■

YOUNG LAWYERS' SECTION

By Thomas B. Albritton, YLS president

Getting Acquainted

Thomas B. Albritton

The annual meeting of the Alabama State Bar Young Lawyers' Section was held July 15, 1999 in conjunction with the state bar's annual meeting in Birmingham. Officers for the YLS for the 2000-2001 term were elected at that time and include: Cole Portis, president-elect; Todd Strohmeyer, secretary; and Bob Methvin, treasurer. I will serve as president of this section for the 1999-2000 term.

I take this opportunity to thank immediate-past President Gordon Armstrong for all of his hard work. Gordon's leadership abilities and organizational skills guided the section through a successful and productive year.

As we begin another bar year, I want to acquaint you with some of the activities of the Young Lawyers' Section of the state bar.

First of all, who are we? Any member in good standing of the Alabama State Bar who is not over the age of 35 years or who has been in practice three years or less is automatically a member of our section. If you fit this description, then this means YOU. Who leads the section? The officers (president, president-elect, secretary and treasurer) in conjunction with a 20-member executive council lead the activities of the section. What do we do? Several things:

Bar Admission Ceremony

In May of this year, over 150 new admittees to the Alabama State Bar and over 1,000 visitors participated in the spring admission ceremony in Montgomery. This ceremony was coordinated by Lisa Van Wagner in conjunction with the staff of the Alabama State Bar. The ceremony included addresses by Wade Baxley, then president-elect of the Alabama State Bar; Keith Norman, executive director of the Alabama State Bar; and members of the Alabama Supreme Court, Court of Criminal Appeals and Court of Civil Appeals. United States District Judge Myron Thompson conducted the swearing-in ceremony for admission to the U. S. Middle District of Alabama.

For the first time, this ceremony was held at the Davis Theatre in Montgomery rather than at the Civic Center. Because of the overwhelming success of the program at that site, it was again held there October 27th and plans are to hold future ceremonies at that site, as well.

Minority High School Pre-Law Conference

Each spring the Young Lawyers' Section sponsors the Minority High School Pre-Law Conference, which is designed to provide minority high school students considering a legal career with an inside look into our profession. Elizabeth Smithart and La Barron Boone worked diligently to produce a tremendous conference on May 14, 1999. Over 150 high school students from Montgomery and surrounding counties gathered at Alabama State University where they divided into small groups for instruction and discussion with successful and distinguished minority members of the bar.

Highlights of the conference were: a mock trial where high school students participated alongside minority attor-

neys and judges, and speeches and valuable participation from Circuit Judge Charles Price, Jock Smith from Tuskegee and J.L. Chestnut. This project is one of the more meaningful programs sponsored by the YLS, and the participation is increasing each year. The target for next year's conference is 200 high school students. If you are interested in helping out with this program, please call La Barron Boone at (334) 269-2343.

Sandestin Seminar

Gordon Armstrong, Todd Strohmeyer, Stoney Chavers, Lisa Van Wagner and Robert Hedge orchestrated another outstanding CLE seminar at Sandestin Beach Resort over the weekend of May 21-22, 1999. Over 200 young lawyers attended this year's seminar and received CLE credit as well as having had a great time. Excellent speakers, (including Professor Brad Bishop, Paul Malek, Andy Birchfield, Sid Jackson, Kenneth Simon, Judge Joseph Johnston, Judge Sharon Yates, Judge Roger Monroe, Judge Sue Bell Cobb and Nolan Awbrey), superb entertainment and good weather combined to make a great weekend at the beach for all.

Other Events

Upcoming YLS activities include a statewide conference of local young lawyer affiliate groups designed to promote dialog between the local affiliates and the YLS of the state bar: the Youth Judicial Program, which is a joint project between the YMCA Youth in Government Judicial Program and the YLS is designed to provide students with a "hands-on" experience of our judicial system by preparing and trying cases during the State Mock Trial Competition; and participation in joint projects with the American Bar Association.

If you are interested in helping out with one of our programs, if you are interested in serving on the Executive Council, or if you have any questions related to our section, please write or call me at Albrittons, Clifton, Alverson & Moody, P.C., P.O. Box 880, Andalusia, Alabama 36420, (334) 222-3177 ■

Want to help improve the image of the legal profession? It's easier than you think!

Why? Because of the ASB's "To Serve the Public" Video Presentation -- a complete package that includes an award-winning eight-minute video, speech points and even brochures for the audience. It's suitable for civic groups, schools or any community organization. Every local bar association has a copy of the presentation or you can just call the ASB (800-354-6154) and request one.

Imagine the impact if Alabama lawyers across the state did just one presentation in their local community. That's right -- there would be over 10,000 positive messages going out about the legal profession!

And it is really easy to do -- no prior preparation is needed. Just pick up the video presentation package and go! Even if you still have a little 'stage fright,' don't worry. You'll end up being as impressed by what Alabama lawyers do as the audience is!

It begins with you.

To SERVE

THE PUBLIC

YES, I volunteer to present or to help schedule a presentation of "TO SERVE THE PUBLIC" to groups in my area. Contact me to make arrangements!

NAME _____

BAR ASSOCIATION _____

PHONE OR E-MAIL _____

Recent Decisions

By William M. Bowen, Jr. and Wilbur G. Silberman

Recent Decisions of the Supreme Court of Alabama—Criminal

Rules for Post-Conviction Discovery

Ex parte Land, [Ms. 1971816, 8/6/99] ___ So.2d ___ (Ala. 1999) should be required reading for prosecutors and defense counsel alike on the subject of discovery. This case involved a petition for writ of mandamus in which the petitioner sought to require the circuit court to grant his motions for discovery. These motions were filed as part of a petition for post-conviction relief in which Land challenged his death conviction and sentence on the ground that trial counsel was ineffective for failing to adequately investigate the possibility of the existence of mitigating evidence and did not present any evidence of mitigating circumstances. In his discovery motions, Land sought access to the complete files of the district attorney's office related to the case, and the complete files of all other agencies involved in the investigation of the charges against him, including the sheriff's office, the municipal police department, the county coroner's office, the Alabama Bureau of Investigation, the Alabama Department of Forensic Sciences, and the Alabama Department of Youth Services. In addition, Land sought access to his institutional records, including penal and mental health records.

Agreeing with the court of criminal appeals (see *Ex parte Land*, [Ms. CR 97-1473, July 2, 1998] ___ So.2d ___ (Ala.Crim.App. 1998)], the supreme court held that post-conviction discovery motions are to be judged by a good-cause standard. The court further held that this does not automatically allow discovery under Rule 32, A.R.Crim.P., and that it does not expand the discovery procedures within Rule 32.4. The court "caution[ed] that post-conviction discovery does not provide a petitioner with a right to 'fish' through official files and that it 'is not a device for investigating possible claims, but a means of vindicating actual claims.' ... Instead, in order to obtain discovery, a petitioner must allege facts that, if proved, would entitled him to relief."

The court found Land's petition was not facially meritorious. "[T]rial counsel's failure to investigate the possibility of mitigating evidence is, per se, deficient performance. ... [T]rial counsel may be found ineffective for failing to present evidence of adjustment to incarceration, evidence of mental-health problems, and evidence regarding the defendant's contact with a juvenile system."

However, the court rejected the state's argument that Land is not entitled to the requested documents until he can show that they contain evidence of mitigating circumstances, noting that "[i]t is impossible to determine whether the documents contain evidence of mitigating circumstances until the documents are actually produced." The court concluded that "it would be practically impossible for [Land] to show that he suffered prejudice from the deficient performance of his counsel unless he could show the trial court that mitigating evidence (which he has a reasonable basis to believe in fact exists) existed at the time of his trial and then argue, on the basis of that evidence, that a 'reasonable probability' exists that a jury hearing the evidence would have recommended life imprisonment without parole."

The court also held that the trial court erred in limiting discovery to just the district attorney's file. Land was entitled to see documents held by state agencies, including the Birmingham Police Department, that acted on behalf of the state in investigating the victim's murder in order to determine whether

William M. Bowen, Jr.

William M. Bowen, Jr. is a *cum laude* graduate of Samford University and received his J.D. degree from Cumberland School of Law. He served as an assistant attorney general from 1973-76 and was elected to the Alabama Court of Criminal Appeals in January 1977 (at age 29, was the youngest appellate judge in the nation). After serving three full terms, Bowen retired in January 1995. He practices with the Birmingham firm of White, Dunn & Booker. Bowen has received numerous awards and has served as a frequent lecturer and instructor. He covers the criminal decisions.

the district attorney withheld exculpatory or "Brady" material (i.e., that others were involved in the victim's murder).

Effect of Fourth DUI

In *Ex parte Formby*, [Ms. 11972151, 8/27/99] ___ So.2d ___ (Ala. 1999), the supreme court revisited its holding in *Ex parte Parker*, No.197001 (Ala., February 26, 1999) that, in a felony prosecution under §32-5A-191(h) for a fourth DUI, the three prior convictions are not elements of the offense charged and are properly to be considered only for the purpose of determining whether upon conviction a defendant shall receive an enhanced sentence. The court restated its earlier conclusions. First, "*Parker* held that a fourth or subsequent DUI conviction is a felony conviction, rather than a misdemeanor conviction." Therefore, jurisdiction over a fourth or subsequent DUI charge should be brought in circuit court and not in district court. Second, "it is reversible error for a jury during the guilt phase of a [DUI] trial, to be presented with evidence of the defendant's prior DUI convictions," even though the indictment should put the defendant on notice that he is being charged with a violation of a felony.

Lesser-Included Offense

Ex parte N.W., [Ms. 1980126, 9/10/99] ___ So.2d ___ (Ala. 1999) is significant because it gives direction in determining what constitutes a lesser-included offense and because it deals with two very "popular" crimes–menacing and harassment. A juvenile entered a store and began pulling on the locked office door. She screamed and cursed when she could not get into the office. Later, she reentered the store and began shouting and cursing, stating that she was going to kill a cashier. Under the facts presented, harassment is not a lesser included offense of menacing. The juvenile court acquitted the juvenile of the charged offense of menacing but adjudicated her a delinquent after finding her guilty of harassment as a lesser included offense.

On appeal, the juvenile argued that she was not given the notice required under constitutional due process. The court stated that the juvenile "received notice that she was charged with the criminal offense of harassment only if all the elements of that offense are included among the elements of menacing, that is, only if it would be impossible to commit menacing without first having committed harassment." Here, the only applicable definition of harassment was that contained in 13A-11-8(a)(1) which required either proof of "abusive or obscene language" or proof of an "obscene gesture." Those elements are not among the elements of menacing. The court noted that an element of menacing is "physical action," and stated: "[W]hile a gesture might be considered 'physical action,' to prove one guilty of harassment the State must establish that the gesture amounted to 'fighting words,' an element not present in the offense of menacing."

Hearsay in Hearsay Admissible in Some Circumstances

A victim's statement to another that the accused had threatened her does not constitute inadmissible hearsay upon hearsay. *Ex parte Dunaway*, [Ms. 1980571, 8/20/00] ___ So.2d ___ (Ala. 1999). At the sentencing phase of this capital trial involving a double murder, three witnesses were permitted to testify that the victim had stated several weeks before her murder that the defendant had threatened to kill both herself and the other victim. The court found this testimony was relevant because it did tend to negate the mitigating circumstance which the defendant was attempting to prove–that he never contemplated killing anyone. The court further found the testimony admissible because it fell within an exception to the hearsay rule, i.e., a statement of the "declarant's" then existing emotions or state of mind. Justice Lyons dissented on the ground that the witnesses could have testified that they personally heard the defendant make the threats but that they should not have been permitted to testify that the deceased told them that the defendant had threatened her. This is hearsay within hearsay. However, because the witnesses also personally heard the defendant threaten the victim and because there was other evidence of premeditation, the admission of this evidence was harmless. Justice Johnson also dissented to this holding of the court.

Recent Bankruptcy Decisions

Fifth Circuit holds it is not required that an ERISA plan be qualified to be excluded from debtor's bankruptcy estate

In re Martha C. Sewell, 180 F.3d 707, B.C.D. 928 (5th Cir. July 27, 1999). Both the bankruptcy and District Court held that even though a plan had been disqualified because of certain acts of the employees of the debtor, the debtor's beneficial interest in the retirement plan, under §541(c)(2) of the Bankruptcy Code, was excluded as an asset of the estate. The Fifth Circuit affirmed the lower court's holdings. It said that it would be a perverse result to hold that acts of the sponsor causing disqualification could similarly cause a participant to be penalized. It relied upon *Patterson v. Shumate*, 112 S.Ct. 2242 (1992), where the Supreme Court decided that so long as there is a restriction on transfer, in accordance with Bankruptcy Code §541(c)(2), such restriction is not dependent upon enforcement under state law, but that it is sufficient if enforceable under federal law other than bankruptcy law. Here, the trustee contended that the plan would not qualify under the IRC, even though it had not been tested. This argument was made in the Seventh Circuit case of *Baker v. LaSalle*, 114 F.3d 636 (7th Cir. 1997), where the Seventh Circuit said that although *Patterson v. Shumate* coined the phrase in referring to the exclusion of debtor's interest in an "ERISA-qualified pension plan," such term "ERISA-quali-

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.

fied pension plan" is not in §541(c)(2), and that the Supreme Court, in further commenting, had indicated that "ERISA-qualified" meant nothing more than that the plan contained the anti-alienation clause required in the ERISA law (§206(d)(1)). The Fifth Circuit concluded its opinion here by stating "the fact that the plan is not or may not be 'qualified' for tax purposes does not preclude excludability." Thus, debtor's interest was determined to be excluded from the estate.

Comment: Do not be totally carried away by the holding. The court added footnote 21 which seems to say that if the debtor could lawfully withdraw funds from the plan at the time of the initiation of the bankruptcy proceeding, there might be a different result.

Anti-Injunction Act did not bar bankruptcy court from re-examining tax issue, which ultimately led to penalty, but debtor taxpayer nevertheless won because he relied on lawyer's bad advice

In re William Stoecker, 179 F.3d 546, (7th. Cir. June 2, 1999), ____BCD___. The bankruptcy court first rejected the claim of the State of Illinois for some $900,000 in unpaid use tax. The District Court affirmed. The tax arose out of the purchase of an airplane by a corporation of which the debtor was president. The state claimed debtor liable as a "responsible officer." Under the Illinois use tax law, there is a provision as to the penalty assessed against a "responsible officer"; if any corporate officer with control, supervision or responsibility of filing returns and making payment willfully fails to do so, such person becomes personally liable for a penalty equal to the total unpaid tax. Here, an airplane was purchased out of state by Chandler Enterprises, Inc., a corporation of which the debtor, Stoecker, was president. After the plane was brought into Illinois, the Chandler corporation not only did not pay the tax, but failed to register the plane, a requirement of Illinois law. Several years later, after the company was defunct, the state issued a tax liability against the company and a penalty against Stoecker. Stoecker filed chapter 7. The District Court held that the corporation owed the tax, and that since Stoecker in effect was a guarantor, he was liable for the penalty. On appeal, the Seventh Circuit opinion by Chief Judge Posner, first held the District Court in error for relying on the Tax Injunction Act (28 U.S.C. §1341) as a bar to re-examining the tax liability of Chandler corporation. This act bars the federal courts from enjoining the assessment or collection of state taxes unless there is no adequate state remedy. Judge Posner said that the Court was not dealing with a tax, but a penalty which could not be enforced unless the tax was valid, and that under §505(a)(1) of the Bankruptcy Code, the bankruptcy court may decide tax issues. After dealing with several arguments, the court then held the Chandler corporation liable for the tax, and stated that the burden of proof was on Stoecker to show that he was not a responsible party. To be a responsible party, just as in corresponding federal law, the failure to pay must be willful. However, the court then held that Chandler had an opinion letter from a reputable attorney that no tax was due because there was a security interest in one of the title holder predecessors to Chandler and that Chandler's reliance on a reputable lawyer's opinion negated willfulness.

Comment: The result in this case did not help the debtor; it was beneficial only to the trustee, and, ultimately, perhaps to unsecured creditors unless only priority creditors would benefit. I do wonder whether other circuits will follow the reasoning of Judge Posner, which seems to be a bootstrap opinion to hold Stoecker liable, and then to let him off. The reader should examine Alabama law to determine if there is similarity in any of these features, such as holding a responsible person liable for payment of sales or use taxes.

Eleventh Circuit almost rules for IRS in not tolling three-year priority period by saying that §105(a) is applicable

In re Jimmy and Jamie Lynne Morgan, 182 F.3d 775, 34 B.C.D. 973 (11th Cir. July 26, 1999). In January 1995, the Morgans, as husband and wife, filed a successive chapter 13 petition. In August 1990, they had filed their first chapter 13. In the first case, the IRS filed a priority claim for $29,207 for unpaid income taxes for 1987, 1988 and 1989, and the confirmed plan provided for full payment for all priority claims. The first case was dismissed in October 1994 for failure to make all required payments, although some payments were made to the IRS. Thereafter, the IRS filed a priority claim in the successive case under §507(a)(8)(A)(i), contending that it was due to be paid in full. The debtors objected on the basis that the cited Bankruptcy Code section grants priority only to claims under three years of age. The bankruptcy and district courts held that the statute was tolled during the period of the first case. The Eleventh Circuit stated that as a question of law was involved, the review was *de novo*. The Morgans relied on the "plain language of the statute" arguing that the running of the statute was stayed during the bankruptcy, for which reason the three-year priority period should be tolled.

The court first remarked that every circuit, except the Fifth, to whom the issue was presented, has allowed tolling. A majority of the courts have based their conclusions upon §108(c), which extends the statute of limitations for creditors, stating that taking §108(c) in conjunction with IRC §6503(b), which suspends the limitation period on a debtor, allows the tolling. However, as §108(c) applies only to non-bankruptcy law and proceedings, the Eleventh Circuit would not accept §108(c) as a basis. It then concluded that the general equity power under §105(a) was sufficient to affirm the tolling. It mentioned that the Tenth Circuit in *In re Richards*, 994 F.2d 765 held that §105(a) was sufficiently broad to suspend the 240-day assessment period of §507(a)(7)(A)(ii), and that the rationale of that case should apply here. It also cited prior Eleventh Circuit cases which held that as a court of equity, a bankruptcy court has "the power to adjust claims to avoid injustice or unfairness." Following this reasoning, the Eleventh Circuit, rather than rendering the result, remanded in order that the bankruptcy court consider the issue of tolling under §105(a), which meant that the equities involved should be the factor for consideration.

Comment: Apparently, there could be a set of facts to militate against tolling, but I do not see how. The Eleventh Circuit looked at the matter *de novo*, and then told the bankruptcy court to decide on the facts. Would it not be ironic if the bankruptcy court decided that the statute should not be tolled? ■

CLASSIFIED NOTICES

Rates: Members: Two free listings of 50 words or less per bar member per calendar year EXCEPT for "position wanted" or "position offered" listings—$35 per insertion of 50 words or less, $.50 per additional word;

Nonmembers: $35 per insertion of 50 words or less, $.50 per additional word. Classified copy and payment must be received according to the following publishing schedule:

November '99 issue—deadline September 15, 1999; January 2000 issue—deadline November 15, 1999. No deadline extensions will be made.

Send classified copy and payment, payable to *The Alabama Lawyer*, to: *Alabama Lawyer* Classifieds, c/o Shannon Elliott, P.O. Box 4156, Montgomery, Alabama 36101.

SERVICES

- **DOCUMENT EXAMINER:** Examination of questioned documents. Certified forensic handwriting and document examiner. Thirty-three years' experience in all forensic document problems. Formerly, chief questioned document analyst, USA Criminal Investigation Laboratories. Diplomate (certified)-ABFDE. Member: ASQDE; IAI; SADFE; NACDL. Resume and fee schedule on request. Hans Mayer Gidion, 218 Merrymont Drive, Augusta, Georgia 30907. Phone (706) 860-4267.

- **TRAFFIC ACCIDENT RECONSTRUCTION:** Evaluation of highway design. This engineer has reconstructed over 3,000 accidents in 20 states on highways, streets, railroads, and highway construction zones involving trucks, vans, cars, pedestrians, and farm implements. Computer animation and CAD drawings prepared to illustrate his opinions. Over 42 years' engineering experience. Registered professional engineer and full ACTAR certification. Contact John T. Bates, P.E., toll-free (800) 299-5950.

- **DUI/DRE EXPERT WITNESS:** Expert witness in the following areas: Driving under the influence, drug recognition, standard field sobriety tests. Operation and maintenance of breath testing devices by a former police officer (retired) and a national instructor for the National Highway Safety Traffic Administration. Also an instructor for breath-testing devices. Charles E. Smith (C.E.S. Consulting, Inc.) Phone (561) 286-5761. Fax (561) 286-6732 or e-mail: *DUICONSUL@aol.com*. C/V and fees sent upon request.

- **FORENSIC DOCUMENT EXAMINER:** Handwriting, typewriting, altered documents, medical records, wills, contractors, deeds, checks, anonymous letters. Court-qualified. Twenty years' experience. Certified: American Board of Forensic Document Examiners. Member: American Society of Questioned Document Examiners, American Academy of Forensic Sciences, Southeastern Association of Forensic Document Examiners. Criminal and civil matters. Carney & Hammond Forensic Document Laboratory, 4078 Biltmore Woods Court, Buford (Atlanta), Georgia 30519. Phone (770) 614-4440. Fax (770) 271-4357.

- **Y2K COMPLIANCE:** Year 2000 computer and legal systems compliance. Certified computing professional, certified data processor, over 23 years' computer systems design and software experience. JD, MBA, BS (accounting). Attorney providing legal assistance for both vendor and end-user client issues regarding Y2K compliance. Contact Phillip G. Estes. Phone (256) 238-8529 or *esteses@internettport.net*. *No representation is made that the quality of legal services to be performed is greater than the quality of legal services to be performed by other lawyers.*

- **HANDWRITING EXPERT:** Forensic document examiner. ABFDE-certified, past president Southeastern Association of Forensic Document Examiners, American Academy of Forensic Sciences Fellow. Federal court-qualified. Nineteen years' experience. Civil and criminal. Handwriting comparison, forgery detection, detection of altered medical records and other documents. Contact L. Keith Nelson, Stone Mountain, Georgia. Phone (770) 879-7224.

- **ELECTRICAL EXPERT WITNESS:** Twenty-four years' experience in the electrical industry. Member of BOCA, CABO, IAEI, ICBO, SBCCI. OSHA-authorized instructor. LPI-certified lighting protection. NICET-certified. Master electrician/contractor in 39 states. Fee basis only. Contact Steven J. Owen, electrical consultant. Phone (205) 987-2502. Fax (205) 982-9613.

- **FORENSIC DOCUMENT EXAMINATIONS:** Seventeen years' forensic document examinations; 27 years' total forensic experience. Retired senior documents examiner and discipline coordinator, Alabama Department of Forensic Sciences. Member, Questioned Document Section-American Academy of Forensic Sciences; Southeastern Association of Forensic Document Examiners; Southern Association of Forensic Scientists; Alabama State Association of Forensic Sciences (past president). Contact Richard A. Roper, Ph.D., 7956 Vaughn Road, #141, Montgomery 36116. Phone (334) 260-2552. Fax (334) 260-7929. E-mail: *richroper@aol.com*.

- **CONSTRUCTION MANAGER AND STRUCTURAL ENGINEER:** Registered professional engineer in Alabama, Mississippi and Louisiana. M.S.C.E. Twenty-seven years' experience with chemical plants, pulp and paper, refineries, fertilizer complexes, petrochemical plants, commercial and residential. Extensive experience with structural failures and insurance claims. Computer animation for failed structures. Negotiate construction claims and mediate construction disputes. Contractor's license in Alabama and Louisiana is current. Will testify. Contact Hal K. Cain, P.E., Mobile.

Phone (334) 661-2605. Web site: *www.hkcain.com.*

- **LEGAL RESEARCH AND WRITING:** Research and writing services, including briefs, trial memoranda and other documents. Prompt deadline services. Experienced researcher and writer. Licensed Alabama attorney and member of the Alabama State Bar since 1979. Katherine S. Weed, P.O. Box 590104, Birmingham 35259. Phone (205) 941-1496. *No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*

- **INSURANCE EXPERT WITNESS:** Fee-only expert witness. Twenty years' experience in risk management insurance consulting. Pre-filing evaluation, deposition and trial. Policy coverage, captives, excess, deductibles, self insurance, agency operations, direct writers, property loss preparation. Member S.R.M.C. Contact Douglas F. Miller, Employers' Risk & Insurance Management. Phone (205) 995-0002, Birmingham or WATS (800) 462-5602.

- **DRUG AND MEDICAL EXPERTS:** Doctors of pharmacy, board-certified physicians, specialists and nurses available for participation in various cases. Pharmacy/medical malpractice cases welcomed. Timely, detailed, accurate written reports on all reviewed material. Most medical specialists on contract. Contact Worldwide's Dr. Damon S. Cousin, Pharm.D., R.Ph. Phone (504) 374-1843. Fax (504) 781-2216.

- **WEB SITE CREATION:** Just for legal profession. Various packages. Reasonable pricing. Increase your choice cases. Call (205) 222-1081 for BamaLaw.com, Inc.

- **FREE REFERRALS:** Legal Club of America seeks attorneys to receive new clients. Must be licensed and maintain professional liability insurance. There is no cost to participate, however, attorneys must follow a discounted fee schedule. All law areas needed. Not an insurance program. Call (800) 305-6816, e-mail: masatty@attynet.net or visit www.legalclub.com for information.

ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?

Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

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

It is.

People entrenched in alcohol or drug dependencies can't see what it is doing to their lives.

You can.

Don't be part of their delusion.

Be part of the solution.

For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 395-0807. All calls are confidential.

POSITIONS OFFERED

- **ATTORNEY POSITION:** Small personal injury firm in Birmingham seeks an associate with two to three years' experience handling claims. Please send cover letter and resume to Frank S. Buck, P.C., Attn: Patrick Patronas, P.O. Box 55089, Birmingham, 35255-5089.
- **LITIGATION ATTORNEY:** Wilkes & McHugh, a growing law firm with offices throughout the Southeast U.S., seeks an associate for our Birmingham office. Candidates to possess a minimum of three to five years' prior legal experience (criminal prosecution experience is preferred); be well-versed in all aspects of litigation, including preparation and review of legal documents, interviewing clients/witnesses/experts, conducting depositions, and partaking in hearings/mediations/trials. In addition, applicants are to be members of the Alabama State Bar and have excellent academic credentials. We offer a generous salary/benefits package. Send resume and salary requirements in confidence to 830 Frankford Drive, Brandon, Florida, 33511. EOE.
- **ATTORNEY JOBS:** The nation's #1 job-hunting bulletin for attorneys is now online at *AttorneyJobsOnline.com*. Subscribe online or call us: 1-800-296-9611. Extensive Web site presents thousands of attorney and law-related jobs nationwide and abroad at all levels of experience in public (federal, state and local) and private sectors. Sponsored by West Group.
- **ATTORNEY POSITIONS:** Leitman, Siegal & Payne, P.C. is seeking attorneys in the fields of commercial litigation, estate planning, corporate, tax and commercial real estate. Three to 30 years' experience is desired. Send resume to the firm in care of Hiring Partner at 600 N. 20th Street, Suite 400, Birmingham, 35203. Compensation based on experience.

FOR SALE

- **LAWBOOKS:** Complete set of Southern Reporter and Southern 2nd (less one volume). Excellent condition. Asking $3,500. Call (334) 834-3656.
- **LAWBOOKS:** William S. Hein & Co., Inc., serving the legal community for more than 70 years, is still your number one source for buying/selling lawbooks. Save 50 to 70 percent on single volumes, major sets, federal and state, foreign/international law, rare/antiquarian law. Appraisal services available. Phone (800) 496-4346. Fax (716) 883-5595. Web site: *www.wshein.com/used-books*.

FOR LEASE

- **OFFICE SPACE:** Convenient to all courts, easy-to-find office space located in downtown Birmingham. Perfect for solo or satellite office. Beautifully renovated historic building. Two offices available. Law library on site. Parking, utilities, fax, copier, phone included. Phone (205) 324-9991.
- **HOMES:** France: Provenca/Luberon-17th C. four bedroom stone farmhouse, pool, on wine estate, near Menerbes, weekly $1,300–$1,700. 18th C. farmhouse, three bedrooms, pool, near Avignon and Arles, weekly $1,000–$1,300. Burgundy: 17th C. Chateau-six bedrooms, five baths; weekly $1,500–$2,000. 18th C. farmhouse, three bedrooms, two baths, weekly $700 to $900, both about 1.5 hours from Paris, near medieval art center of Vezelay. Italy: Tuscany-Exquisite 12th C. house, views of San Gimignano's medieval towers, four bedrooms, three baths, pool, weekly $2,000–$3,200. 18th C. house, views of San Gimignano's medieval towers, six bedrooms, three baths, weekly $1,600–$2,500; on same estate, farmhouse with four spacious apartments, weekly (each) $800–$1,000. Law Office of Ken Lawson, (206) 632-1085, fax (206) 632-1086, e-mail: *kelaw@u.washington.edu*.

SERVICES WANTED

- **LAST WILL & TESTAMENT:** Trying to locate will of Therese McWhorter Graham a/k/a Terri M. Graham. Probably in Montgomery or Jefferson county. If in your possession please contact: W.M. Beck, Jr., Attorney, P.C. , P.O. Box 680066, Fort Payne, AL 35968-1601. Phone (256) 845-1691. ■

Your clients didn't retain *"just any attorney"* to represent their legal interests.

Don't retain *"just any valuation firm"* to advise and assist *you.*

IN COURT OR OUT, LITIGATION SUPPORT OR ESTATE PLANNING, YOU SHOULD ALWAYS BE ARMED WITH A RELIABLE BUSINESS VALUATION FOR YOUR CLIENT.

FOR SWIFT RESPONSE AND STRICT ADHERENCE TO THE PROFESSION'S HIGHEST STANDARDS, RELY ON WILLIAMS, TAYLOR & ASSOCIATES.
WE ARE A NATIONALLY RECOGNIZED ACCOUNTING, VALUATION AND CONSULTING FIRM WITH THE STRONGEST CREDENTIALED PROFESSIONALS IN ALABAMA.

WILLIAMS, TAYLOR & ASSOCIATES - SERIOUS ABOUT YOUR BUSINESS.

JAMES L. WILLIAMS,
CPA/ABV, CVA, CBA

ROBIN E. TAYLOR,
CPA/ABV, CVA, CBA

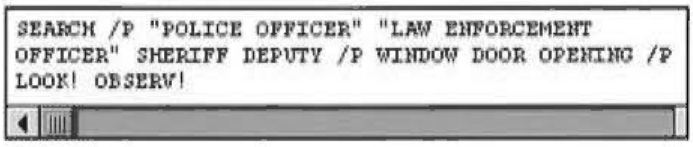
WILLIAM K. NICHOLS II,
CPA, CVA

TIMOTHY W. YORK,
CPA/ABV, CVA

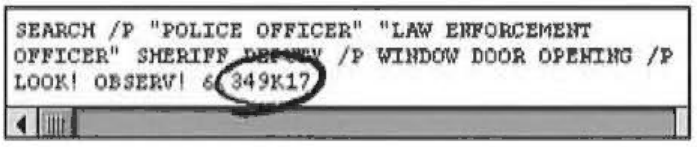
WILLIAMS, TAYLOR & ASSOCIATES
ACCOUNTANTS • CONSULTANTS

2140 ELEVENTH AVENUE SOUTH, SUITE 400 • THE PARK BUILDING • BIRMINGHAM, ALABAMA 35205
(205) 930-9111 • (800) 874-8552 • FACSIMILE (205) 930-9177• WEBSITE www.wtaepa.com

4,249 cases retrieved. 4,194 irrelevant.



58 cases retrieved. 53 on point.



Wasting too much time sifting through irrelevant cases?

Add a Key Number to your Westlaw® word search for on-point results.

For information about searching with Key Numbers, call 1-800-262-0620.

Searches run in ALLCASES database on Westlaw, May 26, 1999.

Westlaw.

INFORMATION ON YOUR TERMS.

Y2K

Bancroft-Whitney • Clark Boardman Callaghan
Lawyers Cooperative Publishing • Westlaw® • West Publishing

WEST GROUP