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JANUARY
20 Professionalism
The University of Alabama School of Law

FEBRUARY
10 Banking Law
Wynfrey Hotel, Birmingham
24 Elder Law
The University of Alabama School of Law

APRIL
13 Workers' Compensation Law
The University of Alabama School of Law

MAY
4-5 City & County Governments
Perdido Beach Resort, Orange Beach
18 Professionalism
Cahaba Grand Conference Center, Birmingham

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FEATURES

28  Protect Yourself, Your Family and Your Business

29  Fall 2011 Admittees

37  Alabama Law Foundation—25 Years of Making a Difference

40  Welcome to the Trophy Generation: Exaggeration of Your Legal Experience Can Lead to Trouble
   By Robert P. MacKenzie, III

46  Fundamental School Finance Reform Comes to Alabama
   By Frank D. McPhillips and Heyward C. Hosch, III

50  Legal Malpractice Actions under the Alabama Legal Services Liability Act: Alleged Involuntary Attorney-Client Relationships and Attendant Statute of Limitations Issues
   By Max Cassady

58  Adverse Reaction without a Remedy
   By Steven F. Casey and David A. Lester

64  2011 Pro Bono Honor Roll

ON THE COVER

Many areas of downtown Montgomery have undergone renovations in the past few years and now included among them are the former Scottish Rite Temple (once home to the Alabama Supreme Court) and the Alabama State Bar, both located on historic Dexter Avenue. The Alabama State Capitol can be seen in the background of this photo taken earlier this month.

Steven F. Casey is a partner in the Birmingham office of Jones, Walker, Waechter, Poitevent, Carrère & Denegre LLP. Casey is a litigator with a diverse practice involving the defense of claims arising from business disputes, aviation accidents, products liability and mass torts. Casey serves as national counsel for a major pharmaceutical manufacturer and as regional counsel for others. He successfully defended the first failure-to-warn metoclopramide case to go to a jury in the country.

Max Cassady graduated from the University of Alabama School of Law in 1990. He served as law clerk to the Honorable Alex T. Howard, Jr. of the United States District Court, Southern District of Alabama (1990-1992). Cassady is a board-certified civil trial advocate by the National Board of Trial Advocacy. He practices with his wife, Utopia Cassady, at Cassady & Cassady PC in Fairhope and Evergreen.

Heyward C. Hosch, III is a shareholder at Maynard, Cooper & Gale PC. He practices in the area of municipal, public and commercial finance.

David A. Lester is an associate in the Birmingham office of Jones, Walker, Waechter, Poitevent, Carrère & Denegre LLP. Lester is a litigator and regularly represents clients in aviation cases, business litigation, class actions, product liability cases, and mass torts. He is also the web editor for the American Bar Association Mass Tort Committee and vice chair of the Tort Trial and Insurance Practice Committee of the ABA’s Young Lawyer Division.

Robert P. MacKenzie, III received his undergraduate degree from the University of North Carolina and his Juris Doctorate in 1984 from Cumberland School of Law. He is a partner at Starnes & Atchison LLP in Birmingham.

Frank D. McPhillips is a shareholder at Maynard, Cooper & Gale PC. He is a member of the firm’s public finance and economic development and incentives practice groups.
The Alabama State Bar plays a very important role in supporting state government, and I anticipate we will continue our efforts to be of assistance when the regular legislative session begins early this year. A great deal of work has already been done to prepare for that session.

Preparation for the Regular Session

Not only has the bar’s role changed in recent years in our interaction with state government, but the role of legislative counsel has also evolved considerably. There is no “off season” for the leadership of the bar or our legislative counsel. Shortly after the 2011 session ended, we started working on projects requested by various legislators. [Past President] Alyce and I jointly appointed the Alabama Custodial Law Revision Task Force to look at a custody bill introduced in the last session and evaluate and study potential constructive changes in the custody law of Alabama. The task force, chaired by Christy Crow, has worked hard and been very productive. The bar will not take a formal position on the issue, but, rather, will provide the senator who requested the study with information which should be of assistance if the senate considers the issue.

A request was also made by a number of senators and Representative Paul DeMarco for the bar to collect data to help the legislature understand court costs. There have been many bills over the years addressing various aspects of court costs, including a number of local bills. This is a huge project given the complexity of the issue and the number of bills. Therefore, I requested that our Leadership Forum alumni provide assistance. Rebecca DePalma, chair of the newly-approved Leadership Forum Section, and Ed Patterson put together a working group that includes Jim Hughey, Chris Deering, Champ Lyons and Brannon Buck. The group collected all of the information that was available, and combined it with that from the AOC. With the assistance of Past President Spruell, President-Elect Phillip McCallum, Rebecca DePalma and legislative counsel Suzi Edwards, the information is being put into a workable format so it can be analyzed and studied.

Suzi and I met with the legislative leadership several times to discuss the legislative agenda for the upcoming session and to determine areas in which we can be of assistance.

There also have been numerous meetings with the new chief justice and his representatives at the AOC, particularly Alyce, who is now the legal director for the Administrative Office of Courts.

Probable Issues

We anticipate the following issues will be brought up during the 2012 regular session that would be of interest to members of the bar.

“I don’t know what your destiny will be, but one thing I know: the only ones among you who will be really happy are those who will have sought and found how to serve.”

–Dr. Albert Schweitzer
Court Funding

The most significant and challenging problem facing the bar and the judiciary is obtaining adequate court funding. Chief Justice Malone has been working around the clock to come up with innovative business solutions to the court funding problem. He is to be commended for involving the leadership of the state circuit judges, district judges, circuit clerks and state bar in the planning and decision-making process concerning the proposed budget for the court system and other proposals to address a shortfall in funding. The chief justice’s approach is to have representatives of the legal community participate as a full partner in studying the issues so we can speak with one voice. Ongoing efforts have been and will be made to work with appropriate leaders in the legislature and the executive branch in an effort to obtain as much funding as possible.

Child Custody Laws

A great deal of work has been done to allow us to be in a position to share the results of our study with the legislature and have an informed answer to any questions regarding proposed legislation. The bar does not take a formal position on these issues, but rather seeks to provide the legislature with the requested information for them to make an informed decision.

Taxpayers’ Bill of Rights

One of the top priorities for the business community in the last session was to obtain a taxpayers’ bill of rights. We were able to build a consensus in support of the bill, but ran out of time in the session before a vote could be taken. I anticipate the legislature will address this issue early in this year’s session and it is hoped the consensus built last session will continue. If this is the case, progress should be made toward passing a bill that makes progressive constructive changes in the system. The bar’s Taxation Section has been very active, working hard for a number of years to pass this important legislation, and Bruce Ely, Will Sellers and Hank Hutchison are to be commended for the time and effort they have spent trying to pass this. I worked with these three last session, learning more tax law than I care to know, so at a recent BBC meeting, they had fun presenting me with an honorary LLM in taxation from NYU. I know it is legitimate because it is signed by John Marshall, Al Capone and former President Bush.

Judicial Selection

Given that we are in the midst of a judicial political election cycle, it is unlikely that the legislature will address any change to our method of selecting judges at this time. However, the discussion about judicial selection for the future needs to be started now so that the legislature will be in a position to prospectively address this issue.

Miscellaneous Matters

There likely will be numerous issues of interest to the judiciary and the state bar. The Elections, Ethics and Governmental Relations Section is in place to address each issue, both in terms of providing research and a response, if appropriate, or placing us in a position to facilitate the conversation about these issues.

Conclusion

Albert Schweitzer once said, “I don’t know what your destiny will be, but one thing I know: the only ones among you who will be really happy are those who will have sought and found how to serve.” The Alabama State Bar sought and found a way to be of great service to all facets of government in our great state. Our influence is not based upon political contributions or party affiliation, but solely on our willingness to be neutral, objective and of assistance to all who serve in state government. I am very proud of our efforts and those who have given of their time and talents to support this. They represent you well and you should be proud of these lawyers and our bar’s noble cause to support the rule of law and those who pass and administer our laws.
This past December brought to a close a long career of service to the state of Alabama. Bob McCurley retired as director of the Alabama Law Institute ("ALI"), Alabama’s chief law reform agency. In January 1975, when Bob left a successful law practice in his hometown of Gadsden to become ALI’s fourth director, he did so with the plan of working there for a year or two and then returning to the Gadsden practice. Thirty-seven years later, he is just concluding his work at the ALI.

A small staff but big results

With a small but dedicated staff assisting Bob, the ALI has had nearly 100 pieces of major legislation make it successfully through the legislative process, starting with its first major law revisions, which were the Banking Code in 1979 and the Criminal Code in 1980. The Alabama Uniform Durable Power of Attorney Act and the Alabama Uniform Rule against Perpetuities were two of four ALI bills to make it through the legislature in 2011. Over the years, Bob has enlisted the expertise of more than 1,000 Alabama lawyers (over 250 are working on the ALI projects at any one time) to serve on committees that have been responsible for drafting reforms of practically every major body of law in our state. By leveraging the service of these willing lawyers over
the last 37 years, millions of dollars in legal time have been
gifted to the state under the auspices of the ALI.²

Drafting legislation, however, is only the first part of the
equation for a bill to become an act. The second and most dif-
ficult part is securing passage by the legislature. This was
where Bob truly excelled, working closely with legislators to
help guide ALI-drafted bills through both chambers of the
Alabama Legislature. During Bob’s nearly four decades at its
helm, the ALI has developed a well-deserved reputation for its
excellent work product which has undoubtedly been a signifi-
cant reason why the legislature has been favorably disposed
toward ALI-drafted bills.

Although revision of Alabama’s substantive laws is its pri-
mary focus, the ALI does much more. Under Bob’s leadership,
the ALI has become a major publisher of handbooks for government officials including probate judges, election officers, county commissioners and sheriffs. Similarly, the ALI regularly conducts training conferences for legislators, probate judges, sheriffs and license commissioners, among others. Thanks to Bob’s foresight, the ALI has become a vital resource for many of Alabama’s government officials.

**Volunteering always a part of the picture**

Bob has also been very involved with the National Conference of State Legislatures (“NCSL”), which is a bipartisan organization that serves state legislatures and their staffs with research, technical assistance and an opportunity for policymakers to exchange ideas on the most pressing state issues. He has served on NCSL committees, as a lecturer, panelist and program presenter. In addition, he has held leadership positions in the NCSL on its Executive Committee, Legislative Staff Coordinating Committee and Legal Staff Committee. Bob’s active participation with the NCSL has enhanced the ALI’s reputation among other jurisdictions for its revision and modernization of Alabama’s substantive laws. This recognition is a compliment to our state, the ALI and, especially, to Bob.

Outside his work with the ALI, Bob’s life is also service-focused. Whether as an
adjunct law professor at Alabama and Cumberland or an invited lecturer for White House conferences, Bob had readily given his time to far-ranging endeavors and many organizations.

“Mr. Kiwanis”

There is no better example of Bob’s community involvement, though, than his long and storied career as a Kiwanian. Without question, Robert L. McCurley is “Mr. Kiwanis” in Alabama. He has served as local club president, lieutenant governor and governor of the Alabama district and trustee and vice president of Kiwanis International. Because of his respect and leadership, Bob was persuaded to serve two consecutive terms as president of the Kiwanis International Foundation. For his service to Kiwanis, he has been named a Barnett Fellow of the Alabama district and recognized by Kiwanis International as a Hixson Fellow. He has also had his name inscribed on the international organization’s Tablet of Honor.

Bob’s professional awards and honors are too numerous to list them all, but they are further indication of his remarkable career of service. He has been named a Fellow of the Alabama State Bar Foundation and the American Bar Foundation, as well as a “Henry Toll Fellow” by the Council of State Governments. He is the recipient of the “Walter P. Gewin Award” from Alabama CLE, the Alabama State Bar Commissioner’s Award and the “E. Roger Sayers Service Award” by the University of Alabama.

In good hands

I have had the privilege of knowing Bob since law school. I worked two years as a research assistant for the ALI during law school and a year there following my graduation. Not only do I consider him a friend, but he is a mentor who helped reinforce the notion that community and professional service is an important aspect of being a lawyer. I feel sure that the hundreds of lawyers who served as ALI research assistants as I did during law school would concur that Bob was a very positive influence during the early stages of their introduction to the legal profession. In this regard, I am delighted that Othni Lathram, who was an ALI research assistant during law school and has served as the ALI’s assistant director the last several years, has been appointed to follow Bob as director. I know that Othni will do an excellent job.

Bob had a passion for the work of the ALI. I recall his saying on many occasions, “Heck, I enjoy this job so much that getting paid is a bonus!” This says a lot about him and helps explain the ALI’s success under his leadership. The ALI’s law reform work over the last 37 years is nothing short of remarkable. Our profession and the state are indebted to Bob McCurley for this enduring legacy.

Endnotes

1. For a complete listing of all ALI-sponsored legislation and other projects, go to www.ali.state.al.us to view the 2010-2011 annual report to the legislature.

2. See the article by Dave Boyd celebrating the 40th anniversary of the creation of ALI in the May 2009 issue of The Alabama Lawyer for details of its operations and history.
Notice of Election and Electronic Balloting

Judicial Award of Merit

Changes to Client Security Fund Annual Assessment

Alabama Lawyers’ Hall of Fame

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:

- 2nd Judicial Circuit
- 4th Judicial Circuit
- 6th Judicial Circuit, Place 2
- 9th Judicial Circuit
- 10th Judicial Circuit, Place 1
- 10th Judicial Circuit, Place 2
- 10th Judicial Circuit, Place 5
- 10th Judicial Circuit, Place 8
- 10th Judicial Circuit, Place 9
- 12th Judicial Circuit
- 13th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 6
- 16th Judicial Circuit
- 18th Judicial Circuit, Place 2
- 20th Judicial Circuit
- 23rd Judicial Circuit, Place 2
- 24th Judicial Circuit
- 27th Judicial Circuit
- 29th Judicial Circuit
- 38th Judicial Circuit
- 39th 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, 2012 and vacancies certified by the secretary no later than March 15, 2012. All terms will be for three years.
Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate’s written declaration of candidacy. PDF or fax versions may be sent electronically 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 27, 2012).

As soon as practical after May 1, 2012, 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 during this election cycle.

Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 18, 2012). Election rules and petitions are available at www.alabar.org.

Changes to Client Security Fund Annual Assessment

The Client Security Fund was established by the Alabama Supreme Court to provide a remedy for clients who have lost money or other property as a result of the dishonest conduct of Alabama lawyers. The Alabama State Bar recognizes that the legal profession depends on the trust of clients and although few attorneys breach that trust, it is important that the profession’s reputation for honesty and integrity be maintained and protected. The Client Security Fund serves this function by providing grants to clients whose money or property was wrongfully taken by an Alabama lawyer. On January 14, 2011, the Supreme Court of Alabama adopted the following rule changes:

- The Alabama State Bar is authorized to assess each lawyer who on January 1 of each year holds a current business license to practice law, as required by Ala. Code 1975, §40-12-49, an annual fee of $25.
- Any person admitted to practice in the State of Alabama who upon attaining the age of 65 years, has elected to retire from the practice of law, shall be exempt from any assessment under these rules.
- The Alabama State Bar is authorized to assess each lawyer who on January 1 of each year holds a special membership to the Alabama State Bar, as provided by Ala. Code 1975, § 34-3-17, an annual fee of $25.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4 and 7. Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2012. A petition form to quality for these positions is available at www.alabar.org.

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, 2012. 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.
The Alabama State Bar is authorized to assess each lawyer who on January 1 of each year is registered as authorized house counsel, pursuant to Rule IX of the Rules Governing Admission to the Alabama State Bar, an annual fee of $25.

The Alabama State Bar is authorized to assess each lawyer admitted pro hac vice pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar, a fee of $25 per application.

The Alabama State Bar is authorized to assess each lawyer who on January 1 of each year is disbarred, suspended, placed on disability inactive status or otherwise inactive, an annual fee of $25, which shall be paid as a condition of reinstatement of the lawyer’s license to practice law.

A lawyer who fails to pay by March 31 of a particular year the assessed annual fee pursuant to Rule VIII shall be deemed to be not in compliance with these rules. Such a lawyer is subject to suspension pursuant to Rule 9 of the Alabama Rules of Disciplinary Procedure.

Applications for pro hac vice admission pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar shall not be approved unless accompanied by the assessed fee as provided in Rule VIII of these rules.

In December 2011, a notice was sent to all bar members advising of the rule changes. This month, members will receive an invoice notice by e-mail with payment instructions. Members who do not have an e-mail address will receive an invoice by regular mail. The full text of the Alabama State Bar Client Security Fund Rules is available at www.alabar.org.

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Alabama Lawyers’ Hall of Fame

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

The Alabama State Bar will receive nominations for the 2011 honorees of the Alabama Lawyers’ Hall of Fame through March 1, 2012. The two-page form (found at http://www.alabar.org/members/hallfame/halloffame_ALH_2011.pdf) should be completed and mailed to:

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

2010
Edgar Thomas Albritton (1857–1925)  
Henry Hitchcock (1792–1839)  
James E. Horton (1878–1973)  
Lawrence Drew Redden (1922–2007)  
Harry Seale (1895–1989)

2009
Francis Hutcheson Hare Sr. (1904–1983)  
James G. Birney (1792–1857)  
Clement C. Clay (1789–1866)  
Samuel W. Pipes, III (1916–1982)

2008
John B. Scott (1906–1978)  
Vernon Z. Crawford (1919–1985)  
Elisha Wolsey Peck (1799–1888)

2007
John Archibald Campbell (1811–1889)  
Howell T. Hefflin (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)  
Honorable 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
Dean Albert John Farrah (1863–1944)  
Frank M. Johnson, Jr. (1918–1999)  
Annie Lola Price (1903–1972)  
Arthur Davis Shores (1904–1996)
Christine McKoy Drake

Christine McKoy Drake, a member of the Cullman County Bar Association, passed away September 26, 2011. A resident of Vinemont, Alabama, Chris graduated from the Birmingham School of Law in 1985. Before attending law school, Chris worked as legal secretary and administrative assistant to her husband, Cullman attorney and former Speaker of the House of Representatives Tom Drake. She attended law school, raised four children and worked as a full-time legal assistant, all at the same time.

Highly political, Chris was a tireless campaigner for her husband’s storied political career, as well as being actively involved in the presidential campaigns of George Wallace and Walter Mondale. Her own opportunity for holding public office came in 1982 when she was appointed a member of the Alabama State Board of Education.

Chris passed the bar exam in 1985 and practiced law as a partner with Drake & Drake in Cullman for 26 years. Two of her children would later become attorneys and both would marry spouses who became attorneys.

Her law practice included general civil work, personal injury and real estate transactions. She was also attorney for the Cauliflower Alley Club, a professional organization for wrestlers and boxers.

Known for having a keen legal mind and a razor-sharp memory, Chris was a law firm administrator, partner and legal assistant, all in one.

She is survived by her husband of 56 years, Thomas E. Drake; her four children, Mary Drake Pate of Birmingham, Tommy Drake II of Vinemont, Whit Drake of Birmingham and Christy Drake Lowe of Denmark; her six grandchildren, Sara Beth, Teddy, Herrin, Kaylee, Rafe, and Tiberius; and numerous cousins, nephews and nieces.

Judge Ferrill David McRae

(This memorial originally appeared in the Mobile Press-Register October 24 as a letter to the editor.)

On October 20, 2011, a truly remarkable, one-of-a-kind lawyer, judge, sports enthusiast and politician, Judge Ferrill D. McRae, died.

Having served almost 42 years, Judge McRae was the longest serving circuit court judge in Alabama. He was appointed to the Mobile Circuit Court bench by Governor George Wallace in 1965. At that time, he was the youngest jurist to be appointed. He had a long distinguished career on the circuit court bench, but, first and foremost, he was a lawyer. Often referred to as “a lawyer’s judge,” he was the
first one to give advice and find a solution when a lawyer or his or her family had a personal problem. He admonished lawyers to follow the maxim: “The sole purpose of a lawyer is to help people.”

Judge McRae regarded advertising by the law profession with disdain. Extremely intelligent, he believed, and vocalized, that if attorneys treat their clients fairly and represent them admirably, they will spread the word. He believed that if a lawyer followed that principle, everything else, including the business side of his or her practice, would take care of itself.

Judge McRae loved all spectator sports, but his true love was Alabama football. The late Coach Paul “Bear” Bryant sought the advice of Judge McRae, who was the unnamed Alabama recruiter in South Alabama for Alabama football. Many great Alabama football players were introduced to Alabama football by the judge. Additionally, Judge McRae was a charter member of the Red Elephant Club in Mobile. (He was asked by Coach Bryant to help with the initiation of this club.) Some of the club’s first meetings were held in the judge’s tiny office in the old county courthouse.

Many politicians, including Governor Wallace, sought the advice of Judge McRae, who had an uncanny ability to understand the pulse of the lower Alabama voters. Numerous “would-be” politicians sought his advice before announcing their candidacy for a political position. Oftentimes, the judge would tell a possible candidate that, unfortunately, he or she had no chance of winning. He would say, “Save your money and your reputation and don’t run.” Those who did not heed his advice were later sorry that they did not listen.

Judge McRae, a loyal friend, will be sorely missed by lawyers, judges, jurors, businessmen, and acquaintances. He always had an opinion, and if you asked him a question, his response was never sugar-coated.

—John C. Brutkiewicz

Jill Olivia Radwin

Jill Radwin (August 16, 1959–September 30, 2011) may never have a bronze plaque made in her image, but she was one of the finest individuals to have ever graduated from the University of Alabama School of Law, as well as being one of its best lawyers. Jill was small in stature, but she more than made up for her size in her beliefs, zeal and dedication to her clients, the majority of whom were those who could not have otherwise afforded representation. After graduating from college, Jill worked for 10 years in advertising and writing, but felt the tug of law school throughout this time. Even though she would have 10 years on her fellow students, Jill enrolled at the law school, and was involved in public interest projects throughout her tenure. She loved the law and the knowledge she gained in law school.

After graduating, she interned for Alabama senators Richard Shelby and Howard Heflin. Soon after, Jill began to work for the Legal Aid Society of Birmingham, and was the only lawyer assigned to the Bessemer Division of the Family Court. Jill worked with Legal Aid from November 1993 until January 1998. During this time, she represented many children as their attorney in delinquency cases and as guardian ad litem in dependency cases.

As usual, Jill went the extra mile in her representation, and tried to mentor “her kids.” One year, on her own time, she arranged a fall carnival for children in foster care in Jefferson County and some of the families who had open cases in the Bessemer family court. Jill recruited many of her friends and colleagues to help in this endeavor. Hundreds of children enjoyed a day filled with the usual activities, such as face-painting, climbing on fire trucks and playing carnival games but there was the additional touch provided by the Alabama Literacy Council. A tent was set up with pillows, chairs and books, with places for children to quietly sit and read their own book. Each child left the carnival with a book, and children and parents with reading problems were provided with referrals for tutoring. Inviting the Literacy Council to partner in the carnival was Jill’s idea, because she recognized how many social and educational problems her children and their families faced because of their inability to read. Jill created an atmosphere at the carnival to make reading fun and inviting for “her kids.”

I worked with Jill when she came to Gordon, Silberman, Wiggins & Childs and became an associate working the area of special education law. While Jill had worked with juveniles, she had little experience in this area of law. There is no client more anxious than a parent whose child is not receiving fair treatment or an equal education. Jill and I shared a wall between our offices, and I would hear Jill literally spend
hours on the phone with her parent clients, listening to their concerns, fears and, sometimes, tears, regarding the treatment of their special needs children in the school systems. She would never recoup all that time in payment, but she did not care. She always wanted to be there for her clients. She became a specialist in working with children with autism and was the “go-to” lawyer in the state for children with autism who were not receiving proper services in school.

Jill was a smart, conscientious and caring lawyer and the best friend you could have. If she knew you were interested in something, she would cut out articles or organize a trip to hear a speaker or attend a book-signing on the topic. I must have 10 books Jill got for me at different book signings she attended. She always remembered your birthday and made you feel special.

When Jill left Gordon, Silberman to move to Atlanta, she continued to work in the area of special education law, first with a firm and later on her own. Many times Jill would not be paid, as the parents could not afford the legal bills, but she would continue to zealously represent these clients. She later went to work for Legal Aid of Atlanta, in Cobb County. I do not think it ever occurred to her to practice law to get rich, as she only represented those who could not afford private representation.

She was loved by her co-workers and supervisors at Legal Aid and later by those employed by the State of Georgia, where she became the liaison between attorneys, judges and the state legislature for child support laws. Jill helped write the new child support laws in Georgia and spent years traveling around the state giving seminars about them to fellow lawyers and the judiciary. Some were in favor of the new legislature and some were not, and Jill responded to everyone with same alacrity, respect and knowledge. The respect and friendships she garnered are reflected by the fact that three Georgia judges, from as far as Savannah, attended her funeral in Birmingham.

Jill is survived by her parents, Myron and Miriam Radwin, her brother, Rusty, and her sister, Holly, and her husband, Gary White.

“Humility is strong—not bold; quiet—not speechless; sure—not arrogant.”

—Julie Marks and Sandra Reiss
Thomas R. Head, III

A native of Wetumpka, Alabama, Thomas R. “Tripp” Head, III was born in 1970 and died November 17, 2011. He joined Balch & Bingham in 2000 and became a partner in 2006, respected and relied upon both inside and outside the firm for his professional expertise, even temperament and sound counsel. Indeed, it was no accident that Tripp was not only the past chair of the Alabama State Bar’s Environmental Law Section but also served on the editorial board of The Alabama Enlaw.

Tripp held numerous academic degrees—a pedigree that subjected him to much good-natured ribbing (tinged with no small amount of envy) from his friends and colleagues in the firm’s environmental and natural resources section. After attending the University of the South at Sewanee for his freshman year, he transferred to Birmingham-Southern College, from which he graduated in 1992. Tripp later earned a master’s degree (in biology) from the University of South Alabama in 1995 before attending the Cumberland School of Law. In 1998, Tripp graduated cum laude from Cumberland and also earned a master’s in environmental management from Samford University that same year. He then earned an LL.M from George Washington University in 1999.

Befitting a man of such education and learning, Tripp’s interests were wide-ranging. An Auburn football fan, he also enjoyed fly-fishing, bird-hunting, vacations to Roatan, Honduras, and weekends at his parent’s lake home, even while finding time to serve on the board of the YMCA’s Camp Cosby. A steady, stalwart Episcopalian, he was a member of the Cathedral Church of the Advent, a staunch member of the Church’s Cursillo community and a regular attendee at the Advent’s annual Lenten Lunches series.

Tripp listed C.S. Lewis and John Irving as among his favorite authors, although, lest he be accused of being too cerebral, was also known to frequently visit The Onion’s website as well and declared Nacho Libre to be among his favorite movies. The same could be said for his musical tastes. They ranged from Kinky Friedman and Parliament-Funkadelic to John Prine and the Grateful Dead.

Tripp, however, was far more than simply an attorney, a BSC graduate, an outdoorsman, an Episcopalian, or even a Kinky Friedman fan. In fact, the most common accolade bestowed upon Tripp was that “he is the nicest guy that I know”—and few would disagree. Even in his last days, his most common sentiment expressed to visitors was “please let everyone know that I am thinking of them . . . .”

And although his circle of friends was amazingly widespread, he was first and foremost a family man. Already blessed with devoted parents and a loving sister, he married the great love of his life, Julie Austin Dorrough, on May 13, 2000, in a marriage that produced two lovely daughters. Tripp and Julie adopted their eldest, Mary Austin, from China and, afterwards, were blessed with the birth of their second daughter, Jane.

Tripp battled cancer for a year and a half before moving on to the next stage of his life’s journey on the morning of Thursday, November 17. Earlier, Tripp had posted on his Facebook page that “[t]he light shines in the darkness, but the darkness has not overcome it.” Even today, even in the wake of Tripp’s passing, that same light shines—thanks to the faithful example that Tripp shared with us while he was with us.

–Balch & Bingham LLP
Recent Decisions of Significance
(September 23–October 31, 2011)

Decisions of the Alabama Supreme Court

Amendments; Fictitious Party Practice; Wantonness Statute of Limitations

*Ex parte Tate & Lyle Sucralose, Inc.*, No. 1100404 (Ala. Sept. 30, 2011)

Failure to conduct discovery on the question of ownership of a premises in the face of a motion raising the issue and pending for many months demonstrated a lack of “reasonable diligence” required for an amendment substituting a party defendant for a fictitious party to relate back for negligence claims. However, claims of wantonness were not barred because under *Ex parte Capstone Bldg. Corp.* (decided June 3, 2011), “litigants whose causes of action have accrued on or before the date of this decision [i.e., June 3, 2011] shall have two years from today’s date to bring their action unless and to the extent that the time for filing their action under the six-year limitations period announced in *McKenzie* would expire sooner.”

Animals in Roadway; Tort Liability


In an animal fence-break case, the circuit court dismissed claims against the Henleys based on an affidavit from Mrs. Henley that she never owned the horse in question, and that under *Ala. Code* § 3-5-3, even if she did own it, willfulness would be required to be shown, for which there was no evidence. The supreme court reversed as to Mr. Henley, because there was no evidence regarding Mr. Henley’s potential ownership of the horse.

Arbitration; Waiver


The defendant has the right to have an arbitration motion heard by a court with proper venue, and, thus, litigation activity directed to the venue question could not be used to prove “substantial invocation of litigation process” or “prejudice to the opponent” in attempting to establish waiver.
Arbitration; Modification of Award


Under 9 U.S.C. § 11(a), the court can modify an arbitral award where there is an “evident material miscalculation of figures.” The court held that, despite the fact that the arbitrator had noted in his award the return of the five percent, the methodology of the arbitrator’s damage award clearly suggested a miscalculation, and, thus, modification under section 11(a) was to be granted.

Contracts; Injunctions

*Capmark Bank v. RGR, LLC, No. 1100318 (Ala. Sept. 30, 2011)*

The court vacated a preliminary injunction because the plaintiff failed to prove a likelihood of success on the merits, based on an alleged promise outside of the loan documents, where contracts contained integration and merger clauses, and where such a promise was not “collateral” so as to be allowable under the parol evidence rule (the case contains a good discussion of this line of law concerning “collateral agreements”), especially since the alleged promise was also subject to the statute of frauds.

Double Jeopardy

In both *Ex parte T.D.M.*, No. 1091645 (Ala. Oct. 28, 2011), and *Ex parte Lamb*, No. 1091668 (Ala. Oct. 28, 2011), the court reversed on double jeopardy grounds two adjudications of guilt based on verdicts, where the verdict forms were changed after the juries were discharged. The court held that “the problematic recalling of a discharged jury can be avoided in all cases if, before the jury is discharged, the court polls the jury and the court and all counsel review the written verdict form or forms.”

Injunctions; Damages against Security Bonds


When a party provides the security bond required by Rule 65(c) upon the entry of a preliminary injunction and that injunction is determined to be wrongful, the party wrongfully enjoined is entitled to seek an award of damages caused by the wrongful injunction up to the amount of the bond for the period the bond was in force. Further, such a damages award is not barred by the failure of the party enjoined to specifically appeal the discharge of the security bond.

Insurance; Intervention of Carrier


Under *Universal Underwriters Insurance Co. v. East Central Alabama Ford-Mercury, Inc.*, 574 So. 2d 716 (Ala. 1990) (“Universal I”), a carrier may seek intervention to obtain a bifurcated trial in which insurance matters would be tried after a tort claim. Under *Universal Underwriters Ins. Co. v. Anglen*, 630 So. 2d 441, 442 (Ala. 1993) (“Universal II”), the carrier may be allowed to intervene to submit a special verdict form or to append special interrogatories to a general verdict form in the tort case. The carrier in this case argued that, when an insurer requests intervention under both *Universal I* and *Universal II*, the trial court loses its discretion to deny intervention and must choose one or the
other method. The supreme court disagreed and held that the trial court has the discretion to deny both methods of intervention. Justice Murdock dissented.

**Insurance; “Your Work” Exclusion**


Under a CGL policy containing an exclusion for the insured’s own work (called a “your work” exclusion), coverage for faulty workmanship depends on the nature of the damage in issue. There is no coverage if the faulty workmanship causes damage to the workmanship itself, and is not attributable to the work of subcontractors.

**Juries; Voir Dire**


A plurality of the court held that a juror’s failure to answer a question accurately in voir dire did not warrant granting a new trial, because the failure did not give rise to “probable prejudice.” The question’s context suggested more a miscommunication rather than a deliberately untrue answer, and the true answer to the question was not sufficiently material to the lawsuit to suggest prejudice to the plaintiff. As to this latter point of materiality, the plurality reasoned that materiality is not a subjective determination based on the sentiment of the questioning attorney in voir dire as to whether a strike would be used. Bolin, Wise, Stuart and Murdock concurred. Shaw concurred in the result, reasoning that the ambiguity of the question, combined with the fact that the party challenging the juror won the case, negated a showing of probable prejudice without reaching materiality. Malone, Main, Parker and Woodall dissented.

**Negligence and Wantonness (Contributory Negligence)**


The court unanimously held that the evidence of wantonness was insufficient to establish a “conscious disregard” of safety by the forklift operator, particularly by clear and convincing evidence, where the operator ran over the foot of the plaintiff while the plaintiff was walking through a marked loading zone. The court held six to three (with Woodall, Malone and Main dissenting) that the plaintiff was contributorily negligent as a matter of law because he had placed himself consciously in harm’s way, having appreciated the danger associated with walking through the loading zone with moving equipment in use.

**Parental Immunity**


Parental immunity bars simple negligence claims against foster parents (but not wantonness or other intent-based torts).

**Personal Jurisdiction**

*Ex parte McNeese Title LLC*, No. 1100764 (Ala. Oct. 14, 2011)

Although personal jurisdiction may sometimes be obtained by imputing conduct to an alleged co-conspirator who has personally performed no overt act in Alabama, a plaintiff cannot establish personal jurisdiction under a conspiracy theory unless the plaintiff pleads with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.
**Personal Jurisdiction**


The seller of goods which were being shipped from Texas to Florida should have reasonably foreseen that the goods would have to move through Alabama, thus supporting personal jurisdiction over the seller. However, the same could not be said for the seller’s transport vendor, which operated a commercial website and did nothing to purposefully avail itself of Alabama.

**Motor Vehicle Franchise Termination**


The 180-day statutory notice period under Ala. Code § 8-20-5 of the Motor Vehicle Franchise Act is not a limitations period, so that a period in the statute allows for termination based on a “continuous and evolving” breach about which notice was provided over a year before termination and which was not cured.

**Service of Process on Individuals; “Usual Place of Abode”**


Under Rule 4, service on an individual can be affected at a resident’s dwelling place or “usual place of abode,” and that under the extant case law, one can have more than one “usual place of abode.” Thus, the defendant could properly be served at the address of his on-again, off-again, but then-former live-in girlfriend.

**State Immunity; State Action Immunity**


Multiple class actions were dismissed against state universities and outside contract vendors of universities for maintenance of “dining dollars” programs at Auburn, Alabama and UAB. The bulk of the claims were barred by Section 14 immunity or state agent immunity, and the student plaintiffs lacked standing to pursue claims under Ala. Code § 16-1-32(d).
**Warranty**


Treating a mandamus petition as a Rule 5 petition, the court held that a putative class-action complaint in warranty should be dismissed on a Rule 12(b)(6) motion, reasoning that Alabama does not recognize a cause of action for a “constructive” breach of warranty.

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**Decisions of the Alabama Court of Civil Appeals**

**“Common Fund” Doctrine**


The court held that the insured plaintiff was entitled to a “common fund” attorneys’ fee for recovering funds which were reimbursable to her insurer as subrogation for “medical payments” coverage benefits which the insurer had paid to its insured. Although Alabama law allows an insurer to contract around the common fund doctrine, the insurer’s policy did not abrogate the common fund doctrine by merely referencing the right to be subrogated. The insurer did not “actively participate” in the insured’s recovery so as to except the case from the common fund doctrine through the insurer’s sending letters claiming to protect its own interest.

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**“Special Employer” Doctrine**


In order to apply the "special employer" doctrine in workers’ compensation, the defendant must establish that the plaintiff gave deliberate and informed consent to the employer’s involvement.

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**Decisions of the Eleventh Circuit Court of Appeals**

**All Writs Act**

*Faught v. American Home Shield Corp.*, No. 11-10459 (11th Cir. Oct. 21, 2011)

The proper method for enforcing an injunction is an order to show cause and a contempt proceeding, not a second injunction under the All Writs Act.

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**Appellate Procedure**


When there is a relevant change in the law before an entry of final judgment, a party generally must notify the district court; if the party fails to do so, it waives arguments on appeal that are based on that change in the law.

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**Arbitration; Post-Arbitral Review**


The arbitrators had specific power to enter attorneys’ fees awards, and the issue was properly submitted to the arbitrators in the record by motion allowable under AAA rules (which governed).

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**Arbitration; Scope**

*Doe v. Princess Cruise Lines*, No. 10-10809 (11th Cir. Sept. 23, 2011)

An employee of a cruise line filed an action under the Jones Act, general maritime law and common law, seeking damages for a repeated rape committed by co-employees. The Eleventh Circuit held that Jones and maritime claims were “related to” the employee’s status as employee, and, as such, fell within the scope of the “related to” arbitration agreement governing the employment relationship with the cruise line. However, common law claims were non-arbitrable because they had no relationship to the plaintiff’s employment, even though the plaintiff would not have been on the cruise ship but for the employment.

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**Bankruptcy; Ponzi Schemes**


Transfers to upstream investors in a Ponzi scheme were “fraudulent transfers” under 11 U.S.C. § 548(a)(1)(A), but the transfers were not avoidable because they were “for value” under 11 U.S.C. § 548(c).

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**Class Actions; Attorneys’ Fees**

When a fee award is at or below the 25 percent “benchmark” for common-fund fees in class actions, analysis under the 12 Johnson factors may not necessarily be required.

**Qui Tam; Taxability**

*Campbell v. IRS*, No. 10-13677 (11th Cir. Sept. 28, 2011)

A False Claims Act plaintiff’s “relator” award is entirely includable, for tax purposes, in the plaintiff’s gross income as the equivalent of a reward, under 26 U.S.C. § 61(a). The Court further held that the plaintiff was subject to an accuracy-related penalty for omitting the award from his reported taxable income.

**Removal and Remand**

*Bender v. Mazda Motor Corp.*, No. 10-14699 (11th Cir. Sept. 23, 2011)

After removal and remand, Mazda filed a Rule 60(b)(6) motion asking for reconsideration of the remand order. The district court denied the motion, holding that once the case was remanded, the district court lost jurisdiction under *Harris v. Blue Cross/Blue Shield of Alabama, Inc.*, 951 F.2d 325 (11th Cir. 1992). The Eleventh Circuit affirmed, reasoning that 28 U.S.C. § 1447(d) not only forecloses appellate review, but also bars reconsideration by the district court of its own remand order.

**Securities; Materiality**


A 10b-5 case can be premised on statements buttressing the veracity of misinformation already in the marketplace through other sources.
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STATISTICS OF INTEREST

Number sitting for exam ...................................... 509
Number certified to Supreme Court of Alabama ..... 353
Certification rate* .............................................. 69.4 percent

CERTIFICATION PERCENTAGES
University of Alabama School of Law ................. 89.9 percent
Birmingham School of Law ................................ 26.9 percent
Cumberland School of Law ................................ 91.9 percent
Jones School of Law ......................................... 86.2 percent
Miles College of Law .......................................... 0 percent

*Includes only those successfully passing bar exam and MPRE

For full exam statistics for the July 2011 exam, go to
www.alabar.org/admissions/files/stats0711detailed.pdf
Alabama State Bar

FALL 2011

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Abrams, Joseph Ross
Adams, Ashley Toccara
Alexander, Rosemary Nations
Amey, Grant David
Anderson, Jesse Kirk
Anderson, Kristopher Omar
Anderton, Judd Jordan
Andres, Patrick David
Arnold, Jared Barton
Arnold, Jonathan Michael
Ashcraft, Aaron Jacob
Atkins, Erin Sabina
Averitt, Austin Allbrook
Bair, Callen Jordan
Baker, Ashley Nicole
Barclay, Elizabeth Collins Linton
Baschab, Mary Martha
Baswell, Laury Jan
Bates, Joshua John
Baxley, Charlie Glenn
Baylet, Christine Rebecca
Beard, Jordan Tyler
Becker, Ryan Christopher
Beckman, Kyle Adam
Bedwell, Jonathan Scott
Bennett, Allen Brantley
Berry, William Grigsby
Black, George Brett
Blake, Robert Brian
Blumentritt, Charlotte Nicole
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Brown, Carin Anne
Brown, Dana Jeanette
Brown, Terrence Antonio
Bryant, Natalie Patterson
Buntain, Carrie Jacqueline
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Burney, Lauren Elaine
Butler, Matthew Cooper
Byun, Hyunchul
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Calhoun, Courtney Lewis
Callaghan, Christopher Adam
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Carden, Joshua Carey
Carpenter, Daniel Burl
Cater, Christopher Franklin
Champion, Jessica Lee
Cheong, Yoo Jin
Cherigiotis, Spiro Nicholas
Childers, Andrew Reed
Choi, Boim
Choi, Yun Jung
Chung, Dajung
Chung, Shin Young
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Connally, Savannah Hughes
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Cox, Kay Lanier
Cox, III, Joseph Thomas
Craft, Anna Leigh
Craig, Lauren Ashley
Crain, Brynn Tatum
Crawford, Emily Frances
Crist, Caitlin Marie
Cross, Amanda Joy
Crosson, Katelyn Elizabeth
Crowe, Catherine Phillips
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Curtis, Lauren Faye
Daniel, Christopher Hugh
Darley, III, Frederick Bryan
Darmer, Angel Alece
Davis, Shenika
Dean, Colin Thomas
Dill, John Elton
Ding, Rebecca Zi Wei
Dobbs, Senna Cody
Dolbare, Jefferson Blane
Donahue, Jr., Timothy Patrick
Donald, Thomas Christopher
Donaldson, Ann Michelle
Doten, Clay Maxwell
Duffy, Sara Lynn
Dungan, Aubrey Patrick
Eager, Alexandra Mogel
Edwards, Treza Latrail
Eldridge, Gregory Allan
Elliott, Charles Bennett
Ely, Taryn Alexandra
Evans, Kelly Guy
Fantroy, Jr., Ronald Larry
Fawal, Christopher Joseph
Fleisher, Gemma Maria Fowler
Flores, Claudia Beatriz
Forsee, Preston Jeffery
Foshee, Lauren Elizabeth
Freeberg, Craig Andrew
Fuller, Kristi Cary
Galloway, Stephanie Lee
Garland, Catherine Elizabeth
Garrett, Clayton Hall
Garrett, Robert Walker
Gilbert, Jaime Lynn
Gilley, Lee William
Gilliland, Laura Lee
Givens, John Jameson
Goldberg, Michael Louis
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Gore, Meg Guscette
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Hill, Matthew Ryan
Hilson, Henry Carlton
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Hur, Dajeong
Hutzell, Jacquelyn Mather
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Hwang, Min Jung
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Jansen, Julie Anne
Jeffreys, Kristin Leigh
Jeter, Jacob James
Jett, Jr., Gardner Miller
Johnson, Franklin Robert
Johnson, Julia Hanlon
Johnson, Kevin Raymond
Johnson, La Toya Grenese
Johnson, Valerie Rochelle
Jones, Jennifer Elaine
Jones, Woodruff Rives
Jung, Ji Hyun
Jung, Soon Ji
| McNeil, Mary Margaret       | McNeil, Samuel Jacob     |
| McNeely, Mark               | Misner, Todd             |
| McPherson, invoice date     | Mitchell, Elizabeth     |
| McGough, Morgan             | Miller, Cameron Josiah   |
| McEwen, Andrew              | Miller, Charles Nathan   |
| McGowen, Steven             | Miller, Daniel Myrick    |
| McGreggor, John             | Minor, Amanda Michelle   |
| Mcommon, Sarah              | Montgomery, Sean Miller  |
| McCreary, John              | Mooty, Robert Styles    |
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| MCM, John                   | Morris, Andrew Edward   |
| MCM, Kyle                   | Morse, Caroline Diana   |
| MD, John                    | Morton, Anne Knox       |
| MD, John                    | Murphy, Margaret goldthwaite |
| MIL, John                   | Nam, Paul Sung Woo      |
| MIR, John                   | Neal, Brandon Charles   |
| MIT, John                   | Nelson, II, Charles Anthony |
| MJ, John                    | Newton, Daniel Jacob    |
| MJ, John                    | Nichols, Laura Michelle  |
| MJ, John                    | Nichols, Preston Ford   |
| MJ, John                    | Nolan, Katherine Brooks |
| MJ, John                    | Nowicki, Meghan Day    |
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| MJ, John                    | Park, Jaeyung           |
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| MJ, John                    | Peters, Sarah Kristen   |
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| MJ, John                    | Pittman, Adam Wade      |
| MJ, John                    | Polito, Curt Anthony    |
| MJ, John                    | Porter, Stephanie Hill   |
| MJ, John                    | Powell, Heather Aubrey  |
| MJ, John                    | Powell, Jacqueline Rachel|
| MJ, John                    | Premo, Grant Alexander  |
| MJ, John                    | Presley, Ellen Sloan    |
| MJ, John                    | Prickett, Charles Russell|
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| MJ, John                    | Rabon, John Christopher |
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| MJ, John                    | Ramey, Eddie Travis     |
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| MJ, John                    | Rich, Christopher Collin|
| MJ, John                    | Rich, David Abraham     |
| MJ, John                    | Riley, Allison Lea      |
| MJ, John                    | Roark, Amy Elizabeth    |
| MJ, John                    | Roberts, Alieze Drake   |
| MJ, John                    | Robinson, Ben Bainbridge|
| MJ, John                    | Rockwell, Megan Elizabeth|
| MJ, John                    | Roeder, Amy-Kate        |
| MJ, John                    | Rogers, Stephen Clarence|
| MJ, John                    | Rohwedder, David Thomas |
| MJ, John                    | Rosen, Brent Louis      |
| MJ, John                    | Rubino, Nathan James    |
| MJ, John                    | Rutherford, Russell Joseph|
| MJ, John                    | Rutledge, William Brennan|
| MJ, John                    | Ryu, Allen (Hyun Gi)    |
| MJ, John                    | Sadberry, Terrie Anneise|
| MJ, John                    | Saenz, Nicolas Vicente  |
| MJ, John                    | Salmon, Jameson Jon     |
| MJ, John                    | Sasser, Katherine Anthony|
| MJ, John                    | Saunders, Caitlin Nicole|
| MJ, John                    | Saxon, Jr, John David   |
| MJ, John                    | Schaefter, Benjamin Hall|
| MJ, John                    | Scott, David White      |
| MJ, John                    | Scott, John Mark        |
| MJ, John                    | Segarra, Jonathan Joseph Beren |
| MJ, John                    | Sevior, Jr, Kirby       |
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| MJ, John                    | Shaver, Jessica Ashley  |
| MJ, John                    | Shields, Kristen Marie  |
| MJ, John                    | Shoemaker, Debra Faye   |
| MJ, John                    | Shreve, Lewis Robert    |
| MJ, John                    | Siebert, Derek Adam     |
| MJ, John                    | Simon, Erin Leigh       |
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| MJ, John                    | Sims, Kristen T.        |
| MJ, John                    | Sims, Jr, James Carlton |
| MJ, John                    | Skinner, Amanda Nicole  |
| MJ, John                    | Smith, Gabriel Joseph   |
| MJ, John                    | Smith, James Aubrey     |
| MJ, John                    | Smith, Jimmy Wesley     |
| MJ, John                    | Smith, Michael Chad     |
| MJ, John                    | Smith, Timothy Russell  |
| MJ, John                    | Smith, Jr, Jeffrey Lawrence |
| MJ, John                    | Smythies, Victoria Louise Rosalind |
| MJ, John                    | Soppe, Katherine Lynn   |
| MJ, John                    | Spainhour, Charles Frederick |
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| MJ, John                    | Spencer, Neshu Quwana  |
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| MJ, John                    | Stephens, Stephanie Ann |
| MJ, John                    | Stewart, II, Jackson Decatur |
| MJ, John                    | Strickland, Michael Harrison |
| MJ, John                    | Strickland, Sydney Rene |
| MJ, John                    | Strong, Justin Miles    |
| MJ, John                    | Sung, Jihye             |
| MJ, John                    | Tate, John Corbitt     |
| MJ, John                    | Taylor, Jessica Fair    |
| MJ, John                    | Teal, Mark Randall      |
| MJ, John                    | Thompson, Brett Cooper  |
| MJ, John                    | Thompson, Linton Blade  |
| MJ, John                    | Tomlinson, Jennifer LeAnn|
| MJ, John                    | Tompkins, Carrie Amanda |
| MJ, John                    | Traylor, Jr, Darryl Steve|
| MJ, John                    | Trotter, Zachary Davis  |
| MJ, John                    | Ulbricht, Alexander Ashton|
| MJ, John                    | Umutoni, Joyceuse Marie |
| MJ, John                    | Utz, Jessica Leigh     |
| MJ, John                    | VacLeave, James Naylor  |
| MJ, John                    | Varner, Nicole Alana    |
| MJ, John                    | Varner, Jr, George Davis|
| MJ, John                    | Vick, Joshua Michael   |
| MJ, John                    | Vinson, Frederick Nathan Thomas |
| MJ, John                    | Vitello, Stacie Elizabeth|
| MJ, John                    | Vocino, Nicholas Raymond|
| MJ, John                    | Waldrop, Kimberly Cosby |
| MJ, John                    | Walker, Joseph Thomas   |
| MJ, John                    | Walters, Rhonda Kinard  |
| MJ, John                    | Warren, Kimberly Danielle|
| MJ, John                    | Wear, Benjamin Scott    |
| MJ, John                    | Weaver, Lonnie Earl     |
| MJ, John                    | Weaver, Zachary Ryan    |
| MJ, John                    | Welch, Jessica Lynn    |
| MJ, John                    | Wells, Laura E. Peterman|
| MJ, John                    | West, Matthew Thomas   |
| MJ, John                    | Wheeler-Berliner, Andrew Pearce |
| MJ, John                    | White, David Matthew   |
| MJ, John                    | White, Jillian Laura Guin |
| MJ, John                    | White, Kyle Jason       |
| MJ, John                    | Wickersham, Taylor-Lee  |
| MJ, John                    | Wilhelm, Susan Franklin |
| MJ, John                    | Wilkinson, Ashley Rebecca|
| MJ, John                    | Willcox, Ginny Britton  |
| MJ, John                    | Williams, Christopher Dorian |
| MJ, John                    | Williamson, William Ledyard |
| MJ, John                    | Wilson, Amber Don       |
| MJ, John                    | Wilson, Emily Caldwell  |
| MJ, John                    | Wilson, Ryan Doane      |
| MJ, John                    | Wimmerley, Matthew Thomas |
| MJ, John                    | Winokur, Benjamin Joseph |
| MJ, John                    | Witcher, Cassi Leanne   |
| MJ, John                    | Wright, Ashley Tormoen  |
| MJ, John                    | Xenakis, Nicholas John  |
| MJ, John                    | Yates, John Parker      |
| MJ, John                    | Yearout, Christopher Cameron |
| MJ, John                    | Yoon, Hoseon            |
| MJ, John                    | Yun, Sungjun            |
| MJ, John                    | Zimmerman, Brandon Michael |
Admittee, grandfather, mother and father

2. Christopher Hugh Daniel (2011) 
and Judge Laura W. Hamilton (1976) 
Admittee and mother-in-law

Admittee, sister and brother-in-law

4. Brandon Neal (2011) and Jack Bains (1992) 
Admittee and uncle

Admittee and father

6. Christopher Joseph Fawal (2011) 
and Joseph A. Fawal (1977) 
Admittee and father

Admittee and father
Admittee, brother and father

Admittee and father

James Goodloe Harrison (1973) and
Matthew Rutland Harrison (2009)
Admittee, father and brother

11. E. Travis Ramey (2011) and
Brittany Ramey (2011)
Husband and wife co-admittees

12. Danielle Myrick Miller (2011) and
William C. Tidwell, III (1972)
Admittee and uncle

Admittee, father, brother and aunt
   Husband and wife co-admittees, brother/brother-in-law

   Admittee and father

   Admittee, father and uncle

   Admittee and father

   Admittee and father

   Admittee and uncle

   Admittee and father
Admittee and father

22. **Frank Tucker Burge, Jr.** (2011),
Frank Tucker Burge (1983) and Mary W. Burge (1984)
Admittee, father and mother

23. **Ky Sevier** (2011) and Kirby Sevier (1971)
Admittee and father

24. **Adam G. Mestre** (2011) and Debra Mestre (1994)
Admittee and mother

Admittee and stepfather

26. **Christopher Yearout** (2011) and Gusty Yearout (1971)
Admittee and father

Admittee, father and uncle
Wife and husband co-admittees, father/father-in-law and sister/sister-in-law

29. **Jackson D. Stewart, II** (2011) and **William B. Stewart** (1990)
Admittee and father

30. **Margaret Goldthwaite Murphy** (2011) and **Robert D. Thorington** (1957)
Admittee and grandfather

31. **Robert Mooty** (2011) and **Dean Mooty** (1983)
Admittee and father

Father, admittee, mother and uncle

33. **Josh Vick** (2011) and **Les Lambert** (2001)
Admittee and brother-in-law
Alabama Law Foundation

25 Years of Making a Difference

The Alabama Law Foundation

marks its 25th anniversary this year. Since its inception, the foundation has grown and accomplished much; however, much remains to be done. Continued and increased support is needed for the foundation to strengthen democracy by making justice available to all citizens regardless of income. The foundation also seeks to increase its assistance to young students in furthering their academic pursuits.

On the occasion of its 25th anniversary, the Foundation celebrates the progress it has made and plans for a bright future with increased efforts to make access to justice a reality for all of Alabama’s citizens. “From the first, legal services to low-income citizens was the chief objective,” said John Scott, first president of the Alabama Law Foundation.

The Alabama Law Foundation—For Alabama Lawyers

Lawyers across Alabama contribute a valuable service to society by devoting their lives to the study and practice of law. Recognizing that lawyers make their living from the legal system, the Alabama State Bar established the Foundation to provide philanthropic opportunities for lawyers to give back to their communities and state, and better the world around them.

The Alabama Law Foundation is the only charitable tax-exempt organization affiliated with the Alabama State Bar, and the attorneys of Alabama are the reason for the Foundation’s success. Their service and commitment to a just society help the foundation meet its objectives. “We have the most talented, caring lawyers in the
JANUARY 2012   |   www.alabar.org

To make a difference in Alabama. To help meet that goal, charter members commit $10,000 over a three-year period. The Atticus Finch Society’s charter membership is comprised of dedicated persons and professionals committed to improving justice in Alabama. Through the Society and the Fellows program, the Foundation recognizes professional excellence and service.

Fellows—Recognizing “Above-and-Beyond” Service

The Fellows are recognized by their peers as exceptional legal professionals committed to helping further the Foundation’s mission statement of providing access to justice with respect for and understanding of the law. Membership is limited to no more than one percent of bar members who have demonstrated dedication to their profession and their community.

Each Fellow commits $2,000 to further the Foundation’s mission, in addition to their service and leadership. Every year, the Foundation celebrates commitment to justice by hosting the Fellows Dinner to acknowledge lawyers chosen to join the program. Current lawyers, though, are not the only ones the acknowledged by the Foundation. Future professionals are a key part of the foundation as well.

Law School Scholarships—Preparing the Next Generation

The Foundation funds three education scholarships for up-and-coming lawyers to make a difference in Alabama.

The Cabaniss, Johnston Scholarship’s aim is to recognize and assist academically outstanding second-year law students

ATTICUS FINCH SOCIETY–JUSTICE FOR ALL

In serving the legal needs of the poor, Atticus Finch, from Harper Lee’s novel, To Kill a Mockingbird, is the epitome of the professional and person who Alabama lawyers strive to be and personifies the mission of the Alabama Law Foundation. Atticus Finch declares, “…in this country our courts are the great levelers, and in our courts all men are created equal.”

The Foundation is the only 501(c )(3) charitable, tax-exempt statewide organization whose primary mission is to provide civil legal aid to the underserved. In that effort, the Atticus Finch Society’s mission is to build an endowment to secure the future of the Foundation and so to make Atticus Finch’s statement a reality in Alabama.

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The Cabaniss, Johnston Scholarship’s aim is to recognize and assist academically outstanding second-year law students
who are also Alabama residents, and to help promising law students become lawyers who will make a positive impact on society. Recipients have attended Vanderbilt, Harvard, Yale and Columbia, among others.

The Justice Janie L. Shores Scholarship is awarded to one or more female Alabama residents attending an Alabama law school. The Foundation and the Women's Section of the Alabama State Bar established the scholarship, named in honor of the first female Alabama Supreme Court Justice.

The William Verbon Black Scholarship recognizes Alabama law students attending school fulltime at the University of Alabama Law School, and who show the promise of continuing Black's legacy of a stellar law career combined with strong character. The scholarship honors Black's distinguished career and high ethical standards.

**Kids' Chance Scholarships—Making Dreams Come True**

When a parent dies or is disabled due to an on-the-job accident, a family's standard of living is lowered. As a direct result, some parents cannot help their children with the cost of education after high school. The Workers' Compensation Section of the Alabama State Bar created Kids’ Chance scholarships to help these young people. Kids’ Chance is administered by the Foundation. Since Kids’ Chance began in 1992, it has awarded scholarships totaling more than $500,000 to more than 100 students.

Kids’ Chance scholarships are completely funded by contributions from corporations, organizations and individuals and recipients are announced once a year. More than 40 recipients have graduated from college. Many gratefully acknowledge that they could not have gone to school and accomplished their educational and career goals without the help from Kids’ Chance.

**25 Years...and Counting!**

From scholarships to professional recognition to grants for civil legal aid, the Alabama Law Foundation truly is making a difference in Alabama. There have been many changes over 25 years, and the foundation shifts and bends with every turn. The ultimate goal of equal access to justice for all Alabama citizens remains the “heart” of the foundation. Reggie Hamner, former executive director of the Alabama State Bar and first secretary/treasurer of the foundation, sums it up: “I can't imagine the bar without the Alabama Law Foundation.” And the Alabama Law Foundation embraces that role, looking forward to the next 25 years.
Welcome to the Trophy Generation:
Exaggeration of Your Legal Experience Can Lead to Trouble

By Robert P. MacKenzie, III

It had been a long T-ball season for the Blue Jays. The team of six-year-olds had lost all eight games at Carmichael Field. Now having faced the undefeated Orioles, the season came to a merciful ending with the last out. The Orioles walked away with an 11-1 win. Both teams met at home plate and after shaking hands, the players went back to their dugouts. While the game and season were over, the “celebration” was just about to begin. Amid cameras flashing, each player from the Blue Jays was given a trophy. The champion Orioles followed. The recognition was not for games won or lost, or play on the field. There would be no distinction in the size or shape for the trophies given to the Blue Jays versus the Orioles. Rather, everybody who played had to have a trophy. Everybody was an All-Star.

Today, the legal profession has joined the trophy generation. Every facet from client development to law schools to even the judiciary has been affected. Various services now rank the legal profession as if we are teams vying for the Bowl Championship Series—“Top Forty,” “Super Lawyers,” “Best Lawyers,” “Top Lawyers,” “Tip Top Lawyers.” Everyone wants to be recognized. The temptation for recognition by misrepresenting one’s experience, however, comes with a huge risk. Claims of exaggeration are increasingly the basis of suits for legal malpractice and bar complaints. Alabama has joined the majority of states which recognize a cause of action against an attorney for misrepresenting credentials. Likewise, bar complaints now include claims of over-blown descriptions of success. The need to exaggerate is likely a product of the tough economic times which have led to the increased competition for legal work. Moreover, the Internet has provided an almost unchecked forum for lawyers to describe their legal skills.

In an effort to attract clients, some attorney websites now read like a John Grisham novel. It is not enough to simply be a litigator but, rather, many are self-described as complex litigators. There are no longer routine commercial transactions, only the sophisticated ones. Divorces are only accepted if they are high-end. Such descriptions are in keeping with the times. We live in a world where any airport like Birmingham with more than a direct flight to Atlanta now includes the word “International” within its name. There was a certain comic relief if not irony when a recent CLE speaker jokingly introduced himself to a crowded room of lawyers by saying, “Just like each of you, I am a Superlawyer.”

While self-promotion is allowed within the practice of law, unchecked statements are not good for the profession. Every lawyer appreciates recognition. Yet, self-promotion based upon false pretenses can lead to trouble. Such an observation is not meant to silence well-deserved accolades or reputations. Lawyers are allowed substantial latitude to describe their skills. Historically, Alabama courts have been reluctant to hold attorneys liable for inflating their experience. In Lawson v. Cagle, 504 So.2d 226 ( Ala. 1997), a Mississippi lawyer found himself the subject of a suit when the client failed to receive a $1,000,000 recovery which the attorney had allegedly guaranteed. The plaintiff had been injured in an accident in Mississippi and hired an Alabama lawyer to file suit in Mississippi. The Mississippi
Beyond being sued for civil damages, an attorney's misrepresentation of qualifications may lead to a bar complaint and disciplinary action.

attorney was subsequently retained as co-counsel. A dispute arose between the attorneys as to the direction of the case. To gain control, the Mississippi attorney purportedly stated he could "guarantee" the plaintiff a $1,000,000 recovery if the client would allow the Mississippi attorney to maintain the case. The client selected the Mississippi attorney based upon this representation. The client, however, failed to recover any settlement or verdict, much less the $1,000,000 allegedly guaranteed.

The client then brought a fraud claim against the Mississippi attorney based upon the $1,000,000 representation. The case proceeded to trial, where the jury awarded the plaintiff $2,500,000. On appeal, the verdict was reversed. The Alabama Supreme Court found that even accepting the plaintiff's version of the attorney's statement as having been made, the attorney did nothing more than make a prediction of a future event. The court observed that the million dollar figure was mere "puffery" which did not constitute actionable fraud. The plaintiff had no right to rely upon the attorney's alleged statements since no one can guarantee the results of a trial.

The distinction between puffing versus misrepresentation was again examined in Valentine v. Watters, 896 So. 2d 385 (Ala. 2004), in which the Alabama Supreme Court recognized a cause of action against an attorney for alleged misrepresentation of his skills. The underlying action arose after Valentine suffered complications following bilateral breast implant surgery. Valentine thereafter consulted with Watters (an attorney) to pursue litigation against the implant manufacturer. According to Valentine, Watters represented that he was familiar with and had represented other clients in the breast implant litigation. Based upon these representations, Valentine stated she was "enticed" to retain the attorney. After Watters was hired to represent Valentine, there was a delay in filing the suit. This delay led to Valentine's dissatisfaction and Watters's termination. Valentine later learned her claims were never filed as part of the multi-district litigation. Valentine thereafter brought suit against Watters.

Within her complaint, Valentine alleged in part a breach of the Alabama Legal Services Liability Act, including a specific claim of misrepresentation as to Watters's reference to having counseled other breast implant litigants. Watters, however, stated he held himself out only as having represented clients in product liability actions but not specifically in breast-implant litigation. Watters filed a motion for summary judgment relying in part upon his affidavit. Watters argued that he satisfied the standard of care and that Valentine had failed to submit rebuttal evidence in the form of expert testimony. The motion was granted. On appeal, however, the Alabama Supreme Court reversed the trial court's findings.

The Alabama Supreme Court recognized that Valentine did state a cause of action by and through her claim that Watters had allegedly misrepresented his experience. The court rejected Watters's argument that Valentine's failure to have expert testimony was a sufficient ground for the motion for summary judgment to have been granted. Instead, the court determined that an attorney's breach of the standard of care by and through a misrepresentation of his qualifications is a matter that does not require expert testimony. A jury of laypersons would be competent to determine by the exercise of common knowledge whether or not the representation was true. Accordingly, the court held that Valentine's claim that Watters misrepresented his experience could go forward without Valentine's having an obligation to produce expert testimony.

If the Alabama Supreme Court's recognition of a cause of action for an attorney's misrepresentation is not sufficient warning, consider the results in Baker v. Dorfman, 239 F.3rd 415 (2d Cir. 2000). In a case filed in New York, the client brought a legal malpractice action against Dorfman (an attorney) arising out of an underlying suit for personal injury. The attorney had missed a court deadline, leading to a dismissal of his client's case. Among the allegations of the malpractice complaint was a claim that Dorfman had misrepresented his legal background and experience.

A review of Dorfman's resume included statements that he engaged in a challenging and highly diversified practice; was a member of multiple state bars; had a strong reputation for excellence; was a founder and editor of a law journal; created a master's of law program in healthcare law at New York University (NYU); had taught at Boston University and NYU School of Law; was regular counsel to multiple public and private companies; engaged extensively in trial and appellate litigation in both state and federal courts; and had been called a "litigator's litigator." The plaintiff claimed she relied upon these representations when she hired Dorfman, only to later determine the representations were not accurate.

Dorfman denied any liability. He characterized his statements to the plaintiff and information included on his resume as mere puffery which did not rise to any material misrepresentation. The jury and appellate court found otherwise. In fact, Dorfman was not an experienced lawyer. Dorfman had only been practicing one month before he was retained to pursue Baker's personal injury claim. Dorfman was not a member of all the state bars that he claimed membership. Dorfman never represented any healthcare organizations. Dorfman had not created an LLM program at NYU and had not taught courses at any law school. As far as being a "litigator's litigator," the first jury trial that Dorfman ever participated was the case against himself. The jury awarded the plaintiff $390,000, including punitive damages.

Beyond being sued for civil damages, an attorney's misrepresentation of qualifications may lead to a bar complaint and disciplinary action. Alabama Rule of Professional Conduct (ARPC) 1.1 outlines the requirement that an attorney provide competent
representation. Helpful to attorneys is the provision of ARPC 1.5, which allows an attorney to accept a matter in a wholly novel field if the attorney can gain an understanding of the matter through necessary study. The compliance with Rule 1.5, however, should include an understanding by the client that the attorney will, in fact, have to become educated on the particular matter. Otherwise, an attorney stands to violate ARCP 7.1. ARPC 7.1 warns lawyers not to engage in conduct involving representations which create an “unjustified expectation” about the results:

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(c) Compares the quality of the lawyer’s services with the quality of other lawyers’ services, except as provided in Rule 7.4; or

(d) Communicated the certification of the lawyer by a certifying organization, except as provided in Rule 7.4.

Given the broad parameters of the ARPC, any misrepresentation of expertise and skill may be grounds for violation.

Like Alabama, other states have taken a dim view of attorneys’ misrepresenting their credentials. In the matter of Michael Hensley Wells, Opinion No. 26969 (May 9, 2011), the Supreme Court of South Carolina issued a public reprimand and monetary fine against an attorney for exaggeration of his law firm experience. The attorney had advertised by way of a website, brochures, telephone book and even a kiosk in a local shopping mall. The advertisements promoted the attorney as having “worked in the legal environment for over 20 years.” In reality, the attorney had only practiced law for seven years. The firm described its associates as “numerous trained and experienced attorneys,” “highly skilled” and having a “deep personal knowledge of the courts, judges, and other courthouse personnel.” The numerous trained and experienced attorneys were two associates who had each been admitted to practice law for less than one year. The lawyer represented the firm had offices not only in South Carolina, but also Georgia and Florida. The lawyer did have a referral agreement with attorneys in Georgia and Florida but no offices. Moreover, the public was advised that the firm had served clients in the areas of constitutional law, civil rights, professional responsibility and toxic torts. It was determined that no lawyer in the firm had ever handled such matters, but only that they were willing to accept those types of cases. The firm’s website even included a section entitled “Consumer Protection and Products Liability Lawyer.” The description proclaimed the firm had a “history of winning product
liability cases,” and the lawyers understood “how to deal with both corporations and insurance companies and have a history of winning cases for our clients.” It was confirmed, however, that no lawyer in the firm had ever handled a products liability matter.

A Virginia lawyer received a 30-day suspension followed by one year of probation when a Virginia court found the lawyer guilty of ethical misconduct. Virginia State Bar EX REL Second District Committee v. Jason Matthew Head, CL 10-4043 (Circuit Court of City of Virginia Beach, Virginia). Multiple charges were brought by the Virginia State Bar against the defendant for, among other causes, misrepresenting the size, location of his office and areas of practice. The firm was referred to as Jason Head & Associates, PLC. The attorney represented that the firm maintained three locations and had decades of experience. In fact, the firm was a solo practice. There was only one office and certain practice groups were non-existent. The “decades of experience” was also incorrect: the lawyer had only been licensed to practice law for eight years.

In a bizarre case, Disciplinary Counsel v. Martin Villeneuve (AC 31841, February 22, 2011), the Connecticut Appellate Court found that a lawyer not only exaggerated his experience, but falsely represented his own identity. In 2008, the lawyer applied for a staff attorney position with the state Workers’ Compensation Commission. During the interview process, the defendant submitted his resume and described his experience. The Commission’s human resources director became suspicious. After further investigation, it was determined the lawyer did not graduate with honors from the law school as he had claimed.

The attorney was not the assistant note editor for his law school’s review. The law firm for which the attorney said he had worked did not even exist. During the resource director’s attempt to speak with the named references by telephone, contact was made with two people who “sounded very similar on the phone” causing her to doubt the legitimacy of the reference information. After the bar complaint was filed, the defendant denied any knowledge of the application, attending the interview or even contacting the state Workers’ Compensation Commission. Instead, the lawyer claimed that his identity had been stolen. No information, however, was provided to substantiate this defense. The court observed the attorney refused to even appear at the initial hearing, much less resolve the issue by just meeting with the human resources director so to prove his case of “mistaken identity.” The court affirmed the attorney’s suspension to practice law.

The temptation to exaggerate qualifications is not limited to just a lawyer’s trying to impress a client or obtain a new position. Unfortunately, such misrepresentations and exaggerations have permeated the entire landscape of the legal profession from students to law schools to the judiciary. In 2010, the Illinois Supreme Court issued a three-year suspension to a then-practicing attorney (ABA Journal, May 20, 2010). The suspension arose out of a finding that the attorney, while a student at the University of Chicago Law School, had changed his grades for approximately 20 classes. The alterations included “whiting out” his transcript and changing certain grades from Cs and Bs to Bs and As. The changes were part of his effort to gain a summer
The pressure to exaggerate credentials has touched the very institutions in which lawyers are trained. Law schools have now become the subject of scrutiny for representations as to the percentage of graduates who find employment and the actual starting salaries. During the past year, suits have been filed against New York Law School, Thomas Jefferson School of Law and Thomas Cooley School of Law on behalf of disgruntled students who find themselves burdened with debt but no job as promised. Within the complaint against New York Law School, the plaintiffs allege:

Unfortunately, NYLS’s false and fraudulent representations and omissions are endemic in the law school industry, as nearly every school to a certain degree blatantly manipulates their employment data to make themselves more attractive to prospective students. It is a dirty industry secret that law schools employ a variety of deceptive practices and accounting legerdemain to “pretty up” or “cook” the job numbers, including, among other things, hiring recent unemployed graduates as “research assistants” or providing them with “public interest” stipends so as to classify them as employed, excluding graduates who do not supply employment information from employment surveys, refusing to categorize unemployed graduates who are not “actively” seeking employment as unemployed, and classifying graduates who have only secured temporary, part-time employment as being “fully” employed.


“Padding the resume” may even extend to the judiciary. In New Orleans, questions have been raised about the number of jury trials handled by certain judges. (ABA Journal, March 2, 2011). In February 2011, the sitting district attorney challenged 12 judges of the criminal court division to complete 600 jury trials a year among themselves. The district attorney himself had previously served on the bench for 17 years. He was reported to have described himself as a “trial machine.” As a judge, he had allegedly tried an average of 100 cases a year beginning in 1986 until he left the trial bench. That number, however, was challenged by others as being inflated. According to the investigation, certain judges orchestrated a “pick-and-plea” deal in the courtroom. The judges would allow attorneys to pick a jury even though all parties and the judge knew the defendant wanted to plead guilty and enter a plea. Once the jury was selected, the matter would officially be credited as a trial. The defendant would then plead guilty and case dismissed. The judge and lawyers would receive credit for a trial and increased experience. There was even a trophy given to the judge who tried the most cases. The district attorney denied the claims. Unfortunately, the investigation could not be completed because the pertinent records were destroyed by Hurricane Katrina.

Suffice it to say, the problem of misrepresentation cannot go unchecked. Our profession is self-governed, and we generally do a good job of policing our own and holding lawyers accountable. The Rules of Professional Conduct require a lawyer to act with candor, honesty and integrity. These rules do not allow a lawyer to create an unjustified expectation by the client concerning the potential success of a legal matter, or the attorney’s credentials. These are rules of reason and common sense. Clients come to lawyers seeking sound, honest advice. Clients are entitled to know exactly who will represent them, and the attorney’s true background and experience. If an attorney cannot be truthful about himself or herself, it is unlikely the attorney can be completely honest about the client’s situation. Ultimately, the client who experiences an unfavorable result will question the outcome and may search for someone to blame. That search will quickly focus on issues with the lawyer’s own training and experience. If there is any misrepresentation, a civil action and bar investigation could follow. The results will be not only embarrassing but costly.
On August 1, 2011, Act No. 2011-631 became law in Alabama, marking the first comprehensive reform, since 1959, of the Depression-era laws governing public school finance. This effort attempted to modernize and streamline the process by which local school boards gain access to the capital markets and strengthen the credit of school boards to lower their costs of borrowing.

Almost immediately, the positive effects of the new law were felt by local school boards throughout the state. In the month of August alone, one small county school board was upgraded from A- to A by Standard & Poor’s and another small county school board received a commitment for bond insurance for the first time—both as a result of the new law. In an era when public resources supporting education are continually stretched and proration is a constant threat, this is indeed welcomed news.

The new law has had another important salutary effect: strengthening State Department of Education oversight over local school boards. The new law explicitly requires state approval of all forms of local school indebtedness, regardless of the plan of financing which the school board may choose to undertake. As will be described in more detail below, the necessity of state approval of all forms of local school indebtedness is consistent with the state’s overall responsibility for K-12 education.

This article addresses many highlights of this important legislation. The purpose of this article is not to summarize or analyze every aspect of Act No. 2011-631. For a thorough understanding of this new law, readers are advised to read the Act itself, which is available online at the Alabama Secretary of State’s website (http://arc-sos.state.al.us/CGI/actnumber.mbr.input).

Sale of Warrants

Prior to enactment of Act No. 2011-631, Alabama law required school boards to sell their warrants as follows:

- Select a date 30 to 60 days in advance;
- Publish a notice in the local weekly newspaper; and
- Hope that a bank or other financial institution would submit a reasonable bid on the prescribed date.

Enormous volatility in the capital markets since 2008 has rendered this procedure increasingly obsolete. Often, a school board has gone to the trouble and expense of advertising for bids, but missed an ideal marketing opportunity while waiting for the bid date. As a result, the board was left empty-handed when it failed to receive a single bid. Or worse, the school board may have received only one bid that had a costly built-in margin to protect the bidder from wild swings in the market.
As competitive sales have become more impractical and uncertain, school boards and their bond counsel have developed innovative ways to avoid this requirement. Usually, this has involved utilizing a city or county, or perhaps another public entity, to incur debt for the benefit of the school board through a sale-leaseback or a funding agreement arrangement. Such indirect alternative financing arrangements have entailed greater complexity which, in turn, has resulted in higher transaction costs and interest rates for the school board. These financing arrangements often contain “lockbox” provisions for pledged taxes that created cash flow problems for school board operations. Since such alternative arrangements do not require state approval, the State Department of Education’s traditional oversight responsibility has eroded over time.

Act No. 2011-631 fixes the problem by expressly granting to school boards the power to sell their warrants directly to a bank or an underwriter on a negotiated basis. School boards may now enter the market on a date of their choosing, when conditions are most advantageous in the light of existing market conditions. In addition, the new law clearly requires the state superintendent’s approval before a local school board may incur indebtedness, regardless of what form such indebtedness may take. As a result, school boards no longer have an incentive to avoid state scrutiny by employing “creative” financing arrangements. In the end, such scrutiny will allow the state to ferret out problematic financings on the front end rather than being forced to bail out a school board under duress.

**Combined School Taxes**

Under the old school finance law, school boards could not pledge more than one tax as security for an issue of school warrants. The primary source of local funding for Alabama school boards is property taxes, but for many school boards this single tax revenue stream is often inadequate to finance a major capital project. Therefore, under the old law, school boards were forced to initiate multiple financings to pay for a single capital project. Such bifurcated financings resulted in higher transaction costs and higher interest rates for the school board.

Act No. 2011-631 allows school boards, for the first time, to combine multiple school taxes as security for a single issue of school warrants. By combining school taxes, a school board may achieve a better coverage ratio—meaning, the maximum annual principal and interest payable on the indebtedness will be covered by more available tax revenues. A more favorable coverage ratio generally results in a better credit rating because the investment is considered less risky, which generally lowers the interest rate on the investment.

Act No. 2011-631 makes clear that any tax pledge constitutes a preferred claim against the taxes so pledged, and takes priority over claims for salaries or other operating expenses of the school board. This is not necessarily true in the case of city and county general obligation indebtedness, where courts have held that the reasonable and necessary expenses of operating general government can take priority over the claims of creditors under certain circumstances. The credit markets are keenly aware of bankruptcy risk as it relates to cities and counties. Local school boards in Alabama are instrumentalities of the state and receive the vast majority of their operating funds from state government through constitutionally earmarked taxes, not from the school board’s local government. Because of the reliable nature of the income from the state, credit rating agencies are increasingly comfortable issuing higher credit ratings to school boards than to their respective cities and counties.

Because creditors have priority over the payment of operating expenses, it is critically important that school board financings receive adequate scrutiny from the state. Act No. 2011-631 prohibits the state superintendent from approving any financing that could jeopardize the state’s foundation program of education. The Alabama Legislature created the Foundation Program Fund to ensure that each Alabama school district is sufficiently funded to meet a minimum operating budget. Beginning in 1995, as a condition to the receipt of state appropriations from the Foundation Program Fund, each local school board was required to provide a local match equivalent to ten mills of local ad valorem taxes. This requirement of minimum local effort became embedded in the Alabama Constitution with the ratification of Amendment No. 778, which mandates that not less than 10 mills of local ad valorem taxes be levied in each school district in the state. As a
matter of policy, the state superintendent generally will not approve a school board financing unless a minimum of 10 mills or its equivalent is unencumbered following the issuance of such school warrants.

**Working Capital**

Under old law, a school board could borrow to pay operating expenses for a period ending not later than September 30 of the fiscal year in which the borrowing occurred. Over the past several years, a school board struggling with the effects of a July or August proration declaration often had no choice but to request its local bank to lend it enough money to permit the board to close out the fiscal year. The bank loan, by law, was required to be paid on September 30, when the school board’s cupboard was bare. Although the bank would usually agree to roll over the loan for another year, the law prevented the bank and school board from negotiating a deal to pay off the loan over a longer period, such as two or three years.

The new law allows a school board, with the prior approval of the state superintendent, to incur working capital indebtedness for periods longer than a year. Although it is not usually prudent to incur long-term debt to pay operating expenses, there are extenuating circumstances where that may be unavoidable. As school boards deal with the ravages of the recent financial meltdown and recession, flexibility in the new law has become vital.

**Financing All School Property**

Under old law, school boards had the power to borrow funds to finance certain specific types of capital improvements—essentially school buildings, playgrounds and school buses. In 1939, school boards did not need sports facilities, performing arts centers, telecommunications facilities, broadband, or separate heating and cooling facilities.

Act No. 2011-631 modernizes the definition of what can be financed so there is no doubt that a school board can borrow to meet the challenges of the 21st century. “Public School Facilities,” as defined in the Act, includes “all tangible and intangible property and interests in property, whether real or mixed, used or useful for educational and public school purposes, . . .” and includes a laundry list of special educational facilities.

In another departure from old law, the Act permits school boards to finance, with the approval of the state superintendent, other “extraordinary, nonrecurring items that are not customarily payable from current revenues including, without limitation, casualty losses, legal judgments, and payments due upon early termination of contractual agreements or prepayments of indebtedness.” The flexibility of the new law is further evident by the provision that empowers school boards to incur debt “for such other purposes for which a board is authorized by law to expend money.”

**Refunding City or County School Warrants**

As discussed above, school boards have discovered innovative financing arrangements to avoid the competitive sale and single tax restrictions in the old school finance law. In many cases, it now makes sense for school boards to unwind these alternative financings to achieve significant savings. Not only were the alternative financings more expensive because of their relative complexity, but they often were done when tax-exempt rates were higher than they are today.

The new law permits school boards to issue school warrants to refund outstanding lease obligations, funding agreement obligations and “any valid indebtedness or obligations of such board incurred pursuant to any agreement . . . by such board and a public person whereunder such board shall make payments.” In the course of unwinding these alternative financings, many school boards will achieve significant savings by relying on their own credit ratings instead of the political jurisdictions they serve.

**Assistance by Other Governmental Entities**

The new law expressly grants to cities, counties and other governmental entities, the power to guarantee school warrants, make grants to school boards and provide other types of financial assistance directly to school boards. Such powers generally did not exist prior to enactment of Act No. 2011-631, so once again alternative financing plans had to be developed to make use of the generosity of the political jurisdiction served by the school board. By expressly granting broad powers to municipalities and counties, the new law permits cooperative financings to be accomplished in the most direct and cost-effective manner.

**Conclusion**

It is essential that lawyers who represent all public entities—especially school boards—develop a working knowledge of Act No. 2011-631. This Act presents significant opportunities for school boards and the political jurisdictions they serve.
Legal Malpractice Actions under the Alabama Legal Services Liability Act:

Alleged Involuntary Attorney-Client Relationships and Attendant Statute Of Limitations Issues

By Max Cassady

Legal malpractice actions in Alabama are governed by the Alabama Legal Services Liability Act ("LSLA" or "Act"), which provides that "[t]here shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action . . ." Ala. Code § 6-5-573. Thus, where the Act applies, all other tort, contract and statutory causes of action are foreclosed and the action must be brought within the ALSLA's statute of limitations. Id. § 6-5-570.

The Act governs "[a]ny action against a legal service provider in which it is alleged that some injury or damage was caused in whole or in part by the legal service provider's violation of the standard of care . . ." Ala. Code § 6-5-573. "Legal service providers" includes lawyers who are licensed by the Alabama State Bar, foreign attorneys "engaged in the practice of law in the State of Alabama" and their law clerks, legal assistants, legal secretaries, investigators, paralegals, and couriers. The "standard of care" required is the "reasonable care, skill, and diligence as other similarly situated legal service providers in the same general line of practice in the same general locality ordinarily have and exercise in a like case." Id. § 6-5-572(3).

The ALSLA Limitations Period vs. Common Law Limitations

In creating a cause of action against legal service providers, the Alabama legislature also "provide[d] for the time in which a legal service liability action may be brought and maintained." Ala. Code § 6-5-570. In general terms, the ALSLA provides for a two-year limitations period for cases not involving fraud, but that period is extended by a six-month discovery rule in non-fraud actions if the "cause of action is not discovered and could not reasonably have been discovered within such period." In cases alleging fraud, the
limitations provision runs two years from the date of discovery of the facts constituting fraud. In all cases, however, a four-year absolute bar applies.

This statute of limitations perhaps may be the most important of the Act’s protections for attorneys. In Kinney v. Williams, 886 So. 2d 753 (Ala. 2003), for example, a lawyer explaining a deed allegedly negligently misrepresented that a road passing through a parcel of property was private and not public. The lawyer explained the deed to four persons—two were his clients, and two were not his clients. All four filed suit when the road was declared to be public, contrary to the attorney’s opinion. The ALSLA applied to the claims of the clients and resulted in summary judgment on limitations grounds under the more rigorous statute of limitations in the ALSLA. The two non-clients asserted common law claims of fraud based on the defendant attorney’s knowledge that he was making professional representations they would rely upon, even though they relied upon the attorney’s opinion outside of the attorney-client context. The two non-clients avoided summary judgment under the common law limitations period.

In cases where the ALSLA limitations provision does apply, the statute of limitations analysis remains difficult because of uncertainty on whether the “act or omission” constituting alleged malpractice commences the running of the limitations period, or the resulting “injury or damage” caused by the alleged malpractice. The Act’s definition of a “[l]egal service liability action” as “[a]ny action against a legal service provider must be commenced within two years after the “act or omission” occurrence test, but declined to establish either test as the preferred test. The court explained that “injury or damage” became the focus of a 1999 plurality decision in Ex Parte David R. Panell, 756 So.2d 862 (Ala. 1999), which held that the Alabama legislature had “intended to replace” the “damage rule” with an “act or omission” rule. In Panell the client alleged that his attorney in the underlying action had settled his case without his consent. The court concluded that “[i]t is immaterial for purposes of the statute of limitations whether the client knows the full extent of the damage resulting from the tortious act or omission.”

Three of the nine members of the court agreed with the rationale, part of which was that the legislature had inserted the “ameliorative discovery provision” in Section 6-5-574(a), which provides a six-month extension to the two-year limitations period where “the cause of action is not discovered and could not reasonably have been discovered within such period.” Applying the “act or omission” rule, the court held that the client’s ALSLA claim was time barred because the limitations period ran from the date of the alleged wrongful settlement of the underlying action, not date of the dismissal of the action (i.e., the “injury”), which came some time later.

The Panell “act or omission” rule has been subject to criticism. A Cumberland Law Review article written by attorneys who “typically act as advocates for defendants in suits for professional negligence,” concluded that the Panell decision produces “illogical” results when read literally. An Alabama Law Review commentary viewed Panell as suggesting that “that a client’s statute of limitations could run before a cause of action accrues” when “[l]egal representation is often a long and protracted process” in which the damage of the act or omission only becomes apparent to a reasonable person when the case is dismissed.

Decisions following Panell have not resolved the confusion on whether to apply an “act or omission” occurrence test or an “injury or damage” test. In Sirote & Permutt, P.C. v. Bennett, 776 So. 2d 40, 45 (Ala. 2000), just one year after Panell, the court noted that “our decision is based on the case law applying the Michael rule that the period of limitations begins to run as soon as the plaintiff sustains a legal injury.” In the same year, in Ex parte Seabol, 782 So. 2d 212, 214-215 (Ala. 2000), the court acknowledged Panell but held that “the running of the limitations period is tolled until the client discovers, or reasonably should discover, the attorney’s act or omission or failure.”

Since 2001, the court has not resolved the uncertainty because it has not been required to do so to reach a decision. In Floyd v. Massey & Stotser, P.C., 807 So. 2d 508, 511 (Ala. 2001), the court acknowledged the “injury or damage” test as well as the “act or omission” occurrence test, but declined to establish either test as correct because the court concluded that the ALSLA claim was

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**In cases where the ALSLA limitations provision does apply, the statute of limitations analysis remains difficult because of uncertainty on whether the “act or omission” constituting alleged malpractice commences the running of the limitations period, or the resulting “injury or damage” caused by the alleged malpractice.**
time barred under either test. In Denbo v. DeBray, 968 So. 2d 983 (Ala. 2006), the court again declined to choose between “the two different approaches for determining when the statute of limitations begins to run,” holding that under either the client's complaint was untimely. Finally, in 2010, in Coilplus-Alabama, Inc. v. Vann, 53 So. 3d 898, 909 (Ala. 2010), the court did not declare either test to be correct, and stated: “[b]ecause Coilplus’s legal malpractice action is time-barred under all applicable provisions of § 6-5-574, regardless of whether the ‘occurrence’ approach or the ‘damage’ approach is used to determine when that action accrued, and because Coilplus failed to present any evidence to support a claim of fraudulent suppression, we affirm the trial court’s summary judgment in favor of the defendants.”

When Does the ALSLA Apply?

Any lawyer sued may wish to invoke the advantageous statute of limitations under the ALSLA. The Act does not apply, however, simply because the defendant in a civil action is an attorney; rather, the Act and its statute of limitations apply only to claims between “legal service providers” and those “who have received legal services.” Thus, the ALSLA clearly applies when the parties agree that the claim arises out of an attorney-client relationship over legal services allegedly falling below the standard of care; conversely, it does not apply when the parties agree that the disputed facts did not involve legal services rendered pursuant to an attorney-client relationship. In such situations, general civil law applies, because the Act does not apply to a dispute between a lawyer and a non-client.

What if the parties cannot agree that the Act applies or does not apply to the civil action at hand? In such a case, the trial judge and the parties are forced to navigate through both the common law and the Act until the applicability of the Act is determined either by the judge as a matter of law, or by the jury as a matter of fact. This article details several scenarios where parties disagree on the whether the Act or the common law applies. In each situation, the trial judge confronts a maze of difficult statute of limitations uncertainties.

Disputed Attorney-Client Relationships in Litigation: Dual Roles of Attorney and Fiduciary

When one party asserts the attorney-client relationship and the other denies the relationship, both the ALSLA and general common and statutory law apply until a jury or judge makes a factual finding that an attorney-client relationship did or did not exist. For example, in Line v. Ventura, 38 So. 3d 1 (Ala. 2009), the Alabama Supreme Court was faced with a lawyer serving dual roles: as the attorney filing the conservatorship, and as the fiduciary co-signer of checks under an agreement with The Hartford, the bonding company for the conservatorship. The blank checks were given to the minor’s mother, who allegedly wasted the money on inappropriate goods such as a polo pony, a BMW and inappropriate investments.

Once the minor reached the age of majority and learned that the $500,000 in wrongful death proceeds were exhausted, he filed suit against the attorney and The Hartford insurance company. The attorney denied that the minor child had been his client but also asserted that the ALSLA barred any claims against him because he had been providing legal services as a licensed lawyer. In opposition, the plaintiff presented expert testimony from a practicing lawyer (a) that the defendant attorney had a duty under the ALSLA in filing for the conservatorship distinguishable from his separate duty as a fiduciary in jointly co-signing the checks with the mother; and (b) that the attorney’s conduct had fallen beneath the standard of care required by the ALSLA; but (c) that the attorney’s breach of the standard of care in releasing the blank checks was under his general fiduciary duty outside of an attorney-client relationship. The Hartford also sued the attorney for breach of his fiduciary duty and for indemnification under an agreement he had executed with The Hartford in which he agreed to be The Hartford’s representative charged with the duty of cosigning checks issued by the conservatorship.

At the close of the evidence the trial judge concluded that no attorney-client relationship had existed and dismissed the ALSLA claim. The case proceeded on common law claims of negligence, wantonness and breach of fiduciary duty, and the jury returned a verdict in favor of the claimant and in favor of The Hartford. On appeal, the attorney argued that the loss of conservatorship funds necessarily related to his providing “legal services” as an Alabama licensed attorney. The supreme court disagreed, holding that the trial judge and jury had properly inferred that the defendant attorney had undertaken an “entirely separate fiduciary obligation to [the minor child and the company] by explicitly agreeing to participate in the conservatorship by cosigning checks and being actively involved with the conservatorship funds.”

Involuntary Attorney-Client Relationships:
The Lawyer’s Duty to Manifest Lack of Consent to an Attorney-Client Relationship

Section 14 of The Restatement of Law Governing Lawyers provides that “[a] relationship of client and lawyer arises when a person manifests to the lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person a consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.” The attorney’s subjective lack of consent to attorney-client relationship does not control because the attorney-client relationship is a matter of contract formation, and Restatement Section 14 adopts the objective theory of contracts.14 The Supreme Court of Alabama has held that “[a]n attorney’s representations to a potential client” may impose the relationship by law and not the attorney’s consent “because [t]he mere existence or nonexistence of an express contract, employment, the payment of legal fees, or the length of the consultation is not determinative of whether a preliminary consultation has matured into an attorney-client relationship.”15

Small Business Organization Counsel: Beware of Involuntary Attorney-Client Relationships with Investors

Alabama Rules of Professional Conduct, Rule 1.13 addresses the “Organization as Client,” and provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents,” but the rule concurrently directs that “a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” Further, Rule 1.13 allows that “[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents,” but “[i]f the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.” Although the Rules of Professional Conduct may not be used as evidence in an action under the ALSLA,16 the rules alert the practitioner to the potential client-identification issues confronting small business counsel and mirror the “lack of consent” standard of the Restatement.

Investors often organize a business entity with a single attorney to avoid paying multiple lawyers and because they share an optimistic unity of purpose and no perceived conflicts among themselves. But conflicts may surface when an individual investor is faced with deep losses or feels unrewarded when large profits are distributed. The lawyer who organized the company may become the first professional the disappointed investor calls because the investor expects the “company attorney” to resolve a conflict among the partners or shareholders. That investor later may seek to blame the attorney for failing to protect that investor’s individual legal interests in the company formation process or in subsequent transaction documents or that the attorney represented each investor in pre-entity formation proceedings and also represented the business organization after it commenced its formal existence. The individual investor may assert that his intent to receive legal services was manifested in his or her signing of legal documents in an individual capacity.

Once the investor claims an attorney-client relationship, the Restatement places the burdens on the attorney to show evidence of the attorney’s “manifest lack of consent” to form the attorney-client relationship. This burden may be mitigated and a legal malpractice claim avoided, for example, by a Southeastern Transactions Manual model letter entitled, “Representing Multiple Investors in Organization of Corporation and Acting as General Counsel.”17 The letter calls for the signature of each investor and:

- Clarifies to the investors who the attorney represents;
- Cautions that attorney-client privileges will be lost in the event of a conflict arising out of misconduct by an investor;
- Gives notice that the lawyer will have a duty to report any investor’s misconduct to other investors and the business entity;
- Warns that disagreements may arise on capitalization and other organizational matters;
- Advises that if the disagreements prove to be material and intractable, the attorney will have to withdraw and recommend new counsel to each; and
- Explains that in litigation between the investors over the meaning of a transactional document drafted by the lawyer, the lawyer will be a witness at trial and cannot represent any investor.

Practicing Business (Or Law, or Both?) With Non-Lawyer Business Partners

A related red-flag situation arises when a lawyer is an investor or partner in a business venture with non-lawyers, and the lawyer provides both legal services and non-legal contributions. The attorney may be invited into the business-partner role by an investment group which has a minimal legal budget and is willing to barter for legal services. Or the attorney may affirmatively ask to join a growing, successful venture which has higher potential profits than practicing law. The real estate market has been a common route for lawyers into investment groups because it tends to involve a local focus and an area upon which many lawyers’ practices touch.

A primary risk for a lawyer joining a group as an investor or partner is the dilution of the attorney’s self-perception of his or her lawyer status. The lawyer may begin to perform legal services more routinely and without advising partners or organization of the risks. Less documentation and less discussion with the “client” is a logical development because the attorney is also representing himself or herself with a genuine, vigorous self-interest of avoiding injury. That is not necessarily a bad thing when the business is doing well: the group has the confidence of having a lawyer involved in the regular conduct of the business. The group then
may naturally drift into exercising less control over material legal decisions ordinarily reserved for the client. Even the lawyer’s own self-perception may become more of a sense of a business partner than the attorney for the investors or the business entity.

The attorney’s central identity as the legal service provider may re-surface if the business venture fails or is threatened for legal reasons related to services provided by the lawyer. The lawyer’s “legal service” role might involve failing to record a mortgage or lien, or not correctly interpreting a legal document, or mistakenly releasing company funds from the lawyer’s trust account, or lack of pretreatment document clarity which only becomes apparent when a dispute arises about the meaning of a profit-sharing document prepared by the attorney for himself and the group. If no outside counsel provided overview for the company, the lawyer may have difficulty denying an attorney-client relationship with the company and perhaps with some of the individual investors. In the context of Restatement Section 14, some investors may contend that they expressed intent to receive legal services, and did receive legal services, and further that the lawyer failed to manifest lack of consent to act as that individual’s attorney. In litigation, the attorney’s denial of the attorney-client relationship would require the court and counsel to address the common law and the ALSLA.

Trust Account Transactions: Involuntary Attorney-Client Relationships or Common Law Negligence

A lawyer’s handling of the firm’s trust account may possibly implicate the ALSLA as well. In recent Alabama litigation, a young lawyer had an existing client who was a real estate finance specialist, and the client had an impressive past record of locating and finding private investors for sound real estate investments. The finance specialist persuaded two investors to wire $500,000 to a lawyer’s trust account. The finance specialist represented that he would also contribute $500,000 of his own money to the investment. The finance specialist also represented that his attorney would act for all of the investors and create the LLC, prepare the transaction documents, take a security interest in property outside of Alabama and close the deal utilizing his law firm’s trust account. The young lawyer had no prior relationship with the two investors and did not meet them during the entire business transaction. But the lawyer communicated with the two investors through faxes of transaction documents and “CCs” of e-mails.

The lawyer created an LLC for the group and accepted into his firm’s trust account a $500,000 wire from the two investors. The finance specialist privately e-mailed the attorney and represented that he had wired $500,000 in funds into the attorney’s trust account. The e-mail instructed the attorney to immediately pay himself a substantial fee and to wire the remaining funds to another bank. When the finance specialist absconded with the two investors’ money, the investors filed suit, alleging that they had received legal services and trust account services from the attorney, and that the attorney had not manifested his lack of consent to act as their attorney. The two investors asserted that his attorney had released their $500,000 without any documentation of the capital and/or service contributions of individuals in the group, without closing instructions and without written authorization from them as individuals. The lawyer denied the attorney-client relationship and left the trial court in the position of navigating the common law and the ALSLA.

Application of the ALSLA to Out-of-State Counsel

In the age of the Internet and cable television, state boundaries do not confine an attorney’s audience of potential clients. Thus, out-of-state mass tort attorneys frequently represent thousands of Alabama clients as individuals by opting them out of class actions. The sheer geographic distance between the client and the out-of-state attorney frequently results in attorney-client relationships being formed by U.S. Mail and in settlements without the Alabama client and the out-of-state attorney ever meeting face to face. Injury attorneys also advertise broadly across state lines, and cross those state lines to settle Alabama claims for Alabama citizens without filing any litigation. Arguably, these attorneys may not be covered by the Act if they fail to at least associate with an Alabama-licensed lawyer who is working for the benefit of the client because Alabama Code § 6-5-572(2) defines a “Legal Service Provider” as “[a]nyone licensed to practice law by the State of Alabama or engaged in the practice of law in the State of Alabama.”

In Alabama Educ. Ass’n v. Nelson, 770 So. 2d 1057, 1059 (Ala. 2000), the court held that “the plain language of § 6-5-572(2), as well as that of the other portions of the ALSLA, clearly indicates that the legislature intended for the ALSLA to apply only to lawyers and to entities that are composed of members who are licensed to practice law within the State of Alabama.” See also Fogarty v. Parker, Poe, Adams & Bernstein, L.L.P., 961 So. 2d 784 (Ala. 2006) (holding that ALSLA did not apply to defendant attorneys from North Carolina had not appeared in any Alabama court or litigation, but rather had handled transactional work for Alabama investors forming an Alabama LLC). According to the

In the age of the Internet and cable television, state boundaries do not confine an attorney’s audience of potential clients.


The Fogarty holding was curtailed in 2009 by Wachovia Bank, N.A. v. Jones, Morrison & Womack, P.C., 42 So. 3d 667, 677 (Ala. 2009), in which the court stated, “We disagree with [the defendant law firm’s] contention that . . . it cannot be held liable under the ALSLA because none of its attorneys were licensed to practice law within the State of Alabama.” The court focused on two factors to distinguish Fogarty: first, the out-of-state defendant law firm in Jones, Morrison agreed that it had provided legal services, whereas the lawyers in Fogarty had denied providing legal services; and second, the law firm had assisted an Alabama-licensed law firm in the matter.

Returning to the mass tort, the following scenario is not uncommon: an out-of-state mass tort firm acquires an inventory of 2,000 clients in Alabama and reaches a tolling agreement with
the defendant manufacturer as to all 2,000 Alabama clients. The Alabama clients are simply held as inventory while a bellwether case being tried in another state or while MDL negotiations establish settlement values. At some point, when settlement values are established, the 2,000 Alabamians may be invited to participate in a global or “aggregate” settlement. The settlement may involve thousands more of claimants in other states as well as various fee-splitting agreements among the mass tort counsel. The disbursement mechanism for the aggregate settlement money may be established in another state. In the event of negligence in the handling of an Alabama claim, the applicability of the ALSLA would likely depend on a determination of whether the out-of-state attorneys assisted an Alabama-licensed lawyer for the benefit of that Alabama client. Failing that, the common law of negligence would logically apply because an attorney cannot be “engaged in the practice of law in the State of Alabama” without a license, except on a pro hac vice basis. In fact, in Fogarty, the plaintiff had not even pleaded the ALSLA, but instead pleaded a claim for the “Unauthorized Practice of Law” under Alabama Code Section 34-3-6, and it was that claim which the court held was sufficient to state a claim. The inapplicability of the ALSLA removes the absolute four-year limitations bar, and, thus, could be critically important as a matter of law at the outset of a claim against an out-of-state attorney.

**Claims against attorneys are governed by the ALSLA only when there is an attorney-client relationship; otherwise, the claim is governed by general civil law.**

**Conclusion**

Under the ALSLA, the statute of limitations is frequently the outcome-determinative issue and an issue which dominates the case law relating to the Act. To even get to that issue, though, the lawyer must first establish that the Act applies. Claims against attorneys are governed by the ALSLA only when there is an attorney-client relationship; otherwise, the claim is governed by general civil law. In cases where an involuntary attorney-client relationship is alleged, the defendant attorney in denying the attorney-client relationship loses many of the protections of the ALSLA, in particular, the limitations provision and the opportunity to argue an “act or omission” or occurrence limitations period. In cases where an out-of-state attorney is sued by an Alabama client in an Alabama court, the applicability of the Act and whether the ALSLA limitations provisions apply appear to depend on whether an Alabama-licensed attorney was also involved in the provision of legal services. Once that hurdle is overcome, the question becomes when the statute of limitations began to run. On this point, the law has not yet been declared as to whether the “act or omission” occurrence rule or the “injury or damage” rule commences the statute of limitations, thus leaving fodder for the attorneys, and toil for the trial judges. | AL

**Endnotes**

1. Alabama Code Section 6-5-572(2) defines a "legal service provider" as "anyone licensed to practice law by the State of Alabama or engaged in the practice of law in the State of Alabama" and goes on to state that "[t]he term legal service provider includes professional corporations, associations, and partnerships and the members of such professional corporations, associations, and partnerships and the persons, firms, or corporations either employed by or performing work or services for the benefit of such professional corporations, associations, and partnerships including, without limitation, law clerks, legal assistants, legal secretaries, investigators, paralegals, and couriers."

2. Section 6-5-574, Ala. Code 1975, provides: "(a) All legal service liability actions against a legal service provider must be commenced within two years after the act or omission or failure giving rise to the claim, and not afterwards; provided, that if the cause of action is not discovered and could not reasonably have been discovered within such period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; provided, further, that in no event may the action be commenced more than four years after such act or omission or failure; except, that an act or omission or failure giving rise to a claim which occurred before August 1, 1987, shall not in any event be barred until the expiration of one year from such date.

3. Section 6-5-574, Ala. Code 1975, provides: "(b) Subsection (a) of this section shall be subject to all existing provisions of law relating to the computation of statutory periods of limitations for the commencement of actions, namely, Sections 6-2-1, 6-2-2, 6-2-3, 6-2-5, 6-2-6, 6-2-8, 6-2-9, 6-2-10, 6-2-13, 6-2-15, 6-2-16, 6-2-17, 6-2-30, and 6-2-39, provided, that notwithstanding any provisions of such sections, no action shall be commenced more than four years after the act, omission, or failure complained of; except, that in the case of a minor under four years of age, such minor shall have until his or her eighth birthday to commence such action."

4. Section 6-5-574, Ala. Code 1975, provides: "(a) . . . provided, further, that in no event may the action be commenced more than four years after such act or omission or failure.

5. Ex parte Stonebrook Dev., L.L.C., 854 So. 2d 584, 592 (Ala. 2003) (rejecting Panell in part because “Panell was a plurality opinion; its rationale was approved by only three of the nine members of this Court”).

6. Ex parte Panell, 756 So. 2d at 867.

7. Panell v. American Home Prods. Corp., 106 F. Supp. 2d 1240, 1242 & n.2 (N.D. Ala. 2000) (“It is highly unlikely that the six justices would ever agree with the rationale of Justice See. In light of stare decisis, Panell cannot stand. . . . This result is nonsensical; a plaintiff cannot maintain an action until he has a cause of action. The limitations period could not only run but expire before the plaintiff ever had a right to maintain an action.”)


12. “[T]he ALSLA does not apply to an action filed against a ‘legal service provider’ by someone whose claim does not arise out of the receipt of legal services.” Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So. 2d 800, 804 (Ala. 1999). See also Fogarty v. Parker, Poe, Adams, and Bernstein, L.L.P., 961 So. 2d 784, 789 (Ala. 2006) (The
Supreme Court of Alabama rejected a law firm’s argument that the ALSLA preempted all other claims because the law firm expressly denied throughout the proceedings that it had provided any legal services to the Fogartys, who were investors in an LLC represented by the law firm. It also does not apply to a devisee under a will. See Robinson v. Benton, 842 So. 2d 631, 637-638 (Ala. 2002) (holding that lack of privity between the devisee and attorney barred the ALSLA claim, and noting, “Robinson also argues that his negligence claim against Benton falls outside the Legal Service Liability Act, § 6-5-570 et. seq., Ala. Code 1975. However, the record shows that this issue was never raised before the trial court. Therefore, we cannot address this issue on appeal.”)

13. Line v. Ventura recited fiduciary duty broadly: “The fiduciary relation is not restricted to such confined relations as trustee and beneficiary, partners, principal and agent, guardian and ward, managing directors and corporation, etc. It applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise. It is the nature of the relation which is to be regarded, and not the designation of the one filling the relation.” (citations omitted)

“Such a relationship is one in which one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interests, or when one person has gained the confidence of another and purports to act or advise with the other’s interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted, or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another.”

Cf. Hannon v. State, 48 Ala.App. 613, 618 (Ala. Crim. App. 1972) and Satterwhite v. State, 359 So. 2d 816, 818 (Ala. Crim. App. 1977) (“The relationship of attorney and client . . . places upon the attorney a position likened to a fiduciary calling for the highest trust and confidence, so that in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity and fidelity.”)


16. Section 6-5-578(b) provides: “Neither evidence of a charge of a violation of the rules of professional conduct against a legal service provider nor evidence of any action taken in response to such a charge shall be admissible in a legal services liability action and the fact that a legal service provider violated any provision of the rules of professional conduct shall not give rise to an independent cause of action or otherwise be used in support of recovery in a legal services liability action.” Accord Ex parte Toler, 710 So. 2d 415 (Ala. 1998).

17. Southeast Transactions Manual, Section, 2.201, Model Engagement Letter.
Most consumers decide whether to buy a brand-name or generic drug based on one of two considerations—price or myths regarding quality. Few, if any, give thought as to whether their choice will affect their ability to pursue a claim against the manufacturer in the event they suffer an adverse reaction to the drug. However, after recent decisions by the United States Supreme Court, consumers who purchase generic drugs may have no avenue to pursue claims against generic drug manufacturers for failing to warn about potential adverse effects of drugs. To comprehend how a consumer could possibly suffer an adverse drug reaction and be left without a legal remedy, it is helpful to review a bit of the history of drug regulations in the United States.

**History**

The Food, Drugs, and Cosmetics Act (“FDCA”) can trace its roots back to the Pure Foods and Drugs Act of 1906. From 1906 to 1962, drugs were reviewed and approved only for safety. During this time, a generic version of a brand name drug could be approved based upon the submission of a “paper” new drug application, which contained published scientific and medical literature demonstrating that the drug was safe. The FDCA was amended in 1962 to require drug companies to show that their drugs were effective through clinical trials. The amended FDCA contained no provision by which companies could gain approval of a generic version of a brand-name drug in an abbreviated process. The generic drug companies were hesitant to invest the time and expense required for clinical trials and, as a result, by 1984, there were 150 drugs whose patents had expired but for which there was no generic drug equivalent. In fact, only 35 percent of the top-selling drugs with expired patents had generic equivalents.

By the early 1980s, as the availability of generic drugs declined, the average price for prescription drugs increased. The Food and Drug Administration (“FDA”) began considering the possibility of implementing new regulations that would allow abbreviated new drug applications for generic drugs. Instead, Congress intervened and passed the Drug Price Competition and Patent Term Restoration Act of 1984, better known as the Hatch-Waxman amendments to the FDCA. The amendments sought to balance two competing objectives:

- Encourage competition from generic drugs and
Continuing to provide incentives for brand-name drug companies to develop new drugs.11

The Hatch-Waxman amendments preserved the incentive for brand-name companies to invest in research to develop new drugs by increasing the patent exclusivity period for new drugs.12 The amendments also allowed brand-name drug companies to obtain patent extensions for a period of time equal to the time the drug spent in clinical trials, so that the brand-name drug company could reap the financial benefits from its new drug for the entire patent term.13

The amendments streamlined the process for approving generic drugs by requiring only that manufacturers demonstrate bioequivalence to an already-approved drug through the submission of an abbreviated new drug application.14 Bioequivalence means that the active ingredient in the generic drug is absorbed at the same rate and to the same extent as the active ingredient in the brand-name drug.15 The tests required to prove bioequivalence are much less costly than those required to prove safety and efficacy.16 The amendments also require that generic drug companies label their drugs with the same label that is approved for their brand-name equivalent.17 The amendments further allowed generic drug companies to submit abbreviated drug applications before the expiration of the brand-name drug's patent.18 This change alone shortened the average time between the expiration of a brand-name drug's patent and the entry of generic versions into the market from three years to three months.19

There is no doubt that the Hatch-Waxman amendments achieved the goal of increasing competition from generic drug manufacturers. In 1983, generic drugs accounted for 13 percent of the prescription drug market.20 In 2010, generic drugs accounted for 78 percent of all drugs sold in the United States.21 Today, on average, more than 80 percent of a brand’s prescription volume is replaced by generics within six months of patent expiration22

Pharmaceutical Litigation After Hatch-Waxman

As long as there have been prescription drugs on the market, there have been patients who suffered adverse reactions from taking those drugs. Accordingly, litigation has been a part of the pharmaceutical industry for as long as it has been around. Some adverse reactions are foreseeable and drug companies warn of those potential reactions in their labels and warnings. Sometimes, there are reactions that were not discovered in clinical trials. Over the years, plaintiffs have asserted claims against pharmaceutical companies based upon countless theories of liability, but most claims have included some variation of a common law failure to warn claim.

Both brand name and generic pharmaceutical companies have also experimented with many theories in defending against failure to warn claims. For most of the past generation, the “learned intermediary doctrine” was an industry favorite.23 Under the learned intermediary doctrine, a pharmaceutical company cannot be held liable for a patient’s adverse reaction to its drug if the patient’s physician was aware that the possibility of such a reaction existed.24 In other words, the doctrine shifts liability from the pharmaceutical company who had no interaction with the patient to the physician, who knew the patient’s medical history, physical condition and other medications the plaintiff was taking.25

Today, some variation of the learned intermediary doctrine has been adopted by 48 states.26

In the past few years, however, new theories of defense have arisen in the pharmaceutical industry that led to landmark decisions from the Supreme Court of the United States. Brand-name drug companies began arguing that plaintiffs could not maintain failure to warn claims against them because it was the FDA, not the drug companies, who had the ultimate say as to what is, and what is not, contained in drug labels and warnings. Generic drug companies argued that plaintiffs could not maintain failure to warn claims against them for two reasons: first, because the Hatch-Waxman amendments require them to use the same labels and warnings on their drugs as are used on the brand-name equivalent; and, second, because neither the FDCA nor FDA regulations provide a mechanism by which the generic manufacturers could amend the labels or warnings. The Supreme Court addressed the brand-name drug companies’ labeling defense in Wyeth v. Levine27 and the generic drug companies’ labeling defense in PLIVA, Inc. v. Mensing.28

Wyeth v. Levine

In April 2000, Diane Levine, a professional musician in Vermont, suffered a severe migraine headache and associated nausea.29 She went to a local clinic, where she was treated with intramuscular injections of Demerol, for the headache, and Phenergan, for the nausea.30 The injections did not relieve Levine’s headache and she returned to the clinic, where she was again treated with Demerol and Phenergan, this time through an intravenous push injection.31

Wyeth produces Phenergan.32 At the time Levine was treated, the drug’s labeling identifies intramuscular injection as the preferred method of administration.33 The package insert warned in at least four places that adverse reactions, including gangrene, can result from exposure of Phenergan to arterial blood.34 In fact, the FDA had reviewed Wyeth’s labeling for Phenergan three years before Levine’s treatment and, during that review, ordered Wyeth to maintain its gangrene warning.35

As you could probably guess, the healthcare provider who had given Levine the injection of Phenergan inadvertently injected it into her artery rather than her vein.36 Levine developed gangrene in her arm, which she ultimately had to have amputated. Levine sued the clinic and healthcare providers for malpractice and settled those claims for $700,000.37 She then sued Wyeth in Vermont state court, asserting that Wyeth had inadequately warned of the dangers of injecting Phenergan into an artery.38

Wyeth’s expert testified that Wyeth should have contraindicated intravenous injection of Phenergan on the drug’s labeling even though the FDA never required such a contraindication.39 Wyeth moved for summary judgment, arguing that the plaintiff’s state law failure-to-warn claims were preempted by federal law.40 Wyeth explained that the FDA dictated the warnings that were included in the Phenergan labeling and argued that state law could not require Wyeth to provide different warnings.41 The trial court rejected Wyeth’s argument and a jury awarded Levine a verdict for $7,400,000.42

Wyeth appealed the verdict to the Vermont Supreme Court.43 Wyeth reiterated its argument that it could not comply
with its federal duty to distribute Phenergan only under the precise labeling approved by the FDA and its Vermont common law duty to give different warnings. The Vermont Supreme Court was unpersuaded and affirmed the jury verdict.

Wyeth petitioned the Supreme Court of the United States for a writ of certiorari. The Supreme Court issued its opinion in March 2010, rejecting Wyeth’s preemption argument in a six-to-three decision.

The Court explained that the FDA’s “changes being effected” (“CBE”) regulation provides that if a manufacturer is changing a label to “add or strengthen a contraindication, warning, precaution, or adverse reaction” or to “add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product,” it may make the labeling change upon the filing of a supplemental application with the FDA and it need not wait for FDA approval.

The Court went on to explain that “it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market.”

After the Supreme Court’s decision in Wyeth v. Levine, most legal scholars concluded that the preemption argument was dead in the pharmaceutical failure to warn context. Needless to say, very few people foresaw the Court’s decision in Mensing.

**PLIVA, Inc. v. Mensing**

A year after its decision in Wyeth v. Levine, the Supreme Court addressed the generic drug manufacturer’s preemption argument in PLIVA, Inc. v. Mensing. The plaintiff in Mensing was prescribed metoclopramide, the generic form of the brand-name drug Reglan. At the time the plaintiff was initially prescribed metoclopramide, the warning label stated that “tardive dyskinesia . . . may develop in patients treated with metoclopramide,” and the drug’s package insert added that “[t]reatment for longer than 12 weeks has not been evaluated and cannot be recommended.”

In 2004, the warning label was changed to read “[t]herapy should not exceed 12 weeks in duration.” The label was once again strengthened in 2009 when the FDA ordered a black-box warning stating that “[t]reatment with metoclopramide can cause tardive dyskinesia, a serious movement disorder that is often irreversible. . . . Treatment with metoclopramide for longer than 12 weeks should be avoided in all but rare cases.” After taking the drug as prescribed for several years, the plaintiff developed tardive dyskinesia and filed suit against the generic manufacturers and the manufacturers of the brand-name equivalents, alleging that the manufacturers failed to warn of the effects of long-term use of metoclopramide.

The generic and brand-name manufacturers moved to dismiss the plaintiff’s claims, arguing that federal statutes and FDA regulations preempted the plaintiff’s state law claims.

www.alabar.org | THE ALABAMA LAWYER 61
drug. The brand-name companies argued that they owed no duty to warn consumers of the risks associated with taking the generic forms of their drugs. The district court agreed and dismissed the case. On appeal, the Eighth Circuit affirmed the district court's dismissal of the brand-name manufacturers, but reversed the dismissal of the generic manufacturers. The Eighth Circuit found that the FDA regulations provided mechanisms by which the generic manufacturers could propose changes for their labels. The generic manufacturers appealed the Eighth Circuit's ruling.

On appeal, the Supreme Court noted that a conflict between state and federal law exists, making it impossible for a private party to comply with both state and federal law requirements. In such situations, state law must give way. The Supreme Court found that a conflict exists between state law failure-to-warn claims asserted in the Mensing case and the Hatch-Waxman amendments to the FDCA. Specifically, the Court found that, under the Hatch-Waxman amendments, a generic manufacturer seeking approval to produce a generic form of a brand-name drug must show that the drug it wishes to produce is equivalent to an already-produced brand-name drug and that the safety and efficacy labeling it proposes is the same as that already approved for the brand-name drug. Therefore, the Court reasoned, the generic drug manufacturers could not comply with the Hatch-Waxman amendments and provide the strengthened warnings that the plaintiffs contended were required, because the generic manufacturers had no ability to change their labels.

In reaching this decision, the Court specifically rejected the Eighth Circuit's reasoning that the generic manufacturers could have satisfied the state law warning requirements by proposing label changes to the FDA. The Court explained that state law demanded a safer label, not communication between the manufacturer and the FDA. Therefore, even if the generic manufacturers had proposed label changes to the FDA, they could not have compelled the FDA to approve such changes. In such a circumstance, if the generic manufacturers' suggested label changes had not been approved, the generic manufacturers would still be in violation of state law.

The Supreme Court further noted that if the plaintiff had taken Reglan rather than metoclopramide, her claims would not have been preempted. The Court acknowledged that, from the plaintiff's perspective, the finding of preemption in this case but not in Wyeth v. Levine makes little sense. The Court noted, however, that Congress enacted meaningfully different statutory schemes to govern generic manufacturers than it did to govern brand-name manufacturers. The Court concluded that those different statutes and regulations lead to different preemption results and noted that Congress and the FDA have the authority to change the law and regulations if they so desire. Until Congress or the FDA adopts such changes, plaintiffs will not be able to maintain state law failure to warn claims against the manufacturers of generic drugs.

Failure-to-Warn Claims After Wyeth and Mensing

After the Wyeth and Mensing decisions, it would be easy to conclude that consumers who suffer adverse reactions from taking a generic drug are left without a legal remedy to compensate them for their injury. That could be true, but plaintiffs have pursued an alternate theory of liability which would compel a different result.

This alternate theory was first advanced in Conte v. Wyeth, Inc., a 2008 California case. In that case, the plaintiff developed tardive dyskinesia after taking metoclopramide for almost four years. He sued Wyeth, the manufacturer of Reglan—the brand name version of metoclopramide—and three manufacturers of generic metoclopramide, alleging that the defendants should have known of a widespread tendency among physicians to mistakenly prescribe metoclopramide for periods longer than that called for in the labeling because the label allegedly understated the risks of extended treatment with metoclopramide. It was undisputed that the plaintiff only ingested generic metoclopramide, not Reglan. His claims against Wyeth were premised on misrepresentation in Wyeth's labeling of Reglan in and in a monograph on Reglan it provided for the Physician's Desk Reference. The trial court entered summary judgment in favor of the defendants and the plaintiff appealed.

On appeal, the California Court of Appeals held that it is very likely that a doctor would rely on Wyeth's Reglan product information when prescribing generic metoclopramide. Based on this logic, the California Court of Appeals reversed the trial court's entry of summary judgment and held that a brand-name manufacturer could be held liable for its failure to warn consumers of generic drugs of the adverse reactions they could suffer from ingesting a generic version of the brand-name manufacturer's drug.

While this may seem to be an incredible result, remember that the FDA regulations impose a duty on the brand-name manufacturer to provide an adequate label and to ensure that its warnings remain adequate as long as the drug is on the market. Generic manufacturers, on the other hand, must label their drugs with the exact language found on the brand-name drug's label. Even so, a number of courts have rejected the reasoning of Conte. The Alabama Supreme Court has yet to weigh in on the Conte theory of liability, though the question is currently before it in question certified by the United States District Court for the Middle District of Alabama, in Wyeth, Inc. v. Danny Weeks.
Conclusion

At this point, it is difficult to predict how liability for adverse reactions to generic drugs will be apportioned. It seems unlikely that Congress and the Courts will allow generic manufacturers to remain immune from suit in failure to warn claims forever. The FDA or Congress may impose a duty on generic manufacturers to seek changes for their labels when they become aware of adverse events that are not discussed in their warnings. In any event, this area of the law has witnessed extraordinary changes in the past few years and there is no indication that the evolution is close to an end.  |  AL

Endnotes

3. Id.
4. Id.
5. Id.
6. Id.
9. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
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24. Id.
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70. Id.
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72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
86. Wyeth, Inc. v. Danny Weeks, Alabama Supreme Court, Case Number 1101397.
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Organized pro bono programs make us keenly aware of the contribution and concern of many of our colleagues and remind us of our own need to serve our community through our profession. We hope that all lawyers will someday participate in organized pro bono programs so that we can recognize their contributions too.

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Justice for all is more than just a cliché. It is a time-honored ideal to which all lawyers and all Americans aspire. By volunteering your time and skill to provide legal services to those who cannot normally obtain them, you are making a significant contribution toward making that ideal a reality.
This honor roll reflects our efforts to gather the names of those who participate in organized pro bono programs. If we have omitted the name of any attorney who participates in such a program, please send that information to Alabama State Bar Volunteer Lawyers Program, P. O. Box 671, Montgomery, AL 36101.
QUESTION:

“This letter constitutes a request for an expedited opinion with respect to the question of whether or not I and other lawyers have a conflict of interest arising out of our participation in two separate lawsuits. In the Circuit Court of Any County, Alabama, in a case styled Doe v. Roe, et al., civil action number CV-1212, we represent a class of pharmacy owners in a lawsuit filed pursuant to Alabama’s antitrust statute, §6-5-60 Alabama Code 1975, against numerous pharmaceutical manufacturers. In Doe we allege that the pharmaceutical manufacturers have conspired in a price discrimination scheme to charge favored purchasers of pharmaceuticals lower than market rates while the same defendants charge the owners of independent pharmacies artificially and agreed upon high rates.

“Other lawyers and I have also recently filed a petition to intervene and a complaint in intervention in Smith v. Acme Laboratories, et al., civil action number CV-3434 pending in the Circuit Court of Some County, Alabama. In the Smith case a class of indirect purchasers or consumers has been certified as a class composed of Alabama residents as well as residents of the District of Columbia and the States of Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico and Wisconsin. In Doe no class certification has yet been entered.
In the Smith case the lawyers for the original plaintiff and plaintiff class oppose our intervention on the grounds that we have a conflict of interest. We believe that no conflict exists for the following reasons: 1. The defendants are the largest pharmaceutical manufacturers in the world. Between them they have more assets and a greater wealth than most of the countries of Europe combined. This is not a situation where there is a limited fund for recovery. The two classes may be competing for the same funds but the funds are unlimited. As you can see from the attached complaint and motion for class certification and order in the Smith case, individual claims of $50,000 or more are excluded by definition from the class. There is simply no possibility that these two classes, that is the class in Doe and Smith, will ever be competing for a limited pool of money. 2. Under Alabama’s antitrust statutory scheme the damages sought in both cases are statutory and therefore are defined or fixed by statute. It is not a situation where unlimited damages would be sought by competing classes. 3. The wrongful conduct complained of in both actions is the concerted effort by the defendants to fix the prices of drugs charged to retail pharmacies and to the customers of those pharmacies. There is no allegation in either case that the retail pharmacies have violated Alabama law. The wrongful conduct complained of in both cases is that of the defendants. The wrongful conduct has affected both classes of plaintiffs. The fact that the pharmacies may in some instances have passed on the artificially inflated prices to the indirect purchasers or the consumers is not a violation of Alabama law and is not the subject of either complaint. With respect to the liability of the defendants, then, the necessary proof is identical in these cases. Accordingly we could have no conflict if that is the complaint of the plaintiffs’ lawyers in Smith.

Any claim by the plaintiffs’ lawyers in the Smith case that we have a conflict of interest due to our representation of the plaintiffs’ class in Doe could only be raised after there had been a certification of the plaintiffs’ class in Doe. No certification has been made by Judge Goodnite. Even if we admitted the possibility of such a conflict, it could not conceivably arise until there was a certification in Doe. * * *

We do not believe that we have a conflict of interest between these two plaintiff classes. Judge Jones, the judge in the Smith case, will be deciding sometime in the near future whether we have a conflict or not. We would like as prompt a ruling as we possibly can get from your office as to whether or not any conflict exists.”

**ANSWER:**

You do not presently have a conflict of interest under the circumstances described in your letter.

**DISCUSSION:**

This situation is covered by Rule 1.7(b), which states:

“Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”

Ordinarily a lawyer may not represent two plaintiffs in separate actions against the same defendant if the lawyer knows or has reason to believe there will be insufficient insurance or assets to satisfy both potential claims. However, if both plaintiffs consent to the representation after full disclosure then the conflict is obviated.

In the circumstances you have described, there do not appear to be any issue conflicts between the two plaintiff classes you seek to represent. In Doe, you represent Alabama pharmacy owners and in Smith, you will be representing consumers who have purchased drugs in the past. Both groups contend that the defendant took illegal steps and measures to inflate the prices of their products to those in the distribution and end-user positions. As for whether both plaintiff classes will be competing for the same assets to satisfy their claims, there is no indication, at this point, that the defendants’ resources are so limited as to generate that type of conflict for you. If future discovery reveals that situation, then the conflict issue would have to be addressed again. Rule 1.7(b), of course, gives you the option of seeking consent from your class clients. In that case the risk of any adverse effect created by the multiple representations is eliminated. [RO-1996-03] | AL
Goodbye and Hello

After serving as director of the Alabama Law Institute for the past 37 years, I retired December 31, but will continue to assist the Constitutional Revision Commission during their four-year, article-by-article study of the 1901 Constitution. **Othni Lathram** was selected as the new director and began earlier this month.

Elected were the following officers and members of the Executive Committee:

**Officers**
President: Senator Cam Ward
Vice President: Representative Marcel Black

**Executive Committee**
LaVeeda Battle
David Boyd
Senator Ben Brooks
James M. Campbell
William N. Clark
Representative Paul DeMarco

Peck Fox
Representative Demetrius C. Newton
Senator Arthur Orr
Representative Bill Poole
Senator Rodger Smitherman

**Emeritus Members**
Senator Roger Bedford
Fred Gray
Oakley W. Melton, Jr.
Yetta Samford

Constitutional Revision

In 1974, when I was being recruited to be director of the Alabama Law Institute, I was told that the two biggest items the Institute would be working on were the newly-drafted revision of the 1901 Alabama Constitution and a new criminal code for Alabama. Thirty-seven years later, we are working on a new revision to the 1901 Constitution and a review of the now 32-year old *Criminal Code*.

Alabama has had six constitutions: 1819–statehood; 1861–succession; 1865–reorganization after the Civil War; 1868–reconstruction or radical constitution; 1875–conservatives abandoned the objectives of the radical constitution; and the current 1901 Constitution.

For more than 40 years, constitutional reform as been a “hot” item.

In the 2011 regular session, the legislature again made it a priority item. Senate Pro Tem Del Marsh introduced and passed a Senate Joint Resolution (SJR-82) calling for a commission to revise the constitution article by article. The resolution also requested the Alabama Law Institute to staff the commission and prepare proposed revisions.

In 1969, with Albert Brewer as governor, the “Alabama Constitutional Commission” was created by Act No. 753 of the legislature. This commission was continued by Act No. 95 in 1971. Conrad Fowler, then probate judge of Shelby County, chaired the committee. Dean Leigh Harrison, with the University of Alabama School of Law, was the research director.

This commission produced a proposed seventh constitution for the State of Alabama, dated May 1, 1973. The recommendations that were made and adopted were:
1. Annual sessions of the legislature beginning in 1976
2. Article VI, The Judicial Article adopted in 1973
3. Classification of cities into eight classes, eliminating general laws of local application in 1979
5. Article VIII–Suffrage and Elections in 1992

In 1978, Governor Fob James campaigned on the need for a new constitution. Senator Ryan DeGraffenried spent over half of the 1983 legislative session at the microphone reviewing the constitution. It passed both houses and was submitted to the electorate for vote on November 8, 1983. This revision never reached the voters when the Alabama Supreme Court case of State of Alabama and Don Siegelman v. Richard S. Manley, 441 So.2d 864 (Ala. 1983) removed the constitution from the ballot, holding the proposed constitution violated Section 284 of the constitution by proposing an entirely new constitution rather than an amendment to it.

In 2001, the legislature asked the institute to analyze the 703 amendments to the constitution and identify those voided by the courts, those antiquated and those unnecessary duplications of other provisions, as well as how to revise the constitution. In response, the Alabama Law Institute submitted a report in January 2002 to the Alabama House of Representatives that outlines the four approaches to a revision of the constitution:

1. Article-by-article approach;
2. Re-codification, as an intermediate step;
3. Comprehensive revision by the legislature after first approving a constitutional amendment overturning State v. Manley; and
4. Constitutional Convention

The institute followed up their report in April 2002 with a proposed recompilation of the Alabama Constitution of 1901 in which all amendments were incorporated into the main body of the constitution. In response, in 2003, the legislature passed Ala. Code § 29-7-11 which directed the Code commissioner (director of Legislative Reference Service) to prepare an official recompilation of the constitution. This now appears in the 2005 replacement volume of the Code of Alabama.
In response to the institute’s report, various plans of constitution reform were initialed. The house of representatives’ plan was to adopt a new constitution, “article by article.” The senate plan was to revise the entire constitution after first passing a constitutional amendment allowing the adoption of a comprehensive constitution. The governor’s plan was to call a constitutional convention. The secretary of state had a plan which created a constitutional revision commission. Cumberland School of Law, Auburn University and other colleges and universities had projects and studies. Private groups, such as the Alabama Citizens for Constitutional Reform and the Alabama Appleseed Foundation, held forums and rallies in support of a new constitution.

Governor Riley used his first executive order after taking office January 20, 2003 to form the “Alabama Citizens’ Constitution Commission.” This commission was to address five issues:

1. Home rule;
2. Voter approval of local taxes;
3. Strengthening governor’s veto powers;
4. Addressing tax structure; and
5. Requiring the governor and lt. governor to run as a team.

The one success was limited home rule, known as “The Alabama Limited Self-Governance Act,” Ala. Code § 11-3A-1. Every year since 2003, bills have been introduced for a Constitutional Convention. Revisions of two articles of the constitution have been introduced and have passed one house of the legislature.

The 2011 Senate Joint Resolution delineates the following article-by-article plan:

**Year 2011**
- Article XII Private Corporations
- Article XIII Banking

*Passed 2011 Session: Remove unconstitutional racist language throughout*

**Year 2012**
- Article III Distribution of Powers
- Article IV Legislative Department
- Article IX Representation

**Year 2013**
- Article 1 Declaration of Rights
- Article V Executive Department
- Article XIV Education

**Year 2014**
- Article VII Impeachments
- Article X Exemptions
- Article XVII Miscellaneous

Commission members were appointed by Governor Bentley, Senate Pro Tem Marsh and Speaker Hubbard with the chairs of the House and Senate Judiciaries and Constitution committees as ex officio members.

Members of the commission include:

Governor Robert Bentley                              John Anzalone
Governor Albert Brewer                               Greg Butrus
Becky Gerritson                                      President Pro-Tem Del Marsh
Vicki Drummond                                      Carolyn McKinstry
Speaker Mike Hubbard                                 Matt Lembke
Representative Patricia Todd                          Jim Pratt

**LEGISLATIVE WRAP-UP**

Continued from page 23

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Domestic Relations
Domestic & Family Violence

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- Organize, tab, and paginate medical records for easy reference
- Identify and locate expert witnesses
- Prepare chronologies of the medical events involved in a case
Ex-officio members: chairs of house and senate Judiciaries and Constitution and Election committees: Representatives Randy Davis and Paul DeMarco, Senators Bryan Taylor and Ben Brooks.

Governor Albert Brewer was chosen chair of the committee, with Representative Paul DeMarco as vice chair.

The commission’s duties and responsibilities are:

• Create a public awareness of and educate the public on the recommended changes;
• Provide the legislature with recommendations for changes to the articles under consideration; and
• Report its recommendations in each house of the legislature by the third legislative day each year.

The Law Institute is staffing the commission with Bob McCurley, Professor Howard Walthall of Cumberland Law School and Mike Waters, of Jones Walker. Waters has been involved with constitutional revision since 1978 when he was Governor James’s legal advisor. Since 1983, Professor Walthall has been a part of every constitution effort.

The commission held meetings last year in August, September, October (twice), November, and December.

Article XII “Private Corporations” and Article XIII “Banks and Banking,” which were scheduled for review in 2011, have been reviewed and approved by the commission and should be introduced in the 2012 Session that will begin next month.

For future meeting days of the commission and its agenda, go to www.open.alabama.ma.gov.

Thank you to the hundreds of great Alabama lawyers who have given thousands of hours and millions of dollars of their billable time over the past 37 years to make Alabama’s laws among the most up to date in America. It has been a joy working with you.

I could never have anticipated that in 1974, when I accepted this job for a year, it would last for 37. I look forward to continuing to be a part of the Alabama bar. | AL
Notice

- Daryl Patrick Harris, whose whereabouts are unknown, must answer the Alabama State Bar’s formal disciplinary charges within 28 days of January 31, 2012, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 09-2834(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatement

- Mobile attorney Frank Dreaper Cunningham was reinstated to the practice of law in Alabama by order of the supreme court, effective September 1, 2011. The supreme court’s order was based upon the decision of Disciplinary Board, Panel II, granting the reinstatement with conditions. Cunningham was reinstated on a probationary basis for a period of four years. Among the conditions of his probation, the board ordered that (1) Cunningham serve only as in-house counsel to his employer and not engage in the private practice of law; (2) Cunningham may provide legal advice to his employer in-house, but may not appear on behalf of his employer as counsel in external matters; (3) Cunningham must attend a total of 60 hours of remedial CLE, in addition to the 12 hours annually required of members of the bar; (4) during the four-year probationary period, Cunningham must sit for and pass the Alabama bar examination for admission to practice; (5) Cunningham must certify to the Office of General Counsel that he has completed the remedial CLE and has successfully completed the bar examination, and failure to do so within the four-year probationary period will result in revocation of the order readmitting Cunningham to active status, including the limited in-house practice authorized by the order; and (6) upon certification of the successful completion of the bar examination and the CLE requirements prior to the expiration of the four-year probationary period, the limitations on Cunningham’s practice will terminate and Cunningham shall then be restored to full active status and the probation lifted. [Rule 28, Pet. No.11-737]

Transfer to Disability Inactive Status

- Bessemer attorney Eric James Copeland was transferred to disability inactive status, pursuant to Rule 27(b), Alabama Rules of Disciplinary Procedure, effective August 8, 2011, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(b), Pet. No. 2011-1316]
Suspensions

• On September 16, 2011, Huntsville attorney Cheryl Ann Baswell-Guthrie was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Baswell-Guthrie’s continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a), Pet. No. 2011-1510]

• Effective September 1, 2011, attorney Jennifer Gregory Cannon of Semmes has been suspended from the practice of law in Alabama for noncompliance with the 2010 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 11-721]

• Huntsville attorney Annary Aytch Cheatham was interimly suspended from the practice of law in Alabama, effective August 30, 2011, by order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Cheatham’s conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2011-1435]

• On October 6, 2011, Phenix City attorney Dana Posey Gentry was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Gentry’s continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 2011-1654]

• Tuscaloosa attorney Steven Wesley Money was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar. The suspension was then held in abeyance and Money was placed on probation for one year. In addition, Money was ordered to enroll in and complete the Alabama Practice Management Assistance Program. The order of the Disciplinary Commission was based upon Money’s conditional guilty plea to multiple violations of the Alabama Rules of Professional Conduct. Specifically, in ASB nos. 2010-591, 2010-606, 2010-613, 2010-712, and 2010-1801, Money failed to adequately communicate with his clients during the course of representation and failed to adequately update the clients on the current status of their matters. [ASB nos. 2010-591, 2010-606, 2010-613, 2010-712, and 2010-1801]

• Daphne attorney John William Parker was interimly suspended from the practice of law in Alabama as ordered by the Disciplinary Commission of the Alabama State Bar on October 17, 2011. After a hearing, the interim suspension was stayed by the Disciplinary Commission, effective October 27, 2011, pending further proceedings.

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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 www.alabar.org/cle.
Therefore, John William Parker’s license to practice law in Alabama was reinstated effective October 27, 2011. [Rule 20(a), Pet. No. 11-1563]

Public Reprimands

- On September 16, 2011, Birmingham attorney Henry Lee Penick received a public reprimand without general publication for violations of rules 1.3 and 1.4(a), Alabama Rules of Professional Conduct. In or about November 2003, the complainant was involved in an automobile accident in Atlanta. Thereafter, the complainant retained Penick to file claims for compensation for medical expenses, lost wages and pain and suffering. The complainant provided Penick with the police report, photographs of the damaged vehicle and medical records. Penick did not communicate again with the complainant until in or about March 2005. Penick informed the complainant that the insurance company had not responded to his demand letters and that it would be necessary to file a lawsuit. The complainant paid Penick a $316 filing fee. Thereafter, Penick was again non-responsive to the complainant’s requests for information regarding the status of his case. Eventually, in or about February 2006, the complainant learned that nothing had been filed on his behalf and that the two-year statute of limitations had expired. [ASB No. 2006-107(A)]

- Phenix City attorney Larry Joel Collins was ordered to receive a public reprimand with general publication for violations of rules 1.3, 1.4(a), 8.4(a) and 8.4(g), Ala. R. Prof. C. In addition, Collins was placed on probation for a period of one year pursuant to Rule 8(h), Ala. R. Disc. P. In September 2009, Collins was retained by a client to assist in modifying the terms of the client’s divorce decree and to assist in obtaining custody of his infant daughter. Collins was paid a flat fee of $1,500 to undertake the representation. Collins subsequently filed a motion for a new trial and the matter was set for hearing on November 12, 2009. Collins’s motion for new trial was denied by the court. After the hearing, Collins informed his client that he had filed the wrong motion and that he would need to file a motion to modify the divorce decree. Thereafter, Collins took no further action in the matter and failed to respond to his client’s requests for information concerning the status of the case. [ASB No. 2010-1693]

- Mobile attorney Johnny Mack Lane received a public reprimand with general publication on September 16, 2011, for violations of rules 1.15(a), 1.15(b), 5.3, 8.4(a), and 8.4(g), Alabama Rules of Professional Conduct. Lane represented a client in collection matters for several years. The client filed a complaint alleging that he had loaned Lane’s secretary $80,000, which she placed in Lane’s trust account. Thereafter, the client sued Lane and his secretary to recover the funds. There was some dispute regarding whether or not the money given to the secretary was a loan, but there was no dispute that the money was placed in Lane’s trust account by his secretary without Lane’s knowledge and then subsequently withdrawn without Lane’s knowledge.

The client also alleged that Lane did not provide a full accounting of collection matters handled for the client’s company. Although Lane provided the client with all of the files and information available to him, he admitted that his secretary handled all of the client’s collection accounts
and that he had no knowledge of the whereabouts of some of the files.

Lane reported the matter to law enforcement and his secretary was subsequently indicted for theft of property in connection with numerous unauthorized withdrawals from Lane’s trust account and the unauthorized use of his debit card all totaling $180,000.

Lane failed to make reasonable efforts to ensure that he had measures in place to ensure that his employee’s conduct was compatible with his professional obligations. Lane’s failure to properly supervise his employee resulted in the mismanagement and misappropriation of his trust account for which he was responsible. Further, Lane’s conduct adversely reflected on his fitness to practice law. [ASB No. 10-1172]

- Tuscaloosa attorney Donnis Cowart received a public reprimand with general publication on September 16, 2011, for violations of rules 1.3, 1.4 and 3.2, Alabama Rules of Professional Conduct. Cowart was retained to represent a client to obtain a guardianship and conservatorship over her first cousin in June 2007. He was paid a $1,500 fee plus filing fees. The client signed the petition in June 2007. Thereafter, Cowart sought to obtain additional medical information, which he received in September 2007. However, Cowart took no further action in the matter and did not file the petition until April 2008. After the petition was filed, the initial hearing was continued due to lack of service on the ward, but Cowart failed to timely notify the client who was traveling from Texas to attend the hearing. Cowart also failed to respond to the client’s requests for information regarding the status of the matter and failed to expedite the case consistent with the interests of his client. It is noted that, as mitigation, Cowart refunded the entire fee to the client and eventually completed the matter for which he had been retained, but only after the bar complaint was filed against him. [ASB No. 09-1313(A)]
William H. Caughran announces the opening of Caughran Mediation LLC at 705 New Hope Mountain Rd., Pelham. Phone (205) 470-6640.

Christopher S. Hamer announces the opening of Hamer Law Group LLC at 1400 52nd St. N., Birmingham 35212. Phone (205) 218-4436.

Rukeya L. McAdory announces the opening of The McAdory Firm LLC at 200 88th St., S., Birmingham 35206. Phone (205) 370-9094.

Peter A. McIntosh announces the opening of Peter A. McIntosh LLC at 153 S. Oates St., Dothan 36301. Phone (334) 671-2555.

P. Mark Petro announces the formation of Petro Law Firm PC at 2323 2nd Ave., N., Birmingham 35203. Phone (205) 327-8311.

Armbrecht Jackson announces that J. Robert Turnipseed has joined as a partner.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that Kristopher Anderson and Joshua F. Reif are now associated with the firm.

Burke, Harvey & Frankowski LLC announces that Allen Schreiber and Micah Adkins have joined the firm.

Butler, Snow, O’Mara, Stevens & Cannada PLLC announces that Michael B. Beers, A. David Fawal and Angela T. Baker have joined the firm.

Capell & Howard PC announces that Barbara J. Wells returned as a shareholder.

The Cochran Firm announces that Cassie Fleming, J. McDavid Flowers, Jr., E. Leanne Richardson and John J. Givens have joined as associates.

Ralph D. Gaines, III, Ronald J. Gault, Tracy N. Hendrix and Brandon T. Bishop announce the formation of Gaines, Gault, Hendrix & Bishop PC with offices in Birmingham and Huntsville. Julie D. Pearce, Shelley D. Lewis and Travis G. McKay have joined as partners, and Michael P. Barratt, Edward E. Blair, Rebecca C. Donnellan, T. Brian Hoven, Travis I. Keith, Patrick G. Montgomery, Thomas C. Phelps, III, James A. Potts, II, and Chad M. Vacarella have joined as associates.

Gamble, Gamble & Calame LLC announces that Woodruff R. Jones joined as an associate.
The Gardner Firm PC announces that Reggie Copeland, Jr. has joined as a partner.

Cliff Hill, Brent Jordan and Joseph Greer announce the opening of Hill, Jordan & Greer PC at 929 Merchants Walk, Huntsville 35801. Phone (256) 534-4502.

Kaufman Gilpin McKenzie Thomas Weiss PC announces that Carla Cole Gilmore; Robert E. L. Gilpin; Clinton D. Graves; John A. Howard Jr.; Sarah S. Johnston; Richardson B. McKenzie, III; Simeon F. Penton; Leslie Pitman; Robert M. Ritchey; Davis H. Smith; George W. Thomas; John Ward Weiss; Brent Wills; Mitchel Hampton Boles; Joseph W. Carlisle; Jonathan S. Harbuck; Jeffrey E. Holmes; David M. Hunt; Kenny Williamson Keith; Spencer A. Kinderman; and Lynlee Wells Palmer are associated with the firm and Gregg Brantley Everett and Samuel Kaufman are of counsel. The firm will be known as Gilpin Givhan PC.

David Hogg and Aaron Gartlan announce the formation of The Hogg & Gartlan Law Firm LLC at 408 S. Foster St., Dothan 36301. Phone (334) 699-4625.

Huie, Fernambucq & Stewart LLP announces that Gardner Miller Jett, Jr. has joined as an associate.

Johnston Barton Proctor & Rose LLP announces that William Horton has joined the firm.

Lee & Mc宁ish PC announces that Benjamin H. Barron has joined as an associate.

Lightfoot Franklin White LLC announces that Alysia Harris, Erik Harris, Brian Kappel and Christopher Yearout have joined as associates.

Daryl L. Masters, Robbie A. Hyde and Gary L. Willford, Jr. announce the formation of Masters, Hyde & Willford LLC in Auburn and Muscle Shoals. Phone (334) 246-2333 and (256) 320-2135.

Maynard, Cooper & Gale PC announces that Lois S. Woodward has joined the firm.

Milam & Milam LLC announces that Matthew Brown has joined as an associate.

Miller & Christie PC announces that Kylie L. Kinney has joined as a shareholder and the firm’s name is now Miller, Christie & Kinney PC.


Ogletree, Deakins, Nash, Smoak & Stewart PC announces that Lisa Karen Atkins has joined the firm.

Phelps Dunbar LLP announces that Maeghan Erin Hill has joined the firm.

Robinson Law Firm PC announces that Charles E. Robinson, Sr. is of counsel.

Sirote & Permutt announces that Adam J. Sigman has joined the firm.

Smith, Spires & Peddy PC announces that Angel A. Darmer has joined as an associate.

Starnes Davis Florie LLP announces that R. Larry Fantroy, Jr. has joined as an associate.

Stone, Granade & Crosby PC announces that J. Bradford Boyd Hicks has become a member.

Desi V. Tobias and Bryan E. Comer announce the formation of Tobias & Comer LLC at 1203 Dauphin St., Mobile 36604. Phone (251) 802-1263.

D. Benjamin Traylor and Matthew S. Davis announce the opening of Traylor & Davis LLC at 2001 Park Place N., Ste. 875, Birmingham 35203. Phone (205) 322-8558.

M. Brandon Walker and James M. McMullan announce the opening of Walker McMullan LLC at 242 W. Valley Ave., Ste. 312, Birmingham 35209. Phone (205) 471-2541.

Wettermark Holland & Keith announces that Jessica Brooks has joined as an associate.

Wayne L. Williams & Associates LLC announces that Jessica L. Champion has joined as an associate.
Positions Wanted

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