

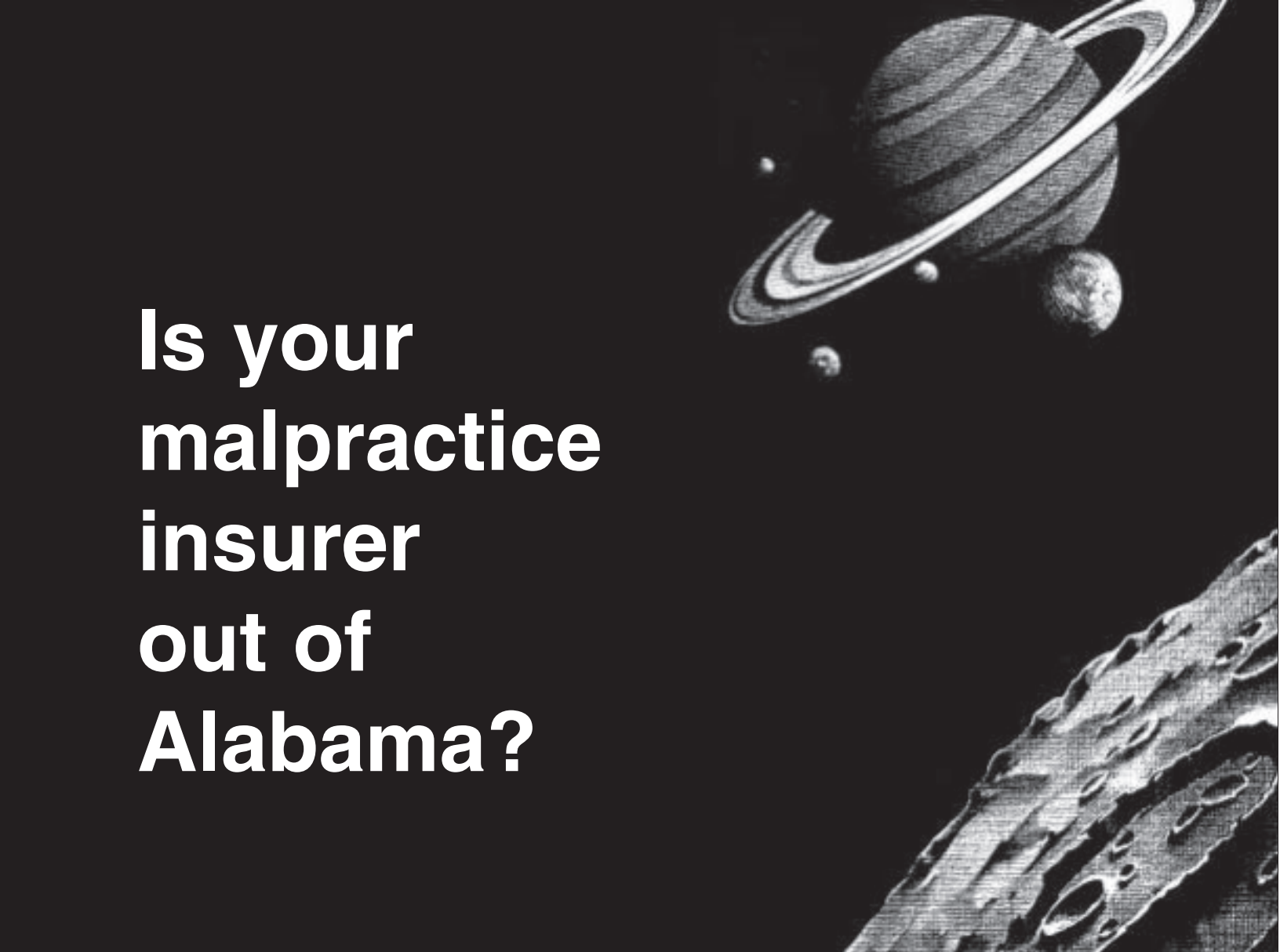
November 2007

Vol. 68, No. 6

The Alabama Lawyer

**THE ROOF OF AFRICA—
Kilimanjaro Expedition**

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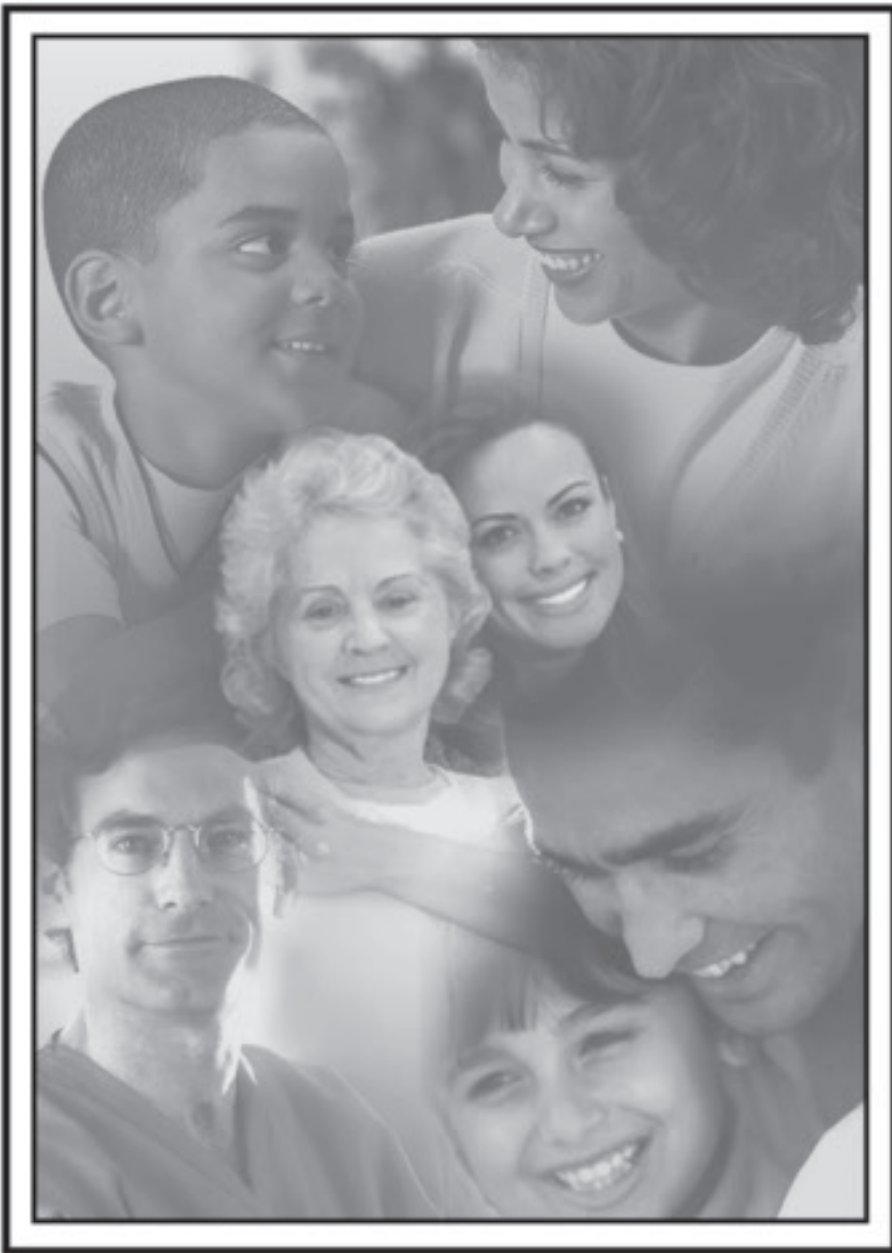
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	28	Friday, Immigration Law - Tuscaloosa
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	12	Friday, Nursing Home Litigation - Birmingham
	19	Friday, Real Estate Law - Birmingham
	26	Friday, Administering the Decedent's Estate - Tuscaloosa
	26-27	Friday-Saturday, Criminal Law Retreat - Birmingham
NOVEMBER	2	Friday, Social Security Disability - Tuscaloosa
	2	Friday, Electronic Discovery - Birmingham
	9	Friday, Employment Law - Birmingham
	9	Friday, ADR - Tuscaloosa
	16	Friday, Bankruptcy Law Update - Birmingham
	28	Wednesday, Alabama Update - Mobile
	29	Thursday, Alabama Update - Montgomery
	30	Friday, Estate Planning - Birmingham
	30	Friday, Depositions - Birmingham
DECEMBER	7	Friday, Tort Law Update - Birmingham
	7	Friday, Trial Skills - Montgomery
	12	Wednesday, Trial Skills - Huntsville
	13	Thursday, Alabama Update - Huntsville
	14	Friday, Electronic Discovery - Tuscaloosa
	19	Wednesday, Trial Skills - Birmingham
	20	Thursday, Alabama Update - Birmingham
20	Thursday, Video Replays - Tuscaloosa	

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The Alabama Lawyer

November 2007 Vol. 68, No. 6

ON THE COVER

Fall colors near Fort Payne, Alabama

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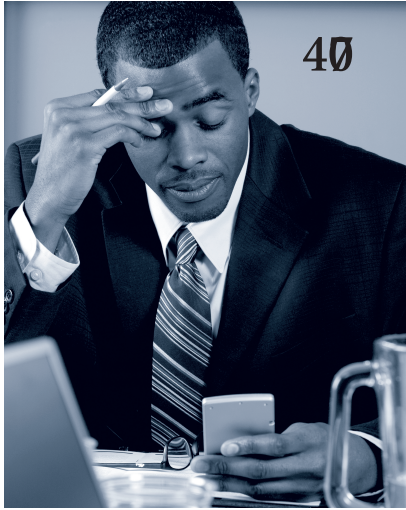
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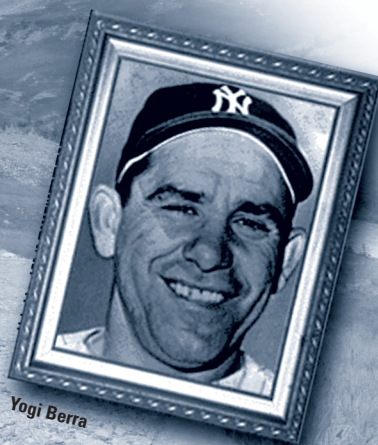
These classic words spoken by the immortal Yankee catcher Yogi Berra describe well my answer, prior to this year, when the following question was asked of me by members throughout the state, "Sam, why don't I read articles about the positive things lawyers are doing to help others?"

This year my answer to the question is, "Will you support our five-month *Lawyers Serving Communities* campaign? Will you help us report a positive contribution by a lawyer in your community by writing an article about the activity (or taking a photograph of it) for publication in your local newspaper?" I would also answer by describing our new *Wills For Heroes* program as something positive and constructive we can do to help others.

Our association has more than 15,700 potential reporters. If only a small fraction of us assist with these efforts we will have a substantial and positive impact.

The members of the ASB Public Relations Committee, working together with our staff, have done an excellent job of using the available resources to publish contributions by the Alabama State Bar and its members. For example, as a result of our partnership with the **Alabama Broadcasters Association** since 1998, the Alabama State Bar has broadcast radio and television announcements with a value of nearly \$8,000,000.

Between now and April 1, 2008, the Public Relations Committee, under the direction of **Scotty Colson** of Birmingham and Commissioner **Harold Stephens** of Huntsville, will spearhead the



Yogi Berra

Lawyers Serving Communities campaign. This campaign requests that each willing lawyer write an article about, or take a photo of, a lawyer making a positive contribution to her or his community.

To date, some members have placed articles and photos in newspapers within the state.

Thank you for considering participating in this effort and please send copies of the articles or photos after publication to Brad Carr, director of communications, Alabama State Bar, P. O. Box 671, Montgomery 36101, or brad.carr@alabar.org.

Another way we can all make a positive contribution to our communities and the legal profession is by participating in the *Wills For Heroes* program administered by the ASB Volunteer Lawyers Program. The Alabama State Bar is the fourth state bar in the country to establish such a program statewide. Participating lawyers provide free simple wills, durable powers of attorney and health care directives to Alabama fire-fighters, paramedics, law enforcement personnel, search and rescue squad members, and other first responders.

The program is already helping many of Alabama's first responders through the efforts of members of the Young Lawyers' Section, the Real Property, Probate and Trust Law Section, the Elder Law Section, the Alabama Lawyers Association, Alabama Paralegals Association, and others. If you are willing to participate in this program, please contact Linda Lund, VLP director, at (360) 269-1515, ext. 226 or vlp2@alabar.org. You can also volunteer online at www.alabar.org/wfh/. ■



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Baby Boomers and the Bar

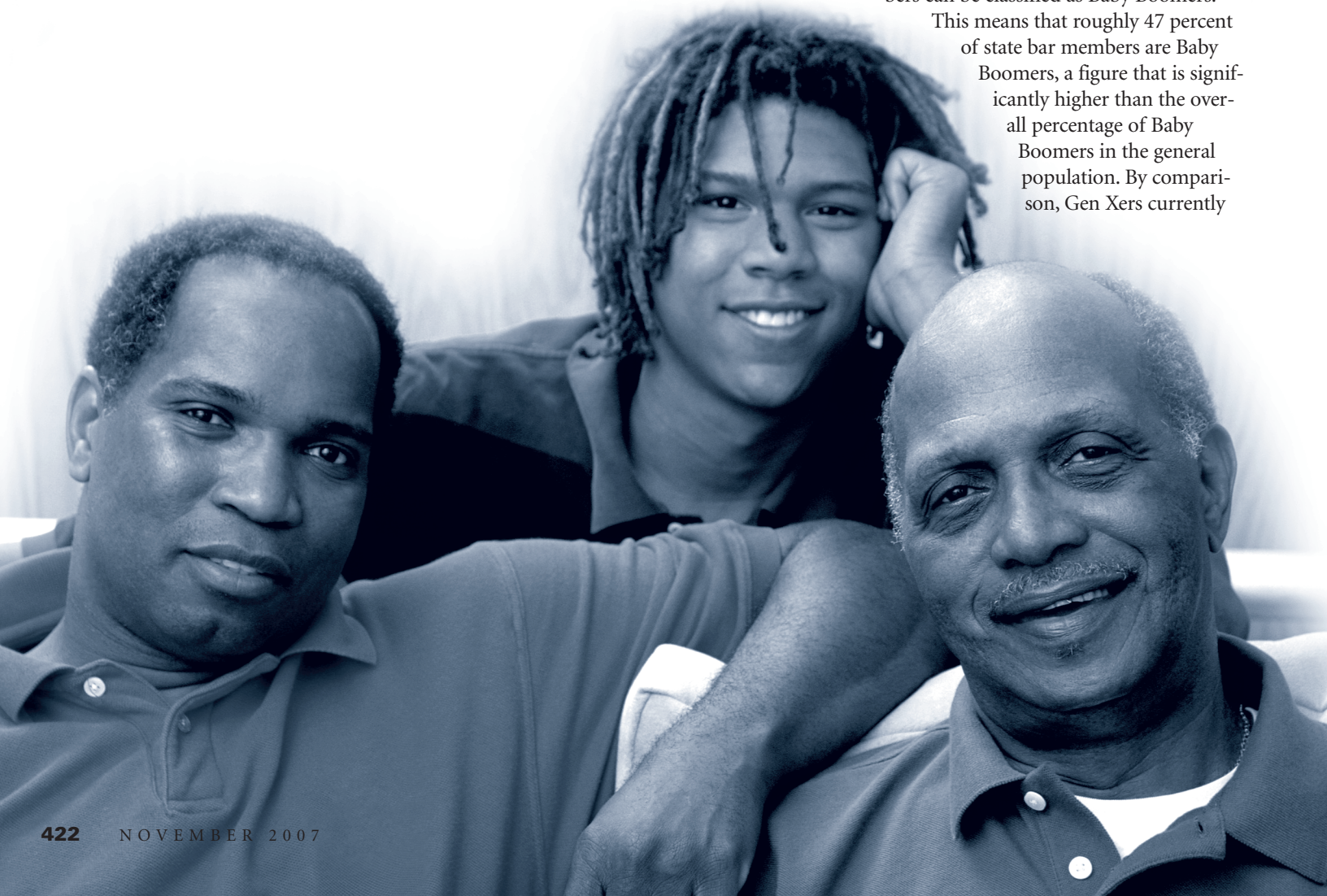
"Baby Boomers," "Generation X" and "Millennials"

Much has been written about each of these groups and their likes, dislikes, differences and influence.¹ The Baby Boomers represent those born from 1946-1964. Generation Xers are those who were born from 1965-1979. And Millennials are those who were born from 1980-1998.

Demographically, how do these generations affect the legal profession, particularly in Alabama?

Of these generations, Baby Boomers constitute the largest group. It is estimated that Baby Boomers total over 78 million, or a little more than 26 percent of the nation's population. As for Alabama State Bar members, some 7,500 of 15,500 members can be classified as Baby Boomers.

This means that roughly 47 percent of state bar members are Baby Boomers, a figure that is significantly higher than the overall percentage of Baby Boomers in the general population. By comparison, Gen Xers currently



total about 5,800 or 38 percent of state bar members while Millennials have, only during the last few years, been old enough to enter the legal profession. Of the nation's roughly 1.1 million lawyers, an estimated 400,000 are Baby Boomers.

Last year, the first Baby Boomers reached the age of 60. In four years, they will be 65. What does this portend for the future of the legal profession? As more and more Baby Boomers reach retirement age, will they choose to retire or continue to practice law given that life spans have increased? Or will they choose to leave the practice of law and pursue other interests? Indeed, will lawyer Baby Boomers even wait until they reach their mid or late 60s before they boomerang into other careers or retire? Although no

one knows the answer to these questions, during the next 25 years we are likely to see a significant reduction in the ranks of practicing lawyers. While it is estimated that there are 75 million Millennials, we will not know for some time how many of that generation will choose to pursue legal careers. Thus far, there are 193 state bar members who were born in 1980 and 106 who were born in 1981.

Based on the characteristics attributed to the different generations by sociologists, it is difficult to tell whether Millennials will have the same intense desire to join the legal profession as has the Baby Boomer generation. If Millennials seek other professions to the exclusion of the legal profession, we could witness a severe reduction in the number of practicing lawyers to meet

the needs of our nation's growing population. To ensure the availability of legal services, it may become necessary to loosen the restrictions on the types of legal services which paralegals can provide, to encourage more foreign lawyers to seek admission to practice law in the states and to make it easier for more people to handle certain legal matters *pro se*. Obviously, these or other solutions to address the anticipated decrease in the number of lawyers could result in a fundamental change in how the needs for legal services in this country are met and who meets them. ■

Endnotes

1. A number of relevant articles about the generations can be found by searching the Web site of the American Bar Association, www.abanet.org.

SAVE THE DATE Cumberland's December Seminars

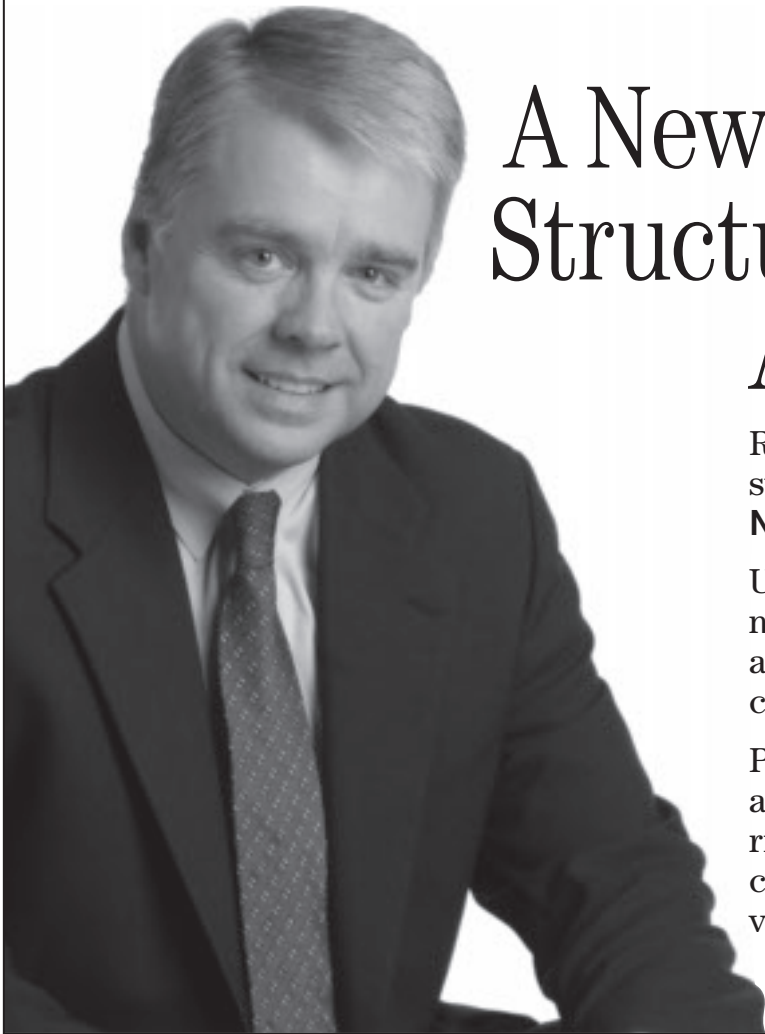


- **Employment Law Update: December 7**
- **Gain the Edge!® Negotiation Strategies for Lawyers featuring Martin E. Latz: December 14**
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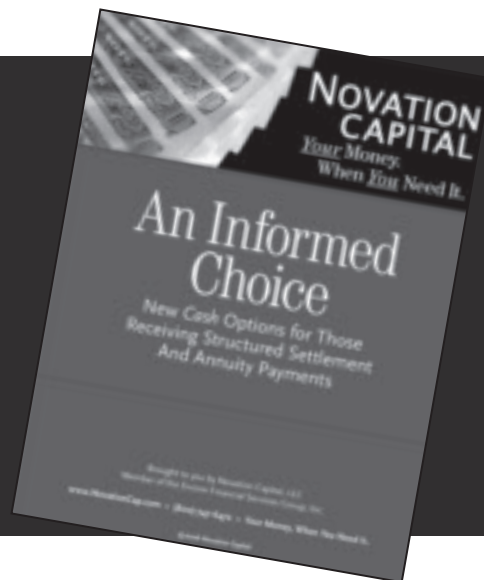
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Broughton, Elliott Pou
Montgomery
Admitted: 194
Died: September 1, 2007

Carpenter, Andrew Elliott
Tuscumbia
Admitted: 2005
Died: July 3, 2007

Flowers, Richmond McDavid
Dothan
Admitted: 199
Died: August 9, 2007

Gallion, George MacDonald
Montgomery
Admitted: 193
Died: August 11, 2007

Gonas, John Samuel, Jr.
Daphne
Admitted: 198
Died: July 2, 2007

Johnsey, Walter Frank
Birmingham
Admitted: 196
Died: July 29, 2007

Morrow, William Howell, Jr.
Montgomery
Admitted: 1952
Died: August 27, 2007

Puryear, John M.
Tuscaloosa
Admitted: 198
Died: July 11, 2007

WILLIAM FENWICK GARDNER

William (“Bill”) Fenwick Gardner passed away May 15, 2007 after 81 years as a member of the Alabama State Bar. He was universally admired by his peers for his friendliness, sense of humor and legal achievements.

He was the fifth lawyer of six straight generations of Gardner lawyers in Alabama. He practiced his entire career with the firm of Cabaniss, Johnston, Gardner, Dumas & O’Neal, where his late father, Lucien D. Gardner, Jr., also practiced law. Bill’s grandfather, Lucien D. Gardner, served as a justice on the Supreme Court of Alabama from 1914 to 1951 and as chief justice from 1940 to 1951.

Bill’s work ethic was evident beginning with his academic achievements. He graduated *cum honore* from the Baylor School in Chattanooga, was a Phi Beta Kappa at the University of Alabama and graduated as a member of the Order of the Coif from the University of Virginia Law School. Bill was elected as a Fellow of both the American College of Trial Lawyers and the College Labor & Employment Lawyers. He was listed in *The Best Lawyers in America* in the Labor & Employment Law section since the first edition in 1983. Bill was named “Among the Nation’s Best Litigators in Employment Law” by the *National Law Journal* in 1992, and in *America’s Leading Business Lawyers*, *The International Who’s Who of Business Lawyers* and *The International Who’s Who of Labor & Employment Lawyers*. He was the principal attorney for over 140 published decisions and was appointed special deputy attorney general for representation of the State of Alabama in employment cases. His advocacy was provided to clients without qualification, even if the client’s cause might be unpopular. See *Falkowski v. Perry*, 464 F.Supp. 1016 (D.C. Ala. 1978); *Perry v. Thomas*, 691 F.Supp. 1323 (N.D. Ala. 1988).

He contributed to several treatises—Schlei and Grossman, *Employment Discrimination*



Law (2nd ed. 1983) and Lindeman and Grossman *Employment Discrimination Law* (3rd ed. 1996)—and was the principal author of *Defending Fair Employment Cases* (Defense Research Institute 1976). He published articles with the Defense Research Institute, *The Alabama Lawyer* and the *Alabama Law Review*, and spoke on labor and employment law at seminars presented by the National Employment Law Institute, the Defense Research and Trial Lawyers Association, the American Bar Association, the Labor Law Section of the Alabama State Bar, Cumberland Continuing Legal Education, and the Alabama Bar Institute for Continuing Legal Education.

Bill assiduously represented his clients and scrupulously handled every case through exhaustive research of the facts and law. He actively practiced up until to just a few weeks prior to his passing. He was also dedicated to his family. He is survived by his wife of 45 years, Melanie Terrell Gardner, sons John Gardner and Robert Gardner, and a host of grandchildren. ■

—Robert Gardner, Birmingham

ANDREW E. CARPENTER
MEMORIAL
SCHOLARSHIP



A scholarship has been established by members of the Colbert County University of Alabama Alumni Association, in memory of fellow attorney Andrew E. Carpenter. Carpenter was admitted to the Alabama State Bar in 2005 and was killed July 3, 2007 in an automobile accident. This effort is being spearheaded by attorneys from Colbert, Franklin, Lawrence and Lauderdale counties. The scholarship will benefit graduating seniors or transfer students attending the University of Alabama from those respective counties.

Checks should be made payable to "The Alumni Fund" and indicate that they are for the Andrew E. Carpenter Scholarship. Contributions are tax-deductible to the extent allowed by law and each donor will receive a gift receipt from UA verifying the contribution.

Mail contributions to:

Ms. Paula Jeter
Alumni Scholarship Program
P.O. Box 861928
Tuscaloosa 35486.

Notice to Show Cause

- Notice is hereby given to **Daryl Patrick Harris**, who practiced law in Birmingham and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the

Alabama State Bar, dated May 17, 2007, he has 60 days from the date of this publication (November 2007) to come into compliance with the Client Security Fund assessment requirement for 2007. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 07-34]

Transfer

- Dothan attorney **Jack Wilmar Smith** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective July 13, 2007. [Rule 27(c); Pet. 06-67].

Reinstatements

- The Supreme Court of Alabama entered an order based upon the decision of Disciplinary Board, Panel I, reinstating Birmingham attorney **Kimberly Jane Dearman-Davidson** to the practice of law in the State of Alabama effective August 29, 2007. [Pet. for Rein. No. 07-05]
- The Supreme Court of Alabama entered an order reinstating Fairhope attorney **Ronald Frank Suber** to the practice of law in Alabama, with certain conditions, effective August 29, 2007, based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar. Suber had been on disability inactive status since November 22, 2004. [Pet. for Rein. No. 07-04]

Disbarments

- Huntsville attorney **Jack Daniel** was disbarred from the practice of law in the State of Alabama retroactive to

January 15, 2004 by Order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Daniel's consent to disbarment. On March 29, 2007, Daniel pled guilty in the Circuit Court of Madison County, Alabama to theft 3rd degree. In addition, at the time of his consent to disbarment, there were several pending investigations with the Alabama State Bar that involved Daniel's willful neglect of legal matters and his failure to communicate with his clients. [Rule 22; Pet. No. 07-3]

- The Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Board, Panel IV, disbarring Alabama attorney **William Stephan LaBahn** from the practice of law in the State of Alabama effective June 26, 2007. LaBahn was also licensed in Ohio, New York and Oregon. This disbarment was reciprocal discipline in regard to LaBahn's disbarment from the practice of law in Oregon, effective January 9, 2007. LaBahn also failed or refused to show cause in writing within 28 days of receipt of the board's show-cause order why reciprocal discipline should not be imposed. [Rule No. 25(a); Pet. No. 07-20]

Suspensions

- Effective August 15, 2007, attorney **Steven Alan Backer** of Meridianville has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CL E No. 07-03]
- Effective August 15, 2007, attorney **Peter Clark Bond** of Birmingham has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CL E No. 07-04]
- Effective August 15, 2007, attorney **Winfred Clinton Brown, Jr.** of Decatur has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal

Education requirements of the Alabama State Bar. [CL E No. 07-05]

- Effective August 15, 2007, attorney **Sarah A. Rutland Cook** of Montgomery has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CL E No. 07-07]
- Effective August 15, 2007, attorney **William Tazewell Flowers** of Dothan has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CL E No. 07-08]
- Tuscaloosa attorney **Michael Anthony Givens** was suspended from the practice of law in the State of Alabama for a period of four years, retroactive to

December 22, 2003, by order of the Supreme Court of Alabama. The supreme court entered its order in accord with the provisions of the July 3, 2007 order of the Disciplinary Commission of the Alabama State Bar accepting G vens's conditional guilty plea, wherein G vens pled guilty in three cases to violations of Rule 1.3, *Ala. R. Prof. C.*, and in six cases to violations of Rule 1.16(d), *Ala. R. Prof. C.* G vens also agreed to make full restitution to the Client Security Fund. [A SB nos. 03 252 (A), 03 253 (A), 04-039(A), 04 04(A), 04 04(A), 04-071(A), 04-086 04 102(A), and 04 121(A)]

- Effective August 15, 2007, attorney **Virginia Frances Holliday** of Greenwood, Mississippi has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-011] ■

ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?
Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

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

It is.

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

You can.

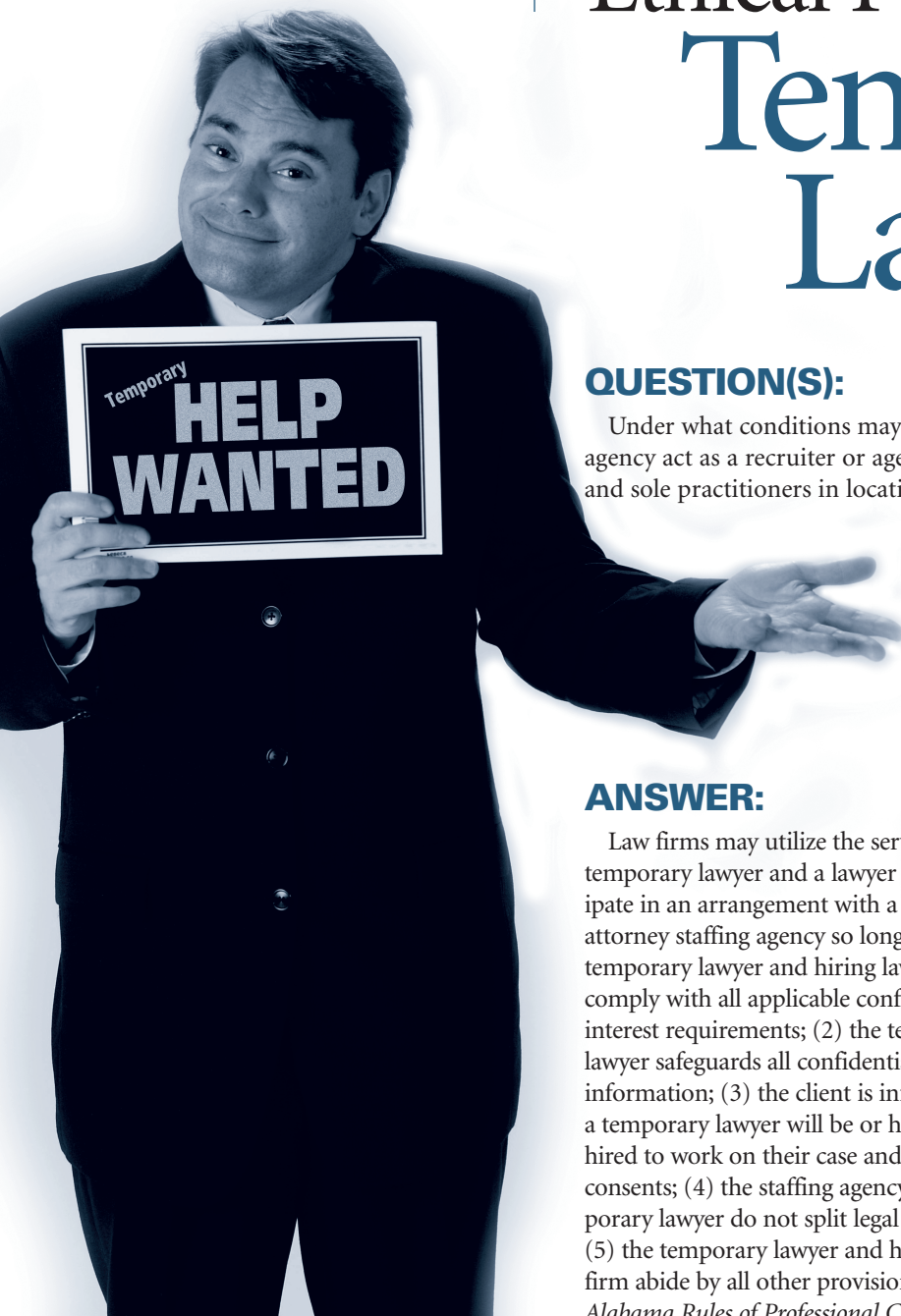
Don't be part of their delusion.

Be part of the solution.

For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.



J. Anthony McLain



Ethical Propriety of Using Temporary Lawyers

QUESTION(S):

Under what conditions may a law firm employ a temporary lawyer? May a staffing agency act as a recruiter or agent (“agency” or “placement agency”) to assist law firms and sole practitioners in locating and hiring qualified temporary or contract lawyers?

ANSWER:

Law firms may utilize the services of a temporary lawyer and a lawyer may participate in an arrangement with a temporary attorney staffing agency so long as: (1) the temporary lawyer and hiring law firm comply with all applicable conflict of interest requirements; (2) the temporary lawyer safeguards all confidential client information; (3) the client is informed that a temporary lawyer will be or has been hired to work on their case and the client consents; (4) the staffing agency and temporary lawyer do not split legal fees; and (5) the temporary lawyer and hiring law firm abide by all other provisions of the *Alabama Rules of Professional Conduct*.

DISCUSSION:

In researching this issue, it appears to the Disciplinary Commission that every state or national ethics organization, including the American Bar Association, that has addressed the issue of temporary lawyers and temporary lawyer staffing agencies has authorized their use by law firms. However, in authorizing their use, each organization has done so under varying restrictions and conditions.¹ While generally approving the use of temporary lawyers and staffing agencies, the Disciplinary Commission finds it necessary to place its own restrictions and conditions on the practice. As such, this opinion attempts to address certain ethical issues facing the temporary lawyer, the hiring law firm and the temporary lawyer staffing agency. While this opinion addresses some of the more pressing ethical dilemmas surrounding the use of temporary lawyers, it is by no means meant to be an exhaustive analysis of the ethical considerations surrounding the

placement and hiring of temporary lawyers. Under any arrangement, both the temporary lawyer and the hiring law firm must abide by all ethical duties arising under the *Alabama Rules of Professional Conduct*, including the duty to provide competent representation under Rule 1.1, *Ala. R. Prof. C.* With that caveat in mind, the Disciplinary Commission addresses certain key ethical issues raised by the placement and hiring of temporary lawyers.

Conflicts of Interest

The most daunting ethical dilemma that will be faced by temporary lawyers and those firms that hire them will be determining whether a conflict of interest exists. For the purpose of determining whether a conflict exists, a temporary lawyer who performs work for a client, even under the sole direction of the hiring law firm, represents that client. In other words, even if the temporary lawyer never meets or speaks with the client and all directions are issued by the hiring law firm, an attorney/client relationship is still formed between the temporary lawyer and the firm's client. As such, the temporary lawyer and hiring law firm must abide by rules 1.7 and 1.9, *Ala. R. Prof. C.*, regarding conflicts of interest involving current and former clients.

The more difficult question that is raised in regard to temporary lawyers and resulting conflicts of interests involves Rule 1.10, *Ala. R. Prof. C.*, which provides as follows:

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c) 1.9 or 2.2.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9(b) that is material to the matter.
- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter

representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

The ethical dilemma posed by Rule 1.10 was aptly described in Hazard & Hodes, *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005):

The question then arises how these lawyers should stand vis-à-vis the firms employing them. Are they closely enough affiliated with the firm so that imputed disqualification (in both directions) will apply during the time they are on staff? Plainly, a "temp" lawyer who has formerly represented a particular client (whether or not as a law temp) cannot personally oppose that client in a substantially related matter, no matter what the practice setting . . . But would it be permissible for that lawyer to work for a firm as a law temp on matters not involving that client while permanent members of the firm (perhaps in the next room) either initiate or continue litigation against the law temp's former client?

The fundamental question then becomes when, for the purposes of Rule 1.10, is a temporary lawyer considered a member or associate of the hiring law firm?

The ABA and others have embraced the functional analysis test for temporary lawyers in ABA Op. 88-36 holding that:

Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.

The primary tenet of the functional analysis test is that the temporary lawyer may be screened from other matters while working for the hiring law firm and, thus, avoid imputed disqualification. However, the effectiveness of using screens or “Chinese walls” has been questioned in recent years by several other jurisdictions. In fact, in RO 2002-01, we rejected the use of “Chinese walls” and determined that non-lawyer employees who change law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. Similarly, the Disciplinary Commission sees no reason to differentiate between temporary lawyers and full-time lawyers. As such, for the purposes of Rule 1.10 and determining whether a conflict of interest exists, a temporary lawyer will be treated as a member or associate of the firm while employed by the firm.

Confidentiality

Under Rule 1.6, *Ala. R. Prof. C.*, a lawyer has a duty to preserve the confidences and secrets of a client. It is the responsibility of the temporary lawyer to abide by Rule 1.6 by observing strict confidentiality regarding any confidences or secrets gained in the course of temporary employment. Absent client consent, a temporary lawyer may not reveal the subject matter and/or content of the services provided to clients of the hiring law firm to the staffing agency. Moreover, the temporary lawyer should not disclose any confidential information to the staffing agency at any time records submitted to the staffing agency. See Virginia State Bar Opinion 1712 (Op. in footnote 1).

Notice to Client

In determining whether the client must be informed and consent to the use of a temporary lawyer, many ethics organizations have drawn distinctions between whether the temporary lawyer works on a client’s case under the direct supervision of the hiring law firm. For instance, the ABA held in Formal Opinion 88-36 that if the temporary attorney will work under the direct

supervision of a lawyer associated with the firm, the law firm is not required to disclose to the client that a temporary attorney is working on the client’s case. In support of its position, the ABA stated that “[a] client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel... is inherent in the act of retaining the firm.” ABA Op. 88-36 at 10. According to this opinion, use of a temporary attorney who will be closely supervised by a firm lawyer is akin to the use of firm personnel and does not require the consent of the client. If the temporary lawyer will not be closely supervised, but will work independently of the firm, then the client will need to be informed and his consent obtained for the use of the temporary attorney.

However, in Formal Opinion 05-9, the Georgia State Bar rejected such distinctions and adroitly observed that “[a] client reasonably assumes that only attorneys within the firm are doing work on that client’s case, and thus, a client should be informed that the firm is using temporary attorneys to do the client’s work.” The Disciplinary Commission agrees with the Georgia State Bar and believes that a lawyer has a duty under Rule 1.3 *Ala. R. Prof. C.*, to inform the client of the law firm’s intention whether at the commencement or at a later point in the course of representation—to use a temporary lawyer’s services on the client’s case. The client should always be given the option of either consenting to or rejecting the use of the temporary lawyer. Additionally, if the law firm wishes to pass on the agency placement fee to the client, the fee should be identified separately when billed to the client.

If the law firm intends on passing along the costs of the temporary lawyer to the client, the client must be so informed and consent to the fee arrangement. Any charge for the services of a temporary lawyer is subject to Rule 1.5, *Ala. R. Prof. C.*, and therefore, must be reasonable. If the cost of the staffing agency is to be passed along to the client, the expense must be clearly communicated to the client and approved by the client at the outset of representation or when the hiring of a temporary lawyer from a staffing agency is first contemplated. Clearly, a payment to a staffing agency for the services of a temporary lawyer is not among those expenses that ordinarily could be anticipated by a client. As such, the hiring law firm may only pass along the cost of the staffing agency to the client if the client has consented to the expense.

Fees

Regardless of whether a staffing agency is solely owned by an attorney or non-attorney, legal fees should not be split between the agency and the temporary attorney. For example, if non-attorneys have any ownership interest in the staffing agency, any splitting of legal fees would be in violation of Rule 5.4, *Ala. R. Prof. C.*, which forbids a lawyer or law firm from sharing legal

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fees with a non-lawyer. Likewise, even if the staffing agency is solely owned by an attorney, the splitting of legal fees would still be inappropriate. While Rule 5.4 would not apply to a lawyer-owned staffing agency, the practical effect of splitting legal fees between the agency and the temporary lawyer would be to create a *de facto* law firm. The creation of a *de facto* law firm would lead to further problems involving Rule 1.10 and conflicts of interest. As such, the Disciplinary Commission has determined that regardless of ownership, legal fees should never be split between the staffing agency and lawyer.

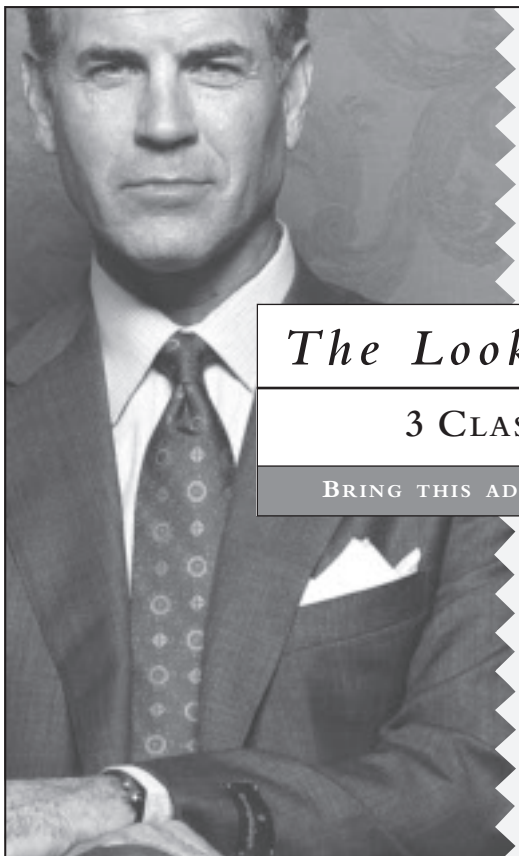
Of course, this prohibition leads one to ask when a payment to a staffing agency is considered the splitting of a legal fee. One often-used payment option involves the hiring law firm paying the staffing agency a certain amount per hour for the services of the temporary lawyer. The staffing agency then pays a portion of that amount to the temporary lawyer. In practical terms, the temporary lawyer is on the payroll of the staffing agency, not the law firm. Such a payment arrangement certainly suggests that a legal fee is being split between the staffing agency and the temporary lawyer.

As such, the Disciplinary Commission believes that the better practice would be for the hiring firm to pay the temporary lawyer

directly and then pay a separate placement/administrative fee to the staffing agency for locating and placing the temporary lawyer with the requesting law firm. The ABA has approved "an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation, . . ." ABA Op. 88-356. Any fee for the location and placement of the temporary lawyer, however, could still be tied to the number of hours of work performed by the temporary lawyer on behalf of the hiring law firm. [2007-03] ■

Endnotes

1. See Alaska Bar Ass'n Ethics Op. 96-1 (1996); Colorado Bar Ass'n Ethics Op. 105 (1999); Supreme Court of Georgia Ops. 05-9(2006); Supreme Court of Texas Professional Ethics Committee Op. 515 (1996); California State Bar Ethics Op. 1992-126 (1992); Supreme Court of Ohio, Bd. of Commissioners of Grievances & Discipline Op. 90-23 (1990); New Jersey Supreme Court Advisory Committee on Professional Ethics Op. 632 (1989); *Oliver v. Bd. of Governors, Kentucky Bar Ass'n.*, 779 S.W.2d 212 (Ky. 1989); City of New York Bar Ass'n Formal Op. 1989-2 (1989); The Florida State Bar Op. 88-12 (1988); Virginia State Bar Ethics Op. 1712 (1998); Wisconsin State Bar Ethics Op. 96-4 (1996); New Hampshire Bar Ass'n Op. 1995-96 (1995); ABA Formal Op. 88-356 (1988).



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Anita Hamlett

CLE Compliance Reporting for 2007

Thanksgiving Day is a jewel, to set in the hearts of honest men; but be careful that you do not take the day, and leave out the gratitude.

~E.P. Powell



We are only 22 days away from Thanksgiving 2007 (and I can't help but remind you that it is only 53 days away from the last day to take all your CLE for 2007)!

As I looked back over my past two years with the bar and the many articles that I have been blessed to write...I noticed a common thread. I often criticize, pushed and prodded our members and rarely stopped to say "thank you." So, as we approach the holiday set aside for giving thanks, I pause to say thank you to the many, many attorneys who do get their CLE hours in a timely manner, check their online transcripts regularly and report any omitted hours. Most of our members fall into that category. Thank you to all the lawyers who can enjoy Turkey Day without a CLE care, because they finished all their courses early to avoid getting a pink notice of non-compliance. And, yes...even to the hundreds of you who wait and use the list of "Approved Courses" off our Web site to find that last hour of ethics to complete before December 31, we tip our MCLE hats in gratitude to you. Your efforts are very much appreciated.

However, since the CLE countdown has begun for 2007, it is time again to remind all attorneys about how to comply for

2007 and to specifically address what non-compliant attorneys can do to come into compliance.

Exempt Individuals

If you are exempt from the MCLE requirements in Alabama for 2007, you should receive a blue (exempt) notice by the end of this year. **Please do not send back blue forms unless there is an error on your personal transcript or address or you are not exempt under the MCLE Rules and Regulations.** Please note that address changes can be sent electronically to ms@alabar.org. If your transcript information is incorrect, submit changes by January 3, 2008.

Compliant Individuals

You should receive a green (compliant) form for 2007 **by the middle of January 2008**. If everything on that form is correct, you did great! Thank you and kudos for all. **Please do not send back green forms unless there is an error on your personal transcript or address.** Please note that address changes can be sent electronically to ms@alabar.org. If your transcript information is incorrect, submit changes by January 31, 2008.

Non-compliant Individuals

The rest of this article will address non-compliant attorneys. The simplest solution we can offer you is to take your CLE credits by December 31 from courses that are already approved in Alabama. Remember that you can look at your transcript online at any time and report any inaccuracies. It is your responsibility to keep up with your CLE hours and earn them by December 31.

However, non-compliant attorneys who fail to take or report their hours for 2007 will receive a formal notice *by the middle of January 2008* of their non-compliance. If you receive that notice (pink form) for 2007, you must use that form to report compliance. Please postmark the completed form by January 31, 2008. In order to help make this reporting as simple as possible, here are a few helpful guidelines. Guidelines can also be found at www.alabar.org/cle.

Guidelines for Using Your Pink Form to Report Compliance

(Remember that these guidelines would not apply to a blue or green form unless the information on the form is incorrect.)

CLE Activities

Printed on the form is the MCLE Commission's record of your CLE activity for 2007. CLE transcripts are updated as sponsors report attendance rosters. So, this transcript is not necessarily complete or accurate, but should serve as a starting point for reporting 2007 compliance. You may view your updated transcript online using your ASB number and e-mail address (if registered with the Alabama State Bar). **Special Note:** If your online

transcript reflects that you were compliant prior to December 31, 2007, you may print it, attach it to your signed pink form and return it postmarked by January 31, 2008.

Additions

If you attended or taught *approved courses* not listed, you may add them. Because legibility is crucial, please make sure the additions are typed or printed clearly. **Only courses attended in 2007 may be added.**

Deletions

If you did not attend or teach the courses listed, you must delete them. (Draw or type a line through them.)

Corrections

You may have been given full credit for an event for which you registered, so that a sign-in, sign-out procedure would not be necessary. The honor system in place since 1981 continues; deduct 1.0 credit per 60 minutes of instruction as necessary.

Teaching Credit

Teaching credit is earned by teaching lawyers or law students in *approved CLE activities*. If you provided a substantial handout, you may claim 6.0 credits per 60 minutes of instruction; if the required handout was not provided, you may not claim extra credit. If you taught a law school course, you may claim 6.0 credits per law school credit earned by students taking the course, e.g., 12.0 CLE credits for 2.0 academic credits. Repeat presentations qualify for one-half the credits earned for an initial presentation. Repeated or second section law school courses qualify for one-half the credits earned for the initial course offering. Panel discussion time must be divided equally among the panelists for purposes of calculating credit, unless the MCLE Commission is informed otherwise.

Address Changes

If any of your personal contact information is incorrect, you may submit written changes or you may submit changes electronically to ms@alabar.org.

Signature

Please be sure any compliance report you submit is signed in the space provided before returning it to our office. (Again, note that blue and green forms do not have to be signed and returned *unless* they contain an error.)

Postmarked Date

All pink reporting forms should be completed and returned postmarked by January 31, 2008. If you fail to postmark by this date, please include a \$100 *late filing fee* with your returned form. If you choose to file your pink form after January 31, 2008, you risk the possibility of being certified to the Disciplinary Commission for failure to report compliance for 2007.

Again, you do not need to return your green or blue form unless your form contains an error.

Guidelines for Requesting an Extension for Late Compliance

There is no automatic "grace period" for CLE compliance in Alabama. The deficiency plan is not to be abused by any attorney and the MCLE Commission has asked that I strongly urge people to avoid requesting a plan unless the attorney has a situation that prevented him from being able to obtain CLE credit in the 60 days allowed in the calendar year.

The General Rule: If You Are Not Compliant After December 31

All courses must be completed by December 31, 2007. Under MCLE Rule 6.A, if you fail to earn 12 approved CLE credits (of which one must be designated as ethics or professionalism) by December 31, you

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Labor & Employment Law Update

Workshop: Roundtable Discussion - The Art of Cross and Other Tales

Criminal Defense Law Update 2007

Workshop: Maximize Mediation Opportunities: Top Volume Mediators Give You Tips on How to Get the Best Results for Your Client

Workers' Compensation Law Update 2007

Panel Discussion on Professionalism

Opening Plenary Session: How Lawyers Can Stay Healthy and Keep the Bottom Line in Shape

Family Law Update 2007

Handling Appeals before the Eleventh Circuit

Recent Legislation: 2007 Regular Session

Workshop Roundtable Discussion

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For informational purposes only. No CLE credit will be granted.

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Montgomery, Alabama 36101



Robert L. McCurley, Jr.



New Acts Effective January 1, 2008

Alabama Uniform Environmental Covenants Act

Alabama Code 35-19-1

This Act provides for a recording in the county probate records of Environmental Covenants. The Alabama Department of Environmental Management will establish a registry, provide forms and regulations and set fees. The law does not expand or reduce the environmental covenants that are on the property. It does provide a mechanism for recording these defined covenants in the probate records so those checking titles can identify the covenants.

A statement in substantially the following form, executed with the same formalities as a deed in this state, satisfies the requirements of *Alabama Code 3-19-12(b)*.

1. This notice is filed in the land records of the Probate Office of _____ County, Alabama, pursuant to Section of the Alabama Uniform Environmental Covenants Act.
2. This notice and the covenant, amendment or termination to which it refers may impose significant obligations with respect to the property described below.
3. A legal description of the property is as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property] [not available].
4. The name and address of the owner of the fee simple interest in the real property on the date of this notice is [insert name of current owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the property is located].
5. The environmental covenant, amendment or termination was signed by the director of the Alabama Department of Environmental Management.

- 6 The environmental covenant, amendment or termination was filed in the registry on [insert date of filing]
7. The full text of the covenant, amendment or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the Alabama Department of Environmental Management.

Apportionment of Estate Taxes

Alabama Code 40-15B-1

The Act provides for apportioning the burden of federal and state taxes between the respective interest of heirs and legatees of an estate or beneficiaries of irrevocable trust. When the fiduciary for an estate or trust is required to pay such taxes the Act does not change the total amount of taxes to be paid.

This Act applies only to:

- a. estates over \$2,000,000,
- b. where there is a will and the will does not enumerate who pays the taxes, or
- c. persons who die after January 1, 2008

The Act does not affect:

- a. the total amount of taxes paid,
- b. estates with no will,
- c. estates less than \$2,000,000,
- d. charitable gifts,
- e. specifically willed gifts of personal property less than \$100,000 to any person,
- f. specifically willed gifts of money less than \$25,000 to any person,
- g. persons who are incompetent, or
- h. any person who dies before January 1, 2008

The act generally will allow taxes to be shared by beneficiaries proportional to the amount received when the testator does not direct otherwise.

Residential Landlord/Tenant Act

Alabama Code 35-9A-163

Leases must be revised and certain provisions are prohibited in rental agreements.

Alabama Code Section 35-9A-163 states:

- (a) A rental agreement may not provide that the tenant:
 - (1) agrees to waive or forego rights or remedies established under Section 35-9A-204, 35-9A-401 or 35-9A-404 or requirements of security deposits established by this chapter or under the law of unlawful detainer;

- (2) authorizes any person to confess judgment on a claim arising out of the rental agreement;
 - (3) agrees to pay the landlord's attorney's fees or cost of collection; or
 - (4) agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.
- (b) A provision prohibited by subsection (a) included in a rental agreement is *unenforceable*. If a landlord *deliberately* uses a rental agreement containing provisions known by the landlord to be prohibited, the tenant may recover, in addition to *actual damages*, *an amount up to one month's periodic rent and reasonable attorney's fees*.

2008 Law Institute Bills

- A. Redemption from Ad Valorem Tax Sales—passed house in 2007
- B. Prudent Management of Institutional Funds—Last revised in 2002
- C. Revised Limited Partnership—last revised in 1983
- D. Revised Anatomical Gift Act—last revised in 2003
- E. Uniform Parentage Act—last revised in 1984
- F. Uniform Satisfaction of Residential Mortgages—last revised in 1886
- G. Business Entities Act—completion of a eight-year study
- H. Repeal of Unlawful Detainer Statutes—100 years of confusing laws

2008 Legislative Interns

The Alabama Law Institute is accepting applications for its 2008 Legislative Intern Program. Those who have completed at least two years of college are eligible. The interns will work full time during the legislative session, February to May 2008, and will analyze bills, provide constituent services and do research for legislators and legislative committees. More information and applications can be found at the Institute Web site, www.ali.state.al.us.

For more information about the Institute, contact Bob McCurley, director, at (205) 874-7411 or 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.

THE ROAD TO CLE COMPLIANCE 2007

START HERE

STEP ONE: FOR ALL MEMBERS OF THE ALABAMA BAR

I will check my CLE transcript on-line using my bar id number and e-mail address (If I can't view my transcript, I will e-mail ms@alabar.org).

STEP TWO: FOR COMPLIANT MEMBERS

If my on-line transcript is correct and I am compliant, I will print it for my records. I know that I will not need to send anything to the bar this year. When I receive my blue or green reporting form from the bar, I will keep it as my record of compliance.

If my transcript is incorrect, but I am compliant, I will either correct it now by writing a brief letter to the bar or wait and correct it on my green or blue reporting form that will be mailed to me in December. I understand that all corrections must be sent by January 31, 2008.

STEP TWO: FOR NON-COMPLIANT MEMBERS

If my transcript indicates that I am non-compliant, I will complete my courses by December 31, 2007. I will report all hours by January 31, 2008 using the reporting form that will be mailed to me in January.

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Uniform Law Commission Concludes 116th Annual Meeting

BY REPRESENTATIVE CAM WARD

The Uniform Law Commission (ULC) recently concluded its 116th Annual Meeting in California. The ULC approved four new acts dealing with issues ranging from the problems of resolving multi-state jurisdictional disputes over adult guardianships to new rules addressing the timely issue of discovery of electronic information.

Commissioners from Alabama have traditionally played an active role in the conference drafting committees. The last three years have been no exception with nearly all of Alabama's commissioners serving on at least one drafting committee for the conference.

At the annual meeting Alabama commissioners were joined by more than 200 lawyers, judges, law professors, legislators,

and government attorneys appointed in their respective jurisdictions to serve as uniform law commissioners. Uniform law commissioners are appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The commissioners draft proposals for uniform laws on issues where disparity between the states is a problem. Commissioners receive no salary or fee for their work with the Uniform Law Commission.

As they've done each summer since 1892, uniform law commissioners gathered for a full week to discuss and debate, line by line, word by word legislative proposals drafted by their colleagues during the year. The four acts approved in California are now available for state enactment.

1

The new **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act** addresses the issue of jurisdiction over adult guardianships, conservatorships and other protective proceedings. Because there are more than 50 guardianship systems in the United States, problems of determining jurisdiction are frequent. This act provides an effective mechanism for resolving multi-state jurisdictional disputes. This new act contains specific guidelines to specify which court has jurisdiction to appoint a guardian or conservator for an incapacitated adult. The objective is that only one state will have jurisdiction at any one time.

2

The **Uniform Rules Relating to Discovery of Electronically Stored Information** should bring up to date the state rules and statutes concerning discovery in civil cases. With the emergence of electronic technology, the extent to which individuals and institutions store or maintain information in an electronic form has clearly increased since the adoption of rules governing discovery generally. By some estimates, more than 90 percent of corporate information is being stored in some sort of digital or electronic format. This new act mirrors the recently adopted amendments to the *Federal Rules of Civil Procedure* dealing with electronically-stored information.

3

The **Uniform Interstate Depositions and Discovery Act** provides simple procedures for courts in one state to issue subpoenas for out-of-state depositions. The act is simple and efficient: it establishes a simple clerical procedure under which a state subpoena in the “trial state” can be used to issue a subpoena in another state. The act has minimal judicial oversight; the goal is to simplify and standardize the current patchwork of procedures across the various states for deposing witnesses for purposes of out-of-state litigation.

4

The **Uniform Limited Cooperative Association Act** addresses the cooperative form of business, a unique business entity which is different from other forms of business organizations. This act creates a new form of business entity and is an alternative to other cooperative and unincorporated structures. It is more flexible than most current law, and provides a default template that encourages planners to utilize tested cooperative principles for a broad range of entities and purposes.

The **Uniform Emergency Volunteer Health Practitioners Act**, approved in 2006 and already adopted in three states, allows state governments to give reciprocity to other states’ licensees on emergency services providers so that covered individuals may provide services without meeting the disaster state’s licensing requirements. Newly approved amendments address the issues of workers’ compensation coverage and protection from some aspects of civil liability.

Amendments were also approved to the **Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act** and the **Model Entity Transactions Act**.

Information on all of these acts, including the approved text of each act, can be found at the ULC Web site at www.nccusl.org.

Once an act is approved by the ULC, it is officially promulgated for consideration by the states, and the legislatures are urged to adopt it. Since its inception, the ULC has been responsible for more than 200

acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act and the Uniform Interstate Family Support Act.

Alabama joined the Uniform Law Commission in 1906, and since that time has enacted more than 80 uniform or model acts promulgated by the commission. Alabama currently has eight uniform law commissioners appointed to the ULC: Jerry L. Bassett, Montgomery; William H. Henning, Tuscaloosa; former Justice Gorman Houston, Jr., Montgomery; Thomas L. Jones, Tuscaloosa; Ted Little, Auburn; Robert L. McCurley, Jr., Tuscaloosa; Bruce J. McKee, Birmingham; and Rep. Cam Ward, Alabaster.

The procedures of the Uniform Law Commission ensure meticulous consideration of each uniform or model act. The ULC usually spends a minimum of two years on each draft. Sometimes, the drafting work extends much longer. No single state has the resources necessary to duplicate this meticulous, careful, non-

partisan effort. Working together with pooled resources through the ULC, Alabama joins with every other state to produce the impressive body of laws known as the “Uniform State Laws.” ■

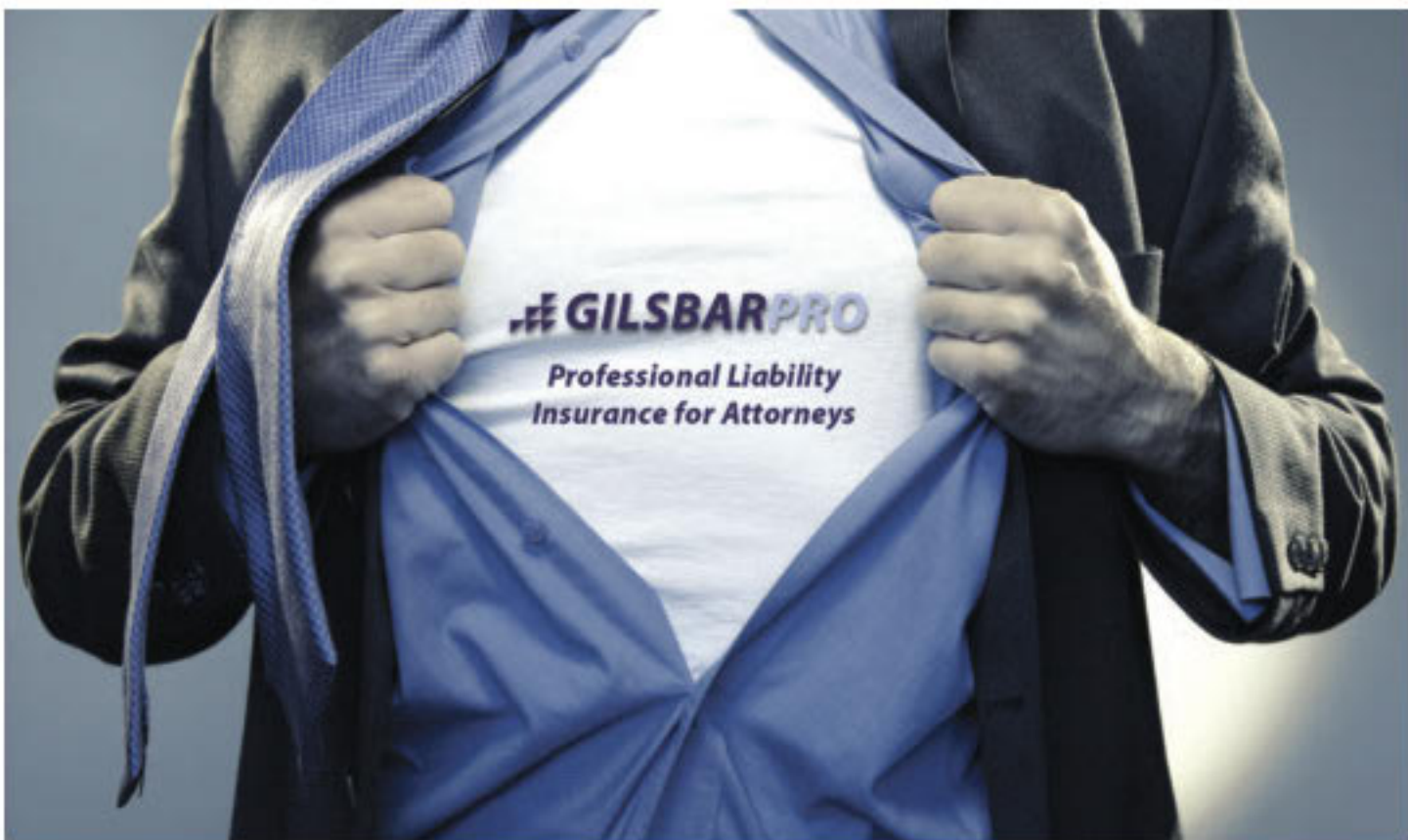


Representative Cam Ward

Representative Cam Ward graduated from Troy University and from Cumberland School of Law at Samford University in Birmingham. He served as deputy attorney general in the Alabama State Auditor’s Office from April 1996 until December

1997. In 1998, he joined the Alabama Secretary of State’s Office as confidential assistant to the Secretary of State.

From November 1998 to June 2001, Ward worked as district director for Congressman Spencer Bachus of Birmingham. In June 2001, he became executive director of the Industrial Development Board of Alabaster. Ward has been a member of the Alabama Republican Party State Executive Committee since 1999 and was elected as an alternate delegate for George W. Bush to the 2000 and 2004 Republican National conventions. In 2002, he was elected to the Alabama House of Representatives for District 49.



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YOU'VE GOT TO KNOW WHEN TO "LITIGATION HOLD" 'EM

The Dangers of Failing to Preserve and Produce Electronically Stored Information

BY KHRISTI DOSS DRIVER

Beginning with the landmark decisions handed down by the Southern District of New York in *Zubulake v. UBS Warburg*,¹ and following the proposal and adoption of the recent amendments to the Federal Rules of Civil Procedure,² electronic discovery ("e-discovery") is the topic *du jour*. Throughout the nation, federal and state courts alike are addressing e-discovery more and more frequently, as parties are routinely requesting electronically stored information ("ESI") during discovery, particularly in high-stakes litigation.

The groundwork for e-discovery was laid by the *Zubulake* court in a series of decisions regarding ongoing discovery disputes in an employment discrimination case. In the numerous opinions, the *Zubulake* court considered the discoverability of "accessible" and "inaccessible" data, analyzed and imposed a cost-shifting approach for production of backup information, and determined the scope of the duty to preserve ESI as well as the consequences of failure to preserve. In *Zubulake V*, the former employee contended that

the employer prejudiced her case by failing to produce certain relevant e-mails and by producing other e-mails in an untimely manner. Ultimately, as a sanction against the defendant for its failure to produce the e-mails, the employee received an adverse inference jury instruction that read as follows:

You have heard that UBS failed to produce some of the emails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.

If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.³

Recently, the Federal Rules of Civil Procedure were amended to specifically address ESI and the issues unique to e-discovery. The parties in a federal civil case are required to "discuss any issues relating to preserving discoverable information" including ESI at the meet and confer conference, and parties must present to the court in their discovery plan their proposals regarding ESI.⁴ The rules limit the scope of discoverability of ESI to that which is "reasonably accessible" unless the court orders production upon motion by the requesting party.⁵ Further, the rules provide

protection for inadvertently produced privileged materials⁶ and provide a “safe harbor” from sanctions where a party fails to produce ESI because the ESI was lost because of the routine, good-faith operation of the party’s electronic information system.⁷ Finally, the rules specifically authorize discovery of ESI, allowing the requesting party to “specify the form in which electronically stored information is to be produced”, while giving the responding party an opportunity to object.⁸

Key to the *Zubulake* decisions and the amended Federal Rules is the concept of a “litigation hold”, meant to preserve potentially relevant ESI for the duration of the litigation. As Judge Scheindlin stated in *Zubulake*, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” When a party “reasonably anticipates” litigation is determined on a case by case basis.⁹

In the following cases decided after the effective date of the amended Federal Rules, courts have continued to define the parameters under which ESI must be preserved and to determine the circumstances under which sanctions may be appropriate when ESI has not been properly preserved and produced.


Recent Sanction¹⁰

In an employment discrimination suit arising in the Western District of North Carolina, *Teague v. Target Corp.*,¹¹ the defendant moved for sanctions against the plaintiff and dismissal of plaintiff’s claim for back pay for spoliation of evidence, where the plaintiff disposed of her home computer after filing an EEOC claim against the defendant. It was revealed during discovery that plaintiff used her home computer to search for a job online after being terminated by the Defendant.

During her online search for a job, plaintiff submitted online employment applications and exchanged e-mails with prospective employers. She also used the home computer to send and receive e-mails regarding her termination from defendant’s employment and regarding her claims of gender discrimination. Plaintiff claimed that she disposed of her computer after the hard drive crashed and was unable to be repaired by her brother, who “dabbled” with computers.

The court noted that parties have an affirmative duty to preserve material evidence, a duty that arises “long before the filing of an initial pleading in litigation.” The court found that sanctions in the form of an adverse jury instruction were appropriate because plaintiff had an obligation

to preserve her home computer when it contained material evidence, noting that



“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”

plaintiff had already hired counsel and filed an EEOC charge at the time that she disposed of the computer.

In a breach of contract case arising in the Eastern District of Missouri, *Claredi Corp. v. SeeBeyond Tech. Corp.*,¹² Plaintiff asserted that defendant breached a software production and marketing agreement between the parties by entering into agreements with plaintiff’s competitors that undermined the contract between the parties. During lengthy and contentious discovery, the plaintiff requested from the defendant all communications and agreements between defendant and the competitors.

Counsel for defendant vehemently denied the existence of any e-mails or agreements with third parties in numerous hearings held on motions to compel, and defendant refused to search its systems or archived databases. The plaintiff ultimately obtained e-mails and other records from the third-party competitors, which revealed that the defendant had communicated with the third-party competitors and contemplated agreements with them. Accordingly, the plaintiff moved for sanctions against the defendant for discovery misconduct. The court agreed and awarded the plaintiff \$54,000 for its attorney’s fees and costs related to bringing the motion to compel. The court also ordered the plaintiff to pay the clerk of court \$20,000 as a sanction for unnecessarily prolonging and increasing the expense of this litigation.

Reaching its decision, the court noted that the case was filed almost two years prior to the ruling, yet the defendant “ha[d] yet to run appropriate searches on its archived database for responsive documents, a search that should have been completed long ago.” Further, the court found that the “Federal Rules of Civil Procedure [do not] grant a party the ability to independently determine which documents it believes are material and produce only those documents.”

In *Padgett v. City of Monte Sereno*,¹³ the court imposed monetary sanctions against the defendant for spoliation of evidence and reserved ruling on whether to enter the more severe penalties of default judgment or terminating sanctions. The plaintiff alleged civil rights violations and infliction of emotional distress in part due to receipt of an anonymous, threatening letter from city



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employees that enclosed a newspaper article downloaded from the internet that reported plaintiff's conviction of a crime. A city employee admitted to having authored and sent the letter, but claimed she did so of her own accord without notifying any other city employee.

Plaintiff requested inspection of the city's computers, printers and backup tapes, to explore the origins of the downloaded article and the authors and reviewers of the letter. The court initially denied the plaintiff's motion to compel the inspection, but ordered the defendant to "continue to preserve everything", making it clear on the record that the court intended to allow the inspection within some narrowing parameters. A few months later, one of the potentially relevant hard-drives "crashed" and was destroyed or discarded by the defendant. When the court later ordered production of the requested items, the defendant explained the "inadvertent" destruction of one of the computers. Oddly, at a later hearing before the court, the city claimed that it had located the computer, with no explanation provided to the court other than that the computer had appeared.

Finding that the defendant discarded the laptop with notice of its potential relevance, the court awarded monetary sanctions against the defendant for causing delay and additional expense to the plaintiff, including all costs associated with the filing of the motion for sanctions, travel costs for same, time spent researching and gathering evidence, the cost of plaintiff's expert, and the cost of

the special master appointed by the court to manage the discovery process.

In a trademark infringement and libel case arising in federal court in Colorado, *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*,¹⁴ the plaintiff sought relief for alleged discovery violations. While the defendant had produced various electronic documents and implemented a litigation hold after the complaint was filed, the plaintiff claimed that the defendant's litigation hold should have started at least two years before the lawsuit was filed, when the plaintiff first began sending correspondence to the defendant regarding the trademark infringement issues.

Examining the conflicting authorities on when litigation should be reasonably anticipated, and acknowledging that each case must be examined individually to determine when a litigation hold should have gone into effect, the court held that under the particular facts of the case, the duty to preserve did not begin until the lawsuit was filed. In reaching that conclusion, the court recognized the difficulty of stopping the routine operation of computer systems. Of importance was the court's finding that plaintiff's correspondence in the years before the lawsuit was filed failed to threaten litigation and did not demand preservation of relevant materials. Instead, the correspondence suggested working matters out with a business solution and solicited a compromise proposal from defendant. Accordingly, the court applied no sanctions for failure to preserve ESI prior to the filing of the lawsuit.

Additionally, the plaintiff complained the defendant failed to preserve computer hard drives that had been used by defendants' former employees, who were "key players" in the case and who left the company after the lawsuit commenced. Admittedly, the defendant continued its practice of expunging the hard drives of former employees, even though the lawsuit was ongoing. The court held that the company should have taken adequate steps to insure preservation of the hard drives of employees who played a significant or decision-making role in the events giving rise to the lawsuit.

As sanctions, the court ordered defendant to pay plaintiff \$5,000 to compensate plaintiff for some of the additional expenses incurred in litigating the matter as a result of the failure to preserve the relevant hard drives. The court also faulted counsel for defendant for their failure to undertake a reasonable investigation and to take affirmative and effective steps to monitor the client's compliance with discovery obligations.

The plaintiff in *Quantum Comm. Corp. v. Star Broad, Inc.*,¹⁵ the prospective buyer of a radio station, brought an action against the sellers alleging breach of the asset purchase agreement and seeking specific performance. After several instances of misconduct by the defendant sellers during the course of discovery, the plaintiff moved for sanctions and default judgment based in part on the defendant's failure to produce key "smoking-gun" e-mails during discovery. The plaintiff ultimately was able to obtain third-party discovery including a

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number of the e-mails that defendants failed to produce. Also of interest, the defendants produced one e-mail without the corresponding relevant attachment, which attachment directly contradicted the testimony of the corporate representative of the defendants.

Finding by clear and convincing evidence that the defendants deliberately failed to produce key documents to the detriment of plaintiff, the court ordered monetary sanctions and *default judgment* against the defendants because of the discovery misconduct and other bad faith actions. In reaching that result, the court noted that the withheld e-mails “hampered the ability of plaintiff to present its claim on the central issue of this case.”

In a class action case involving federal securities law violations, *In re NTL, Inc. Sec. Litig.*,¹⁶ the plaintiffs moved for sanctions against the defendant, alleging that the defendant deliberately destroyed and allowed spoliation of e-mails and other ESI. The defendant company declared bankruptcy before suit was initiated and emerged from bankruptcy as two new companies conducting the business of the predecessor company. During the bankruptcy and transition into a new existence as two companies, pertinent e-mail and other ESI was lost or destroyed. The plaintiffs argued that the new entities had a duty to preserve and produce ESI created during the previous company's existence.

The court concluded that defendant's duty to preserve began when litigation was anticipated by the former company even though most of the documents and ESI ended up in the physical possession of new companies. The court found that the defendant should have known to preserve all documents from the parent company and issue a proper litigation hold spanning across the companies, both old and new. The court held that the defendant's failure to preserve relevant documents and ESI was at least grossly negligent and imposed sanctions consisting of an adverse inference instruction to the jury, as well as plaintiff's attorney's fees and costs.

In *Thompson v. Jiffy Lube Int'l, Inc.*,¹⁷ a putative class action alleging nationwide violations of the Consumer Protection Act, the defendant moved for sanctions against the plaintiffs for spoliation of important documents and information

concerning plaintiffs' interviews and communications with former employees of the defendant. The plaintiffs, under an order compelling them to produce names and contact information regarding the former employees, represented without explanation that the addresses and telephone numbers of the former employees were “unknown”. Upon further inquiry, plaintiffs' counsel claimed that the information was formerly known, but was lost when the hard drive used by plaintiff's counsel crashed without backup.

While the court found the plaintiffs' failure to use a backup system was troubling, the court found that the issue of spoliation need not be reached at that time, as discovery at this stage in the litigation was limited to class certification issues rather than the merits of plaintiffs' claims. Accordingly, the court reserved ruling as to whether spoliation had occurred and whether sanctions were appropriate. The court did however, allow defendant to submit written deposition questions to plaintiffs' counsel regarding how and when the counsel communicated with the former employees, regarding what type of communications were lost, and further regarding the inconsistencies between plaintiffs' arguments on the motion for sanctions and the plaintiffs' prior discovery responses.

Conclusion

The crucial lesson is that counsel must impress upon their clients the significance of the failure to properly preserve and produce ESI. Indeed, *Zubulake V* and its progeny affirmatively place the responsibility to ensure preservation on the shoulders of lawyers.¹⁸ Once litigation is reasonably anticipated, “a party and her counsel must make certain that all sources of potentially relevant information are identified and placed ‘on hold’ . . .”¹⁹ ■

Endnotes

1. “*Zubulake V*,” 229 F.R.D. 422 (S.D.N.Y. 2004); “*Zubulake IV*,” 220 F.R.D. 212 (S.D.N.Y. 2003).
2. The amendments to the Federal Rules of Civil Procedure became effective on December 1, 2006. To date, several states have adopted rules regarding discovery of ESI, including California, Idaho, Illinois, Kansas, Mississippi, New Hampshire, New Jersey, and Texas.
3. *Zubulake V*, 229 F.R.D. at 432.
4. See Fed. R. Civ. P. 26(f) and committee notes.

5. See Fed. R. Civ. P. 26(b)(2) and committee notes.
6. See Fed. R. Civ. P. 26(b)(5)(A) & (B); 26(f)(4) and 16(b)(6).
7. See Fed. R. Civ. P. 37(f)(1) & (2) and committee notes.
8. See Fed. R. Civ. P. 33(d); 34(a)(1) & 34(b). See also Fed. R. Civ. P. 45 (recognizing that ESI may also be obtained from third parties).
9. See *Indiana Mills & Manufacturing, Inc. v. Dorel Industries, Inc.*, 2006 WL 1749410, *4 (S.D. Ind. 2006) (defendant could not reasonably anticipate litigation after receiving a letter which referred to the claims and the possibility of a negotiated solution, but made no further threat of a lawsuit); *Claude P. Bamberger International, Inc. v. Rohm and Haas Co.*, 1997 WL 33768546, *3 (D.N.J. 1997) (defendant had not anticipated litigation, where plaintiff's pre-filing correspondence had not threatened litigation); *Washington Alder, LLC v. Weyerhaeuser Co.*, 2004 WL 4076674 (D. Or. 2004) (letter from plaintiff threatening to sue put defendant on notice of possible litigation and triggered a duty to preserve).
10. In the past, significant sanctions have been awarded for spoliation of ESI. See, e.g., *United States v. Philip Morris, USA, Inc.*, 3727 F.Supp.2d 21, 25-26 (D.D.C. 2004) (imposing fine of \$2,750,000 and barring witness testimony for violation of preservation order and company's document retention policy).
11. 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007)
12. 2007 WL 735018 (E.D. Mo. Mar. 8, 2007)
13. 2007 WL 878575 (N.D. Cal. Mar. 20, 2007)
14. 2007 WL 684001 (D. Colo. Mar. 2, 2007)
15. 2007 WL 445307 (S.D. Fla. Feb. 9, 2007)
16. 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)
17. 2007 WL 608343 (D. Kan. Feb. 22, 2007)
18. See, e.g., *Sexton v. United States*, 2001 WL 649445 (M.D. Fla. 2001).
19. *Zubulake V*, 229 F.R.D. at 432 (emphasis added). It is important to note that the duty to preserve under a litigation hold is broader than the duty to produce. The amended Federal Rules limit the scope of *production* to what is “reasonably accessible.” The responding party to e-discovery can identify information it deems not “reasonably accessible,” meaning data that “cannot be retrieved without undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). It is important to note that the Court may, upon motion, order the production of data that is not “reasonably accessible.”



Khristi Driver

Khristi Driver, who practices in Birmingham with Haskell Slaughter Young & Rediker LLC, was awarded full scholarships to both the University of Alabama and Cumberland School of Law. In law school, she was active in both trial advocacy competitions and the *Cumberland Law Review*. Driver is a member of the Birmingham Bar Association, serving as a member of the Medical Liaison Committee and as chair of the Projects Committee of the Women Lawyers' Section. In 2006, she received the Distinguished Service Award from the Women Lawyers' Section of the BBA.

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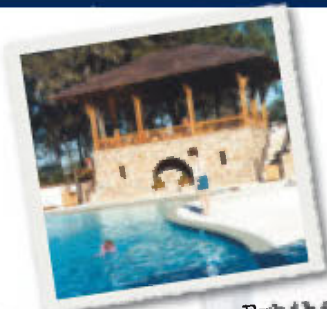


Exhibit A

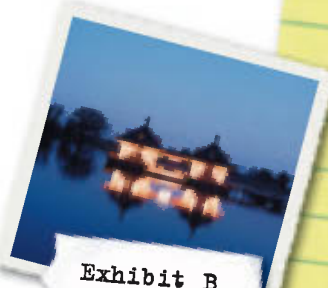


Exhibit B



Exhibit C



Exhibit D



Exhibit E

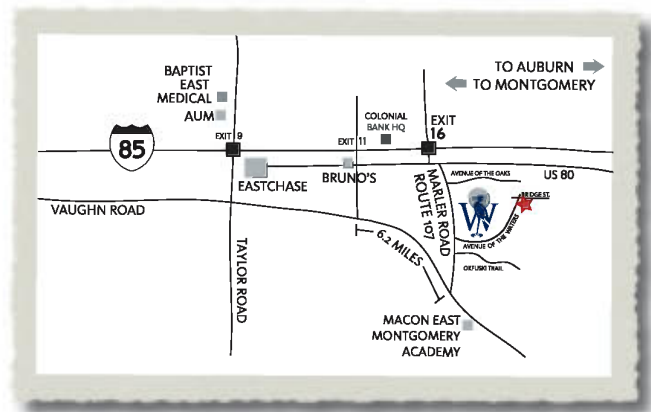
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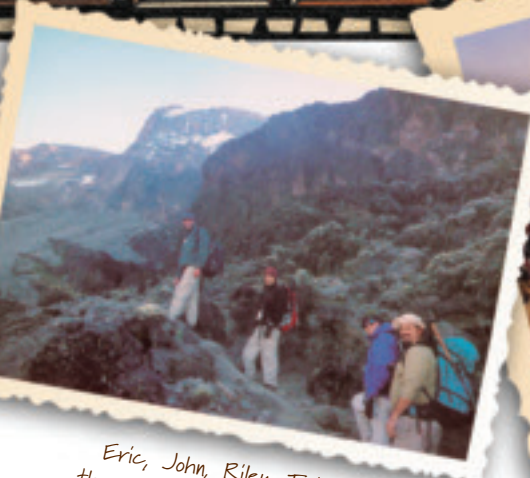
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All information is assumed correct but is not warranted.



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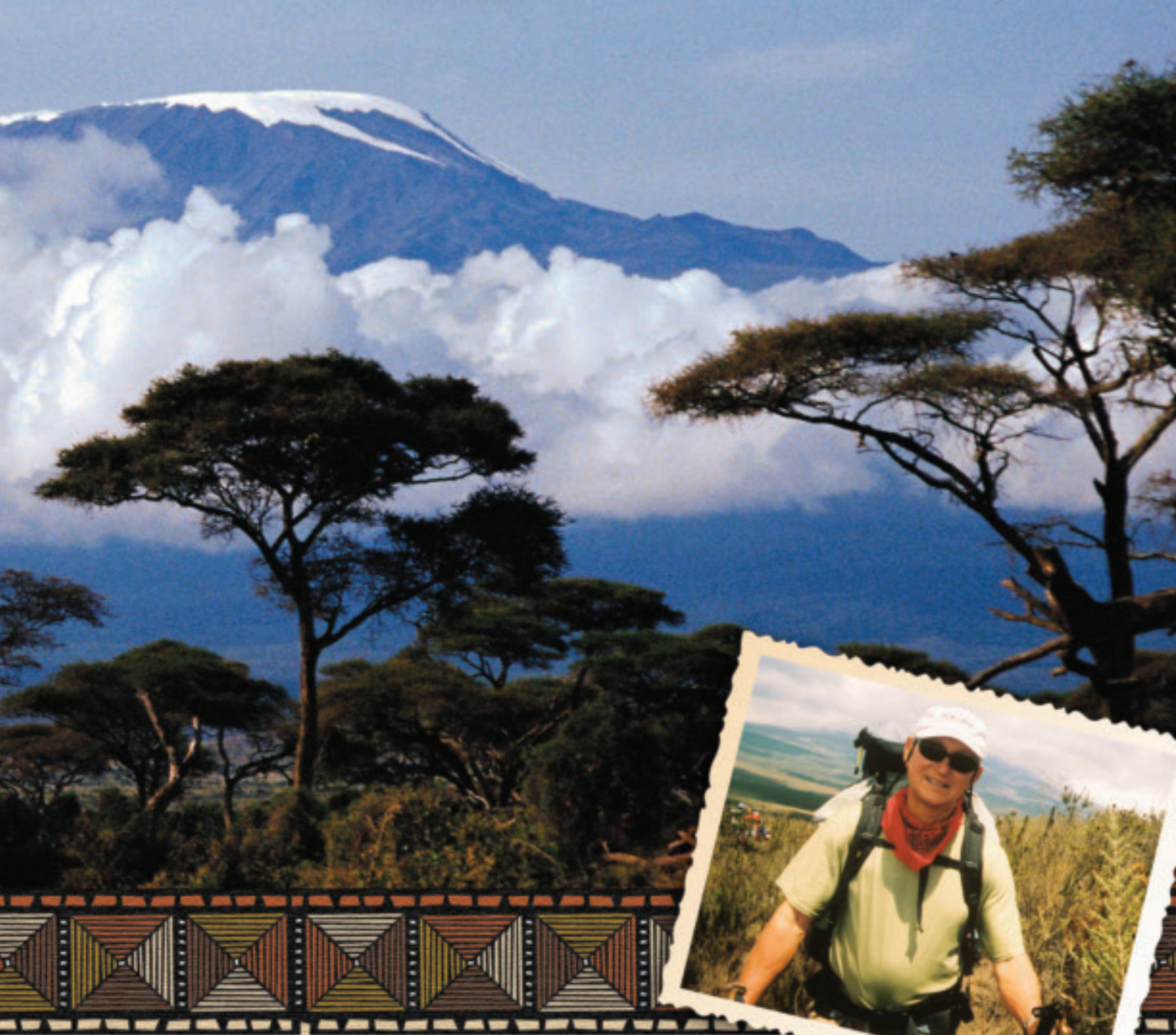
Kilimanjaro Expedition



*Eric, John, Riley, Todd with
the summit of Kilimanjaro directly
over and behind Eric's head*



"The Group"



BY JUDGE JOEL F. DUBINA

Joel on the climb to Shira I Camp on west side of Shira Plateau at 11,500 ft.

After summiting Mount Rainier in August 2002 and writing a Unity Club paper on that adventure, I immediately began looking around for another mountain to climb. I talked at length with my friend, John Steiner, who climbed Mount Rainier the year after I did. I also consulted with Mike Dunnahoo, my friend in Atlanta, who has climbed Mount Everest twice, as well as most of the other major mountains in the world. I narrowed my list down to three: Mount McKinley, which is slightly more than 20,000 ft. and is the highest mountain in North America; Aconcagua at 22,000 ft., the highest mountain in South America; and Kilimanjaro at 19,844 ft., which is the highest mountain on the continent of Africa. All of

these mountains are included in the world's seven summits. I have been to Alaska nine times and South America once, but never to Africa. I decided on Kilimanjaro.

John and I also began researching guides. I had read a book entitled *Detectives on Everest* and John Steiner had read a book entitled *Ghosts of Everest*. Both books were coauthored by Eric Simonson, founding partner of International Mountain Guides of Tacoma, Washington, and who was the leader of the 1999 Mallory and Irving research expedition that found legendary British climber George Mallory's body at 28,000 ft. on the north slopes of Everest. Mallory and Andrew Irving disappeared into the myths of history on June 8, 1924, when they were last seen

climbing high toward the then-unconquered Everest summit. There has always been speculation whether Mallory and Irving summited Mount Everest some 29 years before Sir Edmund Hillary. The mystery has not been solved yet. Eric himself has summited Everest twice and is known as the most experienced Himalayan expedition organizer in the United States and possibly the world. At any rate, John and I had a conference call with Eric about personally guiding us up Kilimanjaro.

Eric agreed to guide John and me but went one step further. He told us that if we could put together a group of ten people we would not be lumped in with another group. In other words, we could have our own private expedition. I invited my two sons-in-law, John Laughlin from Memphis, Tennessee, and Riley Roby, from here in Montgomery, and my son Mitchell. They reluctantly accepted, especially after discussing it with the rest of the family. John Steiner put together the rest of the group, including two women climbers, Becky Risteen from Montgomery and Johanna Heywood from Chattanooga, Tennessee. Everyone else was from Alabama, including Todd Broome, who is a medical doctor from Huntsville.

Kilimanjaro is one of the world's seven summits; consequently, people from all over the world who aspire to climb the world's seven summits go there. The mountain itself is the tallest freestanding mountain in the world. That is because it is not part of any range but simply stands alone on the Kenya-Tanzania border. It rises more than 5,800 meters (19,030 ft.) into a clear blue equatorial sky. The top of the mountain is covered in glaciers. Some are 150 to 250 ft. high. Sadly, the glaciers are melting and, if they continue to melt at the present rate, scientists predict by the year 2050 they will be gone. The base of Mount Kilimanjaro, which begins in a tropical rain forest, is home to the Chagga and Maasai people, two of Africa's most colorful and fascinating communities—the one an industrious agricultural Bantu group, and the other an Nilotic tribe of fierce and noble warriors.

Training, of course, is the most important preparation one can do before climbing one of the world's major mountains. In addition to my five and one-half mile power walk that I do every morning, about three months before our scheduled departure, John Steiner, J. B. Perrine, Riley, Mitchell, and I would meet at the Federal Courthouse every other day at 5:00 p.m. We would put on our backpacks in my chambers, take the elevator to the basement, and climb six flights of stairs. We would then ride the elevator down and repeat the process until we were able to do the six flights forty times in about an hour and a half. As

best we figured, this would be equivalent to a vertical ascent of about 300 ft. Climbing real stairs, in my view, is the most important part of one's training because it builds the main leg muscles used in climbing and it simulates more than anything else, minus the altitude, what climbing a mountain is really like.

Mike Dunnahoo told me that to get to Camp III on Mount Everest, you literally go straight up the Lhotse face. I asked him to describe what it was like and he said it was like climbing the steepest set of stairs you have ever climbed. Other people trained differently. Sam Adams, for example, put his backpack on every day and walked from his office in downtown Montgomery out to East Chase Mall and back going up and down the various ramps where there are overpasses. Sam told me that on two occasions he was stopped by the police. I guess it was because he looked like a hobo with his backpack and such. Once we started climbing Mount Kilimanjaro, it took me about 24 hours to discern who was in shape and who was not.

Finally, although it is not a technical climb like Mount Rainier where one must deal with avalanches and crevasses, one makes a mistake if he or she underestimates this mountain. People die on it every year, mostly from altitude sickness. Some four months after our climb, three people died below the Arrow glacier at about 15,000 ft. when a chunk of the glacier broke off, started a rockslide, and buried them alive. One of my pictures has me standing about 80 ft. below where they were camped. Although challenging and rewarding, mountaineering can be a dangerous business. And now we begin the journey.



Londorosi Gate on the west side of the mountain — about 2 miles to the Kenya border



Me with the Maasai — the most feared warriors in Africa



On our way to Camp I

Monday and Tuesday 9/12/05 and 9/13/05:

Yesterday, my son-in-law Riley rented a large van to take his father Jim Roby, my son Mitchell, my son-in-law John (Sam Adams rode with John Steiner and J.B. Perrine in a separate vehicle) and me, to the Atlanta Airport. K M Airlines was impressive. We had an uneventful flight to Amsterdam where we met up with our guide, Eric Simonson. We had about an hour layover before we flew to Kilimanjaro International Airport. Altogether, we have been flying for 20 hours. All of the group's luggage made it. I can't believe we are in Tanzania, Africa. It was about a 10-minute ride to the Keys Hotel, which is really nice! Tomorrow we pack, and Thursday we actually begin our climb.

Wednesday, 9/14:

A day to relax and pack. Packing is so important. I am thankful Mike Dunnahoo taught me how to pack when we went to Mount Rainier. Our bag going up cannot weigh more than 30 lbs. The first time mine was weighed, it came in at 40! Mine was not the heaviest. Mitchell did great; his was under the first time. So much for two pairs of boots—the Lowas will have to stay behind. Also, Beth will be distressed, but food weighs a lot and much of it will need to stay behind as well. She sent several pounds of oatmeal cookies.

My backpack weighs about 10 lbs. Eric would like to see it at 20, but I told him I could handle the weight and I figure as we go higher it will weigh less because of eating food, etc. Even at 10 lbs., it is 10 lbs. less than what I carried up Mount Rainier.

For lunch today we had cheeseburgers with an egg on top. Absolutely delicious. Also, Mitchell and I got to sit next to Eric. What a fascinating guy! He told us, among other things, about finding George Mallory's body on the north face of Everest at 28,000 ft. The artifacts taken off Mallory's body are on loan to a museum in London. As is typical, once lawyers get involved the rights to those things remain a mess.

We have been drinking water all day. It is important to stay well hydrated.

Tomorrow morning we drive to the base of the Great Mountain where we will check in with the rangers and then begin our climb.

Thursday, 9/15:

An interesting day! Rode in three jeeps from the Keys Hotel to the Lemosho gate on the west side of the Great Mountain. It took almost four hours. The abject poverty in this country is beyond belief. You must see it to believe it. My heart breaks, especially for the children. So cute, yet their life expectancy is in the early forties. Many of them are orphans because their parents have died of AIDS.

In addition to the 12 climbers, we have 39 porters. The porters cook for us and carry our heavy bags up the mountain. They are like machines, balancing much weight on top of their heads. We hiked three hours this afternoon ascending from 7,500 ft. to 9,500 ft., where we made Camp I. Everyone did relatively well. I am worried about Becky; she seemed to have some problems and has a bad cough. Mitchell had a bout with diarrhea, but I think he is okay now.

Tomorrow we climb above the tropical rain forest and get out on the Shira Plateau to 12,500 ft. Eric is my tent mate. I slept fitfully at first; maybe better tonight.

Friday, 9/16:

Today, we left Camp I for Camp II at about 8:15 a.m. Breakfast was excellent: porridge (oatmeal) and an omelet. It was a long dusty hike. I am not sure of the mileage, but we went from 9,500 ft. to 12,500 ft. in about 6 1/2 hours.

Although Mitchell and I could see the mountain from our hotel room, we are now at the base of the Great Mountain looking up at the glaciers on the Western Breech. It is breathtaking to say the least!

J. B. led us in a Bible study (we have all been doing a lot of praying), and we all agreed to recommend to Eric to change the route if it means we all have a better shot at the summit. We came as a team and need to do all we can to help each other. Whatever route we take, tomorrow should be an easy day as we continue to acclimatize. Then on to high camp at 15,000 ft.—higher than I have ever



High Camp 15,000 ft.

been. From there, *hopefully* to the summit whatever route Eric chooses to take.

Saturday, 9/17:

Moved to Camp III today. Took a great acclimatization hike on the side to 13,100 ft. This was the highest elevation several people in the group have ever been, including Mitchell. Everyone did okay, but we lost Becky. Mitchell scared me a little, because he got an intense headache. Instead of taking a Diamox, a drug for pulmonary edema, Eric told him to pressure breathe more. Decadron, which we also had, is for cerebral edema. Eric says headaches are caused by a lack of oxygen, not a lack of Diamox! (I will never forget this statement!) Tomorrow I think an emergency vehicle is coming to get Becky.

We are now at the base of the "Great White Mountain." It is fascinating to look up at the incredible glaciers. It is true that when you climb this mountain you go through between four or five climatic zones. Tonight Eric decides which route we go: Western Breech or Machame. Either way, we are going up to 15,000 ft. Machame takes six hours; Western Breech takes two. The difference is in the vertical ascent. I will be interested to hear what our leader says.

Sunday, 9/18:

Moved to Camp IV today without Becky. We lost her at 12,500 ft. They picked her up in an emergency vehicle this morning as we left Camp III. This is the last place on the mountain accessible by any vehicle. There was much hugging and crying. Who knows? I could be next.

Last night we had a frank discussion with Eric about which route to take. Some of us, including me, wanted to do the Western Breech, but I did say we needed to take the route which would give us *all* the best chance to reach the summit. Eric decided on the Machame route. It too is very hard, but probably not as steep as the Western Breech.

Today we hiked more than 10 miles and went as high as 15,000-plus ft. It was the highest any of us, other than Eric of course, has ever been. We all did well with a great climbing cadence. I am so proud of Mitchell. Other than some minor headaches, he has done well. Climb high; sleep low. Tomorrow we go back up to 15,000 ft. At midnight, we leave for the summit!

Monday, 9/19:

The hardest day yet! We are at high camp after hiking more than 10 miles and are above 15,000 ft.—until yesterday, the highest



John with the summit behind him

any of us has ever been. We eat at 6:00 p.m. and then leave at midnight for the summit. We still have an elevation gain to go of over 4,000 ft. Eric thinks we all have a chance to make it. I still have not taken any Diamox, Decadron or other drug, except Advil. I hope I don't need any tomorrow. All of us are dealing with some altitude issues: headaches, blurred vision, etc. At any rate, this final climb is what it is all about. God willing, we will all make the summit.

Tuesday, 9/20:

Eric sets the alarm for 10:30 p.m. As usual I can't sleep before heading to the summit. We ate at 6:00 p.m. and Eric, and I are in our sleeping bags by 7:00 p.m. I rest and look at the tent ceiling trying to psych myself up for the climb. Much of this sport is mental as much as it is physical.

We left at midnight and climbed all night. When we left high camp, it was very cold, but little wind. It is going to get much colder. The last group Eric took up, it was 15 degrees below zero on the summit. This climb was the hardest thing I have ever done. We go from 15,000 ft. to 19,340-plus ft. At 17,500 ft., John Steiner starts showing signs of cerebral edema—the most dangerous! He sees boulders moving and hears orchestra music. After a while, Eric sends John down with a guide. At 18,000 ft., it hits Mitchell and he starts hallucinating. He goes down as well. Also, at 18,000 ft. we saw the most majestic sunrise I have ever witnessed. It was even more beautiful than what I experienced on the summit of Mount Rainier. At approximately 7:30 a.m., the rest of us, somehow, arrive on the summit. We came up on the crater side at a place called Gilman's point, and then hiked to Uhuru Peak—the highest point on the continent of Africa. The glaciers we hiked past are enormous—over 200



Me with "my men" on the Shira Plateau

ft. high in some places. We are far above the clouds. It is breathtaking. What you can see from the highest freestanding mountain in the world is phenomenal. I see why my father-in-law, who went to Africa in the late 1970s on a safari, could see the mountain on a clear day from as far away as Zimbabwe. When we got to the top, most of us had a terrible cough, all caused by the altitude. It was very cold, right at zero degrees. My water bottles had ice in them. I am disappointed Mitchell and John Steiner didn't reach the summit, but I am particularly proud of Mitchell for getting so high. After taking many pictures, we descended going down the same way we came up. That way we could see what we came through. After eating lunch, we left Camp V. We then descended to Camp VI which is at 11,500 ft. (We can breathe again!)

Tomorrow we hike to the Mweka gate, approximately five miles, and then back to the Keys Hotel where we will get our first shower in six days. We all smell wonderful! We will then meet Becky and head for our safari.



J.B., Johanna and Riley on the summit with 150 to 200 ft. high glaciers behind them

Wednesday, 9/21:

Eric and Mitchell roomed together last night because they are both feeling bad and Eric did not want me to get sick. I roomed with John Laughlin. I am so glad Mitchell roomed with Eric. He told Mitchell and me how proud he was that Mitchell went down. Mitchell was so close to the summit that when we got on the crater rim Enreki, our lead African guide, could see Mitchell's headlamp and thought for a minute that he was continuing to ascend. Eric told Mitchell that he did the right thing. I agree! No mountain is worth the risk of dying from pulmonary or cerebral edema.

While the summit is the goal that is not why one climbs mountains. It is to be together with people you enjoy and to enjoy the beauty of God's nature! Mitchell showed great maturity, and he is young enough that he will live to climb many more mountains. Eric, who is truly one of the world's strongest climbers, told me that he failed on his first two attempts on Everest. Mike Dunnahoo, who had a dream since he was 10 years old of reaching the summit of Everest, failed twice—the last time 300 ft. from the summit. One of our guides told Mitchell he did the right thing, and he is alive to tell everyone about how high he got.

The camp last night was big. As usual, the food was good. These porters make some of the best soup I have ever eaten. I slept 12-plus hours. I was so exhausted. Mitchell told me Eric got up three times last night to check on Dr. Broome. Eric thinks he may have pulmonary edema. We almost put him in the emergency Gamet



Riley, Jim, me and John at the summit 19,340 ft.

bag. This is like a depressurization chamber, similar to what one is put in when one rises too fast from scuba diving. His coughing woke me up several times during the night. He easily could have died.

We got up about 6:30 this morning and once again had a great breakfast. We then descended from 11,000 ft. to the Mweka gate.

Disaster struck on the way down. John Steiner fell and broke his leg. Thank God that Dr. Broome was next to John when he fell. Dr. Broome fixed a rough brace, and then two porters carried John down. I think he is going back to the U. S. tonight but I am not sure. They took



John with his broken leg

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him to a local hospital for x-rays. It is true that most climbers who get hurt or killed are on the descent. That is because they are tired and begin to make mistakes.

Tomorrow, we head for the animal safari on the Serengeti and then home. I hate that John will miss this part of the trip. I talked to him briefly tonight, and he has a great attitude. He does not, however, want a local doctor to set his leg.

The hike down today was very hard. We went from 11,000 ft. down to about 5,000-plus feet. As we got lower, it was good to hit some humidity and to breathe more oxygen.

When we got back to the Keys Hotel, I let Mitchell take the first shower. Mitchell said I looked younger. My grey hair had disappeared. It was the dust. I almost hated to take a shower. The grey came back!

Thursday, 9/22:

Left Moshi today. John Steiner, Eric Simonson and Ivan Wright fly back to the states tonight. The rest of our group went to Arusha where we ate lunch at a fabulous hotel and shopped a bit before we caught a flight to the Serengeti.

This afternoon we saw four of the big five—lions, cape buffalo, leopard and elephant. One cape buffalo charged our truck. We also saw antelope, hippos, crocodiles, wildebeest, dik-diks and all species of birds. This place is unbelievable! I have never seen so much game. Had dinner outside where a cape buffalo came within 20 steps of our table. It was a bit disconcerting. There are armed escorts everywhere to protect hotel guests from the wild animals.

This hotel is unbelievable; it is in the middle of nowhere. When we got to our room Mitchell killed a huge spider. There was a can of bug spray in the room. That is a bad sign! I will probably sleep with one eye open all night. I am so sore from the climb I can barely walk.

Friday, 9/23:

Up early this morning at 4:00 a.m. to head out at 5:00 on the hot air balloon ride. I think it may have been the highlight of the trip. The balloon is the third largest hot air balloon in the world. It held 12 passengers plus the pilot. The pilot was a really interesting guy from Great Britain. Once we were up, we went across the Serengeti, which is the size of the country of Belgium, where we saw much game. In fact, we saw three of the big five, including two huge male lions. I could not believe how quiet the balloon was. Of course, it is steered by hot gas and the use of ropes. The landing was a trip as was the takeoff. We were literally on our backs like astronauts. After we landed, right in the middle of about 10,000 tommys, which is a species of antelope, we drank champagne and made toasts.

After breakfast, we left for Ngorongoro. We saw many animals and as we got closer to Ngorongoro, we began to see many Maasi. They are the most fearsome of all African natives. They literally kill all game, including lions, with spears. After a long dusty ride, we arrived at the Ngorongoro Serera Lodge where we will spend the next two nights. From there back to Arusha and then Sunday night, back to the USA.

Saturday, 9/24:

We went down in the Ngorongoro crater today. It looks like the Great Salt Lake in Utah. The animals were incredible. A female and male lion walked between our trucks. Some sort of territorial thing. We also saw a black rhino today. There are only 13 left in this part of Tanzania. Almost extinct I think. I have never seen so many zebras and wildebeest—thousands of them. We saw warthogs, jackals, two cheetahs, lions and the most despicable, the hyenas (fisi). The natives hate them because they think they are evil spirits. I remember from Robert Ruark's books how evil the natives think they are. Actually, they are just wild dogs who act as scavengers.

Tonight was our last night in Africa. The local Maasi put on a great show. They are the most fearsome natives in this part of the world. They dress colorfully, wearing red and purple capes; they are frightful looking people.

Got word John Steiner is okay. Apparently his surgery was successful. I am saddened his trip ended the way it did.

Sunday, 9/25:

I slept great last night; the first good night's sleep since I got to Africa. I think the exhaustion finally settled in. I killed a second spider at 3:00 a.m. this morning. I am surprised I was able to go back to sleep. I fear nothing in this world but spiders. I hate spiders! God should have made nothing with more than four legs.

We left for Kili International Airport but stopped at a hotel 10 minutes away to cleanup and eat. We first fly to Dar Es Salaam, the capital of Tanzania on the Indian Ocean, then to Amsterdam (almost 12 hours), and then nine more to Atlanta.

Sunday (cont'd) and Monday 9/26:

This is a trip I will never forget. This experience with my three men will remain forever etched in my conscience.

While I never say never about anything in life, I think I have climbed my last major mountain. I am getting close to 60 and I have learned one has to be realistic about these things. I only wish I had started climbing 20 years ago when both body and mind were in better shape.

People constantly ask me why did I climb Mount Rainier and Mount Kilimanjaro? I give you the same answer I did three years ago when I quoted John Muir: "Climb the mountains and get their good tidings. Nature's peace will flow into you as sunshine flows into trees. The winds will blow their own freshness into you, and the storms their energy, while cares will drop off like autumn leaves." ■

Judge Dubina thanks his wife, Beth, for all her support.



Judge Joel F. Dubina

Judge Joel F. Dubina is a judge on the Eleventh Circuit Court of Appeals. He graduated from the University of Alabama in 1969 and received his J.D. degree from the Cumberland School of Law in 1973. After practicing law for nine years, he was appointed a United States Magistrate in 1983, a United States District Judge in 1986 by President Ronald Reagan and to the United States Court of Appeals for the Eleventh Circuit in 1990.



The VLP, the Feisty 97-Year-Old and the Crooked Contractor

BY PROFESSOR PAMELA H. BUCY

Guess who wins when the plaintiff is a feisty 97-year old represented by a VLP lawyer, and the defendant is a crooked contractor? Hint: It isn't the contractor.

Betty Brinson¹ was sitting in the tiny, screened-in front porch of her Montgomery home when I arrived on a summer afternoon to talk with her about her VLP case. Her case was over, she had won and she was excited to talk about it. As we sat on her porch, wary neighbors "dropped in," to ensure, I suspect, that Mrs. Brinson's visitor meant no harm.

Although she is 97 years old, Mrs. Brinson could pass for a 70-year-old. Her eyes are bright, her mind is sharp and she is still mad as hell about the contractor who tried to cheat her. Born in 1910, Mrs. Brinson's life has not been easy. Her father died when she was seven years old. She never finished high school, dropping out to go to work. She worked as a maid, earning \$3 per week, working six days a week. Life became easier as she grew into adulthood. She married, and her husband

was a brick mason and worked on houses. He built the house where Mrs. Brinson, now a widow, lives.

Some years after her husband passed away, the floors in Mrs. Brinson's house began to buckle. Her floor surfaces became so uneven that she was scared to go into her kitchen for fear of tripping and falling. Lifting up the linoleum one day, Mrs. Brinson discovered termites, and soft and rotten wood.

Mrs. Brinson hired a contractor to repair her damaged floor. The contractor worked on her floors and submitted his bill, which Mrs. Brinson paid. For a short while, the floors seemed fine. But they began to buckle again. When Mrs. Brinson lifted up linoleum this time, she found the same rotten, squashy wood, now covered with a layer of bricks on which the linoleum rested. Mrs. Brinson sought help and was referred to the Volunteer Lawyers Program, which is how she became a client of Beasley, Allen, Crow, Methvin, Portis & Miles of Montgomery.

Rhon E. Jones, of Beasley, Allen, was at a bar luncheon one day when the attorneys in attendance were asked to sign up for one VLP case.² Jones did. Soon thereafter, Mrs. Brinson became his first VLP client. Jones and two associates in his firm, Kimberly Ward and Alyce Robertson, worked on Mrs. Brinson's case. They hired an expert to look at the floors. They contacted the contractor on their client's behalf. The contractor would not admit fault, repair the floors or return the money he had been paid by Mrs. Brinson. Jones and his firm filed a complaint, conducted discovery and went to trial in district court. Using blown-up pictures of the buckling floors, Alyce Robertson tried the case.

Mrs. Brinson took the stand at trial. According to her lawyers, "She did a good job. She was happy and proud of herself." During cross-examination, insulted by defense counsel's questions, Mrs. Brinson described, in glowing detail, exactly what the defendant had promised, done and not done. At one point during Mrs. Brinson's cross-exam, the court offered advice to the defense counsel, "Well counselor, I think you have asked one question too many."

Mrs. Brinson was victorious at trial, and won a judgment of \$3,500. Collecting the judgment was a problem, however. Jones and his firm filed an execution of judgment which was served by the Montgomery County Sheriff. Eventually, the contractor paid the judgment and Mrs. Brinson was able to get her floors repaired. At least most of them. She ran out of money before she was able to repair all of the buckled floors. At the end of our visit, Mrs. Brinson took me inside her home and pointed proudly to her kitchen and bathroom floors. The floors were flat and straight.

What does Rhon Jones think of Mrs. Brinson? "She was a per-

son without much hope. She asked us to help her through the legal system and we did. The system worked. She got her day in court." What does Mrs. Brinson think about her VLP lawyers? "They are real good lawyers. They got me some help." ■

ENDNOTES

1. A pseudonym.
2. The Volunteer Lawyers Program (VLP) began statewide in Alabama in 1991. Modeled after the highly successful Mobile Bar Association Volunteer Lawyers Program, it provides a way for lawyers in Alabama to help their communities. Attorneys enroll in the program by agreeing to provide up to 20 hours per year of free legal service to poor citizens of Alabama. Cases are referred to the VLP from Legal Services offices around the state. Before referral, the cases are screened for merit and complexity (to see if the case resolvable in 20 hours or less) and the potential client is screened for income eligibility (must live at 125 percent of poverty level, currently \$2,151.08 monthly, for a family of four.)



Professor Pamela H. Boy

Pamela H. Boy is the Bainbridge Professor of Law at the University of Alabama School of Law. She is also a member of the Access to Legal Services Committee and serves the Alabama State Bar as an at-large commissioner.

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WILLS FOR HEROES:

A Program for Lawyers to Give Back to
Those Who Give So Much

BY ALLISON ALFORD INGRAM



“Something for nothing”

That phrase is usually quickly followed by thoughts of “too good to be true” or “there’s got to be a catch.” The Alabama State Bar’s “Wills for Heroes” project provides first-responders, like law enforcement, firefighters and emergency medical personnel, basic estate-planning services for free and it is not “too good to be true.”

Under the leadership of ASB President Sam Crosby, and the guidance of the bar’s Volunteer Lawyers Program Director Linda Lund, Alabama has now become the fifth state to provide free basic estate-planning services to our first-responders. The program has developed through the assistance and hard work of the state bar’s Elder Law Section, Real Property Probate and Trust Section and Young Lawyers’ Section; the Alabama Lawyers Association; and the Alabama Association of Paralegals.

Every day, firefighters, police and emergency medical personnel devote their lives to serving their communities, and they are prepared to pay the ultimate price in the line of duty. The “Wills for Heroes” project began in South Carolina



Among those at the official launching of the "Wills for Heroes" program September 11 in Montgomery were, left to right, Montgomery Police Chief Art Baylor; ASB President Sam Crosby; VLP Director Linda Lund; Montgomery Fire Chief M. Jordan; Deputy Fire Chief J. J. Addie; and Major Celia Dixon, Montgomery Police Department.

following the September 11th attacks, and was created to provide the legal community with a way to show its appreciation for the efforts and sacrifices of these brave men and women. The "Wills for Heroes" project is a national foundation that helps communities, cities and states establish programs to offer first-responders these basis estate-planning services, intending to give them peace of mind by knowing that their affairs are "in order" should the unthinkable occur.

The Alabama "Wills for Heroes" project is computer-driven, enabling lawyers from any practice area to draft a simple will, power of attorney and health care directive for those first-responders who qualify for the program. Each first-responder whose estate is valued at less than \$600,000¹ is eligible for the program. Individuals who require or want a more complex estate plan are directed to consult with an attorney of their choice.

A significant benefit of the "Wills for Heroes" project is that the wills and other documents can be drafted by the lawyers and executed by the first-responder in a single day. Volunteer lawyers and support

staff travel to the fire or police station with laptop computers preloaded with the necessary software and they meet one-on-one with the first-responders. On the day of the event, information from a questionnaire previously distributed and completed by the first-responder is entered into the computer program. The Alabama State Bar, through a partnership with the Wills for Heroes Foundation™, has been provided with a user-friendly software program called HotDocs™ by Lexis-Nexis. HotDocs™ is document-assembly software that converts the information entered in the computer from the questionnaire into a complete document template. The software program simply presents a series of preprogrammed questions that correspond to the questions in the questionnaire completed by the first-responders. Based on the answers the first-responder provides to the questions in the questionnaire, HotDocs™ generates a personalized will, power of attorney and healthcare directive. Once the computer generates the documents, they are printed, reviewed by the lawyer and first responder and, when complete, executed.

By using established computer technology and software, lawyers participating in the program are able to provide personalized documents that have built-in safeguards to ensure that a quality product is delivered to the first responders. This same computer technology allows the "Wills for Heroes" project to be a one-day pro bono project. A number of Alabama law firms have made generous monetary donations that have allowed the Alabama program to purchase new laptop computers and printers for use across the state in these clinics. Our committee expresses our sincerest thanks to the following firms who have made this project a reality: Ball, Ball, Matthews & Novak P.A., Bradley, Arant, Rose & White, LLP, Burr & Forman, LLP, Carr Allison, Hare, Wynn, Newell & Newton, Haskell, Slaughter, Young & Rediker, L.L.C., Johnston, Barton, Proctor & Rose, LLP, Lyons, Pipes & Cook, Marsh, Rickard & Bryan, P.C., Maynard, Cooper & Gale, P.C., McCallum, Methvin & Terrell, P.C., Pittman, Dutton, Kirby & Hellums, P.C., Stone, Granade & Crosby, P.C., Starnes & Atchison, LLP, and Sirote & Permutt, P.C.

Volunteer attorneys and paralegals assisted officers from the Montgomery Police Department prepare, review and execute wills, powers of attorney and advanced health care directives at the September 11 clinic. The second workshop of the "Wills for Heroes" program kicked off in the Mobile area October 22 with a clinic at the Mobile Police Department. Clinics will be held for the Birmingham Fire Department November 13, 14 and 15. To get involved, go to www.alabar.org.



Alabama kicked off its program in Montgomery on September 11th. The Montgomery Police Department hosted the clinic, which started at 1 p.m. Six attorney volunteers, three paralegals and an attorney specializing in estate matters worked to provide 23 police officers with basic estate-planning services over the course of the afternoon. The officers were able to complete their appointments in about an hour, and walk away with fully executed wills, powers of attorney and health care directives. Montgomery attorney Brooke Emfinger said, "The 'Wills for Heroes' program truly provides a unique opportunity to serve the police officers, firefighters and other first-responders who work to enhance the quality of life in our community. One Montgomery police officer stated that his wife and family would 'rest easier' knowing that they had a plan for the future in the event something unexpected happened to him. It was truly rewarding to know that my simple act of service was so appreciated."

Now that the first clinic has been successfully completed, follow-up clinics for the

Montgomery Police Department were held October and this month. The program also traveled around the state, with clinics held Mobile in October and in Birmingham this month. Clinics are planned for Huntsville and Dothan in early 2008. In addition, the project is receiving a lot of attention, and requests for services are being received from law enforcement and fire personnel all over the state. The program's goal is to offer these services to law enforcement, firefighters and emergency medical personnel across the entire state, in both large and small communities.

Because the goal is to provide these services statewide, volunteer lawyers and paralegals in every community are needed to help participate in clinics. We are asking individuals to sign up, as well as encouraging firms and other legal organizations to sponsor a clinic. A lawyer does not have to be an "estate lawyer" to be eligible to assist first-responders. A free one-hour Web-based CLE course is available to participating lawyers and serves as a "refresher" on basic estate law matters and issues that typically come up in the program. In addition, first-responders are given a questionnaire to review and complete prior to the event date. The questionnaire includes a brief explanation of the planning process and requests key information that each first-responder must provide in order to complete the documents. An attorney specializing in trusts and estates will be available on the day of each program to handle any unforeseen questions or circumstances that may arise.

Please consider volunteering for this very worthwhile project. It is something that is within the ability of all lawyers in our state, and can really make a difference in the life of a first-responder's family. Attorney/volunteer Bryan Paul of Montgomery said, "Participating in the 'Wills for Heroes' clinic was a wonderful and rewarding experience. By using the questionnaire, computer system and HotDocs™ combination, the attorney is basically responsible for data entry and explaining simple estate planning concepts. These concepts are covered in CLE materials provided before the clinic occurs. Considering how easy it was to participate and make an impact in the lives of the participants from the Montgomery Police Department, I highly recommend that other attorneys from around the state pitch in when the pro-

Allison Alford Ingram

Allison Alford Ingram serves as the chair of the "Wills for Heroes" committee.

Rule 1.15

SAFEKEEPING PROPERTY

Definitions. As used in this rule, the terms below shall have the following meaning:

“DL TA account” means a pooled interest- or dividend-bearing trust account benefiting the Alabama Law Foundation or the Alabama Civil Justice Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons;

“Eligible institution” means any bank or savings and loan association authorized by federal or state laws to do business in Alabama, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Alabama. Eligible institutions must meet the requirements set out in section (g).

“Interest- or dividend-bearing trust account” means a federally insured checking account or a business checking account with an automated investment feature, such as an overnight sweep and investment in a government money market fund or daily (overnight) financial-institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is “well capitalized” or “adequately capitalized” as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, have total assets of at least \$250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay except as permitted by law.

“Allowable, Reasonable Fees” means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) Federal deposit insurance fees, (5) sweep fees, and (6) a reasonable IOLTA account administrative fee.

“U.S. Government Securities” means U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

CLE COURSE SEARCH

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www.alabar.org/cle



www.alabar.org/cle

- (a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No funds of a lawyer shall be deposited in such a trust account, except (1) un-earned attorney fees that are being held until earned, and (2) funds sufficient to pay bank service charges on that account or to obtain a waiver thereof. Interest or dividends, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

- (b) Upon receiving funds or other property in which a client or third person has

an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds; provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse the client's uncollected funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of noncollection, replace the funds in the separate account.
- (e) A lawyer shall request that the financial institution where the lawyer maintains a trust account file a report to the Office of General Counsel of the Alabama State Bar in every instance where a properly payable item or order to pay is presented against a lawyer's trust account with insufficient funds to pay the item or order when presented and either (1) the item or payment order is returned because there are

insufficient funds in the account to pay the item or order or, (2) if the request is honored by the financial institution, and overdraft created thereby is not paid within 3 business days of the date the financial institution sends notification of the overdraft to the lawyer. The report of the financial institution shall contain the same information, or a copy of that information, forwarded to the lawyer who presented the item or order.

A lawyer shall enter into an agreement with the financial institution that holds the lawyer's trust account pursuant to which the financial institution agrees to file the report required by this Rule. Every lawyer shall have the duty to assure that his or her trust accounts maintained with a financial institution in Alabama are pursuant to such an agreement. This duty belongs to the lawyer and not to the financial institution. The filing of a report with the Office of General Counsel pursuant to this paragraph shall constitute a proper basis for an investigation by the Office of General Counsel of the lawyer who is the subject of the report, pursuant to the Alabama Rules of Disciplinary Procedure. Nothing in this Rule shall preclude a financial institution from charging a lawyer or a law firm a fee for producing the report and maintaining the records required by this Rule. Every lawyer and law firm maintaining a trust account in Alabama shall hereby be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall hold harmless the financial institution for its compliance with the aforesaid reporting and production requirements. Neither the agreement with the financial institution nor the reporting or production of records by a financial institution made pursuant to this Rule shall be deemed to create in the financial institution a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of a lawyer's overdrawing a trust account.

A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

- (f) A lawyer, except a lawyer not engaged in active practice pursuant to Alabama Code 1975, § 34-3-17 and -18, shall maintain a separate account to hold funds of a client or third person. Every lawyer admitted to practice in this state shall annually certify to the Secretary of the Alabama State Bar that all IOLTA eligible funds are held in an IOLTA Account, or that the lawyer is exempt because the lawyer: does not have an office within the State of Alabama; does not hold funds for clients or third persons, is not engaged in the active practice of law; is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law; or is a corporate or other in-house counsel or teacher of law and is not otherwise engaged in the private practice of law. Certification may be made by a firm on behalf of all lawyers in a firm.
- (g) Lawyers shall hold in IOLTA accounts all funds of clients or third persons that are nominal in amount or that the lawyer expects to be held for a short period and from which no income could be earned for the client or third person in excess of the costs incurred to secure such income. In no event shall a lawyer receive the interest on an IOLTA account.

In determining whether to deposit funds into an IOLTA account, a lawyer shall consider the following factors: the amount of interest or dividends likely

to be earned during the period the funds are expected to be deposited, as well as the estimated cost of establishing and administering a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person, the ability of financial institutions or lawyers or law firms to calculate and pay interest to individual clients or third persons; and any other circumstances that affects the ability of the client or third person funds to earn income in excess of the costs incurred to secure such income. A lawyer shall review the IOLTA account at reasonable intervals to determine whether

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changed circumstances require further action with respect to the funds of any client or third person.

The determination of whether the funds of a client or third person can earn income in excess of costs as provided in (g) above shall rest in the sound judgment of the lawyer or law firm, and no lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment.

Offering IOLTA accounts is voluntary for financial institutions. Lawyers may only place trust accounts in eligible institutions that meet the requirements of this rule, including:

Interest Rates: Eligible institutions shall pay on IOLTA accounts the highest interest rate or dividend the financial institution offers to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance and other eligibility requirements, if any.

A financial institution shall pay on IOLTA accounts the highest interest rate or dividend generally available among the following product types or any comparable product type (if the product type is available from the financial institution to its non-IOLTA customers) by either using the identified product type as an IOLTA account or paying the equivalent interest rate or dividend on the existing IOLTA account in lieu of actually establishing the highest interest rate or dividend product :

1. An interest bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest.
2. A business checking account with an automated investment feature, such as an overnight sweep and investment in repurchase agreements or money market funds as described in the definitions.

3. A government (such as for municipal deposits) interest-bearing checking account.
4. A checking account paying preferred interest rates, such as money market or indexed rates.
5. Any other suitable interest- or dividend- bearing account offered by the institution to its non-IOLTA customers.

As an alternative, the financial institution may pay:

6. An amount on funds, net of allowable reasonable fees, which would otherwise qualify for investment options described at (g)(1-4) equal to 55% of the Federal Funds Target Rate as of the first business day of the quarter or other IOLTA remitting period.

The following considerations will apply to determinations of comparability:

1. Accounts which have limited check writing capability required by law or government regulation may not be considered as comparable to IOLTA in Alabama. This, however, is distinguished from checking accounts which pay money market interest rates on account balances without the check writing limitations. Such accounts are included in the Option 4 class identified above. Additionally, rates that are not generally available to other account holders, such as special promotional rates used to attract new customers, are not considered for comparability in Alabama.
2. For the purpose of determining compliance with the above provisions, all participating financial institutions shall report in a form and manner prescribed by the Alabama Law Foundation and Alabama Civil Justice Foundation the highest interest or dividend rate for each of the accounts they

offer within the above listed account types. The foundations will certify participating financial institutions compliance with this rule on an annual basis.

3. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the eligible institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account.

Pursuant to a written agreement between the lawyer and the eligible institution, interest on the IOLTA account shall be remitted, as the lawyer shall designate, to the Alabama Law Foundation or the Alabama Civil Justice Foundation, at least quarterly.

Interest or dividends shall be calculated in accordance with the institution's standard practice for non-IOLTA account customers, less reasonable fees, if any, in connection with the deposited funds.

Allowable Reasonable Fees, as defined in this Rule, are the only service charges or fees permitted to be deducted from interest or dividend earned on IOLTA accounts. Allowable Reasonable Fees may be deducted from interest or dividends on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for its non-IOLTA customers. All other fees and charges shall not be assessed against the interest or dividends earned on the IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

Fees or charges in excess of the interest or dividend earned on the account for any month or quarter shall not be taken from interest or dividend earned on other IOLTA accounts or from the principal of the account.

Financial institutions may elect to pay higher rates than required by this rule or waive any or all fees on IOLTA accounts.

A statement should be transmitted to the Alabama Law Foundation or the Alabama Civil Justice Foundation with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the rate of interest applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, if any, the average account balance for the remittance period, and the net amount of interest or dividend remitted for the period. A copy of the statement shall also be sent to the lawyer.

(h) All interest or dividends transmitted to and received by the Alabama Law Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

- (1) to provide legal aid to the poor;
- (2) to provide law student loans;
- (3) to provide for the administration of justice;
- (4) to provide law-related educational programs to the public;
- (5) to help maintain public law libraries; and
- (6) for such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(i) All interest or dividends transmitted to and received by the Alabama Civil Justice Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

- (1) to provide financial assistance to organizations or groups providing aid or assistance to:

(2) underprivileged children;

(3) traumatically injured children or adults;

(4) the needy;

(5) handicapped children or adults; or

(6) drug and alcohol rehabilitation programs.

(7) to be used in such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(j) A lawyer shall not fail to produce, at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board, any of the records required to be maintained by these Rules. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or the Rules of Disciplinary Procedure for the production of documents and evidence. ■



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EMPLOYER'S SUBROGATION IN THIRD-PARTY CASES:

Does Anyone Really Understand It?

BY G. WHIT DRAKE

Of all the calculations and formulas used to calculate benefits and liabilities in a worker's compensation case, none have proven to be as frustrating and perplexing as the formula used to determine the subrogation rights of the employer when there has been a third-party recovery by the injured employee. Alabama Code Section 25-5-11 bestows subrogation rights to the employer/worker's compensation carrier when benefits have been paid and the employee makes a separate third-party recovery. However, § 25-5-11(e) provides that the employer is responsible for a pro rata share of attorney's fees and expenses incurred in bringing about the third-party recovery. The pertinent language is as follows:

'In a settlement made under this section with a third-party by the employee or, in the case of his death, by his dependents, the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third-party, either with or without a civil action, in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from such third-party.'

What does all this mean? It means that the employer, who benefits from the third-party recovery, does not get a 'free ride.' While some commentators argue that the subrogation provisions of this Alabama Code section are largely aimed at preventing a double-recovery by the employee, it is clear that a separate and important goal is to prevent the employer from benefiting from the employee's third-party recovery and not paying their fair share of the attorney fees incurred by the employee. Stated differently, the employer must take the bitter with the sweet. "The obvious purpose of [this section] is to require the employer to pay something for having been saved from paying compensation which he would

have paid but for the third-party action." [emphasis added] *J. B. Baggett v. Webb*, 248 So. 2d (Ala. Civ. App. 1971).

The first question to be answered is whether or not there has been a recovery from a "third-party." Mere recovery by an employee, after an on-the-job injury, from someone other than the employer does not always equate to a "third-party recovery." For example, the employer has no subrogation rights against an employee's recovery of uninsured/underinsured motorist benefits. *Bunkley v. Bunkley Air Conditioning, Inc.*, 688 So. 2d 827 (Ala. Civ. App. 1996). § 25-5-11 only applies to a recovery from a "third-party wrongdoer," not from a "contract of insurance that is separate and apart from the wrongful conduct that injures the worker." *Id.* at 831-832. That said, once it is apparent that the recovery is from a "third-party wrongdoer," we begin the analysis to determine the amount owed, if any, to the employer.

The Alabama Court of Civil Appeals squarely addressed this issue for the first time in *Fitch v. Insurance Company of North America*, 98 So. 2d 1017 (Ala. Civ. App. 1981). For instances where an employee receives worker's compensation benefits and also obtains a third-party recovery, the court adopted an algebraic formula to ascertain the pro rata share of the attorney's fee owed by the employer. It is as follows:

$$\text{Employer's Reduced Liability} = \frac{\text{Third-Party Recovery}}{\text{Third-Party Recovery} + \text{Attorney's Fees \& Expenses}} \times \text{X}$$

- "X" equals the employer's liability for attorney's fees and expenses. Ignoring the complicated nature of this formula, it has been loosely expressed in case law as follows: "[the employer] is obligated to pay one-third of the amount

reimbursed to it and one-third of the future liability from which it is released as its proportionate amount of this attorney's fee. [emphasis added] *Maryland Casualty Company v. Tiffin*, 537 So. 2d 469 (Ala. 1988). In other words, whatever the attorney's contract is, whether it be one-third (as in *Tiffin*), forty percent, or fifty percent, the employer's past subrogation interest is reduced by a proportionate share of the attorney's fees and they must also pay the same proportion of their future liability, which was reduced or extinguished by virtue of the third party settlement. The fact that the employer or worker's compensation carrier intervenes in the third-party lawsuit or participates through an attorney is irrelevant. The employer must still pay their proportionate share under the *Fitch* formula. See *Lewis Trucking Company v. Skinner*, 671 So. 2d 696 (Ala. Civ. App. 1995).

- b. **"Employer's Reduced Liability"** represents the amount "saved" by the employer due to the third-party settlement. In most third-party settlements, it will usually be the total amount of worker's compensation benefits paid by the employer, plus any future liability extinguished by virtue of the third-party settlement. If the worker's compensation case is still pending at the time of the third-party settlement, the future liability can be established by agreement.
- c. **"Third-Party Recovery"** is simply the full amount of the third-party settlement.
- d. **"Attorney Fees and Expenses"** is the Plaintiff's attorney fee plus expenses incurred. "The *Fitch* formula allows for expenses." *Lewis Trucking v. Skinner*, 671 So.2d 696 (Ala.Civ.App. 1995)

The employee in *Fitch* received \$2,170.79 in worker's compensation benefits after an on-the-job injury. She then settled her third-party suit for \$3,000. She had a fifty-percent contingency fee arrangement with her lawyer. No mention was made of any future liability owed from the employer. Applying the newly established formula, "x" was determined to be \$1,829.14. The Court simply deducted this amount from the total subrogation claimed to arrive at \$770.86 the net amount owed to the employer.

The first step in this whole process is relatively simple, i.e. ascertaining the value of "x". However, this is where the simplicity ends. Is "x" credited solely against past benefits paid by the employer, as in *Fitch*? Is the employer entitled to expunge their future liability and enjoy a free ride, courtesy of the efforts by the employee and his attorney? What if the third-party settlement is less than the value of the worker's compensation case? The answers to these questions have not always been clear. However, by analyzing the pertinent statutory language and the case law interpreting same, we can see that arriving at "x" is simply the starting point in the analysis.

Perhaps the easiest way to conceptualize the application of the *Fitch* formula, although overly simplified, is to understand that the employer must pay an attorney's fee on what they've paid and on what they are relieved of paying as a result of the third-party settlement. For example, if the employee has a 50% contract with his attorney, the employer must pay 50% "of all sums that it recovers from the common fund and 50% of all sums that it is relieved of paying due to the common fund." [emphasis added] *Maryland Casualty Company v. Tiffin*, 537 So. 2d 469 (Ala. 1988). If no future worker's compensation benefits are owed by the employer, then the calculation is easy, as it was in *Fitch* and *Maryland Casualty*. In other words, "x" is simply credited against past worker's compensation benefits paid.

In those situations where the employee obtains a third-party recovery "mid-stream", i.e., the employer paid initial benefits and future worker's compensation benefits would otherwise still be owing, it becomes more complicated. The value of "x" is first credited against past subrogation. If "x" is more than the past subrogation, the difference is added to the employer's future liability. Phrased differently, the value of "x" is added to the present and future liabilities of the employer and offsets any subrogation for past benefits paid.

In *South Alabama Utilities v. Lambert*, 2006 WL 3041500 (Ala. Civ. App.), the court confronted the issue of a third-party recovery that was worth significantly less than the value of the worker's compensation liability. After applying the *Fitch* formula and arriving at "x", the court noted that the employer must be credited with the entire third-party settlement. That is to say the employer is entitled to apply the third-party recovery as a credit against its paid liabilities as well as its future, unpaid liabilities. However, *Lambert* dispensed with the notion that a substantial third-party recovery necessarily expunges the employer's future liability. After being credited with the employee's third-party settlement, additional compensation may be due from the employer. Even after receiving credit for the substantial third-party recovery of \$300,000, the employer in *Lambert* still owed \$151,011.23 due to the inclusion of "x" in their liabilities.

The *Lambert* court stands for two important propositions, a) the employer must get full credit for any third-party recovery; and b) the employee's attorney should not let the employer walk away from further responsibility when the third-party recovery is substantially eclipsed by the value of the worker's compensation case, such as when the third-party liability is weak but the employee is permanently and totally disabled. In such an instance, *Fitch* operates to require the employer's contribution of



its pro rata share of attorney's fees but preserves any residual worker's compensation liability.

Since the *Fitch* decision, two important changes have occurred that were initially viewed as positive for the employer but in reality have equally assisted the employee. Before 1992, the definition of "compensation", for subrogation purposes, only included worker's compensation benefits, not medical payments. In other words, an employer's subrogation interest did not include the amounts they had paid in medical treatments for the employee. The definition of "compensation" was changed to include medical bills. 25-5-11(a), Code of Alabama. As such, subrogation interests of the employer became much larger and enhanced efforts were directed at subrogating in third-party cases.

The second significant change came in 1998 when the Supreme Court ruled that an employer's subrogation rights attach not only to past medical benefits, but to future benefits that have not yet been paid. *Ex Parte B E & K Construction Company*, 728 So. 2d 81 (Ala. 1998). This was a dramatic shift from previous court decisions.

While both of the above changes appear to be "pro-employer", the *Fitch* formula operates as a great equalizer and returns the parties back to a level playing field. Under a current *Fitch* analysis, both the past medical bills and future medical bills have to be added to the "employer's reduced liability". Thus, the above

changes have resulted in "x" being larger, requiring a corresponding reduction in the employer's subrogation interest. Essentially, this works out to be a "catch-22" for the employer's lawyer when he argues that the future medical bills will be substantial. The greater the future medical bills, the larger "x" becomes. Accordingly, the parties should attempt to agree on a number that represents the future medical bills to be incurred. This total amount is then plugged into the *Fitch* formula and serves as a reduction in the employer's credit for future medical expenses. See *Miller and Miller Construction Co. Inc. v. Madewell*, 901 So. 2d 73 (Ala. Civ. App. 2004).

In an ordinary third-party settlement where future medical bills were claimed, we can see how an employer might claim a "future medical credit" to off-set their liability for medical treatment. We can also see how *Fitch* operates to re-distribute that credit back into "x". From a practical standpoint, it is incumbent on the employer's attorney to establish what portion of the third-party settlement is attributable to future medical expenses. See *Ex Parte Williams*, 895 So. 2d 924 (Ala. 2004). Additionally, in the context of proving the future medical credit, the employer would have the same burden as the employee in his third-party case, i.e. the employer would have to prove the probability (not possibility) of the future treatment, that it will be medically necessary and further, that the charges will be reasonable and customary.

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Let us now look at a realistic but simple example of the *Fitch* formula in operation:

John Plaintiff is injured on the job due to a defective ladder. He sustains a severely fractured leg and requires surgery. He ultimately returns to work and settles his worker's compensation case for \$20,000, based on an impairment to his lower extremity. No future surgery is indicated. His employer paid a total of \$15,000 for medical treatment and \$5,000 in temporary disability benefits. His lawyer's investigation reveals that a local fabricator had designed the ladder and that it violated OSHA regulations in several respects.

A negligence action is brought against the fabricator and results in a recovery of \$80,000. Prior to settlement, John and his attorney receive a letter from the employer demanding reimbursement of the \$40,000 paid in benefits when the third-party case settles. John's attorney has a 50% fee arrangement and incurred \$5,000 in expenses. We will also assume that the attorney's fee is \$21,250. Deducting this amount from the claimed subrogation leaves \$18,750 for the employer. Assuming the attorney first deducts his expenses off-the-top then deducts 50% of the remainder, \$37,500 is left over. After deducting the employer's portion from this amount, John ends up with a net recovery of \$18,750 and he keeps the \$20,000 he already received from the worker's compensation settlement. Accordingly, he ends up with all his medical bills paid, \$5,000 in off-work benefits, plus a recovery of \$38,750.

In the above example, the primary benefit to the attorney is that the application of *Fitch* allows him to settle the case and still put a significant sum in his client's pocket. Without the ability to reduce an employer's subrogation interest, many third-party cases, even those with good liability, would either be abandoned

as a waste of time or tried to a jury because the total subrogation amount eclipses what would be left for the employee after paying his attorney from the proposed third-party settlement. For me personally, the application of *Fitch* has allowed me to settle hundreds of cases that would have otherwise been tried to a jury if the subrogation could not have been reduced.

For the employee's attorney, he may at some point question the wisdom of pursuing the worker's compensation case and instead, opt solely for the third-party route to avoid the above mathematical quagmire. However, there are several valid reasons why he should not choose to do so. First, very few third-party cases are "sure-things". Secondly, the law allows the employee to pursue both claims at the same time, providing a sense of security that a recovery will be had from someone. *Baggett v. Webb*, 28 So.2d 275 (Ala.Civ.App 1971). Finally, the application of the *Fitch* formula will decrease any subrogation interest owing to the employer, thereby increasing the net recovery to the employee.

While there have only been a handful of cases to actually articulate and apply the *Fitch* formula, hopefully this article will assist members of the bar who regularly represent employers or employees in situations where an on-the-job injury results in a third-party recovery. ■



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COURTS DISAGREE: *Is Arbitration a “Class” Act?*

BY RANDALL D. QUARLES

Arbitration clauses in agreements between businesses and their customers often include a waiver of the customer's right to assert claims on behalf of a class. Whether such a waiver can be enforced, though, remains an open question. Recent federal and state court decisions provide three answers: yes, no and maybe.

Class-action waivers are understandably a big issue in consumer litigation. Businesses that may very much prefer to have arbitrators rather than juries decide individual claims do *not* want to arbitrate class claims. Because arbitrators' decisions generally cannot be appealed, the risk of a large, unappealable class award can be an arbitration poison pill. On the other side of the table, the enforceability of a class-action waiver can mean the difference between a possible individual recovery of a few dollars, or a substantial class-wide award or settlement carrying a hefty fee component for class counsel.

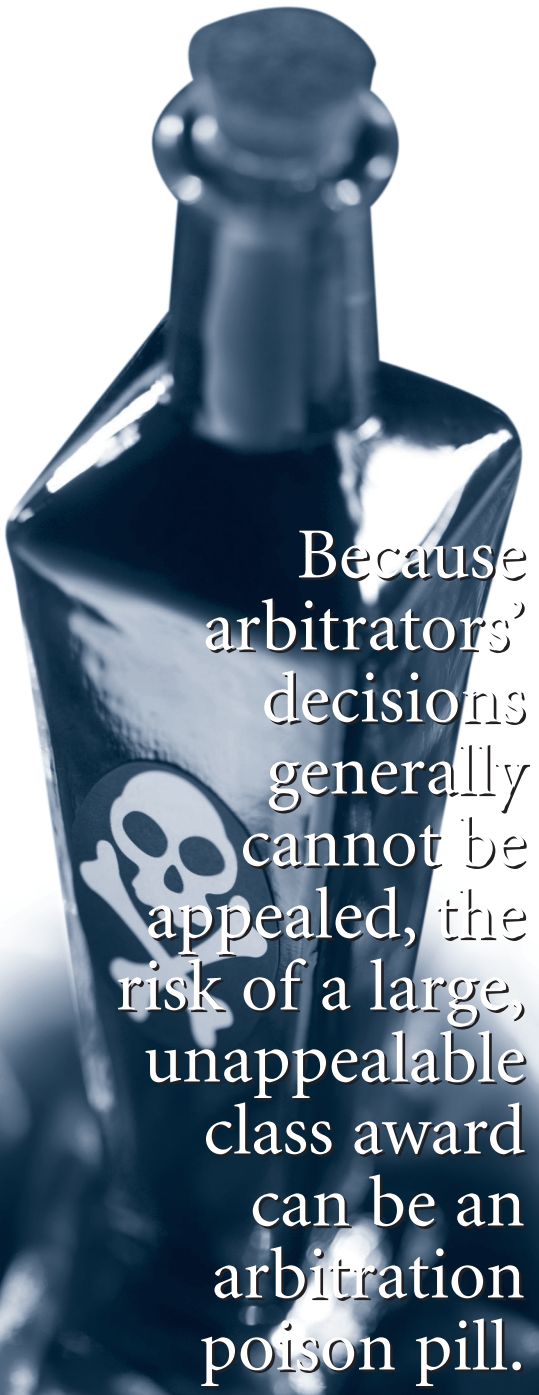
The Meaning of Unconscionable

The buzzword in the debate is “unconscionable.” Critics denounce class-action bans as the unconscionable equivalent of free passes for harmful business practices. Where each wronged consumer has only a handful of dollars at stake, the reasoning goes, few if any will spend the time and money to seek redress *individually*. An offending business will effectively be “shielded” from significant exposure “even in cases where it has violated the law.” *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006). Thus, the United States Court of Appeals for the First Circuit worried in *Kristian*, “[p]laintiffs will be unable to vindicate their statutory rights.” *Id.*

Other courts do not find it unconscionable to require parties to abide by their own contracts and to comply with the pro-arbitration policy mandated by the Federal Arbitration Act (the “FAA”) 9 U.S.C. § 1 *et seq.* Some state statutes favor arbitration, too. As one court has explained: “We cannot ignore the strong policy, made clear in both federal and Maryland law, that favors the enforcement of arbitration provisions.” *Walther v. Sovereign Bank*, 386 Md. 412, 438, 872 A.2d 735, 751 (Md. Ct. App. 2005) (holding that a class-action ban was not unconscionable). See also *Hayes v. County Bank*, 26 A.D.3d 465, 467, 811 N.Y.S.2d 741, 743 (N.Y. App. Div. 2006) (“Furthermore, the fact that the arbitration agreements effectively preclude [a plaintiff] from pursuing a class action does not alone render them substantively unconscionable.”).¹

The Importance of Class Actions

The inconsistent jurisprudence on class-action waivers reflects courts' varying attitudes about the role of class actions in contemporary litigation. The United States Supreme Court has expressly held that a plaintiff does *not* have an inviolable *right* to prosecute a class action in an employment lawsuit. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that the arbitration of a federal age-discrimination claim could be compelled even if a class action were unavailable in that forum. 500 U.S. 20, 32 (1991). In a later, fractured decision with no majority opinion, the Court tacitly acknowledged that a class action is not a matter of right in a consumer context, either. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *Bazzle's* four-justice plurality



Because arbitrators' decisions generally cannot be appealed, the risk of a large, unappealable class award can be an arbitration poison pill.

declared that, where an arbitration agreement is silent on the point, it is up to the arbitrator to determine whether a class action may be maintained. None of the concurring or dissenting opinions in *Bazzle* indicated that the ability to prosecute a class claim is sacrosanct.²

But, while there is no nonwaivable right to assert claims on behalf of a putative class, neither *Gilmer* nor *Baz* held that a court must always enforce class-action waivers in arbitration agreements. Lower federal courts and state courts have put their own spins on the issue, often based on case-specific notions of fairness. In the resulting mishmash of decisions, virtually identical arbitration agreements have met different fates under indistinguishable facts.

Class Actions as Mere Procedural Tools

One judicial school of thought regards a class action as nothing more than a procedural mechanism that litigants may forego in exchange for the benefits of arbitration. For example, the North Dakota Supreme Court, enforcing a class-action waiver, declared that “[t]he right to bring an action as a class action is purely a procedural right” and “not a substantive remedy.” *Strand v. U.S. Bank National Ass’n*, 33 N.W.2d 918, 926 (N.D. 2005). Similarly, the United States Courts of Appeals for the Fifth Circuit and the Eleventh Circuit lumped class actions together with other “litigation devices that may not be available in an arbitration [as] part and parcel of arbitration’s ability to offer simplicity, informality, and expedition.” *Caley v. Gulfstream Aerospace Corp.*, 28 F.3d 139, 138 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 39 F.3d 159, 174 (5th Cir. 2004) (citations and internal quotation marks omitted).

The Tennessee Court of Appeals, applying Utah contract law, also declared that a class-action waiver neither exculpated the defendant nor precluded any substantive remedies. *Spann v. American Express Travel Related Services Co.*, 224 S.W.3d 698 (Tenn. Ct. App. 2006). Said the Tennessee court: “There is nothing particularly shocking about requiring [plaintiffs] to

resolve their claims against . . . defendants on an individual basis.” *Id.* at 714.

Interestingly, even before *Spann* was released, Utah’s legislature entered the fray to declare unequivocally by statute that class-action waivers are valid in at least some types of consumer actions governed by that state’s law. See UTAH CODE ANN. § 70C-4-105(1) (effective March 15, 2006, and authorizing waivers of class actions in open-end consumer credit contracts).

“Substantive” Aspects of Class Actions

Other courts see class actions as an essential cog in the wheels of justice, particularly for consumers with relatively small claims and in other situations where individual actions might be financially impractical. The First Circuit and the California Supreme Court are among those that have taken a fairly hard line against class-action waivers. The First Circuit acknowledged on one hand that class actions are a procedural mechanism rather than a substantive or statutory right, but it basically brushed away any such distinction with the declaration that “we cannot ignore the substantive implications of this procedural mechanism.” *Kristian*, 4 F.3d at 54 (emphasis added). By rendering a private antitrust enforcement action impractical, the First Circuit concluded, a class-action waiver frustrated “the social goals of federal and state antitrust laws.” *Id.* at 6.

The California Supreme Court dismissed the “procedural label” as “not helpful.” *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 113 P.3d 1100, 1109 (2005). The court held that, if California law applied to the dispute before it in *Discover Bank*, a credit card holder could not be required to forego a class action against the card issuer. Deriding class-action waivers in consumer contracts as “indisputably one-sided,” the court proclaimed that such a provision is unconscionable if it is “in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually

small sums of money.” 36 Cal. 4th at 162-63, 113 P.3d at 110.³

Attorney’s Fees and Court Alternatives

The availability or unavailability of attorney’s fees for prevailing plaintiffs has influenced many courts in deciding whether to enforce class-action bans. The theory of courts in this grouping is that a potential fee recovery may make it economically feasible for an attorney to take on even a relatively small, individual claim. Thus, in *Schwartz v. Alltel Corp.*, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006), the Ohio Court of Appeals found that an arbitration provision was unconscionable because it “eliminate[d] the right to proceed through a class action and prohibit[ed] an award of attorney fees that are statutorily authorized.” But in *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865, 872 (N.C. Ct. App. 2006), the North Carolina Court of Appeals enforced a class-action ban after noting that a statute allowed the plaintiffs to recover their costs and attorney’s fees if they prevailed individually. Federal courts also have enforced class-action bans in the context of claims under statutes that award attorney’s fees to prevailing plaintiffs. See, e.g., *Livingston v. Associates Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003) (Truth in Lending Act (“TILA”)); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (TILA and the federal Racketeer Influenced and Corrupt Organizations Act).

Also, a contractual provision that allows a claimant to sue in small-claims court rather than submit a claim to arbitration has been a significant factor in some decisions. The Eleventh Circuit is among the courts that have emphasized a small-claims court option as a viable and inexpensive way for a consumer to obtain redress without a class action. *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 88, 879 (11th Cir. 2005).

Nevertheless, the possibility of fee recoveries and small-claims alternatives do not guarantee that a waiver will be enforced. In the First Circuit and the California Supreme Court cases discussed above, a plaintiff’s ability to recover attorney’s fees for an individual claim did not save the

class-action waivers. *Kristian*, 446 F.3d at 58-59 (stating that the complexity and uncertainty of the antitrust issues in that case made it unlikely that an attorney would invest time worth hundreds of thousands of dollars for a small individual claim); *Discover Bank*, 36 Cal.4th at 162, 113 P.3d at 1109-10. Nor was the California Supreme Court impressed by the plaintiff's option to sue in a small-claims court rather than file an individual arbitration claim. *Discover Bank*, 36 Cal. 4th at 162, 113 P.3d at 1110; see also *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 2006 WL 2828664, at *22 (Ill. Oct. 5, 2006) (stating that "the availability of a judicial forum for individual small claims does not render the prohibition on class treatment of plaintiff's claim enforceable").

A potential award of attorney's fees is a factor but not the determinative one under a "sliding-scale approach" to unconscionability announced by the New Jersey Supreme Court. *Delta Funding Corp. v. Harris*, 189 N.J. 28, 40, 912 A.2d 104, 111 (N.J. 2006) (responding to certified questions from the United States Court of Appeals for the Third Circuit).

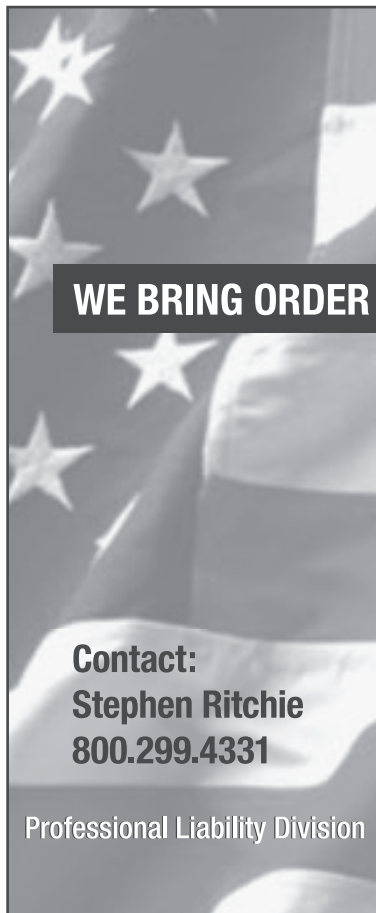
On the New Jersey scale are traditional unconscionability factors that include the relative bargaining power of the parties and the existence of a "contract of adhesion." *Id.* at 39-40, 912 A.2d at 111. The court also will consider the amount of the plaintiff's claim and the availability of a fee award. *Id.* at 46-47, 912 A.2d at 115. The smaller the claim, the more likely a class-action waiver will be deemed unconscionable. In *Harris*, the waiver was enforceable because the plaintiff demanded more than \$100,000 in damages and sued under statutes that provided for recovery of her fees and costs. *Id.* By contrast, the court held on the same day in a separate case that a class action could not be precluded where a plaintiff's individual damages were no more than \$180, even though she also could have been awarded her attorney's fees. *Muhammad v. County Bank*, 189 N.J. 1, 912 A.2d 88 (N.J. 2006).⁴

The Eleventh Circuit's New "Totality" Test

The Eleventh Circuit has enforced class-action waivers in arbitration agreements

on at least three occasions. In addition to two cases noted earlier in this article, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), and *Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), the Eleventh Circuit also upheld a waiver in *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814 (11th Cir. 2001). In a September 2007 decision, however, the Eleventh Circuit found that a class-action waiver was unconscionable and announced a "totality of the facts and circumstances" test that district courts are to apply on a case-by-case basis. *Dale v. Comcast Corp.*, No. 06-15516, 2007 WL 2471222, at *6 (11th Cir. Sept. 4, 2007). Among the relevant "facts and circumstances" is the availability of attorney's fees and costs to a prevailing plaintiff. *Id.* *Dale* also backs away from some of the broader arbitration-friendly language in the earlier Eleventh Circuit cases.⁵

Statutory awards of attorneys' fees were possible for the plaintiffs in *Caley*, *Jenkins* and *Randolph*, although in those decisions the appeals court did not identify the recoverability of fees as a critical factor in enforcing class-action waivers. In its latest



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statement on the subject, however, the Eleventh Circuit distinguished *Dale* from the three earlier cases largely on the fee issue. Unlike the earlier plaintiffs, the plaintiffs in *Dale* had no statutory right to their fees and costs if they prevailed on their claim unless they also proved that the defendant acted in bad faith or engaged in certain other improper conduct.⁶ Such a limited availability of fees and costs, the Eleventh Circuit concluded, “does not provide the same incentive for an attorney to represent an individual plaintiff as the automatic, or likely, award of fees and costs available to a prevailing plaintiff for the claims in *Caley*, *Jenkins*, and *Randolph*.” 2007 WL 2471222, at *5.

The plaintiffs in *Dale* alleged that the defendant cable company collected excessive franchise fees from its subscribers. On an individual basis, the alleged overcharge was small: 66 cents every three months, or a total of \$10.56 per customer for the four-year period in question. In the Eleventh Circuit’s view, the unavailability of fees in the applicable section of the federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, combined

with the high threshold for a fee award under Georgia law, meant that individual lawsuits for such small sums were “effectively precluded.” 2007 WL 2471222, at *6. Therefore, if the class-action waiver were enforced, the defendant would be able “to engage in unchecked market behavior that may be unlawful.” *Id.* The Eleventh Circuit concluded: “Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims.” *Id.*⁷

Dale’s ultimate holding is that the enforceability of a class-action waiver must be decided “on a case-by-case basis, considering the totality of the facts and circumstances.” *Id.* The considerations may include, among others, “the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery, the ability to recover attorneys’ fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical effect the waiver will have on a company’s ability to engage in unchecked market behavior, and related public policy concerns.” *Id.*

Uncertainty in Alabama

The Alabama Supreme Court has been anything but clear about its own view of class actions and arbitration. In *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), the court held that class arbitration is not permitted unless an arbitration agreement expressly provides for it. A contrary holding, the court reasoned, would amount to altering the parties’ written agreement. 727 So. 2d at 20. The viability of *Smith*’s actual holding is somewhat uncertain in light of the United States Supreme Court’s plurality opinion in *Bazzle*, which said that the arbitrator rather than a court should decide whether class arbitration is permitted if the parties’ agreement is silent on the issue. 59 U.S. at ¶ 1-54. Nevertheless, in *Smith* the court apparently saw nothing unconscionable about requiring an individual arbitration rather than a class arbitration.

Four years after *Smith*, though, the Alabama Supreme Court held that an arbitration agreement was unconscionable,



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partly because, under *Smith*, there could be no class arbitration in the absence of an express authorization in the parties' contract. *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002). The plaintiffs in *Leonard* alleged that the defendant pest-control company failed to conduct annual inspections as required by state law. They argued that a class action was the only way they could obtain relief because their individual claims were small. In its five-to-four decision reversing an order compelling arbitration, the supreme court appeared to be troubled not only by the unavailability of a class action, but also by language that denied the plaintiffs any "indirect, special or consequential damages or loss of anticipated profits." 854 So. 2d at 534-35. The court held that the unavailability of a class action and the agreement's limitation of damages combined to deprive the plaintiffs of a "meaningful remedy." *Id.* at 538.

It should be noted that the arbitration agreement in *Leonard* did not include an alternative for a small-claims action. On application for rehearing, the supreme court was presented with the consumer rules of the American Arbitration Association (the "AAA") that allow for actions in small claims court as an alternative to arbitration.⁸ The court declined to consider the effect of those rules, however, because they had not been addressed in the trial court. 854 So. 2d at 54. It is possible but not at all certain that the small-claims-court option in the

AAA's rules, which govern arbitrations to be conducted through that organization, could alleviate the concerns expressed by the supreme court in *Leonard*.

A federal district court in Birmingham recently emphasized the availability of a small-claims action to distinguish *Leonard* and enforce a class-action waiver in a bank's customer agreement. In *Tishaw v. AmSouth Bancorporation*, No. 4 06 CV-0882-RDP (N.D. Ala. Aug. 25, 2006) (unpublished slip opinion), a Social Security recipient alleged damages of no more than \$80 in connection with a two-week hold that was placed on her bank account upon service of a state court's writ of garnishment. Suing individually and on behalf of a putative class of depositors, the plaintiff contended that the hold violated federal statutes that exempt certain government benefits from garnishment. Attorney's fees were not available to the plaintiff in *Tishaw*, but the arbitration agreement containing the class-action waiver did give her the option of a small-claims lawsuit. And, unlike the provision in *Leonard*, the agreement in *Tishaw* did not attempt to restrict the damages that the plaintiff might recover in arbitration or elsewhere. Therefore, the district court rejected the plaintiff's contention that a class action was necessary in the absence of a statutory right to attorney's fees. According to the court, that argument "cuts no ice" where a plaintiff may "pursue a remedy


in small claims court, which is designed to resolve low-dollar claims . . . inexpensively and without the cost of attorneys." *Tishaw*, slip op. at 13.⁹

Conclusion

The cases discussed above illustrate that the enforceability of an arbitration agreement's class-action ban is by no means assured. Nevertheless, many courts are reluctant to buck the strong federal policy favoring arbitration agreements unless barring a class action would leave a consumer without any practical way to pursue a small claim. The possibility of an award of attorney's fees to a successful plaintiff may make a class-action ban more palatable. An option for a small-claims court lawsuit as an alternative to arbitration also may help persuade a court that a class-action waiver is not unconscionable. ■

Endnotes

1. The class-waiver debate typically involves concepts of *substantive* rather than *procedural* unconscionability. Substantive unconscionability deals with the reasonableness or fairness of contractual terms, while procedural unconscionability focuses on the manner in which a contract was made. *Dale v. Comcast Corp.*, No. 06-15516, 2007 WL 2471222, at *2 (11th Cir. Sept. 4, 2007).
2. In *Bazzele* the South Carolina Supreme Court held that class arbitration was permissible even though the arbitration agreements in dispute were silent on the issue. Four members of the United States Supreme Court



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(Justices Breyer, Scalia, Souter and Ginsburg) held that the determination of whether class arbitration was authorized should have been made by the arbitrator and not a court. 539 U.S. at 451-54. Justice Stevens joined in the judgment vacating the South Carolina Supreme Court's decision, stating that the determination "arguably" should have been made by the arbitrator. *Id.* at 454-55. Nevertheless, Justice Stevens also asserted that the South Carolina Supreme Court acted within its authority to hold as a matter of state law that class arbitrations are permissible if not prohibited by the applicable agreement. Three dissenters (Chief Justice Rehnquist and Justices Kennedy and O'Connor) insisted that the determination was for a court rather than an arbitrator, and they interpreted the agreements in question as prohibiting class arbitration. *Id.* at 455-60. Justice Thomas dissented separately on the ground that the Federal Arbitration Act does not apply to proceedings in state courts. *Id.* at 460. *Bazze* also illustrates why defendants may wish to avoid a class arbitration. In *Bazze*, the arbitrator in two separate class arbitrations had awarded damages totaling more than \$20 million against the defendant lender. While the awards in *Bazze* did not stand because of the Supreme Court's eventual reversal, the successful appeal was based only on the issue of who should have decided whether a class action was permissible. Absent that determinative legal issue, the arbitrator's awards may well have been untouchable.

3. See also *Wong v. T-Mobile USA, Inc.*, 2006 WL 2042512, at * 5 (E.D. Mich. July 20, 2006), where the court stated: "Whether the right to a class action is a substantive or a procedural one, it is certainly necessary for the effective vindication of statutory rights, at least under the facts of this case."

4. Depending on how the issue is presented, the enforceability of a class-action waiver might itself be subject to arbitration. That was the holding of the United States Court of Appeals for the Fourth Circuit in *Davis v. ECPI College of Technology, L.C.*, 227 Fed. Appx. 250 (4th Cir. 2007). The plaintiffs agreed that their claims against a technical college were arbitrable, but insisted that they should be arbitrated on a class basis notwithstanding a class-action waiver in the arbitration provision. Because the plaintiffs did not allege that the basic agreement to arbitrate was unconscionable, any question about the class-action waiver—that is, about how the arbitration would proceed—had to be submitted to the arbitrator. *Id.* at * 254.

5. In *Caley*, the Eleventh Circuit affirmed an order compelling arbitration of labor claims over the plaintiffs' objections that the provision was unconscionable because it barred class actions and restricted discovery. The court stated that both the class action bar and the limited discovery were "consistent with the goals of 'simplicity, informality, and expedition'" that are the hallmarks of arbitration. 428 F.3d at 1378 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)). *Jenkins* reversed a denial of a motion to compel arbitration of Georgia state-law claims, declaring: "We have held . . . that arbitration agreements precluding class action relief are valid and enforceable." 400 F.3d at 877. *Randolph* affirmed an order for arbitration of a claim under the federal Truth in Lending Act ("TILA"), holding that "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA." 244 F.3d at 819.

6. 2007 WL 2471222, at *5 (citing O.C.G.A. § 13-6-11).

7. The Eleventh Circuit reversed the district court's order enforcing the class-action waiver. Also, because the arbitration provision itself stated that its components were not severable, the entire provision was held to be unenforceable. 2007 WL 2471222, at *7.

8. See Principle 5 of the AAA's Consumer Due Process Protocol, available at www.adr.org.

9. *Tishaw's* reasoning is echoed in a federal case from Arkansas case that rejected an unconscionability challenge under Arkansas law. *Davidson v. Cingular Wireless, LLC*, No. 2:06CV00133-WRW, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). *Davidson* noted that the arbitration provision gave the defendant's customers a "convenient arbitral forum," required the defendant to pay the full cost of arbitrating non-frivolous claims, permitted customers to proceed in small-claims court as an alternative to arbitration, and did not preclude punitive damages. *Id.* at *8.

RANDALL D QUARLES

Randall D. Quarles is a partner in the Birmingham office of Waller Lansden Dortch & Davis LLP. He represented the defendants in *Tishaw v. AmSouth Bancorporation*, a case mentioned in this article.



■ **Need to find an associate for your firm**

■ **Need to get rid of some office equipment?**

■ **Need to get the word out that you're available as an expert witness?**

Then check out the online "Classifieds" at the ASB Web site, ***www.alabar.org.***

- Montgomery attorneys **William R. Blanchard** and **Richard Keith** were named president and president-elect of the **Alabama Criminal Defense Lawyers Association (ACDLA)**. Other board members selected include **Kathryn King** of Cullman, vice president; **Don Colee** of Birmingham, secretary; and **Patrick Tuten** of Huntsville, treasurer. The ACDLA also honored the **Southern Poverty Law Center** for its support of the ACDLA's legislative program.
- **Joseph P. Borg**, director of the Alabama Securities Commission and president of the North American Securities Administrators Association, recently represented the 53 state securities regulator jurisdictions (including the District of Columbia, Puerto Rico and U.S. Virgin Islands) at the 32nd Annual Conference of the **International Organization of Securities Commissions (IOSCO)**. The IOSCO is a forum for international cooperation among securities regulators.
- The Elder Law Section of the ASB elected **Ronald A. Holtsford** of Montgomery as its 2007-08 chair. **Jason Britt** of Elmore County was elected vice chair.
- **T. Scott Kelly** of the Birmingham office of Ogletree Deakins has been elected co-chair of the **Labor and Employment Committee** for the American Bar Association's Young Lawyers' Division.
- **Yonnie Z. Kim** with Haskell Slaughter has been appointed director of regional development for the **Korea-Southeast United States Chamber of Commerce**.
- **Nicholas Brian Roth** of Eyster, Key, Tubb, Roth, Middleton & Adams LLP in Decatur has become a fellow of the **American College of Trial Lawyers**.
- Hand Arendall LLC announces that **Andrew J. Sinor, Jr.** has been inducted as a fellow into the **Litigation Counsel of America**.
- **J. Mark White**, founding partner of White Arnold Andrews & Dowd PC in Birmingham and 2007-08 ASB president-elect, recently received the 2006 Distinguished Service Award, one of the highest awards presented by the **National Center for State Courts (NCSC)**. This award is presented annually to a person who has made longstanding contributions to the improvement of the justice system and who has supported the mission of the National Center.
- **Frank M. Young, III** of Haskell Slaughter Young & Rediker LLC was recently named president of the **American Committees on Foreign Relations**.
- **Wayne Morse, Andrew Sinor, J. Mark Hart, F. Lane Finch** and **Turner B. Williams** have been selected as Fellows of the Litigation Counsel of America. The LCA is a trial lawyer honorary society.



Wayne Morse



Andrew Sinor



J. Mark Hart



F. Lane Finch



Turner B. Williams

- Sirote & Permutt shareholder **Karl B. Friedha** recently received a 2007

Golden Eagle Honorary Award as a permanent class member of the Alabama Senior Citizens Hall of Fame. The hall of fame was created in 1983 by the Alabama legislature to honor living Alabamians who have made significant contributions toward enhancing the lives of the state's elderly citizens.



Karl B. Friedman

that no one person or organization is larger than the law that protects all entities equally. Morris has practiced for over 30 years and is the founder and senior partner of Morris, Haynes & Hornsby.



Larry Morris

partner, Balch & Bingham LLP; Ashley H. Hattaway, partner, Burr & Forman LLP; David R. Mellon, shareholder, Sirote & Permutt PC; Benjamin M. Moncrief, associate, Bradley Arant Rose & White LLP; Jason Nabors, member, Haskell Slaughter Young & Rediker LLC; Molly J. Williams, assistant vice president, Collateral Real Estate Capital LLC; and Joshua J. Wright, managing partner, Hollis & Wright PC.



Jason Nabors



Molly J. Williams

- Larry Morris has been selected president of the Alabama Law Foundation for 2008-08. His main goal for his term is to promote his long-held belief that the greatest virtue of the legal system is

- Nine members of the Alabama State Bar were recently selected as members of the *Birmingham Business Journal's* "Top 40 Under 40" for 2007. Included were David M. Benck, general counsel, Hibbett Sporting Goods, Inc.; Tanita M. Cain, president, Advantage Equipment, Inc.; Bingham D. Edwards,

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Margaret H. Murphy Date: 09-28-07

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).
 PS Form 3526, September 2006 (Page 2 of 2)

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

Robert E. Austin, former circuit judge of Blount County, announces the opening of his office at 106 2nd St. N., Ste. B, Oneonta 3121. Phone (205) 274 8255.

Cheryl D. Eubanks announces the opening of her office at 22787 U.S. Hwy. 98, Ste. C 4 Fairhope 32. Phone (251) 928-1555.

Among Firms

Lewis & Smyth LLP and Adcox Winter LLP announce their merger. The new firm name is Adcox, Lewis, Smyth & Winter, PC. Shareholders are Albert G. Lewis, III,

C. Barton Adcox, Justice D. Smyth, III and Bryan P. Winters. Associates are Charles M. Coleman, Glen F. Harvey, Susan M. Donovan and Ann L. Reardon. John T. Fisher, Jr. and Joanne M. Jannik have become associated with the firm. The firm's location is 611 Helen Keller Blvd., Tuscaloosa 35404. Phone (205) 553-5353.

Chief Justice Sue Bell Cobb has appointed Griffin Sikes, Jr. as director of the legal division of the Administrative Office of Courts.

The Alabama Center for Foreign Investment, LLC announces that Boyd F. Campbell has accepted the position of general counsel.

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20	\$13	\$13	\$18	\$30	\$47	\$70	\$118
30	\$22	\$24	\$33	\$48	\$72	\$140	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Monthly Premium							
AGE:	30	35	40	45	50	55	60
10	\$15	\$15	\$19	\$31	\$45	\$80	\$130
15	\$18	\$18	\$23	\$44	\$70	\$103	\$168
20	\$23	\$23	\$31	\$56	\$90	\$137	\$231
30	\$39	\$44	\$62	\$91	\$139	\$276	

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About Members, Among Firms

Continued from page 485

Jackson Myrick LLP has become affiliated with The Kullman Firm and the firm will practice as Jackson Myrick*The Kullman Firm.

Lawrence T. King, Richard F. Hornsby and Champ Lyons III have formed King, Horsley & Lyons, LLC with offices at 1 Metroplex Dr., Ste. 280, Birmingham 3209. Phone (205) 871-130.

Lamar, Miller, Norris, Haggard & Christie PC announces that Darren W. Kies has joined the firm.

Ann I. Dennen has become a shareholder with Lanier Ford Shaver & Payne PC. Corey W. Jenkins has become associated with the firm.

Zeb Little announces that Denise M. Learned has joined the Zeb Little Law Firm LLC as an associate.

Maynard Cooper & Gale PC announces that Sid McAnnally has joined as a shareholder.

Kristin Daniels announces her association with Pierce Ledyard PC.

Sirote & Permutt PC announces that Marcus M. Maples has joined as an associate.

Stephens, Millirons, Harrison & Gammons PC announces that Joshua B. White has become an associate.

Enid Dean has joined the United States Attorney's Office for the Northern District of Alabama as an assistant United States attorney, criminal division.

Wallace, Jordan, Ratliff & Brandt LLC announces that Atley A. Kitchens, Jr. has joined the firm.

Walton Law Firm PC announces that Catherine Moncus has become an associate.

Weathington & Moore, PC announces that Alexander M. Weisskopf has become a partner and James E. Hill, III has joined the firm as an associate. The firm name is now Weathington, Moore & Weisskopf PC.

Hope S. Marshall has joined the Birmingham firm of White Arnold Andrews & Dowd PC as an associate. ■



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For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.

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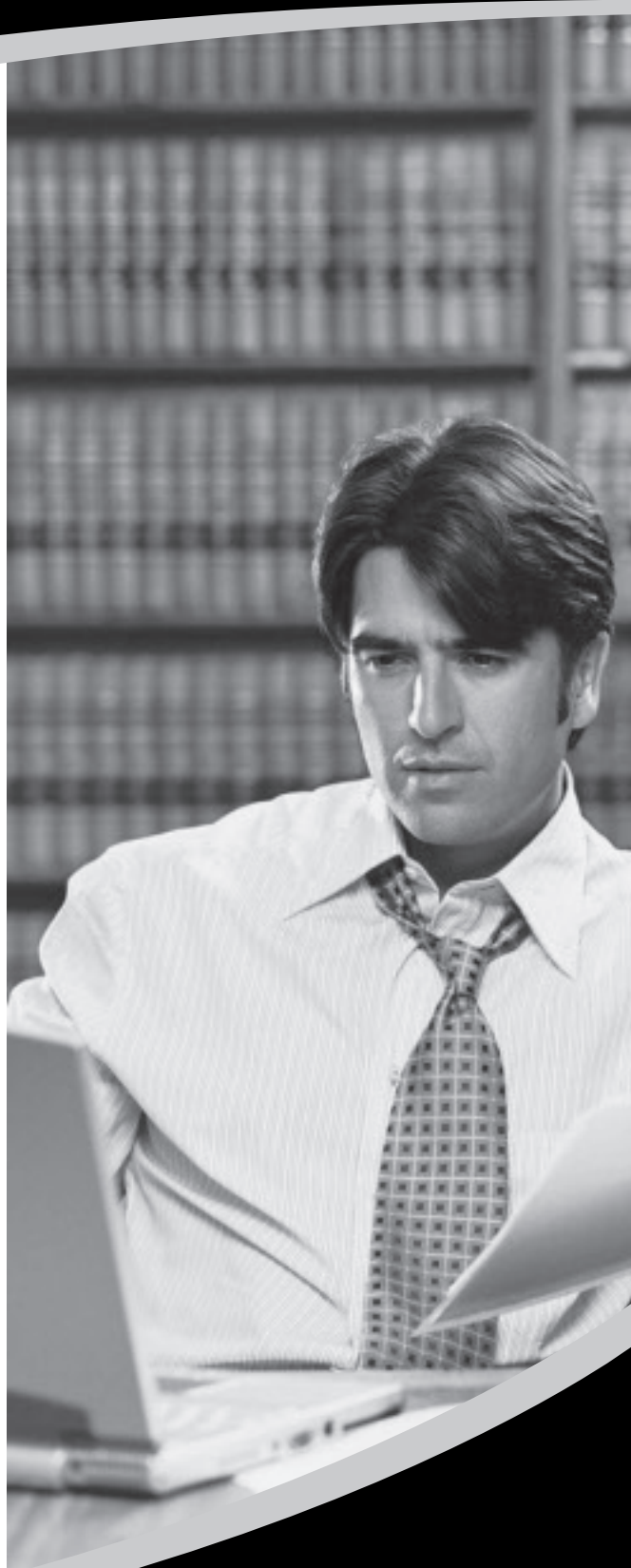
The Administrative Office of Courts has an opening in its legal division for an Attorney I, II or III position. The salary range for these positions is \$43,963.20 to \$101,839.20. The attorney hired for this position will work at the Judicial Building at 300 Dexter Avenue in Montgomery as a member of the legal division's staff. Candidates must possess strong research and writing skills, as well as the interpersonal skills necessary to diplomatically deal with the state's judicial personnel, including circuit and district judges, circuit and district clerks, judicial assistants and others. Several years of experience in criminal and/or civil litigation are preferred, although not required. Applications will be taken from October 15, 2007 through January 15, 2008. Thereafter, copies of legal briefs written by the applicant may be requested to be submitted and a limited number of interviews may be scheduled at a later date. Applicants should complete an Alabama Unified Judicial Systems' employment application which can be obtained from the AOC Web site at <http://humanresources.alacourt.gov> or from the AOC Personnel office. To apply, send a completed application to Administrative Office of Courts, Attn: Human Resources Division, 300 Dexter Avenue, Montgomery 36104-3741 or fax it to (334) 954-5205.

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will be deemed to be in non-compliance for that year. Therefore, as of January 1, 2008, you will officially be in a state of non-compliance if all hours have not been earned.

However, you may file a request to make up the deficiency.

Deficiency Plans for Non-Compliant Attorneys

In order to earn credits between January 1 and March 1, 2008 and remove yourself from non-compliance you must:

1. Select courses to attend that are already approved. The list of approved courses is at www.alabar.org/cle under "Approved Courses."
2. Submit a \$100 *late compliance fee* and a deficiency plan request (the

form for this request can be found at www.alabar.org/cle under "Deficiency Plan Request") to the MCLE Commission postmarked by January 3, 2008, requesting permission to attend the selected pre-approved courses. Include the dates, titles and sponsors of the approved courses that you wish to attend.

The request should be sent to:

MCLE Commission
P.O. Box 671
Montgomery, Alabama 36101-0671

3. Attend all courses by March 1, 2008.

Important note: If you have experienced extraordinary circumstances beyond your control that led to your deficiency for 2007, you should contact us immediately at (334) 269-1515 to discuss your situation.

Final Note: Attorneys who do not meet the CLE requirements for 2007 may be certified to the Disciplinary Commission and will owe a penalty of \$300 in addition to any fees incurred prior to certification.

There you have it—the majority of our members have been properly thanked for their willingness to comply on time and the few who have erred in the past are blessed with 53 more days to get things right! With well over 100 approved courses remaining to choose from, do you really have a valid excuse for falling into non-compliance this year?

If you are still left with questions, visit www.alabar.org/cle. We are hopeful that during busy season, you can find your answers online. If not, then contact the MCLE office and ask for Carol, Christina or me.

A very special "Happy Thanksgiving" to each of you from the staff at CLE! ■

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www.alabar.org, "Bar Directory"

The Nina Miglionico "Paving the Way" Leadership Award

The Women Lawyers Section of the Birmingham Bar Association established the Nina Miglionico "Paving the Way" Leadership Award to recognize and honor lawyers who have actively paved the way to success and advancement for women lawyers.

"Miss Nina," as she is affectionately known to the Birmingham community, exemplifies a life devoted to the public good, as one of the state's first women lawyers to engage in private practice in 1936, as the first female elected to the Birmingham City Council in 1963 and as an altruistic supporter of her church, community and nation throughout her decades of service. From her beginning in a family of Italian immigrants, her short stature belies her tall standing as a role model and mentor to women lawyers in Alabama and the United States.

The Women Lawyers Section is soliciting nominations for this award. The nominee should be:

1. An individual lawyer who has achieved professional excellence, and
2. Assisted women lawyers to achieve their potential through mentoring, or
3. Inspired women lawyers to achieve their potential by providing a professional role model, or
4. Provided opportunities that paved the way for advancement of the status of women lawyers.

Nominations should be postmarked by December 29, 2007. If you would like to obtain a nomination form, please contact Leatha Gilbert at lgilbert@gilbertlaw.com.

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 15, 2008. Nominations should be mailed to:

Keith B. Norman
Secretary
Board of Bar Commissioners
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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Monday, December 3, 2007

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For more information or to register, call the center at (334) 269-0409.

Timothy M. Lupinacci has been named managing shareholder for the Birmingham office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

Benton & Centeno LLP announces that Jamie Alisa Tharp has become associated with the firm.

Bradley Arant Rose & White LLP announces that Bradley W. Lard and Kevin C. Newsome have joined the firm as partners and that James E. Long, Jr. has joined the firm.

Andrew P. Campbell, Caroline Smith Gidiere, Brandy Murphy Lee, Thomas O. Sinclair, Wendy T. Tunstill, and Miles Clayborn Williams announce the formation of Campbell, Gidiere, Lee, Sinclair & Williams with offices at 2100-A Southbridge Pkwy., Ste. 450, Homewood. Phone (205) 803-0051.

Davis & Fields, PC announces that P. Bradley Murray joined the firm and Meredith L. Turpin has become associated with the firm.

Estes, Sanders & Williams, LLC announces that Bryant L. Lewis and Devona L. Johnson have joined the firm as associates.

Haskell Slaughter Young & Rediker, LLC announces that Stephen L. Poer rejoins the firm as a member.

Heninger Garrison Davis LLC announces that Gayle L. Douglas has joined the firm.

Zondra Taylor Hutto and Shannon Clay Staggs announce the formation of Hutto Staggs LLC and the association of Amanda Mulkey. Offices are located at 1788 McFarland Blvd. N., Ste. B, Tuscaloosa 35406.

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