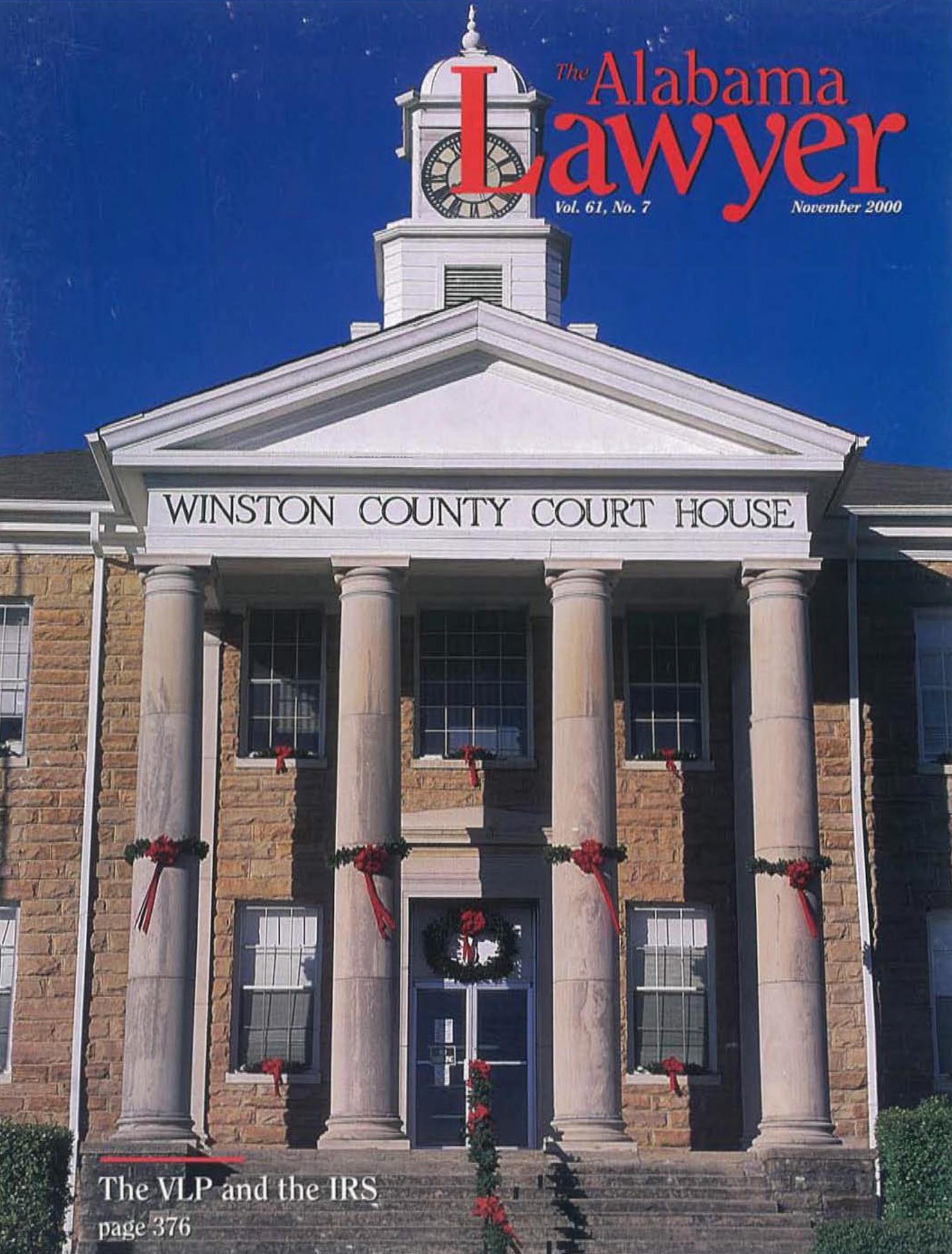




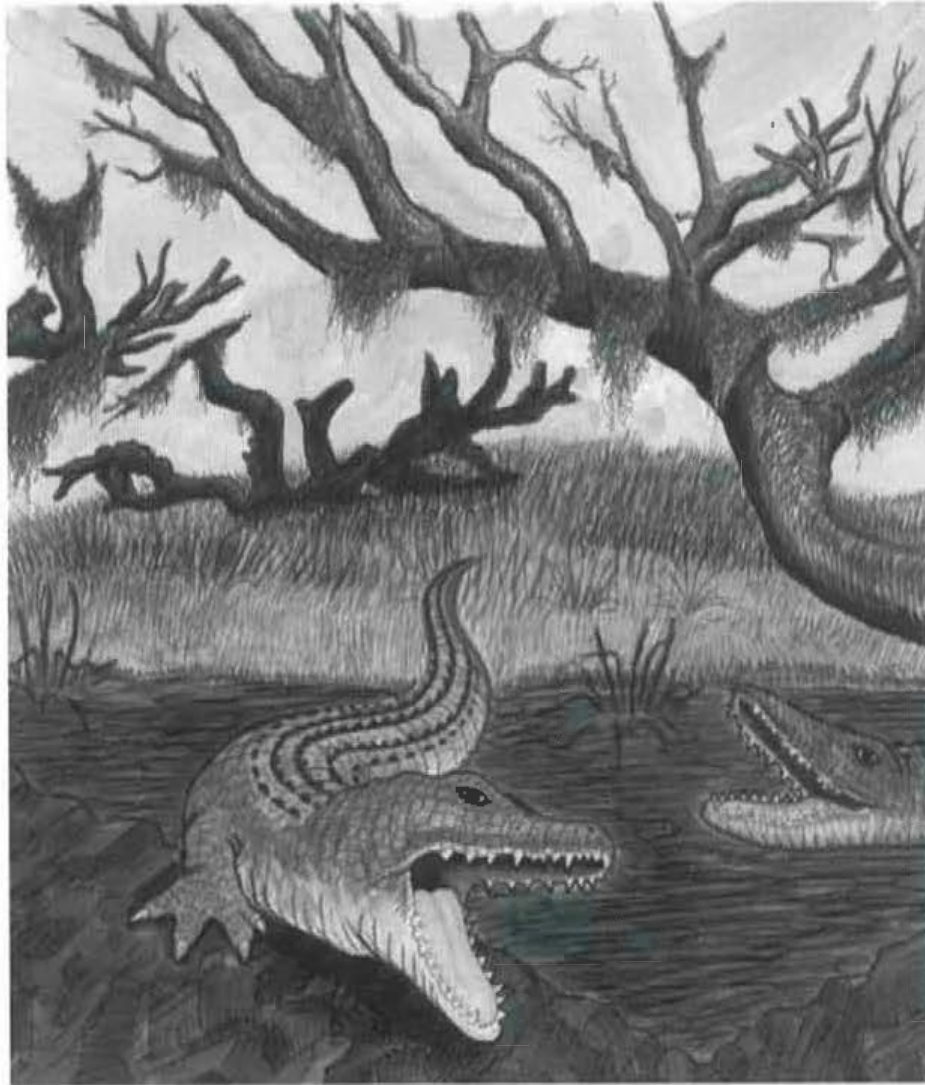
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WINSTON COUNTY COURT HOUSE



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On the Cover

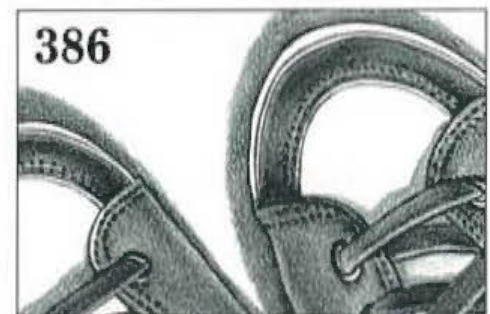
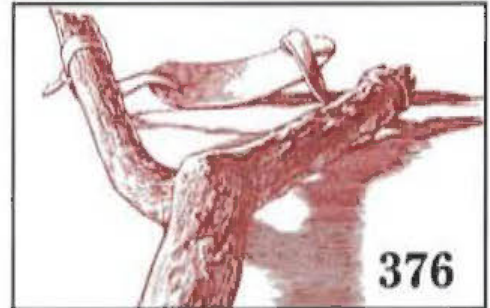
Winston County Courthouse, Double Springs, Alabama — Winston County, named in honor of ex-Governor John A. Winston, often has been called "The Free State of Winston." Although popular legend has it that Winston County seceded from the state prior to the start of the Civil War, historians say this was never formally accomplished. However, a neutrality meeting was held at the site of Looney's Tavern in northeast Winston County in the early 1860s after the war began. Hundreds of persons attended that meeting and heard speeches on the theme that if Alabama could secede the Union, then Winston County could secede from Alabama. Many residents of Winston County desired to be left out of the escalating Civil War, in part because there were few slaves (and fewer slave-owners) in the county, and they believed that the war was being fought over issues which did not concern them.

—Photograph by Paul Crawford, JD

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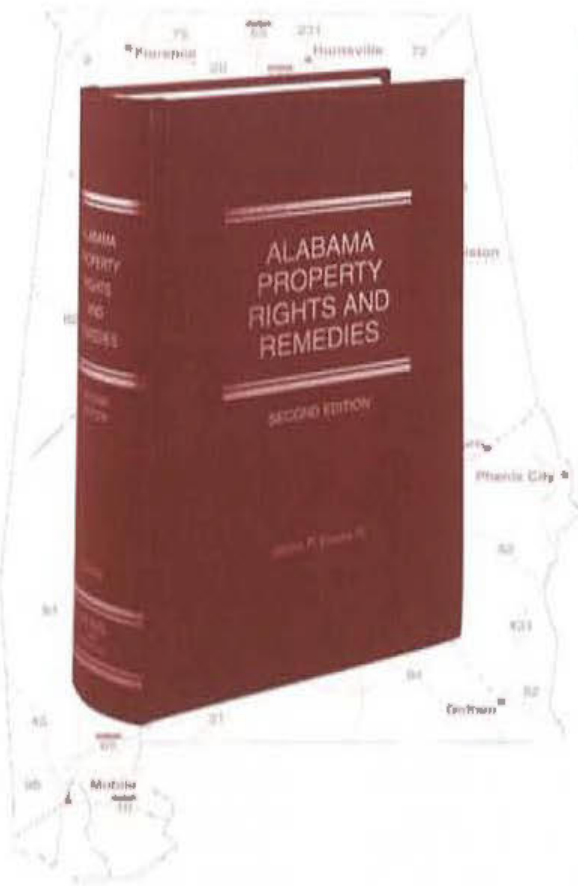
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PRESIDENT'S PAGE

By Samuel A. Rumore, Jr.

Renewing Professionalism



Samuel A. Rumore, Jr.

The Executive Council of the Alabama State Bar had its annual retreat the weekend of August 25-27 at Calloway Gardens. The purpose of the retreat was to review plans for the year, consider problems facing our profession, and get to know each other better in a casual setting. The council met with Keith Norman, our executive director; Tony McLain, our general counsel; Ed Patterson, our director of programs; Susan Andres, our director of communications and public information; and Cole Portis, president of the Young Lawyers' Section.

For those who do not know the makeup of the Executive Council, our by-laws authorize the bar president to appoint the council. The president selects a senior member of the Board of Bar Commissioners to serve as vice-president of our association. I asked Pat Graves of Huntsville to be vice-president. Three other bar commissioners are appointed to the council. I asked Rocky Watson of Fort Payne, Carol Stewart of Birmingham and John Barnett of Monroeville to serve. These lawyers, together with Immediate Past President Wade Baxley and President-Elect Larry Morris, serve as advisors and a pseudo-cabinet for the bar president. My observation at the conclusion of our retreat is that the leadership of your Alabama State Bar is in good hands.

Over the next few months you will be hearing more about many of the items on our agenda. I intend to appoint a task force to review proposals for a new Alabama Constitution. In 2001, Alabama Legal Services will be conducting a fund-raising campaign. For the first time ever, our annual meeting will be at Sandestin, Florida. All members of the bar soon will receive a new bar identification number. And we will consider preparing a new strategic plan for the Alabama State Bar as we move forward in the 21st Century.

Another area of discussion at our retreat concerned professionalism. The common cord that binds all members of the Alabama State Bar is our professional license to practice law.

Professionalism can mean many different things, but basically, as members of the legal profession, we have been given a privilege to do things that other citizens cannot do. With this privilege comes high responsibility. That responsibility is to the public and also to each other in the profession.

Pat Graves, our vice-president, has shared his thoughts with me on professionalism. He was particularly interested in lawyer civility. He reminded me that Jim Rotch, his law partner and a classmate of mine in Leadership Birmingham, had authored "The Birmingham Pledge,"

which is a personal commitment by an individual that he or she will treat all people with dignity and respect. Pat suggested that our bar adopt a similar pledge for lawyer professionalism. I was most impressed by the content of his proposal, and it will be presented to the Board of Bar Commissioners for further action. We can all profit from living this pledge each day. I share the proposed pledge with you now.

Proposed Pledge of Professionalism

I believe that our judicial system holds together the fabric of our democracy.

I believe that, in order to maintain our judicial system, lawyers must maintain a high degree of professional courtesy and decorum.

I believe that every lawyer has a professional duty to maintain a courteous and collegiate atmosphere in the practice of law.

I believe that a courteous and collegiate atmosphere begins with me.

Therefore, I will

- take all actions in good faith.
- never knowingly deceive another lawyer.
- honor promises and commitments made to another lawyer.
- maintain a cordial and respectful relationship with opposing counsel.
- seek sanctions against opposing counsel only where required for the client and not for mere tactical advantage.
- not make unfounded accusations of unethical conduct about opposing counsel.
- never intentionally embarrass another lawyer.
- avoid personal criticism of another lawyer.
- shake hands with the opposing lawyer at the close of adversarial proceedings.
- refrain from engaging in any conduct which engenders disrespect for the court, my adversary, or the parties.
- never have *ex parte* communications with the court when the opposing party is represented by counsel.
- stand to address the court, be courteous and not engage in recrimination with the court.
- dress in proper attire during any court proceeding, whether in the courtroom or chambers, to show proper respect for the court and the law.
- always remember that the purpose of the practice of law is neither an opportunity to make outrageous demands upon vulnerable opponents nor blind resistance to a just claim; being stubbornly litigious for a plaintiff or a defendant is not professional.

Date _____ Signature _____

As lawyers we must renew our commitment to professionalism and I believe that such a signed pledge is a good start. We must not take the approach to "win at all costs." Professionalism begins with each one of us. If we try our cases professionally and if we treat each other with civility, justice will be served and the "rule of law" will be the real winner. You can also view the pledge at www.alabar.org.

I close now with the admonition that we should all strive for higher standards of professionalism in our daily practice. Also, as your president, I welcome similar ideas from all of you that I can share with our membership. My phone number is (205) 323-8957. My fax number is (205) 254-3267. My e-mail address is srumore@aol.com. I look forward to hearing from you this year. ■



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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

A Tribute to B.J.



Keith B. Norman

Betty Jean Solomon departed this life on August 5, 2000. Very few bar members would have occasion to know "B.J.," as she chose to be called, but B.J. worked at the state bar for more than ten years keeping the bar's facilities immaculate for staff and visitors alike. She did not work for the state bar but for a private janitorial company. This fact did not stop her from treating the bar building as her domain. B.J. took a great deal of pride in her work here.

B.J. was a special person to everyone who knew her. What made her special was that she cared so much about everyone else. She always took time to find out about how the other person was doing, and about their spouse and children. From her demeanor, you knew her concern for others was genuine and that she was touched when someone else had a problem. B.J. was the embodiment of the "Golden Rule" and she lived and practiced it every day. She was a model for the rest of us to follow.

Several years ago B.J. was forced to quit work when she lost her eyesight. A conscientious worker who had a full-time job in addition to her part-time job at the bar building, B.J. had to endure a gradual loss of her eyesight. Surgery not only failed to correct the problem but exacerbated it. Yet, throughout the



B.J. Solomon

entire ordeal of her gradual loss of vision to her complete loss of sight, B.J. never complained or blamed anyone for the misfortune that befell her. From working two jobs a day to being confined to her house, B.J. accepted this fate with an unshakable faith and absolute trust in God's will.

As her health deteriorated and hospitalizations became more frequent, B.J.'s faith never ebbed and neither did her selfless spirit. Every time I spoke to or visited with B.J., the first words out of her mouth were to inquire about everyone else. She would ask me about my family and then ask about every member of the bar staff by name. In spite of her blindness and health problems, B.J. was an inspiration. Her spirit and faith, despite her tribulations, were like a tonic to me.

Along with the many friends who mourn her death, B.J. is survived by her husband, Alfonso Solomon; two daughters, Tracy and Etoeshio; her mother, Mrs. Mstlelen Brown; a granddaughter, Tihessey; a brother and a sister; and a host of nieces and nephews.

The last few years were difficult ones for B.J. Through it all, her faith never wavered and her spirit never broke. But, she has gone home now and I think the following words¹ are fitting:

"But Death didn't frighten Sister [Betty Jean];
He looked to her like a welcome friend.
And she whispered to us: I'm going home,
And she smiled and closed her eyes.
And Death took her up like a baby,
And she lay in his icy arm,
But she didn't feel no chill.
And Death began to ride again –
Up beyond the evening star,
Out beyond the morning star,
Into the glittering light of glory,
On to the Great White Throne.
And there he laid Sister [Betty Jean]
On the loving breast of Jesus.
And Jesus took his own hand and wiped away her tears,
And he smoothed the furrows from her face;
And the angels sang a little song,
And Jesus rocked her in his arms,
And kept a-saying: Take your rest,
Take your rest, take your rest.
Weep not – weep not,
She is not dead;
She is resting on the loving breast of Jesus."

Endnotes

1. From the poem "Go Down Death," by James Weldon Johnson

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BAR BRIEFS

• In anticipation of the University of North Alabama's 175th anniversary, Florence attorney **William E. Smith, Jr.** has published a trivia book entitled, *Leo's Tale: University of North Alabama Trivia*. The book contains 175 questions about the University and those who have taught, attended and been associated with the school or its predecessors.

Profits from the sale of the book will go to the University of North Alabama, the UNA Scholarship Fund, the UNA Alumni Association, and projects to recognize prominent alumni of the University.

• **James R. Pratt, III** of the Birmingham firm of Hare, Wynn, Newell & Newton, LLP, has been elected to the American Law Institute.

• **John H. Wilkerson, Jr.**, clerk of the Alabama Court of Civil Appeals, was awarded the J.O. Sentell Award at the 27th annual meeting of the National Conference of Appellate Court Clerks in August. The award is the highest honor that can be given to



William E. Smith, Jr.



John H. Wilkerson, Jr.

a member of the Conference, and it recognizes distinguished service by the recipient who has significantly contributed to the objectives of the NCACC.

• **J.O. Sentell** (former clerk of Alabama's appellate courts) was the first president of the National Conference of Appellate Court Clerks and one of its founders, and served for many years as editor of *The Alabama Lawyer*.

• **William P. Jackson, Jr.**, of Jackson & Jessup, P.C. in Arlington, Virginia, was elected treasurer-elect of the Bar Association of the District of Columbia in June. His term will end in 2001, when he will become treasurer. He is a 1963 admittee to the Alabama State Bar.

• **Tracey Trigillo**, purchasing officer for the Illinois Department of Corrections, was elected to the National Lawyers Association Board of Directors during the NLA's annual convention in August. Trigillo was admitted to the ASB in 1988.

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Due to the huge increase in notices for "About Members, Among Firms," The Alabama Lawyer will no longer publish addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice. Please continue to send in announcements and/or address changes to the Alabama State Bar Membership Department, at (334) 261-6310 (fax) or P.O. Box 671, Montgomery 36101.

About Members

H. Marie Thornton announces the opening of her solo practice at 422 S. Court Street, Montgomery, 36104. Phone (334) 832-4445.

Christopher R. Miller announces the opening of his office at 30 N. Florida Street, Mobile, 36607. Phone (334) 476-9501.

Susan E. Baker announces the opening of her office at 107 North Side Square, Huntsville, 35801. Phone (256) 534-6680.

William R. Chandler announces the opening of his new office at 111 Washington Avenue, Montgomery, 36104. Phone (334) 834-3751.

Andrew A. Smith announces the opening of his new office at 811 21st Avenue, Tuscaloosa, 35401. Phone (205) 349-4870.

Christopher A. Pankey announces the opening of his new office at 428-B N. Carlisle Street, Albertville, 35950. Phone (256) 891-4545.

Steven N. Pritchett, Jr. announces the opening of The Pritchett Law Firm, L.L.C. Offices are located at the Forestdale Professional Building, 1418 Forestdale Boulevard, Suite C, Birmingham, 35214. Phone (205) 791-9991.

Donald R. Jones, Jr. announces the opening of his new office at 111 Washington Avenue, First Floor, Montgomery, 36104. Phone (334) 834-8991.

Terry A. Taylor announces the opening of his office at the Geneva Place Executive Center, 106 John R. Street, Suite F, Muscle Shoals, 35661. Phone (256) 383-5693.

James A. Hoover announces the opening of his new office located at 3800 Colonnade Parkway, Suite 650, Birmingham, 35243. Phone (205) 968-0222.

Among Firms

Laura Bowness announces that she has become southern regional publisher for LEXIS Publishing.™

Thigpen, Tipper & Christian announces that **Jenny H. Behel** has become a member of the firm. The firm name is now **Thigpen, Tipper, Christian & Behel**.

Ball, Ball, Matthews & Novak announces that **Allison L. Alford** has become a partner in the firm.

McFadden, Lyon & Rouse, L.L.C. announces that **John T. Bender** has become a member of the firm.

Haskell, Slaughter & Young, L.L.C. announces that **J. Vernon Patrick, Jr.** has

become *of counsel* to the firm, **R. Scott Williams** and **Georgia Sullivan Roberson** have become members of the firm, and **Matthew T. Franklin** and **S. Jason Nabors** have become associated with the firm.

Thomas W. Christian and **Clarence M. Small** announce the opening of their new firm, **Christian & Small, L.L.P.** Offices are located at 505 20th Street, North, Suite 1800, Birmingham, 35203. Phone (205) 795-6588. The firm also announces that **Steven A. Benefield**, **Eric J. Breithaupt**, **Robert E. Cooper**, **Edgar M. Elliott, IV**, **David L. Faulkner, Jr.**, **Susan Scott Hayes**, **Duncan Y. Manley**, **Deborah Alley Smith**, **Richard E. Smith**, **Daniel D. Sparks**, **Sharon Donaldson Stuart**, and **Ahrian Davis Tyler** have joined the firm as partners. **M. Alex Goldsmith**, **Patrick S. Flynn**, **Summer H. Zulanis** and **Michael A. Vercher** have become associated with the firm.

Hand Arendall, L.L.C. announces that **Frank C. Galloway, Jr.** has become a member of the firm.

Campbell & Baker, L.L.P. announces that **Vivian Vines Campbell** and **Raymond L. Bronner** have joined the firm as associates.

Balch & Bingham announces that **Lana K. Hawkins** and **Clark W. Watson** have joined the firm's partnership and that **Jerry D. Redmond**, **Thomas W. St. John**, **Walter A. Dodgen**, **Kevin C. Gray** and **J. Andrew Watson, III** have joined the firm as associates.

The Brooks Firm, P.C. announces that **Toni J. Braxton** has become associated with the firm.

Lyons, Pipes & Cook announces that **John G. Cherry, Jr.** has become a member of the firm.

The **Schoel Law Firm** announces that **David D. Schoel** has become associated with the firm.

Bernard D. Nomberg, Mary-Ellen Bates and Edward L. Hardin, Jr. announce the formation of **Hardin, Nomberg & Bates, P.C.** Offices are located at The Highland Building, 2201 Arlington Avenue, Birmingham, 35205. Phone (205) 930-6900.

Berry & Associates announces that **Robert C. Gish, Jr. and Steven V. Smith** have joined the firm as associates.

Moore & Trousdale, P.C. announces that **Steven R. Colclough** has joined the firm as an associate.

Meacham, Earley & Jones, P.C. announces that **Jason R. Watkins** has joined the firm as an associate.

Feld, Hyde, Lyle, Wertheimer & Bryant, P.C. announces that **Dale B. Stone** has joined the firm as a shareholder and that **Kay Owens Wilburn** has joined the firm as an associate.

Roberts & Fish, P.C. announces that **Michael B. Walls** has become *of counsel* to the firm and that **W. Scott Brower** has become associated with the firm. The firm's new office is located at Lakeshore Park Plaza, 2204 Lakeshore Drive, Suite 205, Birmingham, 35209. Phone (205) 870-8611.

Smith, Spires & Peddy, P.C. announces that **R. Timothy Estes** and **Clair Maloney Gammill** have joined the firm as associates.

John M. Laney, Jr. and Roger C. Foster announce the formation of **Laney & Foster, P.C.** Offices are located at Two Perimeter Park, South, Suite 404, East, Birmingham, 35243. Phone (205) 298-8440.

Gorham & Waldrep, P.C. announces that **William K. Bradford** has become associated with the firm.

Susan Hicks Stewart and **Charles Andrew Hicks** announce the formation of **Stewart & Hicks, P.C.** Offices are located at 503 Government Street, Mobile, 36602. Phone (334) 438-2700.

Zack, Kosnitzky, P.A. announces that **Orion G. Callison, III** has been named equity shareholder in the firm.

Bainbridge, Mims, Rogers & Smith, L.L.P. announces that **James W. Davis** has become associated with the firm.

Sirote & Permutt, P.C. announces that **John A. Barran, James B. Carlson, Gaile Pugh Gratton, Michael B. Maddox, Charles H. Moses, III and J. Sanford Mullins, III** have become partners in the firm, and **Karen Ashworth, Christopher S. Berdy, Calvin W. Blackburn, III, Christopher A. Bottcher, Kenneth M. Bush, Lee Martin Russell, Russell L. Sandidge, Craig M. Stephens, and Anthony Smith** have become associated with the firm.

Berkowitz, Lefkovits, Isom & Kushner, P.C. announces that **Lisa Wright Borden, Fern H. Singer and Frances Heidt** have joined the firm as members. **Laura E. Proctor, Jacquelyn D. Smith, Erica L. Baldwin, Matthew S. Geller, Nicole M. Rocco, Christopher C. Haug, William Patton Hahn, Jason C. Edwards, and Amy E. Davis** have joined the firm as associates.

Wolfe, Jones & Boswell announces that **Randall K. Gause and Behrouz K. Rahmati** have become associated with the firm.

McDowell, Faulk & McDowell, L.L.C. announces that **Jim T. Norman, III** has joined the firm as an associate.

Boardman, Carr & Weed, P.C. announces that **Philip F. Hutcheson** has joined the firm as shareholder.

Martinson & Beason, P.C. announces that **Elizabeth Beason Moore** has become a partner.

Capell & Howard, P.C. announces that **David B. Byrne, Jr. and Robert F. Northcutt** have joined the firm as shareholders.

Helmsing, Leach, Herlong, Newman & Rouse announces that **William R. Lancaster** has become a member of the firm and that **Leslie G. Weeks and Louisa F. Long** have become associated with the firm.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Diane Babb Maughan and Nikka Baugh Jordan** have become associates of the firm. ■

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MEMORIALS

James Hughston Sharbutt

James Hughston Sharbutt of Centreville departed this life June 10, 2000. He was born in Vincent on August 31, 1917. He attended Vincent High School and received his law degree from the University of Alabama School of Law in 1950. Jimmy was in private practice at Sharbutt & Williams in Childersburg until 1967. In addition to his private practice, he was elected as delegate to the Democratic National Convention in 1956.

Jimmy served Vincent as mayor from 1949—1967. Under his leadership, the town received its first paved streets, fire truck, patrol officers and patrol car. He established the city's gas board, water board, housing authority and industrial development board. He was extremely committed to the town and its people.

Jimmy continued serving his profession as district attorney for the 18th Judicial Circuit Court of Alabama. In 1970, he was elected circuit judge for the 18th Circuit. Judge Sharbutt retired in 1980 to care for his wife, Virginia, during her battle with cancer.

In addition to serving the law, he also served his fellow man. Judge Sharbutt established the Sharbutt Scholarship at the University of Montevallo, in honor of Virginia Sharbutt and Sara Nell Sharbutt. He supported Vincent High School football and band programs. Judge Sharbutt contributed to the Baptist Children's Home.

Judge Sharbutt is survived by his wife, Sara Nell Lightsey Sharbutt, Centreville; two sisters, Helen Kirkland and Ann Smith; and ten nieces and nephews. Memorials may be given to the Sharbutt Scholarship at Montevallo.

Fullan, Margaret Sparks
Birmingham
Admitted: 1953
Died: February 9, 2000

Morgan, Sara Posey
Andrews, North Carolina
Admitted: 1969
Died: August 31, 2000

Sheffield, Billy Joe
Dothan
Admitted: April 23, 1973
Died: September 8, 2000

Lynne, Hon. Seybourn Harris
Birmingham
Admitted: 1930
Died: September 11, 2000

Patton, David Uriah
Athens
Admitted: 1938
Died: March 1, 2000

Tanner, Robert Clyde
Tuscaloosa
Admitted: 1975
Died: July 21, 2000

Mizell, Frank J., Jr.
Montgomery
Admitted: 1929
Died: April 19, 2000



Walton, William Morris
Birmingham
Admitted: 1950
Died: May 18, 1999

McPherson, Billy Jack
Oneonta
Admitted: 1969
Died: August 31, 2000

Young, Thomas Frederick, Sr.
Alexander City
Admitted: 1949
Died: August 23, 2000



LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

The Institute has eight major revisions under study. Four are expected to be presented to the Alabama Legislature on February 6, 2001 when the next Regular Session convenes. These revisions are: Interstate Enforcement of Domestic Violence Orders, Uniform Athlete Agents Act, Revised UCC Article 9, and the Uniform Electronic Transactions Act. This article will review the first two revisions, Interstate Enforcement of Domestic Violence Orders and the Uniform Athlete Agents Act. January's article will review Revised UCC Article 9 and the Uniform Electronic Transactions Act.

Interstate Enforcement of Domestic Violence Orders

This Act will provide a uniform effective system for enforcement of domestic violence protection orders across state lines. To facilitate the interstate enforcement of civil and of qualified criminal domestic protection orders as stipulated is an important provision of the 1994 Federal Violence Against Women's Act. This full faith and credit provision directs states to honor "valid" protection orders issued by other jurisdictions and to treat those orders as if they were their own.

Although the Federal Violence Against Women's Act provided protection and was national in scope, it left several important questions unanswered and states to their own discretion as to how to set up procedures to effectively implement the enforcement.

For example, the federal Act does not answer the question of whether states are required to enforce provisions of foreign orders that would not be authorized by the law of the enforcing state. It is silent as to whether protected individuals seeking enforcement of an order must register or file the order with the enforcing state before the action can be taken on their behalf. It is also vague about whether custody and support orders are included.

In recent years some states have enacted their own enabling legislation but these statutes vary greatly, both in method and extent to which they will enforce foreign protection orders. The new Act that the Institute is considering has two purposes. It defines the meaning of full faith and credit in the context of the enforcement of domestic violence protection orders and it establishes uniform procedures for their effective interstate enforcement.

Under this Act:

- Courts must enforce the terms of protection orders of other states as if they were their own, unless the order expires, regardless of which state the victim has entered.
- Enforcing states must enforce all of the terms of the order, even if the order provides relief that would be unavailable under the laws of the enforcement jurisdiction.
- Terms of orders that concern custody and visitation matters are enforceable if issued for the purpose of protection. Terms that concern support are not.
- Enforcement mechanisms must be applied to orders issued before the effective date of the Act.

The Act envisions that enforcement will require law enforcement officers in enforcing states to rely on probable cause judgments that a valid order has been violated. The law enforcement officers, as well as other government agencies, will be encouraged to rely on individual judgments based on probable cause by the Acts inclusion of the broad immunity provision protecting agencies of the government acting in good faith.

This Act, when passed by each state, will enable states to treat cases consistently and will fill the gap left in the federal Act.

This committee is chaired by Drew Whitmire of Birmingham.

Uniform Athlete Agents Act

In 1987 the Alabama Legislature established the "Alabama Athletic Agents Regulatory Commission." This Act provided that no person could be an athletic agent in Alabama without first registering with the Commission. It was subsequently amended in 1994 to change the makeup of the Commission. The Act was again amended to the current law in 1998 to add additional requirements in the approved form of contracts between the student athlete and the athletic agent and provide criminal and civil penalties on the parties for failure to adhere to the law.

At least 28 states have enacted statutes regulating athletic agents. They vary in degree and do not contain registration reciprocity. An athletic agent intending to do business in each



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state is currently required to comply with 28 different sets of requirements for registration and regulation. A uniform Act has been drafted to protect the interest of student athletes and academic institutions by regulating the activities of athletic agents. This new Act, under study by an Institute committee, provides the following:

- Reciprocity of registration.
- Authorizes denial, suspension or revocation of registrations based upon similar actions in other states.
- Regulates the conduct of individuals who contact student athletes for the purpose of obtaining agency contracts.
- Requires notice to educational institutions when an agency contract is signed by a student athlete.
- Provides a civil penalty for an educational institution damaged by the conduct of an athlete agent or a student athlete.
- Establishes civil and criminal penalties for violation of the Act.

This committee is chaired by Robert Potts, president of the University of North Alabama.

For more information concerning the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P. O. Box 861425, Tuscaloosa, 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.



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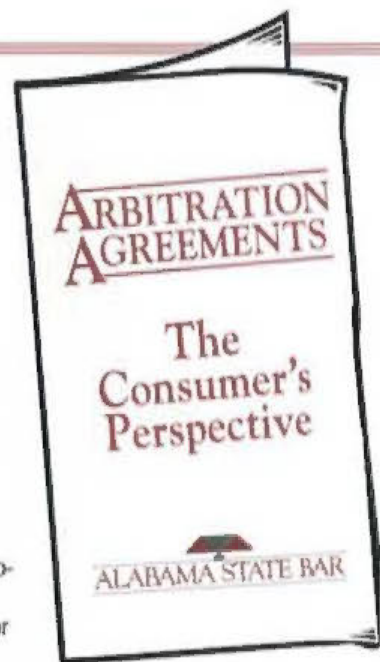
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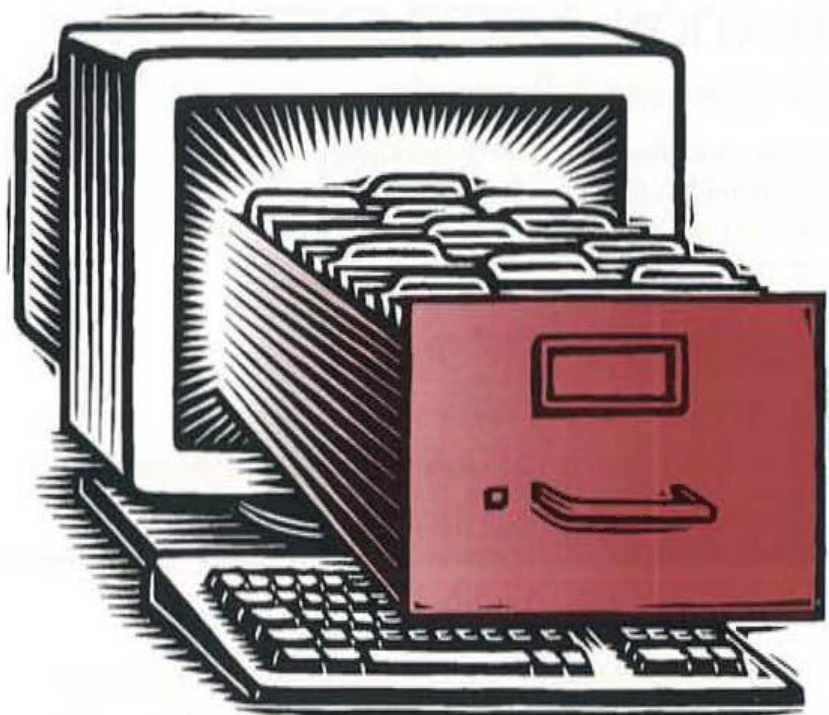
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Judicial Award of Merit Nominations Due

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, 2001. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
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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.

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By Samuel A. Rumore, Jr.



Geneva County

Established: 1868

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Geneva County Courthouse (front view)

Geneva County

Geneva County's history is filled with unanswered questions. It was established during the Reconstruction-era as Alabama's 64th county, but what was the reason for its creation? The popular view was that the county was named for Geneva, Switzerland. Recent research casts doubt on that explanation. For whom or what was it named? The county was authorized by the legislature to change its name. Who was the namesake for the proposed name change and why did the confirmation election never take place? Let us explore these puzzles from the south Alabama pine forest.

The Alabama legislature created Geneva County on December 26, 1868. It was the 12th of 13 counties established in the Reconstruction-era between February 15, 1866 and December 30, 1868. Land for the county was taken from Coffee, Dale and Henry counties.

The area, dense with pine forests and covered in "wiregrass," was not a particularly good choice for the creation of a county. Many believed the soil was unproductive. In fact, agriculture experts considered the area only fit for the pasturing of cattle and hogs. With a

population of less than 3,000, it contained only scattered and isolated farms. Transportation was poor and there was the threat of unhealthy conditions, including diseases such as malaria. With such unlikely prospects for success, why was Geneva County created?

The late 1860s was a time of political confusion in Alabama. As always, there were competing interests between north and south Alabama. Competition was compounded by the era's Radical Republican politics when freed blacks were enfranchised and former Confederates were disenfranchised. Corrupt politicians bought and sold votes and partisan factions vied for control of the legislature. Counties were established, disestablished and re-established based upon the whim of ever-changing power brokers. The creation of Geneva County was probably based on a political deal made when Black Belt forces held sway to establish an additional county in south Alabama.

The decision did have a practical benefit because the citizens of this sparsely populated area had felt removed from their government. Many citizens lived 30 or more miles from their respective county seats in Coffee, Dale or Henry county. Thus, the creation of Geneva County provided convenience for citizens and opened the way for potential development.

Growth in the area began in the 1870s and 1880s. Turpentine men from the Carolinas and Georgia began "boxing" pine trees to obtain their "juice." Then the lumbermen came to cut the

forests. Later, farmers arrived, using fertilizers to grow crops such as cotton, corn and sugar cane. As the farmers came into the county, businesses followed and the population grew.

With commercial and population growth, the railroads came to Geneva County. Between 1890 and 1900 the population of the county almost doubled. Also, with the coming of the railroads, the value of land suddenly increased from one cent per acre to 50 cents to \$1.50. Some land values reached the \$5 to \$10 range. Then they climbed to the \$25 to \$50 level. As the price grew, so did the population. By 1930, Geneva County had more than 30,000 people.

The first settlers in the area that would become Geneva County had arrived even before Alabama attained statehood in 1819. They lived and traded with the Indians. One of the early pioneers was Henry A. Yonge. Yonge is the key to answering the question of how Geneva got its name.

Traditional historical sources state that Henry Alexander Yonge was a native of Geneva, Switzerland. He came to Alabama and early on attained some prominence. The postal records reveal that by 1835 he was the postmaster of Abbeville in Henry County. These sources state that he left Abbeville for a trading post in Coffee County. By 1845 he was the postmaster of the town of Geneva in Coffee County. The natural conclusion is that Geneva, Alabama was named for the famous European city of Geneva, Switzerland. Sources ranging



Geneva County Courthouse (1912-1966)

from Thomas McAdory Owen's 1921 *History of Alabama* to recent publications such as 1982's *Alabama Place Names* and 1989's *Place Names In Alabama* likewise credit Yonge with naming the town for Geneva, Switzerland.

In 1987, the Geneva Woman's Club published *Geneva, Alabama—A History*, which confirms that Henry A. Yonge established a trading post near the confluence of several streams, including what are now called the Pea River, the Choctawhatchee River and Double Springs Creek. However, their research asserts that Yonge was born in the Bahamas in 1799. (Certain census records indicate that he may have fur-

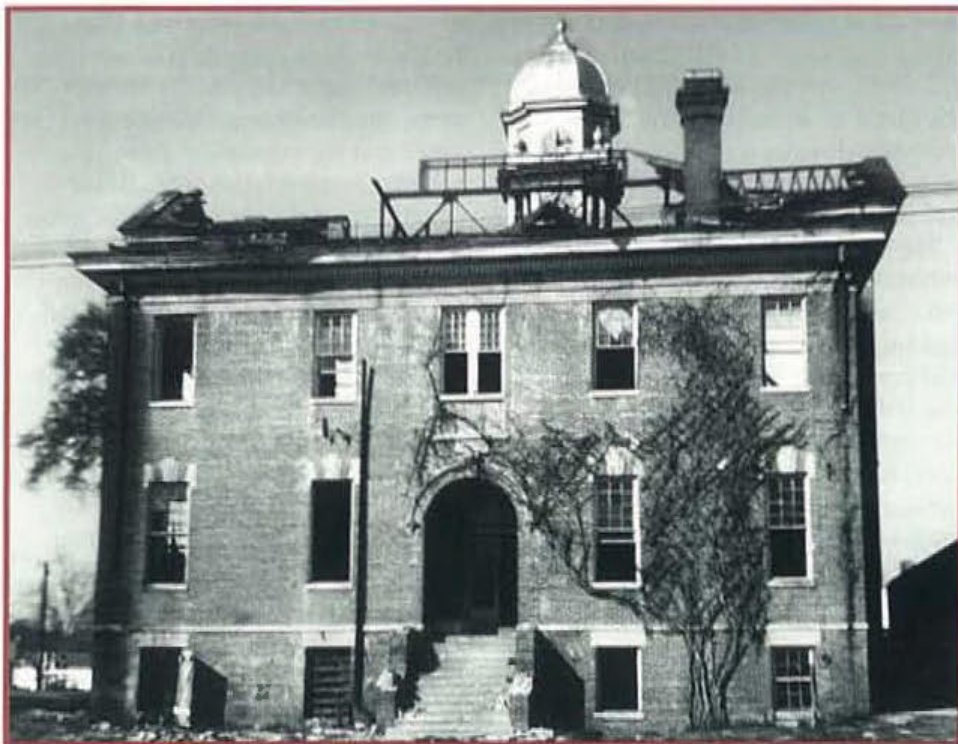


Geneva County Courthouse (1966)

nished information that he was born in Florida in 1805). In any event, they state that he lived in Florida as a child. The authors also claim that he established his trading post at the site of Geneva sometime after 1819.

Meanwhile, in 1820, a young doctor in New York State decided to experience frontier life firsthand. He moved his wife and four children to the area near Eatonton, Georgia. Coincidentally, Henry Yonge had a half-brother, Walter Yonge, who owned a plantation near Eatonton. Sometime in 1824, Henry visited Walter and during the visit he broke his leg. The doctor who set the leg was Dr. Iddo Ellis, the man who had come from New York to Georgia. Dr. Ellis had a young daughter, Mary, who was 13 at the time. Henry and Mary fell in love, and Henry asked the doctor for permission to marry his daughter. The doctor stated that they could get married when Mary was 20.

Henry returned to his trading post but kept his promise to marry. The wedding took place at Walter's home at Eatonton on December 4, 1831. Henry and his bride then returned to Alabama. The rest of the story is that Dr. Ellis and his family, including Mary, the wife of Henry Yonge, came to the South from the city of Geneva, *New York*. The authors of the *Woman's Club* book assert that Henry Yonge named the place of his trading post "Geneva" in honor of the former home of his new bride. Further research will be required



Geneva County Courthouse (rear view, 1966)

in order to finally answer the question: From what place did Geneva, Alabama actually get its name?

Henry and Mary lived in Abbeville for a few years. Henry was appointed the first postmaster there in 1833. He had also acquired significant land holdings and he owned much of what would become downtown Abbeville, including the court square. Meanwhile, his brother, Walter, became the first postmaster of Geneva,

receiving his appointment in July 1840. Henry and Mary later returned to Geneva. He assumed the postmaster position. In the 1850 census he was listed as a merchant, age 45, born in Florida, with a wife, age 38, born in New York. They had seven children, ranging in age from one to 16. Their eighth and last child was born in Geneva in 1851.

Mary Yonge, the wife of the founder of Geneva, died in 1865. She is buried



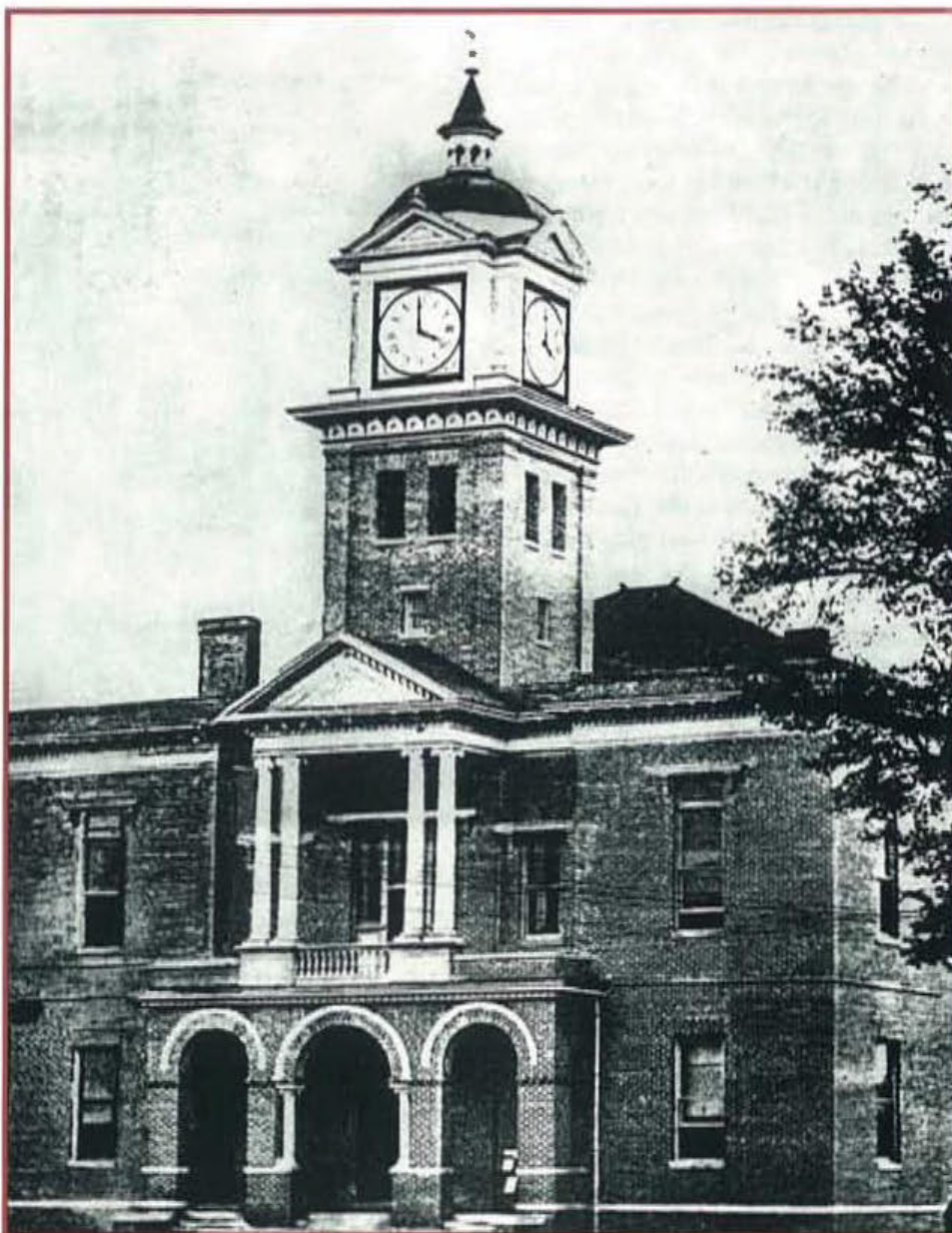
Geneva County Courthouse (side view, 1966)

in the city cemetery at Abbeville. Henry Yonge died in 1867. He is buried beside her at the same cemetery in Abbeville. During the next year, Geneva County was formed and named for the town of Geneva, which began as Henry Yonge's trading post at the junction of the rivers.

The rivers have played a significant role in the history of Geneva. Henry Yonge probably had some knowledge of the potential for flooding because he built his home on the high ground south of the river junction. In 1864, Geneva consisted of approximately 150 families. Extensive rains fell on November 13 and 14 of that year. The village was inundated by what became known as the "Lincoln Flood," since he was President at that time. The town was almost washed away. Due to this calamity, the site of Geneva was moved approximately one-half mile north to higher ground and away from the river junction.

The Act which created Geneva County on December 26, 1868 named seven commissioners. These men were Thomas H. Yarbrough, Daniel Fulford, Daniel Miller, Asa Ray, William Hays, Ira D. Albenson, and Jonas Bell. Their task was to organize the county. They established voting places in the county and conducted an election for all county officers in June 1869. The commissioners levied a special tax to pay the pro rata share of the debt acquired from Coffee, Dale and Henry counties. The Act establishing the county provided that any pending lawsuit was to continue in the old county where it commenced unless the parties agreed to remove the suit to the new county, and that probate matters, including the estate of a decedent who had resided within the boundaries of the new county, were to be removed to the new probate court upon proper petition being filed.

The first grand jury for Geneva County met in 1869. The county did not have a courthouse at the time so the jury sessions were convened in the local school called the Academy, located at the corner of Church and Academy streets. The grand jury, under Judge J. McCaleb Wiley, returned 21 indictments of which ten were for either hunting or fishing on Sunday.



Geneva County Courthouse (1898)

The first courthouse in Geneva County was built in 1869. It was a structure of undressed pine planks near the edge of a grove of trees, where South Academy intersects East Magnolia today. The building was used for two years until the county bought a hotel building which had been constructed by Dr. Angus McKinnon. This structure, located at the intersection of Commerce and Magnolia, served as the courthouse until a new brick edifice was constructed on the same site.

On February 13, 1879, the legislature authorized a change of name for the county. Act Number 200 of the 1878-1879 legislature would have changed

the name of Geneva County to Gordon County. The Act required approval of the name change by a local referendum. However, the election to approve the change never took place. Because the required referendum was not held, the county retained the name Geneva.

Who was this "Gordon" for whom the county was to be named? There are several candidates. The first is Confederate General John B. Gordon. He was a Civil War hero and also involved in railroads after the war. Another prospect was Probate Judge Dan Gordon of nearby Henry County. The town of Gordon in present-day Houston County was named for him. A third possibility for the

honor was Alexander C. Gordon. He was an early pioneer of the area who had served in the Indian wars, was a general of the militia, and spent two years as a state representative from Henry County in 1836 and 1837. He led troops from the area in the Civil War. And from 1876 to 1879 he served as state senator for Coffee, Dale, Geneva and Henry counties. It was not unprecedented for the legislature at this time to name a county for one of its own members. Apparently whoever "Gordon" was, his name had little appeal, hence no effort was ever made to hold the referendum election. Unanswered is the question of why the name change referendum never took place.

The first brick building constructed as a courthouse in Geneva mysteriously burned in March 1898. The fire destroyed all of the county's records. It has always been suspected that this fire was the work of arsonists. In fact, two women saw the courthouse burn and reported that two men left the scene of the blaze in a hurry. They stated that one was tall and appeared to have a weapon. The other was short and carried a shiny object that looked like an oil can. Many in the community believed they knew who the suspects were.

The two suspects were never arrested but apparently the crime did not go unpunished. After the fire, the tall suspect always carried a shotgun with him. He was accidentally killed when his shotgun discharged and he shot himself. The short suspect died suddenly of a heart attack. Soon after his death, his father attempted to evict a woman from some property that she rented. She threatened to tell all she knew about the courthouse fire if she were evicted. The eviction proceedings stopped.

While a new courthouse was being constructed, the Geneva County Commission rented a vacant building for the county. The rent was a most reasonable \$12 per year in advance or \$2 per month. In April 1898, the commissioners decided to pay the \$12 rent.

The new brick courthouse was built at the corner of Commerce and Town. *The Geneva Journal* newspaper began a drive on May 21, 1898 to secure funds for a clock in the tower of the new



Geneva County Jail (1912-1968)

courthouse. Enough money was raised by the newspaper to guarantee payment for the clock, which was ordered by the County Commission.

The 1898 courthouse contained a triple-arched entrance-way under a second-floor balcony. This portico had four Ionic columns supporting a classical pediment. Centered above the entrance was an ornately-designed clock tower with a platform, pediment, four clock faces, dome, cupola, and finial. Unfortunately, like its predecessor, this building also burned. The fire took place on the evening of January 21, 1911. As the firefighters fought the inferno, the townspeople heard the courthouse clock toll the time of 11 p.m. Shortly thereafter, the clock workings crashed into the building below and would keep time no more. Also, as with the previous courthouse fire, this fire was of suspicious origin, but no indictments were ever issued.

The next Geneva courthouse was built in 1912. P. M. Metcalf received the contract to construct a new courthouse and a new jail. The contract price was \$27,475 for the courthouse and \$19,700 for the jail. The courthouse was built on the site of its predecessor at the corner

of Commerce and Town. It was of similar design but larger, consisting of three stories with a basement. The building also contained a majestic clock tower centered above the entrance-way. However, the triple-arched entrance and covered balcony of the former courthouse were replaced by a simple doorway and small non-covered balcony. Awnings were later placed on the building.

As previously mentioned, Geneva is located near the confluence of two rivers and a creek. A large flood occurred in 1864. Other major floods took place in 1916, 1925 and 1928. In 1929 Geneva suffered an unprecedented two floods in one year. The first devastating flood took place in March and it was reported that this flood either damaged or destroyed every business and home in the town. The second flood occurred less than six months later in September.

The constant flooding caused the town leaders to seek federal assistance for flood control. The mayor of Geneva sent a telegram to President Hoover who responded by saying that the request would receive "most careful attention." The Corps of Engineers con-

ducted a study and concluded that a flood control project was feasible. Unfortunately, it took four years, a new administration in Washington, and the efforts of Senator Hugo Black and Senator John H. Bankhead, as well as Representative Henry B. Steagall, to get approval for the construction of a three-mile long protective levee. These earthworks were constructed to protect the eastern and southern sides of the town from future flooding.

By the 1960s, the old 1912 courthouse needed repair. The Geneva County Bar Association passed a strong resolution stating that the courthouse was "antiquated, its recording system obsolete, and its office space and facilities inadequate for the expedient administration of the affairs of the county. Its courtroom is unsanitary, unventilated, and a menace to the health and comfort of court officials, jurors, parties, and witnesses, thereby hindering and delaying the administration of justice." It was further reported that in the past, rooms had to be fumigated in the courthouse because of fleas, mites and other pests. The lawyers called for a two mill ad valorem tax beginning in 1962 for five years, and a one mill ad valorem tax for 15 years thereafter to fund the bonds that would be issued to pay for a new facility.

N. L. Blaum Construction Company and Sherlock, Smith and Adams, Inc. Architects, received the contract for the new Geneva County Courthouse. The courthouse site was moved away from the downtown area to the old elementary school property. The new courthouse is a modern structure with a ground floor for the jail and two upper floors for courts and county offices. The new courthouse was opened in October 1965. The cost of this courthouse was approximately \$600,000.

In January 1966, Geneva County auctioned off its old courthouse, the county jail, a county office building, and a strip of land behind the old courthouse. The county received \$40,100. The old courthouse was demolished in 1966. The old jail was not torn down until 1968.

The threat of flooding continued to plague Geneva. The rains and the flood of March 1990 threatened the town once again. The courthouse, located at its present position, was not in immedi-

ate danger. However, City Hall was built at the site of the former courthouse. The 1930's-era levee still protected the town. It developed leaks and a sinkhole threatened to cause a major break. The mayor of Geneva called for volunteers and the National Guard to place sandbags and reinforce the levee. Fortunately the levee held and Geneva was spared. Mayor Herring was quoted as saying, "This time, we had some warning and we were able to pull together. Because of that, I am sitting in the City Hall today instead of paddling a boat over the top of it. Next time, we might not be so lucky. We need to make sure there is no next time." A new question for Geneva County is, "How?" ■

Sources: "The Counties of Geneva and Coffee," *Alabama Magazine*, November 8, 1937, pages 12—16; articles, *The Montgomery Advertiser*, December 3, 1961, January 18, 1963, December 14, 1963, April 16, 1965, October 5, 1965, January 16, 1966, and May 23, 1966; articles, *The Birmingham News*, January 9, 1966 by John Isbell, July 31, 1968 by Karol Fleming; "Courthouses In Geneva County," *The Alabama Lawyer*, vol. 39, no. 3, July 1978, pages 407—410; Karol Fleming; *A Geneva County Album, Glimpses of the Past*, Geneva County Historical Society, 1987; *Geneva, Alabama—A History*, The Geneva Woman's Club, 1987; article, *The Birmingham Post-Herald*, Thursday, March 22, 1990, pages A1 and A3.

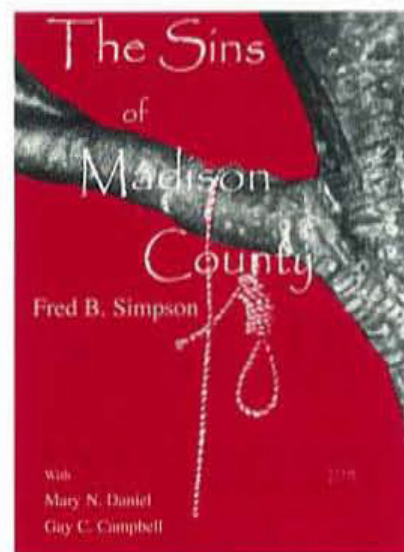


Samuel A. Rumore, Jr.

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

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ETHIX CHEX

By J. Anthony McLain, general counsel

If All Your Friends (?) Could See You Now



J. Anthony McLain

The reflection in the mirror really is you. Do you like what you see? Published survey results continue to demonstrate a growing dissatisfaction among lawyers who are disenchanting with their chosen profession. We possess the privilege of being a self-policing profession and should strive to retain that right.

In an effort to familiarize the membership of the bar with the overall process of discipline a look at our system, its results, and how upcoming changes may further enhance our discipline processes, are discussed below.

How Bar Complaints are Filed

We presently have some 14,000 lawyers licensed to practice in Alabama. In 1999, the Disciplinary Commission reviewed 1,516 complaints which were filed against Alabama attorneys. The majority of those complaints were filed by disgruntled clients. Some complaints were filed by judges, some filed by opposing counsel, and some were received anonymously, or based upon newspaper articles, court orders or opinions, and the like.

The Office of General Counsel has formulated a screening process, an initial "probable cause" review, of all complaints to determine if a full investigation is necessary. The results of this screening procedure have resulted in more than half of all complaints filed being screened out during the initial review phase.

What to Do When You Get that Letter

If you are one of the unfortunate "respondent attorneys," the best advice is to cooperate and be prompt in doing so. Numerous reprimands are being administered to lawyers who refuse or fail to cooperate with attempts to investigate bar complaints filed against

them, which refusal or failure, in and of itself, is a violation of Rule 8.1(b), *Alabama Rules of Professional Conduct*.

Be thorough and forthright in your written response, and provide any documentation that is supportive of your response. In a significant number of cases, the complaint is dismissed due to the detailed and comprehensive initial response of the lawyer.

If there are third-party witnesses who may provide corroborating information, supply their names, addresses and telephone numbers. This can reduce the time and effort expended by the respondent attorney in having to deal with the disciplinary process.

Lastly, don't attack the process or those who attempt to enforce the rules. In a large number of investigations, the respondent attorney's less than professional attitude toward investigators looking into the matter further exacerbates an already unpleasant situation. Demonstrating professionalism and cooperation better serves the lawyer who is subject to such an investigation.

Just Who is Big Brother/Sister?

Pursuant to the *Alabama Rules of Disciplinary Procedure*, investigation of a complaint is conducted by the Office of General Counsel or a local grievance committee. There are presently eight local grievance committees: Birmingham, Mobile, Montgomery, Tuscaloosa, Huntsville/Madison, Houston, Talladega, and Baldwin. Once the investigation is completed, a report and recommendation from the Office of General Counsel or the local grievance committee is submitted to the Disciplinary Commission which determines the final disposition of the complaint. The Disciplinary Commission consists of four bar commissioners who are elected from that body for three-year terms.

The Disciplinary Commission can order: (1) dismissal of the complaint; (2) a private reprimand; (3) a public reprimand without general publication; (4) a public reprimand with general publication; or (5) formal charges. If the Disciplinary Commission determines that the lawyer should receive a reprimand, private or public, the lawyer may request that formal charges be filed and a hearing held thereon.

Hearings are conducted before a Disciplinary Board. Pursuant to new rules of procedure adopted by the Alabama Supreme Court, effective August 1, 2000, there will be six such boards consisting of six members, a disciplinary hearing officer, four bar commissioners, and a layperson. The new rules provide for the appointment of the six disciplinary hearing officers who shall guide and superintend the disciplinary proceedings of the Disciplinary Board.

If a lawyer is found guilty of misconduct, he or she may appeal to the newly-created Board of Disciplinary Appeals which will be composed of five lawyers appointed by the Board of Bar Commissioners. Appeals from a decision of the Board of Disciplinary Appeals shall lie with the Alabama Supreme Court.

What If I Just Tell a Little White Lie?

The new rules will also create a Pre-discipline Diversion Program conducted by the Pre-discipline Diversion Board which will consist of seven members: four lawyers and three laypersons. Cases which otherwise could be disposed of with a public reprimand with general publication or lesser sanction shall be eligible for diversion. A lawyer who has previously been disciplined or who has previously participated in the diversion program shall not be eligible for diversion.

Can the Lawyer Being Investigated Talk to the Complainant?

The best solution in all cases would be for the complainant and the lawyer to work out their underlying problem, especially if the complainant is a client. In those instances where the client may have retained new counsel, the lawyer who is the subject of the grievance should be aware of the "no-contact" provision concerning communication

with a represented party. Additionally, the rules prohibit a lawyer from making an agreement prospectively limiting his liability to a client for malpractice unless permitted by law and the client is independently represented. Obviously, the lawyer should not coerce the complainant into withdrawing the complaint or otherwise impede the investigative process through improper influence or actions.

The rules recognize the possibility of such influence, and specifically declare that disciplinary proceedings shall not necessarily be abated because of unwillingness or neglect of the complainant to sign a complaint or cooperate in the investigation or prosecution of a charge, settlement or compromise between the complainant and the lawyer, or because of restitution by the lawyer.

Gruesome Statistics

Of the 1,516 bar complaints filed in 1999, 1,285 were screened out. Of the lawyers disciplined in 1999, 57 received private reprimands, 16 received public reprimands without general publication, 11 received public reprimands with general publication, 20 were suspended, and six were disbarred.

Therefore, while the overall number of complaints filed seems substantial in view of the number of licensed lawyers in the state, only a small percentage of the complaints resulted in any actual discipline. More than 90 percent of the complaints were found to be without merit and no lawyer misconduct involved.

Consistency, Consistency, Consistency

For the system of self-policing to continue, there must be uniform, consistent discipline of those lawyers who violated the rules of conduct. What one reads in *The Alabama Lawyer* in terms of lawyer discipline is obviously a short synopsis of the case. Prior disciplinary history of the lawyer, mitigating factors, and other elements or facts of each case are not always included in the public notices of lawyer discipline.

The result is that many who read the discipline report contained in each edition of *The Alabama Lawyer* are getting only a portion of the total facts and circumstances involved in each discipline case. Taken in this limited context, some

may conclude that the discipline being meted out to lawyers is inconsistent.

The recent rules changes adopted by the Alabama Supreme Court are designed to eliminate any possible inconsistent concerns, and establish a refined, uniform approach to the disciplinary process. Pretrial conferences, plea deadlines and negotiation cut-offs will eliminate most delays and create a defined structure and hearings calendar within which prosecution of complaints will occur.

If a lawyer is found guilty of violating the rules of conduct, a detailed report of the findings of the Disciplinary Board will be prepared. This information will become a part of the bar's disciplinary database, and will serve as the source for publicizing of the misconduct, both in the media, and upon inquiry, to the public. Eventually, the information will contain sufficient detail to allow more uniform discipline, and continued assurances of due process and equal protection in all discipline cases.

Did You See What I Saw?

Rule 8.3, Ala. R.P.C., requires that a lawyer possessing unprivileged knowledge of a violation of Rule 8.4 (misconduct) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. An increasing number of lawyers and judges are bringing to the attention of the Disciplinary Commission instances of lawyer misconduct. For the system to be accountable to the public, those governed by the system must be responsible to the rules, even when such requires the reporting of another lawyer to the court or the bar.

While some continue to question the reporting requirement of Rule 8.3, those who understand that such is essential to maintaining the right to self-police comply with the rule and thereby eliminate further misconduct by the offending lawyer, and possible future harm to clients and the public.

The privilege of practicing law carries with it significant responsibilities, not the least of which is a commitment to both the substantive rules which govern our conduct, but also a willingness to participate as a bar commissioner, a disciplinary board panel member or a complainant. ■



The VLP and the IRS

By Professor Pamela H. Bucy

It is late June in Montgomery and it is 101 degrees. Ms. Adams¹ is sitting on her front porch as I drive up. She rises to greet me with both arms outstretched and a huge smile. "We'll just sit on the porch since it's so hot," she says. Throughout our visit I notice that there is no air conditioning in the house, only a few fans in small, open windows. The wooden shingle house is tiny but the porch is big, shaded and decorated with plants, some real and some not. White bricks are laid neatly along the edge of the porch. Bright pink, plastic flamingos stand in two pots at the top of the steps leading to the porch. Ms. Adams tells me she is 67 years old. She is the liveliest, most vivacious 67-year-old I have ever met, in or out of 101°.

We talk about the Internal Revenue Service. "My granddaughter, Sarah,² she's 12 now. She's been living with me since she was six months old. A few years ago I started getting letters from the IRS saying I owed them thousands of dollars 'cause of Sarah. I got a letter two times a month. I thought, they're going to have to put me in jail because I

didn't have the money to pay that." Ms. Adams heard that Legal Services might be able to help her. She visited Legal Services and was told that they would put her in touch with an attorney who could help her. That is how Ms. Adams became a client of Henry H. (Hank) Hutchinson, a tax expert, partner at Capell & Howard, P.C. of Montgomery and volunteer with the Alabama State Bar's Volunteer Lawyers Program (VLP).³

Once Mr. Hutchinson agreed to serve as Ms. Adams's attorney, she would stop by to see him every time she got a letter from the IRS. "Those letters worried her to death," Mr. Hutchinson explained. Ms. Adams agreed: "I don't like to talk on the telephone because I get confused. So every time I got a letter, I would stop by and see Mr. Hutchinson. He was always there. Always ready to see me. He was just the best."

Hank Hutchinson took on Ms. Adams's case in September 1998. One and a half years later, after 19 conferences with Ms. Adams, her daughter, her son, and IRS personnel, two petitions to the United States Tax Court, 17 letters to the IRS—many with attach-

ments, a several-inches-thick file, and over 50 billable hours, the matter was resolved. Ms. Adams owed nothing. The IRS had made a mistake.

For 25 years, Ms. Adams has worked at the Days Inn (and its predecessor), doing laundry. She separates sheets from towels, and washes, dries and folds everything. There is no air conditioning in the laundry area. Currently, she earns \$600 per month. During the years she cared for Sarah, Ms. Adams claimed a low-income credit and listed her granddaughter, Sarah, as a dependent. "And properly so," according to Mr. Hutchinson. Apparently, as some point, Sarah's father, who had never paid child support, also listed Sarah as a dependent. The IRS responded by disallowing Ms. Adams's claim of Sarah and demanding payment to the IRS of almost \$2,500 for each of the tax years 1995, 1996, 1997 and 1998, plus interest and taxes totaling in excess of \$15,000. In addition, the IRS withheld a refund payable to Ms. Adams for 1999.

Despite the fact that Mr. Hutchinson was able to document, through receipts retained by Ms. Adams and an affidavit

supplied by Sarah's uncle, that Ms. Adams had provided full care for Sarah, the IRS persisted in its demands. The IRS continued to challenge Ms. Adams's position with respect to some tax years, even after it had agreed that she owed no tax with respect to the two years before the Tax Court. At one point during the many letters and attempts by Mr. Hutchinson to resolve the matter, Ms. Adams received notice that the IRS was placing a lien on her house if she did not pay \$3,287 immediately. Finally, Mr. Hutchinson contacted Senator Jeff Sessions. Mr. Hutchinson explained, "I don't know if that helped, but within a couple of weeks, the IRS conceded that all tax years were resolved and no deficiencies were payable by Ms. Adams." In addition, Ms. Adams received her full 1999 tax refund, which was withheld pending resolution of the dispute regarding the previous years.

Mr. Hutchinson repeatedly explained to the IRS that, "Ms. [Adams] has been extremely inconvenienced by the IRS" and "she has answered questions and provided information to the IRS regarding these matters *ad nauseam*... Ms. [Adams], for justifiable reasons, is very frustrated by the lack of resolution in her case." Ms. Adams is more colorful: "Dog! I don't know what is wrong with those folks. Most folks are just as good as you let them be. But not everyone. Not the IRS."

As a single parent, working in a motel laundry for \$600 a month, Ms. Adams has raised seven children. She has 11 grandchildren and three great-grandchildren. Besides Sarah and Sarah's mother, who live with Ms. Adams, her other children, grandchildren and great-grandchildren are in and out of her house "all the time." At 67, Ms. Adams still works six days a week. She smiles: "I love going to work. They are so nice there. And, I can get some peace and quiet."

Why did Hank Hutchinson sign up with the Volunteer Lawyers Program? "It's just the right thing to do." What does Ms. Adams think of Mr. Hutchinson? "I've been through a lot. But the Lord's been good to me. He sent me Mr. Hutchinson." ■

Endnotes

1. A pseudonym.
2. A pseudonym.
3. The Volunteer Lawyers Program (VLP) began statewide in Alabama in 1991. Modeled after the highly successful Mobile Bar Association VLP, it provides a way for lawyers in Alabama to help their communities. Attorneys enroll in the program

by agreeing to provide up to 20 hours, per year, of free legal service to poor citizens of Alabama. Cases are referred to the VLP from Legal Services offices around the state. Before referral, the cases are screened for merit and complexity (each case should be resolvable in 20 hours or less) and the potential client is screened for income eligibility (must live at 125 percent of poverty level, currently \$1,776 monthly, for a household of four).



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ORGAN DONATION:

Lawyers Can Save Lives Without Going to Medical School

By Sandra Vinik
and Jack Carney

One of the most pressing medical and social concerns facing this nation is the shortage of organ donors. In Alabama, 737 people were on organ waiting lists as of January 1, 1999, while there are more than 60,000 people awaiting transplants elsewhere in the United States.¹

Each year, increasing numbers of Americans die because they are unable to obtain an organ transplant. Lawyers, who are involved in estate planning, have the opportunity and a moral duty to raise the issue with their clients.

Generally, people are in denial about their own mortality and avoid subjects connected with death. As a result, the public has unfounded fears and unanswered questions about organ donation. Attorneys and estate planners can increase awareness about organ donation through client counseling, since estate planners routinely discuss death and living wills with their clients. The American Bar Association encourages attorneys to discuss the issue of organ donation during personal planning conferences with their clients.²

The Alabama Rules of Professional Conduct permit an attorney to discuss organ donation with his or her clients. First, an attorney rendering advice can refer "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Ala. R. P. Con. 2.1. Discussion regarding donating one's organs is certainly a moral and social decision that is relevant to death and estate planning. The rules also provide that an attorney should explain a matter in such a way that the client will be able to make informed decisions regarding the representation. Ala. R. P. Con. 1.4(b). The attorney's role is not to increase organ donation, but should be viewed as part of a lawyer's duty to provide a client with complete and accurate



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information about the issue.³ It is important to educate a client regarding organ donation. Failure to discuss the issue with the client may prevent the removal and donation of the organ, even though that may have been the decedent's wish.⁴

Alabama has adopted the Uniform Anatomical and Gift Act, which permits anyone of sound mind over 18 years to donate all or part of his body, *Ala. Code* 1975 §22-19-42(a). Certain family members, in order of priority, may also donate the decedent's organs. §22-19-42(b). Family members may make the gift in writing or even by telegraph, recorded telephonic or recorded message. §22-19-44(a). However, the statute also allows specified classes of family members to veto the gift. *Ala. Code* 1975 §22-19-42(d). The donation of organs may be incorporated in the deceased's will and the gift becomes effective upon death without waiting for probate. In addition, the gift is still valid if the will is later found to be invalid. *Ala. Code* 1975 §22-19-44(a). The gift can also be made by any other document, including a card, but the donors must sign in the presence of two witnesses. If the donor is unable to sign, the document may be signed for him at his direction and in his presence and in the presence of two witnesses, who must sign the document in his presence. The Alabama Organ Center⁵ and the Alabama Eye Bank⁶ have drafted sensitive brochures which are informative and incorporate donor cards which convey the necessary information and comply with the law.

Sandra Vinik

Sandra Vinik practices with the firm of Siroto & Permutt, P.C. She has law degrees from the University of Witwatersand, and Cumberland School of Law. She is involved in a program to increase organ and tissue donation in Alabama.

The gift may be made to a specified donee. If the specified donee is not available at the time and place of death, the attending physician may accept the organ (unless the donor has expressly desired otherwise). The donee physician may not participate in the procedures of removal or transportation. *Ala. Code* 1975 §22-19-44(b).

The gift of an organ is the gift of life and the need for organ donation in Alabama and the United States is increasing. Lawyers are in a unique position to disseminate information and educate their clients. It is the logical time to do so when the client is addressing his or her own death. If lawyers across the state can overcome their inhibitions in regards to organ donation, then not only will those on waiting lists in Alabama benefit, but so, too, will those countless people across the country who are in need of a life-giving gift. ■

Endnotes

1. Gerome, John, "Children Tell of Need for Transplant Donors," *The Birmingham News*, April 5, 1999, at 1A, 2A.
2. English, David M., "Gift of Life: The Lawyer's Role in Organ and Tissue Donation," *Probate & Property*, April 1994.
3. *Id.* See also *Ala. R. P. Con.* 1.4(b).
4. *Id.*
5. Alabama Organ Center
301 S. 20th Street
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6. Alabama Eye Bank
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Jack Carney

Jack Carney is currently a law clerk at Siroto & Permutt, P.C. He is a third-year law student at Tulane University and has an interest in estate planning.

WAR STORIES

The Alabama Lawyer asked our readers to contribute "war stories," humorous tales and anecdotes about Alabama lawyers and judges, to be published in upcoming issues of the magazine. The first installment appeared in the September issue. Here are some more!

Prior to his service on the Alabama Supreme Court, **Justice Terry L. Butts** served as a circuit judge in Pike and Coffee counties for 20 years. With all the attorneys crowded around the bench, Judge Butts was calling the criminal court docket for trial. When Judge Butts called one case for trial, the attorney stated, 'Judge, if I could talk any sense into my client, he would plead guilty.' Whereupon, Judge Butts replied, 'If you could talk any sense into your client, he'd want a different lawyer.' All of the attorneys convulsed into laughter."

A jury convicted a two-time felon of forgery of several checks. Upon his sentencing hearing, Judge Butts sentenced the now three-time felon to life imprisonment.

"As the defendant was being led from the sentencing bench, another convicted felon was being brought forward for sentencing. As they passed each other within earshot

of Judge Butts, the approaching felon asked the just-sentenced felon, 'Hey, what did you get?' The just-sentenced felon turned back to Judge Butts and said in a loud voice, 'The s.o.b. just gave me life for writing a bad check.'

"The district attorney spoke up and asked Judge Butts, 'Judge, are you going to let him get away with that?' Judge Butts replied, 'I just sentenced him to life; I don't think five more days for contempt will impress him.'"

Judge Butts once sentenced a convicted felon to 99 years in prison for first degree rape. The angered felon jumped up, took a menacing step toward Judge Butts, angrily thrust out his finger, and in a threatening tone said, 'I'm going to remember you and I'll be back,' whereupon Judge Butts replied, 'Well, it won't be next week.'"

—*N.J. Cervera, Cervera, Ralph & Butts, Troy*

Free Report Shows Lawyers How to Get More Clients

Calif.—Why do some lawyers get rich while others struggle to pay their bills?

The answer, according to attorney, David M. Ward, has nothing to do with talent, education, hard work, or even luck.

"The lawyers who make the big money are not necessarily better lawyers," he says. "They have simply learned how to market their services."

A successful sole practitioner who once struggled to attract clients, Ward credits his turnaround to a referral marketing system he developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

Most lawyers depend on referrals, he notes, but not one in 100 uses a referral system.

"Without a system, referrals

are unpredictable. You may get new clients this month, you may not," he says.

A referral system, Ward says, can bring in a steady stream of new clients, month after month, year after year.

"It feels great to come to the office every day knowing the phone will ring and new business will be on the line."

Ward has taught his referral system to over 2,500 lawyers worldwide, and has written a new report, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this system to get more clients and increase their income.

Alabama lawyers can get a **FREE** copy of this report by calling 1-800-562-4627, a 24-hour free recorded message, or visiting Ward's web site, <http://www.davidward.com>

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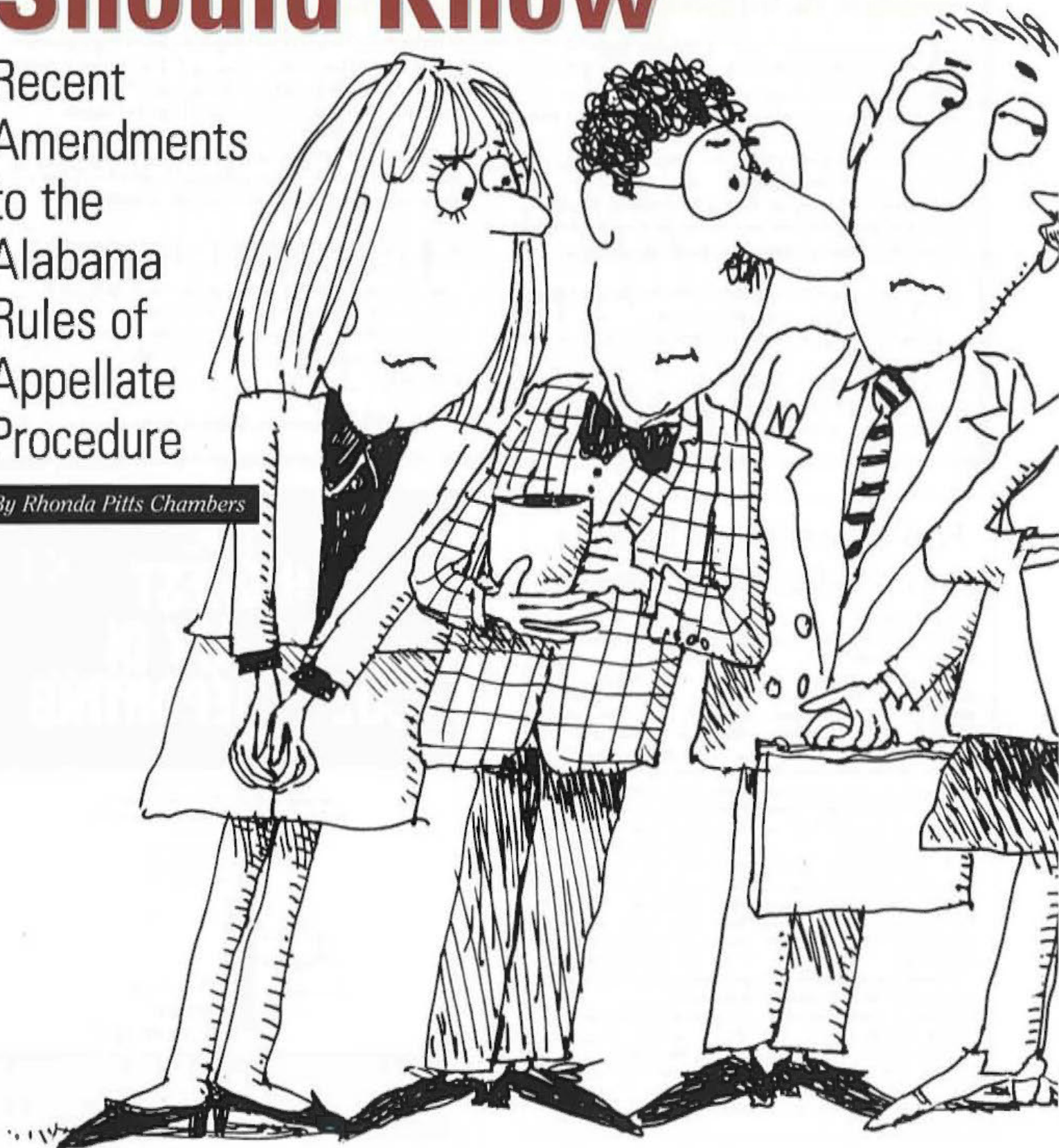
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What Every Lawyer Should Know

Recent
Amendments
to the
Alabama
Rules of
Appellate
Procedure

By Rhonda Pitts Chambers



Pursuant to its rule-making authority, the Alabama Supreme Court has recently promulgated several amendments to the Alabama Rules of Appellate Procedure. Ala. Const. of 1901, amend. 328, § 6.11. These amendments are extensive and will affect every lawyer's appellate practice. The amended rules are published in the volumes of the *Southern Reporter* that contain Alabama cases from 753 So. 2d (rules 3, 4, 10, 21 and 35) and 755 So. 2d (rules 39 and 40). The following is a short summary of what every lawyer should know relating to the recent amendments:

Rule 39. Petitions for Writ of Certiorari— Review of Decisions of Courts of Appeal—Civil

An amendment was approved that completely revises Rule 39 with respect to certiorari practice in civil cases.¹ Less than ten years ago, many litigators never practiced before the intermediate courts of appeals and never found it necessary to utilize certiorari practice. The types of cases they handled were always appealed directly to the Alabama Supreme Court. However, things have changed since the jurisdictional amount of the court of civil appeals was raised and the Alabama Supreme Court can now transfer certain cases that are within its original appellate jurisdiction to the court of civil appeals. Ala. Code, 1975 § 12-2-7. As a result, lawyers are now faced more frequently with the challenge of obtaining review by way of certiorari. However, there were also several procedural hurdles that had to be jumped

through in order to obtain certiorari review. More often than not, the procedural hurdles became pitfalls because of a basic misunderstanding of the rules. See *Ex parte Save Our Streams, Inc.*, 541 So. 2d 549 (Ala. 1989). Through the amendment to Rule 39, the court has attempted to simplify the certiorari process.

Under the old Rule, in order to place a case in the proper posture to file a petition for writ of certiorari in the Alabama Supreme Court, one first must have filed an application for rehearing in the court of civil appeals. Under the new Rule, an application for rehearing is no longer a jurisdictional prerequisite for certiorari review by the supreme court. Ala. R.

App. P. 39(b)(1). In most cases, the losing party never really took seriously any application for

rehearing that was filed in the court of civil appeals. The application for rehearing was merely filed because it was a jurisdictional prerequisite. The amendment should eliminate a time-consuming and expensive step in obtaining certiorari review. It should also lead to higher quality applications for rehearing that are filed in the court of civil appeals.

The amended Rule also totally altered the form in which a petition for writ of certiorari is to be filed. Ala. R. App. P. 39(d), as amended, provides, in pertinent part:

(d) **Form of Petition.** The petition shall be on letter-size paper, and the color of the cover of the brief filed with the petition or filed in response shall be as described in Rule 32(a)(3). The petition shall contain:

- (1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;
- (2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;
- (3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based—and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B)—provided that:
 - (A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or
 - (B) Where it is not feasible to quote that part of the opinion of the court of appeals either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision;
- (4) A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit; and
- (5) A statement of the facts, if a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53. The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition.

Ala. R. App. P. 39(d).

The amended Rule clarifies what must be set forth in the petition when the ground relied upon for review is the "conflict" ground. The conflict ground is the most commonly asserted ground for certiorari review. The old Rule required that the petitioner must either quote that part of the court of



civil appeals' opinion and that part of the prior case alleged to be in conflict or to state specifically and with particularity where the decision was in conflict. It was difficult to quote any conflict when the court of civil appeals issued a no-opinion decision. The amendment now makes clear that where it is not feasible to quote part of the court of civil appeals' opinion, the petition shall state specifically and with particularity how the court of civil appeals' decision conflicts with a prior decision. Ala. R. App. P. 39(d)(3).

The amended Rule's requirements with respect to the statement of facts varies depending on whether the petitioner filed an application for rehearing in the court of civil appeals and whether the court of appeals issued an opinion or an unpublished memorandum. Ala. R. App. P. 39(d)(5). This amendment changes the former practice under Rule 39(k) of attaching to the petition for writ of certiorari a copy of the Rule 39(k) motion to adopt a corrected or proposed statement of facts filed with the court of appeals. There still may be instances in which an attorney would want to file an application for rehearing in the court of civil appeals. However, if an application for rehearing is filed with the court of civil appeals, the party shall put in the petition for writ of certiorari the statement of facts presented to the court of appeals in the application for rehearing and *shall verify* that the state-

ment of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.² If the petitioner does not file an application for rehearing, then the petitioner may present to the supreme court his own statement of facts with references to the pertinent portions of the clerk's record and the reporter's transcript. Ala. R. App. P. 39(d)(5)(C). A statement of facts is not to be included in the brief. It must appear in the petition itself. The amendment essentially eliminated the necessity for filing an application for rehearing and the old Rule 39(k) requirements that were so fatal to many certiorari petitions.

Finally, the amendment clarifies the briefing schedule on preliminary review and in the event certiorari review is granted. Ala. R. App. P. 39(f). The petitioner's brief shall accompany the petition for the writ of certiorari or shall be attached to the petition. The brief must contain all arguments in support of the petition that the petitioner intends to present, including those arguments that the court will consider if certiorari review is granted. In other words, the petitioner should argue in his brief the reasons why certiorari should be granted *and the merits of his case*. Within 14 days thereafter, the respondent may file an initial brief limited solely to the issue of whether any of the grounds authorizes the issuance of the writ. Ala. R. App. P. 39(f)(2). No additional briefs will be required of the petitioner, although the petitioner may file a reply brief within 14 days after the respondent's brief is filed. If the court issues the writ, the respondent may file within 14 days a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari. Ala. R. App. P. 39(h)(1). The petitioner may then file a brief in response to the respondent's reply brief within 14 days.



Stress Management Comes Back to the Bar

Dr. Amiram Elwork, director of the Law-Psychology Graduate Program at Widener University, returns to the Alabama State Bar on Friday, December 8. He will present the highly acclaimed four-hour CLE program, "Stress Management for Lawyers: Achieving Personal & Professional Satisfaction in the Practice of Law," designed to help lawyers manage their time and practice more efficiently, balance their professional and personal lives, and more.

For more information or to register, call Sandra Clements at (334) 269-1515, ext. 302.

The seminar is sponsored by the ASB Law Office Management Assistance Program, the Lawyer Assistance Program, the Volunteer Lawyers Program and the Lawyer Referral Service.

Criminal

The amended Rule changes the standard for certiorari review of criminal cases in which the death penalty is imposed. The amendment removes the provision in former Rule 39(c) that provided that a petition for a writ of certiorari to the supreme court in a case in which the death penalty was imposed would be granted as a matter of right. With this amendment, review of death penalty cases is not "automatic" but instead will be at the discretion of the supreme court. The amended Rule requires that counsel who represented the appellant on the appeal to the court of criminal appeals or successor counsel *shall* prepare and file in the supreme court a petition for writ of certiorari for review of the decision of the court of criminal appeals. In other words, a petition for writ of certiorari must be filed in every death penalty case but instead review is discretionary with the supreme court.

The supreme court retains the authority to notice any plain error or defect in the proceedings under review in those cases. In the death penalty case, the petitioner must concisely state the grounds when review is sought based on a failure to recognize as prejudicial any plain error or defect. That statement must include a description of the issue and circumstances warranting plain-error review. The supreme court also retains the authority to enlarge the time for filing a petition for a writ of certiorari in a death penalty case. Finally, the supreme court may notice any plain error or defect in the proceedings under review, no matter if the issue was brought

to the attention of the trial court or the court of criminal appeals. The amended rule is applicable in all death penalty cases in which the petition for certiorari review is filed in the supreme court of Alabama on or after May 19, 2000.

Rule 40. Applications for Rehearing

The amendment completely revises Rule 40 dealing with applications for rehearing. As previously discussed, the most significant change in Rule 40 is that a party need not file an application for rehearing with the court of civil appeals in order to obtain review by certiorari in the supreme court of a decision of the court of civil appeals. If, however, an application for rehearing is filed with the court of civil appeals, the application must comply with Rule 40(e). An application for rehearing remains a prerequisite to review by the supreme court of a decision of the court of criminal appeals, except in the case of a pretrial appeal by the state.

Rule 10(F). Supplementing or Correcting the Record—Civil

The old Rule required that a motion to supplement or to correct the record on appeal in a civil case must be filed within 14 days after the completion of the record on appeal or, if the appellee is filing the motion, within 14 days after the filing of the appellant's brief. The time deadlines proved to be unworkable. Rule 10(f) has now been amended to delete the 14-day requirements for filing a motion. The amended Rule now requires that the motion to supplement or to correct the record be filed "within a reasonable time."³ The time for filing briefs is not tolled during the pendency of a motion to supplement unless the appellate court so orders. However, the amended rule now provides that in those instances in which a party has requested an extension of time in which to file a brief pending a ruling on the motion to supplement or to correct the record, the party can indicate in its brief, by footnote or otherwise, that a motion to supplement is pending and that the brief will be amended to include the references once the motion is ruled on by the court.

Rule 21. Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing; Time for Filing

The amendment to subsection (a) of Rule 21 adds three sentences relating to the time allowed for filing a petition for writ of mandamus or prohibition.⁴ The old Rule was silent as to time deadlines and the supreme court had never established a strict time frame in which a party must file a petition seeking mandamus relief. See *Ex parte Smith*, 736 So. 2d 604 (Ala. 1999). The amendment's effect is to incorporate into the Rules of

Appellate Procedure the requirement that a petition for writ of mandamus or prohibition be filed "within a reasonable time." Where a petition for the writ of mandamus challenges an action of the trial court, the amended rule adopts as the presumptively reasonable time the 42-day period for appealing from a final judgment in a civil case, unless the time for appeal is shorter.

If a petition is filed outside this presumptively reasonable time, it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time. The Committee Comments indicate that the court should weigh factors such as the prejudice to the petitioner of the court's not accepting the petition and the prejudice to the opposing party of the court's accepting it; the impact on the timely administration of justice in the trial court; and whether the appellate court has pending before it other proceedings relating to the same action and as to which the jurisdiction of the appellate court is unchallenged.

Conclusion

The Alabama Supreme Court encourages the bench and bar to submit any other suggested amendments to the appellate rules to the Standing Committee on the Alabama Rules of Appellate Procedure. It is hoped that this article has provided an understanding of the amended Rules that will affect every lawyer's appellate practice. The reader should consult the amended rules that are published in the *Southern Reporter*. ■

Endnotes

1. The amendment to Rule 39 with respect to civil cases became effective in cases in which the lower appellate court released its decision on or after August 1, 2000.
2. Note, however, that if an application for rehearing is filed with the court of civil appeals, it must comply with Rule 40 and the scope of review will be pursuant to Rule 39(k). In those cases in which an application for rehearing is filed with the court of civil appeals, the party should pay close attention to those sections of rules 39 and 40 relating to the statement of facts.
3. The Rule retains the 14-day time limit for obtaining a ruling on the motion in the trial court.
4. The amended Rule also now requires that the statement of the reasons as to why the writ should issue include citations to the authorities and the statutes relied on by the petitioner. The old Rule contained no such requirement.

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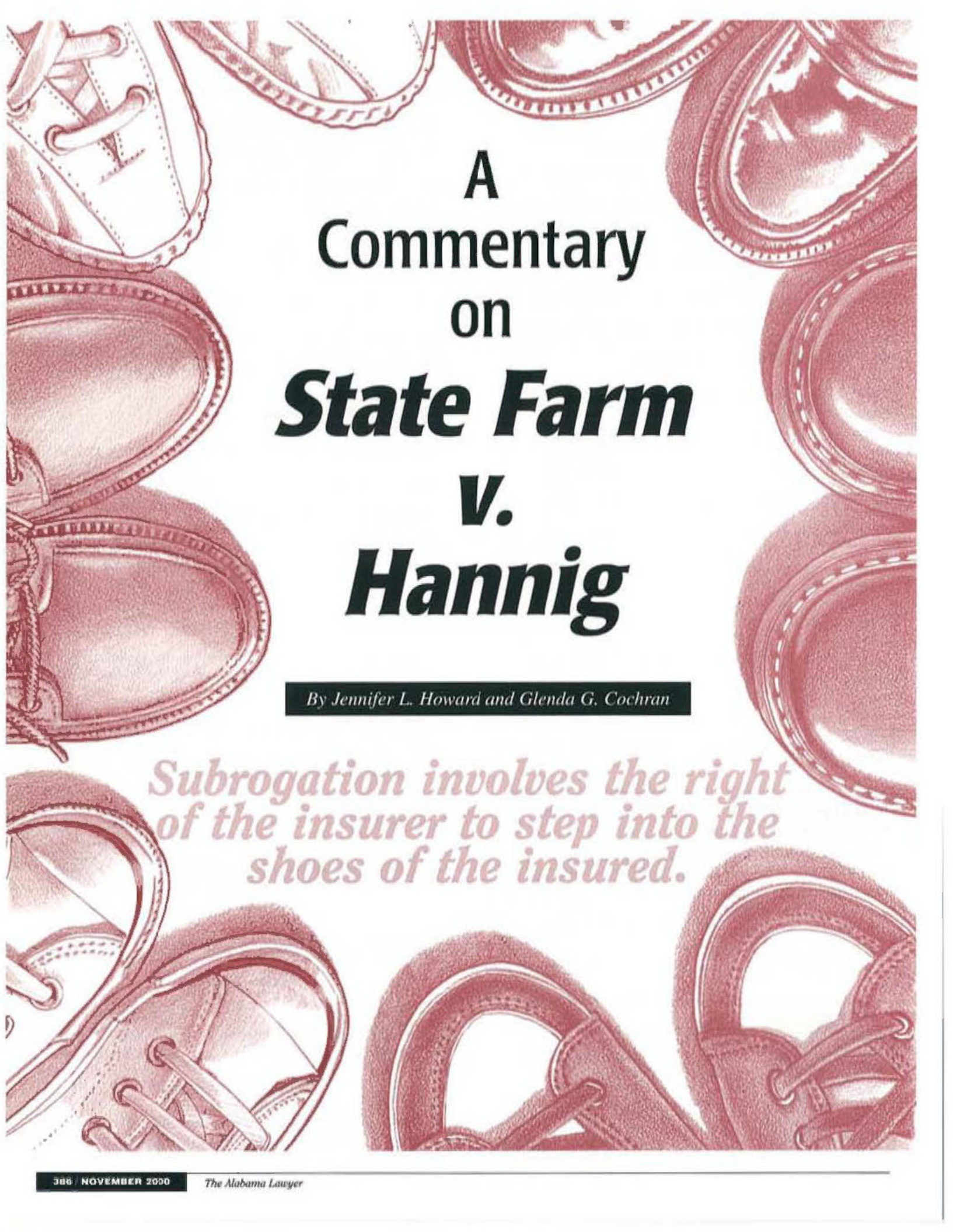
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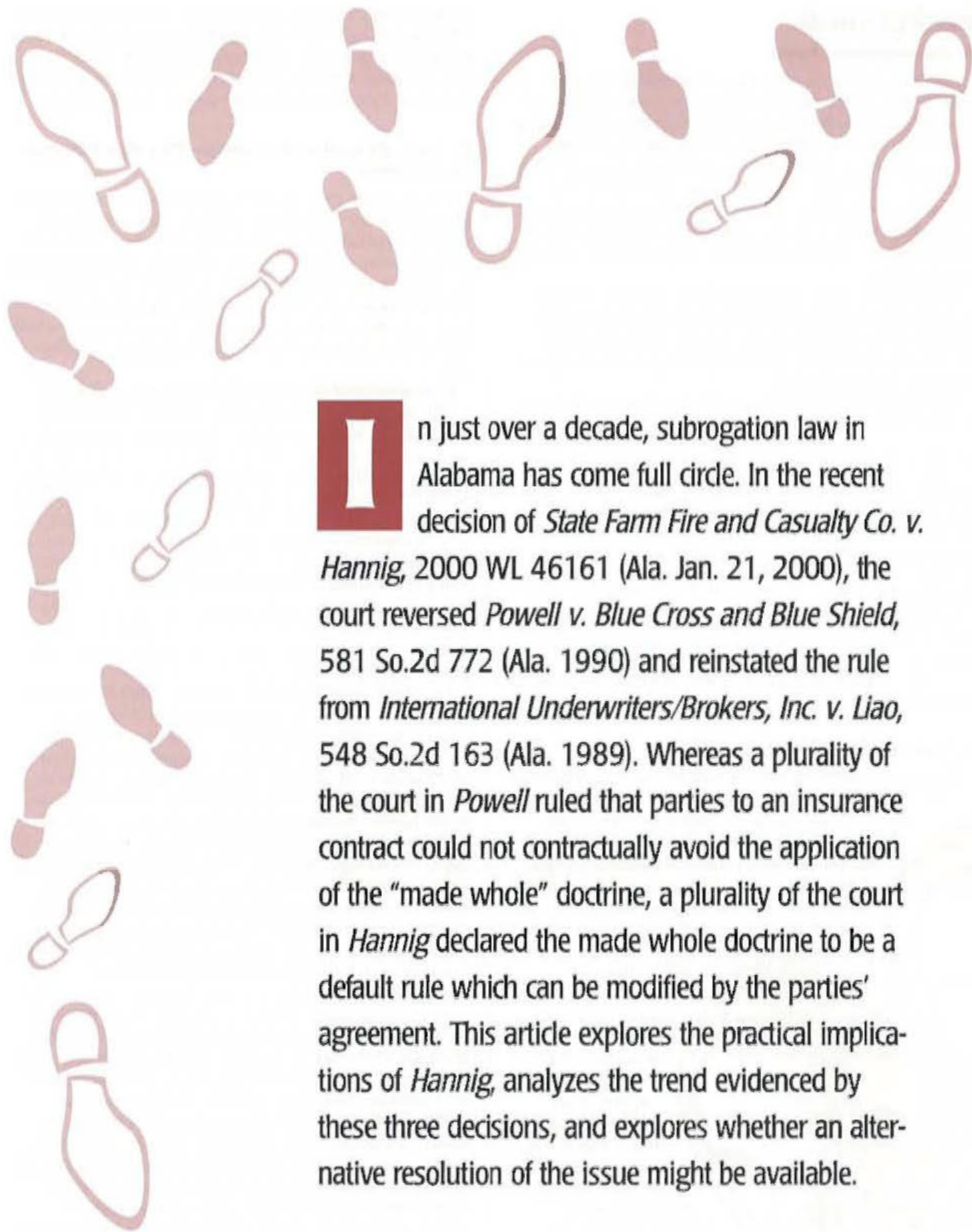
Rhonda Pitts Chambers is associated with Taylor & Taylor with offices in Birmingham and Prattville. She received her bachelor's degree from Judson College in 1986 and her law degree from Cumberland School of Law in 1989. She serves as chair of the Standing Committee on the Alabama Rules of Appellate Procedure.



A
Commentary
on
State Farm
V.
Hannig

By Jennifer L. Howard and Glenda G. Cochran

*Subrogation involves the right
of the insurer to step into the
shoes of the insured.*



In just over a decade, subrogation law in Alabama has come full circle. In the recent decision of *State Farm Fire and Casualty Co. v. Hannig*, 2000 WL 46161 (Ala. Jan. 21, 2000), the court reversed *Powell v. Blue Cross and Blue Shield*, 581 So.2d 772 (Ala. 1990) and reinstated the rule from *International Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989). Whereas a plurality of the court in *Powell* ruled that parties to an insurance contract could not contractually avoid the application of the “made whole” doctrine, a plurality of the court in *Hannig* declared the made whole doctrine to be a default rule which can be modified by the parties’ agreement. This article explores the practical implications of *Hannig*, analyzes the trend evidenced by these three decisions, and explores whether an alternative resolution of the issue might be available.

Background

A. Subrogation rights

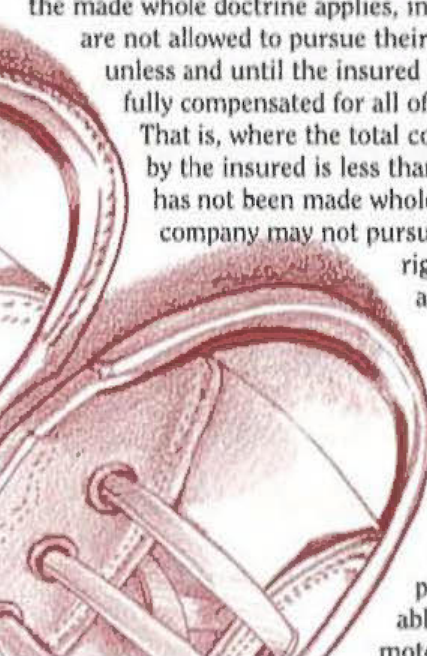
Insurance companies often claim subrogation rights for benefits they paid to the insured for a loss covered by the policy of insurance. Subrogation involves the right of the insurer to step into the shoes of the insured. An insurer exercises active subrogation rights where it assumes the insured's right to pursue a legal cause of action against a third party who caused the insured's loss. An insurer exercises passive subrogation rights where it asserts a right to be reimbursed out of the proceeds of a suit brought by the insured against a third party tortfeasor.

An example of active subrogation is the scenario in which an insured's home is destroyed by a fire negligently set by a neighbor. If the property insurer pays the entire amount of the loss, the insurer may then bring suit against the neighbor to recover the benefits paid.

An example of passive subrogation is the common scenario in which a third-party tortfeasor causes an insured to be injured in an automobile accident and a health insurer pays the insured's medical bills. The insured has an incentive to bring a tort action against the tortfeasor to recover for losses, such as his pain and suffering, for which the insurance benefits did not compensate him. In such situations, insurance companies may be entitled to be reimbursed, out of the insured's recovery from the third party, for the amount of benefits paid.

Subrogation rights can be either equitable or contractual. That is, the rights can arise from a court applying rules of equity or from express provisions in the contract of insurance. Typically, however, the insurance contract will contain express language providing for subrogation rights.

B. The made whole doctrine



The made whole doctrine is an equitable concept. Where the made whole doctrine applies, insurance companies are not allowed to pursue their subrogation rights unless and until the insured is "made whole," or fully compensated for all of the insured's losses. That is, where the total compensation received by the insured is less than her loss, the insured has not been made whole, and the insurance company may not pursue its subrogation rights if the court applies the made whole doctrine. For example, in the classic scenario of the insured who is injured in an automobile accident, if the tortfeasor were judgment-proof, and if the available underinsured motorist coverage pro-

ceeds were not to exceed the amount of the insured's medical bills, the insured would not be fully compensated for her pain and suffering and other uncompensated losses. Under these circumstances, if the made whole doctrine were to apply, the insurance company would not be entitled to subrogation.

C. *Liao, Powell and Hannig*—The three benchmark cases

Three primary cases, *Liao, Powel*, and *Hannig*, address the issue of whether an insurance company may contractually avoid the application of the made whole doctrine. Insurance contracts often contain language giving the insurance company "first priority" over proceeds recovered by the insured from a third party for losses covered by the insurance contract, regardless of whether or not the insured is made whole. The question is whether such contract language is enforceable.

In *International Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989), the Supreme Court of Alabama first addressed the issue. In that case, the insured was injured in an automobile accident. She sustained permanent brain damage. Her health insurance company paid medical benefits of \$75,000, which was the total amount of benefits to which the insured was entitled under the policy. The insured incurred a total of \$200,000 of medical bills. She entered into a settlement with the tortfeasor for the tortfeasor's liability policy limits of \$375,000. The health insurer reduced its subrogation claim to \$43,000, by the amount of its proportionate share of attorney's fees. The trial court, presumably applying the made whole doctrine, reduced the health insurer's subrogation interest to \$7,500 under the facts of the case.

The health insurer appealed, claiming that it should recover the full amount of its subrogation interest because its claim to the right to subrogation arose from contract rather than from equity. Thus, it argued, equitable principles such as the made whole doctrine should not apply to reduce its contractual claim. In the Supreme Court of Alabama, a panel of five justices unanimously held that the made whole rule applies to all claims of subrogation, whether arising from equity or contract, unless the contract expressly provides otherwise. Because the subrogation agreement was not in the record, and the court assumed that it would not modify the made whole rule, the court held under the facts of the case that the made whole rule applied and precluded the insurance company from recovering its subrogation interest.

In *Powell*, one year after the *Liao* decision, a plurality of the court held that an insurance company may not enforce contract language which sought to avoid the application of the made whole rule. In that case, Cynthia Powell was permanently injured in an automobile accident. Her health insurance company, Blue Cross and Blue Shield of Alabama (BCBS), paid health insurance benefits of \$27,080.26. The insured settled her claim against the alleged tortfeasors for the \$100,000 limit of their liability insurance policy. The parties stipulated that the amount of the settlement did not make whole Ms. Powell. BCBS claimed that Ms. Powell should, nevertheless, reimburse it for the \$27,080 in benefits

it paid. BCBS based its claim on language in the contract of insurance which provided that BCBS was "entitled to the reimbursement of any amounts paid by it for the benefit of its insured. This reimbursement is due even though the insured is not paid in full, or made whole by any recovery from a third party." The court held that BCBS could not enforce the language in the contract which attempted to circumvent the made whole rule.

Ten years after the *Powell* decision, the court revisited the issue. In *Hannig*, a plurality of the court held that *Powell* should be overruled and that the parties to an insurance contract may alter the made whole doctrine by agreement. In so holding, the court reinstated the rule from *Liao*.

In *Hannig*, State Farm issued a policy of property insurance to Belmore, who had contracted to buy a house from Mr. and Mrs. Hannig. The insurance policy became effective immediately following the closing of the sale, but Belmore was not to take possession until some time later. After closing but before Belmore took possession, a fire damaged the home while the Hannigs were still in possession. State Farm paid benefits to Belmore under the terms of the property insurance policy, less the \$250 deductible. State Farm and Belmore agreed to join as plaintiffs in a civil action against the Hannigs and agreed that the amount of Belmore's remaining pecuniary interest in the claim was \$5,250. This amount comprised the \$250 deductible plus \$5,000 to compensate Belmore for his loss of use of the house and other consequential damages. The trial court and court of civil appeals held that summary judgment was proper for the Hannigs against State Farm, because Belmore had not been made whole by State Farm. The Supreme Court of Alabama affirmed, holding, "[I]f we apply the *Powell* rationale to the facts and circumstances of this case, then we must conclude that the trial court and the Court of Civil Appeals reached the correct result Time has revealed the inherent inequity in applying the *Powell* rule; therefore, 'we are convinced beyond . . . doubt that [*Powell* and the other cases listed above that apply the *Powell* rule] were [wrongly] decided' [and] that they should be overruled" *Hannig* at 2-3.

Practical Implications

What are the likely practical consequences of the *Hannig* ruling? Only a few clues can be garnered from the small number of cases which rely on it. *Hannig* left open a number of questions for practitioners which remain, for now, unanswered. Many lawyers will likely need to make some adjustments. It is unlikely, however, that *Hannig* and its progeny will substantially affect lawyers' practices. (Note that this discussion does not apply to ERISA or workers' compensation death benefits cases.)

A comparison of the pre- and post-*Hannig* rulings reveals one possible trend. After *Hannig*, courts will be more likely to allow insurance companies to sue third party tortfeasors or to participate as co-plaintiffs in suits by their insureds against third-party tortfeasors. Whereas most decisions relying on

Powell were unfriendly to insurance companies seeking to bring or participate in such suits, *Hannig* and its progeny have been more insurer-friendly in tone, if not in result.

Cases decided during the *Powell* era held that an insurance carrier would not be entitled to intervene as of right, pursuant to Rule 24(a), Ala.R.Civ.P., in the insured's suit against a third-party tortfeasor unless and until the insured had been fully compensated for his loss, even where the insurance carrier claimed a contractual right to subrogation. See *Alfa Mutual Insurance Co. v. Head*, 655 So.2d 975 (Ala. 1995) (denying insurer's motion to intervene); *Geico Insurance Co. v. Lyons*, 658 So.2d 445 (Ala. 1995) (accord). But see *McKleroy v. Wilson*, 581 So.2d 796 (Ala. 1990) (holding that a trial court which allowed plaintiff's insurer to intervene under ARCP 24(b) did not abuse its discretion where the insurer claimed a contractual right to subrogation). In those cases, where the trial court denied motions to allow plaintiff's insurance company to intervene in the suit, the supreme court refused to issue a writ of mandamus to allow the insurance company to participate in the suit.

The court concluded in *Head* and *Lyons* that the insurer had no clear right to intervene under ARCP 24(a) and that the trial court did not abuse its discretion in refusing to allow permissive intervention under ARCP 24(b). The court reasoned that, pursuant to the rule in *Powell*, "[t]he insurer has no right to subrogation unless and until the insured has been made whole for the loss." *Head* at 977. Until such time as the subrogation interest arises, the insurance company does not have a direct, substantial and protectable interest sufficient to require the insurer's presence in the suit. *Id.* Thus, the court concluded, the insurance company's interest was not great enough to justify intervention of right or to imply an abuse of discretion by the trial court in refusing to allow permissive intervention.

Similarly, in *Ex Parte Brock*, 734 So.2d 998 (Ala. 1999), the court found that compulsory joinder of plaintiff's insurer was not required in such a case. Although the defendant urged the court to construe Ala.R.Civ.P. 19 together with Ala.R.Civ.P. 17(a), which provides, "In subrogation cases...if the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee," the court reasoned that it could not disregard cases dealing with the substantive law of subrogation in applying rules of procedure that turn on substantive rights.

Rulings entered after the *Hannig* decision have different in tone if not in result. In *Ex Parte Cassidy*, 2000 WL 641107 (Ala. May 19, 2000), the defendants in a tort suit moved to join the plaintiff's automobile insurer as a real party in interest. The court held that the trial court did not abuse its discretion in refusing to join plaintiff's automobile insurer as a co-plaintiff, because no subrogation agreement was in the record. The court reasoned that *Hannig* and *Liao* require that the court study the subrogation agreement to determine whether it permits subrogation before the plaintiff is made whole. The court held, "Until we conclude that this agreement does permit such subrogation, we cannot issue a writ of mandamus directing the trial court to order the joinder of

[plaintiff's insurer] as a [co]plaintiff." *Id.* at 1. Tellingly, *in dicta* the court further stated, "this decision may not preclude further action under *State Farm* and *Liao* once the policy has been produced and the trial court has had the opportunity to review the subrogation agreement." *Id.* at 2.

The court's statements in *Cassidy* suggest that the court may be more willing to allow joinder of plaintiffs' insurers in suits by the insured against a third-party tortfeasor where a valid subrogation agreement is in the record and where the trial court determines that the agreement has the effect of modifying the made whole rule. The interpretation of Alabama law, post-*Hannig*, by the U.S. District Court for the Middle District of Alabama supports this inference as well. In *Story v. Pioneer Housing Systems, Inc.*, 191 F.R.D. 653 (M.D. Ala. March 2, 2000), under facts analogous to those in *Cassidy*, the district court held that under Alabama substantive law the insurer could not be held to be a real party in interest absent some evidence in the record of a contractual provision which would give the insurer a contractual interest in any recovery by the plaintiff. The district court implied, without deciding, that if such a subrogation agreement were in the record, the court would consider allowing joinder.

In *Allstate Insurance Co. v. Hugh Cole Builder, Inc.*, 2000 WL 709509 (Ala. June 2, 2000), the Supreme Court of Alabama suggested that it may view more favorably the insurers' right to exercise active subrogation rights. In that case, the Supreme Court of Alabama allowed an insurer to sue a third-party tortfeasor although the insured had not been made whole.

In *Hugh Cole*, the Supreme Court of Alabama answered the following certified question from the U.S. District Court for the Middle District of Alabama:

"Does the 'made-whole' rule prevent a property insurer which has paid its insured under the policy, and obtained a subrogation agreement, from maintaining a timely filed subrogation suit against a third-party which allegedly caused the damage, where the insured has not been made whole, but has allowed the statute of limitations to run without filing any suit against the third party?"

The court answered the certified question in the affirmative: "Assuming the existence of an agreement allowing [the insurer] to be subrogated without [the insured's] having been made whole, we conclude that [the insurer] would be entitled to subrogation." *Hugh Cole* at 2. Significantly, the court based its holding on the rationale that under *Hannig* and *Liao*, an insurer may contract with its insured for subrogation against a third-party tortfeasor even before the insured has been made whole. Thus, the court concluded, whether or not the insured's claim for uncompensated damages was time-barred is irrelevant to the issue of whether the insurance company may maintain the suit.

The latter decisions seem consistent with the decision in *Hannig*. Notably, in *Hannig* itself, the practical effect of the court's decision was to allow the insurer to participate in the suit with the insured against the third-party tortfeasor, although the insured had not yet been made whole. The trend

is toward allowing insurance companies greater freedom to bring and participate in suits against third-party tortfeasors.

As a result, practitioners can probably expect a few changes.

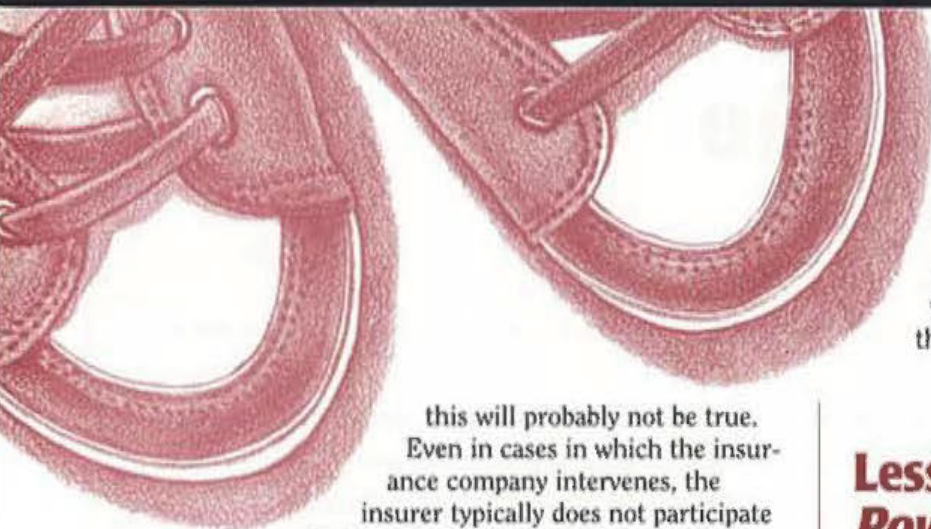
First, insurance companies now have every incentive to always include language in policies of insurance which will entitle them to a first right of recovery against third parties. *Cassidy* teaches that insurance companies who wish to intervene or defendants who wish to compel joinder of plaintiff's insurer in suits by the insured against third parties must (1) submit a copy of the subrogation contract into the record, and (2) identify for the court the language which contracts around the made whole rule. Although the plaintiff's lawyer may resist the defendant's attempts to obtain the insurance contract during discovery, the court in *Cassidy* implied that a motion to compel the production of plaintiff's contract may be proper.

If insurance companies may now enter into contracts with their insured to avoid the application of the made whole doctrine, insureds may well challenge the validity of such contracts using traditional contract defenses. Although subrogation contracts are sometimes negotiated after a loss occurs, more often subrogation clauses are inserted into insurance policies before any losses have occurred. In the latter case, practitioners may expect a wave of challenges grounded on, for example, public policy or unconscionability.

Some attorneys believe that intervention or joinder of an insurance company with a subrogation claim may be detrimental to the plaintiff if the case proceeds to trial. The risk is that the presence of an insurance company who has paid part of plaintiff's damages may lessen sympathy for the plaintiff and reduce the verdict. Plaintiff's attorneys who espouse this view will want to take steps to attempt to limit the insurance company's participation in the trial. Such steps could include petitioning the trial court to put conditions on the insurer's intervention or to enter a pre-trial order which provides that the insurer must not disclose to the jury that the plaintiff received insurance benefits, must not disclose its interest to the jury, and must not present any evidence to support its lien in the jury's presence. See *American Legion v. Leahey*, 681 So.2d 1337 (Ala. 1996) (holding statute unconstitutional which allowed introduction in personal injury actions of evidence that plaintiff's medical or hospital expenses have been or will be paid or reimbursed by collateral source); *Coleman v. Hamilton Storage Co.*, 180 So. 553 (Ala. 1938) (holding the trial court erred in admitting evidence that the plaintiff had received workers' compensation benefits); *Southern v. Plumb Tools*, 696 F.2d 1321 (11th Cir. 1983) (accord); Advisory Committee Note to the 1966 Amendment of Fed.R.Civ.P. 24(a) (recognizing that intervention may be conditional).

Overall, however, few substantial changes to lawyers' practices will likely materialize.

Lawyers who represent insureds in claims against third-party tortfeasors typically negotiate with insurance subrogees in an attempt to reduce the amount of the claimed subrogation interest. Although it might seem that insurance subrogees, who have contractually modified the made whole rule, now have greater leverage in such negotiations, in practice



Despite the likelihood that insurers will now have greater freedom to intervene, as a practical matter insurance companies will not likely do so on a routine basis, due to the costs involved. As before, insurers will likely negotiate with plaintiff lawyers to reduce the subrogation claim by the amount of attorney fees or other collection costs they would otherwise incur, in return for plaintiff's agreement to pay the claim if he recovers.

this will probably not be true. Even in cases in which the insurance company intervenes, the insurer typically does not participate in discovery and does not have the information necessary to try its subrogation claims to a jury. As a result, plaintiffs continue to have leverage against insurers, but of a different sort. If insurers have secured subrogation agreements which allow them to sue third parties before the insured has been made whole, they have the right to try their subrogation claim to a jury, with or without the plaintiff. Thus, plaintiffs and defendants may threaten to settle with each other before trial, leaving the insurer without the means to prosecute its case. Such threats will likely have a powerful effect in pre-trial negotiations to reduce the amount of the subrogation claim.

Lessons learned from *Liao*, *Powell* and *Hannig*

Although *Liao*, *Powell* and *Hannig* seem doctrinally opposed, the decisions reveal a strong trend in the same direction. In each case, the Supreme Court of Alabama appeared to have been primarily motivated by equitable considerations. The facts and interests at stake in each case seemed to make the difference in the outcomes. If this is true, equitable considerations will likely continue to affect the future direction of subrogation litigation.

At stake in *Hannig* was whether the insurer was entitled to participate in the insured's suit against the third-party tortfeasor. The factual scenario in *Hannig* represented an almost

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CLE Rule Change

Supreme Court of Alabama August 23, 2000

It is ordered that Rule 9.A., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, is amended to read as follows:

"A. Within twelve (12) months of being admitted to the Bar, or within twelve (12) months of being licensed to practice law in Alabama, whichever shall last occur, each lawyer shall complete a six- (6-) hour course in professionalism; provided, however, that lawyers who are exempt from those Rules pursuant to Rule 2.C.1. shall also be exempt from the provisions of this Rule 9.A. while they are so exempt. Once a lawyer's exemption under Rule 2.C.1. ends, the lawyer must complete the course in professionalism during the calendar year following the year in which the exempt status ends."

It is further ordered that this amendment is effective immediately.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 9:

"Note from the reporter of decisions: The order amending Rule 9.A., effective August 23, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 2d."

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

UNITED STATES POSTAL SERVICE

Statement of Ownership, Management, and Circulation
(Required by 39 USC 3685)

1. Publication Title: **The Alabama Lawyer**

2. Publication Number: **0002-4287**

3. Filing Date: **October 4, 2000**

4. Issue Frequency: **Bi-monthly: January, March, May, July, September, November, with special directory editions in June**

5. Number of Issues Published Annually: **Seven (7)**

6. Annual Subscription Price: **\$15; state bar members \$30; all others**

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4):
Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer):
Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank):
Publisher Name and complete mailing address:
Alabama State Bar, 415 Dexter Avenue, Montgomery, AL 36104
Editor Name and complete mailing address:
Robert A. Huffer, 184 Commerce Street, Montgomery, AL 36104
Managing Editor Name and complete mailing address:
Margaret S. Murphy, 415 Dexter Avenue, Montgomery, AL 36104

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box: None

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Do not check):
 For-profit
 Non-profit

13. Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement):
 Yes
 No

PS Form 3526, September 1999 (Use instructions on the reverse)

13. Publication Title: **The Alabama Lawyer**

14. Issue Date for Circulation Data Below: **September 2000**

15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		13,300	13,300
b. Paid and Unpaid Circulation			
(1) Sales Through Dealers and Carriers, Street Vendors, and Counter Sales (Not Mails)		0	0
(2) Paid or Unpaid Mail Subscriptions (Include advertiser's proof copies and exchange copies)		12,700	12,831
c. Total Paid and Unpaid Circulation (Sum of 15b(1) and 15b(2))		12,700	12,831
d. Free Distribution by Mail (Carriers, newspapers, and other mail)		100	73
e. Free Distribution Outside the Mail (Carriers or other means)		0	0
f. Total Free Distribution (Sum of 15d and 15e)		100	73
g. Total Circulation (Sum of 15c and 15f)		12,800	12,904
h. Copies not Distributed			
(1) Office Use, Leftovers, Spoiled		500	559
(2) Returns from News Agents		20	36
i. Total (Sum of 15g, 15h(1), and 15h(2))		13,300	13,501
Percent Paid and Unpaid Circulation (15c / 15g x 100)		99%	99%

16. Publication or Reporting of Ownership:
 Publication required. 400 has printed in the **November 2000** issue of this publication.
 Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner:
Margaret S. Murphy, Managing Editor Date: **October 4, 2000**

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classic case in which true subrogation has traditionally been thought appropriate. In *Hannig*, the insurer had paid \$64,884.93 in benefits, fully reimbursing the insured for the property loss except for the \$250 deductible. The insured and insurer agreed that the insured's consequential and other unreimbursed damages amounted to no more than a total of \$5,250.

Where the insurer has paid the entire loss, the insurer traditionally was entitled to assume the rights of the insured against any third party and file suit against third parties to recover the benefits paid. In such situations, where the insured has recovered from the insurer almost the entire amount of his loss, he has little incentive to pursue any third-party tortfeasors himself. In such situations, it has traditionally been held appropriate that the insurance company should have the right to file suit on the insurer's own name and for the insurer's own account.

In *Hannig*, because the insured's remaining pecuniary interest was very small comparatively, the situation was very close to that in which the insurer has traditionally been allowed to bring suit. Thus, to apply a rule which would seemingly require that the insurer be dismissed from the suit altogether seems unfair. Whereas the insurer would have had the right to pursue the suit in its own name, but for the insured's remaining small remaining interest, the defendants claimed that the insured's remaining claim should preclude the insurer from participating in the suit altogether. The court ruled that such a result would be inequitable and refused to affirm summary judgment against the insurer.

The court was also clearly motivated by the fact that the subrogation contract constituted a real meeting of the minds. State Farm and Belmore reached a subrogation agreement after State Farm had paid according to the terms of the policy. According to the terms of the agreement, State Farm would obtain counsel to represent both State Farm and Belmore, State Farm would pay all the costs of litigation, and Belmore would receive \$5,250 of any recovery. Given the evidence of real bargaining between the insurer and insured, the court was unwilling to undermine the parties' right to contract.

The driving issue in *Powell* was quite different. At stake in that case was whether an insured who had not been fully compensated for her loss must reimburse her insurer for the benefits she had received. That situation presented the classic case in which equitable principles were traditionally applied to prevent such a result. The doctrine of subrogation arose from the equitable policy that, as between the insurance company and tortfeasor, the wrongdoer should ultimately bear the loss. However, the made whole doctrine, also a rule of equity, arose from the position that, "Where either the insurer or insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume." *Powell* at 777 (quoting *Rimes v. State Farm Mutual Automobile Insurance Co.*, 316 N.W.2d 348, 355 (Wis. 1982)).

Notably, the insurance company's right to participate in the suit was not at issue in *Powell*. In fact, the insurer in that

case, BCBS, had intervened in the suit, and no party had appealed the trial court's decision to allow BCBS to intervene. The sole practical issue was which party(-ies) were entitled to the proceeds of the recovery from the tortfeasor. The plurality of justices believed that the equitable result was to deny the insurer the right to reimbursement where the insured had not been fully compensated for her injuries.

In *Liao*, significantly, regardless of the court's language regarding whether an insurer may abrogate the made whole rule by contract, the court held that under the facts of that case the made whole doctrine should apply. That case was a situation similar to that of *Powell*.

Thus, each time it has been confronted with the issues discussed here, the supreme court has striven to reach an equitable result under the facts with which it was presented.

Was the *Hannig* ruling required by *Powell*?

Is it true that application of the *Powell* rule to the facts of *Hannig* would have required the court in *Hannig* to affirm the decision to dismiss the insurer from the case? The plurality clearly believed so: "[I]f we apply the *Powell* rationale to the facts and circumstances of this case, then we must conclude that the trial court and the Court of Civil Appeals reached the correct result." *Hannig*, at 2. Perhaps the Supreme Court of Alabama could, however, have reached the desired result in *Hannig* by slightly modifying, rather than overruling, *Powell*.

Although the *Powell* plurality ruled that the insured does not become entitled to reimbursement of the benefits paid until the trial court finds that the insured has been made whole, that holding is not tantamount to a ruling that the insurer can never have a legitimate interest justifying intervention or joinder in the suit. Despite the rulings in *Head*, *Lyons* and *Brock*, discussed above, the *Powell* rule would not always prevent the insurer from participating in a suit against a third-party tortfeasor. Indeed, under facts analogous to those involved in *Lyons*, *Head* and *Brock*, the court held in *McKleroy v. Wilson*, 581 So.2d 796 (Ala. 1990), that it was not error for a trial court to allow plaintiff's insurer to intervene. That case was decided the same day as *Powell*.

Under the *Powell* rule, after a favorable verdict or settlement against the tortfeasor, the insurer would be entitled to reimbursement in every case except those in which the plaintiff is not made whole by the verdict or settlement. It is true that the insurer must overcome one hurdle more than the plaintiff in order to recover. The plaintiff must simply obtain a favorable verdict or settlement, whereas the insurer must also obtain a court ruling that the plaintiff was made whole. The insurer's interest in the outcome will sometimes be as substantial and likely to succeed as the plaintiff's interest, however. For example, under the facts of *Hannig*, where the insurer had paid \$64,884.93 in benefits and the insured's uncompensated claim was stipulated to be only \$5,250, it



would be counterintuitive to hold that the insurance company's interest in the outcome was not a direct, substantial and protectable interest. Under those facts, if the jury entered a verdict favorable for the plaintiff, it almost certainly would be one which would make whole the insured, and the insurer would have a right to reimbursement out of the excess recovery.

The doctrinal problem with allowing an insurer to intervene before the insured has been made whole, however, is that if the insurer were a party in the suit, how would one characterize the insurer's status? If the insurer has no right to assert a cause of action until the plaintiff has been made whole, it makes no sense to characterize the insurer as a co-plaintiff. Nor would any basis exist for characterizing the insurer as a defendant. The solution would be a narrower construction of *Powell*.

Although *Powell* stated that *no subrogation* rights arise until the insured has been made whole, a narrower possible rule would be that *no distribution* rights arise until after the insured has been made whole. On this view, an insurer would not be entitled to share in the distribution of the third-party recovery unless and until the insured has been made whole. The insurer would still have subrogation rights, but anything the insurer recovers itself would be held in trust for the benefit of the insured. The insurer would then be entitled to distribution of the excess recovery after the insured has been made whole.

This position is somewhat supported in the law as it stood before *Powell*. The court held, "in contemplation of law, the insured and the insurer are, in regard to the loss, one person, and the distribution of the proceeds is a matter concerning only the insured and the insurer; therefore, upon paying a

loss, an insurer may sue the person negligently causing the damage, using the name of the insured, for the resulting damages, and retain from the amount recovered the sum paid to the insured, and turn the balance over to him, or the insured may sue the wrongdoer for his own benefit, and that of the insurer." *Hudson and Thompson v. First Farmers and Merchants National Bank*, 93 So.2d 415, 417 (Ala. 1957). On this reasoning, the court held that, where an indemnitee had assigned a part of his cause of action to his indemnitor, the indemnitor and indemnitee could sue separately without splitting their cause of action. In that case, the indemnitor sued the alleged wrongdoer in federal court, and the indemnitee subsequently sued the same defendants in state court while the indemnitor's suit was still pending. The court specifically noted that the situation was no different than a situation involving an insurer and insured.

Such a view would allow the equitable result in both *Powell* and in *Hannig*. Although the court has entertained similar arguments, it did not directly confront the issue. See *Complete Health, Inc. v. White*, 638 So.2d 784, 789 (Ala. 1994) ("In *Powell* we made no such distinction.").

Conclusion

The *Hannig* decision has brought Alabama into a brave new world of subrogation law. To date, more questions have arisen than answers. Practitioners will look forward to the further development of these issues. ■



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Settling Federal Cases On Appeal: A Trap for the Unwary

By Scott B. Smith

The scenario is familiar. Despite the best efforts of trial counsel, your client loses in the trial court. To make matters worse, the district court writes a terrible opinion that, if left undisturbed, could haunt your client for years in other cases. So you file your notice of appeal. Then settlement suddenly becomes an option while the case is on appeal, oftentimes at the behest of the court of appeals' mediation office or after you serve your adversary with your brief on the merits. The sticking point from your client's perspective is the district court opinion. Assuming you can get that opinion vacated, your client is happy to settle. So, what do you do? Make vacatur a condition of the settlement? Have the settlement papers executed and then move the court of appeals to vacate the judgment on appeal? The answers to these questions may surprise you.

Typically, when a case becomes moot while on appeal, the appellate court will "reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). A different rule applies to appeals mooted by settlement, however. These days, obtaining vacatur of an unfavorable opinion is an exceptional remedy after the parties settle an appeal. Unwary lawyers therefore need to learn how to use Federal Rule of Civil Procedure 60(b) to obtain vacatur of a district court opinion as part of an appellate settlement.

The Bancorp Rule

Several years ago, the U.S. Supreme Court made it more difficult to get the judgment on appeal vacated as part of the settlement. The Court's unanimous opinion in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), severely restricted an appellate court's authority to vacate a lower court's opinion as part of a settlement. In an opinion by Justice Scalia, the Court held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 29.

The procedural history of *Bancorp* is instructive. Bancorp held a mortgage and successfully petitioned an Idaho bankruptcy court to suspend the automatic stay of a foreclosure sale against Bonner Mall. On appeal, the United States District Court for the District of Idaho reversed, and the Ninth Circuit affirmed. Bancorp then petitioned for a writ of certiorari. After the U.S. Supreme Court granted certiorari and received briefing on the merits, the parties stipulated to a consensual plan of reorganization, which the bankruptcy court approved. The parties agreed that their settlement mooted the case.

Thereafter, Bancorp filed a motion asking the Supreme Court to vacate the Ninth Circuit's judgment under 28 U.S.C. § 2106, which allows an appellate court to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" on appeal. Bonner Mall opposed the motion. The Supreme Court then set the vacatur question for briefing and argument to resolve a split of authority in the circuits. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 n.2, 34 (1993) (*per curiam*) (recognizing the circuit split on vacating judgments following settlement on appeal, but dismissing the writ of certiorari as improvidently granted).

The fact that the parties entered into their settlement before Bancorp sought vacatur of the Ninth Circuit's opinion was "decisive" because the "[p]etitioner's voluntary forfeiture of review constitutes a failure of equity." *Bancorp*, 513 U.S. at 26. In contrast to the situation in *Munsingwear*, where mootness was unattributable



to any of the parties, the Court in *Bancorp* held: "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 25.

The *Bancorp* rule is especially broad. See 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3533.10 (Supp. 2000) (criticizing the breadth of the *Bancorp* decision). Regardless of whether the settling parties are seeking vacatur of a district-court decision or a court of appeals opinion, the rule is the same: "[M]ootness by reason of settlement does not justify vacatur of a judgment under review." *Bancorp*, 513 U.S. at 29.

The Reason for the Rule

Though recognizing that its rule could discourage settlement of cases on appeal, the Supreme Court chose to elevate the "public interest" over the "systemic value of settlement." In Justice Stevens's words, "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *Izumi*, 510 U.S. at 40 (Stevens, J., dissenting) (quoted in *Bancorp*, 513 U.S. at 26B27). In Justice Scalia's words, "To allow a party who steps off the statutory path [of appeals] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Bancorp*, 513 U.S. at 27.

And in the oft-quoted words of Judge Frank Easterbrook: "History cannot be rewritten. There is no common law writ of erasure. . . . When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property." *Matter of Mem. Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300, 1302 (7th Cir. 1988). As a matter of policy, therefore, the parties are free to settle their differences at any time. But once a judicial opinion issues, posterity trumps peace.

The Exception to the Rule

Luckily, there is a way to avoid the *Bancorp* rule, albeit a narrow one. Because the decision to vacate the judgment of a lower court "is an equitable one," the Court in *Bancorp* recognized that "exceptional circumstances" may justify vacatur in certain cases. *Bancorp*, 513 U.S. at 29. The Court cautioned, however, "that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur." *Id.* Thus, the mere fact that the parties agree to a settlement will not justify vacatur of the decision below.

In the context of the usual appellate settlement, the only opening left after *Bancorp* seems to be through Federal Rule of Civil Procedure 60(b). As Justice Scalia wrote at the conclu-

sion of his opinion: "Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district court judgment may remand the case with instructions that the district court consider the request" under Rule 60(b). *Id.* After *Bancorp*, a few courts of appeals have remanded settled appeals in this fashion. See *Pressley Ridge Schs. v. Shimer*, 134 F.3d 1218, 1222 (4th Cir. 1998); *Nahrebski v. Cincinnati Millacron Marketing Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994).

Using Rule 60(b)

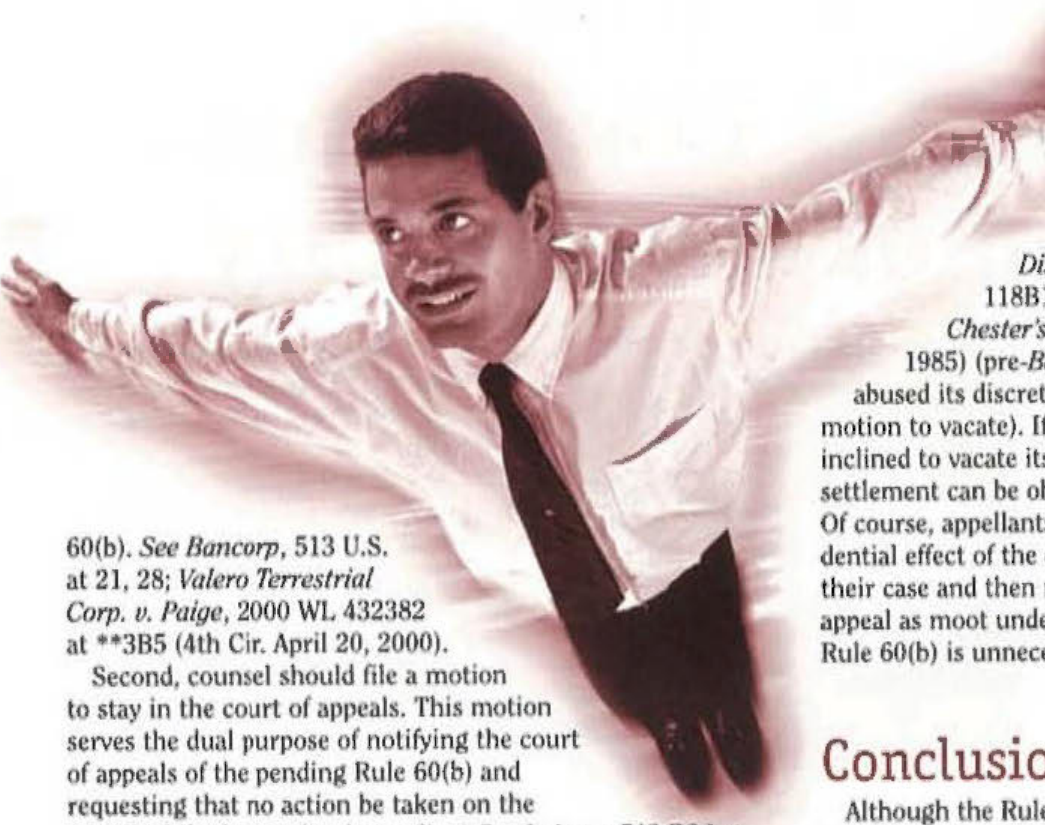
The ironic lesson to be learned from *Bancorp* is that an appellant who wishes to condition an appellate settlement on vacatur of judgment below should not agree to a settlement, at least not unconditionally. Under the *Bancorp* rule, if the appellant agrees to a settlement while the case is on appeal, the settlement itself moots the appeal and prevents vacatur.

Considering settlement but refusing to finalize an agreement until the judgment below is vacated, however, avoids the mootness problem by keeping the case alive. See *Motta v. Dist. Dir. of Immigration*, 61 F.3d 117, 118 (1st Cir. 1995); *Nestle Co., Inc. v. Chester's Market, Inc.*, 756 F.2d 280, 282 (2d Cir. 1985).

Absent extraordinary circumstances, Rule 60(b) now provides the only means to protect the appellant's right to appeal the adverse judgment and simultaneously enter into a settlement conditioned on vacatur. But be careful. Using Rule 60(b) in this manner requires attention to procedural details. Once the case is on appeal, the district court, as a technical matter, no longer has jurisdiction to hear a Rule 60(b) motion. To fill this gap, the courts of appeals and commentators have recognized a procedure under Rule 60(b) to further both the settlement and the appeal. See 11 Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 2873, at 432 & n.6 (1995) (crediting *Smith v. Pollin*, 194 F.2d 329 (D.C. Cir. 1952), and *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955), with developing this "satisfactory" procedure). This procedure, in essence, fosters a dialogue between the district court and the court of appeals under the auspices of a Rule 60(b) motion.

The Procedure

The procedure works as follows. First, counsel for the appellant (or all counsel jointly, if all the parties agree to vacatur as a condition to the settlement) files a Rule 60(b) motion with the district court, requesting that the court vacate the judgment on appeal to further the tentative settlement. There is no need to obtain leave from the court of appeals to file the Rule 60(b) motion; the district court has the power to consider the motion because it is in furtherance of the appeal. See *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930, 932 n.3 (5th Cir. 1976). More importantly, the district court is not bound by the *Bancorp* rule, because that rule, by its terms, applies only to the appellate vacatur power under 28 U.S.C. § 2106, not the district court's discretion to vacate its own judgments under Rule



60(b). See *Bancorp*, 513 U.S. at 21, 28; *Valero Terrestrial Corp. v. Paige*, 2000 WL 432382 at **3B5 (4th Cir. April 20, 2000).

Second, counsel should file a motion to stay in the court of appeals. This motion serves the dual purpose of notifying the court of appeals of the pending Rule 60(b) and requesting that no action be taken on the appeal while the motion is pending. See *Lairsey*, 542 F.2d at 932.

Third, the district court must decide whether to deny the Rule 60(b) motion, since the district court has the power to deny the motion, but has no jurisdiction to grant it while the appeal is still pending. See 11 Wright, Miller & Kane, *supra*, § 2873, at 434B35 & n.8 (collecting cases). If the district court denies the motion, the notice of appeal from such a denial can be consolidated with the appeal already pending. See *Stone*, 514 U.S. at 401; *Fobian v. Storage Technology Corp.*, 164 F.3d 887, 891 (4th Cir. 1999). On the other hand, if the district court is inclined to grant the motion in furtherance of the settlement, it should issue a short memorandum so stating. The movant can then file a motion with the court of appeals asking for limited remand of the pending appeal to obtain the vacatur. See *Fobian*, 164 F.3d at 891; *Washington v. Bd. of Educ., Sch. Dist. 89*, 498 F.2d 11, 16 (7th Cir. 1974); see generally 12 *Moore's Federal Practice* § 60.67[2][b] (3d ed. 2000) (collecting cases from every federal circuit).

The Benefits

The procedure outlined above is especially effective for an appellant who is concerned about the precedential effect of the district court's decision. Under those circumstances, vacatur is the appellant's primary concern; settlement, while attractive, is secondary to pressing the appeal on the merits.

Using Rule 60(b) to obtain vacatur from the district court protects both concerns. If the district court denies the motion to vacate, the appellant stands before the court of appeals having done everything possible to settle despite an intransigent district judge. Moreover, there is some authority that the district court's refusal to vacate its judgment, in the face of the parties' efforts to conditionally settle their dispute, presents

the "exceptional circumstances" necessary to justify appellate vacatur under *Bancorp*. See *Major League Baseball Prop., Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149, 152 (2d Cir. 1998); *Motta v. Dist. Dir. of Immigration*, 61 F.3d 117, 118B19 (1st Cir. 1995); cf. *Nestle Co., Inc. v. Chester's Market, Inc.*, 756 F.2d 280, 284 (2d Cir. 1985) (pre-*Bancorp* holding that the district court abused its discretion by refusing to grant a joint Rule 60(b) motion to vacate). If, on the other hand, the district court is inclined to vacate its decision, the condition precedent to the settlement can be obtained with minimal effort and expense. Of course, appellants who are not concerned about the precedential effect of the district court's decision may simply settle their case and then move the court of appeals to dismiss the appeal as moot under *Bancorp*. In that situation, resort to Rule 60(b) is unnecessary.

Conclusion

Although the Rule 60(b) procedure discussed above is the majority rule, some courts may prescribe a different procedure under Rule 60(b). See Wright, Miller & Kane, *supra*, § 2873, at 430B35 & Supp. (collecting cases); 12 *Moore's Federal Practice, supra*, § 60.67[1]B[2] (collecting cases to show that virtually all of the circuits follow this procedure, except the Ninth Circuit). Also, the appellate procedures of state courts are beyond the scope of this article. Finally, appellate counsel should be aware that at least one court has imposed sanctions for filing a Rule 60(b) motion that essentially duplicated issues raised and briefed on appeal. See *Costello, Porter, Hill, Hesterkamp & Bushnell v. Providers Fidelity Life Ins. Co.*, 958 F.2d 836, 840 (8th Cir. 1992). That decision should be easily distinguishable in the context of a Rule 60(b) motion brought pursuant to a tentative appellate settlement after *Bancorp*.

In sum, Rule 60(b) provides an appellant the only effective way of preserving its right to appeal, while, at the same time, pursuing an amicable settlement of the dispute. If the parties settle before seeking vacatur of a federal decision, *Bancorp* will prevent them from wiping the adverse judgment from the books. Although the *Bancorp* rule both discourages settlement and creates a trap for the unwary, it is now the law of the land. Following the delicate procedural steps under Rule 60(b) appears to be the only way to finalize a settlement conditioned on vacatur. ■



Scott B. Smith

Scott B. Smith is a member of Bradley Arant Rose & White LLP in Birmingham. Before joining Bradley Arant, he served as a judicial clerk to the Honorable Gilbert S. Merritt on the United States Court of Appeals for the Sixth Circuit. This article originally appeared in the summer 2000 issue of *Centworthy*, the appellate practice newsletter of the Defense Research Institute.

Military Law Committee— Cleanup of Phenix City

On August 19, members of the Alabama State Bar Military Law Committee meeting in Tuscaloosa at the University of Alabama School of Law heard from two members of the ASB who told of their active involvement in the cleanup of Phenix City, Alabama in 1954. Former Governor and retired Judge of the Alabama Court of Criminal Appeals John Patterson and Enterprise attorney Joe Cassady, Sr. spoke as members of a panel discussing the role of the Alabama National Guard in the cleanup. Particularly, they addressed the role judge advocates played in the prosecution of gambling and related cases during this period with the panel moderated by Colonel Bill Baxley, the senior judge advocate in the Alabama National



Brigadier General Tom King recognizes Joe Cassady's contributions to the Phenix City cleanup.

Guard, who has served as a military history lecturer at previous Military Law Committee symposiums.

The symposium was attended by over 50 active, guard and reserve military attorneys and has been held each August for the last 11 years. Also in attendance were Brigadier General (Retired) Richard Allen, who presently serves as the chief deputy attorney general and as the civilian aide to the Secretary of the Army, and former Alabama Adjutant General Clyde Hennies. Since both Baxley and Patterson had served as attorney general, the discussion portion of the panel was very interesting.

Gambling and other associated crimes flourished in Phenix City before and following World War II but the corruption began its swift decline with the assassination of Attorney General-elect Albert Patterson, former Governor Patterson's father, shortly after his nomination as the Democratic nominee in June 1954. In response, Governor Gordon Persons called the Alabama National Guard into state active duty on July 22, 1954 and directed that the Guard assume "martial rule" over the Russell County and Phenix City governments. Governor Persons also appointed an acting attorney general and special prosecutors to

handle the gambling and related cases, and the supreme court appointed Judge Walter B. Jones to preside as acting circuit judge.

Discussion at the symposium centered on the key role that the adjutant general, Major General Walter J. Hanna, and the Guard played in the six months that they occupied Phenix City. Hanna and his staff used every asset available, including the Air National Guard, to locate witnesses necessary for the prosecution of alleged vice-related crimes and recover evidence of the gambling—dice tables, slot machines and other gambling equipment hidden throughout the Phenix City area. The Alabama National Guard and other specially appointed attorneys and judges finally brought law and order to an area of the state that General Patton had threatened to flatten with tanks for the crimes committed against his soldiers prior to World War II.

Former Governor Patterson noted that his role in the cleanup resulted in his career in public service and Joe Cassady stated that this was not the normal two-week summer camp but rather an intense six-month period away from his new law practice. Alabama State Bar President Sam Rumore, himself a retired colonel and judge advocate in the USAR, expressed the deep debt of gratitude that all Alabamians owe to former Governor Patterson, his late father, Joe Cassady, Sr. and the countless other attorneys, Guardsmen and officials who cleaned up this terrible situation.

Brigadier General Tom King, a Birmingham attorney, presented plaques to panel participants on behalf of the Adjutant General and the Alabama Military Department. Committee Chairman B. Boozer Downs was assisted by Jack Park, an assistant attorney general, and Lieutenant Colonel Bryan Morgan, staff judge advocate of the Alabama National Guard, in the planning of the symposium which annually addresses military law-related topics. ■

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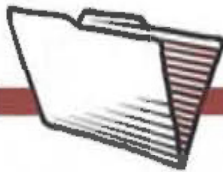
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Suspensions

- The Alabama Supreme Court, based upon the decision of the Disciplinary Board, suspended Wetumpka attorney **Vinson Wilson Jaye** from the practice of law in the State of Alabama for a period of six months, effective July 5, 2000. Jaye was retained to prepare a guardianship for an elderly lady who was living with his client. The client paid Jaye \$300 of his \$750 fee and he assured her he was working on her case. Thereafter, Jaye failed to perform the legal services for which he had been paid, failed to communicate

with his client, and abandoned the practice of law. [ASB No. 99-37(A)]

- The Alabama Supreme Court, based upon the decision of the Disciplinary Board, suspended Wetumpka attorney **Vinson Wilson Jaye** from the practice of law in the State of Alabama for a period of 91 days, effective July 5, 2000, as reciprocal discipline pursuant to Rule 25(a), *A.R.D.P.* This discipline was based upon a January 19, 2000 order of the United States Court of Appeals for the 11th Circuit indefinitely suspending Jaye from the practice of law for his dilatory conduct in filing appeals before the court. This suspension is to run concurrent with the six-month suspension in ASB No. 99-37(A). [Rule 25(a); Pet. No. 00-02]
- Former Dothan attorney **Edward Michael Young** was suspended from the practice of law for 91 days, effective May 19, 2000. On July 5, 2000, the Alabama Supreme Court adopt-

ed the order of the Disciplinary Board of the Alabama State Bar. This suspension was the result of a conditional guilty plea tendered by Young in resolution of two pending disciplinary cases. Two clients alleged willful neglect of their legal matters and a lack of communication by Young. Young also failed to respond to the allegations in the complaints in spite of requests from the bar that he do so within 30 days. At the time of his plea, Young was living in Columbus, Georgia. He had, in effect, abandoned his practice in Dothan, Alabama. [ASB nos. 98-256(A) & 98-257(A)]

- Birmingham attorney **Susan M. Donovan** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar dated August 10, 2000. The Disciplinary Commission found that Donovan's continued

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- **Clarence Christopher Clanton**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2000, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 99-243(A) and 00-77(A) before the Disciplinary Board of the Alabama State Bar.
- **Richard Jude Spurlin**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2000, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 00-154(A) and 00-155(A) before the Disciplinary Board of the Alabama State Bar.

practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a); ASB Pet. No. 00-06]

Public Reprimands

• Centreville attorney **Michael Lynn Murphy** received a public reprimand without general publication. Murphy was retained in 1993 to handle an estate and filed the will for probate. In 1995, Murphy sold the decedent's house and distributed the proceeds. Thereafter, when nothing else was done, a complaint against Murphy was filed in 1997. The Disciplinary Commission instructed the bar to contact Murphy about getting the estate closed. After many attempts, Murphy finally closed the estate in November 1999. The Disciplinary Commission found Murphy's actions constituted a violation of rules 1.3 (willful neglect) and 1.4(a) (failure to communicate). The Disciplinary

Commission mitigated Murphy's discipline due to the fact that he had been medically diagnosed with major depression disorder with alcohol dependency. No prior discipline was involved or considered. [ASB No. 98-025(A)]

• Birmingham attorney **David Elliott Hodges** received a public reprimand without general publication for not providing competent representation and neglecting a client matter in 1994. Hodges did not file a response to a motion for summary judgment, causing the case to be dismissed. He then advised the court that he was under suspension for failure to complete his CLE requirements. The court gave him additional time, and he again failed to file a response, causing the case to be dismissed with prejudice. Hodges's conduct constituted a violation of rules 1.1 (competence) and 1.3 (willful neglect). No prior discipline was involved or considered. [ASB No. 98-140(A)] ■

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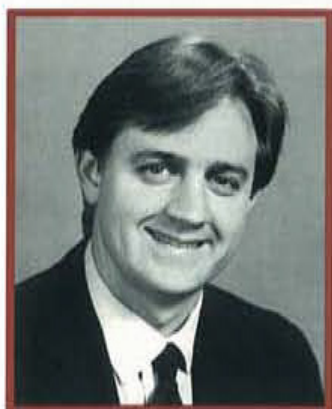
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YOUNG LAWYERS' SECTION

By Cole Portis, YLS president

Improving Our Profession



Cole Portis

I celebrated my 36th birthday this year. For each birthday I celebrate, I tend to reflect more on my life. This year I concluded that too much of my life has been wasted on foolish endeavors. However, I was encouraged when I remembered a lesson I was taught in Sunday School that I must "forget what is behind and press toward what is ahead"

In my life, there are many exciting times ahead. Most importantly, my wife and I are expecting a baby girl in January 2001. In addition, I look forward to serving the Young Lawyers' Section of our state bar as its president. I, along with the Executive Board, intend to use our time wisely and efficiently to make a difference in our profession and in our state.

Our primary concern this year is to promote professionalism and civility. For example, during the Young Lawyers' Sandestin Seminar, scheduled for May 18-19, 2001, many of our speakers will emphasize these topics. Although the seminar is in the planning stage, I hope that you will mark these dates, in ink, on your calendars. If you have never attended, just ask someone who has; I assure you that they will tell you that this is the best seminar for you to attend. I will share additional information about the seminar in the next issue of *The Alabama Lawyer*.

In addition, each year the YLS organizes a pre-law minority high school conference on the campus of Alabama State University. Last year, Jock Smith and J.L. Chestnut motivated the students to be outstanding citizens, to work hard in school, and to dream big dreams. This year's event, spearheaded

by LaBarron Boone, will build upon the successes of past conferences.

These are but two projects that we sponsor. Alabama's YLS is blessed to be involved in many activities that possibly influence others. We are committed to improving our profession as we press forward into the future.

This year, please let me know of any concerns or suggestions you may have. You may contact me by mail at P.O. Box 4160, Montgomery, Alabama 36103-4160, or by e-mail (jcp@bwamc.com). You may also want to contact other members of the Executive Committee listed below:

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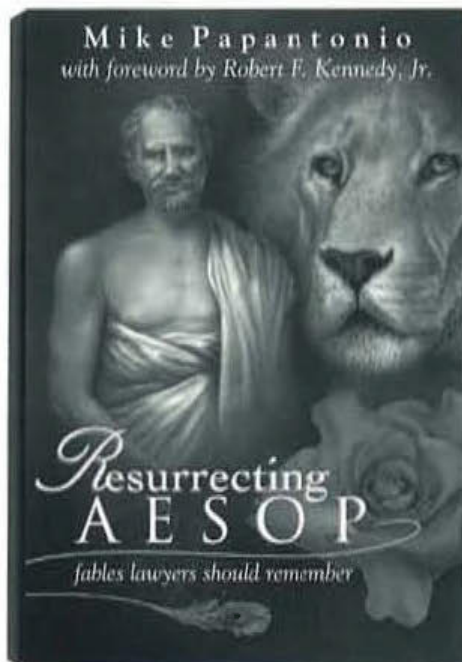
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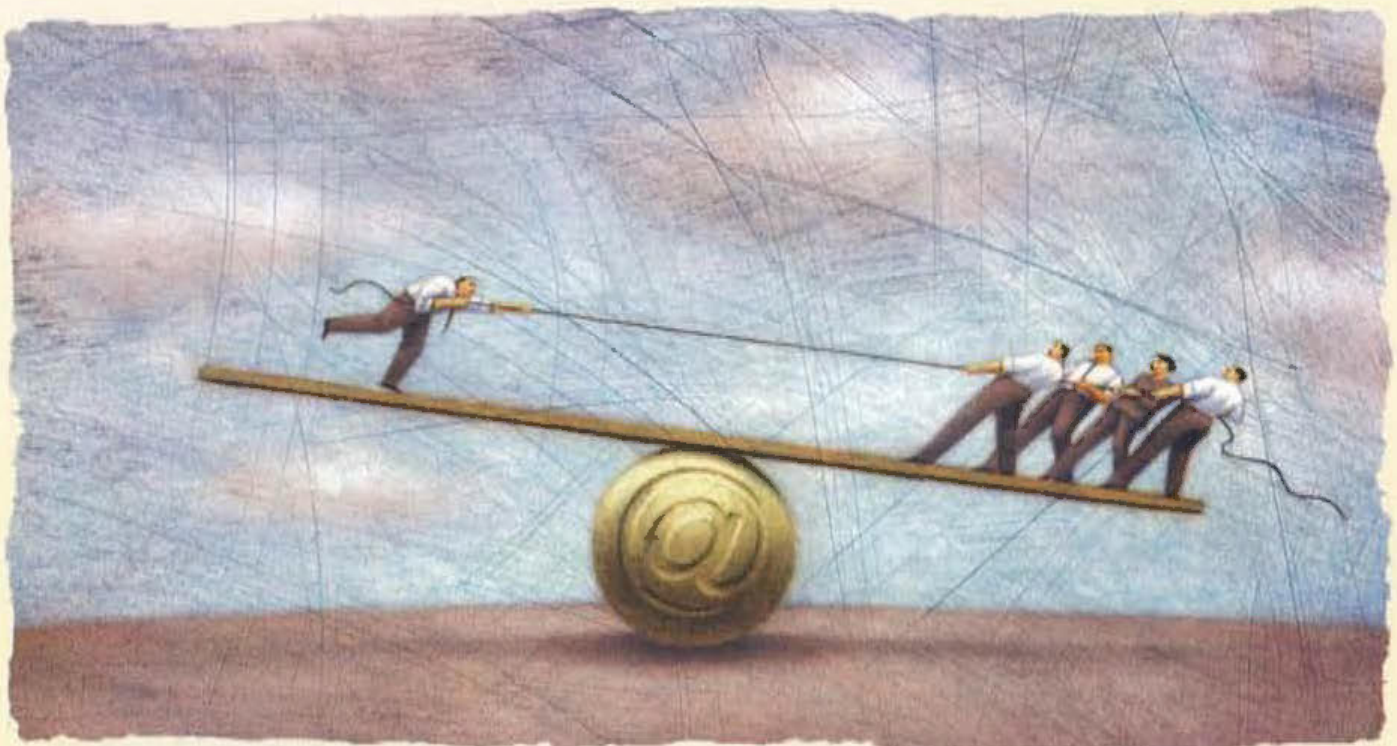


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