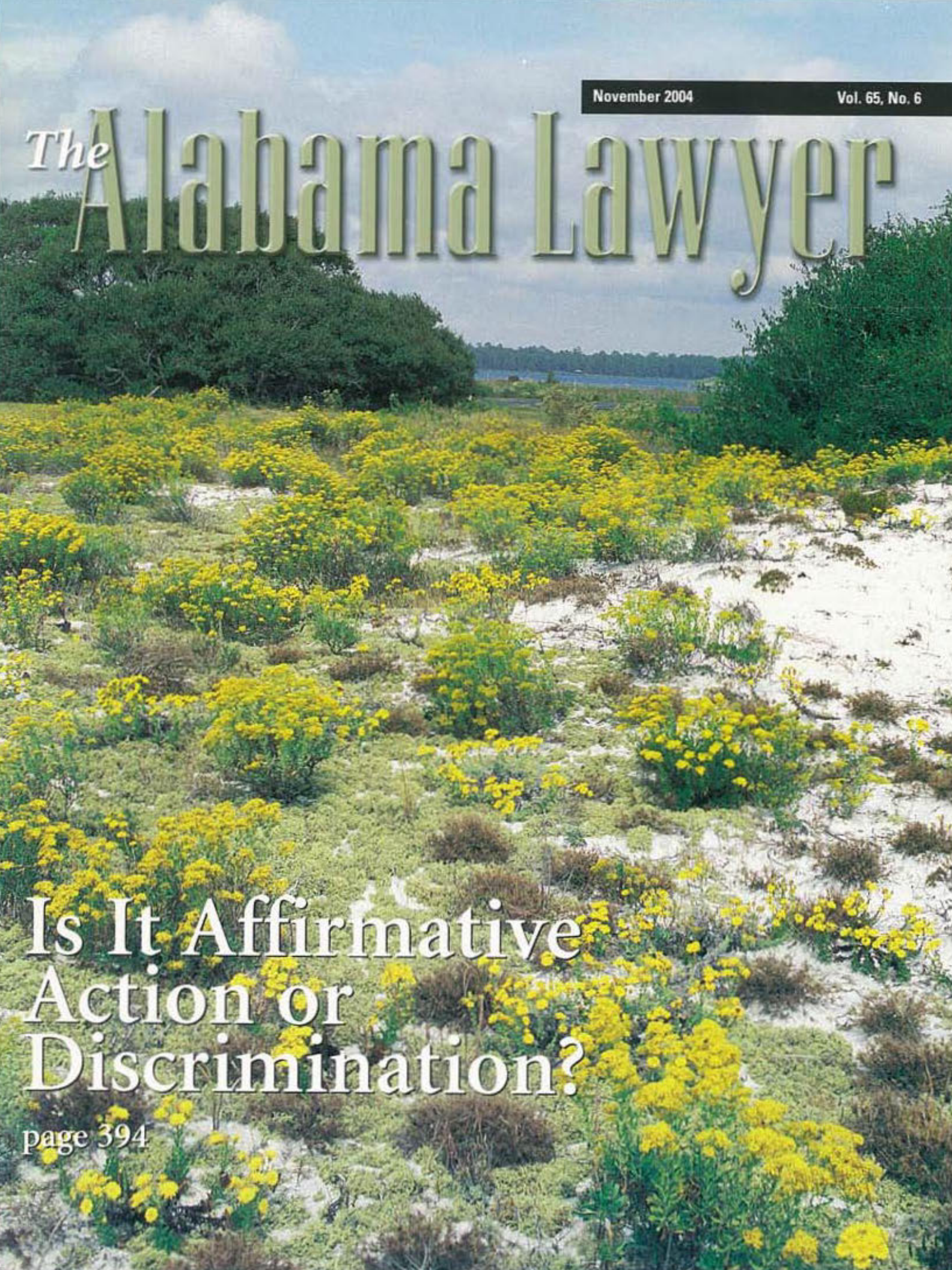
November 2004 Vol. 65, No. 6

The Alabama Lawyer



Is It Affirmative Action or Discrimination?

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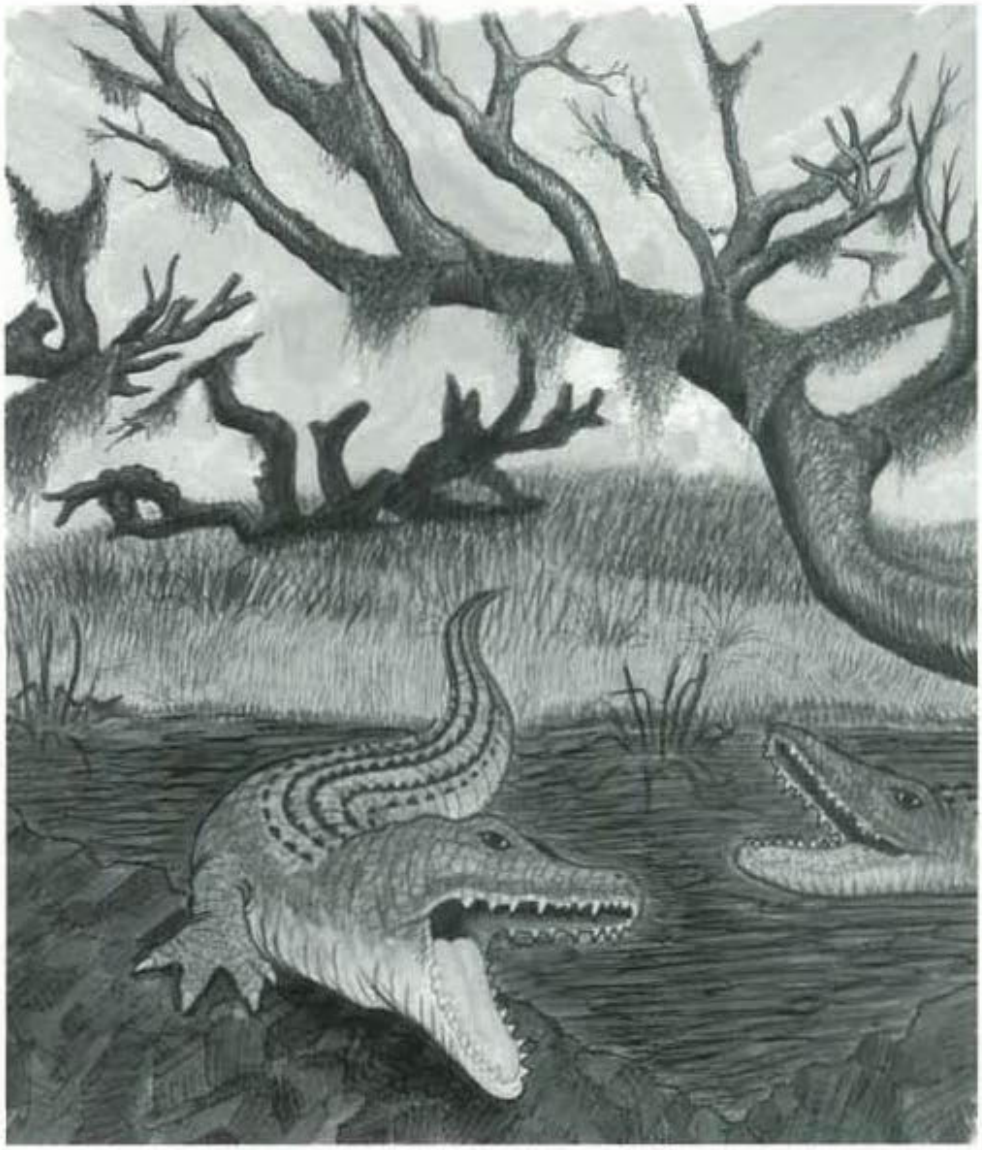

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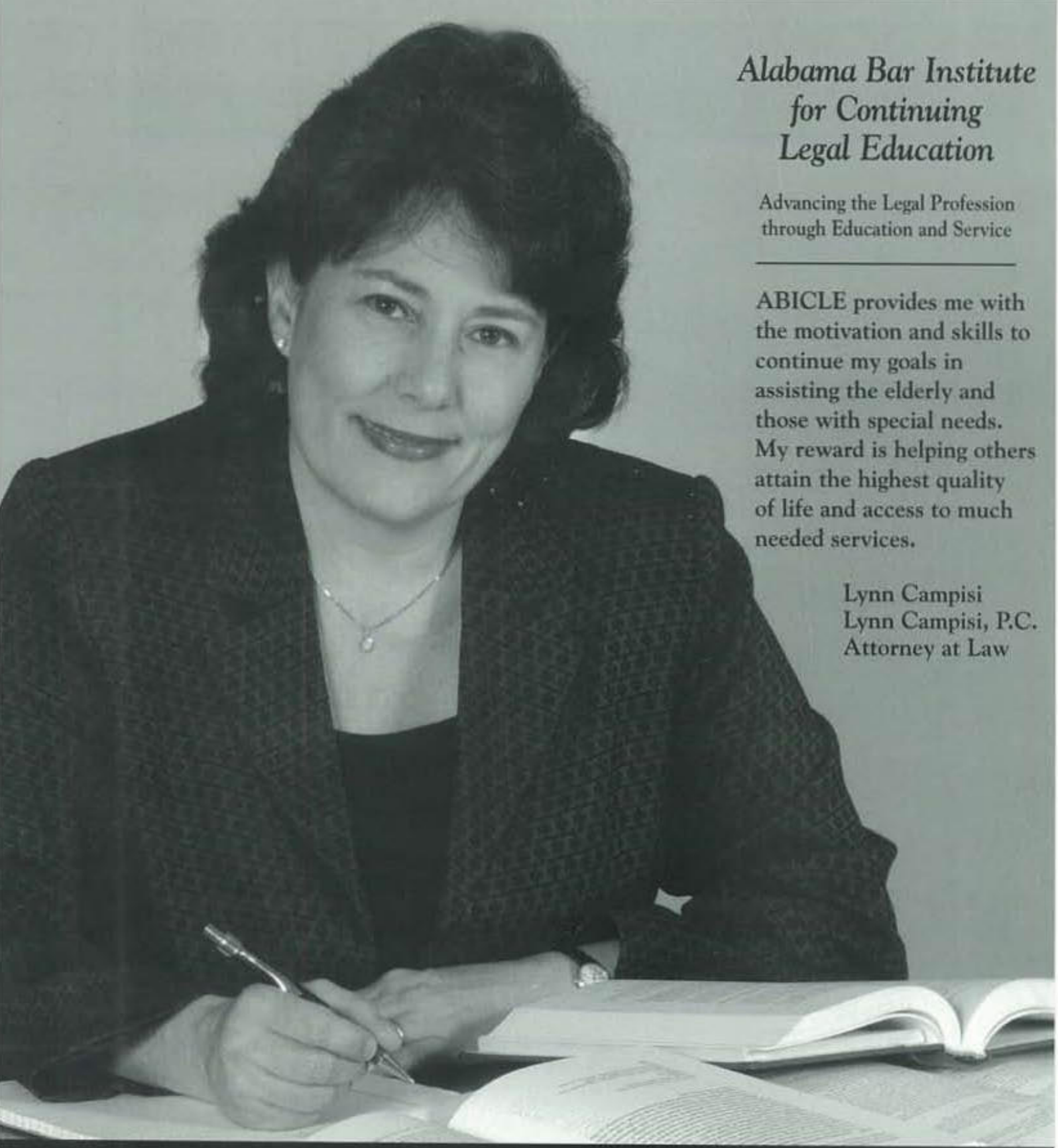

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Attorney at Law

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The Alabama Lawyer

November 2004 Vol. 65, No. 6

ON THE COVER

Coastal wildflowers blooming in the fall, Gulf Shores, Alabama

Photo by Paul Crawford, JD

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415 Dexter Avenue, Montgomery, AL 36104
(334) 269-1515, (800) 354-6154 • FAX (334) 261-6310
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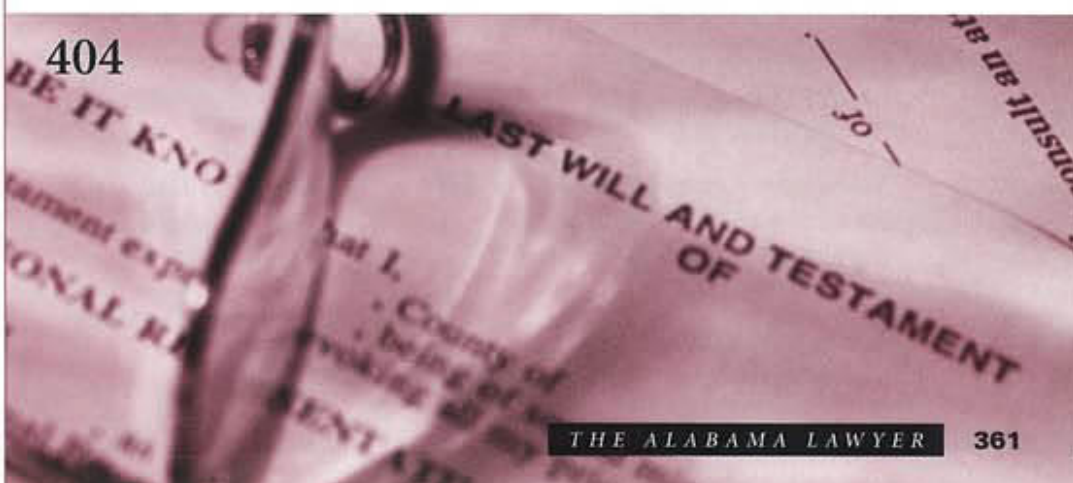

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By Douglas McElvy

Progress: Impossible Without Change

George Bernard Shaw once said, "Progress is impossible without change, and those who cannot change their minds cannot change anything." I don't think he was talking about those kinds of sea changes that throw society and culture into convulsion, or changing firmly-held moral convictions, but rather about simply seeking to improve the status quo.

The Alabama State Bar was founded in January 1879, and has been led by many great lawyers who have been sensitive to keeping our bar and its service to Alabama lawyers on the cutting edge. Since we are a mandatory or "integrated" bar, membership is required to practice law in the State of Alabama. By state law, our major function is regulatory, meaning we have the responsibility to oversee the admissions process, including character and fitness requirements and the bar examination. Additionally, we have the regulatory responsibilities of lawyer discipline, professionalism, continuing legal education and other related duties.

We are blessed with an excellent staff which oversees our regulatory functions and also recognizes an additional function of our state bar, which is to serve our members. My goal and the goal of the bar staff is to provide a level of services which would make members want to belong to the Alabama State Bar, even if it were not mandatory. We realize that to accomplish this goal we must be open to change to provide the most up-to-date programs and services to meet the professional challenges confronting you as an Alabama lawyer.

Part of the process of improving involves our **Long-Range Planning Initiative. Caine O'Rear** has graciously consented to lead our long-range planning effort, which will include a diverse group of legal professionals from all over our state. We will also continue the initiative commenced by former **President Bill Clark** to implement the Alabama State Bar **Leadership Forum. Pat Graves** and **Alyce Spruell** did a great job in pulling together this initiative, and the Alabama State Bar

Leadership Forum received a generous contribution from **Allen Dodd** and **John David Dodd** in the amount of $10,000, in the memory of their late law partner and former state bar **President Bill Scruggs**. This is a great leadership initiative, and lawyers who are interested should download an application from the Alabama State Bar Web site, *www.alabar.org*.

We will continue other initiatives started by Bill Clark and other past presidents, such as the work of our ad hoc committee on judicial selection, indigent defense commission legislation, and the work of our task force on admissions, which has almost completed a corporate counsel affiliation rule.

Last year, the Alabama legislature passed an act amending sections 34-3-40 and 34-3-41 of the *Alabama Code*, enlarging the board of bar commissioners by nine at-large members so the commission can more appropriately reflect the racial, ethnic, gender, age, and geographic diversity of the members of the state bar. The new bar commissioners for the at-large positions will take office in July 2005, pursuant to the terms of the act. ASB **Vice-President Anthony Joseph** is leading an ad hoc committee to develop the rules for implementation of the act as required by law.

Past President Dag Rowe is heading a committee to review the rules and procedures for the election of the president-elect of the Alabama State Bar. The committee will be examining issues to facilitate the election process, as well as the use of electronic communication, which is currently not mentioned in our rules.

Access to justice issues have always been a major concern in the legal profession. Lawyers have traditionally shouldered the burden for providing legal services to those people in our society who cannot afford lawyers. With the decrease in funding and the consolidation of legal services into one corporation in Alabama, we are beginning to re-think how we can take care of the legal needs of the poor in Alabama. **Sam Stockman**, an attorney in

President's Page

Continued from page 365

Mobile, has agreed to chair an **Access to Justice Task Force** to investigate new ways we can take care of the needs of our poorest citizens. This is a serious issue. Nations and states which have neglected the legal needs of the poor historically have not fared well.

Casemaker is an exciting member benefit coming online in approximately nine months. This is a legal research engine created by lawyers for lawyers, and at last count, 17 states had joined the Casemaker family. Every lawyer in Alabama will have access to the database of the Alabama library, as well as the databases of all other Casemaker states. Through the ASB Web site (*www.alabar.org*), you will be able to access an extensive library, including Alabama statutes and appellate court decisions, 11th Circuit decisions and a wealth of other state and federal resources. It may not include every resource you need, but for a lawyer whose practice is limited to state and federal courts in Alabama, it is very comprehensive. There will be no charge to Alabama lawyers to access Casemaker.

Another initiative this year is the **Judicial Liaison Committee. Jere Beasley** and **Sam Franklin** agreed to co-chair this committee with renewed energy and vigor. Perhaps more than ever, our relationships with the courts must be strengthened, as together we examine the legal profession's core values of integrity, service and fairness. We must strive together to maintain the excellence of our legal system. Only together can we solve problems of professionalism, civility, court funding and respect for the rule of law.

I've heard it said that the legal profession is the glue that holds together democracy. I don't quite agree with that statement, because I believe it is the rule of law that holds together democracy. We lawyers are entrusted with the stewardship of the rule of law, so our role is vital.

In memory of JACQUELINE C. HEARTSILL

Executive Assistant, Alabama Center for Dispute Resolution

September 18, 1935 – September 29, 2004

Because the role of the legal profession is instrumental, it is imperative that we examine ourselves to be sure we are dispatching our responsibilities with the highest standards of character and moral virtue. Public perception of the legal profession is not something we can entirely control or manipulate, though I do believe it is important that the public understand the true nature of the legal profession and that at times our calling requires us to take on unpopular clients and causes. It is my desire to promote a proper understanding of the role of lawyers and the rule of law in our society. Civil order without respect for the rule of law is not possible. Respect for the rule of law without the vigilance of the legal profession also is not possible.

Not too long ago, Alabama lawyers held the majority positions in our state house of representatives and in the state senate. Many lawyers, through Alabama's history, have rendered great service as leaders in Alabama's legislative bodies. Today, there are only 11 lawyers in the Alabama house of representatives and 11 lawyers in the state senate. Our state bar motto is "Lawyers Render Service," and I can think of no better way to serve the public than by using our unique training, skills and talents in the law-making process. One of my goals this year is to launch an initiative to get more lawyers back in the legislative process.

The character and fitness requirements for admission to the Alabama State Bar are very important. Our oath of office requires that we demean ourselves with certain attributes, which means that the legal profession is not for everyone. I would like to see initiatives in law schools and in primary and secondary schools that would enhance the character and fitness of those who seek admission to the legal profession. I have never felt worthy or that I actually measured up to the standards and high moral character required of lawyers. I am mindful every day of my own shortcomings, but I am constantly encouraged by the example of so many of the great and honorable members of our bar whom I am meeting as I travel around the state.

The programs and activities of the Alabama State Bar are designed to serve the members of the bar, to improve the administration of justice, and to serve the public at large. In addition to 19 committees and five task forces, the state bar maintains 23 sections which are designed to facilitate communication and share information among members of the sections. I invite each of you to get involved in state bar activities. We need your leadership. ■

By Keith B. Norman

Recognizing Service

The Alabama State has a number of awards that are presented to recognize bar members, firms and non-lawyers. They are a way of saying "THANK YOU" to those who have gone above and beyond what was expected to serve others, the profession or the administration of justice. Described below are the awards presented by the state bar or a section of the state bar and the recipients of these awards. Except as indicated, these awards are not necessarily presented each year.

William D. "Bill" Scruggs, Jr. Service to the Bar Award

This award was created in 2002 in honor of the late Bill Scruggs, former state bar president, to recognize outstanding and dedicated service to the Alabama State Bar.

2003 E.T. Brown, Birmingham

Alabama State Bar Award of Merit

Established in 1973, this award recognizes outstanding constructive service to the legal profession.

1973 Camille W. Cook, Tuscaloosa
Timothy M. Conway, Birmingham

1974 Hon. Howell T. Heflin, Tuscumbia
A. Stewart O'Bannon, Florence
Robert M. Hill, Jr., Florence
Joseph F. Johnston, Birmingham
Conrad M. Fowler, Columbiana
M. Leigh Harrison, Tuscaloosa
Carl Bear, Montgomery
Ronnie G. Flippo, Florence
M. Roland Nachman, Jr., Montgomery
William Michael House, Montgomery

1975 David Ellwanger, Chicago
Charles T. Cameron, Montgomery
E.T. Brown, Birmingham

1976 Dr. David Mathews, Tuscaloosa
George P. Howard, Wetumpka
N. Lee Cooper, Birmingham
J.O. Sentell, Montgomery
Prime Osborn, III, Jacksonville, Florida

1977 James L. North, Birmingham
William B. Hairston, Jr., Birmingham
Walter Knabe, Montgomery
Robert P. Denniston, Mobile

1978 William F. McDonnell, Sheffield

1979 M. Leigh Harrison, Tuscaloosa

1980 J. Mark White, Birmingham
Hon. Joseph D. Phelps, Montgomery
Norborne C. Stone, Jr., Bay Minette
Edward M. Patterson, Montgomery

1981 William N. Clark, Birmingham
Hon. Robert P. Bradley, Montgomery

1982 William D. Scruggs, Jr., Fort Payne

1983 *Edwin C. Page, Jr., Evergreen*
Tennent Lee, III, Huntsville

1984 *Harold F. Herring, Huntsville*
Robert A. Huffaker, Montgomery

1985 *David R. Boyd, Montgomery*

1986 *Robert L. Potts, Florence*
Henry T. Henzel, Birmingham
Gary C. Huckaby, Huntsville

1987 *Rowena M. Teague, Birmingham*
James S. Ward, Birmingham

1988 *Roy J. Crawford, Birmingham*
John B. Scott, Jr., Montgomery
Wilber G. Silberman, Birmingham
Mary Lyn Pike, Montgomery
Richard H. Manley, Demopolis

1989 *Dennis Balske, Montgomery*
Hon. Albert P. Brewer, Birmingham

1991 *Lewis W. Page, Jr., Birmingham*
Joe C. Cassady, Enterprise
Professor Brad Bishop, Birmingham
Steven W. Ford, Tuscaloosa
Robert W. Lee, Jr., Birmingham

1993 *Dr. Richard A. Thigpen, Tuscaloosa*

1994 *Robert P. Denniston, Mobile*

1995 *Marshall Timberlake, Birmingham*
Hon. Oscar W. Adams, Birmingham
Hon. Albert P. Brewer, Birmingham

1996 *Charles F. Carr, Birmingham*

1997 *Hon. William L. Thompson, Montgomery*

2000 *James E. Rotch, Birmingham*

2001 *Thomas G. Keith, Huntsville*
Elouise Williams, Birmingham

2003 *Edgar C. Gentle, III, Birmingham*
Susan Shirock DePaola, Montgomery

Alabama State Bar Judicial Award of Merit

The Judicial Award of Merit was created to recognize both trial and appellate level judges, not yet retired, for their contribution to the administration of justice.

1989 *Seybourn H. Lynne, Senior United States District Judge, Northern District*
James O. Haley, Circuit Judge, Tenth Judicial Circuit

1990 *Joseph D. Phelps, Circuit Judge, Fifteenth Judicial Circuit*

1991 *David A. Rains, Circuit Judge, Ninth Judicial Circuit*

Executive Director's Report

Continued from page 369

1993 *Sam C. Pointer, Jr., United States District Judge, Northern District*

1994 *William R. Gordon, Circuit Judge, Fifteenth Judicial Circuit*

1996 *Ralph D. Cook, Associate Justice, Supreme Court of Alabama*

1997 *Alva Hugh Maddox, Associate Justice, Supreme Court of Alabama*

1998 *Ira DeMent, United States District Judge, Middle District*

2001 *Sandra Hendrickson Storm, Circuit Judge, Tenth Judicial Circuit*

2002 *Jerry L. Fielding, Circuit Judge, Twenty-Ninth Judicial Circuit*

2003 *Charles R. Butler, Jr., United States District Judge, Southern District*

2004 *Pete Johnson, District Judge, Tenth Judicial Circuit*

Pro Bono Award

The pro bono award was created in 1998 and is given annually. It recognizes those who have represented clients with civil legal needs unable to afford a lawyer or those who have furthered volunteer legal service programs in Alabama.

1998 *Hugh Lee, Tuscaloosa*
Nancy Stuart, Montgomery
Phillip Mitchell, Decatur

1999 *Ken Randall, Tuscaloosa*
Melinda Waters, Montgomery
James R. Seale, Montgomery
Victor H. Lott, Jr., Mobile
Kim O. Ward, Montgomery

2000 *Kelli Hogue Mauro and the founders of the Mobile Pro Bono Program*
Christopher Robin Kelley (student award)

2001 *William H. Rowe, Pinson Berkowitz, Lefkovitz, Isom, Kushner, Birmingham*
University of Alabama School of Law Public Law Institute

2002 *J. Timothy Smith, Birmingham Hand, Arendall, Mobile*
Melissa Briggs Hutchens (student award)

2003 *E. Patrick Hill, Huntsville Cunningham, Bounds, Yance, Crowder, Mobile*
William J.N. Coxwell (student award)

2004 *Allison Alford, Montgomery Maynard, Cooper & Gale, Birmingham*

Local Bar Achievement Award

This award was created in 1994 to recognize the work of local bar associations for the programs or activities conducted in a particular year. Awards are made based on the size of the bar.

1994 *Huntsville-Madison County Bar Association*
Calhoun-Cleburne County Bar Association

1995 *Montgomery County Bar Association*

1996 *Lee County Bar Association*

1997 *Escambia County Bar Association*
Lauderdale County Bar Association
Mobile Bar Association

1999 *Morgan County Bar Association*

2000 *Barbour-Bullock County Bar Association*
Calhoun-Cleburne County Bar Association

2001 *Covington County Bar Association*
Tuscaloosa County Bar Association
Mobile Bar Association

2002 *Macon County Bar Association*
Mobile Bar Association

2003 *Macon County Bar Association*
Mobile Bar Association

2004 *Autauga County Bar Association*
Mobile Bar Association

Alabama State Bar Commissioners' Award

Created in 1998, this award recognizes individuals who have had a long-standing commitment to the improvement of the administration of justice in Alabama.

1998 *Hon. Reneau Almon, Montgomery*
Hon. Janie Shores, Birmingham

2002 *Bryan Stevenson, Montgomery*

2004 *Robert L. McCurley, Tuscaloosa*

Administrative Law Section: Eugene W. Carter Medallion

Named in honor of the former circuit judge of the Fifteenth Judicial Circuit, the Administrative Law Section presents the Carter Medallion to former public servants in recognition of their extensive records of consistent, fair and honest balancing of governmental interests against the rights of individuals.

1983 *Eugene W. Carter*

1984 *Pelham J. Merrill*

1986 *John Stanley Frazer*

1988 *William A. Thompson*

1992 *Daniel Gordon Gill*

1994 *Loula Friend Dunn*

1997 *George Searcy Wright*

1998 *Clinton Jackson Coley*

2003 *Carl L. Evans*

Women Lawyers' Section: Maud McLure Kelly Award

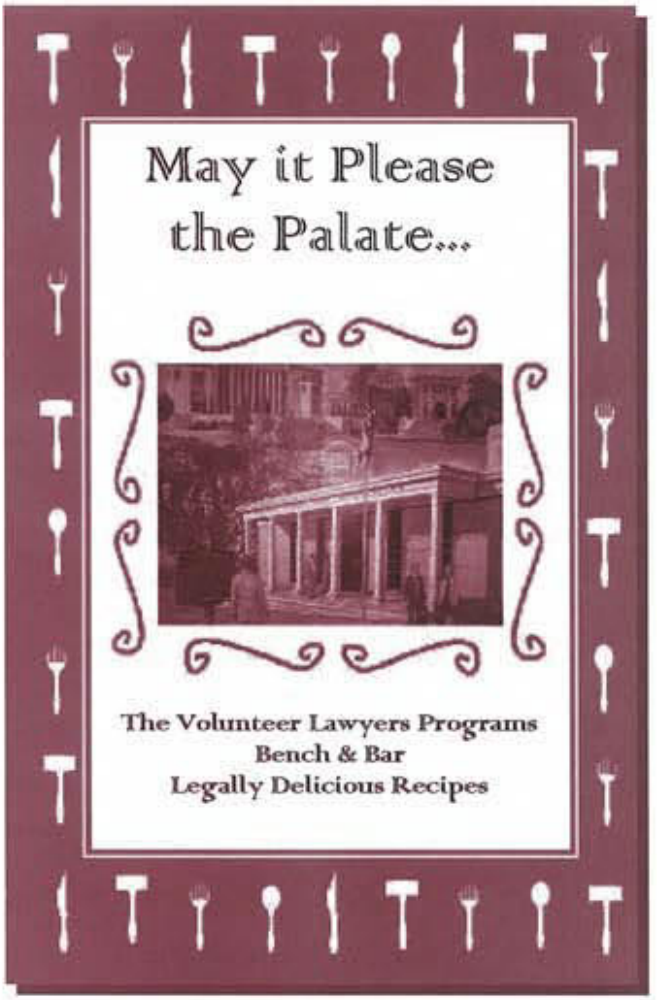
Named for Alabama's first woman lawyer, this award is given to a woman lawyer in recognition of that individual's contributions to the profession.

2002 *Janie Ledlow Shores*

2003 *Alice F. Lee*

2004 *Nina Miglionico*

Service rendered selflessly for another is a noble calling and a hallmark of the legal profession. The individuals who have received these awards are most deserving and are inspiring examples for all of us. They have served well. ■



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Important Notices

Judicial Award of Merit Nominations Due

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15th, 2005. Nominations should be prepared and mailed to:

Keith B. Norman, secretary
Board of Bar Commissioners
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

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

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

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

Mandatory Continuing Legal Education (MCLE) Rule and Regulation Changes, effective January 9th, 2004

Effective January 9, 2004, Mandatory Continuing Legal Education Regulation 2.7 was adopted and MCLE Rule 2.C.2, Rule 3, Rule 5.B, Rule 6.A, and Rule 6.B were amended.

Attorneys are now required to earn one hour each year of ethics or professionalism credit. The minimum number of hours remains 12 hours each year.

Other MCLE Rule revisions include an increase of the late filing fee to $100 and the late compliance fee to $100. Attorneys who fail to comply with the MCLE Rules for late filing and late compliance will be required to pay an additional $300 noncompliance fee.

Attorneys who reside and maintain a principal office in another state that requires MCLE and who can demonstrate compliance with his or her principal state of practice are exempt from the 12-hour CLE requirement but must file the year-end Annual Report of Compliance.

The Rules revisions clarify that assistant or deputy attorneys general and district attorneys, assistant or deputy district attorneys, and public defenders are not exempt from the MCLE Rules.

For a complete listing of all revisions and the full content of the MCLE Rule and Regulation changes, please visit the Alabama State Bar Member page at *www.alabar.org.* ■

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About Members, Among Firms

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

Dennis L. Thompson announces the opening of his office at 112 1st Street, West, Fort Payne 35967. Phone (256) 845-5055.

Among Firms

District Attorney John S. Andrews, Second Judicial Circuit, announces that **Tina Coker Jordan,** formerly law clerk to Alabama Supreme Court Justice Jean Brown, has joined his office as an assistant district attorney.

Austill, Lewis & Simms PC announces that **William E. Pipkin, Jr.** and **Terry A. Moore** have joined the firm as shareholders in the Mobile office, and **Joseph E. B. Stewart** has become a shareholder in the Birmingham office.

Balch & Bingham LLP announces that **Howard Neiswender** has joined the firm.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Wesley Chadwick Cook** has become an associate with the firm.

Burr & Forman announces that **Margaret K. Clark, Dow A. Davidson, Teri D. Fields, Graham W. Gerhardt, Amy K. Jordan, April M. Mason, Matthew T. Mitchell, Beth A. O'Sheasy, Joanne Patterson, Alphonso Simon, Jr.,** and **David G. Wanhatalo** have joined the firm as associates.

Copeland, Cook, Taylor & Bush PA announces that **Ellen Patton** has joined the firm.

Dodson & Steadman PC announces that **Charles A. Graddick, Sr.** has been appointed by Governor Bob Riley to the position of **circuit judge, Thirteenth Judicial Circuit,** and the firm's name has been changed to **Sims, Graddick & Dodson PC.**

Charles J. Fleming, Walter G. Chavers, Chuck Miller and **Robert J. Hedge** announce the formation of **Fleming, Chavers, Miller & Hedge LLP,** with offices located at 169 Dauphin Street, Suite 204, Mobile 36602. Phone (251) 432-4070.

Robert B. French, Jr. PC of Fort Payne announces that **Tommy Allen French** has joined the firm.

The **Jefferson County Medical Society** announces that **Martha Waters Wise** has been appointed executive director.

Lamar, Miller, Norris & Feldman PC announces that **Stephen D. Christie** and **Michael L. Haggard** have become shareholders, and the firm name has been changed to **Lamar, Miller, Norris, Haggard & Christie PC.** The firm also announces that **Lee Stewart** and **Justin South** have become associates.

McCollum & Brown LLC announces that **F. Tim McCollum** has joined the firm.

McCormick & Brown LLC announces that **Hames S. Snedeker** and **J. Ray Hix, Jr.** have joined the firm as associates.

Mercury Air Centers, Inc. announces that **David Moore** has been appointed general counsel and secretary.

Morris-Shea Bridge Company, Inc. announces that **David P.L. Campbell** has been named in-house counsel.

The **Petroleum Technology Transfer Council,** Eastern Gulf Region, announces that **Bennett L. Bearden** has been appointed director.

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About Members, Among Firms

Continued from page 274

Porterfield, Harper, Mills & Motlow PA announces that **Lyman H. Harris** and **Jeffrey K. Hollis** have joined the firm, and that **F. Brady Rigdon, Robert W. Heath, Mark F. Penaskovic** and **Christopher W. Johnson** have joined the firm as associates.

James T. Sasser, Dana L. Rice and **Jennifer Cunningham Barber** announce the formation of **Sasser, Rice & Barber,** with offices located at 309 Broad Street, Gadsden. Phone (256) 546-0611.

Spotswood LLC of Birmingham announces that **Kenneth D. Sansom** has become a member of the firm and that **John R. Parker, Jr.** has become an associate.

Stone, Granade & Crosby PC announces that **Shawn T. Alves** and **R. Scott Lewis** have become shareholders.

Taylor, Martino & Hedge PC announces a name change to **Taylor Martino PC.**

Thomas, Means, Gillis & Seay PC announces that **Monet McCorvey Gaines, Patricia V. Kemp, Tamica Clemons Richard, Clarence Richard, III, Joi C. Scott, Jacqueline C. Smoke, Christopher K. Whitehead,** and **April D. Williams** have joined the firm.

The **City of Tuscaloosa Legal Department** announces that **Thomas D. Bobitt, II** has been appointed as an associate city attorney.

The **State Department** announces that **Don Heflin** has been appointed **Deputy Director of Regional Affairs for Africa.**

Volkert & Associates Inc. announces that **Roger Guilian** has been appointed general counsel.

Walston, Wells, Anderson & Bains LLP announces that **April S. Rogers** has become an associate.

Warranty Corporation, Warranty Acceptance Corporation, Canadian Warranty Corporation, Relcose, Inc., and **Direct Mail International** announce that **Douglas A. Baymiller** has been named secretary and general counsel to the companies. ■

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.**

CASEMAKER® Countdown

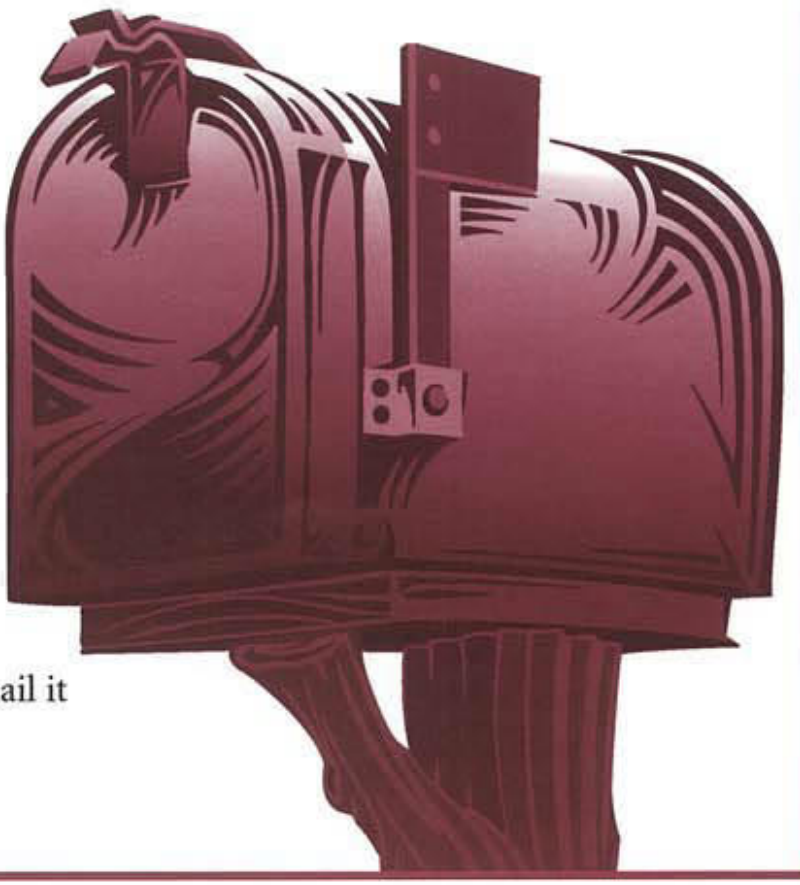
Free online legal research is on the way to ASB members

The 2004-2005 combined edition of

The Alabama Bar Directory

will be in the mail to ASB members February 1st, 2005.

MAKE SURE all member information is corrected by December 1st, 2004. E-mail changes to *ms@alabar.org*, or mail it to ASB Membership, P.O. Box 671, Montgomery, AL 36101.



J. Douglas Harris, Sr.

James Douglas Harris, Sr. died at home in Montgomery on June 7, 2004 at the age of 89. His was a long and productive life of service to his family, friends, church and country.

An Elmore County native, Doug attended the University of Alabama and then served his country in the United States Army during WWII. He was admitted to the state bar in 1942 and practiced law briefly in Tallassee. After his military service, he moved his family to Montgomery, where he enjoyed a long and eventful professional career. Doug served as a hearing officer with the Public Service Commission and later became the executive director of the Alabama Trucking Association. Called back by the law, however, he set up a solo practice in Montgomery, specializing in motor carrier work.

He served as chief assistant for District Attorney Dave Crosland, as city attorney under mayors Jim Robinson and Emory Folmar, and as senior partner of the firm of Harris & Harris PA. It was there that we had the significant opportunity of working with a father who not only cared deeply for our development and success, but also demonstrated integrity and an abiding sense of humor, teaching us that "it doesn't cost much to make someone else feel good."

His civic career was likewise noteworthy. Doug helped to organize and served as president of Montgomery Little League baseball. He was chairman of Montgomery's Senior Citizens Committee and a board member of the Tuckabatchee Council of the Boy Scouts. He helped organize the Jimmy Hitchcock

Memorial Award and was an advisor to the YMCA Youth Legislature. He was president of the Montgomery Lions Club.

Always a man of great faith, he never sent his family, but always took us, to the First Baptist Church, where he was a deacon, choir member and Sunday School teacher. He died conscious of God and without fear and will be missed by many who knew and loved this colorful and excellent man. All honor to his name.

He is survived by his wife of 63 years, Edna Flournoy Harris; his five sons, James D. Harris, Jr., Michael Lee Harris, John Robert Harris, David Patrick Harris, and William Bishop Harris; a brother, Robert P. Harris; a sister, Jane Woodfin; 11 grandchildren; eight great-grandchildren; and numerous friends and professional associates.

–James D. Harris, Jr., Bowling Green, Kentucky, and D. Patrick Harris, Montgomery

Timothy Alan Massey

Our bar lost a treasured member upon the death of Timothy Alan Massey on June 25, 2004. He was born on September 17, 1952, in Birmingham, and was a lifelong resident of eastern Jefferson County. He graduated from the University of Alabama at Birmingham and the Cumberland School of Law, Samford University.

He traveled a much too short, but happy and successful, road in his law practice—and in his life. He started as a solo practitioner and built a law firm of which he was very proud. Tim loved being a lawyer—and he loved life. He was the founding partner and bedrock of what is now Massey, Stotser & Nichols, PC in Birmingham. He was respected both for his expertise and his ability to render service in a way that made each client feel as if he or she were his paramount concern.

Tim was generous of his time and his talents. He served as a leader in the East Jefferson Marketing Group, the Trussville Chamber of Commerce and several other professional and civic organizations. He was a strong supporter of educational and athletic programs in Trussville. On a personal level, Tim's generosity and kindness touched an untold number of lives, for his generosity was often, at his demand, anonymous. He will be missed dearly by family, friends, colleagues and clients.

Tim is survived by his wife, Kennetha Massey; three children, Terra Reed, Emily Massey and Timothy Massey; by his cousin, Edward Seale, and his wife, Barbara Seale, all residents of Trussville.

–Randall W. Nichols, Birmingham

John Randolph Matthews, Jr.

In his 55th year as a member of the Alabama State Bar, John Randolph Matthews, Jr. departed this life on April 28, 2004. John was born January 20, 1925 in Montgomery, the son of Margaret Fuller and John Randolph Matthews. He attended Cloverdale, Barnes, Baldwin Jr. High and Lanier High schools in Montgomery before entering the University of Alabama in 1942. In 1943, he entered the U.S. Navy and graduated from Midshipman's School at Columbia University, receiving his Ensign's Commission at age 19. He immediately commenced amphibious training on the Higgins Boat and the LST and arrived at Okinawa for the invasion of Japan in August 1945 shortly before World War II ended.

He completed his undergraduate studies at the University of Alabama, and in 1948, married Caroline Ball and together they attended the University of Alabama School of Law, graduating in 1950.

In 1950, John commenced private practice with Ball & Ball in Montgomery and remained with that firm, which later became Ball, Ball, Matthews & Novak, until his death. He developed an extensive business practice and aviation defense practice, representing the major aircraft manufacturers in this area. His aggressive and effective representation of his clients is best evidenced by the enormous respect

Continued on page 380

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and friendship he enjoyed among members of the bar.

He was elected to the prestigious American Academy of Trial Lawyers, a select group of trial attorneys in the United States. He served as dean of Jones Law School from 1955 through 1968. He was appointed by United States District Judge Frank Johnson to the Human Rights Committee for Partlow Hospital, on which he served with distinction.

He served as chairman of the board of directors of the Children's Center of Montgomery, president of the Montgomery Chapter of the American Red Cross, trustee and president of the board of St. James School, on the vestry of St. John's Episcopal Church, and on the board of directors of the Autism Society of Alabama.

He is survived by his wife, Caroline; his children, Caroline M. Cutchins, Richmond, Virginia; Jane M. Davis, Annapolis, Maryland; John R. Matthews, III and Fred B. Matthews, Montgomery; five grandchildren; and one great-grandchild. John will be sorely missed, but not forgotten, by his family, law partners and many friends.

–Richard A. Ball, Jr., Montgomery

Simeon Sealy Wilbanks

Simeon Sealy Wilbanks, 92, passed away on April 13, 2004. He was born October 29, 1911, in his beloved Alexander City, and remained an Alexander City resident until the time of his death. He was a 1929 graduate of Alexander City High School. He attended Emory University, and graduated from the University of Alabama School of Law. He began his practice of law in 1936, and was a member of the Alabama State Bar at the time of his death. He served as special counsel for Southern Railroad, and retired from Norfolk Southern Railway as vice-president and assistant to the president. He was founder and CEO of the Citibank Group, which was one of the first bank holding companies in Alabama, and was founder and CEO of The Financial Store, Inc. Mr. Wilbanks served on the board of trustees at Athens State College and Birmingham Southern College, and was on the board of visitors of Emory University. He was instrumental in founding the Alexander City Arts Council, and was a member of the Colonial Lions Club, and past president of the Alexander City Chamber of Commerce. In short, he was a civic activist. Mr. Wilbanks held numerous offices in the First Methodist Church in Alexander City, where he was a lifelong member.

Mr. Wilbanks served his country during World War II in the Judge Advocate General's Corps of the United States Navy as a lieutenant junior grade. He was a lifelong Democrat.

Mr. Wilbanks was an avid international traveler, and owned an ancient country home in Alcester, England, near Stratford upon-the-Avon. He frequently requested that friends and church members visit and stay at this home. Mr. Wilbanks indeed came from a time in the past, but like his English home, was a truly valuable asset to the world. The values with which he was raised were the values he kept to the end. He had a true love for his fellow man, a true love for life and a true love for Alexander City. As was stated in the *Alexander City Outlook*, in an article reflecting on Mr. Wilbanks' passing, "He was a true southern gentleman and a friend to everyone in the community." Amen. We will miss you, Mr. Wilbanks.

He is survived by his wife, Jonnie W. Wilbanks, of Alexander City; one son, Simeon Sealy Wilbanks, and wife Ann of Birmingham; three daughters, Nancy Wilbanks Sellers and husband Fred of Birmingham, Amelia Wilbanks Self and husband Charles of Norman, Oklahoma, and Alice Wilbanks Johnson and husband Benn of Birmingham; 11 grandchildren, Stewart Sealy Wilbanks and wife Ashley; Capt. Fredrick Hagan Sellers, USAF; Robert Wilbanks Sellers and wife Kim; George Simeon Wilbanks; Simeon Sealy Wilbanks Johnson; Natasha Nicole Self; Lara Noelle Self; Kira Katrina Self; Selena Christina Self; Morgan Daniel Wilbanks; and Smith Christian Wilbanks; one great-grandchild, Lily Marjorie Sellers; one sister, Alice Wilbanks Cannady, of Falls Church, Virginia; and one sister-in-law, Nell Fuller Wilbanks, of Alexander City. He was preceded in death by his parents, one brother, Robert Smith Wilbanks, Jr., and one grandmother, Alice Christian Sealy.

One of his grandchildren, Stewart Sealy Wilbanks, is a practicing attorney in Alexander City. Another, Simeon Sealy Wilbanks Johnson, is a senior law student at the University of Alabama School of Law. His granddaughter, Natasha Nicole Self, is a junior law student at the University of Texas.

–Circuit Judge Ray D. Martin, Alexander City

Avant, Grady Jr.
Birmingham
Admitted: 1962
Died: June 2, 2004

Belser, Howard McGriff Jr.
Decatur
Admitted: 1973
Died: May 31, 2004

Fleisher, Louis L.
Birmingham
Admitted: 1947
Died: June 21, 2004

Gray, John Merrill II
Birmingham
Admitted: 1985
Died: July 14, 2004

Keener, Irby Arthur Jr.
Centre
Admitted: 1949
Died: March 2, 2004

Pettus, Erle Jr.
Birmingham
Admitted: 1935
Died: June 26, 2004

Reynolds, James Donald
Montgomery
Admitted: 1966
Died: July 18, 2004

Segrest, Douglas Broward
Montgomery
Admitted: 1959
Died: August 7, 2004

Sides, Jimmie Miller, Hon.
Jacksonville
Admitted: 1956
Died: August 1, 2004

Simon, Thomas Daniel
Montgomery
Admitted: 1994
Died: August 4, 2004

Whitfield, James Bryan Jr.
Demopolis
Admitted: 1949
Died: January 24, 2004

2004-05 License/Special Membership Dues Now Delinquent

Invoices for the 2004-05 occupational licenses and special membership dues were mailed **September 3rd, 2004**. Your 2003-04 occupational license or special membership expired **September 30th, 2004**. License fees and special membership dues for 2004-2005 were due in the Alabama State Bar office by **October 31st, 2004** and are now delinquent. **Occupational licenses purchased after October 31st, 2004 have a $37.50 penalty added.** Payments should be sent to the Alabama State Bar, or you may pay 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.

Remarks of Albert P. Brewer,

Alabama State Bar 2004 Annual Meeting, Grande Convocation, July 24, 2004

BY ALBERT P. BREWER

Albert P. Brewer

As a boy, the one great ambition in my life was to be a lawyer. My life's journey has run the course from boyhood to law school, to general practice, to the state legislature, to the office of lieutenant governor, to the governor's chair, and back to law school.

I received my law degree 52 years ago last month and, with it, my license to practice law. I have been a member of this bar for 52 years.

I wonder if you remember when you decided you wanted to be a lawyer. I can't remember ever wanting to be anything else. Lawyers were important in our community. **Julian Harris** was a member of the Decatur City Board of Education. His brother, **Norman Harris**, represented our county in the state legislature. **Noble Russell** was a member of the legislature. **Russell Lynne** was my scout master. His older brother, **Judge Seybourn Lynne**, was appointed by President Truman to United States District Judge for the Northern District of Alabama, where he served for more than 50 years. **John Caddell** was Decatur City Attorney, a trustee of the University of Alabama, president of the state bar, and a member of the state Democratic Executive Committee. As I was growing up, it just seemed to me that every time I saw a lawyer, I saw a person who was important. I still feel that way about lawyers I have often said that the two most precious things I have are my family and my right to practice law—I feel undeserving of either, but I have been the beneficiary of opportunities which I could not have imagined: In addition to being licensed to practice law for 52 years, I have held public office for 16 years, have been a director and general counsel for a bank for 33 years and have spent the past 17 years teaching at Cumberland School of Law. None of this would have been possible without my law license.

We celebrate today 125 years as a state bar association. Our motto is the truism "Lawyers Render Service." We render service to our clients, to our justice system, to the public, to our communities, and to our fellow lawyers.

Ours is a noble profession. Alexis de Tocqueville, in his 1830s book, *Democracy in America*, made this observation about attorneys in American society:

> "Democratic government favors the political power of lawyers. When the rich, the noble, and the prince are excluded from the government, the lawyers step into their full rights, for they are the only men both enlightened and skillful...
>
> "By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes... In America there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore, the lawyers form the political upper class and the most intellectual section of the society...

"If you ask me where the American aristocracy is found, I have no hesitation in answering that it is not among the rich, who have no common link uniting them. It is at the bar or the bench that the American aristocracy is found."

The nobility of our profession is reflected in the integrity of lawyers.

In April 1906, a great fire and earthquake practically destroyed San Francisco, and all the books of accounts of the Bancroft-Whitney Publishing Company were destroyed. What happened is a great tribute to the legal profession. The following is the company's acknowledgment:

"On April 18, 1906, the date of the great fire, the legal fraternity of this country was indebted to us for hundreds of thousands of dollars. The fire destroyed all of our books of accounts.

"Having no lists of patrons, we sent a circular letter to the lawyers named in Martindale's Legal Directory advising them of our loss and asking for information as to their indebtedness to us.

"The responses to this circular were so prompt and so gratifying that we think the legal profession should know that of this total indebtedness 93 percent has already been reported to us and we are receiving advices every day from parties who had not previously answered our circulars about their indebtedness.

"Let it be known to the world that the legal profession is made up of men of the highest honor."

I would like to think, and I believe, that the same result would be obtained today.

Michael Miller, then president of the New York County Lawyers Association, relates that when a call went out September 24, 2001, for lawyers to volunteer to help 9/11 victims and their families, the response was a reminder of "the nobility of the profession." At a scheduled training session in Midtown Manhattan the next night, a line of attorneys four-deep spilled out of the building for more than a block down the street.

Judge S. A. Lynne, Judge Seybourn Lynne's father, in an address before the Morgan County Bar Association, quoted these words:

"Every lawyer ought to be proud of his profession; every lawyer throughout the world ought to feel, and I think feels, that in the whole world there is no nobler profession than that of the law."

In this 125th year of our existence as a fraternity of lawyers, Judge Lynne's words uttered over 50 years ago seem particularly appropriate:

"I am likening myself to Janus, the God of the Roman Gates, with his two faces. With the one I gaze upon the past and hallow and venerate the memory of the stalwarts and master spirits of this bar of yesteryear, while with the other, with the same earnestness and with equal enthusiasm, I face the future, hoping and confidently believing you will carry the torch entrusted to you to new and higher heights and nobler accomplishments."

The practice of law has changed greatly in the last half-century. I remember when I began the practice of law it seemed that, not entirely because of a lack of clients, we had time to visit with courthouse personnel, to drink coffee with our fellow lawyers, to visit with the judges, and, generally, to move at a much slower pace than we do today. Vast changes have come about in the practice of law, and we seem to have less time to truly enjoy the practice of law. In fact, surveys of lawyers reveal widespread dissatisfaction with practice today. We need to rethink our priorities.

First, we need to recommit to our professional responsibilities.

We need to remember our duty to do pro bono work. From the first day you practiced law, you have been called upon to help others who cannot pay for legal services, and you hopefully have not refused this call. Today, our bar is working to address the pervasive problem of indigent defense, just one aspect of the overall legal needs of our less fortunate citizens.

There is a case which illustrates this idea.

In the case of *United States of America v. Johnny Ray Smith*, Bill Moore of the Montgomery County Bar was appointed by the United States District Court to represent a convicted defendant seeking post-conviction relief from the sentence imposed upon him. At his own expense, without reimbursement or compensation, Mr. Moore made an extensive investigation, prepared and argued motions, and prosecuted a successful appeal to the Fifth Circuit Court of Appeals. The district judge, **Judge Frank M. Johnson**, in open court, stated:

"Mr. Moore, I would like to state for the record, since you have served on this case by virtue of the Court's appointment without any compensation, since the Court knows that you have spent a considerable amount of time, even days, investigating this case, to the extent of going to South Alabama and Northern Florida, investigating and interrogating witnesses at your own expense, that in my judgment your actions and your attitude are commendable and I want to express my appreciation to you for your conscientiousness, that your actions, your attitude and the manner in which you have represented this man without compensation reflects not only credit upon you as an attorney and member of the bar but upon the Bar itself."

Bill Moore's representation of this client was certainly in the highest tradition of the legal profession, and doubtless most lawyers would have responded as Bill did.

Second, we need to respond to the opportunity and responsibility for public service.

Lawyers are uniquely qualified for political leadership and public service. Thomas Jefferson recognized the role of lawyers in providing political leadership over 200 years ago when he said:

"The study of the law qualifies a man to be useful to himself, to his neighbors, and to the public. It is the most certain stepping stone to preferment in the political line."

When I was elected to the state legislature 50 years ago, almost one-half the members of the legislature were lawyers. In fact, when I was lieutenant governor, a majority of the members of the senate were lawyers. My experience has been that lawyers are uniquely qualified to make laws, to bring to the legislative process their analytical ability and their drafting skills. The tenor of debate is more civil and constructive when conducted by professionals. I simply believe that lawyers bring to the legislative process a dynamic that contributes to fair and reasonable legislation. I certainly found legal training to be a very important advantage in serving as governor.

Third, we should be determined that the practice of law will be satisfying, rewarding and uplifting.

We should enjoy being lawyers!

I have shared with my students a homily which I call "Brewer on being a lawyer." These are some reflections of over 50 years as a lawyer.

First are your relationships with your clients. Your clients are a treasure trove of knowledge, information and experience. While some are perhaps not well-educated, many of them have a Ph.D. degree in common sense. Listen to them, observe them, learn from them. They deserve to be treated with dignity and respect, no matter how obstinate or demanding. I have heard lawyers talk down to clients, particularly in divorce cases and criminal cases, in a demeaning and insulting manner. If the client is not worthy of your respect, then let that client go to another lawyer.

Second are relations with other lawyers and judges. Our association as an organized bar gives us the opportunity to associate with people of like interest and experiences. My best friends were other lawyers. Those relationships were among the most rewarding and fulfilling of my life. It is amazing how lawyers are

drawn to each other. Lawyers at social gatherings tend to congregate to talk about matters of mutual interest, ofttimes drawing the ire of their spouses who remonstrate that they have been with the other lawyers all week, why do they want to spend time with them now? I suppose the answer is that we simply enjoy the company of lawyers.

I recalled being in **Neal Newell's** office one morning when his secretary interrupted us to tell him that **Bibb Allen** was calling. I heard only Neal's side of the conversation, but it was apparent that Bibb was calling to postpone a deposition they had scheduled that afternoon. Neal's response was that they would schedule it later. Then Neal said, "Since we don't have the deposition this afternoon, do you want to hit a few?" They then agreed to meet at 1:30 for a round of golf.

Incivility is not a problem where lawyers have relationships like these. And, lawyers care for each other. The "Lawyers Helping Lawyers" program of our state bar is an effective response to the problem of impaired lawyers.

Our bar association has always been very collegial. I am reminded of an example of this collegiality from **Judge John B. Scott's** report of the 1967 annual convention of our bar. Judge Scott related the following:

> "After the Convention adjourned, the rugged youth of our association took themselves to the country for a late evening and night affair. A blaring orchestra disquieted the sylvan scene with sounds hideous to me but music to the ears of the young, who were driven by it to all sorts of contortions, hopping and gyrations, which some referred to as dancing."

Third, pause to smell the roses. In law school we heard the words intoned over and over, "The law is a jealous mistress." While the demands of a law practice are compelling, there are other dimensions that give fulfillment to our lives: family, friends, church and hobbies. Neglect of one's family is not a model of professionalism. I knew an Alabama lawyer who had a reputation as the premiere practitioner in his field. He was proud of his practice and frequently commented about his work habits. He worked seven days a week, never took a vacation and had no outside interests. Not surprisingly, he had no children. He was found dead of a heart attack one Sunday afternoon in his office.

Did you ever hear of a retiring lawyer who said that he wished he had spent more time at his office?

Fourth, guard your reputation. We spend a lifetime gaining our reputation, and we can lose it in one instance, with one moral lapse or one professional mistake. Ours is an adversarial and competitive profession, and there is a temptation to take short cuts, to seek an improper advantage, to be untruthful. It's simply not worth it.

Remember the law is flesh and blood; it is people and their problems. Like all lawyers, I have known the ecstasy of victory, the agony of defeat, experienced the sorrow of clients, exhilarated in their successes, shared in their failures, but through it all, I have known fulfillment, satisfaction, pleasure, achievement, and reward far beyond my boldest dreams when I decided to be a lawyer.

This brings to mind the image of Harper Lee's Atticus Finch, who was defending Tom Robinson, a black man accused of raping a white woman in a small south Alabama community. The cause was unpopular, the verdict was predictable; the audience filled the courtroom, the whites on the main floor, the blacks in the balcony. Atticus' children Jem and Jean Louise (also known as Scout) had slipped into the balcony and were seated near Reverend Sykes, the black minister.

The author describes the scene as the jury returns its verdict, the foreman handing the piece of paper to the clerk who then handed it to the judge. Eight-year-old Scout is speaking:

> "I shut my eyes. Judge Taylor was polling the jury: 'guilty…guilty…guilty…guilty…'. I peeked at Jem: his hands were white from gripping the balcony rail and his shoulders jerked as if each 'guilty' was a separate stab between them.
>
> "Judge Taylor was saying something. His gavel was in his fist, but he wasn't using it. Dimly, I saw Atticus pushing papers from the table into his briefcase. He snapped it shut, went to the court reporter and said something, nodded to Mr. Gilmer and then went to Tom Robinson and whispered something to him. He put his hand on Tom's shoulder as he whispered. Atticus took his coat off the back of his chair and pulled it over his shoulder. . .he walked quickly down the middle aisle toward the south exit. I followed the top of his head as he made his way to the door. He did not look up.
>
> "Someone was punching me, but I was reluctant to take my eyes from the people below us, and from the image of Atticus' lonely walk down the aisle.
>
> "'Miss Jean Louise?'
>
> "I looked around. They were standing. All around us, the black people were getting to their feet. Reverend Sykes' voice was as distant as Judge Taylor's.
>
> "'Miss Jean Louise, Miss Jean Louise, stand up child. Your father's passing.'"

My fondest hope for you is that as you walk from the courtrooms, and boardrooms and conference rooms of your life, your fellow citizens will figuratively stand in an expression of ultimate respect to you, my fellow lawyers. ■

Birmingham Student Awarded Alabama Law Foundation Law School Scholarship

Alexee Deep

Alexee Deep of Birmingham has been awarded a $5,000 **Cabaniss, Johnston Scholarship** by the **Alabama Law Foundation**, a charitable arm of the Alabama State Bar. She is the daughter of Rima and Larry Deep.

Alexee is a second-year law student at Cornell University, and she plans to practice in the medical and scientific fields. A graduate of Indian Springs School, she obtained her bachelor's degree from Princeton University's Woodrow Wilson School of Public Policy and International Affairs and her master's in bio-ethics from the University of Pennsylvania.

Upon completion of her law degree, she hopes to combine her long-held interests in science, public policy and law. At only seven years of age, Alexee decided she wanted to become a lawyer. In junior high, her goals grew more focused. She developed a passion for science, particularly genetics, and technology. By the time she was ready for college, she knew she wanted to pursue the connections between the law and science, medicine, technology and public policy.

Upon receiving her law degree, she will be poised to work with vanguard legal issues in medicine and science.

"For instance," Alexee said, "there are issues involving embryo custody. What if an infertile couple sets aside embryos for implanting but then divorces? Who do the embryos belong to, him or her?

"Then, there's the field of genetic discrimination. Say a company's employee is susceptible to certain workplace toxins. What obligations does the company have to that employee?"

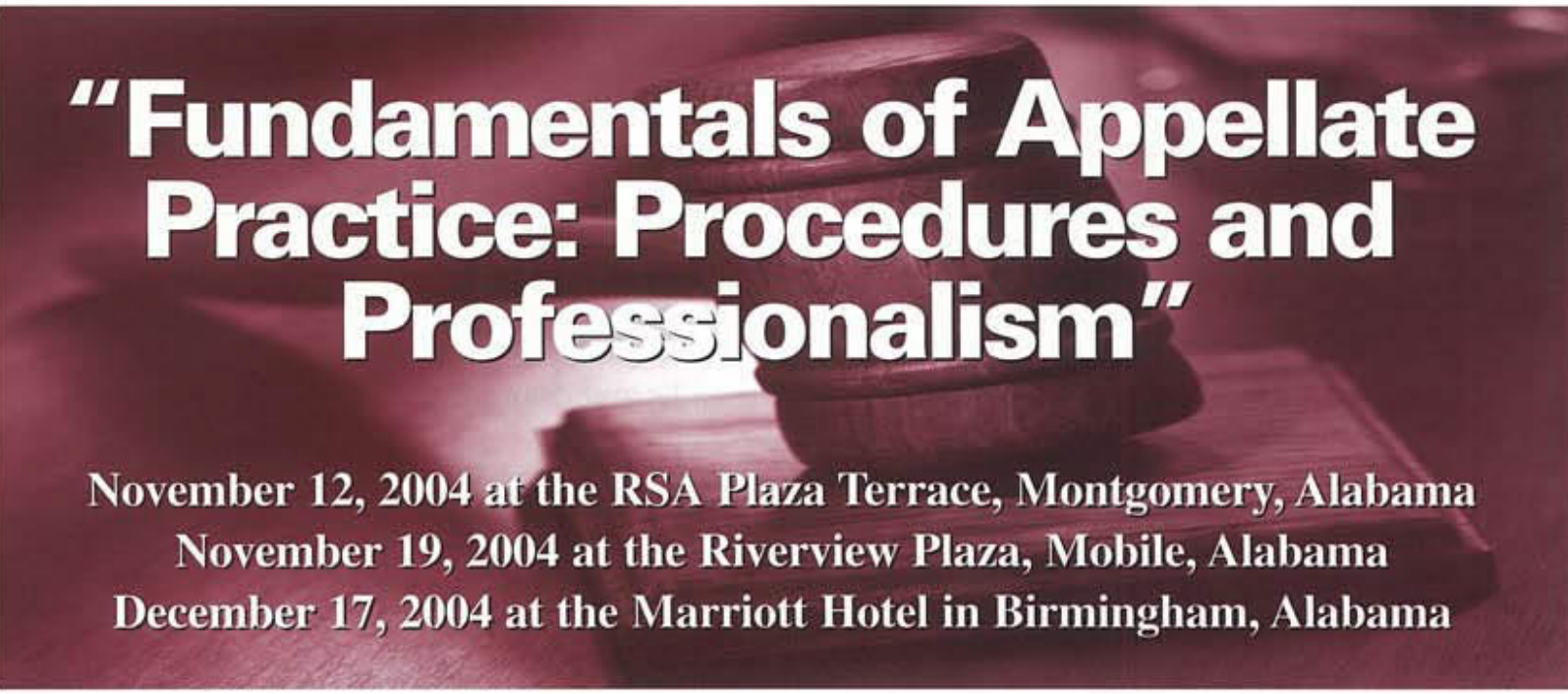
Alexee sees opportunities to work in many different areas of the law and has not yet decided which path to pursue. She says she might work for a large medical complex such as UAB or counsel corporations on health-related issues.

She is sure of one thing. She wants to settle in Birmingham.

Alexee is a shining example of what the Cabaniss, Johnston Scholarship seeks to honor. Its aim is to help promising law students become lawyers who will make a positive impact on society. Few would dispute that Alexee is poised to do just that.

The Cabaniss, Johnston Scholarship program, now in its 17th year, is endowed by the firm of **Cabaniss, Johnston, Gardner, Dumas & O'Neal** of Birmingham and Mobile, and is administered by the Alabama Law Foundation. ■

THE ALABAMA SUPREME COURT AND THE ALABAMA JUDICIAL COLLEGE PRESENTS FREE REGIONAL WORKSHOPS ON



"Fundamentals of Appellate Practice: Procedures and Professionalism"

November 12, 2004 at the RSA Plaza Terrace, Montgomery, Alabama
November 19, 2004 at the Riverview Plaza, Mobile, Alabama
December 17, 2004 at the Marriott Hotel in Birmingham, Alabama

Faculty consists of justices of the Supreme Court of Alabama and several members of the Alabama courts of civil and criminal appeals. Six CLE credits have been applied for, including one hour of ethics and professionalism. Topics to be covered include preserving error, perfecting the appeal and supplying the record, briefing a direct appeal and applying for rehearing and petitioning the court for a writ of certiorari. The registration form and additional information may be found on the court system Web site at *www.alacourt.gov;* click on the link "Fundamentals of Appellate Practice: Procedures and Professionalism" on the home page or contact the Alabama Judicial College at (334) 353-4968.

Fundamentals of Appellate Practice: Procedures and Professionalism

FREE REGISTRATION

Choose one of the following:

- ☐ Nov. 12, 2004—Montgomery
- ☐ Nov. 19, 2004—Mobile
- ☐ Dec. 17, 2004—Birmingham

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SS# or State Bar ID# _____

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Address _____

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Telephone# (_____) _____

Mail or fax form at least two weeks prior to the seminar selected to: Appellate Seminars, Alabama Judicial College, 300 Dexter Avenue, Montgomery, AL 36104, (334) 242-2099 (fax).

The Soulbane Illusion

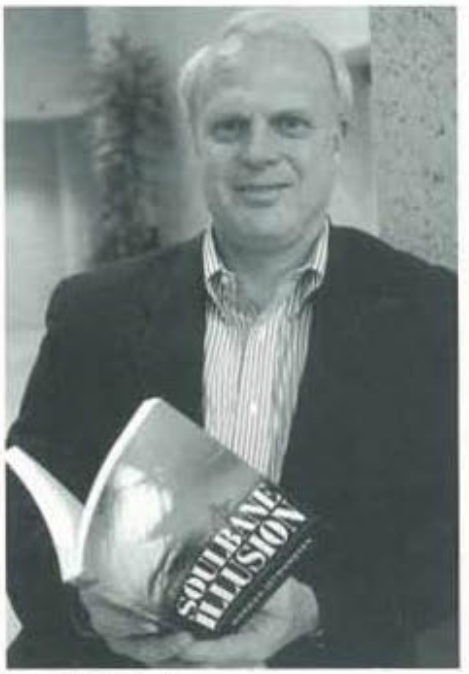
A novel by Norman Jetmundsen, Jr.
Paperback
John Hunt Publishing
2004

REVIEWED BY CHARLES A. STEWART, III

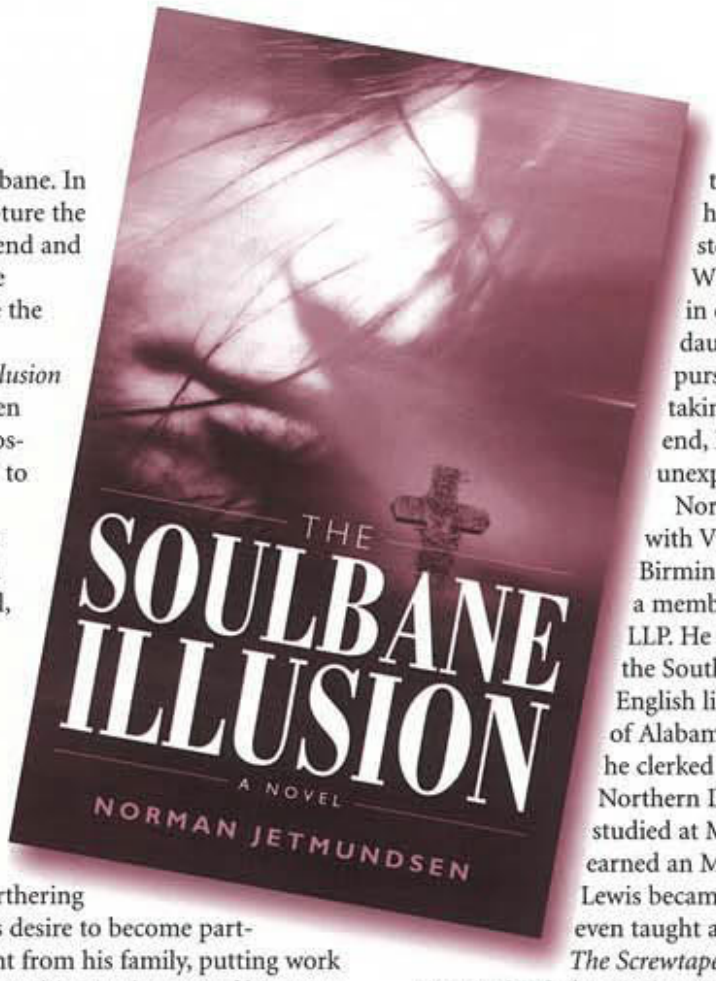
Norman Jetmundsen's second book, *The Soulbane Illusion,* is a fast-paced, mystery novel. The characters are well developed. The story moves at a rapid pace, and I completed the book in no time, much faster than other books of a similar length. It truly is hard to put down. Jetmundsen's first novel, *The Soulbane Stratagem,* was published in 2000 to very strong reviews. The book made the regional bestseller list and was crowned by an English bookstore as one of the "ten…very best Christian fiction titles around." In fact, the English bookstore places Jetmundsen's book among the top ten Christian books, right up there with his literary muse, C.S. Lewis.

I initially reviewed *The Soulbane Stratagem* for Norman back in the March 2000 issue of *The Alabama Lawyer.* I concluded my review by encouraging Norman to write another book. However, I had no idea that this second book would be such a great read.

The Soulbane Illusion picks up ten years after the point at which *The Soulbane Stratagem* story ended. The hero of *The Soulbane Stratagem* was an American student, Cade Bryson, who was studying at Magdalen College in Oxford, England. He uncovers strange letters hidden in the college library. As it turns out, the letters were written between modern minor devils who were communicating about the recent successes of the Devil in encouraging decay and godlessness in modern society. Bryson and his girlfriend go in search of certain reports which are going to be



Norman Jetmundsen, Jr.



prepared by a junior devil, Soulbane. In the end, Bryson manages to capture the reports. He promises a close friend and his girlfriend he will publish the reports and, in doing so, expose the evil forces.

It is here that *The Soulbane Illusion* picks up the story. It has been ten years since Bryson came into possession of the reports. He failed to keep his promise to expose the devil. Instead, he has moved on with his life. He is now married to his college girlfriend, Rachael, and they have a daughter. Bryson finds himself very successful in his law practice and on the verge of becoming a partner with a large Atlanta law firm. Work is the center of his life. In fact, it becomes a god of sorts. All of Bryson's thoughts and energy go into furthering his career and into pursuing his desire to become partner in the firm. He grows distant from his family, putting work before all else. Bryson manages to shine in the eyes of his partners because he works all hours, attacks his cases with tremendous energy, and is willing to do anything for the firm.

Bryson manages to capture the attention of one of the firm's most prominent clients. The client appears to find Bryson's legal abilities invaluable. However, something more sinister is going on. Those devils from his Oxford days have caught up with him and they are intent on capturing back the reports Bryson secreted away ten years before.

Complicating matters, Rachael tires of the inattention and mourns the loss of her best friend and lover. She takes her daughter back to England to be with her mother. Rachael simply has to get away from the decaying marriage. Bryson is left behind to deal with his failing marriage, his blossoming legal career and the inevitable encounter with the devil's foot soldiers. Finally, awakened to the miserable state of his existence, Bryson decides to change things. He barely makes it on a plane to England, escaping narrowly from his law firm's investigators sent to stop him from leaving the country. When he arrives in England, he goes in desperate search for his wife and daughter. Meanwhile, the devils are in pursuit of the reports, even if it means taking his daughter to get them. In the end, Bryson's struggle culminates in an unexpected encounter.

Norman Jetmundsen, Jr. is an attorney with Vulcan Materials Company in Birmingham. Before joining Vulcan, he was a member of Bradley Arant Rose & White LLP. He graduated from the University of the South (Sewanee) with a degree in English literature. He attended the University of Alabama School of Law. After law school, he clerked for Judge Sam Pointer in the Northern District of Alabama. Thereafter, he studied at Magdalen College, Oxford, where he earned an MLitt in Law. While at Oxford, C.S. Lewis became very important to him. (Lewis even taught at Magdalen College, where he wrote *The Screwtape Letters,* the inspiration for Jetmundsen's first and second novels.) Both novels are available from local bookstores or via the Internet. You can also read more about them at *www.soulbane.com.* ■

Charles A. Stewart, III
Charles A. Stewart, III is a partner in the Montgomery office of Bradley Arant Rose & White LLP. Stewart attended the University of the South in Sewanee, Tennessee. While in college, he studied one summer at University College, Oxford, England. He attended Cumberland School of Law, Samford University. Stewart currently serves on the board of directors of the Defense Research Institute. From 1998-99, he served as president of the Alabama Defense Lawyers' Association, and recently served on its board of directors, as well as editor of its publication, The Journal. Stewart is a member of the International Association of Defense Counsel, the Federation of Defense and Corporate Counsel, the Federal Bar Association and the Hugh Maddox chapter of the Inns of Court.

Bar Briefs

Dr. Charles Nelson and Douglas McElvy

- At a reception for **Dr. Charles Nelson**, the new dean of Thomas Goode Jones School of Law, ASB President Doug McElvy was among those welcoming him to Montgomery and to the law school.

  Prior to coming to Jones, Dean Nelson was with Pepperdine University School of Law for 33 years. During his tenure at Pepperdine, the law school was accredited by the American Bar Association (ABA).

  Dr. Nelson, who assumed the role of dean on August 1, says, "Jones School of Law is already a very good law school. We want Montgomery and Alabama to be proud of the school. ABA accreditation will naturally make a difference in how the school is perceived and will add a level of confidence."

- **Judge Judson W. Wells**, Mobile County district judge, recently was elected president of the Alabama District Judges' Association, made up of 102 district judges from the state's 67 counties.

  Judge Wells also was elected president-elect of the National Alumni Association of the University of Alabama and will resume office at A-Day 2005.

Judge Judson W. Wells

- **Judge Aubrey Ford**, Macon County district judge, recently received a certificate recognizing completion of 400 hours of continuing legal education.

  In 1984, the Alabama Judicial College and representatives of the Circuit and District judges' associations started a continuing education program. As a judge, there is no requirement to acquire CLE credit. The awards are presented in 100-hour increments, which must be obtained within a four-year period and with programs conducted within the state of Alabama.

Judge Aubrey Ford

- **Nick Abbett** was recently elected president of the Alabama District Attorneys Association, which represents the

interests of elected district attorneys and appointed prosecutors across the state. Abbett has been a prosecutor in Lee County since 1985 and the elected district attorney since 1999.


Nick Abbett

- **Rebecca Wright Pritchett**, a shareholder of Sirote & Permutt PC in Birmingham, was recently installed as president of the Alabama Wildlife Federation. She is the AWF's first female president, since its inception in 1935. Established by sportsmen, the AWF is the state's oldest and largest citizens' conservation organization.


Rebecca Wright Pritchett

- **United States District Judge W. Harold Albritton** was honored recently at a portrait presentation and unveiling ceremony, marking the conclusion of Judge Albritton's seven-year term as chief judge of the U.S. District Court for the Middle District of Alabama and his assumption of senior status.


Judge W. Harold Albritton

The portrait was added to the collection of portraits of all past judges of the court.

Judge Albritton was appointed to the federal bench by President George H.W. Bush and confirmed by the U.S. Senate in 1991. At the time of his appointment, Judge Albritton was serving as ASB president and senior partner in the Andalusia firm known then as Albrittons, Givhan & Clifton.

While on the bench, Judge Albritton has served as a director of the National Federal Judges Association, a member of the Court Administration and Case Management Committee of the Judicial Conference of the United States by appointment of Chief Justice William H. Rehnquist and a member of the Eleventh Circuit Judicial Council. He established the Albritton Lecture Series at the University of Alabama School of Law and was honored in 2003 by the National Boy Scouts of America, receiving the Distinguished Eagle Award. ■

By Brannon Buck

So Far, So Good

The Alabama State Bar Young Lawyers' Section has begun much of its work for the 2004-2005 bar year. We have already assisted in the organization of the fall bar **admissions ceremony** in Montgomery. Our next event will be the **3rd Annual Iron Bowl** CLE that will take place November 19th at 1:00 p.m. **Burr & Foreman** in Birmingham has graciously agreed to host the CLE in its auditorium in the Forbes Building in downtown Birmingham. We encourage you to sign up for the Iron Bowl CLE. For information and a registration form, please contact **Jimbo Terrell** at McCallum & Methvin in Birmingham at (205) 939-3006.

The YLS has also begun its partnership with and support of the **SpeakFirst Debate Program** in the Birmingham city school system. Young lawyers from the Birmingham area are volunteering their time to work with gifted students who participate on an "all-star" debate team. SpeakFirst is part of the larger nonprofit group started by Stephen Black known as **Impact: An Alabama Student Service Initiative**. The YLS is proud to be participating in this worthy cause. Anyone who is interested in being involved in this service program should contact me at (205) 254-1210.

All of these efforts and accomplishments are made possible by the hard work of the Executive Committee of the YLS. The members of the YLS Executive Committee for this year are:

Christy D. Crow—*president-elect*, Union Springs
Roman Shaul—*secretary*, Montgomery
Bryan Cigelske—*treasurer*, Mobile
Stuart Y. Luckie—*immediate past president*, Mobile
Robert Bailey, II, Huntsville
Robert Battle, Birmingham
LaBarron Boone, Montgomery
Anna Katherine Bowman, Birmingham
Michael J. Clemmer, Birmingham
Suzanne Dorsett, Huntsville
Charles Fleming, Birmingham
W. Ivey Gilmore, Jr., Tuscaloosa
James F. Hughey, III, Birmingham
Clay Lanham, Mobile
Craig Martin, Mobile
Patrick McCalman, Andalusia
Robert G. Methvin, Jr., Birmingham
Matthew C. Minner, Birmingham
George R. Parker, Montgomery
James Pittman, Daphne
Mitesh B. Shah, Birmingham
Matthew Stephens, Birmingham
Norman Stockham, Mobile
James M. Terrell, Birmingham
Kimberly R. Ward, Montgomery
Tucker Yance, Mobile

I encourage all young lawyers to mark May 20-22, 2005 on their calendars for the 2005 **Young Lawyers' Sandestin Seminar**. As in prior years, we will have an outstanding group of speakers and great entertainment in sunny Sandestin, Florida. ■

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Is It Affirmative Action or Discrimination?

BY DOUGLAS B. KAUFFMAN

INTRODUCTION

Various reasons are offered by employers for implementing voluntary diversity initiatives, such as, "diversity sells," and "diversity increases goodwill with the community and customers." Regardless of the reason articulated for diversity initiatives, most employers believe there is value in having a diverse workforce. Further, as a result of the United States Supreme Court decisions involving the University of Michigan, many now believe (perhaps erroneously, as discussed herein) that there is new flexibility and freedom with affirmative action in the employment arena. However, there continue to be limits as to what employers may legally do in attempting to achieve diversity. Often, a fine line exists between legal affirmative action and discrimination against non-minorities. This article provides guidance to attorneys as to when and to what extent employers may voluntarily grant preferential treatment to minorities in the employment selection process.

Do the University of Michigan cases answer all questions as to the legality of affirmative action in the workplace?

The answer is no. The United States Supreme Court upheld the University of Michigan Law School's use of minority status as a flexible "plus factor" for admission purposes.[1] On the same day, the Court held unconstitutional the University of Michigan's undergraduate admissions process, which awarded 20 bonus points out of a possible 150 points to under-

represented minority applicants.[2] Because these cases involve constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment to public higher-education admission practices, not alleged Title VII violations against employers[3], and apply different tests and involve different policy issues than those applicable in the employment context, lawyers must be cautious in their application of these cases to their clients' affirmative action initiatives in the employment context. More specifically, the University of Michigan cases do not provide any guidance to employers as to when they may use voluntary affirmative action for a reason other than a remedial measure to eliminate past discrimination or a manifest imbalance with respect to minority representation, as discussed below in more detail.[4] Nevertheless, the cases do provide insight into how affirmative action may be used in the employment context once there is a justifiable reason for its use.

THE QUESTION NOT ANSWERED BY THE UNIVERSITY OF MICHIGAN CASES: CAN AN EMPLOYER IMPLEMENT VOLUNTARY AFFIRMATIVE ACTION FOR A REASON OTHER THAN REMEDIAL MEASURES?

As stated above, the University of Michigan cases do not address when an employer may implement voluntary affirmative action initiatives. Although the Supreme Court held that remedying past discrimination was not the only method in which a public university could establish a compelling governmental interest for implementing affirmative action in its admission policies, whether employers will be able to justify voluntary affirmative action in hiring or promotion decisions for a reason other than for remedial measures, such as for the sake of having a diverse workforce and the benefits derived therefrom, remains questionable and perhaps doubtful. In a previous decision, the Supreme Court upheld a voluntary affirmative action plan under Title VII in part because its purpose was *not* to *maintain* racial balance, but rather to eliminate a manifest racial imbalance.[5] The Supreme Court's prior decision arguably supports the proposition that the implementation of affirmative action for the sake of having diversity alone is not permissible. Moreover, some lower court decisions have specifically held that employer voluntary affirmative action plans that have a purpose other than to remedy past discrimination or eliminate a manifest imbalance in minority representation violate Title VII.[6]

However, recently, the Seventh Circuit in *Petit v. City of Chicago*, 2003 WL 22939141 (7th Cir. Dec. 15, 2003) held that there was a compelling governmental interest to have diversity in a large metropolitan police force charged with protecting a racially and ethnically divided Chicago. The Seventh Circuit upheld the City of Chicago's standardization of an examination that was used in the past for the purpose of promoting patrol officers to the rank of sergeant.

LESSONS FOR PRIVATE EMPLOYERS FROM THE UNIVERSITY OF MICHIGAN CASES

Assuming there is a justifiable reason to implement voluntary affirmative action initiatives, the University of Michigan cases provide some lessons applicable to private employers, including the following:

■ Any Type of Quota Is Illegal

The Supreme Court confirmed that quotas for minority representation are illegal.[7] In upholding the University of Michigan's Law School's admission process, the Supreme Court stated in part that "[t]he Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin....' That would amount to outright racial balancing, which is patently unconstitutional."[8]

■ Minority Status Only Can Be Used As One of Many Factors or as a "Plus Factor"

The Supreme Court clearly held that the use of race or any minority status as a sole or determinative factor amounts to discrimination.[9] The Court stated that race or minority status only can be used as a "plus factor" or one of many factors in performing an individualized assessment of a candidate.[10] Moreover, factors other than minority status should be given substantial weight in the selection process.[11]

■ The Use of Minority Status Should Be Flexible, and Not Mechanical

Perhaps the most important lesson for employers to learn from the Supreme Court's holdings in the University of Michigan cases is that flexible methods of affirmative action are more likely to be upheld than mechanical methods.[12] The Supreme Court stated that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[13] The Court upheld the law school's admission policy because it did not award "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," unlike the unconstitutional University of Michigan's undergraduate admissions process, which automatically awarded 20 points to under-represented minority applicants and had the effect of making race the decisive factor for virtually every minimally-qualified, under-represented minority applicant.[14]

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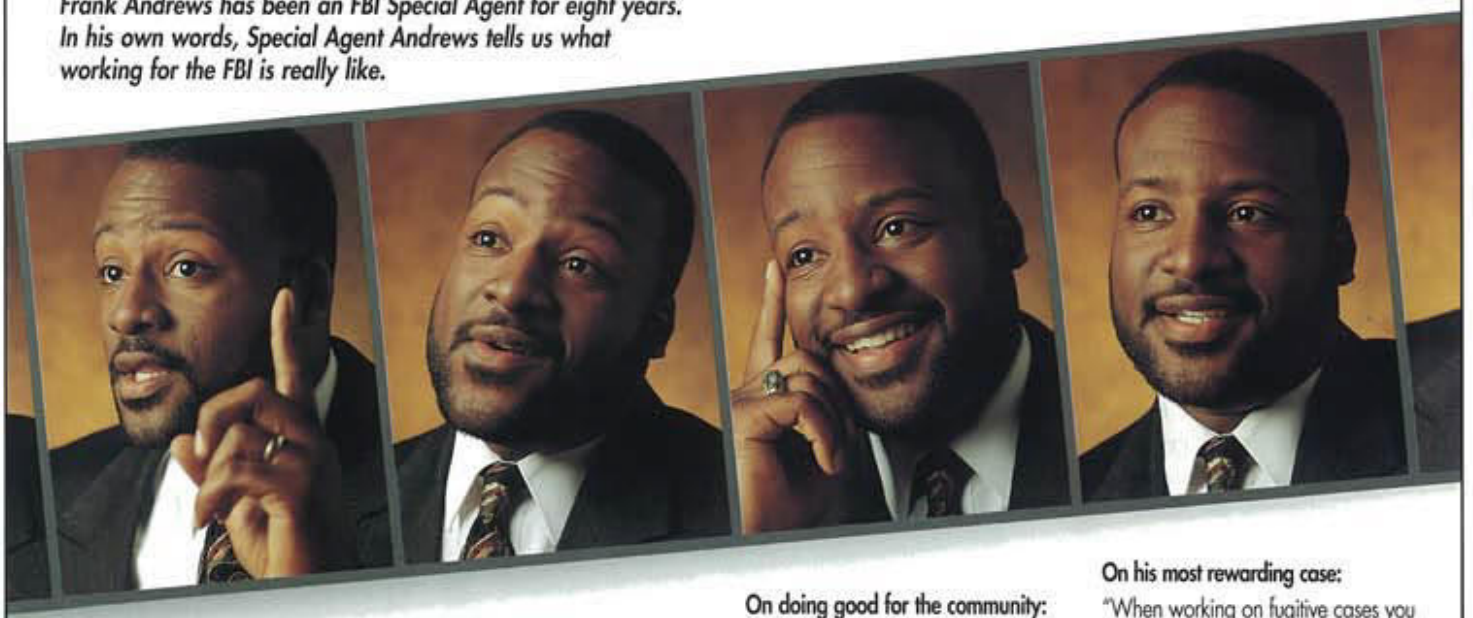
FBI Special Agent Frank Andrews

Frank Andrews has been an FBI Special Agent for eight years. In his own words, Special Agent Andrews tells us what working for the FBI is really like.



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Thus, attributing a predetermined weight to be awarded for minority status in an employment decision is risky. Rather, the amount of weight to be given to minority status in a particular employment decision should vary. Having a well-defined formula for or a specific calculation as to how much weight minority status should be given in all employment decisions would be a mistake. Instead, the application of the minority "plus factor" should be murky.

What are the prerequisites to implementing legal voluntary affirmative action?

TWO PARTS OF THE EQUATION TO DETERMINE IF AFFIRMATIVE ACTION EQUALS DISCRIMINATION

There are two parts of the equation to determine if affirmative action equals discrimination: (1) the basis or the "factual predicate" for the diversity initiative; and (2) the measure used to obtain diversity.

Factual Predicate

The factual predicate is the reason or need for affirmative action. If the factual predicate does not exist, is insufficient, or the employer fails to take it into consideration prior to implementing any type of voluntary affirmative action, then the diversity initiative is discriminatory. Simply stated, this part of the equation cannot be ignored. Often the answer to the question, "Can an employer use race as factor in a selection decision?" is "It depends." The answer does depend on whether a sufficient factual predicate exists. For example, whether an employer can use race as a "plus factor" in a promotion decision most likely depends on the existence of a factual predicate, such as a significant under-representation of a particular minority group in the particular job classification. As stated above, the University of Michigan cases do not provide clear guidance on this part of the affirmative action equation. Other cases, however, provide guidance on the factual predicate, including the following:

- *The factual predicate for affirmative action should be remedial in nature* — to remedy a manifest imbalance in traditionally segregated job categories.[15] A mere belief that minorities are under-represented in the workforce is not enough. In order to show that a sufficient manifest imbalance exists justifying affirmative action, it is not necessary for an employer to establish that it has, in fact, discriminated against a class of minorities or that a *prima facie* case of adverse impact exists.[16] However, a finding by a court of past discrimination in a particular job classification will be sufficient to implement remedial affirmative action measures.
- *Using affirmative action to maintain diversity as opposed to obtain diversity is risky.* Once diversity is obtained, an employer should not use affirmative action to maintain a certain level of diversity, because having diversity alone is not a sufficient factual predicate to implement voluntary affirmative action for employers.[17]
- *Using affirmative action for the sake of having diversity alone probably is illegal.* An employer who implements affirmative action simply because it believes that a diverse workforce is beneficial to its business is taking a risk that its actions will be deemed to be discriminatory. As stated above, what is permissible for universities is not necessarily permissible for employers.

The Affirmative Action Measure Used

The second part of the affirmative action equation is the measure used to obtain diversity. As discussed above, the University of Michigan cases provide some guidance with respect to what measures may be or may not be used in obtaining diversity, *i.e.*, quotas cannot be used, the use of minority status only should be a "plus factor," and the use of minority status should remain flexible, and not mechanical. When examining the measure used to obtain diversity, employers also should be mindful of the following:

- *Race-norming is illegal.* For example, if an employer has a significant under-representation of minorities in a particular job classification, the employer cannot simply hire or promote minorities until the desired number of minorities are obtained, because this would be a complete bar for advancement to non-minority employees.[18] However, if an employer has a *very* significant racial imbalance in a particular job classification, it may be able to, for example, reserve 50 percent of the openings in an in-house training program, until the percentage of the under-represented minorities approximated the population of the minorities in the local relevant labor pool.[19]
- *The use of temporary measures is helpful in showing that the rationale for the affirmative action is remedial.* An employer's implementation of the affirmative action only until an acceptable level of minority representation (as determined by the relevant market data) is achieved shows that the employer intended to use affirmative action as a means to remedy past discrimination or a significant under-representation of minorities.[20]

- *The recruitment of qualified minority applicants and the training of minorities to become qualified applicants are safe ways to increase diversity.* The vast majority of courts look favorably on efforts to increase the qualified minority representation in the applicant pool through, for example, advertisements and job fairs aimed at attracting minorities.[21]
- *The use of minority status as a factor in determining layoffs will be scrutinized closer than the use of minority status in hiring and promotion decisions.* The courts have been less tolerant of affirmative action when its application results in the loss of a job as opposed to simply the loss of a promotional opportunity by a non-minority employee.[22]
- *"Leapfrogging" or bypassing a slightly more qualified non-minority candidate in order to select a slightly less qualified minority candidate may or may not be legal.* An employer should avoid ranking employees based on qualifications and experience and then looking at minority status to determine if a minority candidate should leapfrog or bypass a higher-ranking non-minority candidate. Rather, if minority-status will be utilized in the selection process, it is better for the employer to rank employees by considering minority status as one of the "plus factors" along with qualifications and experience in ranking the employee.[23] Other factors in determining whether leapfrogging is legal include the degree of the manifest imbalance. The greater the imbalance, the more lenient a court likely will be on leapfrogging. The disparity in the qualifications between the minority and the non-minority candidate also will be relevant. The smaller the disparity between qualifications, the more likely the court will allow leapfrogging. It should be emphasized, however, that the minority candidate must be qualified and at least should be in the group of the most qualified candidates.
- *Bona fide seniority systems trump affirmative action.* An employer should not violate a bona fide seniority system for the sake of diversity.[24]

EEOC GUIDANCE ON REASONABLE SELF-ANALYSIS

The Equal Employment Opportunity Commission has provided limited guidance on establishing appropriate affirmative action plans. The EEOC states that an affirmative action program should contain three elements, two of which have been discussed above, including a sufficient factual predicate or "a reasonable basis for concluding action is appropriate," and an appropriate method or "reasonable action." 29 C.F.R. § 1608.4. The other element is a "reasonable self-analysis" to determine if there is a sufficient factual predicate or reasonable basis for affirmative action. According to the EEOC's Guidance on Affirmative Action, the "objective of a self-analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self-analysis."

The results of the self-analysis must be the motivation for the diversity initiative. The existence of an actual manifest imbalance may not be a defense to a legal challenge to a diversity initiative if the employer never considered the imbalance prior to implementing the diversity initiative. In other words, post hoc rationalizations for diversity initiatives may not be a defense to a challenge to a diversity initiative.

What are the risks when affirmative action becomes discrimination?

Title VII and 42 U.S.C. § 1981 prohibit race discrimination regardless of whether the affected employee is African-American or white, and Title VII prohibits sex discrimination regardless of whether an employee is female or male. Employers who discriminate against males and whites do not receive any mercy because they have discriminated against a majority, as opposed to a minority, member. This point has been emphasized in recent court decisions where the courts have shown distaste for the phrase "reverse discrimination," which has been used in the past to describe discrimination against a white individual. As the Eleventh Circuit has stated, "[d]iscrimination is discrimination no matter what the race, color, religion, sex or national origin of the victim.... Racial discrimination against whites is just as repugnant to constitutionally protected values of equality as racial discrimination against blacks."[25]

In *Frank v. Xerox Corporation*, 347 F.3d 130 (5th Cir. 2003), the Fifth Circuit held that Xerox's "Balanced Workforce Initiative," which identified explicit racial goals for each job and grade level, under which Xerox concluded that African-Americans were overrepresented in its Houston, Texas office, constituted direct evidence of racial discrimination with respect to promotion decisions. *Id.* at 137. The court reversed the dismissal of promotion claims by African-American Xerox employees, stating in part:

> Xerox candidly identified explicit racial goals for each job and grade level. The reports also stated that

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> blacks were over-represented and whites were under-represented in almost every job and grade level at the Houston office. Senior staff notes and evaluations also indicate that managers were evaluated on how well they complied with the [balanced workforce] objectives. A jury looking at these facts could find that Xerox considered race in fashioning its employment policies and that because Plaintiffs were black, their employment opportunities had been limited.

Id.

Historically, claims by white or male employees alleging race or sex discrimination have been significantly fewer than discrimination claims by African-Americans or females. This fact may lead some to conclude that employers can be more aggressive or take more chances with respect to their diversity initiatives. However, discrimination allegations arising out of diversity or affirmative action initiatives often are brought by a class of employees who have been impacted by the employer's alleged unlawful practices. Such class or collective actions by non-minority employees are costly to defend and even more costly if discrimination is proved, which is often an easy task if an employer implements an invalid voluntary affirmative action initiative.

What are some mistakes employers make when going too far with their diversity initiatives, and how can these mistakes be avoided?

The types of evidence that have been problematic for employers who have faced discrimination claims as a result of diversity initiates include: (1) placing undue pressure on managers to hire and promote minorities, which causes too much emphasis to be placed on minority status in the selection process; (2) hiring non-qualified or substantially less qualified minorities over qualified non-minorities; and (3) deviating from standard procedures in the selection process in order to achieve a minority candidate selection.[26]

To avoid some of these mistakes, employers should consider the following. When holding managers accountable for their diversity efforts, it is better to evaluate managers on their good-faith efforts, such as working closely with the human resources department or utilizing nontraditional recruiting efforts in an attempt to attract qualified minority applicants, as opposed to evaluating solely based on bottom-line numbers? Training is an essential component of any affirmative action plan. Hiring managers and human resources representatives must understand the mechanics of the plan and the legal boundaries for using minority status in a selection process, which probably varies from one job classification to another depending on whether a manifest imbalance in minority representation exists. In addition, whatever an employer's philosophy may be regarding diversity initiatives, selection decisions ultimately should be based on identifying the most qualified individual among a pool of diverse candidates.

What should be considered when deciding whether to implement voluntary affirmative action?

In the event a lawyer is asked to advise an employer who currently is not engaged in voluntary diversity initiatives, but is considering whether to do so, the following considerations should be kept in mind:

- *The need for affirmative action:* Is there a manifest imbalance in the number of minorities in certain job classifications where the employer is at risk for claims by minorities?
- *Method of achieving diversity:* Will recruitment and training of minorities be sufficient to obtain diversity without the implementation of a formal affirmative action plan? As stated above, the courts look favorably on efforts to increase the pool of qualified minority applicants.
- *Business reasons for having a diverse workforce:* What are the economic reasons for having a diverse workforce other than avoiding potential lawsuits by minorities?
- *The risk in performing the self-analysis:* Do you want to perform the self-analysis necessary to implement affirmative action? Documents relating to the self-analysis can be damaging if the employer is forced to produce them to adverse parties. While arguments that such documents are confidential and privileged may be asserted, there is no guarantee that an employer's self-analysis will not be used against it.
- *Resources in implementing the diversity initiative:* Often employees have difficulty understanding vague concepts involved in diversity initiatives. Is the employer willing to expend the resources necessary to provide training to its human resources representatives and managers on its diversity initiatives and the boundaries for the same?
- *The duty to bargain with a labor union:* Any affirmative action initiatives likely are the subject of mandatory bargaining, especially if they will affect seniority rights of covered employees.

What are the obligations of a federal contractor?

Many federal contractors and subcontractors are required to develop affirmative action plans to comply with Executive Order 11246, Section 503 of the Rehabilitation Act and The Vietnam Era Veterans' Readjustment Assistance Act of 1974. In general, these affirmative action plans commit federal contractors to search intensively for minority candidates and to ensure equal employment opportunity by clearing away barriers to employment and advancement opportunities. There are three parts to these types of affirmative action plans: (1) problem identification; (2) self-analysis; and (3) action-oriented programs, which include recruitment, outreach and mentoring programs.

So, can a covered federal contractor do whatever it likes with respect to affirmative action? The answer is no. It is important to note that covered federal contractors are obligated only to engage in outreach and other efforts to broaden the pool of qualified minority candidates. The failure to meet an established goal is a trigger for further inquiry by the OFCCP, but does not result in automatic sanctions against the contractor. Accordingly, selection decisions still must be made on a non-discriminatory basis. The guidance provided above relating to the use of minority status in selection decisions is applicable to covered federal contractors, although a covered federal contractor may have an easier burden establishing that it has a sufficient factual predicate (its obligations under Executive Order 11246) to implement certain types of diversity initiatives.

CONCLUSION

Despite recent cases, many questions still remain as to when affirmative action constitutes discrimination. Employment lawyers on both sides of the bar will have to wait for a definitive line to be drawn. ■

Endnotes

1. *Gratz v. Bollinger*, No. 02-516, 2003 WL 21434002 (U.S. June 23, 2003).
2. In *Gratz*, the Supreme Court held that the undergraduate admissions process automatically violated Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and 42 U.S.C. § 1981 because it violated the Equal Protection Clause. *Gratz*, 2003 WL 21434002, at *17 n.23.
3. As discussed in more detail below, there are two parts of the equation to determine if affirmative action equals discrimination: (1) the basis or factual predicate for implementing the affirmative action initiative; and (2) the measure used to obtain the desired diversity. With respect to the Equal Protection Clause, the first part of the equation, or the factual predicate, is whether there is a "compelling governmental interest" to justify the use of race as a factor in a selection decision. The Supreme Court found that there is a "compelling governmental interest" in the use of race in the admissions process because the attainment of a diverse student body furthers academic interests. *Grutter*, 2003 WL 21433492, at *14-15. However, what constitutes a "compelling governmental interest" in the public education setting is different and probably broader than what constitutes a sufficient factual predicate for affirmative action in the employment setting.
4. *See United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208 (1979) (upholding affirmative action plan, in part, because "the plan is a temporary measure; it is not intended to maintain racial balance, but is simply to eliminate a manifest racial imbalance").
5. *See e.g., Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (rejecting the use of a tie breaker for equally qualified candidates in a layoff in order to promote diversity with its teachers because the affirmative action did not have a remedial purpose); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486 (3d Cir. 1999) (affirmative action plan was deficient because its goal was not to remedy past discrimination). *See also*, EEOC's Guidance on Affirmative Action Appropriate Under Title VII of the Civil Rights Action of 1964, 29 C.F.R.§ 1608.4(b) (reasonable basis for affirmative action limited to remedial measures).
6. *Grutter*, 2003 WL 21433492, at *18. ("universities cannot establish quotas").
7. *Grutter*, 2003 WL 21433492, at *15 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 205, 307 (1978) (opinion of Powell, J.)).
8. *See also Weber*, 443 U.S. at 208 (upholding affirmative action plan, in part, because it did not present an absolute bar to the advancement of white employees).
9. *Grutter*, 2003 WL 21433492, at *18; 19 ("Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." "The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").
10. *See Grutter*, 2003 WL 21433492, at *20 (relying on the fact that the law school actually gives substantial weight to diversity factors besides race).
11. *See Grutter*, 2003 WL 21433492, at *18 (race can be used in a "flexible, nonmechanical way").
12. *See Grutter*, 2003 WL 21433492, at *19.
13. *Grutter*, 2003 WL 21433492, at *20; *Gratz*, 2003 WL 21434002, at *15.
14. A determination of whether a statistically significant under-representation of a particular minority or a manifest imbalance exists is determined by examining the relevant market data compared to the percentage of minority representation in a particular job classification.
15. In *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 636 (1987), the Supreme Court stated that a manifest imbalance need not be such that it would support a *prima facie* case of discrimination against the employer because such a requirement could "inappropriately create a significant disincentive for employers to adopt an affirmative action plan."
16. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, (3d Cir. 1996) (holding that racial diversity was not one of the goals of Title VII and thus non-remedial objectives cannot be used by employers to implement affirmative action).
17. The Supreme Court, in upholding the University of Michigan Law School admissions process, stated in part that, "[t]he Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin. ... That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, Slip Op. at p. 17.
18. *See United Steelworkers of Am., AFL-CIO v. Weber*, 443 U.S. 193 (1979).
19. *See Weber*, 443 U.S. at 208 (upholding affirmative action plan in part because "the plan is a temporary measure; it is not intended to maintain racial balance, but is simply to eliminate a manifest racial imbalance"); 29 C.F.R. § 1608.4(c)(2) ("The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.").
20. *See also* 29 U.S.C. § 1607.2(C) (exempting recruitment efforts from the definition of "selection procedures" governed by the Uniform Guidelines on Employee Selection Procedures).
21. *See United Steelworkers of Am., AFL-CIO v. Weber*, 443 U.S. 193, 208 (1979) (upholding race-conscious affirmative action plan and reasoning in part that it did not require discharge or the absolute bar for advancement of white employees); *Crumpton v. Bea*, 933 F.2d 1023 (2d Cir. 1993) (holding that exclusive layoff of one race in an effort to rectify past discrimination is an impermissible means to a legitimate end).
22. *See Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 623-24 (1987) (upholding affirmative action plan which allowed female employee with slightly lower test score to be promoted over male with higher test score in part because minority status was one of many factors used in the decision).
23. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); *Firefighters, Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).
24. *Bass v. Board of County Commrs., Orange County, Florida*, 256 F.3d 1095, 1103 (11th Cir. 2001).
26. *See e.g. Bass v. Board of County Commrs, Orange County*, 256 F.3d 1095, 1106-1109 (11th Cir. 2001).

Douglas B. Kauffman
Douglas B. Kauffman is a 1993 *summa cum laude* graduate of Cumberland School of Law, Samford University. He is a partner with Balch & Bingham LLP in Birmingham, and is a speaker on the topics of diversity and affirmative action.

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Estate Planning for Protected Persons

BY MICHAEL A. KIRTLAND

The Baby Boomer generation is growing older. With their aging, and combined with modern medicine's ability to enhance the length, and sometimes the quality, of life, the population in America is growing older. Unfortunately, as people have begun to live longer, medical problems which were not common in generations past have begun to appear. Some medical researchers believe that the increase in the appearance of Alzheimer's Disease in the population is simply based on the aging of the population. The most extreme of these physician/researchers believe that such dementia-based diseases become inevitable as a result of the longevity of the population.

Combined with this aging of the population is the reduction in the traditional core family units which, in decades past, often were the primary providers of care for older Americans. It was simply more prevalent in times past for sons and daughters to care for their aging parents. With the length of the average lifetime greater than ever, though, the time period for which an adult child may be responsible for an aging parent is growing longer as well. As an additional complicating factor, families now are more mobile, resulting in a significant portion of the elderly population living far from their adult children. Finally, the rise in families where both husband and wife are working outside the home means that family members serving as primary caregivers for the elderly, especially those with significant medical problems, is decreasing.

Statistically, approximately 50 percent of the population age 60 or older will spend some portion of their remaining life in a nursing home, whether that time be a few days or weeks, or for a number of years. The average length of stay for a custodial nursing home patient is 2.4 years. Paying for such long-term care is problematic. The average cost of nursing home care in Alabama in 2003 was $3,500 per month. (That is relatively low in comparison with other states.) The immense cost means all but the wealthiest Alabamians will expend a significant portion of their hard-earned assets on nursing home care. Even fairly successful, middle-class persons can spend most or all of their life savings paying for end-of-life care. Where an individual's assets are depleted, governmental benefits become necessary to pay for nursing home care. This care is provided through the Alabama Medicaid Agency's Institutional Care program. Medicaid is a federally-mandated, joint state- and federally-funded, and state-administered welfare program designed to provide medical and nursing home custodial care for the indigent population. For single individuals, including widowed persons, the qualification criteria are drastic, including a countable resource limit of only $2,000. (Detailed discussion of eligibility criteria is far beyond the scope

and purpose of this article. Figures used are for 2003. The data here should not be relied on by the practitioner as a guide to Medicaid qualification. Referral to an elder law practitioner is recommended.) For a married couple, the resource limit is more liberal, though hardly generous. Married couples may keep one-half of their countable assets up to a maximum $90,660 ($92,760 for 2004). The other one-half of the countable assets of the couple must be "spent down" on behalf of the spouse in need of nursing home care (the "institutionalized spouse") before qualification for Medicaid assistance. In addition to asset qualification levels, to qualify for Medicaid assistance, the individual must pass an income level test. For 2003, the income limit is $1,656 per month. Unfortunately, with the average cost of nursing home care at $3,500 even persons with more than $1,656 a month in income can need Medicaid institutional care assistance. The solution rests in the creation of a Qualified Income Trust, commonly known as a "Miller Trust." The Miller Trust permits the individual to direct his/her income into the trust monthly, and limits distributions from the trust to such amounts as will not disqualify the person from receiving Medicaid institutional care assistance. At the death of the individual, the Alabama Medicaid Agency stands as first beneficiary of any remaining funds in the Miller Trust, up to the total amount of Medicaid funds provided for the nursing home care during that individual's lifetime. This technique is an essential Medicaid qualification tool, and is so commonly used that the Alabama Medicaid Agency has a Miller Trust form available to Medicaid applicants.

In order to preserve assets for the community-based spouse (the "community spouse"), while still qualifying the institutionalized spouse for Medicaid Institutional Care assistance, a common practice is to begin a program of asset transfers to the community spouse and often to the next generation as well, to intentionally reduce the institutionalized spouse's assets to Medicaid qualification levels. These asset transfers are a well-recognized device to provide asset planning. Federal law permits such transfers. If the transfers are made within three years of a Medicaid application, or five years if the transfers are made to a trust, a calculation is performed to determine if the Medicaid applicant should have to wait out a disqualification period prior to being qualified for Medicaid nursing home care benefits. By direct transfers from the ailing spouse to his/her healthy spouse and/or children, or by transfers by the healthy spouse/child through a durable power of attorney, such transfers permit assets to be preserved for the benefit of the community spouse and often the next generation as well. With 70 percent of all nursing home patients in Alabama receiving Medicaid institutional care assistance, such planning techniques are essential to the financial well-being of a large part of the population. Despite rampant misconceptions by both laymen and professionals, the Alabama Medicaid Agency does not kick community spouses out of their homes and onto the street, seizing the home for the state's benefit, prior to permitting the individual to receive Medicaid institutional care assistance.

Such asset-transfer planning techniques are well recognized in both state and federal law. Nevertheless, traditional estate planners often look down upon attorneys and clients who make such transfers. A distinction is often made between estate planning for persons without large estates over persons of wealth, who routinely retain legal and tax counsel to preserve the maximum amount of wealth for distribution to a spouse and to the next generations. Clearly, competent individuals can make such transfers themselves, regardless of the economic consequences for the transferor. Generally speaking, the same is

true for transfers from competent persons by way of a durable power of attorney. In fact, Alabama law specifically recognizes a right under a power of attorney to make asset transfers to family members and others if the purpose of such transfers is to reduce the estate tax payable on the principal's death. (§ 26-1-2.1(a)(3), *Code of Alabama*) Such right does, in fact, exist for small estates as well. The same code section that permits transfers for reduction of estate taxes also permits transfers via power of attorney for smaller estates if the transfers are "in the best interest of the principal's estate." (§ 26-1-2.1(a)(2) Still, such transfers for Medicaid qualification purposes are often seen by judges as outside the scope of the power of attorney, by questioning if the transfers are "in the best interest" of the individual.

Because competent individuals can make transfers without the need of judicial scrutiny, the greater problem in small estate planning is considering what happens if the institutionalized spouse is not capable of making such transfers due to incapacity issues. Where there is a well written durable power of attorney, the necessity of involving governmental or judicial agencies in the management of the incapacitated person's assets is not normally necessary. Without a durable power of attorney, where management of the incapacitated individual's assets is necessary, a court-ordered conservatorship is usually the solution. Once a conservatorship is established, strict financial accounting of the incapacitated person's estate is required. Can the types of transfers that are common for non-incapacitated individuals take place once the conservatorship has been established? Anecdotal experience would say no.

Typically, probate judges will not permit such transfers, even if it can be established that the incapacitated person desired to make such transfers had they remained competent, and where it can be established that the transfers are in the best interest of the principal's estate. A careful look at the *Code of Alabama* indicates this should not be the case, though. The possible exception to this reluctance to allow transfer of the ward's assets is permitting the creation of a Miller Trust. Even here, if the judge is not particularly familiar with Medicaid law, there may be a reluctance to permit this action, even though clearly in the best interest of the person.

The authorities granted in a conservatorship are codified in the Alabama Uniform Guardianship and Protective Proceedings Act (§ 26-2A-1 *et. seq.*). In fact, § 26-2A-136 clearly states that "the court, for the benefit of the person *and members of the person's immediate family*, has all the powers over the estate and business affairs which the person could exercise if present and not under disability, except the power to make a will." (§ 26-2A-136(3), emphasis added) This section goes on to list examples of the types of powers that are available, including the power to make gifts, and to convey and release interests in property, "including marital property rights and any right of survivorship incident to a joint tenancy." Under such authority, it seems readily apparent that the court does, in fact, have the authority to permit the transfer of assets for Medicaid qualification purposes.

Even if the court believes that it is an open question as to whether or not the benefit adheres to the ward, clearly the ward's immediate family benefits from the retention of assets, which would otherwise have to be spent on nursing home care prior to qualification for Medicaid assistance. By using its authority to convey interests under joint tenancy, the court could, for example, transfer ownership of a jointly owned home to the community spouse's sole ownership, thereby preserving the ability of the community spouse to distribute the home to the person or persons of his/her choosing at death through a will, instead of the Alabama Medicaid Agency's placing a lien against the home for the institutionalized spouse's interests in the home. Taking the position that such transfers are not in the best interest of the person, or of the person's immediate family, cannot stand scrutiny. There is no benefit to the institutionalized spouse to keeping the home in joint names. The house is an exempt asset for Medicaid qualification purposes, and no forced sale of the property can be maintained. As such, no financial benefit exists to the institutionalized spouse to keep the house in their name, while on the other hand, significant benefit comes to the immediate family of the institutionalized spouse by eliminating the possibility that Medicaid will place a lien

against the property, contrary to the ownership interests of the community spouse.

The *Code of Alabama* permits the court, under color of the conservatorship, to "create revocable or irrevocable trusts of property of the estate which may extend beyond the disability or life of the protected person...." (§ 26-2A-136) This authority permits the creation of Miller Trusts for the benefit of the institutionalized spouse, an act clearly in the best interest of the institutionalized spouse as it allows that person to qualify for Medicaid institutional care benefits. This authority to create revocable or irrevocable trusts, however, also provides an opportunity for flexibility in estate planning for the institutionalized spouse. Where the cause of the conservatorship is the onset of dementia, transferring assets at the early stage would permit significant savings of family assets. While the conventional wisdom might be that by placing assets into a trust you are extending the Medicaid look-back period (the period of time prior to Medicaid application in which transfer of assets must be reported to Medicaid) by two years, depending on the size of the transfer, this may not be a problem. Statistically, the penalty period for transfers of any amount over $126,000 or $210,000 for transfers to trust, dictates that the entire look-back period expire prior to Medicaid application. If the actual disqualification is less than three years, the mere fact that the transfers are reportable is not relevant.

The authority to make transfers to a revocable or irrevocable trust provides an opportunity to cure the problem of a lack of a last will and testament. While the *Code* says the conservatorship may not be used to write a will, revocable living trusts normally have testamentary provisions in them to distribute the assets of the grantor upon the death of the grantor. By establishing a single transaction protective arrangement, the court could authorize the special conservator to establish a revocable living trust for the benefit of the incapacitated person. In so doing, the special conservator specifically designates who shall receive estate assets at the death of the grantor. Only approximately 30 percent of individuals die with a will in place. The revocable living trust serves as a will substitute, and, as such, overcomes the lack of a last will and testament. In that sense, while revocable living trusts are useless instruments for Medicaid qualification, they provide an excellent vehicle for distribution of assets at death in a non-probate setting. If the transfer is to an irrevocable trust, Medicaid qualification benefits exist. In addition to having a viable management scheme, making transfers to trust starts the limitations period for Medicaid qualification purposes. The establishment of the irrevocable trust results in the starting of the Medicaid look-back clock, perhaps resulting in qualification for Medicaid institutionalized care in a shorter period of time. Despite this, judges often decline to order a trust be created because they believe there is too little information about the institutional spouse and the intent of the grantor for determining the testamentary scheme inside the revocable living trust.

Anecdotally, judges and clerks often cite that transfers of assets exceeding 20 percent of the annual income of the estate are not permitted. This is not the case. Rather, if the transfer is larger than 20 percent, it simply imposes the need for a hearing to be held, with notice given to appropriate parties.

In addition to formal conservatorship, a second method of court ordered transfers exists. Under § 26-2A-137, *Code of Alabama,* even where a conservator has not been appointed, but where the basis for a conservatorship exists, the court may authorize transfers "necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person." This situation would exist, for example, where a power of attorney existed appointing an agent for the incompetent institutionalized spouse, thereby negating the need for a conservatorship, but where some third party, such as a bank or brokerage house, declined to honor the power of attorney. Another situation where this procedure might be useful is where the agent is aware that significant hostile reaction of other family members might occur if there was no court sanction of the transfers. The standard for the court to accept such a single transaction protective arrangement is where the "court determines that the transaction is in the best interest of the protected person." The standard goes on to state "the court shall consider the interests of creditors and *dependents of the protected person*..." (emphasis added).

If the court is to truly follow the intent and the language of the Act, a broad interpretation of the code is useful. In all but the most unusual situations, transfers of assets to the community spouse would be something that the institutionalized spouse would want to take place if s/he could speak for him/herself. Such interpretations support the public policy of keeping family units intact and preventing impoverishment of the community spouse. More problematic is the question of permitting transfers to the next generation for estate planning purposes. Where there are dependent children, either minors or disabled children, the public policy considerations in favor of permitting such transfers is as clear as it is for transfers to a spouse. Where the transfers are to be made to adult children or other family members, however, we must consider just what the intentions of the institutionalized individual would be concerning distributions to his/her children. Not all individuals wish to make distributions, even at death, to their children, though this is the norm. Even within the group wishing to make such distributions to their adult children, not everyone wishes to make equal distributions to all adult children. What standard of proof should be used in aiding the court to determine the intent of the incapacitated person? Should the standard of § 26-1-2.1 concerning gifts by power of attorney be used? Under this standard, the agent must first determine: (1) the best interest of the principal; (2) the best interest of the principal's estate; *or* (3) that will reduce the estate tax payable on the principal's death; *and is in accordance with the principal's personal history of making or joining in the making of lifetime gifts.* (emphasis added). While the court might relatively easily determine what is in the best interest of the principal (in this case the institutionalized spouse) and even what the best interest of the principal's estate may be, overcoming the burden of demonstrating that there is a history of making lifetime gifts is difficult, if not impossible. Many individuals never show a substantial pattern of making gifts until faced with the loss of assets to the nursing home. Using the standard of the gifting section of the *Code*, most people could not prove the standard necessary to permit gifts out of the conservatorship for Medicaid qualification. The standards under the conservatorship sections of the *Code* are more flexible because the proponent of the transfer does not have to show a history of such gifting. The problem appears to be not in establishing a viable standard, but in educating the courts as to valid Medicaid estate planning practices and the advantage to the community spouse or other family members. With the aging of the population, the need to educate the judiciary and attorneys simply increases. ■

Michael A. Kirtland
Michael A. Kirtland is a solo practitioner in Montgomery. He received his J.D. from the Jones School of Law and his LL.M. in taxation from the University of Alabama School of Law. He is a member of the Elder Law Committee of both the American Bar Association and the Alabama State Bar. He currently serves as the vice-chair of the American Bar Association's Long-Term Care, Medicaid and Special Needs Trusts Committee. He is a founding board member of the Alzheimer Organization of the Greater Montgomery Area. He is a member of the National Academy of Elder Law Attorneys, and is one of only six Alabama attorneys to have earned the designation Certified Elder Law Attorney (CELA) from the National Elder Law Foundation.

MEDIATION, BANKRUPTCY AND THE BANKRUPTCY ADMINISTRATOR

BY J. THOMAS CORBETT

Due in part to the significant savings of time and costs, mediation has been successfully used to resolve a broad range of disputes. Perhaps one of the best uses for mediation is in the bankruptcy/insolvency context. Important goals encompassed in the *Bankruptcy Code* are an expeditious resolution of a debtor's financial affairs and maximum recovery for creditors. Those goals become frustrated by any unnecessary delay, burdensome expense, unnecessary litigation or duplication of efforts. Since time and costs are such critical elements of a bankruptcy case, mediation is well suited for furthering the goals of the *Bankruptcy Code*.

Authority for the Use of Alternative Dispute Resolution in Bankruptcy Cases

At lease four sources exist for the use of Alternative Dispute Resolution (ADR) procedures in bankruptcy cases. Those sources include: (1) a court's inherent power to manage and control its docket; (2) statutes enabling district courts to use ADR through local district court rules; (3) Section 105 of the *Bankruptcy Code*; and (4) Bankruptcy Rule of Procedure 7016. These sources provide ample encouragement and authority for the use of mediation in bankruptcy cases.

Persuade your neighbors to compromise whenever you can.
- ABRAHAM LINCOLN

One may win the lawsuit, but lose one's money.
- CHINESE PROVERB

Federal courts', including bankruptcy courts',[1] inherent authority[2] allows those courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[3] Courts may exercise case-management authority to encourage settlement but only if there is no interference with constitutional safeguards,[4] settlements are not coerced[5] and undue burdens or delays are not occasioned upon the litigants.[6] The inherent authority of courts to manage the disposition of cases has led at least one commentator to suggest that "...promotion of settlements is now unmistakably the established position of the federal judiciary".[7]

Congress enacted the Judicial Improvements Act of 1990 on October 6, 1990.[8] Title I of the Judicial Improvements Act is known as the Civil Justice Reform Act of 1990.[9] Section 103 of the Civil Justice Reform Act requires federal district courts to develop and implement a civil justice expense and delay reduction plan. In support of the Civil Justice Reform Act, Congress determined that "evidence suggest that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including ...utilization of alternative dispute resolution programs in appropriate cases." Mediation is one of the alternative dispute resolution options contemplated by the Civil Justice Reform Act.[10]

Section 105 of the *Bankruptcy Code* empowers the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the *Bankruptcy Code*.[11] Arguably, courts and litigants could rely on *Bankruptcy Code* Section 105 to provide for the use of ADR as a "necessary or appropriate" procedural means for carrying out the provisions of the *Bankruptcy Code*. Further support for the use of ADR is found in *Bankruptcy Code* Section 105(d) in that a status conference may be held and orders may be issued at such conference prescribing limitations and conditions as the court deems appropriate to insure that a case is handled expeditiously and economically. The legislative history to section 105 reflects an authorization given bankruptcy court judges to "manage their dockets in a more effective and expeditious manner".[12]

Bankruptcy Rule of Procedure 7016, through its incorporation of Federal Rule of Civil Procedure 16, gives credence to the use of alternative dispute resolution

procedures in adversary proceedings. Bankruptcy Rule of Procedure 7016 provides that at any conference conducted under Rule 7016, the court may take appropriate action regarding "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." Many courts specifically inquire at the Rule 7016 conference the status of settlement possibilities and whether mediation may be of assistance to the parties. The Rule 7016 conference is an excellent time for litigants to ask that they be allowed to attempt to resolve the dispute by way of mediation or other alternative dispute resolution procedures. The use of alternative dispute resolution procedures, including mediation, can also be made applicable in contested matters through Bankruptcy Rule of Procedure 9014. Bankruptcy Rule of Procedure 9014 allows the court to order Bankruptcy Rule of Procedure 7016 applicable in contested matters.

Bankruptcy Rule of Procedure 9029 grants district courts the authority to make and amend local rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction. The local rules must not be inconsistent with the Federal Rules of Bankruptcy Procedure promulgated by the Supreme Court pursuant to 28 U.S.C. § 2075. In most all jurisdictions, the district courts delegate the local bankruptcy rule-making authority to the bankruptcy judges. Local Rule of Procedure 9019 is applicable in the Northern District of Alabama and provides for the use of alternative dispute resolution procedures.

Issues Available for Mediation

Mediation is probably the most commonly used form of ADR in bankruptcy cases[13] and was extensively used in several notable cases by way of a "claims resolution facility." A claims resolution facility is a specifically designed program that incorporates a structured negotiation procedure, including mediation and other forms of ADR, to resolve large numbers of disputed claims. The facility is typically approved by the bankruptcy court on either motion of a party or as part of a confirmed plan of reorganization. In the case of *NLRB v. Greyhound Lines,*[14] mediation via a claims resolution facility was used to resolve claim disputes in advance of plan confirmation. Participation was voluntary and claimants could either mediate or elect to liquidate their claims pursuant to the provisions of the *Bankruptcy Code*. If a claimant elected the mediation route, the claimant was required to provide the debtor with a standardized confirmation of loss form. The debtor was then required to request additional information, deny liability, allow the claim in full, make an offer to settle the claim, or request mediation. A denial of liability by the debtor resulted in the claim being referred to mediation. The mediation took the normal course where the mediator met with the parties to help facilitate a resolution. If the claim was not resolved, the claimant had the option of proceeding to binding arbitration or filing a motion for relief from stay to liquidate the disputed claim in a non-bankruptcy forum. The claims resolution facility established in the *Greyhound* case resulted in 95 percent of more than 3,200 prepetition tort claims being resolved through ADR.

Mediation was also used in the case of *In re P.A. Bergner Holding Company.*[15] In that case, a mediator was retained on the debtor's motion to facilitate, prior to confirmation of a plan of reorganization, the resolution of hundreds of personal injury claims and several thousand disputed trade claims. The alternative dispute resolution order entered in the case required the debtor to submit a post-confirmation report analyzing the claims mediation process. That report showed that 1,215 claims were resolved by alternative dispute resolution in the approximate amount of $1.2 billion.

A claims resolution facility, similar to the one use in the *Greyhound* case, was also used in *In re A.H. Robbins Company*[16] to liquidate claims *after* the confirmation of a plan of reorganization. The plan of reorganization established a claims resolution facility and a settlement fund to compensate parties claiming injuries resulting from the use of the Dalkon Shield intrauterine device. The facility provided claimants with several options to seek compensation for their injuries including "instant settlement offers" of a preset and consistent amount. The claimants could reject the 'instant settlements' or any other mediated or negotiated settlement offers and proceed with litigation against the debtor.

While seemingly unusual, and outside of a claims resolution facility, mediation has even been used to coordinate a plan of reorganization. Nearly two years after filing a Chapter 11 case, R.H. Macy and Company, Inc.[17] had not been able to achieve a confirmed plan of reorganization. Presiding Judge Burton R. Lifland, concerned with the possibility of extensive litigation, appointed former Secretary of State Cyrus Vance to mediate negotiations between Macy's and one of its largest creditors, Federated Department Stores Inc. Federated had become one of Macy's creditors by purchasing approximately $500 million in secured mortgage debt. Federated hoped to acquire Macy's by virtue of its creditor status while Macy's intended to emerge from Chapter 11 as an independent entity. Within approximately five months of the appointment of the mediator, Macy's agreed to merge with Federated and a consensual plan of reorganization was born, wherein creditors received total payment of approximately $4.1 billion which was $2 billion more than the initial estimates of payments available to be made to creditors.

The rapid increase in bankruptcy filings— approximately 832,829 in 1994 to 1,654,847 in 2004[13] current budgetary hard times, concerns over cost and inefficiencies of litigation, and the requirements that courts must devise ways to resolve more matters with less judicial resources continues to expand the use of mediation in bankruptcy cases. Today, issues available for mediation have grown to include objections to claims; valuation of collateral; contract disputes; dischargeability complaints under *Bankruptcy Code* Section 523; preference actions; fraudulent transfers; adequate protection payments; motions for relief from the automatic stay; and violations of the automatic stay.

The Bankruptcy Administrator Mediation Division

The Bankruptcy Administrator Organization for the Northern District of Alabama has attempted to assist in addressing the concerns of limited judicial resources, increasing litigation costs and the expediency of dispute resolutions. The United States Bankruptcy Attorney for the Northern District, Southern Division of Alabama began offering limited informal mediation services in Birmingham on an *ad hoc* basis in 1998. In light of the positive results and response to the informal procedure, a Mediation Division has been established as a formal practice section within the United States Bankruptcy Administrator Organization. Active support of the Mediation Division came from the chief judges of the 11th Circuit Court of Appeals, Federal District Court for the Northern District of Alabama and the Bankruptcy Court for the Northern District of Alabama, and resulted in authority from the Judicial Conference of the United States for the appointment of a Chief Deputy Bankruptcy Administrator.

A primary duty of the Chief Deputy Bankruptcy Administrator is to conduct mediation sessions, to educate participants about the program, and to organize, develop, coordinate and implement the policies, procedures and practices of the Mediation Division. The guidelines, policies and procedures that form the basis of the Bankruptcy Administrator (BA) Mediation Division have been promulgated in conformance with Local Rule of Bankruptcy Procedure 9019. Should the guidelines, policies or procedures of the BA Mediation Division conflict with Local Rule 9019 or any other local rule, the provisions of the Local Rules control.

Mediation through the BA Mediation Division is very similar in both attributes and procedure to traditional private-based mediation and provides many of the same advantages. The advantages are becoming well recognized and include a savings of costs; typically a more rapid resolution than a trial; effectiveness in maintaining business relationships which are often crucial to a reorganization; help in minimizing hostility due to the non-adversarial nature of mediation; maintenance of the parties' rights under the *Bankruptcy Code* and Rules; and the ability to provide a great degree of flexibility. Additionally, parties may feel more supportive and committed to a resolution

obtained through mediation because the result was not forced upon them, but crafted in part by them.

The mediation process through the BA Mediation Division largely follows private-based mediation protocols. The BA Mediator begins the mediation with an initial conference wherein all parties are present. Introductions of the parties and the mediator are made and an explanation is given concerning the mediation process. If beneficial or requested, initial or opening remarks are made by the parties. The BA Mediator then caucuses separately with each of the parties and allows them to speak frankly about their needs, concerns and the strengths and weaknesses of their position.

Discussions during the separate caucuses include an effort to accelerate the process of narrowing and evaluating the issues and concerns of the parties. Because the sessions are not bound by procedural and evidentiary rules, the parties are at liberty to discuss and explore peripheral issues or concerns that may be more likely to lead to an agreeable or acceptable settlement than if those issues or concerns were left dormant and unaddressed at trial. The parties are allowed to craft resolutions personally tailored to their needs. Such resolutions may even help to preserve ongoing relationships. If a continuing business relationship is an important factor, as it may well be in a chapter 11 reorganization, mediation should be attractive.

The mediator, and the mediation process itself, attempt to keep the discussions founded in what the future may offer both in terms of possible settlements and results stemming from a trial. Discussions solely about what transpired in the past are rarely productive in resolving issues. An additional important objective of the mediator is to reduce the role that passion and emotion play in the dispute between the parties. As the BA Mediator speaks separately with each party, he acts as a guide or facilitator in an attempt to help the parties discover an area of common interest or acceptable result. The mediator may even offer proposals or possibilities that the parties have not conceptualized.

The parties can expect that the mediator has read the relevant pleadings, motions, orders and the position statements provided by the parties, and conducted his own legal research so that he is able to understand the issues and search for possible resolutions that are beneficial to all the parties. A letter from the BA mediator will be sent to the parties requesting a position statement, confirming the time, date and place of the mediation and asking that the parties specifically address in their position statements particular questions posed by the mediator. The questions posed by the BA mediator in his letter derive from research the BA mediator has undertaken in advance of the mediation that he anticipates will help focus and frame the issues for discussion at the mediation. Those questions are also designed to lead the parties to further consider particular aspects of their own case or aspects of their opponent's case.

As discussed in the May 2004 issue of *The Alabama Lawyer*,[18] the BA Mediation Division Program is offered at no cost to the participants. To further encourage use and confidence in the BA Mediation Division Program, the guidelines, policies and procedures of the program have been tailored to address issues of expediency, neutrality, costs and ease of use.

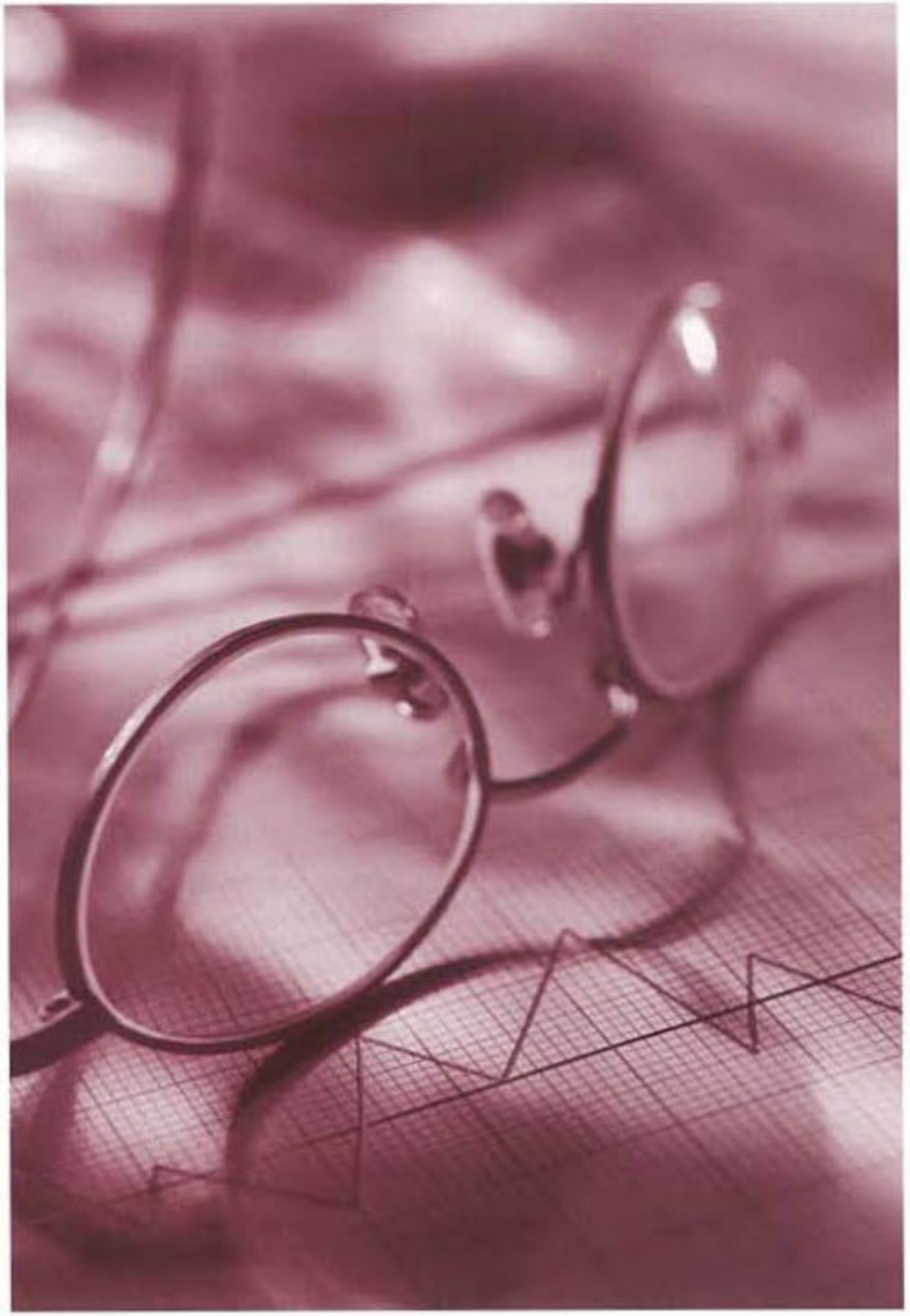
Section 4.0 of the BA Mediation Division Guidelines, Policies and Procedures (BA Mediation Guidelines) indicates that most controversies arising in an adversary proceeding, contested matter or other dispute in a bankruptcy case may be mediated by the BA Mediation Division. Matters not eligible for mediation involve or concern employment and compensation issues; objections to discharge under 11 U.S.C 727; matters involving criminal issues; contempt or other types of sanctions; adequacy of disclosure statements; confirmation of plans; matters in which participation by the United States Bankruptcy Administrator Organization will constitute an actual conflict of interest; or matters which the presiding judge may decide to exclude from mediation by the BA Mediation Division.

In accordance with Section 6.0 of the BA Mediation Guidelines, matters are referred to the BA Mediation Division by way of court order. That order can be issued upon the court's own *sua sponte* power; upon written stipulation of the parties to the matter; upon oral motion of the parties at any hearing or status conference; or upon motion of a single party to the matter. As set forth in Local Rule 9019 and Section 8.0 of the BA Mediation Guidelines, a party may object to the referral of a case, proceeding or matter for mediation by the BA Mediator by filing a written request for reconsideration for good cause shown, within ten days of the date of the court's order referring the matter to mediation.

Status conferences or hearings in accordance with Bankruptcy Rule of Procedure 7016 are an excellent time for the parties to request mediation. Parties who fear asking that mediation be considered because it may be perceived as a sign of weakness in their position may be more willing to engage in negotiation when prompted by the court. Preparations for Rule 7016 hearings should include discussions with clients that mediation is an attractive option for a rapid and less costly resolution, and there is a good chance that the parties may have to answer questions from the court about the possible use of mediation. If a court is prone to inquire about the use of mediation, the parties should not be concerned that a request for mediation will be viewed as a weakness or flaw in their case.

Since mediation is the resolution of a dispute through the non-coercive intervention of a third party, neutrality is important. Accordingly, Section 12.0 of the BA Mediation Guidelines requires the BA Mediator to ascertain, to the best of his ability, knowing only the facts at the time of referral to mediation, whether the referred case creates or constitutes an actual conflict of interest for the United States Bankruptcy Administrator Organization, and whether the mediator is impartial and free of conflicts in accordance with Standard 5 of the *Alabama Code of Ethics for Mediators.*

Should a conflict be discovered, the BA Mediator shall report in writing to the court that he is ineligible to serve as mediator, and nothing more. The parties/litigants may proceed with mediation with a non-BA mediator in accordance with Local Rule of Procedure 9019. If, at any time during the process of mediation, the BA Mediator becomes aware of or a party raises an issue concerning the mediator's neutrality, based on either an interest in the case, proceeding or matter, or a relationship or affiliation with one of the parties, or any other matter, the mediation shall cease and terminate, and the BA Mediator shall report in writing to the referring court his withdrawal, and



nothing more. In such event, the parties may proceed with mediation with a non-BA Mediator in accordance with Local Rule of Procedure 9019. Section 13.0 of the BA Mediation Guidelines directs that if a BA mediator should withdraw from the mediation for any reason, he will not discuss with any replacement or substitute mediator the issue that was the subject of the mediation, the basis for his withdrawal or any other matter discussed at the mediation.

Sections 16.0 and 17.0 of the BA Mediation Guidelines indicate that absent a court order containing a date certain, it is anticipated that the mediation will occur within 75 days of the date of the order referring the matter to mediation. The BA Mediator will coordinate a mutually acceptable date for the mediation with the parties and notify the parties in writing of the date, time and place of the mediation. The BA Mediator determines the place for the mediation conference, taking into account the location of the majority of the litigants, any physical limitations of the parties or any other relevant factors. The BA Mediator typically holds mediation conferences in Birmingham, Tuscaloosa, Decatur and Anniston.

Much like private-based mediation, and in accordance with Section 18.0 of the BA Mediation Guidelines, the BA Mediator will request that the parties submit position statements to the mediator. The position statements will include copies of relevant pleadings, orders and motions; a short memorandum stating the legal or factual position of each party respecting the issue in dispute; and such other materials as the party believes will be beneficial to the mediator. The position statements may also include a statement addressing whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement; a statement setting forth the history of past settlement discussions, including disclosure of prior and presently outstanding offers; an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and the trial; and identification of presently scheduled dates for further status conferences, pretrial conferences, trial or other hearings.

Section 19.0 of the BA Mediation Guidelines states that the attorney primarily responsible for each parties case, proceeding or matter must attend the mediation conference and must be prepared and authorized to discuss all relevant issues, including settlement. The parties, including *pro se* parties, must also be present, except when a party is other than an individual or when a party's interest is being represented by an insurance company, an authorized representative of such party or insurance company with full authority to settle must attend. Mediation sessions are private. Persons other than the parties and their representatives may attend only with permission of all parties and the consent of the BA Mediator.

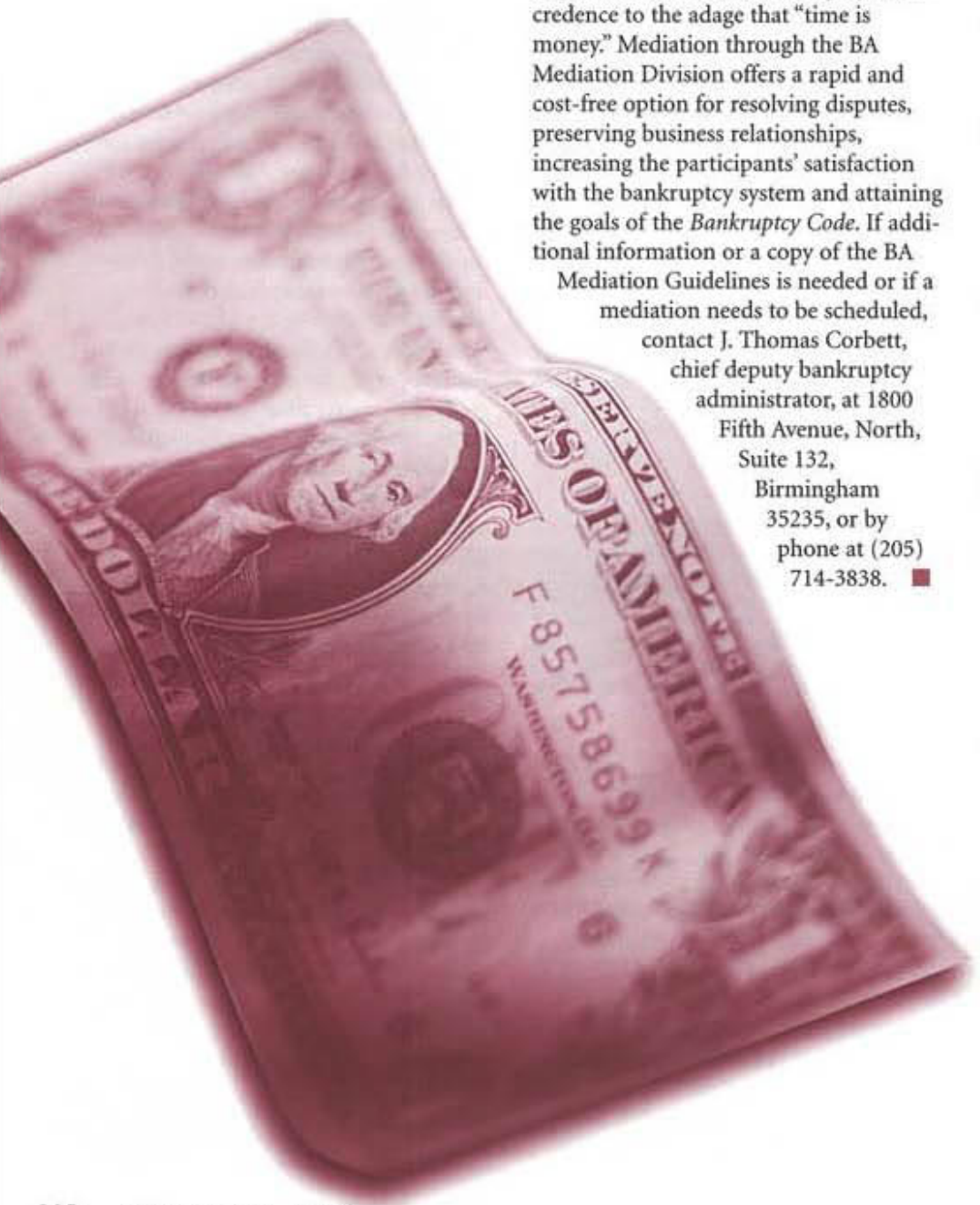
Attendance by the parties, authorized and capable of entering a settlement agreement, is of pressing importance. The process of mediation (being allowed to hear an opponent's position and concerns and being free to voice one's own position and concerns in a non-adversarial setting) is key to reaching a resolution that is manageable, acceptable and productive for all parties. Failure of a party

to attend limits the process and accordingly limits the chances of crafting a resolution. Additionally, the failure to attend by one party may be viewed by the other party as a lack of sincerity or willingness to negociate in good faith, thereby causing the party in attendance to become suspicious and more entrenched in their position.

The mediation concludes, in accordance with sections 22.0 through 24.0 of the BA Mediation Guidelines, when a settlement is reached; the mediator concludes and informs the parties that further mediation efforts would not be useful; or one of the parties informs the BA Mediator that settlement is not possible. As soon a practicable after the mediation conference, the BA Mediator files with the referring court and serves on the parties a report indicating whether or not a settlement was reached, and if a settlement was reached, the name of the party designated to draft the settlement documents. It should be remembered that the parties might be required to obtain court approval of the settlement in accordance with Bankruptcy Rules of Procedure 9019, 2002 and 4001.

Conclusion

Significant goals of the *Bankruptcy Code* are the expeditious resolution of the financial affairs of the debtor and a maximum return to creditors. That goal is frustrated by unnecessary delay, burdensome expense, useless litigation or duplication of efforts. Bankruptcy lends credence to the adage that "time is money." Mediation through the BA Mediation Division offers a rapid and cost-free option for resolving disputes, preserving business relationships, increasing the participants' satisfaction with the bankruptcy system and attaining the goals of the *Bankruptcy Code*. If additional information or a copy of the BA Mediation Guidelines is needed or if a mediation needs to be scheduled, contact J. Thomas Corbett, chief deputy bankruptcy administrator, at 1800 Fifth Avenue, North, Suite 132, Birmingham 35235, or by phone at (205) 714-3838. ■

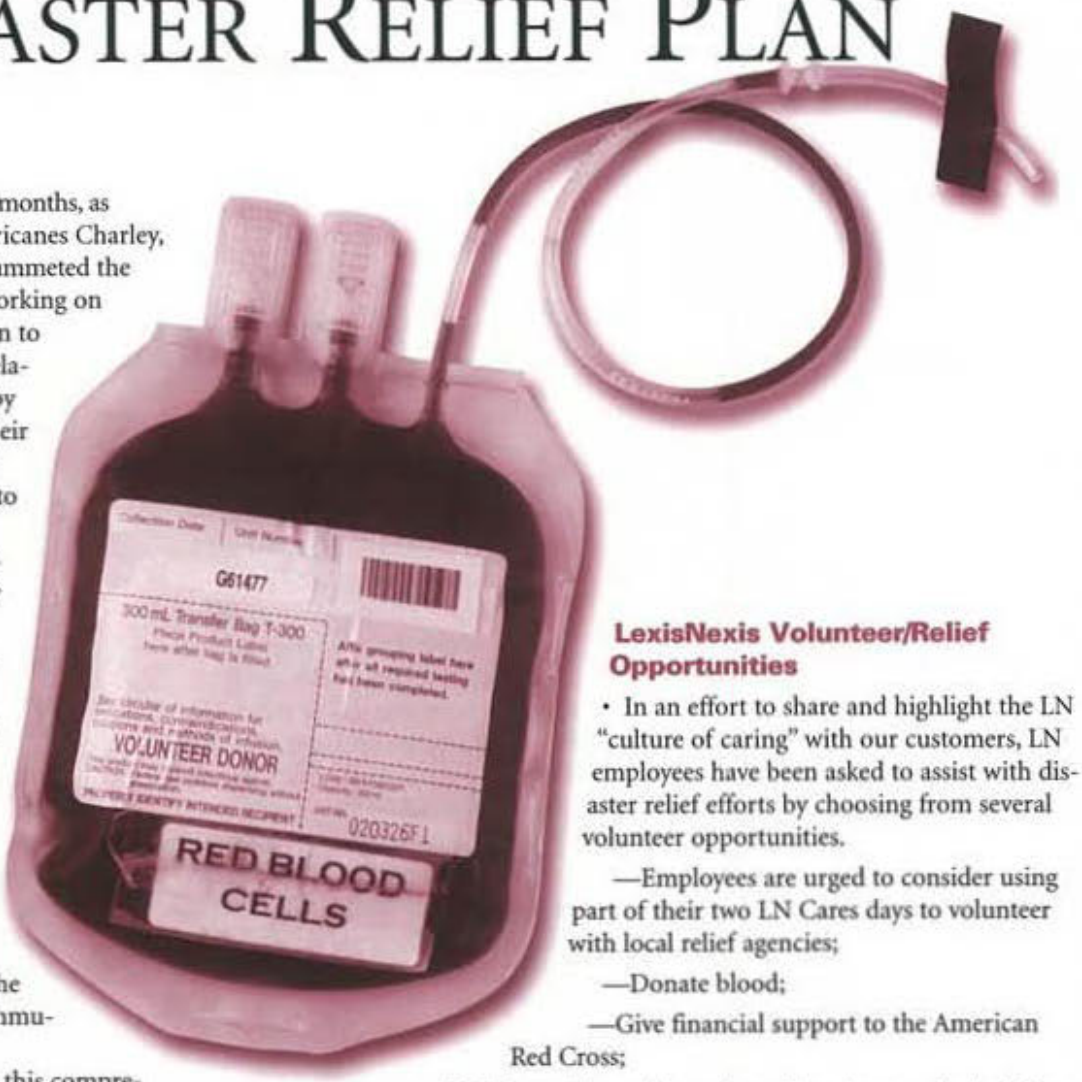


ENDNOTES

1. 28 U.S.C.§ 151 provides that in "each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."
2. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).
3. *See id.* at 630.
4. *See Vietnamese Fishermen's Association v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 208 (S.D. Tex. 1982).
5. *See National Association of Government Employees v. National Federation of Federal Employees*, 844 F.2d 216, 222 (5th Cir. 1988).
6. In re NLO, Inc., 5 F.3d 154, 158 (6th Cir. 1993).
7. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 Judicature 257, 261 (1986).
8. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. § 473 (1994)).
9. Civil Justice Reform Act of 1990, Pub. L. No. 101-650 104 Stat. 5090 (1990) (codified at 28 U.S.C. § 473 (1994)).
10. 28 U.S.C. §§ 473(b)(4), 473(a)(6)(B) (1994).
11. 11 U.S.C. § 105(a).
12. H.R. 5116, Cong., 2d Sess., 140 Cong. Reg. 10752, 10764 (1994).
13. *See generally* Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolution, Conflicts Without Litigation* 130 (1984).
14. In re Eagle Bus Mfg., Inc. 134 B.R. 584 (Bankr. S.D. Tex. 1991), aff'd *sub nom*, NLRB v. Greyhound Lines, Inc. (In re Eagle Bus Mfg., Inc.), 158 B.R. 421 (S.D. Tex. 1993).
15. In re P.A. Bergner Holding Co. Nos. 91-05501 to 05516 (Bankr. E.D. Wis.)
16. In re A. H. Robins Co. 88 B.R. 742 (E.D. Va. 1998).
17. In re R. H. Macy & Co., Inc. No. 92-B-40477 (S.D. New York).
18. See U.S. Bankruptcy Filings 1980-1997 *www.abiworld.org/stats*. See Administrative Office of the U. S. Courts *NEWS RELEASE*, May 21, 2004.
19. J. Thomas Corbett, *The Alabama Lawyer*, Vol 65, No.3 at 194.

J. Thomas Corbett
J. Thomas Corbett is the chief deputy bankruptcy administrator for the Northern District of Alabama. He is a 1988 graduate of the University of Alabama School of Law and a 1985 graduate of the University of Alabama, where he received his degree in corporate finance and investment management. From 1988 to 1990, he served as law clerk to then Chief Bankruptcy Judge George S. Wright. Corbett was formerly a managing partner in the firm of Burnham, Klinefelter, Halsey, Jones & Cater PC, specializing in bankruptcy and business litigation. He is a registered mediator with the State of Alabama.

LexisNexis Cares Disaster Relief Plan



Throughout the past several months, as unwelcome visitors like hurricanes Charley, Frances, Ivan and Jeanne plummeted the Gulf Coast, LexisNexis has been working on a comprehensive disaster relief plan to aid those customers, association relationships and employees affected by the storms. In conjunction with their bar partners, LexisNexis has compiled an extensive list of offerings to help customers get back on their feet as quickly as possible. In addition, the company has put together a list of ways that LexisNexis employees can help through donations and volunteerism.

Brenda Castello, senior director of association markets and community relations for LexisNexis, explains, "LexisNexis regrets that circumstances have prevailed to give rise to the need for disaster relief for our friends and colleagues in Alabama. We are honored to help and will be here for the long term to support the legal community in as many ways as we can."

LexisNexis is pleased to provide this comprehensive package, specifically designed for the Alabama State Bar and its members. LexisNexis wants to do its part to ensure that our customers and employees receive the resources needed in order to recover as quickly as possible from these unfortunate events of the recent hurricanes and tornadoes. Therefore, it is our pleasure to offer Alabama State Bar members the LexisNexis Cares Disaster Relief Plan for Alabama.

Alabama Bar Relief Plan

Bar Member Volunteer Efforts for Hurricane Victims

- Complimentary 30-day lexis.com ID for Alabama State Bar volunteers providing pro bono legal aid to the community. Menus are built around anticipated key legal issues and corresponding LexisNexis content.
- A certain number of computers available through the LexisNexis Cares PC Donation Program for use by the volunteer force providing pro bono legal aid.
- Eligible LexisNexis (Alabama) employees can staff the Alabama hotline, providing legal consultation to disaster relief victims.

LexisNexis Volunteer/Relief Opportunities

- In an effort to share and highlight the LN "culture of caring" with our customers, LN employees have been asked to assist with disaster relief efforts by choosing from several volunteer opportunities.

—Employees are urged to consider using part of their two LN Cares days to volunteer with local relief agencies;

—Donate blood;

—Give financial support to the American Red Cross;

—LN Cares will match employee donations to the Red Cross Disaster Relief Fund thru November 30th; and

—Several LexisNexis locations are featuring a LexisNexis Cares disaster relief program in their city (LexisNexis, Mealey's, Matthew Bender, etc.).

Customer Service

Print Materials (replacing lost or damaged materials)

- Free replacement of Alabama print products, including Matthew Bender, statutes, rules books, etc. for customers with current subscriptions. Affected customers should contact LexisNexis toll-free at **(800) 833-9844.**
- Fifty percent off Alabama print products including Matthew Bender, statutes, rules books, etc. for current customers with expired subscriptions or for the purchase of new titles to support their business. Affected customers should contact LexisNexis toll-free at **(800) 223-1940.**
- A certain number of complementary sets of 2004 Martindale-Hubbell will be donated, on a first-come, first-served basis (current subscribers only). The Alabama State Bar will serve as the clearinghouse and distributor for this component. ■

By Robert L. McCurley, Jr.

Accountability

At the annual meeting of the Alabama Law Institute in July during the Alabama State Bar Convention, a panel addressed the bar on the topic of "Accountability in Government." The panel consisted of **Speaker of the House of Representatives Seth Hammett, Senator Wendell Mitchell, State Finance Director Jim Main** and **Dr. Jim Williams, executive director of the Public Affairs Research Council at Samford University.**

In 2003, Governor Riley, in Amendment 1, which was presented to the people, included accountability issues with his tax package. There were seven bills which addressed the following "accountability issues":

- "Pass Through Pork" Prohibited;
- Health Insurance Cost Sharing by State Employees;
- School Financial Management;
- Tenure Reform;
- Local School Boards Trained in Finance; and
- School Administration Accountability.

With the defeat of Amendment 1, we immediately started hearing that people would not vote for meaningful tax reform before there was accountability in place.

Speaker Seth Hammett reported that during the past 2004 Regular Session of the legislature, the house, on its own initiative, passed accountability bills. Some were included with the Governor's Tax Package, while others were not. Those are:

- Teacher Tenure Act;
- Public School Employees Fair Dismissal Act;
- Health Insurance Minimum Contribution for Employees and Teachers;
- Pass Through Appropriations Prohibited;
- School Administration Accountability Act;
- Local School Board Fiscal Management Act;
- Competitive GED Reports Filed with the Secretary of State;
- State Superintendent of Education Compensation;
- PAC to PAC Transfers Prohibited;
- Professional Service Contracts Subject to Contract Review;
- Transportation Commissioner Established;
- Members of Legislature Prohibited from Serving on College Boards; and
- Retired Teachers May Teach Part-Time.

Senator Wendell Mitchell, a senior member of the legislature due to having been first elected in 1974, recognized the recommendations of ARISE, which are:

- A stronger open meetings law;
- A stronger campaign finance reporting law;
- A stronger lobbying expenditure reporting law;
- A current online listing of all *no-bid contracts*, with an explanation for each;
- An annual online listing of all *community service grant* awards, with a description of each;
- An annual online listing of the taxes that Alabama corporations pay on their profits;

- An annual online listing of *tax expenditures*–the amount of revenue lost through tax credits and exemptions; and
- A *transparent budget* process that allows the public to "follow the money" from taxation through appropriation to distribution.

State Finance Director Jim Main said the Governor was considering bringing back his previous bills, including those that were in the Tax Package and also the ones that he proposed in 2004 that the legislature has not adopted. In the past Regular Session, the Governor's Accountability Package included 20 different bills.

Dr. Jim Williams, executive director of PARCA, Samford University's Public Affairs Research Council, commented that accountability was spoken about by President James Madison, father of the U. S. Constitution, when he said that the big problem is, "You must first enable government to control the government and in the next place, oblige itself to control itself." Accountability is all about the word in the middle–"count"–what gets measured, gets done.

Dr. Williams outlined several basic reforms.

1. **State Budget Based on Plans and Measured Performance**

We have one of the best state budget reforms in the nation. In 1976, the legislature passed the Budget Management Act, but it has never been fully implemented by the Department of Finance and Executive Budget Office.

Attention has focused too much on earmarking and where the money comes from, rather than the purpose for which it is spent and the results we achieve in spending it. Alabama, by far, has the most earmarked state budget in America. Most of the attention at state budget time goes to the State General Fund, which is seven percent of the total fund, and to the Special Education Trust Fund, which is another 24 percent of the total budget. In other words, the legislature can only affect 31 percent of the total dollars spent by state agencies. We should be managing to achieve results.

Of our tax dollars, 43 percent of the total budget is for education. Another 36 percent is spent for health care and social services. This leaves us with only 21 percent of the total budget to run the rest of the government, including the court system, the legislature, the executive branch, public safety, prisons, highways, hundreds of licensing agencies, economic development, and other agencies.

House Joint Resolution 89, passed this year, requested "the Finance Director to get performance-based data from all agencies for the 2005 budget."

2. **Better Management of State Debt in Capital Investments**

We should set standards for borrowing, payback and refinance of state bond issues. In the early 1980s, the state borrowed in excess of 400 million dollars to upgrade schools, colleges, parks, roads, docks, etc. The debt was initially set to be fully paid off in 2002, however, on the day originally scheduled as the pay-off day, there was still $200 million of principal and $38 million of interest still outstanding due to refinancing. The state can't afford new facilities when we're still paying off the worn-out ones built by the last bond issue.

3. **Allowing Local Decisions to be Made in County Courthouses and City Halls**

Citizens will never recapture the confidence in government if all governmental decisions are made in Montgomery. Local officials cannot be held accountable when all decision-making is in Montgomery. Over the years, 80,000 local Acts have been adopted by the legislature.

4. **Ethics**

The judicial branch has its own ethics structure in process. The executive and legislative branches should also have an official code of conduct.

5. **State Purchasing System and Personnel System**

Regarding how personnel services are handled and equipment is purchased, staff are hired either through the personnel system where the system manages them, or on contracts, with someone outside the system buying what the state needs.

By the time you read this article, the state legislature very well could have been called into Special Session to address this timely subject. As Speaker Hammett started the discussion, the first task must be to define, "What is accountability?"

For more information about the Institute or any of its projects, contact Bob McCurley, director, at the Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or visit our Web site, *www.ali.state.al.us.* ■

Robert L. McCurley, Jr.
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

By J. Anthony McLain

"Cheers, Old Bloke"

Imparting Ethics and Professionalism on English Soil

Great Britain stands as the ancestor of our cherished system of jurisprudence. We separated from the motherland, traveled across the Atlantic and established this country of American values and ideas. In creating our legal system, we looked to the English system, the common law, and the court structure and processes. We kept what we wanted, discarded or disregarded the rest, and added to it along the way to arrive at what we today believe is the greatest legal system on earth.

Most lawyers are historians by nature, due in large part to our system's reliance upon precedent. We are taught in law school to research the legal issue to a point of origin, to search a land title to

George Square, Glascow, Scotland

Lindisfarne Priory, Holy Island, England

the original patent from the federal government, and to leave no ALR page unturned in our quest for that one cite, that one supportive and dispositive authority, which will increase our chances of victory.

With this history and background permeating the profession, I felt most privileged when **Professor Charles "Bo" Cole** of Cumberland Law School invited me to be a member of the faculty at Cumberland's summer studies program at Durham University in England. Durham University was founded in 1832, and is located in Durham, which is in the northeastern England county of Northumbria. The city is a short train ride from Newcastle upon Tyne. Durham is a small university town, with most of its commerce directly connected with the university and its students.

For several summers, Professor Cole has organized and administered a summer studies program in England for law students. This year was his tenth year to be at Durham for this program, and he was duly recognized with a plaque presentation by Durham's mayor for Professor Cole's commitment and dedication to the program.

This year, the students were mostly Cumberland Law School students, and were joined by students from the University of South Texas Law School, the University of California at Chapman, and students and judges from Brazil, some of whom were working on the advanced degree of masters' of comparative law. The students were offered three possible courses in the program, including my course in professional responsibility. In past years, professional responsibility has been taught by **Gov. Albert Brewer**, who graciously supported and assisted me in my efforts to serve as a faculty member for the program.

My wife, Leah, and I traveled via Atlanta (of course) and New York to Heathrow Airport in London. After some down time to recover from jet lag, we spent three days in London doing the thing American tourists do in London—seeing the sights. And, as things go, you cannot possibly see and do everything you want to do while visiting a foreign land, but we tried anyway.

We took in the basic "have-to-see" sights—Big Ben, Buckingham Palace, 10 Downing Street, Trafalgar Square, the Horse Guards, the London Eye, Westminster, the National Gallery—tired yet? And, for my social advancement of the year, we saw *Les Miserables* at the Queen's Theater. And, of course, Harrod's. And if the prices there don't get your attention, then try the Princess Diana memorial created in the store by

its own, Mohammed Al Fayed, which memorial contains the engagement ring given to Princess Diana by Mohammed's son, Dodi Fayed.

Following our stay in London, we then took the Britrail to Durham, and then a taxi to our accommodations at Collingwood College, one of the 15 colleges within the Durham University system. We arrived on Saturday, which gave us a chance to prepare for campus life and classes, which began on Monday.

The setting at Durham allowed us most days of breakfast and lunch with the students in the college cafeteria. Fortunately, I drew the first class of the day, which generally concluded around 10:30 a.m.. I had about 25 students in my class—all but one from Cumberland, and that one was a young lady from Sao Paulo, Brazil. I must admit our language problems, but her English was much better than my Portuguese.

The program was organized around 14 class periods. We had two weeks of four-class days, one week of five-class days, and a Monday class the week of final exams. This allowed two three-day weekends for travel and other pursuits. Organized field trips included a trip to the Scottish courts, and excursions to Hadrian's Wall, Holy Island and the city of Alnwick.

During his return visits to Durham, Professor Cole has made the acquaintance of two very colorful local personalities—John Abrey and Bob Gillespie. John is a true English historian, and when given the microphone, is not prone to quickly relinquish it. He educated us on some very little known historical events and facts about the places and people of England. Bob, while also being well versed in English history and local folklore, made a definite impression with his ability to read beer foam. Think about that one. Bob was a professional guide, but due to health issues, is somewhat retired, and lives in a flat in the shadows of Durham Cathedral. The Cathedral is over 900 years old, and along with the Castle, constitutes a World Heritage Site. It has been called a masterpiece of Norman architecture, and houses the remains of Saint Cuthbert and Venerable Bede.

The classes were not only a time for academic enrichment, but also created an opportunity to better understand the new generation of those who seek the law as a profession. I was encouraged by the quality of the individuals who want to be lawyers, and who want to serve their clients and improve our legal system.

The location of our classes, lodging, cafeteria and campus surroundings gave us additional opportunities to get to know the students and faculty, and live the experience of being in a foreign country, bound by the law as a calling. And then there was the most impressive of think tank labs—the computer lab—

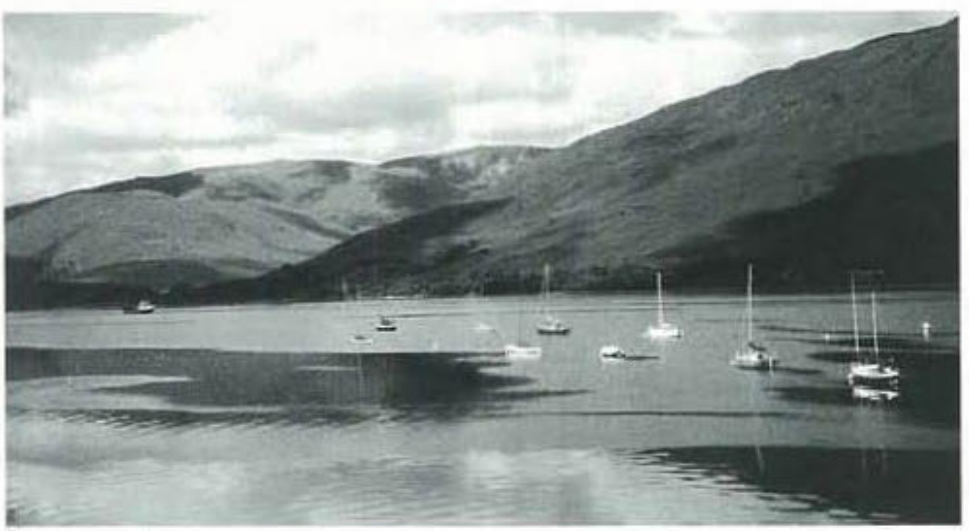
City Chambers, Edinburgh, Scotland

where students maintained a constant vigil for morsels of news about American politics, weather and, most important of all, fantasy league baseball.

In addition to field trips and organized excursions, travels were had to Prague, Czechoslovakia, Paris, France, Dublin, Ireland, Fort William, Scotland, Oxford, Cambridge, Stratford-upon-Avon, Glasgow, York, Edinburgh, St. Andrews, Inverness, and Troon, to name a few. We also had the good fortune of being "across the pond" during the British Open Golf Tournament, held at Royal Troon.

The one drawback of the entire trip was the exchange rate, which during our stay almost reached two to one (dollars to pounds). So, when you saw a listed price in pounds, just double that amount to convert the cost to U.S. dollars. Common examples would be a Happy Meal at McDonald's for almost $10, newspapers for $6, parking tickets for $10, and postage you don't even want to consider.

Americans rightfully take pride in the history and landmarks of a country over 200 years old, but we look new compared to sites and buildings in England which date back to B.C. times. The Priory on Holy Island was built over 1,300 years ago, and York Minster contains the



Loch Linnhe, Fort William, Scotland

remains of a Roman fortress, Viking, Norman and medieval carvings. The natives take great pride in the historical treasures of Great Britain, and have done an amazing job in their preservation of these landmarks.

The language and customs of Great Britain are connected, but distinctly different, from those we see in the United States. Opportunities to be adventurous while in this beautiful land are plentiful, but I drew the line at the dinner table. I did not then, nor do I now, have any desire to try haggis (organs of a sheep or calf, seasoned and boiled in the animal's stomach), kippers (split, salted smoked herring)—for breakfast, no less—or blood pudding (you figure out that one). And, they are still confused, calling french fries "chips," and chips "crisps." And, heaven forbid, that you think you will ever get ice in any soft drink or glass of water. One student related his having asked for ice in his water. He was tendered a glass of water with one cube of ice. When he later asked for some more ice, the waitress came tableside with tongs and a bowl of ice, and using the tongs, removed his one piece of ice and replaced it with another!

The country is beautiful, and steeped in tradition and pride. The opportunity to be there and experience all Great Britain has to offer is one for which I am truly thankful. A tremendous blend of ancient architecture and customs, from which we have distilled our way of doing things, both as a society and as a system of laws, helps you truly appreciate being a part of such a noble and essential profession.

I sense a need in our country to reinstill some of the more traditional and formal trappings of the law, especially when you observe the respect given to the legal processes where such formality and pomp still prevail. And, seeing firsthand that the system does not have to be relaxed or "modernized" to survive the passage of time, further convinces me that we need to remember why we are lawyers, and why we should conform our conduct to a level where respect is a given, because of how we acquit ourselves to society as a whole.

Cheers!

Lindisfarne Castle, Holy Island, England

Several lawyers in Alabama died this year as a result of addiction or other mental health issues. Their spouses, children and other loved ones are left behind this holiday season to ponder and wonder all the "if only's." The reality is addiction kills. Its consequences are devastating. It happens in every profession, every socio-economical level, in every race and in all genders. One in every three families lives with it, are fighting it or suffering consequences of it. Aggressively treating addiction followed by structured monitoring has been the treatment of choice for other licensed professionals. The conclusion of this study suggests that although lawyers, judges and law students have different issues in treatment, they also benefit from lawyer-specific programs and structured monitoring.

STATISTICAL DEMOGRAPHICS AND OUTCOME STUDY OF CHEMICALLY DEPENDENT ATTORNEYS

BY TIMOTHY J. SWEENEY

"John" was a trial lawyer from the east coast of Florida. He was estranged from his wife and children, and his once thriving solo practice was all but destroyed as a result of the alcoholism that drove him into treatment in 1996. John was diagnosed with continuous and severe alcohol dependency as well as major depression. Following detoxification (which was especially difficult due to a history of seizures and delirium tremens), it was recommended that John undertake long-term residential-type treatment in an impaired professionals program. John's treatment experience was tumultuous, marked by revocations of consents, threats of lawsuits against the provider and numerous voiced plans to leave treatment against medical advice. John eventually did leave treatment AMA, and immediately recommenced drinking alcoholically. Over the next number of months, he continued to contact the treatment center, asking for and then refusing proffered help. Finally, John was convinced to reenter treatment, but only stayed one day before leaving again. Two weeks later, the treatment center was contacted by local police and advised that John was found dead in a flophouse hotel, having apparently bled to death from the virtual disintegration of his liver. The treatment center was contacted because when the police found John, he was wearing a placard around his neck listing his vital statistics and various phone numbers of people to be called in case of emergency. John was 51 years old.

Introduction

In the spring of 2002, a retrospective study was conducted of 75 clinical case files of chemically dependent attorneys, judges and law school graduates treated at HealthCare Connection of Tampa, Inc. ("HCC"). HCC is a continuum of services treatment facility specializing in the care of impaired professionals, e.g. physicians, attorneys, nurses, pharmacists, etc., and persons with dual disorders. The continuum ranges from primary and extended care treatment to halfway, three-quarter and aftercare services. Detoxification, when necessary, is typically handled on an outpatient basis by the on-site medical clinic of David P. Myers, M.D.

The study collected and examined demographical data including median age, gender, marital status, practice type, and drug of choice. The study also considered the incidence of psychiatric dual diagnosis, as well as personality disorders/configurations as interpreted by the MCMI-III. Finally, data was collated regarding law enforcement and state bar association complications, as well as history of prior treatments.

The outcome statistics considered how treatment was concluded (patients leaving treatment against medical advice versus successfully completing treatment and following aftercare recommendations) with comparison of discharge types before and after formal institution of recovering attorneys' program track in October 1999. Where available, follow-up data was collected concerning program participants' recovery progress following treatment.

Methods

Collection of data on select professional groups is well known.[1] The data presented in this study was collected by the author, a Florida-licensed attorney and Certified Criminal Justice Addictions Professional. The data was obtained from the attorney/patients' clinical charts. Treatment was based on American Society of Addiction Medicine's Adult Patient Placement Criteria,[2] and executed via the HCC Impaired Professionals' Program under the direction of Dr. David Myers. Consistency of information and measures to control for misclassification were enhanced by the fact that each patient was evaluated by the same Addictionist, all Axis II personality data was derived from the Millon MCMI-III,[3] and each biopsychosocial interview and history was conducted pursuant to the same format. Post-treatment, follow-up data is always difficult to obtain and, when obtained, is suspect to a degree, given the natural prevalence of denial and deception exhibited by those treatment alumni not actually in recovery. However, corroboration was obtained, when possible, through lawyer assistance program monitoring agencies, culling of public records, recovery support systems, and anecdotal evidence.

Results

Patient Profile

Seventy-five clinical case records were examined for attorney/patients treated from 1994 through 2002. Forty-one of the 75 (54.66 percent) were treated following creation of the specialized track, the Recovering Attorneys' Program, in October 1999. Of the 75, 65 were men (86.7 percent) and ten were women (13.3 percent). The age of the male attorneys ranged from 27 to 65, with a median age of 43.9 years. The median age for female attorneys was slightly younger at 41.9. Thirty-eight of the lawyer/patients were married, 20 divorced and 17 single. Nearly all reported significant marital or relationship difficulties. Forty-four (58.6 percent) were litigators, eight (10.6 percent) were transactional attorneys, seven (9.3 percent) were law school students or graduates awaiting admission to the bar, three (4 percent) were judges, four (5.3 percent) were disbarred, and nine (12 percent) fit some other category.

The drugs of choice for the 75 lawyers treated were as follows:

Drug of choice	Number	Percentage (Rounded)
Alcohol	43	57%
Cocaine	19	25%
Opiates[4]	6	8%
Benzodiazapenes[5]	2	3%
GHB[6]	2	3%
Methamphetamine	2	3%
Marijuana	1	1%

Most engaged in polysubstance use/abuse. Forty-four of the lawyers (58.6 percent) had prior treatment. Of these, 19 had one prior treatment, five had two previous experiences, and 20 had three or more, with the most being one lawyer with eight prior treatments.

Thirty-eight, or just over half, of the lawyers treated, reported a history of criminal arrests. The most common offense was driving under the influence (18), followed by drug possession (12), domestic violence (ten), trafficking (three), and assault and battery (three). [Note: some lawyers reported multiple offenses.] Thirty-four of the lawyers had bar complaints or other problems. These included nine suspensions and four disbarments.

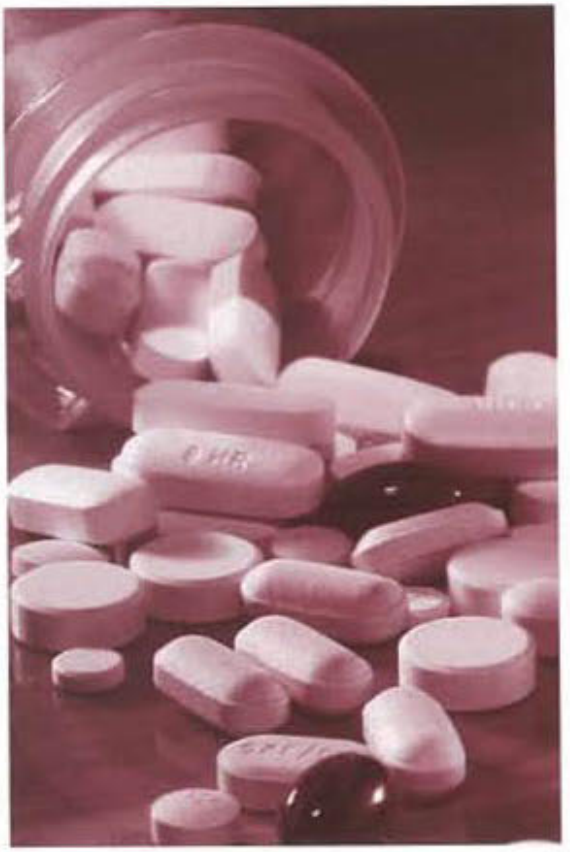
Psychiatric Data and Personality Testing

Forty-five of the attorneys (60 percent) presented to treatment with a co-occurring psychiatric disorder (dual diagnosis). This percentage is higher than that for health care professionals at HCC, and significantly higher than the non-professional treatment population at HCC. Of the 45, 24 (32 percent) were diagnosed with major depression, 11 (14.6 percent) with bipolar disorders and ten (13.4 percent) with anxiety disorders.

The MCMI-III personality testing scores were most interesting. Of a total of 119 personality configurations identified among the lawyers tested (some had more than one), the antisocial personality classification (disorder, trait or feature), not surprisingly, was returned highest, with 21 lawyers (17.6 percent) testing as Antisocial. Predictable also was the high number of attorneys (14) with a Narcissistic Personality configuration. This is consistent with the lawyer stereotype: rule-challenging, maverick,

somewhat self-absorbed, egotistical. These characteristics in measured doses can define a successful attorney. When unchecked, however, these personality configurations are typical among the chemically dependent attorney population.

Three results, however, seem quite surprising. The second most frequent personality configuration identified was the Dependent Personality, with 20 lawyers (16.8 percent) so classified. The DSM-IV defines Dependent Personality Disorder as "a pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears."[7] This seemingly flies in the face of the popular conception of attorneys as *caregivers*, solvers of other peoples' problems.



High frequency was also found in the Schizoid (10.9 percent) and Avoidant (ten percent) Personality Classifications. The DSM-IV defines Schizoid Personality Disorder as "a pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings."[8] Avoidant Personality Disorder is defined as "a pervasive pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation."[9] Certainly, trial lawyers (who comprise a majority of the treatment patients) would be significantly hindered by these types of personality configurations. And yet most of the lawyers entering treatment reported having very successful and lucrative practices, and these reports are confirmed by collateral contacts.

The Axis II personality data breaks down as follows:

Type	Number	Percentage	DSM Prevalence[10]
Antisocial	21	17.6%	3% to 30%
Dependent	20	16.8%	high
Narcissistic	14	11.7%	2% to 16%
Schizoid	13	10.9%	uncommon
Avoidant	12	10%	10%
Borderline	9	7.6%	10%
Obsessive-Compulsive	9	7.6%	3% to 10%
Paranoid	7	5.8%	2% to 10%
Depressed	6	5%	n/a
Histrionic	4	3.4%	10% to 15%
Sadistic	3	2.5%	n/a
Passive-Aggressive	1	.8%	n/a

Outcome

The average length of stay in treatment was 10.6 weeks, with a range from one day to nine months. Of the 75 patients, 48 (64 percent) successfully completed treatment and 27 (36 percent) left AMA. [For the purposes of this study, the term "against medical advice" is given a broader meaning than is typical in the therapy setting, and includes all patients other than those who entirely accepted clinical recommendations for treatment, length of stay and aftercare. For instance, a lawyer who came seeking and was admitted for one week of treatment, and who successfully completed that week, is herein nevertheless designated "AMA" if, at the end of the week he declined a recommendation for continued care.] Of the 27 AMAs, 18 occurred prior to institution of the formal Recovering Attorneys' Program; thus, 79 percent of the lawyers in the Recovering Attorneys' Program successfully completed treatment and followed aftercare recommendations, versus 47 percent successful completions of the pre-Recovering Attorneys' Program.

Four clients were re-treated at a later date; one was re-treated twice. Three of the re-treated patients had no further relapses. No followup information was available relating to nine of the AMAs. Three are believed to be sober, per the monitoring agency. Eight have either self-reported or are reported to be in relapse since treatment. Four had periods of incarceration or are currently incarcerated, three have been subsequently disbarred and two suffered substance abuse-related deaths.

Of the 48 successful completions, 41 (85.4 percent) are reported sober, evidenced by compliance under monitoring contracts, or having successfully completed a contract. Four are believed to be in relapse, and no information was obtainable on the other three. Four of the successful completions currently have five or more years of documented sobriety; five have four-plus years documented, one has three-plus, five have at least two years' sober; twelve have over one year sober, eight have six months or more and six are in their first six months of sobriety. Of the 41 currently sober, 29 report no relapse following treatment, while 12 report one or more relapses following treatment prior to achieving their current sobriety.

Discussion

Profile

Based on the foregoing, the typical attorney entering treatment is a male trial lawyer in his early 40s, with a polysubstance addiction

(often alcohol and cocaine), and who has a co-occurring mood disorder as well as a personality disorder complicating treatment. He is a veteran of multiple prior treatments, is often successful at work but rarely enjoys a satisfying home life.

The rate of psychological dysfunction and personality disorders were higher than one might expect, given the strenuous screening process inherent in becoming a member of the legal profession. With respect to the personality testing, lawyers not surprisingly tested high on the antisocial and narcissistic scales. However, a large percentage of attorneys entering treatment tested high on dependent, schizoid, and avoidant scales. As described above, these are personality configurations one would anticipate hindering the successful practice of law, but such was not the case. That means these individuals compensated for their personality proclivities by acting in a fashion contrary to their nature. Their success was tempered by an inner conflict that they, in turn, medicated with drugs or alcohol. In some cases, this balancing act lasted for years until overtaken by the consequences of uncontrolled substance use and the lawyer sought (or, more often, was compelled to seek) treatment.

Outcome

Treatment outcomes improved significantly following institution of the Recovering Attorneys' Program in the fall of 1999. It is believed that the basis for this improvement may be found in the framework of the program:

- Impaired professional treatment with additional, lawyer-specific overlay services;
- Program oversight by director with both legal and clinical background; and
- Proactively addressing work, bar and criminal (if any) issues.

The program and treatment community are well-served by keeping lawyer-patients extra busy. Boredom and ennui are counterproductive in any treatment population; with attorneys too much downtime is often a recipe for clinical disaster. Lawyers in the Recovering Attorneys' Program have three extra group activities, an additional five hours, per week.

A program director or case manager with both legal and clinical experience is most helpful. Lawyers typically enter treatment with practice issues that must be addressed. The lawyer/patient will advise that every case requires immediate attention, to the neglect of the recovery process. This is a tailor-made way of avoiding the pain and fear inherent in getting clean and sober. Give the lawyer his way and he will never engage in treatment, being so busy running his practice from the treatment center. On the other hand, there often are real problems that must be addressed, in order to avoid new or additional bar grievances for client neglect. The key is to accurately discern between problems that need immediate attention, versus "smokescreen" issues that are raised only as distractions or as ways to prevent or impede the treatment process. The conundrum is that the typical clinician cannot and really should not be expected to know the true state of a lawyer's practice: which trials really are going forward on the next docket, which closings really can no longer be continued and so on and so forth. And even if a therapist was able to discern crises from non-crises, what to do? The truth is, judges, mediators, opposing counsel and even clients are usually accommodating if approached in the right way. This is why having dual disciplines is effective: the legal background aids in deciding which matters are urgent and who needs to be contacted, and the clinical background is helpful in convincing of the paramount importance and need for prioritization of treatment.

Conclusion

Further studies of a prospective nature are needed to identify the causal relationship between chemical dependency/mental health problems and the legal profession. However, both ethics and compassion dictate that aggressive intervention cannot be withheld, but rather must be initiated immediately, given the large number of lawyers that may be suffering from either active or occult dependency or other mental disorders. This intervention should be initiated by state bar associations, which need to adopt a more active and confrontational role relating to its members' substance abuse and mental health issues. The intervention should then take the form of comprehensive chemical dependency and mental health assessment followed by, when dictated, lawyer specific primary and extended care treatment, and aftercare monitored by the state's lawyers' assistance program. ■

Endnotes

1. Talbot GD, Gallegos KV, Wilson PO, Porter TL: The Medical Association of Georgia's Impaired Physicians Program-Review of the First 1000 Physicians: Analysis of Specialty, *JAMA* (1987); 257: 2927-2930.
2. Mee-Lee D, Shulman GD, Fishman M, Gastfriend DR, and Griffith JH, eds. (2001). *ASAM Patient Placement Criteria for the Treatment of Substance-Related Disorders, Second Edition-Revised* (ASAM PPC-2R). Chevy Chase, MD: American Society of Addiction Medicine, Inc.
3. Millon T, MCMI-III Interpretive Reports, (1994) Dicandrien, Inc.
4. Opiates include prescription pain medication such as oxycodone (Percoset, Oxycontin), hydrocodone (Lortab, Vicodan), and hydromorphone (Dilaudid) as well as heroin and methadone.
5. Benzodiazapines, or tranquilizers, include Valium, Xanax, and Clonipin.
6. Gamma-Hydroxybutyrate
7. American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. Washington, DC, American Psychiatric Association, 1994. (Page 665).
8. Id. at 638.
9. Id. at 662.
10. Id. at 629-673.

For further information, please visit the ALAP page on the ASB Web site, *www.alabar.org*, or call the ALAP office at (334) 834-7576 for confidential assistance.

Timothy J. Sweeney

Timothy J. Sweeney is the staff attorney and director of the recovering attorneys' program at HealthCare Connection of Tampa, a chemical dependency treatment facility specializing in the care of impaired professionals and persons with dual disorders. Sweeney is a graduate of Illinois Wesleyan University and the University of Illinois School of Law. He has been a member of The Florida Bar since 1990. His work with impaired attorneys has been published in the *Journal of Addictive Diseases* and *The Florida Bar News*.

Disciplinary Notices

Notices to Show Cause

- Notice is hereby given to **Danny Lawrence Dupree**, who practiced law in Phenix City, 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 2, 2004, he has 60 days from the date of this publication (November 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 04-132]

- Notice is hereby given to **Melissa Montgomery Jones**, who practiced law in Dallas, Texas and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated August 20, 2004, she has 60 days from the date of this publication (November 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 04-248]

- Notice is hereby given to **Adam L'Ouverture Thrash**, 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 April 2, 2004, he has 60 days from the date of this publication (November 15, 2004) to come into compliance with the Mandatory Continuing Legal Education requirements for 2003. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 04-149]

Reinstatement

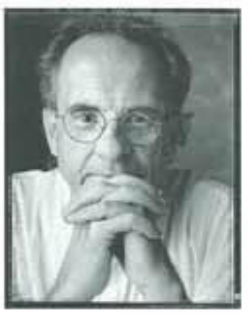
- The Disciplinary Board, Panel 1, upon hearing the petition for reinstatement of Birmingham attorney **John C. Coggin, III**, ordered that Coggin be reinstated to the practice of law in the State of Alabama, with certain conditions. The board's order was adopted by the Alabama Supreme Court on June 25, 2004. [Pet. No. 04-02]

Suspensions

- The Supreme Court of Alabama ordered that Bessemer attorney **Che'Ree Minor Dudley** be suspended from the practice of law in the State of Alabama for a period of three years, effective July 13, 2004. The suspension was based upon a decision of the Disciplinary Commission of the Alabama State Bar. Dudley pled guilty to violating rules 4.1(a) and 8.4(a) and (c), Alabama Rules of Professional Conduct. Dudley participated in a scheme to defraud mortgage lenders by submitting and causing to be submitted materially false information and documentation to obtain mortgage loans. Dudley pled guilty to violating 18 U.S.C. Section 371 (conspiracy to defraud) and sections 1342 and 1343 (aiding and abetting wire fraud) in the United States District Court for the Northern District of Alabama Southern Division. [ASB No. 01-29(A)]

At 16, you think nothing bad can ever happen to you. At 45, you should know better.

At one time you thought you were invincible. So young and naive. Things sure have changed since then. Now you are older and wiser. And, unfortunately, at greater risk than ever. One in five Americans over 50 will need long-term care within the next twelve months. And when you consider that the cost of long-term care averages over $40,000 annually, you have to ask yourself if it's worth the risk. Your family's assets and quality of life hang in the balance. As an adult, you should seriously consider long-term care insurance from Blue Cross and Blue Shield of Alabama, a company that has been protecting Alabamians for over 68 years. Give us a call today for Group coverage information at 1888 331-4188 or Individual coverage information at 1 888 651-5462. Visit us at preferredltc.com to learn more or to enroll. It's the mature thing to do.



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Disciplinary Notices

Continued from page 428

- Birmingham attorney **Stephen Duane Fowler** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, dated February 11, 2004. The Disciplinary Commission found that Fowler's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 04-03]
- The Supreme Court of Alabama ordered that Decatur attorney **Robert Foster Tweedy** be suspended from the practice of law in the State of Alabama for a period of two years, retroactive to February 7, 1997, the date of Tweedy's transfer to disability inactive status. The suspension was based upon a decision of the Disciplinary Commission of the Alabama State Bar accepting Tweedy's guilty plea in four cases.

In ASB No. 96-286(a), Tweedy pled guilty to violating rules 1.7(b) and 1.15(a), A.R.P.C. Tweedy was hired to handle a contempt action against a client's former husband. Tweedy concealed issues from the client who, along with her ex-husband, was Tweedy's landlord, including the fact that he, Tweedy, had written a bad check to pay utilities that remained in the ex-husband's name. The check was written out of Tweedy's trust account.

In ASB No. 96-357(A), Tweedy pled guilty to violating Rule 1.3, A.R.P.C. Tweedy was hired to file suit on behalf of his clients. He failed to pursue the matter. The case was dismissed for failure to prosecute. Tweedy failed to appear for two hearings in federal court and failed to inform his clients of the hearings.

In ASB No. 97-38(A), Tweedy pled guilty to violating Rule 8.1(a), A.R.P.C. Tweedy was retained to represent a client in an uncontested divorce. Tweedy neglected the matter and the client was forced to hire another attorney to finalize the divorce. Tweedy was not responsive to the bar's request for information regarding the matter.

In ASB No. 98-251(A), Tweedy pled guilty to violating Rule 1.16(d), A.R.P.C. Tweedy was retained to defend a client on criminal charges. Tweedy transferred to disability inactive status before the matters were concluded and failed to notify the client or take any action reasonably necessary to protect the client's interest. [ASB nos. 96-286(A), 96-357(A), 97-38(A) and 98-251(A)] ■

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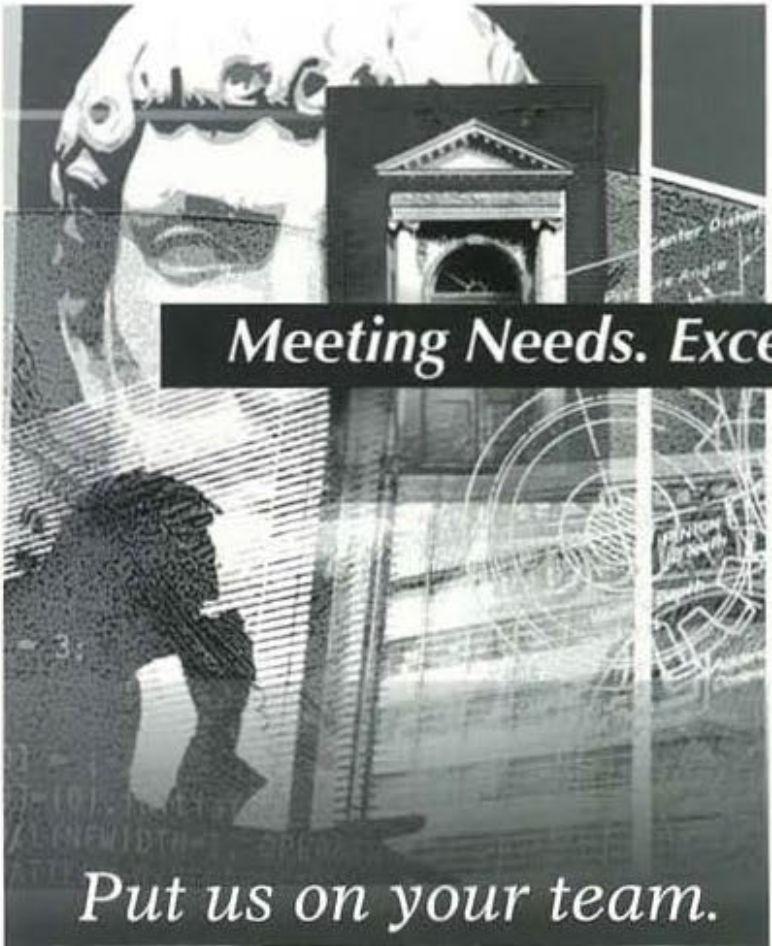

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