

The Alabama
Lawyer

Vol. 63, No. 1

January 2002

**African-American Attorneys
Assume Top Association Offices**

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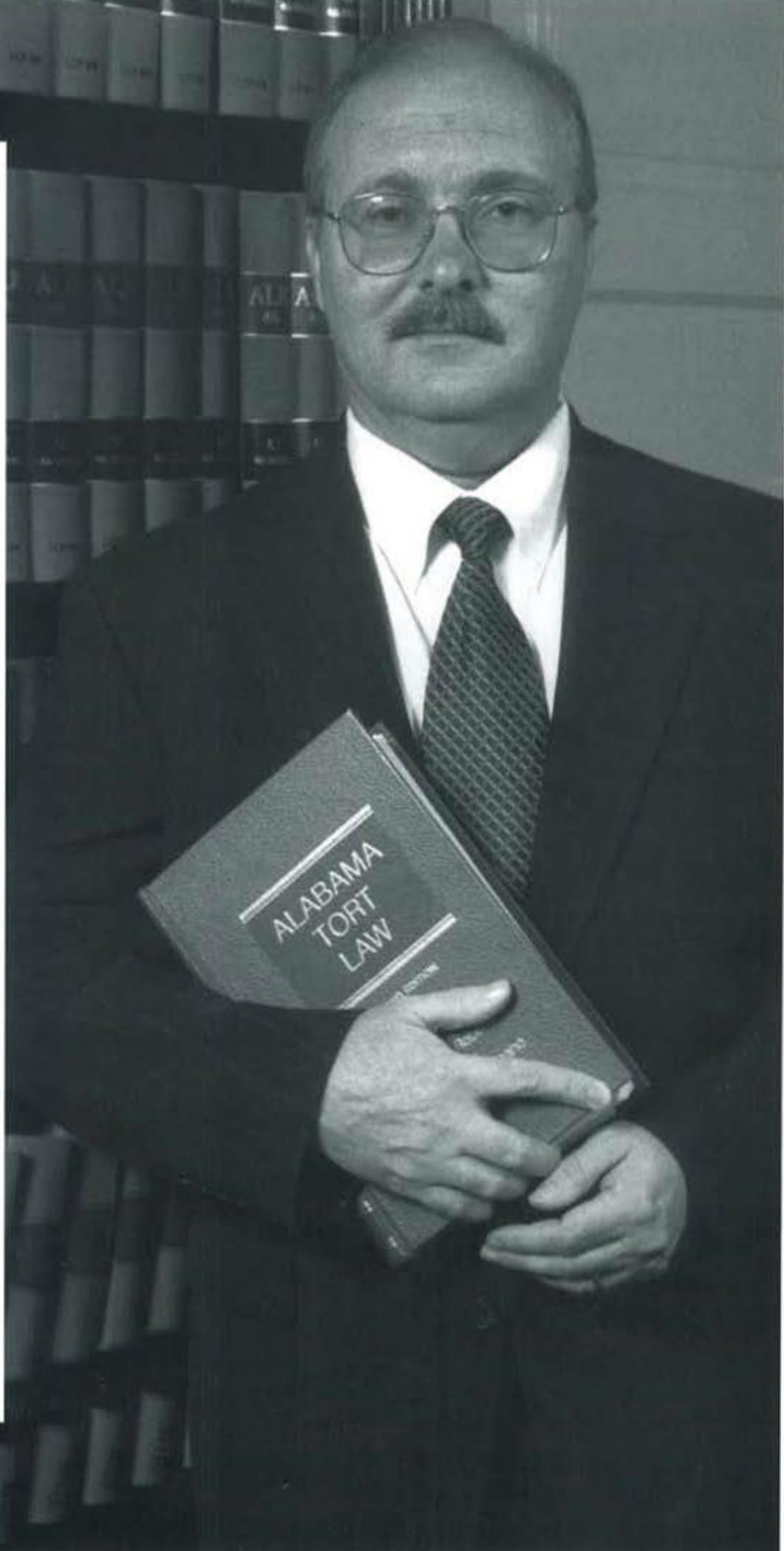
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Wintertime near Gulf Shores in Baldwin County, Alabama

—Photography by Paul Crawford, JD

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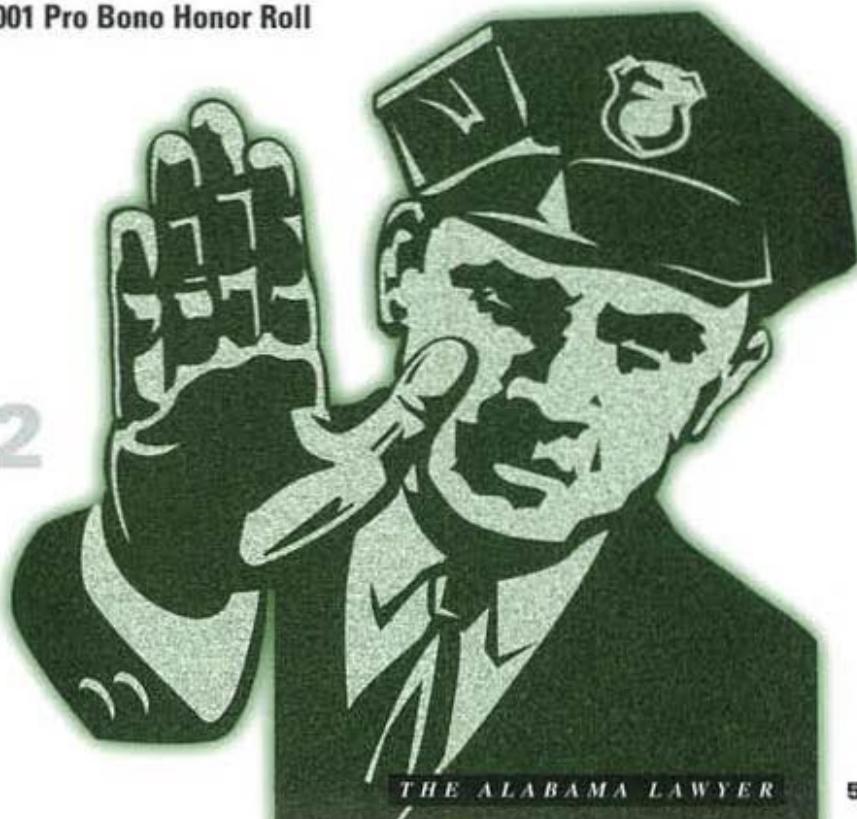
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By Larry W. Morris



Larry W. Morris

One Lawyer Who Truly Made A Difference

I have come to realize that my life is little more than being a "sponge." I soak up traits that I admire from one person, try to copy and implement that trait and usually fail miserably. I then hear some stirring speech or great closing argument and attempt to imitate the orator and usually fall flat. My problem is that I have not had an original thought, phrase or quotation to my memory, so I am relegated to sponging off the intellect of others. Even so, if you choose your idols and sources wisely, you can enjoy a certain degree of success.

My heroes have always been sports figures, government leaders and lawyers. I have enjoyed being Bart Starr, Pee Wee Reese, Jackie Robinson and "Doctor J" on many an Alabama playground. As a lawyer, my heroes have been great orators and teachers like **Francis Hare, Sr., Leigh Harrison, Dan Meador** and **Charles Gamble**. These and other legal giants have inspired members of our bar to distinguish themselves among the elite jurists in this country. Of course, like many people, I derive inspiration and determination on a daily basis from Paul William Bryant. It is not that I could obtain the stature of these heroes, but it sure helps to have a dream and vision on this journey, and these legends have left a wonderful road map for us to follow.

There is one true hero that helps me and many lawyers every day. **Howell Heflin** must have had me in mind when he did away with pleading at length in a complaint. He must have had me in mind when he abolished demurrers, pleas in short by consent, red-embroidered ribbon on appellate briefs and other specified self-serving rules which defeated meritorious claims. Because of his efforts and many others helping

him, lawyers were finally able to have valid cases addressed on merit rather than on form which barred a party from justice based on some antiquated rule.

If you do not believe one man can make a difference, examine the record of Judge Heflin. I have just finished reading a wonderful book about Judge Heflin's career, *A Judge In the Senate*. I believe it should be mandatory reading for all Alabama lawyers. It is a wonderful study in history and a wonderful lesson that one man can have a huge impact. If you doubt that one dedicated individual with purpose and vision can make a difference, consider the following:

1. After Heflin served as president of the state bar from 1965 to 1966, the American Bar Association, for the first and only time, awarded Alabama its coveted Award of Progress as having the most progressive bar for that year in the nation.
2. In that year, a Citizen's Conference was formed to evaluate the legal system in this state. This conference became the nucleus of the support for the adoption of the Judicial Article.
3. In the early '70s, Alabama's judicial system ranked at the bottom by most national legal scholars. According to *State Supreme Courts in State and Nation*, the state's appellate courts were "totally controlled by old men" and operating under petty, ludicrous and antiquated rules. Further, rules of pleading were dictated by trickery that varied from circuit to circuit. Four years later, the same publication wrote "under the leadership of Howell Heflin, a

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legal system fraught with ineptness and injustice has swiftly become a model for the Nation." An article in *The New York Times* stated, "Alabama has become the most dramatic example in the country to improve the quality in state courts and it is attributable to the leadership of Howell Heflin." The *Boston Globe*, *Nashville Banner* and *Washington Post* all joined in praising the dramatic change in Alabama's court system.

Without question, Judge Heflin had a lot of help in passing and implementing these changes. However, he was state bar president and shortly thereafter chief justice when these startling overhauls occurred. He convinced many people to assist in pulling the wagon but he was in charge of driving the mules. As a result of one man making a difference, a system of fairness, equality and justice became the rule rather than the exception in the Alabama courts.

This new system is now almost 25 years old. The majority of attorneys in this state, thank goodness, have never experienced the deadly fear that sets in when a lawyer realizes he has left off the circuit court's jurisdictional averments, and his client's appeal is dismissed without any ruling on the merits. This "good old boy" system had deprived many a deserving human being of his just day in court. It is noteworthy to consider the stringent opposition the Judicial Article was facing. After further reflection, it also may have current application in today's climates.

Black Belt "Bourbons," as they were affectionately called, consisted of the large landowners of the state. Since 1901, they, along with the large industrialists, had formed an alliance that controlled the legislature. The 1901 Constitution gave judicial rulemaking and procedural power to the legislative branch of government. Hence, in order for the judiciary to change its manner of doing business, it had to have legislative approval. The separation between the two branches of government, at best, was blurred, if, indeed, it existed at all. In essence, if you controlled the legislature, you controlled the judiciary. That was the climate under which Judge Heflin and his followers began the arduous task of changing the legal system by changing Article VI of the constitution.

Through some clever politics, such as making judges' widows the beneficiary of state retirement and other skillful maneuvering, Judge Heflin was able to bring the lawyers, circuit judges, probate judges, circuit clerks, and all court personnel together in a common cause. I am confident the reason the official court reporters signed on with so much enthusiasm was not because they would become eligible for state retirement but because they wanted a change for justice. I am sure the same is true of the probate judges and circuit clerks who agreed to go off the fee system. They just wanted good government. For whatever reason, Judge Heflin's vision created strong support for a new system.

Howell Heflin then had the difficult task of convincing the legislature to give up some of their power and let the people vote on the new Judicial Article. Again, with an awful lot of help, this happened and then the people changed the entire article by a 62 percent affirmative vote. The legal and judicial system, after 30 years, says, "Thank you, Judge Heflin."

So here we are—50 years after Big Jim Folsom explained how this outmoded constitution pushes working people down and

pushed the "Big Mules" up, and 35 years since the nearest "New South" governor we have ever had courageously insisted we improve and revise the 1901 document for the good of Alabama. **Albert Brewer** was called a "pinko liberal" among other things for his efforts, which may well have cost this honorable and talented lawyer the governorship. Other well intended office holders have characterized the constitution as stifling, archaic and repressive. Yet, no one person has stepped up to lead.

After reading Judge Heflin's biography, I realize more than ever that your state bar will not enjoy a banner year like 1965. I have not grabbed an obvious need for change by the throat and asked you to follow me. Maybe cowardice and political scars have prevented me from so doing. But I am willing to pledge my efforts to a young Howell Heflin who is willing to give his time for all the right reasons to get us started toward a state constitution up to 21st century standards, one who is willing to sacrifice his efforts toward tax fairness and allowing a system where local people solve local problems. Isn't it time for a lawyer to lead? Twenty of the first 23 presidents of this country were lawyers. Isn't it time for a lawyer to read *A Judge in the Senate* and realize that one dedicated soul can truly make a difference?

Howell Heflin is my hero. I want some more heroes. I believe some more will step forward in the name of honor, in the name of equality and in the name of justice. Many wonderful movements have begun with a small letter nailed to a church door or one courageous person not willing to move to the back of the bus. Isn't it time for us with a united front to say "the time is right, the cause is just, now let's get it done"? I believe we can. ■

Free Report Shows Lawyers How to Get More Clients

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

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

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

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

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

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

"Without a system, referrals

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

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

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

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

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



Keith B. Norman

"Absurd Vaporings of a Disordered Mind"

By Keith B. Norman

Not long ago former state bar president **Gary Huckaby** of Huntsville mailed me a bound copy of the "Proceedings of the Thirty-Eighth Annual Meeting of the Alabama State Bar Association." This volume had been preceded by a bound copy of the "Proceedings of the Thirty-Ninth Annual Meeting of the Alabama State Bar Association" that I received from **Sherry Thomas** of Birmingham. The 38th and 39th annual meetings were held in 1915 and 1916 respectively. Gary and Sherry had come across these volumes in used book shops and had wanted the state bar to have them.

Both of these meetings occurred prior to the passage of legislation in 1923 creating a mandatory state bar. Prior to 1923, the state bar was a voluntary association. These minutes reflect issues confronting the profession 85 years ago and offer some important lessons for today.

At the 1916 meeting, the treasurer reported that the bar association's receipts for 1915 were \$2,920 and disbursements were \$1,647.40. Annual dues were \$5 and there were 283 members. By comparison for fiscal year 2000-2001, state bar receipts were \$3,730,165.77 and disbursements were \$3,507,597.07. Our members numbered 13,200.

The 1916 minutes included reports about legislation considered during the 1915 legislative session. At that time, the legislature met in biennial sessions. Legislation was enacted in 1915 to permit the bar association to prosecute attorneys for ethical violations in the name of the state. Parenthetically, the Alabama State Bar Association adopted the profession's first code of ethics in 1888. This code would later serve as the model for the code of ethics adopted by the American Bar Association in the early 1900s.

Other major legislative enactments reported at the 1916 meeting included: abolition of equity courts;

allowing entry of default judgments after 30 days; making the trial court's oral charge and all charges refused or given a part of the record in all cases; allowing judges to apportion costs in all cases and the transfer of a case filed in one circuit to the appropriate one for trial.

During the 1916 meeting, several committees made reports and recommendations. Among these committees were the Committee on Legal Education and the Central Council. The Committee on Legal Education recommended that those seeking to become lawyers first receive a "course of study substantially equivalent to that prescribed to a county high school," and three years of law school. In response to public criticisms leveled at the profession regarding the excessive number of lawyers and competency concerns, the report of the bar association's Central Council, authored by **Henry Upton Simms**, suggested a solicitor-barrister model similar to the one in England and an extensive internship. Writing for the committee, Mr. Simms stated:

'...While we cannot actually limit the number of lawyers in Alabama, or even greatly reduce the number who in one way or another practice the profession, we can probably secure the enactment of laws dividing the lawyers into those who practice generally and those who have the privilege of appearing in causes in the Superior Courts. Then we can require as a preliminary training to appearing as a barrister in court, three years study in an approved law school, followed by two or three years as the clerk of a barrister in his office; and then following the whole five or six years training by a strict examination under supervision of the Bar Association of the State. If requirements are applied without exception, even to applicants from other States, in due time, I believe the number of practicing

barristers in Alabama will be greatly reduced. Then if the disbarment statutes are simplified as we recommended last year, so that a barrister's license can be cancelled on a motion and trial in an Appellate Court, without intervention of a jury, I believe the ethical standards of your bar can be maintained.'

Judicial selection was a hot topic at the 1916 meeting because of legislation adopted in 1915 requiring candidates for the appellate courts to take part in primaries. Prior to the 1915 legislation, appellate court judges were elected at the general election in what was tantamount to a non-partisan election. Bar association president **Charles S. McDowell** commented on this change at the meeting.

'If the unyielding and zealous advocates of the primary system for choosing judges are logical, they must go further than they have gone and declare, virtually, that they do not want men upon the courts not because of their legal attainments, but because of their political alignments. All men recognize a difference between a political and judicial office, and we should recognize a corresponding difference between candidates for these offices. ...The judge does not make the law, and it is not therefore material what he thinks about current political issues. He is chosen to serve the people, not to represent them; he does not translate their convictions into statutes, nor shape the policy of the State. His office is simply to hold the scales of justice even as between man and man, and the should never be forced into a contest which must inevitably engender passion and prejudice which are fatal to judicial poise...'

One of the more interesting episodes at the 1916 meeting involved a resolution to censure a bar member. The bar member had written a letter to fellow lawyers containing disparaging remarks about corporate lawyers and the judiciary. A resolution censuring the lawyer was proposed at the meeting which referred to statements in the letter to be not only "...untrue but [also] so entirely without foundation as to be the absurd vaporings of a disordered mind...". The proposed resolution was

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supported and challenged with great passion and eloquence by some of the state's best known and most successful lawyers. The most meaningful aspect of the debate, however, was the dignity with which it was conducted. Although an amended version of the resolution removing the "vaporings" language did pass, civility was the order of the day.

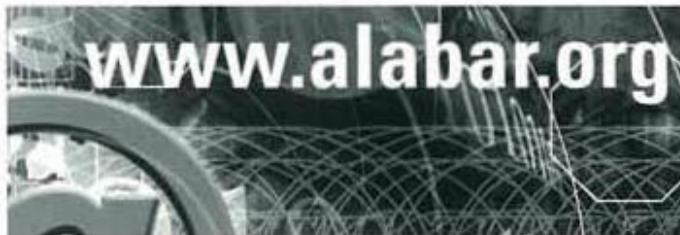
Although many changes have occurred in the legal profession since 1916, civility and professionalism are as important today as 85 years ago. Regardless of the cause or situation, we should make every effort to ensure that our conduct will stand 85 years later as a worthy example for the profession. ■

War Stories

The Alabama Lawyer is looking for "war stories" to publish in upcoming issues, humorous tales and anecdotes about Alabama lawyers and judges. Obviously, for such stories to be published, they must be (a) true, (b) amusing and (c) tasteful. Send your reminiscences to: *The Alabama Lawyer*, P.O. Box 4156, Montgomery 36101. **Be sure to include your name, address and a daytime telephone number, in case we need to contact you.**

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- The University of Alabama School of Law's **National Moot Court Team** has placed second in the Regional Competition held Nov. 12-14 at the law school. The team will advance to national competition in New York City early this year.

Team members Ben McAninch, Laura Robertson and Mitesh Shah were led by team manager Jordan Montiel in competition with nine other law schools throughout the Southeast.

- The Alabama Veterinary Medical Association presented **Boyd Whigham**, district attorney for Bullock and Barbour counties, with a special award recently at the ALVMA Annual Convention. The award was for Whigham's personal direction in the investigation that afforded the confiscation of over 200 abused animals. He was also instrumental in allowing humane organizations to find homes for the abused animals. Additionally, Whigham's prosecution of the individual charged included a cease and desist order, along with a substantial fine and probation time.

These actions were noteworthy since the offender had avoided serious sanctions by various state and federal agencies for over ten years.

- The National Judicial College has named **John T. Crowder** to the NJC Advisory Council. Crowder practices with Cunningham, Bounds, Yance, Crowder & Brown of Mobile.

The NJC Advisory Council provides philanthropic leadership, advice and support for the development of the College's resources and operations.

Crowder is a graduate of the University of Alabama School of Law and is certified as a Civil Trial Specialist by the National Board of Trial Advocacy and a certified diplomat of the American Board of Professional Liability Attorneys.

- **Clarence M. Small, Jr.** and **Thomas W. Christian** have been selected for membership in the American Board of Trial Advocates. Both practice with Christian & Small LLP in Birmingham. ■

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About Members

Richard G. Brock announces the formation of **American Legal Search, LLC** Offices are located at 132 Fairmont Drive, Birmingham 35213. Phone (205) 871-3223.

Franklin M. Cauthen, Jr. announces the opening of his office at 601 Greensboro Avenue, Alston Place, Suite 700, Tuscaloosa 35401. Phone (205) 349-4101.

Tom E. Ellis announces the opening of his office at 300 Office Park Drive, Suite 309, Birmingham 35223. Phone (205) 870-5565.

Caryl P. Privett announces the relocation of her office to 300 Union Hill Drive, Suite 220, Birmingham 35209. Phone (205) 868-1240.

Michael S. McNair announces the relocation of his office to 2151 Government Street, Mobile 36606. Phone (251) 450-0111.

Among Firms

Ramsey, Baxley & McDougle announces that **M. Hampton Baxley** has become associated with the firm.

Thomas, Means, Gillis & Seay PC announces that **Valerie L. Acoff, Darnell D. Coley, Raymond L. Johnson, Jr., James L. Richey, Paul C. Williams, John W. Adams, Jr., and Pamela Robinson Higgins** recently became shareholders in the firm.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **D. Michael Andrews, Charles W. Barfoot, Ronald A. Canty, Melissa A. Prickett, and W. Roger Smith, II** have become associated with the firm. **C. Gibson Vance, J.P. Sawyer, Benjamin E.**

Baker, Jr., David B. Byrne, III, Ted G. Meadows, Gerald B. Taylor, Jr., Benjamin H. Albritton, David F. Miceli, and Frank Woodson have become *of counsel* to the firm.

Fees & Burgess PC announces that **Joseph D. Aiello** has become an associate with the firm.

Berkowitz, Lefkovits, Isom & Kushner PC announces that **Jonathan R. Geisen, Milton D. Hobbs, Jr., Harriet T. Ivy, Donald J. Nettles, Jason M. Osborn, and Sandy S. Sparrow** have joined the firm as associates.

Bradley Arant Rose & White LLP announces that **Chris Hawkins, Lisa Moss, Brian Wahl and Laura Watkins** have joined the firm as associates.

Walston, Wells, Anderson & Bains LLP announces that **Dawn Helms Sharff** has become a partner, and **Anu Mahatekar Brady and Emily S. Lassiter** have become associates with the firm.

Lloyd, Gray & Whitehead PC announces that **Howard Y. Downey** has become a shareholder with the firm, and **Ashley E. Manning and Emily K. Niezer** have become associated with the firm.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **G. Thomas Sullivan** has joined the firm as a partner, and **Amy Bell Nelson** has joined as an associate.

William C. Maddox announces that **Charles Michael Herrington** has become associated with the firm.

Austill, Lewis & Simms PC announces that **Joel DiLorenzo and Shelley D. Howton** have joined the firm as associates.

Smith, Spires & Peddy PC announces that **Sheri R. McMullen and Jennifer M. Williamson** have joined the firm as associates.

Morris, Cary & Andrews LLC announces that **Cory H. Driggers** has joined the firm.

Boyd & Fernambucq PC announces that **Richard L. Vincent** has joined the firm and the firm name has been changed to **Boyd, Fernambucq & Vincent PC**

R. Ben Hogan, III announces the formation of **Hogan Law Office PC** and that **Christopher D. Glover** has joined the firm as an associate.

The Law Offices of Max Cassady PC announces that **Utopia Cassady** has joined the firm as a partner and the firm name has been changed to **Cassady & Cassady PC**

Hatcher, Stubbs, Land, Hollis & Rothschild announces that **Edward P. Hudson** has become a partner in the firm.

Farmer, Farmer, Malone & Sherrer PA announces that **Virginia Lynn Nichols** has joined the firm as an associate.

David M. Wilson and **Jonathan L. Berryhill** announce the formation of **Wilson & Berryhill PC**, and that **Jud C. Stanford** and **Irene Blomenkamp** have become associates of the firm. Offices are located at 1475 Financial Center, 505 20th Street, North, Birmingham 35203. Phone (205) 252-4441.

Clark, Scott & Sullivan PC announces that **Benjamin C. Heinz** has

become associated with the firm in its Mobile office.

Glenn N. Baxter LLC announces that **James E. Gentry** has become associated with the firm.

Ferguson, Frost & Dodson LLP announces that **Lisa F. Brown** and **William R. Allen, III** have joined the firm as associates.

Lewis Fisher Henderson & Claxton LLP announces that **Craig A. Cowart** has rejoined the firm as an associate.

Richardson Callahan LLP announces that **W. Brad English** has joined the firm as an associate.

William H. Webster and **D. Mitchell Henry** announce the formation of **Webster & Henry PC** and that **Thomas A. Treadwell** is an associate with the firm. Offices are at 418 Scott Street, Suite B, Montgomery. Phone (334) 264-9472.

Huie, Fernambucq & Stewart LLP announces that **Bradley J. McGiboney, J.**

Patrick Strubel and **David L. Brown, Jr.** have become associates.

Tanner & Guin LLC announces that **Justin G. Williams** has joined the firm as an associate.

Young, Young & Parks announces that **Christopher L. Albright** has become associated with the firm.

Phillip E. Adams, Jr., Arnold W. Umbach, Jr., Patrick C. Davidson and **Matthew W. White** announce the formation of **Adams, Umbach, Davidson & White LLP**. Offices will remain at 205 9th Street, Opelika.

Wilkins, Bankester, Biles & Wynne announce that **C. Joseph Norton** has joined the firm.

Young, Young & Parks announces that **Christopher L. Albright** has joined the firm.

Ferguson, Frost & Dodson LLP announces that **Lisa F. Brown** and **William R. Allen, III** have joined the firm. ■

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Left to Right: Tom Marvin, Gina Matthews, Leon Sanders, Buddy Rawson

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James A. Turner

The Tuscaloosa County Bar Association lost a distinguished member on June 27, 2001 with the death of James A. Turner at age 75. Jimmy Turner practiced law in Tuscaloosa for 49 years, earning a reputation as a fierce advocate and a gentleman of unquestioned honesty and impeccable integrity.

He was born August 22, 1925 in the Brownville Community of Tuscaloosa County. He grew up during the height of the Depression and when not in school, he would work on the family farm or would haul logs and cord wood to help support his family.

On October 22, 1943 he entered the United States Marine Corps. After basic training he shipped out to the Central Pacific and participated in the landing of Iwo Jima on February 19, 1945, where the Marines faced some of the bloodiest and most furious combat of World War II. On March 5, 1945, 15 days after landing on Iwo Jima, Jimmy Turner was severely injured, receiving five bullets to his face and totally and permanently blinding him for life. For his action on Iwo Jima, he was awarded the Purple Heart.

He was sent to the United States Navy Hospital in Philadelphia for treatment and rehabilitation. While there he underwent the first of several painful reconstructive surgeries. He would also listen to individuals from various professions brought in to speak to him and many others like him who had been wounded and blinded in combat. He listened intently one day to an attorney and when he finished speaking, Jimmy Turner had decided on his profession.

He was discharged on April 12, 1946 and on his discharge papers listed law as his job preference. He returned home and enrolled in the University of Alabama under the GI bill. Due to his injuries, readers were provided for him who read his books, notes and exams to him. It was soon apparent to his readers and his professors that he had a phenomenal memory. He would have several readers during his undergraduate years but there was one that was special to him. Her name was Louise Ingram, and they were married in January 1948. Together they soon began a family and their first son, James Donald, was born in October 1948. Mr. Turner graduated from the University of Alabama and entered the University of Alabama Law School in 1949 and his wife, Louise, joined him a year later. They were also joined by their second son, Richard Dillard, having been born in December 1949. Jimmy Turner was known as an excellent student excelling in his studies. He graduated from the University of Alabama Law School in 1952 and his wife, Louise, graduated a year later in 1953. They established the law firm of Turner & Turner, the same firm which bears their name today. His first office was on the ninth floor of the First National Bank Building, now known as the AmSouth Bank Building, where he pro-

ceeded to slowly starve to death, as young lawyers do. Times were not tough for long as he soon gained a reputation as a fierce determined advocate who would unflinchingly fight for his client's rights. He gained the admiration of his peers by taking on cases other lawyers would not, and winning them. The late Olin Zeanah, a prominent and distinguished lawyer in his own right, once commented that he hated to try cases with Jimmy and Louise Turner more than any other lawyers. He would state that Jimmy was just too mean and that Louise was so sweet the jury just fell in love with her. Their family continued to grow as Michael Glenn, their third son, was born in July 1955, and their law practice continued to grow as well.

In 1964 the offices of Turner & Turner were moved to the River Hill Building on Greensboro Avenue where the firm would be located for the next 26 years. In 1968, Jimmy Turner was elected president of the Tuscaloosa County Bar Association by his peers and in 1974, Jimmy Turner's eldest son, Don, joined his father and mother in the practice of law.

In 1976, Jimmy Turner suffered a heart attack but was soon back at his law practice. He suffered a second massive heart attack in 1986 and underwent quadruple bypass surgery. He returned to work but no longer tried jury cases and limited his practice to worker's compensation and Social Security disability, a specialty of his since 1962. In 1988, Jimmy Turner's second son, Ric, joined the firm.

In 1990, Turner & Turner moved to its present location on 22nd Avenue. All were amazed at how quickly he was able to learn his way around his new building and surroundings, but Jimmy Turner never considered himself to be disabled.

Jimmy Turner continued to handle Social Security disability cases just prior to his death and was able to witness his grandson, Brian Donald, join the firm in 1998. Through the 1990s he suffered health problems but would astound and amaze everyone with his grit, toughness and tenacity in being able to rebound from these problems. Unfortunately he was not able to overcome his last illness and departed this life on June 27, 2001. The respect he earned was evident by the many members of the bar who were in attendance at this funeral.

He is survived by his wife of 53 years, Louise; sons Don, Ric and Glenn; grandchildren Brian, Lindsay and Brittany; and great-grandchild Farris Anne.

He will be remembered as a tough, hard and fierce advocate and one who loved the law and practiced it with honesty and humility. He was an example to all and a mentor to many. His wit and wisdom will be greatly missed by his family, friends and colleagues.

—Thomas D. Bobitt, II,
Tuscaloosa County Bar Association

Lee Edmundson Bains, Sr.

Lee Bains was a distinguished member of the Bessemer Bar Association for more than 50 years and during those years served his profession, his community, his family and his clients with distinction and honor. He died July 4, 2001.

He was born in Bessemer, Alabama and graduated from Bessemer High School, the University of Alabama and the University of Alabama School of Law. He began his practice in Bessemer in 1936 and represented various groups and individuals, including labor unions, corporations, individuals, municipalities, and state associations. He also served as city attorney for the City of Bessemer and, on numerous occasions, as the president of the Bessemer Bar Association.

Because of his legal abilities and skills, he was a member of numerous state and national honor societies and held memberships in many legal organizations, most notably the prestigious American College of Trial Lawyers.

Lee Bains was a longtime member of the First United Methodist Church of Bessemer, where he taught Sunday School for more than 50 years, and most recently continued his devotion to his God until his death, as a Sunday School teacher at Canterbury United Methodist Church and at Fair Haven Methodist Retirement Center.

He exhibited his continuous desire to improve both his mind and his body through continuous study and reading and a regiment of physical activity, including daily swims at the YMCA, long-distance skiing and skating, for which he received Presidential awards, most of which were obtained after the age of 60.

His service to this nation, which began upon his entrance into World War II and continued throughout his legal career, included his obtaining the rank of Rear Admiral, having served as the Commanding Officer of the Birmingham Naval Reserve Group, a director of the Naval Reserve Officers' School, a member of the National Naval Reserve Policy Board, a graduate of the Senior Naval Reserve Course at the Naval War College and the National War College in defense strategy, and, until shortly before his departure from this life, he was called upon to represent the Navy by making local appearances and speeches.

His many civic activities including being elected chairman of the Bessemer Democratic Executive Committee and an alternative delegate to the Democratic Convention naming Franklin D. Roosevelt for his third term in office, serving as president of the Bessemer Board of Education, as a member of the Bessemer Kiwanis club, as a member of the Bessemer Parks & Recreation Board and as president of the YMCA Board of Directors.

He set examples for the bar as to the proper role that a lawyer should take in the allocation of his time and attention to his family, having married his wife, Ruel Burton Bains, in 1938 and having raised three children, Anita Bains Hardegree, Myrtle Lee Bains and Lee Bains, Jr., two of whom attended law school and graduated in the top of their classes. He also devoted much time and attention to his six grandchildren.

—Jon B. Terry, president, Bessemer Bar Association

William Doyle Scruggs, Jr.

February 7, 1974 - August 15, 2001

The dates above represent the time line of service given to the Alabama State Bar by Bill Scruggs, its 110th president (1986-1987). Bill succumbed to cancer in his native DeKalb County on November 6, 2001, at the age of 58. He had practiced law in Fort Payne since his admission to the bar in 1968, following his graduation from the University of Alabama School of Law.

Bill was an exemplary member of the legal profession for 33 years and, therein, he was recognized as one of the finest lawyers ever to practice in Alabama. Former Chief Justice "Bo" Torbert responded "No," when asked by someone seeking his opinion on hiring legal counsel, if Bill Scruggs was the "best country lawyer" in Alabama. He would then explain that, "Bill Scruggs was the *best* lawyer in Alabama." His election as a Fellow of the American College of Trial Lawyers was an attestation to the respect he enjoyed as a result of his considerable courtroom talents. Bill's success as a lawyer was grounded in a strong character of absolute integrity, a brilliant mind, a continuing quest for knowledge, an abundance of common sense, and a sharp and disarming wit. Bill's ability to speak with the most learned and one with minimal abilities, at the same time, and have both understand him clearly, was legendary. He possessed a special talent for taking extremely difficult and complex matters and simplifying them for others to understand.

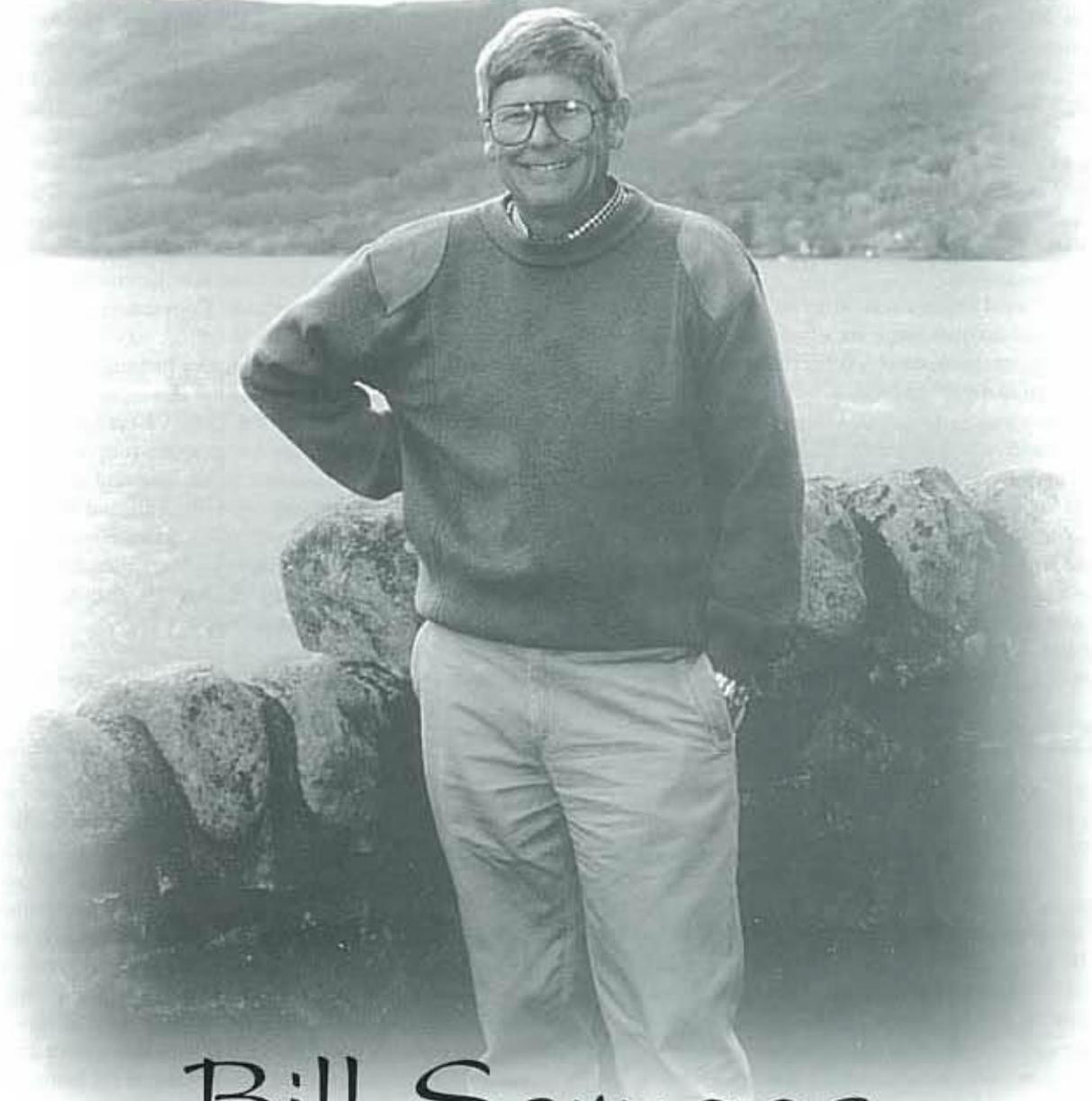
For 27½ of the 33 years he practiced law, Bill was actively involved in meaningful ways to improve our profession. His friend and teacher, Justice Sam Beatty, summed up Bill's work accordingly: "Much of the essential nature of the Alabama State Bar bears the stamp of his interest. In that, he is truly first among equals."

Bill wasn't just on a committee list. He showed up and, more often than not, was leading whatever effort he and others had been asked to undertake. We were friends before I worked closely with Bill in an official capacity for 20 of those years. The years included those in which the legal profession underwent dramatic change, not only in its growth, but in issues that confronted the profession. No one was more personally involved in seeking to meet the challenges facing the bar than was Bill Scruggs. Bill completed, by most standards, yeoman service to the profession very early in his career. A succession of bench and bar leaders continued to seek his advice and his personal involvement in the betterment of the bar and in helping it better meet its public responsibility.

Bill was elected bar commissioner for the 9th Judicial Circuit on February 7, 1974 to fill the vacancy resulting from the creation of Jackson County as the 38th Judicial Circuit. The previous commissioner from the 9th Circuit resided in the new 38th Circuit. Bill was elected by the Board of Commissioners, under prevailing rules, upon the recommendation of the lawyers of the 9th Judicial Circuit. He was 31 years of age. Bill was the commissioner for the 9th Judicial Circuit until he resigned in 1986 to assume the ASB presidency to which he had been elected. He was reelected as a bar commissioner, following his year as president, in 1987 and served until 1993. He had accepted an appointment to the Court of the Judiciary where he was serving at the time of his death. In the spirit of term limits recently adopted, though not yet legally applicable to him, he left the Commission a year early.

Bill presided over two annual meetings for the state bar, the 1982 Huntsville meeting and the 1987 Mobile meeting. He was serving

In Remembrance



Bill Scruggs



Louie Jeff Terry Wade

(...and don't forget the quail)

ref. Exodus 16:13

as second vice-president of the bar for the years 1981-82. During that year, President Harold V. Hughston died. He was succeeded by Broox Garrett, Sr., the president who served the remainder of the term. Mr. Garrett was taken ill in Huntsville, the evening before the annual meeting was to begin, and returned home to Brewton. Bill, as 2nd vice-president, was thrust into the role of presiding over the meeting. I awakened him before 7 a.m. to tell him of his new responsibility. As usual, Bill conducted the meeting flawlessly with both grace and humor. It was at this time Bill began kidding me, both publicly and privately, about "The Script."

"The Script" was merely a detailed suggested "game plan" for the use of the president in running the Annual Meeting. I had been preparing it yearly for just such an event as had occurred. Bill had fun (and he confessed a great sense of security) at my expense. The Script was, again, a prop he used very effectively at his own annual meeting in 1987 and, again, at my expense.

In 1987, he used The Script to welcome our Grande Convocation Speaker, U. S. Secretary of Transportation Elizabeth Dole. He professed to want to welcome her with a kiss, but said The Script forbade such familiarity with a Presidential Cabinet member (even though this wasn't even mentioned in The Script). Mrs. Dole turned the tables on Bill, saying that was a poor excuse for a lack of Southern hospitality and he wasn't getting off that easily. To his surprise, and the audience's delight, she hugged him and planted a kiss on his cheek.

At that meeting, Bill was presented with a special gift in recognition of his exceptional leadership and service, above that to be reasonably expected of any bar president. This was a first and, to date, only such expression of gratitude for a retiring president. The special recognition was in addition to the traditional president's service plaque. The gift included the "Golden Slingshot Award," symbolizing Bill's David-like successes against numerous Goliaths during his year. He was also presented an authentic reproduction of the Parker Shotgun, suggested and acquired by his friend, Judge John Bryan. Bill was an avid hunter, conservationist and collector of fine firearms.

A major challenge the bar faced in 1986-87 was the role it would play in the highly politicized debate on tort reform which was generated by introduction of a legislative package referred to as Civil Justice Reform Measures. The confidence the board had in Bill's leadership was manifested in its decision to defer to him solely the articulation of the bar's position. Bill had analyzed each bill to determine the impact it would have on existing statutes and case law for consideration by the full board. Bill's appearance before the state Senate Committee is still remembered as the turning point in this legislative debate and one of the most effective ever. Bill had led the bar's successful participation, with the advice and consent of the Executive Committee, in the review of a significant body of

law, in a highly charged political climate. The bar, through Bill, had been able to play a truly objective role and the effectiveness was due to the fact the bar was able to avoid being portrayed as a party of special interests. Bill Scruggs, with the drafting assistance from now Justice Champ Lyons, Jr., personally directed one of the bar's greatest legislative successes by rewriting a significant portion of the original legislative package.

Bill chaired the bar Task Force on Lawyer Discipline which developed the first major changes in bar discipline. Bill's last visit to the state bar was August 15, 2001 and, ironically, his continuing concern for professionalism was the reason for his trip. He was leading a training session for the Character and Fitness committees and their appeals board. We had planned to have lunch together, but the session lasted longer than expected and lunch was sent in. I did, however, have lunch with his son-in-law who had driven him down and when we returned to the state bar, Bill was waiting on the front porch to go home. We bid each other goodbye, without my realizing that would be my last face-to-face visit with Bill. It somehow seems appropriate that my last visual memory of Bill will be at the place he had led and served well so long. A better lawyer and bar leader, a state bar never had.

Bill's family—his wife Kay, daughter and son-in-law, Shannon and Christopher Campagna, granddaughter Liza Banks, and his sister, Jane—must know their loss is shared by a vast circle of Bill Scruggs's admirers: his friends, his clients, his professional colleagues, and the many people his good works benefited who never knew their benefactor.

If I could, I would gladly rewrite "The Script," knowing full well every player on life's stage must ultimately make an exit, and I would most certainly have delayed Bill's. At his memorial service, the minister shared aspects of a final hospital visit with Bill and Bill's admonition to him following a discussion of Scripture, "... and don't forget the quail." (Ref. Exodus 16:13). His longtime friends, Randy, Teddy, Jeff and Mark, better known as ALABAMA, also placed a remembrance in their hometown paper which noted the Biblical reference to quail. The minister interpreted Bill's remarks to explain that Bill recognized there was a life more abundant than just the basics of living. Bill most certainly contributed abundant measure to the lives of those who knew and loved him.

Bill Scruggs, 1943-2001

—Reginald T. Hammer

Endnote

1. Bill's former partner, Judge David Rains, shared with me a classic example of this wit. Bill was known to be a Democrat when it came to politics. After Bill became aware that he was terminally ill, he announced to his morning coffee group, which included some with strong Republican leanings, he had decided to become a Republican (sic). He explained this decision by noting that when he died, there would be one less of them.

Clark, Virginia Lynn

Birmingham
Admitted: 1983
Died: May 25, 2001

Frierson, Meade III

Birmingham
Admitted: 1966
Died: September 24, 2001

Grinstead, Eugene Andrews III

Brookline, MA
Admitted: 1974
Died: February 28, 2001

Hagood, John Adair

Mobile
Admitted: 1942
Died: April 16, 2001

Hutson, John Robert

Decatur
Admitted: 1941
Died: May 18, 2001

Merrill, Carl Henry

Heflin
Admitted: 1949
Died: June 2001

McArthur, Paul Graham

Foley
Admitted: 1967
Died: June 8, 2001

Morris, Kreg Layton

Fairhope
Admitted: May 5, 2000
Died: September 30, 2001

Perry, Walter Emmett Jr.

Birmingham
Admitted: 1950
Died: October 21, 2001

Pruet, Bennett Edward

Birmingham
Admitted: 1956
Died: September 6, 2001

Scalici, Matt Paul

Birmingham
Admitted: 1950
Died: February 18, 2001

Spoon, Samuel Alexander

Montgomery
Admitted: 1983
Died: October 31, 2001



Fourth Special Session

The session was called to raise funds for the Education Budget. In the call was a revision of the Business Privilege Tax (HB. 1)(*died*); Suspension of Carryover Losses for Two Years (HB. 2); Elimination of Consolidated Corporate Tax Returns (HB. 4); Tax Treatment of Limited Liability Entities (HB. 5); Multi-State Tax Compact (HB. 7); Establish Education Rainy Day Fund and Make Available \$171 Million (HB. 8).

Also passed by both houses was a tax on cell phones (HB. 62); Licensing of Assisted Living Administrators (SB. 11); Crime of Harassing Sports Officials (SB. 16); Abolishing On-Site Absentee Balloting (SB. 34); and Prohibition on candidate who was defeated in a Party Primary from running as a candidate in another party the same year (SB. 36). Although both houses have passed these bills, they must each be signed to become law. Please consult the legislature's Web site for final passage: www.alisdb.legislature.state.al.us/acas/ACASLogin.asp.

2002 Regular Session

The 2002 Regular Session of the legislature began January 8, 2002 and can continue until April 22, 2002.

Last year the legislature not only had their regular session but four special sessions which left legislators away from their homes about half the year.

A major issue facing the Alabama legislature and 45 other legislatures is the sharp drop in tax revenues. Sixteen states are considered in critical condition in which revenues are lower and spending is higher than expected in current budget projections. These include our neighboring states of Georgia and Mississippi, as well as nearby North Carolina. Alabama is listed in serious condition in which revenues are lower than expected but spending is on target with current budget projections. This condition is shared by Florida and Tennessee. Only four states have revenues on target with current budget projections. This information is from the National Conference of State Legislatures in their December 2001 publication.

It is also expected that the 2002 statewide and legislative elections will have an impact on the session. April 5, 2002 is the last day for candidates seeking nomination by a party primary to file a declaration for candidacy with the state party chairman or county party chairman. The initial primary election is June 4 with the run-off election June 25, 2002.

Law Institute-Prepared Legislation

Alabama Uniform Anatomical Gift Act. The bill clarifies the rights of parties involved in the donation of their

body parts and the authority and procedures for individuals involved in removing and transplanting a part. See March 2001 *Alabama Lawyer*.

Alabama Uniform Interstate Enforcement of Domestic Violence Orders. The act provides a uniform system for enforcement of domestic violence protection orders across state lines. This full faith and credit provision directs states to honor "valid" protection orders issued by the jurisdictions and to treat those orders as if they were their own. See March 2001 *Alabama Lawyer*.

Alabama Uniform Institutional Funds Act. In 1993 Alabama adopted the Uniform Management of Institutional Funds Act, however, it was restricted to "educational institutions" thereby other institutions, as the State Bar, religious organizations as the State Baptist Association and the Methodist Districts, and those civic organizations as Kiwanis and Rotary could not avail themselves of investment options as a fiduciary. The amendment to the Educational Institutional Funds Act would remove the limitation of this act to only education institutions. It will not affect the current law as it relates to educational institutions. This will provide Alabama with the same standards for judiciary investments as found in most other states.

Law Institute Major Revisions Effective 2002

Effective January 1, 2002 is **Revised UCC Article 9** concerning secured transactions. There are new forms, new filing procedures and in many cases, new filing places. One should consult the new law which is now effective in all 50 states.

The **Uniform Electronic Transactions Act** that Alabama passed in 2001 has now been adopted in 35 states. In those states that have not adopted this act, they are governed by the Federal Electronic Signatures in Global and National Commerce Act or "E-sign" law.

New Web Site

Our new Web address is www.ali.state.al.us. For more information concerning the Institute or any of its projects contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013; FAX (205) 348-8411; phone (205) 348-7411. ■



Robert L. McCurley, Jr.

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.

ON THE ROAD AGAIN...

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- The director of the Alabama Lawyer Assistance Program, Jeanne Marie Leslie, raises awareness and understanding of substance abuse within the profession and tells you how to be part of the solution to this growing problem.
- Judy Keegan, director of the Alabama Center for Dispute Resolution, brings you a summary of the latest updates and important cases from the fast-growing areas of mediation and arbitration.
- General Counsel Tony McLain keeps bar members informed of the latest in disciplinary issues and major legal developments in Alabama and across the nation.
- Volunteer Lawyers Program Director Linda Lund has developed an ethics and professional component covering significant developments on a local and national level.

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ALABAMA STATE BAR
To Serve the Profession



J. Anthony McLain

Attorney's Right to Communicate with Opposing Party's Expert Witness

QUESTION:

In RO-87-74 and RO-88-28, the Disciplinary Commission of the Alabama State Bar addressed the question of whether, and under what circumstances, an attorney may contact and communicate with an expert witness employed by an opposing party. The Commission concluded that it was ethically permissible for an attorney to communicate with such a witness despite the fact that the opposing party is represented by counsel and despite the fact that the attorney has not obtained permission from opposing counsel to engage in such communication with the witness. The Commission based its opinion in large part upon three opinions of the American Bar Association Committee on Ethics and Professional Responsibility: Formal Opinion 117 (1934), Formal Opinion 127 (1935) and Informal Opinion 892 (1965). In 1993, the American Bar Association issued Formal Opinion 93-378 which modified, to some extent, its earlier rulings on this issue. Accordingly, the Disciplinary Commission considers it inappropriate to revisit and reconsider its previous opinions regarding contact with opposing experts.

ANSWER:

Subject to certain conditions discussed below, it is still permissible, under most circumstances, for an attorney to contact and communicate with an expert witness employed by an opposing party. However, if the matter is pending in federal court, or in any other jurisdiction which has adopted an expert discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(A), an attorney who engages in such contact could be in violation of Rule 3.4 (c) of the Rules of Professional Conduct of the Alabama State Bar.

DISCUSSION:

Nothing in the Rules of Professional Conduct conclusively precludes an attorney from initiating contact with the opposing party's expert. Rule 4.2 prohibits an attorney from communicating with a party or other person¹, only if such party or person is represented by another attorney. Neither Rule 4.2, nor any other rule, extends this protection to witnesses or explicitly treats expert witnesses differently from fact witnesses.

The above-stated conclusion is consistent with the holding of the Alabama Supreme Court in *Romine v. Medicenters of America, Inc.*, 476 So.2d 51 (Ala. 1985), a medical malpractice case in which the personal representative of a deceased patient contended that testimony of the deceased's treating physician was inadmissible because the defendant's attorney had discussed the case with the physician without authorization from the representative of the estate. The court rejected this argument noting that "[t]here is no testimonial privilege in Alabama covering communications between a physician and his patient or the physician's knowledge of the patient's condition acquired by reason of the relationship." 476 So.2d at 54, footnote 2. The Court went on to quote with approval from *Doe v. Eli Lilly & Co.*, 99 F. R. D. 126 (D. D. C. 1983), viz:

"As a general proposition, however, no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to any witness, however partial or important to him, by insisting upon some notion of allegiance. Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance

of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, e.g., compensation for his time and expertise or payment of reasonable expenses involved . . .". 476 So.2d at 55 (citations omitted)

However, there are certain ethical restrictions on contacts with any witness which are obviously equally applicable to expert witnesses. For example, Rule 4.3 requires candor and truthfulness on the part of an attorney dealing with an unrepresented person. When an attorney contacts any person who is not represented by counsel, including a lay or expert witness, the attorney must ensure that the person contacted fully understands the attorney's role in the matter and his relationship to the case or controversy that has given rise to the contact.

Furthermore, Rule 4.1 (a) prohibits an attorney from making false statements of material fact or law to a third person. This rule precludes any contact with a witness which would convey the message, directly or indirectly, that the witness must speak with the attorney. As is the case with any person or witness not under subpoena, an expert witness may refuse to discuss the case with opposing counsel. In fact, Rule 3.4(d) expressly recognizes the right of an attorney who has hired an expert to instruct the expert not to discuss the case with opposing counsel.

Obviously an attorney may not coerce or intimidate an opposing expert or in any way attempt to change or influence the expert's testimony. The prohibition in Rule 3.4(b) against counseling or assisting a witness to testify falsely applies with the same force and effect to an opponent's witnesses as it does to the attorney's own witnesses. Finally, in any contact with either a fact or expert witness, the attorney may not attempt to elicit confidential or privileged information. A corollary to Rule 1.6 which prohibits an attorney from revealing client confidences is that an attorney may not attempt to cause another to breach such confidences. However, the most significant impact on the validity and applicability of those opinions which permit contact with opposing experts came about as a result of rules which have been adopted by some jurisdictions gov-

erning the discovery of expert testimony. Foremost among these is Rule 26(b)(4)(A) of the Federal Rules of Civil Procedure. Pursuant to this rule, there is a two-step process which must be followed in order to obtain discovery of facts and opinions held by an adversary's expert who is expected to testify at trial. This rule requires that, prior to any contact with an opposing expert, interrogatories must be served upon the expert.

If the attorney feels the responses to the interrogatories are insufficient, leave of the court must be obtained in order to conduct additional discovery. In two different opinions, the United States Court of Appeals for the Ninth Circuit has held that an attorney who makes *ex parte* contact with the opposing party's expert, as opposed to complying with prescribed procedures, has committed a "flagrant violation" of Rule 26(b)(4)(A). See, *Campbell Industries v. Gemini*, 619 F.2d 24 (9th Cir. 1980) and *American Protection Insurance Co. v. MGM Grand*, 748 F.2d 1293 (9th Cir. 1984).

Several states have also adopted discovery rules that are patterned after, and similar to, Federal Rule 26(b)(4)(A). One of these is our neighboring state of Georgia. In *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303, 404 S.E.2d 607 (1991), the Georgia Court of Appeals held that an attorney who had refused to follow mandated discovery procedures "should not be allowed to circumvent them by engaging in *ex parte* communication with the opposing party's expert." 404 S.E.2d at 611.

Additionally, some jurisdictions have other statutory prohibitions against certain attorney-witness contacts. In many states, it is unlawful for a treating physi-

cian to discuss a patient's case with anyone without first obtaining the patient's consent. There may also be similar prohibitions involving other professionals who may be employed as experts. Rule 3.4 (c) of the Rules of Professional Conduct of the Alabama State Bar provides as follows:

"Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

* * *

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

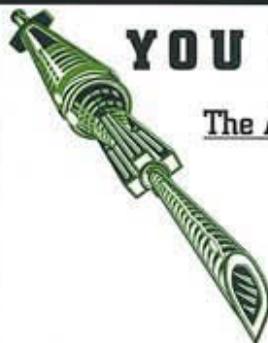
Applying this rule to the issue here presented, it is the opinion of the Disciplinary Commission that, while *ex parte* contact with the opposing party's expert is not ethically prohibited, *per se*, such contact and communication with an expert witness in a jurisdiction where such contact and communication is prohibited or restricted by statute or procedural rule, constitutes a violation of Rule 3.4(c) and could, therefore, subject the attorney who engages in such contact to disciplinary action. This opinion is consistent with that of the American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 93-378. [RO-01-02] ■

Endnotes

1. Rule 4.2 prohibits contact with a "party." However, the Comment to the Rule provides as follows: "This rule also covers any person, whether or not a party to the formal proceeding, who is represented by counsel concerning the matter in question."

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Jeanne Marie Leslie, program director



Todd S. Strohmeyer

My first article as president of the Young Lawyers' Section of the Alabama State Bar was to be published in the November issue of *The Alabama Lawyer*, and was due to the publisher in mid-September. The article I had written seemed insensitive and a little too edgy for those days following September 11, and I trashed it. My first (unpublished) article discussed the moral decline of America and was to be entitled "Wake Up America." I have pulled portions of that article out of the trash for this article.

I want every young lawyer to know the importance of their position. It should be apparent that there has been a slow decline in society's morality. What is considered normal behavior today was considered deviant behavior in the last generation. This process of becoming desensitized to immoral conduct has advanced for many previous generations bringing this country to its present condition. This does not mean that morality must continue to decline. In my unpublished article, I discussed the declining times of the Roaring 20s and how World War II stopped the decline and provided a revival in national unity, religion and the law. The question I posed in my first unpublished article was where would the present decline end? Which generation would stand up and put a stop to the decline? My article was to challenge our generation of young lawyers to help put a stop to the decline.

However, the answer came on September 11. September 11 horrified and stunned this nation, but look at its results. We have seen an increase in national unity, religion and the law. It was a wake-up call to our generation to make changes. We as lawyers must speak up and take a stand against immoral and uncivilized conduct. It is easy, but wrong, to believe that you cannot make a difference.

Speaking at last spring's annual YLS seminar and meeting at Sandestin (which every young lawyer should attend), **Bryan Stevenson**, founder of the Equal Justice Initiative of Alabama, reminded us that lawyers hold positions of trust and that our words are powerful in confronting injustice. Bryan's motivational speech showed us that we have a responsibility as lawyers to be careful of what we say and how we act, and that a word of encouragement, or a sound word of caution can have a lasting impact on many lives. There is

power in this profession. September 11 has created a revival in America in national unity, religion and the law. It is now our duty to continue this revival and take a stand against individual, corporate and political immoral conduct.

As young lawyers, we should challenge ourselves every day to make our communities better places and to promote the public's welfare. The Young Lawyers' Section of the Alabama State Bar will do everything possible this year to promote the general welfare of this state. If you are not involved in your local chapter, please get involved. Here is this year's Executive Committee:

Robert G. Methvin, Birmingham, president-elect
Brannon J. Buck, Birmingham, secretary
Stuart Y. Luckie, Mobile, treasurer
Cole J. Portis, Montgomery, immediate past president
Thomas B. Albritton, Andalusia
Nolan Aubrey, Birmingham
Robert N. Bailey, Birmingham
LaBarron N. Boone, Montgomery
Benjamin M. Bowden, Andalusia
Kimberly J. Calametti, Mobile
Bryan N. Cigelske, Mobile
Christina D. Crow, Union Springs
Paul J. DeMarco, Birmingham
Suzanne C. Dorsett, Huntsville
Jim Hughey, Birmingham
Craig D. Martin, Mobile
Patrick W. McCalman, Andalusia
Apsilah G. Millsaps, Tuscaloosa
Roman Shaul, Montgomery
James Pittman, Mobile
Harlan F. Winn, Birmingham
Tucker Yancey, Mobile

This fine executive committee will undertake numerous projects this year such as the Bar Admission Ceremony, the Youth Judicial Program, the Minority Participation Conference, a Federal Emergency Management Act Response Project, and the Young Lawyers' Section Sandestin Seminar. We look forward to undertaking these challenges. ■

Todd Strohmeyer is a partner at Sims, Graddick & Dodson in Mobile.

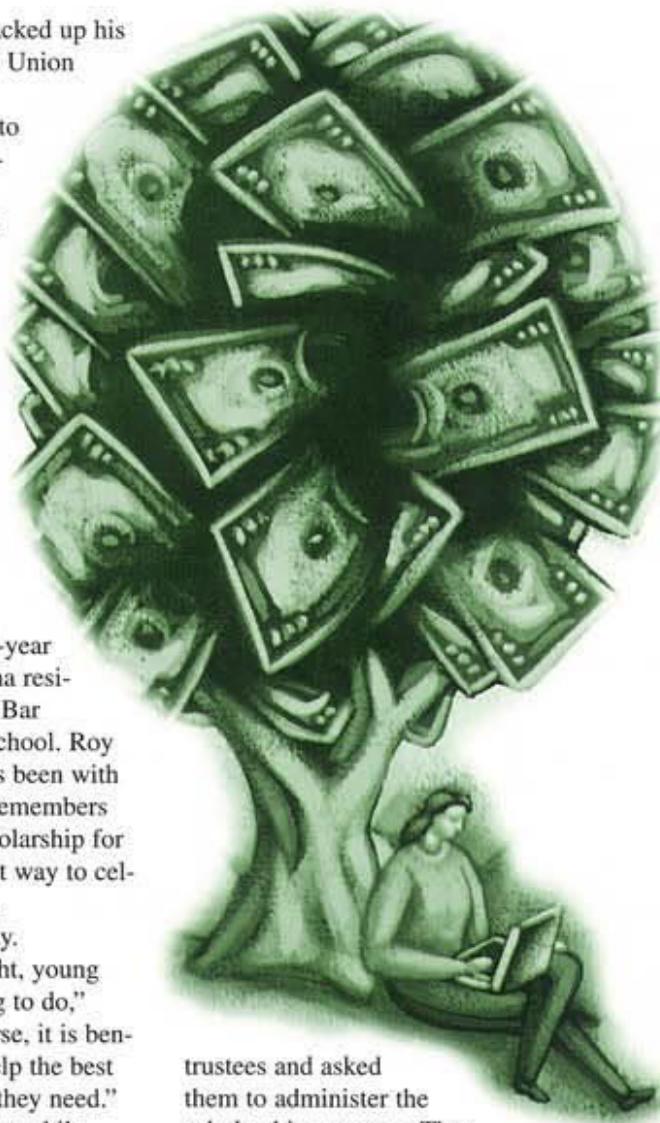
CABANISS JOHNSTON SCHOLARSHIP Keeps Giving

In 1887, E.E. Cabaniss packed up his life and moved from tiny Union Springs, Alabama to the bustling city of Birmingham to start a law practice. One hundred years later Cabaniss, Johnston, Gardner, Dumas & O'Neal, the now very successful law firm he started, found the perfect way to commemorate him and his firm's immense contribution to the legal profession. In 1987, on the firm's 100th anniversary, the idea for the Cabaniss Johnston Scholarship was formed.

The Cabaniss Johnston Scholarship is a scholarship awarded each year to second-year law students who are Alabama residents attending an American Bar Association-accredited law school. Roy Crawford is a partner and has been with the firm since 1977, and he remembers thinking that endowing a scholarship for law students would be a great way to celebrate the firm's anniversary.

He still feels that way today. "Providing assistance to bright, young law students is the right thing to do," Crawford said. "And, of course, it is beneficial to the profession to help the best minds can get the education they need." Crawford also pointed out that while many law firms endow scholarships, they usually to go to a specific school. Those receiving a Cabaniss Johnston Scholarship can go to any law school they choose as long as it is accredited by the American Bar Association.

The Cabaniss Johnston Scholarship is administered by the Alabama Law Foundation, a non-profit organization dedicated to law-related charities. When the foundation was formed, Crawford was asked to do the incorporation work. He served on the foundation's board of



trustees and asked them to administer the scholarship program. They agreed, and Crawford continually praises them on the job they have done. "The Alabama Law Foundation has been wonderful. They have done an excellent job administering the Cabaniss Johnston Scholarship fund each year," he said. "Of course, it is such a small part of what they do. With all of their programs, especially the IOLTA (Interest on Lawyers' Trust Accounts) Grant Program, they have helped so many women, children and disadvantaged. They do a tremendous amount of good."

Crawford also prepared the scholarship guidelines that the foundation's committee uses to pick the winners each year. The committee is made up of two lawyers from the firm and three other members appointed by foundation's trustees.

This year, the foundation has awarded the 2001 Cabaniss Johnston Scholarship to two exceptional students. Harrison Bishop from Dothan and Henry Walker from Decatur each received a \$3,500 scholarship to continue their legal education.

Bishop graduated from Northview High School in Dothan and went on to graduate from Birmingham Southern College with a degree in business administration. He is now in his second year of law school at the University of North Carolina. Bishop expressed his gratitude to the foundation and the firm not only for the scholarship he got, but also their dedication to legal education in general. "This scholarship has been a great help to me, but I am also extremely grateful to the Alabama Law Foundation and the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal for their continuing support of legal education for Alabama students," he said.

Walker graduated from Decatur High School and received his bachelor's degree from the University of North Alabama. He then went on to get his master's and Ph.D. from the University of Alabama. Walker is now attending Cumberland Law School, thanks in part to the Alabama Law Foundation and the Cabaniss Johnston Scholarship Program.

For 15 years, the Cabaniss Johnston Scholarship program has been awarding scholarships to promising law school students from Alabama. Together, the Alabama Law Foundation and the law firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal are helping students further their education and realize their potential. ■

Amendment to Alabama Rules of Appellate Procedure

The Alabama Supreme Court has amended Rule 5, Rule 21(d), Rule 27(d), Rule 28, Rule 32, Rule 39(d), Rule 39(f), Rule 39(h), and Rule 40(g), Alabama Rules of Appellate Procedure, and has adopted Court Comments to those amendments (except the amendments to Rule 21(d) and Rule 27(d)). The amendment of those Rules and the adoption of the Court Comments are effective June 1, 2002; however, the supreme court encourages members of the bar to begin compliance with these new rules as soon as possible.

The amendment to Rule 5 changes the procedure for pursuing a permissive appeal from an interlocutory order and imposes a page limitation on the petition for permission to appeal and any answer to the petition. The amendments to Rule 28 and Rule 32 make significant changes in the format and length of briefs and other documents submitted to Alabama appellate courts, and the amendment to Rule 32 includes sanctions for noncompliance with these Rules. The amendments to Rule 21(d), Rule 27(d), Rule 39(d), Rule 39(f), Rule 39(h), and Rule 40(g) provide that the documents addressed in those various rules conform to Rule 32(a) and impose page limitations for those documents.

The order amending these rules and adopting the Court Comments to these rules appears in an advance sheet of *Southern Reporter* dated on or about December 20, 2001. The order and the text of the amendments and the comments may also be found at the Administrative Office of Courts' Web site at www.alacourt.org/rulechanges and at the Alabama State Law Library's Web site at www.alalinc.net/rulechanges.

—Bilee K. Cauley, Reporter of Decisions, Alabama Appellate Courts

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Fall 2001 Admittees



Statistics of Interest

Number sitting for exam.....	549
Number certified to Supreme Court of Alabama.....	323
Certification rate*.....	58.8 percent

Certification Percentages:

University of Alabama School of Law.....	83.8 percent
Birmingham School of Law.....	33.3 percent
Cumberland School of Law.....	81.4 percent
Jones School of Law.....	35.7 percent
Miles College of Law.....	11.3 percent

*Includes only those successfully passing bar exam and MPRE

Alabama State Bar Fall 2001 Admittees

- Adams, Anne Cole
Adams, Brian Paget
Adams, Clayton Matthew
Adams, Forrest Lamar II
Aiello, Joseph Douglas
Albright, Christopher Lamar
Allen, Anthony Scott
Allen, Leslie Garrett
Allen, William Ragon III
Allums, Stephen Scott
Almond, Alexander Pearson
Anderson, Andrea Nakia
Anderson, Jacinda Denise
Anderson, Robert Lynn LaPointe
Atkinson, Cynthia Susan Lee
Baker, Jerry Wayne Jr.
Balch, Sue Ann
Barganier, Rodney Fontaine
Barnett, Henry Clay III
Bartley, Paul Carver Jr.
Baxley, Mark Hampton
Bentley, Samuel Boyd
Beruff, Max
Blackmon, William Drake
Blair, Gordon Liddell
Blalock, Dan Jr.
Blanco, Maria del Carmen
Blaylock, Jeremy Alan
Bonner, Charles Britton
Borton, Thomas Ernest IV
Bowyer, Jason Richard
Brashier, Keith Edward
Braswell, Dennis William
Brennan, Anna Kelly
Brom, Steven Michael
Broussard, Keasha Ann
Brown, Ann Yetta
Brown, David Lee Jr.
Brown, Joseph Allan
Bryant, Robert Dale
Bunn, Jonathan Rudman
Burnette, Brandy Marie
Butler, Barney Anderson
Butler, Elizabeth Ray
Butler, James Landrum
Campbell, Anastasia Pamham
Campbell, William Lynn Jr.
Canty, Ronald Austin
Carney, John Thomas Jr.
Cassady, Utopia Conger
Chappell, Jean-Paul Michael
Chartoff, Marion Dawn
Chestnut, Prince Darius
Cleon, William
Cochran, Jessica Virginia
Coleman, Julie Janetta
Colley, Harold Jerome
Colvin, Alan Matthew
Conlin, Jon Collins
Connally, Amy Wallace
Cook, Jason Shane
Coppage, Carrie Constance
Creel, Thomas Stuart
Crissey, Laura Johnson
Crocker, Robert Champ
Cunningham, Andrew Steven
Dasinger, Brian Anton
Davis, John Richard
Day, John David
Day, Wayne Charles Jr.
Dearman, Henry Chase
DeGaris, Ashley Lynn Harris
DeLeon, Fred R. Jr.
DeVaney, Nancy Magalin
Dodd, Cynthia Lynn Douthitt
Dorsett, Clyde Powers III
Dotson, Melanie Kathryn
Douglas, Michael Jon
Driggers, Cory Holley
Dubina, Martha Kehres
East, Christopher Ryan
Edwards, David Eugene
English, Walter Brad
Espy, Benjamin Joseph
Evans, Emma B. Robinson
Evans, Jonathan Scott
Faulkner, Scott William
Fibbe, George Harold
Field, Sheila Crumley
Fingar, Justin Dane
Fite, Heath Alan
Floyd, Marilyn Scott
Ford, Brannon Sykes
Frazer, Ross Alexander
Fridy, Matthew David
Furman, Kimberly Ann Lumpkin
Gaines, Cleophus Jr.
Garner, Marilyn Marie
Garner, Stuart James
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Geiger, Shelley Elizabeth
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Geneux, Christopher Stephen
Gill, Charles Nelson
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Goldman, Christine Eugenia Hudson
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Hallford, Tanya Diane
Hallmark, Mark Alan
Hamlin, William Tony
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Harrison, Donald Mauricell
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Henderson, Jeffery Calhoun
Henderson, Sarah Lindsay
Henderson, Sarah Lindsay
Hendrix, Bradley Loyed
Hiley, Thomas Stewart
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Holt, Edward Morris
Holzwanger, Edward Brough
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Huffaker, Matthew Lee
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Hunter, Scott Wayne
Hurst, Norman Jr.
Hutchings, Shannon Dawson
Ifediba, Anthony Chuma
Irby, James Elwyn Reese
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Ivy, Harriet Thomas
Jackson, Joshua Jonathan
Jackson, Robert Milton III
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Jarvinen, Thomas John
Jefferis, Clifton Wayne
Jernigan, Robert Frederick
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Kennedy, Patrick Edward
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King, Gerald Wesley Jr.
Kizziah, Michelle Mestler
Knight, Kelly Riggins
Kwashnak, Kevin Vaughan
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Lanham, Clay Arnold
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McCollum, Meredith Lee
McCrary, Michael Vance
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McGiboney, Bradley Jason
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McKinley, Robert Ball
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McKay, Walter Henry Clay
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Minneti, Jeffrey John
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Mitchell, John Timothy
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Mujumdar, Anil Ashok
Murphy, Shannon Leigh
Nabors, Jeffrey Dale
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Newton, George Edwin III
Niezer, Emily Kay
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O'Rear, William Gunter Jr.
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Osborn, Jason Michael
Osborn, Paige Freeman
Overstreet, Adam Wayne
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Palmer, Allison Beth
Palmer, Patricia Lynlee Wells
Parker, Stephen Davis
Parnell, Justin Matthew
Payne, Chandra Bonita
Pell, Kristin Gray
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Pentecost, Vincent Bonner
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Satterwhite, Paul Daniel
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Scott, Joi Charisse
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Sheehan, Ashley Swink
Sheffield, John Martin
Sherrer, William Jefferson
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Wallace, Stephen Cochran
Ward, Kimberly Renee
Watson, Christian Nicole
Watters, Latanishia Daniele
Webb, Jon Kevin
Wells, Michele Alexander
White, Michael Alan
Wilhite, Tillery Delquon
Williams, Justin Glyien
Williams, Tina Maria
Williams, Walter Abner Jr.
Williamson, Jennifer Mae
Wilson, Anthony Glenn
Wood, Thomas Marriott
Wright, Dan Dwaine Jr.
Yance, Randolph Tucker
Young, Eric Edward
Youngren, Kathryn Ann Faulkner

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Martha Dubina Roby (2001), Judge Joel F. Dubina (1973) and Riley W. Roby (2000) (admittee, father and husband)



Brian Anton Dasinger (2001), Michael Anton Dasinger (1991) and Thomas Edgar Dasinger (1995) (admittee and brothers)



Valerie Rucker Russell (2001) and Lee M. Russell, Jr. (1997) (admittee and husband)



Karon Ansel Sasser (2001) and Robert Earl Sasser (1970) (admittee and father)



Christopher Ryan East (2001), Shirley Crawford Dorrrough (1971) and Judge Richard H. Dorrrough (1970) (admittee, mother-in-law and father-in-law)



Lynlee Wells Palmer (2001) and H. Thomas Wells (1975) (admittee and father)



M. Hampton Baxley (2001), Wade H. Baxley (1968) and William J. Baxley (1964) (admittee, father and uncle)



Bruce Bunyan Thompson (2001) and Joe Bunyan Thompson (1959) (admittee and father)

Lawyers in the Family



Brian L. Justiss (2001) and Thomas P. Stowe, Jr. (1968) (admittee and father-in-law)



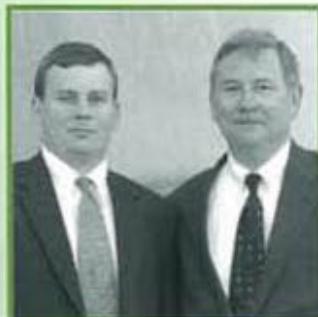
Sally M. Page (2001) and Quentin E. Musick (1949) (admittee and grandfather)



Elizabeth Butler (2001), Philip H. Butler (1971) and Albert S. Butler (1984) (admittee, father and uncle)



William Jefferson Sherrer (2001) and Wayman Gray Sherrer (1956) (admittee and father)



Charles Nelson Gill (2001) and Richard H. Gill (1965) (admittee and father)



Forrest Adams II (2001), Amy Adams (2000) and Sam Adams (1971) (admittee, wife and father)



Benjamin Joseph Espy (2001) and Joseph C. Espy, III (1972) (admittee and father)



Margaret Elizabeth McDowell (2001) and R. David McDowell (1980) (admittee and uncle)



Jason R. Smith (2001) and Rufus R. Smith, Jr. (1974) (admittee and father)



Laura Johnson Crisspy (2001) and Hon. Earl V. Johnson (1974) (admittee and father)

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M. Lee Huffaker (2001), Robert A. Huffaker (1968) and Robert A. Huffaker, Jr. (1999) (admittee, father and brother)



Andrea N. Anderson (2001) and James W. Wilson (1976) (admittee and uncle)



Jonathan Scott Evans (2001), Carl L. Evans (1967) and Carl L. Evans, Jr. (1997) (admittee, father and brother)



Ashley H. DeGaris (2001), Annesley H. DeGaris (1989) and Judge John W. Gibson (1950) (admittee, husband and uncle)



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Amy Connally (2001) and Joel Connally (1998) (admittee and husband)



Henry Clay Barnett, III (2001), Henry Clay Barnett, Jr. (1974) and Henry H. Hutchinson (1975) (admittee, father and uncle)

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DeAnna Hay (2001) and Steve Hay (2001) (wife and husband co-admittees)



C. Powers Dorsett, III (2001) and C. Powers Dorsett, Jr. (1969) (admittee and father)



Angela Hames Sahurie (2001) and Randy Allan Hames (1999) (admittee and father)



Stephen C. Wallace (2001) and William M. Dawson (1969) (admittee and stepfather)



Leslie Garrett Allen (2001) and William Ragon Allen, II (2001) (wife and husband co-admittees)



Anastasia P. Campbell (2001) and William L. Campbell, Jr. (2001) (wife and husband co-admittees)



Joseph Allan Brown (2001) and Joseph M. Brown (1977) (admittee and father)



Tucker Yance (2001) and Jim Yance (1973) (admittee and father)



Christopher L. Albright (2001), John A. Tinney (1974) and Claire Tinney Jones (1998) (admittee, father-in-law and sister-in-law)



Ross A. Frazer (2001) and Albert Danner Frazer, Jr. (1972) (admittee and father)



Keith Lichtman (2001) and Charles Lichtman (1972) (admittee and father)

Lawyers in the Family



Leigh Gwathney (2001) and Curt Gwathney (2001) (sister and brother co-admittees)



Frank Springfield (2001) and Steve Springfield (1975) (admittee and father)



Teresa Griffin Heinz (2001) and Benjamin Connell Heinz (2001) (wife and husband co-admittees)



Donna McGee (2001) and Glenn Glover (2000) (admittee and fiancé)



Michael Alan White (2001) and Anne Mitchell (1978) (admittee and sister)



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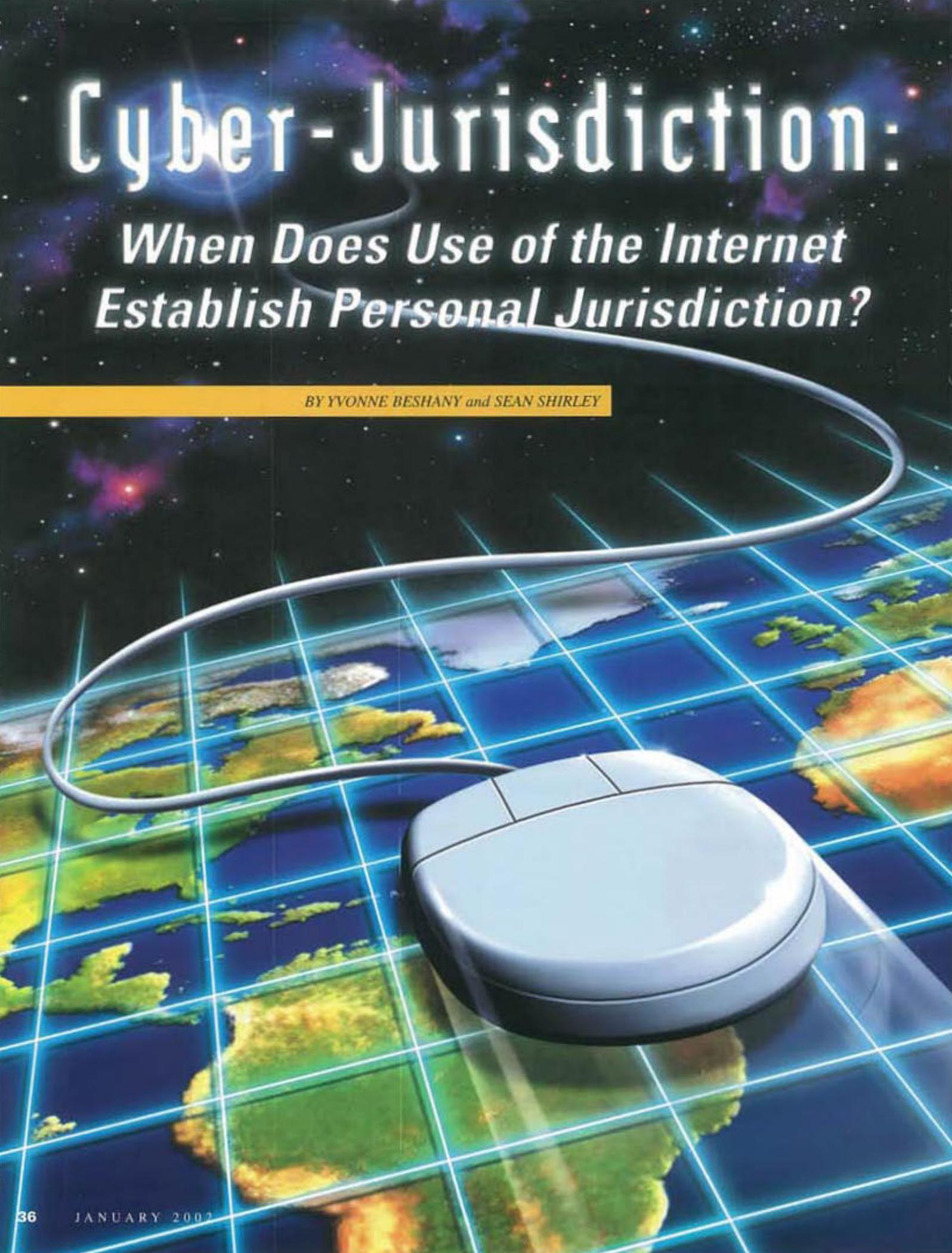
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Cyber-Jurisdiction:

When Does Use of the Internet Establish Personal Jurisdiction?

BY YVONNE BESHANY and SEAN SHIRLEY



The Internet, like television and radio before it, has become an important source for entertainment, news, technology, communication, and business. The development of the Internet continues to produce great opportunities and advantages, but, like any innovation, this evolving medium presents unique problems, especially in the realm of personal jurisdiction.

To date, the Eleventh Circuit and Alabama have not yet addressed when personal jurisdiction exists over a foreign defendant based upon the defendant's cyber-contacts. However, due to the pervasiveness of the medium, such a decision is imminent. This article provides an overview of how other courts have adapted and applied fundamental concepts of personal jurisdiction jurisprudence to cyber-contacts in order to predict how Alabama courts may decide the issue.

Overview of Personal Jurisdiction

Personal jurisdiction can be established by a plaintiff in either of two ways: general jurisdiction or specific jurisdiction. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 15 (1985). General jurisdiction may be established when the defendant's contacts with the forum are continuous and systematic. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1983). To establish specific jurisdiction, the Due Process Clause of the Fourteenth Amendment requires that a plaintiff show that the defendant has at least minimum contacts with the forum state such that maintenance of the suit in the does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945). Additionally, the "quality and nature" of the defendant's activities within the state must ensure that it is "reasonable and fair" to require it to defend in that state. *Kulko v. Superior Court of California*, 436 U.S. 84, 92, (1978). "[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). Specific personal jurisdiction requires a plaintiff to show that the defendant has "purposely

directed" its activities at residents of the forum, and that the litigation results from alleged injuries that "arise out of or relate to" that purposeful availment. *Burger King Corp.*, 471 U.S. at 472.

These basic principles provide the foundation for determining personal jurisdiction in cyber cases. However, the unique circumstances presented by the Internet necessitated the evolution of a test that could provide both guidance and stability in the ever evolving world of electronic commerce.

Web Sites and Personal Jurisdiction

A. The Zippo Decision and the Sliding Scale

One influential district court opinion which has been referenced by many of the courts is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). In that case, a Pennsylvania plaintiff best known for manufacturing tobacco lighters brought a trademark infringement action against a California Internet news service that registered the domain names <zippo.com,> <zippo.net,> and <zipponews.com,> which were used by the defendant to solicit customers for its newsgroup services. After completing an online application and paying the defendant directly over the Internet or by telephone, customers received a password, which allowed them to view and download the defendant's newsgroup messages. Of 140,000 paying subscribers, approximately 3,000 (or 2 percent) were Pennsylvania residents.

The defendant moved to dismiss the action for lack of personal jurisdiction. In analyzing the Web sites, the *Zippo* court noted the varying degrees of commercial activity that can be performed through the Internet:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an

Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippo, 952 F. Supp. at 1124. Finding that jurisdiction was proper, the *Zippo* court concluded that the defendant's contacts with 3,000 Pennsylvania residents over the Internet "constitute[d] the purposeful availment of doing business in Pennsylvania" due "to the nature and quality of commercial activity that [the defendant] conduct[ed] over the Internet." *Id.* at 1126.

The "sliding scale" adopted by the *Zippo* court has been adopted by a majority of the circuits facing the same determinations of personal jurisdiction. See, e.g., *Soma Medical Intern. v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999); *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). But see *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373 (Fed. Cir. 1998); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997). While most courts agree on the two ends of the spectrum outlined in the *Zippo* decision, the middle ground is not a clearly defined one and has served for varying decisions across the nation.

B. The Passive Web Site

1. The Majority Rule: A Passive Site Is Insufficient to Confer Personal Jurisdiction

As defined by the *Zippo* court and many others, a passive Web site "does little more than make information available to those who are interested in it." *Zippo*, 952 F. Supp. at 1124. The majority of courts agree that a passive Web site may not serve as the basis for exercising personal jurisdiction. See, e.g., *Remick v. Manfredy*, 238 F.3d 248, 259 n. 3 (3rd

Cir. 2001); *GTE New Media Serv., Inc. v. BellSouth*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999); *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373 (Fed. Cir. 1998); *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d Cir. 1997); *Trex Co., LLC v. Canton Lumber Co. & Diversified Bus. Credit, Inc.*, No. CIV.A. 5:01CV00009, 2001 WL 543227, at *6 (W.D. Va. May 16, 2001); *Miami Breakers Soccer Club, Inc. v. Women's United Soccer Assoc.*, 140 F. Supp. 2d 1325, 1329-30 (S.D. Fla. 2001); *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194, 1203-04 (C.D. Ca. 2000); *Amberson Holdings, LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332, 337 (D. N.J. 2000); *Neogen Corp. v. Neo Gen Screening, Inc.*, 109 F. Supp.2d 724, 729-30 (Aug. 21, 2000); *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 795-96 (E.D. Tenn 2000); *Brown v. Geha-Werke*, 69 F. Supp.2d 770, 777-78 (D. S.C. 1999); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999).

One frequently cited circuit court decision which exemplifies the majority's position regarding passive Web sites is *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). In *Cybersell*, the Ninth Circuit held that advertising on the Internet, alone, is insufficient to establish personal jurisdiction. In *Cybersell*, the defendant maintained a Web page that contained information about its products and services and allowed users to request additional information. However, the defendant did not sell products on its Web site or direct contacts to the forum.

In affirming the trial court's dismissal for lack of personal jurisdiction, the *Cybersell* court held that "'something more' [must be shown] to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Id.* Otherwise, every complaint arising out of the use of the Internet would automatically result in personal jurisdiction wherever the plaintiff is located, a result that does not comport with what tradi-

tionally qualifies as invoking the benefits and protections of the forum state.

2. Minority Approach: A Passive Web Site May Confer Personal Jurisdiction

Despite the majority rule, a few courts have held that personal jurisdiction may be established over a defendant based upon material contained in a passive Web site. See, e.g., *Teleco Communications Group, Inc. v. An Apple a Day, Inc.*, 977 F. Supp. 404 (E.D. Va. 1997); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). For example, in *Inset*, the court held that the defendant satisfied the minimum contacts test by merely advertising on its Web site and by listing a toll-free number for inquiries. See *Inset*, 937 F. Supp. at 165. However, these decisions have been heavily criticized by subsequent cases, see, e.g., *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp. 2d 681, 686 (E.D. Va. 1999); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999), and are clearly anomalies in the world of cyber-jurisdiction.

3. The Eleventh Circuit, Alabama and Zippo

While the Eleventh Circuit has not addressed this issue, the only Alabama court which has faced the issue of determining whether personal jurisdiction can be established over the Internet applied the *Zippo* test and concluded that a passive

Web site was insufficient to establish personal jurisdiction. In *Butler v. Beer Across America*, 83 F. Supp. 2d 1261 (M.D. Ala. 2000), the parent of a minor brought an action in state court against an Illinois corporation for the sale of beer to her son. After removal, the federal trial court faced the issue of "whether personal jurisdiction properly may be asserted by a federal court sitting in diversity in Alabama over a nonresident Illinois defendant in an action arising from a sale made in Illinois solely in response to an order placed by an Alabama resident via the Internet?" *Id.* at 1264. In finding that no personal jurisdiction existed over the nonresident defendant, the *Butler* court reasoned that Beer Across America "made a single sale amounting to \$24.95," which did not involve as great a degree of "personal interaction," and its Web site "does not even anticipate the regular exchange of information across the Internet, much less provide for such interaction." *Id.* at 1268.

C. The Gray Area of Zippo: Interactivity v. Commercial Nature of the Web Site

The middle ground of *Zippo* is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Zippo*, 952 F. Supp. at 1124.

This middle ground has created "a hodgepodge of case law [that] is inconsistent, irrational, and irreconcilable." Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. Rev. 925, 939 (1998). Some courts find that an interactive Web site alone is sufficient to establish minimum contacts.¹ Others find minimum contacts through additional non-Internet activity in the forum, regardless of whether the activity is related to the underlying claim.² Finally, some courts require additional conduct in the forum that is related to the plaintiff's cause of action.³ The divergent and fact intensive analysis has created more questions than answers; however, one well reasoned opinion sheds some light on this black hole of cyber-jurisdiction.

In *Millenium Enterprises, Inc. v. Millenium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999), the court held that personal jurisdiction could not be exercised over the defendant based upon the interactive capability and potential commercial nature of its Web site. In *Millennium*, the plaintiff, an Oregon music store chain, alleged that the defendant's Web site, which advertised its music stores in South Carolina, violated Oregon trademark laws. The plaintiff argued that personal jurisdiction existed due to the interactive nature of the site and because the site enabled users to purchase music online.

Declining to exercise personal jurisdiction on the mere potential for commercial sales or that the site was interactive, the court held that the middle tier of the *Zippo* spectrum requires "deliberate action within the forum." *Millennium*, 33 F. Supp. 2d at 921. The court reasoned purposeful availment requires that the defendant take some direct action which targets the residents of the forum because:

Web sites are accessible day and night to all who possess the necessary technological know-how and equipment. Thus, if an interactive Web site can constitute 'purposeful availment' of a forum simply by being continuously accessible to residents of that forum . . . a plaintiff could sue a foreign defendant in any forum and claim jurisdiction based on the defendant's interactive Web site, even if the cause of action is unrelated to the Web site. Such results hardly conform with notions of 'fair play and substantial justice.' The grasp of personal jurisdiction was never intended to reach so far and so wide.

Id. at 923.

Millennium reiterates the touchstone requirements of personal jurisdiction and leaves both courts and litigants with a cogent formula for determining cyber-jurisdiction. It is hoped that courts will follow the light it provides and refocus



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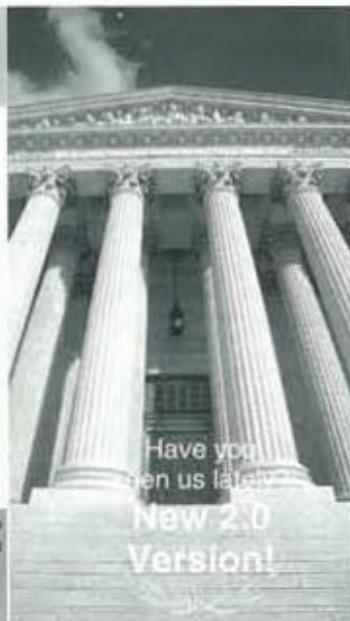
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their inquiry on the conduct of the defendant, rather than the sophistication of its web site or its potentiality for commercial sales around the globe.

D. Transacting Business Over the Internet

At the opposite, and most clear cut, end of the spectrum are situations where a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet. Under this scenario a defendant is considered to be transacting business over the Internet and personal jurisdiction is proper. See *Zippo*, 952 F. Supp. at 1123. The seminal case on transacting business via the Internet is *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

In *CompuServe*, the Sixth Circuit found personal jurisdiction over the defendant, Patterson, where he marketed CompuServe's software in other states, loaded his software onto CompuServe's Internet provider system for others to use

(and perhaps purchase), advertised on the system, and e-mailed messages to CompuServe via the system over a period of three years. The court reasoned that "Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio." *CompuServe*, 89 F.3d at 1265.

Other courts have held that a defendant transacts business over the Internet by generating revenue through direct contact with forum residents, see, e.g., *International Star Registry v. Bowman-Haight Ventures, Inc.*, No. 98 C 6823, 1999 WL 300285, at *6 (N.D. Ill. May 6, 1999), targeting forum residents or intending an effect in the forum, see, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), or using a forum state's computers to provide a customer benefit, see, e.g., *Plus Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992). At this end of the spectrum, the cyber-jurisdictional quagmire is given some clarity: When a defendant targets the forum or obtains a financial benefit, the defendant will be deemed to be transacting business through the Internet and personal jurisdiction will exist.

E-Mail and Personal Jurisdiction

Every day offices are inundated with e-mails, some forwarded by friends or co-workers and others mysteriously appearing from cyber-space. Can these e-mails serve as the exclusive basis for exercising personal jurisdiction over the originator of the message? Two regional courts addressing this issue agree that jurisdiction hinges upon whether the message was sent by the defendant for pecuniary gain. See *Reliance Nat'l Indem. Co. v. Pinnacle Cas. Assur. Corp.*, No. CIV. A. 01-D-827-N, 2001 WL 849530, at * (M.D. Ala. July 19, 2001); *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 773, 779-80 (S.D. Miss. 2001).

In *Internet Doorway*, one of the defendants, Davis, falsified the "from" header of an e-mail to make it appear that the message was being sent by Internet Doorway, an Internet Service Provider,

and sent e-mails to persons around the world, including residents of Mississippi, which advertised a pornographic Web site. Internet Doorway filed suit against several defendants, including Davis, alleging Lanham Act violations and a state law claim of trespass to chattels. Davis filed a motion to dismiss claiming that the alleged injury occurred in Texas, the location from which the e-mail was sent.

In finding that there was personal jurisdiction over Davis, the *Internet Doorway* court compared that case to an earlier decision in which a Mississippi court found jurisdiction where a Mississippi plaintiff sued residents of Florida for defamation, libel and slander for statements placed by the defendants on a Web site in Florida which was read by residents of Mississippi. See *Lofton v. Turbine Design*, 100 F. Supp. 2d 404 (N.D. Miss. 2000). Distinguishing *Lofton* on the ground that it involved a passive Web site, the *Internet Doorway* court stated that "the medium in the instant case is an e-mail, which as actively sent to the recipient in hopes that the recipient would read its contents and patronize the Web site it was promoting." 138 F. Supp. 2d at 777. Such a factor "weigh[ed] in favor of finding personal jurisdiction." *Id.* The court also held that, like the injury in *Lofton*, the injury occurred in Mississippi when the e-mail was received and opened. In analyzing whether the fairness and due process rights of the defendant, the court reasoned that, in sending the e-mail advertisement all over the world, the defendant:

had to have been aware that the e-mail would be received and opened in numerous fora, including Mississippi. Accordingly, the Court finds that it would be neither "unfair" nor "unjust" to subject her to personal jurisdiction in Mississippi. By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation.

Id. at 779-80.

Of greater significance than the court's



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holding is the analysis the court declined to apply. The court found that the "sliding scale" approach was "inapplicable to the case *sub judice* as the alleged contact was not via an Internet Web site, but through an e-mail actively sent by Defendant." *Id.* at 779 n. 4. Instead of relying on cyber precedent, the court articulated a new test for determining personal jurisdiction based upon an e-mail contact: whether or not the e-mail was sent for pecuniary gain. This test which, although not applied, was cited with approval by the Middle District of Alabama in *Reliance National Indemnity Co. v. Pinnacle Casualty Assurance Corp.*, No. CIV. A. 01-D-827-N, 2001 WL 849530, at *5 (M.D. Ala. July 19, 2001).

In *Reliance*, the plaintiff asserted personal jurisdiction over the defendant based upon an e-mail that was originally sent to the defendant's employees and inadvertently forwarded to the plaintiff. Citing with approval the *Internet Doorway* decision that minimum contacts cannot be established via an e-mail contact unless the defendant or its agent sends the message for a pecuniary gain and noting that the Eleventh Circuit and Alabama⁴ previously exercised jurisdiction where a contact was made for a pecuniary benefit, the court held that the forwarded e-mail amounted to unilateral conduct by the plaintiff and was insufficient to establish personal jurisdiction.

These cases may constitute the beginning of a trend in analyzing personal jurisdiction based upon an e-mail contact. Although they provide a definitive statement that an e-mail directed for pecuniary benefit establishes personal jurisdiction, they open the door for many more questions. For example, is personal jurisdiction established if an e-mail links the plaintiff to a Web site and will the court employ *Zippo*, *Internet Doorway* or a hybrid analysis in determining jurisdiction? Only time, and, it is hoped, well-reasoned opinions will provide answers to these questions.

Conclusion

Gone are the days where a defendant had to be physically present in the state in order to be hauled into court. The Internet has obviated the need for a defendant to cross state borders to trans-

act business. Now, with the click of a mouse, a defendant can sell its wares in Oxford, England or Oxford, Alabama. Whether one does business by foot or by e-mail, one fundamental concept remains true: If you target forum residents for your own pecuniary benefit, expect to be grabbed by the long-arm of personal jurisdiction. ■

Endnotes

1. See, e.g., *Starmedia Network, Inc. v. Star Media, Inc.*, No. 00 CIV 4647(DLC), 2001 WL 417118 (S.D.N.Y. April 23, 2001) (finding personal jurisdiction in New York despite the fact that the defendant made no sales in New York); *Alitalia-Linee Aeree Italiane v. CasionItalia.com*, 128 F. Supp. 2d 340 (E.D. Va. 2001) (finding Internet gambling site highly interactive); *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895, 901 (N.D. Tex. 2000) (finding that the exercise of personal jurisdiction satisfied due process in case in which allegedly infringing Web site allowed the users to submit via the site product order forms that contained credit card and shipping information and allowed users to communicate via e-mail with publisher's employees and in which publisher of Web site shipped its products directly to homes of forum state's residents); *Tech Heads, Inc. v. Desktop Serv. Ctr., Inc.*, 105 F. Supp. 2d 1142 (D. Or. 2000) (finding that the exercise of personal jurisdiction satisfied due process in case in which allegedly infringing Web site was "highly interactive" and in which there was one actual transaction involving a resident of the forum state); *Student Advantage, Inc. v. International Student Exch. Cards, Inc.*, No. 00 Civ.1971, 2000 WL 1290565, at *4 (S.D.N.Y. Sept. 13, 2000) (finding that foreign defendant transacted business in New York when its Web site allowed New York customers to apply for loans on the Internet, electronically chat with an online representative, and e-mail questions to the defendant and receive a rapid response); *Sparks Auth. Michigan, Inc. v. Justballs, Inc.*, 97 F. Supp. 2d 806 (E.D. Mich. 2000) (concluding that Web site provided a basis for exercising personal jurisdiction because it enabled customers to purchase products by placing them in a virtual shopping cart and paying for them at the checkout counter); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (finding jurisdiction despite evidence of any actual transactions with forum residents).
2. See, e.g., *Hsin Ten Enter. USA, Inc. v. Mark Enters.*, 138 F. Supp. 2d 449 (S.D.N.Y. 2000) (basing personal jurisdiction on highly interactive Web site, presence of company employees in the forum, and the sale of products in the forum); *Wise v. Lindamood*, 89 F. Supp. 2d 1187 (D. Colo. 1999) (basing general personal jurisdiction on highly interactive Web site and the facts that the defendant entered into several contracts with forum residents and had previously maintained an office in the forum); *Blumenthal v.*

Drudge, 992 F. Supp. 44 (D. D.C. 1999) (basing personal jurisdiction on highly interactive Web site and the fact that the defendant visited the forum on two occasions and had numerous contacts with forum residents who supplied him with information for his Web site).

3. See, e.g., *Bancroft & Masters v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (finding that the sending of a letter into the forum by the defendant was related to the plaintiff's trademark dilution suit involving the defendant's Web site); *Dagesse v. Plant Hotel, N.V.*, 113 F. Supp. 2d 211, 218 (D. N.H. 2000) (holding that advertisement of hotel in New Hampshire on interactive Web site was not related to the plaintiff's slip and fall at the defendant's hotel in Aruba); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997) (holding that due process requirements were met because the defendant entered into contracts with New York residents related to plaintiff's cause of action for trademark infringement).
4. *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1179 (11th Cir. 1985) (mailing of purchase receipts), cert. denied, *Zoldessy v. Founders Title Co.*, 475 U.S. 1109, 106 S. Ct. 1516, 89 L. Ed. 2d 915 (1986); *Cordell v. Greene Fin. Co.*, 892 F. Supp. 1396, 1399 (M.D. Ala. 1995) (solicitation letters); *Duke v. Young*, 496 So. 2d 37, 40 (Ala. 1986) (phone calls and letters).



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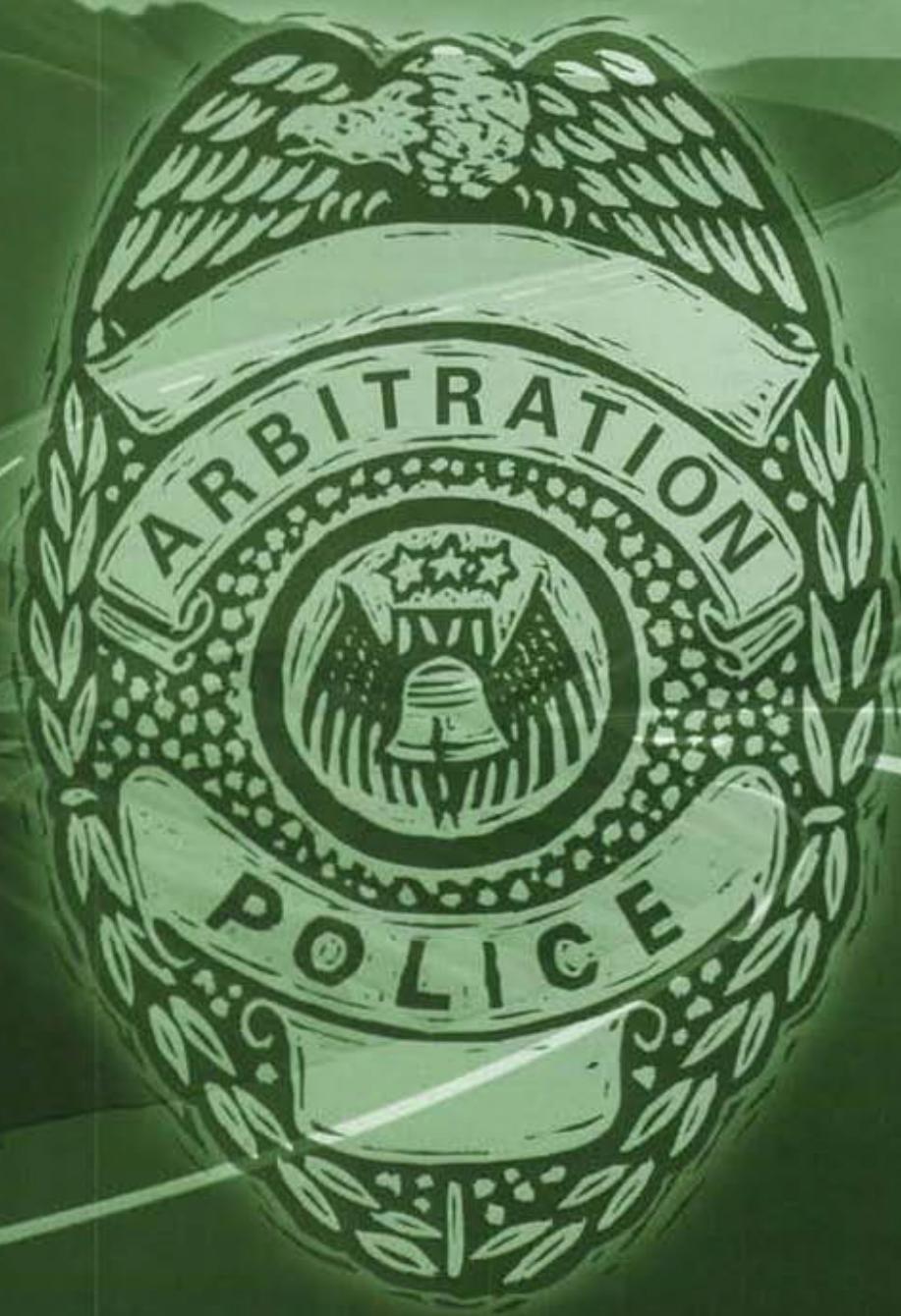


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When Does A Party Waive Its Right To Enforce Arbitration?

BY JAMES W. DAVIS



COMMON LAW DEFENSE LIMIT

Arbitration has become a consuming issue in Alabama. It is the subject of political campaigns and public relations crusades, and it has joined the list, along with coverage and removability, of issues a lawyer must consider during the initial stages of every case.

With feelings running so strongly on both sides of the issue, one would think that in every case where an arbitration clause is present, at least one of the parties would immediately locate and seek to enforce the agreement. However, there are a surprising number of reported cases in which a party is accused of waiving its right to arbitration because of delay in asserting that right. Perhaps it is not clear at first if the opposing party has signed an arbitration agreement. Perhaps the chances of enforcing the clause seem hopeless until certain testimony is given, or the moving party has simply changed its mind. For whatever reason, some parties wait weeks, months or even years after the complaint is filed to move to compel arbitration. In the interim, the parties may engage in discovery and motion practice unavailable in arbitration. Depending upon the length of delay, the extent of the litigation activity that has taken place, and whether prejudice was caused as a result thereof,

the party may forever lose its right to enforce a valid arbitration agreement.

A party seeking to enforce an arbitration agreement must be wary of initiating any activity, or being guilty of inactivity, that would waive its arbitration rights. Likewise, a party seeking to avoid an arbitration agreement should be familiar with what causes a waiver in order to take advantage of missteps. This article considers Alabama case law concerning what activity and prejudice will close the door on a party's right to enforce an arbitration agreement.

A. The Federal Arbitration Act Sets Limits on Common Law Defenses Such as Waiver

Like any other right, the right to compel arbitration may be waived. Waiver is a common-law concept, but it may be applied to arbitration agreements only within the limits of the Federal Arbitration Act (FAA). The FAA states that arbitration agreements are "valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus, state law cannot treat arbitration clauses with less deference than other contract terms:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal "footing," directly contrary to the Act's language and Congress' intent.

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995).

B. The Test for Waiver Under Alabama Law

As applied to contracts generally under Alabama law, "waiver" is the intentional relinquishment of a known right. *Putman Construction & Realty Co. v. Byrd*, 632 So. 2d 961 (Ala. 1992). It must be shown in an unequivocal manner and may be found only when a party has knowledge of all material facts on which waiver depends. *Id.* However, unlike other provisions of a contract, arbitration agreements are given the added protection of a strong federal policy in favor of their enforcement. Therefore, all doubts are to be resolved *against* waiver:

The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 941 (1983).

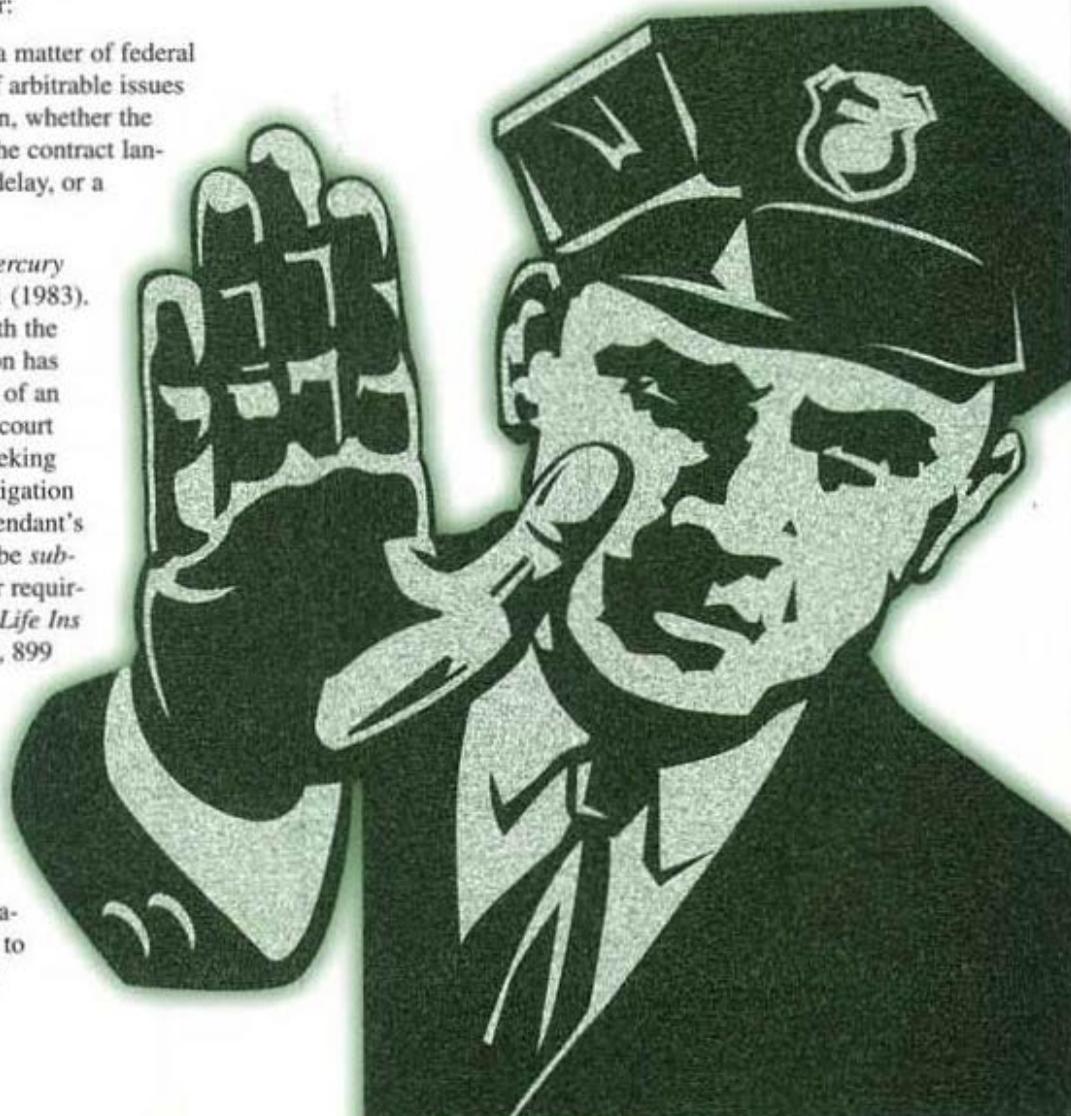
The blending of common-law waiver with the binding federal policy in favor of arbitration has resulted in a two-part test. To show waiver of an arbitration agreement in an Alabama state-court action, one must prove (i) that the party seeking arbitration has *substantially* invoked the litigation process, and (ii) that, as a result of the defendant's acts, the party opposing arbitration would be *substantially* prejudiced by a subsequent order requiring it to submit to arbitration. *Companion Life Ins Co. v. Whitesell Mfg., Inc.*, 670 So. 2d 897, 899 (Ala. 1995). Whether a waiver has occurred may depend upon whether the moving party has "a reasonable basis for not seeking to arbitrate sooner than it did." *Id.* at 900. Alabama recognizes, as it must, the strong federal policy in favor of arbitration: "The courts will not lightly infer a waiver of the right to compel arbitration; thus, the burden on the party seeking to prove waiver is a heavy one." *U.S. Pipe &*

Foundry Co., Inc. v. Curren, 779 So. 2d 1171, 1174 (Ala. 2000), cited with approval in *Blue Ribbon Homes Super Center, Inc. v. Bell*, 2001 WL 1392266 (Ala. Nov. 9, 2001) (No. 1000820).

C. How Does a Party "Substantially Invoke the Litigation Process?"

There is no bright-line test for the amount of litigation activity that will substantially invoke the litigation process. "No rigid rule exists for determining what constitutes waiver of the right to arbitrate; the determination as to whether there has been a waiver must, instead, be based on the particular facts of each case." *Whitesell*, 670 So. 2d at 899. In one case, waiting eight months is a waiver, but in another, 11 months is not.¹ In one case, filing a motion to dismiss appears to sway the court in favor of finding a waiver, while in another case, a summary judgment motion does not.²

The Alabama Supreme Court has stressed on numerous occasions that almost no single action, by itself, will cause a waiver: "The joining of issue on the merits, assertion of a counterclaim or cross-claim, or engaging in discovery, alone, is not sufficient to create a waiver." *Ex parte Costa & Head (Atrium) Ltd.*, 486 So. 2d 1272, 1277 (Ala. 1986). However, each of these actions, along with others, may be evidence of waiver.



1. Filing an Answer

"[A]nswering a complaint does not 'substantially invoke' the litigation process." *Ex parte Dyess*, 709 So. 2d 447, 453 (Ala. 1998). Likewise, the failure to plead in the answer that the plaintiff's claims are subject to arbitration will not in itself constitute a waiver. *Ex parte Hood*, 712 So. 2d 341, 346 (Ala. 1998). The contents of the answer are often scrutinized, however, in deciding whether a waiver has occurred. For instance, in one case where the trial court denied arbitration, the supreme court reversed and ordered arbitration because the defendant pled arbitration in its answer and placed the plaintiffs on notice of the defendant's arbitration rights. *Terminix Int'l Co. Ltd. Partnership v. Jackson*, 669 So. 2d 893, 896 (Ala. 1995). Conversely, in another case, the court cited (among other things) the failure to assert the defense of arbitration in the answer as a basis for finding that a defendant had waived arbitration. *Morrison Restaurants, Inc. v. Homestead Village of Fairhope, Ltd.*, 710 So. 2d 905, 907 (Ala. 1998).

The value of asserting the right and desire to arbitrate at the earliest possible moment is shown in *Ex parte Hood*, 712 So. 2d 341 (Ala. 1998). In *Hood*, *supra*, the court found that a defendant (Golden) had waived arbitration in only three months when it had removed the case to federal court, met with the plaintiff's (Hood's) attorney to develop a discovery plan, and only two months later filed its answer asserting arbitration and moved to compel arbitration. The federal court remanded the case and the state circuit judge entered an order compelling arbitration. The Alabama Supreme Court reversed and held that the defendant had waived arbitration, primarily because the defense of arbitration was not pled at the time of removal:

We might assume that if Golden had immediately followed its removal with service of its answer pleading an arbitration defense, such action would have been sufficient to put Hood on notice that Golden still intended in the federal court to reserve its right to seek arbitration. Filing an answer at such a time might have indicated that Golden intended to pursue arbitration instead of a federal judicial remedy, and it would have given Hood the opportunity to avoid spending the resources necessary to have the case remanded to the state court for trial. As it was, Golden removed the case to the federal court and proceeded as if it was preparing for a judicial resolution of Hood's claim. Golden's answer pleading the arbitration agreement simply came too late, after Golden had substantially invoked the judicial process, to the substantial prejudice of Hood.

Id. at 346.

Conversely, in *Curren*, the defendant removed and, after the case was remanded, moved to compel arbitration approximately one year after the suit was initially filed. The court found that there was no waiver because the defendant pled arbitration in its answer and notice of removal. 779 So. 2d at 1174. *See also*, *Blue Ribbon Homes*, 2001 WL 1392266 (Ala. Nov. 9, 2001).

2. Filing a Motion to Transfer Venue

If a plaintiff files suit in a county where venue is improper,

the defendant may first seek to have the case transferred to a proper venue without waiving arbitration. *Thompson v. Skipper Real Estate Co.*, 729 So. 2d 287 (Ala. 1999). The defendant in *Thompson* moved to compel arbitration eleven months after the plaintiffs filed their complaint in Mobile County. The first document filed by the defendant was a motion to transfer venue to Baldwin County, along with a set of interrogatories. At the plaintiffs' request, the Mobile County Circuit Court delayed ruling on the motion to transfer until the parties conducted discovery on the venue issue. The judge subsequently transferred the case to Baldwin County and the defendant filed its motion to compel arbitration three months later.

The trial court in Baldwin County ordered the plaintiffs to arbitrate and the Alabama Supreme Court affirmed, holding that no waiver had occurred: "A defendant has the right to have the proper venue established before it has any obligation to move to compel arbitration." *Id.* at 292. The court noted that eight months of the 11-month delay were spent litigating venue, that the written discovery and depositions conducted related to venue, and that the plaintiffs learned during deposition that the defendant intended to enforce the arbitration agreement. *Id.* *See also Ex parte Allen*, 2001 WL 410426 (Ala. April 20, 2001) (No. 1991656, 1991707) (also holding that a defendant did not waive arbitration by seeking to have the case transferred to the proper venue, where no discovery was taken and where the motion to compel arbitration was filed 94 days after the suit was filed).

It is not clear how important it was to the court in *Thompson* that the plaintiffs were put on notice of arbitration during discovery and not for the first time when the defendant filed its motion to compel. If faced with such a case, a defendant should include in the motion to transfer a statement that the defendant intends to enforce arbitration once venue is determined. If discovery is needed on the venue issue, the chances of waiver are probably minimized if discovery is carefully tailored to address only the venue issue and not the merits.

3. Filing a Notice of Removal

Hood and *Curren* are compared in detail in the section above discussing the importance of pleading arbitration in the initial answer. In *Hood*, the defendant waived arbitration by removing the case, filing an answer without mentioning arbitration, and waiting three months to file the motion to compel. 712 So. 2d 341. In *Curren*, the defendant did *not* waive arbitration by removing and waiting nearly a year to assert arbitrability, because the defendant pled arbitration in the answer and asserted it in its notice of removal and report of the parties' planning meeting. 779 So. 2d 1171. In both cases, the defendants were accused of waiving arbitration by its removal to federal court and the corresponding delay. The only apparent distinction is the point in time when arbitration was first raised.

Companion Life v. Whitesell is another case in which the defendant removed before seeking arbitration. 670 So. 2d 897. The defendant removed on grounds that the plaintiff's claims were governed by ERISA and participated in developing a discovery plan in the federal district court. After the case was remanded, the defendant moved to compel arbitration. The case

had been pending more than five months when the issue was first raised, and the Alabama Supreme Court held that the defendant had waived arbitration:

Companion's removal of the case to the federal court, its attempt to have Whitesell's claims disposed of under ERISA in that judicial forum, and its invocation of the arbitration clause approximately five months after the filing of Whitesell's complaint and only after an adverse ruling in the federal district court, certainly indicate an intention on Companion's part, at least initially, to forfeit its right of arbitration in favor of a judicial resolution.

Id. at 899.

The "adverse ruling" from the federal court was apparently on the plaintiff's motion to remand. There is no indication in *Whitesell* that the defendant sought to have the federal court rule on the merits. The only acts, then, that could have been an invocation of the litigation process were the removal, filing an answer and participating in the required parties' planning meeting. Therefore, when a defendant removes a case, it should state in its notice of removal that it intends to arbitrate, plead the defense of arbitration in its answer, and move to compel arbitration promptly after removal.

4. Participating in Discovery

There is no strict rule concerning the amount of discovery that may be taken before a waiver occurs. Discovery initiated by the

moving party, to which its opponent must respond, is a factor that a court will likely review if waiver is raised. One party waived arbitration when it waited ten months after the complaint was filed and, in the interim, participated in written discovery, various discovery motions and depositions of the plaintiff and defendant. *Ex parte Smith*, 706 So. 2d 704 (Ala. 1997). Another party did not waive arbitration when, during a four-month period, it propounded one set of interrogatories and two requests for production, but sought no depositions. *Ex parte Rager*, 712 So. 2d 333 (Ala. 1998). Yet another defendant did not waive arbitration even though, during a seven-month delay, it filed requests for admissions, interrogatories and requests for production, and where the defendant took two depositions and the plaintiff three. *Terminix Int'l Co. Ltd. Partnership v. Jackson*, 669 So. 2d 893, 896 (Ala. 1995).

All discovery is not counted toward a waiver. For instance, discovery on the issue of arbitrability does not "invoke the litigation process." *Jack Ingram Motors, Inc. v. Ward*, 768 So. 2d 362, 366 (Ala. 1999). Likewise, discovery related to the issue of venue is not a waiver. *Thompson*, 729 So. 2d at 292. Discovery related to class certification may also be exempt from a waiver analysis. *See Med Center Cars, Inc. v. Smith*, 682 So. 2d 382, 385 (Ala. 1996) (Houston, J., concurring) ("the defendants will not be deemed to have waived their arbitration rights by participating in discovery or other proceedings related to a class certification.") Finally, discovery that *benefits* the party opposing arbitration cannot logically cause prejudice, and therefore will not

Notice of Election

Notice is given herewith pursuant to the Alabama State Bar Rules Governing Election of President-Elect and Commissioner.

President-Elect

The Alabama State Bar will elect a president-elect in 2002 to assume the presidency of the bar in July 2003. Any candidate must be a member in good standing on March 1, 2002. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 2002. Any candidate for this office must also submit with the nominating petition a black and white photograph and biographical data to be published in the May 2002 *Alabama Lawyer*.

Ballots will be mailed between May 15 and June 1 and must be received at the state bar by 5 p.m. on the second Friday in June (June 14, 2002).

Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4; 10th, place no. 7; 10th, Bessemer cutoff; 11th; 13th, place no. 1; 15th, place no. 5; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 30th; 31st; 33rd; 34th; 35th; 36th; 40th; and 41st. Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner positions will be determined by a census on March 1, 2002 and vacancies certified by the secretary no later than March 15, 2001.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 26, 2002).

Ballots will be prepared and mailed to members between May 1 and May 15, 2002. Ballots must be voted and returned by 5 p.m. on the last Friday in May (May 31, 2002) to the Alabama State Bar.

amount to a waiver. *Ex parte Phelps*, 672 So. 2d 790, 793 (Ala. 1995); *Ex parte McKinney*, 515 So. 2d 693, 703 (Ala. 1987).

Discovery is risky if a party intends to seek arbitration. Although limited discovery probably will not constitute a waiver, a party seeking to compel arbitration would be wise to avoid it if possible unless the discovery relates to venue or the issue of arbitrability itself.

5. Filing Dispositive Motions

"Joining issue on the merits," without more, is not a waiver of arbitration. *Ex parte Costa and Head (Atrium) Ltd.*, 486 So. 2d 1272, 1277 (Ala. 1986). However, seeking a ruling from the trial court on the merits of the claim is arguably inconsistent with the right to arbitrate and therefore risks a waiver of that right.

In *Morrison Restaurants, Inc. v. Homestead Village of Fairhope, Ltd.*, 710 So. 2d 905, 907 (Ala. 1998), the plaintiff moved for a summary judgment on liability—and the trial court granted the motion—before the defendant moved to compel arbitration. Although the defendant was not the party that filed the summary judgment motion, the Alabama Supreme Court held that the defendant waived its right to arbitration and relied heavily on the fact that the defendant waited until after a ruling on the merits. *Id.* However, in *Jericho Management, Inc. v. Fidelity Nat. Title Ins. Co. of Tennessee*, 2001 WL 792781 (Ala. July 13, 2001) (No. 1980537), the defendant moved to compel arbitration and then later, in open court, moved for summary judgment. The majority found that no waiver had occurred (the motion for summary judgment was mentioned by the dissent but not in the majority opinion).

Filing a summary judgment motion or a motion to dismiss may not be a waiver *per se*, but doing so obviously raises a risk of waiver. A party who places the case squarely in the trial court's hands should not expect to be able later to place it in the hands of an arbitrator. This type of motion practice is best avoided if a party intends to arbitrate.

6. Participating in a Class Action

Before a class is certified, there can be no waiver concerning the right to arbitrate the claims of absent class members. An order granting or denying arbitration in a class action applies only to members of a certified class: "[I]n the absence of class certification, the trial court's ruling concerning a motion to compel arbitration in a putative class action applied only to the particular individuals who were before the court." *Blue Cross & Blue Shield of Ala. v. Woodruff*, 2001 WL 527848 (Ala. May 18, 2001). If the trial court cannot legally enter an order compelling the arbitration of unnamed class members, then a party who participates in the case, even if he waives the right to arbitrate against the named parties, should not be deemed to have waived the right to arbitrate the claims of members of an uncertified class.

Even if a class is certified and a defendant participates in litigation, he may still compel arbitration of claims of class members who opt out of the class suit. In *Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 So. 2d 1 (Ala. 1986), the plaintiff filed suit in spite of being a member of a class in a pre-existing federal suit. Ten months into the suit, the plaintiff for-

mally opted out of the class action. The defendant moved to compel arbitration three months after the opt-out and over a year after the suit was filed. The Alabama Supreme Court held that no waiver had occurred:

Defendants had no reason to seek arbitration before plaintiff's opt-out, as they could have reasonably believed that plaintiff would obtain her relief in the federal suit, and, consequently, that the action in [State court] would then be dismissed. . . . We cannot find that this delay caused plaintiff any prejudice.

Id. at 3. See also *First Family Financial Services, Inc. v. Jackson*, 786 So. 2d 1121 (Ala. 2000) (no waiver as a result of participating in previous litigation, in which plaintiff was a class member before opting out and where plaintiff's claims in the new suit were different claims from those raised in the class action.)

7. How Long is Too Long?

Just as there is no formula for determining how much litigation will result in a waiver, there likewise is no formula for determining how much time can safely go by between the time the complaint is filed and the time arbitration is asserted. Three months was too long in *Hood*, 712 So. 2d 341, but 19 months was not too long in *Jericho*, 2001 WL 792781.³

Obviously, the closer a case gets to trial, the more likely that a defendant will have waited too long to assert arbitration. Courts have consistently held that waiting until *after* a trial on the merits is a waiver. *Palm Harbor Homes, Inc. v. Crawford*, 689 So. 2d 3 (Ala. 1997); *Ex parte Prendergrast*, 678 So. 2d 778 (Ala. 1996). Waiting until the eve of trial may also waive arbitration. *Matchmaker Intern. Inc. of Mobile v. Francis*, 753 So. 2d 520 (Ala. Civ. App., 1999). Even waiting until after a trial setting may be too long. *Palm Harbor Homes, Inc. v. Crawford*, 689 So. 2d 3 (Ala. 1997).

However, time is not the only factor that determines whether a waiver has occurred; what is important is what happens *during* that time: "A party claiming that another party has waived its right to arbitrate its dispute normally must show more than the mere passage of time." *Ex parte Dyess*, 709 So. 2d 447, 454 (Ala. 1998).

Moreover, the clock does not always start running when the complaint is filed. Rather, a court will measure time from the point that the claim became arbitrable:

A party's participating in discovery at a time before the claim becomes arbitrable is not a factor to be considered in determining whether a waiver has occurred. The law does not require the futile gesture of asking for arbitration before a claim becomes arbitrable; any delay in seeking arbitration should be measured from the time the claim becomes arbitrable.

Georgia Power Co. v. Partin, 727 So. 2d 2, 7 (Ala. 1998) (time measured from the date amended complaint was filed which first raised arbitrable claims) (citation omitted).

This rule explains the seeming leniency in *Jericho*, 2001 WL 792781, where the delay was measured from the time the United States Supreme Court ruled that arbitration agreements were enforceable in Alabama, notwithstanding state law to the contrary.⁴ Although the motion to compel in that case was filed 19 months after the complaint was filed, the motion was filed

only seven months after the U.S. Supreme Court ruled. The court considered only the seven-month delay, and only the activity that took place during those seven months, and held that no waiver occurred. *Id.*; see also *Ex parte Phelps*, 672 So. 2d 790 (Ala. 1995) (accord); *Ex parte McKinney*, 515 So. 2d 693 (Ala. 1987) (motion filed two years after litigation commenced but just a few months after a settlement agreement was reached with another party, making the claims arbitrable for the first time).

The language of the arbitration agreement may affect the length of delay that is permissible before arbitration is waived. In *Prendergrast*, the defendant waited only five months before moving to compel arbitration, but nonetheless waived its right to arbitrate. The court noted that the arbitration agreement required that arbitration be commenced "within a reasonable time after the dispute has arisen." 678 So. 2d at 780. Even though five months might not be too long in a typical case, the contract language shortened the time during which arbitration could be raised.

D. When is a Party "Substantially Prejudiced?"

Regardless of the extent to which a party has invoked the litigation process, "a finding of waiver cannot be made absent a showing of prejudice to the party opposing arbitration." *Thompson*, 729 So. 2d at 291. In determining whether prejudice has occurred, the Alabama Supreme Court has examined "the extent and nature of discovery conducted," *Terminix v. Jackson*, 669 So. 2d at 896, the costs incurred by the plaintiff, *Ex parte Smith*, 706 So. 2d at 706, as well as the length of the delay, see *Ex parte Bentford*, 719 So. 2d 778, 781 (Ala. 1998), *overruling on other grounds recognized by Ex parte Allen*, 2001 WL 410426 n.2.

Discovery served by the plaintiff, to which the defendant responds, apparently does not cause prejudice to the plaintiff if the defendant later moves to compel arbitration. See *Jericho*, 2001 WL 792781. Nor is prejudice caused by discovery which is beneficial to the party opposing arbitration. *Ex parte Phelps*, 672 So.2d at 793. However, in *Ex parte Handley*, 775 So. 2d 141 (Ala. 2000), the defendant filed a third-party indemnity claim, and this action was cited as a step the defendant took to invoke litigation and cause prejudice to the plaintiff. Likewise, the court ruled that the expense a plaintiff incurred in seeking a remand was prejudicial to the plaintiff in *Hood*, 712 So. 2d at 345, even though the plaintiff probably would have sought a remand even if the defendant had moved to compel arbitration earlier.

Prejudice must be shown to prove a waiver, and the longer the delay, the more expense incurred by the plaintiff, or the more effort the plaintiff must make to respond to non-arbitration filings by the defendant, the greater the likelihood a court will find that the plaintiff has been prejudiced. If seeking to avoid a waiver, a party should give notice of its intentions as soon as possible and should be reluctant to take action that requires a response from the other party, unless it is related to a subject such as venue that has been expressly held not to be a waiver.

E. Withdrawing a Waiver

Can a waiver be taken back? One federal case suggests that a significant change in a case may reset the clock and allow a party to recant an earlier waiver.

We have said that invoking judicial process is *presumptive* waiver. For it is easy to imagine situations . . . in which such invocation does not signify an intention to proceed in a court to the exclusion of arbitration. There might be doubts about arbitrability, and fear that should the doubts be resolved adversely the statute of limitations might have run. Some issues might be arbitrable, and others not. *The shape of the case might so alter as a result of unexpected developments during discovery or otherwise that it might become obvious that the party should be relieved from its waiver and arbitration allowed to proceed.*

Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390-91 (7th Cir. 1995) (citations omitted) (underlining added). The *Cabinetree* opinion is quoted twice by the Alabama Supreme Court, in *Hood*, 712 So. 2d at 344, and *Whitesell*, 670 So.2d at 900-01 (with the court finding in both instances that a waiver had occurred).⁵

A waiver, after all, is supposed to be "knowing," and a party might convincingly argue that by consenting to litigate the claim as filed, he was not waiving arbitration for the case it later became. The Alabama Supreme Court has not yet ruled on what changes in a case, if any, would start the clock over. A simple contract case could evolve into a dangerous fraud action. Perhaps an amended complaint raising class allegations for the first time, or an amendment to the *ad damnum* clause deleting a previous limitation of damages, would be such a change. While the decision to forego arbitration may have seemed wise when made, a later change such as these could cause a party to rethink that decision. The *Cabinetree* decision suggests that the party should have an opportunity to do so.⁶

F. Other Issues

I. The Effect of "No-Waiver" Clauses

Many arbitration agreements incorporate the rules of the American Arbitration Association, which includes the following "no-waiver" provision: "No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Rule 47(a). Although there is no reported decision from an Alabama court addressing the issue, other courts have held that the clause does *not* prevent a finding of waiver, but was intended to permit parties to obtain provisional remedies in court (such as a temporary restraining order) without waiving arbitration. *E.g.*, *Shay v. 746 Broadway Corp.*, 409 N.Y.S.2d 69, 71 (N.Y.Sup. 1978). Other courts have held that the clause was not dispositive, but simply "another factor to be weighed in the scales." *Knorr Brake Corp. v. Harbil, Inc.*, 556 F.Supp. 489, 493 n.5 (N.D.Ill. 1983). For a summary of decisions discussing "no-waiver" clauses, see *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 85-86 (2d Cir. 1998).

2. Who Decides Whether a Waiver has Occurred?

In certain circumstances, waiver may be a question for the arbitrator and not the court, such as when the alleged waiver is a result of failing to abide by the procedural requirements of the arbitration agreement, as opposed to participating in litigation. *Dean Witter Reynolds, Inc. v. McDonald*, 758 So. 2d 539, 542 (Ala. 1999) (citations omitted). Another such circumstance is when the parties in the arbitration contract itself to refer waiver questions to the arbitrator. See *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So. 2d 564 (Ala. 1999).

3. Standard of Review on Appeal

Generally, trial court orders granting or denying a motion to compel arbitration are reviewed *de novo* on appeal. When it comes to questions of waiver, however, the Alabama Supreme Court has stated that “[o]rordinarily, we review issues regarding waiver of arbitrability under an abuse-of-discretion standard.” *Karl Storz Endoscopy-America, Inc. v. Integrated Medical Systems, Inc.*, 2001 WL 755661 (Ala. July 6, 2001) (No. 1000580). See also *Crimson Industries, Inc. v. Kirkland*, 736 So. 2d 597, 600 n.3 (Ala. 1999) (accord); *Ex parte Handley*, 775 So. 2d 141, 143 (Ala. 2000) (accord). In practice, however, legal conclusions concerning waiver are reviewed *de novo*. In *Big Valley Home Center, Inc. v. Mullican*, 774 So. 2d 558 (Ala. 2000), the court explained its standard as follows:

Although a trial court’s determination that a party has waived its right to arbitration is a legal conclusion subject to our plenary review, the trial court’s findings supporting that conclusion are based on questions of fact and will not be overturned unless clearly erroneous.

Id. at 560. See also, *Ex parte Allen*, 2001 WL 755661 (“the trial court has *no discretion* to deviate from a case that is direct-ly on point.”)

4. Waiver in the Eleventh Circuit

Federal law concerning waiver of an arbitration agreement does not differ significantly from Alabama law. A federal court looks to federal law, not state law, to determine whether there has been a waiver. *E.g.*, *S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990), *cert. denied* 498 U.S. 1026 (1990). A detailed analysis of federal law is beyond the scope of this article. For cases from the Eleventh Circuit dealing with waiver, see *Morewitz v. West of England Ship Owners*, 62 F.3d 1356, 1366 (11th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1995); *S&H Contractors*, 906 F.2d 1507 (“When determining whether the other party has been prejudiced, we may consider the length of delay . . . and the expense incurred by that party from participating in the litigation process.”); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222-23 (11th Cir. 2000); *Stone v. E.F. Hutton & Co., Inc.*, 898 F.2d 1542 (11th Cir. 1990); *Benoay v. Prudential-Bache Securities, Inc.*, 805 F.2d 1437 (11th Cir. 1986); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); and *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986).

Conclusion

Waiver of arbitration is not a precise area of the law and caution is advised. Short of filing a motion to compel arbitration immediately upon receiving service of the complaint, there is no guarantee of avoiding a waiver. A case could be made that clear rules, even if arbitrary, would be better than the current system, and would lessen the chance that a party will waive arbitration without intending to do so. For instance, there could be a rule that waiver is presumed only after a trial setting or upon the filing of a dispositive motion. Another benchmark might be discovery related to the merits that would not be available in arbitration (and to which the party opposing arbitration spends time and resources to respond). However, to remain consistent with the federal policy in favor of arbitration, there must be exceptions to any rule for a case where the opponent has not been prejudiced or where the waiver was not a “knowing” waiver.

Under the system we have now, each case is considered on its individual facts. Therefore, a party who is serious about arbitration should make its decision as soon as possible and give notice of its intent, even if it does not move to compel arbitration until later, and should avoid litigation steps inconsistent with the right to arbitrate. ■

Endnotes

1. *Compare Thompson v. Skipper Real Estate Company*, 729 So. 2d 287 (Ala. 1999), and *Morrison Restaurants, Inc. v. Homestead Village of Fairhope, Ltd.*, 710 So. 2d 905 (Ala. 1998).
2. *Compare Companion Life v. Whitesell*, 670 So. 2d 897, with *Jericho Management, Inc. v. Fidelity Nat. Title Ins. Co. of Tennessee*, 2001 WL 792781 (Ala. July 13, 2001) (No. 1980537).
3. See also *Ex parte Prendergrast*, 678 So. 2d 778 (Ala. 1996) (waiver after five months); *Ex parte Handley*, 775 So. 2d 141 (Ala. 2000) (waiver after 18 months); *Morrison Restaurants, Inc.*, 710 So. 2d 905 (waiver after eight months); *Ex parte Phelps*, 672 So. 2d 790 (Ala. 1995) (no waiver after 36 months); *Ex parte McKinney*, 515 So. 2d 693 (Ala. 1987) (no waiver after two years).
4. See *Allied-Bruce Terminix Cos. v. Dabson*, 513 U.S. 265 (1995).
5. See also *Brown v. E.F. Hutton & Co., Inc.*, 610 F.Supp 76 (S.D.Fla.1985) (no waiver when motion was filed four years after the case began but when the plaintiff had recently filed a second amended complaint); *Creative Telecommunications, Inc. v. Breeden*, 120 F.Supp 2d 1225, 1232 (D. Hawaii 1999) (“even if a district court finds an initial waiver of the right to arbitrate, it is also entitled to permit that waiver to be rescinded, depending upon the course the litigation takes.”); *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 113 (2nd Cir. 1987), *overruling on other grounds recognized by McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761 (2nd Cir. 1988).
6. The *Cabinetree* opinion, in which the court held that the moving party had waived arbitration, also held that the party opposing arbitration did not have to prove that it suffered prejudice in order to defeat arbitration on grounds of waiver. In this respect, *Cabinetree* is inconsistent with Alabama and Eleventh Circuit law.

James W. Davis

James W. Davis practices with the Birmingham firm of Bainbridge, Mims, Rogers & Smith, LLP. He is a 1990 graduate of the University of Alabama and a 1993 graduate of the University of Virginia School of Law.

AFRICAN-AMERICAN ATTORNEYS ASSUME TOP ASSOCIATION OFFICES

BY ELIZABETH VIA BROWN

Fred Gray set out to be a minister, but by his senior year in college he knew he wanted to be a lawyer. As a young black man in Montgomery at the end of the 1940s, he didn't know any black attorneys; for that matter, he didn't know any white ones, but, he had heard that lawyers help people and helping his fellow African-Americans was what he wanted to do.

In July 2002, Gray will become the first black to serve as president of the Alabama State Bar.

Reared in Hunter Station on Montgomery's west side, Judge Charles Price enlisted in the United States Army upon graduating from George Washington Carver High School, because the military offered more advancement for blacks. After his discharge, he attended college in Virginia, then graduated with honors from the George Washington University School of Law in Washington, DC. Now the presiding judge of the 15th Judicial Circuit of Alabama, Price will become the first black president of Alabama's Circuit Judges Association when he assumes the office in July 2002.

After graduating from law school in Kansas, Tyrone Means chose to come to Montgomery to practice law. As a youngster, he often visited relatives in Lowndes and Greene counties and felt his degree could be put to better use in the South. Recently, he completed his term as the first African-American president of the Alabama Trial Lawyers Association.

All three men have blazed trails for other African-Americans who want to practice law in Alabama. That they are black is significant, but not as important,

they say, as their records and reputations as attorneys.

Tyrone C. Means

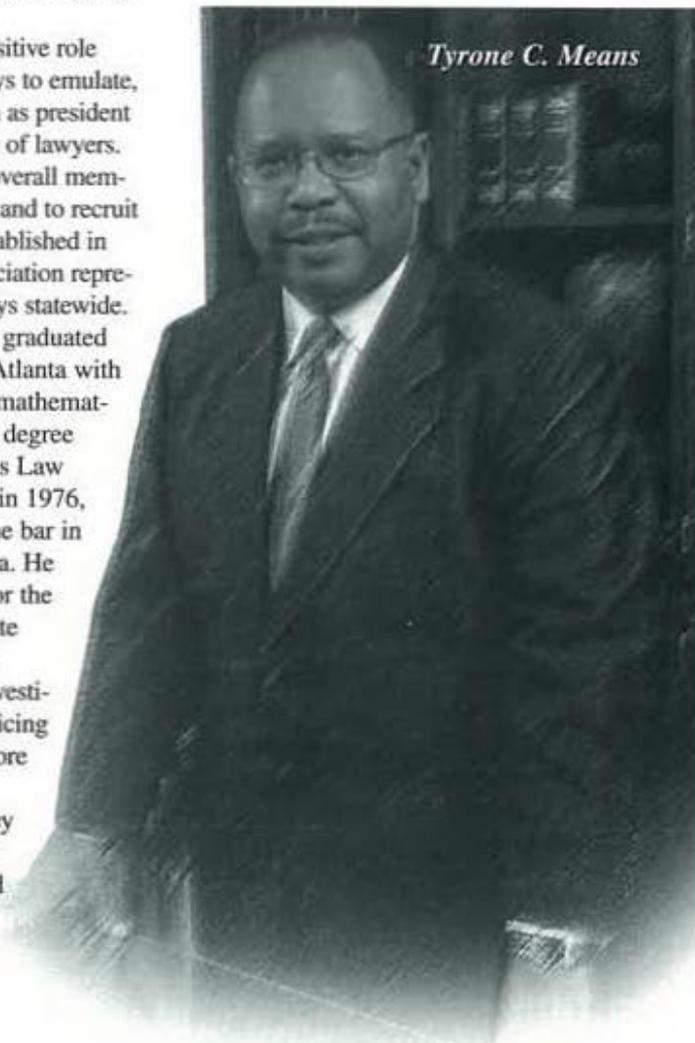
Being first isn't new to Means, but he says that being the first black in any role has to become less of a priority if you want to accomplish certain goals. Serving as president of the Alabama Trial Lawyers Association was prestigious, he says, but he had to fit it into the responsibilities he has at his law practice.

In addition to creating a positive role model for other black attorneys to emulate, Means wanted to use his term as president to improve the public's image of lawyers. His goal was to increase the overall membership of the bar association and to recruit more African-Americans. Established in 1946, the Trial Lawyers Association represents more than 2,000 attorneys statewide.

Reared in Chicago, Means graduated from Morehouse College in Atlanta with a bachelors of arts degree in mathematics. He earned a Juris Doctor degree from the University of Kansas Law School in Lawrence, Kansas in 1976, and has been admitted into the bar in Kansas, Alabama and Georgia. He worked as a budget analyst for the City of Chicago during the late Mayor Richard Daley's term.

When he came south, he investigated the possibilities of practicing in Birmingham or Atlanta before settling on Montgomery. He worked as an associate attorney for Gray, Seay & Langford in Montgomery, and then formed Thomas, Means, Gillis & Seay, P.C., where his practice

areas concentrate on personal injury and wrongful death litigation, consumer fraud, medical malpractice, government law, nursing home litigation, and products and premises liability litigation. Currently, he is a managing partner of the firm, which has offices in Birmingham, Atlanta and Livingston, Alabama. Not only active in local, state and national bar associations, he frequently serves as a speaker, chairman



Tyrone C. Means

and moderator for law-related conferences. As the father of two children, one a student at Auburn University with aspirations as an attorney, Means is also active within the community as a board member of numerous civic and social organizations.

With only 500 to 600 African-American attorneys in Alabama, he takes his responsibility as a role model seriously. Through his association with the Trial Lawyers Association, he fosters networking and continuing professional education. "We have the ability to exchange ideas," says Means. "As advocates for the public, we can lobby for better representation."

Judge Charles Price

"Well, somebody has to be first," Judge Price says, "and it needs to be someone like me—so it might as well be me."

Energetic, active in his profession and quick to speak his mind, Judge Price says being the first black anything is not new to him. To be effective in whatever role you've been placed, says Price, you've got to be aware of who you are, but willing to let go and concentrate on the business at hand.

Judge Price began his legal career at the Department of Justice in Washington, D.C., but returned to Alabama in 1973 as an assistant Attorney General. In 1974, his friend, Bill Baxley, then the state's Attorney General, appointed him as Acting District Attorney for Escambia County.

"I love that guy," Price says of Baxley. "You can say that, too," he said. In a time when few blacks held such high offices, Baxley took a chance on Price and the position helped him establish a solid reputation as a lawyer. Before entering private practice in 1977, Price was Deputy District Attorney for Montgomery County and was appointed Assistant Municipal Judge for Montgomery County in 1980. One of his proudest achievements came on April 4, 1983, when then Gov. George C. Wallace appointed him as a Montgomery County Circuit Judge.

As a participant in numerous educational seminars, Price says it is a lawyer's duty to constantly upgrade not only himself, but also the profession. He has served as president of the Montgomery Trial Lawyers Association and is a member of the National Bar Association, an organization created for black attorneys. In the



Judge Charles Price

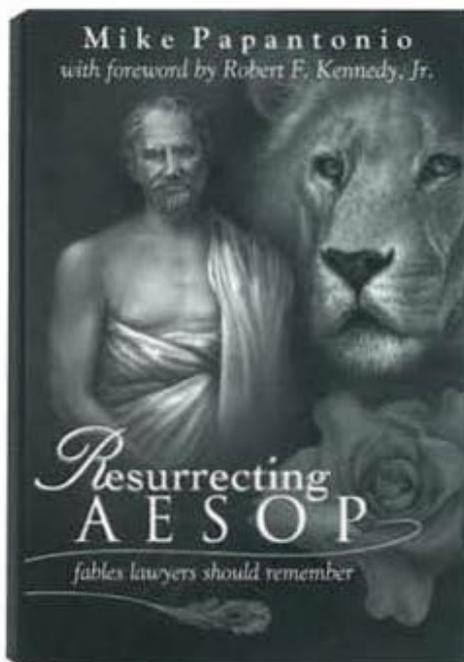
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Alabama Circuit Judges Association, he serves as secretary/treasurer and in 1999, he was unanimously selected presiding judge of the 15th Judicial Circuit.

Going back home to Hunter Station, he is still just Charles Price, a fact that keeps him humble. It's not easy explaining his title, he said, because most folks assume if you are a judge, you preside over a court of law. To his old friends and former neighbors, he says he presides over all the other judges.

A recipient of the John F. Kennedy Profile in Courage Award, he was presented with the National Education Association's Dr. Martin Luther King Humanitarian Award in 1998. Among his prized honors is the Raymond Pace Alexander Award, given to him in 2000 by the National Bar Association. While entering law was a major decision, his biggest and most important was marrying his wife, Bernice Price, who is a college professor. Their two children are following in their father's footsteps and are pursuing careers in law.

Fred D. Gray

Fred Gray is probably the most influential African-American trailblazer in Alabama's law profession. At one of the most crucial times in the state's, indeed the nation's, pursuit for civil rights, he was setting the standard by which all other attorneys, especially blacks, are now measured.

As a "boy preacher," he was sent away to the Nashville Christian Institute, the only African-American Church of Christ-supported boarding school. At 12 years old, he was on a mission from God, he says, and was determined to be a minister. He was elected president of the student body and as such, he traveled as a school representative on fund-raising trips. The experiences he had and the opportunities to meet people serve him well to this day, he says.

He graduated from high school early and came back home to Montgomery to enter Alabama State College for Negroes (now Alabama State University) with a plan of becoming a social science teacher and a minister, but a teacher who often lectured on obtaining civil rights changed his mind. Working his way through college as a district manager of the *Alabama Journal* newspaper, he had to ride the city buses on his rounds through his delivery territory and came face-to-face with discrimination because of his race.



Fred D. Gray

During his junior year, he decided to attend law school and return to Montgomery to practice and "to destroy everything segregated that I could find." He kept the dream a secret and in his senior year, he applied to law schools in cities where he would also have an opportunity to get good enough jobs to help pay his expenses. He was accepted at Case Western Reserve University in Cleveland, Ohio, where Alabama assisted with a grant on a reimbursement basis.

Admitted to the Ohio and Alabama bars in 1954, he came home to Montgomery where he opened his own law office. One of his first clients was Rosa L. Parks, who had become his friend and sometimes lunch partner in his downtown office. When she was arrested on Dec. 1, 1955, for not giving up her seat on a city bus to a white man, Gray became her attorney and the Montgomery Bus Boycott changed not only the history of civil rights in Alabama and the nation, it launched Gray's long and distinguished career.

In 1956, he became the first civil rights attorney for Dr. Martin Luther King, Jr., and defended him in the Montgomery Bus Protest trial. Cases against the other 97 defendants indicted in the same case were dropped when King was found guilty and the appeal was dismissed on a technicality. Some of Gray's cases are now subjects of constitutional law textbooks, including the *Gomillion v. Lightfoot* case, which laid the foundation of the "one man, one vote" concept; *Williams v. Wallace*, a class action

suit resulting in court-ordered protection of marchers from Selma to Montgomery in 1965; *Mitchell v. Johnson* in 1966, which was one of the first civil actions filed to end systematic exclusion of blacks from jury duty; and *Lee v. Macon*, involving the infamous Tuskegee Syphilis Study in 1972.

For more than 45 years, Gray has led the charge to obtain civil rights for all persons and from 1970 to 1974, he was the first black since Reconstruction to serve in the Alabama legislature. To be more assured of election, in 1965 he and his family moved to Macon County, where his satellite office in Tuskegee was prospering and opportunities for political offices were greater.

As president of the National Bar Association in the mid-1980s, he initiated the NBA Hall of Fame, to which he was inducted in 1995. His awards are as numerous as is his participation in professional and community organizations. At 70 years old, an age when most lawyers have already retired, he looks forward to his year as president of the Alabama State Bar. Although he hasn't yet settled on an agenda for his term, he knows it will have something to do with improving the image of lawyers to the public. "Lawyers render a service," he said, explaining the need for attorneys to have positive public images.

His year as association president may also have additional benefits, says Gray. As the firm's senior partner, he wants to step back from the everyday duties at Gray, Langford, Sapp, McGowan, Gray & Nathanson on the square in downtown Tuskegee and as association president, he will be expected to tend to business throughout the state. "I've been telling everybody that it's time for them to take care of the things they always expect me to do," he said. Slowing down will also allow him to devote more time to working with the Tuskegee Human and Civil Rights Multicultural Center, a non-profit facility in which historical materials and exhibits recognize the human and civil rights contributions of Native Americans, European Americans and African Americans. "If these groups can work side by side," Gray says, "then we will see we have a lot in common." ■

Elizabeth Via Brown

Elizabeth Via Brown is a freelance writer living in Montgomery. She may be contacted by e-mail at evbrown@achworld.net, or by fax at (334) 271-0675.

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 J. Hodge Alves
 Holly Alves
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 Frank Anderson
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 Michael E. Ballard
 J. Daniel Barlar
 Eaton G. Barnard
 David L. Barnett
 Joe E. Baseniberg
 D. A. Bass-Frazier
 P. Kent Baxley
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 Richard M. Beckish
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 Raymond L. Bell
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 Thomas H. Benton
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 Jaime W. Betbeze
 Windy Cockrell Bitzer
 Donna Ward Black

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 Edward C. Blount
 James W. Bodiford
 Thomas R. Bolter
 R. Preston Bolt
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 Knox Boteler
 Kevin Boucher
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 Toby D. Brown
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 Jerome C. Carter
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 K. W. Michael Chambers
 Walter G. Chavers
 C.S. Chiepalich
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 Kathryn M. Cigelske
 Andrew T. Citrin
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 Mylan R. Engel
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 Sidney M. Harrell
 Alvin E. Harris
 Michelle M. Hart
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 Wilson M. Hawkins
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 Robert J. Hedge
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 Martha Durant Hennessy
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 Charles A. Hicks
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 Anthony M. Hoffman
 Lyman F. Holland
 Broox G. Holmes
 Broox G. Holmes
 Richard H. Holston
 D. Charles Holtz

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 J. Gordon House
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 Stewart L. Howard
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 Victor T. Hudson
 Karen Huelskamp
 Michael G. Huey
 W. Gregory Hughes
 Christopher G. Hume
 John Michael Hunter
 Willie J. Huntley
 Herndon, III Inge
 Herndon Inge, Jr.
 William B. Jackson
 Brandon D. Jackson
 T. K. Jackson
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 Joy A. Jaye
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 Leah P. Ladd
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 Johnny Lane
 Alex F. Lankford

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Desmond V. Tobias
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William W. Watts
Lawrence M. Wettermark
A. Holmes Whiddon
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J. George Whitfield
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George K. Williams
Ronnie L. Williams
Adam T. Williamson
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James A. Yance
Richard D. Yelverton
Jay A. York
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Madison County
Volunteer Lawyers
Program

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Douglas Baymiller
Vicki Bell
Jeffery G. Blackwell
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Joseph M. Cloud
Maureen Cooper
Susan Conlon
Patrick H. Graves, Jr.
Elissa H. Green
D. Milburn Gross, Jr.
Joel Hamner
Kenneth D. Hampton
John W. Harrison
Kevin Heard
James R. Hinson
Ralph H. Hornsby, Jr.
Ralph H. Hornsby, Sr.
Gary C. Huckaby
Joe Alton King, Jr.
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Jeffery W. McKinney
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Dag Rowe
L. Thomas Ryan, Jr.
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Stephen M. Wilson
R. Wayne Wolfe
David E. Worley

*This Honor Roll
reflects our efforts
to gather the names
of those who
participate in
organized pro bono
programs. If we
have omitted the
name of any
attorney who
participates in an
organized pro bono
program, please
send that name and
address to:
Alabama State Bar
Volunteer Lawyers
Program,
P. O. Box 671,
Montgomery, AL
36101.*

REGISTRATION FORM

JOINT MEETING OF THE BENCH AND BAR CLE PROGRAM

JANUARY 24, 2002
BRYANT CONFERENCE CENTER • TUSCALOOSA, AL

NAME _____
(as you would like for it to appear on your name tag)

FIRM _____

ADDRESS _____
(official work address)

TELEPHONE _____

- Please register me for the CLE program (hours applied for) (**\$120.00 per person**)
Deadline: January 14, 2002. (Absolutely no refunds will be given after January 18, 2002. Only personal checks and money orders are accepted via mail. The above-mentioned and cash are gladly accepted for payment upon arrival at the conference site.)
- I will attend the reception *only* at the Paul Bear Bryant Museum on Wednesday evening.
(\$60.00 per person)
- I am a member of the Tuscaloosa Bar Association and will attend the reception at the Paul Bear Bryant Museum on Wednesday evening. (**\$40.00 per person**) **(Members of this group receive a discounted price due to their association's monetary contribution to the overall reception.)**
- Please register the following guest(s) for the reception at the Paul Bear Bryant Museum on Wednesday evening. (**\$60.00 per person**)

Guest Name _____

Guest Name _____

Guest Name _____

TOTAL PAYMENT \$ _____

Mail your completed form and check to
Alabama Judicial College Faculty Association (AJCFA)
300 Dexter Avenue
Montgomery, AL 36104
Telephone #(334) 242-0847
Fax #(334) 353-5125

Wednesday, January 23, 2002

6:00 Reception at the Paul Bear Bryant Museum
(Sponsored by the Tuscaloosa County Bar Association)

JOINT MEETING OF THE BENCH AND BAR

Thursday, January 24, 2002 Tuscaloosa, AL

7:30 - 8:30 Law School Breakfast for Judges

7:30 - 8:30 Registration at the UA Law School

8:30 - 8:35 Welcoming Remarks
Honorable Roy S. Moore, Chief Justice, Supreme Court of Alabama, Montgomery, AL

8:35 - 10:00 U. S. Constitution
Dr. Forrest McDonald, Professor of History, UA, author of Novus Ordo Seclorum: The Intellectual Orgins of the Constitution

10:00 - 10:15 Break

10:15 - 11:45 Alabama Evidence Update
Charles Gamble, Esq., Professor, University of Alabama School of Law, Tuscaloosa, AL

12:00 - 1:30 Joint Lunch of the Bench and Bar
Larry Morris, Esq., President, Alabama State Bar, Alexander City, AL

1:30 - 2:45 Criminal Law Update & Sentencing Commission
John Gibbs, Esq., Assistant Attorney General, Office of the Attorney General, Montgomery, AL
Honorable Joseph Colquitt, Retired Circuit Judge, Tuscaloosa, AL

2:45 - 3:00 Break

3:00 - 4:00 Concurrent Sessions

Repeated Session - Civil Law Update
Ann McMahan, Esq., Dominick, Fletcher, Yeilding, Wood, & Lloyd, P.A., Birmingham, AL

Mental Health Legal Update
James Reddoch, Jr., Esq., Director, Taylor Hardin Secure Medical Facility, Tuscaloosa, AL

Bond Forfeiture & Court Cost Collections
Honorable Dan Reeves, Circuit Judge, 18th Judicial Circuit, Columbiana, AL

Community Notification Act
TBA

4:00 - 5:00 Concurrent Sessions

Repeated Session - Domestic Law Update
Honorable Richard Dorrough, Circuit Judge, 15th Judicial Circuit, Montgomery, AL
Honorable Gary Pate, Circuit Judge, 10th Judicial Circuit, Birmingham, AL

4:00 - 5:00 Repeated Session - Mental Health Legal Update
James Reddoch, Jr., Esq., Director, Taylor Hardin Secure Medical Facility, Tuscaloosa, AL

4:00 - 5:00 Concurrent Sessions Cont'd

Workman's Compensation
Tom Oliver, Esq., Carr, Allison, Pugh, Howard, Oliver & Sisson Law Firm, Birmingham, AL
Steve Ford, Esq., McElvy & Ford, P.C., Tuscaloosa, AL

5:00 Adjournment

6:00 UA President's Reception & UA/AU Women's Basketball Game



Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating Gadsden attorney **Joseph Gullatte Hunter, III** to the practice of law in the state of Alabama effective February 23, 2001. [Pet. for Rein., No. 00-07]

Disability Inactive

- Scottsboro attorney **Clifton Wade Johnson** was transferred to disability inactive status pursuant to Rule 27(c), Alabama Rules of Disciplinary Procedure, effective November 20, 2001. [Rule 27(c), Pet. No. 01-04]

Disbarments

- The Supreme Court of Alabama adopted an order of the Disciplinary Commission disbarring former Huntsville attorney **James Laurence Butler, Jr.** from the practice of law in the State of Alabama effective August 21, 2001. On February 28, 2001, the Circuit Court of Madison County, Northern District of Alabama, accepted Butler's guilty plea to the crimes of theft second degree in two cases, CC-00-1089 and CC-00-3137. Butler was sentenced to a term of five years in the state penitentiary in each case to run concurrently. In both cases, said sentence was suspended for five years on the condition that Butler serve on the Madison County Work Release Program until all court-ordered money is paid, all fines paid, the Victims' Compensation Act assessment is paid, that he makes restitution to the injured police officer, and submit to DNA samples. Butler was already intermily suspended under Rule 20 of the Alabama Rules of Disciplinary Procedure. On

May 1, 2001 the Disciplinary Board, Panel V, entered an order decreeing that Butler was convicted of a "serious crime" under Rule 22 of the Alabama Rules of Disciplinary Procedure. On August 13, 2001, the Disciplinary Board, Panel V, entered an Order denying Butler's July 30, 2001 motion to dismiss. The hearing was held as scheduled on August 20, 2001. Butler did not attend. [Rule 22(A), Pet. No. 01-01]

- The Supreme Court of Alabama entered an order based upon the decision of the Disciplinary Board, Panel V, disbarring **Walter Jasper Price, Jr.** from the practice of law in the State of Alabama, effective April 26, 1996, which is the date of his previous disbarment ordered by the supreme court on August 11, 1998. Price was found guilty of violating Rule 8.1(b), A.R.P.C. Price failed to respond to requests for information from the Office of General Counsel concerning a complaint that had been filed against him. [ASB No. 97-232A]
- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel V, on September 5, 2001, that **Gregory Dwayne Jones** be disbarred from the practice of law in the state of Alabama effective retroactively from October 27, 1993, the effective date of Jones's interim suspension from the practice of law. Jones's conditional guilty plea and order of disbarment were based on the following:
 - In ASB No. 94-167(A), Jones represented the complainant in a motor vehicle accident case. Jones settled the case on behalf of the complainant and paid the complainant her share of the proceeds with a personal check that was returned for non-sufficient funds. Jones pled guilty to violating Rule 8.4(g), A.R.P.C.

In ASB No. 95-050(A), Jones converted funds held in trust for the benefit of the complainant to his personal use. Jones pled guilty to violating Rule 8.4(g), A.R.P.C.

In ASB No. 92-532(A), Jones was paid to represent the complainant in a dispute with a former employer over non-payment of medical insurance premiums. Jones did nothing on behalf of his client and failed to refund the unused portion of her retainer. The Disciplinary Commission initially ordered that Jones receive a private reprimand and make restitution to the complainant. Jones failed to abide by the Disciplinary Commission's order. Therefore, formal charges were filed against Jones for his misconduct. Jones pled guilty to violating Rules 1.3 and 1.16(d), A.R.P.C.

In ASB No. 93-271(A), Jones was paid to represent the complainant's husband in a criminal appeal. Jones did no work in the matter, failed to communicate with the client and refused to refund the unearned retainer. Jones pled guilty to violating rules 1.3, 1.4(a) and 1.16(d), A.R.P.C.

In ASB No. 93-286(A), Jones was paid to represent the complainant in a wrongful discharge case. Jones did no work in the matter, failed to communicate with his client and refused to refund the unearned retainer. Jones pled guilty to violating rules 1.3, 1.4(a) and 1.16(d), A.R.P.C.

In ASB No. 93-493(A), Jones was paid to represent the complainant in a criminal matter. Jones had the case continued, but did no other work on the case, refused to communicate with the client and refused to refund the unearned retainer. Jones pled guilty to violating rules 1.3, 1.4(a) and 1.16(d), A.R.P.C. The Disciplinary Board ordered Jones to make restitution to the complainant in the amount of \$3,000.

In ASB No. 93-498(A), Jones was retained by the complainants to represent them in a legal matter. Jones did no work in the matter and failed to communicate with the complainants regarding their case. Jones also failed

to respond to requests for information or otherwise cooperate during the bar's investigation of the matter. Jones pled guilty to violating rules 1.3 and 1.4(a), A.R.P.C.

In ASB No. 94-013(A), Jones was retained to represent the complainant in a legal matter. Jones did no work in the case, failed to communicate with the client regarding the matter and refused to refund the unearned retainer. Jones pled guilty to violating rules 1.3, 1.4(a) and 1.16(d), A.R.P.C. The Disciplinary Board ordered that Jones make restitution to the complainant in the amount of \$5,000.

In ASB No. 94-043(A), Jones was retained to represent the complainant and accepted payment for the representation after he had been interimly suspended. Jones did not inform the complainant of his suspension, did not do any work in the matter, did not communicate with the complainant and did not refund the retainer. Jones pled guilty to violating rules 1.3, 1.4(a) and 1.16(d), A.R.P.C.

[ASB nos. 93-271(A), 93-286(A), 92-532(A), 94-167(A), 95-050(A), 93-493(A), 93-498(A), 94-13(A), and 94-43(A)]

Suspensions

- On September 17, 2001, the Disciplinary Board, Panel V, issued an order accepting Montgomery attorney **Paul Whiting Copeland's** conditional guilty plea. This order dissolved Copeland's interim suspension upon acceptance of his plea. Copeland entered a plea to the first charge in the complaint filed against him. On April 26, 2001, the Disciplinary Commission of the Alabama State Bar interimly suspended him from the practice of law in the State of Alabama. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing Copeland's failure to comply with his stipulation agreement with the Alabama Lawyer Assistance Program. On March 9, 2000, Copeland signed a stipulation agreement with ALAP for

alcohol abuse. This agreement called for the "immediate suspension" of Copeland's law license if he failed to comply with any of the provisions of that agreement. Copeland violated the agreement on April 11, 2001 by testing positive for alcohol during a random urine analysis required by his agreement. Copeland has agreed to probation for two years with special conditions. [ASB No. 01-130(A)/Rule 20(a), Pet. No. 01-07]

- Effective October 18, 2001, Birmingham attorney **Cecilee R. Beasley** has been suspended from the practice of law in Alabama for non-compliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 01-5]
- Effective October 8, 2001, Atlanta attorney **Darin Wayne Collier** has been suspended from the practice of law in Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 01-14]
- Effective October 8, 2001, Fort Payne attorney **Steven George Noles** has been suspended from the practice of law in Alabama for noncompliance with the 2000 Mandatory Continuing

CLE Opportunities

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

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 of drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependence. 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.

Legal Education requirements of the Alabama State Bar. [CLE 01-35]

- Effective October 8, 2001, Miami attorney **Barton Stuart Sacher** has been suspended from the practice of law in Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 01-38]
- Effective October 8, 2001, New Orleans attorney **Berney Leopold Strauss** has been suspended from the practice of law in Alabama for noncompliance with the 2000 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 01-45]

- The Alabama Supreme Court entered an order based upon the decision of Panel IV of the Disciplinary Board on October 9, 2000, suspending **Darryl Clarence Hardin** from the practice of law in the state of Alabama for a period of three years and six months, effective March 27, 1997.

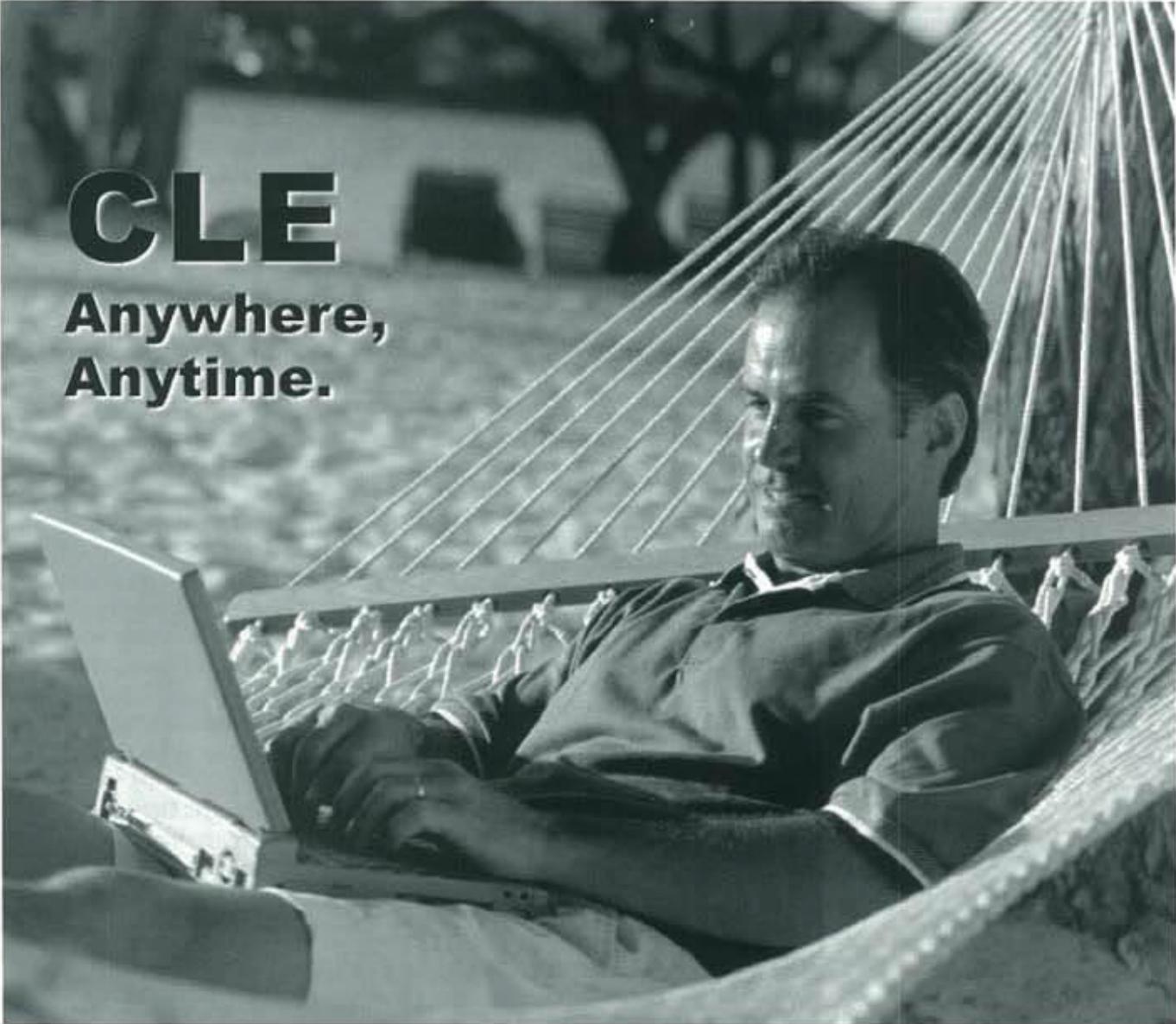
Hardin accepted employment from clients and thereafter failed or refused to take any action on behalf of the clients or provide any legal services whatsoever. Hardin failed or refused to return telephone calls or respond to written correspondence from clients or otherwise keep them informed as to the status of the representation. When clients filed complaints with the Alabama State Bar, Hardin failed or refused to respond to the complaints. Hardin pled guilty to having violated rules 1.1, 1.3, 1.4, and 8.4(g) in each case. Additionally, in ASB No. 92-339(A), Hardin pled guilty to a violation of Rule 1.15(b). In ASB No. 93-257(A), Hardin pled guilty to a violation of rules 1.8(h), 8.1(b) and 8.4(c). And, in ASB nos. 93-347(A), 96-040(A), 96-105(A), 96-274(A), 96-345(A), 97-010(A), 97-129(A), 97-143(A), 97-155(A), and 97-156(A), Hardin pled guilty to violating Rule 8.1(b).

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Commission of the Alabama State Bar, suspending **Lynette Kay Gayle-Williams** from the practice of law in the state of Alabama for a period of one year,

effective October 24, 2001. Gayle-Williams pled guilty to violating rules 8.4(a) (b) (c) (d) and (g), Alabama Rules of Professional Conduct. Gayle-Williams was arrested and charged with theft of property second degree. After her arrest, Williams contacted the owner of the property and arranged a meeting with him and pled with him to drop the criminal charges and allow her to make restitution. Gayle-Williams pled guilty to criminal trespass third degree, a violation of Section 13A-7-4, which is a violation punishable by not more than 30 days in jail. [ASB No. 00-153(A)]

Public Reprimand

- On October 26, 2001, Andalusia attorney **James Harvey Tipler** received a public reprimand without general publication. Tipler represented Donna Morgan in a personal injury case. During the representation, Tipler had the client go to the Diagnostic Imaging Center of Northwest Florida for an MRI. On August 29, 1996, she signed a lien form given to her at the Center. Tipler subsequently received a judgment in the amount of \$25,000. On November 9, 1996, Tipler disbursed proceeds to Ms. Morgan and certain medical providers. Tipler did not pay the Center's outstanding bill of \$1,345 because he did not receive the lien form from them until December 2, 1996. Tipler signed the lien form and returned it, thereby acknowledging receipt and agreeing to protect the Center's interest. The Center began calling Ms. Morgan about payment and she finally agreed to pay them \$100 per month. She did not make any payments and Tipler sent her a letter on February 12, 1998 requesting that she either pay the bill in full or begin making payments. Ms. Morgan refused to communicate any further about the matter. Tipler filed suit against her on behalf of the Center in the District Court of Covington County. The case was tried and a judgment was entered against Ms. Morgan for \$1,345 on January 11, 1999. The Disciplinary Commission found Tipler's actions constituted a violation of Rule 1.9 [conflict of interest] of the Rules of Professional Conduct. [ASB No. 00-233(A)]

A black and white photograph of a man in a suit sitting in a hammock on a beach. He is looking at a laptop computer. The background shows a beach with some buildings in the distance.

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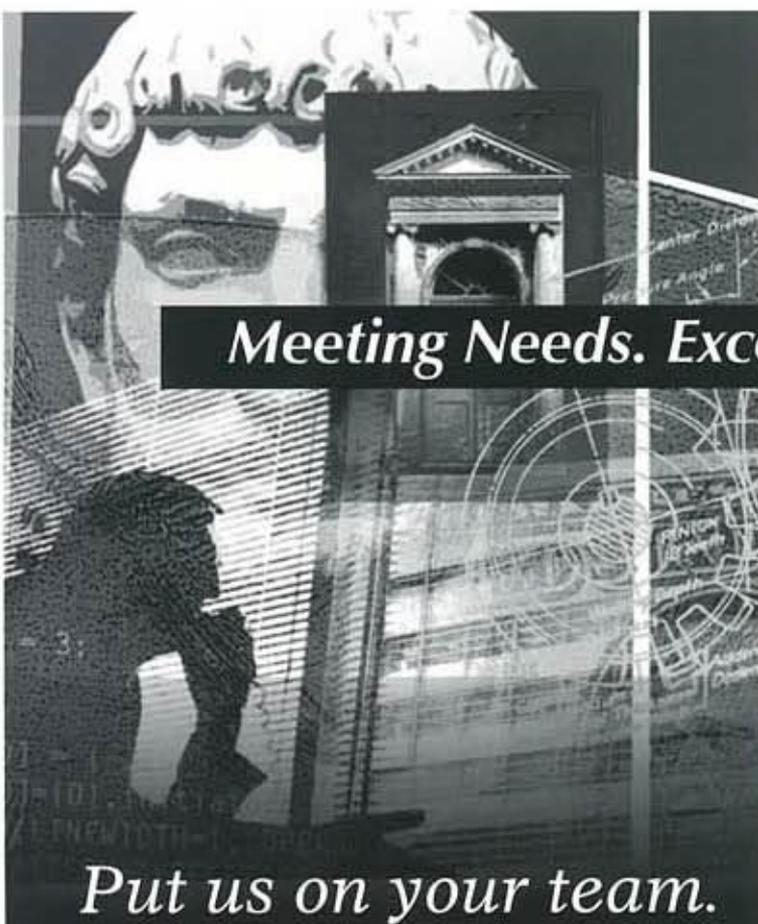
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