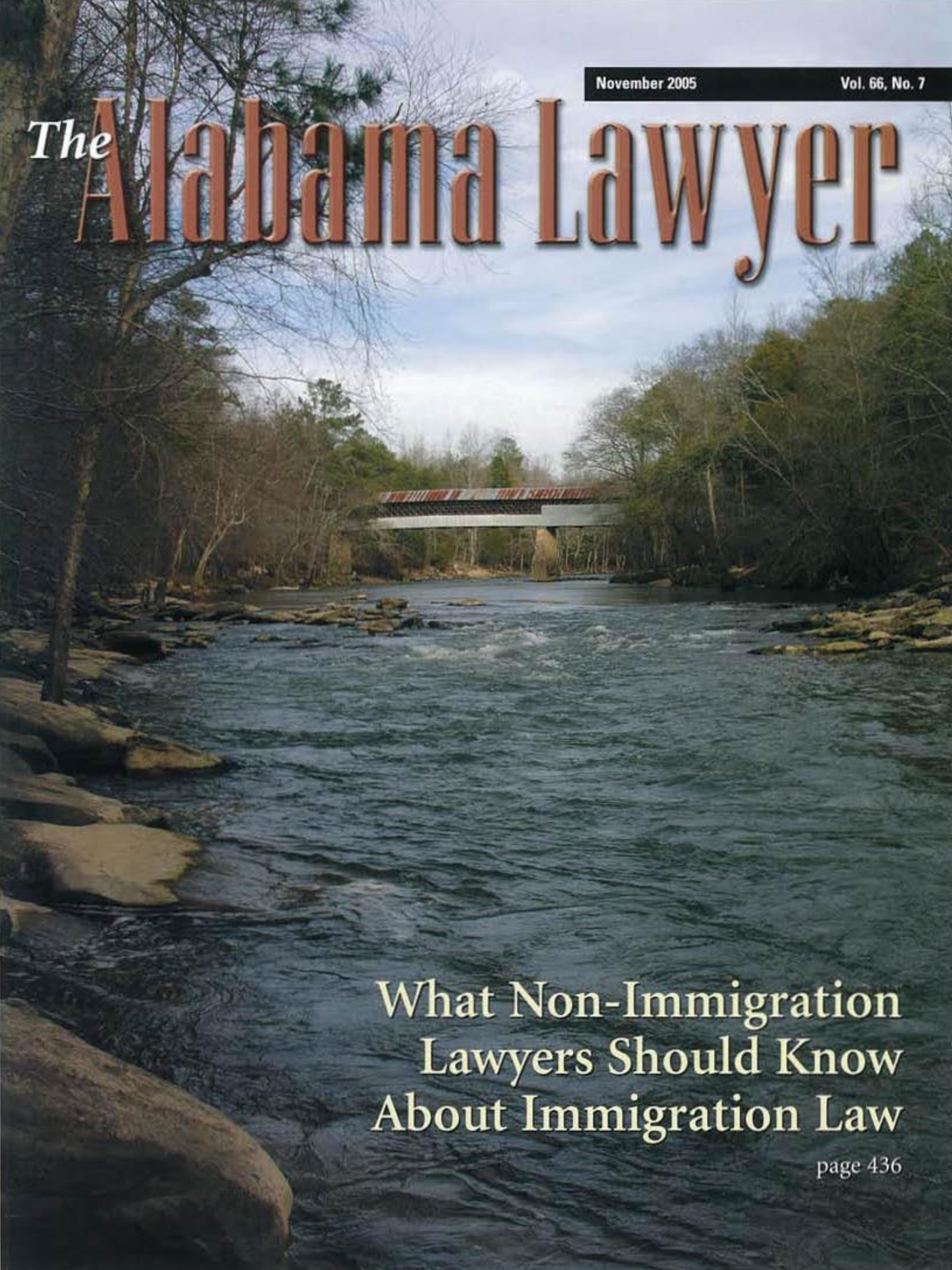
November 2005 Vol. 66, No. 7

The Alabama Lawyer



What Non-Immigration Lawyers Should Know About Immigration Law

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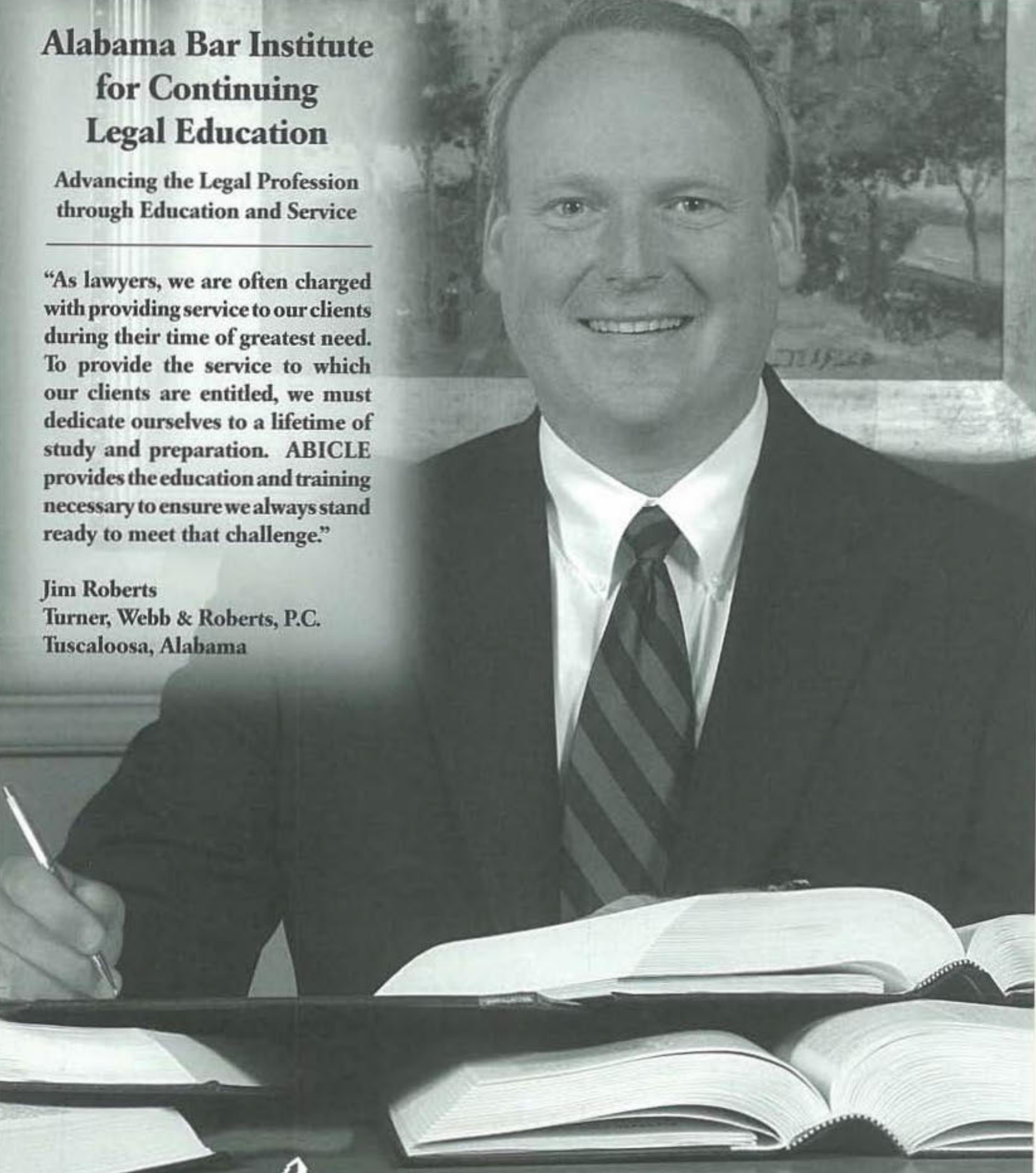

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The Alabama Lawyer

November 2005 Vol. 66, No. 7

ON THE COVER

Horton Mill Bridge

Horton Mill Bridge is located just off Highway 75 in Blount County, Alabama. Built in 1935, this is one of the highest covered bridges in the nation, standing at 70 feet above the Black Warrior River. It is also one of three which still exist in Blount County, Alabama's "Covered Bridge Capital" and home of the Covered Bridge Festival each year.

Photo by Paul Crawford, JD

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DEPARTMENTS

The Alabama State Bar, P.O. Box 671, Montgomery, AL 36101, Phone (334) 269-1515, (800) 354-6154 • *www.alabar.org*

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Bobby Segall

No Joking Matter (For Once)

Some people expect it. So, I'd like to be humorous–tell a joke or at least demonstrate some wit. But I can't. It's still too fresh–especially with Hurricane Rita bearing down,[1] and goodness knows what to follow.

"No jobs, no food…We advise people that this city has been destroyed. It has been completely destroyed." Those were the words of New Orleans Deputy Police Chief Warren Riley on Monday after Hurricane Katrina devastated this country's Gulf Coast.[2]

One of our nation's cities completely destroyed. We've seen it in the movies over and over again, but this is the first time it has ever really happened. Including the great fires near the turn of the century in Chicago and San Francisco. Including even 9-11.

One of the country's most storied, most beloved cities–gone. We will rebuild, I'm sure. The last few days of news, before this article went to press in mid-September, have been very encouraging. For right now, though, New Orleans is no more. That is for sure.

Thinking about it that way helps me put it in perspective. Seeing all the images on the television day after day sort of numbs you to the reality of the devastation. But thinking about that city that so many of us loved, that so many of us have visited, and then thinking about it "completely destroyed," helps the grim reality of this disaster really settle in on me.

We all have our own personal stories and memories of New Orleans. Sandy and I spent our honeymoon (and most of our life savings) eating and drinking there (Sandy handled the eating). Our son Jacob was to be a junior (majoring in the House of Blues) at Tulane this fall. (He's suffering through the semester in a school in London, the one in England. I hope I get to go to England someday.) Before Alabama split into the 11th Circuit, I was lucky (or, given my customary result, unlucky) enough to make oral arguments before the Fifth Circuit there.

For the people who lived and worked there, though, the damage is immeasurable. They've lost much more than memories.

And, of course, the destruction was cast well beyond the City of New Orleans. Mississippi's Gulf Coast is entirely wiped out, as well. Here at home in Alabama, in Mobile and along our own Gulf Coast still reeling from the effects of Ivan, there is more devastation.

Way too many lives have been lost.[3] And for those who are still breathing, most have lost everything they knew of life–their jobs, their homes–for many–their family and friends. So many human lives and $125 billion worth of damage.[4]

Think for a moment what it means to lose your home. It is not just the roof and the furniture. Family photos. Your child's high school diploma. Your pets. The laughter that filled the halls. All the memories. Your entire life.

Thinking about it that way helps me understand the folks so desperate to cling to some semblance of the life they knew. Despite the urging of authorities, they stay in that city, in their home–clinging to

something, anything, risking their lives and their safety–because it is just too much to comprehend that everything they knew, everything they lived for, is gone.

We are only now beginning to realize the true devastation this storm has caused. It obviously hurt some more than others, but its devastation spanned race and class–Black, White, Hispanic, rich, and poor. It destroyed homes and lives and put nearly an entire city underwater. It destroyed the economy in New Orleans and along the Gulf Coast.

Part of that economy, of course, included the legal profession.

The *New York Times* reported that more than a third of all the lawyers in Louisiana have "lost their offices."[5] The *Chicago Tribune* estimated that half of the state's lawyers were displaced.[6] Many Mississippi lawyers suffered the same fate.

And, it's more than just flooded offices, soaked files and fried computers. So many Louisiana and Mississippi lawyers have lost what we all hold sacred: clients.

Just imagine. William Rittenberg, a New Orleans lawyer, had supported his practice by representing the New Orleans teachers' union. Now, there is no New Orleans. There are no schools. There are no teachers, so there is no union, no client and no practice.[7]

For every law office flooded, lost or destroyed, think how many clients are affected. Whole case files destroyed, crucial evidence lost. Even courts were not spared. Records from state and federal courts have been damaged or lost. The *Chicago Tribune* reports that the storm's aftermath threatens to "disrupt cases ranging from an assault charge against Michael Jackson to the hundreds of suits filed against Merck and Co. for its painkiller Vioxx."[8]

The area of the legal system most severely impacted may be the criminal justice arena. There are prisons and jails all along the Gulf Coast, and inside those prisons, there were prisoners. Where are they now? What happens to them now? We're full in Alabama.

And what about those who might not be criminals at all? Lots of people sit in jail before they are ever convicted of any crime. "Of the 8,000 prisoners transferred from flooded prisons, about 4,500 have not had charges filed against them, or they have a trial or an appeal pending."[9] The Constitution, of course, guarantees all of these people a right to a speedy trial, but how does our Constitution hold up when there are no courts, no judges?

They all have a right to counsel, but what good does that right do when there are no lawyers? The answer, at least for the time being, is that it doesn't do those folks much good at all.

Men and women of the Alabama State Bar, that is where we come in. Katrina is the worst natural disaster in our history. But, at the same time, perhaps it is the greatest call to service our nation has seen since World War II.

Our profession is one of service. This is our call. And, so far, we've responded.

And it's inspiring–what we in Alabama are doing for those who happened to choose to live their lives somewhere a hurricane came ashore. Maybe it took our government too long to respond, but since when do Americans wait on government to get things done? Many of you may know **Tara Middleton**, a lawyer in Tuscaloosa. She, like so many other Alabama lawyers, didn't wait on FEMA; she went into action the day after the hurricane, helping set up a shelter for displaced citizens at the University Recreation Center. She's helping collect food, clothing and home furnishings–and she's helping folks find jobs–so that they can get their life back on track.

She set an example for the government. And, so did many other lawyers throughout Alabama. The **Mobile Bar Association**, for example, is working through its **Volunteer Lawyers Program**, and independently of it, to provide both legal services and mediation services to Katrina's victims. The **Calhoun County**

President's Page

Continued from page 413

Bar Association is sending lawyers into a shelter at Ft. McClelland to provide free legal services. The **Tuscaloosa County Bar Association** is turning out in great numbers to provide services to victims in a clinic atmosphere. Students from the **University of Alabama School of Law** are helping. Other local bars have responded similarly.

The **Young Lawyers' Section** of the Alabama State Bar unfortunately is experienced in providing legal services to disaster victims. **Christy Crow** and **Brent Irby** are leading an effort to do that–again. **Legal Services Alabama** (LSA), under the overall leadership of **Melissa Pershing** and the disaster response leadership of **Jimmy Frye** and **Carl Salle**, has begun a tremendous effort to meet legal needs that will be ongoing for years. Melissa is coordinating the efforts of LSA with those of the Alabama State Bar's **Volunteer Lawyers Program** led by **Linda Lund**. Many of you have signed up with the VLP specifically to provide disaster-related legal services. And, many more of you need to do so–at *www.alabar.org*. The **Alabama Association of Paralegals**, which already has provided wonderful humanitarian assistance to lower Alabama, has volunteered to provide paralegal services in conjunction with LSA and the VLP.

I've recently read an article that said the wealthy will have their lawyers to collect their insurance, but asked, "What about the poor?" And, I, in turn, ask you, who is going to help the poor collect a few thousand dollars for the car left behind? If children need medical attention, but their parents have lost Social Security cards, birth certificates and other information needed for Medicaid, who is going to help them? I know the kind, giving and compassionate spirit of Alabama lawyers. So, in this state, I've no doubt. *We are.*

In addition to providing free legal services on an ongoing basis, Alabama lawyers have volunteered office space for displaced lawyers from Louisiana and Mississippi. As of mid-September, over 70 firms and lawyers had registered with the ASB for this purpose. Numerous Alabama lawyers have also offered living space for the displaced.

Firms and lawyers have contributed food, water, clothing and other supplies. **Beasley, Allen, Crow, Methvin, Portis & Miles**, for example, has undertaken the tremendous project of providing, soliciting, collecting, storing in its warehouse, and distributing all manner of supplies to evacuees residing in Montgomery. **Cunningham, Bounds, Yance, Crowder & Brown** in Mobile has adopted two cities, Bayou La Batre, Alabama and Waveland, Mississippi, and has sent, and is sending, truckloads of food and supplies to these areas.

And, Alabama lawyers have contributed money, the universal gift certificate. Although it may feel better (and, in some instances, be better) to give water or food or clothing, cash, admit it, is more versatile. With universal gift certificates, one need not guess at what victims need. And, many of our big firms have come up big. **Lee Bradley** and **Douglas Arant** (who will be inducted soon into Alabama's Lawyer Hall of Fame) would have been proud of the firm they helped build. **Maynard, Cooper & Gale** (I included "Gale" just because he's a pal) also has been generous–and so, too, **Sirote & Permutt**, and **Burr & Forman**, and **Baker Donelson**, and **Hand Arendall**, and **Balch & Bingham**, and **Lightfoot, Franklin & White** (White's also a pal) and others of whom I am unaware (and who will be justifiably upset, okay, p_ _ sed, that I failed to mention them).

Medium- to small-sized firms have acted like large firms. **White Arnold** has given a ton. So have **Beasley Allen**, and **Cunningham Bounds** and **Wallace Jordan** and others. The same is true of lots of small firms and solo lawyers. Birmingham lawyers, for example, have contributed a truckload through the **Birmingham Bar**

Association. Many, many lawyers have given more than they can afford. You know what, though? I'm not surprised. That's the way Alabama lawyers are. And, please understand this clearly: **every** gift matters–no matter the size. In addition to the dollars, it's the caring that counts. So, if you want to give, contributions can be made through the **Alabama Law Foundation** or the **Alabama Civil Justice Foundation**, or in any other means you choose.[10]

In closing (mercifully, I'm sure you're thinking), Katrina is a tragedy to be sure, but it gives us an unprecedented opportunity to serve others and to feel good about ourselves and our profession. If you have not yet been able to offer help–legal help–of some kind, I ask you to do so. If you have already done something, I thank you, and *I ask you to do more.*

Katrina may have destroyed New Orleans, and–I'm speculating–Rita probably has wreaked even more devastation, but like any disaster or any attack, these hurricanes could not, and did not, destroy the spirit that has helped our country endure and thrive. With everyone's help, we can–and will–survive and rebuild. ■

Endnotes

1. This article went to press September 22, 2005. Hurricane Rita has just reached Category 5 status, and a full-scale evacuation of Galveston, Texas is underway.
2. *Deputy chief: New Orleans "a hazard,"* CNN.com, Sept. 5, 2005, *available at www.cnn.com/2005/US/09/05/katrina.new.orleans/.*
3. *Katrina death toll could be lower than feared,* CBC.ca, Sept. 8, 2005, *available at www.cbc.ca/story/world/national/2005/09/08/katrina_deaths_overview20050908.html.*
4. Eileen Alt Powell, *Katrina damages estimate upped to $125B,* Sept. 9, 2005, *available at www.al.com/newsflash/hurricane/index.ssf?/base/national-51/112628484356631.xml&storylist=al_hurricane.*
5. Peter Applebome and Jonathan D. Glazer, *A Legal System in Shambles,* New York Times, Sept. 9, 2005.
6. Charles Sheehan, *Can Justice Be Done in the Midst of a Disaster?,* Chicago Tribune, Sept. 9, 2005.
7. Applebome, *supra* note 4. I wonder if Rittenberg catches as much grief for (once) representing the New Orleans teachers' union as I do in some quarters for representing the AEA.
8. Seehan, *supra* note 5.
9. *Trib* article.
10. If you choose to donate through ALF, checks can be made payable and mailed to the Alabama Law Foundation Katrina Disaster Fund, P.O. Box 671, Montgomery, AL, 36101. Credit card donations can be made online at *www.alfinc.org/donationform.cfm.* If you choose ACJF, checks should be written to the ACJF Katrina Relief Fund and sent to P.O. Box 1549, Montgomery, AL, 36102.

Of course, you can always donate through the Red Cross: *www.RedCross.org,* or other organizations. But if you do donate through these other groups, please send me an e-mail so I can keep track of what our bar members have done. I'm reachable at *Segall@copelandfranco.com.*

By Keith B. Norman

Hurricane Katrina and The Practice of Law

President Bobby Segall's message in this issue highlights the overwhelming generosity with which the legal profession has responded to Katrina's disaster victims. Lawyers will be assisting Alabama victims as well as those from Mississippi and Louisiana who have been displaced by Katrina's swath of destruction for months to come. Her impact will be felt for many years.

Because Katrina's destruction was so complete, there is virtually nothing left for many of her victims including lawyers. Not only were law offices destroyed and records obliterated, but the client base of many lawyers and firms have been entirely displaced. Early estimates suggest that at least 75 percent of the 900 lawyers' offices located in the three Mississippi counties on the Gulf Coast were severely damaged or destroyed. In Louisiana, at least 6,000 lawyers were displaced. Many of the affected lawyers from Mississippi and Louisiana have taken refuge in the surrounding states, including ours.

Katrina's winds and storm surge did more in several hours to advance the concept of multi-jurisdictional practice (MJP) than the American Bar Association could have ever hoped to accomplish in a decade. A majority of state supreme courts have entered rules[1], mostly temporary ones, to waive unauthorized practice (UPL) considerations so that displaced lawyers may handle legal matters in the lawyers' home state from other jurisdictions. The chief justice of the Georgia Supreme Court has asked the chief justices of Alabama, Mississippi and Louisiana to consider adopting reciprocity rules like Georgia's so that displaced lawyers can become licensed and practice in other jurisdictions. Katrina's terrible impact has made it plain that the licensing requirements imposed by some jurisdictions, including our own, may no longer be adequate for a modern, mobile society. Experienced lawyers with unblemished records are foreclosed by licensing restrictions from establishing practices in other jurisdictions because of the delay of taking another bar examination.

Prior to Katrina, President Segall appointed a task force chaired by **Glennon Threatt** of Birmingham to study issues of reciprocity. Katrina's results have made the work of this task force very timely and important. In light of Katrina, President Segall has urged the task force to commence its considerations and make a report to the ASB Board of Bar Commissioners as soon as possible.

There are likely to be those who will argue that we should not change our rules despite the fact that more than 30 jurisdictions have reciprocity, comity or admission on motion.[2] As Katrina has vividly shown, however, lawyers are only one disaster away from losing everything, including their ability to practice law. ■

ENDNOTES

1. A copy of the Alabama Supreme Court's order is posted on www.alabar.org
2. The following states have admission rules that permit the admission of attorneys through reciprocity, comity or on motion: Alaska, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

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Important Notices

United States District Court, Northern District of Alabama

In the Matter of the Reappointment of Harwell G. Davis, III as United States Magistrate Judge

The current term of the office of United States Magistrate Judge Harwell G. Davis, III at Huntsville, Alabama is due to expire March 18, 2006. The U. S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: Conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; the trial and disposition of misdemeanor cases; conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and trial and disposition of civil cases upon consent of the litigants.

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

Perry D. Mathis, Clerk
U. S. District Court
Northern District of Alabama
Room 140, 1729 5th Avenue North
Birmingham, Alabama 35203

Comments *must be received by* December 31st, 2005.

United States District Court, Northern District of Alabama

In the Matter of the Reappointment of John E. Ott as United States Magistrate Judge

The current term of the office of United States Magistrate Judge John E. Ott at Birmingham, Alabama is due to expire April 5, 2006. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: Conducting most preliminary proceedings in criminal cases, such as initial appearances, bond and detention hearings, and arraignments; the trial and disposition of misdemeanor cases; conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court, including civil discovery and other non-dispositive motions; conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions; and trial and disposition of civil cases upon consent of the litigants.

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Comments *must be received by* December 31st, 2005. *(Continued on page 420)*

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12/04

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Important Notices

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Judicial Award of Merit

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, 2006. 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. ■

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By Christy Crow
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Union Springs

"Bore You, Inspire You and Invite You"

It is with great anticipation that I am taking over as the president of the Young Lawyers' Section this year and with great dread that I start my first article as president. After reading Bobby Segall's article in the last issue, I feel woefully inadequate and know that nothing I write will be as entertaining as what you read on the "President's Page." So… I'm not even going to try to entertain you but, instead, will bore you with statistics and information while, I hope, inspire you nonetheless to become more involved with the YLS.

The YLS is the largest section of the Alabama State Bar with over 3,600 members (and almost 400 new admittees joining this fall–Congratulations, New Admittees!). The YLS is designed to be a large part of the service arm of the bar. I guess the thought is that young lawyers have more energy and willingness to serve than some of our older counterparts. While I don't know if that is always true, during my tenure as president, I want to make sure every young lawyer in the state has an opportunity to become active in the YLS and to volunteer on one or more of our subcommittees. To that end, by now, every young lawyer should have received a brochure that describes our various committees with information on how you can become more involved.

In case you didn't get the brochure (or threw it away but now really feel compelled to get involved), here is a brief description of the committees, along with the members of the YLS Executive Committee who are heading them up:

Sandestin CLE–Help organize and host the annual CLE seminar in Sandestin.

Chair: Tucker Yance, Mobile
Co-Chair: Craig Martin, Mobile

Iron Bowl CLE—Help organize and host the annual CLE seminar that takes place on the Friday prior to the Auburn/Alabama game.

Chair: Jim Terrell, Birmingham
Co-Chair: Michael Clemmer, Birmingham

Admissions Ceremony–Help organize one of the most important events in any new lawyer's life.

Chair: George Parker, Montgomery
Co-Chair: Valerie Russell, Tuskegee

Diversity in the Law (including Minority Pre-Law Conference)–Increase diversity in the law and encourage youth around the state in legal-related professions.

Chair: Kimberly Ward, Montgomery
Co-Chair: Bob Battle, Birmingham

FEMA–Provide legal representation or advice in the event a disaster occurs in Alabama, giving members an excellent opportunity to donate time to people in the community who are in need.

Chair: Brent Irby, Birmingham
Co-Chair: Charles Fleming, Birmingham

ABA/Affiliate Outreach—Help organize young lawyer sections across the state.

Chair: Clay Lanham, Mobile
Co-Chair: Anna Katherine Bowman, Birmingham

Web site/Publicity/Publications–Keep other young lawyers and the public aware of our activities and how the YLS can be of service.

Chair: Matt Stephens, Birmingham
Co-Chair: Page Banks, Huntsville

Long-Range Planning–Help determine the future of the YLS.

Chair: Christy Crow, Union Springs
Co-Chairs: Roman Shaul, Montgomery, and Bryan Cigelske, Mobile

Community Service Projects—Organize volunteers to provide community service.

Chair: Bob Battle, Birmingham
Co-Chair: Brannon Buck, Birmingham

Special Grants—Identify law-related projects that need funding and help find funding for them.

Chair: Norman Stockman, Mobile
Co-Chair: Shay Lawson, Tuscaloosa

Law School Relations—Introduce the YLS to third-year law students.

Chair: Andrew Nix, Birmingham
Co-Chair: Shane Seaborn, Clayton

A Lawyer in Every Classroom—Organize volunteer lawyers to go to schools when requested by the teachers.

Chair: Mitesh Shah, Birmingham
Co-Chair: Robert Bailey, Huntsville

The YLS officers this year are:

Christy Crow, Union Springs, president

Roman Shaul, Montgomery, president-elect

Bryan Cigelske, Mobile, secretary

George Parker, Montgomery, treasurer

Brannon Buck, Birmingham, past president

If you're interested in volunteering, contact one of the committee chairs or one of the officers and we'll get you headed in the right direction.

We are members of a noble profession. Service to each other and to the public is, and always should be, one of the hallmarks of our profession. There are needs in our profession and in our communities that we, as young lawyers, are uniquely situated to meet, but often we either don't know how to get involved or simply don't take the time. This is your opportunity to change that trend and to make a difference. This year, please help make the YLS the most active section of the bar, not just the largest. ■


MEDIATION

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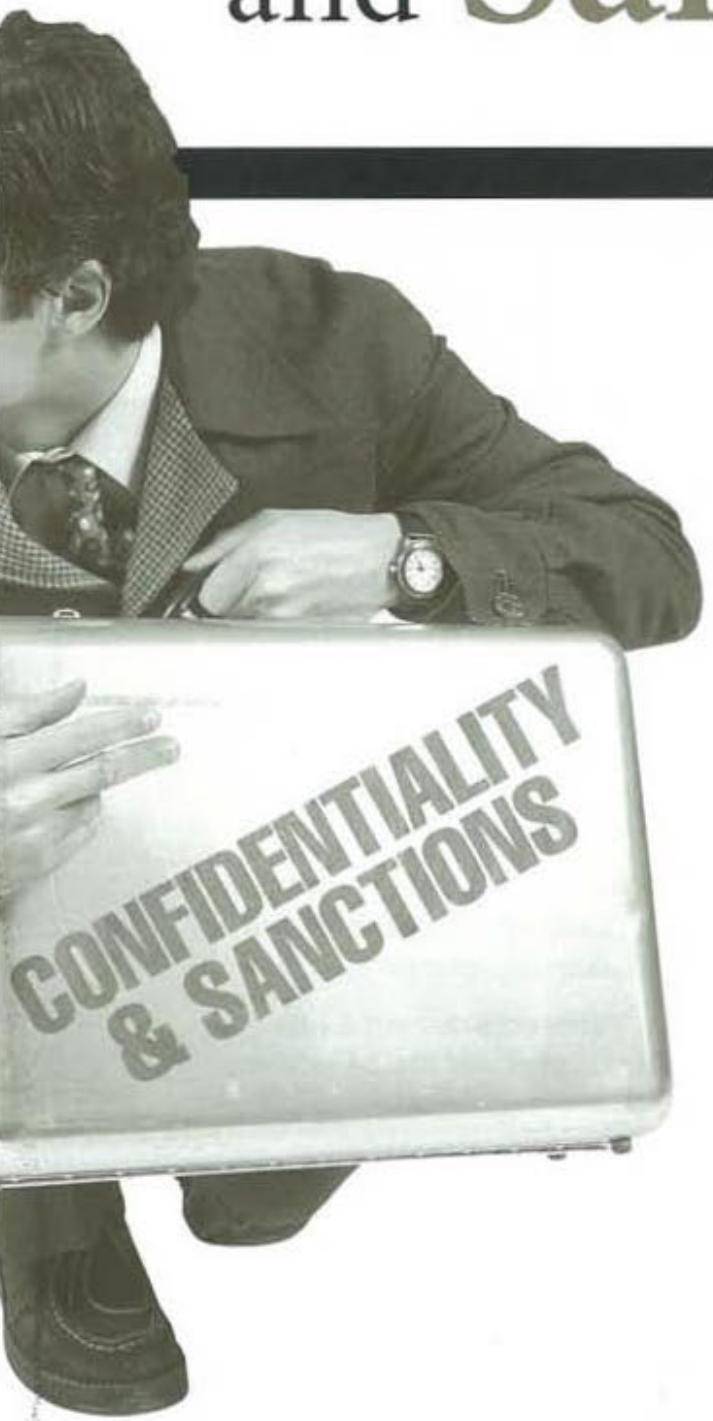


BY CELESTE W. SABEL

In case you have not heard, Alabama's Supreme Court and Court of Civil Appeals have a new program, the Appellate Mediation Program. It has been in effect since January 2004; consequently, we now have over a year and a half's worth of experience. This article will share some of that experience and discuss the confidential aspect of the mediation program and the possibility of court-imposed sanctions for failure to comply with the Appellate Mediation Rules and with orders of the Mediation Office.

The success rate for the mediation program has been phenomenal, with settlements in each court of more than 53 percent of those cases referred to appellate mediation. As of September 6, 2005, the total number of cases disposed by mediation settlement since the beginning of the program is 148 in the supreme court and 133 in the court of civil appeals. Appellate mediation, if ordered, is mandatory; settlement, however, is not.

Appeals are referred to mediation on a case-by-case basis. In most appeals filed with the two courts, the attorneys are asked to file a screening form and a confidential statement with the mediation office. The screening form provides necessary data; the confidential statement gives the attorneys' insights on whether mediation might be possible in the case. The confidential statement is *not* served on opposing counsel; consequently, this is the form on which to state plainly and without reservation if you think mediation has any hope of success and whether you want it. The confidential statement is seen only by the staff of the mediation office and, if requested, by the mediator if the cause is referred to mediation. No judges on the courts or their staffs see the confidential statement. So, please, do not check the box indicating you think the case is "appropriate" for mediation just to win the favor of the court. The court never sees it. Also, please do more than just check the boxes indicating whether you think the case is appropriate for mediation or not. Give the mediation office some real information as to why you feel the case merits mediation.

The mediation office refers cases to mediation based on the type of case and the comments of counsel on the confidential statement, but indicating on the confidential statement that you do not think the appeal is appropriate for mediation does not mean it will not be referred. Based on a year and a half's experience, the program administrators will ultimately decide whether to refer a case after considering your comments. While some attorneys have indicated displeasure with being ordered to mediation, stating in their evaluations that the mediation office "should not order mediation if none of the parties ask for it" and "I suggest not sending cases to mediation unless the parties agree to mediate," it should be known that even if one party tells another that he or she did not want mediation, that may not necessarily be the case. Secondly, the history of our program has shown agreement to mediate by both parties does not necessarily indicate the case will successfully mediate, nor does a negative response from one or both sides mean a case will not mediate. For instance, of the supreme court cases that did not successfully mediate, the parties in 36 percent of those cases had both indicated they thought the case appropriate for mediation. Of the cases that settled, at least one party in 54 percent of those cases indicated they were not amenable to mediation.

Key to the success of the mediation program is the understanding by both appellate courts participating in the program that confidentiality is essential. The mediation office, while housed in the supreme court clerk's office, functions as a separate office. It has its own docketing, file maintenance and e-mail systems. Both appellate courts respect the fact that the program is separate and that all matters are confidential.

Although the mediation program is separate, it is a court-approved program; therefore, any order issued from the mediation office is an order of the court in which that appeal is pending. The supreme court and the court of civil appeals have made it clear sanctions will be imposed if attorneys and/or parties fail to attend mediation sessions or otherwise delay the mediation process in violation of Rule 5(f), *Alabama Rules of Appellate Mediation*. Although the administrators and the executive director of the mediation program do not have the authority to impose sanctions, they can and will recommend sanctions pursuant to Rule 5(i) if they are of the opinion that the *Rules of Appellate Mediation* have been violated.

Any participant in the mediation process may ask for sanctions. At the time this article went to press, a motion for sanctions was pending in the supreme court, alleging that a party failed to attend or otherwise be "available" for a mediation session, thus hindering the mediation. You may ask, "If a motion for sanctions is filed, how can confidentiality be maintained?" The courts have instituted a procedure for addressing such motions. If the motion is filed in one of the clerk's offices, the motion is not entered on the court's docket, but is immediately forwarded to the mediation office. A

response can be filed. The motion and response, if any, will not be presented to the court until *after* the merits of the appeal are decided or, if an application for rehearing is filed, after the application is ruled upon. At that time, the mediation office will transmit the motion to the court for consideration. By using this procedure, any misconduct or alleged misconduct on the part of a party and/or counsel will not affect the decision on the merits.

Before the administrators of the mediation office seek sanctions, the attorney will receive a notice that his or her failure to do some act, i.e., file documents, report on the status of the mediation, etc., may result in sanctions. If the attorney continues to ignore the court order, sanctions may be sought by the mediation office after the appeal is decided.

This article lets attorneys know that the Appellate Mediation Program is important to the supreme court and the court of civil appeals, and that the courts will, if necessary, impose sanctions in the appropriate case. As stated earlier, the program has proven a phenomenal success. The success is attributable to the enthusiastic response of appellate counsel and the incredible work done by the mediators. Here are some of the comments by mediators, attorneys and parties:

Mediator: "There was a companion case for workers' compensation pending in circuit court. This companion case was also settled during the appellate mediation."

Mediator: "Appeal of a non-jury judgment. Although we did not settle, I believe the parties may settle before briefs are due. Mediation put them in a position to do that."

Mediator: "Tough case to mediate, but it was enjoyable."

Attorney: "This was my first appellate mediation–very favorable experience."

Attorney: "Very surprised at the resolution. The client was pleased."

Attorney: "The process was instructive and useful because it provided insight as to the motivation of both parties and what led us to this state of legal proceedings."

Attorney: "Very pleased! Gives the parties an opportunity to resolve the case when otherwise that opportunity may not have existed."

Party: "This was a very good process. It got us to the point that this case will be resolved in the near future."

Party: "Fantastic."

Party: "Very satisfied with the process and the mediator."

Party: "It was successful. I think better than pre-trial mediation."

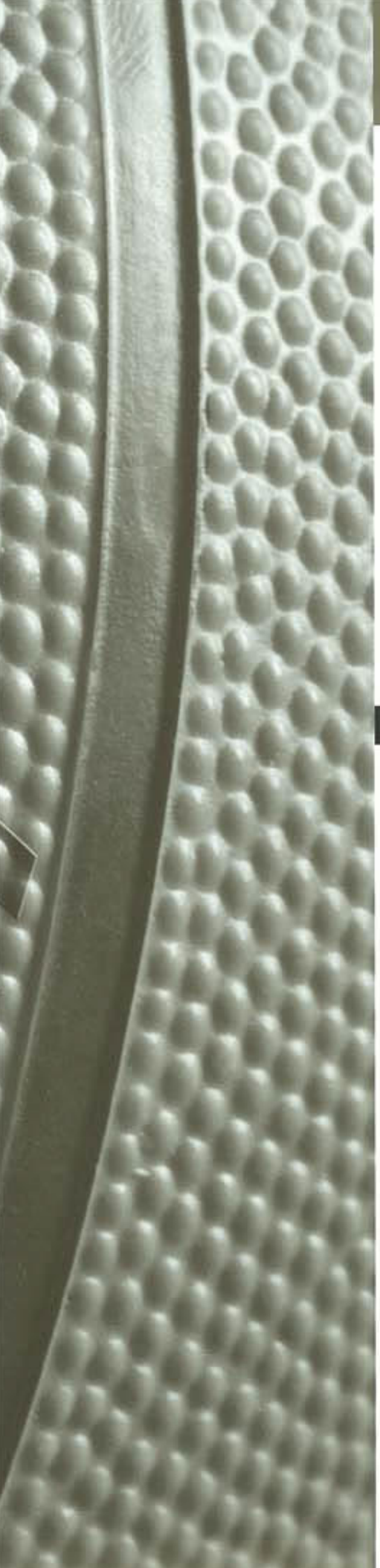
Party: "I appreciate [mediator's] effort to make a very sensitive and difficult process work as well as she did. If all mediators are like her, I can see how so many cases are settled."

Party: The mediator "was very professional and made everything easy for me and my wife to understand as far as how things go."

For information on Alabama's appellate mediation program, contact the Mediation Office at (334) 353-9797 or *mediation@appellate.state.al.us*. Information about the program can be found on the Alabama Judicial System's Web site at *www.judicial.state.al.us*. You may also contact **Lynn DeVaughn**, the program's executive director, at (334) 353-9797; **Rebecca Oates**, administrator for the court of civil appeals, at (334) 242-4087; or **Celeste Sabel**, administrator for the Supreme Court of Alabama, at (334) 242-4866. ■

Celeste W. Sabel

Celeste W. Sabel is a senior staff attorney and appellate mediation administrator with the Supreme Court of Alabama. She attended undergraduate school at Agnes Scott College and law school at Jones School of Law, where she graduated with honors. Following law school, she served as law clerk to the Honorable Richard L. Jones, associate justice of the supreme court. Sabel practiced with the firm of Mandell & Boyd in Montgomery, prior to joining the supreme court clerk's office legal staff in 1988. She is a member of the Alabama State Bar and the American Bar Association, Council of Appellate Staff Attorneys. She is currently serving as the appellate mediation administrator for the Supreme Court of Alabama.



The Face of Title IX:

Post-*Jackson v. Birmingham Board of Education*

BY KENNETH L. THOMAS AND RAMADANAH M. SALAAM

In a 5-4 decision, the United States Supreme Court effectively broadened the scope of Title IX litigation to include claims of retaliation in the case of *Jackson v. Birmingham Board of Education*, No. 02-1672, 544 U.S. ___, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005). This decision, although beneficial to some, has been seen as another example of a legislating judiciary.

Roderick Jackson ("Jackson") was employed as a teacher and a coach of a girls' high school basketball team in the Birmingham, Alabama public school system. Jackson complained about the athletic program as it pertained to his team. When Jackson experienced changes in his job assignments with the school, he immediately attributed it to retaliation against him for making the complaints about the basketball team.

Jackson filed suit against the Birmingham Board of Education ("the Board") alleging retaliation under the Title IX statute. The board moved to dismiss Jackson's complaint. The district court granted the dismissal, and Jackson's series of appeals ensued from there.

It should be noted that none of the court opinions produced from Jackson's lawsuit addressed the merits of his claims. From the district court to the Supreme Court, all opinions addressed the issue of whether Jackson, a male coach, can sue for retaliation based upon the Title IX rights of female basketball players.

It is also interesting to note that prior to the Supreme Court decision, the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit both ruled in favor of the board and held that Title IX does not create a private cause of action for a male teacher

to claim retaliation under Title IX. *See Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002); *Jackson v. Birmingham Board of Education*, No. CV-01-TMP-1866-S (N.D. Ala. 2002). The Supreme Court, however, deviated from this judicial history to create a rule that has opened an entirely new aspect of Title IX litigation.

Background on Title IX

Title IX is a 30-year-old statute codified at 20 U.S.C. 1681, *et. seq.* Title IX specifically states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

All agencies receiving financial assistance from the federal government must adhere to Title IX's prohibition of gender discrimination. The receipt of grants, the use of federal land, as well as the receipt of federal financial aid given directly to the student, are all examples of federal financial assistance. United States Department of Justice, Civil Rights Division, *Title IX Legal Manual* (2001). School boards and universities are not the only agencies that receive assistance from the Department of Education, but private schools, libraries, museums and rehabilitation programs are also common recipients of Department of Education funding, and they also must abide by Title IX. United States Department of Education, Office of Civil Rights, *Title IX and Sex Discrimination* (1998). Furthermore, the prohibition against discrimination is not limited solely to discrimination within the traditional classroom setting, but it also applies to an agency's recruitment, athletics, counseling and housing practices. *Title IX and Sex Discrimination.*

Title IX is enforced by the Department of Education's Office for Civil Rights. As the enforcing agency, the Department of Education has been responsible for the primary regulations regarding Title IX compliance. The departments of Justice, Agriculture and Energy have also promulgated regulations for the enforcement of Title IX. *Title IX Legal Manual.*

Title IX cases often rely on cases analyzing Title VI and/or Section 504 of the Rehabilitation Act. Title VI prohibits any recipient of federal funds from discriminating on the basis of race, color or national origin. Section 504 prohibits any recipient of federal funds from discriminating on the basis of disability. Congress used Title VI as a model to create Title IX and Section 504, *Title IX Legal Manual.* In *Alexander v. Choate*, 468 U.S. 287, 294, 105 S. Ct. 712, 716, 83 L. Ed. 2d 661 (1985), the United States Supreme Court stated that "[b]ecause Title IX, Section 504 and Title VI all contain parallel language, the same analytic framework should generally apply in cases under all three statutes."

Since the Supreme Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 560 (1979), holding that individuals have a private cause of action under Title IX, litigation under this statute has most commonly centered on equality in female and male athletic programs. More recently, Title IX litigation has also included claims of sexual harassment and hostile environment within an educational setting. Whether Title IX created a private cause of action for retaliation was a question of first impression for the United States Supreme Court in *Jackson.*

Decisions of the Lower Courts

The United States District Court for The Northern District of Alabama Opinion

The United States District Court for the Northern District of Alabama was the first court to render an opinion in the *Jackson* cases. The court held that not only was there no private cause of action for retaliation under Title IX, but also that Jackson had no standing to assert the Title IX claims of the girls' basketball team. *Jackson v. Birmingham Board of Education*, No. CV-01-TMP-1866-S (N.D. Ala. 2002). The court stated that "the 'persons' being subjected to the illegal discrimination are the female members of the basketball team, not the coach; it is they who are being 'denied the benefits of' the educational activity of competitive basketball." *Jackson*, No. CV-01-TMP-1866-S.

As for Jackson's Title IX retaliation claim, the court held that the decision in *Holt v. Lewis*, 955 F.Supp. 1385 (N.D. Ala. 1995) (holding that Title IX does not create a private cause of action for retaliation), aff'd, 109 F.3d 771 (11th Cir. 1997) (TABLE, No. 96-6046), *cert. denied*, 522 U.S. 817, 118 S. Ct. 67, 139 L. Ed. 2d 29 (1997), dictated that Jackson's claim be dismissed. *Jackson*, No. CV-01-TMP-1866-S (N.D. Ala. 2002). *Jackson*, No. CV-01-TMP-1866-S.

Jackson appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit Affirmation

The Eleventh Circuit based its reasoning upon the holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Court stated that *Sandoval* was governing in its decision because it clarified the judicial analysis for determining whether to imply a private right of action from a statute; it resolved a claim under Title VI which serves as a model to Title IX; and the plaintiffs, like Jackson, relied upon regulation as the premise for implying a private right of action. *Jackson v. Birmingham Board of Education*, 309 F.3d 1333, 1338-39 (11th Cir. 2002).

According to the Court, *Sandoval*, which relied upon *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688-89 (1979), requires that it analyze whether a private right of action can be implied solely from the text of the statute. The court concluded that the text of the statute was totally devoid of any language that would imply a private cause of action for retaliation, especially a private cause of action for a person who is not a "direct victim of

gender discrimination." *Jackson*, 309 F.3d at 1344. The Court stated that its task is "to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory discharge." *Id.* at 1344-45.

When looking to the Department of Education's promulgated rule for Title IX, 34 C.F.R. § 100.7(e), the Court's conclusion did not vary. The Court stated that the regulation does protect individuals retaliated against for making a complaint and testifying or participating in an investigation or hearing regarding a complaint. *Jackson*, 309 F.3d at 1346. However, the Court stated that this regulation cannot create rights that Congress did not intend to create. Therefore, Jackson could not rely upon this regulation to create a private cause of action for retaliation under Title IX. *Jackson*, 309 F.3d at 1346.

Further, the Court held that even if a prohibition against retaliation is implied with Title IX, Jackson still would not prevail. *Id.* at 1346-47. The Court reasoned that Title IX prohibits gender discrimination against a protected group of victims. Jackson clearly was not in that protected class. The Court stated that there was no evidence that Title IX meant to protect anyone other than the direct victims of discrimination. *Id.*

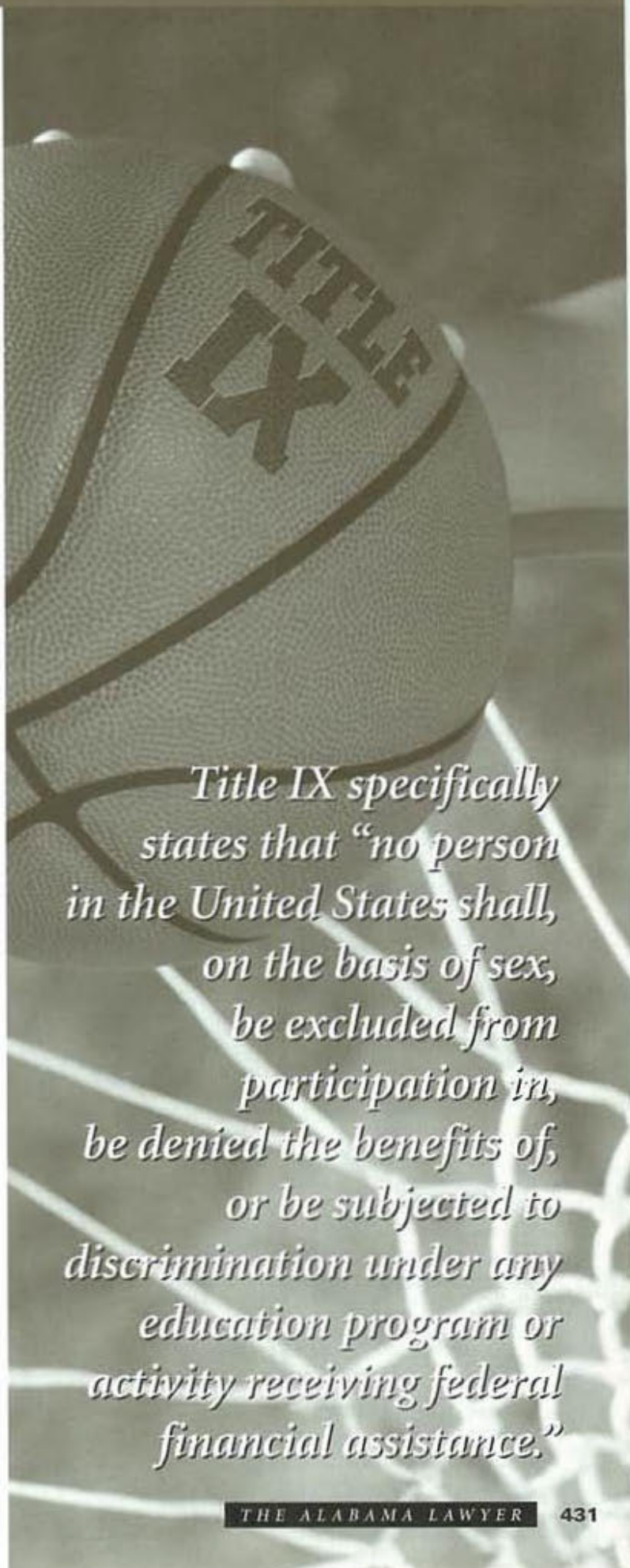
The Eleventh Circuit affirmed the decision of the district court, and Jackson appealed to the United States Supreme Court.

Jackson's Appeal

With representation from the National Women's Law Center, Jackson argued that Title IX's prohibition against discrimination on the basis of sex encompasses a prohibition on retaliation against an individual who complains about the discrimination. As the basis of his argument, Jackson cited to *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Petitioner's Brief ("Pet. Brief"), p. 14. In *Sullivan*, the Court held that a white member of a community park who was expelled for assigning his shares to a black man had standing to sue to establish the rights of the black man under § 1982. According to Jackson, the decision in *Sullivan* established that broad bans on discrimination include retaliation. Pet. Brief, pp. 13-14.

Jackson also argued that the failure to include retaliation as prohibited conduct under Title IX would discourage victims from bringing Title IX complaints to the forefront. Pet. Brief, p. 22. Jackson relied upon the regulations promulgated pursuant to Title VI, 40 Fed. Reg. 24,128, 24,136, 24,144 (1975) as evidence of the statute's inclusion of retaliation. Pet. Brief, p. 27. The regulations state that "intimidatory or retaliatory acts are prohibited" by Title VI.

Jackson asserted that the court of appeals' reliance upon *Sandoval* was incorrect. The plaintiffs in *Sandoval* were basing their lawsuit upon disparate impact discrimination created by the regulations of Title VI when Title VI itself only provided for claims of intentional discrimination. Here, according to Jackson, Title IX, as well as its regulations, prohibits retaliation. Pet. Brief, p. 33.



Title IX specifically states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

Also, Jackson took issue with the court of appeals' assessment that Jackson could not sue under Title IX because he was not a direct victim. Jackson proffered the view that one cannot distinguish between direct and indirect victims in Title IX and still uphold the protections against sex discrimination provided for by the statute.

The Board's Response

The board attacked Jackson's reliance upon *Sullivan* by noting that this case was decided after Congress enacted Title VI, and, therefore, could not create a private cause of action for retaliation pursuant to Title VI or its progeny, Title IX. Respondent's Brief ("Resp. Brief"), pp. 15-16.

Furthermore, the board argued that there is a clear difference between discrimination and retaliation, particularly when the complainer's accusations of retaliation are not based upon his sex. Resp. Brief, p. 34. This difference makes Jackson an indirect victim of discrimination for which there is no protection under Title IX. Resp. Brief, p. 35.

Most importantly, the board argued that the plain language of Title IX does not mention retaliation. Resp. Brief, p. 17. The prohibition on retaliation is found only in the regulations promulgated pursuant to Title VI. Holding that Title IX creates a private cause of action for retaliation would result in an impermissible extension of the statute. Resp. Brief, p. 17. For example, the board noted that Congress created an express prohibition against retaliation in Title VII; therefore, if Congress wanted Title IX to prohibit retaliation, it would have done so expressly in the statute. Resp. Brief, p. 21. Delving further into the Separation of Powers Doctrine, the board argued that the Court should not imply a private cause of action for retaliation because "if Title IX is to be amended to include such a claim for retaliation, Congress is the proper branch to cause such to occur." Resp. Brief, p. 12.

Furthermore, the board stated that Title IX was enacted pursuant the Spending Clause. When Spending Clause legislation

prohibits particular conduct, it "must do so unambiguously." Resp. Brief, p. 24-25. Therefore, the board must have actual notice that it could be liable for retaliation at the time that it accepted federal funds. According to the board, no such notice existed by the plain language of the statute, and the Department of Education's regulations could not serve as notice either.

As for Jackson's contention with the Eleventh Circuit's reliance upon *Sandoval*, the board stated that the Eleventh Circuit's holding that neither the text nor structure of Title IX allows for a private cause of action for retaliation under Title IX has been followed by various district and circuit courts, with the exception of the Fourth Circuit which clearly ignored precedent.

During oral argument, the board, represented by Alabama attorney Kenneth L. Thomas, reiterated to the Court that less than ten years ago it denied certiorari in the case of *Holt v. Lewis* which held that "an implied private right of action was not cognizable under Title IX, and that the regulation was not a basis to follow it." Oral Argument Transcript, p. 38. *Holt*, according to counsel, was the guideline by which the board had been following throughout the past years.

The Supreme Court Weighs In

The Majority

Justice O'Connor, in what turned out to be her last opinion on the Court, wrote for the majority (justices Stevens, Souter, Ginsburg and Breyer) and outlined four reasons for allowing a private cause for retaliation under Title IX.

First, the Court stated that retaliation is "discrimination" for the purposes of Title IX because it is an intentional act and the complainant suffers differential treatment. When addressing Title IX's failure to expressly include retaliation as a prohibited form of discrimination, the Court stated that Title IX cases rely on the "broad language" of the statute to define discrimination. *Jackson v. Birmingham Board of Education*, 544 U.S. ___, ___, 125 S. Ct. 1497, 1505, 161 L. Ed. 2d 361 (2005). This broad language somehow sweeps retaliation into the mix. Further, the Court stated that the holding in *Sullivan*, which was issued three years prior to the enactment of Title IX, provided for a general prohibition of racial discrimination to include retaliation; therefore, Congress could have presumably "expected its enactment of Title IX to be interpreted in conformity with *Sullivan*." *Jackson*, 125 S. Ct. at 1506. However, the Court gives no other indication or proof of Congress's "expectation" other than the *Sullivan* case.

The second prong distinguishes its holding in *Sandoval* from its decision in *Jackson*. In *Sandoval*, the Court held that plaintiffs could not use a Department of Justice regulation to read a disparate-impact cause of action into the statute. Similarly, the board argued that Jackson's attempt to assert a private cause of action for retaliation was again based upon a separate Department of Education Regulation, 34 C.F.R. § 100.7 (e). The Court opined that *Jackson* was different from *Sandoval* because the text of Title IX itself (although not expressly), not its regulations, prohibits retaliation. *Jackson*, 125 S. Ct. at 1506-07.

Next, the Court addressed Jackson's standing to bring a retaliation claim. Traditionally, those bringing retaliation claims are also the subject of the original complaint. In this instance, the girls' basketball team was the victim of the original complaint–an allegation that the girls were being discriminated against on the basis of their sex. Jackson sought retaliation as being an indirect victim of an alleged violation of Title IX. His claim of retaliation had nothing to do with discrimination of the basis of *his sex*. The Court held that Jackson's proximity to the original complaint of discrimination was irrelevant. *Jackson*, 125 S. Ct. at 1507. The Court stated that teachers, as opposed to the students who are directly affected by the Title IX violation, are in the best position to bring the discrimination to the forefront. *Id.* at 1508. Therefore, they should be afforded a redress against any resulting acts of retaliation. *Id.*

Lastly, the Court refused the board's argument that holding it liable for retaliation pursuant to Title IX would be violative of the Spending Clause because it did not have adequate notice of the forbidden conduct. The Court stated that funding recipients have been on notice that retaliation was prohibited conduct under Title IX since its holding in *Cannon* in 1979 where it held that individuals had private causes of actions for violations under the statute. *Jackson*, 125 S. Ct. at 1509. Furthermore, its holdings in *Pennhurst*, *Davis* and *Gebser* all held institutions liable for deliberate indifference toward Title IX violations. *Id.* Therefore, institutions, including the board, should have been on notice that they would be liable for retaliating against Title IX complainants.

The Dissent

The dissent, written by Justice Thomas and joined by the Chief Justice, Justice Scalia and Justice Kennedy, opined that if "a party asserts that a cause of action should be implied, [then] we require that the statute itself evince a plain intent to provide such a cause of action." *Jackson*, 125 S. Ct. at 1510. According to the dissent, Title IX does not have such an indication to hold the board liable for retaliation.

Specifically, the dissent cites to the premise that Congress' use of the phrase "on the basis of sex" has always been held to mean on the basis of the complainant's sex. *Id.* at 1511. Here, Jackson has not made any claims that he has been discriminated against on the basis of his sex. Instead, his claim rests solely on the basis of the sex of others. Therefore, according to the dissent, Jackson's claim of retaliation does not fit into the plain language of the statute.

The dissent states that the majority's reliance upon cases dealing with vicarious liability, e.g. *Davis* and *Gebser*, was misplaced.

Jackson, 125 S. Ct. at 1512. These cases could not establish notice that an institution could be held liable for the type of retaliation alleged by Jackson because in each of those cases, the complainant alleged violation of Title IX on the basis of their own sex. *Id.* According to the dissent, the funding recipients must now assume liability for any conduct related to sex discrimination no matter how far removed the conduct is from the language of the statute. *Jackson*, 125 S. Ct. at 1512-13.

In addition to the failure of Jackson's claim to fit into the "on the basis of sex" element, the dissent also noted the absence of any retaliation provision with Title IX. *Id.* at 1513. The lack of a retaliation provision within the statute was of importance to the dissent because it is apparent that Congress knows how to provide for private causes of action for retaliation when it sees fit. For instance, Title VII has an express provision for retaliation in addition to its prohibition against the underlying discrimination itself. *Id.* Congress has also provided for retaliation in the Americans with Disabilities Act and the Age Discrimination in Employment Act. The dissent holds the opinion that if Congress meant for individuals to sue for retaliation under Title IX then it would have created a mechanism for them to do so.

The dissent also disagrees with the majority's reliance upon *Sullivan*. *Sullivan*, according to the dissent, held that a white lessor had standing to assert discrimination claims on behalf of a black lessee. To do this, the white lessor had to show that the black lessee had actually been discriminated against on the basis of race. The majority did not require such a showing from Jackson. The dissent viewed this practice to be contradictory toward *Sullivan* because it allowed for Jackson to have secondary rights that exceeded the primary rights of the actual alleged victims of discrimination. *Jackson*, 125 S. Ct. at 1516. The majority's opinion, as interpreted by the dissent, seems to encourage whistleblowing within the realm of Title IX that Congress had no intention of creating. *Id.* at 1517.

The dissent concludes by stating that the majority's expansion of the statute without evidence of Congress' intent will now allow for private causes of action for persons who are further and further removed from the actual discrimination. *Jackson*, 125 S. Ct. at 1517.

The Impact of Jackson

Title IX is now considered a broad and all-encompassing statute. To that end, not only may students sue based upon Title IX violations, but parents, teachers, coaches and administrators may also be held to have a private cause of action under Title IX. Now, Title IX is read to prohibit retaliation against third parties as well as intentional acts of sex discrimination against the direct victim. More lawsuits based upon retaliation against indirect victims should be expected. Fund-receiving institutions and their legal counsel must now pay special and close attention to the "whistleblowers" in addition to the actual allegations of sex discrimination in the educational setting.

Although the Court and Jackson maintain that providing a private cause of action for these whistleblowers will promote observers of sex discrimination to seek redress of wrongs under Title IX, the fact is that any recovery gained from a lawsuit brought by a whistleblower will go directly to that individual. No relief will be given to the actual victim of a Title IX violation. It can hardly be said that Congress intended these indirect victims to receive relief under the statute and the direct victims to be left with nothing.

It will also be interesting to note any changes in the requests to the Department of Education's Office of Civil Rights ("OCR") for enforcement of Title IX. Traditionally, an indirect victim could file a complaint with the OCR and request that the alleged Title IX violator be investigated and that wrongs be righted. Using this method, the third party would automatically be protected against retaliation for filing a complaint or participating in an investigation. The enforcement mechanism would also ensure that the direct victims had some type of recovery or rather the Title IX violator had some type of rehabilitation. Now that the indirect victim has a private cause of action, the use of the OCR enforcement mechanism may begin to wane.

Although the Court's opinion in *Jackson* established new ground in the interpretation of Title IX, this opinion also gives an indication of how other discrimination statutes will be interpreted before the Court. This decision signifies the Court's willingness to create rights and rectify what it sees as social wrongs even in the absence of Congressional intent.

The *Jackson* opinion, although very recent, may also become obsolete given the upcoming changes on the Court. Justice O'Connor, who penned this opinion, has now retired after 24 years of service on the Court, and it may only be a matter of time before the Chief Justice and other staples on the Court may also seek retirement. With the appointment of new justices, new opinions regarding statutory interpretation and the prohibitions of Title IX may surface in contradiction to *Jackson*. ■

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Detach, Relax, Participate: Taking Care of Yourself Is Critical

BY JEANNE MARIE LESLIE

There have been many studies done and articles written about depression within the legal profession. Looking at the activities most lawyers engage in on a daily basis, it is surprising that the number of lawyers suffering from this illness is not higher. According to the National Institute of Mental Health, *in any given one-year period, 9.5 percent of the population, or about 19 million American adults, suffer from a depressive illness. For lawyers that percentage is almost doubled.* Clinical depression is a serious medical condition. It affects the way a person thinks, reacts, interacts and sleeps. For lawyers, it affects the way they prepare, interpret and argue. It affects relationships with spouses, with children, with colleagues and with clients. Many lawyers suffering from depression are actually brought into the disciplinary process.

How does this happen? Lawyers referred to the **Alabama Lawyer Assistance Program** who are suffering from depression are often intelligent and successful professionals. They are dedicated to helping their clients, often to the extent that they neglect their own well-being. On any given day, lawyers are exposed to distraught, frightened and anxious clients, seeking immediate relief from their problems. Many of these clients are victims of devastating circumstances or perpetrators charged with horrific crimes. Their freedoms, their finances, their homes and their very lives are often at stake. This type of day-in and day-out exposure is emotionally wearing. It becomes even more difficult for lawyers when they take on the burden of their clients, as if they were their own. Taking care of oneself is critical. Lawyers who are able to detach, relax and participate in healthy ways of relieving stress are far better equipped to handle the difficult situations they confront. Lawyers also encounter adversarial opponents, grueling schedules, overwhelming client loads and unpredictable outcomes, which only add to the increasing stress.

In presenting programs to local bar associations, I often ask, "How many of you bring your cases home? How many of you obsess about your day's performance?" All hands usually are raised. In addition, when I inquire about the number of working hours, many have reported an increase in the time spent at the office and a decrease in free time or down time. This type of behavior fuels tensions at home and tends to cause personal relationships to suffer.

I recently had a lawyer in my office who had isolated himself to the point that colleagues in his area thought he had stopped practicing, that he had been diagnosised with a terminal illness or died. All attempts to contact him were to no avail. He was, in fact, alive, but he did not go to his office and he did not return phone calls. He explained to me that he knew he had pressing deadlines, but he just could not face them. He explained that he had lost interest in all of the things that once brought him pleasure and satisfaction. This behavior is typical for individuals suffering from depression. Other signs to look for include:

- Persistent feelings of sadness or irritability;
- Changes in weight or appetite;
- Changes in sleep patterns;
- Feelings of guilt or hopelessness;
- Inability to concentrate or make decisions;
- Fatigue;
- Thoughts about suicide or death; and
- Avoiding friends and family.

Persistent overstress without relief affects every bodily system and increases the risk for depression, heart disease, insomnia, obesity, and digestive disorders. Prolonged stress responses also diminish the body's immune system, increasing susceptibility to infections. Fortunately, however, skills can be developed to help avoid some of life's daily stressors and to limit the effects of others.

I often ask bar members, "What are you currently doing to take care of yourself and how is that working for you?" Knowing what needs to change is the first step. Breaking it down into specific behaviors or thought patterns not only avoids additional stress, but also helps to identify specific and attainable goals for lasting change.

Stress, and the depression that sometimes results from a busy practice, can be managed. Medication can help, but often more is needed. Correct breathing, meditation and being quiet and still without thought are all methods that have been used to relieve stress and to achieve a tranquil, less anxious state. ALAP is here to help with extensive resources and a network of lawyers who understand. *So, if you need help, get help.* Our services can be accessed by calling our direct line at (334) 834-7576 or by visiting our page on the ASB Web site, *www@alabar.org.* All inquiries are confidential. ■

Jeanne Marie Leslie

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What Non-Immigration Lawyers Should Know About Immigration Law

BY AMY K. MYERS

The United States historically is a nation of immigrants. Today, there are millions of people in this country who were neither born in the U.S., nor became citizens through naturalization. Specifically, Alabama has experienced a tremendous influx of immigrants in the last ten years, with the Hispanic population alone increasing by an estimated 208 percent during that time period, according to the latest Census.

In general, individuals in the U.S. are in one of four categories with regard to immigration status: Citizens, either through birth in the U.S. or one of its territories, or through naturalization; permanent residents (often called "green card" holders), immigrants who have gained the status of permanent residents in the U.S. through family-based sponsorship, employment, the diversity lottery or other means; holders of temporary visas allowing individuals to be in the U.S. for a limited time for a specific purpose, (i.e., student visas which allow aliens, nationals of foreign countries, to study in the U.S for a temporary period of time); or undocumented aliens. In this article I will discuss selected areas of law, including litigation, employment, school law, financial planning, and tax, where the immigration status of an individual may have a significant impact on the particular area of law.

Litigation

Diversity of Citizenship

Litigators may face cases where one (or more) of the parties may be an immigrant. In such cases, the litigator should question whether the individual's immigration status will have an effect on diversity of citizenship for jurisdiction in federal court. Congress amended 28 U.S.C.A. § 1332(a) in 1988 to provide that an alien who has been admitted to the U.S. as a permanent resident shall be deemed a citizen of the state in which the alien is domiciled for the purpose of the diversity statute. By contrast, an alien who has not gained permanent residency status in the U.S. and who holds merely a temporary visa is not treated as a resident of the state

in which he is domiciled for the purpose of diversity, regardless of how many years the alien has lived in such state. *See Miller v. Thermarite Pty. Ltd.*, 793 F. Supp. 306 (S.D. Ala. 1992) (even though defendant, a citizen of Australia and Great Britain, resided in Mobile, had an Alabama driver's license and held a bank account in Alabama, he was not a citizen of the state for the purpose of diversity since he held temporary non-immigrant status). As a result, undocumented workers also would not be treated as citizens of the state in which they reside for diversity purposes. Finally, diversity is not present if both plaintiff and defendant are aliens. *Calbalceta v. Standard Fruit Co.*, 883 F. 2d 1553, 1557 (11th Cir. 1989).

Rights of Immigrants to Bring Litigation

Often the general public and attorneys unfamiliar with immigration law perceive that citizens of the U.S. have greater rights with respect to filing legal actions than individuals in the U.S. who are not citizens. This belief is generally wrong. In most circumstances, individuals in the U.S. have the right to file suits to address grievances and harms without regard to whether they are U.S. citizens, temporary or permanent residents, or illegal aliens. *Dunlop & Co. v. Ball*, 2 Cranch 180, 6 U.S. 180, 2 L. Ed. 246 (1804). Aliens can bring actions in contract or tort for harms they have suffered. *Id.* Under the language of the vast majority of statutes there is no reference to the term "citizen." As examples, the following statutes allow "individuals" to file complaints to redress claims, without regard to immigration status:

- ★ Title VII–Persons can bring a charge under Title VII. Section 701(a) of the Act defines a "person" as including "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees in cases under Chapter 11 [bankruptcy], or receivers." 42 U.S.C. § 2000e(a).
- ★ The Americans With Disabilities Act (ADA) makes it unlawful to discriminate against qualified *individuals* with disabilities. 29 U.S.C. § 621.
- ★ Age Discrimination in Employment Act (ADEA) allows any aggrieved person the right to sue for legal or equitable relief that will effectuate the purpose of the Act. 29 U.S.C. § 626 (c)(1).
- ★ The Equal Pay Act–protects all employees of a "covered" enterprise. 29 U.S.C. § 203(r).
- ★ The Alabama Workers' Compensation Act–There are no cases directly on point, but under the Act the term "employee" specifically includes aliens. The Act does not specifically address whether or not employees must be legally employed to benefit under the statute. Nonetheless, in all likelihood, even workers not legally employed would be covered under the Act since it recognizes aliens and, by analogy, the Act allows double recovery for minors who are not legally employed. ALA CODE § 25-5-1.

Employment Law

Undocumented Workers May Have Limited Remedies Under Certain Statutes Due to the Immigration Reform and Control Act

With respect to claims under the NLRB, the U.S. Supreme Court has held that undocumented aliens are not entitled to back pay, since they did not have legal work status during the period for which they are claiming back pay. In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court held that since The Immigration Reform and Control Act of 1986 (IRCA) prohibited the employment of illegal aliens in the U.S., an award of back pay to an undocumented worker "runs counter to policies underlying the IRCA." 535 U.S. 137, 149 (2002). In making this decision, however, the Supreme Court did not preclude the NLRB from taking *any* remedial action for the employer's improper firing of an undocumented worker. In fact, the Court expressly preserved the NLRB's ability to issue injunctive and declaratory relief. *Hoffman*, 535 U.S. at 152.

In the aftermath of *Hoffman*, courts and governmental agencies are struggling with the issue of whether undocumented workers can recover wages under other federal statutes, such as the Fair Labor Standards Act, Title VII and ADA. In general, governmental agencies have tried to limit the impact of *Hoffman* on claims brought under these specific statutes.

The Department of Labor has indicated that *Hoffman* does not apply to the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), making the fine distinction that "under the FLSA and MSPA the Department (or an employee) seeks back pay for hours actually worked," as contrasted to pay for work not performed, as is the case under an NLRB action. See Fact Sheet #48, Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Department of Labor, available at *www.dol.gov/esa/regs/compliance/whd/whdfs48.htm*. The EEOC affirmed its commitment to fighting illegal discrimination against any U.S. worker, regardless of immigration status. This EEOC guidance can be found at *www.EEOC.gov/press 6-28-02*. However the agency did rescind an earlier guidance based on pre-*Hoffman* rationale. See *www.EEOC.gov/policy/docs/undoc-rescind*.

IRCA Provisions

In addition to the information relating to rights of immigrants under many of the Civil Rights Acts discussed above, employment lawyers need to be aware of the general requirements for work authorization. Under IRCA, for the first time, employers were subject to criminal and civil sanctions for knowingly hiring or continuing to hire an unauthorized alien worker. Now all employers are required to have every employee complete an I-9 form within three days of being employed. The Department of United States Citizenship and Immigration Services (USCIS)

supplies a list of documents from which employers can establish identity and work authorization. Employment of individuals not authorized to work can subject employers to civil fines and criminal penalties. 8 U.S.C. § 1324(a)(1). In April of this year, a new law went into effect allowing employers to keep I-9 verification documents in an electronic format if they so elect.

IRCA also has anti-discrimination provisions, including a provision on national origin discrimination which applies to employers smaller than those governed by Title VII's similar provision (applying to employers who have as few as four employees) and a provision which prohibits discrimination in hiring and discharge based on citizenship status. See 8 U.S.C. § 1324b (a)(1)(A); 8 U.S.C. § 1324b (a)(1)(B).

School Law

Lawyers who practice school law frequently face questions related to immigration status with respect to the rights of undocumented children to attend public schools in the U.S. Constitutional issues preclude public schools from denying undocumented children attendance in school. As background, in 1982 the U.S. Supreme Court considered whether Texas could prohibit local school systems from providing funding for the education of children not legally admitted into the United States. The Supreme Court held that the Texas statute violated the equal protection clause of the Fourteenth Amendment which applied to individuals within its jurisdiction. *See Plyer v. Due*, 457 U.S. 202 (1982).

One common restriction placed by public schools on attendance is a residency requirement that children in their district must reside with "a parent, guardian, or other person having lawful control of him under an order of a court." *See Martinez v. Bynum*, 461 U.S. 321, 323 (1983). The U.S. Supreme Court upheld this type of residency restriction as a valid restriction in *Martinez*, a case involving a child who was a U.S. citizen, but who resided with his sister, who was not his legal guardian, while his parents resided in Mexico. *See Martinez*, 461 U.S. 321 (1983).

Ironically, in the strange environment of immigration law, if a foreign student wishes to attend public school in the United States with non-immigrant student status and seeks to do so pursuant to the law, there are rigorous requirements that must be met for such attendance. For instance, F-1 or J-1 foreign students are not authorized to attend public elementary schools at all, and foreign students who are allowed to attend public high schools may only attend schools certified to accept them and must reimburse the school district for the cost of attendance. See 8 CFR § 214.2(f)(D).

Estate Planning

Lawyers who draft wills for clients and provide other estate planning advice may want to inquire as to the immigration status of the clients and their spouses. One of the most common tax planning measures, a marital deduction trust (commonly called a "QTIP trust") is only available to individuals if the beneficiary is a U.S. citizen unless certain conditions are met. However, there is a specific window of time during which an individual can become a citizen through naturalization, even after the spouse has died and the non-resident spouse has become the beneficiary of such a trust. For further details refer to 26 U.S.C. § 2056(d). A helpful article related to this topic is "My Client Married an Alien: Ten Things Everyone Should Know About International Estate Planning," by Warran G. Whitaker and Michael J. Parents, published in the March/April 2004 issue of *Probate and Property*, available at *www.abanet.org/rppt/publications/magazines/indexes/estateplanning.html*.

Mergers and Acquisitions Lawyers

Attorneys who advise businesses in the context of business mergers or acquisitions should inquire as to the immigration status of key employees before the deal is completed. Employees who hold certain temporary work visas, such as L intra-company transfer visas, could be adversely affected by a buyout, and the employees involved may not continue to have valid work status (or immigration status) after the deal. Advance notice of the problem can allow an immigration lawyer the time to find a new

status for the employee, if possible. In other situations where individuals hold temporary visas such as H-1B professional visas, existing petitions filed with the USCIS may need to be amended.

Tax Lawyers

Lawyers who advise individuals about tax liability need to understand the basics of the non-immigrant categories of aliens so they can determine the appropriate taxes and withholdings to be made on behalf of aliens in non-immigrant status. Certain exceptions to the general tax rules exist for aliens with specific types of visas, including F, J, M and Q visa holders who are temporarily in the U.S. as foreign students, teachers, trainees and exchange visitors. Other exceptions apply to visa holders who work for a foreign government or international organization.

Resident aliens are subject to federal income tax in the U.S. on the same basis as citizens of the U.S. while non-resident aliens are taxed on income sources in the U.S. but not on world-wide income. For foreign nationals of certain countries, there are tax treaties which should be consulted. An excellent resource on this topic is CRS Report for Congress which can be located at *www.shusterman.com/pdf/tax204.pdf.*

As you can tell from this non-exhaustive listing of legal subject areas, knowledge of certain principles of immigration law and where to find more detailed information can be helpful in a wide variety of legal practices. Inevitably, as international travel, trade and immigration into the U.S. increases, the need for such knowledge will also increase. ■

Amy K. Myers

Amy K. Myers is a member of Bradley Arant Rose & White LLP. In preparation of this article, Myers was assisted by Crystal Wilkerson, a member of the firm.


POST-ENFORCEABILITY
ARBITRATION

After the Battle Over Arbitration:

An Analysis of Post-Enforceability Issues Confronting Lawyers and Litigants in Actual Arbitration Proceedings

BY FLOYD D. GAINES AND ANDREW P. WALSH

Introduction

For much of the past 20 years, arbitration cases in Alabama almost exclusively involved the issue of enforceability of a given arbitration agreement. In an oft-repeated scenario, a plaintiff who had signed a binding arbitration agreement filed a lawsuit directly in an Alabama trial court, in spite of the agreement, and thereafter opposed efforts of the defendant to obtain a judicial order requiring such plaintiff to arbitrate his or her claims. Countless times, the loser of the fight in the trial court appealed to the Alabama Supreme Court. As a result of the arbitration fight's focus on enforceability, rarely in this period did Alabama courts have occasion to address appeals of actual awards rendered in an underlying arbitration proceeding. Recent developments in the law have largely ended any debate concerning the enforceability of arbitration agreements–it is now settled that the vast majority of arbitration agreements are presumptively enforceable. In other words, in this day and age, when plaintiffs wage the fight against enforceability of an arbitration agreement, they almost always lose. With this change in the state of the law, more and more plaintiffs have started to bring their claims before an arbitrator, and appellate litigation in Alabama has experienced a corresponding shift to efforts by a party dissatisfied with the result of an underlying arbitration to have the arbitrator's award modified or vacated entirely. This article focuses on this new period in the evolution of Alabama's law of arbitration from the standpoint of an attorney faced with the prospect of defending claims in an arbitration. After identifying significant issues and challenges that are present in the defense of claims in arbitration, most notably the difficulty of overturning arbitration awards, the following discussion addresses the importance of evaluating the appropriateness of arbitration in cases where a defendant controls the decision and highlights steps a practitioner can take to protect his or her clients' interests throughout the arbitration process.

Historical Overview of Arbitration in Alabama

In 1925, Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). Alabama courts adopted this arbitral hostility as part of the state's common law at least as early as 1836. See *Stone v. Dennis*, 3 Port. 231, 239 (Ala. 1836). The Alabama legislature ultimately codified the prohibition against enforcement of pre-dispute arbitration agreements beginning with the *Alabama Code* of 1923. *See Birmingham News Co. v. Horn*, 901 So. 2d 27, 44 (Ala. 2004). To date, Alabama has retained its statutory executory arbitration ban, which is currently codified at § 8-1-41(3), *Ala. Code* 1975. Whether this statutory ban was inconsistent with the FAA, and therefore subject to federal preemption analysis, remained an open question until the United States Supreme Court decided *Southland Corp. v. Keating*, 465 U.S. 1 (1984), nearly 60 years after the FAA's enactment. *Keating* held that Congress, in enacting § 2 of the FAA, created a substantive rule of law applicable in state courts and "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10, 14-15. Accordingly, state laws barring enforcement of an arbitration agreement within the FAA are preempted as violative of the Supremacy Clause. *Id.* at 11, 16.[1]

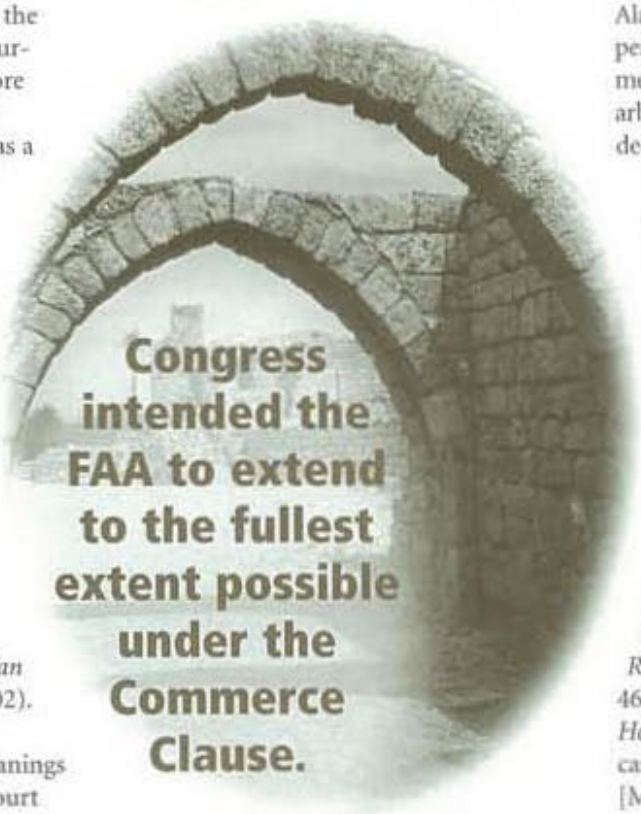
Keating did not speak on the important related questions of what standards courts should use to determine whether an agreement is subject to the FAA and to what extent are states entitled to invalidate otherwise enforceable arbitration agreements under traditional contract defenses. Other United States Supreme Court decisions, both before and after *Keating*, bear on these questions, which are largely beyond the scope of this article.[2] Two such decisions, however, are significant to an understanding of the historical development of arbitration in Alabama: *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) and *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). Both cases involved appeals from decisions of the Alabama Supreme Court holding arbitration agreements unenforceable as not meeting the "involving commerce" requirement of § 2 of the FAA, 10 U.S.C. § 2.

Following *Keating*, Alabama courts initially employed an expansion interpretation of the phrase "involving commerce," requiring only "the slightest nexus of the agreement with interstate commerce [to] bring the agreement within the ambit of the FAA." *Ex parte Costa & Head (Atrium), Ltd.*, 486 So.2d 1272, 1275 (Ala. 1986). That interpretation was short lived, as the Alabama Supreme Court, widely viewed at that time as pro-plaintiff, changed course and implemented a restrictive interpretation of the commerce requirement, *see Ex parte Jones*, 628 So. 2d 316 (Ala. 1993) (citing *Ex parte Warren*, 548 So. 2d 157, 160 (Ala. 1989)), known as "the 'contemplation of the parties' test." *See Dobson*, 513 U.S. at 278. Pursuant to this standard, Alabama courts enforced arbitration agreements only where "the parties 'contemplated substantial interstate activity' at the time they entered into the contract and accepted the arbitration clause." *Lopez v. Home Buyers Warranty Corp.*, 628 So. 2d 361, 363 (Ala. 1993), *vacated*, 513 U.S. 1123 (1995).[3] In *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993), the Alabama Supreme Court employed its restrictive "involving commerce" standard to a termite bond contract between an Alabama resident and an out-of-state corporation, finding such agreement not to fall within the FAA and therefore preempted by § 8-1-41(3), *Ala. Code* 1975. *Id.* at 356-57. Rejecting Alabama's narrow "involving commerce" test, the United States Supreme Court reversed, holding that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Dobson*, 513 U.S. at 277.

Six months after *Dobson*'s release, Professor Henry C. Strickland of the Cumberland School of Law, a scholar in the area of arbitration,[4] predicted that the decision "w[ould] revolutionize arbitration law in [Alabama]" and, "[f]or the first time, enforcement of contractual arbitration provisions will be the rule rather than the exception in Alabama." Henry C. Strickland, *Allied-Bruce Terminix, Inc. v. Dobson: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238, 238 (July 1995). Strickland's basic premise was correct–*Dobson* foretold major changes in the enforcement of arbitration clauses in Alabama, as enforcement of an arbitration agreement became the rule and denial of enforcement the exception. Yet, Professor Strickland never could have expected the lengths to which opponents of arbitration would go after *Dobson* to quell the rising tide of arbitration. He also likely underestimated the continuing hostility of many Alabama judges to binding arbitration, including justices on the Alabama Supreme Court, who were receptive to new and creative arguments for refusing to enforce binding arbitration agreements. Notably, in 1995, when the United States Supreme Court decided *Dobson*, Alabama's highest court was Democratically-controlled and widely recognized as being plaintiff/consumer friendly. The latter part of the 1990s saw a marked ideology shift with the Alabama Supreme Court, as Republican justices with pro-business sympathies came to dominate the court. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J. L. & POL. 645, 657 (1999). In this volatile period, what has been penned the "battle over arbitration," *see* Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 ALA. LAW. 56, 67-61 (Jan. 2001), was waged throughout the state, not just in the courts. In this fight, consumer advocates and trial lawyers opposed to binding arbitration squared off against pro-business groups that favored arbitration. As part of this battle and in spite of *Dobson*, plaintiffs litigated

the enforceability of arbitration agreements at every turn, including by way of appeal. Dissatisfied defendants similarly employed the appellate process, as a result of which the Alabama Supreme Court experienced a deluge of arbitration enforceability appeals in the late 1990s and early 2000s.[3]

With the changing sympathies of the Alabama Supreme Court, it is not surprising that over time more and more defendants were successful in compelling disputes to arbitration. Yet, as a later United States Supreme Court decision would show, the Republican-dominated court did not go far enough. Instead, in 2000, the court installed yet another interstate commerce test that would later be struck down as too restrictive and therefore preempted by the FAA. That test, first set forth in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000), "focuse[d] on the quantity and quality of involvement of foreign entities with the subject transaction." *See Brookfield Constr. Co. v. Van Wezel*, 841 So. 2d 220, 221 (Ala. 2002). Using this test, Alabama's highest court–even with its pro-business leanings and in spite of what the supreme court had said in *Dobson*–continued to find a significant number of arbitration agreements failed to meet the FAA's interstate commerce requirement and therefore were unenforceable under Alabama law. It did not take the United States Supreme Court long to act. The opportunity came in *Alafabco, Inc. v. Citizens Bank*, 872 So. 2d 798 (Ala. 2002), wherein the Alabama Supreme Court, relying upon *Sisters of the Visitation*, refused to enforce an arbitration agreement that was executed as part of a large underlying financial transaction. Only Justice Harold See dissented, arguing that *Sisters of Visitation* was wrongly decided and that the court's majority had failed to follow the dictates of *Dobson*. On certiorari review, the U.S. Supreme Court, in a terse unanimous *per curiam* opinion, rejected Alabama's new interstate commerce test as resting upon "an improperly cramped view of Congress' Commerce Clause power." See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003). As a practical matter, the supreme court simply reiterated what it had previously said in *Dobson*, and what the Alabama Supreme Court had ignored: Congress intended the FAA to extend to the fullest extent possible under the Commerce Clause.



Alabama Arbitration Law Enters a New Phase

As a practical matter, *Citizens Bank* marks the final chapter in Alabama's fight over the enforceability of executory arbitration agreements. Although plaintiffs occasionally still have success opposing a motion to compel arbitration,[4] Alabama cases that follow *Citizens Bank* demonstrate that Alabama is now an arbitration-friendly state and that the Alabama Supreme Court has waived the "white flag of surrender" on the FAA's interstate commerce requirement.[5] Thus, Professor Strickland's prediction concerning arbitration in Alabama–that it would become "the rule rather than the exception"–has ultimately proven correct, albeit several years later than expected. Parties now subject to the reality of binding arbitration, along with their legal counsel, have only two choices going forward–walk away from their claims or bring them in an arbitral forum. As Alabama litigators well know, a substantial percentage of plaintiffs has taken the former option, as the increased number of arbitrations has by no means offset the decreased number of lawsuits.

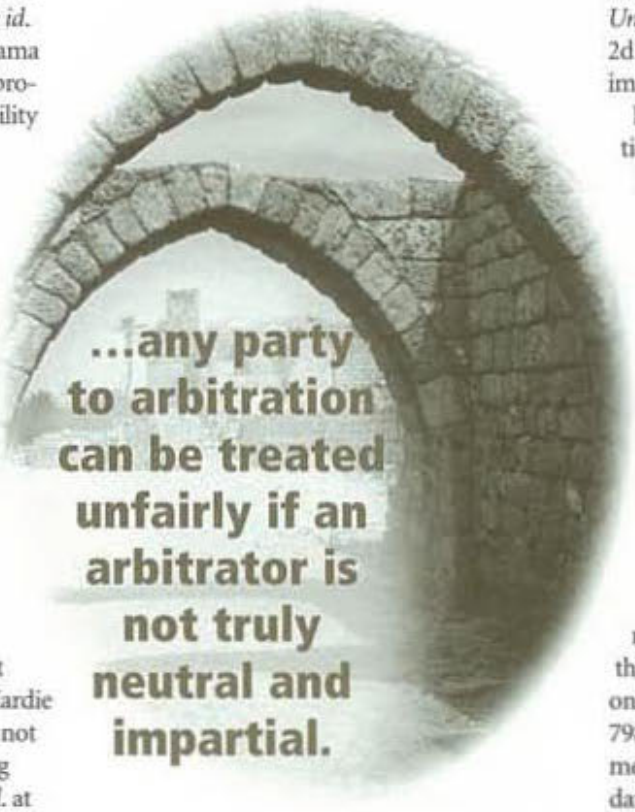
Yet, more arbitrations are now taking place and there has been a corresponding increase in the number of appellate decisions involving awards rendered in an actual arbitration. Today, these decisions are critical in the developing law of arbitration in Alabama, an area of law that was largely dormant during the "battle over arbitration."[6] In the approximately three years since *Citizens Bank*, Alabama's highest court has released three such decisions for publication: *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493 (Ala. 2003), *R.P. Indus. v. S & M Equip. Co.*, 896 So. 2d 460 (Ala. 2004), *Birmingham News Co. v. Horn*, 901 So. 2d 27 (Ala. 2004). A fourth case, *H & S Homes, L.L.C. v. McDonald*, [Ms. 1031445, Nov. 24, 2004] ___ So. 2d ___ 2004 Ala. Lexis 343 (Ala. 2004) ("McDonald III"), was recently decided, but has yet to be released for publication. Evaluation of these cases, along with certain cases from other jurisdictions, offers important wisdom and insight to attorneys preparing to defend cases in arbitration. Following an overview of grounds for appealing arbitration awards, this article considers these four cases in depth.

Avenues for Appealing Arbitration Awards[9]

Seven years ago, at which time the body of appellate law from Alabama was limited, Mobile attorney William H. Hardie published an article in *The Alabama Lawyer*

that addressed in detail potential avenues to attack arbitration awards. See William H. Hardie, *Arbitration: Post-Award Procedures*, 60 Ala. Law. 314 (Sept. 1999). Looking to § 6-6-14 of the Alabama Arbitration Act, § 10 of the FAA (9 U.S.C. § 10), and appellate decisions from courts throughout the United States, Hardie identified 16 possible grounds for attacking an arbitration award. *See* Hardie, *supra*, at 318. The first 11 are statutory grounds set forth in the AAA or FAA. *See id.* The remaining five are non-statutory grounds established by courts in accordance with the common law. *See id.* In the years since this article, the Alabama Supreme Court has made important pronouncements bearing on the applicability of most of these suggested grounds. Notably, in the *Horn* case, the court formally adopted the grounds of appeal set forth in § 10 of the FAA as applicable to appeals from arbitration awards in Alabama courts and further stated that the grounds included in § 6-6-14 are cumulative of the FAA. *See Horn*, 901 So. 2d at 46-47). With regard to the non-statutory grounds, *Horn* expressly adopted one of the five proposed grounds, "manifest disregard" (Hardie Category 13), *see id.* at 50, but rejected three others, including that an award is "arbitrary and capricious" (Hardie Category 14), that an award is "completely irrational" (Hardie Category 15), and that an award does not "derive its essence from the underlying contract" (Hardie Category 16). *See id.* at 52 (citing Hardie, *supra*, at 322-23). The Alabama Supreme Court has not spoken directly on Hardie's remaining non-statutory category, that an "award violates fundamental public policy" (Hardie Category 12), but approvingly quoting an article in Horn that recognized the validity of this non-statutory ground. *See Horn*, 901 So. 2d at 52 (quoting Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 489-93 (1998)).

Regardless of how many viable categories of appeal remain, it is abundantly clear that judicial review of an arbitration award is severely limited, regardless of whether an appeal is pending in state or federal court. *See, e.g., Horn*, 901 So. 2d at 50; *McKee v. Hendrix*, 816 So. 2d 30, 33 (Ala. Civ. App. 2001); *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). It has even been suggested that "the standard of review of arbitral awards 'is among the narrowest known to the law.'" *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005) (quoting *Litvak Packing Co. v. United Food & Commercial Workers*, 886 F.2d 275, 276 (10th Cir. 1989)). In light of the restrictive nature of judicial review, those persons and entities employing arbitration agreements should carefully consider the significance of judicial review in disputes likely to fall within the scope of a given arbitration agreement. In this regard, it is important to recognize that arbitration is a two-way street–both parties to an arbitration agreement have a legal right to judicially compel arbitration in accordance with the terms of a given agreement. In recent years, plaintiffs almost invariably filed lawsuits in court in spite of an arbitration agreement with the intention of fighting an anticipated motion to compel arbitration from the other side. In such circumstances, defendants were largely left with the choice of whether or not to enforce an arbitration agreement–the defendant could abandon the arbitration agreement simply by not filing a motion to compel arbitration. Yet, plaintiffs have at their disposal a tool similar to a motion to compel, known as a petition for arbitration. While less well known to Alabama practitioners and the Alabama judiciary than the motion to compel arbitration, the petition for arbitration allows a party to an arbitration agreement to commence a court action to force another party to submit to arbitration in accordance with the terms of an arbitration agreement. *See Unum Life Ins. Co. of Am. v. Wright*, 897 So. 2d 1059, 1075 (Ala. 2004) (discussing import of 9 U.S.C. § 4).



In those circumstances in which arbitration agreements are to be used, care in drafting the agreement can eliminate some, but not all, of the risks identified in recent Alabama decisions. As addressed below, the largest risk presented to defendants in arbitration is the inability to obtain any relief on appeal from a damage award that would unquestionably be struck down in a traditional appeal. A recent example of such an award is found in *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004), wherein the Eighth Circuit Court of Appeals reinstated a $6 million punitive damage award despite the fact that compensatory damages were only $4,000, a ratio of 1,500 to 1. *See id.* at 798. Responding to the defendant's argument that the magnitude of the punitive damages award established that the arbitrator had manifestly disregarded United States Supreme Court precedent imposing due process restrictions on such awards, the Eighth Circuit provided the following chilling commentary: "Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties . . . can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner." . . . Here, [defendant] chose to resolve this "dispute quickly and efficiently through arbitration." Indeed, it was [defendant] that insisted on removing the matter to arbitration. In so doing, [defendant] "got exactly what it bargained for." "Having entered such a contract, [defendant] must subsequently abide by the rules to which it agreed."

Id. at 803 (citations omitted).

In light of the concern over judicial review, those drafting arbitration agreements should consider including language that preserves the parties right to obtain judicial review of matters of law to the fullest extent allowed. At the time of the drafting of this article, neither the Alabama state courts nor the Eleventh Circuit Court of Appeals has addressed the question of whether the FAA allows parties to an arbitration agreements to contractually bargain for expanded judicial review. However, the issue at present splits other federal courts of appeal. The Third, Fourth and Fifth circuits have found that the FAA permits expanded judicial review, *see Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 U.S. App. Lexis 21248, at *14-*18 (4th Cir. Aug. 11, 1997) (unpublished decision); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995), while the Ninth and Tenth circuits have rejecting expanded judicial review. *See Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 1004 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001).

Alabama's Developing Body of Decisions Involving Appeals from Arbitration Awards

McMichael–Exercise Care and Caution in Selecting an Arbitrator

The *Waverlee Homes, Inc. v. McMichael* decision from 2003 was the Alabama Supreme Court's first appeal involving an actual arbitration award in nearly a decade. See footnote 8, *supra*. The *McMichael* plaintiffs originally filed suit in circuit court against the seller and the manufacturer of a mobile home, seeking "compensatory and punitive damages on claims alleging fraud, breach of express and implied warranties, and negligent and/or wanton construction, inspection, transport, and setup of the home." *Id.* at 494. As often happens in cases of this nature, the defendants demanded enforcement of their arbitration agreements by way of a motion to compel arbitration and the circuit court gave these defendants exactly what they asked for–an order compelling plaintiffs to arbitrate. It is safe to assume that, in choosing to enforce the arbitration agreement, the defendant manufacturer did not expect an arbitrator to award plaintiffs $490,000 in economic damages and emotional distress, particularly when the plaintiffs' own expert estimated economic damages to be at most $5,500.[10]

After the circuit court entered judgment on the arbitration award, defense counsel for the manufacturer sought to depose the arbitrator based on evidence he had uncovered that cast doubt on the arbitrator's partiality. Specifically, defense counsel uncovered evidence that the arbitrator had issued similarly large awards in three analogous mobile home cases, based on virtually identical factual findings, with all four awards being issued within a span of four days. In each of these four arbitrations, plaintiffs were represented by the same attorney. Defense counsel further put forth evidence that counsel for plaintiffs and the arbitrator had previously acted as co-plaintiffs counsel in a lawsuit against a mobile home manufacturer. Finally, counsel put forth evidence that plaintiffs' counsel may have entered into an arrangement with the selling dealer's counsel pursuant to which plaintiffs' counsel was allowed to select the arbitrator he wanted. *See id.* at 496-99. The circuit court rebuffed defense counsel's efforts to obtain discovery and a post-trial motion to vacate the arbitration award was denied by operation of law. *See id.* at 495. The defendant manufacturer thereafter appealed the judgment confirming the arbitration award on the purported grounds of "partiality, bias, and corruption on the part of the arbitrator." *See id.*[11]

Based on the evidence presented as to possible partiality or bias, which the court found sufficient to "raise[] a threshold inference of possible bias based on [the arbitrator's] alleged failure to disclose any interest or bias that might affect his judgment," the Alabama Supreme Court held that the trial court erred in not holding "a hearing for the purpose of determining whether adequate evidence exists to grant [defendant's] request to set aside the judgment of confirmation." *Id.* at 501. Although it determined that it would not decide the significance of the evidence presented but instead allow the trial court the opportunity to hear and weigh such evidence of bias/partiality, *see id.* at 502, the supreme court proceeded to establish the "reasonable impression of partiality" standard as the applicable standard for challenges to an award on the basis of bias or partiality. *See id.* at 508. Pursuant to this standard, an arbitration award is subject to challenge if the party asserting bias or partiality "makes a showing through admissible evidence that the court finds to be credible, that gives rise to an impression of bias that is direct, definite, and capable of demonstration, as distinct from a 'mere appearance' of bias that is remote, uncertain, and speculative." *Id.*

McMichael acutely demonstrates the risks associated with the selection of an arbitrator. For years, opponents of arbitration have complained about how arbitration was unfair to plaintiffs. *McMichael's* facts establish that any party to arbitration can be treated unfairly if an arbitrator is not truly neutral and impartial. The risks associated with the selection process of an arbitrator are largely dependant upon the selection procedures set forth in a given arbitration agreement. Such procedures, unless unconscionable,[12] are due to be enforced and cannot be varied by a trial court enforcing an arbitration agreement. *See McDonald v. H & S Homes, L.L.C.*, 853 So. 2d 920, 925 (Ala. 2003) ("*McDonald II*") (reversing "order direct[ing] the parties to select an arbitrator in a manner that is inconsistent with the terms of the parties' agreement to arbitrate"). Some arbitration agreements allow a court to select an arbitrator and the FAA itself provides for judicial selection of an arbitrator in certain circumstances, including where no selection procedure exists. *See* 9 U.S.C. § 5. Such a procedure itself presents risk, as there is

nothing to prevent a judge from appointing an arbitrator that the defendant views as unfavorable.

McDonald III–The Need For a Sufficiently Developed Record

The size and composition of the award in *McMichael* undoubtedly was disturbing to product manufacturers generally and the mobile home industry in particular. Because the Alabama Supreme Court's opinion was limited to the bias/partiality issue, interested parties were left to wonder if an arbitration award of that magnitude could survive on appeal in Alabama. The court recently decided another appeal involving a mobile home and a large award in favor of a plaintiff. *See McDonald III*, 2004 Ala. Lexis 343 (Ala. Nov. 24, 2004). This decision will do little to calm the fears of companies defending claims in arbitration in Alabama. *McDonald III* involved allegations of intentionally tortious conduct in the sale of a mobile home. The arbitrator awarded $500,000 in damages without specifying what amounts, if any, were awarded for emotional distress or punitive damages. *See id.* at *14. Finding the record evidence sufficient to support an award of damages on conversion and fraud, but having no way to determine whether the award was impermissibly large under the law, the court rejected a manifest disregard challenge. *See id.* at *12-15. Such a challenge was viewed as an impossibility because the court had no way to compare the amount of the compensatory award to the amount of the punitive award, as such information was entirely lacking. *See id.* at *14-15.

What *McDonald III* counsels is the need for a sufficiently developed record to allow appellate courts to determine exactly what occurred below in the arbitral proceeding. Lacking in *McDonald III* is an award that delineates the amounts awarded for each category of damages sought. Detail is critical in other areas, however, including an explanation of the facts upon which the arbitration award is based and the legal authorities/rules of law that underlie the award. Further, many of the avenues of appeal, most notably the manifest disregard of the law standard, depend upon the existence of a transcript of the arbitration proceedings to allow the appellate court to determine what information was before the arbitrator. In absence of such a transcript, appellate courts generally are unable to determine what factual and legal arguments were or were not made, thereby eliminating arguments that an arbitrator ignored or disregarded controlling law. *See Sanderson Group, Inc. v. Smith*, 809 So. 2d 823, 829 (Ala. Civ. App. 2001) ("Without a record to dispute [the arbitrator's] finding, we must presume that the arbitrator heard the evidence that would have been necessary to support his finding"); *McKee v. Hendrix*, 816 So. 2d 30, 37 (Ala. Civ. App. 2001) ("Without the complete transcript of the hearing before the arbitrator, however, this court cannot be certain what evidence or arguments were presented to the arbitrator").

Horn–The Need for Precision in Framing Grounds for Appeal

While the limited nature of judicial review with arbitration is an inevitable risk all parties to arbitral proceedings must assume (provided the parties have not validly agreed to an alternative standard or review), *Horn* demonstrates that the Alabama Supreme Court, in the right circumstances, will carefully consider arguments on appeal for vacatur of an arbitration award, in whole or a part thereof. The record in *Horn* was sufficiently well developed, factually and legally, to allow as meaningful an appeal as possible in arbitration. In particular, the *Horn* arbitral panel issued a 49-page decision that included "detailed findings of fact and explicit legal conclusions underlying the awards." *Horn*, 901 So. 2d at 31. *Horn* thus presented the rather unusual scenario where the appellate court essentially knew exactly what the arbitrators awarded for each specific category of damages and knew the factual and legal basis upon which the arbitrators made such awards.

Horn involved claims against the *Birmingham News* for breach of contract, breach of fiduciary duty, conversion, and fraud by six individuals who formerly sold and distributed newspapers to the public. The panel awarded the six plaintiffs approximately $20 million in compensatory and punitive damages. *See id.* at 30. On appeal, the *Birmingham News* challenged, *inter alia*, the validity of the panel's finding of fraud, the amount of compensatory damages awarded and the amount of punitive damages awarded. *See id.* at 57-69. The *Birmingham News* ultimately received a substantial reduction of the overall award, nearly $4 million, but the supreme court affirmed as to the approximately $16 million. *See id.* at 65-66, 69. With regard to punitive damages, the court found sufficient state action in the confirmation of an arbitration award to implicate the Due Process Clause. *See id.* at 66-67. Accordingly, the court determined that it would review properly made due process challenges to a punitive damages award under the manifest disregard theory of review. *See id.* The implication of this pronouncement is that defendants are able to assert the due process limitations on the award of punitive damages from *BMW* and *State Farm* in arbitration awards, although, as demonstrated in the above discussion of *McDonald III*, the underlying record must allow for a comparison of the amounts awarded in compensatory and punitive damages for such an award to proceed. Importantly, in finding sufficient state action in the confirmation of an arbitration award to implicate due process concerns, the Alabama Supreme Court parted ways with the United States Court of Appeals for the Eleventh Circuit, which some years before found arbitration not to involve state action. See *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-1192 (11th Cir. 1995).

In firmly establishing manifest disregard as an available grounds for appeal and making clear that punitive damages awarded in arbitration can be reviewed on appeal for excessiveness, *Horn* unquestionably is favorable precedent regarding the appealability of arbitral awards. Yet, at the same time, the decision evidences the harsh realities of arbitration appeals. In particular, the opinion demonstrates that Alabama appellate courts will, to the extent possible, constrain their review to the narrowest scope possible and will only address precisely made appellate arguments that are specifically linked to an accepted avenue

of appeal. *See, e.g., Horn*, 901 So. 2d at 61 ("In the final analysis, [defendant] makes no real argument concerning the sufficiency of the fraud evidence presented at the arbitration hearing"); *id.* ("It is important to note another issue not raised in these appeals"); *id.* at 62 ("The other points made only tersely in this portion of the [defendant's] argument do not adequately articulate any manifest disregard of the law by the panel"); *Id.* at 62 ("At no point in its briefs to this Court does [defendant] challenge the amounts awarded each plaintiff for mental damages, apart from arguing that it has no liability for damages at all"); *id.* at 64-65 (focusing on arguments not made by defendant in its brief).[13] In other words, the Alabama Supreme Court has made it clear that it will not bend over backwards to rescue defendants from the ill-fated results of their conscious decision to require and invoke arbitration.

Conclusion

Although Alabama's next phase of arbitration is in its inception, early signs suggest that arbitration is not always the better course of action for defendants, particularly in light of the current composition of the Alabama Supreme Court. The problems experienced by defendants in Alabama courts in the 1990s, excessive punitive damages awards and "drive-thru" class certification, are long gone. Based on the current state of the law and the challenges present in defense of claims in arbitration, potential defendants and their counsel should consider reexamining both the use of arbitrations and the terms employed in such agreements to best protect against an unanticipated worst-case scenario. ■

ENDNOTES

1. A year before *Keating*, the Alabama Supreme Court erroneously predicted that the U.S. Supreme Court would find the FAA inapplicable in state courts. *See Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158, 1161-62 (Ala. 1983). That decision was later vacated in the wake of *Keating*. *See York International v. Alabama Oxygen Co.*, 465 U.S. 1016 (1984).

2. *See Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1; and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

3. In a footnote, the *Lopez* court candidly acknowledged that the controlling standard "better promotes our strong public policy against the use of pre-dispute arbitration agreements." *Lopez*, 628 So. 2d at 363 n.2.

4. *See* Henry C. Strickland *et al.*, *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59 (1994); Henry C. Strickland *et al.*, *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59, 60 n.4 (1994); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law*, 21 HOFSTRA L. REV. 385, 401 (1992).

5. *See* Thomas J. Methvin, *Alabama–The Arbitration State*, 62 ALA. LAW. 48, 49-54 (Jan. 2001) (author noting that the Alabama Supreme Court decided 67 cases concerning the enforceability of arbitration agreements between January 1999 and September 2000); F.M. Haston, III, *Arbitration in Alabama–Of Road Signs and Reality*, 62 ALA. LAW. 63, 64-69 (Jan. 2001) (author recognizing 80 appellate decisions concerning the enforceability of arbitration agreements over a three-year period and describing such numbers as "truly astonishing" when compared to the numbers of comparable opinions released by the entire federal judiciary and by several large state supreme courts over the same period).

6. *See, e.g., Massey Auto., Inc. v. Norris*, 895 So. 2d 215, 220-221 (Ala. 2004) (arbitration denied based on allegations of fraudulent inducement); *United Wis. Life Ins. Co. v. Tankersley*, 880 So. 2d 385, 390 (Ala. 2003) (scope of arbitration agreement held to be too narrow to cover claims alleged); *Capitol Chevrolet & Imps., Inc. v. Payne*, 876 So. 2d 1106, 1110 (Ala. 2003) (scope of arbitration agreement held to be too narrow to cover claims alleged); *Hudson v. Outlet Rental Car Sales, Inc.*, 876 So. 2d 455, 457-58 (Ala. 2003) (arbitration denied based on allegations of fraud in the factum); *Clement Contr. Group, Inc. v. Coating Sys., L.L.C.*, 881 So. 2d 971, 975 (Ala. 2003) (person who signed only in official capacity on behalf of LLC not required to arbitrate individually); *Hales v. ProEquities, Inc.*, 885 So. 2d 100, 106-107 (Ala. 2003) (defendant waived right to arbitrate based on substantial invocation of litigation process).

7. *See, e.g., Huntsville Utils. v. Consol. Constr. Co.*, 876 So. 2d 450, 454-55 (Ala. 2003) ("Thus, in light of the United States Supreme Court's decision in *Alafabco*, we no longer apply the substantial-impact-on-interstate-commerce test adopted in *Sisters of the Visitation*.... [Instead], we need determine only whether [a] transaction affected interstate commerce or if the economic activity in question represents a general practice subject to federal control. If either of these questions can be answered affirmatively, the FAA is triggered.").

8. From January 18, 1995, the date of the *Dobson* decision, until June 2, 2003, the date of the *Citizens Bank* decision, the Alabama Supreme Court, based on the author's research, did not release a single case for publication involving an appeal from an arbitral award. The court decided one case, *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493 (Ala. 2003), a few months before *Citizens Bank*, but did not release the decision for publication until July 24, 2003. The Alabama Court of Civil Appeals decided two appeals of arbitration awards during this time period. *See Sanderson Group, Inc. v. Smith*, 809 So. 2d 823 (Ala. Civ. App. 2001); *McKee v. Hendrix*, 816 So. 2d 30 (Ala. Civ. App. 2001). Litigation in this area was also relatively sparse from the time of *Keating's* release (January 23, 1984) until *Dobson*. The author's research uncovered only six such decisions. *See Pruett v. Williams*, 623 So. 2d 1115 (Ala. 1993); *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376 (Ala. 1992); *H.L. Fuller Constr. Co. v. Industrial Dev. Bd.*, 590 So. 2d 218 (Ala., 1991); *Roscoe v. Jones*, 571 So. 2d 1043 (Ala. 1990); *Raburn v. Bailes*, 565 So. 2d 122 (Ala. 1990); *Wright v. Land Developers Constr. Co.*, 554 So. 2d 1000 (Ala. 1989).

9. The procedural requirements for perfecting an appeal of an arbitration award are beyond the scope of this article. The author cautions readers that Alabama law at present is not entirely settled in this regard, as demonstrated by Justice Champ Lyons's special concurrence in *Horn*. *See Horn*, 901 So. 2d at 71-74 (Lyons, J., concurring specially) (specifically asking the Advisory Committee on the *Alabama Rules of Appellate Procedure* "to establish an easily understood triggering date for the time for taking an appeal from an arbitrator's award"). Nevertheless, *Horn* establishes that a dissatisfied party may, within ten days of issuance of an arbitration award, simultaneously move to vacate the award and file a notice of appeal. *See id.* at 31, 42 (finding notice of appeal of arbitration award filed before judgment on award became final effective upon entry of final judgment).

10. According to the *McMichael* opinion, "[t]he award d[id] not purport to include punitive damages." *McMichael*, 855 So. 2d at 499.

11. The defendant in *McMichael* also appealed on the basis that "the arbitrator acted arbitrarily and capriciously and in a manifest disregard of the law," *see McMichael*, 855 So. 2d at 496, but the Alabama Supreme Court's opinion does not address these grounds.

12. The Alabama Supreme Court has held unconscionable a selection procedure that gave one party the exclusive right to select the arbitrator. *See Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779, 785 (Ala. 2002).

13. The court in *Horn* appears to have gone out of its way to point out deficiencies in the appellate arguments made by the defendant and, in a published denial of defendant's application for rehearing, was similarly unforgiving, if not more so. *See id.* at 76-83.

Floyd D. Gaines

Floyd D. Gaines is the founder and managing member of Gaines LLC. He obtained his undergraduate degree in business administration in 1983 and his law degree in 1992 from the University of Alabama.

Andrew P. Walsh

Andrew P. Walsh is an attorney with Gaines LLC, where he has practiced since July 2000. He received his undergraduate degree from Tulane University (B.S., political science and history, 1992) and law degree from Western New England College School of Law (1997, *magna cum laude*). While in law school, he served as note editor on the *Western New England Law Review*.

Benjamin Lee Boyanton

Benjamin L. Boyanton, a member of the Huntsville-Madison County Bar Association, died December 19, 2004 at the age of 34. He was born July 1, 1970 in Huntsville and attended Samford University, where he obtained his undergraduate degree in 1992. He graduated from Birmingham School of Law and was admitted to the Alabama State Bar in 1997.

Boyanton moved back to Huntsville and established himself as an excellent attorney, one who loved his profession and prided himself on helping those in need. He was a respected attorney in the Huntsville area, well known for his impressive personal presence in the courtroom and equally well known for his gentlemanly approach to life and the law.

Boyanton was a member of the First Baptist Church and was a devoted husband to Amy Yates Boyanton, his wife of nine years, and a loving father of two sons, William Lee Boyanton and Wesley Bryant Boyanton.

– Frederick L. Fohrell, president, Huntsville-Madison County Bar Association

John Grow, Sr.

John Grow, Sr., a member of the Mobile Bar Association, died in Gulf Shores September 6, 2004 at the age of 67.

He was born in Tuscaloosa on September 20, 1936, the son of Altona Way and James A. Grow. He grew up in Tuscaloosa, and received his bachelor's degree from the University of Alabama and his law degree from the University's School of Law, where he was editor of the *Law Review* and wrote a number of scholarly articles. Before attending law school, he entered the United States Army, from which he received an honorable discharge after being commissioned as a captain. After he received his law degree in 1962, he clerked for the Honorable Frank Johnson, a distinguished jurist in the U.S. Middle District Court, Southern Division, in Montgomery, from 1962 to 1964, who was heavily engaged in landmark civil rights cases at that time. He practiced law in Mobile from 1965 until 1995. John then was licensed by the Alabama Real Estate Association and engaged in the real estate business in the Gulf Shores area from 1995 until his death.

John was an engaging attorney who was known for his style, wit and sense of humor. He was also known for his willingness to assist his fellow lawyers who needed assistance, both professionally and personally. He had a keen sense of appreciation, sensitivity and compassion for people which translated into a genuine concern for his clients.

John was a member of St. Margaret of Scotland Catholic Church in Foley.

He is survived by his wife, Evie L. Grow; three sons, John and his wife, Annette, Brad and his wife, Patricia, and Winston; two stepsons, Lee Hartley and Lance Hartley and his wife, Brandy; three daughters, Angela and her husband, John Locklier, Carol and her husband, Scott Heggeman, Carla and her husband, Scott Kennedy; four brothers; one sister; and ten grandchildren.

– Beth Rouse, president, Mobile Bar Association

WILLIAM HENRY MCDERMOTT

William H. McDermott, a distinguished lawyer and circuit judge, died May 24, 2004 at the age of 70. Judge McDermott, a native and lifelong resident of Mobile, was born August 2, 1933, the eldest son of Judge and Mrs. William V. McDermott. He graduated from McGill Institute in 1950 and received an AB degree and an LLB degree from the University of Alabama. He served in the United States Army from1955 to 1956, where he was a Ranger, platoon leader and company commander of the 7th Infantry Division. He also served in the Alabama National Guard from 1957 until 1961.

He began practicing law in Mobile in 1958. He married Catherine O'Brien in 1960 and they had nine children. Judge McDermott was preceded in death by his infant daughter, Mary Virginia, as well as his parents. He is survived by his wife, Katie, and eight children, Michelle (Michael) Mayberry, Elizabeth (Kevin) O'Neal, Annette (Gregory) Carwie, Jeanne M. Cruthirds, Mary Claire (John) Wacker, Catherine (Jason) Williamson, Maureen P. McDermott, and William J. McDermott; 14 grandchildren; two brothers; and numerous other relatives.

Bill served in the Alabama House of Representatives from 1962 to 1966 and in the Alabama Senate from 1966 to 1970. During his service in the house and the senate, he took an active role in creating the University of South Alabama and the School of Medicine for the university. He was appointed by Governor Albert P. Brewer as vice-chairman of the Alabama Constitution Commission and served in that role from 1970 to 1976. He was appointed general conservator for Mobile County in 1995 and served until 1998. He also served as city attorney for the City of Chickasaw from 1961 until 1998, when he was elected circuit judge. He also served shorter terms as city attorney for Creola and Citronelle. At the time of his election to the circuit court, he was the senior partner in Sirote & Permutt. He was also a member of the Alabama, Mobile and American bar associations, and served as president of the Mobile Bar Association in 1989.

He was a member of St. Pius Catholic Church, serving that parish at PTA president and on the parish council. He was a member of the Knights of Columbus and was a 4th Degree Knight of the Bishop Toolen Council. He was designated a Knight of Saint Gregory by Pope John Paul II in 1988.

Bill was a member of many other service and civic organizations.

At the time of his death, he was an active member of the Alabama Pattern Jury Instructions Committee.

Expressing his grief over his death, Bill's brother, Edward, said, "This is a great loss for me, both personally and professionally. I began my law practice in 1967 and I was fortunate enough to have him as a mentor, advisor and teacher. I was, of course, also fortunate to have him as a brother. . . ."

– Beth Rouse, president, Mobile Bar Association

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Patrick William Richardson

Patrick W. Richardson, a member of the Huntsville-Madison County Bar Association, died November 14, 2004. Pat was born in Huntsville on October 5, 1925 to Judge Schuyler H. Richardson and Susanne Smith Richardson. He distinguished himself early in his life with his quick and insightful mind, graduating as valedictorian from Huntsville High School. He also graduated in 1947 from the University of Alabama with a B.S. degree and in 1948 with a law degree. As a student, he continued to find distinction as evidenced by his admission to Phi Eta Sigma, Beta Gamma Sigma, *Law Review* and the Farrah Order of Jurisprudence.

Upon graduation from law school and admission to the bar, Pat became the fourth generation of Richardsons to find distinction in our honored profession. Pat returned to Huntsville to join the firm of Bell Richardson. Pat was an exceptional lawyer and was widely regarded as a true "lawyer's lawyer." He was elected president of the HMCBA in 1965 and of the Alabama State Bar in 1969.

Pat distinguished himself as counsel for the L & N Railroad and the Southern Railroad for over 50 years and was an active member of the National Association of Railroad Trial Counsel. As a reflection of his broad and varied skills, while an able trial lawyer, he was recognized by his admission to the American College of Mortgage Attorneys.

Pat was also an able mentor to many young lawyers and molded their early careers by giving generously of his time, energy, talents and resources. Throughout his life, he served as cherished friend, attorney and counselor to thousands, who were the recipients of his great wealth of judicial knowledge and uncanny insight.

Pat also effectively promoted education in the Huntsville community, playing a causal role in establishing an extension campus of the University of Alabama in Huntsville. He served as the first president of the UAH Foundation, a trustee of that foundation and as its counsel from 1961 until his death. Pat was a recipient of the UAH Honorary Doctor of Laws Degree, the UAH President's Medal, the Distinguished Civic Service Award, and the first official UAH class ring.

Pat was also a founder of Randolph School; a director of the Huntsville Industrial Expansion Committee, the Boy's Club, the Community Chest and the United Way; a longtime member of the Huntsville Rotary Club; and a longtime member of the National Conference of Christians and Jews (now known as the National Conference for Community and Justice).

Pat received the Award of Merit from the Alabama State Bar, the John Sparkman Award from the University of Alabama Madison County Alumni Chapter, the Distinguished Service Award of the Huntsville-Madison County Chamber of Commerce, the Humanitarian Award from the Arthritis Foundation, and the Distinguished Service Award from the HMCBA.

Pat is survived by his wife, Mary Moore Richardson; his sons, Schuyler H. Richardson, III and James H. Richardson; and four grandchildren.

– Frederick L. Fohrell, president, Huntsville-Madison County Bar Association

KENNETH WILDER UNDERWOOD, JR.

Kenneth Wilder Underwood, Jr. of Montgomery joined the Lord on Saturday, May 7th. He is survived by his wife, Rena Alice Pope Underwood; a daughter, Judge Lucie McLemore and her husband, Ernest Wray Smith; three sons, John Lewis Underwood, II, Kenneth Wilder Underwood, III and his wife, Nancy Harris Underwood, and George Wilkie Underwood and his wife, May Walker Underwood; eight grandchildren; and one great-grandchild. He is also survived by numerous brothers-in-law; sisters-in-law, nieces and nephews. He was preceded in death by his father, Kenneth Wilder Underwood; his mother, Lucie Crommelin Underwood; and two sisters, Crommelin Underwood Alexander and Katharine Underwood Cross.

Kenneth was born May 13, 1924 in Montgomery. He was educated at The Citadel and the University of Alabama. A member of the Alabama State Bar for 56 years, he graduated from the University of Alabama School of Law in 1949. He was a lifelong member of St. John's Episcopal Church, where he served on the vestry. Kenneth was a member of Phi Delta Theta fraternity, Capital City Kiwanis Club, Old South Historical Society and a charter member of the Montgomery Society of Pioneers. His daughter, Judge Lucie McLemore, his

son-in-law, E. Wray Smith, and one granddaughter, Grace McLemore Jeter, are members of the Alabama State Bar also.

During World War II, Kenneth served as a sergeant in the United States Army, 1259th Engineer Combat Battalion, in the European Theater of Operations. Before his retirement in 1987, he was assistant vice-president of Southern Bell Telephone Company.

Kenneth was an avid hunter and outdoorsman and continued to enjoy visiting with friends after suffering a massive stroke nine years ago.

Brigham, William Henry
Mobile
Admitted: 1962
Died: August 4, 2005

Crook, Charles McDowell
Montgomery
Admitted: 1961
Died: August 10, 2005

Farris, Hugh Douglas, Jr.
Jasper
Admitted: 1955
Died: June 13, 2005

Fonde, Henry Buck
Mobile
Admitted: 1949
Died: May 24, 2005

Moss, Katherine Elise
Huntsville
Admitted 1976
Died: April 26, 2005

Powers, Robert Francis
Montgomery
Admitted: 1984
Died: August 14, 2005

Prestwood, Alvin Tennyson
Montgomery
Admitted: 1956
Died: August 22, 2005

Sapp, Robert Austin
Cullman
Admitted: 1945
Died: April 23, 2005

Scruggs, Edward Neal
Guntersville
Admitted: 1949
Died: June 5, 2005

Sharpe, Eldon
Dadeville
Admitted: 1989
Died: July 9, 2005

Bar Briefs

- Mobile attorney **Mark Wolfe** was honored in August by Mothers Against Drunk Driving (MADD) for his creation of a comprehensive handbook designed to help victims of automobile accidents and their families.

  Wolfe first published the manual in 1994. Since its initial appearance, the manual has been used by numerous law enforcement agencies and other groups as a learning tool.

  Wolfe received MADD's Public Service Award during a seminar sponsored by the group.

  A University of Alabama graduate, Wolfe earned his law degree from the University of Alabama School of Law in 1987.

- **Gibson Vance**, a shareholder at Beasley, Allen, Crow, Methvin, Portis & Mills PC, was recently elected to the office of parliamentarian of the Association of Trial Lawyers of America. The election took place at the ATLA Annual Convention in Toronto. As parliamentarian, Vance will be one of six officers representing ATLA's 60,000 members nationwide. Vance is currently second vice-president of the Alabama Trial Lawyers Association and president of the Montgomery County Bar Association. He also serves on ATLA's Public Affairs Committee, is the state chairman for the Leader's Forum Committee and is serving a two-year term as a member of the board of directors for Trial Lawyers for Public Justice. Vance received his J.D. from Jones School of Law at Faulkner University and his B.A. from Troy State University in 1987.

- **Gary M. Brown**, shareholder at Baker, Donalson, Bearman, Caldwell & Berkowitz PC, has been appointed to serve as general counsel for the Ethics Office Association (EOA).

  The EOA is a non-counseling, member-driven association exclusively for individuals who are responsible for their company's ethics, compliance and business conduct programs. The only organization of its kind, it is the largest group of corporate ethics and compliance practitioners in the world.

- The Alabama Lawyer's Association (ALA) has selected **H. Lewis Gillis**, partner of Thomas, Means, Gillis & Seay PC, as the recipient of the **Arthur D. Shores Distinguished Service Award**. The award, which was presented at their annual convention, recognizes an ALA member who best personifies the ideals and interests of attorney and civic leader Arthur D. Shores.

  The Alabama Lawyer's Association, an affiliate of the National Bar Association (NBA), was organized in 1971 to encourage the study of law, to provide support services to members to address those issues which limit their effectiveness and to protect civil and political rights to all citizens.

- **Jock M. Smith** has been named the winner of the inaugural Johnnie L. Cochran Jr. Journey to Justice Award. Smith is a founding national partner of The Cochran Firm. The award was presented at the National Bar Association meeting in Orlando. ■

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Case Law Update: From the Plaintiff's Perspective	**Trust Law and Medicaid Protection Update**
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Legal Ethics Update—2005	**And much more information on the CD!**

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By Robert L. McCurley, Jr.

Federally-Mandated State Legislation

The Alabama legislature, for the past two years, has been in a budgetary crisis, due in part to federal mandates that require states to spend money to meet federal requirements. To meet these demands in fiscal year 2003-2004, general fund agencies were forced to take an 18 percent funding cut. In 2004-2005, many agency budgets were cut an additional seven percent.

The National Conference of State Legislatures has tracked these staggering costs to federal mandates. The NCSL reports that Alabama, for 2004, realized cost-shifting from the federal government that amounted to $358,887,000 or 6.5 percent of the state's total appropriation.

Recently passed federal legislation that preempts state authority and does not fully fund its impact on states are the following:

The Intelligence Reform and Terrorist Prevention Act of 2004 - Driver's License (P.L.108-458)

Social Security Protection Act of 2004 (P.L.108-203)

Law Enforcement Officer's Safety Act (P.L.108-277)

No Child Left Behind 2001 (P.L.107-110)

The Help America Vote Act of 2002 (HAVA) (P.L.107-252)

Class Action Fairness Act of 2005 (P.L.109-002)

In many cases, Alabama first learns of a federal mandate when a federal agency notifies Alabama that the state is out of compliance with the federal law, or that the state legislature must pass a statute or lose federal funding.

Federally mandated state legislation usually appears in one of four forms:

1. Compulsory legislation clauses in federal statutes directing states to comply under the threat of civil or criminal penalties. (Example: Equal Employment Opportunity Act)
2. Legislation requirements which apply generally to recipients of federal grants which further national, social or economic policies. (Example: environmental protection and nondiscrimination laws)
3. Legislation which does not require compliance but which imposes financial sanctions such as reduction or elimination of funds for certain programs if the state does not comply. (Reduction of blood alcohol levels for DUI violations and the No Child Left Behind Act)
4. Partial preemption laws which establish basic policies but permit administrative responsibilities to be delegated to states if they meet nationally determined conditions or standards. (Example: Clean Air Act and Help America Vote Act)

Learning of these federal mandates is not a problem for states when it is a highly publicized issue, like speed limits, DUI laws or election reform but it is more problematic for more obscure acts.

State legislation, once signed by the governor, is deposited with the secretary of state's office. However, there is no corresponding depository for acts in the federal system. Once a bill passes both houses of Congress it goes to the appropriate Senate or House enrolling clerk. After the President signs the bill into law, the original goes back to the national archives and a copy goes to the superintendent of documents who supplies slip laws to the various agencies and depository libraries. There is no corresponding depository like a state's secretary of state's office.

Federal mandates are not new to Alabama. It became common for federal

statutes to require the Alabama legislature to enact state legislation in the mid-1980s when Alabama was directed to pass certain types of legislation or risk reduction or elimination of federal grant monies.

In the wake of reduced grants in aid, Alabama and other states could not afford to risk the loss of funding sources by not fulfilling such state mandated legislative requirements. In order to make prudent budgeting decisions and to assure funding sources, Alabama and other states' legislatures must become aware of these requirements. In the mid-1980s there was no single source which identified and compiled the state legislative requirements of state statutes. On behalf of the Alabama legislature and the National Conference of State Legislatures, I spent the summer of 1985 working in Washington with the NCSL and the White House, compiling the first directory of Federally Mandated State Legislation. States worked for years to educate Congress about the financial problems these federal mandates were causing state budgets.

It was ten years later that Congress passed the unfunded Mandates Reform Act of 1995 as an effort "to curb the practice of imposing unfunded federal mandates on states and local governments."

Subsequently, the NCSL established both a "Mandate Monitor" and a "Preemptive Monitor" to track federal legislation affecting states. The NCSL has identified a $51 billion cost shift in federal funding to states for the fiscal years 2004 and 2005 collectively, and a potential of a $30 billion cost shift in fiscal year 2006.

The mandate monitor also identifies the following pending federal legislation that will have a financial impact on states. The NCSL'S review of these pending acts makes the following observations:

Medical Malpractice

Several bills, all of which seek to preempt state laws across the country in the areas of damage caps, attorneys' fees and statutes of limitations for malpractice suits.

Legislative Wrap-Up

Continued from page 457

Clear Skies Legislation

Clear Skies Legislation would set federal emission targets and deadlines for reaching these targets for sulfide dioxide, nitrogen oxide and mercury. It would preempt the use of New Source Review, a state enforcement tool designed to ensure that power plant equipment, in modifications or expansions, does not increase pollutants.

Campaign Finance—"527 Reform Act"

Will clarify when Section 527 political organizations must register with the Federal Elections Commission or lose their tax-exempt status.

Driver's License—The Real ID Act of 2005

Dismantles the Intelligence Reform Act and driver's license provisions and requires states to verify lawful presence before issuing a driver's license; established security standards for state offices where driver's licenses and related documents are produced and stored; regulate personnel training and security clearances; set federal data storage requirements; and prohibit financial assistance to a state unless it joins an interstate compact, which is yet to be enacted by a single state.

Insurance—The Smart Act of 2005

The bill would establish federal requirements for insurance regulatory reform. States would either have to adopt federal provisions or face preemptions and sanctions. States could either enact model laws developed by the National Association of Insurance Commissioners or accept the model laws if state action were deemed inconsistent with them by a federal insurance panel. The bill regulates automobile, homeowners' and workers' compensation insurance.

Small Business Health Fairness Act of 2005

Preempts state laws providing critical protection to consumers and fails to replace them with adequate federal protections. It would destabilize a state's small group insurance markets, undermine previously enacted state and federal insurance reforms and reintroduced the practices they had banked by these laws.

Alabama legislators and other legislators across the country are provided this preemption monitor by the National Conference of Legislatures. This enables state legislators to monitor and analyze both federal legislation and judicial efforts to preempt historic and traditional state authority.

For more information about the Institute, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or visit our Web site at *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.

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By J. Anthony McLain

Law Firm May Not "Choose" Between Conflicting Present Clients And Withdraw from Representation So As to Relegate One Present Client to "Former Client" Status in Order to Take Advantage of Less Stringent Conflict Rules

QUESTION:

"I have found myself in a situation where my opponent in litigation contends that my law firm must withdraw from representation of a longtime client, A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the new *Rules of Professional Conduct* which became effective January 1, 1991. I would appreciate receiving a confidential opinion from you as to whether we can take advantage of the comments to Rule 1.7 and withdraw from representing client C and continue to represent client A under Rule 1.9.

"The situation arose when I filed suit on behalf of our longtime client A against B, an Alabama general partnership, and its general partners C and D, for breach of a construction contract and a fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

"Shortly after filing suit, I learned that another lawyer in our firm, Jane Doe, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved preparing the necessary legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose. Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

"Legal work on the condominium project for C commenced in April 1989. For several years prior to this date, my law firm had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which was not in any way related to

the condominium project. In November 1989, client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B, and in November 1990, A asked us to file suit against B. C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990.

"In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

"In January 1991, we were advised by counsel for C (Law Firm X) that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a copy of the Complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the *Rules of Professional Conduct* and cites a portion of the comments thereto (under subtitle "Conflicts in Litigation") which state:

> "'Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.'

"Since the matter involving C is wholly unrelated to the construction litigation, it seems to me that other comments to Rule 1.7 control how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comments under 'Loyalty to a Client' states:

> "'Where more that one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken],

Continued from page 461

whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.' Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

"This resolution of the asserted conflict was mentioned to C's counsel who responded by citing Wolfram's *Hornbook on Modern Legal Ethics* and the California bankruptcy case *In re California Canners and Growers*, 74 B.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to who he would represent. However, the bankruptcy case seems to be distinguishable from our situation since the two matters involved here are totally unrelated and since the case deals with the old code. Additionally, the portions of Wolfram cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

"Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent our longtime client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and to continue to represent C in the condominium project, or whether we should do something else. We would appreciate your confidential opinion as to what we should do in this situation and whether we can withdraw from representation of C and continue to represent A in the construction litigation."

ANSWER:

Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally you may not, by discontinuing your representation

of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

DISCUSSION:

Rule 1.7 of the *Rules of Professional Conduct* provides the following:

"Rule 1.7 Conflict of Interest: General Rule (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."

As pointed out in the Comment to Rule 1.7 "loyalty is an essential element in the lawyer's relationship to a client." In the situation where a lawyer takes part in litigation against an existing client "the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the *Rules of Professional Conduct* provides the following:

"Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or (b) use information relating to the representation to the disadvantaged of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client. In the instant situation there is no question that you could not continue to represent both client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9). Indeed the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that, "Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." We do not believe that this Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise, would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, (9th Cir. 1981) where the Court held that: "The present-client standard applies if the attorney simultaneously represent clients with different interest. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a 'former client' by choosing when to cease to represent the disfavored client." (Supra at 1345, N.4, citing, *Fund of Funds Ltd. v. Arthur Anderson & Co.*,567 F.2d 225(2d Cir. 1977). For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to your client C. [RO-1991-08] ■

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.***

About Members

G. Douglas Benson announces the opening of his office at 114 S. Broad Street, Scottsboro 35768. Phone (256) 259-1443.

Martin M. Poynter, formerly of Smith, Spires & Peddy PC, announces the opening of **The Poynter Law Firm LLC**, 305 N. Joachim Street, Suite A, P.O. Box 235, Mobile 36601-0235. Phone (251) 441-0653.

Among Firms

District Attorney Randall Houston announces **Glenn Goggans** has been named chief assistant district attorney for **Autauga, Chilton** and **Elmore** counties.

Bradley Arant Rose & White LLP announces that **Douglas L. Patin, Michael S. Koplan, Robert J. Symon, Stephen R. Spivack,** and **Edward J. Beder, Jr.** have joined the firm's Washington office as partners.

Douglas L. Brown, Donald C. Radcliff and **Clifford C. Brady** announce the opening of **Brady, Radcliff & Brown LLP** with offices at 61 St. Joseph Street, 16th Floor, Mobile 36602. Phone (251) 405-0077.

Tammy L. Dobbs, a partner of **Constangy, Brooks & Smith LLC,** has been named head of the firm's Birmingham office. **Shannon L. Miller** has been promoted to partner with the firm.

Farmer, Price, Hornsby & Weatherford LLP announces that **Patrick O. Gray** has joined the firm as a partner and that **Nathan A. Wake** has joined the firm as an associate.

Helmsing, Leach, Herlong, Newman & Rouse announces that **Russell C. Buffin** has become a member of the firm.

Key, Greer, Frawley, Key & Harrison announces that **Margaret M. Casey** has become an associate with the firm.

Massey, Stotser & Nichols PC announces the formation of a mediation practice group to provide alternative dispute resolution services. The firm also announces that **Shay N. Click** has joined the firm as an associate.

Davis L. Middlemas and **Kevin L. Berry** announce the formation of **Middlemas & Berry LLP** with offices at 205 N. 20th Street, Suite 210, Birmingham 35203. Phone (205) 380-0737.

Elizabeth Barry Johnson has accepted a position as vice-president and assistant general counsel of **Movie Gallery US, Inc., Movie Gallery Canada, Inc.** and **Hollywood Entertainment Corporation.**

Nix, Holtsford, Gilliland, Higgins & Hitson PC announces that **S. Mark Dukes** has become a shareholder in the firm, **April M. Willis** and **John W. Bell** have become associated with the firm's Montgomery office, and **Susan D. Sanich** has become associated with the Daphne office.

Sirote & Permutt PC announces that **James R. Sturdivent** has joined the firm.

Smith, Spires & Peddy PC announces that **Mark F. Penaskovic** has joined the firm as an associate.

Starnes & Atchison LLP announces that **Arnold W. Umbach, III** has joined the firm as a partner.

Watson, Jimmerson, Martin, McKinney, Graffeo & Helms PC, formerly Watson, Jimmerson, Givhan, Martin & McKinney PC, announces that **Kristin D. Horn** has become associated with the firm.

Wilmer & Lee PA announces that **Chad W. Ayres, Christian M. Comer, Rachel M. Howard, T. Mark Maclin,** and **Clint L. Maze** have become associated with the firm.

Wilson, Dillon, Pumroy & James LLC announces that **Douglas H. Mooneyham** has joined the firm as an associate. ■

Disciplinary Notices

Reinstatement

- Dothan attorney **Clark Maurice Parker** was summarily 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 effective August 4, 2005. The order of the Disciplinary Commission was based on a petition filed by the office of general counsel evidencing that Parker had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. The summary suspension was dissolved by order of the Disciplinary Board entered on August 25, 2005, reinstating Parker to the practice of law as of that date. [Rule 20(a); Pet. No. 05-09]

Orders to Show Cause

- Notice is hereby given to **Timothy Ronald Wilson**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 6, 2005, he has 60 days from the date of this publication (November 2005) to come into compliance with the Client Security Fund assessment requirement for 2005. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 05-94]

- Notice is hereby given to **Julie Elizabeth Jordan**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 18, 2005, she has 60 days from the date of this publication (November 2005) to come into compliance with the Client Security Fund assessment requirement for 2005. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF 05-40]

- Notice is hereby given to **Mary Elizabeth Traudt-Bowdoin**, who practiced law in Montgomery, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated March 18, 2005, she has 60 days from the date of this publication (November 2005) to come into compliance with the Mandatory Continuing Legal Education requirements for 2004. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE 05-255]

- Notice is hereby given to **Robert Edward York, III**, who practiced law in Marietta, Georgia and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 18, 2005, he has 60 days from the date of

this publication (November 2005) to come into compliance with the Client Security Fund assessment requirement for 2005. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 05-96]

- Notice is hereby given to **Joanne Patterson**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 18, 2005, she has 60 days from the date of this publication (November 2005) to come into compliance with the Client Security Fund assessment requirement for 2005. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF 05-64]

- Notice is hereby given to **Larry Edward Smith**, who practiced law in Alabaster, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 26, 2005, he has 60 days from the date of this publication (November 2005) to come into compliance with the Mandatory Continuing Legal Education requirements for 2004. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 05-378]

- Notice is hereby given to **Monica Dionne McCord-Jackson**, who practiced law in Birmingham, Alabama and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 26, 2005, she has 60 days from the date of this publication (November 2005) to come into compliance with the Mandatory Continuing Legal Education requirements for 2004. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE 05-356]

- **David Joel Forrester**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2005 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 04-261(A), 04-318(A), 05-19(A), 05-72(A), 05-73(A), and 05-90(A) by the Disciplinary Board of the Alabama State Bar. [ASB nos. 04-261(A), 04-318(A), 05-19(A), 05-72(A), 05-73(A), and 05-90(A)]

Suspension

- Rainsville attorney **Hoyt Luther Baugh, Jr.** was summarily 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 effective August 4, 2005. The order of the Disciplinary Commission was based on a petition filed by the office of general counsel evidencing that Baugh had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 05-08] ■

Classifieds "Going to the Web"

The Alabama Lawyer will no longer accept classified ads for print in the magazine. Ads already under contract will be printed through the November 2005 issue. However, the Alabama State Bar will gladly post classified ads on the ASB Web site, *www.alabar.org*, for a nominal fee. For requirements or questions about your classified ad, e-mail us at *web@alabar.org*.

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