Red Flags for Young Attorneys to Avoid

By Brandon C. Stone

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So you have passed the bar exam with flying colors and are ready to embark on your long successful career of practicing law! Congratulations on your accomplishments and beginning what I believe is a profession that is constantly mentally stimulating and rewarding. Unfortunately, as you begin your practice, you will probably find, as I have, that after all the years of studying and preparation, mistakes will be made. They are practically unavoidable.

Even the most successful lawyers will admit that they make mistakes from time to time. In my experience, the manner in which mistakes are handled will determine what overall effect they will have on your litigation. I believe the best course of action is to meet your problem head-on. Reveal the problem to your supervising attorney, admit that you made a mistake and begin exploring possibilities to correct the misstep. As a new attorney, you will be expected to make mistakes. I have found that in taking these proactive steps, I often discover that the mistake was a very minor issue compared to how I perceived it, the mistake was easily correctable or that the mistake was not a mistake at all.

Perhaps the worst thing you can do is hide behind your desk and hope that a mistake will in some way correct itself or that no one will notice it. Your problem could become worse as time passes and take a real toll on your case.

In my three short years of practice, I have made my share of blunders, and I would like to believe that I have learned from them. I have also tried to learn from the mistakes of others. Below, I have addressed five random examples of statutory law, caselaw and rules of court that in my experience have been stumbling blocks in the course of litigation. Some of these examples are commonly argued and briefed, and others are a little more obscure. My hope is that these "red flags" will help you in your practice, and you will learn from mine and others' mistakes. I have attempted to discuss these examples in the order of potential for seriousness of consequences (and potential for mental and emotional trauma to you) from least to worst if the errors at issue are made.

Motions to Dismiss Pursuant to Rule 12(B), *Ala. R. Civ. P.* Are Not Permitted in District Courts

The defenses listed in rule 12(B), *Ala. R. Civ. P.* obviously arise in cases before district courts as they do in circuit courts. However, in district court actions, those defenses must be asserted in the defendant's answer and not by motion. Rule 12(dc)(2), *Ala. R. Civ. P.* states that "the provisions for the assertion of certain defenses by motion at the option of the pleader in Rule 12 are deleted."

The real danger in incorrectly filing a motion rather than an answer is waiving certain 12(B) defenses. Rule 12(g) of the *Alabama Rules of Civil Procedure* states that "[i]f a party makes a motion under this rule (Rule 12) but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based upon the defense or objection so omitted. . . ." Rule 12(g), *A. R. Civ. P.*

The Alabama Supreme Court commented on this rule in *Couch v. Sutton*, 508 So. 2d 681 (Ala. 1986). The court stated that "the rules do provide that objections to improper venue are waived if not raised in the **first** responsive pleading or **first** motion." Rules 12(g), 12(h)(1), *A.R.Civ.P.*; *Id.* at 681-682. See also *Den-Tal-Eze Manufacturing Co. v. Gosa*, 388 So. 2d 1006 (Ala. Civ. App. 1980).

If an improperly filed motion to dismiss is filed with the district court, an opposing party might argue that the motion should be stricken. If the court rules that the improperly filed motion was your "first responsive pleading" as referenced in *Couch,* it could be grounds for a ruling that your 12(B) defenses are effectively waived. The easy solution to avoid these problems is to simply file an answer to a district court complaint which lists all of the appropriate 12(b) defenses.

Fortunately, the District Court Committee Comments following Rule 12, *Ala. R. Civ. P.* state that "a party will not be deemed in default if he has served an appearance in the form of a motion to dismiss," which references Rule 55(dc)(5), *Ala. R. Civ. P.*

Equitable Relief Is Generally Not Available in District Court Actions

One mistake commonly made is to seek equitable relief in the district courts, which is only available in circuit courts. *Ala. Code* §12-12-30 states that:

> "The original civil jurisdiction of the district court of Alabama shall be uniform throughout the state, concurrent with the circuit court, except as otherwise provided, and shall include all civil actions in which the matter in controversy does not exceed ten thousand dollars ($10,000), exclusive of interest and costs, and civil actions based on unlawful detainer; except, that the district court shall not exercise jurisdiction over any of the following matters:
>
> "(1) Actions seeking equitable relief other than:
>
> "a. Equitable questions arising in juvenile cases within the jurisdiction of the district court.
>
> "b. Equitable defenses asserted or compulsory counterclaims filed by any party in any civil action within the jurisdiction of the district court."

While obvious equitable remedies, such as injunctions, are clearly not available in district courts, less obvious ones are perhaps more often sought. For example, claims of unjust enrichment and requests for relief via a theory of quantum meruit, which are commonly pled as alternative counts to breach of contract claims, are both equitable remedies. See *Avis Rent-a-Car Systems, Inc. v. Heilman*, 876 So. 2d 1111, 1123 (Ala. 2003) and *Mantiply v. Mantiply*, 951 So. 2d 638 (Ala. 2006).

These claims made in the circuit court are proper, and are commonly pled in the alternative. However, as *Ala. Code* §12-12-30 states, equitable relief may not be provided by the district courts. If there is a doubt as to whether there was "an offer and an acceptance, consideration, and mutual assent to the terms essential to the formation of the contract" *Strength v. Alabama Dep't of Fin.,* 622 So.2d 1283, 1289 (Ala.1993), district court may not be the best forum to seek your relief. Such requests for equitable relief would be ripe for dismissal in district court, and if the elements of a contract are not present, the equitable claims would be at risk.

Requests for Admissions Are Automatically Deemed Admitted If No Response Is Served in 30 Days

Requests for admissions, pursuant to Rule 36, *Ala. R. Civ. P.* in my experience are the source of many mistakes and are commonly at issue on the appellate level.

Rule 36(a), *Ala. R. Civ. P.* states

> "(E)ach matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or an objection addressed to the matter…"

The plain language of this quoted section of Rule 36 states that the request is "deemed admitted **unless**…" a response is timely served. Some trial courts in my experience have required a motion to have the requests for admissions deemed admitted in order for the requests to be officially admitted. The language

of Rule 36(a), *Ala. R. Civ. P.* does not, on its face, require such a motion. While there are several opinions which reference a motion to have the requests deemed admitted as being filed, none of those opinions expressly require the motion to be filed. See *Ex Parte American Resources Ins. Co., Inc.,* 663 So. 2d 932, 935 (Ala. 1995) and *Leonard v. State for Use and Ben. of Talladega County*, 387 So. 2d 852, 853 (Ala. 1980).

Rule 6(e), *Ala. R. Civ. P.* allows an additional three days to respond if the requests for admissions are served by mail. *Green Tree Acceptance, Inc. v. Doan*, 529 So. 2d 201, 205 (Ala. 1988). Thankfully, Alabama law provides a "safety net" in addition to the mailbox rule for parties responding later than 33 days (using the mailbox rule) of service to a request for admission. Rule 36(d), *Ala. R. Civ. P.* states that:

> "Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."

In *Doan*, the supreme court addressed the issue of late responses to requests for admissions. In this case, the party requesting the admission was served with the defendant's response three days prior to trial. *Id.* at 205. Green Tree moved to strike the responses, claiming it had been prejudiced in that it had prepared for trial with the assumption that the requests for admissions had indeed been admitted. *Id.* The trial court allowed the untimely responses stating that Green Tree could not identify any specific prejudice. *Id.* The Alabama Supreme Court held that this action was not an abuse of discretion. *Id.*

Note that according to the language of Rule 36 (a) and (d), merely denying a request after the 30 days expires is likely of no effect. Rule 36(d) allows you to withdraw or amend your admission (which has automatically been entered if late) unless your opposition can show prejudice. Normally, as highlighted in *Doan,* it will be difficult to show the court prejudice, especially if the litigation is in its early stages.

Children Born out of Wedlock Generally Do Not Inherit from Their Father

The issue of the right of a child born out of wedlock to inherit from his or her father has surfaced in my practice through the litigation of heirship property. Real estate often passes from generation to generation for decades without changing title, and it is normally titled as "the heirs of John Doe" in tax records. Illegitimate children naturally believe that they, like their brothers and sisters, inherit their respective percentage interest in the property, and they pass this belief down to their heirs. Alabama law, however, does not treat children born out wedlock as those who are born of married parents.

Ala. Code §43-8-48(b) states that in order for a child born out of wedlock to inherit from his or her father by intestate succession "paternity (must be) established by an adjudication before the death of the father or is established thereafter by clear and convincing proof…."

Ala. Code §6-2-33 states, "(T)he following actions must be commenced within 10 years:…(2) Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as otherwise provided in this article."

These two statutes read in conjunction reveal that Alabama law allows a child born out of wedlock has ten years to have him/herself adjudicated as a child by clear and convincing evidence in order to inherit from his or her father. This reading was recently

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confirmed by the Alabama Supreme Court in 2004 in *Blackmon v. Brazil*, 895 So. 2d 900 (Ala. 2004). The court in *Blackmon* stated:

> "to summarize our holding, by authority of §43-8-48(2)(b), we hold that paternity may be established after the death of the father upon clear and convincing proof. The action to establish paternity may be brought within the time allowed by law to establish rights of inheritance in any case." *Id.* At 906-907.

Unless a child born out of wedlock has him or herself adjudicated as a biological child, the belief that he or she has inherited from his or her father is unfounded. This belief could lead the child born out of wedlock and/or his heirs to sell an interest (or believed interest) in the subject heirship property to family members or third parties, which could easily later be deemed worthless.

As if this treatment of children born out of wedlock is not harsh enough, *Ala. Code* §43-8-48(b) also states that "the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child." *Id.*

This problem is compounded by Alabama's recognition of common-law marriage. This twist adds the burden of one's proving that a common-law marriage existed in some cases many decades in the past. Whether one's parents "held themselves out" as being husband and wife at the time of his birth could possibly be determinative of whether he or his heirs inherit substantial interests in real estate. See *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000).

I have worked on a case affected by this problem in which the child's father was listed on his birth certificate as the father. He was publicly acknowledged as the father's child in the community and treated as such by the child's brothers and sisters. The father had provided financial support for the child throughout his years of minority. These facts were irrelevant because the father's paternity had not been adjudicated as required in *Ala. Code* §43-8-48(b) and *Blackmon*. Because the child had always been accepted by his father and it was publicly known that he was his father's child, he had no reason to believe that his paternity was ever in question, and in turn, he had no reason to believe he needed to have his father's paternity adjudicated.

At least rights have improved for children born out of wedlock in Alabama over the years. As stated in *Stone v. Gulf and American Fire and Cas. Co.*, 554 So. 2d 346 (Ala. 1989),

> "(A)t common law, an illegitimate child, who had not been legitimated, was considered the child of no one and could inherit from no one. See *Williams v. Witherspoon,* 171 Ala. 559, 55 So. 132 (1911). The courts considered an illegitimate child "*nullius filius,*" the "heir to nobody," and thus, the child "ha[d] no ancestor from whom any inheritable blood [could] be derived." *Lingen v. Lingen,* 45 Ala. 410, 413 (1871) (quoting 1 Wendell's Blackstone, 459). *Stone*, 554 So. 2d at 363.

The court in *Stone* goes on to discuss the slow progression of Alabama's view of the rights of children born out of wedlock from its common-law view to its more current stance.

Alabama's current stance of this issue as held in *Blackmon* will continue to yield unfair results for children born out of wedlock in heirship property cases as well in other situations. The percentage of births out of wedlock in Alabama have steadily risen from 11.6 percent of all births in 1960 to 36.8 percent of all births in 2006. This percentage is projected to continue to increase* which ensures that this problem will continue to arise.
*Source: Alton D. Stone, Statistical Analysis Division, Center for Health Statistics, Alabama Department of Public Health.

The Attorney General's Office Must Be Served with the Complaint in Actions Challenging a Statute's Constitutionality

Ala. Code §6-6-227 states "if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard." The failure to comply with this statute perhaps yields the most damaging consequences of any other addressed in this article. The obvious legislative intent is to provide the state with an opportunity to defend its own statute or law when it is challenged.

The Alabama Court of Civil Appeals has held as follows:

> "The record contains no indication that Stringer served the attorney general with notice that he was challenging the constitutionality of the Act. When a party challenging the constitutionality of a state statute fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claim, and any judgment regarding that claim is void." *Stringer v. State, ex rel. Valeska*, 628 So. 2d 686, 688 (Ala. Civ. App. 1993, quoting *Roszell v. Martin,* 591 So.2d 511 (Ala.Civ.App.1991).

One misconception in relation to this requirement is that since *Ala. Code* §6-6-227 appears in the Declaratory Judgment Act in the *Alabama Code of 1975* such service on the Attorney General is only necessary in suits seeking declaratory judgment. The Alabama Supreme Court has held, however, as follows:

> "in a proceeding in which the constitutionality of a state statute is challenged, *Code of 1975,* § 6-6-227, requires that "the attorney general of the state shall also be served with a copy of the proceedings and be entitled to be heard." This Court has determined that "service on the Attorney General, pursuant to § 6-6-227, is mandatory and jurisdictional," regardless of whether appellants' action was brought as a declaratory judgment action." *Wallace v. State*, 507 So. 2d 466, 468 (Ala. 1987), quoting *Barger v. Barger,* 410 So.2d 17, 19 (Ala.1982).

If you have not served the attorney general in this situation, at least you are not alone. A cursory review of caselaw on this issue will reveal that this obscure requirement is commonly overlooked. Judge Wright voiced his dissent of this requirement

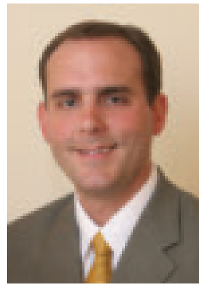
in *Guy v. Southwest Council on Alcoholism*, 475 So. 2d 1190, 1192 (Ala. Civ. App. 1992), stating:

> "The majority has directly held that if 'a party challenges the constitutionality of a state statute and fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claims and its decree is void.' With that holding, the judgments in hundreds of cases in which constitutional defenses or issues were raised and decided, as in this case, without notice to the attorney general, are rendered void. This court has heretofore entertained and decided many of them on appeal. This decision has obvious far-reaching consequences. The attorney general is going to be very busy." *Guy v. Southwest Council on Alcoholism*, 475 So. 2d 1190, 1192 (Ala. Civ. App. 1992).

Clearly, the failure to serve the attorney general's office when required in *Ala. Code* §6-6-227 can be harsh. The most ironclad constitutional argument attacking a statute can be rendered meaningless if this requirement is not complied with. It is also important, however, to note what is not contained in *Ala. Code* §6-6-227. This section does not require service on the attorney general for all constitutional arguments, but only those that directly challenge a state law.

Conclusion

Lessons can be learned from each and every case you litigate. I hope some of these examples of lessons I have learned will be useful to you and will prevent some accelerated heart rates and cold sweats that I have unfortunately already experienced. From one young attorney to another, I encourage you to deal with mistakes aggressively and to learn from them, and I wish you the best in your practice.



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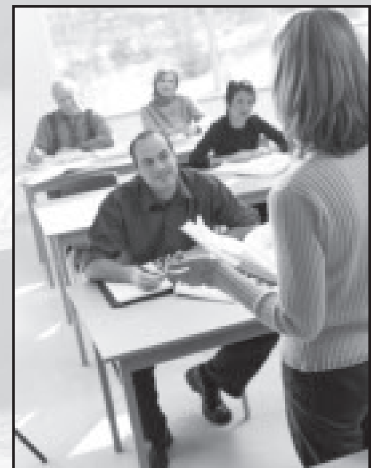

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