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Vol. 67, No. 4

The Alabama Lawyer

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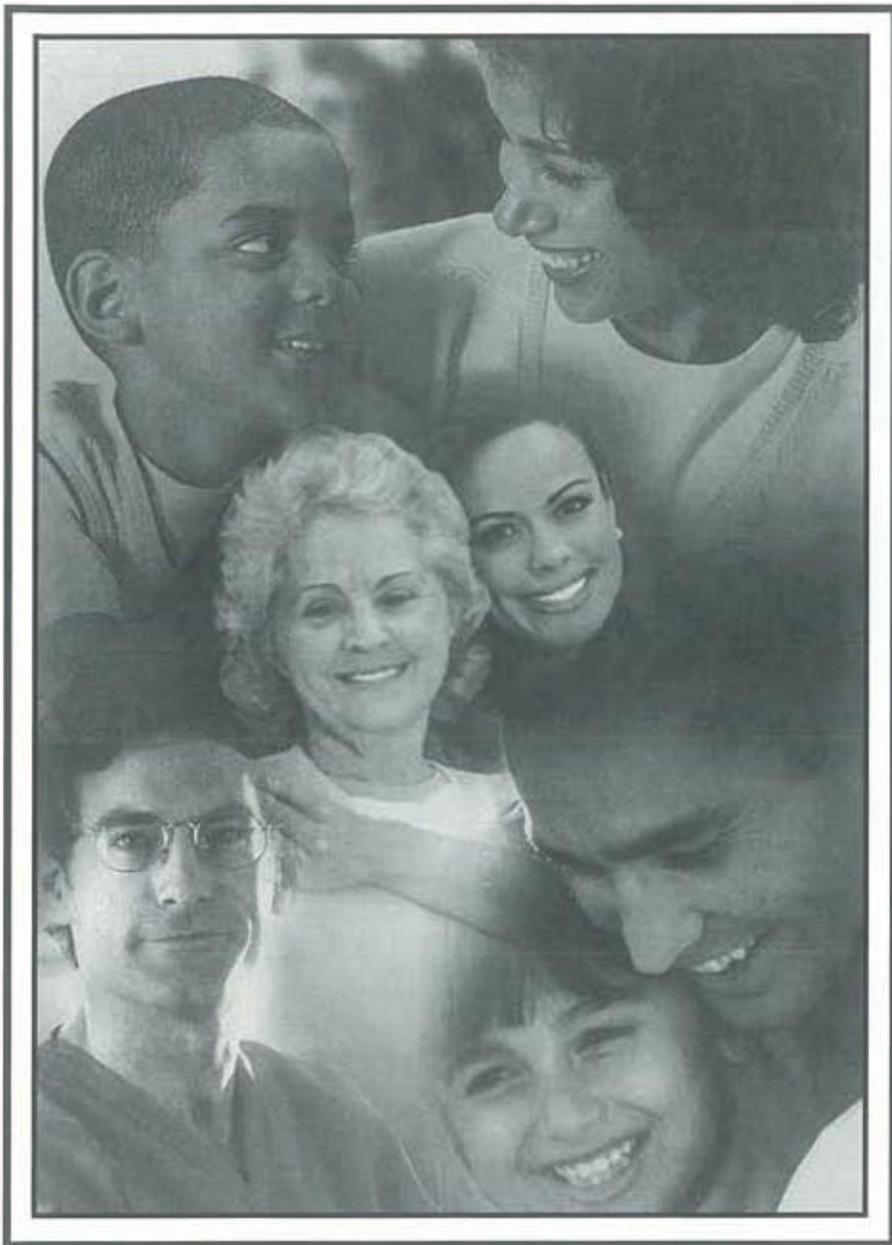
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The Alabama Lawyer

July 2006

Vol. 67, No. 4

254

ON THE COVER

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Photo by Paul Crawford, JD
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LAW DAY 2006:

250 Special Event Celebrates 50th Anniversary of
Historic Case that Ended Bus Segregation In Alabama

251 Hundreds of Law Day Posters, Essays Show
Students' Views of American Legal System

252 Disaster Preparedness: Ready, Set, Go!
(What to Do When the Next Hurricane Hits)
By Allison Alford Ingram

254 Preparing for the Unexpected:
Anticipate and Plan for Law Office Disasters
By Laura A. Calloway

THE ALABAMA LAW FOUNDATION:

257 Awards 2006 IOLTA and Endowment Grants

258 Atticus Finch Brochure receives ADDY

260 Making The Plaintiff-Property Owner Whole:
The Recovery of Stigma Damages
By Stephen T. Etheredge

260

Table of Contents >> continued on page 226



272 Is The Alabama Supreme Court Obligated to Follow Precedental Case Law of The United States Supreme Court?

By James F. Vickrey, Jr.

280 The Contours of Arbitration Discovery

By W. Scott Simpson and Omer Kesikli

287 Practicing Technical Proficiency in Legal Writing: Seven Ways to Avoid Embarrassing Yourself And Your Client

By Professor Neil M. B. Rowe and Professor Christopher L. Frost



DEPARTMENTS

228 President's Page

Many Things But Never Boring

238 Executive Director's Report

Do Americans Want an Independent Judiciary?

240 Bar Briefs

242 Memorials

248 Disciplinary Notices

290 CLE Corner
Stress-Free CLE

294 Young Lawyers' Section

The "Thank-You" Article

296 Legislative Wrap-Up
Really Productive Legislature

300 Opinions of the General Counsel
Unclaimed Client Trust Funds—Escheat to State

302 About Members, Among Firms

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Bobby Segall

Every year, *The Alabama Lawyer* editor, Robert Huffaker, spends some quality time with the president of the Alabama State Bar, looking back over his year in office, and discussing accomplishments, disappointments, surprises and the future. For all of you who know the current president, Bobby Segall, this is no small undertaking. By the end of the interview, I think Robert had resigned from the editorial board, Bobby had been fired from his firm and Veronique, who used to work for Bobby and was "hired away" by Robert, had just walked out.



Doug McElvy and Bobby Segall at the 2005 ASB Annual Meeting—After "grooming" Segall for a year, McElvy gets ready to "let him loose" on the bar and the public!

Many Things But Never Boring

Q What is the biggest surprise of your presidency?

A That I got elected. I think my wife Sandy still is in shock. She thinks she's the only one crazy enough to select me for anything, and she's not sure she'd select me again.

Q Anything else?

A I've been surprised by how generous lawyers across this state are. Not only did lawyers come up big for disaster relief, but the Birmingham Bar Association raised a ton for Legal Services Alabama. Sam Franklin and Lee Pittman headed up that campaign for LSA, and the result of that effort, although only a beginning, was inspiring. I knew those big firms had more money than G-d (i.e., more than Jere Beasley or Bobo Cunningham, depending on your religion), but I didn't know they were so generous with it.

Q You've written some fairly controversial—and sometimes funny—"President's Page" columns. Have you had any negative reaction to them?

A One Alabama licensed lawyer in California wrote me and said I was a clown and a disgrace to the bar.

Q Did you respond and, if so, how?

A I carefully pondered my response. I thought anything I said should reflect the maturity and reserve of the office I hold. I also felt that as a matter of courtesy and professionalism, I should promptly respond. So, I faxed him a note saying, "No, I'm not, but you are."

Q Have you had any seriously negative reaction to your columns from lawyers who actually practice in Alabama?

A Not to my face. I think it's possible Justice Parker hasn't appreciated some of my comments, but he was probably too nice to tell me that personally—either that, or he thought he would get physically ill if he had to look at me. Some friends disagreed with some points I tried to make, but that was just expressing a different view. No one has been insulting to my face. Alabama lawyers are nice that way. Generally, if they have

something bad to say about you, they have the courtesy to say it behind your back, which is definitely the way I prefer it.

Q (Alabama Republican Party Chair) Twinkle Andress Cavanaugh didn't always treat you so nicely, did she?

A Twinkle has always been nice to me when we've been together. I really like her. We have a lot in common. A good friend of mine who used to work for the ACLU of Alabama is a close relative of Twinkle's. I think Twinkle has ACLU tendencies. She may be getting treatment for that, though.

Q Has there been any response from the public to anything you've written?

A Yes, it turns out that in one of the cases where Judge Charles Nice overrode the jury's recommendation of death, the victim was the daughter of Miriam Shehane, director of VOCAL, Victims of Crime and Leniency. Understandably, Ms. Shehane did not think well of Judge Nice, or of my column. She got Troy King to write the letter that is printed in this very issue of the *Lawyer* (immediately following this interview). Troy didn't think of writing anything on his own, but I don't blame him for trying to act tough during an election year. As you can see from his letter, though, he's a pretty good actor. One thing Troy said is that my letter upset victims "across Alabama." I'm sorry about that, but I do want to congratulate you on the tremendous circulation growth *The Alabama Lawyer* has apparently experienced under your leadership. She was particularly upset that the column failed to mention that during the time Judge Nice was on the Domestic Relations Court he received a suspension from the Court of the Judiciary.

Q Why did you omit that from your column?

A It was a judgment call. I agonized about it, but ultimately decided it wasn't relevant to the topic, which was Judge Nice's legislative and judicial

courage. If I were writing about the war-time courage of Audie Murphy or Sgt. York or some other war hero, I wouldn't necessarily include that years after



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exhibiting such courage, the war hero had failed to pay his income taxes. I'm not saying anyone did fail to pay his income taxes—it's just a hypothetical.

Q Speaking of a hypothetical, what do you consider your biggest accomplishment as president?

A No one, at least to my knowledge, has yet proposed impeachment. That's better than the last two presidents of our country. Other than that, I don't know that I have accomplished anything really. I've tried to help create a tone or atmosphere for our bar in which all Alabama lawyers, no matter their race, sex, religion or national origin, could, and would, feel completely welcome and wanted. Regardless of those birth factors, and regardless of the area of law in which one practices, and regardless of whether one represents plaintiffs or defendants, the Alabama State Bar should be a place where all Alabama lawyers can share their common concerns and work together for our profession and for justice.

Q How have you gone about doing that?

A I've tried to set that kind of tone in what I've written for *The Alabama Lawyer* and in my talks around the state. More concretely than that, though, the Alabama State Bar, in conjunction with the Alabama Lawyers Association, put on the best program I've ever attended as a lawyer, and I think that program helped demonstrate the kind of atmosphere our bar wants.

Q What was the program?

A It was a celebration of the 50th Anniversary of *Browder v. Gayle*, the case that ended the Montgomery Bus Boycott. It was also a celebration of the events that led to the case and of the people involved in the case—the parties, the boycott participants, the lawyers and the judges. It was an all-day program, organized under the primary leadership of Carol Ann Smith of Birmingham, but also with the help of Janet Akers and Kendall Dunson, both of whom are com-

mited members of the ASB and leaders in the Alabama Lawyers Association.

Q Frankly, that program doesn't seem like it would generate widespread interest across the bar. Did it?

A Unbelievably so. The folks on the program were tremendous. They included Fred Gray, Wayne Greenhaw, who wrote an acclaimed book about the boycott, Bill Clark, Judge Truman Hobbs, Sr., Rod Nachman, and Claudette Colvin and Mary Louise Smith Ware, both of whom refused to give up their seats on a Montgomery city bus before Rosa Parks did, and both of whom were plaintiffs in the lawsuit. It also included Judge U.W. Clemon, who spoke about E.D. Nixon. Syd Fuller, who was Judge Frank Johnson's first law clerk, spoke about him. Judge Ginny Granade, who was the granddaughter of Judge Richard Rives, spoke about him, and Robert Potts, a former law clerk for Judge Seybourn Lynne and now the chancellor of the North Dakota University System, came in from North Dakota to speak about Judge Lynne.

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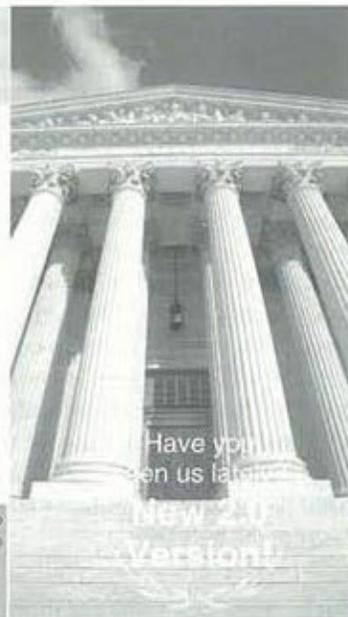
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Dean Charlie Gamble summed up the day. All of these folks were great.

Q What was attendance like?

A It varied throughout the day with the lunch program having the largest crowd. We had planned for a maximum of 350 people, but after we received 450 registrations, we had to stop taking them.

Q So the program was an unqualified success?

A The day was summed up best by an e-mail I received the next day from Ernestine Sapp, a former bar commissioner and a partner of Fred Gray's. It really captures what a lot of other people said. It said, "Dear Bobby: Yesterday was a rare occasion in our legal community. A day of healing. It is days like this that move our whole state forward. THANKS for your sensitivity and honesty. Equally as poignant is your article on "independence." I am pleased to learn of Judge Charles Nice. Thank you is much too simple but it is straight from the heart."

Q I'm guessing that made you feel pretty good?

A It made me feel good about the effect of the program, but I didn't deserve the credit. The folks I mentioned before did all the work, along with their committee members, and the ASB Staff, especially Eddie Patterson and Susan Andres. Keith Norman, of course, oversees everything.

Q Has the ASB done anything else to promote active participation by minorities in bar programs and bar leadership?

A The Board of Bar Commissioners elects nine at-large members with the idea being to increase the diversity of the bar commission along lines of race, sex, age and even geography, and to make

the commission more representative of bar membership. The idea for at-large members started when Fred Gray was president, but this bar year was the first time at-large commissioners actually served. Every at-large commissioner has served exceedingly well, and one, Merceria Ludgood, has served on the Executive Council of the bar. My hope is that this taste of leadership will encourage minorities, including women, to seek election to the commission and to otherwise increase their participation in bar work.

Q Are there other things about the year that you consider accomplishments?

A You headed up a task force that I think did a great job. Your task force has recommended that Alabama

grant reciprocity to lawyers of good character and fitness who have passed another state's bar exam and who plan to live in Alabama or have their primary office here. The Board of Bar Commissioners approved the task force's recommendation at its meeting on May 19. It will now go to the Alabama Supreme Court for its approval. The commissioners also approved the recommendation of the task force for *pro hac vice* admission procedures for out-of-state lawyers handling capital punishment cases or post-conviction criminal matters in Alabama on a pro bono basis.

The Judicial Liaison Task Force, chaired by Sam Franklin and Jere Beasley, has also done excellent work. It has proposed a new protocol for the bar's responding to unfair criticisms of judges and also is undertaking to raise funds to help assure that new judges get to go to judge school.

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Another accomplishment relates to the development of a **Spanish Hotline**. Although I've had almost nothing to do with it, sometimes when you appoint good people, you get to claim credit for the great work they do. The bar's **Public Relations Committee**, which always does good work under its chair **Scotty Colson**, appointed a subcommittee on Spanish outreach chaired by **Flynn Mozingo**. That subcommittee worked with the Volunteer Lawyers Program and Legal Services Alabama to develop a Legal Hotline for Spanish-speaking people. This is an access-to-justice type program, where folks who speak only Spanish can talk to someone in their native tongue and hopefully get directed to the legal help they need, including to law firms



Spanish Hotline Project Core Partners included representatives from the Alabama State Bar, Legal Services Alabama and numerous other statewide Hispanic organizations. ASB members who headed up the program were Flynn Mozingo (back row, left center) and Scotty Colson (back row, right center).

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Another relates to mentoring. Pam Bucy and Ted Hosp lead a task force that recommended a pilot project that will begin later this year. That task force did a ton of work, and I think it came up with a program that has good potential.

The last area I'll mention is disaster relief. In my opinion, the Alabama State Bar had a tremendous response to Hurricane Katrina, but I'm even more impressed by the work of the Volunteer Lawyers Program and Legal Services Alabama in preparing for future disasters that we pray will not occur. There's an article about that in this edition of the *Lawyer*.

Q You didn't mention the legislatively enacted increase in lawyer license fees as an accomplishment. Wasn't the ASB behind that?

A Yes. The Alabama State Bar has tried to get that passed for three years now. Doug McElvy did a lot of work on it last year. I don't think there had been an increase in the license fee for something like 12 or 15 years, and it was badly needed. It finally passed this year, but I give full credit to Doug and Keith Norman. I have enough baggage without being known as the tax-and-spend president.

By the way, may I ask you a question?

Q Sure.

A Am I boring you with these answers as badly as I'm boring myself?

Q I don't want to answer that to your face. In accordance with the preference you expressed earlier, I'll talk behind your back tonight at home. What, if any, disappointments have you had as bar president?

A I've had at least two. The biggest relates to indigent criminal defense. We very badly need a statewide indigent defense commission with

authority to determine what kind of delivery program is best (in terms of quality and economy) for each judicial circuit. There has to be local input into the decision-making, but I believe the statewide commission should have authority to make the decision. The problem right now is that appointed lawyers are paid an inadequate hourly rate, and whether they are entitled to be reimbursed for overhead expense is pending in court. Because the bill to create a statewide indigent defense commission did not solve the inadequate pay problem, the Alabama Criminal Defense Lawyers Association opposed legislation to create the commission. I think the ACDLA believes the commission is a good idea, but its members don't want to lose leverage by letting that pass without also solving the compensation issue. As a

result, despite that the chief justice and former Justice Gorman Houston urged the bar commission to endorse the commission bill, it declined to do so for the second straight year.

Q Would it have passed if the bar had endorsed it?

A I don't know. There was no opposition to the license fee increase bill for the two years before this year, and it still didn't pass. I feel sort of like Tommy Wells, whom I think will be unopposed for the presidency of the American Bar Association this coming year, or the year after that. Tommy told me that since he has no opposition, his chances are 50-50.

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President's Page

Continued from page 233

Q How did the chief justice take being rejected by the bar commission?

A He told me the commission was so tough, he was happy to escape the imposition of capital punishment.

Q What's your other disappointment?

A Disappointment may be the wrong word, but I wish we had made more progress on the merit selection of appellate judges. Bill Clark revitalized the push for a saner way to select judges when he was bar president, and he definitely inspired me.

Q Do you think that will ever come to pass, given the reaction of the Republican Party?

A I think it will in time. The state bar must remain consistent and persistent in its efforts. If Justice Houston really gets fired up, I think it can happen. I know Boots Gale and the new president-elect will be strongly supportive. I think Boots can be an inspiring leader in that effort.

Q Why will the Republican Party ever be persuaded? It has almost every appellate judge now.

A Because changing to a system that includes a judicial nominating commission, appointment by the governor, a judicial evaluation committee, and a retention election is not intended to, and won't, change the composition of the court. I truly believe the Republican Party, on reflection, will do what's best for the State of Alabama, for the citizens of Alabama and for justice.

Q Twinkle Andress Cavanaugh says you'll never be able to take politics out of the selection of judges. Do you disagree with that?

A Yes, to some extent she's right. Politics will always play a role. But



Members of Bobby Segall's family and the rest of the crowd get a kick out of the new president's remarks.

you can eliminate, or substantially diminish, the obscene amounts of money that are spent and the terrible, mean-spirited and un-judgelike advertising campaigns that are conducted. Very few people in our state believe judges who take a ton of money from one special interest group or another, and hope to get more funds for future elections, won't be influenced in their decision-making. It's critical not only that judges be impartial, but that people believe they are impartial, and I don't think we have that now.

Q Has serving as bar president taken up a lot of time?

A Yes.

Q What have you spent the most time doing?

A Do you mean aside from trying to get Keith Norman to loosen up?

Q Yes, aside from that?

A I've spent a good deal of time working on the merit selection of appellate judges. Whenever folks have asked me to speak, unless they've designated a different topic, I've talked about merit selection. Even when I've given ethics CLE talks, I've said that the way we select judges is criminal, and probably, therefore, unethical.

Q Have you enjoyed serving as bar president?

A Yes.

Q If you could, would you run again?

A No, like my good friend Newt Gingrich, I believe in term limits. Besides, just your asking the question is probably causing blood pressures across the state to jump. I can hear bar members everywhere mumbling to themselves, "Fool us once, shame on you. Fool us twice, shame on us."

Q We're running out of time. You have a reputation for being semi-witty—a quality you've disguised pretty well in this interview. Do you have anything witty to say in closing?

A I can tell you what my friend Von Memory said a few weeks ago. Von, who's my age, has announced he's retiring from the practice of law, and he's way too young to do that. He was in a group of lawyers a few weeks ago when someone asked why he was retiring. Von said, "I told myself ten years ago that if they ever make Segall president, I'm quitting."

Q I guess it's quitting time for this interview as well.

A Yes, I hope after this interview they'll let you remain editor of *The Alabama Lawyer*.

LETTER FROM ATTORNEY GENERAL TROY KING



STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
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May 17, 2006

Mr. Bobby Segall
President
Alabama State Bar
Post Office Box 671
Montgomery, Alabama 36101-0671

Dear Mr. Segall:

I just read your News Flash! in the May 2006 edition of "The Alabama Lawyer" in which you declared Judge Charles Nice an "unsung Alabama hero." I share your assessment that judges should be independent and that they should scrupulously obey "their sacred obligation to adhere to, and apply the law of the land ... independent of partisan (or any other) politics, of peer pressure and of public opinion." While I normally respect my grandmother's caution to never speak ill of the dead, because of the disservice that your column does to many dead and the pain it has inflicted on many survivors that they left behind, I feel compelled to respond on behalf of all of them.

In direct contradiction of your premise that a hero on the bench should "apply the law of the land," you continue on to applaud Judge Nice for, on four occasions, overriding the jury's recommendation that a convicted killer receive the death penalty. You describe this as a "courageous stand." To the victims' families who had fought to secure the one just punishment, Judge Nice's actions were not the independence that you purport to celebrate, but a denial of the justice they sought. Take, for example, the case of Eddie Bernard Neal, who killed Quinette Shehane. Her case was one of those where justice was denied by Judge Nice as he commuted Neal's death sentence. Certainly, all of us expect judges to craft sentences that are commensurate with the crimes committed. We do not, however, expect judges to accept a job that includes the responsibility of imposing the death penalty in appropriate circumstances and then refusing to do so based upon their own moral convictions. In fact, to do so, is not "independent" but is a deception of the worst kind. What you fail to note in your article was that Judge Nice

(Continued on next page)

Letter to Mr. Bobby Segall
May 17, 2006
Page Two

never imposed the death sentence a single time during the entire time he sat on the bench. Instead, he brought a bias to the bench and then abdicated his responsibility to do justice as he advanced his own agenda. You also fail to mention that Judge Nice's misconduct was much more egregious than his refusal to apply state law in capital cases. In fact, eventually, he was found guilty of four charges of misconduct by the Court of the Judiciary.

Your column and your designation of Judge Charles Nice as an "unsung hero" unnecessarily inflicted new pain on victims across Alabama. For many of us who stand at the side of the victims and seek to do justice for them each day, the heroes in Alabama, whether sung or not, are those who go into courtrooms across our land seeking nothing more than that justice be equally applied using scales that are properly balanced, not judges who place their thumb on the scales.

Sincerely,



Troy King
Attorney General

TK:oi

cc: Mrs. Miriam Shehane
Mr. Keith Norman, Executive Director, Alabama State Bar
Mr. Robert Huffaker, Editor, The Alabama Lawyer



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Cumberland School of Law is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our Continuing Legal Education seminars during the 2005–06 academic year. We gratefully acknowledge the contributions of the following individuals to the seminars' success.

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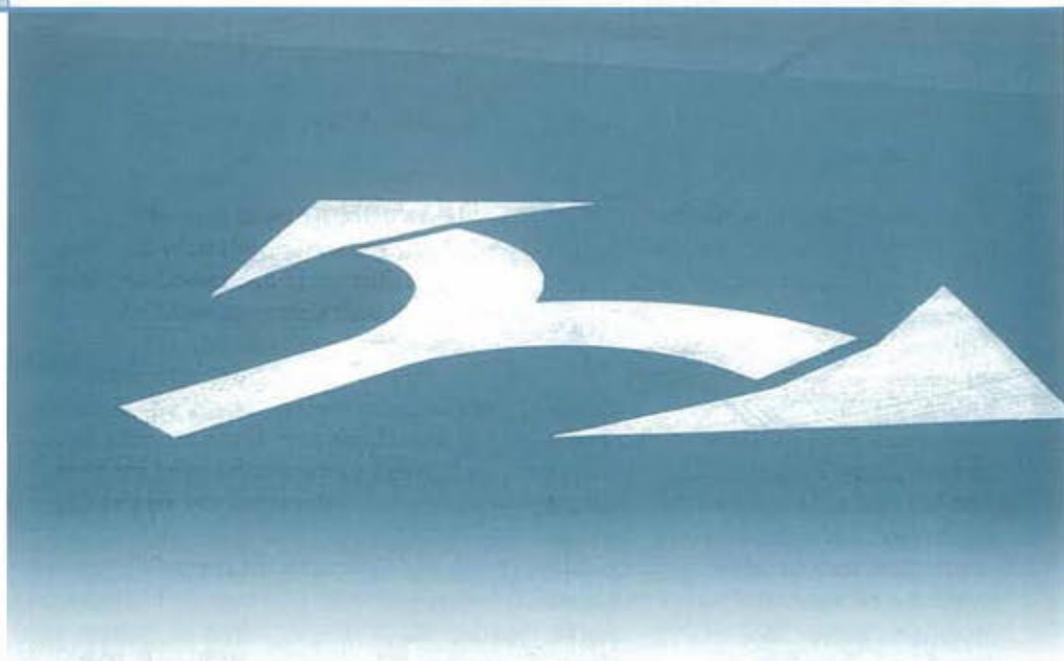
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Keith B. Norman



Do Americans Want an Independent Judiciary?

The theme of this year's Law Day, "Liberty Under Law—Separate Branches, Balanced Powers," made me think, what kind of judiciary do Americans want? As I write this "Executive Director's Report," we are in the midst of the primary campaign and the accompanying barrage of political messages from candidates for all elective offices, including judicial office. Sadly, the majority of statements or paid political ads emanating from the camps of judicial candidates look or sound like the messages of candidates seeking executive or legislative office.

I have always believed that judges can render no higher duty than simply to do justice. *Black's Law Dictionary* defines "justice" as, "The constant and perpetual disposition to render every man his due." *The American Heritage Dictionary* defines it as "fair handling; due reward or treatment." We should never require more from our judges than their dedication to this virtue demands. Apparently, though,

this virtue does not make for exciting campaigns or memorable candidates. Perhaps, judicial candidates and their handlers are telling the electorate what they think the electorate wants to hear. Indeed, as long as judges are required to seek office in the crucible of elective politics, we can hope for something different, but we should not expect it.

Do citizens desire impartial, fair-minded jurists? Have they have grown cynical, no longer believing there is such a thing as a fair and impartial third-party arbiter? Have we lost our appreciation for an independent judiciary? I don't know the answer to these questions, but I sure hope the behavior expressed by some fans and players toward umpires and officials is not how citizens feel about judges and the role the judiciary.

The field of competitive sports is replete with examples where fans, players, coaches or managers are quick to accuse the official or umpire of being

incompetent or biased when their team is not getting the benefit of the "calls". Let me state that disagreeing with an official's call at a ball game is a ritual that has long been a part of sports. What I am referring to, however, is the assumption that the umpire or official is making a call based on something other than his or her best judgment. Many fans and players no longer believe that an umpire or official is merely calling it as he sees it. A recent episode has made me realize this attitude is far-reaching.

For those who might not be familiar, tee ball is baseball for youngsters five to six years old. The game is designed to familiarize these young players with the rudimentary aspects of hitting and fielding. The players hit a ball that has been placed on a stationary tee and the opposing team attempts to field the ball. Teams play six innings and innings change when the team batting makes three outs, which is usually by having their runners tagged out, or scoring six runs. A final score is not kept. The game official is usually a teenager standing behind home plate that calls the outs and keeps up with the number of runs so that the innings can change.

Several weeks ago, my 12-year-old son, who has played baseball since he was five, was umpiring a tee ball game. He made a call that allowed one of the players from the team at bat to score a run. The adult coach from the opposing team, on which his son played, vehemently disagreed with the call. He berated my son for making the call and pointed a bat in his face in a threatening way. (Fortunately, this coach's actions that evening resulted in his removal by the league as a coach). Although this was an extreme case, it does reflect that there are those who are

unwilling to accept decisions of a fair and disinterested party who judges or officiates at a contest. These people seem to prefer someone who only sees the contest or dispute from their point of view.

Ours is a competitive society and we generally hate to lose. When we do, it is a lot easier to blame someone else than accept the facts or possibly our own shortcomings. Certainly, competition is fine for athletic events. Judicial proceedings, however, are not competitive endeavors. They are for resolving the disputes of parties by discerning the truth and following the law. Very often I receive calls and letters from parties who have had a court rule against them in a legal proceeding. They routinely rail that the "judge was bought" or in "cahoots" with the other party. For these parties, this is the only way they can explain why the court failed to rule in their favor. Sadly, they refuse to believe anything else.

An even more troubling manifestation of this attitude has recently taken place in South Dakota and Montana. A constitutional amendment has been proposed in both states, and possibly others, to provide for the recall of judges for *any* reason. The initiative is called "JAIL"—**Judicial Accountability Initiative Law**—and is led by a California lawyer. Never mind that states can remove judges from office either by impeachment or the ballot box. Under the proposals in South Dakota and Montana, a recall petition can be filed for any reason, without regard to a judge's good-faith efforts to perform the duties of office. In Montana, the petition language reads, "The justification statement is sufficient if it sets forth any reason acknowledging electoral dissatisfaction with a judge or justice notwithstanding good

faith attempts to perform the duties of office." This so-called "judicial accountability" is, to my way of thinking, no different from an adult tee ball coach threatening a 12-year-old umpire just because he disagreed with the call.

The feature of our system of government that has most impressed other countries around the world for many years is our adherence to the **Rule of Law**. The institution which has made this possible is an independent judicial branch of government. Those who support these judicial accountability initiatives are essentially saying that they no longer want an independent judicial branch of government. These "initiatives" should frighten everyone who understands the importance of checks and balances in our tri-partite form of government. With a number of Americans now eschewing judicial independence or deviating from the Rule of Law, it is doubtful that we will long continue as a worthy model for other nations to emulate.

This attitude seriously compromises an independent judiciary. Requiring more civics courses in our schools might help ameliorate this growing problem by emphasizing the importance of co-equal branches of government and the importance of judicial independence. As a profession, we should all recognize the seriousness of this problem and do our best to counsel our clients about the importance of an independent judiciary. Finally, judicial candidates should be mindful that campaigns mimicking the campaigns of legislative and executive officials will give the electorate little reason to perceive the judiciary any differently from the other two branches of government so as to afford it the independence necessary to render "equal justice under the law." ■

- Maynard, Cooper & Gale PC announces that **Stephen W. Still** has been appointed to the 2006 Lawyers Council of The Financial Services Roundtable. The Financial Services Roundtable is the premier forum in which leaders of the United States financial industry determine and influence public policy issues.

- Holland & Knight announces that Tampa partner **William R. Lane, Jr.** has been named a Fellow by the American College of Trust and Estate Counsel (ACTEC) at the association's recent annual meeting.



Lane

ACTEC is a professional association consisting of approximately 2,700 lawyers from throughout the United States. Fellows of the College are nominated by other Fellows in their geographic area and are elected by the membership at large. Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching and bar activities.

Lane earned a Bachelor of Arts, *cum laude*, in 1977, a master's of public administration and Juris Doctorate in 1980, from the University of Alabama, and a master's of laws (taxation) in 1981 from the University of Florida.

- **Laura Calloway**, director of the Alabama State Bar's Practice Management Assistance Program, has been appointed to a three-year term as a member of the governing council of the ABA Law Practice Management Section. In addition, she has been appointed to serve as secretary of the ABA Techshow 2007 Planning Board.
- **Ronald Levitt**, a shareholder with Sirote & Permutt PC, participated in a panel presentation of "Redemptions Involving S Corporations" at the American Bar

Association's Taxations Section Meeting in May. He currently serves as chair of the S Corporation Committee of the American Bar Association Section of Taxation, has been listed in Best Lawyers in Taxation since 1995 and is a Fellow in the American College of Tax Counsel. He has served as chairman of the Alabama State Bar's Tax Section, president of the Federal Tax Clinic, Inc. and of the Birmingham Tax Forum and as an adjunct professor of law for both the University of Alabama School of Law's LLM in Taxation program and Cumberland School of Law, teaching partnership taxation.

- **J. Mark White**, a founding member of White Arnold Andrews & Dowd PC, was recently inducted into the International Academy of Trial Lawyers (IATL).

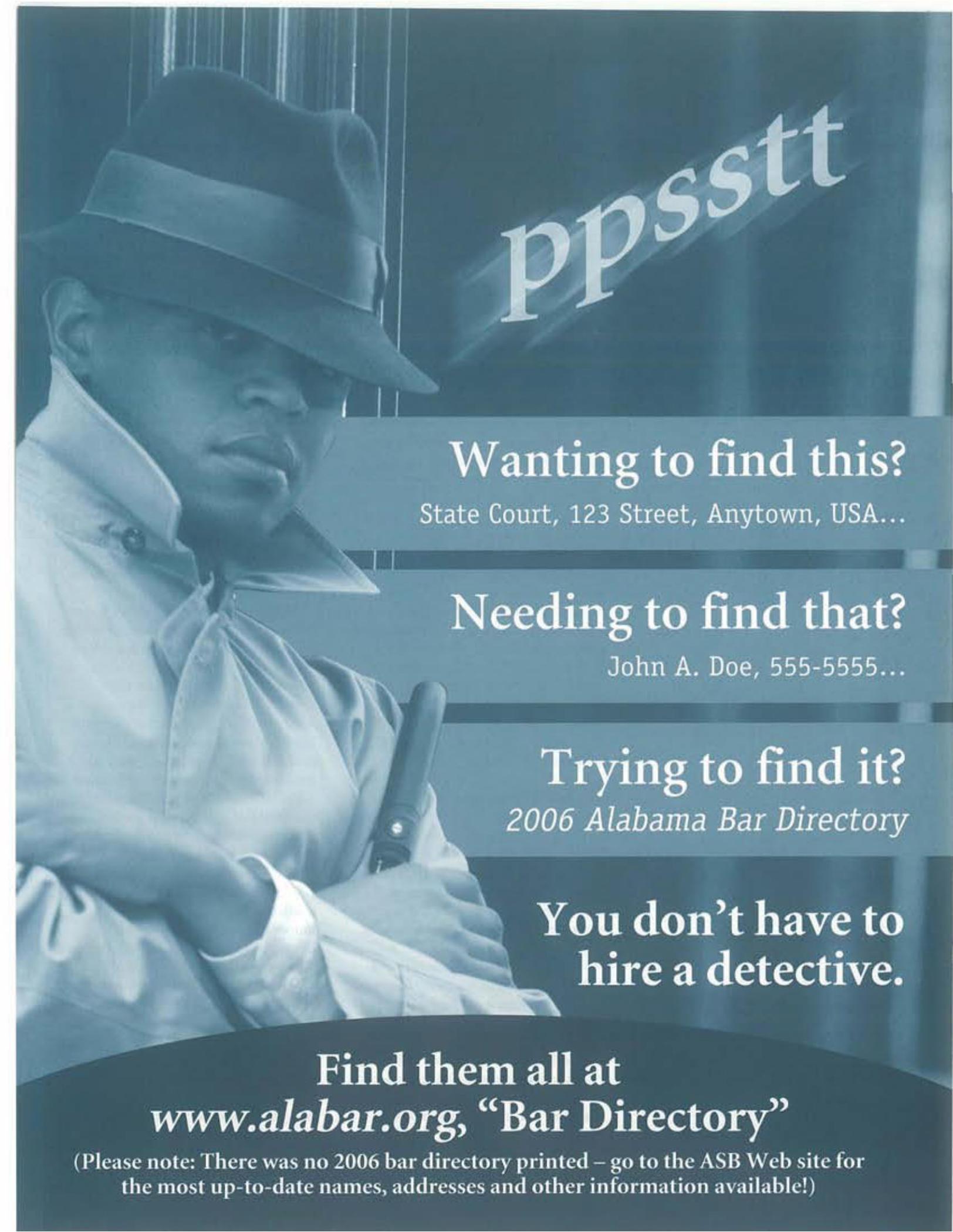


White

White, president of the Birmingham Bar Association in 2004, joins 12 other Birmingham lawyers in this national organization, including other former BBA presidents Clarence M. Small, Jr., Fournier J. Gale, III, Thomas W. Christian and Stephen Samples.

The International Academy of Trial Lawyers was chartered in 1954. Its purpose is to cultivate the science of jurisprudence, promote reforms in the law, facilitate the administration of justice and elevate the standards of integrity, honor and courtesy in the legal profession.

White graduated from Auburn in 1969 and received his law degree from Cumberland Law School in 1974. ■



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JOHN A. CADDELL

On February 7, 2006, death came to John A. Caddell of Decatur. He was 95 years old.

Widely, if not universally, John Caddell was recognized throughout the state as dean of the Alabama legal profession. His name was synonymous with honor, integrity, unsurpassed excellence at the practice of law and dedicated service to his community and to his fellow man.

For over 70 years Johnny practiced law in Decatur and Morgan County, continuing in active and effective practice until a few days before his death. His age notwithstanding, Johnny was more often than not the first in the office and the last to leave even until the week before his death.

While he lived in and loved Decatur and Morgan County, he was well-known and admired by most of the lawyers throughout the state. His reputation as both a lawyer and a dedicated public servant was the standard to which all lawyers in Alabama aspired but few achieved.

John Caddell was born in Tuscumbia on April 23, 1910. His family soon moved to Decatur. Educated in the public schools of Decatur, he attended the University of Alabama, graduating with a B.A. degree in 1931. Thus began a lifelong love affair between John Caddell and the University of Alabama. In 1933 he received his law degree from the university, and in 1992, he was honored by the university with a honorary doctorate of laws of degree.

Active in affairs of the student community even while attending the university, Johnny became a member of the "A Club," "Pi Kappa Alpha" social fraternity and "ODK and JASONS" honorary fraternities, and Phi Kappa Phi legal fraternity.

In 1954, Johnny was appointed to the University of Alabama Board of Trustees. He continued actively in that office until 1979 when he became a trustee emeritus. In 1975, while Johnny was serving as chairman of the university's board of trustees, then-President Dr. David Mathews was called to national service as a member of President Ford's cabinet.



Johnny was called to serve briefly as the interim university president.

While serving on the university board, Johnny chaired the search committee that led to the engagement of Dr. Frank Rose as the university president and he also was directly engaged in the efforts that brought Coach Paul "Bear" Bryant to the university. From the time that university identification by automobile tags became available, until his death, Johnny's car proudly bore the university tag number AA16". It would be impossible to find any citizen of this state who has made a greater contribution to the University of Alabama or, indeed, to the cause of education in Alabama than did John Caddell.

Upon graduation from law school and admission to the state bar in 1933, Johnny immediately began his practice in Decatur. At the time of his death, 73 years later, he was the senior partner of Harris, Caddell & Shanks PC. His skill and knowledge of the law have been constantly recognized and applauded by the bench and bar throughout the state and beyond. Perhaps the most eloquent testimony to his surpassing skills was the fact that, at 95, he was still the attorney of choice for many individual, corporate and governmental clients who recognized his unique abilities and unequalled understanding of complex legal issues. His mastery of the

law was a constant work in progress as he always stayed abreast of new and evolving legal concepts and practices, far more faithfully than lawyers half his age.

While Johnny's talents and energy were always focused on the practice of law, he also played a central and effective role in wide-ranging public service in Decatur, Morgan County, and throughout the state. For more than a half-century, John Caddell was the chief spokesman, organizer and leader of virtually every worthwhile community enterprise in Decatur and Morgan County. He worked tirelessly for and gave generously to improve and strengthen programs of the University of Alabama, particularly its medical school.

Whether a task was a needed expansion of community health facilities or services, stronger support for education, hospice programs, support for charitable work of all kinds, efforts to improve and strengthen racial and community relations, or persuading some new industry that Decatur, Morgan County or north Alabama were the only sensible choices, John Caddell was the "Go-To Guy." He always knew how to make good things happen.

While attending the University of Alabama, Johnny met Lucy Bowen Harris and they married in 1935. Sadly, Lucy became a victim of Alzheimer and died in 2002. Johnny and Lucy had four children, three sons, Tom, Jack and Hank, and one daughter, Lucinda Bell of Mobile. Fittingly, the three sons are lawyers, one being a federal bankruptcy judge. Johnny was also survived by eight grandchildren.

Always mindful that spiritual life and growth are essential cornerstones of all lasting human virtues and values, John Caddell was a faithful member, elder and supporter of the First Presbyterian Church of Decatur. He not only spoke the language of Christian faith, he lived it every day.

A complete catalog of John Caddell's well-deserved honors would require far more space than all the pages of this journal. Some, however, must be listed to display the remarkable scope and impact of this man's life.

- National president, University of Alabama Alumni Association, 1953.
- Member, Board of Commissioners, Alabama State Bar, 1939-1954; Board of Bar Examiners, 1950-1951; president, Alabama State Bar, 1951-52.

- Founding member, University of Alabama Law School Foundation, and member of Executive Committee of Board of Directors from 1961 until death.
- Founding member, Farrah Law Society, and Trustee from 1965 until death.
- Member, Alabama State Bar, Morgan County Bar Association, American Bar Association and American Judicature Society.
- Fellow, American College of Trial Lawyers, 1961 until death.
- Director and chairman, Board of Directors, First National Bank of Decatur, 1966-1981; director emeritus, AmSouth Bank, 1975-1981.
- Brotherhood Award of National Conference of Christians and Jews, 1979.
- Humanitarian Award, Decatur Chamber of Commerce, 1985.
- Member, Decatur Chamber of Commerce, 1938 until death; president, 1943-1944.
- Member, Decatur Kiwanis Club; president, 1939.
- Member, Decatur General Hospital Foundation, 1983-2003; chairman, 1983-1985.
- Counsel to Committee of the House of Representatives of the United States, 1944-1945.
- The Golden Trowel Award, Decatur Kiwanis Club, 1987.
- Elected to Alabama Academy of Honor, 1977.
- Member, State Democratic Executive Committee of Alabama, 1938-1950.
- Decatur Rotary Club, Paul Harris Fellow Award, 1990.
- George F. Hixson Fellow, 1998.
- Tutwiler Award, 1980.
- Distinctive Image Award, 1982.
- Algernon Sidney Sullivan Award, 1984.
- Distinguished University Alumnus Award, 1986.
- United Way of Morgan County, Ira Lay Award, 2003.

- Barrett C. Shelton, Sr. Freedom Award, 2005.
- Morgan County Minority Development Association, Community Involvement Award, 2005.
- Honored by Decatur City Board of Education with naming of a school complex for him and another local civic leader as the Banks-Caddell Elementary School.
- Perennial Executive, chairperson or principal fundraiser of Morgan County United Way or its predecessors, Hospice of Morgan County, and virtually every other charitable organization that has existed in Decatur for the past half century.

Rarely, there comes upon the stage of human experience a person whose life is a complete fulfillment of the divine command that we do justice, love mercy and walk humbly with our creator. Johnny Caddell was such a man. To the extent that mere words can describe and define the noble life, those words would be integrity, humility, honor, dedication, selflessness, love, compassion, and excellence in all things. These words remind us of the qualities that are always taught, rarely learned and even more rarely practiced. However, for almost 96 years, these words have defined and described the life of John Caddell. His life reminds us that we, like Ulysses, are created to strive for mankind's most noble virtues; to constantly seek new avenues of service; to find through faith the assurance of a bright today and even brighter tomorrow; and never to yield to a view that the life of man is defined or limited by years or fears. Time was not his master, only an opportunity for service to be rendered. He was, in the truest sense, a renaissance man.

The bench and bar of Alabama may take justifiable pride in the example that John Caddell set for all of us. He understood and accepted that the honor and privilege of practicing law carries the obligations of honesty, dedication and service; and that the practice of law is a way of life, not just a way to make a living.

In the life and service of John Caddell we have seen and experienced the unmistakable proof that man need not be a slave to his mortality, and that God did indeed create man in His own image.

EVAN AUSTILL

Evan Austill, a member of the Mobile Bar Association, died in Mobile October 16, 2005 at the age of 70. Austill was a native and lifetime resident of Mobile, and an avid hunter and fisherman with a great reputation as an outdoorsman. He was a Phi Beta Kappa at the University of Alabama, from which he received a bachelor's of science degree, and from which he later was awarded his law degree.

He was an active member of various

civic and business organizations and was also a member of the Country Club and the Athelstan Club of Mobile.

Austill served with the U. S. Military Reserve and was retired from the reserves with the rank of major.

During the lifetime of his father, his firm was known as Austill, Austill & Austill, which developed an outstanding reputation in the field of real property and mineral rights litigation.

He left surviving him his wife of 41 years, Ruth Sullivan Austill; his daughter, Elizabeth Harris of Mobile, and his son, Nashville attorney Evan Austill, Jr.; his brother, Mobile attorney Jere Austill, Jr.; and his sister, Mary Samford of Opelika, Alabama, together with two grandchildren, Austill Harris and Caroline Harris, and numerous other family members.

—Ben Rowe, *president,*
Mobile Bar Association

A. STEWART O'BANNON, JR.

A. Stewart O'Bannon, Jr., a distinguished and longtime member of the Lauderdale County Bar Association, passed away on February 15, 2006 at the age of 75.

He was a native of Brewton, and served in the United States Army, stationed in the Panama Canal Zone. He graduated from the University of Alabama Law School with an LLB in 1956.

He began practicing law with the firm of Bradshaw & Barnett in Florence, and then founded the firm of O'Bannon & O'Bannon. He practiced law for nearly 50 years.

He served as the Alabama senator for the Old Senate District 1 (Colbert and Lauderdale counties) from 1966 until 1974. During his terms, he served on the first Alabama Constitutional Revision Commission (1969-73) and was the senate

sponsor for the Alabama Judicial Article, which created the current system for courts in Alabama and which served as a model for courts in many other states. He also authored the legislation creating Joe Wheeler State Park in Lauderdale County.

He served on the Alabama Board of Bar Commissioners and as counsel for or a member of many boards and commissions, locally and statewide. He was also active in local and state politics and a loyal member of the Alabama Democratic Party. He was a longtime member of Trinity Episcopal Church in Florence.

He is survived by his wife, Martha G. O'Bannon, and three children, including A. Stewart O'Bannon, III, an attorney in Florence, three step-children, nine grandchildren, a sister and brother, nieces and nephews.



CLARENCE F. RHEA

Often on these pages we read about someone being called a "lawyer's lawyer." It goes without saying that those who knew Clarence F. Rhea would call him a lawyer's lawyer, but Mr. Rhea was so much more than that. A better description and one that he would probably prefer would be a "client's lawyer." General Rhea, as many called him, was completely dedicated to his clients. His philosophy was that if someone sought his services and felt that they had been wronged or mistreated, a lawyer worth his or her salt should strive to help, to serve. His philosophy concerning service was not limited to law practice, but encompassed his entire life. General Rhea's life was one of service. He served in Europe traveling with 15,000 troops on the Queen Mary without escort. He served in active military service for five years, including combat in Germany in World War II. Following the war he attended several sessions of the Nuremberg trials. He served the armed forces in Holland and later with the 31st Infantry "Dixie" Division during the Korean Conflict. He served as brigadier general in the Alabama Army National Guard and was commander for five years of the 31st Armored "Dixie" Brigade. He served as national president of the 84th Infantry Division "Railsplitter" Society and the first national president of the 31st Infantry "Dixie" Division Society.

He served as a 33rd Degree Scottish Rite Mason and past master of the Gadsden Masonic Lodge. He served the



Eagle Scout Project and Board of Review, as well as the Etowah County and Alabama Society of the Sons of American Revolution. He served as district and conference lay leader of the United Methodist Church, as Sunday School teacher and as delegate to the Conferences of the United Methodist Church. He also served as judge advocate for 25 years for the Civitan International Alabama District, ultimately being named "International Fellow" the highest honor a civitan club can bestow on one of its members. He served on the board of the Salvation Army for 30 years, the Choccolocco Council of Boy Scouts and the Boys and Girls Clubs of Northeast Alabama.

Clarence F. Rhea received his B.S. Degree from the University of Alabama

in 1943 and law degree from the University of Virginia in 1948, and passed the bar of both Alabama and Virginia.

He served as a member of the Association of Trial Lawyers of America, the Alabama State Bar and the American Judicature Association, and was admitted to practice before numerous federal circuit courts and the United States Supreme Court.

He continued to serve his clients as a "client's lawyer" in Gadsden for 53 years until only days before his death on the December 27, 2005.

Clarence was married to the former Marie Cannon for 58 years. He met Marie when she was an Army nurse in Karlsruhe, Germany. They have three sons and a daughter. Bill, Donald and Richard all practiced law with their father. Bill is now a circuit judge in Etowah County, and Donald and Richard continue to practice law in Gadsden under the firm name Rhea, Boyd, Rhea & Coggins. Their daughter, Marie Singleton, practices dentistry in Eufaula.

The life, spirit and effect that Clarence F. Rhea had and continues to have are too large to place on a printed page. A few years ago he was asked if he planned to retire any time soon. His response, "It's a pleasure to be in the law practice, and as long as I feel good, I'll be in the practice." Clarence F. Rhea did just that. He left us all much the better on the 27th day of December 2005.

—Gregory S. Cusimano

CURTIS HOWE SPRINGER

Curtis Howe Springer, a distinguished member of the Alabama State Bar, died May 7, 2006 at the age of 83.

Curtis was born in Wheeling, West Virginia on November 12, 1922. When he was just a small child, he moved with his family to Mentone, Alabama and then to Birmingham. Curtis attended the public schools in Birmingham and graduated from the historic Ramsey High School. On his 18th birthday, Curtis enlisted in the United States Army Air Corps, and became part of what Tom Brokaw calls "the Greatest Generation." He served our nation faithfully during WWII. When the war came to an end, Curtis came back home and enrolled at the University of Alabama and became an active member of the SAE fraternity and the National Leadership Fraternity, ODK. He served as business manager of *The Crimson White* student newspaper. Curtis graduated from the University of Alabama in 1949. Thereafter, he worked in the office of Congressman George Andrews in Washington, DC and then came back to the University of Alabama School of Law where he graduated in 1952.

While Curtis was a student at the University of Alabama, he met and fell in love with Mary Haden Whatley from Opelika. They were married July 30, 1949 and celebrated over 56 years of married life at the time of his death. In 1952, Curtis began his legal career as a practicing attorney in Montgomery. He served from 1967 until 1971 as a member of the Alabama House of Representatives. In 1973, Curtis became a municipal court judge in Montgomery and faithfully



served 27 years until his retirement in 2000. Judge Springer's tenure as a municipal judge is believed to have been the longest in Montgomery history. He mixed humor with dignity and sternness during his 27 years on the bench. The honesty, integrity and fairness that he maintained as a judge spoke volumes of his devotion to the Rule of Law and to the city and citizens of Montgomery. He loved and respected the staff at the Montgomery Municipal Court and the police officers who put their lives on the line every day.

Curtis was a lovable guy. He had a large circle of friends. One of his dear friends said, "When Curtis walked into your room, you felt as though Santa Claus had arrived. He was always so jolly and brought so much laughter to any group. Curtis was always the life of the party." He loved to sing. He sang in the choir of the First United Methodist Church for 27 years. He

could sing religious and Broadway songs and would often sing to total strangers in a restaurant or to groups of people anytime and anyplace. He would sing while he was in the hospital or in his home when people would come to visit him. Curtis loved to play golf and tennis and support the University of Alabama, especially the Crimson Tide football team. Everyone who ever knew Curtis has a humorous "Springer" story that they can tell and that will live with us forever.

Curtis served as chairman of the administrative board of his church. He taught Sunday School. He was a lay speaker. He led the singing for the Christmas service at the Tutwiler Prison for Women each December. He served behind the scenes in many anonymous ways helping people who were struggling with personal problems.

Curtis Springer was devoted to his wife and children, having been married to Mary Haden for 56 years and being blessed with three children: a daughter, Dru, and her husband, Harris; two sons, John, and his wife, Glenn, and Rocky, and his wife, Margie; and nine grandchildren.

Curtis's stated philosophy of life was, "What you do for someone else is what lives after you." In Curtis's case, much will live after him because he did so much for so many. The world is richer because Curtis Springer lived and loved and worked and sang and left his footprints. He was a true credit to the bench and bar of Alabama, as well as an inspiration for all who knew him and who seek to also honor the legal profession.

—Oakley Melton, Jr., Montgomery

GEORGE F. WOOTEN

George F. Wooten, a former member of the Talladega County Bar and Alabama State Bar, died peacefully January 11, 2006, at his retirement home in Charlottesville, Virginia at the age of 91. He retired after 50 years of practicing law at Dixon, Wooten, Thornton, Carpenter, O'Brien, Lazenby & Lawrence. He was preceded in death by his wife of 64 years, Jane Wooten.

He was a proud graduate of the University of Alabama School of Law. He served one term as a circuit judge but did

not seek re-election in order to return to his practice which he dearly enjoyed. He served as a member of the Alabama State Bar Commission for 16 years. He was a dedicated member at the First Baptist Church in Talladega where he served on the board of deacons for more than 50 years and he taught Sunday School for many years as well.

As long as lawyers practice their profession in the geographical area of Talladega County, the personal and pro-

fessional life of George F. Wooten will serve as an inspirational guide. His best expression of what a lawyer should be was not just a theory—it was exemplified by his life's work as a true professional in every sense of the word. He was known by all as a person of the utmost integrity. He was also a Christian lawyer and his faith was part of his everyday life.

—O. Stanley Thornton

Bahakel, Cy Nesibe
Charlotte, North Carolina
Admitted: 1947
Died: April 20, 2006

Barton, James Clifton
Birmingham
Admitted: 1950
Died: April 17, 2006

Harrison, Steven Franklin
Tuscaloosa
Admitted: 1978
Died: March 17, 2006

Massey, Curtis Aaron
Dadeville
Admitted: 1975
Died: March 26, 2006

Poellnitz, Richard Hooker
Greensboro
Admitted: 1949
Died: October 31, 2005

Powell, Charles Arthur III
Birmingham
Admitted: 1964
Died: March 15, 2006

Rockefeller, Calvin Seely III
Tuscaloosa
Admitted: 1996
Died: April 11, 2006

Self, John Wilford
Decatur
Admitted: 1966
Died: April 13, 2006

Shaw, John Mark
Childersburg
Admitted: 1990
Died: March 14, 2006

Young, Edward Michael
Columbus, Georgia
Admitted: 1984
Died: April 14, 2006

Disciplinary Notices

Notice

Roger Dale Centers, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2006 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 04-309(A) by the Disciplinary Board of the Alabama State Bar.

Disciplinary Bar, Alabama State Bar

Petition for Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of Disciplinary Board, Panel III, reinstating former Cullman attorney Edwin Charles Glover to the practice of law in the State of Alabama effective March 27, 2006. [Pet. for Rein. No. 05-04]

C O U R S E S E A R C H

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 listing of current CLE opportunities, visit the ASB Web site, www.alabar.org/cle.



www.alabar.org/cle

Publications Order Form



The Alabama State Bar is pleased to make available to individual attorneys, firms and bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available for distribution by bar members and local bar associations.

BROCHURES

<i>To Serve the Public</i> ... Highlights and details of bar public service programs from the TO SERVE THE PUBLIC video presentation.	\$10.00 per 100	Qty ____ \$ ____
<i>Law As A Career</i> ... Information on the opportunities and challenges of a law career today.	\$10.00 per 100	Qty ____ \$ ____
<i>Lawyers and Legal Fees</i> ... A summary of basic legal procedures and common legal questions of the general public.	\$10.00 per 100	Qty ____ \$ ____
<i>Last Will & Testament</i> ... Aspects of estate planning and the importance of having a will.	\$10.00 per 100	Qty ____ \$ ____
<i>Legal Aspects of Divorce</i> ... Offers options and choices involved in divorce.	\$10.00 per 100	Qty ____ \$ ____
<i>Consumer Finance/"Buying On Time"</i> ... Outlines important considerations and provides advice on financial matters.	\$10.00 per 100	Qty ____ \$ ____
<i>Mediation/Resolving Disputes</i> ... An overview of the mediation process in question-and-answer form.	\$10.00 per 100	Qty ____ \$ ____
<i>Arbitration Agreements</i> ... Answers questions about arbitration from the consumer's perspective.	\$10.00 per 100	Qty ____ \$ ____
<i>Advance Health Care Directives</i> ... Complete, easy to understand information about health directives in Alabama.	\$10.00 per 100	Qty ____ \$ ____

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Marcia N. Daniel, publications assistant, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

Special Event Celebrates 50th Anniversary of Historic Case That Ended Bus Segregation In Alabama



Carol Gray, Carol Ann Smith, Janet Akers and Judge Aubrey Ford, Jr. mark Law Day 2006 by attending the commemorative program.



Luncheon guests were welcomed by Montgomery attorney Walter R. Byars.

The Alabama State Bar and the Alabama Lawyers Association presented a special Law Day Commemoration program and luncheon to celebrate the 50th anniversary of *Browder v. Gayle*, the case that ended bus segregation in Alabama and recognized almost 60 of the unsung heroes of that momentous time in history. The event, entitled *THE TRIUMPH OF THE RULE OF LAW: Behind Every Act is a Human Being*, drew over 300 lawyers and special guests from across the state. Two of the original plaintiffs in the case, Claudette Colvin and Mary Louise Smith, were also honored.

The program began at the Embassy Suites in Montgomery on Thursday, May 4, and included a luncheon honoring participants in that historic event. The day's activities concluded with a reception at the Rosa Parks Museum.

A copy of the original transcript from *Browder v. Gayle* is featured on the Alabama State Bar Web site at www.alabar.org. ■



It was standing-room only for the commemoration program, held at Embassy Suites in Montgomery.



"Unsung heroes" Lillian Bradford and Lucille Times were recognized and honored at the luncheon.

Hundreds of Law Day Posters, Essays Show Students' Views of American Legal System

As the nation celebrates Law Week, Alabama students shared their thoughts on this year's theme of *Liberty under Law: Separate Branches, Balanced Powers* through creative expressions of art or the imagery of the written word. With a record number of 300+ entries, judges of the Alabama State Bar's Law Day 2006 annual competition came away with a vivid impression of what our legal system means to Alabama's youth. Visitors to the bar's Web site can view all the winning entries at www.alabar.org/lawday.

Over 150 posters and 157 essays were entered by students across the state in this year's Law Day contests. In addition to members of the Alabama State Bar staff and Law Day Committee, celebrity judges this year included Eileen Jones, WSFA-TV; Alvin Benn, *Montgomery Advertiser*; and WAKA's Stefanie Hicks. Capt. Allan Brock and Capt. Laura Hanson, both with the office of Judge Advocate General, Maxwell AFB, also helped with the judging.

Montgomery attorneys Tommy Klinner and Tim Lewis are co-chairs of the state bar's Law Day 2006 Committee. Winners were recognized Wednesday, May 3 at a special ceremony at the Supreme Court of Alabama. Following the presentation of awards by Honorable Tommy Bryan, the students and their guests had a special luncheon at the Alabama State Bar, followed by a tour of the supreme court.

There were two classifications—grades K-3 and 4-6 for posters and grades 7-9 and 10-12 for essays. Winners in the essay contest received a U. S. Savings Bond in the amount of \$200, \$150 or \$100 respectively; winners in the poster contest received a bond in the amount of \$125, \$100 or \$75. All winners received engraved gold medals and award certificates. Schools of all winners received certificates and teachers of the winners received a \$25 contribution per award for use in their classrooms. ■



Judge Tommy Bryan places a medallion on student Nic Powell, who won first place in the high school essay contest, a part of the Law Day events. This is the sixth year that Nic has entered and won.



Pictured in front of the Hefflin-Torbert Judicial Building are some of the ASB 2006 Law Day winners.

This year's winners include:

Essays

1st Place

Grades 7-9

Elaina Plott
Tuscaloosa Academy
Heatherly Whiteside
2nd Place
Wesley Walker
Tuscaloosa Academy
Mrs. Andrea Shelton
3rd Place
Parker Leonard
Tuscaloosa Academy
Heatherly Whiteside

Grades 10-12

Nic Powell
Falkville High School
Mr. Marshall Mooney
Garrett Henderson
Lakeside School
Mrs. Frankie Speake
Nick Givens
Wilson High School
Mrs. Kenda Rusevlyan

Posters

1st Place

Grades K-3

Dakota Coleman
Evergreen Elementary
Mrs. Duke
2nd Place
Amber Varner
G. W. Carver, Tuskegee
Mrs. Bynum
3rd Place
Megan Cummings
Arcadia Elementary
Mrs. Nemmers

Grades 4-6

Bobby Hannah
The Lakeside School
Karen Johnston
Casie Herbert
Dalraida Elementary
Teri Gisi
Mary Beth Mulkey
Bear Exploration Center
Mrs. Kris White

Winning Schools

1. Falkville High School
2. Tuscaloosa Academy
3. Lakeside School
4. Wilson High School
5. Evergreen Elementary
6. George Washington Carver Elementary
7. Arcadia Elementary
8. Dalraida Elementary
9. Bear Exploration Center



DISASTER PREPAREDNESS:

Ready, Set, Go!

(What to Do When the Next Hurricane Hits)

BY ALLISON ALFORD INGRAM

As a result of several recent natural disasters, like hurricanes Ivan and Katrina, we have all seen the devastation and destruction that has affected fellow Alabamians. The losses suffered from the hurricanes are truly tragic. For those who managed to survive the initial disasters themselves, the losses and pain have continued even after the storm subsided and the sunny sky returned. And once the storm did subside, many federal and state agencies shifted into high gear to provide assistance in numerous ways—from emergency food and shelter to legal assistance.

Several Alabama organizations have worked in conjunction with the Federal Emergency Management Agency (“FEMA”) in the past to provide emergency assistance and legal advice to those in need. Most recently, the Mobile Volunteer Lawyers’ Program, the Alabama State Bar Young Lawyers’ Section and Legal Services Alabama did an outstanding job coordinating volunteers and dispensing valuable information to those affected by Hurricane Katrina.



Alabama family entering their FEMA trailer—their only home for the coming months, if not years

The Alabama State Bar Disaster Legal Assistance Line was the first disaster assistance line in the country to open after the storm.¹ It began operation on August 30, 2005—the morning after Hurricane Katrina hit the Gulf Coast.² Approximately, 668 disaster-related calls were received.³ The Mobile Bar Association Volunteer Lawyers' Program received over 456 disaster-related calls and handled over 140 disaster-related cases.⁴ LSA also helped over 1,000 individuals and opened more than 500 Katrina-related cases.⁵ Over 135,000 Alabama applicants requested FEMA assistance.⁶

From these past experiences, members of the Alabama State Bar have learned that getting information to those who need it in a timely manner is critical. As would be expected, there is often utter chaos following a disaster. The chaos is compounded by the fact that traditional forms of communication, like telephones and e-mail, often are nonexistent.

As we approach the next hurricane season, our hope is to provide helpful information to you in advance. Whether the disaster that you face is a hurricane, tornado, flood or fire, it is important to know how to get assistance to those who need it. We also want you to be able to contact those who may be able to use your volunteer services. (See names and numbers in next column.) And, it will also be on the ASB Web site. No matter what your area of practice or expertise, there is a place for you and your support staff, and we hope you will consider giving your time and resources. Consider pulling out these two pages and keeping them for future reference.

Disaster Relief Contact Information

I. Information for the General Public

- A. FEMA Legal Assistance Line: 1-800-354-6154, 8 a.m.–5 p.m., M–F

FEMA will be using the Alabama State Bar number for emergency relief. It will be staffed by the Alabama State Bar Volunteer Lawyers Program.

- B. Legal Services Alabama: 1-877-393-2333, 8 a.m.–8 p.m., M–F, 8 a.m.–noon, Sat. Bilingual—English/Spanish
Maintains a statewide hotline for disaster relief

II. How You Can Volunteer

- A. At Disaster Recovery Centers Providing On-Site Advice: (800) 354-6154.

Contact Linda Lund, executive director of the Alabama State Bar Volunteer Lawyers Program, at (334) 269-1515, ext. 118.

- B. Handling Referral Telephone Calls about Disaster Assistance for the Young Lawyers' Hotline. Contact Young Lawyers' FEMA Disaster Relief Co-Chair Charles Fleming at cjf@hfsllp.com or co-chair Brent Irby at birby@mhcilaw.com.

- C. Handling Cases of a Brief Nature: (800) 354-6154.
Contact Linda Lund, executive director of the Alabama State Bar Volunteer Lawyers Program

- D. Handling Extended Litigation or FEMA Issues: (334) 264-1739. Contact Melissa Pershing, executive director of Legal Services Alabama Inc.

Stay Informed through the Alabama Bar Web site: www.alabar.org. The ASB Web site will have links to all necessary disaster relief information, including where to make financial contributions. ■

Endnotes

1. "Rebuilding Lives: Alabama's Legal Response to Disaster," A Report to the ABA House of Delegates, February 13, 2006, compiled by Legal Services Alabama, Inc.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Allison Alford Ingram

Allison Alford Ingram received her undergraduate degree, *magna cum laude*, in 1989 from the University of Alabama, and her law degree in 1992 from the University's School of Law. She served as law clerk to the Honorable W. Harold Albritton, III, United States District Judge, Middle District of Alabama, and as an adjunct professor at the University of Alabama School of Law. She joined the firm of Ball, Ball, Mathews & Novak PA in 1993 and now serves of counsel to the firm. She is chair of the Alabama State Bar's Volunteer Lawyers Program and on the board of directors of the Montgomery County Bar Association, as well as on numerous other boards. She received the ASB Pro Bono Award in 2004.



Preparing for the Unexpected: Anticipate and Plan for Law Office Disasters

BY LAURA A. CALLOWAY

Over the last several years, the nightly news seems to have been full of stories of natural and man-made disasters. Flooding wiped out or caused the relocation of entire towns along the Mississippi River. Drought conditions caused broken water mains in Texas, resulting in widespread flooding. There have been stories about gas line explosions, the derailment of trains carrying volatile gasses and the unexpected discovery of toxic chemicals in the soil. Tornadoes, which we here in the South thought we were accustomed to and knew how to plan for, have cut a swath through many inhabited areas, leaving a trail of incomprehensible destruction in their wake. No lawyer now living will ever forget the events of September 11, 2001 and their effects on our colleagues who practiced from the twin towers of the World Trade Center. And all this was before hurricanes Katrina and Rita arrived, reminding us that even in the 21st Century, nature is still capable of rendering an entire city uninhabitable in the blink of an eye.

These events tell us that we lawyers are not immune from the forces of nature or the whims of the demented. Likewise, as our communities continue to grow and age, we are subject to the increased likelihood of infrastructure failure. Advance planning cannot entirely prevent the unexpected, or the unimaginable, but it can give you and your firm an edge in

overcoming the long-term effects of what could otherwise be a catastrophe.

Any disaster preparedness plan should have two goals. First, it should be designed to protect the people in your office, both staff and clients, and your vital business records. Second, it should also protect your clients and your future livelihood by providing a framework within which to replicate your office and have you up and running, in a new location if necessary, as quickly as possible.

In order to devise a successful disaster recovery plan, you need to first think about what sort of potential disaster situations you will be most likely to face, and then assess whether there is anything about the way in which you currently operate that could make a potential disaster worse. As with any program to be carried out in a group situation, if your disaster recovery plan is to be successful, one person needs to be assigned overall responsibility for its development and implementation. That person then needs to be given the authority, time and resources necessary to accomplish the task.

Analyze Your Potential Risk

The following is a list of potential problems to anticipate and plan for. Carefully

evaluate this list in light of what you know about your physical setting, your equipment, your clients and your community and the surrounding environs.

Natural Disasters—Do you practice in an area that is subject to hurricanes, tornados, floods, drought, lightening strikes, forest fire or wildfire, landslides, or earthquakes?

Technological Disasters—Are you subject to fire; power failure; water line, gas line or sewer break; pipeline explosion; industrial explosion; hazardous materials accident; hard drive crashes?

Antisocial Activities—Can you imagine a situation involving arson, bomb or bomb threat, theft or vandalism, a violent intruder (former client, opposing attorney or party or terminated employee), computer hacker, or civil disturbance?

Health Disasters—Could your community ever be subject to pollution-related problems or epidemics?

Personal Problems (yourself and your employees)—There is always the possibility of accident, long-term illness or disability, suspension or disbarment, and death.

Analyze Your Present Situation

Once you have evaluated and ranked your potential risks, you should conduct an analysis of your physical facilities and

current office procedures to determine if they will help or harm you in the event of a disaster. The following are some things to consider:

- How do your building size, type and age affect security considerations?
- How do the number and use of doors and windows affect security considerations?
- Is free access during business hours really necessary, or could restricted access work?
- Would posting a security guard be appropriate or useful during certain times?
- Is your electrical, computer or phone system exposed to sabotage?
- Is your computer system exposed to hackers (either physically or through connection to the Internet)?
- Do you duplicate important materials and backup all computer programs?
- Do you carry one copy of backup materials off site every day?
- Is your off-site backup storage location subject to the same potential disasters as your office?
- Do you periodically restore from your backup medium to make sure your backup system is working properly?
- Will your file storage/retention policies cause additional problems in a disaster?

When it comes to building security, an important part of any security systems is its deterrent value. If security measures are sufficiently visible, many potential intruders will simply go elsewhere.

Plan for Personal Safety

There are many steps that can be taken to ensure the safety of your personnel and your clients, and they will differ depending on your physical setting and the type of potential disasters you face. If you practice in a small freestanding building, develop appropriate emergency escape routes and procedures, and appropriate places to shelter if the office must be abandoned during the work day. Make sure all exits are unblocked and accessible. For those who practice in large buildings, make time to review your building's emergency proce-

dures and coordinate your emergency plans with those of adjoining tenants.

Post vital safety information where everyone can find it, including fire exit locations, fire extinguisher locations and how to use them, escape routes and emergency phone numbers, first-aid kit locations, and basic first-aid procedures.

Take time and make the effort to educate your personnel. In particular, send your safety coordinator to appropriate classes or seminars. Prepare a safety section for your office manual and make sure your employees are familiar with it. Train personnel regularly and issue periodic memos about emergency procedures. Conduct unannounced fire drills and other safety preparation drills, and critique the results. Train one person to be responsible for escorting clients out of the building during an emergency.

You should also develop a written intra-office emergency communication plan. Here are the basic elements any plan should follow:

- Collect and store all employee's home and cell phone numbers in a secure off-site location. Check this list on a regular schedule in addition to relying on memory to make changes as they occur.
- If your office staff is large, develop a phone tree to facilitate spreading information within the firm in the event of a disaster.
- Determine and publish an alternative phone number or a series of numbers employees can call for instructions in case of destruction of the office or office phone system. This should include numbers for parents, adult children, close friends, etc., in the event that phone service is severely disrupted.
- Develop a plan for letting your clients know what has happened to your office and what you are doing to establish a new office.

Every office should have a minimum store of emergency supplies, which should be inspected and replaced on a regular schedule. Some things to include are:

- First-aid kit
- Flashlights
- Battery operated or wind-up radio or mini-TV
- Cell phones or walkie-talkies
- Emergency food and water

- Petty cash in case banks and ATMs are not operational
- Fresh spare batteries for all your battery operated items

In addition to preparation for natural or man-made disasters, every lawyer should make plans for his or her own unforeseen disability or demise. Planning steps include:

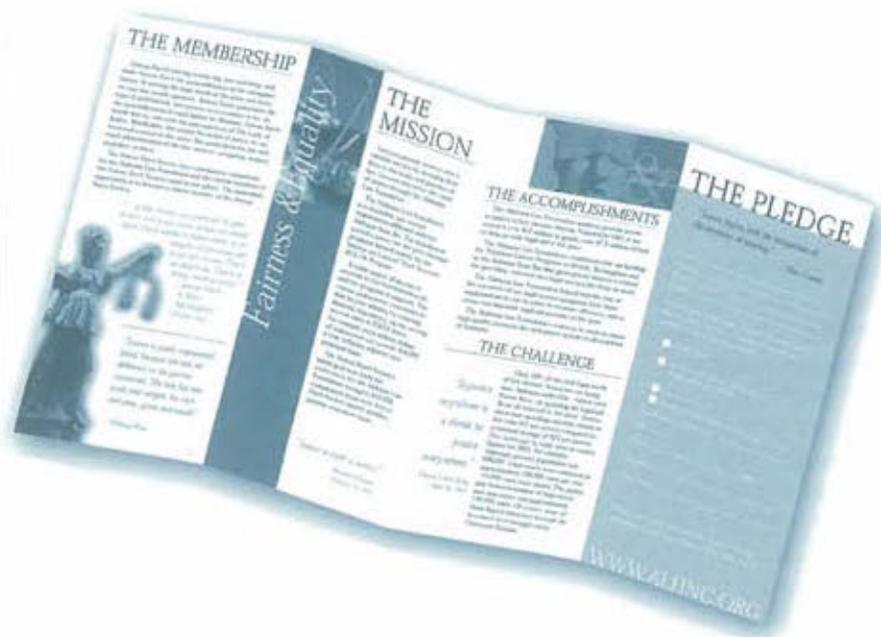
- Arranging in advance for one or more lawyers to cover your practice and drafting an agreement to cover the process.
- Getting advance authority from clients (in fee agreement or addendum) to allow for associate counsel in case of emergency.
- Getting your files organized and up to date, and including a "to do" list of uncompleted tasks in each file.
- Preparing a letter of instruction for your spouse, your partner, your staff and any attorneys who will be covering or, in the event of the worst, taking over and closing out your practice.

Safeguard Your Records and Equipment

Once you're sure all personnel and clients are safe, your thoughts will immediately turn to your files and other client and practice data. If you take these steps now, you'll be in much better shape if disaster strikes. First, make a complete office inventory including:

- All computer hardware and peripherals, including serial number, purchase date, purchase price and vendor. Update your inventory immediately as equipment is replaced.
- All software, including version number, serial number, purchase date, purchase price, and vendor.
- All library contents, including both books and active subscriptions.
- All office furnishings, including purchase date and price.
- All office equipment, including serial number, purchase date, price and vendor.
- All other equipment, such as coffee machines, TVs, tape recorders, still cameras, video cameras, and Dictaphones.
- All office supplies you regularly stock.

THE ALABAMA LAW FOUNDATION'S Atticus Finch Brochure Receives ADDY



On February 18, the Alabama Law Foundation's brochure for the Atticus Finch Society was honored with an ADDY award by the Montgomery Advertising Federation. The brochure explains the purpose, activities and goals of the Atticus Finch Society.

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The Atticus Finch Society's mission is to form a solid financial future for the Alabama Law Foundation, a charitable, tax-exempt organization which provides access to the civil justice system to underprivileged residents of Alabama. The society's initial goal is to build the Alabama Law Foundation's endowment to secure the foundation's financial longevity.

The Atticus Finch Society brochure was created for the Alabama Law Foundation by Cunningham Group Advertising & Public Relations agency.

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Alabama State Bar and Legal Services Alabama launch Spanish Legal Hotline to help meet needs of Alabama's Spanish-speaking population



In partnership with the Alabama State Bar's Spanish Outreach Project, Legal Services Alabama has launched a dedicated statewide toll-free legal hotline for Spanish-speaking persons in Alabama. The Spanish Legal Hotline has its own separate toll-free number (888-835-3505) and calls are answered and routed by Spanish-speaking staff members at call centers across the state.

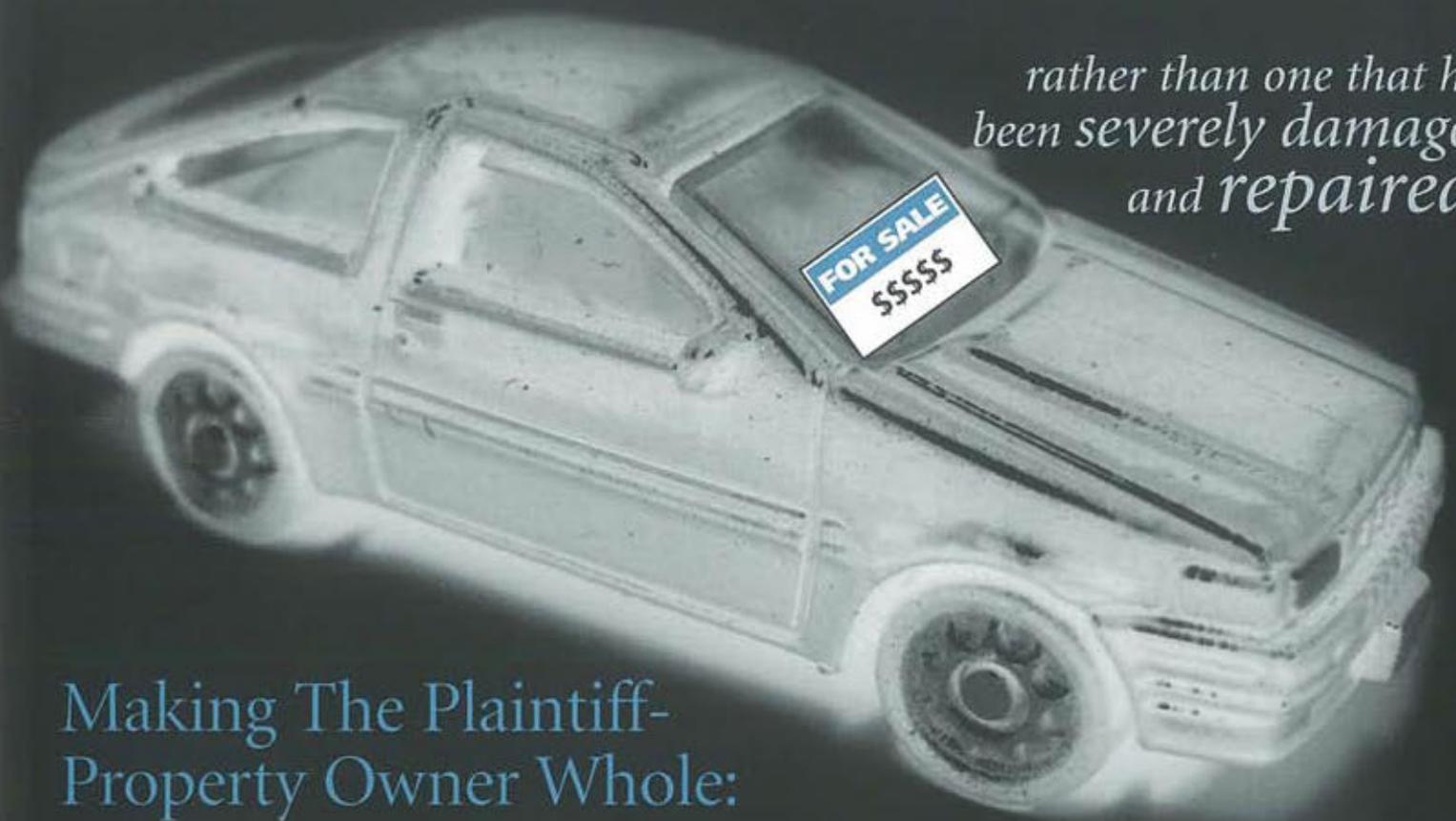
Regular Spanish Legal Hotline network hours are 8:00 a.m. to 8:00 p.m. Monday through Friday and 9 a.m. to noon on Saturdays. If a bilingual staff member is not available or is on another call, a message in Spanish will tell the caller the best time to call back. Based on specific legal needs and guidelines, callers will be referred to Legal

Services Alabama, the Volunteer Lawyers Program of the Alabama State Bar or the state bar's Lawyer Referral Service for legal assistance.

Other core partners in this project include the **Auburn Cooperative Extension System; Hispanic Interest Coalition of Alabama (HICA); Alabama Latin American Association; Cumberland School of Law;** and **KPI Latino.**

Spanish Legal Hotline information is available at the state bar's Web site www.alabar.org, as well at the Legal Services Alabama Web site www.alsp.org. Brochures are available upon request from the Alabama State Bar or may be picked up at any county Auburn Cooperative Extension System office.

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rather than one that has
been severely damaged
and repaired?

Making The Plaintiff-
Property Owner Whole:

The Recovery of Stigma Damages

BY STEPHEN T. ETHEREDGE

Litigation arising from damage to homes and business properties, whether arising from subterranean termites, mold or chemical contamination, is increasing. The arguments and/or possible explanations for the increases are varied and often depend upon the position being advocated. Whatever the reason, lawyers and clients have come to the realization that simply recovering the costs of repairing damage often is not sufficient to make the client whole. A negative market perception exists to cause a diminution in the market value of property even after repairs have been made. Who among us would not choose the undamaged automobile rather than one that has been severely damaged and repaired? Just as clearly, who would not choose to avoid problems with termites, mold or chemical contamination even when we are told that the problems have been repaired or remediated?

The concept of stigma damages is often overlooked as a factor in the proper measurement of damages to real property. Are such damages recoverable and, if so, how do you prove them? These are questions which will be addressed.

The starting point for such an analysis is a review of the measure of damages to property as recognized by Alabama law. In *Fuller v. Fair*, 202 Ala. 430, 80 So. 814 (1919) the court set forth the following methods of measurement which remain applicable today:

“From the cases, a statement of the measure of damages to real estate may be said to be: (1) If the land is taken, or its value totally destroyed, the owner is entitled to recover the market value thereof at the time of the taking or destruction, with legal interest thereon to the time of the trial. (2) If the land is permanently injured, but not totally

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the *undamaged* automobile



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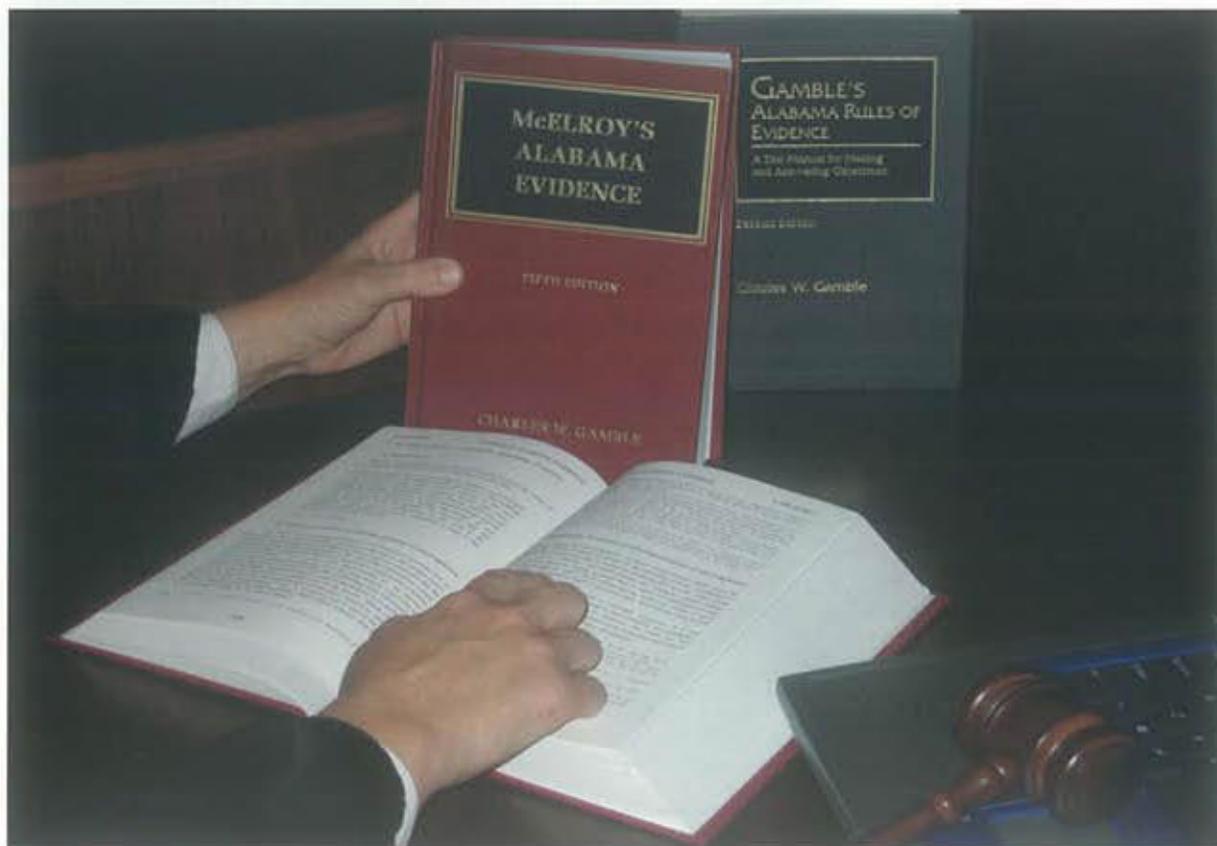
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destroyed, the owner will be entitled to recover the difference between the market value of the land at the time immediately preceding the injury and the market value of the land in its immediate condition after the injury, with legal interest thereon to the time of the trial. (3) If the land is temporarily, but not permanently, injured, the owner is entitled to recover the amount necessary to repair the injury or to put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of the trial."

Thus, the proper measure of damages for injury to real property varies with the type of injury, but the underlying principle of such damages was succinctly stated in *Rickenbaugh v. Asbury*, 28 Ala.App. 375, 185 So. 181 (Ala.App.1938): "the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach, and the same rule obtains whether the loss is claimed for injury to property, personal injury, or breach of contract."

Placing the temporary injury/permanent injury concept into context may be assisted by reviewing some all too common scenarios of property damage involving both temporary and permanent injuries to property.

Typical Property Damage Scenarios

The following factual statements were selected from actual cases. Where the names of one or more of the parties are mentioned the factual statements were taken either from actual cases or appellate decisions.

(1) Buyers execute a "Real Estate Purchase Agreement" whereby they agree to buy the sellers' home. As part of the contract, the sellers agree to pay for a termite inspection conducted by a licensed or bonded pest control operator for the purpose of establishing that the property is free and clear of any active infestation or damage by wood-destroying insects or fungus. Sellers also agree that, if possible, they will transfer the existing termite bond on the house to buyers at closing. Terminix, sellers' existing termite company, performs the inspection and renders a wood infestation inspection report (WIIR). The WIIR, delivered at closing, represents the home to be free of any evidence of an active infestation of the five specified wood destroying organisms identified in the report, including subterranean termites; it further identifies a



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previous infestation of subterranean termites in the garage, but states it has been re-treated and "proper measures were taken care of." In addition, the WIIR indicates that Terminix had treated the residence in January 1992 and that there is a contract providing treatment warranties which can be transferred to subsequent owners upon proper payment. The purchase and sale are completed and the Termite Protection Plan is transferred to the buyers. Within days after the closing buyers discover an active infestation of termites. Terminix is called upon to re-treat. In the months following the closing, buyers continue to discover additional areas of termite infestation and damage to their house and additional claims for re-treatment are made. In less than ten months the buyers' home is treated four times and live infestations continue to be found. Investigation reveals that three days prior to closing and prior to delivery of the WIIR at closing, Terminix, with knowledge of and at the direction of sellers, re-treated due to an active infestation of subterranean termites to an area of the house which was not disclosed in the WIIR. Everyone in the neighborhood, if not most of the small town, is aware of the continuing termite problems at the buyers' home.

(2) In the factual recitation of a Florida appellate decision to be discussed later, DelGuidice completed the construction of his 10,000-square-foot, \$1.3 million dollar, home. Two years later he purchased from Orkin a termite protection plan providing for an initial treatment and, if necessary, subsequent retreatment and repair of termite damage provided DelGuidice annually renewed the contract. During the course of seven years following the original Orkin treatment, continuing termite infestations



required 17 treatments, all unsuccessful, and Orkin paid in excess of \$78,000 dollars for repairs. Under Florida law, should DelGuidice desire to sell his home, he is affirmatively required to disclose the termite history. However, under Alabama's law of caveat emptor, DelGuidice would be required to disclose the termite history only in response to direct inquiry.

(3) Property owner "A," a fast food franchisee, seeks to refinance its existing indebtedness on one of its locations. The lender requires an environmental study which reveals the presence of petroleum-based products in the soil. Further investigation, including test bores and monitoring wells, reveals the source of contamination to be a leaking fuel tank on the property of an adjacent service station.

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Status of Alabama Law

The status of the law in Alabama can best be described as in the embryonic stage. Circumstances under which *stigma*, as a part of diminution damages, may be recovered, have not been directly addressed by Alabama appellate courts, although the Alabama Supreme Court, in the case of *Carson v. City of Prichard*, 709 So.2d 1199 (Ala.1998), refused to reverse the jury verdict on the damage award saying, "We cannot say that the verdict was plainly and palpably wrong and unjust," after it acknowledged that the verdict was based, in part, upon the testimony of a real estate agent/appraiser as to the diminution in value of the property arising from the "stigma" of having been flooded by sewage from the municipality's sewer lines.

Clearly, economic feasibility aside, *known* termite damage to a structure can be repaired and such injuries are therefore argued by the pest control industry to be temporary in nature. Applying *Fuller v. Fair*, *supra*, the measure of damages is "the amount necessary to repair the injury or to put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of the trial." The *stigma* attached to a structure with a significant past history of termite problems often results in a diminution in its marketability and therefore its value and is a form of permanent injury to property that does not destroy the property. Therefore, again utilizing the measures of damage to property as enunciated by the Alabama Supreme Court in *Fuller v. Fair*, *supra*, the proper measure of damages for *stigma* is "the difference between the

market value of the land at the time immediately preceding the injury and the market value of the land in its immediate condition after the injury, with legal interest thereon to the time of the trial."

Thus, the finder of fact would be called upon to apply two different, but arguably appropriate, standards in the determination of the amount of damages necessary to "compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation." *Rickenbaugh v. Asbury*, *supra*.

Directions from Other Jurisdictions

It is enlightening to examine how other jurisdictions have addressed the issue of stigma damages. The second factual scenario set forth above was taken from the case of *Orkin Exterminating Company, Inc., v. DelGuidice*, 790 So.2d 1158, (5th DCA, 2001). Orkin appealed from a jury verdict rendered in a breach of contract action which included *stigma* or diminution in value damages of \$300,000. The court reversed and remanded, determining that the contractual remedy of repair or replacement was the exclusive remedy for a breach of the contract. The court stated further that "diminution in value damages, or stigma damages, not otherwise provided for in a contract can be awarded in Florida on a breach of contract theory only in limited circumstances. Diminution in value damages is

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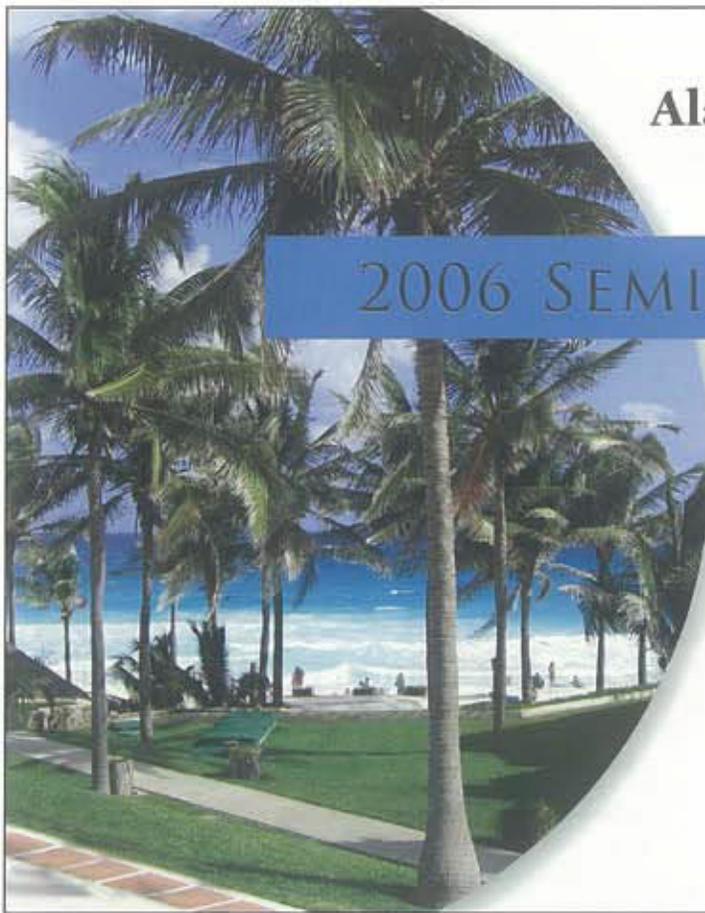


appropriate when the remedy of repair or replacement is impracticable." The court also noted that Orkin had admitted at trial that it had made "some mistakes" in the treatment of the DelGuidice home. One is left to speculate as to how the court would have addressed the "appropriateness" of diminution in value, or stigma damages, on a negligence theory.

The District Court of Appeal of Florida, Third District, in the case of *Bisque Associates of Florida, Inc., v. Towers of Quayside No. 2 Condominium Association, Inc.*, 639 So.2d 997 (1994), 19 Fla. L. Weekly D708, was presented with a case in which a condominium unit owner sued the condominium association on tort theories, seeking damages for loss of rental income, and

diminution of the unit's value, alleging that market value of the unit had decreased because of the association's inability to prevent water drainage backup problems and spillovers. The trial judge excluded evidence of diminution of value, and subsequently entered judgment on the jury verdict awarding damages to owner only for costs of repairs. The appellate court acknowledged that under general principles of tort law, (1) where the injury to real property is merely temporary, or where the property can be restored to its original condition at reasonable expense, the measure of damages should include the cost of repairs or restoration; and (2) where the cost of repair exceeds the value of the property in its original condition, or where restoration is impracticable, the measure of damages is diminution of value. Finding that the determination of permanent or temporary injury to real property is a question of fact to be presented to the jury rather than a matter of law to be resolved by the trial judge, the court reversed the trial court's exclusion of proffered evidence from a realtor relating to diminution in value.

In *Westminster Associates, Ltd., v. Orkin Exterminating Co., Inc.*, .285 B.R. 38 (2002) the Bankruptcy Court for the Middle District of Florida, citing *Bisque Assoc. of Fla., Inc. v. Towers of Quayside No. 2 Condo. Assoc., Inc.*, *supra*, interpreting and applying Florida law, held that in real property cases, the measure of



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damages flowing from a breach of contract are the greater of the diminution in value of the real property or the repair costs, or a combination of both.

Ultimately, due to a conflict in the Florida appellate districts resulting from the decisions in *Bisque Assoc.* and *DelGuidice*, the Florida Supreme Court will be presented the opportunity to establish the law in Florida. If the *Westminster* decision is a correct interpretation of Florida law, a combination of repair costs and diminution in value would be available in cases involving *stigma damages*.

In *Daley et al. v. Ryland Group* 245 Ga.App. 496, 537 S.E.2d 732 (2000), litigation arose between new homeowners and their contractor relating to unremedied construction defects. The jury awarded the Daleys both (a) the cost to repair their home so as to bring it up to the value as it should have been when finished and after the defects were repaired, and (b) an additional ten percent diminution in value of the contract price of the house, i.e., excess of the fair market value to the Daleys. The trial court reduced the award, deciding that it was not a proper measure of damages for a contract breach, i.e., in the contemplation of the parties. The Georgia Court of Appeals affirmed the trial court stating that cost to repair and diminution in value are allowed as the measure of damages only in tangible property cases and not in improved realty cases, except where there exists *defects* that cannot be repaired. The court noted the absence of evidence that, after proper and reasonable repairs, permanent defects would continue to exist. The court reasserted its holding in the earlier case of

Hammond v. City of Warner Robins, 224 Ga.App. 684, 690, 482 S.E.2d 422 (1997) that "[s]tigma to realty, in and of itself, is too remote and speculative to be a damage." The speculative nature of the damages were attributed by the court to the fact that under Georgia law, in a "sale-by-owner" situation, the Daleys would not be forced to disclose the construction problems to potential buyers. Thereby reasoning it speculative and a future loss that may or may not be sustained depending upon whether the repaired defects are disclosed to a future buyer.

In *Tudor Chateau Creole Apartments Partnership, v. D.A. Exterminating Co., Inc.* 691 So.2d 1259 (La App 1 Cir.,1997), after having maintained a termite control contract with the pest control company for many years, the apartment complex found severe termite damage the true extent of which could not be determined without destructive investigation. The trial court awarded both costs of repairs, as estimated, and diminution in the value of the property. Citing *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So.2d 874 (La.1993), as support for the proposition that property damage principles require the compensation of the victim to the full extent of the loss and restoration to as good a position as held prior to the damage, the court acknowledged that there is no formula which can be applied with exactitude in the assessment of property damages and further acknowledged that it was plausible that Chateau Creole had suffered a "stigma" to the property arising from the unknown character of the total structural damage to the property which must, by Louisiana law, be passed on to any



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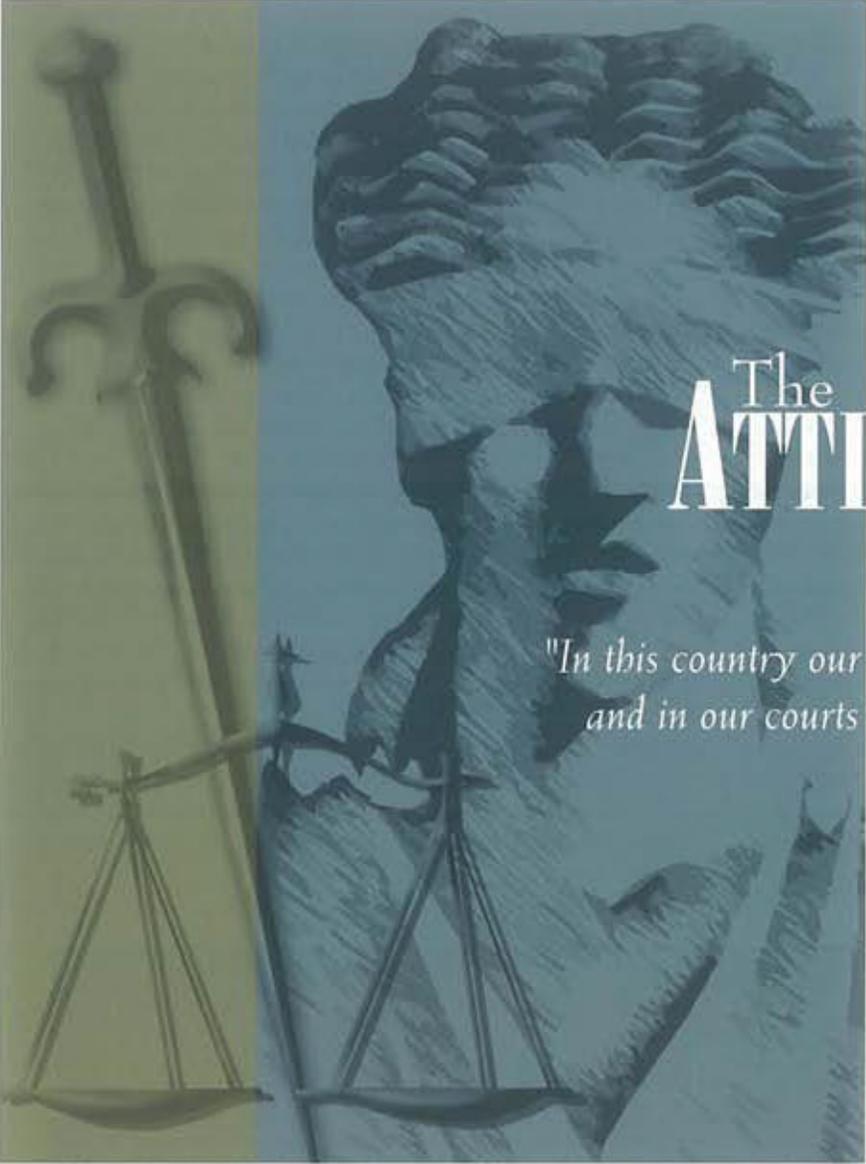
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purchaser. The court held that awarding diminution in value, in addition to cost of repair, places the victim closer to the position they held prior to the damage. In *Horsch v. Terminix International Company*, 19 Kan.App.2d 134, 865 P.2d 1044 (1994), a negligent inspection case, the jury awarded damages for both the costs of repair and for diminution in value. Terminix appealed arguing the concept of temporary versus permanent injury to property. The Kansas appellate court acknowledged that the issue of recovery for stigma damages presented a case of first impression in Kansas, however, the court drew upon the reasoning of the Texas appellate court in *Terminix Intern., Inc. v. Lucci*, 670 S.W.2d 657, 663 64 (Tex.App.1984) which had found that there was substantial evidence that, although a house had been treated for termites and the damage repaired, the house's value in the market place could suffer a reduction. The *Lucci* court held the evidence was sufficient to support the award of damages for both the permanent reduction in market value and the reasonable cost of repair. 670 S.W.2d at 664. In response to the argument of Terminix that the Horschers are not required to disclose the termite damage to prospective buyers because the damage is not material, the court observed that, pursuant to Kansas law, when one party to a contract or transaction has knowledge of a fact material to the transaction and not within the fair and reasonable reach of the other party and which the other party could not discover by the exercise of reasonable diligence, the first party is obligated to reveal that material matter to the second party. The court further observed that a reasonable prospective buyer would likely want to know that there was prior termite damage in the amount of \$5,000 to the floor joists, bathroom studs, first floor window, and roof before purchasing the farmhouse. Refusing to limit Kansas to a set criteria for determination of the measure of damages and subordinating the rules for measuring damages "to the aim of making good the injury done," the appellate court allowed the recovery of stigma damages, in addition to the costs of repair, finding the same to be a natural and probable result of a tortious act.

In *Walker Drug Company, Inc., v. La Sal Oil Company*, 972 P.2d 1238, (Utah 1998), a case of first impression in Utah relating to the availability of stigma damages, the plaintiffs alleged that significant quantities of gasoline leaked from tanks at defendants' service stations and contaminated the groundwater and soil of the drugstore and liquor store properties, damaging the value of all their properties. The service stations were upgradient from the Walkers' properties, and leaked gasoline from the stations had migrated downward with the natural groundwater across the Walkers' properties. The suit against La Sal alleged trespass, nuisance and strict liability claims. The Utah Supreme Court stated that typically, the measure of damages in trespass and nuisance cases involving 'permanent' [or indefinite] injury has been the diminished market value of the property," plus consequential losses to the use of the land or from discomfort or annoyance to the possessor. By contrast, damages from "temporary" injury, i.e., injury that is remediable, typically include compensation for the cost of remediation or repair to the property or the property's diminished rental or use value during the period in which the



injury persists, plus consequential damages. The court recognized that stigma damages are a facet of permanent damages, and recovery for stigma damages is intended to compensate for loss to the property's market value resulting from the longterm negative perception of the property in excess of any recovery obtained for the temporary injury itself. The court observed that if stigma damages are not allowed the plaintiff's property would be permanently deprived of significant value without compensation and thus opted to join what it deemed "a majority of courts from other jurisdictions" that allow recovery of stigma damages when a plaintiff demonstrates that (1) defendants caused some temporary physical injury to plaintiff's land and (2) repair of this temporary injury will not return the value of the property to its prior level because of a lingering negative public perception.

The Minnesota Supreme Court in *Dealers Mfg., Co. v. County of Anoka* 615 N.W.2d 76 (Minn., 2000) was faced with the question of whether stigma should be taken into account in a property tax reduction for chemically contaminated property. The court acknowledged that it had previously recognized the practice of considering the market value impact of both the present value of clean-up costs and the stigma devaluative factor as appropriate considerations in determining the market value of contaminated properties. The Minnesota court further observed that a stigma factor can attach to property whether contaminants are present, are threatened or are totally absent. Even in those instances where, for example, a property has been successfully remediated leaving no contamination, or is in proximity to property that is contaminated, stigma may nonetheless be present as a heavy burden on the value of the property due to the perception of risk.

Proving Stigma

Obviously, an appraisal is the approach of choice when seeking to establish property values. An appraiser licensed in the State of Alabama is required to comply with the Uniform Standards of Professional Appraisal Practice (USPAP). *Alabama Administrative Code Section 780-X-13-.01*. In determining property values licensed appraisers take one of three potential approaches: (1) sales comparisons made through analyzing such comparable sales data as are available to indicate a value conclusion; (2) a cost approach reached by (a) developing an opinion of site value by an appropriate appraisal method or technique, (b) analyzing such comparable cost data as are available to estimate the cost new of the improvements and (c) analyzing such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation); or (3) income approach made through (a) analyzing such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property; (b) analyzing such comparable operating expense data as are available to estimate the operating expenses of the property; (c) analyzing such comparable data as are available to estimate rates of capitalization and/or rates of

discount; and (d) make base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence. 2005 USPAP Standards 1-4.

Although not specifically defined in the USPAP, the stigma which attaches to properties with current infestations of termites or mold may be likened to those suffering an "environmental stigma" which is defined by the USPAP as "an adverse effect on property value produced by the market's perception of increased environmental risk due to contamination."

"Environmental risk" is defined by the USPAP as follows:

"The additional or incremental risk of investing in, financing, buying and/or owning property attributable to its environmental condition. This risk is derived from perceived uncertainties concerning, among other factors, the nature and extent of the contamination, estimates of future remediation costs and their timing, liability for cleanup and such other factors as may be relevant."

USPAP Standards 1-4(e) directs that when addressing the diminution in value of a contaminated property and/or its impaired value, the appraiser must recognize that the value of an interest in impacted or contaminated real estate *may not be measurable simply* by deducting the remediation or compliance cost estimate from the opinion of the value as if unaffected but must measure cost, use and risk effects which can potentially impact the value. *Cost effects* are generally defined as deductions for costs to remediate and are usually estimated by someone other than the appraiser. *Use effects* are intended to reflect impacts on the utility of the site as a result of the contamination which could impact value. *Risk effects* are derived from the market's perception of increased environmental risk and uncertainty and must be based on market data, rather than unsupported opinion or judgment.

Unfortunately, many appraisers feel ill equipped or are unwilling to devote the time to incorporate all of these criteria into determination of value of impacted properties. Many relate the absence of readily available market data to determine risk effects. The multiple listing service (MLS) data as maintained by Realtors and readily available to appraisers in most metropolitan areas does not identify the amounts by which the ultimate sales price was depressed for a particular property due to the impact of lingering negative public perception. Too often, due to the antiquated caveat emptor rule in place in Alabama and the obvious desire to close the sale and earn a commission, Realtors take a "don't ask-don't tell" approach to the less obvious (latent) problems which may impact the desirability of a particular property, opting to actively pursue a sales approach that keeps the seller and buyer apart, thereby lessening the opportunity for questions which may require the disclosure of matters deemed negative. That this attitude prevails in Georgia as well was reflected by the Georgia Appellate Court in the case of *Hammond v. City of Warner Robins, supra*, in which the court, acknowledging the possibility that the seller would be able to pass the problem to the buyer without the buyer's knowledge, held the damages resulting from stigma "too speculative."

Until such time as there is a source from which appraisers can easily identify the amounts by which the value of property is diminished by negative factors, it is unlikely that many appraisers will be willing to undertake the processes of valuing

the diminution. Realtors are often more intimately aware of necessary reductions in sales prices to offset stigma and should, at present, be in a better position to offer expert opinions relating to diminution.

The Alabama Supreme Court in the case of *Carson v. City of Prichard, supra*, tacitly approved the qualification of Realtors to offer such testimony.

Analysis

Diminution in value (stigma) damages should be recoverable where the same result from the tortious conduct of the defendant and are sought within the framework of a tort claim. The basic rule of tort compensation is that the plaintiff should be placed in the position that he would have occupied absent the defendant's negligence. *Keel v. Banach*, 624 So.2d 1022 (Ala., 1993). It is a fundamental tenet of tort law that a negligent tortfeasor is liable for *all* damages that are the proximate result of his negligence. Therefore, recoverable damages in a tort action are generally broad enough to include those damages necessary to compensate the plaintiff for injuries to property, both temporary and permanent, proximately caused by the defendant's negligence or other wrongful conduct. Recovering such damages in a breach of contract action is more doubtful because from that prospective courts are more inclined to enforce the limitation of damage provisions of contracts, which are often drafted solely by and for the benefit of the wrongdoer, and exclude any recovery for stigma damages on the basis that such damages "were not in the contemplation of the parties" at the time the contract was signed. See *Orkin Exterminating Company, Inc., v. DelGuidice, supra*, and *Pritchett v. State Farm Mut. Auto. Ins. Co.* 834 So.2d 785 Ala.Civ.App., 2002 (although personal property, the contract language was applied to preclude recovery of stigma damages). A practical view would indicate that if any contracting party contemplated that by contracting with the opposing party he or she would expose their property to injury resulting in stigma, few, if any, would enter into the contract.

Therefore, there must be a recognition that while repairs to improvements may return the improvements to the condition which existed prior to the injury, public perception of the property is of a more permanent nature which cannot be resolved by simply repairing the improvements. Damages which compensate one or the other, but not both the temporary injury and permanent injury, do not fully compensate the injured party. The current trend, from the majority of states, is toward the recognition that these two types of damages are distinct, not mutually exclusive and both must be available to allow the opportunity for proper compensation. Evidence exists to establish not only the costs of repair but also the diminution resulting from the stigma, however, you must find not only your best available expert testimony, you also have to be in a position to present that testimony in a manner that is not speculative. ■

Stephen T. Etheredge

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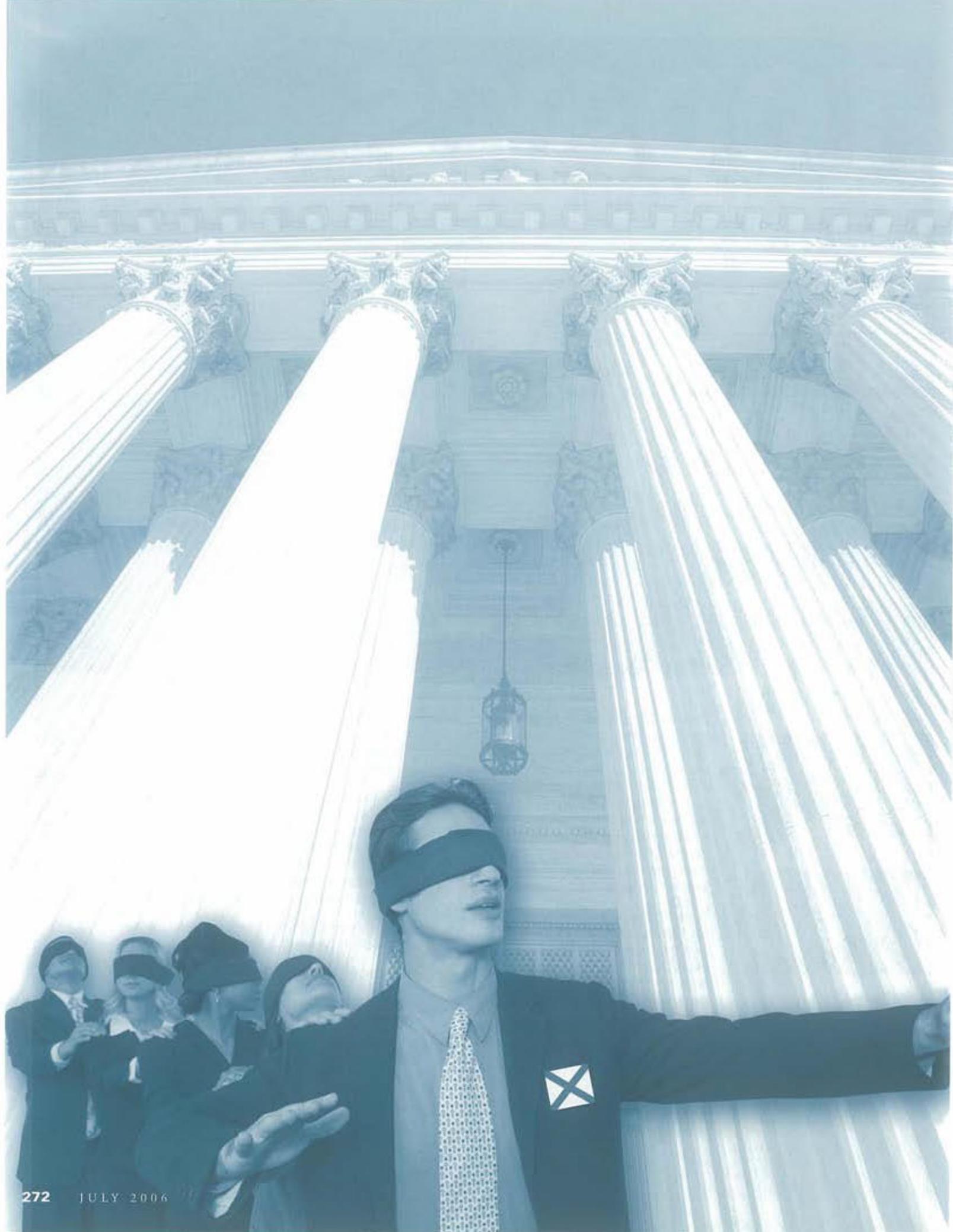
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Is the Alabama Supreme Court Obligated to Follow Precedential Case Law of The United States Supreme Court?

BY JAMES F. VICKREY

“Accepting the risk of obscuring the obvious by discussing it,” *United States v. Reading Co.*, 253 U.S. 26, 61 (1920), is one of the challenges of essaying the issue constituting the title of this article. To the vast majority of members of the Alabama State Bar as well as legal analysts, the answer to the query may now be self-evidently obvious; to a small minority, however, it appears that that is not the case.¹ Regardless, perhaps too many readers of this journal may have difficulty answering completely the “why?” of it when confronted with the issue directly by another lawyer or layperson, or by a judge. So, let us consider the matter here, being mindful of Sir Edward Coke’s observation: “Reason is the life of the law; nay, the common law itself is nothing else but reason.” *Edwards et al. (eds.), The New Dictionary of Thought* 345 (1969).

The answer to the question—Is the Alabama Supreme Court obliged to follow precedential case law of the United States Supreme Court?—implicates the answers to three separate but related queries. First, does Alabama law,² expressly or impliedly, require the state supreme court to do so? Second, does federal law, expressly or impliedly, require the state supreme court to do so? Third, do any considerations of public policy require the Alabama Supreme Court to follow U.S. Supreme Court precedent?

One citation will be enough, if it is in point.

—Mr. Justice Oliver Wendell Holmes, quoted in *Novick, Honorable Justice* 194 (1989).

A. Does Alabama law, expressly or impliedly, require the state supreme court to follow precedent of the U.S. Supreme Court? There is no state statute requiring it. There is, however, ample authority otherwise for the requirement in decisions of Alabama’s court of last resort. At least since 1866, members of the state supreme court have recognized and applied rulings of the U.S. Supreme Court as precedent—for example, in cases purportedly involving the impairment of contracts by the state under Article I, section 10, clause 1, of the U.S. Constitution. *Ex parte Pollard*, 40 Ala. 77 (1866), and the prior cases cited therein.³ See also *Nelson v. McCrary*, 60 Ala. 301 (1877) (“obedience is due from all state tribunals, on this [impairment of contracts] and kindred questions” to “decisions of the Supreme Court of the United States,” *id.* at 311). A more recent case to the same effect, involving the separation of powers doctrine and the Fourteenth Amendment to the U.S. Constitution in the context of a legislative redistricting dispute, is *Rice v. English*, 835 So.2d 157 (Ala. 2002). It is admitted that, in light of the answer to the second question, *infra*, such cases are also “federal” authority; indeed, they are arguably the basis of the Alabama decisional law! But, such is not necessarily so, because of the following.

There is one Alabama constitutional provision that impliedly suggests an affirmative answer to the question: Article XVI, section 279 of the 1901 Constitution. It provides, in pertinent part, that “[a]ll members of the legislature. and all officers,

“Bind by oath”
was the sense
found for
oblige in early
examples

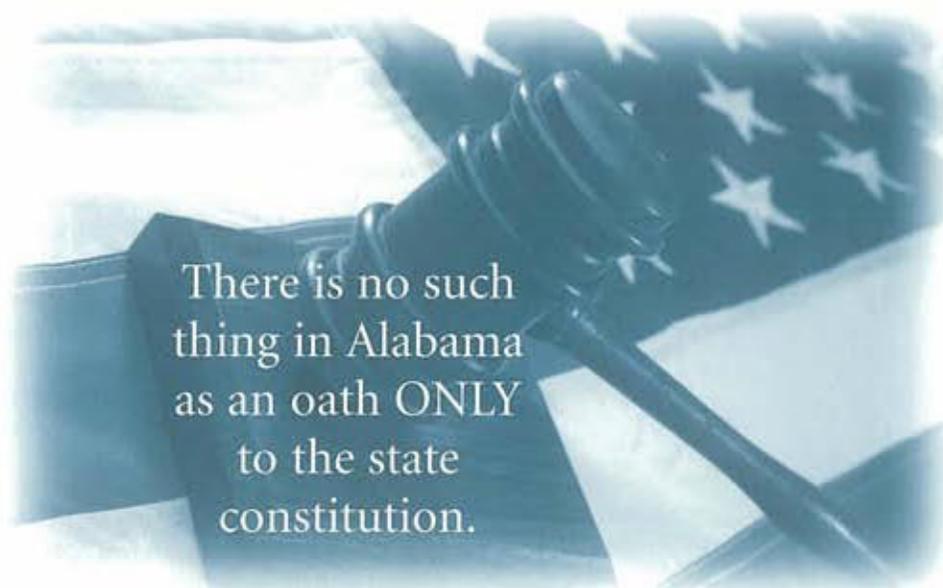
—CHANTRELL (ed.), *The Oxford Dictionary of Word Histories* 349 (2002)

executive and judicial ..." must affirm or swear to "support the Constitution of the United States and the Constitution of the State of Alabama ... and [to] faithfully and honestly discharge the duties of the office ... to the best of ... [their] ability." A similar provision may be found in the Alabama constitutions of 1875 (Art. VII, sec. 6), 1865 (Art. XV, sec. 1), and 1819 (Art. VI, sec. 1). The related provision (Art. VI, sec. 1) in the constitution of 1861 makes no reference to the federal Constitution for reasons too sad to recall. (The unadopted constitution of 1868 includes a provision (Art. XV, sec. 1) similar to that in the current state constitution.) The relevance of the oath, which has been a part of Alabama organic law from the beginning of statehood 187 years ago, is that all legislators and all of the denominated state officers, including justices of the state's highest court, are obligated to support both the federal and state constitutions. (There is no such thing in Alabama as an oath ONLY to the state constitution.) And, since it is the justices who say and apply what the constitutions mean as applied in a given factual situation,⁴ they must follow the dictates of such reasoning. As today, so throughout the history of the state, most state supreme court majorities have accepted this and gone about the business of appellate adjudication. See, e.g., *Ex parte Selma & Gulf Railroad Co.*, 45 Ala. 696 (1871), 1871 WL 986 ("No power of this nature is expressly given. Considering its importance, it is a little strange that it has been wholly omitted. *But grant that it exists*" (emphasis supplied), *id.* at *22). The U.S. Supreme Court, of course, is the final arbiter of what federal law is to be applied and how, beginning with its declaration to that effect in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 2 L.Ed. 60 (1803),⁵ the single most famous and important case in American constitutional history. CHEMERINSKY, *Constitutional Law: Principles and Practices*, sec. 2.2.1, 36-37 (1997).

So, if one is an Alabama Supreme Court justice with the "inherited," common law authority and duty to exercise review of the constitutionality of acts of other branches of government and has taken an oath to "support" the state and federal constitutions, is one not thereby

bound to exercise it in a proper case? See *Walden v. State*, 426 So.2d 515 (Ala.Crim.App. 1962), on the solemnity (in a search warrant context) of the oath in section 279 of the Alabama constitution. Since states' highest courts are still the final expositors of the meaning and application of state law, *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875), honoring the oath in regard to state constitutional issues is just as important as it

U.S. 1090, 154 L.Ed. 2d 635, 123 S.Ct. 695 (2002); *State Farm Mut. Auto Ins. Co. v. Carlton*, 867 So.2d 320, rehearing denied, affirmed *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003), rehearing denied. See also 21 C.J.S., Courts, sec. 151. That has been the case since the establishment of the state's intermediate appellate courts. There is even a state statute on the matter. Section 12-3-16, *Code of Alabama* (1975), states: "The decisions of the Supreme Court [of



There is no such thing in Alabama as an oath ONLY to the state constitution.

is in regard to following precedent of the U.S. Supreme Court on matters within its purview. Neither the oath nor any other requirement mandates that the Alabama Supreme Court follow precedent of any federal court other than the nation's court of last resort. As the state court puts it in *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So.2d 905 (Ala 1995), rehearing denied, cert. denied, 516 U.S. 971 133 L.Ed.2d 348, 116 S.Ct. 434, the court may rely on a decision of any federal court, if it chooses to do so, but it is bound only by decisions of the Supreme Court of the United States.

One other aspect of state judicial activities is relevant: the requirement that the Alabama Court of Civil Appeals and the Court of Criminal Appeals follow precedent of the state supreme court. *Irwin v. State*, 23 Ala.App. 284, 124 So. 408 (1929), cert. denied, 220 Ala. 160, 124 So. 410 (Ala. 1929); *Smith v. State*, 838 So.2d 413 (Ala.Crim.App., 2002), cert. denied, 537

Alabama] shall govern the holding and decisions of the courts of appeals, and[, moreover,] the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment No. 328." *L.J.K. v. State*, __ So.2d __, WL 3506374 (Ala.Crim.App. 2005), noting both the case law and the statutory requirement to follow precedent of the state's highest court. It has been said that "the 'decisions of the supreme court' referred to in said Code Section [12-3-16] can only mean the 'decisions of the majority' of the Supreme Court." *Willis v. Buchman*, 30 Ala.App. 33, 199 So. 886 (1941), opinion after remand and dismissal. The case of majorities in U.S. Supreme Court decisions is noted in section B. *infra*. Q.: If Alabama courts of appeal are required to follow the precedent of the Alabama Supreme Court, to which they are subordinate, why should not the state supreme

court be obliged to follow the U.S. Supreme Court, to which it is subordinate—at least by implication in regard to “federal questions”? At the very least, it is incongruous, if not unseemly, for a member of the state supreme court to argue that the court is not bound by holdings of the U.S. Supreme Court, while simultaneously demanding that the state courts of appeal honor the holdings of his/her tribunal. That leads to the second, and foundational, question.

B. Does federal law, expressly or impliedly, require the state supreme court to follow precedent of the U.S. Supreme Court? No U.S. Code or any other statutory provision generally expressly provides such a result, although section 25 of the Judiciary Act of 1789, 1 Stat. 73, impliedly does so in its laying out of the basis of supreme court review of state rulings on federal Constitutional issues. (The language thereof has been amended over the years.) There is, nevertheless, ample authority for the requirement in decisions of the U.S. Supreme Court and concomitant ones of the Alabama Supreme Court, interpreting and applying Article VI, clause 2, of the federal Constitution. That often-cited provision reads, in pertinent part: “This Constitution, and the Laws of the United States ... made in Pursuance thereof; and all Treaties made ... under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding” (emphasis supplied). The Supremacy Clause so-called thus establishes three things as the supreme law of the land: the U.S. Constitution, laws made pursuant to it and treaties made under the authority of the national government.

When considering matters under the nation’s Constitution, state courts are bound by decisions made on the same issues by the nation’s highest court. 20 Am.Jur. 2d, Courts, sec.147, (530) (“A United States Supreme Court decision regarding a question of the construction or application of the Federal Constitution binds all state courts in interpreting and applying federal constitutional law”). The Alabama Supreme

Court is no different; it is obliged to accept the majority view of the nation’s highest court, when deciding matters that fall within the three categories delineated in the Supremacy Clause. *Duncan v. State*, 278 Ala. 145, 176 So.2d 840 (1965). (If that were not so, the U.S. Supreme Court’s decisions in, say, *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d, 106 S.Ct. 1712 (1986), and its progeny, might not have played the role they have the past two decades in Alabama criminal trials. *Smith v. State*, 838 So.2d 413 (Ala.Crim.App. cert.denied, 537 U.S. 1090, 154 L.Ed.2d 635, 123 S. Ct. 695 2002).) “[W]here a suit in ... state court involves a question arising under the Constitution, laws, or treaties of the United States ..., a decision of the United States Supreme Court upon the point at issue is to be regarded as absolutely binding and authoritative ...,” 14 Am.Jur., Courts, sec.117, 336, citing *South Carolina v. Bailey*, 289 U.S. 412, 77 L.Ed. 1292, 53 S.Ct. 667 (1933), and *State Fireman’s Fund Ins. Co.*, 223 Ala. 134, 134 So. 858 (1931), *inter alia*. Moreover, “The laws of the United States are as much a part of the law of Alabama as is its own local laws. *Blythe v. Hinckley*, 180 U.S. 333, 21 S.Ct. 390, 45 L.Ed. 557,” quoted in *Walker v. Jones*, 34 Ala.App. 348, 34 So.2d 608 (1947), cert. denied 250 Ala. 396, 34 So.2d 614 (1948). And yet, states have from the beginning of the nation sought to evade their responsibilities in this regard. For an early summary of the problem, see generally Warren, “Legislative and Judicial Attacks on the Supreme Court ... A History of the Twenty-Fifth Section of the Judiciary Act,” 47 *Am.L.Rev.* 1 (1913).

But, what is a “law” for the purpose of constitutional adjudication; for example, a “law of the United States”? (The treaty portion of the Supremacy Clause is being omitted here as irrelevant to present purposes.) Is it merely a statute or other enactment of Congress or of a state legislative body, as in: “The Legislature makes the law; the courts only interpret it in the act of applying it to specific factual situations”?—a cliché uttered over-often during campaign seasons. Law indeed includes, of course, enactments of Congressional and legislative bodies, acting

within the constitutional scope of their authority.⁶ But, it includes more; it includes authoritative *decisions* of the U.S. Supreme Court and of other courts of last resort of the states. That is so for at least three reasons. First, the courts have so held! Second, law, since the beginnings of English common law, has never meant merely acts of legislative bodies, as some English judges concluded as long ago as the 17th century. Third, in the course of interpreting and applying constitutional and statutory law, courts necessarily “make law,” for all of the reasons so brilliantly described by Mr. Justice Benjamin Cardozo in *The Nature of the Judicial Process* (1921): The rule that fits [a given] case may be supplied by the constitution or by statute. If...so, the judge looks no farther. The correspondence ascertained, his[her] duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. *** [But,] codes and statutes do not render the judge superfluous, nor his[her]work...mechanical. There are gaps to be filled...doubts and ambiguities to be cleared...hardships and wrongs to be mitigated, if not avoided.” *Id.* At 14. The great jurist adds: “[And]...when constitution and statute are silent,...the judge must look to the common law for the rule that fits the case.” *Id.* at 18-19. If that were not so, how would a judge apply, say, an amendment to the Alabama constitution restricting “vehicles” to roadways in a case in which a riding lawn-mower was claimed to fall within its ambit, the amendment lacking adequate definitions? (One day, should not we lawyers educate the public about this aspect of the common law so that its members will better understand arguments such as the ones being advanced here?)

In one of the few dictionaries available to the Framers of the U.S. Constitution, law is defined, first, as “[a] rule of action” and, alternatively, as “[a] decree, edict, statute, or custom publicly [sic] established as a rule of justice.” LYNCH (ed.), *Samuel Johnson’s Dictionary ... Selections 290* (original publication date: 1755). One recent writer captured this understanding with his view that “law is not a thing. Law is not simply this or that particular rule of

law. Law is more than this. Law is *principally an act*. In particular, law is an act of *judgment*." Cascarelli, "Is Judicial Review Grounded in and Limited by Natural Law?" 30 *Cumberland Law Review* 416-417 (1999-2000) (emphasis in the original). The authoritative *Black's Law Dictionary* has featured the most complete set of definitions, beginning with the 4th ed. in 1951: Law is "[t]hat which is laid down, ordained, or established [this is closest to the etymologically based history of the word]. *** That which must be obeyed and followed by citizens *** 'The earliest notion of law was not an enumeration of a principle, but a judgment in a particular case.'" *Id.* at 1028. Of course, it also includes legislative acts, constitutions, the common law, and "judicial decisions, judgments or decrees," as well as ordinances." *Id.* The most recent edition of *Black's* begins the definitional list thus: "1. The regime that orders human activities and relations through systematic application of the force of politically organized society ...; the legal system 2. The aggregation of legislation, judicial precedents, and accepted legal principles" *Black's Law Dictionary* 900 (8th ed. 1999; 2004).

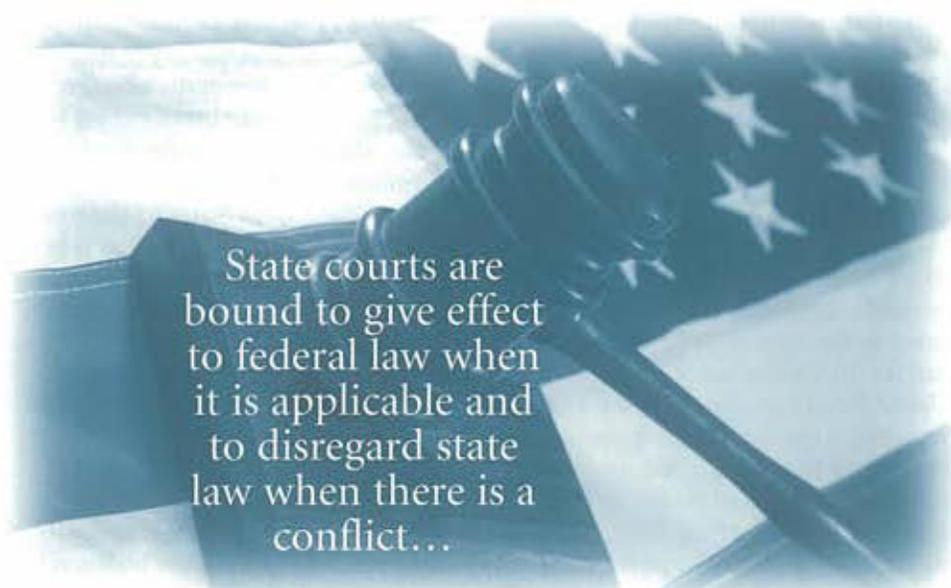
A non-specialized dictionary defines law to be "a binding custom or practice of a community; a role or mode of conduct or action ... prescribed or formally recognized as binding by a supreme controlling authority" *Webster's Third New Int'l. Dictionary* 1279 (2002). The English authority on definitions defines it over the course of four pages, in part, as "[a] rule of conduct imposed by authority. *** The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members The action of the courts of law" *Oxford English Dictionary* "L," 113-117 (compact ed. 1971).

Courts that have addressed the matter directly have concluded that "laws" include more than statutes. A California court concluded, for example, that "[t]he term 'law' includes decisions of courts, as well as legislative acts." *Miller v. Dunn*, 72 Cal.462, 14 P. 27, 29 (1887). The same is so of the constitution of a state, which the U.S. Supreme Court has said "is a 'law' of

that state, within the meaning of the constitution of the United States" *Bier v. McGehee*, 148 U.S. 137, 37 L.Ed. 397, 13 S.Ct. 580, 581 (1893). The Alabama Supreme Court frequently uses "law" in this general sense when it revises old or adopts new rules of procedure, as do commentators on the "law of evidence," for example. The court itself sometimes speaks thus: The holding in case X "changed the law in Alabama," but it is not to be applied retroactively. *See, for example, Osborn v. Roche*, 813 so.2d 811 (Ala. 2001). There are cases, typically old ones, which say that judicial opinions "do not make the law"; they simply "declare the law as it existed before." *Bloodgood v. Grasey*, 31 Ala. 575 (1858). But, such statements are mere circumlocutions and, regardless, do not square with the way the word is generally used today; nor does it square with the implications of section 12-2-13, *Code of Alabama* (1975): "The [state] Supreme Court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time is law, without any regard to such former ruling on the law by it[emphasis supplied]." (Q.: Does that language abrogate the "law of the case doctrine," which continues to pop up in case law? *Papastefan v. B&L Constr. Co.*, 385 So.2d 966 (Ala. 1980), says it does.)

What difference does it make how "law" is defined, particularly here? Simply this:

Defining it properly, *i.e.*, as the word is actually used (dictionaries are descriptive more than they are prescriptive tools), to include judicial opinions as well as acts, constitutions, and even such other things as lawfully adopted rules and regulations of state agencies (*see, e.g. Vargis v. Perry Drug Stores, Inc.*, 204 Mich.App. 481, 516 N.W.2d 102 (1994)), eliminates needless debate on definitions from the on-going debate regarding what is included in the phrase "supreme law of the land." (It may be recalled that the definition of law was one of the issues in *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D.Ala. 2002) [the complicated procedural history eventually resulted in *affirmance* by the 11th Circuit Court of Appeals, 335 F.3d 1282, and *cert. denied* by the U.S. Supreme Court, 540 U.S. 1000, 154 L.Ed.2d 404, 124 S.Ct. 497]. The district court held that placement of a large granite monument in the State Judicial Building Rotunda, engraved with the Ten Commandments, by the Chief Justice of the Alabama Supreme Court constituted "law" for the purposes of Establishment Clause analysis.) The only limitation placed on laws in the Supremacy Clause is that they be made pursuant to the U.S. Constitution. Thus, it is that treaties include such statements as this one: "State courts are bound to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitutional and congress-



State courts are bound to give effect to federal law when it is applicable and to disregard state law when there is a conflict...

sional enactments and treaties but as well the interpretations of their meanings by the United States Supreme Court," citing the seminal case of *Cooper v. Aaron*, 358 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958); see *infra*. Jayson et al. (eds.), *The Constitution of the United States of America* 871 (Library of Congress 1973). See also, Hoke, "Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause," 24 *Conn.L.R.* 829, 848-849 (Spring 1992) (the Court now recognizes, not only acts of Congress, but actions of federal agencies, the President and "the federal judiciary, which pronounces federal common law of both the constitutional and non-constitutional genre").

Given that the Supremacy Clause requires state court judges (and other state officials) to "support" the federal constitution, treaties and laws, notwithstanding any state laws to the contrary it is obvious that, if high court precedent applies to federal "law," it applies to state "law" as well. After all, the plain meaning of "support" is "[t]o bear the weight of, especially from below ... [t]o hold in position so as to keep from falling ... [t]o keep from weakening or failing; strengthen." *The American Heritage Dictionary of the English Language 1804* (3d ed. 1992). "The opinion in *Cooper v. Aaron* [sic] ... provides the major judicial support for a view widely held by the public [and doubtless most members of the legal community], that the Court is the ultimate or supreme interpreter of the Constitution." *Sullivan & Gunther, Constitutional Law* 26 (2004). In the 1958 public school civil rights case, the Court writes in what some commentators call *obiter dictum*, for it was seemingly unnecessary to decide the issues (except in a kind of ultimate legal sense), some of its most famous language: "Article VI of the Constitution makes the Constitution the 'supreme law of the land.' In 1803 ... a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in ... *Marbury v. Madison* ... that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of

the Constitution, and that principle has ever since been respected by the Court and the country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI ... makes it of binding effect on the states 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, [clause 3] 'to support the Constitution.' *** No state legislator or executive or judicial officer can war against the constitution without violating his undertaking to support it." *Cooper v. Aaron* at 1409-1410. It matters not whether one agrees with a particular ruling, be one governor, legislator or justice of the state supreme court.

But there are a number of technical aspects regarding decisional law that should be noted, although they will not be developed here. See, for example, "Duty of state courts to follow decisions of Federal courts, other than the Supreme Court, on Federal questions," 147 *ALR*. 857 (n.d.) (the Alabama Supreme Court has answered the implicit query both ways, but the general federal rule is that state courts are not obligated to follow federal district and/or circuit court of appeals ruling on such questions) and "binding effect upon state courts of opinion of united states supreme court supported by less than a majority of all of its members," 65 *ALR* 3d (n.d.) 504 (depending on how "majority" is defined, the rule seems to be ... unclear). See also Binimow, "Precedential Effect of Unpublished Opinions," 105 *ALR* 5th 499 ('Generally,[such] ... have no precedential value,' although there is authority to the opposite effect; compare *Harris v. U.S.*, 769 F.2d 718 (11th Cir. 1985) (yes, they are binding) with *U.S. v. Futrell* F.3d 1286 (11th Cir. 2000) (no, they are not binding precedent) and subsequent cases.

Regarding the oath in Article VI, clause 3 of the federal Constitution, Congressional and state legislative members and "[a]ll executive and judicial Officers, both of the United States and of

*Mighty oaks
from little
acorns grow*

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the several States, shall be bound by Oath or Affirmation, to support this Constitution” The nation’s highest court has held since at least 1858 that the desire of the people of the country to preserve the Constitution in full force and to guard against resistance to it by state authorities “is proved” by the clause requiring members of state legislatures, as well as executive and judicial officers (and those of the federal government) to bind themselves by oath or affirmation to “support this Constitution.” *Ableman v. Booth*, 62 U.S. 506, 21 How. 506, 16 L.Ed. 169 (1858). And, it is presumed by federal courts that state court judges and other state authorities who take the oath will act accordingly. *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963), cert. denied, 375 U.S. 975, 11 L.Ed.2d 420, 84 S.Ct. 489 (1964). “The Oaths Clause helps to fulfill the Framers’ plan to integrate the states into the electoral, policy-making, and executive functions of the federal union. *** The oath was at the heart of John Marshall’s opinion in *Marbury v. Madison* ... [*supra*,] obliging judges to give priority to the Constitution over ordinary legislative acts. Justice Joseph Story likewise stated in his *Commentaries on the Constitution of the United States* that officers sworn to support the Constitution are ‘conscientiously bound to abstain from all acts inconsistent with it,’ and that in cases of doubt they must ‘decide each for himself, whether, consistently with the Constitution, the act can be done.’ But taking the oath does not relieve a judge from obedience to higher judicial authority, even if he thinks the higher court was acting contrary to the Constitution. *Glassroth v. Moore* (2003).” *Meese et al. (eds.), The Heritage Foundation Guide to the Constitution* 295 (2005). In *Ex parte Selma & Gulf Railroad Co.*, *supra*, this state’s supreme court affirmed the importance of the oath in a separation of powers case that reminds its readers that both the legislature and the court “acts under ... sanction of an oath, and fealty to the best interests of the people, whose agents they are.” *Id.* at *22. Otherwise, how can others be held to adherence to the oaths they take in, for example, courtrooms before testifying?

C. Do any considerations of public policy require the state supreme court to

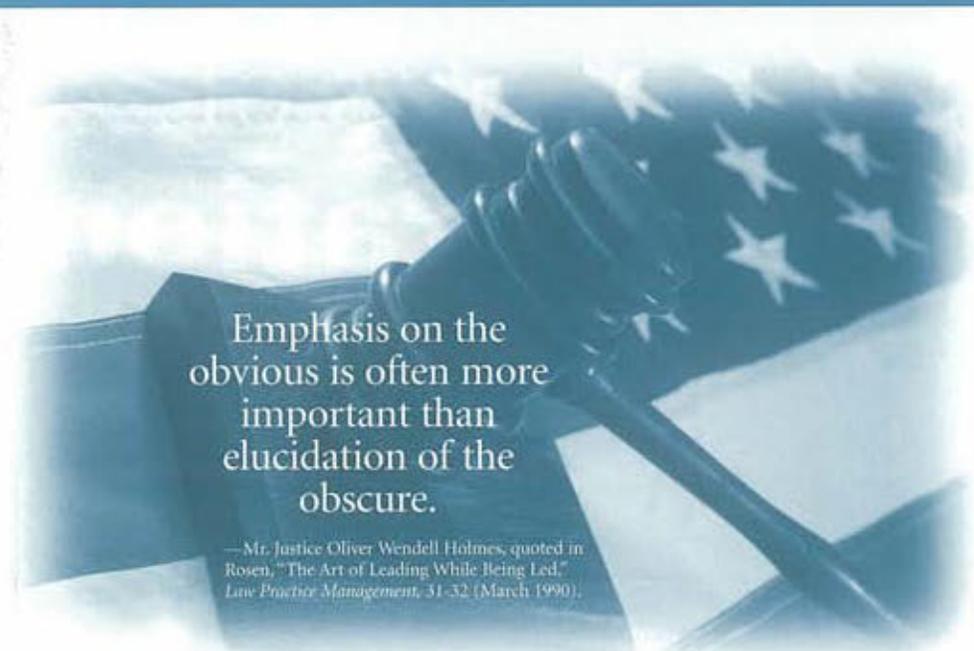
follow U.S. Supreme Court precedent? The U.S. Constitution itself embodies the public policy reasons. Thomas Healy in “Stare Decisis as a Constitutional Requirement,” 104 *W.Va.L.Rev.* 43, 108-109 (2001), outlines the four values he suggests “provide strong support for a[n]y doctrine of precedent.” First is predictability, which enables people to plan their affairs and courts to apply known rules to their conduct. Second is equality, which “ensure[s] that legal rules are applied consistently and fairly. As Karl Llewellyn observed, there is an ‘almost universal sense of justice which urges that all men [and women] are properly to be treated alike in like circumstances [footnote omitted].’” Third is judicial efficiency, a value especially applicable when voters are comparing candidates for the judiciary. “If individuals with legitimate grievances cannot have their complaints heard within a reasonable time, the courts will have failed in their role as a protector of rights.” Fourth is “judicial restraint and impartiality. When judges are required to base their decisions primarily on precedent, they have less room to exercise discretion or bias.”

Such values have special relevance to appellate court review and the adherence of one court to the rulings of its “superior” court or courts. Jerome Hoffman described the factors in these words: “Appellate ... review is thought to [1] foster uniformity in the decision of similar cases, [2] the maintenance of judicial discipline, [3] some relief from arbitrariness and caprice at the local [*i.e.*, lower court] level, [4] some compensation for the uneven quality of trial-level judicial skills, and [5] an appearance that the judiciary is striving for fairness.” “Alabama Appellate Courts,” 46 *Ala.L.Rev.* 843, 843 (spring 1995). The first factor enumerated by Hoffman is of special significance in the context of the precedential case law at issue here. In fact, it was used as a part of the rationale for the U.S. Supreme Court’s holding in *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (1816), that the federal court in civil cases may review the actions of state governments for their constitutional validity, in part because of the “necessity of uniformity of decisions throughout the whole United States, upon all subjects within the

purview of the [U.S. C]onstitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the [C]onstitution itself; if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different [in different] states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.” Furthermore, if that were so, defendants would be encouraged to go forum-shopping from state to state, looking for the most favorable interpretations on federal questions, which would defeat the very purpose of the Framers in adopting a national government founded on a federal constitution, rather than a confederated one based on a compact, whose organic law was “designed for the common and equal benefit of all the people of the nation.” (A similar conclusion for criminal cases was later reached in *Cohens v. Virginia*, 6 Wheat. 264 (1821), for similar reasons.) In his treatise on *American Constitutional Law I* (2000), Laurence Tribe opines: “However debatable one finds the conclusion of *Marbury v. Madison*, the holding of *Martin v. Hunter’s Lessee* was quite plainly compelled by the structure of the federal system.” See, e.g., Oliver Wendell Holmes, *Collected Legal Papers* 293 (1920) [cited as indicated] (“I do not think the United States would come to an end if [the Court] lost [its] power to declare an act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states”). Tribe at 25, footnote 8. So, there are policy reasons for the requirement that the Alabama Supreme Court follow the precedents of the U.S. Supreme Court—the same reasons applicable within the state to prevent local circuit, district, juvenile and probate judges and judges of the two courts of appeal from generating different law within and among its 67 counties.

Summary: An abridgment; brief ... digest ... a short application to a court or judge

—*Black’s Law Dictionary* 1435 (6th ed. 1990).



Emphasis on the
obvious is often more
important than
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obscure.

—Mr. Justice Oliver Wendell Holmes, quoted in
Rosen, "The Art of Leading While Being Led,"
Law Practice Management, 31-32 (March 1990).

Is the Alabama Supreme Court obliged to follow precedential case law of the United States Supreme Court? Can there be any doubt? First, Alabama law requires it—both the case law of past and present majorities of the state's highest court and the state constitutionally mandated oath of office which all justices have sworn to or affirmed. Moreover, Alabama's own appellate court system, which requires that the intermediate appellate courts adhere to precedential case law of the state supreme court, makes it unseemly, at the very least, for the latter to deny that it, too, must follow the dictates of the only Court in the land with a higher precedential status than it enjoys.⁷ Second, federal law requires it—the case law of the U.S. Supreme Court itself, which stretches back into the nation's past more than 200 years, and the federal constitutionally mandated oath of office which all state and federal judges have sworn to or affirmed. Third, public policy considerations dictate that the state's highest court follow U.S. Supreme Court precedent, particularly the overriding value in the federal system created by the U.S. Constitution of uniformity of resolution of the "federal issues" implicated by Article VI, clause 2 of the nation's organic law.

Emphasis on the obvious is often more important than elucidation of the obscure.

—Mr. Justice Oliver Wendell Holmes, quoted in Rosen, "The Art of Leading While Being Led," *Law Practice Management*, 31-32 (March 1990). ■

Endnotes

1. See the special concurrence of Justice Tom Parker in *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*, 912 So.2d 204 (Ala. 2005), in which he attacks the 203-year-old "unconstitutional doctrine of judicial supremacy" and laments the "turning away from our national compact by federal courts, which now threatens our country with a constitutional crisis." *Id.*, at 223-24.
2. The meaning of the word "law" has special significance in this context, for reasons to be seen. Accordingly, it will be developed at the place in the text where it is most relevant.
3. Because of the ambiguity in the use of the word "constitution," it is often difficult in such older cases to ascertain when the authoring judges and justices are referring to both the state (Art. I, sec. 22, of the 1901 constitution) and U.S. contract impairment prohibitions or to one only at a given point in an opinion. As to the state court's power to void acts of the legislative branch under the Alabama constitution, see the text *infra* and footnote 5.
4. A recent decision likewise declaring that it is a judicial power to determine what the law is or has been is *City of Daphne v. City of Spanish Fort*, 853 So.2d 933 (Ala. 2003), citing Article 3, section 43 of the Alabama Constitution of 1901.
5. The power to do such is, of course, what is usually referred to as "judicial review." If the promise of this premise were ever broken, then the argument of this entire essay would likely fail, along with the unified federal legal system. After 200-plus years that is not likely for most lawyers and laypersons have for too long accepted the premise. That is not to say, however, that *Marbury v. Madison* does not continue to bear the brunt of criticism as the first such judicial opinion in American history. See generally for negative reviews, Clinton, *Marbury v. Madison And Judicial Review* (1989), and the often-cited VanAlstyne, "A Critical Guide to *Marbury v. Madison*," 1969 *Duke L.J.* 1; for positive reviews, see Pfander, "Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers," 101 *Colum.L.Rev.* 1515 (2001), and Louise Weinberg, "Our Marbury," 89 *Va.L.Rev.* 1235 (2003).
For Alabama state courts, at least since 1835, the Alabama Supreme Court has recognized that it has

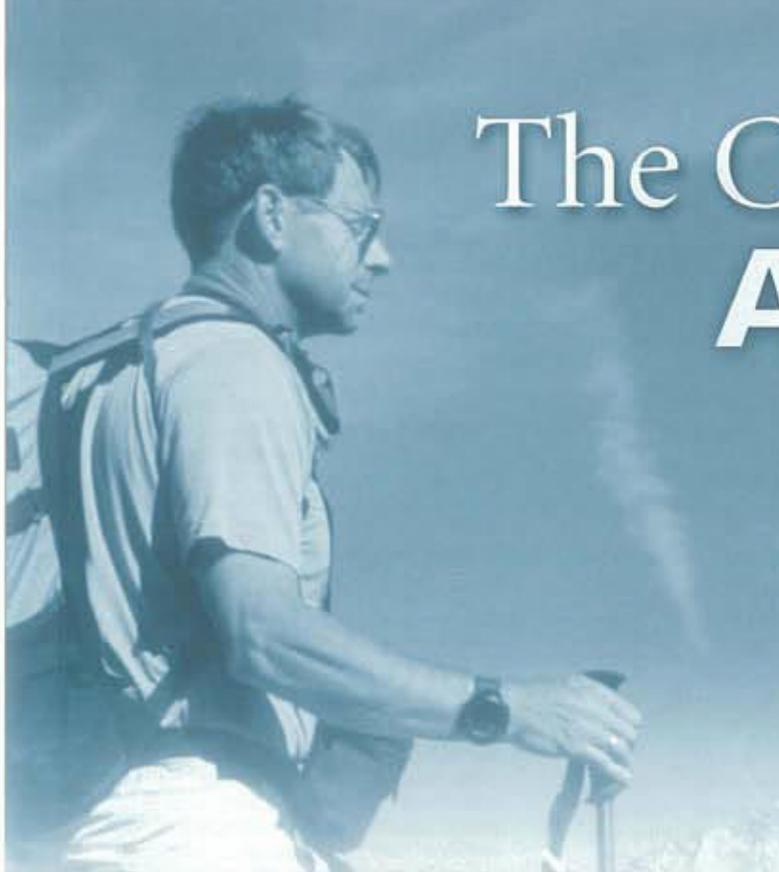
the power, not merely to interpret the state's then-current constitution, but to strike down an act of the legislature found to be repugnant to the state constitution. *Dyer v. Tuscaloosa [sic] Bridge Co.*, 2 Port. 296 (Ala. 1835) (the court in this eminent domain case did not choose to exercise the power it said it had of "investigation into the constitutionality of an act of a co-ordinate department of government: and of pronounc[ing] the act ... void," if inconsistent with Alabama organic law.) See also *Halsey v. Clark*, 26 Ala. 439 (1856). The same power is affirmed in such recent cases as *City of Daphne v. City of Spanish Fort*, footnote 4 *supra*. See also *Rice v. English* in the text (concluding, in part, that "the authority of this Court to review challenges to acts of the Legislature on constitutional grounds is a bedrock principle of our State's legal heritage," *id.* at 162).

6. Rhetorical and legal studies make clear the hazards of definitions, for the ultimate meanings of words are not in the books people read, but in people themselves. Moreover, it is well known that "peril lurks in definitions." *Cardozo, Selected Writings 16* (1947), quoted in Thornton, "Predictability in Appellate Courts ...," 33 *Alabama Lawyer* 234, 241 (July 1972). This fascinating essay includes numerous definitions of "law."
An excellent recent article in this publication about the more general problem of interpreting legal language is Ayers, "Unpacking Alabama's Plain-Meaning Rule ...," 67 *Alabama Lawyer* 31 (January 2006), which well reminds judges and practitioners alike that "all terms require interpretation on some level" *Id.*, at 34. Why?—Because verbal symbols are not self-explanatory.
7. "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 L.Ed. 469, 73 S.Ct. 397, 427 (1953). This observation of Mr. Justice Robert Jackson is quoted in *Wright, The Law Of Federal Courts*, sec. 4, 14 (1983). That is why "[t]here is ... no direct review of decisions of the [U.S.] Supreme Court." *Id.*, at 14. Indirect review, of course, is available under the Article III, sec. 2, jurisdictional exception and the Article V amendatory provisions of the federal Constitution. Moreover, mere statutory interpretations by the Court, which Congress does not like, may be "undone" by the passage of "corrective" legislation. So, "We the People" do not stand powerless before "wrong" or even unpopular decisions of the nation's highest court!



James F. Vickrey

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The Contours of Arbitration

DISC

BY W. SCOTT SIMPSON AND OMER KESIKLI

Introduction

Arbitration is now generally accepted in the legal community as a mainstream method of alternative dispute resolution. Arbitration is widely used in a variety of contexts, including disputes involving commercial transactions, consumer transactions and employment relationships. Some of the primary benefits of arbitration are speed, efficiency and cost savings. However, these benefits come with significant trade-offs as well—the primary one being limited discovery. Unlike litigation under the *Federal Rules of Civil Procedure*, discovery in arbitration can be very limited. Discovery devices such as interrogatories, requests for admissions and mental examinations are generally not employed in arbitration. Depositions of parties are common in arbitration, but depositions of nonparties are rare and somewhat controversial. These discovery devices although usually helpful in developing a case, can be very expensive. John C. Koski, *From Hide-And-Seek to Show-And-Tell: Evidentiary Disclosure Rules*, 17 *Am. J. Trial Advoc.* 497 (1993) (Noting that attorney's fees generated from discovery account for 40 to 60 percent of a law firm's profits). That's why many potential litigants are opting for arbitration of their disputes. Arbitration is a streamlined process that limits discovery and saves people money in the process.

This begs the question: How much discovery is permitted in arbitration? The answer to that question is it depends on a variety of factors, including the institution chosen by the parties to administer the arbitration, and the person against whom the discovery is directed. This article will explore these issues, beginning first with the public policy of arbitration and its application to discovery issues. This article will explore the scope of discovery available

under Section 7 of the Federal Arbitration Act ("FAA"), and the controversial issue of nonparty discovery in arbitration. This article will then discuss the scope of discovery permitted under mainstream institutional arbitration rules—the *Commercial Rules of the American Arbitration Association* ("AAA"), as well as issues involving the enforcement of arbitration discovery orders.

Ideally, a dispute that parties have agreed to arbitrate should be handled within the confines of arbitration, without resorting to litigation either before or after the hearing. Unfortunately, this does not always happen. It is common for parties to litigate the arbitrability of their dispute in court before submitting to arbitration. Similarly, after an arbitrator issues an award, parties sometimes choose to attack the award in court under one or more of the statutory and common law grounds for vacating an award. 9 U.S.C. § 10 (statutory grounds for vacating arbitration award); *Birmingham News Co. v. Horn*, 901 So. 2d 39, 65 (Ala. 2004) (adopting "manifest disregard of the law" as a common law ground for vacating arbitration award).

Fortunately, the policy of limited discovery in arbitration bleeds-over into "arbitration-related proceedings" in court, which this article defines as litigation leading up to arbitration (a motion to compel arbitration under Section 3 of the FAA, or an original petition to compel arbitration under Section 4 of the FAA.), and litigation instituted to challenge an arbitration award (an application to vacate an arbitration award under Section 10 of the FAA). State and federal courts have crafted special rules to limit discovery in arbitration-related proceedings because parties frequently try to circumvent the discovery limitations of arbitration through broad-based discovery in court. This article will discuss the contours of those rules.

DISCOVERY

The Public Policy of Arbitration and Its Application to Discovery Issues

The primary goals of arbitration are speed, efficiency and reduction of litigation expense. *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980). Potential litigants opt for arbitration, as opposed to litigation, because arbitration is a faster and less formal method of dispute resolution. *Forsythe Internat'l., S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990). A primary reason for this is that formal discovery under the *Rules of Civil Procedure* generally is not allowed in an arbitral proceeding. *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D. N.Y. 1957); *Schacht v. Hartford Fire Ins. Co.*, No. 91 C 2228, 1991 U.S. Dist LEXIS16430, *12 -*13 (N.D. Ill. November 6, 1991). The court in *In re Technostroyexport* underscored the differences between discovery in arbitration and litigation:

It appears to be generally accepted that the rules and procedures in arbitration are intended to be radically different from the rules and procedures in the courts. Arbitrators govern their own proceedings, generally without assistance or intervention by a court. Whether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrators decide. It has been expressly held that a Federal District Court has no power to order discovery under court rules where the matter is being litigated in an arbitration.

853 F. Supp. 695, 697-98 (S.D. N.Y. 1994)(citations omitted).

In *Gilmer v. Interstate/Johnson Lane Corp.*, the United States Supreme Court affirmed the policy of limited discovery in arbitration. There, the Court rejected the argument of a plaintiff, who made an age discrimination claim, that the limitations of discovery in arbitration precluded him from effectively proving his case.

Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions and subpoenas . . . will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration."

500 U.S. 20, 31 (1991)(citations omitted).

Because discovery is limited in arbitration, a court should stay discovery when ordering a case to arbitration pursuant to Section 3 of the FAA, 9 U.S.C. § 3; *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 989 (Ala. 2004). Similarly, courts should not permit discovery to be undertaken simultaneously in court and arbitration because of conflicts with the arbitration process. In *Mississippi Power Co. v. Peabody Coal Co.*, the court discussed the rule precluding dual or "double-barreled" discovery.

[T]he parties should be held to their agreement and to the availability of Rule 30 of the *Rules of the American*

Arbitration Association. Backed up by the federal statute, this rule allows the arbitrator, in his discretion, to permit any discovery necessary to the performance of his function. There should be no necessity for double-barreled discovery, proceeding simultaneously under the supervision of the court, on one hand, and under the supervision of the arbitrator, on the other, a situation fraught with the likelihood of conflicts, duplications, hindrances and delays, all basically in conflict with the arbitration process, as demonstrated by the many cases hereinabove cited. This course avoids anything inimical to the obligation to arbitrate, yet it will not deprive the plaintiff of the benefits of discovery, which can be had, if needed, at the hands of the arbitrator and under his direction.

69 F.R.D. 558, 567 (S.D. Miss. 1976).

Federal Rule of Civil Procedure 81(a)(3) specifically limits the application of the *Federal Rules* to proceedings in court "relating to arbitration." The discovery rules applicable in court have no field of operation in an arbitral proceeding. *Great Scott Supermarkets, Inc. v. Local Union No. 337*, 363 F. Supp. 1351 (E.D. Mich. 1973); *Internat'l Brotherhood of Teamsters, Chauffeurs, and Warehousemen of North America*, 363 F. Supp. 1351 (E.D. Mich. 1973); *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1959).

The Seventh Circuit Court of Appeals explained this rule in *Champ v. Siegel Trading Co., Inc.*:

Rule 81(a)(3) only applies to *judicial* proceedings under the FAA. These include: a stay of a suit in which an issue involved is referable to arbitration (9 U.S.C. §3); a petition for an order compelling arbitration (9 U.S.C. § 4); an application for the appointment of arbitrators or an umpire (9 U.S.C. § 5); an application for the confirmation of an arbitration award (9 U.S.C. § 9); an application for vacating an arbitration award (9 U.S.C. § 10) and an application for modifying or correcting an arbitration award (9 U.S.C. § 11). So, for example, in a proceeding under section 4, which consists of a preliminary determination on whether the parties intended an issue to be referred to arbitration, a district court could order discovery pursuant to Fed.R.Civ.P. 26 on matters relevant to the existence of an arbitration agreement. But nothing in the language of Rule 81(a)(3) purports to apply the *Federal Rules of Procedure* to the actual proceedings on the merits before the arbitrators, which are normally regulated by the *American Arbitration Association's Commercial Arbitration Rules*. As the Fourth Circuit has explained it: "An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."

55 F.3d 269, 276 (7th Cir. 1995)(citations omitted).

Like many rules in the law, the one precluding formal discovery in arbitration comes with an exception. When a party to an arbitration agreement needs to perpetuate testimony before the arbitration commences, some courts will permit such discovery

under what has been referred to as the "exceptional circumstances" exception. *Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa*, 199 F. Supp. 716 (S.D. N.Y. 1961). The court in *Koch Fuel Internat'l Inc. v. M/V South Star* applied this exception to permit a party to an arbitration to depose a crew member of an international vessel that was about to leave port in order to perpetuate testimony.

Although discovery on the subject matter of a dispute to be arbitrated generally has been denied, courts have recognized that discovery may be appropriate in exceptional circumstances. One of the "exceptional circumstances" in which discovery has been deemed proper is where a vessel with crew members possessing particular knowledge of the dispute is about to leave port.

118 F.R.D. 318, 320 (E.D. N.Y. 1987)(citations omitted).

This exception is very narrow, and should be applied only in cases when a party faces the prospect of losing the ability to obtain relevant and material evidence based on delay. Therefore, unless a party proves that the discovery sought is "vital," and that the information may become "unavailable," courts generally will not permit a party to engage in discovery initiated in court when a case is ordered to arbitration.

Discovery under Section 7 of the Federal Arbitration Act

Section 7 of the FAA empowers arbitrators to compel witnesses to produce records and appear at arbitration hearings. This statute is the closest thing to a "rule" on the issue of permissible discovery in arbitration. Section 7 provides as follows:

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title [9 USCS §§ 1 *et seq.*] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or

their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

As a threshold matter, it is important to point out that parties do not technically conduct discovery in arbitration; instead, the arbitrators conduct all discovery. *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980) (arbitrator—not the parties—has the power of subpoena); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988) (arbitrator may conduct discovery as he finds necessary). "If a dispute is arbitrable, responsibility for the conduct of discovery lies with the arbitrators—indeed, for the sake of economy and in contrast to the practice in adjudication, parties to an arbitration do not conduct discovery; the arbitrators do." *Cigna Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002).

Ordinarily, discovery disputes among parties to an arbitration proceeding are administered according to the rules of the governing body. For example, in a commercial arbitration case administered by the AAA, the *Commercial Rules* would govern the availability of discovery among the parties. (The AAA's *Commercial Arbitration Rules and Mediation Procedures* (Including Procedures for Large, Complex Commercial Disputes) are located on the Web at www.adr.org/sp.asp?id=22440). Whenever discovery is sought from someone who is not a party to the proceeding however, problems can arise. A nonparty is not bound by the rules of the administering body because he or she never agreed to arbitrate in the first place. The ability of an arbitrator to compel discovery from a nonparty is governed by Section 7 of the FAA.

Section 7 of the FAA empowers an arbitrator to summon in writing "any person" to attend a hearing and bring with him "any book, record, document, or paper which may be deemed

material as evidence in the case." The phrase "any person" has been uniformly interpreted to include nonparties to a proceeding. However, there is some disagreement among federal circuit courts of appeals over the scope of an arbitrator's power to compel a nonparty to respond to a discovery request *before* an arbitration hearing. Four different rules have emerged among the Third, Fourth, Sixth and Eighth Circuit courts of appeals.

The Sixth Circuit Court of Appeals interpreted an arbitrator's powers liberally. In *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999) the court held that under Section 301 of the Labor Management Relations Act of 1947 an arbitrator has the power to compel a nonparty to produce material records either before or during an arbitration hearing. The court relied on analogous cases interpreting Section 7 of the FAA in reaching this conclusion. The court did not decide whether an arbitrator may subpoena a nonparty for a discovery deposition relating to a pending arbitration proceeding.

A slightly more restrictive approach was announced in *Arbitration Between Security Life Insurance Company of America and Duncanson & Holt, Inc.*, 228 F.3d 865 (8th Cir. 2000). There, the Eighth Circuit Court of Appeals affirmed the issuance of a document subpoena to a nonparty that required the production of records before the arbitration hearing because the nonparty was intricately related to the parties to the arbitration, as opposed to a mere bystander pulled into this matter arbitrarily. It is unclear whether the power to compel nonparty discovery before a hearing is permitted in the Eighth Circuit without a showing of an intricate relationship between the nonparty and the parties to the case.



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Are you watching someone you care about self-destructing because of alcohol or drugs?
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Are they telling you they can handle it?

They can't.

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It is.

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You can.

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The Fourth Circuit Court of Appeals adopted a narrower view of Section 7. In *COMSAT Corp. v. National Science Found'n*, 190 F.3d 269 (4th Cir. 1999) the court remarked, in what was arguably *dicta*, that Section 7 of the FAA does not empower an arbitrator to subpoena a nonparty to a pre-hearing deposition or produce records before the arbitration hearing without a showing of special need or hardship by the party seeking discovery. The court did not define the requirements of a showing of special need or hardship, but stated that, at a minimum, the information sought must be unavailable otherwise.

The most conservative interpretation of Section 7 comes from the Third Circuit Court of Appeals. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) the court held that Section 7 of the FAA vests an arbitrator with the power to require nonparties only to attend the arbitration hearing, produce records and testify during the hearing. Pre-hearing discovery is foreclosed. Interestingly, Circuit Judge Tcherhoff, in a concurring opinion, remarked that an arbitrator has the power to convene a special hearing for the purpose of receiving documents from a nonparty, and then may adjourn the hearing. The ultimate hearing on the merits would be convened sometime later under this approach.

The Eleventh Circuit Court of Appeals has not decided the issue of an arbitrator's power to require discovery from nonparties. However, in *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988) the Federal District Court for the Southern District of Florida held that an order from an arbitrator directing the production of documents before the hearing was permissible. According to the court, the FAA gives arbitrators the power to order and conduct such discovery as they find necessary. This decision, although somewhat dated, expresses the most liberal reading of Section 7 in decisional law.

Recent cases seem to draw a distinction between requiring nonparties to produce records before an arbitration hearing as opposed to requiring nonparties to testify in deposition on a pre-hearing basis. The former practice appears permissible, whereas the latter practice has been condemned as being beyond the scope of Section 7. See *Hawaiian Electric Industries, Inc. v. Hei Power Corp.*, No. M-82, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y. May 25, 2004); *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995); *Douglas Brazell v. American Color Graphics*, No. M-82 (AGS), 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y. April 6, 2000). An arbitrator's power to order nonparty discovery under Section 7 is far from settled. The United States Supreme Court will likely be called upon to resolve this important issue in the near future.

Discovery under the Commercial Rules of the American Arbitration Association

The *Commercial Arbitration Rules of the AAA* are among the most widely used arbitration rules in the country. (The AAA administered more than 230,255 cases in 2002. See

www.adr.org/Overview). The *Commercial Rules* set forth a variety of rules that establish the contours of discovery among the parties. Nonparties are not strictly bound by these rules because the rules are a matter of contract arising out of an arbitration agreement that incorporates the rules. Under the *Commercial Rules*, an arbitrator has broad powers to order discovery between the parties. Although arbitrators technically conduct discovery in arbitration, it is common for the parties to handle discovery themselves as a practical matter.

One of the most important rules is Rule 30, which vests the arbitrator with the power to conduct the proceedings as he sees necessary. The power to direct the proceedings includes the power to control discovery as well. Under Rule 31, an arbitrator has the ability to decide what evidence is material, relevant and necessary. This rule also gives an arbitrator the power to subpoena witnesses and documents. Rule 33 gives an arbitrator the power to conduct an inspection or investigation. It does not expressly permit an arbitrator to order the physical or mental examination of a party, which is permitted in court under Federal Rule of Civil Procedure 35. However, there is legal authority for the proposition that an arbitrator has this power nonetheless. *Sunshine Mining Co. v. United States Steelworkers of America, AFL-CIO, CLC and Local 5089, United Steelworkers of America*, 823 F.2d 1289, 1295-96 (9th Cir. 1987).

The *Commercial Rules* do not expressly provide for depositions in a typical case. However, Rule 22 states that in a preliminary hearing, an arbitrator may establish "the extent of and schedule for the production of relevant documents and other information." Some arbitrators interpret the "other information" language to include the power to order depositions. See *A Guide for Commercial Arbitrators*, www.adr.org/sp.asp?id'22016. In any event, full-blown litigation-like discovery is not contemplated under the *AAA Commercial Rules*.

Enforcement of Arbitrator Discovery Orders

Sometimes, arbitrators are called upon to enforce discovery orders. An arbitrator has a limited array of tools to enforce discovery orders as between the parties to the proceeding. An arbitrator may draw a negative inference against a party who refuses to produce records (www.adr.org/sp.asp?id'22026). In an extreme case, an arbitrator has the power to strike a party's claims or defenses. There is some authority that an arbitrator may award monetary sanctions for discovery abuses. Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, *Dispute Resolution Journal*, pp. 60-69, 75 (Nov. 2005-Jan. 2006). A party also can apply to a court for an order enforcing an arbitrator's discovery order. *Western Employers Ins. Co. v. Merit Ins. Co.*, 492 F. Supp. 53 (N. D. Ill. 1979)(court that orders a case to arbitration retains jurisdiction to enforce discovery orders of the arbitrator); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 559 F. Supp. 875 (M.D. Pa. 1982)(subpoenas in labor arbitrations are to be enforced by the courts).

Because arbitrators lack the power to enforce discovery orders against nonparties to a proceeding, a party seeking to enforce an arbitration subpoena against a nonparty *should* apply to a court for relief. See *Commercial Metals Co. v. International Union Marine Corp.*, 318 F. Supp. 1334 (S.D. N.Y. 1970)(court may hear motion to quash arbitrator subpoena); *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995)(discussing enforcement of subpoena in another jurisdiction).

Discovery in Arbitration-Related Proceedings

Courts are frequently called upon to decide whether a dispute is subject to arbitration. In these instances, parties may challenge the scope of an arbitration agreement, or test its enforceability based on any number of state contract law defenses, such as unconscionability, for example. Discovery is sometimes necessary to develop facts relative to the issues raised. Similarly, after an arbitrator issues an award, parties are permitted to challenge the award in court, pursuant to Section 10 of the FAA, which sets forth the statutory grounds for vacatur. 9 U.S.C. § 10. Motions to vacate arbitration awards are relatively rare. However, there are some cases that may require the development of facts beyond those presented in the arbitration hearing itself. For example, a court may vacate an arbitration award if the court finds that the arbitrator acted with “evident partiality” or corruption. 9 U.S.C. § 10(a)(2); see also *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493, 508 (Ala. 2003)(adopting evident partiality standard in Alabama). This is a difficult standard to meet, and may require the development of facts establishing that the arbitrator had an undisclosed conflict of interest, for example. From a practical standpoint, post-award discovery may be necessary to discover such facts.

Of course, broad-based discovery in court is inimical to arbitration. Courts are understandably reluctant to grant parties unrestricted leave to undertake discovery when the underlying controversy has been (or will be) decided in arbitration. Through decisional law, rules have emerged that strike a balance between the need for some discovery in an arbitration-related proceeding, and the protection of the integrity of the arbitral process, which demands limited discovery. The following discussion summarizes the leading rules in this regard.

Discovery in Connection with Proceedings to Compel Arbitration

Procedurally speaking, there are two ways that a court may be called upon to decide the arbitrability of a dispute. In a pending

court case, a party may move to stay the court proceeding and have the case ordered to arbitration pursuant to Section 3 of the Federal Arbitration Act. 9 U.S.C. § 3. Similarly, a party wishing to invoke an arbitration agreement may file an original petition in court, and move to have the agreement specifically enforced. 9 U.S.C. § 4. In either case, parties opposing arbitration have the right to raise defenses to the arbitration agreement; in which case, discovery may be necessary.

Federal case law generally permits a party to undertake *limited* discovery on the issue of arbitrability. In *the Matter of the Application of Deiuemar Compagnia Di Navigazione S.P.A. For the Perpetuation of Certain Evidence v. Allegra*, 198 F.3d 473 (4th Cir. 1999) (Rule 81 of the Fed.R.Civ.P. authorizes a district court, in enforcing an arbitration agreement, to order discovery pursuant to Fed.R.Civ.P. 26 on matters relevant to the existence of an arbitration agreement); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) (same); *Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa*, 199 F. Supp. 716, 718 (S.D.N.Y. 1961) (same). Broad-based fact discovery is not allowed. A party undertaking broad-based discovery before moving to compel arbitration runs the risk of waiving the right to compel arbitration. *Stone v. E.F. Hutton & Co., Inc.*, 898 F.2d 1542, 1543 (11th Cir. 1990); *Jones-Williams Construction Co. v. Town & Country Property, L.L.C.*, No. 2040451, 2005 Ala. Civ. App. LEXIS 470 (Ala. Civ. App. August 19, 2005); James W. Davis, “When Does a Party Waive Its Right to Enforce Arbitration?: Common Law Defense Limit,” 63 *Ala. Law.* 42, 46-47 (2002). However, as long as a discovery request is narrowly tailored to the issue of arbitrability, a federal court should grant the request.

Case law in Alabama is fairly well-developed on this issue, partly because Alabama appellate courts decide more cases on the enforceability of arbitration agreements than any appellate court in the country. W. Scott Simpson, Stephen J. Ware & Vicki Willard, “The Source of Alabama’s Abundance of Arbitration Cases: Alabama’s Bizarre Law of Damages for Mental Anguish,” 28 *A. J. Trial Advoc.* 135, 160 (2004). In Alabama, a party opposing a motion to compel arbitration has a limited right to conduct discovery relative to the arbitration issue if such party establishes that it is unable or virtually unable to obtain relevant evidence. *Ex parte Greenstreet, Inc.*, 806 So. 2d 1203, 1208-09 (Ala. 2001); *Ex parte Horton Family Housing, Inc.*, 882 So. 2d 838, 840 (Ala. 2003). In that circumstance, the opposing party must present a factually-based predicate to the court establishing what the party knows, what it expects to discover and why that information matters. Alabama has no analog to Federal Rule of Civil Procedure 81 (a)(3), which permits a federal court to apply the *Rules of Civil Procedure* to arbitration-related proceedings in court. Nevertheless, Alabama courts address motions to compel arbitration like motions for summary judgment under Alabama Rule of Civil Procedure 56. Thus, the rule requiring a “factually-based predicate” is grounded in Alabama Rule of Civil Procedure 56(f), which permits a party opposing a summary judgment to delay a hearing on the motion in order to obtain additional discovery. *Ex parte Walker Regional Center v. Potts*, 825 So. 2d 741, 744 (Ala. 2001). A party urging a motion to compel arbitration also has the right to conduct limited arbitration discovery to gather evidence necessary to support the

motion and to rebut contract defenses raised in opposition to the motion. *H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630 (Ala. 2001).

Discovery in Connection with Proceedings to Vacate Arbitration Awards

After an arbitrator renders an award, parties to the proceeding have the right to confirm, vacate or seek a modification of the award in court. 9 U.S.C. §§ 9, 10 and 11. The FAA sets forth four grounds to vacate an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; and (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made. 9 U.S.C. § 10; see also *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1458-59 and 1462-63 (11th Cir. 1997)(mentioning two additional common law grounds for vacatur and adopting a third, manifest disregard of the law); *Birmingham News Co. v. Horn*, 901 So. 2d 27, 65 (Ala. 2004)(adopting "manifest disregard of the law" as a common law ground for vacating arbitration award in Alabama).

The question sometimes arises in vacatur proceedings whether the court will allow post-arbitration discovery to develop facts in support of a motion to vacate. To protect the integrity of the arbitration proceeding, courts have developed discovery limitations in post-award proceedings that balance the movant's need for additional facts, with the policy that courts should protect the finality of an arbitration award.

The leading decision on this issue is *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691 (2nd Cir. 1978). In *Andros*, the Second Circuit Court of Appeals considered the issue of whether a party to an arbitration proceeding could undertake discovery in court to develop facts to attack an award based on a claim of arbitrator bias. The court held that any questioning of arbitrators "should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented." *Id.* at 702. A Federal District Court in the Southern District of New York explained the analysis a court must undertake when applying the *Andros* rule:

[I]n actions addressing the results of an arbitration—whether it be a proceeding to enforce or to set aside an arbitrator's award—the court is to exercise close supervision over the extent and nature of discovery, although the discovery rules are, at least in principle, applicable to such a proceeding. In assessing requests for discovery, the court should examine the relationship of the discovery requests to the specific factual issues raised by the parties' claims and

defenses. Moreover, in the context of a claim of arbitral bias, the court may insist that the challenging party proffer some evidence of arguable misconduct before permitting discovery, particularly if it is addressed to the arbitrator.

National Hockey League Players' Assoc. v. Bettman, No. 93 Civ. 5769 (KMW), 1994 U.S. Dist. LEXIS 1160, *20-21 (S.D. N.Y. February 4, 1994)(citations omitted).

Relying on *Andros*, the Ninth Circuit adopted a similar rule in *Woods v. Saturn Dist. Corp.*, 78 F.3d 424 (9th Cir. 1996) where the court held that the *Federal Rules of Civil Procedure* do not apply to *post hoc* questioning of arbitrators in Title 9 proceedings, and questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented. See also *O.R. Securities, Inc. v. Professional Planning Assoc.*, 857 F.2d 742 (11th Cir. 1988) ("courts have repeatedly condemned efforts to depose members of an arbitration panel to impeach or clarify their awards").

Trial courts are given great deference when determining whether to permit post-arbitration discovery in court. In *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 898 (2nd Cir. 1991) the court held that a trial court's decision to preclude discovery in court following arbitration should be reversed only on a clear showing of abuse of discretion.

Conclusion

The contours of discovery in arbitration will continue to receive considerable judicial attention as arbitration grows in popularity. Arbitration has many advantages over litigation, including substantial cost-savings. However, these advantages come with a significant trade-off: parties are limited in terms of the breadth of available discovery before, during and after an arbitration hearing. ■



W. Scott Simpson

W. Scott Simpson is a shareholder in Batchelor & Simpson PC and the assistant general counsel of Southern Energy Homes, Inc. He received his B.A. with honors from the University of Florida (1989) and his J.D., *magna cum laude*, from Samford University's Cumberland School of Law (1993). He teaches alternative dispute resolution and arbitration as an adjunct professor of law at Cumberland. He has numerous reported decisions involving arbitration issues.



Omer Kesikli

Omer Kesikli is a candidate for a master's of comparative law degree from Samford University's Cumberland School of Law and a candidate for a master's of law in business law from Istanbul Bilgi University. He received his bachelor of law degree (2004) from Marmara University Faculty of Law, Istanbul, Turkey. He is currently practicing law in Turkey and is a member of the Istanbul Bar Association.

Seven Ways to Avoid Embarrassing Yourself and Your Client



BY PROFESSOR NEIL M. B. ROWE AND PROFESSOR CHRISTOPHER L. FROST

As attorneys today we pride ourselves on the “style” of our legal briefs. “Always begin with a catchy first line.” “Make your headings punchy, and invoke parallelism.” “Educate the judge about the merits of the overall case in every brief.” All are good advice. Indeed, in a profession so dominated by the power of the written word, and where oral argument is being rapidly replaced by determinations “on the papers,” the importance of persuasive legal style cannot be underestimated. However, in our quest to present a persuasive or “catchy” brief, we tend to overlook another basic concept—technical proficiency. Persuasive legal arguments lose their flavor because of the misspelled words in the brief. Grammatical errors distract the judicial clerk from the merits of the argument. Judges ridicule, or even question the credibility of, advocates because of ineffectual or even misleading citations to authority. All of these embarrassing results could be avoided if attorneys would remember seven simple writing tips:



Anita Hamlett
MCLE director, Alabama State Bar



Stress-Free CLE

Granted, there are a few genuine, major stressors in life. We have all been stripped of our shoes and forced to walk through the hot coals that fate scatters in our paths—an untimely death of a friend or family member, a failed marriage, major health problems or a job change that uproots your family from their circle of support. These events shake us up, get us off our routine and, justifiably so, change the course of our lives forever.

But, it does not take a psychologist to recognize that your CLE compliance should *never* be placed on this list of major life-stressors—not with the thousands of CLE courses offered annually and

hundreds of sponsors just chomping at the bit to get your business. Think about it ... is there one work day that goes by that you are not inundated with marketing (snail and e-mail) wooing you to drink from the abundant stream of CLE?

So, I am urging you—this July 4th, as you slice watermelon, grill the burgers and wave the flag—try to pry your sweaty palm from the spatula (okay, from the television remote) and determine to set yourself free from worrying about CLE compliance for 2006 by creating a plan for “stress-free CLE.” As you create this plan for independence (I know I am overreaching a bit here), you might need a few helpful hints to get you started.

Research What Is Required for 2006

If you are practicing with a regular license in Alabama, the general rule is that you have until December 31, 2006 to get 12 general hours of MCLE credit. Of those 12, at least one hour must be designated as an hour of ethics. Please recognize that ethics hours are included in the total count of general MCLE hours. For example, if you attend a program that offers "six MCLE hours, including one hour of ethics," you may claim a total of six, not seven, hours.

Don't forget to check your transcript periodically at www.alabar.org/cle. Use your Alabama State Bar number (ASB #) and e-mail address to log-in. Sponsors should post attendance within 30 days fol-

lowing a program, however, if you notice that a course has not been posted within that timeframe, notify us as soon as possible so that we can correct your transcript.

Exemptions due to age: Under the current MCLE rules and regulations, a few individuals are exempt from the MCLE requirements and are not expected to report any hours of CLE to the MCLE commission for 2006. If you are 65 or older, or if you are 62 and already receiving Social Security retirement benefits, you are exempt from CLE in Alabama.

New admittee exemption: One of the most misunderstood MCLE regulations is 2.3. If you are newly admitted to the practice in Alabama, you are exempt until the end of the calendar year in which you are admitted. Therefore, if you were admitted in August 2006, you will be exempt through December 31, 2006 only (not until

August 2007). You may carry over to 2007 any credits earned this year, if you earn them after you are admitted to the bar and report them prior to January 31, 2007.

Exemptions due to occupation: As a member of the Alabama State Bar, you should know whether you hold a regular or special license. If you do not know, you may contact membership services to determine your current status.

Under MCLE Rule 2.C.1, regardless of the type of license you hold, if you are strictly prohibited from the private practice of law *by virtue of your occupation* (unless you fall under MCLE Rule 2.C.2—see details below), you are exempt for the full calendar year during which they held such office. For example, if a judicial law clerk leaves his clerkship in May 2006, he may claim an exemption from CLE for all of 2006.

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Qualified special members: In addition to members exempt strictly by their occupation, some attorneys need a break from the practice of law at certain points in their career. We often see attorneys opt to purchase special memberships when children are born, sickness strikes a family member or they move into a career that does not require a law degree. During these "breaks" in practice, an attorney may purchase a "special" license to remain in "good standing" until they return to practice.

Under MCLE Regulation 2.4, all special members, other than the list of governmental attorneys listed in MCLE Rule 2.C.2 (includes assistant or deputy attorney generals and district attorneys, assistant or deputy district attorneys and public defenders) are exempt from CLE requirements if they hold a special membership the entire calendar year. Therefore, a law professor with a "special" license in Alabama for all of 2006 would be exempt for 2006, but a district attorney with a "special" license would not.

Note the difference here. Exempt members (prohibited from private practice under MCLE Rule 2.C.1) are exempt

for the full calendar year in which they held that position. Special members (holding a "special" restricted license), on the other hand, are only exempt if they hold a "special" license the entire calendar year.

If an attorney holds a "regular membership" during *any part* of the year, they cannot claim the "special membership" (MCLE Regulation 2.4) exemption, even if they switch to special membership before December 31. For example, a member returning to the active practice of law from maternity leave this November, will be required to obtain 12 MCLE hours (including one hour of ethics) for 2006.

Qualified out-of-state attorneys: Many Alabama attorneys reside in other mandatory CLE states and primarily conduct their practice there. Now under MCLE Regulation 2.7, attorneys may request a waiver from Alabama's MCLE requirements by demonstrating compliance with their home state's Mandatory CLE requirements. The applicant must file an updated request annually. Instructions for filing this request will be available on-line this fall.

Develop a Plan for Completing Your Hours

Find courses from our Web site

The best way to guarantee that a course will be approved and that your attendance will be reported timely is to locate the course from our course listing at www.alabar.org/cle. Courses on that list have been submitted and approved in advance. As long as these courses, by their presentation, meet Alabama's standards, then the course will be granted the credit indicated on our Web site.

Avoid self-study courses

If your "certificate of attendance" indicates that you completed a "self-study" course online, or if you completed a video or audio rebroadcast presentation without an instructor present to answer questions, then Alabama will not recognize that course for credit. Many people submitted "self-study" on-demand courses for credit last year and were not allowed to count those courses for compliance.

Under MCLE Regulation 4.1.8, approval may be given for video replayed activities if a *qualified instructor* is available to comment and answer questions. Additionally, all online courses must be interactive and pre-approved. Therefore, if you have a doubt about a course that appears to be self-study, find the course on our approved course listing or call our office before you attend.

The MCLE Rules and Regulations are posted online at www.alabar.org/cle. Review those to make sure you know and understand them as they apply to you. If a course is not listed on the approved list on our Web site, you may submit the course yourself. However, it is important that you familiarize yourself with the criteria that are considered when approving a course.

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Remember that no more than six hours may be claimed annually for pre-approved, online courses.

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At the seminar, ask the sponsor to report your hours to the Alabama State Bar using your Alabama State Bar number. If the sponsor refuses, request a certificate of attendance. If the course was listed as pre-approved, please send us that certificate and let us know that the sponsor refused to report your attendance.

If it was not a pre-approved course, you may use the application for accreditation found on our Web site to apply for credit for the course within 30 days of attending the program. There will be a \$25 processing fee for the course to be reviewed and there is no guarantee that the course will be approved for credit in our state. You will need to submit a copy of the agenda, the faculty list, the certificate of attendance and all written materials provided at the seminar.

Communicate with our office in a timely fashion

If you get a notice of compliance, review it and make necessary edits

If you receive a notice of compliance from our office this fall, make sure it adequately reflects your current contact information and the hours that earned in 2006. If there are errors, correct those on the transcript and return the transcript by January 31, 2007.

If you get a notice of non-compliance, respond timely

If you receive a notice of non-compliance, you will have until December 31, 2006 to complete your hours—so, don't panic. You will also have until January 31, 2007 to correct your transcript and mail it back to us to avoid any penalties.

Notify us early if you do have a major life-stressor

Under MCLE Regulation 3.2, the MCLE commission will review requests for substituted compliance, partial waivers or other exemptions based on extenuating

circumstances. It is best for those to be submitted as soon as the injury or event occurs so that it can timely be processed and considered. The worst thing you can do is to avoid communicating with our office in hopes that you will be "overlooked" this one time. Requests based on physical limitations should be accompanied by a physician's statement addressing the attorney's inability to meet the CLE requirements in the usual manner.

Give us your feedback

As I put to bed the woes of 2005 compliance, I felt compelled to urge you to begin looking at 2006 compliance now. Many of the issues addressed herein were pulled from the suggestions that followed the last CLE article. I appreciate and encourage your continued feedback and suggestions. My e-mail address is anita.hamlett@alabar.org.

In the meantime, put this article down and head back to your kids, spouse, burgers, TiVo or whatever it is that truly reduces your stress...with the peace of mind that you have a plan in place for "stress-free CLE"—the resolution to complete all your CLE prior to December 31 (heck, maybe even by Christmas). Hope springs eternal! ■

Robert E. Perry

Mechanical Engineer

Expert Witness

- BSME Norwich University
- MSME Lehigh University
- Adjunct Professor at UAB
- Owner of 2 patents

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Christy Crow
Jinks, Daniel & Crow PC
Union Springs

The "Thank-You" Article

What a great adventure it has been serving as the Young Lawyers' Section president this year. This is my last article and it feels like the year has just flown by. With the help of great volunteers on the various committees and wonderful sponsors, we have accomplished some amazing things. And, in the tradition of all of the great YLS presidents before me, this is the "thank you" article because there is no way anyone can do this job alone.

I begin by thanking the various sponsors of our events. The following firms sponsored all of our activities:

Jinks, Daniel & Crow PC
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Hand Arendall LLC sponsored both the Sandestin seminar and the Minority Pre-Law Conference.

We held our Sandestin seminar May 19-20. We had a great turnout and everyone there had a great time. These firms sponsored our Sandestin seminar:

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Armbrecht Jackson LLP

Finally, these firms sponsored our Minority Pre-Law Conference that was held April 7 in Birmingham at Birmingham Southern College and April 10 in Montgomery at Alabama State University:

McCallum, Methvin & Terrell PC
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Many thanks go to all of these firms for sponsoring our activities throughout the year. With your help, we had a very successful year, including hosting the first ever Birmingham Minority Pre-Law Conference. Between Montgomery and Birmingham, we sponsored over 350 students from nine different schools and provided these high school students an opportunity to meet legal professionals from across the state and learn more about our profession.

In addition, thanks go to the other YLS officers and the members of the Executive Committee, all of whom have really worked hard this year to help expand the programs of the YLS. With the help of these lawyers who have given so freely of their time, we had our first ever "Lawyers Day of Service" on June 10, 2006. I hope we can make this an annual event so that everyone remembers that service to the community is essential to the successful practice of law.

Thanks, too, to the hundreds of young lawyers from across the state that volunteered for the various committees. I hope you have all been put to work by the committee chairs already but, if not, don't worry, you will be soon.

While I'm thanking people, I would be remiss if I did not thank everyone on staff at the Alabama State Bar. There is no way I can list everyone at the bar who has made this job easier

by supporting the YLS through the years.¹ Being YLS president has given me a better appreciation for the staff and the hard work that they put in to making sure we have an easier time practicing our profession.

Finally, I truly appreciate my law partners, Lynn Jinks, Terry Daniel and Nathan Dickson, and my husband, Van Wadsworth, for their continued support of this and all of my endeavors and, more importantly, for their friendship and love.

And for those of you who actually made it through this insufferably long article, thanks to you, too. I hope through the course of the last year, you have learned more about the YLS and have become inspired to get more involved in your community and in your local or state bar association, no matter what your age. Together, we *will* make a difference. ■

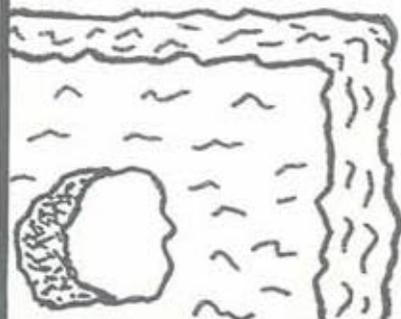
Endnotes

1. In the tradition of our president, Bobby Segall, I am adding a footnote here to explain that I had originally listed the folks at the bar who have been so great, as well as all of the members of the YLS Executive Committee. Then I realized I was starting to look like that Oscar winner who wouldn't sit down and that the music is starting to play with the cut-a-way to a commercial. Please don't take the failure to include the names of all of the great people on staff at the Alabama State Bar and the members of the Executive Committee as a slight in any way because they are wonderful and deserve to be thanked every time you see them.

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Robert L. McCurley, Jr.

Really Productive Legislature

In the May 2006 "Legislative Wrap-Up" article, it was mentioned that the legislature was two-thirds of the way over and that 68 bills had already been signed into law. If the legislature had stopped that day, it would have been called productive. Now that the legislature has completed its work of considering the 1,431 bills, 365 of them found their way into law or 25 percent of the bills introduced passed. This is compared to the 2005 legislative session when only six bills of statewide concern.

There was something passed for everyone. For the more affluent there was the Trust Code. For the less affluent there was the raising of state income tax exemptions and for everyone there was the Residential Landlord/Tenant Act and Election Law Revision.

Copies of all acts discussed may be obtained from alisdh.legislature.state.al.us/acas/ACASLogin.asp.

A few of the acts that are of most interest to lawyers are as follows:

General Interest

HB. 11 (Act 2006-529): Amends the guardianship law to provide that when an estate does not have sufficient assets to provide reasonable compensation to the guardian *ad litem*, court representative or physician, or to cover court costs, the court may tax the costs to the petitioner.

HB. 31 (Act 2006-114): Amends various sections of Title 40 of the *Code of Alabama* to conform Alabama law to federal income tax rules for the taxation of trusts, estates and their beneficiaries. This applies also to entities taxed as a financial institution and business trust. It further allows the Alabama Department of Revenue to promulgate rules interpreting the act. This is effective for all taxable years after January 1, 2005.

HB. 49 (Act 2006-216—the Uniform Trust Code): This act is a default provision for trusts where the trust instrument is silent or incomplete. Alabama, as most states, has not had a statutory trust code

and has relied on case law to interpret the trust powers. This act will become effective January 1, 2007.

HB. 59 (Act 2006-525): Raises attorneys' annual business license fees from \$250 to \$300. Effective October 2006.

HB. 68 (Act 2006-104): Amends Section 6-5-332, the Good Samaritan Act, to add protection for a licensed engineer, architect, surveyor, contractor, subcontractor, or those working under the direct supervision of them in connection with a community emergency response team or FEMA.

HB. 73 (Act 2006-533): Amends Section 12-15-10 to provide that a municipality is responsible for the expenses of maintenance for the care of juveniles placed in a facility used by the county for housing juveniles as a result of a violation of a city ordinance.

HB. 77 (Act 2006-238): Amends Code Section 5-19-33 to provide that an additional account maintenance fee of \$3 may be charged each month for credit transactions, loans or credit sales and will not be considered as a finance charge.

HB. 95 (Act 2006-611): Prohibits a state agency from placing or otherwise revealing a person's Social Security number in a document available for public inspection.

HB. 152 (Act 2006-213): Provides the designation of "flood vehicle" to be on the motor vehicle's title for disclosure to a prospective purchaser when the motor vehicle has been submerged in water.

HB. 184 (Act 2006-577): Amends Section 40-2A-10 to clarify that cities and counties must provide confidentiality of information in a taxpayer's tax records.

HB. 201 (Act 2006-200): Regulates the practice of court reporting and provides for the creation of the Alabama Board of Court Reporting which will have authority over licensing and imposing penalties for violation of the act.

HB. 287 (Act 2006-316 Uniform Residential Landlord/Tenant Act): Defines the relationship of landlords and tenants regarding residential property. (See highlights at the end of this article.)

HB. 288 (Act 2006-626): Requires an injured party who receives the structured settlement in a workers' compensation case and wishes to assign or transfer the agreement in exchange for a lump sum settlement to follow a certain procedure. The transfer must be approved by the court to be effective.

HB. 292 (Act 2006-352): The new standard deductions for the 2007 tax year for married taxpayers filing jointly with an adjusted gross income tax of \$20,000 or less has been amended as well for single taxpayers.

HB. 369 (Act 2006-521): Amends the unemployment compensation benefits by increasing them \$10 a week beginning July 4, 2006.

HB. 380 (Act 2006-564): Amends Section 10-2B-1.40 of the Alabama Business Corporation Act to allow shareholders to appoint proxies electronically through the Internet. It would also allow corporations to accept votes electronically.

SB. 53 (Act 2006-291): Approves the acts of the 2003 Second Special Session, 2004 and 2005 regular sessions and the 2005 First Special Session to be codified in the *Code of Alabama*.

SB. 61 (Act 2006-227): Amends Section 11-24-2 and Section 11-24-3 to require the owner or developer to receive approval from the county commission for a proposed plat and obtain a permit to develop from the city engineer at the time of approval. The developer also has to furnish the city engineer with the names of adjoining landowners.

SB. 83 (Act 2006-185): Authorizes two or more municipalities to establish a regional jail authority and to operate a regional jail authority.

SB. 373 (Act 2006-414): Amends sections 32-13-3, 4 and 6 to allow towed, abandoned vehicles owned by governmental entities to be sold at public auction. It further provides for the sale of abandoned vehicles.

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SB. 293 (Act 2006-413): Provides for the filing of "living wills" with the probate judge's office where the person resides and for confidentiality of this living will.

Criminal Acts

HB. 19 (Act 2006-419): Amends Section 13A-6-1 concerning criminal homicide and assaults to broaden the law to define a person to include an unborn child.

HB. 37 (Act 2006-572): Allows alleged victims of rape, sodomy or sexual misconduct to request testing of the person charged for sexually transmitted disease and HIV.

HB. 47 (Act 2006-531): Amends Section 26-15-3 to increase the penalty for child abuse to a Class C Felony.

HB. 118 (Act 2006-197): Amends Section 13A-5-11 and Section 13A-5-12 to increase the fines for felonies as follows:

Class A Felony - \$60,000

Class B Felony - \$30,000

Class C Felony - \$15,000

Misdemeanors are increased to:

Class A Misdemeanor - \$6,000

Class B Misdemeanor - \$3,000

Class C Misdemeanor - \$1,500

HB. 120 (Act 2006-198): Amends Section 13A-7-5 and Section 13A-7-6 relating to burglary in the first or second degree to add a provision to the law relating to a burglar being armed with a deadly weapon or threatening the use of a deadly weapon against another person. It no longer makes a difference when the burglar obtained the weapon.

HB. 122 (Act 2006-218): Amends Section 13A-5-5 to provide that a pre-sentence investigation report is to be completed and filed on every defendant convicted of a felony and it will be in an electronic format.

HB. 125 (Act 2006-539): Makes it a crime to shoot into a school bus or school building irrespective of whether it is occupied or unoccupied.

HB. 142 (Act 2006-546): Requires motorists approaching a stationary emergency vehicle to yield the right-of-way by making a lane change into a lane not adjacent to the emergency vehicle.

HB. 145 (Act 2006-547): Amends Section 15-10-10 to allow a search warrant from one county to be executed by any law enforcement officer in this state and repeals Section 15-10-13 which required judges or magistrates in the other county to endorse the warrant.

HB. 146 (Act 2006-579): Allows for an electronic traffic ticket for traffic violations and amends sections 12-12-53, 12-12-54, 12-14-51 and 32-1-4 to allow for the use of e-tickets.

HB. 160 (Act 2006-580): Establishes the crime of home repair fraud.

HB. 214 (Act 2006-551): Sheriffs must conduct criminal background checks prior to the issuance of pistol permits.

HB. 260 (Act 2006-554): An initial driver's license or learner's license must be issued by the Department of Public Safety, however, they may be renewed at the probate office or license commissioner's office.

HB. 371 (Act 2006-561): Provides that theft of property in the first degree includes property resulting from a common plan or scheme by one or more persons where the object of the scheme is to sell or transfer property to another person who knows the property is stolen and the cumulative value taken within a 180-day period is \$1,000 or more. This amends Section 13A-8-3.

HB. 824 (Act 2006-622): Provides that a person possessing a commercial driver's license who is charged with a violation of a traffic law in this state will not be eligible for a deferred prosecution program, diversion program or any deferred imposition of sentences.

SB. 38 (Act 2006-623): Amends Section 32-5-22 relating to the use of child passenger restraints for children under the age of six. Increases the fine for failure to use child seats to \$25 and provides point violations to be added to the driver's record.

SB. 68 (Act 2006-148): Amends Section 13A-8-192 to make all "identity theft" a felony.

SB. 128 (Act 2006-311): Amends Section 35-5A-154 for passing or overtaking a school or church bus is a violation and punishable by a fine of not less than \$150 or more than \$300 for a first offense.

SB. 133 (Act 2006-204): Makes it a crime to expose a child to a net lab.

SB. 229 (Act 2006-297): Amends Section 13A-8-4 to correct the monetary range of values relating to theft in the second degree to be between \$500 and \$2,500.

SB. 230 (Act 2006-298) (HB. 117 (Act 2006-654): Amends Section 32-5A-191 to provide that a prior conviction in another state for a DUI will be considered for enhancement of an Alabama sentence.

SB. 231 (Act 2006-312): The legislature created the Alabama Sentencing Commission which has adopted voluntary sentencing guidelines for 26 felony offenses. The commission was directed to develop voluntary sentencing standards and submit them to the legislature for approval before they become effective. This has been delayed from 2006 to 2009.

SB. 283 (Act 2006-303): Amends Section 13A-3-20 and Section 13A-3-22 relating to the justifiable use of defensive force and defense deadly force against an aggressor. It further provides for the justified use of deadly force against a person intruding in a dwelling, residence or vehicle. The act removes the duty to retreat for a person using force or a deadly force under certain circumstances. It further makes legal presumptions concerning persons justified to use force against intruders an immunity from civil and criminal actions.

Elections Acts

HB. 51 (Act 2006-634): Moves the presidential preference primary date from June to the first Tuesday in February.

HB. 81 (Act 2006-537): Amends Section 17-4-129 to provide that the voter registration list may be published as an insert in the newspaper.

HB. 100 (Act 2006-570): Revises the entire Election Code, title 17 to clear up inconsistencies, duplication and otherwise reorganize Alabama's election law. It takes the current 24 chapters and reduces them to 17. It will not become effective until January 1, 2007.

HB. 141 (Act 2006-545): Each employer in the state must permit their employees to take the necessary time off to vote in any election.

HB. 479 (Act 2006-281): When the Help America Vote Act passed, it related only to state and county elections. This act changes the procedure for challenged ballots in municipal elections to that of "provisional ballots."

SB. 18 (Act 2006-327): Amends Section 17-6-13 to increase the compensation paid to each election clerk, returning officer and election inspector to pay them an additional \$25 for attending an election school.

SB. 529 (Act 2006-354): Due to a lawsuit being filed by the U. S. Justice Department claiming Alabama was violating the Uniform and Overseas Citizens Absentee Voting Act by not allowing enough time for overseas voters to vote in the primary run-off, the primary run-off date has been moved from three weeks after the initial primary to six weeks after the primary.

Alabama Uniform Residential Landlord and Tenant Act

The bill's protections for *tenants*:

Warranty of habitability/applicability of building and housing codes. 35-9A-204

Limits on security deposits and timelines for deposit return. 35-9A-201

Repairs by landlords, 14 days after notice. 35-9A-401

Tenant's recovery of actual and injunctive damages for landlord's breach. 35-9A-401

Prohibition against landlord's retaliation. 35-9A-501

Prohibition against exculpatory clauses. 35-9A-163

Prohibition against intentionally including prohibited provisions in leases. 35-9A-164

Provides attorney fees for successful party. 35-9A-401

Prohibition against changing material rules without tenant's approval. 35-9A-302

Repeals the Sanderson Act 35-9-80 to 88

The bill also provides strong protections for *landlords*:

State law preempts local law on landlord tenant matters. 35-9A-121

Tenant's obligation to pay rent before enforcing rights. 35-9A-164
Right of landlord and tenant to enter into a separate agreement for tenant to assume some repair responsibilities. 35-9A-201 (c)(d)

Landlord's right to recover actual damages and injunctive relief for tenant's breach of lease. 35-9A-301

Tenant—No right to repair and deduct. (Was 35-9A-403)

Security deposits forfeited by tenant if not claimed within 180 days. 35-9A-201(d)

Responsibility of tenant maintaining dwelling. 35-9A-301

Landlord's right of entry to rental unit with advance notice, or in an emergency, without consent. 35-9A-303

Landlord not responsible for tenant's property abandoned on premises. 35-9A-423

Defines landlord's liability for breaches. 35-9A-401(b)

Shortens eviction notice to seven days for non-payment of rent. 35-9A-421 [7-7-7]

Shortens court action by landlord to seven days. 35-9A-461

Shortens appeal time to seven days. Section 2 amends 6-6-350

Provides attorney fees for landlord. 35-9A-426

Effective Date: January 1, 2007

The Annual Meeting of the Alabama Law Institute will be held at 10:30 a.m. Thursday, July 13, 2006 during the Alabama State Bar Meeting in Destin. Major legislation passed during the 2006 Regular Session of the legislature will be reviewed.

For more information about the Institute, contact Bob McCurley, director, at (205) 348-7411 or visit www.ali.state.al.us. ■

Robert L. McCurley, Jr.

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

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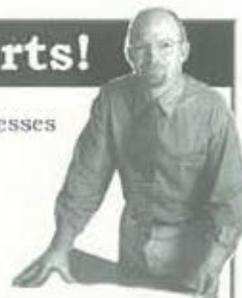
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J. Anthony McLain

Unclaimed Client Trust Funds—Escheat to State

QUESTION:

A solo practitioner with an active trust account died. "Attorney A" was appointed executor and undertook to wind up the practice and distribute the funds from the trust account. The solo practitioner maintained an accounts ledger of the trust account but the balances did not reconcile with the bank account. After several years "A" was able to determine the clients who owned the various accounts and appropriate disbursements were made. He was unable, however, to determine the owners of some of the funds or the whereabouts of certain clients. What distribution should "A" make in order to close the account?

ANSWER:

There are two categories of funds in the account. The first category involved those funds that cannot be attributed to a particular client. After a reasonable and good faith effort is made to determine the ownership of the funds, and after holding the funds as long as necessary to assure that no unidentified client could make a successful claim against the account, "A" may distribute the funds to the solo practitioner's estate. The second category of funds in the account is that which can be attributed to a client but the location of that client is unknown. After making a good faith and reasonable effort to locate the client, "A" must hold the funds until they are presumed abandoned under state law, at which time he should turn them over to the state.

DISCUSSION:

"Attorney A" should first make every reasonable effort to ascertain the identity and location of the clients entitled to the funds. This would include publication of a notice in a newspaper of general circulation, not only in the area where the decedent practiced but also in the last known area where the client or clients reside or do business.

Regarding the funds that cannot be attributed to a client or clients, several state ethics committees have held that after reasonable and good faith attempts to ascertain the ownership and after holding the funds long enough to ensure that no unidentified client could make a claim against the funds within any applicable statute of limitations, they may be distributed to the attorney's personal account or his estate.

Unidentified funds in a trust account could properly be funds deposited to pay service charges [DR 9-102(A)(1)] or to avoid any possibility of a shortage in the account or fees earned but not withdrawn [DR 9-102(A)(2)].

The Michigan Bar Committee on Professional and Judicial Ethics held that funds that could not be associated with any particular client or file, or were presumed to belong to attorneys formerly with the firm, or to be interest earned on an account, after notifying former clients of the existence of the funds and providing them an opportunity to substantiate any claim, could be retained by the attorneys involved [Opinion CI-947 (1983) and CI-752 (1982)].

Similarly, in Virginia, it was held that such unidentifiable funds must be placed in an interest-bearing account for a sufficient length of time to determine that no successful claim by an unidentified client could be made. If no owners or claims are found, the lawyer may then transfer the funds to his own account [Virginia Opinion 548 (3/1/84)].

In another Virginia opinion, it was held that unidentifiable funds in a trust account could be distributed to a deceased lawyer's estate or distributed according to law to meet the deceased lawyer's non-trust obligations, provided a good faith effort to determine ownership is made and the funds are retained a sufficient length of time to assure that a successful claim could not be made.

The Alabama Disciplinary Commission addressed a similar question in RO-82-649. In that case there were several thousand dollars in a deceased attorney's trust account that could not be "traced to its rightful owner." The commission held that:

"Some type of legal proceeding should be instituted whereby notice by publication could be given to potential claimants. Although other proceedings may be available we suggest that the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, Section 35-12-20, *Code of Alabama*, 1975."

In this case the commission assumed that the funds were client funds and were "not earned attorney's fees which [the attorney] deposited in a trust account pursuant to the provisions of DR 9-102(A) and failed to withdraw therefrom." The opinion then cites an earlier opinion where the client was known but could not be located.

In the case at hand, we make no such assumptions and hold that where it cannot be determined that the funds are client funds by reasonable, diligent and good faith efforts, including public notice in a newspaper of general circulation and after holding the funds long enough to assure that no successful claim will be filed by an unknown client, the funds may be distributed to the deceased attorney's estate.

The second category of funds in the trust account is that which can be attributed to a client but the whereabouts of the client are unknown. In this situation "Attorney A" does not have

the option of distributing the funds to the deceased attorney's estate because the money clearly does not belong to the deceased attorney. In situations such as this numerous opinions of state bar ethics committees, including the Disciplinary Commission of the Alabama State Bar, have held that the funds must be retained until presumed abandoned under state law at which time the funds must be turned over to the state [Mississippi State Bar Ethics Committee Opinion 104 (6/6/85); State Bar of New Mexico Advisory Opinions Committee, Opinion 1983-3. (7/25/83); North Carolina State Bar Association Ethics Committee Opinion 372 (7/25/85); Michigan Committee on Professional and Judicial Ethics of the State Bar of Michigan, Opinion CI-1144 (4/9/86); Committee on Professional Responsibility of the Vermont Bar Association, Opinion 87-9 (8/87)].

The Office of General Counsel and the Disciplinary Commission have held, in a number of opinions, that where funds in a trust account may be attributed to a client but the location of the client is not known, some type of legal proceedings should be instituted whereby notice by publication could be given to the owner of the deposited funds. The opinions also hold that although other proceedings may be available the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, §35-12-20, *Code of Alabama*, 1975, [RO-82-649, RO-83-14, RO-84-26, RO-84-48, RO-83-146, and RO-84-106]. In situations where the client is known but cannot be found the money clearly does not belong to the attorney. Consequently, the lawyer has no alternative but to retain the funds on the client's behalf at least until such time as the funds may be considered legally abandoned.

Consequently, in the case at hand, we hold that "Attorney A" must make every reasonable effort to locate the client, including public notices in a newspaper of general circulation in the area where the deceased lawyer practiced as well as in the area where the client maintained his last known address or business. If these efforts are unsuccessful then "Attorney A" must hold the funds until such time as they may be considered abandoned under the Alabama Uniform Disposition of Unclaimed Property Act, Chapter 12, Article II of Title 35, *Code of Alabama*, 1975. [RO-1988-92]

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

L. Brooks Burdette announces the change of her firm to The Burdette Law Firm PC.

R. Champ Crocker announces the opening of R. Champ Crocker LLC at 207 Second Avenue, Southeast, Cullman 35055. Phone (256) 739-5005.

Maston Alonzo Evans, Jr. announces the opening of Maston A. Evans, Jr. LLC Attorney at Law at 17 Office Park Circle, Suite 100 Birmingham 35223. Phone (205) 879-6027.

Richard L. Fricks announces the formation of Richard L. Fricks LLC at 106 S. Main Street, Boaz 35957. Phone (256) 593-4978.

Stephen Willis Guthrie announces the opening of Law Office of Steve Guthrie in Birmingham.

Penny Dianne Hays announces the opening of Hayes Cauley PC in Tuscaloosa.

Virgil Eric Hunter, II announces the opening of Law Offices of Virgil E. Hunter, II in Bessemer.

Herndon Inge, III announces the opening of Herndon Inge III, LLC in Mobile.

John David Kimbrough announces the opening of his firm at 654 Lawrence Street, Moulton 35650.

Robert Edward Kirby, Jr. announces the opening of The Kirby Law Firm in Birmingham.

Joseph Claude Kreps announces the opening of his firm at 1932 Laurel Road, Suite 1E, Birmingham 35216.

Robert Norris Payne announces the opening of his firm in Huntsville.

Ralph Lynn Pearson, Jr. announces the opening of Pearson Law Firm in Huntsville.

Paul R. Roberts, II announces the opening of Paul R. Roberts, Attorney at Law, LLC at 271 College Street, Gadsden 35901. Phone (256) 543-8710.

Nicole Romano Saia announces the opening of Nicole Romano Saia, Attorney at Law, LLC at 41 Weldon Drive, Chelsea 35043. Phone (205) 678-4660.

James Arthur Stanford announces the opening of his firm in Arab.

Gilbert Mann Sullivan, Jr. announces the formation of Gilbert M. Sullivan, Jr. PC.

Anita Barnes Westberry announces the opening of The Law Offices of Anita Barnes Westberry at 297 Huntington Park Road, Homewood 35226.

Stephanie Haley Williams announces the opening of her firm in Texas.

Benjamin Lee Woolf announces the opening of Benjamin L. Woolf, Attorney at Law at 2703 Seventh Street, Tuscaloosa 35401. Phone (205) 464-0020.

John Genaro Zingarelli announces the opening of John Zingarelli PC in Decatur.

Among Firms

Deaver Hiatt Collins and Jannea Suzanne Rogers announce their association with Adams & Reese LLP.

Carl Travis Maxwell III announces his association with AdvanceMe, Inc.

Jeffrey Todd Webb, Sr. announces his association with the Alabama Department of Agriculture and Industries.

John Fairley McDonald, III announces his association with the Alabama Department of Insurance, Legal Division.

George Robert Prescott, Jr. announces his association with Alabama Department of Transportation, Legal Bureau.

Alfa Insurance announces that Angela L. Cooner has been promoted to vice-president and associate general counsel.

Janet A. St. Denis announces her association with Auburn University as university counsel.

Stephen D. Apolinsky announces his association with Apolinsky & Associates LLC.

Lawrence B. Clark announces he is now a shareholder with Baker, Donelson, Bearman, Caldwell & Berkowitz.

Sara M. Turner, William L. Waudby and Kelly Louis Worman announce their association with Baker, Donelson, Bearman, Caldwell & Berkowitz PC.

Balch & Bingham LLP announces that Jennifer M. Buettner, Aaron L. Dettling, Thomas R. Head III, Erci T. Ray, and Christopher T. Terrell have become partners in the firm, and that Thomas Craig Williams and Valerie Hose Plante are associates.

Jason Robert Watkins announces his association with Ball, Ball, Matthews & Novak PA.

Michael Devon Whitt announces his association with Beam & Whitt.

Amy H. Hazelton announces her association with Benton & Centeno LLP.

Gregory Scott Berry and Deborah Lynn Dunsmore announce their association with Berry & Associates LLC.

Timothy Alton Evans announces his association with the Bibb County District Attorney's Office in Centreville.

Gina Elizabeth DeRosier announces her association with Blank Rome LLP.

Debra Wilkinson Botwin announces her association with Brewer Botwin.

Darryl Charles Holtz announces his association with Bowron, Latta & Wasden PC.

Boyd, Fernambucq & Vincent PC announces the firm name has changed to Boyd, Fernambucq, Vincent & Dunn PC and that Charles H. Dunn has become a shareholder.

Helen Denice Ball announces her association with Bradley Arant Rose & White LLP.

Jon-Patrick Amason announces his association with Brantley & Amason.

Kevin Lee Young announces his association with The Brink's Company.

Joseph N. Hocutt, II has become an associate with Brinyark, Lee & Hickman PC.

David Gerald Poston announces his association with Brock & Stout.

John William Roberts announces his association with Buerger, Moseley & Carson PLC.

Briana M. Montminy announces her association with Burr & Forman LLP.

Brian G. Wilson announces his association with Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP.

Belinda Elmore Johnson announces her association with Capps & Associates, PC.

Regina Ford Cash announces her association with Carr, Allison, Pugh, Oliver & Sisson.

James L. Butler announces his association with CenturyTel Inc.

Joi Charisse Scott announces her association with Christian & Small LLP.

Michael Brandon Meadows announces his association with Compass Bank, Legal Department.

Tamula Renee Yelling announces her association with Constangy, Brooks & Smith LLC.

Hendrik Searcy Snow announces his association with Crosby Saad LLC.

Andrew Hamilton Smith announces his association with Curtis, Heinz, Garrett & O'Keefe PC.

Dustin Thomas Brown announces his association with Daugherty, Crawford, Fuller & Brown.

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	30	35	40	45	50	55	60
10	\$9	\$9	\$11	\$18	\$25	\$42	\$67
15	\$11	\$11	\$13	\$24	\$37	\$53	\$86
20	\$13	\$13	\$18	\$30	\$47	\$70	\$118
30	\$22	\$24	\$33	\$48	\$72	\$140	

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

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About Members, Among Firms

Continued from page 303

William Morgan Rayborn announces his association with Davis, Rayborn, Herrington & Prescott LLC.

Karen Sullivan Dean announces her association with Dell.

Simeon Sealy Wilbanks Johnson announces his association with Dillard & Associates.

Anthony Darrell Lehman announces his association with DLA Piper Rudnick Gray Cary US LLP.

Rebecca Kiley announces her association with Equal Justice Initiative.

Jonathan Kaz Espy announces his association with Espy, Metcalf & Espy PC.

Aundrea Mann Snyder announces her association with Field & Field LLC.

Mark Edward Gualano announces his association with First Security Title, Inc.

Terry Price announces his association with Ford & Harrison LLP.

Scott Hughes announces his association with French & Hughes LLC.

Wallace Wayne Watkins announces his association with Graves & Watkins LLC.

John David Lawrence announces his association with Gulas & Stuckey PC.

Rodney Reed Cate announces his association with Hand Arendall LLC.

Harbert Management Corporation announces that R. A. Ferguson, III has joined their legal department as assistant general counsel and Conrad Morrison has joined as assistant director of compliance.

Michael Bruce Odom and Robert Maurice Lichenstein, Jr. announce their association with Haskell, Slaughter, Young & Rediker LLC.

Shannon Elizabeth Hoff announces her association with Helms, Mulliss & Wicker PLLC.

Steve Heninger, Lewis Garrison, Tim Davis and Erik Heninger announce the formation of Heninger Garrison Davis

LLC. Jonna Miller Denson is associated with the firm. Offices are located at 2224 1st Avenue North, Birmingham 35203. Phone (205) 326-3336.

Kathryn Harrington announces her association with Hollis & Wright PC.

Sidney W. Jackson, III and Mathew B. Richardson announce their association with Jackson, Foster & Graham LLC.

Dwain Denniston announces his association with the Jefferson County District Attorney's Office. Shawnte' Denise McClain announces her association with the Jefferson County District Attorney's office, Bessemer Division.

Francoise Alice Hartley Horn announces her association with the Jefferson County Family Court as senior trial referee, Birmingham division.

Johnston Barton Proctor & Powell LLP announces that Heather F. Lindsey, Angie Godwin McEwen and Susan V. Simpson have become partners and that Justin A. Barkley, Joseph W. Carlisle, W. Lee Elebash, Sonya E. Eubank, Lindan J. Hill, David R. Kinman, Vincent J. Schilleci, III, and Richard G. Wheelahan, III have joined the firm as associates.

Lucy Westover Jordan announces her association with Kee & Selby LLP.

Juan Carlos Moreno announces his association with Kievit, Odom & Barlow.

Emily K. Niezer announces her association with Knight & Griffith, McKenzie, Knight & McLeroy LLP.

Cindy Lorraine Self announces her association with Lamar, Miller, Norris, Haggard & Christie PC.

Dana Dachelet announces her association with The Lamb Firm.

Jeffrey Norman Mykkeltvedt announces his association with Peter A. Law PC.

Eric Neal Snyder announces his association with Lawton & Associates.

Margaret Holladay Alves announces her association with T. Leavell & Associates Inc.

Gregory Wayne Lee announces his association with Lee & McClelland LLC.

James Wesley Chipley, Hilary Leigh Funk and Misty Dawn Sosebee-Ledbetter announce their association with Legal Services Alabama.

Lehr Middlebrooks Price & Vreeland PC has changed its name to Lehr Middlebrooks & Vreeland PC.

Christina Marie Crow announces her association with Liberty Park Joint Venture LLP.

Lightfoot, Franklin & White LLC announces that Lana K. Alcorn, Kevin E. Clark, Terrence W. McCarthy and J. Chandler Bailey, II have become members of the firm.

Matthew Jay Avon announces his association with Office of Chief Counsel, LMSB.

Laura Ellison Proctor announces her association with Louisiana Pacific Corporation.

Rafael Gil, III announces his association with Ludlum & Gil LLC.

Lusk, Lusk, Dowdy & Caldwell PC announces that David L. Dean has joined the firm as a partner.

Mark Alan Dowdy announces his association with Luther, Oldenburg & Rainey PC.

Maynard, Cooper & Gale PC announces that Robert H. Adams, Rima Hartman and Anthony Aaron Joseph have joined the firm as shareholders, Kimberly B. Glass has joined the firm as *of counsel* and Christopher Charles Frost has become an associate.

Richard Shields announces his association with McCleave, Denson, Shields LLC.

Christopher Max Mims announces his association with McDowell Knight Roedder & Sledge.

Stephen A. Brandon announces his association with McGlinchey Stafford PLLC.

Adam Gerard Sowatzka announces his association with McGuireWoods LLP.

Stephen Lyman Duncan, Jr. and Lorie Elizabeth Melton announce their association with Melton & Duncan LLC.

William Anderson Mudd, James M. Strong and John Francis Whitaker announce their association with Miller, Hamilton, Snider & Odom.

Christopher Paul Haugen announces his association with The Miller Law Firm LLC.

Michael Mark Majors announces his association with Joint Forces Headquarters, Mississippi National Guard.

Florence Kessler announces that she is now chief assistant city attorney for the City of Mobile, Legal Department.

Jennifer Anne Millwee Howell announces her association with the Morgan County District Attorney's Office.

Adrienne Le Aldridge announces her association with James R. Morgan PC.

V. Michelle Obradovic and Stephen J. Bailey announce their association with Moses & Moses PC.

James A. Nadler announces his association with Nadler & Associates PC.

Najjar Denaburg PC announces that Karen G. Kolaczek has become a shareholder and that Steven D. Altmann, Jeremy D. Crow and Nathan C. Weinert have become associated with the firm.

Rosalind Greene announces her association with the National Aeronautics and Space Administration.

Amy Elaine Bryant and Edward Brough Holzwanger announce their association with the National Labor Relations Board.

Michael Lewis Odom announces his association with Navarre Press.

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About Members, Among Firms

Continued from page 305

Mary Ellen Wyatt announces her association with Nielson Law Firm in Metairie, Louisiana.

Megan Claire Kime McCarthy announces her association with Nix, Holtsford, Gilliland, Higgins & Hitson PC.

Ogle, Liles & Upshaw LLP announces that Chris Miller has become an associate.

John Thaddeus Moore, James Eric Coale, Michael D. Godwin and Lee M. Otts announce the formation of Otts, Moore, Coale & Godwin Law Offices at 401 Evergreen Avenue, Brewton 36426. Phone (251) 867-7724.

Kendall Jones Paloci announces her association with Paloci & Jones.

William Warren Satterfield announces his association with Patterson & Patterson PLLC.

Jennifer B. Cooley announces her association with Parker & Cooley LLC.

Michael Held announces his association with Phelps Dunbar LLP.

Robert G. Upchurch announces his association with Phelps, Jenkins, Gibson & Fowler LLP.

Edward William Payne announces his association with Porterfield, Harper, Mills & Motlow.

Erin Leslie O'Kane announces her association with The Powell Law Firm.

J. Hobson Presley, Jr. and Kathleen A. Collier announce that John H. Burton, Jr. has become a member of the firm and the firm name is now Presley Burton & Collier LLC.

Caron Lee Camp announces her association with Pritchard, McCall & Jones LLC.

Nathaniel F. Hansford announces his association with The Ramos Law Firm.

Hope Dana Mehlman announces her association with Regions Financial Corporation.

R. Taylor Abbot, Jr. announces his association with the Office of Salem N. Resha, Jr.

Mark Alan Humphrey announces his association with Romaguera, Baker, Dawson & Bringardner PA.

Elizabeth Schadt Gordon announces her association with Rosen, Cook, Sledge, Davis, Shattuck & Oldshue PA.

Barbara Wallace Wade announces her association with the Law Offices of David W. Rousseau.

Daniel Alexander Feig announces his association with Rumberger, Kirk & Caldwell.

Gary Edward Sullivan announces his association with Sullivan & Gray LLC.

Kaylyn Brooke Shoultz announces her association with Smith & Yentzen PLLC.

Vanessa Buch announces her association with Southern Center for Human Rights.

Melissa Brooke Croxton and Thomas S. Hiley announce their association with Spain & Gillon LLC.

Catherine Filhiol Golden announces her association with Sprott & Golden.

Will M. Booker, Jr. announces he has become *of counsel* with Steiner, Crum & Byars PC.

Michael Brett Stevens and William Guy Stevens announce their association with Stevens & Stevens PC.

Patrick O'Neal Gray announces his association with Sullivan and Gray LLC.

Charles Wayne Rutter, Jr. announces that he is now associated with Robert B. Tidwell LLC.

J. William Eshelman announces he is a member with Tighe Patton Armstrong Teasdale PLLC.

Michael John Petersen announces his association with the U.S. Federal Defenders Office, Middle District of Alabama.

The U.S. Attorney's Office for the Northern District of Alabama announces that Sandra Stewart has joined the office as First Assistant United States Attorney and that Scarlett Singleton has joined the office as an Assistant United States Attorney.

Robin Bobo Redding announces her association with the U.S. Bankruptcy Court.

Laura Isabel Bauer announces her association with the U.S. District Court for the Northern District of AL.

Darren William Kies announces his association with Vickers & Kies, LLC.

Elizabeth Bromberg Sullivan announces her association with Virginia College as Dean of School of Business and Legal Studies in Birmingham.

James Richard Esdale announces his association with Waldrep, Stewart & Kendrick.

Shayla Rae Fletcher announces her association with Waller Lansden Dortch & Davis LLC.

Melissa Storey Gowan announces her association with Walter Northcutt & Associates.

Brent Gibson Grainger announces his association with Waldrep, Stewart & Kendrick.

Scott D. Waldrup announces that Teri Hayes Smith has become a member and the firm's name is now Waldrup & Smith LLC.

Davidson, Wiggins, Jones & Parsons PC and The Fisher Law Firm PC announce their merger. The new firm will be Wiggins, Jones, Parsons & Fisher PC with offices at 2625 8th Street, Tuscaloosa 35401. Phone (205) 759-5771. The firm also announces that Christine M. Gates has joined as an associate.

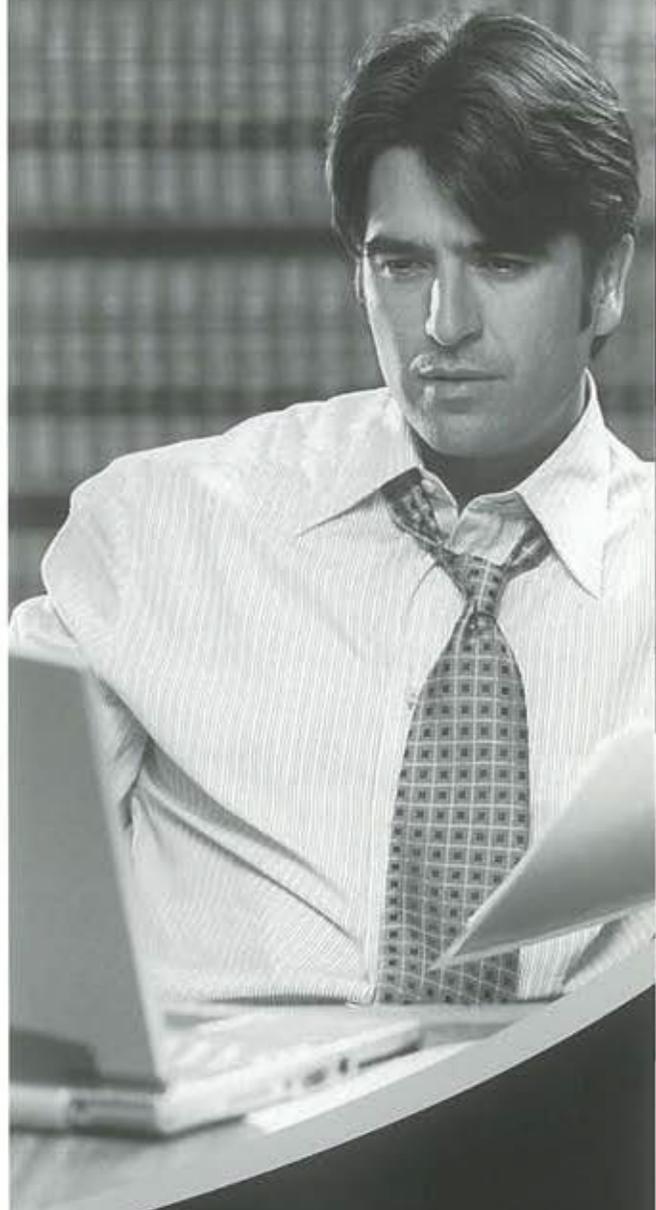
Joseph Kellam Warren announces his association with Wyrick, Robbins, Yates & Ponton LLP. ■

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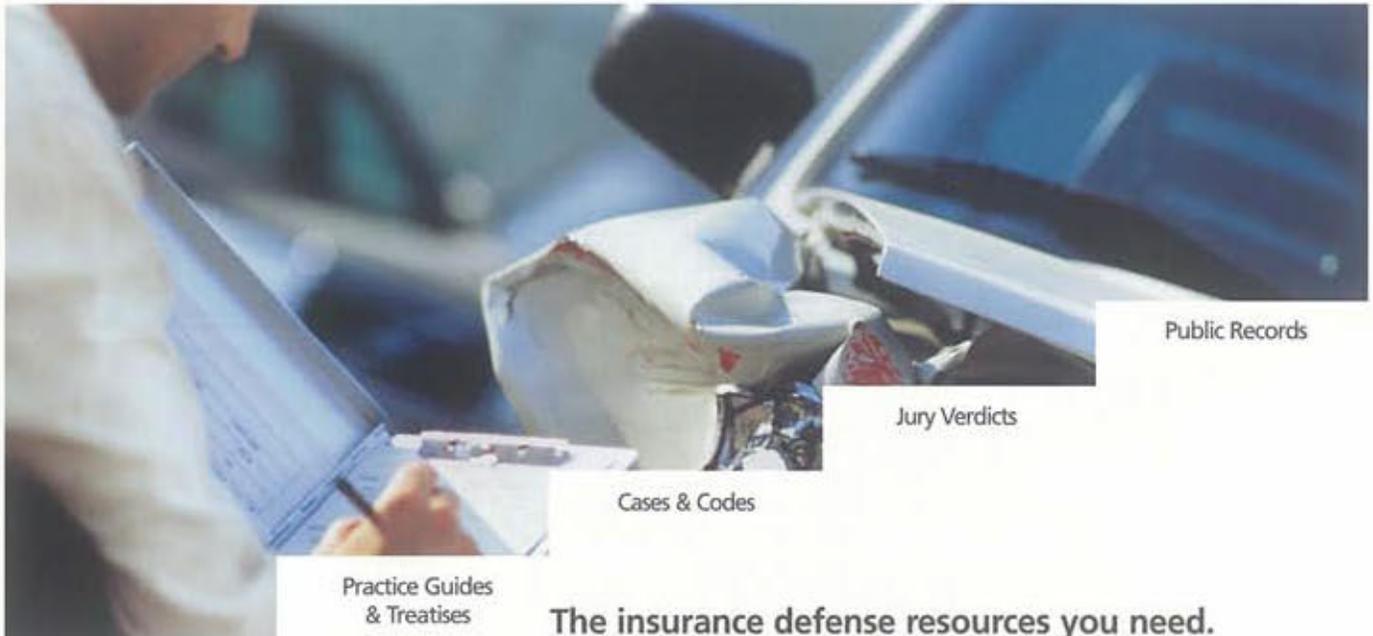
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