

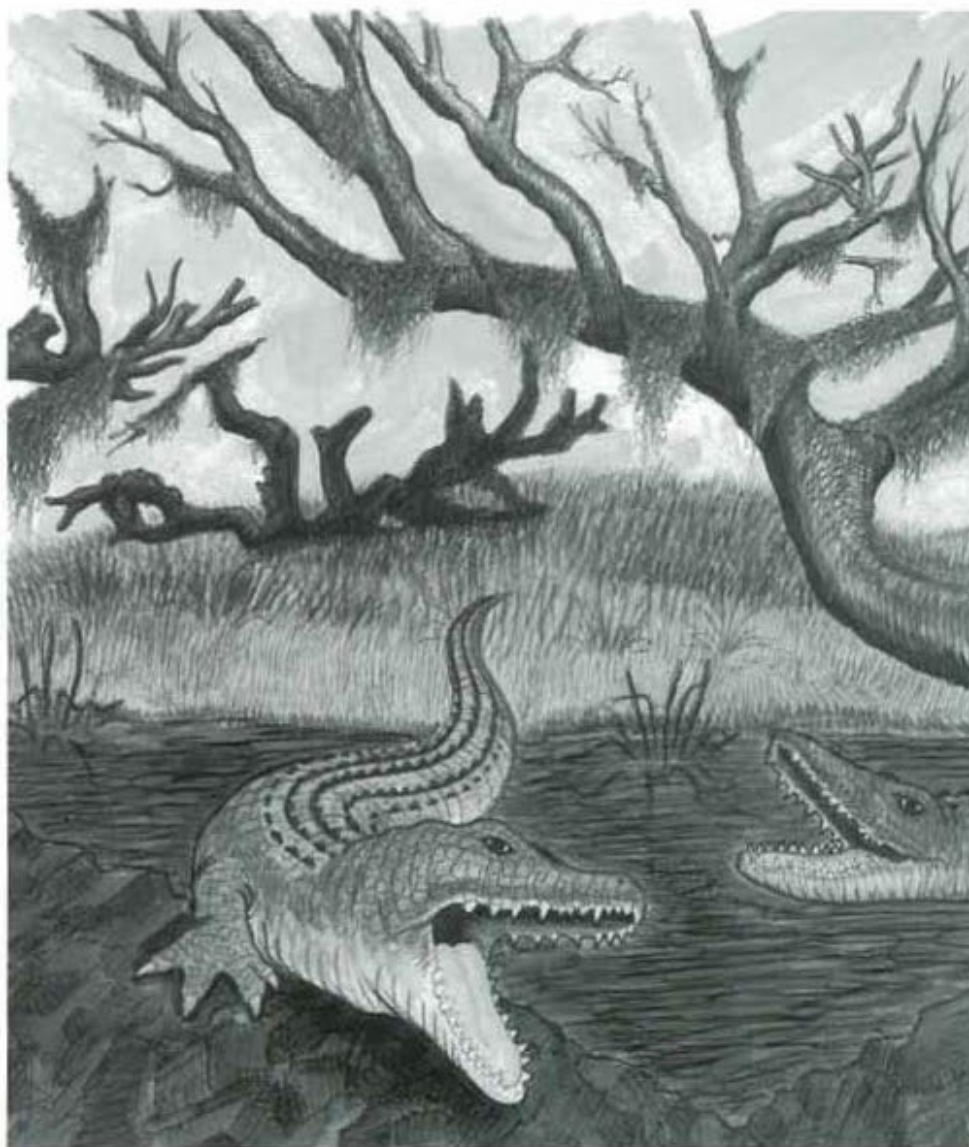
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William N. Clark

In the few short months that I have been president of the Alabama State Bar, we have seen the leaders of both our state executive and judicial branches of government in the national news. Each announced he felt an obligation to the people of Alabama: Governor Riley because he felt he had a duty to lessen the tax burden on the less fortunate among us, and to increase revenues to meet the essentially fundamental needs of Alabama; Chief Justice Roy Moore because he felt he had a duty to protect Alabama's right to acknowledge God. In both instances, the Alabama State Bar responded: to Governor Riley's tax proposal by publishing a brochure and maintaining a Web site designed to educate Alabamians on both sides of the issue and encouraging voters to vote for what was best for Alabama. To the Ten Commandments monument issue, the state bar issued a press release emphasizing the importance of the rule of law, and I met with the chief justice to discuss the application of the rule of law to that.

Regardless about how one feels about Governor Riley's plan, it seems clear that if Alabama is going to meet its fundamental responsibilities to its citizens, we must raise taxes, be vastly more efficient in the operation of state government, or dramatically reduce services. All of these potential actions require action by the legislature.

The ASB has taken no position on the underlying issue on the monument, i.e., whether the monument in and of itself and its placement are constitutional. However, the Alabama State Bar staunchly supports the "rule of law." In order to better understand this concept, it is helpful to review the history of that fundamental principle.

The rule of law is not just another buzzword. It is a key principle, which forms the foundation of our American system of government. The rule of law can be traced back to 1215 when King John was forced by the barons, with the support of the church and others, to sign the Magna Carta. It limited the power of the king, and caused him to govern according to established rules of law. At Runnymede in England where King John signed the Magna Carta there is the Magna Carta national memorial erected by the American Bar Association.

The creation of parliamentary government followed in England in the 14th Century with the creation of the House of Lords and the House of Commons. In the 17th Century the Stuart kings and their Parliaments quarreled over a variety of issues including religion. At the heart of this dispute was a key question: "Must the king govern through Parliamentary law?" In 1628 Parliament forced King Charles to sign the Petition of Right, which guaranteed Englishmen certain fundamental rights. In

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the Glorious Revolution of 1688, King James, II was overthrown. He had been accused of trying to make Roman Catholicism the state religion of England. A result of the revolution was the English Bill of Rights. This enactment did not provide for freedom of religion, but the Act of Toleration passed soon thereafter did. It gave freedom of worship to Protestants. "The English Bill of Rights restated the old idea that government must be according to the rule of law. Both government and the governed must obey the laws of the land."

The American colonists, in order to protect their fundamental rights, insisted on the creation of a government of laws. The United States Constitution was modeled after the Virginia Plan, which provided for both federal and state governments and created three branches—legislative, executive and judicial. The Supremacy Clause of the Constitution provides that the Constitution and all laws and treaties approved by Congress in exercising its enumerated powers are the supreme law of the land. That clause further provides that judges in state courts must follow the Constitution, or federal laws and treaties where there is a conflict with state law.

In 1803, in the case of *Marbury v. Madison*, the Supreme Court recognized the right of judicial review, i.e., the right to interpret the Constitution. Five years before Alexander Hamilton stated that "... A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning." *The Federalist #78*, 1788.

This historical review brings into sharp focus the two critical issues we have been facing in Alabama over the past few

months. Is there a relationship between these historical principles and the revenue problems we face in Alabama and the Ten Commandments monument? I believe there is. The Board of Bar Commissioners recently approved Fred Gray's theme, "Lawyers Render Service," as the motto of the Alabama State Bar. One of the primary roles of state government is to serve the public. Governor Riley said his tax plan was intended to improve the service of government to Alabamians; Chief Justice Moore said his placement of the monument was intended to serve our citizens by reminding them of one of the foundations of our law, both laudable goals. In Governor Riley's case the process available to him under our system is the executive/legislative process established by law. In Chief Justice Moore's case, the process available to him under our system is the judicial process and the legislature, as well as these systems, provide the means by which the rule of law may be followed.

Service, as well as leadership, by public officials to the people of Alabama comes in many forms. However, it seems that fundamental to the leadership and service obligations of our state's elected officials is the recognition that we must work within our system of government. It is important that both the government and the governed obey the laws of the land.

Good men and women, good lawyers and good judges, may differ on important issues, but it is hoped that we all share a dedication to the ancient and fundamental principle of the rule of law.

Note: Historical references from *We the People, the Citizen and the Constitution*, Center for Civic Education (1987). ■

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By Keith B. Norman



Keith B. Norman

It's a Family Affair

Tom Albritton of Andalusia, **Broox Garrett, Jr.** of Brewton, **Wes Pipes** of Mobile, **Henry Pitts** of Selma, and **Alyce Spruell** of Tuscaloosa are members of the Alabama State Bar Board of Bar Commissioners. They all have something else in common besides being commissioners and lawyers, however. What they share is that their fathers also served on the commission or were state bar presidents.

Alyce's father, **Rick Manley** of Demopolis, served as a commissioner for 24 years from the 17th circuit. **McLean Pitts** of Selma, father of Henry Pitts, represented the 4th circuit. Wes Pipes's father, **Sam Pipes** of Mobile, served as state bar president from 1968-1969. **Broox Garrett, Sr.** not only represented the 21st circuit for 24 years as commissioner, but as vice-president in 1981-1982, he was called to serve as state bar president for eight months following the untimely death of **Harold Hughston**. Tom Albritton is the third generation of Albrittons to serve on the commission. Not only did his father, now **United States District Court Chief Judge Harold Albritton**, serve for eight years as commissioner for the 22nd circuit and as state bar president in 1990-1991, his grandfather, **Robert B. Albritton** of Andalusia, served as president in 1971-1972. In addition, Tom's great-uncle, **Marvin J. Albritton**, represented the 22nd circuit for nine years, including the year his brother, Bob, was president.

The state bar has had at least three other father-son presidents. The first team was made up of the **O'Neals** of Lauderdale County. **Edward** was president in 1881-1882 and his son, **Emmett**, was president in 1909-1910. Interestingly, the O'Neals were both elected governor at the conclusion of their terms as state bar president. The next father-son combination was **Thomas Goode Jones** in 1900-1901 and his son, **Walter B. Jones**, in 1954-1955. Both hailed from Montgomery. Thomas Goode Jones, who served as governor in 1890-1894, was the drafter of the bar's first code of ethics in 1887, which served as the example for the model code of ethics approved by the American Bar Association that was later adopted by most of the states. His son was a county judge in Montgomery, founder of Jones Law School and the first editor of *The Alabama Lawyer*. The final father-son state bar presidents were Mobilians **Francis J. Inge** in 1934-1935 and **Francis H. Inge** in 1955-1956.

There have been a number of Alabama lawyers who served as state bar president and had sons who served as commissioners. These include: **John D. McQueen** of Tuscaloosa, president in 1932-1933, and his son, **John D. McQueen, Jr.**, who served as commissioner for the 6th circuit from 1953-1972; **Jacob A. Walker** of Opelika, president in 1942-1943, and his son, **Jacob A. Walker, Jr.**, who served as commissioner for the

5th circuit (now 37th) from 1954-1971; **Francis Hare** of Birmingham, president in 1949-1950, and his son, **Francis R. "Brother" Hare, Jr.**, who represented the 10th circuit from 1985-1991; and **Tommy Greaves** of Mobile, president in 1975-1976, and his son, **Mac B. Greaves**, who represented the 10th circuit from 1992-2001.

Fathers and sons who have served as commissioners include: **Caine O'Rear, Jr.**, of Jasper, from 1970-1974, and **Caine O'Rear, III**, of Mobile, from 1992-2001; **Harry W. Gamble**, in the early 1940s, and **Harry W. Gamble, Jr.**, from 1976-1985, both of Selma; **Roy D. McCord**, from 1955-1976, and **Roy O. McCord**, from 1994-1997, both of Gadsden; and, from Andalusia, **Abner R. Powell**, who served from 1975-1978, and **Abner R. Powell, III**, who served from 1989-1996. The first father and daughter to serve as commissioners were **A.B. Robertson**, who served from 1964-1981, and **Lynn Robertson Jackson**, who served from 1986-1998. Both represented the 3rd circuit. Although not a commissioner, **Judge John B. Scott** served as state bar executive director and secretary of the Board of Bar Commissioners from 1950-1969. **John B. Scott, Jr.**, his son, represented the 15th circuit as commissioner from 1983-1986.

Besides Bob and Marvin Albritton of Andalusia, there have been two other sets of brothers to serve the state bar. **Harold Speake** of Moulton served as commissioner from 1972-1975 and was followed by his brother, **James**, who also served the

36th circuit from 1975-1978. Likewise, **S. Dagnal Rowe** of Huntsville served as commissioner from 1987-1994 and his brother, **Benjamin T. Rowe** of Mobile, served from 1989-1998, thus becoming the first set of family members to serve simultaneously as commissioners. With Dag Rowe later serving as state bar president from 1997-1998, the Rowes became only the second set of brothers, other than Bob and Marvin Albritton, to serve together as state bar president and commissioner.

I am sure there are family connections among the lawyers who served the bar during its formative years in the late 1800s and the early 20th century. There may be others from more recent times whom I have overlooked. If you know of any special family relations among those who have served as bar commissioners or officers, I would appreciate your letting me know.

Educational Debt Continues to Climb

Fifty-five percent of the examinees sitting for the July 2003 bar examination had educational loans. The average educational debt was \$61,904, with the debt amounts ranging from a low of \$4,000 to a high of \$171,000. Assuming a repayment period of ten years at a favorable interest rate of 4.0 percent, the amount of the average monthly payment would be \$626. ■



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- **Thomas H. Henderson, Jr.**, CEO of the Association of Trial Lawyers of America for the past 15 years, recently was awarded the 151st Key Award. The Key Award is the American Society of Association Executives' highest award for association chief staff executives. Henderson is a graduate of the University of Alabama School of Law and was admitted to the ASB in 1966.

- **Joel L. Williams** of Troy was recently elected to serve a three-year term as a member of the House of Delegates, Region I, Kiwanis International. He is a 1981 ASB admittee.



Williams

- Tuskegee attorney and ASB Past President **Fred D. Gray** recently was awarded the Soaring Eagles Award from the Minority Caucus of the Association of Trial Lawyers of America. The award symbolizes the struggle of lawyers of color as they pursue personal and professional excellence and success.



Gray

- **Daniel F. Beasley** of Huntsville was recently elected a member of the board of directors of the Foundation of the International Association of Defense Counsel. The IADC Foundation supports projects and activities that seek to improve the civil justice system, the practice of law and the professional interests of members' clients.



Beasley

- **C. Glenn Powell**, general counsel for The University of Alabama System, recently retired, after more than 30 years of service to Alabama's largest higher education enterprise.

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Powell

Birmingham (UAB) and The University of Alabama in Huntsville (UAH), as well as every UA president since 1966 and every UA system chancellor since the system was established.

Powell earned his B.A. degree from the University in 1964, and received his L.L.B. from the UA School of Law in 1966. He was inducted into the Farrah Order of Jurisprudence, was president and treasurer of Phil Delta Phi legal fraternity, case note editor of *Alabama Law Review* and co-chair of Law Day.

- The Young Lawyers' Section of the Birmingham Bar Association recently honored **Jefferson County Circuit Judge Tom King, Jr.** for his commitment to the job and to helping the section.

Judge King was presented with the Drayton James Award, which is given annually to a state or federal judge who best exemplifies James's legacy of friendship to young lawyers practicing in Jefferson County. King is the fourth award recipient.

- Montgomery attorney **Gibson Vance** was recently elected treasurer of the Alabama Trial Lawyers Association. He is a shareholder in the firm of Beasley, Allen, Crow, Methvin, Portis & Miles.

- **Judge Robert Kendall**, presiding judge of the 13th Judicial Circuit, was elected president of the Alabama Circuit Judges Association. Judge Kendall was been a circuit judge in Mobile County for 19 years. He sits on the state Court of the Judiciary and became the presiding judge of the 13th Circuit in 1999. Judge Kendall received his law degree from the University of Alabama, where he was a member of the *Alabama Law Review*. **Circuit Judge John Bush**, presiding judge of the 19th Circuit, was elected secretary-treasurer of the Association. He received his B.S. in public administration from Auburn University in 1978, where he was president of the Student Government Association. He received his J.D. from the Cumberland School of Law, Samford University, in 1981, where he also served as president of the Student Bar Association.

- **Richard S. Jaffe**, senior partner with the firm of Jaffe, Strickland & Drennan, has been seated on the board of the National Association of Criminal Defense Lawyers.

- The National Register's Who's Who in Executives and Professionals recently added **Michael W. Jackson**, a Selma attorney. Jackson is a 1991 admittee to the ASB and will appear in the 2004 edition of the publication.



Jackson

- The American Bar Association, Judicial Division, recently announced the election of **Judge James Scott Sledge** as chair of the division. The Judicial Division represents all judges, including state and federal, municipal, administrative, trial and appellate. Judge Sledge serves as United States Bankruptcy Judge for the Northern District of Alabama. He is past chair of the National Conference of Federal Trial Judges and currently serves as the chair of the Alabama State Council on the Arts.

- The American Bar Association elected **Charles A. Powell, III**, partner with the Birmingham firm of Johnston Barton Proctor & Powell LLP, to the Board of Governors. As a member of the governing body for the ABA, Powell will represent the Section of Labor and Employment Law. Powell has also served the ABA as former section chair, member of the House of Delegates and chair of the Committee on the Development of the Law under the National Labor Relations Act. He is a founding member of



Powell

the American Employment Law Council and charter fellow and former president of the College of Labor and Employment Lawyers.

- **Ronald A. Levitt**, partner with Walston Wells Anderson & Bains, LLP, has been named president of the Birmingham Tax Forum. The Forum is an organization of local tax attorneys and accountants who are committed to providing continuing education and information about significant tax issues. Levitt serves as vice-chair of the S Corp Committee of the ABA Section of Taxation. He received his B.S., MBA and J.D. from The University of Alabama, and his LL.M. in Taxation from the University of Florida.

- **Former United States Senator Howell Heflin** recently received the John Marshall Award, a national honor created by the ABA Justice Center to recognize individuals responsible for extraordinary improvement in the administration of justice. Heflin served in the Senate from 1979 until his retirement in 1997, and prior to that, was chief justice of the Alabama Supreme Court. Heflin is a graduate of Birmingham Southern College and the University of Alabama School of Law. He served as ASB president in 1971 and led a state initiative to adopt a new Judicial Article to the Alabama Constitution, which served as a model for a unified state courts system and judicial administration. ■



Heflin

2003-04 License/Special Membership Dues Invoices

Invoices for the 2003-04 occupational licenses and special membership dues were mailed **September 22, 2003**. Your 2002-03 occupational license or special membership expired **September 30, 2003**. License fees and special membership dues for 2003-2004 were due in the Alabama State Bar office by **October 31, 2003** and are now delinquent. **Occupational licenses purchased after October 31, 2003 had a \$37.50 penalty added.** Payments should be sent to the Alabama State Bar or may be made online at www.alabar.org. If you have a question, contact the ASB Membership Department by e-mail, ms@alabar.org, or by telephone, (334) 269-1515.



The Alabama Lawyer no longer publishes 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

John Amari announces the relocation of his office to 1873 Gadsden Highway, Birmingham. Phone (205) 655-8484.

J. Dennis Bailey announces the relocation of his office to 1873 Gadsden Highway, Birmingham. Phone (205) 655-0404.

Champ Lyons, III announces the opening of his office at The Highlands Building, 2201 Arlington Avenue, South, Birmingham. Phone (205) 933-5112.

Melinda Lee Maddox announces the relocation of her office to 712 Oak Circle Drive West, Mobile. Phone (251) 660-0261.

Julie Baker McCormick announces the relocation of her office to 105-B Grand Avenue South, Fort Payne. Phone (256) 845-8898.

T. Eric Ponder announces the relocation of his office to 2706 Winding Lane, Atlanta. Phone (678) 530-9900.

Sheardren N. Pride announces the opening of her office at 906 S. Perry Street, Suite 102, Montgomery. Phone (334) 269-2799.

Collier H. Swecker announces the opening of his office at 337 E. Magnolia Avenue, Suite 6, Auburn. Phone (334) 821-4464.

Steven Lamar Terry announces the relocation of his office to 273 Azalea Road, Two Office Park, Suite 300, Mobile. Phone (251) 461-0853.

Heath E. Trousdale announces the opening of his

office at 119 S. Court Street, Florence. Phone (256) 767-1058.

Among Firms

Ables, Baxter, Parker & Hall, PC announces that **Ronald W. Smith** has become associated with the firm.

Adtran, Inc. announces that **Kelly McDonald Jordan** has joined the firm.

Alford, Clausen & McDonald, LLC announces that **Charles J. Potts** has joined the firm as a partner.

Bowron, Latta & Wasden, PC announces that **Kristin T. Ashworth** has joined the firm as an associate.

Bradley Arant Rose & White, LLP announces that **Jeffrey D. Dyess** and **R. Thomas Warburton** have joined the firm.

Burr & Forman, LLP announces that **Duncan B. Blair** and **Nancy D. Bolyard** have joined the firm as partners, and **J. Murphy McMillan, III** has joined as an associate.

Henry C. Chappell announces his withdrawal as a shareholder of **Rushton, Stakely, Johnston & Garrett, PA**, Montgomery, effective August 31, 2003, in order to assume duties as chief counsel, **Alabama Department of Revenue**, Montgomery.

Coker B. Cleveland and **Jon K. Vickers** announce the formation of **Cleveland & Vickers, LLC**. Offices are located at 2101 6th Avenue, North, Suite 115, Birmingham. Phone (205) 324-1217.

Ross Diamond, III, James E. Hasser, Jr., James H. Frost and Stuart Y. Luckie announce a name change of their law firm to **Diamond, Hasser, Frost & Luckie**.

Timothy L. Dillard and Allwin E. Horn, IV announce the formation of **Dillard & Horn, LLP** with offices located at 2015 Second Avenue, North, Fourth Floor, The Berry Building, Birmingham. Phone (205) 251-2823.

McGlinchey Stafford announces that **David A. Norris** has joined their firm.

Najjar Denaburg, PC announces that **William R. Myers** has joined the firm as a shareholder.

Lawrence G. Newman, Victor L. Miller, Jr. and Theresa A. Terrebonne, all formerly of Newman, Miller, Leo & O'Neal, announce the formation of **Newman, Miller & Terrebonne**.

Ogletree, Deakins, Nash, Smoak & Stewart, PC announces that **Joseph V. Musso, John W. Roberts** and **Alysonne O. Hatfield** have become associates.

Phelps, Jenkins, Gibson & Fowler, LLP announces that **Robert S. Plott, Terri O. Tompkins** and **Kevin A. McGovern** have joined the firm as associates.

Sirote & Permutt, PC announces that **David R. Mellon** has become associated with the firm in their Birmingham office.

Turner & Webb, PC announces that **Chris E. Roberts** has joined the firm as a shareholder. The firm name has changed to **Turner, Webb & Roberts, PC**.

The United States Attorney's Office for the Middle District of Alabama announces that **Julia Jordan Weller** was promoted to first Assistant United States Attorney, as of January 2003. **Patricia A. Snyder** returned to the office in April 2003, as an Assistant United States Attorney.

Wallace, Jordan, Ratliff & Brandt, LLC announces that **Glenn E. Estess, Jr.** has joined the firm as a member, and that **Julie Bonner DeArman** and **John D. Tolbert** have joined as associates.

Wainwright, Pope & McMeekin, PC announces that **Bradley J. Cain** has joined the firm as an associate.

Watson, deGraffenried, Hardin & Tyra, LLP announces that **W. Ryan deGraffenried, III** has joined the firm as an associate. He represents the fifth generation in his family to practice as an attorney.

G. Thomas Yearout, Paul J. Spina, III and Paul K. Lavelle announce that the firm formerly known as **Duell, Yearout & Spina, PC** is now **Yearout, Spina & Lavelle, PC**, and **Joy J. Minner** and **Christy L. Phillips** have become associated with the firm. **Ryan S. Marsteller** remains associated with the firm. ■

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G15	\$135	\$135	\$168	\$290	\$443	\$650	\$1,035
G20	\$168	\$170	\$225	\$373	\$575	\$863	\$1,418

West Coast Life Insurance Company \$500,000 Level Term Coverage Male, Super Preferred Annual Premium

AGE:	30	35	40	45	50	55	60
G10	\$185	\$185	\$230	\$375	\$535	\$930	\$1,495
G15	\$220	\$220	\$285	\$530	\$835	\$1,250	\$2,020
G20	\$285	\$290	\$400	\$695	\$1,100	\$1,675	\$2,785

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CLE Opportunities

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



Ludger D. Martin

The Etowah County Bar lost one of its most eloquent and convivial practitioners of the juridical arts on May 23, 2003, with the passing of Ludger D. Martin of Gadsden at the age of 82, after having practiced law here for 50 years. Ludger graduated from Hackneyville High School (in the days when the players had a jump ball after every successful goal), Piedmont College (where he met his lovely wife, Gayle) and the University of Alabama School of Law (in 1948). He served in World War II and spent 18 months at 15th Air Force Headquarters in Italy as a meteorologist. He was a member and Sunday School teacher at First United Methodist Church and had previously taught Sunday School at Christ Central United Methodist Church for 36 years. He was full of country wisdom that he used to good advantage in making many a winning jury argument. He was also an admirer of good poetry, which he had a knack for remembering (and memorizing in advance) and using at opportune moments during his closings, as well as being a good writer himself of topical verse from his college days onward. One of the poems he wrote in college was read at his funeral service. He practiced both civil and criminal law, was past president of the Etowah County Bar Association and a bar commissioner for 12 years. He spent 15 years as a part-time deputy district attorney, some of

that while in partnership with his son, Charles D. Martin, who also was a part-time prosecutor. Ludger took detailed notes of every defense attorney's argument and carefully rebutted each point, after having gotten the jury's attention by, as they used to say, crawling into the jury box and chatting with them. He, along with the district attorney for most of his prosecutorial career, William W. Rayburn, prosecuted all the big cases in Etowah County. He was a toastmaster without peer and had a fund of jokes and stories for all occasions. One CLE speaker asked for a joke to use before giving a dry but fact-filled talk, and got one that still makes the rounds today. Ludger had a twinkle in his eye and was always good company. His enjoyment was especially enhanced when around his family.

He is survived by his wife, Gayle; son, Charles D. Martin, and his wife, Nancy; granddaughters Jennifer (John) Troncale, Kelly and Leslie Martin; sisters Verna (David) Reaves and Jeannette (Bill) Ward; brother Sam (Ellen) Martin, and a number of nieces and nephews. "Now cracks a noble heart. Good-night, sweet prince, and flights of angels sing thee to thy rest!" William Shakespeare, *Hamlet*

—Charles Centerfit Hart,
Etowah County Bar Association

Thomas Drake Samford, III

I first read the following poem in an article by James Harvey Tipler of Andalusia, on the occasion of the death of his father, Frank J. Tipler, Jr., as printed in the March 1999 edition of *The Alabama Lawyer*:

"Stop all the clocks, cut off the telephone,
Prevent the dog from barking with a juicy bone,
Silence the pianos and with muffled drum
Bring out the coffin, let the mourners come.
"Let aeroplanes circle moaning overhead
Scribbling on the sky the message He Is Dead.
Put crepe bows round the white necks of public doves,
Let the traffic policeman wear black cotton gloves.
"He was my North, my South, my East and West.
My working week and my Sundays rest,
My noon, my midnight, my talk, my song;
I thought that he would last forever; I was wrong.
"The stars are not wanted now: put out every one;
Pack up the moon and dismantle the sun;
Pour away the ocean and sweep up the wood;
For nothing now can ever come to any good."
—W. H. Auden

After eulogizing the very productive and memorable life of his father, the author concluded as follows:

"My brother said, 'I am here to tell you that God exists, that He loves each and every one of us, and that at the end of time we will all be together again.'

"My father believed that, too, and so although the depth of loss expressed in the poem by W. H. Auden is very real, I would like to think that my father is looking down on us today, listening, and that he would want each of us not to be sad about his passing. I think he would have liked these words written by another poet:

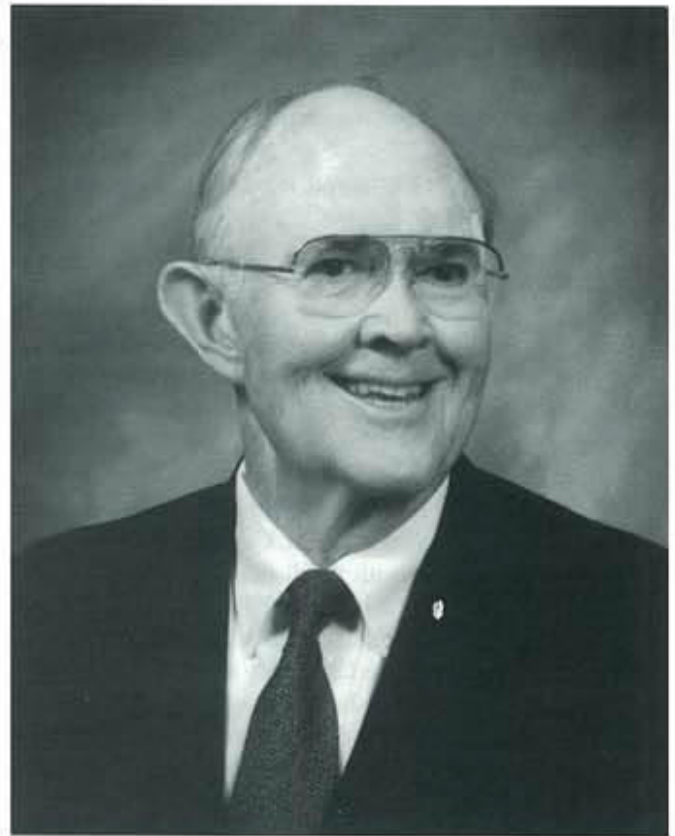
"Do not stand at my grave and weep. I am not there; I do not sleep. I am a thousand winds that blow. I am the diamond glints on snow. I am the sunlight on ripened grain. I am the gentle autumn rain. When you awake in the morning's hush I am the swift upflinging rush of quiet birds in circling flight. I am the soft star-shine at night. Do not stand at my grave and cry. I am not there; I did not die."

—Anonymous

I identified with the feelings expressed above then, and now repeat them on a more personal level. I would add two additional items: one, a poem, delivered by Daddy, as the keynote speaker, on the occasion of my high school graduation, which has always remained in my mind, and which exemplifies our renewed emphasis on "service." The other is a song, written by Kim Noblitt, which has given me great comfort, since my sister, Lynn, made me aware of it:

The Bridge Builder

An old man, going a lone highway,
Came at the evening, cold and gray,
To chasm, vast and deep and wide,
Through which was flowing a sullen tide.
The old man crossed in the twilight dim;



The sullen stream had no fears for him;
But he turned when safe on the other side
And built a bridge to span the tide.
"Old man," said a fellow pilgrim near,
"You are wasting strength with building here;
Your journey will end with the ending day;
You never again must pass this way;
You have crossed the chasm, deep and wide —
Why build you the bridge at the eventide?"
The builder lifted his old gray head:
"Good friend, in the path I have come," he said,
"There followeth after me today
A youth whose feet must pass this way.
This chasm that has been naught to me
To that fair-haired youth may a pitfall be,
He, too, must cross in the twilight dim;
Good friend, I am building the bridge for him."
—Will Allen Dromgoole

"If You Could See Me Now"
(Kim Noblitt)

Our prayers have all been answered. I finally arrived.
The healing that had been delayed has now been realized.
No one's in a hurry. There's no schedule to keep.
We're all enjoying Jesus, just sitting at His feet.
Chorus:

If you could see me now, I'm walking streets of gold.
If you could see me now, I'm standing strong and whole.
If you could see me now, you'd know I've seen His face.
If you could see me now, you'd know the pain is erased.
You wouldn't want me to ever leave this place,
If you could only see me now.

My light and temporary trials have worked out for my good,
To know it brought Him glory when I misunderstood.
Though we've had our sorrows, they can never compare.
What Jesus has in store for us, no language can share.
(Chorus twice)

You wouldn't want me to ever leave this perfect place
If you could only see me now
If you could see me now
If you could only see me now

Thomas Samford exemplified all of the qualities required of a successful lawyer. He led by example, serving his God, his church, his family and his community. Born in March 1934, he grew up in Opelika, becoming an Eagle Scout, and later graduating from Princeton University. After serving honorably in the United States Marine Corps and Marine Corps Reserve, he graduated first in his class from the University of Alabama School of Law in 1961, with the distinction of having only one "B," given by Professor "Black Jack" Payne. Many of you who studied under Mr. Payne realize what a feat that was! When I began my law studies at the University of Alabama, I went by Mr. Payne's office and introduced myself. He asked me, with a grin, if I knew that he was the only professor to give my dad a "B" (it seemed to be a matter of personal pride)! Many notables among our ranks have come from the Class of '61! Also, when I talked with Mrs. Ginny Bryant, who succeeded "Miss Anna" as registrar, she looked up the records of my granddaddy and commented, "Boy, have you got some big shoes to fill!" It was great to see Clarence Small and "General" Bill Jackson, who attended law school with Daddy, as well as a number of other attorneys for whom Daddy held a special place in their hearts, at the services!

Thomas Samford returned to Opelika, practicing law with the firm of Samford & Samford, in existence since the 1800s. He served with distinction as Opelika Municipal Judge for 27 years, from 1961 to 1988, when he joined the Auburn University on-campus staff. He served as an attorney for Auburn University for 42 years, first as an associate under William J. Samford, beginning in 1961, then as general counsel from 1965 to 1995, and finally as general counsel emeritus until shortly before his death.

In addition to pursuing his legal career, Thomas Samford did not ignore his community. He was president of the local Kiwanis Club and Chamber of Commerce. He was also active in and/or received recognition from the Boy Scouts, United Way, Community Chest, Jaycee's, Alpha Tau Omega Fraternity, and Junior Achievement. He received the Lee County Bar Association Spud Wright Jurisprudential Award, "in recognition of a career of extraordinary contributions and service to the legal profession and to the community."

God was the focal point of Thomas Samford's life. He served in numerous leadership positions in the First Presbyterian Church, as well as Trinity United Methodist Church, both of Opelika. He loved to teach his Sunday School classes and to sing in a number of choirs. In addition to serving his community, his profession and his church, his responsibilities as a husband and father were not neglected. He married Jackie, his loving wife of 48 years, in 1955, and successfully raised four devoted children, Thomas Drake Samford, IV ('86 of Montgomery), Lynn Samford Fargason of Birmingham, Robert Maxwell Samford and Richard Drake Samford, both of Opelika.

God Bless You, Daddy, and God Bless those who keep the memory of loved ones in their hearts, those they loved, and continue to love, who "built the bridges" for the rest of us! In loving memory ... Tom

—Thomas D. Samford, IV,
Montgomery

Adair, Charles Robert, Jr.

Dadeville
Admitted: 1948
Died: July 14, 2003

Blackburn, Stephen T.

Indian Springs
Admitted: 1990
Died: August 8, 2003

Bookout, John Garber

Montgomery
Admitted: 1959
Died: July 18, 2003

Collins, Fred Gano

Mobile
Admitted: 1950
Died: July 20, 2003



Daniels, Gladys Marie

Mobile
Admitted: 1985
Died: July 25, 2003

O'Rear, Caine, Jr.

Jasper
Admitted: 1949
Died: August 25, 2003

Trammell, Warren Seymore

Union Springs
Admitted: 1950
Died: July 31, 2003

Weissinger, Alan B.

Mobile
Admitted: 1953
Died: July 7, 2003



"Athletes, Academics and the Law: Play It Smart!"

"Athletes, Academics and the Law: Play It Smart!" is a project sponsored by the Alabama State Bar. The project will identify varsity college athletes, in the sports of football and basketball from major Alabama colleges, who are now successful lawyers and involve them in speaking to students about a career in law, focusing on the 9th grade and above.

The goal will be two-fold:

- 1) to highlight successful athlete/lawyers at halftime presentations during fall and winter sports schedules; and
- 2) to have participating lawyer/athletes make appearances at area schools to talk to high school students about the importance of focusing on academics with an eye toward a future in law or similar professions. Athletics is a great training ground for personal development and can be a stepping stone to many future opportunities and fields of endeavor.

The project began in October 2003 and runs through April 2004.

We are currently compiling a list of lawyer/athletes. If you lettered in collegiate sports or know of colleagues who did, and are interested in participating in this program, please contact Susan Andres, director of communications, at 800-354-6154, ext. 132, or send an e-mail to sandres@alabar.org.



ALABAMA STATE BAR



Robert L. McCurley, Jr.

Election Law Changes

This year more significant changes in the election law were made than any year since the passage of the federal Voting Rights Act. The legislature passed the following laws that will be effective upon the Justice Department's approval and in time for the 2004 elections:

Act 2003-381, Voter Identification

This bill requires all voters to carry a form of identification with them to the polls for each election. There are at least 17 different forms of identification and if the voter has none of these a person may still vote

when two of the voting officials sign the voter's list stating they positively know the voter.

Act 2003-339, Automatic Recount

In an election for public office or for a ballot measure, if a candidate or the ballot loses by 0.5 percent or less of the votes cast, a recount must be held within 72 hours. In an election for public office, the losing candidate may submit a written waiver of recount within 24 hours of the certification of the election results and the recount will not be held. If the election is for a federal, state, circuit, or district office the waiver is submitted to the

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Secretary of the State. If it is a county election, the waiver is sent to the appropriate probate judge. The Secretary of the State or the probate judge must immediately order the recount to be cancelled.

Precinct election results must be posted at a place in the county courthouse designated by the probate judge. The results must be posted no later than two hours after the polls close. However, counties that have centralized balloting tabulation may not be required to comply with this posting requirement until January 1, 2006.

Act 2003-311, Presidential Elections Certification

The date for filing the certification of nominating petitions for presidential electors has been changed to September 6th preceding the date of the presidential election.

Act 2003-400, Municipal Elections

The municipal election laws are found in Title 11, Chapter 46 whereas state, county and federal elections are specified in Title 17 of the *Code of Alabama*. These municipal procedures have been extensively amended. Municipal elections generally are held at a different time than other elections and are the responsibility of the municipality.

Act 2003-337, Polling Hours

All polling places must be open at least from 7 a.m. to 7 p.m. and remain open for 12 consecutive hours. Chambers County and Lee County may decide to open and close to either Eastern or Central Time Zones.

House Bill 104, Restoration of Voting Rights for Convicted Felons

(Vetoed by the Governor)

Act 2003-313, Help America Vote Act

The Federal Help America Vote Act 2002, public law 107-252, passed by Congress, requires each state to make conforming changes to the state law.

Alabama adopted its compliance law this year and affects the following:

1. Provides the Secretary of State is the chief election officer and grants rule making authority to the Secretary of State. Further defines the probate judge as the chief election official for the county.
2. Requires a central voter registration list that is within the office of the Secretary of State.
3. Provides for provisional voting. This replaces challenge voting and provides guidelines for electors to vote when their name does not appear on the voting list.
4. Board of Registrars. The appointment of the Board of Registrars remains with the Governor, Secretary of Agriculture, and State Auditor, however, these persons must possess minimum computer and map reading skills and are

subject to guidelines set up by the Secretary of State in determining further qualifications.

5. Voter Identification and Re-identification. This law requires a voter that has registered by mail to show one of several forms of identification the first time they vote. The voters who do not vote or voters who have failed to vote for four years and whose names have been stricken from the voter registration list and placed on the inactive list may be permitted to vote provided they complete a voter registration form. This form must be accompanied by the voter's name, driver's license number or other identifying number, date of birth, address, race, sex, and place of voting.
6. Precincts. Each polling place must be equipped with a voting machine that will provide for a readout of the vote in the polling place and at least one machine that will accommodate handicap voters.
7. Voter Information. The probate judge will provide instruction cards for voters.
8. Absentee Voting. Procedure required to allow voters not in North America and military personnel overseas to request an absentee ballot through the Secretary of State's Office is provided.
9. Certification of Returns. Certification of returns provides that election results must be certified on the second Friday after the election. Currently, certification is the first Friday after election as the date for certifying of the results.
10. Prohibited Practices. Provides additional penalties for violating the Act.
11. State Plan. The Secretary of State must devise a state election plan composed of individuals from various constituencies and with the assistance of election officials.
12. Administrative Review of Complaints. A new procedure must be established to provide for an administrative review of complaints of people who are denied the right to vote.

Election Law Committee

With the major changes due in many sections throughout Title 17 of the *Code of Alabama*, the Law Institute has undertaken a review of the state's elections laws, Title 17, to clarify the inconsistencies where they may exist and to better organize the Title for more effective use.

Alabama evolved, as most states, from voting on paper ballots to lever machines and now to electronic voting. However, the laws have never been synthesized to create one election procedure. This committee is attempting to do that and to look at inconsistencies dealing with recounts in contested elections. A proposed reorganization of the election code would have chapters as follows:

- I. Secretary of State
- II. Help America Vote Act
- III. Voter Registration
- IV. Candidate Requirements

- V. Election Preparation
- VI. Management of Elections
- VII. Primary Elections
- VIII. General Elections
- IX. Special Elections
- X. Post Election Procedures

The committee has had its initial meeting and expects this study to last a year. Any changes or reorganization must be pre-cleared by the Justice Department. This will require an explanation of each change. We hope to have the revision completed by 2005 to be approved by the legislature. The earliest that changes could be effective will be for the 2006 election.

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- Robert Bates, Cullman
- Bill Clark, Birmingham
- Honorable Don Davis, Mobile
- Peck Fox, Montgomery
- Representative Ken Guin, Carbon Hill
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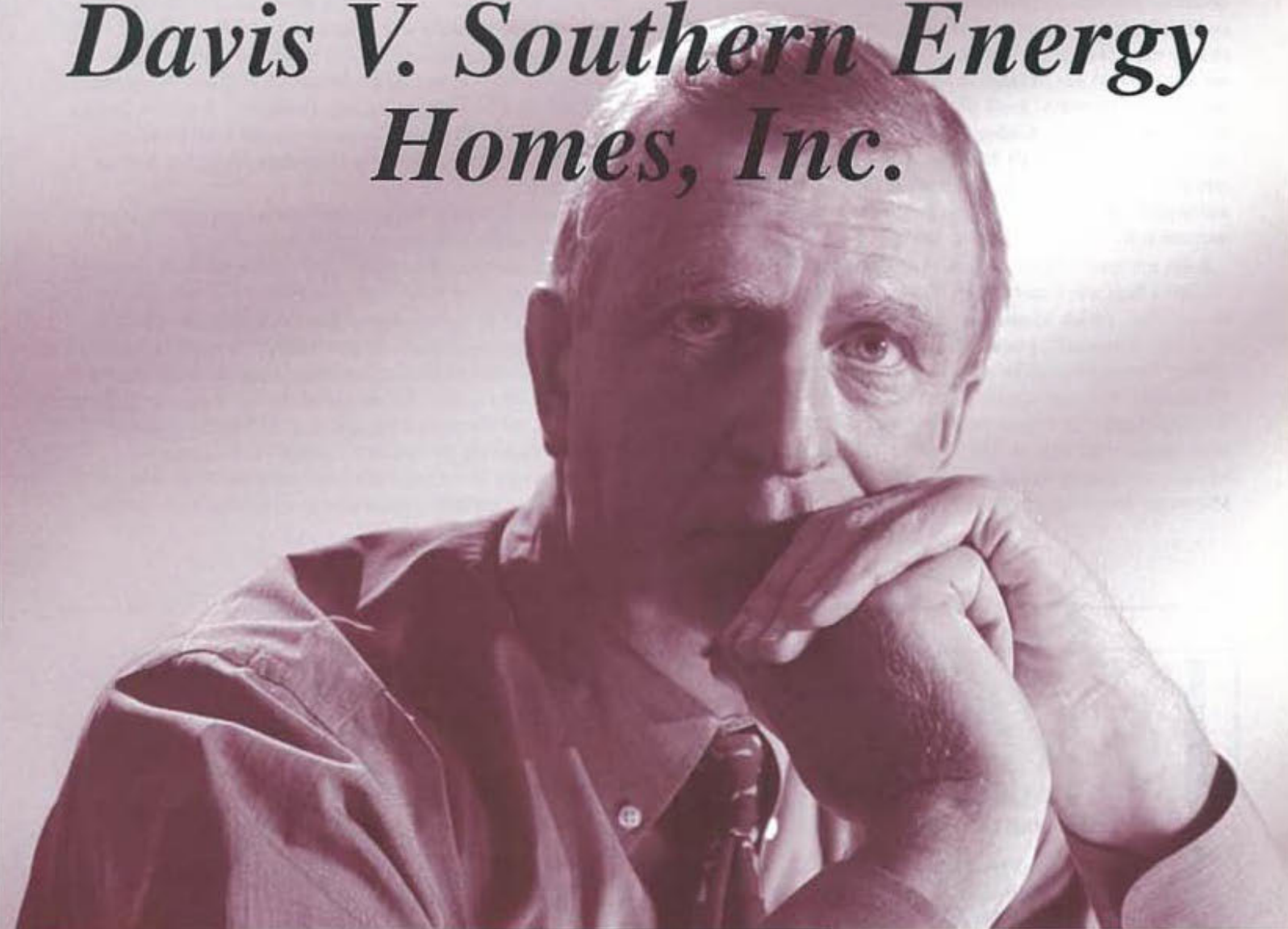
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What's Left After *Davis V. Southern Energy Homes, Inc.*



BY W. SCOTT SIMPSON AND GORDON L. BLAIR

Alabama's bench and bar have been inundated with arbitration issues since *Allied-Bruce Terminix Companies, Inc. v. Dobson*¹ made the enforcement of arbitration agreements in Alabama a reality. Until recently, one of the most controversial issues was whether consumer warranty claims are arbitrable.

In 1997, Chief Judge Myron Thompson decided *Wilson v. Waverlee Homes, Inc.*², which held that the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson Moss Act")³ precludes warrantors from compelling consumer claims to arbitration. *Wilson* was disastrous for manufacturers who had come to rely on arbitration to resolve product warranty disputes short of risky jury trials. In Alabama, warranty claims are particularly dangerous for warrantors of automobiles and manufactured homes because those claims will support mental anguish awards, even in cases where the plaintiff suffered no actual physical injury.⁴ After *Wilson*, arbitration was no longer a safe harbor for warrantors.

Subsequent federal decisions from Alabama narrowed the *Wilson* holding somewhat. These cases held that the Magnuson Moss Act only precludes arbitration of written warranty claims and Magnuson Moss Act claims.⁵ All other types of claims between consumers and warrantors still could be arbitrated. These decisions did not diminish the impact of *Wilson*. Consumers still could prevent manufacturers from arbitrating the more valuable claims: express warranty claims (where mental anguish damages are recoverable) and Magnuson Moss Act claims (which permit the award of attorneys' fees). Shrewd plaintiffs' lawyers reacted to these decisions by pleading single count complaints for breach of express warranty under the Magnuson Moss Act. The end result was the same—warranty claims could not be arbitrated, and defendants paid handsome settlements or suffered the consequences at the hands of Alabama juries.

It did not take long for *Wilson* to catch on. In 1999, the Alabama Supreme Court released *Lee v. Southern Energy Homes, Inc.*, which adopted the *Wilson* rule in a five-to-four decision.⁶ Ultimately, a number of jurisdictions did the same. Among those jurisdictions were federal districts in Virginia and Mississippi, and state appellate courts in Georgia, Texas, Illinois and Mississippi.⁷ For three years, every court to address the issue agreed with *Wilson*. The Federal Trade Commission, which is the agency that promulgates regulations under the Magnuson Moss Act, even adopted the *Wilson* rule.⁸

After the 2000 judicial election changed the composition of the Alabama Supreme Court, the court reconsidered this issue. In *Southern Energy Homes, Inc. v. Ard*, another five-to-four decision, the court reversed itself, and held that the Magnuson Moss Act does not preclude arbitration of warranty claims.⁹ This decision was the first of its kind to reject *Wilson*. The *Ard* decision prompted Georgia and Texas to reject *Wilson* as well.¹⁰ The federal bench first rejected *Wilson* in *Walton v. Rose Mobile Homes, L.L.C.*, a Fifth Circuit decision.¹¹ Within a few months, the Eleventh Circuit followed suit. In *Davis v. Southern Energy Homes, Inc.*, the Eleventh Circuit abrogated *Wilson* and its progeny, effectively ending the Magnuson Moss Act defense to arbitration.¹²

Although *Wilson* has been rejected almost universally, one by-product of *Wilson* continues to plague warrantors. Before the Eleventh Circuit decided *Davis*, it was confronted with a related Magnuson Moss Act issue in *Cunningham v. Fleetwood Homes of Georgia, Inc.*¹³ In *Cunningham*, a home manufacturer sought to compel arbitration of the home purchasers' claims against it based on an independent arbitration agreement between the purchasers and seller of the home.¹⁴ The manufacturer was not a party to that agreement, but sought to enforce it as a third-party beneficiary.¹⁵ The court expressly refused to decide the *Wilson* issue, and focused instead on a related issue—whether the Magnuson Moss Act requires a warrantor to disclose an arbitration clause within



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the text of a warranty.¹⁶ The court held that because the arbitration agreement at issue did not appear as part of a "single document" within the text of the warranty, the agreement could not be enforced. To reach this result, the court relied on a Federal Trade Commission regulation that requires "informal dispute settlement mechanisms" to be displayed within the text of a warranty.¹⁷ The Alabama Supreme Court adopted the *Cunningham* "single document" rule in *Ex parte Thicklin*¹⁸ last year.

This rule presents a substantial impediment to the enforcement of warranty-arbitration agreements because the defense of lack of mutual assent can preclude their enforcement. Contract assent is usually proven through a written agreement signed by the parties. The plaintiff's signature is the best evidence of assent in most circumstances.¹⁹ Consumer warranties, however, generally are not signed by either the consumer or warrantor. They are simply delivered with the product. A plaintiff can avoid a warranty-arbitration agreement by arguing that he never received or read the warranty.²⁰ The Alabama Supreme Court has been receptive to this argument, even in cases where the plaintiff files a claim for breach of express warranty (which presupposes that the plaintiff received a warranty in the first place).²¹

The good news for warrantors is that the Eleventh Circuit's analysis in *Davis* conflicts with its holding in *Cunningham*. The *Cunningham* single document rule may be subject to challenge for this reason. In determining that an arbitration provision must be set forth within the text of the warranty itself, the *Cunningham* court relied upon a Federal Trade Commission regulation that requires "informal dispute settlement mechanisms" to be displayed within the warranty.²² The *Cunningham* court concluded that arbitration is an "alternative dispute settlement mechanism" under that regulation.²³ The *Davis* court has since rejected that interpretation.²⁴ The Fifth and Third circuits have as well.²⁵ Arbitration agreements are not "informal dispute settlement mechanisms" under the Magnuson Moss Act. Instead, they are viewed as forum selection clauses.²⁶ This important distinction should render the single document rule inapplicable to warranty-arbitration agreements. Separately signed arbitration agreements between warrantors and consumers should be enforceable.

Until the single document rule is properly reconciled with recent decisions, warrantors face a "Catch-22" situation. If warrantors place their arbitration agreements in product warranties, then the defense of lack of mutual assent can render those agreements unenforceable. On the other hand, if warrantors rely on separately signed agreements, then the single document rule may preclude the enforcement of such agreements. It is hoped that the Eleventh Circuit and the Alabama Supreme Court will revisit the single document rule in light of recent decisions to bring clarity to this important issue. ■

ENDNOTES

- 513 U.S. 265 (1995).
- 954 F. Supp. 1530, 1537-38 (M.D. Ala. 1997), *aff'd without opinion* 127 F.3d 40 (11th Cir. 1997).
- 15 U.S.C. § 2301 et seq.
- Alabama Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986) ("mental anguish need not be predicated upon the presence of physical symptoms"); *Southern Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 519 (Ala. 2000) (mental anguish award of \$355,000 affirmed on appeal in simple warranty case involving a mobile home); *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301, 1305 (Ala. 1991) (mental anguish recoverable in a breach of warranty case involving an automobile).
- Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1432, 1441 (M.D. Ala. 1997), *remanded on jurisdictional grounds*, 188 F.3d 1294 (11th Cir. 1999); *Rhode v. E & T Invs., Inc.*, 6 F.Supp.2d 1322, 1331 (M.D. 1998); *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1327-28 (11th Cir. 2001).
- Lee v. Southern Energy Homes, Inc.*, 732 So. 2d 994, 999-1,000 (Ala. 1999).
- Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958, 964-65 (W.D. Va. 2000); *Browne v. Klyne Tysons Imports, Inc.*, 190 F.Supp.2d 827, 831 (E.D. Va. 2002); *Raesley v. Grand Housing, Inc.*, 105 F.Supp.2d 562, 574 (S.D. Miss. 2000); *Results Oriented, Inc. v. Crawford, No. A00A0540*, 2000 WL 868468 (Ga. App. Ct. June 30, 2000); *In re Van Blaricum*, 19 S.W.3d 484, 496 (Tex. Ct. App. 2000); *Borowiec v. Gateway 2000, Inc.*, 772 N.E.2d 256, 263 (Ill. Ct. App. 2002); *Pankerson v. Smith*, 817 So. 2d 529, 533-34 (Miss. 2002).
- 64 Fed. Reg. 19709 and n. 72 (1999).
- 772 So. 2d 1131, 1135 (Ala. 2000).
- Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 81 (Ga. App. Ct. 2000), *aff'd* 548 S.E.2d 342 (Ga. 2001); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 492 (Tex. 2001). The Third Circuit Court of Appeals of Louisiana rejected the *Wilson* rule in *Howell v. Cappaert Manufactured Housing, Inc.*, 819 So. 2d 461, 464-65 (La. App. Ct. 2002).
- 298 F.3d 470, 479 (5th Cir. 2002).
- 305 F.3d 1268, 1280, *cert. denied* 123 S. Ct. 1633 (2003). The Court of Appeals of Michigan recently adopted the *Davis* rule in *Abela v. General Motors Corp.*, No. 236238, 2003 WL 21664686 (Mich. App. Ct. July 15, 2003).
- 253 F.3d 611 (11th Cir. 2001).
- Id.* at 613.
- Id.*
- Id.* at 623.
- Id.* at 620-22 (citing 15 C.F.R. § 701.3(a)(6)).
- 824 So. 2d 723, 728-30 (Ala. 2002).
- Lawler Mobile Homes, Inc. v. Tanver*, 492 So. 2d 297, 304 (Ala. 1986) ("The object of a signature is to show mutuality of assent . . .").
- Southern Energy Homes, Inc. v. Kennedy*, 774 So. 2d 540, 547 (Ala. 2000). Assent can sometimes be proven circumstantially, by a showing that the consumer asked for and received warranty service. The principle of estoppel prevents the purchaser from taking advantage of the favorable warranty terms and avoiding the arbitration clause set forth within the warranty. *Ard*, 772 So. 2d at 1134.
- Kennedy*, 774 So. 2d at 547.
- Cunningham*, 253 F.3d at 620.
- Id.* at 622.
- Davis*, 303 F.3d at 1278-80.
- Walton*, 298 F.3d at 476; *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3rd Cir. 1997).
- Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).



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Alabama Municipal Employees' Rights to Paid Military Leave

BY SCOTT HETRICK AND PAUL MYRICK

Most Alabama municipalities are well aware of their obligations under the *Uniformed Services Employment & Reemployment Rights Act of 1994*, 38 U.S.C. §4301, *et seq.*, when municipal employees request a leave of absence to serve in the military. Generally, all employers (including municipalities) must allow leaves of absence of up to five years for military service, and must reinstate employees upon completion of the military service to the same job or a substantially similar job.

In light of the on-going call-up of our National Guard and U.S. Reserve for extensive operations in the Middle East and elsewhere, Alabama municipalities also should be aware of their *additional* state law obligations to provide employees a certain amount of *paid* military leave each calendar year, as well as a recently enacted law that allows (but does not require) municipalities to provide supplemental pay for municipal employees called to serve in the war on terrorism.

Under *Alabama Code* §31-2-13(a), Alabama municipal employees are entitled to 168 hours of paid leave each calendar year for military duty *required by federal law* and an additional 168 hours of paid leave each year if called by the Governor *for service to the state*:

All officers and employees of [any] State of Alabama... municipality... who are active members of the Alabama National Guard, Naval Militia, the Alabama State Guard organized in lieu of the National Guard, or of any other reserve component of the armed forces of the United States, shall be entitled to military leave of absence from their respective civil duties and occupations on all days that they are engaged in field or coast defense or other training or on other service ordered under the National Defense Act, or of the federal laws governing the United States reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave.

Notwithstanding the foregoing, no person granted a leave of absence with pay shall be paid for more than 168 working hours¹ per calendar year, and those persons shall be entitled, in addition thereto, to be paid for no more than 168 working hours at any one time while called by the Governor to duty in the active service of the state....

Ala. Code §31-2-13(a).² The law does not apply to private employers.³

Section 31-2-13(a) addresses paid leaves of absence for two mutually exclusive types of military service – “federal duty” and “state duty” – and mandates 168 hours of paid military leave each calendar year for each type of duty. Because military service, in most cases, is governed by federal law, municipalities *generally* will be required only to provide 168 hours of paid military leave in any given calendar year. Only in those rare instances when a municipal employee is absent for *both* “federal duty” military service *and* military “service to the state” during the same calendar year would the municipality have an obligation to pay the employee for more than 168 hours in the calendar year.⁴

State Military Duty versus Federal Military Duty

In most cases, a municipal employee’s absence for military duty is required by federal law, and the employee is paid by the federal government. Accordingly, when the President calls a U.S. Reservist or National Guard⁵ member to active duty under the *National Defense Act*, the “service is clearly under federal law” and “only the provision of §31-2-13 providing leave for federal service is applicable.” *Atty. Gen. Op. 90-00398*, pp.2-3. Similarly, absences for National Guard training are usually considered “for federal military duty” within the meaning of *Ala.*

Code §31-2-13(a) because these absences are required under the *National Defense Act* and paid for by the federal government:

The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

10 U.S.C. §101(d)(5).⁶

In contrast, military duty "in the active service of the state" when called by the Governor⁷ is limited to the enforcement of the law, the preservation of the peace or for the security of the rights and lives of citizens or protection of property in aid and relief of citizens in disaster, or any similar duty, or any other service that the Governor may for specific reasons so designate *Ala. Code* §31-2-38. A municipal employee's absence for military training is considered "in the active service of the state," and thus counted against the 168 hours of "state duty" paid leave, only when the training is ordered by Alabama's Governor and when "such duty is paid for solely from state funds and no federal funds are used." *Ala. Code* §31-2-38.

Supplemental Pay for "War on Terrorism" Duty

While *Alabama Code* §31-2-13(a) grants municipal employees the right to paid military leave, that law also establishes the maximum amount that a municipal employer may pay—no more than 168 hours for military duty absences. "Alabama law prohibits any person granted a leave of absence from his or her respective civil duties and occupation, because of active military duty, from receiving supplemental pay for more than 168 working hours." *Atty. Gen. Op.2002-129*, p.3. In other words, "[t]he payment of the difference between [an employee's] military pay and his public, civilian pay is a violation of the statute." *Atty. Gen. Op.96-00188*, p.2.

In 2002, the Alabama Legislature passed a comprehensive statute entitled "*Preservation of Rights and Benefits During Military Service*" that became effective July 1, 2002. *Ala. Code* §31-12-1 *et seq.* Under this law, Alabama

municipalities may now, under limited circumstances, implement supplemental military pay policies:

The governing body of any local governmental entity in this state may provide for any public employee of the entity who is *called into active service in the armed forces of the United States during the war on terrorism which commenced in September 2001*, to receive from his or her employer compensation in an amount which is equal to the *difference between the lower active duty military pay⁸ and the higher public employment salary which he or she would have received if not called to active service.*

Ala. Code §31-12-6 (emphasis added).

Notably, this statute expressly excludes from its coverage absences for "normal National Guard and Reserve weekend drill, annual training, and required schools as described in 32 U.S.C. §502(a) through (e), inclusive, and other related statutes." *Ala. Code* §31-12-4. Each Alabama municipality remains free to craft its own policies and procedures for this supplemental compensation:

The amount of compensation which may be paid under this section to a local public employee called into active service may be paid for a period as determined by the local governing



body under rules and regulations for processing claims for and payments of the compensation promulgated and implemented by the local governing body.

Ala. Code §31-12-4.

Accordingly, municipalities may (but are not required to) adopt policies that permit payment of the difference between a lower military pay and a higher civilian salary once the 168 hours of paid leave are exhausted, but only for absences occasioned by "active service in the war on terrorism." If the municipality chooses to adopt such a policy, it has complete discretion to decide how long it will make these supplemental payments. Municipalities should formally adopt a supplemental pay policy by ordinance or other formal action to avoid potential liability under the general military pay statute, *Alabama Code* §31-2-13(a).

Conclusion

Municipal employers and employees have significantly different rights and responsibilities with respect to paid military leave when compared with private employers. Municipalities should review their obligations to ensure compliance with these state laws designed to promote participation in our nation's armed services. ■

Endnotes

1. A 1995 amendment substituted "168 working hours" for "21 working days."
2. Because the statute requires pay only for "working hours," the municipality need not pay for any weekend military duty (e.g., National Guard "weekend drill") if a municipal employee's regular workweek does not include weekend workdays. See *Britton v. Jackson*, 414 So.2d 966, 967-68 (Ala. Civ. App. 1981). On the other hand, the municipality must pay the employee for days spent at weekend drills if the municipality regularly requires the employee to work on the weekends. *Id.*
3. In *White v. Associated Industries of Alabama, Inc.*, 373 So.2d 616, 8 ALR.4th 696 (Ala.1979), the Alabama Supreme Court held that this section, as applied to private employers, violates Article 1, § 6, the due process provision, and Article 1, § 22, the impairment of contracts provision, of the Alabama Constitution.
4. A municipal employee could take up to 336 hours of paid leave for one leave of absence for military service when the absence continues beyond the end of one calendar year into the next. *Atty. Gen. Op. 2002-090*, p.5 (Government employee called to active duty in late 2001 was entitled to 168 hours of paid leave during 2001 and then "would get an additional 168 hours of federal-status leave with pay beginning on January 1 of any subsequent year"); *Atty. Gen. Op. 91-00140*, p.5 ("[T]he employee . . . who was called into active military service for Operation Desert Shield and who received [168 hours] of military leave in calendar year 1990, will be entitled to be paid for [168 hours] of military leave beginning January 1, 1991. It is not necessary that the employee return to work . . . in order to receive the [168 hours] of military leave for the calendar year 1991").
5. The Alabama National Guard is "organized in accordance with the laws of the United States affecting the National Guard, army and air, and the regulations issued

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6. by the appropriate Secretary of the Department of Defense." *Ala. Code* §31-2-3. Under the *National Defense Act*, the National Guard includes both the Army National Guard and the Air National Guard of each state—the "federally recognized organized militia of the several States" who are "organized, armed, and equipped wholly or partly at Federal expense." 10 U.S.C. §101(c). See *Atty. Gen. Op. 83-250* (Municipal employees must be paid for absences to attend National Guard training.); *Atty. Gen. Op. 81-309* (Municipal employees who voluntarily re-enlist in the National Guard must be paid for training absences); *Atty. Gen. Op. 79-280* (Municipal employees are entitled to leave with full pay to attend National Guard summer camp).
6. See 32 U.S.C. §316 (National Guard members may be required to serve as instructors at rifle ranges); 32 U.S.C. §502 (National Guard members are required to assemble for drill and instruction at least 48 times in a year and participate in training, maneuvers at least 15 days each year.); 32 U.S.C. §503 (The Secretary of the Army and the Secretary of the Air Force may provide for National Guard participation in exercises independently or with the regular Army or Air Force.); 32 U.S.C. §504 (National Guard members may attend schools conducted by the Army or Air Force, may conduct or participate in schools conducted by the National Guard, and may participate in small arms competitions.); 32 U.S.C. §505 (Approved National Guard members may attend service schools other than the military academies).
7. Alabama law empowers the Governor to call upon the state's armed forces. *Ala. Code* §31-2-37 ("Subject to the restrictions of the National Defense Act and other federal laws governing the armed forces, the Governor may annually order into the service of the state the whole or such portion of the armed forces of the state as he may deem proper, the period of such service to be fixed by the Governor").
8. "Military pay . . . means the basic pay received by those serving in the military. Pay is a separate and legally distinct compensation from allowances and from other forms of compensation such as retirement benefits, education benefits, bonuses, medical care, and PX and commissary privileges, all of which, as a package, make up military compensation." *Atty. Gen. Op. 2002-270*, p.2.




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A photograph of two men in suits walking outdoors on a paved area. The man on the left is wearing a dark suit and tie, and the man on the right is wearing a dark blazer over a light-colored shirt and white trousers. They are both smiling and appear to be in conversation. The background shows a building with a covered walkway and some greenery.

The American Inns of Court: Establishing Professionalism through Camaraderie

BY JAY E. STOVER

In the *Taming of the Shrew*, Shakespeare advised romantic rivals to “[d]o as adversaries do in law, strive mightily but eat and drink as friends.” At the time Shakespeare wrote the *Taming of the Shrew* in 1584, the English barristers had already established organizations for members of their bar and bench known as the “Inns of the Court.” The “Inns of the Court” were where English barristers would meet to “break bread” and engage in fellowship. Such English Inns continue to this day.

In the 1970s, many respected jurists and attorneys came together to create what has now become known as the “American Inns of Court” (AIC) based upon the English Inns. In 1980, U.S. Supreme Court Chief Justice Warren Burger, former Solicited General Rex Lee and Federal District Judge A. Sherman Christensen began the American Inns of Court and established its first chapter in Utah. Its concept was adopted from the British Inns of Court system where the education and training of attorneys was a process of mentoring and developing experience through fellowship with more experienced barristers. Since its formation, AIC chapters have been established throughout the United States. There are presently 317 chapters active and organizing throughout the United States with an active membership of over 23,000 judges, lawyers, law teachers and law students. The AIC promotes professionalism, ethics and skill of the bench and the bar. The stated mission of the AIC is “to foster excellence in professionalism, ethics and legal skills for judges, lawyers, academicians, and

students of law in order to perfect the availability and efficiency of justice in the United States."

AIC chapters benefit their legal communities in many different ways. They provide a mechanism of training for lawyers in small firms and rural areas. This is very important in states such as Alabama where such a large percentage of state attorneys practice in small firms or in solo practices. The AIC helps attorneys by filling in the gaps in law school education. The education provided by AIC chapters is often more enjoyable and more frequent than continuing legal education courses that attorneys must attend on a yearly basis. By bringing together members of the bench and bar, the AIC fosters communication between them. In addition to the educational and informational aspects of the AIC chapter meetings, the AIC provides opportunity for attorneys to develop contacts, and AIC membership provides attorneys with the prestige of being associated with the organization itself.¹

In 1989, the first Alabama AIC chapter was organized in Montgomery. The Montgomery AIC chapter has now been renamed the Hugh Maddox AIC Chapter. Since its establishment, six other AIC chapters have been established or chartered for establishment in Tuscaloosa County, Birmingham, Madison County, Mobile County, Calhoun County, and Etowah County.

Each AIC chapter meets at least once a month for nine months out of the year. At the meetings, not only do members of the bar get an opportunity to socialize with other attorneys and judges, but also are presented programs designed to promote legal excellence, civility, professionalism and ethics. Some chapters even arrange for continuing legal education credits for members attending the programs.

The growth of the AIC in Alabama has been greatly encouraged by respected members of the state bar and bench, such as Justice Maddox. Justice Maddox was pivotal in the formation of the AIC chapter in Montgomery and has helped to promote the AIC throughout the state and nationwide. He is presently a member of the Board of Trustees for the National American Inns of Court and is serving on the Strategic Planning Committee, which has been established to study and develop strategic plans con-

cerning the goals, operation and finance of the AIC.

Justice Maddox contends that the AIC, through the diversity of membership of the individual chapters, helps promote collegiality among the attorney members and, thus, promotes civility throughout the entire legal community. He notes that the AIC chapters should strive to attain representative membership of the legal community served by the chapter including not only a diverse gender and racial makeup, but diversity in the type of law practiced among its members. He states that chapter membership is greatly enhanced when it includes both federal and state judges. Justice Maddox suggests that it is important to have members representing different and competing aspects of the bar, including prosecutors, criminal defense attorneys, government attorneys, private sector attorneys, civil defense attorneys, and trial lawyers.

Each AIC chapter divides its membership into three separate groups based on the length of time that each member has practiced law. Those groups include master benchers, barristers and associates. Within these categories, membership is subdivided into pupilage teams consisting of individuals from each membership category. These pupilage team members assist in the presentation of programs and are encouraged to maintain contact outside the monthly meetings for the purpose of allowing less experienced attorneys to learn more effective advocacy from the more experienced attorneys and judges in the pupilage groups.

The use of AIC chapters for mentoring young or less experienced attorneys has been recognized by many participants of such chapters. Nora C. Porter noted the importance of the Inns for fostering such mentoring relationships in her article, "Enriched by Colleagues".² Porter writes:

In the U.S., as preceptorships for novice lawyers became a thing of the past, there arose an obvious need to provide a way for attorneys to learn from the experience of wiser colleagues as well as to meet informally with judges and sometime-adversaries or competitors in a way that would foster common ideals and goals.

...

The current president [of the Cumberland County, Pennsylvania Chapter of the AIC], Marlin McCaleb,



*"[d]o as
adversaries do
in law, strive
mightily but
eat and drink
as friends."*

-Shakespeare

finds that the AIC meets a real need. "In the late '60s, when I graduated from law school, there were only about 50 lawyers in the county. At that time it was common practice for many of the older lawyers to meet for lunch. For younger lawyers, sitting down with them was an invaluable way to learn the nuts and bolts of practice. Nowadays, with 250 to 300 lawyers in the county, that's no longer feasible. I think it's a great idea to have an organization set up where we can pick each other's brains and learn from what others have done."³

The formalities of the American Inns of Court vary throughout each individual chapter. Some chapters concentrate more than others do on the social functioning of the American Inns of Court. Other chapters may have more elaborate educational sessions. These sessions often

include skits, demonstrations and workshops in addition to lectures.

The Etowah County AIC chapter was established in 1999. It has over 58 chapter members. Its membership is over 50 percent of the bench and bar in Etowah County. The Etowah County AIC chapter has open membership for the entire county and much diversity in its membership. Its membership includes members of the federal and state bench, and attorneys from all types of practice, including prosecutors, criminal defense lawyers, general practitioners, trial lawyers, civil defense lawyers, and real estate attorneys. Each meeting has a lecture or program centered on improving the membership's advocacy and promoting professionalism and civility.

The meetings provide the opportunity for attorneys to have dinner and fellowship with other members of the bench and bar. The meetings provide attorneys an opportunity to see others whom they may only see each other while performing in their professional roles. This social setting probably does more to promote

friendship throughout the Etowah County bar than any other county bar function. Without question, the biggest draw each year is the annual steak cookout hosted by Judge Allen Millican. Everyone is able to relax, talk and joke with each other in a very informal setting without the stuffiness and formality the practice of law so often requires.

The Honorable Howard T. Markey, dean of the John Marshall School of Law, noted in his speech at the annual meeting of the American Inns of Court on June 10, 1993 that each member of the bar must do his or her part to promote professionalism. The establishment of a membership in the AIC could be an important part to answering that responsibility. Dean Markey encouraged that "all lawyers should so conduct [themselves] as to make the phrase 'ethical lawyer' a redundancy." He urged that:

"The American Inns are proving that the solution lies closer to home. It lies with the individual lawyer. Each of us must start with ourselves and with our choice of a personal lodestar, a star to

steer by as we practice our ancient profession as counselors and protectors of our fellow citizens. You must answer for the choice you make, to history if not to no other. Choose as you will, but, I beg of you choose! For a lawyer without a lodestar is a mere mechanic."

As Justice Maddox noted in his article, "An Old Tradition with a New Mission the America Inns of Court," that participation in a local AIC chapter can be most productive and enjoyable organization that an attorney can be a member. Enjoying the experience is probably the most important part of joining an AIC chapter.⁴ Too often, attorneys do not develop relationships with other members of the bar when the opportunity to form such friendships with others that share their love of the law so readily exists.

William Cobet noted, "All men seek the society of those who think and act somewhat like themselves." Despite the diversity in the membership of the AIC chapters, each member shares the love of practice of law and this is what lends to the promotion of civility.

There is much room for much growth of the AIC in Alabama. Even lawyers in smaller communities can form chapters by joining together other members of their judicial circuit or counties in close proximity. The growth of the AIC with the goal of returning professionalism and civility to the legal profession can only be strengthened by the growth of these organizations throughout the state. Expansion of the AIC can only help to promote professionalism and improve the perception that the state citizenry has of attorneys and the justice system in general.

For attorneys interested in establishing American Inns of Court in their county or judicial circuit, inquiries regarding membership can be directed to the American Inns of Court Foundation, 127 S. Payton Street, Suite 201, Alexandria, Virginia 22314. (703) 684-6590; fax (703) 684-3607; www.innsofcourt.org.

Endnotes

1. Bill Ibelle, "Inns of Court Attracting Record Numbers of Lawyers," *Lawyers Weekly USA*, April 8, 1996.
2. Nora C. Porter, "Enriched by Colleague," *The Pennsylvania Lawyer*, July-August 2002, pp. 20-24.
3. Porter, *supra*, pp. 24.
4. Justice Hugh Maddox, "An Old Tradition With a New Mission—The American Inns of Court," *The Alabama Lawyer*, vol. 56, pp. 384-86 (1993).

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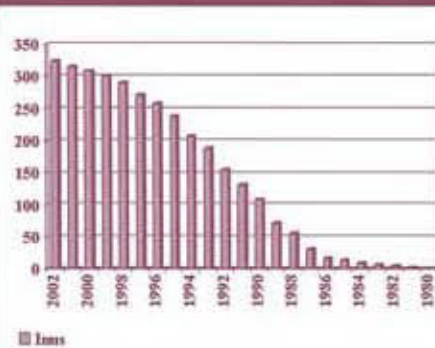
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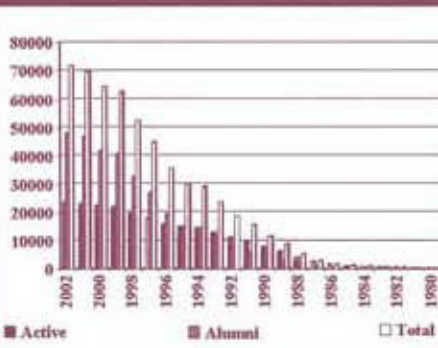
I will work to make the legal system more accessible, responsive and effective.

I will honor the requirements, the spirit and the intent of the applicable rules of codes of professional conduct for my jurisdiction, and will encourage others to do the same. ■

American Inns of Court Chapter Growth



American Inns of Court Membership Growth



Jay E. Stover

Jay E. Stover is a partner in the Rainbow City firm of Callis, Stover & Stewart. He is a graduate of the University of Alabama at Birmingham and the Cumberland School of Law, Samford University. Following law school, he served as law clerk and staff attorney to the Honorable Hugh Maddox, associate justice, Alabama Supreme Court. He is a member of the board of editors of *The Alabama Lawyer*.

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The admission of records and satisfying the burdens of proof in the injury case often present lawyers with a myriad of hurdles. This article arose out of my desire to answer questions that consistently presented themselves in case after case and it is a compilation of research, trial and error, and numerous discussions with experienced practitioners. With this in mind, this article will discuss the nature of these issues and proposes explanations and practical solutions to admission of records and the burdens of proof and production in the injury case, with respect to law and procedure in Alabama.

Authentication

Authentication or identification is the first evidentiary hurdle which a docu-

ment or article of evidence must overcome in order to gain admissibility at trial. Authentication is simply accurate identification of an item of evidence to determine if that item is the "genuine article." Authentication is the first step or the "preliminary" foundation for admission of records and it is totally separate from the requirements of establishing a foundation under the business record exception. "Authentication alone is never sufficient to admit a document as a business record over a party's objection.¹ Although authentication and foundation are often used interchangeably, they are distinct evidentiary issues and I address them separately in this article.²

The authentication of a business record is a matter of proving that the record or document is *genuine and trustworthy*. According to the Alabama Rules

Evidence 901(a), "[t]he requirement of authentication or identification . . . is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims."³ In other words, the movant proves that the document or item of evidence is authentic or the real thing, the "genuine article," that it really is what the movant says it is.

In a personal injury claim, a plaintiff's medical records and bills must be authenticated by the appropriate medical provider before the documents are admissible at trial. In practical terms, the medical provider, usually the physician through deposition testimony or the custodian of records, is asked to identify the document and/or testify that the medical record is what it is claimed to be. Thus, the record is accurately identified by the appropriate person and is shown to be

Authentication, Foundation, Reasonableness and Causation: Admission of Medical Records and the Burdens of Proof in the Injury Case

The admission of records and satisfying the burdens of proof in the injury case often present lawyers with a myriad of hurdles.

BY JAMES G. BODIN

the genuine article. The person who actually authenticates the record does not have to be the custodian of record,⁴ or have first-hand or personal knowledge of the contents of the record,⁵ or be the person who actually prepared the original record⁶ i.e., the physician who dictated the medical report. However, even though the authenticating witness does not need to be the person who created the record or have specific knowledge of its contents, this witness must be able to explain and can be cross-examined as to the manner in which the businesses' records were made, kept or stored.⁷

Once a business or medical record has been authenticated as genuine or certified as a true and correct copy, it has cleared an important preliminary hurdle, but it is still hearsay. The record cannot be admitted into evidence under the busi-

ness records exception to the hearsay rule until a proper foundation is laid.⁸

Foundation

Once an article of evidence is authenticated, the second hurdle to admission is **foundation**. Foundation goes to the heart of the reliability of the record and/or its content. If authentication is the accurate identification of an item of evidence then foundation is factual proof of how the item of evidence was correctly prepared, stored, and retrieved. Foundation is simply explained as the chain-of-custody for an item of evidence to formally establish its reliability. Whereas, authentication may allow the introduction of the book into evidence, the trier of fact cannot open the book and read the first line of page one until its foundation is established.

Medical records are business records and are hearsay. But if these business records are qualified by the business records exception by the rules listed below, they are deemed exceptions to hearsay. In an injury claim, medical records are typically prepared in the ordinary course of business by a medical provider, therefore, they must be properly verified by establishing a foundation for their admission to qualify as a hearsay exception. In order to achieve admissibility at trial, the practitioner must establish that the "foundation" of the documentary evidence is solid, reliable and trustworthy. If this cannot be established, the evidence is deemed hearsay and inadmissible.

The next logical question is how do you establish the foundation for the admission of medical records? Establishing the foundation is a four-step process. In Alabama,

the procedure is set forth in three separate rules that employ similar qualifying language.

First, according to *Rule 803 (6)*, *Gamble's Alabama Rules of Evidence*, the appropriate witness must testify that the transcribed statement in the business record:

- (1) is a record of that business;
- (2) the witness knows the method used to make such records;
- (3) it was the regular/routine practice of the business to make the records; and
- (4) the record was made in the ordinary course of business or a reasonable time thereafter.⁹ Second, the above-listed procedure for establishing the foundation of a business record is also set forth in Rule 44(h) of the Alabama Rules of Civil Procedure, which reads:

"Any writing or record (medical record) . . . made as a memorandum

or record of any act, transaction, occurrence, or event shall be admissible in evidence as proof of such act, transaction, occurrence, or event, if it was made in the regular course of any business, . . . and it was the regular course of the business to make such memorandum or record at the time of such act . . . or within a reasonable time thereafter . . ."¹⁰

Third, the statutory equivalent to Rule 44(h) and Rule 803(6) is the Alabama Business Record Act, Section 12-21-43, *Code of Alabama*. A properly authenticated business record is admissible in evidence when a foundation is established by showing:

- 1) that the record or writing was made as a record of an act, transaction, . . .
- 2) the record was made in the regular course of business to make such . . . record at the time of such act . . . or a reasonable time thereafter.¹¹

Finally, who is qualified to testify to

establish the foundation by direct testimony? The procedural steps above, used to create a foundation are proven through the testimony of the custodian, a representative of the medical provider who prepared the record (the maker), the treating physician, or any employee of the business who can satisfy the required elements of the business record exception.¹² The person testifying to the foundational facts does *not* have to be the person who prepared the information, created the record, or documented the knowledge first-hand, i.e) the declarant or typically in an injury case, the patient's physician. The Alabama Supreme Court has held:

"The rule (44(h) A.R.Civ.P.) does not require that the person who made the entry be the witness who lays the foundation for the introduction of the records into evidence . . . Any witness who knows the method used in the business of making records . . . and knows that it was the regular practice of the business to make such

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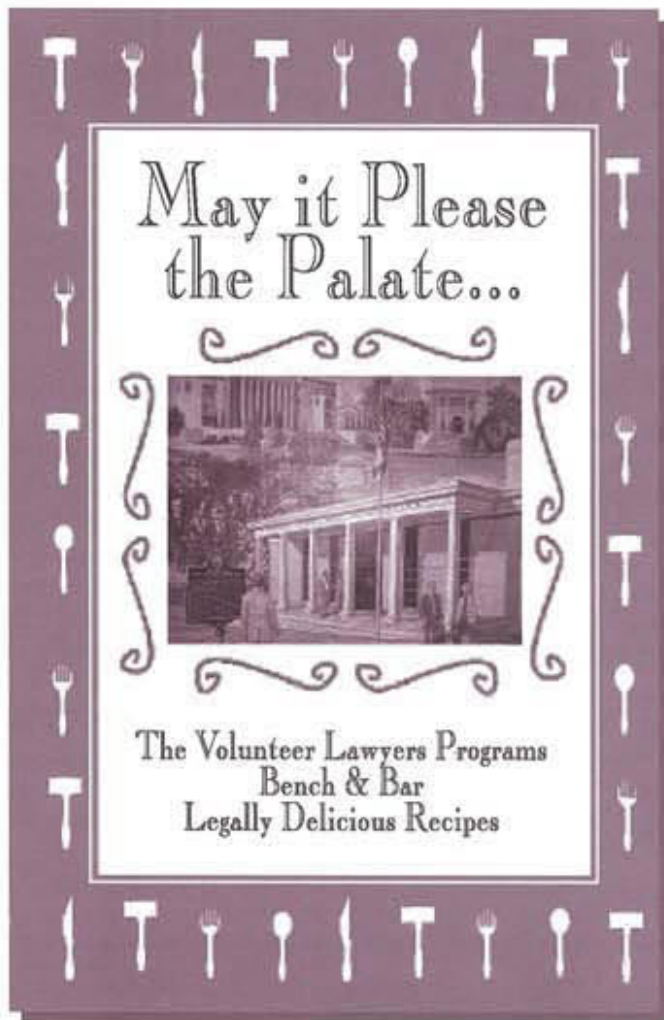
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records at the time of the event in question or within a specified reasonable time thereafter is competent to lay the foundation by testifying that the exhibit is such a record."¹³

Therefore, any employee of the business can testify and/or lay the foundation for admission of the evidence. Additionally, lack of personal knowledge (as to the truth contained in the record) concerning the entries in the business record by the entrant/custodian does not affect the admissibility of the record. Such lack of personal knowledge by the entrant/custodian does affect the weight of the evidence to be decided by the trier of fact.¹⁴ In *Reeves v. King* the Alabama Supreme Court held:

"...when an appropriate witness testifies that a statement, which derives from a declarant's first-hand knowledge, in an authenticated business record was made and transmitted to the maker pursuant to a routine business duty, then the record can be introduced to prove the truth asserted in the statement and the maker's lack of personal

knowledge of the facts recorded presents an issue of credibility only."¹⁵

But caution, the declarant or person who created the record and/or reported the information (ie. the physician) to the entrant/custodian, must possess personal or first-hand knowledge of the information in the record, or the information was not received in the regular course of business and it is hearsay.¹⁶

Hospital Record Exception to Hearsay

The State of Alabama considers **hospital records** trustworthy¹⁷ and the legislature codified a statutory procedure allowing the introduction of certified copies of original hospital records, without having to call to trial or depose the business employee, custodian, or physician to authenticate and/or establish a foundation for introduction of the hospital records. Section 12-21-5 to 7, *Code of Alabama*; *Pickett v. State*, 456 So.2d 330 (Ala.Crim.App.1982)¹⁸ Sections 12-21-5 to 7 provide a practical procedure where-

by copies of a patient's medical records are admitted in court proceedings, without the unnecessary expense and delay in calling the hospital custodian to lay a foundation or predicate for admissibility.¹⁹

In practical terms, once the hospital custodian receives the subpoena duces tecum, the custodian must copy the patient's medical records, as provided in Section 12-21-6-7, and forward the certified medical records to the court's clerk for admission at trial. Once submitted to the court under this statutory procedure, the records are considered business records' exception to hearsay, they satisfy the statutory foundational requirements of Section 12-21-43, *Code of Alabama*, and they are admissible in any state court without the additional testimony of the custodian.²⁰ Although the form below is not required verbatim,²¹ in § 12-21-7 the legislature codified a sample custodian of records' certificate, as follows:

"The certificate of the custodian of the hospital records provided for in Sections 12-21-5 and 12-21-6 shall show the name of the parties to the



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case or proceeding and the name of the court to which made, by appropriate caption, and said certificate shall be in form in substance as follows, to-wit: _____, hereby certify and affirm in writing that I am of _____ Hospital, a hospital organized or operated pursuant to or under the laws of Alabama, located in _____, Alabama, that I am custodian of the hospital records of said hospital and that the within copy of said hospital records are an exact, full, true and correct copy of said hospital records pertaining to _____. I further certify that I am familiar with and know, and knew when made and charged, the **reasonable** value and price for the various charges made and shown in said hospital records pertaining to _____ and that said charges are in my judgment just, **reasonable** and proper and in keeping with those generally charged in the county and community where said hospital is located. All of which I hereby certify and affirm on this _____ day of _____, 20__.

But caution, medical records must still be relevant to be admissible²⁷ and the Code sections do not allow the absolute or carte blanche admissibility of all hospital records.²⁸ For example, because causation goes to weight of the evidence and not to the admissibility or authenticity of the actual record, statements in a hospital record "concerning the *cause* or manner of injury, which do not refer to diagnosis or treatment in the record, are inadmissible hearsay."²⁹ See *J.T.H. v. W.R.H.*, 628 So. 2d 894, 897 (Ala.Civ.App. 1993). Further, note that the party objecting to the introduction of evidence in a medical record concerning "causation" or manner of injury cannot offer a broad objection but "must target *specific* portions of the medical record; however, objections to the medical record as a whole are properly overruled."³⁰

Why is the evidence of a patient's diagnosis and treatment admissible under the hospital records exception, but evidence of causation in the records is not admissible? This question was answered in *Pickett v. State* 456 So. 2d 330 (Ala.Crim.App. 1982). *Pickett* was a sexual abuse case where the State issued a subpoena duces tecum to a hospital

(under Code sections 12-21-5 et al.) directing the hospital to produce the victim's hospital record at trial. The hospital record was introduced to prove the victim experienced trauma as diagnosed by the emergency room physician. The evidence of trauma was not disputed and no evidence as to causation or manner of injury was listed in the records.

The criminal appeals court held that the victim's hospital records were admissible because first, they were "trustworthy." Second, evidence of this patient's diagnosis and treatment were essentially "*documentary*," or in other words, the clinical diagnosis of trauma was undisputed and "other medical experts would not have disagreed with the diagnosis." The court also held that cross examination of the attending physician would not have shaken the foundation of the evidence or undermined its reliability.³¹ Third, the hospital record did not mention the defendant or reveal that the defendant or anyone else caused the injury.

For an additional example, consider these facts. A person breaks their arm during a car collision. The physician's "documentary" diagnosis of a broken arm would generally not be disputed as it is considered reliable and trustworthy. However, evidence of who or what caused broken-arm-injury is "*testimonial*" evidence in nature. The testimonial evidence of causation is not consistently reliable and it is usually challenged. Therefore, the physician's testimonial opinion of causation cannot be admitted without sworn testimony and it is subject to cross-examination to give party the opportunity to either establish or refute the actual cause of injury. Testimonial evidence is also subject to cross-examination because evidence of causation is frequently subject to "divergent views from other experts" and cross-examination of the physician may cast doubt or expose the opinion to other expert opinions that might "shake the foundation of the record or undermine its reliability."³²

Probable Cause In A Civil Case?

Causation is the third of four elements of proof that must be satisfied by a majority of evidence to prove negligence in the civil case. In a personal injury or negligence

case, it is the plaintiff's burden to prove by a majority of evidence that the injury complained of was caused by the defendant's negligent act. Negligence alone does not afford a cause of action. "Liability is only imposed when negligence is the proximate cause of injury and the natural and probable consequence of the negligent act."³³

The next question that must be answered is who is qualified to testify and/or give their opinion to establish the cause of an injury. First, as a general proposition, a lay witness may not testify that one thing caused another.³⁴ A "lay opinion as to the ultimate issue of proximate cause is not admissible evidence."³⁵ Therefore, although the plaintiff can testify as to certain matters relating to his/her injuries and damages,³¹ the plaintiff usually cannot testify as to the cause of his/her injuries.

Medical opinions and conclusions require expert testimony. "An expert witness may testify to the ultimate issue of causation in a tort action . . . a treating physician is competent to give his opinion of the cause of his patient's injuries."³² "If the requisite predicate is laid for the expert testimony, and if the expert is duly qualified, he or she can give an opinion as to the cause of a wound and its effect."³³ In practical terms, this requires the plaintiff's physician to testify and render the opinion that the client's injuries were caused by act which is subsequently proved to be negligence. Causation can be established through the testimony of a physician, a medical doctor, and as the Alabama Supreme Court has recently held, a chiropractor.³⁴

First, expert testimony as to the *probable cause* of an injury establishes the necessary medical causation. The issue of medical causation must be established by probable rather than possible cause.³⁵ A physician does not have to testify that he or she is absolutely certain as to the cause of an injury. Moreover, in a civil claim, the plaintiff's traditional burden of proof as to causation is satisfied by a *majority* (probability) of the evidence. The Alabama Supreme Court stated:

"the mere possibility that an injury could cause a condition is not sufficient to support the burden of proof resting on the plaintiff. The testimony must establish a probability, not a mere possibility, of such causal connection."³⁶

There is a long held myth in the legal profession that the burden of proof for causation is greater than establishing the *probability* of the cause. This problem is compounded by the common but vague legal term "to a reasonable degree of medical certainty," which confuses physicians and lawyers alike and is misleading as to the proper burden of proof in a civil case. "A reasonable degree of medical certainty" sounds strikingly similar to a defendant's

burden of proof in a criminal case or "beyond a reasonable doubt." It also negatively implies that the burden of proof in a civil case is absolute scientific certainty or 90%, as opposed to the 50.1 percent probability burden of proof required in a civil case. In *Western Ry. of Ala. v. Brown*, the Alabama Supreme Court addressed the confusion and confirmed that the term "to a reasonable degree of medical certainty" is "an expression of an expert opinion that

the plaintiff's condition was *probably* caused by his/her injury."³⁷ Note therefore that the ambiguous term, "a reasonable degree of medical certainty" and the "probability of causation" both mean 50.1 percent or the probable cause of an injury in a civil case.³⁸

Second, a physician's opinion as to causation is not limited to the physical examination of the patient. In addition to the examination and/or tests, the basis of the physician's opinion of probable causation can also be based on "statements made by the patient in the form of a medical history so long as the facts in the history are part of the basis of the physician's opinion of the nature and extent of the injury."³⁹ Therefore, to establish the probable cause and effect of an injury, the physician may testify to and base his/her expert opinion on the patient's statements and the patient's history of the case.⁴⁰

Unfortunately, physicians are occasionally reluctant to testify to the probable cause of a personal injury because they do not know the complete facts surrounding the patient's injury. The expert must understand that "[i]n Alabama an expert is allowed to testify whether certain facts *could or would* cause a result, but *not* whether they *actually* did."⁴¹ The expert does not have to personally witness the act that is alleged to have caused the injury and therefore the expert cannot testify that he or she has personal knowledge that specific act actually caused the injury. The expert can rely on the parties' facts to establish his/her expert opinion as to causation. The medical expert's testimony is not used to establish the patient's version of facts as the absolute truth, but in establishing an opinion, the expert can assume that patient's version of facts in the patient's history are true and taken as true, would have *probably caused* the resulting injury.

Reasonable Expenses And Necessary Treatment

In an injury/negligence claim, a plaintiff must also prove by a preponderance of the evidence that he or she incurred damage as a result of a defendant's negligence. With respect to damages, a plaintiff may only recover those "**reasonable and necessary**" medical



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expenses specifically shown to have resulted from treatment made necessary by the negligent act of a defendant.⁴²

First, the question of reasonable expenses and necessary treatment is a question of fact but initially, it is also a procedural question requiring the trial court judge to determine whether there is substantial evidence to be submitted to the trier of fact.⁴³ Second, once evidence of reasonable treatment and necessary expenses is submitted to the jury, the jury must also determine by a majority of the evidence that treatment and expenses were reasonable and necessary. "Proof of an amount expended for medical treatment must include the element of reasonableness of the charge for the service and the necessity of treatment. Each element is one of fact for the jury."⁴⁴ The reasonableness and necessity of medical expenses is a substantive jury question and the jury is not bound to award medical expenses merely because they were incurred and introduced at trial.⁴⁵ Therefore, the jury or trier of fact has a twofold duty to determine whether the claimed medical expenses were reasonable and necessary and proximately caused by the defendant's negligence.⁴⁶

The question of reasonable expenses and necessary treatment must be answered through the opinion testimony of an expert witness.⁴⁷ However, where the necessity of medical treatment is evident from the injury, like an immediate emergency room visit following an accident, the necessity of the charges may be admissible without expert testimony.⁴⁸ In *Dairyland Insurance Co. v. Jackson*, the Alabama Supreme Court determined the treating physician "is well-qualified to give an expert opinion as to whether the care given to a plaintiff was necessary and whether the charges were 'fair and reasonable.'"⁴⁹ In *Dairyland*, the supreme court also held that an emergency room physician can give his opinion as to the reasonableness of a hospital's emergency room expenses.⁵⁰

To save time and expenses and expedite trial, parties can submit requests for admissions to opposing parties to factually establish the reasonableness of charges or the necessity of treatment.⁵¹ If a party refuses to recognize the obvious, and it is later proven through deposition or trial testimony that the charges were in fact rea-

sonable and the treatment was necessary, the moving party can request the court tax costs against the party denying the request.⁵² The issue of reasonableness of charges is usually apparent and this issue should be resolved prior to trial. I am not aware of a documented case where a treating physician testified that his/her charges were not "reasonable" or the patient's treatment was not medically "necessary." Nevertheless, the question must be asked, answered, and the witnesses' answer must be presented to the trier of fact in order to satisfy the element of damages.

Stipulation Between The Parties

Pre-trial stipulations or agreements on the admissibility of evidence save time and expenses of the parties and medical personnel—who are often inconvenienced by missing work to appear at trial or deposition. Parties can stipulate to issues of causation and agree that charges were reasonable and medically necessary or undisputed medical evidence is authentic and admissible, without the formality of establishing a foundation for introduction at trial.

The pre-trial conference, as set forth in *Rule 16 A.R.C.P.*, provides the opportunity for litigants to take action "to obtain admissions of fact and of documents which will avoid unnecessary proof, stipulation regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence . . . and the avoidance of unnecessary proof and cumulative evidence."⁵³

Agreements and stipulations [concerning questions of law] made in a pre-trial order and admitted in court are binding on the parties and admissible into evidence.⁵⁴ Notwithstanding, although the parties can also stipulate to the issue of proximate cause, the stipulation must be consistent with the testimony and evidence presented at trial, as addressed below.

Verifying that charges were reasonable and medical treatment was necessary will not satisfy the plaintiff's burden of proving proximate cause in a negligence case. A physician's testimony that treatment for an injury was medically necessary does not prove that the injury was proximately caused by a negligent act. See *Stricklin v.*

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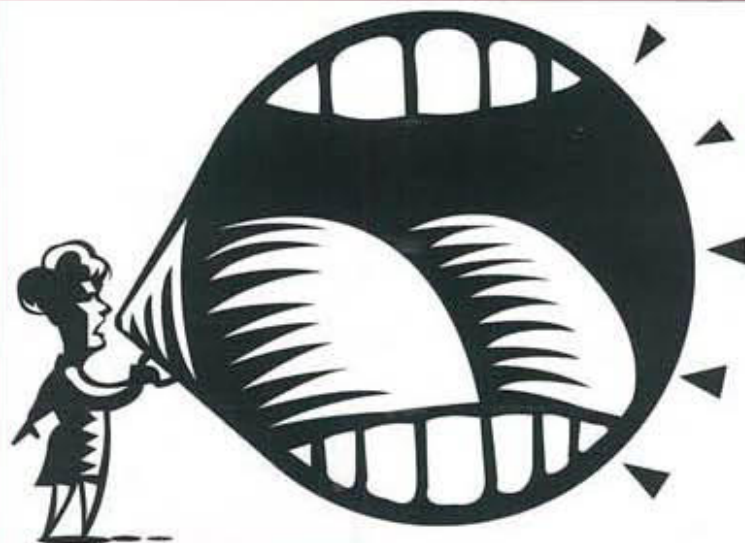
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Skipper.⁵⁵ Also, be aware that even where there is a pre-trial stipulation between the parties as to the reasonableness of charges and necessity of treatment, where the proximate cause of an injury is at issue, the court is not bound by the parties' agreement if it is contrary to the evidence disclosed at trial.⁵⁶ In *Stricklin*, even where the parties stipulated to "the reasonable medical bills and necessary treatment of the plaintiff," the court or the jury could reject the parties' stipulation, when "the [factual] question of whether certain medical expenses were proximately caused by the accident are clearly at issue at trial."⁵⁷ ■

ENDNOTES

1. *Hampton v. Bruno's, Inc.*, 646 So. 2d 597, 599 (Ala. 1994)(the party introducing the document must "prove: 1) that the document was genuine or authentic; 2) that the document met all of the elements of the business records exception; and 3) that the document was relevant." See also *Atmore Farm & Power Equipment Co. v. Glover*, 440 So. 2d 1042 (Ala. 1983). It is noteworthy that the supreme court in *Hampton* also held that a document is "automatically authenticated upon production" by a party following a discovery request. *Id.* at 599.
2. For a brief lesson on the differences between authentication and foundation, see former Chief Justice Torbert's opinion in *Ex parte Frith*, 526 So. 2d 880, 883 (Ala. 1987). Authentication properly identifies an item or document but authentication will not overcome a "no foundation" objection. Besides, "... it is the business record foundation that establishes the reliability of the contents of the document, not its authenticity ... the two issues are separate and distinct."
3. See Section 901(a), *Gamble's Alabama Rules of Evidence* (1995). "Any party offering writings, (medical records), objects, and other real or demonstrative evidence must lay a foundation to show that the item is what the offering party purports it to be ..."
4. Section 803(6), *Gamble's Alabama Rules of Evidence*, footnote 9.
5. *Reeves v. King*, 534 So. 2d 1107, 1113, (Ala. 1988) ("lack of personal knowledge by the entrant may be shown to affect the weight of the admitted record ... but does not affect its admissibility."); *Meriwether v. Crown Inv. Corp.*, 268 So. 2d 780, 784-785 (Ala. 1972).
6. *Meriwether*, 268 So. 2d at 784-785; *Reeves*, 534 So. 2d at 1113; *Ikner v. Miller*, 477 So. 2d 387, 390 (Ala. 1985).
7. Section 803(6), *Gamble's Alabama Rules of Evidence* (1995), footnote 10; C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3)(3rd ed. 1977).
8. *Mester v. State*, 755 So. 2d 66, 74 (Ala.Crim.App. 1999); *Hampton*, 646 So. 2d at 599; Alabama Business Record Act, Section 12-21-43, *Code of Alabama*, 1975.
9. Section 803(6), *Gamble's Alabama Rules of Evidence* (1995), C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3)(3rd ed. 1977).
10. Rule 44(h), Alabama Rules of Civil Procedure.
11. Alabama Business Record Act, Section 12-21-43, *Code of Alabama*; *Ex parte Frith*, 526 So. 2d at 882; *Dix v. State*, 580 So. 2d 81, 84 (Ala.Crim.App. 1991).
12. *Ikner*, 477 So. 2d at 390; *Ex parte Frith*, 526 So. 2d at 883; *Elliott v. Standard Oil Co. of Louisiana*, 167 So. 295 (Ala. 1936); see also *Gamble's Ala.R.Evid.*, Rule 806(6), footnote 1; C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3)(3rd ed. 1977).
13. *Ikner*, 477 So. 2d at 390; citing *Austin v. State*, 354 So. 2d 40, 42 (Ala.Civ.App. 1977); *Bailey v. Tennessee Coal, Iron & Railroad Co.*, 75 So. 2d 117, 120-121 (Ala. 1954); C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(3).
14. *Gamble's Ala.R.Evid.*, Rule 806(6), footnotes 11 & 12; *Meriwether v. Crown Inv. Corp.*, 268 So. 2d 780 (Ala. 1972); *Ikner*, 477 So. 2d at 390; *Reeves*, 534 So. 2d at 1113-1114.
15. *Reeves*, 534 So. 2d at 1113.
16. *Gamble's Ala.R.Evid.*, Rule 806(6), footnote 13, advisory committee's notes at Appendix p. A-131; *McElroy* Section 254.01(2); *Pan American Petroleum Corp. v. Mullack*, 167 So. 2d 728 (Ala. 1936); see also *Reeves*, 534 So. 2d at 1113-1114 (Ala. 1988)(to lay a proper foundation, the person who reports/prepares the information in the records must be an "authorized person" acting within the line and scope of the business who created the record and the authorized person must have first-hand knowledge of the information in the record to overcome a hearsay objection). Moreover, "[w]here the information comes to the entrant or maker from unauthorized persons, the record is inadmissible not because it contains hearsay, but because it was not made in the regular course of business." *Reeves*, 534 So. 2d at 1112. Please also see *Giddens v. State*, 565 So.2d 1277, 1279(Ala.Crim.App. 1990)(the person with personal, first-hand knowledge of the contents of the report and who prepared the report, must be a "regular" employee of the business responsible for the report in order to qualify for admission under the business records exception or Section 12-21-43, *Code of Alabama*).
17. *Tomlin v. State*, 601 So. 2d 130 (Ala.Crim.App. 1991). "The very essence of the admissibility of a business record is its probability of trustworthiness." quoted in *Neal v. State*, 372 So. 2d 1331, 1343 (Ala.Crim.App. 1979).
18. Section 12-21-5 to 7, *Code of Alabama*; *Pickett v. State*, 456 So.2d 330 (Ala.Crim.App.1982). See Section 12-21-7 which provides a statutory form or the certificate the hospital custodian should complete in conjunction with the production of the patient's medical records. In my opinion, for efficiency and to save all parties time and expenses, the qualified admission of certified medical records should be extended to cover all licensed medical providers, not only hospitals. To date, the Alabama legislature has not extended this practical option to medical providers other than hospitals.
19. *Wyatt v. State*, 405 So. 2d 154 (Ala.Crim.App.1981).
20. *Reynolds v. State*, 484 So. 2d 1171 (Ala.Crim.App.1985); *Seay v. State*, 390 So. 2d 11, 12 (Ala. 1980).
21. *Shorts v. State*, 412 So. 2d 830 (Ala.Crim.App. 1981).
22. *Reynolds*, 484 So. 2d 1171.
23. *Whetstone v. State*, 407 So. 2d 854 (Ala.Crim.App. 1981). *Wyatt*, 405 So. 2d 154.
24. *J.T.H. v. W.R.H.*, 628 So. 2d 894, 897 (Ala.Civ.App. 1993); *Smith v. State*, 354 So. 2d 1167 (Ala.Cr.App. 1977); C. Gamble, *McElroy's Alabama Evidence*, Section 254.01(7), footnote 3, (3rd ed. 1977).
25. *Id.*, at 897.
26. *Pickett*, 456 So. 2d at 336.



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27. *Pickert*, 456 So. 2d at 335-337.
28. *Nelson By Sanders v. Meadows*, 684 So. 2d 145, 150 (Ala.Civ.App. 1996); *Vines v. Plantation Motor Lodge*, 336 So. 2d 1338, 1339 (Ala. 1976).
29. C. Gamble, *McElroy's Alabama Evidence* Section 128.09 (3rd Ed 1977); cited in *Dean v. City of Dothan*, 516 So. 2d 854, 855 (Ala.Cr.App. 1987).
30. *City of Birmingham v. Watkins*, 670 So. 2d 878, 880 (Ala. 1995).
31. Plaintiff can testify concerning their inability to work following injury, *Prescott v. Martin*, 331 So. 2d 240, 246 (Ala. 1976); their loss of weight, pain and insomnia following injury, *St. Louis & San Fran. R.R. v. Savage*, 50 So. 113 (1909); and a third-party lay witness can testify to a plaintiff's physical appearance and condition before and after an injury, *Piel v. Dillard*, 414 So. 2d 87, 90 (Ala.Civ.App. 1982). *But see Golden v. Stein*, 670 So. 2d 904, 908 (Ala. 1995) ("issue of proximate cause is not always beyond the keen of the average layman.") The average layman (juror), without the assistance of an expert, can recognize a causal connection between a negligent act and an apparent injury claimed by the plaintiff.
32. *Knapp v. Wilkins*, 2000 WL 1273670, page 5, (Ala. 2000); see also §12-21-160, *Code of Alabama*, 1975; Rule 702, A.R.Evid.; A physician and/or expert is qualified to render an expert opinion by his study, education, licensure, practice, experience, and observation of the plaintiff/patient. *Radney v. State*, 342 So. 2d 942 (Ala.Cr.App. 1979); *Knapp* at 6; *Bird v. State*, 594 So. 2d 676 (Ala.Cr.App. 1991).
33. *Hampton v. State*, 621 So. 2d 376, 377 (Ala.Cr.App. 1993); citing *White v. State*, 423 U.S. 951 (1975).
34. *Knapp v. Wilkins*, 2000 WL 1273670 (Ala. 2000).
35. *Tidwell v. Upjohn Co.*, 626 So. 2d 1297, 1301 (Ala. 1993); *Willard v. Perry*, 611 So. 2d 358 (Ala. 1992).
36. *Western Ry. of Ala. v. Brown*, 196 So. 2d 392, 400 (Ala. 1967).
37. *Id.*, at 401.
38. *Id.*, From a practitioner's view, clever attorneys will use the term "reasonable degree of medical certainty" in a physician's deposition because it seemingly implies absolute certainty as to causation, which some physicians will feel uncomfortable testifying to, especially in soft-tissue injury cases. Attorneys must be aware of the equality of the terms "reasonable degree of medical certainty" and "probable cause" with respect to causation of an injury.
39. *Stewart v. Lowery*, 484 So. 2d 1055, 1058 (Ala.1985).
40. *State Realty Co. v. Ligon*, 119 So. 672, 674 (1929); *Frazier v. State*, 366 So. 2d 360, 365-66 (Ala.Cr.App. 1979); C. Gamble, *McElroy's Alabama Evidence*, Section 110.01(1).
41. *White v. Alabama*, 314 So. 2d 857, 862 (Ala. 1975); *cert. denied*, 96 S.Ct. 373 (1975).
42. *Birmingham Amusement Co. v. Norris*, 216 Ala. 138, 112 So. 633 (1927); *Aplin v. Dean*, 231 Ala. 320, 164 So. 737 (1935)(reasonable and proper charges); *Alabama Pattern Jury Instructions Civil* 11.09 (2nded. 2002); §25-5-77 *Code of Alabama*, 1975.
43. See *Ex parte Hicks*, 537 So. 2d 486, 489 (Ala. 1988)(trial court improperly excluded evidence of reasonable hospital charges were it was shown that treatment was necessary and justified).
44. *Sweet v. Foust*, 419 So. 2d 260, 261 (Ala.Civ.App. 1982).
45. See *Leonard v. Steelman*, 693 So. 2d 476, 477 (Ala.Civ.App. 1997); *Shelby v. Phillips*, 694 So.2d 30, 31 (Ala.Civ.App. 1997); *Bennich v. Kroger Co.*, 686 So. 2d 1256, 1257 (Ala.Civ.App. 1996); *Nix v. Key*, 682 So. 2d 1371 (Ala.Civ.App. 1996); *Brannon v. Webster*, 562 So. 2d 1337, 1339 (Ala.Civ.App. 1990); *Union Telegraph Co. v. Green*, 47 Ala. App. 427, 255 So. 2d 896 (Ala.1971).
46. *Lynch v. Rowser*, 597 So. 2d 227, 229 (Ala.Civ.App. 1992). Further, once liability is established, the trier of fact must determine the injured party's damages. These damages must include an amount at least as high as the uncontradicted special damages or reasonable medical expenses related to treatment, as well as an amount as compensation for pain and suffering.
47. *Aetna Life Insur. Co. v. Hare*, 256 So. 2d 904 (Ala. 1972); *Hamrick v. Daniel*, 449 So. 2d 1247, 1248 (Ala.Civ.App. 1984).
48. *Posey v. McCray*, 594 So. 2d 152, 154 (Ala.Civ.App. 1992).
49. *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 727 (Ala. 1990).
50. *Id.* Emergency room physicians reluctant to testify about the reasonableness of a hospital's bills must be advised that their opinion is allowed even though they may be unfamiliar with their hospital's actual billing practices.
51. Rule 36, A.R.Civ.P.
52. Rule 54(d); Rule 37(a) 4, A.R.Civ.P.
53. Rule 16(c)(3)&(4), A.R.C.P.
54. *Osborne Truck Lines, Inc. v. Langston*, 454 So. 2d 1317 (Ala. 1984); *Watson v. McGee*, 348 So. 2d 461 (Ala.1977).
55. *Stricklin v. Skipper*, 545 So. 2d 55, 57 (Ala.Civ.App. 1988).
56. *Id.*
57. *Id.* The lesson of *Sticklin* is that stipulations concerning questions of law are binding, but stipulations concerning questions of fact are conditioned on acceptance by the jury, who is the supreme judge of the facts.



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J. Anthony McLain

Ethics of a Lawyer's Protection Letters

Question:

Does an attorney have an ethical obligation to honor "protection letters" sent by the attorney to the creditors of a client, either at the client's request or with the client's knowledge and approval, when the client subsequently instructs the attorney not to pay the creditors?

Answer:

An attorney is ethically compelled to fulfill commitments made to a client's creditors pursuant to Rules 4.1(a), 8.4(c), 1.15(b) and 1.2(d) of the Rules of Professional Conduct.

Discussion:

It is a frequent occurrence in the legal profession that an attorney will represent a client who has a meritorious cause of action but who has also incurred substantial indebtedness. The client may have incurred medical expenses for treatment of the injuries which form the basis of the cause of action or the indebtedness may be the result of the client's inability to work due to such injuries or it may be that for some other reason the client is unable to meet his or her financial obligations. If the anticipated recovery on behalf of the client would be sufficient to pay the client's debts, the client may ask the attorney to, or agree for the attorney to, contact the client's creditors and request forbearance in collection efforts in exchange for promise of payment upon receipt of settlement or judgment proceeds from the client's pending cause of action. Such written commitments on the part of the attorney are commonly referred to as "protection letters."

It sometimes happens that upon receipt of the proceeds the client will have a change of heart and, despite the previous instruction or authorization, will instruct the attorney not to pay the client's creditors, thus placing the attorney in an ethical dilemma. The attorney is faced with the choice of either disregarding

the client's express directive or giving the appearance of having lied to the client's creditors.

However, the Rules of Professional Conduct provide ethical guidance in addressing this dilemma. Rule 4.1(a), for example, provides, in pertinent part, as follows:

"Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person"

Of similar import is Rule 8.4(c):

"Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

While in many, if not most instances, protection letters are provided in good faith, an attorney would be guilty of violating Rule 4.1(a) and Rule 8.4(c) if, at the time protection letters were sent, the attorney had reason to believe, or even suspect, that the client did not really intend to pay the creditor.¹

Further guidance is found in Rule 1.15(b), which addresses an attorney's ethical obligations upon receipt of funds or other property in which a third person has an interest.

"Rule 1.15 Safekeeping Property

Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or

third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.”

It is the opinion of the Disciplinary Commission that an attorney who has sent a protection letter to a client’s creditor and who is holding in trust, funds to pay the creditor, is ethically obligated by the above-quoted Rule to pay the creditor those funds which the creditor “is entitled to receive”.

Perhaps the Rule most relevant to the issues presented here is Rule 1.2(d), which provides, in part, as follows:

“Rule 1.2 Scope of Representation

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”

In RO-90-48, the Disciplinary Commission concluded that an attorney who releases all settlement or judgment proceeds to the client, after having told the client’s creditors that the proceeds would be used to pay the client’s debts, has assisted the client in a fraudulent act as expressly prohibited by Disciplinary Rule 7-102(A)(7), which is the verbatim predecessor, under the previous Code of Professional Responsibility, to the above-quoted Rule 1.2(d).

However, the Disciplinary Commission is of the opinion that RO-90-48 is due to be modified in one respect. The inquiry of the attorney requesting that opinion was whether he could ethi-

cally interplead the money claimed by a client’s creditor when the client refused to authorize payment to the creditor. The Disciplinary Commission opined that he could ethically do so. The Commission wishes to refine this position further by holding that money which an attorney has promised to pay creditors should not be interpled unless there is a dispute between the client and the creditor as to existence of the debt, the amount of the debt or the reasonableness of the debt. Accordingly, RO-90-48 is hereby modified in accordance with this opinion.

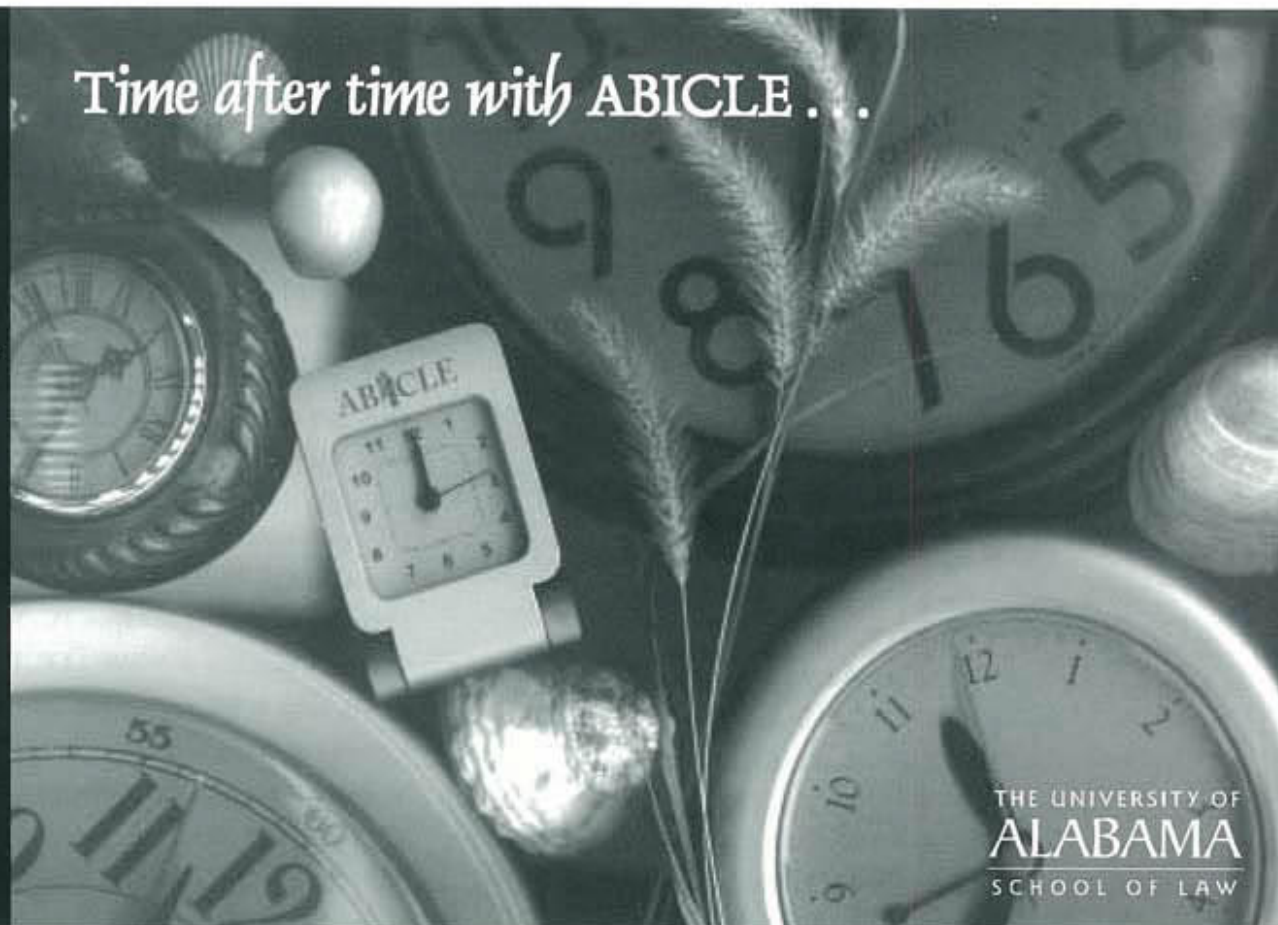
In summation, it is the opinion of the Disciplinary Commission that the Rules of Professional Conduct ethically preclude an attorney from failing or refusing to honor his commitment to pay a client’s creditors. The attorney is ethically obligated to fulfill his commitment and pay the creditors, despite the client’s insistence that he not do so. However, this ethical obligation exists only where the debt, and the amount thereof, is reasonable and undisputed. If there is a legitimate question concerning the debt, or the amount of the debt, the attorney should interplead the disputed funds and let the court reach a determination regarding the creditor’s claim. [RO-2003-02] ■

ENDNOTES

1. This predicament can be avoided by obtaining from the client written authorization to pay creditors. Such authorization should include language to the effect that the creditor acknowledges that the authorization is irrevocable and the client understands that, when the attorney has made a commitment to pay the creditor pursuant to that authorization, the attorney is ethically obligated to do so, regardless of whether the client’s preference in the matter may change. This language may be included in the attorney’s employment contract with the client.

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The Young Lawyers' Section deeply appreciates everyone's involvement in and support of the Sandestin Seminar.

This year also marks our second annual Iron Bowl CLE, to be held November 21st, the day before the Iron Bowl, at Jones School of Law in Montgomery. Confirmed speakers include **Judge Sharon Yates**, presiding judge of the Alabama Court of Civil Appeals, and **Judge Terry Bozeman**, district court judge of Lowndes County. This promises to be another great and educational event sponsored by the YLS. If you have any questions about the Iron Bowl CLE, please contact **Jimbo Terrell** or **Anna Katherine Bowman**.

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Throughout the year I will keep you up to date on our numerous projects, such as the Admissions Ceremonies, the Minority Pre-Law Conference, FEMA Response Project and, of course, the Sandestin Seminar. We look forward to the challenges and hard work (along with the fun) that these projects provide. ■

Stuart Y. Luckie is a partner in the firm of Diamond, Hasser, Frost & Luckie.

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- Notice is hereby given to **Melvin Lamar Bailey**, who practiced law in Upper Marlboro, Maryland and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 14, 2003, he has 60 days from the date of this publication (November 15, 2003) to come into compliance with the Mandatory Continuing Legal Education requirements for 2002. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 03-82]
- Notice is hereby given to **Kimberly M. Neighbors Carey**, who practiced law in Mobile, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 14, 2003, she has 60 days from the date of this publication (November 15, 2003) to come into compliance with the Mandatory Continuing Legal Education requirements for 2002. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 03-83]
- Notice is hereby given to **Roy Lajuan Dancybey**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 10, 2003, he has 60 days from the date of this publication (November 15, 2003) to come into compliance with the Mandatory Continuing Legal Education requirements for 2002. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 03-111]
- Notice is hereby given to **Adam Daniel Danneman**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 1, 2003, he has 60 days from the date of this publication (November 15, 2003) to come into compliance with the Mandatory Client Security Fund Assessment Fee requirement for 2003. Noncompliance with the Client Security Fund Assessment Fee requirement shall result in a suspension of his license. [CLE No. 03-17]



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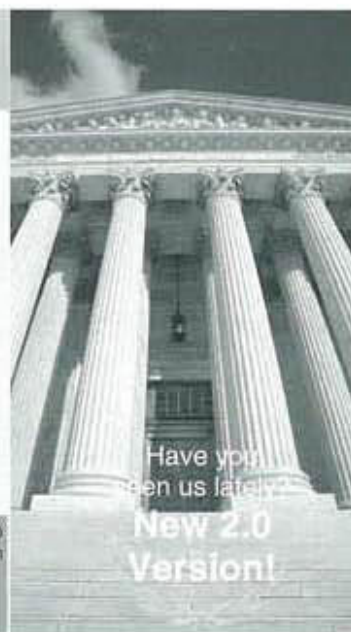
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Disability Inactive

- Guntersville attorney **Robert Carey Mann** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective June 19, 2003. [Rule 27(c); Pet. No. 03-02]

Reinstatements

- The Disciplinary Board, Panel V, upon reviewing the petition for reinstatement of Deephaven, Minnesota lawyer **Joan McLendon Budd** ordered that Budd be reinstated to the practice of law in the State of Alabama, without the necessity of a hearing, effective August 13, 2003. Budd was suspended on December 6, 1999 for non-compliance with MCLE. [Pet. No. 03-06]
- The Disciplinary Board, Panel V, ordered that former Birmingham attorney **Whitmer A. Thomas** be reinstated to the practice of law in the State of Alabama, with certain conditions, effective June 17, 2003. Thomas was issued a five-year suspension on March 13, 1998. The Board's order, dated June 19, 2003, was adopted by the Alabama Supreme Court on July 3, 2003. [Pet. No. 03-03]

Suspensions

- Effective August 8, 2003, attorney **Davis Duane Carr**, of Glenview, Illinois, has been suspended from the practice of law in the State of Alabama for noncompliance with the 2002 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 03-07]
- On March 7, 2003, the Supreme Court of Alabama adopted the February 7, 2003, order entered by the Disciplinary Board, Panel IV, accepting the conditional guilty plea entered by Montgomery attorney **Kenneth Talvin Hemphill**. This suspension was the result of the following four bar complaints. [Hemphill has been suspended since February 18, 2001.]

In ASB No. 01-41(A), the complainant hired Hemphill to represent her and her company in a civil lawsuit. The complainant was the defendant in connection with a "slip and fall" injury. On or about June 3, 1999, at the direction of Hemphill, to settle the lawsuit, the complainant gave him a check in the amount of \$4,700 payable to his trust account. This check was deposited into Hemphill's trust account on that same date. Later, the complainant requested documentation of the settlement of her lawsuit. Hemphill produced a copy of a case action summary showing that the lawsuit had been dismissed August 4, 1999. (The case action summary also shows the case was initially settled on January 5, 1999.) Hemphill's trust account records did not contain any checks made payable to the plaintiff or her attorney. In another matter, on or about July 12, 1999, the complainant gave Hemphill a check for \$8,800 payable to his trust account. Hemphill was to use this money to negotiate a settlement with the IRS in regard to a \$17,727.63 tax liability owed by the complainant. The check was deposited into Hemphill's trust account on July 13, 1999. Hemphill did not negotiate with the IRS on the complainant's behalf, and never paid the IRS any money on the complainant's behalf. On October 2, 2000, the complainant received a "Reminder of Overdue Tax" from the IRS. With interest on late payment, the total amount owed had increased to \$21,395.60. Hemphill's trust account records

did not show any check payable to the IRS on behalf of the complainant. Hemphill misappropriated the complainant funds to his own use or to the use of other persons, and thereby violated rules 1.15(a), 1.15(b), 8.4(c) and (g), *Alabama Rules of Professional Conduct*.

In ASB No. 01-152(A), on or about March 4, 1998, the complainant retained Hemphill to represent her with her divorce and paid him a fee of \$364. Although the complainant was unable to locate her husband for service, she asked Hemphill to complete the divorce by whatever means necessary and agreed to pay any additional costs and fees. Hemphill would not respond to telephone calls or correspondence from the complainant. On January 3, 2001, the complainant requested a refund because of Hemphill's neglect and his failure to communicate with her about her legal matter. Despite three letters from the Office of General Counsel, Hemphill failed or refused to respond. Hemphill was guilty of violating rules 1.3, 1.4(a), 1.5(a), 8.1(b), and 8.4(g), *Alabama Rules of Professional Conduct*.

In ASB No. 01-164(A), Household Finance Corporation of Alabama (Household) was the owner of some real property located in Prattville, Alabama. Household acquired title through an earlier mortgage foreclosure. A buyer negotiated to purchase the property from Household. The buyer obtained mortgage financing from Lincoln Mortgage, LLC.

Hemphill was the attorney for the buyer and the lender, Lincoln Mortgage, at the closing of the sale. The real estate transaction

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was closed by Hemphill on November 3, 2000. The purchase price was \$79,000. Household was to receive proceeds in the amount of \$76,492.60, in return for a deed to the property. Household deeded the property to the buyer. Hemphill issued a worthless check for \$76,492.60 from his trust account. Household made several demands that Hemphill pay over the sale proceeds, but he failed to do so. Hemphill did not provide a written response to the Office of General Counsel regarding the complaint. Household filed suit against Hemphill, the buyer and Lincoln Mortgage. A default judgment was obtained against Hemphill. Defaults against the other defendants were set aside. Hemphill was guilty of violating rules 1.15(a), 1.15(b), 1.15(d), 8.1(b), 8.4(b), and 8.4(g), *Alabama Rules of Professional Conduct*.

In ASB No. 01-195(A), Hemphill filed a Chapter 13 Bankruptcy for the complainant in 1993 and failed to properly address the issues of her unpaid student loans. After being notified about the problem with her student loan, the complainant attempted to contact Hemphill for assistance in addressing this problem. Hemphill failed to take any action. The Internal Revenue Service withheld two consecutive years' tax refund checks due the complainant to apply to the unpaid loan. Despite three letters from the Office of General Counsel, Hemphill did not provide a written response. Hemphill was guilty of violating rules 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*.

Hemphill entered a plea of guilty to the allegations in the formal charges filed in ASB nos. 01-41(A) and 01-164(A), and accepted a four-year suspension as concurrent discipline in a total of

four complaints. Defaults had already been entered in ASB nos. 01-152(A) and 01-195(A). [ASB nos. 01-41(A), 01-152 (A), 01-164 (A) and 01-195 (A)]

- Effective August 8, 2003, attorney **Robert Carey Mann** of Guntersville, Alabama, was suspended from the practice of law in the State of Alabama for noncompliance with the 2002 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 03-41]
- On July 10, 2003, the Disciplinary Commission of the Alabama State Bar ordered, pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, that Sylacauga attorney **Michael Anthony Givens** be summarily suspended from the practice of law in the State of Alabama. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing Givens's lack of response to the bar regarding disciplinary matters. The nature of Givens's conduct represented a threat to his present clients, as well as to the members of the public at large who are potential clients.

On July 28, 2003, a hearing was held before Disciplinary Board, Panel V, pursuant to Givens's "Petition for Dissolution or Amendment of Interim Suspension or Summary Suspension." Givens entered a "Conditional Guilty Plea" to all pending complaints pending with the bar. The Disciplinary Board ordered that Givens receive a one-year suspension from the practice of law in Alabama, the imposition of which will be suspended and held in abeyance pending a two-year probationary period, with special conditions. [Rule 20 (a) Petition 03-07, ASB nos. 01-304(A), 02-129(A), 03-17(A), 03-113(A), and 03-171(A)] ■

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The University of Alabama System

The University of Alabama System invites nominations and applications for the position of general counsel, the chief legal officer of Alabama's largest and most complex higher education enterprise.

Serving the board of trustees, the chancellor, campus presidents and all components of the UA System, the general counsel represents these entities in all legal matters and is responsible for the delivery of all legal services, including the conduct and resolution of litigation, the prosecution and settlement of all claims, and the legal review of all significant transactions. This position is charged with staffing, organizing and administering the Office of Counsel in the University System Office (located in Tuscaloosa), and offices at The University of Alabama, The University of Alabama at Birmingham and the UAB Health System, and The University of Alabama

in Huntsville, as well as retaining and managing all outside counsel performing legal services for the University.

Candidates for general counsel should:

Present the ability to serve as the manager of a dynamic legal operation, serving clients with wide ranging issues including health care, higher education, employment and litigation in a complex, rapidly expanding organization;

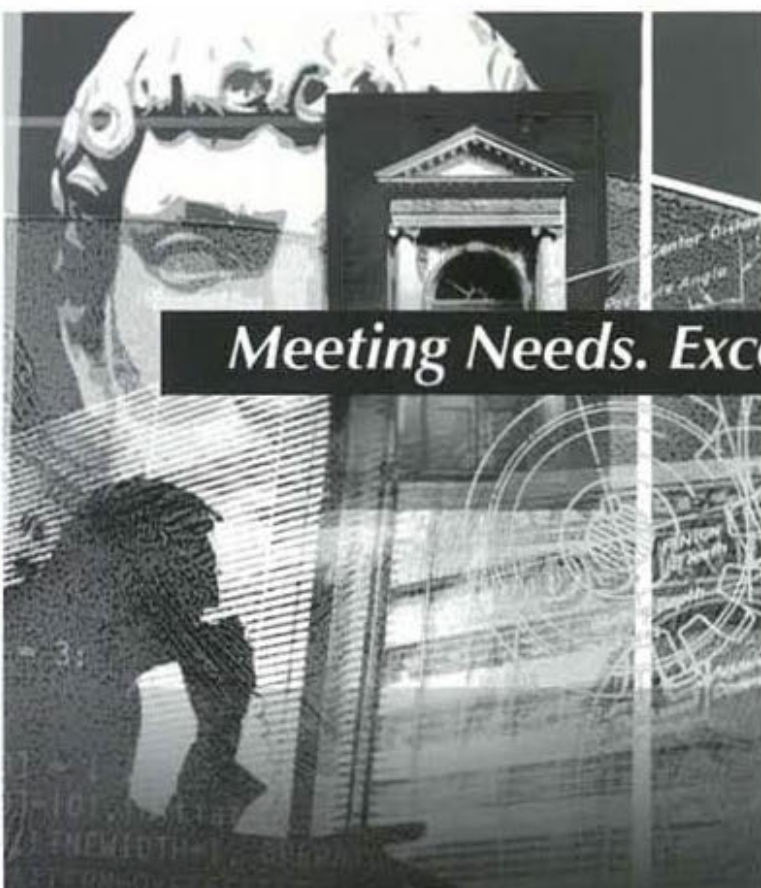
Relate well as a peer to leading lawyers statewide; and

Have a sophisticated working knowledge of the Alabama legal system and all its parts.

Salary is to be negotiated with the chancellor, subject to approval by the board of trustees.

Nominations and applications should be submitted immediately to: Ms. Fannie Turner, The University of Alabama System, 401 Queen City Avenue, Tuscaloosa 35401, or send an e-mail to uashr@uasystem.ua.edu.

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