

JANUARY 2011 • VOL. 72, NO. 1

THE ALABAMA LAWYER

**ALABAMA TRADEMARK ACT
REVISED AND REVIVED**

page 52

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A close-up portrait of Katy O'Leary, a woman with long brown hair and blue eyes, smiling warmly. She is wearing a grey blazer over a teal collared shirt. The background is a soft, out-of-focus brown.

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Spring 2011
Calendar

FEBRUARY

4 Elder Law *Birmingham*
11 Banking Law *Birmingham*
25 Workers' Compensation *Birmingham*

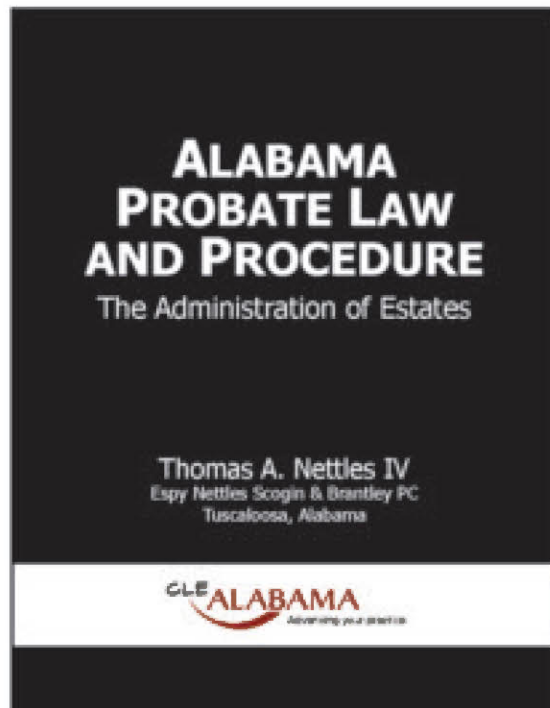
MARCH

25 Domestic Practice *Birmingham*

MAY

6-7 City & County Governments *Orange Beach*

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Pictured on the cover is Sanford Hall at Auburn University in the wintertime. Sanford Hall is the university's most recognizable landmark and the main administration building. The current building was constructed in 1888 and was officially named for Governor William James Sanford in 1929. Sanford Hall originally had a bell that rang every hour for classes, and although the bell still remains in the tower, an electrically-controlled clock marks the time now.

—Photo by Paul Crawford, JD
paul@LightfortheDay.com

IN THIS ISSUE

- 11** Letter from the Editor
- 23** ASB Fall 2010 Admittees
- 32** Relationship of Biological Relatives After Termination of Parental Rights
By Judge William G. Hightower and Robert H. Maddox
- 38** Should the Exception Be the Rule? Advocating for Appellate Review of Summary Judgment Denials
By Abbott Marie Jones
- 46** *Batson* Challenges in State and Federal Courts in Alabama: A Refresher and Recent Decisions
By Christopher L. Ekman
- 52** Alabama Trademark Act Revised and Revived
By Linda A. Friedman and Will Hill Tankersley

DEPARTMENTS

- 9** **President's Page**
The Picture of Service
- 13** **Executive Director's Report**
The 2010 Southern Conference of Bar Presidents' Meeting, Point Clear
- 15** **Memorials**
- 19** **Young Lawyers' Section**
Iron Bowl 2010 Helps Year End on a High Note
- 21** **Important Notices**
Notice of Election
Lawyers' Hall of Fame
Judicial Award of Merit
- 59** **Opinions of the General Counsel**
Retention, Storage, Ownership, Production, and Destruction of Client Files
- 69** **Legislative Wrap-Up**
New Laws Effective January 1, 2011
- 77** **Disciplinary Notices**
- 85** **About Members, Among Firms**



CLE COURSE SEARCH

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.



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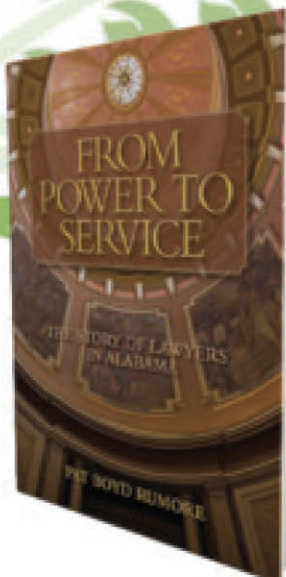
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What readers are saying about "From Power to Service"

From Power to Service: The Story of Lawyers in Alabama

Written by attorney-author Pat Boyd Rumore. This hardcover book, filled with pictures, many of which were not previously published, is the ideal gift.

This 336-page book captures the story of lawyers in Alabama who promoted professionalism and who showed their dedication to a just legal system. It is a tribute to the thousands of lawyers who are members of The Alabama State Bar, who strive daily to serve the public and the legal profession. Publication of this book was co-sponsored by the History and Archives Committee of the Alabama State Bar and the Alabama Bench and Bar Historical Society. Proceeds from the sale of this book go to the Alabama Law Foundation and the Bench and Bar Historical Society.

The cost is \$40 per copy.

Order your copy today using a credit card, go online to: www.alabar.org/historybook

The Picture of Service

As we begin this new year, it is always important to take inventory of the work done in the past year and confirm goals for the coming year. For the Alabama State Bar and most local bar associations, this month is actually midyear, which is even a better time to reflect. The Board of Bar Commissioners has completed the **Client Security Fund** rule revisions, and these have been submitted to the Alabama Supreme Court, along with the new Uniform Bar Exam rules. The **CLE & Membership Criteria Task Force**, chaired by **Richard Gill** and **Alicia Bennett**, is close to making its report. The **Pro Bono & Public Service Committee** has finished its extensive strategic plan and is readying its report as well. New sections have been formed and committees are moving forward with their programs. As always, the **Young Lawyers' Section** is moving along with its various programs and efforts. All of this activity provides a picture of service provided to our bar by its members and leaders, and should more appropriately be considered a constantly changing video, because this service is ongoing—day to day, month to month and year to year.

I report these efforts not only to keep you informed of the progress of our bar but to also honor those providing this service. The **Client Security Fund Rules Revision Task Force** members—named in the September 2010 Alabama Lawyer—toiled for almost two years before finalizing their recommendations. Likewise, the **CLE & Membership Criteria Task Force** is completing its study of proposed rules and recommendations for continuing education requirements for those who voluntarily or involuntarily suspend their active bar license. We are one of the few state bars that have no rules regarding this gap. The task force is also addressing the problem of lawyers who fail to renew their bar license at all (as either an active or special member) and how those individuals' obligations to our profession and our citizens should be addressed.

The **Task Force on the Chief Justice's Judicial Reallocation Proposal**, chaired by **Cooper Shattuck** and **Allan Chason**, is reviewing proposed legislation on judicial resource reallocation. Cooper is also working with the **Judicial Liaison Committee**, chaired by **Tom Warburton** and **Sam David Knight**, to review the chief justice's proposed constitutional amendments on the Judicial Inquiry Commission. That committee is also studying the needs our bar members have regarding our courts and the e-filing system and Alacourt. Our **Civics & Education Subcommittee**, chaired by **Bruce Barze** and **Matt Minner**, is working to have the iCivics.org curriculum approved by the State Board of Education by identifying and training teachers in public and private schools to be test sites during the spring semester. This effort is complementary of the efforts of the **Law Day Committee**, chaired by **Ashley Swink** and **David Rains**, which is highlighted by the insert in this article.

And then there are those who are laboring to focus on the issues facing the future of our profession. **Diandra Debrosse** and **Hope Marshall** are co-chairing the **Future of the Profession Committee** this year. This group of creative leaders is reviewing the ABA's Next Steps report and its



ALYCE M. SPRUELL

Please provide us with the names of your local bar members who desire “local lawyer” recognition.

PRESIDENT'S PAGE

Continued from page 9

application to our bar and its programs. They are continuing their work with minority pre-law students while also planning programs addressing the needs of our diverse bar membership. Their efforts and report should help provide a blueprint for our bar leadership in the future.

I also thank those members of our profession who have recently run for public office or may be in the midst of doing so now or in the future. We all recognize the need for more of our members in our legislative bodies. Lawyers bring a special quality of leadership to their public service along with an ability to analyze problems analytically and without personalization. We need more of that "bipartisan" type of leadership. We will be highlighting these outstanding leaders in the February *Addendum* and the March *Lawyer*.

I conclude by offering my congratulations to **Bar Commissioner Cooper Shattuck** from Tuscaloosa on being appointed legal advisor to Governor Robert Bentley. Cooper has served in many leadership roles as a commissioner, focusing primarily on the VLP and pro bono programs' work. We will miss him on the commission but look forward to working with him over the next four years. His unselfish agreement to accept that position is yet another picture of public service of our bar.

I am sure you know of others within your bar and community who toil for our profession and deserve recognition. Take a moment to thank them when you have a chance. I also ask that you let your bar commissioner know of anyone you think should be honored by the bar commission. We look for local lawyers to recognize every commission meeting by resolutions that are sent back to their local bar members and news services. Please send us your local servant leaders' names. The commission would enjoy recognizing them. ▲▼▲



Cooper Shattuck

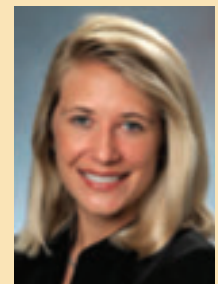
“Liberty cannot be preserved without general knowledge among the people.”

—John Adams

Law Day, which was first recognized nationally by President Dwight Eisenhower in 1958, offers us the opportunity to “Celebrate the Profession” both locally and statewide. As part of Law Day 2011, we will honor the life and legacy of our nation’s first lawyer-president, John Adams. This year’s theme provides us with the opportunity to explore the historical through modern-day role of lawyers in defending the rights of the accused—one of the cornerstones and often times lightning rods of our system of justice.

While Law Day is officially recognized on May 1, 2011, events throughout the state during the months of April and May will have a “Law Day” emphasis. With this in mind, the goals this year of this year’s Law Day committee are fourfold: (1) encourage and assist local bar associations who have never administered a Law Day event to begin doing so; (2) recognize and honor those local bar associations with established Law Day programs, which help to renew our understanding of and appreciation for the fundamental principle of the rule of law; (3) educate students in our schools about the importance of the rule of law by not only sending lawyers to the classrooms armed with the “iCivics” program, but also by encouraging participation in the student competitions administered by the state bar; and (4) inform and educate the public at large through the media about the modern-day role of lawyers and how the lawyers in their area contribute to their community.

We hope that these programs will serve as vehicles for educating our communities, schools and those outside the legal profession about the role of law as the foundation of this nation and its importance to our society. The Law Day Committee has ideas for circuits large and small, and wants to serve as a resource to all local bar leadership, whether your program is brand new or, like Escambia County’s, almost 40 years strong! Please feel free to contact us at drains@rosenharwood.com or ashley.swink@phelps.com.



— David Rains and Ashley Swink, co-chairs,
ASB Law Day Committee

ASB Names Gregory H. Hawley Editor of *The Alabama Lawyer*

Gregory H. Hawley, a shareholder in the Birmingham firm of White Arnold & Dowd PC, was recently named editor of *The Alabama Lawyer* magazine.

The Alabama State Bar's Board of Bar Commissioners unanimously approved his selection. Robert A. Huffaker of Montgomery, who died in September after a brief illness, had served as editor for 27 years.

Alabama State Bar President Alyce M. Spruell said, "We are pleased to have Greg Hawley serve as editor of the bar's flagship publication. Greg is an amazing leader and we are lucky to have him agree to serve in this capacity. With its long history and a readership that spans a broad spectrum of the legal profession, the *Lawyer* is a vital communication vehicle for the state bar. Greg's extensive practice experience, coupled with his recent service as president of the Birmingham Bar Association, will be a great asset to this publication and its future growth."

Hawley has previous experience with the magazine, having served on the board of editors from 1985-91.

He received his undergraduate degree *cum laude* from Harvard College (1979) and earned his law degree from Georgetown University (1983). He practiced law in Birmingham with Maynard Cooper & Gale PC for 20 years before joining White Arnold & Dowd in 2006.

Letter from the Editor

As some of you know, Alabama State Bar President Alyce Spruell, along with Keith Norman, Margaret Murphy, Ed Patterson and Brad Carr, recently approached me about my interest in serving as editor of *The Alabama Lawyer*. Needless to say, I was flattered to be considered as a successor to Robert Huffaker, whose legacy cannot be matched.

I look forward to serving you and working with the great staff and members of the Editorial Board. More important, I hope that you will make suggestions about things that you would like to see in *The Alabama Lawyer*. It is your publication, designed to support your law practice and make you a more informed lawyer. Please do not hesitate to share your thoughts with me or with any member of the Editorial Board.

For us to maintain the standard of excellence—and the regular improvement—that Robert Huffaker established through his years of hard work and diligence, I will rely heavily on input from the Editorial Board, from Margaret Murphy and from you.

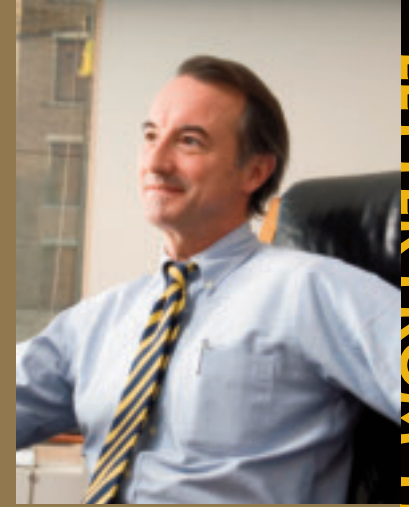
I am eager to hear your ideas, and I look forward to serving you.

Gregory H. Hawley

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GREGORY H. HAWLEY



ALABAMA STATE BAR 2011 ANNUAL MEETING

July 13-16, The Grand Hotel Marriott Resort, Golf Club & Spa in Point Clear

An invitation for you to join hundreds of your colleagues and their families. As a special incentive for those members who register in the first seven days (once on-line registration is announced) we will be drawing one name to win an iPad2. You must be present at the meeting in order to win. We've negotiated a special room rate from Saturday-Saturday so that registrants can make a vacation out of it with their family!

These Sections are already confirmed to present first-class CLE programs:

- Dispute Resolution
- Real Property, Probate & Trust
- Workers Compensation
- Litigation
- Family Law

Meeting Highlights:

* There will also be workshops sponsored by: Casemaker[®], Alabama Criminal Defense Lawyers Association, Alabama Law Institute, Alabama Defense Lawyers Association, Alabama Applesced and a program on Business Valuations for Attorneys: Litigation, Estate Planning, Domestic Relations, Corporate Law, produced by Decosimo Advisory Services.

*The Christian Legal Society Breakfast will have as its keynote speaker, Hon. Sonja Bivins, Magistrate Judge, Southern District of Alabama.

*Scholarships: A limited number of full tuition scholarships are available to first-time attendees to the 2011 Alabama State Bar Annual Meeting and those attorneys with a demonstrated need for financial assistance. Minorities, women and solo practitioners are encouraged to apply. Send an e-mail to al.patterson@alubar.org and request an application form. Applications must be received by March 1.

*And you'll never guess who's coming! [Hint: Children will really like this.]



Look for additional registration and housing information in the coming weeks.



KEITH B. NORMAN



The 2010 Southern Conference of Bar Presidents' Meeting, Point Clear

This past October, the Alabama State Bar hosted the 42nd annual meeting of the Southern Conference of Bar Presidents (SCBP) at the Grand Hotel in Point Clear. The SCBP is a regional organization for state bar presidents, president-elects, past presidents and executive directors of their respective bar associations. The SCBP includes the bar associations of Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, the Virgin Islands, and West Virginia. (North Carolina, Virginia and West Virginia all have a mandatory and a voluntary state bar organization that are SCBP members.) Each state takes a turn hosting the meeting. The 2010 meeting was the third time that Alabama has hosted it since the organization's inception in 1969. The two previous times were in 1974 and 1993 and they were also held at the Grand Hotel.

The 200+ registrants and guests attending the meeting were treated to an array of social events and substantive programs during the two-day conference. The mornings of both meeting days were devoted to speakers covering a broad range of topics including: Security, Pseudo-Patriotism and the Erosion of American Liberties, The Uniform Bar Exam, Today's Economy and Its Impact on the Profession, Judicial Modesty and A Crisis in the Bar (a panel discussion of the Nifong disbarment in North Carolina, the judicial scandal in Mississippi and the removal of minor children from the polygamist compound in Texas).

EXECUTIVE DIRECTOR'S REPORT

Continued from page 13



Among the social events which our guests could choose were golf, tennis, a tour of the battleship USS Alabama, shopping excursions to downtown Fairhope, and sailing on Mobile Bay aboard the schooner, Joshua.

Saturday afternoon of the meeting featured a tailgate party that was a huge success. Large screen TVs carried the various televised football games that appealed to football lovers and team supporters alike. With outdoor dinners on the lovely grounds of the Grand Hotel, including our own "Alabama Jubilee," to celebrate this unique event on Mobile Bay, and a traditional "Dinner on the Ground," our guests had an opportunity to appreciate local traditions and enjoy local seafood selections and cuisine. During their three-day visit, our guests were also treated to the unique spectacle of migrating Monarch butterflies that adorned the grounds of the resort.

The Planning Committee for this successful SCBP meeting included current ASB President **Alyce**

Spruell and former presidents **Sam Crosby, Ben Harris, Broox Holmes, Tom Methvin, Spud Seale,** and **Mark White**. Retired ASB Executive Director **Reggie Hamner** also served on this committee. ASB past presidents who attended the meeting, including those above, were **Phil Adams, Wade Baxley, Bill Clark, Boots Gale, John Owens, Dag Rowe,** and **Sam Rumore**.

The Grand Hotel was the ideal facility to host last year's SCBP meeting. The resort has a wonderful reputation among those who have attended past SCBP meetings there as well as among those who have simply heard about meetings that the Alabama State Bar has hosted. As a result, the Grand Hotel is a popular SCBP meeting location. Alabama is fortunate to have this first-class resort whose well-deserved reputation for hospitality has been established over its 164 years of operation.





JERE AUSTILL, JR.

JAMES R. CLEARY

JOEL FRANKLIN DANLEY

T. DWIGHT REID

Jere Austill, Jr.

Jere Austill, Jr., a member of the Mobile Bar Association, died April 10, 2010 at age 85. Jere was born in Mobile March 22, 1925 to Jere and Winifred Leppert Austill. He graduated from Murphy High School shortly after the bombing of Pearl Harbor and immediately enlisted in the United States Navy, where he became a Naval Aviator. After the war, Jere graduated from the University of Alabama and later the University of Alabama School of Law. He was an accomplished attorney at Austill & Austill, where he practiced with his father, Jere Austill, and his brother, Evan Austill.



Mr. Austill was a businessman extraordinaire and developed Ono Island and several shopping centers.

Jere was also an avid fisherman and founded the Mobile Big Game Fishing Club and the Mobile Hatteras Yacht Sales and later opened the Dog River Marina. He held the Alabama State record for grouper at 74 pounds.

Jere was well known for his great story-telling. One of his best-known stories was of an Austill ancestor who, in a canoe, along with several others, fought the Creek Indians, claiming the first victory over the Creek Indians in the Creek Indian War.

Jere was preceded in death by his wife, Katherine Isabelle Partridge Austill; his son, David Gavin Austill; and his brother, Evan Austill. He is survived by his children, Jere Austill, III, Katherine Windsor Austill-Barker and William A. Austill, his sister, Mary Austill Samford, and his 10 grandchildren.

—Carlos A. Williams, president, Mobile Bar Association

James R. Cleary

James R. Cleary, a retired Huntsville, Alabama attorney and civic leader, died February 15, 2010.

After graduating from Northwestern Law School in 1951, Cleary moved to Huntsville to establish the Army legal office at Redstone Arsenal. He worked there until 1955 when he became a partner in Bell, Richardson, and Cleary in 1956.

He also was a partner in Cleary, Lee, Porter, Morris, Evans & Rowe, and other firms.

Cleary was born in Springville, Alabama on July 16, 1926. His parents were Bereman LeRoy Cleary and Bertie Jones Cleary.

He graduated from Birmingham-Southern College in 1948, with majors in history and economics. While in college, he worked as a mid-day announcer for WSGN-AM from 1945-48. His program was the top-rated radio show in the country at the time.

In addition to his legal practice, Cleary was active in the development of Huntsville's economy.

He was one of the founding partners of WAFG (which stood for "Alabama's Fastest Growing City"). That station became WAAY in 1959. He was one of the founders of the Huntsville News, later sold to the Huntsville Times.

Additionally, he developed residential and commercial property in southeast and northwest Huntsville, through Economy Homes, a company he formed.

Cleary was one of the founding directors of Security Federal Savings and Loan—later reformed as Secur—and American National Bank, which eventually became AmSouth. He served on the board of directors of both for many years.

Cleary was appointed to the Madison County Airport Authority in 1968 and served until 1986.

He was the Madison County president of the Jaycees from 1955 to 1956 and state vice president of the

Jaycees in 1957. He was also the Madison County president of the Optimist Club in 1966-67. He was named the "Young Man of the Year" for Huntsville in 1957.

He was a member of the Board of Trustees for Birmingham Southern College from 1969 until 1981.

Cleary was a member of the First United Methodist Church of Huntsville for more than 50 years and had served as chair of the administrative board.

He married Voncille James in 1960. They have two daughters, Johanna Cleary of Gainesville, Florida and Susan (Bill) Sommers of Huntsville. Cleary is also survived by his sister, Louise Amos of Huntsville, and two nephews.

In lieu of flowers, memorial contributions may be made to Birmingham-Southern College, Box 549003, 900 Arkadelphia Road, Birmingham 35254 or the Building Fund at the First United Methodist Church of Huntsville, 120 Greene Street, Huntsville 35801.

Joel Franklin Danley

Joel Franklin Danley, a member of the Mobile Bar Association, died May 24, 2010 at the age of 64.

Mr. Danley was born in Florence, Alabama on November 20, 1945. He graduated from Coffee High School, the University of Alabama and the University of Alabama School of Law. Subsequently, he was commissioned in the U. S. Army and retired as a captain. He has been a resident of Mobile and practiced law there for the past 40 years.

During his career, Mr. Danley was an active member of the Rotary Club of Mobile, where he was the recipient of the Paul Harris Fellow Award. He also served on the board of the Exploreum, the Mobile Opera and the Visiting Nurses Association. He was an avid fisherman and an excellent cartoonist and gave freely of his talents to family and friends all over the country.

According to his former partner, Ralph Holberg, and his

many other lawyer friends, he had an uncommon facility for writing a persuasive appellate brief, yet making dry material interesting and readable by including subtle humor and using a lighter touch. He was an accomplished folk guitarist and an impressionist, and could dependably find the funny parts in otherwise serious situations.

Mr. Danley was preceded in death by his parents, Edith and Elmer Danley. He is survived by his wife, Fran Aldridge Danley; his son, Franklin Aldridge Danley; his daughter, Blair Danley Schoenvogel; four grandchildren; and a sister and a brother.

—Carlos A. Williams, president, Mobile Bar Association

T. Dwight Reid

T. Dwight Reid, a member of the Mobile Bar Association, died April 6, 2010 at age 76.

Mr. Reid was born January 5, 1934 in Statesville, North Carolina. He was raised in a Presbyterian orphanage and, subsequently, served honorably in the United States Navy. He graduated from the University of Alabama School of Law in 1961, and served as a very respected and well liked member of the Mobile Bar Association.

Mr. Reid is survived by his wife, Darlene Reid; his children, Thomas Dwight Reid, Jr., Sandra Ellen Richards and Michael Fayette Reid; and by his stepson, Jason John Powers. He is also survived by his former wife, Grace Reid, and four grandchildren, his sister, his brothers and many close friends.

Dwight Reid especially enjoyed being with his family and friends and playing horseshoes, poker and dominoes with his buddies. He lived life to the fullest every day and often said he would “live forever”—and he does—in the hearts of his family and dear friends.

—Carlos A. Williams, president, Mobile Bar Association

<p>Braden, Deborah Susan Birmingham Admitted: 1983 Died: September 25, 2010</p>	<p>Butler, James L., Jr. Madison Admitted: 1988 Died: October 22, 2010</p>	<p>Turner, Louise Ingram Tuscaloosa Admitted: 1953 Died: November 14, 2009</p>
<p>Brooks, Richard Seals Montgomery Admitted: 1947 Died: September 10, 2010</p>	<p>Conley, Charles Swinger Montgomery Admitted: 1959 Died: September 9, 2010</p>	<p>Tutt, James Wallace, III Hollywood, FL Admitted: 1983 Died: June 12, 2010</p>
<p>Brown, Milton, Jr. Tuscaloosa Admitted: 1990 Died: February 28, 2010</p>	<p>Foshee, Jeffery Alan Montgomery Admitted: 1981 Died: September 28, 2010</p>	<p>Wilson, Jack Anniston Admitted: 1955 Died: November 30, 2009</p>
	<p>Gasery, John L., Jr. Slidell Admitted: 1978 Died: August 8, 2010</p>	

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CLAY A. LANHAM
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Iron Bowl 2010 Helps Year End on a High Note (And We're Not Even Talking About the Game)

On behalf of the Young Lawyers' Section (YLS) of the Alabama State Bar, I congratulate the 236 new attorneys who were recently sworn in and admitted to the Alabama State Bar at the October Admission Ceremony held at the Montgomery Performing Arts Center in downtown Montgomery. I have received several compliments on this past October's Admission Ceremony and thank **Nathan Dickson, Louis Calligas, Walton Hickman** and **Bill Robertson** for their tireless efforts in organizing such a successful program. I also thank the following sponsors of the Admission Ceremony whose generous donations contributed to its success:

Freedom Court Reporting
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 Henderson & Associates Court Reporting
 Lexis Nexis
 United States District courts of the Northern, Middle and Southern districts
 Village Photography

In addition to the Admission Ceremony in October, the YLS also hosted a successful Iron Bowl CLE November 19, 2010. Thanks go to Balch & Bingham for their generous support and for allowing the YLS to use their facilities to conduct the CLE. I also thank the following speakers who generously volunteered their time to come and speak at the Iron Bowl CLE: **Brett Bloomston, Hon. Joseph L. Boohaker, Ripp Andrews** and **Andrew Nix**. Special thanks go out to **Jon Patterson, Brett Ialacci** and **Clifton Mosteller** who did a great job in organizing the 2010 Iron Bowl CLE.

YOUNG LAWYERS' SECTION

Continued from page 19

Upcoming YLS events include the **Minority Pre-Law Conference (MPLC)** to be held in Birmingham and Montgomery during March and April 2011. The MPLC was started more than 15 years ago by the YLS. It is currently offered at Birmingham Southern College and at Alabama State University. The YLS has hopes of one day expanding the MPLC to other locations, such as Mobile and/or Huntsville. The MPLC provides teenagers from local schools with an opportunity to engage in a panel discussion with local attorneys and observe a mock trial in which student participants act as jurors. Following the mock trial and luncheon featuring a keynote speaker, the students participate in break-out sessions with local attorney volunteers as well as law student volunteers, where they can ask questions about law school, the practice of law and how to achieve their educational and professional goals. Students who participate in

the MPLC also receive the benefit of a college prep speaker, as well as college admission materials from various institutions of higher learning across the state. I know YLS Executive Committee members **J. R. Gaines, Sancha Howard, Elizabeth Kanter** and **Mitesh B. Shah** will do another great job of organizing and hosting the 2011 MPLCs. If you or your firm would like to participate in or help sponsor one or both of the MPLC events this year, please contact J. R. at (334) 244-6630 or Sancha at (334) 215-3803.

The YLS is looking forward to its biggest event of the year, the Sandestin CLE, which will take place May 12-14, 2011 at the Sandestin Resort in Destin. Mark your calendars and plan to attend this year's YLS Sandestin CLE as it will be better than ever! For more information on your YLS, visit www.alabamayls.org. ▲▼▲

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Notice of Election and Electronic Balloting

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:

8 th Judicial Circuit	22 nd Judicial Circuit
10 th Judicial Circuit, Place 4	23 rd Judicial Circuit, Place 1
10 th Judicial Circuit, Place 7	28 th Judicial Circuit, Place 2
10 th Judicial Circuit, Bessemer Cutoff	30 th Judicial Circuit
11 th Judicial Circuit	31 st Judicial Circuit
13 th Judicial Circuit, Place 1	33 rd Judicial Circuit
13 th Judicial Circuit, Place 5	34 th Judicial Circuit
15 th Judicial Circuit, Place 5	35 th Judicial Circuit
17 th Judicial Circuit	36 th Judicial Circuit
18 th Judicial Circuit, Place 1	40 th Judicial Circuit
19 th Judicial Circuit	41 st Judicial Circuit
21 st Judicial Circuit	

Additional commissioners will be elected in circuits for each 300 members of the state bar with principal offices therein as determined by a census on March 1, 2011 and certified by the secretary no later than March 15, 2011. All terms are 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. PDF or fax versions are acceptable and may be sent to the secretary as follows:

Keith B. Norman, Secretary, Alabama State Bar
P. O. Box 671 • Montgomery, AL 36101
keith.norman@alabar.org • Fax: (334) 517-2171

Either paper or electronic nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 29, 2011).

As soon as practical after May 1, 2011, members will be notified by e-mail with a link to the Alabama State Bar website that includes an electronic ballot. **Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot.** A single written request will be sufficient for all elections, including run-offs and contested president-elect races. Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 20, 2011). Election rules and petitions are available at www.alabar.org.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2011. A petition form to qualify for these positions is available at www.alabar.org.

IMPORTANT NOTICES

Continued from page 21

Alabama Lawyers' Hall of Fame

The Alabama State Bar will receive nominations for the 2010 honorees of the Alabama Lawyers' Hall of Fame through March 1, 2011. The two-page form should be completed and mailed to:

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

In 2000, Terry Brown of Montgomery wrote Sam Rumore, the Alabama State Bar president at that time, 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, a later 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:

2009:

Francis H. Hare, Sr. (1904–1983)
James G. Birney (1792–1857)
Michael A. Figures (1947–1996)
Clement C. Clay (1789–1866)
Samuel W. Pipes, III (1916–1982)

2008:

John B. Scott (1906–1978)
Vernon Z. Crawford (1919–1985)
Edward M. Friend, Jr. (1912–1995)
Elisha Wolsey Peck (1799–1888)

2007:

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

2006:

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

2005:

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

2004:

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

To download a printable nomination form for 2010, go to http://www.alabar.org/members/hallfame/hallof_fame_ALH_2010.pdf.

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 15, 2011.

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. ▲▼▲

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ALABAMA STATE BAR Fall 2010 Admittees

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

STATISTICS OF INTEREST

Number sitting for exam	490
Number certified to Supreme Court of Alabama	360
Certification rate*	73.5 percent

Certification Percentages

University of Alabama School of Law	90.8 percent
Birmingham School of Law	34.5 percent
Cumberland School of Law	86.4 percent
Jones School of Law	85.5 percent
Miles College of Law	12.5 percent

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

For full exam statistics for the July 2010 exam, go to www.alabar.org, click on "Members" and then check out the "Admissions" section.

Alabama State Bar Fall 2010 Admittees

Antonina Marie Abate	Holly Elizabeth Caraway	Matthew Edward Dye	Nicholas Charles Gonzalez
Muhammad Ibn Abdullah	Grady E. Carden	David Alexander Ealy	Rachel Lee Goodson
Justin Clay Aday	Reid Clark Carpenter	Laura Caroline Edwards	Matthew Conrad Gosney
Kathryn Garrison Aderholt	Mary Margaret Pittman Carroll	Rachel Winford Eidson	David Lee Graves
Barbara Hamlin Agricola	Jesse Ryan Cash	Mark Randall Ekonen	Katherine Kincey Green
Gary Anthony Anderson	Allison Barrett Chandler	Henry Cooper Ellenberg II	Benjamin Joseph Grodi
Samuel Afamefuna Anyake	Richard Aaron Chastain	William Edward Elliott III	Elizabeth Stewart Hall
Joshua David Arnold	Joshua Kyle Chesser	Lauren Jean Ellison	Margaret McClure Hammond
Morgan Goodwin Arrington	Yae Sun Chung	Stephanie Countiss Emens	Brett Austin Hamock
Shannon LeaAnn Atkinson	Stewart Richard Civils	Ethan Drew Emerson	Jennifer Aileen Hanson
Natalie Alexandra Aziz	Christopher Oneal Cleckley	Omobolanle Ene-Korubo	Shannon Marie Hardin
James Blake Bailey	Stephen Marc Collins Jr.	Rachel Anne English	Harold Eugene Hargrave II
Andrew Davis Bailey	Allison Leigh Collins	Cachavious Quineous English	Cynthia Carol Harper
John Trant Baird	Henry Chandler Combest	Barbara Evers Estep	Edward Nathan Harris
Andrew Micah Balducci	Mallory Morgan Combest	Laura Thomas Eubank	Breanna Rebecca Harris
Franklin Donnel Ball	Kenneth Luke Connor	Roderick Jariel Evans	Erik Edward Harris
Caleb Winslow Ballew	Luther Franklin Corley IV	John Wesley Fain	Josh Chandler Harrison
Joshua Kyle Ballinger	Sally Robinson Corley	Kimberlee Moore Fair	James Allen Hartin
Maranda Robinson Barry	Benjamin Brock Coulter	James Derrell Fancher	Charles Miller Hartman
Taylor Christopher Bartlett	Herman Finhold Cox Jr.	Kenneth Brandon Farley	Joseph Mitchell Hastings
Gerald Glasco Baxter	Matthew Ronald Creel	Kelly Marie Fehrenbach	Samuel Bittle Haugabook
Christopher Shawn Beard	Lori Michelle Creel	Alexander Bunnen Feinberg	Robert Alan Hawk
Mallory Noel Beaton	Jon Sidney Crews	Taylor Patrick Fendley	Raymond James Hawthorne Jr.
Brian Eric Beck	Katriesa Ann Crummie	Shomari Coleman Figures	David Van Hayes
Pamela Ruth Beidleman	Christopher Lamar Davis	Timothy Jay Fincher	Krislyn Dora Spivey Haynes
Jeanine Clements Bell	Richard Eugene Davis Jr.	Kurt S. Fischer	John Coleman Hensley III
Luther Daniel Bentley IV	John Randolph Davis	Emily Fisher	Vanessa Hernandez
Rachel Michelle Blackmon	Sarah Phillips Davis	Mary Anne Flippo	Andrew Scott Herring
Joshua Benjamin Boone	Patrick Wayne Dean	Amy Leigh Florine	Jonathan Corley Hill
Clark Edward Bowers	Benjamin Edward Dean	John McDavid Flowers Jr.	Amy Elizabeth Hill
Rebecca Aberette Boykins	Thomas Richard DeBray	Todd Langstaff Frederick	Tiffany Renae Holder
Lawrence Edward Bradford	William Leath DeBuys	Rachel Ross Friedman	William Ernest Hollingsworth IV
Constance Jeanne Brewster	Candace Michelle Deer	Gretchen Morgan Frizzell	David Wayne Holt
Beverly Catherine Bridgers	Sara Elizabeth DeLisle	Nicholas Howell Gajewski	Joshua Lee Hornady
Samuel Jacob Brooke	Gary Daniel DeLoach	William Russell Gamble	Steven Randall Horton
Kathryn Megan Brooks	Michael Louis DiChiara	George Dinkins Gaskin III	Colin Patrick House
Cecelia Helen Brown	Estela Maureen Dimas	Jordan Baxter Gaston	April Valfria Houston
Audrey Elaine Brown	Mitchell Damon Dobbs	Craig John Geraci Jr.	Ebony Glenn Howard
Andrew Jude Browning	Dorothy Lee Donaldson	Tebra Lolli Gieske	Matthew Riley Huggins
Huel Taylor Buckner	Rebecca Chambliss Donnellan	Carey Parks Gilbert III	Melissa Joanna Humber
Allison Mims Burg	Timothy Jay Douthit	Phillip Shannon Godwin Jr.	Thomas Benjamin Humphries
Carl J. Burrell	Matthew Cory Drinkard	Alexander Gideon Plashow	Nathan Randall Hunt
Jennifer Lynn Burt	Krystal Lauris Drummond	Goldenberg	Seth Tyler Hunter
Samantha Leigh Burt	Sady Elise Duffner	Robert Vermillion Goldsmith III	Eric Wilson Hunter

Yolanda Yvette Lawson Hunter	Christopher Andrew McNutt	Lilly Albright Rainey	Laura Coker Strachan
Kourtney Brienne Ikard	Anna Katharine Meegan	Christopher Scott Randolph Jr.	William Robert Sutton
Ronald Da'Von Jackson	Thomas James Mercado	Brannan Ward Reaves	Elizabeth Miller Swann
Megan Elizabeth James	Jessica AshLeigh Meyer	Christopher Calvin Reid	Laurie Kathrynne Synco
Rachel Nicole Jarrett	Anthony David Michel	Ashley Brooke Reitz	Clayton Rushing Tartt
Adam Keith Jarvis	Tamika Renee Miller	Victoria Denise Relf	Patrick Lankford Tate
Katherine Suzanne Jessip	Daniel Nathan Milton	Victor Martell Revill	Justin Michael Taylor
Russell Dean Johnson	Matthew Coty Mitchell	Hannah McBride Richard	Jennifer Rae Taylor
Chadwick Lane Jones	Chelsey Ann Mitchell	Dwight Moody Richardson III	David Gordon Thomas
Amandeep Singh Kahlon	Evan Patrick Moltz	Christopher Keith Richardson	Michael Earl Thomas Jr.
Constantine Themistoklis	Lauren Goodson Moore	Greg L. Ridenour	Virginia Anne Thomas
Kanellopoulos	Jeffrey Clayton Morman	Kevin Alan Rogers	Danielle Candice Thomas
Laurie Elizabeth Kellogg	Eric Matthew Morris	Robert Earl Rone	Michael Alexander Thomason Jr.
Joshua Benjamin Key	Monica Ingram Moses	Lindsay Choat Ronilo	Lance Ryan Thomason
Joshua TeRoiri King	Courtney Clanton Murchison	Lakeita Faye Rox	Braxton Scott Thrash
Cory Thomas King	Christopher Holt Nahley	Tania Nicole Roye	Derek Michael Tokaz
Casey Jackson King	James Leighton Nation	Adam Leavitt Sanders	Julie Catherine Trumm
Meghan Annette King	Donald Shane Neese	Emily Lauren Santiago	Matthew Neal Tully
Melissa Tomeka Knight	Clifford Thomas Nelson Jr.	Christina Lorino Schutt	Kathryn Elizabeth Varner
Kendall Kay Krajicek	Stephen McKay NeSmith Jr.	Amanda Lea Senn	Royce Grey Wadsworth
Christopher Edward Krzeminski	David Thomas Newton	Samuel Turner Sessions	Lee Tyler Walden
Adrienne Michele LaBudde	William Beeland Nielsen	Ahmad Moosavi Shabani	Heather Elaine Ward
Justin Louis Ladner	Brian O'Neal Noble	Andrea Lynn Shepard Shaw	Jason Michael Ware
Brad E. LeMarr	Kelli Kristin Noffke	Leigh Ann Shelton	Margaret Ann Ware
Laura Lynn Lester	Robert McKim Norris III	Miranda Dawn Simpson	Michael David Waters Jr.
Mary Lane Elizabeth Lewis	Brigitte Lotte Ohlig	Lindsay Beth Singletary	Jonathan Donald Watson
Browne Garrison Linder III	James Harris Oppenheimer	Stephen Andrew Sistrunk	David Bishop Welborn
Benjamin Randall Little	Sarah Emily Orr	Daniel Lee Slaten	Christopher Ray Wells
Clint Jeffry Locke	Mark Andrew Overall	Benjamin Myles Slaughter	Kimberly Diane White
Heather Nicole Locklar	Jennifer Jill Panetta	James Adam Smith	Katherine Olivia Whiting
Melony Parlana Lockwood	Dennis George Pantazis Jr.	Matthew Jennings Smith	Raley Livingston Wiggins
Chase Anderson Long	Katherine Reeves Parrish	Michael Joseph Smith	Stephen Wright Williams
Lauren Parker Lovell	Courtney Lynn Peinhardt	Glen Edwards Smith	Stephanie Lynne Williams
Amanda Leigh Luker	Ashley Nicole Penhale	Lachlan William Smith	Amanda Scott Williamson
Anna Catherine Lundy	Kristy Marie Peoples	Tempe Dorinda Smith	Timothy Oden Wilson Jr.
Mary Martin Majors	Michelle Lee Perez	Brian Kenneth Smithweck	Kristopher Beau Womack
Jacob Oakman Malatesta	Allen Leo Perkins	Daniel Benjamin Snyder	Christopher Eric Wood
William Brooks Marks	Vesselin Boykov Petrov	Tanya Paige Solomon	Catherine Blaire Wood
Daniel Emmett Massey IV	Matthew Zachary Phelan	Burke McKee Spree	Mena Weschelle Woodall
Darren Bugs May	David Norman Phillips Jr.	Robert Brian Spring	Whitney Leigh Woodington
Nathan Wayne Mays	Staci Michelle Pierce	Amanda Marie Staton	William Thomas Worthy
Shema Neza Mbyirukira	Jason Tyler Pointer	Joshua Charles Stemle	Joshua Aaron Wradly
Stacy Nicole McBride	Erin Michelle Potter	Jamie Morgan Stephens	James Wallace Wright Jr.
Shannon Reed McClure	Robert James Powell	Harry Bartlett Still III	James David Wright
Stephen Chase McCormick	Benjamin Tennant Presley	Dragan Stojanovic	Patrick Kimball Yeatts
William Allen McGeachy	John Marcus Price	Sarah McCarron Stokes	
Janine Alicia McKinnon	Monica Renea Quinn	William Dowlen Stokes	

LAWYERS IN THE FAMILY



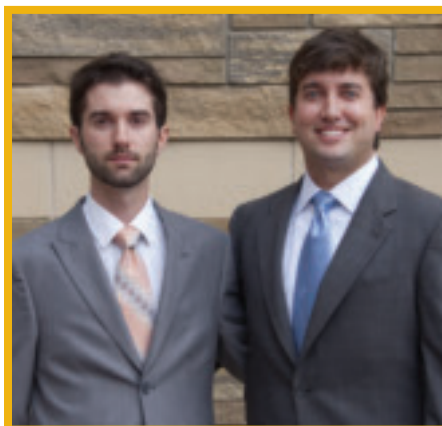
*Virginia Anne Thomas (2010), George W. Thomas (1977) and
Judge H. Randall Thomas (1970)
Admittee, father and uncle*



*Katherine Green Robertson (2010), B. Kinsey Green, Jr. (1978)
and Norris Walton Green (1987)
Admittee, father and uncle*



*John Wheeler Allen (2010) and
Courtney Penney Allen (2005)
Admittee and wife*



*Stephen Wright Williams (2010) and
David Carl Williams, Jr. (2006)
Admittee and brother*



*Breanna Rebecca Harris (2010) and
Hugh C. Harris (1976)
Admittee and father*



*Stephanie Countiss Emens (2010),
Patsy Franklin Emens (1986) and
Steven Countiss Emens (1976)
Admittee, mother and father*



*Robert M. Norris, III (2010), David B. Norris (1987), Robert M. Norris, Jr. (1976),
T. Cameron McEwen (2007), and Stephen C. Norris (2008)
Admittee, uncle, father, brother-in-law, and brother*

LAWYERS IN THE FAMILY



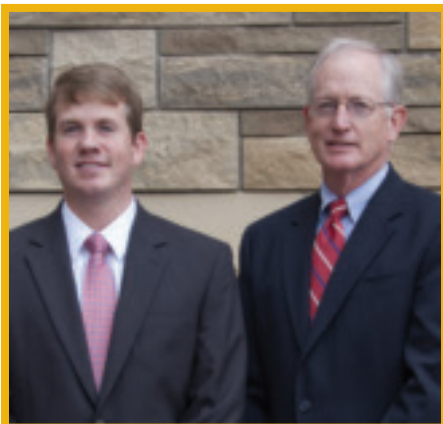
*Daniel Lee Slaten (2010) and
Clifton E. Slaten (1990)
Admittee and father*



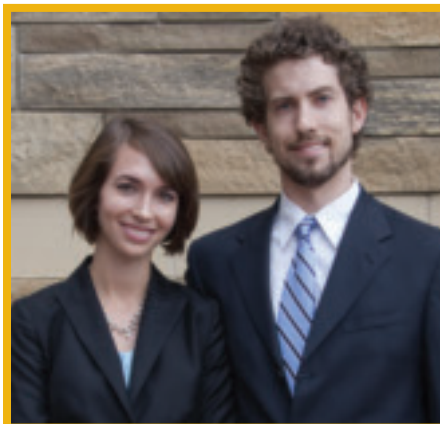
*Christopher Calvin Reid (2010) and
Allison Reid Lumbatis (2006)
Admittee and sister*



*Matthew Jennings Smith (2010) and
Charles Wiley Smith, III (2008)
Admittee and brother*



*William E. Hollingsworth, IV (2010) and
Judge William E. Hollingsworth, III (1979)
Admittee and father*



*Lauren Goodson Moore (2010) and
Joshua Dayton Moore (2009)
Admittee and husband*



*Clark E. Bowers (2010) and
Sarah C. Bowers (1983)
Admittee and mother*



*Barbara H. Agricola (2010), Algert S. Agricola, Jr. (1978)
and Erin M. Agricola (2009)
Admittee, father and sister*



*Mary Lane Lewis Falkner (2010), Albert Lewis, III (1979)
and Laura L. Youngpeter (1987)
Admittee, father and aunt*

LAWYERS IN THE FAMILY



*Robert V. Goldsmith, III (2010) and
Cecil B. Caine (1970)
Admittee and father-in-law*



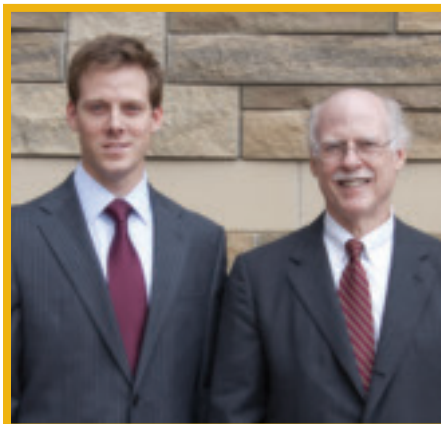
*Stewart Richard Civils (2010) and
John Stewart Civils, Jr. (1977)
Admittee and father*



*Kurt Fischer (2010) and
Monica Fischer (2007)
Admittee and wife*



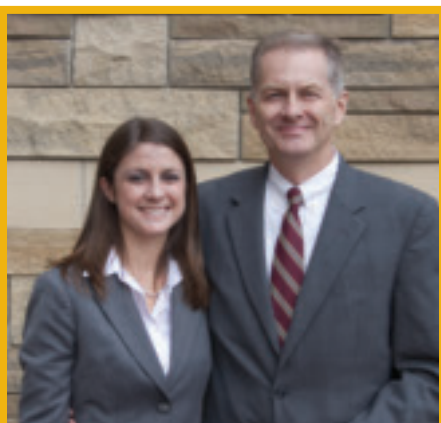
*Patrick L. Tate (2010) and
Patrick H. Tate (1971)
Admittee and father*



*William L. DeBuys (2010) and
John F. DeBuys, Jr. (1967)
Admittee and father*



*William Dowlen Stokes (2010) and
William R. Stokes, Jr. (1980)
Admittee and father*



*K. Megan Brooks (2010) and
Ben H. Brooks, III (1983)
Admittee and father*



*Justin Ladner (2010) and
Gordon Ladner (1974)
Admittee and father*



*Laura Thomas Eubank (2010) and
James Bringhurst Eubank (2007)
Admittee and husband*

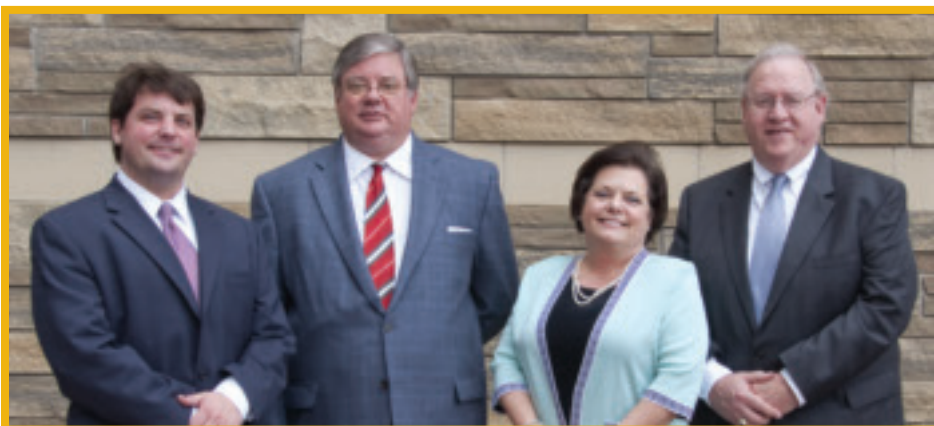
LAWYERS IN THE FAMILY



*Sarah Stokes (2010), Barrie Stokes (1978) and
Mitch Reid (2009)
Admittee, mother and husband*



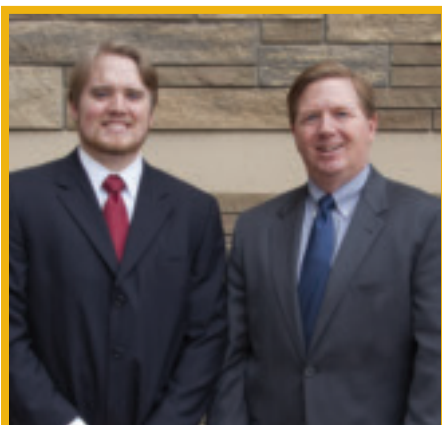
*Michael David Waters, Jr. (2010), Melinda Mitchell
Waters (1977) and Michael David Waters (1977)
Admittee, mother and father*



*Thomas Richard DeBray, Jr. (2010), Thomas Richard DeBray (1981),
Hendon Blaylock Coody (1981) and Judge Charles S. Coody (1975)
Admittee, father, mother and stepfather*



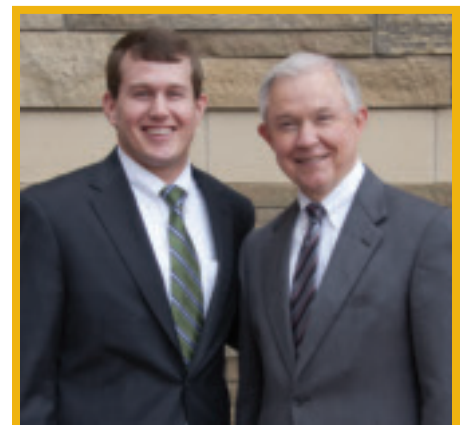
*Brannan Ward Reaves (2010) and
Randolph Pierce Reaves (1974)
Admittee and father*



*Braxton Thrash (2010) and
Roy Thrash, Jr. (1979)
Admittee and father*



*J. McDavid Flowers, Jr. (2010) and
Jeanie Brauer Flowers (1981)
Admittee and mother*



*Samuel Sessions (2010) and
Senator Jeff Sessions (1973)
Admittee and father*

LAWYERS IN THE FAMILY



*Joshua B. Boone (2010) and
Claude D. Boone (1974)
Admittee and father*



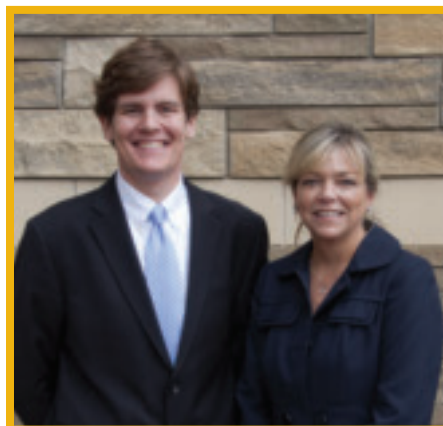
*Shannon Hardin Dye (2010) and
Matthew Dye (2010)
Wife and husband co-admittees*



*Steven Randall Houston (2010) and
Thomas Leon Johnston (1983)
Admittee and uncle*



*Cecelia Helen Brown (2010) and
Courtney Burge Brown (1984)
Admittee and stepmother*



*Kristopher Beau Womack (2010) and
Stephanie Keller Womack (1994)
Admittee and aunt*



*Matthew Corey Drinkard (2010) and
C. Daryl Drinkard (1979)
Admittee and father*



*Andrew J. Browning (2010), Katherine M. Browning (2008)
and Richard E. Browning (1980)
Admittee, sister and father*



*Rachel Friedman (2010), Linda Friedman (1976),
Jessica Friedman (2008) and Doug Friedman (1975)
Admittee, mother, sister and father*

LAWYERS IN THE FAMILY



*Reid Clark Carpenter (2010), B. Clark Carpenter (1974), Kellie Carpenter Fleming (2006) and W. M. Bains Fleming, III (2007)
Admittee, father, sister and brother-in-law*



*James Leighton Nation (2010), Amy Hill Nation (2010), Horace H. Nation, III (1974) and Horace H. Nation, IV (2003)
Husband and wife co-admittees, father/father-in-law and brother/brother-in-law*



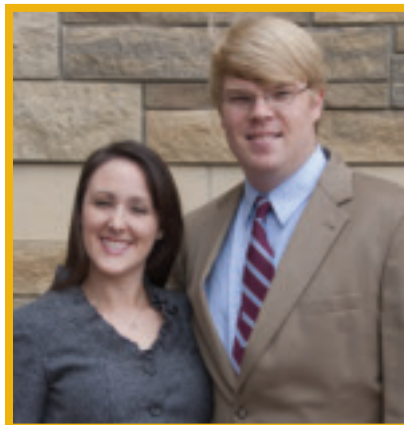
*Margaret Hammond (2010), Alex W. Newton (1957) and Clark R. Hammond (1984)
Admittee, grandfather and father*



*Frank Howard Hawthorne, Jr. (1979), Raymond James Hawthorne, Jr. (2010) and Raymond James Hawthorne, Sr. (1981)
Uncle, admittee and father*



*Ahmad M. Shabani (2010) and Michael M. Shabani (1997)
Admittee and brother*



*Krislyn D. Haynes (2010) and P. Scott Haynes (2009)
Admittee and husband*



*Benjamin T. Presley (2010), Margaret Sloan Presley (1981) and J. Hobson Presley, Jr. (1975)
Admittee, mother and father*





Relationship of Biological Relatives After Termination of Parental Rights

By Judge William G. Hightower and Robert H. Maddox

Presentation of the Issue

The development of the law and the increased concentration in the area of permanency for dependent children has brought to light issues that are both interesting and important to the welfare of children and the integrity of families. One such issue is the question of what rights are retained by the biological relatives of a child after the rights of the child's parents have been terminated. Do biological relatives enjoy any residual rights such as grandparent visitation or a priority for consideration as adoptive resources? The requirement of ruling out viable alternatives, including relative resources, minimizes the incidence of this problem, but it will not entirely eliminate it. Relatives might be located or rehabilitated after parental rights have been terminated but before the child has been adopted.


History of "No Viable Alternatives"

Prior to January 1977, Alabama statutory law gave broad discretion to a trial court in providing for a child who was placed under the guardianship of the State.¹ Additional guidance and restrictions were presented in *Roe v. Conn*, 417 F.Supp. 769 (M.D. Ala.1976). In this case the U. S. District Court for the Middle District of Alabama adopted the test from an Iowa District Court opinion [*Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10, 24 (S.D.Iowa 1975)] which required that "termination must only occur when more harm is likely to befall the child by staying with his parents than by being permanently separated from them." *Roe v. Conn*, supra, at 779. This opinion introduced the beginnings of the "no viable alternatives" requirement

which applies today in termination of parental rights cases in that it reaffirmed the fundamental right to integrity of the family in its decision. The District Court stated that, “As discussed *supra*, the Constitution includes the right to family integrity among the fundamental rights secured to all persons. This right is applied to the States through the Fourteenth Amendment and is accorded strong protection from state interference. States, in the exercise of their inherent police powers, may abrogate such rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective.” *Id.* at 779. The District Court suggests appropriate measures short of termination of parental rights such as participation in parenting seminars and counseling.

The Alabama Court of Civil Appeals in *McCulloch v. State Department of Human Resources*, 536 So.2d 68 (Ala.Civ.App.1988), continued the trend toward “no viable alternatives” citing *Fitzgerald v. Fitzgerald*, 490 So.2d 4 (Ala.Civ.App.1986). In *McCulloch*, the court of civil appeals stated that termination of parental rights required a finding not only that the child was dependent but also “that there are no less drastic alternatives to termination of parental rights.” *McCulloch*, *supra*, p. 69.

While stating that it was not bound by the decision in *Roe v. Conn*, *supra*, the court of civil appeals acknowledged that a determination of the best interests of a child necessarily involved a consideration of alternatives which are less drastic than termination of parental rights in *Lovell v. Department of Pensions and Security*, 356 So.2d 188 (Ala.1978). The notion that a trial court must consider alternatives which are less drastic than permanent placement with a non-relative was advanced by the court of civil appeals in *Miller v. Ala. Dept. of Pensions and Security*, 374 So.2d 1370 (Ala.Civ.App.1979), wherein the court of civil appeals acknowledged that the presence in the statute of dispositional alternatives in a dependency case which are less drastic than termination of parental rights “serves to limit and define those instances where the severance of the parent-child relationship may be deemed ‘appropriate.’” *Id.* at 1376. In *Glover v. Ala. Dept. of Pensions and Security*, 401 So.2d 786 (Ala.Civ.App.1981), the court



...the recent Act precludes the juvenile court from placing the child directly with a “relative or other individual” unless the person is the individual who signed the petition to terminate parental rights.

of civil appeals introduced the term “viable alternative” when it stated that “we consider important that the State,...present a viable alternative to better serve the future welfare of the children.” *Id.* at 788. It is useful to note that between January 16, 1977, the effective date of the Alabama Juvenile Justice Act, and May 8, 1984, the effective date of the Child Protection Act, termination of parental rights and an award of permanent custody were dispositional alternatives after a child was adjudged to be dependent. The Child Protection Act did not codify the requirement of a finding of no viable alternatives, nor did the Alabama Juvenile Justice Act which was adopted in 2008. However, the requirement remains in place because of case law since there are numerous cases which make it clear the court must find that there are no viable alternatives to termination. In *the Matter of Colbert*, 474 So.2d 1143 (Ala.Civ.App.1985); *Ex parte Beasley*, 564 So.2d 950 (Ala.1990); *B.H. v. Marion County Dept. of Human Resources*, 998 So.2d 475 (Ala.Civ.App.2008). The issue of a finding of “no viable alternatives” is important because it eliminates most of the questions about residual rights of other biological relatives after the rights of the parents have been terminated.

Who May Be Granted Permanent Custody

When it took effect on January 16, 1977, the Alabama Juvenile Justice Act authorized the juvenile court “in appropriate cases” to award permanent custody to the Department of Pensions and Securities (now the Department of Human Resources) or to a licensed child placing agency with termination of parental rights and to grant authorization to place the child for adoption. *Ala. Code 1975*, §12-15-71(a)(5). Further clarification was provided in 1984 by the Child Protection Act which was codified in *Ala. Code 1975*, §26-18-1, *et seq.*, as amended. The Child Protection Act authorized the court to terminate parental rights and to place the child not only in the permanent legal custody of the Department of Human Resources or another child-placing agency, but alternatively, in the permanent legal custody of a “relative or other individual...found to be able to properly receive and care for the child...” *Ala. Code 1975*, §26-18-8.

The Alabama Juvenile Justice Act of 2008 replaced the Child Protection Act with only limited changes. The more recent Act replaced the old language of “relative or other individual” with the option of placing the child with the “petitioner.” Practically speaking, therefore, the recent Act precludes the juvenile court from placing the child directly with a “relative or other individual” unless the person is the individual who signed the petition to terminate parental rights. The only way a non-petitioning individual can receive custody of the child is through adoption or by placement through the Department of Human Resources or other child-placing agency. However, the latest Act changed the restrictions on who can file a petition. The Child Protection Act provided that an “interested party” could file an action to terminate parental rights.

While the Alabama Juvenile Justice Act of 2008 in *Ala. Code 1975*, §12-15-317, allows an “interested person” to file the petition and, thus, become the petitioner, this change is not a large one. The Alabama Court of Civil Appeals had already determined in *B.J.C. v. D.E.*, 874 So.2d 1109 (Ala.Civ.App. 2003), that the term “interested party” could include relatives, specifically a maternal aunt and uncle. This decision is an extension of the dicta in *N.A. v. J.H.*, 571 So.2d 1130 (Ala.Civ.App.1990), suggesting that foster

parents were “interested parties” as it read in the former *Ala. Code 1975*, §26-18-5, who could file a petition to terminate parental rights. The result of these changes seems to be that a biological relative has no priority for consideration as a placement alternative over and above an unrelated person. An “interested person” who actually petitions the court for termination of parental rights would obtain priority seating at the table when the court decides the issue of permanent placement of the child. Nevertheless, “relatives,” within the new definition of *Ala. Code 1975*, §12-15-301(7), should be considered as placement resources within the context of an investigation of other viable alternatives.

What Legal Relationships Remain

Priority for consideration as adoptive resources is not the only possible residual legal connections for relatives after termination of parental rights. The most likely possibility is in the area of grandparent visitation. The Alabama Juvenile Justice Act of 2008 defines termination of parental rights as “a severance of all rights of a parent to a child.” *Ala. Code 1975*, §12-15-301(10). The first question is whether the severance of the parent-child relationship also automatically severs the legal relationship between the child and the grandparents.

A review of the Alabama Adoption Code, specifically *Ala. Code 1975*, §26-10A-30, reveals that biological grandparents may be permitted visitation by a court granting an adoption under certain narrow circumstances and in the discretion of the court. This section provides that the authority of the court to grant visitation to grandparents only attaches in cases where the child is adopted by a relative as defined in *Ala. Code 1975*, § 26-10A-30, i.e., a brother, half-brother, sister, half-sister, uncle, or aunt within the first degree and their respective spouses, first cousin, grandparent, great-grandparent, great-aunt, great-uncle, niece, or a stepparent. In most termination of parental rights cases, this situation would not exist since the existence of suitable relatives would have constituted a viable alternative to termination of parental rights. The possibility of location or rehabilitation of a suitable relative leaves the door open to such a result. Therefore, it would appear that the grandparent-grandchild legal relationship can

Grandparent visitation is limited and may not be granted in situations where the related parent has given up legal custody, had legal custody removed by court order or has abandoned the child financially unless the court finds that the grandparent has an established relationship with the child and that visitation with the grandparent is in the best interest of the child.

survive termination of parental rights, albeit in a small minority of the cases.

Under what authority may a court grant grandparent visitation after termination of parental rights? The grandparent visitation law, *Ala. Code 1975*, §30-3-4.1, as amended, sets up five circumstances in which a grandparent is entitled to visitation with a child through an original action: 1) when one or both of the parents of the child are deceased, 2) when the marriage of the parents of the child has been dissolved, 3) when a parent of the child has abandoned the minor, 4) when the child is born out of wedlock, or 5) when the child is living with both biological parents, who are still married to each other, whether or not there is a broken relationship between either or both parents of the minor, and the grandparent and either or both parents have used their parental authority to prohibit a relationship between the child and the grandparent. *Ala. Code 1975*, §30-3-4.1(c) provides that a grandparent can file a motion to intervene in a pending custody matter, which would include a dependency case or a termination of parental rights case, even though the conditions of *Ala. Code 1975*, 30-3-4.1 (b) do not exist. “...at common law, a parent’s obligation to allow visitation between his or her child and that child’s grandparent was a moral obligation, not a legal one....” *Dodd v. Burlison*, 932 So.2d 912 at 913 (Ala.Civ.App.2005), citing *Ex parte Bronstein*, 434 So.2d 780,

782 (Ala.1983). The legal authority to grant grandparent visitation is a legislative creation and is narrowly defined and strictly construed. As a result, it would appear that a grandparent would still be entitled to visitation with a child after termination of parental rights but only in the rarest of circumstances. Grandparent visitation is limited and may not be granted in situations where the related parent has given up legal custody, had legal custody removed by court order or has abandoned the child financially unless the court finds that the grandparent has an established relationship with the child and that visitation with the grandparent is in the best interest of the child. *Ala. Code 1975*, §30-3-4.1(g).

The current state of the case law makes the burden of a grandparent seeking visitation after termination of parental rights a very heavy one indeed. This is especially true in light of the factors to be considered by the court in determining whether the visitation should be allowed. In *Dodd v. Burlison*, supra at 921, the court of civil appeals adopted the rationale of the Kentucky Court of Appeals expressed in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky.Ct.App.2004) which set out the following factors: “We now hold that the appropriate test under [the applicable grandparental-visitatio statute] is that the courts must consider a broad array of factors in determining whether the visitation is in the child’s best interest, including but not limited to:

the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; and the wishes and preferences of the child. The grandparent seeking visitation must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child." The consideration of these factors coming on the heels of a determination of "no viable alternatives" will make the grant of grandparent visitation after termination of parental rights an extremely rare occurrence.

Bias against Relatives after Termination

Some trial courts have apparently approached the issue of considering relative resources after termination of parental rights as if they were radioactive. There is no firm legal authority to support the position that relatives may never again be considered as placement alternatives after parental rights have been terminated. Certainly, in most instances, relatives will have been investigated and ruled out as viable alternatives to termination of parental rights. The Child Protection Act seemed to address the issue in authorizing a trial court to place a child in the custody of a "relative or other individual" after termination of parental rights. Under the recent Juvenile Justice Act it would now appear that a relative would be on the same footing as a non-relative after termination of parental rights, enjoying no priority and suffering from no negative bias.

Siblings

The thorniest issue concerns continuing relationships between siblings after termination of parental rights. There is currently no statute or case law which addresses this issue. The policy of the Department of Human Resources attempts to address this problem by establishing a presumption in favor of placement of siblings in the same home whenever possible and when such placement is not in opposition

There is no firm legal authority to support the position that relatives may never again be considered as placement alternatives after parental rights have been terminated.

to the best interests of either of the children. However, the problem of placement or birth of siblings after termination of parental rights and adoption and issues occurring with half-siblings ensures that this problem will be one which must be addressed by the courts. One consideration is whether the continued relationship will hinder the cultivation of a healthy relationship between the child and his or her adoptive family. Another dynamic is whether the continued relationship between siblings is necessary to provide for the best interests of the child. These matters vary widely depending on factors such as the age of the child, the closeness of the relationship of the siblings and the comparative profit or detriment to be realized from the continued relationship. Ultimately, the courts will have to decide these issues on a case-by-case basis absent some guidance from the legislature or the appellate courts.

In juvenile dependency cases, it is of vital importance for participants in the juvenile justice system to be aware of the state of the law and trends in the law in order to protect the vulnerable members of our society and to promote stability and responsibility in the next generation. There is clear guidance as to how to take advantage of the benefits of healthy family relationships for the benefit of the child. The best practice is to investigate and address those issues prior to the filing of a petition to terminate parental rights.

The guidance and best practices include preserving the bond between children and their grandparents where that bond promotes the child's best interests.

Additional guidance is needed in the area of relationships between biological siblings after termination of parental rights. In the meantime, it will fall to the courts, attorneys and agency personnel to tailor the best possible path in each case. The need to know and follow the law and best practices becomes crucial in cases in which a petition to terminate parental rights has been filed because the results of these decisions are so far-reaching and so long-lasting. All of the participants in the juvenile justice system must take special care in pursuing the wisest course of action throughout the entire process in order to ensure the very best outcome for each child. ▲▼▲

Endnote

1. Alabama Code 1940, Tit.13, §361, "If, after hearing the case of any child, the court shall find the child dependent, neglected, or delinquent and shall so adjudge, the judge may commit the child to the home of its parents. . . . Or, the child may be committed by either temporary or final order of the court to any orphanage, institution, association, or agency approved by the state department of public welfare for the care of such children in the State of Alabama and which is willing to receive such child. The court may commit to the state department of public welfare by either temporary or final order such children as the state department of public welfare is equipped to care for and agrees to receive. . . .The court may such other order or judgment as the court, in its discretion, shall deem to be for the best interests of the child. No child shall be committed to any orphanage, institution, association, or agency, except state institutions or agencies, unless such orphanage, institution, association, or agency is approved by the state department of public welfare for the care of children of his class. . . ."



Judge William G. Hightower is a graduate of the University of Alabama School of Law and serves as a district judge in Pike County.

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Should the
Exception
Be the Rule?

Advocating for Appellate Review of Summary Judgment Denials

By denying your motion for summary judgment on legal grounds, the district court has foreclosed your ability to offer at trial a legal argument, claim or defense to which you believe your client is entitled.

By Abbott Marie Jones

Suppose the federal district court has denied your motion for summary judgment, not because factual disputes exist but because of a legal determination that your client was not entitled to a judgment as a matter of law. The case proceeds to trial, but as a result of the summary judgment denial, the district court has overruled and removed from the case your client's challenge to personal jurisdiction, assertion of a statute of limitations defense, assertion of immunity, assertion of a presumption, in addition to arguments about interpretation of a contract and the interpretation of a statute. By denying your motion for summary judgment on legal grounds, the district court has foreclosed your ability to offer at trial a legal argument, claim or defense to which you believe your client is entitled. How can you, the prudent and zealous advocate, preserve the error and properly present it to the appellate court?

The Eleventh Circuit will not review a district court's denial of summary judgment following a full trial on the merits. While every circuit has accepted this same general rule, most circuits also have recognized an exception to the rule where the issue presented is a "pure question of law." The Eleventh Circuit has not adopted this exception and continues to decline review of all pre-trial summary judgment denials. Because the circuits have divergent procedures for accepting appeals from summary judgment denials following a full trial, the United States Supreme Court recently heard oral arguments in a case that asks the Court to determine whether and under what circumstances courts of appeals may review such summary judgment denials. The focus of this article will be the different approaches used by the circuits and the potential implications that could result from the Supreme Court's decision on the issue.

Purpose of Summary Judgment Practice

The summary judgment procedure is an integral part of the Federal Rules of Civil Procedure. Pursuant to Rule 56, a party may move for summary judgment as to all or part of a claim. On a motion for summary judgment, the district court must determine whether any genuine issues of material fact exist and, if not, whether the movant is entitled to judgment as a matter of law. According to the Advisory Committee Notes to the 1963 amendments "[t]he very mission of summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

The U.S. Supreme Court has maintained that one of the principal purposes of the summary judgment procedure is to identify and eliminate claims or defenses that are not factually supported. In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1), the Court averred that summary judgment is not a "disfavored procedural shortcut" but instead plays an important role in "'secur[ing] the just, speedy, and inexpensive determination of every action.'" Though summary judgment is intended to dispose of factually unsupported claims, district courts also have discretion to "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

If the district court denies a summary judgment motion because genuine issues of material fact remain, or because the moving party is not entitled to judgment as a matter of law, or because there is reason to believe the better course is proceeding to trial, the case proceeds to a full trial on the merits. The question then becomes whether, and under what circumstances, the summary judgment

movant may appeal the pre-trial denial of summary judgment following trial.

Eleventh Circuit's Decision in *Holley*

The Eleventh Circuit first considered whether it would hear an appeal from a summary judgment denial following a full trial on the merits in *Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375, 1376-78 (11th Cir. 1988). In *Holley*, the defendant had moved for summary judgment as to the plaintiff's retaliatory discharge claim, but the district court denied the motion and the case proceeded to trial. Following the trial, the defendant asked the Eleventh Circuit to review the district court's denial of its pre-trial summary judgment motion.

The Eleventh Circuit observed that the summary judgment procedure was designed to decrease the time, effort, and costs associated with a full trial on the merits in cases where the trial process is not necessary. Relying on the purpose behind Rule 56, the Eleventh Circuit declared that a summary judgment determination "was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal." 835 F.2d at 1377. Though it invoked the broad rationale behind summary judgment practice to support its conclusion, the Court narrowed its holding to the specific circumstances presented in *Holley*:

[W]e hold that the party whose motion for summary judgment was denied may not appeal the motion if the party admits that . . . by trial the evidence produced by the opposing party was sufficient to be presented to the jury . . . or . . . by trial the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment.

Id. at 1377-78. The Eleventh Circuit, therefore, left open the possibility that it might review some pre-trial summary judgment denials under circumstances different from those presented in *Holley*.

Circuits Adopt Broad Rationale of *Holley*—The General Rule is Born

Rather than adopting only the narrow holding of *Holley*, all of the circuits to consider the issue since *Holley* have adopted a broad general rule based on the rationale articulated by the Eleventh Circuit in support of its holding. For example, the Fourth Circuit has characterized appellate review of pre-trial summary judgment denials as problematic, because those denials are based on incomplete records that are superseded by the evidence introduced at trial. *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995). Even if the evidence presented at trial is identical, the Fourth Circuit views the jury's verdict as superior to the summary judgment denial, because the verdict is based upon credibility assessments and fact finding that the district court cannot engage in during summary judgment consideration.

Likewise, the Fifth Circuit has long held that "[o]nce trial [begins], the summary judgment motions effectively became moot." *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir. 1994) (quoting *Wells v. Hico ISD*, 736 F.2d 243, 251 n.9 (5th Cir. 1984)). In the Fifth Circuit, appellate review of pre-trial summary judgment denials is contrary to procedural order and justice, because such

review "diminish[es] the discretion of the district court" to determine that, "even in the absence of a factual dispute," summary judgment should be denied "where there is reason to believe that the better course would be to proceed to a full trial." *Id.* at 571 (quoting *Anderson*, 477 U.S. at 255).

The Seventh Circuit has observed that pre-trial summary judgment denials become essentially moot after a full trial on the merits, and has concluded that appellate review of those denials is generally inappropriate. The Court explained that a summary judgment denial "decides one thing—that the case should go to trial; [that denial] does not settle or even tentatively decide anything about the merits of the claim." *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994) (quoting *Switz. Cheese Ass'n v. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)). The Seventh Circuit, therefore, will not "step back in time" to determine whether a different judgment may have been warranted on the factual record presented at summary judgment.

Considering the competing interests in justice, the Ninth Circuit has observed that "the party moving for summary judgment suffers an injustice if his motion is improperly denied. . . . However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial." *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987). In the Ninth Circuit, "[t]he appropriate forum to review the denial of a summary judgment [sic] motion is through interlocutory appeal under 28 U.S.C. § 1292(b)." *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992).

Instead of citing interlocutory appeal as the appropriate vehicle for review as did the Ninth Circuit, the Tenth Circuit has taken the position that "even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law . . . and appellate review of those motions if they were denied." *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992). In fact, "[f]ailure to renew a summary judgment argument — when denial was based on factual disputes — in a motion for judgment as a matter of law . . . is considered a waiver of the issue on appeal." *Wolfgang v. Mid-American Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997).

The Federal Circuit also has adopted the general rule against appellate review of summary judgment denials. In *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1567 (Fed. Cir. 1986), the Court noted that an order *granting* summary judgment, from which no immediate appeal lies, is merged into the final judgment of the court and is, therefore, reviewable on appeal. An order *denying* summary judgment, on the other hand, "is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought." *Glaros*, 797 F.2d at 1567.

Eleventh Circuit Expressly Adopts Broad General Rule

The Eleventh Circuit's own precedent supported the adoption of a narrower rule, or an exception to the general rule, that would allow for appellate review of pure legal determinations.

However, more than 10 years after its narrow holding in *Holley*, the Eleventh Circuit instead broadened its ruling to encapsulate the sweeping general rule adopted by the other circuits. In *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1282-84 (11th Cir. 2001), the plaintiff moved for summary judgment on her own retaliation claim, which motion the district court denied. Following a bench trial and the district court's determination that no retaliation had occurred, the plaintiff appealed the denial of her summary judgment motion and argued that the defendant had not presented sufficient evidence to withstand summary judgment.

The Eleventh Circuit reiterated the broad rationale it had set out initially in *Holley* as well as the similarly broad general rule adopted in other circuits. The Eleventh Circuit also cited its decision in *University of Florida v. KP, Inc.*, 89 F.3d 773, 775 (11th Cir. 1996), not to review the denial of summary judgment because the inquiry was "directed to the sufficiency of the evidence as presented at trial, which the record reveals to be competent support for the jury's verdict." Its decision in *KPB* coupled with the narrow holding in *Holley* seemingly invited a narrower prohibition against review—one that would only bar appeals from those summary judgment denials that are based upon the existence of remaining factual disputes. The Eleventh Circuit nevertheless announced in *Lind* that it would not review a denial of summary judgment after a trial on the merits under any circumstances.

To support its adoption of the broad general rule, the Eleventh Circuit observed that a party believing that the district court erroneously denied summary judgment has adequate remedies besides seeking appellate review of that denial. First, the party may seek an immediate interlocutory appeal. Alternatively, where a jury trial has occurred, the party may move for judgment as a matter of law under Rule 50, and if the Rule 50 motion is denied the party may seek appellate review of that denial.

The Eleventh Circuit stated that permitting post-trial review of a pre-trial denial of summary judgment would run afoul of the rules of procedure and undermine the district court's discretionary power to deny summary judgment in a case where the better course would be to proceed to a full trial. The court further explained that reviewing a pre-trial summary judgment denial on the basis of the incomplete record presented on summary judgment would be unjust in light of the fact that the record is more fully developed, and the jury is allowed to weigh credibility and resolve factual disputes during trial.

The Court also hearkened back to its observation in *Holley* that a summary judgment denial should not be a "bomb planted within the litigation at its early stages and exploded on appeal." Not



...a party believing that the district court erroneously denied summary judgment has adequate remedies besides seeking appellate review of that denial.

wishing to give district courts any incentive to grant summary judgment in a close case to defuse the potential "bomb" of a denial's reversal following what would be a therefore superfluous trial, the Eleventh Circuit determined that it would not review any pre-trial denial of a summary judgment motion following a full trial on the merits. *Lind*, 254 F.3d at 1285-86. In adopting the broad rule against appellate review, the Eleventh Circuit fell in line with the general consensus among the circuits and unconditionally adopted the rationale it first relied upon in *Holley*.

Most Circuits Read *Holley* as Supporting Exception to General Rule

None of the circuits that continue to follow only the sweeping prohibition against all appellate review of pre-trial summary judgment denials have adequately addressed the situation where summary judgment is denied not on

the basis of remaining factual questions but on purely legal grounds. Pure legal questions rejected on summary judgment, such as challenges to personal jurisdiction, assertions of the statute of limitations or claim preclusion, assertions of immunity or presumptions, and interpretations of statutory or contractual language, do not proceed to trial. Rule 50 motions, which are designed to test the sufficiency of the evidence presented at trial, do not provide an ideal vehicle for preserving error where pure legal arguments have been rejected on summary judgment. The traditional justifications for declining review of summary judgment denials after trial do not apply in situations where the denial is based purely on a legal determination.

The majority of the circuits, therefore, have read the holding in *Holley* as inviting a narrow, but important, exception to the otherwise overly broad general rule. For example, the Ninth Circuit adopted the exception to the general rule after concluding that the justifications for the general rule do not support a prohibition against appellate review of pure legal errors. In *Pavon v. Swift Transp. Co.*, 192 F.3d 902-07 (9th Cir. 1999), the Court considered whether to review a summary judgment denial where the district court had rejected the defendant's argument that the plaintiff's claims were precluded. Because the district court had determined on summary judgment that the claims were not precluded, the claims proceeded to trial. The defendant had no suitable way to raise the argument of preclusion during trial. The Ninth Circuit, therefore, succinctly announced,

"While this court will often decline to engage in the 'pointless academic exercise' of reviewing a denial of summary judgment after a trial on the merits, *Lum v. City and County of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992), such a case is not presented here, because the question of claim

preclusion was not a disputed factual issue that went to the jury, but was a ruling by the district court on an issue of law.”

Pavon, 192 F.3d at 906. Recently, the Ninth Circuit reaffirmed its acceptance of the exception to the rule against reviewing pre-trial summary judgment denials. Expressing the logic behind the exception, the court stated that “[i]f a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision.” *Banuelos v. Constr. Laborers’ Trust Fund for S. Cal.*, 382 F.3d 897, 902-03 (9th Cir. 2004). If, on the other hand, the district court denies summary judgment on the basis of a factual dispute, those factual disputes are resolved during any subsequent trial and the Ninth Circuit will not examine whether a factual issue was disputed at summary judgment after it has been decided by a jury at trial.

For similar reasons, the Seventh Circuit also has adopted the exception to the general rule. In *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 716-18 (7th Cir. 2003), the defendant moved for summary judgment on the basis of the relevant contractual language, which the defendant argued precluded the plaintiff’s breach of contract claim. The district court denied the motion for summary judgment, and the breach of contract claim proceeded to trial. The defendant appealed the summary judgment denial, and on appeal, the Seventh Circuit acknowledged that the general rule made sense in most circumstances, “because a denial of summary judgment is a prediction that the evidence will be sufficient to support a verdict in favor of the non-movant.” 320 F.3d at 718. However, the Seventh Circuit found that the traditional justifications for the rule against appellate review of pre-trial summary judgment denials are inapplicable when the denial of summary judgment was not based on the adequacy or inadequacy of the evidence. The Court, therefore, joined those circuits that have adopted the exception to the general rule against appellate review and concluded that review of pre-trial summary judgment denials is appropriate if the issues raised are purely legal, such as the interpretation of contractual language. The Seventh Circuit also discussed the Fourth Circuit’s decision in *Chesapeake Paper*, where the Fourth Circuit explicitly rejected as problematic the distinction between factual issues and purely legal issues. While the Seventh Circuit agreed that, in some cases, it may be difficult to discern the basis for the district court’s denial of summary judgment, the court nevertheless concluded that “if the legal question can be separated from the factual one, then we see no bar to reviewing



...when a party presents a pure legal question in a summary judgment motion and the district court denies the motion, the Tenth Circuit determined that the party need not make a Rule 50 motion to preserve the error.

the legal question notwithstanding the party’s failure to raise it in a motion for judgment as a matter of law at trial.” *Chemetall*, 320 F.3d at 719-20.

Following the lead of the Seventh and Ninth Circuits, the Sixth Circuit recently adopted the exception to the broad general rule for pure questions of law. In *Barber v. Louisville & Jefferson County Metro. Sewer Dist.*, 295 Fed. App’x 786, 787-89 (6th Cir. 2008), the defendant had moved for summary judgment on the plaintiff’s Whistleblower Act claim, but the district court denied the motion, finding that the plaintiff’s speech need not be “protected speech” under the First Amendment to sustain a whistleblower claim. The whistleblower claim proceeded to trial, and the jury determined that the defendant had violated the Whistleblower Act by terminating the plaintiff in retaliation for statements the plaintiff had made. On appeal, the defendant cited as error the district court’s statutory interpretation in the pre-trial summary judgment denial. The Sixth Circuit held, “[W]here the denial of summary judgment was based on a question of

law rather than the presence of material disputed facts, the interests underlying the rule [against appellate review of summary judgment denials] are not implicated.” *Id.* at 789 (quoting *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 441 (6th Cir. 2005)). Nevertheless, the Sixth Circuit interprets the exception to the rule for pure legal questions narrowly so as not to run afoul of the carefully balanced rules of civil and appellate procedure.

Five years after the Tenth Circuit first announced that it generally would not review pre-trial denials of summary judgment motions, that Court also drew a distinction between denials based upon remaining factual disputes and denials based upon pure legal determinations: “By contrast, when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment.” *Wolfgang v. Mid-American Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997). Like the Ninth Circuit, the Tenth Circuit explained that its adoption of the broad general rule against appellate review had been based, at least in part, on the notion that subsequent Rule 50 motions preserve any error in the district court’s determinations as to the sufficiency of the evidence. Like Rule 56 motions for summary judgment, Rule 50 motions for judgment as a matter of law are designed to test whether there is a legally sufficient evidentiary basis for the jury to find for the moving party. *Ruyle v. Cont’l Oil Co.*, 44 F.3d 837, 841-42 (10th Cir. 1994). Thus, to preserve for appeal a challenge to the district court’s determination that there was sufficient evidence to conduct a trial (in

other words, the denial of a summary judgment for remaining factual disputes), a party must raise the issue in a Rule 50 motion for judgment as a matter of law.

However, when a party presents a pure legal question in a summary judgment motion and the district court denies the motion, the Tenth Circuit determined that the party need not make a Rule 50 motion to preserve the error. In *Ruyle*, the defendant had presented on summary judgment a legal question regarding the preclusive effect of an order of the Oklahoma Corporation Commission. 44 F.3d 839-41. The Tenth Circuit, therefore, saw no reason to apply the broad general prohibition against appellate review of the summary judgment denial where the issue presented was a pure legal question, which a subsequent Rule 50 motion is not suited to preserve. *Id.* at 842-43.

Similarly, the Second Circuit has explained that, while appellate review generally should focus on the evidence admitted at trial rather than the earlier summary judgment record, that evidentiary focus has no bearing on challenges to the district court's legal conclusions. In *Rothstein v. Carriere*, 373 F.3d 275, 283-84 (2d Cir. 2004), the district court denied the defendant's motion for partial summary judgment in which the defendant had argued that the grand jury's indictment gave rise to a presumption of probable cause, an element of the plaintiff's malicious prosecution claim. By denying the motion for partial summary judgment, the district court "took the presumption out of the case entirely," so the defendant did not, and indeed was not obligated to, raise the issue in a Rule 50 motion at trial. 373 F.3d at 284. After trial, the defendant appealed the summary judgment denial, and the Second Circuit determined that "[w]here a motion for summary judgment based on an issue of law is denied, appellate review of the motion is proper even if the case proceeds to trial and the moving party fails to make a subsequent Rule 50 motion." 373 F.3d at 284 (internal quotation marks and citations omitted).

Falling in line with the majority of the circuits, the Federal Circuit also has adopted the exception to the general rule that an order denying a motion for summary judgment is non-final and non-appealable: "[T]here is the exception that '[a] denial of a motion for summary judgment may be appealed, even after a final judgment at trial, if the motion involved a purely legal question and the factual disputes resolved at trial do not affect the resolution of that legal question.'" *Revolution Eyewear, Inv. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1366 n.2 (Fed. Cir. 2009) (quoting *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 189 F.3d 1338, 1344 (Fed. Cir. 1999)).

Some Circuits Explicitly Reject Exception to Rule

While some circuits have seen the logic of allowing appellate review of pre-trial summary judgment denials based on pure legal determinations, others have expressly rejected that approach. As discussed above, the Fourth Circuit conceded in *Chesapeake Paper* that the Eleventh Circuit's narrow holding in *Holley* could be read as supporting what it called a "dichotomy approach" to appellate review of pre-trial summary judgment denials. 51 F.3d at 1235 & n.8. Despite that possible reading of *Holley*, the Fourth Circuit was persuaded more by the broad rationale cited by the *Holley* court in support of its admittedly

narrow holding. The Fourth Circuit "decline[d] to create" what it characterized as a "new jurisprudence in which district courts would be obliged to anticipate parties' arguments on appeal by bifurcating the legal standards and factual conclusions supporting their decisions denying summary judgment." *Id.* at 1235.

The Fifth Circuit also rejects this so-called "dichotomy approach" that most circuits have adopted. In a footnote in *Black*, the Court addressed the Eleventh Circuit's decision in *Holley*, which the Fifth Circuit viewed as suggesting an exception to the general rule against appellate review of summary judgment denials. 22 F.3d at 571 n.5. The Fifth Circuit determined that creating an exception to the rule whereby denials based on purely legal grounds would be reviewable would be inappropriate, because such an approach would require appellate courts "to craft a new jurisprudence based on a series of dubious distinctions between law and fact. And, such an effort—added to the tasks of already overburdened courts of appeal—would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits." *Id.*

Few Circuits Have Not Expressly Accepted or Rejected Either Approach

While most circuits have taken fairly strong stances on whether they will review any pre-trial summary judgment denials, the positions of some circuits remain unclear. For example, in an unpublished decision in *Robinson v. Garrett*, 966 F.2d 702, 1992 WL 132470, at *1 (D.C. Cir. May 8, 1992), the D.C. Circuit determined that, in light of the judgment entered following a full trial on the merits, it would not examine on appeal the argument that the district court erred in denying the pre-trial summary judgment motion. The court cited cases from the Sixth, Ninth, and Federal Circuits to support its conclusion. *Id.* (citing *Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir. 1990); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986)). The cases cited by the D.C. Circuit stand for the proposition that pre-trial denials of summary judgment are not reviewable following a full trial on the merits. However, subsequent to the *Robinson* decision, the Sixth, Ninth, and Federal Circuits have adopted the exception to the general rule against reviewing summary judgment denials when the issues presented are pure legal questions. *See, e.g., Revolution Eyewear*, 563 F.3d at 1366 n.2; *Medshares*, 400 F.3d at 441; *Banuelos*, 382 F.3d at 897. Whether the D.C. Circuit will follow the lead of the Sixth, Ninth, and Federal Circuits and adopt the exception to the rule, or whether the D.C. Circuit will rest only on its prior adoption of the broad general rule is yet to be seen.

The Third Circuit, without expressly noting whether it condoned appellate review of pre-trial summary judgment denials, has entertained such appeals. For example, in *Pennbarr Corp. v. Insurance Co. of North America*, 976 F.2d 145, 149-55 (3d Cir. 1992), the Court reviewed a pre-trial summary judgment denial related to the legal issue of contract interpretation. The Third Circuit ultimately reversed the district court's denial of summary judgment, determining as a matter of law that the contract terms were not ambiguous and that the summary judgment should have been granted. Whether upon explicit examination of the propriety of reviewing pre-trial summary judgment denials

the Third Circuit would choose to follow the exception to the general rule, as it did implicitly in *Pennbarr*, remains to be seen.

Unlike the Third and D.C. circuits, which have not explicitly adopted any rule, the Eighth Circuit's jurisprudence on the issue is explicit and self-contradictory. Like the majority of the circuits, the Eighth Circuit has adopted the general rule against appellate review of pre-trial summary judgment denials: "A ruling by a district court denying summary judgment is interlocutory in nature and not appealable after a full trial on the merits." *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994). The Eighth Circuit also rejected an appellant's argument in favor of the exception to the rule as problematic and without merit. *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997).

Despite its initial rejection of the exception to the rule two years prior, the Eighth Circuit did review a pre-trial denial of summary judgment after a full trial on the merits in *White Consolidated Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185 (8th Cir. 1999). Following the Tenth Circuit's rationale in *Wolfgang*, the Eighth Circuit determined that "when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment." *White*, 165 F.3d at 1190 (internal quotation marks omitted). Since its ruling in *White*, the Eighth Circuit seemingly has acknowledged that the law of that circuit is to allow post-trial review of a pre-trial denial of summary judgment only where the issues presented are purely legal questions, though it has not consistently applied either the general rule or the exception. *Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 780 (8th Cir. 2009) ("[W]e have, in at least one instance, allowed a party to appeal a district court's denial of summary judgment after final judgment when there were no disputed material facts and 'the denial of summary judgment [was] based on the interpretation of a purely legal question.'" (quoting *White*, 165 F.3d at 1190)); *but see EEOC v. Sw. Bell Tel., L.P.*, 550 F.3d 704, 708 (8th Cir. 2008) (refusing to consider appeal of summary judgment denial where appellant argued that the district court erred as a matter of law).

Supreme Court Review of Issue—Should Exception be the Rule?

The United States Supreme Court granted the petition for a writ of certiorari in *Ortiz v. Jordan*, on April 26, 2010, and set oral argument of the case for November 1, 2010. That case asks the Court, among other things, to determine whether a court of appeals may review any denial of summary judgment following a full trial on the merits. As described above, some circuits, including the Eleventh, maintain that appellate review of any summary judgment denial is inappropriate and inconsistent with the rules of civil and appellate procedure. Other circuits, including the Sixth Circuit in *Ortiz*, have adopted an exception to the general rule that allows appellate review of pre-trial summary judgment denials for pure legal questions. Those circuits adopting the exception to the rule against appellate review have determined that the rationale that supports the general rule has no application in a situation where the summary judgment denial

was based upon a purely legal inquiry. While it is hard to predict what the Supreme Court will decide, some basic principles undoubtedly will come into play as the Court endeavors to resolve this circuit split.

The logic behind the exception to the general rule makes sense in the abstract. If a district court makes a legal error in denying summary judgment and thereby essentially forecloses consideration of an argument during trial, the courts of appeals should be allowed to review those legal determinations after a trial on the remaining factual disputes. Such an appeal should lie regardless of whether the aggrieved party makes a Rule 50 motion on the issue at trial, because Rule 50 motions are designed to challenge the sufficiency of the evidence not the correctness of the district court's legal determinations.

The confusion arises, however, out of the practical application of the exception to the rule: what constitutes a "pure" legal question as opposed to just a legal question? All summary judgment determinations, as evidenced by the *de novo* standard of review utilized by the courts of appeals, are legal determinations. As the Supreme Court has explained, "[a]t the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party . . . the reasonableness of [the respondent's] actions . . . is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) (reversing the Eleventh Circuit's decision that affirmed the district court's denial of summary judgment based upon qualified immunity). The distinction drawn by the circuits adopting the exception to the rule for summary judgment denials based on "pure" legal questions, then, rests upon a bit of a legal fiction. As such, the Supreme Court may choose to adopt the exception as the rule and allow appellate review of any pre-trial summary judgment denial, because any such denial is a legal determination subject to *de novo* review. *See Banuelos*, 382 F.3d at 902-03 ("If a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision.").

On the other hand, the Supreme Court could agree with the minority of circuits that apply only the broad general rule that prohibits appellate review of any summary judgment denial. Only the First, Fourth, Fifth and Eleventh circuits have specifically rejected the exception in favor of applying only the broad general rule. In rejecting the exception, those circuits have relied upon the perception that the bases for summary judgment, and whether they can be categorized as purely legal, may be difficult to discern in some cases. Those circuits also rely upon the idea that appellate review of pre-trial summary judgment denials that are based on purely legal determinations emasculates the procedures set forth in Rule 50. As described above, however, Rule 50 motions are designed to test the sufficiency of the evidence, not the effectiveness of legal arguments. True, the adoption of an exception to the rule to allow for review of pure legal questions denied by pre-trial summary judgment motions may prove more challenging than a bright line rule against review of any summary judgment denials. The intellectual burden placed upon the courts of appeals by the exception surely is far outweighed by the benefits to the parties and the interests of justice. *See Adams v. United States*, 317 U.S. 269, 273 (1942) ("Procedural instruments are means for achieving the rational

ends of law.”); *see also Moore v. Zant*, 885 F.2d 1497, 1506-07 (11th Cir. 1989) (noting, in a different context, two competing interests: society’s interest in the finality of judgments and the litigants’ interests in securing a full and fair opportunity for consideration of their rights).

The Supreme Court may side with the majority of the circuits and conclude that courts of appeals should review only those summary judgment denials that raise pure legal questions. The Second, Sixth, Seventh, Ninth, Tenth, and Federal circuits have adopted the exception to the general rule against appellate review of pre-trial summary judgment denials, finding that the rationale supporting the general rule does not apply where the issues presented are purely legal. Additionally, the Third Circuit has reviewed and reversed a pre-trial summary judgment denial where the issue presented was purely legal, though it did not explicitly adopt the exception to the rule in so reversing. Therefore, though the petitioner in *Ortiz* asks the Court to reject outright the exception to the rule for cases presenting pure legal questions, jurisprudence from the majority of the circuits is stacked against the *Ortiz* petitioner.

If it adopts the majority rule (which includes the exception to the general rule against appellate review of summary judgment denials), then the Supreme Court should also offer some guidance as to what kinds of summary judgment denials fall within the exception. The Supreme Court’s prior decisions offer very few indications as to what “pure legal questions” rejected by a pre-trial summary judgment denial it may deem appropriate for appellate review. In many different substantive contexts, the Supreme Court has noted the difficulty of distinguishing between pure factual questions, pure legal questions, and so-called mixed questions involving both law and fact. In *Williams v. Taylor*, 529 U.S. 362, 385 (2000), the Court noted the “not insubstantial differences of opinion as to which issues of law fell into which category of question.” *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990) (“The Court has long noted the difficulty of distinguishing between legal and factual issues.”). The Court described “the proper characterization of a question as one of fact or law” as “sometimes slippery” in *Thompson v. Keohane*, 516 U.S. 99, 110-11 & n.10 (1995). The Court has also observed that “the appropriate methodology for distinguishing” pure questions of law, pure questions of fact, and mixed questions has been “to say the least, elusive” and “vexing.” *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Suffice it to say that the Supreme Court “has yet to



Until the Supreme Court either rejects the pure legal question exception or clearly articulates what types of pre-trial summary judgment denials are appealable following a trial, prudent counsel in any circuit would do well to preserve the issue in a Rule 50 motion.

arrive at “a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.” *Miller*, 474 U.S. at 113 (quoting *Pullman*, 456 U.S. at 288). The *Ortiz* case could provide the perfect opportunity for the Court to delineate what constitutes a “pure” legal determination. With guidance from the Court on that point, the exception, which allows for appellate review of pure legal determinations made in pre-trial summary judgment denials (which denials remove from the case the overruled legal arguments, claims, or defenses), should easily become the rule.

Conclusion—How to Proceed in the Meantime

The Eleventh Circuit will not review any summary judgment denial following a full trial on the merits. The Eleventh Circuit’s rule does not provide a suitable vehicle for preserving for review the district court’s error in denying summary judgment, and removing certain legal issues from the case, such as personal jurisdiction, presumptions, statutes of limitations and contract or statutory interpretation. Until the Supreme Court’s decision in *Ortiz*, counsel for unsuccessful

litigants who desire appellate review in this Circuit have two options: (1) seek interlocutory review of the summary judgment denial, or (2) preserve the issue by filing the appropriate Rule 50 motions, which are appealable. In circuits that have adopted the pure legal question exception, it nevertheless may be difficult to discern the basis for the district court’s denial of summary judgment, because what constitutes a “pure” legal question is unclear. This is not an ideal approach, but until the Supreme Court either rejects the pure legal question exception or clearly articulates what types of pre-trial summary judgment denials are appealable following a trial, prudent counsel in any circuit would do well to preserve the issue in a Rule 50 motion. ▲▲▲



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Batson Challenges in State and Federal Courts in Alabama: A Refresher and Recent Decisions

By Christopher L. Ekman

In the landmark decision of *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause forbids prosecutors from utilizing peremptory challenges to strike potential jurors solely on account of their race. Subsequently, the Supreme Court extended the *Batson* holding to apply to race-based peremptory strikes by criminal defendants and civil litigants, cases where the objecting party does not belong to a racial minority, and gender-based exercise of peremptory challenges. Despite these enlargements, the paradigmatic *Batson* scenario remains one in which a prosecutor is alleged to have exercised peremptory strikes to remove venire persons in a criminal case because they are African-American.

The three-pronged burden-shifting test developed by the *Batson* Court for evaluating those claims has been roundly criticized over the years as unwieldy and ineffective. For example, U.S. Supreme Court Justice Stephen Breyer has openly questioned the utility of the *Batson* test, noting in a published concurrence that it “asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor’s instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the

challenge.” *Miller-El v. Dretke*, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring). And commentators routinely heave broadside attacks at the *Batson* framework, with one decrying it as “infinitely cumbersome” and lamenting that only the “most overtly discriminatory or impolitic lawyer can be caught in *Batson*’s toothless bite.” Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, Wis. L. Rev. 501 (1999); see also Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 Brook. L. Rev. 95, 105 (Fall 2008) (“Many courts are frustrated with their inability to second-guess the reasons behind a race-neutral reason. . . . [M]any of these reasons are difficult, if not virtually impossible, to assess given that they rest on intangible factors such as a juror’s tone of voice, demeanor, or eye contact with the attorney.”). Notwithstanding these withering critiques, *Batson* remains omnipresent, an 800-lb. gorilla looming over jury selection proceedings in federal and state courtrooms throughout Alabama. This article reviews the major features of the *Batson* mechanism, examine recent federal and Alabama state court applications of that test, and offer practical tips for practitioners confronted with *Batson* issues.

Three-Step Procedure for Evaluating Batson Objections

When a *Batson* issue arises, whether in federal or Alabama state court, the trial court must employ a three-step process analogous to the *McDonnell Douglas* test used in the employment discrimination context. Each step must be considered separately. Indeed, “the failure to address each of *Batson*’s steps creates the risk of serious constitutional error.” *United States v. Edouard*, 485 F.3d 1324, 1343 (11th Cir. 2007).

First, the trial court must determine whether the objecting party has made a *prima facie* showing of discrimination by demonstrating that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Judges and litigants are often tempted to skip over this step because of its amorphous character, and the case law is rife with examples where a *prima facie* case is assumed, not proved. Nonetheless, glossing over this step may needlessly complicate the analysis, hamper the efforts of a reviewing court, and potentially require a remand. Indeed, the Eleventh Circuit has stressed that “establishment of a *prima facie* case is an absolute precondition to further inquiry into the motivation behind the challenged strike.” *Central Alabama Fair Housing Center, Inc. v. Lowder Realty Co.*, 236 F.3d 629, 636 (11th Cir. 2000); *see also United States v. Walker*, 490 F.3d 1282, 1291 (11th Cir. 2007) (“We have held that a *prima facie* case must be established before there is any further inquiry into the motives for the challenged strikes.”). This burden is not onerous, and does not require the objecting party to show that it is more likely than not that the peremptory challenge was motivated by purposeful discrimination. Rather, all that is necessary

is for the objecting party to come forward with any of a wide variety of “evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Johnson v. California*, 545 U.S. 162, 170 (2005).

That said, Alabama courts have established a bright-line rule that simply pointing out numerical disparities in the final composition of the jury is never enough to make a *prima facie* showing of discrimination. *See, e.g., Ex parte Walker*, 972 So.2d 737, 741 (Ala. 2007) (“An objection based on numbers alone, however, does not support the finding of a *prima facie* case of discrimination and is not sufficient to shift the burden to the other party to explain its peremptory strikes.”); *Saunders v. State*, 10 So.3d 53, 78 (Ala.Crim.App. 2007) (“Because Saunders relied on numbers alone when he objected to the State’s strikes ... Saunders failed to establish a *prima facie* case of discrimination.”). Similarly, federal courts have insisted that an objecting party “point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal.” *United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990) (citation omitted).

Second, once the objecting party successfully establishes a *prima facie* case, the striking party must articulate a race- or gender-neutral reason for the strike. To satisfy this burden, the striking party need only proffer a “clear and reasonably specific” explanation of the “legitimate reasons” why it exercised the peremptory challenges in that manner. *McGahee v. Alabama Dep’t of Corrections*, 560 F.3d 1252, 1257 (11th Cir. 2009); *see also Ex parte Branch*, 526 So.2d 609, 623 (Ala. 1987) (striking party’s burden is to articulate “a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is

nondiscriminatory,” but which “need not rise to the level of a challenge for cause”). So low is this hurdle that “almost any plausible reason can satisfy the striking party’s burden,” whether it be “superstitious, silly, or trivial,” or even mistaken, as long as it is race- and gender-neutral. *Walker*, 490 F.3d at 1293. However, the striking party must proffer more than mere general explanations and an affirmation of its good faith. *See McGahee*, 560 F.3d at 1257.

Third, after the striking party articulates a nondiscriminatory explanation, the objecting party must prove purposeful discrimination by showing that the proffered neutral reason is a pretext for discrimination. This step demands consideration of the totality of the circumstances, and trial courts are afforded great deference in this purely factual inquiry. *See, e.g., Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (recognizing trial court’s “pivotal role” under *Batson* because in many situations, “the trial court must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror”); *Walker*, 490 F.3d at 1294 (because the “trial judge is in the best position to evaluate an attorney’s candor and ferret out purposeful discrimination,” appellate court will defer to trial court’s findings on genuineness of reasons even when “troubled by the weakness of record evidence”); *Bryant v. State*, 951 So.2d 732, 740 (Ala.Crim.App. 2003) (“A trial court’s ruling on a *Batson* objection is entitled to great deference; this Court will not reverse the trial court’s ruling unless it is clearly erroneous.”).

Circumstances that may support a finding of pretext are many, but have been held to include the following, by way of example: (1) the striking party’s stated



“As long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made.”

explanation is equally applicable to jurors of a different race or gender who were not challenged; (2) the striking party fails to engage in meaningful voir dire examination on a subject about which it later professes concern; (3) the striking party's reasons are unrelated to the facts of the case; (4) the striking party examines venire members of one race or gender in a systematically different manner than others (by, for example, asking them a question designed to provoke a disqualifying response); (5) the striking party utilizes its peremptory challenges to remove all jurors of a particular race or gender; (6) the striking party explains that it struck the juror based on a group bias (*i.e.*, teachers are too liberal), without any showing that the purported group-wide trait applies to that individual; or (7) the striking party mischaracterizes voir dire testimony, or shifts its rationale after weaknesses are exposed. *See, e.g., Branch*, 526 So.2d at 624; *Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir. 2009). Alabama courts have held that if the striking party proffers multiple neutral explanations, then the objecting party must prove *all* of those reasons to be pretextual. *See Johnson v. State*, 648 So.2d 629, 632 (Ala.Crim.App. 1994) ("As long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made."); *Battle v. State*, 574 So.2d 943, 949 (Ala.Crim.App. 1990) ("Where a prosecutor gives a reason which may be a pretext, ... but also gives valid additional grounds for the strike, the race-neutral reasons will support the strike.").

Recent Applications of Batson in Federal and State Courts in Alabama

The three-step *Batson* test is well-settled as a matter of appellate jurisprudence in the federal and state courts of Alabama. However, that fact in no way blunts or alleviates the critiques by Justice Breyer and others with respect to its practical, day-to-day administration. A sampling of recent cases confronted by the Eleventh Circuit and Alabama appellate courts demonstrates that the pretext analysis remains an inexact and perilous endeavor, as judges attempt to peer into the hearts of lawyers to divine their true



“Where a prosecutor gives a reason which may be a pretext, ... but also gives valid additional grounds for the strike, the race-neutral reasons will support the strike.”

motivations for exercising strikes in a facially suspect manner. These authorities underscore appellate courts' reluctance to disturb or second-guess lower court *Batson* determinations in the absence of either egregious facts or a full-fledged breakdown in the development of the record.

In *Johnson v. State*, ___ So.2d ___, 2009 WL 725204 (Ala.Crim.App. Mar. 20, 2009), the defendant, who was black, argued to the Alabama Court of Criminal Appeals that the trial court had erred by overruling his *Batson* objection. The State had utilized all eight of its peremptory challenges to strike African-American venirepersons. The State's proffered justifications for utilizing its strikes as to seven of these jurors were that one juror had a family member whom the defendant's counsel had represented, the second juror had been charged with domestic violence and his wife was related to a witness in another case, the third juror was related to a defendant in a different case, the fourth juror was related to someone convicted of robbery, the fifth juror was believed to "lack mental acuity," the sixth juror had previously sat on a jury that had acquitted a defendant, and the seventh juror had an unspecified familial relationship with a defense witness. The appellate court analyzed none of these strikes in detail, but simply noted that the proffered reasons were race-neutral and that the State had agreed to allow one of the eight struck jurors to be reseated. On the strength of those observations, the *Johnson* court affirmed the trial court's denial of the *Batson* challenge.

Johnson exemplifies many of the difficulties with a *Batson* analysis. The challenging party's threshold of proof for offering race-neutral explanations is so low that plausible, run-of-the-mill justifications can

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be readily found (or manufactured) for almost every juror in every case. How is a trial court supposed to look behind those justifications and read prosecutors' minds? How is an appellate court supposed to look behind the trial court's credibility findings? As *Johnson* demonstrates, these problems of implementation may be intractable, even where the prosecution goes a perfect eight-for-eight in striking black venirepersons. The cynical view supported by cases like *Johnson* is that, to survive a *Batson* challenge, the striking party need only "hold its mouth right" and select from an expansive menu of available, acceptable, court-approved non-discriminatory criteria. If it does so, then the trial court and reviewing court will be hard-pressed to deem those peremptory challenges to be motivated by race or gender, irrespective of the pattern of strikes or other outward indicia of discrimination.

Similarly, in *United States v. Edouard*, 485 F.3d 1324, 1341-43 (11th Cir. 2007), the Eleventh Circuit addressed an unsettling *Batson* challenge. At Edouard's federal trial for importing cocaine from Haiti, the Government exercised four of its five peremptory challenges to strike black venirepersons. When the defendant interposed *Batson* objections, the Government proffered a series of wobbly explanations that the district court summarily accepted even as it commingled the three distinct *Batson* steps into an undifferentiated mass. The Government indicated that it had struck one juror because her "English could be an issue." For the second veniremember, the prosecution's reason was that the man had been wearing sunglasses, such that it was difficult to gauge his reactions to certain questions. The Government's explanation for striking the third black juror was that she was unemployed and difficult to understand. And the prosecutor's rationale for striking a fourth black veniremember was that "she answered the questions very quickly," impeding counsel's attempts to write down her responses, such that the prosecutor professed to know "nothing about her." The Eleventh Circuit upheld the denial of the *Batson* motion, citing the great deference afforded to trial court credibility determinations, the fact that the prosecutor had been forthcoming with reasons (albeit flimsy ones), the absence of evidence of white comparators, and the fact that three black jurors served on the sworn panel



In all but the most extraordinary of cases, *Batson* issues are won or lost at the trial court level, and rarely overturned on appeal.

(never mind that the prosecution could have struck no more than one of those three jurors because it had already used all but one of its allotted strikes on blacks). A fair reading of *Edouard* is that the appellate court largely took on faith that the district court had gotten it right, sweeping aside troubling aspects of the issue presented in the absence of glaring proof of discrimination.

These types of fact patterns are recurring in the case law. See, e.g., *United States v. Bernal-Benitez*, 594 F.3d 1303, 1311-12 (11th Cir. 2010) (affirming district court's overruling of *Batson* objection where prosecution stated that it struck African-American venireperson who worked as cook, dishwasher and security guard because it was "looking for a more educated panel," even as prosecutors accepted as jurors a postal worker, a bus driver and an airport parts mechanic); *United States v. Namur-Montalvo*, 2009 WL 4755719 (11th Cir. Dec. 14, 2009) (affirming without comment district court's denial of *Batson* objection by Latino defendants, where prosecutor used peremptory strikes on jurors based on their ability to speak Spanish, resulting in elimination of all Hispanics from the jury pool). The point is not that these cases are wrongly decided or that courts are shirking their *Batson* responsibilities. Rather, the point is that

this test—which essentially transforms jurists into Johnny Carson's "Carnac the Magnificent"—is a daunting undertaking for courts in a wide range of circumstances.

To avoid conveying the misleading impression that *Batson* challenges are a lost cause, it bears noting that courts do sometimes grant *Batson* relief. Particularly at the appellate level, however, such an outcome is found only in the presence of truly egregious circumstances. Last year, the Eleventh Circuit considered just such a case in *McGahee v. Alabama Dep't of Corrections*, 560 F.3d 1252 (11th Cir. 2009). There, the trial venire consisted of 66 potential jurors, of whom 24 were African-American. The prosecution used challenges for cause to eliminate eight African-American jurors, and peremptory challenges to remove the other 16. There was not a single remaining black juror at trial. When the defense objected, the prosecution initially proffered only an affirmation of good faith and, with a single exception, the general explanation that it felt the challenged jurors "would be detrimental to the interests of the State in this particular case." Although the trial court denied the motion in conclusory fashion, the prosecution later placed individualized reasons for each challenge on the record. With respect to one African-American juror who was a teacher, the prosecution explained that, after striking another African-American teacher, "we did not want to leave him individually," an explanation for which the appeals court could not imagine a non-racial interpretation. As to multiple other African-American venire persons, the prosecution's sole explanation was "low intelligence," even though not a single question had been asked of them pertaining to educational level or intelligence. The Eleventh Circuit viewed this reason as "particularly suspicious," given both the dearth of supporting evidence and "the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries." *Id.* at 1265. In light of this "astonishing set of facts," the *McGahee* court concluded that "[t]he record in this case compels a finding that the State's use of a peremptory strike in this case to dismiss [an African-American juror] constituted intentional discrimination, and violated McGahee's rights under the Equal Protection Clause." *Id.* at 1270. The

Eleventh Circuit reversed, and instructed the district court to issue the writ of habeas corpus.

Conclusion

It is perhaps tempting to infer from this discussion that, in the wild and woolly world of *Batson* challenges, anything goes. And there is at least a grain of truth to that sentiment. After all, trial judges possess vast discretion in evaluating *Batson* issues, particularly because of the crucial role that credibility determinations (as to both lawyers and venire persons) play in the analysis. In all but the most extraordinary of cases, *Batson* issues are won or lost at the trial court level, and rarely overturned on appeal.

Nonetheless, there are a few important lessons to bear in mind. From the standpoint of a party raising a *Batson* challenge, it is critical to voice that objection contemporaneously during the jury selection process and before trial begins, or else it may be waived. The objecting party should not simply assume that a blanket, general objection will suffice to place the other side in the hot seat, but should pay particular attention to the oft-overlooked *prima facie* element. As an advocate accused of violating *Batson*, one must be prepared to offer clear, specific reasons for each strike. These explanations must be internally consistent and (because of the paramount role of credibility) must be presented in a direct, forthright manner, without obfuscating or conveying an impression of hide-the-ball tactics. Sincerity of delivery and consistency of approach are of paramount importance.

Finally, trial judges confronted with these objections should take care to apply each of the three prongs of the *Batson* test, without collapsing or scrambling them. Because a large percentage of *Batson* remands stem from defects in the record, trial courts should also make certain to develop an adequate record for appeal, rather than simply trading in generalities, and should clearly delineate their findings as to each prong, rather than resolving the objection summarily. A stark cautionary tale of the pitfalls of not doing so is found in *Snyder v. Louisiana*, 552 U.S. 472 (2008), where the prosecutor struck an African-American juror named Mr. Brooks, who was a student teacher. When the defense

objected on *Batson* grounds, the prosecution explained that it struck Mr. Brooks for two reasons, to-wit: he “looked very nervous” and he might refuse to convict the defendant of capital murder to eliminate the penalty phase so that he could return to class sooner. The trial judge overruled the objection without comment or indicating which explanation it was accepting and why. Twelve years later, the U.S. Supreme Court found *Batson* error and reversed the state court judgment, rejecting the second explanation as not credible even under deferential review and the first because there was nothing in the record suggesting that the trial judge had credited it. This was tantamount to an order for new trial. So the defendant’s capital murder conviction was undone a dozen years after the fact on *Batson* grounds, at least in part because of the trial judge’s failure to make specific credibility findings and to identify which of the prosecutor’s stated reasons it credited and why.

It is certainly true that the much-maligned *Batson* test is imperfect. But it is not without virtues, chief among them being well-developed expectations and standards for case participants. Besides, to paraphrase former Secretary of Defense Donald Rumsfeld, you go to trial with the law you have, not the law you might want or wish to have at a later time. Unless and until someone builds a better mousetrap, *Batson* is what we have. ▲▼▲



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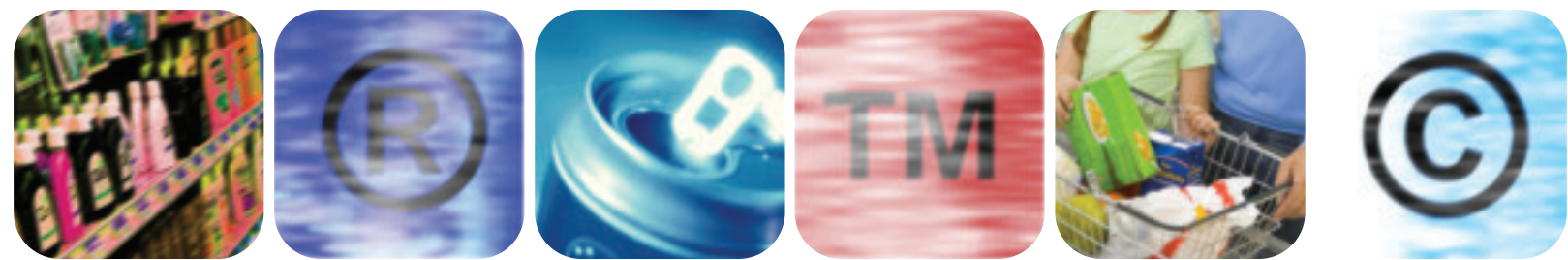
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Alabama Trademark Act Revised and Revived

By Linda A. Friedman and Will Hill Tankersley



ALI Model State Trademark Bill Committee

In January 2009, the Alabama Law Institute (“ALI”) assembled a group of Alabama lawyers from various practices for its committee on the Model State Trademark Bill (“MSTB”). These lawyers included:

Lee F. Armstrong, general counsel, Auburn University
Donna M. Bailer, Feld, Hyde, Wertheimer, Bryant & Stone, PC
Brian M. Clark, Wiggins, Childs, Quinn & Pantazis, LLC
Honorable Jean W. Brown, chief legal advisor,
Alabama Secretary of State’s Office
Diane H. Crawley, Maynard Cooper & Gayle, PC
Linda A. Friedman, Bradley Arant Boult Cummings LLP
Stephen H. Hall, Bradley Arant Boult Cummings LLP
Thad G. Long, Bradley Arant Boult Cummings LLP
Dr. Sheree Martin, Samford University, Dept. of Journalism
and Mass Communications
Kimberly T. Powell, Balch & Bingham LLP
David R. Quittmeyer, Hand Arendall LLC
Richard P. Rouco, Whatley Drake & Kallas
Honorable Harold See (retired Alabama Supreme Court Justice)
Bruce B. Siegal, The Collegiate Licensing Company general
counsel
James Dale Smith, Armbrecht Jackson LLP
Will Hill Tankersley, Balch & Bingham LLP
M. Chad Tindol, office of general counsel, University of
Alabama
India E. Vincent, Burr & Forman LLP
Lance J. Wilkerson, Johnston Barton Proctor & Rose LLP



Back Row: Representative Greg Canfield (bill sponsor), Will Hill Tankersley, Ret. Justice Harold See, Linda Friedman, Diane Crawley, Lance Wilkerson, Hon. Jean Brown, Donna Bailer. Front Row: Governor Bob Riley (with photo of Lee Huffaker)

ALI MSTB Process

Lee Armstrong, general counsel for Auburn University, was appointed the committee chair and the late Lee Huffaker was designated as the reporter for the committee. Lawyers were divided into subcommittees in the areas of registration issues, dilution and remedies. For the next nine months the committee investigated MSTB provisions and met and conferred before producing a final report which was presented at the November 2009 ALI Council meeting.

The MSTB Committee recommended keeping the overall structure of Alabama’s existing trademark act, but recommended changes where Alabama’s current act needed updating or clarification. The ALI MSTB Committee recommended that Alabama adopt meaningful guidance for the already existing (but little used) Alabama trademark “dilution” cause of action. The ALI accepted these recommendations and the Act was passed by the legislature and the Governor signed the bill May 21, 2010. The amendments took effect January 1, 2011.

INTA Model State Trademark Bill

The amendments passed by the Alabama legislature were largely derived from the International Trademark Association's ("INTA") Model State Trademark Bill of 2007 ("Model Bill"). In promoting the Model Bill, the INTA attempts to harmonize state and federal trademark laws to enhance the protection of trademarks nationwide. Following passage of the amendments by the Alabama legislature, the INTA Executive Director Alan Drewsen commended Alabama for adopting the newest version of the model bill, stating that in so doing, "the state has provided businesses with assistance and support for growth, which is critical as Alabama and the nation recover from the current recession." (*Ala. Passes Landmark Trademark Legislation to Harmonize with Fed. Law*, INTA Press Releases (Int'l Trademark Ass'n, New York, N.Y.), May 4, 2010.) The recently passed amendments modify Alabama's pre-existing trademark law that was based on a former version of the model bill, using the 2007 version of the model bill as the basis for the recent amendments.

Currently, 46 states have passed the pre-2007 Model Bill in whole or in part. Alabama became the fourth state to pass the latest version of the 2007 Model Bill, following California, Mississippi and Oregon. The 2007 version of the model bill uses standards and definitions that are consistent with current codified federal law, including the Trademark Dilution Revision Act of 2006. The 2007 version of the model bill is the first to provide trademark dilution claims for marks famous within the state ("Niche Fame").

By adopting in large part the 2007 Model Bill, Alabama harmonized its state trademark protections with those afforded by the federal government.

Overview of the Alabama Trademark Act and the Dual State/Federal Registration Systems

The Alabama Trademark Act, originally enacted in 1980, set up a procedure for registration of trademarks and service marks that are in use in Alabama and prescribed trademark causes of action for protection of trademarks. Effective January 1, 1989, the Act was amended to allow for registration of trade names, in addition to trademarks and service marks, all of which are collectively defined in the Act as "marks." Registration is not mandatory, as rights in a mark arise under common law, not by registration. See Comment B to 1988 1st Ex. Sess. Amendment, following *Ala. Code* §8-12-7. The statute expressly recognizes that its provisions shall not adversely affect the rights or enforcement of rights in marks acquired in good faith at any time at common law. *Ala. Code* § 8-12-19. Nonetheless, registration provides some advantages, most importantly the benefit of public notice of the registrant's claimed rights and some evidence that the mark was in use as of the time of registration.

In some ways the state registration process is duplicative of the federal registration process under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, administered by the United States Patent and Trademark Office. See www.uspto.gov. Certainly, a federal

registration confers rights much broader than a state registration. In particular, a federal registration confers exclusive nationwide rights to the mark except as against any pre-existing common law rights acquired by another prior to the filing date of the federal application. 15 U.S.C. § 1057(c). Nevertheless, reasons exist for a trademark owner to register its marks at the state level instead of, or even in addition to, the federal level. If a mark is used only in Alabama and not used in commerce that can be regulated by Congress, it does not qualify for federal registration. See 15 U.S.C. §§ 1051 (mark must be "used in commerce"), 1127 ("use in commerce" defined). Moreover, a trademark owner may have exclusive rights to a mark in Alabama, or in a multi-state region, yet may not be the senior user nationwide, in which case the senior user would have a superior right to the federal registration.

Moreover, the federal registration system is not available for a trade name, unless the trade name is used to identify a product or a service, in which case it would also serve as a trademark or service mark. By contrast, the owner of a trade name being used in Alabama can register its trade name in Alabama, regardless of whether it also is used to identify a product or service.

Finally, the state registration procedure is much faster and less expensive than the federal procedure. Registration in Alabama, which requires a \$30 filing fee, can be secured within weeks of filing an application with the Alabama Secretary of State. *Ala. Code* § 8-12-10; see www.sos.state.al/BusinessServices/Trademarks. By contrast, a federal application, which requires a filing fee of \$275 or more, typically takes a year or longer before a registration issues. Therefore, a budget-conscious trademark owner that operates in a limited geographic area may choose to register its mark only at the state level.

In addition to establishing a state registration procedure, the Alabama Trademark Act as originally enacted provided causes of action and remedies for persons harmed i) by infringement of registered marks, *Ala. Code* § 8-12-16, ii) by the fraudulent procurement of a registration, *Ala. Code* § 8-12-15 or iii) as a result of "likelihood of injury to business reputation or of dilution of the distinctive quality of a mark," which is referred to as trademark dilution, *Ala. Code* § 8-12-17.

Amendments to the Alabama Trademark Act, Effective January 1, 2011

The amendments revise the Act with respect to:

1. Administrative matters regarding applications for registration and renewals;
2. The dilution cause of action; and
3. Remedies.

Administrative Reforms

Harmonization of Classifications of Goods and Services with Federal Classes

All trademark applications must identify the goods or services with which the mark is used. At both the state and federal levels, the goods and services are organized into classes used for administrative convenience. Alabama's existing application scheme uses a classification system for goods and services, referred to as

International Classifications, as those classes existed in 1988, when the Alabama statute was last amended. *Ala. Code* § 8-12-14. In addition to the classes for goods and services, the state statute adopted a *sui generis* classification system for trade names, to categorize the type of business conducted under the trade name. The new amendment to the state statute harmonizes the state classification system with the system for goods and services adopted by the U.S. Trademark Office, as it may be amended from time to time. In the future, the classifications used for Alabama trademark and service mark applications will automatically be amended whenever the U.S. Trademark Office amends its classifications, which it typically does from time to time to conform to revisions made by the World Intellectual Property Organization pursuant to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. See <http://www.wipo.int/classifications/nice/en/>; <http://www.uspto.gov>.

Because the federal system has no counterpart for trade names, the state Act retains the existing classes of businesses for trade name applications, but renumbers the classes as business classes 1-25, which appear in Section 8-12-14(c).

Registration Term

Prior to January 1, 2011, registration in Alabama was for a 10-year registration term and 10-year renewal terms. *Ala. Code* § 8-12-10(a). The federal statute, by contrast, provides for a 10-year term but requires that, between the fifth and sixth year after registration, the registrant verify that the mark is still in use by filing an affidavit of continued use, along with evidence of use. Failure to file the required affidavit of use will result in cancellation of a federal registration. As a result, the federal registers are purged of marks abandoned within five years of registration, in contrast to Alabama's current register which is not being purged until 10 years after registration, when the registrant must demonstrate continued use in order to renew a registration.

After consultation with our Secretary of State's office, which indicated its preference for a shortened registration term and its ability to handle earlier renewals, the committee recommended that the registration term be shortened to five years. As of this month, registrations are now issued for five-year terms. Consistent with the federal requirement to show continued use after five years an Alabama registrant will be required to show use of the registered mark after five years as a condition of renewal. Registrations in force as of January 1, 2011 will continue in full force for the unexpired term.

Under the amendment, renewals can be secured for successive five-year terms, as long as the mark is still in use in Alabama. The amendments require the Secretary of State to notify registrants, within the year preceding the end of the five-year registration or renewal term, of the need to apply for renewal. The amendment, as explained by the committee's comments, permits the notice to be made by any method, including pursuant to Alabama's adoption of the Uniform Electronic Transaction Act, found at *Ala. Code* § 8-1A-1.

Trademark Dilution

Unlike trademark *infringement*, which arises when use of a similar mark creates a likelihood of confusion, trademark *dilution* can arise in the absence of confusion or even likelihood of confusion.

When Alabama first enacted its dilution statute, the concept of trademark dilution was still evolving. Many states recognized a common law claim of trademark dilution and some states had codified the claim in their statutes, but the elements of the claim were not consistent throughout the country. A common thread of trademark dilution, however, has been the threat of a gradual erosion of the distinctiveness of a mark, which can occur from another's use of a similar or identical mark, regardless of whether the parties are competitors and whether any confusion is likely.

When the Alabama Trademark Act was enacted in 1980, the comments stated that no Alabama court had yet directly adopted a cause of action for dilution. The anti-dilution statute as enacted in 1980 and in effect until January 1, 2011, provided:

Likelihood of injury to business or reputation or of dilution of the distinctive quality of a mark registered under this article, or a mark valid at common law, including a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of the goods or services.

Ala. Code § 8-12-17.

This state statute had not been the subject of many judicial decisions. Typically, a complaint in a trademark action will assert a claim for infringement (which requires a likelihood of confusion) and may also claim dilution under state and federal law, along with other potential claims. In the majority of cases, and in the few reported Alabama cases, the court's decision is based on multiple grounds, and the state dilution claim is not decisive. For example, in an early case under the state dilution statute, *Arthur Young, Inc. v Arthur Young & Co.*, 579 F. Supp. 384 (N.D. Ala. 1983), the court found that the distinctiveness of the plaintiff's mark was likely to be diluted by the defendant's continued use of its very similar trade name, thus entitling the plaintiff to injunctive relief under the *Ala. Code* § 8-12-17. *Id.* at 390. However, the court also found that the defendant's mark had caused a likelihood of confusion under state and federal law, and therefore was infringing. *Id.* at 389.

Courts have tended to defer to the federal trademark statute and case law when considering a claim of trademark infringement under state law. However, when the Alabama Trademark Act was originally enacted, there was no dilution counterpart in the Lanham Act. It was not until 1996, with passage of the Federal Trademark Dilution Act, that the Lanham Act incorporated a claim for dilution. The wording of the federal dilution provision, however, differed from the wording of the Alabama statute. Accordingly, courts applying Alabama law have had little guidance as to the interpretation of the state dilution statute, and, indeed, have on occasion looked to the federal statute, despite the differences in the respective statutes. See *EBSCO Indus., Inc. v. LMN Enterprises*, 89 F. Supp. 2d 1248, 1264 (N.D. Ala. 2000) (in denying plaintiff's summary judgment motion, the court curiously stated, without explanation or analysis, that "the plaintiff's burden of proof for dilution under § 8-12-17 is essentially the same as under federal law.").

Against this background, the committee recommended that the state dilution statute be revised to follow the federal statute more closely, but with a significant modification to benefit local

businesses. The amendments also add a definition of dilution, something that was missing in the original statute.

Dilution Defined

Under the Act, as amended, dilution is now defined as “the association arising from the similarity between a mark and a famous mark” that either “impairs the distinctiveness of the famous mark” (referred to as “dilution by blurring”) or “harms the reputation of the famous mark” (“dilution by tarnishment”).

Under the amended dilution statute, only famous marks will have the right to pursue a dilution claim. The requirement that the allegedly diluted mark be “famous” is consistent with the federal dilution provision, which applies only to famous marks, but is arguably a narrowing of Alabama’s current dilution statute, which only refers to the *distinctiveness* of a mark. Every mark must have at least minimal distinctiveness to qualify for protection as a trademark under common law, and a mark can be distinctive without being famous. *See, e.g., Dan Tana v. Dantanna’s*, 611 F.3d 767 (11th Cir. 2010). However, no reported decision under the current Alabama dilution statute has expressly addressed the question of how distinctive a trademark or trade name need be before it qualifies for protection against dilution. The authors are not aware of any case, reported or otherwise, that has granted relief, under the Alabama dilution statute, to a mark that was not famous or at least well known.

The amendment’s definition retains the concept, present in the original statute, that dilution occurs regardless of whether the parties are in competition, or whether there is confusion. It further clarifies that dilution can occur in the absence of likelihood of confusion (in contrast to the present statute that refers only to the absence of confusion), mistake or deception, or actual economic injury.

Cause of Action for Dilution

The amendment replaces existing Section 8-12-17 with a new provision that follows the federal statute, 15 U.S.C. § 1125(c), but with some changes. The new state statute will protect a mark in Alabama that is famous and distinctive, inherently or through acquired distinctiveness, regardless of whether the mark is famous or even in use outside Alabama. A mark will qualify as famous under this provision if it “is widely recognized by the general consuming public of this state or a significant geographic area in this state as a designation of source of the goods or services of the business of the mark’s owner.” By contrast, the federal statute’s protection is limited to those marks that are “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A).

The federal statute lists factors a court “may consider” in determining if a mark is widely recognized, or famous, throughout the United States, and the new Alabama statute will likewise list similar factors for determining the fame of a mark in Alabama or in “a significant geographic area” in Alabama. The list includes the same factors set forth in 15 U.S.C. § 1125(c)(2)(A)(i)-(iii), but focuses on the factors as they apply to the mark’s use and fame in Alabama. The factors include the mark’s duration, extent and geographic reach of advertising and publicity in Alabama; the amount, volume and geographic extent of sales offered under the mark in Alabama; and the extent of actual recognition of the mark in Alabama or in a significant geographic area of the state.

Consistent with the federal statute, a mark can be famous and protected against dilution regardless of whether it is registered, but a court may consider, as a factor indicating fame, whether the mark is registered in Alabama or on the Principal Register of the U.S. Trademark Office.

Under the new state provision, the owner of a famous mark will be entitled to injunctive relief “throughout the geographic area in which the mark is found to have become famous prior to commencement of the junior use, but not beyond” the state’s borders. Other remedies are available, including monetary damages and attorney fees, if the person against whom the relief is sought “willfully intended to cause dilution of the famous mark...”. The possibility of additional remedies mirrors the federal statute which provides for the same remedies as are available for infringement if the party against whom the injunction is sought “willfully intended to trade on the recognition of the famous mark” or “willfully intended to harm the reputation of the famous mark.” 15 U.S.C. § 1125(c)(5)B). As the Comment to the amendment explains, the additional remedies are not available merely because “one who adopts a diluting mark intended to adopt that mark while aware of the existence of the famous mark.” Rather, “[t]here must have been a willful (not merely incidental) intent to blur or tarnish the famous mark” before the additional remedies are awarded.

Because the state statute continues to define a “mark” to include a trade name, in addition to a service mark or trademark, the state dilution statute (unlike the federal statute) will continue to protect trade names, consistent with the original dilution statute, provided they qualify as famous.

Finally, the amendment to the state statute borrows again from the federal statute by specifying that dilution is not actionable when the other’s use is a fair use, a noncommercial use or a use in news reporting or news commentary. *Compare* 15 U.S.C. § 1125(c)(3) and *Ala. Code* § 8-12-17(d).

Remedies Provisions

The amendment makes four primary changes to Section 8-12-18 of the *Alabama Code*:

- (a) stylistic modifications;
- (b) specification of the burden of proof for both parties;
- (c) a provision for enhanced damages; and
- (d) a provision for reasonable attorneys’ fees.¹

In a largely stylistic modification of the language of the Alabama Trademark Law, the committee changed the reference to a trademark “registrant” in pre-existing subsection (b), current subsection (d), to now refer to a trademark “owner.” This change is not substantive, but instead brings the subsection into conformity with the other portions of the Alabama Trademark Law which refer to the “owner of a mark registered under this article” instead of plaintiffs or registrants. Thus, the remedies for infringement are available only if the owner’s mark is registered in Alabama, as opposed to remedies for willful dilution, which are available to the owner of a famous mark, whether or not it is registered.

The pre-existing section on remedies did not specify the burden of proof for parties in a trademark cause of action. Under the newly amended Trademark Law, parties are subject to different burdens of proof based upon trademark ownership status. Owners of trademarks are only required to prove that the defendant sold a

product in violation of the Alabama Trademark Law, whereas defendants must prove all elements of the cost or deduction claimed. The amended proof requirements correspond with the burden of proof for actions under the Lanham Act, bringing consistent proof standards between federal and Alabama state actions.

The newly promulgated provision for enhanced damages allows judges, at their discretion, to enter judgment against defendants in an amount up to three times the dollar value of the profits and/or damages claimed in the trademark action when the defendants willfully intended trademark infringement or dilution. Though enhanced damages were not available under the pre-existing Alabama trademark law, the Lanham Act allows for up to treble damages “according to the circumstances of the case,” allowing for larger potential awards for trademark cases litigated under federal law. The “willful intent” language parallels the Lanham Act’s provisions for awards of attorneys’ fees for “exceptional cases,” which has been interpreted to include malicious, fraudulent, deliberate and willful infringement of the Lanham Act. The comments to Section 8-12-18 define willful intention as something more than mere volition, but not necessarily requiring actual malice. Additionally, willfully intended infringement mirrors the language for dilution actions under Section 8-12-17. Enhanced damages are not available, however, for cases in which the defendant reasonably acts in good faith, believing such actions to be authorized by law.

Using language similar to the provision for enhanced damages, another newly promulgated provision in Section 8-12-18 allows judges, at their discretion and under limited circumstances, to award reasonable attorneys’ fees to a prevailing party. Though not previously available under Alabama trademark law, the Lanham Act has allowed awards of attorneys’ fees in the aforementioned “exceptional cases.” The newly promulgated provision allows judges, in their discretion, to award attorneys’ fees to prevailing trademark owners when the defendant willfully intended infringement or dilution of a trademark. The provision also allows judges, in their discretion, to award attorneys’ fees to prevailing defendants in cases where such attorneys’ fees would be available under the Alabama Litigation Accountability Act. Attorneys’ fees are not, however, available for cases in which the party against whom the fees are sought reasonably acts in good faith, believing the claim to be a viable cause of action pursued for a proper purpose.

The amendments to Section 8-12-18 harmonize the remedies available under Alabama law with the remedies available under federal law, bringing consistency of judgments among venues.

Conclusion

Harmonization of the Alabama Trademark Statute with the federal Lanham Act should facilitate resolution of claims in litigation, whether in state or federal court, by allowing the courts to look to federal case law in applying the Alabama statute. The harmonization and clarification of remedies also make the choice of proceeding in state court more attractive than before, as some plaintiffs might prefer to proceed in circuit court and choose to rely solely on the state trademark statute, especially if they do not have the benefit of a federal registration. Clearly, federal registration will continue to confer valuable rights not associated with a state registration, particularly the prospect of securing national rights even before the registrant uses the mark on a national scale. Yet, when parties operate in a more localized area, the state statute, as amended, provides a viable option for protecting a business’s trademarks from infringement and dilution. ▲▲▲

Endnote

1. H.B. 165, 2010 Leg., Reg. Sess. (Ala. 2010) (enacted).

In memoriam: Lee Huffaker, who had served as the ALI MSTB’s reporter, died shortly before the committee’s final meeting in September 2009. His skillful work, good humor and intelligence had been a joy to all who had the privilege to know him, and his invaluable contribution to the final bill was acknowledged by legislative resolution and by his picture that appears beside the governor at the bill signing.



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	Old Trademark Law	New Trademark Law
Burden of proof for owners of trademarks	Not specified	Must only prove sale of a trademarked product by the defendant
Burden of proof for defendants	Not specified	Must prove all elements of the cost or deduction claimed
Enhanced damages	Not specified	Allows up to treble damages and/or profits for willfully intended trademark infringement or dilution
Attorneys’ fees for prevailing owners	Not specified	Reasonably allowed for willfully intended trademark infringement or dilution
Attorneys’ fees for prevailing defendants	Not specified	Reasonably allowed where provided for under 4ALAA



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J. ANTHONY MCLAIN

Retention, Storage, Ownership, Production, and Destruction of Client Files

Introduction

Formal opinions 1986-02, 1993-10 and 1994-01 are the most recent pronouncements of a lawyer’s ethical obligations regarding client files. Since those opinions were issued, advances in technology, electronic filing and Internet-based electronic file storage and retrieval services have created issues that were not contemplated by those opinions. Realizing the need to provide guidance to lawyers that is relevant to the practice of law in today’s technological world, the Disciplinary Commission offers the following opinion concerning a lawyer’s ethical responsibilities relating to the retention, storage, ownership, production, and destruction of client files.

Applicable Rules

The following rules must be considered when determining a lawyer’s professional responsibilities relating to client file-retention policies. Although most often considered a rule relating solely to lawyer trust accounting, Rule 1.15, Alabama Rules of Professional Conduct, sets out a lawyer’s responsibilities relating to types of property of clients or third persons, other than money, and provides, in pertinent part:

“(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. [...] 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 (6) years after termination of the representation....

OPINIONS OF THE GENERAL COUNSEL Continued from page 59

“(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

“(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.”

COMMENT

“A lawyer should hold property of others with the care required of a professional fiduciary.

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Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts...."

* * *

"Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party."

The issue relating to whom the file belongs was decided in Formal Opinion 1986-02, wherein we held that the materials in the file furnished by or for the client are the property of the client. Therefore, Rule 1.15, Ala. R. Prof. C., imposes an ethical and fiduciary duty on the lawyer to properly identify a client's file as such, segregate the file from the lawyer's business and personal property, as well as from the property of other clients and third persons, safeguard and account for its contents, and promptly produce it upon request by the client.

Although specifically addressing the issues relating to declining or terminating representation, Rule 1.16(d), Ala. R. Prof. C., also refers to client property and provides, in pertinent part:

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

As explained in Formal Opinion 1986-02, the file belongs to the client. However, the client's possessory

rights to the file are subject to an attorney's lien created by Ala. Code §34-3-61 (1975, as amended), for unpaid fees and expenses. We take this opportunity to reiterate that where a lawyer is asserting a valid attorney's lien pursuant to the Attorney's Lien Statute to secure payment for reasonable fees and expenses that the client has not paid, the lawyer has a statutory right to withhold a client's papers and property in his possession until such time as the client satisfies the lien by tendering payment or makes reasonable and satisfactory arrangements to protect or otherwise secure the lawyer's interest in the unpaid fees and expenses.

Rule 1.6, Ala. R. Prof. C., embodies one of the most fundamental principles of our profession and requires that, with few exceptions, a "lawyer shall not reveal information relating to representation of a client." The duty to maintain confidentiality includes the duty to segregate, protect and safeguard a client's file and the information it contains. The obligation to maintain a client's file contemporaneously organized and orderly filing and indexing system is inherent in the duty of confidentiality and explicit in Rule 1.15. The failure to do so is a breach of Rule 1.15 and may also rise to the level of a breach of Rule 1.6. The principles of confidentiality, loyalty and fidelity are so fundamental to the practice of law that these rules must be enforced to eliminate even the risk of a breach of these principles.

However, a lawyer's obligation to identify and segregate a client's file, safeguard its contents, maintain its confidentiality and promptly account for and produce it upon request from the client does not create an obligation to permanently preserve all files of the lawyer's clients or former clients. See, D.C. Bar Opinion 206; ABA Informal Op. 1384 (1989). Lawyers do not have unlimited space to store files and what limited space is available is often expensive. Lawyers do have an ethical obligation to prevent the premature or inappropriate destruction of client files. See, D.C. Bar Opinion 205 (1989). Clients may reasonably expect lawyers to maintain valuable and useful information, not otherwise readily available to the client, in their files for a reasonable period of time. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 13384 (March 14, 1977)

OPINIONS OF THE GENERAL COUNSEL Continued from page 61

Adopt File-Retention Policies

The best practice is for a lawyer to adopt and follow a file-retention policy that best fits the needs of the lawyer's practice and the lawyer's clients. File-retention policies may vary from lawyer to lawyer and even from client to client, but they must be consistent with the guidelines expressed in this opinion. Additionally, the policy must be communicated to the client in writing at the outset of the representation. Upon conclusion of the representation, the lawyer should reiterate the policy and engage in appropriate follow-up with the client regarding retention and destruction of the client's file. The lawyer's file-retention policy may be included in the retainer or engagement agreement. In certain situations, it may be necessary and appropriate for a lawyer to create a separate file-retention and destruction policy, tailored to meet the specific needs of a client or a client matter, or the lawyer's practice. In developing a file-retention and destruction policy, the lawyer must abide by the guidelines expressed in this opinion and should also consider the individual client's level of education, sophistication, resources and other relevant circumstances.

Although, as a general rule, the file belongs to the client and must be produced promptly upon request, circumstances may exist that would make production of a copy of the entire client's file inappropriate. Absent a court order, a lawyer should not tender the entire file to a client who has diminished capacity or serious mental health disorders, or to juvenile clients or clients who have a propensity for violence. A lawyer may also refuse to tender the entire client file to clients who are violent criminal defendants, sex-offenders or other clients where the information contained in the file would endanger the safety and welfare of the client or others. In these circumstances, it is reasonable and appropriate for the lawyer to redact or remove documents containing sensitive mental health or medical records, descriptions of crimes, photographs of crime scenes or victims, sensitive or salacious information, and personal or other identifying information relating to jurors, victims, witnesses or others. A lawyer's retention and destruction policy should allow for these exceptional situations.

How long must files be retained?

Generally, a lawyer should maintain a copy of the client's file for a minimum of six years from termination of the representation or conclusion of the matter. A lawyer's failure to maintain a file for this minimum period of time is presumptively unreasonable based upon consideration of the statute of limitations under the Alabama Legal Services Liability Act (Ala. Code §6-6-574) and the six-year period of limitations for the filing of formal charges in lawyer disciplinary matters (Rule 31, Alabama Rules of Disciplinary Procedure). Six years is the absolute minimum period, but special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities, and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer or the administration of justice.

What is considered part of the client's file?

In general, there are two approaches to determine what constitutes the client's file. The "entire file" approach provides that the client owns and is, therefore, entitled to all of the documents within the client's file, unless the lawyer establishes that withholding items would not result in foreseeable prejudice to the client or would, as previously discussed, endanger the health, safety or welfare of the client or others. In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP, 91 N.Y. 2d 30, 666 N.Y.S. 2d 985, 689 N.E. 2d 879, 883 (1997); Clark v. Milam, 847 F. Supp. 424, 426 (D. W.Va. 1994); Gottlieb v. Wiles, 143 F.R.D. 241, 247 (D. Colo. 1992); Martin v. Valley Nat. Bank of Arizona, 140 F.R.D. 291 (S.D.N.Y. 1991); Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647 (N.D. Tex. 1989). The "end product" approach divides ownership of documents in the file between the client and the lawyer and permits a lawyer to retain certain documents, such as notes by the lawyer to himself made in preparation for deposition, trials or interviews or blemished drafts of other documents, which may contain the lawyer's mental

impressions, opinions and legal theories, some of which may not be flattering or palatable to the client or the lawyer. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, et al.*, 824 S.W.2d 92 (Mo. App. E.D. 1992); Minnesota Lawyers Professional Responsibility Board Opinion 13 (June 15, 1989); ABA Informal Ethics Op. 1376 (Feb. 18, 1977). Either approach requires weighing the protections of both a lawyer's right to think and practice freely during the representation and the client's right to demand an accounting of the actions of his lawyer. The rationale supporting the "end product" approach is that unless the lawyer's recorded thoughts are protected, he will not provide effective representation. The "entire file" approach, which is the majority view, fosters open and forthright lawyer-client relations. The rationale supporting this approach is that a lawyer's fiduciary relationship with a client requires full, candid disclosure. The relationship would be impaired if lawyers withheld any and all documents from their clients without good cause. *Henry v. Swift, Currie, McGhee & Hiers, LLP, et al.*, 581 S.E.2d 37 (Ga. 2003) (Adopting the majority view). The Disciplinary Commission agrees with the majority of jurisdictions that the "entire file" approach is the best approach. The lawyer is in possession of the file, knows its contents and is best able to determine the appropriateness of redaction or removal of some of its contents. In those situations where the lawyer determines that production of the entire file is unreasonable or inappropriate, the lawyer must provide reasonable notice to the client that portions of the file have been redacted or items removed for good cause.

What contents of a client's file may be destroyed?

We have consistently opined that six years is the minimum period of time a lawyer must retain a client's file after the file is closed or after final disposition of the matter. See, formal opinions 1994-91 and 1993-10. Although we have opined that six years was generally a reasonable minimum period of time, we are aware that most have assumed that the six-year minimum period of time applied to all client files. Today, we emphasize that six years is the minimum period of time that a client's file must be retained, but circumstances may extend that minimum period of time indefinitely. Even

when the passage of time and other circumstances render destruction of a client's file appropriate, there are some contents that should never be destroyed.

In Formal Opinion 1993-10, we described the nature of documents that might be contained in a client's file and opined that it was the nature of those documents that determined whether they could be destroyed. We stated that those documents fall into four basic categories. Today, we modify that categorization to simplify the analysis; the results are unchanged.

Category 1 property is "intrinsically valuable property." Its "value" is inherent in its nature. Value is not dependent upon certainty of ownership or its source. The fact that the property may be a copy or duplicate, rather than an original, may minimize its value, but this factor, without more, does not change its character as a Category 1 documents. Copies of Category 1 documents must be retained indefinitely, unless the lawyer determines that the copy can be lawfully destroyed



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OPINIONS OF THE GENERAL COUNSEL Continued from page 63

because it has been rendered useless and of no value by the client's possession of the original, or by the proper recording of the original, or at the specific written instruction of the client, under circumstances where destruction of the property would not otherwise be illegal or improper. However, the best practice is that the lawyer should never destroy originals of Category 1 property. Where destruction is necessary and appropriate, the lawyer should deliver the original to the client or deposit it with the court. Examples of such property include, but are not limited to: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, stock certificates, bonds, cash, negotiable instruments, certificates of title, abstracts of title, deeds, official corporate or other business and financial records, and settlement agreements.

Category 2 property is "valuable property." Its value is dependent upon the present circumstances or upon the reasonably foreseeable probability of a change in future circumstances. Factors that the lawyer may consider are certainty and identity of ownership, source of the property, its intended purpose, its planned or possible use, its character as an original or copy, its form and size, the practicality of preserving or storing it, and the reasonable expectations of the client or owner regarding its ultimate disposition. Category 2 property may be destroyed with the actual consent of the client or upon the client's implied consent, which may be obtained by the client's failure to take possession of the property on or within 60 days of a date established by the lawyer's written file-retention policy or as provided in a separate written notice, sent to the client's last known address, advising of the date of the lawyer's planned destruction or disposal of the property. Notice provided as part of the lawyer's written file-retention policy, which is affirmatively acknowledged in writing at the outset of the representation or upon termination of the representation, is presumed sufficient and no further notice or attempted notice is required prior to destruction or final disposition of the property. Examples of Category 2 property include, but are not limited to: tangible personal property, photographs, audio- and video-recordings, pleadings, correspondence, discovery, demonstrative aids,

written statements, notes, memoranda, voluminous financial, accounting or business records, and any other property the premature or unauthorized destruction of which would be detrimental to the client's present or reasonably foreseeable future interests.

Category 3 property is property that has no value or reasonably foreseeable future value. It does not fall into either Category 1 or Category 2. It may be destroyed after the minimum required period of time without notice to or authorization by the client. However, the best practice is for the lawyer to use the same notice procedure for Category 3 property as prescribed for Category 2 property.

Documents which fall into Category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him. After the minimum retention period of six years, those documents may be appropriately destroyed. There is no longer a Category 4 for purposes of the analysis.

Before destroying or disposing of any client file, it is the lawyer's responsibility to review and screen the file to ensure that Category 1 property is not being destroyed. The lawyer must maintain an index of all destroyed files, which index must contain information sufficient to identify the client, the nature or subject matter of the representation, the date the file was opened and closed, the court case number associated with the file, a general description of the type of property destroyed, e.g., "Pleadings, Correspondence, Notes, Legal Research, Videotapes, Photographs," a notation that the file was reviewed for Category 1 property, by whom, whether or not such property was contained in the file, and, if so, its location or disposition, and the date and method of destruction of the file.

What are the ethical considerations relating to electronic files?

The practice of law today often requires legal documents and many other components of a client's file to

be converted to, created, transmitted, stored, and reproduced electronically. Moving from "the paper chase" to "the paperless office" presents practical concerns. Converting existing paper files to electronic format is usually accomplished by "scanning" the paper file, which converts it to a format that can be stored, transmitted and reproduced electronically.

When paper files are converted to electronic format, destruction of the paper file is not without limits or conditions. Even after Category 1 documents are scanned and converted to electronic format, the lawyer cannot destroy the paper Category 1 document. After scanning and conversion, Category 2 and 3 documents may be destroyed, but the best practice is to follow the procedure used for ordinary paper documents.

Like documents that are converted, documents that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file. This requires the lawyer to ensure that only authorized individuals have access to the electronic files. The lawyer should also take reasonable steps to ensure that the files are secure from outside intrusion. Such steps may include the installation of firewalls and intrusion detection software. Although not required for traditional paper files, a lawyer must back up all electronically stored files onto another computer or media that can be accessed to restore data in case the lawyer's computer crashes, the file is corrupted or his office is damaged or destroyed.

A lawyer may also choose to store or back up client files via a third-party provider or Internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or Internet-based servers may include what is commonly referred to as "cloud computing." According to a recent ABA Journal article on the subject, "cloud computing" is a "sophisticated form of remote electronic data storage on the Internet. Unlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large

servers located elsewhere and maintained by a vendor." Richard Acello, "Get Your Head in the Cloud," ABA Journal, April 2010, at 28-29.

The obvious advantage to "cloud computing" is the lawyer's increased access to client data. As long as there is an Internet connection available, the lawyer would have the capability of accessing client data whether he was out of the office, out of the state or even out of the country. In addition, "cloud computing" may also allow clients greater access to their own files over the Internet. However, there are also confidentiality issues that arise with the use of "cloud computing." Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third party that is free to access the data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the Internet.

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OPINIONS OF THE GENERAL COUNSEL Continued from page 65

However, such confidentiality concerns have not deterred other states from approving the use of third-party vendors for the storage of client information. In Formal Opinion No. 33, the Nevada State Bar stated that:

“[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney’s direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent.”

In approving online file storage, the Arizona State Bar noted in Formal Opinion 09-04 that:

“[T]echnology advances may make certain protective measures obsolete over time. Therefore, the Committee does not suggest that the protective measures at issue in Ethics Op. 05-04 or in this opinion necessarily satisfy ER 1.6’s requirements indefinitely. Instead, whether a particular system provides reasonable protective measures must be ‘informed by the technology reasonably available at the time to secure data against unintentional disclosure.’ N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients’ documents and information.”

In their opinions, the bars of Arizona and Nevada recognize that just as with traditional storage and retention of client files, a lawyer cannot guarantee that client confidentiality will never be breached, whether by an employee or some other third party. Rather, both Arizona and Nevada adopt the approach that a lawyer only has a duty

of reasonable care in selecting and entrusting the storage of confidential client data to a third-party vendor. The Disciplinary Commission agrees and has determined that a lawyer may use “cloud computing” or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.

The duty of reasonable care requires the lawyer to become knowledgeable about how the provider will handle the storage and security of the data being stored and to reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third-party provider.

In whatever format the lawyer chooses to store client documents, the format must allow the lawyer to reproduce the documents in their original paper format. If a lawyer electronically stores a client’s file and the client later requests a copy of the file, the lawyer must abide by the client’s decision in whether to produce the file in its electronic format, such as on a compact disc or in its original paper format.

When a lawyer discards laptops, computers or other electronic devices, he must take adequate reasonable measures to ensure that client files and/or confidential information have been erased from those items. Failure to do so could result in the disclosure of confidential information to a subsequent user. If such disclosure occurs, the lawyer could be subject to disciplinary action for a violation of Rule 1.6 of the Alabama Rules of Professional Conduct.

In what format must the client’s file be delivered?

There are various possible combinations of client file formats, including original paper files scanned and converted to electronic document format, original e-documents and e-mails. Often, client files are maintained in

part in paper format and electronic format. Rarely is it possible to originate and maintain a client file in electronic format. Therefore, the best practice is to develop a procedure that integrates the various file formats into an organized, indexed and searchable, unified system, so that prompt access to and production of the complete file, regardless of its various formats, can be reasonably assured.

Where a client has requested a copy of his file, the file may be produced in the format in which it is maintained by the lawyer, unless otherwise agreed upon or requested by the client. If the client requests that the electronic documents be produced in paper format, then the lawyer must accommodate the client, unless the lawyer's written file-retention policy agreed to by the client provides otherwise. Even in cases where the lawyer's file retention policy provides that the file will be produced in only electronic format, where the client's level of education, sophistication or technological ability,

or lack of financial resources, or the unavailability of computer hardware or software necessary to access the documents would create an burden on the client to access the file in electronic format, the lawyer must produce a copy of the file in traditional paper format. Likewise, if the client requests the lawyer to produce the file in electronic format, but the lawyer maintains portions of the file in traditional paper format, the lawyer is not required to produce the file in electronic format, but may simply produce the file in the format in which it is maintained.

Can the lawyer charge the client for the cost of copying the file?

A lawyer may not charge the client for the cost of providing an initial copy of the file to the client. We note that many lawyers furnish courtesy copies of documents to their clients during the representation. Again, unless the lawyer includes a provision providing otherwise in his



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OPINIONS OF THE GENERAL COUNSEL Continued from page 67

written file-retention policy, acknowledged by the client at the outset of the representation, providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the entire file to the client at the termination of the representation. And, the lawyer may not charge the client for copying the entire file, even though courtesy copies of some documents have been previously provided to the client. Although some of the documents being provided to the client may be duplicates, tendering the entire file protects the interests of the client and the lawyer with the assurance that nothing has been overlooked. If the lawyer includes a contrary provision in the client contract or engagement letter which provides that contemporaneous courtesy copies of documents during the representation satisfies his obligation to produce the client's file, such provision must describe with specificity what documents will be contemporaneously produced, what documents will not be contemporaneously produced and what procedure and safeguards will be in place to ensure that the contemporaneous courtesy copy policy will be consistently followed. In any case, the client has a right to inspect the lawyer's file to ensure that the client's contemporaneous courtesy copy corresponds to

the lawyer's copy of the file. Lawyers may not charge the client for any costs incurred in producing and tendering the file to the client. However, the lawyer may charge reasonable copying costs if a client requests additional copies of his file.

As a general rule, the client is responsible to make arrangements to pick up a copy of his file at the lawyer's place of business. The lawyer may insist on a written acknowledgement of receipt from the client as a condition of surrender of the file. In the event the client refuses to acknowledge receipt of the file, the lawyer may refuse to tender the file. If the client requests that the file be produced to his authorized agent, then the lawyer should insist on written authorization to do so and should expressly warn the client that production of the file to a third party may defeat confidentiality and attorney-client privilege. Finally, if the client requests that the file be produced by mail, common carrier or at a location other than the lawyer's office, the client is responsible for the costs associated with such production and the lawyer may withhold production until the client pre-pays the estimated costs or makes arrangements agreeable to the lawyer.

[RO-2010-02]



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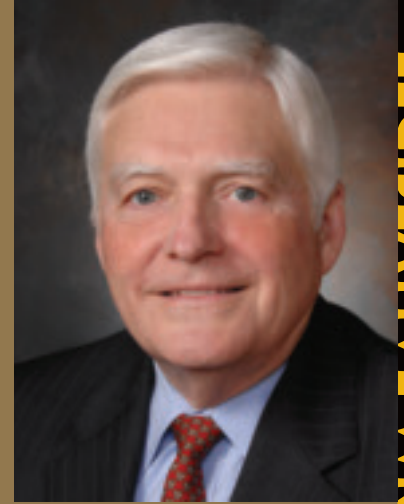


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New Laws Effective January 1, 2011

1. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Act 2010-500 (HB 114)

Effective Date: January 1, 2011

The same jurisdictional problems exist for adult guardianships of aging parents as with children living in different states. Guardians are regularly appointed by courts to care for an aging adult in one state then the individual moves to a second state. Sometimes guardianships must be initiated in a second state because of the refusal of financial institutions, care facilities and the courts to recognize a guardianship or protective order issued in a second state. This act provides an effective mechanism for resolving multi-jurisdictional disputes.

The Uniform Adult Guardianship and Protective Proceedings Act will clarify many guardianship issues including registration and transfer for out-of-state cases. The procedures in the act will help reduce the cost of guardianship and protective proceedings from state to state.

2. Uniform Child Abduction Prevention Act

Act 2010-212 (HB 213)

Effective Date: January 1, 2011

While current Alabama law addresses initial child custody determination as well as criminal repercussions for child abductions, this act clarifies the procedure for courts to follow to protect the child and all parties.

In 1999, Alabama passed the Uniform Child Custody Jurisdiction and Enforcement Act. This act compliments that act, including the temporary emergency jurisdiction currently available for minors.

The act also addresses special problems involved in international child abduction. These include risk factors related to whether the party is likely to take the child to a country that is not a party to the Hague Convention on the Civil Aspects of the International Child Abduction or to a country that is on a current risk of state sponsors of terrorism or engaged in active military war.

If abduction appears imminent, the court may issue a warrant to take physical custody of the child, direct law enforcement officers to take steps to locate and return the child or exercise other appropriate powers existing under state law.

3. Amendments to Trademark Act

Act 2010-747 (HB 165)

Effective Date: January 1, 2011

Rather than fully replace the current Alabama Trademark Law, the Alabama Trademark Act was amended to add concepts from the Model Act which will be improvements to current Law. The general areas at issue are dilution, the term for the trademark registration period, the classification system and the remedies available for infringement.

Alabama retains the ability to register a trade name in addition to a trademark.

4. Amendments to Revised Limited Partnership Act

Act 2010-211 (HB 115)

Effective Date: January 1, 2011

Passage of this Amendment will allow the new Lt. Partnership Act to be fully effective simultaneously with the new Business Entities Code and will allow both to be fully integrated into one code.

5. Business Entities Code

Act 2009-513

Effective date: January 1, 2011

The purpose of this code is primarily non-substantive and is a comprehensive reorganization of the entity laws.

It reorganizes the following business entities into one code. They are reorganized into the following chapters:

1. General Provisions (Apply to all entities);
 2. Alabama Business Corporation Act;
 3. Alabama Non-Profit Corporation Act;
 4. Alabama Professional Corporations Act;
 5. Alabama Limited Liability Company Act;
 8. Alabama Revised Partnership Act & LLP Act;
 9. Alabama Revised Limited Partnership Act & LLLP Act;
 10. Alabama Real Estate Investment Trust Act;
 11. Employee Cooperative Corporations;
 16. Business Trusts;
 17. Unincorporated Non-Profit Associations;
 20. Special Purpose Entities;
 21. Certain Powers, Rights and Duties of Corporations; and
 30. Provisions Applicable to Existing Entities of a Type that Can No Longer be formed: Unincorporated Professional Associations and Close Corporations.
- (Omitted chapter numbers are "reserved")

The re-organization will:

- (1) Rearrange the business and non-business organizations into a more logical order;
- (2) Provide a smooth transition when a business needs to change from one entity to another;
- (3) Provide a numbering system designed to accommodate future expansion of the law;
- (4) Eliminate repealed, duplicative, expired and other ineffective provisions; and
- (5) Simplify the language of the various acts.

The Code is organized on a "hub and spoke" model in Title 10. Article One, constituting the "Hub," consists of provisions applicable to each of the various Business Entities. The remaining articles are the "spokes" of the Act.

6. Electronic Recording of Real Estate Records Commission

Chair: Judge James Fuhrmeister

Reporter: Othni Lathram

The Uniform Real Property Electronic Recording Act which became effective January 1, 2010 is codified at Alabama Code § 34-4-120, et seq. The Act established the Alabama Electronic Recording Commission to develop the standards and procedures by which electronic recording will be conducted.

Members of the Commission are:

- Judge Bill English, Alabama Probate Judges Association
- Judge James Fuhrmeister, Alabama Probate Judges Association
- Judge Alan King, Alabama Probate Judges Association
- Judge Alice Martin, Alabama Probate Judges Association
- Judge James Perdue, Alabama Probate Judges Association

Joe McEarchern, Jr., Alabama Probate Judges Association

Brian Mann, Alabama State Bar

Palmer Smith, Alabama State Bar

Linda Barrontine, Examiners of Public Accounts

Tracey Berezansky, Department of Archives and History

Chris Green, Association of County Commissioners

Warren Laird, II, Alabama Title Insurers

Brandon Meadows, Alabama Bankers' Association

Thomas Owings, Alabama Association of Realtors

Before the act may be implemented by a county, "standards" must be developed. The commission is working on the creation of standards, model business rules and practices to be implemented for electronic recording. Once the commission has created these standards each county will have the option to allow for electronic recording of real property records in its probate office.



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Studies Completed to be Reviewed by the ALI Council

The Law Institute is constantly studying proposals for new revisions, beginning new projects, working with committees studying and drafting revisions, completing projects, proposing the completed project first to the Institute Council and then to the legislature, and, finally, helping educate lawyers and affected persons on the new laws. The following are the current projects of the Institute that are expected to be introduced in the 2011 Regular Session of the legislature:

1. Uniform Durable Power of Attorney

Chair: Richard Cater

Reporter: Professor Tom Jones

This Act revises the current durable power of attorney in law in Alabama found in only one code section, § 26-1-2. The drafting committee followed the Uniform Power of Attorney Act drafted by the Uniform Law Commission in 2006.

A durable power of attorney is a power that continues or becomes effective after the principal becomes incapacitated. Alabama passed the current Durable Power of Attorney statute in 1981 (see Ala. Code § 26-1-2) to allow one to designate another to make financial decisions for them without requiring one to petition a court to appoint conservator. In 1997, § 26-1-2 was amended to allow for healthcare powers.

Under current law one must designate the power of attorney as “durable” for it to remain in effect when the maker subsequently becomes incompetent. The current default rule is for powers of attorney to be void when the maker becomes incompetent unless the power of attorney specifically makes it durable. This act reverses the default to make all powers of attorney “durable” unless they specifically provide otherwise.

This act will be prospective only in application. Current § 26-1-2 will continue to govern all powers executed prior to the effective date of the new act. Furthermore, the current durable attorney law and this Act do

not include healthcare decisions. Healthcare powers will be governed by new § 26-1-2.1 which will carry forward existing law as it relates to health care power.

The act offers clear guidelines for the agent. It provides:

1. An agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests; and
2. Methods for the agent to give notice of his or her resignation if the principal becomes incapacitated.

The act encourages acceptance of a power of attorney by third parties by:

1. Providing broad protections for the person who accepts or refuses a power of attorney without actual knowledge that the power of attorney is invalid or has been terminated;
2. Offering an additional protective measure for the principal by providing that third persons may refuse the power if they have the belief that “the Principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the Agent or person acting for or with the Agent, and make a report to the appropriate adult protective service agency;” and
3. Providing an optional statutory form for granting a durable power of attorney.

2. Rule against Perpetuities

Chair: William B. Hairston, III

Reporter: J. Reese Murray, III

Alabama is the last state in the country with the original Common Law Rule against Perpetuities. Every other state has modified the common law rule in some manner. The modifications have incorporated several different concepts, including abolishing the rule altogether, setting a fixed number of years or adopting some version of the Uniform Statutory Rule against Perpetuities. The Alabama Law Institute Committee is proposing the 21 years for vesting be changed to 100 years and 360 of its creation for trusts.

The committee draft will be presented to the ALI Council and the legislature.

3. Uniform Unsworn Foreign Declarations Act

Chair: Harlan Prater

The Uniform Unsworn Foreign Declarations Act (UUFDA) allows for the use of declarations made by persons outside the territorial boundaries of the United States which are signed under penalty of perjury, but are not sworn to in the presence of a notary public. The act excludes from its application declarations for depositions, oaths of office, oaths related to self-proving wills, declarations recorded under Title 35, oaths required to be given before specified officials other than a notary, and powers of attorney.

Federal courts have allowed the flexibility of using unsworn declarations for more than 30 years. Since 1976, federal law has allowed an unsworn declaration to be recognized and valid as the equivalent of a sworn affidavit if it contained an affirmation substantially in the form set forth in the federal act.

The Alabama Law Institute Council will meet in Birmingham in the Balch-Bingham Conference Room Wednesday, February 2, from 10 a.m. until noon to review these three committee drafts:

Drafting Committees

1. Model Nonprofit Corporation Act

Chair: L. B. Feld

Reporter: Professor Jim Bryce

Alabama's Model Nonprofit Act was adopted in 1984 and followed the 1964 Model Nonprofit Act drafted by the American Bar Association. Since that time, the Nonprofit Act has twice been revised by the ABA with the third edition adopted in August 2008.

The Institute committee was formed in 2007 to begin a review of the new act drafted by the American Bar Association. The Act is divided into 17 Chapters. The committee has reviewed the Act and made a number of changes to conform the Act to Alabama practices.

Subsequent to the passage of the Alabama Business and Nonprofit Entities Code in 2009, the committee has reviewed the Nonprofit Act in light of the need to make changes to incorporate the new Nonprofit Corporation Law into the Alabama Business and Nonprofit Entities Code.

The committee is working to ensure that the changes in the Model Act recommended by the American Bar Association are compatible with Alabama's new Alabama Business and Nonprofit Entities Code effective 2011. All revised entities will become a part of the Entities Code.

2. Limited Liability Company

Chair: Kent Henslee

Reporter: Professor Jim Bryce

The Revised Limited Liability Company Act was approved by the Uniform Law Commission in 2006. The issues addressed in the revised LLC Act are issues of formation, relationships between members and managers (if applicable), distributions, disassociation, dissolution and winding up, foreign limited liability companies, merger and conversion, and actions against a company by members.

In the new Act, the operating agreement determines whether a company is manager-managed or member-managed. If the agreement is silent, the company is a member-managed company by default. Leaving this decision to the agreement allows the company to determine and re-determine its management structure more flexibly. A third-party creditor may seek affirmation of a manager's or a member's authority before doing business with the company and practice indicates does so without checking the official record for the certificate. In addition, certificates of authority may be filed to provide notice that only certain members or managers in a company are entitled to do business on behalf of the company.

A member may not transfer his or her membership in a company, unless the operating agreement makes it possible. In the revised Act, a "transferable interest" is generally any right to distributions that a member has under the operating agreement. The operating agreement may impose restrictions on a right to transfer. However, the certificate of organization may provide that a "transferable interest" is freely transferable under the new Act. If it does, the transferable interest may be certificated in the same manner any investment security is, and is likely to be a security under Article 8 of the Uniform Commercial Code.

The operating agreement governs the relationships between members and members and managers (if any). In the revised Act, the operating agreement may eliminate the duty of loyalty or duty of care, provided that eliminating them is not "manifestly unreasonable." The agreement may not authorize intentional misconduct or knowing violations of law, as well.

LEGISLATIVE WRAP-UP

Continued from page 73

The revised Act further provides for indemnification as a statutory matter. The operating agreement may, however, alter the right to indemnification, and may limit damages to the company and members for any breach except for breach of the duty of loyalty or for a financial benefit received to which the member or manager is not entitled.

In the new Act there is no obligation to buy out a dissociating member, nor grounds upon which a member may seek judicial dissolution to require a buyout. However, under the new Act, a member may sue the LLC.

3. Uniform Interstate Family Support Act

Chair: Julia Roth

Reporter: Penny Davis

The 2008 Uniform Interstate Family Support Act (UIFSA) Amendments modify the current version of the UIFSA's international provisions to comport with the obligations of the United States under the 2000 Hague Convention on Maintenance.

The UIFSA provides universal and uniform rules for the enforcement of family support orders by setting basic jurisdictional standards for state courts and by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding. It establishes rules for determining which state issues the controlling order in the event of proceedings initiated in multiple jurisdictions. It further provides rules for modifying or refusing to modify another state's child support order.

In July 2008, the Uniform Law Commission amended the UIFSA to incorporate changes required by the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. In order for the United States to fully accede to the convention it was necessary to modify the UIFSA by incorporating provisions of the convention that have an impact on existing state law. Section 7 of the 2008 UIFSA provides for the guidelines and procedures for the registration, recognition, enforcement and modification of foreign support orders from countries that are parties to the Convention. Enactment of the amendments to UIFSA will improve the enforcement of American child support orders abroad and will assist many children residing in the United States in their efforts to receive the financial support due from parents, wherever the parents reside.

Legislation before Congress to ratify the Convention provides that the

new amendments of the UIFSA must be enacted in every jurisdiction within two years after the enactment of federal implementing legislation as a condition for continued receipt of federal funds for state child support programs. If that legislation is enacted as presented, the failure to enact these amendments by that date will result in the loss of significant federal funding. The committee is watching Congress closely for any action to ratify the convention.

4. Warrant and Indictment Forms

Chair: Tommy Smith

Reporter: Bill Lindsey

After the Criminal Code was passed in 1978, the Institute drafted the Model Warrant and Indictment Forms which were to be consistent with criminal law then in existence. The forms were revised in 1989 and 1999. We are again revising the warrant and indictment forms to be consistent with legislative changes to the criminal code and court decisions since the last revisions that require the forms to be modified.

5. Criminal Rules of Procedure

Chair: Hon. Bill Bowen

Reporter: Bob McCurley

Since the adoption of the Alabama Rules of Criminal Procedure in 1981, the Institute and courts have maintained a committee to answer questions that are posed for interpretations of the rules and to modify the rules when necessary due to recently enacted legislation or court interpretations of the rules.

The committee meets one or two times a year to review these issues and readily submits revisions both to the rules and to the comments which are routinely adopted by the supreme court.

6. Criminal Code

Chair: Howard Hawk

Reporter: Hon. Bill Bowen

The Alabama Criminal Code became effective in 1980. Since that time there have been numerous amendments, additions, and changes. A new Criminal Code Committee was formed in 2009. The 1980 Criminal Code was compared with the current law showing lines marked through and underlined changes during the past 30 years. The committee is undertak-

ing a systematic review of the entire criminal code, classification system and sentencing structure.

This review will be conducted with the goal of ensuring the criminal code is as effective and efficient as possible. The committee is reviewing the chapters one at a time. It is anticipated that this review will take several years to complete.

7. Amendments to Condominium Act

Chair: John Plunk

Reporter: Carol Stewart

The Real Estate Committee reviewed the Uniform Common Interest Ownership Act (UCIOA). Although the committee believed the UCIOA coverage was too broad, the committee believes the Uniform Common

Interest Ownership Act does provide provisions to modernize Alabama's Condominium Act. A committee began comparing the Condominium Act and Uniform Common Interest Act in the fall of 2010.

New Revisions Being Considered

1. Revised Uniform Notarial Act
2. Uniform Partition of Heir Property
3. Uniform Military and Overseas Voter Act
4. Mortgage Foreclosures



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Notice

- **Elliot Joseph Vogt**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of January 15, 2011 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 10-524, before the Disciplinary Board of the Alabama State Bar. [ASB No. 2010-524]

Transfer to Disability Inactive Status

- Pelham attorney **Kevin M. McCain** was transferred to disability inactive status, effective September 1, 2010, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 10-1354]

Disbarments

- Saraland attorney **George Wayne Arnold** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama effective February 2, 2009, the date of Arnold's previously ordered suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Arnold's conditional guilty plea wherein Arnold admitted to violations of rules 1.3, 1.4(a), 1.4(b), 1.15(a), 1.16(d), 5.5(a), 8.4(a), and 8.4(g), Alabama Rules of Professional Conduct. In ASB No. 09-2237(A), Arnold admitted that he failed to deposit client funds received by him into his trust account and engaged in the unauthorized practice of law after his suspension on February 2, 2009. [ASB No. 09-2237(A)]
- Alabama attorney **Dennis Michael Barrett** was disbarred from the practice of law in Alabama, effective June 24, 2010, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the May 19, 2010 order of Panel I of the Disciplinary Board of the Alabama State Bar.

In ASB No. 99-263(A), Barrett was determined to be guilty of violating rules 4.1, 8.1(b), 8.4(c) and 8.4(g), Alabama Rules of Professional Conduct. According to the formal charges in or around July 1997, Barrett contacted a dentist about treating one of his clients who had suffered injuries in an automobile accident. Barrett informed the dentist that he had already negotiated a settlement on behalf of the client and

DISCIPLINARY NOTICES

Continued from page 77

that the dentist would be paid from the proceeds of the settlement within six months. The dentist performed the services, which totaled approximately \$5,048. Sometime later, Barrett informed the dentist that another firm was now handling the client's case. When the dentist contacted the other firm he was informed that there had never been a settlement and that the defendant had entered into a Chapter 11 bankruptcy. Thereafter, the dentist filed a complaint with the bar. Barrett failed to cooperate or communicate with the bar during the disciplinary investigation.

In ASB No. 00-74(A), Barrett was determined to be guilty of violating rules 8.4(b), 8.4(c), 8.4(d) and 8.4(g), Ala. R. Prof. C. According to the formal charges, the client hired the firm of Barrett & Poore to represent him concerning injuries he sustained in an automobile accident in 1998. Barrett's law partner settled the case for \$8,000 without the knowledge or consent of the client. Barrett acted in concert with his law partner in converting the settlement funds. Barrett later lied to the client about having insurance to cover the theft.

In ASB No. 00-104(A), Barrett was determined to be guilty of violating rules 1.1, 1.3, 1.4(b), 8.4(d), and 8.4(g), Ala. R. Prof. C. According to the formal charges, Barrett was retained to represent a client in a personal injury claim in 1999. Later that year, Barrett was interimly suspended from the practice of law in Alabama. Barrett failed to inform the client of his suspension and failed to take any action on his behalf. As a result, the statute of limitations on the client's claim expired without any suit having been brought on the client's behalf.

In ASB No. 05-184(A), Barrett was determined to be guilty of violating rules 1.5, 1.15(a), 3.4(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(g), Ala. R. Prof. C. According to the formal charges, Barrett was retained in 1998 to represent a client and her son in a case where her son was injured by a crib. After accepting the case, Barrett dissolved his law firm and forwarded the

client's file to another attorney. Barrett requested that the attorney convince the client to settle the claim for \$4,000. The client refused to settle the claim for \$4,000 and instructed the attorney to proceed with the case. Without the consent of the client and the knowledge of the other attorney, Barrett negotiated a settlement with the insurance company and accepted the \$4,000. In or around February 2000, Barrett forged the complainant's signature to the settlement check in the amount of \$4,000. Thereafter, Barrett filed for Chapter 7 Bankruptcy. The client never received any portion of the \$4,000 settlement. Thereafter, the client filed a complaint with the bar. Barrett failed or refused to respond to requests for information from the bar in the matter.

Formal charges were filed against Barrett in ASB nos. 99-263(A), 00-74(A), 00-104(A) and 05-184(A). Barrett failed to file an answer to the formal charges and default judgments were entered in each of the above-referenced cases. An order setting a hearing to determine discipline was sent to Barrett by certified and regular mail at his last known address on January 13, 2010. A hearing to determine discipline was conducted by Panel I of the Disciplinary Board on May 18, 2010. Barrett failed to appear at this hearing. Following the hearing to determine discipline, the board ordered that Barrett be disbarred. [ASB nos. 99-263(A), 00-74(A), 00-104(A) and 05-184(A)]

- Dothan attorney **Randy Carroll Brackin** was disbarred from the practice of law in Alabama, effective July 22, 2010, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Brackin's surrender of his license and consent to disbarment, which was based upon his conviction of 11 counts of possession of child pornography in the Circuit Court of Houston County, Alabama on April 29, 2010, and based upon


his acknowledgement that there were current pending investigations concerning his ethical conduct as a lawyer that involve alleged violations of rules 1.3, 1.4(b) 1.15(a), 1.15(b), 1.16(d), 8.4(a), 8.4(c), and 8.4(g), Ala. R. Prof. C., which, if proven, would likely result in serious discipline by the bar, to include disbarment. [Rule 23, Pet. No. 10-773 et al]

- Albertville attorney **Lawton Dale Fuller** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective July 9, 2009, the date of Fuller’s previously ordered disbarment from the practice of law in Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Fuller’s consent to disbarment in ASB nos. 09-1956(A), 09-1993(A), 09-2020(A), 09-2081(A), 09-2094(A), 09-2135(A), 09-2161(A), 09-2360(A), 09-2398(A), 09-2404(A), 09-2432(A), 09-2459(A), 09-2563(A), 09-2690(A), and 09-2807(A). In each of these cases Fuller admitted that he willfully

neglected matters entrusted to him, failed to keep his clients updated on the progress of their cases and improperly converted client funds held in his trust account. [ASB nos. 09-1956(A), 09-1993(A), 09-2020(A), 09-2081(A), 09-2094(A), 09-2135(A), 09-2161(A), 09-2360(A), 09-2398(A), 09-2404(A), 09-2432(A), 09-2459(A), 09-2563(A), 09-2690(A), and 09-2807(A)]

- On September 28, 2010, the Supreme Court of Alabama entered an order adopting the order of the Disciplinary Board of the Alabama State Bar, Panel I, disbarring Hoover attorney **Tony Shayne Hebson**, effective September 28, 2010. Hebson consented to disbarment on August 20, 2010, admitting the misappropriation of client and third-party funds by violating rules 1.15(a) and 1.15(b), Ala. R. Prof. C. [Rule 23(a), Pet. No. 2010-1320; ASB nos. 2010-631 and 2010-922]
- Birmingham attorney **Kevin James Henderson** was disbarred from the practice of law in Alabama by order

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The Just One Look link can be accessed from the Administrative Office of Courts website at www.AlaCourt.gov or directly at www.AlacourtAccess.com.

DISCIPLINARY NOTICES

Continued from page 79

of the Supreme Court of Alabama, effective August 11, 2010. The supreme court's order was based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Henderson's consent to disbarment filed August 4, 2010. The consent to disbarment was based upon Henderson's acknowledgement that there were pending investigations into his ethical conduct as a lawyer which allegedly involved misappropriation of expense reimbursement requests to his law firm which may have been billed to clients. [Rule 23(a), Pet. No. 10-1086; ASB No. 10-1047]

- Mobile attorney **John Charles Wilson** was disbarred from the practice of law in Alabama, effective August 12, 2010, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Wilson's surrender of his license and consent to disbarment, which was based upon his acknowledgement that there were current pending investigations into his ethical conduct as a lawyer that concerned alleged violations of rules 1.15, 8.4(a), 8.4(b), 8.4(c), and 8.4(g), Ala. R. Prof. C., which, if proven, would likely result in serious discipline by the bar, to include disbarment. [Rule 23, Pet. No. 10-1271 et al]

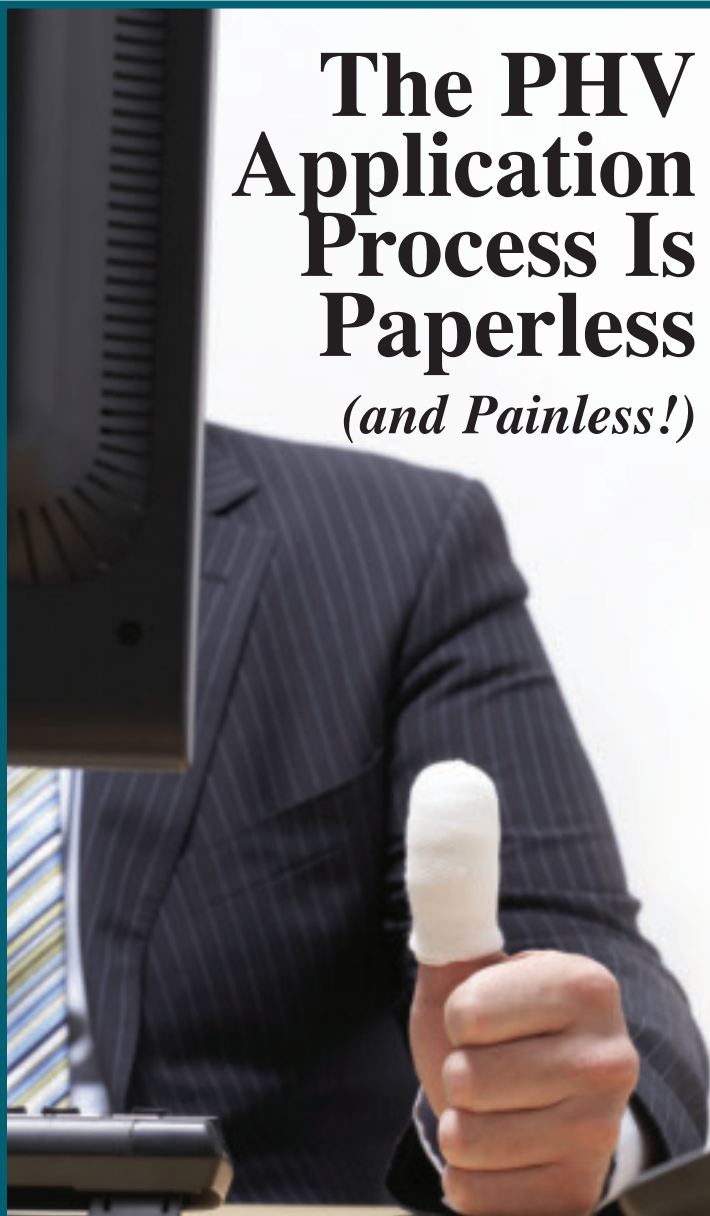
Suspensions

- Effective August 31, 2010, attorney **Shirley Trivett Chapin** of Northport has been suspended from the practice of law in Alabama for noncompliance with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 10-688]
- On September 8, 2010, the Disciplinary Board of the Alabama State Bar, Panel II, entered an order suspending the license of Birmingham attorney **Coker Bart Cleveland** for two years. The suspension will be held in abeyance and Cleveland will be placed on probation for two years. Cleveland's discipline is based upon his failure to adequately communicate with clients, his failure to respond to requests for information from the Office of General Counsel and his conduct that was prejudicial to the administration of justice, involved fraud and reflected adversely on his fitness to practice law. The suspension was based upon Cleveland's entering a plea of guilt to violations of rules 1.3, 1.4(a), 1.4(b), 8.1(b), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), Ala. R. Prof. C. Due to prior conduct, Cleveland will remain suspended from the practice of law. [ASB No. 07-196(A)]
- Effective August 31, 2010, attorney **April Elizabeth Green** of Gulf Shores has been suspended from the practice of law in Alabama for noncompliance with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 10-691]
- Effective August 31, 2010, attorney **Bret Lee Hooten** of Alabaster has been suspended from the practice of law in Alabama for noncompliance with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 10-694]
- Montgomery attorney **Mark David Mullins** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar, effective September 24, 2010. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Mullins had failed to respond to requests for information from a disciplinary authority. [Rule 20(a), Pet. No. 10-1424]
- Birmingham attorney **Leotis Williams** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 45 days, effective October 15, 2010. The supreme court entered its order

based upon the Disciplinary Board's acceptance of Williams's motion to impose discipline by consent. Williams was determined to be guilty of violating rules 1.1, 1.3, 1.4(a), 1.4(b), 8.4(a), and 8.4(g), Ala R. Prof. C. In ASB No. 09-11(A), Williams was retained to represent a client on a personal injury case arising from an automobile accident. Williams failed to provide competent representation to the client and willfully neglected a matter entrusted to him. [ASB No. 09-11(A)]

- Millbrook attorney **Guy Rodney Willis** was suspended from the practice of law in Alabama for 91 days, effective

June 21, 2010, with said suspension being deferred pending successful completion of a two-year period of probation. Upon successful completion of probation, the suspension will be abated and Willis shall receive a public reprimand with general publication as discipline in this matter. Willis entered a conditional guilty plea admitting that he, on more than one occasion, issued third-party subpoenas for records relating to a certain case, but issued the third-party subpoenas in an entirely different and unrelated case for which the information was sought, thereby violating rules 3.4(c), 4.4(a) and 8.4(a), (c) and (d), Ala. R. Prof. C. [ASB No. 09-1178(A)]



The PHV Application Process Is Paperless (and Painless!)

The Alabama State Bar's Pro Hac Vice (PHV) filing process has gone from paper to online. Instead of sending a check and hard copy of the Verified Application for Admission to Practice Pro Hac Vice to the ASB, an out-of-state attorney can now request that his or her local counsel file their PHV application through AlaFile, including electronic payment of the \$300 application fee.

Once local counsel has filed this motion, it will go electronically to the PHV clerk's office at the Alabama State Bar for review.

- If all of the information on the application is correct, the motion will be docketed and sent electronically to the judge assigned to the case for ruling.
- If the information in the application is incorrect or incomplete, a deficiency notice will be e-mailed to the filer (local counsel).

A corrected application may be resubmitted by local counsel via AlaFile.

The PHV clerk will then review the corrected application and, once accepted, the motion will be docketed and sent electronically to the judge assigned to the case for ruling.

Please refer to the "Step-by-Step Process" to file the PHV application in the correct location in the Alafile system. (It should no longer be filed under 'Motions Not Requiring Fee').

Contact IT Support at 1-866-954-9411, option 1 and then option 4, or applicationsupport@alacourt.gov with questions or comments.

Public Reprimands

- Evergreen attorney **John Gordon Brock** received a public reprimand with general publication on September 24, 2010 for violations of rules 3.4(c), 8.4(a) and 8.4(d), Ala. R. Prof. C. Brock represented a client in an estate matter in the probate court of Covington County. The court set a hearing concerning claims filed by Brock's client and concerning Brock's client's objection to the appointment of the administrator. However, Brock, after having received notice of the hearing, did not appear. Brock's client consented to proceed without him. The judge issued an order requiring Brock's appearance at a show cause hearing concerning his failure to appear. During the hearing, Brock admitted receiving the order, but testified that his client had decided to withdraw her objection and he assumed that his presence was unnecessary. Brock did not explain his failure to notify his client, the administrator's counsel or the court that he would not attend, nor did he explain his failure to seek permission from the court to be excused. The judge found him in contempt, fined him and sentenced him to serve 24 hours in the Covington County Jail. [ASB No. 10-462]

- Montgomery attorney **Rodney Newman Caffey** received a public reprimand without general publication for violations of the Ala. R. Prof. C. in each of the following matters.

In ASB No. 08-97(A), Caffey was ordered to receive a public reprimand without general publication for violation of Rule 1.15(a), Ala. R. Prof. C. In or around May 2007, Caffey represented a family member in a personal injury matter and, as part of that representation, Caffey sought medical records from the client's chiropractic clinic. Caffey signed a "letter of protection," by which he agreed to withhold from any settlement received funds necessary to pay the clinic's charges for treating the client. The personal injury

claim was settled with the tortfeasor's insurer, and the funds were paid jointly to Caffey and the client. Caffey and the client cashed the settlement check at a pawn shop and all of the funds were delivered to the client. Caffey made no payment to the chiropractic clinic pursuant to the letter of protection.

In ASB No. 08-98(A), Caffey was ordered to receive a public reprimand without general publication for violation of Rule 8.1(a), Ala. R. Prof. C. In or around April 2007, Caffey was retained to assist a client in obtaining a post-conviction reduction in his life sentence being served. Caffey informed the client that he would charge a rate of \$250 per hour to review documents, formulate a strategy and counsel with him concerning his case. The client's mother paid Caffey \$5,000 in advance against anticipated billing, and payment was to be placed in Caffey's trust account. Sometime thereafter, the client filed a grievance with the bar asserting that he had not received the services promised and had not received an accounting of the \$5,000 paid. During the course of the bar's investigation Caffey produced an itemization that included unjustified and unsubstantiated legal time and costs. It was also determined that Caffey failed to deposit the funds into his trust account. [ASB nos. 08-97(A) and 08-98(A)]

- On September 24, 2010, Birmingham attorney **James Scott Langner** received a public reprimand without general publication for violations of rules 1.1 and 1.4(b), Ala. R. Prof. C. Langner was hired by a client to probate the will of her deceased father and was paid \$1,000 in fees. After undertaking the representation, the matter became more complicated. Langner was unable to locate any witnesses to support probate of the will but failed to pursue other avenues that would have possibly resulted in his having the will admitted for probate. Langner could have sought other advice or associated another attorney, but failed to do so. Ultimately, Langner did not probate the will.

Langner's client repeatedly attempted to contact him regarding the status of the matter but he failed to adequately communicate with her. She complained that she would call Langner's office and cell phone on numerous occasions and he would not return her telephone calls. When Langner did communicate with her, he did not fully discuss the problems he was having with probating the will so that his client could make informed decisions about the matter. Langner also failed to advise his client about the problems involved in not having the will probated and the matter remained at a standstill.

Langner failed to competently represent his client in attempting to probate the will and failed to communicate with his client in a manner that allowed her to make informed decisions regarding the representation. [ASB No. 04-26(A)]

- On September 24, 2010, Dadeville attorney **Michael Allen Mosley** received a public reprimand without general publication for violations of rules 1.3, 3.2, 8.4(a), 8.4(d), and 8.4(g), Ala. R. Prof. C. On or about August 13, 2007, the Office of General Counsel received from the United States Bankruptcy Administrator in the United States Bankruptcy Court, Middle District of Alabama, copies of motions for sanctions filed against Mosley, indicating that Mosley had not filed any responses to the motions. A hearing on the motions was scheduled for August 29, 2007. At another hearing, Mosley had admitted to the Court that he did not remit a filing fee that he received in January 2007 until June 2007, after the bankruptcy case was already dismissed. The Bankruptcy Administrator indicated that she filed a miscellaneous proceeding "In re Michael Allan Mosley" citing incompetence and lack of diligence in Mosley's overall performance, with a chart attached referencing all the cases he filed during the year.

In Miscellaneous Proceeding No. 07-301, the Bankruptcy Administrator also stated that over the previous year, Mosley had filed several cases containing specific deficiencies and other errors and omissions. These deficiencies involved filing bankruptcy actions that were incomplete and not later corrected. Mosley

also filed pleadings that he failed to sign, that had missing pages and that did not contain a declaration regarding the electronic filing fee.

Mosley failed to diligently pursue his clients' bankruptcy matters, did not make reasonable efforts to expedite litigation, engaged in conduct that was prejudicial to the Bankruptcy Court and engaged in other conduct that adversely reflected on his fitness to practice law. [ASB No. 07-160(A)]

- On September 24, 2010, Foley attorney **James Russell Pigott** received a public reprimand without general publication for violations of rules 1.3 and 3.2, Ala. R. Prof. C. Pigott was appointed to represent a criminal defendant to appeal a probation revocation proceeding. During the course of the case, the court of criminal appeals issued a deficiency notice giving Pigott 14 days to complete, file and serve the court reporter's transcript order. Two subsequent notices were sent to Pigott indicating that if he failed to take the appropriate action in the case, an order would be issued removing him as counsel. Twenty-two days later, the court of criminal appeals removed Pigott from the case for his failure to comply with its orders. Furthermore, the appellant's brief he filed in the case was filed 12 days late. Pigott blamed his failure to file the reporter's transcript order on the actions of trial counsel. Due to the fact that trial counsel filed the notice of appeal, Pigott believed that it was trial counsel's responsibility to file the reporter's transcript order. However, Pigott continued to ignore multiple notices from the court of criminal appeals regarding the deficiencies. [ASB No. 06-205(A)]
- Opelika attorney **Wanda Marler Rabren** received a public reprimand without general publication on September 24, 2010 for violations of rules 1.3, 1.4(a), 1.4(b) and 8.4(a), Ala. R. Prof. C. Rabren was retained to represent a client in a workers' compensation case and a wrongful termination case. Although Rabren filed the workers' compensation action, the case was subsequently dismissed because Rabren failed to comply with the court's order directing that a verified complaint be filed as required by statute. Rabren also failed to

DISCIPLINARY NOTICES

Continued from page 83

timely notify her client of the dismissal. When attempts failed to settle the wrongful termination case, Rabren made a unilateral decision not to file suit and failed to discuss the matter with her client. The client did not discover that the wrongful termination action had not been filed until after the statute of limitations had run. The Disciplinary Commission considered, as mitigation, Rabren's numerous personal problems during this time. [ASB No. 08-177(A)] ▲▼▲



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Wendy A. Hartley announces the opening of her office at 5501 Hwy. 280, Ste. 301, Birmingham 35242. Phone (205) 980-5550.

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Among Firms

Adams & Reese announces that **Mindi Robinson** has joined as special counsel.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces the addition of **Staci M. Pierce** and **Adam S. Winger**.

Balch & Bingham LLP announces that **Richard E. Glaze, Jr.** has joined as a partner.

Burr & Forman LLP announces that **Eric J. Dyas** and **Holly M. Hicks** have joined as counsel, and that **Rachel Blackmon, Jennifer L. Burt, Benjamin Coulter, George D. Gaskin, III,** and **Daniel B. Snyder** have joined as associates.

Kathryn S. Crawford LLC announces that **Rachel L. Goodson** has joined as an associate.

Cunningham Bounds LLC announces that **Laura C. Edwards, Margie Y. Williams** and **William E. Bonner** have joined as associates.

Feld, Hyde, Wertheimer, Bryant & Stone PC is now **Feld Hyde PC**.

Ford & Harrison LLP announces that **J. Scott Evans** has joined as counsel.

ABOUT MEMBERS AMONG FIRMS Continued from page 85

Hand Arendall announces that **Megan Brooks** and **Allison Collins** have joined as associates.

Huie, Fernambucq & Stewart LLP announces that **Nick Gonzalez, Joshua Wrady** and **Justin Ladner** have joined as associates.

Isom & Stanko LLC announces that **W. Drew Senter** has joined as a member.

Christopher H. Jones LLC announces that **Monica I. Moses** has joined as an associate.

Jones Walker announces that **Michael Anthony Shaw** has joined as special counsel and **Mary Colleen Beers** has joined as an associate.

The **McMath Law Firm PC** announces that **Patricia Stephens** has joined as an associate.

Morris, Conchin & King announces that **Joseph D. Aiello** has become a partner and **David J. Hodge** has joined as a partner. The firm name is now **Morris, Conchin, King & Hodge**.

Red Mountain Law announces that **Brice M. Johnston** and **John S. Steiner** have joined the group.

Reynolds, Reynolds & Duncan LLC announces that **Robert V. Goldsmith, III** has joined as an associate.

Rosen Harwood PA announces that **Blake A. Madison** has joined as a shareholder.

Sparks & Diamond LLP announces that **Brian S. Royster** has joined as a partner and the firm's name is now **Royster, Sparks & Diamond LLP**.

Satterwhite & Erwin LLC is now **Satterwhite & Associates LLC** and **Edward L. D. Smith** has joined of counsel.

Samford & Denson LLP announces that **Christopher J. Hughes** has been appointed a Lee County Circuit Judge, **John V. Denson** has rejoined the firm and **Andrew V. Stanley** has joined as an associate.

Starnes Davis Florie LLP announces that **William L. DeBuys, Breanna R. Harris, Laura Lynn Lester, Benjamin T. Presley, Stephen A. Sistrunk,** and **Alex S. Terry** have joined as associates.

Harwell E. Coale, III announces that he is now a realty specialist in the easement programs division of the Natural Resources Conservation Service of the **U. S. Department of Agriculture** in the Montgomery Office of General Counsel.

The **U.S. Department of Defense** announces the appointment of **William A. Kirkland** to the Department of the Air Force.

Wallace, Jordan, Ratliff & Brandt LLC announces that **Samuel T. Sessions** has joined as an associate.

Wettermark Holland & Keith announces that **Vincent Swiney** has been named a partner. ▲▼▲

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15	\$125	\$125	\$152	\$270	\$398	\$600	\$960
20	\$152	\$152	\$202	\$340	\$515	\$775	\$1,325
30	\$230	\$241	\$339	\$525	\$797	\$1,545	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Annual Premium							
AGE:	30	35	40	45	50	55	60
10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
15	\$195	\$200	\$255	\$485	\$725	\$1,150	\$1,830
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