The background of the cover is a close-up photograph of a field of white flowers, likely lilies or similar species, with green stems and leaves. The flowers are in various stages of bloom, with some fully open and others as buds. The lighting is bright, suggesting a sunny day.

# The Alabama Lawyer

July 2012 | Volume 73, Number 4

Alabama's New  
Limited-Scope  
Representation  
Rules

Page 262

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262



264

# The Alabama Lawyer

July 2012 | Vol. 73, No. 4



268



## ON THE COVER

Cahaba lilies, at the Cahaba River National Wildlife Refuge,  
Bibb County

—Photo by Gregory H. Hawley

## FEATURES

- 258** How Alabama Lawyers Value Their Legal Heritage
- 260** Law Day 2012
- 262** Alabama's New Limited-Scope Representation Rules  
*By Henry A. Callaway*
- 264** Common Estate-Planning Mistakes  
*By R. Mark Kirkpatrick*
- 268** Crashworthiness-Based Product Liability and  
Contributory Negligence in the Use of the Product  
*By D. Alan Thomas, Paul F. Malek and John Isaac Southerland*
- 274** Diagnostic and *Daubert* Criteria for Diving Injury  
*By Gregory C. Buffalow*
- 284** Lawyers, Ethics and Trial Publicity  
*By J. Anthony McLain*

# ADVERTISERS

ABA Retirement Funds.....246

Alabama Mediation Center.....256

The University of Alabama  
School of Law .....254

Attorneys Insurance Mutual  
of the South.....226

The Bar Plan .....245

CoreVault.....251

Cumberland School of Law .....228 & 235

Davis Direct.....294

J. Forrester DeBuys, III.....279

Steven H. Emerson .....281

Expedited Process Serving, LLC.....247

The Finklea Group.....291

Freedom Court Reporting.....295

Gilsbar Management Services, LLC .....296

Law Pay.....253

The Locker Room .....233

Mahaney Law .....255

PangeaTwo.....277

Professional Software Corporation .....276

Restaurant Expert Witness .....278

Upchurch Watson White & Max .....257

Westlaw/Thomson Reuters.....227

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## COLUMNS

### 232 President's Page

*Challenges and Consequences:  
The Observations of a Short-Timer*

### 236 Executive Director's Report

*The 2008 Recession and the Legal Profession in Alabama: Some Interesting Trends*

### 238 Important Notices

*Adoption of Rule 5.1, Alabama Rules of Civil Procedure*

*Recommendations to the Alabama Rules of Evidence*

### 240 Memorials

### 244 The Appellate Corner

### 250 Bar Briefs

*Recipient of the "Lawrence B. Sheffield, Jr. Lifetime Achievement Award"*

*Birmingham School of Law Plans New Campus*

### 252 Disciplinary Notices

### 286 Legislative Wrap-Up

### 290 About Members, Among Firms

### 292 Classified Ads

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## Challenges and Consequences: The Observations of a Short-Timer

“You’ve got to prime the pump, you must have faith and believe, You’ve got to give of yourself ’fore you’re worthy to receive. Drink all the water you can hold, wash your face, cool your feet, Leave the bottle full for others, thank you kindly. Desert Pete”

When I began this journey as president, I told you I believed the challenges and potential for the Alabama State Bar had never been greater. As I review the months following that first “President’s Page,” I am more convinced than ever that those two observations are correct. Here are a few examples.

### Judicial Elections

In a March 16<sup>th</sup> editorial, *The New York Times* took the position that “expensive, partisan judicial state elections are tarnishing the integrity of American justice.” We were not successful in changing our method of selecting judges in this state during the recent general session of the legislature and, in fact, did not even try because it was an election year.

However, selections for the Alabama Supreme Court this year were the least expensive and adversarial than they have been in decades. I believe, in part, this was because of efforts made on behalf of the Alabama State Bar to set a better tone in those elections, as well as the courage of various special interests to take a different approach. I believe it is encouraging that both the business community and the trial community are open to working with the state bar to develop a long-term solution to focus judicial elections on experience, integrity and qualifications. I would like to see the bar work between now and the next session to gain a consensus so that a constructive solution can be presented to the legislature in the next general session.



## State Judges Emerge as Respected Stakeholders

In this session, the state judges' associations, both circuit and district, emerged as informed and important stakeholders. Through the excellent work of Suzi Edwards (who is legislative counsel to both the circuit and district judges' associations), both associations and, in particular, the leadership of **Judge Scott Vowell**, as well as the time devoted by judges from all over the state to either come and discuss issues of concern or to call their representatives, the state judges became recognized as an integral part of the process. Bar leadership made every effort to facilitate the state judges, both circuit and district, being included and heard by both the special interest groups and the legislators.

## Court and District Attorneys Funding

The U.S. Agency for International Development (USAID) defines the rule of law as follows:

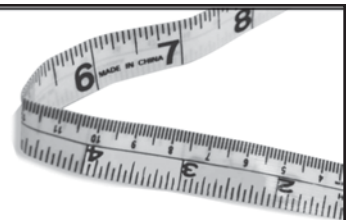
The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guaranties of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals.

As I have mentioned before, I believe the rule of law is the greatest principle invented by man. Unfortunately, this lofty



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goal cannot remain a reality without the courts being adequately funded, and Medicaid, the Department of Corrections and the court system are all victims of insufficient revenues. As important as Medicaid and the Department of Corrections are, they are state agencies. The court system is not a state agency but rather a branch of government. Nonetheless, and despite the best efforts of our legislators and our governor, the courts were required to come up with a supplemental means of funding in order to avoid the need for draconian cuts. I say draconian because the court system does not have programs to cut. Any additional cuts made by the courts would involve the lives of people—both those who would lose their jobs and those who would no longer be served by this branch of government. None of us wanted to increase court costs, but it was the only answer. While we all realize it presents an access-to-justice issue, the ultimate issue is whether the courthouse is open and able to function.

Thus, under the tremendous leadership provided by **Chief Justice Chuck Malone** and **AOC Director Alyce Spruell**, a court cost bill was developed to try to stabilize court funding. The bill also included additional funding for the district attorneys. **Chris McCool**, **Randy Hillman** and **Barry Matson** provided great cooperation and leadership in coordinating the bill so that funding for both the courts and the district attorneys was accomplished. It was my pleasure to work with everyone in trying to pass this bill. The challenges and burdens we faced in doing so exceed the space I have available, so let it suffice to say we are all indebted to **Representative Mike Hill** (the sponsor of the bill), the leadership of the house and senate and numerous representatives and senators who took a strong stand on behalf of the court system. We are also indebted to **Senator Arthur Orr** (senate budget chair) and **Representative Jim Barton** (house budget chair) for doing all they did to increase our appropriations within the budget itself. Last but not least, the governor and his staff were very supportive in trying to find adequate funds for the court. While it is certainly not truly adequate, this year's budget with the addition of the court cost bill will give us a chance to continue to serve the rule of law and the people of the state. Hopefully, the future will produce better means and further funding.

## Conclusion

These are just a few of the examples I believe demonstrate that the bar was very consequential in dealing with tremendous challenges. In looking to the future, I am going to borrow

from a column written by **Clay Alspaugh** for the **Birmingham Bar Association** several years ago. In quoting from a song by the Kingston Trio entitled "Desert Pete," he wrote:

"The gist of the song goes something like this. A cowboy was crossing a desert in the sweltering sun and was thirsty down to his toenails. He stopped to rest and surprisingly, though thinking it a mirage as a consequence of his intense thirst, saw a water pump close at hand. By the pump was a baking powder can and a note which read 'This pump is old, but she works, so give 'r a try. I put a new sucker washer in 'er, you may find the leather dry.'

"Now some of you may not know what priming a pump is, but in order to get water out of a well like this you literally have to pour more water into the well to 'prime it.' The note went on to say that under a rock close at hand the cowboy would find water left in a bit-ter's jar. The admonition to the cowboy was there was only enough to prime the pump, 'so don't go drinking it first.' The promise was if the cowboy just poured it in and then pumped like mad, he would have abundant water to not only quench his thirst, but also cool off in.

"The dilemma facing the cowboy was, do I drink that water or do I take the word of some unknown desert rat and chance pouring it down this rusty water pump with a mere hope that I might quench my thirst? As you probably can guess he took the challenge, though not without substantial risk and poured the water into the pump. Pumping like mad he heard the beautiful sound of water bubbling and splashing out of the ground, took off his shoes, drank his fill, thanked the Lord, thanked the pump, and thanked Desert Pete. Desert Pete's admonition and the refrain in the song goes something like this:

'You've got to prime the pump, you must have faith and believe,

'You've got to give of yourself 'fore you're worthy to receive.

'Drink all the water you can hold, wash your face, cool your feet,

'Leave the bottle full for others, thank you kindly. Desert Pete"

The leadership of your bar has believed, taken the challenge, primed the pump, pumped hard, and tried to leave the bottle full for future leadership. | AL



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 Lindsay L. Sinor  
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 William B. Stewart '90  
 Hon. C. Michael Strlson  
 J. Theodore Stuckenschneider '77  
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**Keith B. Norman**

*keith.norman@alabar.org*

# The 2008 Recession and the Legal Profession in Alabama: Some Interesting Trends

There has been much discussion about the far-ranging effects of the 2008 recession. Those effects are still evident in many areas as the economy makes a sluggish recovery. The legal profession has not gone unscathed during the economic downturn, with some segments of the profession having fared worse than others, e.g., real estate. In addition, the economy may have had an effect on the number of people choosing to join the legal profession, with a reported 16 percent drop in the number of people taking the LSAT this past February. This was the second year in a row that the number taking the LSAT has declined, with this year's decline being the largest on record. Indeed, last year's survey of new Alabama State Bar admittees (*The Alabama Lawyer*, May 2011; [www.alabar.org](http://www.alabar.org)) indicated tremendous dissatisfaction with the employment opportunities following law school.

A review of ASB membership renewal statistics for several years prior to 2008, and the same period of time since 2008, reveal some interesting trends that appear to suggest that the "great" recession may have had an impact on the decisions of some lawyers to leave the profession in Alabama. As the accompanying chart reflects, from 2004–2008, the number of state bar members increased by 10.6 percent but only by 7.4 percent from 2008–2012. The renewals of ASB members located outside the state experienced double-digit increases during both periods (albeit slower during 2008–2012) while the growth rate for

in-state members dropped in the years since 2008. It is interesting that the average number of new admittees for the two periods (533 for 2004–2008 and 527 for 2008–2011<sup>1</sup>) only dropped by a little more than 1 percent. The decreased rate of growth witnessed in Alabama since 2008 appears to be consistent with the national figures for licensed lawyers. From 2004–2008, the national total of licensed lawyers grew by 7.2 percent, but increased by only 4.6 percent through 2011, the most current year for which figures are available.

By drilling down a little deeper, we find that from 2004–2008, the number of Caucasian ASB members increased by 10 percent but only by 7 percent since 2008. On the other hand, the number of African-American bar members increased by 18.7 percent from 2004–2008 and by 14 percent from 2008–2012. The number of lawyers whose race is categorized as "Other" increased by 37 percent and 115 percent respectively, during the same two periods. The actual number of lawyers in this category of members, however, totals just a little over 100.

Drilling down slightly farther, we find that since 2008, the five counties with the highest concentration of lawyers—Jefferson, Montgomery, Mobile, Madison, and Tuscaloosa—have experienced very little growth since 2008. From 2004–2008, the number of lawyers in these five counties grew by 9.8 percent and represented 71 percent of all ASB members. The number of lawyers in the rest of the state grew

by 9 percent during the same period. Since 2008, the lawyer population in these five counties increased by less than 1 percent while the rest of the state has seen a surge of 22 percent. The percentage of lawyers in these five counties has dropped to 67 percent, compared to the rest of the state, which now claims 33 percent of the overall lawyer population in Alabama.

These membership figures and percentages since 2008 are significant because they reflect demographic and geographic changes over the last five years that are much different from what was occurring before then. Of course, without survey data to actually explain the variances of bar member demographics since 2008, we cannot be sure what role the recession has played with respect to lawyers' decisions to enter or leave the profession

or where they have chosen to practice. It is clear that although the number of ASB members continues to grow, the rate of growth has slowed. Though the rates of growth for Caucasian and African-American lawyers have also slowed, the growth rate for African-American lawyers was more than double the rate of growth of their Caucasian colleagues, while the number of lawyers of other races has experienced triple-digit growth. Perhaps the most revealing change these past five years is the rate

of growth of lawyers in the areas of the state that have traditionally lost ground to the counties with the largest number of lawyers. Time will tell if all of these changes are directly linked to the condition of the economy. If they do continue, they may represent a new paradigm for the demographics of the legal profession in Alabama. | AL

### Endnote

1. This is the most recent year for which there are complete admissions figures.

<b>ASB MEMBERSHIP RENEWALS</b>				
	<b>2004-2008</b>		<b>2008-1012</b>	
In-State	12,082-13,220	9.4%	13,220-14,135	5.9%
Out-of-State	2,168-2,534	16.9%	2,534-2,888	14.6%
Total Members	14,250-15,754	10.6%	15,754-17,023	7.4%



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### **Adoption of Rule 5.1, Alabama Rules of Civil Procedure**

### **Recommendations to the Alabama Rules of Evidence**

## Adoption of Rule 5.1, *Alabama Rules of Civil Procedure*

The Alabama Supreme Court has adopted Rule 5.1, *Alabama Rules of Civil Procedure*. The new rule is effective August 1, 2012. The order adopting Rule 5.1 appears in the advance sheet of *Southern Reporter* dated on or about April, 26, 2012. Subject to exceptions identified in the rule, Rule 5.1 provides a party the option of redacting certain information contained in a filing in a court proceeding. Specifically, the rule provides that a party may include only the last four digits of any Social Security number, taxpayer-identification number or financial-account number contained in a filed document. The rule further provides that a court may order that a filing be made under seal without redaction and that any party to a civil proceeding is presumptively entitled, upon request, to a copy of a filing made under seal and to an unredacted copy of any redacted filing made pursuant to the rule. The responsibility for making redactions pursuant to the rule lies with the attorney, party or nonparty filing the document, not with the clerk or other official custodian of court records, and a person or entity waives the protections of the rule as to the person's or entity's own information by filing a document that has not been redacted or placed under seal. The provisions of the rule apply to both documents filed physically and documents filed electronically. The text of Rule 5.1 can be found at <http://judicial.alabama.gov/rules>.

*Bilee Cauley, reporter of decisions, Alabama appellate courts*

## Recommendations to the *Alabama Rules of Evidence*

Recommendations for numerous amendments to the *Alabama Rules of Evidence* were submitted to the Alabama Supreme Court by the court's Advisory Committee on the *Alabama Rules of Evidence*. Alabama lawyers and judges are invited to submit comments on the proposed amendments to the Alabama Supreme Court on or before September 1, 2012. The proposed amendments can be viewed at <http://judicial.alabama.gov/proposed> and comments should be submitted to Supreme Court Clerk Robert G. Esdale at [resdale@appellate.state.al.us](mailto:resdale@appellate.state.al.us) or the Heflin-Torbert Judicial Building, 300 Dexter Avenue, Montgomery 36104. | AL

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**Ralph Gaines**

**Betty Cook Love**

**Judge Robert M. Parker**

## Ralph Gaines

The legal community and many others were saddened to learn of the passing of Talladega lawyer Ralph Gaines.

Ralph was the kind of lawyer his fellow lawyers aspired to be. He could be as tough as the old World War II Navy veteran that he was when his clients' cause required that. At the same time, he relished opportunities to be a peacemaker. Upon hearing of Ralph's death, a fellow trial lawyer who knew him well described him as "the greatest lawyer I have ever opposed in front of a jury, and I have tried cases in my 38 years against some of the so-called 'super lawyers.' None of them could hold a candle to Ralph Gaines." Another lawyer observed he was a "veritable Atticus Finch."

He was the kind of man his fellow men wished to be. He was physically and mentally strong and able, yet he had a great capacity for gentleness and kindness when that was what someone he encountered needed at the time. Ralph was impressed by hard work, integrity and good judgment. Not only did he practice those traits himself, but he also influenced others to honor those principles. A former circuit judge observed: "He is one of the bright spots in my adult life, and I always looked forward to having him in court. He was a true professional in every sense, a perfect southern gentleman, and, above all, a Christian who lived his faith daily."

Most importantly to Ralph, he was the kind of husband and father his fellow husbands and fathers strived to be. The quality one finds in each and every one of his children and grandchildren, as well as the happy sweet spirit of his wife, Mary Sue, exemplifies his influences during the lives they shared with Ralph. A former client wrote: "He taught me a great deal—probably most importantly—how to be a good father."

Ralph's life was one to be celebrated, honored, respected and cherished by all who knew him.

—*B. Clark Carpenter, Jr.*



## Betty Cook Love

Betty Love passed away peacefully on the morning of January 23, 2012, at the age of 77. A 1965 graduate of the Cumberland School of Law, she and a handful of other brave women forged the way for a career upon which I, and many other grateful females, would later embark.



After graduation, she returned to her hometown of Talladega, and alongside her husband, Huel, began practicing in what would remain for decades a predominately male profession. Fittingly, she would seat Talladega County's first female juror, a woman who went on to serve as foreperson, with both events causing commotion in the community.

The self-described "country lawyer" began gravitating toward insurance litigation, serving as David to a corporate Goliath. Other attorneys laughed when she used the term "bad faith" to describe certain insurance industry practices—that is, until she tried a case involving just that practice, and establishing precedent that is followed today. She received the first million dollar-judgment against an insurance company in Calhoun County. She would receive her second in Tuscaloosa County in 2001.

Betty was a founding member of the Insurance Programs Committee of the Alabama State Bar and a member of the Litigation, Workers' Compensation and Women's sections. She served on various committees, as a speaker for The Association of Trial Lawyers of America and edited *Trial Magazine*. She also authored, "How to Prepare and Try a Bad Faith Case" and "Bad Faith: A Species of Fraud" and was recorded for the "Million Dollar Arguments" series.

On February 12, 1994, she would become one of two female attorneys ever awarded the coveted War Horse Award by the Southern Trial Lawyers of America in recognition of her lifetime achievement as a trial lawyer and teacher. The inscription on the award sums up her legal career: "*The highest reputation in ethics and honesty within the legal profession.*"

Her children, Huel M. Love, Jr., Dana Leigh Love and Fred Franklin Ledbetter, Jr., followed her to the courthouse as young lawyers. She argued a case in front of the Alabama Supreme Court immediately before my birth and joked that osmosis made my career choice. The last case she tried was perhaps her proudest moment, as she found herself seated at counsel table with Huel, Jr. and a grandson, Huel M. Love, III.

For everything she was as an attorney and colleague, though, she was more as an individual, a friend, a mentor and a mother. For 13 years she led Girl Scout Troop 60, hauling girls all over the United States in her old blue van. An avid horsewoman, she held charity horseshows, giving back to the community by sharing one of her great passions. She was a founder of Talladega Academy, and would serve on various boards, including The Red Door Kitchen, The Salvation Army and The Arc.

However, it was Betty's service on the board of Alabama Teen Challenge that became her passion. She clocked countless hours of pro bono representation of individuals all over the state whom she felt could benefit from the one-year Christian-based drug and alcohol rehabilitation program. Once again, she was able to use her legal skill to help others.

My mother feared nothing but regret. She viewed her impending death as a new and exciting adventure due in large part to her strong Christian faith. She was preceded in death by her husband and law partner, Huel M. Love (1949-2004). Her survivors include her children, Huel M. Love, Jr., Carla Love Tinney, Dana Leigh Love, John Hugh Love, Jason Landers Love, and Julie Love-Templeton; stepdaughters Alice Faye Love and Virginia Paige Love Smith; foster sons Fred Franklin Ledbetter, Jr. and James Adams; her sister, Sadie Rooks; 15 grandchildren; and 12 great-grandchildren.

Her closing argument typically ended with, "*Folks, the word 'Verdict' means to speak the truth.*" Her life spoke her truth, as does Micah 6:8, "And what does the LORD require of you? To act justly and to love mercy and to walk humbly with your God."

—Julie Love

## Judge Robert M. Parker

Judge Robert M. Parker was born December 28, 1928 in the Inglenook neighborhood of Birmingham to Herman and Mabel Parker. A life-long sports enthusiast, he graduated a semester early from J. H. Phillips High School in order to attend spring football training at the University of Alabama as a walk-on member of the Crimson Tide. A knee injury prevented Bob from pursuing that particular dream, but did not diminish his love for the Tide. While at the university, Bob became an active member of Delta Chi fraternity and served as its



treasurer and president. He finished his undergraduate work in three years and began his legal education at the school of law, then located in Farrah Hall. Law school was interrupted by his service in the Army during the Korean War. After an honorable discharge, he then returned to law school to earn his LL.B. degree in 1955.

After graduating from law school, he began practicing in Jacksonville, Alabama. He later moved to Anniston, where he practiced until 1964, when he was appointed as a circuit judge for the 7th Judicial Circuit. He served as a circuit judge for 18 years, until 1982, and was the circuit's presiding judge for the last six years of his tenure. During his time on the bench, Judge Parker adjudicated with a common-sense wisdom that was respected by all. He was a long-time member of the First United Methodist Church in Anniston, the Inns of Court and the Civitan Club of Anniston, of which he was a past president.

After his retirement, Judge Parker often returned to active status as a special judge at both the trial and appellate levels. In 1997, he served as a special justice of the Alabama

Supreme Court for a case in which the regular justices recused themselves because the then-chief justice was a party to the lawsuit. Judge Parker also served by special appointment on the Alabama Court of Civil Appeals for a number of cases.

He was an avid tennis player, and, in his later years, enjoyed golf and meeting his "breakfast club" at Jack's. He was loved by many in the community and had close friends from all walks of life. He is survived by his loving wife of 27 years, Virginia Allred Parker; his daughter, Frances Parker Quarles (Randy) of Mountain Brook; three stepsons, Larry Daniel of Talladega, Patrick Porteous of Anniston and Joseph Porteous of California; and grandchildren George R. Tankersley, Parker Tankersley and Stewart Quarles, all of Mountain Brook; Kate Porteous of Anniston; and Drew Daniel, Cassidy Daniel and Peyton Daniel, all of Talladega. Most notably, Judge Parker endeared himself to his family and displayed a deep love for his wife, daughter, stepchildren and, especially, his grandchildren. His contributions to the Anniston community were abundant, and his presence will be dearly missed. | [AL](#)

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Died: April 30, 2012

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Leeds  
Admitted: 1950  
Died: April 27, 2012

**Hon. Jerome Belcher Baird**

Tuscaloosa  
Admitted: 1967  
Died: March 9, 2012

**Clifford L. Callis, Jr.**

Gadsden  
Admitted: 1988  
Died: March 25, 2012

**Charles Edward Clark**

Birmingham  
Admitted: 1957  
Died: April 17, 2012

**Hon. Irwin Weldon Coleman**

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Admitted: 1959  
Died: March 12, 2012

**Maria Athanasia Cotter**

Huntsville  
Admitted: 1997  
Died: January 19, 2012

**Hon. William Sidney Fuller**

Andalusia  
Admitted: 1956  
Died: March 11, 2012

**James Robert Fuqua**

Ozark  
Admitted: 1977  
Died: March 31, 2012

**Darla T. Furman**

Huntsville  
Admitted: 1990  
Died: December 26, 2011

**Larry Lee Guthrie, Jr.**

Hoover  
Admitted: 1997  
Died: April 8, 2012

**Hon. Karen Neal Knight**

Montgomery  
Admitted: 1978  
Died: March 19, 2012

**Hon. James H. Lackey, Sr.**

Mobile  
Admitted: 1963  
Died: April 13, 2012

**Robert Stanley Morrow**

Alabaster  
Admitted: 1983  
Died: April 12, 2012

**James T. Pons**

Montgomery  
Admitted: 1961  
Died: March 30, 2012

**Courtney Adele Schloemer**

Madison, Mississippi  
Admitted: 1998  
Died: March 6, 2012

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- **No attorney will remain a member of an existing section unless 2013 section dues are paid in full by June 30, 2012.**
- There is no charge to join the Young Lawyers' Section which is open to all attorneys ages 36 and under
- Effective July 1, 2012, the fiscal year for all sections shall be July 1-June 30.



**Marc A. Starrett**

### **By Marc A. Starrett**

*Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.*

## Decisions of the United States Supreme Court—Criminal

### **Federal Habeas Corpus Procedure; *Sua Sponte* Review of Petition's Timeliness**

*Wood v. Milyard*, No. 10-9995, 2012 WL 1392558 (Apr. 24, 2012)

As is the case with federal district courts, the federal appellate courts may *sua sponte* consider the timeliness of a habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). However, the Tenth Circuit Court of Appeals abused its discretion in finding the petition untimely in this case, because the State of Colorado explicitly waived that statute of limitations defense.

### **Search and Seizure; Search of Detainee upon Incarceration**

*Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012)

A detainee—here, a man held following a traffic stop due to an outstanding bench warrant—may be "strip-searched" upon entry into a jail's general population, regardless of the seriousness of offense resulting in that incarceration. Concerns raised by *amici* regarding the invasiveness or potential abuse resulting of such searches were rejected as "not implicated on the facts of this case" and thus deemed "unnecessary" for the Court's consideration.

### **Sentencing; Consecutive Federal and State Sentences**

*Setser v. U.S.*, 132 S. Ct. 1463 (2012)

The federal district court did not abuse its discretion in ordering the defendant's federal sentence to run consecutively with a state court sentence.

### **Ineffective Assistance of Counsel; Plea Negotiations**

*Lafler v. Cooper*, 132 S. Ct. 1376 (2012)

The Court affirmed the Sixth Circuit Court of Appeals' decision that a state

defendant's trial counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel advised the defendant, charged with assault with intent to murder and other related offenses, to reject a proposed plea agreement on the erroneous grounds that the prosecution could not prove his intent because he shot his victim below the waist. The Court rejected the Court of Appeals' judgment, however, to the extent it ordered specific performance of the rejected agreement. The Court instead directed the state to reoffer the proposed plea agreement, and, if the defendant accepts the offer, the trial court may then accept or reject the plea agreement.

### Ineffective Assistance of Counsel; Plea Negotiations

*Missouri v. Frye*, 132 S. Ct. 1399 (2012)

In another *Strickland*/plea agreement case, the Court held that the defendant's trial counsel rendered ineffective assistance by failing to communicate the prosecution's plea offer before the offer expired. It remanded for the state court to review whether, under state law, the agreement could have been canceled by the prosecution or rejected by the trial court.

### Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel in Post-Conviction Proceedings; Cause for Procedural Default

*Martinez v. Ryan*, 132 S. Ct. 1309 (2012)

The Court held that ineffective assistance of counsel during state court post-conviction proceedings may serve as cause to excuse the procedural default of an ineffective assistance of trial counsel claim that could have been raised during those post-conviction proceedings. Thus, where an ineffective assistance of trial counsel claim must be raised in the first post-conviction proceeding, the habeas petitioner's failure to properly present that claim throughout one complete round of state court post-conviction review does not bar federal habeas review of the claim "if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."

## Decisions of the Eleventh Circuit Court of Appeals—Criminal

### Federal Habeas Corpus Procedure; *Batson*

*Madison v. Comm., Ala. Dept. of Corr.*, No. 11-12392, 2012 WL 1450039 (11<sup>th</sup> Cir. Apr. 27, 2012)

The court held that the Alabama Court of Criminal Appeals failed to properly apply *Batson v. Kentucky*, 476 U.S. 79 (1986) in finding that the defendant failed to make a prima

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facie case of racial discrimination regarding the state's jury strikes. The court concluded that, in finding that the defendant failed to show "purposeful racial discrimination" in the state's strikes, the court of criminal appeals applied a more onerous standard than the "inference of racial discrimination" *Batson* standard that would require the state to provide race-neutral grounds for its strikes.

**Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel**

*Morris v. Sec., Dept. of Corr.*, No. 09-15471, 2012 WL 1370848 (11<sup>th</sup> Cir. Apr. 20, 2012)

The state court held that trial counsel's failure to ensure the petitioner's presence during a bench conference and to advise him of his right to testify during the trial's penalty phase did not result in prejudice under the *Strickland* standard. In his federal habeas proceedings the petitioner failed to show that the state court's decision was contrary to


clearly established Supreme Court precedent or an unreasonable application of federal law as required for habeas relief under AEDPA.

**Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel; Beck; Resentencing**

*Roberts v. Comm., Ala. Dept. of Corr.*, No. 10-15259, 2012 WL1325604 (11<sup>th</sup> Cir. Apr. 18, 2012)

The court found no error in the state court's conclusion that trial counsel did not render ineffective assistance in his failure to investigate or present evidence to support an insanity defense. The state court also did not misapply *Beck v. Alabama*, 447 U.S. 625 (1980) in affirming the trial court's refusal to instruct the jury on felony murder as a lesser-included offense to the petitioner's capital murder charge. The state court also did not err in upholding the petitioner's resentencing before a judge without a jury.

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C12-0201-010 (2/12)

## **Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel; Miranda; Confession to Family Member/Law Enforcement Officer**

*Cook v. Warden, Ga. Diagnostic Prison*, No. 10-1334, 2012 WL 1371276 (11<sup>th</sup> Cir. Apr. 20, 2012)

The court found no error in the state court's adjudication of the petitioner's claims that his trial counsel rendered ineffective assistance in his investigation/presentation of mental health evidence during the trial's penalty phase and in his preparation of the petitioner's father to testify during that phase. It also found no error in the state court's admission of the petitioner's non-*Mirandized* confession into evidence; he confessed to his father, an FBI agent, who was "chiefly acting as the [p]etitioner's father" rather than as a law enforcement officer at the time of the confession.

## **Search and Seizure; Search Warrant; Protective Sweep**

*U.S. v. Noriega*, No. 10-12480, 2012 WL 1193542 (11<sup>th</sup> Cir. Apr. 11, 2012)

Without deciding whether a law enforcement officer's "protective sweep" of the defendant's premises was legal, the court remanded for the district court to determine whether the officer would have sought a search warrant without conducting the protective sweep. If the district court determines he would not have done so, the court will then decide whether the protective sweep was proper.

## **"Crime of Violence" under Federal Sentencing Guidelines**

*U.S. v. Chitwood*, No. 11-120504, 2012 WL 1122971 (11<sup>th</sup> Cir. Apr. 5, 2012)

Georgia's "false imprisonment" offense constitutes a crime of violence for purposes of career offender treatment under the federal sentencing guidelines.

## **Search and Seizure; Search Warrant; Affidavit Supporting Warrant**

*U.S. v. Lebowitz*, No. 10-13349, 2012 WL 1123845 (11<sup>th</sup> Cir. Apr. 5, 2012)

Among other holdings in its affirmance of the defendant's child pornography and attempted sexual enticement convictions, the court found a search warrant of the defendant's home to be supported by probable cause. It rejected the defendant's claim that the timing of his knowledge of his

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minor victim's age created an innocent explanation for his conduct and should have been included in the search warrant's affidavit, observing that a "post-hoc innocent explanation for incriminating behavior does not vitiate a finding of probable cause."

## **Federal Habeas Corpus Procedure; Prosecutor's Comments to Sentencing Jury**

*Reese v. Sec., Fla. Dept. of Corr.*, No. 11-12178, 2012 WL 1059452 (11<sup>th</sup> Cir. Mar. 30, 2012)

The state courts did not unreasonably apply federal law in rejecting the petitioner's claim that the prosecutor engaged in misconduct by referring to him during sentencing phase arguments as "every woman's worst nightmare," suggesting that he would be released on parole absent a death sentence, comparing him with a "cute little puppy" that grew up to become a "vicious dog," and asking the jury to show him "the same sympathy, the same pity that he showed to [the murder victim] and that was none."

## **Federal Habeas Corpus Procedure; Ineffective Assistance; Change of Venue**

*Price v. Allen*, No. 09-11716, 2012 WL 1059111 (11<sup>th</sup> Cir. Mar. 30, 2012)

The state court did not unreasonably apply federal law in denying the petitioner relief on his ineffective assistance of trial counsel claims related to his motion to change venue and his investigation into mitigation evidence, nor in denying the petitioner's motion to change venue.

### **Terry Investigatory Stop; Reasonable Suspicion**

*U.S. v. Lewis*, No. 10-13567, 2012 WL 967969 (11<sup>th</sup> Cir. Mar. 23, 2012)

Reversing the district court's suppression of evidence in the defendant's "unlawful possession of a firearm by an illegal alien" charge, the court noted that the law enforcement officers' approach and questioning of the defendant and three other men in a restaurant parking lot "did not implicate the Fourth Amendment at all." Further, the officers could briefly detain all four men after two of the men stated that they had weapons, one of whom had a gun concealed in his waistband. That the officers later learned that the man had a concealed-weapon permit did not defeat the "reasonable suspicion" supporting the stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

### **42 U.S.C. § 1983 Challenge to Lethal Injection Protocol**

*Arthur v. Thomas*, No. 11-15548, 2012 WL 934385 (11<sup>th</sup> Cir. Mar. 21, 2012)

The court reversed the district court's *Fed.R.Civ.P.* 12 (b)(6) dismissal of the death row inmate's challenge to Alabama's lethal injection protocol under 42 U.S.C. § 1983. It held that the inmate's Eighth Amendment claim that the recently altered protocol could subject him to "substantial pain" was entitled to further factual development. The court also reversed the dismissal of the inmate's Fourteenth Amendment claim that a deviation in the protocol in a recent execution (an alleged lack of a "pinch test" for consciousness) denied him equal protection.

## Decisions of the Alabama Court of Criminal Appeals

### **Probation; Order Granting Probation After Execution of Sentence Void**

*State v. Utley*, CR-11-0244, 2012 WL 1450535 (Ala. Crim. App. Apr. 27, 2012)

The court granted the state's petition for a writ of mandamus and directed the trial court to set aside its order granting probation; the order was void, because probation may be granted only "at any time before 'execution of sentence.'"

### **Probation; Defendant's Right to Reject Probation**

*Goodson v. State*, CR-11-0209, 2012 WL 1450538 (Ala. Crim. App. Apr. 27, 2012)

The trial court abused its discretion in denying the defendant's rejection of a suspended sentence and probation, because the defendant may choose to accept or reject a suspended or probated sentence.

### **Preservation of Alleged Error in Jury Instructions and Closing Argument; Self-Defense; Duty to Retreat**

*Kidd v. State*, CR-10-1487, 2012 WL 1450539 (Ala. Crim. App. Apr. 27, 2012)

The defendant's arguments against the trial court's "self-defense" jury instruction and the prosecutor's comments during closing arguments were not first presented to the trial court; accordingly, they were not preserved for appellate review. Regardless, the trial court's instruction as to the "right to stand his or her ground" was correct, and the state's closing arguments were consistent with the instruction. The defendant had a duty to retreat because his unlawful possession of a firearm led to the fatal shooting.

### **Ala.R.Evid. 404 (b) Evidence of Prior Bad Acts; Rebuttal Evidence**

*Hammond v. State*, CR-10-1263, 2012 WL 1450540 (Ala. Crim. App. Apr. 27, 2012)

The court reversed the defendant's convictions on the grounds that the state, through its cross-examination of the defendant, could not "open the door" for its own rebuttal witness to provide evidence of the defendant's prior acts of molestation. The state also did not provide reasonable notice of its intention to introduce that evidence as required by *Ala.R.Evid.* 404 (b).

### **Mistrial; Substitution of Alternate Juror During Deliberations**

*Peak v. State*, CR-10-0753, 2012 WL 1450541 (Ala. Crim. App. Apr. 27, 2012)

Among other holdings in affirming the defendant's felony murder conviction, the court found no error in the trial court's denial of a mistrial stemming from its substitution of an alternate juror during deliberations. The trial court determined that the alternate juror had not discussed the case



and ordered that the jury begin its deliberations anew upon the alternate juror's inclusion.

### Appointed Attorney Fees

*Hutchinson v. State*, CR-10-0595, 2012 WL1450542 (Ala. Crim. App. Apr. 27, 2012)

The court reversed the trial court's reduction of defense counsel's appointed attorney fees, finding no proper justification to support the reduction.

### Ala.R.Crim.P. 32; Ineffective Assistance Of Counsel

*Washington v. State*, CR-07-1351, 2012 WL1450543 (Ala. Crim. App. Apr. 27, 2012)

Among other holdings, the court found no error in the trial court's denial of the defendant's *Ala.R.Crim.P. 32* petition and its ineffective assistance of trial counsel claims based on counsel's failure to interview the defendant's family members for the trial's guilt phase.

### Batson

*Wilson v. State*, CR-07-0684, 2012 WL 976825 (Ala. Crim. App. Mar. 23, 2012)

Among other holdings, the court found no error in the trial court's denial of the defendant's *Batson* motion. The state's jury strikes were based on race-neutral grounds such as the venire-members' criminal history, and the defendant did not show that the grounds were pre-textual.

### Harboring a Felony Probationer Constitutes Hinderling Prosecution

*Yearby v. State*, CR-10-0500, 2012 WL 976827 (Ala. Crim. App. Mar. 23, 2012)

As an issue of first impression, the court held that the defendant's act of concealing a felony probationer in his residence constituted the offense of first-degree hindering prosecution under *Alabama Code* (1975) § 13-10-43.

### Juvenile Transfer; Involuntary Commitment

*Clancy v. State*, CR-10-1228, 2012 WL 976829 (Ala. Crim. App. Mar. 23, 2012)

In this procedurally complex case, the court held that the minor defendant's appeal of his juvenile transfer order (seeking his transfer to circuit court for trial as an adult) was final at the time of his jury trial and resulting conviction. The

court distinguished between the juvenile transfer case and the defendant's separate involuntary commitment proceeding, and also observed that a civil proceeding, such as the commitment proceeding, cannot be used to interfere with the enforcement of criminal laws.

### Motion for DNA Testing

*Ex parte Hammond*, CR-10-1777, 2012 WL 976830 (Ala. Crim. App. Mar. 23, 2012)

The trial court did not abuse its discretion in denying the defendant's motion for DNA testing under *Alabama Code* (1975) § 15-18-200. He failed to show a reasonable probability that the testing would show that he is factually innocent of his offense. | [AL](#)

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**Recipient of the “Lawrence B. Sheffield, Jr. Lifetime Achievement Award”**

**Birmingham School of Law Plans New Campus**

## Recipient of the “Lawrence B. Sheffield, Jr. Lifetime Achievement Award”

**John A. Lentine**, a partner with Sheffield & Lentine PC, was the 2012 Recipient of the “Lawrence B. Sheffield, Jr. Lifetime Achievement Award” presented by the Greater Birmingham Criminal Defense Lawyers Association. The award is the highest award given by the association for service and dedication to the practice of criminal defense.



*Lentine*

## Birmingham School of Law Plans New Campus

Birmingham School of Law, which has operated from several offices in downtown Birmingham since 1915, announced plans to renovate and then move into the historic 1929 J.F. Oates building in Birmingham.

“The move will mark the first time in our nearly 100-year history that the law school has had its own building. It’s going to offer the school a true campus with fully modern classroom space,” said James L. Bushnell, dean, Birmingham School of Law.

Located in the Birmingham City Center at 2200 Third Avenue South, the building is close to interstates and other major highways which is important because a significant portion of the school’s students commute from other cities to the evening and weekend classes.

Renovation is scheduled to begin this fall with an anticipated move-in by fall semester 2013. | [AL](#)

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## Notices

### Reinstatement

### Transfer to Disability Inactive Status

### Suspensions

### Public Reprimand

## Notices

- **Sherryl Snodgrass Caffey**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 20, 2012, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 09-1160(A) before the Disciplinary Board of the Alabama State Bar.
- **Joseph Edward Carr, IV**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2012, or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2009-1210(A) by the Disciplinary Board of the Alabama State Bar.
- **Kristin Elizabeth Johnson**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2012 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2011-1722 before the Disciplinary Board of the Alabama State Bar.
- **William Orr Smith**, whose whereabouts are unknown, must answer the Alabama State Bar Disciplinary Board's order to show cause why reciprocal discipline should not be imposed within 28 days of July 15, 2012, or, thereafter, the reciprocal discipline shall be entered against him pursuant to Rule 25(a), *Alabama Rules of Disciplinary Procedure*, in Pet. No. 2011-1097.

## Reinstatement

- On November 30, 2011, the Supreme Court of Alabama entered an order reinstating Birmingham attorney **Coker Bart Cleveland** to the practice of law in Alabama based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Cleveland was summarily suspended from the practice of law on November 30, 2007. In September 2010, he entered a conditional guilty plea wherein he received a two-year suspension to be held in abeyance and was placed on probation for two years retroactive to his summary suspension date of November 30, 2007. [Pet. No. 2011-920]

## Transfer to Disability Inactive Status

- Dadeville attorney **Thomas Howard Sherk** was transferred to disability inactive status, effective March 13, 2012, by order of the Supreme Court of Alabama. The court entered its order based upon the March 13, 2012 order of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition to transfer to disability inactive status filed by the Office of General Counsel, pursuant to Sherk's written request. [Rule 27, Pet. No. 2012-471]

## Suspensions

- Birmingham attorney **Janine Marie Burrell** was summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 14, 2012. The court entered its order based upon the Disciplinary Commission's order finding that Burrell had failed to respond to a request for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2012-470]
- Birmingham attorney **Courtney Renee Dredden** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective April 24, 2012. The court entered its order based upon the Disciplinary Board's acceptance of Dredden's consent to discipline. In ASB No. 2011-614, Dredden pled guilty to violating rules 1.5(a), 1.15(a), 8.4(a) and 8.4(g), *Ala. R. Prof. C.*

Dredden previously worked as an attorney in the creditor's rights section of Balch & Bingham. While at Balch & Bingham, Dredden, on behalf of a client, filed a complaint against a party ("defendant") concerning a collections matter, and a default judgment was subsequently entered. In December 2008, Dredden left the firm and moved to Washington, D.C. After Dredden's departure from Balch & Bingham, another attorney with the firm filed garnishment proceedings against the defendant's employer. In March 2010, the circuit court began sending the garnishment checks to Dredden in Washington, D.C. Rather than forward the garnishment checks to Balch & Bingham or the client, Dredden cashed the checks and kept the funds totaling \$2,888.10. In addition to the 91-day suspension, Dredden was also ordered to repay \$2,888.10 to Balch & Bingham, and required to provide proof of said repayment to the Office of General Counsel. [ASB No. 2011-614]

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- Montgomery attorney **Regina Nelson Eng** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective April 20, 2011. The court entered its order based upon the Disciplinary Commission's acceptance of Eng's conditional guilty plea wherein she pled guilty to violations of rules 1.4(a), 1.4(b) and 8.1(b), *Ala. R. Prof. C.* Eng was previously suspended from the practice of law in April 2011 and had not been reinstated.

In ASB No. 2011-338, Eng was hired to represent a client in a divorce action that had been filed by the client's wife. Eng filed an answer to the divorce petition and entered a notice of appearance. A final hearing was held in the matter, and the court entered a final judgment of divorce. Thereafter, the client tried to contact Eng to discuss the final order on several occasions, without success. Eng failed to return the client's phone calls and failed to appear at appointments the client had made with Eng's office. In

February 2011, a letter and a copy of a bar complaint filed by the client were sent to Eng, advising her of the complaint and informing her that she was required to submit a response to the complaint within 14 days of the date of the letter. No response was received from Eng, and as a result, Eng was summarily suspended from the practice of law on April 20, 2011.

In ASB No. 2011-854, Eng was hired by a client in September 2010 to represent the client in a medical malpractice claim. Eng filed suit on behalf of the client on September 17, 2010, and later filed a motion to withdraw on February 23, 2011. Along with the motion to withdraw, Eng requested the court grant a 30-day continuance in order for the client to obtain new counsel. The court granted Eng's motion to withdraw and her request for a 30-day continuance. In April 2011, a motion for summary judgment was filed by the defendant in the case. In response, the client filed a handwritten note asking for

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additional time to find a lawyer, and argued that her first notice of Eng's withdrawal was when she was served with the motion for summary judgment on April 25, 2011. On three separate occasions, Eng was sent copies of the complaint to the address she provided to the bar. Eng failed to submit a written response to the complaint. [ASB nos. 2011-338 and 2011-854]

- On April 19, 2012, Tuscaloosa attorney **Byron Edwin House** was intermily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that House's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or the public. [Rule 20(a), Pet. No. 2012-668]

- Mobile attorney **Keith Anderson Nelms** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective March 21, 2012. The court based its order on Nelms's conditional guilty plea to violations of rules 1.4(a), 1.16(d), 8.1(b) and 8.4(g), *Alabama Rules of Professional Conduct*. Nelms was hired to represent a defendant in a series of civil suits initiated by several credit card companies. According to the fee agreement, Nelms was paid an initial retainer of \$5,000 to be billed at \$225 per hour. Shortly before the cases were scheduled to go to trial, Nelms hired another attorney to try the case in his stead. At the conclusion of the trial, a judgment was entered against the defendant. The defendant attempted to obtain a copy of his file in order to pursue an appeal. Nelms failed to return the file to the defendant and failed to timely respond to a subpoena *duces tecum* issued by the bar.

In another matter, Nelms filed a petition for bankruptcy, which is currently pending in the Middle District of Alabama. Nelms's lawyer filed a motion to have his fees paid out of the bankruptcy estate which was denied by the court. After the hearing, Nelms left a series of telephone messages for the judge, in which Nelms demanded an apology for what he deemed were inappropriate comments by the judge during the hearing. In an e-mail to the judge, Nelms stated that he "wanted an apology because the judge had called him a crook [and] that if anyone was a crook, it was the judge."

- Daphne attorney **John William Parker** was intermily suspended from the practice of law in Alabama pursuant to

rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 24, 2012.

Parker was initially intermily suspended October 27, 2011 for failure to properly maintain his trust account as required by Rule 1.15, *Ala. R. Disc. P.* Thereafter, Parker filed a petition for dissolution of interim suspension and a hearing was held in the matter November 1, 2011. At the conclusion of the hearing, the Disciplinary Commission entered an order conditionally staying Parker's interim suspension retroactively to October 27, 2011. Parker was warned at the November 1, 2011 hearing that strict compliance with Rule 1.15, *Ala. R. Prof. C.* was required as a condition of the stay of his interim suspension.

On February 15, 2012, the Office of General Counsel filed a motion to reinstate the interim suspension based on evidence proving that Parker had overdrawn his trust account and that his trust account was not properly reconciled.

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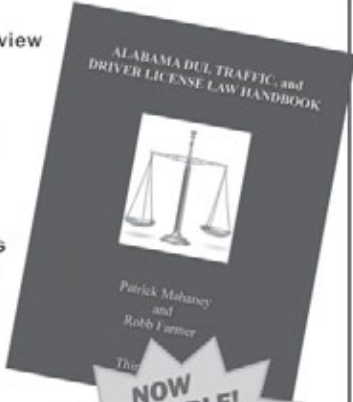
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On February 24, 2012, the Disciplinary Commission entered an order reinstating Parker's interim suspension for violating the conditions of the conditional stay. [Rule 20(a), Pet. No. 11-1563]

- Birmingham attorney **Otis Stewart, Jr.** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective October 12, 2011. The court entered its order based upon the Disciplinary Commission's acceptance of Stewart's conditional guilty plea wherein Stewart pled guilty to violations of rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.* On or about July 19, 1985, Stewart borrowed \$60,000 and was to repay the loan in 360 monthly installments of \$571.50. Stewart failed to make payments as agreed and suit was filed against him in March 2000. On or about July 29, 2010, the court entered a judgment against Stewart in the amount of \$191,766.25. After Stewart's appeal of the court's order failed, he filed a Chapter 7 bankruptcy petition. A bar complaint was subsequently filed against Stewart alleging that he was using his trust account to shield his assets from being seized or garnished as the result of an outstanding judgment. A review of Stewart's trust account statements and check register revealed that beginning in August 2009, he began depositing personal funds into his client trust account and making personal payments from the trust account. Since that time, Stewart has continued to deposit personal funds into his trust account and to make improper personal payments from that account. [Rule 20(a), Pet. No. 2011-1670; ASB No. 2011-1344]
- Gardendale attorney **Henry Whitfield Strong, Jr.** was summarily suspended from the practice of law in Alabama

pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective March 20, 2012. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Strong had failed to respond to requests for information from a disciplinary authority. [Rule 20(a), Pet. No. 12-476]

- McIntosh attorney **Stacey LaShun Thomas** was interimly suspended from the practice of law in Alabama, by order of the Supreme Court of Alabama, effective February 13, 2012. The court entered its order based upon the Disciplinary Commission's order in response to a petition filed by the Office of General Counsel, evidencing that Thomas had failed to respond to a request for information concerning a disciplinary matter and was engaging in conduct which was causing, or was likely to cause, immediate and serious injury to a client or the public. [Rule 20(a), Pet. No. 2012-306]
- Tuscaloosa attorney **Jarrett Nathaniel Tyus** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective November 1, 2011. The court entered its order based upon the Disciplinary Commission's acceptance of Tyus's conditional guilty plea wherein Tyus pled guilty to violating rules 3.4(c), 5.5(a)(1), 8.4(a) and 8.4(g), *Alabama Rules of Professional Conduct*. Tyus was previously suspended in April 2011 and had not been reinstated. In July 2011, the Office of General Counsel received a series of e-mail exchanges between Tyus and an assistant district attorney, wherein Tyus referred to himself as a lawyer. Tyus later admitted to acting as a paralegal while he was suspended and admitted that he had not received permission from the Disciplinary Commission to work in the legal field during his suspension. [ASB No. 2011-1336]
- Montgomery attorney **Leon David Walker, III** was interimly suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective March 22, 2012. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that probable cause exists that Walker has misappropriated and mismanaged client trust funds. [Rule 20(a), Pet. No. 12-475]

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- Huntsville attorney **Jimmy Donald Wells** was suspended from the practice of law in Alabama, effective February 24, 2012, for noncompliance with the 2010 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 11-733]

## Public Reprimand

- Phenix City attorney **Larry Joel Collins** was ordered to receive a public reprimand without general publication for violations of rules 1.9(a) and 8.4(a), *Alabama Rules of Professional Conduct*. In February 2010, Collins was appointed to represent a defendant after he and a co-defendant were arrested and charged with robbery 1<sup>st</sup> degree. The defendant insisted that he was not with the co-defen-

dant at the time of the robbery. However, the co-defendant had already confessed to law enforcement and alleged that the defendant was with him and participated in the robbery. At the conclusion of the preliminary hearing, the case was bound over to the grand jury and the defendant was subsequently indicted. Due to scheduling conflicts, Collins was late for the defendant's arraignment, and a new attorney was appointed to represent the defendant. Six months later, Collins was contacted by the co-defendant's father about representing his son on the same charge. Collins agreed to represent the co-defendant as he did not recall previously representing the other defendant. Collins then negotiated a plea deal for the co-defendant. Since the filing of the bar complaint, Collins moved to withdraw from representing the co-defendant and asked another attorney to represent the co-defendant at sentencing. [ASB No. 2011-986] | [AL](#)



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into the Alabama Lawyers' Hall of Fame, located at the Heflin-Torbert Judicial Building.

The first induction took place for the year 2004. Since then, 30 lawyers have become members of the Hall of Fame. Five new members were inducted May 4.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished

career in the law. This can be demonstrated through many different forms of achievement, leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of his or her selection. Also, each induction must include at least one lawyer who has been deceased for 100 years or more. This provides recognition to historic figures.

The five new inductees include:



## John McKinley

McKinley died more than 100 years ago. He moved to Alabama from Kentucky in 1818 and began practicing law. He was elected to the Alabama Legislature in 1820, 1831 and 1836. He represented Alabama in the United States Senate from 1826 to 1831. He also served in the House of Representatives from 1833 to 1835. In 1838 he became the 23<sup>rd</sup> Associate Justice of the United States Supreme Court and the first Alabamian to serve. He died in 1852, still a member of the Supreme Court.



## Roderick Beddow, Sr.

The most outstanding criminal defense lawyer of his day was Roderick Beddow, Sr. He was called Birmingham's "Perry Mason." He was recognized by his peers for his honesty and his leadership, serving as president of the Birmingham Bar Association in 1938 and president of the Alabama State Bar for the 1944-45 term of office. He was always involved in local civic affairs and became the International President of the Lions Club, 1933-34. Beddow was also an effective mentor to many young lawyers.



## Nina Miglionico

Nina Miglionico was one of the first women in Alabama to establish her own law firm. She was active in many organizations and attained state and national leadership positions in the Business and Professional Women's Club, the American Association of University Women and the National Association of Women Lawyers, in which she served as president in 1958. In 1963 she became the first female member of the new Birmingham City Council and helped to steer Birmingham in a different direction from the policy of racial segregation. She served as president of the City Council and of the Alabama League of Municipalities. In 1996, she received the Margaret Brent Award from the American Bar Association as one of five outstanding women lawyers in the United States. She practiced law for 73 years, a record for women lawyers in Alabama.



## Charles Morgan, Jr.

Chuck Morgan was one of the leading civil rights lawyers of the 20<sup>th</sup> century. He argued and won a number of important cases before the United States Supreme Court, including *Reynolds v. Sims*, *Whitus v. Georgia*, *Lee v. Washington* and others. His

singular moment of courage, though, took place on the day following the 1963 bombing of the 16<sup>th</sup> Street Baptist Church in Birmingham. On that Monday, Mayor Albert Boutwell proclaimed: "All of us are victims..." In contrast, speaking on the same day, Morgan commented that every member of the white community who, however tacitly, contributed to the community's racial atmosphere, bore some measure of guilt for the bombing. Morgan's remarkable career took him from Birmingham to Atlanta, then to Washington, DC, and eventually back to Alabama. He lived up to the ideal that all human beings are equal, and he worked to make that a reality.



## William D. Scruggs, Jr.

Bill Scruggs was a general practitioner and he conducted his practice in Fort Payne. However, he had a statewide and national reputation as a great trial lawyer. He was a loyal and unselfish servant of the legal profession in general and the Alabama State Bar in particular. He served 20 years as a bar commissioner and then became state bar president for the 1986-87 term of office. He continued to serve as a bar commissioner again, volunteered for numerous committees and sat on the Court of the Judiciary until his death. Bill always found time to mentor younger lawyers and instill in them the importance of professionalism. He is fondly remembered for the quality and breadth of his service to the law.

The selection committee actively solicits nominations to the Hall of Fame from members of the bar. Nominations can be made by downloading the nomination form from [www.alabar.org](http://www.alabar.org). Plaques commemorating the inductees are located in the lower rotunda of the Heflin-Torbert Judicial Building, and profiles of all inductees are also found on the bar's site. | [AL](#)

## 2012 LAW DAY:

# “No Courts, No Justice, No Freedom”

This year’s Law Day theme reflects that the current funding crisis experienced by the court system exerts a disproportionate impact on the wheels of justice.

The Alabama State Bar asked for entries from students in grades K-12 across the state for a creative competition based on this year’s theme, “No Courts, No Justice, No Freedom.” Students could submit entries using social media, posters or essays.

Montgomery attorneys **Chad Stewart** and **Pamela Beard Slate** served as co-chairs of this year’s Law Day Committee.

A total of \$2,400 was awarded to winners. Teachers also received a monetary gift for use in the classroom.

In 1958, President Dwight D. Eisenhower established May 1<sup>st</sup> as Law Day to strengthen the country’s heritage of liberty, justice and equality under law.

For the first time, three schools swept first, second and third place in the Posters (K-3), Twitter and Facebook categories. They are Advent Episcopal School (Birmingham), Central High School (Phenix City) and Brewbaker Technology Magnet School (Montgomery), respectively.

Winners were recognized on Law Day in a ceremony at the Alabama Supreme Court, with the presentation of awards by **Alabama Supreme Court Chief Justice Chuck Malone**.

This year’s judges included Law Day co-chairs Stewart and Slate, **Tommy Klinner, Tim Lewis, Craig Baab, Alvin Benn, Jeremy McIntire, Robby Lusk,** and **Mark Moody**. | [AL](#)

## LAW DAY WINNERS POSTERS

	<b>GRADES K-3</b>	<b>GRADES 4-6</b>
1 <sup>st</sup> Place	<b>Sasha Foreman</b> Advent Episcopal School, Birmingham Mrs. Lee Stayer	<b>Nicholas Fitzgerald</b> Baldwin Magnet School, Montgomery Mrs. Martha Sikes
2 <sup>nd</sup> Place	<b>Lily Geisen</b> Advent Episcopal School, Birmingham Mrs. Lee Stayer	<b>Simon Jeon</b> Baldwin Magnet School, Montgomery Mrs. Martha Sikes
3 <sup>rd</sup> Place	<b>Simms Berdy</b> Advent Episcopal School, Birmingham Mrs. Lee Stayer	<b>Madison Foshee</b> Bear Exploration Center, Montgomery Mrs. Lindsey Norred

## ESSAYS

	<b>GRADES 7-9</b>	<b>GRADES 10-12</b>
1 <sup>st</sup> Place	<b>Brady Unzicker</b> S. Girard School, Phenix City Mrs. Kim Jones	<b>Read Mills</b> Spain Park High School, Hoover Mrs. Libby Day
2 <sup>nd</sup> Place	<b>Hayden Desmond</b> Hilltop Montessori School, Birmingham Mrs. Sherry Cook	<b>Danielle Thompson</b> B.T. Washington Magnet, Montgomery Dr. DeShannon McDonald
3 <sup>rd</sup> Place	<b>Starlaina Graham</b> Central Freshman Academy, Phenix City Mrs. Barbara Romey	<b>Jasmine Bolden</b> Spain Park High School, Hoover Mrs. Libby Day

## SOCIAL MEDIA

	<b>TWITTER</b>	<b>FACEBOOK</b>
1 <sup>st</sup> Place	<b>Paul Waldrop</b> Central High School, Phenix City Mrs. Barbara Romey	<b>Ashley Biggs</b> Brewbaker Tech Magnet, Montgomery Mrs. Sonya Keeton
2 <sup>nd</sup> Place	<b>Nick Jackson</b> Central High School, Phenix City Mrs. Barbara Romey	<b>Monica Sarabia</b> Brewbaker Tech Magnet, Montgomery Mrs. Sonya Keeton
3 <sup>rd</sup> Place	<b>Mary Jenkins</b> Central High School, Phenix City Mrs. Barbara Romey	<b>Alwaleed Alzahrani</b> Brewbaker Tech Magnet, Montgomery Mrs. Sonya Keeton

# LAW DAY 2012 PARTICIPANTS

## POSTERS

### K-3

Clara Rominger  
Lily Geisen  
Anna Irwin  
Wilson Narducci  
Simms Berdy  
Finn Cassady  
Adeline Carroll  
Hooper Markert  
Rowan Khazaeli  
Janina Wu  
Sasha Foreman  
MariAlana Jeter  
Sam Pittman  
Cameron Norris  
Jordyn Hudson  
Rhianna Helmers  
Neal Carlson  
Devin Wilkins  
AnneElise Hogue  
Elizabeth Standifer  
K C Owens  
Paul Weir  
Ollie Vance  
Maddie Thomas  
D'aria Lane  
Blair Smith  
Audrey Roller  
Zoe Yearout  
Dalton Coleman  
Elsa Stubbs

### 4-6

Cammy Smith  
Dakota Coleman  
Connor McLemore  
Haley Smith  
Jackson Morrisette  
Kyle Adams  
Cole Dulaney  
John Brant Hill  
Fredrica Sanders  
Hayley Gwin  
Sarah Lowery  
Ashley Hayes  
Tyler Williams  
Lane Bloomer  
Nate Brewer  
Ben Schultz  
Jesse Custard  
Tracey June  
Nathan Robert McOmber  
Hamp Mulkey  
Jailyn T. Easter  
Kade Etheridge  
Lindsey Stewart  
Peyton Fleming  
Allie Friday  
Joe Higgins  
Meredith Stump  
Leah Grace Borders  
Hope Johnson  
Dezzie DeRamus  
Kivy Hicks  
Trey Jones  
Will Reed  
Peyton Cross  
Logan Dulaney  
Emily Frances Marshall  
Brett Tolerson  
Hanah Bloom  
Grace Hogan  
Adam Ward  
Topanga Anderson

John Richard Talley  
Alex Campbell  
Jordan Stewart  
Jordan Rogers  
Isaac Stubbs  
Alison Frander  
Gracie Deaton  
Zaurya Slaughter  
Halleigh Woods  
Victoria Gilliard  
Collin Payne  
Kaylie Blankenship  
Nathan Estes  
Savannah Epperson  
Jaxon Holland  
Justin Lantrell  
John-David Wright  
Carlee Fleming  
Abigail Thornbury  
Jack Davis  
Caroline Nolan  
Cade Pettus  
Anna Claire Beason  
Payton Poole  
Trevor Duckett  
Lee White  
Gielle McCutcheon  
Hunter Miller  
Ross Palmer  
Willow Bilbrey  
Jerry Cervantes  
Jacob Barksdale  
Mary Kathryn Pankey  
Jackson Spence  
Noah Reese  
Jaylon Brooks  
Drew Snider  
Steven Nguyen  
Mya Patino  
Makenzie Knight  
Alivia Gore  
Mercedes Childers  
Erin James  
Leanna Sampson  
Noah Moon  
Alli Reno  
Alejandro Gomez  
Zac Stancil  
Benjamin Estep  
Lucas Cheek  
Ashley Graham  
Caleb Hudson  
Jessica Colquitt  
Lucy Carroll  
Nancy Martinez  
Alexis Gonzalez  
Caitlin Holt  
Trey Formby  
Carley Short  
Jeannie Elkins  
Emma Strange  
Rebecca Pall  
Bryce Davis  
Cade Maddox  
Marshal Graham  
Madison Smith  
Bailey Cornelius  
Katelyn Lindley  
Raylee Wilson  
Austin Reese  
Emily Peppers  
Joey Winn  
Gracie Forte'  
Tia Daniels  
Kylee Christianson

Michael Rossi  
Allsion Jarrett  
Spencer Linn  
Payton Pierce  
Jaeda Gardner  
Kaylah Kerr  
Liam Coleman  
Grant Hartsell  
Emily Willford  
Andrel Howard  
Grant Tyson  
Trevor Dylan Horstead  
Georgia Fortin  
Skyler Owens  
Chaney Adair  
Mary Kate Pattee  
Jackson D. Sellers  
Ma'Ye Humphries  
Madalyn Dye  
Baine Mertens  
Harrison Hall  
Ian Wright  
Jackson Childs  
Andrew Kenny  
Logan Horne  
Elizabeth Wilkin  
Kyra Washington  
Trinity Collier  
Connor Hibbard  
Madison Foshee  
Blake Stephens  
Anna Frost  
Rinbam Kromtit  
Luke Truslow  
Drew Reilly  
Skylar Essex  
Sabrina Gates  
Ginny Snipes  
Kymberlin Gilchrist  
Gracie Sullivan  
Varun Kosgi  
Trinity Williams  
Lauryn Johnson  
Shelby Young  
Tori Smith  
Isabella Snowden  
Tyson Walters  
Alexis Yates  
Youjin Lee  
Won Heo  
Dustin Watkins  
John Bennett  
Fowler Askew  
Harin Kim  
Dorothy Walker  
Catharine deCarmen  
Dante' McGhee  
David Kim  
Holly Hinote  
Hana Kim  
Russell Turner  
Liyu Woldemichael  
Destiny McGhee  
Will Percival  
Will Norris  
Simon Jeon  
Jacob Messick  
Christian Jackson  
Mallie Mims  
Kalynn Hall  
Jailyn Holt  
Payton Cherry  
Jayla Davis  
Alyzabeth Ellison  
Emily Chamnong

Kaylyn Butler  
Alex Carbajal  
Jack Cater  
Layla Araincjad  
Aloria Adams  
Percionna Denise Hale  
Se-Eun Kim  
Natalie Reynolds  
Grace O'Neal  
Aishaiyah Ward  
Kennedy Wright-Briggs  
Martha Jin  
Asia York  
Joey Pappanastos  
Dakyla Dillard  
Jennifer Son  
Tymia Ballard  
Parker Jones  
Benjamin Helms  
Kaitlyn Garner  
Haley Byrd  
Ann Williams  
Jackson Taylor  
Joseph McConnell  
Aleigha Walden  
Collin Stephens  
Riya Patel  
Harper Payne  
Chassity Rhodes  
Demarcus Narcisse  
Blake Johnson  
Melody Handy  
Catherine Chon  
Yewon Choi  
Zoe Ballentine  
Catherine Boswell  
Dymon Burke  
Collin Stevens  
Kolbi Lockwood  
Jonathan Hu  
Philip Julian  
Madison Lockwood  
Jaylin McCollum  
Benjamin Lowery  
Anna Stokes  
Macy Pope  
Antonio Simmons  
Jacob Mesina  
Maura McCoy  
Alizeh Khalid  
Kendall McKinnon  
Genesis Leonard  
Ryan Gracie  
Eva Shumakova  
Justin Sankey  
Chiara Romano  
Ella Skier  
Amir Urquhart  
Grace Walz  
Christopher Wilson  
Goeun Sim (Melody)  
Kayla Johnson  
Hannah Lee  
Kevin Curtis Glackmeyer  
Devin Watts  
Alexandra Toney  
Scott Gardner  
Kiersten Gavin  
Christy Chen  
Amelia Blair  
Candance Arrington  
Abby Ford  
Da Heo  
Tiara Griffin  
Min Hee Jeon

Becca Jones  
Mariah McClaren  
Cassie Meyer  
Alex Lee  
Ellie Russell  
Quintarria Chapman  
Alonte' K. Drayton  
Mallory Houlditch  
Mary Handsome  
Kaylee Kelley  
Cole Womble  
William Sumlin  
Constance McKnight  
Jasmine Hall  
Wenton Kennedy  
Chantelle D. Williams  
Jae-Min Kim  
Nicholas Fitzgerald  
Asha Dalling  
Arkaysia Hampton  
Amelia Felder  
James Chambers  
Tori Carl  
Haley Covington  
Myles Beasley  
DeAndrea Z. Jones  
Nathaniel May  
Jiyoon Moon  
Sean Harris  
Nigel Taylor  
Jennie (Siyoun) Youn  
Hayeong Jin  
Coryn Carter  
Cammy Smith

## ESSAYS

### 7-9

Starlaine Graham  
Hugh Praytor  
Hayden Desmond  
Trey Moss  
Mitchell Cox  
Brady Unzicker  
Jonathan Hart  
John Butler

### 10-12

Jaylon Williams  
Minerva Flores  
Juan McFarland  
Wesley Reece  
Christopher Griffin  
Danielle Thompson  
Sheri Jones  
Adrian Rodriguez  
Samuel DiChiara  
Collin O'Connor  
Destiny Houston  
Zach Dotson  
Danielle Johnson  
Lovainea Jordan  
Hannah Davis  
Mallory Marcus  
Caroline Friday  
Allison Hanby  
Aaron Aizenman  
Jacob Kimes  
Will Barden  
Austin Haight  
Noah Crawford  
Nikolas Kassouf  
Scout Johnson  
Clay Jones  
Blake Daniel  
Meredith Sanford

Abigail Brunner  
Oliver Barreau  
Alexander Coleman  
Talia Mickens  
Kevin Borden  
Jordan McDonald  
J M Hollie  
Jessica Spence  
Matthew Johnson  
Read Mills  
Jasmine Bolden  
Joseph Saunders  
Emily Allen  
Brittany Spears  
Sam Beckenstein  
Matt Schoeneman  
Julie Knight  
Kellen Kern

## SOCIAL MEDIA

### (Facebook)

Henry Huffman  
Brittney Booker  
Kiara Daniels  
Antoine Blackmon  
Sydney Parker  
Ashley Biggs  
Valarie Surls  
Zaria Stephenson  
Jaylon Davis  
Joshua Glass  
Alwaleed Alzahari  
Andre Cole  
Adagio Glover  
Rico Thomas  
Autumn Macon  
Brendan Knight  
Brian McKenzie  
Candra Davis  
Daniel Davis  
Jacqueline Pou  
Jalon Levett  
Larry Gracie  
Lindsey Delaine  
Monica Sarabia  
Morgan Lawrence  
Natalia Serrano  
Quinton Askew  
Steven Hubbard  
Steven Rogers  
Sydney Glymph  
Tiara Wells  
Tristan Reeves  
Wade Banister  
Thomas Harris  
Keith Williams  
Andrew Fox  
Felicia Pledger  
Jamal Means  
Wade Bannister  
Alex Rikerd  
Kristen Butler  
Bradi Lewis  
Jacquan McCall

## SOCIAL MEDIA

### (Twitter)

Mary Jenkins  
Paul Waldrop  
Queenyetta Deloney  
Ethan Calhoun  
Nick Jackson  
Leyden Skipper



# Alabama's New Limited-Scope Representation Rules

*By Henry A. Callaway*

## On March 26th, the Alabama Supreme Court

adopted changes to the *Rules of Civil Procedure* and the *Rules of Professional Conduct* that establish procedures for limited-scope representation (LSR). Sometimes called “unbundling,” limited-scope representation allows the client and his/her lawyer to agree that the lawyer will provide limited services, representing the client only in a certain area or task rather than representing the client for the entire scope of the legal matter. Limited-scope representation can take place either out-of-court, such as drafting of pleadings

or trial preparation, or in-court, such as appearing at a specific hearing.

LSR has always been permissible under *Rule of Professional Conduct* 1.2, and the Alabama State Bar's General Counsel's office issued an opinion in 2010 that it was permissible for a lawyer to draft court pleadings without signing them or revealing his or her involvement to the court. [Alabama State Bar Formal Opinion 2010-01.] However, because there were no procedures as to *how* to do LSR, until now it has not been used much in Alabama.

The new rules regulate and codify how limited-scope representation should take place—for the benefit of clients, lawyers and the courts. The **Alabama State Bar Pro Bono Committee**, which drafted the rules, believes that the new rules will create a “win-win” situation for everyone: the clients get legal help they could not otherwise have afforded, lawyers earn fees they would not otherwise have received and the courts benefit from better pleadings and better-prepared litigants.

The new LSR rule also provides an opportunity to expand your law practice. In other states which have adopted LSR rules, lawyers have profitably marketed an LSR practice to potential middle-income clients who would otherwise not be able to pay full freight. This is especially true in the area of family law, where motions regarding child support, visitation and custody are suitable for both in-court and out-of-court limited-scope representation. A 2005 Alabama State Bar task force found that only 20 percent of circuit court domestic relations cases and only six percent of child support cases in Alabama had attorneys on both sides. That’s a lot of potential clients who need legal help!

Nationally recognized LSR expert Sue Talia has prepared LSR practice management materials which are posted at [www.alabar.org](http://www.alabar.org). She has also conducted a free webinar entitled, “Expanding Your Practice Using Limited-Scope Representation,” which has been approved for three hours CLE and is available for on-demand viewing at [www.pli.edu](http://www.pli.edu). Talia will also present two two-hour programs on how to profitably utilize limited-scope representation in your practice at this year’s Alabama State Bar Annual Meeting.

Here is a summary of the changes:

### *Alabama Rule of Civil Procedure 11*

There are two changes to Rule 11 regarding the drafting of pleadings on an LSR pleading for the client’s signature. The first change relaxes the usual Rule 11 standard that the attorney is certifying that to the best of his or her knowledge, information and belief there is good ground to support it; the amendment provides that the drafting lawyer may rely on the *pro se* client’s representation of the facts unless he or she has reason to believe they are false or material or insufficient.

The second change is that the attorney need not sign or put his or her name on the pleading but shall include a notation at the end stating: “This document was prepared with the assistance of a licensed Alabama lawyer pursuant to Rule 1.2(c), *Alabama Rules of Professional Conduct*.” Some states don’t require any notation at all, which creates potential for problems with unauthorized practice of law and documents sold over the Internet. A few states require the lawyer’s name be listed on the pleading, which has a chilling effect because lawyers are afraid they will be pulled into a case where they have not agreed to provide full representation. The new rule adopts a middle way which will alert clients that the documents should be prepared by an attorney and at the same time let the court know that an attorney has been involved.

### *Alabama Rule of Civil Procedure 87*

Under the new Rule 87, you can provide in-court LSR without fear of getting trapped in a case beyond the scope of your agreement with the client.

The new rule creates an expedited procedure for getting in and out of a case on a limited-scope representation basis. The lawyer files a “notice of limited-scope representation” with the court ahead of time or even at the start of a hearing. The purpose of that requirement is to prevent “after-the-fact” limited-scope representation when a lawyer decides he or she has not been paid enough and is simply going to stop providing services. The filing notifies the court, the other parties and the client that the attorney is only in the case for a specific purpose and defines the scope of that representation.

After the services are complete, the attorney files (and serves on his or her client) a “notice of completion of limited-scope representation” and then is *out of the case*, without the necessity of leave of court. In other words, the lawyer doesn’t need to file a motion to withdraw and then have to wait for the court to grant the motion.

So the new rules allow a lawyer to appear at a hearing, file a notice of limited-scope representation, participate in the hearing and then, at the conclusion of the hearing, file (and give his client) the notice-of-completion form and be out of the case.

Rule 87 also provides that an attorney providing LSR is to be served with pleadings only for matters within the scope of his representation as set forth in the notice filed with the court.

The state bar Pro Bono Committee has drafted forms LSR-1, -2 and -3 for use in filing an appearance and then withdrawing from a case on an LSR basis. The forms are available at [www.alabar.com](http://www.alabar.com) and [www.alacourt.gov](http://www.alacourt.gov).

### *Rule of Professional Conduct 1.1*

The change here simply provides that the scope of representation may be limited and sets the standard for competent representation.

### *Rule of Professional Conduct 1.2*

The limited-scope representation agreement *must be in writing* unless the representation consists solely of a telephone consultation, a clinic conducted by a pro bono program or Legal Services Alabama or a court appointment. The writing requirement is critical for both the client and the lawyer so that there is no misunderstanding about exactly what the attorney is to do. Of course, the better practice is to have the client sign the agreement, but the rule doesn’t require it.

### *Rules of Professional Conduct 4.2 and 4.3*

The client is considered to be unrepresented for purposes of dealings and communications except for matters within a written notice of limited-scope representation provided to the opposing counsel. The rule follows a “bright line” approach, that is, the attorney providing LSR is to provide the opposing attorney with a notice which delineates the scope of the lawyer’s representation. The notice can be as simple as an e-mail. As to matters outside that notice, though, the client is considered unrepresented. So, for example, if you don’t send a notice of your limited-scope representation to the other lawyer, he or she can still communicate directly with your client without violating the rule.

These new LSR rules will provide new ways for lawyers to serve their clients. | [AL](#)





# Common Estate-Planning Mistakes

By R. Mark Kirkpatrick

## Failing to Have an Estate Plan at All (Dying without a Will)

If you die without a will and you have assets passing through probate, state law determines who gets the assets, as follows:

If there are no issue or parents surviving, a surviving spouse gets everything.

If there are surviving parents, but no issue, a surviving spouse gets the first \$100,000 and everything else is split 50-50 between the surviving spouse and the parents.

If there are surviving issue, all of whom are from the marriage, a surviving spouse gets the first \$50,000 and everything else is split between the surviving spouse and the issue.

If there are surviving issue from a prior marriage and a surviving spouse, everything is split 50-50 between the surviving spouse and the issue.

If there is no surviving spouse, the surviving issue get everything.

In addition, a surviving spouse would be entitled to claim a \$3,500 personal property allowance, a \$6,000 homestead and a \$6,000 family allowance off the top. Let's look at an example of how this may work.

What happens if you die with a modest \$100,000 house as your only asset and you are survived by a spouse and children from a prior marriage? The surviving spouse can claim \$15,500 in allowances, but after that, everything has to be split

50-50 with the children, making a forced sale of the residence the most likely outcome, a result which probably is not the desired outcome.

## Failing to Have a Comprehensive/Coordinated Plan

Often people will add one child to a large bank or brokerage account so that it passes by survivorship to that child outside of probate and then die with a will that says everything goes equally to all three of his or her kids. This creates confusion about the decedent's true intent and leads to litigation.

## Leaving Assets to Minors

Of course, a minor cannot hold title to assets so leaving assets to a minor necessitates the opening of a conservatorship. A conservator has to post bond and file an inventory, tri-annual accountings and a final settlement with the probate court. Further, a conservator is limited to investing in so-called legal investments. A trust is a much more flexible vehicle, allowing the trustee to have broad discretion and investment authority with little or no court supervision, which may be good or bad depending on the trustee. A trust is generally much more cost-effective.

## Granting Someone Ownership, rather than Power of Attorney over An Asset

Often, people will add a child as a joint owner on their bank or brokerage accounts to pay bills if they get sick, or add the child to real estate to avoid probate at death. There are several problems with this approach. First, it subjects the assets to the claims of the creditors of the joint owner. Second, as noted above, it may conflict with the person's overall estate plan. Third, it may constitute a taxable gift. Remember, adding a child as a joint owner to a piece of real estate is permanent, and it is a gift for tax purposes. If the donor changes his or her mind after the fact, he/she can only obtain sole title through the child's consent.

## Failing to Use Trusts to Ensure that Assets Pass to Whom You Ultimately Want Them To Go

If you have children from a prior marriage and you want them ultimately to receive your estate at your current spouse's death, why would you leave everything to your current spouse and trust him or her to leave it to your children, rather than to his or her children? By using a trust, you can benefit the surviving spouse, but control the ultimate disposition at the death of the surviving spouse.

## Leaving Assets Outright to Spouses, Children or Grandchildren Who Have Creditor Problems, Disabilities, Drug, Alcohol or Gambling Problems, Marital Problems or Who Manage Money Poorly (Spending Problems)

If you leave money outright to someone receiving SSI or some other need-based

program, it will probably disqualify him or her. The better practice is to leave it in a discretionary supplemental needs trust. You cannot leave it to him or her in a trust that requires distributions for his or her support and maintenance.

Spendthrift law allows you to leave assets in a discretionary trust for a spouse or child which will be protected from creditors.

Why would you leave assets to a child outright whom you know has a drug, alcohol or gambling problem? This is like throwing gas on a fire. A better approach is to leave such assets in a discretionary trust and give an independent trustee the power to withhold distributions if needed. This allows you to address the problem, not enable it to get worse.

Some people will always spend more than they take in, like the federal government. For these people, why not leave their assets in trust and pay out a certain percentage annually?

All of the above situations cry out for an independent trustee to assist with managing the assets.

## Wasting the Applicable Credit of The First Spouse to Die

Everyone can leave the applicable exclusion amount to the next generation without estate tax. The applicable exclusion amount is \$5.12 million in 2012, but reverts to \$1 million after that unless Congress takes some action to change it. Historically, clients have been advised not to overfund the amount left to the surviving spouse outright because this would lead to the wasting of the applicable exclusion of the first spouse to die. Rather, it was typically recommended that the applicable exclusion amount be placed in a trust for the surviving spouse, which was designed to be excluded from such spouse's estate at death, to make use of the applicable exclusion of the first spouse to die, thereby using the exclusion of both spouses. This type of trust is commonly called a "bypass" trust because it bypasses the surviving spouse's estate for estate tax purposes. A recent tax law included portability, which allows the credit of the first spouse to die to be used at the second spouse's death even if everything was left outright to the surviving spouse. However, last fall, the IRS announced that estates must file Form

706 to elect to make the unused exclusion portable, even for those with under \$5 million (\$5.12 million in 2012) in assets. Portability is set to expire at the end of 2012 as well, absent action by Congress. There are still compelling reasons to use a bypass trust, even if portability becomes permanent, for those that do not want to waste the generation-skipping tax exclusion of the first spouse to die (see below) and because of the ability to control ultimate disposition of the assets at the subsequent death of the surviving spouse.

## Leaving Assets Outright to a Child Who May Have a Taxable Estate or Is in A High-Risk Profession

Everyone can utilize the applicable generation-skipping exclusion to pass assets down multiple generations without tax. Like the estate tax applicable exclusion, the generation-skipping exclusion is \$5.12 million in 2012, but reverts to \$1 million after that, absent Congressional action. If you have a child who already has or may have an estate tax problem, why compound the problem by leaving him or her any assets outright? Instead, you should consider passing the assets to him or her in a trust designed to be excluded from their estate for estate tax purposes. In many cases, such child can be a trustee of the trust, if desired, and receive most, if not all, income, and limited principal.

The same reasoning holds true if you have a child who is in a high-risk profession, like a doctor. Why leave assets outright to him or her when these assets could be subjected to a malpractice claim? Isn't it better to give such child the use of the assets, but not full ownership, to give them protection from a judgment creditor?

## Failing to Plan for the Liquidity Needs of Your Estate

Too often people die with plenty of assets, but not enough liquid assets to pay debts and taxes, causing an untimely liquidation of assets. Real estate and closely-held businesses are by their nature illiquid. Although liquid by nature, retirement plan assets are not a good source of the

funds, because accessing the funds will generate an income tax on any amounts distributed (assuming previously untaxed contributions to the plan or account). If you have a taxable estate and most of the estate consists of assets that fall in these categories, you have to plan for paying the estate tax due nine months after death and the claims that will be filed by your creditors, including mortgage lenders.

This problem can be exacerbated by the manner in which the assets are valued for estate taxes purposes. The value is set either as of the date of death or six months thereafter. What happens when a person dies at the height of the market or, worse, the height of a bubble, as recently seen in the real estate market? The reported and taxed value is based upon a date of death appraisal, which always uses comparable sales as one of the valuation methods.

Thus, even though you may not be able to sell it for that price, you are still taxed on it.

The estate may qualify to pay the tax over a 10-year period if certain requirements are met. Too often, the assets have to be sold.

## Failing to Implement a Gift-Giving Program (if You Have a Taxable Estate)

You can give away \$13,000 per year per donee without gift tax. These are called non-taxable gifts. You can make a one-time taxable gift using your lifetime gift applicable exclusion amount, which is \$5.12 million in 2012, but is set to go down to \$1 million unless Congress acts. Thus, a couple can make a one-time gift of \$10.24 million this year without incurring any gift tax. Taxable gifts are added back to your taxable estate at death on the estate tax return to arrive at the tentative tax base. The result is that a taxable gift generally only removes future appreciation from tax, but not the value of the gift itself. The purpose of this add-back is not to subject lifetime gifts to additional tax, but rather to adjust the tax bracket to be applied to the estate that remains after lifetime gifts were made. A tentative estate is then determined, which is reduced by any gift tax paid, to determine the tentative estate tax, which is then reduced by the applicable estate tax credit to determine the tax due. Many experts interpret the new law as requiring this calculation to be made based

# You can give away \$13,000 per year per donee without gift tax.

*These are called non-taxable gifts.*

on the gift tax that would have been incurred using a \$1 million tax exclusion regardless of whether any amount was actually paid for gifts made in 2012. If accurate, this creates a unique window of opportunity to remove up to \$8.24 million from a married couple's estate without tax (assuming the applicable estate tax exclusion amount is \$1 million at death). Of course, if the \$5 million gift and estate applicable exclusion amounts are extended permanently, it will make no difference. It is expected that future legislation will have to address this issue if the applicable exclusion amounts decline.

## Gifting the Wrong Assets

There may be non-taxable reasons to make a gift, but you have to remember that there are tradeoffs from a tax standpoint to making a gift. If you die owning an asset, the basis of the asset for income tax purposes is reset to equal its fair market value on the date of death. This could be up or down depending upon what you have invested in the asset. If the value has appreciated over its basis and you gift it, the donee receives your basis, called a carry-over basis. Thus, if the donee sells it immediately after the gift for its value, he will owe capital gains tax on the difference between the sales price and its carry-over basis. On the other hand, if you transfer the asset to the same person at death, he would receive a basis stepped up to fair market value. If he sold it for fair market value the next day, no tax would be due because there is no difference between sales price and basis. Thus, a gift of the wrong asset could create a tax when none would otherwise be due, assuming you died without a taxable estate. A gift of a low-basis asset, on the other hand, may make sense if you have a taxable estate, if there are no high-basis assets that can be

gifted instead and if the estate tax rate is higher than the capital gains rate.

Life insurance is a perfect asset to give away. Contrary to common belief, it is includable in your taxable estate and is subject to estate tax. The value of the gift is based on its cash value, which is generally less than the death benefit. It is not subject to income tax so the fact that the donee receives a carryover basis does not matter.

Because of Internal Revenue Code (IRC) § 1014(a), any appreciation of the affected property that occurred during the decedent's lifetime will never be taxed. This provision provides an incentive for taxpayers to retain appreciated property until death and sell depreciated property while they are alive to recognize the loss.

## Failing to Have a Proper Beneficiary Designated for Your Retirement Account

If you die before your required beginning date (i.e., April 1<sup>st</sup> of the year after turning 70½, a defined term under the IRC) and designate your estate as beneficiary of your retirement account, it will all have to be paid out in five years under the required minimum distribution rules, thereby triggering income tax on the entire account. If you have passed your required beginning date and designate your estate as beneficiary, the retirement account can be paid out over the remaining single life expectancy of the deceased owner. If you designate an individual as beneficiary, however, they can leave it in your name and begin taking distributions over their life expectancy. A spouse could roll it over tax free into their own IRA. Certain trusts can qualify for extended payouts and thereby defer payment of the income tax over the life expectancy of the oldest beneficiary. | [AL](#)



# Crashworthiness-Based Product Liability and Contributory Negligence In the Use of the Product

By D. Alan Thomas, Paul F. Malek and John Isaac Southerland

Seventeen years ago, *The Alabama Lawyer* published a commentary on the state of the law in Alabama concerning contributory negligence in product liability cases.<sup>1</sup> The focus at that time was upon the Alabama Supreme Court's decision in *Dennis v. American Honda, infra.*, and whether the application of contributory negligence in product liability cases was "dead" in this state. The verdict at the time prompted the authors of the earlier article to quote one of Mark Twain's famous lines—namely, "The reports of my death are greatly exaggerated."

Twenty years after the release of *Dennis*, it is apparent that certain confusion remains. However, it appears that contributory negligence in the use of the product in an Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") case should be considered—even if the contributory negligence causes the accident in question, so long as it is in the use of the product alleged to be defective.

No matter how it may be phrased, however, the concept of fault is so woven into the fabric of the AEMLD that no amount of argument should be able to separate the examination of the alleged fault of the manufacturer from that of the plaintiff in his/her use of the product. A product *is* still a product, and negligence *is* still negligence. Why then, we ask, should a jury not be allowed to consider the fault of all parties who potentially contributed to an accident or injuries when using the product alleged to be defective? The answer, as it was 17 years ago, remains relatively simple and straightforward: In AEMLD cases where there is evidence of negligence in the use of a product by a plaintiff, Alabama law requires the jury to consider that evidence.

On November 15, 1985, the Supreme Court of Alabama released its landmark decision in *General Motors Corporation v. Edwards*<sup>2</sup> and adopted what was then termed "the crashworthiness doctrine."<sup>3</sup> The *Edwards* opinion followed the supreme court's decisions in *Atkins v. American Motors Corp.*<sup>4</sup> and *Casrell v. Altec Industries, Inc.*,<sup>5</sup> which created the AEMLD and retained the "fault" concept for proving liability against a product manufacturer.<sup>6</sup>

Part and parcel of the fault-based concept under the AEMLD was the contemporaneous survival of lack of causal relation, assumption of the risk and contributory negligence as affirmative defenses.<sup>7</sup> Indeed, as the supreme court noted, "the practical distinction, then, between our holding and the *Restatement [of Torts 2d, § 402A]* is that our holding will allow certain affirmative defenses not recognized by the *Restatement's* no-fault concept of liability."<sup>8</sup>

*Edwards* was simply an expansion of the type of case that could be maintained under the AEMLD. Prior to that opinion, a product liability cause of action arguably did not arise without some allegation that the defect caused the incident in question to occur.<sup>9</sup> The supreme court, analyzing the different legal views of various national jurisdictions, preferred to adopt what was deemed as "the crashworthiness doctrine," finding that it was "in keeping with the purpose of the AEMLD, which is to protect consumers against injuries caused by defective products."<sup>10</sup> Equally important, the court's adoption of "the crashworthiness doctrine" did nothing to modify the "fault"-based concepts implicit within the AEMLD, including the availability of contributory negligence as a defense.<sup>11</sup>

Despite a singular reliance on the *Restatement of Torts 2d, § 402A's* "no-fault" concepts since *Edwards*, the Supreme Court of Alabama has reiterated on numerous occasions that contributory negligence in the use of the product alleged to be defective remains an available defense in a product liability case. Likewise, the December 2009 Alabama Pattern Jury Instructions explicitly recognize this key concept of AEMLD law, stating in the "Notes on Use": "Negligence by the plaintiff in the use of the product in question is a defense to an AEMLD claim, but plaintiff's negligence in causing the accident is not a defense to an AEMLD claim *when the alleged contributory negligence does not relate to plaintiff's use of the product.*"<sup>12</sup> Equally important, the updated pattern jury instructions also note that "[t]here is no distinction between 'crashworthiness' and an AEMLD design defect claim."<sup>13</sup> Thus, under current Alabama jurisprudence, there should never

be a difference between the available defenses in what some may deem a “traditional” AEMLD case as opposed to a “crashworthiness” case. Indeed, given the breadth of authority, one might think the availability of contributory negligence in any AEMLD case is well-settled law; yet, approximately 25 years after the supreme court’s holding in *Edwards*, the debate rages on across the state.

Although some may argue that contributory negligence is “dead” in product liability, most simply try to limit its use by seeking a narrowly-tailored definition of the product in question to include only a specific portion or component part of the product as a whole. On this issue, significant precedent exists to guide the bench and bar. When involved in a complex product liability case, it is important to understand how “the product in question” is defined so that contributory negligence in the “use” of that product may properly be presented to the jury.

## The Debate Begins

### *Dennis v. American Honda*

The recognition of contributory negligence as a defense in AEMLD “crashworthiness” cases remained relatively unscathed until the Supreme Court of Alabama’s decision in *Dennis v. American Honda Motor Co.*<sup>14</sup> *Dennis* is a case where unique facts created a narrow exception. Accordingly, that opinion has little practical application in the vast majority of product liability cases in Alabama. Unfortunately, the narrow holding in *Dennis* is often cited for a sweeping proposition that contributory negligence is unavailable as a defense to a defendant in a “crashworthiness”-based case if the negligent act(s) relate to the cause of the accident in question, or if the negligent act(s) do not relate to the specific component and/or safety feature of the product alleged to be defective. Such assertions, however, are belied by the facts of the *Dennis* case and are contradictory to the basic tenets upon which Alabama product liability law is founded.

In *Dennis*, the plaintiff was injured when the motorcycle he was riding collided with a truck.<sup>15</sup> The plaintiff brought claims against the helmet manufacturer and American Honda under the Alabama Extended Manufacturer’s Liability Doctrine (“AEMLD”) for alleged defect(s) in the helmet, not the motorcycle on which the plaintiff was riding.<sup>16</sup>

Despite its ultimate holding, the supreme court found that (under the AEMLD) certain defenses remain available to a defendant, including contributory negligence.<sup>17</sup> However, *based on the very particular circumstances of that specific case*, the court held that the trial judge improperly allowed a charge on contributory negligence of the plaintiff in the use of one product (the Yamaha motorcycle) while a separate product (the motorcycle helmet being worn by the plaintiff) was the product alleged to be defective.<sup>18</sup> In finding that contributory negligence as it related to accident causation was not available to the defendant in that case, the court stated, “[a] Plaintiffs’ mere inadvertence or carelessness in causing an

When involved in a complex product liability case, it is important to understand how “the product in question” is defined so that contributory negligence in the “use” of that product may properly be presented to the jury.

accident should not be available as an affirmative defense to an AEMLD action.”<sup>19</sup>

## The Supreme Court Clarifies The *Dennis* Confusion

### *Williams v. Delta Machinery*

Following *Dennis*, there was, admittedly, a great deal of confusion in Alabama as to the viability of contributory negligence in an AEMLD case. In fact, the argument was made across the state that contributory negligence in product liability was “dead.” In response, the Supreme Court of Alabama took the opportunity in *Williams v. Delta Machinery* to clarify the *Dennis* court’s limited holding.

In *Williams*, the plaintiff was injured while pushing a board across an expandable dado blade.<sup>20</sup> The plaintiff sued Powermatic and Delta Machinery under the AEMLD.<sup>21</sup> The trial court charged the jury on contributory negligence as a complete defense to the plaintiff’s claims.<sup>22</sup> Even though the supreme court found that the plaintiff had not properly preserved an objection to the contributory negligence charge, it felt compelled to speak on *Dennis* because of the confusion as to that case’s proper interpretation.<sup>23</sup>

Justice Houston, writing for the court, stated, “...we direct the attention of the Bench and Bar to the *specific holding* in *Dennis*...”<sup>24</sup> Justice Houston clarified that the unique facts in *Dennis* led to the holding from that court, explaining:

If the contributory negligence instruction had been limited to the plaintiff’s *failure to exercise reasonable care in his wearing of the helmet* ..., then such an instruction *would have been proper* under this court’s previous interpretations of the AEMLD.<sup>25</sup>

The *Williams* Court further pointed out that:

The trial error in *Dennis* was in not limiting the *contributory negligence* charge to the plaintiff’s use of the helmet *as opposed to the plaintiff’s alleged negligent operation of his motorcycle*.<sup>26</sup>

With this language, the supreme court clearly reaffirmed the existence of contributory negligence in product liability cases under the AEMLD.

Much like the supreme court’s opinion in *Williams*, the factual and legal scenarios played out in *Dennis* are not the same as many of the product liability matters brought in this state. For instance, many times the actual product being used by the plaintiff will be the product alleged to be defective with a specific defect in a component part being the primary focus of the case, i.e. an automobile is alleged defective under the AEMLD with the primary focus being on the particular plaintiff’s seat belt restraint system.

Analyzed under the holding in *Williams*, it is clear that a plaintiff’s contributory negligence in causing an accident is an appropri-

ate defense when the accident-causing act is in the use of the product alleged to be defective. The supreme court has further reiterated this point in *Campbell v. Cutler Hammer, Inc.*<sup>27</sup>, *General Motors Corp. v. Saint*<sup>28</sup>, *Uniroyal v. Hall*<sup>29</sup> and *Haisten v. Kubota Corp., infra*.

## Contributory Negligence Can Cause the Accident

### *Haisten v. Kubota Corp.*

On October 14, 1994, the Supreme Court of Alabama rendered its decision in *Haisten v. Kubota Corp.*<sup>30</sup> The court's opinion solidified the contributory negligence defense in an AEMLD case based on "crashworthiness." In *Haisten*, the plaintiff was injured when his Kubota tractor overturned and the attached rotary blade cut his legs.<sup>31</sup> The plaintiff sued Kubota under the AEMLD alleging that the tractor was "defective" because it "did not contain a rollover protection system."<sup>32</sup> Kubota introduced evidence that, at the time of his injury, the plaintiff was operating the tractor on a sloping bank.<sup>33</sup> Kubota argued that the plaintiff was contributorily negligent in using the tractor on a slope.<sup>34</sup> The trial court gave a jury charge on contributory negligence as a defense to the plaintiffs' AEMLD claim(s), and the jury found in favor of Kubota.<sup>35</sup>

On appeal, the plaintiff argued that the trial court erred by charging the jury with respect to contributory negligence as a defense in an AEMLD action.<sup>36</sup> The Supreme Court of Alabama held that contributory negligence was an available defense because the jury could find that the plaintiff failed to use reasonable care with regard to the tractor by operating it on a slope.<sup>37</sup> The *Haisten* court also noted that the foreseeability of the plaintiff's actions, though relevant to the defense of product misuse, was not relevant to the defense of contributory negligence.<sup>38</sup>

*Haisten*, of course, was decided after *Dennis* and *Williams* but clearly reaffirmed the law on contributory negligence in a "crashworthiness"-based case. The plaintiff's contributory negligence in *Haisten* was operating the "tractor" (product alleged to be defective) on a slope. This operation "caused" the accident in question. Thus, contributory negligence was an appropriate defense for Kubota despite the fact that plaintiff's only allegation was one sounding in "crashworthiness" under the AEMLD (i.e. failure to incorporate an appropriate rollover protection system or "ROPS"). In addition, one may also properly surmise from *Haisten* that the product alleged to be defective is the whole product, not just one particular component or safety feature. Although *Haisten* seemingly resolved both issues, some advocates continue to try and limit the product to a component or feature, as opposed to the completed product as a whole.

## The Product Must Be Considered as a "Whole"

### *Burleson v. RSR Group Florida, Inc.*

*Burleson v. RSR Group Florida, Inc.* was decided September 21, 2007.<sup>39</sup> In *Burleson*, the plaintiffs alleged that the defendants "defectively designed and manufactured a firearm."<sup>40</sup> More specifically, the plaintiffs asserted a "crashworthiness" type claim that the firearm was defective in that it did not utilize a "passive

safety device that would have prevented it from discharging."<sup>41</sup> In other words, although the plaintiffs alleged a specific defective condition in the gun/product (lack of passive safety device), they claimed that the gun/product was defective as a whole.

To cause the accident, the plaintiff's decedent "was hanging the revolver in its holster on a gun rack in his home when the revolver fell from the holster; it struck a desk and discharged. [Plaintiff's decedent] was struck in the abdomen by the discharged round and died as a result of the wound."<sup>42</sup> The defendants argued, in part, that "[Plaintiff's decedent] was contributorily negligent because he failed to engage the manual safety and [because] he was putting the revolver away with a cartridge chambered directly in line with the hammer and the firing pin." In other words, the defendants alleged contributory negligence in both the improper use of the firearm by not properly engaging the safety, and also in causing the accident by putting the firearm away with a live round in the chamber. The defendants moved for summary judgment and it was granted by the trial court.

The Supreme Court of Alabama affirmed the trial court's ruling on contributory negligence in the decedent's failure to not engage the safety *and* in causing the accident by storing the product with a live round in the chamber.<sup>43</sup> The importance of the supreme court's holding is the court's affirmation that a plaintiff or decedent's contributory negligence in an AEMLD case is not just in his/her use of the components and/or safety features alleged to be defective, but in his/her use of the product as a whole. Simply stated, the product may not be parsed out into many different sub-parts for an AEMLD claim, but it must be considered as a total and complete product, including in its alleged defectiveness and in the plaintiff's use of it.

## As a Practical Matter

A recent case is instructive in framing the current state of the debate. The plaintiffs filed suit under the AEMLD alleging that an automobile's brake interlock system was defective and that it was the cause of the plaintiffs' harm.<sup>44</sup> Prior to trial, the plaintiffs moved *in limine* to "exclude all testimony, argument, documents, or the like regarding accident causation or accident fault."<sup>45</sup> The District Court denied the plaintiffs' motion.

The plaintiffs attempted "to circumvent *Campbell* and its progeny by relying on [the *Dennis*] case for the proposition that 'contributory negligence relating to accident causation will not bar a recovery in an AEMLD action.'<sup>46</sup> However, the court explained that "*Dennis* is distinguishable from the Plaintiffs' claim" because "[i]n *Dennis*, the plaintiff was suing a helmet manufacturer because the defective helmet allowed greater harm to befall the plaintiff during a motorcycle accident..."<sup>47</sup> The District Court agreed that "[t]he Alabama Supreme Court [in *Dennis*] found that it was error for the trial judge to instruct the jury as to the plaintiff's contributory negligence in driving the motorcycle because the theory of the case was not that the motorcycle had caused the accident, but that the defective helmet was the cause of the plaintiff's damages during the accident."<sup>48</sup>

In comparison, the district court held that in *Ray*, the plaintiffs alleged that the automobile "was defective and, unlike the helmet from *Dennis*, was the cause of the harm that the plaintiffs suffered."<sup>49</sup> The court further explained that the *Ray* defendant contended "that the plaintiff was negligent in the use of *the*

*product-automobile* and that a jury could find that the plaintiff used *the automobile* in a negligent way.<sup>50</sup> The court stated, “[t]o reiterate, ‘contributory negligence bar[s] recovery to an [AEMLD] case if a proximate cause of the accident was the unreasonably dangerous condition of the product, [and] a contributing proximate cause of the accident was the plaintiff’s failure to use reasonable care [in using the product].’”<sup>51</sup>

One of the significant aspects of the court’s order was the recognition of several key aspects concerning the application of contributory negligence under the AEMLD, including the fact that “[c]ontributory negligence also ‘bar[s] recovery in an [AEMLD] case if a ... contributing proximate cause of the accident was the plaintiff’s failure to use reasonable care [in using the product].’”<sup>52</sup> In addition, the court noted that “[i]n Alabama, ‘[t]he question of contributory negligence is normally one for the jury.’”<sup>53</sup>

So, the question is, “*How can the misconceptions from Dennis play out in the real world when applying the teachings of Alabama courts?*” For example, take our plaintiff-to-be, “Bubba,” who is the operator of his ex-brother-in-law’s new motorcycle.<sup>54</sup> Bubba is hanging out with some friends on Saturday morning, watching a re-run of the previous night’s X-Games on television. Showing currently is the “triple jump air 360 motorcycle stunt competition.”

Roddy Halpiper, an X-Games hall-of-famer, performs his famous quadruple air loop handstand with a double-stuff twirl. Bubba turns to his buddies and says, “That ain’t so tough. I could do that in my sleep.” Bubba’s best friend, Johnny, knowing Bubba cannot resist a good double-dog dare, replies, “You couldn’t even so much as do a handstand on the handle bars of the motorcycle if it was sitting still in your driveway.” Bubba makes the classic mistake of turning to his buddies and saying, “Watch this.”

Bubba then proceeds to attempt not only a handstand, but a double back flip off the handle bars of Johnny’s newly purchased motorcycle. At the one and one-half roll position, Bubba’s hand slips, presses the start button and sends the motorcycle speeding into the side of the family’s above-ground pool. After a rather spectacular crash, Bubba decides it was the motorcycle’s fault that he is hospitalized. In the ensuing product liability case, Bubba contends that the design of the motorcycle is defective because it did not have a start switch “guard,” and that defect proximately caused the motorcycle to crash into the side of the pool, thus injuring Bubba.

When faced with the manufacturer’s defense of contributory negligence, Bubba’s attorney responds that the plaintiff is not contending the entire motorcycle is defective—*only the start switch*. Moreover, the plaintiff contends that he was “using” the handlebars, not the start switch; therefore, he was not using the “product” alleged to be defective. The manufacturer did not sell just the handlebars or the start switch. The manufacturer sold an entire motorcycle. Based upon the Alabama Supreme Court’s analysis, it is obvious that Bubba was using the “motorcycle,” which was the “product” alleged to be defective, and that Bubba’s

...a product must be judged as a “whole” and should not be “parsed” out into multiple different parts and sub-parts simply as a means for negating the contributory negligence defense.

contributory negligence in that use was a proximate cause of the crash. The crash, of course, was a proximate cause of Bubba’s injuries. Thus, Bubba’s contributory negligence must be considered by the jury.

In another example, Bubba recovers from his quasi X-Games attempt and purchases a table saw at his local Tool Mart. Not having learned from his motorcycle experience, Bubba succeeds in severing his left ring finger and causing extensive property damage to his wedding ring, attempting to use the saw with one hand while talking on the phone with Johnny with the other. Of course, this made his lovely wife, Sallie Sue, none too happy.

In the ensuing product liability case against the table saw manufacturer, Bubba claims that the dado blade supplied as original equipment was defectively designed because it was designed with 12 teeth, instead of 14, per inch. In response to the saw manufacturer’s attempt to invoke contributory negligence, Bubba’s attorneys

argue that while he was operating the table saw, the product alleged to be defective is just the dado blade. The plaintiff contends that his actions in having caused the accident, injuries and damages [the aforementioned ring] should not be considered as contributory negligence, *nor should* the actual facts leading up to the accident be admissible at trial. When the trial court properly did not buy Bubba’s argument, his second attempt was to make the allegation that the table saw was not equipped with an appropriate guard to prevent fingers from ever being able to contact the saw blade. In this regard, Bubba argued that he could not possibly be contributorily negligent in the use of the “product” [the guard], which did not exist. The judge was similarly unimpressed with Bubba’s argument.

Finally, Bubba purchases his lovely wife, Sallie Sue, a new car. Sallie Sue is the envy of her co-workers until one day she is involved in a rollover crash. Unfortunately, Sallie Sue was not wearing her seat belt and was injured. In the ensuing product liability case against the automobile manufacturer, Bubba and Sallie Sue’s attorneys contend that the automobile was defective due to the “excessive” roof deformation sustained by the vehicle as it landed at the bottom of a ravine. The plaintiffs contend that Sallie Sue’s failure to wear the seat belt and her alleged contributory negligence in driving the vehicle into a ravine while attempting to apply her lipstick are irrelevant because the “product” was the “roof,” not the seat belts or the handling and stability of the vehicle. Bubba and Sallie Sue’s attorneys argue that Sallie Sue’s alleged contributory negligence in causing the crash did not pertain to her “use” of the “roof”; therefore, she was not contributorily negligent in “using” the “product.”

The defendant automobile manufacturer cited the supreme court’s decisions set forth above, including *Haisten v. Kubota Corp.* Faced with this clear and unequivocal precedent, Bubba and Sallie Sue’s attorneys argued that the *Haisten* decision was distinguishable from their case because they allege the vehicle was not equipped with an appropriate rollover protective structure, i.e. a stronger roof. The plaintiffs concede that under the



holding of the Alabama Supreme Court, Sallie Sue’s contributory negligence would be an issue if Sallie Sue’s vehicle was a convertible and did not have a roof. However, because Sallie Sue’s automobile did have a roof, her attorneys argue that contributory negligence would not be applicable because she was not “using” the “roof.” The trial court similarly rejected this argument.

## Conclusion

A common-sense reading of the last 25 years of Alabama precedent, including that of the Alabama Supreme Court, indicates that the defense of contributory negligence in AEMLD cases is alive and very well. Moreover, as a basic and fundamental element to Alabama’s “fault-based” concepts in product liability, contributory negligence continues to protect the notion that every party is responsible for his or her own actions in both designing and manufacturing an allegedly defective product and in using that product in a negligent manner, whether those actions contributed to cause the accident in question or enhance the injuries to the plaintiff. Finally, a product must be judged as a “whole” and should not be “parsed” out into multiple different parts and sub-parts simply as a means for negating the contributory negligence defense. These foundational principles are borne out by recent decisions of the Alabama Supreme Court. | [AL](#)

## Endnotes

1. D. Alan Thomas and Nancy S. Akel, “Products Liability and Contributory Negligence in the Wake of *Williams v. Delta International Machinery Corp.*,” 54 *Alabama Lawyer* 261 (1993).
2. 482 So. 2d 1176 (Ala. 1985).
3. Also referred to as the “second collision doctrine” or the “enhanced injury doctrine.” *Edwards* at 1181.
4. 335 So. 2d 134 (Ala. 1976).
5. 335 So. 2d 128 (Ala. 1976).
6. *Atkins* at 137.
7. *Id.* at 143.
8. *Id.* at 137.
9. *Edwards* at 1181 (citations omitted).
10. *Id.* at 1181-82.
11. *Id.* at 1192 (“[T]he defendant manufacturer may offer, in addition to evidence to counter plaintiff’s prima facie case, the two affirmative defenses recognized as available to manufacturers under the AEMLD—(1) assumption of the risk, and (2) contributory negligence—and, of course, the defense that the proximate cause of the injury or death was the wrongful conduct of the striking driver or other intervening agency.”)
12. APJL 32.13—Defense—Contributory Negligence—Notes on Use (database updated December 2009) (emphasis added).
13. APJL 32.07—Design Defect—Elements—Notes on Use (database updated December 2009).
14. 585 So. 2d 1336 (Ala. 1991).
15. *Id.*
16. *Id.*
17. *Id.* at 1339.
18. *Id.*
19. *Id.*
20. 619 So. 2d 1330 (Ala. 1993).

21. *Id.*
22. *Id.*
23. *Id.* at 1332.
24. *Id.* (emphasis added).
25. *Id.*
26. *Id.*
27. 646 So. 2d 573 (Ala. 1994) (wherein on certified question from the U.S. Court of Appeals for the Eleventh Circuit, the Supreme Court of Alabama answered the following question in the affirmative:  
“Does contributory negligence bar recovery in an [AEMLD] case if a proximate cause of the accident was the unreasonably dangerous condition of the product, but a contributing proximate cause of the accident was the plaintiff’s failure to use reasonable care [in using the product]?”)
28. 646 So. 2d 564 (Ala. 1994) (reaffirming *Williams, supra.* and further distinguishing the defenses of contributory negligence and product misuse).
29. 681 So. 2d 126 (Ala. 1996) (finding error in trial court’s charge that “Contributory negligence as it relates to accident causation is not a legal defense to the plaintiff’s cause of action based upon the [AEMLD].”).
30. 648 So. 2d 561 (Ala. 1994).
31. *Id.* at 562.
32. *Id.*
33. *Id.*
34. *Id.* at 565.
35. *Id.*
36. *Id.*
37. *Id.* at 562.
38. *Id.*
39. 981 So. 2d 1109 (Ala. 2007).
40. *Id.* at 1110.
41. *Id.* at 1112.
42. *Id.*
43. *Id.* at 1114.
44. *Ray v. Ford Motor Company*, 2011 WL 6182531 (M.D. Ala. 2011).
45. *Id.* at \*1. (Although the plaintiffs contended in part that their claims fell under the “crashworthiness doctrine,” the court dismissed this contention finding that the plaintiffs alleged the “part” in question “caused the accident,” thus making the “crashworthiness doctrine” “irrelevant” to the plaintiffs’ motion.)
46. *Id.* (brackets supplied).
47. *Id.*
48. *Id.*
49. *Id.* at \*2.
50. *Id.* (emphasis added).
51. *Id.*; quoting *Campbell*, 646 So. 2d at 574. (brackets supplied in original).
52. *Id.* at \*1; quoting *Campbell v. Cutler Hammer, Inc.*, 646 So. 2d 573, 574 (Ala. 1994) (brackets in original); notation to see also *Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 860 (Ala. 2002) (citing *Campbell* for the rule that ‘a plaintiff’s contributory negligence will preclude recovery in an AEMLD action.’)
53. *Id.*; quoting *Hannah*, 804 So. 2d at 860.
54. The scenario in this example is purely hypothetical and is not based on any specific past, current or contemplated claims or litigation.



# Diagnostic and *Daubert* Criteria for Diving Injury

By Gregory C. Buffalow

## Most Alabama lawyers probably associate

underwater diving with warm water vacation destinations where scuba diving opens an underwater world of colorful coral reefs and exotic marine life. For many people who live and work on the Gulf Coast, though, underwater diving can be a hazardous duty that is part of a difficult occupation. Injuries are common and legal and medical issues can be tricky.

Typically, reported cases and commentary involving diver's decompression injury or decompression sickness focus on questions of jurisdiction and the evaluation of factors pertaining to the Longshore versus the Jones Act.

The Longshore & Harbor Workers' Compensation Act ("Longshore Act") applies to persons in maritime employment including longshoremen, ship repairers and other harbor workers, but excludes "a master or member of a crew of any vessel." 33 U.S.C. §902(g). The Longshore Act does not preclude application of state workers' compensation laws, which may be of practical benefit if state law benefits are more generous.

In contrast, the Jones Act requires a connection with a vessel or fleet of vessels. The U.S. Supreme Court has approved a rule of thumb that "[a] worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Chandris v. Latkis*, 515 U.S. 347, 370 (1995). The Jones Act negligence remedy is provided to an injured seaman "against the employer." 46 U.S.C. §30104. Finally, general maritime law also provides a remedy to an injured seaman based on unseaworthiness of the vessel on which he is a crewman. *The Osceola*, 189 U.S. 158 (1903).

While scholarship on jurisdictional issues is important, lawyers who practice in this area need to educate themselves about medical issues surrounding diving injury, decompression and residual symptoms. Consequently, the following summary is offered as a guide to evaluating diagnostic criteria, including references to medical literature, case law and other reliable authorities.

Decompression injury includes decompression sickness and arterial gas embolism.<sup>1</sup> Decompression injury is a general term applied to all pathological changes "secondary to altered environmental

pressure.”<sup>2</sup> Arterial gas embolism usually occurs after a diver holds his breath too long after breathing pressurized air while underwater. It can also occur if a diver ascends to the surface too rapidly, without adequate time for pressurized air to dissipate. Arterial gas embolism is associated with impaired consciousness, visual loss and vertigo.<sup>3</sup> Other terms frequently used in the context of diving injury include “the bends” which refers to joint pain, “the chokes” which refers to pulmonary symptoms and “the staggers” which refers to vestibular (balance) symptoms.<sup>4</sup>

Guidance in this area is essential because the medical evaluation is quite subjective and “the diagnosis of decompression injury is challenging because there are no specific diagnostic tests.”<sup>5</sup> The cause of decompression sickness is the result of “bubble formation” in the blood and tissues. As pressure increases during diving, “inert gas—primarily nitrogen—is dissolved in tissues, creating in the body a supersaturated state; if ascent is too rapid, the dissolved nitrogen in the

blood and tissues . . . [will] form bubbles that cause tissue injury . . .”<sup>6</sup> Recompression is recognized as the definitive treatment to reduce bubble volume, and redistribute and re-dissolve gas.<sup>7</sup> Initially, the diagnosis of a mild case of decompression injury may be based on nothing more than clinical reports of pain, followed by improvement after treatment in a hyperbaric chamber.<sup>8</sup> There is no firm classification system or “gold standard.”<sup>9</sup> Decompression injury is characterized as a “spectrum.”<sup>10</sup> Type I decompression injury, at the lower end of the spectrum, is characterized by the absence of neurologic symptoms and “usually manifests as musculoskeletal symptoms, such as pain.”<sup>11</sup> Type I patients may experience merely “fatigue, malaise, and a sense of foreboding,”<sup>12</sup> as contrasted to Type II, which involves more severe decompression injury involving “severe cardiopulmonary or neurologic symptoms,”<sup>13</sup> or inner ear and pulmonary symptoms with long-term or irreversible damage.<sup>14</sup> Generally, the classification is as follows: Type I involves joint pain and Type II involves impairment of the central nervous and pulmonary systems.<sup>15</sup>

Diagnostic criteria, which can be summarized from a review of the literature, correlates more serious incidents of decompression injury (more likely to have long-term consequences) with additional, objectively verifiable symptoms. The diagnostic criteria for symptoms associated with more serious incidents of decompression injury involve the following:

- Inner-ear symptoms;<sup>16</sup>
- Neurological symptoms;<sup>17</sup>
- Cardiovascular symptoms;<sup>18</sup>
- Pulmonary symptoms;<sup>19</sup>

Each of the foregoing symptoms has “special importance, because it often results in long-term and irreversible damage.”<sup>20</sup> Additional factors used in the diagnosis of decompression injury are reported in order of importance as follows:

- Symptom onset time;<sup>21</sup>
- Loss of consciousness or other neurological symptom;<sup>22</sup>
- Seizure as presenting symptom;<sup>23</sup>
- A plausible history of a rapid decompression (such as rapid ascent).<sup>24</sup>

Onset time is deemed “critically important,” because the probability of decompression injury “rapidly decreased with symptom onset times greater than 2–3 h[ours] after a dive.”<sup>25</sup> Other criteria taken from a listing of 25 important factors include the following:

- Joint pain;<sup>26</sup>
- Any relief after recompression treatment;<sup>27</sup>
- Motor weakness (anywhere) reported as a “secondary symptom,”<sup>28</sup>
- Skin symptoms;<sup>29</sup>
- Unusual fatigue;<sup>30</sup>
- Previous decompression injury.<sup>31</sup>

Depression as a consequence of decompression injury is a rarely reported symptom.<sup>32</sup> Headaches are usually considered unrelated to the dive.<sup>33</sup> There is little concern in the medical literature for the “false positive” case of decompression injury, because “recompression of false positive cases of decompression sickness or arterial gas embolism is not harmful.”<sup>34</sup> Consequently, a diver with marginal symptoms is typically “assumed to have decompression injury and [is] treated.”<sup>35</sup> The literature thus recommends “[i]f there is any doubt as to the cause of pain, the physician should assume that the patient has decompression injury and treat accordingly.”<sup>36</sup> The *U.S. Navy Diving Manual* also recommends that “[i]f there is any doubt as to the cause of the pain, assume the diver is suffering from decompression sickness and treat accordingly.”<sup>37</sup> Standard treatment principles thus advise “[n]ever fail to treat doubtful cases.”<sup>38</sup>

While the foregoing regimen, no doubt, provides reassurance to the emergency room physician that no harm should result from recompression treatment of

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The cause of decompression sickness is the result of “bubble formation” in the blood and tissues.

the doubtful case, it enables the false positive patient or claimant with minor injury to pursue workers' compensation or injury claims involving minor incidents without residual symptoms, which do not involve the likelihood of long-term consequences. Mild decompression injury symptoms such as limb pain without neurological signs "almost invariably stabilize within 24 h[ours]."<sup>39</sup> Typically, such mild decompression injury symptoms "do not worsen over days, weeks or months."<sup>40</sup> Reliable studies therefore conclude that the majority of "mildly injured divers" obtain complete relief after recompression.<sup>41</sup> Courts should be encouraged to dismiss the claim of mild decompression injury or limit recovery in the absence of residual symptoms.<sup>42</sup> Likewise, courts should consider dismissal in the absence of more significant objective symptoms,<sup>43</sup> particularly where the diver has complied with dive tables<sup>44</sup> and recognized standards, or where there is failure to establish factual support for negligence.<sup>45</sup> The foregoing summary of diagnostic criteria, supported by reliable medical authorities, may assist a defendant in limiting exposure for Type I cases and in properly evaluating Type II cases.

Where the contested facts involve subjective complaints, and lack of objective verification, the issue should be subject of a *Daubert*<sup>46</sup> challenge. For example, testimony of a hyperbaric physician based on "belief" or personal opinion as opposed to medical studies, publications or testing may be stricken.<sup>47</sup> Similarly, medical testimony may also be excluded due to insufficient foundation where a factual showing is made that the opinions were based on "unreliable" oral history provided by the plaintiff.<sup>48</sup> Medical testimony on general and specific causation, e.g., whether exposure caused injury, may also be rejected because of deficiencies in the underlying data.<sup>49</sup>

The literature also recognizes that injury may occur despite compliance with recognized standards such as U.S. Navy Diving Tables, as "the possibility of decompression injury should not be discounted from a differential diagnosis, just because the diver dived within their table or computer guidelines."<sup>50</sup> "A predisposition to decompression injury is suggested if the occurrence of decompression injury

## While minimum depth does not exclude the diagnosis, it nevertheless remains a positive diagnostic criterion among a number of experts.

was unlikely, given the dive profile."<sup>51</sup> Liability for alleged injury despite substantial evidence of compliance with appropriate standards and dive tables should therefore be contested based on the contention that there was no breach of duty, or that there was a deviation from a recognized standard. A further illustration of potential injury, despite compliance with dive tables, is the fact that medical literature suggests that injury is possible in shallow water because "bubble formation can occur after shallow dives and it is inappropriate to exclude the diagnosis of decompression injury based on a perceived minimum depth."<sup>52</sup> A working definition of "shallow" is 30 feet or less.<sup>53</sup> Compensation for injury resulting from a shallow dive could be rejected, however, as an ordinary hazard<sup>54</sup> of the calling for the qualified<sup>55</sup> commercial diver. Recovery may also be denied a harbor worker where the hazard was one that the worker should reasonably expect to encounter.<sup>56</sup> While

assumption of the risk is not applicable to Jones Act claims,<sup>57</sup> it has not been completely rejected in claims by patrons of dive charter operations.<sup>58</sup>

While minimum depth does not exclude the diagnosis, it nevertheless remains a positive diagnostic criterion among a number of experts.<sup>59</sup> Nevertheless, a diver may be predisposed to decompression injury, even in shallow dives, or in compliance with dive tables.<sup>60</sup> Predisposition to decompression injury due to such "host factors"<sup>61</sup> includes the following:

- Alcohol or drug use;<sup>62 63</sup>
- Sleep deprivation;<sup>64</sup>
- Obesity;<sup>65 66</sup>
- High cholesterol;<sup>67</sup>
- Dehydration;<sup>68 69 70</sup>
- History of decompression injury;<sup>71</sup>
- Smoking;<sup>72 73</sup>
- Traumatic injury;<sup>74</sup>
- Muscle sprain or bruise;<sup>75</sup>
- Feminine gender;<sup>76</sup> and
- Menstruation.<sup>77</sup>

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The factors involving predisposition to injury, such as dehydration, smoking or alcohol use, are relevant to liability standards involving comparative fault or the plaintiff's duty to exercise due care for his own safety.<sup>78</sup> Misconduct may be argued in the more extreme case. The diver's obligation to exercise due care and corresponding comparative fault should be evaluated in the context of regulations applicable to both commercial divers and their employers. Similar provisions of OSHA and Coast Guard regulations require the dive supervisor to inquire as to the diver's "current state of physical fitness,"<sup>79</sup> or to question the diver "about his physical well-being"<sup>80</sup> before entering the water. A similar duty is placed on the diver to disclose any condition which affects his ability to dive, or work safely.<sup>81</sup> The referenced CFR provisions thus support an argument for comparative fault arising from a duty of disclosure. The *Cenac Towing*<sup>82</sup> decision also recognizes that contributory negligence may be attributed to the seaman who conceals from his employer material infor-

mation about a pre-existing injury or physical condition and then suffers re-injury or aggravation, independently of related *McCorpen*<sup>83</sup> issues.

Claims of permanent injury may be tempered by optimism for full recovery, particularly in situations involving early treatment. The literature suggests that "[c]omplete resolution is most likely to result from early hyperbaric treatment."<sup>84</sup> Typically, the outcome of treatment "depends on severity of injury as well as delay to treatment."<sup>85</sup> Nevertheless, improvement from hyperbaric treatment is expected despite delay in treatment, and may be expected even with more severe Type II cases involving permanent injury.<sup>86</sup> While the majority of patients improve despite delayed treatment, delay in seeking treatment by the patient may also result in a substantial finding of comparative fault.<sup>87</sup> The referenced CFR provisions thus provide a basis to allege comparative fault for both a diver's failure to disclose accurately his physical condition prior to entering the water,<sup>88</sup> and later for his failure to comply with post-dive procedures requiring him or her to report "any physical problems or adverse physiological effects including symptoms of decompression sickness."<sup>89</sup>

Fitness for return to diving involves criteria just as flexible as the initial diagnosis. While the standard for resumption of diving is said to be based on "complete recovery,"<sup>90</sup> the literature documents a vague standard that "[f]itness to dive and return to diving after an injury are complex issues and should be left to experienced diving medicine physicians."<sup>91</sup> Reliable criteria for return to work are set forth in the *U.S. Navy Diving Manual*, *NOAA Diving Manual* and *Association of Diving Contractors Consensus Standards*.<sup>92</sup> The general medical practitioner is capable of providing an examination and supervising

the physical fitness test, but the literature suggests that in "all cases of doubt referral should be made to a diving medicine specialist"<sup>93</sup> or experienced diving medicine physician.<sup>94</sup>

A return to diving is common "for the majority of divers who appear to have made a full clinical recovery."<sup>95</sup> One writer suggests that "a diver can dive again after a month if he/she has made a full recovery after treatment, [if] the dive was consistent with the occurrence of decompression injury, and [if] there was no pulmonary barotrauma."<sup>96</sup> In the more severe case, however, involving "major residual problems," a return to diving may be impossible.<sup>97</sup> Appropriate periods to lay off before a return to diving can vary from four weeks to three months.<sup>98</sup> The *U. S. Navy Diving Manual* provides a range of criteria. For example, a diver experiencing "complete relief" after treatment using Treatment Table 5 may return to normal diving activity within seven days,<sup>99</sup> but the diver's return may be delayed at least four weeks for Type I or Type II decompression injury requiring Treatment Table 6,<sup>100</sup> and on recommendation of a diving medical officer.<sup>101</sup>

Continued employment as a diver also involves a purely subjective factor that the diver must confirm to the dive supervisor his physical fitness or well-being in accordance with regulations discussed above. The suggested adherence to objective criteria and a focus on credibility of subjective complaints could minimize the impact of the purely subjective component in evaluating the claim. There is also precedence in rejecting claims based on a finding of no causal relationship to new symptoms because they are too far removed from the alleged decompression incident.<sup>102</sup> Such findings on causation are justified by the *U.S. Navy Diving Manual*, which reports from its database that 98

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Claims of permanent injury may be tempered by optimism for full recovery, particularly in situations involving early treatment.

percent of symptoms causally related to a diving incident occur or become manifest within 24 hours of the incident.<sup>103</sup>

The resolution of claims involving residual injury should emphasize objective criteria and should adhere to threshold requirements for medical and expert testimony. *Daubert* suggests that testimony should be supported by peer reviewed studies and should be widely accepted in the medical community. Relying on accepted diagnostic criteria, particularly in cases in which reliable, objective evidence of residual symptoms is not established, should limit exposure in Type I or Type II cases.

## Conclusion


Typically, the focus of legal articles on commercial diving injuries has been on jurisdictional issues. There has been little to assist lawyers in dealing with the claims after the threshold coverage issues are resolved. Most articles overlook the treatment or evaluation of the injury, or fail to consider the difficulties presented by subjective diagnostic criteria. Fortunately, however, recent literature indicates that diagnostic criteria for diving injury are evolving into more specific criteria to classify Type I and Type II injuries. As a result, the foregoing survey may serve as a practical guide to evaluate a case and perhaps challenge the injury based on these more objective standards. | [AL](#)

## Endnotes

1. Richard D. Vann, Richard E. Moon, *et al.*, *Decompression Illness Diagnosis and Decompression Study Design*, 79 *Aviation, Space & Environ. Med.* 797 (No. 8, Aug. 2008)[hereinafter *Decompression Study Design*].
2. K. K. Jain, *Textbook of Hyperbaric Medicine*, Ch. 10 *Decompression Sickness*, p. 88 (5th Ed. 2009)[hereinafter *Textbook*].
3. *Decompression Study Design*, *supra*, p. 797.
4. *Id.*
5. *Decompression Study Design*, *supra*, although the article notes "decompression injury experts tend to employ similar diagnostic criteria." *Id.*

# ...recent literature indicates that diagnostic criteria for diving injury are evolving into more specific criteria to classify Type I and Type II injuries.

6. James H. Lynch, *et al.*, *Diving Medicine: A Review of Current Evidence*, 22 *J. Am. Bd. Fam. Med.* 399, 401 (No. 22, 2009)[hereinafter *Current Evidence*].
7. *Textbook*, *supra*, p. 96 (5th Ed. 2009). The resulting pain is sometimes referred to as the "bends." Historical origins of the term "bends," including a pose by "uptown ladies," and construction of the Brooklyn Bridge. Hillsman, *supra*, p. 51 and n. 16.
8. One of the top ten diagnostic factors is "[a]ny relief after recompression treatment." John J. Freiberger, *et al.*, *Consensus Factors Used by Experts in the Diagnosis of Decompression Illness*, 75 *Aviation, Space & Environ. Med.* 1023, 1026 Table II (No. 12, Dec. 2004)[hereinafter *Consensus Factors*].
9. *Consensus Factors*, *supra*, p. 1023.
10. Diana M. Barrat, Keith Van Meter, *et al.*, *Decompression Illness in Divers: A Review of the Literature*, 8 *The Neurologist*, 186, 190 (2002)[hereinafter *Review of Literature*].
11. *Current Evidence*, *supra*, p. 401.
12. *Review of Literature*, *supra*, p. 190.
13. *Id.*
14. Christoph Klingmann, *et al.*, *Decompression Illness Reported in a Survey of 429 Recreational Divers*, 79 *Aviation, Space & Environ. Med.* 123, 125 (No. 2, Feb. 2008)[hereinafter *Survey of 429*].
15. Gianvincenzo Sparacia, *et al.*, *Magnetic resonance findings in scuba diving-related spinal cord decompression sickness*, 5 *MAGMA* 111 (No. 5, 1977).
16. *Survey of 429*, *supra*, p. 125. The article noted more serious symptoms included hearing or vestibular dysfunction, and observed that the level of a diver's certification had a strong impact on the lifetime incidence of more severe decompression injury, "the less certified the divers were, the higher the lifetime incidence of severe decompression injury." *Id.* at 127. Vertigo related to diving is "best interpreted by its temporal relationship to the dive." *What you need to know*, *supra*, p. 374.



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17. *Survey of 429, supra*, p. 125. Neurological symptoms include muscle weakness, paraesthesia, vision and speech. *Id.* at 127.
18. *Id.* at 125.
19. *Id.*
20. *Id.* The article notes mild decompression injury is associated with isolated muscle or joint pain, skin symptoms or fatigue, *id.* at 126 Table II; and concludes for recreational divers “[w]ith increasing diving depth, the risk of decompression injury increases.” *Id.* at 126.
21. *Consensus Factors, supra*, p. 1026. Onset time in minutes after surfacing of first symptom was considered important as “longer onset time was a negative predictor.” *Id.* at 1025 Table I.
22. *Id.* at 1026.
23. *Id.*
24. *Id.*
25. *Id.* The article notes the mean, median and mode for symptom onset time were three, two and one hours, respectively. *Id.* Headache did not have statistical significance as a diagnostic factor in the study. *Id.* Other authors concur that “[h]eadaches coming on after diving are usually unrelated to the dive and alternative diagnoses should be sought.” Gregory M. Emerson, *What you need to know about diving medicine but won't find in a textbook*, 14 *Emergency Med.* 371, 373 (No. 14, 2002)[hereinafter *What you need to know*]. For smokers, association of headache is consistent with pulmonary disease. David A. Buch, Richard E. Moon, *et al.*, *Cigarette Smoking and Decompression Illness Severity: A Retrospective Study in Recreational Divers*, 74 *Aviation, Space & Environ. Med.* 1271, 1273–1274 (Vol. 74, Dec. 2003)[hereinafter *Cigarette Retrospective*].
26. *Consensus Factors, supra*, p. 1025 Table I.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* The criterion involving prior injury is disputed among medical experts. “There is little evidence to suggest that a previous episode of decompression injury predisposes to subsequent episodes.” *What you need to know, supra*, p. 374. There is an alternative theory, however, that the central nervous system has a functional reserve “that allows for a degree of injury without showing functional problems,” which may be exceeded. *Id.* See also, P. J. Benton, *Operational Medicine: Resumption of Diving after Illness or Injury*, 84 *J. Royal Naval Med. Serv.* 14, 17 (1998)(discussing *post-mortem* studies in a small number of cases)[hereinafter *Operational Medicine*].
32. Diana M. Barratt and Keith Van Meter, *Decompression Sickness in Miskito Indian Lobster Divers*, 75 *Aviation, Space & Environ. Med.* 350, 352 (No. 4, Apr. 2004).
33. *What you need to know, supra*, pp. 371, 373 (“[h]eadaches coming on after diving are usually unrelated to the dive and alternative diagnoses should be sought”). For smokers, association of headache is consistent with pulmonary disease. *Cigarette Retrospective, supra*, pp. 1271, 1273–1274 (vol. 74, Dec. 2003).
34. *Consensus Factors, supra*, p. 1027.
35. *Id.*
36. *Review of Literature, supra*, p. 193.
37. *U.S. Navy Diving Manual*, Ch. 20, Diving Disorders Requiring Recompression, Differentiating between Type I Pain and Injury, ¶20-3.3.1.1 (2010).
38. *Consensus Factors, supra*, p. 199 Table 5, indicating any painful or neurological symptoms within 24 hours of a dive or 48 hours of flying are initially considered decompression injury.
39. *Decompression Study Design, supra*, p. 797.
40. *Id.*
41. R. Ball, *Effect of severity, time to recompression with oxygen, and re-treatment on outcome in forty-nine cases of spinal cord decompression sickness*, 20 *Undersea & Hyperbaric Med.* 133, 143 Table 4 (No. 2, 1993). The reported “trends observed in the data suggest that almost all divers with severity less than or equal to 5 obtain complete relief regardless of time to recompression with oxygen.” *Id.* at 141 and Fig. 4 (on a scale of 1 to 10).
42. *Pettis v. Bosarge Diving Inc.*, 751 F. Supp. 2d 1222 (S. D. Ala. 2010)(awarding \$0. for loss of future earnings, limiting recovery to \$10,000 for pain and suffering, for minor incident with no residual symptoms for eight months following successful hyperbaric treatment).
43. See *Snyder v. Peake*, 2008 WL 5111542 at \*1 (Vet. App., Nov. 12, 2008) involving appeal from denial of benefits. The claim was remanded for appointment of a medical examiner where the “examiner stated that there was no objective evidence of neurological damage,” but failed to provide a medical examination, and “[t]he Board did not assess the credibility” of the claimant. *Id.* at \*6. See also *Tesche v. Continental Cas. Co.*, 109 Fed. Appx. 495 (3 Cir. 2004), although not involving a diver, the claim for disability benefits was denied based on failure to provide objective medical evidence supporting the claimed limitations.
44. It is possible for a diver to develop decompression injury while diving within the dive table limits, *What you need to know, supra*, p. 371. See also discussion of normal or ordinary hazards, *infra*, n. 57.
45. *Superior Diving Co., Inc. v. Watts*, 2008 WL 1926977 at \*4 (E.D. La., Apr. 25, 2008), entering summary judgment where there was “no evidence to show that Superior negligently failed to maintain proper pressure in the saturation system.” The court also noted “a vessel is not deemed seaworthy because of an isolated personal negligent act of the crew.” *Id.* \*3, citing *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).
46. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2706, 125 L. Ed. 2d 469 (1993).
47. *Hughes v. International Diving and Consulting Services, Inc.*, 1993 WL 603203 at \*5 (E.D. La., Mar. 9, 1994)(Jury instructed to disregard certain opinion testimony from Dr. Keith Van Meter admitted to be speculative). The court also reviewed record evidence concerning the physician’s belief in the context of the absence of medical studies documenting a causal



relationship. *Id.* The Fifth Circuit affirmed because “his opinions were not based on objective scientific evidence such as publications or testing.” *Hughes v. International Diving and Consulting Services, Inc.*, 68 F. 3d 90, 92 (5th Cir. 1995). An award based on disputed medical evidence of preclusion from return to diving was nevertheless affirmed based on hiring policies summarized in the employer’s safety manual. *Id.*, 68 F. 3d 93.

48. *Vittero v. Dow Chemical Co.*, 826 F. 2d 420 (5th Cir. 1987). Medical testimony was excluded by FRE 403 because the history relied on by the physician “lacked reliability,” *Id.* at 423. The Court also noted “the lack of objective evidence” linking to plaintiff’s reported ailments. *Id.*
49. *Knight v. Kirby Inland Marine, Inc.*, 482 F. 3d 347, 2007 AMC 743 (5th Cir. 2007). While the injury involved alleged benzene exposure instead of decompression injury, medical expert testimony was rejected based on *Daubert* and FRE 702 where the studies relied on by the physician were “statistically insignificant” or unreliable on other grounds. The court defined causation in terms of general causation, “whether a substance is capable of causing a particular injury or condition in the general population,” and specific causation, “whether a substance caused a particular individual’s injury.” *Id.*, 2007 AMC 746, citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

50. *What you need to know, supra*, p. 371.

51. *Id.* at 374.

52. *Review of Literature, supra*, p. 190.

53. *Id.*

54. “The owner of the vessel and the employer of the seaman has every right to expect a seaman to cope with the ordinary hazards that must prevail even on a seaworthy vessel.” *Creppel v. J.W. Banta Towing, Inc.*, 202 F. Supp. 508, 512 (E.D. La. 1962). This is based on the rationale “[w]hile seamen do not assume the risk of their employer’s negligence they are deemed to realize and accept or assume the risk of the natural hazards of their occupation.” *Savard v. Marine Contracting Inc.*, 471 F. 2d 536, 541 (2 Cir. 1972). The doctrine is distinguished from assumption of risk, which is not available as a

defense under the Jones Act, based on causation. “The doctrine that the seaman assumes the ‘ordinary risks’ of his job in Jones Act cases is chimerical for it fails to state what should be obvious, viz., that the injury was not caused by the negligence of the employer and therefore the employee has not sustained the burden of his affirmative proof under the Jones Act.” *Massey v. Williams-McWilliams, Inc.*, 414 F. 2d 675, 679 n. 6, citing M. Norris, *The Law of Seamen* §685 (2d Ed. 1962).

55. The dive team may be qualified by “experience or training.” OSHA regulation, Qualifications of dive team, 29 C.F.R. Ch. XVII § 1910.410(a)(1)(7-1-04 edition).

56. *Deyerle v. United States*, 149 F. 3d 314, 317 (4 Cir. 1998) (“sharp corners are precisely the type of hazard that one hired to repair vent ducts in a metal ship should reasonably expect to encounter in the course of his duties.”).

57. *Massey, supra*.

58. *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778, 789 (D. Haw. 1993) rejecting assumption of risk because the decedent, although a certified diver, was a tourist “not so experienced that he fully understood all the ramifications” of the 145-foot deep-water dive.

59. *Consensus Factors, supra*, p. 1026.

60. As noted above, predisposition to injury is suggested if occurrence of decompression injury was “unlikely, given the dive profile.” *What you need to know, supra*, p. 374.

61. *Review of Literature, supra*, p. 189.

62. *Id.* at 191, Table 2.

63. Rachel Dankner, et al., *Recompression Treatment of Red Sea Diving Accidents: A 23-Year Summary*, 15 Clin. J. Sport Med., 253, 255 (No. 4, July 2005)[hereinafter *Red Sea Accidents*].

64. *Review of Literature, supra*, p. 191 Table 2.

65. *Textbook, supra*, Ch. 10, p. 102 (5th Ed. 2009).

66. *Red Sea Accidents, supra*, p. 255.

67. *Textbook, supra*, p. 102.

68. Andreas Fahlman, et al., *Dehydration Effects on the Risk of Severe Decompression Sickness in a Swine Model*, 77 Aviation, Space & Environ. Med. 102 (No. 2, Feb. 2006).

69. *Review of Literature, supra*, p. 191 Table 2.

70. *Red Sea Accidents, supra*, p. 255.



**STEVEN H. EMERSON, CPA,  
CGFM, CGAP, CFE, CITP**

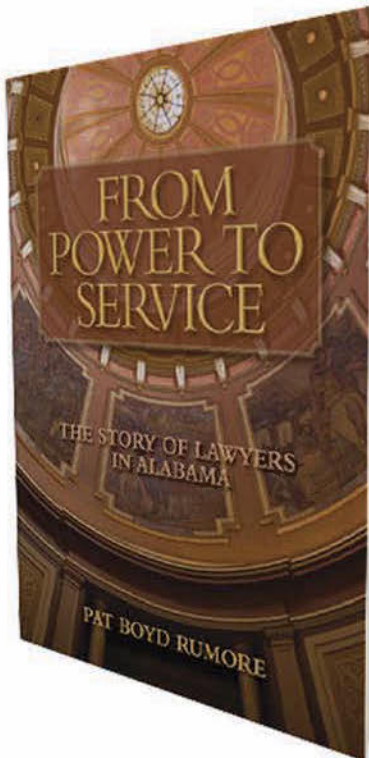
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71. *Consensus Factors, supra*, p. 1026 Table I. *But see, What you need to know, supra*, p. 374 discussed above (little evidence that prior decompression injury predisposes the diver to injury).
72. Thomas A. Dillard, *et al.*, *Should Divers Smoke and Vice Versa*, 74 *Aviation, Space & Environ. Med.* 1275 (No. 12, Dec. 2003)(finding “higher severity of decompression injury in the smoking groups when compared categorically.”)
73. *Cigarette Retrospective, supra*, pp. 1271, 1272 (“[S]moking appears to increase the odds of severe symptoms ... and ... there is some degree of dose-relationship with the amount of smoking.”).
74. *Review of Literature, supra*, pp. 192–193.
75. *Id.*
76. *Red Sea Accidents, supra*, p. 255.
77. *Textbook, supra*, p. 102.
78. A seaman is “obligated under the Jones Act to act with ordinary prudence under the circumstances,” including his “experience, training, [and] education.” *Gautreaux v. Scurluck Marine, Inc.*, 107 F. 3d 331, 339 (5th Cir. 1997)(*en banc*). The *Gautreaux* decision overruled earlier cases, replacing prior language that “the seaman’s duty to protect himself ... is slight,” *Spinks v. Chevron Oil Co.*, 507 F. 2d 216, 223 (5th Cir. 1975).
79. OSHA regulation, Pre-dive procedures at 29 C.F.R. Ch. XVII §1910.421(f)(2) (7-1-04 edition).
80. Coast Guard regulation, Dive procedures at 46 C.F.R. Ch. 1 §197.410(a)(7)(B) and by visual observation, §197.410(a)(7)(A)(10-1-04 edition).
81. “The diver is instructed to report any physical problems or adverse physiological effects including aches, pains, current illnesses, or symptoms of decompression sickness or gas embolism.” Dive procedures, *supra*, 46 C.F.R. §197.410(a)(7)(B)(i).
82. *Johnson v. Cenac Towing, Inc.*, 544 F. 3d 296, 303–304 (5th Cir. 2008), held “contributory negligence may be found where a seaman has concealed material information about a pre-existing injury or physical condition from his employer; exposes his body to a risk of reinjury or aggravation of the condition; and then suffers reinjury or aggravation injury.”
83. *McCorpen v. Central Gulf Steamship Corp.*, 396 F. 2d 547 (5th Cir. 1968)(denial of maintenance and cure for failure to disclose past injury or condition, related to injury, based on objective proof of prior condition). The *McCorpen* defense may also be based on a subjective standard, *i.e.*, “[w]here the shipowner does not require a pre-employment medical examination or interview, the rule is that a seaman must disclose a past illness or injury only when in his own opinion the shipowner would consider it a matter of importance.” *Id.*, 396 F. 2d 548–549.
84. *Review of Literature, supra*, p. 198. The same article also recommends decompression injury should be treated “even days to weeks post injury,” *id.*, p. 199, and provides an observation that “[m]ost divers receive between 5 and 10 treatments....” *Id.*
85. *Id.* at 200.
86. Case studies indicate improvement following a varied range of 8, 61 and 110 treatments, covering a period from eight months up to one year. *Textbook, supra*, Ch. 39, pp. 464, 468–469. Consequently, conventional wisdom is “[i]n fact, there is no firmly established time period beyond which hyperbaric treatment of residual injury from decompression injury/arterial gas embolism has definitely been found to be effective.” *Id.* at 465.
87. *Vandergrift v. Ft. Pierce Memorial Hospital, Inc.*, 354 So. 2d 398 (Fla. App. 4th Dist. 1978)(Jury verdict affirmed in medical malpractice claim finding scuba diver 90 percent at comparative fault for delay in seeking treatment).
88. Regulations, 29 C.F.R. Ch. XVII §1910.421(f)(2); 46 C.F.R. Ch. 1 §197.410(a)(7)(A) and (B); 46 C.F.R. Ch. 1 §197.410(a)(7)(B)(ii), *supra*.
89. OSHA regulation, post-dive procedures, 29 C.F.R. §1910.423(b)(ii).
90. *Operational Medicine, supra*, p. 14.
91. *Review of Literature, supra*, p. 201.
92. *Id.* at 201, nn. 1, 3, 4.
93. *Operational Medicine, supra*, p. 15.
94. *Review of Literature, supra*, p. 201.
95. *Operational Medicine, supra*, p. 17.
96. *What you need to know, supra*, p. 374.
97. *Operational Medicine, supra*, p. 17.
98. *Id.*
99. U.S. Navy Diving Manual, *supra*, Ch. 21, Recompression Therapy, Post-Treatment Considerations, ¶21-6.6.
100. U. S. Navy Diving Manual, *supra*, ¶21-6.6.1.
101. *Id.* A diver experiencing cardiorespiratory and central nervous system symptoms should not dive for a minimum of three months, and obtain a thorough review by a diving medical officer. U.S. Navy Diving Manual, *supra*, ¶21-6.6.2.
102. *Pettis v. Bosarge Diving, Inc.*, *supra*, 751 F. Supp. 2d at 1237–1238. The court found it significant that plaintiff returned to active diving without report of symptoms, obtained new certification of fitness to dive and was terminated from employment, all involving a period of approximately eight months, before there was a report of new symptoms. Plaintiff experienced decompression sickness on August 24, 2006 which subsided following decompression treatment on August 25, 2006. Plaintiff returned to work and received certification of fitness to dive in November 2006. Following termination of employment in May 2007, “[o]n May, 30, 2007 Plaintiff sought treatment for complaints of pain related to diving.” *Id.* at 1238. The decision therefore rejected proximate cause, following review of extensive medical testimony concluding “[a]ny subsequent decompression sickness symptoms were not related to the August 24, 2006 dive.” *Id.*
103. U.S. Navy Diving Manual, *supra*, Ch. 20, Diving Disorders Requiring Recompression, Onset of Symptoms, ¶20-3.5.1.

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# Lawyers, Ethics and Trial Publicity

By J. Anthony McLain

## The first paragraph of the preamble

of the *Alabama Rules of Professional Conduct* states that "...a lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Lawyers occupy a unique position in our system of justice. It is well recognized that lawyers' responsibilities extend not only to clients but to the public, the legal system and the legal profession.

In Alabama, regulation of lawyers is within the sole province of the Supreme Court of Alabama. Recognizing this plenary authority, the court adopted the *Rules of Professional Conduct* and *Rules of Disciplinary Procedure*. These rules govern the actions of lawyers licensed to practice law in the State of Alabama.

The *Rules of Professional Conduct* are *de minimis* standards for a lawyer's conduct. The *Rules of Professional Conduct* are subject to interpretation and are augmented

by relevant case law and scholarly treatises addressing lawyer conduct. How lawyers should conduct themselves during a trial was recently distilled in an opinion authored by **United States District Judge Myron Thompson** of the Middle District of Alabama.

Judge Thompson drew the responsibility of presiding over the public-corruption trials wherein seven individuals were charged with conspiring to enact a bill which would have authorized a constitutional amendment allowing the public to decide whether to legalize electronic bingo in Alabama. Prior to any trial, two of the defendants pleaded guilty.

The first trial resulted in the jury finding two defendants not guilty on all counts. As to the remaining seven defendants, the jury found them not guilty on certain counts but was unable to reach a verdict on the remaining counts. Therefore, the matters were scheduled for a second trial.



J. Anthony McLain,  
Alabama State Bar General Counsel

To minimize external influence of the jurors, Judge Thompson required the jurors, as well as the parties and their counsel, to enter the federal courthouse in an area physically separated from the media. Still, the legal proceedings were so highly publicized that Twitter feeds were established documenting the ongoing trial proceedings. Additionally, lawyers for both sides engaged in lengthy discussions with the media during recesses as well as at the start and the conclusion of trial each day.

The day before retrial was scheduled to begin, federal prosecutors filed a motion for a gag order which would limit what the parties' lawyers could say to the media. Rather than issuing a gag order, Judge Thompson instructed all lawyers involved to comply with Rule 3.6, *Alabama Rules of Professional Conduct*.

The retrial of the defendants resulted in the jury acquitting all remaining defendants on all charges.

Thereafter, on March 14, 2012, Judge Thompson issued an expositive opinion detailing why he refused to enter the requested gag order. The following is a précis of Judge Thompson's opinion.

Judge Thompson noted the gag order sought by the government placed no limits on the defendants themselves or the media's reporting on the trial. Rather, the gag order sought by federal prosecutors was aimed at the lawyers involved in the trial. Judge Thompson performed a thorough analysis of the case law addressing gag orders and noted that neither the Supreme Court nor the Eleventh Circuit Court of Appeals ever directly addressed a requested gag order limited to attorneys in an ongoing criminal trial.

Following his analysis of two Supreme Court cases which provided some collateral guidance on gag orders generally, Judge Thompson concluded, "Prior restraints are not the only means of restricting an attorney's extrajudicial remarks. *Rules of Professional Conduct* have regulated the bar's relationship with the press since the *Alabama Code* of 1887, which was the first official code of legal ethics promulgated in this country." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1066 (1991)." Judge Thompson analyzed the provisions of Rule 3.6, generally titled "Trial Publicity" and concluded that "...attorney adherence to Rule 3.6 was a less restrictive alternative to the government's proposed gag order." He also maintained that a gag order would not have been fully effective in curbing trial publicity. Describing his efforts as an attempt to "...strike a balance between defense counsel's First Amendment Rights and the government's interest in a fair trial," he "...employed the less restrictive alternative of requiring the attorneys and their trial teams to comply with *Alabama Rule of Professional Conduct* 3.6." Judge Thompson's final assessment of the measures taken was that "...the Rule 3.6 alternative worked well."

Judge Thompson's opinion once again brings to the forefront the importance of lawyers conforming their conduct to the provisions of the *Alabama Rules of Professional Conduct*. Civil litigation and criminal prosecutions grow more contentious with each passing year. Lawyers and judges opine that professionalism and civility are at an all-time low. Judge Thompson's opinion reminds us that the *Rules of Professional Conduct* provide us with the guidance necessary to ensure that our actions protect not only our clients, but also the public, the legal system and the legal profession. The bench and bar of this state should embrace this reminder by Judge Thompson and strive to meet its well-defined mandate—simply follow the *Rules of Professional Conduct*. | AL

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*or*



*or*



*or*

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**Othni J. Lathram**  
*olathram@ali.state.al.us*

For more information about the Institute, visit [www.ali.state.al.us](http://www.ali.state.al.us).

This is being written in the hours immediately after adjournment sine die of the 2012 Regular Session of the Alabama Legislature. In just a few hours the legislature will reconvene in a special session to focus on redistricting for the Alabama House of Representatives and Senate.

The 2012 Regular Session was one which was trying for a number of reasons. First and foremost among them was the state's budgetary situation. As outlined in the last edition, the budgets were a tremendous challenge; however, the legislature was able to pass both a general fund and education budget which were responsible and the result of tremendous compromise, patience and hard work.

The Law Institute had a successful session in both the passage of ALI bills and services provided to the legislature. This success is due to the tremendous legislative leadership provided by our president, **Senator Cam Ward**, and vice president, **Representative Marcel Black**, and the other legislative members of our executive committee: **senators Ben Brooks, Arthur Orr and Rodger Smitherman** and **representatives Paul DeMarco, Demetrius Newton and Bill Poole**.

Below is the legislation of particular interest to the bar and which has been forwarded to the governor. A number of these bills have not been acted upon yet and so do not have act numbers. There is the possibility that some of these might be vetoed, but the final status of the bills without an act number can be found at <http://alisondb.legislature.state.al.us>.

## Alabama Law Institute Legislation

The three uniform bills will be effective January 1, 2013 and reviewed in the November 2012 edition of *The Alabama Lawyer*.

### **HB 222—Amendments to the Alabama Principal and Income Act**

Bill Sponsors: Representative Paul Beckman and Senator Slade Blackwell

### **SB 348 (Act 2012-470)—Alabama Uniform Foreign-Country Money Judgments Recognition Act**

Sponsors: Representative Bill Poole and Senator Phil Williams

## **HB 399–Alabama Uniform Interstate Depositions and Discovery Act**

Sponsors: Representative Paul DeMarco and Senator Ben Brooks

## **SB 363–Share Exchange Act**

Sponsors: Representative Jim Carns and Senator Rodger Smitherman

This bill will correct an error in the adoption of the Alabama Business and Nonprofit Entities Code (Title 10A) by which the ability for corporations to merge via a share exchange was deleted.

# Crimes and Offenses

## **HB 2 (Act 2012-291)**

Prohibits the use of a handheld wireless device to write, read or send a text message. The first offense carries a penalty of \$25, a second offense is \$50 and a third offense will be \$75. The offense can be a primary violation for a traffic stop. Each offense will also be entered on the driving record of the offending person as a two-point violation.

## **SB 208 (Act 2012-267)**

Amends Section 20-2-23 related to controlled substance analogs (e.g., synthetic marijuana) and adds cathione compounds, certain named chemical compounds of synthetic canninoids and controlled substance analogs to the Schedule I controlled substances list. Amends Section 13A-12-231 to provide penalties for trafficking in controlled substances analogs added to Schedule I

## **HB 376 (Act 2012-393)**

Creates the crime of possession of a controlled substance with intent to distribute which is a class B felony

## **SB 91 (Act 2012-369)**

Establishes the crime of disarming a law enforcement or corrections officer. The offense is committed when a person

attempts to take or deprive the use of a firearm or weapon from a law enforcement or corrections officer. The crime is a class C felony.

## **SB 101 (Act 2012-464)**

Provides that it shall be unlawful for an inmate to possess a cellular telephone, wireless communication device or computer that allows the input, output, examination or transfer of computer programs from one computer to another person or for a person to possess with intent to deliver, or deliver, to an inmate in the custody of the Alabama Department of Corrections a cellular telephone, wireless communication device or computer that allows the input, output, examination or transfer of computer programs from one computer to another person; each offense is a Class A misdemeanor.

## **HB 340 (Act 2012-316)**

Creates the crime of looting during a state of emergency declared by the governor. A person commits the crime of looting if the person intentionally enters, without authorization, any building or real property during a state of emergency and obtains, exerts control over, damages or removes the property of another person without lawful authority. Looting is a class C felony.

## **SB 379 (Act 2012-472)**

Would prohibit obscuring, removing or otherwise rendering illegible any information appearing on beverage labels, packages or containers related to product information. This bill would also prohibit storing or transporting any beverage product that has been obscured, removed or otherwise rendered illegible. Violations are punishable by a fine not exceeding \$500 or by imprisonment for not more than six months.

## **HB 363 (Act 2012-237)**

Amends sections 13A-12-212, 13A-12-260, 20-2-72 and 20-2-190 and adds Section 20-2-190 to further regulate the sale of over-the-counter products containing certain quantities of ephedrine or pseudoephedrine within certain periods of time; enhances existing criminal penalties for violations and provides additional criminal penalties

**HB 400 (Act 2012-432)**

Creates the Digital Crimes Act to create crimes related to phishing, data fraud and computer tampering

**SB 16 (Act 2012-368)**

Adds instances to the crime of identity theft when an individual gains employment through the use of another person's identity

## Courts, Procedure and Civil Actions

**HB 14**

Allows a presiding circuit judge to allow for certain hearings to be held by audio-video telecommunications

**HB 17 (Act 2012-209)**

Creates a procedure for the removal or expungement of false instruments filed with the secretary of state or judges of probate. The recording official makes the initial determination subject to certain procedures and notice requirements. The act also creates a procedure for appeal to a circuit court.

**HB 46**

Grants civil immunity to persons acting in defense of self, others or property against trespassers

**HB 100**

Amends the juvenile code to clarify jurisdictional issues and the continuing jurisdiction of the juvenile court over matters

**HB 167 (Act 2012-388)**

Provides for a limitation of liability of \$5,000 for bar pilots

**SB 138 (Act 2012-266)**

Allows parties to certain types of actions to consent to the appointment of a private judge to adjudicate their action at their expense

## State Employees

**HB 225 (Act 2012-302)**

Allows retirement benefits to be calculated on an amount which includes overtime pay under certain circumstances and limitations

**HB 466 (Act 2012-433)**

Defines *de minimus* for purposes of the Ethics Act to be any item less than \$25 and an annual aggregate amount of \$50

**SB 213 (Act 2012-412)**

Provides for circumstances where a member of the state retirement systems would lose their retirement benefits upon a conviction of certain felony offenses

**SB 388 (Act 2012-377)**

Changes the minimum age to collect retirement benefits for teachers and state employees to 62 for all persons hired on or after January 1, 2012

## Proposed Constitutional Amendments

**HB 276 (Act 2012-269)**

Would change compensation for legislators so that their base pay would be calculated on the median annual household income in Alabama and allow for actual expenses

**HB 357 (Act 2012-275)**

This amendment is the revision of Article XII (Private Corporations) of the Alabama Constitution as proposed by the Constitution Revision Commission. An extensive article on this provision will appear in the September edition of *The Alabama Lawyer*.

**HB 358 (Act 2012-276)**

This amendment is the revision of Article XIII (Banks and Banking) of the Alabama Constitution as proposed by the Constitution Revision Commission. An extensive article on this provision will appear in the September edition of *The Alabama Lawyer*.



### **HB 359 (Act 2012-304)**

This bill is a required amendment to Title 10A of the *Alabama Code* which is contingent upon the amendment to Article XII of the Alabama Constitution's becoming effective. It will subject foreign corporations to the same registration requirements and regulations as all other foreign entities.

### **SB 147**

Would create a new procedure for distributing interest and capital gains from the Alabama Trust Fund, a repository for revenues from oil and gas royalties, to the State General Fund Budget.

## Other Acts of Interest

### **HB 436 (Act 2012-256)**

Creates a tax holiday for the purchase of items related to emergency preparedness. The exemption applies to the types of items routinely needed during tornado and hurricane seasons. The first tax holiday will be the first weekend of July.

### **SB 28 (Act 2012-295)**

Decreases the minimum mandatory age of entering school from seven to six. The act does allow for a procedure to opt out.

### **SB 216**

Requires a person to present proof of actual purchase price to record a deed with the judge of probate.

### **SB 347**

Establishes the Alabama Residential Mortgage Satisfaction Act. The act provides for circumstances for the provision of pay-off statements and increases the penalty for failure to satisfy a mortgage. The act also creates a procedure whereby a person can seek to satisfy a mortgage through a title insurance company or their agent when they have been unable to get the lender to do so.

### **SB 73 (Act 2012-214)**

Relates to the publication of legal notices by authorizing the electronic publication of legal notices and requires newspapers maintaining Internet websites to publish legal notices on the website in addition to publishing in print in a newspaper.

The act also requires the publication of legal notices on a statewide Internet website.

### **SB 136 (Act 2012-224)**

Excludes certain prefabricated storm shelters from the provisions of Title 24, *Code of Alabama* 1975 and requires resident and nonresident prefabricated storm shelter manufacturers to post a bond with the Alabama Emergency Management Agency.

### **SB 280 (Act 2012-179)**

Adds Section 22-9A-11.1 to provide for the state registrar to issue a Certificate of Foreign Birth without judicial proceedings if certain criteria are satisfied | [AL](#)

## ALABAMA LAW INSTITUTE

# Annual Meeting & Legislative Update

Friday, July 20, 2012, 10:30-11:30 a.m.

Magnolia Ballroom F

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(during the Alabama State Bar Meeting)



PROGRAM :

**Senator Cam Ward, president, presiding**  
**ALI Bills reviewed**  
**2012 Legislative Update**



Please e-mail announcements to **Marcia Daniel**, [marcia.daniel@alabar.org](mailto:marcia.daniel@alabar.org).

### About Members

**Clinton C. Carter** announces the opening of **Clinton C. Carter PC** at 200 S. Lawrence St., Montgomery 36104. Phone (334) 517-1232.

**Jeffrey C. Ford** announces the opening of **The Law Office of Jeffrey C. Ford LLC** at 119 S. Center Ave., Piedmont 36272. Phone (256) 447-4900.

**Joshua G. Kesling** announces the opening of **Joshua G. Kesling, Attorney at Law** at 4547 Cypress Village Blvd., Ste. 9, Orange Beach 36561. Phone (251) 981-4529.

**Vonda S. McLeod** announces the opening of **Vonda S. McLeod, Attorney at Law LLC** at 4131 Carmichael Rd., Ste. 21, Montgomery 36106. Phone (334) 245-3610.

**Todd McLeroy** announces the opening of **McLeroy Law Firm LLC** at 1626 First Ave., SW, Cullman 35055. Phone (256) 734-6994.

**Brandon C. Neal** announces the opening of the **Neal Law Firm LLC** at 217 2nd Ave., E., Oneonta 35121. Phone (205) 625-6900.

**Michael Skotnicki** announces the opening of **Appeals and Briefs by Michael Skotnicki**.

**Hendrik S. Snow** announces the opening of **Snow Law Firm PC** at 50 Saint Emanuel St., Mobile 36602. Phone (251) 380-8108.

**Stephen A. Strickland** announces the formation of **Stephen Strickland Law** at 2320 Arlington Ave., S., Birmingham 25205. Phone (205) 930-9800.

### Among Firms

Governor Bentley announces the appointment of **Errek Jett** as district attorney for the **36<sup>th</sup> Judicial Circuit**.

**Bradford Ladner LLP** announces **Joseph A. Ingram** has joined as a partner and the firm name is now **Bradford Ingram & Ladner LLP**. Phone (205) 802-8823.

**Brown & Adams LLC** announces that **Anderson D. Robinson** has joined as an associate.

**Burr & Forman LLP** announces that **Whitney C. Henry** and **J. Allen Sullivan, Jr.** have joined as associates.

**Robert E. Clute, Jr.** and **Robert E. Clute, III** announce the opening of **Clute & Clute PC** at 118 N. Royal St., Ste. 600, Mobile 36602. Phone (251) 345-6188.

Due to space constraints, *The Alabama Lawyer* no longer publishes address changes, additional addresses for firms or positions for attorneys that do not affect their employment, such as committee or board affiliations. We do **not** print information on attorneys who are not members of the Alabama State Bar.

#### About Members

This section announces the opening of new solo firms.

#### Among Firms

This section announces the opening of a new firm, a firm's name change, the new employment of an attorney or the promotion of an attorney within that firm.

**Gentle, Turner & Sexton** announces that **Katherine Harbison** has become a partner.

**Goodwyn, Mills & Cawood A&E** announces that **Matthew Griffith** has joined as general counsel.

**James G. Harrison, Robert C. Gammons, Robert E. Rawlinson** and **Matthew R. Harrison** announce the formation of **Harrison, Gammons & Rawlinson PC** at 2430 L&N Dr., Huntsville. **Bethany G. Harrison** joined as an associate and the **Hon. Bruce E. Williams** is of counsel.

**Huie, Fernambucq & Stewart LLP** announces that **Jacob Crawford** has rejoined the firm.

**Johnston Barton Proctor & Rose LLP** announces that **Michael H. Johnson** has become a partner.

**Laney & Foster PC** announces that **John C. DeShazo** has become a shareholder and **Clark E. Bowers** has become associated with the firm.

**Jeffrey L. Luther, Danny J. Collier, Jr., Lucian B. Hodges** and **Regina F. Cash** announce the formation of **Luther, Collier, Hodges & Cash LLP** with locations in Mobile and Pensacola. Phone (251) 694-9393 and (850) 473-2260. **S. Gaillard Ladd, Jr.** and **L. Robert Shreve** have joined as associates.

**Maynard, Cooper & Gale PC** announces that **Michael P. Johnson**

and **James M. Robertson** have joined as shareholders and **Alvin K. Hope, II** has joined the firm.

**Morris, Haynes & Hornsby** announces that **M. Todd Wheelles** and **Jeremy Knowles** have become partners. The firm will now be known as **Morris, Haynes, Hornsby, Wheelles & Knowles PC**.

**Ragsdale LLC** announces that **Allison L. Riley** has joined as an associate.

**William E. Scully, Jr.** and **William E. Scully, III** announce the opening of **Scully & Scully PC** at 816 Mancie Ave., Daphne 36526. Phone (251) 626-5052. | [AL](#)

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*— Henry Ford.*



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### **Florida Collections Attorneys**

Florida firm seeks attorneys licensed in Alabama with 0-5 years' experience to review and manage collection demands, as well as possible mediations/litigation on an ongoing contract basis. E-mail résumés and references to James F. Welborn, Law Offices of Palmer, Reifler & Associates, [jwelborn@palmerreifler.com](mailto:jwelborn@palmerreifler.com).

### **Marine Corps Judge Advocate**

Apply to attend Officer Candidates School (OCS) at Quantico. If you graduate from OCS you will earn a commission as a Second Lieutenant and progress to officer training and Judge Advocate school in Newport, RI. Areas of practice include: trial attorney, civil law, legal assistance attorney, in-house counsel, and operational law attorney. If you are interested in becoming a Marine Corps JAG, call Captain Joe Goll at (205) 758-0277 or e-mail [joseph.goll@marines.usmc.mil](mailto:joseph.goll@marines.usmc.mil).

### **Mobile-area Attorney**

Busy solo practice located north of Mobile seeks attorney for office share arrangement. Will consider all types of experience and levels of expertise. Call (251) 944-3889.

### **Montgomery Attorney**

Assist operations and legal departments in daily functions and legal matters. Requirements: Minimum law degree from accredited institution and two years' experience required, along with current Alabama State Bar license. Needs strong research and computer skills. Familiarity with review and case discovery software preferred. EEO/AA Employer. Call (334) 272-7723.

## Staff Attorney

Legal Services Alabama Dothan office. Responsible for coordinating/ensuring quality of day-to-day advocacy and administration of the office and for the supervision of staff. Expected to carry caseload and engage with the local bar and community. Previous supervisory/management experience highly desirable. Qualifications: Admission to the Alabama State Bar is required. Experience working with a low-income population preferred. Computer proficiency required. Bilingual encouraged to apply. Salary/Benefits: Salary \$48,000 + DOE. Benefits include medical insurance, paid leave and paid holidays. Send cover letter, résumé, references and a recent writing sample to: [jobs@alisp.org](mailto:jobs@alisp.org). No telephone calls or faxes, please. EOE.

## Positions Available— Paralegal/Secretarial

### Birmingham Litigation Paralegal

Burr & Forman LLP is accepting applications for a full-time litigation paralegal in its Birmingham office. Prefer a minimum of five years' experience as a litigation paralegal. Position will include case management from inception through discovery and verdict. Successful candidate will have experience with drafting and electronic filing of pleadings and motions, summarization of medical records, deposition scheduling and summarization, trial preparation, and legal research. Knowledge of PACER, Summation, Excel and document management software is important. A medical or nursing background is a plus. Candidates with a bachelor's degree from an accredited college or university and an ABA paralegal certificate, or its equivalent, are preferred. EOE. Qualified and interested candidates may apply online by visiting <http://www.burr.com/workatburr/support-staff.aspx>.

### Talladega-area Real Estate Secretary

Real estate secretary needed in small firm in Talladega County. Will be responsible for handling closings, including preparation of HUD, etc. Experience required. Bookkeeping knowledge a plus. Competitive pay and benefits. Please e-mail résumé and references to [lawfirm127@yahoo.com](mailto:lawfirm127@yahoo.com).

## Positions Available—Other

### LSAT Test Prep Instructor

Educational Testing Consultants is seeking an LSAT preparation instructor in Auburn. Successful candidates will have exceptional LSAT scores, previous teaching experience and a willingness to work evenings or weekends. Pay rate begins at \$40 per hour of instruction. E-mail [jobs@etctestprep.com](mailto:jobs@etctestprep.com) and request an application. Do not send a résumé.

## Positions Wanted

### Birmingham Clerkship

Paid or unpaid clerkship in Birmingham desired for summer 2012. Relocating from out of state to Alabama. Excellent résumé, writing skills and people skills. Previous experience at Alabama plaintiff's firm. Second year at University of Kentucky College of Law. E-mail [kimberly.simpson@uky.edu](mailto:kimberly.simpson@uky.edu).

### Litigation Attorney

Litigation attorney with 15 years' experience, along with 10 years' litigation experience, is available for contract work throughout Alabama. Contact Tammy Woolley at (205) 601-0616 or [tammy766@gmail.com](mailto:tammy766@gmail.com).

### Bankruptcy Attorney

Sole practitioner with more than 16 years' experience, primarily in the area of bankruptcy law and debtor/creditor rights. Seeking a position with a firm or other individual, where broad base of experience will be an asset. Willing to bring experience to an entry-level position, whether in the area of bankruptcy law or other area of practice. Willing to relocate within Alabama. Résumé provided upon request. Call (205) 585-4923.

### Insurance/Collections Attorney

New admittee seeking employment as an attorney. Strong IT background, very knowledgeable of insurance, collections and city government. Résumé, references, writing samples available upon request. Call (205) 948-8274.

**Litigation Attorney**

Licensed attorney with three years of trial, litigation and negotiation experience in various fields willing to provide a wide range of legal services for private practitioners, large or small firms. Willing to travel long distances and odd hours welcome. Contact Christopher R. Manley at [cmanley31@gmail.com](mailto:cmanley31@gmail.com) or (205) 617-0409.

**For Rent**

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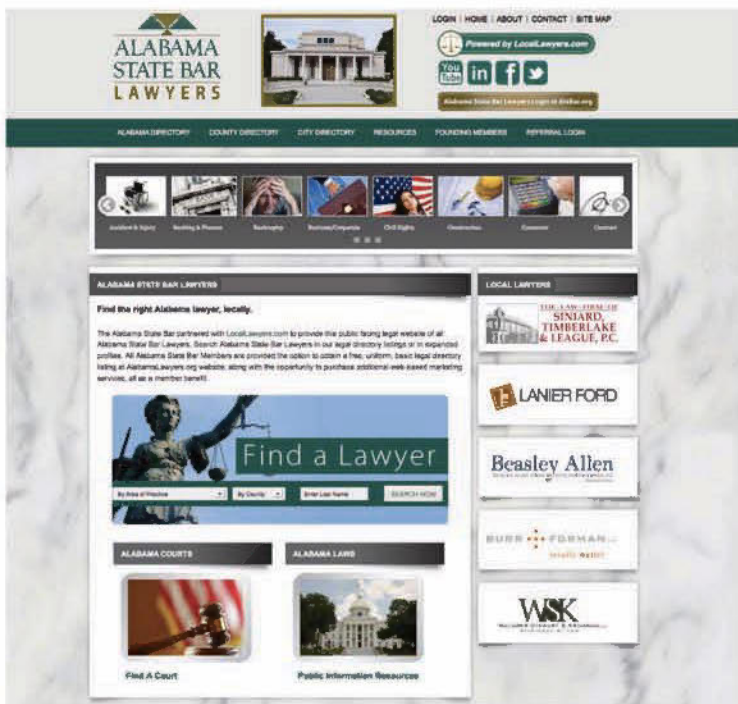
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