

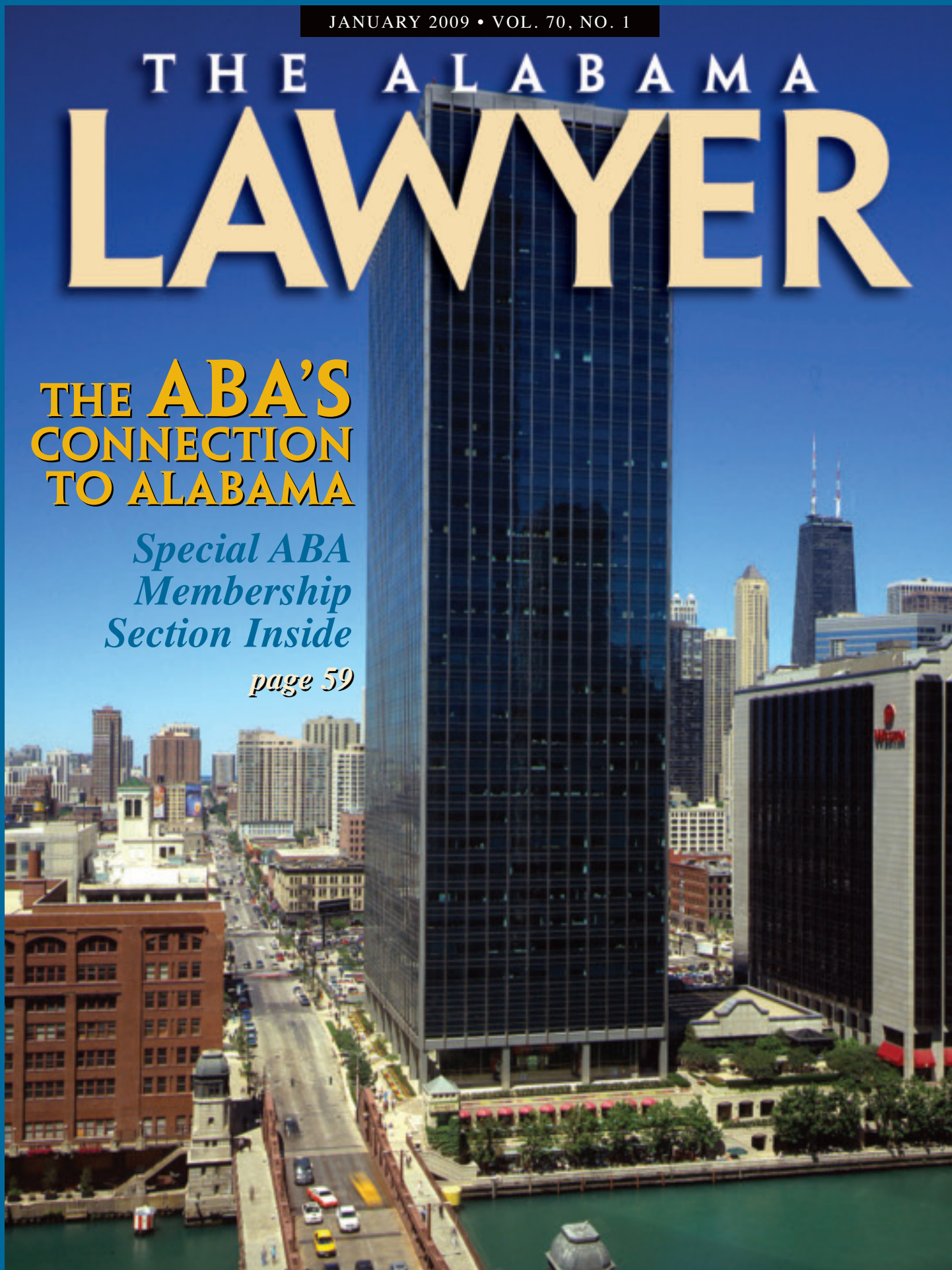
JANUARY 2009 • VOL. 70, NO. 1

# THE ALABAMA LAWYER

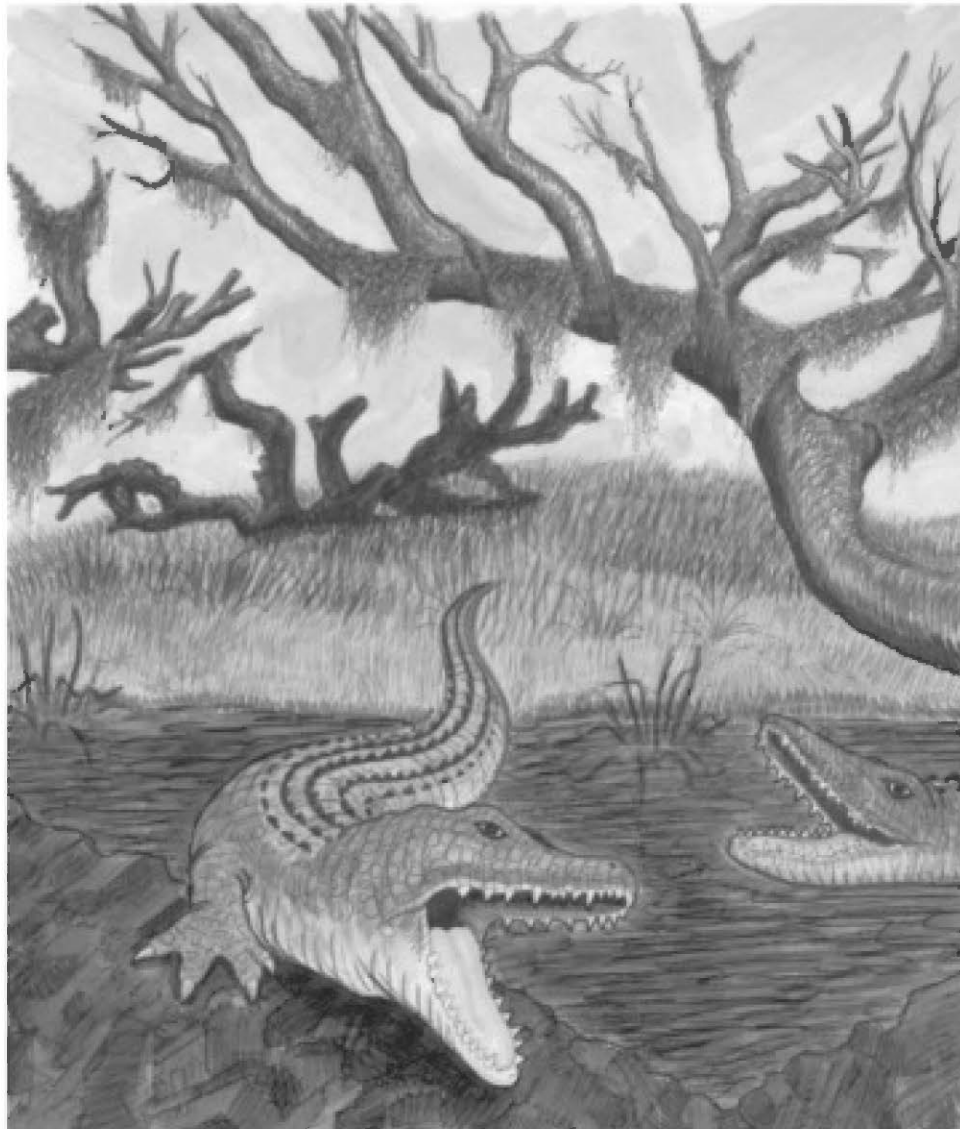
## THE ABA'S CONNECTION TO ALABAMA

*Special ABA  
Membership  
Section Inside*

*page 59*



# Finding Malpractice Insurance Does Not Have To Be A Trip Through Troubled Waters!



**Call AIM.**  
*We Take the Bite  
Out of the Process.*



**Attorneys Insurance Mutual  
of Alabama, Inc.**

200 Inverness Parkway  
Birmingham, Alabama 35242-4813

Telephone (205) 980-0009  
Toll Free (800) 526-1246  
FAX (205) 980-9009

**"A Mutual Insurance Company Organized by and for Alabama Attorneys"**

[www.AttysInsMut.com](http://www.AttysInsMut.com)



# ANNOUNCING

## MED-A-PRO

*the efficient and affordable answer  
to Medical Insurance  
for Members of the*



**ALABAMA STATE BAR**

Now, through ISI ALABAMA'S  
**MED-A-PRO**, Professionals may  
access reputable carriers such as:

- Aetna
- Assurant
- Humana
- United Healthcare
- World

*and many more...*

**MINIMUM PAPERWORK  
MAXIMUM SERVICE**

ISI SALES DIRECT: 1-888-ISI-1959

E-mail: [sales@isi1959.com](mailto:sales@isi1959.com)

Free Online Quotes: [www.medapro.com](http://www.medapro.com)

*Brought to you by:*

**ISI** ISI ALABAMA  
a division of  
**INSURANCE SPECIALISTS, INC.**  
EST. 1959

\*Also Available to Member Spouses, Dependents, Member Employees, and their Eligible Family Members



After 50 years, we were ready for a makeover!

AB<sup>1</sup>CLE

is now

CLE ALABAMA

Advancing your practice

Same high-quality programs

**New cutting-edge customer service**

We're celebrating 50 years of service by giving you **CLE the way you want it**. We've updated the way we do business to bring you the essential information you need to advance your practice.

- ▶ Register on our new user-friendly website
- ▶ Pay online with check, debit, or credit card
- ▶ Choose how we contact you, and on what topics
- ▶ Select among live, online, and telephone programs
- ▶ Tell us what programs you need to succeed!

Spring 2009  
**Calendar**

## FEBRUARY

- 13 Banking Law *Birmingham*
- 20 Elder Law *Birmingham*
- 27 Workers' Compensation Law *Birmingham*

## MARCH

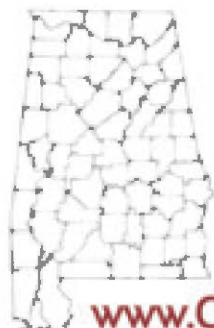
- 6 Adoption Law *Birmingham*
- 27 Trial Skills Seminar *Birmingham*

## APRIL

- 3 Domestic Relations Practice *Birmingham*
- 17 Depositions *Birmingham*
- 24 Article 9 Update *Birmingham*

## MAY

- 8-9 City/County Government Law *Orange Beach*



[www.CLEalabama.com](http://www.CLEalabama.com)

THE UNIVERSITY OF  
**ALABAMA**  
SCHOOL OF LAW



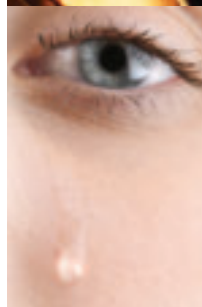
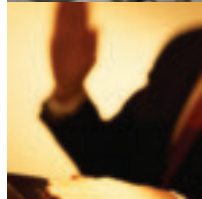
## ON THE COVER

The American Bar Headquarters was dedicated July 2004 and is also home to the American Bar Endowment, American Bar Insurance, American Bar Retirement Association, American Lawyers Auxiliary, and National Association of Women Lawyers. The American Bar Foundation is housed at another downtown location.

The lobby features an artistic etched-glass wall installation featuring key moments in legal history including the Magna Carta, the Mayflower Compact, the Declaration of Independence and the United States Constitution. Founded in Saratoga Springs, N.Y. in 1878, the ABA has been headquartered in Chicago since 1926. With more than 400,000 members, it is the largest voluntary professional membership association in the world. The ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

## IN THIS ISSUE

- 24** ASB Fall 2008 Admittees
- 34** ASB Reaches Membership Milestone: Birmingham Lawyer Cristina Rodriguez Recognized as 16,000th Member
- 36** Gary Wolfe: A Lawyer Serving His Community through Coaching  
By Harold Stephens
- 38** The New and Expanded Americans With Disabilities Act  
By Sandra B. Reiss and J. Trent Scofield
- 44** A Guide to Impeachment in Federal and Alabama State Courts  
By Terry McCarthy
- 52** Legal Stressors on Proving Recoverable Damages for Mental Anguish  
By Erik S. Heninger
- 59** AMERICAN BAR ASSOCIATION:
  - The American Bar Association: A Valuable Resource  
By Keith Norman
  - ABA Membership Has Broadened My Horizons  
By Patricia Lee Refo
  - Alabama State Bar Provides Rich Heritage of Support for the American Bar Association  
By Henry F. White, Jr.
  - Alabama Provides Fertile Ground for Growing ABA Leaders  
By H. Thomas Wells, Jr.
  - I Cannot Imagine a Legal Career without Membership in the ABA  
By Elizabeth K. Acee
  - Partnership with the Alabama Legal Community  
By Michelle Behnke



## DEPARTMENTS

- 7** **President's Page**  
*My New Year's Resolutions*
- 11** **Executive Director's Report**  
*ASB's Long-Range Plan: Direction and Accomplishment for the Profession, Part II*
- 17** **Memorials**
- 21** **Important Notices**  
*Judicial Award of Merit  
Local Bar Award of Achievement  
Notice of Election*
- 23** **Bar Briefs**
- 35** **Young Lawyers' Section**
- 65** **Opinions of the General Counsel**  
*Lawyers' Trust Account  
Obligations with Regard to Retainers and Set Fees*
- 69** **Legislative Wrap-Up**
- 73** **Disciplinary Notices**
- 77** **About Members, Among Firms**

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, ***[www.alabar.org/cle](http://www.alabar.org/cle)***.



## ALABAMA STATE BAR STAFF

Executive Director .....	Keith B. Norman
Executive Assistant .....	Diane Locke
Network Administrator .....	Wayne Hughes
Computer Programmers.....	Dolan L. Trout
	Larry Pratt
Scanning Operator .....	Kristi Neal
Web Administrator .....	Willie Murphy
Assistant Executive Director .....	Edward M. Patterson
Administrative Assistants .....	Rita Gray
	Marie Updike
Director of Regulatory Programs .....	Angela Parks
CLE Administrative Assistant.....	Carol Thornton
Regulatory Programs/PHV Assistant ..	Cathy Sue McCurry
Director of Communications .....	Brad Carr
Publications Director .....	Margaret L. Murphy
Communications and Publications	
Assistant.....	Marcia N. Daniel
Membership Services Director .....	Mary Corbitt
Membership Administrative Assistant .....	Emily Farrior
Director of Admissions .....	Dorothy D. Johnson
Admissions Administrative Assistants .....	Heidi Alves
	Sonia Douglas

**ALABAMA STATE BAR CENTER FOR  
PROFESSIONAL RESPONSIBILITY STAFF**



**THE TAPLEY  
FINKLEA GROUP**  
— PLLC —  
*The Alabama Lawyer*  
**GRAPHIC DESIGN**



**davis direct**  
**ready. print. go >>**  
*The Alabama Lawyer*  
**PRINTING**

## Board of Editors

## Officers

## Board of Commissioners

### At-Large Board Members

*The Alabama Lawyer* is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive *The Alabama Lawyer* as part of their annual dues payment; \$15 of this goes toward subscriptions for *The Alabama Lawyer*. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement. Copyright 2009. The Alabama State Bar. All rights reserved.





MARK WHITE

# My New Year's Resolutions

There's a lot of list-making that goes along with the holidays. Lists of holiday card recipients, lists of gifts for both loved ones and tolerated ones, lists of groceries for special holiday meals, and now, lists of New Year's resolutions. Like many of you, my list contains some resolutions that are personal goals and others that are more altruistic. Halfway through my term as bar president, I have also used this time to reflect on where the bar is, and where I would like to see it before next July. Here are my New Year's resolutions.

My first resolution is to move forward the cause of judicial campaign reform. As we continue to work toward a non-partisan method of selecting our judiciary, there's a new front in this battle. It frankly does not matter whether you favor or oppose merit selection in order for you to be offended by this latest effort against the cause. I have come to call it "Bar Bashing." The argument is that merit selection is wrong because lawyers can't be trusted to

## PRESIDENT'S PAGE

Continued from page 7

be involved in the process. The fact they represent clients, the argument goes, means that they are biased and can't make a fair recommendation. The message is simply, "Lawyers are intellectually dishonest." Some of the ways they convey this message are through buzzwords like "accountability" and statements like "elections are the only way to get 'information' to the public." Do any of you think the political ads we see in these races provide intelligent information? Make no mistake: this is a very organized, national effort that is grounded in a fundamental goal of diminishing the reputation and role of lawyers in our society. We must work together to show the public, and some members of our own organization, that attorneys are capable and ready to lead in this fight. Few, if any, lawyers haven't had the experience of a friend or acquaintance coming up to them and asking who they should vote for as judge. We obviously have the respect of those who know us, so why should we, as a group, be eliminated from the merit selection process? We must not let the efforts of the few tarnish the good names of the many. When we let people compromise our reputation and our integrity and we say nothing, we cast a vote for the perception of a biased and bought judiciary.

There is much work to be done before we move to a system of merit selection, which brings me to my second, "in the meantime" resolution: clean judicial campaigns. Sometimes life just doesn't go according to my plan. I didn't plan for this to be one of my resolutions. My plan was to write to you all in celebration of the achievement of two positive and uplifting supreme court campaigns. We all wanted this year to be different. We believed that the candidates running for a seat on the highest court on our state could run better, cleaner, issue-driven campaigns. Unfortunately, that is not where we find ourselves. Equally, if not more disturbing to me, was the insistence by some third-party groups on using the bar as part of their campaign message. This conduct was offensive in and of itself, but the false information

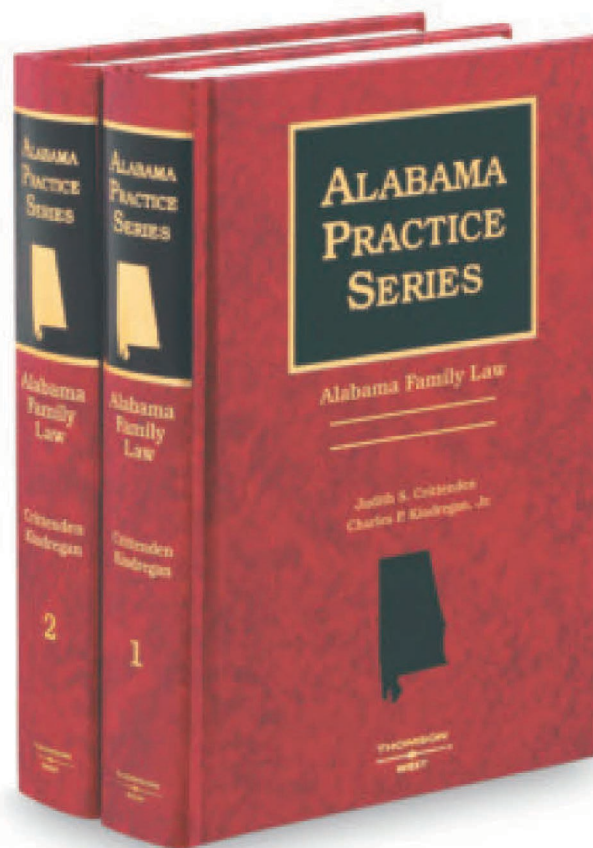
about the bar in those messages required a response. Every effort was made to get the false information removed and retracted, but in return we just got "spin." I think this response I received from a campaign consultant sums up the problem well: "I receive no benefit from reform, but until some people take action, I will treat this campaign like any campaign, and I will not 'play nice' if that hinders winning." Our judicial candidates must control their campaigns and not be controlled by their campaigns. Please know that the bar is pursuing every opportunity to hold these third-party groups accountable. Abuse of this bar cannot, and will not, be tolerated.

I don't want this fact to be lost in the muck of this campaign season: every other statewide judicial campaign was positive and uplifting, and I have written all of those candidates a letter thanking them for their conduct. I also applaud the hard work of Judge Bill Gordon and the Judicial Campaign Oversight Committee. Judge Gordon's best work never sees the light of day. His committee, as well of the work of the bar on this issue, is to be commended. Despite these encouraging developments, we once again hold the dubious distinction of having had the most expensive (and likely one of the most negative) supreme court race in the country. In the words of a friend, "Whether the glass is half-empty or half-full matters not to the person who has to wash the glass."

While we have made some much-needed progress, there is still much that we need to do. I got lots of contacts during the election and afterwards asking, "Can't the bar do something?" Actually, we did a lot, and now is the time to accomplish real change before 2010. Like our bar, the American Bar Association is also dedicated to helping maintain a fair and impartial judiciary, and we must not overlook opportunities to work together. This year, ABA President Tommy Wells formed the ABA Presidential Commission on Fair and Impartial State Courts. A national group working for change, the Commission will meet in Charlotte May 7-9, 2009, under

(Continued on page 10)





# INTRODUCING ALABAMA FAMILY LAW

(ALABAMA PRACTICE SERIES) by *Judith S. Crittenden* and *Charles P. Kindregan Jr.*



**Judith S. Crittenden**  
 Founder, shareholder, and  
 partner in THE CRITTENDEN  
 FIRM, P.C.



**Charles P. Kindregan Jr.**  
 Distinguished Professor for  
 Research and Scholarship  
 Suffolk University Law School

- Comprehensive two-volume treatise covering all aspects of Alabama family law
- More than 200 sample forms, clauses, and letters
- Extensive citations to case and statutory law
- Explains interrelationship of state, federal, and international family law topics

For more information, please call 1-800-344-5009.

WEST.THOMSON.COM

**WEST.**



THOMSON REUTERS™

© 2008 Thomson Reuters. L-14562712-08  
 Thomson Reuters and the West logo are trademarks of Thomson Reuters.

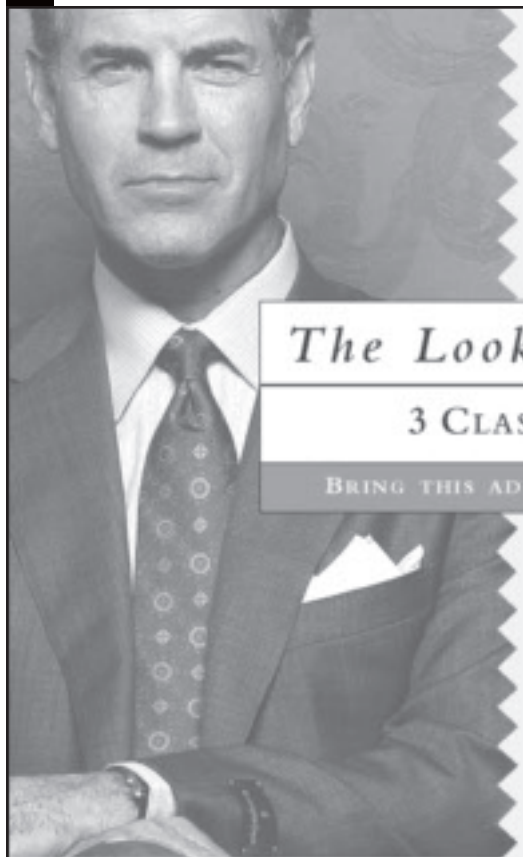
## PRESIDENT'S PAGE

Continued from page 8

the theme of "Justice as the Business of Government: A Fair and Impartial Infrastructure for Our State Courts." I appreciate Tommy's presenting this issue on the national stage, and look forward to the opportunity to learn from those who assemble in Charlotte.

I want us to get the same kind of concerted effort on judicial campaign reform we got on attending to the IOLTA problem. Lawyers, legislators and bar leaders at the state and national level were well-coordinated and committed to the cause. I did not enjoy or welcome the problem, but watching this group unite and work in concert was inspiring. Our bar can and should address the pressing issues of our day, directly and with the passion

and candor befitting our professional calling. As I told all of you who were in attendance at the Annual Meeting, *you* are the bar, and I will insist that your question not be, "Why isn't the bar doing something about judicial campaign reform," but, instead, "Why aren't we doing something about judicial campaign reform?" We will be outlining our plan soon, and in the meantime, we invite your suggestions, comments and criticism on how we can speak with one voice to achieve the kind of judicial campaign reform that Alabama needs. I consider these the resolutions that are closest to my heart, and those for which I will work most earnestly in the upcoming year. Join me in fighting this good fight. ▲▼▲



Our famous suit package includes three classic Graham & Gunn year round 100% tropical weight wool suits—or substitute a blazer and trouser for one suit—for only \$1,295, a *15% savings*. And ask about our *no interest* financing option. Call Tom, Josh, Hunter or George.

*The Look of Success for Less*

**3 CLASSIC SUITS FOR \$1,295**

BRING THIS AD IN FOR *\$50 Off* YOUR SUIT PACKAGE.

Whether you are a senior partner or associate, we offer the finest men's clothing in Alabama. From our classic suit packages to exceptional quality from names like Canali, Hickey Freeman, Zanella, Robert Talbott and Samuelsohn. With personal service that is second to none.



THE LOCKER ROOM

1717 CARTER HILL ROAD MONTGOMERY 334.262.1788 TUES-SAT 9AM-6PM WWW.TLRCLOTHIERS.COM





KEITH B. NORMAN

## ASB's Long-Range Plan: Direction and Accomplishment for the Profession, Part II

In the November issue of *The Alabama Lawyer*, I highlighted many of the accomplishments under the first two goals of the Alabama State Bar's Long-Range Plan ("LRP"). As you recall, the first two goals of the LRP are:

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

***II. Advance Improvements in the Administration of Justice.***

In this concluding segment, I will highlight a few of the accomplishments under the LRP's last three goals.

***III. Maintain an Effective State Bar Organization and Structure.***

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

***B. Aggressively advocate issues which promote the bar's mission statement and do so in a manner which minimizes fragmentation among its members.***

***1. Regarding political or ideological issues, the bar should take positions and/or utilize its resources only with respect to those issues which are germane to the bar's stated purposes, such as regulation of the legal profession, the improvement of the quality of legal services and of the administration of justice, and the promotion of the public's understanding of and respect for the law.***

# EXECUTIVE DIRECTOR'S REPORT

Continued from page 11

## ***2. Monitor and, if appropriate, act on the current issues concerning the regulation of the profession which include, among others, federal efforts to regulate lawyers, multi-jurisdictional practice initiatives and pro hac vice admission rules.***

An important factor in the soundness of the bar's operation is its continued independence, particularly of the bar's governing authority, the Board of Bar Commissioners ("BBC"). The BBC's independence is due in large measure to two things: Commissioners are elected by lawyers from their circuit and the number of commissioners—72 (63 who are elected and nine at-large members selected by the commission). Although the BBC's size has helped it maintain independence, it has not limited its effectiveness. Likewise, the BBC's size has allowed commissioners to thoroughly vet issues before it in a fashion that reflects the views of virtually all Alabama lawyers.

The LRP's Mission Statement has been the pole star to guide the bar in pursuing the plan's goals. The Mission Statement reads:

### ***The Alabama State Bar is dedicated to:***

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

With all lawyers being required to be a member of the bar, the BBC has been sensitive to this fact without taking positions on matters that are outside the bar's purview as the licensing and regulatory authority of lawyers in Alabama and its mission to serve the profession, enhance the administration of justice and promote the rule of law while attempting to address issues affecting the profession.

## ***C. Maintain the financial health of the bar and its components.***

- 1. Maximize the purpose and utilization of the state bar foundation.***
- 2. Monitor income and expenses and develop new revenue sources.***

## ***D. Enhance the network of local and specialty bars.***

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

## ***E. Promote an effective structure of service by Bar Commissioners.***

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

The fiscal operations of the bar are sound. The BBC and bar staff are good stewards with bar revenues and expenditures. Several factors have made fees and dues increases infrequent (five increases in 50 years). First, the number of bar staff is small relative to the many responsibilities with which the bar is charged, e.g., conducting the bar examination, administration of discipline, regulation of MCLE and operation of the Client Security Fund, as well as the many programs offered by the bar. Second, we have benefited from technology, e.g., online payment of licenses and dues, which has allowed the bar staff to operate very efficiently. Finally, thanks to the bar's forward thinking predecessors, the Alabama State Bar Foundation ("ASBF") was established to serve as the landlord of the bar. This arrangement gives the BBC flexibility to manage the premises and facilities for the ultimate benefit of the bar and its members. Despite the efficiency at which the bar currently operates, there are still additional opportunities to increase efficiency and keep staffing levels stable. Nevertheless, because the cost of operations continues to escalate each year, investigating possible non-dues sources of revenue is necessary.



The bar generally conducts more than 50 Road Shows at local bar associations throughout the state each year. A typical Road Show features bar staff members discussing different topics that qualify from one to three hours of CLE credit for local bar members. There has been very little interest exhibited by local bar members for regional groups. Consequently, there has been little impetus for creating regional bar groups. To strengthen the bar's relationship with local bars, local bar officers are invited to attend the regular BBC meetings to observe the BBC and facilitate networking with state bar leaders.

Technology saves the bar from printing and mailing agendas and accompanying written materials commissioners before each BBC meeting. The meeting materials are turned into electronic documents which commissioners can access in advance of the meeting. Similarly, the agendas for each meeting are posted on the bar's Web site as are the minutes of each meeting following their approval by the BBC. This has saved thousands of dollars on postage and printing costs, not to mention staff time.

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

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

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

A special video was developed and first displayed on the bar's Web site in 2007 to acquaint new admittees with the bar's operations as well as programs and benefits. Each new admittee was sent a link to the short video presentation in order to access it. The Leadership Forum has evolved and improved in its first few years to become a model program for other bar associations across the country. Nearly three years ago, the BBC recommended two rule changes to the supreme court. These changes, adopted

by the court, are the Approved House Counsel Rule (AHCR) and admission by motion (Rule III of the Rules Governing Admission to the Alabama State Bar) for lawyers from jurisdictions who will admit Alabama lawyers on the same terms. So far, neither rule change has resulted in a flood of AHCR or Rule III applications. Both recommendations were made by task forces of limited duration that expired once the reports to the BBC were made. The bar now has fewer standing committees than in past years because of the use of task forces and ad hoc groups to study specific problems or time-restricted issues.

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

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

**A COMPREHENSIVE GUIDE TO DUI  
AND TRAFFIC LAW IN ALABAMA**

**Only \$75 plus shipping & handling**



ALABAMA DUI, TRAFFIC, and  
DRIVER LICENSE LAW HANDBOOK

William M. Bowen  
and  
Patrick Mahaney

Second Edition

**A MUST FOR EVERY ALABAMA LAWYER.**

**ORDER NOW!** Send Name, Shipping Address and Phone # to:

**Alabama DUI Handbook**  
P.O. Box 242324  
Montgomery, AL 36124

**Total Price \$83.50**

(334) 264-5054

# EXECUTIVE DIRECTOR'S REPORT

Continued from page 13

***B. Promote the programs and resources of the bar by making access to resources "user-friendly" and a "first choice" for lawyers.***

- 1. Consider how a "Bar Concierge Service" might operate.***
- 2. Develop benefits programs, such as health insurance, and other programs which assist in a) professional, b) economic and c) personal development for lawyers. Customize, package and promote member benefits and services to various categories of members, such as developing "suites of benefits" targeting varied practice settings and specializations.***

The completed Quality of Life Survey provided insight to the attitudes about Alabama lawyers' career satisfaction and personal quality of life. As noted in the November article, we have had several initiatives to address some of the concerns noted in the survey, including targeted programs at the bar's annual meetings and providing all members with the online magazine, *Complete Lawyer*, which contains useful articles to help lawyers deal with career, family and health issues. A subcommittee of the bar's Quality of Life Committee has offered to counsel law students at the five in-state law schools about the tremendous burden of shouldering a large student debt upon leaving law school. The Alabama Law Foundation ("ALF") has also investigated ways to address the high student debt load through some type of loan forgiveness program.

Consistent with the LRP, the bar has increased the number of free or low-cost benefits it offers members and strengthened its member-directed programs, including the Practice Management Assistance Program (P-MAP) and Alabama Lawyers' Assistance Program (ALAP). At present, the bar provides more than 20 member benefits that are explained on the bar's Web site. These benefits provide bar members with lower cost products such as insurance or free services like CaseMaker, a Web-based legal research tool. These products and services not only can save a lawyer money but also help improve a lawyer's practice.

***C. Encourage lawyer participation in meaningful ways on committees, in sections and in other bar***

***roles, including promotion of a "menu" of opportunities for participation in the bar.***

***D. Maximize the use of technology for effective communications.***

- 1. Develop video meetings and online collaboration so that rural members can easily participate.***
- 2. Anticipate that technology and the Internet will be the communication medium of choice for members.***
- 3. Study and report how the "virtual law office" of the future operates and affects the bar.***
- 4. Position the bar to understand and anticipate technology as it affects a) the practice of law, b) member relations, services and communications and c) the public and stakeholders.***

Service on committee and task forces is important because the bar is a volunteer-driven agency. As suggested by the LRP, an effort has been made to streamline the process with an online sign-up for participation. The bar is developing an electronic archive of committee rosters to have a record of committee service and participation. Likewise, the bar is now making extensive use of telephone conferencing and has updated its video equipment to facilitate more video-conferencing for committee and task force meetings. Not surprisingly, because teleconferencing eliminates the need to travel for meetings, the level of member participation on committees and task forces has improved.

To make communication with bar members more cost effective, year before last, the BBC adopted a "blast e-mail" policy. The bar has also developed a "listserv" capability and is currently working on being able to offer sections, committees and task forces the ability to have "discussion groups." The bar will continue to emphasize [www.alabar.org](http://www.alabar.org) as the information portal for members (including the members'-only password-protected area) and an access point for public information about the legal profession in Alabama. Finally, last year the bar introduced the "I-Profile" for members. This allows them to receive communications from the bar in their

preferred format—electronically or by regular mail. Member preference will become more critical in future years as the bar continues to add publications and other communications to the I-Profile menu of options.

**E. Expand opportunities for CLE online and by dvd.**

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

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

As noted in the previous article, an extensive review and revision of the MCLE Rules and Regulations are underway. The bar works closely with all CLE providers, especially our

two largest in-state not-for-profit providers, CLE Alabama (formerly ABICLE) and CICLE, who do an excellent job in providing Alabama lawyers with high quality and reasonably priced seminars and online programs.

The bar has a very good working relationship with the Commission on Access to Justice, the Chief Justice's Commission on Dispute Resolution, the Alabama Supreme Court Commission on Dispute Resolution, the Alabama Law Institute, Alabama Appleseed, and various specialty bars in the state. Working cooperatively with each of these groups, among others, helps the bar fulfill its mission to bar members and the public alike. In addition, the bar has used its partnership with the Alabama Broadcasters Association to conduct recent media campaigns on both radio and TV stations across Alabama that are not just generic messages but are targeted to highlight bar programs, services or publications. Recent examples of these include our campaign

## NOTICE

### **Adoption of Rules 71B and 71C, *Alabama Rules of Civil Procedure*, and Amendment of Rule 4(a)(1) and Adoption of Rule 4(e), *Alabama Rules of Appellate Procedure***

The Alabama Supreme Court has adopted Rule 71B and Rule 71C, *Alabama Rules of Civil Procedure*, and has amended Rule 4(a)(1) and adopted Rule 4(e), *Alabama Rules of Appellate Procedure*. The amendment and adoption of these rules are effective February 1, 2009. The orders adopting Rule 71B and Rule 71C and amending Rule 4(a)(1) and adopting Rule 4(e) appear in an advance sheet of *Southern Reporter* dated on or about January 1, 2009. Rule 71B, “Appeals from Arbitration Awards,” sets out the method for taking an appeal from an arbitration award and supersedes the procedure set out in *Ala. Code* 1975, § 6-6-15. Rule 71C governs the enforcement of arbitration awards. The amendment to Rule 4(a)(1) and the adoption of Rule 4(e) incorporate into the *Rules of Appellate Procedure* the method for taking an appeal from an arbitration award set out in the newly adopted Rule 71B. The text of these rules can be found at [www.judicial.state.al.us/rules.cfm](http://www.judicial.state.al.us/rules.cfm).

– Bilee Cauley, reporter of decisions, Alabama Appellate Courts

## CORRECTION:

A correction needs to be made and noted to the article “The Current Status of Judicial Accountability” by J. Douglas McElvy which appeared on pages 426-433 of the November 2008 *Alabama Lawyer*. On page 428, it should have read, “In the 26 years of the JIC’s existence prior to the 2001 amendments, thousands of inquiries were made to the JIC but only 3,939 inquiries resulted in the filing of formal complaints before the JIC. Obviously, the vast majority of inquirers did not pursue their concerns after gaining information from the JIC’s staff about judicial ethics, the JIC’s authority and the requirements for a complaint. Of the inquiries that resulted in formal complaints, only 27 complaints progressed to charges being filed with the Court of Judiciary. This represents **only .68 percent** of the formal complaints filed by the JIC before the Court of the Judiciary.” [emphasis added in correction]



# EXECUTIVE DIRECTOR'S REPORT

Continued from page 15

on advance directives, the debate on a new constitution and the bar's cooperation with Legal Services Alabama to deal with the mortgage crisis situation in Alabama.

## ***V. Advance the Principles of Diversity.***

***1. Promote racial, ethnic, gender, age, and geographical diversity among all programs and components of the bar, including leadership, staffing and composition of committees, sections and local bars.***

***2. Promote continuation of diversity principles in law school admissions.***

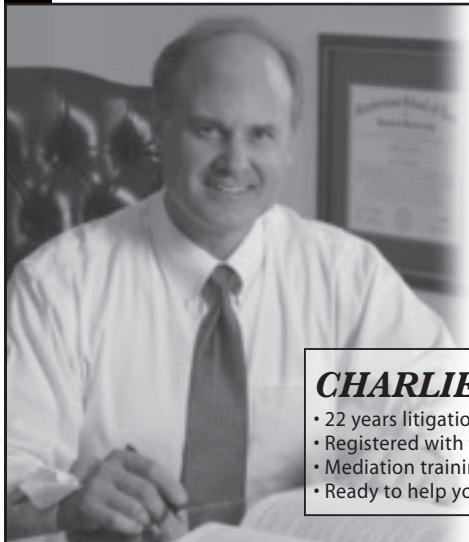
***3. Promote opportunities for women and minorities in the legal profession.***

The BBC and bar officers have made a concerted effort to promote inclusion in all areas of bar participation and leadership. Several years ago, the BBC took the initiative, following a recommendation of the Diversity in the Profession Committee, to request that the legislature enact legislation permitting the commission to increase its gender, racial and geographic diversity by selecting at-large members. This change has increased the BBC's diversity, in particular, by adding blacks, females and younger lawyers. In addition, the BBC has made appointments to

the executive council in the last several years that have been both diverse and representative. Bar presidents have conscientiously supported diversity through committee appointments and staffing at the state bar.

For many years, the Young Lawyers' Section ("YLS") of the bar has conducted a law conference to introduce minority high school students to consider pursuing legal careers. Last summer, this program, which has been conducted by the YLS since the early 1990s, received the American Bar Association's Young Lawyers' Division Achievement Award. Our in-state law schools recognize this is one of best ways to attract more minorities to their schools by increasing the number who are interested in applying for admission. Although much progress has been made, the LRP not only acknowledges but *stresses* that the bar continue the advancement of the principles of diversity.

In conclusion, the officers and the BBC have not allowed the LRP to become a static document. The bar's leaders have made a concerted effort to advance the LRP's five goals by the manner in which the bar's resources have been applied, how the staff has been directed and in the committee and task force charges and section initiatives. The LRP has been a useful guide that has allowed the bar and the legal profession to make significant strides since its adoption. ▲▼▲



## Client problems?...

### *Give me a call!*

Often times, difficult clients can make even the most straightforward case seem impossible to manage. Personalities come into play creating obstacles to resolution and a case that should be settled ends up on the trial docket. The right mediator can help you with your client and help you move on to a better use of your time than trying cases that should be settled.

#### ***CHARLIE ANDERSON, Mediator***

- 22 years litigation experience in 38 Alabama counties
- Registered with the State Court Mediation Roster since 1994
- Mediation training completed at the Harvard Law School
- Ready to help you find resolution and to bring peace to adverse parties

#### **Charles L. Anderson**

7515 Halcyon Point Dr.  
Montgomery, AL 36117  
(334) 272-9880

[www.andersonmediationservice.com](http://www.andersonmediationservice.com)

## John Nathanael Bryan

John Nathanael Bryan, a member of the Jefferson County Bar Association for more than 23 years, died August 25, 2008.

Nat was a partner at the firm of Marsh, Rickard & Bryan, PC in Birmingham. His partners and colleagues at the law firm will miss him dearly.

He is survived by his wife, Ashley Butler Bryan; his children, Jack Bryan and Kate Bryan; his parents, Jefferson County Circuit Judge John Newton Bryan, retired, and Susan Baarcke Bryan; and his sister, Sandra Bryan Vitalis.

Nat was deeply devoted to his family. He adored Ashley, his wife of 17 years, and a 1992 graduate of Alabama School of Law. Just as Nat learned to hunt and fish from his father, Nat passed on his love of the outdoors to his 14-year-old son, Jack. Nat took great delight in the adventures of his 12-year-old daughter, Kate.

Nat graduated from W.A. Berry High School in 1978, lettered in three sports and was a member of the Berry 1977 State Championship football team. Nat was a 1982 graduate of Auburn University and loved to follow Auburn's football program. Nat graduated *cum laude* from the Cumberland School of Law in 1985. Nat was a member of the Alabama Association for Justice and a Fellow of the American Board of Trial Advocates. For years, he was very active in the Birmingham Bar Association, and its charitable arm, the Birmingham Bar Foundation.

As his partners and colleagues at Marsh, Rickard & Bryan will tell you, Nat Bryan was just a lot of fun to be around, whether you were trying a lawsuit—which Nat did very passionately and very well—or simply riding down the road sharing a bag of sunflower seeds (another passion of Nat's). Only rarely did you go into Nat's office, or he into yours, that he would not share a funny story with you and absolutely brighten your day.

Each and every one of us who were fortunate enough to call Nat friend or family shall miss his warmth, his smile and his robust laugh.

—Susan J. Silvernail, Marsh, Rickard & Bryan, PC, Birmingham



JOHN NATHANAEL BRYAN

DOUGLAS CHARLES  
FREEMAN

ARTHUR EMMETT  
GAMBLE, JR.

LAWRENCE B. SHEFFIELD, III

## Douglas Charles Freeman

Douglas Charles Freeman was born May 9, 1950 and died October 29, 2008. Doug attended public schools in Montgomery and was always proud to call Montgomery his home. He received a BS in English and Social Sciences from Troy State in 1972 and eventually went to work for the Department of Human Resources as a social worker. While working full-time and raising a family, he attended Jones Law School at night and received his Juris Doctorate in 1981. He practiced as a solo practitioner specializing in the areas of family law and criminal defense work.

I first met Doug when I was a new assistant district attorney. Who was this attorney who always wore stylish hats with every suit and walked at an extremely rapid pace? After getting my clock cleaned on more than one occasion in court, I found out very quickly that this attorney was one of the best criminal defense attorneys in Montgomery. After leaving the District Attorney's Office, our paths rarely crossed again.

In 1998, I was elected to replace Judge William R. Gordon who was retiring from the bench. Doug was one of Judge Gordon's contract defense attorneys and I was thrilled that he agreed to stay on with me. He truly loved representing



## MEMORIALS

Continued from page 17

criminal defendants and worked tirelessly in preparing for court. I watched Doug for many years conduct numerous trials in my courtroom and his knowledge in the area of criminal law was second to none. He came to share my passion in the area of restorative justice and served as a criminal mediator, victim-offender facilitator and circle keeper for criminal sentences. He taught numerous CLE's in the area of restorative justice and criminal law. One year, he presented a seminar entitled "The Nuts and Bolts of Practicing Criminal Law." The handout was so well written that lawyers still refer to it in their practice and often make copies to give to new attorneys. Lawyers would call Doug at all hours of the day or night to ask him questions in the area of criminal law or to get copies of the numerous forms and documents that he had created. He had a wonderful sense of humor and won first place one year at our courthouse Halloween carnival when he came dressed up in his bathrobe. His true love was Starbucks coffee and he never missed stopping by in the morning to get his five shots of espresso in his Latte.

Doug was eccentric and memorable! He was a true philosopher and gentle soul who struggled with life's inequities and how to make the world a better place. I never knew his IQ, but I am sure that he was somewhere on the genius level. He will be missed by his children, Allison and Zack, and his new grandson and namesake, Charles.

Thanks for all the wonderful memories and making all of us who knew you better people just for having had you in our lives.

*—Judge Tracey McCooley,  
15<sup>th</sup> Judicial Circuit, Montgomery*

### Arthur Emmett Gamble, Jr.

Arthur Emmett Gamble, Jr. was born in Greenville February 9, 1920 to Arthur and Bettie Steiner Gamble and died July 17, 2008. He attended Greenville schools and graduated from Marion Military Institute High School. He also attended college there for one year. He transferred to the University of Alabama and entered the College of Arts and Sciences. While at the University of Alabama, he became a member of Sigma Nu fraternity and served as commander of the chapter. He was also on the university's golf team.



Immediately following the Japanese attack on Pearl Harbor, Gamble joined the Navy and became a pilot of patrol planes. He served with distinction in the Caribbean and South America and as part of the Navy Patrol Bombing Squadron Twenty-One in the South Pacific in World War II.

After military service with the Navy, Gamble returned to the University of Alabama where he earned his bachelor's and law degrees.

In 1948, he married Roberta Anne Peacock and in 1949 they returned to Greenville for Gamble to begin the practice of law. In the early 1950s, he served two years in the Alabama senate. In 1959, he was appointed to the office of district attorney and ran unopposed for the office in 1962 and 1966. It was during that time that Gamble came to national attention as the prosecutor of Klansmen for the murder of several Civil Rights workers.

He was president of the Alabama Association of District Attorneys and served on the state bar's Board of Bar Commissioners.

In 1969, Gamble was appointed by Governor Albert Brewer to the judgeship of the 2<sup>nd</sup> Judicial Circuit. He served as judge of this circuit until his retirement in 1992.

An avid golfer, Gamble had a lifelong interest in the course at the Greenville Country Club, a course his father had helped design. Gamble had served as president of the country club.

He was a member of the First Baptist Church and for many years he conducted a men's Bible class there.

He is survived by his wife of 60 years, Roberta, and one daughter, the Rev. Eugenia Gamble, Presbyterian Church U.S.A., and her husband, Robert Phillips, of Arroyo Grande, California.

### Lawrence B. Sheffield, III

On September 24, 2008, the Alabama State Bar and the legal community lost a true champion in the constant fight for justice, longtime member Lawrence B. Sheffield, III of Hoover. Larry practiced in Jefferson County and in numerous other courts across the state. He was the managing partner of Sheffield, Sheffield, & Lentine, PC and practiced law for nearly 28 years. He was 56 years old.

Larry's greatest passion, other than his family, was the practice of law, especially criminal law. He had the reputation as a phenomenal trial lawyer and a formidable opponent in



the courtroom. Larry attended the University of Alabama–Birmingham and received his law degree from the Birmingham School of Law. Upon passing the bar he went into practice with his father, Lawrence B. Sheffield, Jr., himself an acclaimed criminal trial lawyer. Father and son compiled a staggering record of victories in court together and separately for nearly 20 years. Following Larry’s father’s death, Larry practiced law with his brother, R. Wendell Sheffield and John A. Lentine.

Out of the courtroom, Larry coached youth baseball, football and softball and passed along his experience and wisdom to many young men and women in those sports,

being an accomplished athlete in baseball and football himself while at Ramsey High School and UAB.

Larry had been a member of the Alabama Criminal Defense Lawyers Association, the American Trial Lawyers Association and the Birmingham Bar Association.

Larry is survived by his wife, Connie Sheffield; his children, Katie, Diana and Larry (IV); and his brothers James, Wayne and Wendell Sheffield.

Larry was the example of a true professional. He was kind, compassionate and respected by all who knew him both personally and professionally. He was truly a lawyer’s lawyer.

–John A. Lentine, Birmingham

<b>Bone, Gary Joseph</b> Gadsden Admitted: 1984 Died: September 11, 2008	<b>Hash, Jessee Dean, II</b> Birmingham Admitted: 1994 Died: January 9, 2008	<b>Lucas, William Ray, Jr.</b> Birmingham Admitted: 1980 Died: September 26, 2008	<b>Sherrill, William Bruce</b> Spanish Fort Admitted: 1949 Died: March 15, 2008
<b>Carr, Jeffrey Byron</b> Guntersville Admitted: 1994 Died: September 22, 2008	<b>Kahlmus, Maurice Fuller</b> Meridian, Mississippi Admitted: 1948 Died: June 22, 2008	<b>Moore, John Lauthlin, III</b> Mobile Admitted: 1942 Died: May 29, 2008	<b>Tune, Billy Gene</b> Florence Admitted: 2004 Died: August 26, 2008
<b>Chestnut, J. L., Jr.</b> Selma Admitted: 1959 Died: September 30, 2008	<b>King, Cecil Bruce</b> Mobile Admitted: 1957 Died: May 30, 2008	<b>Moss, David Charles</b> Alpharetta, Georgia Admitted: 1992 Died: May 6, 2008	<b>Webb, Paul Haymon</b> Birmingham Admitted: 1982 Died: October 2, 2008
<b>Duffey, Walter E.</b> Huntsville Admitted: 1963 Died: March 4, 2008	<b>Kirkland, Reo, Jr.</b> Brewton Admitted: 1977 Died: September 17, 2008	<b>Propst, Jack Edward</b> Kennedy Admitted: 1959 Died: September 22, 2008	
<b>Estes, Phillip Grant</b> Anniston Admitted: 1996 Died: July 18, 2008	<b>Liechty, Nicole McClain</b> Birmingham Admitted: 2003 Died: October 3, 2008	<b>Riley, Richard Spain</b> Birmingham Admitted: 1937 Died: February 1, 2008	
<b>Hand, William Brevard, Hon.</b> Mobile Admitted: 1949 Died: September 6, 2008	<b>Loeb, Robert Hirsch</b> Birmingham Admitted: 1941 Died: March 29, 2008	<b>Rox, Eddie Bernard</b> Bessemer Admitted: 2002 Died: September 30, 2008	

# Alabama Lawyers' Hall of Fame Nomination

The Alabama State Bar will receive nominations for the 2008 honorees of the Alabama Lawyers' Hall of Fame through March 1, 2009. The two-page form should be completed and mailed to:

Sam Rumore  
Alabama Lawyers' Hall of Fame  
P.O. Box 671  
Montgomery, AL 36101

In 2000, Terry Brown of Montgomery wrote Sam Rumore, then Alabama State Bar president, with a suggestion to convert the old supreme court building into a museum honoring the great lawyers of Alabama. Although the concept of a lawyers' hall of fame was studied, the next bar president, Fred Gray, appointed a task force to implement a hall of fame. The Alabama Lawyers' Hall of Fame is the culmination of that idea and many meetings.

## PREVIOUS HONOREES INCLUDE:

### 2007:

John Archibald Campbell (1811 to 1889)  
Howell T. Heflin (1921 to 2005)  
Thomas Goode Jones (1844 to 1914)  
Patrick W. Richardson (1925 to 2004)

### 2006:

William Rufus King (1776 to 1853)  
Thomas Minott Peters (1810 to 1888)  
John J. Sparkman (1899 to 1985)  
Hon. Robert S. Vance (1931 to 1989)

### 2005:

Oscar W. Adams (1925 to 1997)  
William Douglas Arant (1897 to 1987)  
Hugo L. Black (1886 to 1971)  
Harry Toulmin (1766 to 1823)

### 2004:

Dean Albert John Farrah (1863 to 1944)  
Hon. Frank M. Johnson, Jr. (1918 to 1999)  
Annie Lola Price (1903 to 1972)  
Arthur Davis Shores (1904 to 1996)

**To download a printable nomination form, go to  
[www.alabar.org/members/hallfame/halloffame\\_ALH\\_2009.pdf](http://www.alabar.org/members/hallfame/halloffame_ALH_2009.pdf).**



JUDICIAL AWARD  
OF MERIT

LOCAL BAR AWARD OF  
ACHIEVEMENT

NOTICE OF ELECTION

## Judicial Award of Merit

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 16, 2009. Nominations should be mailed to:

Keith B. Norman  
Secretary  
Board of Bar Commissioners  
P. O. Box 671  
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.



# IMPORTANT ASB NOTICES

Continued from page 21

## Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented July 18 during the Alabama State Bar's 2009 Annual Meeting at the Grand Hotel in Point Clear.

Local bar associations compete for these awards based on their size—large, medium or small.

The following criteria will be used to judge the contestants for each category:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2009. Applications may be downloaded from the ASB Web site at [www.alabar.org](http://www.alabar.org) or by contacting Rita Gray at (334) 269-1515.

## Notice of Election

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners*.

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

- 2<sup>nd</sup> Judicial Circuit
- 4<sup>th</sup> Judicial Circuit
- 6<sup>th</sup> Judicial Circuit, Place No. 2
- 9<sup>th</sup> Judicial Circuit
- 10<sup>th</sup> Judicial Circuit, Place No. 1
- 10<sup>th</sup> Judicial Circuit, Place No. 2
- 10<sup>th</sup> Judicial Circuit, Place No. 5
- 10<sup>th</sup> Judicial Circuit, Place No. 8
- 10<sup>th</sup> Judicial Circuit, Place No. 9
- 12<sup>th</sup> Judicial Circuit

- 13<sup>th</sup> Judicial Circuit, Place No. 2
- 15<sup>th</sup> Judicial Circuit, Place No. 2
- 15<sup>th</sup> Judicial Circuit, Place No. 6
- 16<sup>th</sup> Judicial Circuit
- 20<sup>th</sup> Judicial Circuit
- 23<sup>rd</sup> Judicial Circuit, Place No. 2
- 24<sup>th</sup> Judicial Circuit
- 27<sup>th</sup> Judicial Circuit
- 29<sup>th</sup> Judicial Circuit
- 38<sup>th</sup> Judicial Circuit
- 39<sup>th</sup> Judicial Circuit

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1, 2009 and vacancies certified by the secretary no later than March 15, 2009.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 24, 2009).

Ballots will be prepared and mailed to members between May 1 and May 15, 2009. Ballots must be voted and returned to the Alabama State Bar by 5:00 p.m. on the last Friday in May (May 29, 2009). Election rules and petitions are available at [www.alabar.org](http://www.alabar.org).

## At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4 and 7.



**Physician Experts!**  
We have thousands of practicing, board certified physician expert witnesses in all medical specialties.  
☒ Testimony  
☒ Opinion Letters  
☒ Review for merit  
Flat rate referrals; flat rate reviews  
Your satisfaction GUARANTEED  
Med-mal EXPERTS, Inc. [www.medmalEXPERTS.com](http://www.medmalEXPERTS.com)  
**888-521-3601**



- The Council of The American Law Institute recently announced the addition of ASB member **William S. Brewbaker, III** to its membership. Brewbaker is a professor at the University of Alabama School of Law.

- The Alabama Law Foundation announces that **Cullen Brown** is the 2008 recipient of the William Verbon Black Scholarship. The scholarship recognizes Alabama law students who show the promise of continuing Black's legacy of a stellar law career combined with strong character, and specifically those fulltime students at the University of Alabama School of Law (which Brown attends).



*Brown*

- The State Fellows of the American College of Trial Lawyers announce that **Robert C. Brock** of Rushton, Stakely, Johnston & Garrett PA, **Harlan I. Prater, IV** of



*Brock*



*Prater*



*Rogers*

Lightfoot, Franklin & White LLC and **Alan T. Rogers** of Balch & Bingham LLP have been inducted into the Fellowship.

- Bradley Arant Rose & White LLP announces that **William C. Byrd, II**, a partner in the Birmingham office, has become an adjunct professor at Samford University's Cumberland School of Law and is teaching a course in "Commercial Real Estate Finance."



*Byrd*

- Criminal defense lawyer **Tommy Spina** of Birmingham has been named 2009 president of the American Board of Criminal Lawyers (ABCL). ABCL, founded in 1978, is an exclusive society of the nation's best criminal trial lawyers. Spina became a member of ABCL in 1990 and has served as president-elect, vice president, member of the board of governors and treasurer.



*Spina*

- **Sara M. Turner**, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, has been appointed vice chair of the Defense Research Institute's (DRI) Technology Committee.



*Turner*

**WILLIAM S. BREWBAKER, III**

**CULLEN BROWN**

**ROBERT C. BROCK**

**HARLAN I. PRATER, IV**

**ALAN T. ROGERS**

**WILLIAM C. BYRD, II**

**TOMMY SPINA**

**SARA M. TURNER**

# ALABAMA STATE BAR

## Fall 2008 Admittees

(Photograph by FOUTS COMMERCIAL  
PHOTOGRAPHY, Montgomery,  
photofouts@aol.com)



### STATISTICS OF INTEREST

Number sitting for exam .....	468
Number certified to Supreme Court of Alabama .....	345
Certification rate* .....	73.7 percent

#### **Certification Percentages**

University of Alabama School of Law .....	94.4 percent
Birmingham School of Law .....	35.4 percent
Cumberland School of Law .....	92.5 percent
Jones School of Law .....	89.8 percent
Miles College of Law .....	14.3 percent

*\*Includes only those successfully passing bar exam and MPRE*

For full exam statistics for the July 2008 exam, go to [www.alabar.org](http://www.alabar.org), click on "Members" and then check out the "Admissions" section.



# Alabama State Bar Fall 2008 Admittees

Adams, John Quincy  
Akins, William Douglas  
Alexander, Jalon Micah  
Allen, John Robert  
Allender, John Casey  
Ammons, Ryan Whitney  
Anderson, Brett Matthew  
Anderson, Cassidy Lee  
Andrews, Matthew Ian David  
Andrews, Joshua Addam  
Angelichio, Hallie Hill  
Arendall, Edward Hayes  
Ashley, III William Thomas  
Asiyanbi, Samson Oluwasegun  
Askew, Michael Jeffrey  
Badawi, Osama Youssef  
Bailey, John Evans  
Baker, Sr. John Carradine  
Barker, Christopher Lee  
Barnes, Meridith Hamilton  
Barron, Benjamin Huff  
Bates, Shawn Michael  
Baum, Lauren Ashley  
Bawgus, Kimberly Michelle  
Beal, Johnny Brent  
Beaver, Elijah Thomas  
Beckham, Nicholas Joseph  
Beers, Jr. Michael Baird  
Beers, Mary Colleen Black  
Bence, Stacy Gray  
Bernhardt, Sophia Farber  
Berry, Jr. Ronald Ray  
Bobo, Jason Wayne  
Boman, Ontkeno Kentreal  
Booth, Stephanie Lee  
Bowles, John Richard  
Bozeman, Haley Danielle  
Bracewell, Jr. Kenneth Mac  
Brackett, Jr. Thedric  
Brasher, Virginia Denson  
Brinson, Christopher Bennett  
Britton, Sheri Renee  
Brodie, Christopher Wayne  
Brown, Stephanie Ann  
Brown, Holly Jessica  
Brown, Benjamin Joseph  
Browning, Katherine Michele  
Bull, John Nicholas  
Bumpus, IV Robert Franklin  
Burney, Lamar Justin  
Burns, III Harris Stanton  
Burr, Zackery Lee  
Bush, Anthony Brian  
Byram, Kimberly Paige  
Byrom, Charles Edward  
Cahill, Matthew Martin  
Cain, Valerie Millo  
Campbell, Cheryl Dees

Carn, David Alan  
Carter, Nathan Blake  
Casey, Kimberly Paige Janney  
Chambers, Ryan Dickson  
Chambliss, Mandy Doris  
Cillo, Nicholas James  
Clark-Pearson, Lenaa Yvonne  
Clay, Stephen Lawrence  
Coffey, Carla Michelle  
Coffman, Margaret Garlikov  
Cohen, Jonathan Michael  
Cole, John Wesley  
Colvin, Adam Ryan  
Corley, Casey Huddleston  
Cottingham, Kingsley Crystal  
Coumanis, Keri Renee  
Cowan, Robin Guy  
Crockett, Frank Thomas  
Crooker, Benjamin Eric  
Davis, II Stephen Duane  
Davis, IV William Anthony  
Davis, Sharon Marie  
Day, Richard Bruce  
deGruy, Tiffany Johnson  
Denbo, Ariel Barbara  
Denson, Allen Hand  
Denson, Joseph Anthony  
Desai, Sheetal Mayur  
DeWitt, Krista Leigh  
Dimitri, Lauren King  
Dionne, Anna Manasco  
Dobson, Shawanna Rachae'  
Doggett, Patrick Glenn  
Domnanovich, John David  
Drago, Jr. Keith Gaines  
Dugan, Kristy Waldron  
Dugan, Steven Cole  
Duncan, Jr. James Brian  
Eaton, Christopher Dallas  
Eddy, Carrie Burleson  
Elliott, Robert S.  
Ellis, Gregory Francis  
Ellis, Gregory Francis  
Elmer, Lyle Kenneth  
Faulk, Elizabeth Peyton  
Fleenor, Jr. John Robert  
Fleming, Karol Locascio  
Flowers, Katherine Heather  
Ford, Kimberly Adina  
Forehand, Kelly Elizabeth  
Formby, Elizabeth Prim  
Forrester, Randall Keith  
Fouad, Nancy F. Hilmy  
Frieder, Anne Christine  
Friedman, Jessica Mara  
Friedman, Joshua Daniel  
Gandhi, Neeli Dinesh  
Gaxiola, Nicholas Michael

Gerheim, Jordan W  
Gibson, Ginger Erica  
Gibson, Darlene McGough  
Gipson, John Dale  
Gober, Cara Elizabeth  
Goggins, Jason Monroe  
Gooslin, Michele Smith  
Gordon, Lori Newell  
Gray, Carrie Elizabeth  
Grayson, Bryan Andrew  
Green, Anna Christine  
Gregg, Jr. Michael John  
Griffin, Jr. Thomas Parker  
Griffin, Bradford Joseph  
Griffith, Matthew Ross  
Guilliams, Kelli Marie  
Haggard, Jaime LeaAnne  
Hand, III Ivan Lionel  
Hardie, Jessica Christine  
Hardy, Jessica Isabelle  
Hargett, Dustin Brent  
Harris, Matthew Mosley  
Harris-Walton, Josie Joan  
Hartjen, Nancy Lynn Carty  
Hawkins, Kelly Burns  
Hawthorne, III Robert Edwin  
Henson, Sarah Frederick  
Hines, Emily Frances  
Hines, Nicholas Skyler  
Hogan, Jamin Wayne  
Hogan, Cameron Lee  
Holifield, Ann Wilson  
Hornsby, Matthew Joseph  
Howell, Carmen Francis  
Hubbard, John Crad  
Hughes, Michael Langston  
Hughston, III Harold Vaughan  
Humber, David Hammond  
Hunter, Robert Ely  
Huntley, Mark Benjamin  
Hutchinson, Courtney Aleece  
Hutchison, Matthew Daniel  
Hynum, Julie Doughty  
Ikard, Thomas William  
Inge, Thaddeus Waterman  
Irwin, Mariam Alison  
Isom, Bryant Jackson  
Jackson, Monica Ball  
Jackson, Jody Forester  
James, Cheryl Anne  
Johnson, Benjamin Seth  
Johnson, LaTara Danielle  
Johnson, Joshua Daniel  
Jones, Christina Elizabeth  
Jones, Nicholas Alexander  
Jones, Pamela Tucker  
Jones, Allen Charles  
Jordan, Chase Cameron



**Keith**, Travis Ian  
**Kelley, II** Michael Wayne  
**Kelley**, Kimberly Nicole  
**Kelly**, Justin Howe  
**Kerr**, Jared Gwynne  
**Key**, Mitchell Theodore  
**Kilgroe**, William Whitney  
**Kim**, Sujin  
**Kim**, Doh Ah  
**King**, Andrew Nolen  
**Kinsaul**, Daniel Wallace  
**Klotz**, John Christopher  
**Knapp**, Lisa Michele  
**Korejo**, Ayesha Anna  
**LaMar**, Melani Christine  
**Latta**, Bradley James  
**Lawrence**, John William  
**Laymon**, Matthew Albert  
**Lee**, Christina Shire  
**Lee**, Rebecca Henderson  
**LeMoine**, Robert Edward  
**Lester**, David Alan  
**Liles**, William Walton  
**Lipscomb**, Corey Bennett  
**Lloyd**, John Douglas  
**Lockett, Jr.** Melvin  
**Logan**, Gavin Kenneth  
**Long, III** Henry Sprott  
**Lyons**, Andrea Carol  
**Malbrough**, Trey Joseph  
**Malcom**, Brian James  
**Malcom**, Brooke Garner  
**Marcoux**, Valmore Michel Magloire  
**May**, Dana Michael  
**McCay**, Andrew Steven  
**McClurkin, IV** Samuel Preston  
**McComb**, William Reed  
**McCrary**, Latasha Lanette  
**McCurry**, Steven David  
**McElheny**, John Hollis  
**McGrane**, Ashley Elizabeth  
**McKay**, Gregory Allen  
**McLean**, Katherine Brandon  
**McLeod**, Aaron Gavin  
**McNearney, III** Robert Oliver  
**Meherg**, Heath Edward  
**Merritt**, Rebecca Paige  
**Milam**, Patrick Scott  
**Miles**, Ternisha Ann  
**Miller**, Jennifer Marie  
**Miller**, Joseph Parker  
**Miller**, Zachary David  
**Mills**, Kelly Lynn  
**Mims**, Sean Thomas  
**Mink**, Amanda Lica  
**Mitchell**, Neah Lyn  
**Mobley**, Wesley Scott  
**Moffett**, Adrienne Athedria  
**Moody**, Kimberly Ann  
**Moore**, Bethany Terez Watkins  
**Mooty, III** Harold Dean  
**Morgan**, Jennifer Stapleton

**Morrison**, Jake Lavon  
**Mosley**, Lea Linn  
**Mulvaney**, Patrick Mark  
**Neel**, Preston Hunter  
**Nelson**, Yemisi Snortte  
**Nichols**, John Levi  
**Nichols**, William Steven  
**Nixon**, Brooke Milstead  
**Norris**, Stephen Capps  
**Norris**, Whitney Leigh  
**Nowak**, Lauren Marie Marti  
**Nowell**, Makesha Nicole  
**Olinger**, Christy Leigh  
**Oswalt, III** Guy Coleman  
**Owens**, Richard Rhett  
**Parker-Kynard**, Carnesa Trina  
**Parton**, Larry Jerome  
**Pasley**, Megan Katherine  
**Patten**, Robert MacLean  
**Payne**, Joshua Kerry  
**Pigg**, Melissa Gail  
**Portella**, Victor Martin  
**Pratt**, James Andrew  
**Prendergast**, Walter Patrick  
**Price**, Emily Kornegay  
**Priest**, Laura Lee  
**Pudner**, Stephen Kieran  
**Pullom**, Cynthia Quinish  
**Rahmaan**, Tralia Jamika  
**Reed**, Tamika Henry  
**Reyes**, Luisa Kay  
**Rhodebeck**, Seth Paul  
**Rhodebeck**, Margaret Byrne  
**Richardson**, Daniel Mark  
**Riggs**, Jason Christopher  
**Rigsby**, Nefertari Sudetta  
**Rimmer**, Kelly Joy  
**Roberson**, Jerome Eugene  
**Rodriguez**, Cristina  
**Rogers**, Ashley Brooke  
**Romano**, Patricia Anne  
**Roney**, Kelly Bouldin  
**Ronnlund**, Millicent Worley  
**Ronnlund**, Robert Moore  
**Rubio**, Sigfredo  
**Runge**, John Patrick  
**Rush**, Samantha Bristow  
**Rutter, III** James Henry  
**Ryan**, Mitchell Sager  
**Saad**, James Gordon  
**Samuelson**, Patrick Wesley  
**Sanders**, Harriet Elizabeth  
**Saunders**, Sirena Lourdes  
**Scott**, Tyler Nathaniel  
**Scully**, Matthew Taylor  
**Seymore**, Matthew Alan  
**Shaver**, Russell Alan  
**Shelby**, Jason Matthew  
**Sheppard, Jr.** Timothy Marion  
**Sherman**, Colin Derrick  
**Simpson**, Margaret Eileen  
**Sirmon**, Kellie Segrest

**Skipper**, Shannon Corey Petree  
**Smalley, III** Jack  
**Smith, III** Charles Wiley  
**Smith**, Michael Wayne  
**Smith**, Jenna Brooks  
**Smith**, Kewana Jamai  
**Smith**, Lauren Audrey  
**Smith, II** William Key  
**Snead**, Neil Barnes  
**Snodsmith**, Leigh Maples  
**Soderlund**, Monica Elizabeth  
**Solomon**, William Redding  
**Spaht**, William Carlos  
**Sport**, Morgan McCue  
**St. Louis**, Marcia Hastings  
**Stanley**, Andrew Dykes  
**Stariha**, Donna Kay  
**Stone**, Moses Oscar  
**Strange**, Christie Jean  
**Street**, Billy Gene  
**Sudeall**, Lauren Dara  
**Sway**, Meagan Sophia R.  
**Taylor**, Molly Campbell  
**Thistle, II** William Theodore  
**Thomas**, Daniel Bryan  
**Thompson**, Maridi Leigh  
**Todd**, Charles Samuel  
**Tuamokumo**, Otomini Ladipo  
**Tucker**, Michael David  
**Tudor**, Susan Elizabeth  
**Tufts**, Lucy Elizabeth  
**Tufts**, David Christopher  
**Turner**, Martha Virginia  
**Tyner**, Star Mishkel  
**Unkenholz**, Jesse Stuart  
**Van Der Hulst**, Christina Marjanca  
**Wallace**, Lara Ashley  
**Walsh**, William Acree  
**Ward**, Christine Marie  
**Ward**, Patrick James R.  
**Warner**, Melanie Denise  
**Webster**, Ty Lee  
**Wetzler, II** Ernest Lee  
**Wheelis**, Kylie Marie  
**Whillock**, Amber McGowan  
**Whitfield, Jr.** Thomas Eugene  
**Wilcox**, Kelly Marie  
**Wilkerson**, Kristi Oggs  
**Williams**, Nichelle Lynese  
**Williams**, Gary Lee  
**Wise**, Fisher Edward  
**Wise**, April Dunaway  
**Wood**, Jared Neal  
**Woods**, Shuntavia Wykemia  
**Wooldridge**, Bradley Scott  
**Wooten**, Christopher Michael  
**Yang**, Soo Seok  
**Zickefoose**, Emily Graham  
**Ziemann**, Jennifer Elizabeth  
**Zimmerly**, Philip Richard

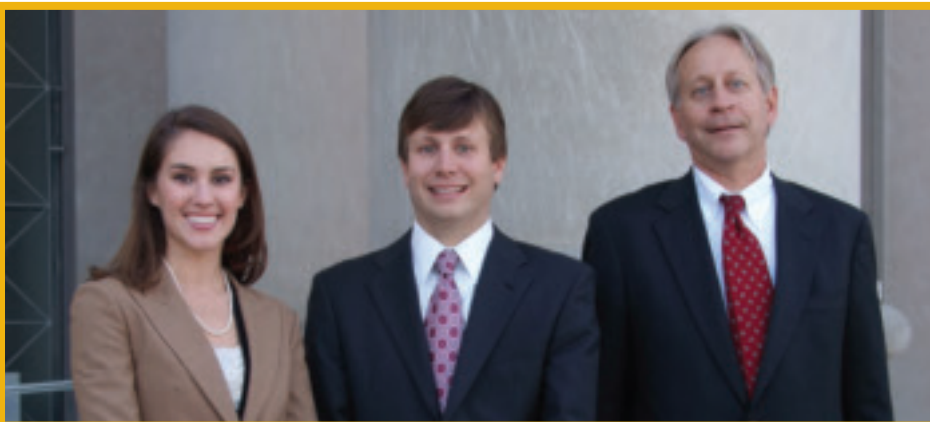
# LAWYERS IN THE FAMILY



*William Steven Nichols (2008), Harold Vaughan Hughston, III (2008), Harold Vaughan Hughston, Jr. (1981), James Hughston (1980), and Hughston Nichols (2006)*  
*Admittee, admittee, uncle/father, uncle/uncle, and brother/cousin*



*Mark Huntley (2008) and William D. Latham (1968)*  
*Admittee and father-in-law*



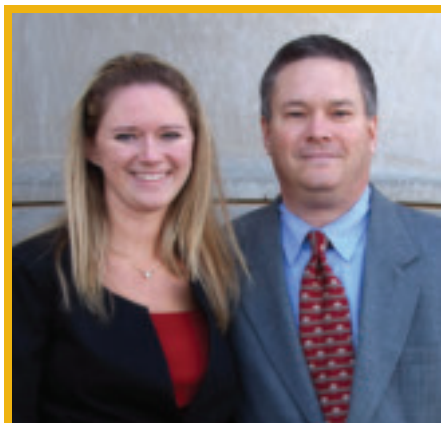
*Emily K. Price (2008), Oscar M. Price, IV (2007) and Oscar M. Price, III (1980)*  
*Admittee, husband and father-in-law*



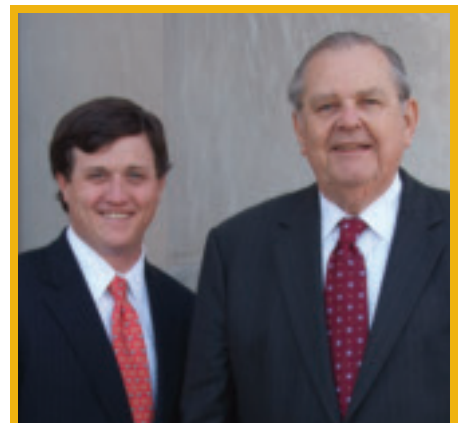
*Evans Bailey (2008) and Dennis R. Bailey (1979)*  
*Admittee and father*



*William Anthony Davis, IV (2008) and William Anthony Davis, III (1974)*  
*Admittee and father*



*Rebecca Paige Merritt (2008) and Gordon Carter (1981)*  
*Admittee and uncle*



*Guy C. Oswalt, III (2008) and Justice Champ Lyons (1965)*  
*Admittee and uncle*

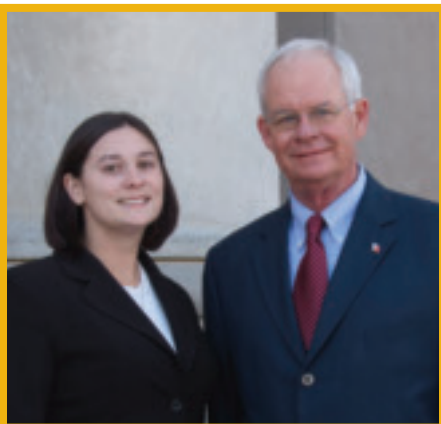
# LAWYERS IN THE FAMILY



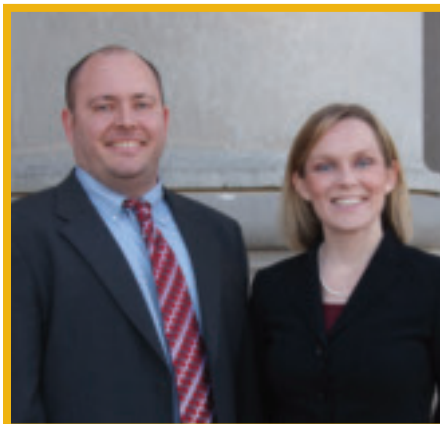
*Harold Dean Mooty, III (2008) and  
Harold Dean Mooty, Jr. (1983)  
Admittee and father*



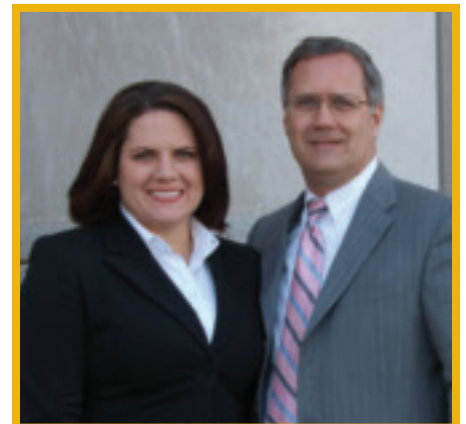
*Allen Charles Jones (2008), David L. Moncus, Jr. (1992),  
Meagan Moncus England (2000) and Russell L. England (2003)  
Admittee, father-in-law, sister-in-law and brother-in-law*



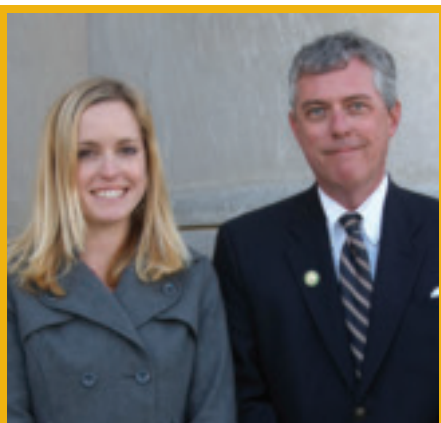
*Sarah Frederick Henson (2008) and  
C. Michael McInnish (1981)  
Admittee and uncle*



*Jake Morrison (2008) and  
Carla Morrison Thomas (2006)  
Admittee and sister*



*Katherine M. Browning (2008) and  
Richard E. Browning (1980)  
Admittee and father*



*Margaret Eileen Simpson (2008) and  
Stephen K. Simpson (1982)  
Admittee and father*



*Nichelle Williams (2008), Reginald L. Williams (2005),  
Derrick V. Williams (2007) and Ronnie L. Williams (1980)  
Admittee, brother, brother and father*



# LAWYERS IN THE FAMILY



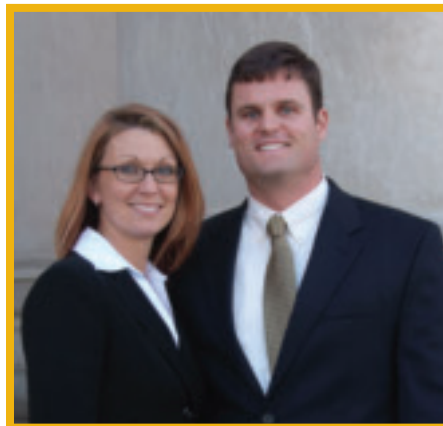
*James Andrew Pratt (2008), James R. Pratt, III (1978) and  
Marcia W. Pratt (1980)  
Admittee, father and mother*



*Michael Baird Beers, Jr. (2008), Mary Colleen Beers (2008)  
and Michael Baird Beers, Sr. (1977)  
Husband and wife co-admittees, father/father-in-law*



*Johnny Brent Beal (2008) and  
Rebekah Pugh Beal (2006)  
Admittee and wife*



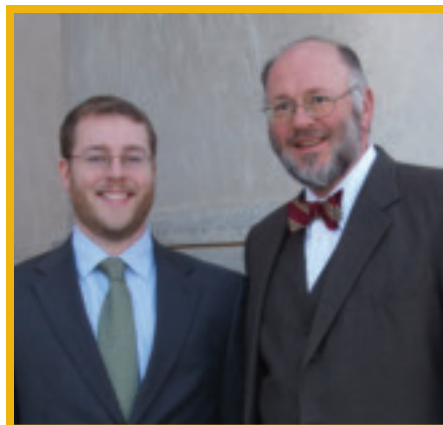
*Stacy Bence (2008) and  
David Bence (spring 2008)  
Admittee and husband*



*Ryan D. Chambers (2008) and  
Michael L. Chambers (1976)  
Admittee and father*



*Thomas Parker Griffin (2008) and  
James F. Burford, III (1977)  
Admittee and uncle*



*Benjamin Seth Johnson (2008) and  
Wylie Benjamin Johnson (1986)  
Admittee and father*



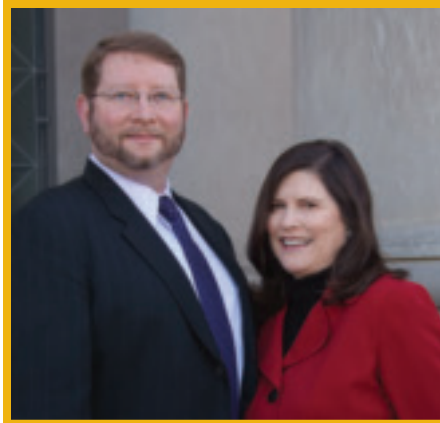
*Nathan Carter (2008) and  
Huel Carter (1981)  
Admittee and father*



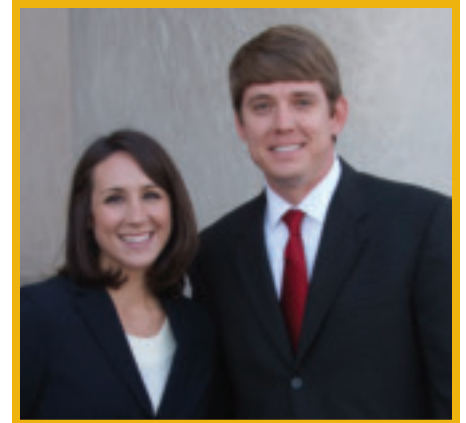
# LAWYERS IN THE FAMILY



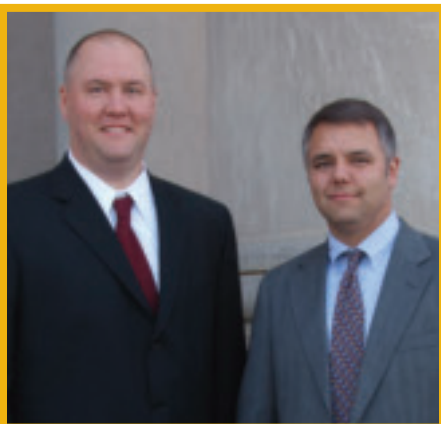
*John Levi Nichols (2008) and  
John Aubrey Nichols (1977)  
Admittee and father*



*Shawn Michael Bates (2008) and  
Mary Lynn Bates (1978)  
Admittee and mother*



*Meridith Hamilton Barnes (2008) and  
Noel S. Barnes (2006)  
Admittee and husband*



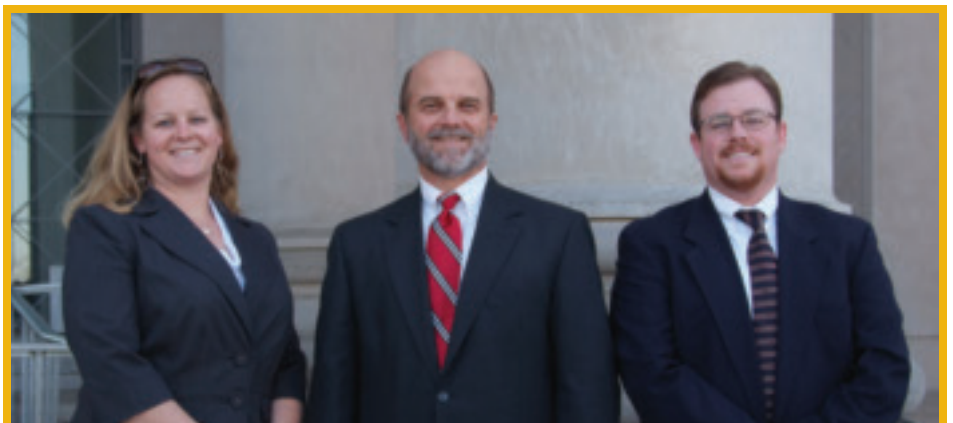
*Richard Day (2008) and  
John Day (2001)  
Admittee and brother*



*Bradley Scott Wooldridge (2008), David Mace Wooldridge (1975),  
Robert Von Wooldridge, Jr. (1951), Robert Von Wooldridge, III (1979), and  
Hon. Charles R. Malone (1981)  
Admittee, father, grandfather, uncle, and uncle*



*John Hollis McElheny (2008) and  
Terry McElheny (1978)  
Admittee and father*



*Kelly E. Forehand (2008), Steve R. Forehand (1981) and Sean M. McTear (2007)  
Admittee, father and fiancé*

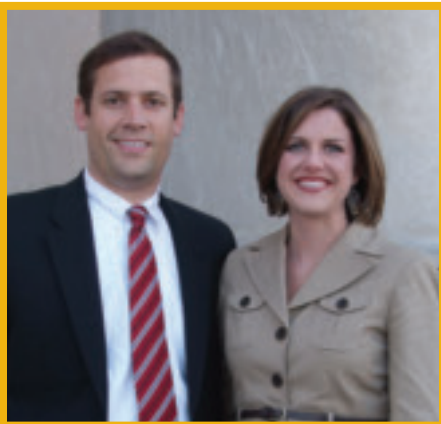
# LAWYERS IN THE FAMILY



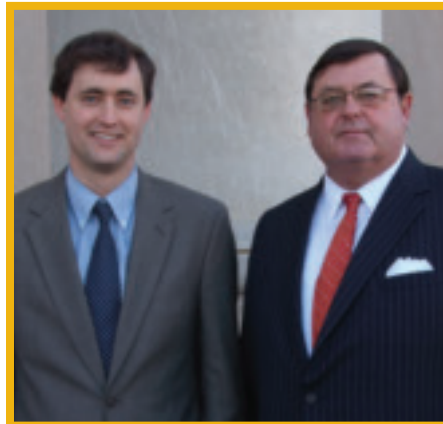
*Jessica Friedman (2008), Doug Friedman (1976),  
Linda Friedman (1976) and Len Rivkin (1950)  
Admittee, father, mother and grandfather*



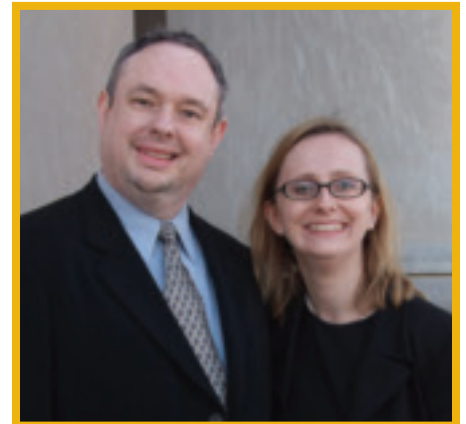
*Ariel Denbo (2008) and  
Solomon Miller (1982)  
Admittee and uncle*



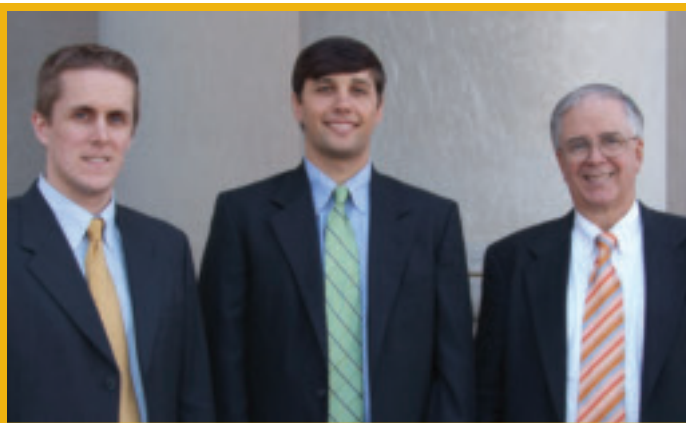
*Matthew Daniel Hutchison (2008) and  
Caron Camp Hutchison (2003)  
Admittee and wife*



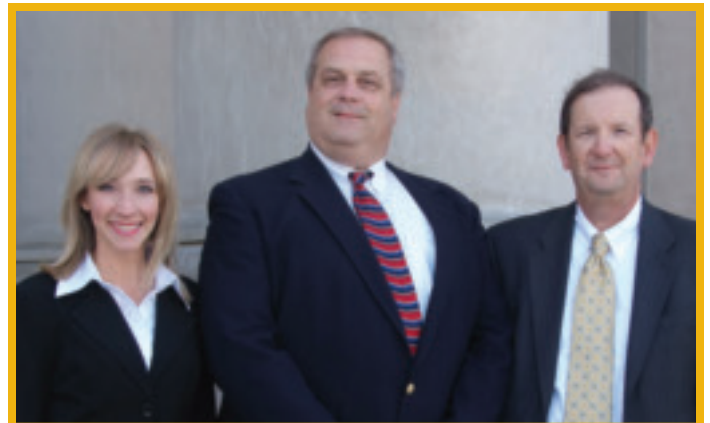
*Thaddeus W. Inge (2008) and  
Zebulon M. P. Inge (1974)  
Admittee and father*



*Billy Gene Street, Jr. (2008) and  
Kathleen Graham Street (1997)  
Admittee and wife*



*Jamin W. Hogan (2008), Cameron L. Hogan (2008) and  
R. Ben Hogan, III (1973)  
Cousin co-admittees and father/uncle*



*Kimberly Paige Byram (2008), Steven C. R. Brown (1987)  
and Herman Marks, Jr. (1976)  
Admittee, cousin and cousin*

# LAWYERS IN THE FAMILY



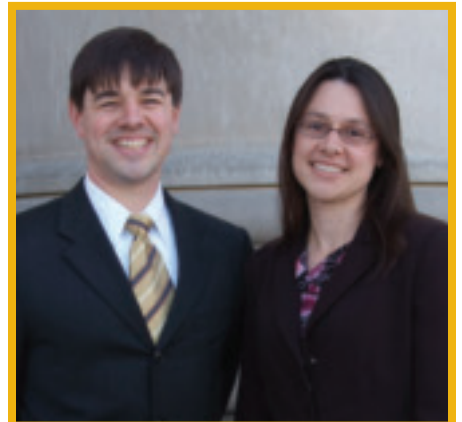
*W. Patrick Prendergast (2008), William Prendergast (1980),  
Calvin Whitesell (1951), Chris Lewis (1981), and Tim Lewis (1988)  
Admittee, father, grandfather, aunt, and uncle*



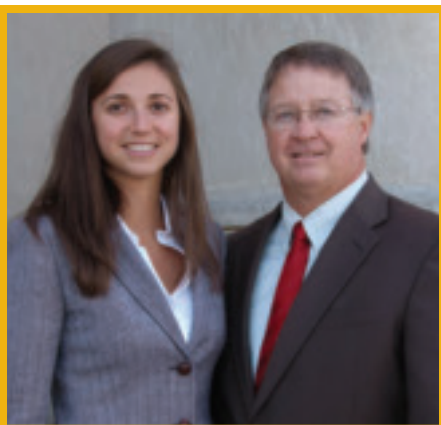
*Anna Manasco Dionne (2008) and  
John Michael Manasco (1980)  
Admittee and father*



*Stephen C. Norris (2008), Robert Norris (1976), David B. Norris (1987) and  
T. Cameron McEwen (2007)  
Admittee, father, uncle and brother-in-law*



*John Richard Bowles (2008) and  
Elizabeth Bowles (2004)  
Admittee and sister*



*Karol L. Fleming (2008) and  
Charles W. Fleming, Jr. (1979)  
Admittee and father*



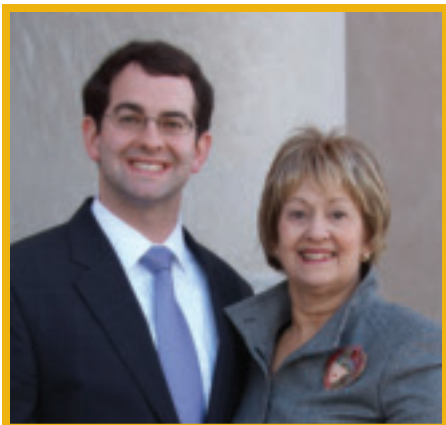
*Jack Smalley, III (2008) and  
Donna W. Smalley (1979)  
Admittee and mother*



*Matthew J. Hornsby (2008) and  
Bobby J. Hornsby (1985)  
Admittee and father*



# LAWYERS IN THE FAMILY



*C. Samuel Todd (2008) and  
Judith F. Todd (1981)  
Admittee and mother*



*Christopher Eaton (2008) and  
Cathy Donohoe (1992)  
Admittee and aunt*



*Joshua Daniel Friedman (2008) and  
Barry Allen Friedman (1975)  
Admittee and father*

## Quality Paralegal Education



### ■ Our Mission

The Faulkner University Legal Studies Department seeks to provide a program that supports its students during their academic and professional careers. Upon graduation, students will be well equipped to begin or continue an exciting career as a paralegal.

### ■ What are typical paralegal responsibilities?

Paralegals work in many areas of law including litigation, real estate, corporate, probate and estate planning, intellectual property, family law, labor law, and bankruptcy. Paralegals perform tasks such as investigating facts, drafting legal documents, legal research, interviewing clients and witnesses, maintaining contact with clients, and the maintenance of legal files.

### ■ What can I not do as a paralegal?

A paralegal/legal assistant cannot give legal advice, represent a client in court, establish a fee, or accept a case on behalf of an attorney.

### ■ How do I choose a Legal Studies Program?

One way to ensure you receive a quality education is to choose a program with instruction specific to the skills required for the state. Secondly, it is important to choose a program with academic standards, such as those required by the American Bar Association.

Faulkner University's Legal Studies Program is approved by the American Bar Association. The Faulkner University Legal Studies program offers an ABA Approved curriculum exclusively at its Montgomery campus, with a strong reputation of academic excellence.

### ■ How can I get started?

Legal Study courses are offered at convenient times that cater to the needs of students of all ages. Our faculty is comprised of experienced practitioners with outstanding academic credentials. Contact Marci Johns, J.D., Director of Legal Studies today!

Phone: 800.879.9816  
Ext. 7140  
mjohns@faulkner.edu

5345 Atlanta Highway  
Montgomery, AL 36109  
www.faulkner.edu





# Birmingham Lawyer Cristina Rodriguez Recognized as 16,000<sup>th</sup> Member



www.monicacarroll.com

Rodriguez

**A**t the October Admissions Ceremony conducted by the Alabama State Bar, Cristina Rodriguez of Birmingham became the 16,000th attorney to join the organization. “I’m thrilled to be a part of such a distinguished and talented group,” said Rodriguez.

ASB President Mark White said, “Cristina represents part of the future face of the legal profession in Alabama—a young, second-career professional from a diverse background who has rendered service to the community.”

Law is a second career for the 38-year-old Rodriguez. Her first was spent as a cancer researcher. “I enjoyed my time in cancer research, but I always felt that I could do more. From childhood, I had a strong interest in science and service to the community. Now I hope to find a way to merge law and science together, that I would really enjoy.”

Rodriguez earned her B.S. (microbiology, 1993) from Auburn University, a master’s in public health (epidemiology, 1994), a Ph.D. in nutrition sciences/chemoprevention (1999) and a post-doctoral fellowship in pathology prior to earning her J.D. from the University of Alabama (2008).

Before passing the bar, Rodriguez clerked with the Birmingham firm of Whatley Drake & Kallas, utilizing her science background in pharmaceutical litigation. She also did an externship for the U.S. Attorney’s Office and served as judicial intern for U.S. Northern District Court Judge Karon Bowdre. In 2008, she was recognized by the state bar with a law student pro bono award and her work on federal preemption of pharmaceutical-related state tort claims was published in *The John Marshall Law Review*.

Rodriguez is married to another state bar member, Steve R. Burford (Spain & Gillon, LLC), and they have a 16-month old son, Carlos. She is the daughter of Rodrigo and Dorotea Rodriguez who live in Auburn. Her father’s family was living in Cuba when he was sent to the U.S. alone at the age of 17 to escape the communist regime. Her father enrolled at LSU where he met Dorotea, who was from Columbia, and, as they say, the rest is history.

Not surprisingly, Rodriguez is bi-lingual which she believes has proven to be a great gift from her parents. Rodriguez says she is interested in learning more about the bar and hopes to put her fluency in Spanish to work in some capacity. “There is a lot the bar could do in terms of providing courtroom interpretation services and reaching the underserved Hispanic population with legal assistance.”





JAMES M. TERRELL

If you haven't heard the news (see story on previous page), on October 29, 2008, the Alabama State Bar welcomed its 16,000<sup>th</sup> member, **Cristina Rodriguez**, at the fall admissions ceremony in Montgomery. The Alabama State Bar Young Lawyers' Section is deeply indebted to the following businesses and groups that served as sponsors of this great event: **Ivize of Montgomery, LLC; Freedom Court Reporting, Inc.; The Locker Room of Montgomery; Frank M. Wilson, P.C.; the Federal Bar Association, Montgomery Chapter; ABICLE; the United States District Court for the Northern District of Alabama; the United States District Court for the Middle District of Alabama; and the United States District Court for the Southern District of Alabama.** We greatly appreciate their support of this event and of the Young Lawyers' Section.

On November 21, 2008, our section hosted its Seventh Annual Iron Bowl CLE in Birmingham. This was a great CLE that was well-attended. First, thanks to **Bradley Arant Rose & White LLP** for allowing us to hold this CLE in their multi-purpose conference room. On several occasions, Bradley Arant has graciously welcomed us into their office for this event, and we are grateful for their continued support of the Young Lawyers' Section. This year's seminar had a great lineup of speakers including: **the Honorable R. David Proctor** (United States District Judge for the Northern District of Alabama), **Brandon Falls** (district attorney for Jefferson County), **Robert R. Maddox** (attorney, Bradley Arant Rose & White LLP) and **Victor L. Hayslip** (attorney, Burr & Forman, LLP). I also have to recognize Executive Committee members **Jon Patterson, Michael Clemmer** and **Brett Ialacci** for their outstanding effort in planning this event. Reviews from participants of the Iron Bowl CLE were excellent, and if you were not able to join us this time, please make plans to attend next year.

We have several projects that will begin in earnest over the next few months. Our Minority Pre-Law conferences will be held in April in Birmingham and Montgomery. These conferences introduce high school students to our justice system and to the career choices available to them in the legal profession and are great examples of lawyers rendering service in our communities. I encourage you to volunteer to participate in these upcoming conferences. The Executive Committee members spearheading this initiative are **J.R. Gaines, Kitty Brown** and **Navan Ward**. Specific information regarding these conferences and volunteer opportunities will appear in this column in the March edition of *The Alabama Lawyer*.

Additionally, the YLS will again be hosting its Sandestin Seminar in May. The Sandestin Seminar is an annual tradition for our group and is our largest event. During these difficult economic times, you would be hard-pressed to find a better value in a CLE program than this. The lineup of speakers for this year's seminar will appeal to attorneys working in many different practice areas, and the seminar occurs in mid-May before the crowds arrive in Sandestin for the summer. If you haven't attended this before, I encourage you to join us this year. It is a tremendous opportunity to network with other young lawyers, and it is always a great event!

If you have any questions about the section, or if you want to get more involved with your YLS, please contact me.







# GARY WOLFE:

## A Lawyer Serving His Community through Coaching

*By Harold Stephens*

**T**he running back darts to the right, finds an opening and dashes for a 40-yard touchdown. As the group of 11- and 12-year-old football players jump for joy and slap each other's back, I know what you're thinking. His dad must be the coach, right? In this case, the coach is not the running back's dad, not the quarterback's dad, not even the middle linebacker's dad. In fact, the coach is not the father of any of the players. The coach doesn't even have a son on the team. Coach Gary Wolfe is a lawyer with the firm Wolfe, Jones, Boswell, Wolfe, Hancock & Daniel in Huntsville. He hasn't had a child playing on any of his football teams for the last six years. He coaches because of his love for the game, to teach athletic skills to young players and to serve his community.

As Gary describes his introduction to the world of coaching, he cheerfully notes that he has coached youth sports

for 20 years. He professes to know nothing about the game of soccer but recalled that his first year of coaching his team had six wins and no losses. With humility, Coach Wolfe explains that his next soccer team went 0 and 6 and he immediately concluded that it was the kids, not the coaching, after all.

From a quick glance around his office, it is apparent that Gary's true love is coaching youth football teams. His experience in Huntsville began at Fern Ball Park coaching his son, Riley, who played on a city recreational team. Despite Gary's refusal to take credit for his teams' successes, trophies around his office reflect city football championships in 1998, 1999, 2003 and 2004, including undefeated seasons in three of those years.

But why does Gary continue to coach now that his own children are grown? He states, "I love being with the kids. You

see kids literally grow up before your eyes.” Gary takes great satisfaction in helping young athletes realize that they can achieve something both on and off the field. Coach Wolfe explains, “Sports is an opportunity for kids to experience their own excellence.” Coach Wolfe believes in coaching through praise, not punishment. He notes that once you reward young players for their achievement, their self-confidence, on and off the field, begins to blossom. As Gary describes it, you have players literally go from watching airplanes streak across the sky during the practice to asking, “Coach, can I do that drill again?” In his decade-and-a-half experience in coaching, Gary has observed young players, even without football experience, grow into accomplished players with some going on to play high school football.

In 2005, Gary shifted his focus from city league football to the Pop Warner League. As he explained, this is an age- and weight-restricted program which includes a national playoff system. Having had an undefeated season in 2005, Coach Wolfe’s Huntsville Sting had another outstanding year in 2007. In fact, the 2007 team went undefeated (9-0) in league play. This qualified the team for the regional playoffs. With imbued confidence from Coach Wolfe and the other members of their coaching staff, the 2007 Huntsville Sting won their first two regional games at Milton Frank Stadium. This qualified the team to participate in the regional championship game in Charlotte, North Carolina. The Huntsville Sting faced last year’s national championship team who has been undefeated for the past three years. Although losing to the defending national champions 24-16, the 2007 Huntsville

Sting players had an incredible season. If you have any doubt, just ask Coach Wolfe and he will be happy to show you some of the video highlights! Gary Wolfe is a lawyer by profession but one who clearly has a calling for teaching and coaching young football players. He describes himself as a “firm believer in sports” who is convinced that success on the gridiron can remove the fear of failing. As a lawyer serving his community, Gary Wolfe is helping to build the character of young men both on and off the field.

Gary grew up in Huntsville and graduated from Huntsville High School in 1971. He served as in-house corporate counsel in Birmingham for eight years, practiced law in Denver, Colorado for ten years and returned to his home in Huntsville in 1996. Gary and his wife, Belinda, are the proud parents of three children: Riley, who is a sophomore at Troy University; Patrick, who lives in Huntsville and helps coach wrestling; and Bergan, who coaches softball at Catholic High School. His children’s love of coaching is quite natural.

The ball is snapped; the quarterback takes a couple of steps backward and then proceeds to charge straight up the middle of the field behind what Coach Wolfe describes as their “wedge play.” With a front line of blockers pushing the opposing team back, the quarterback fights his way into the end zone. It’s another touchdown for the Huntsville Sting! On the sideline, the coach has a big smile on his face—and it’s not even his son playing. “Sports is an opportunity for kids to experience their own excellence.” And, Coach Gary Wolfe is a shining example that Alabama lawyers render service to their communities. ▲▼▲

---

**H. Harold Stephens** received his undergraduate degree, *summa cum laude*, and his law degree from the University of Alabama. Before entering private practice, he served as an Assistant United States Attorney in Birmingham. Stephens is past chair of the Litigation Section of the Alabama State Bar. He is a member of the Alabama Academy of Attorney Mediators, a member of the Board of Bar Commissioners, a member of the Board of Directors of Farrah Law Society at the University of Alabama and president-elect of the Alabama Defense Lawyers Association. He practices with Bradley Arant Rose & White LLC in the Huntsville office.



## ASB Lawyer Referral Service

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$50 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.





# The New and EXPANDED Americans with Disabilities Act

**By Sandra B. Reiss and  
J. Trent Scofield**

## *Introduction*

January 1, 2009 marks both the start of a new year and the effective date regarding substantial amendments to the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.* On September 25, 2008, President George W. Bush signed into law S. 3406, the ADA Amendments Act of 2008 or “ADAAA.” The original ADA was signed into law by President George H.W. Bush on July 26, 1990. The ADAAA will protect a much broader percentage of the workforce and may well fundamentally alter employee relations with regard to persons with disabilities.

Legislative proponents believe that the ADAAA reflects what the original ADA was intended to affect, while others argue that the amendments have reached far beyond the original intent of the Act. Either way, the ADAAA contains significant changes in not only the definition “disability,” but also the definition “major life activity,” as well as how persons “regarded as” disabled will be treated in the workplace.

The ADAAA responds to the increasingly narrow interpretation given the terms “disability,” “major life activity” and other terms of art by federal courts since the ADA’s passage. Legislative proponents note that, in 2004, plaintiffs lost 97 percent of the ADA employment discrimination claims that actually made it to trial, often due to the interpretation of the definition of the term “disability.” In the findings published with the ADAAA, the drafters stated, “While Congress expected that the definition of disability under the ADA would be interpreted consistently with how the courts applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”<sup>1</sup>

The original ADA applies to employers with 15 or more employees and aids in protecting an individual with a *disability* that *substantially limits a major life activity* who can perform the *essential functions* of his or her job with or without *reasonable accommodation(s)* that do not constitute an *undue hardship*. In determining the meaning of the many

highlighted terms contained in the statement above, practitioners have long had to rely on the accompanying Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630 and the Appendix to Section 1630—“Interpretive Guidance on Title I of the Americans With Disabilities Act” drafted by the Equal Employment Opportunity Commission (“EEOC”). However, despite the regulations and the EEOC’s Interpretive Guidance, this long statement of the ADA has many caveats developed by the courts over the last 18 years.

Specifically, Congress was most displeased with the whittled down definition of disability by the Supreme Court in a number of employment cases including *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams* 534 U.S. 184 (2002) and specifically referred to these cases in the findings to the ADAAA. In *Sutton*, the Supreme Court ruled that employers were allowed to consider mitigating measures such as medicines and other devices in determining whether an individual was substantially limited in a major life activity. In *Toyota Manufacturing*, the Supreme Court ruled that an individual must show that his/her impairments prevent or severely restrict an ability to perform activities of central importance to most people’s daily lives. For example, after these rulings, persons with diabetes, some back injuries, multiple sclerosis and other debilitating conditions were not considered “disabled” under the terms of the original ADA.

In a response to these judicial rulings, Congress, in stating the purposes of the ADAAA, avowed:

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; (3) to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), with regard to the coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth the broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973; ADA Amendments Act of 2008, Purposes (b)(2-3).

## The New Meaning of Disability—Without Mitigating Circumstances

While the ADAAA does not change the actual language of Section 12102(2), which defines the term “Disability” (except for an addendum to the “Regarded As” definition, which refers to an additional paragraph 3), additional language *added* to the Definition Section in the “Rules of Construction Regarding the Definition of Disability” expands the definition quite broadly.

The term “disability” is defined in the ADAAA as follows:

### (2) Disability

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).


\* \* \* \*

### (4) Rules of Construction Regarding the Definition of Disability

\* \* \* \*

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures* such as—

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs or devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;



**A Death Penalty Seminar**  
**"Loosening the Death Belt XIII"**

January 30—January 31, 2009  
 Double Tree Hotel—Birmingham, AL

Hear nationally acclaimed death penalty lawyers  
 talk about successful defense techniques.

- *Voir Dire*
- *Opening Statements*
- *Ethics*
- *Defense of the Unpopular Case*
- *Keynote—Rev. Carroll Pickett, Texas Death House Chaplain for 16 years*
- *Closing Statements ... and much more!*

Registration: \$300 by 1/15/09 (ACDLA members)  
 \$325 non-members — \$350 at door for all.

**12 CLEs** \* Make all checks payable to:  
 ACDLA, P.O. Box 1147, Montgomery, AL 36101  
 (334) 272-0064 fax: (866) 665-7522  
 VISA/MC accepted | <http://acdla.org/seminars>

Hotel: **Double Tree Hotel**  
 808 So. 20th Street, Birmingham, AL  
 (205) 933-9000 Rate: \$119.00 plus tax s/d



- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.
- (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- (iii) As used in this subparagraph—
  - (I) the term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
  - (II) the term ‘low-vision devices’ means devices that magnify, enhance or otherwise augment a visual image.”

(emphasis added).

So, what does this new section regarding the definition of disability mean in practice? If an issue of possible discrimination arises whether it be with regard to, *inter alia*, hiring, pay, promotion, termination, or terms and conditions of employment, the employee’s disabling condition will now be considered *without regard* to mitigating measures. While the EEOC has been charged with issuing new Interpretative Guidelines to accompany the ADAAA, the number of persons with a covered disability should greatly increase in light of the new definition.

The following represent examples of different employees who may now be considered disabled under the ADAAA because the employer may not take into account the mitigating measure of:

- ⚠ the medication of a legal assistant whom the employer knows has bipolar disorder;
- ⚠ the weekly treatments of a waiter with HIV;
- ⚠ the insulin used by an salesperson who is diabetic;
- ⚠ the walking cane a plumber utilizes to walk;

- ⚠ the low-vision device relied upon by the elementary school teacher with glasses;
- ⚠ the prosthetic leg used by the foreman;
- ⚠ the hearing aid or cochlear implant used by the customer service representative;
- ⚠ the wheelchair used by a human resource manager; or
- ⚠ the oxygen therapy required by the librarian.

Additionally, a typist with ADHD who has been accommodated by being allowed to work in an office by himself may be considered disabled even taking into account this reasonable accommodation and a grocery bagger who does not use any sort of hearing aid but has learned to read lips may also be considered disabled despite a learned behavioral modification. In fact, *the only mitigating measure* that appears relevant when determining whether an employee is disabled is whether he or she wears glasses or contact lenses that “are intended to fully correct visual acuity or eliminate refractive error.” ADA Amendments Act, Section 12012(4)(iii)(I).

In sum, the aides, adaptive measures, medications and behavioral adaptations utilized by persons with otherwise substantially limiting conditions cannot be taken into account to exclude them from the definition of “disabled.” For practitioners, this will mean that more employees may qualify as disabled, an issue that in the past prevented many employees from overcoming an employer’s motion for summary judgment.

## The ADAA Includes More Major Life Activities

The ADAAA has also redefined the term “major life activities.” The original ADA did not define the term “major life activities,” but such activities could be found in the EEOC’s Interpretive Guidelines to the Act. The ADAAA now lists both major life activities *and* major bodily functions:



## (2) Major Life Activities

- (A) In General—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- (B) Major Bodily Functions—For purposes of paragraph (1), a major life activity *also includes* the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADA Amendments Act of 2008, Section 12102(2) (emphasis added). There is little doubt that the EEOC guidelines that are expected to accompany the enactment of the ADAAA will further clarify many of the terms as listed under “major bodily functions.”

In application, however, individuals who have HIV or AIDS which involve a compromised immune system or persons with sickle cell anemia could be considered persons with substantially limiting conditions. Additionally, Crohn’s disease, most cancers, including skin cancer, as well as pulmonary diseases, asthma, and sterility issues could be considered disabling under the bodily functions section of “major life activities.” To reiterate, medicine or other medical aides or assistive technology cannot be taken into account in determining whether these illnesses are disabling under the ADAAA.

## “Substantially Limited” Has Been Substantially Broadened

The new ADAAA also broadens the term “substantially limited.” In Section 10102 (4) “Rules of Construction Regarding the Definition of Disability,” Congress set out the following parameters regarding construing the terms disability and substantially limited:


- (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- (B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- (C) An impairment that substantially limits one major life activity *need not limit other major life activities* in order to be construed as a disability.
- (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active...* (emphasis added)

These additional rules of construction are a strong reiteration by Congress that the term “disability” is not to be viewed narrowly or its definition diminished, and the term “substantially limited” will be broadened consistent with the “findings and purposes” clause of the ADAAA. Specifically, as stated in (C) above, a medical condition need only substantially limit *one* major life activity in order to be considered a disability. Therefore, if a bank teller has liver cancer and is undergoing chemotherapy, thus compromising her immune system but can otherwise car[e] for herself, perform manual tasks, see, hear, eat, sleep, walk, stand, lift, bend, speak, breathe, learn, read, concentrate, think, communicate, and work, she may be still be considered “disabled” under the ADAAA.


Similarly, conditions which are episodic or in remission may be considered a disability when those conditions are active. For example, a person with epilepsy who has seizures, at most every six months, could be considered disabled with the condition is active.

## Changes to “Regarded as Disabled”

The ADA Amendments Act also clarifies the traditional “third prong” of the original ADA’s definition of disability—where an



**aea** GROUP, LLC  
Accounting, Economics & Appraisal Group, LLC



**Accounting, Economics & Appraisal Group, LLC**

Certified Public Accountants  
Certified Computer Examiner  
Accredited in Business Valuation  
Certified Fraud Examiners

**Les Alexander, Managing Principal** 205-488-1150

**Denise Dauphin, Principal** 205-488-1130

**Bill Long, Principal** 205-488-1138

Accounting & Computer Forensics, Business & Asset Valuation, Economic & Demographic Studies, Enterprise Risk Management & Fraud Investigations

Accounting, Economics & Appraisal Group, LLC, a Certified Public Accountancy Firm  
Two North 20<sup>th</sup> Street, Suite 1400 Birmingham, Alabama 35203  
Telephone (205) 488-1100 - Facsimile (205) 488-1101 - [www.aeagroup.com](http://www.aeagroup.com)

individual is “regarded as” disabled by an employer. The original ADA prohibits discrimination in employment with regard to whether an individual is: (a) disabled, (b) has a record of disability or (c) is regarded as disabled.

The ADAAA now states, “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” This does not apply to impairments that are transitory and minor. The ADAAA defines a “transitory impairment” as “an impairment with an actual or expected duration of six months or less.” The ADAAA also provides that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment. Accommodations need not be provided to an individual who is only “regarded as” having an impairment.

## What Does the Future Hold?

The primary intent of the ADAAA broadens coverage for those employees who may qualify as “disabled” in today’s workplace. It is very safe to assume that the EEOC will soon follow with expanded regulations for these broader protected categories.

We anticipate that there will be a greater emphasis placed on the “reasonable accommodation” requirements, as well as the

“interactive process” that accompanies such accommodation efforts. Employers must also carefully evaluate the essential functions of each job in the workplace in light of the expanded definitions provided in the ADAAA.

Without a doubt, the Amendments to the Americans with Disabilities Act will be the subject of litigation for years to come.



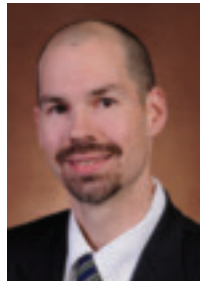
### Endnote

1. ADA Amendments Act of 2008, Findings (3)



---

*Sandra B. Reiss is a shareholder with the Birmingham office of Ogletree, Deakins. Reiss represents employers in a wide variety of discrimination claims, including the ADA.*



---

*J. Trent Scofield is a shareholder with the Birmingham office of Ogletree, Deakins. Scofield advises management on labor and employment issues.*



- **Need to find an associate for your firm?**
- **Need to get rid of some office equipment?**
- **Need to get the word out that you’re available as an expert witness?**

Then check out the  
online “Classifieds” at  
the ASB Web site,  
**[www.alabar.org](http://www.alabar.org)**

### FORENSIC FINANCIAL SERVICES GROUP, LLC

Investigative accounting to  
assist you in preventing and  
detecting fraud

Forensic accounting services,  
litigation support, internal  
controls review and  
implementation, training

Ned Egbert, CPA, CFE  
Mac McCawley, CPA, CFE  
Linda Steele, CGFO, CFE

Certified Fraud Examiners  
251-928-0339

[negbert@mobis.com](mailto:negbert@mobis.com)

Mobile/Baldwin

[www.protectfromfraud.com](http://www.protectfromfraud.com)





# A Guide to Impeachment in Federal and Alabama State Courts

By Terry McCarthy

As long as we have had trials, the witnesses at those trials have been impeached. Some impeachment techniques, such as catching a witness in an inconsistency, have been around since the beginning of litigation as we know it. Other techniques, however, had their genesis in the 1975 adoption of the *Federal Rules of Evidence*.

Like most states, Alabama adopted evidentiary rules that were patterned after the *Federal Rules*. Alabama's *Rules of Evidence* went into effect on January 1, 1996 and most of them are identical to the *Federal Rules*. For those parallel rules, federal cases construing them are persuasive authority in the Alabama courts. *Ala. R. Evid.* 102, advisory committee notes. While there are many similarities between the Alabama and federal rules, there are also many differences. Some differences are obvious. Some are not so obvious. In addition, there are many impeachment techniques that are not codified under the rules, but that remain alive and well as impeachment techniques in Alabama and federal courts. The purpose of this article is to highlight the major impeachment techniques, and to note the major differences between the *Alabama* and *Federal Rules of Evidence* with regard to impeachment.

## Who may impeach?

The threshold question to ask in any impeachment situation is who may actually impeach a witness? According to Rule 607 of both the *Alabama* and *Federal Rules of Evidence*, "[t]he credibility of a witness may be attacked by any party, **including the party calling the witness.**" Fed. R. Evid. 607; Ala. R. Evid. 607 (emphasis added). In other words, in most circumstances, it is perfectly acceptable for an attorney to impeach the very witness he called. Before Rule 607 was adopted, the common law generally precluded a party from impeaching his own witness. *See* Fed. R. Evid. 607 & Ala. R. Evid. 607 advisory committee notes. Rule 607 rejects this old "voucher rule," so that now a party is no longer expected to "vouch" for the credibility of the witnesses that the party chooses to call. *Id.*

There is at least one major exception to this rule. Despite the inviting language of Rule 607, a party is not allowed to impeach a witness if the sole purpose for calling that witness would be to impeach the witness with otherwise inadmissible evidence. Here is the most common scenario: suppose the prosecuting attorney obtained a witness statement from George in which George says that the defendant committed the

crime. Before the trial, however, the prosecutor learns that George has recanted that statement and, if called at trial, he would testify that George did not commit the crime and is not guilty. Because George's prior statement is hearsay, the only way to get the statement admitted would be for the prosecutor to call George to the stand, knowing that he would provide unfavorable testimony, and then impeach him with the prior statement. Both Alabama and federal cases have held that this is impermissible—i.e., a party cannot call a witness solely to impeach that witness with otherwise inadmissible evidence. Litigants must have a good faith intention to elicit admissible evidence from every witness they call. As Judge Posner noted in the leading case of *U.S. v. Webster*, 734 F.2d 1191 (7<sup>th</sup> Cir. 1984), “Impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.” *Id.* at 1192 (quoting *U.S. v. Morlang*, 531 F.2d 183, 190 (4<sup>th</sup> Cir. 1975).

the first question is the same in Alabama and federal courts, but the answer to the second question is different.

## When can you examine a witness about a prior inconsistent statement?

At common law, under the infamous *Queen Caroline's Case*, 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820) and its progeny, before a witness could be impeached with an inconsistent writing, the witness had to be given the opportunity to read that writing. This longstanding common law requirement was abrogated with the passage of Rule 613(a) under Alabama and federal rules for both written and oral statements. See Fed. R. Evid. 613(a) and Ala. R. Evid. 613(a) advisory committee notes. Since the passage of Rule 613(a), a party can ask a witness about a prior inconsistent statement without first showing it to the witness or informing the witness of its contents. The only requirement of Rule

may not be used until the witness is confronted with the particular circumstances of the prior statement (i.e., time, place, content and to whom it was made) and given the opportunity to admit or deny having made it. If the witness admits having made the prior inconsistent statement, extrinsic evidence is generally not allowed because it would be cumulative to allow extrinsic evidence to prove something that a witness has already admitted. *Ala. R. Evid.* 613(b) advisory committee's notes; *Usrey v. State*, 36 Ala. App. 394, 56 So. 2d 790 (Ala. 1952). If the witness denies having made the statement, it is only at that time that the party is allowed to go extrinsic to prove it.

Consider the following scenario in which the witness testified on direct examination that A ran the red light, and he had previously given an audio statement that B ran the red light. Here is an exchange that would be permissible under *Ala. R. Evid.* 613(b):

Q: You just testified on direct that A ran the red light, correct?

A: Yes.

Q: Immediately after the accident you were interviewed by the police? [Time]

A: Yes.

Q: And that was on January 1, 2007? [Time]

A: Yes.

Q: At that time the accident was fresh on your mind? [Time]

A: Yes.

Q: And he interviewed you right there at the accident scene, right? [Place]

A: Yes.

Q: At the corner of Fifth Avenue and Twentieth Street? [Place]

A: Yes.

Q: The police officer asked you who ran the red light, correct? [Content and to whom the statement was made]

A: I'm sure he did.

Q: And you told him, that B ran the red light, didn't you? [Giving the opportunity to admit or deny it]

A: No.

...it is acceptable for an attorney to impeach a witness who he calls, but he must have a good faith belief that the witness will likely say some things that will help his case.

To summarize, it is acceptable for an attorney to impeach a witness who he calls, but he must have a good faith belief that the witness will likely say some things that will help his case. If the only reason for calling the witness is to admit otherwise inadmissible evidence, this “back door” approach is not allowed and the witness should not be called to begin with.

## Impeachment by Prior Inconsistent Statements

While Rule 613 of both the Alabama and federal rules allows for impeachment via prior inconsistent statements, the foundations that are required are different under the two rules. It is not uncommon for even the most experienced trial lawyers to miss the foundational elements in Rule 613. Rule 613 answers two basic questions: (1) When can you examine a witness about a prior inconsistent statement? and (2) When can you use extrinsic evidence to prove the prior inconsistent statement? The answer to

613(a) is that the prior inconsistent statement must be shown or disclosed to opposing counsel upon request. See e.g., *Ex parte Flowers*, \_\_\_ So. 2d. \_\_\_, 2008 WL 821056 at n. 3 (Ala. March 28, 2008).

## When can you use extrinsic evidence of a prior inconsistent statement?

Alabama and federal rules differ considerably on when a party may use extrinsic evidence to prove a prior inconsistent statement. Extrinsic evidence simply means proving the prior inconsistent statement using something other than the live testimony of the witness on the stand. Perhaps the most common illustration is a deposition, but extrinsic evidence can also be written statements, audio or video statements, or another witness who testifies that he heard the person make the inconsistent statement.

Under Alabama Rule 613(b), extrinsic evidence of a prior inconsistent statement

At this point, because the witness denied having made the prior inconsistent statement, the impeaching party is allowed to use extrinsic evidence to prove it. In this case, the prior statement was recorded, so with the court's permission, the impeaching party should be allowed to play the tape.

Federal Rule 613(b) handles the extrinsic evidence issue in a different way. The Federal Rule 613(b) rejects the common law requirement (and Alabama Rule 613(b)) that requires the witness to be confronted with the specifics of the prior inconsistent statement before extrinsic evidence is used. "[Federal] Rule 613 makes it clear that an attorney examining a witness in federal court as to prior inconsistent statements need not first show the statement to the witness as was required at common law." Prof. William A. Schroeder & Prof. Jerome A. Hoffman *Alabama Evidence* 3d § 6:64 (2008). The only requirement for using extrinsic evidence is that the impeached witness must be given an opportunity at some point in the trial to explain away the inconsistency.

So, under the federal rules, in theory, you may call a witness to the stand, and never ask him about the prior inconsistent statement. Then you may call another witness to the stand and present evidence of that prior inconsistent statement through that second witness. The only requirement is that the first witness must be given the opportunity at some point in the trial to explain away the inconsistency. In Alabama, of course, you cannot present extrinsic evidence of the prior inconsistent statement until you confront the witness with the specifics of the prior inconsistent statement and give him the opportunity to admit or deny having made it. It should be noted that, even in federal courts, most attorneys prefer to confront a witness with the prior inconsistent statement before going extrinsic, even though Rule 613(b) does not require them to do so.

There are four additional points to remember. First, as already stated, if the witness admits to having made the prior inconsistent statement, you generally cannot use extrinsic evidence to prove it.

Second, if the prior inconsistent statement was made in a hearing, deposition, trial or some other formal proceeding where the witness was under oath, that prior inconsistent statement is not only

## ...two categories of convictions are now allowed to impeach a witness: (1) felonies and (2) crimes of dishonesty or false statement.

admissible to impeach, but it is also admissible as substantive evidence of the truth. *Fed. R. Evid.* 801(d)(1)(A); *Ala. R. Evid.* 801(d)(1)(A). In other words, the trier of fact can disregard the statement made at trial and use the prior inconsistent statement for its truth.

Third, the foundational requirements for Rule 613 do not apply when the witness is a party and the statement is an admission. There is no foundational requirement for using an admission in Alabama or federal courts. *Fed. R. Evid.* 613(b) ("This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)"); *Ala. R. Evid.* 613(b) (same).

Finally, the Alabama and federal courts are both guided by the collateral matter rule. This longstanding rule provides that the impeaching party may not use extrinsic evidence to prove a collateral matter. See Charles W. Gamble, *McElroy's Alabama Evidence*, § 156.01(1) (5<sup>th</sup> ed. 1996). So, if a witness denies having made a prior inconsistent statement, if the matter is collateral, extrinsic evidence

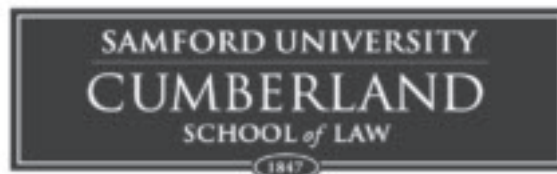
is not allowed as a matter of judicial economy.

### Impeachment by Convictions

It has long been the law in Alabama and federal courts that a witness may be impeached with certain prior convictions. Historically, Alabama law limited these past convictions for impeachment purposes to crimes of moral turpitude. Charles W. Gamble, *Gamble's Alabama Rules of Evidence*, § 609 (2<sup>nd</sup> ed. 2002); *Ala. R. Evid.* 609 advisory committee's notes. With the adoption of Rule 609 of the *Alabama* and *Federal Rules of Evidence*, two categories of convictions are now allowed to impeach a witness: (1) felonies and (2) crimes of dishonesty or false statement.

### Impeachment by Felony Convictions

According to the Alabama and federal rules, a witness may be impeached if that witness has been convicted of a crime punishable by death or at least one year in



For upcoming Cumberland CLE programs, go to:  
<http://cumberland.samford.edu/cle>

Use the same link to find online CLE courses.

Call 800-888-7454 or (205) 726-2391  
for more information

Samford University is an Equal Opportunity Institution.



prison—the common definition of a felony. *Fed. R. Evid.* 609(a)(1); *Ala. R. Evid.* 609(a)(1)(A). For any witness other than the criminally accused, the court must perform a Rule 403 analysis to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Because Rule 403 favors inclusion of evidence rather than exclusion, it is typically difficult for an attorney to argue that the conviction of someone other than the criminally accused would be inadmissible under Rule 403. By contrast, it is a much tougher burden to impeach the criminally accused under Rule 609. Under those circumstances, the impeaching party must show that the probative value of the evidence outweighs its prejudicial effect to the accused—a reverse Rule 403 test. Thus, it is often difficult to successfully impeach the criminally accused with a prior conviction due to this exacting balancing test.

...the impeaching party is allowed to identify the crime for which the witness was convicted and the sentence that was imposed.

### Impeachment by Crimes of Dishonesty or False Statement

Rule 609(a)(2) says that a witness can be impeached with prior convictions that involve dishonesty or false statement. Unlike Rule 609(a)(1), if a witness has been convicted of a crime involving dishonesty or false statement, the conviction must be admitted if it is less than ten years old. In other words, the trial court does not perform a Rule 403 analysis or any balancing test—if a conviction meets the definition of a crime of dishonesty or false statement, then it gets in. Charles W. Gamble, *Gamble's Alabama Rules of Evidence*, § 609(a) (2<sup>nd</sup> ed. 2002).

Alabama and federal courts diverge on precisely what constitutes a crime of dishonesty or false statement. According to the advisory committee notes to Federal Rule 609, simple theft is not a crime of dishonesty or false statement. The Alabama Court of Criminal Appeals, however, has rejected this view and has held that theft is a crime of dishonesty or false statement in Alabama state courts. *Huffman v. State*, 706 So. 2d 808 (*Ala. Crim. App.* 1997).

A long-standing conflict in the federal courts over how to decide whether a conviction qualifies as one for dishonesty or false statement was resolved in 2006 with an amendment to Federal Rule 609(a)(2). Prior to the amendment, some courts looked solely at the elements of a particular crime, and if none of them required proof of falsity or deceit, the crime was not one of dishonesty or false statement. Other courts looked beyond the conviction to decide whether the witness committed some act of dishonesty during the course of the crime. There were problems with both approaches. Under the “strict elements” test, for example, a conviction for obstruction of justice would not be a crime of dishonesty or false statement because deceit is not a required element for that crime. For its part, the “look beyond the conviction” approach could be very time consuming and potentially take the court far afield from the case before it.

The federal drafters ultimately reached a compromise. Under the new federal Rule 609(a)(2), a crime qualifies as one of dishonesty or false statement “if it can readily be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.” This allows a limited inquiry behind the conviction, but avoids a full blown mini-trial on the matter. Alabama has not passed this amendment.

### Impeachment with Remote Convictions

Even if a the witness has been convicted of a crime that qualifies under Rule 609(a)(1) or (2), an entirely separate analysis must be applied if the conviction is more than ten years old. A remote conviction will only be admitted if the probative value of the conviction substantially outweighs its prejudicial effect. *Fed. R. Evid.* 609(b); *Ala. R. Evid.* 609(b). This balancing test, which is the opposite of Rule 403, makes it very hard to use a remote conviction. Even if the proponent is somehow able to pass this difficult balancing test, the conviction is still not admissible if the proponent fails

to give the adverse party sufficient advance written notice of intent to use the remote conviction. Rule 609(b).

### Form of Question to Elicit Impeachment by Conviction

Case law places some limits on how a party can bring out the Rule 609 conviction. “Some courts limit the opponent’s proof to evidence that, in a certain jurisdiction in a certain year, the witness suffered ‘a felony conviction.’” Terry L. Butts, Charles W. Gamble, and Edward J. Imwinkelreid, *Alabama Evidentiary Foundations*, p. 144 (1999). In Alabama courts, the impeaching party is allowed to identify the crime for which the witness was convicted and the sentence that was imposed. *Id.* However, the impeaching party is not allowed to delve into the prejudicial specific details of the conviction. “The law of Alabama, in keeping with the general rule in the country, is that one generally cannot go beyond the name of the crime, the time and place of conviction and the punishment.” *McElroy’s*, § 145.01(11). For example, it would be appropriate to ask the witness the following on cross-examination, “Isn’t it true that you were convicted of manslaughter in Calhoun County in 2002 and sentenced to five years in prison?” By contrast, it would not be appropriate to ask, “Isn’t it true that you took out a knife and stabbed someone three times in the chest and were then convicted for it?”

### Extrinsic Evidence of a Conviction

If the witness denies having been convicted of the crime, the impeaching party is allowed to use extrinsic evidence to prove it. Most commonly, this will be the record of the conviction.

### Impeachments by Non-Convictions

Prior to the adoption of the *Federal Rules of Evidence*, past acts relevant to truth-telling for which there was no conviction were inadmissible. Federal Rule 608(b) revolutionized this concept. Since the passage of Federal Rule 608(b), past acts relevant to truth-telling may be inquired about on cross-examination for impeachment purposes. For example, on cross-examination, the impeaching party may ask, “Isn’t it true that you made false statements on your tax returns last

year?” This can be inquired about even if there has been no conviction.

This concept frightened many practitioners, and many believed it was ripe for abuse. To prevent any potential abuses, there are some safeguards. First, the impeaching party must have a good-faith basis for asking the question. In other words, if you are going to ask a witness if he made false statements on his income taxes, you need to have some reason to believe in good faith that he actually did it. Second, the impeaching party is precluded from using extrinsic evidence to prove that the witness actually committed the act. *Fed. R. Evid.* 608(b). So, if the witness answers no when asked if he had made false statements on his tax returns, the impeaching party may not call a witness, show the tax returns, etc., to prove that the event actually occurred. The impeaching party is stuck with whatever answer the witness gives.

The Alabama rule drafters decided to reject Federal Rule 608(b). Alabama Rule 608(b) essentially says that the drafters have no intention of creating a new method of impeaching a witness

with past acts for which there is no conviction. Just because the drafters did not create a new method of impeachment under 608(b) does not mean that non-convictions cannot be used for impeachment. Indeed, there are several situations in which a witness can be impeached with non-convictions and the Alabama drafters made it clear that those traditional methods of impeachment are alive and well. For example, a non-conviction may be used to show that a witness is biased.

### Impeachment by Bias

Bias has long been an acceptable form of impeachment in federal and Alabama courts. In federal courts, there is no specific rule of evidence that pertains to bias. The federal drafters chose not to codify it under the *Federal Rules of Evidence*.

However, bias is alive and well under the federal case law and continues to be a commonly used method of impeachment. Under the Alabama rules, bias is codified as *Ala. R. Evid.* 616.

Bias is commonly regarded as “[o]ne of the broadest forms of impeachment. *Gamble’s*, § 616. The types of bias that can be brought out on cross-examination are limited only to the creativity of counsel. Extrinsic evidence is allowed if the witness denies the matter brought out to show bias. *Id.*

### Impeachment by Reputation and Opinion Evidence

Many lawyers often forget that Rule 608(a) of the Alabama and federal rules

...if you are going to ask a witness if he made false statements on his income taxes, you need to have some reason to believe in good faith that he actually did it.

evidence at your fingertips.

**AVANSIC™**  
Digital Forensics Professionals

- Data Preservation
- Digital Forensics
- Consulting
- Expert Services
- Electronic Discovery

[www.avansic.com](http://www.avansic.com)

(205) 994-2766



allow for impeachment via reputation and opinion evidence. By way of example, suppose that Witness A testifies and gives favorable testimony for the plaintiff. The defense can then call Witness B to testify that Witness A has an unfavorable reputation in the community for lying. Or, that in Witness B's opinion, Witness A does not tell the truth and should not be believed under oath.

To use this impeachment technique, it is imperative that counsel understand the foundational requirements. If Witness B is going to testify that Witness A has a bad reputation in the community for lying, the impeaching attorney must show the following: (1) that Witness A has sufficient contacts in the community in order to have formed a reputation in that community; and (2) that Witness B has sufficient contacts in the community in order to be familiar with Witness A's reputation. Assuming those foundational elements are met, the impeaching attorney may ask Witness B about Witness A's reputation in a particular community for lying. While the community may be a geographic one, such as a town or city, it does not have to be. It can be a church, a

school or any group of people where the person at issue has formed a reputation. *Gamble's*, § 608(a)(1).

The impeaching attorney may also ask Witness B whether Witness A is a liar in his opinion. If this medium is selected, the impeaching attorney must establish that Witness B has had sufficient enough contacts with Witness A to be familiar with whether Witness A tells the truth.

## Rehabilitation of an Impeached Witness

Whenever a witness is impeached, the opposing party should be ready to rehabilitate that witness in any way possible. This is typically done on redirect examination, and is often done just through good, common-sense examination. For example, if it is revealed on cross-examination that the witness is a friend and co-worker of the criminally accused, on redirect examination the attorney may get the witness to tell the jury that his friendship with the witness would not cause him to lie under oath. Many forms of rehabilitation are simply the lawyer relying on his gut to decide what it will take for the witness to look credible before the jury.

It is important for counsel to be aware of two specific rehabilitation techniques that are provided for under both the Alabama and federal rules. First, Rule 608(a) allows for a witness to be rehabilitated with reputation and opinion character witnesses, but only after the character of that witness has been sufficiently attacked. "Those methods of impeachment which open the door to rehabilitation evidence under Rule 608(a) are: (1) reputation and opinion character evidence; (2) convictions; (3) prior inconsistent statements; and (4) corruption." *Gamble's*, § 608(a)(2).

Second, while prior consistent statements generally are not allowed to rehabilitate a witness, Rule 801(d)(1)(B) in the Alabama and federal rules allows an exception. Specifically, when a witness has been charged with fabricating his testimony, or improper influence or motive, prior consistent statements are allowed to rebut these charges, as long as these prior consistent statements pre-date the alleged fabrication, improper influence or motive. *Gamble's*, § 801(d)(1), Practice Pointer 4. For example, suppose that Witness A says that the plaintiff ran the red light. On cross-examination, the plaintiff's lawyer shows that just before he took the stand, the defendant paid him \$500. If Witness A had said that the plaintiff ran the red light at some time before this improper influence, that prior consistent statement would be admissible.

## Conclusion

This article has by no means exhausted all the available means for impeaching a witness in Alabama and federal courts, but has sought only to highlight some of the more common techniques. In practice, impeachment techniques are only limited by creativity of counsel. ▲▲▲

## Birmingham School of Law

The Birmingham School of Law offers an affordable legal education for individuals who attend class at night. Many students commute nightly from as far away as Athens, Montgomery, Tuscaloosa and Auburn. Our students graduate in 4 years, depending on the course loads and are eligible to sit for the Alabama bar exam. See our web site.



**Night Classes**

**Affordable**

An Evening Law School Since 1915  
823 Frank Nelson Bldg. Birmingham, AL 35203  
(205) 322-6122 [www.bsol.com](http://www.bsol.com)



*Terry McCarthy is a partner at the Birmingham firm of Lightfoot, Franklin & White, LLC. He serves on the adjunct faculty of the University of Alabama School of*

*Law, where he teaches advanced evidence. He also serves on the faculty of Birmingham School of Law, where he teaches evidence and advanced evidence. He can be reached at [tmccarthy@lightfootlaw.com](mailto:tmccarthy@lightfootlaw.com).*



## WHY OLD SCHOOL IS ACTUALLY NEW THINKING.



BACK IN THE DAY, YOUR "BANKER" WAS YOUR SOLE TRUSTED FINANCIAL ADVISOR – someone who truly knew all there was to know about your financial life – old school. Banks have become large, and bankers – spread thin. At Oakworth Capital, we're unabashedly old school. We begin by introducing you to a single, seasoned client advisor whose sole responsibility is to come to know your financial situation holistically – from your commercial needs, to your private needs, to your long-term goals. Then, working with state-of-the-art technology and a team of veteran financial specialists, your advisor helps you create a plan tailored specifically to your financial needs. And that's thinking you'll find very, very new.

COMPLETE FINANCIAL SERVICES:  
COMMERCIAL BANKING • WEALTH MANAGEMENT • PRIVATE BANKING

OAKWORTHCAPITAL.COM | 205.263.4700



MEMBER FDIC



OAKWORTH  
CAPITAL BANK



# Legal Stressors on Providing Recoverable Damages for Mental Anguish

*By Erik S. Heninger*

One of the current challenges facing attorneys in Alabama is determining the existence and extent of psychological and physical damages that apply to particular cases. Questions abound as to whether emotional damages are available in certain causes of action and, if so, how the degree of the damage can be proven. Where does the court draw the line and why? Furthermore, can these emotional damages be understood or quantified for mediation, settlement or argumentative purposes? These questions and more should be considered when the lawyer reviews the facts of his or her case and attempts to claim emotional damages exclusively or coupled with other compensable injuries.<sup>1</sup>

## *Physical Damages versus Emotional Damages*

To appreciate the limits the courts have set for recovering mental anguish or pain and suffering damages we must understand the physical and/or psychological effects of an “injury.” The word “pain” is derived from the Latin word *poena*, meaning punishment. Pain is defined by the International Association for the Study of Pain (IASP) as “an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage.”<sup>2</sup> This definition





reflects the now well-accepted premise that pain can occur without any discernable trauma at all, or can persist beyond the expected healing period. Furthermore, pain has unique physiologic and psychological components that contribute to the pain experience. The pain experience, both physical and mental aspects, is unique to each individual. No two people, even those with similar etiologies for their pain, will experience pain in exactly the same way.

Physiologically, pain involves sensitivity to chemical changes in the tissues and then interpretation that these changes are harmful.<sup>3</sup> The natural stimulus for “superficial pain” is injury: cutting, crushing, burning, etc.<sup>4</sup> In the injured area, the receptors are excited or primed by bradykinins (a nonapeptide which stimulates pain receptors), coming from the circulation, and by histamine, prostaglandins, serotonin and potassium ions locally, from injured tissues. A complex physiologic arrangement in the dorsal horn of the spinal cord has been postulated to control or modulate incoming pain impulses. From these impulses, the brain is able to “perceive” an injury including the location, degree and, possibly, cause of pain.

The IASP’s definition of pain illustrates that it is a *perception*, not really a sensation, which can be compared with hearing or seeing. This perception is real, whether or not harm has occurred or is occurring. Cognition is involved in the formulation of this perception. There are emotional consequences and behavioral responses to the cognitive and emotional aspects of pain.

Pain is a significant physical stressor that may induce or exacerbate psychological distress. A significant proportion of patients who have chronic pain, regardless of its cause and origin, experience psychological symptoms in the course of their illness. In most chronic pain patients, psychological disturbances are not the primary cause of pain but are the consequence of unrelieved pain and its effects on the quality of life. Some of the common

psychological disturbances associated with chronic pain include depression, anxiety, sleep disturbances and decreased sexual activity. These factors can lead to physical de-conditioning and disability, and prolonged psychological distress often leads to pain behavior. “Pain behavior” is considered that behavior which occurs in the context of specific events whether internal or external, cognitive or affective, and is followed by consequences emanating from a variety of sources occurring continuously or intermittently with potentially variable effects depending on the complexity of the situation.<sup>5</sup> These events can be physical, psychological, social or any combination thereof.

The concepts of pain and suffering are frequently mixed and sometimes confused in dialogue, especially because pain is commonly used as if it were synonymous with suffering. Yet, pain and anguish are distinct phenomena. Suffering, or anguish, is loosely defined as a “state of severe distress associated with events that threaten the intactness of the person.”<sup>6</sup> Not all pain causes suffering, and not all suffering expressed as pain or coexisting with pain, stems from pain. In other words, individuals can experience pain without a physical injury and, likewise, can sustain an injury without experiencing pain or a consistent degree of pain.

So what does this mean for everyday practitioners? It is widely accepted that damages for mental anguish can form a substantial part of compensatory damages for torts involving physical injury.<sup>7</sup> As the very term “mental anguish” suggests, there are psychological damages which are separate and distinct from the physical aspect of an injury. The Alabama Supreme Court attempts to catalogue a few psychological aspects of an “injury” in *Daniels v. East Alabama Paving, Inc.* 740 So.2d 1033 (1999), which reads:

“when connected with a physical injury, [the term mental anguish] includes both the resultant mental sensation of pain and also the accompanying feelings of



distress, fright and anxiety. As an element of damages [it] implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment, or embarrassment, although it may include all of these, and *it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, sham, despair and/or public humiliation . . .* [A]s a ground ... for compensable damages or *an element of damages, it includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc.*" (emphasis in original).

Thus, just as the medical texts suggest, mental anguish is not a condition limited to suffering painful sensations due to the exposure of a physical injury, but also includes disturbances to a person's psyche.

Clearly, there are few who have suffered injuries or witnessed a loved one's injury that can divorce the mental aspect of pain from the physical. The two travel hand in hand. A more difficult question arises when a physical injury is lacking. Does the fact that we do not see a limp or scar suggest that an individual is not injured? The court recognized this dilemma long ago in *Vinson v. Southern Bell Telephone & Telegraph Co.*, 188 Ala. 292 (1914):

"'Injury to the person' is ... synonymous with bodily hurt, bodily harm. Great physical effort may be immediately productive of that character of hurt or

harm. If such effort produces physical exhaustion it is open, at least, to be concluded that bodily harm or hurt has, though not visibly manifested in impaired physique, resulted ... It has never been supposed that only permanent injuries were injuries to the person; nor that only visible injuries or injuries susceptible of being discovered or known through any of the five senses of another observing the person alleged to have suffered injury were injuries to the person."

Technological, psychological and psychiatric advances in testing and research demonstrate that mental injuries can be as debilitating as their physical counterparts. For these reasons, courts around the country, including Alabama, have struggled to define the parameters of mental anguish claims. These efforts are also an attempt to supplant the inherent distrust of an individual's claim of injury without a corresponding physical manifestation. To that end, Alabama courts have established loose guidelines (required proof, standard of review, etc.) that need to be understood when pleading or defending against a mental anguish claim.

The Alabama Supreme Court, in *Taylor v. Baptist Medical Center*, 400 So.2d 369 (1981), specifically rejected the longstanding rule requiring physical injury, stating "to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities." *Taylor* merely ratified the longstanding principle that emotional damages are, and should be considered, separate and distinct from the physical.

In Alabama, "there is no fixed standard for determining the amount of compensatory damages a jury may award for mental anguish." *Delchamps, Inc. v. Bryant*, 738 So.2d 824 (1999). The amount awarded is left to the jury's sound discretion subject only to review by the court for clear abuse of that discretion. *Southern Pine Electric Cooperative v. Burch*, 878 So.2d 1120 (2003). A plaintiff is required only to present some evidence of mental anguish and, if he presents such evidence, the question of how much compensation he is entitled to for mental anguish is a question for the jury. *Hathcock v. Wood*, 815 So.2d 502 (2001). Mental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience. *Volkswagon of America, Inc. v. Dillard*, 579 So.2d 1301 (1991). "Claims for damages for mental anguish need not be predicated upon the presence of physical symptoms." *Alabama Power Co. v. Harmon*, 483 So.2d 386 (1986).

Attorneys must be cognizant that merely pleading mental anguish in a case with or without an injury will not survive appellate review unless the plaintiff meets certain criteria and presents direct evidence regarding the effect of the mental anguish on the plaintiff. In negligence actions in which the plaintiff seeks compensatory damages for emotional distress, Alabama now follows the "zone of danger" test, "which limits recovery of mental anguish damages 'to those plaintiffs who sustain a physical injury as a result of defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.'" *City of Mobile v. Taylor*, 938 So.2d 407 (2005). For a plaintiff to recover for emotional distress, he must show not only that "it was reasonably foreseeable to the defendant that the plaintiff would be placed at risk of physical injury," but also that "he, in fact, suffered emotional distress."

**LAW FIRM  
MERCHANT ACCOUNT™**

CREDIT CARD PROCESSING FOR ATTORNEYS

The only processing system  
recommended by over 50  
bar associations nationwide!

866.376.0950 LawFirmMerchantAccount.com


"Affiniscap Merchant Solutions," is a registered ISO/MSP of  
Bank of America, N.A., Charlotte, NC.

In *AALAR v. Francis*, 716 So.2d 1141 (1998), the defendant car rental company negligently rented a vehicle to plaintiffs which continued to be improperly listed as stolen on the National Crime Information Center database. One evening, the driver, C.J. Francis, was approached by a police officer because of the erroneous listing. While attempting to retrieve rental papers from the glove compartment, the police officers pulled a gun. While this occurred, F.N. Francis, C.J.'s mother, along with another authorized individual, witnessed the events from inside the mother's home. Neither plaintiffs suffered a physical injury. The Alabama Supreme Court held that F.N. Francis was not entitled to mental anguish damages because she was outside the "zone of danger" and never physically threatened or at risk for physical injury. However, C.J. Francis was entitled to present his claim for mental anguish to the jury since he was in the zone of danger and feared for his personal safety. The *AALAR* court observed through other jurisdictions that "based on the realization that a near miss may be as frightening as a direct hit, the zone of danger test limits recovery for an emotional injury to those plaintiffs who sustain a physical impact as a result of defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."

Juxtaposing two factually similar cases provides even more insight to Alabama's application of the "zone of danger" test. In *White Consolidated Industries, Inc. v. Wilkerson*, 737 So.2d 447 (1999), the plaintiffs alleged various tort and contract claims against an air conditioning manufacturer following a fire which destroyed their home. At the time of the fire, the Wilkersons were away from their home and neither of them sustained physical injuries. Applying the "zone of danger" test, the Court ruled that the plaintiffs were not entitled to emotional damages because they were away from their home—outside a "zone in which they would have been at immediate risk of physical harm."

In contrast, plaintiffs who find themselves within the "zone" would be able to recover emotional damages regardless of physical injuries. When a surge of electrical power was caused to pass from the transmission lines into the electrical circuitry of the plaintiffs' home, while the plaintiffs were asleep, igniting a fire which destroyed the house, the plaintiffs were allowed to recover emotional damages despite no physical injuries. *Alabama Power Co. v. Murray*, 751 So.2d 494 (1999). The plaintiffs provided testimony that they awoke during the night to find their home ablaze. Although fortunate to safely escape with their children, the plaintiffs stood in the street and watched everything they owned destroyed by the fire. Finding that the plaintiffs "were within the zone of danger negligently created by the [defendant], and because they presented some evidence of their mental anguish, the questions whether to award damages for emotional distress was one for the jury to answer in the exercise of its discretion as fact-finder."

Despite the supreme court's express adoption of the zone of danger test in *Taylor* and its progeny, other appellate decisions indicate the court's willingness to forgo such an analysis and allow recovery for emotional damages in noteworthy cases.<sup>8</sup> Cases in which the court has ignored a zone of danger analysis and allowed the plaintiff to proceed with mental anguish claims include: city negligence causing continuous raw sewage in plaintiffs' home resulting in property damage<sup>9</sup>; negligent maintenance of drainage ditch causing property damage in home<sup>10</sup>; mental anguish as a



"based on the realization  
that a near miss may be as  
frightening as a direct hit,  
the **zone of**  
**danger** test limits  
recovery for an emotional  
injury to those plaintiffs  
who sustain a physical impact  
as a result of defendant's  
negligent conduct, or  
who are placed in immediate  
risk of physical harm by  
that conduct."



result of malicious prosecution<sup>11</sup>; breach of contract<sup>12</sup>; defamation<sup>13</sup>; Title VII retaliation claims<sup>14</sup>; willful misrepresentation<sup>15</sup>; reckless desecration of a burial ground<sup>16</sup>; wrongful retention of deceased relative's remains<sup>17</sup>; and mishandling of a dead body.<sup>18</sup>

A common assumption among lawyers is that mental anguish claims are available only when an attendant physical injury exists. In fact, the general rule is that a plaintiff cannot receive damages for mental anguish arising from a breach of contract "unless the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering." *Moore v. Beneficial Nat. Bank USA*, 876 F. Supp. 1247 (M.D. Ala. 1995). Contractual obligations and duties which touch upon mental concern or solicitude are more common in the area of bad faith or general breach of an insurance contract. See *Independent Fire Ins. Co. V. Lunsford*, 621 So.2d 977 (1993). In *National Insurance Association v. Sockwell*, 829 So.2d 111 (2002), the court affirmed an award of \$201,000 where there was evidence from the plaintiff that she experienced aggravation of a pre-existing condition because of her worry and anger. There was no independent medical evidence of this aggravation and her direct testimony was sufficient.<sup>19</sup> *Sockwell* illustrates that evidence of mental anguish must be viewed from the plaintiff's perspective to determine if the evidence supports the plaintiff's suffering. See *Orkin Exterminating Co. v. Jeter*, 832 So.2d 2538 (2001).

Furthermore, the court will view "the evidence of mental anguish claimed by each plaintiff to determine if that particular person should recover; one plaintiff's mental anguish cannot bootstrap the awarding of damages to the other plaintiff or plaintiffs." *George H. Lanier Memorial Hospital v. Andrews*, 901 So.2d 714 (2004). "The inquiry is not whether traumatic events have occurred, but whether the plaintiff has actually suffered as a result of those events." "When a plaintiff's testimony amounts to little more than the obvious notion that dealing with the traumatic event was 'hard' or 'humiliating,' [the Court] has consistently remitted damages."

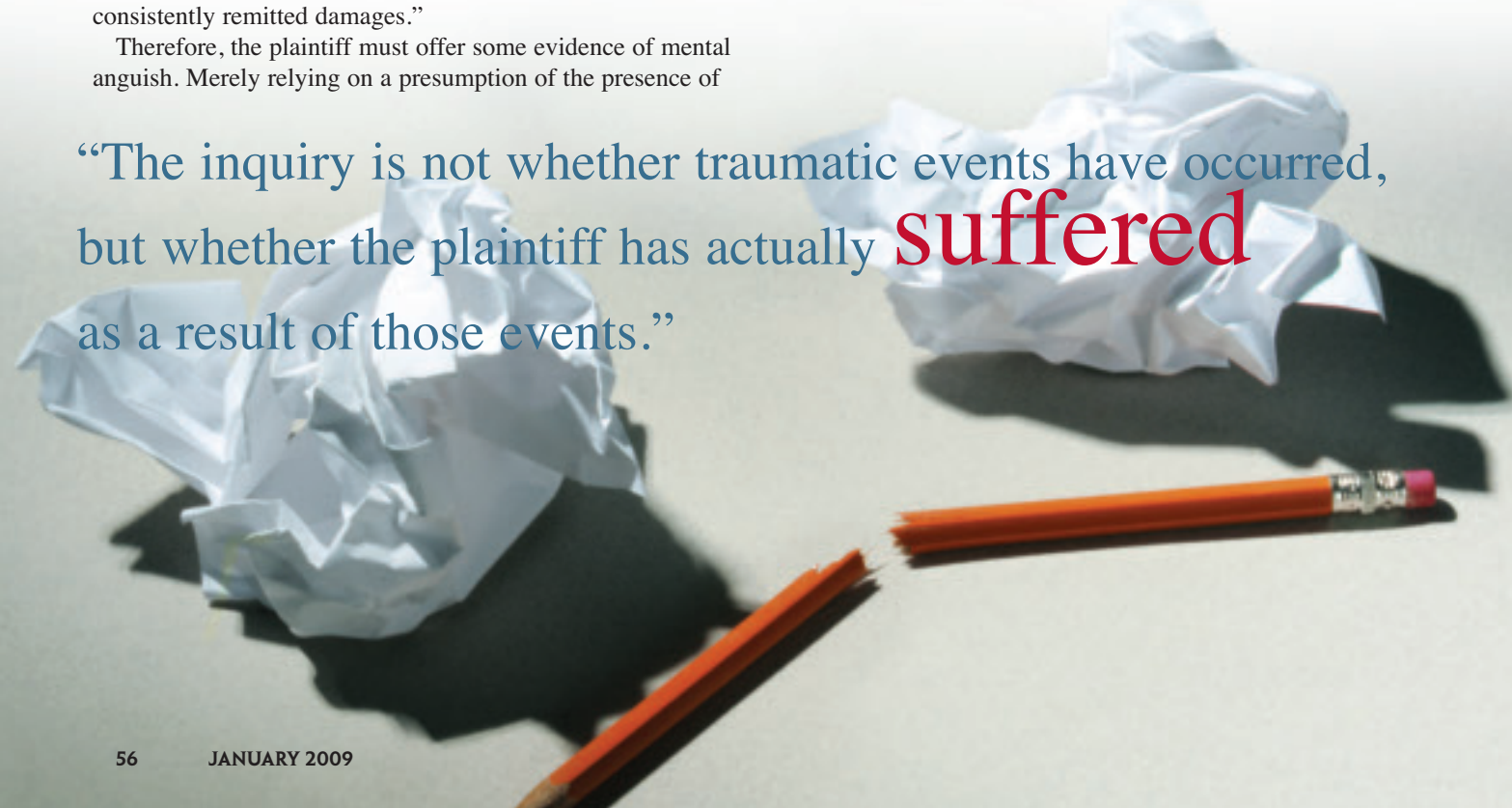
Therefore, the plaintiff must offer some evidence of mental anguish. Merely relying on a presumption of the presence of

mental anguish without testimony is treading dangerous water. In *Kmart v. Kyles*, 723 So.2d 572 (1998), during the third trial of a malicious prosecution claim against the defendants, plaintiff failed to offer testimony concerning the mental anguish she claimed to have suffered as a result of the prosecution. Considering the "paucity of evidence presented by the plaintiff," the court concluded that the jury had abused its discretion in awarding \$100,000 in compensatory damages and remitted the verdict to \$15,000. Similarly, the plaintiff in *Life Insurance Company of Georgia v. Foster*, 656 So.2d 333 (1994), testified that the alleged fraud "affected me a lot." The court stated that "from this limited evidence, we agree that the jury could infer that Foster had suffered some measure of mental anguish and emotional distress . . .; however . . . Foster's scant testimony of mental anguish and emotional distress, without more, does not support [the verdict]." The court then reduced the plaintiff's verdict of \$250,000 in compensatory damages to \$50,000.

Alabama law also allows lay witness testimony regarding mental anguish of a plaintiff. However, the testimony is only admissible regarding the fact of mental anguish, and is not admissible regarding the cause of the mental anguish. *Fomby v. Popwell*, 695 So.2d 628 (1997). In *Fomby*, the witness was allowed to testify that the plaintiff was "worried" but was not allowed to testify about the cause of the plaintiff's worry. Although in the *Fomby* case, the witness was not allowed to testify about why the plaintiff was worried, two years later the Alabama Court of Civil Appeals did allow witnesses to testify that a plaintiff was scared and agitated when planes flew low over his house. *Seale v. Pearson*, 736 So.2d 1108 (1999). The court determined that the jury used that evidence, along with testimony from the plaintiff, to find that a mental anguish award was proper in the nuisance case because the low flights were made with "malice, insult, inhumanity, or contumely."

As can be seen, juries and courts recognize the impact of mental anguish on a plaintiff and are willing to compensate for those injuries. To ensure the client receives the full range of compensation, the attorney must be prepared to supply adequate proof of these injuries to the jury as well as the appellate court.

"The inquiry is not whether traumatic events have occurred, but whether the plaintiff has actually **suffered** as a result of those events."





## Appellate Review

Mental anguish claims present peculiar problems for jurists and courts sitting in review of verdicts for mental anguish. As discussed above, mental anguish may exist with or without a physical injury. Yet, an appellate court's approach to determining the validity of a verdict for mental anguish rests on whether a physical injury occurs. Although rare, there are instances in which Alabama courts have found damages for mental anguish to be excessive even when coupled with a physical injury.<sup>20</sup> Under Alabama law, the presence of physical injuries or physical symptoms is not a prerequisite for a claim for damages for mental anguish. However, Alabama courts will give "stricter scrutiny to an award of mental anguish where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced." *Kmart v. Kyles*, 723 So.2d 572 (1998). But, "the strict scrutiny rule established in *Kyles* is inapplicable in a case where the plaintiff suffers physical injury or pain in conjunction with emotional distress." The *Sockwell* opinion makes evident that the new strict scrutiny rule will not apply where the plaintiff suffers mental anguish or emotional distress in connection to a physical injury. What Alabama courts have not done is set out specific parameters regarding how this strict scrutiny test will be applied or how far a plaintiff must go to justify an award for mental anguish when a physical injury is lacking.

In *Kyles*, the Alabama Supreme Court examined a verdict of \$200,000 (\$100,000 compensatory and \$100,000 punitive damages) for malicious prosecution after two mistrials. The plaintiff presented evidence that she was arrested, spent a few hours in jail and had out-of-pocket expenses of \$4,000 in attorney's fees and bail bond. During the third trial, the plaintiff presented evidence of mental anguish that she cried on one occasion when she phoned her husband to tell him she had been arrested. The opinion highlighted that in the two previous mistrials *Kyles* produced much more evidence of mental anguish. In the absence of similar testimony during the third trial, the court concluded that this was a tactical decision by the plaintiff in an attempt to limit the scope of cross-examination. In suggesting that the plaintiff accept a reduced amount, the court noted that "although *Kyles* presented

substantial evidence indicating that certain events occurred,... she presented no testimony or other evidence indicating that those events caused her to suffer great mental anguish." Thus, in *Kyles*, the court appeared to be raising the evidentiary burden already borne by the plaintiff. Stated explicitly, the court will not consider "indirect evidence" of mental anguish sufficient to support a substantial verdict. However, in *Sockwell*, the court states that "*Kyles* did not alter the law as previously established in Alabama... and that once the plaintiff has presented some evidence of mental anguish, 'the question of damages for mental anguish is for the jury.'" This seeming incongruity is even more obscure when considering the context of the *Kyles* opinion was to address "the strength of the presumption of correctness to be placed on the jury's award...." The well-established law in Alabama is once a plaintiff presents some evidence of mental anguish, the question whether he should recover for such mental anguish, and, if so, how much, is a question reserved for the jury. *Sockwell*, *supra*. Furthermore, "a jury's verdict is presumed correct, and that presumption is strengthened by the trial court's denial of a motion for a new trial." *Cochran v. Ward*, 935 So.2d 1169 (2006). Although clouded by equivocation, practitioners should take away from *Kyles* a warning that only direct evidence from the plaintiff of mental anguish will be accepted when reviewed under the strict scrutiny standard.

The supreme court's position in *Kyles* appears to be a limited departure from well-established law in Alabama. The opinions following *Kyles* on mental anguish suggest that any "strict scrutiny" on jury verdicts should be limited to an extremely narrow situation. For example, in *Liberty National Life Ins. Co. v. Daugherty*, 840 So.2d 152 (2002), the plaintiff was awarded \$300,000 in a defamation suit for mental anguish over a two-year period. The plaintiff testified that he began to suffer from stress, depression, fear, worry, and sleeplessness because of the defendant's conduct. In the opinion, while noting the new presumptions under *Kyles*, the court referenced a long line of Alabama cases in stating, "[T]he amount of the jury's award is left to the jury's sound discretion, and the jury's award will not be set aside absent a clear abuse of discretion. Also, a jury's verdict is presumed correct, and that presumption is strengthened by the trial court's denial of a motion for



Statewide  
&  
National Service

SCOTT G. HADLY C.P.S. [scott35115@yahoo.com](mailto:scott35115@yahoo.com)

Office: 205-476-8136

Cell: 205-746-7939 [www.had-fam-pi.com](http://www.had-fam-pi.com)

**Had-Fam Investigations**  
and

**Legal services, LLC**  
*Certified process Servers*

**24 Hour Service**



- ⊙ Certified Accident Investigator
- ⊙ Certified Insurance Claims Investigator
- ⊙ Counter Electronic Surveillance

**Montevallo, AL**

new trial.” Since the plaintiff and his wife testified to the extent and duration of his mental anguish and emotional distress direct evidence the court affirmed the jury’s verdict.

Thus, the line appears to be drawn for when the court will apply strict scrutiny to a jury verdict for mental anguish: (1) no physical injury, and (2) little or no evidence of the effect of mental anguish on the plaintiff. Apart from these limited circumstances, any award for mental anguish or emotional distress will remain the province of the jury. The court also offers this piece of advice: “While the virtue of stoically dismissing one’s suffering by limiting any description of it to a few terse words has its place, the courtroom is not one of them if the person suffering is a plaintiff who expects a significant award to pass judicial scrutiny.” *Delchamps v. Bryant*, *supra*.

Perhaps a more important and practical question is how counsel for each party addresses the pressure of increased appellate scrutiny. Decisions to limit the amount of mental anguish testimony occurs in every courtroom for fear the plaintiff will come across as a whiner. In light of *Kyles*, a jury’s “presumption” that defendant’s conduct would cause significant emotional distress without evidence of its actual affect will no longer pass judicial muster. Where to draw the line in direct testimony or even whether to cross-examine a witness on the issue and provide more direct evidence is an issue that must be considered in each trial with each witness. For the plaintiff, the only indication from the court is that it must be done to some extent.

For those cases in which evidence of mental anguish is proffered, there remain a few specific items of interest that need to be addressed. Mental anguish cases tend to be reviewed on a case-by-case basis. If the plaintiff has only been “upset” or “concerned,” the potential for reduction by an appellate court increases dramatically, as was seen in *Kyles*. The court has made note of several factors which will be considered in the review of a verdict for mental anguish. Three factors are consistently referenced and reviewed: the nature, severity and duration of the mental anguish.<sup>21</sup> Each of these factors must be considered by the practitioner when deciding what testimony needs to be elicited from the witness. In *Horton Homes, Inc. v. Brooks*, 832 So.2d 44 (2001), the plaintiff presented testimony that the situation was stressful, he lost sleep over the situation and his wife testified that he was a nervous wreck, “edgy” and would get upset and cry. Based on this testimony, the court upheld a verdict of \$138,000 in compensatory damages for mental anguish. Further, in *Southern Energy Homes, Inc. v. Washington*, 774 So.2d 505 (2000), the court upheld a verdict of \$350,000, of which a large part was allocable to mental anguish damages. The court noted the plaintiff presented evidence that he experienced anger, embarrassment and disruption of his sleep over a period of almost five years. “Evidence that Washington had experienced such feelings over such an extended period supports the jury’s finding of mental anguish under the standard in *Kyles*.” The cases following *Kyles* illustrate that the plaintiff must show the effects of mental anguish at least in duration and the form of distress (i.e. crying, anger, sleeplessness) in order to be entitled to this form of damages.

As juries have identified the need for compensating emotional damages and indicated a willingness to do so, the courts have provided a bleary compass to navigate the minefield of appellate review. For several years now, attorneys have been besieged with warnings and admonitions of the inadequacy of evidence verifying the nature, severity and duration of emotional damages. For

the unsuspecting lawyer, beware: blindly plodding through witness examinations while ignoring the specific nuances of proof is a direct path to your own pain and suffering. ▲▲▲

## Endnotes

1. This article is limited in scope to damage claims available in general tort and contract actions. This article does not address the separate and distinct tort of outrage. For a glimpse of outrage in Alabama see: *Am. Rd. Service Co. v. Inmon*, 394 So. 2d 361 (Ala. 1980); *Continental Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208 (Ala. 1990); *Ex parte Lumberman’s Underwriting Alliance*, 662 So. 2d 1133 (Ala. 1995).
2. Christine Miaskowski, “Principles of Pain Assessment,” in *The Neurological Basis of Pain* 195 (Marco Papagallo et al., eds., 2005).
3. Don Ranney, *Anatomy of Pain*.
4. Raymond Adams, *Principles of Neurology* 63 (5<sup>th</sup> ed. 1994).
5. Daniel M. Doleys, *Psychological and Behavioral Assessment*, [www.pain.com/sections/professional/Journals/journalfull.cfm?id=102](http://www.pain.com/sections/professional/Journals/journalfull.cfm?id=102)
6. Jyontsna Nagda, “Definitions and Classifications of Pain,” in *Principles and Practice of Pain Medicine* 51 (Carol A. Warfield et al. eds., 2d ed. 2004).
7. W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts*, § 12, at 55 (5th ed. 1984).
8. See M. Lee Huffaker, *Recovery for Infliction of Emotional Distress: A Comment on the Mental Anguish Accompanying Such a Claim in Alabama*, 52 Ala. L. Rev. 1003 (2001).
9. See *Carson v. City of Prichard*, 709 So.2d 1199 (Ala. 1998).
10. See *City of Mobile v. Jackson*, 474 So.2d 644 (Ala. 1985).
11. See *Kmart v. Kyles*, *supra*; *Delchamps, Inc. v. Bryant*, 738 So.2d 824 (Ala. 1999); *USF&G v. Miller*, 117 So. 668 (Ala. 1928); *Thompson v. Kinney*, 486 So.2d 442 (Ala. Civ. App. 1986).
12. See *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990); *B & M Homes, Inc. v. Hogan*, 376 So.2d 667 (Ala. 1979); *Stead v. Blue Cross Blue Shield of Ala.*, 346 So.2d 1140 (Ala. 1977).
13. See *Slack v. Stream*, \_\_ So.2d \_\_, 2008 WL 162618 (Ala.).
14. See *Tucker v. Housing Authority of Birmingham Dist.*, 229 Fed. Appx. 820 (11th Cir. 2007).
15. See *Holcombe v. Whitaker*, 318 So.2d 289 (Ala. 1975).
16. See *Whitt v. Hulsey*, 519 So. 2d 901 (Ala. 1987).
17. See *Levite Undertakers Co. v. Griggs*, 495 So. 2d 63 (Ala. 1986); see also *Wadley v. St. Vincent’s Hospital*, No. CV-2004-1257-RSV, 2006 WL 2061785 (Ala. Cir. Ct. 2006) (extending claims for mishandling of a deceased non-viable fetus).
18. See *SCI Alabama Funeral Services, Inc. v. Brown*, 770 So. 2d 97 (Ala. Civ. App. 1999).
19. *Id.* See also, *Wal-Mart Stores, Inc. v. Goodman*, 789 So.2d 166 (Ala. 2000); *Liberty National Life Insurance Company v. Daugherty*, 840 So.2d 152 (Ala. 2002) (affirming award of \$300,000 where only testimony was from plaintiff and his wife about depression, inability to sleep and worry).
20. See *Consolidated Freightways, Inc. v. Pancheco-Rivera*, 524 So. 2d 346 (Ala. 1988); *Coca-Cola Bottling Co. v. Parker*, 451 So. 2d 786 (Ala. 1984).
21. *Alabama Power Co. v. Murray*, 751 So.2d 494 (Ala. 1999); see also *Southern Pine Electrical Cooperative v. Burch*, 878 So.2d 1120 (Ala. 2003) (upholding an award of \$19,900 because plaintiff was without electricity for 34 days); *Liberty National Life Ins. Co. v. Daugherty*, 840 So.2d 152 (Ala. 2002) (upholding verdict of \$300,000 for mental anguish which occurred over a period of two years).



**Erik S. Heninger** is an attorney with Heninger Garrison Davis, LLC. He graduated from Birmingham-Southern College in 1999 and received his J.D. from Cumberland School of Law in 2001. He is a member of the Alabama State Bar, Mississippi State Bar, Georgia State Bar, Birmingham Bar Association, American Bar Association, American Association for Justice, and Alabama Association for Justice.

His practice is devoted to representing businesses and individuals in disputes ranging from breach of contract to wrongful death.

## The American Bar Association: A Valuable Resource

**By Keith B. Norman**

This issue of *The Alabama Lawyer* features five different articles about the American Bar Association (“ABA”). These articles cover a variety of the programs and benefits available to those who join the ranks of the ABA. I have been a member of the ABA since 1982 and can attest to what these writers say but I’m going to share my thoughts about the ABA from the perspective of a bar association staff member.

The ABA helps its members directly through a range of services and benefits. The fact is, however, all lawyers benefit at least indirectly through the ABA’s divisions, programs and affiliated organizations that serve local and state bars. The ABA’s Division for Bar Service (“DBS”), for example, is the entity to which bar associations and their staffs turn when they need help or information. Bar associations can request on-site visits from the Field Services Program for guidance on administration, management and substantive issues or even to facilitate meetings and planning sessions.

Our bar has benefited from the services offered by the DBS and from evaluative visits that have been requested from other ABA entities to obtain suggestions for starting new programs or improving existing programs. We have had volunteers from the ABA’s Commission on Lawyers’ Assistance Programs (COLAP) evaluate the Alabama Lawyers’ Assistance Program (ALAP) and even have a visit scheduled this month from representatives of the ABA’s Standing Committee on Client Protection to evaluate our Client Security Fund program. The visiting evaluation teams consist of volunteers who are active ABA members with experience in these same programs in their own states.

In addition, a number of our senior staff and officers participate in affiliated organizations whose operations are facilitated by the ABA including the: National Client Protection Organization; National Conference of Bar Foundations; National Conference of Bar Presidents; National Association of Bar Executives; National Conference of Bar Examiners; National Legal Aid and Defender Association; and the National Organization of Bar Counsel. Regular participation in these various organizations helps keep officers and staff abreast of the national—and international—trends and developments in these areas of the legal profession. Moreover, they afford an opportunity to network with colleagues from other bar associations who share similar responsibilities.

As a bar association, we are extremely fortunate to be able to call on the ABA for multifaceted assistance in all areas of our operations and programs. For the Alabama State Bar and other state and local bar associations, the ABA is a valuable resource.

## ABA Membership Has Broadened My Horizons

**By Patricia Lee Refo**

When I joined the American Bar Association, I found my horizons widened far beyond the walls of my law firm’s offices. I found tools to

make me a better lawyer and help me to better serve my clients. I found rich professional experiences and wonderful colleagues around the country.

The ABA has helped me learn about the nuances of the practice of law much faster than I could have learned them on my own, while introducing me to mentors who have guided my path through the association as I hope to guide others.

I know that ABA members are among the brightest and most unselfish lawyers I know. And, just as I realize that being a member of the ABA at any level signals a lawyer’s dedication to excellence in the profession, I realize that being an active ABA member takes time. Time invested with ABA activities, however, ends up paying dividends. And there are many ways to benefit from ABA membership without taking time away from your practice.

### A Wealth of Information

One of the best things about tools and resources from the ABA is that there is something for every lawyer in every practice setting and specialty. The ABA’s 28 sections and divisions range from Litigation to Intellectual Property and from General Practice to Government Lawyers. Each has committees and task forces that generate a wealth of extremely current and useful information for today’s practitioner—whether you are just starting out or a seasoned legal veteran.

For example, the General Practice, Solo and Small Firm Division offers a variety of services, ranging from the Solosez listserv—a virtual community of more than 3,000 legal professionals from across the country and around the world—to newsletters such as *SOLO*, which provides real-life solutions to the challenges of managing a solo or small firm and *Technology eReports* to help to run a successful practice. Other resources for general practice and solo lawyers include the division’s magazine, *GPSOLO*, and the twice-yearly *Technology and Practice Guide*.

If your practice is specialized, you can benefit from ABA information as well. Every possible practice area has been covered so that no matter what or where you practice, you can find information on current trends and thinking that help you best represent your clients in your area of specialization.

### Publications Promote Efficient Practice

Another benefit the ABA offers members is the discount on the latest legal publications. Operating its own publishing arm, the ABA maintains one of the leading legal publishing organizations in the world. Publications range from committee newsletters to e-mail reports to journals and books—all available through the ABA Web Store. One example, Edna Selan Epstein’s *The Attorney-Client Privilege and the Work-Product Doctrine*, is now the leading resource on attorney-client privilege issues.

And, when it comes to continuing legal education, the ABA is second to none. Along with the highest quality content and a huge array of courses, the ABA offers CLE in a variety of formats so you can find one that works for you. If you find that you don’t have time to get away, you can do your CLE training online at your desk or over your phone. If you want to network with other lawyers who share your interest in a professional topic or practice area, you can attend one of the on-site CLE programs presented by the many sections and committees of the ABA. By checking the ABA calendar, you can be sure that you can find an ABA program near you.

### The ABA Is the Voice of the Profession

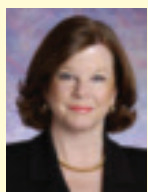
For me, however, as critical as the ABA’s support is to lawyers on an individual basis, it is the organization’s support for the rule of law and the legal profession that really makes me proud I am a member. As the voice of the legal profession, the ABA works every day to advance the rule of law and improve our justice system.



# A Fresh Look at an Old Friend: The American Bar Association

For example, the ABA has taken the lead in protecting the attorney-client privilege from recent attacks, particularly by government agencies. The ABA was a driving force behind the important new Federal Rule of Evidence 502. Signed into law by President Bush in September 2008, this rule will reduce the skyrocketing cost of producing electronically-stored information in litigation. We also work to protect and preserve the independence of the judiciary, a core value of our association. The ABA serves as an advocate for the Legal Services Corporation, and has supported maintaining FDIC insurance for IOLTA accounts in the states that mandate the use of IOLTA monies to fund LSC.

Together, the ABA's support for the profession and its support for the individual lawyer make me very proud to be a member. I ask each of you to join me—and join the ABA.



*Patricia Lee Refo serves as chair of the ABA Standing Committee on Membership. A former chair of the ABA Section of Litigation and the American Jury Project, she is a member of the ABA House of Delegates. She has also served on the Advisory Committee on the Federal Rules of Evidence. Refo is a partner at Snell & Wilmer LLP in Phoenix.*

## The Alabama State Bar Provides Rich Heritage of Support for the American Bar Association

**By Henry F. White, Jr.**

Alabama has a rich heritage of support for and involvement with the American Bar Association. In fact, when Tommy Wells of Birmingham's Maynard, Cooper & Gale assumed the ABA presidency in August, he became the third lawyer from the state to serve in that critical role. President Wells follows in the footsteps of Henry Upson Sims, who served in 1929-30, and N. Lee Cooper, also with Maynard Cooper & Gale, who served in 1996-97. Providing distinguished leaders of the bar, such as these three, underscores Alabama's tradition of contributing to the ABA and its activities, a tradition that has been shaped by participation of the state's 5,000+ current ABA members.

In a particularly meaningful recent example of service, Alabama lawyers were critical to the success of last year's "Wills for Heroes" project, a public service endeavor that provides estate planning for emergency first responders. That effort was led by the ABA Young Lawyers' Division and the Wills for Heroes Foundation. Since September 11, 2007, participants from the Alabama State Bar Volunteer Lawyers Program have helped families of thousands of first-responders—police officers, firefighters and emergency medical technicians—in becoming an acknowledged nationwide model for "Wills for Heroes" efforts in other states.



*Birmingham attorney N. Lee Cooper and family—Cooper was the ABA president in 1996 and the second Alabamian to hold that office.*

### Alabama Lawyers Are ABA Members

Not surprisingly, nearly one-third of the practicing lawyers in Alabama are ABA members, and they are critical to the association in roles as experts on continuing legal education, advocates on Capitol Hill, architects of ABA policy, developers of new programming, and so much more.

In return, the ABA offers what lawyers from Alabama want and need by harnessing the best legal minds in the country. In fact, last year, ABA continuing legal education programs and expert publications served nearly 1,000 lawyers from the state. Additionally, ABA resources, such as its public education materials, toolkits to enhance local bar leadership, an online search engine to identify "second career" opportunities and an ethics hotline, among many others, helped thousands advance their professional careers. Moreover, ABA events, such as the Midyear, Annual and Section meetings, offer Alabamians networking opportunities on a scale that is second to none.

As the national voice for the legal profession, the ABA has direct access to key public policy decision-makers, benefiting lawyers in Alabama as well as local communities everywhere. Just last year, our leadership in Washington, D.C. helped to secure debt relief for public interest lawyers, worked toward preserving the attorney-client privilege in corporate fraud investigations and supported funding the Legal Services Corporation, to name just a few accomplishments. Work continues this year as the ABA lobbies on approximately 100 different legislative issues affecting both lawyers and ordinary citizens alike.

### Advocating for the Rule of Law

The ABA's efforts extend beyond domestic issues to include the global community as well. The country's current financial crisis and its depressing effect on the world markets demonstrate how interconnected the world has become. Advocating the rule of law is more important than it ever has been for the nation, for American businesses abroad and for American citizens traveling and working in other countries—and the ABA is at the leading edge of that advocacy. In July, the ABA's World Justice Forum in Vienna brought together hundreds of leaders from more than 95 countries to seed projects that advance the rule of law worldwide. As a result, a team from Asia plans to launch a program to educate migrant workers on labor law and their rights. Another team from Africa will start a rule of law awareness campaign targeting the troubled countries of Rwanda, Sudan and Uganda. Closer to home, a North American team seeks to reinstate civics education in three countries. These activities are just a sampling of the many transformative initiatives now germinating all around the globe. Today the ABA's rule of law work continues in more than 40 countries with even more initiatives on the horizon.

Issues of national and international significance are the ABA's bailiwick, while state and local bar associations lead in issues specific to their geographic communities. Each bar association has its own portfolio of offerings and specialties; there is little competition among the groups. Instead, there is a strong connection between the ABA and the state and local bars, one that is built upon collaboration and mutual benefit. Those of us in the legal community share many common goals. Together, the ABA and the state and local bar communities are powerful partners that can achieve much together. The synergies between the groups will be espe-

cially helpful as the legal community copes with the challenges presented by America's economic downturn and new threats to the rule of law abroad. Now more than ever, it is important that we recognize our collective power so we may realize the best for our profession, our community and the world at large.



*Henry F. White, Jr. is executive director and chief operating officer of the American Bar Association, the largest voluntary professional membership organization in the world with more than 400,000 members. Before assuming leadership of the association in 2006, White served as president of the Institute of International Container*

*Lessors, representing the international container and chassis leasing industry throughout the world. White is a retired rear admiral in the Naval Reserve, who last served as vice commander of the U.S. Fleet Forces Command, the Navy's largest operational command. A New York City native, White is a graduate of the U.S. Naval Academy and the Fordham University School of Law.*

## Alabama Provides Fertile Ground for Growing ABA Leaders

**By H. Thomas Wells, Jr.**

Those of us who are lawyers in Alabama—like our colleagues across the county—find that membership in the American Bar Association provides us with chances to learn leadership while supporting our profession and our communities.

One indication that we stand to benefit from ABA membership is the fact that our state is fertile ground for ABA leadership. For example, my law partner, Anthony Joseph, is chair of the ABA's Criminal Justice Section. A.J. is one of 76 Alabama lawyers in the ABA's leadership directory. Our leaders are from towns and cities from Dothan to Birmingham, and from Fairhope to Montgomery. Alabama lawyers serve in the ABA House of Delegates and in a variety of ABA practice sections and committees.

Here's another thing to consider: Of the 132 ABA presidents over the years, three, including me, have hailed from Alabama.

### ASB's Connection to the ABA

The Alabama ABA president immediately before me was my law partner, Lee Cooper, who served from 1996 to 1997. Like me, Lee had previously chaired the House of Delegates, the ABA's policy-making body.

The other ABA president from Alabama was Henry Upson Sims, also from Birmingham. Sims was a nationally renowned real property law scholar who has a faculty position named for him at the University of Alabama School of Law.

Sims, as the old Chinese curse puts it, led "in interesting times." He served as president of the Alabama State Bar from 1917 to 1918, America's years in World War I. He was president of the ABA from 1929 to 1930, right as the stock market crashed.

Today, we also live in "interesting times" and are dealing with our own financial crisis. At my request, the ABA has created a Task Force on Financial Markets Regulatory Reform. The group is coordinating the ABA's response to regulations proposed by the President's Working Group on Financial Markets and other actions taken by the Federal Reserve, the Department of the Treasury, the Securities and Exchange Commission and other federal agencies. It will inform the ABA's lobbying efforts in Washington, D.C. on any proposed legislative changes affecting regulation of the financial markets.

We also live in interesting times when it comes to the bar's common core values, values that inspire lawyers in their communities to work together and make a difference at the national level.

## A Shared Sense of Core Values

Foremost among these values is access to justice. The bar is making a huge difference even as we have a lot of work to do. We know this in Alabama, which joined many other states when Chief Justice Cobb established the Supreme Court's Access to Justice Commission. The ABA informs and encourages the efforts of access to justice commissions throughout the country, and we're happy to work with Alabama's.

When natural disasters such as the Gulf Coast hurricanes strike, the ABA's Young Lawyers' Division always staffs legal assistance hotlines, in conjunction with state bars and FEMA.

At the federal level, the ABA and our state and local bars continually lobby to ensure adequate funding of the Legal Services Corporation—made all the more crucial by home foreclosures and other crises. Last April, we were fortunate to have Alabama lawyers Sam Crosby, Wade Baxley and Bill Broome and Tracy Daniel from the Alabama Law Foundation meet with Alabama's congressional delegation in Washington for ABA Day, our annual lobbying activity on behalf of Legal Services and other core issues of the profession. We appreciate Alabama's steady participation in this crucial activity, and we look forward to working together on Legal Services funding and other access to justice issues.

## Developing Solutions to Aid the Poor

Access to justice is a front-and-center issue with another activity we're planning for the current bar year—a national summit in May on the critical role of fair and impartial state courts. The summit will foster a deeper understanding of the major challenges facing state courts in serving the public. It will identify ways the three branches of government can cooperate effectively to ensure that our state courts are adequately resourced and empowered. We're fortunate to have the involvement of Alabama State Bar President Mark White in our efforts.

I often remind audiences throughout the country that we lawyers in the South have a unique saying—that we're "called to the bar." Aside from the clergy, no other profession can point to its work as a calling. We minister justice, and our mission is public service. Only through our members' support can the ABA foster justice and public service at the local and state levels, and collectively on the national level.

As ABA president, I am privileged to serve Alabama's lawyers as part of America's larger bar community, and I look forward to your participation.



*H. Thomas Wells, Jr., a partner and founding member at Maynard, Cooper & Gale in Birmingham, is president of the American Bar Association. He has served on numerous committees and in leadership roles in the Alabama State Bar, the Birmingham Bar Association and the ABA. His children, Lynlee Wells Palmer and Trey Wells, are also lawyers in Birmingham and active ABA members.*

## I Cannot Imagine a Legal Career without Membership in the ABA

**By Elizabeth K. Acee**

When I first started practicing law in 1999, an ABA membership automatically came with my new associate status.

However, I chose to become an *active* member of the ABA Young Lawyers' Division after I was mentored in my bar association activities by other lawyers who participated in the bar—both at the state and national level. My first experience with the YLD was speaking during a conference

# A Fresh Look at an Old Friend: The American Bar Association

in 2001 on a program that I'd presented in Connecticut called "Gender and Credibility in the Courtroom," which examined whether women faced credibility issues on the basis of gender.

At that first conference, I quickly realized that there was a vast network of young lawyers who, regardless of their geographical region, were experiencing the same issues as a new lawyer that I was, and I connected with lawyers nationwide. Today, because of my ABA involvement, there is not a state in the country where I do not know a lawyer.

Over the years, I learned to appreciate the benefits of YLD involvement: networking opportunities, outstanding CLE and the ability to understand the profession beyond the local level—all benefits that have made me a better lawyer.

## The Voice of the Profession's Future

The YLD gives us a voice. With approximately 147,000 members, we are the largest division of the ABA. We provide invaluable resources, including CLE, networking, pro bono and mentorship opportunities. We provide a New Lawyer Roadmap that assists new lawyers in navigating the ABA. We also offer leadership training, giving a young lawyer the opportunity to chair a committee, speak in front of a group, debate resolutions before the assembly, influence division policy, develop and implement programming, lead a team, supervise the work of others, and obtain affiliate leader training.

Although work-life integration can challenge young lawyers, the division provides opportunities for involvement at various levels, believing that YLD membership should enhance, not inhibit, career growth.

The YLD also offers young lawyers a home that embraces diversity, operating a scholarship program that encourages participation by racially and ethnically diverse lawyers, as well as lawyers from varied practice areas, including government and small-firm lawyers. Division committees focus on issues related to minorities, women and individual rights. Sitting on its council are representatives from four affiliate organizations: the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Bar Association and the National Lesbian & Gay Lawyers Association.

The YLD is the public service arm of the ABA. As such, the division annually launches a national public service project that encourages young lawyers to become involved in community service activities.

## A Tradition of Service to the Community

This year, the YLD will serve communities through the 2008–09 service project "Voices Against Violence," designed to educate young lawyers about domestic violence issues, particularly among the teen population. Its Web site, [www.abanet.org/yld/dv](http://www.abanet.org/yld/dv), engages lawyers in taking on pro bono cases, coordinating community discussions, delivering presentations and taking part in advocacy.

The project encourages our 147,000 members to get involved in raising awareness of domestic violence issues while addressing the unmet legal needs of domestic violence victims.

In addition, the YLD works with the Federal Emergency Management Agency to provide assistance to disaster victims. Since 1978, when FEMA

first entered into a Memorandum of Understanding with the ABA Young Lawyers' Division, the YLD has supported FEMA's Disaster Legal Assistance program. When disaster strikes and FEMA invokes the memorandum, the YLD goes into action, setting up and staffing a toll-free number so that qualified victims can obtain legal services. The YLD has helped victims of national disasters ranging from 9/11 to hurricanes Katrina and Rita, and most recently, Ike and Gustav.

By addressing the needs of the new and young lawyer, the YLD creates a source of future ABA members. The division instills a sense of the relevance of the organization so that by the time young lawyers "age up," they recognize the importance of active membership in the association.



*The ASB Award-Winning Team (left to right): Navan Ward, who chaired the YLS Minority Pre-Law Conference Committee, Immediate Past YLS Chair George R. Parker (holding the award), and J.R. Gaines, Pre-Law Conference Committee co-chair*

## Mentoring Tomorrow's Leaders

This year, the YLD will serve its members through a Mentorship Project offering an online collection of articles, quick tips and audio recordings geared toward the needs of young lawyers. As part of this project, the YLD is working with StoryCorps® to share stories of mentorship in the legal profession. The recordings will be available on the YLD Web site and archived at the Library of Congress. At this year's conferences, the YLD will collaborate with the legal consulting firm of Young Mayden to provide career development programming and career counseling.

Additional plans this year include improving delivery of the resources young lawyers need, holding open discussions on diversity and continuing to work with FEMA.

For nearly 75 years, the ABA YLD has focused on giving back—giving back to our members, giving back to our communities and giving back to one another through networking opportunities and friendships that we form through our volunteer involvement. This year, we will continue to offer more pro bono and public service than any other professional organization. We will continue to serve our members—the largest contingent of the ABA. And we will continue to lead in diversity initiatives and as providers of disaster legal services.

I really cannot imagine a professional career as a lawyer without active participation in the American Bar Association. Following my term as chair, I hope to take a two-year seat as a YLD delegate to the House of Delegates, a move that will help me learn more about the total organization while remaining active in the YLD. I also plan to take a more active role in ABA sections, where I can continue to take advantage of some of the best CLE and networking opportunities available to the profession. Of course, I will maintain the many, many friendships that have grown out of my YLD involvement.



*Elizabeth K. Acee, who serves as the 2008–2009 chair of the ABA Young Lawyers' Division, is a partner at LeClairRyan. She is a graduate of the State University of New York at Buffalo and the Case Western University School of Law, where she served as executive editor of Health Matrix: Journal of Law-Medicine. Acee is a fellow with the American Bar Foundation.*



# Partnership with the Alabama Legal Community

By Michelle Behnke

Some 30 years ago, then Alabama State Bar Executive Director Reggie Hamner was appointed to a special ABA committee along with six other bar leaders and helped shape the ABA Division for Bar Services (the division) and what later became the Standing Committee for Bar Activities and Services (SCOBAS). The focus for SCOBAS and the staff of the division came out of a series of caravans around the country, convening groups of state bar leaders to discuss their needs and requests for services. It is this tradition of input and feedback from state and local bar associations that has been the *modus operandi* for the work of SCOBAS and the division through the years.

## A History of Dedicated Service

The division is the ABA staff department dedicated to servicing state and local bar associations, and the division is the key link between the ABA and bar associations. Primary among the services that the division provides to bar association leaders are:

1. A national clearinghouse of information on bar association issues, such as bar management and governance, member services and programs for the public. In addition, it publishes *Bar Leader*, the nation's only bi-monthly news magazine that covers news, issues and trends of importance to leaders of state, local and special-focus bar associations. Its Web site, [www.abanet.org/barserv/](http://www.abanet.org/barserv/), features updates on services and connects to a host of bar association topic-related resources. It also includes an online directory of state and local bar associations around the country, linking to those respective Web sites, as well as an online job announcement service for bar associations seeking to fill staff positions.
2. Field and consulting services, including strategic planning, board education and retreats and leadership training. The Alabama State Bar was one of the first bar associations to participate in the Bar Association Operational Survey program, an overview "check-up" of the bar's operations that provides recommendations for increased effectiveness. Both the local bar associations throughout the state and the state bar have been the recipients of field service visits throughout the years, allowing for information exchange and sharing of resources.
3. Leadership training, exemplified by the annual ABA Bar Leadership Institute. With its focus on good governance, effective communications and inspired leadership, the BLI experience provides valuable information, resources and a network of colleagues upon which bar leaders can draw during their term in office. Bar leaders from the state bar and the Birmingham and Mobile bar associations have

regularly attended this two-day training program for presidents-elect since its inception in the 1970s. The program is open to the incoming leaders of all bar associations, and will be held in Chicago March 12-14, 2009.

4. Association management services for the National Association of Bar Executives; National Conference of Bar Presidents, of which the



*Pictured above with the ABA 2004 Outstanding Law Day Activities Award for the play, "Cross That River," are Law Day Co-Chair Tommy Klinner; '04-'05 ASB President Douglas McElvy; Alan Kopit, chair; ABA Division for Public Education; Tim Lewis, committee co-chair; and Jane Garrett, co-author of "Cross That River."*

Metropolitan Bar Caucus is a part; and National Conference of Bar Foundations. These organizations provide education and networking opportunities for the bar leadership and professional staff, and are governed by boards of their respective colleagues. The division serves as staff and the point of contact and coordination for each of the groups. Again, the involvement and contributions of Alabamians in and to each of these groups are noteworthy. Both Reggie Hamner and Keith Norman served on the board of the National Association of Bar Executives and Reggie served as president and as the NABE delegate to the ABA

House of Delegates, while Keith also chaired the all-important Program Committee. Two past presidents, Ben Harris and Fred Gray, served on the Executive Council of the National Council of Bar Presidents. Tracy Daniel, executive director of the Alabama Law Foundation, and Crystal McMeekin, executive director, Birmingham Bar Foundation, both served as trustees on the National Conference of Bar Foundations.

## Addressing Concerns of Bar Leaders

Today, the members of SCOBAS continue to be drawn from elected bar leaders and bar executive directors. SCOBAS works with the division to share its collective experience as bar leaders and to link with current bar leaders to facilitate information sharing. SCOBAS members participate in the state and metropolitan bar regional conferences throughout the country to hear the concerns of bar association leaders who are trying to address the challenges in their own jurisdictions. We serve as your "agents" to deliver input for ABA priorities and action. We also communicate the efforts the ABA is making and the resources available for mediation of problems.

Together, SCOBAS and the division are your organizational link to the ABA and its invaluable resources for state and local bar leaders. As bar leaders we give voice to the challenges facing our members, our bar associations and our communities. And it is *your* voices that SCOBAS and the division represent at the ABA.

There is a rich tradition of collaboration between the Alabama State Bar and the American Bar Association, as demonstrated throughout this special issue. We hope to continue to serve you, your bar associations, your communities and the legal profession.



*Michelle Behnke, chair of the ABA Standing Committee on Bar Activities and Services, is a sole practitioner in Madison, WI. She served as president of the State Bar of Wisconsin in 2005, and has served on the ABA Standing Committee on Bar Activities and Services for four years, with three years as chair.*

# Annual Meeting CLE CD Now Available!

**\$15**

CLE Program Materials from the 2008 Alabama State Bar Annual Meeting are available on a single CD. It's convenient, portable and worth every penny!

**LIMITED  
SUPPLY**

Succeeding in Your Law Practice: Part I – How Can I Be More  
Successful, Efficient and Content in My Legal Career?

Immigration Issues and Employment Law Update

Criminal Defense Law Update

A Cautionary Tale for All Administrative Boards:

Relating *Morrison* and *Lupo*

Family Law Case Update

Electronic Recording Act and the Real Estate Practitioner

Succeeding in Your Law Practice: Part II –Strategic

Planning – Identifying Your Purpose, Establishing Objectives and

Reaching Your Goals

Featured Workshop: At the Center of America's Cultural

Wars – The Role, Decisions and Influence of the U.S. Supreme Court

Featured Workshop: Don't Be Client No. 9 – What Happens

in Las Vegas May Cost You Your Law License (\*Ethics)

Workers' Compensation Law Update

Featured Workshop: Annual Meeting of the Alabama Law Institute

Featured Workshop – The "D" Word: A Candid Look at

Achieving a Diverse Legal Profession

Featured Workshop: 2008 Intellectual Property Law Section Update

The Final Word: Finality and Rule 54(b)

Auto Products Liability – Plaintiff's and Defense Perspective

## PLUS!

You'll get the *Alabama Rules of Professional Responsibility* and other information from many of the bar's programs, sections and services.

## How do I order the CD?

Simply remit a check or money order made payable to the Alabama State Bar for \$15 and forward it with your name and mailing address either clearly marked on the check or money order, or by filling in the following information:

Feel free to order as many CDs as you would like! Just tally the cost at \$15 per CD, and remit that amount.

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

For informational purposes only. No CLE credit will be granted.

## Mail To:

Alabama State Bar  
Communications Department  
Post Office Box 671  
Montgomery, Alabama 36101



J. ANTHONY MCCLAIN

# Lawyers' Trust Account Obligations with Regard to Retainers and Set Fees

## QUESTION:

Should a flat fee that is received prior to the conclusion of representation be deposited into an attorney's IOLTA account or is it earned at the time of receipt?

## ANSWER:

In Alabama, a flat fee that is received prior to the conclusion of the representation or prior to the performance of services must be deposited in the attorney's IOLTA account until the fee is actually earned.

## DISCUSSION:

In RO 1992-17, the Disciplinary Commission previously stated that:

[T]he client has the absolute right to terminate the services of his or her lawyer, with or without cause, and to retain another lawyer of their choice. This right would be substantially limited if the client was required to pay the full amount of the agreed on fee without the services being performed. In *Gaines, Gaines and Gaines v. Hare, Wynn*, 554 So.2d 445 (Ala. Civ. App. 1989), the Alabama Court of Civil Appeals stated:

"The rule in Alabama is that an attorney discharged without cause or otherwise prevented from full performance, is entitled to be reasonably compensated only for services rendered before such discharge. *Mall v. Gunter*, 157 Ala. 375, 47 So.2d 144 (1908)."

Likewise, in RO 1993-21, the Disciplinary Commission held that an attorney "may not characterize a fee as non-refundable or use other language in a fee agreement that suggests that any fee paid before services are rendered is not subject to refund or adjustment."

As in RO 1993-21, the Commission noted that "non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in." As such, the overriding



## OPINIONS OF THE GENERAL COUNSEL Continued from page 65

principle of RO 1992-17 and RO 1993-21 is that a non-refundable fee would impinge on the right of the client to change lawyers at any time. Allowing an attorney to keep a fee, regardless of whether any service has been performed for the client, would certainly restrict the ability of a client to terminate the attorney and seek new counsel. In reaching this conclusion, the Commission also made clear that the rule applied to all arrangements where fees are paid in advance of legal services being rendered. As such, all retainers and fees are refundable to the extent that they have not yet been earned. To conclude that a flat fee is earned at the time of receipt, where the contemplated services have yet to be performed or completed, would be in direct contradiction of this long standing principle.

The only exception to the rule that all fees are refundable would be a true availability-only retainer. An availability-only retainer is a payment that is made by a client solely to secure an attorney's future availability and would necessarily restrict the ability of the attorney to represent other clients. A true availability-only retainer is earned at the time of receipt, must be in writing and must be approved by the client in advance of the payment. To be clear, an attorney may not characterize a flat fee or other type fee that is being paid for future services as an availability-only retainer fee. Any attempt by an attorney to circumvent the rule that all retainers and fees are refundable by mischaracterizing a fee as an availability-only retainer would be an ethics violation.

Because a flat fee paid in advance of services is subject to being refunded, Rule 1.15(a), *Ala. R. Prof. C.*, requires that the flat fee be deposited into an attorney's IOLTA account. Rule 1.15, *Ala. R. Prof. C.*, provides in pertinent part, as follows:

### **Rule 1.15 Safekeeping Property**

(a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No personal funds of a lawyer shall ever be deposited in such a trust account, except **(1) unearned attorney fees that are being held until earned**, and (2) funds sufficient to

cover maintenance fees, such as service charges, on the account. Interest, if any, on funds, less the fees charged to the account, other than overdraft and returned-item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six years after termination of the representation.

(emphasis added)

Because flat fees are not earned at the time of receipt, they are unearned attorney fees that must be held in the attorney's IOLTA account until earned in accordance with Rule 1.15. However, the entire flat fee is not required to be held in trust until the conclusion of the representation. Rather, an attorney may withdraw portions of the fee from the trust account as the fee is earned. Exactly when and what amount of the fee is earned during the representation is a question of reasonableness.

It is generally recognized that the first yardstick used in assessing the reasonableness of an attorney fee is the time consumed. *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). For example, an attorney may withdraw portions of the flat fee that have been earned based on the time the attorney has spent on the matter and his normal hourly rate. In doing so, the attorney should notify the client when portions of the fee are withdrawn from the trust account by sending a statement or invoice to the client stating the date and the amount of the withdrawal.

An attorney may also enter into a written agreement with the client setting forth milestones in the representation that entitle the attorney to receive a specified portion of the fee. The fee agreement may explicitly state that an attorney is entitled to specific portions of the fee after certain stages in the representation have been completed. For example, assume an attorney is representing a client in a criminal matter for a flat fee of \$5,000. The fee agreement may provide that the attorney is entitled to \$2,500 of the fee after arraignment or after the preliminary hearing has been held. Any such agreement between the attorney and the client should be set out, preferably in writing, at the outset of the representation. [RO 2008-03]



# Alabama State Bar Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and bar associations, at cost only, a series of pamphlets on a variety of legal topics of interest to the general public. Below is a current listing of public information pamphlets available for distribution by bar members and local bar associations, under established guidelines.



## PAMPHLETS

<b>Law As A Career</b> Information on the opportunities and challenges of a law career today.	\$10.00 per 100	Qty ____	\$ ____
<b>Lawyers and Legal Fees</b> A summary of basic legal procedures and common legal questions of the general public.	\$10.00 per 100	Qty ____	\$ ____
<b>Abogados Y Honorarios Legales</b> Un resumen de procedimientos legales básicos y preguntas legales comunes del gran público.	\$10.00 per 100	Qty ____	\$ ____
<b>Last Will &amp; Testament</b> Aspects of estate planning and the importance of having a will.	\$10.00 per 100	Qty ____	\$ ____
<b>Legal Aspects of Divorce</b> Offers options and choices involved in divorce.	\$10.00 per 100	Qty ____	\$ ____
<b>Consumer Finance/"Buying On Time"</b> Outlines important considerations and provides advice on financial matters.	\$10.00 per 100	Qty ____	\$ ____
<b>Mediation/Resolving Disputes</b> An overview of the mediation process in question-and-answer form.	\$10.00 per 100	Qty ____	\$ ____
<b>Arbitration Agreements</b> Answers questions about arbitration from the consumer's perspective.	\$10.00 per 100	Qty ____	\$ ____
<b>Advance Health Care Directives</b> Complete, easy to understand information about health directives in Alabama.	\$10.00 per 100	Qty ____	\$ ____
<b>Alabama's Court System</b> An overview of Alabama's Unified Judicial System.	\$10.00 per 100	Qty ____	\$ ____
<b>Notary Public &amp; Lawyers/Notarios Y Abogados</b> Clarifies the difference between notary publics and lawyers in the USA. Clarifica la diferencia entre Notario público y abogados en los Estados Unidos.	\$10.00 per 100	Qty ____	\$ ____
<b>Acrylic Stand</b> Individual stand imprinted with attorney, firm or bar association name for use at distribution points.	\$ 5.00 each	Qty ____	\$ ____

Shipping & Handling \$ 5.00

**TOTAL** \$ \_\_\_\_

Name to imprint on stand: \_\_\_\_\_

Physical Mailing Address (not P.O. Box): \_\_\_\_\_

Please remit CHECK OR MONEY ORDER MADE PAYABLE TO: THE ALABAMA STATE BAR  
for the amount listed on the TOTAL line and forward it with this order form to:  
Marcia Daniel, Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101



# Exceptional service.

That's our version of Southern hospitality.



Trust your next transaction to local experts willing to go the extra mile for you. Whether complex or simple, residential or commercial, your Lawyers Title and Commonwealth team can help with every aspect of the real estate transaction. We've been a proud partner of the southern communities we serve for over 130 years and look forward to offering you exceptional service in the decades to come.

2200 Woodcrest Place, Suite 330, Birmingham, AL 35209 • Phone: (205) 868-1000 • Toll Free: (800) 831-6807





The 2009 legislature convenes February 3, 2009 and may continue until May 19, 2009. If things begin as usual there will be over 500 bills introduced on the first day. Most of the 1,606 bills introduced during the 2008 session were not passed and most likely will be reintroduced.

The Alabama Law Institute has six bills it will introduce this year. These are:

## 1. Redemption from Ad Valorem Tax Sales

This bill will again be introduced in the legislature. In 2008 the house bill passed the house of representatives and the senate bill passed the senate. To become law the same bill must be passed by both houses. The bill will again be sponsored by Senator Wendell Mitchell and Representative Mike Hill.

When section 40-10-122 was amended in 2002 to limit 12 percent interest paid at tax sale to taxes and on the overbid up to 15 percent of assessed value, other sections of the law should have been amended. This bill will clarify and codify the current law by amending other relevant code sections concerning the redemption of property from ad valorem tax sales. It also codifies case law on redemption and delineates the counties' responsibility with regard to holding and refunding an "overbid" by the tax sale purchaser who paid all taxes, fees and charges and any additional sums paid to the tax collector.

The bill also:

- Provides a procedure for redemption by the landowner from multiple tax sales.
- The owner who remains in possession after the sale may always redeem. (The owner has a statutory redemption period for three years from sale; there is an additional three years' redemption period by the owner from the purchaser after the original three-year statutory redemption period.)
- Allows the tax status for Class 3 property to remain to be taxed as Class 3 residential property as long as the owner occupies the property.
- After three years from the date of the tax sale, the probate judge must receive proof that all ad valorem taxes have been paid before a tax deed is issued.
- Provides a less complicated procedure for redeeming property sold at a tax sale.
- Bill is effective September 1, 2009.

## 2. Uniform Revised Limited Partnership Act

This bill will again be introduced in the legislature. In 2008, the house bill passed the house of representatives and the senate bill passed the senate. (To become law, the same bill must be passed by both houses.) The bill will again be sponsored by Senator Roger Bedford and Representative Cam Ward.



**ROBERT L. MCCURLEY, JR.**

*For more information about the Institute, contact Bob McCurley at (205) 348-7411 or visit [www.ali.state.al.us](http://www.ali.state.al.us).*

# LEGISLATIVE WRAP-UP

Continued from page 69

Alabama last revised its Limited Partnership Act in 1983. This revision updates the Limited Partnership Act to reflect modern business practices. Limited partnerships are now used primarily in two ways: for family limited partnerships in estate planning arrangements, and for highly-sophisticated, manager-controlled limited partnerships.

A limited partnership is distinguished from a general partnership by the existence of limited partners who invest in the partnership; in return for limited liability, the limited partner usually relinquishes any right of control or management of partnership affairs. However, the general partner of a limited partnership traditionally receives no direct liability protection.

This new act provides:

- **Perpetual Entity.** No termination of a limited partnership unless the agreement so provides. A limited partner who leaves does not dissolve the entity.
- **Entity Status.** A limited partner is clearly an entity.
- **Convenience.** The new Limited Partnership Act provides a single, self-contained source of statutory authority for issues pertaining to limited partnerships. The act is no longer dependent upon the general partnership law for rules that are not contained within it.
- **LLLP Status.** Under this new act, limited partnerships may opt to become limited liability limited partnerships (LLLP), simply by so stating in the limited partnership agreement, and in the publicly filed certificate. The primary reason for a limited partnership to elect LLLP-status is to provide direct protection from liability for debts and obligations of the partnership to the general partner of the limited partnership.
- **Liability Shield.** The current limited partnership law provides only a restricted liability shield for limited partners. The new act provides a full, status-based shield against limited partner liability for entity obligations. The shield applies whether or not the limited partnership is an LLLP.
- **Express Default Statute.** The act provides default provisions between the partners and between partners and the partnership. Therefore, when the partnership agreement does not define the relationship, there is a fall-back default law.

The act also addresses issues such as allocating power between general partners and limited partners, and setting

fiduciary duties owed by general partners to other general and limited partners.

## 3. Uniform Satisfaction of Residential Mortgages

This bill will again be introduced in the legislature and again be sponsored by Senator Myron Penn and Representative James Buskey.

This act only applies to residential real estate in Alabama. The process of clearing titles for residential real estate mortgage has been complicated by the failure of lenders to render a timely payoff statement and mortgage satisfaction when the mortgage is to be paid off or has been fully paid but not satisfied.

In some instances the original lender is no longer in business and the mortgage has been sold to another party, however, the legal assignment has not been recorded or has become lost.

The act basically does the following:

- **Payoffs.** The mortgage lender must give a payoff statement within 14 days after a written request. If the lender fails to do so, there is a \$500 penalty payable to the borrower. This is identical to the penalty in section 7-9A-210 and 7-9A-625 of the UCC for failure to give a payoff statement for personal property.
- **Mortgage Satisfaction.** A mortgage lender has 30 days after receiving a full payment to submit a satisfaction document. A mortgagee that neglects to file a mortgage satisfaction within the 30 days after being paid may be subject to a \$500 penalty. An identical penalty is in section 7-9A-210 and 7-9A-625 of the UCC for failure to satisfy a lien on personal property. (Since 1852, Alabama has had a \$200 penalty for failure to satisfy a mortgage after 30 days [see section 35-10-30].). After a second 30-day notice, if the mortgage is still not satisfied and the mortgagor has to hire an attorney, the mortgagor may be awarded reasonable attorney's fees.
- **Self-Help Satisfaction.** When the mortgage lender cannot be found or is non-responsive, the bill provides for a self-help method to remove the satisfied mortgage. After the lender receives full payment, a title insurance company or licensed attorney, under bond, can follow the specified

procedure of giving the mortgagee 30 days notice to satisfy the mortgage or object to a satisfaction and record an affidavit of satisfaction using a specific form. This results in a satisfying of the paid mortgage on the record. A satisfaction agent or anyone who knowingly makes a false satisfaction is liable for actual damages as well as attorney's fees and costs.

## 4. Business and Nonprofit Entities Code

This bill will again be introduced in the legislature and again be sponsored by Senator Rodger Smitherman and Representative Marcel Black.

The revision, which was nine years in the making, was reviewed in the November 2008 edition of *The Alabama Lawyer*.

## 5. Electronic Recording of Real Estate Records

This bill is being introduced this year for the first time in Alabama, although it has been widely adopted across the county.

Recording of real estate records is now available in 20 states due to the passage of the Uniform Real Property Electronic Recording Act. Tennessee, Florida, South Carolina and North Carolina have already adopted this act.

As a result of the enactment of the Uniform Electronic Transactions Act passed by the Alabama legislature in 2001, it is now possible to have contracts in electronic form with electronic signatures of the parties. However, real estate transactions require another step not addressed by the e-sign law.

Real estate documents must be recorded in public records in order to provide notice of the current owner of the property. Real estate records establish a chain of title based on filing the original document, preserving it by copying it and recording the document in the probate office.

Another example of the growing use of electronic recording is the 2005 court rule by the Alabama Supreme Court, authorizing electronic filing of circuit and district court documents. Electronic filings occur pursuant to this rule in 48 counties by registered users.

This act does essentially three things:

- Equates electronic documents and electronic signatures to original paper documents and manual signatures. Thus, any requirements for original paper documents or manual signatures are satisfied by an electronic document and signature. The process is essentially a scan-in of the document and electronic filing by e-mail.
- Establishes that electronic filing and storage of electronic records is purely an opt-in option by probate offices in each of the 67 counties and does not mandate them. Those electing to have electronic recording will be able to do so while maintaining the procedure for walk-up filing of paper documents.
- Establishes a board to set uniform standards for filing electronically in every probate office that elects to opt-in to utilize electronic filing. This 13-person board consists of probate judges, lawyers and other officials who have an interest in the recording process.

## 6. Residential Landlord-Tenant Act Amendments

The Residential Landlord-Tenant Act was passed in 2006. These are the first amendments to the act and are to clarify provisions in the Landlord Tenant Act.

- The bill clarifies that a landlord may enter a unit to show the dwelling to prospective future tenants within four months of the end of the lease and schedule pest control of a unit during certain times, provided the tenant has at least two days' notice.
- The bill provides there are certain "non-curable" acts of the tenant, such as possession of illegal drugs, discharge of a firearm on the premises and criminal assault on a tenant or guest. Therefore, the rental agreement may be terminated after 14 days' notice.
- The tenant may be served anywhere in the state.
- The bill clarifies the filing of a post-judgment motion and suspends the time for the filing of an appeal.
- The amendments address the rights of a tenant to be restored to the premises after a successful appeal.

Copies of these bills and commentary to them are available on the Law Institute's home page at [www.ali.state.al.us](http://www.ali.state.al.us). ▲▼▲



# ABA TECHSHOW<sup>®</sup> 2009

PRESENTED BY THE **ABA** **LAW PRACTICE MANAGEMENT SECTION**  
MARKETING • MANAGEMENT • TECHNOLOGY • FINANCE

## THE WORLD'S PREMIER LEGAL TECHNOLOGY CONFERENCE & EXPO

**Conference:**  
**April 2-4, 2009**

**Expo:**  
**April 2-3, 2009**

**Hilton Chicago**  
**Chicago, IL**

### 15 Exciting Educational Tracks:

- A Day in the (Techno) Life **NEW!**
- E-Discovery Update
- E-Discovery Boot Camp **NEW!**
- E-Records Management **NEW!**
- Enterprise IT
- I'm a Mac
- Internet
- Large Firm/Corporate Counsel
- Paperless Practice
- Solo Small Firm I
- Solo Small Firm II
- Tech for Client Development **NEW!**
- Tech for Financial Management **NEW!**
- Trial Skills
- Virtual Practice **NEW!**

### ABA TECHSHOW<sup>®</sup> 2009 Highlights:

- More than 50 Educational Sessions
- Two-day Expo Featuring Over 100 Vendors
- Group/Law Firm Discounts
- Product Demonstration Sessions
- Deep Discounts on LPM Books
- CLE Credit Available

**[www.techshow.com](http://www.techshow.com)**

**Register early  
and save!**

Registration  
now open.



EP Code **EP901**

## Notice

- **Stephen Willis Guthrie**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2009 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 07-114(A) and 07-135(A) by the Disciplinary Board of the Alabama State Bar.

## Reinstatements

- The Supreme Court of Alabama entered an order reinstating Dothan attorney **A. Gary Jones** to the practice of law in Alabama, with certain conditions, effective August 26, 2008, based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Jones's law license had been interimly suspended in February 2007. [Pet. No. 08-01]
- On September 30, 2008, Scottsboro attorney **Eileen Robinson Malcom** was reinstated to the practice of law in Alabama with conditions. Malcom's law license had been summarily suspended, effective September 12, 2008, for her failure to respond to the Office of General Counsel regarding a disciplinary matter. [Rule 20(a); Pet. No. 08-57]
- On September 2, 2008, the Supreme Court of Alabama entered an order reinstating former Anniston attorney **Harold G. Quattlebaum** to the practice of law. This order was entered based on the order entered by Panel VI of the Disciplinary Board of the Alabama State Bar. Pursuant to the board's order, Quattlebaum will be on probation for a period of two years, effective September 2, 2008, during which time he must comply with specific conditions set forth in the order.  
Quattlebaum was disbarred from the practice of law effective October 25, 1994. He subsequently filed a motion to reconsider. On January 5, 1995, the supreme court entered an order denying Quattlebaum's motion for reconsideration. [Pet. No. 07-07]



# DISCIPLINARY NOTICES

Continued from page 73

## Transfer to Disability Inactive

- Jasper attorney **James Wesley Brooks** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective August 26, 2008. [Rule 27(c); Pet. No. 08-55]

## Suspensions

- Grove Hill attorney **Stuart Craig DuBose** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective September 12, 2008. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel showing evidence that DuBose's conduct is causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(a); Pet. No. 08-59]
- Birmingham attorney **Richard Charles Frier** was suspended from the practice of law in the State of Alabama by order of the Alabama Supreme Court for a period of three years, effective September 12, 2008, with credit for time served during the period of his interim suspension which became effective January 12, 2005. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Frier's conditional guilty plea.

Between March 2004 and May 2007, more than 35 grievances and Client Security Fund claims were filed against Frier. Most of the claims alleged that Frier would undertake to represent a client in bankruptcy cases, then do little or no work on the case, fail to communicate with the client and fail to account for and refund unearned fees. Frier agreed to make restitution totaling in excess of \$21,000. [ASB nos. 04-204(A) *et al*]

- Montgomery attorney **Gary Lane Stephens** was suspended from the practice of law in the State of Alabama for a period of 91 days, by order of the Supreme Court of Alabama, effective September 1, 2008. The supreme court entered its order in accord with the provisions of the August 14, 2008 order of the Disciplinary Commission of the

Alabama State Bar accepting Stephens's conditional guilty plea and consent to the revocation of probation pursuant to the terms of a conditional guilty plea previously entered in a prior disciplinary matter. Under the terms of that plea any subsequent violation of the *Alabama Rules of Professional Conduct* would be considered a violation of his probation. Subsequently, Stephens violated the terms of his probation by knowingly failing to respond to a disciplinary complaint. As a result, Stephens consented to a revocation of his probation and was ordered to receive a 91-day suspension. In exchange for his consent to the revocation of his probation, Stephens was given credit for the 28 days he was previously suspended in the prior disciplinary matter. In addition, Stephens was also ordered to receive public reprimands with general publication in three separate cases for violations of rules 1.3, 1.4 (a), 1.4(b) and 8.4(a), *Ala. R. Prof. C.* Stephens was also ordered to make restitution in two of these cases in the total amount of \$1,502. [ASB nos. 08-27(A), 07-06(A), 07-163(A), 07-164(A); Rule 20; Pet. No. 08-09]

- On September 22, 2008, the Supreme Court of Alabama entered an order accepting the order of the Disciplinary Board, Panel IV, entered on August 22, 2008, imposing reciprocal discipline consisting of a six-month suspension of the license of attorney **Anthony Brett Williams**, effective June 30, 2008, the date of the suspension order of the Supreme Court of Georgia. In the *State of Georgia vs. Anthony Brett Williams*, Docket #: 08CR198, Williams had pled guilty to a single violation of *OCGA* § 45-11-5 (misdemeanor for a public officer to receive money not due him through the use of his office) and was sentenced under the First Offender Act to one year of probation. [Rule 25(a); Pet. No. 08-54; ASB No. 08-128(A)]

## Public Reprimands

- Madison attorney **James Ralph Bryant** received a public reprimand without general publication on September 12, 2008 for violations of rules 1.3, 1.4(a), 1.15(a), 1.15(b), 1.16(d), and 8.4(a), *Alabama Rules of Professional Conduct*. This discipline was the result of a negotiated plea agreement, which initially imposed a 91-day suspension that was deferred pending a two-year period of probation. During probation, Bryant made restitution to the client's daughter in the amount of \$15,000 and complied with other conditions as ordered.



Prior to his admission to the Alabama State Bar, Bryant was employed as a certified public accountant by an individual who owned substantial real estate in Tennessee. Bryant assisted in the management of the client's real estate holdings. The client's wife died January 5, 1996. Bryant was admitted to the ASB April 25, 1997.

After the death of the client's wife, a dispute arose among the children and next of kin concerning ownership and control of his real estate holdings and other assets of the estate and a family trust. The client executed an unlimited power of attorney in Bryant's favor. Bryant was to take over management of the client's real estate holdings and other business matters.

In May 2000, one of the client's daughters moved her father from Tennessee to live with her in Texas and communicated with Bryant regarding exercising her father's power of attorney on his behalf to regain control of his real estate holdings and other matters in Tennessee. Bryant proposed to incorporate a management company in Tennessee to take over management of the client's real estate holdings. Bryant represented that the client would derive a substantial portion of income from the management fees from the corporation. Bryant asked the client's daughter for \$15,000 to use as "start-up" money to establish a temporary office in Tennessee, and to pay for legal work and other expenses. Bryant then prepared a 180-day promissory note payable to the client's daughter and her husband. After receiving the funds, Bryant did not use them for their intended purpose and improperly converted the unearned trust funds to pay firm and other personal expenses. When Bryant was terminated, he did not provide an accounting nor did he refund the unearned portion of the funds. Further, Bryant did little or no substantial work and did not respond to the

# AMERICAN LEGAL SEARCH

*Where Lawyers Look for Lawyers®*

## Attorney Search

- Permanent Placement  
(Associate & Partner Level)
- Temporary Placement
- Firm Mergers & Acquisitions

**Richard G. Brock, Esq.**

[richard@americanlegalsearch.com](mailto:richard@americanlegalsearch.com)

**Brannon Ford, Esq.**

[brannon@americanlegalsearch.com](mailto:brannon@americanlegalsearch.com)

**Birmingham (205) 397-9500**

**Nationwide (800) 930-9128**

[www.AmericanLegalSearch.com](http://www.AmericanLegalSearch.com)

[www.AmericanSearchCompanies.com](http://www.AmericanSearchCompanies.com)

Atlanta Birmingham Houston Los Angeles Nashville New York Tampa



*"Nationwide Legal Support"*

## Support Search

- Paralegals
- Legal Secretaries
- Legal Assistants

**Katherine Marsh, Esq.**

[katherine@apexlegalsupport.com](mailto:katherine@apexlegalsupport.com)

**Birmingham (205) 397-9555**

**Nationwide (800) 930-9128**

[www.ApexLegalSupport.com](http://www.ApexLegalSupport.com)

[www.AmericanSearchCompanies.com](http://www.AmericanSearchCompanies.com)

Atlanta Birmingham Houston Los Angeles Nashville New York Tampa

# DISCIPLINARY NOTICES

Continued from page 75

client's reasonable requests for information. [ASB No. 00-241(A)]

**James Ralph Bryant** also received a public reprimand without general publication on September 12, 2008 for violations of rules 1.15(a), 1.15(b), 1.16(d) and 8.4(a), *Alabama Rules of Professional Conduct*. This discipline was the result of a negotiated plea agreement, which initially imposed a 91-day suspension that was deferred pending a two-year period of probation. During probation, Bryant made restitution to the client's mother in the amount of \$1,000 and complied with other conditions as ordered.

A client's mother retained Bryant's firm to represent her son in a criminal matter. The client's initial conference was with Bryant's former partner, who informed the client's mother that the firm would require a \$2,500 fee. The client's mother paid the fee, which was deposited into Bryant's account.

While the case was pending in district court, Bryant's former partner signed Bryant's name to a waiver of preliminary hearing. After the case was filed in circuit court, Bryant entered an appearance and filed a waiver of arraignment and plea of not guilty, as well as an application for treatment as a youthful offender. However, Bryant did not appear at the hearing on the youthful offender application, nor did he notify the client or his mother of the hearing. As a result, youthful offender status was denied.

The client's mother hired another attorney to represent her son. The client's mother contacted Bryant several times requesting a refund of the unearned portion of the retainer. Bryant refused to refund the unearned portion and did not provide an accounting of the funds. Bryant initially told the client's mother that he did not do any work on the case and that his former partner was responsible for and had all the money, which later proved to be untrue. [ASB No. 01-81(A)]

- Dothan attorney **Malcolm Rance Newman** received a public reprimand without general publication on September 12, 2008 for violating Rule 1.3 of the *Alabama Rules of Professional Conduct*. Newman was retained to represent a client in a divorce action after the case had been set for trial, but before the trial date. Newman mailed his notice of appearance and his motion to continue in the case, but it did not arrive in the clerk's office for filing until two days after the trial. Newman filed a motion for a new trial, which the court denied. Thereafter, Newman filed a notice of appeal, which was also mailed to the clerk's office and, therefore, filed two days after the time for filing notice of appeal had run. The appeal was dismissed by the Alabama Court of Civil Appeals on motion of the appellee as being untimely filed. Newman was also ordered to make restitution to the complainant in the amount of \$1,000. [ASB No. 07-102(A)] ▲▲▲



## Serving the Demands of the Legal Profession

We help solve your temporary staffing needs for projects like:

- \* Document production
- \* Brief writing
- \* Legal research
- \* Commercial transactions
- \* Management of complex litigation
- \* Human Resources matters
- \* Family Medical Leave

We can help with permanent placement, too. Call us now.

205.383.4619 (ph) - [www.legaldemands.com](http://www.legaldemands.com) - [info@legaldemands.com](mailto:info@legaldemands.com)

## About Members

**Kathryn S. Crawford** announces the opening of **Kathryn S. Crawford LLC** at 12 Office Park Circle, Ste. 101, Birmingham 35223. Phone (205) 423-0010.

**C. Brian Davidson** announces the opening of **Davidson Law Firm PC** at 3965 Helena Rd., Helena 35080. Phone (205) 685-4822.

**Joel L. DiLorenzo** announces the opening of **The DiLorenzo Law Firm LLC** at 1130 22<sup>nd</sup> St. S., Ste.

4500, Birmingham 35205. Phone (205) 212-9988.

**Belinda S. Elmore Johnson** announces the opening of **Johnson Legal LLC** at 202 West Adams St., Ste. 1, Dothan 36303. Phone (334) 671-1111.

**Carla Verletha Morton** announces the opening of **The Morton Law Firm LLC** at the Age Herald Building, 2107 5th Ave. N., Ste. 103, Birmingham 35203. Phone (205) 267-2473.

**Elizabeth Barry Johnson Parker** announces the opening of her firm at 14 S. Section St., Fairhope 36532. Phone (251) 929-0068.

PLEASE E-MAIL  
ANNOUNCEMENTS TO  
MARCIA DANIEL  
[marcia.daniel@alabar.org](mailto:marcia.daniel@alabar.org)

## ARE YOU PAYING TOO MUCH FOR LIFE INSURANCE?

Through Drane Insurance you can purchase affordable life insurance from highly rated insurance companies. To avoid overpaying, call or visit our web site for a free quote on policies ranging from \$100,000 up to \$25,000,000 to compare with your current life or business insurance policy. Look at the sample rates below.

\$250,000 Level Term Coverage  
Male, Super Preferred, Non-Tobacco  
Monthly Premium

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

\$500,000 Level Term Coverage  
Male, Super Preferred, Non-Tobacco  
Monthly Premium

AGE:	30	35	40	45	50	55	60
10	\$15	\$15	\$19	\$31	\$45	\$80	\$130
15	\$18	\$18	\$23	\$44	\$70	\$103	\$168
20	\$23	\$23	\$31	\$56	\$90	\$137	\$231
30	\$39	\$44	\$62	\$91	\$139	\$276	

Drane Insurance  
Carter H. Drane  
(800) 203-0365

Life Insurance • Employee Benefits • Estate Planning • Annuities

LET US FAX OR EMAIL YOU A QUOTE

[www.draneinsurance.com](http://www.draneinsurance.com)



## ABOUT MEMBERS, AMONG FIRMS Continued from page 77

### Among Firms

**Dana Pittman** has been appointed deputy attorney general of the **Alabama Board of Pardons and Paroles**.

**Daniel F. Aldridge** announces that **Howard & Aldridge PC** has changed to **Aldridge Law Firm PC** and is now located at 605 Madison St., Huntsville.

**Beasley, Allen, Crow, Methvin, Portis & Miles PC** announces that **J. Parker Miller** has joined as an associate.

**Bradley Arant Rose & White LLP** announces that **Ginger Carroll, Tiffany**

**J. DeGruy, Christy Graham, Jennifer A. Harris, Joshua Daniel Johnson, John Thomas Richie, Molly Campbell Taylor, William T. Thistle, II, Daniel Bryan Thomas, C. Samuel Todd, and Brian Michael Vines** have joined the firm as associates.

**William M. Cheves, Jr.** has joined **Carlock, Copeland & Stair LLP** as an associate.

**Mark S. Carter and James E. Hall** announce the opening of **Carter & Hall PC** at 1608 Broad St., Phenix City 36867. Phone (334) 291-3070.

**Critin Law Firm PC** announces that **Samuel P. McClurkin, IV** has joined the firm as an associate.

**Davis & Fields PC** announces that **Michael M. Shipper** has joined the firm in the Mobile office.

**Duell Law Firm LLC** announces that **Robert O. McNearney, III** has joined the firm.

**Engel, Hairston & Johanson PC** announces that **John R. Bowles and Haley D. Bozeman** have become associates.

**Devona L. Johnson, W. Walker Moss and Jonathan G. Wells** have joined **Estes, Sanders & Williams LLC** as associates.

The **Fisher Law Firm PC** announces that **Jaime L. Webb** has become an associate.

**Haygood, Cleveland, Pierce, Mattson & Thompson LLP** announces that **Susan Haygood McCurry** has joined as an associate.

The **Law Offices of H. Thomas Heflin, Jr.** announces that **Harold V.**

**Hughston, III** has joined as an associate.

**Huie, Fernambucq & Stewart** announces that **Krista L. DeWitt and William A. Davis** have become associates.

**S. Andrew Scharfenberg** now serves as counsel for **Hunt Refining Company** in Tuscaloosa.

**Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP and Miller, Hamilton, Snider & Odom LLC** announce the merger of their firms. The new firm will continue under the name of **Jones Walker**.


**Maynard, Cooper & Gale PC** announces that **Hayes Arendall, Christine Green, Jaime Haggard, Nefertari Rigsby, and Key Smith** have joined the Birmingham office as associates.

**Morris & McAnnally LLC** announces that **Jon R. Moody** has joined as an associate.

**Giles Perkins, Brian V. Cash, Jay Murrill and John S. Steiner** announce the formation of **The Perkins Group LLC**, at 104 23rd St. S., Ste. 100, Birmingham 35233. Phone (205) 327-8188.

**Starnes & Atchison LLP** announces that **Michael T. Scivley, Amber M. Whillock and Lucile A. Ray** have joined the firm's Birmingham office as associates, and **William P. Blanton** has joined the Mobile office as an associate.

**Wallace, Jordan, Ratliff & Brandt LLC** announces that **John H. McElheny** has joined as an associate.



**J. FORRESTER DEBUYS, III**  
(de-bweez)

*Agent, New York Life Insurance Company*  
CLU, ChFC, REP


**INDIVIDUAL AND BUSINESS INSURANCE PRODUCTS AND CONCEPTS**

FOR INDIVIDUALS	FOR BUSINESSES
• Life Insurance	• Key Person Coverage
• Fixed Annuities *	• Buy-Sell Agreement Funding
• Disability Insurance **	• Deferred Compensation
• Long Term Care Insurance	• Group Life and Disability Insurance **

\* Issued by New York Life Insurance and Annuity Corporation (A Delaware Corporation)  
\*\* Products available through one or more carriers not affiliated with New York Life dependent on carrier authorization and product availability in your state or locality

2311 Highland Avenue South, Suite 100  
Birmingham, Alabama 35205  
(205) 918-1515





**In just 5 minutes,  
you may save up to 15% on your  
professional liability policy.**

Get a quote today and see how much you can save.

GilsbarPRO is the exclusive administrator for the  
CNA Lawyers Professional Liability Program  
in the State of Alabama.

prontoquote

- ☒ Get a premium estimate during your first phone call.
- ☒ Get a customized quote usually within 6 hours.
- ☒ Get your CNA policy at your desk usually within 1 business day.

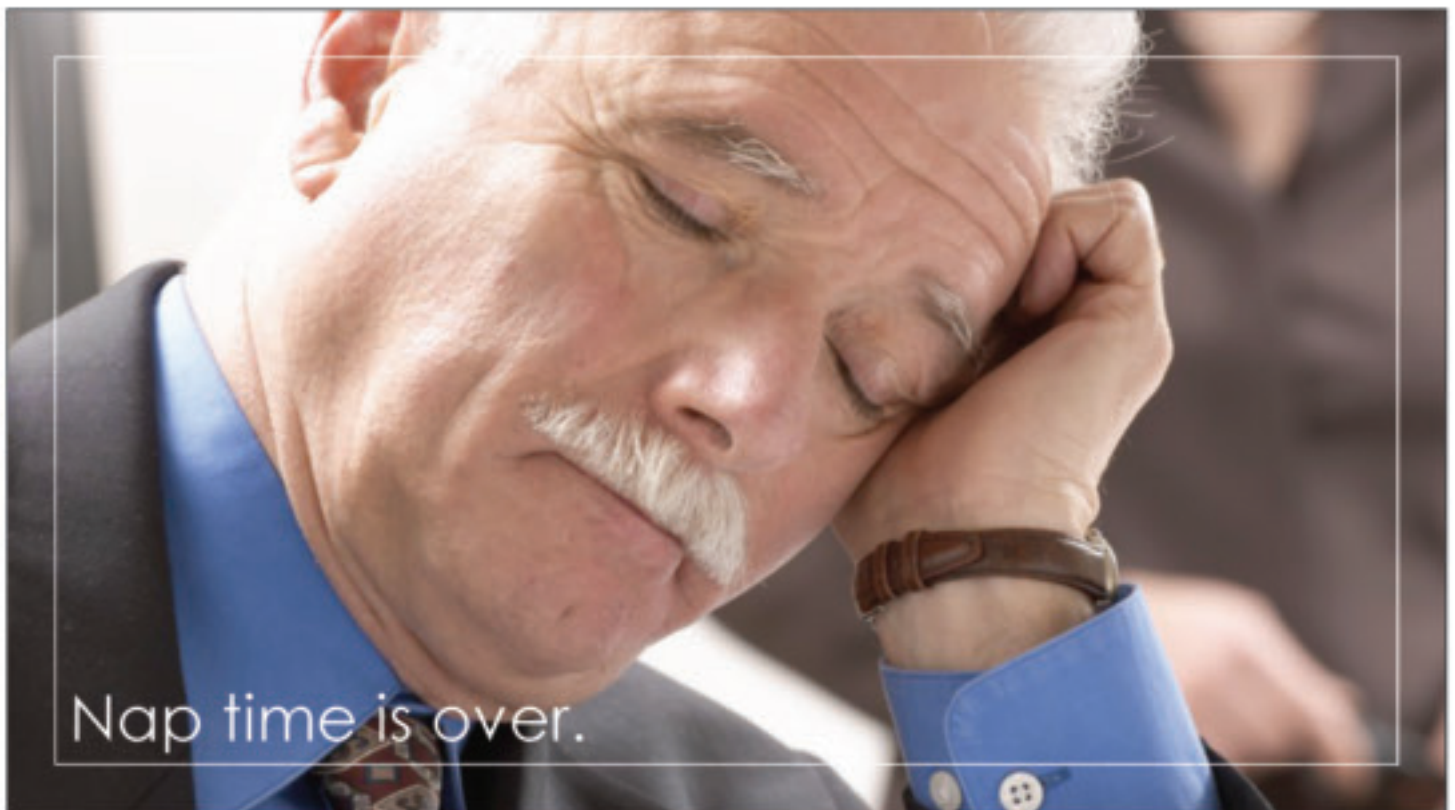
Call the Pros. **1-800-906-9654**

**[www.gilsbarpro.com/prontoquote](http://www.gilsbarpro.com/prontoquote)**

**CNA**

**GILSBARPRO**  
Professional Liability Insurance for Attorneys

One or more of the CNA insurance companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes and is not intended to substitute for the guidance of retained legal or other professional advisors, nor to constitute a contract. Please remember that only the relevant insurance policy can provide the actual terms, coverage, amounts, conditions and exclusions. All products and services may not be available in all states. CNA is a service mark registered with the United States Patent and Trademark Office. Copyright © 2008 CNA. All rights reserved.



Nap time is over.

If the best thing that can be said of your last CLE experience is that you had a nice afternoon nap, you need a different kind of CLE!

Since 1995, our basic and advanced mediation seminars have provided an informative, entertaining and interactive CLE experience for Alabama attorneys. If you want to be a mediator (or just think like one) our seminars will provide you with a marketable skill and a CLE experience unlike any other. Come find out why attorneys, judges and mediators tell us that our programs are the best CLE seminars they've ever attended.

And, please, get plenty of rest before the seminar because you'll get a lot of great things out of our CLE programs, but a nap isn't one of them!



[WWW.MEDIATIONMEDIA.COM](http://WWW.MEDIATIONMEDIA.COM)

- Seminars offered in Birmingham, Montgomery, Mobile, Huntsville and Dothan.
- In-house training for your firm or organization is available at your location.
- Meets the training requirements of the Alabama Center for Dispute Resolution.
- Visit [mediationmedia.com](http://mediationmedia.com) or call 800-237-3476 for more information.



Periodicals Postage  
**Paid**  
Montgomery, AL



**Mixed Sources**  
Product group from well-managed  
forests, controlled sources and  
recycled wood or fibre  
[www.fsc.org](http://www.fsc.org) Cert no. SW-COC-003392  
© 1996 Forest Stewardship Council

