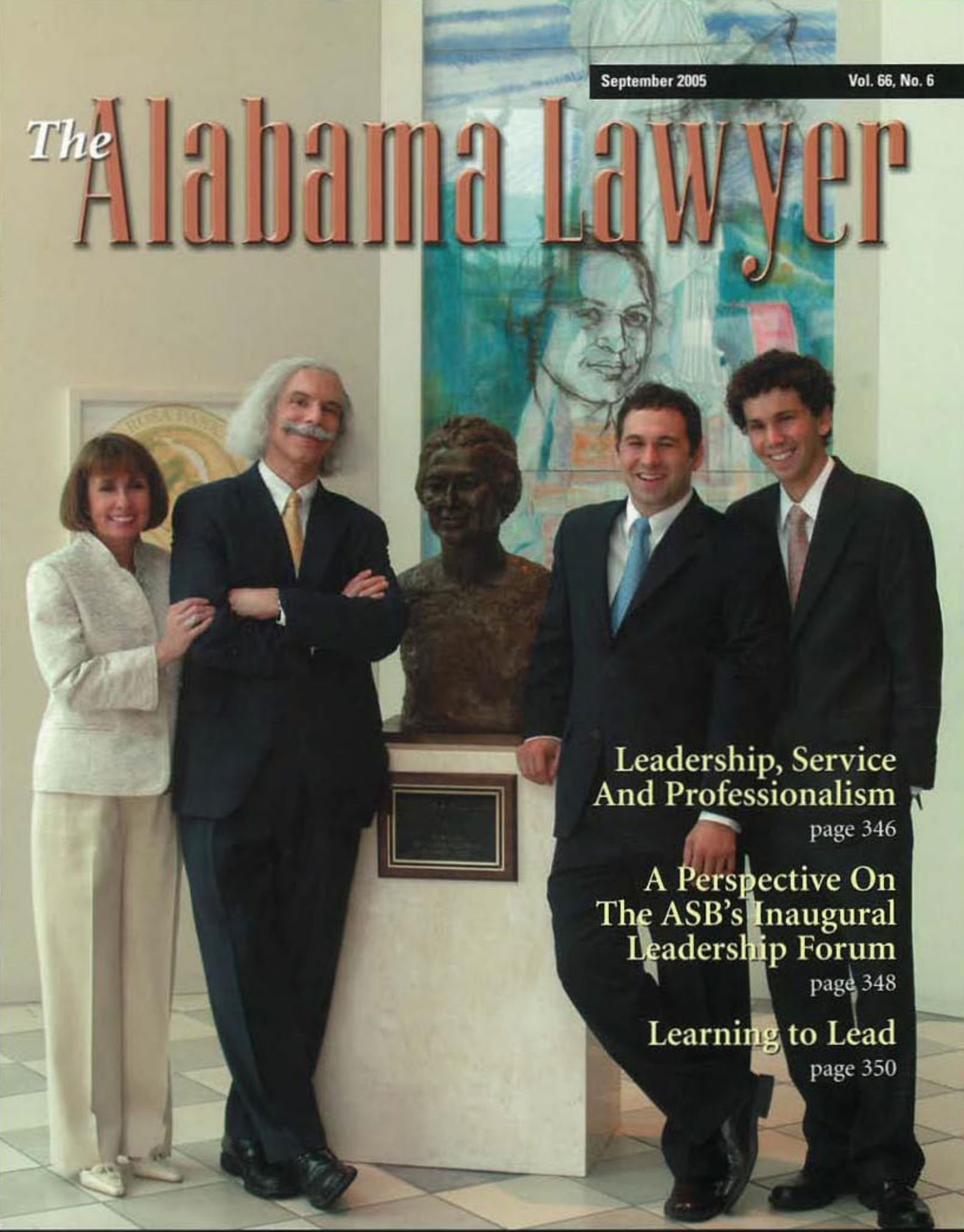
September 2005 Vol. 66, No. 6

The Alabama Lawyer



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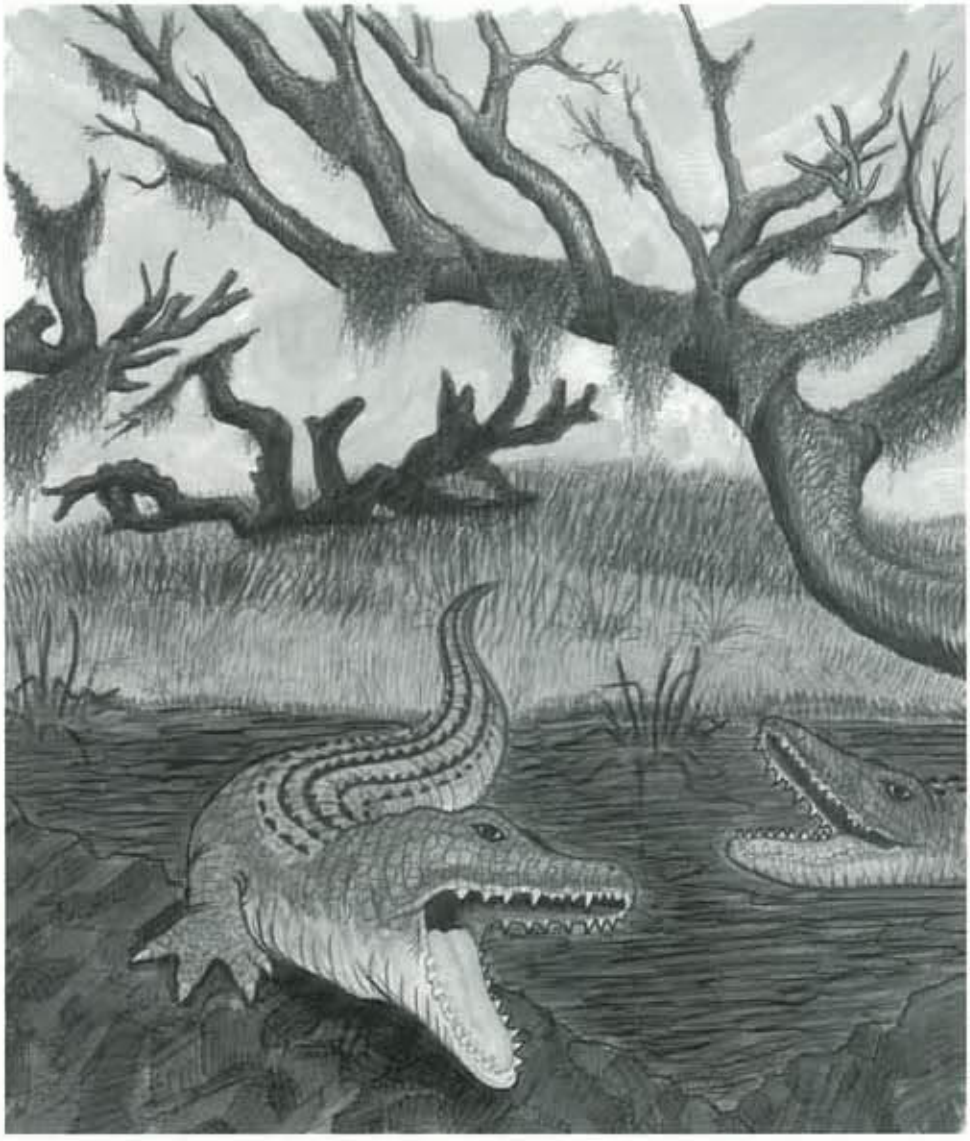

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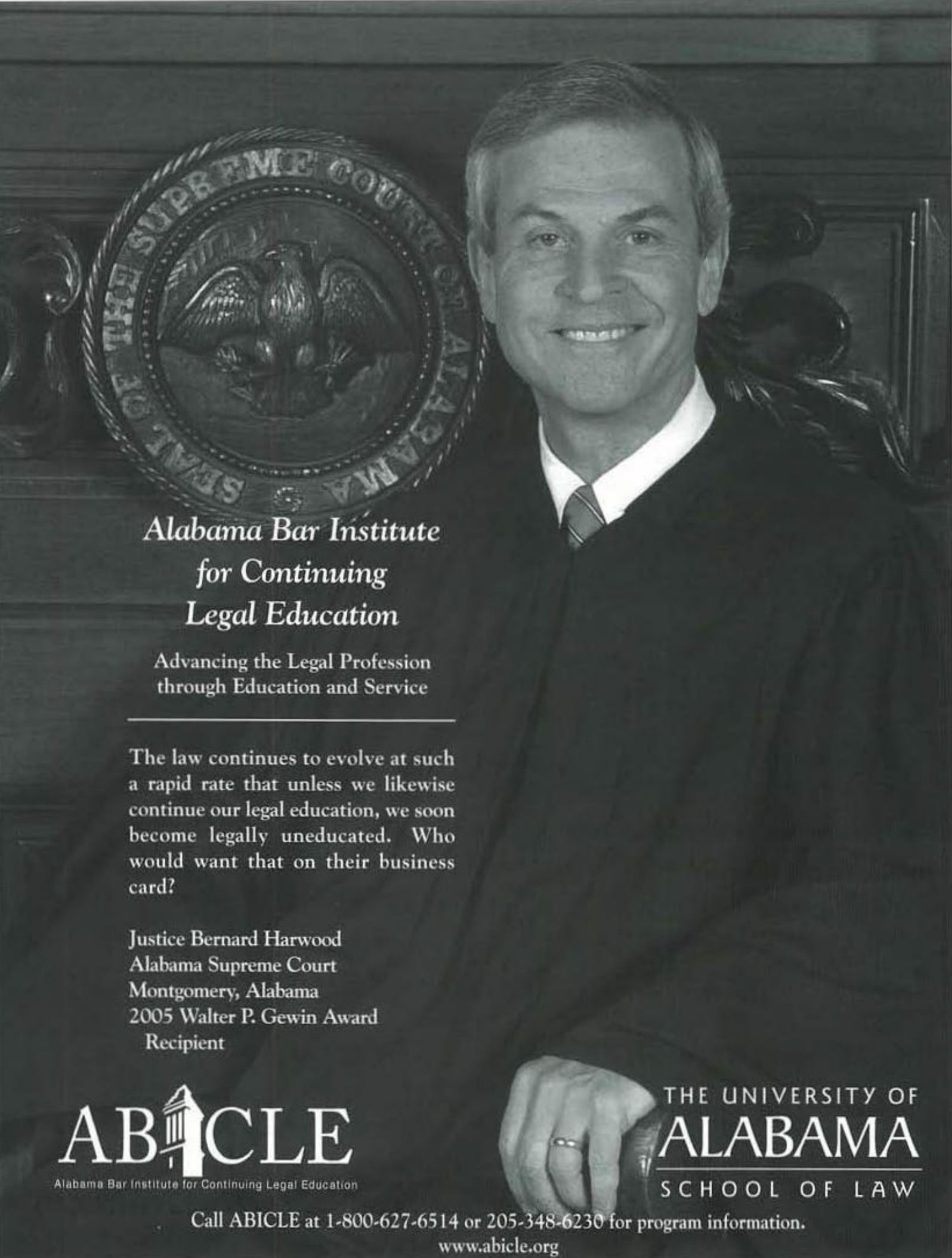

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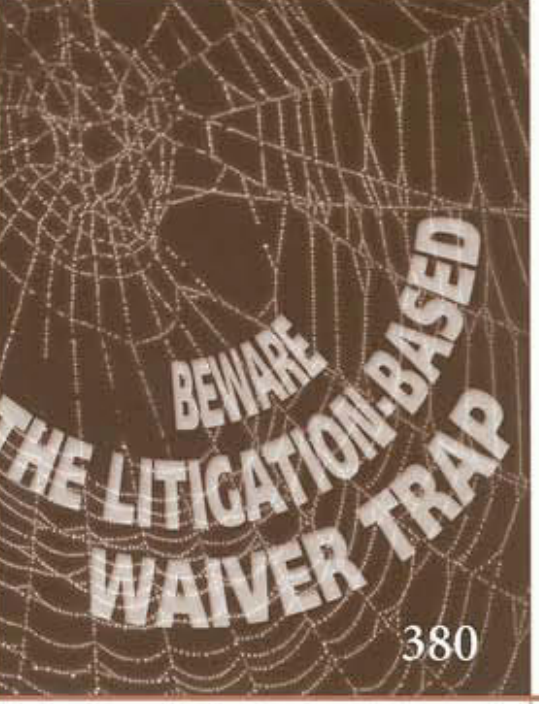

The Alabama Lawyer

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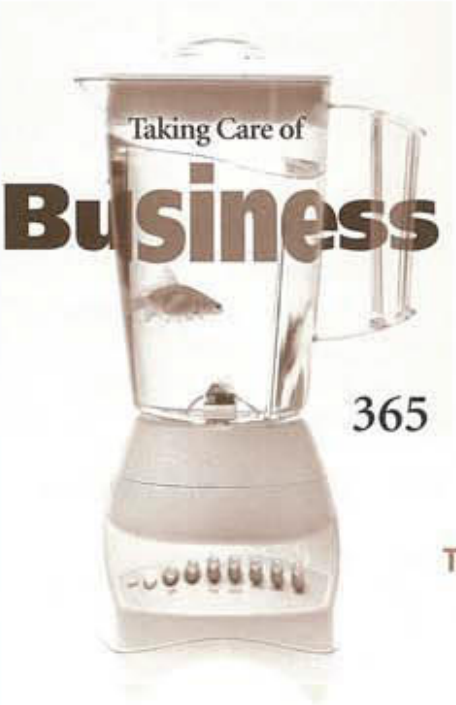
ON THE COVER

President Bobby Segall with wife Sandy and sons Joshua and Jacob at the Rosa Parks Museum in Montgomery

This cover honors the Montgomery Bus Boycott and commemorates its 50th anniversary. The cover also honors the courageous decision in *Browder v. Gayle* reached by Judge Richard Rives and Judge Frank M. Johnson, Jr. In that decision, Judge Rives and Judge Johnson held the statutes and ordinances requiring segregation of motor buses in the City of Montgomery violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.



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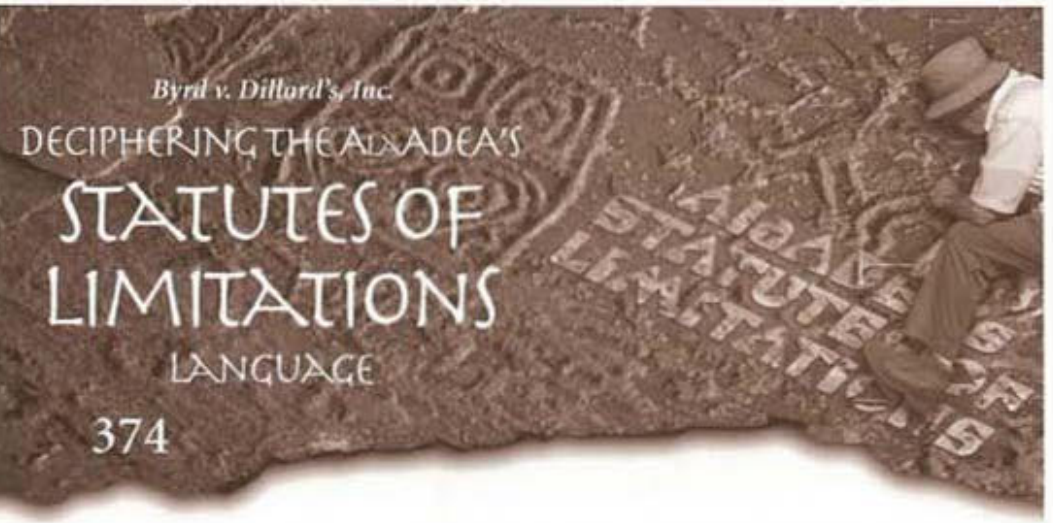

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Bobby Segall

The Independence of Our Judiciary

I've only been president two months, but I can tell already—it's pretty cool. Yeah, it's a lot of work (mostly work others make for you), but, boy, are there perks. I mean, your life changes completely. I noticed it right away. The first thing is that people are interested, or pretend to be, in what you have to say. And, even when what you say is goofy, people are polite: "That's an interesting idea," as opposed to "Cut the BS, Bobby, be serious." Never mind that I *was* serious.

They arrange meetings when *you* want them, and sometimes even *where* you want them. Most of you are familiar with conflicts in your schedules. Not me! No more—except for those pesky judges, of course. Now, if there's a conflict, the bar staff conforms events to my schedule. I don't even have to ask. They want to be helpful. It's almost like being breast-fed. (Not really, but I've always heard that a president should try to include sexual references in his/her column. It's attention getting.)

Another thing—you get your own stationery. It says "The Office of the President" and it has your name on it. I've never even had personal stationery with my name on it. (I had to fight to get my firm to include my name on its stationery.) So, of course, I'm writing tons of letters. Not that I have much to write about, it's just that I love using my stationery. So, if you receive a letter from me that makes no sense, please ignore the content and just know that I wanted you to see my stationery—with my name on it.

As president, you also get a lot of free food. In fact, if you schedule enough meetings at the right times, you can cut out buying food altogether. That's the real reason **Doug McElvy** spoke to so many local bar associations. Every one of them provided lunch or dinner. The best part is that folks are insulted if you offer to pay for your food—and I've learned that good bar presidents try hard never to offend.

Pretty impressively, you get calls from folks who never would have called you had you not been president. Have you ever been called by the sitting chief justice of the Alabama Supreme Court, other than to solicit a campaign contribution back when that was kosher? I never had been, but now I get calls from the chief justice. It's "Bobby this" and "Chief Justice that." (Ok, I'm exaggerating—okay, lying—but he has called me once, and he called me "Bobby." I called him **"Justice Nabers."**)

I've also gotten calls from federal judges. Really! And, so far, the word "contempt" hasn't been mentioned. One judge even invited me to the **Eleventh Circuit Judicial Conference** where I got to see Miami-based humor writer **Dave Barry** speak at lunch. Barry said he moved to Miami from the United States. Someone at my table asked me if I had moved to Alabama from the same country. Thanks to civility lessons from McElvy, my response was (a little) nicer, and shorter, than George Carlin's seven dirty words.

That's another thing. As president, you get to say outrageous things—just like you were Howard Dean or somebody like that. And, no matter how radical you sound, people pretend like you're not a dope. Sometimes, you can tell it's hard for folks to pretend. Still, they try. And, sometimes, my outrageous comments can actually be persuasive. For example, I suggested to **Keith Norman** that the bar move from electing its president to a process of merit selection. Keith said the more he heard me talk (about almost anything), the better the idea sounded.

I've also learned something pretty important as president. I've learned that candor is the best policy. Mark McGwire (testifying on steroids before Congress) taught me that. And, even though some past presidents have suggested that candor may not always be the best practice,

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President's Page

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the most meaningful thing you get to do as president is talk about issues that are critical to our profession. So, I'm going to candidly share (some of) my (repressed) feelings with you about those critical issues: The way we select appellate judges in Alabama reeks! (Bar presidents can't say "s--ks.")

Can we agree on this? There is no more critical issue than that of the **independence of our judiciary**, both in practice and in perception. People need to know—to believe—that when they come to court, they will receive justice and fairness, untainted by contributions from plaintiff lawyers, defense lawyers, the Business Council, the AEA or even Karl Rove or James Carville. The way we select our judges, though, and especially our appellate judges—in outrageously expensive[1], often mean-spirited, and always demeaning elections—leads to just the opposite perception.[2] Really! After some of these "Wrestlemania"-style contests, our winning judge appears about as impartial as a figure-skating judge in the Olympics.[3]

The fact that we have, by good fortune, elected, for the most part, talented, honest and good people has made no dent in the perception that our judges are "politicians in robes." Is there a better way? Duh! That Alabama is one of only eight states (including Mississippi) that still selects judges in mud-slinging elections (fully protected by the First Amendment) suggests that there may be no worse way. In my view, and in the view I believe of the overwhelming majority of the bar, it is time to take a first step—maybe even a giant leap—toward assuring that our system of justice is one that the public accepts as independent and impartial and that gives substance to the concept that we are a nation (okay, a state) ruled by laws and not by people. We should, and we must, begin at the top of our judicial food chain, with our appellate courts. And I have a plan, or at least a hope, okay, a wish.

It's easy to say that what we need is a present-day **Howell Heflin**—Chief Justice Heflin—a modern Moses—to lead us out of the wilderness. And, we do need a charismatic leader. But, even with a great leader, this "wait for Godot" attitude can, and has, become a crutch and, even worse, an excuse for not trying. We have to make progress now. Together, we can do what lawyers are supposed to do—ignore the naysayers and rise above politics and self-interest and what may seem the expediency of the day. And, rise above simple inertia. "Professionalism" means more than being nice to one another, and a lot more than complying with our *Code of Professional Responsibility*. That's basic. No real effort is required. Our greater task as professionals, as lawyers, is to promote in Alabama a system of lasting justice, a system in whose integrity and impartiality our citizens will impose trust and confidence. We must

(Continued on page 328)

Justice Harwood Receives Prestigious Gewin Award

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16	Friday, Social Security Disability Law - Tuscaloosa
23	Friday, Practical Criminal Defense Law - Tuscaloosa
30	Friday, The Boot Camp for Litigating an Automobile Accident Case - Tuscaloosa

OCTOBER

7	Friday, Administering the Decedent's Estate - Tuscaloosa
7-8	Friday, Saturday, Family Law Retreat to the Beach - Orange Beach
14	Friday, Real Estate - Birmingham
14	Friday, Immigration Law - Tuscaloosa
14	Friday, End of Life Issues - Tuscaloosa
21	Friday, Serving as a Guardian Ad Litem in Alabama - Tuscaloosa

NOVEMBER

3	Thursday, DUI Defense - Birmingham
4	Friday, Medical Malpractice - Birmingham
4	Friday, Collection Law - Tuscaloosa
11	Friday, Hot Topics for the Litigator - Tuscaloosa
17	Thursday, Back to the Basics - Birmingham
18	Friday, 24th Annual Bankruptcy Law Update - Birmingham

DECEMBER

1	Thursday, Alabama Update - Mobile
2	Friday, Alabama Update - Montgomery
2	Friday, 28th Annual Estate Planning - Birmingham
8	Thursday, Alabama Update - Huntsville
8	Thursday, Tort Law Update - Birmingham
9	Friday, Trial Skills - Huntsville
16	Friday, Damages and Remedies: Awards, Interest and Attorney's Fees - Birmingham
16	Friday, Trial Skills - Montgomery
21	Wednesday, Trial Skills - Birmingham
21	Wednesday, Video Replays - Tuscaloosa
22	Thursday, Alabama Update - Birmingham
12/27-1/3	Ski and CLE - Big Sky, Montana

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President's Page

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demonstrate that we lawyers truly do love justice, that we care about right and wrong, and that we care about the legacy of justice we leave for our children and for all who follow us. Our goal is clear. We must convince our legislature and our citizens that the merit selection of appellate judges (as opposed to bar presidents) is an idea whose time has come, and gone, and come again and again and again.[4]

And, guess what? We do have a charismatic leader, one of impeccable reputation and ability, to guide us. We have our leader, despite the shortcomings of my efforts to recruit him. Not very long ago, I called the person **Bill Clark's** entire *ad hoc* committee on judicial selection[5] felt most likely in Alabama to be a great, modern-day judicial reformer. I said, "Houston, we have a problem." And, **Justice Gorman Houston**, with his usual equanimity, fired back, "Congratulations, funny man, you're the 500th person to say that to me."

Off to this auspicious beginning, several committee members and I laid out a case that Justice Houston, having personally participated in our present system of judicial elections, understood far too well. We also begged him. Finally, we promised him a leadership team with which to work,[6] and we promised him your help. After we made clear that we were not trying to change anything before the 2006 elections, to the great and good fortune of us all, Justice Houston, in my view the ultimate professional, agreed to serve.

Of course, we all have roles to play. To promote merit selection, I am willing, if necessary, to demean myself, even more than usual. If nothing else works, I'll run for the appellate bench, on a ticket with that great American (idol), Judge Paula Abdul. We could be elected too, because Paula, along with W. Mark Felt, will handle all (campaign) solicitations. If either Judge Abdul or I are elected, merit selection will quickly gain status as Alabama's most critical need.

My guess, and hope, is that you have more realistic ideas about how to move our state toward a better way of selecting its appellate judges. If this is an issue about which you are interested, or on which you are willing to work, really work, please e-mail me at *segall@copelandfranco.com*. We need lawyer power.[7] If you disagree with me, and with Justice Houston, because you feel either that our appellate judges should be subjected to humiliating elections or that our judicial system should be perceived by the public as the best money can buy, please do not e-mail me. (Kidding, I love speaking to naysayers.)[8]

In addition to improving the way in which we select our judges, our profession has other critical issues, ones that will be discussed in subsequent columns. One such issue relates to **indigent defense.** After an independent judiciary, the second prong of a system of true justice is providing competent defense lawyers to indigents who have been charged with crimes. To provide competent counsel, it's necessary to pay counsel, and not to have a system where lawyers risk becoming indigent in order to represent indigents. We have a crisis in that area right now. We have to address it. The chief justice has appointed a commission to address it, and our bar will take a leadership role in that effort.

Another critical issue is **civil legal services to the poor.** At a time when Legal Services Corporation funding has been cut way back, this bar, and we lawyers in Alabama, must devote ourselves to finding a way to assure that our disadvantaged citizens are not left without fundamental civil legal services. More will be said and done in these areas by our state bar throughout the year and, it is hoped, for years into the future.

In closing, I want you to know that serving as president of our unified bar is a thrilling experience and an amazing honor. The greatest pleasure for me, and probably for everyone else who has ever served, has been to meet and work with so many wonderful people. Although I don't get out much, lawyers, to me, are the best and

brightest people in the world—the most passionate, the most interesting, the most sincere, the most caring, the most energetic, the most adaptable, the most creative, and even the most entertaining.[9] Alabama lawyers are good and true friends to one another and to their clients. Like you, I want our profession to be all it can be—and that's a lot. I also want our profession to be perceived by the public for what it is—a noble and courageous calling. I look forward very much to working toward that goal with all—well, maybe not "all"—of you throughout this year and beyond. ■

Endnotes

1. Whoever said Alabama is not first in anything? According to the *Montgomery Advertiser*, for the last decade (ending with the 2004 elections), Alabama was first in the country in the money spent on state supreme court elections. In fact, Alabama administered a crushing defeat to runner-up Texas. During the decade, candidates for the Alabama Supreme Court spent $41 million compared to a paltry $27.5 million spent by candidates for the Texas Supreme Court. And, you wonder why a lot of folks in Alabama, including some lawyers, doubt the impartiality of our justices?
2. And that perception is often fueled by lawyers. Just recently, parties to the Vioxx litigation challenged the objectivity of the Alabama judge handling the case—on the basis of campaign contributions he received while running for the Alabama Supreme Court. Some time ago, an Alabama lawyer, in a filing before the Alabama Supreme Court, suggested that just about every judge on the court was bought, because of political contributions.
3. You should fill in the country you believe has the most egregiously biased figure-skating judges.
4. Merit selection can take many forms, but an obvious one is that a broad-based judicial nominating commission submits a limited number of qualified nominees to the governor for appointment to vacancies. This method is already successfully used for circuit and district court positions in Jefferson County and other judicial circuits. Once appointed to a judgeship, judges, at the end of their terms, stand for retention elections in connection with which they are evaluated by a broad-based judicial evaluation commission. A proposed constitutional amendment has already been drafted and approved by the Board of Bar Commissioners.
5. That committee consists of **Wade Baxley, Bill Bowen, Albert Brewer, Walter Byars, Bradley Byrne, Tom Carruthers, Bill Clark, Bob Denniston, Boots Gale, Fred Gray, Warren Lightfoot, Vic Lott, Rick Manley, Doug McElvy, Bob McCurley, Larry Morris, Rod Nachman, Keith Norman, Paul Patterson, Drew Redden, Maury Smith, Chuck Stewart, Howard Walthall,** and **Mark White.**
6. This article has gone to press well in advance of its publication date. It is hoped that by now our entire leadership team is in place. Its other members either have been, or shortly will be, announced.
7. If you would like to see a copy of the proposed constitutional amendment, let me know, and I (ok, my secretary) will e-mail it to you.
8. Actually, I understand that some lawyers may feel that the selection of judges simply is a matter that the bar should not address. If you feel that way, I would like to hear from you—not enough to include an invitation in the text, but at least enough to include one in a footnote.
9. On occasion, very, very rare occasion, in Alabama, lawyers can also be outrageous, exasperating, frustrating, insufferable, outlandish, self-aggrandizing, and even despicable, but we'll deal with that later. I'm trying to be nice in this column.

By Keith B. Norman

A New Long-Range Plan for the Alabama State Bar

In 1994, the ASB Board of Bar Commissioners approved the bar's first long-range plan. The task force recommending that plan was chaired by **Camille Cook** of Tuscaloosa. Typically, an organization's long-range plan should be revised or updated every three to five years. The 1994 plan was well conceived and served the bar for over a decade. Virtually, every goal addressed in the 1994 plan was accomplished, thanks to the efforts of many bar members who volunteered and served on bar committees and task forces.

In 2001, bar President **Larry Morris** appointed a Long-Range Plan Task Force to draft a new plan. From 2002-2004, the task force worked as nine subcommittees. In 2004, newly-elected bar President **Doug McElvy** appointed a new Long-Range Plan Task Force (2004 Task Force) to complete the work of the previous task force. He asked **Caine O'Rear** of Mobile and **Karen Bryan** of Tuscaloosa to serve as chair and vice-chair, respectively. Those serving on the 2005 Task Force included:

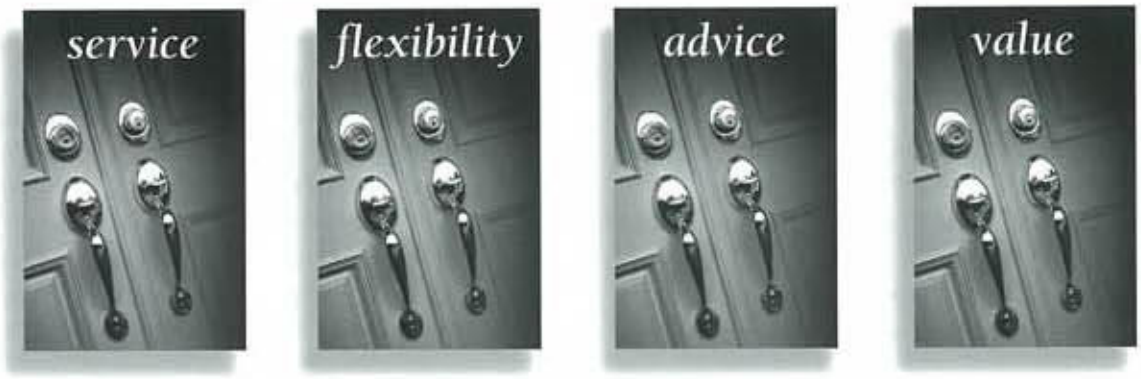
Dave Boyd, Montgomery; immediate past President **Bill Clark**, Birmingham; **Sam Crosby**, Daphne; **Caroline Gidiere**, Birmingham; **Robert Gonce**, Florence; **Wilson Green**, Birmingham; **Anthony Joseph**, Birmingham; **Karen Mastin**, Montgomery; **Rebekah McKinney**, Huntsville; **Tony McLain**, Montgomery; **Tom Methvin**, Montgomery; former bar President **John Owens**, Tuscaloosa; **Gerald Paulk**; Scottsboro; President-Elect **Bobby Segall**, Montgomery; **Stan Starnes**, Birmingham; **Bill Trussell**, Pell City; and **David Wirtes**, Mobile.

In making its recommendation for a new long-range plan, the 2005 Task Force reviewed a great deal of information, including: the 1994 Long-Range Plan; the 2001 Task Force subcommittee reports; the reports of a number of standing committees and task forces of the bar; input from former bar presidents; the long-range plans of other state bars; and the goals and trends identified by the National Association of Bar Executives and the American Society of Association Executives.

Caine O'Rear presented the 2005 Task Force report to the Board of Bar Commissioners for its consideration. The new long-range plan as proposed by the 2005 Task Force included a *mission statement* defining the foundational purpose of the bar. The plan included a *values statement* explaining the bar's core values consistent with its mission. The plan also included five broad *goals*. The goals are synonymous with the bar's major objectives. They influence resources, staffing, committee charges and section initiatives. Finally, the 2005 Task Force report identified strategies to advance the designated goals. This past May, the Board of Bar Commissioners approved the task force report, adopting the new long-range plan for the Alabama State Bar. The entire long-range plan starts on page 332.

(Continued on page 332)

WHAT ARE YOU LOOKING FOR *in a 401(k) plan?*



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Executive Director's Report

Continued from page 330

ALABAMA STATE BAR 2005 LONG-RANGE PLAN MISSION AND VALUES STATEMENTS

The **mission statement** of the Alabama State Bar is:
The Alabama State Bar is dedicated to:

- Promoting the professional responsibility, competence and satisfaction of its members;
- Improving the administration of justice; and
- Increasing the public understanding of and respect for the law.

The **values statement** of the Alabama State Bar is:
The Alabama State Bar is guided by the values of:

- Trust;
- Integrity; and
- Service.

GOALS AND STRATEGIES

I. Assure the Highest Standards of Bar Admission, Professional Conduct and Professional Competence and Service.

A. With respect to admission and membership:
1. Ensure that admission standards and bar examination procedures are current and consistent with the best practices nationally.
2. Ensure that the bar examination is an appropriate measure of minimum competency.
3. Enhance the bar's liaison with in-state law schools to address issues of mutual interest, including:
   a. Ensuring timely student registration with the bar's admission office; and
   b. Considering post-law school internships for all graduates.
4. Review "voluntary inactive" and "inactive" membership categories and the rules regarding transition to active status, with particular emphasis on:
   a. Reinstatement costs;
   b. Education accountability; and
   c. Economic impact on the bar.

B. With respect to professional conduct and regulation:
1. Periodically review and make recommendations regarding disciplinary rules and procedures.
2. Consider aspects of uniformity and expediency in disciplinary rules, utilizing the national model as a resource.
3. Especially address the regulation of lawyers not licensed to practice in Alabama.

C. With respect to professional competence and service:
1. Partner with local bars to encourage creation of mentoring or buddy programs.
2. Review existing CLE requirements and needs, with special focus on:
   a. Effectiveness of carry-over of hours provision;
   b. Exemption at age 65 and above;
   c. Number, availability and quality of programs; and
   d. Course on professionalism for new lawyers to ensure that content, length and presentation are appropriate and effective.
3. Continue to work cooperatively with the Chief Justice's Commission on Professionalism.
4. Continue the bar's "Road Show" to maintain and increase awareness of opportunities afforded by the bar staff, programs and CLE.
5. Develop programs for lawyer training on personal finances, law practice management and quality-of-life issues.
6. Encourage lawyers to pursue public service and to seek public office.

II. Advance Improvements in the Administration Of Justice.

A. Support the selection of justices and judges in a manner that removes the judiciary from political and special interests, pressures and influences.
1. Support and participate in efforts to implement the recommendation made by the Board of Bar Commissioners in 2004 for establishing merit selection of appellate judges.
2. Establish a committee or task force to study the issue of selection of circuit and district judges and, where appropriate, coordinate with the efforts of the various circuit and district judges' associations.
3. Consider effectiveness of setting minimum standards and experience levels for judge selection.

B. Increase public understanding and respect for the law.
1. Continue public service announcements and campaigns.
2. Build relationships and partnerships with all stakeholders (government, private, associations, foundations, etc.).

C. Promote public access to high quality legal services regardless of financial or other circumstances.
1. Enhance public recognition by state and local bars for lawyers excelling in providing pro bono services.

(Continued on page 334)

Lawyers Make Change.

You are an invaluable guide in helping your clients develop and execute charitable giving plans. Discuss various giving options with your clients. Explore the ways they can support what is closest to them while benefiting their financial situation at the same time.

To learn more about your clients' charitable giving options, ask your local bar association about providing the 2 hour CLE course "Change Alabama with Giving Alternatives" or contact your local community foundation at www.cfalabama.org.

ALABAMA
GIVING
GIVING MAKES CHANGE

P.O. Box 530727 • Birmingham, AL 35253-0727 • phone 205.313.4830 • fax 205.879.4899 • alabamagiving.org

Continued from page 332

2. Promote the purpose for and use of Small Claims Court through an effective media campaign.
3. Explore mandatory funding mechanisms for legal services for underprivileged and poor persons.
4. Support the creation of a structure or mechanism to oversee, improve and provide accountability for the provision of indigent legal services throughout the state.

D. Be the leader in alternative dispute resolution.
1. Encourage circuit judges to require mediation of domestic relation cases through appropriate court orders.
2. Adopt additional rules concerning the qualification and training of arbitrators and an Alabama *Code of Ethics* for arbitrators.
3. Develop pamphlets directed to the public which generally explain the rights, obligations and potential costs for parties involved in arbitration.
4. Explore the merits of promoting ADR for use in lawyer-to-lawyer disputes.

E. Enhance the relationship between the bar and judiciary.
1. Consider setting annual meeting site and dates to correspond with state Circuit Judges' Association meeting.
2. Appoint a task force composed of judiciary and bar members to address both attorneys' behavior before judges and judges' behavior before attorneys.

III. Maintain an Effective State Bar Organization And Structure.

A. Rigorously preserve the role of the bar as an independent organization for maintaining professional integrity and self-regulation.

B. Aggressively advocate issues which promote the bar's mission statement, and do so in a manner which minimizes fragmentation among its members.
1. Regarding political or ideological issues, the bar should take positions and/or utilize its resources only with respect to those issues which are germane to the bar's stated purposes, such as regulation of the legal profession, the improvement of the quality of legal services and of the administration of justice, and the promotion of the public's understanding of and respect for the law.
2. Monitor and, if appropriate, act on current issues concerning the regulation of the profession which include, among others, federal efforts to regulate lawyers, multijurisdictional practice initiatives and *pro hac vice* admission rules.

C. Maintain the financial health of the bar and its components.
1. Maximize the purpose and utilization of the state bar foundations.
2. Monitor income and expenses and develop new revenue sources.

D. Enhance the network of local and specialty bars.
1. Provide guidance and resources as deemed appropriate for the state bar.
2. Offer a local bar leader conference to promote education and networking for local volunteer leaders.
3. Consider whether a network of "regional" bars would be more effective than county or single circuit bars in some areas.

E. Promote an effective structure for service by bar commissioners.
1. Consider term limits of not more than two consecutive terms, with an option to seek re-election after sitting out a term.
2. Develop a template or uniform electronic report for bar commissioners to send to local members.
3. Appropriately post minutes of the bar commission meetings on the bar's Web site.

F. Develop training opportunities for new admittees, including review and assessment of the effectiveness of the bar's inaugural Leadership Forum initiated in 2005.

G. Study the opportunity for and impact of affiliate relationships with the bar.

H. Study the committee and section structure of the bar to ensure that the bar is best situated to meet its mission and goals, including consideration of "rapid response" committees to volunteer for short, intense projects.

IV. Serve Member Needs While Enhancing the Use of Bar Technology and Communications.

A. Conduct a quality-of-life survey in 2005, with special focus on student loan debt, and utilize results to be a member-driven organization.

B. Promote the programs and resources of the bar by making access to resources "user-friendly" and a "first choice" for lawyers.
1. Consider how a "bar concierge service" might operate.
2. Develop benefits programs, such as health insurance, and other programs which assist in professional, economic and personal development for lawyers. Customize, package and promote member benefits and services to various categories of members, such as developing "suites of benefits" targeting varied practice settings and specializations.

C. Encourage lawyer participation in meaningful ways on committees, in sections and in other bar roles, including promotion of a "menu" of opportunities for participation in the bar.

(Continued on page 336)

Hard Evidence From Hard Drives

Have you considered the possibility that you may find a smoking gun inside a computer? Electronic evidence is an emerging area of discovery and rightly so because the majority of written correspondence today takes place in email, and all of today's legal documents are prepared on a computer. In order to take advantage of electronic evidence, an expert must be trained in the proper methodology to ensure admissibility, must understand data storage technology, and must be proficient in forensic software. All these skills can be found in one place . . . . .

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Executive Director's Report

Continued from page 334

D. Maximize the use of technology for effective communications.
   1. Develop video meetings and online collaboration so that rural members can easily participate.
   2. Anticipate that technology and the Internet will be the communication medium of choice for members.
   3. Study and report how the "virtual law office" of the future will operate and affect the bar.
   4. Position the bar to understand and anticipate technology as it impacts the practice of law, member relations, services and communications, and the public and stakeholders.

E. Expand opportunities for CLE online and by DVD.

F. Continue partnering with allied organizations to best position the bar to serve the public and its members.

G. Develop a media "campaign of the year" initiative, rather than multiple messages which may drain resources and cannot be measured well for effectiveness.

V. Advance the Principles of Diversity.

1. Promote racial, ethnic, gender, age, and geographic diversity among all programs and components of the bar, including leadership, staffing and composition of committees, sections and local bars.
2. Promote continuation of diversity principles in law school admissions.
3. Promote opportunities for women and minorities in the legal profession.

The 1994 Long-Range Plan proved to be a valuable planning tool and road map for the Alabama State Bar. Thanks to the work of many dedicated bar members, the 2005 plan should be no less helpful as a future guide for keeping the bar focused on its mission. Future bar leaders no doubt will use the 2005 Long-Range Plan to develop future programs that will help improve member services and ensure that the state bar continues to fulfill its regulatory responsibilities in an effective and efficient manner. ■

ASB Online Bar Directory

Looking for Something or Someone?

The 2004-2005 ASB online bar directory provides you with the most up-to-the-minute information on courts, elected officials, membership information and much, much more.

And, it's only the beginning!

With the addition of Casemaker®, the Alabama State Bar presents the "Electronic Suite of Services" to its members. *WWW.ALABAR.ORG* will quickly become the most valuable resource in your practice. And, it's all free!

So, go ahead and take a look—you're going to love it!

Memorials

Clark, James Edward
Birmingham
Admitted: 1941
Died: May 28, 2005

Jones, Rodney Kenyal
Huntsville
Admitted: 2005
Died: May 16, 2005

Kennedy, Cain James
Mobile
Admitted: 1972
Died: May 20, 2005

McDavid, Andrew Scott
Tuscaloosa
Admitted: 2000
Died: April 7, 2005

Montiel, Gonzalo Fitch
Mobile
Admitted: 1949
Died: May 27, 2005

Sullivan, James Dennis
Mobile
Admitted: 1965
Died: December 23, 2004

Taylor, Robert Macey
Birmingham
Admitted: 1940
Died: June 12, 2005

Ware, Daniel Carl Sr.
Millry
Admitted: 1988
Died: June 12, 2005

Wireman, John Wheatley
Tuscaloosa
Admitted: 2003
Died: June 10, 2005

George Augustus Tonsmeier, Jr.

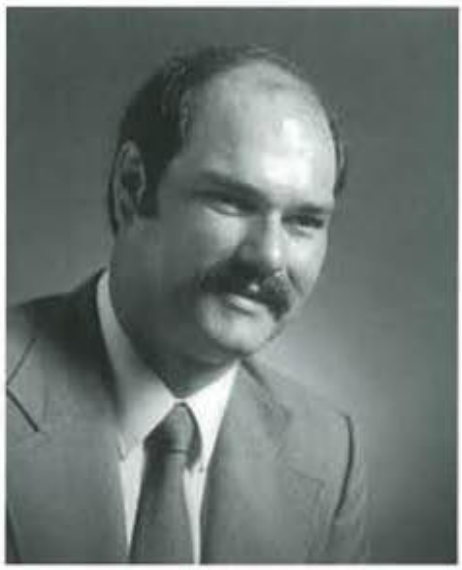
The Mobile Bar Association honors the memory of George Augustus Tonsmeier, Jr., who died February 18, 2005, and recognizes his contribution to our profession and our city.

George was a native and lifelong resident of Mobile and respected member of the MBA for more than 30 years. He was a graduate of McGill Institute, attended Louisiana State University and graduated from the University of Alabama School of Law in 1974, and was admitted to the Alabama State Bar that same year.

George was a highly respected general practitioner, specializing in real estate matters. He began practice with a brief association in his father's distinguished firm of Tonsmeier, Hodnette & McFadden and he also served as a part-time prosecutor with the Office of the District Attorney Charles Graddick.

George was a man of imposing stature, which much belied his kind temperament and cheerful attitude. The comment heard from many lawyers having dealt with him was that he was a "real gentleman."

Among his many interests, George was an avid HAM operator and generously gave his time helping servicemen and women on foreign stations stay in touch with loved ones and family at home. George did this for the troops in Viet Nam.



George is survived by his wife of 19 years, Karen A. Tonsmeier; daughters Rachael Tonsmeier (Rick) Starnes of Columbia, SC; Tegan Ann Tonsmeier of Mobile; Tracey Margaret Tonsmeier of Mobile; a brother, William G. Tonsmeier of Mobile; and nieces, nephews, cousins, other relatives, and many wonderful friends.

George was a parishioner at St. Mary's Church and is buried in Old Spring Hill Cemetery.

Important Notices

Contacting Our Staff

Just another way we are making *your* bar available to you!

Admissions	Ext 119/120	*admit@alabar.org*
Alternative Dispute Resolution	Ext 111/293	*jkeegan@alabar.org*
Attorney Advertising	Ext 214	*gil@alabar.org*
Communications	Ext 132/134	*sandres@alabar.org*
Continuing Legal Education	Ext 156/158	*cle@alabar.org*
Discipline	Ext 218	*bmainor@alabar.org*
Ethics Opinions	Ext 213/219	*gil@alabar.org*
General Counsel	Ext 207/127/215	*tmclain@alabar.org*
General Information	Ext 101	*soglesby@alabar.org*
Law Foundation & IOLTA	Ext 131/13	*tdaniel@alabar.org*
Law Office Mgmt. Assist. Program	Ext 116	*lcalloway@alabar.org*
Lawyer Assistance Program	Ext 112	*jmleslie@alabar.org*
Complaints Against an Attorney	Ext 210	*kime@alabar.org*
Lawyer Referral Administrator	Ext 277	*lrs@alabar.org*
Membership	Ext 136/272	*ms@alabar.org*
Programs and Sections	Ext 305	*edpatter@alabar.org*
Publications	Ext 134/135	*mmurphy@alabar.org*
Volunteer Lawyers Program	Ext 301/118	*vlp2@alabar.org*

Position Available

Assistant General Counsel

The Alabama State Bar is now accepting applications by letter with resumes and writing samples from qualified lawyers for the position of assistant general counsel. These applications should be addressed and mailed to:

J. Anthony McLain
Alabama State Bar
General Counsel
P.O. Box 671
Montgomery, Alabama 36101

This position requires an experienced lawyer with a strong professional background. Salary will be commensurate with experience and maturity. The deadline for submission is ***October 1, 2005***. The Alabama State Bar is an equal opportunity employer.

Bar Briefs

- The **Alabama Civil Justice Foundation** recently presented a $2,000 check to Kid One Transport, the only nonprofit transit system in Alabama for children and expectant mothers in need of medical care when they are ill and without means of transportation. ACJF has given over $671,000 to grants in Montgomery County; Kid One currently has a presence in 39 counties, and has provided over 81,000 rides since its inception eight years ago. For more information, go to *www.kidone.org*.

- **David Leon Ashford** was recently inducted as a Fellow into the International Academy of Trial Lawyers. Ashford practices with Hare, Wynn, Newell & Newton in Birmingham. He is one of 14 new inductees invited to join the group of 500 national and 100 international lawyers.

- The Petroleum Technology Transfer Council Eastern Gulf Region announces that **Bennett L. Bearden**, an ASB member, has been elected as a delegate to the American Association of Petroleum Geologists. Bearden will serve a three-year term representing the Alabama Geological Society in the AAPG House of Delegates. AAPG is an international geological organization and is the world's largest professional geological society with over 30,000 members. Bearden is director of the PTTC Eastern Gulf Regional office in Tuscaloosa.

- Birmingham attorney **Jack Criswell** has been named chair of the Automobile Law Committee of the Tort, Trial and Insurance Practice Section of the American Bar Association. The Automobile Law Committee is made up attorneys nationwide from both the plaintiff and defense bars.

- Durward & Cromer in Birmingham announces that **G. John Durward, Jr.** has become a Fellow of the American Academy of Matrimonial Lawyers.

- **Deborah J. Long**, senior vice-president and general counsel of Protective Life Corporation, was recently elected president of the Association of Life Insurance Counsel. Founded in 1914, the Association of Life Insurance Counsel is a national bar association whose members represent the life insurance industry. Long previously served as president-elect of the association and, from 2000-2004, on the board of governors.

- **William J. Gamble** of Selma has been elected president of the Alabama Defense Lawyers Association. Other officers elected were **Patrick L.W. Sefton** of Montgomery, middle district director, and **Edwin K. Livingston** of Montgomery, executive vice-president. **Livingston** has also been installed as president of the Alabama Council of Association Executives.

- **William W. Horton**, with Haskell Slaughter Young & Rediker of Birmingham, has been named to serve for the fourth consecutive year as vice-chair of the InHouse Counsel Practice Group of the American Health Lawyers Association. Additionally, he will serve in 2005-2006 as deputy chair for programs of the AHLA's Sarbanes-Oxley Task Force.

- The American Pharmacists Association recently presented Alabama Finance Director **Jim Main** with its Hubert Humphrey Award. The award recognizes a pharmacist who has made major contributions in government at the local, state or national level. Main

is finance director and Governor Bob Riley's top budget adviser and was also chief of staff and legal advisor to then-Governor Fob James from 1997-99. He practiced law for 25 years in Anniston and Montgomery and worked in Union Springs and Tuscaloosa as a pharmacist from 1968-72.

- Retired Birmingham attorney **John N. Randolph** is the author of a political history of the Alabama National Forest Wilderness movement entitled, *The Battle for Alabama's Wilderness*, published by the University of Alabama Press, *www.uapress.ua.edu*. The book details the significant contribution of a number of Alabama lawyers to the 30-year effort to establish and enlarge the Sipsey Wilderness Area, to create the Cheaha and Dugger Mountain wildernesses and to designate the West Fork Sipsey National Wild and Scenic River.

- **Matt Reynolds**, with the firm Paden & Paden, has been appointed deputy probate judge effective June 1, 2005. He replaces Eddie Vines.

- **Susan S. Wagner**, a shareholder in the Birmingham office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, has been elected as a Fellow of the American Academy of Appellate Lawyers.

- **Judge Judson W. Wells, Sr.** of Mobile was recently named president of the University of Alabama National Alumni Association. Wells holds a bachelor's degree from UA and a juris doctorate from the UA School of Law. After receiving his law degree in 1986, he practiced law for 11 years in Mobile before being named to the bench by Gov. Fob James in 1997, where he now serves as a district court judge for Mobile County. He currently serves as secretary of the Mobile Red Elephant Club, first vice-president of the Mobile Touchdown Club and a member of the Mobile Bama Tip-Off Club. He also is president of the Alabama District Judges Association. ■

Spring 2005 Admittees

(Photograph by Fouts Commercial Photography, Montgomery, photofouts@aol.com)

STATISTICS OF INTEREST

Number sitting for exam	245	
Number certified to Supreme Court of Alabama	120	
Certification rate*	49	percent

Certification Percentages

University of Alabama School of Law	75.0	percent
Birmingham School of Law	25.7	percent
Cumberland School of Law	70.4	percent
Jones School of Law	45.0	percent
Miles College of Law	13.0	percent

**Indicates only those successfully passing bar exam and MPRE*

For full exam statistics for the February 2005 exam, go to *www.alabar.org*, click on "Members," and then check out the "Admissions" section.

Alabama State Bar Spring 2005 Admittees

Abney, Charles Eugene
Adams, Cassandra Washington
Agnew, John Michael
Aldridge, Adrienne Le
Alexander, Daniel Ray
Andros, Vanessa Maria
Barr, Paul Allen
Barron, Richard Scott
Bass, Charity Erin
Bea, Stefany LaFawn
Bell, John Wesley
Blackmon, Darryl Tyrone
Blankenship, Brandon Lee
Bollaert, Adam Anthony
Boone, Ginger Orr
Bourne, Adam Lynn
Britt, Daniel Jason
Bush Jr., Arnold
Cameron, Jennifer Anne
Carpenter, Andrew Elliott
Cleveland, III Ollie Ancil
Crouse, Scott Robert
Curtis, III Oliver Benton
Dall, Gabrielle Renee
Dalton, Michael Paul
Daniels, Stephanie Olivia
Davis, Courtney Brooke
Davis, Paula Denise
Demastus, Jason David
Denison, Todd Leroy
Dockery, Rhonda Pouncey
Dugas, Aimee Alimia
Duncan, Jr. Stephen Lyman
DuPré, Benjamin David
Endsley, Melissa Dawn
England, Megan Caroline
Evans Jr., Maston Alonzo
Evans, Timothy Alton
Foreman, Richard William
Fowler, Carrie Renee
Fry, Anna Brantley
Garrett, Colin Martin
Gerard, Carol Robin
Gonzalez, Daniel
Good, Joel Robert
Grace, Elise Lapidus
Graves, Donna Michelle
Greco, Danielle Kara
Gregory, Theresa Marie
Grenier, Celeste Crowe
Grubbs, Norman Osaygefo
Gualano, Mark Edward
Guthery, Shelbie Christine
Hammett, Monica Gay
Haney, Denis Jan
Harris, Cassandra Jean
Hess, Michael Richard
Hill, Lindsey O'Dell
Holifield, Cody Lee
Holmes, William Allison
Hudson, Lauren Leigh Lagarde
Hughes, Jennifer McPherson
Jackson, Pamela Dawn
James, Joshua Brandon
Jones, Emily Roberts
Jones, Gregory Matthew
Jones, Rodney Kenyal
Jordan III, Ezra
Keahey, George Marshall
Kellis, Brandi Michelle
Kitterman, Damon Patrick
Kreag, Jason Patrick
Lagarde, Ross Forrest
Latimer, Christopher James
Lav, Jennifer Rachel
Leiter, Tara Lynn
Letson, Michael Dan
Logue, Liem Anova
Loper, Katherine Erickson
Malatesta III, John Thomas Aquina
Mangieri, Janie Lee
Marshall, Kenya Lavender
Mayes, Ralph Benjamin
McCullough, Colleen Elizabeth
McGough, William Christopher
McMillen, Matthew Ernest
McPherson, Robert Bruce
Melton, Blake Neisler
Mills, Elizabeth Haney
Moody, Bradley Clayton
Moore, Shannon Yvonne
Moreno, Juan Carlos
Munnerlyn, Lloria Candis
Murton, Gary Chandler
Nations, Charles Christopher
Neil, Marilyn Sprouse
Newsom, Kevin Christopher
Nichols, Ashley Lane
Nored, Linda Williams
Parker Jr., John Robert
Parker, Virginia Geneva
Paulus, Craig R
Piazza, John Anthony
Pockstaller, James Edward
Price, William Banton
Ray, Michael Riley
Redfield, Terrica LaShun
Reid, Shannon Rene
Rodgers, Bradford Douglas
Rossley, David Alan
Roth, Keri Mason
Rutledge, Bettye Lynn
Schuetze, Cheryl Ann
Self, Matthew Travis
Sheffield, Amos John
Sherer, Jeremy Paul
Sherman, Candice Dianne
Shoultz, Kaylyn Brooke
Skalnik, John Allen
Slatton, Scott Alan
Snable, Joshua Chad
Stanley, Mary Katherine
Stansberry-Johns, Amanda Lane
Starkey, Gregory Charles
Stewart, Kirk Wendell
Stillwell, Robert Bowen
Stone, Brandon Clark
Strother, Olan Frank
Stutzman, Darius Nicholas
Tenley, Christine Stuart
Thayer, Richard Marshall
Thomas, Marilyn Creagh
Thompson, Joe Haguewood
Trottier, David Wayne
Turpin, Meredith Lane
VanDyke, Zachary Andrew
Wake, Nathan Alexander
Ward, Adrienne Dionne
Wayland, Edward McCoy
White, Carolyn Mathis
Wilkes, Melissa Criss
Willard, Vickie Lynn May
Williams, Devinti Martel
Williamson, Edrie Renee
Wilson, Jonathan David
Wilson, Stephen Paul
Wilson, Thomas Wade

Lawyers in the Family

George Marshall Keahey (2005), Ronnie E. Keahey (1970), Robert D. Keahey (1984)
Admittee, father, brother

Andrew Elliott Carpenter (2005),
George Elliott Carpenter (1978)
Admittee, father

Lloria Munnerlyn (2005), Jock Smith (1976), Samarria Munnerlyn (2003),
Charles James (2003)
Admittee, uncle, sister, fiancé

Lindsey O'Dell Hill (2005),
Paul A. Phillips (1977)
Admittee, uncle

Olan Frank Strother (2005), Betty Strother-Rogers (1986), John Baker (1967),
Janie Baker-Clarke (1985), Julie Baker McCormick (2002)
Admittee, mother, cousin, cousin, cousin

Paula Davis (2005),
Douglas Davis (1981)
Admittee, father

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Lawyers in the Family

Joe Haguewood Thompson (2004), John William Thompson (1969), James Joseph Thompson, Jr. (1969), Patricia Kelley Martin (1987), Maureen Kelley Cooper (1992), James Joseph Thompson, III (1999), Stephen Kellis Winters (2000)
Admittee, father, uncle, cousin, cousin, cousin, brother-in-law

Stefany LaFawn Bea (2005), Charles Langford (1953), Audrey Langford (1984)
Admittee, cousin, cousin

William A. Holmes (2005), Judge Richard M. Avery, Jr. (1975)
Admittee, cousin

Celeste Crowe Grenier (2005), A Evans Crowe (1989), Rae M. Crowe (1954)
Admittee, brother, father

(Photographs by Fouts Commercial Photography, Montgomery, photafouts@aol.com)

Leadership, Service and Professionalism

BY PATRICK H. GRAVES, JR. AND ALYCE MANLEY SPRUELL

Mission: To produce committed and involved lawyers willing and able to fill significant leadership roles in the local and state bar associations, in communities and in state organizations and to serve as role models in matters of ethics and professionalism.

The first class of the Alabama State Bar's Leadership Forum graduated May 19, 2005 at a banquet at the Capital City Club in Montgomery. ASB **President Doug McElvy** acted as emcee. The guest speaker, Lieutenant General Harold G. Moore, Jr., co-author with Joe Galloway of *We Were Soldiers Once, and Young* which was made into a major motion picture starring Mel Gibson in the role of General Moore, gave an eloquent talk on leadership. President McElvy and **President-Elect Bobby Segall** presented each of the 27 graduates a boxed compass inscribed with their name "for participation in the Alabama State Bar Leadership Forum 2005." Graduates **Jennifer Bedsole, Robert Minor** and **Tripp Haston** gave inspired responses. The graduates were:

Michael Bradley Almond
Melissa Kay Atwood
Mary Margaret Bailey
Jennifer McCammon Bedsole
Anna-Katherine Graves Bowman
Ryan Geoffrey Brake
Kathleen Anne Brown
Anna Funderburk Buckner
Paige M. Carpenter
Paul John Demarco
John A. Earnhardt
Terry Charles Fry, Jr.
Fred Marion Haston, III
Pamela Robinson Higgins
Kelly Tipton Lee
William J. Miller
Christopher Ralph Jones
John Albert Smyth, III
Reta Allen McKannan
Teresa Gaston Minor
Robert Lake Minor
Anthony Catledge Portera
Gabrielle Reeves Pringle
David Edwin Rains
Richard Joe Rupert Raleigh, Jr.
John Albert Smyth, III
Rhonda Fredericka Wilson

The forum consisted of four sessions at the state bar in Montgomery:

SESSION 1: Leadership for Lawyers

Responsible Committee Members: Frank M. Caprio and Patrick H. Graves, Jr.

Overview of the Alabama State Bar – Keith B. Norman, executive director

Principles of Leadership and Characteristics of Leaders – Dr. Diane E. Johnson, Management and Marketing Department, University of Alabama

Exercising Leadership – Warren B. Lightfoot

Leadership Styles & Personality Types – Dr. John R. Dew, director, Continuous Quality Improvement, University of Alabama

Leaders and Followers – William N. Clark

Panel Discussion – Leadership
- Jere L. Beasley
- Hon. Albert P. Brewer
- Dr. David G. Bronner
- William N. Clark
- Dr. John R. Dew

SESSION 2: Leadership Through Service

Responsible Committee Members: Dawn W. Hare and Alyce M. Spruell

Exercise – Lawyers in Service Leadership – Alyce M. Spruell

Why Lawyers are Needed In Elected and Regulatory Positions
- Richard S. Manley
- Beth Slate Poe
- David R. Boyd
- A. Vernon Bennett, IV

What the Phrase "Lawyers Render Service" Means In Today's Society – Hon. W. Harold Albritton

Exercise: An Analysis and History of Alabama Lawyers In Service – Alyce M. Spruell

Service to the Community Through the Financial Support of the Alabama State Bar: The Progress of the Alabama Law Foundation, Inc.
- Samuel L. Franklin, president
- Tracy Daniel, director

SESSION 3: Ethics, Justice and Values

Responsible Committee Members: E. Allen Dodd, Jr. and Robert G. Methvin, Jr.

To Kill a Mockingbird and the Study of Justice
Hon. Randall L. Cole

When Politics & Justice Collide – Fournier J. Gale, III

Overcoming Prejudice in the Justice Process – Fred D. Gray, Jr.

Judging Juries in the Pursuit of Justice – Joseph C. Espy, III

Justice Outside the Courtroom: Leadership in the Community – James E. Rotch

Values and Ethics in the West and Middle East – Bill Wise, Bevilacqua Research Corp.

SESSION 4: Professionalism

Responsible Committee Members: Hon. J. Gorman Houston and William D. Melton

Character: The Foundation Stone of Professionalism – Hon. Drayton Nabers, Jr.

The Oath of Alabama Attorneys – William D. Melton

The Alabama Rules of Professional Conduct - J. Anthony McLain

Group Problem-Solving Exercises (I-III)- Hon. J. Gorman Houston, Jr.

Lawyers Aren't Typically Funny Unless by Accident – Edward M. Patterson

Professionalism As a Lifestyle – Orrin K. Ames, III

Group Problem-Solving Exercises (IV-VI) – Hon. J. Gorman Houston, Jr.

Panel Discussion –Professionalism
- Hon. Sharon L. Blackburn
- Robert D. Segall
- Michael D. Knight
- Hon. J. Gorman Houston, Jr.

The committee thanks Keith Norman and his staff, most notably Ed Patterson and Rita Gray, for their outstanding support.

Patrick H. Graves, Jr.
Patrick H. Graves, Jr. is a partner with Bradley Arant Rose White LLP in the firm's Huntsville office. He is a graduate of the United States Military Academy and the University of Alabama School of Law. He was admitted to the Alabama State Bar in 1972. He has also served several terms as a bar commissioner representing the 23rd Circuit.

Alyce Manley Spruell
Alyce Manley Spruell practices with the Tuscaloosa firm of Spruell & Powell PC. She is a graduate of the University of Alabama School of Law and was admitted to the ASB in 1983. She represents the 6th Circuit, place number 2, on the ASB Board of Bar Commissioners. She also serves on the state bar's Indigent Defense Syposium.

A Perspective On the ASB's Inaugural Leadership Forum

BY TRIPP HASTON

"Servant leadership." Now that, I admit, was a new one on me. The two words had collided in a speech I heard delivered to a group of Alabama State Bar members in Montgomery this past February. As I made the late Friday afternoon drive home to Birmingham from Montgomery, I continued to turn the expression over and over in my head. As the months moved on, the more I pondered, the more it made sense. After all, if you reflect upon the truly great leaders–in any field–they are the men and women who lead by example through service, rather than having their "servants" serve while they merely enjoy the trappings of leadership. It is the difference between a grandiose but hollow title–and a meaningful, productive office.

And I was lucky enough to learn more about "servant leadership" through a new program started this year: the Alabama State Bar Leadership Forum. Born as the brainchild of fellow ASB member Pat Graves, the stated goals of the Leadership Forum are to:

- Raise the level of awareness of lawyers as to the purpose, operation and benefits of the ASB;
- Build a core of practicing lawyers to become leaders with respect to ethics and professionalism, resulting in raising the overall ethical and professional standards of lawyers in the community; and
- Form a pool of lawyers from which the ASB, state and local governmental entities, local bar associations, and community organizations can draw upon for leadership and service.

Roughly 30 ASB members were chosen early this year to represent the inaugural class of the Leadership Forum. We came from north, south and central Alabama; plaintiff and defense firms; civil and criminal practices; private and public practices; and diverse racial backgrounds. While I trust future classes will continue to expand on the diversity front, our class represented a healthy cross-section of our state bar. Yet, despite our varied backgrounds, we all shared a common purpose: to learn to be better servant leaders for our ASB, in particular, and our communities, in general.

Ed Patterson and Rita Gray at the ASB, with the help of numerous ASB members, coordinated and led a series of four sessions, once a month, on Fridays through the winter and spring. Each session focused on a specific attribute of leadership and included "Leadership for Lawyers," "Leadership through Service," "Justice, Ethics, and Values" and "Professionalism." Finally, we enjoyed a graduation dinner and ceremony that included a keynote address from a truly remarkable leader, Lt. General Hal Moore, whose leadership story was memorialized in the book and movie, *We Were Soldiers Once and Young*.

Each session enlightened, inspired and enriched. In fulfilling the stated goal of raising awareness of the ASB's purpose, operation and benefits, we learned how our ASB is organized, administered and led. We learned about the mission of the Alabama Law Foundation, the job of the Board of Bar Commissioners, and the various committees and task forces that give purpose to the ASB.

At each session, we were privileged to learn from servant leaders in our state bar and our communities. These included current and former ASB officers, current and former state and federal judicial officials, academics and lawyers of all stripes.

Our speakers opened very personal windows into their lives and shared with us their hopes for the future of our profession. Here is just a representative sampling of what we were privileged to learn and enjoy:

- Fred Gray inspired us with his remarkable life story, including his triumph overcoming prejudice in the judicial process;
- Former Justice Gorman Houston challenged us to emulate the example of Atticus Finch in using power and advantage for moral purpose;

- Rick Manley explained the need for more lawyers in service through our state legislature and the challenges of such service;
- Judge Harold Albritton explained what our ASB's motto, *Lawyers Render Service*, means in today's society;
- Joe Espy lectured us on how to be a tenacious, determined, but professional opponent in litigation; and
- Chief Justice Drayton Nabors asked each of us to first consider our purpose; next, to define the moral standards we intended to live by; and finally, challenged us to stay true to those moral standards.

At various times in the sessions, the speaker's podium fell silent and the action moved to the audience. These discussions involved a wide range of difficult issues facing the ASB, our legal system and Alabama in general. We all benefited from these collective sessions, which revealed varied points of view, but consistently well-reasoned positions.

Relationships matter and perhaps the most important benefit of the Leadership Forum will be those relationships borne from participation in the program. As the ASB's membership grows, the chances of member-to-member anonymity increase. Anonymity often breeds impassiveness and aloofness in relationships with others. From this general lack of concern about relationships with other bar members, it is a short step to incivility. Coming out of the program, I am most grateful for having had the opportunity to build friendships with lawyers with whom I likely never would have crossed paths but for the Leadership Forum. One of the certain benefits for future Leadership Forum participants, and the ASB, is the opportunity to combat the anonymity threat through interaction while strengthening the ASB across geographic boundaries, diverse political viewpoints and varied practices.

If you are an ASB member who has practiced for not less than five years but no more than ten, I strongly encourage you to apply to participate in next year's Leadership Forum. You will be richer for the experience and friendships that are certain to come.

Tripp Haston
Tripp Haston is a partner with Bradley Arant Rose & White in Birmingham. He graduated from Auburn University and the University of Alabama School of Law. Following law school, he clerked for the Hon. Emmett R. Cox of the United States Court of Appeals for the Eleventh Circuit.

Learning to Lead

BY RICHARD J. R. RALEIGH, JR.

At the outset of the First Annual Alabama State Bar Leadership Forum, the inaugural class was asked whether it believed leaders were born, or if leadership was taught and learned. I believe that the capacity to lead is within each of us. Circumstances, personal abilities and your personal willingness dictate when and how you will lead. Leadership, I believe, is not static. It changes. Leadership styles must change, given new conditions and circumstances.

After having the wonderful opportunity to mix with leaders and future leaders of the bar, hear others' perspectives and draw upon others' experiences during my participation in the ASB Leadership Forum, I have come to believe that certainly two things are required for one to become a leader. First, one must be aware of the opportunity to lead. Secondly, one must accept the responsibility. One must accept the position of leader—that is, to be in charge of something for which they are responsible.

The goals of the Leadership Forum were to raise the level of awareness of lawyers as to the purpose, operation and benefits of the ASB, to build a core of practicing attorneys to become leaders in the bar, and to form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations and community organizations can draw upon for leadership and service. The Leadership Forum clearly met its goals. As we discussed, and as John Maxwell noted in *Leadership 101: Inspirational Quotes and Insights for Leaders,* leadership development is a lifetime journey, not a brief trip. Already, many of my classmates have sought out and accepted leadership positions in the bar and in the state. Lawyers in Alabama have always led–in the legal community, their local communities, the state and the nation as a whole. Indeed, our state bar's motto is "Lawyers Render Service."

We learned that our state bar was chartered in 1878, and that by 1887, the bar itself took on a leadership role, leading the way for other state bars in passing the first *Code of Ethics* for lawyers. We learned from selfless leaders, current leaders of the bar, about selfless dedication and passionate leadership. On the topic of the image of lawyers in the community, **Warren Lightfoot** told us not to be concerned about the image of lawyers–do what is right, be tough, zealous advocates for what is right, and if we do this, the image of lawyers will be improved. Lead by example, he told us, and don't ask subordinates to do more than you. Pursue excellence and communicate with your subordinates. Be lavish in public in your praise of others and give credit where credit is due. Be modest and be balanced in your life–family, friends, faith and community. He properly advised us to adhere to courteous treatment of your adversary, to treat your adversary as you would want to be treated and go as far as you possibly can to accommodate your adversary.

We learned from leaders in our bar who guide the Alabama Law Foundation and in 2004 directed $118,000 from the Interest On Lawyer Trust Account program ("IOLTA") to legal aid to the poor, to the administration of justice and to community education programs. Leaders in our bar have directed over $10 million to these programs since 1997.

We listened with concern that of the 35 members of the Alabama senate, only 11 were lawyers. And, of the 105 members of the house, only seven were lawyers (now eight as our fellow classmate, **Paul DeMarco**, was recently elected to the house). We discussed the impact that this reduction of numbers of attorneys participating in the legislature has had on our state, and how the legislature desperately needs the guidance of those schooled in the law as it undertakes the work of passing laws for Alabama's citizens. Lawyer-leaders like **Richard Manley** of Demopolis, who served in the Alabama house of representatives for 17 years and the Alabama senate for four years, and who served 24 years as a member of the board of bar commissioners and three times as vice-president of the state bar, discussed with us the importance of having lawyers in our legislature. As we listened to leaders like Rick Manley, **Gov. Albert Brewer, Justice Gorman Houston, Jr., Jere Beasley,** and **Fred Gray**, we realized that perhaps leaders sometimes lead by just doing. They lead by example. Certainly, those set a great example for leaders in our bar.

We had the real pleasure to learn from **Chief Justice Drayton Nabers**, who recently lead our state through a period

of judicial turmoil. He challenged us to be honest, to be fair and to be prepared. Lawyers, as we discussed, are involved in a win-lose game, because the two parties involved are so related that anything good for one is bad for the other (the relationship of the plaintiff and the defendant in the lawsuit). In win-lose games, honesty is vitally important. We must be scrupulously honest and play by the rules, and the "secret to winning" the win-lose game, Chief Justice Nabers explained, is to be honest, be fair and be prepared. We are all under a great deal of pressure. But, as we discussed in our "Legal Professionalism" section of the Leadership Forum, credibility is our single best asset that we bring to our client. Legal professionalism, we decided, encompasses competence, civility, integrity and commitment to the rule of law, to justice and to the public good.

On May 19, the 27 graduates of the Alabama State Bar Leadership Forum listened to a real hero and leader, Lieutenant General Harold G. Moore, a United States Military Academy graduate, war hero and author of *We Were Soldiers Once, and Young*, a book about his experiences in Vietnam. Lieutenant General Moore encouraged us to lead in a professional, honorable, loyal and caring way–to serve others and strive to do our best.

There are many examples in Alabama history, and in Alabama presently, of professional, honorable, loyal and caring leadership. **Carl Elliott, Sr.** hung up his lawyer's shingle in Jasper in 1936, and he served Alabama in the United States Congress from 1948 to 1965, during which time he helped to author the National Defense Education Act (providing low-cost college loans) and the Rural Library Service Act (which enhanced rural and urban libraries throughout the United States). This lawyer-leader was the first recipient of the John F. Kennedy "Profile in Courage" Award. Lawyers continue to render service. Judges we heard from at the Leadership Forum and throughout the state rule in perhaps unpopular ways at times, because they are scrupulously honest, and committed to the rule of law, justice and the public good. Leaders like **"Boots" Gale** step forward to serve as our state bar president. We heard from lawyer-leaders like **Albert Brewer** who served in the house of representatives, as lieutenant governor and as governor of the State of Alabama; **Jere Beasley**, who served as lieutenant governor and, for a short time, as governor of the State of Alabama; **Richard Manley**, who served our state in the house of representatives, in the senate and selflessly served our bar; and **Dr. David Bronner**, a lawyer who has lead our state in business and enterprise acting as chief executive officer of the Retirement Systems of Alabama. My classmates and I were inspired by these strong, committed leaders, and graduated from the Leadership Forum with a greater knowledge of where we can lead and opportunities to lead, as well as a more fervent desire to serve–to lead in our bar and in the state.

I believe that one must be trained in the skills of leadership, and they must be willing to step forward and accept the role of leader. Certainly, we learned a great deal about leadership positions and roles in the bar and in our state, and we were trained in leadership by some of our state's greatest past and current lawyer-leaders. We must continue our leadership education, and strive to seek out and accept positions of leadership. Many of my classmates have already begun to do so, accepting positions of leadership in the bar and, in one case, state politics. Thomas Jefferson said, "At the end of your life, the only things we have left are our relationships and experiences. Make them extraordinary!" I encourage you to participate in the extraordinary experience of the Leadership Forum–to learn to lead our bar as it continues to lead in the state and in the nation.

As our state and our bar tackle issues related to the selection of appellate court judges and indigent defense, we will turn to lawyer-leaders, perhaps some of whom honed their leadership skills in the 2005 Alabama State Bar Leadership Forum. ■

Richard J.R. Raleigh, Jr.

Richard J. R. Raleigh, Jr. graduated from the University of Alabama and the University of Alabama School of Law. He was admitted to the Alabama State Bar in 1995. He served on active duty in the United States Army Judge Advocate General's Corps from 1995 until 2000 with the 1st Armored Division in Germany, Bosnia-Herzegovina, Croatia and Macedonia. Raleigh started his private practice in Huntsville with Wilmer & Lee in 2000. He serves on the ASB's Board of Bar Commissioners and is admitted to appellate and state courts in Alabama and Tennessee, the U.S. District Courts for the Northern and Middle districts of Alabama, the Middle and Eastern districts of Tennessee, the U.S. Supreme Court, the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Armed Forces, and the U.S. courts of appeals for the Sixth and Eleventh circuits.

ALABAMA STATE BAR LEADERSHIP FORUM
CLASS II–2006

DO YOU HAVE WHAT IT TAKES?

We want you to take a chance on yourself and see if you have the "right stuff."

Applicants should submit a completed application to the Alabama State Bar, Attn: Edward M. Patterson, P.O. Box 671, Montgomery, AL 36101-0671, along with (a) your personal resumé (not to exceed 2 pages) (b) one letter of recommendation and (c) a narrative summary addressing why you should be selected as a participant in the Leadership Forum Class, what you consider to be your most important contribution to the legal profession and to the community, and what you hope to gain from participation in the Leadership Forum. The narrative summary should conclude with a signed statement that you understand attendance is a requirement for the successful completion of the program.

Applications must be completed and received prior to November 1, 2005. Successful applicants will be notified on or before December 15, 2005. Each class will consist of no more than 30 participants. The program will be made up of a minimum of four sessions beginning in January and ending in May. Some overnight travel may be required. One excused unexpected personal or professional absence is allowed. Applicants are encouraged to apply only if they expect to attend all sessions. For more information, direct all questions to Alyce M. Spruell, at (205) 345-8755 or alyce@tuscaloosalaw.net.

Name _____ Position _____

Employer/Firm _____

Business Address _____
Street/Suite City/State Zip

Business Phone (___) _____ Fax _____ E-Mail _____

What is your area of practice? _____

Year of first bar admission _____ States Admitted _____

A nominal tuition (TBD) for each participant will be charged and is due by January 15, 2006. (The 2005 fee was $250.00.) Payment plans are available. A limited number of scholarship money is available. If accepted in the Leadership Forum, will you find it necessary to seek scholarship assistance towards the tuition fee, and if so, what percentage?

Please check one: Yes ☐ _____% No ☐

I understand the purposes of the Leadership Forum 2006, and will devote the time and energy necessary to make it a successful experience if I become a participant.

_____
Signature

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Case Law Update: Best Cases for the Defendant	**Christian Conciliation**
Case Law Update: From the Plaintiff's Perspective	**Trust Law and Medicaid Protection Update**
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Montgomery, Alabama 36101

By Robert L. McCurley, Jr.

Home Rule

George Wallace and his "State's Rights Platform" catapulted him into national prominence in the early 1960s. In 1973, the Alabama Constitutional Commission, which had been created by an Act of the legislature in 1969, proposed its final draft. One of the key points in the commission's finding was a similar philosophy George Wallace expounded, which was that states know better than the federal government how to govern their people, similarly the Commission proposed county "Home Rule" with the idea that county government know better than state government how to run their county.

A subsequent effort for constitutional reform was made during Governor Fob James' first term. The issue for Home Rule was again a major issue. In the latest effort for constitutional revision, under Governor Bob Riley, Home Rule was once more a major issue.

In the 2005 Regular Session, the legislature adopted a "Limited Self-Governance Act" for counties, which I have outlined below. This grants limited powers to counties who opt into the law, but specifically prohibits local taxation. This outline of Act 2005-200 is not a substitute for reviewing the law, but to give lawyers a point of beginning for understanding this new Act.

Alabama Limited Self-Governance Act

Act 2005-200 (SB 129)
***Ala Code* 11-3A-1**

1. The county commission may be given the following powers:
   (Subject to general law or the Alabama constitution)
   1) Abatement of weeds;
   2) Control of animals;
   3) Control of litter;
   4) Control of junkyard areas that create a public nuisance; and
   5) Abatement of noise, unsanitary sewage or pollution creating a public nuisance.
2. How the powers are implemented:
   1) By resolution of the majority of a county commission;
   or
   2) In response to petition signed by ten percent of the total number of qualified electors of the county who reside in the unincorporated areas of the county. The petition must include the full legal names and addresses and filed in the office of probate judge. The judge of probate must verify the petition within 60 days and forward it to the county commission to prepare for a referendum.
3. Powers granted under this act may not be construed to extend or supersede local law enacted after May 26, 2005. Existing current law is to be read in *para materia* with this act.
4. County commissions may adopt ordinances to provide for notice to persons cited for violation of the ordinances and shall also include procedures for appeal.
5. These self-governance powers do not include any authority to:
   1) Levy or collect taxes or non-administrative fees, or establish and enforce planning and zoning;
   2) Extend regulation over any regulated business activity;
   3) Affect any court or personnel;
   4) Affect any public school system;
   5) Affect pari-mutuel betting or any pari-mutuel betting facility;
   6) Affect the government of a municipality or of certain public corporations;
   7) Affect the private or civil law governing relationships, except as incident to the exercise of an independent government power;
   8) Extend the power of regulation of water, gas, telecommunications or electric utility services;
   9) Affect rights granted to agricultural, manufacturing or industrial plants;
   10) Affect or enforce environmental easements; or
   11) Restrict or regulate mining activities granted federal or state permits, or any actions restricting or regulating processing or distributing of mining products.
6. Counties may contract with municipalities or other counties to exercise powers.
7. Municipal utilities are not precluded from expanding into the county. Municipalities shall not grant counties the authority to govern or regulate municipal water and sewer systems that operate within the county.
8. Counties with Class III municipalities which have a county commission presided over by a chairman elected countywide and county commission members who are elected by single member districts require a four-fifths

majority vote of the commission the to implement the act.

9. County commissions cannot expend county funds for improvement of private property.
10. Adoption of a limited home rule ordinance:
    1) Prior to adoption, the county commission shall:
    a. Post notice of intent to adopt for at least 30 days;
    b. Publish notice at least twice, beginning at least three weeks prior to the meeting, in all newspapers in the county that are authorized to publish legal advertisements; and
    c. Notice shall include time, date and location at which the proposed ordinance will be considered and advise where copies of the ordinance may be obtained;
    2) Adoption of the ordinance must be at a regularly scheduled commission meeting by majority vote;
    3) Ordinances must be kept in a separate book and on a Web site, if available; and
    4) Adoption is only effective in a county after passage by a majority vote of the electors in the unincorporated areas of a county at a primary, general or special election held for another purpose. A vote may only be taken once every 48 months.
11. A county may not charge fees that exceed actual costs and cannot collect charges or fees for services unrelated to the property.
12. A county commission may establish and enforce administrative and civil penalties. A fine cannot exceed $150 per day or $5,000 in the aggregate.
13. A section of the Act makes special provisions for a county with a Class III municipality that has an elected county commission chair.
14. A county commission shall call for a referendum election on the repeal of the ordinance following a resolution of the county commission or in response to a petition signed by ten percent of the total number of qualified electors who reside in the unincorporated portion of the county.
15. Jefferson County is excluded unless it repeals existing specific local acts.
16. The Act is effective May 26, 2005.

First Special Session, 2005

The first Special Session of 2005 began Tuesday, July 19 and lasted for only five days, at which time the legislature passed a General Fund Budget, thereby completing the work it began during the Regular Session. The only significant pieces of legislation affecting lawyers were:

HB-8 D.U.I.
Section 32-5A-191 is amended to provide for who have a blood alcohol level of .04 or greater to be guilty of D.U.I.

HB-12 Unemployment Compensation
Section 25-4-8 is amended to apply to the assignment of rates when the business is transferred.

SB-53 Sexual Predators
Persons committing sexual offenses will have enhanced punishments. Persons committing offenses against a child under 12 will receive a Class A felony with a 20-year minimum sentence. There are new and shorter times for offenders to notify the sheriff if they move their residence or change jobs. There are also restrictions of where an offender may work.

SB-68 Eminent Domain
Municipalities or counties may not condemn property for non-governmental retail, office, commercial, residential, or industrial development use.

SB-87 Jury Service
A person may receive an excuse or delay in jury service if the person has five or less employees or if another employee has been summoned for jury duty. Also, one may be excused if service would cause an "undue or extreme physical or financial hardship" as defined in the Act. Failure to appear for jury service may result in a $300 fine.

SB-106 Condominiums
Condominium escrow accounts, over ten percent of the purchase price, may be used for construction purposes.

There were also 47 local laws, or general laws affecting particular agencies, that passed.

Annual Meeting of the Alabama Law Institute

The annual meeting of the Alabama Law Institute was held July 21 at the ASB Annual Meeting in Point Clear. The following officers were re-elected:

President: **Representative Demetrius Newton**
Vice-President: **Senator Roger Bedford**
Secretary: **Bob McCurley**

Members of the Executive Committee are:

Representative Marcel Black
David Boyd
James Campbell
William Clark
Peck Fox
Representative Ken Guin
Richard Manley
Senator Rodger Smitherman

In addition, **Oakley Melton, Jr.** of Montgomery and **Yetta Samford** of Opelika were elected emeritus members for life of the Executive Committee, each having served more than 25 years in a leadership position with the Law Institute.

In addition to a report of the Law Institute's activities, which can be found on the Institute's Web site at: *www.ali.state.al.us*, Dorman Walker spoke on the two significant pieces of legislation passed during the Regular Session, the "Open Meetings Law" and the "Alabama Limited Self Governance Act."

For more information about 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 or phone (205) 348-7411, or visit our Web site at *www.ali.state.al.us*.

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

Charmed in Charleston WEEKEND GETAWAY

The grand prize winner will enjoy a weekend for two in a club level room at the elegant Charleston Place Hotel in downtown historic Charleston, South Carolina. During your stay, you and your guest will enjoy:

- Dinner for two at the Charleston Grill;
- Dinner for two at your choice of Magnolia, High Cotton or Peninsula Grill;
- Afternoon at the Spa; and
- One-hour private carriage ride.

Compliments of ISI ALABAMA

Insurance Specialists, Inc.'s President Bill Bass (right) "hands off" the goodies to Grand Prize winner Richard Tingle.

Amicus Attorney Advanced Edition
$400 value–*Donated by Best Law Firm Solutions, Inc.*
Winner: Greg Morgan, Opelika

Engraved Stationery Package including letterhead, envelopes and business cards
$317 value–*Donated by Blumberg Excelsior*
Winner: Patrick Jones, Dothan

Medical Case Consultation (maximum of 3 hours)
$300 value–*Donated by Boswell, Donaldson & Patrick, Certified Nurse Consultants*
Winner: Nicholas Roth, Decatur

Gift Certificate to *giftcertificates.com*
$250 value–*Donated by Gilsbar, Inc.*
Winner: Wade Baxley, Dothan

iPod Mini
$200 value–*Donated by LexisNexis*
Winner: Randall K. Bozeman, Hayneville

iPod Mini
$200 value–*Donated by LexisNexis*
Winner: Mary Margaret Bailey, Mobile

TimeMap Timeline Graphing Software
$200 value–*Donated by CaseSoft*
Winner: Nedra Watson, Boaz

Odyssey Gold Putter
$175 value–*Donated by ABA Members Retirement Program*
Winner: LaBella Alvis, Birmingham

Summer Gourmet Gift Basket of treats to enjoy while relaxing poolside
$150 value–*Donated by Blue Cross Blue Shield of Alabama*
Winner: Ed Raymon, Tuskegee

Golf Gift Package, including putter, balls and other accessories
$150 value–*Donated by Boswell, Donaldson & Patrick, Certified Nurse Consultants*
Winner: Courtney Paine Snider, Madison

Gift Goodie Basket
$100 value–*Donated by Jackson Thornton & Co.*
Winner: Clifton E. Slaten, Montgomery

Panasonic VHS Proline VCR
$100 value–*Donated by The Dancel Group*
Winner: Russell Balch, Auburn

Goodie Gift Basket
$100 value–*Donated by C & S Consulting*
Winner: Lois Carney, Foley

Computer Bag
$50 value–*Donated by Colonial Bank*
Winner: Tammy L. Irons, Florence

***Gamble's Alabama Evidence* & Golf Shirt**
Priceless value—*Donated by University of Alabama School of Law*

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ALABAMA STATE BAR 2005 ANNUAL MEETING
Grand Hotel • Point Clear, Alabama • July 20-23, 2005

PHOTO HIGHLIGHTS

Wednesday

On a serious note, Ernestine Sapp (right) listens intently to a fellow ASB member.

Bar commissioners and "Basic Issues of Law" attendees "wander the halls" during a Wednesday afternoon break.

Thursday

Bryan Stevenson addresses the problems associated with indigent defense in capital cases.

Speaker David Wooldridge, Jeanne Marie Leslie, director of ALAP, and Sam Partridge, ASB assistant general counsel, visit before Wooldridge's presentation, "Dealing With Partners and Associates Impaired By Alcohol, Substance Abuse and Mental Health Problems."

Speaker Pro Tem Jim Campbell and Law Institute Director Bob McCurley relax before getting down to business at "Recent Developments In the Alabama Legislature—2005."

ASB Assistant General Counsel Robbie Lusk "counts the ways" during "Legal Ethics Update—2005."

Franklin L. Shuford, Jr. (left) receives the ASB Attorney Pro Bono Award from Ben Bowden, chair, Volunteer Lawyers Program Committee.

President McElvy promotes Bill Haltom's book while the Bench & Bar speaker (center) shares a laugh with Circuit Judge Herman Thomas.

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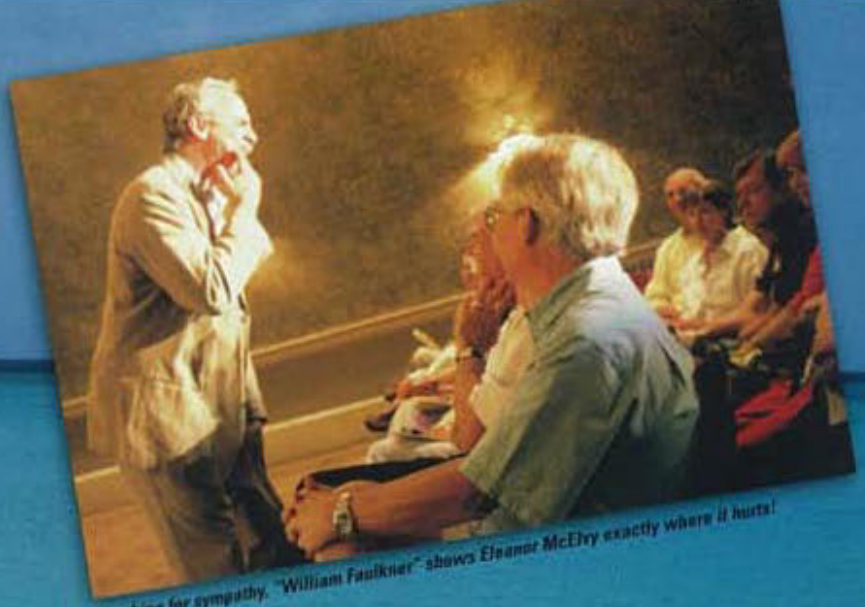
Thursday

Several members of Ball, Ball, Matthews & Novak accept the ASB Firm Pro Bono Award from Bee Bowden on behalf of the entire firm.

Former ASB "First Lady" Nancy Seale dances with her grandson at the Lower Alabama Reception.

Mamie and Billy Bedsole enjoy a "night in" with their grandchildren.

Professor Pam Bucy and Judge Caryl Privett unwind at the reception.



Looking for sympathy, "William Faulkner" shows Eleanor McElvy exactly where it hurts!

President McElvy presents retired Justice Gorman Houston, Jr. with the ASB Award of Merit.

Even with meetings to attend, John and Alicia Bennett are proof that a couple can still enjoy a quiet dinner together.

Julian McPhillips, Boots Gale, Micki Beth Stillar, Sam Crosby, and Sam Rumore "grin and bear it" during a plenary session.

Plenary speaker Greg Cousimano "watches" as a fellow ASB member checks out the Thomson West exhibit.

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Friday

Actor and classic rock singer Michael Messer uses his acoustic guitar to get across the message of legal ethics.

ASB past presidents swap war stories during their annual a.m. soiree.

President McElvy enjoys being "just one of the guys" during Jack Marshall's "Ethics Rocks."

Judge Sue Bell Cobb congratulates Judge Phyllis S. Nesbit (seated) on receiving the Maud McLure Kelly Award.

The Grand Chef pours, stirs, dices and slices for an enthusiastic audience...

...including Mike Jackson and his wife, Cathy.

Riley Powell's daughters are having a "roaring" good time at the Children's Party!

Clowning around" at the Big Apple Alabama Children's Party

Even with the high temperatures and heavy humidity, a large crowd turned out for the outdoor reception.

Justice Lyn Stuart and Claude Huntley help guide the discussion during "Mentoring in the Legal Profession."

Bill Clark admires Everette Price's fancy legwork.

A professional classical trio from Mobile kept the atmosphere "cool, calm and collected" during the President's Reception.

Martha Harris and Mercoria Ludgood cool off and chat in the shade of the Grand Ballroom Patio.

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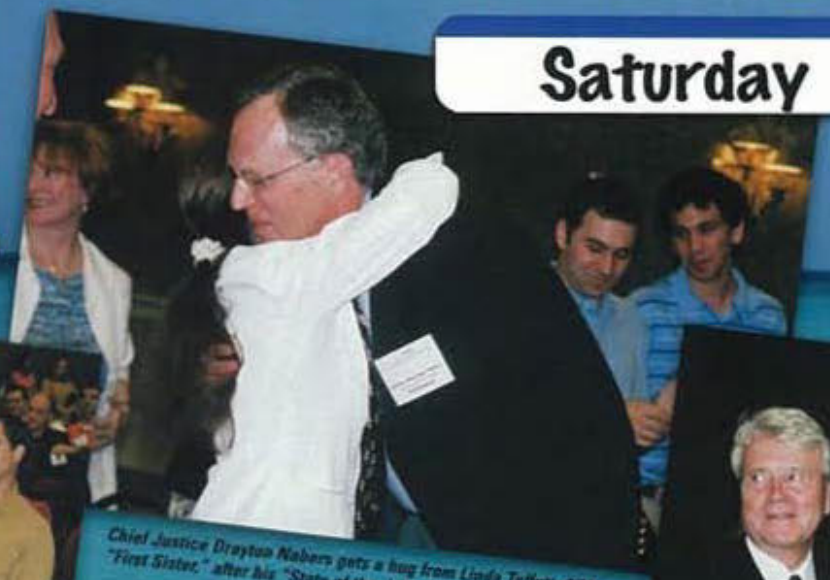
Saturday

Thanked by President McElvy for helping make his term a success are his wife, Eleanor McElvy; legal assistant Lana Ellis; and children Keren and Jonathan McElvy.



Chief Justice Drayton Nabers gets a hug from Linda Tetfutt, ASB "First Sister," after his "State of the Judiciary" presentation.

James W. Cameron is recognized for 50 years of practice and professionalism.

Lara M. Ryals accepts the ASB Local Bar Achievement Award for the Shelby County Bar Association.

Bill Clark (right) makes it official—Doug McElvy "has left the building."

Sim Penton obviously can multi-task, talking and taking advantage of the LEXISNEXIS™ Cyber Connection.

ASB past, present and future—Doug McElvy, Bobby Segall and "Boots" Gale

Members of the ASB History and Archives Committee are still "alive and kicking!"

John Pickens, Alabama Appleseed executive director, is amused by what Martha Jane Patton has to say.

1847

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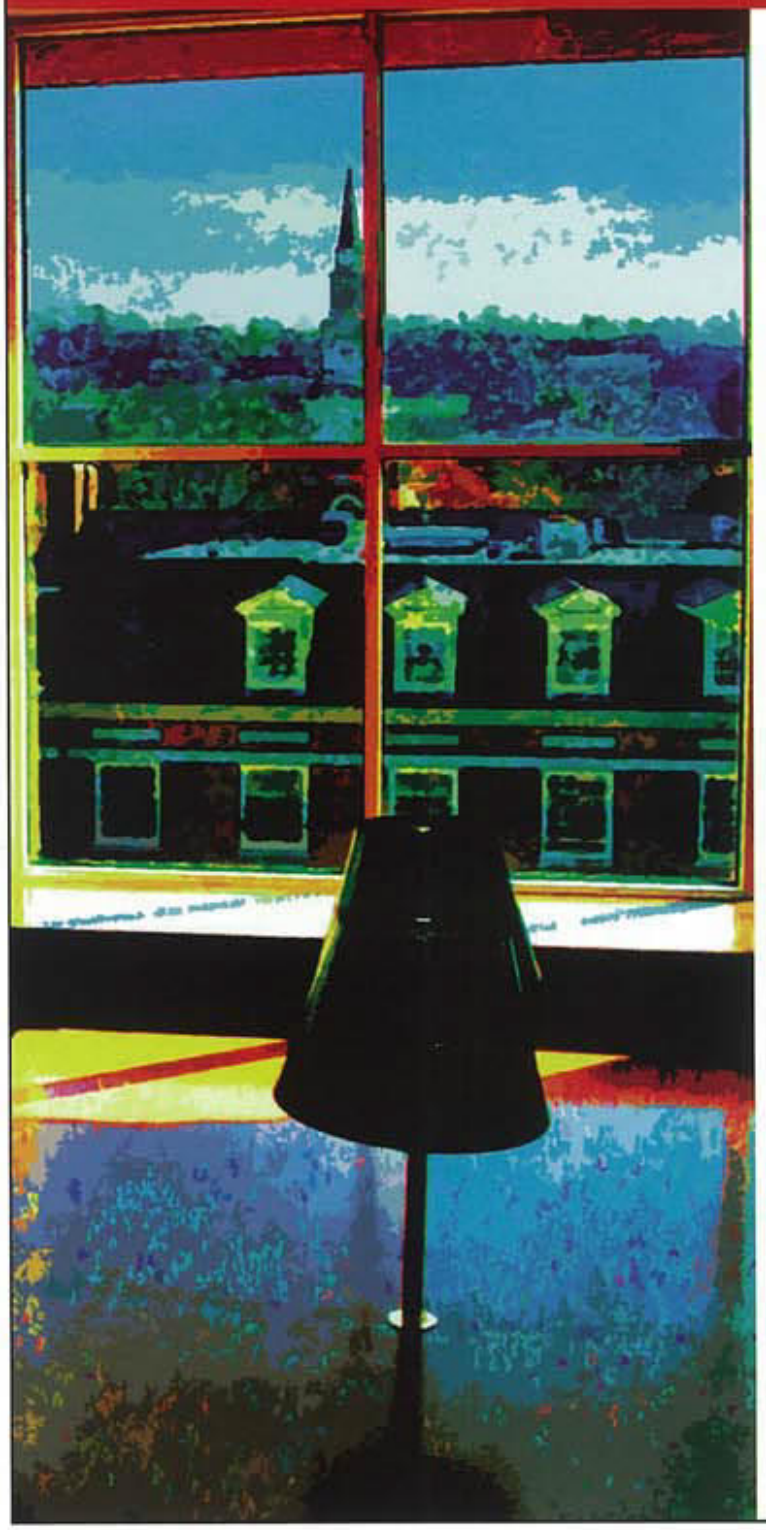
Fall 2005 Continuing Legal Education Seminars



SEPTEMBER

- **9** Developments and Trends in Health Care Law 2005
- **16** Business Ethics in Government Contracting—Understand and Successfully Navigate the Special Ethical Rules that Apply to all Federal Government Contractors
- **23** The Basics of Will and Trust Drafting
- **30** Advanced Legal Writing Workshop

OCTOBER

- **7** 16th Annual Bankruptcy Law Seminar
- **14** Creditors' Rights
- **21** Mastering Trial Advocacy
- **28** DUI: The Law in Alabama
  The Arrest and Prosecution of DUI Cases

NOVEMBER

- **4** 19th Annual Workers' Compensation Seminar
- **18** Reel Justice! Power, Passion and Persuasion in the Modern Courtroom featuring Dominic J. Gianna

DECEMBER

- **2** Employment Law Update
- **8** Hot Topics, Birmingham
- **8** Hot Topics, Mobile
- **16** Gain the Edge!℠ Negotiation Strategies for Lawyers featuring Martin Latz
- **29–30** 12th Annual CLE by the Hour

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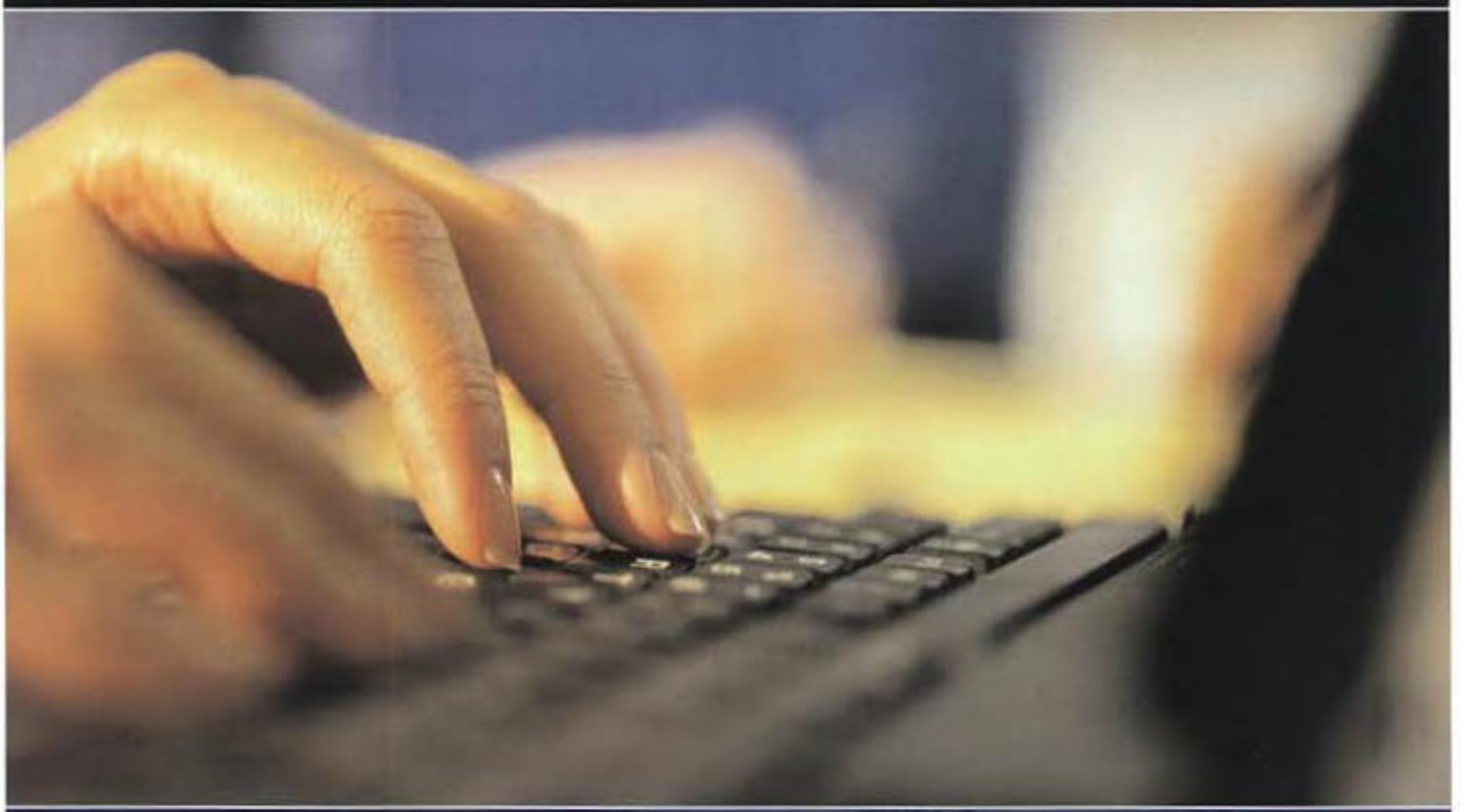

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Taking Care of Business

Non-Consumer Aspects of the Bankruptcy Abuse And Consumer Protection Act of 2005

BY J. PATRICK DARBY AND CHRISTOPHER L. HAWKINS

On April 20, 2005, President Bush signed the Bankruptcy Abuse and Consumer Protection Act of 2005 (the "Act"). Though certain provisions become effective at different times, generally the Act will apply to bankruptcy cases filed after October 17, 2005.

The Act represents the broadest overhaul of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), since its enactment in 1978. Commentary has concentrated on the effect of the Act on consumer bankruptcies. Dealing with perceived abuses in consumer cases was the primary impetus for passage of the Act. However, media focus on consumer

issues has obscured the importance of the Act to businesses' cases. The changes for business debtors and creditors are extensive, and some are of uncertain consequence. Congress intended to protect the interests of creditors and tighten requirements for discharging debt. Commercial landlords, lenders, trade vendors and other creditors have important new rights under the Act. By increasing the leverage of certain non-debtor constituencies over others, however, the Act also may have unintended negative consequences for business creditors.

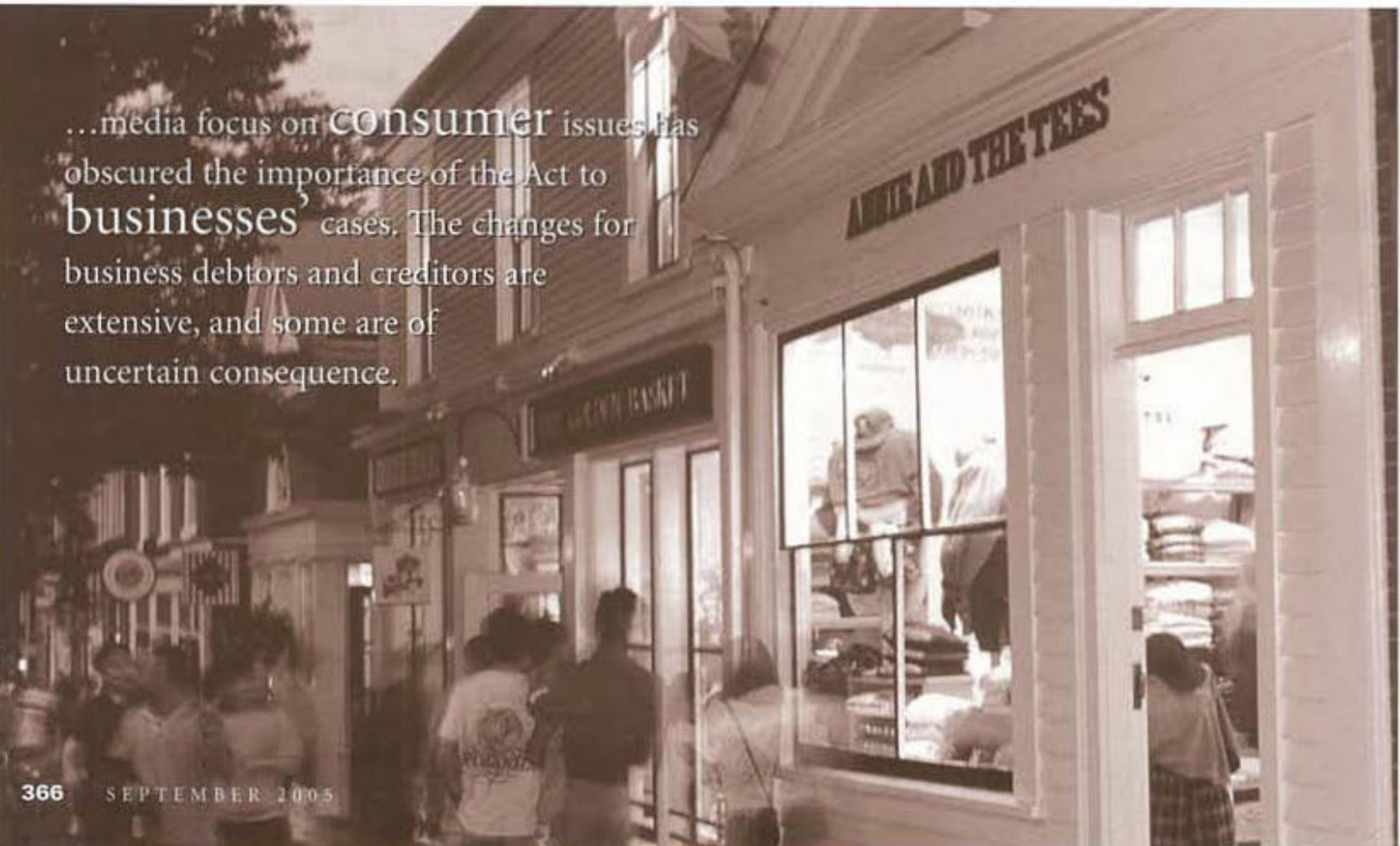
The following discussion highlights certain aspects of the Act that may have particular significance in cases under chapter 11 of the Bankruptcy Code. Generally, a business filing chapter 11 remains in possession of its assets as it tries to reorganize. A debtor-in-possession has most of the obligations and powers of a trustee in bankruptcy and manages its assets and affairs as a fiduciary for creditors and other parties in interest. Many of the provisions discussed below apply in all bankruptcy cases, but the materials refer to the debtor rather than the trustee to emphasize the debtor-in-possession's role in a chapter 11 case.

Commercial Real Estate Leases

A debtor may assume or reject executory contracts and unexpired leases under section 365 of the Bankruptcy Code. Assumption binds the bankruptcy estate to the contract or lease. Rejection relieves the debtor and the estate from further performance and liquidates the counter-party's damages for the debtor's breach. Under current law, the debtor must decide to assume or reject non-residential real property leases within 60 days of the filing of the bankruptcy petition, but may obtain multiple, even indefinite extensions on a showing of cause. The Act amends section 365(d)(4) to provide that the debtor's deadline to assume or reject a commercial real property lease is the earlier of 120 days after the filing date or the entry of an order confirming a chapter 11 plan, provided the court for cause may extend the deadline once for 90 days. The court may grant no further extensions unless the lessor specifically consents.

The Act will hurt retailers and other business debtors dependent on leased commercial real property. As a practical matter, debtors will be forced either to reject valuable leases prematurely or to assume leases that ultimately may prove burdensome. The effect will be to increase the power of landlords in commercial cases vis a vis not only the debtor but also commercial lenders, unsecured creditors and other parties in interest. The Act further provides that if a debtor assumes and later rejects a commercial real property lease, the landlord's administrative claim under the lease shall be limited to obligations due for the two-year period following the later of rejection or surrender of possession. The balance of the lessor's damages will be treated as a general unsecured claim. Under current law, the landlord may claim administrative expense priority for all damages arising through the end of the lease term, subject to a general duty to mitigate. The two-year cap ameliorates the negative effect of a debtor's premature assumption under the new time limits, but lessor claims under leases that the debtor assumes and later rejects still may be large enough to render many estates administratively insolvent. Without limitation, under the Act the landlord has no duty to mitigate its administrative claim.

The Act also amends section 365(b) of the Bankruptcy Code with respect to a



debtor's non-monetary defaults under a commercial real estate lease. A debtor may assume a lease or contract over the counter-party's objection only if it cures all outstanding defaults. Controversy has arisen over how to treat non-monetary defaults that cannot be cured retroactively (for example, a going out of business sale or a suspension of operations in violation of a shopping center lease). The Act clarifies that if a cure is impossible, the debtor is not required to undo the proscribed activity as a condition to assumption. However, the debtor must act in accordance with lease provisions going forward. Moreover, if the default is a failure to operate according to lease requirements, the debtor must compensate the landlord for any pecuniary losses.

Limitation of Exclusive Periods

The Act limits a debtor's ability to extend the time to file and seek confirmation of a chapter 11 plan. Under current law, the debtor generally has the exclusive right to file a plan for the first 120 days of the case and the exclusive right to solicit acceptance of a plan for the first 180 days of the case. Under section 1121(d), the court may increase or decrease each period for cause. The amendments provide that a court may not extend the debtor's 120 day period to file a plan more than 18 months after the filing date or the 180 day period to obtain acceptances of a plan more than 20 months beyond the filing date. The limits on extending the exclusive periods are a significant departure from current law and increase the negotiating power of lenders and other creditors in cases where the debtor is unable to or unwilling to formulate an acceptable plan.

Single Asset Real Estate Cases

Congress wrote the concept of single asset real estate cases into the Bankruptcy Code in 1994. A single asset case involves a debtor that receives substantially all its income from a single real estate project

(excluding residential real property with fewer than four units) and has no other substantial operations. Under section 362(d)(3), the automatic stay terminates with respect to the secured creditor's rights against collateral in a single asset case unless, within 90 days of the filing date, the debtor has either filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time or commences monthly payments to the secured creditor in an amount equal to interest at a current fair market rate (not necessarily the contract rate) on the value of the creditor's interest in the collateral. The secured lender is entitled to interest payments under section 362(d)(3) even if it is not entitled to

adequate protection payments (that is, even if the creditor's interests are not harmed by a decline in the value of the property). Under current law, application of these provisions is limited by the definition of "single asset real estate" to apply only to cases where the secured debt is $4,000,000 or less.

The Act eliminates the $4,000,000 cap. As a result, all single asset real estate projects will be subject to section 362(d)(3), regardless of the amount of secured debt. The Act further provides that interest payments must be equal to the non-default contract rate on the value of the creditor's interest in the collateral, even if the "current fair market rate" is less. The amendments clarify that the payments may be from rents or other income generated by the collateral regardless of lender consent (otherwise, a debtor generally cannot use cash collateral over a lender's objection without providing replacement collateral). The new law extends the 90-day period within which the debtor must commence payment or face stay termination to the later of 90 days or 30 days after the court finds the debtor to be a single asset debtor. Accordingly, a debtor may be able to extend the 90-day period by contesting its status as a single asset real estate debtor. The net effect of the Act, however, is to strengthen the ability of lenders to force a quick settlement of single asset real estate cases on favorable terms.

Conversion and Dismissal

The Act substantially expands the conditions under which a chapter 11 case must be dismissed or converted to chapter 7 and tightens the standards under which the court may deny a motion to convert or dismiss. The Act also appears to change the parties that may bring a motion to convert or dismiss by deleting references to the United States Trustee and the Bankruptcy Administrator.

The Act expands the nonexclusive list of grounds to convert or dismiss from the current ten to 16. More importantly, the Act substantially changes the standard of proof in favor of the moving party. Current law provides that the court may convert or dismiss a case for cause. The new law provides that upon a show of cause the court shall convert or dismiss the case unless the court specifically identifies unusual circumstances showing that such relief is not in the best interest of creditors and the estate. To defeat a motion to convert or dismiss, an objecting party must establish there is a reasonable likelihood that a plan will be confirmed within a reasonable period of time and, with respect to each ground for cause (other than substantial or continuing loss to or diminution of the estate) there is a reasonable justification for the act or omission and the act or omission will be cured within a reasonable time. Finally, the Act requires the court to commence a hearing on a motion to convert or dismiss not later than 30 days after filing and to decide the motion within 15 days after the start of the hearing, unless the movant consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits.

The new standards for converting or dismissing a chapter 11 case will enhance the negotiating power of all creditors. By increasing the ability of an isolated or recalcitrant creditor to interfere with the debtor's case through motions to convert or dismiss, the amendments also may work to the disadvantage of creditors who have settled with the debtor or otherwise wish to support the debtor's reorganization.

Protections for Sellers Of Goods

Section 546(c) of the Bankruptcy Code generally preserves the rights of a supplier of goods on credit to reclaim goods from an insolvent debtor under the Uniform Commercial Code ("UCC"), subject to certain limitations. The seller must demand reclamation in writing within ten days of receipt of the goods by the buyer/debtor or, if the ten-day period expires after the commencement of the bankruptcy case, within 20 days of receipt. The seller may not reclaim goods from a good faith purchaser for value under the UCC. Most courts have held that a lender with a floating lien on inventory is a good faith purchaser for value whose security interest in the goods primes the seller's reclamation rights.

The Act modifies Section 546(c) to extend the period for reclaiming goods received by the debtor from ten days to 45 days from receipt. The Act further provides that if the 45-day period expires after the commencement of the case, a seller may make a reclamation demand up to 20 days after the bankruptcy filing. The Act specifies that rights of reclamation are defeated by a prior security interest in goods or proceeds, confirming the current legal reality that reclamation rights may have practical value only in cases where the debtor's inventory is unencumbered.

More significantly, the Act amends Section 503(b) of the Bankruptcy Code to provide sellers the right to seek allowance and payment of an administrative expense claim for the value of any goods received by the debtor within 20 days before the date of bankruptcy. Administrative expense claims are entitled to priority of payment over other unsecured claims. A debtor generally will not be required to pay such claims immediately upon allowance, but will have to provide for full payment of administrative expense claims to obtain confirmation of a chapter 11 plan. The seller may obtain administrative expense treatment even if it fails to make a timely reclamation demand. Moreover, unlike the seller's rights under section 546(c), the seller's rights under revised section 503(b) are not subject to the rights of an ordinary course buyer, a good faith purchaser or a secured lender. In addition to increasing the chances a trade vendor will be paid some or all of its claim, the Act increases the leverage of trade vendors in the debtor's reorganization. The cost of financing a reorganization will increase, to the detriment of lenders as well as debtors. Further, the administrative expense priority for goods delivered on the eve of bankruptcy may affect preference claims against vendors as the debtor/trustee faces an additional hurdle in proving that a payment entitled the vendor to receive more than it would have in chapter 7.

Use and Sale of Estate Property

The Act amends section 363 with respect to the use, sale and lease of specific types of estate property. These provisions will complicate the efforts of debtors to use and sell certain assets and may affect creditors' efforts to maximize value through bankruptcy sales. The Act provides that if a debtor, in connection with offering a product or service to an individual, has a policy prohibiting the transfer of "personally identifiable information" about the individual to unaffiliated third parties, the debtor may not transfer such information unless: (a) the proposed sale or lease is consistent with the policy; or (b) the court appoints a consumer privacy ombudsman and approves the sale or lease after notice and a hearing and finding the sale or lease would not violate applicable non-bankruptcy law. Personally identifiable information is defined as: the first name (or initial) and last name; geographic address or physical place of residence; electronic mail address; telephone number at place of residence; Social Security account number; credit card account number; and, if associated with the foregoing, birth date, place of birth and number of birth certificate, adoption certificate, or naturalization certificate. The consumer privacy ombudsman will have standing to appear and be heard at the sale hearing and to provide the court with information to assist in the consideration of the proposed sale or lease. The court may consider the debtor's privacy policy, potential losses, gains, costs or benefits to consumers, and potential alternatives that would mitigate privacy losses or potential costs to consumers.

The new provision arises out of legitimate concerns in cases where Internet-based debtors have sought to sell contact information on customers and visitors to commercial Web sites. The scope of the definition is potentially broad enough, however, to apply to other going concern sales involving customer lists, goodwill and general intangibles. The ombudsman's compensation will be entitled to administrative expense priority, which means, in effect, that creditors will be required to fund the activities of an independent agent that will not answer to a particular client and will have no particular incentive to support the sale and may be motivated to oppose the sale regardless of the circumstances. A new cottage industry in bankruptcy ombudsmen (see also discussion of health care bankruptcies, below) will work to the detriment of commercial creditors.

The Act also limits or conditions sales by nonprofits to for-profit corporations. These changes will be significant in the healthcare industry, where debtors often are nonprofits that seek to reorganize or liquidate through asset sales to commercial corporations. The Act prohibits any such sale absent compliance with applicable non-bankruptcy law. State attorneys general have appeared in several recent healthcare bankruptcies to argue that a proposed sale violates state law. The Act provides that the attorney general of the state in which the nonprofit debtor is incorporated, was formed or does business has standing to appear with respect to these issues, even if the state otherwise is not a party. These changes become effective as of the date of enactment and apply to cases pending on April 20, 2005; provided, however, that in confirming a plan in a pending case the court mush consider whether the changes substantially would affect the rights of a party in interest that acquired such rights after the filing of the bankruptcy.

The new provision arises out of legitimate concerns in cases where Internet-based debtors have sought to sell contact information on customers and visitors to commercial Web sites.

The Act provides that section 363(f) (which governs the sale of assets free and clear of liens and other interests) shall not apply to sales of any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract. Accordingly, the purchaser of consumer credit paper shall remain subject to all claims and defenses of the consumer under the contracts to the same extent as if the sale had not been conducted under section 363(f).

Special Healthcare Provisions

The Act defines "healthcare business" as any private or public entity primarily engaged in offering to the general public facilities and services for the diagnosis and treatment of injury, deformity or disease and surgical, drug treatment, psychiatric or obstetric care. The Act adds section 351 to the Bankruptcy Code, providing that a healthcare business without funds to store patient healthcare records under applicable law must give a year's publication notice of intent to destroy the records and attempt to contact each affected patient and insurance carrier directly, by mail, within 180 days. If the records are not claimed during the one-year period, the debtor must request by certified mail that each appropriate federal agency take possession of the records. Thereafter, the debtor may destroy

The Act includes several provisions regarding a fast-track procedure for small businesses to weed out cases unlikely to succeed and to expedite procedures for potentially viable cases.

any remaining records but only through specified methods to ensure privacy.

The Act adds section 333 to the Bankruptcy Code, requiring appointment of a healthcare ombudsman within the first 30 days of a health care business case. If the debtor provides long-term care, the court may appoint a state long-term care ombudsman under the Older Americans Act of 1965. The ombudsman's duties include monitoring and reporting to the court on the quality of patient care. The ombudsman will have access to patient records but must maintain confidentiality with respect to such records.

If a healthcare business case converts to chapter 7, the Act requires the trustee to use reasonable best efforts to transfer patients to a local healthcare business that provides substantially similar care maintains a reasonable quality of care. The costs of a trustee or a federal agency in closing a healthcare business, transferring patients and disposing of patient records shall be entitled to administrative expense priority.

Small Business Cases

The Act includes several provisions regarding a fast-track procedure for small businesses to weed out cases unlikely to succeed and to expedite procedures for potentially viable cases. A small business debtor is defined as a business having an aggregate debt of not more than $2.0 million (not including debts to affiliates and insiders). A business under the debt limit will not be a small business if a creditor committee is appointed, but may revert back to small business status if a committee is appointed but not active. The small business debtor will face additional reporting requirements regarding profitability, cash flow, tax returns and other matters. The United States Trustee or Bankruptcy Administrator is required to more closely monitor the small business debtor's activities. Without limitation, the debtor must submit to an initial interview and to an investigation into its viability and the condition of its books and records.

The court may extend the small business debtor's time to file a plan beyond 300 days after the filing of the petition only if the debtor can prove it is more likely than not to obtain confirmation within a reasonable time. If the debtor files a plan that meets all applicable requirements, the court generally must confirm the plan within 45 days. The Act loosens the disclosure requirements for small business debtors, directing courts to take the size and complexity of a case into account in determining whether disclosure is adequate and allowing courts to dispense with a disclosure statement altogether if the plan contains adequate information. Further, the court may approve a disclosure statement on a conditional basis, on limited notice, subject to final approval on full notice at the confirmation hearing. The Act also includes a new exception to the automatic stay in serial filings by a small business debtor.

Individual Chapter 11 Cases

The Act makes several refinements in chapter 11 cases filed by individuals. Most of the changes are intended to make individual chapter 11 plans look more like chapter 13 plans. Under the new law, a plan of an individual that provides for less than full payment of unsecured claims may not be confirmed unless the value of property to be distributed to unsecured creditors is not less than the amount of the debtor's projected disposable income during the five-year period beginning on the date that the first payment is due under the plan. If the disposable income test is satisfied, an individual debtor may retain property in the estate even though unsecured creditors are not paid in full, so long as the debtor pays all required domestic support obligations. This change suspends application of the "absolute priority rule" in individual chapter 11 cases, which is of arguable practical effect under current law.

In another nod to chapter 13, the Act provides that an individual debtor may modify a chapter 11 plan to increase or reduce the amount of payments, to extend the time period for payments, or to alter the amount of distribution to a creditor whose claim is treated by the plan. Similarly, the amendments provide that an individual chapter 11 debtor shall not receive a discharge until completion of all payments under the plan, unless for cause shown. Under existing law, the discharge

is entered upon confirmation. However, the court may grant a discharge after confirmation to an individual debtor who has not completed payments under the plan if the value of the amount of property distributed under the plan on account of each unsecured claim is not less than the amount that would have been paid in a chapter 7 and modification of the plan is not practicable. Finally, the Act tightens the requirements for the discharge of an individual debtor who engaged in felonies related to the abuse of the Bankruptcy Code, securities violations or any criminal act, intentional tort or willful or reckless misconduct that causes serious physical injury or death to another individual in the preceding five years.

The Act expands property of the estate in an individual's chapter 11 to include everything the debtor owns as of the petition date plus all property, including earnings from services performed by the debtor, acquired after commencement of the case but before the case is closed, dismissed or converted. Under current law, most courts have held that an individual debtor's post-petition wages and salary were not part of the estate.

Preferences

Creditors receiving payment on claims against a debtor on the eve of bankruptcy may be required to return the payments to the bankruptcy estate under section 547(b) of the Bankruptcy Code. The debtor (or trustee) may avoid as a preference any transfer of an interest of the debtor in property: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before the transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the filing of the petition (or on or within a year before the filing of the petition if the transfer was to an insider); and (5) that enables the creditor to receive more than it would have if the case were a case under chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the Bankruptcy Code.

The theory behind the preference statute is that creditors receiving payment have been "preferred" over creditors not receiving payment and, to promote equality of treatment, preferential transfers should be returned to the estate and redistributed ratably to all creditors. Such logic tends to work better for lawyers than business people, who generally find public policy an inadequate rationale for returning payments to which they were entitled. The inability to collect a bad account usually is a less of an emotional issue for a business than being forced to give back an account already collected.

The Act provides significant relief to preference defendants. First, section 547(c) of the Bankruptcy Code creates a number of affirmative defenses. One of the most significant is the ordinary course of business defense under subsection (c)(2), which provides that a transfer is not avoidable to the extent such transfer was: (1) in payment of a debt incurred in

the ordinary course of business or financial affairs of the debtor and the defendant; (2) made in the ordinary course of business or financial affairs of the debtor and defendant; and (3) made according to ordinary business terms. The second prong of the defense is subjective, based on the course of dealing between the parties. The third prong is objective, based on industry standards. Under current law, the preference defendant has the burden of proving all three elements.

The Act greatly simplifies the ordinary course of business defense by changing the and in subsection (c)(2) to an or, so that the defendant does not have to prove both the subjective and objective tests but only one of them. Hence, under the new law, to except a transfer from avoidance as a preference a defendant will have to prove (1) the transfer was in payment of a debt incurred in the ordinary course of business and (2) the transfer was made in accordance with the course of dealing between the parties or according to industry standards. The existence of a viable affirmative defense often is the most important element in negotiating the settlement of a preference claim. The Act will provide preference defendants with additional bargaining power in settlement discussions.

In addition to providing a more defendant-friendly ordinary course of business defense, the Act significantly alters the cost-benefit analysis of litigating smaller preference actions. Under current law, a trustee can profit greatly from filing large numbers of small preference claims in the debtor's home forum. Even if the claims are weak or subject to valid defenses, defendants in foreign jurisdictions rarely can justify the economics of defending the claim and are forced to settle quickly to avoid expense. Pursuant to the Act, revised section 547(c) will preclude a defendant's preference liability on transfers totaling less than $5,000 in the aggregate. Further, the Act revises 28 U.S.C. § 1409 to provide that an action to avoid a non-consumer debt against a non-insider for less than $10,000 must be brought in the district in which the defendant resides. The Act will reduce the number of nuisance preference claims and alleviate the pressure on businesses to pay preference demands because the amount is too small to justify a defense.

The Act also extends protections to secured creditors. A transfer under section 547(b) may include the perfection of a lien or security interest. The perfection of a lien to secure an antecedent debt, therefore, may be avoided as a preference, depriving an otherwise secured creditor of its collateral. Under the current version of section 547(c)(3), a purchase money security interest cannot be avoided as a preference if the lender perfects within 20 days of the debtor's receipt of property. The Act extends the period to 30 days. The perfection of a purchase money security interest within 30 days will relate back to the date of the debtor's receipt for preference purposes.

Similarly, under section 547(e), the perfection of any lien or security interest relates back to the date of attachment if perfected within ten days. The Act revises subsection (e) to increase the secured lender's grace period to 30 days. The Act also amends section 362(b) to allow the filing of financing statements and other acts of perfection during the extended grace period. These relation-back provisions provide protection only from preference attack. They do not affect state law rules regarding perfection or lien priority. Moreover, the Act does not amend the trustee's powers under section 544 of the Bankruptcy Code to avoid security interests that are unperfected as of the filing date. If the debtor files bankruptcy during the grace periods provided by sections 547(c)(3) and (e), the lender may be able to eliminate preference exposure, but the security interest remains at risk. The Act does not, therefore, change the importance of prompt perfection of security interests.

Of further note to lenders and other creditors relying on insider guaranties, the Act revises section 547 to provide that transfers between 90 days and one year before the bankruptcy filing may be avoided only with respect to a creditor who is an insider. This change represents Congress' second effort to address the so-called Deprizio doctrine. Section 547(b) provides for the avoidance of transfers to or for the benefit of a creditor. Payments to a third party creditor holding an insider guaranty are also for the benefit of the insider, whose exposure under the guaranty is reduced (and who also is a creditor by virtue of his contingent subrogation rights against the debtor). In *Levit v. Ingersoll Rand Fin. Corp.* (*In re V.N. Deprizio Constr. Co.*), 874 F.2d 1186 (7th Cir. 1989), the court applied a literal reading of section 547 to hold that a non-insider creditor was subject to the extended one-year reach-back period for payments that benefited an insider guarantor. Congress tried to fix the problem in 1994, but got only halfway, by providing that such preferences could not be recovered from the non-insider. The Act appears to close the Deprizio loop by preventing the avoidance of payments made to non-insiders more than 90 days prior to bankruptcy.

Fraudulent Transfers

Section 548 of the Bankruptcy Code empowers a trustee or DIP to avoid transfers the debtor made with actual intent to hinder, delay or defraud creditors. Constructively fraudulent transfers also are avoidable, regardless of intent, if the debtor was insolvent or undercapitalized at the time of the transfer and received less than reasonably equivalent value. The Act amends section 548(a)(1) to apply to transfers occurring within two years of the filing of the bankruptcy petition. The current reach-back period is one year. This provision only applies to cases filed one year after enactment (April 20, 2006). Because the reach-back period expands, some litigants next year potentially will face the anomalous situation of a transfer sheltered from fraudulent transfer attack because the debtor filed bankruptcy too early rather than too late.

The Act adds a new subsection (e) to section 548 to expand the definition of fraudulent transfer to include transfers by a debtor to a self-settled trust or similar device within ten years of bankruptcy if the debtor is a beneficiary of the trust and made the transfer with intent to hinder, delay or defraud creditors. The amendment provides a new weapon to battle fraudulent asset protection strategies, but applies only to transfers involving actual intent and not to constructively fraudulent transfers by insolvent debtors receiving less than reasonably equivalent value.

The Act provides that a benefit to an insider under an employment contract may be avoided as a fraudulent transfer if it was not made in the ordinary course of business. Under this provision, a showing of actual intent to defraud and a showing of insolvency is not necessary. The extraordinary nature of the payment, in and of itself, subjects the transfer to

avoidance, unless the debtor received reasonably equivalent value in exchange for the transfer. This provision becomes effective on the date of enactment but is applicable only to cases filed on or after the date of enactment (April 20, 2005).

Executive Compensation

The Act prohibits payment of retention bonuses to insiders (generally, officers, directors and principal owners of the debtor) unless the court finds that each affected individual has an outstanding job offer from another business at the same or greater rate of compensation and the services provided by the person are essential to "the survival of the debtor's business" (not merely necessary to the debtor's reorganization or to maximize asset values). In addition, retention bonuses are capped. The Act also prohibits severance payments to an insider unless the payment is part of a program generally available to all full time employees and the amount of the payment is not greater than ten times the amount of the mean severance pay to nonmanagement employees during the calendar year. The Act prohibits other transfers or obligations outside the ordinary course of business for the benefit of officers, managers or consultants "not justified by the facts and circumstances of the case," which may limit the debtor's ability to pay for D&O insurance on behalf of officers and directors. The amendments provide relief to creditors on a particularly galling issue (increasing pay to insiders who presided over the debtor's bankruptcy), but creditors may suffer the consequences if debtors are unable to retain key employees.

Creditor Committees

The Act gives bankruptcy courts additional authority over the composition of creditor committees and imposes additional rights and obligations on committee members. Under current law, the United States Trustee or Bankruptcy Administrator has the authority to name and change committee members. The new law provides that the bankruptcy court may order a change in membership to ensure adequate representation of creditors. Without limitation, the court may order an increase in the number of committee members to include small business concerns that disproportionately may be affected by nonpayment of claims. This change may be significant both for smaller creditors and institutional bondholders that tend to dominate committees in larger cases.

The Act amends section 503(b)(4) of the Bankruptcy Code to eliminate the right of a committee member to seek compensation for attorneys and accountants retained in connection with performing committee duties. Committee members retain the right to seek compensation of other reasonable and necessary expenses under section 503(b)(3).

The Act requires committees to provide information to creditors who are not members of the committee. While increasing unsecured creditors' access to information, this provision raises dangers for debtors and other parties. Members of an official committee have a fiduciary duty to maintain confidentiality. Creditors who are not members of a committee do not have similar duties. By requiring the committee to turn over information to general unsecured creditors, the new law unintentionally may force the public disclosure of financial, pricing, trade secret and other sensitive information. The new law does not provide a mechanism by which a committee can refuse to release information or a court can order such information not be disclosed. Debtors and other parties in interest will have to be careful about sharing confidential information with committees.

Summary: The Trend

Provisions in the Act not discussed above generally follow a consistent theme: The business debtor faces new and serious hurdles to emerging from chapter 11 under a plan of reorganization. A number of additional provisions in the Act materially will increase a debtor's cash needs early in the case and the burden of administrative and other priority claims through confirmation. For example, the Act essentially doubles the cap and the reach-back period for priority wage claims. The Act also expands the lien, priority and other rights of federal, state and local taxing authorities and limits the debtor's flexibility in dealing with tax claims in its plan. Further, the Act allows utilities to insist on cash deposits or other cash equivalents to ensure post-petition utility services to the debtor. Debtors (and lenders) will confront additional challenges (and opportunities) in financing chapter 11 cases.

The trend over the last decade has been against the reorganization and survival of businesses in chapter 11. Chapter 11 predominantly has become a mechanism to sell the debtor's assets as a going concern. The trend often is salutary for the enterprise value as a whole, preserving the value of the assets under new ownership, free and clear of debts and with greater capitalization and management resources. Facilitating the sale of businesses is a perfectly valid use of chapter 11. A sale can be the best means of saving jobs and maximizing the return to creditors, but rarely preserves equity interests in the debtor. For good or ill, the Act is likely to accelerate the trend towards the sale of businesses out of chapter 11.

Conclusion

Chapter 11 traditionally has balanced the interests of the debtor and other parties to a bankruptcy case. The Act significantly alters the balance by weakening the debtor's position and providing important new rights to particular parties in interest. By altering the balance against the debtor, the Act will complicate the efforts of unfavored creditors to protect their interests in chapter 11. Now, more than ever, businesses should not enter chapter 11 without a clear exit strategy and open communication with all creditor groups. Similarly, if enterprise value is to survive the claims of particular constituencies favored by the Act, creditors must work with debtors in good faith to expedite and streamline the negotiation of a consensual plan. ■

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Byrd v. Dillard's, Inc.

DECIPHERING THE ALABAMA'S STATUTES OF LIMITATIONS LANGUAGE

BY H. WILLIAM WASDEN AND KRISTIN TAYLOR ASHWORTH

Introduction

As most Alabama practitioners know, absent a contractual relationship or a bargaining unit restriction, workers in Alabama generally are employed "at-will." *McClain v. Coca-Cola Bottling Co.*, 578 So. 2d 1299, 1300 (Ala. 1991) (citing *Howard v. East Tennessee, Virginia, & Georgia Ry.*, 8 So. 868, 868-69 (Ala. 1890)). Accord, *Webb Wheel Products, Inc. v. Hanvey*, 2004 Ala. LEXIS 346 *1, *18 (Dec. 30, 2004, Ala.) (citing *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987)). In other words, an employer or an employee can terminate the employment relationship for a good reason, a bad reason or no reason at all. *Coca-Cola Bottling Co. Consol. v. Hollander*, 885 So. 2d 125, 120 (Ala. 2003) (citing *Wal-Mart Stores, Inc. v. Smitherman*, 872 So. 2d 833, 838 (Ala. 2003) (quoting *Culbreth v. Woodham Plumbing Co.*, 599 So. 2d 1120, 1121 (Ala. 1992))).

However, over the years, the Alabama legislature has carved out various exceptions which afford limited protections to at-will employment relationships under various circumstances. These circumstances included discriminating on the basis of jury service, *Ala. Code* § 12-16-8.1 (2004), and retaliation against workers' compensation claimants. *Ala. Code* § 25-5-11.1 (2004). The most recent protection afforded to workers in Alabama is Alabama's Age Discrimination in Employment Act, *Ala. Code* §§ 25-1-20, *et seq.* (2004) ("AlaADEA"). This statute

prohibits employers from discriminating against applicants for employment or employees 40 years of age or older on the basis of age; consequently, *inter alia*, under the AlaADEA, an employer may not terminate a covered employee because of the employee's age.

The AlaADEA was enacted in 1997 and, thus, is a relatively new statute. Given its short history and the predominance of claims under the corresponding federal statute, Alabama courts only have limited experience with AlaADEA claims. That circumstance contributed to the state of confusion that developed between Alabama's federal district courts regarding the appropriate limitation periods for AlaADEA claims. See cases discussed infra. For that reason, when the Eleventh Circuit Court of Appeals in *Jones v. Dillard's, Inc.*, 331 F.3d 1259 (11th Cir. 2003) recently was confronted with the confusion surrounding the AlaADEA's statutes of limitations, it certified the following question to the Alabama Supreme Court: "[w]hat is the applicable limitations period for a claim brought under the [AlaADEA]." The supreme court answered the question in *Byrd v. Dillard's, Inc.*, 2004 Ala. LEXIS 79 (Apr. 2, 2004, Ala.).

This article will review the origin of the previous confusion between Alabama's federal district courts regarding the AlaADEA's statutes of limitations and how those courts attempted to logically reconcile conflicting applications of the AlaADEA's limitation periods. Additionally, this article will discuss the supreme court's holding in *Byrd* wherein it finally deciphered the AlaADEA's statutes of limitations language and, in doing so, clearly outlined the AlaADEA's alternative limitation periods.

Please note that this article is not meant to provide a complete analysis or overview of the AlaADEA. The practitioner should review the AlaADEA itself and the interpretive cases and articles related thereto for a thorough discussion of the scope and application of the AlaADEA.

Why the Confusion Over the AlaADEA's Statutes of Limitations?

The reason for the confusion over the appropriate limitation periods for AlaADEA claims is quite simple: the AlaADEA adopts the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* (2004) ("FedADEA"), limitation periods but does not include an administrative exhaustion requirement.

The AlaADEA provides that ". . . the remedies, defenses, and statutes of limitations, under [the AlaADEA] shall be the same as those authorized by the [FedADEA] except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit . . ." *Ala. Code* § 25-1-29. Therefore, to determine the appropriate statutes of limitations under the AlaADEA, one must understand the FedADEA's limitation periods.

The limitation periods under the FedADEA are guided by its administrative exhaustion requirement. In short, the FedADEA provides that before a complainant may bring a civil action, he/she must exhaust his/her administrative remedies. 29 U.S.C. § 626(d) (2004). First, a complainant must file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discriminatory act. 29 U.S.C. § 626(d)(1). If the EEOC fails to act on the charge within 180 days of the filing of the charge or dismisses the charge, it should issue a right-to-sue notice to the complainant–the complainant then has 90 days from the issuance of the right-to-sue notice to file a lawsuit. 29 U.S.C. § 626(d)(1) & (e). Typically, if a complainant fails to meet the 180-day and/or 90-day administrative time limits, a subsequent civil action by the complainant based on the facts alleged in the charge of discrimination will be time-barred. *Jones*, 331 F.3d at 1263-68 (discussing the fact that under appropriate circumstances, the FedADEA's statute of limitations may be equitably tolled).

Although the AlaADEA adopts the FedADEA's statutes of limitations, it does not require a plaintiff to exhaust any administrative remedies before bringing a civil action: ". . . a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit . . ." *Ala. Code* § 25-1-29. Thus, prior to *Byrd*, "[t]o comply with the AlaADEA, [a court dealing with an AlaADEA claim had to] resolve the problem of meeting the AlaADEA's seemingly conflicting requirements

that, on the one hand, the FedADEA's statute of limitations applies to AlaADEA claims, while, on the other hand, the FedADEA's administrative exhaustion requirement, which is the basis for its statute-of-limitations requirement, does not apply to such claims." *Robinson v. Regions Fin. Corp.*, 242 F. Supp. 2d 1070, 1073 (M.D. Ala. 2003).

Courts Attempt to Make Sense of The AlaADEA's Limitation Periods

Before *Byrd*, three of Alabama's federal district courts attempted to reconcile the AlaADEA's statutes of limitations provision with that of the FedADEA in light of the FedADEA's administrative exhaustion requirement, all reaching different conclusions.

First, the Northern District of Alabama, Western Division held that "[t]he clear import of the AlaADEA . . . is to adopt, at the longest, a 180-day statute of limitations for actions brought pursuant to the [AlaADEA] . . ." *Jones v. Dillard's*, Inc., 2002 U.S. Dist. LEXIS 26769 *1, *44 (May 30, 2002, N.D. Ala.). Thus, under *Jones*, an employee would have 180 days from the date of the alleged discriminatory act to file his/her AlaADEA civil action or otherwise, be time-barred. Alternatively, after *Jones*, the Northern District of Alabama, Southern Division found that the AlaADEA "is silent as to the limitations period" and held that *Alabama Code* § 6-2-38(l)-which provides for a two-year statute of limitations when the *Alabama Code* does not otherwise specify the appropriate limitations period-applies to AlaADEA claims. *Dooley v. Autonation USA Corp.*, 218 F. Supp. 2d 1270, 1276-77 (Aug. 21, 2002, N.D. Ala.). *Contra Robinson*, 242 F. Supp. 2d at 1072 ("*Dooley* ignores the AlaADEA's plain language[] which provides for a statute of limitations that is the same as that in the FedADEA."). Finally, the Middle District of Alabama, Northern Division declared that "an employee would have a viable AlaADEA claim if she filed that claim either (a) within the time period that a timely parallel FedADEA claim is filed or (b) within 450 days of the act of discrimination, whichever is longer." *Robinson*, 242 F. Supp. 2d at 1078. The court's 450-day calculation in *Robinson* was based on the 180 days a complainant has to file an EEOC charge, plus the 180 days the EEOC can either act on the charge or issue a right-to-sue letter, plus the 90 days the complainant has to file a civil action once he/she receives a right-to-sue letter. Id. In other words, the 450-day limit "reflect[ed] the time that an employee with a FedADEA claim would typically have, under . . . the FedADEA without time extensions, to file a judicial complaint after the discriminatory act." Id.

Obviously, if not resolved, the disagreement over and confusion surrounding the AlaADEA's statutes of limitations could have led to inconsistent results throughout the courts and created an incentive–undoubtedly, a justified incentive-for plaintiffs to forum shop. For example, if a plaintiff filed an AlaADEA claim 365 days after the alleged discriminatory act, he/she would have a timely claim if it was filed in the Northern District of Alabama, Southern Division (since *Dooley* would apply a two-year limitations period to AlaADEA claims) or in the Middle District of Alabama, Northern Division (since *Robinson* would apply at least a 450-day limitations period to AlaADEA claims), but not in the Northern District of Alabama, Western Division (since *Jones* would apply a 180-day limitations period to AlaADEA claims). Or, a plaintiff who filed an AlaADEA claim 500 days after the alleged discriminatory act would have a timely claim if it was filed pursuant to the Northern District of Alabama, Southern Division's two-year statute of limitations for such claims, but not if it was filed in the Northern District of Alabama, Western Division (because of *Jones*) or Middle District of Alabama, Northern Division (because of *Robinson* and assuming there was not a corresponding FedADEA claim that extended the limitations period).

Additionally, amidst the atmosphere of disagreement and confusion, plaintiffs might altogether have been discouraged from bringing their AlaADEA claims because of the uncertainty as to whether their claims were time-barred. Likewise, attorneys might have been hesitant to represent AlaADEA plaintiffs for fear that their time, energy and resources would be spent on time-barred AlaADEA claims that ultimately would be judicially disposed of on the basis of such untimeliness.

Byrd v. Dillard's, Inc.: Deciphering The AlaADEA's Statutes of Limitations Language

Apparently recognizing the potential problems that could result from the AlaADEA statutes of limitations conundrum, the Middle District of Alabama, Northern Division noted in *Robinson* that although Alabama courts could each put their own spin on the AlaADEA statutes of limitations language, ultimately the "issue [would have to be] resolved by the Alabama Supreme Court." 242 F. Supp. 2d at 1078. Fortunately, the Supreme Court of Alabama had an opportunity to do so in *Byrd* when the Eleventh Circuit certified the question.

Byrd v. Dillard's, Inc.

Gerda Byrd ("Byrd") became employed with a Gayfer's department store in Tuscaloosa, Alabama in 1975. In 1998, Dillard's, Inc. ("Dillard's") purchased Gayfer's but offered all Gayfer's employees employment with Dillard's. With Dillard's, Byrd was made an assistant area sales manager ("AASM") and received the same amount of pay she received while employed with Gayfer's. Byrd learned later that Dillard's was permanently eliminating the AASM position, and rather than accepting an alternative management position (per Dillard's restructuring plan), she accepted severance pay and terminated her employment with Dillard's in May 1999 when she was 50 years old.

However, upon speaking with Andy Poole ("Poole"), Dillard's operations manager, on June 8, 1999, Byrd learned that Dillard's was reinstating the AASM position. Soon thereafter, Dillard's

hired Tiffany Winters ("Winters"), a woman Poole allegedly called "young and pretty," for an AASM position in October 1999, thereby prompting Byrd to file an EEOC charge for age discrimination under the FedADEA on February 24, 2000.

When Byrd filed a civil action in the Northern District of Alabama, Western Division in December 2000 asserting, *inter alia*, FedADEA and AlaADEA claims, Dillard's moved for summary judgment on the basis that those claims were untimely. *Jones*, 2002 U.S. Dist. LEXIS 26769 at *37. Specifically, Dillard's argued that Byrd's FedADEA claim was time-barred because, having filed her EEOC charge on February 24, 2000, she failed to file her charge within 180 days of June 8, 1999, the date on which Byrd was informed that Dillard's intended to hire a new AASM and, hence, learned of the alleged discrimination. Yet, Byrd asserted that the 180-day filing period did not begin to run until Winters actually was hired into the AASM position in October 1999 "because that was the first point at which she suspected that she had been discriminated against on account of her age." Id. at *38. The court disagreed with Byrd, however, concluding that her FedADEA claim was time-barred because "prior to the 180-day period leading up to her EEOC charge, she had reason to believe, and actually did believe, that Dillard's had discriminated against her on the basis of her age in violation of the [FedADEA]." Id. at *41.

With respect to Byrd's AlaADEA claim, Dillard's argued that it also was time-barred:

> [D]illard's points out that there are two time limits in the [FedADEA]: an aggrieved individual must file a charge of discrimination with the EEOC within 180 days of the complained-of event and must file his or her complaint in federal court within 90 days of receiving his or her right to sue letter from the EEOC. It argues that because these are the only limitations periods present in the [FedADEA], the Alabama legislature clearly intended that parties filing suit under the [AlaADEA] are subject to, at the longest, a 180-day statute of limitations. Dillard's asserts that because the [FedADEA's] former two-year statute of limitations was repealed well before the Alabama legislature passed the [AlaADEA], the legislature clearly did not intend a two-year statute of limitations to apply to actions brought pursuant to the [AlaADEA].

Id. at *42-43. Byrd countered that the FedADEA's time limits are merely administrative guidelines which cannot be applied to AlaADEA claims (since the AlaADEA has no administrative exhaustion requirement) and, therefore, Alabama's default two-year limitations period in § 6-2-38(l) was applicable to AlaADEA claims.

As with the FedADEA claim, the court disagreed with Byrd and concluded that, at most, AlaADEA claims had to be filed within 180 days of the date of the alleged discrimination and consequently, her AlaADEA claim was untimely:

> [W]hen debating and passing the [AlaADEA], the Alabama legislature was certainly in possession of the knowledge that the two-year statute of limitations that had formerly applied to the [FedADEA] had been repealed by Congress and that the only limitations periods remaining in the [FedADEA] were the 90-day deadline by which to file suit after receipt of a right to sue letter and the 180-day deadline by which to file a charge of discrimination with the EEOC . . . [T]hese deadlines are not jurisdictional but, instead, serve as a form of statute of limitations, complete with the power to entirely bar suit on an otherwise valid discrimination claim. The legislature presumably knew that the courts had treated these deadlines as statutes of limitations when it chose to adopt the "statutes of limitations ... authorized by the [FedADEA]" for the [AlaADEA]. The clear import of *Ala. Code* § 25-1-29, then, is to adopt, at the longest, a 180-day statute of limitations for actions brought pursuant to the [AlaADEA]. . .

Id. at *43.

Byrd appealed the entry of summary judgment in favor of Dillard's to the Eleventh Circuit.

Initially, the Eleventh Circuit applied the equitable tolling doctrine and concluded that Byrd's 180-day time period for filing the EEOC charge did not begin to run until October 1999 when Byrd learned that Winters had been hired, "notwithstanding her earlier suspicion of age discrimination." *Jones*, 331 F.3d at 1266. As such, her EEOC charge was timely filed, and consequently, the Court vacated the summary judgment entered in Dillard's favor on the FedADEA claim. Id.

The Court then confronted Byrd's AlaADEA claim and the statutes of limitations issue related thereto. The Eleventh Circuit noted that because the FedADEA's limitation periods are subscribed by certain administrative requirements, "it is difficult, if not impossible, to transfer them to the [AlaADEA]." Id. at 1269. Would the FedADEA's 90-day limitations period apply or instead, would the FedADEA's 180-day limitations period apply? Could the FedADEA's 90-day and 180-day limitation periods be combined to provide an AlaADEA plaintiff with 270 days from the date of the alleged discrimination to file a civil action? Alternatively, would § 6-2-38(l)'s two-year default limitation period apply? The Court also pointed out the possibility that the "variable rule" outlined in *Robinson* might apply. *Jones*, 331 F.3d at 1269 n.5.

Thus, recognizing the disagreement between Alabama's federal district courts and the absence of guidance from Alabama's state courts regarding the AlaADEA's statutes of limitations and, rather than taking a "guess" as to whether Byrd's AlaADEA claim was time-barred, the Eleventh Circuit certified the question "[w]hat is the applicable limitations period for a claim brought under the [AlaADEA]" to the Alabama Supreme Court. Id. at 1269. The Eleventh Circuit declined to remand the case until it had a clear ruling from the supreme court.

When answering the certified question in *Byrd*, the supreme court stated that because the AlaADEA has no administrative exhaustion requirement, in addition to the fact that it uses the plural "statutes" when mandating that the ". . . statutes of limi-

tations, under [the AlaADEA] shall be the same as those authorized by the [FedADEA]", the AlaADEA gives effect to both the 90-day and 180-day limitation periods under the FedADEA. 2004 Ala. LEXIS 79 at *8-9. Indeed, the court had no problem applying the FedADEA's statutes of limitations to AlaADEA claims when it outlined two alternative AlaADEA statutes of limitations.

Deciphering the AlaADEA's Statutes of Limitations Language

The 180-day limitation period

As to the 180-day limitations period, the court held that if a plaintiff files an AlaADEA claim in a state court within 180 days of the alleged discrimination (i.e., the amount of time within which a complainant has to file an EEOC charge for an alleged FedADEA violation), the plaintiff's claim is timely. Thus, a short-and-sweet rule: the plaintiff has 180 days from the date of discrimination to file an AlaADEA claim in a state court.

The 90-day limitation period

As to the FedADEA's 90-day limitations period, the court held that if a plaintiff timely files an EEOC charge (presumably for a parallel FedADEA claim since the AlaADEA does not require a discrimination charge be filed) and subsequently receives a right-to-sue letter, the plaintiff has 90 days from receipt of the right-to-sue letter to file an AlaADEA claim in a state court (i.e., the amount of time within which a complainant has to file a civil action under the FedADEA after receiving a right-to-sue notice). Under this scenario, a plaintiff has a longer period of time to file his/her AlaADEA claim: The plaintiff has 180 days to file his/her EEOC charge, plus the time period the EEOC retains the charge, plus 90 days after the EEOC issues a right-to-sue notice. However, in this situation a plaintiff will have two time limits with which he/she must comply: the 180 days to file the EEOC charge and the 90 days to file a civil action once the right-to-sue notice is issued. Thus, although a plaintiff has the benefit of having a longer period of time to file his/her AlaADEA claim, he/she has two opportunities to run afoul of the time limits, and a failure to meet either one of the time limits presumably will result in the claim being time-barred.

It is important to note that under either statute of limitations scenario, an AlaADEA plaintiff must take some kind of action within 180 days of the alleged discrimination in order to preserve his/her claim–he/she must either file his/her claim in a state court, or he/she must file an EEOC charge. Only under the second scenario does the 90-day period become relevant, which does not even occur until after the EEOC has issued a right-to-sue notice.

Once the supreme court answered the Eleventh Circuit's certified question, the Eleventh Circuit, pursuant to *Byrd*, vacated the summary judgment entered in favor of Dillard's on the AlaADEA claim. When doing so, the Court set forth *Byrd's* holding and then summarily stated, "[a]ccordingly we vacate the entry of summary judgment to Dillard's on the . . . [AlaADEA] claim . . .", but declined to fully discuss its reason for vacating the summary judgment. *Jones v. Dillard's, Inc.*, 368 F.3d 1278, 1279 (11th Cir. 2004). Presumably, it did so because it found Byrd's AlaADEA claim timely under the 90-day limitation period. In other words, recall that after invoking the equitable tolling doctrine, the Court concluded that Byrd's EEOC charge was timely filed within 180 days of the alleged discrimination and therefore, vacated the summary judgment entered on the FedADEA claim. Thus, because Byrd timely filed an EEOC charge within 180 days of the alleged discrimination and (presumably) filed her civil action within 90 days of the EEOC's issuance of the right-to-sue notice, her AlaADEA claim was timely under the 90-day limitations period.

Conclusion

The AlaADEA affords certain protections to at-will employees that they otherwise would not have under state law. However, understanding the AlaADEA's limitation periods has been difficult and obviously was a recurring source of confusion for employees, their counsel and the courts, thereby diminishing the AlaADEA's protections by unnecessary procedural impediments. Although the supreme court now has clarified the AlaADEA's statutes of limitations language, complying with the staggered filing deadlines will continue to present a procedural hazard for AlaADEA plaintiffs and their counsel. It also should be noted that the *Byrd* Court did not indicate whether the AlaADEA's limitation periods will be subject to equitable tolling as are the FedADEA's limitation periods. See J. Sheffield & B. Bostick, 59 *Ala. L. Rev.* at 114 ("[A]labama courts will have to determine whether the limitations period is subject to equitable tolling."). Consequently, it is safe to assume that despite the guidance found in *Byrd*, AlaADEA claims will continue to present variations on issues of timeliness and the question regarding equitable tolling will have to be addressed soon. ■

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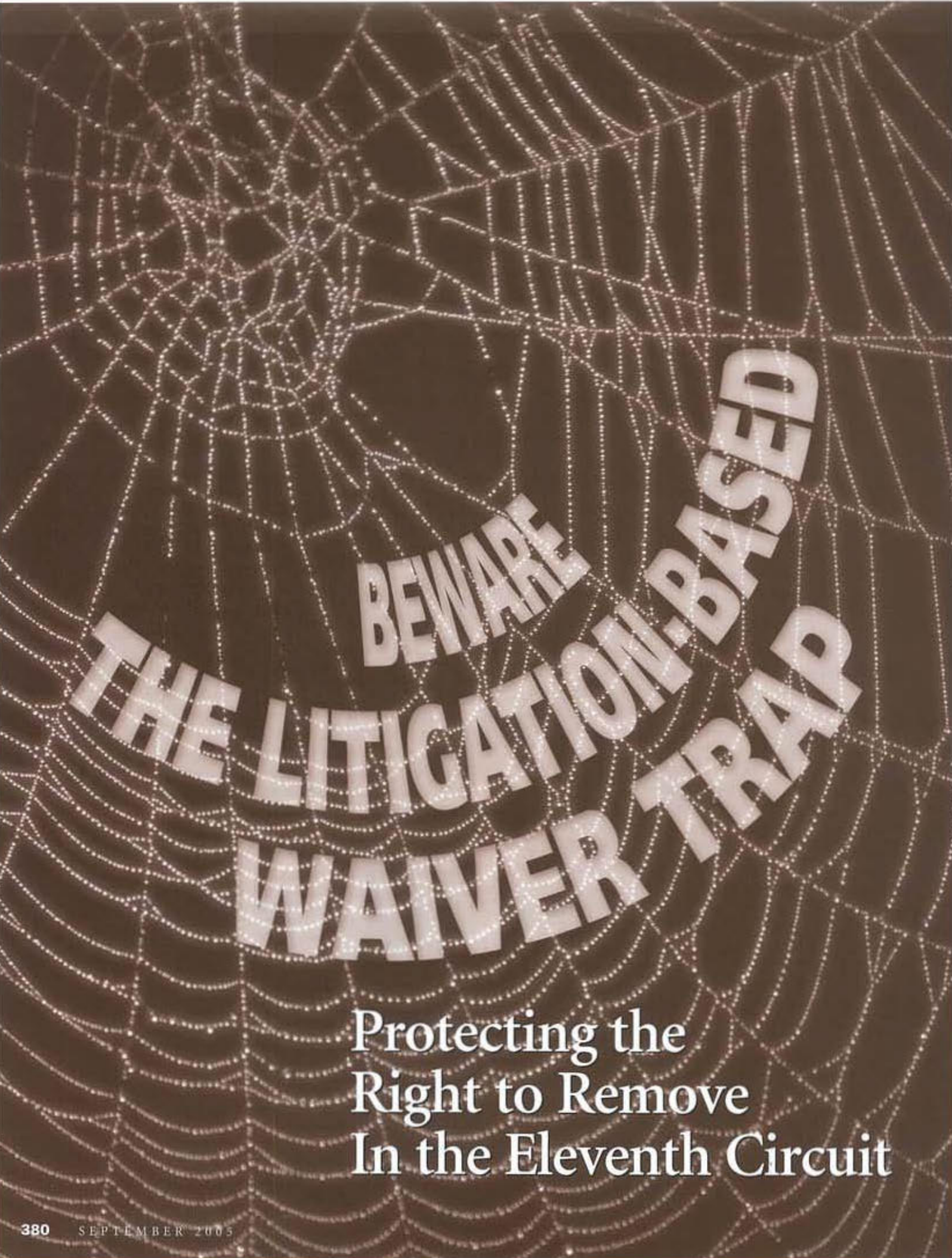


Protecting the Right to Remove In the Eleventh Circuit

BY CHRISTOPHER L. FROST, CARRIE W. MITCHELL AND BRETT HARRISON

It is widely recognized that challenges to a federal court's subject matter jurisdiction cannot be waived by parties to the litigation. These challenges may be raised at any time by any party, even *sua sponte* by the court, and at any level, including for the first time on appeal. Closely akin to principles of subject matter jurisdiction is the doctrine of removal, whereby a defendant "removes" the case from state court to the appropriate federal court. Because of the close connection between removal and principles of subject matter jurisdiction, one may assume that the right of removal is as immune from waiver as challenges to a federal court's jurisdiction. This misperception is perpetuated by the very terms "right of removal" and "removal jurisdiction," which seem to suggest fundamental, absolute and unfettered rights in a party to remove. Nothing could be further from the truth.

Perhaps the only thing truly fundamental about a defendant's right to remove is "the fundamental principle . . . that removal is a purely statutory right which is to be strictly construed in view of the congressional policy against removal law." *Jetstar, Inc. v. Monarch Sales & Service Co.*, 652 F. Supp. 310, 312 (D. Nev. 1987); *see also Global Satellite Comm. Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004) ("A defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'"). Contrary to what common sense may suggest, the "right" of removal may be waived, and in any number of ways. First, a defendant waives its right to remove by not timely filing a notice of removal. *See* 28 U.S.C. § 1446 (defining timeframe for removal); *Martin v. Mentor Corp.*, 142 F.

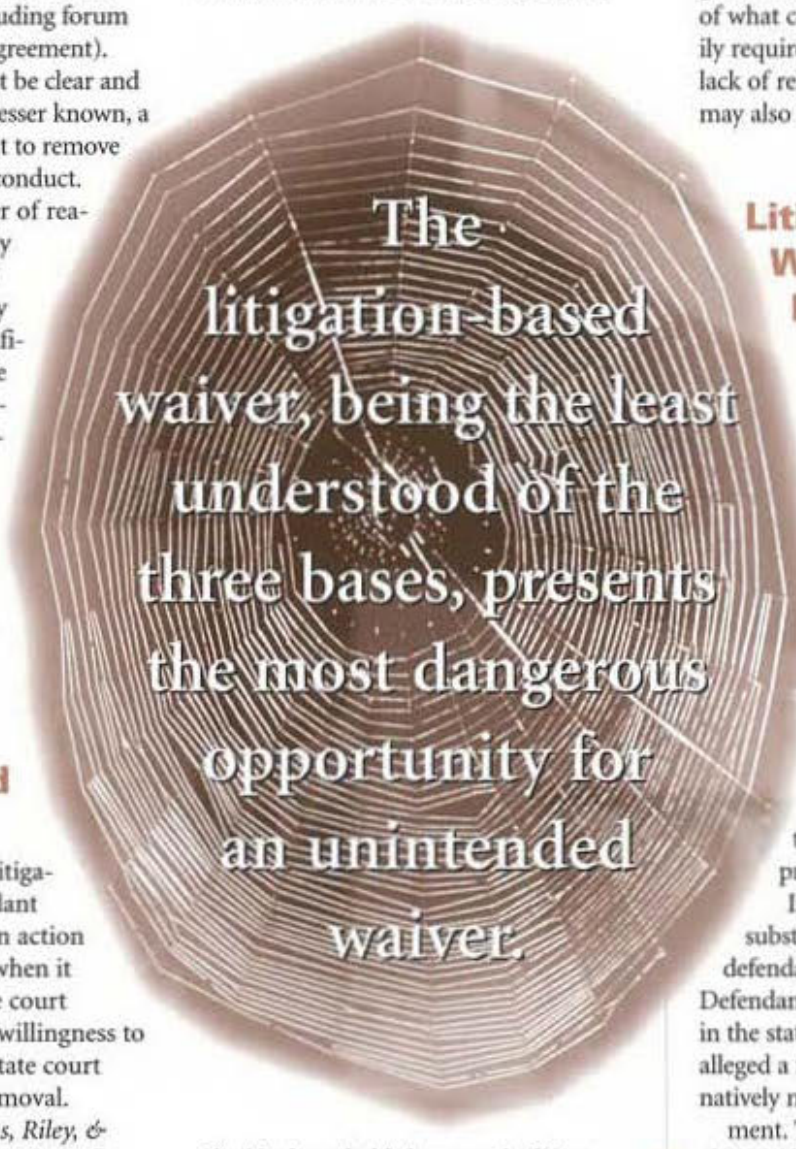
Supp. 2d 1346, 1349 (M.D. Fla. 2001) (remanding to state court where defendant had missed 30-day removal deadline, and had thus waived its right to remove). Second, a defendant may contractually waive its right to remove. *See Snapper, Inc. v. Redan*, 171 F.3d 1249, 1260 (11th Cir. 1999) (defendants contractually waived their right to remove by including forum selection clause in security agreement). Contractual waivers need not be clear and unequivocal. *Id.* Third, and lesser known, a defendant may waive its right to remove through its litigation-based conduct.

There may be any number of reasons that a party consciously decides to waive its right to remove. However, there may also be any number of ramifications when one waives the right to remove as an unfortunate and unintended consequence of a lack of foresight. The litigation-based waiver, being the least understood of the three bases, presents the most dangerous opportunity for an unintended waiver.

What Is the Litigation-Based Waiver?

Commonly termed the "litigation-based waiver," a defendant waives its right to remove an action from state to federal court when it makes sufficient use of state court processes to demonstrate a willingness to litigate the case before the state court prior to filing a notice of removal. *Yusefzadeh v. Nelson, Mullins, Riley, & Scarborough, LLP*, 365 F.3d 1244 (11th Cir. 2004). Actions that are insubstantial and necessary to preserve the status quo will not be sufficient to amount to waiver. *Id.* at 1246; *Fain v. Biltmore Sec., Inc.*, 166 F.R.D. 39, 41 (M.D. Ala. 1996). Even so, although the litigation-based waiver must be "clear and unequivocal," many courts have recognized the litigation-based waiver is often "inadvertent." *See, e.g., Foley v. Allied Interstate, Inc.*, 312 F. Supp. 2d 1279, 1282 (C.D. Cal. 2004); *Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F. Supp. 575, 577 (N.D. Ill. 1984); *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 737 (E.D. Ky. 1981).

Although this standard seems clear, its application is anything but. Courts across the country disagree over what conduct is sufficient to constitute a waiver. Examples on the fringes provide some rough guidelines. For example, most courts, including the Middle District of Alabama and the Southern District of Florida, have held that merely filing a defensive responsive pleading in state court—such as an answer—will not effect a waiver. *See, e.g., Haynes v. Gasoline Mktrs., Inc.*, 184 F.R.D. 414, 416-17 (M.D. Ala. 1999); *Miami Herald Pub. Co. v. Ferre*, 606 F. Supp. 122, 124-25 (S.D. Fla. 1984). At the other extreme, requesting a judgment on the merits from the state court, such as with a motion for summary judgment, will almost inevitably constitute a waiver. *See, e.g., Quatman .v. Beverly Savana Cay Manor, Inc.*, 2004 WL 370275 (M.D. Fla. 2004) (trial order) (defendants waived right to remove by, among other things, filing a motion for summary judgment).



Beyond these examples on the ends of the litigation-conduct spectrum, what will constitute sufficient use of state court processes to effect a litigation-based waiver is murky at best. Much of the confusion grows from the fact that a determination of what constitutes sufficient use necessarily requires a case-by-case analysis. The lack of relevant Eleventh Circuit authority may also be to blame.

Litigation-Based Waiver In the Eleventh Circuit

The Eleventh Circuit directly addressed the issue of what affirmative state court uses will constitute a waiver of the right to remove in April 2004, in a pair of cases decided less than two weeks apart. In *Cogdell v. Wyeth*, 366 F.3d 1245 (11th Cir. 2004), and *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244 (11th Cir. 2004), the Court addressed the specific issue of whether filing a motion to dismiss in state court constitutes sufficient use of state court processes to constitute a waiver.

In both cases, the relevant facts are substantively identical. Plaintiffs sued defendants in Florida state court. Defendants then filed motions to dismiss in the state court. The *Cogdell* defendants alleged a failure to state a claim, and alternatively moved for a more definite statement. The *Yusefzadeh* defendants moved to dismiss for lack of personal jurisdiction and the existence of complaint defects such as statute of limitations. Before taking any further action on the motions to dismiss, and before the state court could rule on them, both defendants removed the cases to the United States District Court for the Middle District of Florida. The district court *sua sponte* remanded both cases to the state court, holding that the defendants had waived their right to remove when they filed motions to dismiss in state court.

The Eleventh Circuit reversed and remanded in both cases. The Court first took up the *Yusefzadeh* case, and in a *per*

curiam opinion, held that defendants' moving to dismiss in state court did not constitute "substantial offensive or defensive actions in state court" sufficient to constitute a waiver of the right to remove. The Court reasoned that neither the defendants nor the Court had taken any action on the motion to dismiss after it had been filed. Recognizing that Florida law requires a motion to dismiss be filed within 20 days, and the federal statutes allow 30 days for removal, the Court further reasoned that this "quandary" should not be used to prevent a state court defendant who protects his right to file a motion to dismiss from seeking to remove.

Just 11 days after deciding *Yusefzadeh*, the Eleventh Circuit reached the same ruling in *Cogdell*. Again, the Court reasoned that neither the defendants nor the state court had taken any action on the motion to dismiss.

Left unanswered by the Court's two opinions is whether the Court's rulings would have been the same had the defendants pursued the motions to dismiss, or the state court considered or denied them. The Court also did not address whether its determination would have been different had the time limit for filing a motion to dismiss been the same or longer than the time to remove, as is the case in Alabama circuit courts (30 days to file a motion to dismiss).

Beyond these two cases, the Eleventh Circuit has been largely silent on what will or will not constitute sufficient substantial action in state court to effect a waiver of the removal right. The Eleventh Circuit acknowledged the litigation-based waiver five years earlier in *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1260-61 (11th Cir. 1999), but only to distinguish it from contractual waivers at issue in that case. The Eleventh Circuit also addressed the litigation-based waiver in 1998 in *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1381 n.15 (11th Cir. 1998), but relegated the discussion to a footnote, in which the court concluded that "the plaintiffs' attempt to preserve the timeliness of any possible future discovery cannot be equated with a waiver of their right to object to removal."

General Guidance from Other Courts

Although the extent of guidance from the Eleventh Circuit on the litigation-based waiver of the right to remove is scant at best, some general principles can be gleaned from authority from the district courts within the Eleventh Circuit, and cases from other courts.

Counterclaims

One lesson that the lower federal court cases teach is that defendants should be cognizant of the potential for a litigation-based waiver at every stage of the litigation, including at the initial pleading stage. In *Paris v. Affleck*, 431 F. Supp. 878, 880-81 (M.D. Fla. 1977), and *Briggs v. Miami Window Corp.*, 158 F. Supp. 229, 230-31 (M.D. Ga. 1956), the Middle districts of Florida and Georgia, respectively, held that the defendants in those cases waived the right to remove by filing non-compulsory counterclaims in the state court. (The defendant in *Briggs* had also filed a plea in abatement.) Both courts reasoned that the defendants, by filing the non-compulsory counterclaims, had voluntarily submitted themselves to the jurisdiction of the state because they had sought affirmative relief from the state court that was beyond what claims would be required to be filed in an answer in that court (i.e., compulsory counterclaims).

The *Paris* and *Briggs* opinions also seem to suggest that filing compulsory counterclaims with the answer will not amount to a waiver, although that issue was not before those courts, and precedent on this issue within the Eleventh Circuit is surprisingly sparse. Most (but not all) courts agree with this principle. The secret to avoiding the litigation-based waiver in the counterclaim context, therefore, is to make sure that the counterclaims one is filing in state court could be fairly characterized as compulsory, a determination not always easy to make.

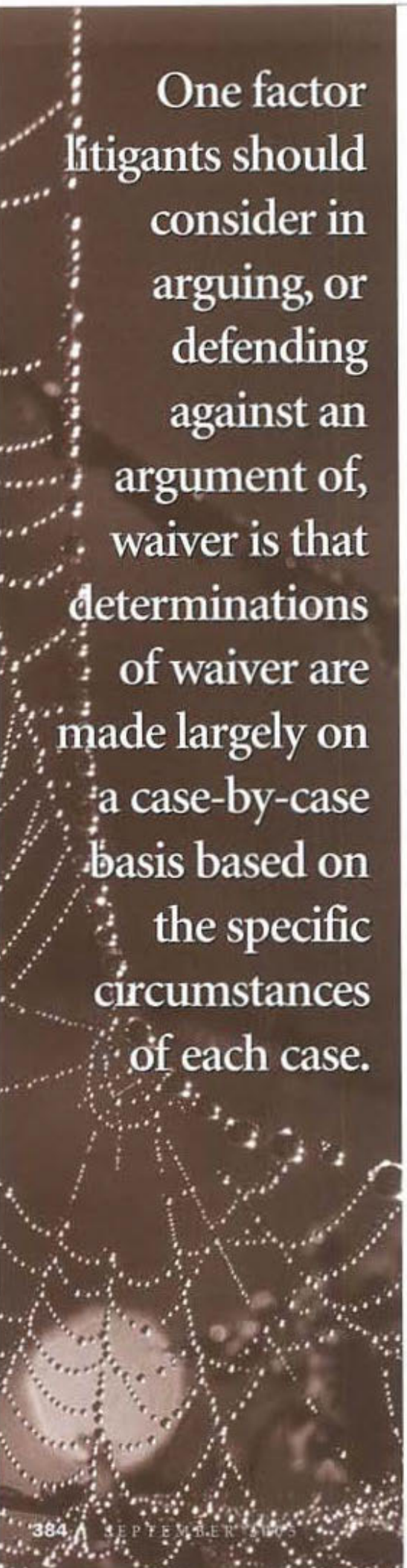
The Answer

Another lesson that can be learned from the district court opinions is that, although bringing permissive counterclaims may amount to a waiver, simply filing an answer likely will not. Consistent with virtually every other court to address the same issue, the federal district courts for the Middle District of Alabama and Southern District of Florida have both held that merely filing an answer in state court is insufficient activity to constitute a waiver. *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347-48 (M.D. Ala. 2000); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. supp. 127, 128-29 (S.D. Fla. 1985). Including affirmative defenses does not change this result. *Brown*, 128 F. Supp. 2d at 1347.

Admittedly, two courts have indicated that filing an answer may constitute a waiver. In 1999, Judge Pregerson, then with the Central District of California, noted in dicta that "[b]ecause the defendant may waive his right to remove should he file an answer in state court, removal generally occurs before the defendant serves a responsive pleading." *Clinco v. Roberts*, 41 F. Supp. 2d 1080, 1087 n.4 (C.D. Cal. 1999). Fifty years earlier, the Fifth Circuit noted that "if the [party] had any right of removal it waived the same by its answer." *Texas Wool & Mohair Marketing Ass'n v. Standard Acc. Ins. Co.*, 175 F.2d 835, 838 (5th Cir. 1949). However, the statements have not been followed by the Central District of California or the modern Fifth Circuit, and these authors have found no modern decisions where a court did in fact recognize a waiver based on the filing of an answer alone.

Discovery

Courts within the Eleventh Circuit have generally viewed serving discovery as merely a defensive action necessary to maintain the status quo, and thus not a basis for a waiver argument. In *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347-48 (M.D. Ala. 2000), the Middle District of Alabama held that a party's serving interrogatories and document production requests, even in conjunction with an answer setting out affirmative defenses and a motion for more definite statement, did not waive its right to remove. The court reasoned that the defendant's actions were "not at all comparable to the sort of dispositive motion addressing the merits of a case that arguably might most clearly demonstrate an intent to litigate." *Id.* at 1348. Similarly, in *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127, 128 (S.D. Fla. 1985), the Southern District of Florida held that a party's serving interrogatories, in addition to an answer and motion for extension of time, did not effect a waiver. As with the *Brown* court, the *Kraft* court reasoned that taking discovery "clearly do[es] not evidence an unequivocal intent to waive removal and



as such ha[s] been held not to result in the waiver of the right to remove." *Id.*

Again, however, litigants should beware. Most courts within the Eleventh Circuit have not addressed the issue of waiver based on serving discovery. The majority of courts outside the Eleventh Circuit to address the issue agree that serving discovery does not waive the right to remove, however, that position is not universal. For instance, the District of New Mexico in *Chavez v. Kincaid*, 15 F. Supp. 2d 1118, 1125 (D.N.M. 1998), held that a defendant waived his right to remove after serving discovery requests and a motion to dismiss. That caution should be tempered, of course, by the recognition that the *Chavez* opinion is the exception and not the rule.

Motion Practice

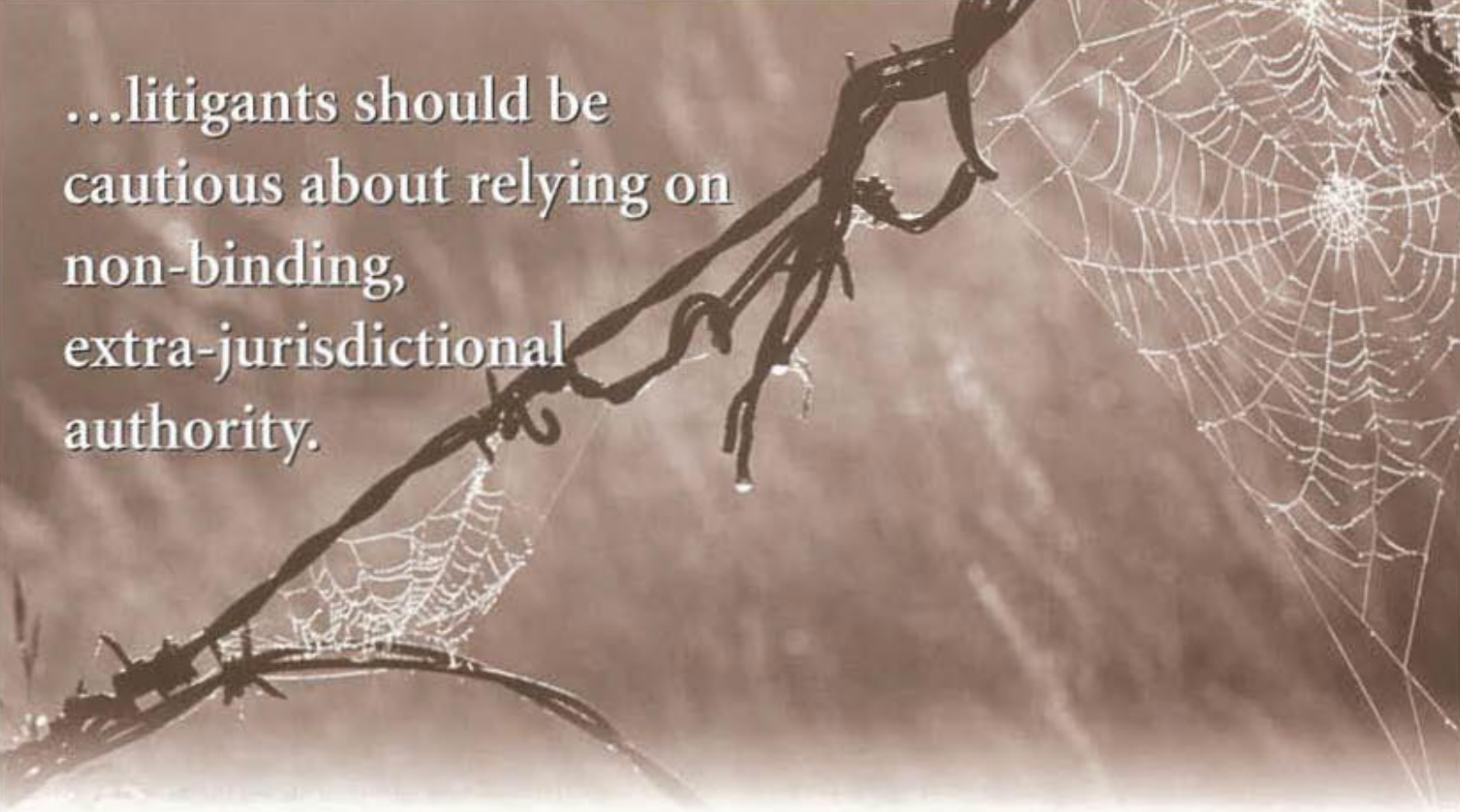
Motion practice in state court also raises the potential for a litigation-based waiver. The motion for summary judgment is the most apparent, with most all courts to address the issue (although that is not many in the Eleventh Circuit) agreeing that filing the motion results in a waiver of the right to remove. Filing multiple motions, and setting them for hearing or actually arguing them increases the risk of a waiver. For instance, the Middle District of Florida held in *Quatman v. Beverly Savana Cay Manor, Inc.*, 2004 WL 370275, at *1 (M.D.Fla. 2004), that "[d]efendants waived their right to remove this action to federal court by proceeding in state court, filing a Motion to Dismiss, Motion for Summary Judgment and/or Motion to Strike, serving Plaintiff with those dispositive motions and agreeing to a hearing time to have those motions disposed of in state court."

Filing some other motions, however, does not appear to constitute a waiver. The Southern District of Florida has held that a non-party's filing a motion to intervene did not constitute a waiver. *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355 (S.D. Fla. 2000). Other motions not effecting a waiver include a motion for extension of time (*Estevez-Gonalez v. Kraft, Inc.*, 606 F. Supp. 127, 128 (S.D. Fla. 1985)); a motion for stay pending arbitration and order compelling arbitration (*Fain v. Biltmore-Securities, Inc.*, 166 F.R.D. 39, 42 (M.D. Ala. 1996)); a motion for consolidation of two cases in state court (*Bley v. Travelers Ins. Co.*, 27 F. Supp. 351, 354 (S.D. Ala. 1939)); and a motion for more definite statement (*Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347-48 (M.D. Ala. 2000)). On the opposite side of the same coin, the Southern District of Florida has held that opposing a motion for preliminary injunction also does not effect a waiver. *Miami Herald Pub. Co., Div. of Knight-Ridder Newspapers, Inc. v. Ferre*, 606 F.Supp. 122, 124 (S.D. Fla. 1984).

The precedent regarding motions to dismiss, however, is not so easy to traverse. After *Cogdell* and *Yusefzadeh*, it appears in the Eleventh Circuit that merely filing a motion to dismiss will not constitute a waiver–although as discussed above one could argue that this notion is still in doubt in cases where the time to respond to a complaint in state court is no shorter than the time to remove. One should not assume that the Eleventh Circuit answered the question of whether acting on a motion to dismiss, or filing a motion to dismiss in addition to other state court filings constitutes a waiver. As discussed above, in the *Yusefzadeh* and *Cogdell* opinions, the court addressed the filing of motions to dismiss, with no further action on those motions. Moreover, the court did not address the issue of whether filing a motion to dismiss, in addition to other actions in the state court, will constitute a litigation-based waiver. Other courts have. For instance, in *Fernandez v. Amrep, Inc.*, 1999 WL 54524 (S.D. Fla. 1999), the Southern District of Florida held that "[b]y voluntarily entering into a dispositive ruling on an element of Plaintiff's Complaint in state court [dismissing a claim following a motion to dismiss], Defendant made affirmative use of the state court process, and thereby waived its right to remove the action to federal court." The Middle District of Florida recognized a waiver when the defendant filed three motions to dismiss and scheduled a hearing on the motions *Scholtz v. RDV Sports, Inc.*, 821 F. Supp. 1469, 1470 (M.D. Fla. 1993).

A Combination of Procedures

One factor litigants should consider in arguing, or defending against an argument



of, waiver is that determinations of waiver are made largely on a case-by-case basis based on the specific circumstances of each case. Those determinations are made, often not in the vacuum of a single action, but based on the cumulative effect of a multiplicity of actions It is commonly not the single action of filing a motion, for instance, that will effect a waiver, but the cumulative effect of multiple procedural maneuvers in the state court. Therefore, simply because one court holds that each individual move does not constitute a waiver does not mean than the cumulative whole will not be viewed as such.

Consequences of Waiver

Once a party waives its right of removal, that right, with limited exception, is waived for all time. The litigation-based waiver is no exception. Defendants who otherwise may have chosen to litigate in federal court will be forced to litigate the claims in state court. Additionally, an order remanding an improperly removed claim back to state court "may require payment of just costs and any expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). For a client, and an attorney's relations with his client, this can be a catastrophic result.

A Word of Caution

It goes without saying that litigants should be cautious about relying on non-binding, extra-jurisdictional authority. This is particularly true with regard to case law analyzing the issue of litigation-based waiver, given that this area of the law in particular is fluid and in many respects still in its infancy. Additionally, state-specific procedures may help dictate whether a defendant's actions constitute sufficient substantive activity to result in a waiver, thereby resulting in seemingly divergent positions from the same court. For instance, although courts generally hold that merely filing an answer in state court does not constitute a waiver of the right to remove, those courts yet to address the issue may sooner find waiver where the defendant has relied on a state law procedure allowing general denials in answers, in order to avoid the line-by-line response in an answer in federal court.

Ultimately, the question of what litigation conduct in state court is sufficient to effect a waiver of the right to remove is a grey issue that will continue to be decided over time on a case-by-case basis. For now, take the cases already decided on this issue as some guidance, but proceed with caution: Your client's right to remove depends on it. ■

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About Members, Among Firms

The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice.

About Members

Valerie Kisor Chittom announces the opening of the **Law Office of Valerie Kisor Chittom**, 700 Alabama Avenue, Selma. Phone (334) 874-1111.

Joseph P. Van Heest, formerly an assistant federal defender for the Middle District of Alabama, announces the opening of the **Law Office of Joseph P. Van Heest LLC**, 402 S. Decatur Street, P. O. Box 4026, Montgomery 36103-4026. Phone (334) 263-3551.

B. Scott Shipman, formerly of Latham, Moffatt, Shipman & Wise PC, announces the opening of **B. Scott Shipman PC**, 1205 21st Street, P.O. Box 549, Haleyville 35565. Phone (205) 486-7000.

Victor Kelley, formerly of Emond, Vines, Gorham & Waldrep PC, announces the opening of **Victor Kelley LLC**, 505 N. 20th Street, Suite 1650, Birmingham 35203. Phone (205) 244-1449.

Bert Joseph Miano announces the opening of **Miano Law PC**, 201 Avon Place, 700 29th Street South, Birmingham. Phone (205) 714-7199. An additional office opened in San Francisco.

Kelly Marie McDonald announces the opening of her firm, 100 Jefferson Street, Huntsville 35801. Phone (256) 534-5003.

Among Firms

C. Barton Adcox and **Bryan P. Winter** announce the formation of **Adcox Winter LLP,** 2201 Jack Warner Parkway, Suite 2-A, Tuscaloosa 35401. Phone (205) 345-4115.

J. Michael Manasco announces his private practice has closed and he is now general counsel for **Alabama State Treasurer Kay Ivey**, State Capitol Building, S-106, P.O. Box 302510 Montgomery 36130-2510. Phone (334) 242-7500.

Alacare Home Health & Hospice announces that **Adrian C. Payne** has joined the agency as in-house counsel. A 2002 graduate of the University of Alabama School of Law, she was a senior editor of the *Alabama Law Review*.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces the addition of **Timothy M. Lupinacci, Eric L. Pruitt** and **Rhenda Barnes** to the firm's Birmingham office. The firm also announces **D. J. Simonetti** as the new office managing shareholder of the firm's Birmingham office.

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

Robert C. Campbell, III and **Barry C. Prine** announce the opening of **Campbell, Duke & Prine,** 851 E. I-65 Service Road, Suite 700 (Union Planters Tower), Mobile. Phone (251) 476-2400.

Capell & Howard PC, with offices in Montgomery and Opelika, announces that **Michael P. Dalton** has become an associate of the firm and will work in the Montgomery office.

Feld, Hyde, Wertheimer, Bryant & Stone PC announces that **James J. Coomes** and **Kay O. Wilburn** have become shareholders.

Friedman & Downey PC announces that **Paul E. Meyers** and **Aimee A. Dugas** have joined the firm as associates.

Gamble, Gamble, Calame & Chittom LLC and **Valerie Kisor Chittom** announce that Chittom has been appointed a municipal judge for the City of Selma and effective June 1, 2005, she will be withdrawing from the firm. The firm name will return to **Gamble, Gamble & Calame LLC**.

The **Jefferson County District Attorney's Office** in Birmingham announces the addition of three attorneys. **Joseph Basgler, III** is a 2002 graduate of the University of Alabama Law School and was previously in private practice in Bessemer. **Tyler Koch Forsythe** graduated from the University of Alabama Law School in 2003 and previously worked for a law firm in Chelsea. **Allen Goodwine** worked for an online research service after graduating from Birmingham School of Law in 2004.

Frederick T. Kuykendall, III has joined the Mobile firm of **Taylor Martino**. The firm has changed its name to **Taylor Martino Kuykendall**. The new office is located at 51 St. Joseph Street, Mobile. Phone (251) 433-3131.

The **Law Office of Earl H. Lawson, Jr.** announces that **William F. Smith, II** has joined the firm as field legal counsel.

Timothy B. Loggins and **Eugenia L. Loggins** announce the reopening of their offices. **The Loggins Firm LLC** is located at 100 North College Street, Opp 36467. Phone (334) 493-9761.

Polson & Robbins announces that **Whitney B. Polson** has joined the firm as an associate attorney.

The Powell Law Firm PC in Andalusia announces that **Corey Daniel Bryan** and **Grant John Scott** have become associated with the firm.

Micki Beth Stiller PC announces that **Donna M. Graves** has become associated with the firm.

Thomas, Means, Gillis & Seay PC announces the hiring of **Camille L. Edwards** as a staff attorney in its Birmingham office, and of **Charles James, II** as attorney in its Montgomery office.

Turner, Webb & Roberts PC of Tuscaloosa announces that **James H. Roberts, Jr.** has joined the firm as a shareholder.

Wilmer & Lee PA announces that **T. Dwight Sloan** and **Samuel H. Givhan** have become partners with the firm, and **Chad W. Ayres, Christian M. Comer, Rachel M. Howard, T. Mark Maclin, Clint L. Maze**, and **Mark F. Penaskovic** have become associated with the firm.

Alan Zeigler and **Jason Britt** announce the formation of **Zeigler & Britt Attorneys LLC**, with offices in Birmingham and Wetumpka. ■

By J. Anthony McLain

Imputed Disqualification Of Law Firms When Non-Lawyer Employees Change Firms

QUESTION:

In formal opinions RO-91-01 and RO-91-28, the Disciplinary Commission of the Alabama State Bar held, in substance, that conflicts of interest resulting from non-lawyer employees changing law firms can be overcome by building a "Chinese wall" to screen the newly hired employee from involvement with any matter on which the employee worked while employed at his or her old firm. In recent years, however, an increasing number of jurisdictions have concluded that such screening procedures are ineffective when a non-lawyer employee has obtained confidential information concerning the matter in litigation. Consideration of the positions taken by these jurisdictions calls into question the factual and ethical validity of the rationale upon which these two opinions were predicated and the Disciplinary Commission, therefore, has determined that the conclusions reached therein should be reconsidered.

ANSWER:

A non-lawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a non-lawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and, therefore, must be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case.

DISCUSSION:

In some jurisdictions the "Chinese wall" cure for conflicts resulting from changing firms has been applied to lawyers as well as non-lawyers. The Alabama Supreme Court, however, has taken the position that the "Chinese wall" concept should not apply to practicing lawyers. In *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), the court held, by way of dicta, that the "Chinese wall" could not provide an effective screen to attorneys in private practice but should apply only to government or other publicly employed attorneys. 572 So. 2d 1231, 1234 at n. 3.

More significantly, in 1990, the Alabama State Bar proposed, and the Alabama Supreme Court adopted, the *Alabama Rules of Professional Conduct*, which became effective January 1, 1991. Rule 1.10(b) of the *Rules of Professional Conduct* governs conflicts of interest on the part of a firm which employs an attorney previously employed by opposing counsel in ongoing litigation and provides, in substance, that an attorney with confidential information about a former client has a conflict of interest which precludes representation by the firm. The rule makes no mention of, or provision for, any type of "Chinese wall" screening process.

Based upon the above, the Office of General Counsel and the Disciplinary Commission have consistently held that such conflicts on the part of an attorney cannot be cured or overcome by erection of a "Chinese wall" or any other type of screening procedure. The Disciplinary Commission, however, refused to disallow the "Chinese wall" concept in addressing conflicts of interest which can result when a non-lawyer changes law firms.

In recent years, various jurisdictions have begun to question the effectiveness of screening procedures when a non-lawyer employee who changes firms is in possession of confidential information concerning the matter in litigation. One of the first jurisdictions to reject screening and to hold non-lawyer employees to the same standard as lawyers was the U.S. District Court for the Western District of Missouri. In *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W. D. Mo. 1984), the Court made the following statement:

> "Non-lawyer personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have a devastating effect on both the free flow

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of information between the client and the attorney and on the cost and quality of legal services rendered by an attorney. Every departing secretary, investigator or paralegal would be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." 588 F. Supp. at 1044.

Subsequently, as more states began to adopt the *Model Rules of Professional Conduct*, or some variation thereof, more and more jurisdictions concluded that Rule 5.3(a)&(b)[1], when read in conjunction with Rule 1.10(b)[2], requires that non-lawyer-employees be held to the same standards as attorneys with regard to client confidentiality and conflicts of interest resulting from changing firms. Typical of the jurisdictions which employed this analysis is the opinion of the Supreme Court of Nevada in *Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997). The Nevada Supreme Court concluded as follows:

> "When SCR 187 [ARPC Rule 5.3] is read in conjunction with SRC 160 (2) [ARPC 1.10 (b)], non-lawyer employees become subject to the same rules governing imputed disqualification. To hold otherwise would grant less protection to the confidential and privileged information obtained by a non-lawyer than that obtained by a lawyer. No rationale is offered by *Ciaffone* which justifies a lesser degree of protection for confidential information simply because it was obtained by a non-lawyer as opposed to a lawyer. Therefore, we conclude that the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a non-lawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests." 945 P.2d at 953.

The Nevada Supreme Court characterized the "Chinese wall" approach as having

been "roundly criticized for ignoring the realities of effective screening and litigating that issue should it ever arise." The court cited as an example of such criticism an article in the *Georgetown Journal of Legal Ethics*, viz.:

> "For example, one commentator explained that a majority of courts have rejected screening because of the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures. M. Peter Moser, 'Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm,' 3 *Geo. J. Legal Ethics* 399, 403, 407 (1990)." 945 P.2d at 953.

There are numerous other decisions which reach the same or similar conclusions, e.g., *Cordy v. Sherwin Williams*, 156 F. R. D. 575 (D.C. N.J. 1994); *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, 764 F. Supp. 712 (D. Conn. 1991); *Makita Corp. v. U.S.*, 17 C. I. T. 240, 819 F. Supp 1099 (CIT 1993); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 129 A.D.2d 678, 514 N.Y.S. 2d 440 (1987); *Smart Industries v. Superior Court*, 179 Ariz. 141, 876 P.2d 1176 (1994); *Koulisis v. Rivers*, 730 So.2d 289 (Fla. Dist. App. 1999); *Daines v. Alcatel*, 194 F. R. D. 678 (E. D. Wash. 2000); *and Zimmerman v. Mahaska Bottling Co.*, 270 Kan. 810, 19 P.3d 784 (2001). In *Zimmerman, supra*, the Supreme Court of Kansas pointed out that disqualification is not inevitable in every instance.

> "Our holding today does not mean that disqualification is mandatory whenever a non-lawyer moves from one private firm to another where the two firms are involved in pending litigation and represent adverse parties. A firm may avoid disqualification if (1) the non-lawyer employee has not acquired material and confidential information regarding the litigation or (2) if the client of the former firm waives disqualification and approves the use of a screening device or Chinese wall." 19 P.3d at 793.

For the reasons stated above, the Disciplinary Commission of the Alabama State Bar is of the opinion that a non-lawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a non-lawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and, therefore, must be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case. However, as indicated in *Zimmerman, supra*, the client of the former firm may waive disqualification and approve the use of a screening device or Chinese wall. (RO 2002-01) ■

Endnotes

1. Rule 5.3(a)&(b) provides as follows:
   "With respect to a non-lawyer employed or retained by or associated with a lawyer:
   (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
   (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

2. Rule 1.10(b) provides as follows:
   "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9(b) that is material to the matter."

Disciplinary Notices

Notice to Show Cause

- **Stephen Duane Fowler**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2005, or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ABS nos. 04-03(A) and 04-174(A), by the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Supreme Court of Alabama entered an order based upon the decision of Disciplinary Board, Panel VI, reinstating Montgomery attorney **Branch Donelson Kloess** to the practice of law in the State of Alabama, effective June 15, 2005. [Pet. for Rein. No. 05-02]

- The Supreme Court of Alabama entered an order based upon the decision of Disciplinary Board, Panel VI, reinstating Florence attorney **Barry Neal Brannon** to the practice of law in the State of Alabama, effective June 15, 2005. [Pet. for Rein. No. 04-04]

Disbarment

- Birmingham attorney **Marvin Lee Stewart, Jr.** was disbarred from the practice of law in the State of Alabama effective May 6, 2005, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

  Stewart was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective April 22, 2003.

  The complaint that made the basis of the disbarment was one of numerous complaints filed against Stewart that resulted in his interim suspension. Specifically, Stewart represented an individual in a federal civil action. The case was settled. The client signed the settlement documents but did not sign the settlement check because Stewart told him it would take some time before the check could be disbursed. Thereafter, when the client would call to inquire about the settlement proceeds, Stewart, or someone to his discretion, would tell the client that the funds had not been received. However, Stewart deposited the settlement check into his trust account the day after the client promptly signed the settlement. Instead, he transferred $45,000 of the $48,000 settlement into his firm's operating account and used most of the client's share of the settlement to pay other firm expenses.

  After a hearing in the matter, the Disciplinary Board found Stewart guilty of violating rules 1.15(a), 1.15(b) and 8.4(a), (c) and (g), *A.R.P.C.* and fixed Stewart's discipline as disbarment. [ASB No. 03-88(A)]

- Birmingham attorney **James Shawn McKinnon** was disbarred from the practice of law in the State of Alabama, effective June 17, 2005, by order of the

Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting McKinnon's surrender of his license and consent to disbarment. [Rule 23; Pet. No. 05-01]

- Scottsboro attorney **Dennis Gene Nichols** was disbarred from the practice of law in the State of Alabama, effective June 8, 2005, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. The board further ordered that Nichols make restitution of all fees paid to him in each case not previously refunded as set forth in the formal charges filed against him.

Nichols failed to respond to the formal charges filed against him by the Office of General Counsel. As a result of the default judgment against him, Nichols was found guilty of all of the charges as follows:

In ASB No. 02-21(A), Nichols accepted a fee of $640 to represent a client in a criminal matter. Thereafter, he became unable to pursue the matter due to his being suspended. Nichols failed to communicate with the client or to refund her fees and failed to respond to her complaint filed with the Alabama State Bar. [Violations of rules 1.3, 1.4(b), 1.5(a), 1.16(d), 8.1(b), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-28(A), Nichols accepted a fee of $600 from a client to file a bankruptcy. He did not file the bankruptcy. Thereafter, he was suspended from the practice of law. Nichols only refunded a portion of the fee and failed to respond to the complaint filed with the bar. [Violations of

Disciplinary Notices

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rules 1.3, 1.4(b), 1.5(a), 1.16(d), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-50(A), Nichols accepted fees of $660 from a client to file a bankruptcy. Thereafter, Nichols was interimly suspended from the practice of law without having performed the agreed-upon services. Nichols told the client that he would have another attorney work on the matter, but failed to do so. [Violations of rules 1.3, 1.4(b), 1.5(a), 1.16(d), 8.1(b), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-93(A), Nichols was hired in 1995 by a client to file a Chapter 13 bankruptcy. In 2002, the client filed a complaint with the Alabama State Bar alleging that Nichols had kept two checks that had been sent to him and, to the client's knowledge, Nichols had cashed one of the checks. Despite notices by certified mail, Nichols never responded in any way to the complaint filed with the bar. [Violations of rules 1.15(a) and 8.1(b), *A.R.P.C.*]

In ASB No. 03-51(A), Nichols was hired by a client and his wife in 2002 to handle an adoption. He was paid fees of $600 for this work, plus "filing fees," which he asked for on three separate occasions. Nichols told the clients that the adoption papers had been filed, but upon checking with the clerk of the court, the clients learned that the adoption had never been filed. Nichols failed to respond to the complaint filed with the bar. [Violations of rules 1.3, 1.4(b), 1.5, 8.4(c) and 8.4(g), *A.R.P.C.*] [ASB nos. 02-21(A), 02-28(A), 02-50(A), 02-93(A), and 03-51(A)]

Suspensions

- Selma attorney **Robert Boland Blair** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective May 20, 2005. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Blair had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 05-05]

- On July 14, 2005, the Supreme Court of Alabama entered an order suspending Alabama attorney **Beatrice Elaine Oliver** for a period of seven months. On June 24, 2004, Oliver was suspended for a period of seven months by the Grievance Committee of the State Bar of Texas. The terms of her suspension included a one-month suspension, with the remaining six months probated, subject to specific terms and conditions. Oliver was instructed to make restitution to the complainant, Erika Medlow-Braxton, in the amount of $9,213, on or before July 31, 2004. In or about September or October 2004, the Alabama State Bar received notice of Oliver's suspension from the National Lawyer Regulatory Data Bank.

  Upon the Alabama State Bar's receipt of the certified copy of the suspension from the State Bar of Texas, a notice of filing was made and on February 25, 2005, an order was entered requesting Oliver to show cause why identical and reciprocal discipline should not likewise be imposed. Oliver filed an answer to the show cause order and stated that she could find no grounds as to why identical and reciprocal discipline should not likewise be imposed.

  The April 28, 2005 motion for order to impose reciprocal discipline was granted on May 5, 2005 by the Alabama State Bar Disciplinary Board, Panel V, effective on the day of the order.

- On May 20, 2005, the Supreme Court of Alabama entered an order accepting the order of Panel I, Disciplinary Board of the Alabama State Bar, entered on March 15, 2005, suspending Mobile attorney **Stephen Keith Orso** for a period of five years, effective July 17, 2002, the date of his interim suspension. Orso waived the filing of formal charges and pled guilty to violations of rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*, in ASB nos. 04-83(A), 04-87(A) and 02-194(A). Orso plead guilty to all charges filed in the remaining bar complaints:

  In ASB No. 00-43(A), Orso was retained by a client regarding termination of child support obligations due to his children having reached the age of emancipation. Orso failed to file the necessary paperwork with the court and would not communicate with his client. Orso refunded a portion of the fees. [rules 1.3 and 1.4(a), *A.R.P.C.*]

  In ASB No. 00-216(A), Orso was retained and paid $1,500 to represent a client regarding a 20-year prison sentence the client was serving. A hearing was scheduled on a motion-to-restructure sentence filed by Orso. It was reset on at least four occasions. Orso did not perform any other legal services on behalf of his client. [Rule 1.5(a), *A.R.P.C.*]

  In ASB No. 01-204(A), a client retained Orso to obtain emergency temporary custody of her stepchild. Orso instructed the client to come to his office to complete necessary paperwork. When the client appeared at Orso's office, Orso's staff knew nothing about the case. The client hired another lawyer at an additional fee to complete the matter. That lawyer completed the necessary work and obtained an emergency order. At first, Orso refused to refund the client's money claiming the client failed to show for her appointment. Later, Orso refunded the fee. [rules 1.3, 1.4(a), 1.5(a) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-59(A), Orso tendered a trust account check to the probate court. The check was returned for insufficient funds. The court sent Orso numerous notices regarding the dishonored instrument. Orso failed to remit the funds to the probate court for approximately three weeks. In Orso's written response to the bar, he essentially admitted that he did not keep his clients' funds in a separate account designated as "Attorney Trust Account," "Attorney Escrow Account" or "Attorney Fiduciary Account." Orso also admitted that it was not his practice to separate clients' funds given to him for filing fees from his own funds. [rules 1.15(a) 1.15(d), 1.15(e), 1.15(f), 1.15(g), 8.4(d), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-60(A), in October and November 2001, Orso negotiated three separate worthless checks, each in the amount of $3,396.80, to Wilstaff Worldwide Staffing in violation of the criminal laws of the State of Alabama. [rules 8.4(b), 8.4(c) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-79(A), Orso was retained to prepare an uncontested divorce. Between February and December 2001, the client and his wife negotiated the terms of their divorce on their own. The wife's lawyer sent Orso the executed divorce documents. Orso's client signed the documents. Orso did not file the divorce petition until after the client filed a complaint with the bar. [rules 1.3 and 1.4(a), *A.R.P.C.*]

In ASB No. 02-156(A), Orso was retained to open a guardianship/conservatorship for the client's mother. Orso's office was provided with all necessary information. The client was repeatedly asked by Orso's office to provide the same information she had provided earlier. The client later learned that the case had not been filed, although Orso's office staff had told her the matter had been filed. After unsuccessful attempts to meet with Orso, Orso's services were terminated. With knowledge that he had been terminated by the client, Orso attempted to file the guardianship/conservatorship. Orso failed or refused to refund the fee. [rules 1.1, 1.3, 1.4(a), 1.5(a), 5.1(c), 8.4(c), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-167(A), Orso was hired to file suit against two individuals regarding an assault. Orso filed the suit on January 2, 2001. Only one defendant was served. The served defendant filed a verified motion for summary judgment claiming that he was not one of the persons who committed the assault. Orso filed no affidavits in opposition to the summary judgment motion and, therefore, it was granted. Orso stated that he thought he could rely on the "verified complaint" filed to initiate the case; however, it was not a "verified complaint." The client made several efforts to obtain his file from Orso, but Orso would not release it. [Rule 1.1, *A.R.P.C.*]

In ASB No. 02-178(A), Orso was hired to file a civil suit and was paid an advance fee of $900 toward a $1,500 fee. After Orso failed to keep several scheduled appointments, the client terminated Orso and requested a refund of the fee and his file. Orso did not refund any portion of the fee, and could not locate the client's file. [rules 1.3, 1.5(a), 1.16(d) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-194(A), the Disciplinary Commission determined that this matter be dismissed if Orso made a refund of half of the attorney's fees. The client retained Orso for a fee of $2,500 to appeal the court's decision in the client's divorce. After Orso had the first court date continued his law license was suspended. Orso sent the client's files to another attorney, but did not forward or refund the unused

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portion of his retainer. The client had to pay an additional $3,500 to the new attorney to complete her case. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-207(A), Orso was paid $1,500 to represent a client in a custody proceeding. Orso failed to prepare for hearings and failed to subpoena appropriate witnesses. [rules 1.3, 1.4(a), 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-208(A), Orso was retained to represent a client in a juvenile criminal matter. Later, the client's mother requested that Orso get a continuance of the court date, as her son would be out of state until school started. Orso did not file any pleadings seeking a continuance, nor did he appear in court. A warrant was issued and the client was arrested. [Rule 1.3, *A.R.P.C.*]

In ASB No. 02-209(A), Orso was retained to represent a client with an adoption. Orso had the client sign the necessary adoption papers, but never placed the necessary notice in the newspaper nor file the pleadings in court. Later, the same client retained Orso to represent her in a divorce. Orso never achieved any significant legal results in either case. The client terminated Orso's services, but received no refund of any fees paid. [rules 1.3, 1.4(a), 1.4(b) and1.5 (a), *A.R.P.C.*]

In ASB No. 02-212(A), Orso was retained to represent a client in a child custody matter. The client paid Orso $1,000. At the time of Orso's suspension, he had not performed any significant legal work for this client. Orso did not refund any portion of the unearned fees. [rules 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-213(A), Orso was retained to represent a client regarding visitation issues with his children. The client signed documents which were to be filed in court. Orso later called the client and told him that he was overbooked with clients and therefore was turning over his case to another lawyer. In fact, Orso had been suspended by the bar. The client learned that Orso had not filed anything on his behalf. [rules 1.3, 1.4(b) and 1.5(a), *A.R.P.C.*]

In ASB No. 02-237(A), a client paid Orso $3,500 to represent him in a criminal case. Approximately ten months later, Orso's license was suspended. Orso forwarded the client's file to another attorney, but did not refund any of the unearned fees. [rules 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-238(A), Orso was hired to represent a client in a criminal case. Later, Orso informed the client that he had been suspended from the practice of law and could not represent her. The client was unsuccessful in obtaining a refund. [rules 1.5(a), 1.16(d) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-239(A), Orso was retained to represent a criminal client to seek a sentence reduction. Orso met with the client and advised him to call after four weeks for an update. Afterwards, the client was unable to get in contact with Orso. [rules 1.3, 1.4(a), 1.5(a) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-255(A), a client hired Orso to handle a petition for guardianship and conservatorship. Later, the ward died and the matter converted to the probate of an estate. At the time of his suspension, Orso had done very little work to establish and close or probate the estate. Orso provided his file materials to another attorney but did not refund any of the fees. [rules 1.3, 1.5(a), 1.16(d) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-265(A), Orso was retained to represent a client in a child support matter. Prior to his suspension, Orso did not file any pleadings, return the client's phone calls or refund any portion of the unused fees. [rules 1.5(a) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-266(A), Orso was retained regarding change of venue/child custody matter. After Orso's suspension, he did not refund any unused portion of the advanced fees. Orso stated in his response to the bar that he sent her file to another attorney, but did not remember who. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-267(A), Orso was retained to correct the deed to property a client had purchased. Orso did not complete the work and subsequently did not refund any unused attorney's fees. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-280(A), Orso was representing a client in connection with a divorce, child support case and Chapter 13 bankruptcy. Orso borrowed $8,000 from the client. Orso executed a

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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.**

promissory note on April 23, 2002, whereby four installment payments of $2,500 were to be paid by August 22, 2002. Any balance still outstanding after August 22, 2002 would be doubled. Orso only repaid $700 of the loan. [rules 1.8(a) and 1.8(b), *A.R.P.C.*]

In ASB No. 02-288(A), Orso was retained to represent a client with grandparents' visitation rights as well as custody for the son. Orso filed a custody petition for the client's son, but did nothing further on the grandparents' visitation matters. Orso had not achieved any results by the date of his suspension. Orso did not notify the client of his suspension, nor did he refund any portion of the advanced fee. [rules 1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(d), and 8.4(g), *A.R.P.C.*]

In ASB No. 02-290(A), Orso was retained to represent a client in a criminal case. Two days later, Orso was interimly suspended by the bar. Orso never notified the client of his suspension, nor did he refund the fees paid. [rules 1.4(b), 1.5(a), 1.16(d) and 8.4(g), *A.R.P.C.*]

In ASB No. 02-304(A), Orso was retained to represent a client in a domestic matter. Orso did not complete the work he was retained to do nor refund any portion of the advanced fee. Orso did not respond to the bar regarding this complaint. [rules 1.3, 1.5(a), 1.16(d) and 8.1(b), *A.R.P.C.*]

In ASB No. 02-321(A), Orso was retained to file a bankruptcy for a client. Later, Orso notified the client that he was not going to be able to handle her case due to his interim suspension. Nothing was filed on behalf of

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the client and none of the advanced fees were refunded. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 02-332(A), Orso was hired to represent a client with a possible reduction in his prison sentence. Orso never filed a motion or other written request for a sentence reduction. [rules 1.3, 1.4(a), 1.4(b) and 1.5(a), *A.R.P.C.*]

In ASB No. 03-10(A), Orso was retained to represent a client in a divorce. Prior to his suspension, he had not initiated any divorce proceedings. [rules 1.3, 1.4(a), 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 03-25(A), Orso was retained to represent a client in a child support matter. By the date of his suspension, Orso had not performed any substantial work on the case. Orso failed to refund any of the fees paid. [rules 1.4(b), 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 03-26(A), Orso was hired to represent a client in a divorce matter. The opposing party never responded to the agreement Orso sent to him. Subsequent to his suspension, Orso did not refund any of the advanced fees. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 03-41(A), Orso was retained in or about June 2000 to pursue a wrongful death action. When the client would inquire about the status of the case, she would usually be told that they were awaiting a court date. After Orso's suspension, the client learned that Orso did not file the lawsuit. [rules 1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(d), 8.4(c), and 8.4(g), *A.R.P.C.*]

In ASB No. 04-83(A), Orso was retained and paid to represent a client in criminal matters. Orso appeared for court but after court had adjourned, Orso did little or no work in the matter. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*]

In ASB No. 04-87(A), Orso was hired to file a divorce. After Orso's suspension, the client learned that Orso had not filed his divorce proceeding. [rules 1.3, 1.5(a) and 1.16(d), *A.R.P.C.*] [ASB nos. 04-083(A), 04-087(A), 02-194(A), 00-43(A), 00-216(A), 01-204(A), 02-059(A), 02-060(A), 02-079(A), 02-156(A), 02-167(A), 02-178(A), 02-194(A), 02-207(A), 02-208(A), 02-209(A), 02-212(A), 02-213(A), 02-237(A), 02-238(A), 02-239(A), 02-255(A), 02-265(A), 02-266(A), 02-267(A), 02-280(A), 02-288(A), 02-290(A), 02-304(A), 02-321(A), 02-332(A), 03-010(A), 03-025(A), 03-026(A), 03-041(A), 04-083(A), & 04-87(A)]

- On April 22, 2005, the Supreme Court of Alabama adopted the March 9, 2005 order entered by the Disciplinary Board, Panel V, accepting the conditional guilty plea entered by Birmingham attorney **Stephen Daniel Phillips** involving bar complaints filed against him. Phillips waived the filing of formal charges by the bar in ASB No. 04-187(A) and CSP No. 05-170(A). He pled guilty to violations of rules 1.3 and 8.1(b), *Alabama Rules of Professional Conduct*, in connection with those two complaints. Phillips had been defaulted on the merits in the remaining charges filed against him. Phillips acknowledged guilt of all rule violations alleged in said charges. Phillips accepted a five-year suspension in resolution of the disciplinary cases pending against him. He received credit for the time he has spent under an interim and summary suspension under Rule 20, *Alabama Rules of Disciplinary Procedure*, which was effective May 12, 2003. Phillips is to sign a two-year contract with the Alabama Lawyer Assistance Program. Successful completion of that program shall be a condition of any future reinstatements to the practice of law.

  In ASB numbers 03-103(A), 03-105(A), 03-107(A), 03-114(A), 03-116(A), 03-128(A), 03-129(A), 03-130(A), 03-146(A), 03-166(A), 03-167(A), 03-183(A), 03-184(A), 03-246(A), and 04-15(A), Phillips pled guilty to violating, in whole or in part, rules 1.3, 1.4(a), 1.5(a), 1.16(d), 8.1(b), 8.4(c), and 8.4(g), *A.R.P.C.* Phillips either failed to file bankruptcy for his clients or willfully neglected the bankruptcy after filing. Phillips also failed or refused to communicate with his clients and failed to refund fees associated with these matters. [ASB numbers 03-103(A), 03-105(A), 03-107(A), 03-114(A), 03-116(A), 03-128(A), 03-129(A), 03-130(A), 03-146(A), 03-166(A), 03-167(A), 03-183(A), 03-184(A), 03-246(A), and 04-15(A)]

- Madison attorney **David Ashby Thomas** was suspended from the practice of law in the State of Alabama for a period of two years, effective June 8, 2005, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

  In ASB No. 04-127(A), Thomas accepted a retainer of $648 from a client. Thereafter, Thomas did little or no work on the matter, would not return the client's phone calls and failed to communicate with her about the status of the matter. During the representation, Thomas took possession of the title to the client's vehicle. As of the date the client filed her grievance with the Alabama State Bar, Thomas had not returned the title to her despite her repeated requests for its return. Thomas failed to answer the grievance filed with the bar, with the bar's last request for a response being returned marked "refused."

  In ASB No. 04-130(A), Thomas accepted a retainer of $534 from a client to represent him in a child support modification matter. Thereafter, Thomas left his firm and told the client he was having trouble getting his files from his former firm. Throughout the

representation, Thomas failed to communicate with his client and did little or no work on the matter. In February 2004, Thomas told the client he would refund the fee but never did. Despite two requests, Thomas failed to answer the grievance filed against him with the Alabama State Bar.

Formal charges were filed in each case on September 15, 2004. As a result of Thomas' failure to answer the formal charges, on January 7, 2005, the disciplinary hearing officer granted the bar's motion for judgment pursuant to Rule 12(e)(1), *Alabama Rules of Disciplinary Procedure*, finding Thomas guilty as charged in the formal charges. On May 17, 2005, the matter was heard before Panel V of the Disciplinary Board on the sole question of the appropriate discipline to be imposed. As has been stated, the Disciplinary Board ordered that Thomas be suspended from the practice of law in the State of Alabama for a period of two years, effective immediately. The board further ordered that Thomas make restitution of all fees paid to him in each case not previously refunded as set forth in the formal charges filed against him. [ASB nos. 04-127(A) and 04-130(A)]

Public Reprimands

- Enterprise attorney **John Richard Hollingsworth** received a public reprimand without general publication on May 20, 2005, for violations of rules 3.3(a)(2) and 8.4(a), *Alabama Rules of Professional Conduct*. Hollingsworth was appointed conservator for his father who was physically and mentally incapacitated. While serving as conservator, Hollingsworth obtained a warranty deed conveying real estate from his father to him. His father subsequently died. Hollingsworth failed to provide notice to the court and obtain prior approval of the real estate conveyance and failed to disclose the transaction in his inventory and accounting, which was submitted with the petition for final settlement. [ASB No. 02-137(A)]

- On May 20, 2005, Millbrook attorney **John David Norris** received a public reprimand without general publication for violations of rules 1.3, 1.4(b) and 1.5(a), *Alabama Rules of Professional Conduct*. Alice Mink hired Norris to represent her in connection with a custody case involving her grandson. The case was pending in Chilton County. On April 16, 2003, a client contract was executed. Mink paid Norris $1,000 in installments. Norris attended one hearing in Juvenile Court. After that, he moved to another firm and ceased communicating with Mink. Norris took no further action on Mink's custody case, insisting that the matter was going to be handled by a lawyer he had associated to assist him with the case. That lawyer denied any such arrangement to Mink, as well as to the bar. Norris refunded $300 to Mink when he provided his written response to the bar complaint. [ASB No. 04-140(A)]

- On May 20, 2005, Birmingham attorney **Paul Archie Phillips** received a public reprimand without general publication, for violations of Rule 7.3(a), in ASB No. 03-045(A); Rule 8.4(g) in ASB No. 03-188(A); and Rule 1.15(b) in ASB No. 04-078(A), *Alabama Rules of Professional Conduct*. Phillips was also placed on two years' probation.

  In ASB No. 03-045(A), an investigator working for Phillips made direct contact with an automobile accident victim, who was already represented by counsel. Phillips and his investigator later met with the victim and had her sign a letter terminating her existing counsel and executing a contract employing Phillips.

  In ASB No. 03-188 (A), Phillips offered money to a UAB Hospital employee in return for information on accident victims admitted to the hospital. That employee reported this offer to a hospital supervisor, who initiated a bar complaint against Phillips.

  In ASB No. 04-078 (A), Phillips settled a slip-and-fall case for a client and received a settlement check for $10,000 on July 7, 2002. Phillips did not pay the client his share of the proceeds until December 6, 2002. [ASB nos. 03-045(A), 03-188(A) and 04-078(A)]

- On May 20, 2005, Tuscaloosa attorney **James Dwight Smith** received a public reprimand with general publication for violations of rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct*. On August 3, 2001, Cynthia Hubbert hired Smith to represent her in a sexual harassment case against her employer. She signed a contract on that date, and also filled in portions of an EEOC complaint form which was to be completed by Smith's secretary for later signature, and to be filed with the EEOC. After the initial meeting, Smith never filed the complaint with the EEOC, nor did Smith take any other action on Hubbert's behalf. Hubbert called Smith on several occasions to find out when she should come in to sign the complaint. Smith failed to respond to those calls. Upon learning that her case had been compromised by Smith's neglect, she filed a complaint with the Alabama State Bar. In response to her complaint, Smith conceded that, "I am probably guilty of attempting to take on a matter I should not have taken on." Smith blamed the problem on family medical problems and his involvement in several large class action lawsuits. Smith also stated that Hubbert was out of touch for an extended period of time. However, Smith's office file contained no indication of any effort by Smith to contact her about the case during this time. [ASB No. 03-136(A)] ■

Classifieds

Classifieds "Going to the Web"

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

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- **HANDWRITING EXPERT/FORENSIC DOCUMENT EXAMINER**: ABFDE-certified, formerly chief, Questioned Documents Division, U.S. Army Criminal Investigation Laboratory. American Society of Questioned Document Examiners. American Academy of Forensic Sciences. Civil and criminal cases accepted. Farrell Shiver, Shiver & Nelson Document Investigation Laboratory, 1903 Lilac Ridge Drive, Woodstock, Georgia 30189. Phone (770) 517-6008.

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Classifieds

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